Resolving Unsettled Questions of State Law

A Pocket Guide for Federal Judges

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Introduction

U.S. Supreme Court precedent,[1] as well as principles of federalism and comity, requires federal courts to apply state[2] law when deciding claims that do not arise under federal law. But when considering a question of state law, a federal court may find that the law is unsettled—that is, that a question of state law presented in the case is unanswered by either a state statute or an on-point decision of the state supreme court. This situation is not rare. A 2021 survey found that 79% of responding federal judges encountered at least one unsettled question of state law between 2016 and 2020, and 45% reported having encountered four or more such questions.[3]

Judges may take one of three approaches when unsettled questions of state law arise:

1. Abstention
2. Question certification
3. Prediction method (sometimes known as the *Erie* guess)

This pocket guide describes each approach and considerations for judges in using them. It also identifies practical factors for judges to consider when presented with unsettled questions of state law.

To begin, it is important to clarify the terminology used in this pocket guide. First, *abstention doctrines* are judge-made doctrines that permit a federal court to decline to exercise jurisdiction, or to postpone the exercise of

1. *E.g.*, Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

2. As used herein, "state" refers both to the District of Columbia and the territories (Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands), as well as to any of the fifty U.S. states. As shown in research from the Federal Judicial Center, territorial courts do receive certified questions from other courts, though rarely. *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) 1 (2020) ("Cantone & Giffin (2020)").

3. Kathleen Foley, *Navigating* Erie*: Federal Judges' Assessments of the* Erie *Guess and Question Certification* (2021) (unpublished manuscript on file with authors). The survey results reflect the experiences of 759 active and senior federal district and circuit judges. *Id.*

jurisdiction, under very limited, narrow circumstances.[4] Second, *question certification* is a legal procedure by which federal courts can obtain definitive answers from state courts of last resort[5] on unsettled issues of state law that arise in federal legal proceedings; state courts of last resort may answer certified questions at their discretion.[6] Third, the *prediction method* is a legal procedure by which federal courts predict how state courts of last resort would resolve unsettled questions of state law that arise in federal legal proceedings.[7] The discussion in this pocket guide first addresses those methods (abstention and question certification) that may be useful in select cases, and of which federal judges should be aware, and concludes with an explanation of the prediction method, which is the most commonly available.

When considering how to respond to unsettled questions of state law, it is also important to consider building and maintaining relationships between state and federal courts. The culture and practices of jurisdictions vary, including in receptiveness to question certification. Understanding those differences and promoting cooperation could not only assist federal courts on issues surrounding unsettled questions of state, but also forge new relationships that will allow federal and state courts to address areas of mutual interest, including how to best use limited resources.[8]

4. The U.S. Supreme Court has noted that "[a]bstention should rarely be invoked, because the federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'" Akenbrandt v. Richards, 504 U.S. 689, 705 (1992) (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)).

5. All states except for North Carolina have a question-certification statute. *See infra*, "Does the state court accept certified questions from your court?"

6. In 2020, the FJC released a report examining the operation of question certification in three federal courts of appeals. *See* Cantone & Giffin (2020), *supra* note 2, at 1. These data are more thoroughly explained, along with the history of the certification procedure, in Jason A. Cantone & Carly Giffin, *Certified Questions of State Law: An Empirical Examination of Use in Three U.S. Courts of Appeals*, 53 U. Tol. L. Rev. 1 (2021) ("Cantone & Giffin (2021)").

7. The prediction method has never been explicitly endorsed by the Supreme Court, but has instead evolved in the lower federal courts after the Supreme Court's declaration in *Erie Railroad Co. v. Tompkins* that federal courts must apply state law (rather than federal general common law) in state-law cases. 304 U.S. at 78.

8. One avenue many jurisdictions have found beneficial to state–federal judicial relations is the state–federal judicial council. State–federal judicial councils can take many forms, but whatever the form of a council, its establishment enables regular discussion of recurring issues and matters that might otherwise not be addressed systemically, including question certification and federal-court resolution of unsettled state-law questions more broadly. For more information about state–federal judicial councils, see Jason A. Cantone, Fed. Jud. Ctr., Enhancing Cooperation Through State–Federal Judicial Councils (2017).

Abstention Doctrines

Of the available means for resolving unsettled questions of state law, courts rely on abstention doctrines least often, despite their use predating the certification procedure described in the next section. This is because the U.S. Supreme Court has found abstention to be appropriate only in very limited circumstances, discussed below. Although the Supreme Court has in the past reversed lower courts for failure to abstain,[9] abstention is now generally considered to be discretionary even when its conditions precedent are present.[10]

In 1941, the U.S. Supreme Court announced the first abstention doctrine in *Railroad Commission v. Pullman Co.*[11] Accordingly called "*Pullman* abstention," it is the most-discussed abstention type in the academic literature and its boundaries are the clearest of the relevant abstention doctrines. For a court to use *Pullman* abstention, the case must present both federal and state grounds for relief, there must be an unsettled question of state law, and disposition of the state-law claim must have the potential to obviate the need to adjudicate a federal constitutional claim. A court employing *Pullman* abstention retains jurisdiction over the action and stays it pending proceedings in state court to resolve the unsettled question.[12]

In contrast to *Pullman* abstention, the other potentially relevant abstention doctrines are not as well defined and are even less frequently used. Under

9. *E.g.*, Bellotti v. Baird, 428 U.S. 132, 146–47 (1976) (holding that "the District Court should have abstained" under *Pullman*).

10. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996) (stating that "federal courts *may* decline to exercise their jurisdiction . . . in otherwise exceptional circumstances" while discussing *Pullman* and *Thibodaux* abstention (emphasis added) (internal quotation marks omitted)); *see also id*. at 728 (describing *Burford* abstention as an "exercise of . . . discretion"); Erwin Chemerinsky, *Federal Jurisdiction* 841–42 (7th ed. 2016) (stating that there is "uncertainty" as to "whether *Pullman* abstention is mandatory or discretionary" and concluding that "[t]he preferable approach is to treat abstention as discretionary").

11. 312 U.S. 496 (1941).

12. Cases in which the law of Texas is the source of the unsettled state-law question represent an exception to the ordinary course, as the Texas Supreme Court has held that declaratory judgment actions are impermissible advisory opinions where a federal court retains jurisdiction over the entire matter. United Servs. Life Ins. Co. v. Delaney, 396 S.W.2d 855, 860 (Tex. 1965). As to *Pullman* abstention cases that concern Texas law, therefore, the Supreme Court has endorsed the practice of ordering dismissal without prejudice. Harris Cty. Comm'rs Court v. Moore, 420 U.S. 77, 83 n.14 (1975).

Burford v. Sun Oil Co.,[13] abstention may be appropriate where federal adjudication of an unsettled state-law question might disrupt a state's attempt to preserve uniformity with regard to a complex administrative scheme dealing with an essentially local problem.[14] *Burford* abstention generally calls for the dismissal of a suit rather than a stay. Finally, per *Louisiana Power & Light Co. v. City of Thibodaux*,[15] a federal court should abstain from resolving an unsettled question of state law on "an important state interest that is intimately involved with the state government's sovereign prerogative," typically involving eminent domain. Like *Pullman*, *Thibodaux* calls for the stay of the at-issue case pending state-court resolution of the state-law issue. *Burford* abstention and *Thibodaux* abstention are similar in that they both arise in contexts that may counsel particularly against federal-court intervention, but they address distinct concerns: The Supreme Court framed *Burford* abstention as largely pragmatic and employed to preserve uniformity, while *Thibodaux* abstention is addressed more to sovereignty concerns.

While abstention provides an opportunity to obtain authoritative resolutions of unsettled questions of state law, it can lead to an often-long delay in the federal proceeding, as many abstention doctrines call for staying the federal case rather than dismissing it. Further, the federal court loses control over the pace of proceedings, which cannot continue until state courts resolve the state-law matters. One reason abstention doctrines are rarely invoked is that question certification, discussed below, is more often the preferred approach when considering issues previously addressed by *Pullman* abstention.[16]

13. 319 U.S. 315 (1943).

14. For example, at issue in *Burford* itself was Texas's reticulated administrative scheme to regulate its oil industry, a scheme that was supported by "a system of thorough judicial review" by Texas state courts. *Id.* at 319–25.

15. 360 U.S. 25 (1959).

16. *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 75 (1997).

Certify or Predict?
Commonly Considered Factors

The remainder of this pocket guide describes two methods that a federal court may use even in the absence of conditions that might counsel abstention: question certification and prediction. When deciding whether question certification or prediction is the best approach to help resolve an unsettled question of state law, judges may wish to consider a variety of relevant factors. The factors, and the four categories provided below, stem from a 2021 survey of federal judges regarding which factors they find relevant when deciding between the question-certification and prediction methods.[17] These categories are not presented in the chronological order judges should consider them, as different questions and cases could require different considerations.

Question-Related Factors

Judges should consider the question itself, including its potential public-policy importance and whether or not the question concerns an area of traditional state authority. Judges could ask:

- How frequently is the question likely to arise in future cases?
- Is the question one of pure law, or is it highly fact-bound?

A question that regularly comes before the court and implicates state law might benefit from the opinion of the relevant state supreme court, and that court might also appreciate the opportunity to answer the question, thus ensuring that the issue receives the same treatment in state and federal court. And a question of pure law is more appropriate for certification than one that is fact-bound, because the answer to a purely legal question will have broader application. Additionally, judges could consider their own familiarity with the at-issue area of state law and the legal complexity of the question.

17. In 2021, 759 active and senior federal district and court of appeals judges responded to a survey regarding their views on the factors relevant to the choice between question certification and the prediction method. These factors are derived from federal appellate case law and were refined through conversations with district and circuit judges. *See* Foley, *supra* note 3, at 19.

Procedural Factors

Judges may also wish to consider procedural factors when deciding whether or not to use the certification method. For example, did a party (or both parties) request certification? As described below, the court can *sua sponte* certify an unsettled question of state law, but the preferences of the parties might be relevant. Judges could consider:

- Is the certification request contested or agreed-upon?
- Could the requesting party have made the request at an earlier time?
- Is the party seeking certification the one that chose the federal forum?
- Has the requesting party established the appropriateness of certification?

Method-Specific Factors

When considering which method to use, judges may wish to weigh specific factors related to either the prediction method or question certification. When considering the prediction method, the following factors are relevant:

- the sufficiency of legal sources to support a confident prediction
- concern about reaching an answer with which the state supreme court will later disagree
- a sense that the federal court has a duty to answer an unsettled state-law question
- a sense that the federal court is competent to answer an unsettled state-law question

When considering question certification, the following factors are relevant:

- the additional cost and delay of certification

- the perceived likelihood of the state supreme court exercising its discretion to answer the question[18]
- the perceived likelihood of the state supreme court returning an answer quickly
- the ability to frame the question well for certification
- desire to get an authoritative answer to the question
- the location of the state whose law is at issue relative to the federal court (foreign or home state or circuit)
- desire not to overburden state courts or state supreme court justices
- desire to use the certification procedure sparingly so as to preserve it against abrogation due to potentially burdensome overuse
- desire to have state supreme courts answer unsettled questions of law for comity reasons

Question Certification

Question certification gained prominence in 1960, when the Supreme Court commended Florida for adopting the nation's first certification statute.[19] In the intervening years, certification has become much more widely available. Today, almost all states and territories permit at least some federal courts to use the question-certification procedure to obtain definitive answers to unsettled issues of state law directly from the state courts of last resort.

18. Some state supreme courts, including the Supreme Court of Missouri, have stated that they perceive certified questions as being akin to advisory opinions and thus consider answering them to be in violation of their state constitutions. Although this is a minority view, review of how the relevant court responds to certified questions is advised. For more on this topic, see Cantone & Giffin (2021), *supra* note 6. *See also* Volvo Cars of N. Am. v. Ricci, 137 P.3d 1161, 1164 (Nev. 2006) (declining to answer a certified question as to "a discrete evidentiary issue," which would "have, at best, a speculative impact in determining the underlying case"). A desire to avoid the issuance of advisory opinions likely explains why state certification statutes tend to require that a certified question be determinative of the issue in the federal case. Some federal judges may also hesitate to certify questions for reasons having less to do with the questions themselves than with the judges' past experiences of delay or difficulty in the use of the question-certification procedure.

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

Question certification differs from abstention in important respects. Unlike abstention, question certification does not require litigants to litigate an entirely different proceeding in the state court. Instead, the federal court sends the question directly to the state court; the state court can then accept the question or decline to answer it. The federal court retains all decision-making authority and management of the original proceeding.[20]

General Considerations

While the precise processes can vary by state and by federal court, some general principles guide the certification procedure.

How do certified questions originate?

Certified questions can originate in different ways. Parties can submit a motion to certify, or they can raise the issue in briefs or in oral argument. A motion to certify can be made either jointly or by one party, and proposed language for the certified question is then submitted to the federal court. The court can also decide *sua sponte* to certify a question of state law. In either situation, the court retains control over the decision to certify and, if it does certify, over the specific question(s) that will be transmitted to the receiving court. It is important that certified questions be written neutrally to best obtain an answer that resolves the unsettled issue. A proper certified question is a question of law only, and the clearer and more concise it is, the more likely it will lead to a helpful answer from the appropriate court, if accepted by that court.

Is the question of state law truly unsettled?

Before beginning the certification procedure, it is important for the court to assess whether the question of state law is truly unsettled, as defined by applicable federal circuit precedent and the certification statute of the at-issue state. For example, the U.S. Court of Appeals for the Eleventh Circuit has

20. Question certification gained exposure in 2020, with a U.S. Supreme Court majority opinion in one case, *see* Mckesson v. Doe, -- U.S. --, 141 S. Ct. 48, 50–51 (2020), and a concurring opinion in a separate case, *see* Carney v. Adams, -- U.S. --, 141 S. Ct. 493, 503–04 (2020) (Sotomayor, J., concurring), explaining the procedure.

directed judges to consider not only state supreme court decisions, but also intermediate appellate court decisions, in their analysis of whether a question is unsettled.[21] Similarly, several states' certification statutes discourage accepting certified questions on issues of state law already answered by intermediate state appellate court decisions.

Does the state court accept certified questions from your court?

In 2020, Federal Judicial Center researchers examined fifty-four sources of authorizing language that allow state or territorial courts to accept certified questions of law from federal courts.[22] Every U.S. jurisdiction but North Carolina has a statute or court rule providing for the certification of questions to its court of last resort.[23] But there are significant differences between jurisdictions with regard to which courts (or other entities) may submit certified questions. While some jurisdictions enacted broad federal authorizations (Ohio, for example, allows certified questions from "a court of the United States"[24]), other states, such as Delaware, use very specific authorization language.[25] Jurisdictions also vary on which federal courts can submit certified questions. For example, some jurisdictions permit federal district courts to certify questions, while others do not. While most states accept certified questions from federal courts of appeals, a few are more restrictive. A jurisdiction is not limited to authorizing certified questions from federal courts; in fact, according to Federal Judicial Center research, almost half of the jurisdictions (twenty-five, or 46%) specifically authorize certified questions from

21. *See, e.g.*, State Farm Fire & Cas. Co. v. Steinberg, 393 F.3d 1226, 1231 (11th Cir. 2004) ("In the absence of definitive guidance from the Florida Supreme Court, we follow relevant decisions of Florida's intermediate appellate courts.").

22. *See generally* Jason A. Cantone & Carly Giffin, Fed. Jud. Ctr., Certified Questions of State Law: An Examination of State and Territorial Authorizing Statutes (2020) ("Cantone & Giffin, Authorizing Statutes"). Each state or territory's authorizing language was reviewed and updated, if necessary, for this pocket guide.

23. *Id*. at 1.

24. Ohio S. Ct. Prac. R. 9.01.

25. "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." Del. Sup. Ct. R. 41(a)(ii).

state or, less commonly, territorial courts.[26] Additionally, a small number of states specifically authorize certified questions from tribal courts or bankruptcy courts. One state (Delaware) also authorizes certified questions from the U.S. Securities and Exchange Commission.

States' certification statutes and rules are provided in the appendix, so that judges may become familiar with the authorizing language in jurisdictions where they may seek to certify questions.[27]

Is it proper, per state and circuit law, to certify the question of state law?

Even if the question of state law is unsettled and the receiving court is authorized to accept certified questions, it still might not be proper to certify. Many states, for example, require that the state-law question at issue have the potential to resolve all or part of the case. Twenty-eight states require that the issue "may" be determinative of the pending case, while eleven require that the issue *is* determinative. The remainder use other language such as "materially advance."[28] It is important to review the specific guidance provided by each jurisdiction to determine what standard applies.[29]

Additionally, is it proper to certify the question under federal circuit precedent? The considerations relevant to the determination of whether certification is appropriate vary widely by circuit and can include pragmatic

26. Cantone & Giffin, Authorizing Statutes, *supra* note 22, at 1.

27. Authorizing language can come from statute as well as from state constitutional provisions. The appended authorities were last reviewed in August 2021.

28. *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, 1932–33 (2020).

29. It is also helpful to review the Uniform Certification of Laws Act, which sought to make the certification process more accessible. *See* Unif. Certification of Questions of L. § 3, 12 U.L.A. 74 (1996).

as well as doctrinal factors.[30] Notably, a prediction by a court of appeals is generally binding on district courts and subsequent appellate panels absent an intervening change in state law.[31] Some circuits also impose a burden on parties that move for question certification to establish that certification is proper.[32]

What is the procedure to certify the question?

Once the federal court decides to certify the question, it must follow the local rules of the state court concerning how a question must be submitted. These rules vary, and judges should review the specific rules, but they generally require the federal court to transmit the question to be answered and a statement of the facts of the case that are relevant to the question. Judges may transmit the questions submitted by the parties (or a single party) or revise the question wording to ensure a constructive answer. After certification and transmittal, federal courts differ in their next steps. In some courts, such as the U.S. Court of Appeals for the Ninth Circuit, most cases involving certified questions are administratively closed until either the court receives a response from the state court or the parties seek to reopen the case due to a state-court response or another issue requiring federal-court action. In other courts, the cases remain open during the pendency of the certification process.

If the state court accepts the certified question, state rules govern the remainder of the process. States differ in whether they require briefs or oral

30. For example, a concern for the public-policy importance of the unsettled state-law question is present in many circuits' case law, Foley, *supra* note 3, at 13 & n.84, whereas only one court of appeals—the First Circuit—has indicated that "the dollar amounts involved" is a relevant factor, Easthampton Sav. Bank v. City of Springfield, 736 F.3d 46, 52 (1st Cir. 2013).

In addition to considering different factors, courts of appeals certify at different rates. An FJC study conducted at the request of the Judicial Conference Committee on Federal-State Jurisdiction revealed that, between 2010 and 2018, the Third, Sixth, and Ninth Circuits certified at drastically different rates. *See generally* Cantone & Giffin (2020), *supra* note 2.

31. *See, e.g.*, Earl v. NVR, Inc., 990 F.3d 310, 314 (3d Cir. 2021); Nat'l Union Fire Ins. Co. of Pittsburgh v. Dish Network, LLC, 17 F.4th 22, 31 (10th Cir. 2021); Scafidi v. Las Vegas Metro. Police Dep't, 966 F.3d 960, 963 (9th Cir. 2020).

32. *See, e.g.*, Duncan v. Omni Ins. Co., 719 F. App'x 102, 106 (3d Cir. 2017) (denying motion to certify question where movant "ha[d] not shown that the issue presented is of . . . substantial public importance"); Brown v. Argosy Gaming Co., 384 F.3d 413, 417 (7th Cir. 2004) (party seeking certification "faces a steep uphill climb . . . to overcome our hesitancy to utilize the certification process").

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 the court's standards for answering.

After consideration of an accepted question, the state court transmits an answer to the question back to the federal court.[33] The state court's involvement in the procedure ends when it transmits its answer to the certifying federal court. Upon receipt of a state supreme court's answer to a certified question, a federal court should treat it as binding state law.[34]

How often (and how quickly) does the court accept certified questions?

Federal judges should also consider courts' certification practices, as actual court practice might differ from what is authorized in a statute or court rule. For example, while the state of Missouri authorizes certified questions, the Missouri Supreme Court has held that answering certified questions is akin to issuing an advisory opinion, which would violate the state constitution.[35] Additionally, even courts with the most expansive authorization language are not required to accept any specific submitted certified question. Instead, courts retain discretion in their acceptance or declination decision. Furthermore, federal judges should recognize that question certification adds time to the litigation process. Just as state supreme courts maintain discretion in whether or not to accept the certified question, there is also no statutory time limit regarding when this decision must be made or when, if the question

33. Availability of the state court opinions varies. In most, but not all, cases, the state court's answer is docketed and available in the federal record. *See, e.g.*, Cantone & Giffin (2020), *supra* note 2, at 14–15, 20, 26. Additionally, the answer may be publicly released on the state court's website.

34. *See, e.g.*, Buero v. Amazon.com Servs., Inc., 21 F.4th 623, 626 (9th Cir. 2021); Grover *ex rel.* Grover v. Eli Lilly & Co., 33 F.3d 716, 718 (6th Cir. 1994); Hopkins v. Lockheed Aircraft Corp., 394 F.2d 656, 657 (5th Cir. 1968).

35. *E.g.*, Washington v. Countrywide Home Loans, Inc., 747 F.3d 955, 958 n.2 (8th Cir. 2014) ("This court asked the Supreme Court of Missouri to consider [a] certified question . . . . The Supreme Court of Missouri declined the request, adhering to Grantham v. Missouri Department of Corrections."); *see also* Grantham v. Mo. Dep't of Corr., No. 72576, 1990 WL 602159 (Mo. July 13, 1990) (per curiam) (en banc) (Missouri's state "constitutional provisions do not expressly or by implication grant the Supreme Court of Missouri original jurisdiction to render opinions on questions of law certified by federal courts.").

is accepted, the court's decision must be submitted back to the certifying court. Research shows that the time from a federal court submitting the certified question to the state court's ultimate response can range from months to years.[36]

Additional Considerations

Question certification presents a series of benefits and concerns that judges should consider before certifying unsettled questions of state law.[37] The benefits that have been acknowledged by scholars and practitioners include:

- **Obtaining an authoritative answer to an unsettled question of state law.** State supreme courts are well situated to provide definitive judgments on unsettled issues of state law.[38] The certification procedure can also help federal courts establish uniform decisions in a quicker and less costly manner than abstention.
- **Encouraging respect and cooperation between federal and state judges.** By certifying questions, federal judges acknowledge that state courts offer expertise they may lack and allow state courts to weigh in on state-related matters. This can lead to more collegial relationships, which can in turn foster cooperation on other areas of mutual interest, such as sharing available resources.
- **Discouraging forum shopping.** Authoritative resolution of previously unsettled state-law questions discourages forum shopping by eliminating the potential for inconsistency between federal-court predictions and state-court decisions.
- **Acknowledging the role of the state courts in our federalist system.** Some see question certification as an example of the proper operation of federalism because it vests state courts with the power to make new state law.

36. Cantone & Giffin (2021), *supra* note 6. It is likely that some of this variation depends on the nature of the question and the thoroughness of the response, as short yes/no answers take less time than questions requiring longer opinions.

37. These additional considerations are provided in more detail, along with data regarding timing, in Cantone & Giffin (2021), *supra* note 6.

38. The Supreme Court has indicated that the failure to certify a question is reversible error where a "novel issue[] of state law peculiarly call[s] for the exercise of judgment by the state courts" and the doctrine of constitutional avoidance is implicated. Mckesson v. Doe, 141 S. Ct. 48, 51 (2020).

- **Giving state supreme courts the opportunity to resolve questions.** Relatedly, state supreme courts may have few opportunities to resolve certain questions by virtue of litigants' preference for federal fora in some types of cases. Question certification can thus give state supreme courts the ability to clarify state law where they otherwise could not.

Question certification also presents concerns that judges should recognize before using the procedure. These include:

- **Burdens on the state courts.** Certifying questions to the state courts inevitably results in some burden on those courts, many of which are working with strained resources. Responding to all certified questions could take significant time away from already-congested dockets. Although state courts maintain discretion as to whether they accept or decline certified questions, the procedure is only one-way; state courts cannot ask federal courts to resolve unsettled federal law that might be germane to cases before them.
- **Burdens on the litigants.** While certification is generally both faster and less expensive than abstention, certification adds time to the length of the case, which can also add additional cost to litigants. If a question is certified and accepted, it could take months or even years to reach final resolution. If the question is declined, the delay would likely be less, but it and the associated cost would result in no benefit to the litigants, the federal court, or the development of state law.
- **Time burdens on the federal courts.** As noted above, the federal court might expend significant time determining if a question is appropriate for certification. Additionally, courts can spend further time finalizing the wording of the questions and reviewing a statement of facts to transmit along with the questions themselves.
- **Uncertainty regarding whether a certified question will be accepted.** State supreme courts that authorize certified questions vary in how often they accept those questions. When they do accept questions, they vary further in how long they take to issue a response. Uncertainty around the state court's response and timeline imposes an additional burden on both the federal court and the litigants.

- **Potential tension with principles of federal jurisdiction.** While some jurists consider question certification to be only a postponement of a federal court's exercise of its congressionally conferred jurisdiction (pending state-court resolution of state-law issues), others are troubled by what they see as an abdication of that jurisdiction.

Prediction Method

A federal court presented with an unsettled question of state law can also put itself in the shoes of the state court of last resort and resolve the question by predicting how the state court would resolve it. Unlike abstention and certification, the prediction method can be used without interruption to the ordinary litigation process. The federal court performs the requisite research and resolves the issue as it would any other question of law. Because federal courts are not empowered to determine state law,[39] their resolutions of unsettled state-law questions are inherently tentative; they may be subsequently overridden by state supreme court decisions, as well as by state statutes.

General Considerations

While there is some intercircuit variation, the procedures and principles that govern the use of the prediction method are very similar from circuit to circuit.

When is prediction appropriate?

A federal court may decide to employ the prediction method to resolve an unsettled question of state law when it cannot abstain or has decided not to, when it decides the burdens of question certification outweigh its benefits, and/or when the state whose law is at issue does not permit the court to certify questions. Notably, prediction may be inappropriate where the court of appeals has already made a prediction about the issue in question.

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

What is the procedure to make a prediction?

Unlike both abstention and question certification, no other court need be involved in the resolution of an unsettled state-law question if the prediction method is used. Prediction will almost certainly not be requested by party motion, though the parties may make mention of it in their briefs.

Once a federal court decides to employ the prediction method, it is important to consider circuit precedent regarding the prescribed use of the method. While intercircuit differences on the prediction method are not so wide as they are on question certification, there are some important distinctions. For example, the circuits differ with regard to which materials a federal court should rely on in predicting how the state supreme court would resolve the issue.[40]

After determining how predictions are done in its particular circuit, the federal court next needs to conduct the necessary research as laid out in controlling circuit precedent. Each court of appeals, via controlling case law, directs federal courts using the prediction method to review a variety of sources before predicting how the state court of last resort would resolve the issue. Review of these sources will assist the federal court both in arriving at the best possible prediction and in writing the resultant decision.

40. Each circuit has its own iteration, or iterations, of the materials that a federal court should consult in making a prediction. Some of these statements are closed-ended, if still fairly broad. *See, e.g.*, PSM Holding Corp. v. Nat'l Farm Fin. Corp., 884 F.3d 812, 820 (9th Cir. 2018) ("[A] federal court must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance." (citation omitted)); Gray v. Am. Express Co., 743 F.2d 10, 17 (D.C. Cir. 1984) ("When District of Columbia law is silent, it has been the practice of the federal courts in this Circuit to turn to the law of Maryland for historical and geographical reasons."). Others give a nonexhaustive list of potential resources while indicating that broader research is permissible. *See, e.g.*, *In re* I80 Equip., 938 F.3d 866, 869–70 (7th Cir. 2019) ("[W]e look to relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand." (citation and internal quotation marks omitted)); DiBella v. Hopkins, 403 F.3d 102, 112 (2d Cir. 2005) (Second Circuit looks "[p]rincipally" to "the language of the state intermediate appellate courts," but "also look[s] to the language of other jurisdictions on the same issue and other sources the state's highest court might rely upon in deciding the question, including scholarly writings").

Factors to Consider

As with question certification, prediction presents factors that judges should consider. Potential benefits of the prediction method include:

- **Speed relative to certification and abstention.** Unlike certification and abstention, prediction allows a federal court to resolve the question "in house," meaning that the federal court retains control over the timeline of the case. Rather than waiting months or years for a state-court decision, a federal court can resolve an unsettled question of state law as a matter of course.
- **Convenience relative to certification.** Prediction does not require the federal court to frame the question with another court in mind or to formulate a statement of relevant facts. And because prediction is done "in house," a federal court need not involve a state court, meaning that the federal court retains control over every aspect of the case.
- **Reduced cost to the litigants.** When a federal court uses the prediction method, the litigants need not repair to any state court to litigate the issue separately. This generally results in cost savings.
- **Retention of entire matter over which federal court has congressionally conferred jurisdiction.** Some jurists view certification as an abdication of federal diversity or supplemental jurisdiction. Using the prediction method can obviate those concerns.

Possible burdens include:

- **Potential for later disagreement by state courts or state legislatures.** Federal judges cannot make state law with their decisions. When a federal court makes a prediction of how a state court of last resort would resolve an issue, the state court or state legislature may subsequently resolve the issue in a different way than the federal court predicted it would. This can be embarrassing for the federal courts and can strain relations between federal and state judiciaries. It also may make the prior federal-court decision appear to have been substantively unfair, both to the parties involved and to litigants in any subsequent cases where the erroneous prediction was treated as binding or persuasive.

- **Encouragement of forum shopping.** Future litigants might base their decisions as to their desired forum on the favorability to their positions of federal-court predictions on unsettled questions of state law. This could in turn stymie the development of state law in the state courts.
- **Pragmatic difficulties of making a prediction.** Doing the research necessary to make a prediction can be very time-consuming. It can also be difficult for a federal court to select, from among numerous and often contradictory sources, which to credit in making its prediction.
- **Potential to run afoul of principles of federalism.** Some judges view unsettled questions of state law as the exclusive province of the state courts and are uncomfortable with the concept of "making state law" as to the parties before the federal court by utilizing the prediction method.

Conclusion

Federal judges regularly encounter unsettled questions of state law, and this pocket guide aims to provide a better understanding of the available methods to resolve them. When encountering an unsettled question of state law, a federal judge can consider the three available methods of resolving it and make an informed choice about which method is most appropriate. In doing so, judges should consider both doctrinal and pragmatic factors. Where the conditions precedent for abstention are present, it should be considered; where they are not, question certification and prediction each present factors that judges should think about carefully. Having a working understanding of each method enables a judge to make an informed choice about which is most appropriate in a given situation.

Regardless of the method judges use, federal courts' handling of unsettled questions of state law implicates state–federal judicial relationships. Such relationships can have far-reaching effects. When those relationships are strong, they can help promote comity and cooperation between federal and state courts, which benefits judges, litigants, and the rule of law.

Additional Resources

Jason A. Cantone and Carly Giffin, Certified Questions of State Law: An Examination of State and Territorial Authorizing Statutes, a 2020 report published by the FJC, reviews states' certification statutes and rules and is a good starting point for those wishing to learn more about question certification.

Jason A. Cantone and Carly Giffin, Certification of Questions of State Law in the U.S. Courts of Appeals for the Third, Sixth, and Ninth Circuits, another report published by the FJC in 2020, examines the use of question certification in three U.S. courts of appeals and may be informative with regard to considerations such as the delay that can attend question certification and the discretion of state supreme courts to decline to answer certified questions.

Jason A. Cantone and Carly Giffin, *Certified Questions of State Law: An Empirical Examination of Use in Three U.S. Courts of Appeals*, 53 U. Tol. L. Rev. 1 (2021), a law review article, expands from the findings in the 2020 FJC reports and grounds them in the history of the certified-question procedure, addressing perceived benefits and burdens of certification.

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), by the Advisory Committee to the New York State and Federal Judicial Council, provides an instructive window into the operation of question certification in one jurisdiction.

Jason A. Cantone, Enhancing Cooperation Through State–Federal Judicial Councils, in the FJC's Pocket Guide Series, discusses the utility of state–federal judicial councils for enhancing cooperation and provides suggestions for their establishment and function.

Appendix

Authorizing Statutes.[41]

State/Territory	Statute/Rule
Alabama	Ala. R. App. P. 18 "a court of the United States" "questions or propositions of law of this State which are determinative of said cause and that there are no clear controlling precedents in the decisions of the Supreme Court of this State"
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" "questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of this state"
Arizona	Ariz. Rev. Stat. Ann. §§ 12-1861–12-1867 "the supreme court of the United States, a court of appeals of the United States, a United States district court or a tribal court" "questions of law of this state which may be determinative of the cause . . . and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court and the intermediate appellate courts of this state"

41. As of August 2021. This appendix is adapted from and supersedes Cantone & Giffin, Authorizing Statutes, *supra* note 22, at 7–11. Each state or territory's authorizing language was reviewed and updated, if necessary, for this pocket guide.

State/Territory	Statute/Rule
Arkansas	Ark. Sup. Ct. R. 6-8 "a federal court of the United States" "questions of Arkansas law which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court"
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" "a question of California law if: (1) The decision could determine the outcome of a matter pending in the requesting court; and (2) There is no controlling precedent."
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" "questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court that there is no controlling precedent in the decisions of the supreme court"
Connecticut	Conn. Gen. Stat. Ann. § 51-199b "a court of the United States or by the highest court of another state or of a tribe" "the answer may be determinative of an issue in pending litigation in the certifying court and if there is no controlling appellate decision, constitutional provision or statute of this state"

State/Territory	Statute/Rule
Delaware	Del. Sup. Ct. R. 41 "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" "a question or questions of law . . . if there is an important and urgent reason for an immediate determination of such question or questions by this Court and the certifying court or entity has not decided the question or questions in the matter" (examples of such reasons appear in statute)
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" "questions of law of the District of Columbia which may be determinative of the cause pending in such certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the District of Columbia Court of Appeals"
Florida	Fla. Const. art. V, § 3(b)(6) "the Supreme Court of the United States or a United States Court of Appeals" "a question of law . . . which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida"
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" "questions of the laws of this state which are determinative of the case and there are no clear controlling precedents in the decisions of the Supreme Court of this state"

State/Territory	Statute/Rule
Guam	Guam R. App. P. 20 "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" "(A) questions of law of this state are involved in any proceeding before the certifying court which may be determinative of the proceeding; (B) it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of this territory"
Hawaii	Haw. R. App. P. 13 "a federal district or appellate court" "a question concerning the law of Hawai'i that is determinative of the cause and that there is no clear controlling precedent in the Hawai'i judicial decisions"
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" (1) The question of law certified is a controlling question of law in the pending action in the United States court as to which there is no controlling precedent in the decisions of the Idaho Supreme Court, and (2) An immediate determination of the Idaho law with regard to the certified question would materially advance the orderly resolution of the litigation in the United States 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" "questions as to the law of this State, which may be determinative of the said cause, and there are no controlling precedents in the decisions of [the Illinois Supreme C]ourt"

State/Territory	Statute/Rule
Indiana	Ind. R. App. P. 64 "The United States Supreme Court, any federal circuit court of appeals, or any federal district court" "an issue of state law that is determinative of the case and on which there is no clear controlling Indiana precedent"
Iowa	Iowa Stat. §§ 684A.1–684A.11 "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" "questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the appellate courts of this state"
Kansas	Kan. Stat. Ann. §§ 60-3201–60-3212 "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" "questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court and the court of appeals of this 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" "questions of law of this state which may be determinative of the cause then pending before the originating court and as to which it appears to the party or the originating court that there is no controlling precedent in the decisions of the Supreme Court and the Court of Appeals of this state"

State/Territory	Statute/Rule
Louisiana	La. Sup. Ct. R. XII "the Supreme Court of the United States, or to any circuit court of appeal of the United States" "questions or propositions of law of this state which are determinative of said cause independently of any other questions involved in said case and that there are no clear controlling precedents in the decisions of the supreme court of this state"
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" "questions of law of this State that may be determinative of the cause and that there is no clear controlling precedent in the decisions of the Supreme Judicial Court"
Maryland	Md. Code Ann., Cts. & Jud. Proc. §§ 12-601–12-613 "a court of the United States or by an appellate court of another state or of a tribe" "a question of law . . . if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this State"
Massachusetts	Mass. Sup. 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" "questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of this court"
Michigan	Mich. Ct. R. 7.308 "a federal court, another state's appellate court, or a tribal court" "a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent"

State/Territory	Statute/Rule
Minnesota	Minn. Stat. Ann. § 480.065 "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" "a question of law . . . if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this state"
Mississippi	Miss. R. App. P. 20 "the Supreme Court of the United States or . . .any United States Court of Appeals" "questions or propositions of law of this state which are determinative of all or part of that cause and there are no clear controlling precedents in the decisions of the Mississippi Supreme Court"
Missouri[42]	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" "questions of Missouri law which may be relevant to the cause then pending and as to which it appears to the certifying court there is no controlling precedent in this state"
Montana	Mont. R. App. P. 15 "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" "question of law . . . if: (a) The answer may be determinative of an issue in pending litigation in the certifying court; and (b) There is no controlling appellate decision, constitutional provision, or statute of this State."

42. As noted in the guide, the Missouri Supreme Court does not accept certified questions, as it has ruled that Missouri's certification statute violates the state constitution. Grantham v. Mo. Dep't of Corr., No. 72576, 1990 WL 602159, at *1 (Mo. July 13, 1990) (Missouri's state "constitutional provisions do not expressly or by implication grant the Supreme Court of Missouri original jurisdiction to render opinions on questions of law certified by federal courts").

State/Territory	Statute/Rule
Nebraska	Neb. Rev. Stat. §§ 24-219–24-225 "the Supreme Court of the United States, a Court of Appeals of the United States, or a United States District Court" "questions of law of this state which may be determinative of the cause then pending in the certifying court as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of this state"
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" "questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court or Court of Appeals of this state"
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" "questions of law of this State which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of this court"
New Jersey	N.J. Ct. R. 2:12A "the United States Court of Appeals for the Third Circuit" "question of law . . . if the answer may be determinative of an issue in litigation pending in the Third Circuit and there is no controlling appellate decision, constitutional provision, or statute in this State"

State/Territory	Statute/Rule
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" "questions of law . . . if the answer may be determinative of an issue in pending litigation in the certifying court and the question is one for which answer is not provided by a controlling (a) appellate opinion of the New Mexico Supreme Court or the New Mexico Court of Appeals; or (b) constitutional provision or statute of this 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" "determinative questions of New York law are involved in a case pending before that court for which no controlling precedent of the Court of Appeals exists"
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" "questions of law . . . when . . . the following conditions are met: (1) questions of law of this state are involved in any proceeding before the certifying court which may be determinative of the proceeding: (2) it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of this state"

State/Territory	Statute/Rule
Northern Mariana Islands	N. Mar. I. Sup. Ct. R. 13 "A federal court" "questions of Commonwealth law where the federal court finds that: (1) The question may be determinative in the proceedings before it; and (2) There is no controlling precedent from this Court"
Ohio	Ohio Sup. Ct. Prac. R. 9 "a court of the United States" "a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court"
Oklahoma	20 Okla. Stat. Ann. §§ 1601–1606 "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" "a question of law . . . if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling decision of the Supreme Court or Court of Criminal Appeals, constitutional provision, or statute of this state"
Oregon	Or. Rev. Stat. §§ 28.200–28.255 "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" "questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court and the intermediate appellate courts of this state"

State/Territory	Statute/Rule
Pennsylvania	Pa. Code §§ 29.451–29.452 "The United States Supreme Court; or . . . Any United States Court of Appeals" "question or questions of Pennsylvania law" and "particular reasons why [the Pennsylvania Supreme] Court should accept certification"
Puerto Rico	P.R. Sup. Ct. R. 24s(g) (2018 supp.) "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" "questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme 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" "questions of law of this state which may be determinative of the cause then pending in the certifying court when it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court"

State/Territory	Statute/Rule
South Dakota	S.D. Codified Laws § 15-24A "the Supreme Court of the United States, a court of appeals of the United States, or a United States district court" Where "questions of law of this state [are] involved in any proceeding before the certifying court which may be determinative of the cause pending in the certifying court and it appears to the certifying court and to the Supreme Court that there is no controlling precedent in the decisions of the Supreme Court of this state."
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" "questions of law of this state which will be determinative of the cause and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of Tennessee"
Texas	Tex. R. App. P. 58 "any federal appellate court" "determinative questions of Texas law having no controlling Supreme Court precedent"
Utah	Utah R. App. P. 41 "a court of the United States" "question of Utah law . . . [that] is a controlling issue of law in a proceeding pending before the certifying court; and . . . there appears to be no controlling Utah law"
Vermont	Vt. R. App. P. 14 "a federal court" "a question of Vermont law . . . if the answer might determine an issue in pending litigation and there is no clear and controlling Vermont precedent"

State/Territory	Statute/Rule
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" "a question of law which may be determinative of the cause then pending in the certifying court and concerning which it appears there is no controlling precedent in the decisions of the Supreme Court"
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" "if a question of Virginia law is determinative in any proceeding pending before the certifying court and it appears there is no controlling precedent on point in the decisions of this Court or the Court of Appeals of Virginia"
Washington	Wash. Stat. §§ 2.60.010–2.60.030 "any federal court" Where "it is necessary to ascertain the local law of this state in order to dispose of such proceeding and the local law has not been clearly determined"
West Virginia	W. Va. Code § 51-1A "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" "a question of law . . . if the answer may be determinative of an issue in a pending cause in the certifying court and if there is no controlling appellate decision, constitutional provision or statute of this state"

State/Territory	Statute/Rule
Wisconsin	Wis. Stat. Ann. §§ 821.01–821.12 "the supreme court of the United States, a court of appeals of the United States or the highest appellate court of any other state" "questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court and the court of appeals of this 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" "a question of law which may be determinative of the cause then pending in the certifying court or agency and concerning which it appears there is no controlling precedent in the decisions of the supreme court"

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