

Nos. 19-4, 19-13

In the Supreme Court of the United States

JACKSON NATIONAL LIFE INSURANCE COMPANY,
Petitioner,

v.

TAMARIN LINDENBERG, Individually and as Natural
Guardian of Her Minor Children ZTL and SML,
Respondent.

STATE OF TENNESSEE,
Petitioner,

v.

TAMARIN LINDENBERG, Individually and as Natural
Guardian of Her Minor Children ZTL and SML,
Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**BRIEF OF AMICI CURIAE STATES OF
OHIO, ALABAMA, ALASKA, CONNECTICUT,
GEORGIA, INDIANA, MONTANA,
NEVADA, AND TEXAS, AND THE
DISTRICT OF COLUMBIA, IN
SUPPORT OF THE PETITIONERS**

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QUESTION PRESENTED

Whether a federal court exercising its diversity jurisdiction should certify an important state constitutional issue of first impression to the State's highest court before declaring, on its own, that the state statute violates the state constitution.

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STATEMENT OF AMICI INTEREST

When should federal courts certify state-law questions to state courts?

In one sense, this question has nothing to do with the Constitution; everyone agrees that federal courts can decide state-law issues, and everyone agrees that the Constitution never *requires* certification. But in another sense, this case involves a “constitutional question” as “old as the Constitution” itself: “the proper division of authority between the Federal Government and the States.” *New York v. United States*, 505 U.S. 144, 149 (1992). Even though federal courts have the power to decide state-law questions, they also have the power to certify those questions to state courts. By exercising the latter power, federal courts can avoid interfering with state prerogatives. For example, federal courts can use certification to confirm a state law’s meaning before taking the drastic step of holding the law unconstitutional. Even in cases presenting no constitutional questions, federal courts can use certification to avoid misapplying state law. In either circumstance, certification keeps federal courts from interfering with policy and lawmaking decisions that the Constitution leaves to the States.

Because certification helps preserve the States’ role in our constitutional order, each of the *amici* States would like federal courts to exercise their power to certify more often. This case provides a perfect vehicle for this Court to announce principles en-

couraging more certification. That is why the *amici* States are filing this brief in support of certiorari.¹

SUMMARY OF ARGUMENT

If ever there were a case for certification, this is it. “This case presents two uncertain and important questions of state law: one concerning the proper construction of a Tennessee statute; the other concerning the conformity of a different Tennessee statute with the Tennessee Constitution.” Pet.App.43a (Larsen, J., concurring in part and dissenting in part). Tennessee’s Attorney General intervened to request certification, and the “Tennessee Supreme Court has signaled its willingness to decide both issues.” *Id.* Despite all this, the Sixth Circuit “decide[d] the state law questions on its own,” *id.*, and probably incorrectly, *see id.* at 64a–78a. The majority had no reason to plod ahead. No party needed an expedited decision, for example. So instead of guessing what the law in Tennessee is, the Sixth Circuit should have asked the Tennessee Supreme Court for a definitive answer. *Id.* at 43a (Larsen, J., dissenting); 178a (Bush, J., dissenting from denial of rehearing en banc); 195a (Nalbandian, J., statement regarding denial of rehearing en banc).

The extreme facts of this case give rise to a broader, related question: When should federal courts certify unsettled state-law questions to state courts? This Court has never provided any guidance on this question. This case gives it an opportunity to do so. The Court should grant certiorari, and adopt a

¹ All parties have consented to this filing, which the *amici* States are submitting under Rule 37.4.

framework that favors certification whenever it stands a fair prospect of preventing federal interference with state affairs.

More certification would have two main benefits from the *amici* States' perspectives. First, it would keep federal courts from meddling with state prerogatives. Federal courts needlessly interfere with state affairs when they hold unconstitutional a state law that the state courts, if asked, would narrowly interpret to avoid the constitutional problem. *See Arizona for Official English v. Arizona*, 520 U.S. 43, 76 (1997); *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1156 (Sotomayor, J., dissenting). Federal courts also interfere with state affairs when they misinterpret state law, and thereby fail to give effect to the state legislature's work. Through the certification process, a federal court can get a definitive interpretation of state law from the only court with the power to provide such an interpretation. When that definitive interpretation avoids a constitutional question, or stops the federal court from misapplying state law, it keeps the federal court from interfering with the proper operation of state law.

More certification would also encourage the development of state law. First, it would create more chances for state courts to develop state-law doctrine. Less obviously, more certification might encourage parties to raise and thoroughly develop state-law arguments in the first place. Today, they rarely do. *See* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 9 (2018). As a result, courts rarely address state-law questions, and state doctrinal solutions to important policy problems tend to die on the vine. But if federal courts would give more consideration to certifying

state-law questions, instead of reflexively resolving cases under *federal* law, they would give parties incentive to pursue and develop state-law arguments. The result? Better use of the decentralized form of government that the founding generation left to us.

ARGUMENT

The Sixth Circuit invalidated a Tennessee law under the Tennessee Constitution. It did this even though Tennessee’s Attorney General intervened to seek certification, and even though the Tennessee Supreme Court signaled its willingness to accept certification. Pet.App.45a–48a (Larsen, J., dissenting). The certiorari petitions that Tennessee and Jackson National filed lay out the many reasons why the Sixth Circuit should have certified the state-law questions to the Tennessee Supreme Court. The petitions also illustrate that federal courts should generally certify important state constitutional issues of first impression before declaring, on their own, that a state statute violates the state constitution.

This *amicus* brief elaborates on a broader, related point: the important role that certification can play in our federalist system. Through certification, courts can avert needless conflict between state and federal power and help facilitate the thoughtful development of state law.

I. Certification is a useful tool for averting clashes between state and federal power.

Our federalist system brings with it a risk of “clashing sovereignty.” *McCulloch v. Maryland*, 4 Wheat. 316, 430 (1819). After all, when multiple governments have authority over the same jurisdic-

tion, they will sometimes interfere with or frustrate the exercise of one another's powers.

The States and the federal government have adopted (at least) two categories of approaches to avoid these conflicts. The first consists of constitutional limits on the degree to which they can meddle with one another's affairs. For example, Article I, Section 10 enumerates issues that the States must leave to the federal government. In contrast, the Tenth Amendment confirms that the States and the People retain all the powers not expressly conferred upon the federal government.

The second category consists of approaches that are less binding, but perhaps more important: those based on mutual respect. Out of mutual respect, the federal and state governments have developed many tools that keep them from stepping on one another's toes. Block-grant programs, in which Congress trusts the States to spend federal funds in whatever ways best serve local communities, are a good example. *See, e.g.,* Child Care and Development Block Grant Act of 2014, 113 Pub. L. 186, 128 Stat. 1971. Abstention doctrines are another. *See, e.g.,* *Younger v. Harris*, 401 U.S. 37, 41 (1971); *R.R. Com. of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941). So too are rules of construction that require Congress to speak clearly before legislating on topics traditionally left to the States, *see, e.g.,* *Bond v. United States*, 572 U.S. 844, 857 (2014), or before depriving States of their immunity from suit, *see, e.g.,* *Bd. of Trs. v. Garrett*, 531 U.S. 356, 363 (2001).

The option to certify state-law questions to state courts is a species of this second approach to avoiding sovereign clashes. Such clashes arise whenever fed-

eral courts hold state laws unconstitutional. They also arise when federal courts misinterpret state law: misinterpretation entails misapplication which entails denying effect to a State’s sovereign act. Through certification, courts can avoid unnecessary clashes. They can obtain a definitive interpretation of state law, which may negate the constitutional difficulty or prevent the misapplication of state law. Either way, certification helps avoid “needless friction with state policies” and helps preserve “harmonious relation[s] between state and federal authority.” *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2188 (2019) (Kagan, J., dissenting) (quoting *Pullman*, 312 U.S. at 500–01).

A. The federal courts respect the States’ sovereignty when they use certification to avoid invalidating state laws.

“If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that” courts “ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable.” *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944). This deeply rooted doctrine makes particular sense in cases challenging a statute’s constitutionality. When a court “declares unconstitutional a legislative act,” it “thwarts the will of representatives of the actual people.” Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16–17 (2d ed 1986). And to the extent the decision is precedential, it trims the power of elected officials to act on behalf of their constituents in the future.

The risks associated with constitutional adjudication are greater still in cases challenging *state* legislation. In that context, needlessly addressing a constitutional issue involves all the risks just noted plus one more: the risk of needlessly intervening in another sovereign's exercise of its own authority. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997). Of course, federal courts have a duty to say what the law is—a duty that entails refusing to give effect to unconstitutional state laws. See, e.g., *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). Still, when federal courts hear constitutional challenges to state laws (including *state* constitutional challenges) they ought to place special emphasis on the “cardinal principle of judicial restraint”: “if it is not necessary to decide” an issue, “it is necessary not to decide” it. *PDK Labs, Inc. v. United States DEA*, 362 F.3d 786, 799 (2004) (Roberts, J., concurring in part and concurring in the judgment).

Because of the certification procedure, it is often necessary not to decide constitutional issues. Today, almost every State permits its courts to accept certified questions. See Eric Eisenberg, Note, *A Divine Comity: Certification (At Last) in North Carolina*, 58 Duke L. J. 69, 71 & n.13 (2008). In constitutional challenges to these States' laws, federal courts can avoid constitutional issues by certifying “state-law questions antecedent to [the] federal constitutional issues.” *Arizonans for Official English*, 520 U.S. at 76. More specifically, the federal courts can ask the state courts for a definitive interpretation of state law, and that definitive interpretation might moot any constitutional challenge.

Federal courts should use certification to avoid constitutional questions more often. “Speculation by a federal court about the meaning of a statute in the absence of a prior state court adjudication is particularly gratuitous when” state courts are “willing to address questions of state law on certification from a federal court.” *Id.* at 79 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O’Connor, J., concurring)). It is more gratuitous still when certification might moot the federal constitutional question. In those circumstances, the court risks resolving a constitutional question even though reaching that question “may turn out to be unnecessary.” *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1156 (2017) (Sotomayor, J., concurring in the judgment).

Nothing in the foregoing paragraphs is novel. To the contrary, this Court has recognized for decades that certification can keep federal courts from needlessly invalidating state laws. *See Arizonans for Official English*, 520 U.S. at 76; *Elkins v. Moreno*, 435 U.S. 647, 662 (1978); *Lehman Bros. v. Schein*, 416 U.S. 386, 390–91 (1973); *accord Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1895–96 (2018) (Sotomayor, J., dissenting); *Expressions*, 137 S. Ct. at 1156 (Sotomayor, J., concurring in the judgment); *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 776–77 (2005) (Stevens, J., dissenting). But the Court has never provided any guidance regarding when federal courts should certify questions and when they should not. *See* Pet.App.182a (Bush, J., dissenting from denial of rehearing en banc). This case provides an opportunity to do so.

The Court should seize the opportunity. Unguided discretion invites arbitrariness. When a court de-

cides to certify a question in one case but not another, that decision ought to rest on something other than judicial whim. It is probably impossible to fashion a bright-line rule for when to certify. But the Court can at least adopt a framework for federal courts to use when deciding whether to certify a state-law question. At the very least, the Court should require that federal courts factor into their certification decisions the importance of the underlying state interest. *See* Tennessee Petn. 16; Jackson Life Petn. 32–33. That state interest will reach its apex when certification stands a fair chance of yielding an interpretation that spares a state law from being held unconstitutional.

No doubt, there are plenty of cases in which certification is a bad idea. For example, the parties may need an answer more quickly than the certification process allows. Or the question might be easy enough that certification would be a waste of everyone's time. But in many other cases, federal courts have no good reason *not* to certify.

B. Federal courts interfere with state prerogatives when they misinterpret state law.

Certification can help avoid another set of sovereign conflicts: those that arise when federal courts misapply state law.

The Constitution sets up a series of checks and balances. It gives the States and each federal branch tools that they can use to stop the others from abusing their authority. *See Printz v. United States*, 521 U.S. 898, 920–22 (1997); *The Federalist* No. 51 at 349 (J. Madison) (J. Cooke, ed., 1961). But the same tools that help combat overreach can *facilitate* over-

reach. Consider judicial review, for example. In the federal system, Congress makes the law and the courts apply it to concrete disputes. This division of labor protects Americans from legislative overreach; if Congress passes a law it has no power to enact, the courts will refuse to give it effect. *See, e.g., Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015). But with the power to say what the law is comes the power to misinterpret it, and thus the opportunity to misapply it. When the courts *misapply* the laws that Congress passed, they inadvertently intrude on the legislative power. After all, misapplying a law that Congress passed is equivalent, in practice, to applying a law that Congress never passed. *See* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 Geo. L. J. 1361, 1399–1400 (1988); Reed Dickerson, *The Interpretation and Application of Statutes* 253 (1975); *cf.* Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 Mich. L. Rev. 1, 64–65 (2011).

Mistakes are, to some extent, unavoidable. Courts are staffed with judges; judges are people; people err. As Justice Scalia put it, “responsible attorneys, and even responsible judges, sometimes make mistakes.” *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 560 (2014) (Scalia, J., dissenting). But courts *can* take steps to limit errors. And they should be particularly careful to avoid erring in cases that bear on *state* law. Federal courts’ “pronouncements on the content of state law inherently involve a significant intrusion on the prerogative of the state courts to control that development.” *Lexington Ins. Co. v. Rugg & Knopp, Inc.*, 165 F.3d 1087, 1092 (7th Cir. 1999) (citation omitted). “Until corrected by the state supreme court,” such decisions

“inevitably skew the decisions of [those] who rely on them and inequitably affect the losing federal litigant who cannot appeal the decision to the state supreme court.” Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction through the Lens of Federalism*, 78 Va. L. Rev. 1671, 1681 (1992). Those decisions “may even mislead lower state courts that may be inclined to accept federal” decisions as correctly interpreting state law. *Id.* Federal courts’ intervention thus risks “interrupt[ing] ... the orderly development and authoritative expositions of state law.” *Factors, Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 282 (2d Cir. 1981).

The certification process enables federal courts to obtain a definitive answer on the meaning of state law from the highest court in the State. True enough, the state court itself might misinterpret state law, undermining the interests of *its own* legislature. But two considerations make that less concerning than it might otherwise be. The first is that, when a state court *does* misinterpret state law, it does not give rise to the clashing-sovereignty concerns that arise when federal courts do the same. Second, state courts are often less prone to error simply because they have more experience with, and greater expertise in, state law. *See Lehman*, 416 U.S. at 390–91. As such, they are more likely to understand the pertinent history, local interpretive norms, and so on. State courts, in other words, are better positioned to interpret state law for the same reason this Court is better positioned than the Supreme Court of Canada to interpret federal law: state courts see state law more often, and they have a better understanding of how its pieces fit together.

Every resolution of a thorny issue comes with a risk of error. To limit that risk, courts should certify questions more often than they do, availing themselves of the state courts' comparative advantage in interpreting state law.

II. More certification will promote the development of state law.

This Court would help promote the development of state law if it encouraged federal courts to certify more state-law questions to state courts.

A. “Our Nation boasts not one Constitution but 51, meaning American constitutionalism concerns far more than what began in Philadelphia 232 years ago.” *Thompson v. Dall. City Attorney’s Office*, 913 F.3d 464, 471 (5th Cir. 2019). When the “Framers split the atom of sovereignty,” they decentralized power, enabling the States and the federal government to pursue laws and policies of their own. *United States Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). Americans reap the benefits in many ways. Two stand out.

First, whereas citizens of centralized governments have one set of rights, Americans have two, one deriving from federal law, and another deriving from state law. The “Constitution sets a floor for the protection of individual rights. The constitutional floor is sturdy and often high, but it is a floor. Other federal, state, and local government entities generally possess authority to safeguard individual rights above and beyond the rights secured by the U. S. Constitution.” *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring).

States do not just “possess” this authority; they exercise it. Ohio’s constitution, for example, contains far greater religious-freedom protections than the First Amendment. *Compare Humphrey v. Lane*, 89 Ohio St. 3d 62, 68 (2000) *with Emp’t Div. v. Smith*, 494 U.S. 872, 878–79 (1990). It also provides more restrictions on the government’s eminent-domain power. *Compare City of Norwood v. Horney*, 110 Ohio St. 3d 353, 377 (2006) *with Kelo v. City of New London*, 545 U.S. 469, 484 (2005). One could make similar points for every one of the other forty-nine States and the District of Columbia. *See generally* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (2018); William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

The second benefit of a decentralized approach to governance is its greater sensitivity “to the diverse needs of a heterogeneous society.” *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). By leaving governance largely to the States, our federalist structure “increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.” *Id.* Perhaps most importantly, it allows citizens to pursue the policies they want without having to involve an entire nation. That usually makes it easier to get things done. And it makes for a system of government that is “better able to reflect the diversity of interests and preferences of individuals in different parts of the nation.” Michael W. McConnell, *Federalism: Evalu-*

ating the Founders' Design, 54 U. Chi. L. Rev. 1484, 1493 (1987).

B. A more active certification practice would help promote the development of state law, to the benefit of our federalist system. *See* Sutton, *51 Imperfect Solutions* at 197.

Most obviously, more certification would mean more opportunities for state courts to announce binding interpretations of state law. Increasing these opportunities could prove quite valuable, given the enormous number of state-law claims that, absent certification, never see a state courtroom. Even when parties sue in state courts, defendants can very often and very easily remove their cases to federal court. *See, e.g., Dart Cherokee*, 135 S. Ct. at 554. Through certification, courts can exercise removal jurisdiction while still observing a “[d]ue regard for the rightful independence of state governments.” *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941) (internal quotation marks omitted).

Certification allows courts to pay the same due regard to state independence in diversity cases. Congress last raised the amount-in-controversy requirement for diversity cases in 1996. *See* Act of Oct. 19, 1996, Pub. L. No. 104-317, 110 Stat. 3850. At just \$75,000, plaintiffs who want to litigate in federal court can usually find a way to get there. That is good for furthering the main purpose of diversity jurisdiction: assuring “nonresident litigants” that they can litigate in “courts free from susceptibility to potential local bias.” *Guar. Tr. Co. v. York*, 326 U.S. 99, 111 (1945). But it can be bad for the development of state law, since it decreases the opportunities for

state courts to issue binding opinions interpreting state law.

Certification allows federal courts to give parties the benefits of diversity jurisdiction without imposing its costs on the States. When federal courts certify a state-law question, they continue providing a forum in which out-of-state litigants can proceed free from perceived “local bias.” *Id.* At the same time, they give state courts a chance to weigh in on the meaning of state law. Of course, if there is some reason to doubt whether the state court can impartially adjudicate the state-law issue, the federal court should decline to certify. This should happen only rarely, however, since the resolution of a *legal* question will apply to in- and out-of-state parties alike.

In addition to increasing the opportunities for state high courts to interpret state law, more certification might have another, less obvious effect (if only at the margins). Specifically, it would give lawyers an incentive to raise and develop state-law theories in the first place. Today, many lawyers treat state-law claims “as quintessential arguments of last resort, if they raise them at all.” Sutton, *51 Imperfect Solutions* at 9. That is often bad for clients. But it is bad for federalism, too. Federal courts are unlikely to certify (or address on their own) state-law arguments that lawyers never seriously develop. That deprives the States, and future litigants, of binding state-court opinions (or persuasive federal-court opinions) on state law. Further, when federal courts *do* take up poorly developed state-law arguments, they are more likely to err, creating precedent that might lead future courts astray. See Sloviter, *A Federal Judge Views Diversity Jurisdiction through the*

Lens of Federalism, 78 Va. L. Rev. at 1681; *Factors*, 652 F.2d at 282.

If federal courts certified state-law questions more often, they would send a clear message to litigants: vigorously pursue state-law theories, because the federal courts are taking state law seriously. If litigants took the hint, this would result in a feedback loop, in which more certification would lead to more thoughtful state-law arguments, which would lead to even more certification. This feedback loop would present even more opportunities for courts to interpret (and thus develop) state law. It would also lead to better briefing of state-law questions, and so more thoughtful treatment of those questions even in cases where federal courts *do not* certify.

CONCLUSION

This Court should grant the petitions for certiorari.

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