No. 20-361

In the Supreme Court of the United States

JAMES COURTNEY AND CLIFFORD COURTNEY,

PETITIONERS,

v.

DAVID DANNER, CHAIRMAN AND COMMISSIONER OF THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION; ANN RENDAHL AND JAY BALASBAS, COMMISSIONERS OF THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION; AND MARK JOHNSON, EXECUTIVE DIRECTOR OF THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, IN THEIR OFFICIAL CAPACITIES,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION OF THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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QUESTION PRESENTED

Does the Privileges or Immunities Clause prohibit States from requiring those wishing to operate a commercial ferry service from obtaining State approval?

THE PARTIES

Petitioners, the appellants in the Ninth Circuit, are James and Clifford Courtney. Respondents, the appellees in the Ninth Circuit, are David Danner, chairman and commissioner of the Washington Utilities and Transportation Commission (WUTC); Ann Rendahl, commissioner of the WUTC; Jay Balasbas, commissioner of the WUTC; and Mark Johnson, executive director of the WUTC, in their official capacities.

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INTRODUCTION

This case meets none of the Court's criteria for granting certiorari. The unpublished opinion below has no effect beyond this case, creates no conflict with decisions of this Court or other courts, and does not actually raise the questions supposedly presented.

The three-page per curiam order below is narrow and unimportant, with no precedential value. 9th Cir. R. 36-3. In arguing to the contrary, the Petition claims that the Ninth Circuit issued two broad holdings, but neither claim is tenable.

First, petitioners say the panel held that the Privileges or Immunities Clause creates no right to use navigable waters except for interstate commerce. Pet. 1-2. In reality, the Ninth Circuit assumed in a prior published opinion in this case that the Clause protects the right to use navigable waters for non-commercial reasons. Pet. App. 112. But the court recognized that such a right was not actually at issue; indeed, if petitioners simply wanted to use Lake Chelan for non-commercial purposes, they would not need a permit from the State. Pet. App. 113. In reality, the right petitioners seek is far broader: they want to operate a ferry service. Pet. App. 113. But as the court explained, states have been regulating ferries since colonial times, no court has ever recognized a ferry-operation right under the Privileges or Immunities Clause, and the *Slaughter-House Cases* themselves made clear that no such right exists. Pet. App. 109-14. The panel's truncated repetition of this rationale in the unpublished order creates no basis for certiorari.

Second, petitioners contend that the Ninth Circuit held that the Privileges or Immunities Clause bars claims against States by their own citizens. Pet. 2. Their sole basis for this claim is a few words ripped from the panel's parenthetical description of a prior Ninth Circuit decision by Judge O'Scannlain, *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008). Seeking certiorari based on a parenthetical in an unpublished order borders on the absurd.

With these mischaracterizations stripped away, it becomes obvious that the petition does not actually raise the questions supposedly presented and that there is no split of authority. The court below simply applied the universal consensus of courts, including this Court in the *Slaughter-House Cases*, that there is no Privileges or Immunities Clause right to operate a ferry. The panel viewed this outcome as so obvious and so thoroughly addressed in its prior published opinion that it saw no need to address the issue in detail or in a binding order again. The hyperbole offered by petitioners and their amici cannot change the miniscule scope and consequences of the panel's order. The Court should deny review.

STATEMENT OF THE CASE

I. Public Ferry Regulation on Lake Chelan

Lake Chelan is a fifty-five-mile long lake located entirely in the State of Washington. The Courtneys live in Stehekin, a popular tourist destination at the northwest end of Lake Chelan,

within the Lake Chelan National Recreation Area. Stehekin is accessible only by boat, plane, or foot. Most tourists reach Stehekin by way of a public ferry operated by the Lake Chelan Boat Company. Pet. App. 100-01.

The State has regulated ferry service on Lake Chelan since 1911. Pet. App. 101. In 1927, the Washington Legislature enacted a law that conditioned the right to operate a ferry service in the state upon certification that such service was required by "public convenience and necessity" (PCN certificate). Wash. Rev. Code § 81.84.010(1); Pet. App. 101. Many States impose similar requirements, and have since the founding.[1]

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[1] *See, e.g.*, 2 Eugene McQuillin, *Municipal Corporations* § 4:137, Westlaw (3d ed., database updated Aug. 2020) (a "ferry franchise is generally regarded as public property, under the absolute and unlimited control of the state through its legislature, and, in essence, not subject even to federal controls or restrictions" (footnote omitted)) (collecting cases); 36A C.J.S. *Ferries* § 19, Westlaw (database updated Sep. 2020) ("Exclusive ferry privileges, founded on a general legislative act prohibiting the licensing of other ferries within a specified distance of an established ferry, do not invade private rights, or bestow special privileges, or interfere with the free right of navigation.") (collecting cases); 2 Henry P. Farnham, *The Law of Waters and Water Rights* 1203-04 (1904) ("Therefore, in the absence of peculiar or special circumstances, a grant or license from the government is necessary to authorize one to set up a ferry; and this license may contain such conditions as are necessary to give the government supervision of the operations of the ferry, and the opportunity to protect the rights of the public.") (collecting cases).

In order to obtain a PCN certificate, a potential ferry operator must prove that its proposed operation is required by "public convenience and necessity," and that it "has the financial resources to operate the proposed service for at least twelve months[.]" Wash. Rev. Code § 81.84.020(1), (2). If the territory in which the applicant desires to set up operation is already served by a commercial ferry company, no certificate may be granted unless the applicant proves that the existing certificate holder: "[(a)] has failed or refused to furnish reasonable and adequate service[; (b)] has failed to provide the service described in its certificate or tariffs after the time allowed to initiate service has elapsed[;] or [(c)] has not objected to the issuance of the certificate as prayed for." Wash. Rev. Code § 81.84.020(1); Pet. App. 102.

The Washington Utilities and Transportation Commission (WUTC) has issued one PCN certificate for providing public ferry services on Lake Chelan since 1927. That certificate is now held by Lake Chelan Recreation, Inc. d/b/a Lake Chelan Boat Company. Pet. App. 103.

II. The Courtneys' Litigation

In 1997, petitioner James Courtney applied for a PCN certificate to operate a competing ferry service to and from Stehekin. The WUTC denied the application after a two-day evidentiary hearing regarding the financial viability of the Courtneys' proposed service and the need for an additional ferry. Pet. App. 127. The WUTC found that the Courtneys lacked the financial resources to sustain the ferry service for twelve months, that the service was not required by "public convenience and necessity," and

that the existing operator provided reasonable and adequate service. Pet. App. 127-28. The Courtneys did not appeal these findings. Pet. App. 103.

In 2006, the Courtneys began to explore whether a "charter" or "shuttle" ferry service supporting their Stehekin-based businesses would be exempt from the PCN certificate requirement. In 2008, a WUTC official informed the Courtneys that their proposed services for hire would require a PCN certificate. The WUTC official, however, told the Courtneys that they could seek a declaratory ruling from the WUTC regarding that issue. Alternatively, the Courtneys could proceed with their proposed ferry operations, but potentially be subject to a "classification proceeding" by the WUTC to determine if a PCN certificate was required for their proposed "charter" or "shuttle" boat transportation service. Pet. App. 103-04.

Dissatisfied with these options, the Courtneys urged several state legislators and the governor to eliminate or relax the PCN requirement. Pet. App. 28. The legislature subsequently directed the WUTC to conduct a study on the regulation of commercial ferry services on Lake Chelan. Pet. App. 28. The WUTC issued its report in early 2010 based on its review of nearly a century of ferry service regulation on Lake Chelan. Pet. App. 29. The WUTC concluded that the Lake Chelan Boat Company's year-round ferry services "provide[d] a lifeline" to Lake Chelan communities and that permitting unregulated passenger ferry operators would likely result in a dramatic reduction or elimination of essential ferry service during unprofitable time periods, including the winter months, times of high gas prices, or when

more profitable economic opportunities arose. Pet. App. 29. The WUTC also lacked confidence that increasing competition during profitable summer months would adequately subsidize unprofitable winter ferry service if ferry operators lost market share to seasonal competitors. Pet. App. 29. The high cost of ferry operations similarly raised concerns that operators would not be able to adequately comply with safety standards. Pet. App. 30. Based on all of these findings, the WUTC recommended no change to the existing laws and regulations. The WUTC report noted that there could be flexibility under the existing law to permit some competition by exempting certain services from the PCN certificate requirement, as long as any such service would not "significantly threaten" the existing certificate holder's business. Pet. App. 10-11.

In October 2011, the Courtneys sued Respondent WUTC officials for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201. Pet. App. 30, 105. The Courtneys claimed Washington's ferry certificate requirement abridged their right to "use" the navigable waters of the United States as protected by the Privileges or Immunities Clause of the Fourteenth Amendment. Pet. App. 11. The Courtneys asserted two causes of action. First, they alleged Washington's PCN requirement infringed on their right to provide a commercial ferry service open to the general public on Lake Chelan. Second, they claimed that the PCN requirement infringed on their right to provide a private ferry service for patrons of their Stehekin-based businesses. Pet. App. 11.

The district court dismissed their complaint under Federal Rule of Civil Procedure 12(b)(6). The court concluded that even if the Fourteenth Amendment created a right to use navigable waters, it did not include a right "to operate a ferry service open to the public." Pet. App. 106. The court also ruled that the Courtneys did not have a ripe claim to examine "charter" or "shuttle" boat transportation services on Lake Chelan for patrons of their businesses because they had never sought a formal ruling from the WUTC as to whether such services would require a PCN certificate. For the same reason, the court also abstained from addressing this claim pursuant to *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Pet. App. 106.

A unanimous Ninth Circuit Court of Appeals affirmed, but vacated the portion of the ruling regarding *Pullman* abstention. *Courtney v. Goltz* (*Courtney I*), 736 F.3d 1152 (9th Cir. 2013) (Pet. App. 98-124). The court agreed that even if the Privileges or Immunities Clause encompasses a federal right "to use the navigable waters of the United States," any such right does not protect the Courtneys' use of Lake Chelan to operate a commercial public ferry free from the PCN certificate requirement. Pet. App. 107-08.

The court examined the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), at length. The court recognized that *Slaughter-House* did not attempt to define the privileges or immunities of citizens of the United States. Rather, the *Slaughter-House* majority suggested only that such privileges might include a "right to *use* the navigable waters of the United States, however they may penetrate the territory of the several States[.]" *Id.* at 79 (emphasis

added); Pet. App. 109-10. The court explained why this dictum in *Slaughter-House* did not aid the Courtneys. The Courtneys' claim was about far more than *navigating* the waters of the United States. "While navigation of Lake Chelan is a necessary component . . . it is neither sufficient to achieve their purpose nor the cause of their dissatisfaction." Pet. App. 112. The "actual" privilege asserted by the Courtneys was to operate a commercial ferry for passengers without application of Washington's ferry certificate requirements. The court concluded that it was "exceedingly unlikely" that the reference to navigation in *Slaughter-House* indicated that States, in the Fourteenth Amendment, lost their historic authority to regulate public ferries. Pet. App. 113. The court noted that even the dissenting justices in *Slaughter-House* affirmed state power to grant an "exclusive" privilege to private parties to operate a public ferry. Pet. App. 114 (*citing Slaughter-House*, 83 U.S. at 88 (Field, J., dissenting)); *see also Slaughter-House*, 83 U.S. at 120-21 (Bradley, J., dissenting).

Next, the Ninth Circuit rejected the Courtneys' view of the scope of the Privileges or Immunities Clause described in *Slaughter-House*. The court differentiated the "privileges *and* immunities" of citizens recognized in Article IV, which protects rights that "are *fundamental*; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign." Pet. App. 108 (quoting *Slaughter-House*, 83 U.S. at 76). In contrast, as recognized in *Slaughter-House*, only those

rights that are of a federal character are "privileges *or* immunities" protected by the Fourteenth Amendment. Pet. App. 109. As the court observed, operating a ferry is not inherently federal in character. Rather, the States retained a "vital interest" in regulating passenger ferries that is well-established in case law, and nothing in federal law contemplated any intent or need to preempt state ferry regulations. Pet. App. 115.

Last, the Ninth Circuit modified the abstention ruling addressing the Courtneys' alternative claimed right to offer boat services to patrons of specific businesses. The Courtneys had standing to make that claim, but the claim would be rendered moot if the WUTC or Washington Supreme Court concluded that no PCN certificate is required for their proposed "charter" or "shuttle" boat service. Therefore, the federal courts could not address that claim under the abstention doctrine in *Pullman*. The Ninth Circuit instructed the district court to retain jurisdiction if the Courtneys were going to pursue their claim that the certificate requirement does not apply to a "charter" or "shuttle" boat service. Pet. App. 118.

On March 3, 2014, the Courtneys petitioned for certiorari to review the disposition of their first claim only. This Court denied certiorari on June 2, 2014. *Courtney v. Danner*, 572 U.S. 1149 (2014).

The Courtneys thereafter petitioned the WUTC for a declaratory order that their specific proposed boat transportation services did not require a PCN

certificate. *See Courtney v. Wash. Utils. & Transp. Comm'n*, 414 P.3d 598 (Wash. Ct. App.), *review denied*, 422 P.3d 911 (Wash. 2018) (Pet. App. 26-51). After finding the Courtneys' initial petition lacking in necessary detail, the WUTC issued a declaratory order on the Courtneys' resubmitted petition, concluding that the Courtneys' proposed ferry services required a PCN certificate. Pet. App. 31-32. The WUTC identified the sole legal issue as whether the Courtneys' proposed services would operate "for the public use" under Wash. Rev. Code § 81.84.010(1). Pet. App. 15. The WUTC construed the phrase "for the public use" as meaning "accessible to or shared by all members of the community" and determined that the Courtneys' proposed transportation services fell within this statutory definition. Pet. App. 15.

The Courtneys petitioned for judicial review with the Chelan County Superior Court, which affirmed the WUTC's order. Pet. App. 16. The Washington Court of Appeals affirmed. Pet. App. 27. The Court of Appeals explained that "the public is free to visit Stehekin," and "[l]imiting service to guests of one or more Stehekin businesses does not strip the proposed ferry service of its public character," as required to avoid the certificate requirement. Pet. App. 45. The Washington Supreme Court denied the Courtneys' petition for discretionary review of the decision. Pet. App. 25.

The district court thereafter reopened the Courtneys' case and dismissed their remaining constitutional challenge to the PCN requirement as

applied to their proposed ferry services. Pet. App. 6. The Courtneys acknowledged that *Courtney I* conclusively established that the right "'to use the navigable waters of the United States' does not include a right to operate a *commercial public ferry* on Lake Chelan," but argued that the question remained as to whether the right to use the navigable waters extends to their specific transportation services, which they argued were "private" in character. Pet. App. 20. The district court held that the WUTC and Washington state courts had already definitively concluded that the Courtneys' proposed ferry services constituted "a *commercial public ferry service* under Washington law." Pet. App. 20. Regardless of the label used, the district court held that the Courtneys sought "a ferry operation privilege, not a broad navigation privilege," which had already been rejected in *Courtney I*. Pet. App. 21.

A unanimous Ninth Circuit Court of Appeals affirmed in a three-page, unpublished opinion issued without oral argument. Pet. App. 2. The Ninth Circuit did not retread ground previously covered in *Courtney I*. Instead, it reaffirmed that the Privileges or Immunities Clause protects privileges that "'owe their existence to the Federal government, its National character, its Constitution, or its laws.'" Pet. App. 3 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010)). Citing the historical regulation of ferry franchises by States, the court held that while the right to *use* the navigable waters of the United States is a national right, the right to an intrastate ferry franchise is fundamentally a property right. Pet. App. 3. Due to its lack of nexus to foreign or interstate commerce, the court held that the WUTC's

determination "that the [Courtneys'] proposed services would interfere with the current ferry operator's franchise rights does not affect the Courtneys' privileges or immunities as citizens of the United States." Pet. App. 3-4. Under Ninth Circuit Rule 36-3, the unpublished decision is "not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion."

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Regarding Whether There Is a Federal Privilege to Avoid State Ferry Regulation

In alleging a conflict between the decision below and the decisions of this Court and other courts, petitioners mischaracterize the true nature of the privilege they claim. As to the privilege they actually seek, there is no conflict whatsoever in the courts.

The Courtneys erroneously claim to be asserting a "right to *use* the navigable waters of the United States." Pet. 1 (emphasis added). Their Amici similarly defend a privilege to "*use* the nations' navigable waterways[.]" *See, e.g.*, Americans for Prosperity Found. Amicus Br. 2 (emphasis added). Neither accurately characterizes what petitioners seek in this case.

The actual privilege at stake here is "a ferry operation privilege, not a broad navigation privilege," as explained in *Courtney I* and the decision below. Pet. App. 21; *see also* Pet. App. 2 ("The Courtneys seek to provide intrastate boat transportation on Lake Chelan for certain customers of Stehekin-based

businesses."). Contrary to their assertions, the Courtneys are entirely free to "travers[e] Lake Chelan in a private boat for private purposes" without regulation by the State. Pet. App. 21 (alteration in original). The Courtneys, however, do not claim the privilege to *use* the navigable waters of the United States. Rather, they assert the privilege to operate a commercial public ferry without first obtaining a certificate of public convenience and necessity as required by state law. Pet. App. 21.

No Court has ever held that the Privileges or Immunities Clause precludes state regulation over commercial public ferry licenses. Nor has any court held or even hinted that operating a public ferry on a lake in the middle of a state is a right of national citizenship. That is because this Court and others have always understood intrastate ferries to be the prerogative of state and local authorities. Pet. App. 3, 115; *see also* Pet. App. 19-20; *supra* n.1. The majority and both of the dissents in *Slaughter-House* confirm that understanding. The *Slaughter-House* majority recognized that laws "which respect turnpike roads, ferries, etc., are component parts" of the state police power. *Slaughter-House*, 83 U.S. at 63 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824)).

Dissenting Justice Bradley agreed:

> "It has been suggested that [the 1624 Statute of Monopolies] was a mere legislative act, and that the British Parliament, as well as our own legislatures, have frequently disregarded it by granting exclusive privileges for erecting ferries, railroads, markets and

> other establishments of a public kind. It requires but a slight acquaintance with legal history to know that grants of this kind of franchises are totally different from the monopolies of commodities or of ordinary callings or pursuits. These public franchises can only be exercised under authority from the government, and the government may grant them on such conditions as it sees fit." *Slaughter-House*, 83 U.S. at 120-21 (Bradley, J., dissenting).

See also id. at 88 (Field, J., dissenting) (recognizing the "duty" of state governments to "provide suitable roads, bridges, and ferries for the convenience of the public"). Rejecting the privilege claimed by the Courtneys, therefore, presents no conflict with *Slaughter-House*.

Other decisions of this Court, both before and after *Slaughter-House*, confirm that ferries on intrastate waters are the prerogative of state and local governments. *See Port Richmond & Bergen Point Ferry Co. v. Bd. of Chosen Freeholders*, 234 U.S. 317, 321 (1914) (tracing to English common law states' practice of granting franchises for "ferries wholly intrastate"); *Starin v. Mayor of New York*, 115 U.S. 248 (1885) (whether city had exclusive right to establish ferries over public waters entirely within one state was a matter of state, not federal, law); *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 215 (1885) ("The power of the States to regulate matters of internal police includes the establishment of ferries[.]"); *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 763

(1884) (Bradley, J., concurring) ("[A]n exclusive right to use franchises, which could not be exercised without legislative grant, may be given; such as that of constructing and operating public works, railroads, ferries, etc."); *Conway v. Taylor's Ex'r*, 66 U.S. (1 Black) 603, 635 (1861) (since "before the Constitution had its birth, the States have exercised the power to establish and regulate ferries");[2] *Mills v. County of St. Clair*, 49 U.S. (8 How.) 569, 581 (1850) ("The parties respectively assume, and so the court below held, that the establishment and regulation of ferries across navigable streams is a subject within the control of the government, and not matter of private right; and that the government may exercise its powers by contracting with individuals. We deem this general principle not open to controversy[.]"); *see New State Ice Co. v. Liebmann*, 285 U.S. 262, 303 (1932) (Brandeis, J., dissenting) ("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

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[2] The Courtneys argue that the lower court's reliance on *Conway* is misplaced and cite *City of Sault Ste. Marie v. International Transit Co.*, 234 U.S. 333 (1914), as an example where the Court invalidated a ferry franchise under the Commerce Clause. Pet. 15 n.3. But that case is inapposite. There, the Court held that a municipality could not require a ferry company, enfranchised by Canadian authority and operating across international waters, to take out a license as a condition to its operation. *City of Sault Ste. Marie*, 234 U.S. at 341. The Courtneys' discussion ignores *Port Richmond & Bergen Point Ferry Co.*, 234 U.S. at 321, a case the Court handed down the same day, where the Court discussed the States' grant of franchises for "ferries wholly intrastate."

may be sufficient to justify maintaining the ferry service[.]"). The decision below comports with this unbroken line of authority from this Court.

There is also no conflict or uncertainty among lower courts regarding a privilege to avoid state regulation of commercial ferries. Over a century of state and federal court decisions confirm that establishing and regulating ferries is the prerogative of state and local governments. *E.g.*, *Canadian Pac. Ry. Co. v. United States*, 73 F.2d 831, 833 (9th Cir. 1934) (explaining that, in the United States, ferries are established by the legislative authority of states); *Vallejo Ferry Co. v. Solano Aquatic Club*, 131 P. 864 (Cal. 1913) (affirming injunction against operation of competing ferry); *State Highway Bd. v. Willcox*, 149 S.E. 182, 185 (Ga. 1929) ("The right to establish and maintain a public ferry is a franchise, which, in this State, can only be granted by the proper county authorities." (Internal quotation marks omitted.)); *Tri-State Ferry Co. v. Birney*, 31 S.W.2d 932 (Ky. Ct. App. 1930) (affirming injunction against operation of competing ferry); *Patterson v. Wollmann*, 67 N.W. 1040, 1044 (N.D. 1896) (citing Justice Field's *Slaughter-House* dissent in holding that citizens have no natural right to maintain a public ferry); *Kitsap Cnty. Transp. Co. v. Manitou Beach-Agate Pass Ferry Ass'n*, 30 P.2d 233, 234 (Wash. 1934) (state commercial ferry law "is but an exercise of the power of the state, recognized and exercised from time immemorial, to control travel over and on its navigable streams and waters"). The Courtneys do not and cannot identify a single judicial holding that supports the extraordinary privilege they claim here to avoid state ferry regulation.

Unable to point to any genuine conflict on this core legal issue, the Courtneys attempt to manufacture a conflict with two circuit court decisions, *Loving v. Alexander*, 745 F.2d 861 (4th Cir. 1984), and *United States v. Harrell*, 926 F.2d 1036 (11th Cir. 1991). But neither *Loving* nor *Harrell* had anything to do with the Privileges or Immunities Clause or state regulation of ferry franchises. Rather, the cases addressed whether particular stretches of rivers or creeks constituted "navigable waters" under federal regulations establishing the jurisdiction of the Army Corps of Engineers. The cases turned on whether the disputed waterways were "navigable in fact" based on their historical use or susceptibility to use as highways of commerce. *Loving*, 745 F.2d at 864; *see also Harrell*, 926 F.2d at 1039 ("[A] river is 'navigable in fact' when it is used or susceptible of being used in its ordinary condition to transport commerce."). Beyond referencing the general subject matter of "navigable waters," there is virtually no overlap in the legal issues presented in *Loving* or *Harrell* and this case.

Here, there is no dispute that Lake Chelan is a "navigable" water under the regulations at issue in *Loving* and *Harrell*, as explicitly recognized in *Courtney I*. Pet. App. 100 ("Lake Chelan is a narrow, fifty-five-mile long lake, which has been designated by the Army Corps of Engineers as a 'navigable water of the United States.'"). Nor is there any dispute that the public has a right to access Lake Chelan. As explained in *Courtney I*, if the Courtneys had merely sought to *use* the navigable waters of Lake Chelan, they would never have needed a certificate of public necessity in the first instance. This case arises only

because the Courtneys assert much more than a navigation privilege; they assert a commercial ferry operation privilege. Pet. App. 21. Neither *Loving* nor *Harrell* has anything to say on this issue, or the Privileges or Immunities Clause in general.

The Courtneys also contrive a conflict with *Saenz v. Roe*, 526 U.S. 489 (1999), and *Colgate v. Harvey*, 296 U.S. 404 (1935), based entirely on their mischaracterization of the decision below as recognizing a home-state exception to the Privileges or Immunities Clause. The Courtneys assert that the court below held that the Privileges or Immunities Clause "in general bar[s] . . . claims against the power of the State governments over the rights of [their] own citizens." Pet. 25 (alterations in original). But this language is taken from the Ninth Circuit's parenthetical description of *Merrifield*, 547 F.3d 978. The court below cited *Merrifield* solely for the uncontroversial proposition that "[a]n intrastate ferry franchise is a property right, and '[r]ights of commerce give no authority to their possessor to invade the rights of property.'" Pet. App. 3 (first alteration ours). The court did not adopt or apply a home-state exception, and petitioners exaggerate wildly in asking this Court to grant review because of language in a parenthetical in an unpublished opinion.

Petitioners suggest that this case presents an opportunity to review *Merrifield*. Pet. 25. That is obviously incorrect, and in any event they badly mischaracterize Judge O'Scannlain's opinion in that case. They claim that Judge O'Scannlain misunderstood the difference between the Privileges and Immunities Clause of Article IV and the

Privileges or Immunities Clause of the Fourteenth Amendment. Pet. 25. Not so. *Merrifield* explicitly distinguishes between the two, *see* 547 F.3d at 983 & n.7, and simply explained that as to economic rights (such as the plaintiff's claimed privilege to operate a pest-control business), *Slaughter-House* made clear that such rights "are left to the State governments for security and protection," *see* 83 U.S. at 78. The prior published opinion in this case also recognized the distinction between the rights secured by Article IV and the Fourteenth Amendment. *Courtney I*, 736 F.3d at 1158.

The Courtneys cite no other conflict with *Saenz*, which reaffirmed that the Privileges or Immunities Clause ensures each citizen a right to become a citizen of any state of the Union. *Saenz*, 526 U.S. at 502-03 (finding that the Clause protects "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State"). *Saenz* found that this right "has always been common ground" in disputes over the scope of the clause, *id*. at 503, and that it could not be limited by a state's discriminatory classification of newly arrived citizens to deny public benefits, *id*. at 505. The decision below does not conflict with this holding.

The Courtneys similarly fail to demonstrate any genuine conflict based on *Colgate*. To start, this Court overruled *Colgate* eighty years ago in *Madden v. Kentucky*, 309 U.S. 83, 93 (1940). *See Saenz*, 526 U.S. at 511 (Rehnquist, J., dissenting) (*Madden*'s overruling of *Colgate* rendered Privileges or Immunities Clause "dormant" for nearly six

decades). To the extent any aspect of *Colgate* survived *Madden*, there is still no conflict for the same reason there is no conflict with *Saenz*: the decision below did not adopt a home-state exception to the Privileges or Immunities Clause.

The Courtneys also incorrectly suggest that the court below construed the Privileges or Immunities Clause as coextensive with the Commerce Clause. Pet. 20-21. In truth, the Ninth Circuit's prior published opinion in this case makes clear that it did no such thing. Reviewing *Slaughter-House*, the court said: "a reasonable interpretation of the right to 'use the navigable waters of the United States,' and the one we adopt, is that it is a right to *navigate* the navigable waters of the United States." *Courtney I*, 736 F.3d at 1160. That right would obviously differ from Commerce Clause rights, as it does not turn on using the navigable waters for commerce. Indeed, the court distinguished the non-commercial navigation right mentioned in *Slaughter-House* from the commercial right to operate a ferry that the Courtneys seek, and explained that the Privileges or Immunities Clause could protect only the former. *Id.* The Courtneys argued, however, that the right to engage in a profession, while not normally a federal privilege, should be treated as one here because operating a ferry is "inherently federal." *Id.* at 1161. The Ninth Circuit responded that even if that could theoretically be true in some case, it could not be true in the case of "ferry service on wholly intrastate waterways," as here. *Id.* at 1161-62. The unpublished panel opinion here severely truncated this discussion but made essentially the same point, noting that there could be no federal privilege to conduct the profession of ferry

operator in circumstances that "do not involve interstate or foreign commerce." Pet. App. 4. The panel's few sentences on this topic should not be misconstrued to suggest that the Privileges or Immunities Clause protects no rights beyond those protected by the Commerce Clause. And even accepting the Courtneys' misreading, this unpublished opinion would have no precedential value.

In short, the Courtneys can show no conflict and inaccurately describe the issues they ask the Court to address. Their claim would require the Court to completely rewrite *Slaughter-House*, to reexamine centuries of case law concerning state regulation of commercial ferries, and to establish a new privilege of national citizenship to operate commercial ferries free of state regulation.

II. This Case Is a Poor Vehicle to Provide Meaningful Guidance on the Privileges or Immunities Clause

This case is also a poor vehicle for deciding the questions presented. Neither of the questions the Courtneys offer is actually at issue here, but even if they were and the Court resolved them in the Courtneys' favor, petitioners would ultimately obtain no relief.

First, the opinion below does not cleanly present this Court with an opportunity to address the scope of a right to use navigable waters under the Privileges or Immunities Clause. Contrary to the Courtneys' argument, this case is not about whether the Clause protects the use of navigable waters only for interstate commerce. *See* Pet. at 2. As explained above, the Ninth Circuit already made clear in its

prior, published opinion in this case that the two rights are distinct, and that the right discussed in *Slaughter-House* was to use navigable waters for reasons unrelated to interstate commerce. Pet. App. 112. But a right simply to navigate is not what is at stake here. Rather, as the panel previously held and as the district court explained in rejecting the Courtneys' claims, "the actual privilege at stake here is 'a ferry operation privilege, not a broad navigation privilege.'" Pet. App. 21 (quoting *Courtney I*, 736 F.3d at 1160); *see also* Pet. App. 23 (district court ruling relying on *Courtney I* to narrowly construe rights incident to United States citizenship with respect to regulation of purely intrastate economic activities). It is in this context of evaluating state-created franchise rights that the Ninth Circuit determined that a proposed service that would interfere with the state-created right, while at the same time not involving interstate or foreign commerce, was not a question involving a person's rights as a citizen of the United States. Pet. App. 4.

The opinion below said nothing about the broader issue involving any use of navigable waters. As the Ninth Circuit previously explained and the district court below held: "The Courtneys are not merely seeking to 'travers[e] Lake Chelan in a private boat for private purposes,' nor are they being prevented from doing so." Pet. App. 21 (alteration in original).

Instead, the state regulation here is just like those that even amici supporting the Courtneys acknowledge is permissible. Amicus Americans for Prosperity Foundation forthrightly acknowledges, as it must, States' authority to

regulate ferries. Americans for Prosperity Found. Amicus Br. at 17-18. Amicus further argues that state regulation of navigable waters, even obstructing certain uses of navigable waters, is permissible if the state is attempting to increase overall transportation rather than diminish access. Americans for Prosperity Found. Amicus Br. at 19 (discussing *Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713 (1865)). What Amicus and the Courtneys ignore, however, is that the franchise regulation at issue here is precisely that: a legitimate means of ensuring greater overall access through the granting of a franchise that is required to provide a certain service. *See* Pet. App. 29 (WUTC report that permitting unregulated passenger ferry operators would likely result in a dramatic reduction or elimination of essential ferry service during unprofitable time periods, including the winter months, times of high gas prices, or when more profitable economic opportunities arose).

Second, as discussed above, the opinion below did not purport to hold that the Privileges or Immunities Clause bars suits by citizens against their own states. Again, petitioners' only evidence for such a holding is the panel's parenthetical description of a prior case. This passing parenthetical reference should be seen in the context of the case's primary focus: a state property right of a ferry franchise, not a right of a citizen of the United States to use navigable waters. *See* Pet. App. 3.

Finally, this case does not present an effective vehicle for addressing the scope of the Privileges or Immunities Clause because the Washington state courts have definitively concluded that the Courtneys' proposed boat transportation services—even those

they repeatedly label as "private" in their brief—constitute operation of a commercial public ferry.[3] Pet. App. 15-16, 27. The Courtneys' Privileges or Immunities claim would thus fail under *Courtney I* even if the questions presented by the Courtneys here were decided in their favor.

In short, the scope of the Privileges or Immunities Clause should be reviewed in a case in which the issue is squarely presented and in which the outcome of the case turns on the Court's decision. Because neither is true here, the Court should deny the petition.

III. The Unpublished Decision Below Does Not Raise Important Issues Warranting the Court's Intervention

There is no reason for the Court to devote its limited time to this case. Petitioners seek review of an unpublished decision that will have no effect beyond this case. If the issues presented were as narrow as petitioners claim, then a ruling ultimately in their favor would be all but meaningless. But in reality, petitioners' claim threatens to overturn centuries of state regulation and open a Pandora's Box of new claims under the Privileges or Immunities Clause.

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[3] The Courtneys' repeated, incorrect characterization of their proposed ferry service as "private" calls to mind a familiar exchange from the film quoted in their petition. As the character Inigo Montoya says to Vezzini about Vezzini's use of the word, "inconceivable," "You keep on using that word. I do not think it means what you think it means." *The Princess Bride* (20th Century Fox 1987).

As an initial matter, the decision below has no effect beyond this case. It is unpublished, non-precedential, and summary in nature; it will not bind future panels of the Ninth Circuit or district courts within the Ninth Circuit. *See* 9th Cir. R. 36-3. And the Court has already denied certiorari in the prior published opinion in this case. *Courtney*, 572 U.S. 1149. Although the Court has granted certiorari to review unpublished decisions before, review has generally been granted where the unpublished decision actually conflicted with the published decision of another circuit. *See, e.g.*, *Lynce v. Mathis*, 519 U.S. 433, 436 (1997) (granting certiorari to resolve the conflict between a Tenth Circuit case and the decision below, an "unpublished order" of the Eleventh Circuit); *Old Chief v. United States*, 519 U.S. 172, 177 (1997) (granting certiorari where an unpublished Ninth Circuit opinion became part of a sharp divide among the courts of appeal); *Thompson v. Keohane*, 516 U.S. 99, 106 (1995) (granting certiorari "to end the division of authority" between published and unpublished courts of appeal opinions). The unpublished decision below did not create a split in lower court authority or contravene precedent. *See supra* pp. 12-21.

Second, if petitioners' claim is as narrow as they claim, it is profoundly unimportant: *Slaughter-House* already indicated that "[t]he right to use the navigable waterways of the United States" is a Privileges or Immunities right, 83 U.S. at 79-80, and the prior published panel opinion in this case assumed as much, Pet. App. 2. There is no reason to grant review to decide what those cases already assume and what has no impact on the outcome here.

Finally, while petitioners say that "enforc[ing] a holding of *Slaughter-House*," Pet. 34, would not "up-end a century-and-a-half's worth of precedent," Pet. 34-35, what they really seek here is not to enforce *Slaughter-House* but to dramatically expand it, overturning centuries of precedent and practice allowing state regulation of ferry service. For centuries, courts have affirmed States' police power to regulate ferries, cases that would be upended should the Court rule for petitioners. *See supra* pp. 14-16 (discussing cases); Pet. App. 3-4 ("Historically, states—not the federal government—regulated ferry franchises . . . ."); *see also Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009) (noting that the "antiquity of the precedent" factors in favor of *stare decisis*). They do not offer any "special justification" why the Court should not adhere to ordinary *stare decisis* principles as to its cases on the authority of States to regulate ferries. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)).

A ruling for petitioners would effectively rewrite the *Slaughter-House Cases* and disturb the present predictability of the Privileges or Immunities Clause. Petitioners seek not a navigational privilege, but a privilege to offer a commercial public ferry service for their customers. Creating such a right would open a Pandora's Box regarding state powers to regulate, despite petitioners' argument to the contrary. *See* Pet. 35.

Expanding *Slaughter-House* would also lead to unpredictable consequences for the scope of rights protected by the Privileges or Immunities Clause. "For the very reason that it has so long remained a

clean slate, a revitalized Privileges or Immunities Clause holds special hazards for judges," who might seize on it to "write their personal views of appropriate public policy into the Constitution." *McDonald*, 561 U.S. at 860 (Stevens, J., dissenting) (quoting J. Harvie Wilkinson III, *The Fourteenth Amendment Privileges or Immunities Clause*, 12 Harv. J.L. & Pub. Pol'y 43, 52 (Winter 1989)). As Judge Wilkinson observed, it is "anybody's guess" as to whether new rights recognized under the Privileges or Immunities Clause would be "personal" or "economic" or "whether they would belong to business, to private property owners, to the dispossessed or the discontented[.]" Wilkinson, 12 Harv. J.L. & Pub. Pol'y at 52.[4] Denying the petition for certiorari would preserve the Clause's predictability.

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[4] This unpredictability is reflected in legal scholarship, as scholars dispute what the Privileges or Immunities Clause protects. *See Saenz*, 526 U.S. at 522 n.1 (1999) (Thomas, J., dissenting) (citing John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1418 (May 1992) (Clause is an antidiscrimination provision); David P. Currie, *The Constitution in the Supreme Court* 341-51 (1985) (same); 2 William W. Crosskey, *Politics and the Constitution in the History of the United States* 1089-95 (1953) (Clause incorporates first eight Amendments of the Bill of Rights); Michael K. Curtis, *No State Shall Abridge* 100 (1986) (Clause protects the rights included in the Bill of Rights as well as other fundamental rights); Bernard H. Siegan, *Supreme Court's Constitution* 46-71 (1987) (Clause guarantees Lockean conception of natural rights); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453, 521-36 (1989) (same); John H. Ely, *Democracy and Distrust* 28 (1980) (Clause "was a delegation to future constitutional decision-makers to protect certain rights that the document neither lists . . . or in any specific way gives directions for finding"); Raoul Berger, *Government by Judiciary* 30 (2d ed. 1997) (Clause forbids race discrimination with respect to rights

The Court should decline petitioners' invitation to overturn over a century of case law concerning state regulation of commercial ferries and to rewrite *Slaughter-House*.

CONCLUSION

The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED.

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listed in the Civil Rights Act of 1866); R. Bork, *The Tempting of America* 166 (1990) (Clause is inscrutable and should be treated as if it had been obliterated by an ink blot)).