No. 13-1064

IN THE

Supreme Court of the United States

JAMES COURTNEY AND CLIFFORD COURTNEY,

Petitioners,

v.

DAVID DANNER, CHAIRMAN AND COMMISSIONER OF THE WASHINGTON UTILS. & TRANSP. COMM'N, ET AL.,

Respondents.

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

BRIEF OF HISTORY AND LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are legal historians and scholars of constitutional law, all of whom have devoted significant attention to the Fourteenth Amendment's Privileges or Immunities Clause.

Amici have a strong interest in ensuring that this Court's jurisprudence reflects an accurate understanding of the historical context of the Fourteenth Amendment. *Amici* teach that history matters; that without history, law becomes inscrutable and lacks normative substance; and that courts cannot shape the values embodied in law into a shared narrative without a proper understanding of the origins of the legal provisions they apply.

Like the vast majority of scholars, *amici* believe the Court's decision in *The Slaughter-House Cases*, 83 U.S. 36 (1873), limiting the reach of the Privileges or Immunities Clause, reflects a profoundly erroneous understanding of history. *See*, *e.g.*, Brief for Constitutional Law Professors as Amici Curiae Supporting Petitioners at 3-4, *McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010); *cf.* Akhil R. 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 [*Slaugh-*

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[1] Counsel for all parties received notice of *amici*'s intent to file at least ten days before the filing date; the parties have consented to this filing. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

ter-House] is a plausible reading of the [Fourteenth] Amendment.").

Amici believe this case presents an opportunity to begin—in a cautious and restrained fashion—the process of correcting the mistake of *Slaughter-House*. Responding to the charge that it had eviscerated the Privileges or Immunities Clause, the *Slaughter-House* majority carefully preserved some scope for the provision. Yet the Ninth Circuit truncated even that remaining nub of constitutional protection, holding that the right to use the navigable waters recognized in *Slaughter-House* must be narrowly construed and generally does not apply to economic activity. This Court need only faithfully apply the holding of *Slaughter-House* to repudiate that cramped interpretation, and thus may use this case to affirm a proper historical understanding of the Privileges or Immunities Clause even while leaving in place existing precedent.

While *amici* believe the Ninth Circuit's failure to subject the infringement of petitioners' rights to proper constitutional scrutiny was error, *amici* do not take a position on whether the particular regulation challenged in this case is constitutional.

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SUMMARY OF ARGUMENT

In the early months of 1866, six senators and nine representatives met in Washington, DC to consider the Nation's future in the wake of the Civil War. Known as the Joint Committee on Reconstruction, this group of congressmen was responsible for the most significant change to the country's constitutional order since the enactment of the Bill of Rights seventy-five years before. The amendment that the Committee drafted, and the Nation adopted, secured to all citizens powerful new guarantees of liberty.

The Privileges or Immunities Clause was the linchpin of this transformation. With language commonly understood to encompass a rich tradition of natural liberty—tracing its origins through the Declaration of Independence to England's Magna Carta—that Clause was designed to provide meaningful new protection against the States. Congress understood that this was a significant change. Presenting the amendment to the Senate, Senator Jacob Howard declared, "The great object of the [Privileges or Immunities Clause] is . . . to restrain the power of the States and to compel them at all times to respect these great fundamental guarantees." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866).

The Supreme Court retreated from that original design in *The Slaughter-House Cases*, 83 U.S. 36 (1873), as four dissenting Justices recognized, *id.* at 129. Indeed, that decision has been accused of "strangling the privileges or immunities clause in its crib." Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1259 (1992). But the *Slaughter-House* majority was careful not to render the Clause a complete nullity. The Court enumerated a number of rights protected by

the Clause, including a right to use navigable federal waterways. 83 U.S. at 79. Because petitioners here challenge a state law prohibiting them from operating their business on navigable federal waters, their claim falls squarely within that preserve.

Yet the Ninth Circuit below refused to recognize even those aspects of the Privileges or Immunities Clause that *Slaughter-House* retained. Applying the same overarching historical narrative deployed in *Slaughter-House* to downplay still further the extent to which the Clause was intended to effect *any* significant change, the Ninth Circuit announced that the rights enumerated in *Slaughter-House* must be "narrowly construed" when applied to "economic activities." *Courtney* v. *Goltz*, 736 F.3d 1152, 1161 (9th Cir. 2013). The court thus held that the "economic rights protected by" the Clause are "limited to the right of travel," and that the right to use navigable federal waterways does not include the right to "utilize those waters for a very specific professional venture." *Id.* at 1160, 1161 & n.5 (internal quotation marks omitted).[2]

Certiorari is warranted to repudiate the Ninth Circuit's further evisceration of the Privileges or Immunities Clause. The Clause was drafted in response to widespread restrictions of economic liberty, including limitations on the economic activities of former slaves. And the framers of the Clause used language commonly understood to incorporate a long tradition of natural law rights, including the right to

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2 The Ninth Circuit acknowledged the economic dimension of the right to travel only because it was affirmed by this Court in *Saenz* v. *Roe*, 526 U.S. 489 (1999). *See* 736 F.3d at 1161 n.5.

pursue a lawful trade. The Ninth Circuit's removal of economic activity from the scope of the Clause cannot be reconciled with history demonstrating that economic freedom lay at the provision's core.

This case provides a particularly appropriate vehicle to begin, in a cautious and restrained fashion, the process of placing judicial interpretation of the Privileges or Immunities Clause on a proper historical foundation. This Court need not overrule *Slaughter-House* to reject the Ninth Circuit's analysis; the *Slaughter-House* decision nowhere suggests that economic activity is excluded from the Clause, and *Saenz* v. *Roe* in fact precludes that interpretive gloss. Yet, because the Ninth Circuit's fundamental disregard for history mirrors *Slaughter-House*, this case nonetheless presents an opportunity to correct the historical error perpetrated by the *Slaughter-House* majority. Simply by applying the holding of *Slaughter-House*, this Court would affirm that the Privileges or Immunities Clause must be interpreted in light of a correct understanding of the circumstances of its adoption.

Because the petition does not call on the Court to overrule *Slaughter-House*, moreover, it raises none of the concerns that led the Court to reject reliance on the Privileges or Immunities Clause in *McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010). Far from asking the Court to wipe clean the slate of precedent, the petition calls on the Court to *uphold* and *apply* its existing precedent in light of a proper understanding of the relevant history.

The Privileges or Immunities Clause is not a vestigial organ of our Constitution. It is binding law, and a central part of the transformation effected by the Fourteenth Amendment. By taking even the

smallest step to affirm that to be true, this Court will reject the odious suggestion that an unelected judiciary may vitiate protections secured to the People through amendment to the Constitution.

The petition for certiorari should be granted.

ARGUMENT

I. The Court Should Grant Certiorari To Uphold A Proper Historical Understanding Of The Privileges Or Immunities Clause.

This Court should grant certiorari to reject the Ninth Circuit's departure from the historical meaning and purpose of the Privileges or Immunities Clause. When the 39th Congress formed the Committee on Reconstruction, it was motivated in significant part by restrictions on the economic activities of former slaves. And when the Committee members drafted the Clause, they used language commonly understood to include protection for economic rights. This history cannot be squared with the Ninth Circuit's holding that the Clause must be "narrowly construed" when applied to "economic activities." *Courtney* v. *Goltz*, 736 F.3d 1152, 1161 (9th Cir. 2013).

A. The Privileges Or Immunities Clause Was Enacted In Response To Widespread Violations of Economic Rights.

Several strands came together, in the aftermath of the Civil War, to give rise to the Privileges or Immunities Clause. Each of these strands demonstrates the framers' concern for economic liberty.

1. Although the institution of slavery had been formally eradicated, Southern States by 1865 had begun the process of re-institutionalizing *de facto*

slavery through restrictive Black Codes, while simultaneously imposing draconian limitations on the rights of white Unionists. These laws focused overwhelmingly on eradication of economic rights intrinsic to a free labor system.

Despite grudgingly conceding that freed slaves were free, these laws deprived former slaves (and some white Unionists) of basic rights necessary to make freedom meaningful. *See generally Laws in Relation to Freedmen*, 39th Cong. 2d Sess., Sen. Exec. Doc. 6, 170-230 (1866) ("*Freedmen Laws*"). Some States substituted coerced labor contracts for the master-slave relationship. *See*, *e.g.*, *id.* at 176-77 (Florida), 181-83 (Louisiana), 190 (Maryland). Others created new forms of bondage out of old apprenticeship or vagrancy statutes. *See*, *e.g.*, *id.* at 170-72 (Alabama), 180-81 (Georgia), 190-92 (Mississippi). Others merely changed the word "slave" to "negro." *See*, *e.g.*, *id.* at 199 (North Carolina).

Under these laws, former slaves' economic activities were rigidly constrained. Freed slaves had virtually no freedom to contract for better wages; could not purchase land; and in some places could not even hunt, fish, or graze livestock. *See*, *e.g.*, 2 *Report of the Joint Committee on Reconstruction* 61, 218-19, 243 (1866); Eric Foner, *Reconstruction* 203 (1988). States used licensing systems and outright bans to deny freedmen and white Northerners access to professions. *See*, *e.g.*, Harold M. Hyman & William M. Wiecek, *Equal Justice Under Law* 319 (1982). In South Carolina, for instance, freedmen could not "pursue or practice the art, trade, or business of an artisan, mechanic, or shop-keeper, or any other trade, employment, or business (besides that of husbandry or that of a servant under a contract for ser-

vice or labor)" without a license from a judge. *Freedmen Laws*, *supra*, at 204, 215; *cf. id.* at 179 (Florida).

As word of the Black Codes spread, the Nation was repulsed by freed slaves' inability to own property or enter into business. *See*, *e.g.*, *Black Code of Mississippi*, Chicago Tribune, Dec. 1, 1865 at 2, col.2; David T. Hardy, *Original Popular Understanding of the 14th Amendment As Reflected in the Print Media of 1866-68*, 30 Whittier L. Rev. 695, 703-04 (2009). Nor were these concerns limited to freed slaves. Numerous members of the 39th Congress expressed concern that Southern States were "habitually and systematically den[ying]" the rights of white Unionists. Cong. Globe, 39th Cong., 1st Sess. 1263 (1866) (Broomall); *see*, *e.g.*, *id.* at 783 (Ward).

2. The Nation's repudiation of the Black Codes emanated from a rich tradition of natural law protection for economic rights. A few weeks before the 39th Congress assembled, House Speaker Schuyler Colfax invoked that tradition, declaring: "[T]he Declaration of Independence must be recognized as the law of the land . . . . [Free men] must be protected in their rights of person and property." Ovando J. Hollister, *Life of Schuyler Colfax* 271 (1886).

The connection between natural rights and economic liberty reflected the Founders' belief that a core purpose of government was to protect property rights. *See* James W. Ely, Jr., *"To Pursue any Lawful Trade or Avocation": The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 J. Const. L. 917, 929-33 (2006). A State denying citizens "free choice of their occupations," Madison warned, was "not a just government." *James Madison: Writings* 516 (Jack N. Rakove ed. 1999). Jeffer-

son agreed: "[E]very one has a natural right to choose that [vocation] which he thinks most likely to give him comfortable subsistence." 9 *The Writings of Thomas Jefferson* 505 (Henry A. Washington ed. 1857). Roger Sherman's early draft of the Bill of Rights thus affirmed the "natural right[ ]" of "acquiring property." Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 Harv. J. L. & Pub. Pol'y 5, 6 (2012). Numerous state constitutions likewise secured the right to acquire, possess, and protect private property. *See id.* at 6-7 (assembling provisions).

The views of Republicans like Speaker Colfax also reflected influence from abolitionists, who had critiqued slavery in part as an abridgement of economic rights. *See*, *e.g.*, Michael K. Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 42-46 (1986). The crucial contribution of abolitionists to this tradition was to theorize *national* citizenship as a source of natural law rights enforceable against the States. *See* Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. Legal Analysis 165, 254-55 (2011). Lysander Spooner, for instance, argued that national citizenship secured "those acquisitions of property, privilege, and claim, which men have a *natural* right to make by labor and contract." *See* Lysander Spooner, *The Unconstitutionality of Slavery* 6 (1856).

After the Civil War, Congress sought to enshrine protection for economic liberty in the Nation's laws. *See* Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 Stan. L. Rev. 379, 411-20 (1988). Following Speaker Colfax's exhortation, other Republicans agreed that, in order to be free, a

man must be able to "go where he pleases, [and] work when and for whom he pleases." Cong. Globe, 39th Cong., 1st Sess. 111 (1866) (Wilson); *see also, id.* at 475 (Trumbull); *id.* at 504 (Howard); *id.* at 602 (Lane); *id.* at 1151 (Thayer). Indeed, while there was disagreement over whether emancipation conveyed political or social rights, it was "not in dispute" that former slaves must possess *at least* economic freedom. Herman Belz, *Emancipation and Equal Rights* 116 (1978). Of all the "civil rights" that Congress sought to secure, economic rights were foundational. *See*, *e.g.*, Hyman & Wiecek, *supra*, at 395-400.

Congress's determination to make national citizenship a source of protection for civil rights—including economic rights—was "revolutionary." Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War*, 92 Am. Hist. Rev. 45, 47-55 (1987). Nonetheless, this program of reform enjoyed strong popular support. The *Chicago Republican* proclaimed Speaker Colfax's speech advocating such reform "the universal sentiment of the people," while even the moderate *New York Times* endorsed the platform as "sound, patriotic, and safe." Hollister, *supra*, at 272-73.

3. The final impetus for the Privileges or Immunities Clause developed midway through the 39th Congress, as members of Congress began to doubt that lasting reform could be accomplished by statute alone. The Privileges or Immunities Clause thus constitutionalized protections—largely economic in nature—previously provided by federal statute.

The cornerstone of that statutory program was the Civil Rights Act of 1866. That law protected economic rights, including "to make and enforce con-

tracts" and to the "full and equal benefit of all laws and proceedings for the security of person and property." Civil Rights Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27. Senator Trumbull, who authored the Act, saw Congress as securing natural rights, especially economic liberty. Cong. Globe, 39th Cong., 1st Sess. 474 (1866). He thus presaged the Bill by noting, "It is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell." *Id.* at 43 (1865). Congressman Lawrence similarly deemed it a "mockery" that a man had a right to live, but was denied "the right to make a contract to secure the privilege and the rewards of labor." *Id.* at 1833 (1866).

Members of Congress worried that these protections would prove ephemeral absent a strong constitutional foundation. Statutory reforms would be vulnerable to repeal after Southern States rejoined the Union. *See*, *e.g.*, Garrett Epps, *Democracy Reborn* 164-83 (2006). Moreover, arguments for the constitutionality of the Civil Rights Act rested on contested assumptions about the enforcement provisions of the Thirteenth Amendment. Curtis, *No State*, *supra*, at 77-81. The Committee on Reconstruction accordingly concluded that a constitutional amendment was needed to "determine the civil rights and privileges of all citizens." S. Rep. No. 39-112, at 15 (1866).[3]

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[3] Notably, waterways were a significant "source of income and a marketplace" for freedmen. Dylan C. Penningroth, *The Claims of Kinfolk* 64 (2003). African Americans "stood at [the] center" of the "distinctive maritime society" that existed on waterways. David S. Cecelski, *The Waterman's Song* 136 (2001). Slaves and freedmen operated so many ferries, freights, and

[Footnote continued on next page]

B. The Text And History Of The Privileges Or Immunities Clause Demonstrate That It Safeguards Economic Rights.

The provision that emerged from this crucible prohibits state laws that "abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1. That language was undoubtedly understood to confer constitutional protection for natural rights—including basic economic rights.

From Colonial times, the words "privileges" and "immunities" had been interchangeable with "rights" and "liberties." Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. Rev. 1071, 1094-1132 (2000). The language of the Clause thus encompassed not just the protections of the Civil Rights Act of 1866, but also natural law rights. *See*, *e.g.*, Cong. Globe, 39th Cong., 1st Sess. 2459 (1886) (Stevens). Members of Congress understood the phrase "privileges or immunities of citizens of the United States" to cover these well-understood natural rights. *See*, *e.g.*, *id.* at 1117 (Wilson) ("absolute rights"); *id. at* 2542 (Bingham) ("inborn rights").

The Privileges or Immunities Clause, moreover, was modeled after the Privileges and Immunities Clause of Article IV, which had long been understood to encompass natural law rights—including economic

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[Footnote continued from previous page]
boats that "locals and outsiders alike came to think of boating as an occupation conducted by blacks." Melvin Patrick Ely, *Israel on the Appomattox* 156 (2004).

liberties. In *Corfield* v. *Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823), Justice Bushrod Washington famously defined the "Privileges and Immunities" protected by Article IV as "fundamental principles" that "belong, of right, to the citizens of all free governments." *Id.* at 551-52. Echoing the commonplace formulation in state constitutions, *supra* 10, Justice Washington included in his list the rights to "the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety." 6 F. Cas. at 551-52. Members of Congress repeatedly cited *Corfield* as authority identifying privileges or immunities protected by the Clause. *See*, *e.g.*, Cong. Globe, 39th Cong., 1st Sess. 475 (Trumbull); *id.* at 2765 (Howard); *cf. id.* at 1117-18 (Wilson).

Against this backdrop, the phrase "privileges or immunities of citizens of the United States" would have been readily understood to encompass economic freedom. *See* Ely, *To Pursue*, *supra*, at 932; *cf.* Barnett, *Economic Liberty*, *supra*, at 10. Indeed, "[t]he framers [of the Fourteenth Amendment] . . . were unequivocal in declaring that the natural rights to life, liberty, *and property*, and rights incidental to these, were the rights of U.S. citizenship that they intended to secure." Kaczorowski, *To Begin The Nation Anew*, *supra*, at 55 (emphasis added).

No member of the 39th Congress doubted that the Privileges or Immunities Clause "protect[ed] basic common law rights of property and contract." William E. Nelson, *The Fourteenth Amendment* 163 (1988). Representative Howard, for example, stated that the Clause would protect the "right to acquire and possess property of every kind" and "to reside in any other state, for purposes of trade, agriculture,

professional pursuits, or otherwise." Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866) (quotation omitted); *see also id.* at 2459 (Stevens); *cf.* Cong. Globe, 35th Cong., 2d Sess. 985 (1859) (Bingham).

These protected economic liberties included the right to pursue a lawful trade. Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 Geo. Wash. L. Rev. 1241, 1250-51 (1998). Monopolies had been "repugnant to the spirit of American republicanism" from the Founding. Gordon Wood, *The Radicalism of the American Revolution* 319 (1992). Laws conferring monopolies had historically been subjected to special scrutiny, on the theory that such legislation deprived citizens of the enjoyment of their property. *See*, *e.g.*, Ely, *To Pursue*, supra, at 930-31; Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207, 227-31, 263 (2003). Senator Trumbull thus observed that, because "the principle of our Government is that of equal laws and freedom of industry," there was "no room for favored classes or monopolies" or any other deprivation of basic economic rights. Cong. Globe, 39th Cong., 1st Sess. 322 (1866) (quotation omitted).

* * *

This history flatly contradicts the Ninth Circuit's refusal to apply the right to "use" navigable federal waters to petitioners' intended use of the waters for economic activity. The framers of the Privileges or Immunities Clause did not act to secure the right to "use" the navigable waters only for yacht racing, sport fishing, or pleasure cruises. The framers acted to safeguard, at the least, citizens' right to practice their chosen trade free from undue government restriction—the same right that petitioners seek to vindicate here.

II. This Case Provides An Ideal Vehicle To Affirm The Historical Meaning Of The Privileges Or Immunities Clause.

Because the errors committed by the *Slaughter-House* majority and the Ninth Circuit below are at once similar and different, this case presents a unique opportunity to repudiate the historical narrative of *Slaughter-House*—and to vindicate the Fourteenth Amendment—while nonetheless leaving in place that decision's specific holding. The Court should take this opportunity to affirm a proper understanding of the Privileges or Immunities Clause.

A. Without Overruling *Slaughter-House*, This Court May Repudiate The Historical Narrative Adopted By That Decision.

Although the petition does not call on the Court to overrule *Slaughter-House*, it does provide an opportunity to correct the profoundly mistaken historical narrative adopted by the *Slaughter-House* Court and extended by the Ninth Circuit below.

1. Far from flowing directly from *Slaughter-House*, the Ninth Circuit's opinion in fact conflicts with that decision, as well as this Court's subsequent decision in *Saenz* v. *Roe*, 526 U.S. 489 (1999).

Slaughter-House drew a distinction between "privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such," and concluded that the natural law rights that the framers had intended to protect "must rest . . . where they have heretofore rested"—*i.e.*, with the States. 83 U.S. 36, 75 (1873). Evidently unwilling to render the Clause a complete nullity, however, the Court enumerated several privileges of national citizenship protected under its in-

terpretation, including the right "to use the navigable waters of the United States." *Id.* at 79.

The Court in *Slaughter-House* never suggested that economic activity was excluded from the scope of these national privileges or immunities, and in fact enumerated many rights that plainly encompass economic activity. These include the "right of free access to its seaports" to conduct foreign commerce; the right of "free access" to "subtreasuries" maintained by the federal government to perform functions of a central bank; the right to travel through a State, for whatever purpose; the right "to demand the care and protection of the Federal government over [one's] . . . property when on the high seas or within the jurisdiction of a foreign government"; and the right not to be forced to labor without pay. 83 U.S. *at* 79-80 (emphasis added). The economic orientation of so many of these rights precludes the Ninth Circuit's holding that the Clause must be "narrowly" applied to economic activity.

Indeed, this Court's decision in *Saenz* is flatly inconsistent with the Ninth Circuit's approach. The *Saenz* Court applied the right to travel recognized by *Slaughter-House* to invalidate a restriction on the payment of welfare benefits to new residents of a State—a plainly "economic" concern. *See* 526 U.S. at 492; *cf. Supreme Court of N.H.* v. *Piper*, 470 U.S. 274, 281 n.10 (1985) (holding that the Privileges and Immunities Clause of Article IV protects the right to practice a trade); *Baldwin* v. *Mont. Fish & Game Comm'n*, 436 U.S. 371, 387-88 (1978) (holding that economic activities receive greater protection under the Privileges and Immunities Clause than non-economic activities).

2. While the petition accordingly does not ask this Court to overrule *Slaughter-House*, it nonetheless provides an opportunity to repudiate the historical narrative adopted in that decision.

Both the *Slaughter-House* majority and the Ninth Circuit below obscured the extent to which the Privileges or Immunities Clause was intended to recognize new federal protections against state infringement of certain fundamental rights. In *Slaughter-House*, the majority rejected that evident purpose on the ground that the amendment's framers could not have intended so "great a departure" from the status quo. 83 U.S. at 77-78. This narrative of continuity allowed the majority to turn the Clause on its head: While the framers intended to protect the rights laid out by Justice Washington in *Corfield*, *supra* 13-14, the Court in *Slaughter-House* determined that the *Corfield* privileges were privileges of state citizenship and therefore *excluded* from protection. 83 U.S. at 76-77.

The Ninth Circuit below similarly emphasized continuity over change. Observing that "the regulation of ferry operation has traditionally been the prerogative of state and local authorities," the Ninth Circuit found it "exceedingly unlikely" that the right to use the navigable waters would "divest the states of their historic authority to regulate public transportation on intrastate navigable waterways." 736 F.3d at 1160-61. On this basis, the Ninth Circuit gave considerable weight to pre-Civil War Commerce Clause cases construing the scope of the States' ability to regulate ferry crossings. *See id.* at 1159-60.

This overriding narrative—downplaying the extent to which the framers of the Privileges or Immunities Clause intended to effect *any* significant

change—warps the historical record. *See*, *e.g.*, William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 Cal. W. L. Rev. 227, 259-61 (1988). For the framers, the entire purpose of the Clause was to provide a national guarantee for civil liberties, including economic rights. Yet *Slaughter-House* returned to the States exclusive control over the very rights the Black Codes had violated. And the Ninth Circuit extended this narrative of continuity still further to exclude from the Clause the very economic rights that the framers acted to protect. While the Ninth Circuit's decision misapplies and conflicts with *Slaughter-House*, its central error is therefore ultimately the same.

B. By Correcting The Ninth Circuit's Error, This Court Would Vindicate A Proper Understanding Of The Privileges Or Immunities Clause.

Precisely because the *Slaughter-House* majority and the Ninth Circuit below employed the same narrative of continuity, the petition in this case affords an opportunity to begin undoing the harm perpetrated by *Slaughter-House*. Even while leaving *Slaughter-House* in place—and thus avoiding the risks that accompany departure from stare decisis—this Court may affirm that the Clause was not drafted as a dead letter. And, by affirming that the Clause provides meaningful protection for economic rights—even within the limited scope preserved by *Slaughter-House*—this Court may take at least a preliminary

step towards placing the jurisprudence of the Clause on a proper historical foundation.[4]

This task is worth the effort. The Privileges or Immunities Clause emerged from a generation of struggle; it codified a theory of national citizenship in order to ensure that the rights gained through the bloodshed of war would not be infringed by future generations. That intention should not be allowed to recede to a historical footnote.

1. First, this Court should affirm the historical understanding because it is faithful to the original meaning of the Fourteenth Amendment. *See McDonald*, 130 S. Ct. at 3063 (Thomas, J., concurring in part and concurring in the judgment). Scholars overwhelmingly agree that *Slaughter-House* departed from the original meaning. *E.g.*, Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughter-House Cases, 70 Chi.-Kent L. Rev. 627, 627 (1994). As historian Eric Foner remarks, "the Court's [holding] should have been seriously doubted by anyone who read the Congressional debates of the 1860s." Foner, *Reconstruction*, *supra*, at 530; *see also*, *e.g.*, Josh Blackman & Ilya Shapiro, *Keeping*

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[4] In order to reverse the Ninth Circuit's determination that operation of a ferry falls outside the scope of the Clause, the Court need not take a position on whether the specific regulation at issue would satisfy constitutional scrutiny. Even those rights secured by the Clause may be subject to "reasonable regulation." *Slaughter-House*, 83 U.S. at 119 (Bradley, J., dissenting); *see also id.* at 114 (States may regulate privileges or immunities to "prescribe the manner of their exercise, but . . . cannot subvert the rights themselves").

Pandora's Box Sealed, 8 Geo. J. of L. & Pub. Pol'y 1, 10-11 (2010).

The four dissenting Justices also vigorously contested the *Slaughter-House* majority's suggestion that its decision was a product of recent history "free from doubt," 83 U.S. at 68. Writing for all the dissenters, Justice Field contended that the very consequences that worried the majority were "so intended" by the framers. *Id.* at 89. Justice Swayne likewise stated that the framers "deliberately" ensured that "ample protection [be] given against wrong and oppression." *Id.* at 129. Far from focusing on continuity, the dissenting Justices emphasized the framers' intent to "place the common rights of American citizens under the protection of the National government." *Id.* at 93 (Field, J., dissenting); *see also id.* at 116 (Bradley, J., dissenting). The amendment formed "a new departure" and "mark[ed] an important epoch in the constitutional history of the country." *Id.* at 125 (Swayne, J., dissenting).

The dissenting Justices recognized that the "common rights" protected by the Clause encompassed the "right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons." 83 U.S. at 97 (Field, J., dissenting). "All monopolies in any known trade or manufacture are an invasion of th[is] privilege[]." *Id.* at 101; *see also id.* at 122 (Bradley, J., dissenting). This was not just one privilege of national citizenship; it was the most "essential and fundamental" of privileges (*id.* at 119 (Bradley, J., dissenting)), "next in importance" only to life and liberty (*id.* at 127 (Swayne, J., dissenting)).

The framers of the Privileges or Immunities Clause likewise recognized *Slaughter-House*'s error.

George Boutwell, a member of the Committee on Reconstruction, pronounced the decision "a great mistake." Cong. Record, 43d Cong., 1st Sess. 4116 (1874). Another member of the 39th Congress protested, "that is not law and cannot be law." *Id.* at 4148 (Howe). Yet another recollected that Congress had "[u]ndoubtedly" believed the Amendment had "far greater scope." 2 James G. Blaine, *Twenty Years of Congress: From Lincoln to Garfield* 419 (1886).

2. The mistake of *Slaughter-House* is also worth correcting because of its place within a larger historical narrative that has undermined the values of liberty that the framers sought to preserve. The skepticism of the *Slaughter-House* majority towards the Privileges or Immunities Clause mirrored the public's growing fatigue with Reconstruction. *See*, *e.g.*, Hyman & Wiecek, *supra*, at 475-80. After nearly seven years, budget shortages and practical realities—including Presidential obstruction, state intransigence, and Klan violence—had made the prospect of continued civil rights enforcement unappealing. *See id.* at 439-72; *see also* Robert J. Kaczorowski, *The Politics of Judicial Interpretation* 87-89 (2005). Even prominent supporters of civil rights weakened in their resolve. *Compare*, *e.g.*, Cong. Globe, 42d Cong., 1st Sess. 576 (1872) (Trumbull) *with* Cong. Globe, 39th Cong., 1st Sess. 500 (1866) (Trumbull). Championing civil rights had become a political liability. Hyman & Wiecek, *supra*, at 439-40, 472.

Slaughter-House then catalyzed further retreat, galvanizing Southern Democrats and encouraging observers disaffected by Reconstruction policies. Kaczorowski, *Judicial Interpretation*, *supra*, at 134-35; Foner, *Reconstruction*, *supra*, at 533. The editor of

the *Chicago Tribune*, for instance, hoped the decision would put "a quietus upon the thousand-and-one follies seeking to be legalized" under the Fourteenth Amendment. *New Orleans Abattoir Decision*, Chicago Daily Tribune, Apr. 19, 1873 at 4. And indeed, the Civil Rights Act of 1875 would be Congress's last foray into civil rights for over eighty years.

Relying on the narrative of continuity first propagated in *Slaughter-House*, subsequent decisions from this Court helped institutionalize Jim Crow. *See* Hyman & Wiecek, *supra*, at 487-507. Called upon to decide whether the Fourteenth Amendment incorporated the Bill of Rights, the Court echoed *Slaughter-House*, insisting that protection of those rights "was originally assumed by the States; and it still remains there." *United States* v. *Cruikshank*, 92 U.S. 542, 555 (1875). Then, confronted with institutionalized segregation, the Court concluded that, "in the nature of things," the Fourteenth Amendment "could not have been intended to abolish distinctions based upon color." *Plessy* v. *Ferguson*, 163 U.S. 537, 544 (1896), *overruled by Brown* v. *Bd. of Educ.*, 347 U.S. 483 (1954). Segregationist laws had been "generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power." *Id.* Separate but equal thus resonated with the words of the *Slaughter-House* majority: that the framers of the Fourteenth Amendment could not possibly have contemplated "so great a departure from the structure and spirit of our institutions." 83 U.S. at 78.

Although many steps have been taken to restore the original meaning of the Fourteenth Amendment, the legacy of *Slaughter-House* continues to haunt the Nation's jurisprudence. *See* Hyman & Wiecek, *su-*

pra, at 487-89; Barnett, *Economic Liberty*, *supra*, at 11-12. Constitutional protections for individual rights—properly located in the Privileges or Immunities Clause—have had to be justified through the back door of "substantive" due process. And a lack of attention to the historical origins of these protections has undermined many rights, including the right to earn a living at issue in this case. This gap between the text of the Fourteenth Amendment and the Court's jurisprudence strains the public's understanding and ultimately undermines the credibility of the Fourteenth Amendment's guarantee of liberty.

3. Finally, the historical narrative of *Slaughter-House* is worth correcting for the simple reason that history has "real consequences for how we think about . . . society." Eric Foner, *The Supreme Court and the History of Reconstruction—and Vice-Versa*, 112 Colum. L. Rev. 1585, 1605 (2012).

As historian William Wiecek has explained, this Court has the unique power to "*declare* history: that is, to articulate some understanding of the past and then compel the rest of society to conform its behavior to that understanding." Wiecek, *supra*, at 227-28. This Court's decisions "help to legitimate some interpretations and to marginalize others." Foner, *Supreme Court*, *supra*, at 1604.

Simply by rejecting the cramped and ahistorical decision of the Ninth Circuit, while leaving the specific holding of *Slaughter-House* undisturbed, this Court may exercise that power to vindicate the historical understanding of the Privileges or Immunities Clause. The Clause was enacted as one of our Nation's great bulwarks of liberty—a constitutional innovation no less significant than the system of enumerated and separated powers fashioned in Phila-

delphia, or the Bill of Rights adopted thereafter. That milestone of history should not be regarded as a dead end.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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