No. _____

In The
Supreme Court of the United States

PHILLIP TRUESDELL, et al.,

Cross-Petitioners,

v.

ERIC FRIEDLANDER, in his official capacity as Secretary of the Kentucky Cabinet for Health and Family Services, et al.,

Cross-Respondents.

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

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether this Court should overrule the *Slaughter-House Cases* and hold that the right to enter a common and lawful occupation is a privilege or immunity protected by the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

Conditional Cross-Petitioners are: Phillip Truesdell and Legacy Medical Transport, LLC.

Conditional Cross-Respondents are: Eric Friedlander, in his official capacity as Secretary of the Kentucky Cabinet for Health and Family Services; Adam Mather, in his official capacity as Inspector General for the Kentucky Cabinet for Health and Family Services; and Carrie Banahan, in her official capacity as Deputy Secretary of the Kentucky Cabinet for Health and Family Services.

First Care Ohio, LLC, f/k/a Patient Transport Services, Inc. was the Intervenor-Defendant below.

CORPORATE DISCLOSURE STATEMENT

Cross petitioners have no parent corporations and no publicly held company owns 10% or more of the stock of the business.

RELATED PROCEEDINGS

The Proceedings in federal district and appellate courts identified below are directly related to the above-captioned case in this Court:

Friedlander, et al. v. Truesdell, et al., No. 23-725, Petition for Writ of Certiorari (U.S. Jan. 5, 2024).

Truesdell, et al. v. Friedlander, et al., U.S. Court of Appeals for the Sixth Circuit, No. 22-5808, judgment entered September 1, 2023, en banc review denied October 5, 2023.

Truesdell, et al. v. Friedlander, et al., U.S. District Court for the Eastern District of Kentucky, No. 3:19-cv-00066-GFVT, opinion and order entered September 9, 2022.

Truesdell, et al. v. Friedlander, et al., U.S. District Court for the Eastern District of Kentucky, No. 3:19-cv-00066-GFVT, opinion and order entered May 3, 2022.

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Phillip Truesdell and Legacy Medical Transport, LLC, respectfully petition this Court for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, if the Court grants the Petition for Writ of Certiorari in *Friedlander, et al v. Truesdell, et al*, No. 23-725.

OPINIONS BELOW

The decision of the Sixth Circuit is published at *Truesdell, et al. v. Friedlander, et al.*, 80 F.4th 762 (6th Cir. 2023), and reproduced at Pet.App.1. The Sixth Circuit's denial of rehearing *en banc* is available at 2023 WL 6932070 and reprinted at Pet.App.75.

The district court's opinion dismissing Plaintiffs' Privileges or Immunities claim is available at 2022 WL 1394545 and reprinted at CrossPet.App.1a.

The district court's opinion dismissing Plaintiffs' Commerce Clause claim is available at 626 F.Supp.3d 957 and reprinted at Pet.App.46.

JURISDICTION

The district court had jurisdiction over this case under 42 U.S.C. § 1983 and 28 U.S.C. § 1331. The district court granted the Defendants' motion to dismiss Plaintiffs' Privileges or Immunities Clause claim on May 3, 2022. It then granted the Defendants' motion for summary judgment on September 9, 2022. On September 1, 2023, a panel of the Sixth Circuit affirmed dismissal of the Privileges or Immunities

Clause claim but reversed the district court on the Commerce Clause claim. Defendants filed a petition for writ of certiorari on January 2, 2024. Cross-Petitioners now file this conditional cross-petition under Rule 12.5. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AT ISSUE

The Fourteenth Amendment to the Constitution provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Relevant statutes are reproduced in the Appendix.

STATEMENT OF THE CASE

Through the state Certificate of Need (Certificate) program, the Kentucky Cabinet of Health and Family Services (the Cabinet) grants local monopolies to incumbent ambulance companies. In doing so, it arbitrarily excludes even the most qualified prospective service providers on the basis that new services are "unneeded." This arbitrary exclusion burdens the right of Ohio entrepreneur Phillip Truesdell to engage in a common and lawful profession in violation of the Privileges or Immunities Clause of the Fourteenth Amendment. The Sixth

Circuit affirmed the district court's ruling that Mr. Truesdell failed to state a claim under the Privileges or Immunities Clause on the sole basis that this Court's decision in *Slaughter-House Cases*, 83 U.S. 36 (1872) (*Slaughter-House*) bars such a claim. Pet.App.10. The Court should take this opportunity to overturn *Slaughter-House* and allow Mr. Truesdell's claim to proceed.

A. Factual Background

1. The Kentucky Certificate Program

Medical transport is a licensed profession in Kentucky. 202 Ky. Admin. Reg. 7:501. But before a person can provide transportation within the state or make certain trips between Kentucky and neighboring states, a prospective licensee must first apply for and receive a Certificate from the Cabinet. Ky. Rev. Stat. §§ 216B.015(13), 216B.061; 202 Ky Admin. Reg. 7:501 § 6.[1] The Certificate process is separate from licensure. If an applicant secures a Certificate, it must then satisfy various health and safety requirements and obtain a license from the Kentucky Board of Emergency Medical Services. 202 Ky. Admin. Reg. 7:501. Mr. Truesdell does not challenge these health and safety regulations.

In contrast, the Certificate program does not evaluate an applicant's qualifications, but instead

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[1] In its Petition, the Cabinet claims that Kentucky passed its Certificate program in 1980 in response to a federal mandate which threatened to withhold reimbursements to states that did not adopt Certificate of Need laws. Pet. at 1. That is wrong. Kentucky adopted its Certificate of Need laws in 1972 prior to the mandate. *See* 1972 Ky. Acts. ch. 149.

rests on a single government official's determination of whether a provider is "needed" in the community. The program *requires* Cabinet hearing officers to deny even the most qualified applicants if they are deemed unneeded. Neither the statute nor the regulations provide any guidance regarding what constitutes "need"; thus, applicants are forced to guess at what evidence Cabinet hearing officers might find persuasive. Pet.App.6-7. To make matters worse, incumbent businesses are invited to participate by filing protests against new businesses—businesses that would compete with them for customers. Pet.App.7. These anticompetitive protests automatically send applicants into an onerous and expensive hearing process akin to a full-blown trial. *Id.* Further, public Cabinet records demonstrate that these protests are essentially determinative. With only two unusual exceptions, every protested application *since 2009* has been denied. Boden Decl. Ex. B, R. 107-12, PageID # 4350-4830.

In its briefing below, the Cabinet raised only one government interest purportedly served by the Certificate program. It contended that the competitor's veto allows tax-subsidized 911 providers to maintain services by excluding competition for more lucrative non-emergency trips and protecting their own revenue. Pet.App.60. However, this argument is entirely disconnected from how the program works on paper and in practice. As written, the Certificate program allows any incumbent—including non-emergency services—to protest any applicant—including 911 services. CrossPet.App.22a. In practice, it allows the foxes to guard the henhouse. Indeed, even the intervenor below is a private, non-

emergency service provider that directly benefits from the Certificate program and seeks to stifle the competition from entrepreneurs like Mr. Truesdell.

2. Condititonal Cross-Petitioners

Phillip Truesdell is an entrepreneur and ambulance business owner. In 2017, Mr. Truesdell spotted an ambulance with a for sale sign on its window. Looking to start a business that would keep his family employed and close to home, he purchased the ambulance and founded a medical transportation company in Aberdeen, Ohio, less than a mile from the Kentucky border. Pet.App.4. He named his business "Legacy," both as a nod to his accomplishments as a "boy from Lewis County raised poor as dirt with a ninth-grade education," and the legacy he sought to leave for his children and "grandbabies." Truesdell Depo., R. 107-1, PageID # 3134.

With its six ambulances, Legacy primarily provides non-emergency transport for people who must travel by ambulance from home or health facilities to medical appointments and back. Pet.App.5. Legacy also provides unscheduled, emergency trips for people who need immediate transportation to urgent care or the hospital. *Id.* Shortly after beginning operations, Mr. Truesdell began to receive several calls for service every week from potential Kentucky customers. *Id.* at 8-9. In response, Mr. Truesdell sought to expand his services and offer transportation to his neighbors across the Ohio River. In 2018, he filed a Certificate application. But after his direct competitors protested, the Cabinet

denied Legacy the opportunity to serve Kentucky patients. *Id.* at 9-10.

B. Legal Background

1. District Court Proceedings

On September 24, 2019, Mr. Truesdell and Legacy filed this civil rights lawsuit under the Commerce Clause as well as the Fourteenth Amendment's Equal Protection, Due Process, and Privileges or Immunities Clauses. On May 2, 2022, the district court granted the Cabinet's motion to dismiss Mr. Truesdell and Legacy's Fourteenth Amendment claims but denied the motion with respect to their Commerce Clause claim. CrossPet.App.1. After discovery, the district court granted the Cabinet's motion for summary judgment on the sole remaining claim. Pet.App.70-71. Mr. Truesdell and Legacy appealed to the Sixth Circuit, raising three issues: (1) whether Plaintiffs properly stated a claim that the Kentucky Certificate program violates the Privileges or Immunities Clause; (2) whether the program violates the Commerce Clause with respect to intrastate ambulance trips; and (3) whether the Certificate program violates the Commerce Clause with respect to interstate trips. Pet.App.10.

2. The Sixth Circuit Decision

On September 1, 2023, the Sixth Circuit affirmed in part and reversed in part. With respect to the Privileges or Immunities Clause, the court affirmed the lower court opinion. It held that Mr. Truesdell's claim was foreclosed by *Slaughter-House* and was therefore properly dismissed. Pet.App.10. Further, in

light of this Court's recent opinion in *Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142 (2023), the Sixth Circuit affirmed the district court that the Commerce Clause does not bar Kentucky's regulation of intrastate ambulance trips. However, it reversed the lower court regarding whether Kentucky's certificate program unconstitutionally bars Legacy from engaging in interstate commerce from Kentucky to Ohio. Pet.App.44.

On October 5, 2023, the Sixth Circuit denied the Cabinet's petition for rehearing *en banc*. Pet.App.75. The Cabinet then filed a petition for writ of certiorari with this Court on January 2, 2024, seeking review of the Sixth Circuit's decision on the Commerce Clause claim. Mr. Truesdell files this conditional cross-petition seeking review of the Sixth Circuit's decision on his Privileges or Immunities Clause claim.

REASONS FOR GRANTING THIS CONDITITONAL CROSS-PETITION

If the Court grants the Cabinet's petition, it should also grant this petition to recognize the right to enter a common and lawful occupation is a "privilege" or "immunity" under the Fourteenth Amendment. This right has a historical pedigree unmatched by nearly any other. *See, e.g.*, *Golden Glow Tanning Salon, Inc. v. Columbus*, 52 F.4th 974, 982 (5th Cir. 2022) (Ho, J., concurring). Yet it was written out of the Privileges or Immunities Clause by *Slaughter-House*. The Fourteenth Amendment's plain text and rich history demonstrate that the Privileges or Immunities Clause protects at least those rights secured by the Civil Rights Act of 1866 and the Privileges and Immunities

Clause as articulated in *Corfield v. Coryell*, 6 Fed. Cas. 546 (E.D. Pa.1823), which includes the right to enter a common and lawful occupation. Thus, this case presents both an issue of national importance and an opportunity to correct *Slaughter-House*'s 150-year-old mistake.

Individuals and entrepreneurs like Mr. Truesdell should not be denied the right to enter a common and lawful occupation simply because entrenched businesses have coopted the power of the state to exclude competition. At minimum, he should have the opportunity to prove that his pursuit of a lawful occupation is a privilege or immunity of federal citizenship. As such, this case is the Court's opportunity to restore the Fourteenth Amendment's original meaning and provide important civil rights with meaningful judicial review.

I. Correcting the *Slaughter-House Cases* Is of the Utmost National Importance

A. *Slaughter-House* Wrongly Stripped the Privileges or Immunities Clause of Much of Its Meaning

To the detriment of millions of workers and entrepreneurs like Mr. Truesdell, *Slaughter-House*'s majority opinion flagrantly undermined the purpose and function of the Privileges or Immunities Clause. Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 Pepp. L. Rev. 601, 631 & n.178 (2001) ("[V]irtually no serious modern scholar—left, right, or center—thinks that [*Slaughter-House*] is a plausible

reading of the [Fourteenth] Amendment.").[2] It stripped U.S. citizens of any meaningful opportunity to vindicate rights protected by the clause and cast civil rights law in the wrong direction. To correct this harmful error, the Court should overturn *Slaughter-House* and clarify that the Privileges or Immunities

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[2] Even where they disagree on the clause's scope, most scholars agree that *Slaughter-House* was wrong. *See, e.g.*, Randy E. Barnett & Evan D. Bernick, *The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit* 22 (2021); Ilan Wurman, *The Second Founding: An Introduction to the Fourteenth Amendment* (2020); Christopher R. Green, *Equal Citizenship, Civil Rights, and the Constitution: The Original Sense of the Privileges or Immunities Clause* (2016); Jack M. Balkin, *Abortion and Original Meaning*, 24 Const. Comment. 291, 313-15, 317-18 (2007); Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J. L. & Liberty 334, 342 (2005); Michael Kent Curtis, *The Bill of Rights and the States: An Overview from One Perspective*, 18 J. Contemp. Legal Issues 3, 20-25 (2009); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, 98 Geo. L.J. 1241, 1244, 1287 (2010); Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process*, 5 N.Y.U. J. L. & Liberty 115 (2010); Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 Ohio State L.J. 1509, 1562-63 (2007); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 22-30 (1980); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 163-230 (1998); Laurence Tribe, *American Constitutional Law* § 7-6 at 1320-31 (2000); Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 Vand. L. Rev. 409, 449 (1990); Ilan Wurman & Robert Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. Rev. 863, 932 (1986); Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases – Freedom: Constitutional Law*, 70 Chi.-Kent L. Rev. 627, 628 n.7 (1994).

Clause protects the right to enter a common and lawful occupation.

In *Slaughter-House*, 83 U.S. 36, butchers challenged a Louisiana law that granted a monopoly over slaughtering in New Orleans to a single corporation. The butchers argued that the law deprived them of their livelihoods in violation of the Privileges or Immunities Clause of the Fourteenth Amendment. *Id.* at 60. Rejecting the butchers' claim, the five-justice majority distinguished between privileges or immunities of state and federal citizenship, ruling that the clause protected only the latter. *Id.* at 74-75. According to Justice Miller, the butchers' reading would have "radically changed the whole of government," *id.*, and thus could not have been the framers' intention. Instead, the clause secured only rights that "owe their existence to the Federal government, its national character, its Constitution, or its laws," like the right to petition the government, to freely access its seaports, and to demand protection abroad. Later in *United States v. Cruikshank*, 92 U.S. 542 (1875), the Court further narrowed those rights by ruling inalienable rights pre-dating the Constitution were unprotected because they did not owe their existence to the federal government.

While the *Slaughter-House* majority relied on the "far reaching consequences" of the butchers' interpretation, the four dissenting justices analyzed the text and purpose of the clause. In his dissent, Justice Field observed that the Fourteenth Amendment made federal citizenship primary; thereby radically changing the relationship between

citizens and their states. 83 U.S. at 95. He further recognized that if the clause only protected rights of a national character, it was redundant to the Supremacy Clause, which already prohibited states from passing laws in conflict with federal law. *Id.* at 96. Justice Field's textual and historical analysis suggested that the Privileges or Immunities Clause protected those rights specified in the first section of the Civil Rights Act of 1866 (which the Fourteenth Amendment was intended to codify), those rights protected by the Privileges *and* Immunities Clause (as elucidated in *Corfield v. Coryell*), and those belonging to "citizens of all free governments," which included "the right to pursue a lawful employment in a lawful manner ...." *Id.* at 98.

In his dissent, Justice Bradley agreed that the clause protected fundamental rights belonging to "citizens of any free government," including "the rights of Englishmen," "which had been wrested from English sovereigns at various periods of the nation's history." *Id.* at 114. Among these rights were those protected by the Bill of Rights and the Privileges and Immunities Clause of Article IV. Tracing the longstanding English opposition to monopolies through English history, Justice Bradley called "the right … to follow whatever employment he chooses to adopt (submitting himself to all lawful regulations)" one of the "most valuable rights." *Id.* at 113-14. "Without this right," no one can "be a freeman." *Id.* While states can "prescribe the manner of [its] exercise … [they] cannot subvert the right[] [itself,]" as Louisiana had by locking a large class of citizens out of the trade completely. *Id.* at 114.

In the final dissent, Justice Swayne responded to the majority's assertion that the dissenters would have rendered the federal government's power "novel and large." *Id.* at 129. "The answer," he wrote, "is that the novelty was known, and the measure deliberately adopted." *Id.* Before the Civil War, "ample protection was given against oppression by the Union, but little was given against wrong and oppression by the States." *Id.* "That want was intended to be supplied" by the Fourteenth Amendment. "Without such authority[,] any government claiming to be national is glaringly defective." *Id.* The majority's interpretation, he said, subverted both the intention and meaning of the clause and turned "what was meant for bread into a stone." *Id.* The dissenters were right.

B. The Right to Enter a Common and Lawful Occupation Is a "Privilege" or "Immunity" Protected by the Fourteenth Amendment

Even before the Founding, the terms "privileges" and "immunities" were used broadly to mean "rights," "liberties," or "freedoms." *See* Amar, *Bill of Rights* at 166-69. Blackstone's *Commentaries* spoke of "those 'immunities' that were the residuum of natural liberties and those 'privileges' that society had provided in lieu of natural rights." In several American colonial charters, the terms are used generically to mean "rights." Eric R. Claeys, *Blackstone's Commentaries and the Privileges or Immunities of United States Citizens: A Modest Tribute to Professor Siegan*, 45 San Diego L. Rev. 777, 788 (2008) (citing charters of Virginia, Carolina, Maryland, and others).

This understanding continued through the framing of the Fourteenth Amendment. *See, e.g.*, N. Webster, *An American Dictionary of the English Language* 1039 (C. Goodrich & N. Porter rev. 1865) (defining "privilege" as "a right or immunity not enjoyed by others or by all" and listing as synonyms: "immunity," "franchise," "right," and "liberty"); *id.* at 661 (defining "immunity" as "[f]reedom from an obligation" or "particular privilege"); *id.* at 1140 (defining "right" as "[p]rivilege or immunity granted by authority"); *see also McDonald v. Chicago*, 561 U.S. 742, 814 (2010) (Thomas, J., concurring) (citing other dictionary definitions); Ohio Const. of 1851 art. I, § 2 (state constitution of Ohio stating that "no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly"); Richard L. Aynes, *Ink Blot or Not? The Meaning of Privileges and/or Immunities*, 11 U. Pa. J. Const. L. 1295, 1312 (2009) (citing other contemporary examples).

Where a more specific right was intended, that specific right was articulated. The Articles of Confederation, for example, referred to the specific privileges of trade and commerce. Articles of Confederation and Perpetual Union, art. IV, § 1. The framers of the Fourteenth Amendment would not have used terms signifying fundamental principles well understood by the public to secure only the truncated list of rights recognized by *Slaughter-House*.

"The mere fact that the Clause does not expressly list the rights it protects does not render it incapable of principled judicial application." *McDonald*, 561

U.S. at 854 (Thomas, J., concurring). The Civil Rights Act and the Privileges and Immunities Clause offer two textual anchors for interpreting the Privileges or Immunities Clause. In the wake of the Civil War, Congress had first attempted to protect substantive rights through the Civil Rights Act of 1866. Randy E. Barnett, *Three Keys to the Original Meaning of the Privileges or Immunities Clause*, 43 Harv. J.L. & Pub. Pol'y 1 (2020). The Act passed, but only after surmounting President Andrew Johnson's veto with a supermajority vote. *Id.* Because Johnson had argued the Act exceeded Congress's power under the Thirteenth Amendment, legislators sought to allay any lingering concerns by writing its protections into the Constitution via the Fourteenth Amendment. Those rights protected by the Civil Rights Act thus provide insight into the substantive rights protected by the Privileges or Immunities Clause. *Id.*

A second textual clue is the Privileges *and* Immunities Clause of Article IV. As Justice Field correctly observed, both clauses use the same terms, which would not have been lost on the framers or the public. Under *Corfield*, the Privileges and Immunities Clause was understood to protect the Bill of Rights and natural fundamental rights which "belong … to the citizens of all free governments."

The congressional debates confirm this understanding of the clause. In a speech articulating the Amendment's meaning, Senator Jacob Howard, the Act's sponsor, said that while the full scope of the privileges or immunities "cannot be fully defined in their entire extent and precise nature," there were at least two places in the text of the Constitution that

informed the definition: the federal Bill of Rights and Article IV's Privileges and Immunities Clause. Cong. Globe, 39th Cong., 1st Sess. 2764-67 (May 23, 1866) (speech of Jacob Howard). He said, "The great object of the first section of this amendment is to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.* Representative John Bingham similarly argued that an Amendment was needed to secure substantive rights given that *Barron v. Baltimore* had ruled the Bill of Rights inapplicable to the states. *Id.* at 1089-90.

History further bolsters this interpretation. The Fourteenth Amendment arose in response to recalcitrance by former slave states, who continued to deprive former slaves their civil rights through the Black Codes even after the Civil War and passage of the Thirteenth Amendment. *See* Barnett, *Three Keys to the Original Meaning of the Privileges or Immunities Clause*, *supra*. It was enacted against a backdrop of rampant discrimination and oppression, including denial of property and contract rights. *See Report of The Joint Committee on Reconstruction* (1866) (detailing violence and deprivation of rights requiring new, substantive protections). The Fourteenth Amendment was meant to secure civil rights, including rights to earn a living through a common and lawful occupation. Its purpose was to make federal citizenship paramount, and to act as a radical bulwark against state infringements on liberty. Thus, *Slaughter-House*'s assertion that the framers could not have intended to "change[] the whole of government" is wrong. Worse still, the majority rendered the clause a "vain and idle

enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage." 83 U.S. at 96 (Field, J., dissenting).

Representative John Bingham, the primary author of Section 1, 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." Cong. Globe, 42nd Cong., 1st Sess. App. 86 (1871) (statement of Rep. Bingham). No reasonable person at the time of the Framing would have understood the Privileges or Immunities Clause to have excluded this right, and yet it is among the least protected in constitutional law today. By narrowing the Privileges or Immunities Clause to rights that "owe their existence to the federal government," *id.* at 79, *Slaughter-House* "strangled the … clause in its crib." *See, e.g.*, Amar, *The Bill of Rights* at 305. As is nearly universally acknowledged, "[t]he Civil War was not fought because States were attacking people on the high seas or blocking access to the Bureau of Engraving and Printing." Tr. of Oral Arg.*, McDonald v. City of Chicago*, 561 U.S. 742 (2010). Rather, it was fought to protect the right of every citizen to speak, to defend oneself, and to earn a living. This case presents an opportunity to restore the ability of Mr. Truesdell and millions of people like him to defend these hard-won rights in court.

C. The Right to Enter a Common and Lawful Occupation Has a Lengthy and Rich History

History and tradition strongly support the right to enter a common and lawful occupation against government monopolies. This is particularly true for centuries-old occupations like the paid transportation at issue here. The right to enter a "known established trade" was "among the most cherished principles in English law." *See* Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207, 209-17 (2003) (collecting cases dating back to the 14th century); Bernard H. Siegan, *Protecting Economic Liberties*, 6 Chap. L. Rev. 43, 51 (2003) (citing common law cases protecting economic rights generally). Blackstone wrote that "[a]t common law, every man [was free to] use what trade he pleased." 1 *Commentaries* at 427. The English had a "hatred of monopolies," Steven G. Calabresi, et al., *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J.L. & Pub. Pol'y 983, 989 (2013), which included exclusive grants to individual providers and favored groups such as guilds. *See, e.g.*, *The Tailors of Ipswich Case*, 77 Eng. Rep. 1218, 1219 (K.B. 1614) (Coke, C.J.).

In *Darcy v. Allen*, 77 Eng. Rep. 1260 (K.B. 1602), the English common law court struck down a royal grant to produce and sell trading cards. Sir Edward Coke's account notes that "all grants of monopolies are against the ancient and fundamentall laws of this kingdome," because "a mans trade is accounted his life, because it maintaineth his life; and therefore the monopolist that taketh away a mans trade, taketh away his life." Edward Coke, *The Third Part of The*

Institutes of The Laws of England 181 (1669). Like Coke, the Founders were suspicious of laws that excluded individuals from their desired trade and deprived them of a living, especially at the behest of established businesses.

James Madison wrote, it

> "is not a just government … where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called."

James Madison, *Property* (Mar. 29, 1792), *in* 14 *The Papers of James Madison* (William T. Hutchinson et al. ed. 1987). In a letter to Madison, Thomas Jefferson disapproved the proposed Constitution's omission of "a Bill of rights providing clearly … for freedom of religion, freedom of the press, protection against standing armies, *restriction against monopolies*, the eternal and unremitting force of the habeas corpus laws, and trials by jury." Letter from Jefferson to Madison (Dec. 20, 1787), *in* 12 *The Papers of Thomas Jefferson* 438, 440 (J. Boyd ed. 1955) (emphasis added).[3] Six of the ratifying states recommended an explicit prohibition on monopolies. Calabresi, *supra*, at 1013-15. For comparison, just four demanded

[3] Jefferson repeated his desire for a prohibition on monopolies in letters to Madison in 1788 and in 1789. *See* Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 Emory L.J. 785, 800 n.72 (1982).

express protections for due process of law, speedy and public trials, and the right to assemble and petition the government. *See* Conant, *supra*, at 800.

It is true that *Slaughter-House* upheld a monopoly. But in doing so, the Court didn't deny the long history of anti-monopoly common law or the existence of a right to enter a lawful trade. It held only that the right was not protected by the Privileges or Immunities Clause. After *Slaughter-House*, this Court continued to recognize the right to enter a common occupation under the Due Process and Equal Protection Clauses. *See, e.g.*, *Powell v. Pennsylvania*, 127 U.S. 678, 684 (1888) ("enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade ... is an essential part of his rights of liberty and property as guarantied by the fourteenth amendment"); *Dent v. West Virginia*, 129 U.S. 114, 121 (1889) (referring to the "right of every citizen of the United States to follow any lawful calling, business, or profession he may choose"); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (the Fourteenth Amendment encompasses "the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned"); *Truax v. Raich*, 239 U.S. 33, 41 (1915) ("[T]he right to work for a living" is "the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."); *Meyer v.*

Nebraska, 262 U.S. 390, 399 (1923) (The Fourteenth Amendment includes "the right of the individual to contract, to engage in any of the common occupations of life … and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.").

It wasn't until the New Deal that the right to enter a trade, at one time the "distinguishing feature of our republican institutions," *Dent*, 129 U.S. at 121, was pushed aside, first with *Nebbia v. New York*, 291 U.S. 502 (1934), which reduced the standard of review, then *United States v. Carolene Products*, 304 U.S. 144, 150 n.4 (1938), which created tiers of judicial scrutiny that relegated economic freedom to the lowest level of protection. The consequence has been a legal regime that harms the vulnerable individuals and groups it purports to protect, since they no longer have effective judicial redress against rent-seeking by politically powerful groups.

The right to enter a lawful and common occupation arguably has more of a historical pedigree than other unenumerated rights this Court has deemed fundamental, including the right to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to refuse unwanted lifesaving medical treatment, *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990); to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535 (1942); to direct the upbringing of one's child, *Troxel v. Granville*, 530 U.S. 57 (2000); or to travel, *Saenz v. Roe*, 526 U.S. 489 (1999). It combines many fundamental rights, like the

right over one's labor and the right to equal treatment under law. And it is a prerequisite to the exercise of most other rights, since a livelihood is required to exercise the right to travel, speak, acquire property, and many others. As this Court has written, the ability to deprive individuals "the opportunity of earning a livelihood" is "tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases[,] [people] cannot live where they cannot work." *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 416 (1948).

As one Congressman said during the debates over the Fourteenth Amendment,

> it is idle to say that a citizen shall have the right to life, yet to deny him the right to labor, whereby alone he can live. It is a mockery to say that a citizen may have a right to live, and yet deny him the right to make a contract to secure the privilege and rewards of labor.

Cong. Globe, 39th Cong., 1st Sess. 1833 (1866) (statement of William Lawrence).

Given its rich history and fundamental nature, jurists have called on this Court to reconsider its treatment of the right to enter a common occupation. For example, Judge Sutton of the Sixth Circuit recently remarked that:

> Many thoughtful commentators, scholars, and judges have shown that the current deferential approach to economic regulations may amount to an

> overcorrection in response to the *Lochner* era at the expense of otherwise constitutionally secured rights.

Tiwari v. Friedlander, 26 F.4th 355, 368-69 (6th Cir. 2022) (citations omitted). In a spirited concurrence, Judges Janice Rogers Brown and David Sentelle of the Court of Appeals for the District of Columbia lamented that:

> The practical effect of rational basis review of economic regulation is the absence of any check on the group interests that all too often control the democratic process. It allows the legislature free rein to subjugate the common good and individual liberty to the electoral calculus of politicians, the whim of majorities, or the self-interest of factions.

Hettinga v. United States, 677 F.3d 471, 482 (D.C. Cir. 2012) (Brown, J., concurring). She concluded "[r]ational basis review means property is at the mercy of the pillagers. The constitutional guarantee of liberty deserves more respect—a lot more." *Id.* at 483.

This case presents a sound opportunity to overturn *Slaughter-House* because it does not involve mere regulation of an occupation, but rather a law that, at the behest of local incumbents, arbitrarily excludes people from even applying for a license to enter a lawful calling. It does not implicate run-of-the-mill health or safety regulations or an abstract right to "economic liberty." Instead, it implicates the right not to be excluded from a lawful occupation for reasons

wholly unrelated to one's qualifications. States can impose health or safety requirements on occupations, including licensure and minimum safety protocols. However, monopolistic schemes that exclude individuals from a lawful occupation for reasons other than fitness to provide service should be accorded meaningful judicial scrutiny under the Privileges or Immunities Clause.

CONCLUSION

If the government's petition is granted, so too should this Conditional Cross-Petition be granted.

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Respectfully submitted,

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