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Certification Comes of Age: Reflections on the Past, Present, and Future of Cooperative Judicial Federalism

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CERTIFICATION COMES OF AGE: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF COOPERATIVE JUDICIAL FEDERALISM

Hon. Kenneth F. Ripple & Kari Anne Gallagher***

INTRODUCTION

In 1995, the American Judicature Society (AJS) undertook a comprehensive survey of certification.¹ The survey explored federal courts' use of certification as well as how judges perceived its use: whether certification was being over- or underused, when it should be used, and its shortcomings and advantages.² The survey was not limited to federal judges—the individuals who certify questions; it also solicited the views of state court judges—the individuals to whom certified questions are directed.³ The report generated in the survey's wake revealed overwhelmingly positive attitudes toward certification as a tool of “cooperative federalism.”⁴ Nevertheless, some judges voiced concern that certification could be overused and could frustrate the ability of parties to litigate, of federal judges to adjudicate, and of state judges to handle an already crowded docket.⁵ To others, the benefits of certification as a method for achieving comity simply were overblown.⁶

This Article uses the AJS's survey as a starting point to examine the development of certification over the past twenty-five years. Were the fears of its critics well founded, or have the federal and state judiciaries adapted to mitigate the shortcomings of certification? Has certification been a useful

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1 JONA GOLDSCHMIDT, AM. JUDICATURE SOC'Y, CERTIFICATION OF QUESTIONS OF LAW: FEDERALISM IN PRACTICE 1 (1995).

2 *See id.*

3 *Id.*

4 *Id.* at 1, 110.

5 *Id.* at 57–58.

6 *See id.* at 66.

tool in allowing for development of state law by the state judiciary, or has it been an imposition on the judiciary of a coequal sovereign?

Beyond these questions, this Article also will look at how certification has expanded beyond its diversity origins to other areas of law where state law expertise is uniquely important, such as habeas and the Armed Career Criminal Act (ACCA). Finally, the Article will consider ways in which the certification process can be further refined and expanded for the benefit of both the state and federal judiciaries as well as litigants.

I

As the AJS's report and numerous scholars have detailed, certification has its origins in *Erie Railroad Co. v. Tompkins*.⁷ In *Erie*, the Court held that, "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State," whether that law is "declared by its Legislature in a statute or by its highest court in a decision."⁸ Since that decision, federal judges sitting in diversity regularly have confronted "the problem of ascertaining the applicable state law,"⁹ with varying degrees of success.¹⁰

The Supreme Court first suggested certification as a possible remedy to *Erie* dilemmas in its 1960 opinion in *Clay v. Sun Insurance Office Ltd.*¹¹ *Clay* concerned the validity of a provision in an Illinois insurance policy that required an action on a claim for loss be brought within twelve months of discovery.¹² The owner of the policy had moved to Florida and instituted a federal diversity action more than two years after discovery of the loss.¹³ After a jury found for the owner, the district court denied the insurance company's motion for judgment, apparently believing that a Florida statute rendered the contractual time limitation ineffective.¹⁴ The Fifth Circuit reversed on the ground that the application of the Florida statute to invalidate the time limitation violated due process.¹⁵ The Supreme Court held, however, that the Fifth Circuit acted prematurely in reaching the constitutional question: the appellate court first should have determined whether the

7 304 U.S. 64 (1938); see GOLDSCHMIDT, *supra* note 1, at 3.

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

9 GOLDSCHMIDT, *supra* note 1, at 4.

10 See Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1679–80 (1992) (detailing a number of times that the U.S. Court of Appeals for the Third Circuit made incorrect *Erie* guesses regarding Pennsylvania and New Jersey law). The Third Circuit's experience is not unique. Compare, e.g., *McGeshick v. Choucair*, 9 F.3d 1229, 1234 (7th Cir. 1993) (predicting that Wisconsin Supreme Court would not follow an appellate court decision that had interpreted broadly the doctrine of informed consent), with *Martin v. Richards*, 531 N.W.2d 70, 78–79 (Wis. 1995) (adopting view of the appellate court).

11 363 U.S. 207 (1960).

12 *Id.* at 208.

13 *Id.*

14 *Id.* at 209.

15 *Id.*

Florida statute actually applied to the contract provision at issue.¹⁶ Noting that the Fifth Circuit had “indicated [that] it could not, on the available materials, make a confident guess how the Florida Supreme Court would construe the statute,” the Supreme Court suggested a solution: “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.”¹⁷

Following the *Clay* decision, the Supreme Court of Florida promptly adopted a rule implementing the Florida statute,¹⁸ and, in short order, the U.S. Supreme Court used the rule to certify questions to the Florida Supreme Court in two separate cases.¹⁹ Those cases, however, did not provide any guidance to lower courts as to when certification should or should not be invoked. That guidance came in *Lehman Bros. v. Schein*.²⁰

Lehman Bros. was a shareholder derivative suit filed in New York against a Florida company.²¹ The district court concluded that Florida law applied, that it barred the relief sought, and, therefore, that summary judgment should be granted to the defendants.²² A panel majority in the Second Circuit reversed; it agreed with the district court that Florida law applied, but believed that the Supreme Court of Florida “probably” would follow the course set by a New York court.²³ The Supreme Court vacated and remanded to the Second Circuit with instructions to “reconsider whether the controlling issue of Florida law should be certified to the Florida Supreme Court,” a proposal that had been urged by the panel dissent.²⁴ The Court observed:

We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court.

Here resort to it would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law, Florida being a distant State. When federal judges in New York attempt to predict uncer-

16 *Id.* at 209–10.

17 *Id.* at 212.

18 *In re Fla. Appellate Rules*, 127 So. 2d 444, 444–45 (Fla. 1961) (per curiam).

19 *See Aldrich v. Aldrich*, 375 U.S. 249, 251 (1963) (per curiam) (certifying question whether a particular divorce decree was permissible under Florida law); *Dresner v. City of Tallahassee*, 375 U.S. 136, 138–39 (1963) (per curiam) (certifying question whether any other state court had the jurisdiction to review the defendant’s conviction and to consider constitutional questions raised by the defendant).

20 416 U.S. 386 (1974).

21 *Id.* at 387.

22 *Id.* at 388–89.

23 *Id.* at 389 (quoting *Schein v. Chasen*, 478 F.2d 817, 822 (2d Cir. 1973), *vacated sub nom., Lehman Bros.*, 416 U.S. 386 (1974)).

24 *Id.* at 391–92, 389.

tain Florida law, they act, as we have referred to ourselves on this Court in matters of state law, as “outsiders” lacking the common exposure to local law which comes from sitting in the jurisdiction.²⁵

Lehman Bros. provided the official imprimatur to certification as a means of discerning state law. Beyond merely sanctioning certification as a discretionary tool, however, it provided the courts of appeals with some initial parameters for using that tool. In exercising its discretion to certify (or not) a question of state law, a federal court should be guided both by practical and jurisprudential considerations: Will certification save time, energy, and resources? Are the federal decisionmakers generally familiar with the law to be applied and the interests of that state? Will referral to the state judiciary “build a cooperative judicial federalism” by giving it the opportunity to develop its own state’s law?²⁶

The years following *Lehman Bros.* saw a steady increase in the number of states adopting certification procedures.²⁷ In 1976, only fifteen states allowed certification.²⁸ By 1995, the year of the AJS survey, forty-three states, the District of Columbia, and Puerto Rico formally had authorized certified questions.²⁹ Today, every state except for North Carolina allows certifications.³⁰

25 *Id.* at 390–91 (footnote omitted).

26 *See id.* at 391. Federal courts regularly have drawn upon these factors in concluding that questions should and should not be certified. *See, e.g., In re Amazon.com, Inc.*, 942 F.3d 297, 300–01 (6th Cir. 2019) (applying factors and granting certification); *Fernandez v. Chardon*, 681 F.2d 42, 54–55 (1st Cir. 1982) (applying factors and declining to certify question).

27 The Uniform Certification of Questions of Law Act originally was drafted in 1967, *see* UNIF. CERTIFICATION OF QUESTIONS OF LAW (amended 1995), 12 U.L.A. 82 (1967), and therefore also could have played a role in the increased number of states authorizing certification. However, as one commentator has observed, in 1967, four states had certification procedures, and by 1971, that number had climbed only to seven. *See* 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, 383 (2010). *Lehman Bros.*, it would seem, proved to be more of a catalyst for adoption of certification procedures than the Uniform Law. *Id.* at 384.

28 Note, *Civil Procedure—Scope of Certification in Diversity Jurisdiction*, 29 RUTGERS L. REV. 1155, 1156 n.6 (1976).

29 GOLDSCHMIDT, *supra* note 1, at 15. Although, by statute, Missouri allows certification, *see* MO. REV. STAT. § 477.004 (2020), the Supreme Court of Missouri has held that the Missouri Constitution does not “expressly or by implication grant the Supreme Court of Missouri original jurisdiction to render opinions on questions of law certified by federal courts.” *Grantham v. Mo. Dep’t of Corr.*, No. 72576, 1990 WL 602159, at *1 (Mo. July 13, 1990) (en banc). The AJS, therefore, did not include Missouri in its count. *See* GOLDSCHMIDT, *supra* note 1, at 15.

30 Since 1995, the following states have adopted certification procedures: Pennsylvania, 204 PA. CODE § 29.452 (2019); New Jersey, N.J. STAT. ANN. § 2:12A-1 (West 2019); VERMONT, VT. R. APP. P. 14; Arkansas, ARK. SUP. CT. R. 6-8; and California, CAL. R. CT. 8.548. Some state supreme courts authorize certification from only the Supreme Court of the United States and the federal court of appeals in which the court is located, *see, e.g.,* ILLCS S. CT. R. 20(a); others authorize certification from any Article III court, *see, e.g.,* IND.

II

It is tempting to let the numbers speak for themselves. If certification were a severe drain on state court resources, it seems that some state judiciaries, over time, would have opted out. However, state judiciaries steadily have followed Florida's lead. Moreover, state judiciaries have expanded, rather than restricted, the entities from which they will accept certified questions.³¹ From the federal perspective, the possibility of some additional delay has not seemed to deter us from certifying questions of state law to the state supreme courts.³² Nor have certifications resulted in significant delays, at least in our own circuit.³³

R. APP. P. 64(A); and some states extend certification to agencies and to foreign sovereigns, *see, e.g.*, DEL. S. CT. R. 41 (a)(ii) (authorizing the state supreme court to accept a certified question from any federal Article III court, federal bankruptcy courts, the Security and Exchange Commission, "the Highest Appellate Court of any foreign country, or any foreign governmental agency regulating the public issuance or trading of securities," among others); MONT. R. APP. P. 15(3) (authorizing the state supreme court to answer a certified question from a tribe, from Canada, a Canadian province or territory, Mexico, or a Mexican state).

31 *See, e.g.*, CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 229 n.1 (Del. 2008) (explaining that the Delaware Constitution "was amended in 2007 to authorize this Court to hear and determine questions of law certified to it by . . . the United States Securities and Exchange Commission"); *see also* GA. CODE ANN. § 165 (West 2003) (amending the Georgia Constitution to allow the Georgia Supreme Court to answer questions certified from federal district, as well as appellate courts).

32 To compare recent use of certification by federal courts, we ran a Westlaw search (certify! /3 question and da(after 1/1/2015)) similar to that employed in the AJS report. *See* GOLDSCHMIDT, *supra* note 1, at 28 n.59 (employing "WESTLAW search terms: da (after 1989 & before 1995) & 'certif! of question'"). Over the last five years, the First Circuit has certified twenty questions in fifteen cases compared to thirteen questions between 1990 and 1994; the Second Circuit has certified thirty questions in twenty-four cases compared to thirteen questions between 1990 and 1994; the Third Circuit has certified seven questions in six cases compared to six questions between 1990 and 1994; the Fourth Circuit has certified fourteen questions in seven cases compared to fourteen questions between 1990 and 1994; the Fifth Circuit has certified twenty-four questions in seventeen cases compared to fifteen questions between 1990 and 1994; the Sixth Circuit has certified six questions in five cases compared to eight questions between 1990 and 1994; the Seventh Circuit has certified six questions in six cases compared to thirteen questions between 1990 and 1994; the Eighth Circuit has certified two questions in two cases compared to eleven questions between 1990 and 1994; the Ninth Circuit has certified eighty-four questions in fifty-five cases compared to twenty-three questions between 1990 and 1994; the Tenth Circuit has certified eight questions in six cases compared to eleven questions between 1990 and 1994; the Eleventh Circuit has certified twenty-six questions in fourteen cases compared to forty-nine questions between 1990 and 1994; and the D.C. Circuit has certified a single question compared to fifteen between 1990 and 1994. *Id.* at 28.

33 In the last four cases in which we have certified questions and received answers from state courts, on average the state courts have provided notice of acceptance within thirty-eight days and have provided answers to the certified questions in just a little over nine months. One recent article reports that "[s]ome studies have found 'that the certification process generally causes delays of longer than one year with an average being about fifteen months.'" Coby W. Logan, *Certifying Questions to the Arkansas Supreme Court: A Practical Mat-*

Although the numbers affirm that certification currently is widely accepted and enjoys general approval, this result did not happen by accident, nor was it inevitable. In certification's infancy, the possibility that state courts could have become flooded with certified questions was real, and the merits of certification were uncertain. Through the efforts of the federal and state courts, it has developed into an effective tool of "cooperative judicial federalism."³⁴ Since *Clay* and *Lehman Bros.*, the federal and state courts have engaged in a productive conversation regarding how certification can and should be used for the benefit of both judiciaries. The states began this conversation with the adoption of certification statutes and rules.

Before determining whether it will exercise its discretion to certify a question, a federal court must ensure compliance with its own rules and those of the state court to which the question will be certified.³⁵ State court rules generally require that the question being certified "be determinative" or "may be determinative" of the litigation in the certifying court and that there is no controlling precedent.³⁶ Of the state courts in our circuit, Illinois

ter for Federal Courts in Clarifying State Law, 30 U. ARK. LITTLE ROCK L. REV. 85, 101 (2007). The one-year and fifteen-month estimates ultimately trace back, respectively, to a 1969 article using as examples two Fifth Circuit cases, see Brian Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 U. MIAMI L. REV. 717, 726–27, 727 n.62 (1969), and to an "average . . . derived from data" supplied from a survey of cases, issued between 1963 and 1975, involving certified questions, David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 326–27, 327 n.52 (1977) (citing Note, *supra* note 28, at 1176–81). Nevertheless, there is no question that delay attendant to certification can vary, and our circuit's experience may not be representative.

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

35 Our certification rule provides, in relevant part:

When the rules of the highest court of a state provide for certification to that court by a federal court of questions arising under the laws of that state which will control the outcome of a case pending in the federal court, this court, sua sponte or on motion of a party, may certify such a question to the state court in accordance with the rules of that court, and may stay the case in this court to await the state court's decision of the question certified.

7TH CIR. R. 52(a). Only four federal courts of appeals—the Courts of Appeal for the Second, Third, Seventh, and Tenth Circuits—have formal rules addressing certification. GOLDSCHMIDT, *supra* note 1, at 13; see, e.g., 3D. CIR. R. 110.1

36 See GOLDSCHMIDT, *supra* note 1, at 18. The AJS survey reported that eleven states require both that the certified question "is determinative" and that there is no controlling precedent; twenty-six states require both that the certified question "may be determinative" and there is no controlling precedent; and six states use "other" criteria. *Id.* (emphases added). As an example of the last category, Idaho requires:

(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 decision 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.

Id. at 19 n.3 (quoting IDAHO APP. R. 12.3(a)). Of the five states that have adopted rules since the AJS survey, New Jersey and Arizona join the twenty-six states that require both

and Wisconsin require only that the question posed “may be determinative”;³⁷ Indiana’s rule, however, requires that the state law question be “determinative of the case.”³⁸ All require that there be an absence of controlling precedent on the certified question.³⁹ In setting these requirements, the state courts sent a clear message to their federal counterparts: although open to providing guidance to the federal courts, they do not want to waste their time and effort. Questions sent to them must be critical to the case before the federal court, and the state courts must not have spoken authoritatively on the issue presented.

These requirements have functioned as the first line of defense to deter federal courts’ overuse of certification. Federal courts have been respectful of these criteria and regularly observe that “[t]he most important consideration guiding the exercise of this discretion . . . is whether the reviewing court finds itself genuinely uncertain about a question of state law that is vital to a correct disposition of the case.”⁴⁰ When “[t]here is controlling state precedent . . . , certification is both inappropriate and an unwarranted burden on the state court.”⁴¹ And we have declined to certify questions to a state supreme court where the court has “illuminate[d] a clear path” for us to follow.⁴² Even if the precedent is dated, or the law as a whole is developing in a different direction, we may not certify the question to “check if [the state

that the issue “may be determinative” and that there is no controlling precedent. *Id.* at 18–19; see N.J. STAT. ANN. § 2:12A-1 (West 2019); ARIZ REV. STAT. ANN. § 12-1861 (2020). California, Vermont, and Pennsylvania use “other” formulations. CAL. APP. R. § 8.548; VT. R. APP. P. 14(a); PA. R. APP. P. 3341(c).

37 See ILCS S. CT. R. 20; WIS. STAT. § 821.01 (2018). This standard has been accorded a wide range of meanings. See *Volvo Cars of N. Am., Inc. v. Ricci*, 137 P.3d 1161, 1164 (Nev. 2006) (collecting cases). Wyoming has interpreted this standard to require that, once the certified questions is answered, “there is nothing left for the trial court to do but apply our answer to the question or questions and enter judgment.” *Hanchey v. Steighner (In re Certified Question)*, 549 P.2d 1310, 1311 (Wyo. 1976). Other courts have interpreted the phrase somewhat more broadly, “permitting certification if one of the possible answers will conclude the federal case (whereas a different answer might require more proceedings in federal court) or if the answer may resolve one of the pending claims, even if not the entire case.” *Volvo Cars of N. Am., Inc.*, 137 P.3d at 1164. Finally, some courts “ha[ve] considered certified questions when [their] answers may ‘be determinative’ of part of the federal case, there is no controlling [state] precedent, and the answer will help settle important questions of law.” *Id.* (quoting *Ventura Grp. Ventures, Inc. v. Ventura Port Dist.*, 16 P.3d 717, 719 (Cal. 2001)).

38 IND. R. APP. P. 64(A).

39 Indiana Rule of Appellate Procedure 64(A) requires that there be “no clear controlling Indiana precedent,” *id.*, Illinois Supreme Court Rule 20 requires that there be “no controlling precedents in the decisions of this court,” ILCS S. CT. R. 20, and Wisconsin Statute § 821.01(a) requires that it “appear[] to the certifying court there is no controlling precedent,” WIS. STAT. § 821.01 (2018).

40 *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 671 (7th Cir. 2001) (omission in original) (quoting *Tidler v. Eli Lily & Co.*, 851 F.2d 418, 426 (D.C. Cir. 1988)).

41 *Manchester Sch. Dist. v. Crisman*, 306 F.3d 1, 14 (1st Cir. 2002).

42 *Officer v. Chase Ins. Life & Annuity Co.*, 541 F.3d 713, 719 (7th Cir. 2008) (alteration in original) (quoting *Plastics Eng’g Co. v. Liberty Mut. Ins. Co.*, 514 F.3d 651, 659 (7th

supreme] court has changed its mind.”⁴³ On the occasions when federal courts have not been as mindful of these requirements as they should be, state courts have not hesitated to decline to answer the certified questions.⁴⁴

Beyond adhering to state court rules, however, federal courts have developed a jurisprudence of restraint with respect to certification that also has helped stem the flow of questions to the state courts. We have recognized that, “[a]t some level[,] there is uncertainty in every application of state law”⁴⁵ and have looked for principled means to make *Erie* predictions. Thus, “[i]n the absence of a definitive ruling by the highest state court,” courts “may consider ‘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.’”⁴⁶ The court employed the first of these criteria in *Fischer v. Bar Harbor Banking & Trust Co.* In *Fischer*, one of the parties had requested certification on the question “whether Maine jurisprudence would recognize the doctrine of ‘qualified privilege of a rival claimant’ in an action for slander of title.”⁴⁷ The court determined that certification was not warranted because, although the Supreme Court of Maine had not addressed this question, there was “no real debate in the law

Cir. 2008)); *see, e.g.*, *Cedar Farm, Harrison Cty., Inc. v. Louisville Gas & Elec. Co.*, 658 F.3d 807, 812–13 (7th Cir. 2011).

43 *Sanchelima Int’l, Inc. v. Walker Stainless Equip. Co.*, 920 F.3d 1141, 1146 (7th Cir. 2019).

44 *See, e.g.*, *Heatherwood Holdings, LLC v. First Commercial Bank*, 61 So. 3d 1012, 1026 (Ala. 2010); *CSX Transp., Inc. v. City of Garden City*, 619 S.E.2d 597, 599 (Ga. 2005) (declining to answer certified questions in part because they involved questions previously decided by the court); *Jackson Brook Inst., Inc. v. Me. Ins. Guar. Ass’n*, 861 A.2d 652, 654 (Me. 2004) (declining to answer three of four certified questions “as there is clear controlling Maine precedent, and/or material facts that are either in dispute or not before us”); *Grant Creek Water Works, Ltd. v. Comm’r*, 775 P.2d 684, 685 (Mont. 1989) (declining to answer certified question because case did not involve a “controlling question of the Montana law as to which there is substantial ground for difference of opinion” as required by the Montana Rules of Appellate Procedure).

45 *State Farm*, 275 F.3d at 672.

46 *Fischer v. Bar Harbor Banking & Tr. Co.*, 857 F.2d 4, 7 (1st Cir. 1988) (quoting *Michelin Tires (Can.) Ltd. v. First Nat’l Bank of Bos.*, 666 F.2d 673, 682 (1st Cir. 1981)); *see also, e.g.*, *C.S. McCrossan Inc. v. Fed. Ins. Co.*, 932 F.3d 1142, 1145 (8th Cir. 2019) (“If the Minnesota Supreme Court has not spoken on a particular issue, [this court] must attempt to predict how the Minnesota Supreme Court would decide an issue and may consider relevant state precedent, analogous decisions, considered dicta . . . and any other reliable data.” (quoting *Integrity Floorcovering, Inc. v. Broan-Nutone, LLC*, 521 F.3d 914, 917 (8th Cir. 2008) (alteration and omission in original))); *Wade v. EMCASCO Ins. Co.*, 483 F.3d 657, 666 (10th Cir. 2007) (listing, among other considerations, “appellate decisions in other states with similar legal principles” to predict how a state supreme court would rule on a particular issue (citing *United States v. DeGasso*, 369 F.3d 1139, 1148 (10th Cir. 2004))); *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1445 (3d Cir. 1996) (listing the “decisions . . . of other state supreme courts that have addressed the issue” as sources of guidance for an *Erie* prediction (citing *Wiley v. State Farm Fire & Cas. Co.*, 995 F.2d 457, 459–60 (3d Cir. 1993))).

47 *Fischer*, 857 F.2d at 7.

that one who maintains a competing claim to an interest in the property of another is conditionally privileged to assert a lien on that property in order to preserve his interest.”⁴⁸ Absent some indication that Maine would deviate from the majority rule, there was no reason to burden the Supreme Court of Maine with this question.

In the area of uniform laws, analogous decisions frequently have obviated the need for certification. In *Northrop Corp. v. Litronic Industries*, for instance, a panel of our court had to determine what rule the Supreme Court of Illinois would apply in a “battle of the forms” situation.⁴⁹ The Uniform Commercial Code did not dictate what the resulting terms of a contract would be if the “offer and acceptance contain[ed] different terms,” as opposed to situations when “the acceptance merely contain[ed] additional terms to those in the offer.”⁵⁰ “The majority view [was] that the discrepant terms fall out and are replaced by a suitable UCC gap-filler.”⁵¹ We reasoned that

Illinois in other UCC cases has tended to adopt majority rules, and because the interest in the uniform nationwide application of the Code—an interest asserted in the Code itself—argues for nudging majority views, even if imperfect (but not downright bad), toward unanimity, we start with a presumption that Illinois, whose position we are trying to predict, would adopt the majority view. We do not find the presumption rebutted.⁵²

The same rationale has been applied to discern state law under the Uniform Trade Secrets Act⁵³ and the Uniform Fraudulent Conveyance Act.⁵⁴

48 *Id.* (citing 3 RESTATEMENT (SECOND) OF TORTS § 647 cmt. g (AM. LAW INST. 1977)).

49 *Northrop Corp. v. Litronic Indus.*, 29 F.3d 1173, 1174–75 (7th Cir. 1994).

50 *Id.* at 1178.

51 *Id.*

52 *Id.* (citations omitted) (first citing *Rebaque v. Forsythe Racing, Inc.* 480 N.E.2d 1338, 1341–42 (Ill. App. Ct. 1985); and then citing U.C.C. § 1-102 (AM. LAW INST. & UNIF. LAW COMM’N 1990)).

53 See *Bondpro Corp. v. Siemens Power Generation, Inc.*, 463 F.3d 702, 704 (7th Cir. 2006) (observing that Wisconsin had adopted the Uniform Trade Secrets Act, which “is to ‘be applied and construed to make uniform the law relating to misappropriation of trade secrets among states enacting substantially identical laws’” and therefore “decisions by other jurisdictions . . . on questions involving the UTSA are to be given careful consideration” (first quoting WIS. STAT. § 134.90(7) (2018); and then quoting *Minuteman, Inc. v. Alexander*, 434 N.W.2d 773, 779 (Wis. 1989))); see also *Degussa Admixtures, Inc. v. Burnett*, 277 F. App’x 530, 534 (6th Cir. 2008) (noting that, although Michigan had not construed a particular provision of its Uniform Trade Secrets Act, “other courts construing identical provisions from other States” had, and concluding that there was “no reason not to apply this conventional test”); *Amalgamated Indus. Ltd. v. Tressa, Inc.*, 69 F. App’x 255, 261 (6th Cir. 2003) (observing that it was “appropriate . . . to turn to decisions in other jurisdictions for guidance in interpreting and applying the Uniform Act . . . especially . . . since no Kentucky court ha[d] published a decision interpreting or applying the Act”).

54 See *Sikirica v. Wettach (In re Wettach)*, 811 F.3d 99, 107 (3d Cir. 2016) (stating that the Pennsylvania Uniform Fraudulent Transfer Act “is a statute ‘uniform with those of other states,’” should be “interpret[ed] . . . in accordance with the laws of other jurisdictions,” and, therefore, applying the rule followed by “[t]he overwhelming weight of judicial

The sources to which federal courts frequently turn in making *Erie* predictions are decisions of state intermediate appellate courts. Although it is both logical and practical for federal courts to look to these decisions as authoritative sources of state law, the federal courts' uniform reliance on state appellate courts is not a matter of judicial choice. In *West v. American Telephone & Telegraph Co.*,⁵⁵ the Supreme Court instructed that

[w]here an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.⁵⁶

The rule in *West* has been invoked frequently by nearly every federal circuit.⁵⁷

authority on this issue" (first quoting 1 PA. STAT. AND CONS. STAT. ANN. § 1927 (West 2019); and then citing *Klein v. Weidner*, 729 F.3d 280, 283 (3d Cir. 2013))). Pennsylvania has a statutory provision that requires that "[s]tatutes uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them." § 1927 (Westlaw).

⁵⁵ 311 U.S. 223 (1940).

⁵⁶ *Id.* at 237.

⁵⁷ See, e.g., *Naylor Farms, Inc. v. Chaparral Energy, LLC*, 923 F.3d 779, 794–95 (10th Cir. 2019) (applying *West* and predicting action of Oklahoma Supreme Court based on two decisions of the Oklahoma courts of appeals); *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1266–67 (9th Cir. 2017) (applying *West* and concluding that there was no persuasive reason to conclude that the California Supreme Court would not follow a decision of the California Court of Appeal); *Lukas v. McPeak*, 730 F.3d 635, 637–39 (6th Cir. 2013) (quoting *West* and determining that it would follow interpretations of state law by intermediate appellate courts); *Raines v. Safeco Ins. Co.* 637 F.3d 872, 875–77 (8th Cir. 2011) (applying *West* and following Kansas Court of Appeals' decision as basis for *Erie* prediction); *Noviello v. City of Boston*, 398 F.3d 76, 91 (1st Cir. 2005) (relying on *West* for proposition that "the decision of an intermediate appellate court of the state generally constitutes a reliable piece of evidence"); *Am. Nat'l Gen. Ins. Co. v. Ryan*, 274 F.3d 319, 328–29 (5th Cir. 2001) (applying *West* and following state intermediate appellate court decisions in predicting what Supreme Court of Texas would do); *Nationwide Mut. Ins. Co. v. Buffetta*, 230 F.3d 634, 637 (3d Cir. 2000) (noting that, in predicting how a state supreme court will rule, "[t]he opinions of intermediate appellate state courts are 'not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise'" (quoting *West*, 311 U.S. at 237); *Assicurazioni Generali, S.p.A. v. Neil*, 160 F.3d 997, 1002–04 (4th Cir. 1998) (applying *West* and holding that district court had erred in failing to follow decision of intermediate appellate court); *Pentech Int'l, Inc. v. Wall St. Clearing Co.*, 983 F.2d 441, 446 (2d Cir. 1993) (quoting *West*); *Watson v. Dugger*, 945 F.2d 367, 369–71 (11th Cir. 1991) (noting that the court had "consistently followed" *West* and adhering to Florida intermediate court opinion in predicting action by Florida Supreme Court); *Garris v. Schwartz*, 551 F.2d 156, 158 (7th Cir. 1977) (quoting *West* and concluding that "[w]e are not convinced that the Illinois Supreme Court would reject the rule of law as announced and applied by the appellate court"). The District of Columbia does not have an intermediate appellate court; consequently, there has been less of an occasion for the Court of Appeals for the District of Columbia to invoke the rule.

This was the animating principle behind our decision in *State Farm Mutual Automobile Insurance Co. v. Pate*.⁵⁸ State Farm had brought a declaratory judgment action seeking a ruling that “the ‘impact clause’ in its automobile insurance policy was valid under Indiana law. The impact clause require[d] that the unidentified motorist must make physical contact with their car in order for the Pates to be paid under their uninsured motorist policy.”⁵⁹ Over the course of thirty years, the state appellate courts had held, on several occasions, “that the ‘policy requirement of “physical contact” is not unreasonable and does not unduly restrict the [uninsured motorist] statute.’”⁶⁰ Given this consistent approach over a significant period of time, we had “no reason to believe that the Supreme Court of Indiana would take a view different from” its appellate courts.⁶¹

A consistent approach among the intermediate appellate courts also guided the decision of the Fifth Circuit in *Guilbeau v. Hess Corp.*⁶² In *Guilbeau*, a subsequent purchaser of land, Guilbeau, brought suit against Hess Corporation for damages stemming from the oil- and gas-related activities that Hess Corporation’s predecessors had conducted on the land. Both parties acknowledged that Louisiana generally adhered to “the subsequent purchaser rule,” according to which a property owner may not recover “from a third party for damage which was inflicted on the property before his purchase, in the absence of an assignment or subrogation of the rights belonging to the owner of the property when the damage was inflicted.”⁶³ Nevertheless Guilbeau had claimed that the rule’s applicability to gas and mineral leases was uncertain because (1) the Supreme Court of Louisiana had “express[ed] no opinion as to the applicability of [its] holding to fact situations involving mineral leases or obligations arising out of the Mineral Code” and (2) there was a “mishmash” of state appellate authority on the issue.⁶⁴ The Fifth Circuit disagreed. It observed that, although some earlier state appellate decisions had concluded the rule did not apply, “a clear consensus ha[d] emerged among all Louisiana appellate courts that have considered the issue, and they have held that the subsequent purchaser rule does apply to cases . . . involving expired mineral leases.”⁶⁵ The court also specifically addressed why the case was ill suited for certification:

“[A]lone, the absence of a definitive answer from the state supreme court on a particular question is not sufficient to warrant certification.” “Rather, we must ‘decide the case as would an intermediate appellate court of the state

58 275 F.3d 666, 671 (7th Cir. 2001).

59 *Id.* at 668.

60 *Id.* at 669 (quoting *Ely v. State Farm Mut. Auto. Ins. Co.*, 268 N.E.2d 316, 319 (Ind. Ct. App. 1971) (alteration in original)).

61 *Id.* at 671.

62 854 F.3d 310 (5th Cir. 2017).

63 *Id.* at 312 (quoting *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 79 So. 3d 246, 256–57 (La. 2011)).

64 *Id.* at 312–13 (quoting *Eagle Pipe*, 79 So. 3d at 281 n.80).

65 *Id.* at 313.

in question if . . . the highest court of the state has not spoken on the issue or issues presented,” and we are “reluctant” to certify “absent genuinely unsettled matters of state law.” When, as here, the appellate decisions are in accord, the law is not unsettled, and certification is unwarranted.⁶⁶

Even when federal courts face a genuine quandary regarding the meaning and applicability of state law, practical considerations further narrow the category of cases certified to the state courts. Federal courts agree that “questions tied to specific facts” generally are “not suitable for certification to a state’s highest court.”⁶⁷ The rationale for this limitation is clear: it is not fair to saddle a state court with the burden of determining a case when the resulting rule would have limited applicability.⁶⁸ Instead, federal courts are more inclined to certify questions involving “matter[s] of vital public concern.”⁶⁹ The state courts, after all, are uniquely attuned to the public policy of their home states and can best divine a path in matters that “will almost exclusively impact citizens of that state.”⁷⁰ For example, recently a federal court certified the question whether a state statute permits a plaintiff to bring a disability discrimination claim based solely on the perception that the plaintiff suffered from untreated alcoholism.⁷¹ In certifying the question, the Second Circuit noted that it “present[ed] important issues of New York law and policy”;⁷² specifically, it asked the court to determine whether the statute “protect[ed] only recovering alcoholics” or rather “[sought] to ensure that employees with disabilities do not receive less protection under City law than they receive under State and federal law. . . . The question presented also broadly affect[ed] the viability of employer-sponsored rehabilitation programs in New York.”⁷³ The Second Circuit concluded that “[a] New York

66 *Id.* at 315 (footnotes omitted) (quoting *Jefferson v. Lead Indus. Ass’n*, 106 F.3d 1245, 1247 (5th Cir. 1997) (per curiam) (alteration in original)).

67 *Zahn v. N. Am. Power & Gas, LLC*, 815 F.3d 1082, 1085 (7th Cir. 2016) (quoting *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 672 (7th Cir. 2001)); *see also Green v. Montgomery*, 219 F.3d 52, 60 (2d Cir. 2000) (identifying “the likelihood that the question will recur” as a criterion for determining whether to grant certification).

68 Some of our sister circuits impose additional restrictions on certification. Some, for instance, adhere to the “principle that federal courts ‘should be slow to honor a request for certification from a party who chose to invoke federal jurisdiction.’” *Smith v. SEECO, Inc.*, 922 F.3d 406, 412 (8th Cir. 2019) (quoting 17A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4248 (3d ed. 2017)); *see also Johnson v. Teva Pharm. USA, Inc.*, 758 F.3d 605, 614 (5th Cir. 2014); *cf. Nat’l Bank of Wash. v. Pearson*, 863 F.2d 322, 327 (4th Cir. 1988) (“Certification would be inappropriate here, however, because Pearson himself removed this case from Maryland state court after the Maryland judge decided the question against him. If Pearson had wanted the Maryland Court of Appeals to rule on the matter, he should not have removed the action to federal court.”).

69 *Tammi v. Porsche Cars N. Am., Inc.*, 536 F.3d 702, 713 (7th Cir. 2008) (quoting *Plastics Eng’g Co. v. Liberty Mut. Ins. Co.*, 514 F.3d 651, 659 (7th Cir. 2008)).

70 *Id.* (quoting *State Farm*, 275 F.3d at 672).

71 *Makinen v. City of New York*, 857 F.3d 491 (2d Cir. 2017).

72 *Id.* at 496 (quoting *Doe v. Guthrie Clinic, Ltd.*, 710 F.3d 492, 497–98 (2d Cir. 2013)).

73 *Id.*

court should determine in the first instance which of these judgments ought to prevail in the event they conflict.”⁷⁴

Federal courts also have certified questions regarding the scope of a state’s wrongful death action,⁷⁵ the availability of a cause of action under a state’s insurance code for wrongful denial of benefits,⁷⁶ and the ability of private parties to contractually limit statutes of limitation.⁷⁷ In all of these cases, the courts cited the importance of public policy and the state’s interest in directing its own policy as grounds for certification.

Federal courts have not been alone, however, in their efforts to narrow certified questions to those that are both important and far reaching. Many of the criteria used by the federal courts to make certification decisions also are employed by state courts in exercising their independent determinations whether to answer certified questions. In *Western Helicopter Services, Inc. v. Rogerson Aircraft Corp.*⁷⁸—discussed in the AJS report—the Supreme Court of Oregon delineated the considerations that it would use in deciding whether to accept certification, and many state courts have adopted these same criteria, in whole or in part.⁷⁹ In addition to assuring itself that the five statutory criteria had been met,⁸⁰ the first, and primary consideration, was “whether, in spite of the contrary opinion of the certifying court, there already is controlling Oregon precedent for the question certified.”⁸¹ To accept a certified question, the issue also “truly [had] to be contested,” and, when the case originated from a district court, the court would examine if the case had

74 *Id.*

75 *GGNSC Admin. Servs., LLC v. Schrader*, 917 F.3d 20, 24–25 (1st Cir. 2019) (considering whether the decedent’s beneficiaries may maintain a wrongful death action against a residential facility under circumstances where the decedent, had she survived, would have been bound by an arbitration clause).

76 *Cameron Int’l Corp. v. Liberty Ins. Underwriters, Inc. (In re Deepwater Horizon)*, 807 F.3d 689, 698 (5th Cir. 2015) (certifying a question concerning “the availability of a cause of action under the Texas Insurance Code where the insurer wrongfully denied the policy benefits but caused the insured no damages other than those denied benefits”).

77 *Pfeifer v. Fed. Express Corp.*, 455 F. App’x 813, 813–14 (10th Cir. 2011) (“Does Kansas law, specifically Kan. Stat. Ann. § 60–501 and/or public policy, prohibit private parties from contractually shortening the generally applicable statute of limitations for an action?”).

78 811 P.2d 627 (Or. 1991).

79 *GOLDSCHMIDT*, *supra* note 1, at 36–37.

80 Those are: the certifying court is one listed in the statute, the question is one of law, the law at issue is Oregon law, the question “may be determinative of the cause,” and there is no controlling Oregon precedent. *W. Helicopter*, 811 P.2d at 630.

81 *Id.* at 631; *see also* *Scottsdale Ins. Co. v. Tolliver*, 127 P.3d 611, 612 (Okla. 2005) (declining to answer certified question due to controlling state court precedent). The Supreme Court of Oregon explained that “[w]here the controlling precedent is an opinion of this court,” it “ordinarily shall not reconsider such precedent in a certified case.” Where the controlling precedent is from the court of appeals, the court would “review the request for certification in much the same way we would view a petition for review of the Court of Appeals decision.” *W. Helicopter*, 811 P.2d at 631.

progressed sufficiently to focus the issues.⁸² As a matter of comity, the court usually would accept certified questions in “*Pullman*-type abstention cases.”⁸³ The court also would evaluate the question’s long-term impact and would avoid questions that were of “limited legal consequence.”⁸⁴

What is notable about these criteria is how closely they mirror the federal criteria. Both court systems are employing the same considerations to achieve the same goals. As explained by the New York Court of Appeals, “the certification procedure can provide the requesting court with timely, authoritative answers to open questions of New York law, facilitating the orderly development and fair application of the law and preventing the need for speculation.”⁸⁵

Although we do not mean to suggest that certification has been embraced by all federal and state jurists as the ultimate repository of judicial federalism and comity,⁸⁶ the last twenty-five years reflect an effort by both

82 *W. Helicopter*, 811 P.2d at 633; *see also* *Life Inv’rs Ins. Co. v. Estate of Corrado*, 838 N.W.2d 640, 643–44 (Iowa 2013) (noting that the court would decline certification when “the court lacks specific findings of fact or finds the factual record to be unclear”).

83 *W. Helicopter*, 811 P.2d at 632.

84 *Id.* at 633; *see also* *Grabois v. Jones*, 667 N.E.2d 307, 307 (N.Y. 1996) (citing “rarity of any recurrence of this issue” as a reason to decline answering the certified question).

Applying these criteria, the court in *Western Helicopter* first determined that, arguably, all the statutory criteria were met. *W. Helicopter*, 811 P.2d at 635. Turning to the discretionary factors, the court stated:

The first applicable factor is our conclusion, contrary to that of the district court, that there *is* controlling precedent with respect to the first question. It is true that *Korbut* is an extremely brief decision from the Court of Appeals. It is also true that there is contrary precedent from the Ninth Circuit—precedent that the district court normally would follow. But the question is one of Oregon law, not federal law, the federal court’s decision was the earlier of the two, and it is the Oregon court’s decision—not that of the Ninth Circuit—that is binding for purposes of the certification law. It follows from the foregoing that this court should not accept certification of the first question, unless some other discretionary factor dictates a contrary conclusion.

We find no factor favoring discretionary allowance of certification of the first question. The issue does not appear to be one of such general importance that we now believe that we should address it, nor is this a *Pullman*-type case in which a decision from this court will facilitate the functioning of the federal courts. We have left development of the law in this regard to the Court of Appeals and see no reason to depart from that course now.

Id. at 635 (citation omitted) (footnote omitted) (citing *Korbut v. Eastman Kodak Co.*, 787 P.2d 896 (Or. Ct. App. 1990) (mem.)). In essence, the state supreme court was admonishing the certifying court to follow the rule of *West* and to accord sufficient weight to a decision of an intermediate state appellate court.

85 *Tunick v. Safir*, 731 N.E.2d 597, 599 (N.Y. 2000) (per curiam).

86 As noted previously, North Carolina does not have a certification procedure, and Missouri is de facto without one. Additionally, some jurists on the Supreme Court of Michigan have expressed doubt as to the validity of its certification practice under the Michigan Constitution, *see, e.g.*, *Melson v. Prime Ins. Syndicate, Inc.*, 696 N.W.2d 687, 687 (Mich. 2005) (Weaver, J., concurring) (concurring in decision to decline to answer a certified question, “question[ing] this Court’s authority to answer such questions,” and identifying

judiciaries to make certification workable and beneficial to both sets of courts. Cooperative judicial federalism is alive and well.

III

Certification has proven uniquely beneficial in allowing states to develop areas of substantive law in which the stakes usually are very high and the defendant is a corporation from a foreign state. Cases in these areas routinely, if not inevitably, end up in federal courts. However, they frequently involve questions of great importance for the state or will impact a large swath of the state's population. The risk, in such circumstances, is that the interpretation of state law will exist without any participation by the state courts. One after another, cases will be removed to federal courts, federal courts will decide them, and then will come to rely on their own decisions in the interpretations of state law.⁸⁷ Certification, however, provides a check against federal monopoly and allows state courts the opportunity to weigh in on matters of pressing state interests.

One such area is products liability, and *Jaramillo v. Weyerhaeuser Co.*, is a case in point.⁸⁸ Jaramillo sought to hold Weyerhaeuser liable under a strict liability theory for injuries he sustained in 2002 while operating an industrial machine at work.⁸⁹ Weyerhaeuser had purchased the machine secondhand thirty years prior to Jaramillo's injury and sold it to his employer sixteen years prior to the injury.⁹⁰ Weyerhaeuser argued that it could not "be held strictly liable because it was a 'casual' or 'occasional' seller of [the machines], not an 'ordinary' or 'regular' seller" as required by New York's strict liability law.⁹¹ In determining whether to certify the question to the New York Court of Appeals, the Second Circuit noted that, since the New York Court of Appeals' decision in *Sukljian v. Charles Ross & Son Co.*,⁹² the state court had not had an opportunity to address a question of who was an "ordinary" or "regular" seller

other members of the court who share her concerns), and at least one federal judge has questioned the merits of certification, see Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 SUFFOLK U. L. REV. 677, 691 (1995) (calling "for a fundamental reexamination of the practice"). Commentators, as well, are not unanimous in their support of certification. See Justin R. Long, *Against Certification*, 78 GEO. WASH. L. REV. 114, 165-66 (2009) (concluding that "certification reflects dual federalism, a theory that inevitably undermines state autonomy").

87 For example, in *FMS, Inc. v. Volvo Construction Equipment North America, Inc.*, 557 F.3d 758, 759 (7th Cir. 2009), a panel of our court was required to interpret the Maine franchise law. Noting that "[t]he Maine courts have not interpreted the Maine franchise law," we relied on a number of federal cases interpreting the Wisconsin franchise statute to guide our analysis. See *id.* at 761-64. To date, it appears that all published opinions interpreting the provision at issue, Maine Revised Statutes Annotated Title 10 § 1363(3)(c), have originated in the federal courts.

88 *Jaramillo v. Weyerhaeuser Co.*, 536 F.3d 140 (2d Cir. 2008).

89 *Id.* at 141.

90 *Id.*

91 *Id.*

92 503 N.E.2d 1358 (N.Y. 1986).

of used machinery.⁹³ “Indeed, it appear[ed] to remain an open question in New York whether strict products liability can attach to a regular seller of used goods at all”⁹⁴ Moreover,

the regular seller doctrine is intended to advance certain public policy goals, such as spreading the costs of accidents, encouraging improvements in products safety and quality, and preserving consumer expectations. However, . . . extending strict products liability to companies like Weyerhaeuser raise[d] concerns about the potentially deleterious effects on the market for used equipment, which not only helps companies dispose of obsolete assets in an efficient way, but also makes low-cost equipment available for smaller companies that otherwise might not be able to afford it. Accordingly, whether and to what extent courts should impose strict liability on sellers of used equipment like Weyerhaeuser depend[ed] on the weighing of various policy considerations, which is best accomplished by the New York Court of Appeals.⁹⁵

The combination of uncertain state law and important state policy interests also prompted the Ninth Circuit to certify questions of Arizona products liability law to that state’s supreme court in *Torres v. Goodyear Tire & Rubber Co.*⁹⁶ The Torreses had sought to hold Goodyear liable for injuries sustained during a car accident based on, among other theories, “the ‘enterprise theory’ of strict products liability.”⁹⁷ The district court held that “this claim lacked an essential element of strict liability under Arizona statutory and case law: the defendant must have designed, manufactured or sold the defective product.”⁹⁸ Although the tires at issue bore the trademark “Goodyear,” they actually had been manufactured by one of Goodyear’s subsidiaries under a licensing agreement, and a different Goodyear subsidiary had designed the tire.⁹⁹ In considering the Torreses’ claim on appeal, the Ninth Circuit observed that Arizona courts had “found a variety of entities to be integral parts of an enterprise responsible for placing allegedly defective products on the market. . . . However, no Arizona court ha[d] considered the precise issue of whether a trademark licensor is strictly liable for personal injuries caused by a defective product bearing its trademark.”¹⁰⁰ The court then explained that policy considerations suggested restraint in “prematurely . . . extend[ing] the law of products liability in the absence of an indication from the Arizona courts or the Arizona legislature that such an extension would be desirable.”¹⁰¹ Among the court’s concerns were how to balance the “very substantial” costs attendant to products liability insurance with the “incentive

93 *Jaramillo*, 536 F.3d at 146, 148.

94 *Id.* at 148.

95 *Id.* (citation omitted) (citing *Jaramillo v. Weyerhaeuser Co.*, No. 03-Civ-1592(NRB), 2007 WL 194011, at *5 (S.D.N.Y. Jan 24, 2007)).

96 867 F.2d 1234 (9th Cir. 1989).

97 *Id.* at 1235.

98 *Id.* at 1237.

99 *Id.* at 1235–36.

100 *Id.* at 1237–38.

101 *Id.* at 1238.

to make available to its inhabitants all the possible benefits of” products liability coverage.¹⁰² The Ninth Circuit therefore certified the question

whether a trademark licensor is subject to strict product liability under section 402A of the Restatement (Second) of Torts . . . by reason of being either (a) a “manufacturer” or “seller” within the meaning of [Arizona statutes] or (b) an “integral part of an enterprise” responsible for placing allegedly defective products on the market.¹⁰³

Since the AJS survey, no fewer than twenty products liability cases have been certified to state supreme courts from seven federal circuits.¹⁰⁴

Certification also has played an important role in allowing state courts to develop their own franchise law. Wisconsin, for example, enacted the Wisconsin Fair Dealership Law (WFDL) “[t]o promote the compelling interest of the public in fair business relations between dealers and grantors”; “[t]o protect dealers against unfair treatment by grantors, who inherently have superior economic power and superior bargaining power in the negotiation of dealerships”; to enlarge the dealers’ rights and remedies beyond “those existing by contract or common law”; and “[t]o govern all dealerships . . . to the full extent consistent with the constitutions of this state and the United States.”¹⁰⁵ Because “the Fair Dealership Law implicates an important state public policy,” questions regarding its scope should be answered by the Supreme Court of Wisconsin.¹⁰⁶ Nevertheless, because these cases “often involve out-of-state sellers and in-state distributors, and the amount in controversy often exceeds \$75,000,” they find their way to federal court.¹⁰⁷ *Baldewein Co. v. Tri-Clover, Inc.*,¹⁰⁸ reached our court through this route.

From 1940 until 1996, Baldewein, an Illinois corporation with its principal place of business in Illinois, had sold pumps, valves, fittings, and tubing manufactured by Tri-Clover, a Delaware corporation with its headquarters and principal place of business in Kenosha, Wisconsin.¹⁰⁹ Although Baldewein “derived some 80 to 90 percent of its total revenue from the sale

102 *Id.* at 1238–39.

103 *Id.* at 1239.

104 *See, e.g.*, *Bergin v. Mentor Worldwide LLC*, 871 F.3d 1191 (11th Cir. 2017); *McNair v. Johnson & Johnson*, 694 F. App’x 115 (4th Cir. 2017); *Miller v. Ford Motor Co.*, 857 F.3d 1016 (9th Cir. 2017); *Izzarelli v. R.J. Reynolds Tobacco Co.*, 731 F.3d 164 (2d Cir. 2013); *Tabor v. Metal Ware Corp.*, 182 F. App’x 774 (10th Cir. 2006); *Burden v. Johnson & Johnson Med.*, 447 F.3d 371 (5th Cir. 2006); *Trans States Airlines v. Pratt & Whitney Can., Inc.*, 86 F.3d 725 (7th Cir. 1996).

105 WIS. STAT. § 135.025(2) (2018).

106 *Winebow, Inc. v. Capitol-Husting Co.*, 867 F.3d 862, 870 (7th Cir. 2017).

107 *Id.* Indeed, a Westlaw search of cases involving the WFDL (Westlaw search conducted in the Seventh Circuit database: “wfdl” “Wisconsin fair dealership” “Wisconsin franchise law”) and dated after January 1, 1995, revealed that, since 1995, there have been 181 federal cases in our circuit involving the WFDL compared to forty-nine cases involving the WFDL in the Wisconsin appellate and supreme court (same Westlaw search conducted in the Wisconsin database).

108 *Baldewein Co. v. Tri-Clover, Inc.*, 606 N.W.2d 145, 147 (Wis. 2000).

109 *Id.* at 147.

of Tri-Clover's products," its sales were primarily in Illinois.¹¹⁰ Historically, less than one percent of them came from Wisconsin, although that number had increased to about four percent near the end of its relationship with Tri-Clover.¹¹¹ When Tri-Clover ended its relationship with Baldewein, Baldewein instituted a diversity action under the WFDL.¹¹² However, to invoke the WFDL's protections, Baldewein had to establish that it was "situated in this state."¹¹³ Relying on Baldewein's small percentage of sales in Wisconsin, the district court concluded that Baldewein did not meet this definition and, therefore, was not entitled to the statute's protection.¹¹⁴

On appeal, we certified the question to the Supreme Court of Wisconsin.¹¹⁵ That court explained that "the 'situated in this state' concept limits the application of the WFDL to commercial relationships that exist in some substantial way in this state (and otherwise satisfy the definition in the statute)."¹¹⁶ Although the amount of sales within a state does shed light on this inquiry, a court also must look to the amount of resources that the dealer has invested in the state.¹¹⁷ "Therefore," the court held,

to determine whether a dealership is "situated in this state" under the WFDL, courts should examine the following factors: 1) percent of total sales in Wisconsin (and/or percent of total revenue or profits derived from Wisconsin); 2) how long the parties have dealt with each other in Wisconsin; 3) the extent and nature of the obligations imposed on the dealer regarding operations in Wisconsin; 4) the extent and nature of the grant of territory in this state; 5) the extent and nature of the use of the grantor's proprietary marks in this state; 6) the extent and nature of the dealer's financial investment in inventory, facilities, and good will of the dealership in this state; 7) the personnel devoted to the Wisconsin market; 8) the level of advertising and/or promotional expenditures in Wisconsin; and 9) the extent and nature of any supplementary services provided in Wisconsin. We do not intend this list to be all-inclusive. The inquiry should focus on the nature and extent of the dealership's development of, investment in and reliance upon the Wisconsin market.¹¹⁸

Because the record was not sufficiently developed regarding some of the relevant factors, the Supreme Court of Wisconsin could not conclude if Baldewein was "situated in this state."¹¹⁹ It therefore returned the case to

110 *Id.*

111 *Id.*

112 *Id.* at 147–48.

113 *Id.* at 148.

114 *Id.*

115 *Id.*

116 *Id.* at 150.

117 *Id.* at 151.

118 *Id.* at 152–53 (footnote omitted).

119 *Id.* at 153.

us,¹²⁰ and we promptly remanded to the district court so that the record could be further developed.¹²¹

Since *Baldewein*, numerous federal courts have employed its multifactor test to determine whether a dealer could invoke the WFDL,¹²² therefore ensuring the public policy as set forth by Wisconsin courts, and not individual federal judges' views of that public policy, is given effect.

Certification not only has allowed the Supreme Court of Wisconsin to clarify who may invoke the WFDL's protections, but also has allowed the Supreme Court of Wisconsin to check the expansion of the law beyond its legislative intent. Recently, in *Winebow, Inc. v. Capitol-Husting Co.*, a panel of our court faced the question whether the definition of a dealership for purposes of the WFDL includes wine distributorships.¹²³ The Supreme Court of Wisconsin had not spoken to the issue, and both parties had presented sound legal arguments to support its interpretation of the statute.¹²⁴ In addition to presenting an unsettled question of state law, we observed that the "scope of the [WLDF] has been the subject of numerous cases," and it was unlikely that "litigation will diminish."¹²⁵ Given these considerations, and the importance of the state public policy at issue, we certified the question.¹²⁶ Answering the question in the negative, the Supreme Court of Wisconsin disposed of an entire class of potential WLDF cases and freed federal courts of the burden and frustration of considering and trying cases that have no legal basis.¹²⁷

120 *Id.*

121 *Baldewein Co. v. Tri-Clover, Inc.*, No. 98-1901, 2000 WL 817674, at *2 (7th Cir. June 22, 2000).

122 *See* *Kaeser Compressors, Inc. v. Compressor & Pump Repair Servs., Inc.*, 781 F. Supp. 2d 819, 828–29 (E.D. Wis. 2011); *Brio Corp. v. Meccano S.N.*, 690 F. Supp. 2d 731, 752–54 (E.D. Wis. 2010); *Wash Sols., Inc. v. PDQ Mfg., Inc.*, No. 4:01CV2028MLM, 2003 WL 25737112, at *11–12 (E.D. Mo. Apr. 14, 2003); *Crown Operations Int'l, Ltd. v. Solutia, Inc.*, No. 99-C-0802-S, 2000 WL 33906466, at *5–7 (W.D. Wis. Aug. 22, 2000).

123 *Winebow, Inc. v. Capitol-Husting Co.*, 867 F.3d 862, 871 (7th Cir. 2017).

124 *Id.* at 868–70.

125 *Id.* at 870.

126 *Id.* at 870–71.

127 *Winebow, Inc. v. Capitol-Husting Co.*, 914 N.W.2d 631, 638 (Wis. 2018). Products liability and franchise law are just two examples of areas of law where there is the possibility of federal courts becoming the primary interpreter of state law. Another example is insurance. In 2019, the U.S. courts of appeals certified questions regarding the scope of insurance policies or the extent of insurance coverage in the following cases: *State Farm Lloyds v. Richards*, 784 F. App'x 247, 253 (5th Cir. 2019) (per curiam) (certifying the following question to the Texas Supreme Court: "Is the policy-language exception to the eight corners rule a permissible exception under Texas law?" (citation omitted) (citing *B. Hall Contracting Inc. v. Evanston Ins. Co.*, 447 F. Supp. 2d 634 (N.D. Tex. 2006))); *Liberty Mutual Fire Insurance Co. v. Fowlkes Plumbing, L.L.C.*, 934 F.3d 424, 428 (5th Cir. 2019) (per curiam) (noting that Mississippi had not "taken a side in this deep and longstanding split" regarding interpretation of a waiver of subrogation provision); *State Farm Mutual Automobile Insurance Co. v. Mizuno*, 933 F.3d 1030, 1031 (9th Cir. 2019) (certifying to the Supreme Court of Hawai'i a question regarding the scope of insurance coverage for a permissive user); *Plavin v. Group Health Inc.*, No. 18-2490, 2019 WL 1965741, at *3 (3d Cir. Apr. 4, 2019) (certifying the question whether an insurance company had engaged in "consumer-oriented conduct"

IV

One significant development that has occurred in the area of certification since the AJS survey is its expansion beyond its diversity origins. The AJS survey noted that “[d]iversity cases were the most recent (i.e., within the past 12 months) and frequent type of cases that gave rise to an application for certification” according to eighty-seven percent of the circuit judges surveyed.¹²⁸ The survey, however, also noted “innovative uses of certification” in habeas and tax cases.¹²⁹ Although diversity cases continue to be the general rule,¹³⁰ nearly one-fourth of cases certified by circuit courts in the past year were something other than diversity cases.¹³¹ Moreover, certification has played an increasingly important role in habeas and criminal cases after the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Armed Career Criminal Act, respectively. If not commonplace, continuing to label the use of certification in habeas and criminal matters as “innovative” is a misnomer.

The AEDPA, enacted in 1996, imposed among other restrictions a one-year statute of limitations “to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.”¹³² The limitations period runs from the latest of several dates including “the date on

and thus was subject to liability for an allegedly deceptive act or practice under New York law); *Yahoo! Inc. v. National Union Fire Insurance Co. of Pittsburgh*, 913 F.3d 923, 926 (9th Cir. 2019) (certifying question to the California Supreme Court regarding “the insurer’s duty to defend the insured against a claim that the insured violated the Telephone Consumer Protection Act by sending unsolicited text message advertisements that did not reveal any private information”).

128 GOLDSCHMIDT, *supra* note 1, at 41.

129 *Id.* at 92 (capitalization altered) (citing *Adams v. Murphy*, 598 F.2d 982 (5th Cir. 1979) (habeas); *Hoadley v. Heggie*, 617 F.2d 589 (10th Cir. 1980) (per curiam) (habeas); *Gaskill v. United States*, 561 F. Supp. 73 (D. Kan. 1983) (tax), *aff’d mem.*, 787 F.2d 1446 (10th Cir. 1986)).

130 A review of the certifications across all circuits for calendar year 2019 revealed that over three-fourths of those cases were diversity cases or cases under the Class Action Fairness Act.

131 These included actions brought under 42 U.S.C. § 1983, *see Gale v. City & County of Denver*, 923 F.3d 1254, 1255 (10th Cir. 2019) (certifying the question whether “the Colorado Supreme Court [has] crafted an exception to the doctrine of res judicata such that a prior action under Colorado Rule of Civil Procedure 106(a)(4) cannot preclude 42 U.S.C. § 1983 claims brought in federal court, even though such claims could have been brought in the prior state action”), bankruptcy cases, *see In re Hernandez*, 918 F.3d 563, 571 (7th Cir. 2019) (certifying the question whether, after recent amendments to state law, “the Illinois Workers’ Compensation Act exempt[s] the proceeds of a workers’ compensation settlement from the claims of medical-care providers who treated the illness or injury associated with that settlement”), habeas actions, *see Phongmanivan v. Haynes*, 918 F.3d 1021, 1024 (9th Cir. 2019) (certifying the question as to when the denial of a personal restraint petition becomes final), and cases brought under the Armed Career Criminal Act, *see United States v. Glispie*, 943 F.3d 358, 359, 372 (7th Cir. 2019) (certifying the question “whether the limited-authority doctrine applies to residential burglary”).

132 28 U.S.C. § 2244(d)(1) (2012).

which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review”;¹³³ however, the limitations period is tolled for “[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.”¹³⁴ What followed the AEDPA’s enactment was a run of cases concerning the finality of state court judgments, what state court actions reset the statute of limitations, and when petitions for relief were properly filed in state courts, among others.¹³⁵

Resolving these questions often requires only a straightforward application of state law or rules of procedure. When that is not the case, certification provides federal courts a means of discerning state law and, in the process, ensuring the availability of habeas to those who meet statutory requirements. The Ninth Circuit, for instance, has sought the aid of state supreme courts numerous times in clarifying requirements that bear on issues arising under § 2244. Most recently, in *Phonsavanh Phongmanivan v. Haynes*,¹³⁶ the court certified to the Washington Supreme Court the question of when the denial of a personal restraint petition became final for purposes of tolling under § 2244. And, in *Robinson v. Lewis*¹³⁷ and *Bunney v. Mitchell*,¹³⁸ it certified to the California Supreme Court questions concerning the timeliness and finality of state habeas petitions.¹³⁹

133 *Id.* § 2244(d)(1)(A).

134 *Id.* § 2244(d)(2).

135 *See, e.g.,* *Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012) (setting forth two-pronged analysis for determining when a judgment becomes final for purposes of AEDPA); *Patterson v. Sec’y, Fla. Dep’t of Corr.*, 849 F.3d 1321, 1322–23 (11th Cir. 2017) (en banc) (resolving question of whether amended order to sentence restarts statute of limitations under § 2244); *Jenkins v. Superintendent of Laurel Highlands*, 705 F.3d 80, 84–85 (3d Cir. 2013) (raising question regarding whether petition for state post-conviction relief was properly filed); *Voravongsa v. Wall*, 349 F.3d 1, 1–2 (1st Cir. 2003) (same); *Bennett v. Artuz*, 199 F.3d 116, 117 (2d Cir. 1999) (same).

136 918 F.3d 1021 (9th Cir. 2019).

137 795 F.3d 926 (9th Cir. 2015).

138 249 F.3d 1188 (9th Cir. 2001).

139 Specifically, in *Robinson* the question certified was:

When a state habeas petitioner has no good cause for delay, at what point in time is that state prisoner’s petition, filed in a California court of review to challenge a lower state court’s disposition of the prisoner’s claims, untimely under California law; specifically, is a habeas petition untimely filed after a unexplained 66-day delay between the time a California trial court denies the petition and the time the petition is filed in the California Court of Appeal?

Robinson, 795 F.3d at 928. In *Bunney*, the question certified was: “When is the summary denial of a petition for habeas corpus by the California Supreme Court ‘final’: when filed, 30 days after filing, or at some other time?” *Bunney*, 249 F.3d at 1188–89.

Of course, once a state has clarified its criminal or postconviction procedure, the question whether that procedure tolls the time for filing a federal habeas petition or yields a final judgment for purposes of § 2244, is a question of federal law. *See, e.g.,* *Jimenez v. Quarterman*, 555 U.S. 113, 121 (2009) (“We hold that, where a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review,

Even outside the context of AEDPA, federal courts, including the Supreme Court, have requested guidance from state supreme courts on issues raised in habeas petitions. In *Fiore v. White*,¹⁴⁰ for example, the habeas petitioner challenged on due process grounds his Pennsylvania conviction for operating a hazardous waste facility without a permit. At trial, “[t]he Commonwealth conceded that Fiore in fact had a permit, but argued that Fiore had deviated so dramatically from the permit’s terms that he nonetheless had violated the statute. . . . [T]he Commonwealth’s lower courts agreed.”¹⁴¹ Fiore was convicted, and the state supreme court denied review.¹⁴² However, it later granted review of the conviction of his codefendant, Scarpone, who had been convicted of the same crime. The Pennsylvania Supreme Court

reversed Scarpone’s conviction on the ground that the statute meant what it said: The statute made it unlawful to operate a facility without a permit; one who deviated from his permit’s terms was not a person without a permit; hence, a person who deviated from his permit’s terms did not violate the statute.¹⁴³

Following this ruling, Fiore was unsuccessful in setting aside his conviction and eventually, and unsuccessfully, petitioned for federal habeas relief. When Fiore’s case reached the Supreme Court of the United States, the Court was “uncertain whether the Pennsylvania Supreme Court’s decision in Scarpone’s case represented a change in the law of Pennsylvania” or was the “proper statement of law at the date Fiore’s conviction became final.”¹⁴⁴ If the latter, then Fiore’s conviction violated Due Process. The state supreme court accepted the certified question and provided an answer: “*Scarpone* did not announce a new rule of law.”¹⁴⁵ Armed with this answer, the Supreme Court held that Fiore’s conviction failed to satisfy due process and reversed the lower court’s judgment.¹⁴⁶

The importance of state courts’ willingness to respond to certified questions in habeas—and criminal matters—cannot be understated. However important it may be to obtain a state court’s guidance on whether one if its citizens has a *civil* right of action or recovery under state law, that interest pales in comparison to a defendant’s interest in his or her freedom. In habeas and criminal cases, the moral and judicial imperative to “get it right”

but before the defendant has first sought federal habeas relief, his judgment is not yet ‘final’ for purposes of § 2244(d)(1)(A).”)

140 *Fiore v. White*, 528 U.S. 23 (1999).

141 *Fiore v. White*, 531 U.S. 225, 227 (2001) (per curiam).

142 *Id.*

143 *Id.* (emphasis omitted).

144 *Id.* at 228 (quoting *Fiore v. White*, 757 A.2d 842, 849 (Pa. 2000)).

145 *Fiore v. White*, 757 A.2d 842, 848–49 (Pa. 2000).

146 *Fiore*, 531 U.S. at 229.

is most pressing, and the only way to satisfy that duty is, at least in some circumstances, by referral to the state courts.¹⁴⁷

An area of criminal law in which certification is playing an increasingly important role is in the interpretation of the ACCA. The ACCA “increases the sentences of certain federal defendants who have three prior convictions ‘for a violent felony.’”¹⁴⁸ Under the ACCA, a violent felony is (1) a crime that “has as an element the use, attempted use, or threatened use of physical force against the person of another,” or (2) “burglary, arson, . . . extortion, [or] involves the use of explosives.”¹⁴⁹ Courts employ the categorical

147 In some cases, the importance of the defendant’s liberty interest may drive federal courts to certify questions in habeas cases that otherwise do not satisfy generally accepted criteria for certification. For instance, in *Hammonds v. Commissioner, Alabama Department of Corrections*, 712 F. App’x 841 (11th Cir. 2017) (per curiam), a federal habeas petitioner claimed that his Fifth Amendment right against self-incrimination and right to due process had been violated when a prosecutor commented on his failure to testify, and the curative instruction given by the state court judge exacerbated, rather than ameliorated, the violation. Prior to seeking federal habeas relief, the defendant had sought, but was denied, review in the state supreme court. The defendant moved for reconsideration. Following the state supreme court’s initial denial of review, but before it ruled on the motion to reconsider, a corrected trial transcript was filed in the state supreme court that revealed the trial court had given a truly curative instruction. The state supreme court denied reconsideration. On habeas review, the Eleventh Circuit could not determine which record the state supreme court had used in issuing its opinion: the earlier problematic one or the later curative one. It therefore certified the question to the Supreme Court of Alabama, which declined to provide an answer. *Id.* at 846–47. Although the Supreme Court of Alabama did not provide a reason for its denial, it may have been that, given the unique factual circumstances, the answer to the certified question, although important to the defendant, would have “limited legal consequence[s]” beyond his case. *See* *W. Helicopter Servs., Inc. v. Rogerson Aircraft Corp.*, 811 P.2d 627, 633 (Or. 1991).

Unlike the Supreme Court of Alabama, the Court of Appeals of New York was explicit in its reasons for denying the questions certified in *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998). In that case, the habeas petitioner’s ability to challenge his detention was dependent on being able to effect service of process on an INS District Director whose office was outside the State of New York. The Second Circuit certified the question of the reach of the New York long-arm statute to the state supreme court, posing the question as: “What contacts between an Immigration and Naturalization Service District Director, whose office is located outside the State of New York and whose district does not encompass the State of New York, and an alien residing in the State of New York, are sufficient to bring the District Director within the scope of the New York long-arm statute . . . ?” *Yesil v. Reno*, 705 N.E.2d 655, 655–56 (N.Y. 1998) (per curiam). In declining to answer the certified question, the court explained that several considerations factored into its decision: (1) “uncertainty whether the certified question[] can be determinative of the underlying matters”; (2) “this exclusive Federal matter—Immigration and Naturalization—presents a fact pattern that would most likely not arise in any State court proceeding”; and (3) “a theoretical quality inheres in the form of the . . . certified question.” *Id.* at 656. In sum, traditional certification criteria had not been met.

148 *Descamps v. United States*, 570 U.S. 254, 257 (2013) (quoting 18 U.S.C. § 924(e) (2012)).

149 18 U.S.C. § 924(e)(2)(B). Under the “residual clause” of 18 U.S.C. § 924(e)(2)(B)(ii), even if the defendant’s offense was not one of the enumerated

approach to determine if a past offense qualifies as one of the enumerated offenses:

They compare the elements of the statute forming the basis of the defendant's conviction with the elements of the "generic" crime—i.e., the offense as commonly understood. The prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense.¹⁵⁰

Additionally, "some statutes . . . have a more complicated (sometimes called 'divisible') structure, making the comparison of elements harder."¹⁵¹ As explained by the Supreme Court in *Mathis v. United States*:

A single statute may list elements in the alternative, and thereby define multiple crimes. Suppose, for example, that the California law noted above had prohibited "the lawful entry or the unlawful entry" of a premises with intent to steal, so as to create two different offenses, one more serious than the other. If the defendant were convicted of the offense with unlawful entry as an element, then his crime of conviction would match generic burglary and count as an ACCA predicate; but, conversely, the conviction would not qualify if it were for the offense with lawful entry as an element. A sentencing court thus requires a way of figuring out which of the alternative elements listed—lawful entry or unlawful entry—was integral to the defendant's conviction (that is, which was necessarily found or admitted). To address that need, this Court approved the "modified categorical approach" for use with statutes having multiple alternative elements. Under that approach, a sentencing court looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of. The court can then compare that crime, as the categorical approach commands, with the relevant generic offense.¹⁵²

Thus, the ACCA regularly calls upon federal judges to determine the contours of a particular state offense—whether the level of force required satisfies the ACCA, whether it is divisible, and whether (divisible or not) it mirrors the elements of the generic version of the offense.

In many instances, the statute will be sufficiently clear to answer these questions.¹⁵³ In those situations where the law is unclear, federal courts

offenses, it still might have qualified as a violent felony if it "involve[d] conduct that present[ed] a serious potential risk of physical injury to another." *Id.* § 924(e)(2)(B)(ii) However, in *Johnson*, the Supreme Court held that the residual clause was unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015).

In *Stokeling*, the Supreme Court held that "'physical force,' or 'force capable of causing physical pain or injury,' includes the amount of force necessary to overcome a victim's resistance." *Stokeling v. United States*, 139 S. Ct. 544, 555 (2019) (citation omitted) (quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010)).

¹⁵⁰ *Descamps*, 570 U.S. at 257.

¹⁵¹ *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016).

¹⁵² *Id.* (citations omitted).

¹⁵³ See, e.g., *United States v. Smith*, 921 F.3d 708, 715 (7th Cir. 2019) (concluding that relevant Indiana statute was divisible based on decisional law); *United States v. Stovall*, 921 F.3d 758, 760 (8th Cir. 2019) ("Based on the plain language of the statute, Arkansas rob-

recently have begun to see certification as a viable alternative.¹⁵⁴ In the first of these cases, *United States v. Franklin*, a panel of our court was faced with discerning whether the location provisions of the Wisconsin burglary statute “identify alternative elements of burglary, one of which a jury must unanimously find beyond a reasonable doubt to convict, or whether they identify alternative means of committing burglary, for which a unanimous finding beyond a reasonable doubt is not necessary to convict.”¹⁵⁵ The panel explained the significance of this difference to the defendants:

There is no doubt that what Franklin and Sahn actually did to earn their prior convictions was burglarize buildings or structures, as prohibited by § 943.10(1m)(a). Their actions fit within the “generic burglary” definition adopted in *Taylor*—“an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.”

But under the categorical method adopted in *Taylor*, what counts is not what they actually did but the statutory definition of the crime. Taken as a whole, Wis. Stat. § 943.10(1m) is considerably broader than the “generic burglary” definition adopted in *Taylor*. The Wisconsin statute reaches burglaries of boats, trucks, and trailers, see *id.* at (c)–(e), but the *Taylor* definition does not. Thus, if we apply the “categorical” approach to the whole burglary statute, then Franklin and Sahn cannot be sentenced as armed career criminals under 18 U.S.C. § 924(e).¹⁵⁶

Initially, we determined the Wisconsin burglary statute sets forth alternative location elements for burglary, one of which a jury must find beyond a reasonable doubt.¹⁵⁷ However, on panel rehearing, the defendants persuaded us that our initial opinion had not considered fully a decision of the Wisconsin Supreme Court interpreting a similarly structured statute. We concluded that the best course of action was to seek guidance from the state supreme court. Two considerations, in particular, directed us toward this course. “First, the question of State law [wa]s a close one. Specific guidance from State law [wa]s limited, and both sides offer[ed] good reasons for interpreting the available signs in their favor.”¹⁵⁸ “Second, this issue of state law [wa]s important for both the federal and state court systems, and a wrong decision on our part could [have] cause[d] substantial uncertainty and confusion if the Wisconsin Supreme Court were to disagree with us in a later decision.”¹⁵⁹

bery has the same elements as the generic definition of robbery.”); *United States v. Thrower*, 914 F.3d 770, 775 (2d Cir. 2019) (per curiam) (“By its plain language, the New York robbery statute matches the ACCA definition of a ‘violent felony.’”).

154 See Joshua Rothenberg, *Criminal Certification: Restoring Comity in the Categorical Approach*, 51 U. MICH. J.L. REFORM 241, 259 (2017) (stating that “[i]t is difficult to say as an empirical matter that no federal court has certified a criminal sentencing question it faced under the categorical approach” and further noting that “it is clear that courts do not see certification as a method for dealing with criminal sentencing issues”).

155 *United States v. Franklin*, 895 F.3d 954, 961 (7th Cir. 2018) (per curiam).

156 *Id.* at 597 (emphasis omitted).

157 *Id.* at 960–61.

158 *Id.* at 961.

159 *Id.*

We explained that “[t]he choice between elements and means is decisive for Franklin and Sahm’s federal sentences, and a number of other federal defendants may be affected directly,” and that

[t]he answer to this question may also have significant practical effects for at least some of the nearly 2,000 burglary prosecutions in Wisconsin state courts every year. Those implications include the following. How should a jury be instructed in a burglary trial? What facts must the prosecution prove beyond a reasonable doubt about the place the defendant entered unlawfully and with felonious purpose? What must the jury agree on unanimously about the place? . . . The answer also has implications for questions of multiplicity and double-jeopardy protections, which depend on the elements of the crimes in question. And the answer to the elements v. means question will have practical consequences for prosecutors deciding how to charge a suspect and for defense counsel advising clients about potential defenses and plea negotiations.¹⁶⁰

The Wisconsin Supreme Court accepted the certified question and concluded that “the locational alternatives in Wis. Stat. § 943.10(1m)(a)–(f) identify alternative means of committing one element of the crime of burglary under § 943.10(1m). Accordingly, a unanimous finding of guilt beyond a reasonable doubt as to subsections (a)–(f) is not necessary to convict.”¹⁶¹ Once we received the answer, we noted that that the state crime “is broader than the federal generic crime of burglary” for purposes of the ACCA, and, therefore, “the prior Wisconsin burglary convictions of defendants-appellants Dennis Franklin and Shane Sahm do not qualify as prior convictions for ‘violent felonies’ to support their federal sentences under the Armed Career Criminal Act.”¹⁶² We therefore vacated the defendants’ federal sentences and remanded to the district court for it to resentence them without applying the ACCA enhancement.¹⁶³

Only a few months after we issued our certification decision in *Franklin*, the Ninth Circuit certified three questions to the Oregon Supreme Court concerning the divisibility of Oregon’s first- and second-degree robbery statutes.¹⁶⁴ After the state supreme court had accepted certification, but before it had answered the questions, the Supreme Court issued its decision in *Stokeling v. United States*, “which concerned a similar issue involving how to treat a predicate Florida robbery for federal sentencing purposes.”¹⁶⁵ In response to *Stokeling*, the Ninth Circuit narrowed its certification to focus only on the second-degree robbery statute.¹⁶⁶ As to the questions related to that statute, the state supreme court ultimately declined to provide an answer. Referencing its decision in *Western Helicopter*, the court first observed

160 *Id.* (citation omitted) (citing *Blockburger v. United States*, 284 U.S. 299, 306 (1932)).

161 *United States v. Franklin*, 928 N.W.2d 545, 553 (Wis. 2019).

162 *United States v. Franklin*, 772 F. App’x 366, 366–67 (7th Cir. 2019) (mem.).

163 *Id.*

164 *United States v. Lawrence*, 441 P.3d 587, 588 (Or. 2019) (en banc).

165 *Id.*

166 *See id.*

that “one of the statutory factors is whether the question presented is one of Oregon law.”¹⁶⁷ Here, however “[t]he second certified question, whether Oregon’s second-degree robbery statute is ‘divisible,’ involves a federal sentencing concept that does not turn exclusively on Oregon law.”¹⁶⁸ “Another factor,” the court continued,

which we have described as “one of the most important factors—perhaps the most important one,” is whether there exists Oregon precedent that addresses the certified question. Given that the only remaining aspect of the third question certified by the Ninth Circuit in this case concerns whether jury concurrence is required on particular elements of the second-degree robbery statute, we conclude that an Oregon Court of Appeals decision provides sufficient guidance as to what remains of that question.¹⁶⁹

When the case returned to the Ninth Circuit, the court applied the Oregon Court of Appeals decision referenced by the Oregon Supreme Court to conclude that the second-degree robbery statute was divisible and that each subsection of the statute was an alternative element that had to be proven beyond a reasonable doubt.¹⁷⁰ Based on that conclusion, the Ninth Circuit evaluated the crime as set forth in the information and guilty plea to conclude that the defendant had committed a violent felony.¹⁷¹

Most recently, in *United States v. Glispie*,¹⁷² another panel of our court certified to the Supreme Court of Illinois a question as to the scope of the Illinois residential burglary raised by an ACCA sentence. The district court had sentenced Glispie under ACCA with one of his predicate offenses being a conviction for Illinois residential burglary.¹⁷³ Glispie argued, however, that a defendant could commit residential burglary by simply entering a residence with an intent to commit a crime therein.¹⁷⁴ If his interpretation were correct, then Illinois residential burglary was broader than generic burglary for purposes of the ACCA, and convictions for Illinois residential burglary could not be used as predicate offenses for ACCA enhancements. After tracing the history and application of the “limited-authority doctrine,” we observed that, although “Illinois case law, as well as its principles of statutory interpretation, generally point[ed] to the conclusion that the Supreme Court of Illinois would apply the limited-authority doctrine to the residential burglary statute,” the “Illinois appellate courts ha[d] not been unanimous” in this conclusion.¹⁷⁵ Additionally, extension of that doctrine might “affect the

167 *Id.* at 589.

168 *Id.*

169 *Id.* at 589–90 (citation omitted) (quoting *W. Helicopter Servs., Inc. v. Rogerson Aircraft Corp.*, 811 P.2d 627, 631 (Or. 1991)).

170 *See United States v. Ankeny*, No. 17-35138, 2020 WL 242609, at *1 (9th Cir. Jan. 16, 2020).

171 *See id.* at *2

172 943 F.3d 358 (7th Cir. 2019).

173 *Id.* at 359.

174 *Id.*

175 *Id.* at 372.

interpretation of other sections of the Illinois residential-burglary and home-invasion statutes.”¹⁷⁶ Given the importance of this issue, not only to Glispie, but to all other federal defendants who had convictions under this statute, as well as the interest of the State of Illinois in having its criminal laws correctly applied, we concluded that the most prudent course was to certify the question to the Supreme Court of Illinois.¹⁷⁷ The Illinois Supreme Court has agreed to answer the certified question, and we are awaiting its determination.

As these cases make clear, the scope of a state criminal law can be critical in determining whether a state conviction qualifies as a predicate offense for purposes of the ACCA. From the standpoint of the individual defendant, the ACCA increases the time of incarceration substantially. In Glispie’s case, for instance, the difference between an ACCA sentence and the statutory, non-ACCA maximum sentence was five years. Beyond the individual defendant, however, our determinations on these questions impact other federal defendants who have state convictions under the same statute.¹⁷⁸ Moreover, as Judge Hamilton noted in our *Franklin* decision, the implications for the State are far reaching as well—raising questions about how juries should be instructed, what facts the prosecution must prove beyond a reasonable doubt, what the double-jeopardy implications of a conviction are, and how prosecutors decide to charge suspects.¹⁷⁹ These important state policy concerns counsel, perhaps more than any other area of law to date, that state supreme courts be willing to answer certified questions concerning the scope and structure of state predicate offenses.

V

As we enter the second quarter-century following the AJS survey (and the seventh decade following the Supreme Court’s *Clay* decision), it is appropriate not only to look back at certification’s origin and development, but to look forward at ways the mechanism can be improved and refined.

As we have discussed, state and federal courts, by rule and in common law, have established a number of criteria to guide their consideration of whether to certify questions and to accept certified questions for decision.¹⁸⁰ Nevertheless, there have been times when federal courts have certified questions even though state intermediate appellate courts provided an answer or, at least, pointed the way to a resolution.¹⁸¹ Perhaps because of the gravity of the concerns or the complexity of legal issues involved, federal courts also have certified questions that apply only to a single or small group of individu-

176 *Id.*

177 *Id.*

178 The Wisconsin Supreme Court’s answer to the certified question in *Franklin*, for instance, prompted the Eighth Circuit to vacate the defendant’s ACCA sentence in *United States v. Holston*, 773 F. App’x 336 (8th Cir. 2019) (per curiam).

179 *United States v. Franklin*, 895 F.3d 954, 961(7th Cir. 2018) (per curiam).

180 *See supra* Part II.

181 *See supra* note 169 and accompanying text.

als.¹⁸² Federal courts are not alone in occasionally setting aside guidelines. As one scholar has noted, state supreme courts sometimes turn a blind eye to these requirements in order to answer a question that they deem particularly important or that they have not had the opportunity to address.¹⁸³ There indeed may be times when the prudent exercise of judicial discretion justifies deviation from standard practice. However, these deviations need to be kept to a minimum. To maintain the integrity of certification, federal and state courts must adhere to the rules and guidelines designed to ensure cooperative judicial federalism.

The benefits of certification counsel for expanding, not contracting, its use. One suggestion made by the AJS survey was to expand certification “to allow submission of certified questions by federal district courts and tribal courts.”¹⁸⁴ At the time of the AJS survey, forty-three states allowed for certification generally, and thirty-five of those allowed certification by federal district courts.¹⁸⁵ Of the forty-nine states that now have certification procedures, thirty-nine allow certification by federal district courts.¹⁸⁶

A case from our circuit, *Doe v. American National Red Cross*,¹⁸⁷ speaks to the merits of the AJS’s suggestion. In October 1991, John Doe, who had received HIV-infected blood during a transfusion, brought an action against the Red Cross, who had supplied the blood.¹⁸⁸ The Red Cross submitted that the action was time barred; according to the Red Cross it was a “health care provider” under Wisconsin law, and, therefore, the one-year statute of limitations for medical malpractice claims applied to Doe’s action.¹⁸⁹ Doe argued that the longer, three-year statute of limitations for personal injuries was applicable.¹⁹⁰ Neither Wisconsin statutes nor Wisconsin case law define the operative term.¹⁹¹ Wisconsin does not allow for certification from a federal district court, so the district court in this case had to predict how the Supreme Court of Wisconsin would rule. Noting that “the Wisconsin supreme court ha[d] accorded a broad construction to the term ‘health care provider,’” the court concluded that “it would be difficult to conclude that in collecting, processing, and distributing blood from donors for ultimate use in transfusions, defendant [wa]s not providing health care to others.”¹⁹² Find-

182 See *supra* note 147.

183 See Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 185–88 (2003).

184 GOLDSCHMIDT, *supra* note 1, at 111.

185 *Id.* at 15–16.

186 In addition to the states listed in the AJS survey, Vermont, see VT. R. APP. P. 14; Georgia, see GA. SUP. CT. R. 46; and Arkansas, see ARK. SUP. CT. R. 6-8, now allow certifications from district courts. We include Missouri in this number. See *supra* note 29.

187 976 F.2d 372 (7th Cir. 1992).

188 Doe’s wife also brought an action. *Id.* at 373.

189 *Id.* at 374.

190 *Id.*

191 *Id.*

192 *Doe v. Am. Nat’l Red Cross*, 796 F. Supp. 395, 402 (W.D. Wis. 1992), *rev’d*, 9 F.3d 1293 (7th Cir. 1993) (per curiam).

ing that the shorter statute of limitations applied, the district court granted the Red Cross's motion for summary judgment. That ruling was issued in June 1992.¹⁹³

On appeal to our court, Doe, who now had a short life expectancy, immediately filed a request that we certify the question to the Wisconsin Supreme Court. We explained that this case was "particularly suited to certification":

First, it concerns a matter of vital public concern that, unfortunately, is likely to touch the lives of many people not presently before us. It would be more appropriate for the Supreme Court of Wisconsin to address this statute of limitations question than the federal judiciary in view of the fact that it is an important public policy choice that no doubt will apply to many cases in the future. While we are reluctant to burden our colleagues in the state judiciary with additional work, we believe that an appropriate respect for the prerogatives and responsibilities of Wisconsin requires that we permit its Supreme Court to rule definitively on this matter. This course will ensure that Wisconsin's public policy is, from the outset, applied evenhandedly to all litigants whether they find themselves in a state or federal forum.¹⁹⁴

We certified the question, and the Supreme Court of Wisconsin accepted the certification. In June 1993, it rendered its decision that the Red Cross was not a healthcare provider and, consequently, the appropriate statute of limitations was the longer, three-year limitations period for personal injury actions.¹⁹⁵ By the time that the case returned to our court, Doe had passed away.¹⁹⁶

In *Doe*, had the district court been permitted to certify questions to the Supreme Court of Wisconsin, its question would have looked identical to the one we ultimately posed: "Whether a blood bank, sued in negligence for failing properly to screen donors and test blood or blood products, is 'a person who is a health care provider' within the meaning of the Wisconsin medical malpractice statute of limitations, Wis. Stat. Ann. § 893.55?"¹⁹⁷ Between the district and the appellate court, the record had not been enlarged, the factual issues had not been narrowed, and the legal points had not been honed. The only difference was that five months had elapsed.

Saleh v. Damron,¹⁹⁸ a recent case from the West Virginia Supreme Court, provides a stark contrast to the events of *Doe*. Three years after a tubal ligation, Mrs. Damron went to the emergency room with severe abdominal pain, among other symptoms.¹⁹⁹ Later testing revealed that she had a live, ectopic

193 *Id.* at 403.

194 *Doe*, 976 F.2d at 374 (citation omitted) (citing *Woodbridge Place Apartments v. Wash. Square Capital, Inc.*, 965 F.2d 1429, 1434 (7th Cir. 1992)).

195 *Doe v. Am. Nat'l Red Cross*, 500 NW.2d 264, 264-65 (Wis. 1993).

196 Following *Doe*'s death, his estate was substituted as a party, and his wife's claim continued as well. *Id.* at 264 n.1.

197 *Doe*, 976 F.2d at 376.

198 836 S.E.2d 716 (W. Va. 2019).

199 *Id.* at 717-18.

pregnancy; the embryo was removed to save Mrs. Damron's life.²⁰⁰ The Damrons later brought a wrongful death action on behalf of their unborn child in federal district court.²⁰¹ However, it was not clear whether West Virginia's wrongful death statute encompassed an action brought on behalf of a nonviable ectopic embryo or fetus.²⁰² The district court therefore certified two questions related to the scope of that statute, and the West Virginia Supreme Court accepted certification.²⁰³ Less than ten months later, the West Virginia Supreme Court held that "[t]he term 'person' as used in the West Virginia Wrongful Death Statute does not include an ectopic embryo or an ectopic fetus,"²⁰⁴ which completely disposed of the Damrons' action.²⁰⁵

Of course, there may be times when parties in district court (or the courts themselves) are impatient for answers to (potentially) dispositive questions. They may seek certification when the factual or legal issues may not have been distilled sufficiently. In these circumstances, federal district courts, like their appellate counterparts, must exercise self-discipline in ensuring that the questions certified meet the procedural and jurisdictional requirements of the state court. Experience does not show, however, that district courts with the authority to certify questions have been hesitant to tell overanxious litigants no.²⁰⁶ Consequently, there is no reason to believe that the remaining state supreme courts would be deluged with certified questions from district courts should those states broaden their certification rule to include federal district courts.

Certification also could be an effective tool in the international arena. In deciding questions involving a foreign sovereign's laws, federal judges' need for guidance is significantly more acute than with a domestic sovereign's laws. As Professors Wishnie and Hathaway noted in a recent article, federal judges "are not often well-equipped to read decisions in foreign lan-

200 *Id.*

201 *Id.* at 718.

202 *Id.* at 719.

203 *Id.*

204 *Id.* at 725 (citation omitted) (citing W. VA. CODE § 55-7-5; § 55-7-6 (2016)).

205 It also rendered moot the second certified question.

206 *See, e.g.,* *Deem v. Air & Liquid Sys. Corp.*, No. C17-5965BHS, 2019 WL 3716449, at *4 (W.D. Wash. Aug. 6, 2019) (denying motion to certify as premature given possible applicability of maritime law); *Van Patten ex rel Estate of Van Patten v. Washington County ex rel Wash. Cty. Sheriff's Office*, No. 3:15-cv-0891-AC, 2017 WL 2815080, at *3 (D. Or. June 29, 2017) (denying motion to certify five questions to the Oregon Supreme on the ground that answering the certified questions would not terminate fully the plaintiff's claim); *Gregory v. Parker Hannifin Corp.*, No. CIV-13-01031-M, 2014 WL 12844158, at *1 (W.D. Okla. Aug. 15, 2014) (denying certification on the ground that the questions "are not determinative of the case at hand at this stage of the litigation"); *S. Pilot Ins. Co. v. CECS, Inc.*, 15 F. Supp. 3d 1335, 1338 (N.D. Ga. 2013) ("This issue presents a close question of state law that at some point in the course of this litigation may be ripe for a certified question. Thus, if all other facts in dispute are resolved in such a manner that this case in fact boils down solely to the issue of the Notice of Intent's legal sufficiency, the Court will entertain a request to certify a question to the Georgia Supreme Court. At this stage of litigation, however, the Court declines to do so.").

guages, much less appreciate their meaning in context.”²⁰⁷ Instead, they are at the mercy of “the litigants . . . —who are inevitably self-interested—for relevant legal materials to confirm or disconfirm important claims.”²⁰⁸ A procedure for securing a legal determination of an issue of law from a foreign sovereign would provide a means for federal judges to obtain definitive answers and also would ensure the integrity of the court’s ultimate judgment.

Although the idea of certifying questions of law to a foreign tribunal may seem “foreign” to federal jurists, our state colleagues have shown an increasing willingness to open a judicial dialogue with courts of other sovereigns. Several states allow for certification of determinative questions of law from tribal courts, as well as courts of Canada, Canadian provinces, Mexico, and Mexican states.²⁰⁹ Delaware has gone even further and allows certification from “the Highest Appellate Court of any foreign country, or any foreign governmental agency regulating the public issuance or trading of securities.”²¹⁰

There are, of course, differences between accepting certified questions from states of other nations and certifying questions to the courts of those nations. There also are fundamental differences between certification to state courts and certification to foreign courts. To begin the discussion, a federal court will face state law issues raised through diversity or supplemental jurisdiction on a regular basis, but only occasionally will face a dispositive question involving a foreign state’s law. Consequently, there is no threat that federal courts will control or dictate the development of an area of foreign law, and, concomitantly, there is no particular incentive to foreign states to answer certified questions. Developing a viable mechanism for foreign certification, therefore, might require serious consideration of reciprocal certification and whether reciprocal certification is consonant with the Case and Controversy requirement.

This is just one of many issues that would need to be discussed and resolved in pursuit of a regular procedure for foreign certification. Nevertheless, they are discussions worth having. As our world becomes more connected, not only through trade and technology, but through unified approaches to global threats, we will encounter each other’s laws on a more regular basis. Having an institutional method for securing correct answers to questions of foreign law will ensure that our courts can continue to administer justice, regardless of the source of law that governs the rights of the parties before it.

207 Michael J. Wishnie & Oona A. Hathaway, *Asking for Directions: The Case for Federal Courts to Use Certification Across Borders*, 125 YALE L.J.F. 156, 157 (2015).

208 *Id.* at 158.

209 *See supra* note 30.

210 DEL. SUP. CT. R. 41(a)(ii).

CONCLUSION

In *Lehman Bros.*, the Supreme Court sanctioned a relatively untested procedure by which federal courts could seek assistance from their state colleagues in resolving difficult, unresolved, and important questions of state law. In the twenty years between *Lehman Bros.* and the AJS survey, federal and state jurists increasingly perceived certification as a helpful tool—an aid to federal courts in reaching the correct result and an aid to state courts in developing the law of their own states. In the last twenty-five years, certification has continued to mature. The state and federal courts have engaged in a constructive conversation about the appropriate scope of certification. The discipline of these courts not only has contributed to the longevity of certification as originally conceived, it also has provided a foundation for certification's application in new and emerging areas of the law and, in the coming years, may allow for the expansion of certification from a tool of cooperative judicial federalism to a tool of international judicial comity.

