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Certifying Questions in First Amendment Cases: Free Speech, Statutory Ambiguity, and Definitive Interpretations

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Abstract: In the First Amendment-based speech cases of both *Minnesota Voters Alliance v. Mansky* in 2018 and *Expressions Hair Design v. Schneiderman* in 2017, Justice Sonia Sotomayor forcefully contended that the United States Supreme Court should have certified questions about statutory meaning to the highest relevant state court. This Article examines certification—its purposes, its pros, and its cons—in cases pivoting on whether ambiguous state statutes violate the First Amendment. *Mansky* and *Expressions Hair Design* provide timely analytical springboards. The Article argues that certification carries heightened importance today. That is because the justices now frequently fracture along perceived political lines over when a case involving speech merits heightened First Amendment scrutiny and when it deserves only rational basis review. This rift was vividly exposed in 2018 in both *National Institute of Family & Life Advocates v. Becerra* and *Janus v. American Federation of State, County, and Municipal Employees*. Although not a panacea, question certification might sometimes eliminate such splintering. The Article ultimately proposes four criteria for helping the Court to decide when certifying a question of state law in a First Amendment case is appropriate.

INTRODUCTION

In 2018, The United States Supreme Court's ruling in the First Amendment free speech case *Minnesota Voters Alliance v. Mansky* pivoted on statu-

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tory interpretation.[1] The state statute at issue[2] banned wearing "[a] political badge, political button, or other political insignia"[3] inside polling places on election days.

After concluding that these venues on such days are nonpublic fora,[4] the seven-justice majority declared the law unconstitutional for not defining the crucial term "political" and for being of "indeterminate scope."[5] Writing for the majority, Chief Justice Roberts reasoned that if a state wants to limit partisan friction at polling places, then it must clearly define the parameters of the prohibited activity and precisely explain its reasoning for the ban.[6] Roberts' opinion failed to mention the vagueness doctrine and the overbreadth doctrine in its analysis.[7] The majority instead found that the ban, due to definitional

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[1] *See* Minn. Voters All. v. Mansky (*Mansky IV*), 138 S. Ct. 1876 (2018) (holding that Minnesota's political apparel ban violated the Free Speech Clause because the statute lacked clarity). The First Amendment to the U.S. Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated nearly ninety-five years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (assuming "that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States"). *See generally* Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. Ill. L. REV. 1103 (providing an overview of traditional methods of statutory interpretation, including textualism, intentionalism, purposivism, pragmatism, and dynamism, and offering a new approach to statutory interpretation focusing on contemporary meaning and expectations).

[2] MINN. STAT. § 211B.11 (2012), *invalidated by Mansky IV*, 138 S. Ct. 1876 (depicting a list of prohibited election day activities near and in polling places).

[3] *Id.* (banning political apparel at or about polling places during primaries and elections); *Mansky IV*, 138 S. Ct. at 1882.

[4] *Mansky IV*, 138 S. Ct. at 1886. The Court found that "[a] polling place in Minnesota qualifies as a nonpublic forum" and that "[i]t is, at least on Election Day, government-controlled property set aside for the sole purpose of voting." *Id.*

[5] *Id.* at 1888–89 (reasoning that the term "political" can be read broadly and explaining that Minnesota's authoritative guidance on what constitutes "political" apparel makes it difficult to determine what apparel is or is not appropriate at polling places).

[6] *Id.* at 1891 (reasoning, "if a State wishes to set its polling places apart as areas free of partisan discord, it must employ a more discernible approach than the one Minnesota has offered here").

[7] *See* FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012) (noting that due process "requires the invalidation of laws that are impermissibly vague"); United States v. Williams, 553 U.S. 285, 304 (2008) (citing Hill v. Colorado, 530 U.S. 703, 732 (2000)) (observing that a law is void for vagueness if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement"); *see also Williams*, 553 U.S. at 292 (noting that under "our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech," and adding that the justices "have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep"); Frank D. LoMonte, *Fouling the First Amendment: Why Colleges Can't, and Shouldn't,*

difficulties, failed to satisfy the reasonableness criterion of the Court's doctrine for nonpublic fora.[8]

In a dissent joined by Justice Stephen Breyer, Justice Sonia Sotomayor contended that the case first should have been certified to the Minnesota Supreme Court before the law was declared unconstitutional.[9] Sotomayor argued that clarification by the North Star State's highest court might have prevented the Court from grounding its decision on arbitrary distinctions.[10] Sotomayor reasoned that the United States Supreme Court should shy away from invalidating state laws without first seeking the state's interpretation.[11] For Sotomayor, certification was a clear route that her colleagues failed to take.[12]

Mansky was not the first time Sotomayor opined that certifying a question of statutory interpretation to a state court was the proper threshold step in a First Amendment-based free speech case. Just one year prior in *Expressions Hair Design v. Schneiderman*,[13] Sotomayor penned a concurrence joined by

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Control Student Athletes' Speech on Social Media, 9 J. BUS. & TECH. L. 1, 6–7 (2014) (explaining that a law "may be declared void for vagueness if it fails to give intelligible notice of the behavior that will result in penalties").

[8] *Mansky IV*, 138 S. Ct. at 1886. As Chief Justice Roberts framed the issue in *Mansky*, "[t]he question accordingly is whether Minnesota's ban on political apparel is 'reasonable in light of the purpose served by the forum': voting." *Id.* (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)). Justice Roberts opined for the majority that the Minnesota law failed this deferential test, explaining that:

> [T]he State must draw a reasonable line. Although there is no requirement of narrow tailoring in a nonpublic forum, the State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out. . . . Here, the unmoored use of the term "political" in the Minnesota law, combined with haphazard interpretations the State has provided in official guidance and representations to this Court, cause Minnesota's restriction to fail even this forgiving test.

Id. at 1888.

[9] *Id.* at 1893 (Sotomayor, J., dissenting) (reasoning that the Minnesota Supreme Court could have provided "a definitive interpretation of the political apparel ban").

[10] *Id.* (positing that certification would "obviate the hypothetical line-drawing problems that form the basis of the Court's decision today").

[11] *Id.* at 1897.

[12] *Id.* (calling certification an "obvious step").

[13] *See* Expressions Hair Design v. Schneiderman (*Expressions Hair Design II*), 137 S. Ct. 1144, *vacated*, 877 F.3d 99, 102 (2d Cir. 2017). The United States Supreme Court vacated and remanded the case to the United States Court of Appeals for the Second Circuit. On remand, the Second Circuit certified a question of the case to the New York Court of Appeals. The New York Court of Appeals accepted the certification in *Expressions Hair Design v. Schneiderman*, 92 N.E.3d 803 (N.Y. 2018) and answered the certified question in the affirmative in *Expressions Hair Design v. Schneiderman*, 117 N.E.3d 730 (N.Y. 2018).

Justice Samuel Alito.[14] In it, she blasted the United States Court of Appeals for the Second Circuit for taking a circuitous route.[15] She contended that the Second Circuit abused its discretion by not certifying the case to the New York Court of Appeals to interpret a statute banning merchants in the Empire State from imposing surcharges on customers paying with credit cards rather than cash.[16] Pointing to the law's ambiguity, Sotomayor reasoned that it was subject to multiple interpretations;[17] one of which affected the First Amendment right of merchants to describe surcharges to patrons.[18] Justice Sotomayor asserted that certification could have prevented the Court from making a constitutional determination if the state court interpreted the statute to be a price regulation and not a speech regulation.[19] Thus, Sotomayor and Alito concluded that the Court should have vacated the Second Circuit's decision and remanded the case with directions to certify it to the New York Court of Appeals for further clarification regarding the statute's meaning.[20] Concurring separately, Justice Breyer agreed that the remand would afford the State of New York the opportunity to provide a detailed explanation of what the statute entails and requires.[21]

In fact, the Second Circuit in December 2017, on remand, certified the case to New York's highest appellate court to address the following question: "Does a merchant comply with New York's General Business Law § 518 so long as the merchant posts the total-dollars-and-cents price charged to credit

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[14] *Expressions Hair Design II*, 137 S. Ct. at 1153 (Sotomayor, J., concurring) (reasoning that the majority's decision failed to adequately address the petitioners' full First Amendment challenge to the New York statute).

[15] *Id.* at 1157 (stating that the Court "rejected certification, abstained in part, and decided the question in part").

[16] N.Y. GEN. BUS. § 518 (2012); *see Expressions Hair Design II*, 137 S. Ct. at 1158 ("Given the significant benefits certification offered and given the absence of persuasive downsides identified by the Second Circuit, the decision not to certify was an abuse of discretion.").

[17] *Expressions Hair Design II*, 137 S. Ct. at 1154 (Sotomayor, J., concurring) (stating that the New York statute could have been read narrowly by focusing on the plain text, read in relation to the lapsed federal ban that prohibited merchants from charging surcharge fees to credit card using customers, or read more broadly based on the lack of definitions in the statute).

[18] *See id.* at 1155 ("Petitioners view § 518 as an unconstitutional restriction on their ability to display and describe their prices to their customers. And so they sued and challenged the law on First Amendment grounds.").

[19] *Id.* at 1158 ("The Second Circuit should have exercised its discretion to certify the antecedent state-law question here: What pricing schemes or pricing displays does § 518 prohibit? Certification might have avoided the need for a constitutional ruling altogether. If the state court reads § 518 only as a price regulation, no constitutional concerns are implicated.").

[20] *Id.* at 1159.

[21] *Id.* at 1153 (Breyer, J., concurring) (stating that he "agree[d] with Justice Sotomayor that on remand, it may well be helpful for the Second Circuit to ask the New York Court of Appeals to clarify the nature of the obligations the statute imposes").

card users?"[22] The New York Court of Appeals accepted certification of that question in January 2018.[23] In October 2018, it answered the query in the affirmative,[24] without reformulating it.[25] In summary, the Second Circuit certified the case on December 6, 2017,[26] and the New York Court of Appeals responded on October 23, 2018.[27] The turnaround was slightly more than ten months. In brief, the issue did not linger and languish on the New York Court of Appeals' docket, but instead was resolved in less than one year.

The ball, as it were, is now back in the Second Circuit's court in the most recent iteration of *Expressions Hair Design*.[28] The state statute was definitively interpreted by the New York Court of Appeals to mean that a merchant complies with it "only if the merchant posts the total dollars-and-cents price charged to credit card users."[29] In terms of the speech issue lurking therein, the New York Court of Appeals held that so long as the "total dollars-and-cents price charged to credit card users" is disclosed, then "merchants are free to call the price differential anything they wish without fear of prosecution under the statute."[30] The Second Circuit now must determine whether the

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[22] Expressions Hair Design v. Schneiderman (*Expressions Hair Design I*), 877 F.3d 99, 100 (2d Cir. 2017). Writing for a unanimous three-judge panel, Debra Ann Livingston opined, "[f]inding aspects of the New York statute at issue in this case unclear, and, further, that the resolution of these ambiguities will determine the course of our constitutional analysis, we defer decision and certify the following question to the New York Court of Appeals: 'Does a merchant comply with New York's General Business Law § 518 so long as the merchant posts the total-dollars-and-cents price charged to credit card users?' The New York Court of Appeals may reformulate or expand this certified question as it deems appropriate." The Supreme Court majority in *Expressions Hair Design II* concluded that the New York statute "regulates speech." 137 S. Ct. at 1151. The Second Circuit therefore did not have the option on remand that Justice Sotomayor wished it had previously exercised—namely, certifying the question of whether the statute regulated speech or only conduct. *Id.*

[23] *See Expressions Hair Design*, 92 N.E.3d at 803.

[24] *See Expressions Hair Design*, 117 N.E.3d at 730–31.

[25] *See id.* at 733 ("Although plaintiffs have requested that we reformulate the Second Circuit's question, we see no need to rephrase it.").

[26] *Expressions Hair Design I*, 877 F.3d at 99.

[27] *Expressions Hair Design*, 117 N.E.3d at 730.

[28] Rich Samp, *'Expressions Hair Design' Speech Case Back on Track After Detour to NY State Court*, FORBES (Oct. 31, 2018), https://www.forbes.com/sites/wlf/2018/10/31/expressions-hair-design-speech-case-back-on-track-after-detour-to-ny-state-court/#72b97d036633 [https://perma.cc/AY76-BY7H] (observing that "the New York Court of Appeals issued a definitive interpretation of the statute, and the case is finally ready to move forward again in the Second Circuit," and adding that "[t]he case now returns to the Second Circuit").

[29] *Expressions Hair Design*, 117 N.E.3d at 736–37 (reasoning that posting credit card surcharges amounts allows consumers to see the true cost of using a credit card in comparison to making a cash purchase at stores).

[30] *Id.* (reasoning that disclosing the credit card surcharge is enough for merchants to comply with the statute and the way merchants describe the credit card surcharge is irrelevant).

law, as interpreted by the New York Court of Appeals, constitutionally restricts commercial speech.[31]

Justice Sotomayor's recent calls for certification were joined in two instances: one by liberal-leaning Justice Breyer;[32] the other by staunch conservative Justice Alito.[33] This indicates that certification sometimes appeals across ideological lines on today's politically fractured Court, thereby making its use especially relevant.

This Article examines the benefits and drawbacks of certification by the nation's highest court in disputes affecting the First Amendment freedom of speech, filling a scholarly void on this topic.[34] Part I provides a primer on certification as a procedure that federal courts can adopt in cases involving ambiguous state statutes.[35] Part II then explores in greater depth whether certification may have been appropriate in *Mansky* and *Expressions Hair Design*.[36] Part III argues that certification is particularly relevant today, as it may reduce fracturing among the justices on whether heightened First Amendment scrutiny or mere rational basis review is warranted in a case involving a state law.[37] Part III also proposes four criteria to help the Court determine when certification is suitable in free expression cases.[38]

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[31] Barbara S. Mishkin, *NY Court of Appeals Issues Interpretation of NY "No Credit Card Surcharge" Law*, CONSUMER FIN. MONITOR (Oct. 26, 2018), https://www.consumerfinancemonitor.com/2018/10/26/ny-court-of-appeals-issues-interpretation-of-ny-no-credit-card-surcharge-law/ [https://perma.cc/H8UW-R6FS] (explaining the New York Court of Appeals opinion in *Expressions Hair Design* and describing the Second Circuit's next steps in analyzing the New York statute).

[32] *See* Peter Baker, *A 3-Decade Dream for Conservatives Is Within Reach*, N.Y. TIMES, July 10, 2018, at A1 (describing "the four-member bloc of Democratic appointees on the court" as including Justice Breyer); Adam Liptak & Alicia Parlapiano, *Foundation Was in Place for Ideological Shift to the Right*, N.Y. TIMES, June 29, 2018, at A16 (describing Justice Breyer as one of the Supreme Court's "four-member liberal wing").

[33] *See* Adam Liptak, *Diatribe by Nominee Threatens Neutrality of Court, Some Fear*, N.Y. TIMES, Sept. 29, 2018, at A1 (noting that Justice Alito "has forged a consistently conservative voting record"); David G. Savage, *Back Story; His Conservative Revolution; Leonard Leo Has Worked for Years to Transform the Supreme Court*, L.A. TIMES, July 6, 2018, at A2 (reporting that "Alito has been a steady, predictable conservative" since joining the Court, and adding that "[w]hen the court has been split, he has not joined with the liberals in any case of significance").

[34] The author examined the law review indices of these two databases in both September 2018 and December 2018 for such articles.

[35] *Infra* notes 39–84 and accompanying text.

[36] *Infra* notes 87–128 and accompanying text.

[37] *Infra* notes 129–175 and accompanying text.

[38] *Infra* notes 176–178 and accompanying text.

I. CERTIFICATION: AN OVERVIEW

When the United States Supreme Court—or any federal court, for that matter—analyzes a state law, it engages in "intersystemic adjudication"[39] between dual federal and state court systems with overlapping jurisdiction.[40] A key issue for the Court is keenly understanding state law,[41] especially when it provides the necessary predicate for resolving federal constitutional questions,[42] including First Amendment queries.

Certification is a primary method used by federal courts for ferreting out meaning when presented with unsettled state-level legal issues.[43] Certification is "a procedural mechanism that empowers a court to obtain a definitive answer to an unclear or unresolved question of law presented in a case before it by posing the question to another court that possesses the authority to act as the final arbiter of the content of that law."[44] In brief, certification is a transjurisdictional procedure, facilitating feedback between federal and state courts.[45]

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[39] Wayne A. Logan, Erie *and Federal Criminal Courts*, 63 VAND. L. REV. 1243, 1244 (2010) (describing how federal courts apply state criminal laws during trials to resolve federal question cases that also encompass state and local laws).

[40] Robert A. Schapiro, *Interjurisdictional Enforcement of Rights in a Post-*Erie *World*, 46 WM. & MARY L. REV. 1399, 1400 (2005). As Professor Schapiro explains it:

> [I]n the United States, the jurisdictions of the state and federal courts overlap extensively. Issues of state law commonly arise in and are adjudicated by federal courts; issues of federal law commonly arise in and are adjudicated by state courts. Such intersystemic adjudication, by which I mean the interpretation by a court operating within one political system of laws of another political system, is pervasive.

Id.

[41] Geri J. Yonover, *A Kinder, Gentler* Erie*: Reining in the Use of Certification*, 47 ARK. L. REV. 305, 306–07 (1994) (providing suggestions to make certification more equitable and allow federal courts to properly decide cases that include state law interpretation).

[42] Stewart v. Smith, 534 U.S. 157, 160 (2001).

[43] City of Houston v. Hill, 482 U.S. 451, 470 (1987) (stating that certification is an important tool for federal courts to utilize); *cf.* Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1681 (2003) ("Today, certification is the primary method by which federal courts faced with undecided questions of state law are able to enlist the aid of state courts to resolve those questions."); Verity Winship, *Certification of State-Law Questions by Bankruptcy Courts*, 87 AM. BANKR. L.J. 483, 488 (2013) ("In general, certification from federal courts of appeal has become a well-established piece of the federal jurisdictional landscape.").

[44] Peter Jeremy Smith, *The Anticommandeering Principle and Congress's Power to Direct State Judicial Action: Congress's Power to Compel State Courts to Answer Certified Questions of State Law*, 31 CONN. L. REV. 649, 650 (1999) (providing an overview of certification and assessing Congress's authority to compel state courts to answer certified questions).

[45] Jonathan Remy Nash, *The Uneasy Case for Transjurisdictional Adjudication*, 94 VA. L. REV. 1869, 1874–76 (2008) (explaining the different types of transjurisdictional adjudication procedural devices that courts can use to resolve cases including certification).

Certification is relatively new to the United States judicial system. Florida adopted the first certification statute in 1945, allowing a federal court to certify a question of state law to the highest state appellate court.[46] This procedure, however, laid dormant for fifteen years before first being used in 1960.[47]

Certification carries multiple benefits. First, it provides federal courts the opportunity to address federalism concerns by requesting a state's highest appellate court to definitively interpret state law. Second, certification simplifies the adjudicative process by reducing litigation costs, decreasing delayed determinations, and ensuring that a state has the ability to interpret its own law.[48] Put more bluntly, certification enables federal courts to do something more than just guess how a state's highest court might interpret a state statute.[49] In fact, federal court speculation about what a state appellate court might say is often wrong.[50] Thus, certification is consistent with the Supreme

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[46] Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 FORDHAM L. REV. 373, 381–83 (2000). This article explains this history:

> In 1945, acting with what the United States Supreme Court termed "rare foresight," the Florida legislature enacted a statute permitting federal courts to certify unresolved state law questions to the Florida Supreme Court. Florida thus became the first state to offer this procedural mechanism in lieu of abstention in cases where federal courts were faced with open state law issues. When the United States Supreme Court praised the statute fifteen years later, however, the Florida Supreme Court had yet to implement it.

Id. (citations omitted) (referring to Clay v. Sun Ins. Office, 363 U.S. 207 (1960)).

[47] *Id.*; *see also* Coby W. Logan, *Certifying Questions to the Arkansas Supreme Court: A Practical Means for Federal Courts in Clarifying Arkansas State Law*, 30 U. ARK. LITTLE ROCK L. REV. 85, 86 (2007) (noting that although "the Florida Legislature passed the first statute in the nation that authorized the Florida Supreme Court to adopt rules for receiving certified questions from federal courts" in 1945, "the statute was not utilized until fifteen years later when the United States Supreme Court, no less, actually used the statute for the first time" in *Clay*, 363 U.S. 207).

[48] Arizonans for Official English v. Arizona, 520 U.S. 43, 76 (1997) (requesting the Arizona Supreme Court to certify a question regarding its state law before the federal court continued its adjudication).

[49] *See* Haley N. Schaffer & David F. Herr, *Why Guess?* Erie *Guesses and the Eighth Circuit*, 36 WM. MITCHELL L. REV. 1625, 1626 (2010) (observing that "when there is no case directly on point, a federal court . . . must make what is informally referred to as an '*Erie* guess' . . . [which] is an attempt to predict what a state's highest court would decide if it were to address the issue itself"). The name "*Erie* guess" is derived from the Supreme Court's seminal ruling in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). There, the Court held that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Id.* at 78.

[50] Jessica Smith, *Avoiding Prognostication and Promoting Federalism: The Need for an Inter-Jurisdictional Certification Procedure in North Carolina*, 77 N.C. L. REV. 2123, 2133 (1999) ("In fact, the evidence reveals that federal courts 'get it wrong' in a significant number of cases.").

Court's insistence that federal courts should not make constitutional determinations that are rooted in preliminary conjectures of local law.[51]

Furthermore, certification makes sense because state court judges are authorities on state law and thus are better equipped to construe it.[52] Certification is often viewed favorably as respecting and enhancing state courts' authority and prestige.[53] Framing this point somewhat differently, federal-to-state certification can reduce friction between federal and state courts,[54] thereby assuaging federalism concerns.[55]

Moreover, certification allows federal courts to avoid addressing the constitutionality of a statute by affording state courts the opportunity to narrowly interpret it in a way that does not constitutionally invalidate it.[56] Additionally, as suggested later in Part II, Section B, certification taps into another strand of the avoidance canon—namely, that the Court should avoid constitutional questions when possible.[57]

Not all questions of interpretation of state statutes, however, merit certification. The Supreme Court observed in 2000 that certification "is appropri-

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[51] Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944) (highlighting federal courts refraining from adjudicating cases that require preliminary state law interpretation until a state court interprets the state law because this is a fundamental canon of constitutional adjudication).

[52] Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 159 (2003) ("[T]he state law question is sent to those more expert in state law—the state court judges. Certification advocates presume that state court judges . . . will be better equipped than federal judges to determine and interpret state law.").

[53] Justin R. Long, *Against Certification*, 78 GEO. WASH. L. REV. 114, 124 (2009) (arguing that federal courts should interpret state law questions without certification in an effort to better understand and respect state law).

[54] Molly Thomas-Jensen, *Certification After* Arizonans for Official English v. Arizona*: A Survey of Federal Appellate Courts' Practices*, 87 DENV. U. L. REV. 139, 139 (2009) (providing an overview of certification and an analysis of how federal courts determine whether to certify a question to state court).

[55] Kaye & Weissman, *supra* note 46, at 422 (highlighting that certification breaks silos and allows federal and state court communication and cooperation); *see* Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974) (noting that certification "helps build a cooperative judicial federalism"). Federalism is a term often used to describe the vertical division of powers "between the federal and statement governments." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 3 (5th ed. 2015).

[56] United States *ex rel.* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 407 (1909) (explaining that this facet of the larger avoidance canon holds that when a statute is "reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity"); Stuart Buck & Mark L. Rienzi, *Federal Courts, Overbreadth, and Vagueness: Guiding Principles for Constitutional Challenges to Uninterpreted State Statutes*, 2002 UTAH L. REV. 381, 397 (explaining that certification gives deference to state courts to interpret its own laws in a way that keeps them within constitutional bounds).

[57] *Infra* notes 113–114 and accompanying text.

ate only where the statute is 'fairly susceptible' to a narrowing construction."[58] Additionally, certification is only possible if a state has a certification statute that authorizes certification and details the process.[59] Today, nearly all states have such a procedure.[60] Many have adopted some variant of the Uniform Certification of Questions of Law Act.[61] This Act was approved in 1967 by the National Conference of Commissioners on Uniform State Laws and the American Bar Association.[62]

For instance, Oregon's certification statute provides, in relevant part, that the state's highest appellate court:

> [M]ay answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court, a panel of the Bankruptcy Appellate Panel Service or the highest appellate court or the intermediate appellate court of any other state . . . if there are involved in any proceedings before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court and the intermediate appellate courts of this state.[63]

The certification statutes of Minnesota and New York are especially important for this Article. They are relevant in both *Mansky*[64] and *Expressions*

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[58] Stenberg v. Carhart, 530 U.S. 914, 945 (2000) (citing *Hill*, 482 U.S. at 468–71).

[59] Nash, *supra* note 43, at 1690 n.74 (citing Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 493 n.21 (1983)) (noting that certification is available "if the state whose law is at issue offers a certification procedure for the federal court to exercise" and "[a] federal court will not ask a state high court to respond to any questions of state law if there is no procedure under state law that authorizes certification").

[60] *See* Cochran, *supra* note 52, at 159 ("Today, in forty-seven states, the District of Columbia, and Puerto Rico, some or all federal judges can certify a question to the state's highest court, asking that court to answer the question."); Henry duPont Ridgely, Essay, *Avoiding the Thickets of Guesswork: The Delaware Supreme Court and Certified Questions of Corporation Law*, 63 SMU L. REV. 1127, 1129 (2010) ("Today, forty-eight states and the District of Columbia have adopted a certification process, in one form or another.").

[61] *Cf.* Ira P. Robbins, *The Uniform Certification of Questions of Law Act: A Proposal for Reform*, 18 J. LEGIS. 127, 128 (1992) (noting that the Uniform Certification of Questions of Law Act "long ago achieved widespread acceptance in federal diversity cases").

[62] Stella L. Smetanka, *To Predict or to Certify Unresolved Questions of State Law: A Proposal for Federal Court Certification to the Pennsylvania Supreme Court*, 68 TEMP. L. REV. 725, 725 (1995) (arguing that Pennsylvania should adopt a certification statute like the majority of other states and providing guidelines for what the statute should entail).

[63] OR. REV. STAT. § 28.200 (2017) (explaining Oregon's certification process).

[64] *See supra* notes 87–102 and accompanying text (addressing *Mansky IV*).

Hair Design,[65] in which Justice Sotomayor contended that certification was appropriate.

Minnesota adopted the Uniform Certification of Questions of Law Act in 1998.[66] The North Star State's statute provides that the State's Supreme Court:

> [M]ay answer a question of law certified to it by a court of the United States or by an appellate court of another state . . . if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this state.[67]

If the Minnesota Supreme Court receives such a request, it has options about what to do next. It can: (1) accept the question as written, (2) accept the question and reformulate it, or (3) reject the question.[68] Reformulation permits the Minnesota Supreme Court's analysis to "more closely track[] the fundamental issue raised in the case."[69] If the court accepts a question, the statute requires it to respond "as soon as practicable,"[70] with the court reviewing the question de novo.[71]

New York's constitution provides that:

> The court of appeals shall adopt and from time to time may amend a rule to permit the court to answer questions of New York law certified to it by the Supreme Court of the United States, a court of appeals of the United States or an appellate court of last resort of another state, which may be determinative of the cause then pending in the certifying court and which in the opinion of the certifying

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[65] *See supra* notes 103–128 and accompanying text (addressing *Expressions Hair Design II*).

[66] Indep. Sch. Dist. No. 197 v. W.R. Grace & Co., 752 F. Supp. 286, 298 (D. Minn. 1990) (explaining that the federal court has the discretion to certify a question to the Minnesota Supreme Court).

[67] MINN. STAT. § 480.065 (2012) (providing a comprehensive explanation of Minnesota's certification process).

[68] *Id.* (explaining that although the Minnesota Supreme Court has the discretion to decide which course of action to take regarding the question, it must notify the certifying court of its decision).

[69] Lyon Fin. Servs., Inc. v. Ill. Paper & Copier Co., 848 N.W.2d 539, 542 (Minn. 2014) (explaining why the Minnesota Supreme Court narrowed the United States Court of Appeals for the Seventh Circuit's four certified questions to one targeted certified question that focused on the narrower description of "representation of law" which is "a representation of future legal compliance").

[70] MINN. STAT. § 480.065.

[71] *See* Gen. Cas. Co. Wis. v. Wozniak Travel, Inc., 762 N.W.2d 572, 575 (Minn. 2009) ("The certified questions presented are questions of law that we review de novo.").

> court are not controlled by precedent in the decisions of the courts of New York.[72]

The New York Court of Appeals implemented this constitutional provision through a rule of practice.[73] Under that rule, the New York Court of Appeals may accept or reject a question certified to it.[74] As in Minnesota, New York's highest appellate court may reformulate questions it agrees to answer.[75] Furthermore, in taking questions from the Second Circuit—the federal appellate circuit that encompasses New York—the New York Court of Appeals may be asked directly by the Second Circuit to expand or modify a question.[76]

The Second Circuit recently called certification "sometimes prudent and appropriate"[77] when it faces a novel state law question.[78] It has observed that certification is especially useful for questions of state law that are recurrent and have a significant impact on the public.[79]

In terms of disadvantages, certification has been criticized as delaying adjudications.[80] That, however, is not necessarily accurate. For instance, one study found that cases that were certified to state courts were resolved in less than six and a half months after receiving a definitive interpretation from the

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[72] N.Y. CONST. art. VI, § 3, para. 9 (explaining the jurisdiction of New York State Court of Appeals).

[73] *See* 22 N.Y.C.R.R. 500.27 (2018), http://www.courts.state.ny.us/ctapps/500rules.htm#Disc [https://perma.cc/DP88-2FPL].

[74] *See id.* at 500.27(d) (stating that the court must assess the merits of the certified question before deciding to accept or reject it).

[75] *See* Griffin v. Sirva, Inc., 76 N.E.3d 1063, 1068 (N.Y. 2017) (reformulating a question posed to it by the Second Circuit because "other factors" are relevant to the determination of the question beyond the ones that the Second Circuit's "question presumes"); Beck Chevrolet Co. v. Gen. Motors LLC, 53 N.E.3d 706, 712 (N.Y. 2016) (reformulating a question posed to it by the Second Circuit "in accordance with our discretion in these matters").

[76] *See* Penguin Grp. (USA) Inc. v. Am. Buddha, 946 N.E.2d 159, 161 (N.Y. 2011) (noting that the Second Circuit asked the New York Court of Appeals to alter the certified question as it deemed appropriate); Israel v. Chabra, 906 N.E.2d 374, 377 (N.Y. 2009) ("The Second Circuit authorized our Court 'to expand, reformulate, or modify this question'. . . and we have accepted both the certification and the invitation to reframe the inquiry.").

[77] Alphonse Hotel Corp. v. Tran, 828 F.3d 146, 156 (2d Cir. 2016) (noting "a question of state law that . . . is dispositive of the case before us and has not yet been decided by the highest tribunal of the state whose law we are applying").

[78] *Id.*

[79] Kidney v. Kolmar Labs., Inc., 808 F.2d 955, 957 (2d Cir. 1987) (noting that certification is important for questions that "seem likely to recur and to have significance beyond the interests of the parties in a particular lawsuit").

[80] Smith, *supra* note 50, at 2143 (explaining certification benefits and why North Carolina should adopt a certification statute in order to promote judicial economy); *see also* M. Bryan Schneider, *"But Answer Came There None": The Michigan Supreme Court and the Certified Question of State Law*, 41 WAYNE L. REV. 273, 295 (1995) ("A second problem identified by certified question opponents is that the certification procedure causes undue delay in adjudicating the federal action.").

state court.[81] Another criticism is that certification may be abused by federal courts that desire to lessen their caseload.[82] Moreover, some argue that detours through state court systems may lead to higher costs for litigants.[83]

All of these concerns, however, may be unfounded. As one article noted two decades ago, the fear that certification increases costs, prolongs the adjudicative process, and burdens state courts' caseload seems unsubstantiated.[84]

With this background on certification in mind—including the certification statutes in Minnesota and New York that might have come into play in *Mansky* and *Expressions Hair Design*, respectively, had Justice Sotomayor had her way—the next Part returns to those cases for closer scrutiny.

II. A CLOSER EXAMINATION OF POSSIBLE CERTIFICATION IN *MANSKY* AND *EXPRESSIONS HAIR DESIGN*

This Part has two sections. Section A examines the certification issue in *Minnesota Voters Alliance v. Mansky*,[85] and Section B tackles it in *Expressions Hair Design v. Schneiderman*.[86] Both sections examine the arguments militating for and against certification in these recent cases.

A. Certification in Minnesota Voters Alliance v. Mansky[87]

As noted in the Introduction,[88] Justice Sotomayor contended that the Court in *Mansky* should have certified an issue of statutory interpretation to the Minnesota Supreme Court rather than striking down, on a facial challenge,[89] a statute affecting political speech because it failed to explicate a crit-

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[81] Smith, *supra* note 50, at 2144 (highlighting that a "study of forty-eight cases in which certification was used found a median time of only 6.36 months from certification to obtaining the state court's answer, with a range of less than one month to two and a half years").

[82] Cochran, *supra* note 52, at 160 (highlighting that some federal courts "seek to reduce their workload and avoid the time-consuming process of deciding or predicting difficult questions of state law").

[83] *See* Yonover, *supra* note 41, at 332 (citing "increased delays and costs associated with certification" as criticisms of certification).

[84] William G. Bassler & Michael Potenza, *Certification Granted: The Practical and Jurisprudential Reasons Why New Jersey Should Adopt a Certification Procedure*, 29 SETON HALL L. REV. 491, 511 (1998) (highlighting that this fear has failed to materialize due to the federal courts' comity and the state courts' discretion to answer the certifying question).

[85] *See infra* notes 87–102 and accompanying text.

[86] *See infra* notes 103–128 and accompanying text.

[87] Minn. Voters All. v. Mansky (*Mansky IV*), 138 S. Ct. 1876 (2018).

[88] *See supra* notes 9–12 and accompanying text (addressing Justice Sotomayor's call for certification in *Mansky IV*).

[89] *See Mansky IV*, 138 S. Ct. at 1885 (noting that the Court granted the petition for a writ of certiorari on a facial challenge to the statute).

ical term.[90] At least two factors, however, militated against certifying the question in *Mansky*.

First, the case had already traversed the federal court system for eight years, with a district court first ruling on it in 2010.[91] The case was later heard not just once, but twice, by the United States Court of Appeals for the Eighth Circuit.[92] Certification by the United States Supreme Court to Minnesota's highest appellate court would have added more time, expense, and delay to an already protracted legal battle. Thus, in the spirit of a justice-delayed-is-justice-denied mentality found in criminal prosecutions,[93] resolution of the matter by the nation's high court in 2018 was appropriate. As Chief Justice Roberts wrote in response to both Minnesota and Justice Sotomayor's argument that certification was appropriate, that request "comes very late in the day."[94]

Second, *Mansky* involved core political speech affecting elections. Such expression resides at the heart of the First Amendment, and any law that might impermissibly limit or prohibit it merits both swift and careful judicial review.[95] In 1971, the Supreme Court reasoned that First Amendment protections should be especially safeguarded during political campaigns for public office.[96]

Furthermore, any delay of justice on a First Amendment free speech claim is particularly egregious. To wit, the Court opined in *Elrod v. Burns*,[97] more than forty years ago, that any deprivation of core First Amendment pro-

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[90] *Id.* at 1882. As encapsulated by Chief Justice Roberts in writing for the majority, the relevant provision of the statute at issue banned the wearing of "a political badge, political button, or anything bearing political insignia inside a polling place on Election Day." *Id.*

[91] *See* Minn. Majority v. Mansky (*Mansky I*), No. 10-4401, 2010 U.S. Dist. LEXIS 116240 (D. Minn. Nov. 1, 2010) (denying a motion for a temporary restraining order to stop enforcement of the statute), *rev'd*, 708 F.3d 1051 (8th Cir. 2013) (*Mansky II*), *rev'd*, 849 F.3d 749 (8th Cir. 2017) (*Mansky III*), *rev'd*, *Mansky IV*, 138 S. Ct. 1876.

[92] *See Mansky III*, 849 F.3d 749; *Mansky II*, 708 F.3d 1051.

[93] *See, e.g.*, United States v. Hastings, 847 F.2d 920, 923 (1st Cir. 1988) (observing that "justice delayed is justice denied").

[94] *Mansky IV*, 138 S. Ct. at 1891 n.7.

[95] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010) (quoting Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007)). As Justice Anthony Kennedy explained in 2010, "political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Id.*

[96] Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) (reasoning that the press's First Amendment free speech right to publish articles on a political candidate's criminal history during a campaign is protected speech).

[97] Elrod v. Burns, 427 U.S. 347, 372–73 (1976) (stating that firing government employees because of their political affiliation violates the First Amendment).

tections would result in severe harm to an aggrieved party.[98] Indeed, courts deem free speech restrictions exceptionally harmful.[99] Viewed from this perspective, the Court in *Mansky* was correct to strike down a law that negatively affected political speech rather than wait for a possible—but definitely not certain—saving interpretation and construction from Minnesota's Supreme Court.

For the *Mansky* majority, the time had come to strike down a statute and, in turn, to provide some advice to the Minnesota legislature about how it might go about drafting a new and better statute to serve its interests.[100] This was not the moment, eight years deep into litigation, to possibly save a statute by certifying a question to a state court that might—but not necessarily—give the statute a narrowing construction.

On the other hand, as for the issue of certification arising too late (or, at the least, very late) in the litigation of *Mansky*, Justice Sotomayor frankly responded that certification cannot be forfeited.[101] There is, in other words, no statute of limitations imposed either on when a party can request or when the nation's highest court can issue a certification order.

Sotomayor explained why this must be the case. She asserted that Minnesota's delayed certification request does not mean that the Supreme Court must deny the state court the opportunity to interpret its own state law.[102] Thus, although the *Mansky* majority was content to let the Minnesota legislature go back to the drawing board to craft a better drafted law rather than give the state judiciary a chance to save a poorly explicated one during a certification hearing, the dissent seemingly focused more on balancing powers and promoting comity in the relationship between the federal and state court systems. In brief, *Mansky* illustrates both pros and cons of the United States Supreme Court certifying questions in First Amendment-based cases.

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[98] *Id.* at 373 (observing that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury").

[99] Douglas Lichtman, *Uncertainty and the Standard for Preliminary Relief*, 70 U. CHI. L. REV. 197, 201 (2003) (providing a background on how courts assess specific harms and arguing that it is actually difficult for courts to truly weigh the parties' benefits and harms when deciding to issue a preliminary injunction).

[100] *Mansky IV*, 138 S. Ct. at 1891. The majority observed that its ruling was "not to say that Minnesota has set upon an impossible task. Other States have laws proscribing displays (including apparel) in more lucid terms." *Id.*

[101] *Id.* at 1895 (Sotomayor, J., dissenting) (reasoning that certification is a tool that is used to prevent friction between the federal and state courts and "certification is not an argument subject to forfeiture by the parties").

[102] *Id.* (reasoning that "delay in asking for certification does nothing to alter this Court's responsibility as a matter of state-federal comity to give due deference to the state courts in interpreting their own laws").

B. Certification in Expressions Hair Design v. Schneiderman[103]

In her dissent, Justice Sotomayor, joined by Justice Alito, contended that certification was appropriate in *Expressions Hair Design*.[104] Specifically, she would have vacated the United States Court of Appeals for the Second Circuit's earlier decision in the case and remanded the case with directions to certify it to the New York Court of Appeals to further clarify the relevant statute.[105]

Expressions Hair Design arguably offers a more compelling scenario for certification regarding a statute's meaning than *Mansky*. *Mansky* simply boiled down to whether a state had reasonably defined a key term—"political"[106]—that clearly affected speech privileged by the First Amendment.[107] In brief, *Mansky* was about the clarity (or, more accurately, the lack thereof) of a particular word. It was not for the Court, at least in the majority's view, to send the case back to a state court via certification to possibly give the statute a saving construction. Rather, it was time for the Minnesota legislature—after eight years of litigation—to rewrite it.[108]

In contrast, the issue of statutory interpretation in *Expressions Hair Design* dealt with a more outcome-determinative and foundational issue—namely, whether or not the First Amendment freedom of speech was even relevant. As Justice Sotomayor explained in her concurrence, if the New York statute merely regulated price, then there would be no need to conduct a constitutional analysis.[109]

Under such an understanding of the statute—one conceptualizing it as an economic regulation, not as a speech restriction—the deferential rational basis review standard would apply.[110] No form of heightened First Amend-

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[103] Expressions Hair Design v. Schneiderman (*Expressions Hair Design II*), 137 S. Ct. 1144, *vacated*, 877 F.3d 99, 102 (2d Cir. 2017).

[104] *Supra* notes 14–20 and accompanying text (addressing Justice Sotomayor's call for certification in *Expressions Hair Design II*).

[105] *Expressions Hair Design II*, 137 S. Ct. at 1159 (Sotomayor, J., concurring) (observing that certifying the question to the New York Court of Appeals is a better solution than the majority's piecemeal decision).

[106] *See Mansky IV*, 138 S. Ct. at 1888 (noting that the statute "does not define the term 'political,'" and adding that what is political "can be expansive").

[107] *See supra* notes 95–96 (describing the privileged position of political speech in First Amendment jurisprudence).

[108] *See Mansky IV*, 138 S. Ct. at 1892 (concluding that Minnesota's statute lacked clarity and was incapable of reasoned application).

[109] *Expressions Hair Design II*, 137 S. Ct. at 1158 (Sotomayor, J., concurring) (adding that certifying the question to the New York Court of Appeals could have either avoided the need for a constitutional review or limited the scope of the constitutional claim).

[110] Lynn S. Branham, *Toothless in Truth? The Ethereal Rational Basis Test and the Prison Litigation Reform Act's Disparate Restrictions on Attorney's Fees*, 89 CALIF. L. REV. 999, 1016

ment review would come into play.[111] As Sotomayor succinctly put it, "[c]ertification might have avoided the need for a constitutional ruling altogether."[112]

Such an interpretation, in turn, would have allowed the Supreme Court—upon return of the case to its jurisdiction after resolution of the certified question by the New York Court of Appeals—to exercise the last resort facet of the canon of constitutional avoidance.[113] New York's highest appellate court, in other words, might have given the nation's highest court an opportunity to dodge a First Amendment question. When viewed doctrinally, that would have been ideal because it would have allowed the Court to skirt a constitutional assessment, given that the state court's statutory construction would have made the constitutional question obsolete.[114]

In *Expressions Hair Design*, it could have well been that a ruling by the New York Court of Appeals might have made the First Amendment question

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(2001) (explaining that rational basis review "requires only a rational relationship between the end (the legitimate governmental objective) and the means to that end (the statute whose constitutionality is at issue)"); Nicholas Walter, *The Utility of Rational Basis Review*, 63 VILL. L. REV. 79, 79 (2018) (noting that rational basis review is "typically applied to review of economic and social regulations"). Put differently, a court will declare a law unconstitutional under rational basis review "if it is not rationally related to a legitimate governmental interest." Thomas B. Nachbar, *Rational Basis "Plus,"* 32 CONST. COMMENT. 449, 449 (2017); *see* Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 403 (2016) (asserting that "the Court has basically gotten it right about when to apply the rational basis test—using it to analyze *government economic regulations and social welfare legislation* when there is no discrimination based on a suspect classification or infringement of a fundamental right") (emphasis added).

[111] *See infra* notes 129–130 and accompanying text (addressing the strict scrutiny and intermediate scrutiny standards that apply in First Amendment jurisprudence).

[112] *Expressions Hair Design II*, 137 S. Ct. at 1158 (Sotomayor, J., concurring).

[113] Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. F. 331, 332 (2015), http://harvardlawreview.org/wp-content/uploads/2015/06/vol128_CalebNelson.pdf [https://perma.cc/LC36-EGPG] (elucidating the criticisms of the "canon of constitutional avoidance" and illuminating the difference between the canon about avoiding unconstitutionality and the canon about avoiding constitutional questions); *see* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1103, 1104 (1994) ("The 'last resort rule' dictates that a federal court should refuse to rule on a constitutional issue if the case can be resolved on a nonconstitutional basis."). As framed by Justice Louis Brandeis, "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

[114] Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 399 (2005) ("The most fundamental canon is that courts should not decide a constitutional issue if there is some plausible way to avoid it. A corollary to this rule is the familiar canon of statutory interpretation that a serious constitutional challenge to a statute should be avoided if the statute can plausibly be construed in a manner that makes the constitutional question disappear.").

disappear. Justice Sotomayor, in fact, raised the subject of the constitutional avoidance canon in her concurrence, although Chief Justice Roberts' opinion for the Court failed to mention it.[115] Furthermore, the fact that the Second Circuit had already given its interpretation of the New York statute would not, in Justice Sotomayor's view, prohibit the Supreme Court from certifying the question about what the statute means. As she explained, it would be improper for the Supreme Court to "defer to a lower federal court's interpretation of state law even where doing so would cast serious constitutional doubt on, or invalidate, a state law."[116]

Ultimately, Sotomayor did not prevail on her quest for certification. The majority waded deeply into the interpretation muddle and concluded that New York's anti-surcharge statute did, in fact, involve speech and therefore raised a First Amendment issue.[117] The Court thus: (1) vacated the Second Circuit's earlier decision holding that the statute did not involve speech,[118] and (2) remanded the case to the Second Circuit to analyze the statute "as a speech regulation."[119]

Justice Sotomayor only joined the majority in the first half of this result. Specifically, she agreed that the Second Circuit's prior decision interpreting the meaning of the statute should be vacated.[120] Nevertheless, rather than remanding the case to the Second Circuit to consider the statute as a speech regulation as the Roberts' majority concluded, Sotomayor would have remanded it to the Second Circuit with certification instructions to the New York Court of Appeals for clarification.[121] In other words, she would have preserved the opportunity, via certification, for a possible binding interpretation of the statute by New York's highest appellate court,[122] reasoning that the

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[115] *See Expressions Hair Design II*, 137 S. Ct. at 1158–59 n.6 (Sotomayor, J., concurring) ("The Court's silence on the relevance of the avoidance canon to the Second Circuit's interpretation is consistent with an unexpressed conclusion, with which I disagree, that no narrowing construction is available that would avoid constitutional concerns or that a broader constriction [sic] raises no constitutional concerns.").

[116] *Id.*

[117] *Id.* at 1151 (majority opinion) (reasoning that the statute regulates how merchants communicate their prices and does not focus on the difference in the amount merchants can charge cash paying and credit card paying customers).

[118] *Id.* at 1152; *see id.* at 1150 ("The Court of Appeals concluded that § 518 posed no First Amendment problem because the law regulated conduct, not speech.").

[119] *Id.* at 1151.

[120] *Id.* at 1153 (Sotomayor, J., concurring).

[121] *Id.*

[122] *See* Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 543 (1941) (holding that "the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court"); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 66 (1938) (calling it "well settled" that state court decisions "are pertinent and, under

statute did not raise any First Amendment concerns. This would allow the Supreme Court to later avoid a constitutional question.

In addition to possibly avoiding a constitutional question, another factor suggests certification was more appropriate in *Expressions Hair Design* than in *Mansky*—namely, that the former case was not nearly as old as the latter. Specifically, the plaintiffs in *Expressions Hair Design* filed their complaint in 2013[123] and the Supreme Court ruled on it just four years later in 2017.[124] By contrast, the complaint in *Mansky* was filed in 2010[125] and the Supreme Court did not rule on it until 2018,[126] eight years later. Thus, a certification request by the Supreme Court in *Expressions Hair Design* for clarification of the relevant statute would not have delayed ultimate justice for anywhere near as long as it would have in *Mansky*. Put slightly differently, because litigation in *Expressions Hair Design* was far less protracted than in *Mansky*, any delay caused by certification would seem relatively trivial in resolving the case.

Furthermore, the expression at issue in *Expressions Hair Design*—unlike in *Mansky*—was not political. Instead, it involved merchant pricing of commercial goods.[127] Because the fate of political speech—speech that "lies at the heart of the First Amendment"[128]—did not hang in the balance, there was arguably less urgency for the Supreme Court to immediately rule in *Expressions Hair Design* than in *Mansky*, thus making any delay caused by certification more tolerable.

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certain circumstances, controlling in ascertaining or determining the law of the State"). Professor Geri J. Yonover encapsulates the collective rulings from cases on this issue as follows:

> Where there is an on point, though elderly decision, by the state's highest court, and there is "no confusion in the [state's] decisions, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts, or ambiguities in the opinion of the [state's] judges on the question, [and] no legislative development that promises to undermine the judicial rule," the federal court must, under *Erie*, follow the decision of that court.

Yonover, *supra* note 41, at 307 (quoting Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 205 (1956)).

[123] *Expressions Hair Design II*, 137 S. Ct. at 1148.

[124] *Id.* at 1144.

[125] *See Mansky IV*, 138 S. Ct. at 1884 ("Five days before the November 2010 election, MVA, Jeffers, and other likeminded groups and individuals filed a lawsuit in Federal District Court challenging the political apparel ban on First Amendment grounds.").

[126] *Id.* at 1876.

[127] *See* N.Y. GEN. BUS. § 518 (2012) ("No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means.").

[128] Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concurring); *see* Cass R. Sunstein, *Constitutional Caution*, 1996 U. CHI. LEGAL F. 361, 373 (remarking that "[t]he heart of the First Amendment lies in democratic self-governance, and when the government regulates political speech, there is special basis for suspicion").

With this background on both *Mansky* and *Expressions Hair Design*, the next Part argues that a key reason for the Court to exercise certification in First Amendment speech cases today is to reduce possible fracturing among the justices over the appropriate level of constitutional scrutiny.

III. COULD CERTIFICATION REDUCE FRACTURING OVER SCRUTINY IN FIRST AMENDMENT CASES ON TODAY'S SUPREME COURT?

A compelling reason for the United States Supreme Court to engage in certification in First Amendment cases is the possibility that resolution of a question of state law interpretation by a state high court will later eliminate the possibility of fracturing by the justices over the appropriate level of scrutiny by which that law's constitutionality should be measured. Put differently, clarification of the meaning of a state law by a state's highest court might shed much needed light on whether the law in question merits heightened First Amendment scrutiny—be it strict scrutiny,[129] intermediate scrutiny,[130]or the much more forgiving rational basis test.[131]

This is a critical issue. The justices increasingly divide along perceived political lines over when a state law[132]—as Justice Clarence Thomas put it in

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[129] The strict scrutiny standard of judicial review "applies either when a law is content based on its face or when the purpose and justification for the law are content based." Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015). Under this test, laws are "justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2226. Narrow tailoring under strict scrutiny, in turn, requires that the statute "be the least restrictive means" of serving the government's allegedly compelling interest. McCullen v. Coakley, 573 U.S. 464, 478 (2014); *see* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 799 (2011) (observing that a statute that restricts "the content of protected speech" will pass strict scrutiny only if "it is justified by a compelling government interest and is narrowly drawn to serve that interest").

[130] Content-neutral restrictions on speech are generally subject to intermediate scrutiny. Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017). Under this test, the government must prove that the law serves a significant interest and is narrowly tailored to serve that interest. *Id.* Under intermediate scrutiny, a statute "need not be the least restrictive or least intrusive means of" serving the alleged government interest in order to satisfy the narrow tailoring prong. Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

[131] *See supra* note 110 and accompanying text (discussing rational basis review).

[132] The decisions examined in this Part of the Article were rendered before Brett Kavanaugh joined the Court. It considers Chief Justice John Roberts and Justices Clarence Thomas, Samuel Alito and Neil Gorsuch to be conservative. It categorizes Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan as liberals. *See generally* Mark Walsh, *Center Court*, 104 A.B.A. J. 20, 20 (2018) (suggesting that it is likely Chief Justice John Roberts will become, after Justice Anthony Kennedy's retirement in 2018, the Court's new "median justice" who is "at its ideological center, as measured by political scientists who study the court"); Liptak & Parlapiano, *supra* note 32, at A16 (describing the "four-member liberal wing" as comprised of Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan; identifying the Court's "most conservative members" as Clarence Thomas and Samuel Alito; noting that Neil Gorsuch "returned the court to full strength and to a conservative majority" after the death of Antonin Scalia; and adding that Chief Justice John Roberts is moving more to the Court's ideological center);

2018 in *National Institute of Family & Life Advocates v. Becerra*[133]—"regulates speech as speech" (thereby meriting heightened First Amendment scrutiny),[134] and when it merely polices what Justice Stephen Breyer, penning a dissent in that case, called "ordinary social and economic" activity (thereby warranting deferential, rational basis review).[135]

In *Becerra*, the five-justice conservative majority applied heightened First Amendment scrutiny[136] to analyze a California statute compelling speech at licensed crisis pregnancy centers.[137] It concluded that the petitioners challenging the statute's constitutionality were likely to prevail on the merits of their First Amendment claim on remand.[138] In direct contrast, the four-justice bloc of liberal justices in dissent reasoned that heightened scrutiny was inappropriate[139] and they concluded that the statute was probably constitutional.[140]

The exact same fracturing over scrutiny and, in turn, the fate of a state statute, occurred again in 2018 in *Janus v. American Federation of State, County, and Municipal Employees*.[141] There, the five-justice conservative majority concluded that "[f]undamental free speech rights"[142] were endangered by a law compelling non-union public employees to contribute agency or fair-share fees[143] to support the collective bargaining activities of the union that exclusively represents them.[144] In striking down the Illinois statute, the

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Jeffrey Rosen, *A Notorious Advocate for Gender Equality*, WASH. POST, Nov. 11, 2018, at B7 (identifying the Court's liberal justices as Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan).

[133] Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2378 (2018) (holding that the notice requirements in the California statute violate the First Amendment's free speech clause).

[134] *Id.* at 2374.

[135] *Id.* at 2381 (Breyer, J., dissenting) (reasoning that the majority's application of the "contentbased" test makes courts' First Amendment analysis unpredictable and without strong foundation that is rooted in reasoned principle).

[136] *See id.* at 2380 (noting that the majority "applies heightened scrutiny to the" California statute at issue).

[137] CAL. HEALTH & SAFETY CODE § 123472 (a) (West 2016), *invalidated by Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. 2361.

[138] *See Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2376 (majority opinion) ("In short, petitioners are likely to succeed on the merits of their challenge to the licensed notice.").

[139] *See id.* at 2387 (Breyer, J., dissenting) ("There is no reason to subject such laws to heightened scrutiny.").

[140] *Id.* at 2379.

[141] Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

[142] *Id.* at 2460.

[143] *See id.* at 2489 (Kagan, J., dissenting) (noting that agency fees are "now often called fair-share fees").

[144] *See* 5 ILL. COMP. STAT. 315/6 (e) (2016), *invalidated by Janus*, 138 S. Ct. 2448 (providing that non-union employees may be required "to pay their proportionate share of the costs of the

Janus majority rebuffed the argument that rational basis review should be used to examine its constitutionality.[145] Writing for the majority, conservative Justice Samuel Alito opined that compelled subsidization of speech was a grave infringement on First Amendment rights that could not be tolerated.[146]

Conversely, the *Janus* dissenters maintained that government agencies must have the ability to control their employees' speech.[147] Liberal-leaning Justice Elena Kagan,[148] writing for the four-justice dissent, reasoned that the Court typically affords the government significant latitude to create policies that it deems necessary to carry out its role as an employer.[149] She blasted the majority for abandoning the Court's typically deferential style,[150] and instead, "turning the First Amendment into a sword" to attack everyday economic and regulatory policy.[151]

The rift over scrutiny separating conservative from liberal justices was revealed earlier in 2011 in *Sorrell v. IMS Health Inc.*[152] It centered on a Vermont statute that prohibited pharmacies from selling information about the prescription practices of identifiable physicians to purchasers for marketing purposes.[153] At bottom, the outcome in *Sorrell* striking down the statute pivoted on the level of scrutiny that applied to the Vermont statute.[154] The divi-

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collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment"); *Janus*, 138 S. Ct. at 2460.

[145] *Janus*, 138 S. Ct. at 2465 ("This form of minimal scrutiny is foreign to our free-speech jurisprudence, and we reject it here.").

[146] *Id.* at 2464 (noting that "[b]ecause the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed"); *see* Savage, *supra* note 33 (noting that since joining the United States Supreme Court, "Alito has been a steady, predictable conservative," and adding that "[w]hen the court has been split, he has not joined with the liberals in any case of significance").

[147] *Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting) (reasoning that it promotes effective workplace environments and managerial interests).

[148] *See* Adam Liptak, *How Free Speech Was Weaponized by Conservatives*, N.Y. TIMES, July 1, 2018, at A1 (identifying Justice Kagan as "part of the court's four-member liberal wing").

[149] *Janus*, 138 S. Ct. at 2493 (Kagan, J., dissenting) (reasoning that the Court's attitude is "one of respect—even solicitude—for the government's prerogatives as an employer [and s]o long as the government is acting as an employer—rather than exploiting the employment relationship for other ends—it has a wide berth, comparable to that of a private employer").

[150] *Id.* at 2494.

[151] *Id.* at 2501 (reasoning that by using the First Amendment in such an aggressive way the Court is overriding citizens' choices).

[152] Sorrell v. IMS Health Inc., 564 U.S. 552 (2011).

[153] *See id.* at 558–63 (describing the statute, the legislative intent behind it, and Vermont's interpretation of it).

[154] Marcia M. Boumil et al., *Prescription Data Mining, Medical Privacy and the First Amendment: The U.S. Supreme Court in* Sorrell v. IMS Health Inc., 21 ANNALS HEALTH L. 447, 448 (2012) (exploring the relationship between prescription data mining in the pharmaceutical industry, state laws used to curb access to physicians' prescription data, and First Amendment implications).

sion, in turn, among the conservative and liberal justices over the appropriate level of scrutiny to apply to that law foreshadowed the split in 2018 in both *Becerra* and *Janus*. Justice Anthony Kennedy penned the six-justice *Sorrell* majority opinion, joined by Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, Samuel Alito and a lone liberal, Sonia Sotomayor.[155] The majority determined the Vermont statute was subject to heightened First Amendment scrutiny because it burdened a particular viewpoint of speech.[156]

In contrast, the three-justice dissent—authored by Justice Stephen Breyer and joined by fellow liberal Justices Ruth Bader Ginsburg and Elena Kagan—concluded that the statute's impact on expression was in furtherance of managing a commercial enterprise and thus heightened First Amendment scrutiny was unnecessary.[157] Under both this deferential approach and the intermediate scrutiny standard applicable in commercial speech cases,[158] the dissent declared Vermont's law constitutional.[159] Breyer believed that the Vermont statute would have been deemed constitutional when reviewed under both the commercial speech doctrine and an even less stringent standard.[160]

For the dissenters in *Sorrell*, the majority's application of heightened scrutiny in cases like it provides courts with an unnecessarily powerful tool for encroaching on the regulatory realm of the legislative branch in commercial and economic matters.[161] Significantly, Justice Sotomayor—the only liberal to join with the conservative majority in *Sorrell*—expressed disagree-

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[155] *Sorrell*, 564 U.S. at 555 (identifying the justices voting in the majority and dissent).

[156] *Id.* at 565 (noting that the Vermont statute "impose[d] burdens that are based on the content of speech and that are aimed at a particular viewpoint").

[157] *Id.* at 581 (Breyer, J., dissenting) (reasoning that the statute's "effect on expression is inextricably related to a lawful governmental effort to regulate a commercial enterprise . . . [and t]he First Amendment does not require courts to apply a special 'heightened' standard of review when reviewing such an effort").

[158] *See id.* ("And, in any event, the statute meets the First Amendment standard this Court has previously applied when the government seeks to regulate commercial speech.").

[159] *Id.* As Justice Breyer wrote, "I believe that the statute before us satisfies the 'intermediate' standards this Court has applied to restrictions on commercial speech. *A fortiori* it satisfies less demanding standards that are more appropriately applied in this kind of commercial regulatory case." *Id.* at 602.

[160] *Id.* at 603 (noting that "whether we apply an ordinary commercial speech standard or a less demanding standard, I believe Vermont's law is consistent with the First Amendment").

[161] *Id.* at 592 (reasoning that "because the imposition of 'heightened' scrutiny in such instances would significantly change the legislative/judicial balance, in a way that would significantly weaken the legislature's authority to regulate commerce and industry, I would not apply a 'heightened' First Amendment standard of review in this case").

ment seven years later in *Janus* with how *Sorrell* has since been used by the Court.[162]

This division over scrutiny and, in particular, the conservative justices' use of heightened scrutiny in First Amendment cases to attack government regulations has sparked much handwringing among academics.[163] Academics worry about First Amendment Lochnerism, which occurs when the Court weaponizes the First Amendment to encourage extensive deregulation.[164] There is a concern that free speech claims are being used to attack workaday government policies, resulting in a completely transformed regulatory state.[165]

A complete discussion of the academic debate over so-called "First Amendment Lochnerism" is beyond the scope of this Article,[166] which instead concentrates on question certification. What is important here, however, is that fracturing along political lines on such a fundamental issue as the appropriate level of scrutiny to apply in any given First Amendment case potentially undermines the Court's legitimacy. The First Amendment already "float[s] atop a tumultuous doctrinal sea."[167] A doctrinal division along perceived political ideologies compounds the problem. Furthermore, this rift

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[162] *Janus*, 138 S. Ct. at 2487 (Sotomayor, J., dissenting) (calling the development of First Amendment jurisprudence troubling because the First Amendment is being used in an aggressive manner).

[163] *See, e.g.*, Tamara R. Piety, *The First Amendment and the Corporate Civil Rights Movement*, 11 J. BUS. & TECH. L. 1, 22 (2016) ("I remain concerned that this expansive First Amendment will prove to be an unworkable burden on beneficial regulation intended to protect public health, safety, and welfare."); Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 166–67 (2015), http://harvardlawreview.org/wp-content/uploads/2015/03/vol128_PostShanor2.pdf [https://perma.cc/L5HY-XTRK] ("Across the country, plaintiffs are using the First Amendment to challenge commercial regulations, in matters ranging from public health to data privacy. It is no exaggeration to observe that the First Amendment has become a powerful engine of constitutional deregulation. The echoes of *Lochner* are palpable.").

[164] *See* Lochner v. New York, 198 U.S. 45, 57 (1905) (declaring unconstitutional, as an interference with the right to contract under the Due Process Clause of the Fourteenth Amendment, a state statute limiting the number of hours bakers could work); Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CALIF. L. REV. 335, 337 (2017) (contending there is academic worry about "a new free speech Lochnerism—an exploitation of the First Amendment to promote a broad deregulatory agenda, regardless of popular democratic will").

[165] Bambauer & Bambauer, *supra* note 164, at 342; *see also* Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1393 (2017) (noting that "today litigants—often corporate litigants—increasingly use the First Amendment to prioritize new applications of the freedom of speech over regulations designed to protect consumers and citizens").

[166] *See* Enrique Armijo, Reed v. Town of Gilbert*: Relax, Everybody*, 58 B.C. L. REV. 65, 82–84 (2017) (explaining the impact of *Reed* on First Amendment Lochnerism); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1920 (2016) (observing "contemporary liberal critiques of First Amendment Lochnerism").

[167] Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2355 (2000) (examining the conflicting doctrines within free speech jurisprudence).

must be contextualized within today's larger political climate—an atmosphere in which the contentious confirmation hearings for Justice Brett Kavanaugh sparked a legitimacy crisis for the Court in the eyes of some observers.[168]

How, then, might certification mitigate or ease the doctrinal schism on scrutiny? When an ambiguous state statute comes before the Supreme Court that impacts the level of scrutiny that applies to analyze the statute,[169] then allowing a state high court to definitively sort out a statute's meaning may remove or reduce the leeway that the justices possess to choose a level of scrutiny that seemingly comports with either a pro-regulatory or deregulatory philosophy.[170] In other words, permitting a state's highest court to decide if a state statute "regulates speech as speech"[171] or whether it merely incidentally affects speech as part of "workaday economic and regulatory policy"[172]—especially given that "almost all economic and regulatory policy affects or touches speech"[173]—might foster agreement among the justices about the correct standard of scrutiny when the case later returns to the Supreme Court after certification. More colloquially, letting a state court sort out the meaning

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[168] *See, e.g.*, Paul Krugman, *Kavanaugh Will Kill the Constitution*, N.Y. TIMES, Sept. 7, 2018, at A27 ("A vote for Kavanaugh will be a vote to destroy the legitimacy of one of the last federal institutions standing."); Megan McArdle, *There Is No Cleaning Up This Kavanaugh Mess*, WASH. POST, Oct. 7, 2018, at A23 ("Putting Kavanaugh on the court under these circumstances has outraged the left half of the political spectrum and undermined the already shaky legitimacy of the court, and it will touch off a political firestorm if Kavanaugh becomes the fifth vote to overturn *Roe v. Wade*."); Michael Tomasky, *The Court's Legitimacy Crisis*, N.Y. TIMES, Oct. 6, 2018, at A19 ("This is a severe legitimacy crisis for the Supreme Court.").

[169] As Justice Stephen Breyer encapsulated the problem in *Expressions Hair Design II*: "[b]ecause the statute's operation [was] unclear," uncertainty existed whether it should be subject to "a deferential form of review" or something else. 137 S. Ct. 1144, 1153 (2017) (Breyer, J., concurring). In other words, if the statute affected speech—not just conduct—and therefore raised a First Amendment issue (as the Supreme Court majority in *Expressions Hair Design II* concluded it did), it was still unclear whether either the intermediate scrutiny standard of the commercial speech doctrine adopted in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), should be used to analyze its constitutionality or whether a lesser standard akin to rational basis review adopted in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), should apply. *Id.* at 1151.

[170] The perception here among the Court's liberal justices is that the Court's conservative members are applying heightened First Amendment scrutiny to strike down basic economic regulations as part of a larger deregulatory agenda. *See Janus*, 138 S. Ct. at 2501 (Sotomayor, J., dissenting) ("And maybe most alarming, the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy. Today is not the first time the Court has wielded the First Amendment in such an aggressive way."); *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2382 (Breyer, J., dissenting) (criticizing the majority for "suggesting that heightened scrutiny applies to much economic and social legislation" simply because speech is involved instead of adopting a "respectful approach to economic and social legislation when a First Amendment claim like the claim present here is at issue").

[171] *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2374.

[172] *Janus*, 138 S. Ct. at 2501 (Sotomayor, J., dissenting).

[173] *Id.* at 2502.

of a state statute might help the Supreme Court better sort out the standard of scrutiny.

There is, of course, no guarantee that certification will reduce or eliminate divisions among the justices over the appropriate level of scrutiny in free speech cases. Furthermore, certification is only proper where there is a novel, unsettled question of law.[174] Nonetheless, the possibility of reducing fracturing along political lines by sending an ambiguous statute down to a state court to gain a conclusive understanding of how it operates and what it does seems prudent at a time when the Court's very legitimacy is threatened. Unless a case has languished in litigation and involves a law that possibly jeopardizes core political speech, as was the situation in *Mansky*, addressed earlier,[175] then a brief delay and detour through a state's highest appellate court via certification appears to be a small price to pay for the chance of promoting harmony on scrutiny determinations when a case returns to the Supreme Court.

What factors, then, might the Supreme Court consider in evaluating the suitability of question certification in First Amendment cases? Four factors seem particularly relevant, although they are not to the exclusion of other possible considerations:

• ***Whether a case involves core political speech that might be unconstitutionally restrained or restricted by a state law***. There is more urgency for the Court to quickly weigh in on cases where political speech, given its privileged perch in the First Amendment pecking order,[176] is threatened. This, in turn, militates against certification. This factor therefore entails examination of whether the speech at issue is political in nature.

• ***The length of time a case has been in either the state or federal court system***. The principle here—as Part II illustrated, with its head-to-head comparison of the timelines of *Mansky* and *Expressions Hair Design*—is that the longer a case has drifted through a court system, the less likely a question arising in it should be certified by the Supreme Court due to the further delay it would cause.[177]

• ***Whether resolution of the statutory ambiguity might help to clarify the level of scrutiny the Court applies to analyze a statute***. This factor taps directly into the problem explored in Part III—namely, the frequent fracturing over scrutiny among the current justices, often along perceived political lines, in cases such as *Becerra*, *Janus*, and *Sorrell*. Because such divisions undermine notions of the Court's political neutrality and, in turn, the Court's legit-

[174] *Supra* notes 48–51 and accompanying text.
[175] *Supra* notes 95–96 and accompanying text.
[176] *See supra* notes 95–96 and accompanying text (addressing political speech).
[177] *Supra* notes 123–126 and accompanying text.

imacy, special attention to certification should be paid to cases in which certification might eliminate or reduce the odds of such splits.

• ***Whether resolution of the statutory ambiguity might allow the Court to avoid a First Amendment issue altogether, thereby facilitating a facet of the long-standing doctrine of constitutional avoidance***. *Expressions Hair Design* offered a prime opportunity for the Court, as Justice Sotomayor's position in it illustrated,[178] to exercise this principle. In brief, if state court resolution of statutory ambiguity might eliminate the possibility of any First Amendment speech arising, then this militates in favor of certification because it comports with constitutional avoidance.

No one of the four factors above should be determinative, of course. Rather, they should be weighed in holistic, totality-of-the-circumstances fashion. And ultimately, whether the Supreme Court adopts Justice Sotomayor's newfound propensity for certification in First Amendment speech cases remains to be seen. The intersection between certification and free speech cases, however, carries the potential to lessen current divisiveness on the Court over standards of scrutiny and, in turn, to promote judicial legitimacy.

CONCLUSION

This Article explored certification of state law questions by the United States Supreme Court in cases affecting the First Amendment freedom of speech. Justice Sotomayor's very recent opinions in both *Minnesota Voters Alliance v. Mansky* and *Expressions Hair Design v. Schneiderman* calling for certification give the issue heightened and timely importance. Furthermore, as Part III contended, certification is relevant in possibly resolving splits among the justices over scrutiny standards in First Amendment cases. Reducing such rifts could bolster the Court's legitimacy in the eyes of the public, especially after the bruising confirmation hearings for Justice Brett Kavanaugh. Clearly, of course, certification is not a panacea for the problem of eroding judicial legitimacy. It may, however, help in First Amendment cases where battles over scrutiny take partisan lines such as in *National Institute of Family & Life Advocates v. Becerra* and *Janus v. American Federation of State, County, and Municipal Employees*.

Finally, the Article proposed a four-factor analysis for the Supreme Court to deploy when deciding if certification is appropriate in any given case. Those factors address: (1) whether political speech is at issue, (2) the length of time a case has been in the court system, (3) whether certification might alleviate the justices' splintering on the correct level of scrutiny, and

[178] *Supra* notes 109–112 and accompanying text.

(4) whether certification might eliminate the need for the Court to address a constitutional question. These variables are simply starting points for analysis; other considerations may also be relevant depending on the specific facts of any given case.