No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the "right to use the navigable waters of the United States," which was recognized by this Court in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873), limited solely to uses involving interstate or foreign commerce?

2. Does the Privileges or Immunities Clause of the Fourteenth Amendment generally bar claims against the power of State governments over the rights of their own citizens, even when the claim involves abridgement of a recognized right of United States citizenship?

PARTIES TO THE PROCEEDING

The Petitioners, who were the appellants in the United States Court of Appeals for the Ninth Circuit, are James Courtney and Clifford Courtney. The Respondents, who were the appellees in the Ninth Circuit, are David Danner, chairman and commissioner of the Washington Utilities and Transportation Commission ("WUTC"); Ann Rendahl, commissioner of the WUTC; Jay Balasbas, commissioner of the WUTC; and Mark Johnson, executive director of the WUTC, in their official capacities.

RELATED PROCEEDINGS

Courtney v. Goltz, No. 11-CV-0401-TOR (E.D. Wash.) (dismissing first Privileges or Immunities Clause claim for failure to state a claim and exercising *Pullman* abstention over second Privileges or Immunities Clause claim) (opinion issued and judgment entered April 17, 2012) (App. 125-45).

Courtney v. Goltz, No. 12-35392 (9th Cir.) (affirming dismissal of first claim, affirming exercise of *Pullman* abstention over second claim, and retaining jurisdiction over second claim) (opinion issued and judgment entered December 2, 2013) (App. 98-124).

Courtney v. Danner, No. 13-1064 (U.S.) (denying petition for writ of certiorari regarding dismissal of first claim only) (order entered June 2, 2014) (App. 97).

RELATED PROCEEDINGS – Continued

In the Matter of the Petition of James and Clifford Courtney for a Declaratory Order on the Applicability of Wash. Rev. Code § 81.84.010(1) and Wash. Admin. Code § 480-51-025(2), No. TS-151359 (Wash. Utils. & Transp. Comm'n) (declaring public convenience and necessity requirement applicable to transportation at issue in second claim) (declaratory order entered November 16, 2015) (App. 79-96).

Courtney v. Wash. Utils. & Transp. Comm'n, No. 15-2-01015-2 (Super. Ct., Chelan Cty.) (affirming agency declaratory order) (memorandum opinion issued January 25, 2017; judgment entered February 6, 2017) (App. 59-78, 52-58).

Courtney v. Wash. Utils. & Transp. Comm'n, No. 35095-9-III (Wash. Ct. App.) (affirming agency declaratory order) (opinion issued and judgment entered April 3, 2018) (App. 26-51).

Courtney v. Wash. Utils. & Transp. Comm'n, No. 95796-7 (Wash.) (denying review) (order entered August 8, 2018) (App. 25).

Courtney v. Danner, No. 2:11-CV-0401-TOR (E.D. Wash.) (dismissing second Privileges or Immunities Clause claim for failure to state a claim) (opinion issued and judgment entered January 3, 2019) (App. 5-24).

RELATED PROCEEDINGS – Continued

Courtney v. Danner, No. 19-35100 (9th Cir.) (affirming dismissal of second claim) (opinion issued and judgment entered April 15, 2020) (App. 1-4).

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PETITION FOR A WRIT OF CERTIORARI

Conventional wisdom says that this Court's decision in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), "strangled the privileges-or-immunities clause in its crib." Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 305 (1998). But the Clause is only mostly dead. *Cf. The Princess Bride* (20th Century Fox 1987). Mindful that observers would "sa[y] that no . . . privileges [or] immunities" of United States citizenship survived the decision, this Court "venture[d] to suggest some which" did: It identified several rights that are indisputably derived from national citizenship and, thus, protected by the Clause. *Slaughter-House*, 83 U.S. (16 Wall.) at 79. Among them is the right at issue in this case: the "right to use the navigable waters of the United States." *Id.*

In the decision below, however, the Ninth Circuit killed off even this remaining right. After the State of Washington barred James and Clifford Courtney from using Lake Chelan—a federally designated navigable water of the United States located, in part, within a national recreation area—even just to shuttle customers to and from Cliff's own ranch, the Courtneys filed this action alleging an abridgment of the right that this Court recognized in *Slaughter-House*. The Ninth Circuit, however, held that the Courtneys had failed to state a claim upon which relief could be granted.

The Ninth Circuit bent over backwards to reach this result, construing the right to use the navigable waters as constitutional surplusage. The right only

encompasses uses that "involve interstate or foreign commerce," it held, and Washington's ban on "intrastate boat transportation" therefore "does not affect the Courtneys' privileges or immunities as citizens of the United States." App. 2, 4. In so holding, the Ninth Circuit reduced a distinct right derived from national citizenship to a mere redundancy of the right to engage in interstate or foreign commerce.

But the Ninth Circuit did not stop at gutting this one particular privilege or immunity: It effectively gutted the Privileges or Immunities Clause itself. To stave off future litigants who, like the Courtneys, might invoke the Clause's protection for rights that this Court recognized in *Slaughter-House*, the Ninth Circuit insisted that the Clause "in general bar[s] . . . claims against the power of the State governments over the rights of [their] own citizens." App. 3-4 (alterations and omission in original) (internal quotation marks omitted). This, notwithstanding the Clause's command that "*No State* . . . shall abridge the privileges or immunities of citizens of the United States."

While the Privileges or Immunities Clause may not do much constitutional work, it does do some work. As this Court made clear in *Saenz v. Roe*, 526 U.S. 489 (1999), the Clause, at a minimum, protects the rights of national citizenship recognized in *Slaughter-House*, including when those rights are abridged by a citizen's own State. Yet the Ninth Circuit's decision prevents the Clause from performing even this modest function. The decision cannot be reconciled with those of this Court, which have (1) characterized the right to use the

navigable waters broadly and (2) held that the Privileges or Immunities Clause protects United States citizens from abridgments of privileges or immunities at the hands of their own States.

The Ninth Circuit's decision, moreover, conflicts with decisions from other Circuits that arose in different contexts but also construed the right to use the navigable waters. The Fourth and Eleventh Circuits, as well as district courts within them, have held that the right encompasses intrastate uses of such waters—whether economic, as in this case, or recreational. The Fifth Circuit has taken a somewhat more restrictive view, foreclosing protection for recreational uses. But the Ninth Circuit went further still. It determined that the right to use the navigable waters derives from the fact that they are channels of interstate and foreign commerce, and then concluded that the right to use them must be correspondingly limited to uses in interstate and foreign commerce only.

Slaughter-House recognized that future cases would "make it necessary" for this Court to flesh out the rights of national citizenship that the Privileges or Immunities Clause protects. *Slaughter-House*, 83 U.S. (16 Wall.) at 79. This is such a case, and it warrants this Court's attention. The Ninth Circuit's decision raises issues of profound national importance: it eviscerates longstanding limits on the States' exercise of sovereignty over federal navigable waters within their borders, and it gives the States a blank check to bar citizens from pursuing recreational and intrastate economic opportunity on them. Meanwhile, because this

case seeks to enforce a holding of *Slaughter-House* rather than revisit the propriety of that decision, the various concerns that this Court has expressed about reaching Privileges or Immunities Clause issues in recent cases—for example, *Timbs v. Indiana*, 139 S. Ct. 682 (2019), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010)—are non-existent here. Jim and Cliff Courtney therefore respectfully ask this Court to grant a writ of certiorari.

OPINIONS BELOW

The Ninth Circuit's opinion (App. 1-4) is not reported in the Federal Reporter but is available at 801 F. App'x 558. The opinion of the district court (App. 5-24) is unreported.

JURISDICTION

The Ninth Circuit entered judgment on April 15, 2020. Pursuant to this Court's COVID-19-related order dated March 19, 2020, the deadline to file a petition for a writ of certiorari was extended to 150 days from the date of the judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Privileges or Immunities Clause of 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." Reproduced at App. 146-53 are the relevant Washington statutes and regulations, which: (1) impose a certificate of public convenience and necessity requirement for ferry service, Wash. Rev. Code § 81.84.010(1); Wash. Admin. Code § 480-51-025(1), (2); and (2) govern the application process for such a certificate, Wash. Rev. Code § 81.84.020; Wash. Admin. Code §§ 480-51-030, -040.

STATEMENT

A. Lake Chelan

Lake Chelan is a narrow, 55-mile long lake in the North Cascades. The city of Chelan is located at the southeast end of the lake, and the unincorporated community of Stehekin is located at its northwest end. App 100-01. Stehekin is a popular summer destination, drawing Washington residents and visitors from outside the state. App. 100-01.[1] Stehekin and much of the

[1] *See also* Wash. Utils. and Transp. Comm'n, *Appropriateness of Rate and Service Regulation of Commercial Ferries Operating on Lake Chelan* 3-4 (Jan. 14, 2010) (hereinafter "WUTC Report"). This report is not in the record, but the parties agreed that its consideration was proper on a Rule 12(b)(6) motion and the lower courts relied on it. *E.g.*, App. 10-11, 100-01, 115, 121. The report is

northwest end of the lake are located in the Lake Chelan National Recreation Area ("LCNRA"). App. 100.

No roads lead to Stehekin or the LCNRA; both are accessible only by boat, plane, or foot. Lake Chelan thus provides a critical means of access to Stehekin and the LCNRA. App. 60, 100. The lake is a "navigable water of the United States." It has been designated as such by the Corps of Engineers and, as the Corps recognized in making the designation, the lake is presently, has been in the past, and may in the future be used for interstate commerce. App. 100; Compl. ¶¶ 17-20.

B. Ferry Regulation on Lake Chelan

Regulation of ferry service on Lake Chelan began in 1911, with a law addressing safety issues and requiring that fares be reasonable. The law did not impose significant barriers to entry, and by the early 1920s, there were at least four competing ferries on the lake. In 1927, however, the Washington legislature effectively eliminated such competition by passing a law prohibiting anyone from offering ferry service without first obtaining a certificate declaring the "public convenience and necessity" required it. App. 101.

Today, a public and convenience and necessity ("PCN") certificate is required to "operate any vessel or

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available at https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=Stehekin%20Report%20Final_a25a3eb0-cd39-4779-9c08-ecdec4c084a8.pdf.

ferry for the public use for hire between fixed termini or over a regular route upon the waters within this state." Wash. Rev. Code § 81.84.010(1) (App. 146). The requirement applies not only to full-blown ferries open to the general public, but also to something as simple as a business owner's shuttling customers to and from her own business. App. 27, 31, 80, 95.

The applicant for a certificate must prove that her proposed service is required by the "public convenience and necessity," that it "has the financial resources to operate the proposed service for at least twelve months," and, if another certificate holder is already operating in the same territory, that the existing certificate holder: (1) "has not objected to the issuance of the certificate as prayed for"; (2) "has failed or refused to furnish reasonable and adequate service"; or (3) "has failed to provide the service described in its certificate." Wash. Rev. Code §§ 81.84.010(1), .020(1)–(2) (App. 146-47).

The Washington Utilities and Transportation Commission ("WUTC") provides notice of the application to "all persons presently certificated to provide service." Wash. Admin. Code § 480-51-040(1) (App. 152). These existing providers, in turn, may file a protest with the WUTC. *Id.* § 480-51-040(1) (App. 152). The WUTC then conducts an adjudicative proceeding, and any protesting certificate holder may participate as a party. *Id.* §§ 480-07-300(2)(c), -305(3)(e), -340(3)(g). The proceeding is akin to a civil lawsuit and involves discovery, motions, an evidentiary hearing, post-hearing briefing, and oral argument. *Id.* §§ 480-07-375 to

-498. The applicant bears the burden of proof on every element for a certificate.

The PCN process is prohibitively expensive. Because of its complexity and adjudicative nature, the applicant must hire an attorney or other professional, such as a transportation consultant, and may also require an economic expert. Compl. ¶¶ 39-60. Even with this help, however, the application is almost sure to be denied. Since the PCN requirement was imposed in 1927, the WUTC has issued only two certificates to operate on Lake Chelan. WUTC Certificates BC-34, BC-68772. The WUTC identifies "protection from competition" as the "[r]ationale" for the requirement. App. 115; Comp. ¶ 41.

C. The Courtneys' Efforts to Provide Transportation on Lake Chelan

Petitioners Jim and Cliff Courtney are fourth-generation residents of Stehekin. They and their family have several businesses in the community, App. 7, including Stehekin Valley Ranch: a ranch with cabins and a lodge house owned by Cliff and his wife. App. 14; Compl. ¶ 51.

For years, Jim and Cliff listened as customers of these businesses complained about the inconvenience of ferry service on Lake Chelan. Since 1997, they have initiated four significant efforts to provide alternative service, but they have been thwarted by the PCN requirement at every step.

First, in 1997, Jim applied for a certificate to operate a Stehekin-based ferry. An existing certificate holder, Lake Chelan Boat Company, protested the application. In August 1998, after a two-day hearing that yielded a 515-page transcript, the WUTC denied a certificate, finding that the Lake Chelan Boat Company had not failed to provide "reasonable and adequate service" and that Jim's proposed service might "tak[e] business from" the company. App. 9, 103; Compl. ¶¶ 57-67. Jim incurred approximately $20,000 in expenses for the application. Compl. ¶ 68.

Second, in 2006, Jim pursued another service: a Stehekin-based, on-call boat that he believed fell within a "charter service" exemption to the PCN requirement. Because some of the docks on the lake are federally owned, he applied to the U.S. Forest Service for a special-use permit to use the docks in conjunction with the business. Before it would issue the permit, the Forest Service sought to confirm that Jim's proposed service was, in fact, exempt. The Forest Service's district ranger wrote to the WUTC's executive director to get his opinion, and Forest Service staff advised Jim that "[o]nce [the district ranger] has [the WUTC's] formal decision that no cert[ificate] is needed, . . . he will sign your permit." The WUTC's executive director, however, declined to provide an opinion and Jim was unable to launch his boat service. App. 9, 103-04; Compl. ¶¶ 70-82.

Third, in 2008, while Jim was trying unsuccessfully to launch an on-call service, Cliff sent a letter to the WUTC's executive director describing certain other

services he might offer and asking whether they would require a certificate. The first involved chartering a boat for customers of Courtney-family businesses and offering a package with transportation on the chartered boat as one of the guests' options. The second involved Cliff's purchasing a boat and carrying his own customers. The WUTC's executive director opined that both services would require a certificate. App. 9-10, 104-05; Compl. ¶¶ 83-91.

Finally, Cliff contacted the governor and state legislators in early 2009 and urged them to eliminate or relax the PCN requirement. The Legislature directed the WUTC to conduct a study and report on the regulatory scheme governing ferry service on Lake Chelan. The report, issued in 2010, recommended that there be no "changes to the state laws dealing with commercial ferry regulation as it pertains to Lake Chelan." App. 10, 105; Compl. ¶¶ 92-94.

D. The Present Action (Round 1)

In October 2011, Jim and Cliff filed this action for declaratory and injunctive relief against the commissioners and executive director of the WUTC, in their official capacities. App. 105.[2] They asserted two claims: one, challenging Washington's PCN requirement as it applies to the provision of public ferry service on Lake Chelan; the other, challenging the PCN requirement as it applies to provision of boat transportation on Lake

[2] The Courtneys will refer to Respondents collectively as the "WUTC."

Chelan solely for customers of a particular business or group of businesses. Compl. ¶¶ 119, 132; App. 100, 117. The Courtneys alleged that, as applied to both services, the PCN requirement abridges their "right to use the navigable waters of the United States"—a right protected by the Privileges or Immunities Clause of the Fourteenth Amendment. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873). The Courtneys did not challenge any health and safety regulations, such as vessel inspection or insurance requirements.

The WUTC moved to dismiss the complaint, and the district court granted the motion in April 2012. App. 125-45. Regarding the Courtneys' first claim, the court concluded that the "right to use the navigable waters of the United States" recognized in *Slaughter-House* does not encompass their use "to operate a commercial ferry service open to the public." App. 139-40. Regarding their second claim, the court held that abstention under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), was warranted because it was unclear whether the PCN requirement applies to the transportation at issue in that claim; more specifically, it was unclear whether the transportation is "for the public use" as that term is used in the PCN statute. App. 144-45.

In December 2013, the Ninth Circuit affirmed the dismissal of the Courtneys' first claim, "hold[ing] that the Privileges or Immunities Clause of the Fourteenth Amendment does not protect a right to operate a public ferry on Lake Chelan." App. 117. It then distinguished the "public ferry service" at issue in the first claim from

the "private boat services for patrons of specific businesses or groups of businesses" at issue in the second. App. 107, 117. It agreed with the district court that *Pullman* abstention was warranted over the second claim because "it [wa]s not clear whether the PCN requirement applies to the private boat transportation services the Courtneys wish to provide." App. 121. The Court, however, held that retention of federal jurisdiction over the claim, rather than dismissal, was warranted so that the Courtneys could: secure a determination from the WUTC and Washington courts as to whether the PCN requirement applies to such transportation; and return to federal court to litigate the claim if the PCN requirement does, in fact, apply. App. 122-24.

The Courtneys petitioned this Court for a writ of certiorari regarding the dismissal of their first claim only. *Courtney v. Danner*, No. 13-1064. This Court called for a response but denied the petition. App. 97.

E. Declaratory Order and State Judicial Review Proceedings

The Courtneys spent the next half-decade navigating the state administrative and judicial processes necessary to secure a final determination as to the applicability of the PCN requirement. They first petitioned the WUTC for a declaratory order as to whether the transportation at issue in their second claim—*i.e.*, transportation limited solely to customers of a particular business or group of businesses—requires a PCN

certificate, but the WUTC declined to enter an order, claiming the petition lacked sufficient operational details. App. 13-14. The Courtneys accordingly filed a second petition, outlining specific services they would provide, including simply shuttling lodging customers to and from Cliff's ranch. App. 80-81. The WUTC issued a declaratory order, concluding that even such limited service is "for the public use" as that term is used in Wash. Rev. Code § 81.84.010(1) and is therefore subject to the PCN requirement. App. 95.

The Courtneys then petitioned for judicial review of the declaratory order. The Chelan County Superior Court affirmed it, App. 52-78, as did the Washington Court of Appeals, App. 26-51. The Washington Supreme Court, in turn, denied review. App. 25. At that point, the determination that Washington's PCN requirement applies to the boat transportation involved in the Courtneys' second claim was final.

F. The Present Action (Round 2)

In September 2018, the district court re-opened the Courtneys' case. App. 17. The WUTC immediately filed a renewed motion to dismiss the claim, which the district court granted. App. 17, 23. Despite the fact that the transportation in question was limited to customers of a particular business or group of businesses, and despite the Ninth Circuit's prior holding that it was "private boat transportation," App. 121, the district court reasoned that: (1) the Washington courts

had concluded that it was a "commercial public ferry service"; and (2) under the Ninth Circuit's prior opinion, "'the right to use the navigable waters of the United States' d[oes] not extend to operating a commercial public ferry." App. 20-21, 22. Moreover, the court held that "economic rights are not generally protected by the Privileges or Immunities Clause," and, therefore, "the economic purpose of the . . . service at issue cuts against, rather than strengthens, [the Courtneys'] case." App. 22, 23.

The Courtneys appealed, and the Ninth Circuit affirmed the dismissal of their second claim, but on different grounds. App. 1-4. "The right to use the navigable waters of the United States," it held, "is a national right because such waters are channels of interstate and foreign commerce, and the Constitution delegates power over those areas to Congress." App. 3. Because the right, in the Ninth Circuit's view, derives from Congress's Commerce Clause power, the right's scope must be limited to uses in interstate or foreign commerce. "[W]hether classified as 'public' or 'private,'" the court held, the Courtneys' proposed boat transportation "do[es] not involve interstate or foreign commerce," but rather "intrastate boat transportation." App. 2, 4. Accordingly, Washington's application of the PCN requirement to bar the Courtneys from Lake Chelan, according to the Ninth Circuit, "does not affect the

Courtneys' privileges or immunities as citizens of the United States." App. 4.[3]

To support its holding that intrastate uses of the navigable waters of the United States are not encompassed within the "right to use" such waters, the Ninth Circuit invoked its earlier, published opinion in *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008). App. 3-4. Quoting *Slaughter-House*, *Merrifield* had held that the Privileges or Immunities Clause generally "bar[s] . . . claims against 'the power of the State governments over the rights of [their] own citizens.'" *Merrifield*, 547 F.3d at 983 (quoting *Slaughter-House*, 83 U.S. (16 Wall.) at 77). Yet the language from *Slaughter-House* that *Merrifield* quoted for that holding concerned the Privileges and Immunities Clause of Article IV, section 2—not the Privileges or Immunities Clause of the Fourteenth Amendment.

[3] Seemingly at loggerheads with its recognition that uses of the navigable waters involving interstate or foreign commerce *are* protected, the Ninth Circuit cited *Conway v. Taylor's Executor*, 66 U.S. (1 Black) 603 (1861), for the proposition that "[r]ights of commerce give no authority to . . . invade the rights" of a state-conferred ferry franchise. App. 3 (quoting *Conway*, 66 U.S. (1 Black) at 634). The court's reliance on *Conway* is not only confusing, but also misplaced. *See City of Sault Ste. Marie v. Int'l Transit Co.*, 234 U.S. 333, 339 (1914) (invalidating ferry franchise requirement under the Commerce Clause notwithstanding *Conway*).

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit Disregarded this Court's Characterization of the Right to Use the Navigable Waters and Its Holdings Regarding the Protection that the Privileges or Immunities Clause Offers the Right.

While there is no shortage of disagreement concerning the role that the Privileges or Immunities Clause should play in constitutional adjudication, two things regarding the Clause are clear: (1) it protects the rights that this Court *said* it protects in the *Slaughter-House Cases*; and (2) it protects those rights against abridgment by *any* State. When the Clause says "No State . . . shall abridge" those rights, it means just that.

In the decision below, however, the Ninth Circuit bent over backwards to prevent the Clause from performing even this modest, non-controversial function. After nearly a decade of litigation, the Ninth Circuit concluded that the Courtneys could not even state a claim for abridgment of a right expressly recognized in *Slaughter-House*.

Even more troubling is the route the Ninth Circuit took to get there. First, it construed the right in question—the "right to use the navigable waters of the United States," *Slaughter-House*, 83 U.S. (16 Wall.) at 79—as a meaningless redundancy of the right to engage in interstate or foreign commerce. Second, it construed the words "[n]o State . . . shall abridge" to mean "no State *except one's own* shall abridge." The Ninth

Circuit's decision is at loggerheads with the history of the right to use the navigable waters and this Court's expansive descriptions of the right. It also contravenes this Court's repeated holding that the Privileges or Immunities Clause protects citizens from their own State's government.

1. The history of the right to use the navigable waters belies the cramped interpretation that the Ninth Circuit gave it. The lineage of the right traces at least to Magna Carta, which contained protections for free navigation of England's rivers. *See* Magna Carta cl. 33 (1215). As Blackstone would later explain, "appropriating . . . the use" of England's rivers through the issuance of exclusive franchises "was prohibited . . . by King John's great charter, and the rivers that were fenced in his time were directed to be laid open." 2 William Blackstone, *Commentaries* *39.

Over the following centuries, the right to use navigable waters became entrenched in English common law. In *The Gravesend Case* (1612) 123 Eng. Rep. 883; 2 Brownl. & Golds 178 (C.P.), for example, Lord Chief Justice Edward Coke held that a royal grant for ferry service on the Thames was "repugnant," as the Thames was a "common river," "so publick, that the King cannot restrain" competition on it. *Id.* at 885. The grantee, he held, "hath not any preheminence nor precedence, but equal liberty . . . to all watermen to carry what passengers that they could." *Id.*; *see also Anonymous* (1750) 27 Eng. Rep. 1152; 1 Vesey Sen. 476 (Ch.) (refusing monopolist's request for injunction to restrain competing ferries on the River Tyne).

Cognizant that free use of the navigable waters would be critical to the success of the United States, the Founders enshrined the right to use them in the Northwest Ordinance—part of the nation's organic law. The right has "a very definite origin" in Article IV of the Ordinance, *Economy Light & Power Co. v. United States*, 256 U.S. 113, 120 (1921), which declared that "navigable waters" within the Northwest Territory "shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States." Ordinance for the Government of the Territory of the United States North-West of the River Ohio, art. IV (July 13, 1787). The First Congress reenacted the Ordinance when the federal government came into existence, Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51, and as new states entered the Union from the Northwest Territory, they remained bound by its requirement to respect "public rights of highway in navigable waters." *Econ. Light & Power Co.*, 256 U.S. at 119, 120. By virtue of the equal footing doctrine, so too did states admitted from later-created territories, including Washington. *See Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 434-35 (1892); *see also* Act of Aug. 14, 1848, ch. 177, § 14, 9 Stat. 323, 329 (creating Oregon Territory, including what is now Washington State, and providing that inhabitants were entitled to all rights secured by the Northwest Ordinance).

Despite the firm historical underpinnings of this right and its cementing in our nation's founding, Southern States in the antebellum and early postbellum period ran roughshod over it—particularly when

free black boatmen sought to exercise the right. For free blacks in this era, the freedom to use the navigable waters in economic—especially intrastate economic—activity was vital. *See generally* David S. Cecelski, *The Waterman's Song* (2001); Thomas C. Buchanan, *Black Life on the Mississippi* (2004). But Southern governments—state, county, and municipal—systematically deprived them of this freedom by, among other things, banning or severely restricting black boatmen from operating on the Rappahannock, Savannah, Potomac, Appomattox, and Roanoke Rivers (including, in some cases, their branches), and attempting to exclude them from the Pamlico and Neuse Rivers, as well.[4] Often, such laws were passed at the behest of white boatmen eager to suppress black competition, and sadly, they continued well after the Civil War.[5] These laws were unquestionably aimed at denying blacks the right to use the navigable waters *within*—not merely between—States.

It is no surprise, then, that when this Court, in *Slaughter-House*, enumerated some of the rights inherent in American citizenship and protected by the Privileges or Immunities Clause of the Fourteenth

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[4] June Purcell Guild, *Black Laws of Virginia* 102 (1936); Maurice Melton, *African American Maritime Pilots in the South Atlantic Shipping Trade, 1640-1865*, 27 J. Ga. Ass'n Historians 1, 7-8 (2007-08); Jeffrey Richardson, *The Negro in Maryland* 208 (1889); 1835-36 Va. Acts 49-50; John Hope Franklin, *The Free Negro in the Economic Life of Ante-Bellum North Carolina*, 19 N.C. Hist. Rev. 239, 249-50 (1942).

[5] *See* Melton, *supra*, at 7-8, 15; *see also* Franklin, *supra*, at 250.

Amendment, it specifically identified the right to use "the navigable waters of the United States" as among them. *Slaughter-House*, 83 U.S. (16 Wall.) at 79. The right was clearly derived from United States citizenship, enshrined, as it was, in our nation's organic law, and emphasizing it as among the rights protected by the Privileges or Immunities Clause made perfect sense given that the freedmen—who had just obtained United States citizenship by the immediately preceding clause of the Fourteenth Amendment—were being denied the right on a widescale basis.

2. Despite the proud lineage of this right and its importance to the very persons that the Privileges or Immunities Clause was designed to protect, the Ninth Circuit treated it as constitutional surplusage. From the fact that the navigable waters of the United States "are channels of interstate and foreign commerce" that Congress has the power to regulate, the Ninth Circuit inferred a corresponding limitation on the right of Americans to *use* those waters: that it only encompasses uses in interstate or foreign commerce—uses, in other words, that are already fully protected by the Commerce Clause. App. 3-4.

Even then, however the court did not treat the right as coextensive with Congress's Commerce Clause power; rather, it treated the right as much more limited. While Congress may regulate "intrastate economic activity" that "substantially affect[s] interstate commerce," *United States v. Lopez*, 514 U.S. 549, 559 (1995), the Ninth Circuit held that the right to use the navigable waters only encompasses uses that "*involve*

interstate or foreign commerce." App. 4 (emphasis added). Commercial transportation to and from a national recreation area, which Congress created for the benefit of all Americans, 16 U.S.C. § 90a-1, and which attracts tourists from all parts of the nation, WUTC Report, *supra*, at 3-4, 16-17, did not make the Ninth Circuit's cut. Presumably, the only use of the navigable waters that *would* make the cut is a commercial voyage that crosses the political border between two States or between a State and a foreign nation.

This hyper-limited understanding of the right to use the navigable waters of the United States—that it is nothing more than an extremely limited version of the right to engage in interstate or foreign commerce—cannot be reconciled with this Court's consistently broad description or the public's consistently broad understanding of the right. Neither *Slaughter-House* nor this Court's subsequent discussions placed any qualifications on the right to use the navigable waters. To the contrary, the Court has repeatedly stressed that they are "the public property of the nation," *Scranton v. Wheeler*, 179 U.S. 141, 150 (1900), and it has always described the right to use them in expansive terms. They are "highways equally open to all persons, without preference to any," the Court has held, and there can be no "exclusive use" of them—no "farming out of the privilege of navigating them to particular individuals, classes, or corporations." *Huse v. Glover*, 119 U.S. 543, 547-48 (1886); *see also Baltimore & Ohio R.R. Co. v. Maryland*, 88 U.S. 456, 470 (1874) (holding the navigable waters are "recognized public highways of trade

and intercourse," and "[n]o franchise is needed to enable the navigator to use them").

This Court, moreover, has never suggested that the right to use the navigable waters is just a subcomponent of the right to engage in interstate or foreign commerce. If anything, it has implicitly rejected that understanding. *See*, *e.g.*, *Shively v. Bowlby*, 152 U.S. 1, 49 (1894) (noting that Congress, in disposing of public lands, "has constantly acted upon the theory" that the navigable waters "shall be and remain public highways . . . , being chiefly valuable for the public purposes of commerce, navigation, and fishery"). Commentators contemporary to *Slaughter-House* likewise understood the two rights as distinct. Just seven years after the decision, Thomas Cooley separately identified *both* rights as derivative of national citizenship and, thus, protected by the Privileges or Immunities Clause:

> By the fourteenth amendment it is declared that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." . . . A citizen of the United States as such has a right to participate in foreign and inter-state commerce [and] . . . to make use in common with others of the navigable waters of the United States . . . .

Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 245 (1880).

Finally, the leading water law treatise of the era understood the right to use the navigable waters to

encompass *all* uses to which such waters are commonly put. The navigable waters, it explained, are "open to the public for passage," and "[t]he purpose of the navigation is immaterial": "[T]hose who pass upon the water for purposes of pleasure, fishing, or fowling have equal rights with those who navigate for business, trade, or agriculture." John M. Gould, *A Treatise on the Law of Waters* ch. IV, § 86 (1883). This Court cited that passage approvingly in discussing "the right of the public to use [navigable] stream[s] in the interest of navigation," *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 808 (1950), yet the Ninth Circuit, in this case, flatly rejected its understanding of the right.

3. The Ninth Circuit, however, did not interpret away just this one particular privilege or immunity of national citizenship: it interpreted away the Privileges or Immunities Clause itself. As justification for denying protection for intrastate uses of the navigable waters, the court asserted that the Privileges or Immunities Clause "in general bar[s] . . . claims against the power of the State governments over the rights of [their] own citizens." App. 3-4 (alterations and omission in original) (internal quotation marks omitted). That holding conflicts with the repeated holding of this Court that the Clause protects citizens from deprivations of national rights at the hands of their own States.

On at least two occasions, this Court has held that when the Privileges or Immunities Clause commands that "No State . . . shall abridge the privileges or immunities of citizens of the United States," it actually

means "No State." The Court expressly held as much in *Colgate v. Harvey*, 296 U.S. 404 (1935), declaring that "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." *Id.* at 428 (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)), *overruled on other grounds by Madden v. Commonwealth of Kentucky*, 309 U.S. 83 (1940). And much more recently, in *Saenz v. Roe*, 526 U.S. 489 (1999), it implicitly held as much, invalidating a California law, under the Privileges or Immunities Clause, because it abridged the right *of Californians* to travel. *Id.* at 505 (holding that the Privileges or Immunities Clause protects "the citizen's right to be treated equally in her new State of residence"). While there may be robust disagreement on precisely what rights the Privilege or Immunities Clause protects, there is universal agreement that it protects the relevant body of rights from abridgment by a citizen's own State.[6]

Nevertheless, the Ninth Circuit concluded that the Clause generally *bars* claims against one's own State—a conclusion that resulted from its conflation of the Privileges or Immunities Clause of the Fourteenth Amendment with the Privileges and Immunities

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[6] *E.g.*, John Harrison, *Review of Structure and Relationship in Constitutional Law*, 89 Va. L. Rev. 1779, 1790 (2003) ("While 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.").

Clause of Article IV, section 2. The latter clause *is* limited to protecting out-of-state residents. As *Slaughter-House* held, it does not control "the power of the State governments over the rights of its own citizens." *Slaughter-House*, 83 U.S. (16 Wall.) at 77; *see also United Bldg. & Constr. Trades Council v. Mayor and Council of Camden*, 465 U.S. 208, 217 (1984). But the Ninth Circuit cited this passage from *Slaughter-House* for the proposition that the *Fourteenth Amendment's* Privileges or Immunities Clause "in general bar[s] . . . claims against the power of the State governments over the rights of [their] own citizens." App. 3-4 (alterations and omission in original) (internal quotation marks omitted) (quoting *Merrifield v. Lockyer*, 547 F.3d 978, 983 (9th Cir. 2008) (quoting *Slaughter-House*, 83 U.S. (16 Wall.) at 77)). In so doing, the Ninth Circuit relied on its prior decision in *Merrifield*, where it enshrined this mistake in the court's published precedent. This is the constitutional equivalent of mixing apples and oranges—a mistake surprisingly common, *e.g.*, *Shipley v. Orndoff*, 491 F. Supp. 2d 498, 508 (D. Del. 2007); *Branch v. Franklin*, No. 1:06-CV-1853, 2006 WL 3335133, at *3 (N.D. Ga. Nov. 15, 2006); *Warden v. Pataki*, 35 F. Supp. 2d 354, 362 n.4 (S.D.N.Y. 1999), *aff'd sub nom. Chan v. Pataki*, 201 F.3d 430 (2d Cir. 1999), but utterly inexcusable.

And it is particularly inexcusable to suggest that the Privileges or Immunities Clause does not protect the particular right at issue in *this* case from abridgements by a citizen's own State. Given the history discussed above, it is inconceivable that when this Court held that the "right to use the navigable waters of the

United States" is inherent in American citizenship and protected by the Privileges or Immunities Clause of the Fourteenth Amendment, that protection was not meant to extend to the thousands of black boatmen—now American citizens by virtue of the same amendment—who were being shut out of those waters by and within their own States.

II. The Ninth Circuit's Decision Conflicts with Decisions from Other Circuits that Arose in Different Contexts but also Construed the Right to Use the Navigable Waters.

What's more, in reducing the right to use the navigable waters of the United States to a right to engage in interstate or foreign commerce over them, the Ninth Circuit created a split with decisions of the Fourth and Eleventh Circuits. Unlike the present case, those other cases involved attempts by riparian owners (not States) to abridge the right to use the navigable waters, and for that reason, they were not resolved under the Privileges or Immunities Clause. Still, the Fourth and Eleventh Circuits assumed, like the Ninth Circuit, that the right to use the navigable waters derives from the fact that they are channels of interstate or foreign commerce, yet, unlike the Ninth Circuit, refused to limit the right to interstate or foreign commercial uses. The Fifth Circuit, meanwhile, has taken a somewhat more restrictive position than the Fourth's and Eleventh's—but hardly as restrictive as the Ninth's.

1. The Fourth Circuit, in *Loving v. Alexander*, 745 F.2d 861 (4th Cir. 1984), held that the public's right to use a navigable water of the United States includes use for intrastate, recreational purposes. The court rejected a request by riparian landowners to enjoin public fishing access on a segment of the Jackson River. *Id.* at 863. While the court recognized that *whether* the river segment was a navigable water of the United States turned on its use or susceptibility to use as "an actual avenue of commerce," *id.* at 864, it did not limit the scope of the public's right to *use* the water to interstate commerce alone. Rather, it held, without qualification, that "the surface of the disputed section of the Jackson River may be used by the public" and accordingly refused to enjoin "public access for recreational use." *Id.* at 863, 868.

The Eleventh Circuit came to a similar conclusion in *United States v. Harrell*, 926 F.2d 1036 (11th Cir. 1991). There, a group of fishermen brought an action seeking access to Lewis Creek—a small creek in central Alabama—after riparian owners tried to "exclude [them] from using" a stretch of the creek for fishing. *Id.* at 1038.[7] Specifically, the fishermen sought "a declaration that Lewis Creek is a navigable waterway to which they have a right of public access." *Id.* at 1038. While the Eleventh Circuit ultimately concluded that the creek was not a navigable water of the United States, it recognized that if it had been, the plaintiffs

[7] Although the court noted that the plaintiffs had "commercially fished" the creek in the past, *Harrell*, 926 F.2d at 1038, it made no mention of their having engaged in interstate commerce.

would have had "a resulting right of access." *Id.* at 1038-39. "The navigable waters of the United States are public property," it held, and subject to "a right of public access." *Id.* at 1041.

District courts within the Fourth and Eleventh Circuits have likewise protected a broad right to use the navigable waters. In *Atlanta School of Kayaking, Inc. v. Douglasville-Douglas County Water & Sewer Authority*, 981 F. Supp. 1469 (N.D. Ga. 1997), the Northern District of Georgia interpreted the right to encompass intrastate economic and recreational uses. In that case, a canoe instructor, as well as an Atlanta-based kayaking school, challenged a county water authority's resolution that: (1) restricted paddling access to the Dog River Reservoir, "an area for recreational boating and fishing" near the Atlanta metropolitan area; and (2) "effectively . . . banned [them] from canoeing or kayaking on the Dog River" itself (a river "entirely within the state of Georgia"). *Id.* at 1470, 1471, 1473 n.11. The plaintiffs, who "travel[ed] down the river with students for pay," asserted that the resolution "'creat[ed] a regulatory and practical barrier or obstruction to navigation of a navigable waterway of the United States,'" and that it thereby deprived them of their "constitutional right of public access." *Id.* at 1472, 1473 (quoting Pls.' Br. in Supp. of Mot. for Prelim. Inj. at 7, *Atlanta Sch. of Kayaking, Inc. v. Douglasville-Douglas Cty. Water & Sewer Auth.*, 981 F. Supp. 1469 (N.D. Ga. 1997), No. CIV.A.1:96-CV-1886-WBH). Like the Fourth Circuit in *Loving*, the court recognized that *whether* a body of water is a navigable water of the

United States turns on use, or susceptibility to use, in "commerce." *Id.* at 1473; *see also id.* at 1472 n.8. But once it determined the Dog River to be such a body of water, it did not limit the scope of the right to *use* the water to interstate commercial uses only. Rather, it enjoined enforcement of the resolution, thereby allowing the instructor and school to continue their in-state business and allowing other canoers and kayakers to use the river and reservoir recreationally. *See id.* at 1474.

Similarly, in *Goodman v. City of Crystal River*, 669 F. Supp. 394 (M.D. Fla. 1987), the owner of land surrounding and under Three Sisters Springs sued the city in which the springs were located for failure to enforce trespass ordinances against persons entering the water in canoes, kayaks, and rowboats. *Id.* at 397, 402. The United States, which was joined to the lawsuit by the city as a counterclaim defendant, asserted that Three Sisters and the channel leading into it were navigable waters of the United States and, thus, open to recreational boaters. *Id.* at 397. The court agreed and held that because Three Sisters was a "navigable water[] of the United States," the property owner "ha[d] no right to restrict or impede access by water to Three Sisters Springs." *Id.* at 398, 402.

2. The Fifth Circuit, meanwhile, has taken a more restrictive view of the right to use the navigable waters of the United States. In *Parm v. Shumate*, 513 F.3d 135 (5th Cir. 2007), recreational fishermen brought a Section 1983 action against a sheriff, alleging they were falsely arrested for trespass when they

floated onto private property that was flooded by the Mississippi River. *Id.* at 137-38. The fishermen asserted that they had "a federal right to fish on the [p]roperty when it is covered by the Mississippi River's waters because the Mississippi River is a navigable waterway of the United States." *Id.* at 142. The Fifth Circuit disagreed. The court recognized that the Mississippi is encumbered by a navigational servitude, derived from the Commerce Clause, that gives rise to a right of public use, *id.* at 142-43, but it held that this servitude "is concerned with *navigational* rights and *commerce*" only. *Id.* at 143. "Neither navigation nor commerce encompass recreational fishing," the court held, and the plaintiffs therefore had no "right to fish on private riparian land." *Id.*

3. In the present case, the Ninth Circuit took an even more restrictive view than the Fifth Circuit. Whereas the Fifth Circuit's decision in *Parm* does not limit the public's right to *interstate* or *foreign* "commerc[ial]" uses specifically (and, regardless, leaves open the possibility that the right encompasses "navigation" that does not involve "commerce"), *id.*, the Ninth Circuit's decision flatly limits the right to interstate and foreign commercial uses only. "The Courtneys' proposed ferry services, whether classified as 'public' or 'private,' do not involve interstate or foreign commerce," the Ninth Circuit held, but rather "intrastate boat transportation." App. 2, 4. For that reason, it concluded, the Courtneys have no right to use Lake Chelan, despite its being a navigable water of the United States. App. 4.

The position of the Ninth Circuit stands in sharp conflict with the position of the Fourth and Eleventh Circuits—and, to an arguably lesser extent, the position of the Fifth Circuit. While Americans in all four Circuits have an acknowledged right to use the navigable waters of the United States, that right is a nullity for most Americans who, by choice or geographical accident, reside in the Ninth Circuit.[8]

III. This Case Raises Issues of Profound National Importance and Deserves this Court's Attention.

Finally, this case warrants the Court's attention given the historical importance of the right at issue, its continued relevance in our own time, and the damage the Ninth Circuit has done to the right and the constitutional provision that protects it. And while this Court has expressed reservations in recent years about

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[8] There may well be some overlap between the right to use the navigable waters and the right to engage in interstate or foreign commerce. But there is no basis for the Ninth Circuit's conclusion that the right to use the navigable waters offers nothing *beyond* what the right to engage in interstate commerce offers. In fact, this Court has already recognized that Fourteenth Amendment "privileges or immunities" can overlap with the right to engage in interstate commerce, yet still offer protection where the Commerce Clause does not. *Compare Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019) (holding durational residency requirement violated the right to engage in interstate commerce), *with Saenz v. Roe*, 526 U.S. 489 (1999) (holding durational residency requirement violated the right to travel and, thus, the Privileges or Immunities Clause, where no interstate commerce was involved).

reaching Privileges or Immunities Clause issues, the reasons for those reservations are entirely absent here. The Courtneys, after all, seek to enforce a holding of *Slaughter-House*—not to overrule the decision and its progeny.

1. As discussed above, the right to use the navigable waters is a part of our founding, literally written into the nation's organic law. Few, if any, rights share that pedigree, and *Slaughter-House* was correct to identify the right as one that all Americans share by virtue of their United States citizenship. Yet the right is not a *relic* of the founding era; it is just as, if not more, important today. The nation's navigable waters, to be sure, are channels of interstate and foreign commerce, but they are far more than that. They facilitate transportation and trade within States as much as between them. They provide intra- and interstate recreational opportunities to countless Americans each year. They enable access to national parks, national forests, and tribal lands—all of which commonly lay within the borders of a single State.[9] Yet, according to the Ninth Circuit, use of the navigable waters for these purposes enjoys no protection under *Slaughter-House*, because the right it recognized is a meaningless

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[9] This is true of the Lake Chelan National Recreation Area, as well as trust land of the Confederated Tribes of the Colville Reservation on the eastern shore of Lake Chelan. Wash. Geospatial Open Data Portal, *WSDOT–Tribal Reservation and Trust Lands*, http://geo.wa.gov/datasets/5cd20bda14194350ac37928af1424f30_2?geometry=-123.145%2C46.443%2C-116.207%2C47.752.

redundancy and the Privileges or Immunities Clause is impotent against one's own State.

The Ninth Circuit's decision thus eviscerates long-recognized limits on the sovereignty of the States over navigable waters within their borders. Pursuant to the equal footing doctrine, States entering the Union gained title to the beds underlying navigable waters, *Pollard v. Hagan*, 44 U.S. 212, 215-16 (1845), and pursuant to the public trust doctrine, they have discretion to regulate use of such waters in accordance with state law. But there is a federal constitutional floor that they must maintain: they must preserve the right of American citizens to *use* those waters. As this Court held in *Shively v. Bowlby*:

> [T]he ownership of, and dominion and sovereignty over, lands covered by tide waters, or navigable lakes, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done *without substantial impairment of the interest of the public in such waters* . . . .

152 U.S. at 47 (emphasis added); *see also Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 479 (1988) (holding that it is "the 'settled law of this country' that the lands under navigable freshwater lakes and rivers were within the public trust given the new States upon their entry into the Union, *subject to the federal navigation easement*" (emphasis added) (quoting *Barney v. Keokuk*, 94 U.S. 324, 338 (1877))). Although the State

of Washington did not recognize it in this case, other States have indeed recognized that they must maintain this baseline right of use that all Americans possess—that there is a federal limit on their actions as public trustee, and that they therefore cannot "substantially impair[]" the right of Americans to use the navigable waters of the United States. *E.g.*, *Kramer v. City of Lake Oswego*, 446 P.3d 1, 12 n.13 (Or. 2019), *opinion adhered to as modified on reconsideration*, 455 P.3d 922 (Or. 2019); *State ex rel. Rohrer v. Credle*, 369 S.E.2d 825, 827 (N.C. 1988).

But if that right is limited solely to uses involving interstate or foreign commerce, as the Ninth Circuit held, then States will be free to ban citizens from pursuing recreational and intrastate economic opportunities on the nation's navigable waters. The right recognized in *Slaughter-House* will have been reduced to no right at all. This Court should grant certiorari to enforce its holding in *Slaughter-House* and to dispel the notion that the Privileges or Immunities Clause is even more dead than it is already thought to be.

2. Finally, because the Courtneys seek to enforce, rather than relitigate, a holding of *Slaughter-House*, the concerns that Members of this Court have previously expressed about wading into Privileges or Immunities Clause issues are nonexistent here. Ruling for the Courtneys, for example, would not require the Court to up-end a century-and-a-half's worth of

precedent.[10] It would not require the Court to wade through judicial and scholarly disagreement over the rights that the Privileges or Immunities Clause was meant to protect.[11] And it would not run the risk of opening a Pandora's box or unleashing a free-for-all in which judges could read all manner of previously unrecognized rights into the Clause.[12]

Most importantly, however, reaching the privileges or immunities issue in this case *matters*, because the right to use the navigable waters is undisputedly a privilege or immunity of national citizenship. Unlike in *Timbs v. Indiana*, *Ramos v. Louisiana*, and *McDonald v. City of Chicago*, where there was no need to reach the Privileges or Immunities Clause because "nothing in th[e] case turn[ed] on" it,[13] there is every need to

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[10] *See* Tr. of Oral Arg. at 4:6-8, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521) (statement of Roberts, C.J.) ("Of course, this argument is contrary to the Slaughter-House Cases, which have been the law for 140 years.").

[11] *See McDonald*, 561 U.S. at 758 (plurality) (explaining there is no "consensus on that question among the scholars who agree that the *Slaughter-House Cases*' interpretation is flawed").

[12] *See McDonald*, 561 U.S. at 860 (Stevens, J., dissenting) (opining that because "it has so long remained a clean slate, a revitalized Privileges or Immunities Clause holds special hazards for judges," who might seize on it to "write their personal views of appropriate public policy into the Constitution" (quoting J. Harvie Wilkinson III, *The Fourteenth Amendment Privileges or Immunities Clause*, 12 Harv. J.L. & Pub. Pol'y 43, 52 (1989))).

[13] *Timbs v. Indiana*, 139 S. Ct. 682, 691 (2019) (Gorsuch, J., concurring) ("As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clause, . . . [b]ut nothing in this case turns on that question. . . . " (citations omitted)); *see also*

reach it here. After all, it *is* the Privileges or Immunities Clause, *Slaughter-House* tells us, that protects the right to use the navigable waters of the United States, and *Saenz* and *Colgate* make clear that this right is protected against abridgement by *any* State, including one's own. Nevertheless, the Ninth Circuit affirmed dismissal of the Courtneys' claim on the ground that the Privileges or Immunities Clause offers them no protection at all.

The Courtneys have been trying for nearly a quarter century to exercise their right to use the navigable waters of the United States, and the State of Washington has prevented them from doing so at every turn. Theirs is not some abstract, hypothetical complaint. It is a concrete, tangible injury—an injury redressable in the Privileges or Immunities Clause. The Ninth Circuit's contrary holding eviscerates a right that is rooted in Magna Carta, memorialized in the organic law of our nation, and inherent in all Americans by virtue of their national citizenship.

Ramos v. Louisiana, 140 S. Ct. 1390, 1424 (2020) (Thomas, J., concurring in judgment) ("I would accept petitioner's invitation to decide this case under the Privileges or Immunities Clause. . . . But one assumes from its silence that the Court is either following our due process incorporation precedents or believes that 'nothing in this case turns on' which clause applies." (quoting *Timbs*, 139 S. Ct. at 691 (Gorsuch, J., concurring))); *McDonald*, 561 U.S. at 758 (plurality) (noting there was "no need to reconsider" the proper clause for incorporation of Bill of Rights protections).

CONCLUSION

The petition for a writ of certiorari should be granted.

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