IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON IN CONVOYANT LLC, Plaintiff, v. DEEPTHINK, LLC, Defendant.	No. 100523-7 (certified C21-0310JLR) En Banc Filed: August 11, 2022

GONZÁLEZ, C.J. — In our system of divided government, federal courts have the power to apply state law but not to decide state law. *See In re Elliott*, 74 Wn.2d 600, 602, 446 P.2d 347 (1968) (plurality opinion); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). Most states and some territories, including Washington, allow federal judges to ask state or territorial supreme courts to answer open questions of state or territorial law when a resolution of that question is necessary to resolve a federal case. *See* RCW

2.60.020; *McKown v. Simon Prop. Grp. Inc.*, 689 F.3d 1086, 1091 (9th Cir. 2012) (quoting *Bylsma v. Burger King Corp.*, 676 F.3d 779, 783 (9th Cir. 2012)).

A federal district court has certified this question to the court:

> When analyzing whether a claim is preempted by the Washington Uniform Trade Secrets Act, ch. 19.108 RCW, should courts apply the "fact-based" approach set forth in *Thola v. Henschell*, 164 P.3d 524 (Wash. Ct. App. 2007), or the "elements-based" approach endorsed in *SEIU Healthcare Northwest Training Partnership v. Evergreen Freedom Foundation*, 427 P.3d 688 (Wash. Ct. App. 2018)?

Order Certifying Question, *Convoyant LLC v. DeepThink, LLC*, No. C21-0310JLR at 6 (W.D. Wash. Jan. 3, 2022).

Once this court has accepted a certified question, the question is treated, in most ways, like a contested appellate case presented by genuinely adverse parties, each strongly advocating a different resolution to the legal question presented. *See, e.g.*, *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 91, 285 P.3d 34 (2012) (citing *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 149 Wn.2d 660, 670, 72 P.3d 151 (2003)). This court has the discretion to decide whether and how to answer a certified question. *Id.* (citing *Broad v. Mannesmann Anlagenbau, AG*, 141 Wn.2d 670, 676, 10 P.3d 371 (2000)).

The parties before us agree that a fact-based approach should be used in this case. Given their agreement, our resolution of the certified question is not necessary under RCW 2.60.020 or appropriate under the general rule that the court will not decide moot and abstract propositions. *See State v. B.O.J.*, 194 Wn.2d 314,

320-21, 449 P.3d 1006 (2019) (quoting *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)). There has also been no showing by the parties that this is the sort of question that is likely to avoid review, which might justify a decision on the legal question even if the issue was, as to the parties before the court, moot. *See id.* (quoting *In re Det. of Swanson*, 115 Wn.2d 21, 24-25, 793 P.2d 962, 804 P.2d 1 (1990)). Given these circumstances, and given the lack of genuinely adversarial briefing, we decline to answer the certified question.

González, C.J.

WE CONCUR:

Johnson, J.

Gordon McCloud, J.

Madsen, J.

Yu, J.

Owens, J.

Whitener, J.

Stephens, J.

Mann, J.P.T.