Case No. 12-35392

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES COURTNEY; CLIFFORD COURNTEY,

Plaintiffs-Appellants,

v.

JEFFREY GOLTZ, chairman and commissioner; PATRICK OSHIE, commissioner; PHILIP JONES, commissioner, in their official capacity as officers and members of the Washington Utilities and Transportation Commission; DAVID DANNER, in his official capacity as executive director of the Washington Utilities and Transportation Commission,

Defendants-Appellees.

On Appeal from the United States District Court
Eastern District of Washington at Spokane

The Honorable Thomas O. Rice
United States District Court Judge
Case No. 2:11-cv-00401

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

This case challenges Washington statutes and regulations requiring a certificate of "public convenience and necessity" to operate a ferry on Lake Chelan. This requirement—which gives existing ferry providers a veto over new competition—has resulted in a monopoly of ferry service on the lake since 1927. By barring new entrants, including Appellants Jim and Cliff Courtney, the requirement abridges the "right to use the navigable waters of the United States"—a right protected by the Privileges or Immunities Clause of the 14th Amendment.

II. JURISDICTIONAL STATEMENT

This appeal is of an order ("Order") granting a motion to dismiss the complaint of Appellants Jim and Cliff Courtney (together, "Courtneys") for failure to state a claim. The district court had jurisdiction over the action pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3), (4), and its Order is final because the dismissal resolved all claims against all parties. *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1402 (9th Cir. 1988). This Court accordingly has jurisdiction pursuant to 28 U.S.C. § 1291.

The Order was entered on April 17, 2012, and the Courtneys filed their notice of appeal on May 15, 2012. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(A).

III. STATEMENT OF THE ISSUES

A. Did the district court err in failing to hold that the Privileges or Immunities Clause of the Fourteenth Amendment protects the right to use the navigable waters of the United States when the United States Supreme Court has held that it does?

B. Did the district court err in concluding that the Privileges or Immunities Clause was not designed to protect economic rights?

C. Did the district court err in holding that even if the Privileges or Immunities Clause protects the right to use the navigable waters of the United States, it does not extend to the operation of a commercial ferry on such waters?

D. Did the district court err in holding the Courtneys lack standing to challenge Washington's public convenience and necessity requirement as it applies to a Lake Chelan boat transportation service solely for patrons of specific businesses or a group of businesses?

E. Did the district court err in holding unripe the Courtneys' challenge to Washington's public convenience and necessity requirement as it applies to a Lake Chelan boat transportation service solely for patrons of specific businesses or a group of businesses?

F. Did the district court err in concluding that *Pullman* abstention precluded it from resolving the Courtneys' challenge to Washington's public

convenience and necessity requirement as it applies to a Lake Chelan boat transportation service solely for patrons of specific businesses or a group of businesses?

IV. STATEMENT OF THE CASE

The Courtneys sought declaratory and injunctive relief against the members and executive director of the Washington Utilities and Transportation Commission (collectively, "WUTC"), in their official capacities, on October 19, 2012. ER 28. Their complaint, brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201–02, asserts 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 a boat transportation service on Lake Chelan solely for patrons of specific businesses or a group of businesses. ER 60-61 ¶119; 64-65 ¶132. The Courtneys allege that, as applied to both services, the PCN 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 14th Amendment in the *Slaughter-House Cases*, 83 U.S. 36, 79 (1873).

The WUTC moved to dismiss the complaint on December 8, 2011. ER 26. The parties briefed the motion and the district court heard argument on April 12, 2012. ER 3.

On April 17, the district court dismissed the Courtneys' complaint. ER 3. Regarding their first claim, the court concluded that, despite the Supreme Court's holding in *Slaughter-House*, "there is reason to question whether the 'right to use the navigable waters of the United States' is truly a *recognized* Fourteenth Amendment right." ER 16. The court further concluded that the Privileges or Immunities Clause was not "designed to protect quintessentially economic rights." ER 17. Finally, it determined that even if the right to use the navigable waters of the United States is protected, it does not encompass the right "to operate a ferry service open to the public." ER 19.

Regarding the Courtneys' second claim, the court held: (1) that the Courtneys lack standing to challenge the PCN requirement as it applies to transportation solely for patrons of specific businesses or a group of businesses; (2) that such a claim is unripe; and (3) that even if the claim were ripe, the court would abstain under *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941). ER 21- 25.

On May 15, 2012, the Courtneys timely filed a notice of appeal. ER 1.

V. STATEMENT OF FACTS

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 32 ¶¶13-15. Stehekin is a popular summer destination, drawing Washington residents and visitors from outside the state. ER 32 ¶15.[1] Stehekin and much of the northwest end of the lake are located in the Lake Chelan National Recreation Area (LCNRA). ER 32 ¶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 32-33 ¶¶15, 18. The lake is a "navigable water of the United States." ER 33 ¶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 33 ¶¶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 33 ¶21.

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[1] *See also* WUTC, *Appropriateness of Rate and Service Regulation of Commercial Ferries Operating on Lake Chelan* 3-4 (Jan. 14, 2010) (hereinafter WUTC Report). The full report is not in the record, as this case was resolved on a motion to dismiss. The district court, however, relied on it, and the WUTC agreed it could. Defs.'Reply Br. Supp. Mot. Dismiss 11. The report is available at http://www.utc.wa.gov/regulatedIndustries/transportation/commercialFerries/Pages/default.aspx

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 33 ¶22. As the *Seattle Daily Times* explained the day the legislature passed the PCN law, it was "champion[ed]" by existing ferry owners to "protect" themselves from competition. *Ferrymen Champion New Senate Measure*, Seattle Daily Times, Mar. 1, 1927, at 27; *see also id.* ("Puget Sound ferryboat operators are much interested Senate Bill No. 160, … which would protect pioneers in ferryboat routes from unfair and ruinous competition."). The law had "virtually … unanimous support" of the "fourteen or fifteen" then-existing ferry and passenger vessel operators. *Id.*

Today, a PCN certificate is required 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 34 ¶25. The applicant 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: "has not objected to the issuance of the certificate as prayed for"; "has failed or refused to furnish reasonable and adequate service"; or "has failed to provide the service

described in its certificate." Wash. Rev. Code § 81.84.010(1), .020(1), (2); ER 37-38 ¶¶34-36.

The WUTC provides notice of the application to the would-be ferry provider's competitors—that is, "all persons presently certificated to provide service" and "any common carrier which might be adversely affected." Wash. Admin. Code § 480-51-040(1); Wash. Rev. Code § 81.84.020(1); 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(f); ER 36 ¶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), (g), -340(3); ER 36 ¶¶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 -385; 480-07-390 to -395; 480-07-400 to -425; 480-07-440 to -495; 480-07-498; ER 36-37 ¶32. The burden of proof on every element for a certificate is on the applicant. ER 38 ¶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 34 ¶¶24, 26; 39 ¶39.

In short, the PCN requirement creates an insurmountable barrier to entry into the Lake Chelan ferry market. The WUTC identifies "protection from competition" as the "[r]ationale" for the requirement. ER 41-42 ¶¶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 Lake Chelan Boat Company. At least four other applications have been made, including one by Plaintiff Jim Courtney. In each instance, Lake Chelan Boat Company protested and the state denied a certificate. ER 34 ¶¶23-24.

Much of the year, Lake Chelan Boat Company operates only one boat, which makes one trip per day in each direction, three days per week. ER 41 ¶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 40 ¶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 40 ¶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 41 ¶46.

D. The Courtneys' Efforts To Provide An Alternative Service

Appellants Jim and Cliff are fourth-generation residents of Stehekin. They and their siblings have several businesses in the community, including a pastry shop, the Stehekin Valley Ranch (a ranch with cabins and a lodge house), and Stehekin Outfitters, which offers river outings and horseback riding. ER 42 ¶¶50-53.

For years, Jim and Cliff listened as their and their siblings' customers 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 boat but have been thwarted by the PCN requirement at every step. ER 42-43 ¶¶54-56.

First, in 1997, Jim applied for a certificate to operate a Stehekin-based ferry. ER 43 ¶57. Lake Chelan Boat Company protested the application. ER 43 ¶58. In August 1998, after a two-day hearing that yielded a 515-page transcript, the WUTC denied a certificate, finding that 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 45 ¶67. Jim incurred approximately $20,000 in expenses for the application. ER 44-45 ¶¶62, 67-68.

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. ER 46 ¶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 46 ¶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 46-47 ¶72. At first, WUTC staff opined that he did not need a certificate. ER 47 ¶73. Soon thereafter, Lake Chelan Boat Company contacted the WUTC to express concern and WUTC staff abruptly "changed its opinion." ER 47 ¶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 47-48 ¶¶77-78. The WUTC's executive director, however, declined to provide an opinion and Jim was unable to launch his boat service. ER 48-49 ¶¶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 49 ¶83. First, he described a scenario in which he would charter a boat for patrons of Courtney-family businesses and offer a package with transportation on

the chartered boat as one of the guests' options. ER 49 ¶84. In the second scenario, Cliff would purchase a boat and carry his own patrons. ER 49 ¶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 50 ¶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 51 ¶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." *Id*.

The WUTC's executive director did note that Cliff could file "a petition for a declaratory ruling" to try to convince the Commission to take a different position, but he explained that "the existing certificate holder would have to agree to participate" in the proceeding, which is adjudicative in nature. ER 51 ¶89; *see also* Wash. Rev. Code § 34.05.240(7). If Cliff "were to initiate service without first applying for a certificate," he warned, the WUTC could initiate a "classification proceeding," ER 51 ¶89—"a special proceeding requiring such person or

corporation to appear before the commission," "give testimony under oath," and "prov[e] that his operations or acts are not subject to" the certificate requirement. Wash. Rev. Code § 81.04.510.

Finally, Cliff contacted the governor and state legislators in early 2009 and urged them to eliminate or relax the PCN requirement. ER 52 ¶92. The Legislature directed the WUTC to conduct a study and report on the regulatory scheme governing ferry service on Lake Chelan. ER 52-53 ¶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 53 ¶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." WUTC Report, *supra*, at 12, 14, 15 (emphasis added); ER 53 ¶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 53 ¶96.

E. The Present Action

In October 2011, Jim and Cliff filed this action for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. ER 28. They assert two claims under the Privileges or Immunities Clause of the 14th Amendment: that as applied to (1) boat service on Lake Chelan that is open to the general public and (2) boat service on Lake Chelan for patrons of specific businesses or a group of businesses, the PCN requirement abridges their right to use the navigable waters of the United States. ER 60-61 ¶119; 64-65 ¶132. They do not challenge any health and safety regulations, such as inspection and insurance requirements.

VI. SUMMARY OF ARGUMENT

The district court erred in dismissing the Courtneys' claim regarding a public ferry. The Supreme Court has held that the "right to use the navigable waters of the United States" is a right of national citizenship protected by the Privileges or Immunities Clause, *Slaughter-House*, 83 U.S. at 79, yet the district court "questioned" whether this right "is truly a *recognized* Fourteenth Amendment right." ER 16. The right is recognized, and the district court was wrong to disregard *Slaughter-House*.

The district court was likewise wrong in asserting that the Privileges or Immunities Clause was not designed to protect economic rights. ER 17. Although there is disagreement regarding the precise scope of economic rights that the clause protects, it is clear that economic rights derived from national citizenship, such as the right to use the navigable waters of the United States, are protected. The history of the clause, *Slaughter-House*, and subsequent judicial decisions make that clear.

Finally, the district court erred in concluding that the right to provide ferry service is a right of state, rather than federal, citizenship. ER 18-19. *Using the navigable waters of the United States* to provide ferry service is a right of national citizenship, precisely because of the unique, federal nature of those waters.

The district court also erred in dismissing the Courtneys' second claim, which challenges the PCN requirement as it applies to boat transportation on Lake Chelan solely for patrons of specific businesses or a group of businesses. The court dismissed this claim on standing, ripenesss, and *Pullman* abstention grounds because, in the court's opinion, it is "uncertain" whether the Courtneys are required to obtain a certificate for this service. ER 21-25. The WUTC's executive director, the full Commission, and the Washington Supreme Court, however, have all determined that a PCN certificate is necessary for the type of service the Courtneys wish to provide.

The Courtneys have been and continue to be injured by the PCN requirement and thus have standing to challenge it. Moreover, they are not required to avail themselves of state administrative processes to "ripen" their claim, as the district court maintained. Finally, none of the *Pullman* requirements is satisfied. This Court should thus reinstate the Courtneys' second claim, as well.

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).

"The district court's determination on the issue of standing is also reviewed *de novo* …." *Levine v. Vilsack*, 587 F.3d 986, 991 (9th Cir 2009). "Where standing is raised in connection with a motion to dismiss, the court is to accept as true all material allegations of the complaint, and … construe the complaint in favor of the complaining party." *Id.* (omission in original; internal quotation marks and citation omitted).

"Ripeness is a question of law that is also reviewed de novo," *Guatay Christian Fellowship v. Cnty. of San Diego*, 670 F.3d 957, 970 (9th Cir. 2011), as is "whether the requirements for *Pullman* abstention have been met." *Smelt v. Cnty. of Orange*, 447 F.3d 673, 678 (9th Cir. 2006) (citation omitted). "[T]he

district court's ultimate decision to abstain under *Pullman*," however, is reviewed "for abuse of discretion." *Id.*

VIII. ARGUMENT

A. The District Court Erred In Dismissing The Courtneys' Claim Regarding A Public Ferry

The district court erred in dismissing the Courtneys' first claim, concerning operation of a public ferry on Lake Chelan. Contrary to the district court's contentions, the Privileges or Immunities Clause protects economic rights, including the right to use the navigable waters of the United States, that derive from national citizenship. Moreover, the right to use the navigable waters of the United States includes use of such waters in the provision of ferry service.

1. *Slaughter-House* Held That The Privileges Or Immunities Clause Protects The "Right To Use The Navigable Waters of the United States"

The right to use the navigable waters of the United States is protected by the Privileges or Immunities Clause of the 14th Amendment. In the *Slaughter-House Cases*, 83 U.S. 36 (1873), the seminal decision interpreting the clause, the Supreme Court distinguished between "citizenship of the United States" and "citizenship of a State" and held that the clause "speaks only of privileges and immunities of citizens of the United States"—those that "owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.* at 74, 79.

Among such privileges, the Court held, is "[t]he right to use the navigable waters of the United States." *Id.* at 79.

The district court nevertheless insisted that it could not "definitively conclude that the Fourteenth Amendment does in fact protect 'the right to use the navigable waters of the United States.'" ER 16. According to the court, *Slaughter-House* was merely hypothesizing "a number of rights that *could be* protected under the Fourteenth Amendment," and there is "reason to question whether 'the right to use the navigable waters of the United States' is truly a *recognized* Fourteenth Amendment right." ER 16 (first emphasis added).

Slaughter-House's discussion of the rights protected by the Privileges or Immunities Clause was not a mere dictum the district court was free to disregard. The discussion was "germane to the eventual resolution of the case," as it served to establish the types of rights of national, as opposed to state, citizenship that the Court held are protected by the clause, and the Court identified the rights "after reasoned consideration." *In re Tippett*, 542 F.3d 684, 691 (9th Cir. 2008) (internal quotation marks and citations omitted). The discussion, therefore, may not be ignored. *Id.*

In fact, the Supreme Court itself recently relied on the very portion of *Slaughter-House* the district court here disregarded. In holding that the "right to be treated equally in [a] new State of residence" is protected by the Privileges or

Immunities Clause, *Saenz v. Roe*, 526 U.S. 489, 505 (1999), the Court relied on the fact that *Slaughter-House* had "explained that one of the privileges conferred by this Clause 'is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bonâ fide* residence therein, with the same rights as other citizens of that State.'" *Id.* at 503 (quoting *Slaughter-House*, 83 U.S. at 80). The language quoted from *Slaughter-House* is from the same paragraph in which the Court held that "[t]he right to use the navigable waters of the United States" is also protected by the clause. *Slaughter-House*, 83 U.S. at 79.

Even if *Slaughter-House*'s discussion "could be considered a dictum," however, "that would be of little significance." *Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 683 (9th Cir. 2004). This Court's "precedent requires that [it] give great weight to dicta of the Supreme Court," *id.*, and "not blandly shrug them off because they were not a holding." *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) (en banc) (internal quotation marks and citation omitted).

Finally, that the right to use the navigable waters of the United States has not been expounded upon since *Slaughter-House* does not mean, as the district court maintained, that the right lacks protection. *See* ER 16. The Third Amendment right against quartering of soldiers in private residences was not directly examined until 1982. *See Engblom v. Carey*, 677 F.2d 957 (2d Cir. 1982). That two

centuries passed before the right received meaningful judicial consideration in no way diminishes the right or the protection it is accorded.

The same is true of the right to use the navigable waters of the United States. "While instances of valid 'privileges or immunities'" may be "but few, … this is one." *Edwards v. California*, 314 U.S. 160, 183 (1941) (Jackson, J., concurring) (concerning right to migrate). And while the Courtneys "do not ignore or belittle the difficulties of what has been characterized … as an 'almost forgotten' clause[,] … the difficulty of the task does not excuse us from giving these general and abstract words … [the] specific content and concreteness they will bear as we mark out their application, case by case." *Id.* To do otherwise would render the Privileges or Immunities Clause a legal nullity.

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

The district court erred again in concluding that the Privileges or Immunities Clause was not designed to protect economic rights. ER 17. According to the district court, it is "likely that the oppression of former slaves in the wake of the Civil War resulted in adverse economic consequences," but "there is little to suggest that Congress viewed the Privileges or Immunities Clause as the primary vehicle through which former slaves would achieve economic equality." *Id.*

The court was wrong in several respects. First, that oppression of the former slaves resulted in adverse economic consequence is not merely "likely"—it is a

universally acknowledged truth. Second, the Privileges or Immunities Clause protects economic rights. Third, regardless of whether the Privileges or Immunities Clause was "the *primary* vehicle through which former slaves would achieve economic equality," ER 17 (emphasis added), the Supreme Court has made clear that it is the primary vehicle for protecting economic rights of national citizenship.

a. *Slaughter-House* Makes Clear The Privileges or Immunities Clause Was Concerned With Economic Rights

The economic concerns of the framers of the Privileges or Immunities Clause were discussed at length in *Slaughter-House*. The Court detailed the economic deprivations that were being inflicted upon the newly-freed slaves. "Among the first acts of legislation adopted by several of the [Southern] States" after the formal abolition of slavery, the Court noted, "were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property." *Slaughter-House*, 83 U.S. at 70. "They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain …." *Id.* "These circumstances," the Court explained,

> forced upon the statesmen who had conducted the Federal government … through the crisis of the rebellion, and who supposed that by the thirteenth … amendment they had secured the result of their labors,

> the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much.

Id. These statesmen, the Court concluded, recognized that "without further protection of the Federal government," the "condition of the slave race would … be almost as bad as it was before." *Id.* "They accordingly passed … the fourteenth amendment …." *Id.*

With the motives of the clause's framers established, the Court proceeded to identify some of the rights protected by the Privileges or Immunities Clause. The Court did not include an open-ended, natural right to economic liberty, as such a right, the Court said, derives from *state* citizenship, and the clause "speaks only of … privileges and immunities belonging to a citizen *of the United States* as such." *Id.* at 74-75 (emphasis added). The Court did, however, include a number of specific economic rights that "owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.* at 79. They included the right "to come to the seat of government to … transact any business [a citizen] may have with it"; "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 use the navigable waters of the United States." *Id.* at 79-80 (internal quotation marks and citation omitted).

The *Slaughter-House* dissenters agreed that the clause was designed to protect economic rights. They simply believed the clause swept broader, guaranteeing economic liberty more generally. Justice Bradley, for example, asserted that "the right of any citizen to follow whatever lawful employment he chooses to adopt" is a privilege protected by the clause and that without the "right to choose one's calling," one "cannot be a freeman." *Id.* at 113, 116-17 (Bradley, J., dissenting). Justice Field similarly maintained that the "privileges and immunities designated are those which of right belong to the citizens of all free governments," including "the right to pursue a lawful employment in a lawful manner." *Id.* at 97 (Field, J., dissenting) (emphasis omitted).[2]

Thus, all of the justices in *Slaughter-House* recognized that the Privileges or Immunities Clause was designed to protect economic rights; they simply differed on how broadly it swept in that regard. For the majority, it protected specific economic rights "dependent upon citizenship of the United States," including the

[2] Considerable evidence suggests the dissent's understanding of the clause is correct, *see generally* Alfred Avins, *The Right to Work and the Fourteenth Amendment: The Original Understanding*, 18 Labor L.J. 15 (1967), and at least one member of the Supreme Court is "open to reevaluating" the clause. *Saenz v. Roe*, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting). The Courtneys accordingly preserve the argument that *Slaughter-House* did not go far enough in protecting economic liberty. Nevertheless, they should prevail even under the *Slaughter-House* majority opinion.

"right to use the navigable waters of the United States." *Id.* at 79-80. For the dissenters, it protected an even broader right to economic liberty.

b. The History Of The Privileges Or Immunities Clause Supports *Slaughter-House*'s Recognition That The Clause Protects Economic Rights

Slaughter-House's recognition that the Privileges or Immunities Clause protects economic rights is amply supported by the historical record. In the wake of the Civil War, Southern states systematically denied the economic rights of the newly-freed slaves. "In an attempt to curtail the market for African-American labor," Southern states and municipalities passed the Black Codes. David Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African Americans*, 76 Tex. L. Rev. 781, 787 (1998). "The Black Codes, which denied free labor rights to the freedmen, were the paradigm case of what those who ratified the Fourteenth Amendment sought to prohibit." Jeffrey Rosen, *Textualism and the Civil War Amendment: Translating the Privileges or Immunities Clause*, 66 Geo. Wash. L. Rev. 1241, 1250-51 (1998) (internal quotation marks and footnote omitted).

Examples of the Black Codes are legion. In South Carolina, no "person of color" could "pursue or practice the art, trade or business of an artisan, mechanic or shop keeper; or any other trade, employment or business" unless he first proved, to a court, his "skill," "fitness," and "good moral character." Aremona G. Bennett,

Phantom Freedom: Official Acceptance of Violence to Personal Security and Subversion of Proprietary Right and Ambitions Following Emancipation, 1865-1910, 70 Chi.-Kent L. Rev. 439, 454 n.81 (1994) (footnotes omitted). In North Carolina, African Americans were "required … to have a white person as a witness when they contracted for the sale of certain animals or for any article of the value of ten dollars or more." *Id.* at 455 (internal quotation marks and footnote omitted). A local Louisiana ordinance provided that "[n]o freedman shall sell, barter, or exchange any articles of merchandise … within the limits of [the town] without permission in writing from his employer or the mayor or president of the board." 39 Cong. Globe, 1st Sess. 517 (Jan. 30, 1866). And in Mississippi, "blacks were compelled to bind themselves to work for a year and to forfeit the entire year's wages if they left before that time." Michael Kent Curtis, *No State Shall Abridge* 35 (Duke Univ. Press 1986).

The common thread running through these laws is the misuse of public power to confer private, economic advantage on established businesses in order to give those businesses "unfettered power over freedmen's livelihoods." Clark M. Neily, III & Robert J. McNamara, *Getting Beyond Guns: Context for the Coming Debate over Privileges or Immunities*, 14 Tex. Rev. L. & Pol. 15, 18-19 (2009).

In light of these abuses, "Congress established the Joint Committee on Reconstruction to investigate circumstances in the Southern States and to

determine whether, and on what conditions, those States should be readmitted to the Union." *McDonald v. City of Chicago*, ___ U.S. ___, 130 S. Ct. 3020, 3071 (2010) (Thomas, J., concurring). The Committee, which ultimately recommended adopting the Fourteenth Amendment, "justif[ied] its recommendation by submitting a report to Congress that extensively catalogued the abuses of civil rights in the former slave States." *Id.*

The report was replete with discussion of the Black Codes and other abridgments of economic rights. It discussed the exclusion of freedmen from certain businesses and occupations; the denial of just wages to freedmen; the establishment of systems of compulsory, rather than free, labor; the denial of the freedmen's right to freely contract; the forcing of freedmen to carry certificates of employment or be jailed; vagrancy laws directed at freedmen; white businesses' refusal to employ freedmen; and the formation of cartels or combinations to prevent free markets. *E.g.*, Report of the Joint Committee on Reconstruction, H. R. Rep. No. 30, 39th Cong., 1st Sess. pt. I, at 94 (1866) (Tennessee); *id.* pt. II, at 61, 86, 177-78, 186, 188, 218-19, 243, 270 (Virginia, North Carolina, South Carolina); *id.* pt. III, at 5, 9, 25, 30, 36, 68, 143, 70 (Georgia, Alabama, Mississippi, Arkansas); *id.* pt. IV, at 78-79, 83, 125 (Florida, Louisiana, Texas). The report also catalogued abridgements of the economic rights of white northerners and Union sympathizers. *E.g.*, *id.* pt. II, at 143 (Virginia, North

Carolina, South Carolina) ("[P]ersons coming to teach blacks were not permitted to rent a place either for a school or for their own personal occupation …."). Given these widespread abuses, the Committee concluded that "adequate security for future peace and safety … can only be found in such changes of the organic law as shall determine the civil rights and privileges of all citizens in all parts of the republic." *Id.* at XXI.

Congress's first response to these abuses was the Civil Rights Act of 1866. *See* Akhil Reed Amar, *The Bill of Rights* 162 (Yale U. Press 1998). The Act provided that all persons born in the United States were citizens and had "the same right … to make and enforce contracts" and "to inherit, purchase, lease, sell, hold, and convey real and personal property." Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866). The "primary concern" of the act, as evidenced by its focus on contract and property rights, was "the protection of economic rights for new black citizens." Timothy Sandefur, *The Right to Earn a Living*, 6 Chapman L. Rev. 207, 228-29 (2003).[3] As Senator Lyman Trumbull, sponsor of the Civil Rights Act, explained in reporting it to the Senate:

[3] "Legal historians … have uniformly concluded that in the Reconstruction era," the very "phrase 'civil rights' … [was] basically economic rather than political in nature." Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 Yale L. J. 643, 670-671 (2000) (internal quotation marks and footnotes omitted).

> Good faith requires the security of the freedmen in their liberty and their property, their right to labor, and their right to claim the just return of their labor…. Monopolies, perpetuities, and class legislation are contrary to the genius of free government, and ought not to be allowed. Here there is no room for favored classes or monopolies; the principle of our government is that of equal laws and freedom of industry.

39 Cong. Globe, 1st Sess. 322 (Jan. 19, 1866) (quoting President Johnson's first State of the Union address).

President Johnson, however, quickly vetoed the Civil Rights Act, purportedly because of concerns over its constitutionality. *See* President Andrew Johnson, Veto of Civil Rights Bill (Mar. 27, 1866) (reprinted at 39 Cong. Globe, 1st Sess. 1679-81 (Mar. 27, 1866)). Congress just as quickly overrode the veto. Its primary concern continued to be economic freedom, as Representative William Lawrence explained in responding to the veto:

> It is idle to say that a citizen shall have the right to live, yet to deny him the right to labor, whereby alone he can live. It is a mockery to say that a citizen may have a right to live, and yet deny him the right to make a contract to secure the privilege and the rewards of labor. It is worse than mockery to say that men may be clothed by the national authority with the character of citizens, yet may be stripped by the State authority of the means by which citizens may exist.

39 Cong. Globe., 1st Sess. 1833 (Apr. 7, 1866).

More important than overriding the veto, however, was Congress's subsequent proposal of the Fourteenth Amendment. Congress recognized "that without some sort of enabling amendment to the Constitution, the Supreme Court

might well invalidate the Civil Rights Act." Neily & McNamara, *supra*, at 31 (internal quotation marks and footnoted omitted). It accordingly proposed the Fourteenth Amendment to the people.

"The 'privileges or immunities' clause was the central provision of the Amendment's § 1, and the key to its meaning is furnished by the immediately preceding Civil Rights Act of 1866, which, all are agreed, it was the purpose of the Amendment to embody and protect." Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 30 (2d ed. 1997). In essence, the clause "was drafted … and inserted into the amendment as an embodiment of the principles of the Civil Rights Bill to quiet the doubts about the bill's constitutionality … and to place these principles beyond repeal by the Democrats if they should regain control of Congress." Avins, *supra*, at 26. Virtually every serious observer, therefore, recognizes the clause was a response to the Black Codes and was intended to constitutionalize economic protections so that the freedmen—and all Americans[4]—could participate fully in the economic life of the nation. *See, e.g., Craigmiles v. Giles*, 110 F. Supp. 2d 658, 666 (E.D. Tenn. 2000) (recognizing "the historical background of the Fourteenth Amendment as an effort

[4] "Although the fourteenth amendment originally grew out of a desire to extend constitutional protection to former slaves, legislators were also concerned about protecting the economic and personal liberties of all citizens." Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 Harv. L. Rev. 1363, 1369 (1990).

to constitutionalize freedoms enumerated in the Civil Rights of 1866 and its commonly expressed legislative intent to nullify the 'black codes' which Southern states were adopting to limit the economic rights of the former slaves" (footnote and citation omitted)), *aff'd* 312 F.3d 220 (6th Cir. 2002); Kenyon D. Bunch, *The Original Understanding of the Privileges and Immunities Clause*, 10 Seton Hall Const. L.J. 321, 332 (2000) ("Most students of the Privileges or Immunities Clause … agree on one point: the Privileges or Immunities Clause was meant to protect, in some fashion, the freedoms enumerated in the Civil Rights Act of 1866.").

This conclusion enjoys overwhelming support in the clause's legislative history. "It was the contemporary understanding of the amendment by others as well as [John] Bingham," the clause's author, "that one of the privileges of citizenship was the right to work." Avins, *supra*, at 26 (footnote omitted). In fact, in his floor speech introducing the final version of the clause, Senator Jacob Howard—who served on the Joint Committee on Reconstruction with Bingham and was the Fourteenth Amendment's sponsor in the Senate—identified some of the privileges it protects. They included "the right to acquire and possess property of every kind," "to pursue and obtain happiness," and "to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise." 39 Cong. Globe, 1st Sess. 2765-66 (May 23, 1866). In short, "its congressional sponsors saw the 'privileges or immunities' clause as protecting …

mostly economic … rights." David Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866-68*, 30 Whittier L. Rev. 695, 698 (2009).

The clause's concern with economic rights was also understood by the ratifying public. "[P]rint media establishes that readers were told of the Black Codes with frequency," and contemporary "press reports stress[ed] … [r]estrictions upon free blacks' rights to own property or enter businesses." Hardy, *supra*, at 703. In fact, the Report of the Joint Committee on Reconstruction, which "extensively detailed these abuses," was "widely reprinted in the press and distributed by members of the 39th Congress to their constituents." *McDonald*, 130 S. Ct. at 3071, 3082 (Thomas, J., concurring). Newspapers also extensively covered the congressional debates over the Fourteenth Amendment. Senator Howard's speech, for example, was "exceptionally well covered in the popular media," landing on the front pages of such newspapers as the New York Times and New York Herald and in other outlets, large (*e.g.*, Philadelphia Inquirer) and small (*e.g.*, Hillsdale Standard). Amar, *supra*, at 187; Hardy, *supra*, at 715-16, 722; *see also McDonald*, 130 S. Ct. at 3074 n.13 (Thomas, J., concurring) (listing other newspapers). And newspapers routinely explained the privileges protected by the clause in economic terms. *See* James E. Bond, *The Original Understanding of the*

Fourteenth Amendment in Illinois, Ohio, and Pennsylvania, 18 Akron L. Rev. 435, 446-47 & nn.77, 82 (1985) (collecting newspaper accounts).

In short, the historical record places the economic concerns of the Privileges or Immunities Clause beyond dispute. "The most basic goal of Reconstruction," after all, "was the end of chattel slavery," David E. Ho, *Dodging a Bullet: McDonald v. City of Chicago and the Limits of Progressive Originalism*, 19 Wm. & Mary Bill of Rts. J. 369, 412 (2010), "[o]ne of the cornerstones of" which was the "denial of equal economic opportunities." *Williams v. City of New Orleans*, 729 F.2d 1554, 1579 (5th Cir. 1984) (Wisdom, J., concurring in part and dissenting in part). To suggest, therefore, that the clause was not designed to protect economic rights is to deny history.

c. Post-*Slaughter-House* Decisions Make Clear That The Clause Protects Economic Rights

Decisions since *Slaughter-House* confirm that the Privileges or Immunities Clause protects economic rights. In *Saenz v. Roe*, 526 U.S. 489 (1999), for example, the Supreme Court struck down, under the Privileges or Immunities Clause, California's cap on welfare benefits for newly-arrived citizens. The Court held that a citizen's "right to be treated equally in her new State of residence"—another right of national citizenship recognized in *Slaughter-House*, *see* 83 U.S. at 80—includes the right to be treated equally for purposes of welfare benefits. *Saenz*, 526 U.S. at 504-05. Welfare benefits are by definition economic.

Dandridge v. Williams, 397 U.S. 471, 485 (1970) ("The administration of public welfare assistance … involves the most basic economic needs of impoverished human beings."). It therefore flies in the face of *Saenz* to suggest that the rights *Slaughter-House* held are protected by the clause do not include economic rights. *See* Jessica E. Hacker, *The Return to Lochnerism? The Revival of Economic Liberties from David to Goliath*, 52 DePaul L. Rev. 675, 711 (2002) (arguing the clause "clearly encompasses economic rights" and that "the *Saenz* plaintiff sought to enjoy life and liberty through the acquisition of necessary welfare benefits"); *see also Edwards*, 314 U.S. at 181 (Douglas, J., concurring) (concluding "the right of free movement" is protected by the clause and is "basic to any guarantee of freedom of opportunity").

Other rights that the Supreme Court, this Court, and others have recognized as rights or privileges of national citizenship are clearly economic in nature. They include, for example, the right to sell to and contract with the government, *Anderson v. United States*, 269 Fed. 65 (9th Cir. 1920), and the right to enter, possess, and cultivate public lands. *United States v. Waddell*, 112 U.S. 76, 80 (1884); *Nixon v. United States*, 289 F. 177, 179 (9th Cir. 1923).[5]

[5] These cases involved the existence of a "right or privilege" for purposes of 18 U.S.C. § 241. Until 1966, however, the rights and privileges to which Section 241 applied 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); *see also United States v. Price*, 383 U.S. 787, 805 & n.18 (1966); Gregory

In short, there may be some disagreement about the precise *extent* of economic rights protected by the Privileges or Immunities Clause, but there is no basis to conclude that it was not designed to protect economic rights.

3. The Right To Use The Navigable Waters Of The United States Includes Using Them To Operate A Ferry

The district court's contention that the right to use the navigable waters does not include the ability to use them "to operate a commercial ferry service" is similarly incorrect. ER 19. According to the court, "the right to operate a competing commercial ferry service on Lake Chelan appears to derive from state citizenship rather than United States citizenship." ER 18. The court's use of the qualifier "appears" is telling, as is the citation it included to support its assertion: a "*cf.*" citation that does not concern the right to use the navigable waters of the United States, much less the ability to use them to operate a ferry.

The district court did acknowledge—reluctantly—what it called *Slaughter-House*'s "suggestion" that "the right to 'use' the navigable waters of the United States derives from United States citizenship." *Id.* Without explanation, however, it insisted that *Slaughter-House* "counsels" that "using such waters in the manner

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L. Padgett, *Racially-Motivated Violence and Intimidation: Inadequate State Enforcement and Federal Civil Rights Remedies*, 75 J. Crim. L. & Criminology 103, 120 n.124 (1984) (noting *Cruikshank* held that "the rights … protected by § 241 … were only those rights that are attributes of national citizenship … protected … under the Court's narrow view of the privileges or immunities clause of the fourteenth amendment, as interpreted in the *Slaughter-House Cases*").

the Courtneys have proposed—*i.e.*, to operate a competing commercial ferry business—is one of the 'fundamental' rights conferred by state citizenship." *Id.* *Slaughter-House* counsels no such thing. What it *says* is that that "[t]he right to use the navigable waters of the United States" is a "privilege of a citizen of the United States"—*period*. *Slaughter-House*, 83 U.S. at 79.

a. *Slaughter-House* Did Not "Tacitly Approve" Of Exclusive Ferry Franchises

Perhaps recognizing the lack of support for its position, the district court next claimed that "the *Slaughter-House* majority *tacitly* approved of an exclusive ferry franchise." ER 18 n.5 (emphasis added). This "tacit[]" approval, according to the district court, was evident in *Slaughter-House*'s "declining to address a portion of the Louisiana statute which granted the slaughterhouse operator an exclusive right to run ferries on the Mississippi River between its several buildings on both sides of the river." *Id.* The section of the statute to which the district court referred was not even before the Court in *Slaughter-House*; it is mentioned only in the reporter's notes. In fact, the Court itself specifically listed the provisions of the statute that *were* at issue, saying, "These are the principal features of the statute, *and are all that have any bearing upon the questions to be decided by us*." *Slaughter-House*, 83 U.S. at 60 (emphasis added). The ferry provision was nowhere on that list. The Court thus did not "declin[e] to address" the ferry

provision or "tacitly approv[e]" of it—the provision was not challenged and was not at issue in the case.[6]

Nor, for that matter, did the *Slaughter-House* dissenting justices "approve[] of an exclusive ferry franchise." ER 18-19 n.5. In fact, Justice Bradley noted that monopolies—including ferry monopolies—were statutorily *outlawed* in England at the time of our Framing. *Id.* at 120 (Bradley, J., dissenting); *see also id.* at 104 (Field, J., dissenting). Justice Bradley called this statutory proscription "one of those constitutional landmarks of English liberty which the English nation so highly prize and so jealously preserve." *Id.* at 120 (Bradley, J., dissenting). "It was a part of that inheritance," he continued, "which our fathers brought with them." *Id.* Although he did acknowledge that "the British Parliament, as well as our own legislatures, ha[d] frequently disregarded" the statutory proscription "by granting exclusive privileges for erecting ferries, railroads, [and] markets," he made clear that "even these exclusive privileges" were legally questionable, calling them "odious," "wrong in principle," and "inimical to the just rights and greatest good of the people." *Id.* at 120-121. That is hardly an "approv[al]" of exclusive ferry franchises. ER 18 n.5.

[6] There is also no indication the provision conferred an "exclusive right to run ferries." ER 18 n.5. The reporter's notes only indicate that the slaughterhouse operators were allowed "to establish such steam ferries as they may see fit to run on the Mississippi River between their buildings and any points or places on either side of said river." *Slaughter-House*, 83 U.S. at 43 (reporter's notes).

Justice Bradley was prescient, for soon after *Slaughter-House*, the Supreme Court began aggressively striking down state and local ferry regulations, including licensing requirements that had resulted in monopolies. First was *Gloucester Ferry Company v. Pennsylvania*, 114 U.S. 196 (1885), in which the Court struck down a state tax for impermissibly burdening a ferry between New Jersey and Pennsylvania. Next, in *City of Sault Ste. Marie v. International Transit Company*, 234 U.S. 333 (1914), the Court struck down a ferry license requirement because requiring state or city consent to operate a ferry "goes beyond … mere police regulation." *Id.* at 339-40. "If the state, or the city, may make its consent necessary," the Court explained, "it may withhold it." *Id.* at 340. Finally, in *Mayor of Vidalia v. McNeely*, 274 U.S. 676 (1927), the Court struck down an ordinance that conferred an exclusive ferry franchise, holding that a state's "power to regulate" the ferry business does not include the "power to license and therefore to exclude from the business." *Id.* at 680. Although these cases were resolved on Commerce Clause grounds, as they involved ferry service between states (or between a state and a foreign country), their holdings regarding the difference between the power to regulate and the power to exclude are not so limited.

b. The Unique, Federal Nature Of The Navigable Waters Of The United States Nationalizes The Right To Operate A Ferry On Them

But even if the district court were correct that the right to operate a ferry, in the abstract, is a right of state citizenship, *using the navigable waters of the United States* to operate a ferry is a right of national citizenship protected by the Privileges or Immunities Clause. It is the national character of the forum in which such a ferry operates that triggers federal protection.[7]

The Supreme Court has repeatedly emphasized that the navigable waters of the United States are constitutionally distinct and open to all citizens. As Justice Bradley, for the Court, explained just a year after *Slaughter-House*, "The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them." *Baltimore & O.R. Co. v. Maryland*, 88 U.S. 456, 470 (1874). The highest court of New York made the same point a quarter-century later:

> The navigable waters of the United States, even when they lie exclusively within the limits of a state, are open to all the world,

[7] This point is true in other contexts. For example, although engaging in business is, in the abstract, considered a right of state citizenship, engaging in business *in interstate commerce* "nationalizes" the right and triggers distinct federal protection—precisely because of the forum in which the business is conducted. Thus, "[t]o carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States." *Crutcher v. Kentucky*, 141 U.S. 47, 56-57 (1891).

> except so far as Congress may prescribe to the contrary, and it requires no leave or license from a state (except compliance with its police regulations, and possibly payment of tolls imposed to defray the cost of improvements in navigation) for a vessel to journey on those waters.

People ex rel. Penn. R.R. Co. v. Knight, 64 N.E. 152, 154 (N.Y. 1902), *aff'd*, 192 U.S. 21 (1904); *see also United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 62 (1913) (holding the navigable waters of the United States are "the public property of the nation").

Recognition of the unique character of our navigable waters dates back at least to the Northwest Ordinance, if not earlier.[8] Under the Ordinance, navigable waters were to remain "highways equally open to all persons without preference to any"; there could be no "exclusive use" of the waters and no "farming out of the privilege of navigating them to particular individuals, classes, or corporations." *Huse v. Glover*, 119 U.S. 543, 547-548 (1886). Although the Ordinance did not

[8] The right to use navigable waters, including to provide ferry service, was established in English common law at the time of the Founding. For example, in *The Gravesend Case*, (1612) 123 Eng. Rep. 883 (C.P.); 2 Brownl. & Golds 177, Lord Chief Justice Edward Coke held that a royal grant for ferry service on the River Thames was "repugnant," as the Thames was a "common river," "so publick, that the King cannot restrain" competition on it. *Id.* at 885. The grantee, therefore, "hath not any preheminence nor precedence, but equal liberty … to all watermen to carry what passengers that they could." *Id.*; *see also Anonymous*, (1750) 1 Vesey 476 (Ch.) (refusing monopolist's request for an "injunction to restrain defendants … from using ferry boats on the Tyne": "This is like the ferry on the Thames, and passage-boats to Gravesend, which have a sole right of carrying, yet other [f]erries do carry every day; and it is not held an infringement of that right.").

govern Washington directly, under the equal footing doctrine, the state is obligated to maintain navigable waters as common highways and to respect the concomitant right of all American citizens to use them. Henry A. Orphys, *Public Use and Regulation of Artificial Waterways*, 5 Tulane Maritime L.J. 259, 259-60 (1980) ("[T]he public's right to use of waterways … was specifically conferred upon travelers in America's Northwest Territory by the Northwest Ordinance …. [O]ther states … were … subject to the same provisions by virtue of the equal footing doctrine."); *see also Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 434, 452 (1892).

Finally, the navigable waters at issue here are even more uniquely federal in nature. Stehekin and much of the northern end of the lake, including the waters therein, are part of the federal Lake Chelan National Recreation Area (LCNRA). *United States v. Buehler*, 793 F. Supp. 971, 973 (E.D. Wash. 1992) ("LCNRA 'includes the lands and *waters* within the area designated Lake Chelan Recreation Area ….'" (quoting 16 U.S.C. § 90a-1)). The LCNRA is national in character, created by Congress for the benefit of all United States citizens. *See* 16 U.S.C. § 90a-1. As such, it attracts tourists from around the nation. As the WUTC recognizes, the majority of persons traveling to and from Stehekin on Lake Chelan are: (1) tourists seeking to use and enjoy the LCNRA; (2) federal employees who work in the LCNRA; and (3) Stehekin residents, many of whom make their living

supporting tourism (*e.g.*, the Courtney family). *See* WUTC Report, *supra*, at 3-4, 16-17. Apart from air travel, boat transportation across the lake is their only means of accessing this federal property. Such access is itself protected by the Privileges or Immunities Clause, and the WUTC may not impair it. *Twining v. New Jersey*, 211 U.S. 78, 97 (1908) ("[A]mong the rights and privileges of national citizenship recognized by this court are … the right to enter the public lands ...."), *overruled in part on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964).

In short, because of the unique, federal nature of the navigable waters of the United States, the right to use them—including in the provision of ferry service—is a right of national citizenship, even if operation of a ferry or other business, in the abstract, is a right of state citizenship. The district court was wrong to conclude otherwise.

c. The Right to Use The Navigable Waters Of The United States, Including To Operate Ferries, Was A Significant Economic Right For The Freedmen

Finally, there is abundant evidence that the right to use the navigable waters of the United States, including providing ferry service, was an important economic right for the freedmen. "Rivers were more than a means of transport" in the Civil War and Reconstruction-era South. Dylan C. Penningroth, *The Claims of Kinfolk* 64 (2003). "[T]he river itself was a source of income and a marketplace." *Id.*

"In most of the United States before the Civil War, slaves worked as ferrymen," Martha B. Katz-Hyman & Kym S. Rice, *World of a Slave* 211-12 (2011), as did free African Americans. The Union Army, for example, "use[d] … runaway slave watermen to capture Beaufort and Fort Macon," and "no fewer than 100 black watermen ferr[ied] troops and supplies to Federal camps and lookout posts " in the Beaufort area. David S. Cecelski, *The Waterman's Song* 160 (2001). "[F]ree black men … owned one third of … [the] forty-one batteaux" boats in Farmville, Virginia, "carr[ying] nearly 40 percent of the freight that came into and out of the town by water." Melvin Patrick Ely, *Israel on the Appomattox*, 156 (2004). "[A] considerable number of unlicensed slaves and free blacks … pilot[ed] vessels" in North Carolina, Cecelski, *supra*, at 49 (internal quotation marks and footnote omitted), and slaves had "operated and managed most of the ferries in the South Carolina Low Country." Katz-Hyman & Rice, *supra*, at 211-12. African-Americans were also "prominent" on "the rivers of central Virginia," where "farmers and planters … engaged free black … boatmen to transport their wheat to mills and their tobacco to warehouse." Ely, *supra*, at 150-51. In short, "[a] distinctive maritime society … existed on the outskirts of the plantation world," and "African Americans stood at its center." Cecelski, *supra*, at 136. In many areas, "locals and outsiders alike came to think of boating as an occupation conducted by blacks." Ely, *supra*, at 156.

Using the navigable waters of the United States to earn a living—including as a ferry operator[9]—was thus vitally important to a large portion of the African Americans with whom the Privileges or Immunities Clause was most immediately concerned. "Work as ferry operators … represented a level of freedom for slaves," Katz-Hyman & Rice, *supra*, at 211-12, and "running boats … provided a good way of life" for free African Americans, allowing them to "tak[e] on a productive role within the broad, interracial economy." Ely, *supra*, at 167, 172.

In this light, and given that the Privileges or Immunities Clause was designed to ensure that all Americans could participate fully in the economic life of the nation, it is clear that the right to use the navigable waters of the United States is an economic right that includes the ability to use those waters to operate a ferry. The district court was therefore wrong to dismiss the Courtney's public ferry claim.

B. The District Court Erroneously Dismissed the Courtneys' Second Claim

Without any opportunity for briefing, the district court dismissed, on standing, ripeness, and *Pullman* abstention grounds, the Courtneys' second claim, which challenges the public convenience and necessity (PCN) requirement as it

[9] Slaves and freedmen used the navigable waters of the United States to earn a living in myriad other ways. *See* Cecelski, *supra*, at 161 ("African American watermen … had been involved in every maritime trade in antebellum ports.").

applies to boat transportation on Lake Chelan solely for patrons of specific businesses or a group of businesses.[10] The common thread linking each determination is the district court's conclusion that there exists some "lingering uncertainty" about whether the Courtneys are required to obtain a PCN certificate to operate a "private ferry service." ER 21, 22, 24. It could not be more certain, however, that the WUTC and the Washington Supreme Court require the Courtneys to obtain a certificate to operate the service involved in their second claim. The district court's dismissal of the claim should therefore be reversed.

1. There is No "Uncertainty" Regarding The WUTC's Certificate Requirement

There is no question that the service involved in the Courtneys' second claim requires a certificate. The WUTC's executive director, the full Commission, and the Washington Supreme Court have all made clear it does.

The WUTC's executive director addressed the matter in response to inquiries from Cliff Courtney in 2008, in which Cliff proposed a boat for patrons of Courtney-family businesses. ER 49 ¶¶84, 85; ER 7. Cliff specifically inquired as to whether such service would require a certificate, and the WUTC's executive director issued a letter opining that it would. ER 50 ¶86; ER 8. In a subsequent letter, he reiterated that conclusion, stating that it "does not matter whether the

[10] The WUTC did not raise, brief, or argue standing or ripeness. It raised *Pullman* abstention, but only in its rebuttal argument at the hearing on its motion to dismiss.

transportation you would provide is 'incidental to'" other businesses because the service would still be "for the public use for hire." ER ¶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 51 ¶88; ER 8.

The WUTC's executive director did note that Cliff could file "a petition for a declaratory ruling" to try to convince the commission to take a different position, but he explained that "the existing certificate holder would have to agree to participate" in the proceeding, which is adjudicative in nature. ER 51 ¶89; *see also* Wash. Rev. Code § 34.05.240(7) ("An agency may not enter a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding."). Alternatively, Cliff could "initiate service without first applying for a certificate," but the executive director warned that the WUTC could then initiate a "classification proceeding," ER 51 ¶89—"a special proceeding requiring such person or corporation to appear before the commission," "give testimony under oath," and "prov[e] that his operations or acts are not

subject to" the certificate requirement. Wash. Rev. Code § 81.04.510. In other words, Cliff could initiate service in violation of the law and risk the consequences.

Subsequent to the executive director's correspondence with Cliff, the full Commission, at the direction of the Legislature, "stud[ied] the appropriateness of statutes and regulations governing commercial ferry operations on Lake Chelan" and "delivered a formal report to the State Legislature in January of 2010." ER 8; ER 52-53 ¶¶93-94. The Commission recommended that there be no "changes to the state laws dealing with commercial ferry regulations as it [sic.] pertains to Lake Chelan." ER 53 ¶94; WUTC Report, *supra*, at 3-4.

Far from leaving any "lingering uncertainty" about whether the Courtneys would be required to obtain a PCN certificate, the report reiterated the certificate requirement. WUTC Report 9, 14. The Commission acknowledged that it "could *potentially* allow some degree of 'competition'"[11] 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, as had the executive director, that it could only adopt such a policy after "an adjudicative hearing," in which "expert testimony" proved that the proposed service would not "significantly threaten the

[11] "*Could potentially* allow" makes clear that the existing policy *does not allow* this service.

regulated carrier's ridership, revenue and ability to provide reliable and affordable service." WUTC Report, *supra*, at 12, 14, 15 (emphasis added); ER 53 ¶95. Even then, the Commission 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 53¶96.

The Washington Supreme Court has also determined that a service like the one involved in the Courtneys' second claim requires a PCN certificate. In *Kitsap County Transportation Company v. Manitou Beach-Agate Pass Ferry Association*, 30 P.2d 233 (Wash. 1934)—a decision on which the WUTC Report relied extensively—the Washington Supreme Court enjoined a boat transportation service operated exclusively for members of a private association. The court held that even this service was a "common carrier" and required a certificate. *Id*. at 235-36. In so holding, it relied on *Peru v. Barrett*, 60 A. 968 (Me. 1905), which prohibited owners of "a country store … on the Androscoggin river" from allowing "their customers" to use "one or two small rowboats" to "cross[] the river to trade at their store or store house." *Id.* at 969. *Peru* held that the store's customers "consist[ed] of the public generally," and that providing the rowboats "was in effect a transportation across the river of persons and property for hire." *Id.*

Finally, in *McDonald v. Irby*, 445 P.2d 192 (Wash. 1968), another case relied on in WUTC Report, the Washington Supreme Court held that the "owner of

[an] airport parking facility that also transported its parking customers to the airport terminal by van was a 'common carrier.'" WUTC Report, *supra*, at 14 n.39. The parking lot owners had argued that the transportation they provided "was limited to customers of the parking facilities" and "not … available to the general public," but the court concluded that even such a limited service rendered them a common carrier. *McDonald*, 445 P.2d at 195. That is significant, because, as the Commission explained in its report, "common carriers—i.e., those who offer their services for public use—are required to obtain a certificate." WUTC Report, *supra*, at 14.

In short, the WUTC's executive director, the full Commission, and the Washington Supreme Court have all determined that the type of service involved in the Courtneys' second claim requires a PCN certificate. There is no "lingering uncertainty." ER 21.

2. The Courtneys Have Standing For Their Second Claim

The district court erred in its *sua sponte* dismissal of the Courtneys second claim for lack of standing. Regarding the transportation service described in that claim, the court held, incorrectly, that the Courtneys lack an injury[12] sufficient to establish standing because "(1) the WUTC has given directly conflicting opinions

[12] This district court did not address the other requirements for standing: causation and redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

about whether a certificate would be required; and (2) neither the WUTC nor any other state adjudicative body has ever officially ruled on the matter." ER 21.

The WUTC has never given "conflicting" opinions on the matter.[13] Rather, both the WUTC (in the correspondence of its executive director and the full Commission's formal 2010 report) and the Washington Supreme Court (in *Kitsap County Transportation Company* and *McDonald*) have determined that the type of service involved in the Courtneys' second claim is a "common carrier" service and requires a PCN certificate. *See supra*, pp. 46-47. The district court's determination to the contrary simply misreads the unambiguous record.

Moreover, the district court's requirement that a "state adjudicative body ha[ve] … officially ruled on the matter" for standing to exist, *see* ER 21, has no basis in law. "[A] plaintiff who challenges a statute must demonstrate a *realistic danger*"[14]—not metaphysical certitude—"of sustaining a direct injury as a result of the statute's operation or enforcement." *Pennell v. City of San Jose*, 485 U.S. 1, 8

[13] The court appears to have confused Jim Courtney's attempt to establish an on-call boat service in 2006, *see* Complaint ¶¶ 70-82, with Cliff Courtney's 2008-09 efforts regarding a boat for patrons of Courtney-family businesses, *see* Complaint ¶¶ 83-91. Regarding Jim's 2006 efforts, WUTC staff initially sent Jim an email stating that his proposed on-call service would not require a certificate but then "abruptly 'changed its opinion'" after the "Lake Chelan Boat Company contacted the WUTC … to object." Complaint ¶¶ 73-74. The WUTC was nothing but consistent with Cliff in 2008-09.

[14] Significantly, the Courtneys' injury for standing purposes is not merely a risk of future harm, but a present, ongoing harm. *See, e.g.*, ER 53-54 ¶¶ 97, 99.

(1988) (internal quotation marks and citation omitted). Even for a pre-enforcement *facial* challenge, a plaintiff need only demonstrate "an actual and well-founded fear that the law will be enforced against it." *Pac. Capital Bank, N.A. v. Connecticut*, 542 F.3d 341, 350 (2d Cir. 2008) (internal quotation marks and citations omitted). "If a plaintiff's interpretation of a statute is reasonable enough and under that interpretation the plaintiff may legitimately fear that it will face enforcement of the statute, then the plaintiff has standing to challenge the statute." *Id.* (internal quotation marks and citations omitted). Here, it is far more than reasonable to conclude that the certificate requirement reaches the transportation service involved in the Courtneys' second claim, especially given "the fact that government studies and statements confirm … [the Courtneys'] key allegations." *Baur v. Veneman*, 352 F.3d 625, 637 (2d Cir. 2003).

Even the primary case relied on by the district court, *Stoinoff v. Montana*, 695 F.2d 1214 (9th Cir. 1983), demonstrates the Courtneys have standing. *Stoinoff* held that "[w]hen a plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, *and there exists a credible threat of prosecution thereunder*, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Id.* at 1223 (emphasis in original; internal quotation marks and citations omitted). As they alleged in their complaint, "If Jim and Cliff were to exercise

their constitutional right to use the navigable waters of the United States without undergoing the certificate process, … they would face conviction of a gross misdemeanor, punishable by up to 364 days' imprisonment, a $5,000 fine, and significant monetary penalties." ER 56 ¶105; *see also* Wash. Rev. Code §§ 81.04.390, .385; *id.* § 81.84.050; *id.* § 9.92.020. The Courtneys are not required to violate the law and risk fines and criminal conviction simply to establish standing to challenge the PCN requirement.

Regardless, the Courtneys have also suffered economic injury as a result of the certificate requirement, and "[e]conomic injury is clearly a sufficient basis for standing." *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1130 (9th Cir. 1996); *Fair v. E.P.A.*, 795 F.2d 851, 853-54 (9th Cir. 1986) (collecting cases). As they alleged, the PCN requirement "harms Cliff as owner of Stehekin Valley Ranch and Stehekin Outfitters. The inconvenient schedule and service of the existing monopoly have dissuaded potential patrons of the ranch and outfitter from making the trip to Stehekin and patronizing the businesses. This has resulted in lost revenues to Cliff, his businesses, and his family." ER 57 ¶107; *see also* ER ¶104 (alleging additional economic injury). Such economic injuries alone are sufficient to establish standing.

Moreover, Jim Courtney has previously applied for, and been denied, a certificate. ER 5-6; 43-46 ¶¶57-69. The denial of a certificate "constitutes an

injury independent of . . . prospective enforcement" of the PCN requirement. *Parker v. District of Columbia*, 478 F.3d 370, 376 (D.C. Cir. 2007), *aff'd*, *District of Columbia v. Heller*, 554 U.S. 570 (2008); *see also id.* ("We have consistently treated a license or permit denial pursuant to a state or federal administrative scheme as an Article III injury.").

Finally, the district court's standing determination disregards this case's procedural posture. The Supreme Court has cautioned that "application of the constitutional standing requirement is not a mechanical exercise," *Allen v. Wright*, 468 U.S. 737, 751 (1984); when standing is challenged on the basis of the pleadings, the court must "accept as true all material allegations" and "construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Civil rights complaints, in particular, are to be liberally construed. *Gobel v. Maricopa County*, 867 F.2d 1201 (9th Cir. 1989). The district court ignored these commands. Based on the allegations in the complaint, there can be no doubt that the Courtneys have been, and continue to be, injured by the certificate requirement. *See* ER 54 ¶99. But even if injury were in doubt, that doubt should have been resolved in the Courtneys' favor—not the WUTC's.[15]

[15] At a minimum, the Courtneys should have been allowed reasonable discovery to demonstrate facts establishing standing. *See Am. West Airlines v. GPA Group, Inc.*, 877 F.2d 793, 801 (9th Cir. 1989).

3. The Courtneys' Second Claim Is Ripe

Given the allegations of harm in their complaint, the Courtneys' second claim is also ripe for review, and the *sua sponte* dismissal of the claim as unripe was erroneous. *See* ER 21-23. Where a plaintiff "has suffered an injury as a result of the alleged unconstitutional statute," as the Courtneys have here, the plaintiff's "claim is necessarily ripe for review." *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003).

The district court insisted that the WUTC's 2010 report suggests an "apparent willingness to consider an interpretation of the statute that would not implicate the Fourteenth Amendment." ER 22-23. Any "apparent willingness" to consider such an interpretation does not change the fact that the *current* interpretation *does* implicate the Fourteenth Amendment.

In any event, the "apparent willingness" is more accurately described as "avowed unwillingness." As discussed above, in order to convince the WUTC to reverse course and not require a certificate, the Courtneys would have to subject themselves to "an adjudicative hearing" and proffer, among other things, "expert testimony" proving that their proposed service would not "significantly threaten the regulated carrier's ridership, revenue and ability to provide reliable and affordable service." WUTC Report, *supra*, at 12, 14, 15; *see also* ER 53 ¶95. In order for the Courtneys to even *initiate* this process, "the existing certificate holder

would have to agree to participate" in the proceeding. ER 51 ¶89; *see also* Wash. Rev. Code § 34.05.240(7). That is even worse than the certificate process itself, and it simply compounds unconstitutionality with unconstitutionality. And even assuming, against all odds, that the Lake Chelan Boat Company agreed to participate, the WUTC has already determined that it is "unlikely … under existing law" that it could "authorize competing services on Lake Chelan." WUTC Report, *supra*, at 12; *see also* ER 53 ¶96.

Moreover, forcing the Courtneys to avail themselves of such a process would be to impose a backdoor administrative exhaustion requirement. "[E]xhaustion of administrative remedies [is] not required as a prerequisite to bringing an action pursuant to § 1983." *Patsy v. Fla. Bd. of Regents*, 457 U.S. 496, 516 (1981). "Congress never intended that those injured by governmental wrongdoers could be required, as a condition of recovery, to submit their claims to the government responsible for their injuries." *Felder v. Casey*, 487 U.S. 131, 142 (1987).[16]

[16] The district court insisted that a Section 1983 plaintiff "asserting an as-applied challenge" can be required, before going to federal court, to "seek a conclusive determination as to whether the challenged statute will in fact be applied in the manner asserted." ER 23 n.8. The case the court cited for this proposition, however, *Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375 (9th Cir. 1988), involved a land use claim, and it is well established that land use claims present unique ripeness considerations and "finality" requirements not applicable to other constitutional claims. *See Williamson Cnty. Regional Planning Comm'n v.*

Finally, even if an administrative exhaustion requirement were not forbidden outright, the process here would be futile, as the Courtneys specifically alleged. ER 51, 55 ¶¶89, 102. Plaintiffs need not exhaust administrative remedies when doing so would be futile. *Aleknagik Natives Ltd. v. Andrus*, 648 F.2d 496, 499 (9th Cir. 1980).

4. The District Court Improperly Applied *Pullman* Abstention To The Courtneys' Second Claim

The district court likewise erred in concluding that "even if the Courtneys' second claim was ripe for review, the Court would abstain from deciding the constitutional question presented under the 'abstention doctrine' set forth in *Railroad Comm'n of Texas v. Pullman*." ER 23-24. The district court invoked *Pullman* abstention with virtually no analysis and despite this Court's admonition that "abstention is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy," and that "cases involving vital questions of civil rights are the least likely candidates for abstention," *Canton v. Spokane Sch. Dist. No. 81*, 498 F.2d 840, 846 (9th Cir. 1974), *overruled on other grounds as recognized by Heath v. Cleary*, 708 F.2d 1376 (9th Cir. 1983).

Hamilton Bank, 473 U.S. 172, 190-91, 195 (1985); *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989).

Under *Pullman*, a federal court may stay[17] consideration of a federal constitutional question if three factors are met:

> (1) the complaint must involve a sensitive area of social policy that that is best left to the states to address;
>
> (2) a definitive ruling on the state issues by a state court could obviate the need for [federal] constitutional adjudication by the federal court; and
>
> (3) the proper resolution of the potentially determinative state law issue [must be] uncertain.

Fireman's Fund Ins. Co. v. City of Lodi, Cal., 302 F.3d 928, 939-40 (9th Cir. 2002) (first alteration in original; internal quotation marks, citations, and footnote omitted). A court "has no discretion to abstain in cases that do not meet the[se] requirements." *Id.* at 940. Moreover, a court is never *required* to apply *Pullman* abstention, as the doctrine does not implicate the court's subject matter jurisdiction. *Columbia Basin Apt. Ass'n v. City of Pasco*, 268 F.3d 791, 802 (9th Cir. 2001). Here, none of the *Pullman* requirements is satisfied.

a. The Courtneys' Claim Does Not Touch A Sensitive Area Of Social Policy

[17] If a federal court determines that *Pullman* applies, "retention of jurisdiction, *and not dismissal of the action*, is the proper course." *Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d 838, 841 (9th Cir. 1979) (emphasis added). Here, the district court improperly dismissed the Courtneys' second claim. *See* ER 24-25.

The district court did not identify any "sensitive area of social policy … best left to the states to address," *Fireman's Fund Ins. Co.*, 302 F.3d at 939, because there is none. The Courtneys' second claim, like their first, seeks to vindicate their "right to use the navigable waters of the United States"—a right that *Slaughter-House* held is one of the "privileges and immunities belonging to a citizen *of the United States as such*." *Slaughter-House*, 83 U.S. at 75, 79 (emphasis added). As discussed above, the navigable waters at issue here are even more uniquely federal in nature, as Stehekin and much of the northern end of the lake, including the waters therein, are part of the Lake Chelan National Recreation Area; this federal area attracts tourists from around the nation. *See supra*, pp. 39-40. It is hard to imagine an area that is *worse* left to the states to address.

b. Federal Constitutional Adjudication Would Not Be Avoided By A State Ruling

Nor would a definitive ruling on the state issues obviate the need for federal constitutional adjudication. *See Fireman's Fund Ins. Co.*, 302 F.3d at 939. Rather, forcing the Courtneys to go through an adjudicative declaratory order process—a process akin to the certificate process, only the existing ferry company must *consent* to the proceeding—would only compound, not alleviate, the federal constitutional problems inherent in the certificate process itself. *See* ER 51 ¶89. "Where, as here, the [alleged] ambiguity of state law itself gives rise to injuries of constitutional proportion, the best course of action is not to abstain, but to rule so

as to either protect those rights, or alleviate any concern about their infringement by state law." *Hoffman v. Hunt*, 845 F. Supp. 340, 351 (W.D.N.C. 1994).

Moreover, forcing the Courtneys through the adjudicative declaratory order process is not "sufficiently likely to avoid or significantly modify" the federal constitutional question in this case. *Lake Carriers Ass'n. v. MacMullan*, 406 U.S. 498, 512 (1972). The WUTC has already explained that it is "*unlikely* … under existing law" to "authorize competing services on Lake Chelan." WUTC Report, *supra*, at 12 (emphasis added); *see also* ER 53 ¶96. A ruling from the Washington courts is equally unlikely to obviate the need for federal constitutional adjudication, especially given: (1) *Kitsap County Transportation Company*, in which the Washington Supreme Court held that boat transportation solely for members of a private association was a "common carrier" and required a certificate, 30 P.2d at 235-36; and (2) *McDonald*, in which the same court held that a parking facility providing transportation to an airport terminal solely for its own customers was a common carrier, 445 P.2d at 195.

c. There Is No Uncertainty Regarding State Law

Finally, for the reasons noted above, "the proper resolution of the potentially determinative state law issue" is not "uncertain." *Fireman's Fund Ins. Co.*, 302 F.3d at 940. Under *Pullman*, an issue of state law is "doubtful" or "uncertain" if "a federal court cannot predict with any confidence how the state's highest court

would decide an issue of state law." *Pearl Inv. Co. v. City and Cnty. of San Francisco*, 774 F.2d 1460, 1465 (9th Cir. 1985). Here, the Washington Supreme Court would certainly require a certificate. In any event, "*Pullman* does not mandate abstention, even where state law is unclear, if constitutional rights are at stake." *Hoffman*, 845 F. Supp. at 351.

IX. CONCLUSION

For the reasons set forth above, the Courtneys respectfully request that this Court reverse the district court's order and reinstate their claims.

Respectfully submitted September 6, 2012.

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STATEMENT OF RELATED CASES

Pursuant to Fed. R. App. P. 28-2.6, Appellants are not aware of any related cases currently pending in this Court.

Dated this 6th day of September, 2012.

/s/Michael Bindas
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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Dated this 6th day of September, 2012.

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WSBA No. 31590

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on September 6, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

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Additionally, I caused four copies of the excerpts of record to be filed with the Clerk of the U.S. Court of Appeals, 95 Seventh Street, San Francisco, CA 94103 via UPS Next Day Air. Furthermore, one copy of the excerpts of record was served to each party listed above via UPS Next Day Air.

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