CASE NO. 19-35100

In The
United States Court of Appeals
For The Ninth Circuit

JAMES COURTNEY; CLIFFORD COURTNEY,

***Plaintiffs – Appellants*,**

v.

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

***Defendants – Appellees*,**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON AT SPOKANE

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

This appeal is from the dismissal of an as-applied challenge to Washington statutes and regulations that require a certificate of "public convenience and necessity" to provide private boat transportation for customers of a specific business or group of businesses on Lake Chelan. The certificate requirement—which gives the lake's incumbent ferry operator a veto over new competition—has resulted in a monopoly of transportation on the lake since 1929. Appellants Jim and Cliff Courtney have successfully alleged that the 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).

II. STATEMENT OF JURISDICTION

This appeal is of an Order and Judgment dismissing the second of two Privileges or Immunities Clause claims in the complaint of Appellants Jim and Cliff Courtney (hereinafter the "Courtneys") for failure to state a claim upon which relief can be granted. ER 1, 2.[1] The district court had jurisdiction over the action pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3), (4), and its Order and Judgment constitute a final decision because the dismissal resolved all remaining claims

[1] The Excerpts of Record are referred to herein as "ER."

against all parties. *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1402 (9th Cir. 1988). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

The Order and Judgment were entered on January 3, 2019, ER 1, 2, and the Courtneys filed their notice of appeal on February 1, 2019, ER 46. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(A).

III. STATEMENT OF ISSUES

A. Did the district court err in holding that "[t]he right to use the navigable waters of the United States," *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873), does not include their use to transport customers of a specific business or group of businesses? (This issue was raised at ER 53-61 and ruled on at ER 17-20.)

B. Did the district court err in holding that boat transportation restricted to customers of a specific business or group of businesses is a "public ferry," rather than "private boat transportation," as this Court's prior opinion used those terms? (This issue was raised at ER 56-57 and ruled on at ER 17-18.)

C. Did the district court err in holding that use of the navigable waters of the United States in economic pursuits is not a right of national citizenship protected by the Privileges or Immunities Clause? (This issue was raised at ER 59-60 and ruled on at ER 19-20.)

D. Did the district court err in dismissing the Courtneys' second claim for failure to state a claim upon which relief can be granted? (This issue was raised at ER 53-61 and ruled on at ER 17-20.)

IV. CONSTITUTIONAL, STATUTORY, AND REGULATORY AUTHORITIES

Pertinent constitutional, statutory, and regulatory authorities appear in the Addendum to this brief.

V. STATEMENT OF THE CASE

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. ER 102 ¶¶13-15. Stehekin is a popular summer destination, drawing Washington residents and visitors from outside the state. ER 102 ¶15.[2] Stehekin and much of the northwest end of the

[2] *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 district court relied on it, ER 7-8, as did this Court in its prior opinion, ER 70-71, 85 & n.8, and the WUTC agrees that its consideration is proper on a Rule 12(b)(6) motion, ER 94. The report is available at https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=Stehekin%20Report%20Final_a25a3eb0-cd39-4779-9c08-ecdec4c084a8.pdf.

lake are located in the Lake Chelan National Recreation Area (hereinafter "LCNRA"). ER 102 ¶16.

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. ER 102-03 ¶¶15, 18. The lake is a "navigable water of the United States." ER 103 ¶17. 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. ER 103 ¶¶17, 19.

B. Ferry Regulation On Lake Chelan

Regulation of ferry service on Lake Chelan began in 1911, when the Washington legislature enacted 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. ER 103 ¶21. In 1927, however, the 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. ER 103-04 ¶22.

As presently worded, this law requires a PCN certificate to "operate any vessel or 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); ER 104 ¶25. The applicant for a certificate must prove that its 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 the territory in which the applicant would like to operate is already served by a ferry, 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); ER 107-08 ¶¶34-36.

The Washington Utilities and Transportation Commission (hereinafter "WUTC") provides notice of the application to the would-be ferry provider's competitors—that is, to "all persons presently certificated to provide service," Wash. Admin. Code § 480-51-040(1), and "any common carrier which might be adversely affected," Wash. Rev. Code § 81.84.020(1); *see also* ER 35 ¶28. These existing providers, in turn, may file a protest with the WUTC. Wash. Admin. Code §§ 480-51-040(1), 480-07-370(7); ER 106 ¶29. The WUTC then conducts an adjudicative proceeding, and any protesting ferry provider may participate as a party. Wash. Admin. Code §§ 480-07-300(2)(c), -305(3)(e), -340(3)(g); ER 106 ¶¶30-31. The proceeding is akin to a civil lawsuit and involves discovery, motions, an evidentiary hearing, post-hearing briefing, and oral argument. Wash.

Admin. Code §§ 480-07-375 to -498; ER 106-07 ¶32. The burden of proof on every element for a certificate is on the applicant. ER 108 ¶37.

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. Even with this help, however, the application is almost sure to be denied. ER 104 ¶¶24, 26; 109 ¶39.

In short, the PCN requirement creates a virtually insurmountable barrier to entry into the Lake Chelan ferry market. The WUTC identifies "protection from competition" as the "[r]ationale" for the requirement. ER 109-10 ¶¶40-41; WUTC Report, *supra*, at 11.

C. Consequence Of The PCN Requirement

In October 1927, the year the PCN requirement was imposed, the state issued the first—and, to this day, only—certificate for ferry service on Lake Chelan. The certificate is held by the Lake Chelan Boat Company. At least four other applications have been made, including one by Appellant Jim Courtney. In each instance, the Lake Chelan Boat Company protested, and the state denied a

certificate. ER 104 ¶¶23-24.[3] Thus, after 92 years, there remains only one ferry service operating on Lake Chelan.

Much of the year, the Lake Chelan Boat Company operates only one boat, which makes one trip per day in each direction, three days per week. ER 111 ¶48. During peak months—June through September—it operates two boats daily, but each makes only one trip per day in each direction and both boats depart Chelan at the same time (8:30 a.m.), headed in the same direction. ER 110 ¶44. Vacationers often must arrive a day early and stay overnight in Chelan to catch one of the two early morning ferries for Stehekin. ER 110 ¶45. And because both boats depart at the same time, in the same direction, three hours is the most a visitor can spend in Stehekin and the LCNRA without staying overnight. Daytrips are impracticable. ER 111 ¶46.

D. The Courtneys' Efforts To Provide An Alternative Service

Appellants Jim and Cliff are fourth-generation residents of Stehekin. They and their family have several businesses in the community. ER 112 ¶50. Cliff and

[3] In a fifth instance, an application was submitted by Backcountry Travels LLC, the managing member of which is another Courtney family member. *See* Commercial Ferry Application of Backcountry Travel LLC, WUTC No. TS-180677 (Aug. 10, 2018). The Lake Chelan Boat Company formally protested that application, as well. It later withdrew the protest but continues to oppose the application in public comments. *See* Letter from Jack Raines to WUTC, WUTC No. TS-180677 (Jan. 23, 2019).

his wife own Stehekin Valley Ranch, a ranch with cabins and a lodge house. ER 112 ¶51. Their son, Colter, co-owns Stehekin Outfitters, which offers river outings and horseback riding. *See* ER 112 ¶51.[4] And Cliff and Jim's brother and sister-in-law own Stehekin Pastry Company and Stehekin Log Cabins. ER 112 ¶53.

For years, Jim and Cliff listened as customers of these businesses complained about the inconvenience of Lake Chelan's lone ferry. Since 1997, they have initiated four significant efforts to provide an alternative and more convenient service but have been thwarted by the PCN requirement at every step. ER 112-13 ¶¶54-56.

First, in 1997, Jim applied for a certificate to operate a Stehekin-based ferry. ER 113 ¶57. The Lake Chelan Boat Company protested the application. ER 113 ¶58. 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. ER 114 ¶62; 115 ¶67. Jim incurred approximately $20,000 in expenses for the application. ER 115 ¶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.

[4] As the Courtneys apprised the district court, Cliff no longer owns Stehekin Outfitters.

ER 116 ¶70. 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. ER 116 ¶71. Before it would issue the permit, the Forest Service sought to confirm with the WUTC that Jim's proposed service was, in fact, exempt. ER 116-17 ¶72. At first, WUTC staff opined that he did not need a certificate. ER 117 ¶73. Soon thereafter, the Lake Chelan Boat Company contacted the WUTC to express concern and WUTC staff abruptly "changed its opinion." ER 117 ¶74. The Forest Service's district ranger wrote to the WUTC's executive director to get his opinion on the matter, 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." ER 117-18 ¶¶77-78. The WUTC's executive director, however, declined to provide an opinion and Jim was unable to launch his boat service. ER 118-19 ¶¶81-82.

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. ER 119 ¶83. First, he described a scenario in which he would charter a boat for customers of Courtney-family businesses and offer a package with transportation on the chartered boat as one of the guests' options. ER 119 ¶84. In the second scenario, Cliff would purchase a boat and carry his own customers. ER 119 ¶85.

Cliff specifically inquired as to whether such services would require a certificate, and the WUTC's executive director issued a letter opining that they would. ER 120 ¶86. In a subsequent letter, he reiterated that conclusion, stating that it "does not matter whether the transportation you would provide is 'incidental to'" other businesses because the service would still be "for the public use for hire." ER 121 ¶88. He explained that WUTC staff interprets the term "for the public use for hire" to include "all boat transportation that is offered to the public—even if use of the service is limited to guests of a particular hotel or resort, or even if the transportation is offered as part of a package of services that includes lodging, a tour, or other services that may constitute the primary business of the entity providing the transportation as an adjunct to its primary business." ER 121 ¶88.

Finally, Cliff contacted the governor and state legislators in early 2009 and urged them to eliminate or relax the PCN requirement. ER 122 ¶92. The Legislature directed the WUTC to conduct a study and report on the regulatory scheme governing ferry service on Lake Chelan. ER 122-23 ¶93. 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." ER 123 ¶94; *see also* WUTC Report, *supra*, at 31. The report acknowledged that the WUTC "could potentially allow some degree of 'competition'" by "declining to require a certificate" for certain services—including "a boat service offered on Lake Chelan

. . . in conjunction with lodging at a particular hotel or resort, and which is not otherwise open to the public"—but it stressed that it could only adopt such a policy after "an adjudicative hearing," with "expert testimony" demonstrating that the proposed service would not "significantly threaten the regulated carrier's ridership, revenue, and ability to provide reliable and affordable service." *Id.* at 12, 14, 15; ER 123 ¶95. Even then, the WUTC concluded, it is "unlikely that under existing law any of these theories could be relied upon to authorize competing services on Lake Chelan." WUTC Report, *supra*, at 12; ER 123 ¶96.

E. The Present Action (Round 1)

In October 2011, Jim and Cliff filed this action for declaratory and injunctive relief, pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201–2202, against the commissioners and executive director of the WUTC, in their official capacities. ER 98.[5] They asserted two claims: one, challenging Washington's "public convenience and necessity" ("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 Chelan solely for customers of a specific business or group of businesses. ER 130-31 ¶119; 134-35 ¶132. The Courtneys alleged that, as applied to both services, the PCN

[5] The Courtneys will refer to the defendants/appellees collectively as the "WUTC."

requirement abridges their "right to use the navigable waters of the United States"—a right the Supreme Court held is protected by the Privileges or Immunities Clause of the Fourteenth Amendment in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873).

The WUTC moved to dismiss the complaint, ER 95, and the district court granted the motion in April 2012, ER 23. 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." ER 39. Regarding their second claim, the court held that abstention under *Railroad Commission of Texas v. Pullman Company*, 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. ER 44-45.

The Courtneys appealed, and this Court issued its opinion in December 2013.[6] It affirmed the dismissal of the Courtneys' first claim, "hold[ing] that the Privileges or Immunities Clause of the Fourteenth Amendment does not protect a

[6] This Court's opinion is reproduced at ER 63-87. The Courtneys will cite to it as published in the Federal Reporter.

right to operate a public ferry on Lake Chelan." *Courtney v. Goltz*, 736 F.3d 1152, 1162 (9th Cir. 2013).[7]

This Court 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. *Id.* at 1158, 1162 (emphasis added). It agreed with the district court (and WUTC[8]) 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." *Id.* at 1163. The Court, however, held that retention of federal jurisdiction over the second 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 private transportation; and return to federal court to litigate the claim if the PCN requirement does, in fact, apply. *Id.* at 1164-65.

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[7] *See also Courtney*, 736 F.3d at 1158 ("[E]ven if the Privileges or Immunities Clause recognizes a federal right 'to use the navigable waters of the United States,' the right does not extend to protect the Courtneys' use of Lake Chelan to operate a commercial *public* ferry." (emphasis added)); *id.* at 1160 ("We find it exceedingly unlikely that the Supreme Court in the *Slaughter-House Cases* contemplated operation of a *public* ferry as part of the right 'to use the navigable waters of the United States' . . . ." (emphasis added)).

[8] *E.g.*, ER 89 (brief of WUTC arguing that *Pullman* abstention was warranted because there was "uncertainty about whether the Courtneys would need a certificate to operate a *private* ferry service" (emphasis added)).

F. 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. *See Courtney v. Wash. Utils. and Transp. Comm'n*, 414 P.3d 598 (Wash. Ct. App. 2018), *review denied*, 422 P.3d 911 (Wash. 2018). They first petitioned the WUTC for a declaratory order as to whether the transportation at issue in their second claim requires a PCN certificate, but the WUTC declined to enter an order, claiming the petition lacked sufficient information and operational details. *Id.* at 172. The Courtneys accordingly filed a second petition, and, this time, the WUTC agreed to issue an order. It concluded that the type of transportation at issue in their second claim 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. *See Courtney*, 414 P.3d at 174-76.

The Courtneys then petitioned for judicial review of the declaratory order. The Chelan County Superior Court affirmed it, as did the Washington Court of Appeals. *Id.* at 176, 186. The Washington Supreme Court, in turn, denied review. 422 P.3d 911. At that point, the determination that, under Washington's statute, the PCN requirement applies to the private boat transportation involved in the Courtneys' second claim was final.

G. The Present Action (Round 2)

In September 2018—five years after this Court's opinion holding that *Pullman* abstention was warranted—the district court re-opened the Courtneys' case. ER 21. The WUTC immediately filed a renewed motion to dismiss their second claim. ER 48. Contrary to its previous position before this Court—that *Pullman* abstention was warranted because there was "uncertainty about whether the Courtneys would need a [PCN] certificate to operate a *private* ferry service," ER 89 (emphasis added)—the WUTC now insisted that the transportation at issue in the second claim was a "public ferry," ER 51, 53, 56, 57, and that under the prior opinions in this case, "[t]he Privileges or Immunities Clause does not protect the right to operate 'a commercial ferry open to the public on Lake Chelan,'" ER 56 (quoting ER 37). It also argued that dismissal was warranted because the Courtneys' claim "allege[d] the abridgment of economic rights existing because of state citizenship," rather than rights of national citizenship protected by the Privileges or Immunities Clause. ER 60.

The district court granted the renewed motion to dismiss. Despite this Court's prior determination that the transportation at issue in the Courtneys' second claim is "*private* boat transportation," *Courtney*, 736 F.3d at 1163, the district court accepted the WUTC's newly-adopted position that it is, instead, a "public ferry," ER 17, 18, 20. "Though the Courtneys describe the proposed ferry

service at issue in their second claim as a 'private' boat transportation service," the district court reasoned, "the Court cannot ignore the fact that both the WUTC and the Washington courts have definitely concluded that the proposed 'private' ferry service is in fact a *commercial public ferry service* under Washington law." ER 17. "Thus," the district court concluded, "regardless of the label the Courtneys choose to affix to the ferry service at issue in their second claim, at the end of the day it is a commercial public ferry service that they seek to provide." ER 18.

The district court also agreed with the WUTC that "using the navigable waters of the United States 'in the manner the Courtneys have proposed'" is a "right[] conferred by state citizenship," rather than a right of national citizenship protected by the Privileges or Immunities Clause. ER 16 (emphasis omitted) (quoting ER 38). "[E]conomic rights are not generally protected by the Privileges or Immunities Clause," the court held, and, therefore, "the economic purpose of the . . . service at issue cuts against, rather than strengthens, [the Courtneys'] case." ER 19-20. The district court wholly ignored extensive briefing that the Courtneys had provided regarding "[t]he link between national citizenship and use of the navigable waters in economic activity." ER 19 (alteration in original) (quoting Plfs.' Resp. to Renewed Mot. to Dismiss (ECF No. 60) at 18). Specifically, it refused to consider what it called the "much ink" "spilled" by the Courtneys on: (1) the importance of the right to use the navigable waters of the United States in

economic activity to free blacks and slaves before the Civil War, as well as the freedmen after it; and (2) the fact that many black boatmen were denied that right on the very theory that they were not national citizens. ER 19.

On February 1, 2019, the Courtneys timely noticed this appeal. ER 46.

VI. SUMMARY OF ARGUMENT

The district court erred in dismissing the Courtneys' second Privileges or Immunities Clause claim. It justified the dismissal on two grounds, both of which are incorrect. First, it held that the transportation the Courtneys wish to provide, which would be restricted exclusively to customers of a specific business or group of businesses, is actually a "public ferry" for constitutional purposes, ER 17, 18, 20, and "the Privileges or Immunities Clause of the Fourteenth Amendment does not protect a right to operate a public ferry on Lake Chelan," ER 16 (quoting *Courtney v. Goltz*, 736 F.3d 1152, 1162 (9th Cir. 2013)). Second, it held that the Courtneys wish to use the lake for an economic endeavor, and "economic rights are not generally protected by the Privileges or Immunities Clause." ER 19. Neither ground for dismissal was correct.

The transportation the Courtneys wish to provide is *private*—not a "public ferry." This Court determined as much, both explicitly and implicitly, in its prior opinion in this case. *Courtney*, 736 F.3d at 1162, 1163. That determination is the law of the case, and the district court ignored it.

This Court's prior determination, moreover, was correct: caselaw from this Court and others makes clear that transportation like that the Courtneys' wish to provide is, indeed, private. The justification the district court gave for concluding otherwise—that the Washington courts had determined the transportation to be "for the public use" as that term is used in the state's public convenience and necessity ("PCN") statute, Wash. Rev. Code § 81.84.010(1)—is no justification at all. Whether the transportation falls within the state statutory term "for the public use" is a separate inquiry from, and has no bearing on, whether the transportation is a "public ferry" as this Court previously used the term for federal Privileges or Immunities Clause purposes. The district court conflated these distinct state statutory and federal constitutional inquiries, and it incorrectly dismissed the Courtneys' claim on that basis.

The second ground the district court offered for dismissing the Courtneys' claim—that their proposed use of Lake Chelan is not protected by the Privileges or Immunities Clause because it is an *economic* use—is equally baseless. It is true that the Supreme Court held, in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), that the clause does not protect a general, open-ended right to economic liberty, as such a right derives from state, rather than national, citizenship. But the Supreme Court also held that the clause protects certain specific economic rights

that *do* derive from national citizenship, and the "right to use the navigable waters of the United States" is one of them. *Id*. at 79.

In fact, the right to use the navigable waters of the United States in the pursuit of a livelihood was vital to slaves and free blacks in the antebellum years and to the freedmen after the Civil War. The very reason *Slaughter-House* singled it out as one of the rights of national citizenship protected by the Privileges or Immunities Clause is that black seamen trying to earn a living on the water were being denied the ability to do so on the explicit theory that were not *national* citizens. Thus, the fact that the Courtneys' propose to use the navigable waters of the United States in an economic pursuit supports, rather than forecloses, their ability to state a claim under the Privileges or Immunities Clause. The district court was wrong to hold otherwise.

VII. STANDARD OF REVIEW

This Court "review[s] de novo a district court's dismissal for failure to state a claim," accepting factual allegations in the complaint as true and construing them in the light most favorable to the nonmoving party. *Aguayo v. U.S. Bank*, 653 F.3d 912, 917 (9th Cir. 2011). This Court likewise "review[s] de novo a district court's decision regarding the scope of a constitutional right," *United States v. Napier*, 436 F.3d 1133, 1135 (9th Cir. 2006), and a "district court's . . . interpretation of [a]

constitutional rule expressed in" a decision of the U.S. Supreme Court or this Court, *United States v. Maria-Gonzalez*, 268 F.3d 664, 667 (9th Cir. 2001).

VIII. ARGUMENT

In the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), the seminal decision interpreting the Privileges or Immunities Clause of the Fourteenth Amendment, the Supreme Court held that "[t]he right to use the navigable waters of the United States" is one of the rights of national citizenship protected by the clause. *Id.* at 79.[9] The navigable waters of the United States, the Court has held, are "the public property of the nation." *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 63 (1913) (quoting *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 725 (1865)). They are "open to all persons, without preference to any," and there can be no "exclusive use" of them and 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).

The Courtneys have stated a claim for abridgment of their right to use the navigable waters of the United States. They have alleged—and the WUTC has conceded—that:

[9] The Privileges or Immunities Clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

- the right to use the navigable waters of the United States is protected by the Privileges or Immunities Clause, ER 58;
- Lake Chelan is a navigable water of the United States, ER 92;
- the Courtneys wish to use Lake Chelan to transport customers of a specific business or group of businesses, ER 51, 53, 56; and
- Washington's public convenience and necessity ("PCN") requirement prevents them from doing so, ER 53.

The only question, therefore, is whether the private transportation in question is a "use [of] the navigable waters of the United States" under *Slaughter-House*. In the Courtneys' prior appeal, this Court declined to answer that question because "it [wa]s not clear whether the PCN requirement applie[d] to the private boat transportation services the Courtneys wish to provide." *Courtney v. Goltz*, 736 F.3d 1152, 1163 (9th Cir. 2013). The Court accordingly exercised *Pullman* abstention and directed the district court to "retain[] jurisdiction over the constitutional claim" so that the Courtneys could return to federal court and litigate it if the Washington courts determined that the PCN requirement applies. *Id.* at 1165.

After a five-year odyssey of state administrative and judicial proceedings, the Courtneys secured a final determination, and the transportation they wish to provide does, in fact, require a PCN certificate under Washington's statutes.

Courtney v. Wash. Utils. and Transp. Comm'n, 414 P.3d 598 (Wash. Ct. App. 2018), *review denied*, 422 P.3d 911 (Wash. 2018). But rather than allow the Courtneys to pursue their claim at that point, the district court dismissed it for two equally untenable reasons. First, it held that the transportation at issue—transportation that this Court previously determined to be "private," *Courtney*, 736 F.3d at 1162, 1163—is really a "public ferry," ER 17, 18, 20, and "the Privileges or Immunities Clause of the Fourteenth Amendment does not protect a right to operate a public ferry on Lake Chelan," ER 16 (quoting *Courtney*, 736 F.3d at 1162). Second, the district court held that "economic rights are not generally protected by the Privileges or Immunities Clause" and, therefore, "the economic purpose of the proposed [transportation] service at issue cuts against, rather than strengthens, [the Courtneys'] case." ER 20. Both holdings were wrong, as was the dismissal that flowed from them.

A. The Transportation At Issue In The Courtneys' Second Claim Is Private, Not A Public Ferry

When this case was last before this Court, the WUTC argued, and this Court agreed, that the transportation at issue in the Courtneys' second claim is "private." ER 89, 90. On remand, however, the WUTC reversed course, arguing that it is instead a "public ferry," ER 51, 53, 56, 57, and that the claim must therefore be dismissed because "the Privileges or Immunities Clause does not protect the right

to offer commercial public ferry service," ER 57. The district court agreed with the WUTC and dismissed the claim on that basis. ER 17-18.

The district court's holding that the transportation at issue is a "public ferry" was wrong for three reasons. First, it contravened the law of this case: this Court already determined that the claim involves "private" boat transportation, not a "public ferry," and the district court was bound by that determination. *Courtney*, 736 F.3d at 1162, 1163. Second, this Court's prior characterization of the transportation as "private" was correct: it would be restricted exclusively to customers of a specific business (*e.g.*, Cliff Courtney's Stehekin Valley Ranch) or group of businesses (*e.g.*, Courtney-family businesses), and the provision of such limited transportation is not the operation of a public ferry. Finally, the justification that the district court gave for ignoring this Court's characterization—that the Washington courts subsequently held that the transportation is "for the public use" under the state's PCN statute, Wash. Rev. Code § 81.84.010(1)—was unavailing; whether the transportation is for the public use under a state statute is a distinct inquiry from—and irrelevant to—whether such transportation is a "public ferry" and, thus, not a protected "use [of] the navigable waters of the United States" under this Court's prior opinion.

1. The District Court's Dismissal Of The Courtneys' Second Claim Contravenes The Law Of This Case

The district court's conclusion that the service at issue in the Courtneys' second claim is a public ferry violates the law of the case doctrine. That doctrine "precludes the district court on remand from reconsidering matters which were either expressly or implicitly disposed of upon [a prior] appeal." *United States v. Miller*, 822 F.2d 828, 832 (9th Cir. 1987). In its prior opinion, this Court expressly *and* implicitly determined that the transportation in question is private—not a public ferry.

In 2012, the WUTC argued to this Court that *Pullman* abstention was warranted over the Courtneys' second claim precisely because there was "uncertainty about whether the Courtneys would need a certificate to operate a *private* ferry service." ER 89 (emphasis added). "If they want a ruling on whether a *private* ferry service on Lake Chelan would require a certificate of public convenience and necessity," the WUTC insisted, "they have state law procedures available to them." ER 90 (emphasis added); *see also* ER 89 ("If the Courtneys want a ruling on whether a private ferry service would require a certificate of public convenience and necessity, they have state law procedures available to them.").

This Court accepted the WUTC's argument, repeatedly characterizing the transportation at issue in the Courtneys' second claim as "private." It 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. *Courtney*, 736 F.3d at 1158, 1162 (emphasis added). And after dismissing the first claim on the ground that "the Privileges or Immunities Clause of the Fourteenth Amendment does not protect a right to operate a public ferry on Lake Chelan," this Court held 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" in that claim. *Id.* at 1162, 1163 (emphasis added). This express determination of the transportation's "private" nature precluded the district court's subsequent determination that it is instead a "public ferry."

That the Courtneys' second claim involves private transportation, rather than a public ferry, was also the necessary implication of this Court's prior decision. After all, if the Court had considered the service in the second claim a public ferry, then the grounds for dismissal of the first claim—"that the Privileges or Immunities Clause of the Fourteenth Amendment does not protect a right to operate a public ferry on Lake Chelan," *id.* at 1162—would have required dismissal of the second claim, as well. Instead, this Court *vacated* the dismissal of the Courtneys' second claim and directed the district court to "retain jurisdiction

over" it so that the Courtneys could litigate the claim if and when the Washington courts determined that a PCN certificate was required. *Id.* at 1165.

Of course, the Washington courts subsequently determined that a PCN certificate *is* required for what the WUTC and this Court had characterized as "private boat transportation," *Courtney*, 736 F.3d at 1163, and the Courtneys accordingly returned to federal court to litigate their second Privileges or Immunities Clause claim. At that point, however, the WUTC reversed course. "No matter what [the Courtneys'] call the business they wish to engage in," the WUTC argued, "it is a commercial *public* ferry service." ER 51 (emphasis added); *see also* ER 57 ("The ferry service at issue in the Courtneys' second claim is a *public* one." (emphasis added)). Directly contradicting the position they had previously taken (and prevailed on) before this Court, the WUTC argued that the district court "should dismiss the Courtneys' claim by determining that their proposed service is a commercial *public* ferry." ER 49 (emphasis added).

The district court, flouting this Court's prior opinion, agreed with the WUTC and dismissed the Courtneys' claim on the ground that it involves a "public ferry." ER 17, 18, 20. That dismissal contravened this Court's prior determination and, thus, the law of this case. To the extent the WUTC attempts to defend the district court's dismissal on this ground, it is estopped from doing so by the contrary position it previously took in this Court. *See New Hampshire v. Maine*, 532 U.S.

742, 749 (2001) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." (alteration in original) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895))).

2. The Courtneys' Proposed Transportation Is Not A Public Ferry

The law of this case, moreover, is correct: the Courtneys' second claim involves private transportation—not a public ferry. A "public ferry," as this Court has held, is one that "extends its services to all comers," *United Truck Lines v. United States*, 216 F.2d 396, 398 (9th Cir. 1954)—that is, "one to which all the public have the right to resort, it being a common carrier and bound to take all who apply on payment of the regular fare," 36A C.J.S. *Ferries* § 4 (2019); *see also Interstate Commerce Comm'n v. Baltimore & Ohio R.R. Co.*, 145 U.S. 263, 275 (1892) (holding that under "the principles of the common law," common carriers were required to "carry for all persons who applied"); *Shoemaker v. Kingsbury*, 79 U.S. (12 Wall.) 369, 376 (1870) ("[C]ommon carriers . . . undertake, for hire, to carry all persons indifferently who apply for passage . . . ."). The Courtneys' proposed service, by contrast, would be restricted *exclusively* to customers of a specific business or group of businesses. Such transportation is private, and "the owner of a private ferry used exclusively as subsidiary to a private enterprise is not

a common carrier." 4 *Ruling Case Law* 556 (William M. McKinney & Burdett A. Rich eds., 1914).

For example, in *Meisner v. Detroit, Belle Isle & Windsor Ferry Co.*, 118 N.W. 14 (Mich. 1908), the owner of an amusement park located on an island in Lake Huron used two boats to transport customers to and from the park. *Id.* at 15. The Michigan Supreme Court held that provision of such transportation was not the operation of a "public common carrier" because "[t]he ride upon the boat and the use of the grounds [we]re part of the same scheme for pleasure furnished by the defendant to those whom it may choose to carry." *Id.*

Similarly, in *People v. Mago*, 23 N.Y.S. 938 (N.Y. Gen. Term 1893), the owners of a resort on an island in the Niagara River engaged the owner of a steamboat to transport resort customers to and from the resort on a regular, weekly basis. *Id.* at 938-39. The New York Supreme Court held the boat transportation was not a public ferry, as it was not available to "'all [persons] paying toll,' . . . but only excursionists" of the resort. *Id.* at 939-40 (quoting *N. & S. Shields Ferry Co. v. Barker*, 2 Exch. 136, 149 (1848)).

And in *Self v. Dunn & Brown*, 42 Ga. 528 (1871), mill owners provided their customers boat transportation to and from the mill. *Id.* at 531. The Georgia Supreme Court held that such boat transportation was "an appendage to the

mill"—an "accommodation of the mill-owner to his customers"—and, thus, a "private ferry," rather than a common carrier. *Id.* at 530, 531.[10]

Case law concerning waterborne transportation of goods dictates the same conclusion. Courts, including this one, have consistently held that boat transportation that is limited to the goods of specific businesses is a private, not public, ferry or carrier. *E.g.*, *The Lyra*, 255 F. 667, 668 (9th Cir. 1919) (holding that where a business chartered a ship and "furnished the whole cargo," the ship was "not a common carrier").[11] This is true even when there is a longstanding, ongoing engagement of the vessel's services. *E.g.*, *The Bowling Green*, 11 F. Supp. 109, 111 (E.D.N.Y. 1935) (holding that a lighterage service, which, "[f]or a long time past, . . . had an arrangement . . . to transport cargoes" for a specific

[10] In one of these cases (*Mago*), customers were charged for transportation; in another (*Self*), transportation was free; and in the other (*Meisner*), the court held that whether the business "charg[ed] for transportation" or, instead, "exact[ed]" the cost as "an entrance fee at the park" was irrelevant. *Meisner*, 118 N.W. at 15. *Meisner*'s statement—that whether a ferry charges is irrelevant to whether it is a private, rather than public, carrier—is correct, as this Court and others have made clear. *E.g.*, *United Truck Lines*, 216 F.2d at 398 (holding that "[a] private ferry . . . may take pay for ferriage"); *Futch v. Bohannon*, 67 S.E. 814, 815 (Ga. 1910) (same).

[11] *See also The Doyle*, 105 F.2d 113, 114 (3d Cir. 1939) ("The barge was 'chartered' by its owner to the respondent towing company under a verbal arrangement . . . . The owner of the barge is a private and not a common carrier."); *The C.R. Sheffer*, 249 F. 600, 601 (2d Cir. 1918) ("[T]he Brick Company was given and used the full capacity of the scow, and therefore her owners were not common, but private, carriers . . . .").

business, was "acting as [a] private carrier[]"), *aff'd sub nom. Czarnikow Rionda Co v. Ellerman & Bucknall S.S. Co.*, 81 F.2d 1017 (2d Cir. 1936).

Under this precedent, the Courtneys' proposed transportation is private, not public. They would not "extend[] [their] services to all comers," which is the hallmark of a public ferry, *United Truck Lines*, 216 F.2d at 398, but would instead restrict them solely to customers of a specific business or group of businesses. This Court was thus correct in its prior characterization of the transportation at issue, and the district court was wrong to ignore it.

3. The Washington Courts' Characterization Of The Transportation At Issue Has No Bearing On Whether The Courtneys Have Stated A Claim

While the district court's flouting of this Court's prior opinion was bad enough, the reason it gave for flouting it was all-the-more problematic: the district court insisted that it *had* to treat the Courtneys' transportation as a "public ferry" (and, thus, unprotected by the Privileges or Immunities Clause) because the Washington courts had determined that the transportation is "for the public use" as that term is used in Section 81.84.010(1) of the Revised Code of Washington—that is, the PCN statute. ER 17-18.

"Though the Courtneys describe the proposed ferry service at issue in their second claim as a 'private' boat transportation service," the district court asserted, "the Court cannot ignore the fact that both the WUTC and the Washington courts

have definitely concluded that the proposed 'private' ferry service is in fact a *commercial public ferry service* under Washington law." ER 17. "Thus," the district court continued, "regardless of the label the Courtneys choose to affix to the ferry service at issue in their second claim, at the end of the day it is a commercial public ferry service that they seek to provide," ER 18, and "the Privileges or Immunities Clause of the Fourteenth Amendment does not protect a right to operate a public ferry on Lake Chelan," ER 16 (quoting *Courtney*, 736 F.3d at 1162); *see also* ER 20.

The district court's reasoning is curious. This Court, after all, ordered the district court to retain jurisdiction so that the Courtneys could litigate their constitutional challenge to Washington's application of the PCN requirement if the Washington courts concluded that the PCN requirement, in fact, applies to the boat transportation they wish to provide. Yet, on remand, the district court held that the Courtneys could *not* challenge application of the PCN requirement *precisely because* the Washington courts had concluded that it applies to the boat transportation they wish to provide.

The district court's reasoning also rests on a fallacy—specifically, a fallacy of ambiguity. Whether the Courtneys' second 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" and, thus, not a protected "use [of] the navigable waters of the United States" under this Court's prior opinion. *Slaughter-House*, 83 U.S. (16 Wall.) at 79. Nevertheless, the district court conflated the two inquiries, allowing the determination of one (a state, statutory inquiry) to control determination of the other (a federal, constitutional inquiry).

"[I]nterpretations of state statutes do not control [the] construction of federal law . . . ." *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 88 n.2 (1973). "Where a federal right is concerned," a federal court is "not bound by the characterization given to a state [statute] by state courts . . . or relieved by it from the duty of considering the real nature of the [statute] and its effect upon the federal right asserted." *Carpenter v. Shaw*, 280 U.S. 363, 367-68 (1930).

That is true even here, where the state statute in question uses a term—"for the public use," Wash. Rev. Code § 81.84.010(1)—that is similar to the federally relevant term: "public ferry," *Courtney*, 736 F.3d at 1158, 1159, 1160, 1162. In fact, even when *identical* terms are used in connection with a state statute and federal constitutional provision, the state statutory usage will not control the federal constitutional usage. Just five months ago, for example, this Court held that "whether there is a contractual relationship for purposes of the Contracts Clause is distinct from whether there is a contract under state law." *LL Liquor, Inc. v. Montana*, 912 F.3d 533, 540 n.4 (9th Cir. 2018). And in *Sibron v. New*

York, 392 U.S. 40 (1968), the Supreme Court held that a state statute defining "reasonable" searches had no bearing on whether a search was "reasonable" under the Fourth Amendment. A state is "free to develop its own law" and "call the standards it employs by any names it may choose," the Court explained, but it "may not . . . authorize . . . conduct which trenches upon [federal constitutional] rights, regardless of the labels which it attaches to such conduct." *Id.* 60-61.

Thus, a state's determination that a "business is . . . devoted to a public use" does not determine "[t]he extent to which [the business] may be regulated" consistent with "the Fourteenth Amendment." *Charles Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522, 536, 539, 540 (1923). Those are distinct inquiries, and the Supreme Court has repeatedly held PCN statutes unconstitutional as applied in situations where, as here, states have interpreted their statutes broadly to treat private carriers as though they were public carriers.

In *Frost v. Railroad Commission*, 271 U.S. 583 (1926), for example, the California Supreme Court had held that the state's PCN statute applied to a trucking company that had an ongoing contract to provide transportation, between fixed termini over state highways, for a single business. While the U.S. Supreme Court recognized that the California Supreme Court's construction of the PCN statute was "binding upon" it, it nevertheless held the PCN statute unconstitutional as applied because it "ha[d] the effect of transforming" the trucking company "into

[a] public carrier[] by legislative fiat," and "a private carrier cannot be converted," "consistently with the due process clause of the Fourteenth Amendment," "into a common carrier by mere legislative command." *Id.* at 591-92.

Similarly, in *Michigan Public Utilities Commission v. Duke*, 266 U.S. 570 (1925), the Court held that Michigan violated the Fourteenth Amendment in enforcing a PCN statute against a trucking company that provided transportation services for only three businesses. *Id.* at 574, 576, 578. The company, the Court held, did "not devote [its] property to any public use," and "it is beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier." *Id.* at 576, 577-78.[12]

In short, the district court was bound by the Washington courts' determination that the transportation in question is "for the public use" under Washington's PCN statute, but it was not bound to conclude, based on that determination, that such "use [of] the navigable waters of the United States" is a

[12] *See also Hissem v. Guran*, 146 N.E. 808, 810 (Ohio 1925) (holding that the Fourteenth Amendment precludes application of a PCN statute "against a private carrier," even if it "operat[es] over the same routes and between the same termini" as a public carrier); *Allen v. R.R. Comm'n*, 175 P. 466, 474-75 (Cal. 1918) (holding that "[p]ublic use" means "use by the public and by every individual member of it, as a legal right," and that treating private services as public utilities violates the Fourteenth Amendment).

"public ferry" and, thus, unprotected by the Privileges or Immunities Clause of the Fourteenth Amendment. As the U.S. Supreme Court has made clear, a state's determination that a transportation service falls within the parameters of the state's PCN statute is wholly irrelevant to the question of whether applying the PCN statute to that service is consistent with the federal Constitution. And where, as here, the transportation at issue is *private*, the Supreme Court has not hesitated to invalidate application of the PCN requirement to it. Under this precedent, the Courtneys have clearly stated a claim that application of Washington's PCN requirement to the "private boat transportation services" they wish to provide violates their right to use the navigable waters of the United States. *Courtney*, 736 F.3d at 1163.

B. The Right to Use The Navigable Waters Of The United States Includes Their Use In Economic Pursuits

The district court erred again in alternatively holding that the Courtneys could not state a claim because of the economic nature of their proposed use of Lake Chelan. It insisted that "economic rights are not generally protected by the Privileges or Immunities Clause" and that, therefore, the right to use the navigable waters of the United States does not include "pursu[ing] economic opportunity" on them. ER 16, 19 (emphasis omitted). "[U]sing the navigable waters of the United States in the manner the Courtneys have proposed," the district court insisted, is a "right[] conferred by state citizenship"—not a right of national citizenship

protected by the Privileges or Immunities Clause. ER 16 (emphasis and internal quotation marks omitted).

The district court was wrong. The Privileges or Immunities Clause protects economic rights that derive from national citizenship, and the "right to use the navigable waters of the United States" is one of them. *Slaughter-House*, 83 U.S. (16 Wall.) at 79. The ability to use those waters *in the pursuit of a livelihood* was critical to slaves and free blacks in the 19th century, and *Slaughter-House* recognized their use as a right of national citizenship because black seaman were often barred from the waters on the theory that they were not *national* citizens. Thus, that the Courtneys wish to use Lake Chelan in economic activity only confirms—not defeats—their ability to state a claim.

1. The Privileges Or Immunities Clause Protects Economic Rights That Derive From National Citizenship

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*." (Emphasis added.) In *Slaughter-House*, the Supreme Court distinguished between "citizenship of the United States" and "citizenship of a State" and held that the clause protects only rights flowing from the former—that is, those that "owe their existence to the Federal government, its National character, its Constitution, or its laws." *Slaughter-House*. 83 U.S. (16 Wall.) at 74, 79.

Although the Court concluded that a general, open-ended right to economic liberty does not derive from national citizenship, *id.* at 61, 74-75, 78,[13] it identified a number of more specific economic rights that do. They include, for example, "free access to [the nation's] seaports, through which all operations of foreign commerce are conducted"; freedom from involuntary servitude; "access . . . to the subtreasuries"; and the right "to come to the seat of government to . . . transact any business [a citizen] may have with it." *Id.* at 79-80 (internal quotation marks and citation omitted); *see also Saenz v. Roe*, 526 U.S. 489, 505 (1999) (holding that a citizen's "right to be treated equally in her new State of residence," including in the receipt of welfare benefits, is a right of national citizenship protected by the Privileges or Immunities Clause); *Anderson v. United States*, 269 Fed. 65, 72, 74

[13] The dissent disagreed, opining that the clause protects a general right to economic liberty. *Slaughter-House*, 83 U.S. (16 Wall.) at 113 (Bradley, J., dissenting) (opining that the clause protects "the right of any citizen to follow whatever lawful employment he chooses to adopt"); *id.* at 97 (Field, J., dissenting) (opining that the clause protects "the right to pursue a lawful employment in a lawful manner"). The Courtneys believe the dissent was correct and therefore preserve the argument that *Slaughter-House* did not go far enough in protecting economic liberty. However, even under the majority opinion, they have stated a claim, as it was the majority that held the "right to use the navigable waters of the United States" is protected by the Privileges or Immunities Clause. *Id.* at 79.

(9th Cir. 1920) (recognizing the right to sell to and contract with the government as a right of national citizenship).[14]

Another of the economic rights of national citizenship protected by the Privileges or Immunities Clause is the one at issue here: the "right to use the navigable waters of the United States." *Slaughter-House*, 83 U.S. (16 Wall.) at 79. The right to "use"—or, as this Court previously put it, "navigate," *Courtney*, 736 F.3d at 1160—such waters is unquestionably economic in nature, and it includes the freedom to engage in the very type of activity in which the Courtneys wish to engage. Indeed, this Court has already explained that "navigate" means "'to use the waters as a highway for commerce,'" and that "the word 'navigate'" therefore includes the "moving of a vessel from one port to another for the purposes of *transportation of . . . passengers*." *United States v. Monstad,* 134 F.2d 986, 987, 988 & n.4 (9th Cir. 1943) (emphasis added) (quoting *Webster's New International*

[14] Although *Anderson* concerned 18 U.S.C. § 241 (derived from the Enforcement Act of 1870), rather than the Privileges or Immunities Clause, the rights and privileges to which Section 241 applied when *Anderson* was decided were coextensive with the rights of national citizenship protected by the Privileges or Immunities Clause. *See United States v. Cruikshank*, 92 U.S. 542 (1875).

Dictionary (2d ed. 1937)).[15] The Supreme Court has similarly recognized that "[c]ommerce . . . includes navigation" and that it is "[f]or this purpose" that the "navigable waters of the United States . . . are the public property of the nation." *United States v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 312 U.S. 592, 595-96 (1941) (quoting *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 724-25 (1865)). They are "public highways of *trade and intercourse*," and "[n]o franchise is needed to enable the navigator to use them." *Baltimore & Ohio R.R. Co. v. Maryland*, 88 U.S. 456, 470 (1874) (emphasis added); *see also Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 458 (1892) (recognizing the "paramount right of public use of navigable waters" as "common highways for commerce, trade, and intercourse" (quoting *People v. N.Y. & Staten Island Ferry Co.*, 68 N.Y. 71, 76 (1877))).

Despite this recognition of the navigable waters of the United States as fora of economic activity, the district court insisted that the right to "use," or "navigate," those waters does *not* include "pursu[ing] economic opportunity" on

[15] *See also Cook v. Belden Concrete Prods., Inc.*, 472 F.2d 999, 1002 (5th Cir. 1973) (defining "navigation" under the Jones Act as "transportation of passengers . . . from place to place across navigable waters"); *Johnson v. John F. Beasley Constr. Co.*, 742 F.2d 1054, 1063 (7th Cir. 1984) (holding that "[t]he 'vessel in navigation' requirement" under the Jones Act asks whether the vessel "has at times been employed as a means of transport on water for passengers").

them. ER 16 (emphasis omitted). In effect, it reduced the "right to use the navigable waters of the United States" to a right to use them *recreationally*.

We did not fight a civil war for a right to recreational boating. Nor did we endure the national division—and near relapse into civil war—that accompanied the Fourteenth Amendment's ratification, just so that the newly-liberated slaves could go kayaking or paddle-boarding. To reduce the "right to use the navigable waters of the United States" to a right to engage in watersport is a grave disservice to the Fourteenth Amendment's framers and ratifying public (not to mention Union soldiers), who were determined to ensure that all Americans could enjoy the blessings of national citizenship.

The district court claimed that its neutering of this right of national citizenship was supported by this Court's prior opinion in this case—specifically, this Court's observation that it "ha[s] narrowly construed the rights incident to United States citizenship enunciated in the *Slaughter-House Cases*, particularly with respect to regulation of intrastate economic activities." ER 20 (quoting *Courtney*, 736 F.3d at 1161). "[N]arrowly construe," however, does not mean "render meaningless."

Nor does "narrowly construing" a right require—or even permit—turning a blind eye to the history of a constitutional provision that was adopted to secure that right. Yet that is precisely what the district court did. It acknowledged that the

Courtneys' response to the WUTC's renewed motion to dismiss "spilled" "much ink" on the history of the Privileges or Immunities Clause in order "to explain '[t]he link between national citizenship and use of the navigable waters in economic activity,' and why 'it is inconceivable that *Slaughter-House* did not intend the right to use the navigable waters of the United States to encompass use in the pursuit of a livelihood.'" ER 19 (alteration in original) (quoting Plfs.' Resp. to Renewed Mot. to Dismiss (ECF No. 60) at 18-19, 21). But the district court insisted that it could *ignore* that history because of this Court's "narrow[] construc[tion]" approach to economic rights under the Privileges or Immunities Clause. ER 20.

The history that the district court incorrectly ignored—and that the Courtneys now set forth again—makes two things clear: (1) the right to use the navigable waters in the pursuit of a livelihood was an incredibly meaningful right for slaves and free blacks in the 19th century; and (2) the very reason *Slaughter-House* recognized it as a right of national citizenship protected by the Privileges or

Immunities Clause is because black seaman had been denied the right on the theory that they were not national citizens.[16]

2. The Right To Use The Navigable Waters In Pursuit Of A Livelihood Was Profoundly Important For Blacks Before And After The Civil War

The freedom to use the navigable waters, particularly in pursuit of a livelihood, was crucial to slaves and free blacks before the Civil War and the freedmen after it. In fact, they were such a presence on the water that, in many areas, Americans "came to think of boating as an occupation conducted by blacks." Melvin Patrick Ely, *Israel on the Appomattox* 156 (2004). This work provided them tremendous economic opportunity.

a. Black Boatmen Worked Extensively On The Navigable Waters

It is difficult to overstate the black presence on navigable waters in the 19th century. "Between the Revolution and the Civil War, black sailors" were "10 to 20 percent of all merchant American seamen, and as much as half of the native-born seamen in the merchant trade." David S. Cecelski, *The Waterman's Song* 53

[16] The Courtneys use the term "blacks" instead of "African Americans" because the latter term assumes American citizenship, and at the time in question, *Dred Scott v. Sandford*, 60 U.S. 393 (1857), had held that persons of African descent were not citizens. As discussed below, it was to correct *Dred Scott* that the Fourteenth Amendment defined "citizens[hip] of the United States" and guaranteed the "privileges" and "immunities" appurtenant to it.

(2001) [hereinafter *Waterman's Song*]. For "northern free blacks, struggling . . . to create a footprint for freedom, seafaring became one of the most common male occupations." W. Jeffrey Bolster, *Black Jacks* 4 (1997). But even in the antebellum south, "black watermen were common sights crewing flatboats, scows, canoes, periaugers, steamers, and other cargo boats on tidewater rivers and sounds." David S. Cecelski, *Shores of Freedom: The Maritime Underground Railroad in North Carolina, 1800-1861*, 71 N.C. Hist. Rev. 174, 193 n.76 (1994) [hereinafter *Shores of Freedom*]. "A distinctive maritime society . . . existed on the outskirts of the plantation world" and black boatmen "stood at its center." Cecelski, *Waterman's Song*, *supra*, at 136.

On Virginia's rivers, "free blacks worked as batteaumen from the first years of the [19th] century." Ely, *supra*, at 155. Farther down coast, in the Carolinas, "a considerable number of unlicensed slaves and free blacks" worked as pilots, Cecelski, *Waterman's Song*, *supra*, at 49, guiding vessels "in and out of port, and carrying cargo and people up and down the rivers that connected back country towns and villages with the coast," Maurice Melton, *African American Maritime Pilots in the South Atlantic Shipping Trade, 1640-1865*, 27 J. Ga. Ass'n Historians 1, 6 (2007-08). And "it was not unusual in the pre-emancipation days for slaves to be the captain and crew of the plantation-owned sloops and schooners." William C. Fleetwood, Jr., *Tidecraft* 145 (1995).

Black seamen had a substantial presence on the western rivers, as well. "Free black rivermen worked aboard Ohio and Mississippi river flatboats," and some "even rose to supervisory positions and captained their own boats and rafts." Michael Allen, *Western Rivermen, 1763-1861* 175 (1990). They also served on steamboats, and by mid-century, 2,000 free blacks and 3,000 slaves worked on the river at any given time. Thomas C. Buchanan, *Rascals on the Antebellum Mississippi: African American Steamboat Workers and the St. Louis Hanging of 1841*, 34 J. Soc. Hist. 797, 801 (2001) [hereinafter *Rascals*].

The work of black boatmen took on more profound significance during the Civil War, with slaves and free blacks contributing greatly to the Union victory. The Union Army "use[d] runaway slave watermen to capture" southern ports and, "[w]ith black men at the helm, . . . took possession of most of the barrier islands." Cecelski, *Waterman's Song*, *supra*, at 155, 160. Thousands of free blacks served on rivers in the western theater, as well. Thomas C. Buchanan, *Black Life on the Mississippi* 169 (2004) [hereinafter *Black Life*]. Their numbers "grew to as high as one in four of Union enlisted seamen," Cecelski, *Waterman's Song*, *supra*, at 172, and black pilots were eventually allowed officer status, with "authority to independently command small vessels," Melton, *supra*, at 13.

Finally, work on the navigable waters remained important to the freedmen after the war. As the "climb to economic . . . prosperity began anew[,] . . . canoes

and bateaux might be the only transportation or means of making a living" in parts of the South. Fleetwood, *supra*, at 140. The western rivers, too, "remained crucial to the economic health of African American communities along the inland waterways." Buchanan, *Black Life*, *supra*, at 17. As "river trade rebounded from wartime disruptions," freedmen "flocked to the decks of steamboats," which offered "their first paid labor following emancipation." *Id.* at 154, 155.

There is simply no denying the importance of the navigable waters to blacks in this era. Black seamen "figured prominently as sailors, pilots, boatmen, fishermen, stevedores, and maritime tradesmen from the busiest seaports to the most remote fishing camps," from the "inland seas and rivers" to the coast. Cecelski, *Waterman's Song*, *supra*, at 20.

b. Work On The Navigable Waters Provided Important Economic Opportunity To Blacks

The waters, moreover, "were more than a means of transport" for blacks; they were "a source of income and a marketplace." Dylan C. Penningroth, *The Claims of Kinfolk* 64 (2003). "Boating appealed to enterprising black men partly because the owner of a single batteau could prosper," "conduct[ing] . . . large transactions with white mercantile companies and entrepreneurs." Ely, *supra*, at 163, 164. The "coastal trade" likewise "offered free black sailors unprecedented pay and status." Cecelski, *Waterman's Song*, *supra*, at 53. "As independent wage-

earners, they defied white predictions that free blacks would be incapable of making their way in the world." Bolster, *supra*, at 157.

But the benefits were not limited to free men. "[M]erchants and planters . . . entered young slaves into formal apprenticeships to learn maritime trades." Cecelski, *Shores of Freedom*, *supra*, at 195 n.84. Once slaves gained experience, boat owners and trading companies leased them from their masters to work on vessels. Melton, *supra*, at 2-3. Many slaves "negotiated with masters the right to hire themselves for voyages." Bolster, *supra*, at 4. "Hiring out," by which slaves paid their masters a fee or share of wages they earned while working on the water, "eliminat[ed] the role of masters and agents in the contracting process," Buchanan, *Black Life*, *supra*, at 22, leaving slaves "free to solicit business with little oversight so long as sufficient profits accrued to their masters," Cecelski, *Waterman's Song*, *supra*, at 32. Thus, slaves worked as "independent contractor[s], competing with white pilots . . . and keeping most (if not all) of [their] wages." Melton, *supra*, at 4.

"Hiring out" afforded some slaves extraordinary economic opportunity. In 1835, for example, Simon Gray hired out to a lumbering and construction firm. Allen, *supra*, at 175. "[B]y 1838 he was directing rafting crews" for the firm and was soon "promoted . . . to flatboat captain." *Id.* at 175-76. From 1845 to 1862, he worked as the company's "chief boatman," *id.* at 176, commanding crews of up to

20 men, "both Negro slaves and white rivermen," who "looked upon Gray as their employer," John Hebron Moore, *Simon Gray, Riverman: A Slave Who Was Almost Free*, 49 Miss. Valley Hist. Rev. 472, 474, 475 (1962). Gray even took part "in private business enterprises when his services were not required by the company," purchasing his own boat to transport and sell sand and cordwood, and using the earnings to purchase his son's freedom. *Id.* at 478-79.

Even for slaves who did not hire out, working on boats provided a variety of wage-earning opportunities, such as "Sunday wages . . . for work on their customary day of rest." Buchanan, *Black Life*, *supra*, at 92. And while planters often bought produce and fish grown and caught by slaves on their own time, slaves also sold these goods off the plantation, using rivers and creeks to get the goods to town markets. Penningroth, *supra*, at 64.

In fact, the water itself became "a marketplace for the goods" that slaves produced. *Id.* at 65. "Black river workers . . . traded with . . . plantation slaves for their produce," and "[t]his trade offered opportunity for additional income for boat workers while providing riverside slaves with a regular outlet for their goods." Buchanan, *Rascals*, *supra*, at 803. The "river workers . . . created extensive networks of trade" linking "plantation slaves with urban markets," Buchanan, *Black Life*, *supra*, at 93-94, making slaves "less subject to non-market prices offered by masters for their produce," Buchanan, *Rascals*, *supra*, at 803.

In some cases, the navigable waters and black economy on them were a means of achieving literal freedom. Some slaves used money from "hiring out" to purchase freedom for themselves or their families. Moses Grandy, for example, "labored as a river ferryman, canal boatman, schooner deckhand, and lighter captain while still in bondage." Cecelski, *Waterman's Song*, *supra*, at 27. "Out of his boating profits, [he] paid his master . . . for his hire," and "[a]ny money that he earned" beyond that "was his to keep." *Id.* at 34. "Grandy saved a considerable sum of money," allowing him to purchase his freedom. *Id.* He then went to sea, and, "[w]ith his seamen's pay, . . . set about liberating his family." *Id.* at 55.

For others, the waters were a means of *escape* to freedom. For a fee, boatmen, black and white, would allow fugitive slaves to stow away and carry them to freedom. Cecelski, *Shores of Freedom*, *supra*, at 185, 190-91, 205. The navigable waters were thus doubly important to fugitives, providing "a critical source of income for their fare," as well as the conveyance to their freedom. *Id.* at 187; *see also id.* at 185-86.

In sum, work on the navigable waters was "crucial to blacks' economic survival" and "identity-formation" in the ante- and postbellum eras. Bolster, *supra*, at 6. The water "embodied labor [and] livelihood," Ely, *supra*, at 174, providing these men their first tastes of the "right to liberty, the proceeds of one's labor, and the guarantee of personal security under the law," Bolster, *supra*, at 135.

They were "daily involved in commerce," "[m]aking transactions and decisions with real consequences in the marketplace," and they could "assert themselves within their occupation." *Id.* at 5, 141.

3. *Slaughter-House* Recognized The Right To Use The Navigable Waters Of The United States As A Right of National Citizenship Because Blacks Were Being Denied The Freedom To Use Them To Pursue A Livelihood

Despite this extensive economic activity, deprivations of the right of blacks to pursue a living on the water were common. They included: (1) the Negro seaman acts; (2) refusals to recognize free black sailors as U.S. citizens under federal vessel law; (3) refusals to honor seaman protection certificates issued by the federal government to black sailors; and (4) protectionist laws barring black boatmen from the navigable waters. Public discussion and debate of these issues invariably turned on the "citizenship" of black boatmen—the same language on which the Privilege or Immunities Clause turns. When *Slaughter-House* recognized "the right to use the navigable waters of the United States" as one of *national* citizenship protected by the clause, it was because blacks trying to earn a living on the water were being denied that right on the very theory that they were not *national* citizens.

a. The Negro Seaman Acts

"[I]n the generation preceding the Civil War," southern states passed acts that "imposed restraints upon free Negro seamen in their ports." Philip M. Hamer,

Great Britain, the United States, and the Negro Seamen Acts, 1822-1848, 1 J. Southern Hist. 3, 3 (1935). "The first state to enact one of these laws, which for convenience are referred to as Negro seaman acts, was South Carolina" in 1822. *Id.* It required the imprisonment of "any free negroes . . . employ[ed] on board of [a] vessel" while it was in port, and those not in compliance could be "taken as absolute slaves, and sold." Bolster, *supra*, at 194. Other states adopted similar laws, including Georgia (1829), North Carolina (1830), Florida (1832), Alabama (1839), Mississippi (1842), Louisiana (1841), Missouri (1843), and Kentucky (1860). *Id.* at 198-199; Hamer, *supra*, at 3; Buchanan, *Black Life*, *supra*, at 24; Thomas C. Buchanan, *Levees of Hope*, 30 J. Urban Hist. 360, 364 (2004). "These laws institutionalized the debasement of African American seamen," with "*at least 10,000*"—and likely "considerably more"— "jailed under the[m]." Bolster, *supra*, at 194-95, 206. The laws "undeniably circumscribed seamen's . . . livelihood." *Id.* at 214.

The plight of these free black sailors became inextricably intertwined with efforts to define the rights of national citizenship. Ironically, it began with a British sailor, Henry Elkison, who was imprisoned under South Carolina's act. He petitioned for a writ of habeas corpus, and his case came before Supreme Court Justice William Johnson, sitting circuit. Johnson concluded that the law was

unconstitutional but that he did not have authority to issue the writ. *Elkison v. Deliesseline*, 8 F. Cas. 493 (C.C.D.S.C. 1823).

Johnson's opinion sparked national controversy. Southern newspapers complained that it raised the specter of free blacks having *national* rights that could trump the laws of southern states. 1 Howard Gillman *et al*., *Structures of Government* ch. 5 supp. at 4 (2013). Johnson, in turn, authored a series of essays defending his opinion. Foreshadowing *Slaughter-House*'s recognition of a national right "of free access to . . . seaports, through which operations of foreign commerce are conducted," 83 U.S. (16 Wall.) at 79, he argued that the states, in ratifying the Constitution, had "given up the right of deciding who shall have access to our ports for the purposes of trade." Gillman, *supra*, ch. 5 supp. at 5.

Still troubled by his inability to grant the writ, however, Johnson wrote to Secretary of State John Quincy Adams for the position of the executive branch. *Id.* ch. 5 supp. at 6. President Monroe, in turn, requested an opinion from his attorney general, William Wirt, who agreed that the law was unconstitutional. *Id.*; Martha S. Jones, *Birthright Citizens* 42-43 & n.58 (2018). Still, South Carolina refused to back down. "Whatever its theoretical authority, the Federal government was without power, practically, to compel the states to repeal their laws regarding Negro seaman." Hamer, *supra*, at 28.

The issue continued to fuel debate. When Andrew Jackson assumed the presidency, he requested an opinion from his own attorney general, John Berrien, who disagreed with Wirt and concluded that South Carolina's law was constitutional. But the opinion "was not seen as settling the issue," and Jackson requested another opinion from Berrien's successor, Roger Taney. H. Jefferson Powell, *Attorney General Taney & the South Carolina Police Bill*, 5 Green Bag 2d 75, 81 (2001). Taney's opinion laid the groundwork for his future opinion in *Dred Scott*, "formulat[ing] the same harsh racial doctrine that he would [later] proclaim from the bench." Don E. Fehrenbacher, *The Dred Scott Case* 70 (1978). According to Taney, at the time of the framing, members of "the African race . . . were not regarded as constituent members of either of the sovereignties"—*i.e.*, national or state—and "were not therefore intended to be embraced by the terms *citizens of each State*" under the Privileges *and* Immunities Clause of Article IV, section 2. Powell, *supra*, at 85.

The issue, however, did not die, and Congress took it up. But like the dueling attorney general opinions, Congress produced only "dueling committee reports"—reports that "directly anticipate[d]" and "grappled with the tension between black citizenship and slavery in a federal republic and ultimately with the Fourteenth Amendment's protection of privileges or immunities against the states." Gillman, *supra*, ch. 5 supp. at 9.

Finally, South Carolina's negro seaman act surfaced again in the debates over the Fourteenth Amendment itself, when the amendment's architect, John Bingham, brought it up in discussing national citizenship. William J. Rich, *Why "Privileges or Immunities"? An Explanation of the Framers' Intent*, 42 Akron L. Rev. 1111, 1113-14 (2009). Thus, when *Slaughter-House* recognized a right, of national citizenship, to "use the navigable waters of the United States," it was contemplating the right to ply those waters in trade, just as the free black sailors imprisoned in South Carolina and other states with negro seaman acts had been trying to do. *See* William J. Rich, *Lessons of Charleston Harbor: The Rise, Fall and Revival of Pro-Slavery Federalism*, 36 McGeorge L. Rev. 569, 607 (2005).

b. Federal Vessel Law

The link between national citizenship and use of the navigable waters of the United States in pursuing a livelihood is equally clear in antebellum debates over federal vessel law. As early as 1793, federal law required masters of vessels in the coasting trade or fisheries to be "citizen[s] of the United States," and debate arose over whether free black sailors met that qualification. Jones, *supra*, at 52. In 1821, "[o]n behalf of the collector of customs at Norfolk," the Secretary of Treasury requested an attorney general opinion on "[w]hether free persons of color are, in Virginia, citizens of the United States, within the intent and meaning of the acts regulating foreign and coasting trade, so as to . . . command vessels." Philip

Hamburger, *Privileges or Immunities*, 105 Nw. U. L. Rev. 61, 90 (2011). General Wirt gave a nuanced answer: "free black mariners, *if not citizens of the state in which they resided*, were not qualified to command such vessels." Jones, *supra*, at 52 (emphasis added). He left open the possibility that a black sailor who *was* a "full" citizen of his state might also be a "citizen of the United States" capable of command. *Id.* at 42.

The issue surfaced again during the war, as the Lincoln administration sought to circumvent *Dred Scott*. Two days after Lincoln presented the Emancipation Proclamation to his cabinet, Secretary of Treasury Salmon Chase requested Attorney General Edward Bates's opinion on the issue, which had come to the fore when a black sailor named David Selsey was detained by revenue officials in his own state for commanding a vessel in violation of the 1793 law. James P. McClure, *Circumventing the Dred Scott Decision: Edward Bates, Salmon P. Chase, and the Citizenship of African Americans*, 43 Civil War Hist. 279, 280-81 (1997). Chase asked Bates, "[A]re colored men Citizens of the United States and therefore Competent to command American vessels?" *Id.* at 282. Bates opined that they were—that a "free man of color . . . if born in the United States, is a citizen of the United States . . . competent . . . to be master of a vessel engaged in the coasting trade." Edward Bates, *Citizenship*, 10 Op. Att'y Gen. 382, 413 (Nov. 29, 1862). The Government Printing Office distributed his opinion widely in

pamphlet form, and a *New York Times* headline declared, "Dred Scott Decision Pronounced Void." McClure, *supra*, at 283.

"In the early stages of Reconstruction," Bates's opinion on the right of blacks to command vessels, in trade, on the navigable waters of the United States "was an essential component" of the argument for the national citizenship of blacks, McClure, *supra*, at 284, and, thus, for the rights concomitant with that citizenship recognized in *Slaughter-House*.

c. Seaman Protection Certificates

The link between national citizenship and use of the navigable waters in economic activity is evident again in the "seaman protection certificates" issued—and ignored—during the antebellum period. Beginning in the 1790s, the federal government issued these certificates—which "stat[ed] the bearer was a 'Citizen of the United States of America,'" Jessica A. Clarke, *Identity and Form*, 103 Cal. L. Rev. 747, 778 (2015)—to prevent capture and indenture of Americans on the high seas, Bolster, *supra*, at 1-2. "[T]here appears to be no case law on the issue of black sailors being granted a 'seamen's protection' [certificate] or any discussion in [the] executive branch." Paul Finkelman, *Frederick Douglass's Constitution: From Garrisonian Abolitionist to Lincoln Republican*, 81 Mo. L. Rev. 1, 26 n.201 (2016). "[C]ongressional deliberations" similarly "assumed 'free persons of color' were protected like all seamen." Jones, *supra*, at 52. Thus, between 1796 and

1868, "thousands of free black sailors received . . . certificates. Clarke, *supra*, at 778.

These sailors used the certificates to prove they were not runaway slaves while traveling in the United States. Bolster, *supra*, at 1-2. But southerners often ignored the certificates and their attestation that the sailors holding them were national citizens. "[M]an-stealing, or the kidnapping of free sailors in order to enslave them," was common. *Id.* at 200. "[F]ree blacks passing through . . . ports" on the southeast coast "faced the constant risk of enslavement," Cecelski, *Waterman's Song*, *supra*, at 20, and "Mississippi River pilots practiced man-stealing on a grand scale," Bolster, *supra*, at 201.

"The randomness of this piracy unsettled every free person of color, mocking their free status." *Id.* As citizens of the United States, at least in the federal government's eyes, free black sailors had a right to ply the waters in trade—a right that flowed from their citizenship. Yet that right was routinely abridged. In recognizing a national "right to use the navigable waters of the United States" (and to "protection . . . on the high seas"), *Slaughter-House* was speaking in the context of these abuses. The Court sought to ensure that *all* Americans could use the nation's navigable waters in the pursuit of a livelihood.

d. Economic Protectionism

Finally, the bitter debate over the citizenship of black sailors—and over what, if any, rights of national citizenship they held—left the sailors vulnerable to protectionist laws. "Smaller independent white pilots, desperate to protect their ever-contracting earnings, increased their pressure on . . . regulatory agencies," which responded with legislation designed to protect white pilots from economic competition. Melton, *supra*, at 7-8. While slave pilots "had allies in the established and experienced branch pilots who owned them, . . . free men of color had few champions . . . to come to their aid." *Id.* at 8. Thus, for example, "Savannah's City Council banned free black men from piloting" on the Savannah River, but "senior pilots continued training and using slaves in their pilotage concerns." *Id.* Such protectionism did not end with the war. "[A]s white Southerners sought ways to cope with the new order of a South without slavery, . . . pilots' associations and their governmental partners excluded African Americans from the business." *Id.* at 15.

"Before 1865 seafaring had been crucial to blacks' economic survival" and "identity formation"; it "addressed squarely the duality of being black and American," of being "'citizens' of the United States." Bolster, *supra*, at 5, 6. But *Dred Scott* held that blacks were *not* citizens of the United States, and by the time

the Fourteenth Amendment was proposed, *Dred Scott* had not been overruled. It was "[t]o remove this difficulty," and "to establish a clear and comprehensive definition of . . . what should constitute citizenship of the United States," that the Citizenship Clause of the Fourteenth Amendment was adopted. *Slaughter-House*, 83 U.S. (16 Wall.) at 73. And it was to protect the rights concomitant with that citizenship, including the "right to use the navigable waters of the United States," that the Privileges or Immunities Clause was included as the very next clause in the amendment. *Id.* at 79.

Given the deprivations blacks faced in their attempts to earn a living on the water—deprivations justified on the theory that they were *not* national citizens—it is inconceivable that *Slaughter-House* did not intend the right to use the navigable waters of the United States to encompass use in the pursuit of a livelihood. In the 80 years preceding *Slaughter-House*, the right to ply the waters in trade was consistently identified as a right attendant to national citizenship: if blacks were considered citizens, they could exercise that right, and if they weren't, they couldn't. The Citizenship Clause established that they were citizens, and the Privileges or Immunities Clause established that no state could abridge that right.

IX. CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court, hold that the Courtneys have stated a claim for abridgement of their right to use the navigable waters of the United States, and remand this case to the district court for development and resolution on the merits.

Respectfully submitted May 13, 2019.

INSTITUTE FOR JUSTICE

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X. STATEMENT OF RELATED CASES

No known related cases are pending in this Court.

Dated this 13th day of May, 2019.

/s/ Michael Bindas
Michael Bindas
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XI. STATEMENT REGARDING ORAL ARGUMENT

This case involves important constitutional issues of first impression. The Courtneys request oral argument, as they believe it will significantly aid this Court's decisional process in resolving those issues.

/s/ Michael Bindas
Michael Bindas
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number 19-35100

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 13th day of May, 2019, I caused this Brief of Appellants to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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ADDENDUM

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ADDENDUM

U.S. Const. amend XIV, § 1, cl. 2

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .

Wash. Rev. Code § 81.84.010(1)

(1) A commercial ferry may not operate any vessel or ferry for the public use for hire between fixed termini or over a regular route upon the waters within this state, including the rivers and lakes and Puget Sound, without first applying for and obtaining from the commission a certificate declaring that public convenience and necessity require such operation. Service authorized by certificates issued to a commercial ferry operator must be exercised by the operator in a manner consistent with the conditions established in the certificate and tariff filed under chapter 81.28 RCW. However, a certificate is not required for a vessel primarily engaged in transporting freight other than vehicles, whose gross earnings from the transportation of passengers or vehicles, or both, are not more than ten percent of the total gross annual earnings of such vessel.

Wash. Rev. Code § 81.84.020(1) & (2)

(1) Upon the filing of an application, the commission shall give reasonable notice to the department, affected cities, counties, and public transportation benefit areas and any common carrier which might be adversely affected, of the time and

place for hearing on such application. The commission may, after notice and an opportunity for a hearing, issue the certificate as prayed for, or refuse to issue it, or issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the rights granted by the certificate any terms and conditions as in its judgment the public convenience and necessity may require; but the commission may not grant a certificate to operate between districts or into any territory prohibited by RCW 47.60.120 or already served by an existing certificate holder, unless the existing certificate holder has failed or refused to furnish reasonable and adequate service, has failed to provide the service described in its certificate or tariffs after the time allowed to initiate service has elapsed, or has not objected to the issuance of the certificate as prayed for.

(2) Before issuing a certificate, the commission shall determine that the applicant has the financial resources to operate the proposed service for at least twelve months, based upon the submission by the applicant of a pro forma financial statement of operations. Issuance of a certificate must be determined upon, but not limited to, the following factors: Ridership and revenue forecasts; the cost of service for the proposed operation; an estimate of the cost of the assets to be used in providing the service; a statement of the total assets on hand of the applicant that will be expended on the proposed operation; and a statement of prior experience, if any, in such field by the applicant. The documentation required of

the applicant under this section must comply with the provisions of RCW 9A.72.085.

Wash. Admin. Code § 480-51-040(1)

(1) The commission shall send a notice of each application for certificated commercial ferry service and each application to operate vessels providing excursion service, with a description of the terms of that application, to all persons presently certificated to provide service; all present applicants for certificates to provide service; the department of transportation; affected cities and counties; and any other person who has requested, in writing, to receive such notices. Interested persons may file a protest with the commission within thirty days after service of the notice. The protest shall state the specific grounds for opposing the application and contain a concise statement of the interest of the protestant in the proceeding. A person who is eligible to file a protest and fails to do so may not participate further in the proceeding in any way, unless it can be demonstrated that failure to file a protest was due to an omission by the commission in providing proper notification of the pending application.