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

BRIEF OF *AMICUS CURIAE* THE HON. RAFAEL HERNÁNDEZ-MONTAÑEZ, SPEAKER OF THE PUERTO RICO HOUSE OF REPRESENTATIVES, IN SUPPORT OF THE PETITION

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INTEREST OF *AMICUS CURIAE*[1]

The appearing *amicus curiae*, the Hon. Rafael Hernández-Montañez, has held, since January 2021, the position of Speaker of the Puerto Rico House of Representatives. The House of Representatives is the oldest democratic institution made, created by the 1900 Organic Act, 31 Stat. 77[2]. This Nineteenth Legislative Assembly[3] is the most diverse in modern Puerto Rico history with 5 different political parties having elected members to the House. Pursuant to Article 5.2(p) of the current House Rules (House Resolution 161), the Speaker is authorized to make court appearances on behalf of the legislative body.

The challenges currently facing Puerto Rican legislators are unprecedented. The Commonwealth's default on its bond obligation brought about the very unfortunate piece of legislation known as the Puerto

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[1] Both the petitioners and the respondent have provided—via email—the express written consent to the foregoing filing. *Amicus* hereby further certifies, as per this Honorable Court's Rule 37.6 no party or counsel for a party has authored any part of the foregoing brief nor has any of the parties and/or their attorneys made a monetary contribution to fund the filing of this brief. No person other than the *amicus* or his counsel have made a monetary contribution to its preparation or submission.

[2] Under this legislation the "House of Delegates," as it was then called, was the only government institution whose members were selected through popular vote as all other components of the territorial government were either appointed by the President of the United States or by the Governor.

[3] Although the House has been in continuous operation since 1900, the Number Nineteen corresponds to the terms since the post-1952 constitutional era.

Rico Oversight, Management and Economic Stability Act, 48 U.S.C. § 2101, et seq. (hereinafter referred as "PROMESA"), which severely impaired the House's ability to take care of the People's business, as many of the powers delegated to Puerto Rico's elective constitutional government have now been vested on a board of seven appointed individuals that are not accountable to the Puerto Rican electorate[4]. In any event, even in the complex and undemocratic post-PROMESA world, the Puerto Rico Legislature retains the authority to legislate to protect its cultural heritage.

Since the First Circuit's ruling over which relief is being sought validated congressional action that overstepped the boundaries of Article I, we feel compelled to make the instant appearance in support of the petitioners. To be sure, since the Twentieth Century, the Commerce Clause has been construed very broadly in order to, through the identification of actual interstate commerce elements, advance compelling national interests such as the protection of civil rights. Having said this and as we shall now explain, Puerto Rico-raised game birds are not elements of interstate commerce and deciding what constitutes "animal cruelty" is not a national concern that requires congressional action.

For the foregoing reasons, the Puerto Rico House of Representatives supports petitioners' plea for the

[4] For a detailed description of how this reallocation of territorial governance conflicts with prior Congressional policy, *see Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1675-1683 (2020) (Sotomayor, J., concurring).

issuance of a writ of certiorari, the reversal of the First Circuit's decision and the entry of a declaratory judgment holding that P.L. 115-334, at § 12616, which amends Section 26(f)(3) of the Animal Welfare Act, 7 U.S.C. § 2156(f)(3) is unconstitutional, as applied to purely local cockfighting ventured within the Commonwealth of Puerto Rico.

SUMMARY OF ARGUMENT

As more than adequately explained in petitioners' brief, cockfighting events in Puerto Rico are not economic activities that in any way affect the ebb and flow of interstate commerce but rather a deeply engrained cultural tradition embedded in Puerto Rican ethos for almost half a millennium. An amendment to a federal statute enacted under Congress' authority to regulate interstate commerce abruptly ended this tradition and has now subjected enthusiasts of the so-called "Gentlemen's Sport" ("*Deporte de Caballeros*") to the possibility of criminal prosecution.

Because Puerto Rico is a U.S. Territory, it must first and foremost be clarified whether or not the challenged enactment is an exercise of Congressional authority pursuant to Article IV, Section 3 of the Constitution. The legislative record does not reveal the slightest inclination by either Chamber of Congress to amend the Animal Welfare Act pursuant to its Article IV authority. The amendment was instead couched in commerce clause language, following an Article I model. In any

event, Article IV legislation is always aimed at territorial governance and not at the regulation of day-to-day affairs and, in most cases, the intention to legislate under these so-called plenary powers is either explicit in the bill or overtly implicit as a matter of context.

In order to regulate an activity such as cockfighting under a commerce clause theory there would have to be a cognizable link between that activity and the commercial exchange between the states. Where, as here, the activity at issue is purely local in nature, it must substantially affect interstate commerce to the point where it creates a national problem that requires a national solution. None of these elements are here and the lower courts relied on generalized assertions of possible disease and the like that are objectively without support.

ARGUMENT

A) ARTICLE IV AND THE COMMERCE CLAUSE

Notwithstanding the undeniable increased delegation of self-rule on the Commonwealth of Puerto Rico, especially during the 1950-1953 constitutional process, this Honorable Court has held that, with regards to Congress' power over the Commonwealth, "the delegator cannot make itself any less so—no matter how much authority it opts to hand over," which means that "the Commonwealth and the United States are not separate sovereigns." *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1876 (2016). Puerto Rico still

remains under Congress' so-called "plenary powers." However outdated and undemocratic the aforementioned holding may be, it does not stand for the proposition that every single federal statute that affects Puerto Rico is necessarily enacted pursuant to Article IV powers.

Going into the 1787 Constitutional Convention, one of the Founding Fathers' greatest challenges in creating a federalist republic was the hesitance on the part of some of the new states to delegate such broad authority on a central government which may eventually render such states mere subjects to that higher power. Hence, a compromise was reached by means of which the scope of the central government's authority was circumscribed to legislating over matters categorically enumerated in Article I of the Constitution and a Tenth Amendment containing an express reservation that "[t]he 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." *See Saenz v. Roe*, 526 U.S. 489, 508 (1999) (holding that Congressional authority is "limited not only by the scope of the Framers' affirmative delegation, but also by the principle that they may not be exercised in a way that violates other specific provisions of the Constitution").

Most of the legislative competences contained in Article I, Section 8 of the Constitution are intimately related to the structure and functioning of the federal government and, as such, clearly distinguishable from the legislative competences of the several states. For

example, nobody would expect individual states to raise and maintain an army of a navy nor would it make sense for each state to create and operate its own postal service. During the first years of the constitutional era, no significant litigation reached the Supreme Court wherein it was alleged that Congress had enacted a law outside of the Article I lane. However, in *Gibbons v. Ogden*, 22 U.S. 1 (1824), this Honorable Court held that a federal law that licensed vessels to engage in fishing and trading ventures, preempted New York laws that restricted sailing in said state's waterways, on account of Congress' authority to regulate interstate commerce observing that "[t]his power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Id.* at 196.

Article IV legislation concerning territorial governance constitutes an exception to the general rule that whatever areas were not listed under Article I are beyond the scope of legitimate Congressional action. However, the Constitution provides for the drafting of "needful rules" regarding the disposition and other aspects of territorial governance. *See*, *e.g.*, *Binns v. United States*, 194 U.S. 486, 488 (1904) ("It must be remembered that congress, in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution, that *the form of government it shall establish* is not prescribed, and may not necessarily be the same in all the Territories") (emphasis added). Hence, when

Congress acts under Article IV it does so to provide governance schemes for territories. As to legislating on the day-to-day affairs of the territories, the same is always left up to the territorial regimes of which Puerto Rico is, by far, the most autonomous. For example, Congress has never legislated—via organic act or otherwise—basic aspects of daily life such as divorce provisions, contractual rights and the like.

An example of the very particular contextual nature of the exercise of Article IV authority may be found at Section 101(b)(2) of PROMESA, 48 U.S.C. § 2121(b)(2), *categorically states* that the creation of an Oversight Board with many of the prerogatives ordinarily exercised by a territory's elected officials was being done "*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*" (emphasis added). In stark contrast to this statute, the challenged amendments to the Animal Welfare Act do not contain any language asserting the Congress was simply exercising its authority over territorial governance.

It has long been the position of distinguished jurists that not all federal statutes that affect the territories are exercised under Article IV. For example, in one of the infamous Insular Cases, the dissenters observed that "*[i]t is evident that Congress cannot regulate commerce between a territory and the states and other territories in the exercise of the bare power to govern the particular territory*, and as this act was framed to operate and does operate on the people of the states,

the power to so legislate is apparently rested on the assumption that the right to regulate commerce between the states and territories comes within the commerce clause by necessary implication." *Downes v. Bidwell*, 182 U.S. 244, 354-355 (1901) (Fuller, C.J., dissenting) (emphasis added).

To the extent that the legislative record in this case shows a desire to create a uniform ban on animal fighting ventures across all states and territories, rather than creating a scheme of territorial governance, the Government cannot evade the discussion of the merits of petitioners' arguments by simply invoking Article IV for the first time, for purposes of this litigation.

B) INTERSTATE COMMERCE AND COCKFIGHTS

Interstate commerce is not an easily defined term as "[t]here is no single concept of interstate commerce which can be applied to every federal statute regulating commerce." *McLeod v. Threlkeld*, 319 U.S. 491, 495 (1943). The contemporary approach centers on maintaining the flow of commerce between the states. Namely, transactions are understood to fall within the scope of the clause "if they burden interstate commerce or impede its free flow." *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 389 (1994). This standard has since been distilled into three distinct possible areas of action that looks into: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of

interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities having a substantial relation to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce." *United States v. López*, 514 U.S. 549, 558-559 (1995).

This case involves purely local recreational activities in which local breeders provide game fowl to local people who attend government regulated arenas to participate in competitive cockfights. No materials flow from outside the maritime borders of Puerto Rico nor does any aspect of this activity boil over those boundaries. Hence, we cannot identify the use of any channel of interstate commerce that would begin to satisfy the first possible scenario identified in the *López* test, let alone how they pass muster under the third scenario by *substantially* affecting interstate commerce.

Also relevant here is that neither the animals nor the cockfighting activities that are currently banned under federal law are meant for or ever become an object that is sold or otherwise monetized across state lines. As this Honorable Court has observed "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is 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*." *Gonzáles v. Raich*, 545 U.S. 1, 18

(2005) (emphasis added)[5]. The Court of Appeals did not engage in this analysis but rather simply cited generalities raised during the Congressional debate, including concerns over the spread of avian flu, which has not been a cause of major concern to U.S. health authorities during the past years[6]. *Hernández-Gotay v. United States*, 985 F.3d 71, 79 (1st Cir. 2021). More importantly, the legislative debate failed to identify and we were unable to find any scientific studies remotely linking cockfights with outbreaks of avian flu. While expressions made during legislative debates are important, the judicial review paradigm created in *Marbury v. Madison*, 5 U.S. 137 (1 Cranch 137) (1803), demands much more than taking the unsubstantiated conclusions of individual congresspeople at face value.

With no projection beyond the geographic boundaries of the Commonwealth of Puerto Rico and with no cognizable effect on the United States at large, it is hard to see how this is a matter that requires federal legislation. To be sure, Congress is comprised of elected officials subject to pressures and demands from their constituents. Many individuals and organizations (some of which possess considerable financial resources) are bound to raise valid concerns regarding the legality of cockfights. Members of Congress may

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[5] This is in stark contrast with the racially motivated refusal to allow African American guests in a Georgia motel, where the widespread repetition of such conduct would have a direct and substantial effect in the flow of interstate commerce. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 261-262 (1964).

[6] https://www.cdc.gov/flu/avianflu/past-outbreaks.htm.

validly sympathize with such views or otherwise wish to please these constituents. Hence, while we can understand why members of Congress may be inclined to legislate on this matter, we frankly do not see a valid constitutional basis for doing so. This is in line with the existence of a culturally diverse federation. Nobody would even think, for instance, that Congress would be able to enact a prohibition on deer hunting because a majority of the members find what is a bedrock tradition in some states to be barbaric or cruel.

Opponents of cockfighting are not without recourse, as local legislators may be lobbied just the same as members of Congress and they undoubtedly have authority to proscribe this activity if so inclined. Those citizens are also free to support candidates that are identified with their position in order to eventually achieve their goals through the proper legislative channels. Indeed, prior to the 2018 amendments to the Animal Welfare Act, the vast majority of the states had legislated a prohibition of cockfighting that reflected the cultural identity of its citizens. Congress' improper adoption of a national ban deprived local governments from regulating the traditional and cultural activities that define them.

CONCLUSION

For the reasons stated herein, the petition should be granted.

Respectfully submitted,

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