FEDERAL COURTS—CERTIFICATION BEFORE FACIAL INVALIDATION: A RETURN TO FEDERALISM

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INTRODUCTION

A federal court is often asked to review the constitutionality of a state statute before a state court has had the opportunity to interpret the statute. A first amendment overbreadth challenge to a state statute is a common example.1 In such a situation, the federal court must proceed with caution and restraint before invalidating the state law in order to avoid the possibility of unnecessary interference with a state regulatory program.2 On the other hand, before upholding the statute, the federal court must also consider the potential "chilling effect"3 on protected activity.4 Consequently, the Supreme Court has held that "[i]n accommodating these competing interests . . . a state statute should not be deemed facially invalid unless it is not readily subject to

1. The first amendment overbreadth doctrine permits a federal court to invalidate a federal or state statute because it is susceptible of application to a substantial amount of protected expression. New York v. Ferber, 458 U.S. 747, 768-70 (1982). See infra notes 67-78 and accompanying text for a discussion of the first amendment overbreadth doctrine.


3. "Chilling effect" is a term of art in constitutional law that focuses attention on the practical consequences of state action and its effect on individual conduct. See generally Schauer, Fear, Risk and the First Amendment: Unraveling the "Chilling Effect", 58 B.U.L. REV. 685 (1978); Note, The Chilling Effect in Constitutional Law, 69 COLUM. L. REV. 808, 808 (1969). A "chilling" of constitutional rights occurs when an individual must choose between risking prosecution for engaging in some conduct or foregoing that conduct. The deterrence arises from the fear that lawful conduct may be punished through prosecution under a government regulation not specifically directed at the protected activity. Schauer, supra, at 693. The chilling effect is most frequently noted in first amendment cases, but can apply to any individual right setting. Note, supra, at 808; see also Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (A statute's very existence may cause other individuals not before the court to refrain from constitutionally protected speech or expression.); Dombrowski v. Pfister, 380 U.S. 479, 487 (1965) (noting that the chilling effect may derive from the very fact of prosecution, regardless of its success or failure).

4. Erznoznik, 422 U.S. at 216 (recognizing "that a demonstrably overbroad statute ... may deter the legitimate exercise of First Amendment rights"). Even if the law is upheld, it may not be clear what behavior the statute prohibits. Error and uncertainty in the legal system make it difficult to predict the outcome of litigation. For instance, laws may be erroneously declared or improperly applied to the facts. Thus, a chilling effect may always be present because of the "fear that lawful conduct may nonetheless be punished because of the fallibility inherent in the legal process." See Schauer, supra note 3, at 694-95.
a narrowing construction by the state courts," and "its deterrent effect on legitimate expression is both real and substantial."

A federal court reviewing the constitutionality of an unconstrained state statute may proceed in one of three ways. First, under the doctrine established in Railroad Commission v. Pullman Co. ("Pullman abstention"), a federal court can decline to adjudicate the federal constitutional issue until a state court has had the opportunity to construe the statute authoritatively. Abstention is a discretionary power which federal courts should invoke only when a definitive ruling on the state issue will terminate or substantially alter the federal controversy. In addition, the costly nature of abstention works against its application when the statute allegedly abridges free expression or discourages protected activities. Thus, federal courts may opt to rule on the merits of the controversy without the benefit of an authoritative state interpretation.

The second option, proceeding to the merits, defeats the purpose of Pullman abstention, which is to recognize state independence and maintain an efficient federal judiciary. Furthermore, in the absence of an authoritative construction of the state statute, it is often difficult to define precisely the constitutional question presented.

The third option is to invoke a state certification procedure, a

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5. Erznoznik, 422 U.S. at 216 (citing Dombrowski v. Pfister, 380 U.S. 479, 497 (1965)).
6. Id. (citing Broadrick v. Oklahoma, 413 U.S. 601, 612-15 (1973)).
7. 312 U.S. 496 (1941).
8. When a federal court abstains, it is avoiding answering a constitutional question prematurely since an interpretation of the state statute could obviate the need to resolve the constitutional question. "The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of the state court." Id. at 500. Thus, Pullman abstention is an equitable power which allows federal courts to further the harmonious relations between state and federal authority. Id. at 501.
9. Id.
11. Abstention forces litigants to initiate a state court proceeding on the state law issues, which obviously delays final adjudication and increases the expense to the litigants. See infra notes 30-33 and accompanying text for further discussion of the burdens abstention imposes upon litigants.
subset of the abstention doctrine which arises under state law. A federal court may choose to make use of a state certification statute or rule in order to obtain an authoritative answer to a state law question before the court proceeds to the merits of the constitutional question.15 Thus, certification furthers the interests of federalism by providing a state court with the opportunity to decide an issue of state law before being precluded from doing so by a contrary federal court decision.16 Because the state law question goes directly to the highest court of the state, certification is less costly to litigants than abstention.17 Consequently, certification presents the best way to accommodate a reasonable balance between principles of federalism and the expeditious relief required when constitutionally protected rights are potentially at stake.18

Two problems, however, prevent successful use of certification procedures in the first amendment overbreadth situation. First, the test for certification — whether a statute is readily susceptible to a narrowing construction which would render an otherwise unconstitutional statute constitutional19 — invites a federal court to make a sub-


16. Dorman, 862 F.2d at 435. Unlike the availability of Supreme Court review when state courts decide federal issues, there is no possibility of direct review within the state judiciary when federal courts decide questions of state law. Field, Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine, 122 U. PA. L. REV. 1071, 1085 (1974). Once a federal court invalidates a state law based upon an erroneous reading of the state law, a state can only correct the federal decision through legislative enactment or by initiating judicial proceedings in state court. Since there is no direct review from a federal court to a state court, any new state proceeding requires a new case or controversy. Id. at 1119 n.140; see also Wilkins, Certification of Questions of Law: The Massachusetts Experience, 74 MASS. L. REV. 256, 257 n.18 (1989).

17. Field, The Abstention Doctrine Today, 125 U. PA. L. REV. 590, 606 (1977). Professor Field argues that abstention is not worth the costs it imposes on litigants and that if state court input is necessary for unsettled issues of state law, certification is vastly superior to abstention. Id. at 605. Professor Field also argues that the benefits of certification are greater than abstention because the unclear state issue is presented directly to the state supreme court. Under abstention, there is no guarantee that the state law issue will make its way through the state judiciary to the state's highest court. Id. at 606-07.

18. "[C]ourts usually perceive certification as a better means of achieving the end for which abstention was fashioned." Corr & Robbins, Interjurisdictional Certification and Choice of Law, 41 VAND. L. REV. 411, 417 (1988); see also Committee on Federal Courts, supra note 15, at 102 (observing that if the issue is posed as one between abstention and certification, certification usually provides a more expeditious resolution).

19. Dorman, 862 F.2d at 435.
jective judgment it should not make. The test for certification asks a federal court to determine whether a state statute is susceptible to a limiting construction and, thus, fails to serve the federalism interests upon which certification rests since it invites a federal court to decide the merits of the state law issue. Certification is designed to provide the opportunity for state court input before a federal court proceeds to the merits. A standard that encourages federal determination of the state law question leads to the opposite result.

The second problem with the test for certification is that it is unworkable. In answering the question of whether a statute is readily susceptible to a narrow construction, federal courts attempt to distinguish between a narrowing construction and a rewriting of the statute. This distinction is illusive. Courts have disagreed and will continue to disagree over the clarity of statutes. Yet, the clarity of a statute is of critical importance because a first amendment overbreadth analysis always requires construction of the statute in question and because a federal court should only certify when the state law issue is unclear.

The recent case of Dorman v. Satti illustrates the problems with application of the certification standard. The fundamental disagreement between the majority opinion and the dissent shows the difficulty in applying the “readily susceptible” test for certification. Furthermore, the decision not to certify demonstrates how easily a federal court can frustrate state legislative policy despite supposed federal court respect for state independence.

This Note will examine the current application of the test for certification in the context of a first amendment overbreadth challenge,

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20. See infra notes 122-29 and accompanying text for a discussion of how a federal court must address the merits of the state law question to decide whether to certify.
21. See supra note 15 and accompanying text.
22. See infra notes 130-43 and accompanying text for a discussion of the distinction between narrowly construing and rewriting a statute.
23. See infra note 138 and accompanying text for a discussion of how courts have determined when a statute is sufficiently unclear to warrant abstention or certification. See also infra note 144 and accompanying text.
25. Kidney v. Kolmar Laboratories, 808 F.2d 955, 957 (2d Cir. 1987) ("[C]ertification procedure is a valuable device for securing prompt and authoritative resolution of unsettled questions of state law.").
27. See infra notes 79-117 and accompanying text for the facts and reasoning in Dorman.
28. See infra notes 88-107 and accompanying text for an analysis of the majority's decision not to certify the state law questions in Dorman.
focusing on the reasoning in Dorman. Section I traces the development of certification and its intended purpose in federal practice. This section also examines the relationship between certification and facial invalidation of state statutes. Section II discusses the reasoning in Dorman. Section III analyzes the Dorman decision in light of the intended purpose of certification. Given these purposes, Section III proposes that federal courts certify before they invalidate an unconstrued state statute. Section III also contains a proposal that federal courts grant interim relief during the certification process to alleviate any possible chilling of constitutionally protected rights.

I. BACKGROUND: DEVELOPMENT OF CERTIFICATION

A. From Abstention to Certification

Certification is largely an outgrowth of Pullman abstention. Under the Pullman doctrine, a federal court directs the plaintiff to begin a state court action on the state law question, usually in the form of a declaratory judgment action. Thus, the parties must undergo two lawsuits instead of one in order to allow federal and state courts the opportunity to rule on their own law. The parties may then choose to litigate both the federal and state claims in state court or to litigate only the state issue, reserving the right to return to federal court on the constitutional issue if the plaintiff loses in state court. The additional delay and expense to litigants in maintaining two lawsuits is enormous.

In contrast to the burdensome abstention doctrine, state certification statutes provide federal courts with an avenue for posing unclear questions of state law directly to the state's highest court. The fed-

31. Corr & Robbins, supra note 18, at 416; see also Field, supra note 17.
32. Field, supra note 17, at 591 (citing England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964)); see also 122 F.R.D. at 94 (also citing England).
33. The Committee on Federal Courts, Subcommittee on Abstention, concluded that expansion of abstention will have the practical effect of frustrating or unduly delaying the adjudication of federal claims. 122 F.R.D. at 106-07; see also Corr & Robbins, supra note 18, at 416 ("[A]bstention imposes duplicative litigation on federal and state trial courts and also imposes a tax on the public treasury."); Field, supra note 17, at 591-92. Abstention may deter litigants from seeking a federal forum in the first place or it may induce them to minimize their costs by presenting all issues to the state court, thereby waiving their right to return to federal court on the federal issues. Professor Field concludes that abstention is not worth these costs. Id.
34. See supra note 15. In 1945, Florida became the first state to enact an interjuris-
eral court will rule on the merits of the federal question after it receives the state supreme court's answer(s) to the certified question(s). Unlike abstention, certification bypasses the trial and appellate levels of state litigation to produce a more expeditious resolution of the state law issue. Also, in contrast to abstention, certification guarantees that the state's highest court will have the opportunity to decide the state law issue. Thus, certification respects state autonomy, while relieving litigants of some of the burdens imposed by abstention.

Despite its advantages over abstention, certification did not play an important role in the federal courts until recently. By 1974, only a handful of states had adopted certification procedures since Florida's was enacted in 1945. Without a state certification procedure, a federal court cannot compel a state court to answer questions concerning state law issues. Several more states, however, enacted certification statutes and/or rules following the Supreme Court's successful use of these state procedures in the 1970s.

B. The Supreme Court View of Certification

In 1974, the Supreme Court recognized the advantages of certification over abstention in *Lehman Bros. v. Schein*, observing that certification saves "time, energy, and resources and helps build a cooperative judicial federalism." Two years after *Lehman Bros.*, the Supreme Court again noted the benefits of certification.

In *Bellotti v. Baird*, the Court vacated and remanded a district court decision to enjoin the operation of a Massachusetts abortion
The Court found that the district court should have certified questions concerning the meaning of the statute and the procedures it imposed to the Supreme Judicial Court of Massachusetts. The *Bellotti* Court stated:

> It is sufficient that the statute is susceptible of the interpretation offered by appellants . . . and that such an interpretation would avoid or substantially modify the federal constitutional challenge to the statute, as it clearly would. Indeed, in the absence of an authoritative construction, it is impossible to define precisely the constitutional question presented.

The Court further noted that although abstention would be proper in this case were certification unavailable, "the availability of certification greatly simplifies the analysis." The most recent Supreme Court case to invoke a state certification procedure was *Virginia v. American Booksellers Association*. A 1985 amendment to the Virginia statutes made it unlawful "to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse" sexually explicit visual or written material which is "harmful to juveniles." The previously existing statute only

43. *Id.* at 133-34. The statute provided in part:

> [When a woman seeks an abortion, if she is] less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent [for the abortion] may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary.

*Id.* at 134-35 (quoting MASS. GEN. LAWS ANN. ch. 112, § 12P (West 1974) (current version at MASS. GEN. L. ch. 112, § 12S (1990))).

44. *Id.* at 151. At the district court level, a divided three judge panel held that insofar as the Massachusetts statute created a parental veto over a minor's decision to obtain an abortion, the statute violated the fourteenth amendment. *Baird v. Bellotti*, 393 F. Supp. 847, 855-56 (D. Mass. 1975), *vacated*, 428 U.S. 132 (1976). The dissenting judge argued that because the Massachusetts statute expressly provided that the parents' refusal to consent was not final, state courts could make the final determination. Therefore, the dissent reasoned, if the state court found that a minor was mature enough to give an informed consent, the court would enter the necessary order permitting her to exercise her constitutional right to an abortion despite the fact that her parents had refused their consent. *Id.* at 864.


prohibited the sale of such materials to juveniles. 49

The American Booksellers Association brought suit challenging the amendment’s constitutionality. The Association argued that the amendment restricted access to adults because of the economically burdensome and restrictive measures booksellers would have to adopt to comply with the statute. 50 The Association also argued that the amendment was unconstitutionally overbroad because it restricted access by mature juveniles to works that were harmful only to younger juveniles. 51 Finally, the plaintiffs argued that the amendment was unconstitutionally vague because it would be impossible to determine what standard to use in deciding whether a particular work was suitable for juveniles of differing ages and maturity levels. 52

The Virginia Attorney General argued that the 1985 amendment extended only to “borderline obscenity” and that booksellers could comply with the statute by tagging the restricted materials or by placing them behind “blinder racks.” 53 Thus, the Attorney General argued that the statute had no “significant ‘spillover’ effect on adults.” 54

Declining to abstain, 55 the federal district court held that the statute was unconstitutionally overbroad and permanently enjoined its enforcement. 56 The Court of Appeals for the Fourth Circuit affirmed. 57 The state appealed, alleging a conflict among the courts of appeals since the Eighth and Tenth Circuits had upheld similar statutes. 58

The Supreme Court in American Booksellers Association held that it should not attempt to decide the constitutional issues without first having the Virginia Supreme Court’s interpretation of the statute and, therefore, it certified two questions. 59 The Court based its decision to

49. American Booksellers Ass’n, 484 U.S. at 386-87.
50. Id. at 388-89. Specifically, the booksellers argued that compliance would require a bookseller to create an “adults only” section of the store, place the covered works behind the counter, decline to carry the materials in question or bar juveniles from the store. Id. at 389.
51. Id.
52. Id. at 389-90.
53. Id. at 390. Blinder racks hold magazines and books and display only the title of the work.
54. Id.
55. Virginia’s certification procedure was not available to the lower courts since it only became effective on April 1, 1987. Id. at 386.
56. Id. at 391. The district court adopted the plaintiff’s theory as to the scope of the statute and rejected the Attorney General’s suggestion for compliance. Id.
57. Id.
58. Id. at 392 (citing Upper Midwest Booksellers Ass’n v. City of Minneapolis, 780 F.2d 1389 (8th Cir. 1985); M.S. News Co. v. Casado, 721 F.2d 1281 (10th Cir. 1983)); see also Note, supra note 48.
59. American Booksellers Ass’n, 484 U.S. at 393. The Supreme Court certified two
certify on the unusual supposition that the state would decline to defend the statute if its scope were as broad as the booksellers asserted.60 Furthermore, since the statute would remain enjoined during the certification process, the Court reasoned that "[i]n these circumstances, there is some advantage and no cost, either in terms of the first amendment chilling effect or unnecessary delay, to certifying a proffered narrowing construction that is neither inevitable nor impossible."61

The Court proceeded to say that in considering a facial challenge to a statute, a federal court should uphold the statute if it is "readily susceptible" to a narrowing construction that would render it constitutional.62 The unusual circumstances in American Booksellers Association,63 however, prevented the Court from having to determine whether the Virginia statute was readily susceptible to a narrowing construction because the Court chose to certify on the basis that there was nothing to risk and much to gain.64

This "readily susceptible" test for determining the facial validity of a statute derived from the first amendment overbreadth doctrine.65 Recently, the Court of Appeals for the Second Circuit cited American Booksellers Association and other overbreadth cases as support for the proposition that the test for certification is whether a statute is readily susceptible to a narrowing construction.66 Consequently, it appears as

questions to the Virginia Supreme Court. First, the Court asked if the phrase "harmful to juveniles" encompassed any of the plaintiff's exhibits, and what general standard should be used to determine the statute's reach in light of differing ages and maturity levels of juveniles. Second, the Court asked whether a bookseller could comply with the statute by prohibiting juveniles from examining harmful materials when observed, but otherwise taking no action. If compliance was not met, the Court then asked whether booksellers could comply with the statute by announcing the store's policy to the public. Id. at 398.

60. Id. at 394-95.
61. Id. at 397.
62. Id. (citing Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Broadrick v. Oklahoma, 413 U.S. 601 (1973)).
63. See supra notes 60-61 and accompanying text.
64. American Booksellers Ass'n, 484 U.S. at 397.
if some federal judges consider the tests for certification and facial invalidation due to overbreadth to be the same.

C. The Overbreadth Doctrine and Certification

A first amendment overbreadth challenge in federal court is one example of a situation where a federal court may be asked to review the constitutionality of a state statute before that statute has been construed by a state court. Under the first amendment overbreadth doctrine, a federal court may invalidate an allegedly overbroad statute on its face. That is, a federal court may forbid enforcement of the statute so as to remove the threat or deterrence to protected expression.67 The Supreme Court labelled the use of the overbreadth doctrine “strong medicine”68 and recognized that “[i]t remains a ‘matter of no little difficulty’ to determine when a law may be properly held void on its face and when ‘such summary action’ is inappropriate.”69

A federal court must balance the possible deterrence of protected activity with a state’s right to regulate conduct that is “within its power to proscribe.”70 The Supreme Court uses a two part test to determine whether a statute is unconstitutionally overbroad. First, “a law should not be invalidated . . . unless it reaches a substantial number of impermissible applications.”71 Second, the court should


68. Broadrick, 413 U.S. at 613.

69. Id. at 615 (quoting Coates v. City of Cincinnati, 402 U.S. 611, 617 (1971) (opinion of Black, J.).

70. Id. (citing Alderman v. United States, 394 U.S. 165, 174-75 (1969)); see also supra notes 2-6 and accompanying text.

71. Ferber, 458 U.S. at 771; Broadrick, 413 U.S. at 615, where the Court explained:

Although . . . laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.
not invalidate a statute if it is readily susceptible to a limiting con­struction which removes the threat or deterrence to protected expression.\footnote{Broadrick, 413 U.S. at 613.}

The obvious relationship between certification and overbreadth is that to determine whether a statute violates constitutional standards because it is substantially overbroad, a court must first determine what that statute means.\footnote{An overbreadth analysis necessarily requires construction of the statute in question in order to assess its scope. See Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 508-09 (1985) (O'Connor, J., concurring); see also Virginia v. American Booksellers Ass'n, 484 U.S. 383, 399 (1988) (Stevens, J., concurring in part and dissenting in part) (Justice Stevens, in dissenting from the Court's refusal to modify a certified question, stated "an answer to the question I would ask would be of great help in understanding the reach of the statute and evaluating its validity.").} Certification, as a method of ascertaining an authoritative interpretation of state law, may avoid or substantially modify the constitutional challenge to the statute.\footnote{American Booksellers Ass'n, 484 U.S. at 396.} An overbreadth challenge to an unconstrued state statute presents a peculiar problem because the tests for certification and overbreadth are almost identical since both tests require a determination of whether the statute is subject to a narrowing construction. If a federal court does not certify questions concerning the meaning of the unconstrued state statute, it risks invalidating a state statute based upon an erroneous interpretation of state law. If, however, a federal court considers certification, it risks determining the merits of the state law issue in its attempt to determine whether it should certify that issue to the state court.\footnote{See infra notes 122-29 and accompanying text.}

This is because the test for certification — whether a statute is readily susceptible to a narrowing construction — is the same as part two of the test for overbreadth.

II. DORMAN V. SATTI

A. The Facts

In 1985, the Connecticut legislature enacted a statute which prohibited interference with the lawful taking of wildlife (the "Hunter statute"). The statute also prohibited the harassment of a person engaged in or in the preparation of lawful hunting. Violation of the Act was a class C misdemeanor, which could lead "to a fine and/or imprisonment for up to three months." 

Francelle Dorman was arrested under the Act when she approached several hunters and attempted to dissuade them from their plans to hunt geese. Although the chief prosecutor dismissed the charges against Dorman, she filed suit in federal district court, seeking a declaratory judgment as to the validity of the statute. She alleged that her actual arrest and the threat of future enforcement of the Act violated her first and fourteenth amendment rights.

B. The District Court Decision

On cross-motions for summary judgment, the district court invalidated the Connecticut statute on the ground that since the Act failed to define what conduct constituted interference or harassment, the statute's language was impermissibly vague and overbroad. Similarly, the court found that the statute was unconstitutionally overbroad because it failed to limit, as to time and place, "acts in preparation" of lawful hunting.

C. The Court of Appeals Decision

1. The Majority

On appeal to the Court of Appeals for the Second Circuit, the Chief Prosecutor argued that construction of the terms "interfere," "harass," and "acts in preparation" should be certified to the Connect-

79. Id.
80. Id. at 433 (citing CONN. GEN. STAT. § 53a-183a (1985)).
81. Id.
82. Id.
83. Id. at 434.
84. Id. The state prosecutor dismissed the charges, conceding that Dorman's arrest was premature since she only talked about what she was going to do to interfere with the hunting of the geese. Id.
85. Id.
87. Id. at 382.
ict Supreme Court because that court had not had the opportunity to construe the statutory language.\(^8\) The Chief Prosecutor also appealed on the merits.\(^9\)

The court of appeals in *Dorman* declined to invoke Connecticut's certification procedure\(^9\) and affirmed the district court's decision to invalidate the Connecticut statute.\(^9\) The Second Circuit acknowledged that the Supreme Court encouraged the use of state certification procedures as an alternative to abstention,\(^9\) and recognized that certification may further the interests of federal/state comity.\(^9\) Nevertheless, the Second Circuit said that "issues of state law are not to be


\(^9\) Id. at 434.
routinely certified . . . simply because a certification procedure is available. The procedure must not be a device for shifting the burdens of this Court to those whose burdens are at least as great.' 94

According to the Second Circuit, the test for determining the necessity of certification is whether the statute in question is readily susceptible to a narrowing construction that would render it constitutional.95 In determining that the Connecticut statute was not readily susceptible to a narrowing construction, the court of appeals distinguished *Dorman* from *State v. Williams,*96 in which the Connecticut Supreme Court upheld a similar statute.

In *Williams,* the Connecticut Supreme Court upheld a state law making it a crime to interfere with police officers or firefighters in the performance of their duties.97 That statute defines interference as obstructing, resisting, hindering or endangering a police officer or firefighter "in the performance of his duties."98 The Connecticut Supreme Court upheld the statute by limiting its application to intentional interference.99

Both the Second Circuit in *Dorman* and the Connecticut Supreme Court distinguished the statute in *Williams* from a similar ordinance which the United States Supreme Court struck down in *City of Houston v. Hill.*100 The ordinance in *Hill* declared it "unlawful for any person to . . . in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty."101 The United States Supreme Court held that the Houston ordinance was unambiguous and not easily susceptible to a limiting construction because it was not drawn so narrowly as to prohibit only disorderly conduct or fighting words, which may be constitutionally proscribed.102 In declining to

94. *Id.* at 435 (quoting Kidney v. Kolmar Laboratories, 808 F.2d 955, 957 (2d Cir. 1987)).
95. *Id.* (citing Virginia v. American Booksellers Ass'n, 484 U.S. 383, 397 (1988)).
97. *Id.* at 467, 534 A.2d at 236 (citing *CONN. GEN. STAT.* § 53a-167a (1971)).
98. *Id.*
99. *Id.* at 474, 534 A.2d at 239. The court explained that the definition of "interfering" had been construed to include only intentional conduct:

By its terms, § 53a-167a is directed only at conduct that interferes with police and firemen in the performance of their duties. As we have said earlier, it encompasses only interference that is intentional. This limiting construction, which we deem to be fully consistent with the intent of the legislature, preserves the statute's purpose to proscribe "core criminal conduct" that is not constitutionally protected.

101. *Id.* at 461.
102. *Id.* at 462, 465. The Court noted that the language would "prohibit[ ] verbal
certify because the statute was not readily susceptible to a narrowing construction, the Hill Court noted that "[a] federal court may not properly ask a state court if it would care in effect to rewrite a statute."103

Comparing the Connecticut Hunter statute to the statutes in Williams and Hill, the Second Circuit likened the Hunter statute to the ordinance in Hill. The court of appeals said that "because the [Connecticut Hunter] Act fails to define the nature of the interference it proscribes, its language implicitly sweeps as broadly as that of the Houston ordinance, and it thus cannot be saved by a limiting construction as was Section 53a-167a" in Williams.104

Consequently, the Dorman court held that although the parties offered conflicting interpretations of the Connecticut statute, "the Connecticut court would be in no better position than a federal court to decide which interpretation is correct. This is because ... the statute ... is so imprecise and indefinite that it is subject to any number of interpretations."105 To ask the Connecticut Supreme Court to consider construing the statute more narrowly, such as applying only to "core criminal conduct," would, according to the court of appeals, "be tantamount to asking the Connecticut court 'if it would care in effect to rewrite [the] statute.' "106

With this observation, the Second Circuit in Dorman illustrated the second major problem with the "readily susceptible" test. Federal courts often say that a particular statute is not subject to a narrowing construction because to construe the language more narrowly would result in a rewriting of the statute.107 How to tell the difference between narrowly construing and rewriting a statute remains a mystery.

interruptions of police officers." Id. at 461. But see id. at 473-75 (Powell, J., concurring in part and dissenting in part) (arguing that the ordinance was ambiguous enough to warrant certification).

103. Id. at 471; see infra notes 132-37 and accompanying text. But see Williams, 205 Conn. at 473, 534 A.2d at 239 (Unlike the United States Supreme Court, a state supreme court has the power to construe state statutes narrowly to comport with constitutional standards.).


105. Id. at 436. The court of appeals, however, overlooked the fact that a state court construction of state law is, though perhaps incorrect, the authoritative interpretation. Furthermore, the purpose of certification is to allow a state court to provide an authoritative interpretation. See supra note 15 and accompanying text.

106. Dorman, 862 F.2d at 436 (quoting City of Houston v. Hill, 482 U.S. 451, 471 (1987)).

Moreover, the dissenting opinion in *Dorman* did not agree with the majority’s interpretation of the statute’s scope.

2. The Dissent

Judge Miner filed a dissenting opinion in *Dorman*, in which he argued in favor of certification. Judge Miner thought that the statutory terms “interfere,” “harass,” and “acts in preparation” were susceptible to a limiting state court construction.\(^{108}\)

First, unlike the majority, Judge Miner was unable to distinguish the Connecticut statute from that in *Williams*.\(^{109}\) According to Judge Miner, hunting activities could be substituted for police duties so that the Hunter statute would confine proscribed conduct to meddling or hampering in hunting activities.\(^{110}\) Second, Connecticut law affords a restrictive definition of “harassment” in its telephone harassment statute, which requires evidence of an intention to annoy or alarm another person.\(^{111}\) Thus, Judge Miner argued that there is no reason why the Connecticut Supreme Court could not define harassment in the context of the Hunter statute without impinging on the first amendment.\(^{112}\) Third, Judge Miner argued that a narrowing construction could limit “acts in preparation” to preparatory acts “directly, unequivocally and immediately related to the act of taking wildlife.”\(^{113}\)

In addition, Judge Miner concluded that the Connecticut severability statute,\(^{114}\) which allows the Connecticut Supreme Court to excise invalid portions of state statutes without affecting the valid remainder, shows that the Hunter statute is “subject to pruning by the Connecticut Supreme Court.”\(^{115}\)

Finally, in apparent recognition of the difficulty inherent in applying the readily susceptible test, Judge Miner compared the Connecticut Hunter statute to the statute in *Virginia v. American Booksellers Association*\(^{116}\) and concluded:

> If the term “harmful to juveniles,” as defined in a Virginia statute prohibiting the display of certain visual or written materials, is considered subject to a narrowing construction by the Virginia Supreme

\(^{108}\) *See Dorman,* 862 F.2d at 438 (Miner, J., dissenting).

\(^{109}\) *Id.* See supra notes 96-104 and accompanying text for a discussion of *Williams*.

\(^{110}\) *Dorman,* 862 F.2d at 438 (Miner, J., dissenting).

\(^{111}\) *Id.* (citing CONN. GEN. STAT. § 53a-183 (1987)).

\(^{112}\) *Id.*

\(^{113}\) *Id.*

\(^{114}\) CONN. GEN. STAT. § 1-3 (1989).

\(^{115}\) *Dorman,* 862 F.2d at 438 (Miner, J., dissenting).

Court after certification, then the objectionable terms in the Connecticut Hunter Harassment Act certainly should be capable of the sort of limiting construction that would meet constitutional challenges.\textsuperscript{117}

The fundamental disagreement over the susceptibility of the Connecticut Hunter statute to a saving construction shows the weakness of the "readily susceptible" test for certification. The "readily susceptible" standard invites disagreement because it is unclear how to tell when, or if, a narrowing construction becomes a rewriting of the statute. More importantly, the result in \textit{Dorman} also demonstrates how easy it is for a federal court to invalidate an unconstrued state law.

\textbf{III. Analysis}

Federal courts invoke certification procedures to redress the difficulties of abstention.\textsuperscript{118} Certification shares with abstention the objectives of avoiding unnecessary constitutional adjudication and preventing unnecessary interference with state policy.\textsuperscript{119} The issue for federal courts is to determine the necessity of federal court interference with state legislative policy. In other words, should a federal court certify first or should it invalidate the unconstrued state law on its face? The \textit{Dorman} decision shows how easy it is for a federal court to pay only lip service to important federalism interests and still invalidate an unconstrued state law.\textsuperscript{120}

The Second Circuit's application of the "readily susceptible" test in \textit{Dorman} illustrates the two problems with the standard. First, the test encourages federal courts to rule on the merits of the constitutional validity of a state statute, thereby failing to serve the federal interest of deference to state court interpretation of state law. Second, when determining whether a state statute is readily susceptible to a limiting construction, federal courts attempt to distinguish between narrowly construing and rewriting the statute. This distinction is difficult, if not impossible to make.

Application of the "readily susceptible" standard fails to serve the

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\item[117.] \textit{Dorman}, 862 F.2d at 438 (Miner, J., dissenting) (citation omitted).
\item[118.] \textit{Corr \\ & Robbins}, supra note 18, at 417. See supra notes 29-39 and accompanying text for a discussion of the development of certification.
\item[120.] Before invalidating the Connecticut Hunter statute, the Second Circuit restated the federalism interests that certification is designed to further. See supra notes 92-94 and accompanying text.
\end{enumerate}
\end{footnotesize}
federalism interests upon which certification rests because federal courts, rather than state courts, determine the susceptibility of state law to a state court's narrowing construction. Thus, despite the availability of a means for ascertaining an authoritative interpretation of state law, federal courts routinely are able to invalidate unconstrued state statutes. This threat to federalism should be cause for concern as federal court litigation of state issues increases.\textsuperscript{121}

A. The "Readily Susceptible" Test Encourages a Decision on the Merits

The "readily susceptible" test for certification invites a federal court to predict whether a state court could narrowly construe a state statute to save it from constitutional attack. In making such a prediction, a federal court must anticipate somewhat the merits of the constitutional question.\textsuperscript{122}

The Second Circuit's analysis in \textit{Dorman} illustrates that its decision not to certify the meaning of the key terms in the Hunter statute was a function of its determination that the language was unconstitutionally overbroad. In Section II of the court's opinion, entitled "The Merits," the court stated that when considering a facial challenge to an allegedly vague and overbroad statute, "a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct."\textsuperscript{123} The answer to this question necessarily requires knowledge of the meaning and scope of the statute in question. The majority, however, had already decided in its previous section, where it addressed the question of whether to certify, that the language of the Hunter statute was as broad as that of the ordinance in \textit{City of Houston v. Hill}.\textsuperscript{124}

Essentially, the \textit{Dorman} court decided the merits of the constitutional validity of the Connecticut Hunter statute when it decided not

\begin{footnotes}
\item[121] "As the willingness of federal courts to relax the rules of standing and to strike down ordinances in their entirety increases, so also does the incentive to prosecute in the federal courts." \textit{Hill v. City of Houston}, 789 F.2d 1103, 1115 (5th Cir. 1986) (Higginbotham, J., dissenting), \textit{aff'd}, 482 U.S. 451 (1987).

\item[122] \textit{See Field, supra} note 16, at 1109. Professor Field observes that to some extent a federal court must address the merits of state issues in order to make an abstention decision since the court should only abstain when state law is unclear. \textit{Id}. Arguably, this point extends to certification, which like abstention, is only proper when state law is unclear.


\item[124] \textit{Id} at 435. \textit{See supra} notes 100-04 and accompanying text for the court's comparison of the Connecticut statute to the ordinance in \textit{Hill}.
\end{footnotes}
to certify questions of state law to the Connecticut Supreme Court. This evaluation of the merits stems from the test for certification which asks a federal court to determine whether a state statute is readily susceptible to a state court narrowing construction.

The court's analysis in *Dorman* shows that the test for certification in an overbreadth context is directed at the wrong court. A first amendment overbreadth analysis necessarily requires an assessment of the statute's scope. Nevertheless, federalism requires that federal courts abstain from deciding constitutional questions which are entwined with a state law issue so that state courts can provide authoritative interpretations of state law. The issue of whether a statute is readily susceptible to a state court limiting construction is best left to state courts to decide as they are more familiar with the entire body of state law and may have more expertise in the understanding and construction of state legislative intent. If a federal court can predict how a state court might interpret state law, a state is left with little remedy for an erroneous federal court construction of state law. Furthermore, the availability of certification in most states removes the need for a federal court to predict the scope of a state law.

**B. Narrowing Versus Rewriting**

A corollary to the "readily susceptible" standard is that a narrowing construction must not be a rewriting of the statute. In *City of Houston v. Hill*, the Supreme Court stated that "[a] federal court may not properly ask a state court if it would care in effect to rewrite a statute." The Court provided no support for this rule.

While a federal court may not provide a narrowing construction for state legislation, this limitation on federal court power does not

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125. See supra note 73.
127. Comment, supra note 35, at 867.
128. See supra note 16.
131. *Id.* at 471.
132. *Virginia v. American Booksellers Ass'n*, 448 U.S. 383, 397 (1988) (The Supreme Court "will not rewrite a state law to conform it to constitutional requirements."); *see also Gooding v. Wilson*, 405 U.S. 518, 520 (1972) (Federal courts "lack jurisdiction authorita-
preclude a state court from interpreting state law within constitutional boundaries. In *State v. Williams*, the Connecticut Supreme Court said that "unlike the United States Supreme Court, this court has the power to construe state statutes narrowly to comport with the constitutional right of free speech." In addition, the Connecticut Supreme Court said in *Moscone v. Manson* that:

It is . . . true that this court will not ordinarily construe a statute whose meaning is plain and unambiguous. This rule of statutory construction does not apply however if . . . a literal reading places a statute in constitutional jeopardy. We are bound to assume that the legislature intended, in enacting a particular law, to achieve its purpose in a manner which is both effective and constitutional.

As Judge Miner noted in *Dorman*, Connecticut's severability law is further evidence of the state's power to confine state laws to their proper scope.

Given that state courts have the power to interpret state laws and to confine them within the constitutional scope, federal courts cannot distinguish between a narrowing construction and a rewriting of the law. Federal courts cannot even agree on when a state statute is ambiguous enough to warrant certification or abstention. Addition-

134. *Id.* at 473, 534 A.2d at 239 (citing *Moscone v. Manson* 185 Conn. 124, 130-31, 440 A.2d 848 (1981); *Engle v. Personnel Appeal Bd.* 175 Conn. 127, 134, 394 A.2d 731 (1978)).
136. *Id.* at 128, 440 A.2d at 851 (citations omitted).
138. See supra notes 88-117 and accompanying text for a discussion of the differing opinions on the certification issue in *Dorman*. Three other illustrations are relevant.

Justice Powell, joined by Justice O'Connor and Chief Justice Rehnquist, dissented from the majority's decision not to certify in *City of Houston v. Hill*. See 482 U.S. 451, 473-75 (1987) (Powell, J., dissenting). See supra notes 100-03 for a brief discussion of *Hill*. Justice Powell wrote that the ordinance, which prohibited anyone from opposing or interrupting a police officer in the execution of his duty, was ambiguous because it lacked an explicit intent requirement, while the Texas Penal Code mandated "imputation of some culpability requirement." *Hill*, 482 U.S. at 473 (Powell, J., dissenting). Similarly, at the appellate level, seven judges of a fifteen-member panel dissented from the majority's facial invalidation of the ordinance:

Although the ordinance on its face may be susceptible to troubling constructions, it need not be so construed. The state courts could, for example, easily find an intent requirement in the ordinance . . . . Similarly, the ordinance need not be construed as applicable to all police functions . . . . It certainly could be limited to
ally, if a federal court cannot consistently determine whether a statute is clear or unclear, then it cannot proceed further to make the determination that a limiting construction is really a rewriting of the state-

lawful police functions, so that public challenges to unauthorized police activities would be unaffected.

Hill v. City of Houston, 789 F.2d 1103, 1124 (5th Cir. 1986), aff’d, 482 U.S. 451 (1987).

Likewise, disagreement over the meaning of a Washington state moral nuisance law produced a plurality opinion in Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985). The statute declared any place that exhibits lewd films as a regular course of business to be a moral nuisance. According to the statute, "'lewd matter' is synonymous with 'obscene matter.'" Id. at 493 (quoting WASH. REV. CODE § 7.48A.020(2) (1983)). Obscene matter was further defined to include any matter which "'appeals to the prurient interest.'" Id. The statute also defined prurient as "'that which incites lasciviousness or lust.'" Id. at 494 (quoting WASH. REV. CODE § 7.48A.010(8) (1983)). The plurality reversed the lower court's complete facial invalidation and partially invalidated the law "insofar as the word lust was taken to include a normal interest in sex." Id. at 504-05. However, in her concurring opinion, Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist, noted that the Court should have abstained or certified to allow the state courts the opportunity to construe the Washington law. Id. at 507-10 (O'Connor, J., concurring). Justice O'Connor wrote:

The Court of Appeals opined that the Washington statute is not susceptible to a limiting construction . . . . This assertion is simply implausible. . . . Both the text and the background of the Washington statute indicate that the state legislature sought to conform the moral nuisance law to the constitutional standards outlined by this Court in Miller v. California, 413 U.S. 15 (1973). Moreover, the state courts have demonstrated their willingness to construe state obscenity laws in accord with Miller.


Finally, even the most seemingly unambiguous statute may produce disagreement. See Wisconsin v. Constantineau, 400 U.S. 433 (1971). The Court in Constantineau facially invalidated a Wisconsin law which provided that certain persons could post a notice in retail liquor stores prohibiting the sale of intoxicating liquors to persons who, through excessive drinking, posed a danger to the community. Id. at 434. Since the statute contained no provision for notice or hearing, the Court held that the law was unambiguous and violated due process rights. Id. at 436-39. Despite the lack of notice and/or hearing provisions, three justices dissented, arguing that the Court should have abstained to allow the Wisconsin courts to interpret the law. In one of the two dissenting opinions, Justice Black, joined by Justice Blackmun, noted that "'[i]t seems . . . wholly uncertain that the state law has the meaning it purports to have.'" Id. at 444 (Black, J., dissenting). Justice Black explained:

[I]t is unfair to Wisconsin to permit its courts to be denied the opportunity of confining this law within its proper limits if it could be shown that there are other state law provisions that could provide such boundaries. For example, notice and hearing might be provided by principles of state administrative procedure law similar to the federal Administrative Procedure Act.

Id.

These cases illustrate the diverse spectrum of federal court interpretation of state law. The various opinions suggest that federal courts cannot consistently distinguish between a narrowing construction or a rewriting of a state law, since they cannot agree on what makes a statute ambiguous enough to warrant a state court construction in the first place.
Furthermore, to focus on this seemingly empty distinction is to move further away from the essential purpose of certification.

The purpose of certification is to provide state courts with the opportunity to rule on an issue of state law before a federal court renders a decision based upon an interpretation contrary to how the state's highest court would interpret the statute in question. Obtaining an authoritative interpretation on a state law question allows a federal court to make a more accurate determination about the validity of the state law. Considering the availability of certification procedures, federal courts should allow the state's highest court to render its interpretation of a state statute before a federal court invalidates it on its face.

If federal courts are serious about recognizing state independence and maintaining an efficient federal judiciary, they must realize the failings of the current test for certification in the facial overbreadth context and develop a test that better serves the purpose of certification.

139. In fact, when the Supreme Court holds that a court may not rewrite a state statute, it does not offer any standard for knowing when a judicial interpretation is actually a rewriting of the law. See, e.g., Hill, 482 U.S. at 471; Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 n.15 (1975). Perhaps this is because any interpretation may be an amendment to the statute insofar as the construction adds a new or different meaning to the statutory language.

140. Dorman, 862 F.2d at 434-35.

141. See Harrison v. NAACP, 360 U.S. 167 (1959). In this abstention case, the Supreme Court said:

All we hold is that these enactments should be exposed to state construction or limiting interpretation before the federal courts are asked to decide upon their constitutionality, so that federal judgment will be based on something that is a complete product of the State, the enactment as phrased by its legislature and as construed by its highest court.

Id. at 178.

142. A federal court need not accept a narrowing construction which is inconsistent with prior applications of the law. See Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969). However, where there is no prior application of the law, as in a facial overbreadth challenge to an unconstrued state statute, a federal court ought to ground its overbreadth determination on an accurate state court interpretation. See Hill, 482 U.S. at 475 (Powell, J., dissenting) (“[T]he ambiguity of the ordinance, coupled with the seriousness of invalidating a state law, requires that we ascertain what the ordinance means before we address appellee’s constitutional claims.”); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 510 (1985) (O’Connor, J., concurring) (“Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when . . . the state courts stand willing to address questions of state law on certification from a federal court.”).

143. Railroad Comm’n v. Pullman Co., 312 U.S. 496, 501 (1941); Dorman, 862 F.2d at 434-35.
C. Proposal

The seriousness of federal court invalidation of state policy requires an authoritative interpretation of a state statute prior to a federal court invalidation of that statute. Therefore, this Note proposes that when federal courts review a facial overbreadth challenge to an unconstrued state statute, they seriously consider certification prior to a facial invalidation to ensure that any resulting interference with state policy is necessary and not premature. Federal courts should reflect upon the problems that occur when they fail to invoke available certification procedures.

Certification is clearly beneficial in the case of an ambiguous state statute, but considering that certification produces some additional expense and delay, it might appear desirable to allow a federal court to quickly invalidate an unambiguous state statute even in the absence of prior state court adjudication. The problem with such an assumption is that federal courts are inconsistent in determining when a state law issue is unclear enough to warrant abstention or certification.144 Furthermore, in a first amendment overbreadth challenge, the clarity of the statute in question is of critical importance since the analysis focuses on the scope of the law as it relates to protected expression.145

The importance of obtaining an accurate construction of the state statute suggests that federal courts should certify before prescribing the "strong medicine"146 of facial invalidation. The Dorman court noted that certification should not be a device for shifting federal court burdens to state courts.147 The Second Circuit's concern over the state court's docket is misplaced in the context of a facial overbreadth challenge to an unconstrued state statute. As the court of appeals admitted, a state court's interest in accepting questions for review is "particularly strong when it has not yet had the opportunity to interpret the pertinent statutory language."148

Furthermore, state certification statutes limit the type of questions that the states' highest courts will accept, so that state courts

144. "Where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim." Wisconsin v. Constantineau, 400 U.S. 433, 439 (1971) (citing Zwickler v. Koota, 389 U.S. 241, 250-51 (1967)). The Court, however, is unable to consistently determine when a statute is ambiguous. See supra note 138.

145. See supra note 73.

146. See supra note 68 and accompanying text.

147. Dorman, 862 F.2d at 435.

148. Id.
have the discretionary power to decline to answer certain questions.\textsuperscript{149} These state statutory limits on certification should encourage federal courts to refrain from certifying questions which do not satisfy the minimal requirements of state certification statutes.\textsuperscript{150} Obviously, a federal court should not certify questions it knows the state will refuse to accept. If there is any doubt, however, a federal court should certify and allow the state court the opportunity to accept or decline to answer. A state court which declines to answer a certified question should be estopped from arguing premature interference with state policy.

Certification before facial invalidation will further the principles of federalism which warn against unnecessary interference with state policy and unnecessary adjudication of constitutional questions. It will not, however, protect against the chilling effect when constitutional rights are potentially at stake.\textsuperscript{151} Consequently, interim relief during the certification process may be necessary.

If the alternative would be facial invalidation of an unconstrued state statute because the fear of a chilling effect during the certification process is too great, a preliminary injunction against enforcement of the challenged state statute is a possible solution for alleviating any potential chilling effect.\textsuperscript{152} A preliminary injunction serves to protect

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\item\textsuperscript{149} Connecticut's certification statute limits certified questions to those that "may be determinative of the cause then pending ... and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of the state." Conn. Gen. Stat. § 51-199a(b) (1989). Most state certification statutes have similar limiting language.
\item Challenges to unconstrued state statutes necessarily satisfy the second requirement that state supreme court precedent is lacking. The requirement that the state law issue might be determinative of the case is more problematic and is one reason why state courts have declined to answer certified questions. See, e.g., Joseph v. Pima County, 158 Ariz. 250, 251, 762 P.2d 537, 538 (1988) (Non-diversity litigants should not first remove cases to federal court only to ask for certification of state law questions.); White v. Edgar, 320 A.2d 668, 677 (Me. 1974) (question of state law must be "susceptible of an answer ... [which] will produce a final disposition of the federal case"); Grant Creek Water Works, Ltd. v. Commissioner, 235 Mont. 1, 3, 775 P.2d 684, 685 (1988) ("[L]itigation may be settled solely on questions of federal law."); Schlieter v. Carlos, 108 N.M. 507, 509, 775 P.2d 709, 711 (1989) (questions certified not accompanied by sufficient nonhypothetical, evidentiary facts to evaluate constitutionality of state statute); Retail Software Servs. v. Lashlee, 71 N.Y.2d 788, 790, 525 N.E.2d 737, 738, 530 N.Y.S.2d 91, 92 (1988) (answer to a certified question which would establish an abstract proposition would not satisfy the constitutional requirement that the question may be determinative of the pending action); Hachney v. Steighner, 549 P.2d 1310, 1311 (Wyo. 1976) (certified answer must dispose of the case one way or another).
\item\textsuperscript{150} See 17A C. Wright, A. Miller & E. Cooper, supra note 15, § 4248, at 171 (1988).
\item\textsuperscript{151} See supra note 3 for an explanation of the "chilling effect."
\item\textsuperscript{152} Technically, a preliminary injunction only protects the particular federal plain-
the plaintiff from irreparable injury and to preserve the status quo until the federal court renders a meaningful decision following a trial on the merits.\textsuperscript{153}

While interim relief may preserve the status quo and alleviate any chilling effect during the certification process, it also conflicts to some extent with the policies on which certification rests.\textsuperscript{154} First, interim relief necessarily interferes with state policy.\textsuperscript{155} Second, a grant of interim relief does not avoid the constitutional question since the decision to grant a preliminary injunction rests in part on a judicial evaluation of the merits.\textsuperscript{156} Third, because the federal court must inquire into the merits, the state court may take the preliminary determination as an indication of how the federal court will ultimately rule on the merits and may view the injunction as an attempt to force the state court into interpreting the state law in accordance with the federal court's preliminary determination.\textsuperscript{157}

Interim relief in the certification context poses a problem due to the requirement of a showing that the moving party is likely to succeed on the merits.\textsuperscript{158} Just as it is undesirable for a federal court to address the merits of the state law issue prior to certification,\textsuperscript{159} it is similarly undesirable for a federal court to address the merits of the case to determine whether to grant interim relief.\textsuperscript{160} Consequently, certification in situations involving facial overbreadth challenges to

tiffs since the state is free to prosecute others who violate the contested statute. See Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975). Consequently, a temporary stay may not afford all potential plaintiffs with sufficient protection. However, if the plaintiff represents a class of people in a class action challenge to the contested statute, then a preliminary injunction would prohibit enforcement of the statute against all people in the particular class. Even if the plaintiff does not represent a class, the pending suit may encourage the state prosecutor to wait for the final disposition before attempting further prosecutions under the challenged law.


\textsuperscript{154} Wells, Preliminary Injunctions and Abstention: Some Problems in Federalism, 63 CORNELL L. REV. 65, 75 (1977).

\textsuperscript{155} Id.

\textsuperscript{156} Id. at 68.

\textsuperscript{157} Id. at 69.

\textsuperscript{158} The traditional standard for granting a preliminary injunction requires a showing that 1) in the absence of interim relief, the plaintiff will suffer irreparable injury and 2) that the plaintiff is likely to prevail on the merits. Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975). For a detailed history of the standards for granting interim relief, see generally Leubsdorf, The Standard for Preliminary Injunctions, 91 HARV. L. REV. 525 (1978); Wolf, supra note 153.

\textsuperscript{159} See supra notes 122-29 and accompanying text.

\textsuperscript{160} See Wolf, supra note 153, at 230-33.
unconstrued state statutes is one area where federal courts should not focus on the plaintiff's likelihood of success on the merits and should apply an alternative standard.\textsuperscript{161}

One possibility is to completely ignore the merits and balance the relative hardships to the opposing parties.\textsuperscript{162} Under this standard the court could determine whether to grant interim relief based on its analysis of the severity of the potential chilling effect and the competing state interest in enforcing the particular regulation. Alternatively, rather than completely ignoring the merits, a federal court could apply one of the less rigorous tests which asks whether the plaintiff raises a serious question regarding the merits.\textsuperscript{163} If the federal court applies either of these alternative approaches that permit interim relief without a showing that the plaintiff is likely to prevail on the merits, it will preserve the status quo and the principles of federalism by allowing state courts to rule on the state law issue.

Even if the traditional "likelihood of success on the merits" standard is used to determine preliminary relief and federalism principles are violated, a grant of interim relief causes a less serious disruption of a state program than does a refusal to certify.\textsuperscript{164} The preliminary in-

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\item A departure from relying on the moving party's likelihood of prevailing on the merits is not without support. Some courts follow a less rigorous standard, which while still looking at the merits, does not require a showing that the moving party is likely to prevail. See, e.g., Dataphase Sys. v. C L Sys., 640 F.2d 109, 113 (8th Cir. 1981) ("[W]here the balance of other factors tips decidedly toward movant a preliminary injunction may issue if movant has raised questions so serious and difficult as to call for more deliberate investigation."); National Ass'n of Farmworkers Orgs. v. Marshall, 628 F.2d 604, 616 n.52 (D.C. Cir. 1980) ("An order maintaining the status quo is appropriate when a serious legal question is presented . . . ." (quoting Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977))); Jackson Dairy, Inc. v. H.P. Hood & Sons, 596 F.2d 70, 72 (2d Cir. 1979) (injunction may issue if there are "sufficiently serious questions going to the merits"). For an in depth discussion and analysis of the varying standards for issuing preliminary injunctions, see generally Leubsdorf, supra note 158; Wolf, supra note 153.
\item Nineteenth Century English and American precedents relied on equity doctrines to support the legal proposition that even where a movant's legal right to interim relief may be in doubt, the court may nevertheless issue an injunction if the moving party will suffer greater harm if the injunction is denied than the opposing party will suffer if the stay is granted. Wolf, supra note 153, at 177 (citing W. KERR, INJUNCTIONS IN EQUITY (1871)).
\item See Jackson Dairy, 596 F.2d at 72. Under the Jackson Dairy test, the court may grant interim relief when the moving party demonstrates that it will suffer irreparable harm, which means that a monetary award would not be an adequate remedy. Additionally, the moving party must show either that it is likely to succeed on the merits or that there are sufficiently serious questions on the merits to make them a fair ground for litigation. If the moving party demonstrates sufficiently serious questions on the merits, it must also show a balance of hardships that tips decidedly in its favor. Id.
\item Wells, supra note 154, at 71; see also Note, supra note 138, at 1251. "The state
CERTIFICATION BEFORE FACIAL INVALIDATION

junction may influence the state court’s answer to the question(s) certified, but the state court is not bound by the federal court’s preliminary interpretation.\textsuperscript{165} Thus, a grant of interim relief can prevent the chilling effect during certification and will interfere less with state policy than would invalidation of the statute. Finally, if a federal court does not want to grant a formal preliminary injunction, the same objective is attainable if the state enforcement authority agrees not to prosecute during the certification process.\textsuperscript{166}

CONCLUSION

Certification represents the most reasonable way for federal courts to protect individuals from unconstitutionally overbroad statutes without unnecessarily interfering with state legislative policy.\textsuperscript{165}

incurs much greater harm from inaccurate construction of the statute than from interim relief, which merely causes delay in achieving the state’s objective and not total frustration of the objective itself.” \textit{Id.} at 1251-52.

\textsuperscript{165} Wells, \textit{supra} note 154, at 69.

\textsuperscript{166} \textit{Id.} at 84; \textit{see also supra} note 152.

Interim relief will relieve the chilling effect during the certification process, but a question remains as to whether the state may retroactively enforce the statute if the federal court ultimately upholds the statute based upon a state court narrowing construction. Although beyond the scope of this note, retroactive enforcement would seem to undermine the prevention of the chilling effect and the reason for granting the interim relief in the first place, for a person may be just as deterred by delayed prosecution.

Recently, the United States Supreme Court held that an overbreadth challenge to a Massachusetts state law became moot after the Massachusetts legislature amended the statute to cure its overbreadth. \textit{See} Massachusetts v. Oakes, 109 S. Ct. 2633, 2637-38 (1989). Concurring in the judgment that vacated and remanded the case for further proceedings as to whether the former version of the statute could be constitutionally applied to the appellant, Justice Scalia dissented from the majority’s belief that a facial overbreadth challenge is unavailable once the statute is amended. He noted that “[i]f the promulgation of overbroad laws . . . was cost free, . . . then legislatures would have significantly reduced incentive to stay within constitutional bounds in the first place.” \textit{Id.} at 2639-40 (Scalia, J., concurring in part and dissenting in part).

While acknowledging that legislators may not be as careful to avoid careless drafting if they know they can cure their own mistakes by amending the statute, the Court distinguished the situation in which a state court provides the narrowing construction. \textit{See} Osborne v. Ohio, 110 S. Ct. 1691, 1702 (1990). Justice White noted that legislators cannot be certain that the statute they draft will be saved by a narrowing construction or invalidated for overbreadth. Despite the distinction, the Court observed that “[e]ven if construed to obviate overbreadth, applying the statute to pending cases might be barred by the Due Process Clause.” \textit{Id.} This is because the Due Process Clause requires fair warning to the defendant that the statute, as construed, covers his conduct. \textit{Id.} at 1703 n.16.

It seems, therefore, that even if a federal court grants interim relief during the certification process and later upholds the challenged statute based upon a state court limiting construction, there could be no retroactive enforcement unless the defendant had fair notice that his conduct was proscribed by the statute as construed by the state court. Thus, lost enforcement may be the necessary cost of preserving state policy when the alternative is a complete facial invalidation of state law.
Certification allows expeditious and authoritative construction of state law before federal courts evaluate the constitutionality of the statute.

The focus of certification in facial overbreadth challenges to unconstrained state statutes should return to the federalism concerns it is designed to serve. Federal courts should abolish the discretionary "readily susceptible" test currently used in certification cases. The test is directed at the wrong court as it invites federal courts to rule on the merits of state law issues. Furthermore, the test is unworkable because it focuses on the illusive distinction between narrowly construing and rewriting a statute.

A better solution for respecting federal-state court comity is to require certification before a federal court invalidates an unconstrained state statute because state courts are better equipped to evaluate the meaning and scope of state law. Interim relief during the certification process should alleviate any chilling effect on constitutionally protected rights. Any subsequent federal court invalidation is thus necessary and not premature.

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