ERIE UNPRECEDENTED

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Since Erie Railroad Co. v. Tompkins*, the Supreme Court has instructed lower federal courts to follow state common law as declared by the state courts—and not to make it themselves. But starting in the middle of the twentieth century, the federal courts of appeals developed a new rule about precedent: Past circuit decisions strictly bind future circuit panels, which cannot overturn past precedent even if they disagree with it. In every circuit, this rule of prior panel precedent now applies even to past circuit decisions construing state law. This has resulted in a situation much like the one* Erie *sought to prevent. Federal courts today adhere to federal interpretations of state law, even when those federal-court precedents have no basis in, or have been undermined by, state-court decisions. As a result of federal-court precedent, state law as applied by federal courts now often deviates from state law as applied by state courts.*

In response, this Article proposes three ways to minimize the precedential effect of Erie *decisions—federal-court decisions on state law. First, federal courts should liberally invoke the practice of certification: sending unclear questions of state law to the state supreme court for answers. Second, the federal circuits should decline to publish opinions that mainly deal with state law questions, depriving those opinions of precedential force. And most ambitiously, each circuit should modify its own rules about precedent, so that its decisions on pure state law questions have no precedential weight, even when included in published opinions. By leaving the creation of common law precedent to the state courts, each of these solutions would advance the aims of the Supreme Court's* Erie *framework.*

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INTRODUCTION

Eschewing a framework that was nearly a century old,[1] the Supreme Court's 1938 decision in *Erie Railroad Co. v. Tompkins* amounted to a constitutional revolution.[2] "There is no federal general common law."[3] But like every successful revolutionary doctrine,[4] *Erie* soon matured into conventional wisdom.[5] Under the well-established principles of *Erie* and its progeny, the federal courts have no constitutional power to "declare substantive rules of common law applicable in a State."[6] Rather, federal courts sitting in diversity must apply state substantive law as articulated by the organs of state government.[7] The Supreme Court has reiterated that "[i]t is the duty of [federal courts] in every case to ascertain from all the available data what the state law is and apply it."[8] Relevant data on state law include the holdings and dicta of the state supreme court as well as the decisions of state intermediate appellate courts.[9] Federal courts must apply the rule gleaned from this state-court authority "however much the state rule may have departed from prior decisions of the federal courts."[10]

Some decades after *Erie*, the federal courts of appeals began a quiet legal revolution of their own—so quiet that few scholars have

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1 *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79–80 (1938) (overruling Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842)). *But cf.* Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655, 658 (2013) (arguing that *Erie*'s constitutional holding is consistent with *Swift* as it was understood in the 1840s but that the *Swift* doctrine subsequently became unconstitutional).

2 *See* David P. Currie, *The Constitution in the Supreme Court: The New Deal, 1931–1940*, 54 U. CHI. L. REV. 504, 549–51 (1987); Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 461 (2001); Stanford *ex rel.* Phillips v. Brandon Nursing & Rehab. Ctr., L.L.C., 160 F.4th 118, 128 (5th Cir. 2025) (Oldham, J., dissenting) ("*Erie* changed everything."). Though *Erie* also involved a statutory holding, constitutional reasoning drove the decision. *See* Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa*, Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 876–77 (2007).

3 *Erie*, 304 U.S. at 78; *accord* Rodriguez v. FDIC, 140 S. Ct. 713, 717 (2020).

4 *E.g.*, THE DECLARATION OF INDEPENDENCE (U.S. 1776).

5 *See* Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring) (praising *Erie* as a "modern cornerstone[] of our federalism"); Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1622 (2002) (observing that "modern lawyers" largely reject the pre-*Erie* general law).

6 *Erie*, 304 U.S. at 78.

7 *See id.*

8 Montana v. Wyoming, 563 U.S. 368, 378 n.5 (2011) (quoting West v. AT&T, 311 U.S. 223, 237 (1940)).

9 *See Erie*, 304 U.S. at 78 (high court decisions); Nolan v. Transocean Air Lines, 365 U.S. 293, 295–96 (1961) (per curiam) (high court dicta); *West*, 311 U.S. at 237 (intermediate appellate court decisions).

10 *See West*, 311 U.S. at 237.

noticed its effects.[11] From the circuit courts' establishment in the late nineteenth century[12] through the middle of the twentieth century, three-judge circuit panels could overrule circuit cases that they deemed to be wrongly decided.[13] In other words, a past panel decision did not strictly bind a future panel.[14] That changed around the 1960s.[15] During that period, the federal courts of appeals converged on the rule that no panel may overrule another.[16] Only by hearing a case en banc—before the circuit's full bench of judges, not just a three-judge panel—could the circuit reconsider one of its own past decisions.[17] This new principle, called "the law-of-the-circuit doctrine"[18] or "the prior panel precedent rule,"[19] made panel precedent much more rigid and inflexible than before.[20]

This revolution of circuit precedent has since taken up arms against the *Erie* revolution. Initially, there was no conflict. The new rule of circuit precedent emerged independently of the Supreme Court's *Erie* doctrine.[21] And, originally, *Erie* cases—that is, federal cases applying state law—were not necessarily encompassed within the prior panel precedent rule.[22] As the Eighth Circuit explained in the late 1960s,

11 *See* Wyatt G. Sassman, *How Circuits Can Fix Their Splits*, 103 MARQ. L. REV. 1401, 1406–07 (2020) (observing that "[f]ew scholars have discussed the doctrine at all," let alone "connected it" with key debates, *id.* at 1407).

12 *See* Evarts Act, ch. 517, 26 Stat. 826 (1891).

13 *See* Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 795 (2012); *see also* Thomas R. Lee & Lance S. Lehnhof, *The* Anastasoff *Case and the Judicial Power to "Unpublish" Opinions*, 77 NOTRE DAME L. REV. 135, 164 (2001) (explaining that early American judicial opinions were persuasive, not binding).

14 *See, e.g.*, McKenna v. Austin, 134 F.2d 659, 666 (D.C. Cir. 1943).

15 *See* Mead, *supra* note 13, at 796; *cf.* Jud Campbell, *Determining Rights*, 138 HARV. L. REV. 921, 927 (2025) (observing that many aspects of modern constitutional jurisprudence came to maturity in the 1960s); Mitchell Chervu Johnston, *Stepification*, 116 NW. U. L. REV. 383, 391 (2021) (describing how multi-step tests emerged in the 1970s).

16 Ben F. Overton, *A Prescription for the Appellate Caseload Explosion*, 12 FLA. ST. U. L. REV. 205, 215 nn.58–59 (1984).

17 *See, e.g.*, Mallory v. United States, 259 F.2d 801, 802 (D.C. Cir. 1958) (per curiam); *In re* Cent. R.R. Co. of N.J., 485 F.2d 208, 211 (3d Cir. 1973) (en banc); Charleston v. United States, 444 F.2d 504, 506 (9th Cir. 1971) (per curiam).

18 LaShawn A. v. Barry, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc) (discussing "the law-of-the-circuit doctrine").

19 United States v. Smith, 122 F.3d 1355, 1359 (11th Cir. 1997) (per curiam) (discussing "the prior panel precedent rule").

20 *See* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1017 & n.19 (2003).

21 As explained *infra* Section I.A, the prior panel precedent rule responded to growing caseloads and the increasing number of judges on each circuit, which necessitated some means of avoiding conflicts between panels of the same circuit. The new precedent rule was facilitated by new en banc procedures, which allowed the full court to correct an aberrant panel, and by the new rule that allowed for unpublished or nonprecedential decisions.

22 *See* Aceto v. Zurich Ins. Co., 440 F.2d 1320, 1322 (3d Cir. 1971).

"Federal court decisions in diversity cases have no precedential value as state law and only determine the issues between the parties."[23] But once the prior panel precedent rule took deeper root, circuits began extending it to *Erie* cases, too.[24] The result is that federal courts no longer necessarily apply state law as articulated by the authorities of the state.

Instead, the federal courts are bound by whatever construction the circuit has previously given to state law. To be sure, every circuit follows a state supreme court holding that has clearly and directly repudiated circuit precedent. But in many circuits, a panel cannot revise the circuit's view of state law in response to decisions from the state lower courts or dicta from the state supreme court.[25] The prior panel precedent rule thus creates "a law trapped in amber,"[26] a federal version of state law that does not keep pace with state-court developments. And even when later state developments have not undermined an *Erie* guess, the mere existence of binding federal precedent means that an open issue of state law has been settled, at least for the federal circuit, in favor of either the plaintiff or the defendant.[27] This undermines the unity of state law across the state and federal systems and incentivizes forum-shopping by the party with more favorable federal precedent on its side.[28]

This Article calls for an armistice. To end the conflict between the Supreme Court's *Erie* framework and circuit precedent, this Article suggests that the prior panel precedent rule should yield ground.[29] The federal circuits should restore the state of affairs that existed at the start of the precedent revolution: Circuit precedent should bind

23 Peterson v. U-Haul Co., 409 F.2d 1174, 1177 (8th Cir. 1969). The panel reasoned that a federal court could not "make any declarations of law" in a diversity case because it must "rule the issues according to state law" no matter "what it thinks the law ought to be." *Id.*

24 *See, e.g.*, Newell v. Harold Shaffer Leasing Co., 489 F.2d 103, 107 (5th Cir. 1974) ("We are bound by this Court's prior decisions on what is the law of a state in a diversity case, just as we are bound by prior decisions of this Court on what is federal law."); Woodling v. Garrett Corp., 813 F.2d 543, 557 (2d Cir. 1987); Ciba-Geigy Corp. v. Bolar Pharm. Co., 747 F.2d 844, 856 n.10 (3d Cir. 1984).

25 *See, e.g.*, Smith v. Calgon Carbon Corp., 917 F.2d 1338, 1343 (3d Cir. 1990); FDIC v. Abraham, 137 F.3d 264, 269 (5th Cir. 1998); Burton v. E.I. du Pont de Nemours & Co., 994 F.3d 791, 815–16 (7th Cir. 2021); Arena Holdings Charitable, LLC v. Harman Pro., Inc., 785 F.3d 292, 295 (8th Cir. 2015); Kokins v. Teleflex, Inc., 621 F.3d 1290, 1297 (10th Cir. 2010).

26 United States v. Rahimi, 144 S. Ct. 1889, 1897 (2024).

27 *See infra* notes 260–61 and accompanying text.

28 *See infra* notes 216–20 and accompanying text.

29 *See infra* Section III.C.

on questions of federal law, but not on questions of state law.[30] In other words, the federal circuits should not treat *Erie* cases as binding precedent at all. When a federal circuit construes state law, even in an opinion designated as published or precedential, it should count as merely persuasive authority. This resolution of the conflict, however, would likely require the involvement of a federal circuit's full bench.

In the meantime, individual circuit panels should work toward a cessation of hostilities in two ways. They should liberally employ certification: the practice of sending an open question of state law to the state supreme court for its answer.[31] Moreover, most circuit opinions are already designated as unpublished or nonprecedential, and these opinions are rarely cited in comparison to published or precedential opinions.[32] So panels can prevent their own interpretations of state law from binding future courts simply by declining to publish their *Erie* opinions.[33]

Despite incursions from circuit precedent, the *Erie* revolution has largely prevailed in the courts—but it has been less successful in the academy.[34] Scholars such as Professor Stephen Sachs continue to call *Erie* into question and suggest a return to the general law framework that preceded it.[35] But the current situation in the circuits has few, if any, of the advantages of the pre-*Erie* general law. The circuits are not purporting to discover general legal principles. Instead, they are attempting to apply the positive law of the state but are doing so badly. A federalized version of "state law" is neither faithful to *Erie* nor consistent with the pre-*Erie* general law. Even *Erie*'s foes can appreciate the problem of the current precedent rules.

Part I of this Article outlines the origins and development of the precedent rules that govern the federal circuits. Part II explains how

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30 *See* Aceto v. Zurich Ins. Co., 440 F.2d 1320, 1322 (3d Cir. 1971); Peterson v. U-Haul Co., 409 F.2d 1174, 1177 (8th Cir. 1969).

31 *See infra* Section III.A; Justin R. Long, *Against Certification*, 78 GEO. WASH. L. REV. 114, 114 (2009) (defining certification); *see also* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1556–63 (1997) (urging federal courts to adopt a general presumption in favor of certifying unsettled questions of state law to state courts).

32 *See* Rachel Brown, Jade Ford, Sahrula Kubie, Katrin Marquez, Bennett Ostdiek & Abbe R. Gluck, *Is Unpublished Unequal? An Empirical Examination of the 87% Nonpublication Rate in Federal Appeals*, 107 CORN. L. REV. 1, 4, 85 (2021).

33 *See infra* Section III.B; Bradley Scott Shannon, *May Stare Decisis Be Abrogated by Rule?*, 67 OHIO ST. L.J. 645, 657 (2006).

34 *See, e.g.*, Craig Green, *Repressing* Erie*'s Myth*, 96 CALIF. L. REV. 595, 606–14 (2008); Suzanna Sherry, *Wrong, Out of Step, and Pernicious:* Erie *as the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 132–47 (2011).

35 *See* Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 570–71 (2019); *see also* Owen B. Smitherman, *Grounding the Party Presentation Principle*, 101 NOTRE DAME L. REV. (forthcoming 2026) (manuscript at 126–32) (on file with NOTRE DAME L. REV.).

those precedent rules have led federal courts to disregard developments in the state courts, promulgate binding but inaccurate predictions of state law, and create lines of authority on state law that have no basis in any state-court decision. This situation is anomalous in itself and irreconcilable with *Erie*. Part III presents three solutions to this problem, in ascending order of comprehensiveness. Federal circuits should: (1) certify more questions to state courts; (2) decline to publish decisions construing state law; and (3) rework their precedent rules such that federal interpretations of state law do not bind. In other words, the circuits should un-precedent their *Erie* decisions. Part IV acknowledges an alternative resolution to the conflict between the *Erie* framework and the circuit precedent rules: *Erie*, rather than precedent, could give way. This would un-precedent *Erie* in a very different sense, which only the Supreme Court has power to do. Moreover, the problems with the prior panel precedent rule may run deeper than the state law issues that are the focus of this Article. These broader problems may warrant reconsideration, and not just retrenchment, of the prior-panel rule.

I. PRECEDENT RULES AND *ERIE* CASES

This Part traces the development of the precedent rules that apply in the federal courts of appeals and district courts—the main federal courts that decide state common law cases.[36] Starting around the middle of the twentieth century, the circuit courts of appeals converged on the rule that a prior circuit decision is strictly binding within the circuit.[37] Up until that point, the circuit's past decisions were highly persuasive, but not necessarily binding, on future circuit decisions.[38] The new rule—that an appellate panel cannot overrule a past panel decision—was originally designed with federal law cases in mind,[39] and state law cases were not necessarily within its scope.[40]

But every circuit has now extended this rule to cover state law decisions, such that a federal circuit's interpretation of state law qualifies

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36 The Supreme Court's criteria for granting certiorari emphasize important questions of federal law. *See* SUP. CT. R. 10. And, because the Supreme Court decides questions presented, rather than entire cases, *see* Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 795 (2022), state common law is not the focus, even where jurisdiction is premised on diversity.

37 *See infra* notes 74–87 and accompanying text.

38 *See, e.g.*, McKenna v. Austin, 134 F.2d 659, 666 (D.C. Cir. 1943); United States v. Minnesota, 113 F.2d 770, 774–75 (8th Cir. 1940); Moore v. United States, 157 F.2d 760, 764 (9th Cir. 1946).

39 *See infra* notes 100–15 and accompanying text.

40 *See* Aceto v. Zurich Ins. Co., 440 F.2d 1320, 1322 (3d Cir. 1971); Peterson v. U-Haul Co., 409 F.2d 1174, 1177 (8th Cir. 1969).

as controlling precedent.[41] The result: A federal circuit's reading of state law strictly binds future circuit panels and district courts, even in the face of contrary evidence from state-court decisions.[42] This outcome is hard to square with *Erie*, which instructs that federal courts are supposed to follow state common law, not make it.[43]

A. *The Prior Panel Precedent Rule and Its Origin*

Every circuit operates under the rule that a published panel decision binds future panels, absent en banc reconsideration.[44] For some circuits, this principle is enshrined in the court's procedural rules.[45] Other circuits have recognized this rule while sitting en banc.[46] The rest have simply repeated it enough at the panel level that it is a

41 *See infra* note 109.

42 *See infra* notes 111–15 and accompanying text.

43 *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

44 *See* Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801, 805 (1990); Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 721 & n.91 (2000). The Second and Seventh Circuits—which allow a later panel to overrule a previous panel precedent if the later panel circulates its opinion to the full court—provide a limited exception that proves the rule. *See* Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd., 585 F.3d 58, 67 (2d Cir. 2009) ("[I]t would ordinarily be neither appropriate nor possible for us to reverse an existing Circuit precedent. In this case, however, we have circulated this opinion to all active members of this Court prior to filing and have received no objection."); 7TH CIR. R. 40(e) ("A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court . . . shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc . . . ."). Similarly, the D.C. Circuit permits the en banc court to review and endorse a panel opinion that overrules circuit precedent. *See* Irons v. Diamond, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981); *see also* Save Jobs USA v. DHS, 111 F.4th 76, 79 (D.C. Cir. 2024) (describing this practice as an "*Irons* footnote" (quoting Robinson v. DHS, 71 F.4th 51, 56 n.1 (D.C. Cir. 2023))).

45 *E.g.*, 3D CIR. I.O.P. 9.1 ("[T]he holding of a panel in a precedential opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a precedential opinion of a previous panel. Court en banc consideration is required to do so."); 6TH CIR. R. 32.1(b) ("Published panel opinions are binding on later panels. A published opinion is overruled only by the court en banc."); *see also* Brooks v. Walls, 279 F.3d 518, 522 (7th Cir. 2002) ("One panel of this court cannot overrule another implicitly. Overruling requires recognition of the decision to be undone and circulation to the full court under Circuit Rule 40(e).").

46 *See* LaShawn A. v. Barry, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc) ("One three-judge panel . . . does not have the authority to overrule another three-judge panel of the court. That power may be exercised only by the full court . . . ." (citations omitted)); McMellon v. United States, 387 F.3d 329, 332–33 (4th Cir. 2004) (en banc); Broussard v. S. Pac. Transp. Co., 665 F.2d 1387, 1389 (Former 5th Cir. 1982) (en banc); Mader v. United States, 654 F.3d 794, 800 (8th Cir. 2011) (en banc); Miller v. Gammie, 335 F.3d 889, 899 (9th Cir. 2003) (en banc); Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

truism,[47] though it is arguably circular to rely on panel precedent to establish the binding force of panel precedent.[48] The First Circuit labels this rule "the law of the circuit doctrine";[49] the Fifth Circuit calls it the "rule of orderliness";[50] and the Eleventh Circuit names it the "prior panel precedent rule."[51] The circuits that have incorporated this principle into their court rules refer to it by the appropriate rule number.[52] And the remaining circuits have no standard catchphrase for this doctrine, even if they occasionally call it the "law-of-the-circuit rule"[53] or the "prior panel rule."[54] For descriptive clarity, this Article primarily uses the term "prior panel precedent rule" or the shorthand "prior-panel rule."

Courts sometimes describe the prior-panel rule as a species of stare decisis,[55] the principle that a court should stand by its own previous decisions.[56] But the prior-panel rule differs from stare decisis as

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47 *See, e.g.*, Alexandre v. Nat'l Union Fire Ins. Co. of Pittsburgh, 22 F.4th 261, 270 (1st Cir. 2022); United States v. Peguero, 34 F.4th 143, 158 (2d Cir. 2022); United States v. Mason, 84 F.4th 1152, 1155 (10th Cir. 2023).

48 *See* Mead, *supra* note 13, at 800 n.95.

49 *See, e.g.*, United States v. Perez, 89 F.4th 247, 250 (1st Cir. 2023); Irving v. United States, 162 F.3d 154, 160 (1st Cir. 1998) (en banc) (earliest reported First Circuit case using this label).

50 *See, e.g.*, United States v. Medina-Cantu, 113 F.4th 537, 539 (5th Cir. 2024) (per curiam), *cert. denied*, 145 S. Ct. 1318 (2025); Grabowski v. Jackson Cnty. Pub. Defs. Off., 47 F.3d 1386, 1399 (5th Cir. 1995) (Smith, J., concurring in part and dissenting in part) (using this term for the first time).

51 *See, e.g.*, Johnson v. City of Atlanta, 107 F.4th 1292, 1299 (11th Cir. 2024); United States v. Smith, 122 F.3d 1355, 1359 (11th Cir. 1997) (per curiam) (using this term for the first time).

52 *See* United States v. Stevens, 70 F.4th 653, 660 (3d Cir. 2023) (discussing "I.O.P. 9.1"); Gor v. Holder, 607 F.3d 180, 188 (6th Cir. 2010) (discussing the subsequently renumbered "Sixth Circuit Rule 206(c)").

53 *See, e.g.*, Miranda v. Selig, 860 F.3d 1237, 1243 (9th Cir. 2017); *see also In re* Grant, 635 F.3d 1227, 1232 (D.C. Cir. 2011) (discussing "[t]he law-of-the-circuit doctrine"); United States v. Brutus, 505 F.3d 80, 87 n.5 (2d Cir. 2007) (same); Kennedy v. Lubar, 273 F.3d 1293, 1300 n.9 (10th Cir. 2001) (same).

54 *See, e.g.*, Tripathy v. McKoy, 103 F.4th 106, 115 (2d Cir. 2024); United States v. Littlejohn, No. 19-6089, 2023 WL 1859911, at *2 (4th Cir. Feb. 9, 2023) (per curiam); United States v. Rodriguez-Mendez, 65 F.4th 1000, 1001 (8th Cir. 2023).

55 *See* United States v. Chin, 913 F.3d 251, 261 (1st Cir. 2019) (characterizing this doctrine as "a 'subset of stare decisis'" (quoting United States v. Barbosa, 896 F.3d 60, 74 (1st Cir. 2018))); Payne v. Taslimi, 998 F.3d 648, 655 n.4 (4th Cir. 2021); United States v. Lovelace, 565 F.3d 1080, 1085 (8th Cir. 2009); *see also* Barrett, *supra* note 20, at 1018 n.22 ("[T]he rule is fairly treated as part of stare decisis doctrine.") (collecting cases).

56 This is referring to horizontal stare decisis—a court's duty to follow its own precedent—as distinguished from vertical stare decisis, which binds an inferior court to follow the precedents of a higher court. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1416 n.5 (2020) (Kavanaugh, J., concurring in part).

practiced by the Supreme Court.[57] At the Supreme Court level, stare decisis is a rebuttable presumption against overruling past decisions.[58] Sticking to past precedent is the "preferred course" but not an "inexorable command."[59] In deciding whether to adhere to past precedent, the Court weighs several open-ended factors, including the quality of the precedent's reasoning, the workability of its rule, and the reliance on the decision.[60] Indeed, the Supreme Court says it "has never felt constrained to follow precedent" that was "unworkable" or "badly reasoned."[61]

The prior-panel rule, by contrast, admits little flexibility.[62] "Under [the] prior precedent rule, a panel cannot overrule a prior one's holding even though convinced it is wrong."[63] One circuit has even described the rule as a "mechanical mandate."[64] This "firm rule"[65] admits of only "extremely narrow" and "hen's-teeth-rare" exceptions.[66] Succeeding panels cannot overrule past panel precedent themselves: They can only recognize its abrogation by intervening legal authority, such as a subsequent U.S. Supreme Court decision that "demolish[es] and eviscerate[s]" each of the past precedent's "fundamental props."[67]

57 *See* Cent. Pines Land Co. v. United States, 274 F.3d 881, 893 (5th Cir. 2001) ("While easily confused with traditional *stare decisis*, 'our rule that one panel cannot overturn another serves a somewhat different purpose of institutional orderliness.'" (quoting Montesano v. Seafirst Com. Corp., 818 F.2d 423, 425–26 (5th Cir. 1987))).

58 *See* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 1 (2001).

59 Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015) (quoting Payne v. Tennessee, 501 U.S. 808, 827–28 (1991)).

60 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2270 (2024) (quoting Knick v. Township of Scott, 139 S. Ct. 2162, 2178 (2019)).

61 Payne v. Tennessee, 501 U.S. at 827 (quoting Smith v. Allwright, 321 U.S. 649, 665 (1944)).

62 *See* Barrett, *supra* note 20, at 1017 & n.19 (noting how circuit courts have candidly characterized the rule as "strict," "binding," and "rigid"); *see also* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1713 (2013) ("It is a virtually absolute rule in courts of appeals . . . .").

63 United States v. Steele, 147 F.3d 1316, 1317–18 (11th Cir. 1998) (en banc).

64 Payne v. Taslimi, 998 F.3d 648, 654 (4th Cir. 2021). The panel explicitly contrasted the circuit's prior-panel rule with stare decisis at the Supreme Court, which, by contrast, is not "a mechanical formula of adherence." *Id.* at 653 (quoting Payne v. Tennessee, 501 U.S. at 828).

65 United States v. Carlile, 884 F.3d 554, 559 (5th Cir. 2018) (quoting Burge v. Par. of St. Tammany, 187 F.3d 452, 466 (5th Cir. 1999)).

66 San Juan Cable LLC v. P.R. Tel. Co., 612 F.3d 25, 33 (1st Cir. 2010). Thus, the rule applies quite strictly even in the First Circuit, whose version of this rule has sometimes been described as adapting more easily to intervening legal developments. *See* United States v. Vega-Castillo, 540 F.3d 1235, 1236 n.3 (11th Cir. 2008) (per curiam); Randy J. Kozel, *Going En Banc*, 77 FLA. L. REV. 233, 251 & n.109 (2025).

67 A.P.A. v. U.S. Att'y Gen., 104 F.4th 230, 237 (11th Cir. 2024) (quoting United States v. Dubois, 94 F.4th 1284, 1293 (11th Cir. 2024), *vacated*, 145 S. Ct. 1041 (2025) (mem.)).

Although formulations may vary from circuit to circuit,[68] the intervening Supreme Court decision generally must "contradict[]"[69] or "conflict with"[70] the panel precedent. And some circuits will depart from their own precedent based on a subsequent Supreme Court decision only when the circuit precedent is "impossible to reconcile"[71]—or "clearly irreconcilable"[72]—with the new Supreme Court precedent. Thus, the bar for departing from circuit precedent is high.[73]

This rigid adherence to panel precedent is now fundamental to how the federal courts of appeals operate,[74] but its rise was not inevitable.[75] The federal intermediate appellate courts have existed in essentially their present form since 1891, when Congress enacted the Evarts Act.[76] But no statute explicitly requires that panel precedents strictly bind within a circuit.[77] Instead, the prior-panel rule arose organically and gradually in the latter half of the twentieth century.[78] Before the emergence of this rule, panels had power to reconsider past panel decisions that they deemed erroneous.[79] Hence, the federal circuit courts

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68 *Compare* United States v. Medina-Cantu, 113 F.4th 537, 539 (5th Cir. 2024) (per curiam) (holding that the Supreme Court must "unequivocally abrogate" panel precedent), *cert. denied*, 145 S. Ct. 1318 (2025), *with* United States v. Stevens, 70 F.4th 653, 659–60 (3d Cir. 2023) (holding that the Supreme Court must have "undermined the [panel's] rationale," *id.* at 659).

69 United States v. Santiago-Colón, 917 F.3d 43, 57 (1st Cir. 2019) (quoting *San Juan Cable*, 612 F.3d at 33).

70 Karns v. Shanahan, 879 F.3d 504, 515 (3d Cir. 2018) (quoting Mennen Co. v. Atl. Mut. Ins. Co., 147 F.3d 287, 295 n.9 (3d Cir. 1998)).

71 Short v. Hartman, 87 F.4th 593, 605 (4th Cir. 2023) (quoting Carrera v. E.M.D. Sales Inc., 75 F.4th 345, 352 (4th Cir. 2023), *rev'd*, 145 S. Ct. 34 (2025)), *cert. denied*, 144 S. Ct. 2631 (2024) (mem.).

72 CoreCivic, Inc. v. Candide Grp., LLC, 46 F.4th 1136, 1141 (9th Cir. 2022) (quoting Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc)).

73 *Short*, 87 F.4th at 605.

74 *See, e.g.*, United States v. Donath, 107 F.4th 830, 836 (8th Cir. 2024) ("It is a cardinal rule . . . that one panel is bound by the decision of a prior panel." (quoting Mader v. United States, 654 F.3d 794, 800 (8th Cir. 2011) (en banc))); *San Juan Cable*, 612 F.3d at 33 ("It is one of the building blocks on which the federal judicial system rests.").

75 *See* Mead, *supra* note 13, at 799–800. *But see* Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 686 (1984).

76 Evarts Act, ch. 517, 26 Stat. 826 (1891); *see also* Michael T. Morley, *Vertical Stare Decisis and Three-Judge District Courts*, 108 GEO. L.J. 699, 714–15 (2020).

77 Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 LOY. L. REV. 535, 539–40 (2010).

78 *See* Mead, *supra* note 13, at 795–96; Barrett, *supra* note 20, at 1066.

79 *See, e.g.*, McKenna v. Austin, 134 F.2d 659, 666 (D.C. Cir. 1943) ("We think [the previous panel's rule] is anomalous, . . . is unjust in its consequences, and should be laid to rest."); United States v. Minnesota, 113 F.2d 770, 774–75 (8th Cir. 1940) ("[R]espect for precedent balks at the perpetuation of error . . . . Our decision . . . is therefore overruled . . . ."); Moore v. United States, 157 F.2d 760, 764 (9th Cir. 1946) (declining to follow a panel decision where "this court made a controlling error in political history").

could exist without the prior panel precedent rule—because they once did.

The emergence of the prior-panel rule is attributable to several factors that converged in the middle of the twentieth century.[80] First, the invention of the en banc process—and its blessing by the Supreme Court and Congress in the 1940s[81]—enabled a circuit's full bench to correct an aberrant three-judge panel, diminishing the need for a later panel to correct an earlier one.[82] Next, an increase in the volume of cases[83]—and a corresponding increase in the number of judges on each circuit[84]—made conflicts between two panels from the same circuit more likely, heightening the need for a rule to prevent intra-circuit conflicts.[85] Finally, the courts of appeals began to distinguish between published opinions, which enjoyed precedential weight, and unpublished opinions, which lacked precedential value.[86] This distinction created a smaller universe of published precedents, to which judges could devote greater care.[87] And limiting a panel's power to deviate from past decisions was more palatable when only a subset of decisions—the objects of special attention—could bind into the future.

B. Precedent and Publication

The prior panel precedent rule is thus closely related to the rule that lets a panel choose whether to designate its opinion as precedential. Like the prior-panel rule, this rule exists in some form in every circuit.[88] Both rules emerged around the same time, with the limited

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80 *See* Mead, *supra* note 13, at 796.

81 *See* Textile Mills Sec. Corp. v. Comm'r, 314 U.S. 326, 327–35 (1941); *see also* 28 U.S.C. § 46 (2018).

82 *See* Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORN. L. REV. 587, 621–22 (2009) (attributing the emergence of law-of-the-circuit doctrine in part to the en banc process).

83 Robert L. Tucker, *Vexatious Litigation as Unfair Competition, and the Applicability of the* Noerr-Pennington *Doctrine*, 22 OHIO N.U. L. REV. 119, 119 n.1 (1995) (noting that federal appellate caseloads multiplied over 700% between the 1950s and 1980s); John B. Oakley, *Precedent in the Federal Courts of Appeals: An Endangered or Invasive Species?*, 8 J. APP. PRAC. & PROCESS 123, 127 (2006) (attributing the prior-panel rule to "mounting caseloads").

84 *See* Carrington & Cramton, *supra* note 82, at 621.

85 *See* Mead, *supra* note 13, at 796.

86 *See id.*

87 *See id.*

88 D.C. CIR. R. 36(e)(2) ("[A] panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition."); 1ST CIR. R. 36.0(c) (same); 2D CIR. I.O.P. 32.1.1(a) ("When a decision in a case is unanimous and each panel judge believes that no jurisprudential purpose is served by . . . a ruling having precedential effect[], the panel may rule by summary order."); 3D CIR. I.O.P. 5.1 ("A majority of the panel determines whether an opinion is designated as precedential or not precedential . . . ."); 4TH CIR. R. 36(a) ("Opinions . . . will be published if the author or a majority of

publication rule perhaps slightly predating the prior panel precedent rule. In the late 1940s, the Third and Fifth Circuits made initial attempts at limiting publication of opinions.[89] But the practice of designating certain opinions as nonprecedential took off only after 1964, when a report of the Judicial Conference of the United States called for appeals court judges to "authorize the publication of only those opinions which are of general precedential value."[90] These norms around nonpublication solidified only in the 1970s.[91] Likewise, a version of the prior-panel rule—with its principle that only the en banc court can overrule circuit precedent—was articulated as early as the 1950s by the Fifth and D.C. Circuits.[92] But this rule, too, took until the

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the joining judges believes the opinion satisfies one or more of the standards for publication . . . ."); 5TH CIR. R. 47.5.2 ("An opinion will be published unless each member of the panel deciding the case determines that its publication is neither required nor justified . . . ."); 6TH CIR. I.O.P. 32.1(b)(2) ("Any panel member may request that a decision be published."); 7TH CIR. R. 32.1(b) ("The court may dispose of an appeal by an opinion or an order. Opinions . . . constitute the law of the circuit. Orders . . . are not treated as precedents."); 8TH CIR. I.O.P. IV.B ("The panel determines whether the opinion in the case is to be published or unpublished."); 9TH CIR. GEN. ORD. 4.3 (publishing opinions "if at least one member of the panel deciding the case specifically determines that a published decision is necessary"); 10TH CIR. R. 36.2 ("When the opinion of the district court . . . has been published, this court ordinarily designates its disposition for publication."); 11TH CIR. R. 36-2 ("An opinion shall be unpublished unless a majority of the panel decides to publish it. Unpublished opinions are not considered binding precedent . . . ."); *see also* Amy E. Sloan, *If You Can't Beat 'Em, Join 'Em: A Pragmatic Approach to Nonprecedential Opinions in the Federal Appellate Courts*, 86 NEB. L. REV. 895 app. A at 952–54 (2008).

89 William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1168 n.12 (1978).

90 1964 DIR. OF THE ADMIN. OFF. OF THE U.S. CTS. ANN. REP. 11; *see* Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 207–08 (2001); *see also* Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1436 (2004) (arguing that the United States has had its current system of nonpublication since the 1960s, "[o]r perhaps it was the 1950s or the 1970s").

91 Reynolds & Richman, *supra* note 89, at 1169–72. Indeed, the Fifth Circuit took somewhat longer to solidify. Only in the 1990s, after debate, *see* United States v. Melancon, 972 F.2d 566, 570 n.2 (5th Cir. 1992) (Parker, J., concurring specially), did it clarify that unpublished opinions lack precedential value. *Compare* United States v. Don B. Hart Equity Pure Tr., 818 F.2d 1246, 1249–50 (5th Cir. 1987) (holding that unpublished opinions were precedent under then-current circuit rules), *with* Bank One Tex. v. United States, 157 F.3d 397, 404 (5th Cir. 1998) (holding that unpublished opinions are no longer precedent after the 1996 change), *abrogated on other grounds by*, Wilkins v. United States, 143 S. Ct. 870 (2023).

92 *See* Miss. Valley Barge Line Co. v. Indian Towing Co., 232 F.2d 750, 752 (5th Cir. 1956) ("[To] plainly overrule [the law articulated by a past Fifth Circuit decision] . . . [is], of course, a result which only the full Court en banc could reach."); Davis v. Peerless Ins. Co., 255 F.2d 534, 536 (D.C. Cir. 1958) ("This division of the court is not free to overrule so recent a decision . . . , for only by action of the entire court, sitting *en banc*, will such a

1970s to establish itself solidly throughout the circuits.[93] Both rules responded to the era's swelling federal dockets.[94]

The upshot of these rules—the panel chooses which opinions to publish, and a published opinion constitutes binding precedent until overruled en banc—is that any opinion chosen for publication will bind future panels as well as district courts within the circuit. Later panels are bound by earlier panels, so "*a fortiori* district court judges are similarly bound": "[T]he hierarchical nature of the federal judiciary requires no less."[95] And the corollary of this principle (i.e., that opinions selected for publication bind all federal courts in a circuit) is that unpublished circuit opinions do not bind in future cases.[96] They are not even binding on the district courts within a circuit.[97] As one

step be taken."). Other circuits had not yet framed the rule in such absolute terms. *See, e.g.*, United States v. U.S. Vanadium Corp., 230 F.2d 646, 649 (10th Cir. 1956) ("[O]ne panel of the court should not *lightly* overrule a decision by another panel." (emphasis added)).

93 *See* Mead, *supra* note 13, at 796; Barrett, *supra* note 20, at 1066 & n.214; Overton, *supra* note 16, at 215 n.58.

94 *See* Reynolds & Richman, *supra* note 89, at 1170–71 (finding that limited publication came as a response to the consensus view that there were too many published opinions); Mead, *supra* note 13, at 796 (explaining that the prior-panel rule came as a response to increasing caseloads).

95 Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 867 (3d Cir. 1984); *see also* United States v. Bishop, 453 F.3d 30, 31 (1st Cir. 2006) ("The district court . . . properly . . . noted that it was bound to [a panel decision] as the law of the circuit."); Int'l Union, Sec., Police & Fire Pros. of Am. v. Faye, 828 F.3d 969, 974 (D.C. Cir. 2016) (holding that "[t]he district court and we are bound" by circuit precedent); Packer *ex rel.* 1-800-Flowers.com, Inc. v. Raging Cap. Mgmt., LLC, 105 F.4th 46, 50 (2d Cir. 2024) ("[A] District Court must follow controlling precedent . . . rather than preemptively declaring that our caselaw has been abrogated."); Carrera v. E.M.D. Sales Inc., 75 F.4th 345, 352 (4th Cir. 2023) ("[A]ll parties here—the defendants, the district court, and this panel—are bound by Fourth Circuit precedent . . . ."), *rev'd*, 145 S. Ct. 34 (2025); Team Contractors, L.L.C. v. Waypoint NOLA, L.L.C., 976 F.3d 509, 518 (5th Cir. 2020) ("[E]ach panel deciding an appeal is bound by Fifth Circuit precedents . . . as district courts surely are . . . ."); *In re* Miedzianowski, 735 F.3d 383, 384 (6th Cir. 2013) ("Where our circuit has answered the question, the district court is bound by our published authority. And so are we."); Reiser v. Residential Funding Corp., 380 F.3d 1027, 1029 (7th Cir. 2004) ("[D]istrict judges must follow the decisions of this court whether or not they agree."); Hood v. United States, 342 F.3d 861, 864 (8th Cir. 2003) ("The District Court . . . is bound, as are we, to apply the precedent of this Circuit."); Mohamed v. Uber Techs., Inc., 848 F.3d 1201, 1211 (9th Cir. 2016) ("The district court does not have the authority to ignore circuit court precedent, and neither do we."); United States v. Spedalieri, 910 F.2d 707, 709 n.2 (10th Cir. 1990) ("A district court must follow the precedent of this circuit . . . ."); Johnson v. DeSoto Cnty. Bd. of Comm'rs, 72 F.3d 1556, 1559 n.2 (11th Cir. 1996) ("[D]istrict courts must follow the holdings of their court of appeals . . . .").

96 *See, e.g.*, Milton S. Kronheim & Co. v. District of Columbia, 91 F.3d 193, 197 (D.C. Cir. 1996); *In re* Grant, 635 F.3d 1227, 1232 (D.C. Cir. 2011) (collecting authorities).

97 *See, e.g.*, *In re* Grand Jury Investigation, 445 F.3d 266, 276 (3d Cir. 2006) ("[Unpublished opinions] are not precedents for the district courts of this circuit."); Sheets v. Moore, 97 F.3d 164, 167 (6th Cir. 1996) (holding that unpublished opinions "have no

notable circuit judge has explained, "[t]he decision whether to publish matters because . . . unpublished opinions are not precedent that binds the district courts and . . . [c]ircuit panels."[98] So, by choosing not to publish, a panel can avoid "soiling the jurisprudence for future cases."[99]

C. Designed for Federal Law, Applied to State Law

These principles of federal-court precedent seem to have been designed with federal law cases in mind. Almost all criminal cases in federal court involve federal crimes.[100] And cases premised on diversity of citizenship comprise less than half of the civil docket.[101] Indeed, since the latter half of the twentieth century, diversity cases have been a sizable minority as far as federal caseloads go—but a minority nonetheless.[102]

So it is not surprising that standard formulations of the prior-panel rule focus on federal, rather than state, law.[103] For example, an oft-cited Second Circuit formulation of the rule states that later panels are "bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme

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binding effect on anyone other than the parties to the action"); United States v. Allard, 600 F.2d 1301, 1306 n.5 (9th Cir. 1979) (explaining that an unpublished opinion was "not binding upon the district court"); Patterson v. Ga. Pac., LLC, 38 F.4th 1336, 1346 (11th Cir. 2022) ("Our unpublished opinions are not precedential, so they do not bind us or district courts to any degree."); *see also* Owens v. Balt. City State's Att'ys Off., 767 F.3d 379, 401 n.10 (4th Cir. 2014); Flores v. FS Blinds, L.L.C., 73 F.4th 356, 364 n.4 (5th Cir. 2023); White v. NFL, 756 F.3d 585, 594–95 (8th Cir. 2014).

98 United States v. Ramirez, 82 F.4th 384, 386 n.4 (5th Cir. 2023) (Smith, J., dissenting from denial of rehearing en banc).

99 *Id.*

100 *But cf.* 28 U.S.C. § 1442 (2018) (providing that federal officers may remove to federal court certain criminal prosecutions initiated against them in state court). There were around 79,000 federal criminal defendant filings in the 2025 fiscal year. *See* JOHN G. ROBERTS, JR., 2025 YEAR-END REPORT ON THE FEDERAL JUDICIARY app., at 11 (2025).

101 In the 2025 fiscal year, around 97,000 diversity cases were filed in federal district court, out of a rough total of 304,000 civil cases. *See* ROBERTS, *supra* note 100, app., at 10.

102 David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 322–23 (1977) ("In 1969–1970, when diversity cases constituted 26.2% of civil filings in the federal courts, diversity litigation took 37.9% of the district judges' civil case-related time."); Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination*, 98 W. VA. L. REV. 171, 184 (1995) (noting that diversity cases make up "about a quarter of the current federal civil docket"); Carl E. Stewart, *Diversity Jurisdiction: A Storied Past, a Flexible Future*, 63 LOY. L. REV. 207, 217 (2017) ("[C]ases based on diversity jurisdiction constitute approximately 32% of the federal civil docket.").

103 *See generally* Alan R. Gilbert, Annotation, *In Banc Proceedings in Federal Courts of Appeals*, 37 A.L.R. Fed. 274 § 5 (1978) (collecting formulations of this rule from each circuit).

Court."[104] This formulation—together with others like it[105]—assumes that any intervening change is to federal law (as articulated by the U.S. Supreme Court) rather than state law.

This version of the rule, contemplating possible legal change from the U.S. Supreme Court, appears even when a circuit is applying panel precedent on the meaning of state common law.[106] Yet that is, of course, an area where new developments from the state high court are more likely to be relevant than developments from the U.S. Supreme Court.[107] The fact that panels applying state law nonetheless recite a federally-focused formula—"We adhere to circuit precedent until the Supreme Court says otherwise"—is further evidence that the prior-panel rule did not develop with careful attention to state law questions. Indeed, up through the 1970s, some circuits explicitly exempted state law questions from the scope of the prior-panel rule: Panel precedent did not bind when it came to decisions applying state law.[108]

But although it was designed for federal law cases, the prior panel precedent rule has now been extended to state law cases as well. Across the circuits today, panel interpretations of state law count as binding circuit precedent.[109] As one circuit has put it: "Adherence to this rule

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104 United States v. Wilkerson, 361 F.3d 717, 732 (2d Cir. 2004).

105 *See, e.g.*, Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs., Inc. v. Kauffman, 981 F.3d 347, 369 (5th Cir. 2020) (en banc); Ramirez v. Reddish, 104 F.4th 1219, 1225 (10th Cir. 2024).

106 *See, e.g.*, Stahle v. CTS Corp., 817 F.3d 96, 100 (4th Cir. 2016).

107 This is not to say that the Supreme Court never interprets state common law. *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1879 (2021) (construing Pennsylvania state contract law); *see also* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 536 & nn.3–4 (2021) (plurality opinion) (interpreting the Texas Health and Safety Code). *See generally* Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919 (2003).

108 *See* Aceto v. Zurich Ins. Co., 440 F.2d 1320, 1322 (3d Cir. 1971) ("No one may properly rely upon what we have held as more than persuasive on a question of Pennsylvania law so long as the Pennsylvania Supreme Court has not ruled upon that legal question."); Peterson v. U-Haul Co., 409 F.2d 1174, 1177 (8th Cir. 1969) ("Federal court decisions in diversity cases have no precedential value as state law and only determine the issues between the parties.").

109 *See, e.g.*, United States v. Old Dominion Boat Club, 630 F.3d 1039, 1046 (D.C. Cir. 2011) ("[W]e are bound by [the previous panel's] interpretation of Maryland law."); Tomasella v. Nestlé USA, Inc., 962 F.3d 60, 83 (1st Cir. 2020) ("[W]e are bound by [the decision interpreting Massachusetts law] because it is a prior panel decision that is closely on point."); Woodling v. Garrett Corp., 813 F.2d 543, 557 (2d Cir. 1987) ("A ruling of one panel of this Circuit on an issue of state law normally will not be reconsidered by another panel . . . ."); Smith v. Calgon Carbon Corp., 917 F.2d 1338, 1343 (3d Cir. 1990) ("[W]e are bound by the holdings of previous panels of this court [as to Pennsylvania law]."); *Stahle*, 817 F.3d at 100 ("This is not the first time we have anticipated North Carolina law on the subject . . . . [W]e are bound to follow [our past decision] here."); Broussard v. S. Pac. Transp. Co., 665 F.2d 1387, 1389 (Former 5th Cir. 1982) (en banc) ("This rule applies with equal force to cases in which state law supplies the substantive rule of decision . . . .");

is no less immutable when the matter determined by the prior panel is the interpretation of state law: Such interpretations are no less binding on subsequent panels than are prior interpretations of federal law."[110]

Under the prior panel precedent rule, past circuit precedent on state law can be difficult to overcome, even in the face of intervening state-court developments. Several circuits effectively require a contrary "intervening decision of the state's highest court" to overcome past panel precedent.[111] So new precedent from an intermediate state appellate court will not do.[112] Other circuits may be more flexible about which state appellate decisions are relevant but nevertheless demand that the state court has repudiated the panel precedent with a high degree of clarity.[113] And circuits may, of course, ignore any state-court

Innovation Ventures, LLC v. Custom Nutrition Lab'ys, LLC, 912 F.3d 316, 334 (6th Cir. 2018) ("We are also bound by our own published precedent interpreting Michigan law . . . ."); Neidenbach v. Amica Mut. Ins. Co., 842 F.3d 560, 566 (8th Cir. 2016) ("[W]e are bound by a prior panel's interpretation of state law."); Silva v. Garland, 993 F.3d 705, 717 (9th Cir. 2021) ("[W]e are 'bound to reach the same result' as our precedent [on state law]." (quoting Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001))), *abrogated by*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024); Wankier v. Crown Equip. Corp., 353 F.3d 862, 866 (10th Cir. 2003) ("[W]hen a panel of this Court has rendered a decision interpreting state law, that interpretation is binding on district courts in this circuit, and on subsequent panels of this Court . . . ."); Venn v. St. Paul Fire & Marine Ins. Co., 99 F.3d 1058, 1066 (11th Cir. 1996) ("[W]e are bound by a previous decision of this court unless it is overruled by the court sitting *en banc*. This rule applies with equal force to prior decisions involving federal law as well as state law.").

110 FDIC v. Abraham, 137 F.3d 264, 268 (5th Cir. 1998).

111 United States v. Manzanares, 956 F.3d 1220, 1225 (10th Cir. 2020) (quoting *Wankier*, 353 F.3d at 866); *see also Calgon Carbon*, 917 F.2d at 1343 (requiring a "*clear* statement by the Pennsylvania Supreme Court to the contrary or other persuasive evidence of a change in Pennsylvania law"); Woodfield v. Bowman, 193 F.3d 354, 360 n.15 (5th Cir. 1999) ("Only supervening contrary decisions of the state's highest court or the supervening enactment of a controlling statute will render our decisions . . . no longer precedential.").

112 *See* Debiec v. Cabot Corp., 352 F.3d 117, 131 (3d Cir. 2003) ("[Panel precedent] is binding on this Court, notwithstanding the contradictory Pennsylvania Superior Court opinions on this issue."); Coleman E. Adler & Sons, L.L.C. v. Axis Surplus Ins. Co., 49 F.4th 894, 898 (5th Cir. 2022) ("We have only one subsequent decision from an intermediate state court, and that cannot overcome our rule of orderliness."); Kokins v. Teleflex, Inc., 621 F.3d 1290, 1297 (10th Cir. 2010) (holding that Colorado Court of Appeals precedent could not overcome panel precedent on Colorado law because the Colorado Supreme Court had not intervened).

113 For instance, the Second Circuit requires "a conflict, incompatibility, or 'inconsistency' between this Circuit's precedent and the intervening [state court] decision," Glob. Reinsurance Corp. of Am. v. Century Indem. Co., 22 F.4th 83, 101 (2d Cir. 2021) (alteration in original) (quoting *In re* Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144, 155 (2d Cir. 2015)), while acknowledging that "even a development short of a decision of the highest court . . . might call [circuit] precedent into question," *id.* Likewise, the Sixth Circuit considers intermediate appellate decisions, but requires that the intervening state-court decisions expressly indicate "that they disagree with [the previous panel decision] and would have decided it differently." Bennett v. MIS Corp., 607 F.3d 1076, 1095 (6th Cir. 2010)

decisions that predated the past panel decision, even when the state cases went the opposite way.[114] Indeed, one circuit recently expressed doubt about whether intervening state-court decisions can ever overcome panel precedent, while acknowledging that intervening Supreme Court decisions certainly can.[115]

The circuits thus vary with respect to what evidence, in the form of contrary state-court authority, they require to overcome a past panel decision construing state law.[116] There may even be variation from one panel to the next—or conflicting lines of authority—within the same circuit.[117] But whatever standard a court may use to determine whether circuit precedent on state law has been superseded, the prior panel precedent rule puts a thumb on the scale in favor of following a published circuit opinion and downplays subsequent changes in state law identified by the state judiciary.

II. THE PROBLEMS CREATED BY FEDERAL PRECEDENT

The heavy thumb on the scale of federal precedent causes serious problems. First, it leads federal courts to disregard intervening developments in state law, at least when those developments fall short of a clear repudiation of the federal rule by the state's highest court.[118] Second, it binds the entire federal circuit to *Erie* guesses that turn out to

(alteration in original) (quoting Hampton v. United States, 191 F.3d 695, 701 (6th Cir. 1999)).

114 *See Neidenbach*, 842 F.3d at 566, 567 n.2 (conceding that prior "Missouri state court cases . . . have reached the opposite conclusion" but holding that "until a Missouri state court issues an intervening opinion on this point, we are obligated to follow [the past panel precedent]"); EmbroidMe.com, Inc. v. Travelers Prop. Cas. Co. of Am., 845 F.3d 1099, 1105 (11th Cir. 2017) (requiring a "later decision by the state appellate court" in order to reconsider panel precedent).

115 *See* United States v. Donath, 107 F.4th 830, 836–37, 836 n.5 (8th Cir. 2024).

116 *See* Alexis L. Sullivan, Note, *A Rule of Orderliness or Chaos? A Call for the Fifth Circuit to Re-Examine Its Rule of Orderliness as Applied to* Erie *Guesses on Louisiana Substantive Law*, 98 TUL. L. REV. ONLINE 35, 45–48 (2024) (contrasting the "rigid" Fifth Circuit approach with two other circuits); Jed I. Bergman, *Putting Precedent in Its Place: Stare Decisis and Federal Predictions of State Law*, 96 COLUM. L. REV. 969, 991–92 (1996) (discussing the slight variations between circuits).

117 *Compare* Silva v. Garland, 993 F.3d 705, 717 (9th Cir. 2021) (requiring an "intervening decision on controlling state law by a state court of last resort" (quoting Miller v. Gammie, 335 F.3d 889, 893 (9th Cir. 2003) (en banc))), *abrogated by*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024), *with* AGK Sierra de Montserrat, L.P. v. Comerica Bank, 109 F.4th 1132, 1136 (9th Cir. 2024) ("Circuit precedent interpreting state law . . . 'is only binding in the absence of any subsequent indication from the California courts that our interpretation was incorrect.'" (quoting Alvarez v. Chevron Corp., 656 F.3d 925, 932 (9th Cir. 2011))).

118 *See infra* Section II.A.

be inaccurate.[119] And third, it creates lines of controlling authority on state law that lack a direct connection to any state-court decision.[120]

These are problems because they conflict with the *Erie* framework that federal district courts and courts of appeals are bound to apply.[121] Under *Erie* and its progeny, the federal courts have the duty "in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule."[122] When federal courts refuse to consider the decision of a state appellate court or the dicta of the state supreme court—and follow federal-court precedent instead—that constitutes a failure to consider all the relevant data. And when federal circuit courts settle state common law questions incorrectly, they prevent future federal courts from trying to get the state law right.[123] Indeed, when a federal court makes any binding declaration about state law that does not precisely track existing state decisions, it settles a question in favor of either the plaintiff's side or the defendant's side, at least for purposes of the federal system. That incentivizes forum-shopping for a more favorable federal forum, precisely what *Erie* was meant to counteract.[124]

A. *Disregarding State-Court Developments*

At least in some circuits, panels and district courts must adhere to circuit precedent on state law despite evidence from state courts that undermines the federal precedent. In those circuits, overcoming a panel precedent is a heavy burden: It essentially requires clearly contrary guidance from the state's highest court.[125] This means federal courts must ignore all developments in the lower state courts—as well as any developments in the state supreme court that fall short of directly repudiating the circuit precedent.

1. Ignoring State Lower-Court Developments

The prior-panel rule, in some of its versions, requires federal courts to disregard developments in the state lower courts whenever a circuit panel has previously spoken to the issue. This is a decades-long

119 *See infra* Section II.B.

120 *See infra* Section II.C.

121 *Cf.* U.S. CONST. art. III, § 1 (describing these courts as "inferior" to the Supreme Court).

122 West v. AT&T, 311 U.S. 223, 237 (1940).

123 *See infra* notes 241–42 and accompanying text.

124 *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 73–74 (1938); Hanna v. Plumer, 380 U.S. 460, 468 (1965).

125 *See* Smith v. Calgon Carbon Corp., 917 F.2d 1338, 1343 (3d Cir. 1990).

and much-noted problem in the Fifth Circuit,[126] which arguably applies the prior-panel rule more vigorously than any other circuit.[127] So it is appropriate to begin with the Fifth Circuit before turning to examples from its sister circuits.

For decades, the Fifth Circuit's version of the prior-panel rule has disregarded intermediate state appellate court decisions that contradict the circuit's own reading of state law.[128] In the 1980s, the en banc Fifth Circuit held that its version of the prior-panel rule (later dubbed the "rule of orderliness"[129]) "applie[d] with equal force" to state law cases.[130] And during the 1990s, the Fifth Circuit extended this principle in *FDIC v. Abraham*,[131] which addressed a conflict between a state intermediate appellate court decision and a prior Fifth Circuit precedent.[132] Though the Fifth Circuit had never held that only a state supreme court decision could overcome a contrary circuit precedent,[133] *Abraham* read past cases to "contemplate a ruling from a state's highest court only."[134] Normally, only "a clearly contrary subsequent holding of the highest court" could suffice to abandon the circuit's previous view of state law.[135] A single intermediate appellate court decision

126 *See* Allan Erbsen, Erie*'s Four Functions: Reframing Choice of Law in Federal Courts*, 89 NOTRE DAME L. REV. 579, 649 n.255 (2013); John Burritt McArthur, *Good Intentions Gone Bad: The Special No-Deference* Erie *Rule for Louisiana State Court Decisions*, 66 LA. L. REV. 313, 340–41 (2006); David L. Horan, *The Rules That Govern the Rules That Govern in the Federal Courts of the Fifth Circuit*, 67 TEX. BAR J. 622, 625 (2004).

127 *See* Sullivan, *supra* note 116, at 45–46. *But see* Henry J. Dickman, Note, *Conflicts of Precedent*, 106 VA. L. REV. 1345, 1350–52 (2020) (arguing that the Ninth and Eleventh Circuits apply the prior-panel rule even more rigidly).

128 *See* FDIC v. Abraham, 137 F.3d 264, 268–69 (5th Cir. 1998) (citing Broussard v. S. Pac. Transp. Co., 665 F.2d 1387, 1389 (Former 5th Cir. 1982) (en banc)).

129 *In re* McBryde, 120 F.3d 519, 523 n.5 (5th Cir. 1997) (quoting Grabowski v. Jackson Cnty. Pub. Defs. Off., 47 F.3d 1386, 1399 (5th Cir. 1995) (Smith, J., concurring in part and dissenting in part).

130 *Broussard*, 665 F.2d at 1389 (citing Newell v. Harold Shaffer Leasing Co., 489 F.2d 103, 107 (5th Cir. 1974)).

131 *Abraham*, 137 F.3d 264.

132 The Fifth Circuit had held that gross negligence did not constitute a breach of fiduciary duty under Louisiana law, *see* FDIC v. Barton, 96 F.3d 128, 133–34 (5th Cir. 1996), whereas the Louisiana intermediate appellate court had held that negligence sufficed for a breach of fiduciary duty, *see* Theriot v. Bourg, 691 So. 2d 213, 221–22 (La. Ct. App. 1997).

133 For example, the Fifth Circuit had previously held that its own decisions on state law were binding "absent a subsequent state court decision . . . which makes this Court's decision clearly wrong" but without specifying the level of state court that needed to issue the subsequent decision. Lee v. Frozen Food Express, Inc., 592 F.2d 271, 272 (5th Cir. 1979) (per curiam); *see also Newell*, 489 F.2d at 107.

134 *Abraham*, 137 F.3d at 269.

135 *Id.*

would never suffice, though "unanimous" holdings from "a majority" of the state's intermediate appellate courts might do.[136]

This holding—that only a state supreme court decision suffices to overcome a circuit panel's *Erie* guess—has led courts within the Fifth Circuit to disregard decisions from lower state courts.[137] For example, a federal district court parted ways with Texas appellate precedents, which had held that a local board was a distinct entity.[138] Instead, the district court followed the Fifth Circuit's holding that the board was part of the county,[139] reasoning that a state intermediate appellate court could not "override an earlier federal court of appeals" decision.[140] In another case, a district court was constrained to follow a fifteen-year-old Fifth Circuit decision on Texas oil and gas law, though no Texas court had ever followed or cited that decision—and three of the state's intermediate appellate courts had gestured in the opposite direction.[141]

No less than district courts, panels of the Fifth Circuit adhere to past circuit precedent on state law, notwithstanding contrary decisions from lower state courts. In a pandemic-related case, the Fifth Circuit guessed that Louisiana insurance law did not allow a business to recoup losses from government-mandated closures.[142] When a state intermediate appellate court subsequently held the opposite, the Fifth Circuit declined to reconsider whether its original guess remained the best reading of Louisiana law.[143] The Fifth Circuit simply applied its past precedent: "We have only one subsequent decision from an intermediate state court, and that cannot overcome our rule of orderliness."[144]

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136 *Id.*

137 *See, e.g.*, AEP River Operations LLC v. Cargoes of Coal, No. 09-1558, 2009 WL 2013750 (E.D. La. July 6, 2009) (sticking with the Fifth Circuit's holding that standing under the Louisiana Unfair Trade Practices Act was limited to direct consumers and business competitors, despite two intermediate appellate courts' contrary holdings).

138 *See* Coates v. Brazoria County, 919 F. Supp. 2d 863, 869–70 (S.D. Tex. 2013). The state court had held that a juvenile board exists separately from the county it serves. *See* El Paso Cnty. Juv. Bd. v. Aguilar, 387 S.W.3d 795, 798 (Tex. App. 2012); El Paso County v. Solorzano, 351 S.W.3d 577, 580–83 (Tex. App. 2011).

139 *See* Flores v. Cameron County, 92 F.3d 258, 269 (5th Cir. 1996).

140 *Coates*, 919 F. Supp. 2d at 869.

141 *See* PYR Energy Corp. v. Samson Res. Co., 470 F. Supp. 2d 709, 723–25 (E.D. Tex. 2007).

142 Q Clothier New Orleans, L.L.C. v. Twin City Fire Ins. Co., 29 F.4th 252, 257–60 (5th Cir. 2022).

143 Coleman E. Adler & Sons, L.L.C. v. Axis Surplus Ins. Co., 49 F.4th 894, 897 (5th Cir. 2022) ("This is a guess we have already made."); PHI Grp., Inc. v. Zurich Am. Ins. Co., 58 F.4th 838, 843 (5th Cir. 2023) ("[W]e will continue to follow our circuit's *Erie* guess.").

144 *Coleman E. Adler & Sons*, 49 F.4th at 898; *PHI Grp.*, 58 F.4th at 843–44 (same). In a split decision, the Louisiana Supreme Court ultimately endorsed the view that had been

The Tenth Circuit has developed the same rule as the Fifth: Only a state supreme court decision suffices to overcome a circuit panel's interpretation of state law.[145] As the Tenth Circuit originally explained in dicta, a panel's interpretation of state law "is binding on district courts in this circuit, and on subsequent panels of this Court, unless an intervening decision of the state's highest court has resolved the issue."[146] The Tenth Circuit adopted this dictum as a rule in *Kokins v. Teleflex, Inc.*[147] In the lead-up to *Kokins*, a state appellate court had held that a plaintiff may prove a design defect in tort under either of two tests.[148] Despite this intervening state-court decision, the Tenth Circuit followed its own precedent that only one of the two tests was appropriate to consider.[149] It explicitly reasoned that "Colorado's highest court . . . ha[d] not offered any intervening guidance," and that a contrary Colorado Court of Appeals decision did not suffice to depart from circuit precedent.[150]

The rule of *Kokins* has bound courts in the Tenth Circuit to ignore state law developments, even over their own protests. For example, a district judge took aim at the Tenth Circuit's approach, criticizing it as a "stringent restriction" on his ability to apply *Erie*—and lambasting it as in "tension" with Supreme Court precedent.[151] Nevertheless, the district court felt "bound" to follow *Kokins*.[152] So, rather than consider

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taken by the Fifth Circuit, though without citing any federal decision. *See* Cajun Conti LLC v. Certain Underwriters at Lloyd's, London, 359 So. 3d 922, 929–30 (La. 2023). So, the problem was not necessarily the Fifth Circuit's substantive outcome—it was that it reached that outcome by mechanically applying its own precedent, rather than trying to determine, based on all available evidence, the most accurate reading of Louisiana law. *See Coleman E. Adler & Sons*, 49 F.4th at 897–98; *PHI Grp.*, 58 F.4th at 841–44.

145 *See, e.g.*, Kokins v. Teleflex, Inc., 621 F.3d 1290, 1297 (10th Cir. 2010) (citing Wankier v. Crown Equip. Corp., 353 F.3d 862, 866 (10th Cir. 2003)).

146 *Wankier*, 353 F.3d at 866. Indeed, earlier Tenth Circuit caselaw had suggested a lower bar than a state supreme court decision: Any "supervening declaration to the contrary by th[e] state's courts" would suffice. Koch v. Koch Indus., Inc., 203 F.3d 1202, 1231 (10th Cir. 2000).

147 *Kokins*, 621 F.3d at 1297.

148 *See* Biosera, Inc. v. Forma Sci., Inc., 941 P.2d 284, 286–87 (Colo. App. 1996) (permitting jury instructions that incorporated both the "consumer expectation" test and the "risk/benefit" test, *id.* at 286), *aff'd*, 960 P.2d 108 (Colo. 1998).

149 *See Kokins*, 621 F.3d at 1297 (citing Montag *ex rel.* Montag v. Honda Motor Co., 75 F.3d 1414, 1419 (10th Cir. 1996)) (relying on past panel precedent as "controlling law").

150 *Id.*

151 Anderson Living Tr. v. WPX Energy Prod., LLC, 27 F. Supp. 3d 1188, 1247 n.30 (D.N.M. 2014); *see also* Ward v. City of Hobbs, 398 F. Supp. 3d 991, 1085 n.43 (D.N.M. 2019) (repeating much of the same material).

152 *Anderson Living Tr.*, 27 F. Supp. 3d at 1243 & n.30.

new legal developments, the district court adhered to the Tenth Circuit's old interpretation of New Mexico law.[153]

The Fifth and Tenth Circuits do not stand alone in devaluing developments in the state lower courts. Other circuits—including the Second,[154] the Third,[155] and the Seventh[156]—have taken a similar approach. And the Ninth Circuit at least sometimes requires a state supreme court decision to overcome contrary panel authority on state law.[157]

153 *See id.* (following *Elliott Industries Ltd. Partnership v. BP America Production Co.*, 407 F.3d 1091 (10th Cir. 2005)). This required it to side with an oil company against landowners who argued that the company had improperly underpaid them. *See id.* at 1242–43 (concluding that the company had no duty to cover the cost of making the oil marketable).

154 *See, e.g.*, Glob. Reinsurance Corp. of Am. v. Century Indem. Co., 22 F.4th 83, 101, 101 n.13 (2d Cir. 2021) (conceding that a state high court decision overcomes a panel precedent but implying that a lower state-court decision may not); Volino v. Progressive Cas. Ins. Co., Nos. 21 Civ. 6243, 22 Civ. 1714, 2022 WL 5242894, at *5–6 (S.D.N.Y. Oct. 6, 2022) (following a Second Circuit decision from 2017 over a state intermediate appellate court decision from 2019); Ahcom Ltd. v. Bond Commodities Ltd., No. 09 Civ. 8276, 2010 WL 445195, at *1 (S.D.N.Y. Feb. 8, 2010) (declining to follow a state intermediate appellate case because the court was "bound by Second Circuit precedent, even on issues of state law").

155 *See, e.g.*, Debiec v. Cabot Corp., 352 F.3d 117, 131 (3d Cir. 2003) (holding that a past panel decision was "binding" despite "contradictory Pennsylvania Superior Court opinions on this issue" and favoring a more plaintiff-friendly approach to when the statute of limitations begins running in medical malpractice cases); State Farm Mut. Auto. Ins. Co. v. Flubacher, 69 F. App'x 528, 528–29 (3d Cir. 2003) (explaining that a panel "cannot revisit" past precedent "simply on account of a Court of Common Pleas decision," *id.* at 529, and ruling in favor of an insurance company against the beneficiary of an insurance policy); *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 786 (3d Cir. 1994) (permitting a claim to proceed despite state trial and intermediate appellate court decisions militating against such claims); *In re* Corestates Tr. Fee Litig., 39 F.3d 61, 64–65 (3d Cir. 1994) (declining to follow state trial court decisions that allowed punitive damages against a trustee); Robinson v. Wingate Inns Int'l, Inc., No. 13-cv-2468, 2013 WL 6860723, at *4 (D.N.J. Dec. 20, 2013) ("Even in the face of contrary New Jersey Appellate court decisions on this issue, this Court is obligated to follow the Third Circuit's prediction of New Jersey law . . . unless the New Jersey Supreme Court holds to the contrary.") (holding that consumer protection law did not apply); *see also* Hollenshead v. New Penn Fin., LLC, 447 F. Supp. 3d 283, 288–89 (E.D. Pa. 2020) (collecting cases). *But see* Robinson v. Jiffy Exec. Limousine Co., 4 F.3d 237, 239–41 (3d Cir. 1993) (revising an *Erie* guess based on two state intermediate appellate court decisions).

156 *See* Reiser v. Residential Funding Corp., 380 F.3d 1027, 1029 (7th Cir. 2004) (explaining that "decisions of intermediate state courts" cannot "liberate district judges from the force of our decisions," and that "[i]nstead of guessing over and over" in response to lower-court decisions, the Seventh Circuit will normally "stick with one assessment until the state's supreme court" makes a pronouncement); *see also* Burton v. E.I. du Pont de Nemours & Co., 994 F.3d 791, 815–16 (7th Cir. 2021) ("When we weigh in on an unsettled issue of state law, our conclusion binds us until the state's supreme court says otherwise.").

157 *See* Silva v. Garland, 993 F.3d 705, 717 (9th Cir. 2021), *abrogated by*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024); United States v. Gutierrez-Flores, 684 F. App'x 645, 647 n.2 (9th Cir. 2017); Vasquez Cruz v. Barr, No. 19-cv-05251, 2019 WL 6327576, at *6 (N.D. Cal. Nov. 26, 2019). *But see* AGK Sierra de Montserrat, L.P. v. Comerica Bank, 109

The problem with this approach, which ignores or devalues development in state law short of a high court decision, is that it sits in significant tension with Supreme Court precedent.[158] In *West v. AT&T*,[159] decided two years after *Erie*, the Supreme Court reversed a federal circuit that had declined to follow a state intermediate appellate court.[160] In doing so, the Supreme Court explained that a state may have binding law on an issue even when the state's highest court has not declared it.[161] Accordingly, "a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court."[162] Under *West*, "it is the duty of the [federal courts] *in every case* to ascertain from *all the available data* what the state law is and apply it rather than to prescribe a different rule."[163] And intermediate appellate court decisions count as relevant data:

> Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.[164]

This instruction from the Supreme Court requires federal courts to consider state intermediate appellate decisions. So it is difficult to square with the circuit-court rule that requires federal courts to disregard all but state supreme court decisions, at least when a circuit panel has previously spoken on an issue.

West was not a one-off Supreme Court decision. In a string of decisions that fleshed out the contours of *Erie*, the Court reiterated this principle of deferring to state-court authority, even when it falls short of an apex court decision.[165] In case after case, the Supreme Court reversed federal circuits that had declined to follow state intermediate appellate court decisions.[166] As the Supreme Court instructed, "[a]n

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F.4th 1132, 1136–39 (9th Cir. 2024) (relying on subsequent California intermediate appellate court decisions to abandon a panel precedent).

158 *See* Colin E. Wrabley, *Applying Federal Court of Appeals' Precedent: Contrasting Approaches to Applying Court of Appeals' Federal Law Holdings and* Erie *State Law Predictions*, 3 SETON HALL CIR. REV. 1, 10 (2006); Sullivan, *supra* note 116, at 44.

159 West v. AT&T, 311 U.S. 223 (1940).

160 *See id.* at 231, 241.

161 *See id.* at 236.

162 *Id.*

163 *Id.* at 237 (emphasis added).

164 *Id.*

165 *See* Benjamin C. Glassman, *Making State Law in Federal Court*, 41 GONZ. L. REV. 237, 256–63 (2006).

166 *See* Fid. Union Tr. Co. v. Field, 311 U.S. 169, 177, 180 (1940) (reversing the Third Circuit for declining to follow New Jersey Chancery Court precedent); Six Cos. of Cal. v. Joint Highway Dist. No. 13, 311 U.S. 180, 188 (1940) (reversing the Ninth Circuit for

intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question."[167] The Supreme Court's subsequent decisions clarified that unreported state trial-court decisions were due "some weight" but were not necessarily "controlling."[168] The Court also suggested in dicta that "under some conditions, federal authority may not be bound even by an intermediate state appellate court ruling," while reiterating that such decisions were always owed "proper regard."[169] So even under the subsequent relaxation of the *West* principle,[170] federal courts cannot simply disregard the effect of an intermediate appellate court decision.

Fortunately, at least some circuits allow an intermediate state appellate decision to trump panel precedent. Like its sister circuits, the Sixth Circuit normally considers itself bound by its own prior interpretations of state law.[171] But when a subsequent state appellate decision contradicts the panel's rule, the Sixth Circuit follows the state intermediate appellate court instead,[172] even when the state decision is unpublished.[173] The Eleventh Circuit likewise allows decisions from the intermediate state appellate courts to overcome circuit precedent on state law.[174] So although many circuits disregard new data from the

declining to follow the California Court of Appeal); Stoner v. N.Y. Life Ins. Co., 311 U.S. 464, 467 (1940) (reversing the Eighth Circuit for declining to follow the Missouri Court of Appeals).

167 *Field*, 311 U.S. at 177–78.

168 King v. Ord. of United Com. Travelers of Am., 333 U.S. 153, 160–61 (1948).

169 Comm'r v. Est. of Bosch, 387 U.S. 456, 465 (1967).

170 *See* Craig A. Hoover, Note, *Deference to Federal Circuit Court Interpretations of Unsettled State Law:* Factors, Etc., Inc. v. Pro Arts, Inc., 1982 DUKE L.J. 704, 709 (arguing that, in the decades after *West*, "the Supreme Court showed signs of relaxing its requirement that federal courts defer to all lower state court interpretations of unclear state law").

171 *See* Rutherford v. Columbia Gas, 575 F.3d 616, 619 (6th Cir. 2009).

172 *See, e.g.*, Hampton v. United States, 191 F.3d 695, 702 (6th Cir. 1999) ("[T]he Michigan Court of Appeals decision . . . controls and, until or unless the Michigan Supreme Court decides otherwise . . . we must abandon our [previous] interpretation of Michigan law . . . ."); Lindenberg v. Jackson Nat'l Life Ins. Co., 912 F.3d 348, 358 (6th Cir. 2018) ("[T]he Tennessee Court of Appeals has abrogated [our Circuit's] pronouncement . . . .").

173 *See* Bennett v. MIS Corp., 607 F.3d 1076, 1095 (6th Cir. 2010).

174 *See* Roboserve, Ltd. v. Tom's Foods, Inc., 940 F.2d 1441, 1451 (11th Cir. 1991) ("If an intervening Georgia case has specifically contradicted [circuit precedent] . . . we would not be so constrained because we must apply Georgia law . . . . [T]he Court of Appeals of Georgia explicitly contradicted [the circuit precedent]."); EmbroidMe.com, Inc. v. Travelers Prop. Cas. Co. of Am., 845 F.3d 1099, 1105 (11th Cir. 2017) ("[W]hen we have issued a precedential decision interpreting that state law, our prior precedent rule requires that we follow that decision, absent a later decision by the *state appellate court* casting doubt on our interpretation of that law." (emphasis added)); Cheruvoth v. SeaDream Yacht Club Inc., No. 20-14450, 2021 WL 4595177, at *3 n.3 (11th Cir. Oct. 6, 2021) (per curiam) (siding

state lower courts, a few properly consider such decisions in reevaluating circuit precedent on state law.

2. Ignoring Hints from the State High Court

Just as federal courts ignore state lower-court decisions, they also ignore developments from the state supreme court that fall short of directly repudiating the past panel's *Erie* guess. In other words, many circuits require a high level of clarity from contrary state-court authority before they will depart from their own interpretations of state law. This rule—that only clearly contrary state-court precedent trumps federal-court precedent—is especially pronounced in the Third Circuit.

This doctrine emerged in *Smith v. Calgon Carbon Corp.*,[175] a 1990 Third Circuit case about whether Pennsylvanians could sue for wrongful discharge—or whether at-will employment precluded such a claim.[176] Though the Pennsylvania Supreme Court had never directly addressed the issue,[177] a previous Third Circuit decision had read dicta from the state high court as implicitly recognizing such a tort.[178] Yet a subsequent decision from the Pennsylvania Supreme Court implied that at-will employment precluded such a tort,[179] and a subsequent concurrence from a state supreme court justice rejected any cause of action for wrongful discharge.[180] Despite these strong hints that no such tort existed under Pennsylvania law, the Third Circuit hewed to its past precedent recognizing such a tort.[181]

The Third Circuit explained its decision as mandated by the prior-panel rule: "[I]n the absence of a *clear* statement by the Pennsylvania Supreme Court to the contrary or other persuasive evidence of a change in Pennsylvania law, we are bound by the holdings of previous panels of this court."[182] Yet the Third Circuit did not cite any prior case

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with Florida's intermediate appellate courts over an Eleventh Circuit precedent on contract formation).

175 Smith v. Calgon Carbon Corp., 917 F.2d 1338 (3d Cir. 1990).

176 *See id.* at 1341–44.

177 *See id.* at 1341.

178 *See* Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363, 1365–66 (3d Cir. 1979) (discussing *Geary v. U.S. Steel Corp.*, 319 A.2d 174, 180 (Pa. 1974)).

179 Paul v. Lankenau Hosp., 569 A.2d 346, 348 (Pa. 1990) ("[We have] answered in the negative to the central question of 'whether the time has come to impose judicial restraints on an employer's power of discharge.'" (quoting *Geary*, 319 A.2d at 176)), *quoted in Calgon Carbon*, 917 F.2d at 1343.

180 Clay v. Advanced Comput. Applications, Inc., 559 A.2d 917, 923 (Pa. 1989) (Nix, C.J., concurring) ("[T]his Court did not announce a cause of action for wrongful discharge . . . ."), *quoted in Calgon Carbon*, 917 F.2d at 1343.

181 *Calgon Carbon*, 917 F.2d at 1343. But the court ultimately ruled against the plaintiff because the facts did not support the defendant's liability for the tort. *See id.* at 1345–46.

182 *Id.* at 1343.

endorsing this restrictive view of what state-court authority can overcome the circuit's *Erie* guess.[183] Its only citation was to the concise summary of the prior-panel principle in the Third Circuit's court rules[184]: "[N]o subsequent panel overrules the holding in a precedential opinion of a previous panel," as "en banc consideration is required to do so."[185] This succinct formulation of the rule does not flesh out its exceptions.[186] So *Calgon Carbon* essentially invented the rule that only a clear statement from the state court can overcome circuit precedent. Despite its shaky doctrinal foundation—the result of an extravagant inference[187]—*Calgon Carbon*'s clear-statement rule has been influential. Courts within the Third Circuit regularly invoke it and stick with the circuit's *Erie* precedents despite state courts' subsequent suggestions to the contrary.[188]

This requirement of a clear statement is also well established in the Fifth Circuit. As early as 1979, the Fifth Circuit explained:

> Once a panel of this Court has settled on the state law to be applied in a diversity case, the precedent should be followed by other panels without regard to any alleged existing confusion in state law, absent a subsequent state court decision or statutory amendment which makes this Court's decision *clearly wrong*.[189]

As when the Third Circuit arrived at the clear-statement rule, the Fifth Circuit cited only the general principle that prior panel precedent

183 If the *Calgon Carbon* panel had searched more thoroughly, it would have found precedent stating that the prior-panel rule does not apply to *Erie* guesses at all. *See* Aceto v. Zurich Ins. Co., 440 F.2d 1320, 1322 (3d Cir. 1971) ("No one may properly rely upon what we have held as more than persuasive on a question of Pennsylvania law so long as the Pennsylvania Supreme Court has not ruled upon that legal question.").

184 *See Calgon Carbon*, 917 F.2d at 1343 (citing 3D CIR. I.O.P. 9.1).

185 3D CIR. I.O.P. 9.1.

186 *See id.*

187 *See* Cass R. Sunstein, *The Problem of Extravagant Inferences*, 58 GA. L. REV. 467, 470 (2024).

188 *See, e.g.*, *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 786 (3d Cir. 1994) (adhering to circuit precedent recognizing medical monitoring claims although language in state-court decisions "seems to exclude medical monitoring claims"); Debiec v. Cabot Corp., 352 F.3d 117, 130–31 (3d Cir. 2003) (relying on previous panel to reject the state court's suggestion of an earlier start for the statute of limitations clock in medical malpractice cases); *In re* NFL Players' Concussion Inj. Litig., No. 12-md-02323, 2024 WL 2012241, at *14 n.66 (E.D. Pa. Apr. 29, 2024) (declining to follow a new Pennsylvania Supreme Court case that counseled in favor of a different choice-of-law approach, as the Third Circuit had already adopted the approach of an older state supreme court case), *report and recommendation adopted*, No. 12-md-02323, 2024 WL 4281447 (E.D. Pa. Sep. 5, 2024), *aff'd*, No. 24-2839, 2025 WL 2465746 (3d Cir. Aug. 27, 2025).

189 Lee v. Frozen Food Express, Inc., 592 F.2d 271, 272 (5th Cir. 1979) (per curiam) (emphasis added). The court relied on its past circuit precedent to rule out plaintiffs' wrongful death suit under Louisiana law, declining even to certify the question to the Louisiana Supreme Court. *See id.*

binds future panels—as if the clear-statement requirement directly followed from it.[190]

Despite this questionable logic, the en banc Fifth Circuit proceeded to endorse this clear-statement rule just a few years later in *Broussard v. Southern Pacific Transportation Co.*,[191] a wrongful death case.[192] There, the en banc court chided a panel for following a plaintiff-friendly Texas Supreme Court decision rather than a defendant-friendly Fifth Circuit decision.[193] Courts in the Fifth Circuit cite *Broussard*'s clear-statement rule when they disregard hints from the state supreme court and side with panel precedent instead.[194]

The Fifth Circuit's clear-statement rule has also influenced its sister circuits. In following its own precedent to rule in favor of an insurance company, the Eighth Circuit cited the Fifth Circuit's clear-statement principle.[195] "Although our circuit has never specifically determined the binding effect of a state law determination by a prior panel, other circuits defer to prior panel decisions absent a 'subsequent state court decision or statutory amendment that makes [the prior federal opinion] clearly wrong.'"[196] Arguably, this clear-statement rule was not dispositive in the Eighth Circuit case that adopted

190 *See id.* ("[T]his panel of the Court is bound by the decisions of prior panels."); *see also* Bergman, *supra* note 116, at 990 n.118 (describing *Lee* as one of "the leading Fifth Circuit cases" applying the prior-panel rule to *Erie* guesses).

191 Broussard v. S. Pac. Transp. Co., 665 F.2d 1387, 1389 (Former 5th Cir. 1982) (en banc) (quoting *Lee*, 592 F.2d at 272).

192 *See id.* at 1388.

193 *See id.* at 1390 (holding that the panel's "interpretation was binding on the panel in the present case, and the panel erred in declining to follow it"). But the en banc court then instructed the district court, on remand, to reconsider the issue anew in light of a fresh Texas Supreme Court decision—released after the start of en banc proceedings—that more clearly contradicted the Fifth Circuit's old panel precedent. *See id.* This is much like how the U.S. Supreme Court chides lower courts for jettisoning outmoded Supreme Court precedents before the Court itself explicitly overrules them. *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989); *see also* Richard M. Re, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 824, 836 n.57 (2023) (noting that the Supreme Court has "discouraged" lower courts from "anticipatory overrulings").

194 *See, e.g.*, Gonzalez v. Bank of Am., Nos. H-13-861, H-13-1028, H-13-2576, H-13-2929, H-14-1074, 2014 WL 12616132, at *5 (S.D. Tex. Aug. 5, 2014).

195 *See* AIG Centennial Ins. Co. v. Fraley-Landers, 450 F.3d 761, 762, 767–68 (8th Cir. 2006).

196 *Id.* at 767–68 (alteration in original) (quoting *Broussard*, 665 F.2d at 1389). Contrary to the court's suggestion, the Eighth Circuit had in fact previously determined the binding effect of a prior panel's state law determination. *Erie* guesses had formerly had no precedential weight in the Eighth Circuit. *See* Peterson v. U-Haul Co., 409 F.2d 1174, 1177 (8th Cir. 1969) ("Federal court decisions in diversity cases have no precedential value as state law and only determine the issues between the parties.").

it, as the panel's best reading of the state-court cases aligned with circuit precedent.[197]

But the Eighth Circuit's clear-statement rule would prove decisive later.[198] In a case where a defective product started a fire, that court cited this rule to prevent a plaintiff from recovering for the resulting property damage.[199] Although more recent dicta from the state supreme court suggested that recovery was proper,[200] the Eighth Circuit relied on its own precedent to hold that such economic losses were not cognizable in tort.[201] Indeed, it stuck with circuit precedent, while conceding the "doubt . . . raised by North Dakota's subsequent discussion" in two high court cases.[202] According to the panel majority, the "dicta" in the new state supreme court decisions did "not stand as decisive legal authority" that the state would "shun" the circuit's old approach.[203] A vigorous dissent accused the majority of "perpetuat[ing]" the circuit's "flawed prediction" of state law because the state supreme court had "not directly contradicted" it[204]—and emphasized the federal court's "obligation" to apply state law as "described by the highest court of that state,"[205] including in its "considered dicta."[206]

The dissent's view—that state-court dicta trump federal precedent on the meaning of state law—is more consistent with the Supreme Court's articulation of the *Erie* doctrine.[207] According to the Supreme

197 *See AIG Centennial Ins. Co.*, 450 F.3d at 768 (characterizing the prior-panel rule as an "additional basis for our holding"). *But cf. id.* at 767 ("[W]e confess that the state of Arkansas law on the subject leaves room for doubt [about our reading].").

198 *See, e.g.*, Sluis v. Ethicon, Inc., 529 F. Supp. 3d 1004, 1012 (D.S.D. 2021) (citing *AIG Centennial Ins. Co.*, 450 F.3d at 767–68) (holding that a later state supreme court decision did "not undermine" circuit precedent "to such a degree" that the district court could "refuse to apply" the circuit precedent).

199 *See* Arena Holdings Charitable, LLC v. Harman Pro., Inc., 785 F.3d 292, 292–93, 296–97 (8th Cir. 2015).

200 *See id.* at 295.

201 *See id.* at 296 (hewing to *Dakota Gasification Co. v. Pascoe Building Systems*, 91 F.3d 1094 (8th Cir. 1996)).

202 *Id.* at 295 (declining to follow *Clarys v. Ford Motor Co.*, 592 N.W.2d 573 (N.D. 1999), and *Steiner v. Ford Motor Co.*, 606 N.W.2d 881, 885 (N.D. 2000)). Given the conceded doubts these developments prompted, it was puzzling that the majority declined the plaintiff's call to certify the issue to the state supreme court. *Id.* at 296 n.2.

203 *Id.* at 295.

204 *Id.* at 298 (Riley, C.J., dissenting).

205 *Id.* at 301.

206 *Id.* at 299 (quoting Ashley County v. Pfizer, Inc., 552 F.3d 659, 665 (8th Cir. 2009)); *see also* Nolan v. Transocean Air Lines, 365 U.S. 293, 295 (1961) (per curiam) (instructing that "a considered dictum" from the state high court "may be decisive").

207 To their credit, at least some circuits likewise allow hints from state courts to modify circuit precedent on state law. *See, e.g.*, Woodling v. Garrett Corp., 813 F.2d 543, 557 (2d Cir. 1987) ("A ruling of one panel of this Circuit on an issue of state law normally will not be reconsidered by another panel absent a subsequent decision of a state court . . . *tending*

Court, it is a federal court's duty "in every case to ascertain from all the available data what the state law is and apply it."[208] All available data include dicta from the state supreme court,[209] which should take priority when they differ from prior federal-court decisions. Indeed, the Supreme Court explicitly endorsed the import of state-court dicta in *Nolan v. Transocean Air Lines*.[210] There, the Court vacated the lower-court judgment and remanded so that the court below could decide the case anew in light of a "considered dictum" from the relevant state supreme court.[211] So important was the state-court dictum that it warranted a do-over, even though the Court of Appeals could have considered the state-court dictum when it initially decided the case.[212] This is strong evidence that even dicta from state courts should overcome the binding force of panel precedent as to state law.

* * *

To be sure, there are benefits—in the form of intra-circuit predictability and uniformity—to favoring circuit precedent over intervening developments from state courts. According to a respected Ninth Circuit judge, "predictability justifies following circuit precedent even when a state intermediate appellate court subsequently issues a contrary opinion."[213] After all, "[o]ne never knows . . . when the other shoe will drop and another state court will take the opposite position. . . . Are we to revisit our rulings each time the weight of authority shifts?"[214] In Judge O'Scannlain's view, it would be better "to keep to a minimum the frequency with which we receive a new datum, revise our

to cast doubt on that ruling." (emphasis added)); Owen *ex rel.* Owen v. United States, 713 F.2d 1461, 1464 (9th Cir. 1983) ("Our interpretation [of California law] was only binding in the absence of any subsequent indication from the California courts that our interpretation was incorrect."). So, a decision that "tend[s] to cast doubt," *Woodling*, 813 F.2d at 557, on panel precedent or provides "any subsequent indication" to the contrary can warrant reconsideration of that precedent, *Owen*, 713 F.2d at 1464.

208 West v. AT&T, 311 U.S. 223, 237 (1940).

209 Standard Accident Ins. Co. v. Roberts, 132 F.2d 794, 799 (8th Cir. 1942) ("Certainly, a clear, unequivocal dictum in an opinion of the highest State court is 'available data' and is sufficiently 'persuasive data' to convince as to what it 'would decide.'" (quoting *West*, 311 U.S. at 237)); *see also* Doris DelTosto Brogan, *Less Mischief, Not None: Respecting Federalism, Respecting States and Respecting Judges in Diversity Jurisdiction Cases*, 51 TULSA L. REV. 39, 84 & n.402 (2015).

210 *See* Nolan v. Transocean Air Lines, 365 U.S. 293, 295 (1961) (per curiam).

211 *Id.* at 295, 295–96.

212 The relevant dictum had been issued by the California Supreme Court after the federal district court decision but before oral argument at the U.S. Court of Appeals. *See id.* at 295.

213 *In re* Watts, 298 F.3d 1077, 1085 (9th Cir. 2002) (O'Scannlain, J., concurring in the judgment).

214 *Id.*

view of state law accordingly, and reverse ourselves."[215] And although Judge O'Scannlain was speaking of developments in state intermediate appellate courts, the argument also applies to mere hints from the state supreme court.

Judge O'Scannlain's position promotes uniformity of decisionmaking within a federal circuit, but it undermines the unity of state law as applied across the state and federal systems.[216] It can even undermine the unity of state law within the broader federal system when different circuits adopt conflicting yet binding interpretations of a single state's law.[217] That cost to the unity of state law is significant, whereas the benefit of intra-circuit predictability is irrelevant, if not antithetical, to *Erie*.[218] Under Supreme Court precedent, the "twin aims" of *Erie* are "discouragement of forum-shopping and avoidance of inequitable administration of the laws."[219] If state law is unclear in state court, yet clear in federal court, that incentivizes the party that has federal-court precedent on its side to opt for the more favorable federal forum.[220] Accordingly, federal application of state law should shift as the state courts themselves shift—or, better yet, remain indeterminate where the state-court system has not yet settled the issue.

B. Binding but Wrong Erie *Guesses*

"Despite our best efforts," Judge Sloviter conceded in a seminal article, "we have guessed wrong" in a "not insignificant number" of *Erie* cases.[221] Such judicial error is hardly notable in itself.[222] As Judge Sloviter explained, the problem is that "incorrect predictions inevitably skew the decisions of persons and businesses who rely on them."[223]

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215 *Id.*

216 *See* AGK Sierra de Montserrat, L.P. v. Comerica Bank, 109 F.4th 1132, 1144 (9th Cir. 2024) (Miller, J., concurring).

217 *See* Stahle v. CTS Corp., 817 F.3d 96, 114 (4th Cir. 2016) (Thacker, J., concurring) (observing that "four circuits will have addressed this state law question, all with different views of the statute's scope").

218 *See* Glassman, *supra* note 165, at 311 (criticizing Judge O'Scannlain's view as "inconsistent with the Supreme Court's post-*Erie* case law").

219 Hanna v. Plumer, 380 U.S. 460, 468 (1965).

220 *See AGK Sierra de Montserrat*, 109 F.4th at 1144 (Miller, J., concurring).

221 Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1679 (1992); *see also id.* at 1679–81, 1680 nn.48–52, 1681 n.53 (collecting cases from inside and outside of the Third Circuit).

222 "[I]t is not surprising that federal courts often fail to forecast the development of state law accurately." Clark, *supra* note 31, at 1500.

223 Sloviter, *supra* note 221, at 1681. Although she accurately diagnosed the problem, her solution—the abolition of diversity jurisdiction, *see id.* at 1686–87—was somewhat extreme. Diversity jurisdiction is as old as the federal judiciary itself. *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. Diversity jurisdiction thus predates general federal question

In other words, incorrect *Erie* guesses affect external behavior. This hinges not on the mere existence of the inaccurate guess but on its prominence—and its ability to bind courts and litigants into the future.[224] When made in a published or precedential opinion, an inaccurate *Erie* guess binds all circuit panels and district courts within the circuit unless and until the state-court system repudiates it with the requisite degree of clarity.[225]

It is well established that circuits often guess wrong.[226] So a few examples suffice to illustrate the problem of inaccurate *Erie* guesses—starting with a notorious guess from Judge Sloviter's Third Circuit.[227] In 2009, the Third Circuit predicted that the Pennsylvania Supreme Court would adopt the *Third Restatement of Torts* on products liability.[228] In subsequent cases, the Third Circuit—and the district courts within it—held they were bound by the circuit's *Erie* guess to apply the *Third Restatement.*[229] Meanwhile, Pennsylvania state courts continued to apply

jurisdiction by nearly a century. *See* Jurisdiction and Removal Act of 1875, ch. 137, § 1, 18 Stat. 470, 470. During the early republic, even key federal law issues were litigated in federal court under the heading of diversity jurisdiction. *See* Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 80 (1997). Given how fundamental diversity jurisdiction has been to the federal judiciary, its abolition seems farfetched.

224 *See* Brown et al., *supra* note 32, at 85 (noting that the courts of appeals cite published opinions thirty times as often as unpublished opinions).

225 *See supra* notes 111–15 and accompanying text.

226 "Caselaw and scholarship are replete with instances where federal courts sitting in diversity are later overruled by state high courts." Gregory L. Acquaviva, *The Certification of Unsettled Questions of State Law to State High Courts: The Third Circuit's Experience*, 115 PENN ST. L. REV. 377, 380 n.26 (2010) (collecting examples); *see also* Clark, *supra* note 31, at 1502–16 (discussing several contexts in which federal courts have erroneously or prematurely predicted the development of state law).

227 *See* Brogan, *supra* note 209, at 39 (describing the *Berrier* line of cases as "a most vivid example of this mischief"); Connor Clerkin, Note, *Predicated Predictions: How Federal Judges Predict Changes in State Law*, 54 COLUM. J.L. & SOC. PROBS. 305, 315 (2020) (characterizing the *Berrier* line of cases as a "particularly problematic example").

228 *See* Berrier v. Simplicity Mfg., Inc., 563 F.3d 38, 59–60 (3d Cir. 2009). The upshot: A strict products liability claim could proceed against a lawnmower manufacturer, even though the lawnmower had injured a bystander rather than a target user of the product. *See id.* at 45–61.

229 *See* Covell v. Bell Sports, Inc., 651 F.3d 357, 362 (3d Cir. 2011) ("The precedential holding in *Berrier* . . . represents this Court's view of Pennsylvania's products liability law."); Sikkelee v. Precision Airmotive Corp., No. 12-8081, 2012 WL 5077571, at *1 (3d Cir. Oct. 17, 2012) (en banc) ("[W]e will follow the precedent set out in *Covell* and *Berrier.*"); Richetta v. Stanley Fastening Sys., L.P., 661 F. Supp. 2d 500, 504 (E.D. Pa. 2009) ("*Berrier* applies and, as a result, the Court must apply . . . the Restatement (Third) of Torts . . . ."); Hoffman v. Paper Converting Mach. Co., 694 F. Supp. 2d 359, 365 (E.D. Pa. 2010) ("[T]he Third Circuit's decision in *Berrier* [is] binding precedent. As such, the Restatement (Third) applies."); Sansom v. Crown Equip. Corp., 880 F. Supp. 2d 648, 656 (W.D. Pa. 2012) ("[T]his Court must and will apply the Third Circuit's *Covell* prediction and rely upon . . .

the *Second Restatement* on products liability, as they had done before.[230] This conflict persisted until 2014, when the Pennsylvania Supreme Court definitively announced that it was sticking with the *Second Restatement*—and the Third Circuit was forced to reverse course, five years in.[231]

The problem of binding but inaccurate guesses has plagued other circuits, too. In 2005, the Sixth Circuit "anticipate[d]" that the Ohio Supreme Court would permit corporate veil piercing for "unjust acts more broadly,"[232] though the relevant state supreme court decision had discussed only "fraud or an illegal act."[233] Courts within the Sixth Circuit dutifully followed this circuit precedent for the next three years.[234] That is, until 2008, when the Ohio Supreme Court made clear that the Sixth Circuit had guessed wrong.[235]

Consider also the Eleventh Circuit. In 1990, that circuit guessed the Florida Supreme Court would adopt the *Second Restatement of Conflict of Laws* to determine which state's law applies to certain insurance disputes.[236] The Eleventh Circuit adhered to that precedent,[237] as did the district courts within it, even over protests that they would have

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the Restatement (Third) of Torts here."); Lynn *ex rel.* Lynn v. Yamaha Golf-Car Co., 894 F. Supp. 2d 606, 627 (W.D. Pa. 2012) (same).

230 *See, e.g.*, Schaffner v. Aesys Techs., LLC, Nos. 1901 eda 2008, 1902 eda 2008, 2010 WL 605275, at *4 (Pa. Super. Ct. Jan. 21, 2010); Kiak v. Crown Equip. Corp., 989 A.2d 385, 389 n.1 (Pa. Super. Ct. 2010); Burk v. Hillerich & Bradsby Co., No. gd09-002196, 2009 WL 7039607 (Pa. Ct. C.P. Aug. 31, 2009); Ferris v. Golf Car Supply Co., 15 Pa. D. & C.5th 353, 354 (Pa. Ct. C.P. 2010); *see also* Brogan, *supra* note 209, at 40 n.7 (collecting even more cases).

231 *See* Tincher v. Omega Flex, Inc., 104 A.3d 328, 399 (Pa. 2014) ("Pennsylvania remains a Second Restatement jurisdiction . . . ."); DeJesus v. Knight Indus. & Assocs., Inc., 599 F. App'x 454, 455 (3d Cir. 2015) (recognizing that the Pennsylvania Supreme Court had abrogated Third Circuit precedent).

232 Taylor Steel, Inc. v. Keeton, 417 F.3d 598, 610 (6th Cir. 2005).

233 Belvedere Condo. Unit Owners' Ass'n v. R.E. Roark Cos., 617 N.E.2d 1075, 1086 (Ohio 1993).

234 *See* United States v. Am. Scrap Tire Recycles, Inc., No. 07 cv 0156, 2008 WL 1696927, at *9–10 (N.D. Ohio Apr. 9, 2008) (following *Taylor Steel*, 417 F.3d 598, to pierce the corporate veil); Orlich v. ALDnet Media Grp. LLC, No. 05 cv 1416, 2006 WL 8446834, at *3 (N.D. Ohio Mar. 7, 2006) (following *Taylor Steel*, 417 F.3d 598, to pierce the corporate veil, at least at a preliminary stage in the proceedings); *cf.* United States v. Atlas Lederer Co., No. 91cv309, 2007 WL 9852760, at *9 (S.D. Ohio Sep. 12, 2007) (relying on *Taylor Steel*, 417 F.3d 598, to hold that the remedy of corporate veil piercing was equitable, meaning no jury trial was required).

235 Dombroski v. WellPoint, Inc., 895 N.E.2d 538, 543–44 (Ohio 2008) (citing *Taylor Steel*, 417 F.3d at 610) (rejecting the Sixth Circuit's broad formulation of when corporate veil piercing was a permissible remedy); *id.* at 545 ("[T]he proposed expansion . . . to include unjust or inequitable conduct is simply too broad to survive exacting review.").

236 *See* Shapiro v. Associated Int'l Ins. Co., 899 F.2d 1116, 1119–21 (11th Cir. 1990).

237 *See* LaFarge Corp. v. Travelers Indem. Co., 118 F.3d 1511, 1515–16 (11th Cir. 1997) (per curiam).

guessed differently.[238] Yet in 2006, the Florida Supreme Court clarified that the traditional rule (*lex loci contractus*)—not the modern *Second Restatement* approach—applied.[239] This rebuke from the state court had a salutary influence: In the next case about Florida's approach to conflict of laws in insurance cases, the Eleventh Circuit acknowledged its previous mistake and certified the question to the Florida Supreme Court.[240]

These examples are meant to be illustrative, not exhaustive. They elucidate a common problem: Federal courts often make binding state law precedent based on bad predictions about what state courts will do. The problem is not so much that federal courts make some mistakes when state law is unclear. Unless federal courts certify every *Erie* question to state court (which would prove unmanageable), some mistakes are inevitable in a system that makes federal judges "trade [their] judicial robes for the garb of [a] prophet" when they decide diversity cases.[241] What is more troubling is this: The binding force of prior panel precedent creates a federal version of state law that is "trapped in amber."[242] It forces future federal courts to repeat the original panel's error. And it prevents them from realigning the law as divined by the federal courts with the law as declared by the state courts.

C. "State Law" with Minimal Connection to State Decisions

Federal courts often cite federal-court precedent—rather than state-court precedent—for basic propositions of state law.[243] Already in

238 *See, e.g.*, Northland Cas. Co. v. HBE Corp., 145 F. Supp. 2d 1310, 1313 (M.D. Fla. 2001) ("[T]his Court might have opted, given a blank slate, to apply [the *lex loci contractus*] rule to this dispute. The Court concludes, however, that the *Shapiro/LaFarge* line of cases requires application of . . . the Restatement (Second) of Conflict of Laws."); *see also* Pulte Home Corp. v. Ply Gem Indus., Inc., 804 F. Supp. 1471, 1482 (M.D. Fla. 1992) (following *Shapiro*, 899 F.2d 1116, and arguing that it was correctly decided).

239 *See* State Farm Mut. Auto. Ins. Co. v. Roach, 945 So. 2d 1160, 1163–64 (Fla. 2006).

240 *See* U.S. Fid. & Guar. Co. v. Liberty Surplus Ins. Corp., 550 F.3d 1031, 1034–35 (11th Cir. 2008) (per curiam).

241 Walters v. Inexco Oil Co., 670 F.2d 476, 478 (5th Cir. 1982) (quoting John R. Brown, *Certification—Federalism in Action*, 7 CUMB. L. REV. 455, 455 (1977)), *certifying question to*, 440 So. 2d 268 (Miss. 1983). Indeed, some level of judicial error is inevitable in the American court system, *Erie* or otherwise. *See* Andrew D. Hurwitz, *When Judges Err: Is Confession Good for the Soul?*, 56 ARIZ. L. REV. 343, 351 (2014) ("[J]udges are not infallible. We make mistakes."); Lefebure v. D'Aquilla, 15 F.4th 670, 675 (5th Cir. 2021) ("[A]s human beings, judges sometimes make mistakes . . . ." (quoting Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs., Inc. v. Kauffman, 981 F.3d 347, 384 (5th Cir. 2020) (en banc) (Ho, J., concurring))).

242 United States v. Rahimi, 144 S. Ct. 1889, 1897 (2024).

243 *See, e.g.*, Lowe v. Cerner Corp., No. 20-2270, 2022 WL 17269066, at *3 (4th Cir. Nov. 29, 2022) (citing Fourth Circuit precedent for Virginia law of negligence); Thacker v. Ethicon, Inc., 47 F.4th 451, 460 (6th Cir. 2022) (citing Sixth Circuit precedent for Kentucky

the 1980s, Judge Posner observed that this was a worsening problem.[244] He noted that, as compared to the immediate aftermath of *Erie*, when federal courts more frequently cited state decisions, courts were choosing to cite federal decisions instead.[245] The problem continues today. Although the federal precedent that is cited sometimes just mirrors or quotes state caselaw,[246] citing federal precedent for state law propositions can pose vexing problems. It can lead to entire lines of federal precedent on state law that have no discernible connection to any state-court decision.

For example, a district court ostensibly applying New York law—yet citing no New York state authority—devised an elaborate schema to determine when parties have formed an agreement to negotiate in good faith.[247] The Second Circuit adopted and continues to apply this schema.[248] Meanwhile, New York's highest court has neither embraced nor rejected this line of federal cases.[249] The result: a body of entirely federal precedent on New York contract law.

The Second Circuit is hardly unique. The Eighth Circuit has interpreted Nebraska tort law to foreclose any duty to warn certain professionals about the dangers of products sold to them.[250] In the case that established this rule, the Eighth Circuit cited out-of-circuit federal court decisions, but not a single Nebraska case, that had adopted this tort defense.[251] Despite its shaky foundation in Nebraska law,[252] courts

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law of failure to warn); Boerner v. Brown & Williamson Tobacco Corp., 260 F.3d 837, 846 (8th Cir. 2001) (citing Eighth Circuit precedent for what Arkansas requires to prove a design defect); *see also* Shannon M. Kilpatrick, *Sounding the Alarm: Is Diversity Jurisdiction Interfering with Washington State's Development of Its Own Body of Law Related to the Insurance Fair Conduct Act?*, 49 GONZ. L. REV. 553, 561 (2014) (discussing the "trend of some federal courts to cite federal decisions on state law, instead of state decisions").

244 *See* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 145–46 (1985).

245 *See id.*

246 *See, e.g.*, Delgado v. Universal Beauty Prods., Inc., No. 22-2727-cv, 2024 WL 1298509, at *2 (2d Cir. Mar. 27, 2024) (citing a federal decision that quoted a state decision about when a plaintiff may use circumstantial evidence to prove product defect).

247 *See* Tchrs. Ins. & Annuity Ass'n of Am. v. Trib. Co., 670 F. Supp. 491, 498 (S.D.N.Y. 1987).

248 *See* Arcadian Phosphates, Inc. v. Arcadian Corp., 884 F.2d 69, 71–73 (2d Cir. 1989); Murphy v. Inst. of Int'l Educ., 32 F.4th 146, 150–51 (2d Cir. 2022).

249 *See* IDT Corp. v. Tyco Grp., 918 N.E.2d 913, 915 n.2 (N.Y. 2009) ("While we do not disagree with the reasoning in [the] federal cases, we do not find the rigid classifications . . . useful.").

250 Crook v. Kaneb Pipe Line Operating P'ship, 231 F.3d 1098, 1102 (8th Cir. 2000) ("[U]nder Nebraska law, no warnings of any kind are required in these circumstances . . . .").

251 *See* Strong v. E.I. DuPont de Nemours Co., 667 F.2d 682, 687 (8th Cir. 1981).

252 *But cf.* Wedgewood v. U.S. Filter/Whittier, Inc., No. A-09-1280, 2011 WL 2150102, at *12 (Neb. Ct. App. May 31, 2011) (favorably citing Eighth Circuit precedent, albeit in a nonprecedential opinion).

within the Eighth Circuit continue to rely on this precedent in Nebraska tort cases.[253]

Finally, the Fifth Circuit has specified the kinds of evidence that a Louisiana tort plaintiff must provide in a failure-to-warn case.[254] But this standard came from an earlier Fifth Circuit case that cited no state authority.[255] Indeed, it is arguable that the later Fifth Circuit decision simply created this Louisiana state law standard by plucking a few words out of context from a previous circuit opinion.[256] Because it is now part of Fifth Circuit precedent, this standard continues to be decisive in Louisiana tort cases heard in federal court,[257] though no Louisiana state court has ever quoted the formulation.

These examples were chosen for their illustrative value from hundreds of others like them. The problem these examples typify is somewhat different from the problem of when federal precedents ignore data from state courts or make inaccurate *Erie* guesses. There, federal courts get state law wrong in a way that binds. Here, by contrast, the precedent is not necessarily getting state law wrong: At least, there may be no contrary state-court decision to show the federal court's error. Instead, the federal precedent is making "state law" that has no connection to anything the state courts have said. It is a version of state law created by federal courts, distinct from the law applied by the state courts.

* * *

The prior-panel rule, as applied to state law decisions, is the ultimate cause of the problems discussed in this Part. Having federal precedent on state law leads federal courts to disregard new state-court decisions, publish inaccurate *Erie* guesses, and follow lines of federally-created state law precedent—all of which sits in significant tension with *Erie*'s letter and spirit. As already seen, *Erie* and its progeny instruct federal courts to consider "all the available data" from state courts in

253 *See, e.g.*, Vondra v. Chevron U.S.A., Inc., 652 F. Supp. 2d 999, 1005–06 (D. Neb. 2009); Davis v. Simon Contractors, Inc., 117 F.4th 994, 999–1000 (8th Cir. 2024).

254 *See* Stahl v. Novartis Pharms. Corp., 283 F.3d 254, 264 (5th Cir. 2002) ("[A] plaintiff must provide evidence about the 'cause, frequency, severity, or consequences' of the dangerous characteristic in question." (quoting Grenier v. Med. Eng'g Corp., 243 F.3d 200, 205 (5th Cir. 2001))).

255 *See Grenier*, 243 F.3d at 205 ("[Plaintiff] presented no evidence about the cause, frequency, severity, or consequences of 'gel bleed' with regard to the implants at issue in this case.").

256 *See Stahl*, 283 F.3d at 264 (quoting *Grenier*, 243 F.3d at 205).

257 *See* Demouchet v. Gen. Nutrition Corp., No. 11-1961, 2014 WL 1652518, at *3–5 (W.D. La. Apr. 24, 2014) (applying *Stahl*, 283 F.3d 254, to the facts of the case); Summers v. FCA US LLC, No. 23-1777, 2024 WL 3925169, at *10 (E.D. La. Aug. 23, 2024) (same); *see also* Womack v. Dometic Corp., No. 23-30147, 2023 WL 4582425, at *3 (5th Cir. July 18, 2023) (per curiam).

ascertaining what state law is.[258] This instruction is incompatible with disregarding some of that data merely because a prior panel has spoken to the issue.

More broadly, the Supreme Court has explained the "twin aims of the *Erie* rule" as "discouragement of forum-shopping and avoidance of inequitable administration of the laws."[259] Yet an inaccurate *Erie* guess, or a uniquely federal line of precedent, settles circuit law to benefit either the plaintiff or the defendant, incentivizing that side to seek the more favorable federal forum.[260] Such federal precedent requires federal courts to apply different common law rules than the parties would get in state court, undermining the unity of state law across the state and federal systems and generating the inequity that the *Erie* framework seeks to avoid.[261] Moreover, settlement of state law issues by federal courts arguably usurps the proper role of the state courts in the federal system, "invad[ing] rights . . . reserved by the Constitution to the several States."[262] Application of the prior-panel rule in state law cases thus undermines the constitutional principles of federalism and separation of powers that *Erie* seeks to promote.[263]

III. THE UN-PRECEDENT-ING OF *ERIE* CASES

The problems described in the preceding Part stem from the prior-panel rule. Because federal courts (unlike state courts) must adhere to federal circuit precedent construing state law, the version of state law applied in federal court can deviate from the version of state law applied in state court. This sits uneasily with *Erie*. To realign the federal circuits with *Erie*, and state law as applied in federal court with state law as applied in state court, the federal judiciary should minimize the precedential force of *Erie* guesses, so that they no longer bind.

This Part proposes three ways to avoid creating federal precedent on state law—three ways to un-precedent *Erie* cases. First, whenever the answer to an open question of state law would be decisive, the federal

258 West v. AT&T, 311 U.S. 223, 237 (1940).

259 Hanna v. Plumer, 380 U.S. 460, 468 (1965); *see also* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 73–74 (1938).

260 *See* Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 348–49 (2006).

261 *See* Michael Steven Green, *The Twin Aims of* Erie, 88 NOTRE DAME L. REV. 1865, 1875 (2013) (citing Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941)).

262 *Erie*, 304 U.S. at 80; *see also Hanna*, 380 U.S. at 474 (Harlan, J., concurring) (describing *Erie* "as one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems").

263 *See* Adam N. Steinman, *What Is the* Erie *Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 316 (2008) ("The core of *Erie* is a constitutional principle that prohibits certain kinds of federal judicial lawmaking . . . .").

court should consider certifying the question to the state court.[264] Second, circuit panels should choose to designate as unpublished and nonprecedential all opinions that primarily address state law questions.[265] And finally, each circuit should modify its rules about precedent, such that interpretations of state law, even if contained in an otherwise precedential opinion, carry diminished precedential weight—or no precedential force at all.[266] In other words, each circuit should limit the prior-panel rule to questions of federal law, or, to put it more provocatively, abolish the prior-panel rule as applied to questions of state law.

A. *Certification*

Certification—when a federal court sends an unclear question of state law to the state supreme court for its answer—was designed to ameliorate the problem of federal-court precedent deviating from state law. Starting in the 1960s,[267] the U.S. Supreme Court endorsed certification as a solution to the problem of federal courts resolving unsettled state law questions.[268] In recommending that a federal court of appeals certify a Florida state law issue, the Supreme Court praised the Florida legislature's "foresight" in authorizing its state supreme court to answer certified questions from the federal courts.[269] During the next decade, the Supreme Court continued to tout certification as "particularly appropriate" for "novel[]" and "unsettle[d]" questions of state law, noting the recent adoption of certification procedures by several states.[270] While emphasizing its advantages, the Court clarified that certification was never obligatory: The decision whether to certify always rested in the federal court's "sound discretion."[271]

The federal courts and the states took note of this endorsement.[272] At least in part because it kept guessing wrong—state courts kept

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264 *See infra* Section III.A.

265 *See infra* Section III.B.

266 *See infra* Section III.C.

267 *See* Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORN. L. REV. 1672, 1686–87 (2003); Karen LeCraft Henderson, *Certification: (Over)due Deference?*, 63 GEO. WASH. L. REV. 637, 637 (1995).

268 *See* Clay v. Sun Ins. Off. Ltd., 363 U.S. 207, 212 (1960).

269 *Id.* (citing a Florida state statute authorizing certification to the Florida Supreme Court). Originally enacted in 1945, the Florida certification statute "lay dormant" until the Supreme Court blessed certification. *See* Ira P. Robbins, *The Uniform Certification of Questions of Law Act: A Proposal for Reform*, 18 J. LEGIS. 127, 133 (1992).

270 Lehman Bros. v. Schein, 416 U.S. 386, 390 n.7, 391 (1974).

271 *Id.* at 391; *see also* McKesson v. Doe, 141 S. Ct. 48, 51 (2020) (per curiam) (reiterating this principle).

272 *See* Jason A. Cantone & Carly Giffin, *Certified Questions of State Law: An Empirical Examination of Use in Three U.S. Courts of Appeals*, 53 U. TOL. L. REV. 1, 12 (2021) (attributing

rejecting its state law decisions[273]—the Fifth Circuit quickly adopted a liberal approach to certified questions.[274] Today, certification is common across circuits, including the Third, Sixth, and Ninth.[275] Likewise, by the 1980s, over half of the states had authorized the certification of questions to their state supreme courts.[276] And almost every state has now adopted a procedure for certified questions.[277]

Certification presents obvious advantages as a remedy for the divergence of federal-court caselaw from state-court caselaw.[278] By seeking guidance from the state supreme court, a federal court can essentially avoid making an *Erie* guess: The state court just tells the federal court what the state law is.[279] This minimizes the risk of federal-court precedent that is unmoored from state law precedent.[280] *Erie* requires federal courts to adopt "the garb of [a] prophet," but certification to the state supreme court "renders the crystal ball unnecessary."[281] Although it may sound hyperbolic, it is accurate to describe certification as a "wonderful device"—a "procedural wonder"—especially for courts faced with close and unclear questions of state law.[282]

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certification's rapid spread across the nation to *Clay*, 363 U.S. 207, and *Lehman Bros.*, 416 U.S. 386).

273 *See Lehman Bros.*, 416 U.S. at 390 n.6 ("The Fifth Circuit's willingness to certify is in part a product of frequent state court repudiation of its interpretations of state law."); *see also* United Servs. Life Ins. Co. v. Delaney, 328 F.2d 483, 486 (5th Cir. 1964) (Brown, J., concurring) (noting the "staggering" number of state-court decisions that "have expressly repudiated our holdings").

274 *See Lehman Bros.*, 416 U.S. at 390 n.6; *see also* Robbins, *supra* note 269, at 133–34 (highlighting the Fifth Circuit as an early adopter of certification).

275 *See* Cantone & Giffin, *supra* note 272, at 12 (examining the "considerable use of certified questions" in the Third, Sixth, and Ninth Circuits).

276 *See* Paul A. LeBel, *Legal Positivism and Federalism: The Certification Experience*, 19 GA. L. REV. 999, 999 n.1, 999–1000 (1985).

277 *See* McKesson v. Doe, 141 S. Ct. 48, 51 (2020) (per curiam); *see also* Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 168 (2003) (noting "states' widespread embrace of certification").

278 *See* Cantone & Giffin, *supra* note 272, at 15–17.

279 As one circuit panel put it, "[r]ather than guess, certification allows us to rely on the highest authority." Sanders v. Boeing Co., 68 F.4th 977, 983 (5th Cir. 2023), *certifying question to*, 680 S.W.3d 340 (Tex. 2023); *see also* Acquaviva, *supra* note 226, at 385–86 (noting that certification helps federal courts avoid making incorrect *Erie* guesses).

280 *See* Kenneth F. Ripple & Kari Anne Gallagher, *Certification Comes of Age: Reflections on the Past, Present, and Future of Cooperative Judicial Federalism*, 95 NOTRE DAME L. REV. 1927, 1941 (2020).

281 Walters v. Inexco Oil Co., 670 F.2d 476, 478 (5th Cir. 1982), *certifying question to*, 440 So. 2d 268 (Miss. 1983).

282 *Id. But see* Stanford *ex rel.* Phillips v. Brandon Nursing & Rehab. Ctr., L.L.C., 160 F.4th 118, 133–41 (5th Cir. 2025) (Oldham, J., dissenting) (raising eight cogent objections to certification, including that "certification is difficult to reconcile with [federal courts'] fundamental obligation to decide cases," *id.* at 134).

Accordingly, certification has received praise for reducing the problem of forum-shopping.[283] As discussed above, when federal-court precedent on state law lacks a basis in existing state-court decisions, it inevitably settles state law in favor of one side, at least for purposes of the federal system.[284] This incentivizes forum-shopping for the more favorable federal forum.[285] Certification reduces the likelihood of forum-shopping by helping to ensure a single, uniform version of state law, promulgated by the state-court system.[286] Certification can be especially beneficial by giving the state supreme court the opportunity to decide state law questions that normally only arise within federal-court litigation.[287] Because certification promotes the consistency of federal-court precedent with state-court caselaw and so disincentivizes forum-shopping, federal courts should invoke certification as liberally as possible when they encounter unsettled state law questions.

But certification is hardly a panacea. Sending an issue to the state court and awaiting a response inevitably entail costs and delay[288]—meaning that certification will not be feasible in every case.[289] As then-Justice Rehnquist pointed out, "the certification procedure is more likely to produce the correct determination of state law," but "additional time and money are required to achieve such a determination."[290] Accordingly, the Supreme Court has observed that "[f]ederal courts have only rarely resorted to state certification procedures."[291] Even when federal courts err on the side of certification—as this Article suggests they should—most state law questions implicated in federal litigation will be decided by a federal court, not sent to the state supreme court for an answer.

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283 *See* Cantone & Giffin, *supra* note 272, at 16 & n.105; Acquaviva, *supra* note 226, at 385–86. *But cf.* Long, *supra* note 31, at 123 (arguing that procedural differences between the state and federal courts motivate forum-shopping regardless).

284 *See supra* notes 260–61 and accompanying text.

285 *See* Eric Eisenberg, Note, *A Divine Comity: Certification (at Last) in North Carolina*, 58 DUKE L.J. 69, 75–77 (2008) (relating this problem to the solution of certification).

286 *See* Acquaviva, *supra* note 226, at 385–86; Clark, *supra* note 31, at 1544.

287 *See* Ripple & Gallagher, *supra* note 280, at 1941 & n.87; Gutierrez v. Smith, 702 F.3d 103, 116 (2d Cir. 2012).

288 *See* Geri J. Yonover, *A Kinder, Gentler* Erie*: Reining in the Use of Certification*, 47 ARK. L. REV. 305, 332–33, 344 (1994); David Frisch, *Contractual Choice of Law and the Prudential Foundations of Appellate Review*, 56 VAND. L. REV. 57, 110 & n.238 (2003) (noting that certification may delay resolution of a case by a full year); *see also* Valls v. Allstate Ins. Co., 919 F.3d 739, 742–43 (2d Cir. 2019) (per curiam) (declining to certify in part due to the cost and delay).

289 Frisch, *supra* note 288, at 110 (arguing that the private and public costs of certification "caution restraint"); Highland Cap. Mgmt. LP v. Schneider, 460 F.3d 308, 316 (2d Cir. 2006) ("We resort to certification sparingly . . . .").

290 Lehman Bros. v. Schein, 416 U.S. 386, 395 (1974) (Rehnquist, J., concurring).

291 McKesson v. Doe, 141 S. Ct. 48, 51 (2020) (per curiam).

Even when a federal court seeks an answer from the state supreme court, the state court may not oblige. State supreme courts vary significantly in how willing they are to accept and answer certified questions from the federal courts.[292] Between 2010 and 2018, for example, the Sixth Circuit received an answer only sixty percent of the time, though the Ninth Circuit had a higher acceptance rate of eighty percent.[293] And some states may, as a matter of policy, decline to accept some or all certified questions. For example, New Jersey accepts certified questions only from the Third Circuit—and not from any other federal circuit or district court.[294] And although the Missouri legislature has authorized certified questions from federal courts,[295] the Missouri Supreme Court has held that it lacks jurisdiction under the state constitution to consider certified questions.[296] Finally, one state—North Carolina—has no procedure in place for certification at all.[297] This has led a circuit judge to lament the lack of this "beneficial tool," which would have helped the panel solve a "novel and unsettled" question of North Carolina law that multiple federal circuits had addressed in conflicting ways.[298] So lack of cooperation from the states makes certification an incomplete solution.

Moreover, certification requires initiative from the federal court just as much as cooperation by the state court. But that initiative is often lacking. Because the Supreme Court gives federal courts discretion

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292 For example, a recent study found a huge variation between the Nevada and Alabama high courts: Nevada rejected only eleven percent of certified questions from the federal courts of appeals, whereas Alabama rejected forty-three percent of such certified questions. *See* Rachel Koehn Breland, *Avoiding Rejection: Studying When and Why State Courts Decline Certified Questions*, 92 FORDHAM L. REV. 1429, 1462 (2024). And state high courts are normally even less likely to accept certified questions from federal district courts. *See id.*

293 Cantone & Giffin, *supra* note 272, at 36.

294 N.J. CT. R. 2:12A-1 (empowering the New Jersey Supreme Court to answer certified questions from "the United States Court of Appeals for the Third Circuit" and mentioning no other court); *see also* Cantone & Giffin, *supra* note 272, at 24. Similarly, Illinois accepts certified questions only from the U.S. Supreme Court and the Seventh Circuit. *See* ILL. SUP. CT. R. 20(a). A prominent district judge has criticized Florida's constitution for failing to authorize certification from federal district courts. *See* Emergency Recovery, Inc. v. Gov't Emps. Ins. Co., 773 F. Supp. 3d 1304, 1315 n.8 (M.D. Fla. 2025) (Mizelle, J.).

295 MO. REV. STAT. § 477.004 (2025) ("The Missouri supreme court may answer questions of Missouri law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, [or] a United States District Court . . . ." *Id.* § 477.004(1).).

296 *See* Grantham v. Mo. Dep't of Corr., No. 72576, 1990 WL 602159, at *1 (Mo. July 13, 1990) (holding there was "no constitutional jurisdiction permitting this Court to respond" to the certified question); Zeman v. V.F. Factory Outlet, Inc., 911 F.2d 107, 109 (8th Cir. 1990) (citing Zeman v. V.F. Factory Outlet, Inc., No. 72613, 1990 Mo. LEXIS 130, at *1 (Mo. July 13, 1990)); *see also* Harber v. Altec Indus., Inc., 5 F.3d 339, 340 (8th Cir. 1993) (per curiam).

297 *See* Breland, *supra* note 292, at 1438 & n.52.

298 *See* Stahle v. CTS Corp., 817 F.3d 96, 111 (4th Cir. 2016) (Thacker, J., concurring).

whether to certify or not,[299] a circuit panel may decline to certify for a bad reason or no reason at all. For example, panels have cited the existence of prior federal precedent as a reason *not* to certify to state court.[300] Thus, stale *Erie* guesses may prevent later panels from even asking the state supreme court for guidance. Indeed, a past panel's decision not to certify a question has been construed as a precedent that prevents certification of the same question in a future case.[301] And although federal courts have power to certify sua sponte, a court may decline to certify a close state law question simply because no party made a timely request.[302] So many unsettled state law questions will inevitably go uncertified.

Finally, even if the federal court and the state court cooperate in the joint endeavor of certification, that does not prevent the creation of federal-court precedent after the case returns to federal court. Once the state court sends back its answer, the federal court often must apply that answer to the facts of the case[303] or address remaining questions of state law.[304] And, when the federal circuit court does so in a published opinion, it creates new federal precedent on the meaning of state law—precedent that goes beyond the narrow instructions the state supreme court gave in answering the certified question. Thus, increased certification may be an important solution, especially since it does not require radical change to expand the use of this long-accepted procedural tool. But a more comprehensive solution requires limiting the precedential force of opinions applying state law.

B. Nonpublication

A more dramatic but more promising solution would be to designate *Erie* decisions—decisions construing state law—as nonpublished or nonprecedential. As seen above, each circuit panel has considerable

299 *See* McKesson v. Doe, 141 S. Ct. 48, 51 (2020) (per curiam) (citing Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974)).

300 *See* Hughes v. Tobacco Inst., Inc., 278 F.3d 417, 425 (5th Cir. 2001); Arena Holdings Charitable, LLC v. Harman Pro., Inc., 785 F.3d 292, 296 n.2 (8th Cir. 2015). *But see* Lindenberg v. Jackson Nat'l Life Ins. Co., 919 F.3d 992, 1003 (6th Cir. 2019) (Nalbandian, J., statement) ("Certification is one tool to assist us in this endeavor. And it makes no difference whether one panel has already spoken on the issue." (citation omitted)).

301 *See* Rutherford v. Columbia Gas, 575 F.3d 616, 619 (6th Cir. 2009).

302 *See* Boyd Rosene & Assocs. v. Kan. Mun. Gas Agency, 178 F.3d 1363, 1364–65 (10th Cir. 1999).

303 *See* Donohue v. Hochul, 32 F.4th 200, 206 (2d Cir. 2022); Lemoine v. Wolfe, 812 F.3d 477, 478 (5th Cir. 2016); LKQ Corp. v. Rutledge, 126 F.4th 1247, 1249 (7th Cir. 2025).

304 *See, e.g.*, Daniels v. FanDuel, Inc., 909 F.3d 876, 877–78 (7th Cir. 2018); Dillon Gage, Inc. v. Certain Underwriters at Lloyds Subscribing to Policy No. EE1701590, 26 F.4th 323, 325–26 (5th Cir. 2022).

discretion whether to designate its opinion as precedential or not.[305] Currently, panels commonly exercise that discretion to create precedent when they decide state law questions.[306] But, more often, they choose to render their state law decisions in nonprecedential opinions instead.[307] Indeed, the vast majority of federal appellate decisions go unpublished.[308] This Article proposes categorically expanding the practice of nonpublication to cover all cases that primarily address state law questions. To prevent the creation of federal precedent that deviates from state-court precedent, panels should, as a matter of course, decide diversity cases in nonprecedential opinions.[309] This would reduce the amount of binding federal precedent on state law,[310] authorizing future panels and district courts to consider the state-court materials afresh. Federal appellate courts cite nonprecedential opinions thirty times less often than precedential opinions,[311] meaning that

305 *See supra* note 88 and accompanying text.

306 *See, e.g.*, Schuster v. Wynn MA, LLC, 118 F.4th 30, 38–45 (1st Cir. 2024) (precedentially deciding a variety of Massachusetts statutory and common law claims); Wilson v. USI Ins. Serv. LLC, 57 F.4th 131, 138 (3d Cir. 2023) (precedentially predicting how the Pennsylvania Supreme Court would decide an insurance law issue); Princeton Excess & Surplus Lines Ins. Co. v. A.H.D. Hou., Inc., 84 F.4th 274, 280–81 (5th Cir. 2023) (creating precedent on a complicated question of Texas insurance law); Das v. Tata Consultancy Servs. Ltd., 118 F.4th 903, 907 (7th Cir. 2024) (publishing a decision that applied Illinois employment and contract law); Hill v. Walmart Inc., 32 F.4th 811, 818–21 (9th Cir. 2022) (precedentially applying California labor and employment law); Sutton v. Wal-Mart Stores E., LP, 64 F.4th 1166, 1169 (11th Cir. 2023) (precedentially deciding a negligence case under Florida law).

307 *See, e.g.*, Gray v. Wackenhut Servs., Inc., 446 F. App'x 352, 353 (2d Cir. 2011) (negligence case under New York law); Bean v. Upsher-Smith Pharms., Inc., 765 F. App'x 934, 937 (4th Cir. 2019) (per curiam) (failure to warn claim under South Carolina law); Rees v. W.M. Barr & Co., 736 F. App'x 119, 122 (6th Cir. 2018) (products liability case under Ohio law); McQuiston *ex rel.* VanDorn v. Walmart Stores E. I, LP, No. 22-2284, 2023 WL 3772683, at *1 (8th Cir. June 2, 2023) (per curiam) (Missouri law negligence case); Munoz v. FCA US LLC, No. 22-2077, 2023 WL 3746540, at *3 (10th Cir. June 1, 2023) (per curiam) (products liability case under New Mexico law).

308 *See* Pether, *supra* note 90, at 1436; Brown et al., *supra* note 32, at 4 ("Over the last five years, eighty-seven percent of federal appeals were resolved in unpublished opinions."); *see also* ADMIN. OFF. OF THE U.S. CTS., JUDICIAL BUSINESS 2023 TABLES tbl. B-12 (2023), https://www.uscourts.gov/data-news/reports/statistical-reports/judicial-business-united-states/judicial-business-2023/judicial-business-2023-tables [https://perma.cc/FJC2-JEHX] (charting nonpublication rates spanning from sixty percent for the D.C. Circuit to over ninety percent for the Ninth Circuit).

309 Although circuit rules vary as to who on the panel has the power to call for publication, *see supra* note 88, as a practical matter the authoring judge tends to exercise this discretion, *see* David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CIN. L. REV. 817, 824 (2005).

310 *Cf.* Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1495 (1995) (reviewing THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS (1994)) (advocating nonpublication to stymie the "promiscuous growth" of precedent).

311 *See* Brown et al., *supra* note 32, at 85.

the decision not to publish diversity opinions would significantly diminish their influence in future litigation.

Of course, such a categorical expansion of nonpublication would pose some problems. For example, the same case may decide both a state law question and an important question of federal law.[312] It would be impracticable to let important federal law holdings go unpublished, especially in cases of first impression.[313] The answer is for federal courts to adopt a common practice of some state courts: partial publication.[314] Federal courts in the past have at least sometimes employed partial publication, designating one part of a decision as published and another part as unpublished.[315] For example, if an opinion breaks ground addressing a federal law claim in Part II and then addresses a separate state law claim in Part III, the court could designate Part III of the opinion as nonprecedential, much as parts of Supreme Court opinions that fail to garner five votes do not necessarily qualify as precedent.[316] Reviving partial publication for use in diversity cases would enable a federal panel to decide federal law questions precedentially while making no precedent as to state law.[317]

There is another problem with nonpublication: There may be issues of state law that rarely arise in state court but recur in federal court.[318] Consistently deciding these issues in unpublished opinions would mean that there would never be binding guidance.[319] But the

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312 *See, e.g.*, Honey Bum, LLC v. Fashion Nova, Inc., 63 F.4th 813, 819, 824 (9th Cir. 2023) (disposing of both a Sherman Act claim and California state law claims); Louisiana *ex rel.* Div. of Admin. v. i3 Verticals Inc., 81 F.4th 483, 487, 489 (5th Cir. 2023) (deciding a question of Louisiana local government law as well as an important question of statutory interpretation under the Class Action Fairness Act).

313 *See* Law, *supra* note 309, at 824–25 (noting the "conventional view" that panels publish pathbreaking opinions).

314 *See* CAL. R. CT. 8.1110(a) (authorizing partial publication); Rafi Moghadam, Note, *Judge Nullification: A Perception of Unpublished Opinions*, 62 HASTINGS L.J. 1397, 1407–08 (2011) (describing partial publication, which is common in California).

315 *See, e.g.*, United States v. Angulo, 927 F.2d 202, 204 (5th Cir. 1991) (declining to publish Section II.A of an otherwise published opinion); United States v. Kennedy, 726 F.2d 546, 547 n.1 (9th Cir. 1984) ("Kennedy's other points on appeal do not require discussion in a published opinion. They will be considered in an unpublished memorandum.").

316 *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019) (explaining that, due to a lack of votes, Parts II-A and III-A were not designated the opinion of the Court).

317 *Cf.* Arthur D. Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Court*, 23 ARIZ. ST. L.J. 915, 948 (1991) ("[T]he court should make greater use of partial publication and not clutter the *Federal Reporter* . . . .").

318 *See, e.g.*, Ripple & Gallagher, *supra* note 280, at 1941 n.87 (observing that only federal courts had construed a notable provision of Maine law).

319 *See* William L. Reynolds & William M. Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 807, 809.

solution to a recurring question of state law is to certify to the state court for its precedential guidance, not to create federal precedent.[320]

There are two more reasons that nonpublication is an incomplete solution to the problem of federal-court diversity precedent diverging from state-court precedent. First, a decision to stop publishing state law cases would only be prospective: It would leave untouched the mass of state law precedents that the circuits have built up over the decades. Only gradually would those circuit precedents grow stale and fall into oblivion, as state courts continued to generate new caselaw. Second, and most difficult of all, whether to publish is a discretionary decision that lies in the hands of the panel and perhaps really in the hands of the authoring judge.[321] Even if some judges are persuaded by the arguments against publication of diversity cases, others may not be. As a result, judges who decline to publish diversity cases will still be bound by the precedential state law opinions of their colleagues, though the nonpublishers do not contribute to that body of precedent themselves. A complete solution, then, must address the problem for the whole circuit.

C. Modification of the Prior-Panel Rule

The most thorough—but also most radical—solution is to modify the prior-panel rule so that it does not apply to the circuit's interpretations of state law.[322] This would solve the problem entirely, since *Erie* guesses would no longer be binding on anyone except the parties to the case. But because every circuit has previously applied the prior-panel rule to questions of state law,[323] it would be the most difficult solution to implement. A panel probably could not make the change unilaterally. Circuit precedent holds that panel interpretations of state law are binding, so the full court, either sitting en banc or acting through the circuit's judicial council,[324] would likely need to act to change the rule.

This Article recommends that each circuit act to exclude state law issues from the scope of the prior-panel rule. This will even work for those circuits—the Third, Sixth, and Seventh—that have codified the

320 *See supra* note 287 and accompanying text.

321 *See* Law, *supra* note 309, at 824.

322 For a less dramatic solution that would diminish but not eliminate the precedential force of *Erie* guesses, see Bergman, *supra* note 116, at 1008.

323 *See supra* note 109 and accompanying text.

324 *See* 28 U.S.C. § 332(d)(1) (2018) ("Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit."); Robert H. Hall, *Federal Circuit Judicial Councils: A Legislative History and Revisions Needed Today*, 11 GA. ST. U. L. REV. 1, 16–20 (1994) (discussing the circuit judicial council's power to make rules for the circuit).

prior-panel rule in their court rules.[325] There, the circuit's judicial council could simply add a sentence or clause to the rule: Decisions on pure state law questions do not bind as precedent, even when they appear in published opinions. The rest of the circuits, which have established the prior-panel rule as a matter of precedent,[326] should clarify the scope of that rule while sitting en banc. They should hold that, despite what previous panels have concluded,[327] the prior-panel rule is limited to questions of federal law and does not extend to questions of state law. This would completely un-precedent *Erie* guesses.

Although this modification of the prior-panel rule would constitute a revolutionary change to current practice, it would mark a return to the not-so-distant past. During the period when the prior-panel rule was still solidifying—the late 1960s and early 1970s[328]—at least two circuits held that panel interpretations of state law were not binding.[329] In 1969, the Eighth Circuit concluded that "[f]ederal court decisions in diversity cases have no precedential value as state law and only determine the issues between the parties."[330] And in 1971, the Third Circuit adopted essentially the same rule: "No one may properly rely upon what we have held as more than persuasive on a question of Pennsylvania law so long as the Pennsylvania Supreme Court has not ruled upon that legal question."[331] In other words, unless they mirror state supreme court rulings, circuit court rulings on state law are persuasive, not binding.

Paradoxically, under the prior-panel rule, these precedents—and not the later precedents that treat diversity decisions as binding—may already constitute binding circuit law. That is because the prior-panel rule requires following the earlier precedent when two precedents conflict.[332] Insofar as these were the circuits' earliest decisions on the precedential value of *Erie* guesses, they would trump the contrary decisions

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325 *See* 3D CIR. I.O.P. 9.1; 6TH CIR. R. 32.1(b); 7TH CIR. R. 40(e).

326 *See supra* notes 46–47 and accompanying text.

327 *See supra* note 109 and accompanying text.

328 *See* Mead, *supra* note 13, at 796.

329 *See* Wrabley, *supra* note 158, at 8–10.

330 Peterson v. U-Haul Co., 409 F.2d 1174, 1177 (8th Cir. 1969).

331 Aceto v. Zurich Ins. Co., 440 F.2d 1320, 1322 (3d Cir. 1971).

332 *See* Pardini v. Allegheny Intermediate Unit, 524 F.3d 419, 426 (3d Cir. 2008) ("[T]his Circuit has long held that if its cases conflict, the earlier is the controlling authority and the latter is ineffective . . . ." (quoting United States v. Rivera, 365 F.3d 213, 213 (3d Cir. 2004) (en banc))); Mader v. United States, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) ("[W]hen faced with conflicting panel opinions, the earliest opinion must be followed . . . ."); *see also* McMellon v. United States, 387 F.3d 329, 333 (4th Cir. 2004) (en banc) (collecting cases).

that came later.[333] It is possible then that, at least in the Third and Eighth Circuits, a mere panel could recognize the original rule: Panel interpretations of state law do not bind.

Even without completely denying precedential force to panel interpretations of state law, each circuit's en banc court could at least ameliorate the worst excesses of the prior-panel rule. For example, some circuits refuse to consider intervening decisions from the lower state courts[334]—and will not budge from their *Erie* guesses unless the state-court system has issued a clear rebuke.[335] Those circuits could join their sister circuits that more willingly reconsider their *Erie* guesses in light of any new evidence from the state courts.[336] This would not fully solve the problems presented by precedential *Erie* guesses, but it would at least help prevent federal courts from trapping their *Erie* guesses in amber.[337] Nevertheless, if the circuit is spending its limited en banc resources on fixing this problem,[338] it would be better to adopt the most complete solution: entirely eliminating the precedential force of panel pronouncements on state law.

IV. *ERIE* OR PRECEDENT?

This Article has explored a tension between the Supreme Court's *Erie* framework and the precedent rules that govern the lower federal

333 The earliest Third Circuit decision extending the prior-panel rule to state law questions appears to be from the 1980s and cites no supporting authority. *See* Ciba-Geigy Corp. v. Bolar Pharm. Co., 747 F.2d 844, 856 n.10 (3d Cir. 1984) ("[W]e are obligated to follow a prior panel's construction of New Jersey law . . . ."). And the Eighth Circuit took until the 2000s to hold that prior panel interpretations of state law bind. *See* AIG Centennial Ins. Co. v. Fraley-Landers, 450 F.3d 761, 767–68 (8th Cir. 2006) (observing that "our circuit has never specifically determined the binding effect of a state law determination by a prior panel" but concluding that a past panel decision on state law provided a "basis for our holding").

334 *See, e.g.*, Debiec v. Cabot Corp., 352 F.3d 117, 131 (3d Cir. 2003); FDIC v. Abraham, 137 F.3d 264, 269 (5th Cir. 1998); Reiser v. Residential Funding Corp., 380 F.3d 1027, 1029 (7th Cir. 2004); Kokins v. Teleflex, Inc., 621 F.3d 1290, 1297 (10th Cir. 2010).

335 *See, e.g.*, Smith v. Calgon Carbon Corp., 917 F.2d 1338, 1343 (3d Cir. 1990); Broussard v. S. Pac. Transp. Co., 665 F.2d 1387, 1389 (Former 5th Cir. 1982) (en banc); Arena Holdings Charitable, LLC v. Harman Pro., Inc., 785 F.3d 292, 296 (8th Cir. 2015).

336 *See, e.g.*, Lindenberg v. Jackson Nat'l Life Ins. Co., 912 F.3d 348, 358 (6th Cir. 2018); EmbroidMe.com, Inc. v. Travelers Prop. Cas. Co. of Am., 845 F.3d 1099, 1105 (11th Cir. 2017).

337 *Cf.* United States v. Rahimi, 144 S. Ct. 1889, 1897 (2024) ("These precedents were not meant to suggest a law trapped in amber.").

338 *See* Air Line Pilots Ass'n, Int'l v. E. Air Lines, Inc., 863 F.2d 891, 925 (D.C. Cir. 1988) (Ginsburg, R.B., J., concurring in denial of rehearing en banc) (observing the "drain on judicial resources" and "the expense and delay for the litigants" of rehearing a case en banc); AGK Sierra de Montserrat, L.P. v. Comerica Bank, 109 F.4th 1132, 1144 (9th Cir. 2024) (Miller, J., concurring) (noting the Circuit's "limited en banc resources").

courts. Given this conflict, it has suggested that the precedent rules should give way. But the tension could, of course, be resolved differently. If *Erie* and precedent conflict, perhaps that is a sign that *Erie* should give way instead.

There is an important movement in legal scholarship that has questioned the basis for *Erie* and has urged a revival of the general law framework that preceded *Erie.*[339] In particular, Professor Stephen Sachs has characterized *Erie* as "a blunder" that "take[s] a seriously incorrect view of states' unwritten law."[340] As Sachs argues, *Erie* assumes, without support, that each state's constitution has empowered its high court to create common law rules and construe statutes definitively, when states may actually envision the courts as engaged in a common enterprise of law discovery or take a more limited view of state courts' power vis-à-vis the other branches.[341] On Sachs's view, it is impossible to disentangle *Erie*'s discredited Austinian positivism—its view that law "does not exist without some definite authority behind it"[342]—from its holding that federal courts must follow state courts.[343] At the same time, other scholarship has persuasively argued that *Erie*'s positivism is distinct from its constitutional holding about the proper role of the federal courts in relation to state law.[344]

But even for those who advocate a broader return to the pre-*Erie* general law, this Article's proposal could be preferable to the current precedent rules. Currently, the federal courts attempt to apply state positive law, not discover general legal principles. Absent a wholesale return to the general law, faithfully applying existing state law could be better than applying a version of the common law that does not necessarily reflect either current state practice or general legal principles.

And regardless of whether *Erie* is correct as a matter of first principles, it continues to bind lower courts, which must apply it as best

339 *See, e.g.*, Sachs, *supra* note 35, at 570–71; Smitherman, *supra* note 35, manuscript at 126–32; Charles F. Capps, *The Holistic Theory of Precedent*, 93 U. CHI. L. REV. 549, 596 (2026); *cf.* Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 505–07 (2006) (arguing that general law continues to play a role even after *Erie*); Green, *supra* note 34, at 606–14 (arguing that *Erie* was wrong without calling for a return to the general law).

340 Sachs, *supra* note 35, at 571, 573.

341 *Id.* at 574–75 (discussing Michael Steven Green, Erie*'s Suppressed Premise*, 95 MINN. L. REV. 1111, 1112–13 (2011)).

342 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

343 *See* Sachs, *supra* note 35, at 571–73.

344 *See* Jack Goldsmith & Steven Walt, Erie *and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 675 (1998). Professor Bradford Clark has argued that *Erie* was correctly decided and "recognizes the exclusivity of the Supremacy Clause and enforces the political and procedural safeguards of federalism built into the Clause." Bradford R. Clark, Erie*'s Constitutional Source*, 95 CALIF. L. REV. 1289, 1290 (2007).

they can.[345] Only the Justices can overturn *Erie*, and they have shown little appetite to do so.[346] By contrast, each of the twelve geographic circuits has control over its own precedent rules and can modify them at any time.[347] Moreover, the precedent rules that this Article seeks to modify are relative latecomers to the law. The prior-panel rule itself dates only to the 1950s or 1960s[348]—and its most questionable extensions in the state law context came decades later, in the 1980s and 1990s or even in the twenty-first century.[349] It is easier to prune an overgrown hedge than to uproot a venerable tree. *Erie* has been a mainstay of American jurisprudence for as long as anyone alive can remember. Trimming the excesses of the prior-panel rule may prove more feasible.

That is not to suggest that a modest amendment to the prior-panel rule is ultimately enough. The problem of fossilized, federalized state law—a "state law" trapped in amber—indicates that the prior-panel rule may raise serious issues in other contexts, too. Consider when a federal circuit applies the law of another country, such as Spain.[350] That is even more likely to fossilize an erroneous reading of the law, as federal judges are far less capable of tracking Spanish legal developments than they are, say, Californian legal developments. Future courts may continue to feel bound by the panel's view (which might have lacked nuance to begin with) long after the Spanish legal system has moved on.

The prior-panel rule may even pose problems for the interpretation of federal law—the federal courts' bailiwick. That is because superannuated panel precedents may prevent a circuit from updating its law to reflect more recent developments at the Supreme Court,[351] or

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345 *See, e.g.*, Nat'l Republican Senatorial Comm. v. FEC, 117 F.4th 389, 395 (6th Cir. 2024) (en banc), *rev'd and remanded*, 146 S. Ct. 2404 (2026); United States v. Maloid, 71 F.4th 795, 808 (10th Cir. 2023), *cert. denied*, 144 S. Ct. 1035 (2024) (mem.).

346 In 2020, the unanimous Supreme Court favorably invoked *Erie*'s holding that there is no federal general common law. *See* Rodriguez v. FDIC, 140 S. Ct. 713, 717 (2020). And five Justices, all still serving, joined a majority opinion citing that same holding to conclude that federal courts could no longer create causes of action as they had done before 1938. *See* Hernández v. Mesa, 140 S. Ct. 735, 742 (2020).

347 *See* Dickman, *supra* note 127, at 1355 (discussing "the difference in standards among the circuits for applying their own undermined circuit precedent").

348 *See* Mead, *supra* note 13, at 796.

349 *See, e.g.*, Broussard v. S. Pac. Transp. Co., 665 F.2d 1387, 1389 (Former 5th Cir. 1982) (en banc); Smith v. Calgon Carbon Corp., 917 F.2d 1338, 1343 (3d Cir. 1990); FDIC v. Abraham, 137 F.3d 264, 269 (5th Cir. 1998); Kokins v. Teleflex, Inc., 621 F.3d 1290, 1297 (10th Cir. 2010).

350 *See, e.g.*, Cassirer v. Thyssen-Bornemisza Collection Found., 862 F.3d 951, 968 (9th Cir. 2017) (applying "Spanish rules of statutory interpretation" to determine the meaning of a provision in the Spanish Civil Code).

351 *See* Dickman, *supra* note 127, at 1350–51.

impose the heavy cost of en banc review to keep apace.[352] While some circuits permit a panel to depart from previous panel precedent when the Supreme Court "casts doubt on [the past panel's] controlling precedent,"[353] others will abandon past panel precedent only when it is "clearly irreconcilable" with more recent Supreme Court precedent.[354] In these latter circuits, stale panel opinions may continue to hold sway, even when they are in tension with more recent Supreme Court guidance.

This situation has led some judges and scholars to raise questions about the prior-panel rule more broadly. Before taking the bench, then-Professor Barrett argued that the prior-panel rule—which she labeled the "'no panel overruling' rule"[355]—could raise due process concerns if applied too inflexibly.[356] And, more recently, Judge Oldham, an influential circuit judge, has called the prior-panel rule into question.[357] The idea that one opinion can bind the court moving forward is a relatively recent invention.[358] So there may be merit to reconsidering the prior-panel rule more broadly.

CONCLUSION

Binding panel precedent may present many problems, but it is particularly troubling as applied to state law questions. As this Article has argued, the solution is to mitigate the binding force of precedent when it comes to *Erie* guesses. Ideally, each circuit would go en banc to hold—or would establish through its procedural rulemaking process—that federal interpretations of state law have no precedential force. In the meantime, individual panels can certify questions to state

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352 *See* Kozel, *supra* note 66, at 239.

353 *See, e.g.*, Union of Needletrades, Indus. & Textile Emps. v. INS, 336 F.3d 200, 210 (2d Cir. 2003).

354 *See, e.g.*, Miller v. Gammie, 335 F.3d 889, 893 (9th Cir. 2003) (en banc).

355 *See* Barrett, *supra* note 20, at 1026 n.60.

356 *See id.* at 1017–18, 1026 & n.60.

357 *See* Josh Blackman, *Judge Oldham Wants to Restore a Judiciary Without Horizontal Stare Decisis*, VOLOKH CONSPIRACY (Oct. 22, 2025, at 22:37 ET), https://reason.com/volokh/2025/10/22/judge-oldham-wants-to-restore-a-judiciary-without-horizontal-stare-decisis/ [https://perma.cc/A4Y6-SYAF] (reporting on Judge Oldham's Joseph Story Distinguished Lecture from earlier that day). Even before his scholarly speech critiquing the rule of orderliness, Judge Oldham had suggested that the rule should not apply in qualified immunity cases. *See* Boyd v. McNamara, 74 F.4th 662, 673 (5th Cir. 2023) (Oldham, J., concurring in part and dissenting in part).

358 In the nineteenth and early twentieth centuries, the most important consideration in evaluating a decision's precedential weight was whether a series of subsequent decisions had reaffirmed it. *See* William C. Marra, *Precedent and Jurisdiction*, 174 U. PA. L. REV. (forthcoming 2026) (manuscript at 15–16, 18), https://ssrn.com/abstract=5131044 [https://perma.cc/847G-ZEFF].

courts and avoid publishing diversity cases. Of course, the problem of "a law trapped in amber" is not limited to state law issues. Accordingly, the proposed retrenchment of panel precedent in one area of law may prompt a broader reconsideration of the prior-panel rule.