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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONERS

Respondent does not deny that this Court has twice left open the first question presented: whether the Full Faith and Credit Clause permits one State to refuse to enforce a penal claim that another State's courts have already reduced to civil monetary judgment. See *Milwaukee County* v. *M.E. White Co.*, 296 U.S. 268, 279 (1935) ("We intimate no opinion whether[, in] a suit [to enforce] a judgment for an obligation created by a penal law, in the international sense, * * * full faith and credit must be given to such a judgment even though a suit for the penalty before reduced to judgment could not be maintained outside of the state where imposed.") (citation omitted); *Williams* v. *North Carolina*, 317 U.S. 287, 289 n.6 (1942) ("[T]he question of whether a judgment based on a penalty is entitled to full faith and credit was reserved in *Milwaukee County* v. *M. E. White Co.*") (citation omitted). Rather, respondent ignores the second of these statements and argues that the first is "dictum." Br. in Opp. 21. That is, of course, trivially true. Reserving a question necessarily does not decide it. Yet this Court's repeated, express reservation clearly shows that the question is an open one of some importance—a conclusion respondent labors arduously but fruitlessly against.

Respondent does not contest, moreover, that all the issues the second question presents—issues independently worthy of this Court's review—were pressed and decided below and that, if the penal

exception extends to claims reduced to judgment, the case squarely presents the issue of whether and how *Huntington* applies to different remedies. Respondent nonetheless insists that whether and how a federal constitutional standard applies to these various remedies presents no federal question because it "RESTS ON ISSUES OF STATE LAW." Br. in Opp. 26 (original capitalization).

This argument is especially strained. The question involves the proper characterization of different state law remedies under federal law. Although that entails the "careful analysis of the laws of a [state,]" Br. in Opp. 26, it remains at bottom an issue of federal law. Cf. *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 416 (2003) (analyzing state punitive damages award to determine if it represents "grossly excessive or arbitrary punishment[]" in violation of due process). If respondent's view were correct, no state court's refusal to enforce a judgment resting on another State's allegedly penal laws would *ever* raise a federal question. That is clearly not the law, as *Huntington* itself, a case resting on careful analysis of New York law, demonstrates. Indeed, a rule that gave state courts—even presumptively—the last word on *other* States' judgments in cases rejecting full faith and credit claims would get the entire purpose of Article IV backwards.

The major part of respondent's argument does nothing more than throw up dust. It fails to engage what it cannot deny—that the lower courts are deeply divided on both questions presented and that

the issues those questions implicate are of great importance to States and localities.

A. The Nevada Supreme Court Decided and Petitioner Raised the First Question Presented

This Court traditionally allows "a grant of certiorari [when] the question presented was * * * pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation and quotation marks omitted). This rule "operates * * * in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon" and of one not passed upon so long as it has been pressed. *Ibid.* In the present case, the Nevada Supreme Court clearly passed on the first question presented and petitioner just as clearly pressed it.

The Nevada Supreme Court necessarily decided that *Huntington*'s penal exception applies when enforcing claims reduced to judgment, not just when executing the laws of sister States. Otherwise, of course, the City of Oakland would have prevailed in its enforcement proceedings. This distinction, moreover, represents the *only* disagreement between the majority and dissent below. In her dissent for three justices, Justice Pickering criticized the majority for "confus[ing] the distinction * * * between suits to adjudicate claims arising under another state's laws and suits to enforce final judgments rendered by a sister state." Pet. App. 23a (citation omitted). She could have hardly framed the issue at the heart of the majority's opinion—and her response to it—more explicitly. The majority itself,

moreover, responded to Justice Pickering on this point. See Pet. App. 12a n.6 (arguing that the case cited for the proposition that the penal exception does not apply to claims reduced to judgment actually left open the question). This close engagement over the first question presented disproves respondent's claim that that court did not decide it.

It is equally clear that the City of Oakland pressed the issue below. In its opening brief before the Nevada Supreme Court, petitioner repeatedly argued that it was suing to enforce a "judgment" or an "obligation[]," not to execute a foreign law. See, *e.g.*, Appellant's Opening Br. 1, 2, 3, 4. It stated the very first issue presented on appeal, moreover, as "[w]hether the full faith and credit clause * * * require[s] Nevada courts to enforce Oakland's valid California civil judgment regardless of whether the judgment is 'penal' in nature." *Id.* at 2. And it argued that *Huntington*'s penal exception does not extend to "litigation once pursued to judgment." *Id.* at 11. In its reply brief, it pressed this last point further by discussing a New York case that expressly distinguished between enforcing judgments and entertaining in the first instance the claims underlying them. Appellant's Reply Br. 6 (discussing *Overmyer* v. *Eliot Realty*, 371 N.Y.S.2d 246 (N.Y. Sup. Ct. 1975)). That the City of Oakland also made broader arguments against applying *Huntington* in no way undercuts the particular argument it renews here.

B. The Nevada Supreme Court Erred on the Merits

Respondent oddly argues that despite not even having decided the first question presented the Nevada Supreme Court nevertheless got it right. None of the three authorities respondent relies on, however, supports this conclusion. Respondent's central authority, *Wisconsin* v. *Pelican Insurance Co.*, 127 U.S. 265 (1888), did suggest that courts could look through a money judgment to the cause of action upon which it rests to determine whether full faith and credit requires enforcing the judgment. *Milwaukee County* v. *M.E. White*, however, expressly repudiated that view and overruled *Pelican Insurance* on this point, a fact respondent conspicuously overlooks:

> So far as [*Pelican Insurance*] can be taken to suggest that full faith and credit is not required with respect to a judgment unless the original cause of action would have been entitled to like credit, it is inconsistent with decisions of this court * * * and was discredited in [subsequent cases].

M.E. White, 296 U.S. at 278 (citations omitted).

Respondent's second authority, *Nelson* v. *George*, 399 U.S. 224 (1970), fares no better. Although it does hold that "the Full Faith and Credit Clause does not require that sister States enforce a foreign penal judgment," *id.* at 229, it does so only in the context of a criminal conviction, a point petitioner has never contested. Respondent's third authority, *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430

(1943), is simply irrelevant. It merely notes in passing "that there may be exceptional cases in which the judgment of one state may not override the laws and policy of another." *Id.* at 438. It nowhere describes the reach of the penal exception and, in fact, the footnote accompanying this quotation notes the conflict between *M.E. White* and *Pelican Insurance*. See *id.* at 438 n.4. And respondent's policy arguments offer it no help. They oddly ignore the numerous cases petitioner discussed, see Pet. 18-21, in which this Court has noted that full faith and credit applies much more strictly to judgments than to the laws upon which they rest. See Br. in Opp. 21-26.

C. The Several Conflicts Are Real and Enduring

More puzzling still are respondent's claims that no conflicts exist with respect to either the first or second question presented. These arguments reflect at bottom a startling inattentiveness to both the cases involved and controlling Supreme Court precedent. Respondent, for example, tries to distinguish three of the seven cases holding that the penal exception does not apply to penal claims reduced to civil monetary judgment as "involving private wrongs, all of which are irrelevant to the questions presented," Br. in Opp. 10, and three others as "involv[ing] tax-related judgments[, which] are irrelevant to the questions presented in this case," *ibid.* Neither argument has any merit. Each of these cases, in fact, individually disproves respondent's claim that "No States Have Held That The Penal Exception Excludes Monetary Judgments

Rendered By A Sister State." *Id.* at 17 (original capitalization).

The first set of cases, whatever type of wrongs they involve, concern penalties, and all three courts enforced the penalties once reduced to judgment after expressly noting that they would *not* have entertained a suit on the underlying laws in the first instance. In *Schuler* v. *Schuler*, for example, the Illinois Supreme Court enforced a judgment resulting from Pennsylvania proceedings "of a criminal, *quasi* criminal[,] or penal character." 71 N.E. 16, 17 (1904). It held:

> The [Full Faith and Credit Clause] does not require a State to enforce the penal laws * * * of another State. But where a court of a sister State * * * has taken cognizance and rendered judgment in a sum of money for the penalty prescribed * * *, the judgment so rendered is entitled to full faith and credit in every other State.

Id. at 18. Although respondent protests, leading treatises continue to cite the case for this holding.[1] See, *e.g.*, 23A Ill. Law and Prac. Judgments § 302 & n.9 (2012); 50 C.J.S. Judgments § 1366 & n.2 (2011).

Similarly, in *Indiana* v. *Helmer*, the Iowa Supreme Court repeatedly described the judgment Indiana sought to enforce as a "penalty." 21 Iowa

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[1] Respondent may have overlooked this relevant part of the opinion. Westlaw does not include it although the regional reporter and Lexis do.

370, 370-371 (1866). After noting that Iowa courts would not have entertained a suit on the underlying Indiana cause of action, the court held that when the Indiana courts "have properly taken cognizance of the matter, and rendered judgment for such penalty, such judgment is entitled to full faith and credit in every other State," *id.* at 372.

The third case, *Healy* v. *Root*, 28 Mass. (11 Pick.) 389 (1831), rests on this same principle. There the Massachusetts Supreme Judicial Court enforced a civil monetary judgment "for a penalty, wherein the commonwealth of Pennsylvania was interested." *Id.* at 397. It held that even "[i]f the cause of action * * * could not have been sued [on] here[, once] the plaintiff had by a verdict and judgment reduced his damages to a certainty, the original cause of action would be merged in the judgment" and thus had to be enforced in the Massachusetts courts. *Ibid.*

Respondent similarly misreads the second set of cases. They are all tax-related, to be sure, but in addition to allowing other States to enforce judgments for unpaid taxes, they all allow them to enforce separate *penalties*. Respondent ignores this critical aspect, which makes the cases centrally relevant to the first question presented. As respondent notes, in *M.E. White*, this Court held that "state tax laws are not 'penal' within the meaning of the *Huntington* rule," Br. in Opp. 10, but the Court did not "thereby categorically exclude [all] tax-related laws and judgments from the ambit of the exception," *ibid.* *M.E. White* indicated, in fact, that tax "penalties" should be analyzed separately. See 296 U.S. at 279-280. It is thus simply wrong to

state that cases that enforce tax penalties already reduced to judgment are "irrelevant to the questions presented in this case." Br. in Opp. 10. Quite the opposite is true. All the tax cases petitioner cited, which respondent attempts to dismiss, hold that judgments for tax *penalties*, not just for unpaid taxes, must be given full faith and credit. See *Ohio* v. *Kleitch Bros., Inc.*, 98 N.W.2d 636, 638 (Mich. 1959) (enforcing "statutory penalty"); *City of Philadelphia* v. *Bauer*, 478 A.2d 773, 776 (N.J. 1984) (enforcing "fines and penalties"); *City of Philadelphia* v. *Austin*, 429 N.J. 568, 570 (N.J. 1981) (enforcing "fixed dollar penalty unrelated to the amount of the tax claim").

In addition to mischaracterizing these two categories of cases, respondent takes haphazard potshots at some of them individually in an attempt to weaken their authority. See Br. in Opp. 17-20 (reiterating categorical attacks on individual cases and making additional arguments). These retail attacks are also entirely unsuccessful. Respondent attempts to distinguish *Indiana* v. *Helmer*, 21 Iowa 370 (1866), *Spencer* v. *Brockway*, 1 Ohio 259 (1824), and *Healy* v. *Root*, 28 Mass. (11 Pick.) 389 (1831), for example, by arguing that the laws involved were not penal and labeling the cases themselves as "impressively hoary," "antiquated[, and] irrelevant." Br. in Opp. 18-19. The cases still represent good law, however, and their long pedigree strongly supports their view of the original reach of full faith and credit. See *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 715 (1999) (looking to "[e]arly opinions, nearly contemporaneous with

the adoption of the Bill of Rights" to determine "original understanding" of constitutional provision). More significantly, they all concern penalties. This Court has itself cited all three of these cases as "tend[ing] to support the view that the courts of one state will maintain an action upon a judgment rendered in another state for a penalty incurred by a violation of her municipal laws." *Pelican Ins.*, 127 U.S. at 293, overruled on other grounds by *M.E. White*, 296 U.S. 268 (1935). In short, respondent's novel and crabbed reading of these cases contradicts this Court's own view.

More puzzling still, respondent contends that one of the cases enforcing penal claims once reduced to judgment, *Jordan* v. *Muse*, 115 S.W. 162 (Ark. 1909), does not concern this issue. Br. in Opp. 19. *Jordan*, however, enforced a judgment based on a cause of action relating to the defendant's "violation of a public duty" as a county commissioner, 115 S.W. at 162, and the leading article on the penal exception cites it as the first example of a court having to enforce for reasons of full faith and credit a penal claim reduced to judgment in another state. See Robert A. Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 Harv. L. Rev. 193, 206 & n.38 (1932).

Unfortunately, space does not permit a full and detailed rebuttal of respondent's claim that the second question presented involves no conflicts. Certainly, respondent is alone in thinking that how *Huntington* applies is well-settled. For at least the last century, judges and commentators have repeatedly highlighted and lamented the deep

conflict and confusion on exactly this question. See *Christilly* v. *Warner*, 88 A. 711, 714 (Conn. 1913) (Beach, J., dissenting) (noting that "[u]pon the question of what laws are penal in an international sense so that they will not be enforced by [another State's] court, the decisions are in hopeless conflict"); Peter B. Kutner, *Judicial Indentification of "Penal Laws" in the Conflict of Laws*, 31 Okla. L. Rev. 590, 590 (1978) ("[T]here is no judicial consensus on what is and what is not a 'penal law.'"). Respondent can maintain its position only by forsaking accurate description of the cases for fallacious prescription. Respondent repeatedly asserts that since the cause of action is itself penal for some purposes under California law—itself a dubious contention—it necessarily follows that all remedies for its violation are penal under *Huntington*. See, *e.g.*, Br. in Opp. 27 (arguing that "the penalties imposed in this case were imposed under a single statutory provision"); *id.* at 28 (arguing "all three [sic] components of the judgment were based on the same statutory provision designed to impose 'penalties' to 'enforce' local laws"). This reasoning compounds two independent errors. First, a characterization of a cause of action for one purpose under state law, even if accurate, does not entail the same characterization under federal law for a different purpose. And, second, a particular characterization of a cause of action does not necessarily extend to all its remedies. A civil fine for perpetrating fraud on the government, for example, might well be penal while damages for the injury caused to the government by the fraud might well be not.

Finally, respondent misunderstands the significance and importance of the issues. The case no more asks this Court "to second-guess a state court's analysis of another state's billboard ordinance," Br. in Opp. 26, than *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), asked it to "second-guess" a government employment action. The petition presents an issue of great practical importance to state and local governments: whether certain civil judgments and remedies necessary for government to fulfill its functions must be accorded full faith and credit in other States' courts. On this question hangs the ability of state and local governments to civilly enforce taxation, road safety, and health regulation, to mention only a few areas, against those who would flee the jurisdiction.

This case is, moreover, an ideal vehicle. Respondent fully litigated the case to judgment before fleeing California and assertedly leaving "no *known* assests" behind. Br. in Opp. 4 (emphasis added). Petitioner then pursued respondent outside the State and now seeks this Court's review. As respondent acknowledges, see Br. in Opp. 12, in most cases the high cost of litigation alone will prevent governments from pursuing this far delinquent judgment debtors who seek to exploit another State's spurious and inequitable view of full faith and credit. This Court should seize this opportunity to clarify rules of great importance to the functioning of States and local governments.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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