GUIDO CALABRESI, *Circuit Judge*, concurring:

I join the majority opinion in full. There are powerful, conflicting values at stake in this case. And we must balance those values carefully. The majority opinion does just that. It decides, in part, in favor of anti-abortion protesters and, in part, in favor of the State on behalf of abortion clinics and patients. It does so on the basis of a painstaking analysis of the law and the facts. Such analysis is what we ought to undertake in cases like this.

I write separately because, frankly, I do not understand the partial dissent's position with the respect to the New York City Access to Reproductive Health Care Facilities Act ("City Act"). The dissent would conclude—contrary to the majority; to the district court; to the appellant, the State of New York; and to *amicus curiae*, the City of New York—that the State may not sue under the City Act. That position, to me, raises an obvious problem, one that goes to federal-state relations.

The partial dissent, in reaching the conclusion that the State may not sue under the City Act, relies on federal court interpretations of federal statutes. The majority, in reaching the opposite conclusion, relies on these sources too. But the City Act is a state statute. That is so because the City is a creature of the State.

Therefore, the question of whether the State may sue under the Act, like the question of what conduct the Act prohibits, is purely a matter of state law.

The State likely may sue under the City Act. But I must say that that conclusion is uncertain. And I cannot understand how one can say with certainty that the State may not sue under the Act.

In situations where the meaning of a state statute is uncertain, it is usually appropriate to certify the question to the state's highest court. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Mallela*, 372 F.3d 500, 505 (2d Cir. 2004) (certification appropriate where state law is unclear and state courts have not had an opportunity to interpret it, where an unsettled question of state law raises important issues of public policy, and where the question is likely to recur); *Allstate Ins. Co. v. Serio*, 261 F.3d 143, 150–53 (2d Cir. 2001) (certification appropriate where a state court's interpretation of a state statute might avoid federal constitutional questions); *see also McKesson v. Doe*, 141 S. Ct. 48, 50–51 (2020) (same). I believe that the uncertainty here strongly supports such certification.

There are reasons, however, why certification by the majority may well be inappropriate. The principal reason is that the majority remands to the district

court for reconsideration of injunctive relief on any number of grounds, including the application of the federal Freedom of Access to Clinic Entrances Act ("FACE") and the New York State Clinic Access Act ("State Act"). Hence, it is hard to say that the majority's result depends on the State's ability to sue under the City Act. And, if it does not, certification would run afoul of New York's rule that only "determinative" questions of New York law may be certified. N.Y. CONST. art. VI, § 3(9); N.Y. COMP. CODES R. & REGS. tit. 22, § 500.27(a).

A second reason why certification by the majority might not be appropriate is that, while this case is pending, no injunction will issue. Therefore, to the extent timing is important, as it usually is when a party seeks preliminary relief, further delay might be undesirable. For this reason, too, but primarily for the reason that the State's authority to sue under the City Act might not be determinative, I am—reluctantly—willing to forgo certification. But I remain of the opinion that important questions in this case, namely, whether the State may sue under the City Act and, if so, what conduct the City Act prohibits, properly belong to the New York Court of Appeals and not the United States Court of Appeals.

Neither of the reasons why certification is inappropriate as to the majority applies to the dissent. The dissent would deny an injunction on the basis of FACE and the State Act, even though it agrees that some violations of those statutes occurred. On that view, it is fairly obvious that, because the City Act's prohibitions are broader than those of FACE and the State Act, the question of whether an injunction lies depends on the City Act. For the dissent, then, whether the State may sue under the City Act, and what conduct the City Act prohibits, are appropriate questions for certification.

Moreover, the issue of timing, from the dissent's point of view, can be no impediment. Again, the dissent would deny an injunction. And hence delay in resolving whether an injunction should issue is no excuse. Such delay would preserve the status quo, which the dissent favors.

In raising this problem, I do not mean to detract from the spirited disagreement between the majority and dissent over the weighty values at stake in this case. Far from it. But I believe that the disagreement might be better resolved if we had a clearer understanding of what the City Act permits.