No. 11-555

IN THE
Supreme Court of the United States

CITY OF OAKLAND, CALIFORNIA,
Petitioner,
v.
DESERT OUTDOOR ADVERTISING, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The petition for certiorari purports to raise two questions, neither of which is properly before this Court, neither of which presents an issue of continuing significance, and neither of which is the subject of any conflict in the lower courts:

1. The first question presented was neither pressed nor passed upon below: Whether the "penal" exception to the Full Faith and Credit Clause applies to penal judgments.

2. The second question presented turns on matters of state law: Whether in applying the Nevada statute governing the enforcement of judgments, the Nevada Supreme Court erroneously construed the California law underlying the California judgment that petitioner seeks to enforce.

RULE 29.6 STATEMENT

Respondent Desert Outdoor Advertising, Inc., has no parent company, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

The petition is meritless. The primary question it presents was neither raised nor addressed below. Indeed, that question does not appear to have been raised in *any* court for many decades, demonstrating its lack of continuing impact on the administration of justice or the conduct of business. And the cases cited as conflicting either do not conflict at all, or involve issues resolved by this Court more than half a century ago, which is precisely why the question presented almost never arises today.

Throughout this litigation, petitioner disputed the very existence of the "penal exception" to the Full Faith and Credit Clause, arguing that the Nevada courts should ignore precedents of "questionable authority" from this Court establishing the penal exception. Pet. App. 6a. Petitioner now shifts positions, accepting as a given (for the first time in this litigation) the existence of the penal exception established in *Huntington v. Attrill,* 146 U.S. 657, 666, 672-73 (1892), *see* Pet. 3-4, but arguing (for the first time in this litigation) that the exception applies only to the enforcement of penal *laws*, not to the enforcement of penal *judgments*. This Court, of course, is not a court of first review, and it may even be jurisdictionally barred from considering an issue not raised below in a case arising from state court.

Waiver aside, there is nothing to be decided here in any event. The line of cases cited by petitioner addressing the penal exception ends many decades ago—and many of the cases are more than a century old. The reason judicial discussion of the penal exception ceased long ago is that after having clearly

established the exception in *Huntington* in 1892, the Court over the next few decades addressed and resolved the controversies concerning its application. That clarification process was largely complete by the 1940s, and it resulted in narrowing the exception to a very small category of cases—cases that have essentially no continuing significance today. The petition obscures this point in an effort to make old cases seem relevant to modern times, but in fact the penal exception today generally applies only in cases—like this one—involving *public* authorities enforcing *public* laws designed to deter or punish *public* harms. Very few such cases ever arise, as demonstrated by the complete absence in the petition of any modern cases addressing the penal exception. Even as to the anachronistic cases cited in the petition, there is—or, more precisely, *was*—no conflict, and certainly no conflict that requires resolution by this Court today.

The second question presented in the petition, concerning whether the Nevada Supreme Court properly construed the California judgment as penal based on the purposes of the California law being enforced, rests on matters of state law inappropriate for consideration by this Court. And the cases cited by petitioner as creating various conflicts over what it means to be "penal" are not in conflict, and most do not even involve application of the penal exception.

Certiorari should be denied.

STATEMENT OF THE CASE

1. In 2003, respondent Desert Outdoor erected an outdoor billboard in Oakland, California. Peti-

tioner City of Oakland sent various notices to abate to respondent, advising it that the billboard violated the Oakland Municipal Code §§ 14.04.270, 17.10.850 and 17.70.050(B), since it was visible from the freeway and contained advertisements for businesses not located on the billboard property. Pet. App. 40a-41a.

Eventually, petitioner filed suit against respondent in the Superior Court of California, Alameda County. The suit was filed with the consent of the County's District Attorney under California Business and Professions Code § 5466(b), which permits government entities to bring civil actions to enforce public laws concerning advertising displays. On November 2, 2007, petitioner secured a judgment against respondent. Pet. App. 38a-44a.

The California court imposed "statutory civil penalties" for violating California's "statutory prohibitions against unfair business practices." *Id.* at 41a. Pursuant to the mandated penalty in California Business and Professions Code § 5485(b)(2), the court entered judgment against respondent for $43,600 ($10,000, plus $100 a day for each of the 336 days the billboard remained following written notice). Pet. App. 42a-43a. It later amended this award to $114,000 to reflect a daily award of $75 for the longer period extending from 30 days after petitioner had sent its first formal notice to abate. *Id.* at 46a-47a.

The court also found that § 5845(c) mandated disgorgement of the gross revenues from the unauthorized advertising display, amounting to $263,000. *Id.* at 43a. Pursuant to § 5845(e), it further awarded

costs and attorney fees of $92,353.75. Pet. App. 5a.

Respondent appealed the judgment and the California Court of Appeal affirmed. *Id.* at 17a.

2. Respondent is a Nevada corporation with no known assets in California other than the assertedly unlawful sign. Petr. Nev. S. Ct. Br. 3. In 2008, petitioner filed this action under Nevada state law—specifically, the Nevada Uniform Enforcement of Foreign Judgments Act (NUEFJA), Nev. Rev. Stat. §§ 17.330 to 17.400—in Nevada state court seeking to enforce the California judgment. Under NUEFJA, a properly filed foreign judgment has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating or staying as a Nevada district court judgment, and may be enforced or satisfied in like manner. Nev. Rev. Stat. § 17.350. A "foreign judgment" is defined as a "judgment of a court of the United States or of any other court which is entitled to full faith and credit in [Nevada]." Nev. Rev. Stat. § 17.340.

Petitioner subsequently filed a Writ of Execution, commanding the Washoe County Sheriff to seize any non-exempt property for satisfaction of the California judgment. Petitioner thereby garnished respondent's bank accounts as well as income from property owned by respondent in Nevada. Pet. App. 5a.

Respondent filed a motion in the Washoe County District Court under Nevada Rule of Civil Procedure 60(b), seeking relief from enforcement of the California judgment. It argued that the judgment was not entitled to enforcement under the NUEFJA because it was an improper attempt to execute a "sister-state

penalty." *Id.* at 31a. Respondent explained that NUEFJA permits enforcement of a sister-state judgment only to the extent that enforcement would be required under the Full Faith and Credit Clause, and that the Clause—as long construed by this Court—does not require enforcement of other states' penal laws and judgments. *Id.*

The Full Faith and Credit Clause provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1. It is axiomatic, however, that not all judgments are entitled to full faith and credit. Pet. App. 7a (collecting cases). Defenses such as lack of personal or subject-matter jurisdiction of the rendering court, fraud, or lack of due process all provide grounds for a court to refuse to enforce a judgment issued by a sister court. *Grover & Baker Sewing-Mach. Co. v. Radcliffe*, 137 U.S. 287, 295 (1890); *Pennoyer v. Neff*, 95 U.S. 714, 729-30 (1877); Pet. App. 7a; Laura Hunter Dietz et al., 30 Am. Jur. 2d Executions and Enforcement of Judgments § 77 (2011).

This Court has long and repeatedly held that state courts need not accord full faith and credit to penal laws and judgments imposed by other states. *See Nelson v. George,* 399 U.S. 224, 229 (1970); *Huntington,* 146 U.S. at 666, 672-73; *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 292 (1888). This principle—described as the "penal exception"—relieves a state court of any constitutional duty to recognize a sister-state's judgment that "appears to [be] . . . in its essential character and effect, a punishment of an offence against the public, or a grant of civil right to a private person." *Huntington*, 146 U.S. at 683.

Applying the penal exception, the district court agreed with respondent and held that petitioner was not entitled to enforcement of the California judgment under NUEFJA. Pet. App. 31a. It found that the "deterrent statutory penalty" assessed by the California court was penal in nature, because it addressed a public wrong rather than a private harm. *Id.* at 33a-34a.

3. In the Nevada Supreme Court, petitioner raised four issues relevant to this petition. *See* Petr. Nev. S. Ct. Br. 2; Pet. App. 5a, 6a, 15a. First, petitioner argued that the penal exception (as incorporated by the NUEFJA) does not exist at all. Petitioner contended that *Huntington* is a "relic" superseded by both the passage of time and the enactment of NUEFJA. Nev. S. Ct. Br. at 9-14. The court rejected that argument, holding that the *Huntington* penal exception is "valid and binding law," which "removes the judgment from the scope of the Clause altogether." Pet. App. 13a-14a.

Second, petitioner argued that as a matter of California law, the underlying California statute was remedial and not "penal" in nature. Petr. Nev. S. Ct. Br. 17. The court rejected this argument as well, holding that the City of Oakland was by no means "a private entity enforcing a civil right" under the relevant statute. Pet. App. 16a. Instead, pursuant to California Business & Professions Code § 17206, Oakland had filed suit, with the permission of the Alameda County District Attorney, seeking penalties for respondent's violations of Oakland Zoning Ordinances. Under these circumstances, the court concluded that a private party could not have sued this respondent under California Business & Professions

Code § 5466. *Id.* While petitioner had claimed that it had suffered damages, the court found that the purpose of the statute and the resulting judgment was not "to afford a private remedy to a person injured by a wrongful act." *Id.* at 9a. Rather, its essential character and effect was "to punish an offense against the public justice of the State," as evidenced by the fact that the City of Oakland, rather than an injured private party, instituted the action. *Id.* at 17a.

Third, petitioner argued that any "non-penal" portion of the judgment must be enforced by Nevada courts. Petr. Nev. S. Ct. Br. 18-20. But because the court construed the California law as providing that the entire California judgment was "penal," it did not reach this argument.

Finally, petitioner argued that the Nevada courts should enforce the California judgment for reasons of public policy and comity even if NUEFJA and the Full Faith and Credit Clause did not require this enforcement. *Id.* at 15-17. The court "carefully considered" and rejected this contention. Pet. App. 17a, n.10.

Accordingly, the Nevada Supreme Court affirmed the judgment of the trial court. *Id.*

REASONS FOR DENYING THE PETITION

The petition demonstrates its own irrelevance—it cites no precedent from any state court of last resort in decades addressing the scope of the penal exception to the Full Faith and Credit Clause. And it cites no precedent *at all* holding, in conflict with the decision below, that the Clause requires enforcement of a penal judgment obtained by a public authority en-

forcing a public law aimed at deterring or punishing public harms.

The issues raised in the petition, in short, are of no continuing significance. Further, the questions it raises are not properly before this Court, the conflicts it asserts do not exist, and its merits arguments are wrong. Certiorari should be denied.

I. THE ISSUES RAISED IN THE PETITION HAVE NO CONTINUING SIGNIFICANCE

The cases cited in the petition addressing the penal exception are all decades and even centuries old. It is thus easy to see on the face of the petition that the issues it raises must be largely irrelevant today—otherwise modern courts would be grappling with them. But it is not necessarily obvious *why* the issues no longer arise. The answer lies in a series of decisions from this Court in the wake of *Huntington* that clarified and narrowed the penal exception, reducing its application to the limited, very uncommon circumstances presented here: public entities asking courts of other states to enforce state laws and judgments obtained by the public entities to punish or deter public harms. That doctrinal narrowing resolved almost all of the controversies involved in the outdated cases cited by petitioner, and the scenario that remains almost never arises, as is evident from the petition itself.

A. This Court Long Ago Resolved The Issues Raised In The Outdated Cases Cited By Petitioner

1. The existence of a penal exception to the Full Faith and Credit Clause is well-settled and no longer contested by petitioner. *See* Pet. 3-4. In *Huntington*,

this Court held that the Clause, despite its broad language, does not compel state courts to enforce the penal laws of other states, including civil laws. 146 U.S. at 673-85. A civil law is considered "penal" for purposes of this exception, the Court explained, if its "purpose is to punish an offence against the public justice of the State." *Id.* at 674. As then-Judge Cardozo put it, a penal statute under *Huntington* "is one that awards a penalty to the state, or to a public officer in its behalf, or to a member of the public, suing in the interest of the whole community to redress a public wrong." *Loucks v. Standard Oil Co. of N.Y.*, 120 N.E. 198, 198 (N.Y. Ct. App. 1918). A statute is not penal, by contrast, if it "afford[s] a private remedy to a person injured by the wrongful act." *Huntington*, 146 U.S. at 674.

Applying the public-wrong/private-injury distinction in subsequent decades, the Court made clear that the penal exception does not apply to state laws remedying private wrongs. This is true even when the statute awards compensation that is not directly linked to the harm suffered by the plaintiff, but instead punishes the defendant's wrongdoing. For example, some states at first refused to enforce sister-state judgments based on wrongful death statutes that set a minimum level of compensation regardless of the actual harm suffered by a plaintiff. *See*, *e.g.*, *Cristilly v. Warner*, 88 A. 711, 713 (Conn. 1913), *overruled by Daury v. Ferraro*, 143 A. 630, 634 (Conn. 1928). In *Kenny v. Supreme Lodge of the World, Loyal Order of Moose*, 252 U.S. 411 (1920), however, this Court upheld a sister-state wrongful death judgment in a suit between private parties, reinforcing that the penal exception does not apply

to private wrongs. *Id.* at 414-15.

The Court similarly held in *James-Dickinson Farm Mortgage Co. v. Harry*, 273 U.S. 119 (1927), that the penal exception does not apply to judgments for exemplary damages in suits between private parties. *Id.* at 126. Petitioner cites several cases involving private wrongs, all of which are irrelevant to the questions presented. *See, e.g.*, *Schuler v. Schuler*, 71 N.E. 16 (Ill. 1904); *Indiana v. Helmer*, 21 Iowa 370 (1866); *Healy v. Root*, 28 Mass. (11 Pick.) 389 (1831).

Finally, the Court held in *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935), that state tax laws also are not "penal" within the meaning of the *Huntington* rule, *see id.* at 278, thereby categorically excluding tax-related laws and judgments from the ambit of the exception, *see City of Philadelphia v. Austin*, 429 A.2d 568, 571 (N.J. 1981) ("The combined effect of *Milwaukee County* and *Huntington* . . . was to remove from the penal exception civil judgments based on tax claims that included interest and civil penalties."); *State Tax Comm'n v. Cord*, 404 P.2d 422, 425 (Nev. 1965) ("Time, history and review have virtually erased the contentions that taxes are penal in nature . . . ."). Many of the cases cited by petitioner involve tax-related judgments and thus are irrelevant to the questions presented in this case. *See*, *e.g.*, *City of Philadelphia v. Bauer*, 478 A.2d 773 (N.J. 1984); *Austin*, 429 A.2d 568; *Ohio Dep't of Taxation v. Kleitch Bros. Inc.*, 357 Mich. 504, 516 (1959).

The foregoing precedents of this Court have narrowed the penal exception almost out of existence. It now applies only to public laws and judgments enforced by public entities (or individuals acting in the

name of the public) addressing public wrongs. That category includes this case, and by all that appears from the petition, virtually no other—the petition cites no modern case involving the enforcement of a judgment in these circumstances. This Court normally addresses only *unanswered* questions, not questions that nobody is even asking.

B. Given The Narrowing Of The Doctrine, The Factual Circumstances Required To Present A Penal Exception Issue Today Are Very Unusual

As demonstrated by the dusty caselaw petitioner cites, controversies concerning the penal exception almost never arise today. Given the Court's narrowing of the penal exception decades ago, multiple circumstances must combine even to raise the possibility that the exception might apply. And even then the exception might be irrelevant, as courts can and do address sister-state judgments on grounds other than the penal exception.

All of the following events must occur before a penal-exception issue will arise in a state court:

First, a state or local government must obtain a civil monetary judgment enforcing a statute deterring and punishing a public wrong.

Second, the defendant must be unwilling or unable to pay the judgment voluntarily. Certainly very few corporate entities are willing to accept the enmity of public enforcement authorities in jurisdictions where they do business by refusing to pay civil penalties imposed in judicial proceedings.

Third, in the rare instances where the defendant

refuses to pay, the judgment must exceed the defendant's assets available within the state for garnishment or attachment.

Fourth, the judgment, combined with the public interest in enforcement of the law, must be substantial enough that the entity obtaining the judgment considers it worth the candle to pursue enforcement in a foreign state, where the defendant resides and/or has assets available to satisfy the judgment. This is not always the obvious choice: if the judgment is not substantial, the entity may not consider it worth the investment of resources necessary to pursue enforcement in another state.

Finally, the sister-state court not only must decline to enforce the judgment on penal exception grounds, but also must decide that comity is inappropriate. Many courts will enforce foreign state judgments on the grounds of comity. *See, e.g.*, *Oats v. Whittaker*, 18 Mass. L. Rptr. 637 (Mass. Super. Ct. 2005); *Austin*, 429 A.2d at 572-73; *see also* Nicholas D. Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 Yale L.J. 1087, 1156 (1956) (stating that modern courts are "more sympathetic to regulation in the public interest" and more tolerant to "foreign prescriptions"). Whether the penal exception applies thus often becomes irrelevant, because the sister state will elect to enforce a judgment solely on state-law comity grounds.

To be sure, it is theoretically possible that an occasional case will overcome the many obstacles to even raising the penal exception. This case is an example. But it appears to stand alone. The silence of

the petition is deafening: petitioner does not point to a single case in the past three generations where a court has refused to enforce a sister-state judgment in favor of a public authority seeking to enforce a public statute remedying a public wrong.

Caselaw on the second question presented by petitioner is not just minimal—it is wholly nonexistent. Petitioner asks this Court to determine whether the Nevada Supreme Court erroneously construed the City of Oakland's billboard ordinance as a penal statute. Petitioner cites several cases that involve the definition of "penal" in *other* contexts, such as international law or double jeopardy. *See, e.g.*, *Ingenohl v. Olsen & Co.*, 273 U.S. 541 (1927); *SEC v. Bilzerian*, 29 F.3d 689 (D.C. Cir. 1994). These cases are irrelevant. Petitioner does not identify any other case first finding that a cause of action is penal under *Huntington*, and then disaggregating the judgment into penal and non-penal parts, enforcing only the distinct non-penal aspects of the judgment. A question presented that is never actually presented is, by definition, not a question worthy of review.

II. THE FIRST QUESTION PRESENTED WAS WAIVED, INVOLVES NO CONFLICTS, AND WAS CORRECTLY DECIDED BELOW

A. The Question Was Neither Pressed Nor Passed Upon Below

1. This Court generally refuses to consider questions or issues not "pressed or passed upon" below. *United States v. Williams*, 504 U.S. 36, 41 (1992); *Illinois v. Gates*, 462 U.S. 213, 218-20 (1983); *see Hall Street Assocs. L.L.C. v. Mattel, Inc.*, 552 U.S. 576,

591 (2008) (refusing to consider an issue even where a petitioner had "suggested something along these lines in the Court of Appeals"). This Court has several times suggested that the "pressed or passed on" rule is a jurisdictional requirement for review of state court judgments. *See Hill v. California*, 401 U.S. 797, 805-06 (1971); *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 160 (1945); *but see Vachon v. New Hampshire*, 414 U.S. 478, 479 n.3 (1974).

Whether jurisdictional or prudential, there are "reasons of peculiar force" to refrain from "deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review." *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). "Where certiorari is sought to a state court, due regard for the appropriate relationship of this Court to state courts . . . may suggest greater restraint in applying [the] 'pressed or passed upon' rule." *Williams*, 504 U.S. at 45 n.5 (internal citations and quotation marks omitted).

2. The petition here principally asks this Court to decide whether the penal exception enunciated in *Huntington* applies to a civil monetary judgment awarding a penalty for violating a penal law. Pet. 11. Petitioner did not raise this question below, and the court below did not pass on it.

a. Rather than arguing that *Huntington*'s penal exception does not apply to civil monetary *judgments*, petitioner argued below that the penal exception does not exist *at all*. *See* Pet. App. 6a; Petr. Nev. S. Ct. Br. 12-14, 17-20; Resp. Nev. S. Ct. Br. 6-10, 13-18; *see also* Petr. Nev. S. Ct. Reply 1 (assert-

ing that "the primary issue on appeal is the binding weight and authority. . . that Nevada must, or should as a matter of public policy, accord to . . . *Huntington*"). Petitioner itself concedes the difference: the petition expressly describes the question whether the penal exception applies to a civil monetary judgment as "independent" from the question this Court decided in *Huntington*. Pet. 16.

Conspicuously, *Milwaukee County*—which plays a starring role in the petition, *see* Pet. 11, 16-21—was only cited below for unrelated propositions, such as enforcement of judgments on comity grounds. Petr. Nev. S. Ct. Reply 6. Petitioner made a fleeting citation to the difference posited in *Milwaukee County* between a claim under a revenue law and a judgment founded on that claim, but only to argue that the court should examine each element of the judgment separately to assess whether it was penal. *Id.* at 14. Petitioner *never* asserted that this difference between claims and judgments somehow curtails the scope of the penal exception and makes it inapplicable whenever a claim has been reduced to judgment.

Indeed, petitioner accepted as a given below that to the extent the penal exception exists, it *does* apply to civil monetary judgments. *Id.* Petitioner argued that the classification of a judgment as "penal" under *Huntington* does not "rest solely on the civil versus criminal classification of the underlying law, but also [on] whether the *judgment* seeks to enforce punishment for a general public offense rather than a private right of an individual as compensation for personal harm." Petr. Nev. S. Ct. Br. 11 (emphasis added).

b. Because petitioner did not press the issue below, the Nevada Supreme Court unsurprisingly did not pass upon it. As petitioner admits, the court "drew no distinction between executing penal laws and enforcing judgments based on such laws," Pet. 7, for the simple reason that petitioner *never argued* that civil monetary judgments somehow fall outside the penal exception.

The court instead simply applied the penal exception, *see* Pet. 7-8, which it correctly concluded was settled law under *Huntington* and *Nelson*. In the absence of any clear argument by petitioner that the penal exception does not apply to monetary judgments obtained by public entities enforcing public laws, the Nevada Supreme Court's straightforward application of the penal exception to the judgment here cannot qualify as a decision passing upon the much more narrow basis for rejecting application of the exception.[1] Prudence dictates awaiting a case in which this Court can "have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question." *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992). This Court should decline to act as a court of "first view" on whether the penal exception countenances the blanket enforcement of all penal claims, once reduced to

[1] The fact that Justice Pickering's dissent in the Nevada Supreme Court discusses this issue, Pet. App. 22a-23a, does not establish that the court below passed on the issue, since the majority did not engage with the dissent on this point at all. "The comments in the dissenting opinion . . . are just that: comments in a dissenting opinion." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 176 n.10 (1980).

judgment. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009); *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

B. No States Have Held That The Penal Exception Excludes Monetary Judgments Rendered By A Sister State

There is no conflict among state courts of last resort as to whether the penal exception extends to sister-state monetary judgments. Petitioner asserts that, in conflict with the decision below, seven state courts of last resort have refused to extend the penal exception to monetary judgments. Pet. 12. Not so. Not one state has squarely held that the Full Faith and Credit Clause mandates enforcement of monetary judgments rendered in a sister state on a penal cause of action. Three cases cited by petitioner do not involve the holding petitioner ascribes to them. And four cases do not involve "penal" laws—as defined by *Huntington*—at all.

- Petitioner cites a New Jersey case, *Austin*, but that case explicitly reserved the issue, observing that New Jersey courts have left "unresolved . . . the question of enforcement of an extrastate civil judgment containing penalties for violation of laws other than tax laws." 429 A.2d at 572. Petitioner's other New Jersey case simply applies *Austin*. *See Bauer*, 478 A.2d at 776.

- The 1959 Michigan case cited by petitioner does not confront the penal exception issue at all, as petitioner seems to concede. *See* Pet. 15 n.1; *Kleitch*, 98 N.W.2d 636. *Kleitch* was a case brought by the state of Ohio in Michigan courts to enforce a tax judgment against a trucking company. *Id.* at 638.

The *Kleitch* court held that "Michigan . . . has no public policy against collection of taxes which should be weighed against the unifying principle of the full faith and credit clause." *Id.* at 643. As noted above, this Court has held that tax laws do not qualify as "penal" for purposes of the Full Faith and Credit Clause. *See Milwaukee County*, 296 U.S. at 275. Accordingly, even if some exception to that Clause was implicated in *Kleitch*, it was a tax law exception and not the penal exception.

• The Iowa case relied upon by petitioner arose out of a controversy involving child support payments, and thus is inapplicable because the child support law at issue was not penal. *See Helmer*, 21 Iowa 370. *Helmer* was decided in 1866, prior to *Huntington*'s exposition of the test for penal causes of action. Later cases relying on *Helmer* that enforced sister-state judgments seem to be limited either to the child support context or to cases involving private wrongs. *See, e.g.*, *Engelson v. Mallea*, 180 N.W.2d 127, 132 (Iowa 1970). Thus, *Helmer*'s Reconstruction Era holding cannot be taken as a current statement of the scope of the penal exception in Iowa.

• The Illinois case cited by petitioner is equally inapposite, for it also involved a cause of action that is not penal: spousal support payments. *Schuler*, 71 N.E. at 16-17. *Schuler* involved no government entity and no public harm and therefore does not implicate the penal exception.

• The impressively hoary Massachusetts case relied upon by petitioner, *Healy v. Root*, 28 Mass. (11 Pick.) 389, 397 (1831), was decided long before *Hun-*

tington, and later cases limited *Healy* to *qui tam* actions. *See Halsey v. McLean*, 94 Mass. (12 Allen) 438, 440 (1866). Thus, the Massachusetts rule does not conflict with a rule permitting states to refuse to enforce sister-state judgments in favor of a public actor based on a penal cause of action.

• Likewise, the even more antiquated Ohio case cited by petitioner, *Spencer v. Brockway*, 1 Ohio 259, 260 (1824), is irrelevant because the action there was brought "in the name of an individual, and not in the name of the state." *Id.* at 260. The case was also decided before *Huntington* defined the penal exception. Further, the *Spencer* court was explicit in describing its holding as independently chosen rather than constitutionally compelled: "There is not anything in the constitution, or laws of Ohio, that requires such a prohibition . . . ." *Id.*. The court thus made a *choice* to extend full faith and credit to civil judgments obtained under a sister state's penal laws—which in no way conflicts with the Nevada Supreme Court's ruling that it was not *required* to extend full faith and credit to a sister state's penal judgment.

• The seventh and final state cited by the petitioner, Arkansas, has never squarely addressed this issue. Petitioner cites *Jordan v. Muse*, 115 S.W. 162, 162 (Ark. 1909), but the *Jordan* court did not discuss the penal exception at all, and no Arkansas cases citing *Muse* have concerned the penal exception.

There is, in sum, no conflict among state courts of last resort on the applicability of the penal exception to civil monetary judgments obtained by government entities enforcing public laws directed at deterring

public harms. While some courts, such as the court below, have indicated that the penal exception does apply to monetary judgments issued by a sister state on a penal cause of action, petitioner identifies no state high court decision holding that the Constitution compels the opposite choice.

C. The Decision Below Is Correct

1. *This Court's Precedents Already Make Clear That The Penal Exception Applies To Judgments*

Petitioner's newly-hatched argument that the penal exception does not extend to civil penalties reduced to judgment is at odds with decisions of this Court dating back centuries. As the Court explained in 1888 in *Pelican Insurance*:

> The rule that the courts of no country execute the penal laws of another applies, not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and *to all judgments for such penalties.*

127 U.S. at 290 (emphasis added). The Court even explained why: if the principle did not apply to judgments, "all that would be necessary to give ubiquitous effect to a penal law would be to put the claim for a penalty into the shape of a judgment. *Id.* Later cases likewise referred to judgments in describing the exception. *See Nelson v. George*, 399 U.S. 224, 229 (1970); *Magnolia Petroleum v. Hunt*, 320 U.S. 430, 438 & n.4 (1943), *overruled on other grounds by Thomas v. Wash. Gas & Light Co.*, 448

U.S. 261 (1980); *Huntington*, 146 U.S. 657.

Petitioner nevertheless argues that it is an open question whether the exception applies to penal judgments, relying almost entirely on dictum in *Milwaukee County*, which involved the enforceability of tax judgments. 296 U.S. at 279. The Court noted that "[w]hether one state must enforce the revenue laws of another remains an open question," *id.* at 275, but concluded "a judgment is not to be denied full faith and credit in state and federal courts merely because it is for taxes," *id.* at 279. After issuing that holding, the Court added that the holding "intimate[d] no opinion whether a suit upon a judgment for an obligation created by a penal law, in the [Huntington] sense . . . [must be given] full faith and credit." *Id.* at 279.

Rather than leaving the question open, as petitioner asserts, the statement simply stands as the Court's reassurance that it did not mean to opine on civil monetary judgments in general, only on tax judgments. That is, even though the Court narrowed the penal exception as applied to tax penalties, it did not also narrow the exception for penal monetary judgments. Later cases have born this out; since *Milwaukee County*, the Court has repeatedly described the penal exception's application to judgments, as noted above.

2. *It Makes No Sense to Apply The Penal Exception To Laws But Not Judgments*

Petitioner does not dispute that states are not required by the Full Faith and Credit Clause to enforce sister states' *criminal* judgments. *See* Pet. 10 (citing Nevada Supreme Court Dissenting Opinion,

Pet. App. 25a n.2); *see also Nelson*, 399 U.S. 224. In the criminal context, courts do not treat monetary fines as mere "judgment debts" divorced from the underlying criminal proceeding. Because there is no meaningful difference between a civil monetary judgment and a criminal fine for purposes of the Full Faith and Credit Clause, the two should not be treated differently under the penal exception.

In other contexts, this Court has treated civil judgments on par with criminal judgments, and has placed particular emphasis on the state's involvement in seeking or recovering the penalty. *See, e.g.*, *Austin v. United States*, 509 U.S. 602, 604 (1993) (holding that the Eighth Amendment excessive fines clause applies to civil forfeitures); *see also id.* at 610 (noting that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment" (quoting *United States v. Halper*, 490 U.S. 435, 448 (1989), *overruled on other grounds, Hudson v. United States*, 522 U.S. 93 (1997))); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264 (1989).

There is no reason a penalty should have to be enforced across state lines merely because it is labeled "civil" rather than "criminal." If enforcement were required for civil judgments but not criminal, a state could effectively extend its regulatory authority beyond its borders by simply labeling a penal law as civil rather than criminal, thereby infringing upon sister-states' sovereignty. *See Pelican Ins. Co.*, 127 U.S. at 290.

Finally, an "exception" to full faith and credit

that applied only to laws rather than judgments would make little practical sense. Even absent the penal exception, the Full Faith and Credit Clause does not compel state courts to entertain actions based on other states' laws, or apply other states' laws in place of their own. *See, e.g.*, *Franchise Tax Board v. Hyatt*, 538 U.S. 488 (2003); *Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939). In other words, it is *judgments* that matter under the Clause, so if the Clause does not apply to certain types of actions, it necessarily does not apply to judgments on those actions.

3. *Applying The Penal Exception To Judgments Is Consistent With The Purpose Of The Full Faith And Credit Clause*

The penal exception's application to civil monetary judgments fully accords with the history and purpose of the Full Faith and Credit Clause. Petitioner contends that Nevada's refusal to enforce the Superior Court of California's judgment in this case "violates the central precepts" of the Full Faith and Credit Clause, *see* Pet. 16, in particular the Framers' concern about runaway judgment debtors, *see id.* at 18. That argument lacks merit.

a. To start, the Framers were concerned primarily with debts between *private* parties, not individuals subject to government penalties under public laws meant to deter public wrongs.

At the time of the Founding, the issue of interstate deference to judgments was intertwined with the enforcement and collection of *private* interstate debts and the economic hardships caused thereby. *See* Charles M. Yablon, *Madison's Full Faith and*

Credit Clause: A Historical Analysis, 33 Cardozo L. Rev. 125, 147-49 (2011). The Full Faith and Credit Clause was part of a "broader plan. . . to curb the ability of the states to . . . interfer[e] with vested contract and property rights." *Id.* at 132. The reported cases under the Articles of Confederation's similarly worded Full Faith and Credit clause are consistent with Madison's economic concerns in the post-revolutionary era—all four cases involving suits for unpaid debts are between private parties. *See Kibbe v. Kibbe*, 1 Kirby 119 (Conn. Super. 1786); *Phelps v. Holker*, 1 U.S. 261 (1788); *Jenkins v. Putnam*, 1 Bay 8, 1 S.C.L. 8 (S.C. Com. Pl. Gen. Sess. 1784); *Millar v. Hall*, 1 U.S. 229 (1788).

This case does not involve a debt between private parties. The penalty here was imposed pursuant to proceeding initiated by a government entity enforcing its own public laws—far from what the Framers had in mind.

b. Further, the Framers were not principally concerned with the enforcement of judgments, as petitioner contends. Instead, the Clause was meant to eliminate the need to fully relitigate claims in sister states before a judgment could be recognized as valid and final.

Before the Revolution, "the judgments of one colony were deemed re-examinable in another, not only as to the jurisdiction of the court . . . but also as to the *merits* of the controversy. . . ." Joseph Story, *Commentaries on the Constitution of the United States* 471 (1st ed. 1833). This meant that enforcement of a judgment in a sister state required substantial additional litigation. The "clear purpose" of

the Full Faith and Credit Clause, considered in light of this background, was to bar relitigation of final judgments by the courts of other states. *Magnolia,* 320 U.S. at 439; *Adar v. Smith*, 639 F.3d 146, 152 (5th Cir. 2011), *cert. denied,* 132 S. Ct. 400 (2011). That is, the purpose of the clause was to ensure that a defendant "may not a second time challenge the validity of the plaintiff's right which has ripened into a judgment and a plaintiff may not for his single cause of action secure a second or a greater recovery." *Magnolia*, 320 U.S. at 439-40.

This case poses no such issue. The Nevada courts did not question the validity and finality of the California judgment—they did not, for instance, argue the judgment should not be enforced because the California courts misapplied the relevant ordinance. The rationale behind the Clause is simply not implicated here. What *is* at issue is enforcement—and the Clause does *not* require enforcement of a sister-state judgment under all circumstances. Rather, sister-state courts remain free to look behind the judgment to determine its underlying character and decline enforcement for certain reasons, including lack of due process, and the penal character of the law. *See supra* Section I.A.[2]

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[2] Petitioner relies on a quotation from *Baker* (Pet. 20), to suggest that because sister state civil judgments are due more credit than are laws, judgments must be enforced in all cases. Petitioner's quoted segment ends, however, immediately before this Court made clear that it was differentiating between the credit owed to laws and to judgments only in the above-discussed context of preventing relitigation of the merits. *See*

Thus, petitioner is correct to assert that once a judgment is reached, a sister state cannot examine the underlying merits. But the sister state can always examine the underlying cause of action and, if it is penal, decline to enforce the judgment. The Nevada court did not look behind California's judgment to challenge its validity. Rather, it determined that the judgment, though valid, was penal, and thus not required to be enforced outside California. Pet. App. 17a.

III. THE SECOND QUESTION PRESENTED RESTS ON ISSUES OF STATE LAW AND IMPLICATES NO CONFLICTS

The second question presented is whether the Nevada Supreme Court properly applied the penal exception to the California judgment at issue. This question was resolved by a state court of last resort based on a careful analysis of the laws of a sister state. The court's decision rests fundamentally on a parsing of the California statute's design and scope. It is not the office of this Court's certiorari jurisdiction to second-guess a state court's analysis of another state's billboard ordinance.

Petitioner's claimed conflicts also do not withstand scrutiny. Petitioner takes a scattershot approach, asserting purported conflicts in nearly every paragraph in the evident hope that a large quantity of tangential issues will make up for the lack of a single conflict significant enough to warrant this

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Baker v. Gen. Motors Corp., 522 U.S. 222, 232-33 (1998); *see also Bauer*, 478 A.2d at 776; *Adar*, 639 F.3d at 153.

Court's review. These alleged conflicts are sparse, stale, and often do not even deal with the definition of "penal" in the context of the Full Faith and Credit Clause.

A. The Question Turns On Issues Of State Law

The question whether a judgment is "penal" for purposes of the Full Faith and Credit Clause depends on a case-specific analysis of the statute creating the cause of action. Pet. App. 15a-17a. If the statute appears "to be, in its essential character and effect, a punishment of an offence against the public," then the penal exception applies. *Huntington*, 146 U.S. at 683. As the Nevada Supreme Court explained, the penalties imposed in this case were imposed under a single statutory provision, Cal. Bus. & Prof. Code § 5485. This provision allows imposition of "penalties" when a successful action is brought by a government agency; the penalties include flat and continuing fines, disgorgement, and attorney fees. *Id.* § 5485(b),(c),(e). As the court stressed, monetary judgments under this statute are properly deemed to be "penalties" for a violation that was criminal in nature. Pet. App. 16a. Moreover, the court emphasized that these penalties were authorized under the statute in order "to strengthen the ability of local governments to *enforce* zoning ordinances." Pet. App. 4a (quoting Cal. Bus. & Prof. Code § 5485(f) (emphasis added in Pet. App)). Thus, the court concluded the statute was penal because the "statute's remedies do not address private harms but rather address only public wrongs . . . and were intended to deter conduct deemed wrongful under California law." Pet. App. 16a-17a.

This was a proper, straightforward construction of the Califorlia law. Petitioner argues that the court should have broken out the three separate elements of the damage award and analyzed each seriatim, but there was no need; all three components of the judgment were based on the same statutory provision designed to impose "penalties" in order to "enforce" local laws. Cal. Bus. & Prof. Code § 5485(f). The court properly concluded that all "such penalties" were penal in nature. Pet. App. 17a. The court did not have to address—or reject—petitioner's disaggregation argument. Disaggregation only becomes an issue if the elements of a judgment are dissimilar; if they are alike, the result is the same whether the components are considered individually or as a whole.

It thus makes no difference to this case whether the proper approach to analyzing a judgment is holistic, as *Huntington* states, *see* 146 U.S. at 683 ("essential character and effect" of the statute), or disaggregative, as petitioner suggests.[3] The court be-

[3] Petitioner cites only one case for the proposition that disaggregation is this Court's "longstanding practice in applying *Huntington*." Pet. 23 (citing *James-Dickinson Farm Mortg. Co.,* 273 U.S. at 125-26). The plaintiff in that case argued that a Texas statute providing exemplary damages in garden-variety civil suits between private parties was penal in nature. This Court rejected that argument, concluding the statute was "not a penal law." *James-Dickinson Farm Mortg. Co.,* 273 U.S. at 126. The Court did not so much as mention that there were other components of the judgment that could or should be considered separately. When no part of a judgment falls within the penal exception, it is not an endorsement of "disaggregation" to reject the application of the exception in the only place the argument is raised.

low did not need to reach the issue because it did not matter to the end result.

Instead of turning on an issue of federal law, the court's decision turned on its understanding and analysis of the underlying Oakland statute. The court considered the statute's language, structure, and purpose, concluding that the statute was best understood as one designed to be "a punishment of an offence against the public." *Id.* at 683. That conclusion is consistent with California caselaw. For instance, in analyzing similar provisions where the California code provides for statutory penalties, including attorney's fees and court costs, the California courts have emphasized that the purpose of imposing these costs is to penalize. *E.g.*, *Bodell Constr. Co. v. Trustees of Cal. State Univ.*, 73 Cal. Rptr. 2d 450, 455-57 (Cal. Dist. Ct. App. 1998); *id.* at 456 (explaining that the purpose of a statute providing for costs is to "penalize litigants").

Whether the Nevada court's parsing of the California ordinance is right or wrong, it is based entirely on the characterization of a California law. This Court is not in the business of correcting asserted errors in state court decisions that concern matters of state law. *See, e.g.*, *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940).

B. Nevada's Holding That The Judgment Is Penal Does Not Conflict With Any State Or Federal Decisions

As explained in Section I, the relevant test for whether a judgment qualifies as "penal" for purposes of the Full Faith and Credit Clause has been clear for decades: a statute is "penal" when it "is one that

awards a penalty" to an entity acting in the public interest in order "to redress a public wrong." *Loucks*, 224 N.Y. at 102; *Huntington*, 146 U.S. at 674. A statute is not penal, by contrast, if it "afford[s] a private remedy to a person injured by the wrongful act." *Huntington*, 146 U.S. at 674.

The petitioner raises several supposed conflicts among courts as to the application of this long-established test. But the cases petitioner cites do not deal with the penal exception and are not in conflict in any event.

1. *There Is No Conflict As To Whether The Existence Of A Private Right of Action Necessarily Makes A Statute Non-Penal*

Petitioner first contends that the decision below conflicts with yet another decades-old case ostensibly holding that a statute cannot be penal if a private party has the ability to sue under it. Pet. 22 (citing *Desper v. Warner Holding Co.*, 19 N.W.2d 62, 66 (Minn. 1945)). But *Desper* involved a common landlord-tenant dispute between a private plaintiff suing a private defendant, and the court had no need to decide whether the statute would be penal if an enforcement action was brought in the public interest by a public entity. Further, the penal discussion in *Desper* was dictum: the court went on to hold that it did not matter "whether the act be regarded as penal or remedial in nature" because the United States—which obtained the initial judgment—did not qualify as a foreign sovereign in this context. *Id.*

Petitioner is also plainly wrong on the merits of the issue. If the mere existence of a private right of action under a statute means that any government

enforcement under the statute is not penal, then even harsh sanctions available under a state antitrust statute to a state's antitrust enforcement division would be deemed non-penal if the statute also provided a private right of action.

2. *There Is No Conflict As To Whether Courts Must "Disaggregate" Judgments Into Penal And Non-Penal Components*

Petitioner argues that other courts have disaggregated judgments and evaluated each component of the award to determine whether the penal exception applied. Pet. 22-23. Not only is the disaggregation issue irrelevant here, *see supra* Section III.A, but the cases petitioner cites as embracing "disaggregation" were actually wholesale findings that the penal exception did not apply. One case, *Holbein*, ruled that the entire judgment was based on a non-penal cause of action, and thus there was nothing to disaggregate. *See Holbein v. Rigot*, 245 So.2d 57, 59 (Fla. 1971). The second case, *City of Philadelphia v. Smith*, 413 A.2d 952 (N.J. 1980), is equally irrelevant, as the court there concluded "that the 'penalty' herein involved is not punishment but rather a surcharge," *id.* at 954. And the same situation occurred in the final case petitioner cites; the court entirely rejected the penal exception. *See James-Dickinson Farm Mortg. Co.*, 273 U.S. at 125-126. In all these cases, the cause of action was not penal at all. In fact, the only state case that petitioner cites which looked at each component of the award concluded that the penal exception applied to all of these components, just as the Nevada court concluded in this case. *See Arkansas v. Bowen*, 20 D.C. (9 Mackey) 291, 1891 WL 10153 (D.C. Sup.

1891).

3. *There Is No Conflict As To Whether Attorneys' Fees And Court Costs Are "Penal" Under Huntington*

Neither of the cases cited by the petitioner, *Spann v. Compania Mexicana Radiodifusora Fronteriza S.A.*, 131 F.2d 609, 610 (5th Cir. 1942), and *Ducharme v. Hunnewell*, 585 N.E.2d 321, 324 (Mass. 1992), reveals a conflict on the question whether court costs and attorneys' fees are "penal" for purposes of the penal exception. First, neither case was based on a penal cause of action. *See Spann*, 131 F.2d at 610; *Hunnewell*, 585 N.E.2d at 322-23. Second, both courts determined that costs were not penalties as a matter of state (or foreign) law. *See Spann*, 131 F.2d at 611; *Hunnewell*, 585 N.E.2d at 324. Neither case addresses whether costs awarded pursuant to a penal cause of action qualify as "penal" within the meaning of *Huntington*.

4. *There Is No Conflict As To Whether Disgorgement Is Penal*

Petitioner says the decision below conflicts with the observation in *Johnson v. SEC*, 87 F.3d 484, 487 (D.C. Cir. 1996), that "[t]he bare fact that the government is the plaintiff does not automatically convert a proceeding into an action for a 'penalty' *if* the government is *only* seeking recovery of the damages *it* suffered." *Id.* at 487 n.4 (emphasis added). But in this case, the City of Oakland is *not* "only" seeking recovery of its *own* damages—disgorgement is one of multiple penalties imposed. Equally important, Oakland did not "suffer[]" *any* personal loss for which disgorgement is a remedy. The point of dis-

gorgement instead is to ensure that violators of the public law do not benefit from their violations, as another case cited by petitioner makes clear. *See Bowen*, 1891 WL 10153 (penal exception applies to judgment awarding forfeiture).

5. *There Is No Conflict As To Whether Coercive Per Diem And Statutory Liquidated Damages Are Penal*

On the two issues of whether statutes providing for coercive per diem damages or statutory liquidated damages can be penal in nature, the cases cited by the petitioner as conflicting with the decision below are irrelevant. Petitioner tries to draw on analogies from civil contempt cases to argue that penalties designed to change future behavior are not penal, Pet. 27-29, but the California statute at issue here is unlike a civil contempt statute of the sort discussed by the petitioner. Comparing this punishment to a civil contempt remedy is merely begging the question, for this Court has distinguished civil from criminal contempt sanctions based on whether the sanction is punitive. *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827-28 (1994) (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911)). Both deterrence and retribution can properly be aims of penal laws; the only reason to treat them differently is the unique context of contempt orders.

The Nevada Supreme Court held that the statute at issue here was punitive; indeed, that holding is the foundation of this entire case. And surely the judgment assessed here was indeed punitive and not merely coercive: this Court has explained that "if the

defendant does that which he has been commanded not to do, the disobedience is a thing accomplished" and therefore any sanction on that defendant would serve as "punishment for the completed act of disobedience." *Gompers*, 221 U.S. at 442. The sanction here was imposed because the California court found that Desert Outdoor Advertising violated the California code, so the sanction was not prospective or coercive—it was punitive. Petitioner's contrary argument would mean that any law with a deterrent goal would be considered non-penal. Even a speeding ticket would be non-penal; after all, the hurried driver "could have easily avoided [the law's] bite through forward compliance," simply by not speeding. Pet. 28.

Finally, the New Jersey cases relied upon to show a conflict concerning statutory liquidated damages are irrelevant, because the New Jersey courts emphasized that the statutes in those cases were tax laws rather than penal laws. *See Austin*, 429 A.2d at 571; *supra* at 10. Like the rest of the issues raised by the petitioner, there is no conflict here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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