

No. 23-844

**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**

**BRIEF IN OPPOSITION TO
CONDITIONAL CROSS-PETITION
FOR A WRIT OF CERTIORARI**

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**COUNTERSTATEMENT OF
THE QUESTION PRESENTED**

The actual question presented by the Conditional Cross-Petition is whether Phillip Truesdell possesses standing to assert a violation of the Privileges and Immunities Clause under the facts of this case.

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JURISDICTIONAL STATEMENT

The Court lacks subject matter jurisdiction to grant the Conditional Cross-Petition because Phillip Truesdell lacks standing to assert a violation of Section One of the Fourteenth Amendment, and Legacy Medical Transport is not entitled to the protection of the Privileges and Immunities Clause and thus does not have standing to assert a violation of that provision.



INTRODUCTION

This case arises from an application by Legacy Medical Transport, LLC (“Legacy”) to perform ambulance services under the Commonwealth of Kentucky’s Certificate of Need (“CON”) program. Phillip Truesdell and Legacy, as Cross-Petitioners, request that this Court, if it grants Cross-Respondents’ Petition for a Writ of Certiorari, Case No. 23-725, accept this Conditional Cross-Petition and overturn over 150 years of United States jurisprudence found in the *Slaughter-House* cases and its progeny. As a preliminary matter, this Court should deny the Conditional Cross-Petition because Phillip Truesdell does not have standing under the facts of this case to assert such a claim. Additionally, Legacy, an incorporated entity, cannot assert a violation of the Privileges and Immunities Clause of Section One of the Fourteenth Amendment.



COUNTERSTATEMENT OF THE CASE

In 1974, Congress enacted Public Law 93-641, the National Health Planning and Resources Development Act. The law conditioned the continued receipt of federal health care funding on a state creating and administering a certificate of need program within its jurisdiction. In 1980, the Commonwealth of Kentucky dutifully complied and promulgated its CON program, a comprehensive statutory framework to satisfy the federal mandate.¹ Although Congress ultimately rescinded the federal mandate, it did not force the states to abandon the CON programs. As a result, the CON program has served as a fundamental component of healthcare policy in the Commonwealth for more than 40 years with modifications as appropriate.

To open a ground ambulance transport service, a person must submit an application to the Kentucky Cabinet for Health and Family Services (“Cabinet”) demonstrating that its proposed services “shall meet an identified need in a defined geographic area and be

¹ Cross-Petitioners claim the Commonwealth’s CON program originated in 1972, not 1980. *Conditional Cross-Petition*, p. 3 n.1. This is incorrect. While the Commonwealth did experiment with a Certificate of Need program with the passage of the 1972 Act, in 1980 the Kentucky General Assembly repealed the 1972 scheme in full and replaced it with a Certificate of Need program designed to comply with the federal mandate. *See* 1980 Ky. Acts ch. 135, § 35. Importantly, the General Assembly confirmed its intent, stating: “The general assembly further finds that a certificate of need law is required under the provisions of the national health planning resource development act of 1974, P.L. 93-641 as amended, as a condition for the receipt of federal funds.” 1980 Ky. Acts ch. 135, § 1.

accessible to all residents of the area.” Ky. Rev. Stat. § 216B.040 (2)(a)(2)(b). Affected Persons – including patients, residents and existing health facilities within the geographic area; the Cabinet; and third-party payors – may request a hearing and present evidence relevant to the application. *See* Ky. Rev. Stat. § 216B.085. A Cabinet hearing officer conducts the hearing and determines whether to issue the certificate of need based on statutory criteria. Ky. Rev. Stat. § 216B.040 (2)(a)(2)(a-e); 900 Ky. Admin. Reg. 6:090.² Unsuccessful applicants may appeal for comprehensive judicial review of the Cabinet’s final decision. Ky. Rev. Stat. § 216B.115. A successful applicant must then acquire a license from the Kentucky Board of Emergency Medical Services. 202 Ky. Admin. Reg. 7:501.

Legacy Medical Transport, LLC (“Legacy”) is a non-emergency ambulance provider based in Ohio owned by Phillip Truesdell. In 2018, Legacy applied for a CON to perform non-emergency basic life support runs in several rural Kentucky counties near the

² Cross-Petitioners claim “the Certificate program does not evaluate an applicant’s qualifications, but instead rests on a single government official’s determination of whether a provider is ‘needed’ in the community.” *Conditional Cross-Petition*, pp. 3-4. This is incorrect. An application is evaluated based on clearly established statutory criteria. Ky. Rev. Stat. § 216B.040 (2)(a)(2)(a)-(e). One criteria – under the heading “Quality of services” – requires consideration of whether the applicant is “prepared to and capable of undertaking and carrying out the responsibilities involved in the proposal in a manner consistent with appropriate standards and requirements assuring the provision of quality health care services, as established by the cabinet.” Ky. Rev. Stat. § 216B.040 (2)(a)(2)(e).

border with Ohio.³ Legacy never intended for its application to be granted. The company left entire portions of the CON application incomplete and very likely cannot meet the requirements for a license. Unsurprisingly, the hearing officer correctly denied the application after a public hearing, and Legacy did not appeal.

Soon after, Truesdell and Legacy filed a Complaint for Declaratory and Injunctive Relief against several Cabinet officials, asking the federal judiciary to discard a 40-year-old law in favor of their uncompromising economic theories. First Care Ohio, LLC, an Ohio-based ground ambulance company that obtained a CON and license to operate in Northern Kentucky, was granted permission to intervene as a Defendant. In their Second Amended Complaint, Truesdell and Legacy alleged that two components of the Commonwealth's CON program – the substantive requirement to show a “need” for additional services and the procedural rule allowing “affected persons” to participate in

³ Cross-Petitioners state, “In 2018, he [Mr. Truesdell] filed a Certificate application. But after his direct competitors protested, the Cabinet denied Legacy the opportunity to serve Kentucky patients.” *Conditional Cross-Petition*, p. 6. This statement is misleading. To be clear, Legacy Medical Transport filed an application. Further, despite Cross-Petitioners’ insistence on a causal link between the protest and the denial, even a cursory review of the Cabinet’s Final Order leads to the inescapable conclusion the Cabinet denied Legacy’s application because it refused to complete the application even when staff from the Division of Certificate of Need made multiple attempts to provide assistance.

the application process – violated various provisions of the Constitution.

Specific to this Conditional Cross-Petition, the pair alleged the law arbitrarily “interfere[s] with Plaintiff Truesdell’s constitutional right to earn a living in a lawful occupation in violation of the Privileges or Immunities Clause” of the Fourteenth Amendment. *Second Amended Complaint*, 18. The District Court dismissed this claim on the pleadings because it is foreclosed by this Court’s ruling in the *Slaughter-House Cases*, 83 U.S. 36 (1872). *Truesdell v. Friedlander*, 2022 WL 1394545, at *7 (E.D. Ky. May 3, 2022) (unpublished). In a single paragraph, the Sixth Circuit Court of Appeals affirmed. *Truesdell v. Friedlander*, 80 F.4th 762, 767-768 (6th Cir. 2023).

Cross-Respondents filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6), asserting that Cross-Petitioners lacked standing as to any of their claims. The District Court denied the motion. The order did not specifically address Mr. Truesdell or the issue posed by this brief in opposition. By the time Cross-Respondents renewed the standing argument in a motion for summary judgment, the District Court had already dismissed the claim at issue, rendering the standing issue moot.



REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

I. Cross-Petitioners Attempt to Circumvent This Court's Ruling in *Orient Ins. Co. v. Daggs*, 172 U.S. 577 (1899).

In 1899, this Court ruled corporations are not entitled to the protection of Section One of the Fourteenth Amendment because “[a] corporation is not a citizen, within the meaning of the provision, and hence has not ‘privileges and immunities’ secured to ‘citizens’ against state legislation.” *Orient Ins. Co. v. Daggs*, 172 U.S. 557, 561 (1899). The Court has reaffirmed this holding on every possible occasion. *See, e.g., Liberty Warehouse Co. v. Burley Tobacco Growers’ Co-op Marketing Association*, 276 U.S. 71 (1928); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Hague v. Committee for Indus. Organization*, 307 U.S. 496 (1939). Sensibly, this Court applies the same prohibition to the rights guaranteed to citizens under the Privileges and Immunities Clause found in Article IV, Section 2. *See, e.g., Waters-Pierce Oil Co. v. State of Texas*, 177 U.S. 28 (1900); *Hemphill v. Orloff*, 277 U.S. 537, 579 (1928) (“A corporation is not a mere collection of individuals capable of claiming all benefits assured them by section 2, article 4, of the Constitution.”); *Bank of Augusta v. Earle*, 38 U.S. 519, 586-587 (1839) (A corporation cannot claim “the rights which belong to its members as citizens of a state.”).

Understandably, Cross-Petitioners Legacy, a ground ambulance service, and Phillip Truesdell, its owner, do not ask this Court to overrule *Orient Ins. Co.*

and declare artificial entities “citizens” under the United States Constitution. Instead, Cross-Petitioners ask this Court to vindicate a constitutional right ostensibly held by Mr. Truesdell.

However, such a ruling would have no discernible impact under the circumstances outlined by Cross-Petitioners. Mr. Truesdell did not apply for a Certificate of Need under the challenged program. Mr. Truesdell does not provide ambulance services or even own an ambulance. There is nothing in the record indicating a successful result in this case – vindication of his alleged constitutional “right to earn a living” – would cause Mr. Truesdell to apply for a license or otherwise attempt to provide ambulance services in the Commonwealth. Rather, it was Legacy, the incorporated entity, that submitted the application for a CON and Legacy who will apply for a license in the Commonwealth upon a successful result. If anything, the proposed “right to earn a living” will be exercised by Legacy, not Truesdell. Cross-Petitioners ask this court to circumvent *Orient Ins. Co.* to bestow the benefit of a constitutional provision on an artificial entity not entitled to its protection.

II. This Case is a Flawed Vehicle to Examine *Slaughter-House* Because Philip Truesdell Does Not Have Standing to Assert a Violation of The Privileges and Immunities Clause.

The inescapable corollary is that any injury inflicted by the challenged program was suffered by

Legacy, not Truesdell. Because Legacy is a legal entity distinct from Mr. Truesdell, Mr. Truesdell has not suffered an injury at all. As a result, Mr. Truesdell does not enjoy standing to assert a violation of the Fourteenth Amendment.

Article III, Section 2 of the Constitution limits the authority of Federal Courts to resolving cases and controversies. “To state a case or controversy under Article III, a plaintiff must establish standing.” *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011). The “irreducible constitutional minimum of standing consists of three elements.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). The plaintiff must have (1) suffered an injury in fact; (2) that is fairly traceable to the challenged conduct of the defendant; and (3) that is likely to be “redressed by a favorable judicial decision.” *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal punctuation omitted)). None of these elements are present here.

“To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical.” *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal punctuation omitted)). Here, Legacy Medical Transport, LLC is a distinct legal entity from Mr. Truesdell. Legacy provides ambulance services in southern Ohio. Legacy sought to expand into northern Kentucky. Legacy would incur fines if it operated in Kentucky without a certificate of need, and Legacy applied for a certificate of need under the

challenged law. The Commonwealth denied Legacy its certificate of need. Legacy will apply for a license upon a favorable result in this case. Mr. Truesdell, on the other hand, did nothing and will do nothing. Mr. Truesdell does not provide ambulance services or own an ambulance. Nor did he submit an application for a certificate of need. He will not incur any fines or be subject to any other punishment. There is no possibility Mr. Truesdell will ever seek to provide ambulance services or apply for a license. Even the suggestion he might would be absurd for the very reasons Mr. Truesdell opted to organize his business as a limited liability entity.

In short, Mr. Truesdell cannot demonstrate the law caused him an injury. The CON program undoubtedly limits Legacy from providing healthcare services inside the Commonwealth. But this injury is not particularized to Truesdell and does not affect him “in a personal and individual way.” *Spokeo, Inc. v Robins*, 578 U.S. 330, 339 (2016). Rather, it affects Legacy. Likewise, any harm to Truesdell is merely hypothetical, not concrete. Mr. Truesdell is attempting to assert a right to remedy the alleged harm caused to a separate and distinct legal entity. As a result, he does not possess standing and this Court does not have subject matter jurisdiction under Article III.



CONCLUSION

This Court should grant Cross-Respondents' Petition for a Writ of Certiorari in Case No. 23-725, and, for the aforementioned reasons, Cross-Petitioners' Conditional Cross-Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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