

Certified Questions of State Law

An Examination of State and Territorial Authorizing Statutes

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Prepared for the
Judicial Conference Committee on Federal-State Jurisdiction

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Introduction

Certifying questions of state law is a legal procedure by which federal courts can obtain definitive answers from state and territorial courts on unsettled issues of state law that arise in federal legal proceedings. Forty-nine states, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and the Mariana Islands all have statutes authorizing certified questions. The one state that does not—North Carolina—is currently examining the issue. However, as addressed in an earlier report focused on U.S. circuit courts, jurisdictions use the certified question process differently.¹ This report, requested by the Judicial Conference Committee on Federal-State Jurisdiction, addresses the 54 existing statutes.

Overall, the statutes authorizing certified questions vary considerably. Some statutes are brief and broad in their language (e.g., “[a/any] federal court” for Vermont, Washington, and the Northern Mariana Islands²) while others are very specific (e.g., Delaware allows 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”³). Delaware is also unique in having the only statute specifically authorizing questions from the U.S. Securities and Exchange Commission (SEC).

We did find some general trends. For example, all but one statute authorize certified questions from the U.S. Supreme Court. Of the 54 examined statutes, 9 (17%) have broad language authorizing certified questions from all federal courts, while an additional 8 (15%) authorize questions from the U.S. Supreme Court, U.S. circuit courts, and U.S. district courts. A further six (11%) authorize certified questions from the U.S. Supreme Court, U.S. circuit courts, and state appellate or intermediate courts. All of the statutes authorize certified questions from at least one U.S. circuit court, while 74% authorize certified questions from U.S. district courts. Almost half of the statutes (25, or 46%) authorize certified questions from state or territorial courts. Additional statutes specifically address bankruptcy courts, tribal courts, foreign courts, and specific governmental agencies. Our analysis is provided below, with pertinent parts of the statutes presented in the appendix.

1. Jason A. Cantone & Carly Giffin, Federal Judicial Center, *Certification of Questions of State Law in the U.S. Courts of Appeals for the Third, Sixth, and Ninth Circuits (2010–2018)* (2020).

2. N. Mar. I. Sup. Ct. R. 13; Vt. R. App. P. 14; Wa. St. § 2.60.020.

3. Del. Sup. Ct. R. 41(a)(ii).

General Categories of Authorizing Statutes

In this section we will first examine statutes that authorize certified questions from federal courts before proceeding to examine statutes that authorize questions from other states and territories and tribal and foreign courts.

Federal Courts

All but one of the 54 statutes (98%) authorize certified questions from the U.S. Supreme Court. The lone exception is the New Jersey statute, which specifically only authorizes certified questions from the Third Circuit. In 33 (61%) of the statutes, the U.S. Supreme Court is explicitly named in the authorizing language. More specifically, the 53 statutes authorize certified questions from

- federal courts, broadly and exclusively (9 statutes, or 17%) (e.g., language such as for “any of the federal courts”⁴ in Alabama’s statute, or for “a court of the United States”⁵ in Utah’s)⁶
- the U.S. Supreme Court, U.S. circuit courts, and U.S. district courts (8, or 15%)⁷
- the U.S. Supreme Court, U.S. circuit courts, U.S. district courts, and state appellate or intermediary courts (6, or 11%)⁸
- the U.S. Supreme Court and U.S. circuit courts (5, or 9%)⁹
- any federal court, and at least one appellate level of state, tribal, Canadian, and Mexican courts (5, or 9%)¹⁰
- the U.S. Supreme Court, U.S. circuit courts, U.S. district courts, and U.S. bankruptcy courts (4, or 7%)¹¹
- the U.S. Supreme Court, U.S. circuit courts, and state courts of last resort (3, or 6%)¹²
- any federal court, state appellate court, or tribal court (2, or 4%)¹³

In addition to the specific and expansive authorization in the Delaware statute provided earlier, a number of other statutes provide unique authorization language for

- the U.S. Supreme Court and the Seventh Circuit (Illinois)
- the U.S. Supreme Court, U.S. circuit courts, U.S. district courts, and tribal courts (Arizona)

4. Ala. R. App. P. 18.

5. Utah R. App. P. 41.

6. Alabama, Arkansas, Colorado, Hawaii, Ohio, Utah, Vermont, Washington, and the Northern Mariana Islands.

7. Georgia, Idaho, Indiana, Maine, Nebraska, New Hampshire, Rhode Island, and South Dakota.

8. Iowa, Kansas, Kentucky, Massachusetts, North Dakota, and Guam.

9. Florida, Louisiana, Mississippi, Pennsylvania, and Texas.

10. Minnesota, Montana, New Mexico, Oklahoma, and West Virginia.

11. Alaska, Missouri, Nevada, and Tennessee.

12. The District of Columbia, New York, and Wisconsin (California could be considered a fourth state in this category, but its statute specifically authorizes certified questions from “the United States Supreme Court, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth.” Territories are not specifically included in the other statutes. *See* Cal. R. Ct. 8.548.).

13. Maryland and Michigan (Connecticut authorizes certified questions from “a court of the United States or by the highest court of another state or of a tribe.” *See* Conn. Gen. Stat. Ann. § 51-199b(d)). Of note, we do recognize that “a court of the United States” could also include such courts as the U.S. Court of Federal Claims and the Court of International Trade.

- any federal court and the court of last resort for states, D.C., and territories (the Virgin Islands)
- any federal, appellate, or intermediate appellate state court (South Carolina)
- all federal courts and state district courts (Wyoming)
- the U.S. Supreme Court, U.S. circuit courts, and state and territorial courts of last resort (California)
- the U.S. Supreme Court, U.S. circuit courts, U.S. district courts, and state and territorial courts of last resort (Virginia)
- the U.S. Supreme Court, U.S. circuit courts, U.S. district courts, a panel of the Bankruptcy Appellate Panel Service or the highest appellate court or the intermediate appellate court of any other state (Oregon)
- the U.S. Supreme Court, circuit courts, district courts, and any state courts (Puerto Rico)

More detailed analysis of the authorizations for certified questions from other states and territories is provided in the next section.

U.S. Circuit and U.S. District Courts

All 54 statutes (100%) authorize certified questions from at least one U.S. circuit court. As noted in the prior section, the New Jersey statute does not authorize certified questions from the Supreme Court, only the Third Circuit,¹⁴ while the Illinois statute only authorizes certified questions from the Seventh Circuit (and the U.S. Supreme Court).¹⁵ The remaining 52 statutes authorize questions from all circuit courts.

Not all of the statutes authorize certified questions from district courts. For instance, five statutes (9%) authorize certified questions from the U.S. Supreme Court and U.S. circuit courts, but not U.S. district courts or state or territorial courts.¹⁶ Meanwhile, four additional statutes authorize certified questions from the U.S. Supreme Court, U.S. circuit courts, and at least one level of state court.¹⁷ Wisconsin is an example, allowing certified questions from “the supreme court of the United States, a court of appeals of the United States or the highest appellate court of any other state.”¹⁸

Of the 54 statutes, 39 (72%) do authorize certified questions from district courts, though the precise statutory language varies. Louisiana, Mississippi, Pennsylvania, and Texas allow questions from “any federal appellate court”¹⁹ or, more specifically, “The United States Supreme Court [or] Any United States Court of Appeals.”²⁰ Florida specifically includes the Court of Appeals of the District of Columbia in addition to “the Supreme Court of the United States [and] any circuit court of appeals of the United States.”²¹

14. N.J. Ct. R. 2:12A-1.

15. Ill. Sup. Ct. R. 20.

16. Florida, Louisiana, Mississippi, Pennsylvania, and Texas.

17. California, the District of Columbia, New York, and Wisconsin.

18. Wis. Stat. Ann. § 821.01.

19. Tex. R. App. P. 58.1; La. Sup. Ct. R. XII; Ms. R. App. P. 20.

20. Pa. Code § 29.451.

21. Fla. Stat. Ann. § 25.031.

Bankruptcy Courts

In addition to statutes that authorize certified questions from all federal courts (which presumably include bankruptcy courts), five statutes specifically authorize certified questions from U.S. bankruptcy courts,²² although Tennessee only authorizes certified questions from “a United States Bankruptcy Court in Tennessee.”²³ In addition to these five, the Oregon statute states,

The Supreme Court may answer questions of law certified to it by 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.²⁴

Because Oregon’s statute authorizes certified questions from “a panel of the Bankruptcy Appellate Panel Service” and not bankruptcy courts generally, this statute is considered separate in our categorization.

Other State and Territorial Courts

Almost half of the statutes (25, or 46%) specifically authorize certified questions from state or territorial courts. For example, California’s statute authorizes certified questions from “the court of last resort of any state, territory, or commonwealth.”²⁵

The statutes vary in the specific state or territorial courts authorized. Most commonly, 19 of the 25 (76%, or 35% of all 54 statutes) with such provisions authorize certified questions from the state’s highest court or court of last resort.²⁶ Only three of these statutes—from California, Virginia, and the Virgin Islands—specifically authorize certified questions from the territorial courts of last resort.

Authorization from state courts is not limited to the highest courts. Of the 25 statutes, 14 (56%, or 26% of all 54 statutes) authorize certified questions from more than a state or territory’s highest court.²⁷ This includes Wyoming’s statute, which notes, “The supreme court may answer questions of law certified to it by a federal court or a state district court, and a district court may answer questions of law certified to it by a circuit court, municipal court or an administrative agency.”²⁸ Puerto Rico also authorizes certified questions from “the lower courts of the states of the United States of America.”²⁹

Six of the statutes authorizing certified questions from any state’s appellate courts make no mention of territorial courts.³⁰ Interestingly, the Puerto Rico statute also does not reference other territorial courts.

22. Alaska, Delaware, Missouri, Nevada, and Tennessee.

23. Tenn. Sup. Ct. R. 23.

24. Or. Rev. Stat. § 28.200.

25. Cal. R. Ct. 8.548 (California’s statute is the only one to use the term *commonwealth*).

26. 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.

27. Iowa, Kansas, Maryland, Michigan, Minnesota, New Mexico, North Dakota, Oklahoma, Oregon, South Carolina, West Virginia, Wyoming, Guam, and Puerto Rico.

28. Wyo. R. App. P. 11.

29. P.R. Sup. Ct. R. 24s(g) (2018 supp.; only available in Spanish).

30. Maryland, Michigan, Minnesota, New Mexico, Oklahoma, and Puerto Rico. Interestingly, Maryland, Michigan, Minnesota, New Mexico, and Oklahoma authorize certified questions from tribal courts, but not territorial courts (at least not explicitly).

Tribal Courts

Nine statutes authorize certified questions from tribal courts. For example, Arizona’s statute authorizes questions from “the supreme court of the United States, a court of appeals of the United States, a United States district court or a tribal court.”³¹ Similar language is included in the statutes for Connecticut, Maryland, Michigan, Minnesota, Montana, New Mexico, and West Virginia. Oklahoma’s statute uses the more expansive phrase “a federally recognized Indian tribal government.”³²

Foreign Courts

Six statutes authorize certified questions from Canada and Mexico. For instance, Minnesota authorizes certified questions by “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.”³³ Similar language appears in statutes for Montana, New Mexico, Oklahoma, and West Virginia. Delaware provides for a broader international authorization, as stated earlier (“the Highest Appellate Court of any foreign country, or any foreign governmental agency regulating the public issuance or trading of securities”).³⁴

Conclusion

Overall, our examination of the statutes authorizing certified questions reveals some broad similarities, such as the nearly universal inclusion of the U.S. Supreme Court on the list of authorized courts. Our analysis also demonstrates that even though these statutes all concern the same procedure, states and territories differ in implementation, which partially reflects important differences in geography and context. For example, states with larger tribal populations are more likely to authorize certified questions from tribal courts, while Delaware, with its heavy business docket, authorizes certified questions from the SEC, as well as foreign agency equivalents to the SEC. However, this analysis focused exclusively on state and territorial authorization statutes. Courts can also receive their authority to certify questions of state law from their state constitutions. Additional research on state constitutional language would be necessary to explore potentially differing guidance.

31. Ariz. Rev. Stat. Ann. § 12-1861.

32. Okla. Stat. Ann. 20 § 1602.

33. Minn. Stat. Ann. § 480.065(3).

34. Del. Sup. Ct. R. 41(a)(ii).

Appendix

Authorizing Statutes

State/Territory	Authorizing Statutes
Alabama	Ala. R. App. P. 18
	“any of the federal courts”
Alaska	Alaska R. App. P. 407
	“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”
Arizona	Ariz. Rev. Stat. Ann. § 12-1861
	“the supreme court of the United States, a court of appeals of the United States, a United States district court or a tribal court”
Arkansas	Ark. R. S. Ct. Rule 6-8
	“a federal court of the United States”
California	Cal. R. Ct. 8.548
	“the United States Supreme Court, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth”
Colorado	Colo. R. App. P. 21.1
	“the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court, or other federal court”
Connecticut	Conn. Gen. Stat. Ann. § 51-199b(d)
	“a court of the United States or by the highest court of another state or of a tribe”
Delaware	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”
District of Columbia	D.C. Code Ann. § 11-723
	“the Supreme Court of the United States, a Court of Appeals of the United States, or the highest appellate court of any State”
Florida	Fla. Stat. Ann. § 25.031
	“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”
Georgia	Ga. Code Ann. § 15-2-9
	“the Supreme Court of the United States, to any circuit court of appeals or district court of the United States, or to the Court of Appeals or the District Court of the District of Columbia”

State/Territory	Authorizing Statutes
Guam	Guam R. App. P. 20(b)(1)
	“the United States Supreme Court, a court of appeals of the United States, a United States district court, or the highest appellate or intermediate appellate court of any other state”
Hawaii	Haw. R. App. P. 13
	“a federal district or appellate court”
Idaho	Idaho App. R. 12.3
	“The Supreme Court of the United States, a Court of Appeals of the United States or a United States District Court”
Illinois	Ill. Sup. Ct. R. 20
	“the Supreme Court of the United States, or to the United States Court of Appeals for the Seventh Circuit”
Indiana	Ind. R. App. P. 64
	“The United States Supreme Court, any federal circuit court of appeals, or any federal district court”
Iowa	Iowa St. § 684A.1
	“the supreme court of the United States, a court of appeals of the United States, a United States district court or the highest appellate court or the intermediate appellate court of another state”
Kansas	Kan. Stat. Ann. §§ 60-3201–3212
	“the supreme court of the United States, a court of appeals of the United States, a United States district court or the highest appellate court or the intermediate appellate court of any other state”
Kentucky	Ky. R. Civ. P. 76.37
	“the Supreme Court of the United States, any Court of Appeals of the United States, any District Court of the United States, the highest appellate court of any other state, or the District of Columbia”
Louisiana	La. Sup. Ct. R. XII
	“the Supreme Court of the United States, or to any circuit court of appeal of the United States”
Maine	Me. R. App. P. 25
	“the Supreme Court of the United States or to any of the Courts of Appeals or District Courts of the United States”
Maryland	Md. Code Ann., Cts. & Jud. Proc. § 12-603
	“a court of the United States or by an appellate court of another state or of a tribe”
Massachusetts	Mass. R. S. Ct. R. 1:03
	“the Supreme Court of the United States, a Court of Appeals of the United States, or of the District of Columbia, or a United States District Court, or the highest appellate court of any other State”
Michigan	Mich. Ct. R. 7.308(2)(a)
	“a federal court, another state’s appellate court, or a tribal court”

State/Territory	Authorizing Statutes
Minnesota	Minn. Stat. Ann. § 480.065(3) “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”
Mississippi	Miss. R. App. P. 20 “the Supreme Court of the United States or to any United States Court of Appeals”
Missouri	Mo. Ann. Stat. § 477.004 “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”
Montana	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”
Nebraska	Neb. Rev. Stat. § 24-219 “the Supreme Court of the United States, a Court of Appeals of the United States, or a United States District Court”
Nevada	Nev. R. App P. 5 “the Supreme Court of the United States, a Court of Appeals of the United States or of the District of Columbia, a United States District Court, or a United States Bankruptcy Court”
New Hampshire	N.H. Sup. Ct. R. 34 “the Supreme Court of the United States, a court of appeals of the United States, or of the District of Columbia, or a United States district court”
New Jersey	N.J. Ct. R. 2:12A-1 “the United States Court of Appeals for the Third Circuit”
New Mexico	N.M. R. App. P. 12-607 “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”
New York	N.Y. Ct. R. § 500.27 “the Supreme Court of the United States, any United States Court of Appeals, or a court of last resort of any other state”
North Carolina	N/A
North Dakota	N.D. R. App. P. 47 “the United States Supreme Court, a court of appeals of the United States, a United States district court, or the highest appellate or intermediate appellate court of any other state”
Northern Mariana Islands	N. Mar. I. Sup. Ct. R. 13 “A federal court”

State/Territory	Authorizing Statutes
Ohio	Ohio S. Ct. Prac. R. 9.01
	“a court of the United States”
Oklahoma	Okla. Stat. Ann. 20 § 1602
	“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”
Oregon	Or. Rev. Stat. § 28.200
	“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”
Pennsylvania	Pa. Code § 29.451
	“The United States Supreme Court; or . . . Any United States Court of Appeals”
Puerto Rico	P.R. Sup. Ct. R. 24s(g) (2018 supp.; only available in Spanish)
	“the United States Supreme Court, a United States Circuit Court of Appeals, a United States District Court, 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”
Rhode Island	R.I. Sup. Ct. R. 6
	“the Supreme Court of the United States, a Court of Appeals of the United States, or of the District of Columbia, or a United States District Court”
South Carolina	S.C. App. Ct. R. 244
	“any federal court of the United States or the highest appellate court or an intermediate appellate court of any other state”
South Dakota	S.D. Codified Laws § 15-24A-1
	“the Supreme Court of the United States, a court of appeals of the United States, or a United States district court”
Tennessee	Tenn. Sup. Ct. R. 23
	“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”
Texas	Tex. R. App. P. 58.1
	“any federal appellate court”
Utah	Utah R. App. P. 41
	“a court of the United States”
Vermont	Vt. R. App. P. 14
	“a federal court”
Virgin Islands	V.I. R. App. P. 38
	“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”

State/Territory	Authorizing Statutes
Virginia	Va. Sup. Ct. R. 5:40
	“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”
Washington	Wash. St. § 2.60.020
	“any federal court”
West Virginia	W. Va. Code § 51-1A-3
	“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”
Wisconsin	Wis. Stat. Ann. § 821.01
	“the supreme court of the United States, a court of appeals of the United States or the highest appellate court of any other state”
Wyoming	Wyo. R. App. P. 11
	“The supreme court may answer questions of law certified to it by a federal court or a state district court, and a district court may answer questions of law certified to it by a circuit court, municipal court or an administrative agency.”

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