No. ______

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress has power under the Commerce Clause to criminalize cockfighting on the island of Puerto Rico.

PARTIES TO THE PROCEEDING

Petitioners are Ángel Manuel Ortiz-Díaz; Nydia Mercedes Hernández-Gotay; Faustino Rosario-Rodríguez; Asociación Cultural y Deportiva del Gallo Fino de Pelea; and Ángel Luis Narváez-Rodríguez. Petitioners were plaintiffs-appellants below.

Club Gallístico de Puerto Rico, Inc.; Luis Joel Barreto-Barreto; Carlos Quiñones-Figueroa; Laura Green; John J. Olivares-Yace; and José Miguel Cedeño were plaintiffs-appellants below, but are not petitioners here.

Respondents are the United States; the Department of Agriculture; Tom Vilsack, Secretary of the Department of Agriculture; the United States Department of Justice; Merrick Garland, Attorney General; and Joseph R. Biden, President. Respondents were defendants-appellees below.

RULE 29.6 STATEMENT

Asociación Cultural y Deportiva del Gallo Fino de Pelea has no parent company or publicly held company with a 10% or greater ownership interest in it.

RELATED PROCEEDINGS

The related proceedings below are:

United States District Court (D. Puerto Rico, San Juan):

Club Gallístico de Puerto Rico Inc. v. United States, No. 3:19-cv-01481-GAG (Oct. 28, 2019) (opinion and order granting defendants' motion for summary judgment and denying plaintiffs' motion for summary judgment)

Asociación Cultural y Deportiva del Gallo Fino de Pelea v. Trump, No. 3:19-cv-01739-GAG (same) (consolidated)

United States Court of Appeals (1st Cir.):

Hernández-Gotay v. United States, No. 19-2236 (Jan. 14, 2021) (opinion)

Asociación Cultural y Deportiva del Gallo Fino de Pelea v. United States, No. 20-1084 (Jan. 14, 2021) (opinion) (consolidated)

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The First Circuit's opinion is reported at 985 F.3d 71 and is reproduced in the Appendix at App. 1-18. The District of Puerto Rico's opinion is reported at 414 F.Supp.3d 191 and is reproduced at App. 19-57.

JURISDICTION

The First Circuit entered judgment on January 14, 2021. Due to COVID-19, this Court extended the time to file this petition to June 14, 2021. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statute, 7 U.S.C. §2156, was first enacted in 1976 and has changed several times since then. The version that existed between February 7, 2014 and December 19, 2019 is reproduced at App. 60-65, and the current version (in place from December 19, 2019 to the present) is reproduced at App. 66-70. Section 12616 of the Agriculture Improvement Act of 2018, Pub. L. 115-334, 132 Stat. 4490 (2018) is reproduced at App. 71-72.

INTRODUCTION

In the mid-20th Century, "the people of Puerto Rico engaged in an exercise of popular sovereignty by adopting their *own* Constitution establishing their *own* government to enact their *own* laws." *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1874 (2016) (cleaned up). 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). Accordingly, "'Puerto Rico, like a state, is an autonomous political entity sovereign over matters not ruled by the [Federal] Constitution.'" *Sanchez Valle*, 136 S. Ct. at 1875.

One of the ways Puerto Rico has exercised its autonomy and independence is through the legalization and regulation of the sport of cockfighting. Like horse racing in Kentucky, rodeos in Texas, and hunting in Montana, cockfighting is deeply ingrained in the island's history, tradition, and culture. Introduced by the Spanish in the 16th Century, cockfighting has been practiced on the island of Puerto Rico for more than 400 years. Today, Puerto Rican law proclaims cockfighting to be a "cultural right of all Puerto Ricans." P.R. Laws Ann. tit. 15, §301.

The federal government long respected Puerto Rico's choices concerning this inherently local issue. Under the Animal Welfare Act, which was enacted pursuant to the Commerce Clause, Congress did not punish intrastate cockfighting in any "State" (which

was defined to include Puerto Rico) where the practice was legal. In these jurisdictions, cockfighting violated federal law only "if 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)(2) (App. 61). This limited regulation ensured that Congress did not "reach beyond the natural extent of its authority" under the Commerce Clause. *NFIB v. Sebelius*, 567 U.S. 519, 554 (2012).

That changed in 2018 when Congress amended the Animal Welfare Act (through Section 12616 of the Agriculture Improvement Act) to criminalize cockfighting in all States—including those jurisdictions where it was allowed under local law. Because cockfighting was legal under Puerto Rican law, Section 12616 effectively criminalized cockfighting in Puerto Rico, regardless of whether the bird was bought, sold, delivered, transported, or received in interstate or foreign commerce.

In Puerto Rico, "news of [the law's] passage dropped like a bombshell." Adrian Florido, *Puerto Ricans Angry Over Impending Ban on Cockfighting*, NPR (Dec. 14, 2018), n.pr/3w9zmbL. Puerto Rican citizens and politicians showed "vociferous solidarity" against the federal law, which wiped out centuries of local tradition instantly. Adrian Florido, *In Puerto Rico, The Days of Legal Cockfighting Are Numbered*, NPR (Oct. 23, 2019), n.pr/3wbXCdx. In the proceedings below, every branch of the Puerto Rican government—the House, the Senate, and the Government

itself—filed separate amicus briefs in support of the plaintiffs, as did the Resident Commissioner of Puerto Rico, the Puerto Rican Association of Mayors, and others.

Though Congress enacted Section 12616 pursuant to its Commerce Clause powers, it made no effort—through legislative findings, public hearings, or otherwise—to show that cockfighting on the island of Puerto Rico affected interstate commerce in any way. Yet the First Circuit upheld Section 12616 as a valid exercise of Congress's powers under the Commerce Clause. According to the First Circuit, Section 12616 is constitutional because animal fights for "'purposes of sport, wagering, or entertainment'" are "'closely aligned in our culture with economics and elements of commerce.'" App. 13.

The First Circuit's decision blows past the Commerce Clause's "outer limits." *United States v. Lopez*, 514 U.S. 549, 556-57 (1995). The Court's "modern, expansive interpretation" stretches the Commerce Clause to reach activities that "substantially affect interstate commerce." *United States v. Morrison*, 529 U.S. 598, 608-09 (2000). But Section 12616 goes much further. It does not regulate a "fungible commodity" travelling in an "established . . . interstate market." *Gonzalez v. Raich*, 545 U.S. 1, 18 (2005). Intrastate cockfighting has *no connection* to any commodity being traded in the interstate market.

Congress criminalized the practice because federal legislators found it "barbaric" and "inhumane." 164 Cong. Rec. H4221-22 (May 18, 2018). But this was

not Congress's judgment to make. The Commerce Clause is limited in scope because the Founders believed that the "'lives, liberties, and properties of the people'" should be governed by those "more local and more accountable than a distant federal bureaucracy." *NFIB*, 567 U.S. at 536 (quoting The Federalist No. 45, at 293 (J. Madison)). The regulation and criminalization of cockfighting in Puerto Rico is an issue for Puerto Rico—not Congress—to decide. The Court should grant the petition.

STATEMENT OF THE CASE

A. Puerto Rico's Sovereignty Over Its Local Affairs

Puerto Rico became a Territory of the United States in 1898, as a result of the Spanish-American War. *Sanchez Valle*, 136 S. Ct. at 1868. Immediately after that, Congress gave Puerto Rico some measures of autonomy, such as authorizing local elections of certain territorial officials. But on balance, the island's authority over its local affairs was limited. Throughout the early years of Puerto Rico's territorial status, "Congress retained major elements of sovereignty," and "[i]n cases of conflict, Congressional statute, not Puerto Rico law, would apply no matter how local the subject." *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 39 (1st Cir. 1981) (Breyer, J., for the court).

By 1950, however, international and local "pressures for greater autonomy," *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 671 (1974), prompted Congress to pass Public Law 600, a measure

"enab[ling] Puerto Rico to embark on the project of constitutional self-governance." *Sanchez Valle*, 136 S. Ct. at 1868. "'[R]ecognizing'" and "affirm[ing] the 'principle of government by consent,'" Public Law 600 "offered the Puerto Rican public a 'compact,' under which they could 'organize a government pursuant to a constitution of their own adoption.'" *Id.* at 1868, 1876 (quoting Act of July 3, 1950, §1, 64 Stat. 319). The Puerto Rican people accepted that compact and adopted a constitution, which Congress approved with minor amendments. *Calero-Toledo*, 416 U.S. at 671.

Through Public Law 600 and the adoption and recognition of the Puerto Rico Constitution, "the United States and Puerto Rico . . . forged a unique political relationship, built on the island's evolution into a constitutional democracy exercising local self-rule." *Sanchez Valle*, 136 S. Ct. at 1868. Importantly, the Federal Government "relinquished its control over [Puerto Rico's] local affairs[,] grant[ing] Puerto Rico a measure of autonomy comparable to that possessed by the States." *Examining Bd. of Engineers*, 426 U.S. at 597. Indeed, the whole "purpose of Congress in the 1950 and 1952 legislation was to accord Puerto Rico the degree of autonomy and independence normally associated with States of the Union." *Id.* at 594. As a consequence, "Puerto Rico, like a State, is an autonomous political entity, 'sovereign over matters not ruled by the [Federal] Constitution.'" *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) (quoting *Calero-Toledo*, 416 U.S. at 673).

B. Puerto Rico's Historical and Cultural Tradition of Cockfighting

Cockfighting "'is one of the oldest recorded human games or sports'" in the world. App. 23. "The sport was popular in ancient times in India, China, Persia, and other Eastern countries and was introduced into Greece in the time of Themistocles (c. 524-460 BC)." *Cockfighting*, Britannica Online Encyclopedia, bit.ly/2TfYqPK. The Greeks engaged in the practice before battle in order to "stimulate the warriors to brave and valorous deeds." Frederick Hawley, *Cockfighting*, Encyclopedia of Okla. Hist. & Culture, bit.ly/3uS2CSV. "Carried to Europe by the Romans, cockfighting enjoyed its greatest popularity in England and France during the 16th, 17th, and 18th centuries, when it became the diversion of choice for monarchs and commoners alike." Neil Henry, *Cockfighting*, Wash. Post (Mar. 5, 1983), wapo.st/3vdfIdz.

In early America, cockfighting was widely practiced, especially "along the Atlantic seaboard and in the South." *Cockfighting*, Britannica Online Encyclopedia, *supra*. Indeed, there is evidence that former presidents, including George Washington, Thomas Jefferson, Andrew Jackson, and Abraham Lincoln, participated in cockfighting. *See* Concurrent Resolution by the Legislative Assembly of the Commonwealth of Puerto Rico (reproduced at 164 Cong. Rec. S906 (Feb. 13, 2018)); Alan Dundes, The Cockfight: A Casebook 73-74 (Univ. of Wisconsin Press 1994). The Library of Congress holds "more than a dozen books about the sport, most of them extolling its glory and symbolism." Henry, *Cockfighting*, *supra*.

The Spanish introduced cockfighting to the island of Puerto Rico in the 16th Century. Since then, cockfighting has become "deeply rooted in [Puerto Rico's] culture, history, and traditions." Concurrent Resolution of the Legislative Assembly of the Commonwealth of Puerto Rico, *supra*, S906. While the sport's prevalence has declined elsewhere, cockfighting remains a "beloved tradition" in Puerto Rico and is considered the island's national sport. *Cockfighting Still Popular in Puerto Rico*, AP (Jan. 25, 2007), bit.ly/3xeKBjc. In recognition of the sport's importance, Puerto Rico has declared that cockfighting is "a cultural right of all Puerto Ricans, pursuant to Section 22 of the Universal Declaration of Human Rights of the United Nations." P.R. Laws Ann. tit. 15, §301.

Puerto Rico is home to more than 70 cockpits, which are located in most municipalities on the island. *See* Joint Resolution of the Senate of the Commonwealth of Puerto Rico (reproduced at 166 Cong. Rec. S1624 (Mar. 9, 2020)). Until recently, these cockpits hosted tens of thousands of cockfights every year in front of hundreds of thousands of spectators. *Id*. Indeed, in many of the island's rural towns, cockfighting occurred "in dozens of family-run arenas across the island," providing "a pastime and livelihood for thousands of families." Florido, *In Puerto Rico, The Days of Legal Cockfighting Are Numbered*, NPR, *supra*. Puerto Rico estimates that cockfighting supports more than 11,000 jobs and has injected approximately $65 million annually into Puerto Rico's economy. App. 55-56.

Like states that regulate other animal sports, such as hunting, horse races, and rodeos, Puerto Rico heavily regulates cockfighting. App. 24; *see* P.R. Laws Ann. tit. 15, §§301 *et seq*. The Puerto Rican Sports and Recreation Department is "vested with all powers and faculties necessary to promote, direct, regulate, and control any and all activities related to the sport of cockfighting," including "the construction of cockpits, the fixing of seasons for holding the sport, classification and issuance of licenses for cockpits, the regulations of cockfights, [and] the holding of tournaments, jousts, classics, fairs, [and] exhibitions." *See* P.R. Laws Ann. tit. 15, §301b.

Puerto Rico also has "taken measures to ensure the protection of gamecocks." Concurrent Resolution of the Legislative Assembly of the Commonwealth of Puerto Rico, *supra*, S906. For example, "safety measures [were] taken to guarantee that participating gamecocks wear the same spurs and are of the same age, weight, and bet." *Id.* In addition, "pit judges [were] empowered to stop the fight if they notice[d] either excessive punishment or that a gamecock [was] not fit to continue fighting." *Id.* "Once the fight [was] over, both gamecocks [were] examined by specialized staff and treated accordingly for their prompt recovery." *Id.* Puerto Rico prohibits any unauthorized cockfights and nearly every person and entity involved in cockfighting is licensed to ensure compliance with local health and safety regulations. P.R. Laws Ann. tit. 15, §§301b, 301i.

C. Federal Regulation of Cockfighting

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 Ann. § 94 (regulating rodeos and livestock shows); Ky. Rev. Stat. Ann. § 230.260 (regulating horse racing); Mont. Code Ann. § 87-2-116 (regulating hunting). That is because 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).

In 1976, Congress amended the Animal Welfare Act (AWA) to make it unlawful to, among other things, knowingly sponsor or exhibit an animal in any "animal fighting venture" when the animal was "moved in interstate or foreign commerce." Animal Welfare Act Amendments of 1976, Pub. L. No. 94-279, §17, 90 Stat. 417, 421-22 (1976) (codified as 7 U.S.C. §2156(a)). An "animal fighting venture" was defined as "any event which involves a fight between at least two animals and is conducted for purposes of sport, wagering, or entertainment." *Id.* (codified as 7 U.S.C. §2156(g)). Congress defined "interstate commerce" as "movement between any place in a State to any place in another State," and it included Puerto Rico as one of those "State[s]." *Id.* (codified as 7 U.S.C. §2156(d)). Accordingly, the AWA did not criminalize animal fighting in Puerto Rico or any of the States unless the animal crossed state lines.

Congress also enacted a separate provision to

address the importance of cockfighting to certain States and Puerto Rico. Under the new law, the AWA banned animal fighting ventures "involving live birds" only if "the fight is to take place in a State where it would be in violation of the laws thereof." *Id*. (codified as 7 U.S.C. §2156(d)). As a result, Puerto Rico and 30 States that allowed cockfighting could continue the practice. *See* Gov't of Puerto Rico Amicus Br., Dkt. 61 at 10-12.

Congress adopted the 1976 amendments under its Commerce Clause powers.[1] *See id*. §2 (codified as 7 U.S.C. §2131). At the time, the amendments were criticized as "stretch[ing] the theory of centralist federalism to its snapping point by appointing the Secretary of Agriculture as a . . . chicken fighting czar." H.R. Rep. 94-801, 43, 1976 U.S.C.C.A.N. 758 (Rep. Steve Symms). Proponents defended the law's constitutionality by emphasizing that the prohibited activities were not "purely intrastate" but instead "depend[ed] upon the transportation of animals and equipment in interstate commerce." 122 Cong. Rec. S5096 (Apr. 7, 1976). The AWA thus would "supplement rather than replace existing State laws prohibiting dogfighting and cruelty to animals." Animal Welfare Act Amendments of 1974: Hearing before the Subcomm. on Livestock & Grains of the H. Comm. on Agriculture, 93rd Cong. 274 (1974) (Rep. Thomas

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[1] Congress did not enact the AWA through its Territorial Clause powers. *See* 7 U.S.C. §2131; *compare with* 48 U.S.C. §2121(b)(2) (creating an Oversight Board "pursuant to article IV, section 3 of the Constitution of the United States, which provides Congress the power to dispose of and make all needful rules and regulations for territories").

Foley).

Three decades later, in 2008, Congress reversed course. In the Food, Conservation, and Energy Act of 2008, Congress criminalized intrastate animal fighting by eliminating the requirement that the animal be "moved in interstate or foreign commerce." *See* Pub. L. 110-246, §14207, 122 Stat. 1664 (2008). Importantly, however, Congress continued to allow cockfighting in those States where it was permitted under local law. In those jurisdictions, cockfighting was illegal under federal law *only* "if 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)(2)(3) (App. 61); *see* Pub. L. 107-171, §10302, 116 Stat. 134 (2002). Because Puerto Rico did not prohibit cockfighting, Puerto Ricans continued to engage in cockfighting in accordance with their local laws and regulations. App. 25.

D. Section 12616 of the Agriculture Improvement Act of 2018

In 2018, Congress sought to criminalize cockfighting in every "State," regardless of whether the person, the bird, or anything else travelled across state lines. In Section 12616 of the Agriculture Improvement Act of 2018, the omnibus farm bill, Congress proposed to eliminate the AWA's exemption allowing cockfighting when permitted under State law. Pub. L. No. 115-334, §12616, 132 Stat. 4490, 5015-16 (2018) (App. 71-72). Because cockfighting was legal in

Puerto Rico, Section 12616 would effectively criminalize cockfighting in Puerto Rico. App. 25.

Puerto Rico vehemently opposed the bill. The Legislative Assembly of Puerto Rico sent a concurrent resolution to Congress describing cockfighting as "deeply rooted in our culture, history, and traditions" and expressing the legislature's "firm and unequivocal repudiation and opposition" to the bill. Concurrent Resolution by the Legislative Assembly of the Commonwealth of Puerto Rico, *supra*, S906. Representative Jenniffer González-Colón, Puerto Rico's only non-voting member of the U.S. House of Representatives, also strongly opposed the bill. She criticized Congress for proposing to outlaw cockfighting without consulting the people of Puerto Rico or holding a single public hearing. 164 Cong. Rec. H4222 (May 18, 2018).

Though Congress acted under its Commerce Clause powers and not its Territorial Clause powers, *see* 7 U.S.C. §2131; *supra*, n.1, it made no legislative findings that cockfighting affected interstate commerce in any way. Indeed, Congress did not hold a single committee hearing on the issue. The sparse legislative history indicates that Congress criminalized intrastate cockfighting solely because federal legislators found the practice "barbaric," "inhumane," and "[im]moral." *See* 164 Cong. Rec. H4222 (May 18, 2018). On December 20, 2018, Congress passed the Agriculture Improvement Act, including Section 12616, and the bill was later signed into law.

In Puerto Rico, "news of [the law's] passage dropped like a bombshell." Florido, *Puerto Ricans*

Angry Over Impending Ban on Cockfighting, *supra*. Distraught over its passage, many Puerto Ricans took to the streets to protest. As one resident who raises roosters explained, "We're devastated. . . . We don't know what to do. We weren't prepared for this. This is how I feed my family." *Id.* Said another Puerto Rican: "You want to talk about cruelty? You have millions of hunters in the United States who shoot a deer, decapitate it and then mount its head on the wall as a trophy and nobody says anything about it. . . . But we have people in Congress who don't even know where Puerto Rico is and they're going to take away our cockfighting industry?" Jim Wyss, *Puerto Rico Faces the End of a Storied and Bloody Tradition: Cockfighting*, Miami Herald (Dec. 16, 2019), tinyurl.com/d49c5kk5. Local politicians joined in the protests, offering "vociferous solidarity" with the crowds. Florido, *In Puerto Rico, the Days of Legal Cockfighting Are Numbered*, *supra*. To this day, "[n]ot a single local politician openly opposes cockfighting, nor are there local citizen movements against it." *Id.*

E. Proceedings Below

In 2019, various individuals and organizations involved in cockfighting filed suit in the District of Puerto Rico challenging the constitutionality of Section 12616. App. 7-9; 20-22. Among the plaintiffs was Petitioner Ángel Manuel Ortiz-Díaz, the owner of two cockfighting venues and a breeder and owner of more than 200 gamecocks. App. 11. Ortiz-Díaz alleged that he faced a credible threat of prosecution under Section 12616 because he regularly sponsors and exhibits cockfighting matches at his cockpits. App. 11. The plaintiffs sought, among other things, a declaratory

judgment that Congress had no authority under the Commerce Clause to enforce Section 12616 and an injunction preventing the United States from enforcing the law in Puerto Rico. App. 7-9; 20-22.

The parties filed cross-motions for summary judgment. Multiple amici filed briefs in support of the plaintiffs, including the House of Representatives of Puerto Rico, Dkt. 56; the Senate of Puerto Rico, Dkt. 60; the Government of Puerto Rico, Dkt. 61; the Resident Commissioner of Puerto Rico (a non-voting member of the U.S. House of Representatives) Dkt. 65; and the Municipality of Mayaguez, a Puerto Rican municipality that owns a cockpit, Dkt. 62.

On October 28, 2019, the district court granted the defendants' motion for summary judgment. App. 19-57. The court found that the plaintiffs had standing to challenge Section 12616 because they faced "a credible threat of present or future prosecution'" under the new law. App. 37. On the merits, the court held that Congress "has the authority under the Commerce Clause to regulate commerce with the Commonwealth of Puerto Rico" and that Section 12616 was a proper use of that authority because cockfighting has "a substantial effect on interstate commerce." App. 38-45.

The First Circuit affirmed. Pointing to the four factors identified in *United States v. Morrison*, 529 U.S. at 610-12, the First Circuit found that Section 12616 was a proper exercise of the Commerce Clause because cockfighting "substantially affect[s] interstate commerce." App. 12-15. First, Section 12616 targeted "economic" activity because animal fights for

"'purposes of sport, wagering, or entertainment'" are "'closely aligned in our culture with economics and elements of commerce.'" App. 13. Second, Section 12616 had an "express jurisdictional element" because the AWA contains a catchall provision requiring the prohibited activities to be "in or affecting interstate or foreign commerce." App. 13. Third, the AWA's legislative history from 1976 indicated that animal fighting ventures "(a) attract fighting animals and spectators from numerous states, (b) are or have been advertised in print media of nationwide circulation, and (c) often involve gambling and other 'questionable and criminal activities.'" App. 14. Last, Section 12616's effect on interstate commerce was not "incidental" or "attenuated" given the AWA's "jurisdictional hook" and the "for profit" nature of "the plaintiffs' relationship to commercial cockfighting." App. 13, 15. The First Circuit's decision rested entirely on Congress's powers under the Commerce Clause, not the Territorial Clause. App. 12-15 & n.7.

REASONS FOR GRANTING THE PETITION

The Court should hear this case because the First Circuit "decided an important question of federal law that . . . conflicts with relevant decisions of this Court." S. Ct. R. 10(c). The importance of this case to the people of Puerto Rico cannot be overstated. Cockfighting is deeply imbedded in the island's history, culture, and tradition. Our federal system reserves for Puerto Ricans the right to govern themselves on these inherently local issues. Under *Lopez*, 514 U.S. at 549, and *Morrison*, 529 U.S. at 598, the federal government has no authority to ban a local activity that has no effect on interstate commerce. The Court's intervention

is needed to enforce the Commerce Clause's "outer limits," *Lopez*, 514 U.S. at 556-57, and to restore Puerto Rico's sovereignty over its local affairs.

I. The question presented is exceptionally important and warrants review.

Because a circuit split is highly unlikely on this issue,[2] the key question for purposes of certiorari is whether the petition raises an important question of federal law under Rule 10(c). It does.

1. Few legal questions have more widespread importance to Puerto Ricans than the question presented here. Section 12616 criminalizes an activity that has been practiced in Puerto Rico for over four hundred years. Section 12616 thus represents the "loss of centuries of tradition and culture." Amicus Br. of the Municipality of Mayaguez, Dkt. 62 at 8. For Puerto Ricans, "to lose [cockfighting] [is] to lose part of [their] history." Wyss, *supra*. Before Section 12616, tens of thousands of Puerto Ricans participated in

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[2] 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 cockfights. App. 25. It also is unclear whether the Third Circuit or Ninth Circuit would ever 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; *see, e.g., Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1286-87 (9th Cir. 1985) (finding that "the limitations which the commerce clause places upon the power of state governments to burden commerce" do not "extend to unincorporated territories" like Guam).

cockfighting annually; in one year, nearly 100,000 cockfights were held in front of more than 300,000 attendees. *See* Puerto Rico Senate Joint Resolution, *supra*, S1624. Some Puerto Ricans have vowed "to defend their roosters with their lives." Florido*, In Puerto Rico, The Days Of Legal Cockfighting Are Numbered*, *supra*.

The ethics and morality of cockfighting are, of course, hotly debated. While some see it as a "cruel[]" cultural tradition that "[w]e have gone past" as a society, 164 Cong. Rec. H4222 (May 18, 2018), others see it as an indispensable "part of [Puerto Rico's] culture and traditions," Concurrent Resolution of the Legislative Assembly of the Commonwealth of Puerto Rico, *supra*, S906, no different from hunting, horse racing, or other animal sports. The people of Puerto Rico, through their elected representatives, have chosen to allow the practice.

This freedom to govern was part of the deal that Congress and Puerto Rico made in the 1952 compact. "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*, 426 U.S. at 597. Through this compact, Congress promised Puerto Ricans all the "autonomy and independence normally associated with States of the Union." *Id.* at 594. This "newfound authority, *including over local criminal laws*, brought mutual benefit to the Puerto Rican people and the entire United States." *Sanchez Valle*, 136 S. Ct. at 1874 (emphasis added).

Puerto Rico's treatment of cockfighting epitomizes the reasons for our federal system. Puerto Rico enacted local policies "more sensitive to the diverse needs" of its island residents, who for centuries have practiced and enjoyed cockfighting. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Puerto Rico "innovate[d] and experiment[ed]" with its treatment of cockfighting, *id.*, adopting strict regulations designed to protect the health and safety of the animals and individuals alike. And Puerto Rico placed the issue squarely within the local "democratic processes," where the issue has long been debated among the local residents. *Id.* The practice has remained legal in Puerto Rico because "[n]ot a single local politician openly opposes cockfighting," and there are no "local citizen movements against it." Florido, *In Puerto Rico, The Days Of Legal Cockfighting Are Numbered*, *supra*.

Yet Congress—sitting more than a thousand miles away in Washington D.C.—commandeered this local issue for itself. With barely a thought as to whether cockfighting substantially affects interstate commerce, Congress overrode Puerto Rico's sovereign decision, stripping the island of its culture and heritage. All it took was two pages inserted into the omnibus farm bill.

This is not how our federal system should work. Federalism ensures that the powers which concern the "'lives, liberties, and properties of the people'" are held by "governments more local and more accountable than a distant federal bureaucracy." *NFIB*, 567 U.S. at 536 (quoting The Federalist No. 45, at 293 (J. Madison)). Indeed, it is this "mandated division of

authority," *Lopez*, 514 U.S. at 552, that "ensures protection of our fundamental liberties," *Gregory*, 501 U.S. at 458 (cleaned up).

That the federal government long respected Puerto Rico's autonomy isn't an aberration. "For nearly two centuries it has been clear that . . . [a] criminal act committed wholly within a State cannot be made an offence against the United States." *Bond v. United States*, 572 U.S. 844, 854 (2014) (cleaned up). The "regulation and punishment of intrastate [crime] that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." *Morrison*, 529 U.S. at 618; *see, e.g., Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 426, 428 (1821) (Marshall, C.J.) (Congress has "no general right to punish murder committed within any of the States" nor to "punish felonies generally"). Yet this "plenary police power" is exactly what Congress usurped through Section 12616 under the guise of the Commerce Clause. *Lopez*, 514 U.S. at 566.

This dispute thus is no mere "exercise in setting the boundary between different institutions of government for their own integrity." *Bond v. United States*, 564 U.S. 211, 221 (2011). Section 12616 threatens the "'liberties'" that Puerto Ricans possess through "'the diffusion of sovereign power'" inherent in our federal system. *Id.* After all, Puerto Rico has long permitted cockfighting on the island, and the federal government had respected its wishes. Yet any individual who engages in this practice now risks up to five years in prison for each violation. 18 U.S.C. §49(a). To Puerto Ricans, this is the definition of "arbitrary power"

stripping them of the "liberties" that they once possessed. *Bond*, 564 U.S. at 221-22.

2. In addition, the First Circuit's decision endorses an unconstitutional expansion of Congress's Commerce Clause powers that contradicts this Court's precedent. This case presents an ideal vehicle to provide much-needed clarity on the limits of the Commerce Clause's "substantial effects" test. The Commerce Clause gives Congress the power "to regulate Commerce . . . among the several States." Art. I, §8, cl.3. At the time of the founding, "commerce" consisted of "selling, buying, and bartering, as well as transporting for these purposes." *Lopez*, 514 U.S. at 585 (Thomas, J., concurring). The Court long recognized that "commerce" was limited to "traffic" and "commercial intercourse between nations, and parts of nations." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824). Those activities that "affected interstate commerce indirectly were beyond Congress' reach." *Lopez*, 514 U.S. at 555.

Yet under the Court's "modern, expansive interpretation of the Commerce Clause," *Morrison*, 529 U.S. at 608, the Court's "case law has drifted far from the original understanding of the Commerce Clause," *Lopez*, 514 U.S. at 584 (Thomas, J., concurring). The Commerce Clause now reaches activities that "*substantially affect* interstate commerce." *Id.* at 559 (emphasis added). Through this interpretation, the Court has sustained federal regulation of "homegrown wheat," *Wickard v. Filburn*, 317 U.S. 111, 127 (1942), and the "possession of marijuana," *Raich*, 545 U.S. at

15, because of their "effects" on national markets for commodities.

The constitutionality of the "substantial effects" test is suspect. *See Lopez*, 514 U.S. at 584-602 (Thomas, J., concurring); *Carter v. Carter Coal Co.*, 298 U.S. 238, 317 (1936) (Hughes, C.J., separate opinion). Yet even assuming the test's validity, this Court has long recognized that the test must be restrained. *See, e.g.*, *Morrison*, 529 U.S. at 608; *Lopez*, 514 U.S. at 556-57. Without constraints, the Commerce Clause would expand to "'embrace effects upon interstate commerce so indirect and remote'" that the Clause would "'effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'" *Morrison*, 529 U.S. at 608 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

As Justice Thomas presciently recognized, an unbounded Commerce Clause would empower the Federal Government to regulate purely local affairs like "marriage, littering, or *cruelty to animals*." *Lopez*, 514 U.S. at 585 (Thomas, J., concurring) (emphasis added). That is exactly what happened here. The First Circuit found that Congress had the power to criminalize cockfighting regardless of whether the bird, the person, or anything else travels to or from the islands. This is wholly inconsistent with our federal system. The Commerce Clause does not give the federal government this "general power of governing" all aspects of our daily lives. *NFIB*, 567 U.S. at 536.

This Court has not hesitated to enforce Commerce Clause boundaries when Congress has transgressed them. There is "no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits." *Id.* at 538. The Court should do so here.

II. The decision below conflicts with the Court's decisions in *Lopez* and *Morrison.*

The question presented asks whether Congress has the power under the Commerce Clause to criminalize cockfighting on the island of Puerto Rico. Contrary to the First Circuit's ruling, Congress has no such authority.

The Commerce Clause gives Congress the power "to regulate Commerce . . . among the several States." Art. I, §8, cl.3. The Commerce Clause, like all enumerated powers, has "outer limits." *Lopez*, 514 U.S. at 556-57. The Court has recognized only three categories of federal regulation that are consistent with the Commerce Clause: (1) the "channels of interstate commerce," (2) the "instrumentalities of interstate commerce, or persons or things in interstate commerce," and (3) "those activities having a substantial relation

to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *Id.* at 558-59.[3]

The First Circuit recognized that Section 12616 could be sustained only under the Commerce Clause's "substantial effects" test. App. 12. It also recognized that Section 12616 applied regardless of whether the individual used, consumed, or associated with any person or thing that had travelled in interstate commerce. App. 6-7. Yet the First Circuit still sustained the law. Pointing to the four factors identified in *Morrison*, the court concluded that Congress had the power under the Commerce Clause to enact Section 12616 because cockfighting in Puerto Rico and the island territories "substantially affect[s] interstate commerce." App. 12-15. This is wrong.

First, cockfighting is not "economic" activity. *Morrison*, 529 U.S. at 610. "Economics" for purposes of the Commerce Clause refers to "the production, distribution, and consumption of commodities" in an "interstate market." *Raich*, 545 U.S. at 25-26. But cockfighting is not a "commodity" that is "produc[ed], distribut[ed], or consum[ed]" in an "interstate market." *Id.* It is an activity that is inherently *local* in nature. Indeed, the longstanding federal law criminalizing the

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[3] This Court has "long held or assumed that Congress has power under the Commerce Clause to regulate commerce with Puerto Rico." *Trailer Marine Transport Corp. v. Rivera Vasquez*, 977 F.2d 1, 7 n.3 (1st Cir. 1992) (citing *Secretary of Agric. v. Central Roig Refining Co.*, 338 U.S. 604, 616 (1950) (Sugar Act of 1948 applied to Puerto Rico through the Commerce Clause)). The parties in this case all agree that the Commerce Clause applies to Puerto Rico.

interstate transportation of birds has for decades ensured that cockfighting in Puerto Rico is exclusively intrastate. As a consequence, "all cockfighting activity in Puerto Rico is limited to Puerto Rican gamecocks bred and raised in Puerto Rico." Amicus Br. of Commonwealth of Puerto Rico at 5-7 (1st Cir. July 24, 2020).

For all of "our Nation's history," the Court has never "upheld Commerce Clause regulation of intrastate activity" where the activity was not "economic in nature." *Morrison*, 529 U.S. at 613. For example, in *Wickard*, considered "the most far reaching example of Commerce Clause authority over intrastate activity," the Court upheld a law regulating "the production and consumption of homegrown wheat" because the law was designed "to regulate the volume of wheat moving in interstate and foreign commerce," and "'[h]ome-grown wheat . . . competes with wheat in commerce.'" *Lopez*, 514 U.S. at 556, 560-61 (quoting *Wickard*, 317 U.S. at 128). Similarly, in *Raich*, the Court upheld a law "[p]rohibiting the intrastate possession or manufacture of an article of commerce" (marijuana) because "production of the commodity . . . has a substantial effect on supply and demand in the national market for that commodity." 545 U.S. at 26, 19. Unlike wheat or marijuana, cockfighting is not a "fungible commodity" for which there is an established "interstate market." *Id*. at 18.

The First Circuit found that Section 12616 targeted "economic" activity because animal fights for "'purposes of sport, wagering, or entertainment,'" 7 U.S.C. §2156(f)(1), are "'closely aligned in our

culture with economics and elements of commerce.'" App. 13 (quoting *United States v. Gibert*, 677 F.3d 613, 624 (4th Cir. 2012)). But this is not "economic" activity under this Court's precedent. The First Circuit never identified any "fungible commodity" travelling in an "established . . . interstate market" that Congress was trying to regulate. *Raich*, 545 U.S. at 18; App. 12-15. Intrastate cockfighting—untethered to any actual commodity being traded in the interstate market—is simply not "economic" activity. *See Raich*, 545 U.S. at 25-26; *see also Terkel v. Ctrs. for Disease Control & Prevention*, --- F. Supp. 3d ---, 2021 WL 742877, at *6 (E.D. Tex. Feb. 25, 2021) (federal agency lacked power to prohibit housing evictions because evictions are not "the production or use of a commodity that is traded in an interstate market").

The First Circuit appeared to believe that cockfighting was "economic" because Puerto Ricans might exchange money among themselves during a cockfighting match—through an admissions ticket, concessions, or a wager on the fight. App. 13-14. But if the mere exchange of money *associated with* an activity can justify Commerce Clause regulation, then "the distinction between what is national and what is local" has been "obliterate[d]." *Jones & Laughlin Steel Corp.*, 301 U.S. at 37. Indeed, "depending on the level of generality, any activity can be looked upon as commercial." *Lopez*, 514 U.S. at 565. Even under the modern version of the Commerce Clause, there still must be a "substantial" connection to a "commodity" in an "interstate market." *Raich*, 545 U.S. at 18-19. Section 12616 contains no such connection.

Second, Section 12616 has no "'express jurisdictional element which might limit its reach to a discrete set of [circumstances] that additionally have an explicit connection with or effect on interstate commerce.'" *Morrison*, 529 U.S. at 611-12. Indeed, the purpose of Section 12616 was to *eliminate* that jurisdictional element. Under the prior version of the Animal Welfare Act, a Puerto Rican engaged in cockfighting violated federal law only when he "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). Congress eliminated this jurisdictional hook specifically so it could punish entirely intrastate activity.

The First Circuit found this factor satisfied because Section 12616 requires that the animal fighting venture be "in or affecting interstate or foreign commerce." App. 13; *see* 7 U.S.C. §2156(g)(1). But this "limiting" jurisdictional provision is "[a]s a practical matter . . . useless." *United States v. Rodia*, 194 F.3d 465, 473 (3d Cir. 1999). The purpose of a jurisdictional hook is to "limit [a statute's] reach to a discrete set" of circumstances that substantially affect interstate commerce. *Lopez*, 529 U.S. at 562. But Section 12616's capacious jurisdictional provision—that the activity must be "in or affecting interstate or foreign commerce"—encompasses virtually every case imaginable.

After all, unlike a federal criminal law that overlaps with state criminal laws, Puerto Rican law *permits* cockfighting. But Section 12616's jurisdictional

hook provides no demarcation between what is local (and permitted) and what is national (and forbidden). A Puerto Rican seeking to engage in cockfighting has no option but to "risk prosecution to test [his] rights." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). The more likely outcome is that he will cease such activity altogether. If this type of boundless jurisdictional hook is sufficient, Congress could, in practical effect, extend its jurisdiction over anything and everything.

Third, neither Section 12616 nor its legislative history "'contain[s] express congressional findings regarding the effects upon interstate commerce'" of cockfighting in Puerto Rico and the island territories. *Morrison*, 529 U.S. at 612. Section 12616's barebones legislative history contains *nothing* indicating that Congress believed that banning cockfighting in Puerto Rico would "substantially affect" interstate or foreign commerce. The only legislative history available confirms that Congress banned the practice because legislators deemed it morally wrong.

Faced with this dearth of legislative history, the First Circuit was forced to rely on decades-old legislative history to bolster its holding. But the "importation of previous findings to justify [Section 12616] is especially inappropriate here" because "the prior federal enactments or Congressional findings do not speak to the subject matter of [Section 12616] or its relationship to interstate commerce." *Lopez*, 514 U.S. at 563 (cleaned up). In 1976, cockfighting was legal in 30 states, *see* Gov't of Puerto Rico Amicus Br., Dkt. 61 at 10-12, and the 1976 Congress explicitly chose *not* to impose restrictions on those places where cockfighting

was allowed by local law. The findings necessary to support that law do not support Section 12616, which was adopted more than 40 years later. In 2018, Congress chose to *prohibit* entirely *local* activity occurring on *islands* located hundreds or thousands of miles from the mainland. Congress needed new legislative findings to justify such a "sharp break with the long-standing pattern of federal [cockfighting] legislation." *Lopez*, 514 U.S. at 563.

Fourth, "the link between" cockfighting in Puerto Rico and "a substantial effect on interstate commerce" is highly "attenuated." *Morrison*, 529 U.S. at 612. Cockfighting is not a "fungible commodity for which there is an established, albeit illegal, interstate market." *Raich*, 545 U.S. at 18. And cockfighting in Puerto Rico is an inherently *local* activity. There is no reason to believe that cockfighting in Puerto Rico and three island territories—islands that are hundreds and sometimes thousands of miles from the mainland—was creating a national market for birds or any other commodity.

At bottom, the First Circuit upheld Section 12616 only by "pil[ing] inference upon inference" so as to "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567. Through Section 12616, Congress has criminalized a local, noneconomic activity because federal legislators disagreed with the islanders' centuries-long decision to allow the practice. "That is not the country the Framers of our Constitution envisioned." *NFIB*, 567 U.S. at 554. The Court's review is urgently needed.

CONCLUSION

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

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