No. 20-1735

IN THE

Supreme Court of the United States

ANGEL MANUEL ORTIZ-DIAZ, ET AL.,

PETITIONERS,

V.

UNITED STATES, ET AL.,

RESPONDENTS.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the First Circuit

BRIEF OF THE LIBERTY JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

The Liberty Justice Center (LJC) is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. LJC pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on governmental power and protections for individual rights, most notably in its Supreme Court victory in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018).

As part of its mission to defend fundamental rights, LJC works to protect the American system of federalism and to ensure that Congress not surpass the limits of its constitutional authority. To that end, LJC is currently litigating *National Horsemen's Benevolent and Protective Association v. Black*, 5:21-cv-00071-H, (N.D. Tex.), a challenge under the nondelegation doctrine and *Joyner v. Vilsack*, 1:21-cv-01089-STA-jay, (W.D. Tenn.), a challenge under the Equal Protection clause.

SUMMARY OF ARGUMENT & INTRODUCTION

To justify a "sharp break with the long-standing pattern of federal legislation," Congress needs new legis-

[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than Amicus funded its preparation or submission. Counsel for both Petitioner and Respondent received notice more than 10 days before its filing that Amicus intended to file this brief, and both consented to its filing.

lative findings to support its updated cockfighting prohibition. *U.S. v. Lopez*, 514 U.S. 549, 563 (1995). In 1976, Congress passed the Animal Welfare Act, which did not punish intrastate cockfighting in states where the practice was already permitted. This allowed Puerto Rico along with thirty continental states to continue the practice in America. A federal violation occurred only if the animal was moved in interstate or foreign commerce. 2017 7 U.S.C. §2156(a)(3). Defenders of this Act argued its constitutionality because purely intrastate activities complying with local legislation were exempted; a violation of federal law was dependent on the transportation of animals and equipment in interstate commerce. 122 Cong. Rec. S5096 (Apr. 7, 1976).

In 2018, Congress passed the Agriculture Improvement Act, which amended the 1976 Animal Welfare Act. The amended provision removed any applicability of prior arguments that Congress had the ability to impose regulations reaching such an activity due to its interstate component. The new Act criminalized intrastate cockfighting, even where local law permitted it, by eliminating the requirement that the animal be moved in interstate or foreign commerce. It is now a crime regardless of whether the person, bird, or anything else travelled across state lines. 7 U.S.C. §2156(a). The *Lopez* Court's emphasis of the need for a jurisdictional hook makes the elimination of such a hook a sufficiently "sharp break" from prior legislation to require new findings.

The First Circuit incorrectly held that the Agriculture Improvement Act was an extension of the existing ban to Puerto Rico rather than a creation of an entirely

new restriction. This ruling improperly enables Congress to rely on 45-year-old findings when drafting current legislation. While the First Circuit integrated the already insufficiently scarce legislative findings of the Animal Welfare Act to support the Agriculture Improvement Act, neither Act's legislative findings pass constitutional muster when evaluated under the applicable standard. Neither the Agriculture Improvement Act nor the Animal Welfare Act contained express congressional findings regarding the effects upon interstate commerce of cockfighting in Puerto Rico to support the use of Congress' commerce power. Instead, the regulation of cockfighting should be properly understood as a police power left to the states or territories.

ARGUMENT

I. The First Circuit Court ignored established precedent set forth in *Lopez* by improperly relying on outdated findings to support new legislation.

There are three categories of activity that Congress may regulate under the Commerce Clause: "the use of channels of interstate commerce," "the instrumentalities of interstate commerce," and "those activities that substantially affect interstate commerce." *United States v. Lopez,* 514 U.S. 549, 558-59 (1995). This case concerns the third.

While Congress is normally not required to make formal findings as to the substantial burdens an activity has on interstate commerce, this Court has indicated that where the regulated activity is not specifically

economic and the legislation does not contain a jurisdictional hook, such findings would enable the Court to evaluate Congress' legislative judgment that the regulated activity substantially affects interstate commerce. *United States v. Lopez*, 514 U.S. 549, 562-63 (1995). *See U.S. v. Jenkins*, 909 F. Supp.2d 758 (E.D. Ky. 2012); and *U.S. v. Robinson,* 119 F.3d 1205 (5th Cir., 1997) (stating that "if the statute, the congressional findings, and the legislative history provides no rational basis for concluding that the regulated activity has the required nexus to interstate commerce, the statute must fail."). "Congress' power under the Commerce Clause is at least presumptively limited to regulating economic activities and promulgating regulations that include a jurisdictional element." *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820, 848 (4th Cir. 1999)

> "Though congressional findings can clarify the factual relationship that exists between conduct that a statute seeks to regulate and interstate commerce, a court cannot sustain a statute solely on the strength of a congressional finding or a formal legislative record as to that factual relationship; instead, a court must undertake an independent evaluation to determine whether, as a legal matter, the substantially affects test is satisfied."

Id.

The First Circuit's importation of these previous findings to justify the Agriculture Improvement Act was especially inappropriate because "the prior federal enactments . . . do not speak to the subject matter of [the

new law] or its relationship to interstate commerce." *Lopez*, 514 U.S. at 563. Updated findings would support the claim that intrastate cockfighting, "substantially affect[s] interstate commerce, even though no such substantial effect [is] visible to the naked eye." *Id.*

Prior congressional enactments, in particular the legislative history of the Violence Against Women Act (VAWA), illustrate the failure of both the Animal Welfare Act's and the Agriculture Improvement Act's legislative history. Prior to the passage of the VAWA, Congress extensively researched the effects of the violence on interstate commerce, leading to its conclusion that this violence restricts interstate movement, reduces job opportunities, increases health care costs, and diminishes spending, all of which affect the national economy and burden interstate commerce. S. Rep. No. 103-138, at 54 (1993).

While the lack of any such explicit congressional findings indicates the absence of in-depth research conducted regarding the connection between cockfighting and interstate commerce, this lack did not stop the First Circuit from finding what it considered to be the existence of sufficient information to inform Congress' decision to legislate. Further in error, the First Circuit, while holding that the new legislation could be based on findings supporting a 40-year-old legal ancestor, relied heavily on the Fourth Circuit's declaration in *United States v. Gibert,* 677 F.3d 613 (4th Cir. 2012) that the information presented to Congress was sufficient to constitute the necessary congressional findings on such a connection.

The Fourth Circuit found that the economic aspects of cockfighting are evident from statements to Congress made by Jerry Leber, the President of the United Gamefowl Breeders Association (UGBA). *Gibert*, 677 F.3d at 625. Leber testified before Congress in 2007 that the game fowl industry generated "billions of dollars" in annual revenue before Congress' amendment in 1976 and that the value of the game fowl industry remained in the billions annually. *See Native American Methamphetamine Enforcement and Treatment Act of 2007, the Animal Fighting Prohibition Enforcement Act of 2007, and the Preventing Harassment through Outbound Number Enforcement (PHONE) Act of 2007: Hearing on H.R. 545, H.R. 137, and H.R. 740 Before the Sub-comm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 57 (2007). While these statements do purport a relationship between cockfighting and interstate commerce, the statements could not have informed Congress' original act as they were made to Congress thirty-two years after the initial legislation had been enacted. Therefore, Congress in 2018 could not have relied on the congressional findings which supported the prior 1976 legislation because no such prior congressional findings existed. None existed because none were necessary when the act affected only interstate cockfighting.

When viewing the 2018 legislation, further problematic timing issues arise with the First Circuit's reliance on the Fourth Circuit's opinion. Findings found decades prior to the 2018 legislation in support of the 1976 legislation are ineligible to form the basis of the Agriculture Improvement Act of 2018. The Fourth Circuit issued its opinion ten years prior to the 2018

legislation. Therefore, this was a "sharp break with the long-standing pattern of federal [cockfighting] legislation," requiring Congress to obtain new legislative findings to justify its act. *Lopez*, 514 U.S. at 563.

The legislative history regarding the provision of the Agricultural Improvement Act at issue is limited. But the available history confirms that Congress banned the practice because legislators deemed it morally wrong and wished to end the cruelty of animal fighting and protect communities from associated crimes, all of which are objectives traditionally left to the states. 7 U.S.C. §2156.

When the Agriculture Adjustment legislation was introduced in the House on April 12, 2018, it made no mention of a change to the existing cockfighting regulation. This amendment was added on May 18, 2018, when it was agreed to after only a ten-minute debate. 164 Cong. Rec. H. 4213, 4221-23 (May 18, 2018). A mere ten minutes was not enough time to thoroughly evaluate the effects of cockfighting on interstate commerce to the extent necessary to deem that a substantial relationship exists.

Additionally, even during the short debate, the only mention of the effects of cockfighting on commerce was by Resident Commissioner of Puerto Rico, Jenniffer González-Colón. Her comment spoke only to the relationship between intrastate commerce and cockfighting. Ms. González-Colón stated, "cockfighting is already a highly regulated industry in Puerto Rico. . . We actually have offices regulating this issue that creates an $18 million industry on our island. . ." *Id.* at 4222 (statement of Ms. Gonzalez-Colon).

Peter Roskam, the sponsor of the bill and a Representative from Illinois, never made any mention of cockfighting's effect on interstate commerce in either his opening or closing argument. In his opening argument, he argued that "animal fighting is inappropriate and wrong no matter where it happens. . ." and in his closing he argued,

> "We are talking about stuff that attracts gangs. We are talking about stuff that attracts drug trafficking. We are talking about stuff that attracts violence. We are talking about things that you would be ashamed to bring a child to. We are talking about things that if it were to happen in the well of this Chamber, many of us would look away because we would be shocked at the gratuitous violence."

Id. at 4221, 4223. Oregon Congressman Earl Blumenauer argued on behalf of the amendment saying, "at its core, this is a barbaric, inhumane practice." *Id.* at 4222. The final speaker on behalf of the amendment was House Representative Steven Knight. Knight stated, "forcing two animals to fight to the death is not only a crime problem, it is a moral problem as well. We should strengthen our laws to protect animals and society from this barbaric activity which has no place in modern society." *Id.* at 4222.

The floor debate's omission of discussion regarding cockfighting's relationship with interstate commerce supports the position that Congress could not have made an informed decision that this intrastate activity substantially effects interstate commerce. The

floor debate of this amendment to the Agriculture Improvement Act provided no basis for the federal government to exert its commerce power over the intrastate activity. To the contrary, the arguments that were made support the claim that regulating cockfighting is an activity which the Constitution left to the states' police powers. The floor debate made it clear that the proposed legislation regarding cockfighting was rooted in morals, public health, public safety, and the general welfare—all of which are decisions traditionally left to the states.

Thus, *Lopez's* holding should control this case: there are limits to the Commerce Clause so that if the regulated activity is criminal in nature with no relationship to interstate commerce, then the legislation cannot stand.

II. The Agriculture Improvement Act's federal criminalization despite the local Puerto Rican government's authorization of the activity encroaches upon state sovereignty and powers traditionally reserved to the states.

With its careful enumeration of federal powers and explicit statement that all powers not granted to the federal government are reserved, the Constitution does not grant Congress an unlimited license to legislate. *U.S. v. Morrison,* 529 U.S. 598 (2000). *See, e.g., Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820, 837, 843, 855 (4th Cir. 1999) (warning against allowing the Commerce Clause to be used in reliance on arguments that "lack any principled substantive limitations and that consequently would justify plenary federal regulation of anything.")

In the light of our federal system of government, the Supreme Court has consistently limited the scope of Congress' powers to avoid creating a general federal authority akin to state police power. *See Champion v. Ames*, 188 U.S. 321, 365 (1903); *U.S. v. Lopez,* 514 U.S. 549, 584-585 (1995) (Thomas, J., concurring) ("[W]e always have rejected readings of the Commerce Clause and the scope of the federal power that would permit Congress to exercise a police power."); *U.S. v. Morrison*, 529 U.S. 598, 599 (2000); *U.S. v. Comstock*, 130 S.Ct. 1949, 1953 (2010); *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 536 (2012).

A law which tries to regulate gaming "undermines the critical nature of federalism. More specifically, it threatens the opportunity for states to contribute to the development of policies and values that define the nation." Thomas L. Skinner III, *The Pendulum Swings: Commerce Clause and the Tenth Amendment Challenges to PASPA*, 2 UNLV GAMING L.J. 311, 337 (2011). The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. U.S. Const. Amend. X. Public safety, public health, morality, peace and quiet, and law and order are typical categories left for the state to legislate. Additionally, a state's police power encompasses regulating gambling as the police power "extends to all matters affecting the public health or the public morals." *Stone v. State of Mississippi*, 101 U.S. 814, 818 (1879).

"Were the Federal Government to take over the regulation of entire areas of traditional state concern, ar-

eas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur." *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring). A law which tries to regulate gaming simply encroaches too far into this zone of the authority traditionally reserved to state governments. 2 UNLV Gaming L.J. 311. For most of the nation's history, the regulation of animal sports has been left to the states, not the federal government. *See, e.g.,* Tex. Civ. Prac. & Rem. Code § 94.001 (regulating rodeos and livestock shows); Ky. Rev. Stat. § 230.260 (regulating horse racing); Mont. Code § 87-2-116 (regulating hunting). The regulation of animal sports is "'peculiarly within the police power,'" and the Constitution gives the States "'great latitude'" over these policies. *Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 391 (1978).

Lower courts have consistently upheld licensed gaming as a matter reserved to states within the meaning of the Tenth Amendment. *See Thomas v. Bible*, 694 F.Supp. 750 (D. Nev. 1988), *affirmed* 896 F.2d 555; *State v. Rosenthal*, 559 P.2d 830, 836 (Nev. 1977) (explaining, "It is apparent that if we were to recognize federal protections of this wholly privileged state enterprise, necessary state control would be substantially diminished and federal intrusion invited."); *North Hampton Racing & Breeding Assoc. v. New Hampshire Racing Commission*, 48 A.2d 472, 475 (N.H. 1946) (explaining greyhound racing laws deal with a private enterprise which . . . properly com[es] under the exercise and jurisdiction of the police power of the state . . ."); and *Ratti v. Hinsdale Raceway, Inc.*, 249 A.2d 859, 861 (N.H. 1969) (holding "horse racing

. . . properly com[es] under the exercise and jurisdiction of the police power of the state . . .”). For a discussion regarding the privilege status of wagering, as opposed to the status as a fundamental or natural right, see *Medina v. Rudman*, 545 F.2d 244, 250-51 (1st Cir. 1976); and *Lasky v. Van Lindt*, 453 N.Y.S.2d 983, 986 (1982). Prior attempts at federal legislation making it unlawful for a state to authorize certain sports gaming and gambling also have been held to violate the anticommandeering doctrine. *See, e.g., Murphy v. National Collegiate Athletic Assn.*, 138 S. Ct. 1461 (2018) (enjoining specific provisions of the Professional and Amateur Sports Protection Act (PASPA)). The parts of PASPA which were upheld allowed states to choose which laws they wished to leave in place, and the federal legislation imposed no punishment or punitive tax for noncompliance. *National Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013).

However, the First Circuit felt cockfighting was so intertwined with entertainment that it was somehow essentially economic in and of itself; therefore, the court incorrectly held it to be within the scope of Congress’ commerce power. But the states have commerce of their own and are as supreme in its control as Congress is supreme in the control of interstate and foreign commerce. This state power over intrastate commerce has never been disputed. *See Lord v. Goodall,* 102 U.S. 541, 544 (1880); *Hall v. De. Cuir*, 95 U.S. 485, 511 (1877); *State v. Armour & Co.*, 145 N.W. 1033, 1043 (N.D. 1913), *affirmed* 240 U.S. 510 (1916) (stating, “The assumption by Congress of its authority to regulate the interstate commerce . . . does not in any manner curtail the right of the state to control its own

commerce, provided such state control does not incidentally interfere with interstate commerce."); *Simpson v. Shepard,* 230 U.S. 352, 398, 411 (1913); *First Nat. Ben. Soc. v. Garrison*, 58 F. Supp. 972 (S.D.Cal.1945), *affirmed* 155 F.2d 522. *Indiana Creosoting Co. v. McNutt*, 5 N.E.2d 310, 312 (Ind. 1936) (holding "it was not within the power . . . to convert what was exclusively a local business, subject to state control, into an interstate commerce business, protected by the commerce clause."); and *Railroad Commission of Tex. V. Querner,* 292 S.W.2d 166, 170 (Tex. 1951) (holding "unquestionably the Railroad Commission has the power to regulate the handling of intrastate commerce over the highways of this state."). *See also U.S. v. Morrison,* 529 U.S. 598, 614 (2000) (holding, "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."). Therefore, an activity which is essentially economic can contribute solely to intrastate commerce, falling outside the bounds of the federal commerce power. This makes regulation of such an economic activity reserved to the power of the state.

The Circuit Courts have used *Lopez* to determine which sovereign has the power of regulation over a specific economic activity. The Third Circuit explained that in our "complex society," there is virtually nothing that does not affect interstate commerce in some manner; therefore, we must follow a "case-by-case inquiry." The court reasoned, "'The question is necessarily one of degree. . . . There will never be a distinction between what is truly national and what is truly local.'" *U.S. v. McGuire*, 178 F.3d 203, 212 (3rd Cir. 1999) (internal quotations omitted), quoting *Lopez*,

514 U.S. at 567-68. The court called on tribunals to continue making practical, common sense determinations of whether evidence is sufficient to justify the exercise of federal jurisdiction. *Id.* The Fourth Circuit found even stronger protection for state sovereignty over intrastate commerce: "[c]ongressional power under the Commerce Clause to regulate activities that do not themselves constitute interstate commerce does not extend to the regulation of activities that merely have some relationship with or effect upon interstate commerce, but, rather, extends only to those activities that substantially affect interstate commerce." *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820, 830-31 (4th Cir. 1999). This principle has since been integrated into the context of tribal reservations by other jurisdictions.

Gaming corporations, which were allowed under tribal law, were created to generate income to provide for the general welfare of tribe members. The principal place of business is within the tribe's jurisdiction, and enforcing the ban on gaming against the tribe would render it unable to meet its significant financial obligations to its tribal people. *Warren v. U.S.*, 859 F.Supp.2d 522 (W.D. N.Y. 2012), *affirmed* 517 Fed.Appx. 54. Regulation was out of Congress' reach, despite its interstate commerce power, because gaming affected the tribe's economy exclusively. Therefore, the tribe was free to regulate the activity with immunity from any other anti-gaming legislation.

Similarly, in Puerto Rico cockfighting generates income to provide for the commonwealth, every aspect of cockfighting is contained within Puerto Rico, and

banning cockfighting would cause financial instability for Puerto Ricans. Therefore, the regulation of cockfighting is properly left to Puerto Rico. This sort of commercial activity is at the very heart of state police power. Under a proper interpretation of the Constitution, states should be left to regulate activities which provide for the general welfare of their citizens.

CONCLUSION

States are "more accountable than a distant federal bureaucracy;" therefore, activities largely affecting the general welfare of state citizens have traditionally been left to the states for regulation. *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 536 (2012), citing The Federalist No. 45, at 293 (J. Madison).

More importantly, states have been left to regulate activities integral to the specific state because they have more intimate relationships with their citizens allowing the state to better provide for its citizens' needs. Each state's economy is dependent on the unique needs being met by regulating its abilities, specialties, and sources of income in a way which reflects the intricacies of such a unique state. In Puerto Rico, cockfighting contributes to the territory's economy, and the federal government is in no position to be knowledgeable of the intricate details regarding the inner workings of such an activity and its effect on the Puerto Rican people. While the practice may be considered odious to some, such a moral dilemma is an irrelevant consideration to the question of whether Congress is attempting to regulate intrastate commerce.

Congress made no attempt to understand the intricacies of this Puerto Rican tradition, as exemplified by its lack of express findings connecting this tradition to interstate commerce; therefore, it is left with no authority to regulate such an activity. Congress' disdain for cockfighting as an immoral activity is a view which cannot be used to justify legislation which detrimentally impacts the common welfare which the Puerto Rican government is tasked to provide. The Agriculture Improvement Act is an unacceptable and distasteful encroachment on the police power. To uphold this legislation would be a setback to the American system of federalism.

Respectfully submitted,

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