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' REPLY BRIEF

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I. INTRODUCTION

As Appellants Jim and Cliff Courtney (together, "Courtneys") demonstrated in their opening brief, they have stated viable, justiciable claims for abridgement of their right to use the navigable waters of the United States—a right of national citizenship protected by the Privileges or Immunities Clause of the Fourteenth Amendment. Neither the response brief of Appellees (collectively, "WUTC") nor the amicus curiae brief of Arrow Launch Service, Inc., suggests otherwise.

II. ARGUMENT

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

There is no merit to the WUTC's arguments in support of the dismissal of the Courtneys first claim, regarding a boat transportation service on Lake Chelan that is open to the general public.[1]

[1] Claiming it is "not proper for judicial notice," the WUTC asks this Court to disregard a newspaper article the Courtneys cited in their opening brief concerning the Washington legislature's adoption of the PCN requirement. *See* Resp. Br. 4-5 n.1. The Courtneys cited the article in noting that the PCN requirement was supported by incumbent ferry operators as a protection against competition. *See* Opening Br. 6. That is a legislative—not adjudicative—fact, and "[j]udicial notice of legislative facts . . . is unnecessary." *Von Saher v. Norton Simom Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010). To the extent the Court disagrees, however, the Courtneys formally request that it take judicial notice of the article. *See Dockray v. Phelps Dodge Corp.*, 801 F.2d 1149, 1152 n.3 (9th Cir. 1986) (taking judicial notice, *sua sponte*, of newspaper articles). A true and correct copy of the article is included in the addendum attached to this brief at A-1.

1. The WUTC Mischaracterizes The Waters And Right At Issue

Before reaching the merits of the WUTC's response brief, it is important to highlight two mischaracterizations that pervade the brief. The first concerns the waters at issue in this case: the WUTC repeatedly refers to them as "internal state waters." *See, e.g.*, Resp. Br. 8, 19, 24, 25. This case does not concern "internal state waters," whatever that term may mean.[2] Rather, it concerns navigable waters of the United States, and the WUTC has previously conceded that Lake Chelan is such a body of water. *See* Supp. ER 2.

The second mischaracterization in the WUTC's brief concerns the right at issue in this case. The WUTC narrowly describes it as the "right to operate a public ferry on internal state waters," *see, e.g.*, Resp. Br. 25, rather than the right actually recognized in the *Slaughter-House Cases*: the "right to use the navigable waters of the United States." 83 U.S. 36, 79 (1873). Describing the right accurately is critical. In *Lawrence v. Texas*, 539 U.S. 558 (2003), for example, the Supreme Court struck down a Texas statute that made it a crime for two persons of the same sex to engage in certain intimate sexual conduct. The Court properly refused to define the relevant right as the "right … [of] homosexuals to engage in

[2] The term "internal state waters" has only been used in two reported cases. Even then, it was in connection with Article 7(6) of the Convention on the Territorial Sea and the Contiguous Zone—not the Privileges or Immunities Clause. *United States v. Maine*, 469 U.S. 504, 526 (1985); *Pac. Merchant Shipping Ass'n v. Gladstone*, 639 F.3d 1154, 1173 n.3 (9th Cir. 2011).

sodomy," *id.* at 566 (internal quotation marks and citation omitted), instead defining it more broadly as the right to engage in private, consensual sexual activity. *Id.* at 578. To define it more narrowly, the Court held, would reflect a "failure to appreciate the extent of the liberty at stake" and "demean[ ] the claim … put forward" by the individual challenging the law. *Id.* at 567.

The same is true here. The WUTC's narrow definition of the right at issue "fail[s] to appreciate the extent of the liberty at stake" and "demeans the claim … put forward" by the Courtneys. *Id.* at 567. Although the specific "use" the Courtneys wish to make of the navigable waters of the United States may be relevant in determining whether the WUTC has a governmental interest sufficient to justify the restrictions it has imposed—that is, whether the WUTC has a sufficient governmental interest to justify the PCN requirement—it is not a ground for divesting the Courtneys of their right to use those waters or to conclude that they have failed to state a claim for abridgment of that right. *See Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 945-46 (9th Cir. 1997); *Ramos v. Town of Vernon*, 353 F.3d 171, 176 (2d Cir. 2003).

Finally, by avoiding the true right at issue in this case, the WUTC, like the district court, inappropriately concludes that it is unnecessary to determine what *Slaughter-House* meant when it 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. In fact, the WUTC maintains that "[t]he district court wisely expressed no opinion on what the *Slaughter-House* majority had in mind by the 'right to use the navigable waters of the United States.'" Resp. Br. 18. It is difficult to see the wisdom in, or propriety of, "express[ing] no opinion on" the meaning of the "right to use the navigable waters of the United States" in determining whether a plaintiff has stated a claim for abridgment of the "right to use the navigable waters of the United States."

The fact is, the district court was in the enviable (or, perhaps, unenviable) position of having to interpret this right as a matter of first impression. "[T]he difficulty of the task d[id] not excuse" the court from giving the Privileges or Immunities Clause "specific content and concreteness." *Edwards v. California*, 314 U.S. 160, 183 (1941) (Jackson, J., concurring).[3]

[3] The WUTC does suggests *one* possibility of what the "right to use the navigable waters of the United States" might mean: the right of vessels "licens[ed] … in the coasting trade" to navigate the "waters of the United States." Resp. Br. 18 (internal quotation marks and citation omitted). That interpretation—which is premised on an attorney's statement during oral argument in *Gibbons v. Ogden*, 22 U.S. 1 (1824), a half-century before *Slaughter-House*—is not plausible. "The right to use the navigable waters of the United States," after all, is "dependent upon citizenship of the United States," *Slaughter-House*, 83 U.S. at 79-80, not upon a license, and the right belongs to "citizen[s] of the United States as such," *id.* at 75—not as owners of "vessels used in the coasting trade." Resp. Br. 18. In fact, a vessel's owner did not even have to be a citizen of the United States in order to license the vessel under the "coasting trade" law at issue in *Gibbons*. *See Gibbons*, 22 U.S. at 86.

2. The Courtneys' Claim Is Not Analogous To The Claim of The Butchers In *Slaughter-House*

The Supreme Court's decision in *Slaughter-House* is the seminal decision interpreting the Privileges or Immunities Clause. It is significant, then, that, unlike the district court, the WUTC does not question the two key holdings of that decision discussed in the Courtneys' opening brief: (1) that the Privileges or Immunities Clause was designed to protect economic rights; and (2) that one of the rights it protects is the right to use the navigable waters of the United States. *See* Resp. Br. 14-15.

The WUTC is mistaken, however, when it attempts to equate the Courtneys' claims with the unsuccessful claims asserted by the butchers in *Slaughter-House*. According to the WUTC, "the right the Courtneys assert—to operate a competing commercial ferry service on Lake Chelan—is of the same nature as the right to operate a competing slaughterhouse facility that the *Slaughter-House* plaintiffs asserted." Resp. Br. 16. The WUTC maintains that both rights "involve[ ] the right to acquire and possess property, a right that is left to the State governments for security and protection," and that "[n]either is within the scope of the Privileges or Immunities Clause." Resp. Br. 17 (internal quotation marks and citation omitted). Finally, the WUTC contends that "[j]ust as the Louisiana law at issue in *Slaughter-House* did not deprive the butchers of the right to practice their trade, but merely restricted where they could practice it, so too does the Washington law

here at issue not exclude the Courtneys from using the navigable waters of Lake Chelan. It merely restricts the manner of that use." Resp. Br. 16.

The WUTC's equivalence argument is flawed in several critical respects. First, the right claimed by the butchers in *Slaughter-House* and the right claimed by the Courtneys here are not equivalents. The former—"to practice [one's] trade," as the WUTC puts it, Resp. Br. 16—was a right of *state* citizenship according to the *Slaughter-House* opinion. *Slaughter-House Cases*, 83 U.S. at 76. The latter—"to use the navigable waters of the United States"—is a right of *national* citizenship according to the same opinion. *Id.* at 79.

Second, the fact that the right to operate a competing slaughterhouse and the right to use the navigable waters of the United States both involve the right to acquire and possess property does not mean the latter falls outside the scope of the Privileges or Immunities Clause, as the WUTC suggests. *See* Resp. Br. 17. In fact, many of the rights of national citizenship protected by the Privileges or Immunities Clause involve the right to acquire and possess property. The WUTC recognizes one of those rights in its response brief: the "right to make a homestead entry upon unoccupied public lands under federal homestead statutes." Resp. Br. 31. Likewise, the right of new residents to be treated equally in the receipt of welfare benefits, *Saenz v. Roe*, 526 U.S. 489, 504-05 (1999), the right of "free access to [the nation's] seaports, through which all operations of foreign commerce

are conducted," *Slaughter-House*, 83 U.S. at 79 (internal quotation marks and citation omitted), and the right to contract with the government, *Anderson v. United States*, 269 Fed. 65 (9th Cir. 1920), all involve the right to acquire and possess property, yet each of these rights is one of national citizenship protected by the Privileges or Immunities Clause.

Third, contrary to the WUTC's suggestion, the regulations at issue in *Slaughter-House* and those at issue here are not equivalents. Attempting to analogize the PCN requirement to the law in *Slaughter-House*, the WUTC contends that the PCN requirement "does … not exclude the Courtneys from using the navigable waters of Lake Chelan," but "merely restricts the manner of that use." Resp. Br. 16. The Supreme Court has already held, however, that "requir[ing] a [governmental] license" to operate a ferry "is not … a mere police regulation governing the manner of conducting the business," *City of Sault Ste. Marie v. International Transit Company*, 234 U.S. 333, 339 (1914), because the "power to license" the ferry business is the power "to exclude from the business." *Mayor of Vidalia v. McNeely*, 274 U.S. 676, 680 (1927).

Finally, it is no answer to suggest, as the WUTC does, that the Courtneys remain free to use Lake Chelan for other purposes: to transport freight, run "a dinner cruise," or transport "themselves, their employees, or their livestock." Resp. Br. 16-17. Would it be any answer to a law prohibiting the publication of

books for the government to note that citizens remain free to publish newspapers and pamphlets? No, because the right the First Amendment protects is "freedom of speech"—not simply publication of newspapers and pamphlets. So too it is here: the Privileges or Immunities Clause protects the "right to use the navigable waters of the United States"—not simply the right to host dinner cruises or transport livestock.

3. This Court Should Not Hold That Ferries Are Exclusively The Prerogative Of States—An Issue Even The District Court Did Not Reach

The WUTC invites this Court to hold that "establishment of ferries on internal state waters is exclusively the prerogative of the states," all the while acknowledging that "[t]he district court did not reach the issue." Resp. Br. 19. This Court should decline the WUTC's radical invitation.

First, as noted above, the waters at issue in this case are navigable waters of the United States—not "internal state waters." The WUTC's desire that "ferries on internal state waters" be declared "the prerogative of states" is therefore beside the point.

Second, holding that establishment of ferries on Lake Chelan is "exclusively the prerogative of the state[ ]," Resp. Br. 19, as the WUTC urges, would render the federal government powerless in the matter—despite the lake's being a navigable water of the United States and despite its being within a national recreation area.

Moreover, even when ferry monopolies were tolerated in our history, the ferry franchise was "in respect of the landing place, and not of the waters." *Conway v. Taylor's Executor*, 66 U.S. 603, 629-30 (1861) (internal quotation marks and citation omitted). Here, the landing places the Courtneys wish to use are federally-owned docks. The state may no more monopolize access to such docks than it may monopolize access to federal waters or lands.

Third, the WUTC's argument that "[n]o legal authority has ever suggested that operating a ferry is a right of national citizenship," Resp. Br. 19, glosses over the fact that the United States Supreme Court has held that the "right to use the navigable waters of the United States" is a right of national citizenship. *Slaughter-House* , 83 U.S. at 79. Moreover, the fact that, before this case, no legal authority had addressed whether the use of such waters encompasses use for a ferry is simply a consequence of the fact that no legal authority had had occasion to address the issue before this case, as the district court expressly recognized. *See* ER 12, 16. In fact, at the hearing on the WUTC's motion to dismiss, the district court asked counsel for the WUTC, "Have you found any cases that define the term 'use?' [a]s used in the phrase, 'the right to use the navigable waters of the United States?'" Supp. ER 2. She responded, "I have not, Your Honor." Supp. ER 3.

Finally, that ferries may be "part of the public transportation infrastructure," Resp. Br. 20, does not mean the state enjoys exclusive power over a citizen's use of the navigable waters of the United States to operate a ferry. Nor, for that matter, is it relevant on a motion to dismiss that the PCN requirement is supposedly "intended to safeguard essential public transportation services." Resp. Br. 20. Putting aside the dubious nature of the claim (that imposing a monopoly is necessary to ensure adequate transportation service), the WUTC's argument is irrelevant to whether the Courtneys have stated a claim for abridgment of their right to use the navigable waters of the United States. It may be relevant to the merits of the Courtneys' claims should they be allowed to proceed, but it has nothing to do with whether or not the Courtneys have stated a claim for relief.

4. *Slaughter-House* And Subsequent Opinions Do Not Recognize A State Right To Monopolize Ferry Service On Navigable Waters Of The United States

The WUTC is wrong again in suggesting that *Slaughter-House* and subsequent decisions recognized a state's authority to monopolize ferry service on the navigable waters of the United States. *See* Resp. Br. 20-25. Tellingly, it is the *Slaughter-House dissenting* opinions on which the WUTC relies to make its argument, and even those do not support the argument.

As an initial matter, the dissenting opinions are just that: dissenting opinions. More importantly, however, they do not even mention, much less

discuss, the right to use the navigable waters of the United States. They have nothing to say, therefore, on whether the right to use such waters encompasses use to provide ferry service.[4]

That said, two of the dissenting justices did mention ferries in their opinions, and Justice Bradley, in particular, "noted that monopolies—including ferry monopolies—were statutorily *outlawed* in England at the time of our Framing." Opening Br. 35; *see also Slaughter-House*, 83 U.S. at 120 (Bradley, J., dissenting). The WUTC insists that "Justice Bradley said the opposite"—that is, that ferry monopolies were legal in England. Resp. Br. 22. That assertion simply does not square with what Justice Bradley actually said: that England had "abolished all monopolies except grants for a term of years to the inventors of new manufactures." *Slaughter-House*, 83 U.S. at 120 (Bradley, J., dissenting) (emphasis added).

In nevertheless insisting that Justice Bradley considered exclusive ferry franchises lawful, the WUTC points to the next paragraph of his opinion, in which he noted that "the British Parliament, as well as our own legislatures, ha[d] frequently disregarded" the proscription against monopolies "by granting exclusive

[4] Nor, for that matter, does Justice Bradley's subsequent concurring opinion in *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 760 (1884) (Bradley, J., concurring). In fact, none of the opinions in that case discussed or even mentioned the right to use the navigable waters of the United States.

privileges for," among other things, ferries. *Id.*; *see also* Resp. Br. 22. Observing that exclusive ferry franchises had been tolerated, in disregard of the law is not a recognition that such franchises were lawful. Indeed, Justice Bradley made that very point, adding that "even these exclusive privileges"—which he deemed "odious"—"are getting to be more and more regarded as wrong in principle, and as inimical to the just rights and greatest good of the people." *Slaughter-House*, 83 U.S. at 121 (Bradley, J., dissenting).[5]

Again turning to a dissenting opinion, the WUTC invokes two sentences from Justice Brandeis's dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), in which he opined: "'Every citizen has the right to navigate a river or lake, and may even carry others thereon for hire. But the ferry privilege may be made exclusive in order that the patronage may be sufficient to justify maintaining the ferry service.'" Resp. Br. 23 (quoting *New State Ice*, 285 U.S. at 303 (Brandeis, J., dissenting)). The first sentence is certainly correct: "Every citizen" does have the right, in light of *Slaughter-House*, "to navigate a river or lake, and may even carry others thereon for hire." But the second sentence—asserting that

[5] Justice Field also briefly discussed ferries in his dissent, noting that ferry franchises had a "public character appertaining to the government" because "[t]heir use usually requires the exercise of the sovereign right of eminent domain." *Slaughter-House*, 83 U.S. at 88 (Field, J., dissenting). Regardless of the general accuracy of Justice Field's assessment, it is not accurate here, where the docks the Courtneys intend to use are existing, *federally*-owned docks. Washington's eminent domain power is simply not in play.

the "ferry privilege may [nevertheless] be made exclusive"—is not correct, and the case that Justice Brandies cited for that assertion, *Conway v. Taylor's Executor*, 66 U.S. 603 (1862), was effectively overruled in *Gloucester Ferry Company v. Pennsylvania*, 114 U.S. 196 (1885). *See N.Y. Cent. & H.R.R. Co. v. Bd. of Chosen Freeholders of Hudson Cnty.*, 227 U.S. 248, 261 (1913) (noting that the "theories" advanced in *Conway* "are directly contrary to the ruling in … *Gloucester Ferry*," which "is now conclusive and has settled the significance of the Constitution contrary to the views mentioned"); *see also City of Sault Ste. Marie*, 234 U.S. at 340.

The WUTC also relies on the North Dakota Supreme Court's decision in *Patterson v. Wollman*, 67 N.W. 1040 (N.D. 1896), for the proposition that "citizens have no natural right to maintain a public ferry." Resp. Br. 21-22. *Patterson*, however, did not involve a Privileges or Immunities Clause claim, and the relevant question here is not whether the Courtneys have a "natural right" to operate a public ferry. *Slaughter-House* held that the Privileges or Immunities Clause protects rights of national citizenship—not natural rights. *See* Opening Br. 21. The relevant question, therefore, is whether the Courtneys' right of national citizenship to use the navigable waters of the United States encompasses use of such waters to operate a ferry. *Patterson* has nothing to say in that regard.

The WUTC next argues that the Supreme Court "has never struck down a state law that restricts the operation of ferries on wholly intrastate waters or suggested that states lack the power to enact such restrictions." Resp. Br. 24. In support of its assertion, it cites *Starin v. Mayor of New York*, 115 U.S. 248 (1885). In that case, however, there was no constitutional question raised, much less a Privileges or Immunities Clause claim, and the city's argument for an exclusive ferry right was premised on a charter that preceded the Constitution—indeed, even the Revolution. *Id.* at 257. "The question" in the case, the Court therefore explained, "[wa]s as to the extent of the ancient grant made to the city, not as to the rights of the defendants in the navigation of the waters of the United States irrespective of this grant." *Id.* at 258. Moreover, the exclusive right conferred in this "ancient grant" was not, as the WUTC suggests, over the establishment of ferries generally, but rather over a single route, between specific points on Manhattan and Staten Island. Boat owners were perfectly free to run ferries at other locations. *Id.* The same was true in *Gloucester Ferry*, which the WUTC also cites. *See Gloucester Ferry*, 114 U.S. at 218 (explaining that Pennsylvania had never attempted to establish or regulate ferries across the Delaware River: "Any one … is free … to establish such ferries as he may choose.").[6]

[6] The WUTC also cites *Veazie v. Moor*, 55 U.S. 568 (1853), which pre-dates the Privileges or Immunities Clause by fifteen years and *Slaughter-House* by twenty.

Finally, it is important to note that the Courtneys do not disagree with the WUTC that many laws concerning ferries fall within the "state police power." Resp. Br. 21. For example, ferry insurance and inspection requirements—which are truly attuned to the public health and safety—are legitimate exercises of the police power, and it is precisely for that reason that the Courtneys do not challenge them. *See* Opening Br. 13. The WUTC maintains that the Courtneys "offer no principled distinction between such regulations" and the PCN requirement, Resp. Br. 17, but they do, and it lies in the difference between an exercise of the police power, on one hand, and of the power to exclude, on the other. *See* Opening Br. 36. As the Supreme Court explained in *Vidalia* and *Sault Ste. Marie*, a licensing law requiring government consent to operate a ferry "goes beyond … mere police regulation," *Sault Ste. Marie*, 234 U.S. at 339-40, for the "power to license" is the power "to exclude from the business." *Mayor of Vidalia*, 274 U.S. at 680.

The WUTC insists that *Vidalia* and *Sault Ste. Marie* have no relevance here because they were Commerce Clause cases and "Lake Chelan is entirely within the State of Washington." Resp. Br. 23-24; *see also* Br. Amicus Curiae 6 n.2. That is a distinction without a difference. Whether a particular regulation is a legitimate exercise of the police power is a separate question from whether the regulation violates the Commerce Clause. Thus, what *Vidalia* and *Sault Ste. Marie* teach regarding the police power and ferries has as much application here as it did in

those cases. In any event, their reasoning has already been applied to navigable waters wholly within one state. In *People ex rel. Pennsylvania Railroad Co. v. Knight*, 64 N.E. 152 (N.Y. 1902), *aff'd*, 192 U.S. 21 (1904), the highest Court of New York distinguished between "police regulations" and laws requiring "leave or license from a state" and held that the latter are impermissible on "navigable waters of the United States, even when they lie exclusively within the limits of a state." *Id.* at 154.

5. Using The Navigable Waters Of The United States To Operate A Ferry Is A Right Of National Citizenship

As the Courtneys noted in their opening brief, 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. *See* Opening Br. 37-40. The WUTC misconstrues this argument as claiming that "because the United States Army Corps of Engineers has designated Lake Chelan as a 'navigable water of the United States,' it has a 'national character' that gives constitutional status to commercial ferries." Resp. Br. 25. The Courtneys do not maintain that it is the Corps' designation that confers a national character on Lake Chelan and a constitutional status on ferries. Rather, the Corps' designation is a recognition of Lake Chelan's national character and it is this national character that gives constitutional status to the lake's use.

In their opening brief, the Courtneys discussed several cases recognizing this unique national character of the navigable waters of the United States. *See* Opening Br. 37-38. The WUTC attempts to make much of the unremarkable proposition that the cases did not involve state licensing of ferries. *See* Resp. Br. 27-28. The Courtneys, however, never claimed they did. Rather, the Courtneys discussed the cases because they recognize that navigable waters of the United States are "constitutionally distinct and open to all citizens." Opening Br. 37. The WUTC does not—indeed, cannot—take issue with that fact.

The Courtneys also noted in their opening brief that the Northwest Ordinance recognized the unique character of our navigable waters early on in our history. *See* Opening Br. 38. Citing *Fanning v. Gregoire*, 57 U.S. 524 (1854), the WUTC argues that the Northwest Ordinance does not preclude a state from enacting PCN-type laws that monopolize ferry service. *Fanning*, however, like *Conway v. Taylor's Executor*, discussed above, was effectively overruled in *New York Central & Hudson River Railroad.* *See* 227 U.S. at 261 (noting that the "theories" advanced in *Fanning* and *Conway* "are directly contrary to the ruling in … *Gloucester Ferry*," which "is now conclusive"). *Fanning* also predates *Huse v. Glover*, 119 U.S. 543 (1886), in which the Supreme Court held that, under the Northwest Ordinance, navigable waters were to remain "highways equally open to all persons without preference to any," and that 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." *Id.* at 547-548.

The Courtneys further noted that the navigable waters at issue here are even more uniquely federal in character because of the fact that 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). Opening Br. 39-40. The WUTC construes this point as some kind of federal preemption argument, *see* Resp. Br. 30, which it is not. Rather, it is an observation that the navigable waters of Lake Chelan serve as a critical means of accessing a federal area created by Congress for the benefit of all United States citizens.

The Courtneys concluded by noting that access to the LCNRA is itself protected by the Privileges or Immunities Clause. "[A]mong the rights and privileges of national citizenship recognized by" the Supreme Court, they observed, is "the right to enter the public lands." *Twining v. New Jersey*, 211 U.S. 78, 97 (1908), *overruled in part on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964). The WUTC dismisses this point, noting that the case *Twining* cited for this proposition, *United States v. Waddell*, 112 U.S. 76 (1884), concerned the right to access federal lands for homesteading purposes. Resp. Br. 31. Yet numerous other rights of national citizenship recognized by the Supreme Court are concerned with the ability of citizens to access federal property. For example, the clause protects

"the right of the citizen … to come to the seat of government" and "the right of free access to its seaports, … subtreasuries, land offices, and courts of justice in the several States." *Slaughter-House*, 83 U.S. at 79 (internal quotation marks and citation omitted). It is no stretch to suggest there is a similar right of national citizenship to access areas set aside by Congress for the use and enjoyment of all citizens.

Whether there is such a right, however, is ultimately beside the point. This case concerns the right to use the navigable waters of the United States, and the Courtneys have stated a claim that the PCN requirement abridges that right.

B. The District Court Erred In Dismissing The Courtneys' Second Claim

In their opening brief, the Courtneys demonstrated how the district court erred in dismissing, on standing, ripeness, and *Pullman* abstention grounds, the Courtneys' second claim, concerning boat transportation on Lake Chelan solely for patrons of specific businesses or a group of businesses. Neither the WUTC nor amicus Arrow Launch Service offers any meaningful support for the district court's determinations on these issues.

1. Applicability Of The PCN Requirement Is Not "Uncertain"

The common thread running through the district court's justiciability determinations is a supposed "lingering uncertainty" about whether the Courtneys are required to obtain a PCN certificate to offer the service involved in their second

claim. ER 21. Although the WUTC apparently did not previously view the Courtneys' claim as nonjusticiable for want of certainty,[7] it now insists "[t]he district court properly recognized uncertainty about whether the Courtneys would be required to obtain a certificate before providing the services described in Claim II." Resp. Br. 32. The WUTC's failure to raise the matter below is telling: there is no uncertainty.

In fact, the WUTC *acknowledges* that "Cliff Courtney received only consistent opinions from Executive Director David Danner" explaining that the Courtneys' service would require a PCN certificate. Resp. Br. 36. It even concedes that the district court erred in claiming "the WUTC ha[s] given directly conflicting opinions about whether a certificate would be required." ER 21; *see also* Resp. Br. 36.

The WUTC also acknowledges the Washington Supreme Court's decisions in *Kitsap County Transportation Company v. Manitou Beach-Agate Pass Ferry Association*, 30 P.2d 233 (Wash. 1934), and *McDonald v. Irby*, 445 P.2d 192 (Wash. 1968), which employ the same reasoning advanced by the WUTC's executive director. It tries to distinguish these cases on their facts, *see* Resp. Br. 34-35, but their holdings clearly support—indeed, likely prompted—the executive director's position. *See* Opening Br. 46-47.

[7] *See* Opening Br. 43 n.10.

Attempting to create "uncertainty" where there is none, however, the WUTC notes that the full Commission could decide to reject the position of the director (and, presumably, the Washington Supreme Court). *See* Resp. Br. 34, 43. Putting aside the fact that a state agency is bound to follow the holdings of the state's highest court,[8] that the Commission "might"—or "could potentially"—"declin[e] to require a certificate for certain types of boat transportation services" in the future, *see* WUTC Report, *supra*, at 12, 14, 15, proves only one thing: that a certificate *is* required for such services now.

Like the district court, however, the WUTC makes much of the fact that there is a declaratory order process by which the Courtneys could attempt to convince the full Commission to *change* the WUTC's current policy. *See* Resp. Br. 34, 39-40, 42. The existence of such a mechanism, however, does not change the fact of the existing policy and the injury it has caused, and continues to cause, the Courtneys. As this Court has held, the possibility that the government "may adopt some other" policy, or "may change [its] course of conduct," does not diminish an otherwise "credible threat of injury" sufficient to establish standing. *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 950 (9th Cir. 2002).

[8] *See Overton v. Wash. State Econ. Assistance Auth.*, 637 P.2d 652, 654 (Wash. 1981).

The WUTC, moreover, neglects to mention the details of the declaratory order process.[9] As discussed in the Courtneys' opening brief, it involves an expensive and time-consuming adjudicative hearing fraught with its own constitutional infirmities. *See* Opening Br. 44, 52-53, 56-57. It is particularly inappropriate to force civil rights plaintiffs like the Courtneys to avail themselves of such a procedure. *See Babcock and Wilcox Co. v. Marshall*, 610 F.2d 1128, 1139 (3d Cir. 1979); *Corporacion Insular de Seguros v. Garcia*, 680 F. Supp. 476, 483 (D.P.R. 1988).

Perhaps most problematically, the process could not even take place unless the incumbent ferry operator, Lake Chelan Boat Company, "agree[d] to participate." ER 51 ¶89; *see also* Wash. Rev. Code § 34.05.240(7). And even if Lake Chelan Boat Company *did* agree to participate—which is beyond the realm of likelihood, given that it has opposed every certificate application filed for service on Lake Chelan, ER 34 ¶24, 40 ¶43—the WUTC would not have to enter an order. *See* Wash. Admin. Code § 480-07-930(7); Wash. Rev. Code. § 34.05.240(5)(d). Although the WUTC does not acknowledge these facts, it is tellingly careful to note only that the Courtneys "can petition the WUTC for a declaratory order"—not that the WUTC will necessarily issue one. Resp. Br. 34.

[9] The WUTC asserts that the Courtneys' "description of the declaratory order procedure … is inaccurate," Resp. Br. 40, yet provides not a single example of any supposed inaccuracy.

In short, if there is any "uncertainty" involved in this case, it is the uncertainty of whether the Courtneys can even avail themselves of the declaratory order process the WUTC and district court have identified.

2. The Courtneys Have Standing For Their Second Claim

The WUTC does very little in attempting to defend the district court's conclusion that the Courtneys lack standing for their second claim.[10] Specifically, it argues that: (1) "neither the WUTC nor any other state adjudicative body has ever made an official ruling on the need for a certificate"; and (2) the WUTC has not "threatened to enforce state law against them should they initiate a boat transportation service for patrons of specific businesses without a certificate." Resp. Br. 36, 37. The first contention is irrelevant, and the second is both incorrect and irrelevant.

As the Courtneys' noted in their opening brief, there is absolutely "no basis in law" for the supposed requirement that a "state adjudicative body" must have "officially ruled on the matter" for standing to exist. Opening Br. 48. The WUTC still has identified no basis for such a requirement.

As for the contention that the Courtneys "allege no facts showing that the WUTC has threatened to enforce state law against them should they initiate a boat

[10] The WUTC even contends that the district court did not dismiss the claim on standing grounds and that "any error in the court's ruling on standing," therefore, "was harmless error." *See* Resp. Br. 37.

transportation service for patrons of specific businesses without a certificate," Resp. Br. 37,[11] the contention is false in two respects: the Courtneys have alleged it, and the WUTC has done it. As the Courtneys discussed in their opening brief, *see* Opening Br. 11-12, 43-45, the WUTC's executive director, in a letter specifically responding to Cliff Courtney's proposal to provide transportation for patrons of his own businesses, *see* ER 49 ¶85, warned that if Cliff "were to initiate service without first applying for a certificate," the WUTC could initiate a "classification proceeding," ER 51 ¶89—"a special proceeding requiring [him] … to appear before the commission," "give testimony under oath," "prov[e] that his operations or acts are not subject to" the certificate requirement, and, if unable to so prove, "cease and desist from providing" the service. Wash. Rev. Code § 81.04.510.

Even were there not an overt threat of enforcement, however, the Courtneys would still have standing, as injury for standing purposes may result from a law's "operation *or* enforcement." *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988) (emphasis added; internal quotation marks and citation omitted). The WUTC nevertheless maintains that the "'mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III.'" Resp. Br. 37 (quoting *Scott v. Pasadena*

[11] *See also* Br. Amicus Curiae 8.

Unified Sch. Dist., 306 F.3d 646, 656 (9th Cir. 2002)). Here, however, it is not the "mere existence of a statute" that gives rise to the Courtneys' injury. As the Courtneys noted in their opening brief, they have already suffered, and continue to suffer, economic harm as result of the certificate requirement: for example, they have had to refrain from engaging in the business of boat transportation, ER 54 ¶99; 62-63 ¶¶126-27; 65 ¶133; they have had to refrain from purchasing a vessel for which they have negotiated favorable terms, ER 56 ¶104; and the existing monopoly has dissuaded potential patrons of Cliff's ranch and outfitter from making the trip to Stehekin and patronizing the businesses, resulting in lost revenues, ER 57 ¶107. Such "[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), as is the fact that Jim Courtney previously applied for, and was denied, a certificate. These facts establish standing "independent of the [WUTC's] … prospective enforcement" of the PCN requirement. *Parker v. District of Columbia*, 478 F.3d 370, 376 (D.C. Cir. 2007) (holding "a license or permit denial pursuant to a state or federal administrative scheme" is "an Article III injury"), *aff'd*, *District of Columbia v. Heller*, 554 U.S. 570 (2008). Neither the WUTC nor Arrow Launch Service even addresses, much less attempts to refute, these points.

Finally, in an argument even the WUTC and district court did not make, Arrow Launch Service insists that the Courtneys should also be required to go

through the PCN process itself—not just the declaratory order process—to establish standing (and ripeness) to bring their second claim. Br. Amicus Curiae 3, 8-9, 9-10, 16-17. There is a reason the WUTC and district court never adopted this argument: the Supreme Court has flatly rejected it. Where a public convenience and necessity requirement is unconstitutional as applied to a plaintiff, the plaintiff need not seek and be denied a certificate before challenging the requirement in federal court. *City of Chicago v. Atchison, Topeka and Santa Fe Rwy. Co.*, 357 U.S. 77, 89 (1958); *see also Pub. Utils. Comm'n of Cal. v. United States*, 355 U.S. 534, 540 (1958) ("[W]here the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right.").

In a related argument, Arrow Launch Service maintains that "simply because a certificated commercial ferry operator could oppose the Courtneys' application" for a PCN certificate "does not mean that the application will necessarily be denied." Br. Amicus Curiae 9. By way of illustration, it notes that: it once attempted to exclude another ferry operator from the market and was unsuccessful in doing so, Br. Amicus Curiae 9, 13; and, in 1931, another ferry operator was unsuccessful in attempting to keep a new entrant out of the market. Br. Amicus Curiae 13-14. That Arrow Launch Service and some other ferry operator from 81

years ago were unsuccessful in their attempts to exclude competition is beside the point. That the PCN process even *allows* existing ferry operators to appear as a party in the adjudicative proceeding and argue for the abridgment of someone else's right to use the navigable waters of the United States is constitutionally problematic in itself—regardless of whether they are ultimately successful in doing so.

3. The Courtneys' Second Claim Is Ripe

The Courtneys' second claim is also ripe for review.[12] In determining whether a claim satisfies the prudential component of ripeness, this Court "evaluate[s] both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99 (1977). Here, both factors militate in favor of ripeness.

First, the Courtneys' second claim is fit for judicial decision. The WUTC's reliance on *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134 (9th Cir 2000) (en banc), to argue otherwise is misplaced. *Thomas* involved a challenge to laws prohibiting discrimination against unmarried couples in rental housing, and

[12] Relying on *Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2006), which does not mention ripeness, the WUTC insists that "[p]rudential considerations of ripeness" are reviewed "under an abuse of discretion standard." Resp. Br. 9. This Court, however, has made clear that *de novo* review applies. *California v. United States Dep't. of Agric.*, 575 F.3d 999, 1010-11 (9th Cir. 2009).

the plaintiffs, who were landlords, asked the court to declare the laws unconstitutional "in the absence of any identifiable tenants and with no concrete factual scenario that demonstrate[d] how the laws, as applied, infringe[d] their constitutional rights." *Id.* at 1141. Even after an opportunity to develop a factual record, the landlords could not "say when, to whom, where, or under what circumstances" they would "refuse[ ] to rent to unmarried couples." *Id.* at 1139. This Court concluded that such "[a] general intent to violate a statute at some unknown date in the future does not rise to the level of an articulated, concrete plan" sufficient to ripen a claim. *Id.*

"The[ ] [Courtneys'] plans," on the other hand, "are markedly different from the intent of the *Thomas* landlords," *Humanitarian Law Project v. Ashcroft*, 309 F.Supp.2d 1185, 1197 (C.D. Cal. 2004), and there simply is no lack of "factual context," as the WUTC claims there is. Resp. Br. 39.[13] Even the district court did not believe there was. It expressly recognized the factual basis for the Courtneys' second claim: "The Courtneys' second claim is based on Clifford Courtney's proposal to the WUTC in 2008," which involved "a service whereby Clifford would 'shuttle' his customers (lodging and river rafting patrons) between Chelan

[13] Arrow Launch Service makes essentially the same argument couched in standing, rather than ripeness, terms. Br. Amicus Curiae 7-8. The argument lacks merit however it is couched.

and Stehekin in his own private boat." ER 20.[14] Jim and Cliff have been trying to launch this service since 2008 (and other types of boat transportation service since 1997). ER 43-46 ¶¶56-69; 49-52 ¶¶83-91. They have the ability to provide the service, ER 54 ¶99, and have even negotiated terms for the purchase of the boat they would use to provide it—a vessel that complies with all applicable Coast Guard and Department of Labor and Industry standards. ER 56 ¶104. Their proposed service is sufficiently "concrete" to ripen their claim.

Moreover, withholding judicial resolution would impose substantial hardship on the Courtneys. Again analogizing to *Thomas*, the WUTC insists that the "hardship" component of prudential ripeness is lacking because of a supposed "absence of a real or imminent threat of enforcement." Resp. Br. 39. It is somewhat incongruous, however, to even view this case in the light of pre-enforcement case law as the "the gravamen of the suit is economic injury rather than threatened prosecution." *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 855 (9th Cir. 2002). As noted above, the Courtneys have suffered, and continue to

[14] The Courtneys' second claim is pled to also encompass the shuttling of patrons of other business (hence, its challenge to the PCN requirement "[a]s applied to the provision of boat transportation service on Lake Chelan for customers or patrons of specific businesses or *group of businesses*," ER 64 ¶132; 66-67 ¶¶B, D (emphasis added)). If shuttling customers of only the lodge and outfitter requires a certificate, however, then shuttling customers of any additional business would only make the transportation more "public" in the WUTC's eyes and, thus, even more needing of a certificate.

suffer, economic harm as a result of the PCN requirement. Withholding judicial resolution will only perpetuate that harm. *Id.* at 857 ("The second [prudential ripeness] … factor—potential hardship to the parties—also favors adjudication. The trappers are refraining from trapping due to Proposition 4, and will continue to do so unless and until it is declared invalid. For so long as they refrain from trapping, they will suffer continuing economic injury.").

In any event, and as discussed above, there is a threat of enforcement in this case. That threat is credible and not simply imaginary or speculative; indeed, it is documented by the WUTC's executive director. The "hardship" component is therefore satisfied. *See Thomas*, 220 F.3d at 1140 (explaining that if enforcement is "remotely possible" it will ripen a claim so long as the threat is "at least … credible, [and] not simply imaginary or speculative" (internal quotation marks and citation omitted)); *id.* at 1143 (O'Scannlain, J., concurring).

Taking a slightly different tack than the WUTC, amicus Arrow Launch Service argues that the Courtneys' second claim is not ripe because the PCN requirement has not "actually been applied" to them yet, and "the issue would be illuminated by the development of a better factual record." Br. Amicus Curiae 10 (internal quotation marks and citation omitted). It relies primarily on two cases for its argument, neither of which controls here.

The first case, *Pacific Legal Foundation v. State Energy Resources Conservation and Development Commission*, 659 F.2d 903, 915 (9th Cir. 1981), *aff'd on other grounds*, 461 U.S. 190 (1983), involved a claim that California's scheme for certifying nuclear power plants was preempted by federal law. This Court held the claim unripe for review for two connected reasons. First, the Court had "no way of knowing what types of information … [the state] might require" of utilities in deciding whether to certify new plants and "no way of knowing … to what purposes the information might be put." *Id.* at 916. Second, Congress had only intended federal law to preempt state nuclear regulatory law in certain specific areas. Without knowing the type of information the state would require of utilities and what purposes to which it would put that information, the Court would be unable to resolve the preemption claim. *Id.*[15]

Here, those concerns are not present. We know exactly what information the WUTC requires of the Courtneys, *see* Wash. Admin. Code § 480-51-030(1), (3), and exactly what purposes to which that information will be put, *see* Wash. Rev. Code § 81.84.010(1), .020(1), (2). In fact, the Courtneys' claim challenges the constitutionality of requiring that known information and putting it to those known purposes. *See* ER 35 ¶27; 37-38 ¶¶34-36; 64-65 ¶132; 66 ¶B.

[15] The issue in *Pacific Legal Foundation* was so unique that in the 31 years since the case was decided, it has never been cited for its holding regarding the ripeness of the preemption challenge to the certification system.

The other case on which Arrow Launch Service relies, *National Park Hospitality Association v. Department of the Interior*, 538 U.S. 803 (2003), is equally unavailing and is distinguishable for three reasons. First, the case involved a facial, rather than as-applied, challenge. Even the district court in the present case "acknowledge[d] that an as-applied challenge to RCW 81.84.010—which the Courtneys have asserted in this case—is more likely to present a ripe controversy than a facial challenge." ER 23 n.8.

Second, *National Park Hospitality Association* concerned ripeness of a claim brought under the Administrative Procedures Act, and the Court expressly limited its holding to such claims: "[A] regulation is not ordinarily considered the type of agency action 'ripe' for judicial review *under the [Administrative Procedure Act (APA)]* until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Nat'l Park Hospitality Ass'n*, 538 U.S. at 808 (alterations in original; emphasis added). Arrow Launch Service quotes a portion of this sentence but neglects to include the italicized, qualifying language. Br. Amicus Curiae 11.

Third, the challenged provision at issue in *National Park Hospitality Association* was "nothing more than a general statemen[t] of policy"—not a

"regulation with the force of law." *Nat'l Park Hospitality Ass'n*, 538 U.S. at 808, 809. Unlike the PCN requirement, it "d[id] not command anyone to do anything or to refrain from doing anything"; "d[id] not grant, withhold, or modify any formal legal license, power, or authority"; "d[id] not subject anyone to any civil or criminal liability"; and "create[d] no legal rights or obligations." *Id.* at 809 (internal quotation marks and citation omitted). The Court therefore concluded that the plaintiff "[wa]s not litigating any concrete dispute." *Id.* at 807. That is hardly the case here, as already discussed above.

Finally, it must be remembered exactly what is being challenged in this case: a government-imposed obstacle to the exercise of a constitutional right. Where a plaintiff challenges a barrier (like the PCN requirement) to the exercise of some constitutionally protected activity that the plaintiff would engage in *but for* that barrier, his claim is ripened. In *Terrace v. Thompson*, 263 U.S. 197 (1923), for example, landowners and a prospective lessee, a farmer, brought an action to enjoin enforcement of a Washington statute prohibiting alien land ownership. The Court held that they could maintain the action even though the lease had not been consummated because they had alleged they would consummate the lease but for the challenged law and, in the meantime, were foregoing their respective constitutional rights to "use, lease and dispose of" property and to "earn a livelihood." *Id.* at 215-16 (citations omitted); *see also Clements v. Fashing*, 457

U.S. 957, 962 (1982) (holding that an actual case or controversy existed where plaintiffs "alleged in a precise manner that, but for the sanctions of the … provision they seek to challenge, they would engage in the very acts that would trigger the enforcement of the provision").

So, too, are the Courtneys foregoing their right to use the navigable waters of the United States solely because of the PCN requirement. Their second claim is therefore ripe.

4. *Pullman* Abstention Is Inappropriate

Finally, it was inappropriate to apply *Pullman* abstention to the Courtneys' second claim. None of the requisite criteria for such abstention is present in this case.[16]

First, as discussed at length above and in the Courtneys' opening brief, "the proper resolution of the potentially determinative state law issue" is not "uncertain." *Fireman's Fund Ins. Co. v. City of Lodi, Cal.*, 302 F.3d 928, 939-40

[16] The WUTC "agrees with the Courtneys' statement of the standard of review for *Pullman* abstention," Resp. Br. 9—specifically, that this Court first "review[s] de novo whether the requirements for *Pullman* abstention have been met," and "[t]hen … review[s] the district court's ultimate decision to abstain under *Pullman* for abuse of discretion." *Smelt*, 447 F.3d at 678 (citations omitted); *see also* Opening Br. 15-16. In the "Argument" section of its brief, however, the WUTC relies on an abuse of discretion standard in addressing whether the requirements for *Pullman* abstention have been met. *See* Resp. Br. 38, 40, 43. That is inappropriate, as "[t]here is no discretion to abstain in a case that does not meet the requirements of the abstention doctrine being invoked." *Garamendi v. Allstate Ins. Co.*, 47 F.3d 350, 354 (9th Cir. 1995).

(9th Cir. 2002) (internal quotation marks and citations omitted). It is clear that the PCN requirement applies to the service involved in the Courtneys' second claim.

Second, and as the Courtneys also noted in their opening brief, the district court did not identify any "sensitive area of social policy … best left to the states to address." *Id.* at 939 (internal quotation marks and citations omitted). The WUTC likewise identifies no sensitive area of state social policy. Rather, it simply argues (somewhat tautologically) that "[i]n Washington, people care passionately about how navigable waters are used" and, therefore, "[h]ow navigable waters are used is a sensitive are of social policy in Washington." Resp. Br. 41, 42. How citizens use the navigable waters of the United States—that is, how they exercise a right of national citizenship protected by the Privileges or Immunities Clause—is not a sensitive area of state social policy.[17]

Rather, use of the navigable waters of the United States is, by definition, an area of particular *federal* concern, and "[w]hen a case involves an area of particular federal concern, … *Pullman* abstention is not appropriate." *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 867 (C.D. Cal. 2005), *rev'd in part on other grounds*, 447 F.3d 673 (9th Cir. 2006). Moreover, "the Supreme Court … ha[s] on

[17] Moreover, the governmental report that amicus Arrow Launch Service cites in its attempt to argue that use of the navigable waters of the United States is a sensitive area of state social policy speaks only to "transportation problems of the Puget Sound Area." *See* Br. Amicus Curiae 15-16. It has nothing to do with Lake Chelan.

several occasions suggested that federal courts should be especially loathe to abstain in civil rights actions," *United States v. Board of Education*, 798 F. Supp. 1093, 1102 n.8 (D.N.J. 1992) (collecting authorities), and this Court has held that "[f]ederal courts should be reluctant to abstain in civil rights cases regardless of the type of constitutional interest at stake." *Pearl Inv. Co. v. City and Cnty. of San Francisco*, 774 F.2d 1460, 1463 (9th Cir. 1985). Indeed, abstaining here would "impose an exhaustion requirement not appropriate to 42 U.S.C. §1983." *Privitera v. Cal. Bd. of Med. Quality Assurance*, 926 F.2d 890, 894 (9th Cir. 1991) (reversing district court's decision to abstain) (internal citations and quotation marks omitted); *see also Vickers v. Trainor*, 546 F.2d 739, 746 (7th Cir. 1976).

The final requirement for *Pullman* abstention—that "a definitive ruling on the state issues by a state court could obviate the need for [federal] constitutional adjudication by the federal court," *Fireman's Fund Ins. Co.*, 302 F.3d at 939 (alteration in original; internal quotation marks and citation omitted)—is likewise not satisfied in this case. Even assuming the Courtneys could avail themselves of the declaratory order process, the full Commission has already said it is "unlikely" that it would "declin[e] to require a certificate" or "authorize competing services on Lake Chelan." WUTC Report, *supra*, at 12. It is not sufficient for *Pullman* abstention that "there is a bare, though unlikely, possibility that state courts *might* render adjudication of the federal question unnecessary." *Hawaii Hous. Auth. v.*

Midkiff, 467 U.S. 229, 237 (1984); *Yniguez v. Arizonans for Official English*, 42 F.3d 1217, 1227 (9th Cir. 1994) (same).

Quoting *Lake Carriers Ass'n. v. MacMullan*, 406 U.S. 498 (1972), the WUTC nevertheless insists that "[w]here state law is 'sufficiently flexible' to avoid conflict with federal law, abstention is warranted to permit a state tribunal's authoritative resolution of the state law ambiguities." Resp. Br. 42. In language omitted from the quoted passage, however, the Court made clear that "to warrant abstention," a federal court must be "satisfied that authoritative resolution of the ambiguities in the … [state] law is sufficiently likely to avoid or significantly modify the federal questions." *Lake Carriers Ass'n.*, 406 U.S. at 512. As noted above, the Commission itself has already said it is "unlikely" it would adopt an interpretation that would obviate the need to resolve the federal constitutional question. WUTC Report, *supra*, at 12; ER 53 ¶96. Given *Kitsap County Transportation Company* and *McDonald*, it is equally unlikely that the Washington courts would do so on judicial review of any declaratory order.

Finally, it must be remembered that *Pullman* abstention requires that there be an easy, adequate, and ample means by which a plaintiff may secure a determination of the supposedly uncertain issue of state law. *City of Houston v. Hill*, 482 U.S. 451, 476-77 & n.5 (1987) (Powell, J., concurring) (explaining that "the adequacy of state procedures is examined much more strictly in cases seeking

Pullman abstention ," and that "*Pullman* abstention is inappropriate unless the state courts provid[e] the parties with adequate means to adjudicate the controverted state law issue" (alteration in original; internal quotation marks omitted)). For two reasons, "the steps that the district court impliedly required of the [Courtneys] here are not … easy and ample means." *Lister v. Lucey*, 575 F.2d 1325, 1331 (7th Cir. 1978) (internal quotation marks and citation omitted).

First, "[t]he Supreme Court has approved the use of abstention only where it appeared that there was an *available* state court procedure." *United States v. Nev. Tax Comm'n*, 439 F.2d 435, 440 (9th Cir. 1971) (emphasis added). Here, it highly unlikely that the declaratory order process will be available to the Courtneys, as it would require the Lake Chelan Boat Company's agreement to participate, and the company has opposed every application (including Jim Courtneys') for a PCN certificate on Lake Chelan since it received its own certificate in the 1920s. ER 34 ¶24; 40 ¶43. The uncertain availability of the procedure makes abstention particularly inappropriate. *See Nev. Tax Comm'n*, 439 F.2d at 440-41; *see also Zbaraz v. Quern*, 572 F.2d 582, 584 (7th Cir. 1978) (holding abstention inappropriate where it was "questionable whether there exists an 'easy and ample' means of obtaining a state court construction of the statute which would minimize the burden that abstention would place on appellants and the … rights they are asserting"); *Embassy Pictures Corp. v. Hudson*, 226 F. Supp. 421, 426 (D. Tenn.

1964) (holding abstention is inappropriate where there is "considerable doubt" about whether the state process can provide meaningful review).

Second, "the potential for delay militates against *Pullman* abstention here." *Kendall-Jackson Winery, Ltd. v. Branson*, 82 F. Supp. 2d 844, 860 (N.D. Ill. 2000); *see also Potrero Hills Landfill, Inc. v. County of Solano*, 657 F.3d 876, 889-90 (9th Cir. 2011). In *Vickers v. Trainor*, for example, the Seventh Circuit held there was no "easy and ample means of clarifying Illinois law" where plaintiffs were "require[d] [to make] initial recourse to administrative remedies…, with subsequent judicial proceedings by way of administrative review." 546 F.2d at 744 (internal quotation marks and citation omitted). Similarly, in *Kendall-Jackson Winery*, the court held *Pullman* abstention inappropriate even though state administrative proceedings were already underway because "there might be substantial delay before the parties ha[d] the opportunity to present their constitutional arguments to the … state courts on administrative review and obtain a construction of the provisions in [question]." 82 F. Supp. 2d at 860-61. The same concerns exist here, where, as the WUTC explains, the means of clarifying the supposedly uncertain issue of state law is "seeking a declaratory order from the WUTC, followed, if necessary, by judicial review in the state courts." Resp. Br. 39.

Finally, as the Courtneys noted in their opening brief, even if *Pullman* abstention was warranted with respect to the Courtneys' second claim, the district court erred in dismissing the claim, because "'retention of jurisdiction, and not dismissal of the action, is the proper course.'" Opening Br. 55 n.17 (quoting *Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d 838, 841 (9th Cir. 1979)). In responding to this point, the WUTC cites *Harris County Commissioners Court v. Moore*, 420 U.S. 77 (1975), for the proposition that "[d]ismissal without prejudice can be an option," and then argues that "[t]he Courtneys have identified no basis for concluding it was inappropriate in this case." Resp. Br. 43-44. The WUTC neglects to mention the reason the Supreme Court dismissed, rather than retained jurisdiction, in *Harris County*: "[t]he Texas Supreme Court ha[d] ruled … that it cannot grant declaratory relief under state law if a federal court retains jurisdiction over the federal claim." *Harris Cnty. Comm'rs Ct.*, 420 U.S. at 88 n.14. It was solely for that reason that the Court "adopted the unusual course of dismissing." *Id.* The WUTC has identified no basis for concluding that there is a similar risk in this case, and dismissal was therefore inappropriate, even if abstention was appropriate.

C. Arrow Launch Service's Amicus Brief Misapprehends The Nature Of The Courtneys' Claims

Finally, a few additional points are warranted regarding Arrow Launch Service's amicus brief, which appears to misapprehend the Courtneys' challenge. The brief asserts:

> Should this Court reverse the district court ruling and find, *inter alia*, that Wash. Rev. Code § 81.84.010 is unconstitutional, the certificate of public convenience and necessity that Arrow Launch has held since 1989 and, indeed, the entire supporting infrastructure of its operations in Puget Sound would be adversely affected. Thus, Arrow Launch has a direct interest in the outcome of this appeal.

Br. Amicus Curiae 2. This passage significantly overstates the Courtneys' case.

First, the Courtneys are not asking this Court to "find" the PCN requirement "unconstitutional." They are asking it to reinstate the Courtneys' claims.

Second, assuming this Court does reinstate the Courtneys' claims, the district court will be asked to resolve the constitutionality of the PCN requirement *as applied to service on Lake Chelan only*; this case does not involve a facial challenge to Wash. Rev. Code § 81.84.010, as Arrow Launch Service suggests. The Courtneys made that absolutely clear to the district court. *See* Supp. ER 4-5.

Finally, Arrow Launch Service's stated interest—that "the certificate of public convenience and necessity [it]… has held since 1989 … would be adversely affected" by a ruling in the Courtneys' favor, Br. Amicus Curiae 2—lays bare the economic protectionism at the heart of the PCN requirement. Although this Court

need not reach the issue at this point, such protectionism is not a governmental interest that can justify abridgment of the Courtneys' right to use the navigable waters of the United Sates. *See Merrifield v. Lokyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008).

III. CONCLUSION

For the foregoing reasons, and those stated in the Courtneys' opening brief, the Courtneys respectfully request that this Court reverse the district court's order and reinstate their claims.

Respectfully submitted November 6, 2012.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 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 supplemental 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 supplemental excerpts of record was served to Attorney for the Appellees via UPS Next Day Air and Attorneys for Amicus Curiae via First Class Mail.

/s/Michael Bindas
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