No. 20-1735

In The
Supreme Court of the United States

ÁNGEL MANUEL ORTIZ-DÍAZ, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE COMMONWEALTH OF PUERTO RICO AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This *amicus* brief will address the following question:

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

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INTEREST OF THE *AMICUS CURIAE*[1]

With the adoption of Section 12616 of the Agriculture Improvement Act of 2018 (hereinafter "Section 12616"), Congress made illegal every aspect of cockfighting in Puerto Rico, effectively eliminating an activity that many persons in Puerto Rico consider to be part of Puerto Rican culture, and represented a substantial source of economic activity, which Puerto Rico sorely needs in the dire economic situation it is presently confronting. Notably, the district court stated in its Opinion and Order (App. 55-56) that this activity injected $65 million annually into the Commonwealth's economy and generates a total of 11,314 direct, indirect and induced jobs.

On May 3, 2017, the Government of Puerto Rico filed a petition of reorganization of its debts pursuant to Title III of PROMESA, 48 U.S.C. §§2101 et seq., because, after a ten-year recession, it became incapable of paying its enormous public debt. This process is still ongoing. Further, Puerto Rico was affected by two major hurricanes (Irma and Maria) on September 6 and 20, 2017, respectively. Hurricane Maria, specifically, was a catastrophic event which devastated the entire island, and Puerto Rico is still in the early

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties has received notice of the Commonwealth of Puerto Rico's intention to file this brief at least 10 days prior to its due date, and all parties have consented to the filing of this brief. *Amicus* and their counsel have authored the entirety of this brief, and no person other than *amicus* or its counsel has made a monetary contribution to the preparation or submission of this brief.

stages of reconstruction and recovery. Additionally, on January 7, 2020, an earthquake struck the southwestern part of Puerto Rico, destroying many structures, homes and buildings and leaving tens of thousands of persons homeless. Finally, the COVID-19 pandemic has greatly affected the economy of Puerto Rico, forcing a partial shutdown of economic activity in various stages since March 16, 2020, to this date. In this adverse environment, Section 12616 represents yet another blow to the economy of Puerto Rico.

The Commonwealth of Puerto Rico supports the position of Petitioners, who argue that Section 12616 is unconstitutional, on two grounds. *First*, Section 12616 completely prohibits economic activity in Puerto Rico that is exclusively intrastate, and therefore exceeds Congress' power under the Commerce Clause, U.S. Const., Art. I, §8, cl. 3. *Second*, even if Congress had enacted such legislation pursuant to the Territory Clause, U.S. Const., Art. IV, §3, cl. 2, this does not allow it to exceed its authority under the Commerce Clause by regulating wholly intrastate activity in Puerto Rico. Therefore, the Commonwealth requests that the judgment of the First Circuit, which affirmed the district court's dismissal of this case, be reversed.

SUMMARY OF THE ARGUMENT

The Commonwealth asserts that the decision of the First Circuit is erroneous as a matter of law and should be reversed. Section 12616 exceeds Congress'

powers under the Commerce Clause because it completely prohibits cockfighting in Puerto Rico, which is a commercial activity that is exclusively intrastate and does not affect interstate commerce.

There is no rational basis to believe that the activity of cockfighting in Puerto Rico may affect interstate commerce. *First*, in approving Section 12616, Congress did not even address the matter of whether such activity affects interstate commerce. *Second*, cockfighting is not a good that may affect the interstate market; rather, it is an activity that may not be exported. *Third*, since cockfighting had been illegal in all states at the time when Section 12616 was approved, there was no substantial interstate market to consider. *Fourth*, Puerto Rico law clearly and strictly limits this activity to gamecocks born and bred in Puerto Rico. Section 12616 fails to distinguish between what is truly national commerce and what is purely local by absolutely prohibiting an activity that is strictly regulated by Puerto Rico law and does not affect interstate commerce. Consequently, it exceeds Congress' authority under the Commerce Clause.

Further, even if, in approving Section 12616, Congress had acted pursuant to its powers under the Territorial Clause, this would not excuse Congress from its obligation to abide with the restrictions of the Commerce Clause. There is no authority supporting the proposition that the plenary power granted to Congress by the Territorial Clause allows Congress to regulate entirely local economic activity in Puerto Rico. To the contrary, Congress must still abide by the Constitution even while acting under that clause.

Since Section 12616 exceeds the authority of Congress under the Commerce Clause by prohibiting intrastate activity entirely in Puerto Rico, it is unconstitutional, and the First Circuit's judgment should be reversed.

REASONS FOR GRANTING THE PETITION

The activity of cockfighting has been part of life in the United States and its territories, including the Commonwealth, for centuries. However, the evolution on the treatment and regulation of this activity by the states, the Federal government and Puerto Rico has been very different.

The states have gradually shifted from accepting and regulating cockfighting to enacting statutes prohibiting the activity. States' legislatures, oftentimes influenced by a strong and assertive animal rights lobbying, slowly but steadfastly, expanded existing prohibitions of animal fights to include cockfights or simply prohibited outright the practice. This process began with Pennsylvania in 1830[2], and culminated in 2008, when Louisiana became the last state to criminalize cockfights[3], with most states prohibiting the activity during the 1980s and 1990s.

[2] *See* 18 Pa.C.S. §5543.

[3] *See* LSA-R.S.14:102.23. It should be noted that, while Texas was the last state to codify a prohibition on cockfights in 2011, *see* TX Penal §42KS Stat. §21-6417.105, they had been illegal since 1984.

The federal government did not regulate cockfighting activity until 1976. Before that, Congress enacted in 1966 the Animal Welfare Act, Public Law 89-544 which, in essence, authorized the Secretary of Agriculture to regulate the transportation, sale, and handling of dogs, cats, and certain other animals intended to be used for purposes of research or experimentation, and for other purposes. By the Animal Welfare Act Amendments of 1976, Congress introduced a new Section 26, which established certain prohibitions regarding animal fighting. However, Subsection (d) of Section 26 provided that these prohibitions would not be applicable to fighting ventures involving live birds unless the fight was to take place in a state where such practice is unlawful. This section was later codified as 7 U.S.C. §1256. At this time, thirty states allowed cockfighting within their jurisdictions.

In 2002, Congress enacted the Farm Security and Rural Investment Act, Pub. L. No. 107-171, 116 Stat. 134. This statute provided in part that, in states where a fighting venture is not illegal, it will be unlawful for a person to sponsor or exhibit a bird in such a venture only if the person knew that any bird participating in the fighting venture was knowingly bought, sold, delivered, transported, or received in interstate or foreign commerce. *Id.*, at pp. 491-92.

In 2007, Congress passed the Animal Prohibition Enforcement Act, Pub. L. No. 110-22, 121 Stat. 88, in which it provided in part that it is unlawful for a person to buy, sell, transport or deliver in interstate

commerce any sharp instrument to be attached to the leg of a bird for use in an animal fighting venture.

In 2008, Congress enacted the Food Conservation and Energy Act. Section 14207 of this statute, titled "Prohibition of Dog Fighting Ventures", made various changes to 7 U.S.C. §1256, but preserved the differences and exceptions then existing in that section for jurisdictions where cockfighting was allowed.

In 2014, Section 12308 of the Agricultural Act, Pub. L. No. 113-79, 128 Stat. 649, amended 7 U.S.C. §1256 to add a prohibition to attending an animal fight or causing an individual who has not attained the age of 16 to attend an animal fight. *Id.*, at 990-991.

Finally, in 2018, Section 12616 of the Agricultural Improvement Act, Pub. L. No. 115-334, titled "Extending Prohibition on Animal Fighting to the Territories", finally eliminated the state law exceptions previously contained in 7 U.S.C. §1256.

In Puerto Rico, cockfighting activity is regulated by the Puerto Rico government, through the "Puerto Rico Gamecocks of the New Millenium Act", Act No. 98 of July 31, 2007, 15 Laws of P.R. Ann. §301 et seq. In essence, this statute provides that the Puerto Rico Department of Recreation and Sports would oversee all aspects of cockfighting activity by regulation. P.R. Laws Ann., tit. 15 §301b. Most relevant to this case is the provision contained in Section 301t of the statute, which provides that gamecocks imported from outside of Puerto Rico may only be used for exhibition; and that they may not be exhibited during an organized

cockfight or for breeding purposes. *Id.*, at §301t. Thus, all cockfighting activity in Puerto Rico is limited to Puerto Rican gamecocks bred and raised in Puerto Rico. In other words, cockfighting activity in Puerto Rico is restricted to a purely local scenario.

It should also be noted that the Commonwealth has taken extensive measures to prevent and penalize cruelty to animals, by enacting Law 154 of August 4, 2008, P.R. Laws Ann, tit. 5 §1660 et seq. This statute prohibits as criminal offenses multiple acts which constitute cruelty to animals, including negligent treatment, abandonment, mistreatment, and torture, most of them as felonies. *Id.*, §§1664-1670. This statute further prohibits animal fights of any kind, except cockfighting, which is regulated by Act No. 98, *ante*, and makes it a second-degree felony punishable by imprisonment for 8 years and one day to 15 years. *Id.*, at §1671. By regulating cockfight activity, the Commonwealth is not promoting animal cruelty; rather, this traditional activity has been extensively regulated by law for decades, thus preventing the incidents of animal cruelty that occur in illegal animal fights.

As shown before, throughout the years Congress has legislated to prohibit animal fights, particularly dog fights. This prohibition originally excluded "live birds" in those jurisdictions which, like Puerto Rico, already regulated the otherwise prohibited "live birds" fights. In 2007, Congress expanded its prohibition to include the sale and transportation in interstate commerce of any sharp instrument to be attached to the leg of any live bird. By this time, only four states

allowed cockfighting in their respective jurisdictions. In 2014, Congress prohibited attending an animal fight or causing an individual who has not attained the age of 16 to attend an animal fight, but did not remove the exceptions for jurisdictions where cockfighting was not prohibited, although by then, all the states had already prohibited cockfighting in their jurisdictions. From this, it is evident that Congress approved these provisions exclusively pursuant to the Interstate Commerce Clause, Article I, §8 of the Constitution. That is, Congress prohibited animal fights insofar as they had significant effects in interstate commerce. While Congress could not legislate on the intrastate aspects of cockfighting (including the cockfights themselves), it did regulate the interstate commercial aspects of the activity, such as the sale/transport of live birds and the trade in paraphernalia associated to it.

However, in December 2018, by approving Section 12616, Congress outright prohibited the practice of cockfighting by removing the previous exception for jurisdictions with cockfight regulation in place, which, at that time, included Puerto Rico and the other territories of the United States. By then, all states had already banned cockfighting. In effect, what Congress did in Section 12616 was to prohibit all cockfighting activity in Puerto Rico and the other territories, regardless of whether it affects interstate commerce. As a consequence, even a purely local cockfight, attended only by residents of Puerto Rico, and at which only instruments made in Puerto Rico are used, would

be prohibited by federal law. This clearly exceeds Congress' authority under the Commerce Clause.

The Constitution created a federal government of enumerated powers, in which the powers delegated to it are "few and defined", while those retained by the States are "numerous and indefinite". *United States v. Lopez*, 514 U.S. 549, 552 (1995), quoting James Madison, *The Federalist*, No. 45, pp. 292-293 (C. Rossiter Ed. 1961). The Constitution delegates to Congress the power "[to] regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, §8, cl. 3.

In *Lopez*, 514 U.S. at p. 553, this Court quoted the definition of "commerce" set forth in *Gibbons v. Ogden*, 9 Wheat. 1, 189-190 (1824), which stated that commerce is the "commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." However, it also quoted *Gibbons* to state that "[i]t is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between men and men in a state, or between different parts of the same State, and which does not extend to other States." *Id.*, quoting *Gibbons*, at 194-195. In *Lopez* this Court stated that it has undertaken to determine whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce. *Id.*, at 556. However, it found that the activity Mr. Lopez was convicted of, possession of a firearm within a school zone in violation of the Gun-Free Zones Act, is not an

activity that has a substantial effect on interstate commerce, and, therefore, Congress had no authority to prohibit such act. *Id.*, at 567.

In *González v. Raich*, 545 U.S. 1 (2005), this Court addressed the question of whether the power vested in Congress under the Commerce Clause included the power to prohibit the local cultivation and use of marijuana in compliance with California law. In resolving this question, the Court identified the general categories of regulation in which Congress is authorized to engage under its commerce power, to wit: (1) Congress can regulate the channels of interstate commerce; (2) Congress can regulate and protect the instrumentalities of interstate commerce and persons or things in interstate commerce; and (3) Congress has the power to regulate activities that substantially affect interstate commerce. *Id.*, at 16. This Court, citing its opinion in *Wickard v. Filburn*, 317 U.S. 111, 125 (1942), stated that, even if a person's activity is purely local and may not be regarded as commerce, it may still be regulated by Congress if it exerts a substantial effect on interstate commerce. *González*, 545 U.S. at 17. Further, this Court explained that Congress can regulate purely intrastate activity that is not itself commercial (not produced for sale), if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity. *Id.* The Court concluded that this regulation is within Congress' power under the Commerce Clause because production of the commodity meant for home consumption has a substantial effect on supply and

demand in the national market for that commodity. *Id.*, at 19.

The Commonwealth submits that the present case is very different from *González*. The cockfighting activity regulated by Section 12616 does not involve the production of any goods that could be sold in interstate commerce. From the scarce legislative history on this provision, it seems that, before approving it, Congress did not assess at all whether intrastate cockfighting activity has any effect on interstate commerce; but rather, merely wanted to extend the prohibition of that practice adopted by the States to the territories, all of which, including the Commonwealth, opposed the approval of Section 12616. Indeed, there were no hearings on this matter when that section was introduced by amendment. Further, the title of Section 12616, as approved, is "Sec. 12616 EXTENDING PROHIBITION ON ANIMAL FIGHTING TO THE TERRITORIES." Clearly, although regulating interstate commerce is the alleged basis for Congress' jurisdiction to approve Section 12616, this took no part in the congressional discussion and approval of that section.

Considering this case in light of the Commerce Clause, the main question is whether Congress has a rational basis to believe that cockfighting activity in Puerto Rico has a substantial effect in interstate commerce. Even if it could be alleged that Congress made that analysis in enacting Section 12616, the answer is no. As stated before, even if a person's activity is purely local and may not be regarded as

commerce, it may still be regulated by Congress if it exerts a substantial effect on interstate commerce, or if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity. *Gonzalez*, 545 U.S. at 17 and 19.

When Section 12616 was approved, there had been no states in which cockfighting activity was legal for ten (10) years; and therefore, there was no substantial interstate commerce in cockfighting activity to speak of. Further, under Puerto Rico's extensive regulation of cockfighting activity, imported gamecocks may only be used for exhibition, and may not be exhibited during an organized cockfight or for breeding purposes. P.R. Laws Ann., tit. 15 §301t. Indeed, the activity of cockfighting in Puerto Rico is strictly limited to gamecocks born and raised in Puerto Rico, and thus has no substantial effect in interstate commerce. Moreover, there is no evidence that failure by Congress to regulate cockfighting activity in Puerto Rico would undercut its regulation of an interstate market that does not exist. In *González*, at p. 18-19, this Court found that the defendant's activity of growing marijuana for local consumption, as authorized by California law, could undercut the regulation of that substance in the established, albeit illegal, interstate market, because high demand in that market could draw defendant's product into that market. No such possibility is present here because cockfighting activity is not a good that could be drawn into any market.

In *Lopez*, 514 U.S. at 567-568, this Court stated that the Constitution requires maintaining the distinction between what is truly national and what is truly local. Section 12616 obliterates that distinction by absolutely prohibiting an activity that is strictly regulated by Puerto Rico law and does not affect interstate commerce. Therefore, this statute exceeds Congress' authority under the Commerce Clause and should be declared unconstitutional.

Additionally, at pages 1-2 of its Opinion and Order (App. Pet. Cert. 19-20), the district court stated that, "[u]nder the Commerce Clause, Congress has the unquestionable authority to treat the Commonwealth *equally* to the states." This, in support of its determination that the Territorial Clause of the Constitution, U.S. Const., Art. IV, §3, cl. 2, did not prevent Congress from enacting Section 12616[4]. The Commonwealth agrees that Congress should always treat United States citizens residing in Puerto Rico equally to United States citizens who live in the states. Unfortunately, that is not always the case, and was not the case here. The Commonwealth disagrees with the district court's determination that Puerto Rico has been equally treated to the states in this particular matter.

Since the enactment of the Animal Welfare Act in 1976, Congress has been progressively regulating

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[4] In its opinion, the First Circuit did not address this matter because it deemed sufficient Congress' Commerce Clause powers. Slip Op., at 14 (App. Pet. Cert. 15).

cockfighting activities, insofar as they may affect interstate commerce, but has always deferred to those states that allowed such activities within their jurisdictions, until every state prohibited them. Throughout this time, Congress treated Puerto Rico, and other territories, equally to the States. However, after all states had prohibited cockfighting, the deference with which Congress had treated Puerto Rico and the other territories ceased. By approving Section 12616, Congress imposed upon them the prohibition that the states had voluntarily adopted, without even granting Puerto Rico, which strongly opposed approval of this section, the opportunity to discuss this matter through public hearings. It is thus inapposite to conclude that in enacting Section 12616, Congress treated the Commonwealth and states equally. Under the guise of "Extending Prohibition on Animal Fighting to the Territories", Congress in fact incurred in discriminatory treatment of Puerto Rico and the other territories.

However, even if it could be argued that Congress treated Puerto Rico equally to the states in enacting Section 12616, this does not solve the question presented in this case, because this provision violates the Commerce Clause. That Puerto Rico is an unincorporated territory of the United States and that Congress possesses plenary power over territories pursuant to the Territories Clause, U.S. Const., Art. IV, §3, cl. 2, do not alter the obligation of Congress to comply with the Commerce Clause. The broadest statement by the Supreme Court regarding Congress' power under this clause is contained in *Harris v. Rosario*,

446 U.S. 651 (1980), wherein this Court stated, in a two-paragraph *per curiam* opinion entered in a summary disposition, that Congress may "treat Puerto Rico differently from the States so long as there is a rational basis for its actions." *Id.*, at 651-652[5]. However, this statement does not afford Congress "carte blanche" to discriminate against Puerto Rico. *See United States v. Vaello-Madero*, 956 F.3d 12, 21 (1st Cir. 2020) ("We do not view . . . *Harris* as *carte blanche* for all federal assistance programs to discriminate against Puerto Rico residents. There still must be a rational justification for the classification."); *Boumedienne v. Bush*, 553 U.S. 723, 765 (2008), quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885) ("The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.' ").

In essence, the Commonwealth asserts that, regardless of Congress' plenary power over Puerto Rico under the Territorial Clause, this power is still limited by the Commerce Clause to regulating interstate and foreign commerce. We have found no authority of this

[5] The Commonwealth strongly disagrees with this statement's implication, that actions by Congress which discriminate against Puerto Rico or its residents are somehow exempted by the Territories Clause from heightened scrutiny under the Equal Protection Clause. However, in this case it is not necessary to address this issue.

Court allowing Congress to regulate entirely local economic activity in Puerto Rico. However, the United States cited *Palmore v. United States*, 411 U.S. 389 (1973) before the district court, for the proposition that Congress' plenary authority under the Territories Clause: "allows Congress to legislate for the territories 'in a manner . . . that would exceed its powers or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it". *Id.*, at 398. Seemingly, by using the phrase "exceed its powers", the United States implies that, under the Territorial Clause, Congress may ignore its constraints under the Constitution when exercising its powers under the Commerce Clause. This proposition has no basis in this Court's Territorial Clause or Commerce Clause jurisprudence.

In fact, in *Palmore*, this Court was deciding the entirely unrelated question of whether a District of Columbia court, created by Congress pursuant to Article I, could convict a person of offenses regulated by the District of Columbia's penal code, which had been also enacted by Congress. The defendant alleged that only Article III judges could decide cases based on an act of Congress, and therefore his conviction was invalid. *Id.*, at 400. This Court disagreed and held that Congress was not required to provide for an Article III court to preside trials of criminal cases arising from its laws applicable only to the District of Columbia, and that such trials may be presided by local courts created

by Congress under Article I. *Id.*, at 410. This question is entirely inapposite to this case.[6]

Further, this Court stated in *Palmore*, only two sentences before the phrase quoted by the United States, that "Congress 'may exercise within the District all legislative powers that the legislature of a state might exercise within the State, and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, **so long as it does not contravene any provision of the constitution of the United States**.'" *Palmore*, at pp. 397-398, quoting *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899) (emphasis ours). Therefore, *Palmore* does not support the conclusion that Congress may disregard the Constitution of the United States, including the Commerce Clause, in exercising its power under the Territorial Clause.

[6] Notably, in *Vaello-Madero*, 956 F.2d at 31, the First Circuit discussed *Palmore*, and decline[d] to read it "so broadly as to permit Congress to sidestep the Fifth Amendment when it legislates for a territory."

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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