No. _____

In The Supreme Court of the United States

JAMES COURTNEY AND CLIFFORD COURTNEY,

Petitioners,

v.

DAVID DANNER, IN HIS OFFICIAL CAPACITY AS CHAIRMAN AND COMMISSIONER OF THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In the *Slaughter-House Cases*, this Court held that one of the rights of national citizenship protected by the Privileges or Immunities Clause of the Fourteenth Amendment is the "right to use the navigable waters of the United States." 83 U.S. (16 Wall.) 36, 79 (1873). Lake Chelan is such a body of water. Since 1929, however, the State of Washington has allowed only one ferry provider, a private company, to operate on the lake and has prohibited Petitioners James and Clifford Courtney from operating an alternative ferry. The Courtneys filed this action alleging that the monopoly of ferry service on Lake Chelan abridges their right to use the navigable waters of the United States in violation of the Privileges or Immunities Clause. In affirming the dismissal of the Courtneys' claim, the Ninth Circuit held that the clause protects only "a right to *navigate* the navigable waters of the United States" – not "to utilize those waters for a . . . specific professional venture" or "to operate a particular business using" them. Because the Courtneys' proposed use of Lake Chelan is "an activity driven by economic concerns," the Ninth Circuit concluded, it is not protected by the Privileges or Immunities Clause.

The question presented is:

Is the "right to use the navigable waters of the United States" recognized in the *Slaughter-House Cases* solely a right to navigate such waters or does it also encompass their use to operate a ferry or engage in other economic activity?

PARTIES TO THE PROCEEDING

James Courtney and Clifford Courtney are the Petitioners and were the appellants in the U.S. Court of Appeals for the Ninth Circuit. The appellants in the Ninth Circuit were Jeffrey Goltz, then-chairman and commissioner of the Washington Utilities and Transportation (WUTC); Patrick Oshie, then-commissioner of the WUTC; Philip Jones, commissioner of the WUTC; and David Danner, then-executive director of the WUTC, in their official capacities. Since the appeal was undertaken, Oshie has resigned from the WUTC, Danner has been appointed its chairman, and Steven King has been appointed its executive director. Accordingly, and pursuant to Rule 35.3, the Respondents in this Court are David Danner, chairman and commissioner; Jeffrey Goltz, commissioner; Philip Jones, commissioner; and Steven King, executive director, in their official capacities.

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PETITION FOR WRIT OF CERTIORARI

James ("Jim") Courtney and Clifford ("Cliff") Courtney respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 736 F.3d 1152 and appears in the Appendix ("App.") at App. 1-29. The opinion of the district court is reported at 868 F. Supp. 2d 1143 and appears at App. 30-51.

JURISDICTION

The court of appeals entered its judgment on December 2, 2013. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Privileges or Immunities Clause of the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Reproduced at App. 52-155 are the relevant

Washington statutes and regulations, which: (1) impose a certificate of public convenience and necessity requirement for ferry service, Wash. Rev. Code § 81.84.010(1); Wash. Admin. Code § 480-51-025(1); and (2) govern the application process for such a certificate, Wash. Rev. Code § 81.84.020; Wash. Admin. Code §§ 480-51-030, -040; *id.* §§ 480-07-300 to -498; *id.* §§ 480-07-800 to -885.

STATEMENT OF THE CASE

There is widespread uncertainty in the lower courts over the nature and scope of the rights of national citizenship protected by the Privileges or Immunities Clause of the Fourteenth Amendment. The result has been judicial paralysis: an unwillingness to rely on the clause, even to protect those rights of national citizenship that this Court expressly recognized in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

This case involves one such right: the "right to use the navigable waters of the United States." *Id.* at 79. For seventeen years, Petitioners Jim and Cliff Courtney have tried to exercise that right to operate a ferry on Lake Chelan, a 55-mile-long lake that the federal government has declared a navigable water of the United States. The State of Washington, however, imposes a "certificate of public convenience and necessity" requirement for ferry service on the lake. This requirement – which gives an existing ferry provider the power to veto new competition – has

resulted in a monopoly of ferry service that the same company has held since 1929. The state has prohibited all other applicants, including the Courtneys, from operating on this navigable water of the United States.

Relying squarely on *Slaughter-House*, the Courtneys challenged this scheme and the resulting monopoly under the Privileges or Immunities Clause. But in a decision that evinces the uncertainty and paralysis plaguing the lower courts, the Ninth Circuit affirmed the dismissal of their claim. It insisted that, with one limited exception, the clause does not protect "economic rights," App. 19 n.15, and it therefore concluded that the "right to use the navigable waters of the United States" is merely "a right to *navigate*" them – not to use them for a "professional venture." App. 17. Because the Courtneys' proposed use is "an activity driven by economic concerns," the court concluded, they could not state a claim. App. 18-19.

This Court should grant certiorari to begin resolving the widespread uncertainty over the nature and scope of rights protected by the Privileges or Immunities Clause and to determine whether this Court's jurisprudence tolerates the Ninth Circuit's exceedingly narrow interpretation of the clause.

A. Lake Chelan

Lake Chelan is a narrow, 55-mile-long lake in the North Cascades.[1] The city of Chelan lies at its southeast end; the unincorporated community of Stehekin, at its northwest end. Stehekin is a popular summer destination that draws Washington residents and visitors from outside the state. Stehekin and much of the northwest end of the lake are part of the Lake Chelan National Recreation Area (LCNRA). App. 4-5.

No roads lead to Stehekin or the LCNRA; both are accessible only by boat, plane, or foot. Lake Chelan thus provides a critical means of access to Stehekin and the LCNRA. The lake is a "navigable water of the United States." As the Corps of Engineers recognized in making that designation, the lake is presently, has been in the past, and may in the future be used for interstate commerce. App. 5; Compl. ¶¶ 17-20.

B. Ferry Regulation On Lake Chelan

Regulation of ferry service on Lake Chelan began in 1911, when Washington enacted a law addressing ferry safety issues and requiring reasonable fares. The law did not impose significant barriers to entry, and by the early 1920s, at least four ferries competed

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[1] The facts are taken from the Ninth Circuit's opinion, App. 1-29, and from the allegations in the Courtneys' complaint (ECF No. 1), which are assumed true, as this case was resolved on a motion to dismiss. *Haddle v. Garrison*, 525 U.S. 121, 125 (1998).

on the lake. In 1927, however, the Washington legislature eliminated competition by prohibiting anyone from offering ferry service without first obtaining a certificate declaring that the "public convenience and necessity" ("PCN") required it. App. 5.

Today, a PCN certificate is required to "operate any vessel or ferry for the public use for hire between fixed termini or over a regular route upon the waters within this state." Wash. Rev. Code § 81.84.010(1) (App. 52). An applicant must prove that its proposed service is required by the "public convenience and necessity," that it "has the financial resources to operate the proposed service for at least twelve months," and, if the territory is already served by a ferry, that the existing certificate holder: "has not objected to the issuance of the certificate as prayed for"; "has failed or refused to furnish reasonable and adequate service"; or "has failed to provide the service described in its certificate." *Id.* §§ 81.84.010(1), .020(1)–(2) (App. 52-53).

The Washington Utilities and Transportation Commission ("WUTC") notifies the would-be ferry provider's competitors – that is, "all persons presently certificated to provide service" – of the application. Wash. Admin. Code § 480-51-040(1) (App. 153-54). These existing providers, in turn, may file a protest with the WUTC. Wash. Admin. Code §§ 480-51-040(1) (App. 153-54); 480-07-370(1)(f) (App. 79). The WUTC then conducts an adjudicative proceeding, in which any protesting ferry provider may participate as a

party. Wash. Admin. Code §§ 480-07-300(2)(c), -305(3)(g), -340(3) (App. 58, 60, 67-68). The proceeding is akin to a civil lawsuit and involves discovery, motions, an evidentiary hearing, post-hearing briefing, and oral argument. Wash. Admin. Code §§ 480-07-375 to -498 (App. 79-128). The applicant bears the burden of proof on every element for a certificate.

This process is extraordinarily expensive. Because of its complexity and adjudicative nature, the applicant must hire an attorney or other professional, such as a transportation consultant, and may also require an economic expert. Compl. ¶ 39. As discussed below, even with this help, the application is sure to be denied.

C. Consequence Of The PCN Requirement

The WUTC identifies "protection from competition" as the "[r]ationale" for the PCN requirement, App. 20; Comp. ¶ 41, and history demonstrates that it operates in a protectionist manner. In October 1927, the year the PCN requirement was imposed, the state issued the first – and, to this day, only – certificate for ferry service on Lake Chelan. Since 1929, the certificate has been held by Lake Chelan Boat Company. At least four other applications have been made, but in each instance, Lake Chelan Boat Company protested and the state denied a certificate. App. 7 & n.2; Compl. ¶¶ 23, 42-43.

D. The Courtneys' Efforts To Provide An Alternative Service

Jim and Cliff Courtney are fourth-generation residents of Stehekin. They and their siblings have several businesses in the community, including a pastry shop, the Stehekin Valley Ranch (a ranch with cabins and a lodge house), and Stehekin Outfitters, which offers river outings and horseback riding. App. 5; Compl. ¶¶ 51, 53.

For years, Jim and Cliff listened as their customers complained about the inconvenience of Lake Chelan's lone ferry. Because of the infrequent runs the ferry makes and the times at which it makes them, many visitors must arrive a day early and stay overnight in Chelan to catch an early-morning boat to Stehekin. And day trips to Stehekin and the LCNRA are impracticable, because three hours is the most a visitor can spend there without staying overnight. Compl. ¶¶ 44-49.

Since 1997, Jim and Cliff have initiated four significant efforts to provide an alternative and more convenient service. They have been thwarted by the PCN requirement at every step.

First, in 1997, Jim applied for a certificate to operate a Stehekin-based ferry. Lake Chelan Boat Company protested the application. In August 1998, after a two-day hearing, the WUTC denied a certificate, finding that Lake Chelan Boat Company had not failed to provide "reasonable and adequate service" and that Jim's proposed service might "tak[e]

business from" the company. App. 7; Compl. ¶¶ 57-67. Jim incurred approximately $20,000 in expenses for the application. *Id.* ¶ 68.

Second, in 2006, Jim pursued a Stehekin-based, on-call boat service that he believed fell within a "charter service" exemption to the PCN requirement. Because many of the docks on the lake are federally-owned, he applied to the U.S. Forest Service for a permit to use them. Before it would issue the permit, the Forest Service sought to confirm that Jim's proposed service was, in fact, exempt. The Forest Service's district ranger wrote to the WUTC's executive director to get his opinion, and the Forest Service staff advised Jim that "[o]nce [the district ranger] has [the WUTC's] formal decision that no cert[ificate] is needed, . . . he will sign your permit." The WUTC's executive director, however, declined to provide an opinion and Jim was unable to launch the service. App. 7-8; Compl. ¶¶ 70-82.

Third, in 2008, while Jim was trying unsuccessfully to launch an on-call service, Cliff wrote to the WUTC's executive director describing certain other services he might offer and asking whether they would require a certificate. The first involved chartering a boat for patrons of Courtney-family businesses and offering a package with transportation on the chartered boat as one of the guests' options. The second involved Cliff's purchasing a boat and carrying his own patrons. The WUTC's executive director opined that both services would require a certificate. App. 8-9; Compl. ¶¶ 83-91.

Finally, Cliff contacted the governor and state legislators in early 2009 and urged them to eliminate or relax the PCN requirement. The legislature directed the WUTC to study and report on the regulatory scheme governing ferry service on Lake Chelan. The report, issued in 2010, recommended that there be no "changes to the state laws dealing with commercial ferry regulation as it pertains to Lake Chelan." App. 9; Compl. ¶¶ 92-94.

E. The Courtneys' Challenge To The PCN Requirement And The District Court's Dismissal

On October 19, 2011, Jim and Cliff filed this action in the Eastern District of Washington seeking declaratory and injunctive relief against the members and executive director of the WUTC, in their official capacities. Their complaint, brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201-2202, asserted that Washington's PCN requirement, as it applies to the operation of a ferry on Lake Chelan that is open to the public, abridges their "right to use the navigable waters of the United States" – a right the *Slaughter-House Cases* held the Privileges or Immunities Clause protects. 83 U.S. (16 Wall.) 36, 79 (1873).[2]

[2] The Courtneys asserted a second claim, challenging the PCN requirement as it applies to a boat transportation service solely for patrons of specific businesses. This claim, over which the lower courts exercised *Pullman* abstention, App. 22-29, is not at issue in this petition.

Significantly, the Courtneys did not challenge any health and safety regulations, such as vessel inspection or insurance requirements.

The WUTC moved to dismiss the complaint, and the district court granted the motion on April 17, 2012. App. 30-51. The district court opined that, despite this Court's decision in *Slaughter-House*, "there is reason to question whether the 'right to use the navigable waters of the United States' is truly a *recognized* Fourteenth Amendment right." App. 43. It further concluded that the Privileges or Immunities Clause was not "designed to protect quintessentially *economic* rights." App. 44. Finally, it determined that even if the right to use the navigable waters of the United States is protected, it does not encompass the right "to operate a commercial ferry service open to the public." App. 46.

F. The Ninth Circuit's Decision

The Courtneys appealed the district court's order. On December 2, 2013, the Ninth Circuit affirmed the dismissal of their claim. App. 1-22.

Like the district court, the Ninth Circuit questioned whether the Privileges or Immunities Clause truly protects the right to use the navigable waters of the United States. It "assume[d]," however, "that the examples of rights deriving from national citizenship set forth by the Supreme Court in the *Slaughter-House Cases* are not mere dicta." App. 15.

The Ninth Circuit then emphasized the uncertainty over the meaning of this Court's "reference to a 'right to use the navigable waters of the United States'" in *Slaughter-House*. App. 14. It noted that the "phrase . . . has yet to be interpreted by a single federal appellate court in the privileges or immunities context," and that, therefore, "the boundaries of the term 'use' have not been established." *Id.*

Drawing on its own Privileges or Immunities Clause jurisprudence, as well as non-Privileges-or-Immunities cases concerning ferries and a reference to "navigable waters" in the Northwest Ordinance, the Ninth Circuit adopted its own interpretation. Equating the term "use" with "navigate," it held that "a reasonable interpretation of the right to 'use the navigable waters of the United States,' and the one we adopt, is that it is a right to *navigate* the navigable waters of the United States." App. 17.

In so holding, the Ninth Circuit employed an extremely narrow interpretation of the Privileges or Immunities Clause. First, it insisted that the rights the clause protects – even "the rights incident to United States citizenship enunciated in the *Slaughter-House Cases*" – must be "narrowly construed." App. 19. Second, it drew a dichotomy between economic and non-economic rights of national citizenship and maintained that, with one exception – the right to travel at issue in *Saenz v. Roe,* 526 U.S. 489 (1999) – the clause protects only the latter. The Ninth Circuit viewed the absence of any other decisions from this Court protecting "economic rights" under the clause

as a "limitation" on a lower court's ability to protect such rights:

> *Saenz v. Roe* represents the Court's only decision qualifying the bar on Privileges or Immunities claims against the power of the State governments over the rights of [their] own citizens. . . . [*Saenz*] was limited to the right to travel[,] and . . . [t]he Court has not found other economic rights protected by [the Privileges or Immunities C]lause. We have made clear that this limitation on the Privileges or Immunities Clause remains in effect.

App. 19 n.5 (alterations in original; internal quotation marks and citations omitted).

With the Privileges or Immunities Clause and the "right to use the navigable waters of the United States" so narrowed, the Courtneys could not state a claim. "[I]t is clear that the Courtneys wish to do more than simply navigate the waters of Lake Chelan," the Ninth Circuit observed; "they claim the right to utilize those waters for a very specific professional venture." App. 17. "[T]he driving force behind this litigation," the court stressed, "is the Courtneys' desire to operate a particular business using Lake Chelan's navigable waters – an activity driven by economic concerns" – and a "narrow constru[ction]" of the rights protected by the clause is "particularly" warranted "with respect to regulation of intrastate economic activities." App. 18-19. Thus, the court concluded that "even if the Privileges or Immunities Clause recognizes a federal right 'to use the navigable

waters of the United States,' the right does not extend to protect the Courtneys' use of Lake Chelan to operate a commercial public ferry." App. 12.

REASONS FOR GRANTING THE PETITION

Although much of the debate and uncertainty surrounding the Privileges or Immunities Clause concerns whether the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), were correctly decided, there is equal uncertainty over the meaning of the decision itself. For although *Slaughter-House* clearly held that the clause protects only rights derived from national citizenship, the nature and scope of those rights have remained something of a mystery.

The "principal source of confusion" is the "ambiguous definition" and "list of federal privileges or immunities" set forth in *Slaughter-House*. Gerard N. Magliocca, *Why Did the Incorporation of the Bill of Rights Fail in the Late Nineteenth Century?*, 94 Minn. L. Rev. 102, 109-10, 137 (2009). The uncertainty engendered by the decision survived (and, in some ways, was compounded by) this Court's subsequent decisions in *Saenz v. Roe,* 526 U.S. 489 (1999), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). Although *Saenz* and *McDonald* are very different in one sense (*Saenz* involved a federal privilege; *McDonald* did not), they are very similar in another: both declined to provide substantive definition or

explication of the rights protected by the Privileges or Immunities Clause.

The result has been widespread uncertainty in the lower courts over the nature and scope of rights protected by the clause. This uncertainty, in turn, has resulted in judicial paralysis. Despite the clause's apparent vitality (evidenced by this Court's reliance on it in *Saenz*), lower courts refuse to rely on the clause or develop a jurisprudence under it until this Court clarifies what role – if any – the clause may play in modern constitutional jurisprudence. Rather than enforce the clause, these courts have denied relief by: construing the rights recognized in *Slaughter-House* extraordinarily narrowly, *e.g.*, *Pollack v. Duff*, ___ F. Supp. 2d ___, No. 10-0866, 2013 WL 3989089, at **6-7 (D.D.C. Aug. 6, 2013); and refusing to even consider whether the clause might protect rights other than those recognized in *Slaughter-House*, *e.g.*, *Chavez v. Arte Publico Press*, 204 F.3d 601, 608 (5th Cir. 2000). Why? Because "the Supreme Court has provided no guidance." *Id*.

The Ninth Circuit's decision reflects this uncertainty and paralysis. It involves one of the rights of national citizenship specifically enumerated in *Slaughter-House*: the "right to use the navigable waters of the United States." 83 U.S. at 79. In reducing this right to a mere "right to *navigate*" such waters, App. 17, the Ninth Circuit employed an exceedingly narrow interpretation of the Privileges or Immunities Clause, one far narrower than *Slaughter-House* requires or even allows. Specifically,

it (1) insisted that the rights of national citizenship recognized in *Slaughter-House* must be "narrowly construed" and (2) held that, with one exception, those rights must be construed as *non*-economic rights. App. 19 & n.5. *Slaughter-House*, however, imposes neither limitation, and the suggestion that economic rights are excluded from the clause's protection cannot be squared with this Court's protection of such a right in *Saenz*.

The Privileges or Immunities Clause must mean *something*, which is precisely why *Slaughter-House* enumerated a list of rights within the scope of its protection. The Ninth Circuit's decision, however, seems determined to limit the clause to near meaninglessness. Whether the clause is truly so hollow is an important question of federal law that should be, and can only be, settled by this Court.

This Court should accordingly grant certiorari to begin resolving the widespread uncertainty over the nature and scope of rights protected by the Privileges or Immunities Clause and to determine whether the Ninth Circuit's substantial narrowing of *Slaughter-House* is warranted. This case is the perfect vehicle for doing so, largely because of what this case is not: an attempt to overrule *Slaughter-House*. In *McDonald*, this Court was asked to overrule *Slaughter-House*. Here, on the other hand, it is asked to clarify and enforce a right recognized in *Slaughter-House*. Thus, the many concerns this Court expressed about revisiting the clause in *McDonald* are not present here.

Slaughter-House itself recognized that this Court would be called upon in future cases to further define the rights of national citizenship protected by the Privileges or Immunities Clause. 83 U.S. at 78-79. This is such a case. Jim and Cliff Courtney respectfully ask this Court to grant a writ of certiorari.

I. *Slaughter-House*, *Saenz*, And *McDonald* Have Engendered Widespread Uncertainty Over The Nature And Scope Of The Rights Of National Citizenship Protected By The Privileges Or Immunities Clause

This Court's decisions have engendered widespread uncertainty over what role, if any, the Privileges or Immunities Clause can play in protecting rights of national citizenship. This uncertainty originated in the *Slaughter-House Cases*, the seminal decision interpreting the clause, in which the Court proffered an ambiguous definition and list of the rights of national citizenship. This Court's subsequent decisions in *Saenz v. Roe* and *McDonald v. City of Chicago* declined to clarify the ambiguity, and the result has been substantial confusion over the nature and scope of those rights.

1. *Slaughter-House* adopted what is commonly regarded as a "narrow interpretation" of the Privileges or Immunities Clause. *McDonald*, 130 S. Ct. at 3029 (plurality). At issue was the constitutionality of a Louisiana law that forced New Orleans butchers to conduct slaughtering operations out of a single

slaughterhouse. The plaintiffs asserted that the law abridged the "right to exercise their trade" – a right protected, they claimed, by the Privileges or Immunities Clause. *Slaughter-House*, 83 U.S. at 60, 66.

This Court began its analysis by discussing the concerns that motivated the clause's framers – concerns that focused largely on the economic deprivations being inflicted on the newly-freed slaves. "Among the first acts of legislation adopted by several of the [Southern] States" after abolition, the Court noted, "were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property." *Id.* at 70. The Court catalogued some of the abuses suffered by the freedmen: (1) "[t]hey were in some States forbidden to appear in the towns in any other character than menial servants"; (2) "[t]hey were required to reside on and cultivate the soil without the right to purchase or own it"; and (3) "[t]hey were excluded from many occupations of gain." *Id.* "These circumstances," the Court observed, "forced upon the statesmen who had conducted the Federal government . . . through the crisis of the rebellion, and who supposed that by the thirteenth . . . amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection." *Id.* "They accordingly passed . . . the fourteenth amendment. . . ." *Id.*

With the framers' motives established, the Court discussed the nature of the rights the Privileges or

Immunities Clause protects. In so doing, it "dr[ew] a sharp distinction between the rights of federal and state citizenship," *McDonald*, 130 S. Ct. at 3028, and held that the clause protects only the former: rights that "owe their existence to the Federal government, its National character, its Constitution, or its laws," *Slaughter-House*, 83 U.S. at 79.[3] Despite the framers' concern for the economic condition of the freedmen, the Court held that the open-ended, natural right to economic liberty advanced by the plaintiffs was not protected by the clause, as it derives from state, not national, citizenship. *Id.* at 74-79.

The Court recognized that it would have to clarify the rights of national citizenship protected by the clause as future cases "ma[d]e it necessary to do so." *Id.* at 78-79. It nevertheless enumerated some of those rights. Most were, at least in part, economic in nature. They included:

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[3] This Court would not have to revisit *Slaughter-House*'s holding if it grants certiorari. As discussed below, the Courtneys' claim assumes *Slaughter-House* was correctly decided and simply seeks to enforce one of the rights of national citizenship it recognized. That said, the Courtneys, like most observers, believe *Slaughter-House* was wrong in its narrow view of the set of rights protected by the Privileges or Immunities Clause. *See* Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 Pepp. L. Rev. 601, 631 n.178 (2001) ("Virtually no serious modern scholar – left, right, and center – thinks that [*Slaughter-House*] is a plausible reading of the [Fourteenth] Amendment.").

- "free access to [the nation's] seaports, through which all operations of foreign commerce are conducted";
- the right "to come to the seat of government to . . . transact any business [a citizen] may have with it";
- "access . . . to the subtreasuries [and] land offices"; and
- the "right to use the navigable waters of the United States."

Id. at 79-80 (internal quotation marks and citation omitted).

2. *Slaughter-House* engendered immediate confusion about the scope of the Privileges or Immunities Clause. As Gerard Magliocca – biographer of John Bingham, the clause's principal architect – explained, the opinion provided an "ambiguous definition" of the rights of national citizenship, and the "list of federal privileges or immunities" set forth in the opinion was the "principal source of confusion." Magliocca, *supra*, at 109-10, 137. In fact, soon after the decision, John Norton Pomeroy, one of the era's preeminent constitutional scholars, stressed the need for the Court to clarify that aspect of its opinion:

> The decision made in the Slaughter-House Case[s] can hardly be regarded as final in giving a construction to the [Fourteenth] [A]mendment. . . .
>
> . . . [T]he questions which remain open all resolve themselves into this one: What

> particular rights and capacities are embraced within the privileges and immunities which belong to United States citizens?

John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* § 767 (Houghton, Mifflin & Co. 8th ed. 1885).

The uncertainty that followed the decision was substantially compounded by the length of time that lapsed before this Court relied on the Privileges or Immunities Clause in resolving a case. In fact, with one short-lived exception,[4] it would be 126 years before the Court relied on the clause. During that time, the clause was written off as "almost a dead letter." Case Note, *Constitutional Law – Privileges and Immunities* – Colgate v. Harvey, 15 Ind. L. Rev. 448, 449 (1940).

3. The eulogies for the clause, however, were premature, for in 1999 this Court "reawaken[ed]" its "privileges or immunities jurisprudence after more than a century of dormancy." Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future – or Reveal the Structure of the Present?*, 113 Harv. L. Rev. 110, 182 (1999). In *Saenz v. Roe*, the Court held that California's cap on welfare benefits for newly-arrived citizens violated

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[4] In 1935, the Court relied on the clause to invalidate a Vermont tax statute in *Colgate v. Harvey*, 296 U.S. 404 (1935), but it overruled *Colgate* five years later in *Madden v. Kentucky*, 309 U.S. 83 (1940).

the Privileges or Immunities Clause, as it abridged one of the rights of national citizenship enumerated in *Slaughter-House*: the right to "'become a citizen of any State of the Union by a *bonâ fide* residence therein, with the same rights as other citizens of that State.'" 526 U.S. at 503 (quoting *Slaughter-House*, 83 U.S. at 80).[5] This right, *Saenz* held, is a component of the broader right to travel, which "embraces the citizen's right to be treated equally in her new State of residence," including in the receipt of welfare benefits. *Id.* at 504-05.

"For those who may have thought that the Privileges or Immunities Clause of the Fourteenth Amendment was emptied of all content by the *Slaughter-House Cases*," Professor Tribe observed, *Saenz* was "a much-needed corrective reminder." Tribe, *supra*, at 129. The Court's decision suggested two significant things about the clause. First, it still has vitality. Second, even though *Slaughter-House* held that the clause does not protect the right to economic liberty per se, the rights of national citizenship that it *does* protect are, at least in part, economic rights. *See* Tim A. Lemper, *The Promise and Perils of "Privileges or Immunities*," 23 Harv. J.L. & Pub. Pol'y 295, 318-19 (1999) ("Justice Stevens's historical analysis in *Saenz* firmly roots the Fourteenth Amendment Privileges or Immunities Clause in a

[5] This right is from the same list that contained the "right to use the navigable waters of the United States." *See Slaughter-House*, 83 U.S. at 79-80.

tradition of economic and property rights."). "[T]he right of free movement," after all, is "basic to any guarantee of freedom of opportunity," *Edwards v. California*, 314 U.S. 160, 181 (1941) (Douglas, J., concurring), and welfare benefits are inherently economic in nature, *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) ("The administration of public welfare assistance . . . involves the most basic economic needs of impoverished human beings.").

Yet in clarifying that the Privileges or Immunities Clause is not a dead letter – that is, in holding that it protects at least *one* (seemingly economic) right of national citizenship – *Saenz* raised new questions. *See Merrifield v. Lockyer*, 547 F.3d 978, 983 (9th Cir. 2008) (noting *Saenz* "reopened a debate that many had considered foreclosed by the *Slaughter-House Cases*"). As with *Slaughter-House*, the questions concerned the nature and scope of rights protected by the clause, as *Saenz* "d[id] not address this issue head-on." Douglas G. Smith, *A Return to First Principles?* Saenz v. Roe *and the Privileges or Immunities Clause*, 2000 Utah L. Rev. 305, 330 (2000). Rather than "define 'privileges or immunities,' it merely held that the right to travel is encompassed by that definition." Gregory S. Wagner, Comment, *A Proposal for the Continued Revival of the Privileges or Immunities Clause of the Fourteenth Amendment: Invalidate the Alcohol Direct Shipment Laws*, 9 Geo. Mason L. Rev. 863, 886 (2001).

4. Eleven years later, in *McDonald v. City of Chicago*, this Court had the opportunity to dispel

some of the uncertainty that followed *Saenz*. But because *McDonald* involved an issue very different than the rights enumerated in *Slaughter-House*, the Court did not take the opportunity to clarify how those rights should be applied.

McDonald concerned whether and how the Second Amendment right to keep and bear arms is incorporated against the states. Petitioners' counsel in the case maintained that it is incorporated through the Privileges or Immunities Clause rather than the Due Process Clause, the traditional source of this Court's incorporation doctrine. 130 U.S. at 3028. Specifically, they argued that the right "is among the 'privileges or immunities of citizens of the United States' and that the narrow interpretation of the Privileges or Immunities Clause adopted in the *Slaughter-House Cases* should now be rejected." *Id.* (citation omitted).

This Court declined the invitation to overrule *Slaughter-House*. It recognized that "many legal scholars dispute the correctness of the narrow *Slaughter-House* interpretation," *id.* at 3029, but Justice Alito, writing for a four-justice plurality, saw "no need to reconsider that interpretation here." *Id.* at 3030 (plurality). The incorporation question, after all, could be resolved on settled due process grounds. *Id.* at 3030-31 (plurality). The plurality accordingly "decline[d] to disturb the *Slaughter-House* holding," *id.* at 3031, although it, like Justice Stevens in dissent, acknowledged the debate and confusion that

Slaughter-House had engendered. *See id.* at 3029-30; *id.* at 3089 (Stevens, J., dissenting).

Justice Thomas concurred in the judgment but would have held that "the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause." *Id.* at 3059 (Thomas, J., concurring). He viewed the case as "an opportunity to reexamine, and begin the process of restoring, the meaning of the Fourteenth Amendment agreed upon by those who ratified it." *Id.* at 3063 (Thomas, J., concurring).

Although *McDonald* clarified one aspect of the Privileges or Immunities Clause debate – that this Court is not prepared to overrule *Slaughter-House* – it did little to dispel the uncertainty over what role, if any, the clause should play in modern jurisprudence. The plurality and Justice Stevens seemed to recognize that "the full scope of the Privileges or Immunities Clause is unclear." Christian B. Corrigan, Comment, McDonald v. City of Chicago: *Did Justice Thomas Resurrect the Privileges or Immunities Clause from the Dead? (and Did Justice Scalia Kill it Again?)*, 60 U. Kan. L. Rev. 435, 458 (2011). But after the decision, it was no more apparent whether the clause would "draw continued discussion" in future cases, *id.*, or, rather, whether the "revival" begun in *Saenz* "ha[d] finally run its course." Jeffrey D. Jackson, *Be Careful What You Wish For: Why* McDonald v. City of Chicago*'s Rejection of the Privileges or Immunities Clause May Not be Such a Bad Thing for Rights*,

115 Penn. State L. Rev. 561, 603 (2011). In short, things were just as, if not more, uncertain in the wake of *McDonald* than they were in the lead-up to it.

II. The Uncertainty Over The Rights Protected By The Clause Has Left Lower Courts In A State Of Judicial Paralysis

The widespread uncertainty resulting from *Slaughter-House*, *Saenz*, and *McDonald* has flummoxed lower courts, which are left wondering what, if any, rights the Privileges or Immunities Clause actually protects. In the meantime, citizens are being denied the ability to invoke the clause even to protect those rights that *Slaughter-House* recognized.

1. Some courts – granted, few – view the clause as a vibrant and important source of constitutional protection. Shortly after *Saenz*, for example, the United States Bankruptcy Court for the Southern District of Georgia maintained that *Saenz* had "resuscitated" the clause and that it thus "remains a vital source of individual freedom and protection." *In re Wilson*, 258 B.R. 303, 310 (Bankr. S.D. Ga. 2001). The court went on to hold that the right to avail one's self of the bankruptcy laws is a right of national citizenship protected by the clause. *Id.* at 309-10; *see also In re Willis*, 230 B.R. 619, 623 (Bankr. E.D. Okla. 1999) ("The Bankruptcy Code has a vast number of privileges and immunities which are enforceable through the Fourteenth Amendment.").

Most courts, however, take a far more pessimistic view of the clause's continued vitality and evince a kind of judicial paralysis: a refusal to touch the clause or develop any jurisprudence under it until this Court provides further guidance. The Fifth Circuit, for example, declined to even resolve whether the right to "acquire and enforce a copyright" is a right of national citizenship protected by the clause, explaining that any "attempt to piggyback on *Saenz,* where the Supreme Court . . . provided no guidance for its 'modern' interpretation of the clause, asks more of this court than it should give." *Chavez*, 204 F.3d at 608. And in *Merrifield v. Lockyer*, the Ninth Circuit explained that unless a case involves the precise right to travel at issue in *Saenz*, a litigant may not rely on the clause for relief: "Given the *Slaughter-House Cases* limitation on the Privileges or Immunities Clause of the Fourteenth Amendment, we cannot grant relief based upon that clause unless the claim depends on the right to travel." *Merrifield*, 547 F.3d at 984.

Even in cases that arguably *do* involve the right to travel, the tendency has been to interpret the scope of that right extremely narrowly and simply dismiss the claim out of hand. For example, in *Lutz v. City of York*, 899 F.2d 255 (3d Cir. 1990), the Third Circuit refused to consider whether the clause might protect a right to travel intrastate, reasoning that, if protected at all, it must be through substantive due process:

> As the [Supreme] Court grew increasingly willing to discover unenumerated rights

> within the Fourteenth Amendment itself in the decades following *Slaughter–House*, it relied exclusively on the Due Process Clause. Plaintiffs therefore cannot rely on the Fourteenth Amendment Privileges and Immunities Clause, which has remained essentially moribund since *Slaughter–House* as the source of an implied fundamental right of intrastate travel.

Id. at 264 (footnote omitted).

Similarly, in *Pollack v. Duff*, the United States District Court for the District of Columbia addressed a challenge to a geographical restriction on applicants for certain jobs with the Administrative Office of the United States Courts. *See* ___ F. Supp. 2d at ___, 2013 WL 3989089*,* at *7. Relying on *Saenz*, the plaintiff alleged that the restriction abridged her right to travel. *Id.* at **6-7. The court rejected the claim because it did not fall squarely within the scenarios discussed in *Saenz*. *Id.* The court acknowledged that "*Saenz* . . . did not limit the components of the right to travel to the three examples it listed," yet the court refused to adopt an "'expansive'" interpretation of that right. *Id.* at *7; *see also Lines v. Wargo*, 271 F. Supp. 2d 649, 661 (W.D. Pa. 2003) (rejecting magistrate judge's finding of Privileges or Immunities violation: "[W]hile the majority opinion in *Saenz* is now binding precedent, Justice Rehnquist's dissent illustrates that there has been disagreement even as to which constitutional provisions are implicated by

the type of 'right to travel' claim presented in this case.").

In short, while some courts today view the Privileges or Immunities Clause as a viable protection for rights of national citizenship, most either: (1) refuse to rely on it absent further direction from this Court; or (2) recognize that it might have some minimal utility for protecting, at most, one limited aspect of the right to travel. Justice Gregory Kellam Scott lamented this judicial paralysis when *Romer v. Evans* was before the Colorado Supreme Court. *See Evans v. Romer*, 882 P.2d 1335, 1351-56 (Colo. 1994) (Scott, J., concurring). Justice Scott would have held Colorado's Amendment 2 unconstitutional under the Privileges or Immunities Clause because it abridged the right to petition the government, *id.* at 1351 – another right that *Slaughter-House* said is protected by the clause. 83 U.S. at 79 (listing the "right to . . . petition for redress of grievances" among those the clause protects). Other members of the court, however, were unwilling to rely on the clause. Justice Scott stated plainly the nub of the problem: "Courts have been reluctant to develop a working constitutional analysis under the Privileges or Immunities Clause since the *Slaughter-House Cases*. . . ." *Romer*, 882 P.2d at 1355 (Scott, J., concurring).

III. The Ninth Circuit's Decision Reflects The Widespread Uncertainty And Resulting Judicial Paralysis

The Ninth Circuit's decision in this case reflects the widespread uncertainty over the rights protected by the Privileges or Immunities Clause and the judicial paralysis that uncertainty has caused. In fact, the decision narrows *Slaughter-House*'s already narrow interpretation of the clause to the point of near meaninglessness. Thus, while this Court's jurisprudence suggests there is still work for the clause to do, the Ninth Circuit's decision ensures it will do none, unless and until this Court says otherwise.

1. In holding that the "right to use the navigable waters of the United States" is merely "a right to *navigate* the navigable waters of the United States," App. 17 – not to use them to operate a ferry or engage in other "economic activities," App. 19 & n.5 – the Ninth Circuit's decision substantially narrows the nature and scope of rights protected by the Privileges or Immunities Clause. It does so in two ways.

First, the decision insists that even "the rights incident to United States citizenship enunciated in the *Slaughter-House Cases*" must be "narrowly construed." App. 19. *Slaughter-House*'s interpretation of the Privileges or Immunities Clause, however, was narrow because it construed the set, or class, of rights protected by the clause – not the individual rights within that set – narrowly. *See McDonald*, 130 S. Ct.

at 3060 (Thomas, J., concurring) ("This Court's precedents . . . define the relevant collection of rights quite narrowly."); *State v. Cooper*, 301 P.3d 331, 334 (Kan. Ct. App. 2013) ("The *Slaughter-House Cases* decision has since been commonly construed as confining the Privileges or Immunities Clause to a narrow set of federal rights. . . ."). Nothing in *Slaughter-House* suggests that the rights of national citizenship that *do* fall within the clause's ambit must be construed narrowly.

Second, the Ninth Circuit's decision draws a dichotomy between economic and non-economic rights of national citizenship and maintains that, with one exception – the right to travel at issue in *Saenz* – the clause protects only the latter. According to the Ninth Circuit, the absence of any other decisions from this Court protecting "economic rights" under the clause is a "limitation" that precludes lower courts from recognizing such rights:

> *Saenz v. Roe* represents the Court's only decision qualifying the bar on Privileges or Immunities claims against the power of the State governments over the rights of [their] own citizens. . . . [*Saenz*] was limited to the right to travel[,] and . . . [t]he Court has not found other economic rights protected by [the Privileges or Immunities C]lause. We have made clear that this limitation on the Privileges or Immunities Clause remains in effect.

App. 19 n.5 (alterations in original; internal quotation marks and citations omitted).

In other words, the Ninth Circuit construes this Court's pre- and post-*Saenz* silence as an affirmative restriction on the ability of litigants to invoke, and courts to rely on, the Privileges or Immunities Clause to protect rights of national citizenship that happen to be economic in nature. It provides no explanation, however, as to *why* the clause would protect an economic right in one, and only one, instance. It likewise makes no effort to deal with the overwhelming historical record, discussed in *Slaughter-House*, *see* 83 U.S. at 70, that demonstrates the Fourteenth Amendment's congressional sponsors, as well as the ratifying public, "saw the 'privileges or immunities' clause as protecting . . . economic . . . rights." David T. Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866-68*, 30 Whittier L. Rev. 695, 698 (2009). To suggest the clause was *not* designed to protect economic rights – even if only those derived from national citizenship – is to deny history.

2. With the scope of the Privileges or Immunities Clause so narrowly confined, the Ninth Circuit had no trouble dispensing with the Courtneys' claim. Recognizing that "the boundaries of the term 'use'" in *Slaughter-House*'s "right to use the navigable waters of the United States" have "not been established," App. 14, the court applied its narrow view of the clause, along with an inaccurate and incomplete[6]

[6] The court, for example, ignored the distinction this Court has twice drawn between a state's legitimate "power to regulate"

(Continued on following page)

analogy to non-Privileges or Immunities Clause cases, to hold that the right to "use" is merely a right to "navigate." App. 17. The Courtneys could not state a claim under that construction of the right, the court said, because they "wish to do more than simply navigate the waters of Lake Chelan." *Id.* "[T]hey claim the right to utilize those waters for a very specific professional venture," and a "narrow constru[ction]" of the rights protected by the Privileges

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the ferry business and the illegitimate "power to license, and therefore to exclude from the business." *Mayor of Vidalia v. McNeely*, 274 U.S. 676, 680 (1927); *see also City of Sault Ste. Marie v. Int'l Transit Co.*, 234 U.S. 333, 339-40 (1914). It ignored case law explaining that "[t]he navigable waters of the United States, even when they lie exclusively within the limits of a state, are open to all the world" and "require[ ] no leave or license from a state." *People ex rel. Pa. R.R. Co. v. Knight*, 64 N.E. 152, 154 (N.Y. 1902), *aff'd*, 192 U.S. 21 (1904). It ignored this Court's holding that the Northwest Ordinance treated navigable waters as "highways equally open to all persons, without preference to any," and that it "prevent[ed] any exclusive use" or "monopoly" of them. *Huse v. Glover*, 119 U.S. 543, 547-48 (1886). It ignored the fact that two of the cases on which it relied – *Fanning v. Gregoire*, 57 U.S. 524 (1854), and *Conway v. Taylor's Executor*, 66 U.S. 603 (1862) – were effectively overruled. *See N.Y. Cent. & Hudson River R.R. Co. v. Bd. of Chosen Freeholders of Hudson Cnty.*, 227 U.S. 248, 261 (1913) (noting that the "theories" advanced in *Fanning* and *Conway* "are directly contrary to the ruling in . . . *Gloucester Ferry*," which "is now conclusive"). And it ignored Justice Bradley's observation in *Slaughter-House* that ferry monopolies were statutorily outlawed in England at the time of our Framing and that this proscription was "a part of th[e] inheritance which our fathers brought with them." *Slaughter-House*, 83 U.S. at 120 (Bradley, J., dissenting).

or Immunities Clause is "particularly" warranted when it comes to "intrastate economic activities" – that is, to "activit[ies] driven by economic concerns." App. 17, 18-19. Thus, "even if the Privileges or Immunities Clause recognizes a federal right 'to use the navigable waters of the United States,'" the court concluded, "the right does not extend to protect the Courtneys' use of Lake Chelan to operate a commercial public ferry." App. 12.

The Ninth Circuit's decision thus reduces the "right to use the navigable waters of the United States" to a right of recreational boating, and it ensures that the narrow set of rights of national citizenship recognized in *Slaughter-House* is effectively a null set. In short, it forecloses courts and litigants from relying in any meaningful way on the Privileges or Immunities Clause, "the central clause of Section 1" of the Fourteenth Amendment. Amar, *supra*, at 631 n.178.

IV. Only This Court Can Dispel The Uncertainty Resulting From *Slaughter-House* And Its Progeny, And This Case Is The Perfect Vehicle For Doing So

This Court should grant certiorari to clarify the uncertainty over the nature and scope of rights protected by the Privileges or Immunities Clause and resolve whether *Slaughter-House* and its progeny warrant – or even tolerate – the exceedingly narrow interpretation the Ninth Circuit gave those rights.

This case is the perfect vehicle for providing the "guidance for . . . interpretation of the clause" that lower courts are awaiting. *Chavez*, 204 F.3d at 608. Only with such guidance will those courts shed the paralysis that has beset them and "develop [the] working constitutional analysis under the Privileges or Immunities Clause" that Justice Scott called for in *Romer*. 882 P.2d at 1355 (Scott, J., concurring).

1. As noted above, ambiguity in *Slaughter-House* is the root cause of the uncertainty, and a writ of certiorari is appropriate to "resolve any ambiguity" in this Court's decisions – particularly those that "may not be models of clarity." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 278 (2002). As also noted above, *Slaughter-House* itself recognized the need for this Court to clarify the nature and scope of rights protected by the clause in future cases. 83 U.S. at 78-79.

Saenz was one such case, but it was not enough. It spoke only to one specific right of national citizenship and provided no guidance concerning the nature or scope of other rights the clause protects. Granting certiorari would allow this Court to properly analyze the history of the clause – especially its Reconstruction origins – in order to explain the nature and scope of at least another of the rights protected by it. That historical analysis, unfortunately, did not take place in *Saenz*. *See Saenz*, 526 U.S. at 527 (Thomas, J., dissenting) ("Although the majority appears to breathe new life into the Clause today, it fails to address its historical underpinnings or its place in our constitutional jurisprudence.").

The constitutional issues involved, moreover, are of the utmost importance. For while the Privileges or Immunities Clause is hardly the most invoked or, as interpreted by *Slaughter-House*, sweeping provision of the Constitution, it is "the central provision of the [Fourteenth] Amendment's § 1." Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 30 (2d ed. 1997). And although the rights of national citizenship that the clause protects may be few, those rights are of vital importance for ensuring that the full benefits of national citizenship are extended to all Americans, so that all Americans, in turn, can participate fully in the life – including the economic life – of the nation. The "scope of the Privileges or Immunities Clause," in short, is "a major question in constitutional law that should draw continued discussion." Corrigan, *supra*, at 458.

2. This case is the perfect vehicle for continuing that discussion, largely because of what it is not: *McDonald* redux. This Court gave several reasons for declining to reach the Privileges or Immunities issue in *McDonald*, including: (1) the lack of need to revisit the clause in that case; (2) stare decisis; (3) a lack of consensus concerning the clause's proper interpretation; and (4) fear of opening a Pandora's box. None of those concerns is present here.

Lack of need to revisit the clause. The primary reason this Court advanced for declining to reach the Privileges or Immunities issue in *McDonald* was that there was no need to reach it in that case, because the

Second Amendment could be incorporated through the already-recognized doctrine of substantive due process. *See McDonald*, 130 S. Ct. at 3030-31 (plurality). As Justice Scalia pointedly asked during oral argument, "[W]hy are you asking us to overrule 150, 140 years of prior law, when . . . you can reach your result under substantive due [process?]" Transcript of Oral Argument at 6:25–7:2, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521).

Here, on the other hand, there *is* a need to reach the Privileges or Immunities Clause, as it is that clause, *Slaughter-House* tells us, that protects the right to use the navigable waters of the United States. The Courtneys have been trying for nearly two decades to exercise that right, and the state-created monopoly on Lake Chelan has prevented them from doing so. Theirs is not some abstract, hypothetical complaint. It is a concrete, tangible injury – an injury redressable, if anywhere, in the Privileges or Immunities Clause.

Stare decisis. Another reason for this Court's reluctance to reach the Privileges or Immunities issue in *McDonald* was stare decisis. Simply put, the Court did not savor the prospect of up-ending a century and a half of precedent. *See, e.g.*, *id.* at 4:6-10 (statement of Roberts, C.J.) ("Of course, this argument is contrary to the Slaughter-House Cases, which have been the law for 140 years. . . . [I]t's a heavy burden for you to carry to suggest that we ought to overrule that decision."); *McDonald*, 130 S. Ct. at 3089 (Stevens, J., dissenting) ("The burden is severe for those who seek

radical change in such an established body of constitutional doctrine." (footnotes omitted)).

The Courtneys, however, are not asking this Court to up-end anything. To the contrary, they are asking the Court to *enforce* – not overrule – its precedent. Specifically, they are asking the Court to explain that one of the rights recognized in *Slaughter-House* has an economic dimension and that they have stated a claim for its abridgment. That is a far cry from *McDonald*, in which this Court was asked to overrule *Slaughter-House*.

Lack of consensus over proper interpretation of the clause. A third reason for this Court's reluctance to reach the Privileges or Immunities issue in *McDonald* was the lack of judicial and scholarly agreement over the clause's proper interpretation. As the plurality explained, there is no "consensus on that question among the scholars who agree that the *Slaughter-House Cases*' interpretation is flawed." *Id.* at 3030 (plurality); *see also id.* at 3089 (Stevens, J., dissenting).

That concern, again, is not present here. The Courtneys' claim assumes *Slaughter-House* was *correct* when it identified the "right to use the navigable waters of the United States" as among the rights protected by the Privileges or Immunities Clause. Should this Court grant review, it would only have to resolve whether that right is, at least in part, economic, such that it encompasses use of the navigable waters to run a ferry. That is a far narrower

question than the one in *McDonald*, and, as discussed above, there is a far greater consensus that the clause was understood to protect economic rights.

Opening a Pandora's box. A final reason for declining to reach the Privileges or Immunities issue in *McDonald* was that doing so might open a Pandora's box, unleashing a free-for-all in which judges would read all manner of previously unrecognized rights into the clause. In his dissent, for example, Justice Stevens worried that, because "'it has so long remained a clean slate, a revitalized Privileges or Immunities Clause holds special hazards for judges,'" whose "'proper task is not to write their personal views of appropriate public policy into the Constitution.'" *Id.* at 3089 (Stevens, J., dissenting) (citations omitted) (quoting J. Harvie Wilkinson, *The Fourteenth Amendment Privileges or Immunities Clause*, 12 Harv. J.L. & Pub. Pol'y 43, 52 (1989)).

That concern, too, is absent here, because the Courtneys are invoking a right that this Court has already *said* is protected by the Privileges or Immunities Clause. This case is thus akin to *Saenz*, which involved a component of the right to travel that *Slaughter-House* had included, alongside the right to use the navigable waters of the United States, within the ambit of the clause. *Saenz* certainly did not open a Pandora's box; it was resolved 15 years ago and there has been no flurry of Privileges or Immunities litigation in the intervening decade and a half. The fact is, the clause, by virtue of *Slaughter-House*'s interpretation, protects only a narrow class of rights

and nothing this Court is likely to do on certiorari would change that fact.

3. In short, "[w]hile instances of valid 'privileges or immunities'" may be "but few," *Edwards*, 314 U.S. at 183 (Jackson, J., concurring), the right to use the navigable waters of the United States is one. And while the Courtneys "do not ignore or belittle the difficulties of what has been characterized . . . as an 'almost forgotten' clause[,] . . . the difficulty of the task does not excuse us from giving these general and abstract words . . . [the] specific content and concreteness they will bear as we mark out their application, case by case." *Id.* This case presents the perfect opportunity for marking out their application in a cautious, incremental way. This Court should take that opportunity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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