No. 20-1735

In the Supreme Court of the United States

ANGEL MANUEL ORTIZ-DIAZ, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Congress exceeded its enumerated powers under the U.S. Constitution by prohibiting the sponsorship and exhibition of cockfighting in Puerto Rico.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 985 F.3d 71. The opinion and order of the district court (Pet. App. 19-57) is reported at 414 F. Supp. 3d 191.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 2021. The petition for a writ of certiorari was filed on June 11, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1976, Congress amended the Animal Welfare Act, 7 U.S.C. 2131 *et seq.*, to make it illegal to sponsor or exhibit an animal in any "animal fighting venture"—*i.e.*, an event in or affecting commerce that "involves a fight * * * between at least two animals" for "the purposes of sport, wagering, or entertainment." Animal Welfare

Act Amendments of 1976, Pub. L. No. 94-279, § 17, 90 Stat. 422. But Congress provided that the ban would not apply to bird fights (such as cockfights) if the fight is permitted by the laws of the State or Territory where it takes place. §§ 3, 17, 90 Stat. 417, 422. Numerous jurisdictions permitted cockfighting in 1976. Pet. App. 24. But the States and the District of Columbia had all banned it by 2007, leaving Puerto Rico, Guam, the Northern Mariana Islands, and the United States Virgin Islands as the only jurisdictions affected by the carveout from the federal prohibition. *Id.* at 24-25.

Congress repealed the carveout in 2018, in a provision captioned "Extending Prohibition on Animal Fighting to the Territories." Agriculture Improvement Act of 2018 (Agriculture Improvement Act), Pub. L. No. 115-334, § 12616, 132 Stat. 5015 (capitalization altered; emphasis omitted). As a result, federal law now prohibits sponsoring or exhibiting an animal in an animal fighting venture, with no exception for bird fights permitted by state or territorial law. Pet. App. 7.

A group of individuals and organizations, some of whom are petitioners here, sued in federal district court to challenge the extension of the federal cockfighting ban to Puerto Rico. Pet. App. 7-8. They argued, as relevant here, that the application of the ban to Puerto Rico exceeded Congress's enumerated powers. *Id.* at 8.

The district court granted the government summary judgment. Pet. App. 19-57. The court held that the cockfighting ban fell within Congress's power under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, because "live-bird fights in the Commonwealth are * * * a commercial activity," "live-bird fighting events have a substantial effect on interstate commerce," and the statute applies only to fights "'in or affecting interstate or

foreign commerce.'" Pet. App. 41, 42 (quoting 7 U.S.C. 2156(f)(1)). The court then held in the alternative that the extension of the ban to Puerto Rico also fell within Congress's power under the Territory Clause, U.S. Const. Art. IV, § 2. Pet. App. 45.

The court of appeals affirmed. Pet. App. 1-18. The court explained, as relevant here, that the Commerce Clause empowered Congress to enact the cockfighting ban. *Id.* at 12-15. The court emphasized that "[petitioners'] sponsorship and exhibition of cockfights for profit is clearly commercial," that those activities "substantially affect interstate commerce" in the aggregate, and that the statute by its terms applies only to cockfighting "'in or affecting interstate or foreign commerce.'" *Id.* at 13, 15 (quoting 7 U.S.C. 2156(f)(1)). The court then stated: "As the Commerce Clause power is sufficient, we need not reach the Territorial Clause issue." *Id.* at 15 n.7.

ARGUMENT

Petitioners renew their contention (Pet. 17-29) that the federal cockfighting ban exceeds Congress's enumerated powers. That contention lacks merit and does not warrant this Court's review. The court of appeals correctly held the prohibition falls within Congress's power under the Commerce Clause, and its holding does not conflict with any decision of this Court or any other court of appeals. The judgment below also is correct because the prohibition falls within Congress's power under the Territory Clause. The petition for a writ of certiorari should be denied.

1. The Constitution empowers Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. I, § 8, Cl. 3. This Court has identified three general

categories of activity that Congress may regulate under the Commerce Clause: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and (3) "activities that substantially affect interstate commerce." *United States* v. *Lopez*, 514 U.S. 549, 558-559 (1995). Under the third category, Congress may regulate "economic activity" that, "viewed in the aggregate, substantially affects interstate commerce." *Id.* at 561.

The law challenged here regulates economic activity that substantially affects interstate commerce. The law prohibits "sponsor[ing]" or "exhibit[ing]" an animal in "any event, in or affecting interstate or foreign commerce, that involves a fight * * * between at least 2 animals for purposes of sport, wagering, or entertainment." 7 U.S.C. 2156(a)(1) and (f)(1). Those activities are plainly "economic." *Lopez*, 514 U.S. at 561. As the court of appeals correctly observed, "sport, wagering, [and] entertainment" are all "closely aligned in our culture with economics and elements of commerce." Pet. App. 13 (citations omitted). And "on this record, [petitioners'] sponsorship and exhibition of cockfights for profit is clearly economic and commercial." *Ibid.*

Those economic activities, "in the aggregate," also have a "substantial effect" on interstate commerce. *Lopez*, 514 U.S. at 561, 563. A congressional report in 1976 found that animal fights "attract fighting animals and spectators from numerous states," are "advertised in print media of nationwide circulation," and "often involve gambling." *United States* v. *Gibert*, 677 F.3d 613, 625 (4th Cir.), cert. denied, 568 U.S. 889 (2012); see H.R. Rep. No. 801, 94th Cong. 2d Sess. 9 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 758, 761. Members of

Congress also have noted that cockfights can affect commerce by contributing to the spread of diseases such as avian influenzas. See, *e.g.*, 153 Cong. Rec. S451-S452 (Jan. 11, 2007) (statement of Sen. Cantwell) ("Interstate and international transport of birds for cockfighting is known to have contributed to the spread of avian influenza in Asia. * * * Because human handling of fighting roosters is a regular occurrence, the opportunity of disease transmission from fighting birds is substantial."); 153. Cong. Rec. E2 (daily ed. Jan. 5, 2007) (statement of Rep. Gallegly) ("[C]ockfighters spread diseases that jeopardize poultry flocks and even public health. * * * Cockfighting has been identified as the major contributor to the spread of avian flu throughout Thailand and other parts of Asia, where the strain originated. Many of the humans who contracted avian flu and died from it contracted it from fighting birds.").

In addition, the challenged statute applies only to fights "in or affecting interstate or foreign commerce." 7 U.S.C. 2156(f)(1). The phrase "'affecting commerce'" is a term of art that "normally signals Congress' intent to exercise its Commerce Clause powers to the full." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 273 (1995). The inclusion of this jurisdictional element "lend[s] support to the argument that [the statute] is sufficiently tied to interstate commerce." *United States* v. *Morrison*, 529 U.S. 598, 613 (2000).

The court of appeals' decision does not conflict with any decision of this Court. Petitioners argue (Pet. 23-29) that the decision conflicts with *Lopez* and *Morrison*, but that is incorrect. In *Lopez*, the Court held that Congress lacked the power under the Commerce Clause to enact a general ban on possessing guns in school zones. 514 U.S. at 551. The Court emphasized that the pro-

hibition "ha[d] nothing to do with 'commerce' or any sort of economic enterprise" and that it "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.* at 561. In *Morrison*, the Court held that Congress lacked power under the Commerce Clause to provide a federal civil remedy for victims of gender-motivated violence. 529 U.S. at 602. The Court emphasized that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity" and that the statute "contain[ed] no jurisdictional element." *Id.* at 613. The law challenged here, by contrast, regulates economic activity and expressly includes a jurisdictional element.

The court of appeals' decision also does not conflict with the decision of any other court of appeals. Two federal courts of appeals have held that the federal ban on animal fights, as applied in the States, falls within Congress's power under the Commerce Clause. See *Gibert*, 677 F.3d at 616 (4th Cir.); *Slavin* v. *United States*, 403 F.3d 522, 523-524 (8th Cir. 2005) (per curiam). Petitioners do not argue that any court of appeals has reached the opposite conclusion. They instead assert (Pet. 17 & n.2) that "a circuit split is highly unlikely on this issue" because the challenged statute "applies in only three circuits: the First Circuit (Puerto Rico), the Third Circuit (Virgin Islands), and the Ninth Circuit (Guam and Northern Mariana Islands." That assertion is flawed: the animal-fight ban applies in both the States and the Territories, and the question whether the ban exceeds Congress's power under the Commerce Clause can arise in a State. Indeed, a case that arises in a State would seem to be a better vehicle for addressing the Commerce Clause question than a

case that arises in a Territory, because it would not involve the Territory Clause as a separate basis for sustaining the statute. See pp. 7-9, *infra*.

2. The federal cockfighting ban, as applied in Puerto Rico, also falls within Congress's power under the Territory Clause. That Clause empowers Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3, Cl. 2. The Clause means that, "[i]n the Territories of the United States, Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a State might legislate within the State." *Simms* v. *Simms*, 175 U.S. 162, 168 (1899). Congress thus had the power to ban cockfighting in Puerto Rico.

Petitioners argue (Pet. 13) that the Territory Clause cannot support the cockfighting ban because "Congress acted under its Commerce Clause powers and not its Territorial Clause powers." But Congress extended the ban to Puerto Rico in a provision captioned "Extending Prohibition on Animal Fighting *to the Territories*"—a title that would seem to invoke Congress's authority over the Territories. Agriculture Improvement Act § 12616, 132 Stat. 5015 (capitalization and emphasis altered). In any event, it makes no difference whether Congress invoked the Commerce Clause or Territory Clause. "The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948); see, *e.g.*, *NFIB* v. *Sebelius*, 567 U.S. 519, 570 (2012); *EEOC* v. *Wyoming*, 460 U.S. 226, 243 n.18 (1983).

Petitioners also observe (Pet. 16) that the court of appeals' decision "rested entirely on Congress's powers under the Commerce Clause, not the Territorial Clause." "This Court, however, reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956). And a prevailing party may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Granfinanciera, S. A.* v. *Nordberg*, 492 U.S. 33, 38 (1989) (citation omitted). The government properly raised the Territory Clause in both the court of appeals and the district court, and the district court expressly relied on it when upholding the statute at issue. See Gov't C.A. Br. 12-16; D. Ct. Doc. 38, at 9-11 (Oct. 4, 2019); Pet. App. 45. That alternative ground for affirming the court of appeals' judgment makes this case a poor vehicle for considering petitioners' arguments about the Commerce Clause. See Stephen M. Shapiro et al., *Supreme Court Practice* 248 (10th ed. 2013) (explaining that denial of a petition for a writ of certiorari may be appropriate if the Court "might be able to decide the case on another ground and thus not reach the [question presented]").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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