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CERTIFICATION AFTER *ARIZONANS FOR OFFICIAL ENGLISH V. ARIZONA*: A SURVEY OF FEDERAL APPELLATE COURTS' PRACTICES

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INTRODUCTION

Certification of state law questions to state courts allows a dialogue between federal and state courts over questions of common concern. The process of certification generally involves a federal court sending a difficult or novel question of state law to that state's highest court, whereupon the state court responds with an answer that is authoritative. It does not, however, require the federal court to relinquish jurisdiction over the proceedings while the parties litigate the issue in state court. As a result, certification has the potential to diminish tension between federal and state courts' respective roles in a federalist system while improving efficiency and accessibility for litigants.

While certification is not without its critics, it has been an important component of the federal courts' toolkit since the Supreme Court initially endorsed the use of certification in *Clay v. Sun Insurance Office Ltd.*[1] In the years since *Clay*, more states have adopted certification procedures and more federal courts have relied upon certification when faced with novel questions of state law. In *Arizonans for Official English v. Arizona*,[2] the Supreme Court expanded the role of certification when it directed lower courts to certify questions of state law in cases where previously they would have abstained under the *Pullman* doctrine—a doctrine which allows federal courts to abstain in certain cases involving federal constitutional challenges to state laws.[3]

In this article, I examine the development of certification law in the years following the Supreme Court's decision in *Arizonans for Official English*. This article seeks to determine whether federal appellate courts have followed the Supreme Court's directive to certify when previously they would have abstained pursuant to the *Pullman* doctrine. Specifical-

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1. 363 U.S. 207 (1960). *Clay* was a federal diversity case that involved a novel question of Florida law. The Court commended the Florida Legislature for its "rare foresight" in passing a law that allowed federal courts to certify questions of state law to the Florida Supreme Court. *Id.* at 212.

2. 520 U.S. 43 (1997).

3. *Id.* at 75–76. The Supreme Court first announced the *Pullman* doctrine in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). The doctrine is discussed more fully in Part II of this article.

ly, this article catalogues the analytical frameworks federal courts use when determining whether to certify a question of state law in a case that presents *Pullman* considerations and assesses whether these frameworks are consistent with *Arizonans*—and, as an intertwined inquiry, whether they produce *results* that are consistent with *Arizonans*. After concluding that the federal appellate courts' analytical approach to certification in *Pullman*-type cases is inconsistent and frequently at odds with *Arizonans*, this article recommends that courts follow a formal framework that promises analytical consistency and compliance with the directive of *Arizonans*.

Since *Arizonans for Official English*, the Supreme Court has remained relatively silent on questions concerning when and whether to certify. The *Arizonans* decision provided a relatively clear directive—certify when previously you would have abstained pursuant to *Pullman*—but the federal appellate courts have not implemented this rule consistently or predictably. Both *Pullman* abstention and *Arizonans* certification promote federalism values such as comity,[4] but *Arizonans* certification nearly always improves judicial efficiency while reducing the parties' litigation time and costs.[5] By adopting a clear and consistent framework to analyze whether certification is appropriate in cases involving *Pullman* considerations, the courts of appeals will provide valuable guidance to federal district courts. They will also promote the values that are at the core of the *Arizonans* and *Pullman* decisions—namely, federal-state comity and the efficient use of both the judiciary's and litigants' resources.

To provide a foundation for the discussion of the federal appellate courts' implementation of *Arizonans for Official English*, Part I begins with a description of the formation of the *Pullman* doctrine as well as the *Arizonans* decision and its impact on the doctrine of *Pullman* abstention. Part II discusses the doctrinal and pragmatic considerations that might lead a court to find abstention preferable to certification, even after the Supreme Court's decision in *Arizonans*. I conclude that there are relatively few considerations that should sway a court to abstain rather than certify, but note that these considerations remain important and should inform courts' analyses. With this framework in place, Part III provides an overview of the federal appellate courts' approaches to analyzing whether to abstain or certify in *Pullman*-type cases decided since *Arizonans*. The analysis has varied dramatically, from circuit to circuit, and even within circuits. I conclude that the vast range of analytical approaches used by the federal appellate courts produces confusing case

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4. *See generally* Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293 (2003) (describing a "crisis" in the balance between state courts and lower federal courts and prescribing more federal court certification as one way to address the crisis in comity).

5. *See infra* Part I.C.

law that is often at odds with *Arizonans*. In Part IV, I propose an analytic framework that has the potential to provide clarity and consistency to this rather muddled field of law.

I. RAILROAD PORTERS AND THE LANGUAGE OF STATE GOVERNMENT: A SUMMARY OF THE *PULLMAN* AND *ARIZONANS FOR OFFICIAL ENGLISH* DECISIONS

A. Railroad Commission of Texas v. Pullman Co.[6]

In 1941, the Supreme Court decided *Railroad Commission of Texas v. Pullman Co.* The case involved a challenge to the Railroad Commission's decision to require that all sleeping cars operated on Texas rail lines be continuously attended by Pullman conductors.[7] It had been the Pullman Company's practice, on lesser-traveled routes with only one sleeper car on a train, to staff the train with a Pullman porter rather than a conductor.[8] As the United States Supreme Court explained, it was "well known" that Pullman porters were African-American while Pullman conductors were white.[9] The Pullman porters intervened in the lawsuit brought by the Pullman Company challenging the Commission's order, arguing that the order was "a discrimination against Negroes in violation of the Fourteenth Amendment."[10] The cases also presented an unsettled issue of state law, namely whether the Railroad Commission had the power to issue the order that the Pullman Company and Pullman porters were challenging.[11]

Rather than decide the constitutional issue,[12] the Court turned instead to the state issue.[13] The Court held that the federal district court, when presented with the question of state law, should have "exercise[d] its wise discretion by staying its hands."[14] In explaining its decision, the Court emphasized the "sensitive" nature of the constitutional issue and determined that "[s]uch constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy."[15] In a nutshell, the *Pullman* doctrine today stands for the proposition that a federal court, when faced with a tough constitutional question that could be avoided if a state law question were decided in a certain way, should exercise its discretion to abstain from addressing the state law question if it is difficult, sensitive, or relates to an important

6. 312 U.S. 496 (1941).
7. *Id.* at 497–98.
8. *Id.* at 497.
9. *Id.*
10. *Id.* at 498.
11. *Id.* at 498–99.
12. Note that the Court heard this case over a decade before deciding *Brown v. Board of Education*, 347 U.S. 483 (1954).
13. *See Pullman*, 312 U.S. at 501.
14. *Id.*
15. *Id.* at 498.

governmental function.[16] The federal court should then direct litigants to bring their claims in state court, so that a state court may decide novel or unsettled questions of state law. If the federal issue is not precluded by the decision in the state court, the litigants may return to federal court for the resolution of the case.[17]

The doctrine of *Pullman* abstention remains an important limitation on the role of federal courts. The principles underlying the Supreme Court's directive to abstain from answering the state law question in *Pullman* remain vital to ongoing discussions about the proper role of federal courts, notably in that the opinion's reasoning relied upon the Court's assessment that abstention could promote federal–state comity. The *Pullman* Court emphasized that, at least in cases brought at equity, an "unnecessary ruling" on a question of state law made by a federal court would not further the "reign of law" if it were subsequently supplanted by a state court decision.[18] The Court also reasoned that such a ruling might create friction between the federal and state systems.[19]

This doctrine is not without limitations. The most relevant to this article is a policy against abstaining in cases in which plaintiffs seek to vindicate First Amendment rights. The Supreme Court has explained that, "[i]n such case to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect."[20] Federal appellate courts have generally followed this rule, and have declined to abstain in cases involving allegations that a state law violates the First Amendment.[21]

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16. *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 76 (1997):

> Designed to avoid federal-court error in deciding state-law questions antecedent to federal constitutional issues, the *Pullman* mechanism remitted parties to the state courts for adjudication of the unsettled state-law issues. If settlement of the state-law question did not prove dispositive of the case, the parties could return to the federal court for decision of the federal issues.

For the purposes of this article, I refer to cases that present these characteristics—a federal challenge to a state law that has not yet been interpreted by that state's highest court—as a case presenting or involving "*Pullman* considerations." This simply means that these are cases in which a court prior to *Arizonans* would have looked to the *Pullman* decision and weighed these factors before determining, in its discretion, whether abstention was proper.

17. *See* England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 421–22 (1964).

18. *Pullman*, 312 U.S. at 500.

19. *Id.*

20. Zwickler v. Koota, 389 U.S. 241, 252 (1967); *see also* Baggett v. Bullitt, 377 U.S. 360, 378–79 (1964) ("We also cannot ignore that abstention operates to require piecemeal adjudication in many courts, . . . thereby delaying ultimate adjudication on the merits for an undue length of time, . . . a result quite costly where the vagueness of a state statute may inhibit the exercise of First Amendment freedoms." (citations omitted)).

21. *See, e.g.*, Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth., 134 F.3d 87, 94 (2d Cir. 1998) ("If abstention is normally unwarranted where an allegedly overbroad state statute, challenged facially, will inhibit allegedly protected speech, it is even less appropriate here, where such speech has been specifically prohibited. Abstention would risk substantial delay while Bad Frog litigated its state law issues in the state courts."); Cate v. Oldham, 707 F.2d 1176, 1184 (11th Cir. 1983) ("Ab-

Subsequent cases have determined *Pullman*'s applicability to new situations, including claims that invoke federal statutes rather than the federal constitution,[22] civil rights claims brought under 42 U.S.C. § 1983,[23] instances in which the federal court abstains and the state court decides both the state and the federal issues,[24] and cases involving any type of discretionary relief.[25] In the process, the Supreme Court has ensured the longevity and continued relevance of the *Pullman* doctrine.

B. Arizonans for Official English v. Arizona[26]

In 1997, the Supreme Court decided *Arizonans for Official English v. Arizona.* The Court relied upon a line of cases supporting the federal courts' use of state law certification procedures in holding that the federal court should have certified the central state law issue.[27] This holding established a new set of rules for courts faced with cases that involve *Pullman* considerations.

Arizonans involved a federal constitutional challenge to an amendment to the Arizona Constitution that declared English to be Arizona's official language and "the language of . . . all government functions and actions."[28] A state employee, Maria-Kelly Yniguez, working as an insurance claims manager for the state's Department of Administration brought suit in federal court against the State of Arizona, Arizona's governor, and several other state officials.[29] She claimed that the Arizona amendment violated the First and Fourteenth Amendments to the U.S.

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stention is to be invoked particularly sparingly in actions involving alleged deprivations of First Amendment rights . . . .").

22. *See, e.g.*, Propper v. Clark, 337 U.S. 472, 490, 492 (1949) (holding that *Pullman* abstention was not appropriate to avoid the decision of sensitive non-constitutional issues).

23. *See, e.g.*, Harrison v. NAACP, 360 U.S. 167, 169, 176–77 (1959) (holding that *Pullman* abstention is appropriate in cases brought under 42 U.S.C. §1983). Section 1983 provides a cause of action for many plaintiffs alleging federal constitutional violations. It provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2006).

24. *See, e.g.*, England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 421 (1964) (holding that, when the state court addresses both state and federal issues, the federal plaintiff is bound by res judicata only if the plaintiff "voluntarily . . . and fully litigated his federal claims in the state courts").

25. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 719, 731 (1996) (discussing general principles of abstention and noting "we have recognized that the authority of a federal court to abstain from exercising its jurisdiction extends to all cases in which the court has discretion to grant or deny relief").

26. 520 U.S. 43 (1997).

27. *Id.* at 77 (citing Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S 383, 393–96 (1988); Bellotti v. Baird, 428 U.S. 132, 148 (1976); Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974)).

28. *Id.* at 48 (alteration in original) (quoting ARIZ. CONST. art. XXVIII, §1(1)–(2)).

29. *Id.* at 48–50.

Constitution.[30] Yniguez, who was fluent in both Spanish and English, alleged that her work handling medical malpractice claims required significant interactions with the public and that, when working with members of the public who only spoke Spanish, she spoke with them in Spanish.[31] She brought suit because she believed that her Spanish-language interactions might lead to the termination of her employment or other sanctions, and she requested injunctive and declaratory relief that the Arizona amendment violated the U.S. Constitution.[32]

Prior to trial, the Arizona Attorney General issued an official opinion that the amendment to the Arizona Constitution must be read to apply only to "official acts of government," and therefore that it did not apply to "the delivery of governmental services."[33] The attorney general reached this conclusion, at least in part, because he was obliged to read this amendment "in line . . . 'with the United States Constitution.'"[34] The Arizona Attorney General had asked both the district court and the court of appeals "to seek, through [Arizona's] certification process, an authoritative construction of the new measure from the Arizona Supreme Court."[35] Despite the Arizona Attorney General's opinion and request for certification, both the United States District Court for the District of Arizona and the Ninth Circuit Court of Appeals declined to certify the issue to the Arizona Supreme Court and found that the amendment was "fatally overbroad."[36]

The U.S. Supreme Court chastised the lower courts for failing to certify to the Arizona Supreme Court the issue of the proper construction of the constitutional amendment. The Court declared that "[c]ertification today covers territory once dominated by a deferral device called '*Pullman* abstention.'"[37] The Court emphasized that federal courts should not reach constitutional questions unless necessary to resolve the case. The Court reasoned that the Arizona Attorney General's actions in this case—namely, issuing an opinion that indicated Yniguez's actions were not unlawful under the Arizona amendment and requesting that the district court and the court of appeals certify the issue to the Arizona Supreme Court—suggested that the constitutional issue might be easily avoided by a narrowing construction of the Arizona amendment.[38] Indeed, the Court's opinion notes that the amendment's sponsors affirmed at oral argument before the Court that the attorney general's narrow construction was the correct one—and this construction, all parties seemed

30. *Id.* at 50.
31. *Id.*
32. *Id.* at 50–51.
33. *Id.* at 52 (quoting Op. Att'y Gen. No. I89-009 (1989)).
34. *Id.* (quoting Op. Att'y Gen. No. I89-009 (1989)).
35. *Id.* at 75.
36. *Id.* at 54–55, 62.
37. *Id.* at 75.
38. *Id.* at 75, 77.

to agree, would avoid the constitutional issue presented by this case.[39] Finally, the Court noted that this question was particularly appropriate for the state courts to decide because it touched upon a matter of "importance to the conduct of Arizona's business."[40]

In determining that the lower federal courts should have certified the state law issue to the Arizona Supreme Court, the *Arizonans* Court noted that *Pullman* abstention was "[a]ttractive in theory" but "protracted and expensive in practice."[41] The Court emphasized, by comparison, the virtues of certification, inasmuch as it "allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response."[42] The Court relied upon previous cases in which it had found certification the appropriate course of action[43]—most notably, *Bellotti v. Baird*,[44] which held certification to be appropriate in a federal constitutional challenge to a state law restricting access to abortion.[45] Today, *Arizonans for Official English* stands for the idea that federal courts should certify where previously they would have abstained under the *Pullman* doctrine.[46]

C. The Relative Merits of Certification

As *Arizonans for Official English* emphasized,[47] *Pullman* abstention involves considerable expense to litigants, lengthens the litigation timeline, and makes inefficient use of judicial resources.[48] In a 1977 law review article, Martha Field summarized the problems associated with abstention:

> [E]xtreme delays inherent in the abstention procedure, and the attendant expense, have been chronicled many times. Essentially, the parties to a case in which abstention is ordered must undergo two law-

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39. *Id.* at 78.

40. *Id.*

41. *Id.* at 76.

42. *Id.* Note that certification is not limited to *Pullman*-type situations. Indeed, certification may be an appropriate option in federal cases not invoking federal question jurisdiction. *See* RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1201 (5th ed. 2003) (describing cases prior to *Arizonans for Official English*, in which the Supreme Court endorsed the use of certification in cases not involving federal constitutional challenges to state laws).

43. *See Arizonans for Official English*, 520 U.S. at 76.

44. 428 U.S. 132 (1976).

45. *Id.* at 151:

> The importance of speed in resolution of the instant litigation is manifest. Each day the statute is in effect, irretrievable events, with substantial personal consequences, occur. Although we do not mean to intimate that abstention would be improper in this case were certification not possible, the availability of certification greatly simplifies the analysis.

46. *See Arizonans for Official English*, 520 U.S. at 75. Note, however, that *Arizonans* had other holdings unrelated to the abstention/certification issue. *See id.* at 64–67 (standing); *id.* at 68–71 (mootness).

47. *Id.* at 77.

48. *See* Martha A. Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590, 591 (1977).

> suits instead of one, because their cause is bifurcated between state and federal courts. When a federal court abstains in an action before it, the plaintiffs must commence a new lawsuit in state trial court, usually a declaratory judgment action, to have the unclear issue of state law resolved. They must work their way up through the state appellate system, usually without getting any priority on crowded state dockets, before the state issue is settled, so that they can return to the federal system for resolution of federal issues, with the attendant appeals. The prospect is hardly a happy one for litigants. It may deter them from seeking a federal forum in the first instance, or it may, once abstention is ordered, induce them to cut their costs by presenting all issues to the state court for decision and waiving their right to return to federal court on the federal issues.[49]

While certification is generally more efficient and entails less delay than abstention, the procedure is not without its critics.[50] Nevertheless, faced with a choice between certification and abstention, certification will almost always be the speedier, more efficient, and most cost-effective option.[51]

Some who criticize certification (and abstention, for that matter) have questioned whether these procedures actually promote federal–state comity, as their supporters claim.[52] For instance, in an article criticizing what he viewed as the overuse and misuse of certification, Judge Selya of the First Circuit Court of Appeals wrote, "In the end, I believe that it engenders more understanding, and a healthier respect for state courts and what they do, when federal courts tackle the complexities of state law head on."[53] Others, such as Jonathan Remy Nash, question whether certification is consistent with the constitutional and statutory limits on

49. *Id.*

50. *See, e.g.*, Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .* , 29 SUFFOLK U. L. REV. 677 *passim* (1995). *But see* Eric Eisenberg, *A Divine Comity: Certification (at Last) in North Carolina*, 58 DUKE L.J. 69, 77–81 (2008) (noting that a well-drafted certification procedure, combined with the state's highest court's judicious use of its discretion, could avoid many of the pitfalls of certification).

51. *See, e.g.*, Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 217 (2003) (cataloguing delays of over one year in Ohio's response to certified questions, but noting that "even waiting a year for an answer to a certified question answer pales when compared to the time elapsed under abstention"); Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 FORDHAM L. REV. 373, 397 (2000) (noting that New York courts have generally responded to certified questions of law within six months of accepting the certified question); *see also* Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify State Law*, 88 CORNELL L. REV. 1672, 1698 (2003) ("[C]ertification avoids procedural complications that might hinder the state court system's resolution of the state law question were abstention employed."). *But see* Selya, *supra* note 50, at 688 (noting that both certification and abstention require "piecemeal litigation spanning two separate court systems—and such divisions are notoriously inefficient").

52. *See, e.g.*, Selya, *supra* note 50, at 684–87 (emphasizing that certification is a one-way street and noting that to allow state courts to certify questions of federal law to federal courts would undermine the constitutional role of state courts in the federal system).

53. *See id.* at 687.

federal jurisdiction.[54] Nash has argued that certification "raises serious questions of federal jurisdiction," and that its "jurisdictional underpinnings" are inherently weak.[55]

Additionally, some judges and practitioners have been critical of the results that certification produces in practice. Several commentators have noted that problems arise when federal courts do not "artfully present[]" the questions that they wish answered.[56] Other commentators have criticized state courts when they dismiss a certified question without explanation, arguing that "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 [state] certification."[57] Judge Selya has argued that "the advisory nature of certified questions poses a psychological barrier to enthusiastic engagement with the issues."[58] State courts are not given jurisdiction over the cases in which questions are certified to them,[59] but their answers are binding on the federal court and on future litigants.[60] Judge Selya concludes that this lack of jurisdiction and the resulting "psychological barrier" leads state courts to treat the certified issue differently than they would if it were a live case or controversy that had worked its way through the state court system.[61]

Despite these criticisms of both the theory and practical problems underlying certification, it is generally accepted that certification is preferable to the lengthy and expensive process associated with abstention.[62]

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54. Nash, *supra* note 51, at 1672 (concluding that certification can be understood under both a "unitary" and a "binary" conception, but that neither framework can provide a full foundation for both constitutional and statutory jurisdiction).

55. *See id.* at 1748–49.

56. Selya, *supra* note 50, at 689; *see also* Cochran, *supra* note 51, at 198 (noting that most questions certified to the Ohio Supreme Court failed to meet the court's requirement that the certified question be a pure question of law); Kaye & Weissman, *supra* note 51, at 404–414 (outlining cases in which the New York Court of Appeals declined to answer certified questions).

57. Cochran, *supra* note 51, at 179; *see also* Selya, *supra* note 50, at 681–82; 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).

58. Selya, *supra* note 50, at 682.

59. *But see* Nash, *supra* note 51, at 1675:

> First, the unitary conception applies when a federal court that certifies a question to a state high court is understood to transfer the very case that is before it (or some portion thereof) to the state court. The state court considers and responds to the questions of state law, whereupon the federal court regains control of the case. Under this conception, there is one, unitary case, with jurisdiction shifting from the federal court to the state court and then back to the federal court.

60. 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3d §4248 (2007 & Supp. 2009).

61. Selya, *supra* note 50, at 682.

62. *See, e.g.*, *id.* at 688 (arguing that both certification and abstention are problematic and that federal courts should "abjur[e]" from piecemeal litigation, but not disputing the claim that certification, as compared to abstention, is somewhat more efficient); *see also* Kaye & Weissman, *supra* note 51, at 384–85:

> Supreme Court support for certification has been widely echoed. In 1967, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Certification

And, given the Supreme Court's strong endorsement of the use of certification in *Pullman*-type cases,[63] it appears that, for these cases at least, certification is here to stay.

II. SITUATIONS IN WHICH A COURT MIGHT CHOOSE TO ABSTAIN RATHER THAN CERTIFY

The consensus among commentators appears to be that, when choosing between abstention and certification, federal courts ought to choose the latter, both for doctrinal and pragmatic reasons.[64] Why, then, would any court abstain, given the very tangible advantages of certification and the U.S. Supreme Court's endorsement of the certification process? This section details those scenarios in which a court may decide to abstain without contravening the Supreme Court's directive in *Arizonans for Official English*. These procedures are necessarily intertwined: as more courts certify in *Pullman*-type cases, it follows that courts should resort to *Pullman* abstention with decreasing frequency.

Federal courts' doctrine provides several scenarios in which a federal court should abstain rather than certify. In *Pennhurst State School & Hospital v. Halderman*,[65] the Supreme Court expanded its Eleventh Amendment jurisprudence to hold that a federal court could not enjoin a state official from violating state law.[66] If a federal court certified a question of state law to the state's highest court in order to avoid a federal constitutional issue under *Arizonans* and *Pullman*, the *Pennhurst* doctrine would nevertheless prevent the federal court from granting injunctive relief if the state court's response made clear that a state official's actions were not consistent with state law. In that scenario, the court would not need to reach the federal constitutional issue, because of the state court's response; but it would also be unable to grant an injunction ordering the state official to comply with state law. In other words, certification for *Pullman* reasons cannot deal with the *Pennhurst* problem, and the parties would need to re-litigate the issue in state courts. In such

of Questions of Law Act. . . . In 1969, the American Law Institute chimed in with its support, as did the American Bar Association in 1977. In 1992, the National Conference on State–Federal Judicial Relationships suggested that certification could enhance judicial federalism, and in 1995, the Committee on Long Range Planning of the United States Judicial Conference recommended that states without certification procedures adopt them.

63. Arizonans for Official English v. Arizona, 520 U.S. 43, 75–80; *see also* Bellotti v. Baird, 428 U.S. 132, 150–51 (1976) (emphasizing the virtues of certification in a federal constitutional challenge to a state law that had not been interpreted by the state's highest court); Lehman Bros. v. Schein, 416 U.S. 386, 390–91 (1974) (emphasizing relative merits of certification when a diversity case presents an unclear issue of state law).

64. *See* sources cited *supra* note 62.

65. 465 U.S. 89 (1984). Specifically, *Pennhurst* created an exception to the rule established in *Ex parte Young*. *Id.* at 105–06. *Young* held that, even though the Eleventh Amendment barred suits against the states, plaintiffs could sue state officials seeking relief against state action. *Ex parte* Young, 209 U.S. 123, 159–60 (1908). *Pennhurst* limited *Young*'s reach, and thus limited the exception to the Eleventh Amendment's reach.

66. *Pennhurst State Sch. & Hosp.*, 465 U.S. at 117.

a situation, certification is inadequate, and the federal court would need to abstain while the state court addressed the state law issues and determined whether an injunction would be appropriate relief.

An example of this *Pullman–Pennhurst* scenario arose in *University of Utah v. Shurtleff*.[67] In *Shurtleff*, the United States District Court for the District of Utah heard a case brought by the University of Utah against the state attorney general. The University sought equitable relief and a judgment that the University's firearm policy banning concealed weapons was: (1) protected by the First and Fourteenth Amendments of the U.S. Constitution, (2) protected by a provision of the Utah Constitution that purported to give autonomy to the University, and (3) not actually in conflict with the state's concealed weapons laws.[68] The court found that the *Pennhurst* decision would prevent it from granting the requested equitable relief—enforcement of state law against a state official.[69] Ultimately, the court decided to dismiss the state law claims against Utah's attorney general because of the Eleventh Amendment protections announced in *Pennhurst*.[70] As to the remaining federal claim, the court noted that it was left with "jurisdiction over a meaty federal constitutional claim that could be rendered moot by a favorable state court decision on either of [the] state law claims."[71] Citing *Pullman* and other cases for the principle that questions of state law should be resolved before proceeding to substantial federal constitutional questions, the court determined that *Pullman* abstention was appropriate.[72] Given that the plaintiffs would need to bring the state law claims before the state court system, certification would offer none of its usual advantages. Indeed, certification in this case might have been more inefficient—inasmuch as it likely would have involved the state's highest court answering a state law question in the abstract and then later hearing an appeal of the same issues brought by the same plaintiffs.

Federal courts' doctrine creates another situation in which abstention will generally be preferable to certification, namely, when abstention is mandated under another doctrine. Most prominent amongst the other abstention doctrines is the *Younger* doctrine.[73] *Younger* requires federal courts to abstain when an injunction is sought to stay ongoing criminal proceedings.[74] Subsequent decisions extended *Younger* to cases in which declaratory judgment was sought,[75] to some cases in which the federal

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67. 252 F. Supp. 2d 1264 (D. Utah 2003).
68. *Id.* at 1266–67.
69. *Id.* at 1282.
70. *Id.* at 1281–83.
71. *Id.* at 1283.
72. *Id.* at 1284–85.
73. *See* Younger v. Harris, 401 U.S. 37 (1971).
74. *Id.* at 41. Note that, unlike *Pullman*, the *Younger* doctrine of abstention is not discretionary. *Id.*
75. Samuels v. Mackell, 401 U.S. 66, 68–69 (1971).

plaintiffs brought suit before state criminal proceedings,[76] to civil enforcement cases brought by the state,[77] and even to some cases not brought by the state but which involved important state interests.[78] It would defy logic for the federal court to certify the state law question that gave rise to *Pullman* considerations if another doctrine, such as *Younger* or *Burford*[79] or *Colorado River*,[80] would require abstention.

In addition to the limitations imposed by doctrines of federal courts and federal jurisdiction, a number of pragmatic considerations might lead a federal court to abstain rather than to certify. A federal court might note that parallel proceedings in state court already exist, such that it would be inefficient and cumbersome to certify a question to the state's highest court when there is already a case working its way through the state court system that will present the same issue to the state's highest court with a full factual record and without any of the disadvantages of certification. Alternatively, a federal court might decide that questions of state law are so predominant that abstention would actually be more efficient.[81] Finally, a federal court might decide that the state law question is so fact intensive that the state court would be unable to provide a fair and reasoned answer without its own fact-finding trial procedure.

A federal court may also be limited by the certification rules of the state whose law is in question. Certification procedures vary from state to state. In California, for example, a federal district court may not certify questions of state law to the California Supreme Court; the California Rules of Court provide for certification of questions only from "the United States Supreme Court, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth."[82] The Delaware Supreme Court Rules prohibit that state's highest court from accepting a

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76. Hicks v. Miranda, 422 U.S. 332, 348–49 (1975). *But see* Doran v. Salem Inn, Inc., 422 U.S. 922, 930–31 (1975).

77. Trainor v. Hernandez, 431 U.S. 434, 444 (1977).

78. *See, e.g.*, Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 16–17 (1987).

79. Burford v. Sun Oil Co., 319 U.S. 315, 333–34 (1943) (requiring abstention where a complex state administrative scheme that is overseen by the state courts presents a better forum for adjudicating the case at issue in the federal court).

80. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817–18 (1976) (creating a narrow exception to the general rule that pendant proceedings in state court do not bar related proceedings in federal court).

81. In a federal question case, these additional state law issues would likely be brought in by the parties' use of supplemental jurisdiction, under 28 U.S.C. § 1367(a) (2006). *See, e.g.*, Shegog v. Bd. of Educ. of the City of Chi., 194 F.3d 836 (7th Cir. 1999). In that case, discussed in Part III.G, *infra*, the Seventh Circuit heard an appeal involving one federal claim and many state law claims. *Id.* at 837. The Seventh Circuit abstained, rather than certifying, but the court's reasoning deviated from the *Arizonans for Official English* framework, inasmuch as the court justified not certifying because it feared that this would "short-circuit" the process of decision by state courts. *Id.* at 840. If, however, the Seventh Circuit had emphasized that certification was less appropriate than abstention, because abstention might actually be more efficient for litigants and the courts, then it would have been consistent with the holding and reasoning of *Arizonans*.

82. CAL. R. CT. 8.548.

certified question where any of the material facts are in dispute.[83] And one state, North Carolina, does not provide for any certification of questions to its highest court.[84] Furthermore, many states' certification procedures give the state's highest court the discretion whether to accept the certified question.[85] Consequently, a federal court may correctly certify a question, only to have the highest state court decline to answer. In these situations, where certification is unavailable because of state certification rules or because of a state court's exercise of its discretion, a federal court considering *Pullman* abstention should either abstain or decide the state law issue on its own.

III. WHEN DO COURTS ABSTAIN AND WHEN DO THEY CERTIFY?

As the previous sections have shown, federal courts considering *Pullman* abstention *should* certify a question of state law rather than abstain. This section analyzes when they actually certify instead of abstain. Of course, a court may decide to abstain or decide the legal issue itself if it relies upon case-specific reasons—such as those discussed in the previous section—that make certification less attractive or feasible than abstention. An examination of federal case law since *Arizonans for Official English* reveals, however, that most circuits' practices do not conform neatly to these rules. Some circuits, such as the Second Circuit, have endeavored to follow the guidance provided by the U.S. Supreme Court. Other circuits, however, have seemed less concerned with the intent of *Arizonans* and have either applied an inconsistent approach to these cases or have generally preferred abstention to certification.

This section details the varied approaches taken by different circuits, with attention to the structure and reasoning employed by the various courts of appeals as they assess whether to abstain or certify. The following catalogue of cases includes descriptions of nearly every case decided since *Arizonans for Official English* in which a federal appellate court has abstained or certified a question of state law in a case involving *Pullman* considerations. The cases are organized by circuit and in chronological order within each circuit. This list does not include cases involving questions of law from states that, at the time the case was de-

83. DEL. SUP. CT. R. 41(b).

84. *See* Eisenberg, *supra* note 50, at 71.

85. *See, e.g.*, DEL. SUP. CT. R. 41(b) ("Certification will be accepted in the exercise of the discretion of the Court only where there exist important and urgent reasons for an immediate determination by this Court of the questions certified."); HAW. R. APP. 13(a):

> When a federal district or appellate court certifies to the Hawai'i Supreme Court that there is involved in any proceeding before it a question concerning the law of Hawai'i that is determinative of the cause and that there is no clear controlling precedent in the Hawai'i judicial decisions, the Hawai'i Supreme Court may answer the certified question by written opinion.

OR. R. APP. P. 12.20(3) ("The Supreme Court will consider whether to accept a question certified to it without oral or written argument from the parties unless otherwise directed by the Supreme Court."); *see also* Cochran, *supra* note 51, at 176 (noting that the Ohio Supreme Court often declines to explain its exercise of its discretion when deciding not to answer certified questions).

cided, did not have certification procedures in place. I have also omitted a handful of unpublished cases that did not add any depth or information that was not ascertainable through other cases.

A. First Circuit

The First Circuit Court of Appeals has employed several different approaches in determining whether to certify in cases involving *Pullman* considerations.[86] At times, the court has left the decision completely within the discretion of the lower court, while at other times it has directed the district court to certify, even going so far as to provide the exact question that the district court must certify. In other cases, the First Circuit has found abstention appropriate, relying on pragmatic factors such as the existence of parallel proceedings in state court.

In *Romero v. Colegio de Abogados de Puerto Rico*,[87] the First Circuit held that the district court should have stayed the case and certified a question of law to the Supreme Court of Puerto Rico.[88] The case presented a First Amendment challenge to the Puerto Rico Bar Association's use of mandatory membership dues to purchase group life insurance for members.[89] It involved *Pullman* considerations because it was unclear whether, under the state law governing the bar association, the association had the authority to purchase life insurance using member dues.[90] The First Circuit directed the district court to certify to the Supreme Court of Puerto Rico, relying upon the United States Supreme Court's opinion in *Arizonans*, and provided the specific question that the lower court should certify.[91] The court noted that certification was especially appropriate in this case because it would "recognize[]" the role that the Supreme Court of Puerto Rico played in regulating the bar.[92]

In *Laffey v. Begin*,[93] the First Circuit took another approach to the issue of whether to abstain or certify. In a First Amendment challenge to

86. For a description of *Pullman* considerations, see *supra* note 16.

87. 204 F.3d 291 (1st Cir. 2000).

88. *Id.* at 304–05.

89. *Id.* at 293:

> Romero argued that being compelled to purchase life insurance violated his First Amendment rights in two senses. First, noting that compelled membership in a bar association infringes on his freedom of association, he claimed that Puerto Rico's interests in promulgating the statutory purposes of the bar may be sufficient to overcome his interest in not being compelled to associate and pay dues, but only in support of activities germane to the bar's legitimate purposes. Mandatory purchase of life insurance as a condition of bar membership does not, he argued, meet this germaneness test. Second, he stated that he believes in a free-market economy and is opposed to government-sponsored social programs, especially for those who are not indigent. Thus, the mandatory life insurance provision is contrary to his political philosophy, and he objects to this non-incidental expenditure on ideological grounds.

90. *Id.* at 293, 305.

91. *Id.* at 305.

92. *Id.*

93. 137 F. App'x 362 (1st Cir. 2005).

Rhode Island's election contributions law, the court found that the case involved *Pullman* considerations and noted that the parties to the lawsuit had agreed that the questions of state law "should be answered as expeditiously as possible by the state supreme court."[94] The First Circuit left to the district court's discretion the decision of whether to abstain or certify, but suggested that the district court should first consider whether an appeal of the state administrative agency's decision at issue could be taken directly to the state supreme court.[95] The court continued: "If such review is not available and other conventional routes to the state court appear for any reason to be precluded, the district court may certify the appropriate state law questions to the Rhode Island Supreme Court."[96] While this section of the opinion is dicta, the court appeared to suggest that certification should be the last choice, only to be resorted to if a case could not be brought in state court. This, of course, contravenes *Arizonans for Official English*, which emphasized that courts should certify whenever possible and only resort to abstention when certification procedures were unavailable.

Finally, in *Rivera-Feliciano v. Acevedo-Vilá*,[97] the First Circuit Court of Appeals held that *Pullman* abstention was appropriate, in large part because "arguments virtually identical to those presented here had been presented to the courts of Puerto Rico even before this suit was filed, and these are now pending before the Supreme Court of Puerto Rico."[98] The court also noted that abstention was appropriate under the *Colorado River* doctrine, a doctrine that, in very limited circumstances, "permit[s] the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration."[99] The case involved a constitutional challenge to correctional procedures and involved several regulations and questions of law that the Supreme Court of Puerto Rico had not had an opportunity to decide.[100] While the parallel state proceedings and the applicability of *Colorado River* abstention made the case a strong candidate for abstention rather than certification, the opinion does not mention certification as a possibility, let alone analyze the relative merits of certification and abstention in the case.

B. Second Circuit

Shortly after *Arizonans for Official English* was decided, the Second Circuit Court of Appeals issued a pair of opinions that provided a rigorous and thorough analytical framework for deciding whether to ab-

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94. *Id.* at 363.
95. *Id.* at 364.
96. *Id.*
97. 438 F.3d 50 (1st Cir. 2006).
98. *Id.* at 61.
99. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 819 (1976).
100. *Rivera-Feliciano*, 438 F.3d at 60–62.

stain or certify. The Second Circuit's case law is clear and relatively consistent on the issue.

In *Tunick v. Safir*,[101] the Second Circuit provided a thoughtful analysis of when, in a *Pullman* case, a court should certify rather than abstain. The case involved a First Amendment challenge to state law prohibiting public nudity, brought by a photographer who wished to stage a photo shoot involving "75 to 100 nude models arranged in an abstract formation" on a city street.[102] Writing for a Second Circuit panel, Judge Calabresi noted that:

> *Arizonans* made quite clear that, in the eyes of the Supreme Court, the device of certification provides all the benefits of *Pullman* abstention (deference in a federal system to state courts on questions of state law and statutory interpretations that avoid constitutional difficulties), while reducing greatly its drawbacks (delay and cost).[103]

Judge Calabresi's opinion also noted, though, that *Arizonans* does not require a federal court to certify whenever there is a federal constitutional challenge to a state law that is unclear or has not yet been interpreted by the state's highest court. The opinion pointed to two "right to die" cases that the Supreme Court decided shortly after *Arizonans*.[104] Those two cases—*Washington v. Glucksberg*[105] and *Vacco v. Quill*[106]—involved federal constitutional challenges to state laws prohibiting physician-assisted suicide. Both cases presented *Pullman* considerations and an opportunity to certify: a federal challenge to state laws that had yet to be construed by the states' highest courts and that could be avoided by narrowing constructions.[107] In his analysis of these cases, Judge Calabresi emphasized that the U.S. Supreme Court reached the merits of the challenges "despite the concession of the parties that, under certain interpretations, the statutes would avoid constitutional challenge."[108] The opinion explained this apparent inconsistency by looking to the federalism values that underlie both certification and abstention: *Arizonans for Official English* concerned "the very manner in which Arizona was to carry out the basic functions of state governance," while the right to die cases did not implicate "core functions of state governments."[109]

Judge Calabresi concluded that *Arizonans* and the right to die cases "in no way lessen the significance of [the] *Pullman* factors" when deter-

101. 209 F.3d 67 (2d Cir. 2000).
102. *Id.* at 68.
103. *Id.* at 73.
104. *Id.* at 74.
105. 521 U.S. 702 (1997).
106. 521 U.S. 793 (1997).
107. *Tunick*, 209 F.3d at 74.
108. *Id.*
109. *Id.* at 77.

mining whether to certify.[110] Rather, *Arizonans* and the right to die cases "put a gloss" on the *Pullman* factors and point to "other factors that are relevant to the question of certification."[111] The opinion explained that a federal court considering whether to certify "in federal constitutional litigation involving state statutes" should "look first to the *Pullman* doctrine for guidance."[112] The court explained: "This is so because, although *Pullman* abstention involves problems that certification may avoid or reduce, it still remains the doctrine whose purpose is most proximate to that of certification in cases concerning the federal constitutional validity of state laws."[113] After extensive analysis, the opinion concluded:

> The composite lesson of all these cases is that there are at least six factors that must be considered in deciding whether certification is justified. They are (1) the absence of authoritative state court interpretations of the state statute, (2) the importance of the issue to the state and the likelihood that the question will recur, (3) the presence of serious constitutional difficulties that could be avoided by a possible interpretation of the statute, (4) the capacity of certification to resolve the litigation and either to render federal constitutional decisions unnecessary or to ensure that they are inescapably before the federal court, (5) the federalism implications of a decision by the federal courts and in particular whether a decision by the federal judiciary potentially interferes with core matters of state sovereignty, and (6) the effect of the delay entailed by certification on the asserted rights at issue.[114]

Based on its application of these factors to the case at hand, the Second Circuit certified a question to the New York Court of Appeals relating to the construction of the state's public nudity statute.[115] The Second Circuit determined that: (1) the New York Court of Appeals had not interpreted the statutory provision at issue;[116] (2) the constitutional issue was "grave," noting in particular, the "tortured issue of the level of protection . . . [for] artistic or expressive nudity";[117] (3) a construction of the state statute that could avoid the constitutional issue was plausible;[118] (4) certification would either completely resolve the case or resolve all issues but the constitutional issue;[119] (5) federal courts were taking a more active role than customary in reviewing city actions due to the "heavy stream of First Amendment litigation generated by New York City in recent years," and certification might relieve some of the tension

110. *Id.* at 75.
111. *Id.*
112. *Id.* at 74.
113. *Id.*
114. *Id.* at 81.
115. *Id.* at 89.
116. *Id.* at 81.
117. *Id.*
118. *Id.* at 84.
119. *Id.* at 85.

resulting from the federal courts' oversight;[120] and (6) the decision to certify would be "the least harmful alternative" in terms of delay.[121] *Tunick* remains the most thorough and rigorous analysis to date of whether a court should certify a question of state law in a case involving *Pullman* considerations.

A year later, faced with another case involving *Pullman* considerations, the Second Circuit again chose to certify the state law issues to the New York Court of Appeals.[122] In *Allstate Insurance Company v. Serio*,[123] several insurance companies brought a First Amendment challenge to a New York law limiting their ability to make referrals to insured parties.[124] The opinion, also authored by Judge Calabresi, generally followed the framework established in *Tunick*, although it did not address each of the *Tunick* factors.[125] The opinion also forged some new ground. It held that, in a *Pullman* case where the court certified a question and the state court declined to answer the certified question, "this court, once having given the state a first shot at reading its law, has full latitude to interpret the relevant state law."[126] The Second Circuit noted an additional factor weighing in favor of certification: just as in *Arizonans for Official English*, the state attorney general in *Serio* had argued a saving construction of the statute was possible.[127]

In *Nicholson v. Scoppetta*,[128] the Second Circuit heard a constitutional challenge to the City of New York's practice of removing children from the custody of a parent who had been a victim of domestic violence.[129] The court recognized family law disputes as an area of "traditional state concern," and noted that both a concern for federal-state comity, and the fact that this was an area in which the state courts were particularly knowledgeable, weighed in favor of certification.[130] The court further noted that the state law was ambiguous,[131] and that the constitutional challenges were complex but could be avoided by a particular interpretation of the state law.[132] The court relied on both *Pullman* and *Arizonans for Official English* as it reached its conclusion that certification was the appropriate course.[133] It did not rely explicitly upon the *Tu-*

120. *Id.*
121. *Id.* at 88.
122. *See* Allstate Ins. Co. v. Serio, 261 F.3d 143, 145 (2d Cir. 2001).
123. *Id.*
124. *Id.* at 144.
125. *Id.* at 149–54.
126. *Id.* at 153 n.14.
127. *Id.* at 153.
128. 344 F.3d 154 (2d Cir. 2003).
129. *Id.* at 158.
130. *Id.* at 168.
131. *Id.* at 169.
132. *Id.* at 171–76.
133. *Id.* at 167–68.

nick framework, but the analysis in this case is not at odds with that framework.

C. Third Circuit

Since *Arizonans for Official English*, the Third Circuit Court of Appeals has heard few cases involving *Pullman* abstention or requests to certify. Consequently, the Third Circuit does not have a well-developed doctrine to guide judges in deciding whether to abstain or certify.

In *Philadelphia City Council v. Schweiker*,[134] the Third Circuit reviewed a lower court's decision to abstain in a case involving a constitutional challenge to a state agency's decision to take over the Philadelphia school district.[135] The *Schweiker* court made no mention of certification as it reviewed the district court's decision to abstain.

In *Afran v. McGreevey*,[136] the Third Circuit heard a constitutional challenge to the New Jersey governor's decision to delay the effective date of his resignation.[137] The court found that *Pullman* abstention would be inappropriate, but emphasized that certification was also inappropriate for the same reason: the relative clarity of state law.[138] The court also noted that its analysis was informed by consideration of "timing, feasibility, public policy, and plaintiffs' choice of forum."[139]

D. Fourth Circuit

Like the Third Circuit, the Fourth Circuit Court of Appeals has heard few cases involving *Pullman* considerations in the years since *Arizonans for Official English*. In a 2003 case, *PSINet, Inc. v. Chapman*,[140] the Fourth Circuit heard a case challenging an amendment to a Virginia law criminalizing sale of certain sexually explicit materials to youth.[141] The statute had been litigated extensively prior to the amendment at issue in the case.[142] In the prior litigation, the U.S. Supreme Court had certified multiple questions of state law to the Supreme Court of Virginia.[143] Without citing *Pullman*, the Fourth Circuit also chose to certify several questions of state law to the Supreme Court of Virginia. This omission is troubling. While citing to *Pullman* might seem like an unnecessary formality to some, the *Pullman* decision, and the analysis it supports, should be at the foundation of any discussion about whether to certify for *Pullman* reasons. As the Second Circuit explained in *Tunick*, courts consider-

134. 40 F. App'x 672 (3d Cir. 2002).
135. *Id.* at 674.
136. 115 F. App'x 539 (3d Cir. 2004).
137. *Id.* at 540.
138. *Id.* at 542–43.
139. *Id.* at 543.
140. 317 F.3d 413 (4th Cir. 2003).
141. *Id.* at 415.
142. *Id.* at 415–18.
143. *Id.* at 416.

ing certification should look to *Pullman* for guidance because "it still remains the doctrine whose purpose is most proximate to that of certification in cases concerning the federal constitutional validity of state laws."[144] *Arizonans for Official English* did not supplant *Pullman*; instead, it merely "put a gloss" on the guidance provided by *Pullman.*[145]

Nevertheless, it does appear that the Fourth Circuit relied upon a *Pullman*-type justification in its decision to certify: "Ascertaining the scope of the [state] law's coverage and what compliance measures would preclude conviction is necessary for resolution not only of the First Amendment claim, but also for resolution of the Dormant Commerce Clause claim."[146] The Fourth Circuit cited *Arizonans* as it explained its decision to certify, and emphasized that when a federal tribunal considers invalidating a state statute that the state's highest court has yet to interpret, the federal court should tread lightly.[147]

E. Fifth Circuit

The Fifth Circuit Court of Appeals has tended to avoid certification in favor of abstention. It has also overlooked both options in some cases, even when construing state laws that involve core state functions and that are being challenged on federal constitutional grounds.

In *Nationwide Mutual Insurance Co. v. Unauthorized Practice of Law Committee*,[148] the Fifth Circuit reviewed the district court's decision to abstain under the *Pullman* doctrine.[149] The court concluded that the district court did not abuse its discretion and had not erred in abstaining.[150] As part of its analysis, the Fifth Circuit considered whether the district court had erred in not certifying the state law issue to the Supreme Court of Texas. While the Fifth Circuit cited *Arizonans* and noted that certification was likely more efficient, it nonetheless concluded that abstention was preferable to certification because other insurance companies were currently litigating the state law issues in Texas's state courts.[151] The court therefore concluded "that the Supreme Court of Texas would be better suited to answer this question with the benefit of records generated in state court by several insurance companies than it

144. Tunick v. Safir, 209 F.3d 67, 74 (2d Cir. 2000).

145. *Id.* at 75:

> Given the shared goals of *Pullman* abstention and of the device of certification, the factors counseling the former are also suggestive of when the latter is desirable. As a result, *Arizonans*, *Quill*, and *Glucksberg* in no way lessen the significance of these *Pullman* factors. They do, however, put a gloss on them, while also pointing to other factors that are relevant to the question of certification.

146. *PSINet*, 317 F.3d at 422–23.

147. *Id.* at 424.

148. 283 F.3d 650 (5th Cir. 2002).

149. *Id.* at 652.

150. *Id.* at 657.

151. *Id.* at 656–57.

would be by receiving a certified question from one insurer with a relatively limited record on appeal."[152]

In a 2005 habeas case, *Gomez v. Dretke*,[153] the Fifth Circuit abstained based on *Pullman* and other prudential considerations. The case involved a request by a prisoner to stay his habeas appeal so that he could seek remedies in state court that had recently become available.[154] The court did not discuss certification, but certification would not have addressed all of the concerns at work in the case. Most notably, certification would not address the court's desire to allow the state prisoner the opportunity to litigate his claims in the state system in light of the possibility of new relief.

In 2006, the Fifth Circuit heard *Center for Individual Freedom v. Carmouche*,[155] a First Amendment challenge to Louisiana's Campaign Finance Disclosure Act.[156] The court construed the Act "in a way that save[d] it from constitutional infirmity."[157] It did not, however, abstain or certify to allow the state courts to construe the Act. The dissent argued that "[t]he majority erred in refusing to certify the *res nova* state law questions implicated in the interpretation of the CFDA to the Louisiana Supreme Court."[158] The dissent further argued that the case involved core state functions, namely the promotion of "genuinely democratic elections to fill its major public offices free from corruption and other undue influences," and that this made certification all the more appropriate.[159]

F. Sixth Circuit

In the years immediately following *Arizonans for Official English*, the Sixth Circuit Court of Appeals tended to abstain without addressing whether certification was appropriate. While the Sixth Circuit was slow to adopt certification, it now routinely certifies questions of state law to the state court in cases involving *Pullman* considerations, although it often does so without reference to *Pullman* or discussion of abstention. For the reasons discussed above, acknowledgment of and reference to the *Pullman* doctrine provides valuable guidance to courts as they determine whether certification is the appropriate action.[160]

In 1998, the Sixth Circuit heard *Slyman v. City of Willoughby*,[161] a case involving a constitutional challenge to a zoning ordinance.[162] The

152. *Id.* at 656–57.
153. 422 F.3d 264 (5th Cir. 2005).
154. *Id.* at 265.
155. 449 F.3d 655 (5th Cir. 2006).
156. *Id.* at 658.
157. *Id.* at 664.
158. *Id.* at 672.
159. *Id.* at 669. The majority opinion does not address the dissent's arguments that abstention or certification would have been more appropriate. *See id.* at 666.
160. *See, e.g.*, Tunick v. Safir, 209 F.3d 67, 74 (2d Cir. 2000).
161. 134 F.3d 372, 1998 WL 24990 (6th Cir. 1998) (unpublished table decision).

court found that abstention under both the *Pullman* and *Thibodaux*[163] doctrines was appropriate.[164] The *Thibodaux* doctrine suggests abstention is appropriate in cases that involve particularly sensitive matters relating to "sovereign prerogative," especially where the issue somehow touches upon "the apportionment of governmental powers" between local and state-wide authorities.[165] While it did not discuss the possibility of certification, the decision to abstain rather than certify might have been due to the necessity of abstaining under the *Thibodaux* doctrine.

That same year, the Sixth Circuit decided *Gottfried v. Medical Planning Services, Inc.*,[166] a federal First Amendment challenge to a state-court-issued injunction that prohibited protesters from congregating outside of an abortion clinic.[167] The court gave a reasoned and thoughtful explanation as to the appropriateness of abstention to address the *Pullman* concerns in this case:

> Abstention is the proper course here because the state court, unlike the federal court, can modify its injunction or narrowly construe it in light of any intervening legal developments. Giving the state court the first opportunity to reassess the injunction in light of the Supreme Court's recent decisions . . . is the most efficient way to decide this case.[168]

While the opinion did not directly address whether certification was an option, this analysis of the parallel proceedings thoroughly supports the court's conclusion that abstention provided the best response to the issues present in the case.

In *Brown v. Tidwell*,[169] the Sixth Circuit upheld the district court's decision to abstain in a case involving a challenge to a state practice of collecting "jail fees."[170] The court did not discuss certification, nor did it offer any explanation that showed abstention to be particularly appropriate in the case.

In *Northland Family Planning Clinic, Inc. v. Cox*,[171] a challenge to Michigan's "partial birth abortion" law, the Sixth Circuit considered certifying a question relating to the law's meaning to the Michigan Supreme Court.[172] The case involved a federal constitutional challenge to a state law, but the Sixth Circuit held that certification—and, presumably, ab-

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162. *Id.* at *2.
163. La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959).
164. *Slyman*, 1998 WL 24990, at *2.
165. *City of Thibodaux*, 360 U.S. at 28.
166. 142 F.3d 326 (6th Cir. 1998).
167. *Id.* at 328.
168. *Id.* at 332 (citations omitted).
169. 169 F.3d 330 (6th Cir. 1999).
170. *Id.* at 332.
171. 487 F.3d 323 (6th Cir. 2007).
172. *Id.* at 327–28, 343.

stention—would be inappropriate because the law was not subject to a narrowing construction that would bring it within the requirements of the Federal Constitution.[173] While the Sixth Circuit ultimately decided to neither certify nor abstain, the case is notable because it discusses certification, rather than abstention, when faced with *Pullman*-type issues.[174] Indeed, the court did not even cite to *Pullman*; it relied instead on *Arizonans for Official English* to establish the framework for analyzing whether to certify.[175]

In *Planned Parenthood Cincinnati Region v. Strickland*,[176] the Sixth Circuit heard a constitutional challenge to an Ohio law that prohibited the "off-label" use of the drug commonly known as RU-486.[177] After finding that *Pullman* considerations were at play (again, without actually citing to *Pullman*), the court found certification appropriate.[178] Notably, the opinion implied that the decisions whether to abstain or to certify required the same analysis[179] and that once a court found that either was appropriate, it should generally choose certification.[180] Indeed, although the court initially analyzed whether certification or abstention was appropriate, the bulk of the analysis dealt solely with certification.[181]

G. Seventh Circuit

The Seventh Circuit Court of Appeals has only decided a few cases involving *Pullman* considerations or certification since *Arizonans for Official English*. In *Shegog v. Board of Education of the City of Chicago*,[182] a case brought under federal question jurisdiction that involved primarily state law claims, the court considered certifying the state law issues to the Illinois courts but ultimately opted for an abstention-like remedy.[183] The court remanded the case to the district court with instruc-

173. *Id.* at 343.
174. *Id.*
175. *Id.*
176. 531 F.3d 406 (6th Cir. 2008).
177. *Id.* at 408–09.
178. *Id.* at 410–11. The court relied primarily upon the Supreme Court's decisions in *Bellotti v. Baird*, 428 U.S. 132 (1976), and *Arizonans for Official English*. *Id.*
179. *See id.*:

> Where a statutory interpretation is at issue, the United States Supreme Court has instructed the federal courts to employ *certification or abstention* if the "unconstrued state statute is susceptible of a construction by the state judiciary which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem."

(emphasis added) (quoting *Bellotti*, 428 U.S. at 146–47).
180. *See id.*
181. *See id.* at 410–12. For another case in which the Sixth Circuit has opted for certification without consideration of the *Pullman* factors, or, indeed, citation to *Pullman*, see *American Booksellers Foundation for Free Expression v. Strickland*, 560 F.3d 443, 444–45, 447 (6th Cir. 2009) (certifying the construction of state law restricting use of the Internet for distribution of sexually explicit materials to juveniles).
182. 194 F.3d 836 (7th Cir. 1999).
183. *Id.* at 840.

tions to determine whether the federal claim was sound.[184] If the claim was sound, the district court was instructed to "provide appropriate relief and then either relinquish supplemental jurisdiction . . . or defer further proceedings until the state courts have had an opportunity to address the main state-law question."[185] If the claim was not sound, the district court was instructed to dismiss the case and direct the plaintiffs to seek redress in state court.[186] The court preferred not to certify the question because it was concerned that "[c]ertification may present the question in a needlessly abstract way . . . or short-circuit the normal process of decision by the state's intermediate appellate courts."[187] By definition, certification involves a question presented in a somewhat abstract manner to the state's highest court (thus, "short-circuiting" the trial-level and intermediate state courts), but this was the precise procedure endorsed in *Arizonans for Official English.* The court's deviation from the *Arizonans* framework was likely related to its appraisal that the lone federal claim was weak. However, by not citing this as an explanation for its decision not to certify, the Seventh Circuit's decision stands at odds with the *Arizonans* framework.[188]

H. Eighth Circuit

The Eighth Circuit Court of Appeals has also heard few cases involving either *Pullman* or *Arizonans for Official English* since *Arizonans* was decided. The case law is sparse: only one Eighth Circuit case contains any substantive discussion of abstention or certification.

In that case, *List v. County of Carroll*,[189] the Eighth Circuit heard a challenge to the district court's decision to dismiss claims alleging Missouri state practices violated the Americans with Disabilities Act and the Rehabilitation Act.[190] The Eighth Circuit affirmed the dismissal, but on different grounds than the district court's decision.[191] Although the court noted that at least some of the claims were appropriate for *Pullman* abstention,[192] its analysis was brief and did not mention the possibility of certification.

I. Ninth Circuit

In the years since *Arizonans for Official English*, the Ninth Circuit Court of Appeals' *Pullman*-type cases have been inconsistent and inadequately explained. Many of the court's abstention or certification deci-

184. *Id.*
185. *Id.* (citation omitted).
186. *Id.*
187. *Id.*
188. *See supra* note 81.
189. 240 F. App'x 155 (8th Cir. 2007) (per curiam).
190. *Id.* at 156.
191. *Id.*
192. *Id.* at 157.

sions go unpublished—a pattern that does not advance the development of robust and resilient case law or provide guidance to lower courts. More than any other circuit, therefore, the Ninth Circuit's approach to the issue has been inconsistent and poorly reasoned.

In the 1998 case *San Remo Hotel v. City & County of San Francisco*,[193] the Ninth Circuit considered a takings challenge to a San Francisco ordinance regulating hotel rooms.[194] The court abstained after concluding that the takings question could be avoided by allowing the state courts to interpret the ordinance at issue.[195] The court did not, however, mention certification as an option. This may have been because the California certification rule states that a federal district court may not certify a question of state law to the California Supreme Court; that privilege is limited to the U.S. Supreme Court, federal courts of appeal, or any other state's court of last resort.[196] However, due to the Ninth Circuit's silence on this issue in *The San Remo Hotel*—as well as its other *Pullman*-type cases involving questions of California law—it is impossible to know whether this rule impacted the court's decision. Nor is it possible to discern how a litigant might induce the Ninth Circuit to certify a question on appeal that had prompted a district court to abstain based on an unclear question of California law.

In an unpublished opinion in 2000, *Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga*,[197] the Ninth Circuit considered an appeal of the district court's decision to abstain pursuant to *Pullman*.[198] The appellants requested that the circuit court certify the state law questions.[199] The circuit court addressed this request in two short sentences: "The decision whether to certify a question of state law to a state supreme court rests in the sound discretion of the federal court. . . . After reviewing the briefs, record, and relevant law in this case, we conclude that certification to the California Supreme Court is not appropriate."[200] The court of appeals held that the lower court had not abused its discretion in abstaining. That same year, in two other unpublished cases, the Ninth Circuit reviewed lower court decisions to abstain—both of which it ultimately upheld—but did not mention certification as an option in either case.[201]

193. 145 F.3d 1095 (9th Cir. 1998).
194. *Id.* at 1098.
195. *Id.* at 1104.
196. CAL. R. CT. 8.548.
197. 210 F.3d 382, 2000 WL 61312 (9th Cir. 2000) (unpublished table decision).
198. *Id.* at *1.
199. *Id.*
200. *Id.* at *2 (citation omitted).
201. Resist the List v. Selecky, 242 F.3d 383, 2000 WL 1507524, at *1 (9th Cir. 2000) (unpublished table decision); Santa Clara County Corr. Peace Officers' Ass'n, Inc. v. Bd. of Supervisors, 225 F.3d 663, 2000 WL 734387, at *2 (9th Cir. 2000) (unpublished table decision).

In a lengthy opinion examining the legality of a city ordinance regulating rental housing, the Ninth Circuit concluded in *Columbia Basin Apartment Association v. City of Pasco*[202] that *Pullman* abstention was appropriate as applied to some of the plaintiffs, and that *Younger* abstention was appropriate for the remaining plaintiffs.[203] Although the plaintiffs in *Columbia Basin* suggested certification as an alternative to abstention, the majority opinion did not address their request.[204] However, the dissent disagreed with the majority's finding that *Younger* and *Pullman* abstention applied to the parties in this case and suggested that a "better course of action would be . . . to certify the doubtful questions of state law to the Washington Supreme Court."[205]

In an unpublished opinion from 2002, *Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*,[206] the Ninth Circuit found that *Pullman* abstention was appropriate for a question involving the constitutionality of a Nevada prejudgment attachment statute.[207] While the court did not discuss whether certification would have been available in the case, it did note that abstention was particularly appropriate because there was already a "pending state-court action between [the parties that] provide[d] an opportunity for the Nevada courts to construe the attachment statute."[208]

In another opinion from 2002, *Parents Involved in Community Schools v. Seattle School District, No. 1*,[209] a Ninth Circuit panel decided to certify a question regarding whether a school district's use of race to assign students to different schools violated Washington's antidiscrimination statute.[210] Although the court did not reference the *Pullman* decision, the case clearly involved *Pullman* considerations inasmuch as the Ninth Circuit was motivated to certify the question so as to "avoid making federal constitutional decisions unless and until necessary."[211] The case had been before the Ninth Circuit previously,[212] and while the analysis as to whether to certify was brief (and contained no mention of *Pullman* or abstention), its brevity may have been due to the panel's familiarity with the details and extensive history of the case.

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202. 268 F.3d 791 (9th Cir. 2001).
203. *Id.* at 794.
204. *See id.* at 805.
205. *Id.* at 810 (Tashima, J., dissenting).
206. 45 F. App'x 585 (9th Cir. 2002).
207. *Id.* at 588.
208. *Id.* at 587.
209. 294 F.3d 1085 (9th Cir. 2002).
210. *Id.* at 1086–87. This case has a lengthy procedural history. The Supreme Court ultimately reversed the Ninth Circuit's substantive constitutional holdings in 2007. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 551 U.S. 701, 710–11 (2007).
211. *Parents Involved in Cmty. Sch.*, 294 F.3d at 1092 (quoting Clark v. City of Lakewood, 259 F.3d 996, 1016 n.12 (9th Cir. 2001)).
212. *Id.* at 1086.

In an unpublished 2004 decision, *Lueck v. Nevada Judicial Ethics & Election Practices Commission*,[213] a Ninth Circuit panel found that the plaintiff likely did not have standing and remanded the case "with instructions to dismiss [the plaintiff's] complaint without prejudice to any right he may have to seek review by the Nevada Supreme Court."[214] The court reasoned that whether the plaintiffs had standing turned on a question of state law, a determination the court considered a proper basis for *Pullman* abstention.[215] Nowhere in the opinion, however, did the court mention the option of certification.

In *Smelt v. County of Orange*,[216] a challenge to California's law prohibiting same-sex marriage, the Ninth Circuit held that the district court had not abused its discretion when it abstained.[217] At issue was whether the California law violated the California Constitution and the U.S. Constitution.[218] The court did not address certification as an option. However, in its analysis, the court emphasized that abstention was particularly appropriate in this case because very similar cases were pending in the state court system and were likely to reach the California Supreme Court.[219]

Most recently, the Ninth Circuit heard a challenge to a city's practice of denying health insurance to former employees.[220] In *Doyle v. City of Medford*,[221] a group of retirees alleged that the city's practice violated Oregon law and the Fourteenth Amendment's Due Process Clause.[222] The plaintiffs' due process claim was based on the contention that Oregon law conferred on them a property interest in health insurance benefits during their retirement.[223] The Ninth Circuit noted an ambiguity in the Oregon statute at issue that had not been interpreted or resolved by the Oregon courts.[224] The Ninth Circuit, in deciding to certify, wrote simply: "without guidance from the Oregon Supreme Court about what the [ambiguous] phrase . . . means in this context or . . . [what] the legislature intended, we are unable to decide the federal constitutional question accurately."[225] Interestingly, the court then cited Oregon case law governing certification of questions from federal courts to the Oregon Supreme Court and noted that one factor bearing on the certification decision is whether the issues in the case "could implicate the doctrine of

213. 106 F. App'x 552 (9th Cir. 2004).
214. *Id.* at 555.
215. *Id.* at 554.
216. 447 F.3d 673 (9th Cir. 2006).
217. *Id.* at 686.
218. *Id.* at 676–77.
219. *Id.* at 681.
220. Doyle v. City of Medford, 565 F.3d 536, 537 (9th Cir. 2009).
221. *Id.*
222. *Id.* at 537.
223. *Id.* at 538.
224. *Id.* at 541.
225. *Id.* at 542.

'*Pullman* abstention.'"[226] The court devoted considerable space to its discussion of whether *Pullman* factors were at play in this case—ultimately concluding that they were—and relied on both *Arizonans for Official English* and an Oregon case for the proposition that certification would avoid many of the inefficiencies associated with abstention.[227] This analysis, while thorough, was misplaced. To analyze the appropriateness of abstention and certification, along with the relative merits of each, only after having decided to certify, puts the cart before the horse. The court presents its analysis of abstention in an attempt to persuade the Oregon Supreme Court to accept and answer the certified question, without using any of this analysis to support its initial decision to seek state court guidance.[228]

J. Tenth Circuit

While the Tenth Circuit Court of Appeals has heard relatively few cases involving *Pullman* considerations since *Arizonans for Official English*, it has provided one well-reasoned and comprehensive opinion that discusses when to certify and when to abstain.

Kansas Judicial Review v. Stout[229] involved a First Amendment challenge to the Kansas Code of Judicial Conduct canon that prohibits judicial candidates from making certain types of campaign pledges.[230] The Tenth Circuit chose to certify the "important and unsettled questions of state law" underlying the claim to the Kansas Supreme Court.[231] In deciding to certify, the court first looked to whether the case was an appropriate candidate for *Pullman* abstention.[232] Without coming to any firm conclusions as to whether the case justified abstention, the court noted the problems inherent in abstention—especially the effect of abstention-related delay in First Amendment cases—and the Supreme Court's expression of a preference for certification, rather than abstention.[233] It endorsed certification as "consistent with our duties to avoid passing on the constitutionality of a statute where possible," especially when it is a state statute that has yet to be interpreted by the state's highest court.[234] The court concluded that the decision to certify rests within a federal court's discretion, but that "where statutory interpretation is at issue, the touchstone of our certification inquiry is whether the state sta-

226. *Id.* at 543 (citing W. Helicopter Servs., Inc. v. Rogerson Aircraft Corp., 811 P.2d 627, 630 (Or. 1991)).
227. *Id.* at 543–44 (citing Arizonans for Official English v. Arizona, 520 U.S. 43, 75 (1997); W. Helicopter Servs., Inc., 811 P.2d at 632).
228. *Id.* at 543 ("We recognize that the court takes into account several discretionary factors when deciding whether to accept a question for certification.").
229. 519 F.3d 1107 (10th Cir. 2008).
230. *Id.* at 1111.
231. *Id.*
232. *Id.* at 1118–19.
233. *Id.* at 1119.
234. *Id.*

tute is readily susceptible of an interpretation that 'would avoid or substantially modify the federal constitutional challenge to the statute.'"[235]

K. Eleventh Circuit

Like the Tenth Circuit, the Eleventh Circuit Court of Appeals has heard few cases involving *Pullman* considerations since *Arizonans for Official English* was decided. The circuit's sole opinion dealing with the question of when to certify rather than abstain, however, provides an accessible and detailed framework to guide lower courts.

In *Pittman v. Cole*,[236] the Eleventh Circuit considered a First Amendment challenge to the "enforcement of advisory opinions promulgated by the Alabama Judicial Inquiry Commission and the Alabama State Bar's Office of General Counsel" that would have prevented judicial candidates from answering election-related questionnaires.[237] The district court had abstained under the *Pullman* doctrine.[238] The Eleventh Circuit concluded that the decision to abstain was erroneous, even as it noted that "the district court was correct in recognizing that unsettled issues of state law could well shape if not moot the plaintiffs' federal constitutional claims."[239] Though the case involved *Pullman* considerations, the Eleventh Circuit held that the district court abused its discretion because it failed to consider several prudential factors, including "'delay, cost, doubt as to the adequacy of state procedures[,] . . . the existence of factual disputes, and [whether] the case has already been in litigation for a long time,'" as well as the type of claim at issue.[240] The court emphasized that *Pullman* abstention would rarely be appropriate in cases involving First Amendment challenges because delay is particularly injurious to First Amendment rights.[241] The Eleventh Circuit then remanded the case to the district court with instructions to certify the questions of state law to the Alabama Supreme Court.[242] In so doing, it emphasized that where abstention might have proven "problematic," certification simplified the analysis and allowed the federal court to request clarification from state courts.[243]

IV. RECOMMENDATIONS: TWO APPROACHES TO PROPER CERTIFICATION

The inconsistency within and across the circuits has created a confusing backdrop for litigants and for lower courts considering whether to certify a question of state law in cases involving a federal constitutional

235. *Id.* at 1119–20 (quoting Bellotti v. Baird, 428 U.S. 132, 148 (1976)).
236. 267 F.3d 1269 (11th Cir. 2001).
237. *Id.* at 1273, 1276.
238. *Id.* at 1285.
239. *Id.*
240. *Id.* at 1286–87 (quoting Duke v. James, 713 F.2d 1506, 1510 (11th Cir. 1983)).
241. *Id.* at 1290.
242. *Id.* at 1291.
243. *Id.* at 1290.

challenge to a state law. The Supreme Court's decision in *Arizonans for Official English* made clear that lower courts must, at a very minimum, consider certification when they otherwise would have abstained under *Pullman*. *Arizonans* did not, however, provide an analytical framework to guide lower courts as they determine whether to abstain, to certify, or to decide for themselves the state law issues. As the previous section shows, certain circuits—most notably the Second Circuit, the Tenth Circuit, and the Eleventh Circuit—have developed a clear, coherent framework for determining whether to abstain or certify. Other circuits, such as the First Circuit and the Ninth Circuit, have failed to provide a consistent, thorough, and transparent approach to this issue. This inconsistency is problematic for numerous reasons. Here, however, I simply note that dramatic inconsistencies can lead to unfair results and, just as importantly, a public perception of arbitrary decision-making.[244]

In this section, I suggest two approaches to deciding whether to abstain or certify in *Pullman*-type cases. Both approaches are consistent with the Supreme Court's cases on the issue of certification in cases involving federal constitutional challenges to state laws. The first approach, derived from the Second Circuit's cases, combines the *Pullman* doctrine with recent certification decisions from the Supreme Court to create a list of factors that each court should consider as it determines whether certification or abstention is appropriate. The second approach is a two-step analysis that modifies the Second Circuit framework by breaking the inquiry into two separate prongs.

A. The Tunick *Analysis*

The first approach involves the framework devised by Judge Calabresi in *Tunick v. Safir*.[245] In *Tunick*, Judge Calabresi emphasized that,

244. *See* Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. L.J. 909, 915 (2007):

> Research suggests that diffuse support [of the courts] is linked to legitimizing messages about the courts, such as those that highlight the role of precedent and the rule-of-law ideal, and that it is adversely affected by delegitimizing messages, such as those that frame court decisions simply in terms of results (for example, the message that *Bush v. Gore* decided the 2000 election).

Sarah E. Ricks, *The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit*, 81 WASH. L. REV. 217, 217 (2006):

> Doctrinal divergence between the Third Circuit's binding and non-precedential opinions has undermined the predictive value of precedential state-created danger decisions, creating an obstacle to settlement at both the trial and appellate levels. In turn, district courts' unpredictable application of the non-precedential opinions has undermined the critical appellate functions of ensuring that like cases are treated alike, that judicial decisions are not arbitrary, and that legal issues resolved at the appellate level need not be relitigated before the district courts.

See also Robert S. Thompson, *Legitimate and Illegitimate Decisional Inconsistency: A Comment on Brilmayer's* Wobble, or the Death of Error, 59 S. CAL. L. REV. 423, 432–35 (1986) (describing normative objections to judicial inconsistency).

245. 209 F.3d 67 (2d Cir. 2000).

though *Arizonans for Official English* should be read as instructing the use of certification "in more instances than had previously been thought appropriate," *Arizonans* does not hold that a court "must certify whenever (a) a plaintiff raises a federal constitutional challenge to state law in federal court, (b) the state's highest court has not interpreted the statute, and (c) the constitutional question could conceivably be avoided by some saving interpretation."[246] His opinion concluded that any discussion of the appropriateness of certification in federal constitutional challenges to state statutes must rely on *Pullman* "for guidance,"[247] and that, "[g]iven the shared goals of *Pullman* abstention and of the device of certification, the factors counseling the former are also suggestive of when the latter is desirable."[248] *Arizonans for Official English* and the Second Circuit's right-to-die cases, Judge Calabresi reasoned, add a "gloss" to the *Pullman* factors, but do not undermine or displace the *Pullman* analysis.[249]

From these various strands of case law, Judge Calabresi produces six factors that a court should consider when determining whether to certify a case involving federal constitutional challenges to state law: (1) whether the state statute has already been interpreted by the state's highest court; (2) how important the issue is and whether it is likely to recur; (3) whether serious constitutional issues may be avoided by certain interpretations of the state statute; (4) the extent to which certification would "render federal constitutional decisions unnecessary or . . . ensure that they are inescapably before the federal court"; (5) whether the state law issue implicates core issues of state governance and how a potential federal decision would impact federalism concerns; and (6) how the certification-related delay would impact the claimed federal rights.[250]

These six factors will clarify whether certification is the appropriate action or whether the federal court should instead construe the state statute without certifying a question to the state court. The *Tunick* analysis convincingly adapts the Supreme Court's cases into an accessible six-factor test that, if uniformly applied by federal appellate courts, would impose much-needed consistency in this area of law. What these six factors do not explicitly address are those situations in which certification may be appropriate, but, for reasons addressed in Part II of this article, abstention may be even more appropriate. In other words, the *Tunick* analysis does not account for instances in which the federal court should seek state court guidance, but where certification is unavailable or inappropriate because of doctrinal reasons (under *Pennhurst* other forms of

246. *Id.* at 73–74.

247. *Id.* at 74 ("[A]lthough *Pullman* abstention involves problems that certification may avoid or reduce, it still remains the doctrine whose purpose is most proximate to that of certification in cases concerning the federal constitutional validity of state laws.").

248. *Id.* at 75.

249. *Id.*

250. *Id.* at 81.

abstention) or pragmatic reasons (such as the existence of a similar case pending before the state supreme court).

B. The Two-Step Analysis

The two-step approach would require a court considering certification or abstention to engage in a straightforward two-step analysis: first, whether the case involves *Pullman* considerations, and second, whether any factors exist that weigh against the presumption of certification. Under this approach, a court would first determine whether or not a case involves *Pullman* considerations.[251] During this first step, the court would temporarily ignore both the possibility of certification and the question of whether abstention would be the best option. Instead, the court would focus solely on the existence of *Pullman* considerations. A court would analyze whether there is: (1) a difficult constitutional issue involving core issues of state governance that (2) could be avoided by a narrowing construction of a (3) state law that has yet to be construed by the state's highest court.[252] From this analysis, the court will have assessed whether seeking guidance—either certification or abstention—from the state courts would be appropriate.

After ascertaining whether the *Pullman* factors are satisfied, the court would proceed to determine whether any factors exist that weigh against the presumption of certification and suggest that the court either abstain or decide the issue on its own. If any of the prudential or doctrinal considerations discussed in Part II of this article were present, then the court should balance them with the advantages inherent in certification.[253] For example, a court might decide to abstain, rather than certify, because the case involves *Pennhurst* considerations that would render the

251. While I argue here that a court determining whether to certify on *Pullman* grounds should first determine whether the threshold requirements for *Pullman* abstention are met, I do not suggest that certification is only appropriate if these threshold requirements are met. Indeed, certification is appropriate in many situations in which abstention would most definitely not be appropriate. *See* FALLON ET AL., *supra* note 42, at 1201. This article deals only with the limited set of cases in which a court is considering *Pullman* abstention and has the option to certify rather than abstain. In non-*Pullman* certification, a court determining whether to certify should not use the abstention analysis as its starting point. *See* Deborah J. Challener, *Distinguishing Certification from Abstention in Diversity Cases: Postponement Versus Abdication of the Duty to Exercise Jurisdiction*, 38 RUTGERS L.J. 847, 885 (2007) (arguing that certain limitations on abstention are not applicable to certification, and that courts need not apply principles of abstention when determining whether to certify).

252. *See, e.g.*, Nicholson v. Scoppetta, 344 F.3d 154, 168 (2d Cir. 2003) ("We need not certify or abstain unless 'the [state] statute is fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question' . . . . Nor are we obliged to avoid constitutional questions that are not 'serious.'" (alteration in original) (citations omitted)).

253. *See* Pittman v. Cole, 267 F.3d 1269, 1289 (11th Cir. 2001) (emphasizing certification's benefits and finding that certification was appropriate where abstention was not).

court unable to grant the requested relief,[254] or because parallel proceedings in the state courts are already under way.[255]

The mere presence of one of the factors outlined in Part II should not, however, end the inquiry. Whether the existence of a certain factor should lead the court to abstain, rather than certify, will differ from case to case. For instance, the presence of parallel state court proceedings (assuming the inapplicability of *Younger*) might not justify abstention if the case involved a First Amendment challenge on the grounds that the delay that accompanies abstention can cause particular harm to First Amendment freedoms.[256] This result might not be the same in a case that does not involve the First Amendment. In the end, this analysis is essentially a balancing test: the court must weigh the various pragmatic and doctrinal considerations and determine, on balance, whether certification or abstention is more appropriate. Of course, the Supreme Court's statements favoring certification must inform a court's balancing act; in the end, certification should have a thumb on the scale.

This two-step analysis is not altogether unfamiliar. Indeed, some courts already employ similar analyses in their approach to cases involving *Pullman* considerations.[257] For instance, in *Pittman v. Cole*,[258] the Eleventh Circuit first determined that, while *Pullman* factors were present in the case, factors such as the likely impact of abstention-related delay and the interim relief granted to plaintiffs made abstention inappropriate.[259] The court then considered certification, noting that "[a]lthough we conclude that the district court erred by abstaining in the manner that it did in this case, we agree with it that there exist important unsettled issues of state law that are likely to shape, alter, or moot the federal constitutional issues raised by the plaintiffs' claims."[260] The court concluded that certification was appropriate in light of the advantages of certification, as well as the Supreme Court's endorsement of the procedure in *Arizonans for Official English*.[261]

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254. *See, e.g.*, Univ. of Utah v. Shurtleff, 252 F. Supp. 2d 1264, 1285 (D. Utah 2003) (abstaining under the *Pullman* doctrine, in part, because the *Pennhurst* doctrine precluded the court from addressing the state law claims in the case).

255. *See, e.g.*, Rivera-Feliciano v. Acevedo-Vilá, 438 F.3d 50, 61–62 (1st Cir. 2006) (finding *Pullman* abstention appropriate because the same issues were pending before the Supreme Court of Puerto Rico as a result of parallel state court proceedings).

256. *See, e.g.*, Kan. Judicial Review v. Stout, 519 F.3d 1107, 1119 ("Courts have been particularly reluctant to abstain in cases involving facial challenges on First Amendment grounds . . . in part because the delay caused by declining to adjudicate the issues could prolong the chilling effect on speech." (citation omitted)).

257. And, of course, other courts may be employing this balancing approach without making it explicit. But if they do not make their reasoning explicit, it is difficult for the case law to develop and for lower courts to know how they ought to approach the issue.

258. 267 F.3d 1269 (11th Cir. 2001).

259. *Id.* at 1285–88.

260. *Id.* at 1288.

261. *Id.* at 1288–91.

The two-step test takes after the *Tunick* analysis inasmuch as it incorporates the six *Tunick* factors. Both approaches would make clear whether certification is an appropriate course of action, and both tests would also bring a consistent analytic approach to this field of law. By separating the inquiry into two steps, however, the two-step framework provides more information. As with *Tunick*, the two-step approach helps the court determine whether certification is appropriate. But it also helps the court determine whether certain factors counsel in favor of abstention. It is important to not combine these steps, because the inquiries are fundamentally different: whether to ask for participation from the state courts versus how to facilitate state court participation.

The two-step structured analysis has the potential to bring clarity and even elegance to an area of law that has long been unwieldy and unnecessarily confusing. Imposing a degree of formality to the analysis would provide predictability and guidance to lower courts and parties.[262] By following the Supreme Court's ruling in *Arizonans for Official English* more closely, federal appellate courts would also protect the federalism values embodied in both *Arizonans* and *Pullman*. And, perhaps most relevant to practitioners and litigants, they will ensure that parties are spared the unnecessary delay and expense involved in abstention that the *Arizonans for Official English* decision sought to eliminate.

CONCLUSION

Certification and abstention play an important role in the complex and changing relationship between federal and state courts. With certification's rising frequency, abstention under the *Pullman* doctrine has necessarily waned. As this article has shown, however, the theory and reasoning underlying *Pullman* abstention remain essential to any analysis of certification in cases where previously a court would have considered abstaining under the *Pullman* doctrine. If the circuit courts are to develop a coherent and thorough approach to certification in cases where they previously would have abstained, they must look to *Pullman* to deter-

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262. As discussed *supra* note 244, inconsistent or unexplained decision-making may result in arbitrary decisions (or a perception of arbitrariness) and may undermine the legitimacy of the court system. It also makes the job of federal district courts more difficult. *See also* Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 800 (1995) ("By failing to provide sufficient guidance to lower court judges, summary dispositions, selective publication practices, and noncitation rules undermine certainty, predictability, and fidelity to authority.").

Of course, even with a more formalistic framework, the federal courts retain discretion in determining whether to certify or abstain. *See* R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941) ("These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary." (quoting Cavanaugh v. Looney, 248 U.S. 453, 457 (1919); Di Giovanni v. Camden Fire Ins. Ass'n, 296 U.S. 64, 73 (1935)).

mine whether to involve the state courts and to *Arizonans for Official English* to determine how to seek state court guidance.

Courts considering a *Pullman*-type case should rely upon the *Tunick* framework or adopt the two-step analysis described in Part IV.B. The latter option is preferable, inasmuch as it addresses not just whether to seek state court guidance, but also what procedure to use to obtain state guidance. Nevertheless, both options will ensure compliance with the Supreme Court's decisions in *Pullman* and *Arizonans for Official English*. Following the guidance of these two cases will allow courts to develop a robust body of case law, provide a foundation for clear and thorough analysis, and lead to consistent results that reflect the federalism values at the heart of both decisions.