CERTIFIED QUESTIONS OF STATE LAW: AN EMPIRICAL EXAMINATION OF USE IN THREE U.S. COURTS OF APPEALS

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ABSTRACT

Federal courts routinely need to apply state law, but this task is complicated when no definitive state law exists. In these instances, federal judges have a few options, including making an *Erie* guess, or certifying the question of state law to the highest state court. Certification of questions of state law gained attention during the U.S. Supreme Court's October 2020 term when two opinions endorsed their use. However, despite recent interest by the U.S. Supreme Court and the U.S. Judicial Conference Committee on Federal-State Jurisdiction, little empirical research has examined the perceived benefits and burdens of the procedure. This Article provides new empirical data to help fill that gap.

Using a sample of 218 certified question events across the U.S. Courts of Appeals for the Ninth, Third, and Sixth Circuits from 2010 to 2018, we examine how certified questions originate, in what types of cases, how often U.S. courts of appeals certify the questions of state law, and whether the corresponding state supreme courts grant or decline the question. Further, to address the perceived time burden associated with certification, we examined how long each part of the process takes in the appellate court, from filing to certification to termination. We found significant variation between the three U.S. courts of appeals in certification rates and timing. While we encourage future studies regarding certification of state law questions, our data can be readily used to inform courts and academic debates regarding the benefits and burdens of the procedure.

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I. INTRODUCTION

DeRay Mckesson organized a protest in response to the 2016 killing of Alton Sterling, a Black man, by Baton Rouge, Louisiana, police officers. During the protest, a police officer "suffered devastating injuries in the line of duty, including loss of teeth and brain trauma."[1] Although Mckesson did not injure the officer, the officer sued Mckesson in federal court, alleging that his negligent organization of the protest caused the assault. The District Court dismissed the negligence claim,[2] and a divided Fifth Circuit Court of Appeals reversed.[3] In November 2020, the U.S. Supreme Court vacated the judgment and remanded the case, stating that the Fifth Circuit panel "should not have ventured into so uncertain an area of tort law––one laden with value judgments and fraught with implications for First Amendment rights—without first seeking guidance on potentially controlling Louisiana law from the Louisiana Supreme Court."[4] Instead, the U.S. Supreme Court stated that the Fifth Circuit should have certified two questions of state law to the Louisiana Supreme Court.[5]

One month later, the certification procedure again entered Supreme Court discourse. In Justice Sotomayor's concurring opinion in *Carney v. Adams*, a case concerning judicial appointments to state courts, Sotomayor noted that "[c]ertification may be especially warranted in a case such as this, where invalidating a state constitutional provision would affect the structure of one of the State's three major branches of government."[6] Additionally, Justice Sotomayor stated: "[i]t is worth noting that federal courts are not ideally positioned to address such a sensitive issue of state constitutional law. They may therefore be well advised to consider certifying such a question to the State's highest court."[7]

Both recent cases spotlight the procedure for certifying questions of state law, a procedure unfamiliar to some members of the legal community. In brief, the certification procedure allows federal courts to obtain definitive answers from a state court about unsettled questions of state law that may arise during a federal

1. Mckesson v. Doe, 592 U.S. __, 141 S. Ct. 48, 49 (2020) (per curium).
2. *Id.* (citing Mckesson v. Doe, 272 F. Supp. 3d 841, 847-48 (M.D. La. 2017)).
3. *Id.* at 1-2 (citing Doe v. Mckesson, 945 F.3d 818, 835 (5th Cir. 2019)).
4. *Id.* at 5.
5. *Id.* at 4.
6. Carney v. Adams, 141 S. Ct. 493, 504 (2020) (Sotomayor, J. concurring).
7. *Id.* (citation omitted).

proceeding.[8] However, the federal court retains decision-making authority and does not transfer adjudicative power to the state court.[9]

The recent interest in certified questions raises the question of how often the procedure is used by the U.S. Courts of Appeals. While the U.S. Supreme Court suggested that federal courts only use the procedure "rarely" and in "exceptional instances,"[10] every state but North Carolina, as well as the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and the Mariana Islands, currently authorizes the procedure, though frequency of use and type of authorization varies.[11] Further, a 2016 Federal Judicial Center survey found that almost half of federal chief district judges stated that their court certified questions of state law, with an additional ten percent responding that they had either done so in the past, or were considering doing so in the future.[12] Still, empirical information about how often courts certify questions of state law is relatively limited.[13] Using data gathered from the U.S. Courts of Appeals for the Third, Sixth, and Ninth Circuits, this Article seeks to shed light on the procedure itself, how long it takes, and the frequency and purposes for which it is used.

Certification of questions of state law is not without some controversy. It has both its champions[14] and its detractors,[15] as well as many who lie somewhere in

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8. *See* JASON A. CANTONE & CARLY GIFFIN, FED. JUD. CTR., CERTIFICATION OF QUESTIONS OF STATE LAW IN THE U.S. COURTS OF APPEALS FOR THE THIRD, SIXTH, AND NINTH CIRCUITS (2010–2018) (June 3, 2020), https://www.fjc.gov/content/349364/certification-questions-state-law-us-courts-appeals-third-sixth-and-ninth-circuits [hereinafter CANTONE & GIFFIN]. This Article updates and expands upon this earlier work from the Federal Judicial Center. In the event of any discrepancies in the data presented, the reader should rely on this Article.

9. *See infra* Part II.

10. *Mckesson*, 141 S. Ct. at 51.

11. See *infra* Part III for a detailed examination of relevant state statutes and court rules authorizing the certified question procedure.

12. JASON A. CANTONE, FED. JUD. CTR., REPORT ON FEDERAL-STATE COURT COOPERATION: A SURVEY OF FEDERAL CHIEF DISTRICT JUDGES 3 (2016) [hereinafter CANTONE A] (the survey asked chief district judges to note their current use of a variety of ways in which federal and state courts could cooperate on areas of mutual concern. Any data on "current use" reflects survey data from 2016).

13. For a recent empirical examination of the U.S. Court of Appeals for the Seventh Circuit, 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 (2020).

14. *See* Doris DelTosto Brogan, *Less Mischief, Not None: Respecting Federalism, Respecting States and Respecting Judges in Diversity Jurisdiction Cases*, 51 TULSA L. REV. 39, 73-75 (2015) (concluding that while certification is to be preferred to abstention, it should only rarely be invoked); Ripple & Gallagher, *supra* note 13, at 1954-56 (arguing that wise judicial discretion in the usage of certified questions at both the federal and state levels have made certification a beneficial practice that could be expanded).

15. *See* Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 SUFFOLK U. L. REV. 677, 691 (1995) (raising questions about the operation of the entire practice); Wendy L. Watson et al., *Federal Court Certification of State-Law Questions: Active Judicial Federalism*, 28 JUST. SYS. J. 98-103 (2007) ("The view from the trenches is less rosy, exposing the awkwardness of the procedure and the possibility that federal courts may use certification as a means to impress state courts into service on the more tedious legal issues that come before them.").

between.[16] Many commentators and courts, including the U.S. Supreme Court,[17] commend the certification process—saying, in part, that it promotes federal-state cooperation,[18] limits forum shopping,[19] provides definitive answers,[20] and saves time and expense.[21] Others, though, highlight the burdens of certification, noting that the cooperation only goes one way,[22] forum shopping has not been eliminated,[23] cost and delay still accrue (with certification often adding, not subtracting, time to the case duration),[24] and that the constrained nature of the process presents state courts with difficult circumstances in which to make decisions.[25] For example, even though the U.S. Supreme Court remanded *Mckesson* to address certification of two state law questions, the Court also warned that the certification procedure "can prolong the dispute and increase the expenses incurred by the parties."[26]

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16. Many scholars, supportive or not, acknowledge both sides.

17. *See* Clay v. Sun Ins. Off. Ltd., 363 U.S. 207, 212 (1960) ("The Florida Legislature, with rare foresight, has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation by a statute which permits a federal court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision."); *see also* Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974).

18. *See, e.g.*, JASON A. CANTONE, FED. JUD. CTR., ENHANCING COOPERATION THROUGH STATE–FEDERAL JUDICIAL COUNCILS 1, 5 (2017) [Hereinafter CANTONE B]; Brian Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 U. MIAMI L. REV. 717, 724 (1969); CARROLL SERON, FED. JUD. CTR., CERTIFYING QUESTIONS OF STATE LAW: EXPERIENCE OF FEDERAL JUDGES 11 (1983) [hereinafter FJC]; Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1550 (1997); Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1674 (2003); John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411, 417 (1988).

19. *E.g.*, Nash, *supra* note 18; 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, 386 (2010). *But see* Mattis, *supra* note 18, at 733-34.

20. *E.g.*, Mattis, *supra* note 18, at 723; FJC, *supra* note 18, at 9; Clark, *supra* note 18, at 1550; Nash, *supra* note 18, at 1689.

21. *E.g.*, J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 326 (1967); Mattis, *supra* note 18, at 724; Corr & Robbins, *supra* note 18, at 417 ("[C]ertification is 'a mode of disposing of cases in the least cumbersome and most expeditious way.'")(quoting Chicago, Burlington, & Quincy R.R y. Co. v. Williams, 214 U.S. 492, 495-96 (Holmes, J., dissenting)); Nash, *supra* note 18, at 1696.

22. As will be described *infra* Part II, while federal courts can ask state courts to answer questions, state courts cannot do the reverse. *See* Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. OF LEGIS. 157, 160-169 (2003); Brogan, *supra* note 14, at 77.

23. *E.g.*, Mattis, *supra* note 18, at 732; Cochran, *supra* note 22, at 204.

24. *E.g.*, Wright, *supra* note 21, at 325-26; Mattis, *supra* note 18, at 725; Corr & Robbins, *supra* note 18, at 427; Nash, *supra* note 18, at 1697; Brogan, *supra* note 14, at 75.

25. *E.g.*, Wright, *supra* note 21, at 325; Ira P. Robbins, *The Uniform Certification of Questions of Law Act: A Proposal for Reform*, 18 J. OF LEGIS. 127 (1992); Corr & Robbins, *supra* note 18, at 422, 425; Randall T. Shepard, *Is Making State Constitutional Law Through Certified Questions a Good Idea or a Bad Idea?*, 38 VAL. U. L. REV. 327, 327 (2004); Brogan, *supra* note 14, at 77.

26. Mckesson v. Doe, 592 U.S. __, 141 S. Ct. 48, 51 (2020) (per curiam) (citing *Lehman Bros.*, 416 U.S. at 394-95 (Rehnquist, J., concurring)).

We believe some of the theoretical disagreements regarding the use of certified questions of state law can be informed by an empirical understanding of how often federal courts certify and how state courts respond. This Article provides a detailed analysis of the use of certification of questions of state law in the U.S. Courts of Appeals for the Third, Sixth, and Ninth Circuits. These data offer new, objective information that can enhance the discussion surrounding the certification procedure, especially regarding the time burden the procedure imposes upon federal courts, state courts, and litigants.[27]

Before turning to the empirical analysis in Part IV, in Part II, we review the foundational cases and explain the procedural mechanics of certifying questions of state law. We also address the perceived benefits and costs, including the time burden. In Part III, we review state statutes and court rules that authorize state courts to answer certified questions from federal courts. These legal authorities share some commonalities, but they diverge in important respects, including which courts the state courts are authorized to accept certified questions from.

In Part IV, we then begin our empirical analysis by explaining the method we used to identify and analyze cases with certified question events[28] in the U.S. Courts of Appeals for the Third, Sixth, and Ninth Circuits from 2010-2018.[29] In Part V, we present our findings.[30] The data provide an objective view of how the circuits use this procedure, how the states respond to questions, and the time it takes between relevant case events (i.e., the number of days from filing to certification). Among our findings, the data show great variation in the certification rates between the circuits.[31] The Ninth Circuit was much more likely to certify a question than the Third or Sixth Circuit. We also found that cases with certified questions terminated about a year for the Ninth and Third Circuits, and about 15 months for the Sixth Circuit, after the question was certified by the federal court. In the Sixth Circuit, the state supreme courts granted the certified question less often, although there were also fewer certified questions identified in our sample. If one considers the time delay between sending the certified question to the state court and the state court's ultimate response as the amount of time spent on certification, that delay was about 10 months for the Ninth and Third Circuits, and about 12 months in the Sixth Circuit. Finally, in Part VI, we discuss our findings and how they can be used to inform the courts' understanding of, and scholarly debate about, certified questions of state law.

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27. We believe that this information could be helpful to courts as well as to scholars. For instance, this information could provide some objective data points for those in North Carolina examining the adoption of a certification procedure, as well as other courts considering expanding their use of certified questions.

28. We defined a certified question event as a party motion or sua sponte opinion that first raised the possibility of the court of appeals certifying a question of state law in a case. This included proposed questions (certified question events) that were certified or denied by the court of appeals, as well as certified questions ultimately granted, declined, or not responded to by the relevant state supreme court.

29. See *infra* Section IV.A, for a description of how these cases were identified.

30. That is, whether the question was accepted, declined, or no response from the state is visible in the record.

31. *See infra* Part V.

II. PROCESS AND HISTORY

Before analyzing the data concerning certification of questions of state law, it will be helpful to establish the legal landscape surrounding certification, from *Erie*[32] to *McKesson*,[33] and how the procedure is used in courts today. This Part begins with the foundational case background useful for understanding the current use of the certified question procedure. We then provide a brief description of the steps that a federal court follows to certify a question to a state court, as well as the steps state courts go through to respond to such requests. While the exact procedure varies from state to state (and circuit to circuit), the major milestones are generally followed across jurisdictions.

A. *Background on State Law in Federal Court*

Although the certification procedure is a more modern invention, the U.S. Supreme Court has examined federalism concerns regarding conflicts between federal and state law for more than a century. In 1842, the U.S. Supreme Court addressed federalism concerns in *Swift v Tyson*.[34] *Swift* originated as a payment dispute and was brought to the U.S. Supreme Court on a question of admissibility of evidence.[35] The defendant argued for the use of New York law.[36] The U.S. Supreme Court found that the prevailing New York state law was unclear[37] and, further, questioned whether it would be bound by New York law even if the law was clearer.[38] It is the Court's answer to this last question, undoubtedly, for which *Swift* has become most well-known. The Supreme Court decided that § 34 of the Judiciary Act of 1789 – which could be read to obligate it to apply state law – was:

> limited [in] its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature…[39]

Deciding that the case before them concerned commercial issues that were more "general" than local, the U.S. Supreme Court applied a general common law.[40]

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32. *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
33. *See generally* Mckesson v. Doe, 592 U.S. __, 141 S. Ct. 48 (2020) (per curiam).
34. *See generally* Swift v. Tyson, 41 U.S. 1 (1842).
35. *Id*. at 15.
36. *Id*. at 16.
37. *Id*. at 17.
38. *Id*. at 18.
39. *Id.*
40. *Id*. at 19 ("It becomes necessary for us, therefore, upon the present occasion to express our own opinion of the true result of the commercial law upon the question now before us.").

While this initial decision was narrower than it has since been construed, focusing on the truly interstate nature of commercial transactions, the idea of a general, federal common law was broadly embraced in the years following *Swift*.[41] This broad acceptance was based in part on a conception at the time that there existed a truly "common" law, one that would be common to all legal systems. Indeed, it was even noted that the court's role was to "find" rather than "make" law.[42]

This disregard for state common law (and, correspondingly, state courts) led to some arguably predictable difficulties, including forum shopping. With the federal courts routinely applying federal common law, rather than state laws, litigants could file in whichever court system they believed most favored them. This issue was eventually addressed in 1938 in *Erie R.R. v. Tompkins*.[43] In *Erie*, a Pennsylvania man alleged he lost his arm because the railroad had failed to secure part of a train.[44] Established Pennsylvania law would not allow him to recover unless the act was "willful and wanton," but the majority position nationally, which would constitute federal common law, would impose a duty of reasonable care.[45] He unsurprisingly filed and won in a federal district court, and the Second Circuit affirmed.[46] The railroad appealed to the U.S. Supreme Court, which decided that federal courts must apply the applicable state law.[47] The U.S. Supreme Court not only overruled *Swift*, but went so far as to declare the holding unconstitutional.[48]

Erie compelled federal judges to make what are referred to as "*Erie* guesses." *Erie* requires federal judges to look at the applicable state law and, if it is not addressed by applicable state law, put themselves in the place of a state court judge and "guess" what they would do if presented with the case.[49] This procedure is still widely practiced in federal courts today. However, as these issues concern unsettled state law, *Erie* guesses can result in "needless friction" between the federal and state courts.[50]

In seeking to resolve some of this friction, the U.S. Supreme Court offered an alternative process: what became known as *Pullman* abstention. Writing for the Court in *Railroad Commission of Texas v. Pullman Co.*, Justice Frankfurter said that while the case implicated important constitutional issues, there was no need to address them if the case could be decided based on state law.[51] Justice Frankfurter

41. *See* Brogan, *supra* note 14, at 56.

42. *Id*. at 57; *see also* Corr & Robbins, *supra* note 18, at 414.

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

44. *Id.* at 65 (In the facts, the Court notes it is not entirely clear whether a door, hatch, or some other part of the train was left open).

45. *Id*. at 81-82 (Butler, J., concurring).

46. *See generally* Tompkins v. Erie R.R. Co, 90 F.2d 603 (2d Cir. 1937).

47. *Erie R.R. Co.*, 304 U.S. at 78.

48. *Id.* at 74.

49. *See* Cochran, *supra* note 22, at 164; Mattis, *supra* note 18, at 718.

50. Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 500-01 (1941). Additionally, some scholars have stated that *Erie* guesses "appear to be exercising the 'power to declare substantive rules of common law applicable in a State,' contrary both to *Erie's* express prohibition and to the principles of judicial federalism underlying the decision." Bradford, *supra* note 18, at 1494–95.

51. *Id.* at 499. Justice Frankfurter further noted that a Texas state court was best suited to make this decision. *Id*. at 501-502. The Supreme Court remanded the case back to the district court. Justice

further noted that a Texas state court was best suited to make this decision.[52] *Pullman* abstention allows federal courts faced with difficult state law issues to stay the federal proceeding until an entirely separate state court proceeding decides the state law issue.[53] However, *Pullman* abstention, it has been argued, "has significant flaws."[54] It has been criticized for vastly increasing the cost of litigation and delaying the resolution of cases brought in federal court.[55]

Two years later, the U.S. Supreme Court appeared to limit *Pullman* abstention in *Meredith v. Winter Haven*.[56] The *Meredith* Court found that diversity jurisdiction, under which most instances of abstention occurred, was not a duty to be ignored, stating:

> The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act.[57]

Accordingly, federal courts considered the *Meredith* ruling as a clear instruction to not refer parts of cases to state courts merely because the state law issue was difficult, and that abstention was the exception rather than the rule.[58]

Soon after *Meredith*, the U.S. Supreme Court addressed another process that might relieve friction between state and federal courts: the then-uncommon practice of certification of questions of state law. *Clay v. Sun Ins. Office Ltd*. concerned the enforcement of a contract signed in Illinois when the insured made

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Frankfurter noted that "no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination." *Id*. at 499-500.

52. *Id*. at 501-502.

53. *See* Mattis, *supra* note 18, at 719; Corr & Robbins, *supra* note 18, at 415-16.

54. *See* Eric Eisenberg, *A Divine Comity: Certification (At Last) in North Carolina*, 58 DUKE L. J. 69, 72-81 (2008).

55. *Id.* at 74; *see also* Corr & Robbins, *supra* note 18, at 415-16. Two years later, the U.S. Supreme Court, in *Burford v. Sun Oil Company*, introduced *Burford* abstention. Whereas *Pullman* granted a stay while the state court issues were being resolved, *Burford* abstention required the Court to dismiss the case. *See* Burford v. Sun Oil Co., 319 U.S. 315 (1943).

56. *See generally* Meredith v. Winter Haven, 320 U.S. 228 (1943).

57. *Id*. at 234-35.

58. *See* Nash, *supra* note 18, at 1683-84. A later Supreme Court case noted that there did exist specific areas of law specific to state sovereign practices that might counsel toward abstention, such as eminent domain. *See* Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 27-29 (1959).

a claim upon it as a resident of Florida. [59] The U.S. Court of Appeals for the Fifth Circuit decided the case on federal constitutional grounds and indicated "it could not, on the available materials, make a confident guess how the Florida Supreme Court would construe" the state law issues.[60] The U.S. Supreme Court noted that it was not necessary to reach the constitutional issues when state law issues could be addressed first.[61] Due to the uncertainty of the state law, the U.S. Supreme Court remanded the case to the Court of Appeals and suggested that it avail itself of Florida's certification of questions of state law statute, the first of its kind. The U.S. Supreme Court then recommended the certification procedure more broadly, complimenting the Florida Legislature for its "rare foresight" in addressing the problems stemming from unresolved state law involved in federal litigation.[62]

It is important to differentiate certification from abstention, and also *Clay* from *Meredith*. *Clay* recommended certification in a situation in which, according to some legal theorists, *Meredith* would have counseled against abstention. After all, in *Clay*, the Court of Appeals acknowledged that it was presented with a difficult question of state law, for which there was not clear, controlling precedent, precisely the situation which *Meredith* argued was not sufficient for abstention. The majority opinion in *Clay* did not directly address the potential tension, citing *Meredith* as a "*see also*" after noting that, "[e]ven without such a facilitating statute we have frequently deemed it appropriate, where a federal constitutional question might be mooted thereby, to secure an authoritative state court's determination of an unresolved question of its local law."[63] This characterization of *Meredith* appears broader than a reading of the case itself would suggest. Justice Douglas, in his *Clay* dissent, made precisely this point,[64] though it might be the U.S. Supreme Court's attempt to distinguish certification from abstention.

The holding in *Meredith* is akin to the earlier U.S. Supreme Court holding in *Colorado River Water Conservation District v. United States* that "wholly federal concurrent jurisdiction stems from the virtually unflagging obligation of the

59. Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 208 (1960).

60. *Id*. at 212.

61. *Id*. at 209-210.

62. *Id*. at 212 ("The Florida Legislature, with rare foresight, has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation by a statute which permits a federal court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision."). It is worth noting that while the Florida legislature had passed a law authorizing certification in 1944, the Florida Supreme Court had not formulated a rule governing the procedure. They were spurred to enact such a rule in response to this decision. *See* Cochran, *supra* note 2, at 165; Mattis, *supra* note 14, at 720-21. It is also worth noting that the Fifth Circuit was the first in the nation to have the option of certifying a question of state law to one of its states, and the procedure remains important, as the recent Supreme Court case of Mckesson v. Doe, 592 U.S., 141 S. Ct. 48 (2020) (per curiam), shows.

63. *Clay*, 363 U.S. at 212.

64. *Id*. at 228 (after quoting *Meredith*, Justice Douglas says, "[t]he situations where a federal court might await decision in a state court or even remand the parties to it should be the exception not the rule. Only prejudice against diversity jurisdiction can explain the avoidance of the simple constitutional question that is presented here and the remittance of the parties to state courts to begin the litigation anew. Some litigants have long purses. Many, however, can hardly afford one lawsuit, let alone two. Shuttling the parties between state and federal tribunals is a sure way of defeating the ends of justice.").

federal courts to exercise the jurisdiction given them."[65] In *Meredith*, the Court reminded federal judges of their professional responsibilities.

However, certification is different. Certification does not require the litigants to start an entirely new proceeding at the state trial court level, as would be done in *Pullman* abstention[66] Furthermore, the certification procedure does not transfer decision-making authority to the state courts, or ask for the state courts to resolve any state law issues before returning the case to the federal court. Instead, the federal court, in essence, seeks clarity from the state court on specific state law issues while retaining all decision-making authority. Accordingly, we see certification and abstention as different mechanisms that involve the state courts.

The Supreme Court did not explain this difference but did recommend the procedure tucked away in Florida's "little-known certification statute."[67] More than just recommending the then-dormant statute, the Supreme Court soon used it, certifying questions to the Florida Supreme Court in two 1963 cases.[68] However, specific guidance regarding when the use of the certification procedure is appropriate was still necessary.

Some clarification came more than a decade later in *Lehman Brothers v. Schein*.[69] In *Lehman Bros.*, the U.S. Supreme Court noted that certification seemed "particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law."[70] Justice Douglas elaborated on the impact of "Florida being a distant State," noting that federal judges in New York district court had significantly less exposure to Florida state law, compared to New York state law.[71] Yet, *Lehman Bros.* also reiterated *Meredith*'s assertion that mere difficulty is not enough to merit sending the issue to the state courts.[72] In this way, *Lehman Bros.* provided more than a recommendation of certification – it also provided limitations and guidance for how to use the procedure.[73]

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65. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

66. *See* Cochran, *supra* note 22, at 171-172. *See also infra* Part III (describing state statutes that refer certified questions directly to the state's highest court).

67. Eisenberg, *supra* note 54, at 74; see also Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 FORDHAM L. REV 373, 381-82 (2000) (investigating the original Florida certification statute and describing how it was not utilized).

68. *See generally* Aldrich v. Aldrich, 375 U.S. 75 (1963); Dresner v. City of Tallahassee, 375 U.S. 136 (1963).

69. *See generally* Lehman Bros. v. Schein, 416 U.S. 386 (1974). The years between *Clay* and *Schein* also saw considerable work on the Uniform Certification of Questions of Law Act. The Act was intended to "provide a new and better alternative" than the *Erie* doctrine and to "further the goals of comity and expedience while simultaneously making both interstate and federal-diversity certification more accessible." Robbins, *supra* note 18, at 129; *see also* Uniform Certification of Questions of Law Act §1, 12 U.L.A. 52 (1967); *see also* Uniform Certification of Questions of Law § 3, 12 U.L.A. 74 (1996) (revising the 1967 Act) [hereinafter U.L.A.].

70. *Lehman Bros.*, 416 U.S. at 391.

71. *Id*.

72. *Id.*

73. *See* John R. Brown, *Certification - Federalism in Action*, 7 CUMB. L. REV. 455, 461 (1977) (characterizing *Clay* as apparent loosening of the stricter, narrower reading of *Pullman* abstention). One guardrail not explicitly referenced in *Schein* is the import of the issue to the pending case. This may have been added later to address some of the issues discussed in more detail in Part II, *infra*.

We contend that the certification procedure is consistent with prior Court decisions, as it is not abstention and does not transfer adjudicative power to the state courts. In addition, in *Clay* and *Lehman Bros.*, the Court suggests that if states are willing to clarify state law issues faced by federal judges, then judges should have the discretion, but not requirement, to seek such information.

Combined, *Clay* and *Lehman Bros.* popularized a new mechanism to obtain clarity from the state courts. Soon after *Lehman Bros.* was decided in 1974, the number of jurisdictions authorizing certified questions expanded. In 1976, fifteen jurisdictions allowed certification.[74] Currently every state except North Carolina, as well as the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and the Mariana Islands, have certification procedures set either by statute or court rule, as will be further described in Part III.[75] In addition, authorizing language no longer sits dormant in most jurisdictions. As discussed in Part IV, 33 states and Puerto Rico reported at least one incoming certified question during 2012 through 2016, totaling to 404 certified questions, with an upward trend in the number across those five years.[76] These data face limitations, and likely provide an undercount of certified questions, as not all states released their data. Our own analysis in Part IV found considerable use of certified questions in the Ninth Circuit, as well as use in the Third Circuit and Sixth Circuit.

While certification procedures were rapidly adopted nationwide, and generally endorsed by the federal judiciary, including in recent U.S. Supreme Court decisions,[77] not every court uses the procedure.[78] In the next Section, we describe how the procedure is used, including necessary steps for both the federal and state courts.

74. Ripple & Gallagher, *supra* note 13, at 1930.

75. *See infra* Part III.

76. Across the five years, the most certified questions were identified in 2014 (99 certified questions) and 2015 (94 certified questions). This data stems from the Court Statistics Project, which is a project of the National Center for State Courts and the Conference of State Court Administrators. For more information, see http://www.courtstatistics.org [hereinafter Court Statistics Project]. Additional methodological information can be found in CANTONE & GIFFIN, *supra* note 8.

77. *See generally* Mckesson v. Doe, 592 U.S. __, 141 S. Ct. 48 (2020) (per curiam); Carney v. Adams, 141 S. Ct. 493 (2020) (Sotomayor, J. concurring).

78. *See infra* Section II.C.

B. *How Does a Question of State Law Get Certified?*

Federal courts can use the certification procedure when confronted with issues in a case that are governed by state rather than federal law. Importantly, the state law governing the issue must present unsettled, novel issues of state law,[79] and the answer should be "determinative" of, or important to, the federal issue.[80]

The first step in the certification procedure is for the federal court to decide to certify a question of state law.[81] The question can originate with the parties (from a party motion to certify, on the briefings, or in oral argument) or the court can decide, *sua sponte*, to certify the question.[82] While the court can transmit the question submitted by the parties for consideration, judges can also revise the question to ensure that it presents the issue neutrally with enough content for it to be effectively answered. In either situation, the court decides whether the state law is genuinely unsettled and the answer to the question is material to the federal case.[83] In *Lehman Bros. v. Schein*, the U.S. Supreme Court made clear that, even when these criteria are met, the use of certification is in the judge's and court's discretion.[84] The use of the certification process must abide by the differing standards established by the federal courts. This discretion as to the standards used led at least one group of practitioners to find that the "disparate standards adopted by the federal Courts of Appeals effectively discourage certification."[85]

When a federal court does decide to send a certified question to a state court, it must follow the local rules of the state court concerning how a question should be submitted. While these rules vary somewhat from state to state, they generally

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79. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997) (concluding that the issue of state law need not be entirely novel, only "unsettled"); Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974) (saying that the unsettled nature of the Florida law in question was one factor that argued towards certification); U.L.A., *supra* note 68, at § 3 (explaining a state may answer a certified question "if there is no controlling statute or appellate decision of this State"); *see also* Cochran, *supra* note 18, at 165 (arguing that the Florida legislature enacted the country's first certification statute because they saw that the Fifth Circuit had "expressed an inability to decide unsettled, important state matters"); *Mckesson*, 141 S. Ct. at 51.

80. *See* U.L.A., *supra* note 68, at § 3. Twenty-eight states require that the issue "may" be determinative of the pending case, while only eleven require that the issue is determinative. The remainder use other language such as "materially advance." Ripple & Gallagher, *supra* note 13, at 1932.

81. In fact, the first step may be checking the relevant state statutes to determine whether the state allows certification from that federal court. States vary in which courts are permitted to certify questions; some states have a broad authorization that allows all federal courts while others are much narrower. For instance, New Jersey allows certification only from the Third Circuit. *See* N.J. CT. R. 2:12A-1. The differences between authorizing statutes will be reviewed in detail in Section III.A, *infra*.

82. *See, e.g.*, Jack J. Rose, *Erie R.R. and State Power to Control State Law: Switching Tracks to New Certification of Questions of Law Procedures*, 18 HOFSTRA L. REV. 421, 428 (1989); Nash, *supra* note 18, at 1692. We also obtained information on the origin of certified questions through discussions with a federal judge on the U.S. Court of Appeals for the Ninth Circuit.

83. Ripple & Gallagher, *supra* note 13, at 1934; Nash, *supra* note 18, at 1692.

84. *Lehman Bros.*, 416 U.S. at 390-91.

85. Petition for Writ of Certiorari at 30, Albright v. United States, 838 F. App'x 512 (Fed. Cir. 2020) (No. 21-70).

require the federal court to transmit the question(s) to be answered and a statement of the facts of the case relevant to that question.[86]

This nomenclature that we use in this Article warrants explanation. We refer to the decisions of the U.S. Courts of Appeals to certify questions as certifications, and the decisions of the state supreme courts to answer those questions or not as grants or declinations. Even if a federal judge finds the question important to the case and requests the state court's opinion on the issue by certifying the question, the state court is not required to grant the certified question.[87] Additionally, while we use the terms state court and federal court throughout our data analysis, we recognize that the certification procedure can include territorial and tribal courts, as described in Part III. However, as described in Part V, only one of the certified questions examined in this research involved a territorial court. In Part VI, we encourage further research from the perspective of state, territorial, and tribal courts regarding the certified question procedure.

If the state accepts the certified question, state rules govern the remainder of the process. States differ in whether they require briefs or oral arguments, or whether parties can request them. In some cases, the state court reformulates the question asked, either because the original formulation was unclear or because it did not meet their standards for answering.[88] After consideration of the record before it, the state court transmits an answer to the question(s) back to the federal court. When the certified question allows for a simple affirmative or negative response, the court may reply in such a brief manner, but few are that brief.[89] While in the past there has been discussion as to whether the answers provided by the state court were binding on the federal court,[90] it is now largely the practice of federal courts to endorse the state court's answer. However, certifying a question

86. *See* Rose, *supra* note 82, at 428; U.L.A., *supra* note 69, at § 4.

87. MEMORANDUM FROM THE GENERAL STATUTES COMMISSION TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE NORTH CAROLINA SUPREME COURT, RE: QUESTIONS RELATING TO THE ADOPTION OF A CERTIFICATION OF QUESTIONS OF LAW PROCEDURE IN NORTH CAROLINA (DN 05-02) (Dec. 2008) [hereinafter NORTH CAROLINA MEMORANDUM]; *see also* Eisenberg, *supra* note 54, at 77. There is an argument that states cannot ignore the certified question. *See* Cochran, *supra* note 22. In our research we have found cases where no response – either grant or declination – appear on the federal docket. It is of course possible that the state courts simply did not respond *yet* to the question at the time of analysis, or that the appellate case terminated before the state court had an opportunity to respond, or that their response was not recorded on the docket. This latter possibility may perhaps be particularly likely in the case of declinations, and future research should address what happens in cases with no further information on the docket. In Part V, *infra,* we examine decisions of both the federal and state courts at each point of the certified question process, noting the number of certified questions granted, declined, and when there was no evidence on the federal docket of any response.

88. *See* U.L.A., *supra* note 69, at § 4(3) (requiring that the certification order expressly provide the right to reformulate the question). Some scholars argue that the ability to reformulate the question is vital to address a lack of clarity or other issues with the question as originally formulated by the federal court. *See* Brown, *supra* note 73, at 461; Corr & Robbins, *supra* note 18, at 426.

89. *See generally* United States v. 19.7 Acres of Land, 692 P.2d 809 (Wash. 1984) (noting that their response was in the negative but expounding to offer guidance on a case of first impression).

90. *See* FJC, *supra* note 18, at 10 (In at least one Circuit, the U.S. Court of Appeals for the Fifth Circuit's *Erie* guesses are considered explicitly binding on both federal district courts and on subsequent appellate panels until superseded by later decisions or statutory change); *see also* Eisenberg, *supra* note 54, at 76.

to the state court does not relieve the federal judge of the job of deciding the case and, though rare, the federal court can enter its own judgment in disagreement with the state court.[91] The state court's involvement in the procedure ends when it transmits its answer to the certifying federal court.

C. *Certified Questions: Perceived Benefits and Burdens*

When the U.S. Supreme Court initially supported certification, it noted that the procedure "in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism"[92] and survey research has found "overwhelming judicial support" for the procedure.[93] However, scholars and the Court have also expressed concerns that it "can prolong the dispute and increase the expenses incurred by the parties."[94] In this section, we discuss both potential benefits and burdens of the certification procedure.[95]

1. *Perceived Benefits*

The certification procedure should lead to enhanced respect and cooperation between federal and state judges.[96] Certifying a difficult, unresolved state law question to the state court acknowledges that state court judges possess expertise in state laws that federal judges may lack,[97] and allows state courts to weigh in on pressing matters they might not otherwise see, while also providing "a check against federal monopoly."[98] This can lead to a better, more collegial relationship between the federal and state benches, which can promote heightened judicial efficiency and cooperation in other areas of mutual interest.[99] And, indeed, courts are already collaborating on educational programming regarding certified

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91. As described *infra* Part II, we differentiate the certified question procedure from abstention. With certified questions, the federal courts are not seeking the state court to resolve all, or any, issues. Instead, the federal court is seeking information from the state courts, presuming that they are in a better place to determine state law. However, authority to decide the case remains with the federal courts.

92. Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974).

93. Corr & Robbins, *supra* note 18, at 457.

94. Mckesson v. Doe, 592 U.S. ___, 141 S. Ct. 48, 51 (2020) (per curiam) (citing *Lehman Bros.*, 416 U.S. at 394-95 (Rehnquist, J., concurring)).

95. When assessing benefits and burdens, the discussion must be carefully situated as to what alternatives are being compared. The cost/benefit analysis is different when comparing certification to abstention than when comparing certification to *Erie* guesses.

96. *See generally* CANTONE B, *supra* note 18; Corr & Robbins, *supra* note 18 (noting that the practice preserves state's autonomy). *See also* Mattis, *supra* note 18, at 724 (concluding that certification leads to cooperation rather than cooption or dictation); FJC, *supra* note 18, at 11; Rose, *supra* note 82, at 434; Shepard, *supra* note 25, at 336-37 ("certification ensures that states–acting through agents of their choice–rather than federal courts will exercise the 'sovereign prerogative of choice' inherent in the resolution of unsettled questions of state law." (quoting Clark, *supra* note 18)).

97. This point was raised when the Supreme Court in *Schein* talked about the difficulty of New York judges applying the law of the "distant" state of Florida. *Lehman Bros.*, 416 U.S. at 391.

98. Ripple & Gallagher, *supra* note 13, at 1941.

99. *See generally* CANTONE B, *supra* note 18.

questions.[100] Further, separate from the 41% of chief district judges who stated in a 2016 Federal Judicial Center survey that their court currently uses certified questions, about one-third (34%) stated that they believed using certified questions could ease tensions between federal and state courts.[101]

Certified questions can also help establish uniform, definitive judgments on unsettled issues of state law. From one perspective, it is inherently more efficient for state courts to weigh in on unsettled questions of state law, rather than have federal courts decide without state input. As a state supreme court is the final arbiter of that state's law, its decision would be definitive.[102] This results in an authoritative answer for less cost and delay than *Pullman* abstention.[103] If the question is definitively settled, it would then result in less future litigation on similar issues.[104]

Commentators have also noted that the use of certified questions discourages forum shopping.[105] *Erie's* mandate to apply state law as state judges would was intended to discourage forum shopping, but federal guesses are sometimes later contradicted by state law decisions, and federal and state law has been applied inconsistently.[106] This can lead to precisely the kind of forum shopping opportunities *Erie* sought to avoid. Certification reduces this concern, and the use of federal forum shopping, by having the state courts weigh in on an unsettled issue. State courts also have the opportunity to decide novel, important issues of state law that may otherwise not end up in front of them.[107] The definitive nature of the answer could also make further appeals unnecessary, which could save

100. *See generally* CANTONE A, *supra* note 12. *See also* ADVISORY GROUP TO THE NEW YORK STATE AND FEDERAL JUDICIAL COUNCIL, PRACTICE HANDBOOK ON CERTIFICATION OF STATE LAW QUESTIONS BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT TO THE NEW YORK STATE COURT OF APPEALS (3d ed. 2016), https://www.fjc.gov/sites/default/files/2017/certhandbk.pdf [hereinafter N.Y. PRACTICE HANDBOOK ON CERTIFICATION OF STATE LAW QUESTIONS].

101. CANTONE A, *supra* note 12, at 3-4.

102. Eisenberg, *supra* note 54, at 76; *see also* Perez v. Brown & Williamson Tobacco Corp., 967 F. Supp. 920, 926 (Tex. 1997); Bustos v. Martini Club Inc., 599 F.3d 458, 462-63 (5th Cir. 2010); Kelly v. State Farm Fire & Cas. Co., 582 F. App'x. 290, 293 (5th Cir. 2014) ("Certification is not a proper avenue to change our binding precedent on issues of state law, even when the parties challenge a previous panel's Erie guess." (citation, internal quotation marks, and alteration omitted). The same problem exists in the Ninth Circuit, where district courts seem to consider the Court of Appeals. *Erie* guesses to be somewhere between persuasive and binding, but in any event not to be countermanded. *See, e.g.*, Johnson v. Symantec Corp., 58 F. Supp. 2d 1107, 1111 (Cal. 1999). The authors thank Kathleen Foley for the suggestion to add this note.

103. Eisenberg, *supra* note 54, at 77. *See, e.g.*, Wright, *supra* note 21, at 325; Mattis, *supra* note 18, at 724; Corr & Robbins, *supra* note 18, at 417 ("As Justice Oliver Wendell Holmes noted in his dissenting opinion in Chicago, B. & Q. R.R. v. Williams, certification is 'a mode of disposing of cases in the least cumbersome and most expeditious way.'" (quoting Chicago, B. & Q. R.R. v. Williams, 214 U.S. 492 (1909)); Nash, *supra* note 18, at 1696-97.

104. *See* Eisenberg, *supra* note 54, at 76.

105. *See* Mattis, *supra* note 18, at 732; FJC, *supra* note 18, at 11; Nash, *supra* note 18, at 1674; Acquaviva, *supra* note 19.

106. *See* Brogan, *supra* note 14, at 40-42 (detailing a period in which the Third Circuit persisted in finding that Pennsylvania would adopt the Restatement (Third) of Torts, but Pennsylvania kept applying the Restatement (Second) of Torts).

107. *See* Wright, *supra* note 21, at 325; FJC, *supra* note 18, at 11; Shepard, *supra* note 25, at 337; Nash, *supra* note 18, at 1697; Ripple & Gallagher, *supra* note 13, at 1942.

future litigants time and money.[108] Of course, many of these benefits cannot be fully realized if state courts decline the certified questions, or if the federal court does not certify in the first place.

In the 1990s, two researchers examined the potential time burden and found that it may not be as burdensome as expected. Although both findings are now dated and require updated review, they offer insight.[109] From the receiving court perspective, Ira P. Robbins found that none of the 40 jurisdictions with certification procedures at that time "reported being overburdened by the number of certified questions, despite the prevalent fear of inundation."[110] Soon after, Jonah Goldschmidt, relying on data from an American Judicature Society survey, explained that federal courts of appeals waited about 6.6 months for a state court response to a certified question, and district courts waited a little longer: about 8.2 months.[111] Goldschmidt concluded that "the savings in costs and time to future litigants . . . greatly outweigh [the] additional costs . . . incurred by litigants in a single certification case."[112]

However, while delays due to the certification procedure could benefit future litigants and the court as a whole, these delays can add a substantial burden to current litigants. This burden should not be ignored. In addition, certification procedures, and the timing, can differ between jurisdictions and depend upon the particular facts of the case and questions asked. Thus, these burdens may impact different litigants differently. It is also important to consider the timing of the certification procedure as compared to both *Erie* guess and abstention procedures.

2. *Perceived Burdens*

While certification certainly can provide benefits, scholars and jurists also express concerns. One of the largest and most common concerns is that certification procedures shift a non-trivial burden to state courts that are already congested and working with limited resources.[113] State courts handle the questions certified to them in addition to their own, often considerable, caseloads. A recent survey by the National Center for State Courts found almost half of American households had a civil legal problem within the previous year, and nearly a quarter

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108. William G. Bassler & Michael Potenza, *Certification Granted: The Practical and Jurisprudential Reasons Why New Jersey Should Adopt a Certification Procedure*, 29 SETON HALL L. REV. 491, 511-12 (1998).

109. *See* Part IV for brief discussion of more recent research assessing the potential time burden associated with the certification procedure. In Part V, we address these time burdens in our own data.

110. FJC, *supra* note 18, at 136-37 (examining the perceived "deluge of [certified question] cases flooding" into the court and stating that the burden "[u]pon closer scrutiny . . . appears to have little weight.").

111. JONA GOLDSCHMIDT, CERTIFICATION OF QUESTIONS OF LAW: FEDERALISM IN PRACTICE 42 (1995).

112. *Id.* at 109-10; *see also* Eisenberg, *supra* note 54, at 78.

113. *See* Eisenberg, *supra* note 54, at 78.

had more than one,[114] which translated to 83 million state civil cases.[115] This staggering number accounts only for civil cases. Even if the state court declines to answer the question, it must still review the certification materials which may include briefs and oral arguments. The burden on state courts is compounded because they are presented with questions that have been written in an abstract manner without the context of the entire case.[116] While state supreme courts have the ability to reduce this burden by only granting a small number of certified questions,[117] even a small number can lead to a non-trivial burden for the courts, especially given that limited resources would need to be re-allocated from cases originally brought in state courts. [118]

Another concern, identified by the Michigan and Missouri supreme courts, is that answers to certified questions are advisory opinions. These courts have stated that their state constitutions prohibit advisory opinions and thus, should also prohibit answering certified questions.[119] Still, the Michigan Supreme Court has, albeit rarely, granted and answered certified questions. In 2016, the Chief Justice of the Michigan Supreme Court addressed this when he wrote a concurring opinion regarding a certified question "only to explain why, given my longstanding views on the questionable constitutionality of responding to certified questions from federal courts, I choose to participate in responding."[120] This argument also includes concerns that federal judges maintain the decision-making authority when certifying questions to the state courts[121] and, while we saw no evidence of this in our analysis, a federal judge's review and decision can override the state court's opinion.

Overall, however, there is broad consensus from the state courts that certified questions are indeed answerable. Twenty years ago, the California Supreme Court succinctly addressed this issue:

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114. Erika Rickard, *Many U.S. Families Faced Civil Legal Issues in 2018*, PEW TRUSTS (November 19, 2019), https://www.pewtrusts.org/en/research-and-analysis/articles/2019/11/19/many-us-familiesfaced-civil-legal-issues-in-2018.

115. Court Statistics Project, *State Court Caseload Digest 2017 Data*, NAT'L CTR. FOR ST. CTS. 2 (2019), https://www.courtstatistics.org/data/assets/pdf_file/0021/29820/2017-Digest-print-view.pdf.

116. *See* Wright, *supra* note 21, at 325-26; Corr & Robbins, *supra* note 18, at 419-22; Shepard, *supra* note 25, at 327, 343.

117. *See* NORTH CAROLINA MEMORANDUM, *supra* note 87, at 4.

118. *See* Mattis, *supra* note 18, at 734; Corr & Robbins, *supra* note 18, at 419-22 (chronicling the rationales given by courts that their decision may be determinative of a pending case or that a case is pending in federal court); Nash, *supra* note 18, at 1675; *see also* Watson, Craig, & Davis, *supra* note 15, at 98-103, 100; Brogan, *supra* note 14, at 77.

119. *See* Watson, Craig, & Davis, *supra* note 15, at 100-101 (Both Michigan and Missouri judges have stated that their state constitutions prohibit advisory opinions and thus answering certified questions).

120. *In re* Certified Question from the U.S. Court of Appeals for the Ninth Circuit, 885 N.W.2d 628, 634 (Mich. 2016) (Young, J., concurring). For another Michigan Supreme Court answer to a certified question, see *In re Certified Question* from U.S. Dist. Court for W. Michigan, 493 Mich. 70, 825 N.W.2d 566 (2012).

121. *See* Part II.

> [O]ur sister-state high courts overwhelmingly have rejected contentions that in answering a certified question a court issues an improper advisory opinion. The weight of authority holds that a high court's answer to a certified question is not an improper advisory opinion so long as (i) a court addresses only issues that are truly contested by the parties and are presented on a factual record; and (ii) the court's opinion on the certified question will be dispositive of the issue, and res judicata between the parties.[122]

The understanding is that "there is (or should be) an actual, justiciable controversy in the certifying court, part of which the litigants transfer to the answering court and litigate there through the certification procedure. The answering court's response is therefore part of the law of the case and binding between the parties because the referring court is bound to apply it."[123] Some legal scholars have stated that a certifying federal court would be bound by *Erie* to apply the law of the state, and the state court's opinion would determine the federal court result.[124] This would meet the principles of *res judicata* and bind the present and future parties.[125]

Another serious criticism leveled at certification is that federal judges use the procedure to abdicate their duty to decide the cases that litigants chose to prosecute in federal court.[126] While it is likely that *Clay* was attempting to draw a distinction between abstention and certification, that was not explicitly stated. Further, any distinction between the two procedures would be the differential burdens imposed on state courts and litigants. The action of the federal judge, avoiding a decision on a state law issue and instead sending it to the state court, is identical in the two procedures. Thus, scholars have noted that the prescriptions in *Meredith*, prohibiting federal judges from refusing to answer a question merely because it is difficult, remain in force and, in principle, apply to certification as well.[127]

An examination of the benefits and burdens of certification should also include the litigant perspective. It is still possible for litigants to exploit certification in a way that is similar to forum shopping. A petitioner who fears a negative state trial court decision, but anticipates a more favorable state supreme court decision, can leapfrog the lower courts by filing in federal court and seeking certification of state law questions to the state's highest court.[128] This upsets the established hierarchy of the lower courts, forcing the state supreme courts to make room on their docket for a case in which they do not have the full record. It also places certified question cases ahead of those litigants who proceeded by the

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122. Los Angeles All. for Survival v. City of Los Angeles, 993 P.2d 334, 338-39 (Cal. 2000).

123. NORTH CAROLINA MEMORANDUM, *supra* note 87, at 4-5.

124. *See* Eisenberg, *supra* note 54, at 72-73; NORTH CAROLINA MEMORANDUM, *supra* note 87.

125. *See* Eisenberg, *supra* note 54, at 83.

126. *See* Mattis, *supra* note 18, at 730.

127. *See* Mattis, *supra* note 18, at 729; Meredith v. City of Winter Haven, 320 U.S. 228, 229 (1943).

128. *See* Cochran, *supra* note 22, at 171 (arguing certification allows the disruption of "appellate hierarchy in unprecedented ways."); Mattis, *supra* note 18, at 732 (Another method of forum shopping proposed is that a federal litigant who begins to fear a bad federal outcome could petition to have the question certified).

established state route. At least one Court of Appeals (the D.C. Circuit) has declared that, where a party chose the federal forum, that party's request for certification should be looked upon with disfavor.[129] Thus, while certified questions may discourage forum shopping, they do not eliminate it.[130]

In addition, the litigants themselves also face additional burdens. While certification is a cheaper and faster alternative to *Pullman* abstention, certification requires further steps, from the costs of potentially filing a motion to certify to the resulting delays incurred while awaiting a response, which could be a denial from either the federal court or a declination from the state supreme court. The federal court could require additional arguments and briefings just to decide whether to certify the question and then, if certified, the state court could also require further action in another venue. Combined, these additional procedures could result in higher costs to litigants and extend the time to resolution as compared to *Erie* guesses. At best, a certified question would take months to reach final resolution in the federal court,[131] and might actually take several years.[132] Additionally, if the certified question is declined or left unanswered, the delay and additional cost to litigants resulted in no benefit to their case, including no clarification of unsettled state law issues in their, or future, cases.

Another understandable critique notes that the procedure only goes one way.[133] Federal circuit courts can certify questions to state courts, but state courts cannot do the same to get answers regarding nuances of federal law. Still, the burden to the state courts might be balanced by the discretionary nature of certified questions. The Honorable Kenneth F. Ripple and Kari Anne Gallagher[134] recently argued that a burden to the state courts can be balanced with the discretionary nature of certified questions. If state supreme courts find themselves receiving an unexpected number of certified questions, they can decline questions, as they deem necessary.[135] Furthermore, they contend that the certification procedure has not resulted in any significant delays in the U.S. Court of Appeals for the Seventh Circuit.[136] However, as Rebecca Cochran earlier argued, "[w]hile judicial economy, respect for state courts, state court expertise to decide state law issues, and the dangers of federal courts predicting state law appear to support certification, these benefits are more frequently presumed to exist than

129. Metz v. BAE Sys. Tech. Sols. & Servs. Inc., 774 F.3d 18, 24 (D.C. Cir. 2014).

130. Mattis, *supra* note 18, at 732; Cochran, *supra* note 22, at 204.

131. *See* Wright, *supra* note 21, at 325; Mattis, *supra* note 18, at 726; Nash, *supra* note 18, at 1697; Brogan, *supra* note 14, at 75.

132. See discussion *infra* Part V for our analysis of these timing trends in three U.S. Courts of Appeals.

133. *See* Robbins, *supra* note 68, at 179 (discussing a recommend reciprocity provision: "This jurisdiction, having the power to certify questions of law, is empowered to accept certified questions from all jurisdictions having the power to certify."); *see also* Cochran, *supra* note 22, at 169; Brogan, *supra* note 14, at 77.

134. Judge Gallagher is a judge for the U.S. Court of Appeals for the Seventh Circuit. Kari Anne Gallagher is a career law clerk in Judge Gallagher's chambers.

135. Ripple & Gallagher, *supra* note 13 at 1931.

136. *Id.*

demonstrated from certification practice."[137] Additionally, although a state court can decline a certified question, the fact that these requests are only allowed in one direction could undermine the very comity and cooperation the procedure is lauded for fostering.[138]

We agree with Cochran that it is important to obtain and rely on data, rather than presumptions, when making such determinations. Parts IV and V seek to help inform discussions regarding the balancing of costs and benefits of certified questions, particularly regarding potential time delays due to the certification procedure. However, we first turn to examining the authority for certified questions, which emanates from both statutes and court rules.

III. AUTHORITY FOR CERTIFIED QUESTIONS

Efforts to establish a uniform law for certifying questions of state law in all jurisdictions has had mixed success. The Uniform Certification of Questions of Law Act, completed by the Uniform Law Commission in 1967 and revised in 1995, sought to "assure[] that key interpretations of a state's laws are made by the state's own highest court, by empowering the court to answer questions certified to it by a federal court, an appellate court of another state, or courts of Canada and Mexico."[139] The revised 1995 language clarified that "a court of the United States" also included bankruptcy courts.[140] However, the Act has only been enacted by eight states and the District of Columbia.[141]

State and federal courts receive their authority for certified questions from different sources. In this section, we analyze authorizing language across 54 state and territorial jurisdictions.[142] This authorization need not be by statute, or even by state constitution. In fact, some state supreme courts have noted that the certification procedure can be adopted by court rule, as "[i]t is within the inherent power of the court as the judicial body authorized by the constitution to render decisions reflecting the law of this state."[143]

Regardless of the authorization source, state supreme courts maintain discretion regarding whether they will accept any particular certified question. Acceptance decisions can be based on whether the specific questions presented

137. Cochran, *supra* note 18, at 168.

138. *Id.*; *see also* Brogan, *supra* note 14, at 77.

139. Unif. Certification of Questions of Law Act (1955) (enacted 1967), Unif. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=494b84ff-bd1f-465b-89a0-ffaddf84d7b3#:~:text=The%20Uniform%20Certification%20of%20Questions,courts%20of%20Canada%20and%20Mexico [hereinafter ULC] (last visited Oct. 28, 2021).

140. U.L.A., *supra* note 69.

141. ULC, *supra* note 139 (The jurisdictions, with year of enactment, as reported by the Uniform Law Commission web site are: District of Columbia (1987), Maryland and West Virginia (1996), Montana, New Mexico, and Oklahoma (1997), Minnesota (1998), Connecticut (1999), and Vermont (2000)).

142. *See* Cantone & Giffin, *supra* note 8, at 1 (These 54 existing state statutes were examined in response to a request from the Judicial Conference Committee on Federal-State Jurisdiction to the Federal Judicial Center. Of note, we did not examine the authority for federal courts to certify questions. We encourage future research on this topic).

143. Sunshine Mining Co. v. Allendale Mut. Ins. Co., 666 P.2d 1144, 1147 (Idaho 1983).

warrant a response, or after consideration of judicial workload and limited state supreme court resources that might affect the ability to respond promptly in light of the court's pending docket.[144] In addition, just because a state authorizes certified questions does not mean that federal judges or courts will certify any questions to them.

Disconnect can exist between authorization language and state supreme court practice. For example, Missouri, discussed in Part II, Section III has one of the broadest statutes, which authorizes certified questions from "the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court or a United States Bankruptcy Court."[145] However, in practice, the Missouri Supreme Court does not grant certified questions, having found the practice to be unconstitutional, and considers responding to certified questions akin to issuing advisory opinions.[146] In North Carolina, there have been efforts for more than a decade to promote the certification procedure, as it is the only state without clear authorizing language.[147] However, at least two former North Carolina Supreme Court Justices have contested the use of certified questions, stating reasoning analogous to that of the Missouri Supreme Court – that the North Carolina Constitution does not authorize the Court to issue advisory opinions.[148] While the North Carolina General Statutes Commission found that "a certification process can be crafted that avoids that issue,"[149] no process existed at the time of writing. While Missouri has a clear and broad authorizing statute, and North Carolina does not, the outcome remains the same: neither state supreme court grants certified questions. In the next section, we focus on authorization language included in both statutes and court rules.

A. *Analysis of Authorizing Language*

As stated earlier, 49 states, the District of Columbia, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands, all have statutes or court rules authorizing certified questions.[150] Still, the authorization language in the 54 jurisdictions varies considerably. In the next section, we first consider those statutes and court rules that authorize state courts to accept certified questions from Article III federal courts, then we consider those that authorize certified questions from other states and territories, as well as bankruptcy, tribal, and foreign courts.[151]

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144. *See* Cochran, *supra* note 22, at 160-61.

145. See MONT. CODE ANN. § 477.004 (2020).

146. This was re-affirmed in personal discussions between a member of the Missouri Supreme Court and the first author in 2019.

147. North Carolina Memorandum, *supra* note 87.

148. *In re* Advisory Opinion*,* 335 S.E.2d 890, 891 (N.C. 1985).

149. North Carolina Memorandum, *supra* note 87, at 2.

150. *See* Cantone & Giffin, *supra* note 5, 1-3 (including a detailed Appendix of the specific authorizing language in all 54 statutes).

151. In this Article, we sometimes use the word statutes to encompass both the statutes and court rules relevant to certified questions. We do not examine guidance or authorizing language within state supreme court opinions, though we encourage future research in this area.

1. *Certified Questions from Federal Courts*

There were two overall similarities across the jurisdictions: all 54 jurisdictions authorize acceptance of certified questions from at least one U.S. Court of Appeals, and every jurisdiction but New Jersey specifically authorizes certified questions from the U.S. Supreme Court.[152]

No state or territory authorizes certified questions only from the U.S. Supreme Court. Usually, the U.S. Supreme Court is included within a broader authorization that can include federal, state, territorial, bankruptcy, tribal, and foreign courts. In 33 of the jurisdictions (61%), the U.S. Supreme Court is explicitly named in the authorizing language.[153] In the remaining jurisdictions, broad federal authorizing language implicitly includes the U.S. Supreme Court (e.g., "all federal courts").

Jurisdictions that have broad federal authorization language can be split into two groups. First, nine jurisdictions specifically authorize questions from the U.S. Supreme Court, U.S. courts of appeals, and U.S. district courts.[154] These jurisdictions utilize substantially similar language. For example, Idaho authorizes certified questions from "[t]he Supreme Court of the United States, a Court of Appeals of the United States or a United States District Court."[155] Hawai`i warrants separate mention. In Hawai`i, certified questions are authorized from "a federal district or appellate court."[156] We extrapolated that this includes the U.S. Supreme Court, though not specifically mentioned.

Second, eight jurisdictions authorize certified questions from all federal courts, broadly and exclusively with no mention of specific federal courts. For example, certified questions are authorized from "a court of the United States" in Ohio[157] and Utah[158] or any "federal court," with slightly varying language, in Alabama,[159] Arkansas,[160] Northern Mariana Islands,[161] Vermont,[162] and Washington.[163] In Colorado, the state rules of appellate procedure provided more specific language, authorizing questions from "the Supreme Court of the United

152. *See* N.J. CT. R. 2:12A-1 (authorizing only certified questions from "the United States Court of Appeals for the Third Circuit"); ILL. SUP N.J. CT. R. 20 (authorizing language most similar to New Jersey's court rule, which authorizes certified questions from "the Supreme Court of the United States, or to the United States Court of Appeals for the Seventh Circuit").

153. *See, e.g.*, Idaho App. R. 12.3 (authorizing questions from "[t]he Supreme Court of the United States, a Court of Appeals of the United States or a United States District Court").

154. *See* Georgia (GA. CODE ANN. § 15-2-9 (West 2021)); Hawaii (HAW. R. APP. P. 13); Idaho (IDAHO APP. R. 12.3); Indiana (IND. R. APP. P. 64); Maine (ME. R. APP. P. 25); Nebraska (NEB. REV. STAT. § 24-219 (West 2021)); New Hampshire (N.H. SUP. CT. R. 34); Rhode Island (R.I. SUP. CT. R. 6); and South Dakota (S.D. CODIFIED LAWS § 15-24A-1).

155. IDAHO APP. R. 12.3.

156. HAW. R. APP. P. 13.

157. OHIO SUP. CT. PRAC. R. 9.01.

158. UTAH R. APP. P. 41.

159. ALA. R. APP. P. 18 ("any of the federal courts").

160. ARK. R. SUP. CT. & CT. APP. 6-8 ("a federal court of the United States").

161. N. MAR. I. SUP. CT. R. 13 ("A federal court").

162. VT. R. APP. P. 14 ("a federal court").

163. WASH. REV. CODE ANN. § 2.60.020 (West 2021) ("any federal court").

States, a Court of Appeals of the United States, a United States District Court, or other federal court,"[164] with the last clause granting a broad federal authorization. While these two categories are similar, the broader language in the second category presumably also includes bankruptcy or other federal courts.

Every jurisdiction authorizes certified questions from at least one U.S. court of appeals. Two jurisdictions – Illinois and New Jersey[165] – only authorize certified questions from the U.S. Court of Appeals for their corresponding circuit. The remaining 52 jurisdictions authorize certified questions from all circuit courts of appeals.

Fewer, but still most, jurisdictions (39, or 72%) authorize certified questions from district courts, either through the broad federal authorizations discussed above, or with specific mention of district courts such as in Arizona ("the supreme court of the United States, a court of appeals of the United States, a United States district court or a tribal court").[166] Of the 15 jurisdictions that do not authorize certified questions from district courts, five only authorize certified questions from the U.S. Supreme Court and U.S. courts of appeals.[167] An additional four jurisdictions authorize certified questions from the U.S. Supreme Court, U.S. courts of appeals, and a state court of last resort (including California, which authorizes from a state, territory, or commonwealth court of last resort).[168]

Five jurisdictions explicitly name and authorize certified questions from U.S. bankruptcy courts,[169] though Tennessee's Supreme Court rule only authorizes from

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164. COLO. R. APP. P. 21.1.

165. *See* N.J. CT. R. 2:12A-1; ILL. SUP. CT. R. 20.

166. ARIZ. REV. STAT. ANN. § 12-1861 (West 2021).

167. Florida, Louisiana, Mississippi, Pennsylvania, and Texas. *See* FLA. STAT. ANN. § 25.031 (West 2021) ("the Supreme Court of the United States, to any circuit court of appeals of the United States, or to the Court of Appeals of the District of Columbia"); LA. SUP. CT. R. XII § 1 ("the Supreme Court of the United States, or to any circuit court of appeal of the United States"); MISS. R. APP. P. 20 ("the Supreme Court of the United States or to any United States Court of Appeals"); 204 PA. CODE § 29.451(1)(a),(b) (2021) ("The United States Supreme Court; or . . . Any United States Court of Appeals"); and TEX. R. APP. P. 58.1 ("any federal appellate court"). We presumed in our analysis that the Texas authorization included the U.S. Supreme Court among "any federal appellate court".

168. California, the District of Columbia, New York, and Wisconsin. *See* CAL. R. CT. 8.548(a) ("the United States Supreme Court, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth"); D.C. CODE ANN. § 11-723(a) (West 2021) ("the Supreme Court of the United States, a Court of Appeals of the United States, or the highest appellate court of any State"); N.Y. Ct. R. § 500.27(a) ("the Supreme Court of the United States, any United States Court of Appeals, or a court of last resort of any other state"); and WIS. STAT. ANN. § 821.01 (West 2021) ("the supreme court of the United States, a court of appeals of the United States or the highest appellate court of any other state").

169. Alaska, Delaware, Missouri, Nevada, and Tennessee. *See* ALA. R. APP. P. 407(a) ("the Supreme Court of the United States, a court of appeals of the United States, a United States district court, a United States bankruptcy court or United States bankruptcy appellate panel"); DEL. SUP. CT. R. 41(a)(ii) ("The Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court, a United States Bankruptcy Court, the United States Securities and Exchange Commission, the Highest Appellate Court of any other State, the Highest Appellate Court of any foreign country, or any foreign governmental agency regulating the public issuance or trading of securities"); MO. ANN. STAT. § 477.004(1) (West 2021) ("the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court or a United States Bankruptcy Court"); NEV. R. APP. P. 5(a) ("the Supreme Court of the United States, a Court of Appeals of the

the U.S. Bankruptcy Court in Tennessee.[170] This is in addition to jurisdictions with a broad federal authorization of "any federal court" that likely encompasses bankruptcy courts.[171] Additionally, Oregon authorizes certified questions from "a panel of the Bankruptcy Appellate Panel Service."[172]

Nine jurisdictions specifically authorize certified questions from tribal courts.[173] As would be expected, these jurisdictions generally correspond with those with a larger tribal population, though it is not a perfect overlap.[174]

2. *Certified Questions from State and Territorial Courts*

Almost half (25, or 46%) of the jurisdictions authorize certified questions from state or, less commonly, territorial courts.[175] Of these 25 jurisdictions, 19

United States or of the District of Columbia, a United States District Court, or a United States Bankruptcy Court"); and TENN. SUP. CT. R. 23 § 1 ("the Supreme Court of the United States, a Court of Appeals of the United States, a District Court of the United States in Tennessee, or a United States Bankruptcy Court in Tennessee").

170. *See* TENN. SUP. CT. R. 23 § 1.

171. Our reasoning emanates from the 1995 revision of the Uniform Certification of Questions of Law Act, which specified certified questions from bankruptcy courts. *See* 12 U.L.A. 74, § 3 (1995); 12 U.L.A. 52, §1 (1967).

172. *See* OR. REV. STAT. ANN. § 28.200 (West 2021) ("the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court, a panel of the Bankruptcy Appellate Panel Service or the highest appellate court or the intermediate appellate court of any other state").

173. Arizona, Connecticut, Maryland, Michigan, Minnesota, Montana, New Mexico, Oklahoma, and West Virginia. *See* ARIZ. REV. STAT. ANN. § 12-1861 (West 2021) ("[t]he supreme court of the United States, a court of appeals of the United States, a United States district court or a tribal court"); CONN. GEN. STAT. ANN. § 51-199b(d) (West 2021) ("a court of the United States or by the highest court of another state or of a tribe"); MD. CODE ANN., CTS. & JUD. P. § 12-603 (West 2021) ("a court of the United States or by an appellate court of another state or of a tribe"); MICH. CT. R. 7.308(2)(a) ("a federal court, another state's appellate court, or a tribal court"); MINN. STAT. ANN. § 480.065, subd. 3) (West 2021) ("a court of the United States or by an appellate court of another state, of a tribe, of Canada or a Canadian province or territory, or of Mexico or a Mexican state"); MONT. R. APP. P. 15(3) ("a court of the United States or by the highest court of another State or of a tribe, or of Canada, a Canadian province or territory, Mexico, or a Mexican state"); N.M. R. APP. P. 12-607(A)(1) ("a court of the United States, an appellate court of another state, a tribe, Canada, a Canadian province or territory, Mexico, or a Mexican state"); OKLA. STAT. ANN. 20 § 1602 (West 2021) ("a court of the United States, or by an appellate court of another state, or of a federally recognized Indian tribal government, or of Canada, a Canadian province or territory, Mexico, or a Mexican state"); and W. VA. CODE ANN. § 51-lA-3 (West 2021) ("any court of the United States or by the highest appellate court or the intermediate appellate court of another state or of a tribe or of Canada, a Canadian province or territory, Mexico or a Mexican state").

174. Five of the nine jurisdictions (Arizona, Michigan, Minnesota, New Mexico and Oklahoma) are among those with the largest Native American population per the 2010 U.S. Census. *See American Indian and Alaska Native Heritage Month: November 2011*, U.S. CENSUS BUREAU (Nov. 1, 2011), https://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb11-ff22.html.

175. California, Connecticut, the District of Columbia, Delaware, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Montana, Michigan, Minnesota, New Mexico, New York, North Dakota, Oklahoma, Oregon, South Carolina, Virgin Islands, Virginia, West Virginia, Wisconsin, Wyoming, Guam, and Puerto Rico. *See*, CAL. R. CT. 8.548 ("or the court of last resort of any state, territory, or commonwealth"); D.C. CODE ANN. § 11-723 ("or the highest appellate court of any State"); DEL. R.

(76%, or 35% of all jurisdictions) authorize certified questions from the state or territorial highest court or court of last resort.[176] For example, in California, certified questions are authorized from "the United States Supreme Court, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth".[177]

Additionally, 14 of the 25 (56%, or 26% of all jurisdictions) authorize certified questions from a lower state court.[178] For example, Oregon authorizes certified questions from "the highest appellate court or the intermediate appellate court of any other state."[179]

Few jurisdictions specifically authorize questions from territorial courts. Only three – California, Virginia, and the Virgin Islands – explicitly authorize questions from the territorial courts of last resort. [180]

SUP. CT. 41 (", the Highest Appellate Court of any other State"); Iowa St. §684A ("or the highest appellate court or the intermediate appellate court of another state"); KAN. STAT. ANN. §§ 60-3201 ("or the highest appellate court or the intermediate appellate court of any other state"); KY. R. CIV. P. 76.37 ("the highest appellate court of any other state, or the District of Columbia"); MD. CODE ANN., CTS. & JUD. PROC. §§ 12-603-12-610 ("or by an appellate court of another state or of a tribe"); MASS. R. S. CT. R. 1:03 ("or the highest appellate court of any other State"); MICH. CT. R. 7.308(A)(2)-(6) ("another state's appellate court, or a tribal court"); MINN. STAT. ANN. § 480.065 ("or by an appellate court of another state, of a tribe"); N.M. R. APP. P. 12-607 (", an appellate court of another state, a tribe"); N.Y. CT. R. § 500.27 (or a court of last resort of any other state"); N.D. R. APP. P. 47 ("or the highest appellate or intermediate appellate court of any other state"); 20 OKLA. STAT. ANN. § 1602-1604.3 ("or by an appellate court of another state, or of a federally recognized Indian tribal government"); OR. REV. STAT. § 28.200 ("or the highest appellate court or the intermediate appellate court of any other state"); S.C. APP. CT. R. 244 ("or an intermediate appellate court of any other state"); V.I. R. APP. P. 38 ("or the court of last resort of a state, the District of Columbia, or a territory of the United States"); VA. SUP. CT. R. 5:40 ("or the highest appellate court of any state, territory, or the District of Columbia"); WIS. STAT. ANN. §§ 821.01 ("or the highest appellate court of any other state"); WYO. R. APP. P. 11.01 ("or a state district court "); GUAM R. APP. P. 20(b)(1) "or the highest appellate or intermediate appellate court of any other state,"); and P.R. SUP. CT. R. 24s(g) ("or the highest court of appeals of any of the states of the United States of America, as well as by the lower courts of the states of the United States of America").

176. California, Connecticut, the District of Columbia, Delaware, Iowa, Kansas, Kentucky, Massachusetts, Montana, New York, North Dakota, Oregon, South Carolina, Virgin Islands, Virginia, West Virginia, Wisconsin, Guam, and Puerto Rico.

177. CAL. R. CT. 8.548(a).

178. Iowa, Kansas, Maryland, Michigan, Minnesota, New Mexico, North Dakota, Oklahoma, Oregon, South Carolina, West Virginia, Wyoming, Guam, and Puerto Rico. *See* WYO. R. APP. P. 11.

179. OR. REV. STAT. ANN. § 28.200 (West 2021).

180. Only three of these statutes – from California, Virginia, and the Virgin Islands – specifically authorize questions from the territorial courts of last resort. *See* CAL. R. CT. 8.548 (a.); 8.548(a) ("the court of last resort of any state, territory, or commonwealth"); VA. SUP. CT. R. 5:40(a) ("the Supreme Court of the United States, a United States court of appeals for any circuit, a United States district court, or the highest appellate court of any state, territory, or the District of Columbia"); and V.I. R. APP. P. 38(a) ("a court of the United States or the court of last resort of a state, the District of Columbia, or a territory of the United States"). Interestingly, Maryland, Michigan, Minnesota, New Mexico, and Oklahoma authorize certified questions from tribal courts, but not territorial courts (at least not explicitly).

3. *Additional Sources of Certified Questions*

A few jurisdictions also authorize certified questions from sources beyond the federal, state, and territorial courts. Six jurisdictions specifically authorize certified questions from Canada and Mexico. Five – Minnesota, Montana, New Mexico, Oklahoma, and West Virginia – use similar language.[181] The sixth jurisdiction relevant in this category – Delaware – provides a broader authorization, authorizing certified questions from

> The Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court, a United States Bankruptcy Court, the United States Securities and Exchange Commission, the Highest Appellate Court of any other State, the Highest Appellate Court of any foreign country, or any foreign governmental agency regulating the public issuance or trading of securities . . . .[182]

As would be expected given Delaware's business-heavy case load,[183] Delaware is the only jurisdiction that specifically authorizes certified questions from the U.S. Securities and Exchange Commission.

Across this analysis of authorizing language, we must remind readers that jurisdictions with similar authorizing language do not necessarily use the procedure in the same manner (or at all, as we have seen in Missouri). Additionally, states differ in their efforts to promote the certification procedure. In New York, for example, the state court made a concerted effort to highlight the benefits of certified questions. This includes offering to reframe questions to remove obstacles,[184] and creating a review process that, at one time, resulted in answers within six months.[185] In addition, in 2016, the Advisory Group to the New York State and Federal Judicial Council released a practice handbook on certification of state law questions.[186] Other states with similar authorizing language have not taken equivalent actions. These differences are important because they may be taken to signal courts' willingness to accept certified questions and may influence whether federal courts certify the questions in the first place. The same is expected for U.S. courts of appeals, which certify questions of state law to states both within – and outside of – their circuit. Part IV and V describe our empirical research

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181. *See* MINN. STAT. ANN. § 480.065, subd. 3 (West 2021); MONT. R. APP. P. 15(2); N.M. R. APP. P. 12-607(A)(1); OKLA. STAT. ANN. tit. 20, § 1602 (West 2021); and W. VA. CODE ANN. § 51-lA-3 (West 2021)). All five of these jurisdictions are among the nine that authorize certified questions from tribal courts.

182. DEL. R. SUP. CT. 41 (A)(II).

183. For an examination of the certified question procedure in Delaware, *see* Verity Winship, *Delaware Invites Certified Questions from Bankruptcy Courts,* 39 DEL. J. CORP. LAW. 427, 429-323 (2014); Mark J. Roe, *Delaware's Competition,* 117 HARV. L. REV. 588 (2003); Michelle M. Harner & Jason A. Cantone, *Is Legal Scholarship Out of Touch? An Empirical Analysis of the Use of Scholarship in Business Law Cases,* 19 U. MIAMI BUS. L. REV. 1 (2011) (examining the use of legal scholarship in business law cases in Delaware).

184. Kaye & Weissman, *supra* note 67, at 420.

185. *Id.*

186. *See generally* N.Y. PRACTICE HANDBOOK ON CERTIFICATION OF STATE LAW QUESTIONS, *supra* note 100.

examining the use of the certification question procedure in three U.S. courts of appeals.

IV. STUDY METHOD AND DATA SOURCES

The primary objective of our research was to examine the use of certified questions of state law in three U.S. courts of appeals to ascertain how often the process is used, patterns regarding its use, and the timing of key case events (e.g., how much time elapses between the court of appeals certifying the question and the state court filing its response). As described *infra*, one of the largest concerns with certification is that it "can prolong the dispute."[187]

In the 1990s, two separate analyses examined the perceived burden of certified questions upon the courts.[188] However, this research is now out of date, and earlier research and our data show that the use of the certification procedure has risen.[189] This suggests the need for re-assessing the calculus of benefits and burdens of the procedure based upon newer data, with special attention to how long the procedure often takes. We first review some of the earlier data before moving on to our own.

In 2008, the North Carolina General Statutes Commission reported data on the use of certified questions in the U.S. Court of Appeals for the Fourth Circuit and neighboring states.[190] The Fourth Circuit reported certifying eight questions from 2004-2007.[191] The Commission also reviewed data from relevant state courts and found that the states "seem to docket around two to four certified questions a year."[192]

Data from the Court Statistics Project[193] found 404 certified questions across the nation during 2012 through 2016, with an increasing trend across those five years.[194] On average, at least 80 certified questions are transmitted to states and territories each year. While these data provide an initial understanding of the

187. Mckesson v. Doe, 592 U.S. __, 141 S. Ct. 48, 51 (2020) (per curium) (citing Lehman Brothers v. Schein, 416 U.S. 386, 394-95 (1974) (Rehnquist, J., concurring)).

188. These two studies are briefly addressed in the benefits sub-section of this Article, Section II.C.1, *supra. See* Robbins, *supra* note 186, at 136-37 (examining the perceived "deluge of [certified question] cases flooding their court systems" and stating that the burden "upon closer scrutiny . . . appears to have little weight."); GOLDSCHMIDT, *supra* note 111, at 41-46 (analyzing data from an American Judicature Society survey).

189. *See generally*, Corr & Robbins, *supra* note 18; *see also* Part V (explaining our data findings).

190. *See* North Carolina Memorandum, *supra* note 85, at 3-4.

191. *Id.* The North Carolina Memorandum provides a table listing certified questions from 2004-2007. However, the table does not match the text, which states, "[D]uring the period 2003 to 2007, the Fourth Circuit certified questions to West Virginia three times, twice to Maryland, and once each to South Carolina, and Virginia." The text provides a broader time frame but also one fewer certified question. We defer to the table data, which also separated the certified questions by year certified. The memorandum also reported data from Maryland, South Carolina, Virginia, and West Virginia.

192. *Id.* at 4.

193. Court Statistics Project, *supra* note 76.

194. Across the five years, the most certified questions were identified in 2014 (99 certified questions) and 2015 (94 certified questions). Additional methodological information, and a chart of the Court Statistics Project data, can be found in Cantone & Giffin, *supra* note 8.

prevalence of certified question cases, there are limitations. For one, the estimated number of certifications is an undercount, as it only includes data from 35 states and Puerto Rico.[195] Additionally, across the five years, the jurisdictions included vary. While some states provided reportable data all five of the examined years (e.g., Alaska, West Virginia), others either stopped (e.g., New York) or later started (e.g., Minnesota) releasing their data within the examined period. Further, because the information is self-reported, courts may have used different definitions and methods in determining what constitutes a certified question case.

In 2020, Ripple and Gallagher updated certified question data from the 1995 American Judicature Society survey.[196] In both the original (1990-1994) and updated (2015-2019) data sets, the researchers identified certified questions in every circuit. In the 25 years between data sets, five circuits certified more questions (First, Second, Third, Fifth, Ninth), six certified fewer (Sixth, Seventh, Eighth, Tenth, Eleventh, D.C.), and one the same number (Fourth Circuit).[197] The most dramatic shift was within the Ninth Circuit, with the number of certified questions identified increasing from 23 to 84.[198]

This Article extends prior research by providing a more detailed examination of the certification procedure in the U.S. Court of Appeals for the Third, Sixth, and Ninth Circuits. We followed a rigorous coding protocol to better understand not only the frequency of use, but also the timing and frequency of relevant events in certification cases. The remainder of this Part explains our methods, as well as the case variables we examined.[199]

A. *Obtaining Our Sample*

Our database consisted of 218 certified question events occurring between 2010 and 2018. We defined a certified question event as a party motion or *sua sponte* opinion that first raised the possibility of the court of appeals certifying a question of state law in a case. This included proposed questions that were certified or denied by the court of appeals within the 2010-2018 time period; the certified questions were ultimately granted, declined, or not responded to by the relevant state supreme court. If a case had more than one separate and distinct certified question event according to these metrics, each was included in our database as a separate certified question event. As discussed *infra*, it was very rare that a case in our database involved two certified question events.

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195. The absence of data from other states and territories results because jurisdictions can inform the Court Statistics Project whether they want their data reported at the micro level that allows specific analysis of categories such as cases with certified questions.

196. Ripple & Gallagher, *supra* note 13, n.32 (updating the research of GOLDSCHMIDT, *supra* note 111, 28, n.59).

197. *Id.*

198. *Id.* The second largest shift was for the Eleventh Circuit, with the number of identified certified questions dropping from 49 to 26. This is based on absolute numbers, not percentages.

199. Additional methodological information can be found in Cantone & Giffin, *supra* note 8, at 1, 3.

We used two processes to identify cases with certified question events in the three examined circuits.[200] First, we developed a set of search terms and performed docket text searches to identify an initial sample of certified question cases for examination.[201] We also examined event codes used by courts within the Case Management/Electronic Case Files (CM/ECF) system. Clerk's office staff use these codes to tag particular events in a case.[202] In selecting circuits to examine, we wanted to represent geographic diversity and differing CM/ECF practice, while also acknowledging prior findings on the relative use of certified questions.

This research originated with a Committee request to examine certified question activity in the Ninth Circuit. To expand our sample and obtain a more representative sample of how certified questions are used in U.S. courts of appeals, we then also selected a circuit with a well-developed CM/ECF event code system for certified questions of state law (the U.S. Court of Appeals for the Third Circuit)[203] and a circuit with few codes related to certified questions (the U.S. Court of Appeals for the Sixth Circuit).

The docket and CM/ECF code searches resulted in a large number of distinct docket entries that were then individually examined. In the Sixth Circuit, for instance, the docket search found 895 docket entries with key certified question terms that reduced down to 168 individual cases to examine from within the 2010-2018 time period.

After we analyzed each case to determine if it included a certified question event, we initiated our second identification method: contacting the three courts of appeals. We shared the list of identified cases with each court and requested their list of cases with certified question events during the 2010-2018 time period. Each court promptly responded.

We then compared our list and the court's lists and removed all duplicate cases. When a case was on our list, but not the court's, we kept it, as we already reviewed the case closely to ensure it met the criteria for inclusion in our database. When a case was on the court's list, but not ours, we closely examined it before including. We removed cases if they did not meet the established criteria (e.g., the certified question event occurred outside of the time frame; the relevant docket entry only alerted parties to a deadline *if* they chose to file a motion to certify a question of state law that was never ultimately filed; docket entry referred to a certified question in another case; the certified question motions were actually

200. Our request for data was part of a Federal Judicial Center study requested by the Judicial Conference of the United States Committee on Federal-State Jurisdiction.

201. Dockets for the three examined circuits were examined for the following terms: "certifying the question of law" / "certifying the questions of law" and "certify questions of law" / "certify question of law."

202. Although there is a standardized list of codes, each circuit can create its own codes, and use the codes differently. Indeed, the specific codes related to certification of questions of state law varied across the circuits, so we separately searched each circuit for relevant codes across the 2010-2018 time frame.

203. Within the Third Circuit, Pennsylvania, in recent years, has expanded its use of certified questions. *See Generally* Petition for Certification of Questions of State Law, Ebert v. C.R. Bard Inc., No. 20-2139 (3d Cir. Mar. 4, 2021).

motions to grant a certificate of appealability to the U.S. Supreme Court).[204] For instance, the Ninth Circuit provided us with a list of 106 certified question cases. Combining its data and ours resulted in 125 individual cases to examine.

After applying this procedure in all three circuits, our final database included 218 certified question events: 96 distinct certified question events in 94 Ninth Circuit cases, 63 certified question events across 63 Third Circuit cases, and 59 certified question events in 59 Sixth Circuit cases.[205] Overall, it was the number of unique certified question events, rather than cases, that comprised our final database. As described below, the additional data collected and included in the database offers a wealth of new information about the three circuits' use of the certified question process.

B. *Identifying the Variables*

The authors, using a standardized coding protocol to ensure consistency and reliability, then examined the 218 certified question events. For each identified certified question event, the authors reviewed the underlying appellate record and identified the filing date, termination date, outcome from the appellate court (e.g., affirmed, remanded), case type (e.g., contracts, civil rights), case name, year docketed, year of certified question event, originating court, court certified to (if applicable), party motion to certify (yes/no, and date), whether the motion was contested by opposing counsel or not, circuit court certification decision (granted, denied, or no information, and date of the decision), *sua sponte* order to certify (yes/no, and date), date case is transferred to the state supreme court, state court decision (granted, declined, or no information, and date of the decision), whether the state supreme court issued a response (yes/no, and date), as well as a series of variables calculated by the authors to determine the number of days between these events (such as the number of days between filing and termination). The results of our analyses are set forth in detail below.

While we discuss each of these variables in detail below, one of them deserves a special, initial disclaimer. We coded certification decisions as *sua sponte* when there was no evidence on the docket or in underlying documents of a party motion to certify. However, it is possible the parties requested certification through oral argument or other means not captured on the federal docket. Therefore, some certified question cases we coded as *sua sponte* may, in fact, have originated through action by the parties. Our coding relied on the available court

204. Not all identified cases were included in our analysis. If the same certified question was submitted across consolidated or joined cases, only one of the cases was included in the analysis. For instance, in the Sixth Circuit, one pharmaceuticals action included 60 cases, and each of those cases included the same certified question motion. Our database included one of those cases, not 60. On the other hand, in one Ninth Circuit case, the Ninth Circuit certified three different questions to the Supreme Court of California. All three certified question events were included.

205. We recognize the possibility that not all cases with certified questions are included in our database. For example, our method would not include a case if the parties presented the certified question request in an oral argument unless the court responded to it on the docket or coded the case using the CM/ECF event code for certified questions.

data, but we urge caution when interpreting the below results comparing certified questions that originated *sua sponte* and from party motion.

V. DATA AND ANALYSIS

The data presented in this Section show differences in use of certified questions of state law between the Third, Sixth, and Ninth Circuits. Important for our analysis and organization below, this included a difference in the certification rate, and differences in the amount of time between when the federal court certifies the question, when the state court provides its opinion (if it grants the certified question), and when the circuit court terminates the case.

As shown in Figure 1, in addition to having the highest number of identified certified question events, the Ninth Circuit also had the highest certification rate, certifying 89 of the 96 (93%) questions identified by our metrics and denying only one certified question motion (1%). For six certified question events (6%), there was no further information on the docket. The Third Circuit certified 31 of the 63 (49%) questions identified using our metrics, denied 22 certified question motions (35%), and there was no further information for 10 certified question events (16%). The Sixth Circuit certified a significantly smaller percentage of the questions (17%, or 10), and denied 30 certified question motions (52%). There was no further docket information for 19 certified question events (31%).

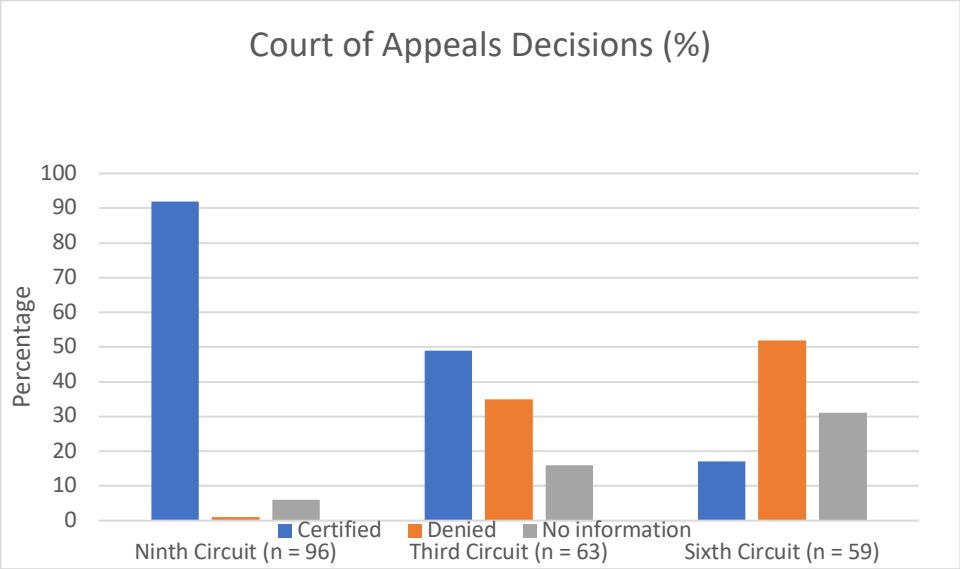


Figure 1. Circuit Court Decision on Certified Question Event Reported as Percentages for Each Decision Type

The Sections below present descriptive data in two sub-parts: for certified question events that were certified and for those certification motions denied by the circuit. Within each Section, we present the data, starting with the circuit that

had the most certified question events (Ninth Circuit) and proceeding in that order (Third Circuit and then Sixth Circuit). Comparisons between the three circuits are made when appropriate. We do not further analyze herein the category of certified question events with no further information on the federal dockets.[206]

A. *Questions Certified by the Circuits*

We first examined the questions that were certified by the circuits across the following variables: case type and certification year, the originating court, court certified to, activity initiating the certified question process, the state court response, and timing between critical events in the certified question process. The Sixth Circuit certified question data should be interpreted with caution, as it is based on only 10 certified questions (compared to 89 in the Ninth Circuit and 31 in the Third Circuit).

1. *Case Type and Certification Year*

We used the CM/ECF data to identify case type, merging types when appropriate. In the Ninth Circuit, 26% (23) of the cases were insurance cases, more than twice as many as the next common case types: other civil rights (11%, or 10), other labor litigation (10%, or 9), and personal injury/product liability (10%, or 9). In the Third Circuit, most cases were insurance and personal injury/product liability cases, with six (19%) of each, followed by personal injury cases (20%, or 2). In the Sixth Circuit, 40% (4) were bankruptcy cases.[207]

Table 1 presents the frequency and percentage of certified question events for each circuit in each of the study years. The Ninth Circuit certified 34 questions (38%) in 2017 and 2018, more than it did in the first four years combined (33, or 37%). Both the Third and Sixth Circuits certified the most questions in 2017 (6 in the Third Circuit; 3 in the Sixth Circuit). Although not a statistically significant trend, the data shows a maintained, if not increased, interest in question certification across the study period.

Year	# Certified by Ninth Circuit	# Certified by Third Circuit	# Certified by Sixth Circuit
2010	6 (7%)	2 (6%)	0 (0%)
2011	11 (12%)	4 (13%)	1 (10%)
2012	12 (13%)	3 (10%)	0 (0%)
2013	4 (4%)	4 (13%)	1 (10%)
2014	7 (8%)	5 (16%)	2 (20%)
2015	9 (10%)	2 (6%)	1 (10%)
2016	6 (7%)	1 (3%)	1 (10%)
2017	13 (15%)	6 (19%)	3 (30%)

206. See Cantone & Giffin, *supra* note 8, to obtain detailed information regarding this third category of certified question events across the three examined circuits.

207. See Cantone & Giffin, *supra* note 8, for more detailed information.

2018	21 (24%)	4 (13%)	1 (10%)
Total	89	31	10

Table 1. Certified Questions, by Circuit and Certifying Year

2. *The Certified Question Process*

We also examined the lower courts from which the court of appeals cases originated, the courts to which the certified questions were sent,[208] and whether the certified question process was initiated with a motion by the parties or through a court of appeals *sua sponte* order.[209]

a. *Ninth Circuit*

In the Ninth Circuit, the cases originated in 22 different U.S. district courts and a Bankruptcy Appellate Panel, but about half originated in California federal district courts (46%, or 41). Of those, eighteen originated in the Central District of California and 16 originated in the Northern District of California. The next most common courts were the District of Nevada (12), and the District of Oregon and the Western District of Washington (10 each).

As would be expected from the share of cases with certified questions originating in California federal district courts, the Ninth Circuit certified questions most often to the Supreme Court of California (47%, or 42). This occurred more than three times as often as to the Supreme Court of Washington (14%, or 12) or the supreme courts of Nevada and Oregon (12%, or 11 each).[210]

According to the available data, seventy-six (85%) of the certified questions were ordered *sua sponte*. The remaining 13 (15%) originated by party motion. About half of the motions (53%, or 7) were contested by opposing counsel.[211] The Ninth Circuit requested briefings from the parties on eight certified questions (9%). Each time the Ninth Circuit requested a briefing, it later certified the question.

208. The circuits generally transmitted the documents the same day of the certified question order. This occurred in 90% of the Ninth Circuit, 97% of the Third Circuit, and three of the four Sixth Circuit certified questions with an available transfer date.

209. While rare, the circuits did certify cases to courts outside of their circuit, notably from the Ninth Circuit to the D.C. Court of Appeals and Supreme Court of Michigan, and from the Third Circuit to the supreme courts of Indiana, South Carolina, and Virginia.

210. In examining the courts from which certified questions originate or to which they are sent, we note that frequency trends might merely reflect the distribution of cases across states. For example, the Ninth Circuit might certify questions to the California Supreme Court due to the underlying number of cases that originate in California federal courts, not because of any preference or expectation as to how the California Supreme Court might respond.

211. We identified contested certified question motions through searches of the docket and within the text of documents relevant to the certified question activity (e.g., the motion, court order, any corresponding party filings).

b. *Third Circuit*

In the Third Circuit, the cases most often originated from the Eastern District of Pennsylvania or the District of New Jersey (32%, or 10 each). Three cases each originated from the District of Delaware, the Middle District of Pennsylvania, and the Western District of Pennsylvania, and one case each originated from the Bankruptcy Court for the District of Delaware and the District of the Virgin Islands, the only territorial court represented in our database. The Third Circuit then certified the most cases to the Supreme Court of Pennsylvania (42%, or 13), followed by the Supreme Court of New Jersey (35%, or 11) and Supreme Court of Delaware (10%, or 3). One case each was certified to the supreme courts of Indiana, South Carolina, the Virgin Islands, and Virginia.

Almost every certified question (90%, or 28) originated from a *sua sponte* Third Circuit order. The remaining three originated in a party motion, with two contested by opposing counsel. The Third Circuit requested briefings or oral arguments regarding the decision to certify for four cases (13%) and, as with the Ninth Circuit, thereafter certified the question each time.

c. *Sixth Circuit*

While there were only 10 certified questions in the Sixth Circuit, the cases originated in seven different courts. The courts with two cases each were: the Southern District of Ohio, the U.S. Bankruptcy Court for the Southern District of Ohio and the Western District of Kentucky. One case each originated in the Eastern District of Kentucky, the Northern District of Ohio, the Eastern District of Tennessee, and the Middle District of Tennessee. The Sixth Circuit certified the questions to the supreme courts of Ohio (50%, or 5), Kentucky (30%, or 3), and Tennessee (20%, or 2).

The certified questions originated both through party motion (4, or 40%) and *sua sponte* orders (6, or 60%). Three of the four motions were contested. The Sixth Circuit referred two of the certified question motions to a hearing panel; both were later certified by the Sixth Circuit.

3. *State Supreme Court Response*

In this Section, we analyze the responses from the state supreme courts,[212] which are also represented in Figure 2. To obtain this data, we examined the federal docket for entries regarding state court activity and reviewed relevant filings and orders. When providing the state grant percentage below, we include cases with an explicit grant from the state court either on the docket or in an underlying document or, in the absence of this, evidence of an earlier grant (e.g., a resulting state court

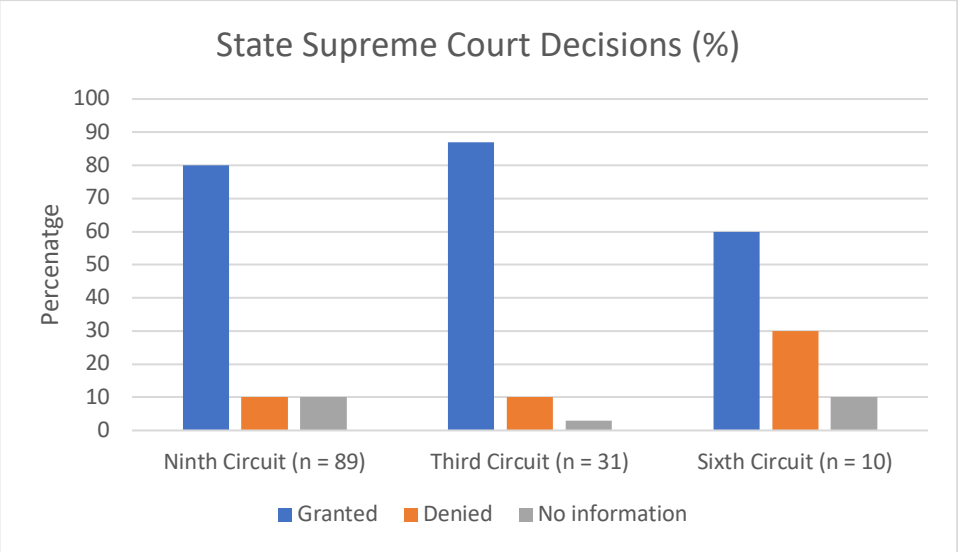
212. All responses to the certified questions came from state supreme courts, rather than territorial courts or the D.C. Court of Appeals, so we use "state supreme court" in our discussion.

opinion). We recommend that future research address certified question activity from the state supreme court side.[213]

In the Ninth Circuit, state supreme courts granted 80% (71) and declined 10% (9) of the certified questions, with no federal docketing of state action for the remaining 10% (9). This last category included two different sets of certified questions in a single case that had not yet terminated at the time of analysis.[214] The state supreme courts issued an opinion responding to 43 (61%) of the granted certified questions. This was about half (48%) of the 89 certified questions in the Ninth Circuit.[215]

In the Third Circuit, the state supreme courts granted 87% (27) of the certified questions, declined 10% (3), with no federal docketing of state action in the remaining one case (3%). The state court issued an opinion regarding the question of state law for 24 (92%) of the 27 certified questions it granted. This was about three-quarters (77%) of the 32 certified questions in the Third Circuit.

In the Sixth Circuit, the state supreme courts granted six (60%), declined three (30%) and there was no further information in the remaining one case (10%).[216] The state supreme court issued an opinion in 5 (83%) of the 6 it granted. This was half (50%) of the 10 certified questions in the Sixth Circuit.



213. Access to certified question information on state supreme court websites varies. The Supreme Court of Ohio website was particularly helpful.

214. This category also included the case certified to the D.C. Court of Appeals.

215. Due to a Ninth Circuit practice of administratively closing cases the same day as the certified question order, we anticipate that the opinion rate is an undercount, and should be expected to rise as state courts issue their opinions in appeals that the Ninth Circuit will then re-open. Furthermore, while we examined evidence of the state courts granting or declining the certified question, it might be that the state court later decided not to answer, and this change was not represented on the federal docket.

216. In the final case, the Supreme Court of Ohio did not file the certified question because the Sixth Circuit order "lacked a designation of a moving party." This was corrected, but the case was soon dismissed by the Sixth Circuit.

Figure 2. State Supreme Court Decision on Certified Question Event Reported as Percentages for Each Decision Type

4. *Termination and Outcome*

We then examined termination dates and the courts of appeals' final decisions. We approached this analysis knowing that conclusions regarding terminations and outcomes are limited because not every case had terminated at the time of analysis, and some cases, especially in the Ninth Circuit, were administratively closed pending a state court response.[217]

In fact, the most common outcome in the Ninth Circuit, in 24% (21) of the certified question cases, was administrative closure "pending receipt of the answer to the certified question or notification from the [state] Supreme Court that it declines to answer."[218] Other common outcomes included affirming the lower court's judgment (22%, or 19), dismissing via a Rule 42(b) motion (14%, or 12),[219] reversing and remanding (13%, or 11), and vacating and remanding (10%, or 9). Certified question cases terminated about 36.5 months (median 1,097 days; range: 357 days to 3,157 days) after the appeal was filed. However, we urge caution in interpreting case length data from the Ninth Circuit due to its practice of administratively closing cases pending a state court response. The median case length would be expected to increase once cases re-open to consider the state court's response.

In the Third Circuit, 28 of the 31 certified questions had terminated at the time of analysis. The Third Circuit most often affirmed (32%, or 9), which was more than twice as common as other outcomes; 4 (14%) were vacated and remanded, 4 (14%) were reversed and remanded, and 2 (7%) were affirmed in part, vacated in part, and remanded. The remaining cases each had different, specific outcomes (e.g., affirmed in part/reversed in part, remanded and dismissed in part, and Rule 42(b) dismissal).

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217. If the Ninth Circuit administratively closed the case pending receipt of a state court response and then re-opened the case after that response, we coded the ultimate outcome, not the administrative closure. We discussed this data with a judge on the Ninth Circuit. The judge responded that the decision to administratively close the case pending a state court response is intentional to encourage certification and remove some disincentives that certification might otherwise hold. A long delay awaiting a state's response could negatively affect a judge's average case time and require constant monitoring, whereas administrative closure removes the case from the judge's docket until the parties seek to re-open the case.

218. A typical example of the docket language for these administrative closures is:

> Further proceedings in this case are stayed pending receipt of the answer to the certified question or notification from the Oregon Supreme Court that it declines to answer. The parties shall notify this Court within ten days after the Oregon Supreme Court accepts or rejects certification. If the Oregon Supreme Court accepts certification, the parties shall file a joint status report with this Court six months after the date of acceptance and every six months thereafter until the case is decided. The parties shall then notify this Court within ten days of the Oregon Supreme Court's decision. The Clerk is directed to administratively close this docket, pending further order.

219. FED. R. APP. P. 42. (Rule for Voluntary Dismissal).

Eight of the ten Sixth Circuit certified question cases had terminated at the time of analysis. These cases took about 26 months from filing of the appeal to termination (median 769 days; range: 498 days to 1,252 days). Four (50%) were affirmed, two (25%) were dismissed under Rule 42(b), one reversed and remanded, and one remanded.

5. *Timing*

We created and examined timing variables to assess the number of days between case-relevant events other than filing of the appeal and termination (e.g., filing, motion to certify or *sua sponte* order, state court response state court opinion, and termination). Of note, these analyses use medians, rather than means, because extreme values (outliers) do not affect medians as much as means. Thus, medians provide a more accurate picture of when important timing events occur in the certified question cases.[220] The median times between case-relevant events are provided in Table 2 and discussed below.

Ninth Circuit Certified Questions		
Granted by State Court	Filing of Appeal to Certification	636 days
	Certification to State Grant	50 days
	State Grant to State Response	459 days
	State Response to Case Termination	68 days
Declined by State Court	Filing of Appeal to Certification	795 days
	Certification to State Declination	71 days
	State Declination to Case Termination	133 days
Third Circuit Certified Questions		
Granted by State Court	Filing of Appeal to Certification	354 days
	Certification to State Grant	51 days
	State Grant to State Response	342 days
	State Response to Case Termination	108 days
Declined by State Court	Filing of Appeal to Certification	420 days

220. However, medians are not additive in the same way that means are. For example, if the median between the filing of the appeal and the certified question order is X days, and the median between the certified question order and the termination of the case is Y days, the median of filing to termination is not necessarily X+Y.

	Certification to State Declination	99 days
	State Declination to Case Termination	168 days
Sixth Circuit Certified Questions		
Granted by State Court	Filing of Appeal to Certification	460 days
	Certification to State Grant	138 days
	State Grant to State Response	342 days
	State Response to Case Termination	267 days
Declined by State Court	Filing of Appeal to Certification	67 days
	Certification to State Declination	89 days
	State Declination to Case Termination	83 days

Table 2. Median Times Between Case-Relevant Events for Cases with Certified Questions (By U.S. Court of Appeals)

a. *Ninth Circuit*

On average, the Ninth Circuit certified the state question almost two years after the appeal was filed (median 656 days), and the cases terminated about one year after certification (median 364 days).[221] Certified questions ultimately granted by the state court were certified sooner by the Ninth Circuit (median 636 days) than those ultimately declined (median 795 days). In cases with a party motion to certify, the party filed the motion about five months after the appeal was filed (median 159 days). The certification order then came about 18 months post-motion (median 552 days). The cases terminated about 36.5 months after the appeal was filed (median 1,097 days).

Looking to the state court decisions, the state court granted the certified question about two years after the appeal was filed (median 711 days), but less than two months after the Ninth Circuit order (median 50 days). The state court declined the certified question about 32 months after the appeals was filed (median 952 days), and about two and a half months after the Ninth Circuit order (median 71 days).

Cases with certified questions granted by the state court terminated about one year after that grant (median 333 days). As stated *supra*, 21 cases were administratively closed at the time of the certification order. This median includes these closed cases, as well as those that remained open and were later terminated by the Ninth Circuit, with or without a response from the state court. Thus, one

221. However, due to Ninth Circuit practice of often administratively closing the case, this included cases that terminated before the certification order. Thus, the range here is from 122 days before to 2,194 days after certification.

should be cautious when interpreting this number. The eight terminated cases with a certified question declined by the state court terminated about four and a half months after that declination (median 133 days).[222]

The state court issued an opinion in 43 terminated cases. The opinion was submitted to the Ninth Circuit about 15 months after the state court granted the certified question (median 459 days), and about 17 months after the Ninth Circuit certified the question (median 508 days). For certified questions originating with a party motion, the state court granted the certified question about 19 months after the motion was filed (median 572 days). The state opinion rate was higher, and the process took less time for questions certified through *sua sponte* order, than in cases that originated from a party motion to certify. The state court issued an opinion in 7 of these 12 cases. Cases with an issued opinion terminated about two months after that opinion (median 68 days).[223]

b. *Third Circuit*

The Third Circuit certified the question about one year after the appeal was filed (median 357 days), and the cases terminated about 14 months after certification (median 414 days). This timing is notably shorter than in the Ninth Circuit. The cases terminated more than two years after filing (median 816 days), which was a shorter case duration than in the Ninth Circuit. As in the Ninth Circuit, the time between filing and certification was longer in the very few cases that the state court ultimately declined (median 420 days) than in cases that the state court granted (median 354 days). Three (10%) of the certified questions originated with a party motion; timing information was only available on the docket for two of these, so separate analyses were not performed.

Looking to the state court decisions, the state court granted the certified question about 15 months after the appeal was filed (median 409 days), and about two months after the Third Circuit order (median 51 days). The state courts only declined three certified questions. When they did, it was about three months after the Third Circuit order (median 99 days). The case terminated about 12 months after the state court granted the certified question (median 358 days) or about 5.5 months after the state court declined it (median 168 days).

The state court issued an opinion in 22 terminated cases. The opinion was submitted to the Third Circuit about 12 months after the state court granted the certified question (median 342 days), and about 17 months after the Third Circuit certified the question (median 380 days). This opinion was submitted more than two years after the appeal was filed (median 784 days). Cases with an issued opinion terminated about three months after that opinion (median 108 days).

222. One case terminated before the declination. The other seven terminated after the state court declination, with the earliest being three days after.

223. Only one case terminated before the response was received and one case terminated the same day.

c. *Sixth Circuit*

As a reminder, there were only 10 certified questions in the Sixth Circuit. Thus, the data analyses were more limited and are less stable/reliable. The Sixth Circuit certified the question about 11 months after the appeal was filed (median 323 days), and about 11 months after a motion to certify was filed by the parties (median 322 days). The four motions were filed shortly after the appeal was filed (about 1.5 months later, or a median of 43 days). The cases terminated about 20 months after the motion (median 600 days) and about 15 months after the Sixth Circuit order (median 449 days).

Interestingly, unlike in the Ninth and Third Circuits, the time between filing and certification was longer in the cases that the state court ultimately granted (median 460 days) than in cases that the state court declined (median 323 days).

Looking more specifically to the state court decisions, the state court granted six certified questions, almost 21 months after the appeal was filed (median 615 days), and about 4.5 months after the Sixth Circuit order (median 138 days). The state court granted the certified question about 15 months after a party motion to certify was filed (median 457 days). The state court declined three certified questions about 14 months (median 412 days) after the appeal was filed, and about 3 months (median 89 days) after the Sixth Circuit order. Because motions to certify were filed shortly after the appeal was filed, the declination also occurred about 14 months (median 411 days) after the motion. Cases terminated about a year after the state court grant (median 350 days), and about three months after the state court declination (median 83 days).

The state court issued its opinion more than two years after the appeal was filed (median 735 days), about 14 months after the Sixth Circuit order (median 425 days), and about 9.5 months after the state court grant (median 267 days). The cases terminated about two months after the opinion (median 67 days).

B. *Denied Certified Questions*

We also examined the certified questions that were denied by the courts of appeals.[224] The prevalence of denied certified questions varied greatly by circuit. The Ninth Circuit denied only one certified question motion, so we do not provide further analysis.[225] The Third Circuit decisions split more evenly between certifying (31) and denying (22), while the Sixth Circuit was less likely to certify

224. In preparing this Article, we returned to our prior work, CANTONE & GIFFIN, *supra* note 8, and updated the data to better account for the difference between certified questions of state law and certification to the U.S. Supreme Court. For example, one case identified as a Ninth Circuit certified question case in the earlier work was removed from the database used for this Article. In the situation of any differences, the data presented herein should be those relied upon.

225. This one case was a property case that was stayed pending a certified question decision in another case and then denied two years later. We identified a second, explicit denial. However, it was a habeas corpus case that, upon further review, we determined was a certificate of appealability to the U.S. Supreme Court, despite certified question language. Following our protocol for the database, we removed this certified question event.

(10) than deny (30). This Section examines only certified question events that originated from party motion and were denied by the circuit court.

1. *Third Circuit*

We examined 22 certified question motions denied by the Third Circuit between 2010 and 2018. In 86% (19), there was an explicit denial on the docket. In the remaining 14% (3), the denial was noted in an opinion. The cases originated in five different courts, with 9 (41%) from the Eastern District of Pennsylvania. This is about double the second-most common district, the District of New Jersey (with 23%, or 5).[226] Although all were denied, more than half (55%, or 12) were intended for the Supreme Court of Pennsylvania.[227]

Denied certified questions were most often in insurance or contracts cases (each with 27%, or 6), or bankruptcy appeals (14%, or 3).[228] There were also two personal injury/ product liability cases, a prisoner case, a Labor-Management Relations Act case, and two statutory actions. Table 2 provides the number of motions denied each year during the 2010-2018 time frame.

Year	# Denied Motions by Third Circuit	# Denied Motions by Sixth Circuit
2010	1	6
2011	2	2
2012	2	4
2013	3	9
2014	6	--
2015	4	5
2016	--	3
2017	2	1
2018	2	--
Total	**22**	**30**

Table 2. Denied Certified Question Motions, by Circuit and Year

Twenty-one of the 22 cases with denied certified questions had terminated at the time of analysis. Of those, 71% (15) were affirmed in full, 14% (3) were affirmed in part, 10% (2) were vacated and remanded, and 5% (1) was reversed and remanded.

The cases took about one year from filing of appeal to termination (median 368 days). Parties filed the certified question motion about 5.5 months after filing the appeal (median 164 days), and the case terminated about 6.5 months after the

226. The remaining certified questions originated in the District of the Virgin Islands (4) and Middle and Western Districts of Pennsylvania (2 each).

227. The remaining certified questions were intended for the Supreme Court of the Virgin Islands (4), Supreme Court of Jersey (3), and Supreme Courts of Delaware, Florida, and New York (1 each).

228. Certified questions in the Third Circuit were most often insurance and personal injury/product liability cases, with six (19%) of each.

motion to certify a question (median 195 days). Half of the cases (11) terminated the same day as the denial (median 0 days).

2. *Sixth Circuit*

We examined 30 certified question motions denied by the Sixth Circuit between 2010 and 2018. The cases originated in eight different courts, with the most from Kentucky (23%, or 7) from the Western District of Kentucky and 20% (6) from the Eastern District of Kentucky).[229]

Although all were denied, 40% (12) were intended for the Supreme Court of Kentucky, followed by the Supreme Courts of Ohio and Tennessee, with 20% (6) each.[230]

Denied certified questions came from 18 different case types. While certified questions ordered by the Sixth Circuit most often came from bankruptcy cases, denials most often were in civil rights (20%, or 6) or insurance (17%, or 5) cases. Among the remaining cases, there were three product liability cases, two truth-in-lending cases, and two other types of contract cases. As shown in Table 2, the motions were filed across the 2010-2018 time frame.

All 30 cases with denied certified question motions had terminated at the time of analysis. More than half (54%, or 16) were affirmed. Of the remaining outcomes, 10% (3 each) dismissed the appeal for lack of appellate jurisdiction or denied a certificate of appealability. Additionally, in two cases each (7%), the final outcome was: reversed and remanded, Rule 42(b) dismissal, or affirmed and remanded. One case was affirmed in part/reversed in part, and, in one case, the Sixth Circuit denied the petition for panel rehearing.

The cases took about 14.5 months from appeal filing to termination (median 439 days). Parties filed the certified question motion about 2.5 months after filing (median 75 days). The Sixth Circuit denied the certified question motion about 6 months after it was filed (median 181 days), which was almost 13 months after the appeal was filed (median 392 days). The case terminated about one year (median 351 days) after the motion was filed. The cases generally terminated the same day as the denial (median 0 days); more than half (58%) terminated the same day.

VI. DISCUSSION

This Article examined the use of certification of questions of state law, providing background on the certification procedure and new data as to how the procedure is being used. We recognize that our study only examined three U.S. courts of appeals – those for the Third, Sixth, and Ninth circuits. While we sought

229. The remaining denied certified question motions were dispersed fairly evenly, with three from cases in five of the remaining courts: the Eastern District of Michigan, the Northern District of Ohio, the Southern District of Ohio, the Eastern District of Tennessee, and the Middle District of Tennessee. There were two denied certified question motions from cases originating in the Western District of Tennessee.

230. Two certified questions were intended for the Supreme Court of Michigan. One certified question each was intended for the Supreme Court of Georgia and the New York Court of Appeals. One motion did not specify the intended court to receive the certified question.

to examine circuits that varied in their use, the data from these three circuits may or may not generalize to others. Examining the data from these three circuits, however, presents some interesting contrasts and similarities that can inform the way we think about the certification procedure, and some of the debates surrounding the perceived benefits and burdens.

In this Section, we discuss the patterns found in our own data. We will then consider how the data reflects on prior discussions of the benefits and burdens of the certification procedure, before finally discussing the broader implications

A. *Insights from the Data*

Our data examined both cases in which the U.S. Court of Appeals certified the question to the relevant state court and cases in which it denied motions to do so. We focus our discussion on certified question events resulting in an order to the relevant state court.[231]

1. *Certification Rates*

Certification rates varied between the circuits. The Ninth Circuit had the most certified question events during the study period, which may be explained by its size and population. However, the Ninth Circuit was also the most likely to certify a question, certifying in 93% (89) of the certified question events. While this is partially an artifact of the high rate of *sua sponte* certification orders (85% of the certified questions, according to the available data), it does not account for the discrepancy between circuits. In fact, 90% of the Third Circuit certified questions originated from *sua sponte* orders, yet the Third Circuit had an overall certification rate of 49%. Likewise, 60% of the Sixth Circuit certified questions originated from *sua sponte* orders, though the overall certification rate was only 17%. The Ninth Circuit's certification rate suggests that its judges find lasting and substantial value in the use of the certification procedure.

The Sixth Circuit had the lowest certification rate, and it also had the lowest rate of certified question acceptance in the state courts. Questions certified by the Sixth Circuit were only accepted by the state courts 30% of the time, compared to 80% of questions in the Ninth Circuit, and 87% of questions in the Third Circuit. These figures may be related. Perhaps the Sixth Circuit certifies fewer questions because the judges expect the state court to decline the question and, thus, do not want to impose any additional delay. Future research addressing the state court perspective on the certification procedure, as well as perceived costs and benefits, could allow for a better understanding of the bidirectionality of this relationship.

Certifying fewer questions could also be a purposeful way to conscientiously use limited federal and state court resources. While we typically consider the burdens of the certification procedure to be borne by state courts, especially given their relatively larger dockets and fewer available resources, the certification process also requires work from the federal certifying court. The federal court must

231. Few patterns and commonalities emanate from the cases with a rejected motion to certify a question. In fact, we only identified one such case in the Ninth Circuit.

carefully consider the proposed questions and, if it seeks to certify them, create the best formulation of the question(s) and prepare – or review the parties' preparation of – a statement of facts relevant to the case. This is a great deal of additional work, especially if the certified question is declined. Courts might consider it to be a better use of their resources – as well as the litigants' time and resources – to make an *Erie* guess initially, rather than do the certification work if, ultimately, they would still make an *Erie* guess if the state court is not expected to grant review. In the Eighth Circuit, for example, there would be no utility in certifying questions of state law to the Missouri Supreme Court, as that court has clearly stated it will not entertain such certified questions.[232]

Authorizing language and state court interpretations may also influence the lower certification rate in the Sixth Circuit. Michigan, one of only four states in the Sixth Circuit, rarely accepts certified questions.[233] However, any effects of Michigan's stance is likely balanced by Ohio. Our data shows that 8 of the 10 certified questions in the Sixth Circuit were sent to Ohio and Kentucky, and earlier data from the Court Statistics Project found that Ohio reported more certified questions than any other reporting state or territory in 2014, 2015, and 2016.[234]

In addition to having the lowest certification rate, the Sixth Circuit also stands apart in the types of cases it typically certifies. Insurances cases are the most commonly certified type of case in both the Ninth and Third Circuit, with civil rights and personal injury/product liability, respectively, coming in second. Certified questions in the Sixth circuit, however, most often involved bankruptcy, followed by personal injury, issues. The fact that insurance did not break into the top two types of cases for the Sixth Circuit is noteworthy not only for its deviation from the other two circuits, but also because insurance law is an area with important state law components,[235] and is frequently a topic in certified question cases.

Despite these differences, the data from the three circuits share commonalities as well. Based on the available data, all three circuits are more likely to certify a question that the court raised itself, *sua sponte*. *Sua sponte* orders were the origination for 85% of the certified questions in the Ninth Circuit, 90% in the Third Circuit, and 60% in the Sixth Circuit. Although this finding could partially be an artifact of incomplete data regarding how certified questions originated, this result makes intuitive sense. The courts of appeals have iterated standards for when certification is appropriate, and U.S. Supreme Court case law has delineated the restricted conditions under which certification is advised.[236] The court itself would also be in the best position to decide whether assistance from the state courts would be necessary or helpful. Litigants who make certified question

232. *See supra* Part III.

233. *See supra* Part III.

234. *Court Statistics Project*, *supra* note 193. In 2014 and 2015, Ohio reported almost three times as many certified questions as the next highest-reporting state, West Virginia (29 vs. 10 in 2014; 31 vs. 13 in 2015); CANTONE & GIFFIN, *supra* note 8.

235. *See generally* TOM BAKER & KYLE D. LOGUE, INSURANCE LAW AND POLICY: CASES AND MATERIALS (Rachel E. Barkow et al. eds., 4th ed. 2017).

236. *See supra* Section II.A.

motions, conversely, may be more motivated by which court they believe will suit their interests than by whether their question meets certification standards.

Finally, the circuits also share a most likely result after a certified question: affirming the order appealed from.[237] The certified question case was affirmed in 22% of the Ninth Circuit, 32% of the Third Circuit, and 50%[238] of the Sixth Circuit cases.

2. *Timing*

The timing of key certified question events also shares some commonalities across circuits. In both the Ninth and Third Circuits, certified questions ultimately granted by the state court take less time to certify than questions ultimately declined by the state court.[239] While we cannot know for sure without further research from the state court perspective, we initially hypothesize that this may reflect the quality or necessity of the question. That is, some questions are more clearly unsettled and important to the case and to state law interests than others. These questions are more quickly recognized by the courts of appeals as questions worth asking, and state courts are then more likely to agree with this assessment and grant the certified question. This may suggest that the courts of appeals are acting as appropriate gatekeepers, only sending those questions worthy of the state courts' time and resources.

In the Ninth and the Third Circuits, the state courts granted a certified question about 2 months after it was certified, while in the Sixth Circuit, the state courts accepted a certified question about 4.5 months after it is certified. The slower acceptances for states in the Sixth Circuit could be due in part to their reduced familiarity with (or hesitancy to use) the process, making the procedure more effortful. Individual judge attitudes toward certification could also affect these decisions and vary within the three circuits studied.

In each circuit, the certified question cases terminated about one year after the state court granted the certified question order. Additionally, the time between a state court opinion and case termination was similar for all three circuits: about 2 months in the Ninth and Sixth Circuits, and about 3 months in the Third.

Across all three circuits, the state court declined a question about 3 months after it was certified. However, there was variation in the time from state court declination to case termination. The cases terminated about 4.5 months after a declination in the Ninth Circuit, 5.5 months after declination in the Third Circuit, and only 3 months after declination in the Sixth Circuit. The shorter time in the Sixth Circuit could suggest that in those few instances where the Sixth Circuit does certify a question, it is the last issue standing. That is, the Sixth Circuit attempts to

237. This is if you remove the 24% (21) of certified question cases in the Ninth Circuit that were administratively closed when the question was certified, and are likely to reopen when or if an answer is supplied by the state court.

238. We only have nine cases in the Third Circuit because one case did not have a response on the record.

239. It was not possible to perform this analysis in the Sixth Circuit due to the low number of certified questions.

resolve the case through other means before using the certification procedure. Once the state court declined the question, the case was quick to resolve.

B. *Implications for Future Use*

This Article aims to provide data to inform some of the discussions scholars and jurists have had weighing the benefits and burdens of the certification procedure. The most obvious application of our data is to the discussion regarding whether certified questions pose a time burden on the court and litigants. As reviewed above, some scholars maintain that using the certification procedure reduces overall time expended by the judicial system as it provides a definitive answer, reducing repeat cases concerning the same issues.[240] Others point out that individual litigants in certification cases are still expending additional time and cost, regardless of how the system benefits overall.[241] Our data provide updated, empirical information about how long the certification process takes across a variety of case types.

Cases with certified questions terminated about a year, for the Ninth and Third Circuits, and about 15 months, for the Sixth Circuit, after the question(s) was certified. These cases terminated about 2 months, in the Ninth and Third Circuits, or about 3 months, in the Sixth Circuit, after an answer was received from the state court. If one considers the elapsed time between sending the certified question to the state court and the state court's ultimate response as the amount of time spent on certification, that elapsed time was about 10 months for the Ninth and Third Circuits, and about 12 months in the Sixth Circuit.

One question that remains is how the duration for cases with certified question events compare to appellate cases overall. Our data show that in the Ninth Circuit, the median time from filing to termination in the courts of appeals for cases with certified question events was about 36 months (1079 days median). Initial comparisons can be made to data publicly available from the Administrative Office of the U.S. Courts (AO). For the 12-month periods ending March 31 of 2015-2018 (during our study period), the median disposition time for Ninth Circuit Courts of Appeals cases overall ranged from 11.0 to 15.2 months.[242] Thus, it initially appears that the case duration of Ninth Circuit cases with certified question events are double to triple those in the Ninth Circuit overall. This trend held up on initial examination of the Third Circuit.[243] Overall, our data found that the median time from filing to termination in the Third Circuit was about 19 months (568 days median). Again, this median time is about double the case duration reported in the AO data, with median disposition times in that public data ranging from 7.8 months to 8.8 months in the 2015-2018 time span.[244]

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240. *See supra* Section II.B.1.

241. *See supra* Section II.B.2.

242. *See generally Caseload Statistics Data Tables*, U. S. CTS., https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables (last visited Nov. 4, 2021).

243. We did not perform comparisons between the case durations in our database and those from the AO for the Sixth Circuit due to the smaller number of cases.

244. *Caseload Statistics Data Tables*, *supra* note 241.

However, these data should be interpreted with great caution and further research is needed to ensure that the comparisons are appropriate and account for case characteristics and complexity (e.g., case types, number of parties and claims, civil vs. criminal filings, decisions on the merits). Research matching certification and non-certification cases on these case characteristics is warranted. Whether the certification procedure adds two months or two years to the duration of the case, it does add time. However, the time must be considered alongside the case's entire duration from initial filing to ultimate termination after appellate review. Furthermore, had the federal court not certified the question, it would have had to devote an unknown amount of time to studying state law to arrive at an *Erie* guess. While we do not have data determining if certification is faster or slower than an *Erie* guess, this warrants further examination as well.

Questions remain as to what amount of time *is* excessive, and what occurs during the elapsed time inherent in the certification process. In the Ninth Circuit, for example, certified question cases were often administratively closed, pending a response from the state courts. An examination of the dockets found very little, if any, activity during this period. In other cases, and districts, however, docket entries continued, including updates on substantive issues and settlement discussions. Notably, certified questions declined by the state courts were declined after only about three months. This means that federal courts are not wasting a large amount of time when no gain is ultimately received from certification. Examining what is happening during the certification period, particularly the cost to the parties and additional workload for the courts and attorneys, warrants further examination as part of any cost-benefit analysis.

Moreover, from the litigant perspective, how does the additional time correspond with additional litigation costs? Our data only shed some light on this burden. Briefs on the certification issue were requested from parties only 9 (9%) times in the Ninth Circuit, 4 (13%) times in the Third Circuit, and the Sixth Circuit sent 2 (20%) to a hearing panel. In each of these instances, the question was later certified, so the work was not expended without result, and these briefing materials could be at least partially reused in the event that the state court requested briefings. However, when the state court grants the certified question, additional work may be necessary. While any additional time added to a case is a burden on litigants that should not be blithely dismissed, we believe much of the additional time burden for certification is without an associated monetary burden, as the dockets either go quiet or proceed with matters that would need to be addressed even in absence of the certified question. However, the burden of any time delay does not affect all parties equally. A well-resourced corporation appealing a large monetary judgment by the district court is likely less concerned with any delays associated with the certification procedure than a less-resourced individual plaintiff seeking monetary damages.

In addition to the burdens placed on litigants, our timing data also shine some light on the burdens faced by the state courts. The burden that certification shifts to the state courts is one of the clearest and most compelling costs mentioned by scholars and jurists alike. Certification indisputably makes more work for state court judges; however, several findings in our data suggests that it is not the deluge some expected.

First, federal judges appear skilled at identifying those questions most appropriate for the certification procedure. Our data showed that federal judges more quickly certified questions ultimately accepted by the state court, compared to those ultimately declined by the state court. This indicates federal judges are efficiently identifying issues that are unsettled, determinative, and of interest to state judges, or at least worthy of accepting. This finding suggests that federal judges are performing their gatekeeping function for certified questions well. However, another aspect of our data suggests that perhaps even the limited number of questions currently certified could be reduced.

In the Ninth and Third Circuits, approximately a quarter of all certified question cases were affirmed. In the Sixth Circuit, half of all certified question cases were affirmed. In each of these cases, the courts of appeals believed that a question of state law was so unsettled and consequential that they certified it to the relevant state supreme court: a step *not* taken in the lower federal courts.[245] Nonetheless, the courts of appeals affirmed the decision that the lower federal courts made absent the state courts' assistance. This could be interpreted as evidence that these lower courts are better at making *Erie* guesses than some scholars and jurists have argued. It also indicates that, perhaps, courts of appeals could have relied on the careful, considered analysis of the district judges, allowing the case to proceed without the pauses required by the certification procedure. Thus, while based on our data the overall burden of certification to any individual state court does not seem great, it may still be true that federal courts are certifying cases they could resolve without imposing *any* burden to the state courts.

Relevant to this discussion of how well federal courts are performing their gatekeeping function is the sheer number of questions certified to state courts over the study period. The Ninth Circuit certified almost three times as many as the next closest circuit, the Third Circuit. Yet even in the Ninth Circuit, the most questions certified in any year in our database was 21, in 2018. This number could present a burden on any individual state court, but these certified questions were sent to multiple courts. Over the entire study period, the California Supreme Court received the most questions from the Ninth Circuit, 42 questions across the eight year period. Thus, while certification varies across circuits and states, even the state that received the most certified questions, in the most active circuit we reviewed, receives only a few requests each year. While future research should work with the individual state and territorial courts of last resort to identify and categorize the certified question requests they receive each year, our data suggests that state courts are not being overwhelmed with certified questions, at least not from the Ninth Circuit, and even less so from the Third Circuit and Sixth Circuit. If the number of certified questions continues to increase, new data will be necessary to analyze the calculus between perceived costs and benefits of the procedure, as it could become more of a burden in the future.

245. It is also important to note that not every federal district court has the ability to certify such questions.

C. *A Call for Future Research and Education*

We recognize that our study only examined three U.S. Courts of Appeals. Although data from those courts represents a wide range of use, it is likely that other U.S. Courts of Appeals use the certification procedure differently. Accordingly, we recommend additional research, expanding our work to other circuits to better understand the representativeness of the U.S. Courts of Appeals for the Third, Sixth, and Ninth Circuits. Additionally, future research should not stop with the circuit courts. Examining the certified questions emanating from district courts and other courts, including bankruptcy courts, will provide a better picture of all certified question requests that appear before the state supreme courts.

Furthermore, this research was completed with federal case data and emanated from work requested by the Judicial Conference Committee on Federal-State Jurisdiction and completed by the Federal Judicial Center. Future research should work closely with the individual state and territorial courts of last resort, as well as tribal courts, to identify and examine the certified question requests they receive each year, as well as more specifically addressing how state courts perceive the benefits and burdens of the certification procedure. Our data only examine certified questions from three circuit courts. If state supreme courts also receive a significant number of certified questions from other courts, it would alter the balance between the burdens and benefits of the certification procedure.[246] A richer understanding of the state court perspective would also be necessary to fully address concerns about the one-sided nature of certification – from the federal courts to the state courts but not vice versa. Additionally, our data cannot directly address concerns expressed by courts, including the Missouri Supreme Court, that certified questions seek advisory opinions, or the concern that asking the questions may be an abdication of duty in some cases. However, support for the procedure throughout the country and differentiation between abstention and certification suggests that most jurists do not find these concerns disqualifying. Despite these limitations, our data offer value to the courts, presenting interesting contrasts and similarities that can inform the way we think about the certification procedure and some of the debates surrounding it.

Finally, we call for expanded federal-state educational programming on issues surrounding certification. Judicial education agencies such as the National Center for State Courts, Federal Judicial Center, and National Judicial College can offer additional guidance to state and federal judges regarding the certification procedure and how it might be utilized in their courts. This education can also occur within bar associations or state-federal judicial councils,[247] such as how the Advisory Group to the New York State and Federal Judicial Council issued a handbook on certified questions of state law.[248]

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246. *See* CANTONE & GIFFIN, *supra* note 8 (citing the *Court Statistics Project*, *supra* note 193, for more information on available state court data).

247. *See* CANTONE B, *supra* note 18.

248. N.Y. PRACTICE HANDBOOK ON CERTIFICATION OF STATE LAW QUESTIONS, *supra* note 100.

VII. CONCLUSION

In late 2020, the U.S. Supreme Court put a spotlight on the certification of questions of state law, addressing perceived benefits (e.g., comity, providing definitive answers) and burdens (e.g., increasing the time and cost of litigation).[249] These debates have been ongoing for decades, with empirical research examining the use of the certified question procedure only rarely. In this Article, we sought to update and extend previous empirical work. Our research can inform some of the discussions regarding the use of certified questions by providing data on how often the certified question procedure is utilized in three U.S. Courts of Appeals, how often the circuits certify a question, how often states grant the certified question, and how long the process takes. Although our data are limited to three circuits, we believe they offer helpful information for courts that must decide whether or not to certify a question and scholars who continue to discuss and weigh the benefits and drawbacks of the procedure. We also call for more judicial education and research, examining this procedure in more circuits as well as from federal district court and state supreme court perspectives. Examining the procedure from multiple perspectives will allow scholars and the courts to better assess whether the benefits of certification outweigh the burdens and how certified questions might enhance federal-state court cooperation.

249. *See* Carney v. Adams 141 S. Ct. 493, 503 (Sotomayor, J., concurring) (2020). *See generally* Mckesson v. Doe, 592 U.S. __, 141 S. Ct. 48 (2020) (per curium).