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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES COURTNEY and CLIFFORD
COURTNEY,

Plaintiffs,

v.

DAVID DANNER, chairman and
commissioner; ANN RENDAHL,
commissioner; and JAY BALASBAS,
commissioner, in their official
capacities as officers and members of
the Washington Utilities and
Transportation Commission; and
MARK JOHNSON, in his official
capacity as executive director of the
Washington Utilities and
Transportation Commission,

Defendants.

NO: 2:11-CV-0401-TOR

ORDER GRANTING DEFENDANTS'
RENEWED MOTION TO DISMISS

18 BEFORE THE COURT is the Defendants' Renewed Motion to Dismiss.
19 ECF No. 59. The Court heard oral argument on November 20, 2018. Michael E.
20 Bindas appeared on behalf of Plaintiffs James Courtney and Clifford Courtney.

1 Assistant Attorney General Jeff Roberson appeared on behalf of the Defendants.

2 The Court has reviewed the record and files herein, and is fully informed.

3 **BACKGROUND**

4 Plaintiffs James Courtney and Clifford Courtney (“the Courtneys”)
5 challenge the constitutionality of Washington’s requirement that an operator of a
6 commercial ferry obtain a certificate of “public convenience and necessity”
7 (“PCN”) from the Washington Utilities and Transportation Commission
8 (“WUTC”) before commencing operations. The Courtneys initially filed this
9 lawsuit on October 19, 2011, asserting two claims under the Privileges or
10 Immunities Clause of the Fourteenth Amendment. ECF No. 1. Currently, only the
11 Courtneys’ second claim remains pending before the Court. Specifically, the
12 Courtneys assert that the PCN requirement, as applied to their proposed ferry
13 service on Lake Chelan “for customers or patrons of specific businesses or groups
14 of businesses,” violates their right “to use the navigable waters of the United
15 States” under the Fourteenth Amendment. ECF No. 1 at 34-38. Defendants move
16 to dismiss the Courtneys’ second claim pursuant to Federal Rule of Civil
17 Procedure 12(b)(6). ECF No. 59. Defendants argue that dismissal is appropriate
18 because the Courtneys do not have a Fourteenth Amendment right to operate a
19 commercial ferry service and, therefore, they fail to state a claim upon which relief
20 can be granted. *Id.* at 8.

1 **FACTS**

2 As the Courtneys observe, the Court is well-versed in the facts and
3 procedural history of this case, which have been summarized at length by not only
4 this Court, but also the United States Court of Appeals for the Ninth Circuit and
5 Division Three of the Washington Court of Appeals. The following facts are
6 drawn from the Courtneys’ Complaint, as well as the prior federal and state court
7 decisions, and are accepted “as true” for purposes of this motion. *Bell Atlantic*
8 *Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

9 The Courtneys are residents of Stehekin, Washington, a small
10 unincorporated town at the northwest end of Lake Chelan. The Courtneys and
11 their families own several businesses in Stehekin, including two float plane
12 companies, Stehekin Valley Ranch, Stehekin Outfitters, Stehekin Log Cabins, and
13 Stehekin Pastry Company. ECF No. 1 at 15. Stehekin is a popular tourist
14 destination, particularly during the summer months. However, access to the town
15 is limited: the only means of accessing Stehekin is by boat, seaplane, or on foot.
16 *Id.* at 5. Currently, most tourists and residents reach Stehekin by way of a public
17 ferry operated by the Lake Chelan Boat Company, which has operated a year-
18 round commercial ferry service on Lake Chelan since 1929. *Id.* at 7.

19 The State of Washington regulates commercial public ferries by statute. In
20 1927, the Washington legislature enacted a law that conditioned the right to

1 operate a ferry service upon certification that such service was required by “public
2 convenience and necessity.” Laws of 1927, ch. 248, § 1. In its current form, RCW
3 81.84.010 provides in relevant part:

4 A commercial ferry may not operate any vessel or ferry for the public
5 use for hire between fixed termini or over a regular route upon the
6 waters within this state . . . without first applying for and obtaining
7 from the commission a certificate declaring that public convenience
8 and necessity require such operation.

9 RCW 81.84.010(1). In order to obtain a PCN certificate, a potential ferry operator
10 must prove that its proposed operation is required by “public convenience and
11 necessity,” and that it “has the financial resources to operate the proposed service
12 for at least twelve months[.]” RCW 81.84.020(1)-(2). If the territory in which the
13 applicant desires to set up operation is already being served by a commercial ferry
14 company, no PCN certificate may be granted unless the applicant proves that the
15 existing certificate holder “has failed or refused to furnish reasonable and adequate
16 service, has failed to provide the service described in its certificate or tariffs after
17 the time allowed to initiate service has elapsed, or has not objected to the issuance
18 of the certificate as prayed for.” RCW 81.84.020(1).

19 Since 1927, only one PCN certificate has been issued for providing ferry
20 services on Lake Chelan. ECF No. 35 at 6. The WUTC’s predecessor issued a
PCN certificate to the Lake Chelan Boat Company in 1929 and, since that time, the
Lake Chelan Boat Company has successfully protected its exclusivity. ECF No. 1

1 at 7. At least four potential ferry operators have applied for a PCN certificate over
2 the last sixty years, but all were denied by the WUTC after Lake Chelan Boat
3 Company objected to the applications. *Id.* at 13.

4 The Courtneys would like to establish a competing ferry service on Lake
5 Chelan. In fact, they have unsuccessfully attempted to operate their own Stehekin-
6 based commercial ferry over the past two decades. In 1997, James Courtney
7 applied for a PCN certificate to operate a commercial ferry out of Stehekin. ECF
8 No. 1 at 16. However, the Lake Chelan Boat Company objected, and the WUTC
9 ultimately denied James's application. *Id.* at 16-18. In 2006, James explored the
10 possibility of providing a Stehekin-based on-call boat service, which he believed
11 fell within the "charter service" exemption to the PCN requirement. *Id.* at 19. The
12 WUTC initially opined that a PCN certificate would not be needed for the
13 proposed on-call boat service, then reversed course and informed James that a PCN
14 certificate was needed, before reversing course yet again and advising James that
15 the proposed service would be exempt from the PCN requirement. *Id.* at 19-20.
16 Ultimately, no formal decision was ever rendered as to the proposed on-call
17 service.

18 In 2008, Clifford Courtney contacted Defendant David Danner seeking
19 guidance as to whether two alternative boat transportation services would require a
20 PCN certificate. *Id.* at 22. The first proposal was a "charter" service whereby

1 Clifford would hire a private boat to transport patrons of his lodging and river
2 rafting businesses between Chelan and Stehekin. The second proposal was a
3 service whereby Clifford would “shuttle” his customers between Chelan and
4 Stehekin in his own private boat. Defendant Danner responded that, in his opinion,
5 both services would require a formal certificate. Specifically, Defendant Danner
6 opined that even private boat transportation, offered exclusively to paying
7 customers of Clifford’s lodging and river rafting businesses, would be service “for
8 the public use for hire” for which a formal certificate was required pursuant to
9 RCW 81.84.010. Defendant Danner noted, however, that his opinion was merely
10 advisory in nature and that Clifford was free to seek a formal ruling on the issue
11 from the full Commission. ECF No. 1 at 24.

12 In February 2009, Clifford contacted the Governor of the State of
13 Washington and several state legislators regarding the PCN requirement. *Id.* at 25.
14 In response, the state legislature directed the WUTC to conduct a study on the
15 regulation of commercial ferry services on Lake Chelan. The WUTC delivered a
16 formal report to the state legislature in January 2010. *See WUTC, Appropriateness*
17 *of Rate and Service Regulation of Commercial Ferries Operating on Lake Chelan:*
18 *Report to the Legislature Pursuant to ESB 5894*, January 14, 2010 (available at
19 [https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=Steheki](https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=Stehekin%20Report%20Final_a25a3eb0-cd39-4779-9c08-ecdec4c084a8.pdf)
20 [n%20Report%20Final_a25a3eb0-cd39-4779-9c08-ecdec4c084a8.pdf](https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=Stehekin%20Report%20Final_a25a3eb0-cd39-4779-9c08-ecdec4c084a8.pdf)). In the

1 report, the WUTC concluded that Lake Chelan Boat Company was providing
2 satisfactory service and recommended that there be no change to the existing laws
3 and regulations. The WUTC noted, however, that there might be flexibility under
4 the existing law to permit some competition by exempting certain services from
5 the PCN certificate requirement, including the private carrier exemption. As the
6 WUTC explained,

7 [T]here may be flexibility within the law for the Commission to take
8 an expensive interpretation of the private carrier exemption from
9 commercial ferry regulation. For example, the Commission might
10 reasonably conclude that a boat service offered on Lake Chelan (and
elsewhere) in conjunction with lodging at a particular hotel or resort,
and which is not otherwise open to the public, does not require a
certificate under RCW 81.84.

11 *Report to Legislature* at 15.

12 In 2011, the Courtneys filed suit in this Court against the WUTC and various
13 commissioners and directors in their official capacities, seeking declaratory and
14 injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201. ECF No. 1.
15 As noted, the Courtneys asserted two causes of action under the Privileges or
16 Immunities Clause of the Fourteenth Amendment. First, they alleged the State of
17 Washington's PCN requirement infringed upon their right to provide a commercial
18 ferry service open to the general public on Lake Chelan. *Id.* at 30-33. Second,
19 they claimed that the PCN requirement also infringed upon their right to provide a
20 private ferry service for patrons of their Stehekin-based businesses. *Id.* at 34-38.

1 Defendants moved to dismiss the Complaint pursuant to Federal Rule of
2 Civil Procedure 12(b)(6). This Court dismissed the Courtneys' first claim—
3 challenging the constitutionality of the PCN requirement as applied to the
4 provision of a public ferry service on Lake Chelan—with prejudice, concluding
5 that it was still unclear whether the “right to use the navigable waters of the United
6 States” was “truly a recognized Fourteenth Amendment right,” and, even assuming
7 it was, it did not extend to protect the right “to operate a commercial ferry service
8 open to the public.” ECF No. 22 at 14-17. The Court dismissed the Courtneys'
9 second claim—challenging the constitutionality of the PCN requirement as applied
10 to the provision of boat transportation services on Lake Chelan for customers or
11 patrons of specific businesses—without prejudice, holding that the Courtneys
12 lacked standing, their claim was unripe, and that the Court would abstain from
13 deciding the constitutional question under the *Pullman* abstention doctrine
14 (*Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941)). *Id.* at 17-23.

15 In dismissing the Courtneys' second claim, the Court noted that neither the
16 WUTC nor any other state adjudicative body had definitely ruled that the
17 Courtneys' proposed “private ferry service would in fact require a PCN certificate
18 under RCW 81.84.010. *Id.* at 19. In light of the lingering uncertainty about
19 whether the Courtneys would be required to obtain a PCN certificate to operate
20 their proposed private ferry service, the Court dismissed the Courtneys' second

1 claim “without prejudice to afford the WUTC or the Washington state courts an
2 opportunity to resolve this unsettled question of state law.” *Id.* at 22-23.

3 On December 2, 2013, the Ninth Circuit affirmed the dismissal of the
4 Courtneys’ first claim but vacated the dismissal of the second claim. *Courtney v.*
5 *Goltz*, 736 F.3d 1152 (9th Cir. 2013). Regarding the second claim, the Ninth
6 Circuit concluded that the exercise of *Pullman* abstention was proper, but this
7 Court “should have retained jurisdiction over the case pending resolution of the
8 state law issues, rather than dismissing the case without prejudice.” *Id.* at 1164.
9 Accordingly, the Ninth Circuit vacated the dismissal of the second claim and
10 remanded to this Court with instructions to retain jurisdiction over Defendants’
11 second constitutional claim pending an authoritative construction of the phrase “for
12 the public use for hire” by the WUTC or the Washington state courts. ECF Nos.
13 35; 36. On remand, consistent with the Ninth Circuit’s instructions, this Court
14 issued an order retaining jurisdiction over the Courtneys’ second constitutional
15 claim and staying the case pending action by the WUTC or the Washington courts.
16 ECF No. 40.

17 On March 3, 2014, the Courtneys petitioned the United States Supreme
18 Court for certiorari to review the disposition of their first claim only. The Supreme
19 Court denied certiorari on the Courtneys’ first claim on June 2, 2014. *Courtney v.*
20 *Danner*, 572 U.S. 1149 (2014).

1 Thereafter, the Courtneys petitioned the WUTC for a declaratory order as to
2 whether a PCN certificate was required to provide the “private” ferry service at
3 issue in their second claim. ECF No. 52 at 4. The WUTC initially declined to
4 enter an order on the ground that the Courtneys’ petition lacked sufficient
5 information and operational details. The Courtneys then filed a second petition
6 setting forth five proposed ferry services, which they contended were not “for the
7 public use,” as contemplated by RCW 81.84.010(1). *Courtney v. Wash. Utils. &*
8 *Transp. Comm’n*, 3 Wash. App. 2d 167, 172-73 (2018). As described in their
9 petition, the proposed services would operate between Memorial Day and early
10 October each year, and charge a flat rate of \$37 per adult passenger for a one-way
11 ticket or \$74 for a roundtrip ticket. *Id.* at 173. Each of the proposed services
12 would be owned by James and/or Clifford Courtney. The primary difference
13 among the proposed services is the scope of passengers the boat would carry:

14 Proposal 1 (Lodging Customers of Stehekin Valley Ranch)—
15 Passengers would be limited to persons with confirmed reservations to
16 stay overnight at Stehekin Valley Ranch, owned by Clifford Courtney
17 and his wife.

17 Proposal 2 (Lodging Customers and Customers of Other Activities
18 Offered at Stehekin Valley Ranch)—In addition to persons with
19 reservations to stay at the ranch, passengers would include anyone
20 with reservations to participate in any of the activities the ranch offers,
including activities provided by Stehekin Outfitters, run in part by
Clifford Courtney’s son.

20 Proposal 3 (Customers of Courtney Family-owned Businesses)—
Passengers would be limited to anyone with reservations at any

1 business owned by Clifford or James Courtney or their extended
2 family, including but not limited to the Stehekin Valley Ranch.

3 Proposal 4 (Customers of Stehekin-Based Businesses)—Passengers
4 could be anyone with reservations at any Stehekin-based businesses
5 that want to use the service, including but not limited to Courtney
6 family-owned businesses.

7 Proposal 5 (Charter by Stehekin-based Travel Company)—Passengers
8 would be restricted to persons who have purchased a travel package
9 from a Stehekin-based travel agency that is not affiliated with the
10 Courtneys but would charter the boat from the Courtneys.

11 *Id.* at 173-74.

12 The WUTC issued a declaratory order concluding that the Courtneys were
13 required to first obtain a PCN certificate before operating any of their five
14 proposed ferry services. The WUTC noted that the only legal issue was whether
15 the proposed services would operate “for the public use” within the meaning of
16 RCW 81.84.010(1). *Id.* at 174. Based on the plain language of the statute, the
17 WUTC construed the phrase “for the public use” as meaning “accessible to or
18 shared by all members of the community.” *Id.* at 175. The WUTC interpreted the
19 term “community” to mean “a body of individuals organized into a unit” or “linked
20 by common interests.” *Id.* Combining these definitions, the WUTC concluded
that a commercial ferry operator must obtain a PCN certificate when the ferry “is
accessible to all persons that are part of a group with common interests.” *Id.*

1 The Courtneys argued that the proposed services were not for the public use
2 because ferry services would be limited to customers of one or more particular
3 Stehekin businesses. The WUTC disagreed, noting that the United States Supreme
4 Court had rejected a similar argument in *Terminal Taxicab Co. v. Kutz*, 241 U.S.
5 252 (1916). Consistent with the *Terminal Taxicab* decision, the WUTC concluded
6 that limiting services to persons who are demonstrated customers of specific
7 businesses would not remove the services' essential public character. *Courtney*, 3
8 Wash. App. 2d at 175.

9 The Courtneys petitioned the Chelan County Superior Court for judicial
10 review of the WUTC's declaratory order. *Id.* at 176. The trial court affirmed the
11 agency's decision and the Courtneys appealed to Division Three of the Washington
12 Court of Appeals. *Id.*

13 On April 3, 2018, the Washington Court of Appeals affirmed the trial court
14 and explicitly adopted the WUTC's definition of "for the public use" as applying
15 to subsets of the public. *Id.* at 181-82. In concluding that the WUTC's definition
16 was correct, the Court of Appeals explained that "the public is free to visit
17 Stehekin" and "[l]imiting service to guests of one or more Stehekin businesses
18 does not strip the proposed ferry service of its public character." *Id.* at 182. Thus,
19 the Court of Appeals held that "the WUTC's rule is correct and consistent with the
20 legislative intent of RCW 81.84.010(1)." *Id.*

1 The Courtneys then petitioned the Washington Supreme Court for
2 discretionary review on May 2, 2018. On August 8, 2018, the Washington
3 Supreme Court denied review. *Courtney v. Wash. Utils. & Transp. Comm'n*, 191
4 Wash.2d 1002 (2018).

5 After both the WUTC and the Washington courts definitively concluded that
6 the PCN requirement does, in fact, apply to the Courtneys' proposed "private"
7 ferry service, the Courtneys moved this Court to dissolve the stay and reopen their
8 case "to afford the Courtneys the opportunity to litigate their second Privileges or
9 Immunities Clause claim." ECF No. 52 at 5. The Court lifted the stay and
10 reopened this case on September 13, 2018. ECF No. 56 at 2. As before,
11 Defendants again move to dismiss the Courtneys' remaining claim under Federal
12 Rule of Civil Procedure 12(b)(6).

13 DISCUSSION

14 A motion to dismiss pursuant to Federal Rule of Procedure 12(b)(6) "tests
15 the legal sufficiency of a [plaintiff's] claim." *Navarro v. Block*, 250 F.3d 729, 732
16 (9th Cir. 2001). To survive such a motion, a plaintiff must allege facts which,
17 when taken as true, "state a claim to relief that is plausible on its face." *Ashcroft v.*
18 *Iqbal*, 556 U.S. 662, 678 (2009) (quotation and citation omitted). In order for a
19 plaintiff asserting a cause of action under 42 U.S.C. § 1983 to satisfy this standard,
20 he or she must allege facts which, if true, would constitute a violation of a right

1 guaranteed by the United States Constitution. *Balistreri v. Pacifica Police Dept.*,
2 901 F.2d 696, 699 (9th Cir. 1988). Similarly, a plaintiff seeking declaratory relief
3 under 28 U.S.C. § 2201 must allege facts which, if true, would violate federal law.
4 *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672 (1950) (holding
5 that Declaratory Judgment Act did not expand subject-matter jurisdiction of federal
6 courts). As discussed below, Plaintiffs fail to satisfy these standards.

7 **A. Plaintiffs’ Second Cause of Action: Operation of a Private Ferry Service**
8 **to Patrons of Stehkin-Based Businesses**

9 When this Court initially dismissed the Courtneys’ constitutional claims in
10 2011, no federal court had ever directly examined the “right to use the navigable
11 waters of the United States,” as referenced by the Supreme Court in the *Slaughter-*
12 *House Cases*, 83 U.S. (16 Wall.) 36, 79-80 (1872). In the absence of applicable
13 precedent, this Court looked to the *Slaughter-House* decision, as well as the history
14 and purpose of the Privileges or Immunities Clause, for guidance in defining the
15 “right to use the navigable waters of the United States” and determining whether
16 the State of Washington’s PCN requirement infringed upon the right. Assuming
17 the Fourteenth Amendment did in fact protect “the right to use the navigable
18 waters of the United States,” this Court concluded that the right did not extend to
19 operating a commercial ferry open to the public on Lake Chelan. ECF No. 22 at
20 17. Particularly relevant here, this Court expressly rejected the Courtneys’

1 argument that the Privileges or Immunities Clause was designed to protect
2 quintessentially economic rights, and determined that using the navigable waters of
3 the United States “*in the manner the Courtneys have proposed—i.e., to operate a*
4 *competing commercial ferry business—is one of the ‘fundamental’ rights*
5 *conferred by state citizenship.” Id. at 16 (emphasis in original).*

6 On appeal, the Ninth Circuit agreed that “even if the Privileges or
7 Immunities Clause recognizes a federal right ‘to use the navigable waters of the
8 United States,’ the right does not extend to protect the Courtneys’ use of Lake
9 Chelan to operate a commercial public ferry.” *Courtney*, 736 F.3d at 1158. In
10 reaching this holding, the Ninth Circuit defined for the first time the “right to use
11 the navigable waters of the United States,” as the phrase had “yet to be interpreted
12 by a single federal appellate court in the privileges or immunities context.” *Id.* at
13 1159. According to the Ninth Circuit, “the right to use the navigable waters of the
14 United States” is “a right to *navigate* the navigable waters of the United States,” *id.*
15 at 1160 (emphasis in original), not a right to *pursue economic opportunity* on the
16 navigable waters of the United States. Based on this interpretation of the phrase,
17 the Ninth Circuit held that “the Privileges or Immunities Clause of the Fourteenth
18 Amendment does not protect a right to operate a public ferry on Lake Chelan,” and
19 explained what this meant for the Courtneys’ first constitutional claim:

20 At the end of the day, the state legislation the Courtneys challenge is
narrow in scope, merely restricting the operation of *commercial public*

1 *ferries* to those who obtain a PCN certificate. The PCN requirement
2 does not constrain the Courtneys from traversing Lake Chelan in a
3 private boat for private purposes. Nor does it affect their ability to
4 operate a commercial freight transportation service. For that matter,
5 the Courtneys are free to operate a commercial ferry service so long as
6 they apply for and obtain a PCN certificate.

7 *Id.* at 1162 (emphasis added, citations omitted).

8 Here, the Courtneys argue that the Ninth Circuit’s holding has no bearing on
9 the success of their second claim because the proposed ferry service at issue here
10 “involves only transportation for customers of a particular business” rather than a
11 “commercial public ferry.” ECF No. 60 at 4. According to the Courtneys, while
12 the Ninth Circuit’s decision conclusively establishes that the right “to use the
13 navigable waters of the United States” does not include a right to operate a
14 *commercial public ferry* on Lake Chelan, the question remains as to whether the
15 right extends to the *private* boat transportation services at issue in their second
16 claim.

17 Though the Courtneys describe the proposed ferry service at issue in their
18 second claim as a “private” boat transportation service, the Court cannot ignore the
19 fact that both the WUTC and the Washington courts have definitely concluded that
20 the proposed “private” ferry service is in fact a *commercial public ferry service*
under Washington law. As the Washington Court of Appeals observed, “[l]imiting
service to guests of one or more Stehekin businesses does not strip the proposed

1 ferry service of its public character.” *Courtney*, 3 Wash. App. 2d at 182. Thus, the
2 Court agrees with Defendants that, regardless of the label the Courtneys choose to
3 affix to the ferry service at issue in their second claim, at the end of the day it is a
4 commercial public ferry service that they seek to provide.

5 Thus, like their first claim, the actual privilege at stake here is “a ferry
6 operation privilege, not a broad navigation privilege.” *Courtney*, 736 F.3d at 1160.
7 The Courtneys are not merely seeking to “travers[e] Lake Chelan in a private boat
8 for private purposes,” nor are they being prevented from doing so. *Id.* at 1162.
9 Instead, the Courtneys simply desire to operate a commercial ferry service for a
10 subset of the public, their customers. As the Ninth Circuit explained, albeit in the
11 context of the Courtneys’ first claim,

12 Here, it is clear that the Courtneys wish to do more than simply
13 navigate the waters of Lake Chelan. Indeed, they are not restrained
14 from doing so in a general sense. Rather, they claim the right to
15 utilize those waters for a very specific professional venture. While
16 navigation of Lake Chelan is a necessary component of the
17 Courtneys’ proposed activity, it is neither sufficient to achieve their
18 purpose nor the cause of their dissatisfaction . . . Were navigation all
19 the Courtneys wished to do, they would not need the WUTC’s
20 permission and this dispute would never have arisen.

17 *Id.* at 1160. This logic applies with equal force to the Courtneys’ second claim.
18 Accordingly, the Court concludes that the Courtneys do not have a Fourteenth
19 Amendment right to operate a commercial ferry service open to a subset of the
20 public on Lake Chelan.

1 In their response to Defendants’ renewed motion to dismiss, the Courtneys
2 devote fifteen page of their twenty-page brief to convincing this Court that the
3 right to “use the navigable waters of the United States” encompasses “a right to use
4 navigable waters in pursuit of a livelihood.” ECF No. 60 at 7-21. In those fifteen
5 pages, much ink is spilled in an effort to explain “[t]he link between national
6 citizenship and use of the navigable waters in economic activity,” and why “it is
7 inconceivable that *Slaughter-House* did not intend the right to use the navigable
8 waters of the United States to encompass use in the pursuit of a livelihood.” *Id.* at
9 18-19, 21. The Courtneys assert that the fact that “they wish to exercise the [“right
10 to use the navigable waters of the United States”] in an economic pursuit only
11 strengthens their claim.” *Id.* at 7.

12 However, this argument has previously been rejected by this Court and the
13 Ninth Circuit. In holding that “the right to use the navigable waters of the United
14 States” did not extend to operating a commercial public ferry, this Court explicitly
15 rejected “the Courtneys’ assertions that the Privileges or Immunities Clause was
16 designed to protect quintessentially *economic* rights.” ECF No. 22 at 15 (emphasis
17 in original). Likewise, recognizing that the Courtneys’ proposed commercial ferry
18 service was an economic pursuit, the Ninth Circuit explained that economic rights
19 are not generally protected by the Privileges or Immunities Clause:

20 Further, the driving force behind this litigation is the Courtneys’
desire to operate a particular business using Lake Chelan’s navigable

1 waters—an activity driven by economic concerns. We have narrowly
2 construed the rights incident to United States citizenship enunciated in
3 the *Slaughter-House Cases*, particularly with respect to regulation of
4 intrastate economic activities.

5 *Courtney*, 736 F.3d at 1160-61. In short, contrary to the Courtneys’ contentions,
6 the economic purpose of the proposed ferry service at issue cuts against, rather
7 than strengthens, their case.

8 Because the Fourteenth Amendment does not protect a right to operate a
9 public ferry on Lake Chelan, the Court concludes the Courtneys’ remaining claim
10 fails to allege the deprivation of a right protected by the United States Constitution.
11 Accordingly, the Courtneys’ second claim must be dismissed.

12 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 13 1. Defendants’ Renewed Motion to Dismiss (ECF No. 59) is **GRANTED**.
14 2. Plaintiffs’ second cause of action is **DISMISSED** with prejudice.

15 The District Court Executive is hereby directed to enter this Order and
16 Judgment accordingly, provide copies to counsel, and close the file.

17 **DATED** January 3, 2019.



Thomas O. Rice
THOMAS O. RICE
Chief United States District Judge