# Closing the Certified Question Loop

## *An Approach for Establishing a Constitutional Certification Mechanism in North Carolina*

By D. Martin Warf and Lorin J. Lapidus

North Carolina remains the lone state in this republic to lack a certification mechanism from a federal court to its state's court of last resort. But such mechanism provides an essential means for a federal court confronted with a case determinative—but unsettled question of North Carolina substantive law—to ask North Carolina to answer that important question of North Carolina law.

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The need for a certification mechanism in North Carolina is clear in our system of cooperative federalism. Under that system, federal courts across the country are asked to decide live cases, which involve application of North Carolina substantive law. *See e.g., Bockweg v. Anderson*, 328 N.C. 436, 439 (1991), *citing Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938) ("[E]xcept in matters governed by the federal Constitution or acts of Congress, diversity cases involve application by the federal court of substantive provisions of state law.") But federal courts are not always equipped with the essential tools required to accurately answer difficult and unresolved questions of North Carolina law. A certification mechanism would serve as a much-needed safety valve which federal courts can turn on by requesting assistance from a co-sovereign court in an area that such sister court naturally knows best. After all, "it is the duty of the Supreme Court of North Carolina alone to declare what the law is under our Constitution." *Holmes v.*

*Moore*, 384 N.C. 426, 438 (2023); *cf. State v. Tucker*, 385 N.C. 471 ,490 (2023), *quoting Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803) ("After all, '[i]t is emphatically the province and duty of the judicial department to say what the law is.'"). Thus, the best equipped institution to ultimately say what the law of North Carolina is, particularly when that jurisprudence is unsettled, the Supreme Court of North Carolina.

The lack of a certification mechanism in North Carolina has been problematic for some time. The need for a certification mechanism has appropriately concerned the United States Court of Appeals for the Fourth Circuit. *See, Stahle v. CTS Corp.*, 817 F.3d 96, 113-115 (2016) (Thacker, J. concurring) ("I write to express my view that a North Carolina certification procedure would have provided this panel with a beneficial tool. As we have noted many times, North Carolina is the only state in the Fourth Circuit without such a mechanism."). Judge Thacker's concurring opinion aptly summarized this core conundrum as follows:

> [as] a federal court sitting in diversity, our role is to apply governing state law, or, if necessary, predict how the state's highest court would rule on an unsettled issue. Because the issue presented in this appeal is not settled by the North Carolina courts, we must, in a sense, trade our judicial robes for the garb of prophet. Some characterize the process of predicting what a state court would do as speculative or crystal-ball gazing, but without the benefit of a certification procedure, it is a task which we may not decline.

*Id.* (internal citation and quotation marks omitted). *The Fourth Circuit's rationale here is powerful—a certification mechanism will appropriately accord "[North Carolina's] own state courts a chance to influence the interpretation of the laws operating within its borders, rather than leaving it to the federal courts to divine how North Carolina should operate." Id.* (emphasis added). Leaving it to federal courts to prognosticate the law of North Carolina can render North Carolina jurisprudence effectively undetermined and even could even result in federal opinions which appear to conflict with binding state appellate precedent. Charging that sole responsibility to the federal judiciary, which is unaccountable to the citizens of North Carolina, frustrates cooperative federalism, the plenary power of the General Assembly, and the duty of this state's Supreme Court.

Implementing a certification mechanism in North Carolina has unfortunately been challenging. Some scholars have identified key legal barriers to achieving a constitutionally sound certification mechanism and have offered good suggestions to achieve certification in North Carolina. *See e.g.*, Eric Eisenberg, Note, *A Divine Comity: Certification (At Last) in North Carolina*, 58 Duke L.J. 69 (2008); Michael Klotz, Comment, *Avoiding Inconsistent Interpretations: United States v. Kelly, the Fourth Circuit, and the Need for a Certification Procedure in North Carolina*, 49 Wake Forest L. Rev. 1173 (2014); Sharika Robinson, Note, *Right, But for the Wrong Reasons: How a Certified Question to the Supreme Court of North Carolina Could Have Alleviated Conflicting Views and Brought Clarity to North Carolina State Law*, 34 N.C. Cent. L. Rev. 230 (2012); Jessica Smith, *Avoiding Prognostication and Promoting Federalism: The Need for an Inter-Jurisdictional Certification Procedure in North Carolina*, 77 N.C. L. Rev. 2123 (1999). To date, many of these theories have been studied by state legislators, judicial officials, and other stakeholders but no certification mechanism has yet been adopted. A bill introduced in the North Carolina General Assembly in 2017 failed to make it out of committee for wider debate. *See* N.C. HB 157 (2017) (proposed bill would have added 7A-27A to our General Statutes, permitting a federal court to certify a question of law to the North Carolina Supreme Court) available at ncleg.net/Sessions/2017/Bills/House/PDF/H157v1.pdf (last accessed __2025).

It appears that two structural concerns have prevented the adoption of a federal certification mechanism in North Carolina by either general statute or rule of appellate procedure. Those concerns are: (1) whether the North Carolina Supreme Court lacks subject matter jurisdiction to receive and answer a certified question directly from a federal court under Article IV, Section 12(1) of the North Carolina Constitution; and (2) whether an answer to a certified question by a North Carolina court would constitute an impermissible advisory opinion, also contrary to this state's constitution.

The concern about North Carolina courts rendering impermissible advisory opinions is more readily addressed. Indeed, our Supreme Court has long held that when an issue has not been "drawn into focus by [court] proceedings," any decision of our courts would "be to render an unnecessary advisory opinion." *Wise v. Harrington Grove Cmty. Ass'n, Inc.*, 357 N.C. 396, 408, 584 S.E.2d 731, 740 (2003); *see also Poore v. Poore*, 201 N.C. 791, 792, 161 S.E. 532, 533 (1931) ("It is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions..."). The necessary ingredients to a justiciable matter that North Carolina courts can address under this state's constitution require adverse parties and their legal theories tested in an actual live controversy. *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 345, 323 S.E.2d 294, 307 (1984).

Certified questions do not bear the problematic features of advisory opinions under North Carolina Supreme Court precedent. A certified question of North Carolina law from a federal court comes directly from an actual case or controversy between two or more adverse parties, and from a federal court that itself has threshold jurisdiction over the cause under the federal constitution. Under *Erie*, that federal court is charged, in our cooperative federal system, to apply North Carolina substantive law to issues in a matter before it *in a case determinative fashion*. Before the issue would be certified by the federal court, the parties in the federal action must address the concerns regarding the unsettled nature of certain facets of North Carolina law, at least in written briefing. The federal court would also certify the specific issue or issues along with the stipulated or decided facts needed to understand and resolve the question. That way, North Carolina state courts would not engage in guesswork or hypotheticals of any sort. The answer to the certified question must also be determinate of one or more issues in the case pending in the certifying court to qualify for certification. Thus, the answer to the certified question would be accorded the same force and effect as any other decision of the North Carolina Supreme Court. The answer would also constitute the law of the case for the parties and further have binding *res judicata* effect on current and future litigants. Both North Carolina Supreme Court precedent and existing scholarly literature appear to reach a general consensus on the accuracy of these important points. *See* Smith, *supra* at 2138-2141; Eisenberg, *supra* at 83-85. Thus,

such critical components of the certification process should alleviate any concern about North Carolina courts exceeding the bounds of their own authority to decide live justiciable cases in a cooperative federal system by answering certified questions.

Overcoming the hurdle of the North Carolina Supreme Court's subject matter jurisdiction under this state's constitution to directly answer certified questions, however, has been an unsurmountable hurdle. Proponents for a certification mechanism have run into the text of the North Carolina constitution, which alone governs the North Carolina Supreme Court's jurisdiction. The North Carolina Constitution decrees, in salient part, that "[t]he Supreme Court shall have jurisdiction to review upon appeal any decision *of the courts below*, upon any matter of law or legal inference." N.C. Const. Art IV, Sec 12(1) (emphasis added). It is difficult to classify a federal court as a court below the North Carolina Supreme Court. *See* Smith, *supra* at 2141-2143; Eisenberg, *supra* at 91-102. Our federal system does not work in such a linear fashion. Instead, federal courts and state courts structurally operate as co-equal sovereigns across a wide legal spectrum, sometimes working together cooperatively, and at other times are compelled by constitutional or statutory limitations to stay in their assigned lanes. The North Carolina Supreme Court itself has construed Article IV, Sec. 12(1) to prohibit the General Assembly from expanding the Supreme Court's jurisdiction. *See Smith v. State*, 222 S.E.2d 412, 429 (N.C. 1976) ("The General Assembly [is] without authority to expand the appellate jurisdiction of [the North Carolina Supreme Court] beyond the limits set in the Constitution.") Thus, the General Assembly appears to be without constitutional authority to codify a certification mechanism from a federal court directly to the North Carolina Supreme Court.

Theories have been advanced to overcome this barrier. *See* Smith, *supra* at 2141-2143; Eisenberg, *supra* at 91-102. These theories range from examining the exercise of the North Carolina Supreme Court's reserved powers, suggesting that the Supreme Court could answer a certified question without exercising any jurisdiction at all, to a constitutional amendment expressly authorizing a federal certification mechanism. *Id.* To date, these principles have not yet been implemented into practice through legislation, appellate court rule, or a combination of both.

Trying to compel certification from a federal court directly to the North Carolina Supreme Court has caused a constitutional conundrum. But a state constitutional amendment on such an arcane legal topic has proven to lack public interest and political will. The answer, if this state is to find one, must realistically start and end with one or more of the elected branches. On that point, perhaps a novel approach that utilizes the full machinery of North Carolina's General Assembly and General Court of Justice is in order. "The reason is simple; our Constitution confers jurisdiction, and the General Assembly reaffirms that principle elsewhere in our General Statues." *State v. Singleton*, 386 N.C. 183, 204 (2024). Under this thinking, *the superior court*, through statutory authorization, appears to be the constitutionally best equipped state court to receive and provide an initial answer to certified questions directly from a federal court. Unlike the narrowly circumscribed jurisdiction accorded to the North Carolina Supreme Court under the state constitution, the provision applicable to the superior court's jurisdiction stands broader and leaves more room to work legislatively. *See* N.C. Const. Art. IV, Section 12(3) ("Except as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State."); *see also State v. Wall*, 271 N.C. 675, 680 (1967) ("Under the quoted provisions of Article IV, the superior court has original general jurisdiction throughout the State *except as otherwise provided by the General Assembly*.") (emphasis in original).

This constitutional provision permits the superior court to serve as an allowable first stop in the General Court of Justice for receiving and answering a certified question from a federal court. The term "original general jurisdiction throughout the state" is quite expansive language. In North Carolina, "original jurisdiction means a court's power to hear and decide a matter before any other court can review the matter." *See In re H.L.A.D.*, 184 N.C. App. 381, 386, 646 S.E.2d 425, 430 (2007), *aff'd per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008); *cf. Williams v. Greene*, 36 N.C. App. 80, 84, 243 S.E.2d 156, 159 (1978) ("According to common interpretation, original jurisdiction should be distinguished from appellate jurisdiction.") That is precisely the role that a statutory certification mechanism would ask the superior court to serve—as the initial receiver of a certified question of North Carolina law from a federal court that is charged to answer that question. The superior court's posture is a natural consequence of a certification order from a federal court. Since the superior court would be the first stop in this state, no other North Carolina court could have previously addressed the matter. And even though the case was first filed in federal court, a federal court and a state court can have concurrent original jurisdiction over a case. *See e.g. Burton v. Smith*, 191 N.C. 599, 602-03 (1926) ("The jurisdiction of the Superior Court of this State is concurrent with that of the District Court of the United States; either court may try the action, and render judgment, finally determining the rights of the parties"); *cf. Eways v. Governor's Island*, 326 N.C. 552, 559 (1990) ("Generally speaking, the federal and state courts that have concurrent jurisdiction over civil actions may be considered as courts of separate jurisdictional sovereignties[.]"). And the certification order itself confirms that the federal court has not reviewed and adjudicated the unsettled question of North Carolina law. The federal court is instead asking the North Carolina superior court to be the first court to hear and decide the unsettled question of state law.

Even if there is some nuance to a statutory certification mechanism in our cooperative federal system, the General Assembly can still codify a constitutionally sound certification mechanism. *See* N.C. Const. art. IV, § 12(3) ("*Except as otherwise provided by the General Assembly*, the Superior Court shall have original general jurisdiction throughout the State.") (emphasis added). Under Art. IV, Sec. 12(3), the General Assembly is accorded with ample legislative prerogative to expand and enhance the superior court's jurisdiction to accommodate a certification mechanism. *See Harper v. Hall*, 384 N.C. 292, 322 (2023) ("[T]he General Assembly possesses plenary power as well as the responsibilities explicitly recognized in the text of the state constitution."); *cf. Bullington v. Angel*, 220 N.C. 18, 20, 16 S.E.2d 411, 412 (1941) ("The Legislature, within constitutional limitations, can fix and circumscribe the jurisdiction of the courts of this State."). The constitutional limits on the General Assembly's power to expand or modify the superior court's jurisdiction are two-fold

under precedent: (1) a statute cannot *remove or eliminate* the superior court's threshold constitutionally defined role as a court of original general jurisdiction throughout the state; and (2) the legislative power to otherwise set the superior court's jurisdiction must be done "without conflict with the other provisions of this Constitution." *Jones v. Standard Oil Co.*, 202 N.C. 328, 332-34 (1932) (emphasis added).

Neither constitutional impediment is present here. A certification statute directing that the superior court be the first North Carolina tribunal to receive and answer a certified question does not remove or eliminate the superior court's bedrock constitutional jurisdiction as a court of general original jurisdiction throughout the state. Such jurisdiction remains undisturbed. Instead, a certification statute could permissibly expand the superior court's jurisdiction to cover a nuanced procedural posture inherent in our cooperative federal system. In that context, the superior court could be statutorily authorized to serve as the initial North Carolina trial court to receive and answer a certified question of North Carolina substantive law from a federal court. Making legal conclusions and rendering an order based on such conclusions and in accordance with stipulated or predetermined facts is a function well within the wheelhouse of the superior court. There consequently appears to be no state constitutional bar to expanding the superior court's jurisdiction to cover a federal certification context.

Such a proposed certification statute also does not impinge upon the constitutional jurisdiction of either the Supreme Court or court of appeals. Since time immemorial, the Supreme Court stands unable to accept a certified question directly from a federal court—by statute—due to the narrowly circumscribed constitutional grant of power. Nor would such a certification statute upset the constitutional balance of power of the superior court with respect to the court of appeals, which "shall have such appellate jurisdiction as the General Assembly may prescribe." N.C. Const. Art IV. Sec 12(2). Even if answering a certified question could be properly classified as an exercise of appellate jurisdiction, it is inapposite in our federal system's structure to statutorily empower this state's intermediate appellate court under the North Carolina Constitution to have appellate jurisdiction relative to any federal court. Finally, since answering a certified question is an inherently judicial function, the constitutionally assigned functions of the Legislative and Executive Branches would not be impaired by a statute authorizing the superior court to initially take the certification reigns.

With constitutionally proper authority now grounded in the superior court, that court's ruling on the certified question may then be permissibly reviewed by the North Carolina Supreme Court under that court of last resort's constitutional supervisory powers. *See* N.C. Const. Art. IV. Sec. 12(1) (empowering the North Carolina Supreme Court to "issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts."). The applicable procedure of Supreme Court review may be promulgated by the Supreme Court itself, by appellate rule, through a remedial writ of certiorari. Since the Supreme Court is the final arbiter of North Carolina law, an appellate rule can detail the two possible outcomes following the superior court's order and opinion on the certified question. The Supreme Court, in its sole discretion, can either: (1) allow the writ of certification, for the sole purpose of vacating the superior court judge's order, and return the certified question unanswered to the federal court; or (2) allow the writ of certification, for the purpose of retaining supervisory jurisdiction over the superior court judge's ruling, and file a written opinion reviewing the superior court judge's order which ultimately answers the certified question.

Given the jurisdictional constraints found in this state's Constitution, this proposed two-court process authorized by statute, and supplemented by appellate rule, may prove to be a workable solution to a long-standing challenge in North Carolina. Under this proposed model, the superior court serves as the constitutionally firm gateway into the General Court of Justice, which then provides the Supreme Court with the jurisdictional means to exercise final supervisory jurisdiction—by remedial writ—over the certified question of North Carolina substantive law. In fact, the superior court judge selected by the chief justice for the special commission in Wake County could make the Supreme Court's later work easier by doing the initial legwork into studying and answering the certified question. The chief justice, acting under his express constitutional authority, can make an appropriate assignment of a superior court judge with the requisite background and specialized knowledge to answer the certified question or questions. *See* N.C. Const. Art. IV, Sec. 11 ("The Chief Justice of the Supreme Court, acting in accordance with rules of the Supreme Court, shall make assignments of Judges of the Superior Court[.]" Thus, North Carolina's certification mechanism, through careful drafting, could likely accommodate the average delay of 6.6 months - 8.2 months that federal litigants typically wait for answers to questions certified by federal courts. Eisenberg, *supra* at 77-78, *citing* Jona Goldschmidt, *Certification of Questions of Law: Federalism in Practice* 98 (1995).

Our state should take an opportunity to reexamine new ways of adopting a federal certification mechanism in a constitutionally sound way. To facilitate that endeavor, drafts of a proposed general statute and rule of appellate procedure consistent with the reasoning contained in this article appear below. There is no good reason why the Supreme Court of North Carolina, in our cooperative federal system, should not have the final say on what the law of this state is, especially when a federal court confirms that it does know the answer. Our legislature and courts should work together to find a way to assist. ■

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## I. Proposed Amendment to the North Carolina General Statutes

The General Assembly of North Carolina enacts:

SECTION 1. Article 20 of Chapter 7A of the General Statutes is amended by adding a new section to read:

**§ 7A 254. Certifying question mechanism.**

(a) Any court of the United States, on motion of a party to a pending cause, or its own motion, may certify one or more ques-

tions of North Carolina law to a Superior Court Judge of the North Carolina General Court of Justice if:

(1) The pending cause before it involves one or more questions to be decided under North Carolina state law;

(2) The answer to the question or questions is determinative of one or more issues in the pending cause; and

(3) No North Carolina controlling statute or decision of the appellate division of the North Carolina General Court of Justice provides a sufficient answer to the question or questions.

(b) A certification order under subsection (a) of this section shall contain:

(1) A statement of the grounds confirming the federal court's subject matter jurisdiction over a justiciable case or controversy before it;

(2) A statement of stipulated or decided record facts, which contain the factual predicate necessary to answer the question or questions certified, and further showing fully the nature of the controversy out of which the question or questions arose;

(3) The specific question or questions of North Carolina law to be certified for an answer; and

(4) The names and addresses of counsel of record and any unrepresented parties.

(c) The federal court shall transmit its certification order to the director of the North Carolina Administrative Office of the Courts along with the record, or any portion of the record, requested by the director for presentation to the chief justice. The chief justice shall appoint a superior court judge to sit for the dispatch of business in Wake County to receive and answer the certified question or questions. Should the original superior court judge appointed by the chief justice be disqualified or otherwise unable to serve or be removed at the discretion of the chief justice, the chief justice shall appoint, as a replacement, another superior court judge to serve.

(d) Based solely upon the record materials provided by the federal court related to its certification order, the superior court judge shall render and file a written order and opinion answering the question or questions of law certified to it by the federal court within 45 days after entry of the chief justice's order appointing the superior court judge.

(e) The superior court judge's written opinion is subject to review pursuant to the North Carolina Rules of Appellate Procedure.

SECTION 2. This act is effective when it becomes law.

**Authority:** N.C. Const. Art IV Sec. 3 ("Superior Court. *Except as otherwise provided by the General Assembly*, the Superior Court shall have original general jurisdiction throughout the State. The Clerks of the Superior Court shall have such jurisdiction and powers as the General Assembly shall prescribe by general law uniformly applicable in every county of the State." (emphasis added); N.C. Const. Article IV, Section 11 ("The Chief Justice of the Supreme Court, acting in accordance with rules of the Supreme Court, shall make assignments of Judges of the Superior Court[.]"; General Rules of Practice for the Superior and District Court, Rules 2.1 (2024) (indicating "The Chief Justice may designate any case or group of cases as 'exceptional'")

## II. Proposed Amendment to the North Carolina Rules of Appellate Procedure

Article V- Extraordinary Writs

**Rule 21.1. Writ of Certiorari on Certified Question**

(a) Scope of the Writ

(1) Supervisory Review of Superior Judge's Opinion and Order - Within 45 days from entry of the superior court judge's written opinion answering one or more questions of North Carolina law certified to it pursuant to N.C.G.S. § 7A-254(c), the Supreme Court, shall, on its own motion, treat the superior court judge's order and opinion on the certified question or questions, and the parties' related filings, as a petition for writ of certiorari to exercise supervision over the superior court judge's written opinion and, within that same time period, enter an order on the writ.

(b) Procedure on Disposition of Writ of Certiorari

(1) The Supreme Court's order on the writ of certiorari shall either:

(A) allow the writ for the purpose of vacating the superior court judge's written opinion. Upon such action, the clerk of the North Carolina Supreme Court shall promptly transmit the supreme court's order to the clerk of the requisite federal court, and the parties, that the question or questions certified by it are returned unanswered. No petition for rehearing of a denial of a writ of certification shall be entertained; or

(B) allow the writ for the purpose of retaining jurisdiction over the superior court judge's written opinion. Upon such retention, the party who sought certification in the requisite federal court, shall serve and file a supporting brief addressing the certified question or questions of North Carolina law within 30 days after entry of an order allowing the writ of certification. The party who opposed certification shall serve and file a responsive brief within 30 days after service of the supporting brief. If the federal court certified the question or questions on its own motion, the Supreme Court shall set the briefing schedule for the parties. No reply briefs or oral argument will be received or allowed unless otherwise ordered by the Supreme Court upon its own initiative.

(c) Rescission of Certification. The Supreme Court, in its discretion, may rescind its prior supervisory retention of jurisdiction over the superior court judge's written opinion as improvidently allowed. Upon deciding to rescind its prior retention, the Clerk of the Supreme Court shall transmit such Order to the parties and the federal court of such action.

(d) Decision. The opinion of the Supreme Court reviewing the superior court judge's ruling and answering the certified question or questions shall be filed as promptly as practicable and state the law of North Carolina governing the certified question or questions. The clerk of the North Carolina Supreme Court shall transmit the Court's opinion to the clerk of the requisite federal court and to the parties. No petition for rehearing of an opinion deciding a writ of certification shall be entertained. The opinion filed shall be accorded the same force and effect as any other decision of the Supreme Court and shall be likewise published with the opinions of the Supreme Court.

**Authority:** N.C. Const. Art IV Sec. 1 (The North Carolina Supreme Court "may issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts."); N.C. Const. Art IV, Sec 13(2) ("The Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division.) ■