A UNIFORM STANDARD FOR CERTIFYING QUESTIONS TO STATE COURTS

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I. INTRODUCTION

Since the mid-twentieth century, federal courts have certified questions of state law to state supreme courts.[1] Rather than speculate on how a state's high court would rule on a given issue, federal courts allow the state court to determine the question itself.[2] In so doing, the federal judiciary promotes comity and consistency while discouraging forum shopping.[3] Yet, federal courts do so at the cost of judicial economy and speedy adjudication of litigants' pending claims.

The United States Court of Appeals is divided into thirteen circuits, of which eleven exercise jurisdiction encompassing states in the Union.[4] Each circuit, as explained in Part III, uses its own test to determine when to certify a question of state law to that state's judiciary.[5] Importantly, though, certification is a dance requiring a partner. While the federal circuit courts must determine which cases involving state issues to send to the state courts, the states must also agree to accept the certified question.[6]

Federal courts need a uniform standard for choosing which questions to certify to state courts to better promote consistency, preserve judicial economy, and prevent forum shopping. Debates continue in the judiciary and scholarly community as to the advisability of the certified question doctrine.[7]

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[1] John Macy, Note, *Give and Take: State Courts Should be Able to Certify Questions of Federal Law to Federal Courts*, 71 DUKE L.J. 907, 917 (2022).

[2] *Id.* at 917–19.

[3] *Id.* at 918–20.

[4] *About the U.S. Courts of Appeals*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals (Last visited Mar. 24, 2023). Although the United States District Courts also certify questions to state courts, they do so using the tests supplied by the court of appeals in their jurisdiction. Thus, this Article refers only to the United States Court of Appeals.

[5] *Infra* Part III.

[6] Richard Alan Chase, Note, *A State Court's Refusal to Answer Certified Questions: Are Inferences Permitted?*, 66 ST. JOHN'S L. REV. 407, 417–20 (1992).

[7] This Article is not the first to consider the proper role and use for the certification doctrine. Others have assessed the efficacy of the procedure and proposed reforms. For instance, Brian Mattis argued in 1969 that federal courts should not have to certify or engage in *Erie* guesses because federal courts have the same ability to reach sound decisions as state courts. *See* Brian Mattis, *Certification of Questions of*

Thus, this Article advocates a reform to the system rather than a complete disassembly, and it does not discuss the continued viability of the practice. Rather, it proposes a standard for federal courts to use when determining whether to certify is the following: first, the question must be determinative of the case pending before the federal court; second, the court must ascertain whether an existing mandatory or persuasive state precedent is directly or indirectly on point for the issue; and finally, if not, the court should consider whether the question is one of state constitutional law. If it is, the court may certify.

This Article presents the proposal in six sections. Part II surveys the history of certification. Part III outlines the current certification standards employed by the eleven circuit courts with jurisdiction encompassing the states. Part IV argues for the need for a uniform standard, proposes a new test, and analyzes the logistics of implementing reform. Finally, Part V briefly concludes.

II. BRIEF HISTORY OF CERTIFICATION

In 1938, the Supreme Court of the United States created the impetus for the modern certification conundrum.[8] In *Erie Railroad Company v. Thompkins*, the Court proclaimed that there is no federal substantive common law, and federal courts faced with state questions sitting in diversity must apply state law and, if no such law exists, make an informed guess about how the state's courts would rule on the question.[9] To avoid making these so-

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State Law: An Impractical Tool in the Hands of the Federal Courts, 23 U. MIA. L. REV. 717, 734 (1969). Thus, Mattis contended that certification should only be used in the rarest circumstances. *Id.* at 735; *see also* Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGISLATION 157 (2003) (arguing that praise for certification does not account for the doctrine's harms). Meanwhile, others, such as New York appellate judges Judith S. Kaye and Kenneth I. Weissman, have maintained that certification is preferable because it promotes better substantive state law development and allows for communication between state and federal judiciaries. *See* Judith S. Kaye & Kenneth I. Weissman, 69 FORDHAM L. REV. 373, 422 (2000); *see also* Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1677 (2003) ("This Article assumes the desirability of retaining the federal diversity jurisdiction—that on balance, certification is generally desirable and, accordingly, that the case for its viability is worth making."). It is beyond the scope of this Article to engage in this ongoing debate about certification's viability and desirability; instead, this Article assumes that the doctrine is going to continue, and, consequently, asserts that if it is to continue, it should be modified to maximize its benefits while minimizing its harms.

[8] Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[9] *Id.* at 78; *see* Mattis, *supra* note 7, at 718. Mattis has described the *Erie* doctrine and the problems it creates for federal courts:

> The *Erie* rule requires federal courts to apply state law in many of the civil cases that come before them. This puts a burden on the court to determine what is the

called *Erie* guesses, initially, federal courts turned to the *Pullman* abstention doctrine.[10]

Pullman abstention permits a federal court faced with a question of federal constitutional law and state law to abstain from adjudicating the case.[11] The federal court may abstain in this situation because a state court's decision on the state law question may render the federal constitutional issue moot, thereby allowing the federal court to evade deciding a constitutional matter.[12] While some federal courts may have hoped to use this procedure to avoid state law questions even when the case presented no issue of federal constitutional law, the Supreme Court rejected this procedure in such situations.[13] In *Meredith v. City of Winter Haven* (1943), the Supreme Court rejected the Fifth Circuit's application of *Pullman* in a case involving Florida law.[14] The Fifth Circuit had instructed the district court to abstain from deciding a diversity case because Florida law was unsettled though the case presented no federal constitutional question.[15] In rebuffing the Fifth Circuit's reliance on *Pullman*, the Supreme Court reasoned that "the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision."[16]

Thus, with *Pullman* abstention not applying to purely state law questions, the federal courts needed another avenue to avoid making *Erie* guesses. Starting in 1945, the state and federal judiciaries started to embrace certification of state law questions.[17] The State of Florida was the first to

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> state law. Sometimes the burden is a light one, as it is when the matter is covered by a clearly written statute, or when the highest court of the state has recently declared its position regarding the issue in controversy. However, when the state statute under consideration is ambiguous, or when there are no clear and controlling precedents from the highest state court, the burden of determining state law becomes a heavy one. Often the federal court has to guess how the highest state court would decide the case. Compelling reasons may exist for wanting to refrain from making such a guess.

Mattis, *supra* note 7, at 718.

[10] Nash, *supra* note 7, at 1681 ("Before the rise of certification, . . . federal courts looked to *Pullman* abstention as a means to elicit the assistance of state courts.").

[11] *Id.* at 1682 ("*Pullman* abstention doctrine, as it has evolved, applies when a federal court is faced with undecided questions of federal constitutional and state law[.]").

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* (quoting Meredith v. City of White Haven, 320 U.S. 228, 234–35 (1943)).

[17] *Id.* at 1686.

permit certification.[18] In 1945, the Florida legislature passed legislation enabling the Supreme Court of Florida to create a procedure for the federal courts to submit questions to the Florida high court.[19] It took the Florida Supreme Court fifteen years to avail itself of the option provided by the Florida legislature.[20] In 1960, the United States Supreme Court reversed a decision of the Eleventh Circuit Court of Appeals for failing to certify a question to the Florida Supreme Court.[21] The Court, in *Clay v. Sun Insurance Office*, encouraged the Eleventh Circuit to certify a question of state law, yet the Court also noted that the Florida Supreme Court had not actually promulgated the necessary rules to establish a procedure for certification despite the legislature's enabling action.[22] Nevertheless, after the Court first spoke favorably about certification, since 1967, the use of certification significantly increased with the formulation of the first Uniform Certification of Questions of Law Act.[23] Now, every state except North Carolina permits certification to some extent.[24]

The United States Supreme Court has looked favorably upon certification and provided context about the goals of the doctrine.[25] In *Lehman Brothers v. Schein*, the Court considered a shareholder derivative action against Lehman Brothers, which was a corporation based in Miami, Florida.[26] The Court found that the case presented a novel question of Florida law.[27] While concluding certification is a matter that should be left to the individual federal court's discretion, the Court nevertheless acknowledged the benefits of certification.[28] Specifically, the Court pointed out that certification "in the long run save[s] time, energy, and resources and helps build a cooperative federalism."[29] The Court, however, recognized that certification should not be mandatory.[30] In so doing, the Court said, "We do not suggest that where

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[18] Cochran, *supra* note 7, at 164.

[19] *Id.* at 165.

[20] *Id.*

[21] *Id.*

[22] *Id.* (citing Clay v. Sun Ins. Off., 363 U.S. 207, 212 n.3 (1960)).

[23] *Id.* at 167.

[24] Verity Winship, *Cooperative Interbranch Federalism: Certification of State-Law Questions by Federal Agencies*, 63 VAND. L. REV. 181, 182 (2010).

[25] *See generally* Lehman Bros. v. Schein, 416 U.S. 386 (1974) (noting that the District Court should consider certifying a question of state law).

[26] *Id.* at 387.

[27] *Id.* at 391 ("Here resort to [certification] would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law, Florida being a distant state.").

[28] *Id.* ("[Certification's] use in a given case rests in the sound discretion of the federal court.").

[29] *Id.*

[30] *Id.* at 390–91.

there is doubt as to local law and where the certification procedure is available, resort to it is obligatory."[31]

In sum, since *Erie*, federal courts have struggled with making educated guesses about how a state's high court would decide unsettled issues of purely state law. The federal judiciary initially used *Pullman* abstention to avoid predicting a state's law by abstaining from deciding questions of state law when another aspect of the case involved federal constitutional law. Yet, under *Meredith*, federal courts may not employ the abstention doctrine to evade state law matters that are not related to federal in the same controversy. Thus, starting in the 1960s, states began permitting federal courts to certify questions to state supreme courts. Since then, the Supreme Court has looked favorably upon the practice, and it has grown in popularity as every state except one has adopted the procedure. Moreover, the Supreme Court has acknowledged the discretionary aspect of certification as well as its core purposes – to promote comity and preserve judicial resources.

III. CURRENT CIRCUIT COURT STANDARDS

Though perhaps seemingly onerous, it is critical to understand each circuit's current certification standard. From these disparate tests emerge patterns of agreement among the circuits. Crafting a uniform standard for certification requires an understanding of the tests used currently by the circuits, with a particular focus on the existing areas of agreement among them.

A. Circuit Tests

Each circuit employs its own unique standard when determining whether to certify. This section identifies the rule used by each circuit that has jurisdiction over a state.

1. First Circuit

When assessing whether to certify a question of state law, the First Circuit looks for an issue of state law that is uncertain or difficult.[32] If the court is faced with such a question, it will grant certification where "the answers to the…question…may hinge on policy judgments best left to the

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[31] *Id.*

[32] Ken's Foods, Inc. v. Steadfast Ins., 36 F.4th 37, 44 (1st Cir. 2022) (quoting Pyle v. S. Hadley Sch. Comm., 55 F.3d 20, 22 (1st Cir. 1995)).

[state] court and will certainly have implications beyond the…parties."[33] The only reason the court will eschew certification is if the "policy arguments line up solely behind one solution."[34] Thus, the First Circuit's test revolves around whether the question demands a contested policy determination.

2. Second Circuit

Like the First Circuit, the Second Circuit's certification standard hinges on whether the issues involve significant aspects of state public policy.[35] The Second Circuit has noted certification of questions of state law is an "exceptional procedure."[36] The court has stated, "[W]e do not certify questions lightly. 'Because it is our job to predict how the forum state's highest court would decide issues before us, we will not certify questions of law where sufficient precedents exist for us to make the determination.'"[37] Yet, where the court cannot identify adequate precedents to predict how a state's supreme court would act, the court may certify the question.[38] In sum, the Second Circuit will certify a question where deciding the case would "'require value judgments and important public policy choices'" and where "answers to the identified questions 'will control the outcome of th[e] case.'"[39]

3. Third Circuit

The Third Circuit only recently, in March 2022, explicitly articulated the appropriate certification test for courts in its jurisdiction to employ, and it now utilizes a multi-factor analysis to determine when to certify issues to state high courts.[40] The court has counseled future panels and lower courts in its circuit that these factors are non-exhaustive and any one factor may advise a court to certify or not.[41] Before engaging in the factor-based evaluation, the court will never certify a question solely because the question is

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[33] Id. (quoting Ropes & Gray LLP v. Jalbert (In re Engage, Inc.), 544 F.3d 50, 53 (1st Cir. 2008)).

[34] *Id.* (quoting *In re Engage, Inc.*, 544 F.3d at 57).

[35] Khan v. Yale Univ., 27 F.4th 805, 831–33 (2d Cir. 2022).

[36] *Id.* at 832 (quoting Ruzhinskaya v. HealthPort Techs., 942 F.3d 69, 73 (2d Cir. 2019)).

[37] *Id.* at 831 (quoting DiBella v. Hopkins, 403 F.3d 102, 111 (2d Cir. 2005)).

[38] *Id.*

[39] *Id.* at 831–32 (quoting Penguin Grp. (USA) Inc. v. Am. Buddha, 609 F.3d 30, 42 (2d Cir. 2010)).

[40] United States v. Defreitas, 29 F.4th 135, 141–43 (3d Cir. 2022). The court acknowledged its previous failure to state a clear standard for certification, saying, "While our rules provide for certification, we have not identified what considerations our court should take into account when deciding if certification is appropriate." *Id.* at 141.

[41] *Id.* at 142–43.

determinative of the pending action.[42] The Third Circuit has noted it is often tasked with deciding close cases, and it need not seek a state's clarification merely because the question is dispositive of the case.[43] After heeding that foundational admonition, the court should turn to the factor-based assessment.

First, the court should only certify questions for which their "eventual resolution should be unclear and control an issue in the case."[44] As part of the initial factor, the court must be mindful that "[c]ertifying a question where the answer is clear is inappropriate and unnecessary."[45] Nevertheless, if the court cannot adequately predict how a state supreme court would decide an issue, and it is therefore unclear and controlling, certification may be proper.[46] As part of the court's consideration of the first factor, the court may only certify if the question is material and dispositive to the case; thus, while the court is barred from certifying solely because the question is dispositive, the question must be critical to the disposition before it may be certified.[47]

Second, the court should assess the importance of the question for which it is weighing certification.[48] For this analysis, the court must credit the state's interest in interpreting questions of state law and the United States Court of Appeals' concern for preserving comity with the states' judicial departments.[49] In fact, the Third Circuit has recognized, "open *questions of state constitutional law* should nearly always be left to the state courts."[50] Additionally, the court is cognizant that issues of state public policy should be decided by the state's judiciary.[51] Moreover, the court should certify to the state those issues that could inspire litigants to engage in forum shopping or that could create recurring inconsistency in the law.[52]

Third, the court must weigh the tax on judicial economy that certification will cause.[53] The Third Circuit acknowledges considerations of judicial economy are not as critical as protecting comity and preserving federalism.[54] Nevertheless, the court is cautious about certifying in situations in which

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[42] *Id.* at 141 (citing City of Houston v. Hill, 482 U.S. 451, 470–71 (1987); Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938)).

[43] *Id.* (citing *Hill*, 482 U.S. at 470–71; *Erie R.R.*, 304 U.S. at 78).

[44] *Id.* (citing *Hill*, 482 at 470–71).

[45] *Id.* (citing *Hill*, 482 at 470–71).

[46] *Id.* (citing Oberdorf v. Amazon.com Inc., 818 F. App'x 138, 143 (3d Cir. 2020) (en banc)).

[47] *Id.* at 141–42 (citing 3d Cir. L.A.R. Misc. 110.1 (2011)).

[48] *Id.* at 142.

[49] *Id.*

[50] *Id.* (citing Blue Cross & Blue Shield of Ala., Inc. v. Nielson, 116 F.3d 1406, 1413 (11th Cir. 1997)).

[51] *Id.* (citing Chauca v. Abraham, 841 F.3d 86, 93 (2d Cir. 2016)).

[52] *Id.* (citing Schuchart v. La Taberna Del Alabardero, 365 F.3d 33, 37 (D.C. Cir. 2004)); In re Badger Lines, 140 F.3d 691, 698 (7th Cir. 1998)).

[53] *Id.*

[54] *Id.*

doing so would unnecessarily delay adjudication.[55] Importantly, when balancing this factor, the court will disfavor requests to certify from the party that originally invoked federal jurisdiction.[56]

Finally, the court takes into account the timeliness of the request to certify.[57] For instance, as the Third Circuit has noted, if a party loses a motion or other matter involving an interpretation of state law, the court should look skeptically upon a subsequent request from that party to certify the question to a state court.[58] The court will not permit litigants to receive "do-overs" for adverse decisions through the certification procedure.[59]

4. Fourth Circuit

The Fourth Circuit has not offered significant guidance on when it will certify a question of state law. Nevertheless, that court has applied certain factors, albeit inconsistently, in making that determination.[60] The Fourth Circuit has acknowledged that it will certify only those issues that may be determinative or dispositive of the case.[61] Likewise, the Fourth Circuit has recognized that it will certify where "there is no controlling appellate decision, constitutional provision, or . . . statute that definitively answers th[e] question[.]"[62] Finally, the Fourth Circuit has also considered the importance of the question and whether it is likely to recur in future cases.[63]

5. Fifth Circuit

The Fifth Circuit utilizes a three-factor weighing standard to determine whether to certify a state question.[64] First, the court considers the closeness of the question before it; thus, if the answer is sufficiently clear, the court will

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[55] *Id.*

[56] *Id.* (citing Powell v. U.S. Fid. & Guar. Co., 88 F.3d 271, 273 n.3 (4th Cir. 1996)).

[57] *Id.* (citing Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1892 n.7 (2018)).

[58] *Id.*

[59] *Id.* (citing State Auto Prop. & Cas. Ins. v. Hargis, 785 F.3d 189, 194 (6th Cir. 2015)); Thompson v. Paul, 547 F.3d 1055, 1065 (9th Cir. 2008)).

[60] *See generally* United Fin. Cas. Co. v. Ball, 31 F.4th 164 (4th Cir. 2022) (certifying a question of state law to the West Virginia Supreme Court of Appeals); Valentine v. Sugar Rock, Inc., 745 F.3d 729 (4th Cir. 2014) (certifying a question of state law to the West Virginia Supreme Court of Appeals).

[61] *Ball*, 31 F.4th at 165 ("[T]he answer will be determinative of an issue in a case currently pending before our court."); *Valentine*, 745 F.3d at 730 ("We perceive that the answer to the foregoing question of West Virginia law may be determinative of the cause now pending before us.").

[62] *Ball*, 31 F.4th at 165.

[63] *Valentine*, 745 F.3d at 735 n.3 ("In view of the importance of the question and the significant likelihood that it will recur . . . we are of the opinion that the state's Supreme Court of Appeals ought to be afforded the opportunity to resolve it.").

[64] Frymire Home Servs., Inc. v. Ohio Sec. Ins. Co., 12 F.4th 467, 470 (5th Cir. 2021).

not certify the issue.[65] Second, the court acknowledges how the question might bear on federal and state comity.[66] If the Fifth Circuit's failure to certify would likely damage the relationship between the federal and state judiciaries, this factor weighs in favor of certification.[67] Finally, the Fifth Circuit recognizes the practical limitations of the case, including "the possibility of delay or difficulty of framing the issue."[68]

6. Sixth Circuit

In a particularly flexible standard, the Sixth Circuit may certify a question to a state supreme court where the issue of law is "new and state law is unsettled."[69] The Sixth Circuit looks to the additional factors of "comity, cooperative federalism, and judicial economy" when deciding whether to certify.[70] Accordingly, the Sixth Circuit's test provides very little black letter rules for its own jurists, and the courts below it, to apply to certification procedures.

7. Seventh Circuit

Unlike the Sixth Circuit, the Seventh Circuit has a more robust set of considerations for certification. The Seventh Circuit's primary concern when deciding to certify "is whether [the court finds itself] genuinely uncertain about a question of state law that is vital to a correct disposition of the case."[71] Further narrowing this analysis, the Seventh Circuit also has provided a set of elements to determine when certification is appropriate.[72] The court has declared:

> Certification is appropriate when the case concerns a matter of vital public concern, where the issue will likely recur in

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[65] *Id.* (quoting Swindol v. Aurora Flight Scis. Corp., 805 F.3d 516, 522 (5th Cir. 2015)).

[66] *Id.* (quoting *Swindol*, 805 F.3d at 522).

[67] *See id.* (quoting *Swindol*, 805 F.3d at 522).

[68] *Id.* (quoting *Swindol*, 805 F.3d at 522). As to this final factor, it may be a mere formality for the Fifth Circuit because in *Frymire*, the court summarily dismissed its consideration by deferentially noting, "there is no reason to think that certification would cause undue delay—to the contrary, the Texas Supreme Court is known for its 'speedy, organized docket.'" *Id.* at 472 (quoting Degan v. Bd. of Trs. of Dall. Police & Fire Pension Sys., 766 F. App'x 16, 19–20 (5th Cir. 2019) (per curiam)).

[69] Lindenberg v. Jackson Nat'l Life Ins. Co., 919 F.3d 992, 993 (6th Cir. 2019) (Clay, J., concurring) (quoting Transamerica Ins. v. Duro Bag Mfg., 50 F.3d 370, 372 (6th Cir. 1995)).

[70] *Id.* (citing Rutherford v. Columbia Gas, 575 F.3d 616, 628 (6th Cir. 2009) (Clay, J., dissenting)).

[71] Craig v. FedEx Ground Package Sys., Inc., 686 F.3d 423, 429 (7th Cir. 2012) (quoting Cedar Farm, Harrison Cnty., Inc. v. Louisville Gas & Elec. Co., 658 F.3d 807, 812–13 (7th Cir. 2011)).

[72] *Id.* at 430 (citing *Cedar Farm, Harrison Cnty., Inc*., 658 F.3d at 813).

> other cases, where resolution of the question to be certified is outcome determinative of the case, and where the state supreme court has yet to have an opportunity to illuminate a clear path on the issue.[73]

Nevertheless, the Seventh Circuit has noted certain reasons that counsel caution in certifying to a state supreme court.[74] First, the court should be "mindful of the state courts' already busy dockets."[75] Second, the court normally will not certify where "certification would produce a fact bound, particularized decision without broad precedential significance . . . ."[76] Therefore, unlike some of its sister courts, the Seventh Circuit provides fairly recognizable borders on its certification analysis.

8. Eighth Circuit

Likewise, the Eighth Circuit employs multiple factors when evaluating whether to certify to a state high court. The Eighth Circuit's overarching standard, however, is "[w]here [the court] find[s] no state law precedent on point and where the public policy aims are conflicting[,] the case may properly be certified to the state court."[77] The Eighth Circuit, in weighing certification, also considers whether the question is one that is unsettled in the state courts, whether the question is dispositive in the case, and whether the issue is likely to recur in later cases.[78] Although the Eighth Circuit acknowledges the tax on judicial efficiency caused by certification, the court does not overly credit that concern over procuring a correct adjudication of the question of state law from a state court and the preservation of comity between the state and federal judiciaries.[79]

9. Ninth Circuit

The Ninth Circuit provides less guidance than some courts in its certification decisions, noting, "The certification procedure is reserved for state law questions that present significant issues, including those with

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[73] *Id.* (quoting *Cedar Farm, Harrison Cnty., Inc*., 658 F.3d at 813) (internal quotation marks omitted).

[74] *Id.* (citing *Cedar Farm, Harrison Cnty., Inc*., 658 F.3d at 813).

[75] *Id.*

[76] *Id.* (quoting Thomas v. H & R Block E. Enters, Inc., 630 F.3d 659, 667 (7th Cir. 2011) (internal quotation marks omitted)).

[77] Hatfield v. Bishop Clarkson Mem'l Hosp., 701 F.2d 1266, 1267 (8th Cir. 1983).

[78] *Id.* at 1267–68.

[79] *Id.* at 1269 ("Delay in the factual context of the present case does not outweigh the significant principle of comity.").

important public policy ramifications, and that have not yet been resolved by the state courts."[80] The Ninth Circuit has stated that its purpose in seeking certification is not to evade its responsibility to decide the cases properly before it, but to give deference to state court determinations of state law.[81] The Ninth Circuit has acknowledged that questions of judicial efficiency, including how overloaded some state courts' dockets may be, is a valid consideration for the court, but it nevertheless will not presume to set a state court's docket priorities for it.[82]

10. Tenth Circuit

The Tenth Circuit employs a fairly robust, albeit subjective, standard of certification.[83] Before certifying, the Tenth Circuit acknowledges, "[W]e will not trouble our sister state courts every time an arguably unsettled question of state law comes across our desks. When we see a reasonably clear and principled course, we will seek to follow it ourselves."[84] Nevertheless, the Tenth Circuit will certify in certain situations. In deciding to do so, the court, while "apply[ing] judgment and restraint," will certify "where the question before [it] (1) may be determinative of the case at hand and (2) is sufficiently novel that [the court] feel[s] uncomfortable attempting to decide it without further guidance."[85] Moreover, the Tenth Circuit is guided by a desire to promote comity between the federal and state judiciaries.[86] Writing for the Tenth Circuit while a member of that court, then-Circuit Judge, now Associate Supreme Court Justice, Neil M. Gorsuch stated, "[W]e also seek to give meaning and respect to the federal character of our judicial system, recognizing that the judicial policy of a state should be decided when possible by state, not federal, courts."[87]

11. Eleventh Circuit

The Eleventh Circuit employs a generalized, and rather unhelpful, certification test.[88] Put very simply, the Eleventh Circuit has stated, "[W]e should certify questions to the state supreme court when we have substantial

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[80] Kremen v. Cohen, 325 F.3d 1035, 1037 (9th Cir. 2003).
[81] *Id.* at 1037.
[82] *Id.* at 1038.
[83] Pino v. United States, 507 F.3d 1233, 1236 (10th Cir. 2007).
[84] *Id.* (citing Armijo v. Ex Cam, Inc., 843 F.2d 406, 407 (10th Cir. 1998)).
[85] *Id.* (citing Delaney v. Cade, 986 F.2d 387, 391 (10th Cir. 1993)).
[86] *Id.* (citing *Lehman*, 416 U.S. at 391).
[87] *Id.* (citing *Lehman*, 416 U.S. at 391).
[88] Whiteside v. GEICO Indem. Co., 977 F.3d 1014, 1018 (11th Cir. 2020).

doubt regarding the status of state law."[89] The court has added little to further narrow the class of cases ripe for certification. Instead, the court has offered, "Certifying questions is a useful tool to avoid making unnecessary *Erie* guesses and to offer the state court the opportunity to interpret or change existing law."[90]

B. Patterns of Agreement

From this review of circuit precedent on certification decisions, there emerge six factors that the individual circuits employ to differing degrees. Those factors, ranked from least commonly to most commonly used, are the following. First, five circuits have explicitly identified as a factor in their analysis whether the question is important or likely to recur in future cases. Second, six circuits have recognized the need to weigh the tax on judicial economy caused by certification, and the Third Circuit, at least, has acknowledged this also involves preventing unnecessary forum shopping. Third, six circuits have mentioned the importance of preserving comity between the federal and state judiciaries as a factor in deciding to certify. Fourth, six circuits have pointed to whether the question requires the federal court to make a state public policy determination better left to the state itself. Fifth, six circuits explicitly demand that the question to be certified be dispositive of the case, or at least one count of the case, before certifying. Finally, every circuit requires the law to be uncertain, unsettled, or difficult to predict prior to deciding to certify the question.

Breaking these patterns down further, there are two types of factors courts use to inform their certification decisions: encouraging and discouraging. The factors that encourage certification are that the law must be unsettled, the issue requires state public policy considerations, the matter is important and likely to recur, and the need to promote comity. Yet, the factors that may—though not always—caution against or discourage certification are judicial economy and whether the question is dispositive. A new, mandatory test for all circuits to use in certification decisions must incorporate these existing patterns.

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[89] *Id.* (quoting Peoples Gas Sys. v. Posen Constr., Inc., 931 F.3d 1337, 1340 (11th Cir. 2019) (internal quotation marks omitted)).

[90] *Id.* (quoting CSX Transp., Inc. v. City of Garden City, 325 F.3d 1236, 1239 (11th Cir. 2003) (internal quotation marks omitted)).

IV. A PATH FORWARD

This section advocates for a mandatory uniform standard for certification in the federal courts. To advance this argument, this section: (A) discusses what can go wrong when the federal judiciary chooses not to certify;[91] and (B) proposes a standard test borrowing from some of the present standards and making certain policy choices given the historic purpose of the certification procedure.[92]

A. The Consequences of Eschewing Certification

A relatively recent disagreement between the United States Court of Appeals for the Sixth Circuit and the Supreme Court of Tennessee encouraged this Article.[93] In *Lindenberg v. Jackson National Life Insurance Company*, a majority of a three-judge Sixth Circuit panel held Tennessee's punitive damage tort cap, passed as part of the sprawling tort reform package in the Tennessee Civil Justice Act of 2011, infringed upon the Tennessee Constitution.[94] Specifically, the majority found that by capping punitive damages beyond what is required by Due Process, the Tennessee General Assembly impermissibly invaded the province of the civil jury, in violation of the inviolate right to a jury in Tennessee's Constitution.[95] In reaching this conclusion of state constitutional law, the panel declined to certify the question to the Tennessee Supreme Court.[96] The majority correctly pointed out that the Volunteer State's high court had rejected a prior request by the District Court to certify the question to the Tennessee Supreme Court.[97]

In dissent, Sixth Circuit Judge Joan L. Larsen criticized the majority's unwarranted encroachment into Tennessee constitutional law.[98] Larsen

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[91] *Infra* Part IV.A.

[92] *Infra* Part IV.B.

[93] *See* Lindenberg v. Jackson Nat'l Life Ins., 912 F.3d 348 (6th Cir. 2018), *reh'g en banc denied*, 919 F.3d 992, *cert. denied*, 140 S. Ct. 624 (2019); McClay v. Airport Mgmt. Servs., LLC, 596 S.W.3d 686, 693 n.6 (Tenn. 2020). I have previously written about the disagreement between the Sixth Circuit and Tennessee Supreme Court based on *Lindenberg* and *McClay*. *See* Bailey D. Barnes, *A State-Circuit Split: Reconciling Tennessee Damage Caps After* Lindenberg *and* McClay, 2 CTS. & JUST. L.J. 244 (2020).

[94] *Lindenberg*, 912 F.3d at 370 ("We therefore conclude that the statutory cap on punitive damages set forth in T.C.A. § 29-39-104 violates the Tennessee Constitution.").

[95] *Id.* at 364 ("Upon our assessment of Tennessee law, we find that the punitive damages bar set forth in § 29-39-104 violates the individual right to a trial by jury set forth in the Tennessee Constitution.").

[96] *Id.* at 370 (Larsen, J., concurring in part and dissenting in part) ("The Tennessee Supreme Court has signaled its willingness to decide both of these state law questions, and we have a mechanism—certification—that allows the Tennessee Supreme Court to decide them. . . . The majority, however, elects to decide the state law questions on its own.").

[97] *Id.* at 355.

[98] *Id.* at 370 (Larsen, J., concurring in part and dissenting in part) ("State courts are the authority on

pointed to the Tennessee Supreme Court's order denying certification from the District Court, which stated, "Nothing in this Court's Order is intended to suggest any predisposition by the Court with respect to the United States Court of Appeals for the Sixth Circuit's possible certification to this Court[.]"[99] Thus, according to Larsen, the Tennessee Supreme Court basically invited the Sixth Circuit to certify the question; although Larsen would have accepted the invitation, the majority did not.[100] The entire Sixth Circuit, over the dissents of four jurists, denied rehearing en banc.[101]

Notably, in his dissent to the denial of rehearing en banc, Judge Bush called for the Sixth Circuit to better define the parameters of the certification power to promote federalism and judicial comity.[102] Judge Bush offered a new standard for the Sixth Circuit that would create a presumption of certification where "a state supreme court has not decided an issue; neither party objects to certification; and a prior precedential panel decision of [the Sixth Circuit] stands between the current panel and the decision it wishes to reach on state law."[103] The dissent to rehearing en banc noted this presumption would not mandatorily require a Sixth Circuit panel to certify in any given case but would create perimeters in which to assess certification situations.[104] Nevertheless, Judge Bush believed a new presumption for certification would more appropriately strike the balance of power between the federal and state judiciaries intended by the Founders.[105] Judge Bush stated that if the Sixth Circuit fails to address failures to certify, "[it] risk[s] validating the prediction of the Antifederalists: that an encroaching federal judiciary would use federal judicial power to diminish the power of state judiciaries."[106] Judge Bush, likewise, welcomed the Supreme Court to

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questions of state law. Federal courts must sometimes decide state law questions, but we are the back-ups. We are to follow, not lead.").

[99] *Id.* at 372 (quoting Lindenberg v. Jackson Nat'l Life Ins., No. M2015-02349-SC-R23-CV, 2016 Tenn. LEXIS 390, at *1–2 (Tenn. June 23, 2016) (per curiam)).

[100] *Id.* ("I would accept this invitation; but the majority has declined.").

[101] *Lindenberg*, 919 F.3d 992. Circuit Judge John K. Bush drafted his own dissent. *Id.* at 995–1002. Meanwhile, Circuit Judge John B. Nalbandian, joined by Circuit Judges Amul R. Thapar, John K. Bush, and Joan L. Larsen, drafted a statement disagreeing with the denial of rehearing en banc. *Id.* at 1002–03.

[102] *Id.* at 995 (Bush, J., dissenting) ("This case presents an unusually strong set of reasons for certification to the Tennessee Supreme Court of state-law questions. It also highlights the need for our circuit to clarify and define certification standards to address the constitutional federalism considerations that underlie *Erie Railroad Co. v. Thompkins*[.]").

[103] *Id.* at 1001.

[104] *Id.* ("Such a presumption would not upend the way that we currently decide cases in the Sixth Circuit. I am not advocating for certifying questions in a vast set of new situations or for requiring every panel to certify if a certain group of boxes is checked.").

[105] *Id.* at 996 ("[D]iversity jurisdiction was designed to address the perceived unfairness of state courts. Diversity jurisdiction did not violate federalism principles because it did not deputize federal courts to apply a different law than would have applied in the case had it been decided in state court.").

[106] *Id.* at 1002. Judge Bush added, "[t]o minimize the risk of unnecessary interference with the

provide clarity to the lower courts on when certification is appropriate or necessary.[107] Ultimately, the Supreme Court denied the writ of certiorari sought by Jackson National Life Insurance Company and the State of Tennessee.[108]

Shortly thereafter, the Supreme Court of Tennessee ruled that the State's $750,000 cap on noneconomic damages did not violate the right to a jury enshrined in Tennessee's Constitution.[109] In a lengthy footnote, Chief Justice Jeffrey S. Bivins, writing for the thin three-to-two majority, passively criticized the Sixth Circuit's failure to certify in *Lindenberg*.[110] Justice Bivins said, "The Sixth Circuit majority . . . chose not to certify [this] question[] to this Court, and, instead, held that the statutory cap on punitive damages violates the right to trial by jury under the Tennessee Constitution."[111] Justice Bivins, seemingly criticizing the panel majority in *Lindenberg*, added, "We simply point out that the procedure for certifying questions of state law to this Court is designed to promote judicial efficiency and comity, and to protect this State's sovereignty."[112]

This sequence of cases between the Sixth Circuit and the Tennessee Supreme Court is illustrative of two potential problems that a federal court may instigate by failing to certify state law questions in certain situations. First, the federal tribunal may foster animus between the federal and state judiciaries causing the state to question, as did the Tennessee Supreme Court majority, whether the federal court unnecessarily invaded the state's sovereignty.[113] Second, a federal court and a state court of last resort may differ on important issues, which may encourage forum shopping and erode uniformity in the application of a state's law. For instance, the Tennessee Supreme Court in *McClay* interpreted the right to a jury under the Tennessee

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autonomy and independence of the states, we should more frequently accept state courts' open invitations to pose to them certified questions regarding their own law." *Id.*

[107] *Id.* at 1001–02 ("Assuming the Supreme Court provides no further guidance (but perhaps it will, which I would welcome), the burden falls on each circuit to define standards for certifying questions, and at some point we should examine our standards more carefully.").

[108] Tennessee v. Lindenberg, 140 S. Ct. 635 (2019).

[109] *McClay*, 596 S.W.3d at 693 ("We conclude that the right to trial by jury under the Tennessee Constitution is satisfied when an unbiased and impartial jury makes a factual determination regarding the amount of noneconomic damages, if any, sustained by the plaintiff."); *see* TENN. CONST. art. I, § 6. I have previously criticized the Tennessee Supreme Court's decision in *McClay* as ignoring centuries of precedent and unreasonably minimizing the jury's role. *See* Bailey D. Barnes, *Violating the Inviolate?: Divided Tennessee Supreme Court Upholds Constitutionality of Noneconomic Damage Caps*, 56 TENN. B.J. 12 (2020). The Tennessee noneconomic damage limit provides for an award up to $1,000,000 in certain enumerated catastrophic situations. TENN. CODE ANN. § 29-39-102(c)–(d).

[110] *McClay*, 596 S.W.3d at 693 n.6.

[111] *Id.*

[112] *Id.* (citing Yardley v. Hosp. Housekeeping Sys., LLC, 470 S.W.3d 800, 803 (Tenn. 2015)).

[113] *Id.* (citing *Yardley*, 470 S.W.3d at 803).

Constitution differently than the Sixth Circuit panel in *Lindenberg*, though on slightly different questions: noneconomic versus punitive damage caps, respectively.[114] Now, although there is reason to believe the Tennessee Supreme Court would uphold the punitive damage cap provision under the right to a jury, litigants may receive a different result in federal court.[115]

B. A New Test to Promote Judicial Efficiency While Preserving State Sovereignty

Accordingly, the need to preserve comity, state sovereignty, and respect between the federal and state judiciaries, as well as the need for uniformity in a state's law to avoid unjust results and dissuade forum shopping counsel the need for a uniform, mandatory system of certification. In fact, these precise concerns originally prompted states to permit certification and the Supreme Court to bless it.[116] Consequently, relying on the patterns from the certification tests currently used by the circuit courts, as well as focusing on the purported policy reasons for the certification procedure, this Part advocates for a uniform, mandatory three-step test.

First, as a preliminary consideration, the federal court must ascertain if the question is dispositive of the case. If so, the court proceeds to step two; if not, the court's inquiry is concluded, and the court will not certify the question. Second, the court must ascertain whether there is existing mandatory or persuasive state precedent that is directly or indirectly on point for the issue. In other words, the court must decide if the question has already been arguably settled. If not, finally, the court asks whether the question is one of state constitutional law. If the issue is solely statutory or common law, the court should not certify the question. The reasoning behind each step is addressed seriatim.

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[114] *Lindenberg*, 912 F.3d at 370; *McClay*, 596 S.W.3d at 693.

[115] The Tennessee Supreme Court expressly chose not to address the merits of the punitive damage cap provision in its footnote criticizing the Sixth Circuit's failure to certify. *McClay*, 596 S.W.3d at 693 n.6 ("[W]e note that the statutory cap on punitive damages in Tennessee Code Annotated section 29-39-104 is not at issue in this case, and we express no opinion on this issue."). Nevertheless, the Tennessee Supreme Court majority noted, "As a preliminary matter, we note that decisions by federal circuit court of appeals [sic] are not binding on this Court. We also find the reasoning of the majority in Lindenberg unpersuasive in this case." *Id.* (internal citations omitted). Accordingly, the Tennessee Supreme Court expressed its disagreement with the Sixth Circuit panel majority's reasoning on the right to a jury in the Tennessee Constitution as applied to the noneconomic damage limit statute. *Id.* This, along with the Tennessee Supreme Court majority's reasoning in *McClay*, implies, though does not guarantee, that the Tennessee Supreme Court would reach a different decision on the punitive damage caps than the Sixth Circuit panel majority. *Id.* Thus, the Sixth Circuit's failure to certify leaves litigants seeking or defending against a punitive damage award under Tennessee law without a shrewd guidepost to predict the state of the law.

[116] *Supra* Part II.

The first evaluation for a federal court is whether the question is dispositive of the case, or at least one component or count of the case. Most of the circuits presently use this factor; at least some of those circuits have acknowledged that the state supreme court to which it is sending the question requires the issue to be dispositive. Certainly, a key policy choice for requiring the question to be determinative of the case is to prevent the state supreme court from issuing solely advisory opinions. Unlike the federal judiciary, though, not all state courts are constitutionally prohibited from rendering advisory opinions.[117] Thus, in those states that permit their high courts to provide non-binding declarations of the court's jurists' views on a matter of state law, requiring the question to be dispositive is not a necessity pursuant to state constitutional law.[118] Regardless, the federal courts, as well as a vast majority of state supreme courts, are prohibited from issuing advisory opinions.[119] To foster uniformity, consequently, any national standard should prohibit certifying questions that would ask a state court to render an advisory opinion.[120]

The second consideration, if a court first determines that the query is dispositive, is whether the state's judiciary has previously addressed the question. This inquiry is not solely whether the state's supreme court has ruled on a case directly on point for the issue before the federal court. Instead, the federal court should scour the legal databases for any state cases interpreting the provision at issue. If a case exists that addresses, even indirectly, the question such that it illuminates the federal court's path to decide the question, the court should not certify. On the other hand, if the court cannot find any cases on the issue, or the case it finds is entirely not helpful, the court may deem the question unsettled and proceed to step three.

This second consideration is already used by every circuit court in the federal judiciary that has jurisdiction over a state. Thus, applying this principle will not be difficult. It is necessary to prevent an excessive waste of judicial resources and time. For instance, if a state supreme court has directly addressed a question, it would be unwise for a federal court faced with the question to certify it to the state supreme court merely to see if the state

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[117] Lucas Moench, Note, *State Court Advisory Opinions: Implications for Legislative Power and Prerogatives*, 97 B.U. L. REV. 2243, 2246 (2017). Moench has specifically recognized eleven states that allow their courts of last resort to issue advisory opinions. *Id.* These states are Alabama, Colorado, Delaware, Florida, Maine, Massachusetts, Michigan, New Hampshire, Oklahoma, Rhode Island, and South Dakota. *Id.*

[118] *See id.*

[119] *Id.* ("State courts are not subject to Article III's case or controversy limitations. Although most [states] have nevertheless adopted the federal advisory opinion ban . . . .").

[120] For more on the debate about advisory opinions and the reasons for the prohibition on federal courts issuing them, see Christian R. Burset, *Advisory Opinions and the Problem of Legal Authority*, 74 VAND. L. REV. 621 (2021).

supreme court has changed its interpretation. Doing so would waste the time of both courts and leave the litigants involved in jurisprudential limbo. Therefore, as all the circuit courts have already acknowledged, the question must be unsettled before it may be sent to the state tribunal.

The third and final step is likely to be the most controversial. Here, the court decides if the question is one of state constitutional law, as opposed to state statutory or common law. If the issue is statutory or common law, the court may not certify, and the federal court must answer the question itself. While this factor certainly makes a clear policy preference for which issues are most likely to affect comity, this narrowing of questions capable of certification is necessary to promote the goals of the doctrine. The fundamental balancing of interests involved in certification, from a zoomed-out lens, is judicial efficiency on one hand and federalism on the other hand. The federal courts should want to promote federalism as much as possible without needlessly sending questions of state law to the state court. Thus, limiting certification to constitutional concerns helps make this choice for federal courts.

Necessarily, this element of the test assumes a state would be more concerned about a federal court's inconsistent interpretation of the state's constitution than a state statute or interfering with a state's common law. There are good reasons to believe this is likely true. For one thing, constitutions are typically the supreme law in a jurisdiction; if a statute or a canon of a state's common law conflict with the state's constitution, the constitution will prevail. Furthermore, it is likely more difficult to revise a state constitution than a statute. Of course, a state supreme court can ridicule and reverse an erroneous—in its eyes—decision of a federal court on any matter of state law. But, to do so, the specific question of state law must come before the court, and it is possible that it would take multiple years for litigation on the topic to reach the state's court of last resort. Accordingly, an incorrect interpretation of state law could be on the books for years even if the state supreme court wishes to clarify the issue. This counsels that the certification procedure absolutely should be used for constitutional questions. If a federal court incorrectly interprets a statute according to the state's legislature, that legislature can meet and clarify the statute without much delay. Likewise, most legislatures are free to abrogate state common law by statute; thus, if a legislature disagreed with a federal court's decision about the state's common law, the legislature could convert the area of law to a statute and clarify the erroneous interpretation. The same is not true for constitutional questions, which often entail a much more involved amendment process that may demand the state's electorate directly vote on the constitutional revision. Thus, to strike the balance between judicial

efficiency and federalism, while also focusing certification where it is most needed, certification should be limited to state constitutional questions only.

Moreover, allowing certification for constitutional issues only is consistent with existing circuit precedent. Most circuits consider the importance of a question before certifying it to the state. It is most probable that issues of state constitutional law will consistently be more important than statutory or common law questions. Thus, in addition to being most in line with the goals of certification, narrowing the availability of certification to state constitutional law is also consistent with the circuit precedent considering the importance of the state law question.

The same can be said about the circuit precedent regarding the public policy of a state. Most current circuit tests ask whether the question is one that implicates state public policy interests best left to the state's courts to determine. State constitutional law, because of its importance and the difficulty with abrogating its interpretation, as noted, often involves interpretation of a state's public policy. Thus, limiting certification to questions of state constitutional law helps focus certification on those questions that most implicate a state's public policy interests. Meanwhile, because requiring a federal court to ascertain which questions require public policy determinations best left to the state is a subjective inquiry, incorporating that analysis into an objective consideration of whether the issue is one of state constitutional law makes the standard more objective and predictable.

Though no certification test that takes into consideration the current standards used by the circuit courts can be completely objective, this proposal attempts to remove subjectivity from the equation to the extent possible. The three steps are yes or no inquiries. Either the question is dispositive of the case or not. Either the state's courts have previously addressed the question or not. Either the question is one of state constitutional law or not. Thus, the three steps significantly reduce the subjective aspects of the inquiry thereby providing predictability and preserving comity.

Undoubtedly, some will argue that the certification standard should remain discretionary to each federal court. This has been, after all, how the system has operated for nearly six decades. Yet, if the certification process is not mandatory, it will remain arbitrary and unpredictable. Meanwhile, if the certification procedure is mandatory, litigants will be able to more precisely predict if a case will end up in state court and the federal and state judiciaries will benefit from the consistency in certification. If a federal court follows the three-step test and concludes the question should not be certified, the state court will likely feel less disrespected than if the federal court went through the three steps, determined the test favored certification, and still exercised

its discretion to decline certification. To promote consistency and to truly preserve federalism, the test must be mandatory.

Another fair question about this standard is what to do when the litigants in an individual case all object to certification when the three prongs of this test are all satisfied. Although this standard explicitly claims to aid litigants by promoting judicial economy and ensuring swift adjudication of claims instead of unnecessary certification of minor questions, the balance can never completely shift in favor of judicial economy; in fact, if it did so, certification would almost never be the right answer because certification always delays a final judgment. Additionally, the burden of promoting comity rests with the court, not the litigants. Indeed, it is most likely that the litigants are not concerned about the comity issues between the state and federal judiciaries. Thus, while the preference of the litigants should be granted some consideration, if the uniform, mandatory standard preponderates in favor of certification, the court must follow the certification procedure rather than the litigants' wishes.

It would be naïve, indeed, to believe this test is the only—or even best—option for a uniform standard that federal courts could use to decide the sometimes-perilous issue of certification. What is clear, however, is that the national judiciary needs a uniform method for making these decisions. Doing so is in the litigants' interests as well as the judiciary's – state and federal. Rather than have situations such as the unfortunate disagreement between the Tennessee Supreme Court and the Sixth Circuit, a mandatory, uniform standard would provide a concrete test to remove unpredictability and caprice from the certification equation. Therefore, I humbly offer this proposal not to suggest it is the only or wisest path forward but to advance the conversation about how the federal and state judiciaries can best coexist because they are inextricably related.

V. CONCLUSION

Because the failure to certify questions of state law may have a harmful effect on the relationship between the state and federal judiciaries, it is important that the federal courts employ a uniform standard when deciding which questions to certify. This Article has proposed such a test that relies on existing patterns from the standards currently used by the circuit courts and that aims to fulfill the stated purposes of the certification doctrine. Litigants are not served when a court unnecessarily certifies a question of state law in an abundance of caution about federalism. But, at the same time, where critical questions of state constitutional law are involved and the issue is unsettled, the balance between comity and swift adjudication should tilt in favor of comity.

The standard proposed here attempts to walk the fine line between these competing interests. To promote consistency across the United States, and to allow litigants to more ably predict when questions of state law are likely to be certified by a court, this Article suggests that any new certification standard should be mandatory. If a federal court determines the elements of the test are satisfied by a given question, the court should have no discretion to avoid certifying the matter to the relevant state high court. Importantly, a federal court's decision to certify does not necessarily mean the state court will accept the question. It is the federal court's action of presenting the question to the state court, accordingly, that preserves judicial federalism—whether the state judiciary accepts the federal court's invitation is irrelevant given the policy reasons for the certification doctrine. This Article offers one method for the federal courts to know when extending such an invitation is necessary.