No. 22-1208

IN THE

Supreme Court of the United States

URSULA NEWELL-DAVIS, et al.,
Petitioners,

v.

COURTNEY N. PHILLIPS, in her Official Capacity as Secretary of the Louisiana Department of Health, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

QUESTION PRESENTED

Should this Court overrule the *Slaughter-House Cases* and hold that the right to enter a common and lawful occupation is one of the "privileges or immunities" protected by the Fourteenth Amendment?

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INTEREST OF AMICUS CURIAE[1]

The New England Legal Foundation (NELF) is a nonprofit, nonpartisan, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of business corporations, foundations, law firms, and individuals who believe in NELF's mission of promoting balanced economic growth in New England and the nation, protecting the free-enterprise system, and defending individual economic rights and the rights of private property. In fulfillment of its mission and as relevant here, over the years NELF has filed numerous amicus briefs in this Court and other courts on private property issues, especially those having constitutional dimensions.

NELF appears as amicus in this case because it is part of NELF's core mission to defend economic rights and the free market. In NELF's opinion, the Petition rightly questions the correctness of the *Slaughter-House Cases*, 83 (16 Wall.) 36, an 1872 decision of this Court that expunged the right to work from among the fundamental rights of U.S. citizenship. In doing so, that decision severely constricted the "privileges or immunities" guaranteed by the Fourteenth Amendment. Whatever their disagreements on particular points, overwhelmingly scholars have declared that the decision in the *Slaughter-House Cases* is wrong

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[1] Pursuant to Supreme Court Rule 37.2(a), on July 2, 2023 NELF gave ten-day notice to counsel for the parties at their respective email addresses as shown on the docket. Pursuant to Supreme Court Rule 37.6, NELF states that no party or counsel for a party authored this brief in whole or in part and no person or entity other than NELF made any monetary contribution to its preparation or submission.

about the "privileges or immunities" clause and requires correction. For the reasons stated in this brief, NELF believes that the Court should grant the Petition in order to correct a serious constitutional error concerning the right to work and to better define the privileges and immunities generally.

NELF has therefore filed this brief to assist the Court in deciding whether to grant the Petition.

SUMMARY OF REASONS FOR GRANTING REVIEW

The right to earn an honest living by working a lawful job is an essential attribute of citizenship in a free society. Like other economic rights, however, especially unenumerated ones, it receives less constitutional protection than do some non-economic rights. This appeal presents that Court with an opportunity to restore this fundamental right to its proper place in the Constitution as among the "privileges or immunities" of national citizenship guaranteed by the Fourteenth Amendment.

The Court's decision in the *Slaughter-House Cases* is weak precedent and should be overruled, as the great majority of legal scholars of all persuasions have urged. The decision largely undermines itself because Justice Miller, writing for the majority, misquotes legal texts and thereby fashions erroneous grounds for excluding the right from the attributes of national citizenship and from the protection of the "privileges or immunities" clause. Also his opinion woefully fails to harmonize with the purposes of the Civil Rights Act of 1866, which this Court has called the "initial blueprint" of the Fourteenth Amendment.

REASONS FOR GRANTING REVIEW

I. In a Free Society, the Right to Pursue an Occupation Is a Fundamental Right, and It Should Therefore Be Recognized as Such Under the Fourteenth Amendment's "Privileges or Immunities" Clause.

Judge James C. Ho of the Fifth Circuit has observed that "our current law of unenumerated rights prioritizes non-economic activities over economic endeavors . . . . leaving economic activities out in the cold." *Golden Glow Tanning Salon Inc. v. City of Columbus*, 52 F.th 974, 982 (5th Cir. 2022) (concurring).

Even when rights involve the "most basic economic needs of impoverished human beings," the Court has declined to find a fundamental right. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). In the "area of economics and social welfare," the Court has held, a State violates no right if its acts on a reasonable basis, "a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." *Id*. at 485, 486.

By contrast, enumerated non-economic rights may be (justifiably) jealously guarded.

> If this were a case involving government action claimed to violate the First Amendment guarantee of free speech, a finding of 'overreaching' would be significant and might be crucial. For when otherwise valid governmental regulation sweeps so broadly as

> to impinge upon activity protected by the First Amendment, its very overbreadth may make it unconstitutional. . . . But the concept of 'overreaching' has no place in this case. For here we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights . . . . For this Court to approve the invalidation of state economic or social regulation [under the Fourteenth Amendment] as 'overreaching' would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.'

Id. at 484 (quoting *Williamson v. Lee Optical of Oklahoma, Inc*., 348 U.S. 483, 488 (1954)).

Even enumerated constitutional rights may become somewhat disfavored through inappropriate and misplaced deference to federalism. *See*, e.g., *Knick v. Township of Scott*, 139 S.Ct. 2162, 2169 (2019) ("The state-litigation requirement relegate[d] the Takings Clause 'to the status of a poor relation' among the provisions of the Bill of Rights.") (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994)).

Here the Petition sets out cogent reasons for believing that an unenumerated right to earn a living was denied its federal constitutional protection when, in 1872, the right was read out of the "privileges or immunities" clause of the Fourteenth Amendment in deference to the State "privileges and immunities" clause of Article IV. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

As the Petition points out, "Representative John Bingham, primary author of Section 1 [of the Fourteenth Amendment], later said that 'our own American constitutional liberty . . . is the liberty . . . to work an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil.'" Petition at 35, citing Cong. Globe, 42nd Cong., 1st Sess. App. 86 (1871). *See also* Alexis de Tocqueville, *Democracy in America* 550-51 (J.P. Meyer ed. & George Lawrence tr., HarperCollins 2006) (1835 & 1840) ("Why Americans Consider All Honest Callings Honorable"); Gordon S. Wood, *The Radicalism of the American Revolution* 325-347 (Vintage 1993) ("The Celebration of Commerce").

Justice Field, in his *Slaughter-House* dissent, in which the three other dissenting justices concurred, emphasized that the right to freely choose an occupation is "one of the most sacred and imprescriptible rights of man." *Slaughter-House Cases*, 83 U.S. at 110. He quoted Adam Smith on the centrality of this right to a free economy and free society:

> "The property which every man has in his own labor," says Adam Smith, "as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him.

> As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper." (Smith's Wealth of Nations, b. 1, ch. 10, part 2.)

Id. n. 39.

The governments of unfree societies are acutely aware of their power to instill fear and submission into citizens by reducing them to penury through the state's power of denying them a right to earn a living. Nadezhda Mandelstam, the wife of Russian poet Osip Mandelstam, who died in a Soviet penal labor camp, wrote in her memoirs:

> In the winter of 1937-38 there was no work of any kind to be had [in the Soviet Union], and I was unable to get a job again until 1939, when it was announced that the wives of prisoners still had the right to work. But in periods of "vigilance" I was always thrown out. Since all work is in the hands of the State, . . . [p]rivate means of subsistence scarcely existed. If you had your own house and plot of land, you could grow vegetables and keep a cow (but for hay you depended on the authorities); you could do dressmaking at home—until the tax inspector caught up with you . . . . Finally, you could beg, but this was not easy because only the faithful servants of the regime had money to spare, and they were not the sort to compromise themselves by contact with outcasts.

Hope Against Hope 140 (Max Hayward tr., Modern Library 1999). *See also* Richard J. Evans, *The Third Reich in Power* 140, 182, 446, etc. (Penguin 2006) (among Nazi government's first moves against Jews

was boycotting and destroying their stores and discharging and excluding them from employment).

The Court should therefore welcome this opportunity to review its *Slaughter-House* decision and to correct that decision's fundamentally flawed view of "one of the most sacred and imprescriptible rights" of U.S. citizenship, the right freely to earn a living through one's own labor.

II. *Slaughter-House Cases* Decision Should Be Overturned Because of its Erroneous View of Fourteenth Amendment "Privileges or Immunities."

Justice Miller's opinion for the Court in the *Slaughter-House Cases* is untrue to the text it purports to examine. He misquoted Article IV's privileges and immunities clause in such a way as to create a sharp apparent dichotomy between State "privileges and immunities" (Article IV) and federal "privileges or immunities" (Amendment XIV).

In reasoning toward the holding of the case, he laid out a crucial contrast between:

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

from Section 1 of the Fourteenth Amendment (emphasis added) and the language of Section 2 of Article IV:

> The citizens of each State shall be entitled to all the privileges and immunities of citizens *of the several States*.

(Emphasis added). *Slaughter-House*, 83 U.S. at 74-75. The parallel qualifiers "of the United States"

and "of citizens of the several States" suggest two very distinct regimes of rights, one for national citizenship and one for State.

Justice Miller drew the conclusion that might naturally follow from such a distinction.

> If, then, there is a difference between the privileges and immunities belonging to a citizen *of* the United States as such, and those belonging to the citizen *of* the State as such[,] the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.

Id. at 75 (emphasis added).

Of course, what Section 2 of Article IV actually says is "The citizens of each State shall be entitled to all privileges and immunities of citizens *in* the several States" (emphasis added). His conclusion is therefore undercut by the text itself once the text is faithfully reproduced.

Unhappily, Justice Miller made the same alteration when misquoting the crucial phrase as found in *Corfield v. Coryell*, 6 F. Cas. 546 (1823). Written by Bushrod Washington, a nephew of George Washington, *Corfield* was viewed as giving the "canonical" definition of "privileges" and "immunities." Brief of Constitutional Law Professors as Amici Curiae at 11, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521).

In expansive language that extends beyond the bounds of State citizenship, Justice Washington wrote:

> The inquiry is, what are the privileges and immunities of citizens *in* the several states?

> We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, *fundamental*; which belong, of right, to the *citizens of all free governments*; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming *free*, independent, and sovereign. What these *fundamental* principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.

Corfield, 6 F. Cas. at 551-52 (emphasis added).

As has been observed to this Court once before in another amicus brief:

> [W]hen Justice Washington in *Corfield* described some of the privileges and immunities of Article IV, § 2, . . . he was describing what were commonly understood to be core fundamental rights. Justice Washington's interpretation informed the public meaning of the text of the Privileges or Immunities Clause in the Fourteenth Amendment. . . .
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> [W]hether in debates over the Fourteenth Amendment or its statutory analogue, the

> Civil Rights Act of 1866, Republicans in Congress affirmed two central points: the Privileges or Immunities Clause would safeguard the substantive liberties set out in the Bill of Rights, and that, in line with *Corfield*, the Clause would give broad protection to substantive liberty, safeguarding all the fundamental rights of citizenship.

Brief of Constitutional Law Professors at 14, 20-21.

However, as noted above, in quoting the case Justice Miller changed *Corfield's* reference to Article IV's "privileges and immunities of citizens *in* the several States" to "privileges and immunities of citizens *of* the several States," echoing and reinforcing his alteration of the text of Article IV when he cited it earlier himself. *Slaughter-House*, 83 U.S. at 76.

"[W]hile *Corfield* had up to that time been generally understood to protect the rights of national citizens, Justice Miller made it appear that it had protected the rights of state citizens by misquoting both Article IV and *Corfield*." Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 Chi.-Kent L. Rev. 627, 636 (1994). He also glossed over the broad terms used in *Corfield's* description of "privileges and immunities," for Justice Washington had declared them to belong "to the citizens of *all free* governments," among whom were not only the citizens of the States from the time the States became "free," 6 F. Cas. at 551, but assuredly also the citizens of the United States once it became an independent, free, and sovereign nation simultaneously with the States.

In his *Slaughter-House* dissent Justice Bradley remarked on the misquotations and on how unduly restricted was the scope of the federal rights that resulted.

> It is pertinent to observe that both the clause of the Constitution referred to, and Justice Washington in his comment on it, speak of the privileges and immunities of citizens *in* a State; not of citizens *of* a State.
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> But even if the Constitution were silent, the fundamental privileges and immunities of citizens, as such, would be no less real and no less inviolable than they now are. It was not necessary to say in words that the citizens of the United States should have and exercise all the privileges of citizens; the privilege of buying, selling, and enjoying property; the privilege of engaging in any lawful employment for a livelihood; . . . . Their very citizenship conferred these privileges, if they did not possess them before. And these privileges they would enjoy whether they were citizens of any State or not.

Slaughter-House, 83 U.S. at 117, 119. *See also Butchers'* Union *Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock & Slaughter-House Co.*, 111 U.S. 746, 764-65 (1884) (Bradley, J., concurring).

Moreover, Justice Miller's majority reading is in conflict with one of the avowed principal reasons for the amendment's very creation. Even some Republicans had harbored doubts about whether Congress possessed the power to pass the crucial

Civil Rights Act of 1866, 14 Stat. 27-30; in addition, they feared that a later Democrat Congress might simply repeal it. Randy E. Barnett, *Three Keys to the Original Meaning of the* Privileges *or Immunities Clause*, 43 Harv. J.L. & Pub. Pol'y 1, 5 (2020). To safeguard the Act from both hazards, the Fourteenth Amendment was written and enacted with an explicit enforcement provision in Section 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). As a further prophylactic measure, the Civil Rights Act was then re-enacted by the Enforcement Act of 1870, 16 Stat. 140, 144, §18, this time on the undisputed constitutional authority granted in the new amendment.

Against this historical background it is appropriate to consider what the 1866 Civil Rights Act says that might be relevant to the "privileges or immunities" clause of the Amendment that was intended as the Act's guarantor of legitimacy.

> [A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, . . . shall have the same right, in every State and Territory in the United States, *to make and enforce contracts*, to sue, be parties, and give evidence, *to inherit, purchase, lease, sell, hold, and convey real and personal property*, and to full and equal benefit of all laws and proceedings for the security of person and *property*, as is enjoyed by white citizens . . . .

Civil Rights Act, §1. The singular prominence given in the Act to economic rights is unmistakable.

> It is generally accepted that the Fourteenth Amendment was designed to constitutionalize these rights so they could not be repealed by a future Congress; to empower the federal courts to enforce these rights; and to empower Congress to enact legislation designed to protect these rights. Indeed, in 1870, Congress reenacted the entire Civil Rights Act after adoption of the Fourteenth Amendment just to be sure.

Randy E. Barnett & Evan D. Bernick, *The Privileges or* Immunities *Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 Notre Dame L. Rev. 499, 505 (2019) (citing Enforcement Act of 1870, 16 Stat. 140, 144, §18). *See also General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 389, 390 (1982) ("Both of these laws [i.e., the Acts of 1866 and of 1870] . . . were legislative cousins of the Fourteenth Amendment; "1866 Act . . . . constituted an initial blueprint of the Fourteenth Amendment"; all three "were all products of the same milieu and were directed against the same evils").

Justice Miller, however, read such rights out of the Fourteenth Amendment, saying that "they have always been held to be the class of rights which the State governments were created to establish and secure," and he confined federal rights, i.e., the rights of U.S. citizens, to those "which owe their existence to the Federal government, its National character, its Constitution, or its laws." *Slaughter-House*, 83 U.S. at 76, 79.

The Court should view the precedential force of its decision in the *Slaughter-House Cases* as slight. The majority failed totally to do justice to the

publicly avowed relationship between the Civil Rights Act of 1866 and the Fourteenth Amendment. *See General Bldg.*, 458 U.S. at 389 (1866 Act "an initial blueprint of the Fourteenth Amendment"). Instead, the majority shrank before the prospect of issuing a decision that might "radically change[] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people." *Slaughter-House*, 83 U.S. at 78. The majority fretted lest "this court [become] a perpetual censor upon all legislation of the States" by issuing a decision that might "fetter and degrade the State governments by subjecting them to the control of Congress." *Id.*

Since then, the Court has shown less timidity in demarcating the relationship between the Federal government and the States.

> Indeed, the principle for which *Slaughter-House* and [*U.S. v.*] *Cruikshank*[, 92 U.S. 542 (1876)], stand—that the personal liberties in the Bill of Rights and other fundamental rights do not limit the states—has been repudiated by the Supreme Court's subsequent "incorporation" of most of the Bill of Rights as a limit on the states, and its protection of unenumerated fundamental rights. In overruling cases such as *Maxwell v. Dow,* 176 U.S. 581 (1900), *Twining v. New Jersey,* 211 U.S. 78 (1908), and *Adamson v. California,* 332 U.S. 46 (1947), the Court has rejected the foundation upon which *Slaughter-House* was built: the idea that the Fourteenth Amendment did not fundamentally change the balance of federal/state power and that Americans should look solely to state

> government for the protection of their most basic rights.

Brief of Constitutional Law Professors at 34.

Also, notwithstanding the decision, on other occasions this Court has placed a very different, and much higher, value on the right to work, bringing it under other forms of constitutional protection, inasmuch as the Court felt bound to skirt around the "privileges or immunities" clause. *See* Petition at 20-21.

Moreover, as we have discussed, Justice Miller, writing for the *Slaughter-House* majority, relied on misquotations of crucial legal texts, as Justice Bradley pointed out to no avail. That surely must count as a fatal flaw in the reasoning of the 1872 Court.

Finally, the *Slaughter-House* decision has elicited a rare uniformity of scholarly opinion convinced of its wrongness. "The reading given to the Privileges or Immunities Clause in *Slaughter-House* and its progeny is contrary to an overwhelming consensus among leading constitutional scholars today, who agree that the opinion is egregiously wrong." Brief of Constitutional Law Professors at 33. "[V]irtually no serious modern scholar—left, right, or center—thinks that it is a plausible reading of the [Fourteenth] Amendment." Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 Pepp. L. Rev. 601, 631 & n.178 (2001).[2]

This Petition presents the Court with an opportune case in which the Court may correct the

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[2] Amicus need not multiply citations on this point. *See* Petition at 26 n. 9 for an ample selection of authorities.

grievous constitutional errors made in the 1872 decision. The foregoing considerations, taken together with the points made in the Petition, demonstrate how sapped of vitality and precedential force the *Slaughter-House* decision is in its view of the scope and content of the Fourteenth Amendment's "privileges or immunities" clause.

> The value of a decision as precedent diminishes when the court issuing it expresses doubt and hesitation or when it has been criticized or disapproved by the same court, by other courts of learning and ability, by well-regarded legal scholars, or by the legal profession generally.

Bryan A. Garner et al., *The Law of Judicial Precedent* 239 (Thompson Reuters 2016).

The 1872 decision checks most, if not all, those boxes. Only this Court may speak authoritatively on the question and finally inter that decision. As Justice Frankfurter observed, "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Id*. at 355.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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