

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.,
Respondents.

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

**BRIEF *AMICI CURIAE* OF PROFESSORS
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MELVIN PATRICK ELY, AND
W. JEFFREY BOLSTER
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*

Amici are professors of history Michael A. Schoeppner, of the University of Maine, Farmington; Melvin Patrick Ely, of the College of William & Mary; and W. Jeffrey Bolster, professor emeritus of the University of New Hampshire. Their research and scholarly interests focus on African-American history, particularly in the antebellum South. Each has published numerous books and articles on free black boatmen during that period.

Amici provide the following historical context to inform the original understanding of what it meant to “use” the “navigable waters of the United States” around the time of the Fourteenth Amendment’s adoption. Accordingly, *Amici* submit this brief in support of petitioners.¹

¹ No counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties received timely notice of *Amici*’s intent to file this brief as required by Rule 37. Counsel for petitioners and respondents consented to the filing.

STATEMENT

The Fourteenth Amendment grants citizenship to “[a]ll persons born or naturalized in the United States.” U.S. Const. amend. XIV, § 1. The very next sentence provides that “the privileges or immunities” of citizens shall not be infringed by the States. *Id.* One such privilege, recognized by this Court in the *Slaughter-House* cases, 83 U.S. (16 Wall.) 36, 79 (1872), is the right to “use the navigable waters of the United States.”

Amici submit this brief to provide historical insight into what it meant to “use the navigable waters of the United States” at the time the Fourteenth Amendment was ratified. Specifically, *Amici* focus on the importance of the use of the navigable waters by free blacks and slaves in the period leading up to the Civil War, and the efforts by Southern governments to restrict that use. This historical background places *Slaughter-House* in its proper historical context and sheds light on why it was so important for the Fourteenth Amendment to protect the right to use the navigable waters of the United States.

SUMMARY OF ARGUMENT

This Court should grant review because the Ninth Circuit's decision eviscerates an important right protected by the Privileges or Immunities Clause. Under that Clause, "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. In the *Slaughter-House* cases, this Court recognized that one of the privileges or immunities inherent to national citizenship is the "right to use the navigable waters of the United States." 83 U.S. at 79.

The use of navigable waters was vital to free blacks and slaves in the 19th century. The coasts and rivers provided a source of income, dignity, and even freedom for many. In the period leading up to the Civil War, however, Southern governments employed a variety of measures to restrict the ability to use the navigable waters to earn a living. They justified these restrictions not only on the ground that blacks were not "citizens," but also on the ground that the federal government had no authority to interfere with the state police power.

The importance of the navigable waters to blacks during the antebellum period—and the notorious restrictions on their use imposed by Southern states—help illuminate the privileges and immunities of national citizenship protected by the Fourteenth Amendment. As this Court recognized soon after ratification, the Amendment protects the right to "use" the navigable waters that Southern states had long denied to blacks. The Ninth Circuit's decision risks burying that important right, and fails to grasp the significance of the right in historical context.

ARGUMENT

I. The Importance Of The Navigable Waters To Free Blacks And Slaves During The Antebellum Period

The navigable waters were important to free blacks during the antebellum period because they provided a means to earn a living in an otherwise hostile economic environment.

By and large, “free blacks were heavily taxed and tightly circumscribed in terms of occupations.” Whittington B. Johnson, *Free Blacks in Antebellum Savannah: An Economic Profile*, 64 Ga. Hist. Q. 418, 419 (1980). “For the free Negro who had received no special training, only the unskilled types of labor were open to him.” John H. Franklin, *The Free Negro in the Economic Life of Ante-Bellum North Carolina: Part I*, 19 N.C. Hist. Rev. 239, 247 (1942) [hereinafter *Economic Life*]. “Unskilled free Negroes could become common laborers, ditchers, farm hands, fishermen, gardeners, miners, railroad hands, servants, timber hewers, turpentine hands, washerwomen, or watermen.” *Id.* at 248. Although most free blacks became farmers, *id.* at 246, many earned a living on the waters, which provided “a source of income and a marketplace,” Dylan C. Penningroth, *The Claims of Kinfolk: African American Property and Community in the Nineteenth-Century South* 64 (2003).

On the waters, free blacks found unique economic opportunity and a degree of social status that was denied to them elsewhere. On the coasts, for example, working on a ship “offered free black sailors unprecedented pay and status.” David S. Cecelski, *The Waterman’s Song: Slavery and Freedom in*

Maritime North Carolina 53 (2001) [hereinafter *Waterman's Song*]. “As independent wage-earners, they defied white predictions that free blacks would be incapable of making their way in the world.” W. Jeffrey Bolster, *Black Jacks: African American Seamen in the Age of Sail* 157 (1997) [hereinafter *Black Jacks*].

River work, too, provided opportunity. “Free black rivermen worked aboard the Ohio and Mississippi river flatboats.” Michael Allen, *Western Rivermen, 1763–1861: Ohio and Mississippi Boatmen and the Myth of the Alligator Horse* 175 (1994). “[T]he river industry was an important employer for free blacks, especially for men,” and provided an “economic backbone” for black communities along the rivers. Thomas C. Buchanan, *Levees of Hope: African American Steamboat Workers, Cities, and Slave Escapes on the Antebellum Mississippi*, 30 *J. Urb. Hist.* 360, 364 (2004) [hereinafter *Levees of Hope*]. “In Cincinnati, for instance, river work occupied 20 percent of the employed male free black workforce.” *Id.* In St. Louis, census records indicate “that about one-third of that city’s employed free black men worked on the river.” *Id.* “Black river workers were esteemed in port communities and became an ideal of manhood for young black boys,” who “looked to the river as a place of hope and opportunity.” Thomas C. Buchanan, *Rascals on the Antebellum Mississippi: African American Steamboat Workers and the St. Louis Hanging of 1841*, 34 *J. Soc. Hist.* 797, 801 (2001) [hereinafter *Rascals*]; see generally W. Jeffrey Bolster, “To Feel Like a Man”: *Black Seamen in the Northern States, 1800–1860*, 76 *J. Am. Hist.* 1173 (1990). Contemporary sources indicate not only that black

steamboat workers earned “good” wages, but also that they had plentiful “opportunities for trading” along the rivers. Buchanan, *Rascals, supra*, at 803.

River boatmen in Virginia provide a helpful illustration. The rivers were the main arteries for conveying goods between central Virginia and the port cities of Richmond and Petersburg. Free blacks and slaves served on three-man crews of the batteaux that conducted this traffic. Melvin Patrick Ely, *Israel on the Appomattox: A Southern Experiment in Black Freedom from the 1790s Through the Civil War* 152–55 (2004). Boating “appealed to enterprising black men partly because the owner of a single batteau could prosper” and conduct “large transactions with white mercantile companies and entrepreneurs.” *Id.* at 163–64. Indeed, boating became one of the three principal occupations of free black men in the Appomattox River trade. *Id.* at 155. “Even though white men continued to navigate the Appomattox, locals and outsiders alike came to think of boating as an occupation conducted by blacks.” *Id.* at 156. Free blacks often acquired boats of their own. “By 1850, and perhaps earlier, black men owned one third of Farmville’s forty-one batteaux, and they carried nearly 40 percent of the freight that came into and out of the town by water. Three of the top five boat owners were Afro-Virginians.” *Id.*

Thus, a “goodly number” of free blacks “made their living in various maritime occupations.” Franklin, *Economic Life, supra*, at 253. In the North, seafaring was “one of the most common male occupations” among free blacks. Bolster, *Black Jacks, supra*, at 4. And in the South, “black watermen were common sights crewing fishboats, scows, canoes, periaugers,

steamers, and other cargo boats on tidewater rivers and sounds.” David S. Cecelski, *The Shores of Freedom: The Maritime Underground Railroad in North Carolina, 1800–1861*, 71 N.C. Hist. Rev. 174, 193 n.76 (1994) [hereinafter *Shores of Freedom*]. “As boatmen, pilots, seamen, stewards, and cooks,” free blacks “could often find employment in seaport or river towns.” Franklin, *Economic Life*, at 253–54.

Piloting, for example, was a relatively profitable trade for free blacks. “Free Men of Color took up the profession, often after learning the water as fishermen (an industry African Americans came to dominate in the South), or as deck hands on local sailing craft.” Maurice Melton, *African American Maritime Pilots in the South Atlantic Shipping Trade, 1640–1865*, 27 J. Ga. Ass’n Historians 1, 3 (2007–08) [hereinafter *Maritime Pilots*]. Pilots played an important role in the antebellum economy, as their skills made it possible for vessels to carry cargo and people “up and down the rivers that connected back country towns and villages with the coast.” *Id.* at 6. As a result, pilots, including black pilots, “made a good living.” *Id.* at 3. Indeed, “Henry Laurens, one of the richest men in colonial South Carolina, made reference to the ‘luxurious’ life style of free black pilot Thomas Jeremiah of Charleston.” *Id.* Piloting “was perhaps the only [occupation] where, in a society whose racial divides became ever more rigid, a black man could be completely in charge.” *Id.*

Slaves, too, managed to benefit from the use of the navigable waters. “Working on the boats allowed a variety of wage-earning opportunities” to slaves, such as “Sunday wages, trading efforts, and wage-sharing deals with masters.” Buchanan, *Levees of Hope*,

supra, at 364. A good number of slaves “negotiated with masters the right to hire themselves for voyages.” Bolster, *Black Jacks*, *supra*, at 4. A slave named Simon Gray, for example, hired out to a lumber company. John Hebron Moore, *Simon Gray, Riverman: A Slave Who Was Almost Free*, 49 *Miss. Valley Hist. Rev.* 472, 472 (1962). There, he learned “the art of flatboating” and was soon promoted “to the rank of flatboat captain.” *Id.* at 474. From 1845 until 1862, Gray served as the “lumber company’s chief boatman.” *Id.* “His crews, usually numbering between ten and twenty men, were made up of both Negro slaves and white rivermen,” who “looked upon Gray as their employer.” *Id.* at 474–75. Gray’s employer even let him “take part in private business enterprises when his services were not required by the company.” *Id.* at 478. Gray used this money to buy his son’s freedom. *Id.* at 479.

Gray’s story is not unique. A slave named Jim Matthews, for example, began “as a common laborer in the sawmill” but “worked his way upward” to “commanding rafting crews.” *Id.* at 483. Matthews also received “pay for extra work performed at night or on holidays, and he often sold logs to [his] company which he had salvaged from the river,” *id.*, a side-business which was quite profitable, *see* Peter Olsen, *The Negro Maritime Worker and the Sea*, 34 *Negro Hist. Bull.* 38, 39 (1971).

Piloting, again, provides a useful example of this point. Slaves often hired themselves out as pilots to earn a more comfortable living. “While the great majority of slave pilots’ wages went to owners, many pilots worked away from their owners, enjoying not only a larger percentage of their wages than was

normal for a hired slave, but the freedom of being on their own as well.” Melton, *Maritime Pilots, supra*, at 4. “Some slaves like antebellum Georgia’s Moses Dallas,” however, “had it written into their contracts that their wages were to be paid directly to them, allowing them to keep all their pay.” *Id.* at 3. Dallas was eventually able to “move[] his large family away from their owners in St. Marys, Georgia to Savannah, the hub of the state’s maritime industry,” was able to rent acres and a house, “helped his wife open a business, negotiated his own contracts, and lived like a free man.” *Id.* at 3–4. Work on the water afforded men like Gray and Dallas a lot “quite different from that of the ordinary cotton plantation field hand.” Moore, *Simon Gray, supra*, at 483.

Indeed, labor on the navigable waters often resulted in a “significant redefinition of the master-slave relationship.” Buchanan, *Levees of Hope, supra*, at 364. During the mid-1800s, for example, “slaves could be found on the Mississippi River and its tributaries in sole charge of rafts and flatboats. Slaves in such positions of authority could scarcely be distinguished in their daily lives from free men.” Moore, *Simon Gray, supra*, at 472. “[S]lave boatmen enjoyed an exceptional amount of privacy and autonomy,” Cecelski, *Shores of Freedom, supra*, at 198, and often managed to live “in a state of quasi-freedom,” Buchanan, *Rascals, supra*, at 801. “Many traveled for days and weeks consecutively without overseers on board their vessels.” Cecelski, *Shores of Freedom, supra*, at 198. “While they worked on the water, those blacks moved in a maritime culture outside of their masters’ total control.” *Id.* “Certainly the high proportion of watermen in the slave

population, their autonomy, and the premium placed on their maritime skills stretched the conventional boundaries of slavery.” *Id.* On the sea, the waters opened up for slaves “an Atlantic seafaring culture renowned for a crude equality among black and white seamen.” *Id.* “Since the early colonial era, Atlantic shipping had been characterized by an exceptional degree of racial equality in seamen’s wages, social status, and duty assignments.” *Id.* And on the rivers, boating “brought slaves, white men, and free blacks together.” Ely, *Israel, supra*, at 155. “White and slave boatmen and headmen did exactly the same work, and in some records of boating it is difficult to distinguish one race from the other.” *Id.* Working on the waters thus “stood for more than income, important though that was.” *Id.* at 167. “For many ... boating provided a good way of life. The time a black batteau crew spent on the water,” for example, “gave those men, at a bare minimum ... the freedom to plan, pace, and carry out their work largely as they saw fit.” *Id.*

For some slaves, the waters provided a means to purchase their freedom. Moses Grandy is one such example. “Over three decades, he operated a river ferry in Camden County, captained canal boats in Elizabeth City and Norfolk (via the Great Dismal Swamp), and crewed a schooner on Albemarle Sound.” Cecelski, *Shores of Freedom, supra*, at 195. From his profits, he was able to purchase his freedom and then “served on ships sailing from North Carolina as far as the Mediterranean.” *Id.*

In other cases, slaves used the extensive network of black watermen to escape to freedom. For example, Thomas H. Jones, a Wilmington stevedore and slave, managed to escape after he got word that his family

was about to be sold. “Loading and unloading ships exposed him daily to sailors and boatmen from up and down the coast.” *Id.* “He eventually used his position to identify a sea captain willing to transport his wife, Mary, and their three children to New York and later negotiated his own escape with a black sailor bound for the same city.” *Id.* Other escaped slaves obtained work on the river as a means of self-support. Buchanan, *Rascals, supra*, at 802.

Further, the waters provided a livelihood not just for those on the water, but also for those in ancillary trades. “Black stevedores trundled freight on and off ships, for all its rigors a profitable and popular day-labor job.” Cecelski, *Shores of Freedom, supra*, at 193. Women often “peddled fish and oysters” and “hawked meals to hungry sailors, and found a ready market for laundry services.” *Id.* And informal economies developed, providing further opportunity to make a living. “Black river workers from ports in the lower North, upper South, and deep South traded with cotton and sugar belt plantation slaves for their produce.” Buchanan, *Rascals, supra*, at 803. “This trade offered opportunity for additional income for boat workers while providing riverside slaves with a regular outlet for their goods,” which provided a new market for plantation slaves whose prices were controlled by their masters. *Id.*

There can be no denying the importance of the navigable waters to slaves and free blacks during the antebellum period. Work on the waters was “crucial to blacks’ economic survival.” Bolster, *Black Jacks, supra*, at 6. And their work on the water was crucial to the larger, white-driven economy as well. “Between the Revolution and the Civil War, black sailors”

constituted “10 to 20 percent of all merchant American seamen, and as much as half of the native-born seamen in the merchant trade.” Cecelski, *Waterman’s Song*, *supra*, at 53. Indeed, when Southern states attempted to ban all free black seamen, “a great howl went up from the employers in the seaport towns.” Franklin, *Economic Life*, *supra*, at 254.

II. Restriction Of The Use Of The Navigable Waters By Southern Governments During The Antebellum Period

Beginning in the 1820s, Southern governments enacted a variety of rules to deprive blacks of their ability to pursue a living on the navigable waters. *Amici* highlight only two groups of such laws for the Court’s consideration: (1) the Seaman Acts and (2) laws regulating intrastate uses of the waters.

Although there were some challenges to the constitutionality of such laws before the Civil War and the enactment of the Fourteenth Amendment, such challenges invariably failed.

To understand the importance of the right “to use the navigable waters of the United States,” it is important to understand how that right had been denied to the nation’s newest citizens.

A. The Seamen Acts

“From 1822 through the Civil War, several southern states enacted laws limiting the ingress of ‘colored seamen’ into their jurisdictions.” Michael Schoeppner, *Legitimizing Quarantine: Moral Contagions, the Commerce Clause, and the Limits of Gibbons v. Ogden*, 17 J. S. Legal Hist. 81, 81 (2009)

[hereinafter *Legitimizing Quarantine*]. “The first state to enact one of these laws, which for convenience are referred to as Negro seaman acts, was South Carolina.” Philip M. Hamer, *Great Britain, the United States, and the Negro Seamen Acts, 1822–1848*, 1 J. S. Hist. 3, 3 (1935). The law “insulated the domestic black population by forbidding the entrance of free black sailors into the state.” Schoepner, *Legitimizing Quarantine, supra*, at 83. “Under the Act, if any vessel ... arrived in a port within the borders of South Carolina, then all of its free black passengers, whether or not employees of the captain, would be arrested while the ship remained in port.” *Id.* If the captain of the vessel did not pay bond to cover the expenses of a sailor’s incarceration, that man “risked enslavement through a public auction to cover his jail expenses.” *Id.*

Other states followed suit by adopting similar laws, including Georgia (1829), North Carolina (1830), Florida (1832), Alabama (1838), Louisiana (1841), and Mississippi (1842). Michael Schoepner, *Peculiar Quarantines: The Seamen Acts and Regulatory Authority in the Antebellum South*, 31 L. & Hist. Rev. 559, 560 n.1 (2013) [hereinafter *Peculiar Quarantines*]. “No reliable statistical evidence exists with which to accurately enumerate the total number of sailors affected by the many Seamen Acts during their enforcement,” but *Amici* estimate the number to be above 10,000. *Id.* (citing Bolster, *Black Jacks, supra*, at 206).

Importantly, the predicament of these sailors was inextricably linked with efforts to define the rights of national citizenship. *See id.* at 561. This proposition is best observed by looking at examples of

constitutional challenges to the Seamen Acts. The South Carolina act famously faced constitutional challenges under both the Commerce Clause and the original “Privileges and Immunities Clause,” which 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. But both types of challenges failed.

With respect to the Commerce Clause challenge, the most famous case is that of Henry Elkison. See *Elkison v. Deliesseline*, 8 F. Cas. 493 (C.C.D.S.C. 1823). Elkison, a native of Jamaica and a British subject, was imprisoned under South Carolina’s Seamen Act. Schoeppner, *Legitimizing Quarantine*, *supra*, at 87. He petitioned for habeas corpus, and his case came before Supreme Court Justice William Johnson, who had “followed the Seamen Act controversy closely from its inception.” *Id.* In arguing the state’s case against the writ, “attorney Benjamin Hunt declared that South Carolina’s inherent police powers were paramount and beyond any power ceded to the federal government under the United States Constitution.” *Id.* Although Justice Johnson concluded that the law was unconstitutional, he did not have power to issue the writ. *Id.* at 90. Further, despite *Elkison* and the subsequent political reaction, “the South Carolina General Assembly ... failed to rescind the Seaman Act.” *Id.* at 93.

The Supreme Court did not clarify the matter in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), because that decision was based on the Supremacy Clause, and did not clearly announce the rule that the Commerce Clause itself prohibited states from impeding commercial operations in navigable

waterways. The plaintiff company in *Gibbons* prevailed because it had been issued a federal charter to operate in the navigable waters, which the Court held prohibited any state from interfering with the company's interstate operations. *See id.* at 200, 221. By contrast, free blacks and slaves who operated on the nation's waterways had no federal charter to rely on. As a result, the Seamen Acts occupied "a constitutional gray area between federal regulatory power over commerce and state powers of inspection and quarantine." Schoeppner, *Legitimizing Quarantine, supra*, at 101.

Amos Daley, a northern citizen from Rhode Island, challenged his 1824 imprisonment under the Seamen Act, arguing "that the Privileges and Immunities Clause in the Constitution guaranteed him, a citizen of Rhode Island, open access to the ports of" South Carolina. Schoeppner, *Peculiar Quarantines, supra*, at 581. "He carried with him freedom papers, and his captain and first mate swore under oath that Daley was a state citizen of Rhode Island." *Id.* at 581–82. The court disagreed, however, accepting the prosecution's position that the Privileges and Immunities Clause at that time did not apply to racial minorities. Michael Schoeppner, *Navigating the Dangerous Atlantic: Racial Quarantines, Black Sailors and United States Constitutionalism* 105–06 (2010) (unpublished PhD dissertation, University of Florida). Indeed, years later, in 1844, the South Carolina legislature affirmed its right to exclude blacks under the Seamen Acts on the theory that they could not be citizens and thus were not protected by the Privileges and Immunities Clause of Article IV. *See* William J. Rich, *Why "Privileges or Immunities"?*

An Explanation of the Framers' Intent, 42 Akron L. Rev. 1111, 1114 (2009).

This history demonstrates two key points. First, Southern governments routinely interfered with the liberty of free blacks who used the navigable waters. And second, the constitutional protections that existed before the adoption of the Fourteenth Amendment were conspicuously inadequate to protect free blacks—even if they were citizens of other States. As Senator Jacob Howard explained in his speech introducing the Fourteenth Amendment in the Senate, a constitutional amendment was necessary because then-existing constitutional provisions “d[id] not operate in the slightest degree as a restraint or prohibition upon” the States. Cong. Globe, 39th Cong., 1st Sess. 2765 (1866).

B. Restrictions On Use Of Navigable Waters

The Seamen Acts were not the only measures that antebellum Southern governments took to restrict the ability of free blacks to use the navigable waters. There were scores (possibly hundreds) of other laws that aimed to restrict the ability of blacks to use the waters. For example, Georgia, Virginia, and South Carolina enacted legislation “barring any black man from operating a boat or canoe without a white man present despite a long history of solo black pilots running cargo downriver and within harbors.” Matthew Spooner, *Freedom, Reenslavement, and Movement in the Revolutionary South, in Race and Nations in the Age of Emancipations* 13, 17 (Whitney Nell Stewart & John Garrison Marks eds., 2018).

A significant number of these laws restricted wholly intrastate uses of the waters. For example, in

1826, Virginia passed a law providing, “No person other than a free white citizen of the Commonwealth shall be allowed to pilot a vessel up or down the Rappahannock River.” June Purcell Guild, *Black Laws of Virginia: A Summary of the Legislative Acts of Virginia Concerning Negroes from Earliest Times to the Present* 102 (1936). In 1836, Virginia passed another law, this time requiring provision of a manifest for property loaded onto a boat on the Appomattox or Roanoke Rivers. If the person doing the loading was a “free Negro,” the law required a certificate from a “respectable white person certifying the truth of the manifest.” *Id.* at 111. Another Virginia law provided that, on the James River, “[a]ny waterman of color found strolling from his boat may be whipped ... if he is not going directly to or from any spring for the purpose of getting water.” *Id.* at 97. Such laws were not unique to Virginia. In 1858, Maryland passed a law forbidding “any colored person in Charles or Prince George’s counties to keep or use any boat on the Potomac, without license” from a master (if slave) or a justice of the peace (if free). Jeffrey Richardson Brackett, *The Negro in Maryland: A Study of the Institution of Slavery* 208 (1889).

Some restrictions on the use of intrastate waters were even enacted on the local or municipal level. For example, Savannah’s City Council banned free blacks from acting as “pilots for the bar of Tybee and river Savannah.” Johnson, *Free Blacks, supra*, at 419. “Many counties in Maryland denied [free blacks] the right to hold a peddler’s license or operate boats.” Amrita Chakrabarti Myers, *Forging Freedom: Black Women and the Pursuit of Liberty in Antebellum Charleston* 86 (2011). As a final example, the city of

Memphis passed a law in 1849 that “prohibited northern steamboats with free black workers on board from docking at the city’s levee for more than three hours at a time.” Buchanan, *Levees of Hope*, *supra*, at 360. Foreign free blacks “who stayed beyond the allotted three-hour period risked imprisonment for thirty days.” *Id.* Black rivermen sometimes circumvented the law by docking outside the Memphis city limits. *Id.* at 368.

III. The Fourteenth Amendment

The deprivations faced by blacks in the period immediately preceding the Fourteenth Amendment should inform the understanding of the Privileges or Immunities Clause. The use of the navigable waters was vital to the economic and psychological welfare of blacks, both free and slave. The Southern antebellum governments sought to deprive them of that use, often on the rationale that persons of color were not entitled to the rights of national citizenship. After the War, the Fourteenth Amendment made blacks citizens of the United States, and the new Privileges or Immunities Clause established that no State could infringe on their rights as such. U.S. Const. amend. XIV, § 1.

As this Court concluded in the *Slaughter-House* cases, among the rights conspicuously protected by the new Privileges or Immunities Clause was the right “to use the navigable waters of the United States.” 83 U.S. at 79. The right to use the navigable waters stems from national citizenship, including from acts of Congress authorized under the Commerce Clause and Treaty Clause, which, prior to the Fourteenth Amendment, had been denied to blacks,

especially to black watermen in the South. See Rich, *Why “Privileges or Immunities”?*, *supra*, at 1114.

Further, the Court in the *Slaughter-House* cases declared that the Privileges or Immunities Clause protects the right to use the navigable waters “however they may penetrate the territory of the several States.” 83 U.S. at 79. This language, combined with the fact that many antebellum restrictions operated on a wholly intrastate basis, undercuts the Ninth Circuit’s holding that the Privileges or Immunities Clause protects only against infringements on *interstate* uses of the navigable waters.

The Ninth Circuit, which encompasses a significant portion of the nation’s waters, issued an opinion that buries the history surrounding the Clause and risks depriving an important historical right to a large segment of our nation’s citizens.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

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