NO. 20-361

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.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE LAW PROFESSORS RICHARD AYNES, JAMES ELY, RICHARD EPSTEIN, CHRISTOPHER GREEN, MICHAEL LAWRENCE, AND REBECCA ZIETLOW IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are law professors and scholars who teach, research, and write about constitutional law as

[1] All parties consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

well as law and history.[2] Amici have an interest in clarifying this Court's precedent about the scope of the protections of the Privileges or Immunities Clause of the Fourteenth Amendment, which is central to individual liberty and the constitutional protections thereof. Amici are interested in this Court's correcting the Ninth Circuit's misinterpretations of the Privileges or Immunities Clause and in restoring the protections of national citizenship rights that, as this Court has previously made clear, the drafters of the Clause intended.

SUMMARY OF THE ARGUMENT

The Privileges or Immunities Clause of the Fourteenth Amendment recognized that all United States citizens have fundamental rights derived from their national citizenship. It provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. Amend. XIV, § 1. While the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), may have eroded the scope of the rights the Privileges or Immunities Clause encompassed, the decision undoubtedly expressed the well-known prevailing view that certain privileges or immunities *were* protected by the Clause, including the one at issue here: the "right to use the navigable waters of the United States."[3]

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[2] Amici file this brief solely as individuals and not on behalf of the institutions with which they are affiliated.

[3] "[L]est it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which ow[e] their existence to the Federal government, its National character, its Constitution, or its laws," including "[t]he right to use the navigable waters of the United States." See *Slaughter-House*, 83 U.S. (16 Wall.) at 79.

This case has wide-reaching implications that require this Court's intervention. Despite the clear instruction in *Slaughter-House* that the Privileges or Immunities Clause of the Fourteenth Amendment does protect certain rights, the Ninth Circuit and other courts have, over the years, chipped away at those protections. This case will enable the Court to restore, in a modest and incremental way, the Fourteenth Amendment's protections of individual liberties and to reaffirm what it made clear in *Slaughter-House* and subsequent case law: where those rights are concerned, the Privileges or Immunities Clause protects citizens from their own states' actions. The framers of the Fourteenth Amendment intended as much; it is no coincidence that the Privileges or Immunities Clause, the Equal Protection Clause, and Due Process Clause are part of the same sentence of text.

Below, the Ninth Circuit founded its decision on a major interpretive error that has eroded the protections of the Privileges or Immunities Clause. Federal courts, the Ninth Circuit included, have mistakenly conflated two similarly named, yet entirely distinct, portions of the Constitution: the Privileges *or* Immunities Clause of the Fourteenth Amendment, which unequivocally protects American citizens from the actions of their own state governments, and the Privileges *and* Immunities Clause of Article IV, Section 2, which does not provide those protections. This repeated error has cudgeled the Privileges or Immunities Clause of the Fourteenth Amendment to within an inch of its life.

While this faulty analysis has cropped up repeatedly in cases from multiple jurisdictions, the Ninth Circuit

anchored its decision here in its flawed opinion in *Merrifield* v. *Lockyer*, 547 F.3d 978 (2008). In *Merrifield*, the Ninth Circuit incorrectly stated that the Fourteenth Amendment's Privileges or Immunities Clause barred "claims against 'the power of the State governments over the rights of [their] own citizens.'" *Id.* at 983 (quoting *Slaughter-House*, 83 U.S. (16 Wall.) at 77). What *Merrifield* failed to grasp is that this alleged bar applies only to the Privileges and Immunities Clause of Article IV, Section 2, not to the Privileges or Immunities Clause of the Fourteenth Amendment.

That error turns the Privileges or Immunities Clause of the Fourteenth Amendment on its head, resulting in an interpretation completely at odds with the clause's historical context. The framers drafted the Privileges or Immunities Clause as a solution to the Southern states' attempts to strip newly freed black citizens of their individual rights. Because the Privileges and Immunities Clause of Article IV, Section 2 was insufficient to shield citizens from discrimination by their own states, the Privileges or Immunities Clause of the Fourteenth Amendment bridged an essential gap in the Constitution's guarantees for individual rights. Given that purpose, it makes sense that the Privileges or Immunities Clause would protect the rights of national citizenship from infringement by *all* states, including one's own.

For the reasons below, amici respectfully request that this Court review the Ninth Circuit's interpretation of the Privileges or Immunities Clause of the Fourteenth Amendment—and enforce its decision in *Slaugh-*

ter-House that the Privileges or Immunities Clause protects the right of every American to use this nation's navigable waters, including in his or her own state's.

ARGUMENT

This case presents the Court with an opportunity to correct a long-standing error, repeated by multiple courts across multiple jurisdictions, by making clear that the Privileges or Immunities Clause of the Fourteenth Amendment protects the rights of all United States citizens against infringements by their home states. The Courtneys' action invokes a right the Privileges or Immunities Clause unquestionably protects—the "right to use the navigable waters of the United States." *Slaughter-House*, 83 U.S. (16 Wall.) 36, 79 (1873). The Ninth Circuit's decision rejecting that claim highlights the need for this Court's intervention to ensure that this Clause's protections are not further whittled away, far beyond the limits of *Slaughter-House*, to the point that the Clause does no work at all.

I. The Ninth Circuit And Other Courts Have Erred By Finding That The Privileges Or Immunities Clause Of The Fourteenth Amendment Protects Few, If Any, Rights Of National Citizenship

Years of judicial confusion and conflation of the Privileges or Immunities Clause of the Fourteenth Amendment with the Privileges and Immunities Clause of Article IV, Section 2 have neutered the privileges and immunities the Fourteenth Amendment unequivocally protects. The Ninth Circuit's decision below was far from the first opinion to downplay, if not outright ignore, the Privileges or Immunities Clause.

The *Slaughter-House* decision in 1873 was the earliest federal court opinion to significantly curb the power of the Privileges or Immunities Clause of the Fourteenth Amendment.[4] That case, decided only five years after the Fourteenth Amendment's adoption in 1868, began a long erosion of the Clause and the universe of individual rights that it ensures. Yet even *Slaughter-House* recognized that the Clause undoubtedly protected certain "privileges and immunities * * * which ow[e] their existence to the Federal government, its National character, its Constitution, or its laws." 83 U.S. (16 Wall.) at 79. These "privileges and immunities" included the "right to use the navigable waters of the United States." *Ibid.*

But the Ninth Circuit's decision here whittled away even the rights recognized by *Slaughter-House*. If, as the Ninth Circuit concluded below, the Privileges or Immunities Clause of the Fourteenth Amendment does not guarantee even the explicitly recognized "right to use the navigable waters of the United States," then there is essentially nothing left for it to protect. 83 U.S. (16 Wall.) at 79. The Clause will have even less force if courts continue to find that a citizen cannot bring an action against his own state to enforce its protections. This result cannot be correct in light of this Court's prior decisions and the historical context in which the Privileges or Immunities Clause arose.

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[4] See *Brown* v. *Ent. Merchants Ass'n*, 564 U.S. 786, 836 (2011) (Thomas, J., dissenting) (suggesting that *Slaughter-House* was inconsistent with the original meaning of the Privileges or Immunities Clause of the Fourteenth Amendment).

A. The Ninth Circuit's Decision Amplifies *Merrifield's* Mistaken Reading Of *Slaughter-House* As Barring Fourteenth Amendment Claims By A Citizen Against Her Own State

By incorrectly assuming that the Privileges or Immunities Clause of the Fourteenth Amendment did not provide the Courtneys with authority to bring an action against their own State of Washington, the Ninth Circuit repeated a mistake that this Court now may fix. The Ninth Circuit's decision cited *Merrifield*, and in turn *Slaughter-House*, for the proposition that the Privileges or Immunities Clause "bar[s] * * * claims against 'the power of the State governments over the rights of [their] own citizens.'" Pet. App. 3 (quoting *Merrifield* v. *Lockyer*, 547 F.3d 978, 983 (2008)). In doing so, the Ninth Circuit made an unfortunate, but common, error: it conflated the Privileges *or* Immunities Clause of the Fourteenth Amendment with the Privileges *and* Immunities Clause of Article IV, Section 2.

Though similar in name, the two clauses are distinct and serve fundamentally different purposes. The Privileges and Immunities Clause of Article IV, Section 2, provides that "[t]he citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." U.S. Const. Art. IV, § 2. This clause prevents the states from discriminating against citizens of *other* states. The Privileges or Immunities Clause of the Fourteenth Amendment, on the other hand, provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. Amend. XIV, § 1. This clause guards citizens from abuses by their *own* states. In other words, the Privileges or Immunities

Clause of the Fourteenth Amendment prevents any state, including one's own, from abridging the rights that Americans derive from their national citizenship.

Merrifield is a clear example of confusion about the two clauses. There, the Ninth Circuit incorrectly held that the Privileges or Immunities Clause of the Fourteenth Amendment did not provide the party below with a cause of action against his own state of California. *Merrifield*, 547 F.3d at 983-984. The court began by relying on *Slaughter-House* to hold that the appellant's claimed right to pursue his chosen profession was not among the rights the Privileges or Immunities Clause contemplated. See *id.* at 983. That decision was wrong, but not egregiously so given *Slaughter-House*'s narrow interpretation of "privileges or immunities." Where *Merrifield* undeniably erred was in holding that the appellant could not challenge his own state's licensing regime in any event. Misreading *Slaughter-House*'s discussion of the Privileges *and* Immunities Clause of Article IV, Section 2, the Ninth Circuit reasoned that *Slaughter-House* thereby instituted a "bar on Privileges or Immunities claims against 'the power of the State governments over the rights of [their] own citizens.'" *Ibid.* (citing *Slaughter-House*, 83 U.S. (16 Wall.) at 77). That bar, the Ninth Circuit concluded, prohibited all claims against one's own state except those based on the right to travel. Because appellant's claimed right did not "depend[] on the right to travel," the Ninth Circuit denied relief and adopted the flawed premise that the Privileges *or* Im-

munities Clause of the Fourteenth Amendment established a barrier to claims against one's own state. See *id.* at 983-984 (citing *Saenz* v. *Roe*, 526 U.S. 489 (1999)).[5]

But *Slaughter-House* never actually created such a bar. Rather, the language upon which *Merrifield* relied to find that bar involved the Privileges *and* Immunities Clause of Article IV, Section 2, not the Privileges *or* Immunities Clause of the Fourteenth Amendment. Pet. App. 3 (quoting *Merrifield*, 547 F.3d at 983). When *Slaughter-House* determined that the constitutional provision at issue included "no security for the citizen of the State in which [privileges and immunities] were claimed or exercised," it was referring to the Privileges and Immunities Clause of Article IV, Section 2, not the Privileges or Immunities Clause of the Fourteenth Amendment. See *Slaughter-House*, 83 U.S. (16 Wall.) at 76-77. The portion of the *Slaughter-House* opinion that *Merrifield* cited for the "bar" on claims against one's own state discussed *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168 (1868), overruled in part by *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). As *Paul* concerned the Privileges *and* Immunities Clause of Article IV, Section 2, it is abundantly clear that *Slaughter-House* was referring to that clause, and not the Privi-

[5] This Court has recognized that the Eleventh Amendment "made explicit" the States' immunity from suit, which was a "fundamental aspect of the sovereignty" the States enjoyed before ratification of the Constitution and "which they retain today." *Alden* v. *Maine*, 527 U.S. 706, 713 (1999). However, this case does not present an Eleventh Amendment or sovereign immunity issue because, "in adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution." *Id.* at 756.

leges *or* Immunities Clause of the Fourteenth Amendment. See *Paul*, 75 U.S. (8 Wall) at 180. The Court was also referencing the Privileges and Immunities Clause when it held that the clause did not "profess to control the power of the State governments over the rights of their own citizens." See *Slaughter-House*, 83 U.S. (16 Wall.) at 77. Thus, *Slaughter-House*'s "bar" on claims by citizens against their own states applies only to the Privileges and Immunities Clause, and not the Privileges or Immunities Clause.

B. This Insidious Error Has Reached Courts Across Several Jurisdictions, And This Case Provides The Court With A Unique Opportunity To Help The Courts Navigate The Law In This Area

The error committed in *Merrifield*, and again here, merits this Court's attention, as many other courts have mistaken the Privileges or Immunities Clause for the Privileges and Immunities Clause.

Some of these courts have relied on a misreading of this Court's decision in *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130 (1873). In *Bradwell*, the Illinois bar denied the plaintiff admission because she was female. The *Bradwell* plaintiff made two distinct claims: one under the Article IV, Section 2 Privileges and Immunities Clause, and one under the Fourteenth Amendment's Privileges or Immunities Clause. *Id.* at 138. The Court rejected the first claim because plaintiff was a resident of the State of Illinois suing her own State's bar, and the Privileges and Immunities Clause provides no protection against one's own state. *Ibid.* (stating that the protection offered by that Clause "has no application to a citizen of the State whose laws are complained of"). The

Court also rejected the Privileges or Immunities claim, not because the plaintiff was a citizen of Illinois, but because the right to practice law in state courts is not a right of national citizenship. *Id.* at 139. In reaching that holding, the Court recognized that the Privileges or Immunities Clause of the Fourteenth Amendment *does* protect rights of national citizenship against abridgement by any state. See *ibid.*

Still, a surprising number of decisions have cited *Bradwell* incorrectly for the proposition that a citizen cannot bring a claim against her own state under the Privileges or Immunities Clause of the Fourteenth Amendment. *E.g.*, *Wang* v. *Pataki*, 396 F. Supp. 2d 446, 459 (S.D.N.Y. 2005) (claiming *Bradwell* supports the proposition that New York residents cannot maintain a claim against New York under the Privileges or Immunities Clause (citing *Bradwell*, 83 U.S. (16 Wall.) at 138)); *Warden* v. *Pataki*, 35 F. Supp. 2d 354, 362 n.4 (S.D.N.Y. 1999) (concluding that the Privileges or Immunities Clause "has no application to a citizen of the State whose laws are complained of" (quoting *Bradwell*, 83 U.S. (16 Wall.) at 138)), aff'd sub nom. *Chan* v. *Pataki*, 201 F.3d 430 (2d Cir. 1999); *Branch* v. *Franklin*, No. 1:06-CV-1853, 2006 WL 3335133, at *3 (N.D. Ga. Nov. 15, 2006) (stating the "Privileges or Immunities Clause, however, 'has no application to a citizen of the State whose laws are complained of'" (quoting *Bradwell*, 83 U.S. (16 Wall.) at 138)). In each of these cases, a court incorrectly conflated the Privileges or Immunities Clause of the Fourteenth Amendment with the Privileges and Immunities Clause of Article IV, Section 2 by stating that the Privileges or Immunities Clause does not provide a citizen with protection from his own state. But *Bradwell* never declared that the Privilege or Immunities Clause of the

Fourteenth Amendment acts as a bar to claims against a citizen's own state when a right of national citizenship is at issue. 83 U.S. (16 Wall.) at 138. Contrary to these various misinterpretations, *Bradwell* explicitly acknowledged that "there are privileges and immunities belonging to citizens of the United States" that "a State is forbidden to abridge." *Id.* at 139.

Other courts have committed this error without citing *Bradwell*. For example, in *Shipley* v. *Orndoff* the District of Delaware improperly conflated "the Privileges and Immunities Clause of Article IV and the Fourteenth Amendment" and stated that "[c]ourts have rejected causes of action brought under the Privileges *and* Immunities Clause of the Fourteenth Amendment where a plaintiff asserts that his rights under this Clause have been violated by actions of his own state." 491 F. Supp. 2d 498, 508 (2007) (emphasis added). This conclusion incorrectly implies that the Privileges and Immunities Clause is a component of the Fourteenth Amendment. Of course, the Privileges and Immunities Clause is a part of Article IV, Section 2, while the Privileges or Immunities Clause is a part of the Fourteenth Amendment.

This oft-repeated error requires this Court's attention as it has permeated various jurisdictions and eroded the protections the Fourteenth Amendment preserved in *Slaughter-House*. The Court should make clear that the Privileges or Immunities Clause cannot and should not be confused with the Privileges and Immunities Clause and reaffirm the Fourteenth Amendment protections *Slaughter-House* preserved.

C. Other Courts Have Misunderstood Yet Another *Slaughter-House* Sentence As Instituting A Bar On Privileges Or Immunities Claims Against One's Own State

Even courts that have understood the distinction between the Fourteenth Amendment's Privileges or Immunities Clause and Article IV's Privileges and Immunities Clause have mistakenly read *Slaughter-House* to provide that the Clause does not protect against a citizen's state of residence. In defining the rights the Privileges or Immunities Clause protects, *Slaughter-House* distinguished between those arising from United States citizenship and those arising from state citizenship. To support this distinction, the Court noted that "[i]t is a little remarkable, *if this clause was intended as a protection to the citizen of a State against the legislative power of his own State*, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it." See *Slaughter-House*, 83 U.S. (16 Wall.) at 74 (emphasis added). Multiple incorrect readings of this sentence highlight an additional need for this Court to make clear the bounds of *Slaughter-House's* holding.

Courts have taken this quotation out of context to mean that the Fourteenth Amendment's Privileges or Immunities Clause does not encompass claims against one's own state. They have stripped the *Slaughter-House* language of the context that makes clear that *Slaughter-House* was speaking about only the rights derived from *state* citizenship (which are the subject of the Article IV Clause). See *Slaughter-House*, 83 U.S. (16

Wall.) at 74.[6] For example, in *Brown* v. *Hovatter*, No. RDB 06-524, 2006 WL 2927547, at *5 (Oct. 11, 2006), the District of Maryland erroneously concluded that *Slaughter-House* "disregarded the contention that the Privileges [or] Immunities Clause provides 'protection to the citizen of a State against the legislative power of his own State.'" The Maryland Court of Appeals made the same mistake in 1895, using this same portion of *Slaughter-House* to find that "this clause merely protected the 'privileges and immunities' of citizens of the United States, and was not intended to control the power of the state governments over the rights of their own citizens." *Short* v. *State*, 31 A. 322, 323. The Court should intervene to correct this additional long-standing error by courts interpreting *Slaughter-House.*

II. The Privileges Or Immunities Clause Of The Fourteenth Amendment Undoubtedly Protects The Rights Of National Citizenship From Infringement By One's Own State

A. The Privileges Or Immunities Clause Protects Citizens From Their Own States

Conflating the Privileges or Immunities Clause of the Fourteenth Amendment with the Privileges and Immunities Clause of Article IV, Section 2, and refusing to apply either to claims against a plaintiff's home state, re-

[6] The quoted language appears within the Court's broader discussion of the distinction between state and national citizenship. Shortly preceding that discussion, the Court explained that "there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual." *Slaughter-House*, 83 U.S. (16 Wall.) at 74.

sults in a rule of law that does not square with the Fourteenth Amendment's text. The Privileges or Immunities Clause reads: "*No State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. Amend. XIV, § 1 (emphasis added). It does not say, "No State, except the one where a citizen actually resides." Even the Ninth Circuit has acknowledged that "[t]he Privileges or Immunities Clause of the Fourteenth Amendment does not expressly contain a home-state restriction." *Merrifield* v. *Lockyer*, 547 F.3d 978, 983 (2008). As a safeguard of the rights of *all* citizens of the United States, the Privileges or Immunities Clause of that Amendment plainly protects citizens from *their own* states.

Leading commentators from across the ideological spectrum agree that the Privileges or Immunities Clause of the Fourteenth Amendment permits claims against one's own state. As Akhil Reed Amar explained, "the clause aimed to affirm that no state could deny *its* citizens any fundamental right or freedom, privilege or immunity." *Lost Clause: The Court Rediscovers Part of the Fourteenth*, The New Republic (June 14, 1999) (emphasis added). Randy E. Barnett has similarly recognized that "the Privileges or Immunities Clause of the Fourteenth Amendment 'prohibits any state from abridging the privileges or immunities of the citizens of the United States, whether its own citizens or any others.'" *The Proper Scope of the Police Power*, 79 Notre Dame L. Rev. 429, 465 (2004) (quoting *Live-Stock Dealers' & Butchers' Ass'n* v. *Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649, 652 (C.C.D. La. 1870)). Michael Kent Curtis likewise noted that "the fourteenth amendment * * * recognizes a body of national privileges that cannot be infringed by any state."

Further Adventures of the Nine Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights, 43 Ohio St. L.J. 89, 93 (1982).

This Court has also consistently upheld the plain reading of the Privileges or Immunities Clause: "*no* state" may infringe upon the rights of national citizenship that the Clause guarantees. In 1935, the petitioner in *Colgate* v. *Harvey* challenged a Vermont statute that he claimed abridged his privileges and immunities as a citizen of the United States by creating a taxation system that taxed individuals in a discriminatory and arbitrary manner. 296 U.S. 404, 419 (1935), overruled on other grounds by *Madden* v. *Kentucky*, 309 U.S. 83 (1940). In invalidating the law, the Court distinguished the Privileges and Immunities Clause of Article IV, Section 2, from the Privileges or Immunities Clause of Fourteenth Amendment. About the former, it found that "the 'privileges and immunities' secured by the original constitution, were only such as each state gave to its own citizens" and that "[e]ach was prohibited from discriminating in favor of its own citizens, and against the citizens of other states." *Id.* at 428 (quoting *Live-Stock Dealers' & Butchers' Ass'n*, 15 F. Cas. at 652). On the other hand, "the fourteenth amendment prohibits any state from abridging the privileges or immunities of the citizens of the United States, whether its own citizens or any others." *Ibid.* (quoting *Live-Stock Dealers' & Butchers' Ass'n*, 15 F. Cas. at 652). Further discussing the Fourteenth Amendment's Privileges or Immunities Clause, the Court found that "whatever latitude may be thought to exist in respect of state power under the Fourth Article, a state cannot, under the Fourteenth Amendment, abridge the privileges of a citizen of the United States, *albeit he is at the same time a resident of*

the state which undertakes to do so." *Ibid.* (emphasis added).

The Court has reaffirmed its interpretation of the Privileges or Immunities Clause of the Fourteenth Amendment as a bulwark against discrimination by one's own state. *Saenz* v. *Roe*, 526 U.S. 489, 507 (1999), held that a California law that limited the welfare benefits available to newer residents of the state violated the Privileges or Immunities Clause of the Fourteenth Amendment. This Court recognized that the Privileges or Immunities Clause protects "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State." *Id.* at 502. Under the Privileges or Immunities Clause, "[t]hat right is protected not only by the new arrival's status as a state citizen, but also by her status as a citizen of the United States." *Ibid.* As *Saenz* observed, "[d]espite fundamentally differing views about the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment, most notably expressed in the majority and dissenting opinions in *Slaughter-House* * * * it has always been common ground that this Clause protects [this] component of the right to travel." *Id.* at 503. Thus, because the Privileges or Immunities Clause protects "the citizen's right to be treated equally in her new State of residence," California's "discriminatory classification" against its *own* newly arrived residents violated the Fourteenth Amendment. *Id.* at 505. In reaching this holding, the Court made clear that discrimination by one's *own* state violated the Privileges or Immunities Clause.

B. The Fourteenth Amendment's Privileges Or Immunities Clause Was Intended To Extend Beyond Article IV's Privileges And Immunities Clause

In addition to contradicting this Court's precedents and the academic consensus, the decision below also interpreted the Privileges or Immunities Clause in a manner that makes no sense given the historic context for the Clause's enactment. As *Saenz* recognized, a primary purpose of the Privileges or Immunities Clause was to "guarantee[] the rights of newly freed black citizens by ensuring that they could claim the state citizenship of any State in which they resided and by precluding *that State* from abridging their rights of national citizenship." 526 U.S. at 503 n.15 (emphasis added).

The Fourteenth Amendment was enacted, in part, in response to the limited scope of the Article IV Privileges and Immunities Clause. As noted above, the Privileges and Immunities Clause of Article IV, Section 2 does not protect citizens from their own states. In *Slaughter-House*, 83 U.S. (16 Wall.) 36, 77 (1873), this Court found that the Privileges and Immunities Clause of Article IV, Section 2 did not "profess to control the power of the State governments over the rights of its own citizens." Similarly, in *United Building & Construction Trades Council* v. *Mayor & Council of Camden*, 465 U.S. 208, 217 (1984), this Court, discussing a Camden, New Jersey ordinance found to have abridged the rights of non-residents under the Privileges and Immunities Clause, stated that "the disadvantaged New Jersey residents have no claim under the Privileges and Immunities Clause."

Leading legal commentators have concurred that the drafters of the Fourteenth Amendment's Privileges or Immunities Clause were aware of the need to supplement the limited protections afforded by the Privileges and Immunities Clause of Article IV, Section 2. John Harrison notes that, "[w]hile exactly what was intended in 1866 remains a matter of dispute, it is clear that the Fourteenth Amendment's drafters were dissatisfied with the protections that the states provided *their own citizens*." *Review of Structure and Relationship in Constitutional Law*, 89 Va. L. Rev. 1779, 1790-1791 (2003) (emphasis added). Douglas G. Smith has likewise noted "the confusion in antebellum America concerning the meaning of the Privileges and Immunities Clause, as well as some of the dissatisfaction with its perceived defects in guaranteeing the rights of citizens of the United States as originally drafted, such as the Clause's inapplicability to controversies between a citizen and his own state government and the lack of congressional power to enforce the Clause." *The Privileges and Immunities Clause of Article IV, Section 2: Precursor of Section 1 of the Fourteenth Amendment*, 34 San Diego L. Rev. 809, 827-828 (1997). Randy E. Barnett has concurred that "the Constitution was amended to give the national government the power to protect the privileges or immunities of citizens from infringements by their own state governments." 79 Notre Dame L. Rev. at 478.[7]

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[7] Barnett also observed in *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, 2003 Cato Sup. Ct. Rev. 21, 38-39: "On the other hand, if the police power of states is not so unlimited and tyrannical as is being claimed, then it is not beyond the 'judicial power' of either state or federal judges to hold state legislatures within their limits. Federal judges may do so, of course, only if they have jurisdiction to protect citizens' rights from violation by their

The framers of the Privileges or Immunities Clause envisioned that the clause would need to protect citizens from the actions of their own states, particularly the Southern ones. In fact, the Privileges or Immunities Clause is a part of the same sentence of the text of the Fourteenth Amendment as the Equal Protection and Due Process clauses, which have been repeatedly held to apply to a State's treatment of its own citizens. As M. Akram Faizer has written of the Fourteenth Amendment, "its Framers, seeking to protect former African American slaves from recalcitrant state and local governments, sought to ensure provision of substantive negative and positive freedoms to all Americans from all levels of government, including one's own state government." *The Privileges or Immunities Clause: A Potential Cure for the Trump Phenomenon*, 121 Penn St. L. Rev. 61, 75 (2016). At the time in question, *Dred Scott* v. *Sanford*, 60 U.S. (19 How.) 393 (1857), had held that persons of African descent were not citizens. It was to correct *Dred Scott* that the Fourteenth Amendment defined "citizens[hip] of the United States" and guaranteed the "privileges" and "immunities" appurtenant to it. *Saenz*, 526 U.S. at 503 n.15.

The added protections of the Privileges or Immunities Clause of the Fourteenth Amendment were necessary because Southern states, through the Black Codes and other laws, were routinely violating the rights of their newly freed black citizens. Such abuses were catalogued in the Report of the Joint Committee on Reconstruction, which laid the groundwork for the Fourteenth

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own states. Although at the founding this power was lacking, the Privileges or Immunities Clause of the Fourteenth Amendment * * * gives the federal government such a power."

Amendment;[8] discussed during debates over the Civil Rights Bill of 1866, which the Fourteenth Amendment was meant to constitutionalize;[9] and highlighted during the debates about the amendment itself.[10] Cognizant of

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[8] *E.g.*, Report of the Joint Committee on Reconstruction, H.R. Rep. No. 30, 39th Cong., 1st Sess. pt. III, at 143 (1866) (testimony of witness from Mississippi that, under the State's vagrancy law, "the freedmen are not allowed to change their places at any time," and that when "freedmen have gone from one county to another and made contracts, [they] were brought back by men * * * who whipped them and ordered them not to leave again").

[9] *E.g.*, Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (statement of Senator Lyman Trumbull explaining bill's purpose "to destroy all the[] discriminations" in Mississippi's Black Codes, including their provision that "[i]f any person of African descent residing in that State travels from one county to another without having a pass or a certificate of his freedom, he is liable to be committed to jail and to be dealt with as a person who is in the State without authority").

[10] *E.g.*, Cong. Globe, 39th Cong., 1st Sess. 1090 (1866) (statement of John Bingham about first draft of Fourteenth Amendment: "[T]he citizens of each State, being citizens of the United States, should be entitled to all privileges and immunities of citizens of the United States in every State * * *."); *id.* at 1094 (statement of John Bingham explaining that the Amendment would protect "every man in every State of the Union"); *id.* at 2502 (Henry Raymond noting that the revised version of section One "secures an equality of rights among all the citizens of the United States."); *id.* 2891 (Senator John Conness noting that to be "treated as citizens of the United States" is to be "entitled to equal civil rights with other citizens of the United States"); The Weekly Standard, Raleigh, N.C., Tri-Weekly Standard, at 2 (May 3, 1866) (newly proposed Fourteenth Amendment is "intended to secure to all citizens of the United States, including the colored population, the same privileges and immunities"); Cincinnati Commercial, Speeches of the Campaign of 1866, at 41 (Benjamin Butler stating in October 1866 that Fourteenth Amendment would require "that every citizen of the United States should have equal rights with every other citizen of the United States, in every State"); *id.* at 44 (William Dennison the

the delicate state of the rights granted to newly freed citizens, the Fourteenth Amendment's drafters knew the Privileges or Immunities Clause would have no teeth were it to exempt individuals' own states from prohibitions against abridgement.

III. Allowing The Ninth Circuit's Mistake To Stand Will Completely Eviscerate The Privileges Or Immunities Clause, Which Has Already Been Largely Gutted By *Slaughter-House* And Its Progeny

This Court should not allow what was supposed to be the Fourteenth Amendment's centerpiece protection for individual liberty to be written out of the Constitution. *Slaughter-House* "h[e]ld [itself] excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so." *Slaughter-House*, 83 U.S. (16 Wall.) 36, 78-79 (1873). However, "lest it should be said that no such privileges and immunities are to be found," the Court articulated certain rights that it believed to be so indelible to national citizenship that the Privileges or Immunities Clause must protect them.[11] Most relevantly, these rights included the "right to use the navigable waters of

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same month: "[T]he colored man shall have all the personal rights, all the property rights, all the civil rights of any other citizen of the United States.").

[11] These rights included "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it" and "to peaceably assemble and petition for redress of grievances." *Slaughter-House*, 83 U.S. (16 Wall.) at 79.

the United States, however they may penetrate the territory of the several States." *Ibid.* This right did not merely survive *Slaughter-House*; it was used as a prime example of the rights belonging to the national citizenry.

The alleged bar on actions by a state's own citizens endangers even this clearly articulated right. That bar simply does not exist. It is a fabrication of a long-standing mix-up of the Privileges *and* Immunities Clause with the Privileges *or* Immunities Clause.

If the Court permits the Ninth Circuit's decision—and in turn its flawed analysis of *Slaughter-House* and the Privileges or Immunities Clause—to stand, then even the most clearly stated individual rights will be gone from the Clause's power. The Privileges or Immunities Clause will be eroded to the point that "no such privileges and immunities are to be found." *Slaughter-House*, 83 U.S. (16 Wall.) at 79.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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