No. 20-361

In The
Supreme Court of the United States

JAMES COURTNEY AND CLIFFORD COURTNEY,

Petitioners,

v.

DAVID DANNER, IN HIS OFFICIAL CAPACITY AS CHAIRMAN AND COMMISSIONER OF THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Respondents (hereinafter "WUTC") insist—with no irony intended—that "[a] ruling for [the Courtneys] would . . . disturb the present predictability of the Privileges or Immunities Clause," while "[d]enying the petition for certiorari would preserve the Clause's predictability." BIO 26, 27. If the WUTC has its way, the Clause will indeed remain predictable: predictably meaningless. This Court should not let that happen. It should grant certiorari.

The WUTC's contrary arguments are unavailing. The Ninth Circuit's decision squarely raises the questions presented. The constitutional claim underlying those questions, moreover, is supported—not foreclosed—by the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). And the Ninth Circuit's dismissal of that claim created genuine—not "contrive[d]" or "manufacture[d]," BIO 17, 18—conflicts with: (1) decisions of this Court, which hold that the Privileges or Immunities Clause protects citizens against their own State governments; and (2) decisions of the Fourth and Eleventh Circuits, which, unlike the Ninth, refuse to limit the right to use the navigable waters of the United States to uses in interstate or foreign commerce.

The right to use the navigable waters is one of the oldest individual rights, with origins that trace at least to Magna Carta, and *Slaughter-House* makes clear that the right is protected under the Privileges or Immunities Clause. The right is also a vitally important one for the Courtneys, who have been fighting for

decades for the ability to transport customers to and from their family's businesses. Yet the Ninth Circuit has effectively reduced that right—and the Privileges or Immunities Clause itself—to a nullity. Certiorari is warranted.

ARGUMENT

I. The Ninth Circuit's Decision Squarely Raises the Questions Presented.

The WUTC's brief in opposition seems to address a different decision than the one issued below. The WUTC's pervading theme is that the Ninth Circuit was correct to dismiss the Courtneys' claim because they wish to operate a public ferry and such ferries have historically been the prerogative of the States. *E.g.*, BIO 26 (claiming the Courtneys assert "a privilege to offer a commercial public ferry service"); BIO 13 ("No Court has ever . . . held or even hinted that operating a public ferry on a lake in the middle of a state is a right of national citizenship."); BIO 16 (collecting cases concerning operation of a "public ferry").

The Courtneys, however, are not seeking to operate a public ferry. To be clear, they *were*, and a public ferry was the subject of their first claim. But the Ninth Circuit affirmed the dismissal of that claim in 2013, while *declining* to address their second claim, concerning what the Ninth Circuit called "private boat transportation." Pet. 11-12; App. 121. When the Courtneys

petitioned this Court for certiorari in 2014, that private transportation was not before the Court.

Now it is. The Ninth Circuit has now held that it is perfectly permissible for the WUTC to ban the Courtneys from operating a private boat service on Lake Chelan, even if only to shuttle customers to and from Cliff Courtney's ranch. Even if the Courtneys' transportation is "private," the Ninth Circuit held, it "do[es] not involve interstate or foreign commerce," and, thus, the Courtneys' "privileges or immunities as citizens of the United States" are "not affect[ed]" by Washington's application of its public convenience and necessity (hereinafter "PCN") requirement to prohibit the transportation. App. 4. In fact, in the Ninth Circuit's view, the Privileges or Immunities Clause could not possibly protect the Courtneys' "intrastate boat transportation," App. 2, because according to its decision in *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008), the Clause "in general bar[s] . . . claims against the power of the State governments over the rights of [their] own citizens." App. 2, 3-4 (alterations and omission in original) (internal quotation marks omitted); *see also* App. 3 ("[A] state licensing requirement impeding [a] state resident . . . within the state does not implicate the Privileges or Immunities Clause . . . .").

That is the decision the Courtneys have asked this Court to review. It squarely raises both questions the Courtneys have presented, and it resolved them in a way that conflicts with this Court's precedent and the decisions of other Circuits.

II. Neither *Slaughter-House* Nor Any Other Decision Forecloses the Courtneys' Claim.

The WUTC insists that the Courtneys' claim, brought pursuant to the *Slaughter-House Cases*, is foreclosed by . . . the *Slaughter-House Cases* (as well as other decisions of this and other courts). *See* BIO 13. It is not.

Slaughter-House held that the "right to use the navigable waters of the United States" is protected by the Privileges or Immunities Clause. *Slaughter-House*, 83 U.S. (16 Wall.) at 79. Although the Court mentioned "ferries" in addressing the police power of the States, *id.* at 63, it then recognized that there are constitutional limits on the police power—that even a law regarding a subject that falls within the police power can exceed that power and contravene federal constitutional protections. *Id.* at 66 ("[T]he authority of the legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the . . . Constitution of the United States . . . ."). The dissent agreed. *E.g.*, *id.* at 120-21 (Bradley, J., dissenting) (referring to exclusive franchises, including for ferries, as "odious" and "inimical to the just rights and greatest good of the people").

That is precisely the Courtneys' claim: Even if it might be permissible for Washington to limit who may operate *public* ferries[1] on the navigable waters of the

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[1] The WUTC recognizes that when the *Slaughter-House* majority and dissenting opinions mentioned "ferries" as subject to

United States, the WUTC's application of the PCN requirement sweeps far too broadly, because it prohibits purely *private* transportation—transportation that courts have long recognized is *not* a public ferry. *E.g.*, *Self v. Dunn*, 42 Ga. 528, 530, 531 (1871) (holding boat transportation for mill customers was an "accommodation of the mill-owner to his customers" and, thus, "private"); *People v. Mago*, 23 N.Y.S. 938, 939-40 (N.Y. Gen. Term 1893) (holding regular, weekly boat transportation for customers of an island resort was not a ferry, because it was only available to resort customers); *Meisner v. Detroit, Belle Isle & Windsor Ferry Co.*, 118 N.W. 14, 15 (Mich. 1908) (holding boat transportation limited to customers of an amusement park located on an island was not a "public common carrier").

The sweeping restriction at issue here is utterly irreconcilable with the history of the right to use the navigable waters and wildly disproportionate to—if not wholly detached from—the WUTC's purported regulatory justification. *Cf. Mayor of Vidalia v. McNeely*, 274 U.S. 676, 680 (1927) (holding government's argument in defense of public ferry licensing requirement "confuse[d] power to license, and therefore to exclude from the business, with power to regulate it"); *City of Sault Ste. Marie v. Int'l Transit Co.*, 234 U.S. 333, 339-40 (1914) (holding public ferry licensing requirement went "beyond" a "mere police regulation"). The Courtneys are prepared to prove as much on the merits on remand. At this stage, however, the Court need only

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the police power, they were referring to "*public* ferr[ies]." BIO 13 (emphasis added).

recognize that such a claim is not *categorically* precluded, as the Ninth Circuit held it was.

In short, there is nothing in any of the WUTC's cited opinions that precludes the Courtneys' ability to state a claim. Not one of those opinions concerns a citizen's right to transport his own customers, to his own business, across navigable waters of the United States—waters that must remain "equally open to all persons, without preference to any." *Huse v. Glover*, 119 U.S. 543, 547-48 (1886).

III. The Ninth Circuit's Decision Creates Genuine—Not "Contrived" or "Manufactured"—Conflicts with the Decisions of this Court and the Fourth and Eleventh Circuits.

The WUTC's next argument—that the Courtneys have "contrive[d]" or "manufacture[d]" conflicts with the precedent of this Court, as well as the Fourth and Eleventh Circuits, BIO 17, 18—is baseless.

1. The Courtneys have not "contrive[d]" a conflict with *Saenz v. Roe*, 526 U.S. 489 (1999), and *Colgate v. Harvey*, 296 U.S. 404 (1935), *overruled on other grounds by Madden v. Kentucky*, 309 U.S. 83 (1940). *See* BIO 18. The conflict is as genuine as it is stark.

As the Courtneys noted in their petition, the Ninth Circuit's recognition of a "bar[]" to Privileges or Immunities claims against a citizen's own State flies in the face of *Saenz* and *Colgate*, which squarely hold that the Privileges or Immunities Clause *does* protect

citizens from their own States. Pet. 23-26. The WUTC does not dispute that this is what *Saenz* and *Colgate* hold. Rather, it accuses the Courtneys of "mischaracteriz[ing] . . . the decision below." BIO 18. The Courtneys will allow the Ninth Circuit's opinion, as well as *Saenz* and *Colgate*, to speak for themselves:

NINTH CIRCUIT'S DECISION	**THIS COURT'S DECISIONS**
• "[T]he Privileges or Immunities Clause . . . in general bar[s] . . . claims against the power of the State governments <u>over the rights of [their] own citizens</u>." App. 3-4 (alterations and second omission in original) (emphasis added) (internal quotation marks omitted). • "[A] state licensing requirement impeding <u>[a] state resident</u> from practicing [a] particular profession <u>within the state</u> does not implicate the Privileges or Immunities Clause." App. 3 (emphasis added).	• "The Fourteenth . . . Amendment's Privileges or Immunities Clause . . . guarantee[s] the rights of . . . citizens by ensuring that they c[an] claim the state citizenship of any State <u>in which they reside[]</u> and by precluding <u>that State</u> from abridging their rights of national citizenship." *Saenz*, 526 U.S. at 502 n.15 (emphasis added). • "[T]he fourteenth amendment prohibits <u>any state</u> from abridging the privileges or immunities of the citizens of the United States, <u>whether its own citizens or any others</u>."

	Colgate, 296 U.S. at 428 (emphasis added) (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) (No. 8,408)).

There is simply no reconciling the language of the Ninth Circuit's decision with *Saenz* and *Colgate*.

The WUTC attempts to minimize the conflict by describing the Ninth Circuit's language as a "parenthetical description of" its earlier decision in *Merrifield v. Lockyer*. BIO 2. But that simply reflects the fact that the Ninth Circuit, in a prior published opinion, had already held that there is a "bar on Privileges or Immunities claims against the power of the State governments over the rights of [their] own citizens." *Merrifield*, 547 F.3d at 983 (alteration in original) (internal quotation marks omitted). A citation to that prior, published opinion was all the Ninth Circuit needed to justify its refusal to protect a right of national citizenship from abridgment by the Courtneys' own State. And the application of that prior published opinion cannot be reconciled with *Saenz* and *Colgate*.

2. Nor is there any basis for the WUTC's assertion that the Courtneys have tried to "manufacture a conflict with two circuit court decisions, *Loving v.*

Alexander, 745 F.2d 861 (4th Cir. 1984), and *United States v. Harrell*, 926 F.2d 1036 (11th Cir. 1991)." BIO 17. The WUTC acknowledges that those cases concerned the navigable waters of the United States, but it insists that "there is virtually no overlap in the legal issues presented." BIO 17. There is indeed overlap—and conflict.

In *Loving* and *Harrell*, the Fourth and Eleventh Circuits held that the public has a right to use the navigable waters of the United States for purposes *other than* interstate or foreign commerce—*e.g.*, recreational and intrastate economic pursuits. *See* Pet. 26-28. The courts recognized that *whether* a body of water is a navigable water of the United States turns on its susceptibility to use in interstate or foreign commerce, but they refused to limit the scope of the public's right to *use* such waters to interstate and foreign commercial uses alone. *Loving*, 745 F.2d at 863, 868 (holding, in case involving recreational fishing, that river segment was a navigable water of the United States and "may be used by the public"); *Harrell*, 926 F.2d at 1038, 1041 (holding, in case involving commercial fishing on a creek wholly within a State, that "navigable waters of the United States are public property" and subject to "a right of public access").

Here, by contrast, the Ninth Circuit held that the right to use the navigable waters somehow derives from Congress's Commerce Clause power, *see* App. 3, and that, therefore, the right must be limited to uses in interstate or foreign commerce. App. 2, 4 (refusing

protection for the Courtneys' "intrastate boat transportation" because it "do[es] not involve interstate or foreign commerce"). That is a conflict and one the WUTC cannot credibly dispute.

IV. This Case Raises Profoundly Important Constitutional Issues and Is an Ideal Vehicle for Resolving Them.

Finally, contrary to the WUTC's assertions, this case involves issues of profound constitutional importance and is an ideal vehicle for resolving them.

1. The WUTC argues that this is a poor vehicle to address the scope of the right to use the navigable waters of the United States because the WUTC itself, as well as the Washington state courts, "definitively concluded that the Courtneys' proposed boat transportation" is "for the public use" under Washington's PCN statute. BIO 23. In this view, although the Courtneys are not in fact seeking to operate a public ferry, prior state proceedings bar the federal courts from recognizing that fact.

The WUTC advanced the same argument in the Ninth Circuit and the Ninth Circuit correctly refused to bite. App. 4 n.1 (declining to decide "the relevance . . . , if any," of the State's "classification" to the "federal constitutional . . . question"). Whether the Courtneys' claim involves transportation "for the public use" as that term is used in Washington's PCN statute is a distinct inquiry from—and utterly irrelevant to—

whether such transportation is a "public ferry" for federal constitutional purposes. *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 88 n.2 (1973) ("[I]nterpretations of state statutes do not control [the] construction of federal law. . . ."); *see also Sibron v. New York*, 392 U.S. 40, 60-61 (1968) (holding state statute defining "reasonable" searches had no bearing on whether search was "reasonable" under the Fourth Amendment). For that reason, this Court has repeatedly held PCN statutes unconstitutional as applied in situations where, as here, States have interpreted them broadly to treat private carriers as though they were public carriers. *E.g.*, *Frost v. R.R. Comm'n*, 271 U.S. 583 (1926); *Mich. Pub. Utils. Comm'n v. Duke*, 266 U.S. 570 (1925).

2. The next supposed vehicle problem identified by the WUTC is the terse and unpublished nature of the Ninth Circuit's order. The Ninth Circuit, however, was working against the backdrop of its 2013 opinion. Although that opinion only disposed of the Courtneys' first claim, regarding a public ferry, it included language that seemed to sweep far more broadly. It spoke approvingly of "state regulation of ferry service on wholly intrastate waterways," for example, and declared that "[w]e have narrowly construed the rights incident to United States citizenship enunciated in the *Slaughter-House Cases*, particularly with respect to regulation of intrastate economic activities." App. 114, 116 (citing *Merrifield*, 547 F.3d at 983-84).

The Ninth Circuit's latest decision confirms the breadth of that earlier opinion. When the Courtneys petitioned for certiorari from the earlier opinion back in 2014, there may well have been some question regarding its application to the private boat transportation at issue in the Courtneys' second claim. But that question has now been answered: The Ninth Circuit has now confirmed that, under the reasoning of its 2013 opinion, a State may bar citizens from using the navigable waters of the United States, even to engage in wholly *private* transportation. That is deeply disturbing, and it warrants this Court's review.

3. Finally, the issues in this case are of fundamental importance. The WUTC, of course, demeans them, insisting that the Courtneys' petition is "profoundly unimportant" and raises issues of "miniscule scope." BIO 2, 25. Such assertions are easy for the WUTC to make, given all that it ignores.

The WUTC ignores the history of the right to use the navigable waters—a right that traces at least to Magna Carta, that was protected by the likes of Lord Coke, and that was enshrined in the Northwest Ordinance, part of the organic law of our nation. *See* Pet. 17-18; Br. Amicus Americans for Prosperity Foundation 6-15. The WUTC ignores the vital importance of that right to free blacks and, later, the freedmen, who found great economic opportunity captaining and crewing bateaux, scows, canoes, periaugers, and even steamers on the nation's navigable waters. *See* Pet. 18-19; Br. Amici Historians 4-12. The WUTC ignores the myriad laws enacted by state, county, and municipal

governments throughout the South to systematically deprive free blacks and the freedmen from earning a living on the navigable waters. *See* Pet. 19; Br. Amici Historians 12-18. And the WUTC ignores the text, history, and precedent interpreting the Privileges or Immunities Clause, which make clear that its framers and ratifiers understood it to protect the freedmen—and all Americans—against abridgment of the right to use the navigable waters by *any* State, including their own. *See* Pet. 20-26; Br. Amici Law Professors 14-17.

When one ignores all of this, as the WUTC does, it is easy to dismiss the Courtneys' petition as "profoundly unimportant." BIO 25. But that would be a mistake. The Courtneys' petition raises fundamental interpretational questions concerning the provision that was intended to be the cornerstone of the Fourteenth Amendment. And it concerns a right that, as this Court has recognized, inheres in every American by virtue of their national citizenship. The Ninth Circuit's judgment, if allowed to stand, will reduce that right to meaninglessness. This Court should not let that happen.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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