

THE FULL FAITH AND CREDIT CLAUSE AND THE PUZZLE OF ABORTION LAWS

DIEGO A. ZAMBRANO,* MARIAH E. MASTRODIMOS,† AND SERGIO F.Z.
VALENTE‡

In 2021, Texas adopted a powerful antiabortion statute—known as S.B.8—that bars anyone from performing abortions in the state of Texas after approximately six weeks of pregnancy. But instead of empowering government officials to enforce its provisions, S.B.8 relies entirely on private lawsuits. In response, California enacted A.B. 1666, which prohibits its courts from serving as a venue for S.B.8 claims or enforcing S.B.8 judgments. California’s statutory response, however, faces tricky challenges under the Full Faith and Credit Clause (FFC) of the U.S. Constitution. And, more generally, the clash between S.B.8 and A.B. 1666 raises larger questions about conflict of laws, constitutional rights, and horizontal federalism.

Grappling with A.B. 1666’s constitutionality directly, this Essay argues that the statute probably complies with the Full Faith and Credit Clause. California has a strong argument for the constitutionality of A.B. 1666’s venue provision under the public policy exception to the FFC. And California has a weaker, but still colorable, argument in support of the statute’s judgment enforcement bar under the FFC’s penal judgment exception. The central question going forward is whether courts will interpret the Full Faith and Credit Clause in a flexible manner—allowing for capacious exceptions—or apply a tight leash to state legislative schemes. Indeed, state clashes like this one continue to matter even after Dobbs overturned Roe v. Wade because states will attempt to use private civil claims to go beyond criminal law on topics like abortion, guns, and LGBTQ rights.

INTRODUCTION	383
I. A BRIEF BACKGROUND ON TEXAS S.B.8, CALIFORNIA A.B. 1666, AND THE FULL FAITH AND CREDIT CLAUSE.	385
A. <i>Texas S.B.8</i>	385
B. <i>California’s A.B. 1666 and the Full Faith and Credit Clause</i>	389
II. A.B. 1666’S VENUE BAR: CHOICE OF LAW & THE PUBLIC POLICY EXCEPTION.....	391

* Associate Professor, Stanford Law School. Full disclosure: the authors were involved in the legislative drafting and debates over the California bill allowing private lawsuits in gun matters, as well as A.B. 1666, and presented these arguments to the California General Assembly. We thank Lea Brilmayer, Larry Kramer, Roger Michalski, and Kim Roosevelt.

† Mariah E. Mastrodimos, J.D., 2023, Stanford Law School; B.A., Chemistry, 2018, Scripps College.

‡ Sergio F.Z. Valente, J.D., 2023, Stanford Law School; B.A., International Relations, 2020, American University. Copyright © 2023 by Diego A. Zambrano, Mariah E. Mastrodimos & Sergio F.Z. Valente

A.	<i>The Venue Bar as a Choice-of-Law Rule</i>	391
B.	<i>The Venue Bar as a Codification of the FFC's Public Policy Exception</i>	393
1.	<i>Diving Deeper into the Public Policy Exception: Hughes v. Fetter and Jurisdiction Stripping</i>	394
2.	<i>How the Public Policy Exception Applies to A.B. 1666</i> ...	397
III.	A.B. 1666's JUDGMENT ENFORCEMENT BAR & PENAL JUDGMENTS	398
A.	<i>The Penal Judgments Exception</i>	398
B.	<i>How The Penal Judgments Exception Interacts with A.B. 1666</i>	405
	CONCLUSION	409

INTRODUCTION

In mid-2021, Texas adopted a powerful, new antiabortion statute known as S.B.8, which proscribes performing or aiding abortions in the state of Texas starting at just six weeks of pregnancy.¹ But instead of empowering government officials to enforce its provisions, S.B.8 relies entirely on private lawsuits.² The Texas abortion law triggered a discussion regarding the use of private enforcement actions to attack federal constitutional rights.³ Critics argued that Texas indirectly nullified the then-established constitutional right to abortion, that the Supreme Court surrendered traditional tools to review state legislation, and that S.B.8's private enforcement regime was a procedural Frankenstein that violated due process norms.⁴

Even after the Supreme Court overturned *Roe v. Wade*,⁵ discussions about the constitutionality of S.B.8 remain relevant because states will continue to enact private enforcement schemes to regulate abortion,

¹ TEX. HEALTH & SAFETY CODE ANN. § 171.204(a) (West 2021) (creating a private right of action to sue those who perform or induce abortions or intend to do so along with anyone who aids and abets the performance or inducement of an abortion). Texas Heartbeat Act, S.B.8, 87th Leg., Reg. Session (Tex. 2021).

² See TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (West 2021) (creating a private right of action to sue those who perform or induce abortions or intend to do so along with anyone who aids and abets the performance or inducement of an abortion).

³ See, e.g., Erin Douglas, *Texas Abortion Law a "Radical Expansion" of Who Can Sue Whom, and an About-Face for Republicans on Civil Lawsuits*, TEX. TRIB. (Sept. 3, 2021), <https://www.texastribune.org/2021/09/03/texas-republican-abortion-civil-lawsuits> [https://perma.cc/C4NV-88XV] (reporting commentators' reactions to Texas S.B.8).

⁴ See, e.g., Diego A. Zambrano & Sharon Driscoll, *Maneuvering Around the Court: Stanford's Civil Procedure Expert Diego Zambrano on the Texas Abortion Law*, STAN. L. SCH. (Sept. 8, 2021), <https://law.stanford.edu/2021/09/08/maneuvering-around-the-court-stanfords-civil-procedure-expert-diego-zambrano-on-the-texas-abortion-law> [https://perma.cc/TQ4P-TNZK].

⁵ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

interstate travel, and other individual rights.⁶ Indeed, California recently adopted a gun control statute modeled after S.B.8's private enforcement scheme.⁷ And private enforcement statutes remain powerful tools to restrain unprotected rights beyond criminal enforcement. For example, after *Dobbs v. Jackson Women's Health Organization*, some local prosecutors have refused to prosecute those seeking abortions. S.B.8 and similar laws would circumvent this prosecutorial discretion.⁸

Additionally, some states have countered S.B.8 with legal provisions that seek to shield in-state residents from out-of-state claims and even prohibit the enforcement of S.B.8 awards.⁹ Thus, the question is not only whether new private enforcement schemes can survive constitutional challenges but whether other states can respond by shielding their own residents.

In this Essay we focus on the constitutionality of one legislative response to S.B.8 adopted by California: A.B. 1666. This law shields in-state medical providers from S.B.8-style actions by prohibiting California courts from serving as a venue for S.B.8 claims and barring enforcement of S.B.8 judgments.¹⁰ California's main concern was that California doctors could face crippling liability under S.B.8 for prescribing abortion pills via telemedicine to patients in Texas.¹¹ The constitutional problem, however, is

⁶ See, e.g., Harry Litman, Opinion, *Column: Love Texas' SB 8 Because You Hate Abortion? Wait Until a Copycat Law Comes for Your Gun Rights*, L.A. TIMES (Mar. 26, 2022, 7:52 AM), <https://www.latimes.com/opinion/story/2022-03-26/abortion-rights-texas-sb-8-supreme-court-enforcement> [<https://perma.cc/2V3X-WKKL>] (warning that acquiescence to S.B.8 will give rise to similar bills targeting other constitutional rights). See also Diego A. Zambrano, Neel Guha, Austin Peters & Jeffrey Xia, *Private Enforcement in the States*, U. PA. L. REV. (forthcoming 2023) (finding that states routinely adopt private rights of action across a range of areas); Diego A. Zambrano, *The States' Interest in Federal Procedure*, 70 STAN. L. REV. 1805, 1838 (2018) ("For several decades, private enforcement has been popular in state legislatures, courts, and administrative agencies."). For an argument that "the Full Faith and Credit Clause contains limitations that make it inapplicable to Texas anti-abortion awards," see Lea Brilmayer, Article IV Full Faith and Credit and the Jurisprudence of Article III (unpublished manuscript) (on file with author). For further discussion of how courts may deal with valid but conflicting state laws governing politically controversial topics, see Roger Michalski, *How to Survive the Culture Wars: Conflict of Laws Post-Dobbs*, 72 AM. U. L. REV. 949 (2023).

⁷ Firearm Industry Responsibility Act, CAL. CIV. CODE §§ 3273.50–.55 (2022) (effective January 1, 2023).

⁸ See J. David Goodman & Jack Healy, *In States Banning Abortion, a Growing Rift Over Enforcement*, N.Y. TIMES (June 29, 2022), <https://www.nytimes.com/2022/06/29/us/abortion-enforcement-prosecutors.html> [<https://perma.cc/ZFZ5-TNR2>]

⁹ See Keshia Clukey & Joyce E. Cutler, *New York Abortion Laws Shield Patients, Providers from Suits*, BLOOMBERG GOV'T (June 13, 2022), <https://about.bgov.com/news/new-york-abortion-laws-shield-patients-providers-from-suits/> [<https://perma.cc/3KBA-L4L2>]. David S. Cohen, Greer Donley & Rachel Rebouché, *Abortion Shield Laws*, NEJM EVID. Apr. 2023, at 2–4; see also *infra* note 40.

¹⁰ CAL. HEALTH & SAFETY CODE § 123467.5 (West 2022).

¹¹ See Press Release, Rebecca Bauer-Kahan, Assemblymember, Cal. State Assemb., *Assemblymember Bauer-Kahan Introduces Bill to Protect Reproductive Health Care Providers &*

that A.B. 1666’s provisions will face challenges under the Full Faith and Credit Clause of Article IV (the “FFC”).¹² This raises a wealth of questions about conflict of laws, interstate relations, horizontal federalism, and the federal Constitution.

The FFC maintains a system of federalism by obligating states to recognize and enforce other states’ laws and judgments. Without it, states could freely ignore each other’s laws, weakening any semblance of a national union and lending a hand to political polarization. Indeed, growing polarization will increase pressure on the FFC, as states seek ways to battle each other over topics like abortion, guns, and LGBTQ-related laws.

But this Article argues that, despite FFC obligations, California’s A.B. 1666 may nevertheless pass constitutional muster. Two specific limitations to the FFC may save A.B. 1666: the public policy and penal judgment exceptions. In Part I, we provide background information on S.B.8, A.B. 1666, and the FFC. Part II then argues that A.B. 1666’s venue provision—which bars S.B.8 suits in California courts—fits within the public policy exception to the FFC. Finally, Part III posits that California has a colorable, but far from certain, argument that A.B. 1666’s judgment enforcement bar fits within the penal judgment exception to the FFC. The central question going forward is whether courts will interpret the FFC in a flexible and pragmatic manner—allowing for capacious exceptions—or apply a tight leash to state legislative schemes.

I

A BRIEF BACKGROUND ON TEXAS S.B.8, CALIFORNIA A.B. 1666, AND THE FULL FAITH AND CREDIT CLAUSE

This Part summarizes the three sources of law necessary to analyze the constitutionality of A.B. 1666: S.B.8; the Full Faith and Credit Clause; and, of course, A.B. 1666 itself.

A. *Texas S.B.8*

Texas’s S.B.8 purports to prohibit abortions after cardiac activity can be detected in an embryo.¹³ The law covers not just medical providers but anyone who “knowingly” aids or abets the performance of an abortion at six weeks or later.¹⁴ The law relies entirely on private enforcement and contains a highly unusual combination of procedural features that, together, are

Patients (Jan. 20, 2022), <https://a16.asmdc.org/press-releases/20220120-assemblymember-bauerkahan-introduces-bill-protect-reproductive-health-care> [<https://perma.cc/FN4B-SDGA>].

¹² See U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”).

¹³ TEX. HEALTH & SAFETY CODE ANN. § 171.204(a) (West 2021).

¹⁴ See *id.* § 171.208(a)(2).

designed to avoid immediate federal judicial review.

First, S.B.8 relies entirely on civil lawsuits by private citizens against anyone who performs an abortion in violation of the six-week ban.¹⁵ The bill also precludes enforcement of the ban by state or local officials.¹⁶ In other words, it is an exclusively private enforcement scheme. Second, private individuals can bring suit without alleging *any injury* whatsoever.¹⁷ While this would not meet standing requirements under Article III of the federal Constitution,¹⁸ S.B.8's drafters wanted the law to be enforced exclusively in state courts, where Article III does not apply.¹⁹ Third, the law awards plaintiffs injunctive relief, statutory damages "in an amount of not less than \$10,000 for each abortion," and costs and attorney's fees.²⁰ Moreover, S.B.8 defendants are placed at a significant disadvantage because they cannot raise certain defenses, including their "belief that [the law is] unconstitutional," and they cannot recover attorney's fees and costs even if they prevail.²¹ Finally, S.B.8 is unusually generous to plaintiffs by allowing venue in the county where the plaintiff resides.²²

By packaging these provisions together, the law raises obstacles to challenge by defendants. It avoids immediate federal review and instead shuttles plaintiffs' cases to the drafters' preferred state courts. Usually, when a state violates a federal constitutional right, plaintiffs must sue the state official in charge of enforcing that law for prospective injunctive relief.²³ But by deputizing private enforcers, S.B.8 makes such suits against state officials impossible. That is, if there is no state official to enforce the law, then there is no one for abortion providers to sue.²⁴ Yet while abortion providers were unable to bring a pre-enforcement challenge to the law in federal court, plaintiffs are free to sue them for violating S.B.8 in state courts. Moreover, by providing \$10,000 in statutory damages, the law also incentivized

¹⁵ See *id.* §§ 171.207–.208(a).

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (describing the "irreducible constitutional minimum" of standing).

¹⁹ See U.S. CONST. art. III, § 1 (applying only to "[t]he judicial Power of the United States" (emphasis added)).

²⁰ TEX. HEALTH & SAFETY CODE ANN. § 171.208(b)(1)–(3) (West 2021). Injunctive relief is available only "to prevent the defendant from violating" S.B.8. *Id.*

²¹ *Id.* § 171.208(e), (i).

²² *Id.* § 171.210(a)(4). By contrast, Texas's general venue rules provide that suits must be brought in the county where the events giving rise to the suit occurred or in the county where the defendant resides. See TEX. CIV. PRAC. & REM. CODE ANN. § 15.002 (West 2023).

²³ See *ex parte Young*, 209 U.S. 123, 159–60 (1908) (holding that state officials could be sued in federal court to prevent them from enforcing unconstitutional laws notwithstanding state sovereign immunity).

²⁴ See *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 531–33 (2021).

plaintiff lawsuits that would otherwise involve no pecuniary remedy.²⁵ S.B.8's history indicates that Texas was trying to deter abortions and avoid federal courts.²⁶ Still, at the end of the day, S.B.8 cannot avoid federal judicial review forever.²⁷ Cases may proceed in state courts until one reaches the Texas Supreme Court and then the U.S. Supreme Court.

S.B.8's reliance on private plaintiffs has provoked debates over whether the bill is in line with the American tradition of private enforcement or, instead, represents something unprecedented.²⁸ Private enforcement is a distinctly American phenomenon.²⁹ Most of the civil law world relies on extensive public enforcement regimes consisting of specialized bureaucrats and administrative schemes.³⁰ But since at least the 1960s, Congress has empowered private plaintiffs to bring claims in a range of contexts, including antitrust, civil rights, environmental law, and employment disputes.³¹ U.S. state governments have also adopted numerous private enforcement schemes in all of these areas.³² Some have argued that S.B.8 is a creative extension of

²⁵ It seems unlikely that any plaintiff would suffer some cognizable financial harm caused by another person's abortion.

²⁶ See Michael S. Schmidt, *Behind the Texas Abortion Law, a Persevering Conservative Lawyer*, N.Y. TIMES (Nov. 1, 2021), <https://www.nytimes.com/2021/09/12/us/politics/texas-abortion-lawyer-jonathan-mitchell.html> [<https://perma.cc/3CP2-9WKQ>] (explaining that one of the law's authors proposed private enforcement as a method of "helping states protect themselves from judicial review").

²⁷ See Charles W. "Rocky" Rhodes & Howard M. Wasserman, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Potential for Defensive Litigation*, 75 SMU L. REV. 187 (2022) (detailing the ways S.B.8 can be challenged and litigated defensively). A group of abortion providers brought a pre-enforcement challenge to the law, which reached the Supreme Court in October 2021. The Court ruled on the narrow procedural question of whether the plaintiffs could proceed past the motion-to-dismiss stage. The Court held that plaintiffs could pursue a pre-enforcement challenge against state medical licensing officials, but not against state judges, clerks, the Texas Attorney General, or private individuals. See *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 539 (2021). Moreover, federal courts usually find a way to reach into state court cases. See generally Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101 (2019) (describing the development of a "new era of judicial federalism" beginning in the 1980s where federal courts began to aggressively appropriate state court litigation).

²⁸ See Zambrano & Driscoll, *supra* note 4 (noting that private enforcement is commonplace in American law, but S.B.8 is highly unusual even within this tradition).

²⁹ See Paul D. Carrington, *The American Tradition of Private Law Enforcement*, 5 GER. L.J. 1413, 1413 (2004); Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71, 95–101 (2020).

³⁰ Jason Rathod & Sandeep Vaheesan, *The Arc and Architecture of Private Enforcement Regimes in the United States and Europe: A View Across the Atlantic*, 14 U.N.H. L. REV. 303, 306, 374 (2016) ("Traditionally, Europe has relied almost exclusively on public enforcement of laws through robust regulatory apparatuses."); see generally Carrington, *supra* note 29 (discussing American judicial institutions as "facilitating private enforcement of what in other nations would generally be denoted as public law").

³¹ Carrington, *supra* note 29 at 1414.

³² See, e.g., COLO. REV. STAT. §§ 6-4-113 to 114 (1992) (granting private parties the power to enforce Colorado's antitrust statute).

this private enforcement tradition.³³ But there are many ways in which S.B. 8 departs from other statutes, including its combination of provisions like one-way attorney fee shifting and unusual venue rules with the use of private enforcement to *explicitly* avoid federal judicial review.³⁴

Now that the Supreme Court has overturned *Roe*, nearly half of the states have banned abortion, while many remaining states have bolstered abortion protections.³⁵ And battles over abortion rights and restrictions will not stop at state borders. Antiabortion states may pass legislation in an attempt to control both in-state and out-of-state conduct.³⁶ This would allow legislatures to side-step the power of local district attorneys who may refuse to enforce criminal laws in blue counties. Some states, for instance, may adopt expansive S.B.8-like laws because its broad definition of “aids or abets” casts a wide net of liability.³⁷ If, for example, an out-of-state doctor prescribes pills via telemedicine for a medical abortion in Texas, the doctor could face suits under S.B.8.³⁸ Other antiabortion states have introduced bills that explicitly apply their domestic abortion restrictions to extraterritorial conduct.³⁹ In response, abortion-supporting states will likely seek to protect their citizens from liability for providing or contributing to abortion services.⁴⁰

³³ See Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 1000–02 (2018) (suggesting a number of ways to evade judicial review including the exclusively private enforcement that S.B.8 relies on).

³⁴ Zambrano & Driscoll, *supra* note 4.

³⁵ See *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES, <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [<https://perma.cc/A25G-UMK3>] (showing that 13 states have banned abortion outright while several others have banned abortion after just 6 or 15 weeks). Some states’ bans have been enjoined by their state supreme courts. *See id.*

³⁶ See Tierney Sneed, *Can Red States Regulate Abortions Performed Outside Their Borders? A Post-Roe Landscape Would Test Just That*, CNN (May 3, 2022, 10:58 AM), <https://www.cnn.com/2022/04/23/politics/abortion-out-of-state-legislation/index.html> [<https://perma.cc/96NK-YNWG>] (highlighting one Missouri bill that would apply its ban to abortions obtained out-of-state).

³⁷ See TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (West 2021).

³⁸ See *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 546 (2021) (Sotomayor, J., dissenting) (“Those vulnerable to suit might include a medical provider, a receptionist, a friend who books an appointment, or a ride-share driver who takes a woman to a clinic.”).

³⁹ *E.g.*, S.B. 603, 101st Gen. Assemb., Reg. Sess. (Mo. 2021) (proposing to apply abortion restrictions to out-of-state conduct).

⁴⁰ *E.g.*, CONN. GEN. STAT. § 52-571m (2022) (providing a cause of action for persons who have had judgments entered against them in other states for procuring an abortion). Another issue we do not address here is that Texas courts may lack personal jurisdiction over out-of-state doctors who provide abortifacients in online consults. In some cases, California defendants may be able to resist the enforcement of S.B.8 judgments irrespective of FFC exceptions because Texas would lack personal jurisdiction over the suit. Personal jurisdiction is both a constitutional and statutory requirement that limits the reach of state courts. Texas’ long-arm statute “extends Texas courts’ personal jurisdiction ‘as far as the federal constitutional requirements of due process will permit.’” *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002) (quoting *U–Anchor*

B. California's A.B. 1666 and the Full Faith and Credit Clause

California responded to S.B.8 and similar laws by passing A.B. 1666, which expressly declares that S.B.8-like laws are contrary to California public policy.⁴¹ At its core, A.B. 1666 prohibits California state courts from serving as a venue for cases brought under S.B.8-like laws and from even enforcing concomitant judgments.⁴²

In the original announcement, Assembly Member Bauer-Kahan mentioned that “[l]aws across the country leave abortion providers, organizations, and individuals open to tens of thousands of dollars in liability,” even though “[r]eproductive freedom is a fundamental right laid out in California’s constitution.”⁴³ For that reason, Bauer-Kahan focused on ways to shield California doctors from legal action in *California courts*. In relevant part, California’s A.B. 1666 includes three key provisions:

- The Public Policy Statement provides that any “law of another state that authorizes a person to bring a civil action against a person” who receives, seeks, or performs an abortion, is “contrary to the public policy of this state.”⁴⁴
- The Venue Bar provides that state courts “shall not” “[a]pply a law described in [the public policy statement] to a case or controversy heard in state court.”⁴⁵ The clear purpose of this provision is to prevent California courts from hosting or serving as a venue for S.B.8

Adver., Inc. v. Burt, 553 S.W.2d 760, 762 (Tex. 1977)). The Constitution, in turn, limits courts’ personal jurisdiction over non-residents to cases where the defendant non-resident has established “minimum contacts” with the forum state. *See Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021). Particularly relevant here, a state may have personal jurisdiction over a non-resident defendant when that defendant’s activity “purposefully avails himself of the privileges of conducting activities within the forum State.” *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). In cases where California abortion providers sell abortion pills into Texas or offer online medical services across state lines, Texas courts may have personal jurisdiction because the providers would have directly entered into transactions with people in Texas, the forum state. In other cases, however, Texas courts will lack personal jurisdiction, and out-of-state defendants will be able to avoid S.B.8 judgments altogether if they do not challenge the initial action. These cases include situations where Texas residents travel to California to procure abortions, abortion pills, or other abortion-related goods and services. In such scenarios, at least where the California providers have not aimed their advertisements at Texas or otherwise targeted Texas, there are likely insufficient contacts with Texas. In cases where Texas courts lack personal jurisdiction over the California providers, the providers may resist enforcement of any S.B.8 judgments by contesting the court’s personal jurisdiction during the enforcement proceeding.

⁴¹ CAL. HEALTH & SAFETY CODE § 123467.5 (West 2022).

⁴² *See id.*

⁴³ Press Release, Rebecca Bauer-Kahan, Assemblymember, Cal. State Assemb., Assemblymember Bauer-Kahan Introduces Bill to Protect Reproductive Health Care Providers & Patients (Jan. 20, 2022), <https://a16.asmdc.org/press-releases/20220120-assemblymember-bauer-kahan-introduces-bill-protect-reproductive-health-care> [<https://perma.cc/DP98-63TA>].

⁴⁴ *See* A.B. 1666, 2021–2022 Gen. Assemb., Reg. Sess. (Cal. 2022).

⁴⁵ *Id.*

claims.

- And finally, the Judgment Enforcement Bar provides that state courts “shall not” “enforce or satisfy a civil judgment received through an adjudication under a law described in [the public policy statement].”⁴⁶ This provision seeks to prevent California courts from enforcing out-of-state S.B.8 awards.

It bears repeating that the combined goal of the three provisions is to protect California residents, and especially doctors, from liability using a two-pronged approach. First, by preventing the application of S.B.8-like laws in California courts the law effectively strips state courts of jurisdiction over S.B.8-like causes of action. Second, A.B. 1666 prohibits California courts from enforcing judgments obtained in other states’ courts under S.B.8-like laws. For example, if a California doctor prescribes abortion pills to a Texas resident, A.B. 1666 prohibits a California court from hearing an S.B.8 claim by a Texas plaintiff. In addition, it would prohibit a California court from enforcing S.B.8 awards obtained in Texas courts against defendants whose assets are in California.

Laws such as A.B. 1666 could serve as powerful tools for abortion-supporting states to protect their citizens, but they may face challenges under the Full Faith and Credit Clause of Article IV, Section 1 of the U.S. Constitution.⁴⁷ The FFC provides that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”⁴⁸ The federal implementing legislation similarly provides that these materials shall receive “the same full faith and credit” in each state that they have in the state “from which they are taken.”⁴⁹ Like its colonial-era precursors, the FFC’s chief purposes are to facilitate admitting other states’ records into evidence and to allow creditors to collect judgments rendered in other states.⁵⁰ Put differently, the FFC obligates states to keep their courthouse doors open to other states’ laws, records, and judgments. At first glance, the FFC and related doctrine suggest that A.B. 1666 might be unconstitutional. S.B.8 constitutes another state’s “public act,”⁵¹ and out-of-state S.B.8 judgments are “judicial proceedings.”⁵² Thus, California would

⁴⁶ *Id.*

⁴⁷ *See* U.S. CONST. art. IV, § 1.

⁴⁸ *Id.*

⁴⁹ 28 U.S.C. § 1738.

⁵⁰ Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 GEO. MASON L. REV. 485, 495–96 (2013).

⁵¹ *See* Carroll v. Lanza, 349 U.S. 408, 411 (1955) (“A statute is a ‘public act’ within the meaning of the Full Faith and Credit Clause.”).

⁵² *See, e.g.,* M’Elmoyle *ex rel.* Bailey v. Cohen, 38 U.S. (13 Pet.) 312, 324 (1839); Mills v. Duryee, 11 U.S. (7 Cranch) 481, 484 (1813) (“[I]t is beyond all doubt that the judgment of the Supreme Court of New York was conclusive upon the parties in that state. It must, therefore, be conclusive here also.”).

not be free to close its courts to claims under S.B.8 or decline to enforce out-of-state judgments.

As it turns out, however, the FFC is not fully ironclad and contains important exceptions. To defend the constitutionality of laws such as A.B. 1666, California and other abortion-supporting states may invoke two specific FFC exceptions: the public policy exception and the penal judgments exception. Below we explore both of these exceptions in turn.

II

A.B. 1666'S VENUE BAR: CHOICE OF LAW & THE PUBLIC POLICY EXCEPTION

The Venue Bar provides that California state courts “shall not [a]pply” an S.B.8-like law “to a case or controversy heard in state court.”⁵³ Courts could read the provision in two ways. First, courts could interpret it as a choice-of-law rule that requires California courts to apply California law (or another state’s abortion laws) when a plaintiff brings an S.B.8 claim in California courts. Or, second, courts could read the bar as directing California courts to refuse jurisdiction over S.B.8-like claims. The difference between these readings is subtle, though they each raise different constitutional questions. The first reading implicates the Constitution’s limits on states’ choice-of-law rules under the Due Process Clause and the FFC, while the second reading implicates the public policy exception to the FFC. As explained below, however, both interpretations likely pass constitutional muster.

A. *The Venue Bar as a Choice-of-Law Rule*

Cases often bear connections to more than one state. For example, a contract may be executed in one state but performed in another, or a resident of one state might commit a tort in another state.⁵⁴ In these situations, a court may need to choose between applying its own state’s law or foreign law. The rules that determine which state’s law to apply are referred to as choice-of-law rules. The Constitution sets a floor for these rules: States have wide flexibility to develop their own choice-of-law rules, but they must at least be consistent with due process and the FFC.⁵⁵

Under the first reading of A.B. 1666, a typical S.B.8 claim against a Californian in California state court would raise an immediate choice-of-law question: Does the Texas law even apply to such a controversy, or should California law apply instead? On the one hand, Texas law provides the cause

⁵³ See A.B. 1666, 2021–2022 Gen. Assemb., Reg. Sess. (Cal. 2022).

⁵⁴ See generally RESTATEMENT (SECOND) OF CONFLICT OF L. § 2 (AM. L. INST. 1971) (defining conflict of laws).

⁵⁵ See *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 304, 307 (1981) (establishing constitutional limits on state choice-of-law rules).

of action against a California doctor who aids an abortion. Yet the defendant would be a California resident, and the challenged conduct may have occurred only or mostly in California (e.g., through the online prescription of an abortifacient). Under the choice-of-law interpretation of A.B. 1666's Venue Bar, A.B. 1666 essentially operates as a simple rule: California courts must not apply foreign law to S.B.8-like cases and instead apply (presumably) California law. In other words, A.B. 1666 supersedes California's traditional, common-law choice-of-law rules. Thus the only question is whether applying A.B. 1666 meets the federal Constitution's limits on choice-of-law.

The answer is likely yes—neither the Due Process Clause nor the FFC obligate California to apply Texas law. The federal constitutional choice-of-law test derives from *Allstate Insurance Co. v. Hague*.⁵⁶ There, the plaintiff sued Allstate to collect insurance coverage after her husband died in an automobile accident. The insurance policy was delivered in Wisconsin, the accident occurred in Wisconsin, and all those involved in the accident were Wisconsin residents.⁵⁷ But the respondent later became a resident of Minnesota and initiated the suit in Minnesota state court.⁵⁸ Given all of Wisconsin's connections to the controversy, Allstate argued that Wisconsin law should apply—which would result in a significantly smaller insurance payout.⁵⁹ The Minnesota courts disagreed and applied Minnesota law to the suit.⁶⁰ The United States Supreme Court affirmed, holding that a forum state may apply its substantive law if it has “a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”⁶¹ The Court identified three contacts that Minnesota had with the litigants: The decedent had worked in Minnesota prior to his death, Allstate conducted business in Minnesota, and the respondent had become a Minnesota resident.⁶² Together, these contacts were sufficient to ensure that the application of Minnesota law did not violate due process or the FFC.⁶³

Similarly, in a typical case where a plaintiff sues a California physician under S.B.8 in California state court, the court could follow A.B. 1666's instruction and apply California law without running afoul of *Allstate*. The defendant would be a California resident, and the relevant conduct would have largely taken place in California. This would create sufficient contacts

⁵⁶ *Id.* at 313.

⁵⁷ *Id.* at 305–06.

⁵⁸ *Id.*

⁵⁹ *Id.* at 306–07.

⁶⁰ *Id.*

⁶¹ *Id.* at 313.

⁶² *Id.* at 313–19.

⁶³ *Id.* at 320.

and “state interests” such that applying California law would not be “arbitrary nor fundamentally unfair.”⁶⁴ And because California law does not provide for an S.B.8-like cause of action, the court could dismiss the case on the merits.⁶⁵ In sum, if courts choose to interpret the Venue Bar as a simple choice-of-law rule, the Constitution poses no challenge to applying the forum state’s substantive law.

B. The Venue Bar as a Codification of the FFC’s Public Policy Exception

Alternatively, a court could interpret the Venue Bar as an instruction not to entertain S.B.8-like claims (as opposed to an instruction to entertain them, but to not apply S.B.8-like laws). This reading raises the question of whether the FFC requires California courts to hear S.B.8 claims, or whether they could decline jurisdiction under the FFC’s public policy exception. Below, we first explore prior case law on this topic before moving on to a more novel analysis on whether a forum state can refuse to exercise jurisdiction over a foreign cause of action on statutory public policy grounds.

In simple terms, the public policy exception holds that states are not obligated to apply out-of-state law that violates the forum state’s “own legitimate public policy.”⁶⁶ Although there were antecedents,⁶⁷ this articulation of the exception originated in *Nevada v. Hall*.⁶⁸ In that case, California residents were involved in an automobile accident with a Nevada state employee and sued Nevada in California state court. Nevada argued that the FFC obligated California courts to apply Nevada’s statutory damages cap for claims against the state, even though California did not provide a similar cap. But the Supreme Court rejected this argument, explaining that California had a “public policy” of providing “full protection to those who are injured on its highways through the negligence of both residents and nonresidents.”⁶⁹ Thus, the FFC did *not* require California to apply Nevada law because this would have been “obnoxious to [California’s] statutorily based policies” of not capping damages.⁷⁰

Nevada v. Hall stands for the proposition that, at least in some circumstances, a state can give preference to its analogous domestic law over

⁶⁴ *Id.* at 313.

⁶⁵ After *Roe* fell, California enshrined the right to an abortion in its state constitution. See CAL. CONST. art. I, § 1.1. This necessarily eliminates an S.B.8-like cause of action.

⁶⁶ *Franchise Tax Bd. v. Hyatt*, 578 U.S. 171, 177 (2016) (quoting *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 489 (2003)).

⁶⁷ *E.g.*, *Carroll v. Lanza*, 349 U.S. 408, 412 (1955).

⁶⁸ 440 U.S. 410 (1979), *overruled on other grounds by* *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485 (2019).

⁶⁹ *Id.* at 422, 424.

⁷⁰ *Id.* at 424.

and above another state's laws. In support of the public policy exception, the Court drew on two earlier conflicts-of-laws cases that are relevant here: *Pacific Employers Insurance Company v. Industrial Accident Commission*⁷¹ and *Alaska Packers Association v. Industrial Accident Commission*.⁷² These cases involved conflicts between different states' workers' compensation statutes. In each case, the Supreme Court recognized that the FFC does not require a forum state to substitute other states' laws where the forum state is "competent to legislate" on that subject.⁷³ Workers' compensation is an area where the forum state is competent to legislate and enact its own scheme, so the forum state is generally free to apply its own law as long as there are otherwise sufficient contacts. In *Nevada v. Hall*, *Pacific Insurance*, and *Alaska Packers*, two states' laws directly conflicted, and the Court invoked the public policy exception to avoid the "absurd result" where states could enforce their laws in *other* states' courts, but not in their own.⁷⁴

While these cases seem to create a capacious public policy exception, the relationship between S.B.8 and A.B. 1666 may be distinguishable. Unlike the warring damages-cap statutes or workers' compensation schemes at issue in those cases, S.B.8 and A.B. 1666 are not conflicting schemes for regulating abortion. This is not a case where one state's law provides for a damages cap, and the other does not; or one state's law allows suits for abortions performed after six weeks, and the other allows suits after ten weeks. Rather, California has no analogous law. Instead of creating a regulatory scheme and instructing courts to apply California law, A.B. 1666 instructs courts to *not* apply Texas law. A court could therefore conclude that A.B. 1666 essentially strips courts of jurisdiction to entertain claims under S.B.8. Thus, this interpretation of A.B. 1666 presents a conflict-of-laws question with a twist: May a forum state refuse to exercise jurisdiction over a foreign cause of action on statutory public policy grounds?

1. *Diving Deeper into the Public Policy Exception: Hughes v. Fetter and Jurisdiction Stripping*

The Supreme Court's decision in *Hughes v. Fetter* addressed whether a state can close its courthouse doors to another state's laws when the forum state's laws would have barred the suit.⁷⁵ In that case, Hughes and Fetter

⁷¹ 306 U.S. 493, 502–05 (1939) (holding that the FFC allowed California to apply its own workers' compensation law to a suit involving a Massachusetts employee against his Massachusetts employer for injuries that occurred in California).

⁷² 294 U.S. 532, 542 (1935) (holding that the FFC allowed California to apply its own workers' compensation law where the employment contract was made in California, but the parties were nonresidents and the injury occurred in Alaska).

⁷³ *Pac. Ins. Co.*, 306 U.S. at 502; *see also Alaska Packers*, 294 U.S. at 547.

⁷⁴ *Alaska Packers*, 294 U.S. at 547.

⁷⁵ 341 U.S. 609 (1951).

were involved in a car accident in Illinois. Hughes died in the crash, and the administrator of his estate filed a wrongful death action against Fetter in Wisconsin. Although the accident occurred in Illinois, all parties were Wisconsin residents. However, the key conflict-of-laws problem was that Wisconsin's wrongful death statute only permitted recovery for deaths that had occurred *within the state of Wisconsin*. Dodging this statutory limitation, the plaintiff sought recovery in Wisconsin state court but sued under the Illinois wrongful death statute instead.

Presented with these facts, the Wisconsin court dismissed the suit on the merits. It interpreted Wisconsin's wrongful death statute as establishing a "public policy" against entertaining suits brought under other states' wrongful death laws.⁷⁶ In other words, the court reasoned that if Wisconsin law does not allow a particular wrongful death suit, a plaintiff cannot get around that policy preference by invoking another state's laws. Notably, the court did not apply the Wisconsin statute and dismiss the case on the grounds that the plaintiff failed to establish an essential element under the statute—that is, a death that physically occurred in Wisconsin.⁷⁷ The state court instead held that Wisconsin public policy closed the courthouse doors to this Illinois claim. This distinguishes *Hughes* from the conflict-of-laws cases where the forum state permissibly applied *its own* law.⁷⁸ Dismissal was instead premised on an *implied* public policy that the court inferred from Wisconsin's statute.⁷⁹

Rather than recognize the power of a state to close its courthouse doors, the Supreme Court reversed, explaining that Wisconsin's "statutory policy" of excluding foreign causes of action was "forbidden by the national policy of the Full Faith and Credit Clause."⁸⁰ Further, the Court noted that Wisconsin should be expected to entertain the Illinois wrongful death action because, as evidenced by its own wrongful death statute, it had "no real feeling of antagonism against wrongful death suits in general."⁸¹

Several years later, the Supreme Court clarified *Hughes* in *Wells v. Simonds Abrasive Company*, holding that while a state cannot discriminate

⁷⁶ *Id.* at 610.

⁷⁷ *See id.* at 612 n.10, 613.

⁷⁸ *See id.* ("The present case is not one where Wisconsin . . . chose to apply its own instead of Illinois' statute to measure the substantive rights involved. This distinguishes the present case from . . . where we have said that 'Prima facie every state is entitled to enforce in its own courts its own statutes . . .'" (quoting *Alaska Packers*, 294 U.S. at 547)).

⁷⁹ *See id.* at 610.

⁸⁰ *Id.* at 613.

⁸¹ *Hughes v. Fetter*, 341 U.S. 609, 612 (1951). *Hughes* is admittedly a puzzling case that is, according to commentators, "troublesome" and "an enigma." Lea Brilmayer, *Credit Due Judgments and Credit Due Laws: The Respective Roles of Due Process and Full Faith and Credit in the Interstate Context*, 70 IOWA L. REV. 95, 109 (1984); Samuel P. Jordan, *Reverse Abstention*, 92 B.U. L. REV. 1771, 1783 (2012).

against another state's laws, it can apply its own laws if they conflict.⁸² In *Wells*, the plaintiff was killed in an industrial accident in Alabama. The administratrix of the plaintiff's estate sued the manufacturer of the machinery in question in Pennsylvania—its principal place of business—more than one year following the accident. The petitioner sued under Alabama's wrongful death statute, which provided a two-year statute of limitations. The analogous Pennsylvania statute provided only one year. The Pennsylvania court held that its conflicts rules compelled it to apply the Pennsylvania statute of limitations and dismissed the case on those grounds.⁸³

The Supreme Court upheld Pennsylvania's application of its own law (rather than Alabama's law) under the FFC.⁸⁴ The Court distinguished *Hughes* by noting that the "crucial factor [in *Hughes*] was that the forum laid an uneven hand on causes of action arising within and without the forum state. Causes of action arising in sister states were discriminated against."⁸⁵ The Court explained that, by contrast, "Pennsylvania applies her one-year limitation to all wrongful death actions wherever they may arise."⁸⁶ This suggests that the substance of the forum state's statute may affect its constitutionality. Specifically, the Court seemed to identify a problem of geography—the statute in *Hughes* discriminated against causes of action "arising in sister states" while privileging causes of action arising in Wisconsin.⁸⁷ Deaths occurring in Wisconsin could serve as the basis for a wrongful death suit, but deaths outside the state could not. According to the *Wells* Court, that is what violated the Full Faith and Credit Clause.⁸⁸

Two relevant principles can be gleaned from *Hughes* and the Court's subsequent explanation in *Wells*: First, whether the state's public policy "discriminates" against causes of action arising in sister states is an important consideration.⁸⁹ In *Hughes*, the Supreme Court reversed the state court

⁸² 345 U.S. 514, 518–19 (1953).

⁸³ *Id.* at 515–17; *see also* *Wells v. Simonds Abrasive Co.*, 102 F. Supp. 519, 520 (E.D. Pa. 1951) (noting that under Pennsylvania law, "a statute of limitation of the state of the forum controls the action" (quoting *Rosenzweig v. Heller*, 153 A. 346, 348 (Pa. 1931))).

⁸⁴ *Wells*, 345 U.S. at 518–19.

⁸⁵ *Id.* at 518.

⁸⁶ *Id.* at 519.

⁸⁷ *Id.* at 518; *see also* *First Nat'l Bank of Chi. v. United Air Lines*, 342 U.S. 396, 398 (1952) (invalidating an Illinois statute that limited courts' jurisdiction over wrongful death actions to those arising from deaths that occurred in Illinois).

⁸⁸ *Wells*, 345 U.S. at 518–19.

⁸⁹ *See* *Loucks v. Standard Oil Co. of N.Y.*, 120 N.E. 198, 202 (N.Y. 1918) (allowing enforcement of a Massachusetts wrongful death statute in New York because "there is nothing in

because wrongful death actions arising in Wisconsin were given preferential treatment, while the state court discriminated against actions arising out-of-state.⁹⁰ In *Wells*, the Court upheld the state court's ruling because Pennsylvania applied its statute of limitations uniformly to suits arising from in-state and out-of-state accidents.⁹¹ Thus, so long as the forum state's law creates a level playing field among cases arising both in and out-of-state, the forum state can apply its law.

Second, while a state cannot simply ignore another state's laws, it can refuse to apply it if the state expresses general opposition to a certain cause of action. In *Hughes*, the Court noted that Wisconsin had its own wrongful death statute—it was not a case where the forum state did not recognize the cause of action at all.⁹² The Court implied that if Wisconsin did possess some “real feeling of antagonism” against wrongful death suits, then perhaps it would not have been constitutionally required to entertain the suit.⁹³ This suggests that a state's categorical refusal to recognize a certain cause of action could be sufficient to invoke the public policy exception to refuse to entertain the suit.

2. *How the Public Policy Exception Applies to A.B. 1666*

The public policy exception probably shields A.B. 1666 from constitutional challenges because that statute does not discriminate against out-of-state causes of action while privileging California's own law—it instead declares a fundamental public policy against antiabortion laws. Two principles discussed above are relevant: (1) A state cannot simply discriminate against out-of-state causes of action, but (2) it can refuse to apply another state's law if the state expresses general opposition to a certain cause of action. Applying these principles would resolve the constitutionality of A.B. 1666 for the following reasons. First, California has not laid an uneven hand on causes of action arising out-of-state. Again, A.B. 1666 does not discriminate against out-of-state causes of action—it instead declares a fundamental public policy against antiabortion laws. Much like Pennsylvania's statute of limitations in *Wells*, which applied to all actions uniformly, A.B. 1666 acts as a bar to all claims brought under S.B.8-like laws regardless of where or how they arise.⁹⁴ A.B. 1666 is better situated than the wrongful death statute in *Hughes* because it does not give preference to causes of action arising in California over causes of action arising in

the Massachusetts statute that outrages the public policy of New York”).

⁹⁰ See *Hughes v. Fetter*, 341 U.S. 609, 612–13 (1951).

⁹¹ See *Wells*, 345 U.S. at 518–19.

⁹² See *Hughes*, 341 U.S. at 612.

⁹³ *Id.*

⁹⁴ See A.B. 1666, 2021–2022 Gen. Assemb., Reg. Sess. (Cal. 2022).

Texas—the state does not recognize S.B.8-like causes of action at all. Thus, unlike in *Hughes*, California is not discriminating against out-of-state causes of action while privileging its own.

Second, the affirmative declaration of California’s public policy against private suits targeting abortion providers buttresses A.B. 1666.⁹⁵ Needless to say, abortion is a quintessential matter of public policy. Indeed, few modern policy battles receive as much attention.⁹⁶ If a difference in statutory damages caps is enough to invoke the exception, as in *Nevada v. Hall*, then surely differences in abortion regulation suffice as well. Further, A.B. 1666 seems to be exactly the scenario contemplated by the Court in *Hughes* where it suggested the exception could apply: Wisconsin did not possess a “real feeling of antagonism” towards wrongful death suits, but California does towards S.B.8-like suits. Because California is categorically opposed to S.B.8-like suits, A.B. 1666 may fit within the exception articulated in *Hughes*. Accordingly, A.B. 1666(b)(1) would likely be upheld as constitutional under the public policy exception of FFC.

III

A.B. 1666’S JUDGMENT ENFORCEMENT BAR & PENAL JUDGMENTS

Even if the public policy exception applies to A.B. 1666’s venue provision, it likely does not apply to the judgment enforcement bar. Courts have unequivocally held that the judgment enforcement part of the FFC is nearly ironclad and does not include a public policy exception.⁹⁷ Despite this limitation, California may try to invoke the so called “penal judgments” exception, which holds that states are not obligated to enforce out-of-state judgments that are “penal” in nature.⁹⁸ If S.B.8 is penal, California need not enforce S.B.8 judgments in its courts under the FFC and A.B. 1666(b)(2) would therefore pass constitutional muster.

A. *The Penal Judgments Exception*

The Supreme Court held long ago that penal judgments must be enforced in the state *where they occurred* and thus constitute an exception to

⁹⁵ See *Loucks v. Standard Oil Co. of N.Y.*, 120 N.E. 198, 199 (N.Y. 1918) (considering Massachusetts’s implied public policy preference based on “the history of the Massachusetts statutes”); *In re Laura F.*, 99 Cal. Rptr. 2d 859, 867 (Ct. App. 2000) (holding that the full faith and credit provision of the Indian Child Welfare Act did not require California state court to apply tribal law in violation of California’s own legitimate and expressed policy in favor of adoptions).

⁹⁶ See Peter Baker, *Supreme Court Confirms Leak but Says Text Is Not Final*, N.Y. TIMES (June 24, 2022), www.nytimes.com/live/2022/05/03/us/roe-wade-abortion-supreme-court?smid=url-share [https://perma.cc/P4VG-W2L2].

⁹⁷ See *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) (“[O]ur decisions support no roving ‘public policy exception’ to the full faith and credit due *judgments*.”).

⁹⁸ RESTATEMENT (FIRST) OF CONFLICT OF L. § 611 (AM. L. INST. 1934).

the FFC.⁹⁹ The First Restatement of Conflicts states that “[n]o action can be maintained to recover a penalty the right to which is given by the law of another state.”¹⁰⁰ The critical feature that makes a judgment “penal” is whether it remedies public injuries which affect a community rather than traditional private injuries that belong to individuals. In *Huntington v. Attrill*, the Supreme Court explained that:

Wrongs are divisible into two sorts or species: *private wrongs* and *public wrongs*. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries*; the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community, and are distinguished by the harsher appellation of *crimes* and *misdemeanors*.¹⁰¹

The facts of *Huntington* are complicated, but the case supports the proposition that states need not enforce another states’ penal judgments. In *Huntington*, the plaintiff had previously prevailed in a suit over a debt against Henry Attrill in New York state court.¹⁰² Huntington had lent \$100,000 to a company where Attrill sat on the board of directors.¹⁰³ Attrill, acting as director of the company, knowingly and falsely certified that all the company’s capital stock was “paid in.”¹⁰⁴ Under New York law, this made Attrill liable for all the company’s debts—including Huntington’s.¹⁰⁵ Based on these facts, the New York court entered an award of \$100,240 in Huntington’s favor, but Attrill refused to pay it.¹⁰⁶ In an attempt to collect on the judgment, Huntington again sued Attrill, his three daughters, and the Maryland-based Equitable Gaslight Company of Baltimore in Maryland state court.¹⁰⁷ One of Attrill’s daughters moved to dismiss the enforcement case on the grounds that the cause of action was premised on a penal New

⁹⁹ See *Huntington v. Attrill*, 146 U.S. 657, 666, 683–84 (1892) (“If a suit to enforce a judgment . . . is brought in . . . another State, this court . . . to determine . . . whether the highest court of the latter State has given full faith and credit to the judgment, must determine for itself whether the original cause of action is penal in the international sense.”). *But cf.* Robert A. Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193, 194–96 (1932) (criticizing the penal judgments exception as a matter of policy).

¹⁰⁰ RESTATEMENT (FIRST) OF CONFLICT OF L. § 611 (AM. L. INST. 1934). *But see* RESTATEMENT (SECOND) OF CONFLICT OF L. § 120 cmt. d (AM. L. INST. 1971) (expressing doubt that states may refuse to enforce sister-state civil-monetary judgments on the grounds that they are penal).

¹⁰¹ *Huntington*, 146 U.S. at 668–69 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1765)).

¹⁰² *See id.* at 660–61.

¹⁰³ *See id.* at 661.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Huntington v. Attrill*, 146 U.S. 657, 661 (1892).

¹⁰⁷ *Id.* at 660.

York law and thus plaintiff was not entitled to relief in Maryland courts.¹⁰⁸ The Maryland Circuit Court denied the motion, but the Maryland Court of Appeals reversed, holding the New York statute was indeed penal.¹⁰⁹

The Supreme Court reversed again, holding that the New York judgment was enforceable because the relevant law was “in no sense a criminal or *quasi* criminal law.”¹¹⁰ The Court at first agreed that there was a penal judgment exception, noting that: “If a suit to enforce a judgment rendered in one state . . . is brought in the courts of another state,”¹¹¹ the latter court “must determine for itself whether the original cause of action is penal.”¹¹² However, the Court then explained that this exception to the FFC applied only in situations where a law redresses “a wrong to the public” as opposed to “a wrong to the individual.”¹¹³ Yet, in *Huntington*, the statute gave a civil remedy only to creditors—those directly injured by the fraud—and only in the amount of their debt (not as a penalty).¹¹⁴ Thus, even though individual officers were liable for their false statements, the purpose of this “burdensome liability” was “clearly remedial” and could not trigger the penal judgments exception.¹¹⁵

After *Huntington*, state and federal courts continue to acknowledge the existence of a penal judgments exception but, puzzlingly, rarely apply it to civil cases.¹¹⁶ As an initial matter, some courts have recognized that the

¹⁰⁸ *Id.* at 663.

¹⁰⁹ *Id.* at 663–64.

¹¹⁰ *Id.* at 676.

¹¹¹ *Id.* at 683.

¹¹² *Huntington v. Attrill*, 146 U.S. 657, 684 (1892).

¹¹³ *See id.* at 668.

¹¹⁴ *Id.* In an earlier case that may be relevant to an S.B.8 or AB 1666 claim, *Dennick v. Railroad Co.*, 103 U.S. 11, 12 (1880), a widow sued a railroad company in New York court for the death of her husband. The relevant statute permitted the personal representative of the deceased to recover civil damages for the death exclusively for the benefit of the deceased’s widow or next of kin. *See id.* The Court held such a law was not penal because it sought to compensate the relatives of the deceased for their personal loss. *See id.* at 17.

¹¹⁵ *Id.* at 676.

¹¹⁶ The types of judgments state courts considered non-compensatory, and thus unenforceable pursuant to the penal judgment exception, has varied considerably over time. *See* Peter B. Kutner, *Judicial Identification of Penal Laws in the Conflicts of Laws*, 31 OKLA. L. REV. 590, 608–22 (1978) (recounting shifts in how American courts apply the penal judgments exception over time). Before *Huntington*, courts applied the penal judgment exception broadly, declining to enforce any damages in excess of the plaintiff’s actual injury because anything else was thought to be non-compensatory. *See id.* at 610; *see, e.g.*, *Langdon v. New York, Lake Erie & W. R.R. Co.*, 11 N.Y.S. 514, 518 (Gen. Term 1890) (declining, before the Court decided *Huntington*, to enforce a sister state’s judgment because the treble damages provision rendered it penal); *Blaine v. Curtis*, 7 A. 708, 710 (Vt. 1887) (predating *Huntington* and holding a sister state’s private right of action for excessive interest to be penal); *Bettys v. Milwaukee & Saint Paul Ry. Co.*, 37 Wis. 323, 326 (1875) (holding a double damages provision is penal before the Court decided *Huntington*). Immediately after *Huntington*, little changed. *See* Kutner, *supra*, at 611, 613. In the early twentieth century, however, courts began to look at double damages, punitive damages, and statutory damages in a different light, concluding that they could be non-penal since their purpose was often to aid a

Huntington penal judgments exception is alive and well. For example, in *City of Oakland v. Desert Outdoor Advertisement, Inc.*, the Nevada Supreme Court rejected an argument that *Huntington* was a “relic” of “questionable authority,” concluding instead “that the *Huntington* penal exception to the Full Faith and Credit Clause is valid and binding law.”¹¹⁷ The Supreme Court itself had reaffirmed the penal judgments exception in *Nelson v. George*.¹¹⁸ Accordingly, a handful of state courts have occasionally declined to enforce another state’s judgment on the grounds that it is penal under the *Huntington* standard.¹¹⁹

Yet, on the whole, published cases considering the exception tend to reject its application. State courts have permitted the enforcement of judgments involving what would seem to be “penal” elements, such as punitive damages, sanctions, and so on.¹²⁰ While there are numerous California cases applying the exception to *criminal* judgments,¹²¹ it is

plaintiff who had suffered a particularly egregious wrong. *See id.* at 614–15; *see, e.g.* *Loucks v. Standard Oil Co. of N.Y.*, 120 N.E. 198, 199 (N.Y. 1918) (Cardozo, J.) (“[T]he damages are punitive But the punishment of the wrongdoer is not designed as atonement for a crime; it is solace to the individual who has suffered a private wrong.”). The contrary view, that such damages could be subject to the penal judgment exception, quickly became the minority view. *See* Kutner, *supra*, at 616, 620. Notably, the California Supreme Court adopted this minority view with respect to the federal Emergency Price Control Act, which involved statutory and multiple damages, referencing either cases that pre-date *Huntington* or which were subsequently overruled. *See id.* at 618–19; *Miller v. Mun. Ct. of L.A.*, 142 P.2d 297, 308–09 (Cal. 1943). Despite this aberration, there now “appears to be a consensus that liability which is either proportionate to the extent of injury or conceived as a rough measure of compensation for injury is not penal in the international sense.” Kutner, *supra*, at 622.

¹¹⁷ *E.g.*, *City of Oakland v. Desert Outdoor Advertisement, Inc.*, 267 P.3d 48, 49–50, 53–54 (Nev. 2011) (rejecting Oakland’s attempt to enforce a California civil judgment in Nevada because the law was penal under *Huntington*); *see also* *People v. Laino*, 87 P.3d 27, 33 (Cal. 2004) (acknowledging that *Huntington*’s limitation on the Full Faith and Credit Clause stands firm).

¹¹⁸ 399 U.S. 224 (1970); *see also* *People v. Bacigalupo*, 820 P.2d 559, 574 n.9 (Cal. 1991) (quoting *Nelson*, 399 U.S. at 229) (explaining that the Full Faith and Credit Clause “does not require that sister States enforce a foreign penal judgment”), *vacated*, *Bacigalupo v. California*, 506 U.S. 802 (1992).

¹¹⁹ *See, e.g.*, *Desert Outdoor Advertisement*, 267 P.3d at 54 (declining to enforce a California judgment brought by the City of Oakland under California’s civil unfair competition law); *Gulledge Bros. Lumber Co. v. Wenatchee Land Co.*, 142 N.W. 305 (Minn. 1913) (determining a Washington law requiring businesses to obtain a license or else be unable to maintain an action in court was penal and thus Minnesota need not enforce it according to *Huntington*); *McGrath v. Tobin*, 103 A.2d 795, 800 (R.I. 1954) (applying the *Huntington* test to hold a Massachusetts wrongful death statute was penal and thus Rhode Island could decline to enforce the judgment consistent with the Full Faith and Credit Clause).

¹²⁰ *See* *Gap Gemini America, Inc. v. Judd*, 597 N.E.2d 1272, 1286 (Ind. Ct. App. 1992) (upholding enforcement of a California law with punitive damages in Indiana); *Enviropower, L.L.C. v. Bear, Stearns & Co.*, 265 S.W.3d 16, 21 (Tex. Ct. App. 2008) (concluding New York’s “death penalty sanctions” are not penal under the *Huntington* standard); *Osborn v. Borchetta*, 129 A.2d 238, 240 (Conn. 1956) (holding New York’s Dram Shop Act is not penal); *Rein v. Koon Ford, Inc.*, 567 A.2d 101, 105–06 (Md. 1989) (holding a law establishing a private right of action for those injured by deceptive advertising is not penal).

¹²¹ *See, e.g.*, *Laino*, 87 P.3d at 32–34 (rejecting defendant’s argument that the Full Faith and

difficult to find a case where a California court applied the *Huntington* standard to another civil state judgment and held that the law was penal. In the few cases where California courts have considered *Huntington* and sister-state civil judgments, they have held that those judgments are not penal.¹²² Nevertheless, that California courts apply the *Huntington* test to sister-state civil judgments and routinely reaffirm their power not to enforce penal judgments from other states suggests that, in the right case, California courts might decline to enforce an out-of-state civil judgment.¹²³

Although California state and federal courts rarely apply *Huntington*'s penal exception, they frequently recognize the *Huntington* standard in the context of international judgments, offering a roadmap for how they might decide whether to enforce S.B.8 judgments. Specifically, in cases involving international judgments—where the FFC does *not* apply—courts employ a multi-part test to determine whether a judgment is penal, focusing mostly on whether a judgment is compensatory or imposes a penalty. In *de Fontbrune v. Wofsy*, the Ninth Circuit noted that under California's Uniform Recognition Act, foreign countries' penal judgments are unenforceable—a situation analogous to the FFC exception.¹²⁴ The Court applied a four-part “penal judgments” balancing test: whether a judgment was (1) compensatory, (2) paid to an individual, (3) arose in a civil context, and (4) included a “mandatory fine, sanction, or multiplier.”¹²⁵ In *Wofsy*, plaintiff sought to protect copyrighted pictures of Pablo Picasso's artwork from reproduction by others.¹²⁶ After winning a €2 million judgment in France for copyright violations, the plaintiff attempted to enforce the judgment in

Credit Clause prevented California courts from counting defendant's out-of-state guilty plea as a prior conviction despite Arizona's subsequent dismissal of the charges because the out-of-state action falls under the penal exception); *Bacigalupo*, 820 P.2d at 574–75 & n.9 (holding that the Full Faith and Credit Clause does not require California to apply New York law regarding the admissibility of evidence from a plea deal to evidence aggravating circumstances in California), *vacated*, *Bacigalupo*, 506 U.S. 802.

¹²² See, e.g., *Farmers & Merchants Tr. Co. v. Madeira*, 261 Cal. App. 2d 503, 508–10 (Cal Ct. App. 1968) (holding a Pennsylvania law regarding a remedy for unpaid child and spousal support was not penal and thus was enforceable in California).

¹²³ See *id.*; *People v. Betts*, 103 P.3d 883, 886 (Cal. 2005) (citing *Huntington v. Attrill*, 146 U.S. 657, 669 (1892)) (“It long has been established that a state will entertain a criminal proceeding only to enforce its own criminal laws, and will not assume authority to enforce the penal laws of other states or the federal government through criminal prosecutions in its state courts.”); *Laino*, 87 P.3d at 33 (“[W]e have stated that the full faith and credit clause ‘does not require that sister States enforce a foreign penal judgment.’” (quoting *Bacigalupo*, 820 P.2d at 574 n.9, *vacated*, *Bacigalupo*, 506 U.S. 802)); *Miller v. Mun. Ct.*, 142 P.2d 297, 308 (Cal. 1943) (“[U]nder well-established principles . . . , no action may be maintained upon a right created by the law of a foreign state as a method of furthering its own governmental interests, nor can an action be maintained to recover a penalty, the right to which is given by the law of another state.”).

¹²⁴ See *de Fontbrune v. Wofsy*, 838 F.3d 992, 1001 (9th Cir. 2016).

¹²⁵ *Id.* at 1001 (citing *Java Oil Ltd. v. Sullivan*, 86 Cal. Rptr. 3d 177, 183–84 (Cal Ct. App. 2008)); see also *Miller*, 142 P.2d at 308.

¹²⁶ See *Wofsy*, 838 F.3d at 994.

federal courts while the defendant argued that the judgment was penal.¹²⁷ Applying California's test, the Ninth Circuit held that the French copyright judgment was *not* penal because it directly compensated the plaintiff for copyright violations, vindicated plaintiffs' "personal interest," was awarded directly to plaintiff (and not the government), and constituted a civil remedy.¹²⁸ The Court noted that the award was even analogous to statutory damages provisions.¹²⁹ Again, whether a judgment is compensatory or imposes a penalty is particularly important, with some courts focusing mostly on that factor.¹³⁰

While *Wofsy* held that a French judgment was not penal, the Ninth Circuit reached the opposite conclusion in *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, holding that a French judgment was likely penal and thus probably unenforceable.¹³¹ In that case, two French organizations sued Yahoo! in France for hosting the sale of Nazi content, in violation of a French statute declaring it a crime to display Nazi emblems.¹³² The French court issued an interim order requiring Yahoo! to prevent the auction of Nazi artifacts on its servers and remove the relevant content.¹³³ The court also threatened to fine Yahoo! €100,000 per day if the company failed to comply.¹³⁴ In an attempt to avoid the French judgment, Yahoo! sought in California federal court a declaratory judgment that the French court's judgments were "not recognizable or enforceable in the United States."¹³⁵ The district court agreed, granting summary judgment for Yahoo! because enforcing the French judgment in the United States would violate the First Amendment.¹³⁶ In a divided opinion, a majority of the Ninth Circuit en banc voted to reverse the district court and dismiss the case without reaching the First Amendment issue.¹³⁷

Following *Huntington*, the Ninth Circuit en banc agreed that district courts could refuse to enforce penal judgments under the *Huntington*

¹²⁷ *See id.*

¹²⁸ *See id.* at 1004–07.

¹²⁹ *See id.* at 1005.

¹³⁰ *See Miller*, 142 P.2d at 308.

¹³¹ *See Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1201, 1218–19, 1221 (9th Cir. 2006) (en banc) (per curiam).

¹³² *See id.* at 1202 (plurality opinion).

¹³³ *See id.* at 1202–03.

¹³⁴ *See id.* at 1203. The French court reaffirmed its interim order with a second interim order. *See id.* at 1203–04.

¹³⁵ *Id.* at 1204.

¹³⁶ *See id.* at 1201.

¹³⁷ *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1201, 1223–24 (9th Cir. 2006) (en banc) (per curiam). Eight judges determined there was personal jurisdiction, but the votes of the three judges who concluded there was no personal jurisdiction combined with three judges who reasoned the case was unripe meant that a majority of the court voted to dismiss the case. *Id.* at 1201.

standard but disagreed on how to apply the test.¹³⁸ A three-judge plurality held that the suit was not ripe because the French law was penal and thus it was “exceedingly unlikely” that it could ever be enforced against Yahoo!.¹³⁹ The plurality observed that the French court referred to its own judgment as penal and that Yahoo! had violated a statute that involved criminal penalties.¹⁴⁰ Although the French court imposed only civil penalties on Yahoo!, the plurality explained that the civil label did “not strip a remedy of its penal nature.”¹⁴¹ Because the French court imposed the penalties primarily to deter Yahoo! from creating “a threat to internal public order,” they redressed a public wrong that was penal in nature.¹⁴² The plurality emphasized that the penalties were payable to the French government and were therefore not compensating plaintiffs.¹⁴³ In dissent, Judge Fisher pointed to the civil nature of the French trial and the restitution award to the plaintiffs as evidence of the judgment’s compensatory nature.¹⁴⁴ Moreover, he suggested that because the French court made the fines conditional on Yahoo!’s future compliance with the injunction, the proper analogy was to civil contempt, which might not be penal under California law.¹⁴⁵

The Ninth Circuit’s contrasting holdings in *Wofsy*, concluding that a French judgment was not penal, and *Yahoo!*, holding the opposite, display the application of the penal judgments test.¹⁴⁶ While *Wofsy* addressed a civil judgment, the one in *Yahoo!* stemmed from a criminal statute and the opinion repeatedly called it a “penalty” even if it was based on civil contempt.¹⁴⁷ Moreover, the French court in *Yahoo!* intended to deter conduct threatening public order, rather than *Wofsy*’s attempt to protect the rights of a specific party.¹⁴⁸ Finally, in *Yahoo!*, the payments were made to the government, whereas in *Wofsy* they were payable to the alleged victim.¹⁴⁹ These factors explain why, despite similarities between the judgments, the Ninth Circuit held as it did.¹⁵⁰

¹³⁸ Compare *id.* at 1219–20 (applying the *Huntington* standard and concluding that the French judgment was likely penal), with *id.* at 1248–51 (Fisher, J., concurring in part and dissenting in part) (applying the *Huntington* standard and concluding that it was at least uncertain whether the French judgment was penal). Some judges would have dismissed the case for a lack of subject matter jurisdiction. See *id.* at 1201 (per curiam).

¹³⁹ See *id.* at 1218–20 (per curiam).

¹⁴⁰ See *id.* at 1219.

¹⁴¹ *Id.*

¹⁴² *Id.* at 1220.

¹⁴³ See *id.*

¹⁴⁴ See *id.* at 1248–49 (Fisher, J., concurring in part and dissenting in part).

¹⁴⁵ See *id.* at 1250–51.

¹⁴⁶ See *de Fontbrune v. Wofsy*, 838 F.3d 992, 1006 (9th Cir. 2016).

¹⁴⁷ See *id.*

¹⁴⁸ See *id.*

¹⁴⁹ See *id.*

¹⁵⁰ See *id.*

In sum, the Full Faith and Credit Clause does not obligate states to enforce out-of-state penal laws.¹⁵¹ As *Huntington* held, a penal law redresses a wrong against the public, as opposed to a wrong against an individual.¹⁵² Following *Huntington*, California courts focus on whether a law is compensatory, paid to an individual, arises in a civil context, and imposes a “mandatory fine, sanction, or multiplier.”¹⁵³ Both *Wofsy* and *Yahoo!* show that in the analogous context of foreign judgments—not involving the FFC but nevertheless influenced by *Huntington*—courts have developed a penal judgments test that hinges on detailed questions about compensation versus punitiveness.

B. How the Penal Judgments Exception Interacts with A.B. 1666

While California has a colorable argument that the penal judgments exception applies to A.B. 1666, it is difficult to predict whether courts would apply it. Considering all four elements of California’s test—whether a judgment was compensatory, paid to an individual, arose in a civil context, and included a mandatory fee—does not definitively point either way. To be sure, some aspects of S.B.8 are clearly penal. But A.B. 1666 faces an uphill battle: The exception is rarely applied to civil judgments and other S.B.8 provisions suggest that it may not be penal. This means that A.B. 1666’s judgment enforcement bar faces an unclear future.

Beginning with California’s multi-part penal judgments test suggests that S.B.8 is a complicated mix of civil and criminal elements. California would have a strong argument on the first factor: whether the law is compensatory. California would argue that S.B.8 lacks a personal injury requirement and allows “anyone” to sue, regardless of whether they have a connection to the alleged abortion.¹⁵⁴ This means that S.B.8 plaintiffs are not injured by the alleged “wrong,” and, without an injury, an award is generally not compensatory.¹⁵⁵ In response, S.B.8 plaintiffs seeking to enforce a judgment may draw on cases that have found that wrongful death statutes are not penal.¹⁵⁶ But California could distinguish wrongful death statutes

¹⁵¹ See *Huntington v. Attrill*, 146 U.S. 657, 666 (1892).

¹⁵² See *id.* at 668.

¹⁵³ *de Fontbrune v. Wofsy*, 838 F.3d 992, 1001 (9th Cir. 2016) (citing *Java Oil Ltd. v. Sullivan*, 86 Cal. Rptr. 3d 177, 183–84 (Ct. App. 2008)); see also *Miller v. Mun. Ct. of L.A.*, 142 P.2d 297, 308 (Cal. 1943).

¹⁵⁴ TEX. HEALTH & SAFETY CODE § 171.208(a) (West 2021) (“Any person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action . . .”).

¹⁵⁵ See *Birdsall v. Coolidge*, 93 U.S. 64, 64 (1876) (“Compensatory damages and actual damages mean the same thing . . . that the damages shall be the result of the injury alleged and proved, and that the amount awarded shall be precisely commensurate with the injury suffered . . . whether the injury be to the person or estate of the complaining party.”).

¹⁵⁶ See *Dennick v. Central R.R. Co. of N.J.*, 103 U.S. 11, 17 (1880) (“It can scarcely be

because the Texas law is not limited to plaintiffs with a close connection to the deceased or, in this case, the fetus. Texas will argue that S.B.8 is a law “manifestly intended to protect life,”¹⁵⁷ similar to wrongful death statutes, but S.B.8 damages do not go to the family of the aborted fetus. As discussed above, the damages can go to anyone.¹⁵⁸ California can argue that while a widow or next of kin has a strong claim of personal injury in the wrongful death context, a member of the general public suing under S.B.8 does not.

This distinction between the deceased’s family in a wrongful death suit and general members of the public coheres with the *Huntington* Court’s discussion of qui tam actions. In *Huntington*, the Supreme Court explained that qui tam actions are remedial with respect to the injured party but “penal as regards the suit by a common informer.”¹⁵⁹ The injured party in a qui tam suit, like the deceased’s family, seeks to vindicate a unique harm felt only by them. What distinguishes the “common informer” is their lack of a personal injury. They, like the plaintiff in an S.B.8 suit, are vindicating a public right and receiving an award as an incentive rather than as a “remedy” or compensation for an injury.¹⁶⁰ S.B.8 plaintiffs, who may bear no relation to the fetus, are members of the general public, akin to the common informer.¹⁶¹

Setting aside the first element, California would have an uphill argument on the second prong: whether the damages are paid to an individual

contended that the [wrongful death statute] belongs to the class of criminal laws which can only be enforced by the courts of the state where the offense was committed”); *see also* *Huntington v. Attrill*, 146 U.S. 657, 673–74 (1892) (analyzing *Dennick* in the context of the penal judgment exception to illustrate how a statute’s purpose affects whether it is penal).

¹⁵⁷ *Huntington*, 146 U.S. at 675 (describing wrongful death statutes like the one at issue in *Dennick*).

¹⁵⁸ TEX. HEALTH & SAFETY CODE § 171.208(a) (West 2021) (“Any person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action.”).

¹⁵⁹ *Huntington*, 146 U.S. at 667 (citations omitted). Qui tam actions involve an uninjured private party (referred to in *Huntington* as “a common informer” but now often called a “relator”) bringing an action on behalf of another party—often the government—in that party’s name in exchange for a monetary award if the suit succeeds. *See* *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 768–69, 774–77 (2000) (discussing the origin and nature of qui tam actions in the context of evaluating whether private parties have standing to bring qui tam actions under the False Claims Act); *see also* Guha Krishnamurthi, *Are S.B.8’s Fines Criminal?*, 101 TEX. L. REV. ONLINE 141, 145–46 (2023) (comparing Texas S.B.8 to qui tam actions). Thus, the *Huntington* Court reasoned that when an injured party brings suit on their own behalf the action is remedial; but when a relator or “common informer” brings the same suit it is penal because the relator lacks a personal injury. *See* *Huntington*, 146 U.S. at 667.

¹⁶⁰ *See* *Vt. Agency of Nat. Res.*, 529 U.S. at 772–73 (explaining that a qui tam relator’s “bounty”—although a concrete interest—is unrelated to an injury in fact).

¹⁶¹ Of course, one can imagine an S.B.8 plaintiff with a strong connection to the fetus such as a parent or grandparent. Such a plaintiff would be akin to the deceased’s family in wrongful death statutes. But, unlike the wrongful death statute at issue in *Dennick*, S.B.8 welcomes “any person.” TEX. HEALTH & SAFETY CODE § 171.208(a) (West 2021) (“Any person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action”). For further discussion of personal injury for various types of S.B.8 plaintiffs, *see* Krishnamurthi, *supra* note 159, at 144–45.

or not. Courts have typically found that when awards are paid to an individual and not the government, the relevant law is probably not penal. Under S.B.8's remedial scheme, courts award statutory damages directly to the plaintiff.¹⁶² There is no role at all for Texas government officials. This, of course, is by design, because preventing the involvement of Texas officials is part of the strategy to avoid federal pre-enforcement challenges. Texas courts are also supposed to award costs and attorney's fees to a prevailing plaintiff.¹⁶³ Unlike in *Yahoo!*, where the court found that the judgment was likely penal because monetary awards went to the French government, none of the monetary damages would go to the state of Texas.¹⁶⁴ This, again, would counsel that S.B.8 is not a penal law.

Moving on to the third factor, courts might also agree with a Texas plaintiff that S.B.8 arises in a civil context, weighing against applying the penal judgments exception. On the one hand, the Texas scheme was designed in every possible way to be a civil remedial scheme.¹⁶⁵ S.B.8 explicitly disempowers the government of any role in enforcement and suits therefore unmistakably arise in a civil context. Not only is S.B.8 enforced by private parties,¹⁶⁶ the statute explicitly empowers plaintiffs to bring only "a civil action."¹⁶⁷ On the other hand, *Yahoo!* suggests that this civil label may not be that important—the plurality argued that while the French court imposed only civil penalties, the civil label did "not strip a remedy of its penal nature."¹⁶⁸

The final prong, however, turns strongly in California's favor: whether the law imposes mandatory fees, sanctions, or multipliers. Here, S.B.8's scheme appears to be classically penal. California will likely argue that S.B.8's statutory damages provision transforms it into a penal statute.¹⁶⁹ As

¹⁶² See TEX. HEALTH & SAFETY CODE § 171.208(b) (West 2021) ("If a claimant prevails . . . the court shall award . . . statutory damages.").

¹⁶³ See *id.* ("If a claimant prevails in an action brought under this section, the court shall award: . . . (3) costs and attorney's fees.").

¹⁶⁴ Cf. *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1220 (9th Cir. 2006) (en banc) (plurality opinion).

¹⁶⁵ But see Krishnamurthi, *supra* note 159, at 150–51. Krishnamurthi argues that S.B.8 imposes a criminal sanction and thus the Constitution affords defendants the protections associated with criminal prosecutions such as a higher standard of proof, the right to remain silent, Double Jeopardy, and a jury trial. See *id.* It bears emphasizing that whether or not a law is criminal for purposes of criminal procedure does not necessarily dictate whether the penal judgment exception to the FFC applies.

¹⁶⁶ See TEX. HEALTH & SAFETY CODE § 171.208(a) (West 2021) ("Any person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action . . .").

¹⁶⁷ See *id.*

¹⁶⁸ *Yahoo!*, 443 F.3d at 1219.

¹⁶⁹ TEX. HEALTH & SAFETY CODE § 171.208(b)(2) (West 2021) ("If a claimant prevails in an action brought under this section, the court shall award . . . statutory damages in an amount of not less than \$10,000 for each abortion that the defendant performed or induced in violation of this

previously mentioned, some California courts have considered “mandatory fines” to be an indicator that a statute is penal.¹⁷⁰ To be sure, the Supreme Court held in *Brady v. Daly* that “the fact that [a statute which] provides that such damages shall not be less than a certain sum, and may be more, if proved, does not . . . transform it into a penal statute.”¹⁷¹ However, the Supreme Court narrowed its holding to only cases where the statute provides “for a recovery of damages for an act which violates the rights of the plaintiff and gives the right of action solely to him.”¹⁷² Unlike in *Brady*, S.B.8 neither remedies a violation of plaintiff’s rights nor limits recovery “solely to” an injured plaintiff.¹⁷³ Because S.B.8’s damage provisions do not approximate the harm suffered by the plaintiff, they are closer to a “mandatory fine” than the statute at issue in *Brady*. And unlike the French damages in *Yahoo!*, which the Ninth Circuit analogized to statutory damages, S.B.8’s award does not seek “to vindicate [the plaintiff’s] personal interest” because, as discussed above, there is no personal injury.¹⁷⁴ This would seem to be a powerful argument for finding that S.B.8 is penal.

Taken together, California has a colorable—but uncertain—argument that S.B.8 is penal. Two factors point one way while another two factors point the other way. California’s argument rests on emphasizing that S.B.8 is not compensatory at all—and that courts have previously found that to be the most important factor. Indeed, one Texas court has already held that S.B.8’s monetary award is punitive rather than compensatory in the context of a due process claim.¹⁷⁵ Moreover, California will have a powerful argument that a court should discount the civil label as merely a label. S.B.8 plaintiffs, on the other hand, will focus on the fact that few if any cases have applied the exception to civil, rather than criminal, judgments. It is difficult

subchapter . . .”).

¹⁷⁰ See *de Fontbrune v. Wofsy*, 838 F.3d 992, 1001 (9th Cir. 2016); *Java Oil Ltd. v. Sullivan*, 86 Cal. Rptr. 3d 177, 184 (Ct. App. 2008) (evaluating whether “mandatory fine, sanction, or multiplier was imposed.”). *But see* *Brady v. Daly*, 175 U.S. 148, 156 (1899) (“[F]or a recovery of damages for an act which violates the rights of the plaintiff . . . the fact that it also provides that such damages shall not be less than a certain sum, and may be more, if proved, does not, as we think, transform it into a penal statute.”); *Wellman v. Mead*, 107 A. 396, 400 (Vt. 1919) (overruling prior precedent and holding statute which included a minimum damages provision and additional damages proportional to defendant’s culpability was remedial).

¹⁷¹ *Brady*, 175 U.S. at 156.

¹⁷² *Id.*

¹⁷³ TEX. HEALTH & SAFETY CODE § 171.208(a) (West 2021).

¹⁷⁴ *Cf. de Fontbrune*, 838 F.3d at 1005 (“[T]he purpose of the award was not to punish a harm against the public, but to vindicate de Fontbrune’s personal interest in having his copyright respected and to deter further future infringements by Wofsy.”).

¹⁷⁵ See *Van Stean v. Tex. Right to Life*, No. D-1-GN-21-004179 at *37 (Dist. Ct. Travis Cnty., Tx. – 98th Jud. Dist. Dec. 9, 2021) (“In addition to the money award, which can only be seen as punitive and not compensatory, S.B.8 has other provisions that have the effect of *punishing* a defendant rather than *compensating* a plaintiff.”), *remanded for consideration in light of answers to certified questions* by *Whole Woman’s Health v. Jackson*, 31 F.4th 1004 (5th Cir. 2022) (mem.).

to predict how a court would address this, but if S.B.8 judgments are penal, California would be under no obligation to enforce them and A.B. 1666 would pass constitutional muster.

CONCLUSION

The post-*Dobbs* abortion landscape has raised a barrage of legal questions in the field of conflict of laws and civil procedure. California's A.B. 1666 represents a serious attempt to blunt the power of Texas S.B.8-like laws. The key question, however, is whether the Full Faith and Credit Clause will serve as a limit to these state-based struggles. Our analysis of current case law suggests that California's A.B. 1666 may successfully shield in-state medical providers from S.B.8-style actions through both its venue and judgment enforcement provisions. The venue bar sits on solid ground: The public policy exception to the FFC probably covers state attempts to prevent forum courts from hearing S.B.8-like claims. With that said, A.B. 1666's judgment enforcement bar will face trickier challenges, and it is difficult to predict how courts will respond. Still, there is a colorable argument that S.B.8 is a penal law because it is not compensatory and serves only to punish a public, not private, wrong.

If the potential result that A.B. 1666 is wholly constitutional is surprising, it is worth considering that S.B.8 is in such a predicament because it itself is unprecedented. Normally, a statute like S.B.8 would be enforced by the state itself. The judgment would be penal, and even criminal (but California would likely be required to extradite defendants to Texas).¹⁷⁶ However, such a statute would have been an unconstitutional infringement on defendants' abortion rights before *Dobbs*.¹⁷⁷ To avoid this result, Texas relied solely on private enforcement. Yet private enforcement by "anyone" raises the problem that there is no personal injury because the "wrong" Texas seeks to redress is quintessentially public. Because it would be so difficult to prove personal injury, Texas elected to not require personal injury at all. And, because there was no injury to compensate, Texas needed to provide statutory damages. These last two procedural choices that Texas used to avoid judicial review are precisely why California may not be required to enforce an S.B.8 judgment. The lack of personal injury and resulting statutory damages which saved S.B.8 from federal review are also what suggest S.B.8 is penal. Put differently, in the context of enforcing its

¹⁷⁶ U.S. CONST. art. IV, § 2, cl. 2 ("Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction."); see also 18 U.S.C. § 3182.

¹⁷⁷ See *Roe v. Wade*, 410 U.S. 113, 164 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

judgments out-of-state, S.B.8 may just be hoisted by its own petard.