COOPERATIVE FEDERALISM IN CLASS ACTIONS

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I. INTRODUCTION**

A computer maker knows that its laptops will break after a few months because of a manufacturing problem, but sells them without disclosing the problem or its effects. Can people who bought the laptops in California recover under the doctrine of fraudulent concealment?

A coffee chain requires its workers to spend a few minutes closing out the register after their shifts are over, but fails to pay them for the extra time. Do the California workers have a state-law claim for unpaid wages?

Although the first question involves consumer law and the second employment law, these state-law questions have something in common: the answer to neither was clear when class actions raising them reached the Ninth Circuit Court of Appeals. In the consumer case, the court construed lower federal decisions and an intermediate state court decision, holding that under California law, a manufacturer need not disclose a product defect that manifests after the express warranty period unless it poses a safety hazard.[1] Even though the California Supreme Court had never so held, the Ninth

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** Editors' Note: For ease of accessibility in electronic format, the legal citations in this Article depart in minor respects from the norms of *The Bluebook: A Uniform System of Citation* (Columbia Law Review Ass'n et al. eds., 20th ed. 2015).

1. Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1141–43 (9th Cir. 2012).

Circuit's holding bound federal district courts in subsequent consumer class actions invoking California law. Confusion and disagreement ensued. But in the employment case, the Ninth Circuit certified the unsettled question to the California Supreme Court, which provided definitive guidance: the employer must pay for all time worked.[2]

These contrasting approaches shed light on how best to maintain an efficient balance of federal and state power in our civil justice system. By expanding federal diversity jurisdiction, the Class Action Fairness Act of 2005 (CAFA)[3] supplanted the prior regime in which state courts overwhelmingly controlled the development of substantive state laws often at issue in class actions. Under CAFA, the federal courts face pressure not only to preside over criminal matters and decide federal constitutional, statutory, and administrative questions but also to define the contours of state laws that govern the jostling marketplace for goods and services.

I argue here that what happened in the Ninth Circuit's employment case offers a good model for easing the burden on the federal judiciary and settling the expectations of courts and businesses. Faced with unclear or conflicting decisions—or an absence of meaningful guidance—on an outcome-determinative question of state law, a federal appeals court should take care not to take over the state's authority to decide the question. In most "CAFA-nated" cases involving such an unsettled or novel question, instead of trying to predict how the state supreme court would rule, a federal appeals court should certify the question to the state court.

The overall clarity and comity from this approach outweigh the delay it may bring about in individual cases. Whether self-defining as "federalists" or "progressives," jurists and legal scholars can agree that the sovereign states have an interest in controlling the meaning of their own laws framed to protect their citizens. State supreme court justices sit in larger panels and have unrivaled knowledge of their state's statutes, policies, and common-law doctrines. While a state supreme court can always decline review if it finds a certified question insufficiently important or better left to further development, its pronouncements can save time and expense by preventing errant or inconsistent applications of state law. With major class actions in state court dwindling, the cross-jurisdictional certification procedure analyzed toward the end of this Article represents a countercurrent to

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2. Troester v. Starbucks Corp., 680 F. App'x 511 (9th Cir. 2016), *certified question answered*, 421 P.3d 1114, 1120–25 (Cal. 2018).

3. Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

the CAFA wave that can defend state sovereignty and allow state judges to control the development of state laws regulating the economy.

II. POST-CAFA OPTIONS FOR RESOLVING COMPLEX STATE-LAW QUESTIONS

Congress enacted CAFA for the stated purpose of counteracting abuses of the class action procedure in state courts.[4] The Senate Judiciary Committee began its report on the legislation by referring to "[a] mounting stack of evidence . . . demonstrat[ing] that abuses are undermining the rights of both plaintiffs and defendants."[5] The committee reported that "[o]ne key reason for these problems is that most class actions are currently adjudicated in state courts, where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and where there is often inadequate supervision."[6] Congress accordingly broadened federal jurisdiction premised on diversity of citizenship to sweep into federal court, subject to limited exceptions,[7] class actions seeking at least $5 million for at least 100 class members where at least one named plaintiff is a citizen of a different state than any defendant.[8] But, in furthering uniform application of legal *procedures* in large class actions, Congress paradoxically allowed for inconsistent federal court applications of *substantive* state law. This was nary a concern for the Judiciary Committee, which stated simply that "the Erie Doctrine . . . requires federal courts to apply the substantive law dictated by applicable choice-of-law principles in actions arising under diversity jurisdiction."[9]

Easier said than done. Faced with an unsettled question of state law, a federal court sitting in diversity ordinarily ventures a prediction about how the state's highest court would answer the question.[10] Once a case reaches a federal appeals court, though,

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4. S. REP. NO. 109-14, at 27 (2005).
5. *Id.* at 4.
6. *Id.*
7. CAFA contains a complex set of exceptions for keeping cases in state court. Those provisions, which I and others have addressed elsewhere, are outside the scope of this Article. *See* Jordan Elias et al., *Welcome to the Jungle: CAFA Exceptions*, *in* THE CLASS ACTION FAIRNESS ACT: LAW AND STRATEGY 149–98 (Gregory C. Cook ed., 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3179722.
8. 28 U.S.C. § 1332(d) (2018).
9. S. REP. NO. 109-14, at 49 (2005).
10. *See, e.g.*, Belnap v. Iasis Healthcare, 844 F.3d 1272, 1295 (10th Cir. 2017) (citing, *inter alia*, Hays v. HCA Holdings, Inc., 838 F.3d 605, 611 (5th Cir. 2016), and

statutes in the largest states permit the federal court to certify an unclear or unsettled (and potentially dispositive) question of state law directly to the highest court of that state.[11] The U.S. Supreme Court noted that, when such a state statute exists,[12] this certification "path is open . . . to any court of appeals of the United States."[13] The Court recalled: "We have, indeed, used it before"[14] and it is plainly superior to abstention, "reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response."[15] Yet these certification statutes tend to be underused, thought of as being somewhat exotic, if elegant, with federal judges calling on their state counterparts fairly sparingly[16]—including in the class actions that

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In re Wholesale Grocery Prod. Antitrust Litig., 707 F.3d 917, 927 (8th Cir. 2013)); Askew v. HRFC, LLC, 810 F.3d 263, 266 (4th Cir. 2016); *In re* Montreal, Maine & Atl. Ry., 799 F.3d 1, 10 (1st Cir. 2015); Gibbs-Alfano v. Burton, 281 F.3d 12, 18–19 (2d Cir. 2002); Clark v. Modern Grp. Ltd., 9 F.3d 321, 326 (3d Cir. 1993); Belline v. K-Mart Corp., 940 F.2d 184, 186 (7th Cir. 1991); *see also* Meredith v. City of Winter Haven, 320 U.S. 228, 234–35 (1943) (in a case predating enactment of state-law certification statutes, holding that, absent unusual circumstances, federal courts that have diversity jurisdiction must "decide questions of state law whenever necessary to the rendition of a judgment" even if "the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state") (citations omitted).

11. *See, e.g.*, CAL. CT. R. 8.548; TEX. R. APP. P. 58.1; FLA. R. APP. P. 9.150; 22 N.Y.C.R.R. § 500.27; ILL. SUP. CT. R. 20; *see also infra* note 153. Other states' certification statutes permit any federal court, including a district court, to certify an unsettled question of state law. *See, e.g.*, GA. SUP. CT. R. 46; WASH. R. APP. P. 16.16.

12. If a state has no recognized certification procedure, federal courts lack authority to request a decision from a court of that state on a question of law. Planned Parenthood Ass'n of Kansas City v. Ashcroft, 462 U.S. 476, 493 n.21 (1983). Further, under prevailing precedent, a district court's decision to certify a question to a state court cannot be appealed to a federal court of appeals. Nemours Found. v. Manganaro Corp., 878 F.2d 98, 101 (3d Cir. 1989).

13. Lehman Bros. v. Schein, 416 U.S. 386, 390 (1974). The Supreme Court earlier endorsed use of the certification process in a diversity suit where a parallel declaratory judgment action had already been initiated in state court. *See* Kaiser Steel Corp. v. W. S. Ranch Co., 391 U.S. 593, 594 (1968).

14. *Id.* (citing Aldrich v. Aldrich, 375 U.S. 249 (1963); Dresner v. City of Tallahassee, 375 U.S. 136 (1963)).

15. Arizonans for Official English v. Arizona, 520 U.S. 43, 76 (1997). The advent of certification statutes after the Supreme Court's 1974 decision in *Lehman Brothers* caused *Pullman* abstention to recede. *See id.* at 75–76; Bellotti v. Baird, 428 U.S. 132, 151 (1976). *Pullman* abstention involves a more drawn-out process by which a federal court exercising federal-question jurisdiction stays an action raising a substantial question of federal constitutional law and allows the litigants to pose a related question of state law in a state declaratory judgment action, subject to appeals up through the state system. *See* Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 27 (1959).

16. Highland Capital Mgmt. LP v. Schneider, 460 F.3d 308, 316 (2d Cir. 2006); *see also* Jefferson v. Lead Indus. Assoc., 106 F.3d 1245, 1247 (5th Cir. 1997) ("As a

now require the federal bench to wrestle with state laws affecting the workings of the interstate economy.

As intended, CAFA shifted into federal court the bulk of class actions alleging state-law violations from misleading advertising, bait-and-switch schemes, hidden fees and interest-rate hikes, underpayment of employees, and consumer warranty and privacy breaches.[17] Mass torts, too, that once would have been litigated in state court are now supervised by federal judges, often under the auspices of the multidistrict litigation (MDL) procedure.[18] Federal judges accustomed to seeing class actions under the federal securities, antitrust, and civil rights laws have had to adjust to the flow of new cases and parse the state statutes, decisions, and regulatory materials that would affect their outcome in any forum.[19]

By using the state certification procedure more freely, federal judges can protect state sovereignty while relieving some of the pressure on the federal system and promoting uniformity in judicial administration. Section III of this Article suggests an analytical framework for application of this procedure and examines its purposes. To those ends, as reflected in the contrasting case studies in Sections II.A and II.B, Congress should add to CAFA a presumption that an unsettled or indeterminate—and potentially dispositive—

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general proposition we are chary about certifying questions of law absent a compelling reason to do so; the availability of certification is such an important resource . . . that we will not risk its continued availability by going to that well too often."); *infra* Section III.

17. *See* Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1617 (2008) (data show a post-CAFA increase in employment and consumer case filings in federal court); *see also* Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 619–22 (2018) (documenting the shift to federal court of most shareholder challenges to corporate mergers and acquisitions in the wake of *In re Trulia, Inc.*, 129 A.3d 884 (Del. Ch. 2016), and commenting that "merger litigation seems likely to become a matter largely for the federal courts.").

18. *See* 28 U.S.C. § 1407 (2018); Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 857–58 (2017) ("[T]he cases that consume MDL practice today were once largely the province of state courts. . . . CAFA federalized broad areas of law governing mass harms by, in effect, voiding out the state court fora in which these cases had traditionally resided. MDL judges then borrowed the organizing and judicial supervision principles of Rule 23 to manage non-class aggregations of tort claims . . . .").

19. *See* Georgene Vairo, *What Goes Around, Comes Around: From the Rector of Barkway to Knowles*, 32 REV. LITIG. 721, 782 (2013) (quoting 2012 testimony of Rep. Jerrold Nadler: "It is State, not Federal, law that provides many core health, safety, and consumer protections. It is, therefore, the State, and not Federal courts, that have authority to interpret their State's law and enforce their State's vision of justice. CAFA upends this system, making it far more likely that Federal judges will have the last word on the meaning of State law."); *see also infra* note 120.

question of state law in a diversity class action should be certified where permitted to the highest court of that state.[20]

A. The Wilson v. HP Model: Discernment of State Law Through Scrutiny of Lower Courts' Decisions

California's Civil Code, enacted in 1872, prohibits deceit, which it defines as suppression of a fact by one under a duty to disclose it.[21] In 1925 the California Supreme Court rejected a litigant's attempt to draw "a distinction between a concealment of a material fact and a misrepresentation as to such fact," recognizing that "[t]he legal effect in each instance amounts to the same thing, fraud."[22] The court held in 1970 that a person may have a duty to disclose a material fact if it is known exclusively to that person and if that person knows that a counterparty would not reasonably know it.[23] A duty to disclose may also exist if the defendant owes fiduciary duties to the plaintiff, takes steps to conceal material facts, or makes partial, incomplete representations.[24] A fact is material to a transaction if it would be important to a reasonable consumer in deciding whether to enter into that transaction.[25] A presumption of reliance arises when concealed facts are material.[26] So under model jury instructions, a plaintiff may prevail on a California claim for concealment upon proof that a defendant intentionally failed to disclose material facts known only to the defendant that the plaintiff could not have discovered, resulting

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20. *See* John L. Watkins, Erie *Denied: How Federal Courts Decide Insurance Coverage Cases Differently and What to Do About It*, 21 CONN. INS. L.J. 455, 458, 479–83 (2015) (cataloguing inconsistencies in courts' treatment of the certification procedure and advocating "uniform standards favoring the liberal use of certification of unsettled questions of state law to a state's highest court."). *See generally infra* Section III.

21. CAL. CIV. CODE § 1710(3) (West 2018).

22. General Accident Fire & Life Assur. Corp. of Perth v. Industrial Accident Comm'n, 237 P. 33, 37 (Cal. 1925).

23. Warner Constr. Corp. v. City of L.A., 466 P.2d 996, 1001 (Cal. 1970).

24. LiMandri v. Judkins, 52 Cal. App. 4th 326, 336 (1997); Heliotis v. Schuman, 181 Cal. App. 3d 646, 651 (1986).

25. Kwikset Corp. v. Superior Court, 246 P.3d 877, 892 (Cal. 2011) (citing Engalla v. Permanente Med. Grp., Inc., 938 P.2d 903, 919 (Cal. 1997)).

26. *In re* Tobacco II Cases, 207 P.3d 20, 39 (Cal. 2009); *see also* Mirkin v. Wasserman, 858 P.2d 568, 574 (Cal. 1993) (holding that "it is not logically impossible to prove reliance on an omission. One need only prove that, had the omitted information been disclosed one would have been aware of it and behaved differently.").

in damage at a transaction.[27] None of these authoritative statements of California law suggests that the concealment tort requires the suppressed fact to concern a physical hazard.

In *Wilson*, the Ninth Circuit assessed these common-law doctrines against the backdrop of two California consumer protection statutes that regularly figure in class actions: the Consumers Legal Remedies Act (CLRA)[28] and the Unfair Competition Law (UCL).[29] California courts have construed the CLRA's prohibition of "[r]epresenting that goods or services are of a particular standard, quality, or grade . . . if they are of another" to prohibit concealment of material deficiencies, given that "[t]he offer of goods for sale *is* a representation of the characteristics, uses, benefits, or qualities of the goods."[30] The UCL, which like the CLRA is liberally construed,[31] forbids "[a] perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information."[32]

The plaintiffs in *Wilson* alleged that HP failed to disclose a defect in its laptop computers that caused them to lose power and sometimes even burst into flames.[33] The Ninth Circuit, citing the absence of allegations that these problems had occurred within the one-year warranty period, affirmed the dismissal of CLRA and UCL claims for failure to plausibly allege that the problems resulted from an "unreasonable safety defect."[34] The court discerned no duty to disclose, explaining that "California *federal* courts have generally

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27. CAL. CIV. JURY INSTR. NO. 1901, 1907–08 (2018). Instructions 1907 and 1908, covering actual and reasonable reliance on an omission, supplement Instruction 1901. *Id.*

28. CAL. CIV. CODE §§ 1750–56 (West 2018).

29. CAL. BUS. & PROF. CODE §§ 17200–10 (West 2018).

30. Outboard Marine Corp. v. Superior Court, 52 Cal. App. 3d 30, 37 (1975) (emphasis added) (applying CAL. CIV. CODE § 1770(7)), *superseded on other grounds by statute*, CAL. CIV. CODE § 1752 (West 2018); *see also* Gutierrez v. Carmax Auto Superstores Cal., 19 Cal. App. 5th 1234, 1256–57 (2018) (noting that the Legislature amended Civil Code section 1770 multiple times since *Outboard Marine* without disapproving of its "interpretation of that section to reach omissions or nondisclosures of material facts.") (citations omitted).

31. CAL. CIV. CODE § 1760 (West 2018); Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 973 P.2d 527, 540 (Cal. 1999).

32. Day v. AT & T Corp., 63 Cal. App. 4th 325, 332–33 (1998); *see* Kasky v. Nike, Inc., 45 P.3d 243, 250 (Cal. 2002) (declaring unlawful "not only advertising which is false, but also advertising which[,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public." (alteration in original) (quoting Leoni v. State Bar, 704 P.2d 183, 194 (Cal. 1985)).

33. Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1138–39 (9th Cir. 2012).

34. *Id.* at 1143–45.

interpreted [*Daugherty v. American Honda Motor Company*[35]] as holding that a manufacturer's duty to consumers is limited to its warranty obligations absent either an affirmative misrepresentation or a safety issue."[36] *Daugherty*, however, appears to hold only that "although a claim may be stated under the CLRA in terms constituting fraudulent omissions, to be actionable the omission must be contrary to a representation actually made by the defendant, or an omission of a fact the defendant was obliged to disclose."[37]

In *Daugherty*, an intermediate appellate court concluded that Honda had no duty to disclose an alleged oil-seal defect that the plaintiffs experienced after driving their sedans between 57,000 to 169,000 miles.[38] The court rejected the plaintiff's arguments under *Bardin v. DaimlerChrysler Corporation*[39] that these engine problems created an "unreasonable risk," as the complaint was "devoid of factual allegations showing any instance of physical injury or any safety concerns posed by the defect."[40] But the court did not purport to render a safety holding.[41] Neither did the court in *Bardin*, which ruled that Chrysler had no duty to disclose that its vehicles' exhaust-pipe components were made of tubular steel prone to cracking instead of industry-standard cast iron.[42] The *Bardin* court, affirming the dismissal of a UCL unfairness claim, relied on the general policies (1) that a consumer "can be 'fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will,'" and (2) that "[e]ven" negligence claims are limited to physical injuries.[43] And the plaintiffs, the court wrote, "did not

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35. 144 Cal. App. 4th 824 (2006).

36. *Wilson*, 668 F.3d at 1141 (emphasis added) (internal quotation marks, citations, and alteration omitted).

37. *Daugherty*, 144 Cal. App. 4th at 835.

38. *Id.* at 828–29.

39. 136 Cal. App. 4th 1255 (2006).

40. *Daugherty*, 144 Cal. App. 4th at 836.

41. *See* Rutledge v. Hewlett-Packard Co., 238 Cal. App. 4th 1164, 1174 (2015) (*Daugherty* "address[es] disclosure of defects related to safety concerns in the context of CLRA and UCL claims" without "preclud[ing] a duty to disclose material information known to a manufacturer and concealed from a consumer.").

42. *Bardin*, 136 Cal. App. 4th at 1260–63; *see Rutledge*, 238 Cal. App. 4th at 1174 ("The *Bardin* court did not hold that a defect must be related to a safety concern to be material for purposes of fraudulent omission.").

43. *Bardin*, 136 Cal. App. 4th at 1270 (quoting Seely v. White Motor Co., 403 P.2d 145, 151 (Cal. 1965) (discussing, in an action for breach of express warranty, the "distinction . . . between tort recovery for physical injuries and warranty recovery for economic loss")).

allege any personal injury or safety concerns related to" the allegedly inferior part.[44]

This reasoning—the seed of *Wilson*'s safety hazard requirement—is questionable on several levels. First, the UCL unfairness test that requires tethering to an established public policy applies to suits brought by competitors, but one or more balancing tests typically apply in the consumer protection context.[45] And though the *Bardin* court referred to safety concerns while applying a consumer balancing test,[46] its policy reasoning more closely fits the competitor tethering test.[47] Second, in any case, California policy does not countenance the sale of goods that fail of their essential purpose from a latent defect, even if it manifests only *after* the one-year statutory warranty period has expired.[48] Third, the concept of an "unreasonable"[49] danger pertains to the law of strict products liability, not fraud.[50] Fourth, fraudulent concealment, as an intentional tort, may be unconstrained by the rule that, subject to developing exceptions,[51] limits contracting parties to recovering their economic losses under contract law.[52]

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44. *Id.*

45. *See* Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 544 n.11 (Cal. 1999); Progressive W. Ins. Co. v. Superior Court, 135 Cal. App. 4th 263, 286 (2005) (observing that the California Supreme Court has never extended *Cel-Tech*'s tethering test to consumer cases "since that decision was announced," and opining that "section 17200's 'unfair' prong should be read more broadly in consumer cases because consumers are more vulnerable to unfair business practices than businesses and without the necessary resources to protect themselves from sharp practices."); Camacho v. Automobile Club of S. Cal., 142 Cal. App. 4th 1394, 1403–05 (2006) (discussing policy rationale for applying Federal Trade Commission Act section 5 test to consumer claims for unfair or deceptive trade practices).

46. *Bardin*, 136 Cal. App. 4th at 1270.

47. *See Cel-Tech*, 973 P.2d at 544.

48. Mexia v. Rinker Boat Co., 174 Cal. App. 4th 1297, 1309–11 (2009) (applying CAL. CIV. CODE § 1791.1(c)); Daniel v. Ford Motor Co., 806 F.3d 1217, 1222–23 (9th Cir. 2015) (following *Mexia*); *see also* Hicks v. Kaufman & Broad Home Corp., 89 Cal. App. 4th 908, 918 (2001) (holding that "proof of breach of warranty does not require proof the product has malfunctioned but only that it contains an inherent defect which is substantially certain to result in malfunction during the useful life of the product.").

49. Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1143–45 (9th Cir. 2012).

50. Anderson v. Owens-Corning Fiberglas Corp., 810 P.2d 549, 553–54 (Cal. 1991). Moreover, even in the products liability context, the California Supreme Court has "flatly rejected the suggestion that recovery . . . should be permitted *only* if a product is more dangerous than contemplated by the average consumer." Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 425 (1978).

51. J'Aire Corp. v. Gregory, 598 P.2d 60, 62–63 (Cal. 1979). A pending appeal in the California Supreme Court concerns application of the economic loss rule. *See* Southern Cal. Gas Leak Cases, 411 P.3d 526 (Cal. 2018) (granting petition for review).

52. Robinson Helicopter Co. v. Dana Corp., 102 P.3d 268, 275 (Cal. 2004) ("Because of the extra measure of blameworthiness inhering in fraud, and because in

Bardin went on to conclude that, absent affirmative misrepresentations, Chrysler's alleged concealment was not fraudulent under the UCL because there were no allegations that consumers expected the exhaust-pipe component to have a particular life span or be made of cast iron.[53] *Bardin* and *Daugherty* balanced consumers' reasonable expectations against the burden to manufacturers from being exposed to products liability claims for the indefinite future.[54] From this standpoint, concealing a safety hazard is more likely to violate public policy and consumer expectations, and, consequently, to justify imposing duties beyond warranty promises. But, even if *Bardin* and *Daugherty* correctly affirmed dismissal in view of their facts, their policy-based reasoning would supersede the elements of fraudulent concealment.

The concealment tort arises from material omissions rather than breach of a contractual promise[55] and requires conscious deception[56] through suppression of facts that reasonably would have influenced

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fraud cases we are not concerned about the need for predictability about the cost of contractual relationships, fraud plaintiffs may recover 'out-of-pocket' damages in addition to benefit-of-the bargain damages.") (internal quotation marks and citation omitted); *id.* at 281 (Werdegar, J., dissenting) (noting that "if the majority's decision is taken to its logical conclusion, then deceit by nondisclosure is a tort independent of any breach, just like deceit by misrepresentation."); *see also In re* General Motors LLC Ignition Switch Litig., 339 F. Supp. 3d 262, 276 (S.D.N.Y. 2018) ("If Plaintiffs paid *x* for their cars and can prove that their cars are now worth *x* minus *y* as the result of the alleged defects, it is arbitrary to prevent them from recovering the difference between *x* and *y* simply because the defect did not manifest itself in property damage or personal injury.").

53. Bardin v. DaimlerChrysler Corp., 136 Cal. App. 4th 1255, 1275 (2006).

54. *Daugherty*, 144 Cal. App. 4th at 829–30 (reasoning in part that manufacturers "can always be said to 'know' that many parts will fail after the warranty period has expired. . . . Failure of a product to last forever would become a 'defect,' a manufacturer would no longer be able to issue limited warranties, and product defect litigation would become as widespread as manufacturing itself.") (citations omitted); *see also* Lozano v. AT & T Wireless Servs., Inc., 504 F.3d 718, 735 (9th Cir. 2007) (explaining that "the common law's emphasis on reasonable expectations" may inform "[t]he legal analysis required under the UCL").

55. *See* Barbara A. v. John G., 145 Cal. App. 3d 369, 376 (1983) (holding that a defendant could be liable for deceit if he caused injury "resulting from" the plaintiff's reliance on his misrepresentations); Vichi v. Koninklijke Philips Elecs., N.V., 85 A.3d 725, 773–74 (Del. Ch. 2014) ("In addition to arising from overt misrepresentations, fraud also may occur through deliberate concealment of material facts, or by silence in the face of a duty to speak.") (citation omitted).

56. Boschma v. Home Loan Ctr., Inc., 198 Cal. App. 4th 230, 248 (2011); *see* Khan v. Shiley Inc., 217 Cal. App. 3d 848, 857 (1990) ("For purposes of establishing fraud, it matters not that the [product] is still functioning, arguably as intended. Unlike the other theories, in which the safety and efficacy of the *product* is assailed, the fraud claim impugns defendants' *conduct*.").

the transaction.[57] None of these black-letter requirements includes any limitation derived from a warranty. Instead, to the extent consumers may transact differently if alerted a product will fail before the end of its useful life—often many years—the materiality element would allow for claims based on hidden defects that manifest well *after* the end of a warranty period.[58] Consistent with the goal of appropriate transparency, whether an omitted fact is material normally constitutes a question of fact for trial.[59]

Whether there should be a physical danger requirement among the requirements for pleading and proving a concealment claim, at common law or under the CLRA or UCL,[60] entails lawgiving judgment properly reserved to California's Legislature or Supreme Court. The Ninth Circuit itself drove home the point in a decision issued in the month before *Wilson*: "Getting the optimal balance between protecting consumers and attracting foreign businesses, with resulting increase in commerce and jobs, is not so much a policy decision committed to our federal appellate court, or to particular district courts within our circuit, as it is a decision properly to be made by the legislatures and courts of each state."[61] Yet, in *Wilson*, the Ninth Circuit endorsed a policy rationale suggested in *Bardin* and *Daugherty*—"to broaden the duty to disclose beyond safety concerns would eliminate term limits on warranties, effectively making them perpetual or at least for the 'useful life' of the product"—despite recognizing that "California courts [were] split on this issue" and the California Supreme Court had not resolved the split.[62]

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57. *In re* Tobacco II Cases, 207 P.3d 20, 39–40 (Cal. 2009).

58. *See* Rutledge v. Hewlett-Packard Co., 238 Cal. App. 4th 1164, 1175 (2015) ("The question under the UCL is related to HP's conduct in failing to disclose the faulty inverter, not . . . whether the notebook[] computer functioned for one year. HP's argument that the expiration of the warranty period precludes a claim for fraudulent concealment under the UCL is incorrect.").

59. *Tobacco II Cases*, 207 P.3d at 39 (citing Engalla v. Permanente Med. Group, Inc., 938 P.2d 903, 919 (Cal. 1997)).

60. As compared with common-law fraud, these consumer protection statutes embrace more relaxed standards for pleading and proof. *See Id.* at 29–30.

61. Mazza v. American Honda Motor Co., 666 F.3d 581, 592 (9th Cir. 2012); *see also supra* note 19 & *infra* note 120.

62. Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1141 (9th Cir. 2012) (internal quotation marks and citations omitted); *see also* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 739 (5th ed. 1984) (identifying "a rather amorphous tendency on the part of most courts in recent years to find a duty of disclosure when the circumstances are such that the failure to disclose something would violate a standard requiring conformity to what the ordinary ethical person would have disclosed.").

At the time of *Wilson*, other California appellate courts had upheld statutory deceit claims without regard to whether the allegedly concealed problem involved physical danger. In *Collins v. eMachines, Inc.*, the court held that a complaint sufficiently alleged Gateway had a duty to disclose a defect that posed no safety issue but caused data corruption and thereby impaired its computers' basic functioning.[63] The court wrote that consumers "certainly" would attribute importance to the defect's disclosure, and pointed to allegations that Gateway had exclusive knowledge of it.[64] Nor was safety mentioned in a 2010 California decision affirming class certification of CLRA claims grounded in allegations that the defendant failed to disclose that its roof tiles would fade to concrete well before the end of their advertised 50-year lifespan.[65]

Wilson ignored these contrary decisions and had a swift impact on many class actions proceeding in federal court under CAFA. Bound by Ninth Circuit holdings, naturally motivated to avoid reversal, federal district judges applied *Wilson*'s safety hazard requirement to dismiss California consumer claims.[66] As a body of federal law addressing the scope of this requirement emerged, federal district judges, just as naturally, turned for guidance to each other's opinions.[67]

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63. 202 Cal. App. 4th 249, 258 (2011).

64. *Id*. at 256.

65. McAdams v. Monier, Inc., 182 Cal. App. 4th 174, 178 (2010).

66. *See, e.g.*, Walsh v. Kindred Healthcare, No. C 11-00050 JSW, 2012 WL 1030090, at *2 (N.D. Cal. Mar. 26, 2012) ("[T]he Ninth Circuit has recently made clear that the duty to disclose is limited to omissions which pose safety concerns.") (citations omitted); Missaghi v. Apple Inc., No. CV 13-02003 GAF (AJWx), 2013 WL 12114470, at *7–8 (C.D. Cal. Aug. 28, 2013) ("Plaintiffs' alleged safety concerns are far too speculative to warrant imposing a duty to disclose.") (citation omitted); Hodges v. Apple Inc., No. 13-cv-01128-WHO, 2013 WL 4393545, at *4 (N.D. Cal. Aug. 12, 2013) ("The Court follows *Wilson*."); Marcus v. Apple Inc., No. C 14-03824 WHA, 2015 WL 151489, at *6 (N.D. Cal. Jan. 8, 2015) (dismissing CLRA claims on the basis that plaintiffs "failed to plead the existence of any affirmative misrepresentations . . . [or] safety issues."); Tietsworth v. Sears, Roebuck & Co., No. 5:09-cv-00288-JF HRL, 2012 WL 1595112, at *14 (N.D. Cal. May 4, 2012) (denying class certification and rejecting the plaintiffs' argument "that the *Wilson* court misinterpreted California law"—"a decision of the Ninth Circuit is binding upon this Court"). *Compare also* Otero v. Zeltiq Aesthetics, Inc., No. CV 17-3994-DMG (MRWx), 2018 WL 3012942, at *4 (C.D. Cal. June 11, 2018) ("Although *Wilson* arose in the product defect context, the Ninth Circuit indicated that its holding applied to a manufacturer's duty of disclosure generally.") (citation omitted), *with* Beltran v. Avon Prods., Inc., No. SACV 12-02502-CJC (ANx), 2012 WL 12303423, at *5 (C.D. Cal. Sept. 20, 2012) (declining to apply *Wilson* outside the product defect context).

67. *See, e.g.*, Apodaca v. Whirlpool Corp., No. SACV 13-00725 JVS, 2013 WL 6477821, at *7 (C.D. Cal. Nov. 8, 2013) (citing Elias v. Hewlett-Packard Co., No. 12-cv-00421-LHK, 2013 WL 3187319 at *11–13 (N.D. Cal. June 21, 2013)); Donohue v. Apple, Inc., 871 F. Supp. 2d 913, 926 (N.D. Cal. 2012); Keegan v. American Honda

Wilson also gave rise to second-order questions, like what constitutes an unreasonable safety hazard and what must be pleaded to link an alleged defect to an alleged hazard. The Ninth Circuit held, in *Wilson*, that the complaint failed to adequately describe how the alleged laptop-port defect caused fires,[68] and in *Williams v. Yamaha Motor Company* that the danger from an alleged boat-motor defect causing premature corrosion and loss of steering power did not rise to the level of being "unreasonable."[69] In contrast, federal district courts held that safety risks sufficient to support concealment claims could arise from auto defects, inaccurate Fitbit heart-rate monitors, and chemical irritants in the fabric of flight attendants' uniforms.[70]

Meanwhile, back in California state court, an appellate panel in *Rutledge v. Hewlett-Packard Company* rejected HP's argument that "manufacturers do not have an independent duty to disclose a product defect absent an unreasonable risk of physical injury or other safety concern."[71] The court clarified that "neither *Daugherty* nor *Bardin* preclude[s] a duty to disclose material information known to a

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Motor Co., 284 F.R.D. 504, 529 (C.D. Cal. 2012); and Tait v. BSH Home Appliances Corp., 289 F.R.D. 466, 488 (C.D. Cal. 2012)); *cf.* Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1681–82 (1992) ("[S]ome evidence suggests that federal courts have shown a preference for citing federal decisions on state law instead of state decisions at rates approaching pre-*Erie* levels.").

68. 668 F.3d at 1144–45 (stating that "[i]t is difficult to conceive (and the complaint does not explain) how the Laptops could ignite if they are 'unable to receive an electrical charge.'").

69. 851 F.3d 1015, 1028–29 (9th Cir. 2017).

70. Aguila v. General Motors LLC, No. 1:13-cv-00437-LJO, 2013 WL 3872502, at *5 (E.D. Cal. July 25, 2013) (noting that "faulty steering systems could lead to unsafe conditions for both drivers and passengers, especially at today's highway speeds."); Pallen v. Twin Hill Acquisition Co., No. SACV 12-01979 DOC (MLGx), 2013 WL 12130033, at *5 (C.D. Cal. Apr. 26, 2013) (finding it "conceivable that the contamination of [flight attendant] uniform fabric with chemical irritants could cause a safety hazard"); McLellan v. Fitbit, Inc., No. 3:16-cv-00036-JD, 2018 WL 2688781, at *3 (N.D. Cal. June 5, 2018) (finding that the plaintiff "plausibly alleged an 'unreasonable safety hazard' that may arise when users rely on Fitbit heart rate readings during exercise.") (citation omitted); *In re* MyFord Touch Consumer Litig., 46 F. Supp. 3d 936, 959 (N.D. Cal. 2014) ("[T]here are certain obvious safety risks if there is a breakdown in the MFT system—*e.g.*, if the rearview mirror camera or the defroster were to stop functioning."); Baranco v. Ford Motor Co., 294 F. Supp. 3d 950, 965–66 (N.D. Cal. 2018) ("Though there appears to be some lack of clarity as to when a progressive condition gives rise to an actionable safety hazard, it is clear that a defect that manifests suddenly and without adequate warning can give rise to a such a claim.") (footnote omitted).

71. Rutledge v. Hewlett-Packard Co., 238 Cal. App. 4th 1164, 1173–74 (2015) (internal quotation marks omitted).

manufacturer and concealed from a consumer."[72] *Rutledge*, following *Collins*, found triable issues of fact regarding HP's alleged concealment of a defect that caused certain of its laptops' screens to darken and dim before the end of their useful lives.[73]

After *Rutledge*, corporate defendants continued to press safety arguments in federal court, where they were met with a conflicting reception. Several district judges considered themselves bound by *Wilson*, notwithstanding *Rutledge*, until the Ninth Circuit overruled *Wilson* or the California Supreme Court settled the matter.[74] Other judges continued to follow *Wilson* without citing *Rutledge*.[75] Still other federal judges repudiated *Wilson*. For example, in *In re Lenovo Adware Litigation*, the court upheld CLRA claims asserting a duty to disclose invasive spyware that allegedly caused laptop purchasers to experience performance problems.[76] The court reasoned that *Rutledge* disagreed with *Wilson*, and "[n]o clear and convincing evidence suggests that the California Supreme Court would decide *Rutledge* differently."[77]

The Ninth Circuit's post-*Rutledge* decisions added to the disarray. In *Yamaha*, the court recited a district court's stringent interpretation of *Wilson* suggesting that, without reference to when consumers may have experienced the defect, "the existence of an unreasonable safety hazard" must accompany "a claim for failing to disclose a defect."[78] In

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72. *Id*. at 1174.

73. *Id*. at 1174–79.

74. Sharma v. BMW of N. Am. LLC, No. 13-cv-02274-MMC, 2016 WL 4395470, at *5 (N.D. Cal. Aug. 18, 2016); Sloan v. General Motors LLC, 287 F. Supp. 3d 840, 868 n.12 (N.D. Cal. 2018), *order clarified on another point*, No. 16-cv-07244-EMC, 2018 WL 1156607 (N.D. Cal. Mar. 5, 2018); Daniel v. Ford Motor Co., No. 2:11-02890 WBS EFB, 2017 WL 3720344, at *1–2 (E.D. Cal. Aug. 29, 2017); Otero v. Zeltiq Aesthetics, Inc., No. CV 17-3994-DMG (MRWx), 2018 WL 3012942, at *4–5 (C.D. Cal. June 11, 2018).

75. McCoy v. Nestle USA Inc., 173 F. Supp. 3d 954, 965 (N.D. Cal. 2016); Wirth v. Mars Inc., SA CV 15-1470-DOC (KESx), 2016 WL 471234, at *3 (C.D. Cal. Feb. 5, 2016); Azoulai v. BMW of N. Am. LLC, No. 16-cv-00589-BLF, 2017 WL 1354781, at *8–9 (N.D. Cal. Apr. 13, 2017); Hindsman v. General Motors LLC, No. 17-cv-05337-JSC, 2018 WL 2463113, at *11–12 (N.D. Cal. June 1, 2018).

76. No. 15-md-02624-RMW, 2016 WL 6277245, at *12–13 (N.D. Cal. Oct. 27, 2016). I am one of the attorneys representing the class in the *Lenovo* adware litigation.

77. *Id*. at *13; *see also* Norcia v. Samsung Telecomms. Am., LLC, No. 14-cv-00582-JD, 2015 WL 4967247, at *6 (N.D. Cal. Aug. 20, 2015) (rejecting Samsung's argument that its duty to disclose alleged smartphone deficiencies was limited to safety issues, as "the California Court of Appeal itself has very recently clarified that this is a misreading of California law.").

78. 851 F.3d 1015, 1025 (9th Cir. 2017) (quoting Apodaca v. Whirlpool Corp., No. 13-00725 JVS (ANx), 2013 WL 6477821, at *9 (C.D. Cal. Nov. 8, 2013)). *But see* Sloan v. General Motors LLC, 287 F. Supp. 3d 840, 868 (N.D. Cal. 2018) (construing Ninth

Hodsdon v. Mars, Inc., however, the Ninth Circuit acknowledged that "the recent California cases do cast doubt on whether *Wilson*'s safety-hazard requirement applies in all circumstances" and would permit "a UCL omission claim when: the plaintiff alleges that the omission was material; second, the plaintiff must plead that the defect was central to the product's function; and third, the plaintiff must allege one of the four *LiMandri* factors [for a duty to disclose]."[79] A safety hazard, the court commented in dicta, may be required for some omission claims unrelated to a product's central functionality.[80] But the court stated that it had no occasion to revisit the holding of *Wilson* because the alleged concealment in *Hodsdon*—Mars' alleged failure to disclose that it sources cocoa beans produced by child or slave labor—did not affect its chocolate bars' central functionality.[81] Uncertainty thus remained, with plaintiffs arguing that *Hodsdon* recognized there may be no safety hazard requirement even when there are no affirmative misrepresentations or in-warranty manifestations of a defect, and defendants arguing that *Hodsdon* expressly disclaimed this as a holding, so *Wilson* and *Yamaha* remain binding in federal court.[82]

All of this effort and confusion—all of the judicial resources and attorney hours devoted over the past seven years to a safety hazard requirement for California omission claims—might have been avoided had the Ninth Circuit in *Wilson* certified the following questions of

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Circuit decisions to hold that a manufacturer may be liable under California law for concealing a non-dangerous product defect that manifests during the warranty period), *order clarified on another point*, No. 16-cv-07244-EMC, 2018 WL 1156607 (N.D. Cal. Mar. 5, 2018).

79. 891 F.3d 857, 861–63 (9th Cir. 2018); *see* LiMandri v. Judkins, 52 Cal. App. 4th 326, 336 (1997); *supra* notes 21–27.

80. *Hodsdon*, 891 F.3d at 864.

81. *Id*. at 862, 864.

82. *See, e.g.*, *In re* Apple Inc. Device Performance Litig., No. 18-md-02827-EJD, — F. Supp. 3d —, 2018 WL 4772311, at *16 (N.D. Cal. Oct. 1, 2018) (noting that "[t]he state of the law on the duty to disclose under California law is in some disarray" after *Hodsdon*); Blissard v. FCA US LLC, No. LA CV18-02765 JAK (JEMx), 2018 WL 6177295, at *11–12 (C.D. Cal. Nov. 9, 2018) (same); *In re* Seagate Tech. LLC, 326 F.R.D. 223, 242 (N.D. Cal. 2018) (stating that "[t]he viability of a 'pure omissions' claim under California law, as interpreted by the Ninth Circuit, is currently in flux," with the applicable standard "unclear after the apparent demise of *Wilson*"); Beyer v. Symantec Corp., No. 18-cv-02006-EMC, 2018 WL 4584217, at *8 (N.D. Cal. Sept. 21, 2018) (interpreting *Hodsdon* to the effect that "the defect must not only be central to the product's function; it must also be physical."); Norcia v. Samsung Telecomms. Am., LLC, No. 14-cv-00582-JD, 2018 WL 4772302, at *1 (N.D. Cal. Oct. 1, 2018) ("Plaintiff says that *Hodsdon* interpreted *Rutledge* in the same way as this Court to find that there can be a duty to disclose in the absence of safety issues. Samsung argues otherwise.").

law to the California Supreme Court: Where a plaintiff asserts CLRA and UCL claims based on the defendant's alleged fraudulent concealment of a product defect, must the alleged defect give rise to an unreasonable safety hazard for the claims to be actionable if the defect has neither been the subject of affirmative misrepresentations by the defendant nor manifested within the period of its express warranty? If so, what standards apply to the requirement of an unreasonable safety hazard? If not, what findings are necessary for the plaintiff to prevail?

B. The Troester v. Starbucks Model: Certifying State-Law Issues to the State Supreme Court

A contrasting case study involves employment law. Actions under the Fair Labor Standards Act of 1938 (FLSA)[83] incorporate a *de minimis* rule that grants employers immunity for "uncertain and indefinite periods of time . . . a few seconds or minutes" of work performed beyond scheduled hours if recording the moments of time is administratively infeasible.[84] Among the "[s]plit-section absurdities"[85] of working life that have been deemed to fall within this rule:

- A broadband technician puts out orange traffic cones when parking a company van off shift and brings them back into the van before driving to a job.[86]
- After clocking out, a dog handler for a police canine unit drives home with the dog, who usually just sits in the back seat but sometimes barks and has to be restrained, and occasionally "vomit[s] or soil[s]" the car.[87]
- A bartender arrives at work: "I walk in the door. I check to see how things are. I just do a visual

83. 29 U.S.C. §§ 201–219 (2018).

84. 29 C.F.R. § 785.47 (2018).

85. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 692 (1946). Under the Ninth Circuit's three-part test for determining whether the FLSA *de minimis* rule applies, courts consider: "(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work." Lindow v. United States, 738 F.2d 1057, 1063 (9th Cir. 1984).

86. Donatti v. Charter Commc'ns, L.L.C., 950 F. Supp. 2d 1038, 1045 (W.D. Mo. 2013).

87. Reich v. New York City Transit Auth., 45 F.3d 646, 652 (2d Cir. 1995).

summary of the restaurant to see if things need to be straightened up. I straighten up chairs on my way back to my area. I pick up trash" and then clock in.[88]

- A police officer sometimes takes a few moments to clean her radio and safety vest and to oil her handcuffs.[89]

Douglas Troester worked for two-and-a-half years as a shift supervisor at a Starbucks in Burbank, California.[90] In the summer of 2012 he filed a complaint in Los Angeles Superior Court asserting California wage-and-hour claims on behalf of a proposed class of California non-managerial Starbucks employees who performed cafe closing tasks from mid-2009 to October 2010.[91] Starbucks removed the case to federal court under CAFA.[92]

The undisputed evidence showed that Troester worked for four to ten minutes after clocking out at the end of each shift.[93] Troester submitted evidence that he was withheld $102.67 in off-the-clock pay—about 13 hours' work, at the $8 minimum wage—for his time spent using the cafe computer to transmit sales data to headquarters, shutting down the computer, activating the building's alarm system, walking co-workers to their cars (to comply with Starbucks guidelines), and occasionally bringing in patio furniture.[94] The federal district court dismissed Troester's claims at summary judgment, relying on cases in which the *de minimis* rule defeated FLSA claims for nonpayment of off-shift work lasting no more than ten minutes per day.[95]

The district court assumed without deciding that this rule of federal law applies equally to California wage-and-hour law. On

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88. Fast v. Applebee's Int'l, Inc., 502 F. Supp. 2d 996, 999–1000 (W.D. Mo. 2007), *order vacated in part on other grounds*, No. 06-04146-CV-C-NKL, 2009 WL 4344562 (W.D. Mo. Aug. 26, 2009), *and supplemented*, 2010 WL 816639 (W.D. Mo. Mar. 4, 2010), *aff'd*, 638 F.3d 872 (8th Cir. 2011).

89. Musticchi v. City of Little Rock, 734 F. Supp. 2d 621, 633 (E.D. Ark. 2010).

90. Troester v. Starbucks Corp., No. CV 12-7677 GAF PJW(x), 2014 WL 1004098, at *1 (C.D. Cal. Mar. 7, 2014); Complaint at ¶ 5, Troester v. Starbucks Corp., No. CV 12-7677 GAF PJW(x) (C.D. Cal. Sept. 7, 2012), ECF No. 1-1.

91. Troester v. Starbucks Corp., 680 F. App'x 511, 512 (9th Cir. 2016).

92. Starbucks Corporation's Notice of Removal of Action Pursuant to 28 U.S.C. §§ 1332(D)(2), 1441, 1446, and 1453 at ¶¶ 5–18, Troester v. Starbucks Corp., No. CV 12-7677 GAF PJW(x) (C.D. Cal. Sept. 7, 2012), ECF No. 1.

93. *Troester*, 680 F. App'x at 513.

94. *Id.*; *Troester*, 2014 WL 1004098, at *1–2.

95. *Troester*, 2014 WL 1004098, at *3.

appeal, the Ninth Circuit observed that two of its recent decisions, citing an intermediate state court opinion,[96] had signaled agreement with the district court.[97] Nevertheless, as permitted by California Rule of Court 8.548(a), the Ninth Circuit sought a direct answer from the California Supreme Court, explaining that the outcome of the appeal could depend on whether FLSA's *de minimis* doctrine applied.[98]

Accepting the request, the California Supreme Court held that California law is more protective of workers than federal law and mandates that they be paid for "all hours worked."[99] Concluding that the *de minimis* principle did not apply to Troester's claims, the court announced that the state labor code's provisions and regulations are "indeed concerned with 'small things'" and do not embrace the federal policy of allowing unpaid wages for insubstantial amounts of work time.[100] As one example, California law requires giving two ten-minute rest breaks each day to non-exempt employees, and the California Supreme Court has safeguarded this break time.[101] State policy aims to prevent workers from being taken advantage of unfairly,[102] and the hundred or so dollars claimed by Troester would be "enough to pay a utility bill, buy a week of groceries, or cover a month of bus fares"—so "[w]hat Starbucks calls '*de minimis*' is not *de minimis* at all to many ordinary people who work for hourly wages."[103] Further, because of the "modern availability" of class actions, "small individual recoveries worthy of neither the plaintiff's nor the court's time can be aggregated to vindicate an important public policy," as by "curtailing illegitimate competition"[104] or deterring "sellers who

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96. Gomez v. Lincare, Inc., 173 Cal. App. 4th 508, 527–28 (2009).

97. *Troester*, 680 F. App'x at 513 (citing Gillings v. Time Warner Cable LLC, 583 F. App'x 712, 714 (9th Cir. 2014), and Corbin v. Time Warner Entm't-Advance/Newhouse P'ship, 821 F.3d 1069, 1081 n.11 (9th Cir. 2016)).

98. *Troester*, 680 F. App'x at 512–13 (citing, *inter alia*, CAL. LABOR CODE §§ 510, 1194, 1197).

99. Troester v. Starbucks Corp., 421 P.3d 1114, 1119–25 (Cal. 2018) (citations omitted).

100. *Id.* at 1122–23. Following the California Supreme Court's decision, the Ninth Circuit reversed the grant of summary judgment. *See* Troester v. Starbucks Corp., 738 F. App'x 562 (9th Cir. 2018).

101. *Troester*, 421 P.3d at 1122.

102. *Id*. at 1119–20.

103. *Id*. at 1125.

104. Similar to the wage-and-hour laws discussed in *Troester*, California's antitrust laws are "broader in range and deeper in reach" than parallel federal laws. Cianci v. Superior Court, 710 P.2d 375, 384 (Cal. 1985). *Compare, e.g.*, Leegin Creative Leather Prods. Inc. v. PSKS Inc., 551 U.S. 877, 907 (2007) (for Sherman Act purposes, vertical price restraints are evaluated under a rule of reason), *with* Mailand v. Burckle,

indulge in fraudulent practices."[105] The court contemplated that digital technology will increasingly enable employers to account for small amounts of time worked, but left open the possibility that this time could be so trifling or irregular as to be non-compensable under California law.[106]

Concurring, Justice Cuéllar cautioned against a future holding that could encourage a "cyberpunk novel" world with a heightened "scope and intensity of employee monitoring, which might systematically erode employees' ability to find even a moment of privacy in their lives."[107] He emphasized nonetheless that California law requires compensation for "all time for which the employer knew or should have known" the employee was working, including "regular minutes . . . worked off the clock."[108] "That protection is not diluted," Justice Cuéllar opined, "if it remains possible for employers to argue against liability for moments so fleeting that they are all but imperceptible."[109]

The California Supreme Court ruled against Starbucks and its business community allies in *Troester*, but in so doing, largely settled their expectations and motivated them to ensure their policies and practices are calibrated for full payment of wages. At the same time, *Troester* headed off judicial uncertainty on the bounds of California wage-and-hour law, supporting efficiency and cooperative federalism.[110] As a result, even those who disagree with the California

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572 P.2d 1142, 1147 (Cal. 1978) (California antitrust law treats vertical price fixing as illegal *per se*). *See also infra* note 156.

105. *Troester*, 421 P.3d at 1123–24 (quoting Linder v. Thrifty Oil Co., 2 P.3d 27, 38 (Cal. 2000)).

106. *Troester*, 421 P.3d at 1124–25. Offering a gloss on this caveat, Justice Kruger's concurrence presented three hypothetical scenarios the court's opinion did not reach: (1) a software glitch on rare occasions delays workers' ability to log-in to start their shifts by up to two or three minutes; (2) workers occasionally receive notice of shift changes by e-mail or text message during their off hours; (3) a retail clerk who has clocked off stays in the store to wait for a ride home and takes a minute or two to help a customer. *Id.* at 1130 (Kruger, J., concurring). Justice Kruger also recognized "California's vital interest in ensuring that employers fully compensate their employees for the work they perform." *Id.* at 1129 (Kruger, J., concurring). In addition to writing separately, Justices Kruger and Cuéllar each signed the opinion of the court. *Id.* at 1125.

107. *Id.* at 1128 (Cuéllar, J., concurring).

108. *Id.* at 1128–29 (Cuéllar, J., concurring) (citation omitted).

109. *Id.* at 1129 (Cuéllar, J., concurring).

110. Lehman Bros. v. Schein, 416 U.S. 386, 393 (1974); *see, e.g.*, Lao v. H&M Hennes & Mauritz, L.P., No. 5:16-cv-00333-EJD, 2018 WL 3753708, at *7–9 (N.D. Cal. Aug. 8, 2018) (exercising CAFA jurisdiction and applying *Troester* to reject a *de minimis* challenge to class certification of California wage-and-hour claims); *Carrington v. Starbucks Corp.*, No. D072392, — Cal. App. 5th —, 2018 WL 6695970,

court's reasoning would be hard-pressed to deny that the Ninth Circuit's certification was in some sense beneficial or prudent.

III. THE FEDERAL COURTS SHOULD LET STATE SUPREME COURTS DECIDE NOVEL OR UNSETTLED ISSUES OF STATE LAW IN CLASS ACTIONS

The problem of federal courts deciding unsettled or indeterminate state-law issues dates to the nineteenth century, but CAFA has thrown this problem into relief by requiring the federal courts to accommodate many, many more class actions under state law. All seem to agree that the solution to the problem is not abstention.[111] Federal courts have a "virtually unflagging obligation" to exercise the diversity jurisdiction conferred by Congress by deciding the disputes before them on that basis,[112] and when sitting in diversity are not in the habit of abstaining from deciding cases because they raise difficult state-law issues. A static approach, whereby federal courts could simply refuse to expand on prevailing state law in light of the facts presented, is also unrealistic, as well as unfair to a litigant who would be deprived of that legal development by the mere "accident of diversity of citizenship."[113] The two options realistically left for federal courts confronted with unsettled or indeterminate state-law issues are (1) the predictive model, and (2) the certification procedure.

First, attempts to forecast state law can subvert our dual sovereignty system and cause instability. As the Supreme Court recognized, "[t]he reign of law is hardly promoted if an unnecessary

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at *11–12 (Cal. Ct. App. Dec. 19, 2018) (applying *Troester* to reject a *de minimis* argument, as there was "no indication of a practical administrative difficulty recording small amounts of time for payroll purposes.").

111. *See, e.g.*, Arizonans for Official English v. Arizona, 520 U.S. 43, 76 (1997); City of Houston v. Hill, 482 U.S. 451, 470 (1987); Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1550–51 (1997) (concluding that certification "affords several distinct structural advantages over abstention" and "alleviate[s] the separation-of-powers concerns associated with abstention by preventing federal courts from 'declin[ing] the exercise of jurisdiction which is given' by Congress.") (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821)); Martha A. Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590, 607 (1977) ("The balance between costs and benefits . . . leaves certification well ahead of abstention . . . .").

112. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

113. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). *See generally* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1535–44 (1997) (discussing the static approach taken by some courts).

ruling of a federal court is thus supplanted by a controlling decision of a state court."[114] At its worst the predictive model invades state authority in a manner redolent of the pre-*Erie* approach.[115] The early twentieth century saw forum-shopping and "injustice and confusion" by result of federal courts' "free[dom] to exercise an independent judgment as to what the common law of the state is—or should be"—which yielded arbitrary or inconsistent results and, in Justice Brandeis's words, "invaded rights which are reserved by the Constitution to the several states."[116] Just as too many state issues were being decided by federal courts before *Erie*, when a federal judge today attempts to divine how a state supreme court would decide an unresolved issue, the judge usurps a function entrusted to a court made up of jurists chosen under state law who are ultimately answerable to the citizens of that state. And that upends what the Supreme Court termed a "vital consideration" in our federal system: "the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments."[117] The Court deemed axiomatic that "[t]he last word on the meaning of" a Texas civil code provision "belongs neither to us nor to the district court but to the supreme court

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114. Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500 (1941); *see also* Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law* 11, 16 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 18-33, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3261372 (lamenting "the slow disappearance of common law development by state courts" and observing that "the normal hierarchical ordering of the law does not occur" when "[t]he cases are developing in federal court, not state court").

115. Swift v. Tyson, 41 U.S. 1 (1842); *cf.* David Marcus, Erie*, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1281 (2007) ("Striking similarities between the debates over CAFA and pre-*Erie* debates over diversity jurisdiction suggest that the statute's supporters expect CAFA to function in a manner not dissimilar from the general common law: it is an avenue through which federal judges' shared preferences can limit the regulatory reach of state law, at least for a small but important subset of claims typically brought as class actions.").

116. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 71, 77, 80 (1938); *see also* Guaranty Tr. Co. of N.Y. v. York, 326 U.S. 99, 102–03 (1945) (explaining that before *Erie*, "it was conceived that there was 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute'" (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting))).

117. Younger v. Harris, 401 U.S. 37, 43–44 (1971) (discussing why federal courts only rarely enjoin proceedings in state court).

of Texas."[118] Thus, without a controlling federal-law issue, the Supreme Court is powerless to disturb a state court judgment.[119] Conversely, the sovereign states are responsible for providing definitive interpretations of their laws enacted to protect their own citizens.[120]

Paired with the encroachment on state sovereignty from an attempt to predict state law is the potential unfairness to a federal litigant who cannot appeal the ruling to a state court.[121] Such

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118. *Pullman*, 312 U.S. at 500; *see also Erie*, 304 U.S. at 78–79; Murdock v. City of Memphis, 87 U.S. 590, 626 (1874) ("The State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise."); Coastal Petroleum Co. v. Secretary of the Army of the U.S., 489 F.2d 777, 779 (5th Cir. 1973) (the Florida Supreme Court's response to a certified question of Florida law provides the "last word").

119. *See* 28 U.S.C. § 1257 (2018); Herb v. Pitcairn, 324 U.S. 117, 125–26 (1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights."); Michigan v. Long, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground."); STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 207 (10th ed. 2013) ("If in fact the judgment rests on a state ground, the Supreme Court has no jurisdiction to review the case. In this circumstance, the state court's ruling with respect to the federal question, even though arguably wrong, becomes superfluous and thus incapable of triggering Supreme Court jurisdiction."); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (state court decisions resting "wholly or even partly on state law . . . . not only cannot be overturned by, they indeed are not even reviewable by, the Supreme Court of the United States.").

120. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422 (2003) ("A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders"); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146 (1963) (laws prohibiting deceptive sales practices lie within the "historic police powers of the States" (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))); Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (the decision that federal law did not preempt negligence claims involving allegedly defective pacemakers was "consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.").

121. *See, e.g.*, Eric Eisenberg, *A Divine Comity: Certification (at Last) in North Carolina*, 58 DUKE L.J. 69, 102 (2008) (advocating a certification statute for North Carolina on the grounds that it would "avoid federal court guesswork on difficult state law issues, ensuring fairness for the litigants while saving time and money"); Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1697 (2003) (arguing that the certification procedure enhances "[t]he prerogative of a state government to establish and define its own state law" and "gives the state judiciary the opportunity to rule on important issues of state law in cases in which it might not otherwise have had the chance."). *But see* Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 SUFFOLK U. L. REV. 677, 690 (1995) (arguing that a litigant who loses in federal court because of a later-corrected interpretation of state law "is no more greatly disadvantaged than a litigant

attempts, moreover, risk sowing uncertainty and disarray. Countless questions of state law remain unanswered, the tide of economic and technological progress constantly generates new legal questions,[122] and "[e]ven when there is a state supreme court decision on point, the direction is not always crystal clear."[123] Judge Friendly alluded to the tenuous nature of the predictive task with the quip that a diversity-based appeal called for the Second Circuit "to determine what the New York courts would think the California courts would think on an issue about which neither has thought."[124] Making an especially memorable wrong guess, the Sixth Circuit held that Elvis Presley's right of publicity did not survive his death as a matter of Tennessee law, only to be corrected seven years later by a Tennessee court.[125] *Wilson v. HP*

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who loses in a lower state court and is thereafter denied discretionary review, only to have the state's high court decide the issue favorably in some other case at a later date.").

122. *See* Frank Chang, *You Have Not Because You Ask Not: Why Federal Courts Do Not Certify Questions of State Law to State Courts*, 85 GEO. WASH. L. REV. 251, 263–64 (2017) (describing how state law can be unclear when there is a question of first impression, when intermediate appellate courts have issued conflicting decisions, or when persuasive evidence indicates the state supreme court may revisit a decision); Haley N. Schaffer & David F. Herr, *Why Guess?* Erie *Guesses and the Eighth Circuit*, 36 WM. MITCHELL L. REV. 1625, 1630 (2010) (noting that a "key benefit of certification is that it eliminates *Erie* guesses, which minimizes federal court errors in interpreting state law.").

123. Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1676 (1992). Judge Sloviter recounted that the Third Circuit "guessed wrong on questions of the breadth of arbitration clauses in automobile insurance policies (we predicted they would not extend to disputes over the entitlement to coverage, but they do), the availability of loss of consortium damages for unmarried cohabitants (we predicted they would be available, but they are not), the 'unreasonably dangerous' standard in products liability cases (we predicted the Restatement would not apply, but it does), and the applicability of the 'discovery rule' to wrongful death and survival actions (we predicted it would toll the statute of limitations, but it does not)." *Id.* at 1679–80 (footnotes omitted); *see also* Gregory L. Acquaviva, *The Certification of Unsettled Questions of State Law to State High Courts: The Third Circuit's Experience*, 115 PENN ST. L. REV. 377, 379, 380 n.26 (2010) (stating that the law books are "replete with instances where federal courts sitting in diversity are later overruled by state high courts" and suggesting that, in *Holmes v. Kimco Realty Corporation*, 598 F.3d 115 (3d Cir. 2010), the Third Circuit should have asked the New Jersey Supreme Court whether an individual tenant has a state-law duty to remove snow from the common areas of a multi-tenant parking lot when the landlord has retained and exercised that responsibility).

124. Nolan v. Transocean Air Lines, 276 F.2d 280, 281 (2d Cir. 1960), *judgment set aside,* 365 U.S. 293 (1961).

125. *See* Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 958 (6th Cir. 1980); State *ex rel.* Elvis Presley v. Crowell, 733 S.W.2d 89, 95–99 (Tenn. Ct. App. 1987).

provides another case in point.[126] The Ninth Circuit's adventuresome interpretation of California consumer law left a trail of conflicting federal opinions on whether a safety hazard is required to make out a California deceit claim when a product defect has manifested after the express warranty period.[127]

Second, as discussed in Professor Bradford Clark's leading article, certification of state-law questions to state supreme courts for authoritative answers "maximiz[es] the chances that the same law will be applied in any given case regardless of the accident of diversity jurisdiction."[128] The high court can act to settle the expectations of courts and businesses, so asking it to decide unsettled or indeterminate state-law questions "in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism."[129] Deference to state courts on substantive legal issues also comports with the various abstention and exhaustion doctrines that recognize and defend the primacy of state courts in resolving matters of state law. Federal jurisdiction thus gives way to state sovereignty in most cases where an indeterminate or unsettled state issue will dictate the outcome.

As to a concern about overburdening state supreme courts, it should be enough to recall that they always have the option to decline review, with or without explanation.[130] They may do so based on a

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126. 668 F.3d 1136 (9th Cir. 2012).

127. *Supra* notes 66–82.

128. Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1465 (1997).

129. Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974); *see also infra* note 153; Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 211–12, 212 n.3 (1960) (citing, *inter alia*, Philip B. Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 489 (1960)); Walters v. Inexco Oil Co., 670 F.2d 476, 478 (5th Cir. 1982), *certified question answered*, 440 So. 2d 268 (Miss. 1983) (declaring "we once again seize the opportunity to praise, extol, laud, and proclaim the virtues of this wonderful device" and "procedural wonder") (internal citation omitted); Ira P. Robbins, *The Uniform Certification of Questions of Law Act: A Proposal for Reform*, 18 J. LEGIS. 127, 132 (1992) (describing the procedure's roots in nineteenth-century British legislation: "The British Law Ascertainment Act of 1859 permitted a court in one part of the British Commonwealth to remit a case for an opinion on a question of law to a court in another part of the Commonwealth. The Foreign Law Ascertainment Act of 1861 allowed questions of law to be certified between British courts and courts of foreign countries, provided that each country had signed a convention governing such procedure.").

130. *See* Robbins, *The Uniform Certification of Questions of Law Act*, 18 J. LEGIS. at 137 ("[P]rocedural safeguards more than protect the answering court from a surfeit of certification cases because as a practical matter that court completely controls its docket and may reject certified-question cases if the number becomes overwhelming."); Eric Eisenberg, *A Divine Comity: Certification (at Last) in North Carolina*, 58 DUKE

determination that the certified question is insufficiently important to consume their limited resources, or in order to allow more doctrinal developments, or because the case is too idiosyncratic, or for any other reason they deem fit.[131] Previously stated concerns about "[p]estering"[132] state court judges with work in a case over which they technically lack jurisdiction should fade absent any indication, several decades into the era of state-law certification, that state judges feel bothered. The Justices of the California Supreme Court demonstrated an eagerness to engage with the employment-law question presented in *Troester*.[133] In general, rather than pushing back against the certification procedure, state court justices—who may reframe questions in their discretion[134]—have displayed a "welcoming attitude" toward it.[135] And concerns about impermissible advisory

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L.J. 69, 77 (2008) ("Perhaps the most important (though least recognized) benefit of certification is that it is discretionary at both ends."); Bryan M. Schneider, *"But Answer There Came None": The Michigan Supreme Court and the Certified Question of State Law*, 41 WAYNE L. REV. 273, 315 (1995) (finding that the Michigan Supreme Court "[n]ot only . . . refuse[s] to answer most questions, but it generally fails to state the reasons for its refusal.").

131. *See* Jack J. Rose, Erie R.R. *and State Power to Control State Law: Switching Tracks to New Certification of Questions of Law Procedures*, 18 HOFSTRA L. REV. 421, 437–41 (1989) (describing various grounds for declining to answer a certified question); Doris DelTosto Brogan, *Less Mischief, Not None: Respecting Federalism, Respecting States and Respecting Judges in Diversity Jurisdiction Cases*, 51 TULSA L. REV. 39, 77 (2015) (noting that some state court judges reported in a 1995 survey that they "did not find the questions certified were as unclear as the certifying judges perceived, and the certified questions were either too fact-specific or not of such importance or broad application to justify certification.") (citing JONA GOLDSCHMIDT, CERTIFICATION OF QUESTIONS OF LAW: FEDERALISM IN PRACTICE 34–39 (1995)).

132. Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 SUFFOLK U. L. REV. 677, 689 (1995); *see also* Kremen v. Cohen, 325 F.3d 1035, 1043–44 (9th Cir. 2003) (Kozinski, J., dissenting) (commenting that "the state court . . . is often so busy keeping its own house in order that it scarcely has time for our overflow laundry.").

133. 421 P.3d 1114 (Cal. 2018); *supra* Section II.B.

134. In *Lyon Financial Services, Inc. v. Illinois Paper & Copier Company*, a state supreme court distilled four questions certified by the Seventh Circuit into one: whether "a claim for breach of a contractual representation of future legal compliance is actionable under Minnesota law without proof of reliance." 848 N.W.2d 539, 540 (Minn. 2014); *see also, e.g.*, Victor v. State Farm Fire & Cas. Co., 908 P.2d 1043, 1044 n.2 (Alaska 1996); Kincaid v. Mangum, 432 S.E.2d 74, 82 (W. Va. 1993); Beard v. Viene, 826 P.2d 990, 993 (Okla. 1992); Western Helicopter Servs., Inc. v. Rogerson Aircraft Corp., 811 P.2d 627, 633 (Or. 1991).

135. Justin R. Long, *Against Certification*, 78 GEO. WASH. L. REV. 114, 124 (2009); *see* Ira P. Robbins, *The Uniform Certification of Questions of Law Act: A Proposal for Reform*, 18 J. LEGIS. 127, 137 (1992) ("None of the forty jurisdictions with certification procedures has reported being overburdened by the number of certified questions . . . ."). A comprehensive 1995 survey found that state court judges were generally satisfied with the certification vehicle. *See* Doris DelTosto Brogan, *Less*

opinions can be allayed by carefully framing certified questions,[136] stating the operative facts so the decision is not rendered in a vacuum,[137] and adhering to a requirement that certified questions be potentially dispositive of the case.[138] Some of these limiting principles, in fact, are codified in state certification statutes.[139] For this reason Professor Clark goes too far in advocating "a presumption in favor of certification whenever [federal courts] are called upon to resolve an unsettled question of state law that would entail the exercise of significant policymaking discretion more appropriately left to the states."[140]

Federalists of all persuasions can agree that by soliciting the binding judgment of state supreme courts, certification of state-law issues conveys respect and, undertaken responsibly, lessens the chances of cross-jurisdictional frustration.[141] Recent debates over

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Mischief, Not None: Respecting Federalism, Respecting States and Respecting Judges in Diversity Jurisdiction Cases, 51 TULSA L. REV. 39, 76–77 (2015) (discussing study conducted by Jona Goldschmidt). Another survey found that judges in both the federal and state systems were of the view that "the federal courts' use of certification improves federal-state comity." John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411, 457 (1988).

136. *See, e.g.*, Swindol v. Aurora Flight Scis. Corp., 805 F.3d 516, 522 (5th Cir. 2015) (advising that an "inability to frame the issue so as to produce a helpful response on the part of the state court" weighs against certification), *certified question answered*, 194 So. 3d 847 (Miss. 2016).

137. *See* NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM CERTIFICATION OF QUESTIONS OF LAW ACT § 6(a)(2) (1995) (requiring a statement of "the facts relevant to the question, showing fully the nature of the controversy out of which the question arose."); Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1694 (2003) (explaining that "[c]ertification applies only to questions of law; thus, state courts have treated the collection by the certifying federal court of all necessary ancillary factual findings as a prerequisite to proper certification.").

138. *See* Abrams v. West Virginia Racing Comm'n, 263 S.E.2d 103, 108 (W. Va. 1980) (declining to answer a certified state-law question where federal law would control); 17A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4248 (3d ed. 2007) (citing further authorities holding that, to avoid a prohibited advisory opinion, there should be at least the possibility that a certified question will determine the outcome of the case). *But see* Washington Water Power Co. v. Graybar Elec. Co., 774 P.2d 1199, 1202 n.2 (Wash. 1989) (answering a certified question, even after the parties settled, "in light of the important and likely recurrent nature of the issues presented, and considering the genuine adverseness of the parties and the exceptional quality of the briefing").

139. *See, e.g.*, CAL. CT. R. 8.548(a)(1).

140. Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1549 (1997).

141. *See, e.g.*, Green v. American Tobacco Co., 325 F.2d 673, 674 (5th Cir. 1963) (acknowledging that the Florida Supreme Court's decision in response to a certified question of products liability law prevented the Fifth Circuit "from committing a

"progressive federalism" have focused on the role of cities and states in securing protections of putative minority rights and resisting the policies of a conservative national government.[142] The state-law certification procedure, however, is ideologically neutral and has produced a range of outcomes, some advancing the interests of corporate defendants. For example, on remand in *Lehman Brothers v. Schein*,[143] the Florida Supreme Court held that the Second Circuit had erred in holding that a shareholder derivative action could proceed under Florida law to recoup the wrongful gain to investors in mutual funds whose managers sold stock based on inside information their broker learned from the company president, because the president was not alleged to have been a conspirator and the investors were not corporate fiduciaries.[144]

Practical factors also favor allowing state supreme courts to decide substantive issues of state law affecting the marketplace for goods and services within their states. Whereas federal appeals courts sit in the first instance in three-judge panels, state supreme courts sit in larger panels of five, seven, or nine justices and bring superior collective acumen to bear on the types of policy-driven questions that enterprising class actions can raise. State justices are steeped in the history of state statutory and decisional law, and well-versed in incidental considerations, such as the effects of certain reasoning on how other state-law doctrines apply, that may be beyond a federal

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serious error as to the law of Florida which might have resulted in a grave miscarriage of justice."); Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 207–08 (2003) (finding that "Ohio federal courts generally recognize, appreciate, and enforce the state law rendered for them by the Ohio Supreme Court."). *But see* Justin R. Long, *Against Certification*, 78 GEO. WASH. L. REV. 114, 120, 166 (2009) (contending that "federal courts best express respect for states by resolving state law issues themselves" and thereby "show[ing] the importance of state law to the development of law (including federal law) nationwide, without risking any intrusion into the lawmaking powers of the state courts.").

142. *See, e.g.*, Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1764 (2005) ("San Francisco's decision to marry gays and lesbians. . . . generated ripple effects that conventional expressions of dissent had never generated."); Daniel I. Morales, *Transforming Crime-Based Deportation*, 92 N.Y.U. L. REV. 698, 710 (2017) ("Part of the genius of the progressive federalism movement is that it co-opts conservative values for liberal ends."); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258–59, 1307 (2009) ("[T]he state's status as servant, insider, and ally . . . enable it to be a sometime dissenter, rival, and challenger.").

143. 416 U.S. 386 (1974).

144. Schein v. Chasen, 313 So. 2d 739, 745–46 (Fla. 1975).

judge's ken.[145] A federal judge "may not even be a citizen of the state involved" and is "not likely to be as attuned as a state judge is to the nuances of that state's history, policies, and local issues."[146] The Second Circuit similarly noted that "the New York Court of Appeals is in a far better position to interpret the intent of New York's legislature than we are."[147]

Of course, the state-law certification procedure does not come without costs or risk of misuse. The likelihood of delay and added expense in the case at hand forms part of the calculus for federal judges deciding whether to certify a state-law question.[148] In one case, the Seventh Circuit cited "incumbent costs to the litigants and the state court system" when it declined to certify a question of whether Indiana law required a casino to bar a compulsive gambler upon his

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145. *See* Michigan v. Long, 463 U.S. 1032, 1039 (1983) ("The process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar . . . .").

146. Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1682 (1992); *see* Ernest A. Young, *A General Defense of* Erie Railroad Co. v. Tompkins, 10 J.L. ECON. & POL'Y 17, 110 (2013) (arguing that "federal courts should defer to state courts on the meaning of state law for reasons analogous to the grounds of deference in administrative law: state courts have greater expertise with respect to state law; they are more democratically accountable to the state electorate; and state law typically delegates law-making authority to state courts.") (footnotes omitted).

147. Runner v. New York Stock Exch., Inc., 568 F.3d 383, 389 (2d Cir. 2009), *certified question accepted*, 12 N.Y.3d 892 (2009), *certified question answered*, 13 N.Y.3d 599 (2009). Reaching the same conclusion in another case, the Second Circuit held that "[t]he unresolved issue of whether promissory notes constitute 'securities' for purposes of Article 8 of the New York U.C.C. raises legal and policy issues . . . best resolved by the New York Court of Appeals." Highland Capital Mgmt. LP v. Schneider, 460 F.3d 308, 319 (2d Cir. 2006), *certified question accepted*, 7 N.Y.3d 836 (2006), *certified question answered*, 8 N.Y.3d 406 (2007).

148. *Cf.* Philip B. Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 489 (1960) ("In part, however, delay is caused by inappropriate use of the [abstention] doctrine."); *see also* Frank Chang, *You Have Not Because You Ask Not: Why Federal Courts Do Not Certify Questions of State Law to State Courts*, 85 GEO. WASH. L. REV. 251, 278–79 (2017) (proposing a new federal rule that would provide: "(a) If the application of the state law, which will determine the outcome of the case, is genuinely uncertain, then the court, *sua sponte* or by motions of the parties, shall certify the question of state law to the state's highest court in pursuance of the state's rules, unless the court determines (i) certification could be misused to unduly delay the proceedings, or (ii) the question of law arises from a heavily fact-specific case such that the state court would not properly declare a consequential rule of law. (b) The court may, without exercising its own independent judgment, predict the course in which the state's highest court would rule only if (i) the state court does not provide for a certification procedure, (ii) [the] state court declines to answer the certified question, or (iii) certification is or becomes unavailable for any other reason.") (footnote omitted).

wife's request.[149] In another case, the Ninth Circuit upbraided a litigant for moving to certify only after the oral argument revealed the panel was inclined to rule against it.[150]

There is no reason to certify a question unaddressed by the state supreme court when the answer is apparent from statutory language or state authorities point in one direction.[151] The "essence" of *Erie* is that "the bases of state law are presumed to be communicable by the parties to a federal judge no less than to a state judge."[152] Hence, for certification to be a valid option there must be actual uncertainty about the issue presented.[153]

But delays from certifying questions need not exceed the delays already inherent in appellate practice. If a federal appeals court promptly certifies a question of law instead of spending months preparing its opinion, the total length of time to dispose of the appeal may not be appreciably different. Where use of the procedure is available and prudent, timely motions to certify and orders to show cause can speed things up, as can district court orders suggesting the

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149. Brown v. Argosy Gaming Co., L.P., 384 F.3d 413, 417 (7th Cir. 2004). Justice Douglas remarked that many litigants "can hardly afford one lawsuit, let alone two. Shuttling the parties between state and federal tribunals is a sure way of defeating the ends of justice. The pursuit of justice is not an academic exercise. There are no foundations to finance the resolution of nice state law questions involved in federal court litigation." Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 227–28 (1960) (Douglas, J., dissenting). Professor Clark countered that "certification permits the parties to avoid the analogous costs they otherwise would incur if the question were adjudicated in federal court." Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1560 (1997).

150. Hinojos v. Kohl's Corp., 718 F.3d 1098, 1108–09 (9th Cir. 2013).

151. *Cf.* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1239 (4th ed. 1996) (in a federal court's determination of whether to engage in *Pullman* abstention, "[t]he newness of a state statute and the total absence of judicial precedent are clearly significant considerations.").

152. Salve Regina Coll. v. Russell, 499 U.S. 225, 238 (1991).

153. Frank Chang, *You Have Not Because You Ask Not: Why Federal Courts Do Not Certify Questions of State Law to State Courts*, 85 GEO. WASH. L. REV. 251, 282 (2017) (identifying the two principal "gatekeep[ing]" requirements set out in the Uniform Certification of Questions of Law Act: "genuine uncertainty" and "outcome determinativeness"). It also goes without saying that a federal judge should refrain from certifying "to avoid the learning curve of unfamiliar state law or to ease a crowded docket." Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 221 (2003); *see also* Kremen v. Cohen, 325 F.3d 1035, 1037 (9th Cir. 2003) ("We request certification not because a difficult legal issue is presented but because of deference to the state court on significant state law matters."); State of Fla. *ex rel.* Shevin v. Exxon Corp., 526 F.2d 266, 274 (5th Cir. 1976) ("[C]ertification should never be automatic or unthinking. . . . We do not abdicate.") (internal quotation marks and citation omitted); *supra* note 12.

possibility of certification to put it on the circuit court's radar. Interlocutory certification, on a petition for an extraordinary writ or even in an appeal under Federal Rule of Civil Procedure 23(f),[154] may save time and money by resolving a key question *before* costly summary judgment and trial proceedings. As a general matter, delay and added expense in a case neither alter nor outweigh the procedure's broader utility in clarifying state law and advancing uniform judicial administration.[155]

IV. CONCLUSION

As the national economy has consolidated, enforcement efforts by government regulators have waned and class actions become more central in our legal system. Numerous recent disputes have turned on the application of state laws that govern corporations' permissible activities in relation to their workers and consumers of their offerings. California's size, its unusually robust laws protecting workers and consumers,[156] and the interconnected nature of the U.S. economy lend outsized influence to California law in this private enforcement regime.[157]

Companies can act with greater leeway in the domain of contract after their success in enforcing compulsory arbitration agreements that waive representative claims. In the realm of tort, where the risk of meaningful group sanction persists, the laws that give substance to

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154. Substantive state law often interacts with federal courts' analysis of whether class certification is appropriate. In particular, courts usually conduct the predominance inquiry of Rule 23(b)(3) by reference to claim elements. *See, e.g.*, Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 371–73 (3d Cir. 2015) (reversing a class certification order and instructing the district court to "rule on the predominance question in light of the claims asserted and the available evidence."). Even so, courts may consider the underlying merits of a claim or defense only insofar as they bear on the analysis of Rule 23 requirements. Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds, 568 U.S. 455, 466 (2013).

155. *See* Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974) (cross-jurisdictional certification "in the long run save[s] time, energy, and resources"); Ira P. Robbins, *The Uniform Certification of Questions of Law Act: A Proposal for Reform*, 18 J. LEGIS. 127, 137 (1992) (a lawsuit with "the capacity to clarify existing law, or indeed to address an issue of first impression," can "minimize other time-consuming litigation.").

156. The California Consumer Privacy Act of 2018, which seeks to ensure adequate protection of consumer data, marks the state's latest effort to curb irresponsible corporate behavior. The new law provides for a private right of action and minimum damages of $100 for certain violations. *See* CAL. CIV. CODE § 1798.150 (West 2018) (effective Jan. 1, 2020). *See also supra* note 104.

157. *See, e.g.*, Heather K. Gerken, *Distinguished Scholar in Residence Lecture: A User's Guide to Progressive Federalism*, 45 HOFSTRA L. REV. 1087, 1091 (2017); Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1127 (2014).

the deterrent are mostly state rather than federal. Yet, because of CAFA, it is mostly federal courts that determine how these laws apply in particular cases. The predictable result has been an erosion in state sovereignty.

But if CAFA made a large body of federal cases applying state law inevitable, a constriction of state authority over state law is not inevitable and should be counteracted. Federal judges should resist the inclination to decide uncertain state-law issues in class actions giving rise to diversity jurisdiction. The vast changes in technology that coincided with the federal courts' absorption of these cases have only magnified the need for guidance on how to interpret state laws in novel situations. So if a case turns on an issue of state law whose resolution is not clear or plain from existing state authorities, and the federal court is permitted to let the state court decide the case, it generally should step aside. Certification operates to preserve dual sovereignty and its virtues of checking extreme or uninformed views, promoting responsiveness to local concerns and preferences, and stabilizing the rule of law.[158] Given these compelling interests and the potential for mischief, Congress should amend CAFA's diversity provisions to make explicit this principle of deference.

158. *See* THE FEDERALIST NO. 45 (James Madison) (envisioning that state governments "will have the advantage of the Federal government" with respect to "the predilection and probable support of the people; to the disposition and faculty of resisting and frustrating the measures of each other. The State governments may be regarded as constituent and essential parts of the federal government.").