No. 20-1735

In the Supreme Court of the United States

ÁNGEL MANUEL ORTIZ-DÍAZ, ET AL.,
Petitioners,

v.

UNITED STATES, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

REPLY BRIEF

Respondents cannot hide the extraordinary implications of the First Circuit's opinion. The First Circuit held that the Commerce Clause gives Congress the power to ban cockfighting in Puerto Rico and three island territories. This local recreational activity—occurring on *islands* hundreds or thousands of miles from the mainland—has nothing to do with interstate commerce. In Puerto Rico, "local breeders provide [local] game fowl to local people who attend [locally] regulated arenas." Amicus Br. of Hon. Rafael Hernández-Montañez, Speaker of the P.R. House of Rep. at 9. Yet Congress wiped out this centuries-old tradition in an instant—without a single hearing or Congressional finding showing that this local practice "substantially affect[s] interstate commerce." *United States v. Lopez*, 514 U.S. 549, 559 (1995).

Respondents offer no good reason for declining review. Respondents argue that the case is a poor vehicle because it can be affirmed on alternative grounds. But the First Circuit never decided whether Congress could have adopted Section 12616 under the Territorial Clause, an issue entirely independent from the question presented. Petitioners also will prevail on the Territorial Clause issue on remand. Nor is waiting for a circuit split a viable option, as a split is unlikely to ever arise over the question presented, which is uniquely specific to Puerto Rico.

Respondents' defense of the merits fairs no better. Respondents don't dispute that Section 12616 doesn't regulate a "commodity" that is "produc[ed],

distribut[ed], or consum[ed]" in an established "interstate market." *Gonzalez v. Raich*, 545 U.S 1, 18, 25-26 (2005). Yet Respondents contend that Section 12616 is constitutional because cockfighting is "'aligned'" with "'elements of commerce.'" BIO 4 (quoting App. 13.). But if that is enough, the "'distinction between what is national and what is local'" will be "'obliterate[d].'" *United States v. Morrison*, 529 U.S. 598, 608 (2000). The Court has never upheld a federal statute on such grounds. This issue is for Puerto Ricans to decide—not Congress. The Court should grant the petition.

I. The question presented is exceptionally important and squarely presented.

1. Respondents don't deny the importance of the question presented. Whether the practice of cockfighting will continue in Puerto Rico is a question of utmost importance to the people of Puerto Rico. Cockfighting is a "deeply engrained cultural tradition embedded in Puerto Rican ethos for almost half a millennium," Amicus Br. of Hon. Rafael Hernández-Montañez, Speaker of the P.R. House of Rep. at 3, and it provides a livelihood for thousands of Puerto Rican families, Pet. 8. Yet the consequences of the question presented go beyond cockfighting. If left to stand, the First Circuit's opinion tells Puerto Ricans that Congress, not Puerto Rico, has total control over the island's affairs, despite every promise from Congress to the contrary. Pet. 5-6. It undermines the protection of liberties inherent in our federal system. Pet. 19-21. And it further expands Congress's Commerce Clause powers into areas long reserved for local control. Pet. 21-23.

2. Respondents don't identify any barriers to the Court's review. Respondents argue that the petition is a poor vehicle because even if Congress lacked power under the Commerce Clause to enact Section 12616, it had this power under the Territorial Clause. BIO 7-8. But as Respondents acknowledge (at 8), the First Circuit did not answer that question; it relied exclusively on the Commerce Clause, App. 12-15 & n.7. The two questions are completely separate. If the First Circuit's holding is wrong, this Court would reverse and remand for the court of appeals to decide the Territorial Clause question, rather than "decide in the first instance" Respondents' "alternative theor[y]" for upholding Section 12616. *NCAA v. Smith*, 525 U.S. 459, 469-70 (1999).

Nor does the Territorial Clause easily dispose of this case. The First Circuit avoided this issue for a reason. Whether Congress can regulate Puerto Rico's local affairs through the Territorial Clause is an "unexplored" and "serious" issue that itself may someday warrant this Court's review. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Investment, LLC*, 140 S. Ct. 1649, 1671, 1683 (2020) (Sotomayor, J., concurring). This Court has never "addressed the scope of Congress's authority [under the Territorial Clause] with respect to a fully self-governing Territory" like Puerto Rico. *Id.* at 1682.

In any event, Section 12616 cannot be upheld under the Territorial Clause. By approving Puerto Rico's constitution, "Congress *relinquished its control* over the organization of the local affairs of the island and granted Puerto Rico a measure of autonomy

comparable to that possessed by the States." *Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 597 (1976) (emphasis added). This grant of self-government was not an "empty promise" that Congress is "free to repeal" at any time. *Aurelius Investment, LLC*, 140 S. Ct. at 1677 (Sotomayor, J., concurring); *see First Nat'l Bank v. Yankton*, 101 U.S. 129, 133 (1879) (Congress's power under the Territorial Clause "continues *until granted away*.") (emphasis added).

Even if Congress could renege on its promise, it didn't do so here. The Court will find an "implied repeal" of a Congressional act only where the provisions are in "irreconcilable conflict" or "where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute." *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009) (citations omitted). This canon is especially pertinent when the implied repeal would repudiate formal Congressional promises of self-government to a group people. *See, e.g.*, *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 444 (1975) ("This court does not lightly conclude that an Indian reservation has been terminated.").

Here, Congress relied exclusively on its Commerce Clause powers when adopting Section 12616. Pet. 11 & n.1, 13. Congress never invoked the Territorial Clause or even hinted that it was relying on that clause to strip Puerto Rico of control over its local affairs. *Id*. The Court should not casually assume that cockfighting was an issue of such importance to Congress that it was willing to override the United

States' "unique political relationship" with Puerto Rico, one that is "built on the island's evolution into a constitutional democracy exercising local self-rule." *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1868 (2016).

At bottom, this Court has "never squarely addressed" these issues, *Aurelius Investment, LLC*, 140 S. Ct. at 1679 (Sotomayor, J., concurring), and it need not here. The Court regularly grants certiorari when alternative arguments will remain on remand. *See, e.g., Zivotofsky v. Clinton*, 566 U.S. 189, 201-02 (2012); *Bond v. United States*, 564 U.S. 211, 214 (2011). All that matters is that the question presented here is exceptionally important, conflicts with this Court's precedent, and independently warrants review.

3. Respondents suggest (at 6-7) that the Court should wait for a circuit split that implicates the question presented. But as explained, Pet. 17 & n.2, no circuit split is likely to arise. Section 12616 applies in only three circuits: the First Circuit (Puerto Rico), the Third Circuit (Virgin Islands), and the Ninth Circuit (Guam and Northern Mariana Islands)—the only jurisdictions that had not previously proscribed cockfighting. App. 25. And the Third Circuit and Ninth Circuit may never reach the Commerce Clause issue because the territories in those jurisdictions lack Puerto Rico's unique "relationship to the United States"—one "that has no parallel in our history." *Examining Bd. of Engineers*, 426 U.S. at 596.

Respondents' assertion (at 6) that a circuit split could arise over the constitutionality of 7 U.S.C. §2156 is irrelevant. Petitioners challenge Section 12616 of the Agriculture Improvement Act, a 2018 law that applies only to Puerto Rico and a handful of other jurisdictions. It is this act, not prior amendments to the Animal Welfare Act in §2156, that is at issue here. Pet. 28-29; *Morrison*, 529 U.S. at 612.

That a circuit split is unlikely to occur does not diminish this case's importance. The Court does not hesitate to hear cases that are exceptionally important to only one state or commonwealth, even when no circuit split could ever arise. *See, e.g., Sturgeon v. Frost*, 139 S. Ct. 1066 (2019) (Alaska); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (Hawaii); *Aurelius Investment, LLC*, 140 S. Ct. at 1649 (Puerto Rico). And by providing clarity on the Commerce Clause's "substantial effects test," the Court's decision would affect more than just Puerto Rico, establishing important precedent on the "'outer limits'" of federal power over interstate commerce. Pet. 21-23 (quoting *Lopez*, 514 U.S. at 556-67). The question presented warrants certiorari.

II. The decision below is wrong.

Respondents devote most of their brief to the merits yet refuse to grapple with Petitioners' arguments. Respondents contend that Section 12616 regulates "economic" activity because "'sports, wagering, [and] entertainment' are all 'closely aligned in our culture with economics and elements of commerce.'" BIO 4-6 (quoting Pet. App. 13). But as explained, Pet. 24-26, Section 12616 does not regulate "econom-

ic" activity because intrastate cockfighting is not a "commodity" that is "produc[ed], distribut[ed], or consume[d]" in an established "interstate market," *Raich*, 545 U.S. at 25-26; Amicus Br. of Cato, et al. at 22-24.

To be sure, cockfighting is responsible for thousands of Puerto Rican jobs and millions of dollars in revenue for Puerto Ricans. Pet. 8. That is part of the reason why this case is so important to the hard-hit island. *See* Amicus Br. of the Commonwealth of Puerto Rico at 1. But the Court has never sustained a federal regulation under the Commerce Clause merely because the regulated activity was *associated with* the exchange of money. Pet. 25-26. Nor should it allow the First Circuit to do so here. Such an expansion would "'obliterate'" the "'distinction between what is national and what is local,'" *Morrison*, 529 U.S. at 608, and have no connection to the original (or even "'modern'") understanding of the Commerce Clause, Pet. 21 (quoting *Morrison*, 529 U.S. at 608-09); Amicus Br. of Cato, et al. at 4-18.

Respondents argue (at 5) that the Animal Welfare Act's requirement that animal fights be "in or affecting interstate or foreign commerce," 7 U.S.C. §2156(f)(1), shows that Section 12616 is "sufficiently tied to interstate commerce," *Morrison*, 529 U.S. at 613. But as explained, Pet. 27-28, this "limiting" jurisdictional provision is "[a]s a practical matter . . . useless," *United States v. Rodia*, 194 F.3d 465, 473 (3d Cir. 1999), because it fails to "limit [the statute's] reach to a discrete set" of circumstances that substantially affect interstate commerce, *Lopez*, 529 U.S.

at 562. Indeed, Section 12616 was enacted to *eliminate* the prior jurisdictional element in the Animal Welfare Act, which prohibited cockfighting in Puerto Rico only when the person "knew that any bird in the fighting venture was knowingly bought, sold, delivered, transported, or received in interstate or foreign commerce for the purpose of participation in the fighting venture." 7 U.S.C. §2156(a)(3) (App. 61).

Finally, Respondents, like the First Circuit, point to decades-old legislative history to defend Section 12616. BIO 4-5. But as explained, Pet. 28-29, the "importation of previous findings to justify [Section 12616] is especially inappropriate" because "the prior federal enactments [and] Congressional findings do not speak to the subject matter of [Section 12616] or its relationship to interstate commerce." *Lopez*, 514 U.S. at 563. Indeed, Respondents rely on congressional findings from nearly 50 years ago—when cockfighting was *legal* in 30 states—and two decade-old House floor statements discussing cockfighting and avian flu *in Asia*. BIO 4-5. None of this history is relevant. Pet. 28-29; Amicus Br. of Hon. Rafael Hernández-Montañez, Speaker of the P.R. House of Rep. at 10. At the time Section 12616 was enacted, the legal landscape had changed dramatically: cockfighting was illegal in all 50 states, federal law already criminalized certain cockfighting practices in Puerto Rico (*e.g.*, if the bird was knowingly bought, sold, or transported in interstate or foreign commerce), and Puerto Rico extensively regulated the practice of cockfighting. Pet. 9-13. Given these fundamental changes, Congress needed new congressional findings before it could criminalize entirely

local activities on the island. *Lopez,* 514 U.S. at 563. It gave none here, likely because a local recreational activity on an island does not "substantially affect interstate commerce." *Id.* at 559.

CONCLUSION

The Court should grant the petition and reverse the decision below.

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