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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES COURTNEY and CLIFFORD COURTNEY, Plaintiffs, v. JEFFREY GOLTZ, et al., Defendants.	No. 11-cv-00401-LRS PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS **ORAL AGRUMENT REQUESTED**

This case is a challenge to Washington statutes and regulations requiring a certificate of "public convenience and necessity" ("PCN") to operate a ferry on Lake Chelan. The PCN requirement—which gives existing ferry providers a veto over new competition—has resulted in a monopoly of ferry service on the lake since 1927. By barring new entrants, including Plaintiffs Jim and Cliff Courtney, the PCN requirement abridges the "right to use the navigable waters of the United States," a right protected by the Privileges or Immunities Clause of the 14th Amendment. The Courtneys' complaint states a claim for abridgement of this right and the Washington Utilities and Transportation Commission's motion to dismiss should therefore be denied.

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I. FACTS

A. LAKE CHELAN

Lake Chelan is a narrow, 55-mile long lake in the North Cascade Mountains. The city of Chelan is located at the southeast end of the lake, and the unincorporated community of Stehekin is located at its northwest end. ECF No. 1 at 5 (¶¶ 13-15). Stehekin has long been a popular summer destination, drawing Washington residents and visitors from outside the state. ECF No. 1 at 5 (¶ 15).[1] Stehekin and much of the northwest end of the lake are located in the Lake Chelan National Recreation Area (LCNRA). ECF No. 1 at 5 (¶ 16).

No roads lead to Stehekin or the LCNRA; they are accessible only by boat, plane, or foot. Lake Chelan thus provides a critical means of access to Stehekin and the LCNRA. ECF No. 1 at 5, 6 (¶¶ 15, 18). The lake is designated a "navigable water of the United States" by the Corps of Engineers and, as the Corps recognized in making the designation, is presently, has been in the past, and may in the future be used for interstate commerce. ECF No. 1 at 6 (¶¶ 17, 19).

B. FERRY REGULATION ON LAKE CHELAN

Regulation of ferry service on Lake Chelan began in 1911, when the Washington legislature enacted a law addressing safety issues and requiring that fares be reasonable.

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[1] *See also* Wash. Utils. & Transp. Comm'n, *Appropriateness of Rate and Service Regulation of Commercial Ferries Operating on Lake Chelan* 3-4 (Jan. 14, 2010).

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The law did not impose significant barriers to entry, and by the early 1920s, there were at least four competing ferries on the lake. ECF No. 1 at 6 (¶ 21). In 1927, however, the legislature effectively eliminated such competition by passing a law prohibiting anyone from offering ferry service without first obtaining a certificate declaring the "public convenience and necessity" required it. ECF No. 1 at 6 (¶ 22).

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); ECF No. 1 at 7 (¶ 25). The 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 in which the applicant would like to operate 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." Wash. Rev. Code § 81.84.010(1), .020(1), (2); ECF No. 1 at 10-11 (¶¶ 34-36).

The Washington Utilities and Transportation Commission (WUTC) provides notice of the application to the would-be ferry provider's competitors—that is, to "all persons presently certificated to provide service" and "any common carrier which might be adversely affected." Wash. Admin. Code § 480-51-040(1); Wash. Rev. Code § 81.84.020(1); ECF No. 1 at 8-9 (¶ 28). These existing providers, in turn, may file a protest with the WUTC. Wash. Admin. Code § 480-51-040(1); *id.* § 480-07-370(f); ECF

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No. 1 at 9 (¶ 29). The WUTC then conducts an adjudicative proceeding, and any protesting ferry provider may participate as a party. Wash. Admin. Code §§ 480-07-300(2)(c), -305(3)(e), (g), -340(3); ECF No. 1 at 9 (¶¶ 30-31). 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 -385; 480-07-390 to -395; 480-07-400 to -425; 480-07-440 to -495; 480-07-498; ECF No. 1 at 9-10 (¶ 32). The burden of proof on every element for a certificate is on the applicant. ECF No. 1 at 11 (¶ 37).

The PCN process is prohibitively 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 have to hire an economic expert. Even with this help, however, the application is almost sure to be denied. ECF No. 1 at 7, 12 (¶¶ 24, 26, 39).

In short, the PCN requirement creates an insurmountable barrier to entry into the Lake Chelan ferry market. In fact, the WUTC identifies "protection from competition" as the "[r]ationale" for the PCN requirement. ECF No. 1 at 12-13 (¶¶ 40-41); Wash. Utils. & Transp. Comm'n, *supra* note 1, at 11.

C. CONSEQUENCE OF THE PCN REQUIREMENT

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. The certificate is held by Lake Chelan Boat Company. At least four other applications have been made,

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including one by Plaintiff Jim Courtney. In each instance, Lake Chelan Boat Company protested and the state denied a certificate. ECF No. 1 at 7 (¶¶ 23-24).

Much of the year, Lake Chelan Boat Company operates only one boat, which makes one trip per day in each direction, three days per week. ECF No. 1 at 14 (¶ 48). During peak months—June through September—it operates two boats daily, but each still makes only one trip per day in each direction and both boats depart Chelan at the same time (8:30 a.m.), headed in the same direction. ECF No. 1 at 13 (¶ 44). Vacationers often must arrive a day early and stay overnight in Chelan in order to catch one of the two early morning ferries for Stehekin. ECF No. 1 at 13 (¶ 45). And because both boats depart at the same time, in the same direction, three hours is the most a visitor can spend in Stehekin and the LCNRA without staying overnight. Daytrips are impracticable. ECF No. 1 at 14 (¶ 46).

D. THE COURTNEYS' EFFORTS TO PROVIDE AN ALTERNATIVE SERVICE

Plaintiffs Jim and Cliff Courtney are brothers who have long suffered the Lake Chelan ferry monopoly. Fourth-generation residents of Stehekin, they and their siblings have several businesses in and around the community, including a pastry shop, the Stehekin Valley Ranch (a rustic ranch with cabins and a lodge house), and Stehekin Outfitters, which offers river outings and horseback riding. ECF No. 1 at 15 (¶¶ 50-53).

For years, Jim and Cliff listened as their and their siblings' customers complained about the inconvenience of Lake Chelan's lone ferry operator. Since 1997, they have initiated four significant efforts to provide an alternative and more convenient boat but

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have been thwarted by the PCN requirement at every step. ECF No. 1 at 15-16 (¶¶ 54-56).

First, in 1997, Jim applied for a certificate to operate a Stehekin-based ferry. ECF No. 1 at 16 (¶ 57). Lake Chelan Boat Company protested the application. ECF No. 1 at 16 (¶ 58). In August 1998, after a two-day hearing that yielded a 515-page transcript, 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. Jim incurred approximately $20,000 in expenses for the application. ECF No. 1 at 17-19 (¶¶ 62, 67-68).

Second, in 2006, Jim pursued another service: a Stehekin-based, on-call boat that he believed fell within a "charter service" exemption to the PCN requirement. ECF No. 1 at 19 (¶ 70). Because some of the docks on the lake are federally owned, he applied to the U.S. Forest Service for a special-use permit to use the docks in conjunction with the business. ECF No. 1 at 19 (¶ 71). Before it would issue the permit, the Forest Service sought to confirm with the WUTC that Jim's proposed service was, in fact, exempt. ECF No. 1 at 19-20 (¶ 72). At first, WUTC staff opined that he did not need a certificate. ECF No. 1 at 20 (¶ 73). Soon thereafter, Lake Chelan Boat Company contacted the WUTC and Forest Service to express concern and WUTC staff abruptly "changed its opinion." ECF No. 1 at 20 (¶ 74). The Forest Service's district ranger wrote to the WUTC's executive director to get his opinion on the matter, and Forest Service staff advised Jim that "[o]nce [the district ranger] has [the WUTC's] formal decision that no

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cert[ificate] is needed, . . . he will sign your permit." ECF No. 1 at 20-21 (¶¶ 77-78). The WUTC's executive director, however, declined to provide an opinion and Jim was unable to launch his boat service. ECF No. 1 at 21-22 (¶¶ 81-82).

Third, in 2008, while Jim was trying unsuccessfully to launch an on-call service, Cliff sent a letter to the WUTC's executive director describing certain other services he might offer and asking whether they would require a certificate. ECF No. 1 at 22 (¶ 83). First, he described a scenario in which he would charter a boat for patrons of Courtney family businesses—*e.g.*, Stehekin Valley Ranch and Stehekin Outfitters—and offer a package with transportation on the chartered boat as one of the guests' options. ECF No. 1 at 22 (¶ 84). In the second scenario, Cliff would purchase a boat himself and carry his own patrons. ECF No. 1 at 22 (¶ 85). The WUTC's executive director opined that even these services would require a certificate, because WUTC staff interprets the term "for the public use for hire" to include "all boat transportation that is offered to the public—even if use of the service is limited to guests of a particular hotel or resort, or even if the transportation is offered as part of a package of services that includes lodging, a tour, or other services that may constitute the primary business of the entity providing the transportation as an adjunct to its primary business." ECF No. 1 at 23-24 (¶ 88).

Finally, frustrated that he and Jim had been repeatedly thwarted by the PCN requirement, Cliff contacted the governor and state legislators in early 2009 to describe the problems with the PCN requirement and urge them to eliminate or relax it. ECF No. 1 at 25 (¶ 92). The Legislature directed the WUTC to conduct a study and report on the

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regulatory scheme governing ferry service on Lake Chelan. ECF No. 1 at 25-26 (¶ 93). 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." ECF No. 1 at 26 (¶ 94).

E. THE PRESENT ACTION

In October 2011, Jim and Cliff filed this action for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. They assert two claims under the Privileges or Immunities Clause of the 14th Amendment: that as applied (1) to boat service on Lake Chelan that is open to the general public and (2) to boat service on Lake Chelan for customers or patrons of specific businesses or a group of businesses, the PCN requirement abridges their "right to use the navigable waters of the United States." *See* ECF No. 1 at 33, 37 (¶¶ 119, 132). Significantly, they do not challenge legitimate health and safety regulations, such as the requirement that boats be inspected and insured.

II. ARGUMENT

At its core, the WUTC's argument for dismissal is that Lake Chelan lies within Washington and the WUTC therefore has absolute, plenary power to regulate transportation across it—including power to monopolize access to the lake. The WUTC has no such power. The Privileges or Immunities Clause guarantees an individual "right to use the navigable waters of United States." *The Slaughter-House Cases*, 83 U.S. 36, 79 (1873). The WUTC does not dispute that Lake Chelan is such a body of water, and the PCN requirement abridges the right of the Courtneys to use it. Faced with this, the

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WUTC attempts to recast the Courtneys' claims as Commerce Clause claims—claims the Courtneys did not bring. To the extent that the WUTC insists on analogizing to Commerce Clause jurisprudence, the Courtneys point out that the PCN requirement would not survive Commerce Clause analysis either.

This Court should accordingly deny the WUTC's motion to dismiss. The allegations in the Courtneys' complaint, accepted as true and construed in a light most favorable to them, state a plausible claim to relief under the Privileges or Immunities Clause. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

A. THE COURTNEYS HAVE STATED CLAIMS FOR ABRIDGEMENT OF THEIR RIGHT TO USE THE NAVIGABLE WATERS OF THE U.S.

The Privileges or Immunities Clause of the 14th Amendment provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." The seminal decision interpreting the clause is *The Slaughter-House Cases*, in which the Supreme Court distinguished between "citizenship of the United States" and "citizenship of a State" and held that the Privileges or Immunities Clause "speaks only of privileges and immunities of citizens of the United States"—those that "owe their existence to the Federal government, its National character, its Constitution, or its laws." 83 U.S. at 74, 79. Among such privileges and immunities, the Court held, is "[t]he right to use the navigable waters of the United States." *Id.* at 79.

The WUTC does not dispute that Lake Chelan is a "navigable water of the United States." The federal government has designated it as such, and the WUTC concedes the

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lake "is navigable between Chelan and Stehekin." ECF No. 8 at 2. Moreover, Stehekin and much of the northern end of the lake, including the waters therein, are part of the federal LCNRA. *United States v. Buehler*, 793 F. Supp. 971, 973 (E.D. Wash. 1992) ("LCNRA 'includes the lands and *waters* within the area designated Lake Chelan Recreation Area . . . .'" (quoting 16 U.S.C. § 90a-1)). Thus, even in the most literal sense, a boat traveling between Chelan and Stehekin travels "navigable waters of the United States."

The Courtneys have stated a claim that the PCN requirement abridges their right to use such waters. The WUTC all but acknowledges as much, conceding that the "right to use the navigable waters of the United States" is protected by the Privileges or Immunities Clause; that "Lake Chelan is navigable"; that the Courtneys wish to use Lake Chelan "to operate a . . . commercial ferry"; and that the WUTC has "denied" permission to operate such a ferry. ECF No. 8 at 2, 5-6, 8. Together, these factual allegations state a claim to relief.

B. THE RIGHT TO USE NAVIGABLE WATERS OF THE U.S. INCLUDES A RIGHT TO OPERATE A FERRY OR OTHERWISE ENGAGE IN BUSINESS ON THEM

Perhaps recognizing the adequacy of the Courtneys' factual allegations, the WUTC argues that the "right to use the navigable waters of the United States" recognized in *Slaughter-House* is not an economic right. Significantly, the WUTC offers no explanation as to what the right *is*. Rather, it only argues what the right supposedly is

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not: "Whatever it is, it is not a right to operate a ferry," nor is it "'the ability to use such waters . . . in engaging in business.'" ECF No. 8 at 8, 10 (quoting ECF No. 1 at 31, 35).

The WUTC's position contradicts the very purpose and history of the Privileges or Immunities Clause. In the wake of the Civil War, Southern states systematically denied the economic rights of newly-freed slaves. A "primary concern" of the 14th Amendment, and of the Privileges or Immunities Clause specifically, was "protection of economic rights for new black citizens." Timothy Sandefur, *The Right to Earn a Living*, 6 Chapman L. Rev. 207, 228 (2003). The *Slaughter-House* majority discussed this history and purpose in considerable detail:

> [N]otwithstanding the formal recognition by [southern] States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before. Among the first acts of legislation adopted by several of the States . . . were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property . . . .
>
> They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain . . . .
>
> These circumstances . . . 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 to the unfortunate race who had suffered so much. They accordingly passed . . . the fourteenth amendment . . . .

Slaughter-House, 83 U.S. at 70. Given this concern with the economic rights of freedmen, it is untenable to suggest that the "right to use the navigable waters of the

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United States" does not include the right to use such waters to operate a ferry or otherwise engage in business. We did not fight a Civil War for the right to take a recreational boat ride.

As the *Slaughter-House* majority lends it no support, the WUTC looks in the opposite direction—to the dissenting opinions. *See* ECF No. 8 at 9-10. It makes much of the dissents' suggestion that exclusive ferry franchises were permissible under then-existing case law. These dissenting opinions, however, are just that: dissenting opinions. Moreover, Justice Bradley's dissent made clear that, even though exclusive ferry franchises had been tolerated in earlier case law, they were legally questionable, as "even these exclusive privileges" are "inimical to the just rights and greatest good of the people." 83 U.S. at 121 (Bradley, J., dissenting).

Moreover, the dissents' observation that ferry monopolies had been tolerated was an observation regarding *public* ferries, such as the current Lake Chelan ferry, and not the type of private transportation that the Courtneys alternatively would like to provide for patrons of Courtney family or other specific businesses. *See* Claim II, ECF No. 1 at 34-38 (¶¶ 121-33); *Slaughter-House*, 83 U.S. at 88 (Field, J., dissenting) (discussing franchises for ferries "of a public character"); *id.* at 121 (Bradley, J., dissenting) (describing ferries as "public franchises"). A public ferry was one that was "open to all," had an "established" and "regular fare," and, as a "common carrier," was "bound to take over all who c[a]me." *Futch v. Bohannon*, 67 S.E. 814, 815 (Ga. 1910) (internal quotation marks and citation omitted). Transportation for one's self, goods, employees,

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and customers, on the other hand, if a ferry at all, was a *private* ferry and did not require a franchise from the state. *See, e.g.*, *Self v. Dunn & Brown*, 42 Ga. 528, 531 (1871) (holding boat transportation for mill customers "was not even a chartered ferry, but a simple accommodation of the mill-owner to his customers"); *Littlejohn v. Jones*, 2 McMul. 365 (S.C. App. 1842) (holding boat transportation for mill customers was not a public ferry because owner did not "undertake[ ] for hire to convey across the river all persons indifferently"). Nothing in the *Slaughter-House* dissents suggests that a state may monopolize such private boat transportation. *See Hissem v. Guran*, 146 N.E. 808, 810 (Ohio 1925) (holding that PCN provisions may not be used "as an instrument of oppression against a private carrier, even though the business operated by the private carrier might prove to be ruinous to a public carrier operating over the same routes and between the same termini . . . .").

Finally, the WUTC invokes the North Dakota Supreme Court's decision in *Patterson v. Wollman*, 67 N.W. 1040 (N.D. 1896)—which, in turn, relied on the dissenting opinions in *Slaughter-House*—for the proposition that "citizens have no natural right to maintain a public ferry." ECF No. 8 at 9. *Patterson* is of no moment. It did not involve a Privileges or Immunities Clause claim, and the relevant question here is not whether the Courtneys have a "natural right" to operate a public ferry, but whether their right of national citizenship to use the navigable waters of the United States allows

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them to operate a ferry or other boat service on Lake Chelan.[2] Moreover, while *Patterson* opined in 1896 that "the granting of exclusive ferry franchises is the proper exercise of the police power of the state," *Patterson*, 67 N.W. at 1044, the Supreme Court later held that the grant of an exclusive ferry franchise "goes beyond" a "mere police regulation." *City of Sault Ste. Marie v. Int'l Transit Co.*, 234 U.S. 333, 339, 340 (1914). As the Court has repeatedly explained in the Commerce Clause context, a law that requires state consent to operate a ferry is not a "mere police regulation," *id.* at 339, but rather the "power . . . to exclude." *Mayor of Vidalia v. McNeely*, 274 U.S. 676, 680 (1927) (distinguishing between "power to regulate" the ferry business and "power to license and therefore to exclude from the business"); *City of Sault Ste. Marie*, 234 U.S. at 339 (holding ferry license requirement was not a "mere police regulation governing the

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[2] Although *Slaughter-House* held that the Privileges or Immunities Clause does not protect a general, natural right to economic liberty, many of the specific rights of national citizenship that the Court held it does protect are economic rights. Still, many commentators have criticized *Slaughter-House* for not recognizing a natural right to economic liberty, and at least one member of the Supreme Court is "open to reevaluating" the Privileges or Immunities Clause. *Saenz v. Roe*, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting). Should this case reach that Court, the Courtneys intend to make, and hereby preserve, the argument that *Slaughter-House* did not do enough to protect economic liberty.

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manner of conducting the business in order to secure safety and the public convenience"). Thus, while regulations that "fix reasonable rates applicable to ferriage," or that "secure safety and convenience in the conduct of the business," may be legitimate exercises of the police power, regulations that "make . . . consent and license a condition precedent to a right to engage" in the business are not. *Mayor of Vidalia*, 274 U.S. at 683.

C. The PCN Requirement Violates Additional Protections Afforded By The Commerce Clause

As noted above, the Courtneys have asserted two claims, both under the Privileges or Immunities Clause. The WUTC, however, spends much of its brief attempting to recast the claims as Commerce Clause claims, noting that "[o]ne commentator has suggested that" the Commerce Clause is the source of the "right to use the navigable waters of the United States." ECF No. 8 at 11. The source of the right is ultimately unimportant; it is the source of its protection—the Privileges or Immunities Clause—that matters, and the WUTC cannot avoid *Slaughter-House*'s clear holding by pretending the Courtneys' claims are something other than what they are. *Cf. Delta Dental v. Blue Cross & Blue Shield*, 942 F. Supp. 740, 747 (D.R.I. 1996) ("[Plaintiff], as the master of the claim, has chosen to rely exclusively on state law[,] . . . a choice that [Defendant] cannot defeat, notwithstanding that the case could have been brought under the Sherman Act."). Although "[t]he absence of any case law directly construing" the right recognized in *Slaughter-House* "presents a serious interpretive problem," and although "analogies to other areas of law" may be useful, "ultimately the issue is one of federal constitutional

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law" under the Privileges or Immunities Clause. *Engblom v. Carey*, 677 F.2d 957, 962 (2d Cir. 1982).

In any event, the Commerce Clause analogy is of no help to the WUTC. The PCN requirement would not be valid under Commerce Clause jurisprudence either. First, "protection from competition" is the WUTC's "[r]ationale" for the PCN requirement. ECF No. 1 at 13 (¶¶ 41); Wash. Utils. & Transp. Comm'n, *supra* note 1, at 11; *see also id.* ("Certificated commercial ferries enjoy considerable protection from competition as long as they continue to provide satisfactory service and comply with regulations."). The WUTC maintains that such protection is necessary to "safeguard essential public transportation services by ensuring that potential providers are financially sound." ECF No. 8 at 4. But economic protectionism is not a legitimate interest for Commerce Clause purposes, and "the state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 538 (1949); *see also Buck v. Kuykendall*, 267 U.S. 307, 315 (1925) (striking down Washington PCN law because its "primary purpose [wa]s not regulation with a view to safety or to conservation of the highways, but the prohibition of competition"). "Where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

Moreover, the Supreme Court has held that "a direct burden upon interstate commerce, as conducted by ferries operating between states, . . . is beyond the

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competency of the states to impose," *Port Richmond & Bergen Point Ferry Co. v. Bd. of Freeholders*, 234 U.S. 317, 326 (1914), and the Court has repeatedly relied on this principle to strike down restrictions, including license requirements, on ferries operating between states. *See, e.g.*, *Mayor of Vidalia*, 274 U.S. 676 (holding ferry license requirement unconstitutional); *City of Sault Ste. Marie*, 234 U.S. 333 (same); *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196 (1885) (holding ferry tax unconstitutional). Although a ferry traveling across Lake Chelan is not "operating between states," it is operating between Washington and the federal LCNRA, which is "to [Washington] as the territory of one of her sister states." *United States v. State Tax Comm'n*, 412 U.S. 363, 375, 378 (1973) (concerning 21st Amendment). Cases regarding state regulation of liquor on federal lands are instructive in this regard. While the 21st Amendment allows a state to regulate commerce in liquor within its borders in ways that might otherwise offend the Commerce Clause, the state may not regulate such commerce on property over which the federal government has exclusive or concurrent jurisdiction,[3] as such property,

[3] Although the WUTC contends that "Washington presumptively retains jurisdiction" over the LCNRA, ECF No. 8 at 2, the case it cites for that proposition speaks of no presumption and specifically declines to decide what jurisdiction, if any, the state retains over the area. *See United States v. Bohn*, 622 F.3d 1129, 1133 & n.3 (9th Cir. 2010). To the extent this issue is relevant, the WUTC's motion should be denied in order to afford the parties the opportunity for discovery on the matter.

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though within the state's borders, is akin to a sister state. *United States v. State Tax Comm'n*, 421 U.S. 599, 613 (1975); *North Dakota v. United States*, 495 U.S. 423, 469 (1990) (Brennan, J., concurring in part and dissenting in part); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 530, 537-38 (1938). If federal property is considered a sister state under the 21st Amendment, the very purpose of which is to "free the State[s] of traditional Commerce Clause limitations," *State Tax Comm'n*, 412 U.S. at 375 (internal quotation marks and citation omitted), then it must be considered a sister state for purposes of the Commerce Clause itself. By requiring the WUTC's consent to provide transportation between the LCNRA and Washington, the PCN requirement directly burdens interstate commerce and is *per se* invalid.

But even if the LCNRA is not "to [Washington] as the territory of one of her sister states," *id.* at 378, the PCN requirement, applied on Lake Chelan, still unduly burdens interstate commerce. The LCNRA is national in character, created by Congress for the benefit of all United States citizens. *See* 16 U.S.C. § 90a-1. As such, it attracts tourists from around the country. *See* Wash. Utils. & Transp. Comm'n, *supra* note 1, at 3-4 ("The unincorporated community of Stehekin, . . . for more than 100 years, has been a popular summer resort for Washington residents as well as tourists from outside the state."). As the WUTC itself recognizes, the majority of persons traveling to and from Stehekin on Lake Chelan are: (1) tourists seeking to use and enjoy the LCNRA; (2) federal employees who work in the LCNRA; and (3) Stehekin residents, many of whom make their living supporting tourism (*e.g.*, the Courtney family). *Id.* at 4, 16-17. Apart

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from air travel, boat transportation across the lake is their only means of access to this federal property. Such access is itself protected by the Privileges or Immunities Clause, and the WUTC may not impair it. *Twining v. New Jersey*, 211 U.S. 78, 97 (1908) ("[A]mong the rights and privileges of national citizenship recognized by this court are . . . the right to enter the public lands . . . ."), *overruled in part on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964). Thus, even if Commerce Clause jurisprudence is relevant, dismissal is inappropriate.[4]

Finally, the WUTC alternatively attempts to recast the Courtneys' complaint as alleging violations of the "common law right of navigation." ECF No. 8 at 14. It cites *Fanning v. Gregoire*, 57 U.S. 524 (1853), as well as two state cases, to argue that this common-law right, even when federalized by an act of Congress, does not preclude a state from enacting PCN-type laws that monopolize ferry service. ECF No. 8 at 16. *Fanning* and one of the state cases pre-date *Slaughter-House*, and all three cases predate *New York Central & Hudson River Railroad Co. v. Board of Chosen Freeholders*, 227 U.S. 248 (1913), in which the Supreme Court made clear that *Fanning* is no longer good law. *Id.* at 261 (noting that the "theories" advanced in *Fanning* "are directly contrary to the ruling in . . . *Gloucester Ferry*," which "is now conclusive and has settled the

[4] At a minimum, Commerce Clause analysis involves factual inquiries not amenable to resolution on a motion to dismiss. *See Wiesmueller v. Kosobucki*, 571 F.3d 699, 704 (7th Cir. 2009).

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significance of the Constitution contrary to the views mentioned"); *see also id.* at 258-59; *City of Sault Ste. Marie*, 234 U.S. at 340.[5]

III. CONCLUSION

The Courtneys have stated valid claims under the Privileges or Immunities Clause for abridgment of their right to use the navigable waters of the United States. The WUTC's motion to dismiss should therefore be denied.

RESPECTFULLY SUBMITTED this 12th day of January, 2012.

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[5] These cases also make clear that *Conway v. Taylor's Ex'r*, 66 U.S. 603 (1861), upon which the WUTC relies earlier in its brief, *see* ECF No. 8 at 12, is no longer good law.

CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants: N/A.

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