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Article

***157 FEDERAL COURT CERTIFICATION OF QUESTIONS OF STATE LAW TO STATE COURTS: A
THEORETICAL AND EMPIRICAL STUDY**

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“(T)he judge who is here sitting is thoroughly persuaded by his thirty-one years of trial and appellate practice in the Alabama courts as a private practitioner and by his six (plus) years of federal judicial experience sitting in the Northern District of Alabama that he can reasonably predict the opinion and holding of Alabama’s highest court” [FN1]

I. Introduction

State and federal judges must be ambidextrous: state judges are obliged to interpret and apply both federal and state law [FN2] and federal judges are similarly obliged to interpret and apply state and federal law. [FN3] State court judges adjudicate federal law cases under the principles of parity and predict unsolved federal law when the United States Supreme Court has not spoken on a federal question. [FN4] When faced with a question of state law not yet resolved by the state’s highest court, a federal judge decides the issue by *158 predicting how that court would resolve the issue. [FN5]

Each court system’s ability to interpret and apply the other’s law has been questioned. Beginning in the 1970’s and continuing today, some judges and legal scholars have debated the strength of parity, which is, a state court’s availability and ability to interpret federal law. [FN6] Despite arguments for federal court superiority in resolving important federal law issues, state court jurisdiction remains unchanged, requiring state court judges to interpret both federal law and state law.

All federal court judges would appear to face the same dual tasks as state court judges because they, too, must receive and resolve issues of both state law and federal law. [FN7] Thus, a notion of “reverse parity” exists: the federal courts are deemed available to receive and adjudicate state law. [FN8] Federal court competence to decide state law issues was presumed when Erie required the federal courts to interpret and apply state law. [FN9]

Yet federal courts have an advantage over their state counterparts. They have some ability to control the issues of state law that they must resolve. Federal courts use exceptions to supplemental jurisdiction, [FN10] and in rare cases, Pullman abstention, [FN11] to return cases to state court. Further, to *159 avoid the often difficult and time-consuming process of researching and predicting the outcome of unresolved state law questions, federal court judges may certify the state law question over to the state’s highest court. [FN12] Today, in forty-seven

states, the District of Columbia, and Puerto Rico, some or all federal judges can certify a question to the state's highest court, asking that court to answer the question. [FN13] The process of state law certification undercuts the principle of "reverse parity" because the state law question is sent to those more expert in state law--the state court judges. Certification advocates presume that state court judges, for several reasons, will be better equipped than federal judges to determine and interpret state law. [FN14]

***160** The state court, at its discretion, may accept or decline the certification, but cannot ignore it. [FN15] To decide to accept or deny certification may require a separate round of briefing. [FN16] Then the state court may reach the merits of the certified question and schedule the next round of merit briefing. [FN17] By certifying state law questions federal courts may seek to reduce their workload and avoid the time-consuming process of deciding or predicting difficult questions of state law. No state court at any level, however, enjoys the opportunity to certify difficult questions of federal law to a federal court. [FN18]

This Article argues that certification, once a response to early, stumbling federal court efforts to predict state law after *Erie* and viewed as an attractive, efficient alternative to Pullman abstention, has been widely embraced, praised and justified without regard to certification as it has been practiced and how that practice affects benefits to both court systems that ***161** could flow in the absence of certification. [FN19] For example, the certification process sidesteps final decisions required by the appellate process and permits a trial court in one system to certify a question to the highest court in another system. Yet certification advocates often express little concern for the process's conflict with these policies and its unusual procedural characteristics. Further, certification advocates assert that federal courts are less capable of interpreting state law than state courts. In contrast, some longstanding views of federal courts have deemed them generally superior to state courts, even in matters of state law. Advocates for certification presume that when a federal court predicts state law, it engages in a dangerous, speculative, potentially embarrassing and intolerable practice that it is poorly equipped to perform. The potential for inconsistency between federal predictions and state court decisions is deemed unacceptable and viewed as inviting forum shopping. Finally, certification advocates assert the process promotes judicial economy and efficiency.

The Article next examines the certification process in Ohio as a case study of the strengths and weaknesses of the process. The Article concludes, after detailed analysis of Ohio's certification experiences, that federal certifying courts and the Ohio Supreme Court have largely accepted certification as a process to be encouraged and embraced with little analysis of its actual practice. Federal and state courts both need to apply Ohio's certification rule more explicitly and carefully. A rule that contradicts the appellate review process should be used more carefully and applied more explicitly. Ohio and other jurisdictions have presumed that only benefits can flow from the process; yet, in practice, certification in Ohio has resulted in advisory opinions, permitted a range of forum shopping, encouraged efforts to avoid the appellate process, and produced opinions so devoid of analysis that for years afterward, courts work to fill in the potholes of missing doctrine. Further, Ohio federal courts and the Ohio Supreme Court tend not to rely on the experiences of other jurisdictions employing certification procedures.

The Article examines closely the procedural history, substance, and ***162** resolution of the fifty-five certified question cases sent to the Ohio Supreme Court from federal courts from the start of Ohio certification on July 15, 1988, to the close of calendar year 2001. Next, the Article turns from the specifics of Ohio's federal and state court certification cases to test the underlying policies supporting certification: (1) the dangers of prediction as a method of decision making; (2) the inability of federal judges to predict the views of the Ohio Supreme Court; and (3) the presumed efficiency of certification over Pullman abstention. The Article concludes that Ohio state

and federal courts need to adopt new certification practices to enhance the benefits of the certification process and to minimize accompanying harm.

II. BACKGROUND

The unilateral certification of state law questions to state courts from federal courts began, in part, in response to federal court decisions issued after Erie. The certification process, first put into action by the United States Supreme Court, has gained nearly universal support and acceptance as an attractive alternative either to prediction under Erie or to abstention under Pullman. [FN20]

A. Erie's Federal Prediction of State Law

Federal diversity jurisdiction requires federal courts to decide issues of state law. [FN21] In 1938, the United States Supreme Court required federal courts to learn and interpret state law because a federal court sitting in diversity applies state law because there is “no federal common law.” [FN22] The Erie Court sought to discourage forum shopping and to avoid “inequitable administration of the laws.” [FN23] Thus, when facing an unsettled or unclear precedent on an important issue of state law, the federal court must review the law available and predict how the highest court in the state would most likely rule, rather than develop a federal common law rule which might differ from the state law rule and encourage forum shopping. [FN24]

*163 The Erie Court, and others after it, endorsed “reverse parity” because they viewed federal judges as perfectly capable of deciding state law questions and called upon them to do so. “(Diversity cases are decided in district courts) manned by judges from the local Bars and fairly conversant with the laws of their respective areas. They are equipped to decide questions of local law as well as federal questions.” [FN25]

In the early years after Erie, federal court judges inevitably faced unsettled state law issues and were forced to develop methods for prediction. Although no single, definitive answer appears to explain why state legislatures and courts moved toward the certification process, the struggle federal courts initially experienced in reaching a settled method for prediction may have worried state legislators and state judges, while simultaneously frustrating federal judges. The Erie Court itself simply instructed federal courts to use the state's substantive law as “declared by its legislature in a statute or by its highest court in a decision.” [FN26]

But, when the highest state court had not issued a decision on point, Erie offered no advice. In the years after Erie, however, the gap between state law in federal and state courts grew wider as federal courts mechanically adhered to state lower court decisions, no matter how old or poorly reasoned. [FN27] Thus, federal courts sometimes ended up obediently following as binding, lower state court decisions that would not have been similarly honored by state courts. [FN28] Observers feared that federal courts' fierce loyalty to lower state court decisions, in the absence of a ruling from the highest state court, revived “the precise evil of forum-shopping” and undermined the uniformity of law the Erie Court sought to establish. [FN29]

In post-Erie efforts to sort out the federal courts' role in determining state law, some federal courts began to articulate a more reasoned process of *164 prediction. In the absence of a decision from the state's highest court, a federal court could predict a state appellate decision on the issue or predict the decision of “reasonable, intelligent lawyers, sitting as judges of the highest (state) court and fully conversant with (state) jurisprudence.” [FN30] The federal courts slowly reasoned their way to a more uniform, predictive approach to questions of

state law not yet resolved by the highest state court.

But based on the federal courts' initial struggles and frustrations, [FN31] some state legislatures and Supreme Court justices, seeing federal courts falter in predicting state law, began to take matters into their own hands. Seven years after *Erie*, in 1945, a state legislature created a means to avoid federal court prediction by certifying an unresolved issue of state law to the Florida Supreme Court for resolution. [FN32] The statute authorized the Florida Supreme Court to adopt rules for accepting certified questions from federal courts of appeal and the United States Supreme Court. Thus, the Florida legislature, not the Florida Supreme Court, decided certification was a good idea.

What specifically motivated the Florida legislature in 1945 may never be known precisely. [FN33] One likely source of motivation was the United States Supreme Court's decision in *Meredith v. Winter Haven* in 1943. [FN34] Following *Pullman* in 1941, the *Meredith* decision warned federal judges against misusing the abstention doctrine as a means to avoid deciding difficult, unsettled questions of state law. [FN35] The Fifth Circuit had found Florida state law difficult and uncertain; therefore, "since no federal question was presented and the jurisdiction was invoked purely on grounds of diversity of citizenship, it thought petitioners should be required to proceed to the state courts." [FN36] Not only was the law uncertain, the Fifth Circuit found that for it to settle such state law "would be undertaking to declare the public policy of a *165 state in respect to obligations of its municipalities" [FN37] A dissenter argued the Fifth Circuit should address, not dismiss, the claim and decide it as the Florida Supreme Court would. [FN38]

The Supreme Court reversed the Fifth Circuit, finding no exceptional circumstances warranting abstention, only the difficulty of deciding unsettled questions of state law. [FN39] Ordered to decide the issue, the Fifth Circuit then gave the claim new life and returned it back to the federal district court. [FN40] The Florida legislature witnessed the Fifth Circuit's expressed inability to decide unsettled, important state matters. [FN41] And it also saw that professed incompetence or not, the United States Supreme Court required the Fifth Circuit to decide the case rather than send it to the Florida state courts. Seeing the Fifth Circuit forced to determine unsettled Florida state law in its March 1944 decision, may have moved the Florida legislature to take matters into their own hands.

Whatever motivated the Florida legislature's desire for certification in 1945, the Florida Supreme Court did not accept the legislature's invitation to create a certification rule for fifteen years. And even then, the Florida Supreme Court acted only after the United States Supreme Court got into the act. In 1960, the Court suggested to the Fifth Circuit that it could use the state certification process to resolve an issue of Florida law, but simultaneously recognized that the Florida Supreme Court had never enacted any rules for certification even though the Florida statute had given them the go-ahead fifteen years earlier. [FN42] Thus, the first use of a state's certification procedure came about because the highest federal court in the nation urged a federal appellate court to respect state law on remand and send a certified question to the state supreme court, a court that had declined to enact a certification rule.

The Clay Court saw an additional benefit in the certification statute beyond a state's desire to rein in federal courts in the wake of *Erie*'s uncertainty and undefined methods of state law prediction. The Court found the Fifth Circuit's decision to reach a constitutional due process issue first, *166 rather than address the Florida state statute, troubling. [FN43] Although *Clay* did not fall within the *Pullman* abstention doctrine, the certification process provided a similar ability to avoid deciding a federal constitutional issue. [FN44] Thus, the certification process was praised for its dual benefits. It would allow the state courts to support federal courts during their

post-Erie struggle with state law, and it would allow federal courts to avoid deciding issues that did not technically require abstention, but where a definitive state ruling would help. Further, where abstention was required, the certification alternative would result in less delay and expense.

The United States Supreme Court has consistently championed the cause of state law question certification. The Court uses the process itself and recommends it to the lower federal courts. [FN45] The Court encourages certification, noting that certification's threshold, unlike that of abstention, is low--an unsettled state law question, not an exceptional circumstance. [FN46] Further, to decline to certify when a state supreme court will receive certified questions and instead to speculate about state law questions is "particularly egregious." [FN47]

*167 B. Universal Praise for and Use of State Law Question Certification

Momentum for certification increased significantly with the first Uniform Certification of Questions of Law Act ("UCQLA") in 1967, followed by the revised 1995 Act. [FN48] The 1995 UCQLA provides for acceptance of certified questions from nearly every existing court:

The (Supreme Court) of this state may answer a question of law certified to it by a court of the United States or by (an appellate)(the highest) court of another State (or of a tribe)(or of Canada, a Canadian province or territory, Mexico, or a Mexican state), if the answer may be determinative of an issue pending in the litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this State. [FN49]

The Comments clarify that "a court of the United States" includes all federal courts, including Bankruptcy courts. [FN50] This language, new in the 1995 Act, increased the number of courts with the power to certify. [FN51] The provision reflects the drafters' belief that, although the number of courts able to certify has expanded, the receiving court retains control over its dockets through its power to accept or reject the questions.

The Uniform Act provides the broadest scope of certifying courts. In practice, the range of courts permitted to certify varies greatly from jurisdiction to jurisdiction. [FN52] Eighteen states accept certified questions from all federal courts; all state intermediate appellate or highest courts; and sometimes tribal, Canadian, and Mexican courts. [FN53] Eighteen states chose to omit all state courts and accept questions from federal courts only. [FN54] The largest states, California, Illinois, and New York, and eight other states, including New Jersey, Pennsylvania, and Texas, chose the narrowest scope for certification. [FN55] These narrow jurisdictions typically deny not only all state courts, but federal district courts the power to certify, limiting the scope of the certification provision to a single federal court of appeals or all federal courts of *168 appeals and the United States Supreme Court. [FN56]

The current Act now explicitly authorizes the receiving court to "reformulate a question of law certified to it," in hopes that this flexibility will avoid an advisory opinion. [FN57] To further promote cooperation and communication, the receiving court is to notify the certifying court when it has rejected or accepted the certified question. [FN58] The receiving court "in accordance with notions of comity and fairness . . . (should) respond to an accepted certified question as soon as practicable." [FN59] Should the receiving court decline to answer a question, it may "advise the certifying court of the reasons for a rejection." [FN60]

III. DISCUSSION

Judging by the states' widespread embrace of certification, its advocates have successfully argued its advantages. Certification places state law issues before state court judges with greater competence in state law; therefore, these judges will render “better” decisions than federal judges. [FN61] When state courts decide these issues, that process avoids the dual dangers of federal court speculation and federal court imposition of uniquely federal perspectives that lead to misinterpretation of state law issues. [FN62] Having state judges act as the state law decision-makers promotes federalism because it serves to allocate and share judicial power between the state and federal court systems. [FN63] The certification process promotes judicial efficiency, ^{*169} avoiding the delays of Pullman abstention. [FN64]

While judicial economy, respect for state courts, state court expertise to decide state law issues, and the dangers of federal courts predicting state law appear to support certification, these benefits are more frequently presumed to exist than demonstrated from certification practice. Examining Ohio's certification practices through the individual Ohio cases moving through these procedures provides a better opportunity to measure the benefits and detriments certification brings to both court systems. The Ohio Supreme Court's practices are examined first, followed by federal court practices. Finally, Ohio certification practice becomes the evidence used to test the assumed benefits of state court expertise in state law and judicial efficiency, as well as the presumed dangers of federal prediction of state law.

A. Ohio Supreme Court Certification: A Case Study of Certification Practices

To test the articulated policies and intended benefits of certification against the practice of state law certification, [FN65] questions certified to and addressed by the Ohio Supreme Court, a court adopting certification with a moderate scope, [FN66] are examined from the start of Ohio certification on July 1, 1988, through December 31, 2001. The study includes fifty-five cases: cases where certification was declined, where certification was accepted, or where the Court dismissed the case. [FN67] To judge the context of the certification^{*170} cases within the Ohio and federal court systems, the study also considers cases reaching the Ohio Supreme Court from Ohio appellate court decisions certified based on conflicts, [FN68] where Pullman abstention occurred, and where an Ohio federal court chose to predict unsettled Ohio law.

To summarize briefly these results: of the fifty-five questions addressed by the Ohio Supreme Court, it resolved nine by dismissal, declined to answer ten, and issued an order or opinion in answer to thirty-six. Fourteen Ohio district court judges, three non-Ohio district court judges and ten Sixth Circuit Court of Appeals panels sent certified questions. The law of torts, in the form of products liability, dominated the questions asked. In additional tort cases, several wrongful death cases raised questions of underinsured and uninsured motorist insurance. The average time from certification to resolution was 11.96 months, with five weeks being the shortest wait and twenty-five months the longest wait.

1. Ohio Supreme Court Certification: Unique Access to the Ohio Supreme Court

The Ohio study begins with the nature and scope of the certification process. The rule permits the Ohio Supreme Court to answer questions certified to it from all federal district court judges and magistrates in the nation, all the federal circuit courts of appeals and the United States Supreme Court. [FN69] When the Ohio Supreme Court promulgated the Rule in 1988, Ohio federal courts had already expressed interest in having certification available in Ohio. [FN70] The process, by definition, is not an appeal because the Rule requires that the certifying court, whether trial or appellate, has not resolved a legal issue that “is determinative of the outcome of

the case,” and “for which there is no controlling precedent” from the Ohio Supreme Court. [FN71]

Judged by certification and appellate practices in the Ohio and federal*171 courts, the certification process is startling. Examined outside the context of universal approval, certification permits unresolved questions of law to cross boundaries and disrupt appellate hierarchy in unprecedented ways. [FN72] Certification permits access to the state's highest court from a federal trial court, before any judgment or decision has been entered in the trial court. The district court's question may be accompanied by a “record” that is simply a complaint and briefs on a motion to dismiss. Further, the certification rule permits interjurisdictional certification, from federal to state court. Because of these characteristics, the Ohio Rule, on its face, raises concerns about the appellate process, advisory opinions, and mootness.

Certification and appeals within the same court system are hardly unusual. Ohio, like many other states, permits intrajurisdictional conflict certification within the Ohio court system: conflicts among Ohio Courts of Appeals may be certified to the Ohio Supreme Court; the Court, at its discretion, may certify and resolve the conflict. [FN73] Under a conflict certification, the Court reviews an established factual record, two trial court opinions, and two courts of appeals decisions. In contrast to litigants in these intermediate appellate courts, Ohio trial court litigants have no certification, direct appeal, or other access to the Ohio Supreme Court, with one exception: where the death penalty is imposed, there is direct appeal “as a matter of right.” [FN74] Ohio trial court decisions cannot travel directly to the Ohio Supreme Court [FN75] and the exception, death penalty cases, reach the Court only on appeal, after trial *172 and entry of judgment and sentence. [FN76]

Within Ohio federal courts, the Sixth Circuit may seek to certify to the United States Supreme Court “at any time . . . any question of law in any civil or criminal case as to which instructions are desired.” [FN77] After certifying a question, the Court may “give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.” [FN78] This federal certification provision somewhat resembles Ohio certification of state law questions because the certifying court, the Sixth Circuit, has not reached a final decision and seeks instructions from the United States Supreme Court. Federal certification, however, is rarely used, most likely because the United States Supreme Court summarily dismissed one request, noting an internal conflict within a circuit court of appeals “should not be the occasion for invoking so exceptional a jurisdiction of this Court as that on certification.” [FN79] Unlike its enthusiasm for state law question certification, the Supreme Court has discouraged federal certification by reminding the Circuit Courts of Appeals that “except in rare instances,” their task is “to decide all properly presented cases coming before (them).” [FN80] The Supreme Court's reluctance to accept certified questions underscores the difficulty created by a procedure that requires a court of last resort to determine an issue and deprives it of a lower court's reasoned decision and a developed factual record. [FN81]

Federal district courts' direct access to the United States Supreme Court is equally limited. An appeal, but not certification before a decision, is possible. A district court litigant may appeal a decision of a three-judge district court panel directly to the United States Supreme Court. [FN82] Such panels are few and far between: a three-judge panel shall be convened “when otherwise required by an Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of . . . any statewide legislative body.” [FN83] In 1976, however, Congress greatly limited the use of three judge *173 panels in district courts, [FN84] and now such panels are most typically convened to hear legislative apportionment cases.

In the alternative, a district court litigant could climb to the United States Supreme Court most directly by securing a final decision in the district court, [FN85] filing an appeal in the Sixth Circuit, and then petitioning

for certiorari. [FN86] This path of ascent provides the Court with the district court opinion and record if certiorari is granted before the Court of Appeals has ruled. But, like other appellate “short cuts,” “this is a power not ordinarily to be exercised.” [FN87]

Thus, within the Ohio court system, certification of a question of law is not an option unless two intermediate appellate courts are in conflict or the issue is a trial court death sentence. Inside Ohio federal courts, the federal circuit court of appeals is discouraged from certifying questions to the United States Supreme Court, appeals from three-judge district courts are rare and granting certiorari before a circuit court rules is disfavored. [FN88]

In both systems, therefore, an intermediate appellate process nearly always precludes trial court litigants from access or appeal directly to the highest court. Sound policy considerations support this appellate structure. [FN89] Further, only the rarely used federal certification process permits review of a less than final judgment; the final judgment requirement supplies the highest court with a lower court's reasoning, research, results, and records. The unusually abbreviated nature of the record in state law certification alarmed the Clay dissenters when the majority put Florida's as yet unformulated certification rule into use:

(t)he Supreme Court of Florida has never promulgated any such (certification) rules, and evidently has never accepted such a certificate Perhaps state courts take no more pleasure than do federal courts in deciding cases piecemeal on certificates. State courts probably prefer to determine their questions of law with *174 complete records of cases in which they can enter final judgments before them. [FN90]

Further, the Ohio certification rule offers to federal courts unique access to the court of last resort of another judicial system. The Rule permits interjurisdictional certification. Thus, federal trial courts may gain access to Ohio's highest court, a privilege rarely granted to Ohio trial courts. In searching for a counterpart to state law question certification, state court certiorari emerges as another interjurisdictional procedure between federal and state courts. [FN91] To petition for certiorari, state litigants must bring with them “final judgments or decrees rendered by the highest court of a State in which a decision may be had” [FN92] Therefore, in this analogous interjurisdictional procedure, access to the other court system requires a final decision from the sister system's highest court.

Although the certification process grants early access to another jurisdiction's highest court that is unmatched in either judicial system, the procedure need not be summarily labeled ill-advised. The Rule may sidestep final judgments, leapfrog over the appellate process, and separates law from fact, but there are limitations imposed. The Rule is invoked through broad procedures that courts may not always discuss or fully apply. The certifying and receiving courts must find “a question of Ohio law that may be determinative of the (federal) proceeding” and for which there is “no controlling (Ohio Supreme Court) precedent.” [FN93] These requirements must be met first in federal court and then established through preliminary memoranda in the Ohio Supreme Court to persuade the Court to accept the question. [FN94] The preliminary memoranda provide the Court the opportunity to analyze, *175 whether certification requirements are met and if they are met, the court may consider the merits of the question. [FN95]

Despite a required, separate inquiry into the certification standards, the Ohio Supreme Court's responses lack consistent analysis of the criteria. The federal certifying courts more frequently address the requirements, but the courts may simply presume that the requirements are met and move quickly to address the merits. This shared lack of attention to procedure may stem from both courts' knowledge that certification decisions are discretion-

ary and not subject to review. [FN96] Parties in federal court may oppose, but not appeal, a decision to certify a question to the Ohio Supreme Court. [FN97] Once in the Ohio Supreme Court, parties may argue against certification again, but when the Court answers a question, the case returns to the federal court to render a decision on the merits. [FN98] If the Ohio Supreme Court dismisses or declines to answer the question, this decision is unreviewable and the parties return to federal court. [FN99]

On the federal side of the process, when a federal court refuses to certify a question to the Ohio Supreme Court, the party seeking to certify may, on appeal, raise that refusal, along with other issues, and may also renew a motion to certify in the Sixth Circuit. Such renewed motions to certify are routinely denied. [FN100]

***176 2. The Ohio Supreme Court Should Consistently Apply the Rule's Requirements and Provide Reasoning for Dismissal and Declination Decisions**

Although certification decisions may receive little review, both the certifying and receiving courts remain bound by the requirements of: (1) “a question of Ohio law that may be determinative of the (federal) proceeding,” and (2) a question of Ohio law “for which there is no controlling precedent in the decisions of (the Ohio) Supreme Court.” [FN101] Thus, federal courts should find the requirements met before certifying and the Ohio Supreme Court should find them met before accepting and answering a question. Further, in light of the unusual nature of certification as a cross-court system procedure from the lowest to the highest court, the courts should articulate, at least briefly, how they found the Rule's requirements were present or absent.

Court opinions where questions are dismissed or declined and not answered by the Ohio Supreme Court represent a good opportunity for articulating and applying the Rule. [FN102] Such opinions foster dialog between the two court systems, the two individual courts, and their judges, counsel, and litigants. Indeed, one presumed benefit of certification is to increase communications between the two court systems. In opinions declining to accept federal certified questions, the Ohio Supreme Court's exercise of discretion under the Rule is made visible by its analysis and application of the Rule to the questions before it. The Ohio Supreme Court has too frequently wasted this opportunity. [FN103]

Admittedly, neither court is required by Rule to explain a decision to decline to certify or answer a question; both may exercise their discretion without explaining their result. Without such explanation, particularly from the Ohio Supreme Court, federal courts and future federal litigants receive little guidance in improving certification practice.

***177** The federal court's decision to decline to certify leaves the litigants where they already were--in federal court. But, the Ohio Supreme Court's decision will affect the litigants seeking access and also educate federal courts and future litigants about the proper nature, scope, and phrasing of a certified question. Thus, in the cases where the Court declines, [FN104] analyzing the Rule's requirements and explaining the result is desirable.

The Ohio Supreme Court has offered some guidance when dismissing certified questions. In three dismissals, the parties had settled and withdrawn the matter; thus, the Court dismissed the case before any rulings. [FN105] Yet when dismissing a case for “want of prosecution,” the Court chose not to write an opinion to educate courts and attorneys about its certification process. [FN106]

Fortunately, when the parties returned to the Sixth Circuit, the certifying court, it took up the task by issuing opinions detailing how the plaintiff's attorney failed to comply with the Ohio Supreme Court's certification

briefing rules. [FN107] It describes the Court's procedures, the attorney's errors, and concludes the attorney made "an honest mistake," and permits the case to go forward. [FN108] The Sixth Circuit wrote to educate federal attorneys and to encourage them to comply with Ohio certification requirements: "The publication of this order will doubtless embarrass the plaintiff's lawyer, and we hope it will forestall such mistakes by other lawyers in the future." [FN109]

The dissenter, however, would have dismissed the federal case for want of prosecution, rejecting the excuses offered for failure to file the required brief in the Ohio Supreme Court. [FN110]

Thus, the federal court, not the Ohio Supreme Court, enforced and discussed explicitly the Ohio certification rule. This task belonged in the first instance to the Ohio Supreme Court. It should have claimed the opportunity, rather than leaving the task to its federal counterpart. [FN111] Three other *178 dismissals were made "sua sponte," or in response to a motion to dismiss, without the text of the certified questions appearing in the opinion. [FN112]

Within the ten opinions where the Ohio Supreme Court expressly declined to answer, its record for articulating its reasoning is uneven. The Court has chosen to articulate its reasoning only sporadically. [FN113] In four of the ten cases declining an answer, the Court explained its results and entered into the interjurisdictional exchange. These opinions, like those in sister jurisdictions, create useful certification precedent.

For example, the Court has published the text of a certified question and explained that such a fact specific question was inappropriate for certification. [FN114] The Court also refused questions that were certified from federal court, when the litigants were improperly seeking a second opinion. [FN115] When the district court granted defendant's motion to dismiss, the plaintiff appealed to the Sixth Circuit. [FN116] Recognizing there was no controlling Ohio precedent on the state law issue, the Sixth Circuit predicted the law as it believed the Ohio Supreme Court would, applied the law, and reversed and remanded the case to the district court. [FN117] Returning to district court, the unhappy plaintiff persuaded the federal district court judge to certify the question to the Ohio Supreme Court. [FN118] But, the Ohio Supreme Court stopped this gamesmanship by explicitly stating the plaintiff had inappropriately requested it to "intervene between the federal appellate and district courts." [FN119] Although the opinion was simply a few sentences, it included the text of the question asked and expressly stated the reasons for declining to answer the question. [FN120]

Aside from these useful opinions describing why questions were declined,*179 the Ohio Supreme Court has chosen not to explain its reasons for declining to answer other certified question. [FN121] Even without explanation, the Court could publish the text of the question it declined to answer. But, when the Court has declined to answer a question, it has not consistently included the text of the certified questions. In five cases, the text is absent; in five cases, the text appears. [FN122] In all cases, the Court declined to answer without further discussion from majority or dissenters. [FN123]

Ohio is not alone in its practice of summary dismissals and dissents. [FN124] Its decisions declining to answer, like a denial of certiorari, convey no opinion on the merits of the certified question. [FN125] Yet, a brief, reasoned opinion when declining to answer would help avoid federal court frustration and misinterpretation of silence, as well as expressly enforce the policies and practice of Ohio certification. [FN126] These additional opinions could further *180 discourage litigants and courts from misusing the certification process, [FN127] and offer useful guidance to federal courts and federal litigants.

Some sister state jurisdictions with certified question procedures endorse "the mutually beneficial practice of

stating the grounds for their decisions” to decline to certify or to decline to answer. [FN128] The New York Court of Appeals, in declining to answer certified questions, has issued five published opinions offering full explanations that “have helped certifying (federal) courts to avoid similar pitfalls in the future.” [FN129] The five decisions were among forty-four certification requests the court received between 1985 and 2000. [FN130] The New York decisions denying certification were not lengthy, but consistently and explicitly addressed the criteria for certification that were not met. All five decisions include the exact text or close paraphrase of the certified questions before the court. [FN131]

The New York court explicitly identified the missing criteria that caused it to decline to answer the question. [FN132] Thus, when the answer to the certified question may be rendered moot, it can not be determinative of the issue in federal court, thus, the New York court declined to answer. [FN133] Further, the court exhibited a concern for advisory opinions by recognizing that by their nature, coming before the court on an uncertain factual basis, certified questions create this risk because they are either too “(a)bstract or overly-generalized” or too “fact and case-specific.” [FN134] Legal issues, in addition to factual issues, raise concerns in certified questions and may result in a decision to decline to answer. For example, where the certifying court *181 seeks an answer to a legal issue not raised by the litigants in the certified question, the New York Court declined to answer. [FN135] Further, the legal issue raised in the certified question may already be proceeding in that state court system where the state appellate process would eventually resolve it. The highest court in New York favored the state appellate process over the truncated route of certification; it declined to answer, preferring “the benefit afforded by our normal process--the considered deliberation and writing of our intermediate appellate court in a pending litigation.” [FN136] In contrast, some certified questions are more properly resolved first in the federal court system and thus are declined by the highest New York state court. [FN137] In addition to New York, other state courts also write published opinions to explain their decisions to decline to answer certified questions and thus promote understanding between the two court systems. [FN138]

A court's need to explain why a certified question was declined resembles other exercises of discretion, including the decision to deny an interlocutory appeal in federal court. [FN139] For example, neither the district court nor the federal circuit court of appeals need offer reasoning for their discretionary decisions to deny interlocutory appeals pursuant to section 1292(b). [FN140] Like the Ohio certification rule, section 1292(b) guides the judge's exercise of discretion with similar criteria: the appeal “may materially advance” the end of the litigation and there is a “controlling question of law that is unsettled. [FN141] Federal litigants learn little from federal circuit judge orders that deny the appeal without explanation in unpublished orders.*182 [FN142] District court judges also typically fail to provide more than “a rote recitation of the (section 1292(b)) criteria” in their interlocutory appeal orders. [FN143]

The need to explain certification denials is greater than the need to explain interlocutory appeals. Because it is an interjurisdictional certification process, state law certified questions call upon two different court systems, not two levels of the same system, to communicate. The Ohio Supreme Court could further this communication by reciting and applying certification criteria explicitly in its orders and opinions.

The process of denying either an interlocutory appeal or certiorari, however, traditionally has not required any explanation. The Ohio Supreme Court's role may be analogous to the United States Supreme Court's denial of certiorari: explanations are neither desirable nor possible, and denial suggests no view of the case's merits. [FN144] When declining to accept certified questions, the Ohio Supreme Court has issued orders without reasoning, explanation, or even the text of the questions asked.

The analogy to certiorari, however, becomes less persuasive in view of the policies underlying the unexplained denial of certiorari. The United States Supreme Court reviews thousands of certiorari petitions annually; thus, “(p)ractical considerations preclude” the Court from explaining the reasons for each denial. [FN145] Further, the reasons informing certiorari denial are legion and encompass technical concerns, such as lack of final judgment, as well as policy concerns, such as desiring the lower courts to develop additional aspects of the issues before a United States Supreme Court decision. [FN146]

In comparison, the Ohio Supreme Court faces many fewer requests for certification of state law issues, with fifty-five requested and addressed in the last fourteen years. [FN147] The decision to certify or decline is more narrowly defined by the Rule’s requirements and less likely to be informed by *183 the host of considerations facing the United States Supreme Court. State law certifications are more like interlocutory appeals than certiorari petitions: there are fewer to decide and the decisions involve fewer and more defined criteria. Thus, the Ohio Supreme Court is in a better position to explain its certification decisions. And even the United States Supreme Court has acknowledged the benefits of explaining the reasoning behind a certiorari denial. “It is of course not possible to explain the reasons supporting every order denying a petition for writ of certiorari. An occasional explanation, however, may allay the possible concern that this Court is not faithfully performing its responsibilities.” [FN148]

3. Assessing Ohio Supreme Court Procedures in Answers to Certified Questions

In the present study, the Ohio Supreme Court supplied answers, in whole or part, in thirty-six certified question opinions. [FN149] Setting aside the substantive merits of these decisions, they also provide the Court a chance to refine the policies and practice of state law question certification. In addition to Practice Rule XVIII, the Court requires that certified questions be questions of law, not fact. [FN150] Next, by answering a certified question, the Court does not exercise jurisdiction over the federal case; the Court may affect the case’s outcome by its answer, but the federal court exercises jurisdiction and ultimately decides the case. [FN151] The state court declares the state law, and the federal court then applies that law to the facts of the case before it. [FN152] Before answering, the Court should determine if the proposed questions: (1) are questions of law; (2) are questions that may be determinative of the issue; and (3) lack answers from the controlling precedent of the Ohio Supreme Court.

Before turning to the merits of the case, therefore, the Ohio Supreme Court should determine if the certified questions are framed purely “as questions of law, not fact.” [FN153] Framing such questions of law is no easy task, and the Ohio Supreme Court has offered little guidance or discussion of the *184 problem of question framing. It declined to answer a question, explaining “it (was) not appropriate for this court to answer certified questions of state law that are so factually specific in nature.” [FN154] At least one federal judge heard this concern and asserted in later certification requests that the question asked was not fact specific, but his efforts brought mixed results. [FN155] Despite declining a question that was too factually specific, the Court has answered, without comment, questions specifically tied to “the facts of this case.” [FN156] The inconsistent treatment threatens to render this threshold requirement meaningless.

Formulating a pure question of law presents a difficult task, but ignoring the difficulty serves no useful purpose. Mixed questions of law and fact that are deemed too fact-specific and unacceptable, should be identified as flawed, and the text of the flawed questions should be included in the text of the opinion. Publishing the text of the question declined would educate federal courts, and also keep the Ohio Supreme Court on task by displaying

its decision fully and being held to its announced precedent to limit certified questions to questions of law.

When faced with the same “pure question of law” difficulty, a sister state court analyzed and addressed the requirement explicitly, identifying and responding directly to the certifying federal court's struggles to frame pure questions of law. [FN157] The Mississippi Supreme Court, like its counterpart in Ohio, read its rule to contemplate answering only “pure questions of law,” but found the questions sent to it were “in the nature of law application questions--what results from applying the rules of law to the facts of the case?--rather than pure questions of law as to what is the law of Mississippi on a particular point.” [FN158] The Court expressly noted the questions' flaws, but then, “in the spirit of federalism,” and because six years had passed since the *185 plaintiff had suffered serious injuries, it stepped forward to address what were technically “law application,” not “law declaration,” questions. [FN159]

Acknowledging the questions' formulation could lead them to decline to answer, the court found that “there must be some give and take” between the federal court and it, as the receiving court. [FN160] The court decided to answer the question as best it could because “it hardly befits our role in the constitutionally ordained enterprise of federalism to act like a stick in the mud whenever the questions certified are not pure law declaration questions.” [FN161] The decision to answer the questions may have been unwise, but the court fully acknowledged its own requirements and then explained its decision to answer, rather than decline, the flawed questions. [FN162] The Ohio Supreme Court should play a similar role in explaining why it would accept questions that technically fail to comply with its Rule or its own certification precedent.

In addition to inconsistency in requiring questions of law, the Ohio Supreme court has an uneven record of accepting questions when the specific legal basis for the question is not defined. The failure to ask a specific legal question presents a serious problem because if the questions do not define the legal issues, then the Court could simply sua sponte address the legal issues it wished to have resolved. [FN163] For example, the Ohio Supreme Court accepted and answered, without comment, the question: “Is Ohio Revised Code § 3937.18(A)(2) unconstitutional on any grounds under the facts of this case, including those stated by the Plaintiff?” [FN164] The question invited, and the Court accepted, the opportunity to use any legal grounds available to hold the statute unconstitutional, whether the plaintiff had raised the issue or not. Yet, the Court later declined to answer a very similarly phrased question: “Is Ohio Revised Code § 3937.18(G), as amended Senate Bill 20, effective October 20, 1994, unconstitutional on any grounds under the facts of this case, including those stated by Plaintiffs?” [FN165] Again, the Court failed to *186 discuss the Rule, the question's success or failure in meeting requirements, or another reason why it declined to answer the question as framed.

The Court's uneven record in requiring certified questions to be precisely framed, to identify a specific legal ground, and to be neither too fact specific nor abstract, leaves it vulnerable to criticism that it accepts or declines questions based on its own desires to strike down, uphold or interpret state statutes or other state law. Further, by choosing not to explain its decisions to decline or answer certified questions, the Court does little to develop the law of certification for itself or for the federal courts sending it questions.

Certified questions entering the Ohio Supreme Court should be formulated as question of law and should also be ones “that may be determinative of the proceeding.” [FN166] The “determinative” requirement is not absolute, but its purpose is to avoid issuing advisory opinions [FN167] that will have no effect upon the federal litigation. [FN168] Further, it keeps the state courts from answering questions that the federal court judge has already answered. [FN169]

Unfortunately, the Court rendered one decision while acknowledging its answer could play no role, not some role, in determining the outcome of the federal proceeding. In federal court, the judge, sua sponte, simultaneously ordered briefing on the issue of a state statute's constitutionality and on the issue of certifying the question of constitutionality to the Ohio Supreme Court. [FN170] The federal court held the state statute constitutional, rejecting claims it violated right to trial by jury and equal protection principles. [FN171] Then, the court found federal diversity jurisdiction no longer existed. [FN172] Finally, with the case ended, the court certified the question of the statute's constitutionality to the Ohio Supreme Court. [FN173]

Understandably, the Ohio Supreme Court expressed some confusion when it received a question the federal court had already answered to determine the outcome of the case. It observed: "Upon reviewing the briefs of the *187 parties, the trial court issued an order reiterating its prior holding that R.C. 4121.80 is constitutional Nevertheless, the trial court certified the cause to this court to determine whether R.C. 4121.80 is unconstitutional in whole or in part under Ohio law." [FN174] Without referring to the Rule's requirement of a question with an answer that may be determinative of the federal proceeding, the Court accepted and then answered the question. [FN175] Apparently wishing to reach the issue and "reverse" the federal court, the Court issued an advisory opinion in response to a certified question by failing to consider the Rule's provisions. [FN176]

Having decided to reach the issue, the Ohio Supreme Court also decided to accept a broadly framed question that would allow it to address the statute's constitutionality on any legal basis: "Whether R.C. 4121.80 is unconstitutional in whole or in part under the Ohio Constitution?" [FN177] Therefore, the Court held the entire statute unconstitutional, without considering the "propriety of any of the arguments (raised in the district court)." [FN178]

The Brady decision exemplifies the potential power available to the state's highest court through certification when the procedure's safeguards are ignored. The court acknowledged implicitly that its answer could not determine the federal proceeding, yet still accepted certification. [FN179] Outside certification, however, the Ohio Supreme Court has declined to answer when an issue will not be determinative, and thus declined to issue an advisory opinion. [FN180] When asked to decide the constitutionality of a new tax statute, the Court found the request was too general and abstract. [FN181] Thus, the Court has held it will not determine a statute's constitutionality unless "the question of constitutionality . . . determines the case before it." [FN182] Similarly, the Brady Court should have declined to address the constitutionality of a statute when the question had already been answered and the case determined by the *188 federal district court.

By Rule XVIII's second requirement, the Ohio Supreme Court should also decline to answer a question when there is Court precedent already available to answer it. Typically, the receiving court declines to answer when this requirement has not been met, then cites, without discussion, the available, controlling precedent. Thus, because there was controlling precedent available, a state supreme court cited its precedent and concluded it was "inappropriate to accept certification" [FN183]

The Ohio Supreme Court has, in four cases, stayed or delayed an answer to a certified question to await controlling precedent that would be issued in response to other cases then pending before the Court. [FN184] This practice, similar to that for certiorari in the United States Supreme Court, reasonably allows for delaying an answer rather than declining to answer when an answer will be given shortly in a similar case.

In a less prudent practice, the Ohio Supreme Court has accepted and answered certified questions where controlling precedent already existed. [FN185] Rule XVIII indicates the Court should decline the question and cite

the “controlling precedent.” But, the Court accepted and answered the question “in the affirmative,” rather than declining the question, and then cited the controlling precedent. [FN186]

In contrast, in the absence of controlling precedent, the Court should accept the question and issue a decision to supply an answer and create new precedent. [FN187] Yet the Court has accepted questions, answered them in the affirmative, but cited no authority for its decision. [FN188] Thus, the Court has found no previous controlling precedent, but created new precedent based on *189 four words--answered in the affirmative. This absence of analysis and citation gained a dissenter's criticism for an opinion issued “ without opinion” or “explanation.” [FN189] Similarly, the Court accepted two cases without controlling precedent, but then failed to create useful new precedent; it answered “in the negative,” without discussion or citation. [FN190]

The better practice would be to comply with the Rule's purpose and avoid new precedent when controlling precedent already exists. Like its sister jurisdictions, the Court would decline and cite the existing controlling precedent, rather than answering a specific certified question and unnecessarily creating new controlling precedent based on the isolated legal issue and bare facts of a certified question. Where no controlling precedent exists, the Court should accept and answer the question but provide analysis and citation beyond an answer in the “affirmative” or “negative.” [FN191]

4. Assessing the Merits of Ohio Supreme Court Answers to Certified Questions

In the period studied, the Ohio Supreme Court has issued thirty-six certified question opinions, with three of these answers creating new Ohio causes of action--two tort claims--and one recognizing the validity of spendthrift trusts. [FN192] Certified question opinions, like any other precedent created by a state's highest court, may address issues of first impression and recognize new causes of action. [FN193] Such questions are appropriate for certification when the federal court has few indicators of what the highest state court would be likely to do when a doctrine or cause of action has already split other jurisdictions. Court opinions recognizing new claims in response *190 to certified questions should be no different than any other opinion performing the same task. The court should summarize material facts; balance competing policy considerations; cite authority from within and outside the state; and clearly state the elements of the new claim. In cases of first impression that progressed through the state court system, the Ohio Supreme Court has consistently supplied such analysis in its opinions. [FN194]

Yet, when the Court accepted certified questions in three cases raising claims as yet unrecognized in Ohio, it broke with its usual pattern of explication in two of them. [FN195] In its first certified question opinion answering an issue of first impression, the Court acknowledged that certification was not designed to change state law precedent, but that it should not refrain from changing state precedent simply because the state law issue “arose in federal court.” [FN196] Thus, when asked if Ohio found spendthrift trusts valid and enforceable, the Court examined its precedent and overruled it, concluding that “(t)he policy reasons against spendthrift trusts, which seemed so strong then, now look weak.” [FN197] The Court established that creating Ohio precedent should not be avoided simply because the law in question arose in a federal certified question. [FN198] Further, the Court issued a full opinion with facts, analysis of precedent, and current policy considerations when it chose to recognize and enforce spendthrift trusts in Ohio.

Yet the Court has recognized two new tort claims in response to certified questions by issuing opinions nearly devoid of all fact, law or legal analysis. First, the Court accepted certified questions concerning spoliation of evidence claims: “Does Ohio recognize a claim for intentional or negligent spoliation of evidence and/or tort-

tious interference with prospective litigation?” [FN199] The certified question was compound and difficult to parse. It asked three questions, not one. The federal court asked if Ohio recognized: (1) a claim for negligent spoliation of evidence; (2) a claim for intentional spoliation of evidence; or (3) a claim for tortious interference with prospective*191 civil litigation.

The Court's response merged the questions, deleted terms, and added terms, but did not indicate that it was re-phrasing the question in order to frame a response. It stated: “A cause of action exists in tort for interference with or destruction of evidence.” [FN200] The answer does not address the division between negligent and intentional conduct; does not use the question's term “spoliation,” [FN201] but indicates the tort claim arises from interference with evidence or destruction of evidence. The answer does not address the “tortious interference with a prospective civil claim” language, suggesting it is merged into the interference and destruction claim.

The Court listed the elements of the new claim: “pending or probable litigation involving the plaintiff; knowledge on the part of the defendant that litigation exists or is probable, (3) willful destruction of the evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and damages proximately caused by the defendant's acts.” [FN202] The elements limited the Court's earlier label of the claim because the elements required intentional, “willful” conduct and limited that conduct to “destruction” of evidence, leaving negligent conduct and “interference” out of the equation. Therefore, the interference is with the plaintiff's case, not the evidence; the evidence must be destroyed, not simply “interfered with.”

Understanding the new claim was further hampered by lack of facts to provide context. Without the facts of the district court case, readers could not discern if the defendant had destroyed, concealed, altered or interfered with the evidence, whatever shape the evidence had assumed in the case.

The Court supplied readers with a single legal authority, a New Jersey intermediate appellate court opinion. [FN203] The New Jersey case, *Viviano*, analyzed a tort claim for fraudulent concealment and its use when tortious conduct occurred in a litigation context. [FN204] Thus, the *Viviano* court used the elements of fraudulent concealment:

To prove that the defendants were liable to plaintiff for fraudulent concealment, she had to show they were legally obligated to disclose*192 the . . . memorandum to her; that it was material to her personal injury case, that she could not readily have learned of it without their disclosing it, that they intentionally failed to disclose it to her, and that she was harmed by relying on the nondisclosure.” [FN205] Rather than recognizing a new spoliation tort, the *Viviano* court adapted an existing claim, noting that the claim before it was “analogous to a recently recognized cause of action for destruction of evidence that has been dubbed ‘spoliation of evidence.’” [FN206]

To support its analogy, the New Jersey court explained that the spoliation of evidence tort “had its origin in California,” citing the tort's elements from a California intermediate appellate court opinion, an opinion not officially published. [FN207]

The Ohio Supreme Court's decision in *Smith* was supported by a legal house of cards. The court relied solely on the *Viviano* decision, a decision that did not recognize any spoliation of evidence torts. [FN208] The elements listed in *Smith* and credited to *Viviano* actually came from a California case cited in *Viviano*, a case without precedential authority in California. Indeed, California has since declined to adopt spoliation torts. [FN209] The *Smith* opinion has left future litigants without facts or useful legal precedent to understand the confusing and contradictory answer and elements that created a new Ohio tort claim.

The opinion announced a claim labeled “interference with or destruction of evidence” but matched the label to elements limited to destruction of evidence. Thus, Ohio courts have struggled to interpret Smith and apply it to a range of factual settings. Because the Smith elements require destruction of evidence, the destruction of evidence cases have been the easiest to decide. [FN210] But, when evidence is alleged not to be destroyed but altered or concealed or withheld, the lower courts must re-write Smith to align the claim's label with its elements. First, a lower court expanded the “destruction” element*193 to include conduct where a party “willfully destroyed, altered or concealed evidence.” [FN211] The court, without offering any legal citation, announced that “(t)o establish her spoliation claim, appellant was required to demonstrate the appellee willfully destroyed, altered, or concealed evidence.” [FN212] Then, the court relied on Smith's “interference” with evidence label rather than the enumerated element of the claim, “willful destruction” of evidence. [FN213] To further support its reading, the Court relied upon the meaning of the term “spoliation,” as encompassing “significant and meaningful alteration.” [FN214] Spoliation can encompass such conduct, but the Smith court did not use spoliation anywhere in its answer to the certified question. [FN215] The federal court question labeled the claim “spoliation of evidence,” but the Court's answer labeled the action as one for “interference with or destruction of evidence.” [FN216] Another court declined to extend the claim beyond its element of destruction of evidence: “(D)n this case, the plaintiff neither alleged ‘willful destruction’ of the RV wash bottle by defendant nor presented any evidence that defendant had willfully destroyed the evidence” [FN217]

When the Ohio Supreme Court addressed the new claim a second time, [FN218] it re-labeled it as a “spoliation of evidence” claim. [FN219] The Court then refined the element of destruction of evidence to now include concealment, interference or misrepresentation, in accord with the lower court's interpretation. [FN220]

In addition to Ohio's lower courts, courts outside the state spent considerable time deciphering Smith's terse ruling. By ignoring the question's reference to “intentional” or “negligent” spoliation and substituting the broader term “tort,” Smith left courts concluding that Ohio recognized both intentional and negligent spoliation claims. [FN221] Such courts, looking for *194 precedent to inform their own views of this new tort, found the Smith court recognized the new tort “without explanation.” [FN222] Rather than spending eight years trying to reconcile the inconsistencies in Smith, the Ohio Supreme Court should instead issue answers to certified questions that develop the legal analysis as fully as in any other opinion recognizing a new state law cause of action. Nothing in Ohio's or in any other state's certification rule limits the state's highest court from issuing full responses and opinions when answering certified questions. [FN223]

The same year it issued Smith, the Ohio Supreme Court recognized the tort of intentional interference with expectancy of inheritance in a decision answering a certified question. [FN224] In this opinion, the concurrence provided a factual narrative, [FN225] and the majority cited two legal authorities. [FN226] But again, the precise label and meaning of the new tort was garbled from the outset. The Court noted the Sixth Circuit's certified question uses the language interference “with expectancy or inheritance.” [FN227] In the parties' briefing, some repeated the question's language, but other parties used the phrase interference with “an expectancy of inheritance.” [FN228] Rather than expressly rephrasing the question, the Court “assumed” that the different versions of the tort's name all meant precisely the same cause of action and further “assumed” that the claim required “an expectancy of inheritance.” [FN229]

By equating phrases with distinct meanings, the Court sowed the seeds of future ambiguity and argument. Four years later, a court of common pleas judge addressed the new claim of “tortious interference with an expectancy of inheritance.” [FN230] The judge, however, had to read the claim to be one for both interference with an expectancy or interference with an inheritance. [FN231] The claim arose when a party interfered with a

gift made *195 through a trust; therefore, the defendant interfered with the “ expectancy” the trust created. [FN232] To reach its conclusion, the common pleas court provided additional legal authority for its tort analysis. [FN233]

The Sixth Circuit, after receiving the answer to its certified questions, also needed to explain how the two related claims could be discovered in the Ohio Supreme Court's four-paragraph opinion, which appeared to create only one type of claim. [FN234] The district court, therefore, received additional guidance about the Ohio Supreme Court's answers, as well as additional research--analogous Florida, Maine, North Carolina and Georgia case law. [FN235]

The task of researching and analyzing the history and use elsewhere of a new tort claim belonged to the Ohio Supreme Court and remained with it when it answered certified questions. Had the Court developed this analysis, the task would not have been left to lower courts and the Sixth Circuit to label the claim properly and match the claim to its elements. The certification process permits the Ohio Supreme Court to recognize new state law causes of action. Opinions issued in response to certified questions have no restrictions that limit opinions in any way. The Court's tasks in establishing a new state claim should be uniform in response to appeals with the state system or in response to certified questions.

B. Ohio Case Study: Ohio Federal Courts' Certification Practices

Ohio's federal courts stand as gate-keepers on the other side of the certification equation. Like the practices of the Ohio Supreme Court, the Ohio federal certification study examines both the procedures and the merits of the cases coming before Ohio federal district courts and the Sixth Circuit on motions for certification.

1. Federal Court Procedural Certification Practices

Federal courts are the first to apply the Ohio Supreme Court's certification rule to decide a motion to certify or to certify a question sua *196 sponte. [FN236] In addition to the Rule's stated requirements, Ohio federal courts have developed a range of factors that influence the certification decision. Further, these courts have addressed, with varying degrees of success, federal litigants' misuse of certification as a lateral appeal or the chance to shop for a second, more favorable, forum in the Ohio Supreme Court.

The federal court's first task is to apply the Rule's stated requirements. In sending fifty-five federal cases to the Ohio Supreme Court, the federal courts typically cited the Rule, quoted the Rule, and carefully applied the Rule to the issue before them. [FN237] But there are some exceptions. The Rule provides that the certified question of state law be one that may be determinative of the proceeding, but in *Brady v. Safety-Kleen*, a federal district court permitted a “lateral” appeal to the Ohio Supreme Court when it issued a certification order. Although the federal court recited the Rule, its Order also concluded that: “Section 4121.80 is constitutional in its entirety and that federal diversity jurisdiction no longer exists in this case.” [FN238] Thus, the federal court held the Ohio statute constitutional, then asked the Ohio Supreme Court to answer the same question. The Ohio Supreme Court's answer could not determine the outcome of the federal case, but it did provide the litigants with a new forum to shop for a different result, which the Ohio Supreme Court provided by “reversing” the federal court and holding the statute unconstitutional.

Unfortunately, other Ohio federal courts have also chosen to certify questions at or near the close of the pro-

ceedings before them, making it likely there is little for the Ohio Supreme Court to determine. [FN239] This eleventh-hour*197 decision to certify undermines or negates the federal court's own efforts, affords the losing litigant an immediate appeal to state court, and prolongs the litigation for the winning litigant. Ohio federal courts should enforce the Rule's need for a question as yet to be determined and refuse questions that have been determined or been determined, but for final entry or motions to reconsider.

Federal courts outside Ohio have readily recognized that litigants abuse the certification process by seeking a reversal in the state supreme court after the federal court has ruled on or is close to ruling on the state law question. When plaintiffs lost on summary judgment in the district court, they “moved the district court to stay judgment and to certify the choice of laws question” to the state supreme court. [FN240] When the district court denied the motion, the plaintiffs renewed it on appeal. [FN241] The appellate court denied certification, noting the plaintiffs sought it only “after the motion for summary judgment had been decided against them.” [FN242] Such a certification gives the losing party the chance to “gamble” for a different outcome in state court. [FN243] The decision to certify also serves to discard the federal court's work, gives the losing party an immediate appeal, and prolongs the litigation needlessly. [FN244] Thus, the Ohio requirement that a certified question should be determinative of the issue acts to prevent this abuse. Ohio's federal courts should enforce this requirement and decline to certify when a district court decision effectively determines the issue, but the losing party attempts to reverse the decision in the state court.

The Rule requires there be no controlling precedent from the Ohio Supreme Court to answer the certified question. Ohio federal courts have honored this requirement, yet remained alert to its potential for abuse. While there may be no controlling Ohio Supreme Court precedent, Ohio state courts and Ohio federal courts may have already addressed the state law issue sufficiently so as to make certification unnecessary. As a Sixth Circuit panel observed, “While there is no controlling Ohio Supreme Court precedent*198 on the issue, certification to the Ohio Supreme Court is unnecessary since the question has been squarely addressed by this circuit on several occasions.” [FN245] Further, the court recognized the motion to certify was a device to gain a lateral appeal in the Ohio Supreme Court: “this appears to be an attempt by (plaintiff-appellant) to appeal the decision of the district court, as well as the Leaman decision in the Ohio courts. Such use of the certification process is inappropriate.” [FN246] One litigant, while moving to certify, cited controlling precedent from Ohio Supreme Court. The district court denied the motion, observing that, rather than meeting the Rule's element for no controlling precedent, the litigant herself relied upon controlling precedent: “defendant's arguments in this case are based on Scott-Pontzer, a recently-decided and arguably controlling opinion issued by (the Ohio Supreme Court).” [FN247]

Thus, by honoring the Rule's requirements for a question that may be determinative and a question not yet addressed by the Ohio Supreme Court, federal courts have also furthered the policies underlying certification. The Ohio federal courts have explicitly taught their litigants that certification is not an appeal to the Ohio Supreme Court to be used when a question of state law has already nearly reached determination in federal court or when existing precedent in the Ohio Supreme Court or lower Ohio state courts makes an unfavorable answer clear without certification.

The Ohio federal courts should also honor Ohio precedent for formulating certified questions as pure questions of law. [FN248] Yet, the federal courts have little incentive to struggle with phrasing questions of pure law because the Ohio Supreme Court, while announcing the requirement, has expressly applied it to certified questions arriving from federal court on a single occasion. [FN249] The questions federal courts certified in the fifty-four cases sent to the Ohio Supreme Court largely fail to meet a pure question of law standard. [FN250] Thus, federal courts are aided by the Ohio Supreme Court in largely ignoring its decision to require pure questions of

law. [FN251]

The requirement should first be addressed in the federal courts. By *199 explicitly raising the difficulty, the federal courts can open a dialogue with the Ohio Supreme Court. The question of law requirement was engineered to keep the two courts within their assigned certification roles. When the requirement is ignored, it permits the Ohio Supreme Court to accept certified questions of law applied to fact, to determine questions of fact, and to issue holdings based on the facts. The federal courts may be glad to send these law application and question of facts tasks elsewhere, but the policy underlying the question of law requirement was to define narrowly the Ohio Supreme Court's role to declare the rule of law, not to apply it to the facts.

By its language, Ohio's [Supreme Court Rule of Practice XVIII](#) permits the Ohio Supreme Court to answer questions certified by a “court of the United States,” specifically including federal magistrate judges. [FN252] For the past fourteen years, however, Ohio bankruptcy judges questioned, in published opinions, whether bankruptcy courts could certify, [FN253] heard one litigant express certainty that bankruptcy courts could certify, [FN254] and certified several questions to the Court, only to have them rejected without comment as to their source. [FN255] A single bankruptcy court's three attempts to certify an identical set of questions were all declined, but the Supreme Court's response likely had little to do with the sources of the questions, but more with their redundancy. [FN256]

Currently, Ohio's [Supreme Court Rule of Practice XVIII](#) and Ohio *200 Supreme Court precedent do not address expressly the power of bankruptcy courts to certify, but those courts can be read to fall within the Rule's phrase “a court of the United States.” Recently, the Court has accepted and answered a certified question from the Bankruptcy Appellate Panel of the Sixth Circuit. [FN257] Thus, the Ohio Supreme Court has indicated that it will receive bankruptcy questions in the future, at least from the Appellate Panel. Accepting certified questions from all bankruptcy courts would satisfy the stated goals of certification by accepting determinative, unsettled question of state law from courts that must regularly address substantive state law issues. [FN258]

Ohio's [Supreme Court Rule of Practice XVIII](#) uses the 1995 Act's generic language of “a court of the United States,” rather than a laundry list of federal courts used in the 1967 Act. The 1995 Act also mentions bankruptcy courts specifically. [FN259] The Ohio Rule could be read broadly as it is stated: to accept questions from “courts of the United States,” including trial level bankruptcy courts. [FN260] The bankruptcy courts' need and desire for quick resolution should contribute to existing federal restraint in certification. [FN261]

The 1988 Ohio Rule's phrase any “court of the United States” should be read to include many more “specialty” courts, in addition to the bankruptcy courts. The evolving versions of the Uniform Act moved from a listing of specific federal courts to the generic phrase, “a court of the United States” in order to eliminate the 1967 Act's long list: “the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court.” Through a 1990 amendment, the list grew to include: “the United States Court of International Trade, the Judicial Panel on Multidistrict Litigation, the United States Court of Military Appeals and the United States Tax Court.” When the 1995 Act was issued, the long list was replaced *201 with the phrase, “a court of the United States,” and the comment noted this phrase included the courts previously listed, as well as bankruptcy courts, which were not listed previously.

Jurisdictions adopting the Act often chose to specify the federal courts they wished to act as certifying courts. [FN262] Other jurisdictions kept the 1990 amendment's list of federal courts and thus have accepted certified questions from such courts as the United States Tax Court. [FN263] Nothing in any legislative or rule his-

tory expressly indicates that Ohio adopted the Uniform Act when it created the Ohio Supreme Court Practice Rule on certification. The Uniform Laws Annotated lists Ohio as an adopting jurisdiction, under the 1967 Act, but with an extensive listing of the differences between the Ohio Rule and the Act. [FN264] A reading based on the history of the Uniform Act, whether Ohio expressly embraced the Act or not, means that Ohio accepts certification from all federal courts, which would include federal courts listed in the 1967 Act, the 1990 amended list, and 1995's addition of bankruptcy courts. In practice, the federal courts certifying to the Ohio Supreme Court have been limited to those who sought to certify district courts, courts of appeals, and now the Sixth Circuit Bankruptcy Appellate Panel. By accepting the bankruptcy appellate panel's certified question, the Ohio Supreme Court may have simply acted on Rule XVIII's invitation to all federal courts since 1988; the invitation was there, but no bankruptcy courts had acted upon it until recently. Thus, the Tax Court, the Court of Claims, and other federal courts have received Rule XVIII's invitation, but to date, apparently have not needed to certify a question of Ohio state law.

Beyond the scope of Ohio's Supreme Court Rule of Practice XVIII's express requirements, Ohio federal courts have developed additional factors that influence the decision to certify. First, when questions are likely to recur or are already present in several cases, Ohio's federal judges have tended to grant certification when it affords a saving of judicial resources. [FN265] Next, *202 state law questions that have or will generate conflicting federal court views make certification more likely. [FN266] Further, federal courts in Ohio have borrowed from state appellate procedure for discretionary appeals by favoring questions that present issues "of great public and general interest" [FN267] and questions seeking answers that are "of importance to the citizens of Ohio." [FN268] Finally, Ohio federal courts favor restraint by requiring more for certification than a federal court's difficulty in understanding state law. "The mere difficulty of ascertaining local law provides an insufficient basis for certification." [FN269] Sister federal courts employ similar factors of restraint to inform their response to a request to certify. [FN270]

These additional policy factors demonstrate federal court respect for the Ohio Supreme Court. Rather than certifying every question where an answer may be determinative and there is no controlling precedent, Ohio federal courts have sought to limit, rather than expand, the already broad scope of certified questions. [FN271] The effort recognizes that the Ohio Supreme Court should not be burdened with every state law question meeting the Rule's low threshold. Federal policies favoring questions of general concern, questions likely to recur, and questions already generating authority splits respect the Ohio Supreme Court's resources. Ohio federal courts should continue to employ these and other certification policies of restraint.*203 [FN272]

Federal court restraint in granting certification directly affects the Ohio Supreme Court's workload and future workload. Certified questions are presently a very small portion of the Ohio Supreme Court's workload. [FN273] Yet, the potential for certified questions is nearly limitless because the Rule invites every federal judge in Ohio and in the rest of the country to certify determinative, unsettled questions of Ohio state law to the Ohio Supreme Court.

Fortunately, few have accepted the invitation, with the majority of certified questions coming from federal district courts within Ohio. While the Court may decline certification, declining requires time and energy in itself. Certification advocates dismiss fears of "inundation," because of federal judge self-imposed restraint, yet the potential for large numbers of certified questions remains. [FN274]

While most Ohio federal court judges have never certified a question to the Ohio Supreme Court, some have a high referral rate. [FN275] The Ohio federal courts should continue to practice restraint and to develop further

policies that promote consistent, reasoned certification decisions. [FN276]

2. Federal Certification: Exercising Restraint by Explicitly Addressing Forum Shopping

Although not part of the Rule or existing precedent, Ohio federal courts should consider the parties' possible forum shopping motives when deciding whether to certify. The Erie decision was motivated, in part, by a desire to prevent litigants from shopping for favorable law between federal and state courts. If federal courts developed their own federal common law, *204 rather than employing state law, the incentive to forum shop would be heightened. The state law certification process, however, creates an "exception" to Erie: state law governs, but the parties may shop between state and federal court for a speedier, less expensive or more favorable interpretation of state law between state and federal court.

Certification forum shopping considerations appear in at least two forms. First, a diversity plaintiff may file in federal district court, not to receive the court's ruling, but to move promptly to certify to the highest state court, avoiding the state court appeals process. Second, a defendant may receive or anticipate an unfavorable ruling in state court, foresee a long state appeals process, and seek removal to federal court. Once in federal court, the defendant moves to certify to the highest state court. Ohio federal courts have rarely considered certification's forum shopping potential.

a. Forum Shopping: Addressing the "Leapfrogging" Diversity Plaintiff

A Sixth Circuit dissenter acknowledged and rejected a diversity plaintiff's attempt to forum shop using state law certification. The judge observed: "It was plaintiffs themselves who pursued relief against defendant Eli Lilly & Co. in the federal district court and not in the Ohio state courts." [FN277] Because the plaintiffs chose to rely on the federal courts to decide a state law issue present when they filed, the judge dissented from the grant of certification to the Ohio Supreme Court.

Apart from this dissenter, Ohio federal courts have not considered plaintiff diversity forum shopping, [FN278] even when litigants use certification motions expressly for that purpose. [FN279] When diversity plaintiffs file in federal court to use certification to avoid the state appeals process, the federal court should at least consider this factor as part of its certification decision. *205 Further, the court should consider those cases already within the state appellate system that will bring the same issues to the Ohio Supreme Court on a complete and developed record. When the federal district court certified the question of the constitutionality of portions of Ohio's workers compensation statute, cases within the Ohio state court system were also bringing similar issues to the Ohio Supreme Court. The Holeyton certification order was first issued in late January 2000, when the Ohio Court of Appeals for Sixth District had already accepted an appeal on similar issues and would issue its ruling in mid-March 2000. [FN280] By August 2000, the Ohio Supreme Court allowed an appeal from the Sixth District decision, [FN281] and another would soon arrive from the Ninth District. [FN282]

The federal judge likely knew, and the plaintiff's attorneys in Holeyton did know, that the issues concerning the Ohio statute's constitutionality would soon reach the Ohio Supreme Court. [FN283] The decision to certify should have considered the plaintiff's forum shopping as one factor, not a dispositive one, but one factor. Further, the federal court should have acknowledged and considered the progress of similar issues through the state appellate system. In a similar race to the state supreme court in a sister jurisdiction, after a certified question reached the state supreme court, an appeal on a similar issue reached the court through the state appellate sys-

tem. The state supreme court declined to rule on the certified question case, preferring to rule on the case from the state system, which arrived with a developed factual record and lower court opinions. [FN284] The Ohio federal courts should similarly consider the benefits of deciding an issue framed by two lower court opinions and a developed factual record when deciding certification motions. At least one Ohio federal judge has noted this concern: “The leapfrogging opportunity deprives the Ohio Supreme Court of that which all judges like to have when confronted with an issue of first impression: that somebody else has been first to offer an opinion.” [FN285] At a minimum, the federal*206 courts could ask parties to identify the progress of cases in the Ohio court system that raise similar issues.

In other jurisdictions, judges more consistently weigh the plaintiff’s choice of forum in deciding a plaintiff’s certification motion. The plaintiff’s choice of forum is not determinative of certification, but may weigh against certification in the decision process. [FN286] By permitting, without consideration or comment, this forum shopping, the Ohio federal courts disagree with other federal circuit and district court judges who indicated “some weight” should be given to forum shopping concerns. [FN287] Ohio federal courts have not developed this factor, but their silence may grow from several causes. District court judges may simply grant or deny certification motions from diversity plaintiffs for other reasons. Judges may see strong reasons favoring certification and grant the diversity plaintiff’s motion to certify without comment on that party’s decision to file in federal court. Or, there may be some interest in having a thorny state law issue likely to require much research and analysis depart the federal court’s docket to be determined elsewhere.

b. Forum Shopping: Addressing the Removing, then Returning, Defendant

The second forum shopping consideration in certification is the removing defendant. In nine of the fifty-five certification cases, the defendant had removed the case from state court. [FN288] As with the diversity plaintiff*207 movant, Ohio federal courts have not often weighed the defendant’s decision to remove, then seek certification, as a factor in the certification decision. One Ohio federal court did address the issue of removal and certification, but found no forum shopping. The defendant had removed the case to federal court, where the plaintiff sought and received a return to state court through certification. [FN289] But the plaintiff failed to file the proper briefs in the Ohio Supreme Court and the Court dismissed for failure to prosecute. [FN290] When the case returned to the Sixth Circuit, the court found the plaintiff’s failure to file was not forum shopping. The plaintiff’s inaction was not “a deliberate attempt to avoid having the state court decide the dispositive question of law” because the plaintiff had originally sought state court when it filed its complaint there; it had ended up in federal court through the defendant’s removal. [FN291]

Again, sister federal jurisdictions address and weigh removal from state court, followed by defendant’s motion to return to state court as a possible tactic adding cost and delay to the plaintiff, who had chosen state court in the first instance. [FN292] Ohio federal courts should adopt this consideration to weigh as one factor among others in the decision to certify.

3. Ohio Federal Courts Should Respect Answers Given to Certified Questions

Once a federal court receives an answer from the Ohio Supreme Court on an issue of state law, comity and other policies supporting certification mandate that the federal court follow the law provided to it at its own request. [FN293] Ohio federal courts generally recognize, appreciate, and enforce*208 the state law rendered for them by the Ohio Supreme Court: “The Court is deeply appreciative that the State of Ohio provides this certifica-

ation procedure.” [FN294]

Yet, one Ohio federal district court, having received a divided opinion from the Ohio Supreme Court, chose to dismiss the disputed state law claim without prejudice, anticipating that the Court could change its mind in the future. [FN295] The Sixth Circuit found the district court disregarded the answer it received after sending the question to the Ohio Supreme Court on a “determinative” state law issue. [FN296] Having placed a “substantial burden” on the state court, representing that “its answer would be dispositive,” the district court, therefore, “was bound to follow state law as declared in the answer . . .” [FN297] The binding effect of the Ohio Supreme Court’s answers to certified questions permits the Court to issue binding precedent, rather than prohibited advisory opinions. [FN298]

Ohio federal courts, like those in other jurisdictions, have otherwise heeded the binding effect of answers to certified questions. [FN299] The Ohio federal courts should continue to recognize their duty to “maintain the integrity” of the certification process by accepting the Ohio Supreme Court’s answers as binding precedent. [FN300] It can hardly be credible to cite the need for comity and respect for state courts furthered by certifying, only to disregard the answer the state court provides.

4. Federal Courts Should Adopt Local Rules to Administer Certification

To make the state law certification process in federal court as efficient as possible, some federal courts have created local rules and internal operating procedures. The rules are brief, but include provisions to stay the federal proceedings, to ensure that judges receive copies of the state supreme court opinions when issued, as well as schedules for parties to file “a statement*209 of position” in light of the state court’s decision. [FN301] Other rules address more substantive issues, requiring the court to make a written finding that “certification of the issue will not cause undue delay or prejudice” and requiring the court to “approve an agreed statement of facts” to transmit to state court. [FN302]

Although these federal housekeeping matters seem obvious, the local rules help ensure that the federal and state courts communicate with each other and also internally about certification cases. Experience suggests that similar rules would benefit Ohio’s federal courts in certification matters. [FN303] For example, when parties settled a case that was pending on certified questions in the Ohio Supreme Court, they informed the federal magistrate, but not the Court. The federal magistrate failed to notify the Court immediately because he “had assumed the parties would have advised the (Ohio Supreme Court) that the order of reference was moot due to the fact that the parties had settled . . .” [FN304] When two courts with crowded dockets are sharing cases, simple procedures set in place by the referring court would improve communication and avoid delay. At least one Ohio federal judge currently provides notice to counsel of their obligations to the Ohio Supreme Court once certification has been granted. [FN305]

The Sixth Circuit and its sister circuits may benefit from changes to the Federal Rules of Appellate Procedure now being discussed. The Rules Committee is considering, among other issues, the “desirability of a uniform rule for referral of issues to state courts where authorized by state law and, if the state court should resolve the issue, uniform rules for commenting on the state court resolution . . .” [FN306] These possible uniform federal appellate rules for the certification process, as well as rules for the other federal courts certifying questions, would improve the process and avoid unnecessary friction *210 between the two court systems. In the absence of an amended Federal Rule of Appellate Procedure, the Sixth Circuit and the Ohio district court could promulgate local rules for certification practice.

C. Testing the Presumed Benefits of Certification in Ohio State and Federal Practices

State law certification in Ohio and elsewhere has been deemed superior to federal court decisions on unresolved issues of state law. Certification is viewed as superior, in part, because federal judges must predict what the Ohio Supreme Court would decide on the issue. Such prediction has been labeled a particularly risky and speculative means of developing the law. And, simply put, the federal judges' predictions demonstrate this risk because they have wrongly predicted state law. Certification eliminates this hazard. Further, certification also directs state law questions to those most expert in state law, the Ohio Supreme Court justices. The Court's experience and expertise makes them superior in matters of state law compared to judges sitting on Ohio's federal courts. Certification is also presumed to generate definitive Ohio law more quickly because it is speedier than the alternatives of Pullman abstention or progressing through state appellate processes. During Ohio's fourteen years of certification practice, these presumptions have proven to be only partially true.

1. Presumed Benefit: Certification Avoids Federal Judges' Inaccurate Erie Predictions of State Law

Certification advocates argue that certification resolves the “prediction problem.” The prediction problem arises because federal judges are called upon to predict or offer an “Erie guess” of how the state's highest court would rule on an unresolved issue of state law. [FN307] Certification protects the federal judge from “time-consuming speculation” and the “possibility of embarrassing error.” [FN308] These federal court decisions are also “unreliable” because a state court could later decide the same issue differently; thus, citizens cannot rely on the federal court prediction in conducting their *211 affairs. [FN309] The Ohio Supreme Court has fully embraced this fear of federal court prediction and guesswork. [FN310]

Ohio federal courts have echoed the dangers of prediction when granting motions to certify to the Ohio Supreme Court. By deciding a state law question itself, a federal court noted “essentially this option (to decide the question of state law) requires federal courts to take an educated guess at how the state supreme court would decide a matter of state law” and worried that such federal “prognostications” may later be proven inaccurate. [FN311] Sister federal courts similarly express concerns, deeming prediction “so hazardous” it becomes more like “prophecy.” [FN312]

The “evils” of prediction in the judicial process, however, are hardly limited to federal courts determining unsettled questions of state law. Ohio state appellate courts must similarly predict how the Ohio Supreme Court will ultimately resolve and unsettled issue of state law. Indeed, Ohio's appellate courts reach different conclusions in their predictions so regularly that the state provides a mechanism to certify these conflicting “predictions” to the Ohio Supreme Court. [FN313] Further, state courts must also predict unsettled questions of federal law; their predictions may later become inaccurate when the federal courts settle the federal law question definitively. [FN314]

The same splits and predictions also occur regularly inside the federal court system; hence, an on-going feature in U.S. Law Week is devoted to reporting and updating splits among the Federal Circuit Courts of Appeal. [FN315] Every federal circuit court has predicted how the United States Supreme Court would rule on an issue; they have come to different conclusions. Further, United States Supreme Court opinions foreshadow future decisions; readers must discern the foreshadowing to predict the high court's future decisions. Thus, prediction as a process for developing the law is neither unusual, risky, nor speculative. Rather, it is a long recognized part of the job for both state and federal courts.

The job of prediction, however, may become more difficult when a ***212** court predicts the decision of a court within another court system. Federal courts, state courts, and certification advocates frequently cite errors federal judges commit in predicting state law. [FN316] Several compilations of federal court errors in predicting state law appear in federal decisions [FN317] and commentaries. [FN318] Frequently, the flawed prediction case chosen for citation is one involving sympathetic parties deprived of a remedy by a federal court, a court that refused to certify the state law question. [FN319] The Ohio Supreme Court has agreed that the danger of federal courts erring on issues of state law “is scarcely theoretical. Federal courts acknowledge that they frequently err in applying state law that is unclear or unsettled.” [FN320]

Accurate federal court predictions of state law have not been compiled. Such a list of accurate predictions remains as anecdotal as the lists of errors. Nevertheless, Ohio federal courts have made several accurate predictions of state law; Ohio state courts have even relied upon these federal predictions when reaching their own decisions. Indeed, in answering a certified question concerning market share liability in Ohio law, the Ohio Supreme Court cited and quoted from an earlier Sixth Circuit prediction, finding its analysis “unassailable.” [FN321] Even when federal courts split in their views of an Ohio state law issue, their discussion has helped state court analysis of the state law issues. [FN322] Thus, the benefit of prediction, rather than certification, is a body of developed analysis for the Ohio state courts to employ in making their decisions. [FN323]

***213** Ohio federal court predictions have benefited Ohio state courts; they have also benefited other Ohio federal courts. [FN324] In a sister jurisdiction, a federal district judge acknowledged that when another district court predicted a state law question, the prediction advanced analysis of the issue, one still not resolved by the state supreme court: “(T)his court in making its own prediction has the benefit of judicial criticism of the McIntyre court’s prediction. The decision has been decried by those courts that have discussed it.” [FN325] Four years of criticism of the earlier federal court prediction informed the next federal court prediction on the unresolved issue of state law.

Federal and state court judges work daily within hierarchies that require them to predict the decisions of the court of last resort within their system. Prediction is part and parcel of judging in a lower court within an appellate system. [FN326] Lower courts in both systems predict, causing splits and fragments until the highest court in the system speaks on the issue. Until the highest court speaks, litigants may receive decisions that are later resolved differently. Splits in both systems may linger on for years without resolution; both systems risk injury to parties and policy concerns by their inaccurate predictions. Thus, federal court prediction of state law serves as only one type of prediction causing the potential for such harm. [FN327] No definitive numbers yet prove the rate of successful predictions within the same system or across systems. Yet, along with the perceived harms of inaccurate predictions, these predictions benefit judges within and across Ohio’s court systems by developing interim thinking on the unresolved issues until they reach the highest courts.

2. Presumed Benefit: Certification Uses the Experts and State Court Judges to Decide State Law Questions

Even if prediction plays a part in any judicial system, state law certification advocates argue the process avoids the risk of federal court speculation^{***214**} by placing important state issues in the hands of the “experts”: the justices of the state’s highest court. [FN328] Federal judges are deemed to have less state law expertise to decide state law issues than state court judges. Federal judges, when facing an issue and predicting the state court’s response, may also render a “distorted adjudication” of state law issues by applying “federal jurisprudential assumptions.” [FN329] In addition to these jurisprudential assumptions, a federal judge, “an outsider” in state

court, will have less experience interpreting and deciding state law issues than state court judges. [FN330]

In matters of judicial expertise and experience, similar concerns have been raised and researched concerning state judges' ability to decide federal law issues. Scholars of federal judges conclude that federal judges' expertise in federal issues derives from several related causes. [FN331] One cause is repetition: federal judges hear federal claims and issues daily while state court judges address federal issues on a much less frequent basis. [FN332] The federal judges' ongoing exposure to federal issues provides them with a well-developed knowledge of federal law that state court judges cannot attain. [FN333] Federal judge superiority has even been extended to a superior expertise in state law. [FN334] Thus, some view federal judges as generally superior and more familiar with substantive law including state substantive law. [FN335]

Perhaps based on questions raised concerning parity, certification proponents presume that the reverse is true: federal judges' ability to determine or predict accurately state law must be less than that of state court judges, yet no research confirms this presumption. Certification advocates would argue the idea of "reverse parity" does not exist because Ohio federal judges lack the credentials, experience, and expertise to predict outcomes to unsettled issues of Ohio law.

In reality, Ohio federal judges sometimes possess personal experience as state court judges similar to or greater than those sitting on the Ohio Supreme Court. Twenty-nine Ohio federal district court judges have had the *215 opportunity to certify state law questions. [FN336] Thirteen served within the Ohio state court system before appointment to the federal bench. [FN337] Among those who served on the state bench, they served an average of eleven and one-half years. Of the seven Ohio Supreme Court justices, six of them served as Ohio judges before election to the Supreme Court, and among those six, they average nine years of service before appointment. [FN338]

At least one Ohio federal judge has noted federal judges' state law expertise in the context of certification. [FN339] When diversity plaintiffs lost a decision in the district court, they appealed and sought to certify before the Sixth Circuit. The dissenter observed that plaintiffs chose federal court to bring claims that included an Ohio state statute of limitations question and had been "unsuccessful before an experienced Ohio jurist," noting that "District Judge Rice had served for ten years as an Ohio state judge before assuming the federal bench in 1980." [FN340]

Ohio certification practice indicates that federal district court judges without service on the Ohio state bench, tend to account for the majority of certified questions sent to the Ohio Supreme Court. Those judges without state court experience sent seventy percent of the questions, while those with state court judging experience accounted for thirty percent of the certified questions. [FN341] While federal judges without state judge experience may certify more readily, they are hardly incompetent to resolve state law issues themselves. Indeed, they have the benefit of sitting with colleagues with considerable state judging experience. Thus, federal district court judges are in much better positions to predict state law than state court judges are to predict federal law. State court judges cannot certify and, therefore, must predict unsettled state law, and they must do so without the expertise of colleagues who are former federal court judges. No Ohio state judge has previously served as a federal judge, but several federal judges have served in Ohio state courts.

Some federal judges in Ohio may feel less certain in making state *216 law predictions, but all have the advice and counsel of colleagues who have considerable state judging expertise. The need for certification based on their errors or incompetence in state law is overstated.

In addition, federal judges also enjoy certain benefits that may favor having some state law questions resolved in federal court rather than certified to state court. Federal judges enjoy lifetime appointments, while most state court judges face election and re-election. Thus, federal judges may escape the political pressures their state counterparts experience and gain more judicial independence. [FN342] Of the fifty-five cases certified to the Ohio Supreme Court, a total of ninety-five individual questions were posed. Of these ninety-five, sixteen raised state constitutional questions on several statutes, as well as the constitutionality of Rule XVIII itself. [FN343] While certification of state law questions, including state constitutional questions, brings a definitive result, federal judges may bring a different benefit: the ability “to make unpopular decisions regarding state constitutional rights.” [FN344] In at least one case, the federal court had held a controversial state statute constitutional, but after certification, the Ohio Supreme Court struck it down. [FN345]

Federal judges bring state court judging experience, state law expertise, and judicial independence to issues of state law. Certification is an option open to federal judges, but one that incurs losses, as well as benefits in adjudicating state law issues. State law expertise resides in both state and federal courts. Federal courts should consider as a factor before presuming that state court certification is required.

3. Presumed Benefit: Certification, an Alternative to Pullman Abstention, Promotes Timely Resolution

Certifying state questions of law to state courts is presumed to provide the parties a definitive and a faster answer than the available alternatives. Yet in practice, the hope of judicial economy is not often realized, [FN346] *217 and even advocates concede certification can be a time-consuming method to resolve an issue. [FN347] In the Ohio study, time between federal court certification and Ohio Supreme Court resolution averaged nearly twelve months. [FN348]

Certification's presumed benefit of efficiency, however, looms larger when compared to Pullman abstention. [FN349] “A principal reason for state certification statutes was the difficulty associated with so-called ‘Pullman’ abstention cases in the federal courts.” [FN350] Thus, even waiting a year for an answer to a certified question answer pales when compared to the time elapsed under abstention.

During certification's fourteen-year tenure in Ohio, the federal courts received a dozen requests for Pullman abstentions. [FN351] Of these requests, the federal courts denied ten [FN352] and granted two. [FN353] Thus, the Ohio certification statute could have been employed twice in the past fourteen years to avoid a Pullman abstention. Neither the parties nor the courts in these two cases raised certification as a speedy alternative to a Pullman abstention, although in both cases, certification had been available in Ohio for ten years. [FN354] Indeed,*218 certification has outgrown its roots in Pullman abstention and been employed in much broader contexts.

Ohio certification movants seek to certify, but not as an alternative to abstention. The fifty-five cases reaching the Ohio Supreme Court do not use certification as the alternative to abstention. Thus, in terms of efficiency and speedy resolution, abstention is really a straw person alternative. Ohio federal court prediction stands as the real alternative to certification. Without any supporting data, certification opponents have argued federal court resolution would be speedier than certification. [FN355] Yet, if federal judges are viewed as less expert in state law than the Ohio Supreme Court, their decisions might be slow in coming.

Anecdotal evidence can be derived from three separate Ohio federal court decisions made after the Ohio Supreme Court declined certification. The Sixth Circuit certified a question to the Ohio Supreme Court on Febru-

ary 16, 1993; the Court declined to answer the question approximately nine months later, on November 10, 1993. [FN356] The Sixth Circuit resolved the question and issued its opinion two months later. [FN357] The Sixth Circuit certified questions on August 26, 1996, but they returned unanswered on October 16, 1996. [FN358] The Sixth Circuit ruled about a month later, on November 20, 1996. [FN359] A district court judge certified questions on January 31, 1995; the Ohio Supreme Court declined to answer over seven months later, on September 14, 1995. [FN360] The federal judge ruled approximately four months later. [FN361] The federal courts' comparative speed in ruling could be attributed to federal court's knowledge that litigants have already waited for resolution in the Ohio Supreme Court.

Efficiency remains an unsettled issue. Abstention places a case back at the start of the state process, with a new judge and the need to “learn the case” again. Certification places the case at the end of the state process, but with new judges who must also learn the case. The court most familiar with the case, the parties, the attorneys, and the unresolved question of law may well be the federal court. Federal court prediction may be made by judges *219 with or without previous state judging experience, but always with a familiarity of the case before them. Figures from the Ohio federal district courts indicate that median times from civil case filing to disposition in the years 1996-2001, average 11.8 months in the Southern District and 4.78 months in the Northern District. [FN362]

As these efforts at measurement indicate, it is difficult to compare time spent in federal court resolving or predicting state law to time spent in the Ohio State Court resolving state law issues by certification. What is clear is that time expended because of abstention is not the proper measuring stick.

IV. CONCLUSION

For fourteen years Ohio courts have practiced state law certification. This record permits the Ohio federal courts and Ohio Supreme Court to see the practice, not the promise, of certification. Rather than acting in reliance on assumed benefits, these Ohio courts should act upon lessons learned from Ohio's record to change and improve the process. Too often certification analysis in Ohio opinions has been minimal, leaving little guidance for others in the future.

In the fifty-five certification cases reaching the Ohio Supreme Court from the federal courts, certification procedures received little attention or discussion. Although the Ohio Rule represents but one variation of a form of Uniform Act, and the practice is now embraced in forty-eight states, the Ohio opinions rarely rely upon a sister jurisdiction's experiences to inform their own certification practice. [FN363] The few issues that have been articulated, such as requiring “pure questions of law” and avoiding “fact specific” questions, are stated once, but not developed or applied thereafter.

Perhaps because the need to address certified questions is infrequent enough, the Ohio Supreme Court seldom educates the federal system about its view of the certification process. The Court does not consistently reproduce the questions it receives; it declines or dismisses without opinion and may offer truncated opinions in answer to some questions. This record reflects*220 answers given to fact-specific, but issue general questions; answers given to questions already determined in federal court; and responses to questions not even known to the reader.

Based on this record, the Ohio Supreme Court should resolve to invoke the Rule, precedent, and policy considerations consistently to determine when to make this unusual process available to federal litigants. The Court

should expressly use its own procedure, [Rule XVIII](#), to frame its decisions to dismiss, decline, or answer certified questions. Without the Rule, the Court's discretion is left unrestricted; it could chose to certify based simply on its own desire to resolve an issue. The Court should include the text of the certified questions in its opinion, no matter what its disposition. While not technically required, an explanation of the Court's dismissal or decision declining to answer will advance and improve future certification practice. Lax attention to procedure and sparse explanations leave the Court open to concerns that certified questions are declined or accepted arbitrarily.

Ohio federal courts should continue to employ the Rules' requirements and continue to develop the policy considerations of restraint they have attached to certification. In addition, forum shopping should be added to the list of factors that influence a certification decision. While the Ohio Supreme Court may always decline certified questions, they must respond to them in some way. Each federal court judge contemplating certification has the duty to consider the relative sizes of the courts involved. Seven justices sit on the Ohio Supreme Court. There are ninety-seven district courts nationwide, with thousands of district court judges; there are thirteen federal courts of appeals. By certifying, the federal judge will guarantee that the Ohio Supreme Court justices take the time to respond by dismissing, declining, or answering.

Further, the federal court judges should consider their own resources and the litigants' resources. A federal judge may seek advice from colleagues with state judging experience and may be able to resolve the state law issue competently through these collaborative efforts. A federal judge who certifies should consider that the litigants will, on the average, wait ten months' for a response. Even after such a wait, the litigants may find themselves no closer to a decision because the questions were declined without explanation. [\[FN364\]](#)

The United States Supreme Court and others have praised widespread,*[221](#) liberal use of certification as a show of respect for state court comity and respect for state court judges to determine their own state law. But, the Ohio case study suggests that certification can be abused, like any other process, and requires more vigilant and careful analysis by federal courts and the Ohio Supreme Court. Certification should be neither encouraged nor discouraged, but considered carefully and granted when its does serve the purpose of comity, rather than to avoid the learning curve of unfamiliar state law or to ease a crowded docket. Federal judges have resources--former state judges--to help determine state law; a resource state judges lack. Federal certifying courts greatly outnumber the Ohio Supreme Court. Federal courts have not offered state court judges a reciprocal sign of respect by offering to accept certified questions from them. Thus, while certification is premised on comity, in practice, other realities influence a decision to certify. Careful and limited, not broad, liberal use of certification reflects both respect and comity for the Ohio Supreme Court.

***223 APPENDIX A: State Certification Statutes or Rules**

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

***224 APPENDIX B: The Supreme Court of Ohio's Annual Report; The Ohio Courts Summary**

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[FN1]. [State Auto Mut. Ins. Co. v. McIntyre](#), 652 F. Supp. 1177, 1195 (N.D. Ala. 1987).

[FN2]. The Supremacy Clause creates this obligation. See [U.S. Const. art. VI, cl. 2](#); see also [Tafflin v. Levitt](#), 493 U.S. 455, 458 (1990) (“Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.”).

[FN3]. The Rules of Decision Act, Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73 (codified as amended at [28 U.S.C. § 1652 \(2000\)](#)), and [Erie R.R. Co. v. Tompkins](#), 304 U.S. 64, 79-80 (1938), create the federal courts' obligation to apply state law.

[FN4]. See Donald H. Zeigler, [Gazing Into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law](#), 40 *Wm. & Mary L. Rev.* 1143 (1999). This ability of state courts to hear and decide federal law cases is part of the notion of “parity.”); see also Michael E. Solimine & James L. Walker, [Respecting State Courts](#) 29 (Greenwood Press 1999) (Broadly defined, parity is the “availability and qualitative receptivity of state courts to adjudicate and . . . uphold federal rights.”) (hereinafter “Respecting State Courts”).

[FN5]. See, e.g., [Gruber v. Owens-Illinois Inc.](#), 899 F.2d 1366, 1369 (3d Cir. 1990) (citing [Commissioner v. Bosch's Estate](#), 387 U.S. 456, 465 (1967) (explaining that a federal court determines state law by giving “proper regard” to lower state court holdings)).

[FN6]. See, e.g., [Burt Neuborne, The Myth of Parity](#), 90 *Harv. L. Rev.* 1105 (1977); [Burt Neuborne, Parity Revisited: The Uses of a Judicial Forum of Excellence](#), 44 *DePaul L. Rev.* 797 (1995); [Michael Wells, Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts](#), 71 *B.U. L. Rev.* 609 (1991); contra [Respecting State Courts](#), supra note 4, at 29-62 (arguing that a study of state courts' ability to interpret federally guaranteed rights concludes “relative parity” exists between state and federal courts abilities to interpret such rights).

[FN7]. State law issues enter the federal system through diversity jurisdiction under [28 U.S.C. § 1332](#) and sup-

plemental jurisdiction under 28 U.S.C. § 1367. In addition, federal statutes may require federal courts to refer to the state law as the rule of decision, see *Imel v. United States*, 523 F.2d 853 (10th Cir. 1975). See also Colloquium, Perspectives on Supplemental Jurisdiction, 41 Emory L.J. 1 (1992); Thomas D. Rowe, Jr. et al., *Compound-ing or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 Emory L.J. 943 (1991).

[FN8]. The author is indebted to Professor Michael Solimine who used this term in a discussion of these issues.

[FN9]. See *Erie*, 304 U.S. at 79-80.

[FN10]. Federal courts may rely on the four enumerated exceptions to such jurisdiction to decline to decide the state law claim. The parties are left to pursue the state law claims in the state system, beginning at the trial level. 28 U.S.C. § 1367 (district court “shall” exercise jurisdiction, except it may decline if claim raises “novel or complex issue of State law,” the State law claim dominates over original jurisdiction claim, the original jurisdiction claim has been dismissed, or there are “compelling” reasons for declining jurisdiction). District court judges exercise discretion to decline supplemental jurisdiction; such decisions are frequently made, but rarely disturbed. See, e.g., *Landefeld v. Marion Gen. Hosp. Inc.*, 994 F.2d 1178, 1182 (6th Cir. 1993) (“This court will review only for an abuse of discretion . . .”); *Huffman v. Hains*, 865 F.2d 920, 923 (7th Cir. 1989) (explaining that discretion to relinquish jurisdiction over state law claims when federal claims have been resolved is “almost unreviewable”).

[FN11]. See *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) (explaining that where controlling state law is uncertain, federal court may retain jurisdiction while parties seek a decision on state law issues in state court).

[FN12]. In 1945, Florida became the first state to create a statute or court rule permitting the highest court of a state to accept certified questions from federal courts. See 1945 Fla. Laws, ch. 23098, § 1 (now codified as Fla. Stat. ch. 25.031 (1998)).

[FN13]. See Ala. R. App. P. 18; Alaska R. App. P. 407; Ariz. Rev. Stat. Ann. § 12-1861 (West 1994); Ariz. Sup. Ct. R. 27; Cal. R. Ct. 29.8; Colo. App. R. 21.1; Conn. Gen. Stat. Ann. § 51-199b (West 2002); Conn. R. App. P. §§ 82-1 to-7; Del. Const. art. IV, § 11(9); Del. Sup. Ct. R. 41; D.C. Code Ann. § 11-723 (1981 & 1987 Supp.); D.C. Ct. App. R. 54; Fla. Const. art. V, § 3(b) (6); Fla. Stat. Ann. § 25.031 (West 1997); Fla. R. App. P. 9.150; Ga. Code Ann. § 15-2-9 (1999); Ga. Sup. Ct. R. 46; Haw. R. App. P. 13; Idaho App. R. 12.2; Ill. Sup. Ct. R. 20; Ind. Code Ann. § 33-2-4-1 (Michie 1998); Ind. App. R. 64, available at <http://www.in.gov/judiciary/rules/appellate/>; Iowa Code Ann. §§ 684.A.1-A.11 (West 1998); Kan. Stat. Ann. §§ 60-3201 to-3212 (1994); Ky. R. Civ. P. 76.37; La. Rev. Stat. Ann. § 13:72.1 (West 1999); La. Sup. Ct. R. XII; Me. R. App. P. 25; Md. Code Ann., Cts. & Jud. Proc. §§ 12-601 to-609 (1998); Mass. Sup. Jud. Ct. R. 1:03; Mich. Ct. R. 7.305; Minn. Stat. Ann. § 480.065 (West Supp. 2000); Miss. R. App. P. 20; Mo. Ann. Stat. § 477.004 (West Supp. 2000) (held unconstitutional by *Grantham v. Mo. Dept. of Corr.*, No. 72576, 1990 WL 602159 (Mo. 1990); Mont. R. App. P. 44; Neb. Rev. Stat. §§ 24-219 to-225 (1997); Nev. R. App. P. 5 available at <http://www.leg.state.nv.us/CourtRules/NRAP.html>; N.H. Sup. Ct. R. 34; N.M. Stat. Ann. §§ 39-7-1 to 7-13 (Michie 1997 & Supp. 1999); N.M. R. App. P. 12-607; N.Y. Ct. R. § 500.17; N.D. R. App. P. 47 available at <http://www.court.state.nd.us/Rules/appellat/frameset.htm>; R. Prac. Sup. Ct. Ohio XVIII; Okla. Stat. Ann. tit. 20, §§ 1601-11 (West 1991); Or. Rev. Stat. §§ 28.200-.255 (1997); Or. R. App. P. 12.20 available at <http://www.ojd.state.or.us/Web/OJDPublications.nsf/ORAP?OpenView&count=1000>; P.R. Sup. Ct. R. 27; In re Certification of Questions of Law, No. 197 Judicial Admin. Docket No. 1 (Penn. Super. Ct. 2000) (adopting certifica-

tion after using it on one-year trial basis) available at [http:// caselaw.lp.findlaw.com/data2 / pennsylvania/cases/supreme/197-rul.pdf](http://caselaw.lp.findlaw.com/data2/pennsylvania/cases/supreme/197-rul.pdf); R.I. Sup. Ct. Rules, art. I, R. 6; [S.C. App. Ct. R. 228](#); [S.D. Codified Laws §§ 15-24A-1 to 15-24A-11](#) (Michie 1994); S.D. S. Ct. R. 85-7; [Tenn. R. Sup. Ct. 23](#); Tex. R. App. P. 214 (used for certification to Texas Court of Criminal Appeals); Tex. R. App. P. 114 (used for certification to Texas Supreme Court); [Utah R. App. P. 41](#); [Va. Sup. Ct. R. 5:42](#); [Vt. R. App. P. 14](#) (extended until Dec. 12, 2003 by Vt. Supreme Court Order No. 02-02); [Wash. Rev. Code §§ 2.60.010 to 2.60.900](#) (West 1998); Wash. R. App. P. 16.16; [W. Va. Code §§ 51-1A-1 to-13](#) (1994); [Wis. Stat. Ann. §§ 821.01 to .12](#) (West 1994); [Wyo. Stat. Ann. § 1-13-106](#) (Michie 1994); [Wyo. R. App. P. 11.01-07](#). Currently, Arkansas, New Jersey, and North Carolina have no state law certification procedures.

[FN14]. See, e.g., William G. Bassler & Michael Potenza, [Certification Granted: The Practical and Jurisprudential Reasons Why New Jersey Should Adopt a Certification Procedure](#), 29 *Seton Hall L. Rev.* 491, 519 (1998) (“it is perverse for federal judges, who, at least in the case of circuit judges, may neither be residents or nor attorneys admitted to practice in New Jersey, to determine important areas of New Jersey policy.”); see also [Michaels v. New Jersey](#), 150 F.3d 257, 259 (3d Cir. 1998) (“(T)he interpretation of state statutes governing the allocation of certain financial responsibilities between the State and one of its subdivisions--is (a question) that seems to us particularly inappropriate for resolution by a federal court . . . (but) we have no choice but to ‘predict’ how the state supreme court would decide the question before us . . .”). The exceptions to federal court supplemental jurisdiction also suggest federal judges are less competent in state law issues. See Huffman, *supra* note 10, (finding that it is proper to relinquish state law claims to state court because of “the state court’s greater expertise in applying state law . . .”); see Patrick D. Murphy, [A Federal Practitioner’s Guide to Supplemental Jurisdiction Under 28 U.S.C. § 1367](#), 78 *Marq. L. Rev.* 973, 1022 (1995) (“(E)xceptions appear to be premised on a belief that state courts are more competent in interpreting state law than are federal courts.”); [Huffman v. Haines](#), 865 F.2d at 923 (7th Cir. 1989) (finding it proper to relinquish state law claims to state court because of “the state court’s greater expertise in applying state law.”).

[FN15]. One commentator would remove this discretion, arguing that Congress, using its powers under [Art. IV, Section 1](#), should “enact a federal statute imposing on state supreme courts an obligation to decide unclear issues of state law certified by federal courts, trial and appellate, for resolution.” L. Lynn Hogue, [Law in a Parallel Universe: Erie’s Betrayal, Diversity Jurisdiction, Georgia Conflict of Law Questions in Contract Cases in the Eleventh Circuit, and Certification Reform](#), 11 *Ga. St. U. L. Rev.* 531, 540-41 (1995).

[FN16]. See, e.g., R. Prac. Sup. Ct. Ohio XVIII § 6, which requires that after certification order is filed, “each party shall file a memorandum, not to exceed fifteen pages in length, addressing all questions of law certified” The Ohio Supreme Court reviews the memoranda and issues “an entry identifying the question or questions it will answer and declining to answer the remaining question or questions.” *Id.* This decision to accept the question(s) may produce dissents.

[FN17]. If the certified question(s) is accepted, then the parties submit merit briefs. See *id.* at (7). The petitioner shall file a merit brief not exceeding fifty pages; the respondent shall file an answer brief not exceeding fifty pages. The petitioner may file a reply brief not exceeding fifteen pages. See *id.* at (6). Parties may seek oral arguments; amicus parties may seek to file briefs as in other Ohio Supreme Court proceedings.

[FN18]. This lack of reciprocity, therefore, cannot be an explicit factor in deciding to accept or reject a certified question from a federal court. The Uniform Certification of Questions of Law Act, however, provides that a court receiving a certified question from another state court “may consider, among other factors, whether the

(certifying court) . . . has authority to answer a certified question from the (receiving court)” [Unif. Certification of Questions of Law Act § 3](#) (amended 1995) cmt., 12 U.L.A. (1996). Judge Newman, United States Court of Appeals for the Second Circuit, once proposed reciprocal routing of appeals between the federal and state systems, but in an effort to ease federal court caseloads. See Jon O. Newman, [Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System](#), 56 U. Chi. L. Rev. 761, 774-75 (1989). Whether the lack of reciprocity is an unexpressed consideration to state supreme court justices cannot be precisely known. The surveys of judicial attitudes toward certification might give some clues. See Jona Goldschmidt, Certification of Questions of Law: Federalism in Practice 35-38 (Am. Jud. Soc’y 1995) (providing examples of state court judges declining certified questions when federal court has already resolved them).

[FN19]. Yet certification has not been without its critics. See, e.g., How a Federal Court Determines State Law, 50 Harv. L. Rev. 1299 (1946) (arguing that federal court function is to predict what the highest state court would do and such prediction is an accepted function of “every court in an appellate hierarchy”); Brian Mattis, Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts, 23 U. Miami L. Rev. 717, 731 (1969) (describing “the case against certification”); David P. Currie, The Federal Courts and the American Law Institute: Part II, 36 U. Chi. L. Rev. 268, 317 (1969) (arguing that to promote judicial economy, federal courts should answer state law questions); Larry M. Roth, Certified Questions from the Federal Courts: Review and Re-proposal, 34 U. Miami L. Rev. 1, 2 (1979) (Florida Supreme Court caseload has “produced lengthy time delays in the certification process.”).

[FN20]. See generally Bassler, *supra* note 14, at 497-98 (“The certification process) . . . and its endorsement by significant American legal institutions, has spawned a vast amount of literature . . . (that) has been favorable, for the most part, to the use of interjurisdictional certification.”).

[FN21]. Although the wisdom of diversity jurisdiction has been hotly debated, it remains with us. 28 U.S.C. § 1332 (2000). See [Erie](#), 304 U.S. at 77 n.20 (citing 1930’s articles and sources arguing that diversity jurisdiction be eliminated or limited). See generally 13A Charles Alan Wright, et al., Federal Practice and Procedure, Jurisdiction & Related Matters §§ 3601-3610 (2d ed. 1984 & Supp. 2002).

[FN22]. [Erie](#), 304 U.S. at 78.

[FN23]. [Hanna v. Plumer](#), 380 U.S. 460, 468 (1965). See also [Brown](#), Fifth Circuit Certification--Federalism in Action, 7 Cumb. L. Rev. 455, 468 (1977).

[FN24]. See, e.g., [Clark v. Modern Group Ltd.](#), 9 F.3d 321, 326 (3d Cir. 1993) (“When the application of (state) law is not clear, . . . we must forecast the position the supreme court of the forum would take on the issue.”). See generally Bradford R. Clark, [Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie](#), 145 U. Pa. L. Rev. 1459, 1495 (1997) (“(M)ost federal courts today employ a predictive approach--that is, they attempt to forecast how the state’s highest court would decide the question were the case before it.”); see [Wright](#), *supra* note 21, at § 4507

[FN25]. [Clay v. Sun. Ins. Office Ltd.](#), 363 U.S. 207, 227-28 (Douglas, J., dissenting).

[FN26]. 304 U.S. at 78.

[FN27]. See, e.g., [Stoner v. N.Y. Life Ins. Co.](#), 311 U.S. 464, 468-69 (1940) (reversing lower federal court that failed to follow Missouri law stated in state Court of Appeals decisions, but where no Missouri Supreme Court

decision addressed the issue).

[FN28]. See Charles E. Clark, *State Law in the Federal Courts: the Brooding Omnipresence of Erie v. Tompkins*, 55 *Yale L. J.* 267, 291, 294 (1946) (suggesting that the federal courts' blind adherence to a lower state court decision might motivate a litigant to file in federal court to avoid the state court forum where a state judge might re-examine, re-consider or not follow non-binding decisions of other state courts).

[FN29]. Note, *How a Federal Court Determines State Law*, 59 *Harv. L. Rev.* 1299, 1301 (1946).

[FN30]. *Cooper v. American Airlines*, 149 F.2d 355, 359 (2d Cir. 1945) (determining capacity to sue or be sued according to state law; district court followed an intermediate appellate state court, but Second Circuit reversed, finding that intermediate appellate state court decision should have been disregarded because highest state court twice stated the issue was undecided).

[FN31]. *Id.* (noting Court was tempted to direct district court to withhold decision until state court decided it authoritatively, but reluctantly concluding the Supreme Court in *Meredith v. Winter Haven*, 320 U.S. 228 (1943), “instructs us to yield to no such temptation” and finds “this case is in that zone in which federal courts must do their best to guess what the highest state court will do.”).

[FN32]. *Fla. Stat. Ch. 25.031* (1995).

[FN33]. See Roth, *supra* note 19, at 6 n.28 (“There are no known recorded reports or hearings with regard to the legislative history of *Fla. Stat. § 25.031* (1977).”).

[FN34]. 320 U.S. 228 (1943).

[FN35]. *Id.* at 234-35.

[FN36]. *Id.* at 231.

[FN37]. *Meredith v. City of Winter Haven*, 134 F.2d 202, 207 (5th Cir. 1943).

[FN38]. *Id.* at 208 (Sibley, J., dissenting).

[FN39]. 320 U.S. at 237.

[FN40]. *Meredith*, 141 F.2d at 352.

[FN41]. In *Meredith*, the Supreme Court talked about how the Fifth Circuit openly “expressed doubt as to what the Florida law applicable to the facts . . . now is or will be declared to be, and in view of this uncertainty” directed the petitioners “to proceed in the state courts.” 320 U.S. at 231.

[FN42]. *Clay v. Sun Ins. Office*, 363 U.S. 207, 212 n.3 (“it appears that to date such rules have not been promulgated.”).

[FN43]. *Clay*, 363 U.S. at 211-12.

[FN44]. The ability to avoid the delay of Pullman abstention is, indeed, a traditional argument advanced in favor of certification. See, e.g., Theodore B. Eichelberger, Note, *Certification Statutes: Engineering a Solution to Pull-*

man Abstention Delay, 59 Notre Dame L. Rev. 1339 (1984); Comment, Certifying Questions to State Supreme Courts as a Remedy to the Abstention Doctrine, 9 S.D. L. Rev. 158 (1964); Comment, Certification to state Courts: Progress in the Field of Federal Abstention, 36 Tul. L. Rev. 571 (1962). See generally Wright, *supra* note 21, at § 4248 (placing state law certification discussion within chapter discussing abstention doctrines).

[FN45]. See, e.g., *Fiore v. White*, 528 U.S. 23 (1999) (asking if a Pennsylvania Supreme Court opinion applied retroactively; certified question came one month before Pennsylvania's temporary certification statute would expire unless renewed); *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 395-97 (1988) (asking Virginia Supreme Court two questions about state statute regulating sexually explicit materials where viewed by juveniles); *Zant v. Stephens*, 456 U.S. 410, 416-17 (1982) (asking Georgia Supreme Court: "What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury?"); *Bellotti v. Baird*, 428 U.S. 132, 150-53 (1976) (holding district court should have certified questions concerning parental consent to abortion state statute to the Supreme Judicial Court of Massachusetts, vacating three judge district court judgment and remanding). But see *Stenberg v. Carhart*, 530 U.S. 914 (2000) (declining to ask Nebraska Supreme Court about partial birth abortion statute where lower federal courts did not seek to certify and state court accepts certification only if answer to question would be determinative of the case).

[FN46]. See, e.g., *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997) (criticizing lower federal courts for refusal to certify, although holding case moot, and noting certification requires not "unique circumstances," only "unsettled questions of state law.").

[FN47]. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (recommending certification and deeming federal court "speculation," where a state court will answer certified questions, as "particularly gratuitous") (O'Connor, J., concurring).

[FN48]. Unif. Certification of Questions of Law Act (1967), 12 U.L.A. 86 (1996) (revised by the Unif. Certification of Questions of Law (Act) (Rule) 1995, 12 U.L.A. 71 (1996).

[FN49]. Unif. Certification of Questions of Law (Act) (Rule) 1995 § 3, 12 U.L.A. 74 (1996).

[FN50]. *Id.*

[FN51]. *Id.*

[FN52]. This range is depicted in Appendix A.

[FN53]. *Id.*, left column.

[FN54]. *Id.*, right column.

[FN55]. *Id.*

[FN56]. The district courts are the main source of referrals in Ohio. Of fifty-five certification cases, all but ten came from district courts. See Appendix D. By omitting district courts, these narrow jurisdictions seek limitations beyond the Uniform Act's broader scope.

[FN57]. *Mont. R. App. P. 44.*; *Kincaid v. Magum*, 432 S.E.2d 74, 83 (W.Va. 1993) (stating that a court retains

flexibility and discretion to re-frame or reshape certified questions). Contra [Moreno v. Sterling Drug, Inc.](#), 787 S.W.2d 348, 349 (Tex. 1990) (observing that the certified question process “is a very limited procedural device: we answer only the questions certified and nothing more.”).

[FN58]. [Mont. R. App. P. 7](#).

[FN59]. *Id.*

[FN60]. *Id.* But see Peter Jeremy Smith, [The Anticommandeering Principle and Congress's Power to Direct State Judicial Action: Congress's Power to Compel State Courts to Answer Certified Questions of State Law](#), 31 *Conn. L. Rev.* 649, 650 (1999) (analyzing if Congress has the power to authorize federal courts to compel state courts to answer certified questions of state law and concluding that the power may exist, but that “sound reasons counsel against its exercise.”).

[FN61]. [Hakimoglu v. Trump Taj Mahal Assoc.](#), 70 F.3d 291, 302-03 (3d Cir. 1995) (Becker, J., dissenting) (“States like New Jersey lacking certification procedures face the threat that federal courts will misanalyze the state's law, already open to varied interpretations, by inadvertently viewing it through the lens of their own federal jurisprudential assumptions.”).

[FN62]. See, e.g., [Peterson v. U-Haul Co.](#), 409 F.2d 1174, 1177 (8th Cir. 1969) (“Where there are no governing state decisions, then the federal court must rule the issues as it is believed the highest state court would rule. Admittedly, this is a hazardous and unsatisfactory method of deciding litigation.”).

[FN63]. See generally John R. Brown, [Certification--Federalism in Action](#), 7 *Cumb. L. Rev.* 455 (1977).

[FN64]. See generally Theodore B. Eichelberger, Note, [Certification Statutes: Engineering a Solution to Pullman Abstention Delay](#), 59 *Notre Dame L. Rev.* 1339 (1984).

[FN65]. The American Judicature Society undertook an extensive survey of federal and state court judges to measure their enthusiasm for the state-federal certification process. Goldschmidt, *supra* note 18, at 58-74 (surveying federal and state judges on their recent experiences with and opinions regarding certification); See also Jon B. Corr & Ira P. Robbins, [Interjurisdictional Certification and Choice of Law](#), 41 *Vand. L. Rev.* 411, 447 (1988) (surveying federal and state judges on experiences with certification, including case-specific questions and broader attitudes and concluding that “problems associated with certification probably have been overstated.”). Other studies, focusing on certification in New York state, have supplied more state-specific detail. See, e.g., Judith S. Kaye & Kenneth I. Weissman, [Interactive Judicial Federalism: Certified Questions in New York](#), 69 *Fordham L. Rev.* 373, 397-422 (2000) (analyzing the cases certified to New York Court of Appeals from federal circuit courts of appeals); Jack J. Rose, Note, [Erie R.R. and State Power to Control State Law: Switching Tracks to New Certification of Questions of Law Procedure](#), 18 *Hofstra L. Rev.* 421 (1989) (reviewing the New York rule and examining two certification cases in detail). The New York studies are useful, but examining New York's narrow certification rule, one which excludes federal district courts. See Appendix A.

[FN66]. R. Prac. Sup. Ct. Ohio XVIII § 1 provides “The Supreme Court may answer a question of law certified to it by “a court of the United States.” This rule may be invoked when the certifying court, in a proceeding before it, determines there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court, and issues a certification order.”

[FN67]. See Appendix C.

[FN68]. R. Prac. Sup. Ct. Ohio IV(1) permits an Ohio court of appeals to issue an order certifying a conflict between court of appeals' decisions on an issue. The Ohio Supreme Court, at its discretion, may certify the conflict and order briefing, find no conflict and dismiss, or order the court of appeals to clarify the issue. See Appendix C.

[FN69]. R. Prac. Sup. Ct. Ohio XVIII.

[FN70]. See, e.g., In re [Aircrash Disaster Near Dayton, Ohio, on March 9, 1967](#), 350 F. Supp. 757, 768 n.1 (S.D. Ohio 1972) (noting the Delaware certification process and observing that

(t)he adoption of a procedure for the certification of questions of Ohio law to the Supreme Court of Ohio from the United States District Courts for the Northern and Southern Districts of Ohio and the United States Court of Appeals for the Sixth Circuit would seem to be a useful step toward eliminating uncertainty as to the requirements of Ohio law in diversity cases.

[FN71]. R. Prac. Sup. Ct. Ohio XVIII.

[FN72]. State law question certification rules in other jurisdictions provide for similar anomalies. See Appendix A.

[FN73]. R. Prac. Sup. Ct. Ohio IV. In addition, many states will accept questions of state law from other state courts. Thus, one state system will accept a question from another state system, usually at the same level--e.g. state supreme court to state supreme court. Ohio is one of twenty-seven states declining interstate certification, while twenty-one other states permit it. See generally Ira P. Robbins, [Interstate Certification of Questions of Law: A Valuable Process in Need of Reform](#), 76 *Judicature* 125 (1992) (urging the use of interstate certification and finding that courts "utterly fail to use the certification process in the state-to-state context").

[FN74]. R. Prac. Sup. Ct. Ohio IX applies to death sentences for an offense committed on or after January 1, 1995.

[FN75]. Other states, however, do provide direct appeal from a trial court decision to the highest state court. For example, Connecticut permits a direct appeal to the Connecticut Supreme Court from the trial court "in an action which involves a matter of substantial public interest and in which delay may work a substantial injustice." [Conn. Gen. Stat. Ann. § 52-265a \(West 1991\)](#). This appeal is available after a decision is rendered in the trial court. There are some state procedures that, like state law certification from federal trial courts, permit "reserved," as yet undecided questions of law from the trial court to be reserved for the state supreme court's resolution. [Conn. Gen. Stat. Ann. § 52-235 \(West 1991\)](#); [Wyo. R. Civ. P. 52\(c\)](#). Reserved questions are limited, however, by requirements similar to or more stringent than those for state law certification. See, e.g., [Koskoff, Koskoff & Beider v. Allstate Ins. Co.](#), 446 A.2d 818 (Conn. 1982) (holding that the Connecticut Supreme Court will consider reserved questions if there is a genuine dispute of significant questions of law, the action is ready for a final judgment, the resolution of the reserved questions involves the public interest, and the resolution of the questions would promote judicial economy).

[FN76]. This statement excepts extraordinary writs as a means of access to the Ohio Supreme Court.

[FN77]. [28 U.S.C. § 1254\(2\)](#) (2000).

[FN78]. *Id.*

[FN79]. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

[FN80]. *Id.* at 902. See also 28 U.S.C. § 1254; David D. Siegel, Commentary on the 1988 Revision (1989) (describing the Supreme Court's decision in *Wisniewski* as “a subtle suggestion that a court of appeals invoking the certification statute is just passing the buck.”).

[FN81]. See, e.g., Council on Judicial Administration & Committee on Federal Courts, Report and Recommendations on the Second Circuit Certification of Determinative State Law Issues to the New York Court of Appeals, 54 *The Record* 310, 311 (May-June 1999) (“By confining certification to the appellate level, the Second Circuit . . . assures that the questions are presented on a fully developed factual record.”).

[FN82]. 28 U.S.C. § 1253.

[FN83]. 28 U.S.C. § 2284(a).

[FN84]. *Id.* (amended in 1976 to conform with the repeal of sections 2281 and 2282).

[FN85]. 28 U.S.C. § 1291 (2000).

[FN86]. 28 U.S.C. § 1254(1) (2000) (stating that cases in courts of appeals may be reviewed by writ of certiorari “before or after rendition of judgment or decree”) (emphasis added).

[FN87]. *The Three Friends*, 166 U.S. 1, 49 (1897) (citing *American Constr. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372, 385 (1893)). See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 937 (1952) (Burton, J. & Frankfurter, J., preferring to have the Circuit Court of Appeals issue a decision before granting certiorari).

[FN88]. See 28 U.S.C. § 2284 (2000).

[FN89]. Policies supporting this appellate process include the need for appellate courts to avoid making piecemeal decisions, and the efficiency of only reviewing adequate records based upon final judgments. See *infra* note 88.

[FN90]. *Clay*, 363 U.S. at 227 (Black, J., dissenting).

[FN91]. 28 U.S.C. § 1257(a).

[FN92]. *Id.* The subject matter is limited to

where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States or where any title, right, or privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

[FN93]. R. Prac. Sup. Ct. Ohio XVIII.

[FN94]. *Id.* at Section 6:

Within twenty days after a certification order is filed with the Ohio Supreme Court, each party shall file a memorandum, not to exceed fifteen pages in length, addressing all questions of law certified to the Supreme Court. The Supreme Court will review the memoranda and issue an entry identifying the question or questions it will answer and declining to answer the remaining question or questions. The Clerk of the Court shall send a copy of the entry to the certifying court and to all parties or their counsel.

[FN95]. In fact, the separate briefing came about in the 1994 revisions to the Rule because the Court had issued orders declining to answer questions, but only after full merit briefs had been filed and considered. R. Prac. Sup. Ct. Ohio XVIII.

[FN96]. [Lehman Bros. v. Schein](#), 416 U.S. 386, 391 (1974) (holding that the decision of a federal court to certify questions of state law to state's highest court rests within sound discretion of court), cited in, [Duryee v. United States Dep't. of the Treasury](#), 6 F. Supp.2d 700, 704 (S.D. Ohio 1995). See also [Mobil Oil Corp. v. Shevin](#), 354 So.2d 372, 376 (Fla. 1977) (“Mobil does not suggest that the Fifth Circuit's decision not to certify a question is reviewable; plainly it is not.”).

[FN97]. See, e.g., [Mullins v. Rio Algom, Inc.](#), Certification Order (S.D. Ohio Nov. 20, 1997) (despite defendants' opposition to certification, the court found “issues in this case are appropriate for certification.”); [Tilley v. McMackin](#), Certification Order (N.D. Ohio Sept. 14, 1990) (“Although petitioner has argued vigorously that this Order of Certification is not necessary or agreeable, I disagree.”). See also [Nemours Fdn. v. Manganaro Corp., New England](#), 878 F.2d 98, 101 (3rd Cir. 1989) (finding an “objection to having the Delaware Supreme Court provide guidance in determining unsettled questions of state law is not important enough in a jurisprudential sense to require an immediate interlocutory appeal” and distinguishing such decision from an appealable decision to abstain).

[FN98]. [Buckeye Union Ins. Co. v. N.E. Ins. Co.](#), 205 F.3d 1339 (6th Cir. 2000) (ruling to reverse and remand based on answer provided in, [Buckeye Union Ins. Co. v. N.E. Ins. Co.](#), 720 N.E.2d 495 (Ohio 1999)); [Burgess v. Eli Lilly & Co.](#), 995 F.2d 646 (6th Cir. 1993) (ruling to reverse and remand based on answer provided in, [Burgess v. Eli Lilly & Co.](#), 609 N.E.2d 140 (Ohio 1993)).

[FN99]. See, e.g., [Copper v. Buckeye Steel Castings](#), 1994 WL 6805 (6th Cir. Jan. 11, 1994) (after the Ohio Supreme Court declined to answer, [Copper v. Buckeye Steel Castings](#), 621 N.E.2d 396 (Ohio 1993), Sixth Circuit holding that “if presented with the question, the Ohio Supreme Court would rule that an employee must present some evidence of retaliation, in addition to the employer's enforcement of a valid, written policy.”).

[FN100]. E.g., [Simmons-Harris v. Zelman](#), 234 F.3d 945, 962 (6th Cir. 2000) (holding that the district court did not abuse discretion in declining to certify state law question and similarly declining to certify on appeal), rev'd on other grounds, 122 S. Ct. 2460 (2002); [The Fifth Column v. Village of Valley View](#), 221 F.3d 1334(6th Cir. 2000) (unpublished order) (holding same); [MacDermid, Inc. v. Electrochemicals, Inc.](#), 142 F.3d 435, 1998 WL 165137, **11 (6th Cir. (Ohio)) (unpublished) (holding same); [Transamerica Ins. Co. v. Dur Bag Mfg. Co.](#), 50 F.3d 370, 373 (6th Cir. 1995) (holding same).

[FN101]. R. Prac. Sup. Ct. Ohio XVIII.

[FN102]. Appendix C.

[FN103]. See text & notes, *infra* at 101. The federal courts typically have supplied fuller explanations for certi-

fication. These courts have fully briefed certification motions in front to them in the first instance. Yet the Ohio Supreme Court has an independent obligation to determine certification and to offer an explanation of decisions to decline or to answer certified questions.

[FN104]. In the fifty-five cases reaching the Court, it declined to answer ten times.

[FN105]. *Sun Co., Inc. v. Crosby Valve & Gauge Co.*, No. 94-2410 Request for Withdrawal of Certified Question Granted and Cause Dismissed (Ohio Dec. 20, 1994) (parties' letter indicated they had settled and certified question rendered moot); *Culp v. Toledo*, 573 N.E.2d 675 (Ohio 1991) (parties settled and request order of reference be withdrawn; cause dismissed); *Gregory v. Dold*, 555 N.E.2d 1306 (Ohio 1990) (“Upon joint application to dismiss, this cause is hereby dismissed.”).

[FN106]. *Diamond Club v. Ins. Co. of N.A.*, 598 N.E.2d 1159 (Ohio 1992) (table of decisions) (“Sua sponte, cause dismissed for want of prosecution.”).

[FN107]. *Diamond Club v. Ins. Co. of N.A.*, 984 F.2d 746 (6th Cir. 1993).

[FN108]. *Id.* at 748 (describing failure to file brief required by R. Prac. Sup. Ct. Ohio XVIII § 7(A)).

[FN109]. *Id.*

[FN110]. *Id.* at 749 (Milburn, J., dissenting).

[FN111]. The Court did decline to answer questions when it was deprived of the “benefit of the preliminary memorandums (sic) from the parties,” but the opinion did not discuss the certification rules, briefing schedules, or deadlines. *Platte v. Ford Motor Co.*, 738 N.E.2d 379 (Ohio 2000).

[FN112]. *F. & G. Ins. Underwriters, Inc. v. Strayhorn Lim. Servs.*, 613 N.E.2d 235 (Ohio 1993); *Corwin v. Ford Motor Co.*, 633 N.E.2d 542 (Ohio 1994); *Baker v. Pease Co.*, 641 N.E.2d 201 (Ohio 1994); *Roth v. Capital Amer. Life Ins. Co.*, 626 N.E.2d 686 (Ohio 1994); *Tilley v. McMackin*, 573 N.E.2d 665 (Ohio 1991).

[FN113]. Compare *Broadview Savings & Loan Co. v. Reistenberg*, 550 N.E.2d 949 (Ohio 1990) (declining to answer because inappropriate to intervene between two federal courts) with *Allstate Ins. Co. v. Cutcher*, 654 N.E.2d 980 (Ohio 1995) (declining to answer without explanation).

[FN114]. *Copper v. Buckeye Steel Castings*, 621 N.E.2d 396 (Ohio 1993) (“The court declines to answer the question . . . because it is not appropriate for this court to answer certified questions of state law that are so factually specific in nature.”).

[FN115]. *Broadview Savings & Loan Co.*, 550 N.E.2d at 949.

[FN116]. *Id.* (“Respondent appealed to the Sixth Circuit.”).

[FN117]. *Id.* (“That court recognized there was no controlling Ohio law on this point, but applied the law as it predicted this court would apply it . . . “).

[FN118]. *Id.* This district court decision is further discussed *infra* at 119.

[FN119]. *Id.*

[FN120]. The remaining decision providing a reason for declining to answer is [Baker v. Pease](#), 641 N.E.2d 201 (Ohio 1994), where previously an automatic stay was granted “on notice of bankruptcy filing,” [Baker v. Pease](#), 578 N.E.2d 824 (Ohio 1991).

[FN121]. [Hunter v. First Union Home Equity Bank](#), 759 N.E.2d 784 (Ohio 2001); [Schaffer v. State Farm Auto. Ins. Co.](#), 748 N.E.2d 545 (Ohio 2001); [Eabens v. U.S. Air](#), 670 N.E.2d 1000 (Ohio 1996); [Allstate Ins. Co. v. Cutcher](#), 654 N.E.2d 980 (Ohio 1995); [Roth v. Capital American Life. Ins. Co.](#), 626 N.E.2d 686 (Ohio 1994); [Corwin v. Ford Motor Co.](#), 633 N.E.2d 542 (Ohio 1994); [Fidelity & Guar. Ins. Underwriters v. Strayhorn Limo. Serv.](#), 613 N.E.2d 235 (Ohio 1993); [Tilley v. McMackin](#), 573 N.E.2d 665 (Ohio 1991).

[FN122]. Compare [Corwin](#), 633 N.E.2d at 542 (declining to answer and omitting question text from opinion); [Fidelity & Guar. Ins.](#), 613 N.E.2d at 235 (same); [Tilley](#), 573 N.E.2d at 665 (same); [Allstate Ins. Co.](#), 654 N.E.2d at 980 (same) with [Watkins v. Transcontinental Ins. Co.](#), 759 N.E.2d 784 (Ohio 2001) (declining to answer and including question text in opinion); [Kemper v. Michigan Millers Mutual Ins. Co.](#), 758 N.E.2d 184 (Ohio 2001) (same); [Eabens](#), 670 N.E.2d at 1000 (same); [Schaffer](#), 748 N.E.2d at 545 (same); [Hunter](#), 759 N.E.2d at 784 (same).

[FN123]. See, e.g., [Allstate](#), 654 N.E.2d at 980 (Douglas & Pfeifer, JJ., dissenting from ruling that “The court declines to answer the certified questions.”); [Platte](#), 738 N.E.2d at 379 (Sweeney & Pfeifer, JJ., dissenting from ruling that “The court declines to answer the certified questions.”); [Corwin](#), 633 N.E.2d at 542 (Douglas & Sweeney, JJ., dissenting from ruling that “Sua sponte, this court declines to answer the certified question . . .”).

[FN124]. See, e.g., [Vt. Rules of App. P. 14\(a\)](#) (West 2001) (“The Court in its discretion may decline to answer any question certified to it and need not state reasons for its action.”). See also Bryan M. Schneider, “[But Answer There Came None](#)”: [The Michigan Supreme Court and the Certified Question of State Law](#), 41 [Wayne L. Rev.](#) 273, 315 (1995) (“The Michigan Supreme Court, to say the least, is not very receptive to the certified question. Not only does the court refuse to answer most questions, but it generally fails to state the reasons for its refusal.” Also noting with approval three cases where Michigan Supreme Court supplied reasoning when declining to answer); Bruce M. Selya, [Certified Madness: Ask a Silly Question . . .](#), 29 [Suffolk U. L. Rev.](#) 677, 681-682 n.19 (1995) (citing cases where state courts refuse to answer certified questions, but offer little or no explanation).

[FN125]. See Richard Alan Chase, Note, [A State Court's Refusal to Answer Certified Questions: Are Inferences Permitted?](#), 66 [St. John's L. Rev.](#) 407, 422 (1992) (arguing decision to decline to answer is neither decision on merits nor suggestion of court's view of the merits). But see [Geib v. Amoco Oil Co.](#), 163 F.3d 329, 331 (6th Cir. 1995) (Engle, J., concurring) (“However, I agree that we are bound to honor our prior decision as a matter of stare decisis and that this is, if anything, reinforced by the Michigan Supreme Court's refusal to take action on our petition for certification.”).

[FN126]. The most recent decisions reflect an increase, not decrease, in summary decisions, but four opinions include the question text. [Wojcik v. Option One Mtge. Corp.](#), 762 N.E.2d 367 (Ohio 2002) (summary declining to answer); [In re Miller](#), 762 N.E.2d 368 (Ohio 2002) (same); [In re Franz](#), 761 N.E.2d 43 (Ohio 2002) (same); [Golem v. Put-In-Bay](#), 761 N.E.2d 43 (Ohio 2002) (same).

[FN127]. See, e.g., [Copper](#), 621 N.E.2d at 396 (“not appropriate for this court to answer certified questions of state law that are so factually specific in nature.”); [Broadview Savings & Loan Co.](#), 550 N.E.2d at 949 (declining to answer where Sixth Circuit had already predicted state law).

[FN128]. Kaye & Weissman, *supra* note 65, at 405 (2000) (describing usefulness of the five decisions issued by New York State Court of Appeals when declining to answer questions certified to it by the Second Circuit Court of Appeals).

[FN129]. *Id.* at 420. The five opinions are: [Tunick v. Safir](#), 731 N.E.2d 597 (N.Y. 2000); [Yesil v. Reno](#), 705 N.E.2d 655 (N.Y. 1998); [Grabois v. Jones](#), 667 N.E.2d 307 (N.Y. 1996); [Retail Software Servs., Inc. v. Lashlee](#), 525 N.E.2d 737 (N.Y. 1988); [Rufino v. United States](#), 506 N.E.2d 910 (N.Y. 1987).

[FN130]. Kaye & Weissman, *supra* note 65, at app. B (list of forty-four certified questions of appeal sent to the New York Court of Appeals).

[FN131]. [Tunick](#), 731 N.E.2d at 597; [Yesil](#), 705 N.E.2d at 655; [Grabois](#), 667 N.E.2d at 307; [Retail Software](#), 525 N.E.2d at 737; [Rufino](#), 506 N.E.2d at 910 n.*.

[FN132]. [Yesil](#), 705 N.E.2d at 656 (“(W)e note our uncertainty whether the certified questions can be determinative of the underlying matters (in federal court).”); [Retail Software](#), 525 N.E.2d at 737 (“we now conclude that the question, as proffered, does not satisfy our . . . requirement that the question certified ‘may be determinative of the cause . . . pending in the certifying court. Therefore, we must decline to answer the question.’”) (citation omitted).

[FN133]. [Tunick](#), 731 N.E.2d at 598 (“the questions come to us in the unique posture that, once accepted, they may become moot . . .”).

[FN134]. [Yesil](#), 705 N.E.2d at 656.

[FN135]. [Tunick](#), 731 N.E.2d at 599 (“This Court could not responsibly engage on that question where the parties to the litigation have not sought relief under this State’s Constitution and the issue would be first briefed and raised in our Court.”).

[FN136]. [Rufino](#), 506 N.E.2d at 911 (declining to answer because similar legal issue already proceeding through the state court system).

[FN137]. [Grabois](#), 667 N.E.2d at 307 (“the interplay between Federal and State law in interpreting issues of statutory construction under ERISA is as yet not fully settled. This issue may thus be more appropriate for resolution in the first instance by the Federal courts.”).

[FN138]. See, e.g., [Western Helicopter Servs., Inc. v. Rogerson Aircraft Corp.](#), 811 P.2d 627, 629-30 (Ore. 1990) (eight-page opinion declining to answer by explaining, “first in general terms and then in terms applicable to the present case, the considerations that lead us to denial” and finding that there is controlling precedent on the issue); [Schlieter v. Carlos](#), 775 P.2d 709, 710 (N.M. 1989) (declining questions that are too hypothetical and where answer would not be determinative of the issue).

[FN139]. See generally Michael E. Solimine, [Revitalizing Interlocutory Appeals in the Federal Courts](#), 58 *Geo. Wash. L. Rev.* 1165, 1201-04 (1990) (hereinafter *Revitalizing*).

[FN140]. 28 U.S.C. § 1292(b): “When a district court judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to where there is substantial ground for difference of opinion and that an immediate appeal from the order may ad-

vance the ultimate termination of the litigation, he shall so state in writing in such an order. The Court of Appeals which would have jurisdiction of such an appeal of such an action may thereupon, in its discretion, permit an appeal to be taken from such order”

[FN141]. *Id.*

[FN142]. *Revitalizing*, supra note 139, at 1202 (circuit court orders denying (or granting) interlocutory appeals are rarely published and the decision not to publish is supported by the orders' lack of legal analysis). See also Michael E. Solimine & Christine Oliver Hines, [Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Court of Appeals Under Rule 23\(f\)](#), 41 *Wm. & Mary L. Rev.* 1531, 1586 (2000) (urging that federal courts of appeals issue opinions when denying (or granting) permission to appeal under *Fed. R. Civ. P. 23(f)*, permitting discretionary appeals from district court orders denying (or granting) class certification).

[FN143]. *Revitalizing*, supra note 139, at 1203.

[FN144]. See, e.g., [Hughes Tool Co. v. Transworld Airlines](#), 409 U.S. 363, 365 n.1 (1973).

[FN145]. [Maryland v. Baltimore Radio Show](#), 338 U.S. 912, 918 (1950) (Frankfurter, J).

[FN146]. *Id.* at 918.

[FN147]. See Appendix C. While the Ohio Supreme Court's certification opinions are readily discovered, the number of requests for certification in federal courts is less accessible and certain. Certification requests may often be denied in unpublished federal court opinions.

[FN148]. [Castorr v. Brundage](#), 459 U.S. 928, 928 (1982) (Stevens, J.), cited in Michael J. Broyde, *The Intercircuit Tribunal and Perceived Conflicts: An Analysis of Justice White's Dissents from Denials of Certiorari During the 1985 Term*, 62 *N.Y.U. L. Rev.* 610, 610 (1987).

[FN149]. See Appendix C, right column.

[FN150]. [Scott v. Bank One Trust Co.](#), 577 N.E.2d 1077, 1079 (Ohio 1991).

[FN151]. *Id.*

[FN152]. *Id.* at 1079.

[FN153]. [Manufacturers' Nat'l Bank of Detroit v. Erie County Road Comm'n](#), 587 N.E.2d 819, 822 (Ohio 1992).

[FN154]. [Copper v. Buckeye Steel Castings](#), 621 N.E.2d 396 (Ohio 1993). The certified question asked: “Whether an employer's discharge of an employee for failing to file request for leave forms pursuant to an established medical leave policy violated [Ohio Rev. Code § 4123.90](#) where the employer is aware that the employee's work-related injury was the cause of his continued absence from work?” *Id.*

[FN155]. See, e.g., [Rolf v. Tri State Motor Transit](#), 745 N.E.2d 424 (Ohio 2001) (district court order stated “the certified question is not fact specific” and question was answered); [Platte v. Ford Motor Co.](#), 738 N.E.2d 379 (Ohio 2000) (district court order stated questions “not fact specific” and Court declined to answer the certified questions).

[FN156]. *Schaffer v. State Farm Auto. Ins. Co.*, 748 N.E.2d 545 (Ohio 2001) (“Is Ohio Revised Code § 3937.18 (G), as amended by Senate Bill 20, effective October 20, 1994, unconstitutional on any grounds under the facts of this case, including those stated by the Plaintiffs?”) (emphasis added); *Beagle v. Warden*, 676 N.E.2d 506 (Ohio 1997) (“Is Ohio Revised Code § 3937.18(A) (2) unconstitutional on any grounds under the facts of this case, including those stated by Plaintiffs?”) (emphasis added).

[FN157]. *Boardman v. United Servs. Auto. Ass'n*, 470 So.2d 1024, 1028-31 (Miss. 1985).

[FN158]. *Id.* at 1028.

[FN159]. *Id.* at 1030-31.

[FN160]. *Id.* at 1030.

[FN161]. *Id.* at 1031.

[FN162]. See *McIntyre v. Farrel Corp.*, 680 So.2d 858, 860 (Miss. 1996) (“(T)his Court has at times shown a willingness to address the particular facts of the case, and even, for all practical purposes, to issue a holding based on the facts of the case.”) (citations omitted).

[FN163]. See, e.g., *Tunick v. Safir*, 731 N.E.2d 597, 599 (N.Y. 2000) (“This Court could not responsibly engage on that question where the parties to the litigation have not sought relief under this State's Constitution and the issue would be first briefed and raised in our Court.”); *Guy v. Director, Patuxent Institution*, 367 A.2d 946, 949 (Md. 1977) (declining to address issues that the certified question did not encompass).

[FN164]. *Beagle v. Warden*, 676 N.E.2d 506 (Ohio 1997) (emphasis added).

[FN165]. *Schaffer v. State Farm Auto. Ins. Co.*, 748 N.E.2d 545 (Ohio 2001) (declining to answer and including text of question) (emphasis added).

[FN166]. R. Prac. Sup. Ct. Ohio XVIII § 1.

[FN167]. *Carberry v. City of Ashtabula*, 757 N.E.2d 307, 310 (Ohio 2001) (“It is well settled that we will not indulge in advisory opinions.”).

[FN168]. See generally John L. Deweerdt, Comment, Inter-jurisdictional Certification and Full Faith and Credit in the Federal Courts, 45 Wash. L. Rev. 167, 170-71 (1970) (requiring that certified questions may be determinative of outcome avoids risk of state court issuing advisory opinions).

[FN169]. Goldschmidt, *supra* note 18, at 35 (“Some courts prefer not to answer a question already answered by the federal court.”).

[FN170]. *Brady v. Safety-Kleen Corp.*, No. C2-87-1548, Order Certifying Questions of State Law to the Supreme Court of Ohio, 6 (Dec. 20, 1989).

[FN171]. *Id.* at 7.

[FN172]. *Id.*

[FN173]. *Id.*

[FN174]. *Brady v. Safety-Kleen Corp.*, 576 N.E.2d 722, 723 (Ohio 1991) (syllabus) (emphasis added).

[FN175]. *Id.* at 724.

[FN176]. The Court's opinion did serve as an appeal. The district court reversed its earlier decision and granted the employer summary judgment. The plaintiff employee, who had won in district court, but lost in the Ohio Supreme Court, appealed to the Sixth Circuit. The Circuit Court affirmed the district court's decision, but cited to the Ohio Supreme Court's decision in support of its result. *Brady v. Safety-Kleen Corp.*, 966 F.2d 1451 (6th Cir. 1992) (unpublished opinion).

[FN177]. *Brady*, 576 N.E.2d at 724.

[FN178]. *Id.* at 728.

[FN179]. *Id.* Other federal and state courts outside Ohio have rejected certification when the federal court has already reached a decision on the issue. See, e.g., *Perkins v. Clark Equip. Co.*, 823 F.2d 207, 210 (8th Cir. 1987) (“Once a question is submitted for decision in the district court, the parties should be bound by the outcome Only in limited circumstances should certification be granted after a case has been decided.”).

[FN180]. *State ex rel. Park Investment Co.*, 285 N.E.2d 356, 357 (Ohio 1972).

[FN181]. *Id.*

[FN182]. *Eyler v. Anderson*, 171 N.E.90, 91 (Ohio 1930).

[FN183]. *Western Helicopter*, 811 P.2d at 635.

[FN184]. *Mullins v. Rio Algom, Inc.*, 708 N.E.2d 706 (Ohio 1999) (stayed until decision in *Johnson v. BP Chemical, Inc.*, 7070 N.E.2d 1107 (Ohio 1999)); *Cheek v. Industrial Powder Coatings*, 706 N.E.2d 323 (Ohio 1999) (stayed until decision in *Genaro v. Central Trans. Inc.*, 703 N.E.2d 782 (Ohio 1999)); *Yepko v. State Farm Mut. Ins.*, 683 N.E.2d 1090 (Ohio 1997) (stayed until decision in *Holt v. Grange Mut. Cas. Co.*, 683 N.E.2d 1080 (Ohio 1997)); *Garlikov v. Cont'l Cas. Co.*, 623 N.E.2d 1183, 1184 (Ohio 1993) (full briefing over eleven months; ruling that the holding in *Savoie v. Grange Mut. Ins. Co.*, 620 N.E.2d 809 (Ohio 1993), “directly answers the question posed.”).

[FN185]. *Taylor v. National Group of Companies, Inc.*, 605 N.E.2d 45 (Ohio 1992) (“The certified question is answered in the affirmative.”). See *Elek v. Huntington Nat'l Bank*, 573 N.E.2d 1056 (Ohio 1991). Cf. *Hoops v. United Tel. Co. of Ohio*, 553 N.E.2d 252 (Ohio 1990).

[FN186]. *Id.*

[FN187]. The certified question must also be one that “may be determinative of the proceeding.” R. Prac. Sup. Ct. Ohio XVIII § 1.

[FN188]. *Henderson v. Lincoln Nat'l Speciality Ins. Co.*, 626 N.E.2d 657 (Ohio 1994) (“Does Ohio Revised Code § 3937.18 apply to an automobile liability or motor vehicle liability policy if insurance covering vehicles registered and principally garaged in Ohio, when said policy was not delivered, or issued for delivery in Ohio by

the insurer? The certified question is answered in the affirmative.”).

[FN189]. *Id.* at 658 (Moyer, C.J., dissenting).

[FN190]. *Poe v. Trumbull County*, 694 N.E.2d 1324 (Ohio 1998) (“answered in the negative,” with no additional text); *Krejci v. Prudential Property & Cas. Ins. Co.*, 607 N.E.2d 446 (Ohio 1993) (same).

[FN191]. See, e.g., *Allstate Ins. Co. v. Serio*, 2002 WL 753924 (N.Y. April 30, 2002); (answering certified questions “in the negative” or not answered as “unnecessary,” following a five-page opinion); *Guy v. Director, Patuxent Institution*, 367 A. 2d 946, 949 (Md. 1977) (answering “the certified question in the affirmative” with factual summary and discussion of statutory interpretation and legislative history at issue).

[FN192]. *Firestone v. Galbreath*, 616 N.E.2d 202 (Ohio 1993) (recognizing the tort of interference with expectation or inheritance); *Smith v. Howard Johnson Co.*, 615 N.E.2d 1037 (Ohio 1993) (recognizing tort of spoliation of evidence); *Scott v. Bank One Trust*, 577 N.E.2d at 1084 (overruling *Sherrow v. Brookover*, 189 N.E.2d 90 (Ohio 1963) and enforcing spendthrift trusts in Ohio).

[FN193]. See, e.g., *Washington v. Robertson County*, 29 S.W.3d 466, 476 (Tenn. 2000) (answering question by deriving elements of civil statutory claim of malicious harassment from crime of civil right intimidation); *Willis v. Wal-Mart Stores, Inc.*, 504 S.E.2d 648, 649 (W.Va. 1998) (answering question recognizing claim for same-gender sexual harassment under W.Va. Human Rights Act); *Hatfield v. Rochelle Coal Co.*, 813 P.2d 1308, 1309 (Wyoming 1991) (answering question of imposing implied covenant of good faith and fair dealing upon an employer); *Transamerica Ins. Co. v. Royle*, 656 P.2d 820, 821 (Mont. 1993) (answering question of parental immunity against tort claim brought by unemancipated child against parent).

[FN194]. See, e.g., *Anderson v. St. Francis-St. George Hosp., Inc.*, 671 N.E.2d 225, 226-27 (Ohio 1996) (addressing new claim of “wrongful living”); *Adair v. Wozniak*, 492 N.E.2d 426, 428 (Ohio 1986) (addressing shareholder claim brought as result of third party wrongful acts that harm the corporation and analyzing Ohio and other jurisdictions' law).

[FN195]. *Smith v. Howard Johnson*, 615 N.E.2d at 1038 (including text of certified questions and one paragraph response); *Firestone*, 616 N.E.2d at 202-03 (including text of certified questions and answering yes, a claim is recognized and listing five elements of claim).

[FN196]. *Scott*, 577 N.E.2d at 1082.

[FN197]. *Id.* at 1084 (deciding to overturn precedent and issuing seven-page opinion).

[FN198]. Accord *Kolanovic v. Gida*, 77 F. Supp.2d 595, 606 (D.N.J. 1999) (declining to create New Jersey claim for negligent spoliation of evidence because New Jersey state courts should make that choice).

[FN199]. *Smith v. Howard Johnson*, 615 N.E.2d at 1038.

[FN200]. *Id.*

[FN201]. Spoliation has been used as a broad term encompassing both destruction and “significant and meaningful alteration.” *Viviano v. CBS, Inc.*, 597 A.2d 543, 550 n.4 (N.J.Super. 1991) (citing Black's Law Dictionary definition of spoliation).

[FN202]. [Smith v. Howard Johnson](#), 615 N.E.2d at 1038.

[FN203]. *Id.*; See [Viviano](#), 597 A.2d at 550

[FN204]. [Viviano](#), 597 A.2d at 548-49 (acknowledging that New Jersey recognized a claim for the tort of fraudulent concealment in [State of N.J. Dep't. of Environ. Pro. v. Ventron Corp.](#), 468 A.2d 150 (N.J. 1983)).

[FN205]. *Id.* at 548.

[FN206]. *Id.* at 549 (emphasis added).

[FN207]. *Id.* at 550 (citing “[County of Solano v. Delancy](#), 215 Cal.App.3d 1232 (Cal. Ct. App. 1988), review denied and ordered not to be officially published (Feb. 1, 1990).”).

[FN208]. [Rosenblit v. Zimmerman](#), 766 A.2d 749, 756-59 (N.J. 2001) (noting [Viviano](#) did not create a new tort of intentional spoliation, but simply adapted the existing fraudulent concealment tort to the litigation context).

[FN209]. [Temple Community Hosp. v. Superior Court](#), 976 P.2d 223 (Cal. 1999) (holding no claim for third party intentional spoliation and expressly declining to decide if cause of action of negligent spoliation exists); [Cedars-Sinai Med. Ctr. v. Superior Court](#), 954 P.2d 511 (Cal. 1998) (holding no claim for first party intentional spoliation).

[FN210]. [Cechowski v. Goodwill Ind. of Akron, Ohio](#), No. 17944, 1997 WL 270523 (Ohio Ct. App. May 14, 1997) (office memoranda destroyed); [Sheets v. Norfolk So. Corp.](#), 671 N.E.2d 1364, 1370-71 (Ohio Ct. App. 1996) (dispatcher tapes destroyed).

[FN211]. [Drawl v. Cornicelli](#), 706 N.E.2d 849, 852 (Ohio Ct. App. 1997).

[FN212]. *Id.* at 852.

[FN213]. *Id.* (rejecting argument that [Smith v. Howard Johnson](#) elements limited action to destruction of evidence).

[FN214]. *Id.*

[FN215]. [Smith v. Howard Johnson](#), 615 N.E.2d at 1037.

[FN216]. *Id.*

[FN217]. [Barker v. Wal-Mart Stores, Inc.](#), 2001 WL 1661961, *7 (Ohio App. Ct. Dec. 31, 2001).

[FN218]. [Davis v. Wal-Mart Stores, Inc.](#), 756 N.E.2d 657, 658 (Ohio 2001).

[FN219]. [Davis](#), 756 N.E.2d at 662 n.3 (Cook, J. dissenting) (“(T)he [Smith](#) court did not apply the district court’s term ‘spoliation’ in its order answering this question, although the term has been apparently reborn in today’s syllabus.”).

[FN220]. *Id.* at 489-90.

[FN221]. [Lucas v. Christiana Skating Ctr.](#), 722 A.2d 1247, 1248 (Del. Super. 1998); [Larson v. City of Trenton](#),

180 F.R.D. 261, 264 (D.N.J. 1998). But see [Goff v. Ives Trucking Co.](#), 27 S.W.3d 387, 388 (Ark. 2000) (Ohio Supreme Court holding cause of action exists in tort intentional interference with evidence).

[FN222]. [Goff](#), 27 S.W.3d at 388.

[FN223]. Indeed, other jurisdictions have recognized analogous destruction of evidence claims in response to certified questions: [Holmes v. Amerex Rent-A-Car](#), 710 A.2d 846, 847 (D.D.C. 1998) (issuing eight-page opinion with factual summary and legal analysis to answer question: “Under District of Columbia law, may a plaintiff recover against a defendant who has negligently or recklessly destroyed or allowed to be destroyed evidence that would have assisted the plaintiff in pursuing a claim against a third party?”).

[FN224]. [Firestone](#), 616 N.E.2d at 203.

[FN225]. *Id.* at 204 (Evans, J., concurring in part and dissenting in part).

[FN226]. *Id.* at 203 (answering the question “in the affirmative (‘yes’)” and citing: “See, generally, [Morton v. Petit](#), 177 N.E.2d 591 (Ohio 1931) (“We find particularly instructive Restatement of the Law 2d, Torts (1979) 58, Section 774B”).

[FN227]. *Id.* at 203.

[FN228]. *Id.*

[FN229]. *Id.*

[FN230]. [Lourdes College of Sylvania, Ohio v. Bishop](#), 703 N.E.2d 362, 370 n.13 (Ohio 1997).

[FN231]. *Id.*

[FN232]. *Id.* at 370-71.

[FN233]. *Id.* at 371 (citing analogous Florida state law, analogous Tenth Circuit law, and Prosser & Keaton on Torts).

[FN234]. [Firestone](#), 25 F.3d at 325-27 (providing “additional guidance” to the district court after receiving answers to certified questions).

[FN235]. *Id.*

[FN236]. See *supra* Ohio certification rule's procedural requirements. R. Prac. Sup. Ct. Ohio XVIII (Indicating that the federal court acts first to certify or not, then the Ohio Supreme Court decides to accept or not.)

[FN237]. See, e.g., [Brady v. Safety-Kleen Corp.](#), Order Certifying Questions of State Law, No. C2-87-1548 (S.D. Ohio Dec. 20, 1989) (citing Rule and finding questions may be determinative of the cause and no controlling precedent); [Diamond Club v. Ins. Co. of North Am.](#), 984 F.2d 746, 747 (6th Cir. 1993) (finding no controlling precedent, that appeal “turned on” the question, and citing Ohio's [Supreme Court Rule of Practice XVIII](#)).

[FN238]. [Brady v. Safety-Kleen Corp.](#), Order Certifying Questions of State Law, No. C2-87-1548, at 8 (S.D.

Ohio Dec. 20, 1989).

[FN239]. *Genaro*, 703 N.E.2d at 783 (federal court ruled on motion to remand case to state court, but on motions to reconsider or certify, court certified questions, waited sixteen months for answer); *Sorrell v. Thevenir*, 633 N.E.2d 504, 507 (Ohio 1994) (federal court tried case to jury verdict, certified after motion for a verdict setoff, received answer over eleven months later); *Clark v. Quality Stores, Inc.*, 633 N.E.2d 504, 507 (Ohio 1994) (federal court tried case to jury verdict, certified after motion for a verdict setoff, received answer over eleven months later); *Morris v. Savoy*, 576 N.E.2d 765 (Ohio 1991) (federal court tried case to a jury verdict, but did not enter judgment on verdict, certified to Ohio Supreme Court, received ruling twenty-two months later); But see *Schaeffer v. State Farm Mut.*, Order of Certification, No. 3:99CV7375 (N.D. Ohio April 13, 2001) (motion to certify granted early in proceedings during motion for judgment on the pleadings); *Krejci v. Prudential Property & Cas. Ins. Co.*, Order of Certification, No. 1:91CV1545 (N.D. Ohio Feb. 28, 1992) (motion to certify granted early in proceedings during motion to dismiss).

[FN240]. *Perkins v. Clark Equipment Co, Melrose Div.*, 823 F.2d 207, 208 (8th Cir. 1987).

[FN241]. *Id.* at 208-09.

[FN242]. *Id.* at 209-10(emphasis added).

[FN243]. *Id.* at 210.

[FN244]. See, e.g., *Complaint of McLinn*, 744 F.2d 677, 681 (9th Cir. 1984) (certification after the district court has decided an issue would wrongly permit a losing party a “second chance at victory”); *Harris v. Karri-On Campers, Inc.*, 640 F.2d 65, 68 (7th Cir. 1981) (affirming denial of motion to certify that followed a completed district court trial); *Stefano v. Smith*, 705 F. Supp. 733, 735 (D. Conn. 1989) (declining to certify when court “has read the briefs, researched the issues, held oral argument and placed the case on the trial list. Certification at this point in the proceedings would not be a benefit, but a hindrance, to the expeditious resolution of this matter.”).

[FN245]. *Herstrum v. Hodge*, 121 F.3d 708, 1997 WL 452299 at *3 (6th Cir. Aug. 7, 1997) (per curiam).

[FN246]. *Id.*

[FN247]. *Fid. & Guar. Ins. Underwriters, Inc. v. Nocero*, 2001 WL 1792448 (N.D. Ohio Dec. 13, 2001) at *11.

[FN248]. See supra discussion of question of law requirements as treated by Ohio Supreme Court.

[FN249]. *Copper*, 621 N.E.2d at 396 (declining to answer questions “that are so factually specific in nature.”).

[FN250]. See Appendix D and discussion supra at 31-38.

[FN251]. *Mfr's Nat'l Bank of Detroit v. Erie Cty. Road Comm.*, 587 N.E.2d 819, 822 (Ohio 1992) (“As a state-law questions certified by federal court, the issues before us are questions of law, not of fact. (T)he federal court hears and decides the cause by applying the law, as we determine it, to the facts of the case.”).

[FN252]. R. Prac. Sup. Ct. Ohio XVIII § 3 (“The certification order shall be signed by any justice or judge presiding over the cause or by a magistrate judge presiding over the cause pursuant to 28 U.S.C. Section 636(c)

.”) (emphasis added).

[FN253]. *In re McCombe*, 93 B.R. 597, 599 (Bankr. S.D. Ohio 1988) (noting issue may recur and preferring to certify, but concluding that certification “apparently may not be available to bankruptcy courts.”) (issue later reached Ohio Supreme Court on certified question from federal district court.), see *Scott v. Bank One Trust*, 577 N.E.2d at 1078.

[FN254]. *In re Plus Gold, Inc.*, 1994 WL 92415, at *3 (Bankr. N.D. Ohio Feb. 4, 1994) (litigant, Ohio Dept. of Taxation “notes that the court may certify the question to the Ohio Supreme Court pursuant to *Ohio Supreme Court Rule XVI*” but argues for submission to Board of Tax Appeals for resolution).

[FN255]. See e.g., *In re Franz*, 761 N.E.2d 43 (Ohio 2002) (declining to answer questions, Judge Patricia Morgenstern-Claren, Bankruptcy Court, Northern District of Ohio, certified while she noted in Certification Order that the same issues had been certified in *Hunter v. First Union Home Equity Bank*, 759 N.E.2d 784 (Ohio 2001) ; *In re Miller*, 762 N.E.2d 368 (Ohio February 6, 2002) (declining to answer questions Judge Patricia Morgenstern-Claren, Bankruptcy Court, Northern District of Ohio, certified while she noted in Certification Order that the same issues had been certified in *Hunter v. First Union Home Equity Bank*, 759 N.E.2d 784 (Ohio 2001), and that the same issues had been sent for certification in *In re Franz*, 761 N.E.2d 43 (Ohio 2002), and that the the same issues had been sent for certification in *Wojcik v. Option One Mtge. Corp.*, 762 N.E.2d 367 (Ohio 2002)); *Wojcik v. Option One Mtge. Corp.*, 762 N.E.2d 367 (Ohio 2002) (declining to answer questions Judge Patricia Morgenstern-Claren, Bankruptcy Court, Northern District of Ohio, certified while she noted in Certification Order that the same issues had been sent in *Hunter v. First Union Home Equity Bank*, 759 N.E.2d 784 (Ohio 2001), and that the same issues had been sent for certification in *In re Franz*, 761 N.E.2d 43 (Ohio 2002)).

[FN256]. See *id.* for examples.

[FN257]. *In re Stewart*, 761 N.E.2d 45 (Ohio 2002) (Judge Patricia Morgenstern-Claren presiding); *In re Stewart*, 771 N.E.2d 250, 251 (Ohio 2002) (“The certified question is answered in the affirmative.”).

[FN258]. For example, both pending cases concern the constitutionality and the application of *Ohio Rev. Code Ann. § 5301.234* (2002), an Ohio statute creating an irrebuttable presumption that a mortgage is properly executed notwithstanding any defects in the witnessing or acknowledging of the instrument unless the mortgagor denies, under oath, signing the mortgage, or the mortgagor is unavailable, but there is other sworn evidence of fraud.

[FN259]. Uniform Question of Certification of Law Act § 3, ct. (1995), 12 U.L.A. 73 (1996) (new language, “a court of the United States” was intended to permit courts to accept question from “any United States court including bankruptcy courts.”) (emphasis added).

[FN260]. See, e.g., Alaska R. App. Pro. 407(a) (“The supreme court may answer questions of law certified to it by the Supreme Court of the United States, a court of appeals of the United States, a United States district court, a United States bankruptcy court or United States bankruptcy appellate panel”) (emphasis added).

[FN261]. See, e.g., *In re Sullivan*, 200 B.R. 682 (Bankr. D. Nev. 1996) (declining to certify unsettled question of state law because Nevada Supreme Court adjudication would require eighteen to twenty-four months).

[FN262]. Those states included Alaska, Colorado, Iowa, Kansas, Maryland, New Hampshire, North Dakota,

Oregon, Rhode Island, West Virginia, and Wisconsin.

[FN263]. See, e.g., [In re Cross](#), 891 P.2d 26, 26 (Wash. 1995) (answering certified question from the United States Tax Court); [Giant Creek Water Works, Ltd. v. Comm'r of Internal Revenue](#), 775 P.2d 684, 685 (Mont. 1988) (declining certified question from United States Tax Court because the issue presented would not determine outcome of tax court litigation). But see [Glosemeyer v. United States](#), 45 Fed. Cl. 771, 780 n. 19 (Fed. Cl. 2000) (“Normally, we would prefer to certify such an important and undecided question directly to the highest court of the state,” but Missouri does not permit certified questions).

[FN264]. Uniform Question of Certification of Law Act General Statutory Note 84 (amended 1995)

[FN265]. See, e.g., [Comella v. St. Paul Mercury Ins. Co.](#), 2001 WL 1579971 (N.D. Ohio July 24, 2001) at *1 (quoting Rule and concluding: “Furthermore, it appears likely that the certified questions are likely to arise in other actions brought in both Ohio state and federal courts.”); [Delli Bovi v. Pacific Indemnity Co., Order of Certification](#), No. 4:97CV0094 (N.D. Ohio Dec. 30, 1997) (noting question to be certified is present in a total of seven cases pending in the district arising from the same accident); [Sorrell v. Thevenir, Order of Certification](#), No. 91-7704 (N.D. Ohio May 20, 1993) (certifying the question results in “conservation of judicial resources”).

[FN266]. See, e.g., [Poe v. Trumbull Cty, Order of Certification](#), No 4:CV0180 (N.D. Ohio Oct. 8, 1997) (certifying and noting a “likelihood of multiple and possibly conflicting federal court rulings on these state law questions.”).

[FN267]. [Gregory v. Dold, Order of Certification](#), No. 88-2043 (N.D. Ohio Nov. 18, 1988) (echoing Ohio Rule of Practice III (B) (2) that governs discretionary appellate jurisdiction if the “case is of public or great general interest”).

[FN268]. [Rolf v. TriState Motor Transit Co., Order of Certification](#), No. 3:99CV7687 (N.D. Ohio July 13, 2000); [Platte v. Ford Motor Co., Order of Certification](#), No. 3:00CV7171 (N.D. Ohio Sept. 18, 2000).

[FN269]. [Duryee v. United States Dep't. of Treasury](#), 6 F. Supp. 2d 700, 704 (S.D. Ohio 1995).

[FN270]. See, e.g., [Diginet, Inc. v. Western Union ATS, Inc.](#), 958 F.2d 1388, 1395 (7th Cir. 1992) (declining questions that “may never recur and lack broad, general significance”); [Barnes v. Atl. & Pac. Life Ins. Co. of America](#), 514 F.2d 704, 706 (5th Cir. 1975) (certifying because “repetitive contract interpretations” have a recurring “nature involving literally hundreds of contracts with many public policy factors affecting the welfare of local citizens” and thus should be resolved by highest state court). See also [Goldschmidt](#), supra note 18, at 35 (Twenty-nine responses from federal judges surveyed about factors that cause them to decide to certify a question and corresponding state judge survey showing preference to accept questions of “great public importance” even when certification rule does not require it). For more examples of the factors used in deciding to certify a question, see generally [Rowson v. Kawaski Heavy Indus.](#), 866 F. Supp. 1221, 1225 (N.D. Iowa 1994) (listing criteria federal courts should apply in deciding to certify questions).

[FN271]. The United States Supreme Court and legal commentators encourage more certification by describing the decision to certify as needing only unsettled questions of law and returning issues to lower federal courts that should have certified the questions to their state supreme courts. See supra notes 20, 45-46.

[FN272]. Other non-Rule certification policies of restraint include the forum shopping considerations described

infra at pages 46-50.

[FN273]. See Appendix B.

[FN274]. *Barnes*, 514 F.2d 704, 705 n. 4 ((W)e use much judgment, restraint and discretion in certifying.”), cited in Jerome A. Braun, *A Certification Rule for California*, 36 *Santa Clara L. Rev.* 935, 943 n.45 (1996). See also *Georgetown Univ. v. Sportec Int'l Inc.*, 572 A.2d 119, 121 (D.C. Cir. 1990) (excluding federal district courts from certification; the limitation “was suggested as a method of achieving the goals of certification ‘without unduly burdening the (court receiving certified questions.)’”).

[FN275]. Appendix D. One Ohio district court judge sent sixteen out of the total fifty-five certified question cases, or twenty-nine percent of all questions certified during the Rule's fourteen year tenure.

[FN276]. The issues of federal court restraint in certifying and the fear that certified questions will inundate state supreme courts are addressed in most certification literature. See, e.g., Bassler & Potenza, *supra* note 14, at 514 (“That the certification floodgates have not opened as feared can also be attributed to the self-restraint exercised by the federal judiciary with respect to the certification process.”); Goldschmidt, *supra* note 18, at 44 (survey responses from federal judges who reported certifying questions “sparingly” and only those involving “important state court issues”).

[FN277]. *Burgess v. Eli Lilly & Co.*, Order Certifying Questions of Law to the Ohio Supreme Court, No. 91-3718 (6th Cir. Mar. 6, 1992 at 1) (Wellford, J., dissenting). Compare *Coleman v. Sandoz Pharmacy*, Docket No. 3:91CV7535 (N.D. Ohio May 3, 1995) (diversity case filed in federal district court; defendant moves to certify; certification granted); question answered in 600 N.E.2d 1008 (Ohio 1998); *Sutowski v. Eli Lilly & Co.*, Docket No. 1:97CV1283 (N.D. Ohio June 5, 1997) (same); considered in, 696 N.E.2d 187 (Ohio 1998), reconsideration denied by, 698 N.E.2d 1008 (Ohio 1998); *Rice v. Certain Teed Corp.*, Docket No. 3:97-CV-7484 (N.D. Ohio Dec. 10, 1997) (same).

[FN278]. *Clark v. Quality Stores, Inc.*, Docket No. 93-1041(N.D. Ohio May 20, 1993) (plaintiff filed in federal district court, then moved to certify; certification granted without comment on plaintiff's status as plaintiff in diversity claim).

[FN279]. See *Holeton v. Crouse Cartage Co.*, 748 N.E.2d 1111, 1113-14 (Ohio 2001) (plaintiff filed diversity claim in federal district court, filed motion for summary judgment or in the alternative, certification to the Ohio Supreme Court); *Feature Story*, 5 *Ohio Lawyers Weekly*, Dec. 24, 2001, at B7 (attorney “brought the challenge in federal court because he knew that, through the certification process, he could skip the drawn-out appeals process he would have faced if it were brought in a state trial court.”).

[FN280]. *Holeton v. Crouse Cartage Co.*, 2000 WL 33356837 (N.D. Ohio Feb. 17, 2000) (amending certification order originally issued Jan. 31, 2000, involving a state fund); *Yoh v. Schlachter*, 2000 WL 281748 (Ohio App. Mar. 17, 2000) (involving a self-insured employer).

[FN281]. *Yoh v. Schlachter*, 734 N.E.2d 377 (Ohio Aug. 30, 2000) (allowing discretionary appeal, but staying for decision in *Holeton*).

[FN282]. *In re Estate of Stewart*, 2000 WL 840512 (Ohio App. June 28, 2000), appeal allowed, 749 N.E.2d 748 (Ohio 2001) (stayed and then decided per *Holeton*).

[FN283]. The same attorney represented the plaintiffs in *Holeton* and in *Yoh*. *Feature Story*, 5 *Ohio Lawyers Weekly*, Dec. 24, 2001, at B7 (“*Yoh v. Schlacter*, which was my case out of the Sixth District Court of Appeals that involved a self-insured employer.”).

[FN284]. *Allstate Ins. Co. v. Randall*, 441 So. 2d 560, 560 (Miss. 1983).

[FN285]. *News Story*, *Ohio Lawyers Weekly*, Dec. 3, 2001, at 1209.

[FN286]. *Jorgensen v. Larsen*, 930 F.2d 922, 1991 WL 55457 at * 3 (10th Cir. 1991) (unpublished) (“We decline to certify this question . . . Plaintiff chose this forum to litigate and could have achieved her desire for a state court ruling had she filed this action in the appropriate state court.”); *Fischer v. Bar Harbor Banking & Trust Co.*, 857 F.2d 4, 8 (1st Cir. 1988) (“We find Fischer’s request for certification particularly inappropriate here. As plaintiff, he had knowledge of the state of the law under his theories of recovery, and had the choice of forums to file suit, either in the local courts or the federal court under diversity jurisdiction.”); *Seaboard Sur. Co. v. Garrison, Webb & Stanaland, P.A.*, 823 F.2d 434, 438 (11th Cir. 1987) (“This is a diversity suit which could have been brought in state court had Seaboard Surety wanted to get a state decision on whether to expand existing law. Having sought a federal forum, Seaboard Surety must abide by a federal determination as to the present state of Florida law.”).

[FN287]. *Goldschmidt*, *supra* note 18, at 50. Forty-nine percent of circuit judges and forty-eight percent of district court judges believe some weight should be given to forum shopping concerns. Fifty-two percent of state court justices believe this factor should be given little or no weight.

[FN288]. *Schaffer v. State Farm Mut. Ins. Co.*, 748 N.E.2d 545 (Ohio 2001) (originally filed in Erie County Court of Common Pleas and removed); *Platte v. Ford Motor Co.*, 738 N.E.2d 379 (Ohio 2000) (originally filed in Hamilton County Court of Common Pleas and removed); *Linko v. Indemnity Ins. Co.*, 739 N.E.2d 338 (Ohio 2000) (originally filed in Summit County Court of Common Pleas and removed); *MetroHealth v. Hoffman-LaRoche*, 670 N.E.2d 1000 (Ohio 1997) (originally filed in Cuyahoga County Court of Common Pleas and removed); *Corwin v. Ford Motor Co.*, 633 N.E.2d 542 (Ohio 1999) (originally filed in Erie County Court of Common Pleas and removed); *Henderson v. Lincoln Nat’l Speciality Ins. Co.*, 626 N.E.2d 657 (Ohio 1994) (originally filed in Lucas County and removed); *Copper v. Buckeye Steel Castings*, 621 N.E.2d 563 (Ohio 1993) (originally filed in Franklin County Court of Common Pleas and removed); *Diamond Club v. Ins. Co. of North America*, 598 N.E.2d 1159 (Ohio 1992) (originally filed in an Ohio court of common pleas and removed).

[FN289]. *Diamond Club v. Ins. Co. of North America*, 984 F.2d 746 (6th Cir. 1993).

[FN290]. *Diamond Club v. Ins. Co. of North America*, 598 N.E.2d 1159 (Ohio 1992).

[FN291]. *Diamond Club*, 984 F.2d at 748

[FN292]. *Nat’l Bank of Washington 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 wanted the Maryland Court of Appeals to rule on the matter, he should not have removed the action to federal court.”); Amer. Law Inst., *Study of the Division of Jurisdiction Between State and Federal Courts*, 296 (Official Draft 1969) (“(T)he courts should also be especially reluctant to certify at the instance of a defendant who has removed a case to federal court. It is ordinarily undesirable to allow a defendant a federal determination of facts and a state determination of state law at the cost

of delay to a plaintiff who was content to have the whole case promptly determined in the state courts.”).

[FN293]. Unfortunately, federal courts did not always adopt this practice. In early certification practice, answers to certified questions were “merely advisory and entitled, like dicta, to be given persuasive but not binding effect as precedent.” *Sun Ins. Office, Ltd. v. Clay*, 319 F.2d 505, 508-09 (5th Cir. 1963). But see *Hopkins v. Lockheed Aircraft Corp.*, 394 F.2d 656, 657 (5th Cir. 1968) ((C)ertification “gives a clear, positive, final decisive answer . . . it is what the law actually is on the precise point presented to us and certified for answer. It is Florida law binding on us as we perform our Erie role.”).

[FN294]. *Mfr. Nat'l Bank of Detroit v. Erie Cty. Road Comm'n*, 963 F.2d 117 (6th Cir. 1992).

[FN295]. *Grover v. Eli Lilly & Co.*, 33 F.3d 716, 718 (6th Cir. 1994) (“(G)iven the status of Ohio law as manifested in the majority and dissenting opinions of the Ohio Supreme Court, plaintiffs should not be precluded from availing themselves of other procedural alternatives.”) (quoting district court decisions).

[FN296]. *Id.*

[FN297]. *Id.* at 719.

[FN298]. *Id.* (citing *Travis v. P.U.C.O.*, 175 N.E. 586 (Ohio 1930) (prohibiting advisory opinions))

[FN299]. See, e.g., *Longway v. Jefferson Cty. Bd. of Supervisors*, 24 F.3d 397, 401 (2d Cir. 1994); *Sifer v. Gen. Marine Catering Co.*, 892 F.2d 386, 391-92 (5th Cir. 1990) (“Ordinarily a state court's answer to a certified question is final and binding . . .”); *Thompson v. Ramirez*, 597 F. Supp. 730, 732 (D.P.R. 1984) ((F)inding state court answer to certified question “final and binding on the parties as to the issue of state law, to be given full res judicata effect by the federal court.”).

[FN300]. *Grover*, 33 F.3d at 719.

[FN301]. See, e.g., U.S. Ct. of App. 2d Cir. § 0.27 (West 2003) (staying federal proceedings pending state court decision); U.S. Ct. of App. 3d Cir. Rule 110.1 (West 2003) (staying federal case to “await state court's decision”); U.S. Ct. of App. 3d Cir., App. I. IOP 10.9 (West 1995) (notifying other judges when certifying question and circulating response when received); U.S. Ct. of App. 7th Cir. Rule 52 (West 2003) (staying federal case; parties response to state court ruling due twenty-one days after opinion issued); U.S. Ct. of App. 10th Cir. Rule 12.7(2) (West 2003) (staying case to await state court's decision).

[FN302]. E.D. Mich., Local Rule 83.40(3).

[FN303]. Presently the Sixth Circuit and Ohio district courts have not promulgated any rules addressing state law question certification.

[FN304]. *Culp v. Toledo*, No. 90-1470 Notice of Withdrawal of Certification (May 13, 1991); *Culp v. Toledo*, 573 N.E.2d 675 (Ohio 1991) (noting federal court has learned of settlement and withdrawn order of reference).

[FN305]. *Watkins v. Transcontinental Ins. Co.*, Notice to Counsel of Record, No. 3:01-1934 (N.D. Ohio 2001) (order issued by Judge Carr).

[FN306]. Call for Comments on Federal Rules of Appellate Procedure sent to Council of Appellate Lawyers/

Appellate Judges Conference (July 17, 2002).

[FN307]. Allen Chase, *A State Court's Refusal to Answer Certified Questions: Are Inferences Permitted?*, 66 *St. John's L. Rev.* 407, 408 n.4 (1992).

[FN308]. Braun, *supra* note 274, at 935 (citing *Grover v. Eli Lilly & Co.*, 33 F.3d 716, 719 (6th Cir. 1994)). See also Note, *Uniform Certification of Questions of Law Act*, 55 *Iowa L. Rev.* 465, 467 (1969).

[FN309]. *Id.*; See also *Peterson v. U-Haul Co.*, 409 F.2d 1174, 1177 (8th Cir. 1989) (predicting is a “hazardous and unsatisfactory method of deciding litigation”).

[FN310]. *Scott*, 577 N.E.2d at 1080.

[FN311]. *Krejci v. Prudential Property & Cas. Ins. Co.*, Certification Order, Docket No. 1:91CV1545 (N.D. Ohio Feb. 28, 1992), at 4.

[FN312]. *Scott*, 577 N.E.2d at 1080 (citing *Nichols v. Eli Lilly & Co.*, 501 F.2d 392, 393 (10th Cir. 1974)).

[FN313]. See Appendix B.

[FN314]. See, e.g., *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997) (validating “reasonable, good-faith interpretations of existing (federal) precedents made by state courts even though they are shown to be contrary to later decisions”).

[FN315]. See generally U.S. Law Week, which often contains the column Circuit Split Round Up.

[FN316]. *Green v. American Tobacco Co.*, 304 F.2d 70, 77 (5th Cir. 1962) (federal judge wrongly predicted Florida law in product liability claim; on rehearing, the federal court certified to the Florida Supreme Court, which “reversed” the prediction).

[FN317]. See, e.g., *U.S. Life Ins. Co. v. Delaney*, 328 F.2d 483, 486-87 n.5-9 (5th Cir. 1964) (collecting cases where state courts held federal courts erred in predicting state law); *W.S. Ranch Co. v. Kaiser Steel Corp.*, 388 F.2d 257, 264-65 nn.11-16 (10th Cir. 1967) (collecting cases) (Brown, J., concurring and dissenting).

[FN318]. See Braun, *supra* note 274, at 937-40 (listing federal cases later found in error by state supreme court decisions).

[FN319]. See *id.* at 938-39 (citing *DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir. 1987), a “particularly poignant case,” where plaintiff sued to recover a Monet painting stolen from her by Nazis, but she “never got her Monet back because an available certification procedure was not used.”).

[FN320]. *Scott v. Bank One Trust*, 577 N.E.2d at 1080 (citing lists and individual cases where federal court predictions were “later rejected” by state supreme courts).

[FN321]. *Sutowski v. Eli Lilly & Co.*, 696 N.E.2d 187, 192 (Ohio 1998) (citing *Kurzci v. Eli Lilly & Co.*, 113 F.3d 1426 (6th Cir. 1997)).

[FN322]. *Genaro*, 703 N.E.2d at 784-85 (citing to and noting split on issue developed within the federal courts of Ohio). See also *Sabin v. Ansorge*, 2000 WL 1774141 (Ohio App. 11th Dist. 2000) (quoting federal district

court's view of Ohio law in support of its own view of Ohio law); [Edelman v. Franklin Iron & Metal Corp.](#), 622 N.E.2d 411, 414 (Ohio App. 2d Dist. 1993) (agreeing with federal district court's criticism of Sixth Circuit opinion's interpretation of Ohio law).

[FN323]. Geri. J. Yonover, [A Kinder, Gentler Erie: Reining in the Use of Certification](#), 47 Ark. L. Rev. 305, 327, 334-43 (1994) (having the federal courts develop state law has positive normative effect and may contribute to greater uniformity among the laws of the various states).

[FN324]. See, e.g., [Griswold v. Fresenius USA, Inc.](#), 964 F. Supp. 1166, 1170 (N.D. Ohio 1997) (citing state appellate court and federal district court opinions to inform analysis of Ohio employment discrimination statute).

[FN325]. [Horace Mann Ins. Co. v. Fore](#), 785 F. Supp. 947, 952 (M.D. Ala. 1992).

[FN326]. [How a Federal Court Determines State Law](#), supra note 19, at 1307 (“(T)he function of a federal court in passing on a state issue is that of prediction concerning what the state supreme court would decide on the same issue. This is, of course, the function of every court in an appellate hierarchy.”).

[FN327]. [Scott](#), 577 N.E.2d at 1080 (“By allocating rights and duties incorrectly, the federal court both does an injustice to one or more parties, and frustrates the state’s policy that would have allocated the rights and duties differently.”).

[FN328]. See generally supra note 14 and accompanying text.

[FN329]. [Hakimoglu v. Trump Taj Mahal Associates](#), 70 F.3d 291, 302-03 (3d Cir. 1995) (Becker, J. dissenting) (“States like New Jersey lacking certification procedures face the threat that federal courts will misanalyze the state’s law, already open to varied interpretations, by inadvertently viewing it through the lens of their own federal jurisprudential assumptions.”).

[FN330]. [Scott](#), 577 N.E.2d at 1080 (citations omitted).

[FN331]. See [Burt Neuborne](#), [The Myth of Parity](#), 90 Harv. L. Rev. 1105, 1120 (1977).

[FN332]. See [Thomas B. Marvell](#), [The Rationales for Federal Question Jurisdiction: An Empirical Examination of Student Rights Litigation](#), 1984 Wis. L. Rev. 1315, 1333 (1984).

[FN333]. *Id.*

[FN334]. Yonover, supra note 323, at 336-37.

[FN335]. [Neal Miller](#), [An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction](#), 41 Am. U. L. Rev. 369, 434 (1992).

[FN336]. See Appendix E.

[FN337]. An Ohio federal judge’s service as an Ohio state judge is the focus of this discussion. Ohio federal judges may also have acquired knowledge of Ohio state law from their experiences practicing law in Ohio, but that factor is not addressed here. See [Dan T. Coenen](#), [To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings](#), 73 Minn. L. Rev. 899, 905 (1989) (examining federal district court judges’ experiences and expertise in state law).

[FN338]. See Appendix F.

[FN339]. *Burgess v. Eli Lilly & Co.*, Order Certifying Questions of Law to the Ohio Supreme Court, No. 91-3718 (6th Cir. March 6, 1992) (Wellford, J., dissenting).

[FN340]. *Id.*

[FN341]. See Appendices D & E.

[FN342]. See, e.g., Michael Wells, *Is Disparity a Problem?*, 22 *Ga. L. Rev.* 283, 335-36 (1988) (suggesting state courts favor the state in constitutional cases, while federal courts favor the individual bringing a constitutional claim).

[FN343]. *Scott*, 577 N.E.2d at 1079 (“Is Rule XVI (now XVIII) of the Ohio Supreme Court Rules of Procedure constitutional under article IV, section 5 of the Ohio Constitution?”).

[FN344]. Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 *Calif. L. Rev.* 1409, 1442 (1999).

[FN345]. *Brady v. Safety-Kleen Corp.*, 576 N.E.2d 722 (Ohio 1991).

[FN346]. 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, 731 (1969) (history of certification shows it is “neither plain, nor speedy, nor efficient”), David P. Currie, *The Federal Courts and the American Law Institute: Part II*, 36 *U. Chi. L. Rev.* 268, 317 (1969) (suggesting that judicial economy would support letting the federal court answer the question themselves); Roth, *supra* note 19, at 2-3 (“Unfortunately, a flaw developed in the (certification) process. The burgeoning caseload of the Supreme Court of Florida produced length delays in the certification process. As a result, the Fifth Circuit has been reluctant to certify state law questions . . .”).

[FN347]. See *Hakimoglu v. Trump Taj Mahal Assoc.*, 70 F.3d 291, 302-04 (3d Cir. 1995) (observing that certification might not be a speedy process: “Moreover, neither the casinos nor Hakimoglu, with all their resources, require immediate resolution of the matter.”); *In re Sullivan*, 200 B.R. 682, 684 (Bankr. D. Nev. 1996) (declining to certify question because “eighteen to twenty-four months would be required before (the Nevada Supreme Court) could enter a decision if this matter were certified to it . . .”).

[FN348]. Appendix G.

[FN349]. *Pullman*, 312 U.S. 496. *Pullman* is the relevant abstention doctrine; certification does not affect other forms of abstention. See Wright, *supra* note 21, at § 4248 (noting other forms of abstention remove a case from federal court, rather than returning the case to federal court to have that court apply the state court’s decision of state law).

[FN350]. *Western Helicopter*, 811 P.2d at 632. See also Smith, *supra* note 60, at 656 n.43 (“certification is preferable to the (albeit rare cases of) diversity abstention.”).

[FN351]. This number does not reflect unpublished orders, rulings from the bench and other rulings not appearing on a database search of the “Sixth Circuit-all” for the terms *Pullman* and abstention.

[FN352]. *Fifth Column, LLC v. Village of Valley View*, 221 F.3d 1334 (6th Cir. 2000); *Assoc. Gen'l Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730 (6th Cir. 2000); *Bennafield v. City of Canton Police Dep't.*, 856 F.2d 192 (6th Cir. 1988); *Allen v. Leis*, 154 F. Supp.2d 1240 (S.D. Ohio 2001); *F & G Ins. Underwriters, Inc. v. Nocero*, 2001 WL 1792448 (N.D. Ohio Dec. 13, 2001); *Chamber of Commerce of U.S. v. Ohio Elections Comm'n*, 135 F. Supp.2d 857 (S.D. Ohio 2001); *J.L. Spoons, Inc. v. Brown*, 40 F. Supp.2d 902 (N.D. Ohio 1999); *Herbst v. Voinovich*, 9 F. Supp.2d 828 (N.D. Ohio 1998); *Summit County Crisis Pregnancy Ctr., Inc. v. Fisher*, 830 F. Supp. 1029 (N.D. Ohio 1993); *MacMillan v. City of Rocky River*, 748 F. Supp. 1241 (N.D. Ohio 1990).

[FN353]. *Gottfried v. Medical Planning Servs., Inc.*, 142 F.3d 326 (6th Cir. 1998); *Slyman v. City of Willoughby, Ohio*, 134 F.3d 372 (6th Cir. 1998).

[FN354]. In one case, a litigant moved to remove the case to state court “or, in the alternative, to certify state law questions to the Ohio Supreme Court.” *F & G Ins. Underwriters*, 2001 1792448, at * 1. Reading the intent behind the misguided motion to remove, the judge, sua sponte, raised, but then rejected, all forms of abstention. *Id.* at * 10.

[FN355]. David P. Currie, *The Federal Courts and the American Law Institute: Part II*, 36 U. Chi. L. Rev. 268, 317 (1969) (judicial economy would support letting the federal court answer the question themselves).

[FN356]. *Copper v. Buckeye Steel Castings*, 16 F.3d 1218 (6th Cir. 1994).

[FN357]. *Id.*

[FN358]. *Fabens v. USAir, Inc.*, 670 N.E.2d 1000 (Ohio 1996).

[FN359]. *Fabens v. USAir, Inc.*, 101 F.3d 702 (6th Cir. 1996).

[FN360]. *Allstate Ins. Co. v. Cutcher*, 920 F. Supp. 796, 798 (N.D. Ohio 1996).

[FN361]. *Id.*

[FN362]. Office of Human Resources and Statistics, Statistics Division, Table C-5, U.S. District Courts-Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the Twelve Month Period Ending March 31, 2002, (March 31, 2002) available at <http://www.uscourts.gov/caseload2002/tables/c05mar02.pdf>

[FN363]. A notable exception is *Scott v. Bank One Trust*, 577 N.E.2d at 1079-81, where the Court addressed its ability to receive certified questions, federal courts' inaccurate predictions, and the constitutionality of Ohio's Supreme Court Rule of Practice XVIII.

[FN364]. See, e.g., *Allstate Ins. Co. v. Cutcher*, 654 N.E.2d 980 (Ohio 1995) (declining certified questions without opinion).

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