

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**

—◆—
**Reply in Support of Conditional Cross-Petition
for Writ of Certiorari**

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Legacy Medical Transport, LLC (Legacy) and Phillip Truesdell—an Ohio ambulance company and its *sole* owner—wish to provide ground transportation services in Kentucky. R. 63 ¶ 1. Legacy applied for legal authority to seek licensure in the state, known as Certificate of Need (CON), but it was denied under a process that violates Mr. Truesdell’s right to earn a living under the Privileges or Immunities Clause of the Fourteenth Amendment. *Id.* ¶ 102–05. Accordingly, he filed this lawsuit challenging provisions of the program. *Id.* The district court below dismissed Mr. Truesdell’s claim as foreclosed by this Court’s decision in *Slaughter-House Cases*, 83 U.S. 36 (1872). CrossPet.App.20a–21a. The Sixth Circuit affirmed on identical grounds. Pet.App.10. Legacy and Mr. Truesdell filed a conditional cross-petition for writ of certiorari requesting this Court’s conditional review of the Sixth Circuit’s decision on the Privileges or Immunities claim.

In its response, the Cabinet fails to address any of the reasons provided in the conditional cross-petition for the Court to grant review. Instead, it argues that the Court has no jurisdiction to consider Mr. Truesdell’s petition because he lacks standing to raise a claim under the Privileges or Immunity clause. BIO 8–9. The Cabinet is plainly wrong. The CON Program directly injures Mr. Truesdell by preventing him from expanding his business into the Northern Kentucky market.

For the reasons provided in Legacy and Mr. Truesdell’s conditional cross-petition for writ of certiorari, the Court should grant the petition if it also

grants the Cabinet’s petition (*Friedlander, et al v. Truesdell, et al*, No. 23-725).

I. The Court Has Jurisdiction over Mr. Truesdell’s Privileges and Immunities Clause Claim

In its opposition brief, the Cabinet argues that Mr. Truesdell and Legacy are attempting to circumvent this Court’s precedent in *Orient Ins. Co. v. Daggs*, 172 U.S. 557 (1899) and subsequent cases which held the “privileges” and “immunities” protected by the Fourteenth Amendment belong only to natural persons who are citizens of the United States. BIO at 6. However, *Orient* and its progeny are not relevant to this case. Here, a corporation is not attempting to assert the constitutional rights of its various members. Rather, Mr. Truesdell, an American citizen and the sole owner of Legacy, has asserted *his own* right to the protections enshrined in the Fourteenth Amendment. *See, e.g.*, Cond. X-Pet. at 7–8 (“Mr. Truesdell files this conditional cross-petition seeking review of the Sixth Circuit’s decision on his Privileges or Immunities Clause claim.”). He plainly has standing to assert this claim and this Court has jurisdiction to review it.

Mr. Truesdell satisfies all the elements for standing. *See generally Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (establishing three elements for the standing analysis: injury-in-fact, redressability, and traceability)¹. The Cabinet argues that

¹ In its opposition brief, the Cabinet manufactures a fourth standing element for plaintiffs alleging a violation of the

Mr. Truesdell fails all three elements of standing because Legacy, not Mr. Truesdell, is the object of the challenged regulations. This argument is wrong. As is clear from the discussion below, Mr. Truesdell easily meets all three elements of the standing analysis, and this Court has jurisdiction to hear his conditional-cross petition.

A. Mr. Truesdell has alleged a concrete and particularized injury

The Cabinet argues that that Mr. Truesdell has not suffered any injury because he is not an ambulance service regulated by the CON program. BIO at 7–8. It argues that only Legacy—a business Mr. Truesdell solely owns—is injured by the CON program. *Id.* at 8. This is wrong both factually and legally.

Mr. Truesdell is suffering a concrete economic injury sufficient to confer standing. *See Tyler v. Hennepin Cnty., Minnesota*, 598 U.S. 631 (2023) (financial injury is a “classic pocketbook injury sufficient to give [the plaintiff] standing”). Mr. Truesdell is the sole owner of Legacy. R. 63 at ¶ 2. He is financially responsible for the company and directly invests in operating and expanding the business. R. 63 at ¶ 54–55, 104. As the sole owner, when the company does well, he receives a monetary

Privileges or Immunities Clause—the plaintiff must not simply be injured, he must also be the object of the regulation himself. BIO 8–9. The Cabinet invented this element and cites no legal support for it.

benefit. When the company does poorly, Mr. Truesdell suffers financially.

Mr. Truesdell is willing and able to expand his business into Northern Kentucky and would take every necessary step to do so in the absence of the CON program. R. 63 at ¶ 7, 14, 60. Because the challenged program prevents him from expanding his business and reaping the financial benefits of doing so, it is the direct cause of injury to Mr. Truesdell's right to earn a living—a right that is protected by the Privileges or Immunities Clause. He has been affected “in a personal and individual way” as Article III requires. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016).

The Cabinet argues that Mr. Truesdell is not injured by the CON program, because he “did nothing and will do nothing.” However, as the sole owner of Legacy, Mr. Truesdell is and was responsible for Legacy's CON application. In fact, Mr. Truesdell is the person who signed the prior CON application. Truesdell Depo., R. 107-1 at 48:13–20. As the sole owner of the company, Mr. Truesdell is directly affected when the CON program interferes with his ability to run the business and make a living.

Additionally, Mr. Truesdell would face consequences for failing to follow the CON program's requirements. The program explicitly provides that any person operating a health facility without first acquiring a CON will be fined. KRS 216B.990(2) (“Any person who, in willful violation of this chapter...establishes a health facility...without first obtaining a [Certificate]...shall be fined...”). This is in

addition to fines that may be levied against facilities themselves under the same statute. *Id.* at 3, 7–8. As the Cabinet recognizes, the CON program, “undoubtedly limits Legacy from providing healthcare services inside the Commonwealth.” BIO at 9. As the sole owner of Legacy, it “undoubtedly limits” Mr. Truesdell in the same way.

**B. Mr. Truesdell’s injury is traceable
to the Cabinet and redressable by a
favorable ruling issued by
the Court**

Because the CON program directly injures Mr. Truesdell by restricting his ability to make a living by operating his business, a favorable decision enjoining the program’s enforcement would directly redress Mr. Truesdell’s injury. Such a decision would allow Mr. Truesdell to apply for a CON in the future without having to satisfy the onerous, expensive, and unconstitutional provisions challenged here. Thus, his injury is redressable. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 260–64 (1977) (the removal of one obstacle to the exercise of one’s rights is sufficient to show redressability); *Bruner v. Zawacki*, 997 F.Supp.2d 691, 697 (E.D. Ky. 2014) (“A favorable decision by this Court would redress the injury...because the unconstitutional obstacle would be removed from their path to operate...in the Commonwealth.”). The Cabinet is responsible for enforcing the CON program; thus, the injury caused by enforcement of the CON program is traceable to it.

CONCLUSION

If the government's petition is granted, so too should Mr. Truesdell's conditional cross-petition.

DATED: March 2024.

Respectfully submitted,

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