No. 20-361

IN THE

Supreme Court of the United States

JAMES COURTNEY AND CLIFFORD COURTNEY, *ET AL.*,
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 FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONERS

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November 2, 2020

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BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioners on its own behalf.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. As part of this mission, it appears as *amicus curiae* before federal and state courts. AFPF works toward these goals, in part, by defending the individual rights and economic freedoms that are essential to ensuring that all members of society have an equal opportunity to thrive. As part of this mission, it appears as an *amicus curiae* before state and federal courts.

SUMMARY OF ARGUMENT

This case turns on whether a state may dispossess citizens of ancient rights that are protected by citizenship in the nation as a whole—here, the right to use the navigable waterways—which was a common right held in trust for benefit of the people by the sovereign well before the allocation of regulatory

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[1] All parties have consented to the filing of this brief after receiving timely notice. *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made any monetary contributions to fund the preparation or submission of this brief.

power between the federal government and the states was memorialized in the Constitution.

It is not a dispute between a state and the federal government and does not turn on whether Congress has constitutional authority via the Commerce Clause to supersede state police power. It is simply a dispute between individuals exercising their rights as citizens and a state's desire to limit competition.

Although the issues are rendered more complex by the interplay of other traditional doctrines, such as government authority to regulate common carriers and improve public highways; those intersecting doctrines are not so complex or unbounded that it is impossible to tell where the authority of the state must yield to the rights of the citizen.

The questions presented here are important because the rights of citizenship should not be nullified through conflating *grants* of power to the government with *constraints* on rights of individuals. This dichotomy is fundamental to our constitutional structure and to a free and prosperous society.

The Ninth Circuit missed the boat when it looked to the Commerce Clause as a limitation on citizens' rights to use the navigable waters of the United States. It should have looked to the Privileges or Immunities Clause of the Fourteenth Amendment—which, though largely displaced by the Due Process Clause, retains its vigor regarding certain rights inherent to citizenship in the country as a whole—as the vehicle for incorporating fundamental rights against the states.

This Court should protect the right of the people to use the nations' navigable waterways and unwind the

conflation of limits on congressional power and protection of individual rights wrought by the Ninth Circuit.

FACTUAL BACKGROUND

Lake Chelan is a "navigable water of the United States" as designated by the Corps of Engineers located in Washington State. Petition for Writ of Certiorari ("Pet.") at 5–6, *Courtney v. Danner*, No. 20-361). The Lake Chelan Dam, which forms the southern boundary of the lake, has been added to the National Register of Historic Places.[2] The northern end of the lake is located in the Lake Chelan National Recreation Area ("National Recreation Area").

The lake is 55 miles long, narrow, and the third deepest lake in the United States.[3] Pet. at 5. The city of Chelan, located at the southern end of the lake near the dam, is accessible by state highway.[4] The unincorporated community of Stehekin, located at the northwest end of the lake, is in the National Recreation Area. Pet. at 5–6. No roads lead to Stehekin or the National Recreation Area, which are accessible only by boat, plane, or foot. Pet. at 6.

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[2] A dam built to raise the level of Lake Chelan, providing water for south Chelan real estate and navigation to the city of Chelan, was completed 1892. The dam has been rebuilt several times. The current dam, which includes a hydroelectric plant, was completed in 1927 and added to the National Register of Historic Places in 1988. *Lake Chelan Dam*, Wikipedia, https://bit.ly/2J87pO5 (last visited Oct. 29, 2020).

[3] *Lake Chelan*, Wikipedia, https://bit.ly/3e6Dy3U (last visited Oct. 29, 2020).

[4] *Chelan, Washington*, Wikipedia, https://bit.ly/3mubpqk (last visited Oct. 29, 2020).

In 1927, Washington began prohibiting ferry service on Lake Chelan without first obtaining a certificate of "public convenience and necessity" ("certificate") it. Pet. at 6–7. Since that time only two certificates have been issued. Pet. at 8. New applicants for a certificate may be rejected if an existing certificate holder files a protest and the *applicant* is unable to prove that the existing certificate holder has failed to provide "reasonable and adequate service." Pet. at 7–8.

Petitioners Jim and Cliff Courtney live in Stehekin, where they operate several family-owned businesses, including Stehekin Valley Ranch: a ranch with cabins and a lodge house. Pet. at 8. Since 1997, they have tried to obtain authority to provide alternative boat transportation for customers attempting to reach their businesses in Stehekin—roughly 50 miles by water from the state highways. Pet. at 9. First, Jim applied for a certificate to operate a Stehekin-based ferry. Pet. at 9. That effort was unsuccessful because he was unable to prove that the existing Lake Chelan Boat Company failed to provide "reasonable and adequate service" Pet. at 9.

Abandoning the ferry approach, Jim then applied to the U.S. Forest Service for a special-use permit to use the federally-owned docks on the lake in conjunction with a proposed on-call boat service. The Forest Service agreed—*if* the Washington Utilities and Transportation Commission would provide an opinion that no certificate was needed for the proposed service. This, the Commission declined to do. Pet. at 9.

Cliff then proposed to the Commission to either: (1) charter a boat for customers of Courtney-family

businesses to provide transportation as one of the guests' options; or (2) purchase a boat to carry his own customers. The Commission responded that both options would require a certificate. Pet. at 10.

The Courtneys filed suit, challenging the requirement for a certificate to provide ferry service on Lake Chelan; and challenging the requirement for a certificate to provide non-ferry transportation on the lake for their own customers, citing their right to use the navigable waters of the United States as protected by the Privileges or Immunities Clause of the Fourteenth Amendment. Pet. at 10–11. After a two-decade journey between the courts and the Commission that resulted in the dismissal of the ferry-certificate claim, the Ninth Circuit affirmed the dismissal of the non-ferry-certificate claim on the basis that the federal government—which was not a party to the case—had no authority over the lake and therefore the Commission's exclusion of the Courtneys from operating a boat service on Lake Chelan "does not affect the Courtneys' privileges or immunities as citizens of the United States". Pet. at 11–14; *Courtney v. Danner*, 801 F. App'x. 558, 560 (9th Cir. 2020).

Thus, with one stroke of the pen, the Court of Appeals inverted a personal right that protects *against* the power of government into an appendage of a limited grant of authority *to* the government.

Argument

I. The Right to Access Navigable Waters is Venerable and Enduring.

By the law of nature these things are common to mankind—the air, running water, the sea and consequently the shores of the sea.

—Justinian[5]

A. Common Use of the Navigable Waters is an Ancient Right Held in Trust by the Sovereign for Benefit of the People.

From ancient times the common law has recognized the right of the people to access the sea and navigable rivers. This right was held in trust by the sovereign for benefit of the people. While rights to ownership of adjacent real property and regulation of certain nautical activities are sometimes in tension with this right, the duty of the sovereign to preserve the people's right to use the water is unwavering. This proposition is not exotic, having a pedigree in the

[5] J. Inst. 2.1.1–4 (A.D. 535), *available at* https://bit.ly/3oGRWEM ("1. By the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitationes, monuments, and buildings which are not, like the sea, subject only to the law of nations. 2. All rivers and ports are public; hence the right of fishing in a port, or in rivers, is common to all men. 3. The seashore extends as far as the greatest winter flood runs up. 4. The public use of the banks of a river is part of the law of nations, just as is that of the river itself. All persons, therefore, are as much at liberty to bring their vessels to the bank, to fasten ropes to the trees growing there, and to place any part of their cargo there, as to navigate the river itself.")

common law reaching at least as far back as the early Thirteenth Century.[6]

In England, "'title to lands under tide waters . . . were by the common law deemed to be vested in the king as a public trust, to subserve and protect the public right to use them as common highways for commerce, trade, and intercourse." *People v. N.Y. & Staten Island Ferry Co.*, 68 N. Y. 71, 76 (N.Y. 1877). Lord Hale, regarding the "common people of England," recognized their "liberty of fishing in the sea, or creeks or arms thereof, as a public common of piscary." *Martin v. Waddell's Lessee,* 41 U.S. 367, 412 (1842). This right was "paramount" even to the king's right to grant the soil under the water, so that "[i]n every such grant [by the king] there was an implied reservation of the public right, and so far as it assumed to interfere with it, or to confer a right to impede or obstruct navigation, or to make an exclusive appropriation of the use of navigable waters, the grant was void." 68 N. Y. at 76.

This longstanding principle of the common law is not a mere preference or historical oddity; but is based on the most fundamental human needs:

> The sea and navigable rivers are natural highways, and any obstruction to the common right, or exclusive appropriation of their use, is injurious to commerce, and, if permitted at the will of the sovereign, would be very likely to end

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[6] *See Magna Carta* 23–33 (1215).

> in materially crippling, if not destroying, it.
>
> The laws of most nations have sedulously guarded the public use of navigable waters within their limits against infringement, subjecting it only to such regulation by the state, in the interest of the public, as is deemed consistent with the preservation of the public right.

N.Y. & Staten Island Ferry Co., 68 N. Y. at 77.

This ancient right was carried to America by the English colonists, who, as subjects of the British crown, retained their right to rely on the sovereign to hold in trust for them access to the navigable waters. In *Waddell's Lessee*, this Court held that the public right to access the navigable waters precluded the ejection of oyster fisheries from a tidal river of New Jersey when ownership of the land beneath the navigable water was asserted pursuant to the charters Charles II gave to his brother the Duke of York in 1664 and 1674, which authorized the Duke to establish a colony in America. *Waddell's Lessee,* 41 U.S. at 367.

In protecting the public's rights, the Court relied on a series of findings and precepts. First, that the "English possessions in America were not claimed by right of conquest, but by right of discovery," and thus, any government established there was not intended for a conquered people, but "was held by the king in his public and regal character, as the representative

of the nation, and in trust for them." *Id*. at 409.[7] Accordingly, in granting the charters, the king could only grant those privileges and property that he, as sovereign, could alienate. Any grant in excess of that authority would be void. *Id*. at 411.

Because the charters conveyed the powers of government, subject to the condition that "the statutes, ordinances, and proceedings established by his authority, should not be contrary to, but as nearly as might be agreeable to, the laws, statutes and government of the realm of England," the Duke was bound by the duty "to stand in the place of the king, and administer the government according to the principles of the British constitution." *Id*. at 408, 412 (cleaned up). Later transfers from the Duke to intermediary proprietors, and then back to Queen Anne in 1702, included the same *jura regalia* associated with the territory. *Id*. at 416.

These charters, the Court found, were consistent with the "various other charters for large territories on the Atlantic cost [sic], [which] were granted, by different monarchs . . . to different persons, for the purposes of settlement and colonization, in which the powers of government were united with the grant of territory." *Id*. at 414. None of these charters were known to have included materially different treatment of "bays, rivers and arms of the sea, and the

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[7] "The discoveries made by persons acting under the authority of the government were for the benefit of the nation; and the crown, according to the principles of the British constitution, was the proper organ to dispose of the public domains; and upon these principles rest the various charters and grants of territory made on this continent." *Waddell's Lessee,* 41 U.S. at 409.

soils under them, [in their conveyance] to the grantees." *Id.*

This then, was the state of the law when the colonists, "took possession of the reins of government, and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the crown or the parliament." *Id.* at 416.

B. Citizens' Rights to Navigation were Retained by All States Under the Equal Footing Doctrine Subject to the Limited Authority of the Federal Government.

"When the Revolution took place the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soil under them for their own common use, subject only to the rights since surrendered by the Constitution to the General Government." *Gilman v. City of Phila.*, 70 U.S. 713, 726 (1865) (cleaned up). Although each state was a sovereign entity, the right of the people to freely access the navigable waters of the entire country was presumed—and jealously guarded.

John Jay, in Federalist No. 2, noted the importance of the rivers that tied the country together:

> It has often given me pleasure to observe that . . . Providence has in a particular manner blessed [independent America] with a variety of soils and productions, and watered it with innumerable streams, for the delight and

> accommodation of its inhabitants. A succession of navigable waters forms a kind of chain round its borders, as if to bind it together; while the most noble rivers in the world, running at convenient distances, present them with highways for the easy communication of friendly aids and the mutual transportation and exchange of their various commodities."[8]

Although no express provision was included in the Constitution to memorialize this element of the common law, the former colonists' understanding of their rights as citizens of their newly-formed nation was manifest in other writings, such as the declaration of rights the Pennsylvania Minority proposed be annexed to the Constitution:

> The inhabitants of the several states shall have liberty to fowl and hunt in seasonable times, on the lands they hold, and on all other lands in the United States not enclosed, and in like manner to fish in all navigable waters, and others not private property, without being restrained therein by any laws to be passed by the legislature of the United States.[9]

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[8] The Federalist No. 2, (John Jay), *available at* https://bit.ly/2Tqy8Y1.

[9] The Dissent of the Minority of the Convention of Pennsylvania, Prop. No. 8 (December 18, 1787), *available at* https://bit.ly/31IgfZp.

The Northwest Ordinance, enacted by Congress under the Articles of Confederation, likewise preserved the freedom of the navigable waterways:

> The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.[10]

The Northwest Ordinance also provided for admission of new states under the Equal Footing Doctrine, thus ensuring that citizens of the new states would maintain the same freedoms and rights as citizens of the original states.[11]

The relevance of the Equal Footing Doctrine to navigable waters was confirmed by this Court in *Huse v. Glover*, 119 U.S. 543 (1886) (regarding 1818 admission of Illinois). Equal Footing means that upon admission to the Union, the state becomes "entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states" including the "same powers over rivers within her limits." *Id.* at 546; *see also Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845) (regarding 1819 admission of Alabama with similar rights regarding navigable

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[10] Ordinance for the Government of the Territory of the United States North-West of the River Ohio, § 14, art. 4 (July 13, 1787), *available at* https://bit.ly/37JXsAM.

[11] *Id.* at § 14, art. 5.

waters). These powers were not unlimited, but were "subject to the common law," and the Constitution. *Id.* at 229–30.

> The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment,—a reason as applicable to navigable fresh waters as to waters moved by the tide.

Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 436–37 (1892).

Accordingly, the states took title to their navigable waters, whether tidal or wholly inland, subject to the same public rights that applied to the original states and the colonies before them.

C. The Privileges or Immunities of Citizenship are Rights that Comprised Access to Navigable Waters at the Time the Fourteenth Amendment was Ratified.

The rights described above were extant when the Fourteenth Amendment was ratified and perforce among the privileges or immunities described therein.

The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;" which, '[o]n its face . . . appears to grant the persons just made United States citizens a certain collection of rights—*i.e.*, privileges or immunities—attributable to that status." *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 808 (2010) (Thomas, J., concurring). "In interpreting this language, it is important to recall that constitutional provisions are written to be understood by the voters." *Id.* at 813. "Thus, the objective of this inquiry is to discern what ordinary citizens at the time of ratification would have understood the Privileges or Immunities Clause to mean." *Id.* (cleaned up).

The terms "privileges" and "immunities" have been used interchangeably with "rights" since the time of Blackstone. 1 William Blackstone, *Commentaries* *125–29 (1753) (describing the "rights and liberties" of Englishmen as those "private immunities . . residuum of natural liberty" and "civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals"). This Eighteenth Century distillation of rights under English law encompasses the time of the founding and thus, the founding public likely understood "privileges and immunities" as equivalent to "rights." Similarly, contemporaneous dictionary definitions confirm that "[a]t the time of Reconstruction, the terms 'privileges' and 'immunities' had an established meaning as synonyms for 'rights.'" *McDonald*, 561 U.S. at 813 (Thomas, J. concurring) (citing 2 N. Webster, An American Dictionary of the English Language 1039 (C. Goodrich & N. Porter rev. 1865)).

Accordingly, the privileges and immunities of Englishmen, as inherited and preserved for American citizens by the states, would have been understood by both the founding and the reconstruction publics as including use of the nation's navigable waters. And thus, such right would have been comprised by the Fourteenth Amendment as ratified. It should come as no surprise then, that this right is among the few privileges or immunities that the Court has expressly identified as encompassed by the term.

II. Neither Federal nor State Power to Regulate is at Issue in This Case.

All experience shows, that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical.

Gibbons v. Ogden, 22 U.S. 1, 78 (1824).

A. The Undisputed Supremacy of the Commerce Clause is not at Issue.

Whether the federal government can regulate navigation was settled in *Gibbons v. Ogden*, which resolved a conflict between New York State law, granting exclusive navigation rights for steamboats on waters within the State's jurisdiction, and an act of Congress "for enrolling and licensing ships and vessels to be employed in the coasting trade and fisheries, and for regulating the same." *Id.* at 1. The Court made three essential holdings: First, that the Commerce Clause "comprehends, and has been always understood to comprehend, navigation within its meaning." *Id.* at 74. Second, that the geographic

limitations of "commerce among the states," was "properly . . . restricted to that commerce which concerns more States than one." *Id*. And third, that due to the "direct collision" between the New York law and an act of Congress, the extent of Congress's authority under the Commerce Clause was necessary to the Court's decision that the New York law must yield. *Id*. at 82, 86.

The narrow question of whether the Commerce Clause applies to navigation on waters wholly within the boundaries of a state was not squarely addressed. However, the Court recognized that the "deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right" and thus, the "power of Congress, . . . comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several States, or with the Indian tribes.'" *Id*. at 74–75. *See also Gilman*, 70 U.S. at 713, 740 (Clifford, J., dissenting) ("Public navigable rivers, whose waters fall into the sea, are rivers of the United States in the sense of the law of nations and of the Constitution of the United States. They are so treated by all writers upon public law, and there is no well-considered decision of the Federal courts which does not treat them in the same way.").

The geographic reach of the Commerce Clause is not necessary to the decision here either because the rights the Courtneys seek to vindicate, unlike the conflicting licensing rights in *Ogden*, are not dependent on an act of Congress. Whether the federal government could regulate commerce on Lake Chelan

as a water of the United States is simply irrelevant because it did not and the Courtneys are not relying on any congressional act to justify their claim.

B. States' Traditional—But Limited—Power to Improve Highways and Regulate Common Carriers is not at Issue.

Within their borders, and "subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states," states have authority to regulate the water and the land beneath the water. *Illinois Cent. R.R. Co.*, 146 U.S. at 435.

But this power is bound by the states' duty to preserve the freedom of navigation:

> the state holds title to soils under tide water, by the common law, . . . and that title necessarily carries with it control over the waters above them, whenever the lands are subjected to use. *But it is a title different in character* from that which the state holds in lands intended for sale. . . . *It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters*, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.

Id. at 452, (emphasis added).

Thus, cases that have reached this Court regarding states' rights to regulate ferries, bridges, and locks demonstrate two common themes: (1) states have authority to regulate ferries, bridges, and locks within their jurisdiction to the extent that regulation does not conflict with federal law; and (2) that authority tends toward improving and expanding access to the navigable waters—not excluding access, even where there is a trade-off between modes of access. In short, authority to regulate is authority to improve, not abolish.

The state's discretion in improving waterways was examined in *Gilman v. City of Philadelphia*, where the State of Pennsylvania authorized construction of a bridge across the Schuylkill River. 70 U.S. at 713–14. The plaintiff was the owner of coal wharves located between the existing upriver bridge and the proposed downriver bridge. The new construction would negatively affect his business because the height of the new bridge was not sufficient to allow masted vessels to pass through and reach his wharves. *Id*. at 719–20.

The case was framed as a violation of the Commerce Clause. *Id*. at 724. But that issue was disposed because, unlike in *Ogden*, the plaintiff was not the owner of a licensed coasting vessel and thus could not rely on the congressional licensing scheme as the basis for an alleged conflict, *id.* at 719; nor had Congress passed a law forbidding obstruction of the river. *Id*. at 729.

Although the Court acknowledged that "the river from its mouth to and beyond the port of Philadelphia is and has been considered as an ancient, navigable,

public river and common highway, free to be used and navigated by all citizens of the United States," the Court emphasized the volume of commerce on the river, and the fact that the obstruction was only partial. *Id.* at 717, 719. In the end, the means of enhancing transportation was left to the state because "[b]ridges, turnpikes, streets, and railroads, are means of commercial transportation as well as navigable waters, and the commerce which passes over a bridge may be much greater than that which will ever be transported on the water which it obstructs." *Id.* at 713. Accordingly, when improvements to transportation involve multiple means of conveyance, "it is for the municipal power to weigh and balance against each other the considerations which belong to the subject-the obstruction of navigation on the one hand, and the advantage to commerce on the other-and to decide which shall be preferred." *Id.*

This proposition, which tends toward the overall enhancement of public access to highways—whether on water or on land—is consistent with the traditional duty of the sovereign to protect public access. *Accord Wabash, St. L. & P. R.R. Co. v. Illinois*, 118 U.S. 557, 583–84 (1886) ("The doctrines announced in these cases apply not only to dams in and bridges over navigable streams, but to all structures and appliances in a state which may incidentally interfere with commerce, or which may be erected or created for the furtherance of commerce, whether by water or by land."); *Huse*, 119 U.S. at 549 (upholding measures for improving the navigation of Illinois river through construction of a lock and dam because, "[h]ow the highways of a state, whether on land or by water, shall

be best improved for the public good, is a matter for state determination."). Improved access is the theme and in no instance has the complainant been individually excluded by the state from accessing the navigable waters.

Regulation of ferries is similar and may be undertaken by the state relative to common carriers so long as that regulation does not exclude citizens' access to go about their own business; for, "it is a well-settled principle of common law that no man may set up a ferry for all passengers, without prescription . . . He may make a ferry for his own use, or the use of his family, but not for the common use of all the king's subjects passing that way." *In re Binghamton Bridge*, 70 U.S. 51, 81 (1865).

Thus, once the Courtneys proposed private transportation for their own customers, any state interest in general regulation of ferry services gave way to the duty to preserve access to the lake. Abolishing private navigation on an indisputably navigable water goes beyond regulating services and trespasses on the individual citizen's right to access the waters of the United States.

III. *The Slaughter-House Cases* Explicitly Rejected the Theory that Access to the Navigable Waters of the United States is Dependent on State Citizenship.

Against the backdrop of the ancient common right to access the navigable waters and the duty of government to preserve that right, the only unsettled issue when the *Slaughter-House Cases* were decided was whether the right to access navigable waters was

an aggregated state-based common law right or truly a national right that applied to all citizens via the Fourteenth Amendment. The Court answered that it was the latter.

The *Slaughter-House Cases* distinguish privileges of national citizenship from rights traditionally protected by the states to conclude that privileges of national citizenship are protected by the Fourteenth Amendment and privileges of state citizenship are protected by the state—as they were before the Fourteenth Amendment. *Slaughter-House Cases*, 83 U.S. 36, 75 (1872); *see also McDonald,* 561 U.S. at 754–55.

It would appear based its long history that access to the navigable waters of a state would be one such right of state citizenship. But the Court concluded otherwise, stating that "[t]he right to use the navigable waters of the United States, however they may penetrate the territory of the several States," is "dependent upon citizenship of the United States, and not citizenship of a State." *Slaughter-House Cases*, 83 U.S. at 79–80. In reaching this conclusion, the Court distilled the fundamental premise of previous cases—that access to the waters of the United States is a right of all United States citizens, regardless of state. *E.g.*, *Gilman*, 70 U.S. at 717 ("the river . . . is and has been considered as an ancient, navigable, public river and common highway, free to be used and navigated by all citizens of the United States."). Thus, in the *Slaughter-House Cases*, what had been presumed became explicit, and the Fourteenth Amendment rendered unassailable under constitutional law the previous common law right of access to the navigable waters.

IV. The Ninth Circuit Erred in Conflating a Grant of Authority with Retained Rights.

Everything which is not forbidden is allowed" is a constitutional principle of English law—an essential freedom of the ordinary citizen. The converse principle—"everything which is not allowed is forbidden"—applies to public authorities, whose actions are limited to the powers explicitly granted to them by law.[12]

The Constitution includes limited grants of authority to the government and presupposes broad individual rights, as is proper for a government that is a creature of the people and has only those powers delegated to it. The Ninth Circuit looked through the lens from the wrong side and got this relationship backwards by holding that the right to use the navigable waters of the United States is dependent on Congress's Commerce power .

By making the Commerce Clause the font of individual rights, the Court of Appeals set constitutionally constrained congressional authority as the outside boundary of citizens' rights. The citizen-creator was thus relegated to being less than its own creation.

Attempting to apply that approach to the other rights of citizenship identified in the *Slaughter-House Cases* makes the error clear. For example, the right to peaceably assemble and petition for redress of

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[12] World Heritage Encyclopedia, citing Gordon Slynn Slynn of Hadley, Mads Tønnesson Andenæs, Duncan Fairgrieve , *Judicial Review in International Perspective*, Kluwer Law International, p. 256 (2000), available at:.https://bit.ly/3osBurR

grievances that is guaranteed by the Constitution is listed as a right of national citizenship. *Slaughter-House Cases*, 83 U.S. at 79. It would be absurd to claim that this right does not exist unless and until Congress acts to animate it. Moreover, if Congress limited that right, it would bear the burden of justifying any infringement.

Similarly, the *Slaughter-House Cases* identify a privilege expressly conferred by the Fourteenth Amendment: "that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bonâ fide residence therein, with the same rights as other citizens of that State." *Id*. at 80. There is no gateway action by Congress required before the citizen's right to settle in a state may be exercised—even though the act of moving house may well be as commercial in nature as navigating a lake.

It defies logic and contradicts the underpinnings of our constitutional system to declare that the rights of citizenship have no force unless Congress has exercised its own limited authority; and it was error by the Ninth Circuit to diminish the rights of citizenship to less than the rights of Congress.

CONCLUSION

The Court should grant the Petition.

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November 2, 2020