No. 20-1735

IN THE
SUPREME COURT OF THE UNITED STATES

ÁNGEL MANUEL ORTIZ-DÍAZ, ET AL.,

Petitioners,

v.

UNITED STATES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE PUERTO RICO INSTITUTE FOR ECONOMIC LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Arturo V. Bauermeister
B&D LLC
1519 Ponce de León Ave.
Ste. 501
San Juan, PR 00909
(787) 931-0941
arturo@bdlawpr.com

Rubén T. Nigaglioni*
**Counsel of Record*
José A. Bagué Soto
Roberto Santana
DTS LAW LLC
221 Plaza Ste. 801
San Juan, PR 00917
(787) 754-8700
rtn@nigaglionilaw.com
Counsel for *Amicus Curiae*

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INTEREST OF *AMICUS CURIAE*[1]

The Puerto Rico Institute for Economic Liberty (ILE for its Spanish acronym) is a nonpartisan public policy foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. ILE's mission includes identifying and removing public-sector barriers to individual liberty and responsibility, meritocracy, and Puerto Rico's economic growth, while promoting reforms grounded in free-market principles, and the ideals of effective and accountable government.

ILE is convinced that in Puerto Rico *opportunities* are unevenly distributed and income inequality exerts an even greater drag on development. Yet the lion's share of Puerto Rico's cockfighters are in the lower income levels. Indeed, they are mostly families and individuals that represent those classes epitomized by Puerto Rico's "jíbaro." *Partido Nuevo Progresista v. Barreto Pérez*, 507 F. Supp. 1164, 1166 n. 2 (D.P.R. 1980) (describing *jíbaros* as "the hill-dwellers of Puerto Rico"). And legions and generations of them have legally operated for almost a century.

Congress's unprecedented shutdown of Puerto Rico's cockfighting industry—and concomitant deprivation of individual rights—goes to the heart of ILE.

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a case about legislative power versus individual and economic liberties. From the founding of the United States, the birthright of economic liberty, the right to earn an honest living free from onerous and unnecessary government intrusion has been a cherished one.

The same rings true with the freedom to participate in cockfighting sanctioned by local law. Since the 17th century, cockfighting permeates Puerto Rico's culture and folklore. Some say that it is "definitely the oldest sport practiced in Puerto Rico."[2] Others call it the Island's "National Sport." *Id.* But all agree that cockfighting is part of Puerto Rico. And since 1933, local law regulates the sport of cockfighting in Puerto Rico. The so-called "Puerto Rico Gamecocks of the New Millennium Act," P.R. Laws Ann. tit. 15, §§ 301 *et seq*. (the "Gamecocks Act"), prohibits importation of fighting gamecocks.

But in 2018 Congress banned cockfighting in all territories under the Animal Welfare Act, 7 U.S.C. § 2156 (AWA). Yet it made no findings that cockfighting *in Puerto Rico* substantially affected interstate commerce. In response, Puerto Rico Act No. 179-2019 amended the Gamecocks Act to prohibit not only the

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[2] Juan Llanes Santos, *Beaks and Spurs: Cockfighting in Puerto Rico* 1, National Register of Historic Places Multiple Property Documentation Form (May 29, 2014), https://tinyurl.com/264kda6a

import or export of fowls and roosters for participation in organized cockfights, but also the import or export of spurs, equipment, and materials used exclusively in organized cockfights. Laws Ann. tit. 15, §301t.

The Commerce Clause does not provide Congress the power to ban intrastate cockfights with no national market. And although the Puerto Rico Legislature took affirmative steps to ensure that its cockfighting industry would not substantially affect interstate commerce—indeed, the 2019 amendments to the Gamecocks Act insulated cockfighting from interstate commerce—the court below neither acknowledged nor addressed those efforts. In any event, the scant evidence on which Congress and the courts below relied to hold that cockfighting substantially affects interstate commerce is insufficient or otherwise inapplicable to Puerto Rico.

Above all, the federal prohibition would have ripple effects on federalism and individual liberty. Will Congressional overreach, like globalization, put an end to the powers of the States and of the People? Powers that neither the States nor the Founding Fathers delegated to Congress. Only this Court can answer these questions. This case thus gives this Court the rare opportunity to not only correct its Commerce Clause jurisprudence—by disavowing what the 115th Congress did here—but also remedy the oppressive encroachments on freedom and individual liberty caused by Congress's impermissible overreach.

ARGUMENT

I. This Court should correct course or otherwise hold that the Commerce Clause does not provide Congress with police power to ban intrastate cockfights with no national market.

The Constitution gives Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. But the Commerce Clause does not grant Congress the authority to prohibit intrastate cockfighting in Puerto Rico.

Before the enactment of Section 12616 of the Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 12616 (codified as amended at 7 U.S.C. § 2156) ("AWA amendments"), the AWA regulated animal fighting ventures affecting only interstate or foreign commerce. Thus, as initially enacted, sponsoring or exhibiting cockfights, or transporting animals involved in cockfighting, was illegal only if it involved a fighting cock transported in *interstate* commerce. *Club Gallístico de P.R. Inc.,* v. *United States*, 414 F. Supp. 3d 191, 199 (D.P.R. 2019).

But the AWA amendments eliminated the right to establish locally applicable laws on animal fighting that had no effect on interstate commerce. *Hernández-Gotay v. United States,* 985 F.3d 71, 76 (1st Cir. 2021). Until then, the territories were the only jurisdictions that had not proscribed cockfights. *Club Gallístico de P.R. Inc.,* 414 F. Supp. 3d at 199. Despite opposition from their local leaders, Congress passed the AWA amendments to extend the animal

fighting prohibition to the territories, including Puerto Rico. *Id.* at 206. Congress held no public hearings, to boot. The AWA amendments passed notwithstanding the opposition of all non-voting representatives from the territories. *See* 164 Cong. Rec. 80, H 4213 at H 4221-H 4222 (daily ed. May 18, 2018). Even worse, the legislative record lacks findings that *cockfighting in Puerto Rico* affects interstate commerce.

The AWA now makes it a federal crime to sponsor or exhibit animals, attend or causing an individual who has not attained the age of 16 to attend, an animal fighting venture, such as a cockfight. 7 U.S.C. § 2156(a). It would incarcerate those who (1) buy, sell, deliver, possess, train, or transport animals for participation in animal fighting ventures; (2) use the Postal Service or other interstate instrumentality to further animal fighting ventures; or (3) buy, sell, deliver, or transport sharp instruments for use in animal fighting ventures. 7 U.S.C. § 2156(b)–(d); 18 U.S.C. §49 (a). Even worse, it criminalizes animal-fight ventures by defining them broadly: "any event, in or affecting interstate or foreign commerce, that involves a fight conducted or to be conducted between at least 2 animals for purposes of sport, wagering or entertainment. . ." *Id.* (f).

But our "Constitution creates a Federal Government of enumerated powers," *United States v. Lopez*, 514 U.S. 549, 633 (1995), and "the Commerce Clause, as originally understood, 'empowers Congress to regulate the buying and selling of goods and services trafficked across state lines." *Taylor v. U.S.,* 136 S. Ct. 2074, 2083 (2016) (Thomas, J., dissenting). For the Nation's first 150 years, this Court held that

Congress could not regulate commerce "which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." *Lopez,* 514 U.S. at 594 (Thomas, J. concurring) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 9 (1824)). "There was no reason to believe . . . that Congress could regulate all activities that affect interstate commerce." *Id.* at 595.

In *NLRB v. Jones & Laughlin Steel Corp.,* this Court expanded the Commerce clause to allow Congress to regulate activity "that has such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions. . .." 301 U.S. 1, 37 (1937). And in *Wickard v. Filburn*, this Court held that Congress may regulate activity that exerts a substantial economic effect on interstate commerce. 317 U.S. 111, 121 (1942). But this Court has cautioned, the interstate commerce power cannot be "extended so as to embrace effects upon interstate commerce so indirect and remote that . . . would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." J*ones & Laughlin Steel,* 301 U.S. at 37. Since then, this Court has focused on "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 276–280 (1981).

Then, however, in *Lopez*, this Court reigned in the limits of Congress's power to regulate commerce: Congress could not prohibit the carrying of handguns

near a school zone. 514 U.S. 549 (1995). Justice Thomas's concurrence correctly held that the Commerce Clause "by no means encompass[es] the authority . . . to regulate . . . cruelty to animals. . ." *Id.* at 585 (Thomas J., concurring). And *U.S. v. Morrison* continued this trend of stricter scrutiny of Congress's power under the Commerce Clause. 529 U.S. 598 (2000); *see also PennEast Pipeline Co., LLC v. New Jersey*, No. 19-1039, 2021 WL 2653262, at *16 (U.S. June 29, 2021) (Barrett, J., dissenting) (arguing that the Commerce Clause has limits, and, for example, "does not permit Congress to strip the States of their sovereign immunity"). After all, as Professor Bickel remarks, "[t]he Framers of the Fourteenth Amendment explicitly rejected the option of an open-ended grant of power to Congress to meddle with conditions within the states. . ." A. Bickel, *The Morality of Consent* 48 (1975).

But by banning cockfighting in the territories, Congress overstepped the limits of its police powers under the Commerce Clause. That is particularly true in Puerto Rico, where the activities are intrastate. And it should go without saying that merely attending a cockfight in Puerto Rico should not be considered an activity governed by the Commerce Clause—justifying federal imprisonment for three years. *See* 18 U.S.C. § 49. As Justice Thomas remarked, "[a]ny interpretation of the commerce Clause that even suggests that Congress could regulate such matters is in need of reexamination." *Lopez*, 514 U.S. at 585 (Thomas J., concurring). *See also* Randy E. Barnett, *Jack Balkin's Interaction Theory of "Commerce"*, 2012 U. Ill. L. Rev. 623 (2012).

This Court "should take this opportunity to repair the damage caused by a misreading of the Commerce Clause." *Brief for Cato Institute, et al., as Amicus Curiae* 23. Be that as it may, the lower courts incorrectly determined that "the prohibitions in the statute are about activities which substantially affect interstate commerce." *Hernández-Gotay,* 985 F.3d at 79-80.

The district court upheld the prohibition because, "the main rationale behind these amendments according to the Congressional record, was to equate the legal standard applicable to the Nation's fifty States . . ." *Club Gallístico de P.R.*, 414 F. Supp. 3d at 2076. It found that, because live bird fights are considered a commercial activity, "that this event must be one "in or affecting interstate or foreign commerce" to be regulated and prohibited under Congress's power over interstate commerce. *Id.* at 2067. [3]

The First Circuit affirmed. It held that the challenged law was "a valid exercise of Congress's Commerce Clause power." *Hernandez-Gotay,* 985 F.3d at 79–80. Employing an incorrect analysis, *see Brief for Cato Institute, et al., as Amicus Curiae* 24, it applied the four factors (of rational-basis test) to hold

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[3] The district court cited the Fourth Circuit's decision in U.*S. v. Gilbert* to hold that "these fighting ventures: (1) attract fighting animals and spectators from numerous states; (2) are or have been advertised in print media of nationwide circulation; and (3) often involve gambling and other questionable and criminal activities." *Club Gallístico de PR,* 414 F. Supp. 3d at 206 (citing 677 F.3d 613, 625 (4th Cir. 2012)). As will be discussed below, however, the district court made no findings of undisputed facts that such factors were met *in Puerto Rico*.

that cockfighting in Puerto Rico substantially affected interstate commerce: whether (1) the law "regulates economic or commercial activity"; (2) it has an "'express jurisdictional element'" that limits its reach; (3) "Congress made findings" about "the regulated activity's impact on interstate commerce"; and (4) "'the link between [the activity] and a substantial effect on interstate commerce was attenuated." *Id.* at 78 (citing*, e.g., Morrison*, 529 U.S. at 610–12). But even if the first two factors were met, the remaining two should have sounded the death knell for the respondent.

As to the third factor, the First Circuit said that Congress made multiple findings on animal-fight ventures impact on interstate commerce back in 1976. *Id.* at 79. But Congress made no findings in support of the AWA amendments that cockfighting *in Puerto Rico* substantially affected interstate commerce. 164 Cong. Rec. 80, H 4213 at H 4221-H 4222 (daily ed. May 18, 2018). Congress banned the practice because those legislators in favor of banning cockfighting believed that it was immoral and that the legal standard applicable to the fifty States should apply to all its territories. *Hernández-Gotay,* 985 F.3d at 79*; Club Gallístico de P.R.,* 414 F. Supp. at 206-207.

The First Circuit was unduly dismissive of the fact that the Gamecocks Act authorizes cockfighting in Puerto Rico and proclaims that "the holding of cockfights in Puerto Rico is a cultural right of all Puerto Ricans." P.R. Laws Ann. tit. 15, § 301. And it regulates cockfighting and delegates its oversight to the Puerto Rico Sports and Recreation Department for the benefit of the public interest. *Id.* § 301(b). Nor,

more critically, did the First Circuit give any importance to the fact that the Gamecocks Act now specifically prohibits *the import or export of fowls and roosters* for participation in organized cockfights. *Id.* § 301(t). The Gamecocks Act also prohibits the import or export of spurs, equipment and materials exclusively used in organized cockfights. *Id.*

As an example of Congress's and the First Circuit's misperception of Puerto Rico's cockfighting, the court cites a 1994 casebook that refers to cockfighting in general and that says fighting birds "are typically armed with steel spurs." 985 F.3d at 75 (citation omitted). But that is not true for Puerto Rico, where gamecocks are armed as required by the Gamecocks Act and applicable regulations. And Article 7 of Regulation 7424 (Nov. 2007) specifically *prohibits* the use of metal spurs in cockfights. Indeed, plastic spurs are typically used in Puerto Rico. This illustrates the importance of making findings relevant to the Commonwealth. And it lends credence to why Congress could not just shoehorn inaccurate, inapplicable, or outdated facts to Puerto Rico.

Finally, as to the fourth factor, the First Circuit found that the "effects on interstate commerce are certainly not incidental" considering the second factor and the nature of plaintiff's relationship to commercial cockfighting. *Hernandez-Gotay,* 985 F .3d at 79. But it overlooked that cockfighting was already illegal in all 50 States *pursuant to the laws of each State*. And, above all, it ignored that Puerto Rico law prohibited the import and export of fowls, roosters, materials, and equipment.

In a similar vein, the Government did not produce nor did the court below refer to any evidence that *Puerto Rico* was importing or exporting fighting animals or spurs, attracting spectators from numerous States, advertising cockfights in print media of nationwide circulation, or that cockfighting in Puerto Rico was entangled with questionable or criminal activities. *See Hernandez-Gotay,* 985 F.3d at 79 (citations omitted). Indeed, the respondent's Statement of Material Facts marshalled no facts and referred only to federal law. *See* Def.'s Stat. Mat. Facts (No. 19-1481, ECF No. 39 at 13–14 (D.P.R Oct. 4, 2019.)). Nor did the federal government present any evidence that the Puerto Rico Government was not enforcing the Gamecocks Act.

From the summary- judgment record, then, there is nothing to disprove that *cockfighting in Puerto Rico* is an activity that is inherently local in nature. And, in any case, nothing in the record supported the finding cockfighting *in Puerto Rico* was substantially affecting interstate commerce. So, the grant of summary judgment was unwarranted. *See* Fed. R. Civ. P. 56(a).

Despite how morally objectionable cockfights may be, the Commerce Clause does not confer Congress the power to prohibit cockfighting that occurs only in Puerto Rico. Absent the interstate aspects of cockfighting already prohibited under local law (like the interstate movement of birds and spurs), all that is left is local or intrastate cockfighting. It thus follows that cockfighting in Puerto Rico cannot—and does not—produce any substantial impact on interstate commerce.

In any event, this Court should remand the case for further findings of fact. In *Bd. Of Trs. v. Fox*, for example, this Court remanded because "it was not properly determined that the restrictions on . . . commercial speech are valid as applied." 492 U.S. 469, 485 (1989). It noted that "factual questions . . . were not "separately addressed by either of the courts below." *Id.* This Court may also remand here—to determine whether cockfighting in Puerto Rico substantially affects interstate commerce.

II. The federal cockfighting prohibition violates individual liberty and harms the Island's ability to fight poverty, low labor participation and income inequality.

The federal cockfighting ban violates individual liberty. And individual liberty is safeguarded by our Constitution. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion) ("The [Due Process] Clause also includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests.").

Indeed, one of our Nation's "bedrock principle[s]" dictates "that dividing power among multiple entities and persons helps protect individual liberty." *PHH Corp. v. Consumer Fin. Protec. Bureau*, 881 F.3d 75, 164 (D.C. Cir. 2018) (Kavanaugh, J., dissenting), abrogated by *Seila L. LLC v. Consumer Fin. Protec. Bureau,* 140 S. Ct. 2183 (2020). Or, as Justice Scalia wisely reminded, "'the constitutional structure of our Government is designed first and foremost not to look

after the interests of the respective branches, but to 'protec[t] individual liberty.'" *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 571 (2014) (Scalia, J., joined by Thomas and Alito, JJ., and Roberts, C.J., concurring) (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011)). At bottom, "liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it." L. Hand, *The Spirit of Liberty: Papers and Addresses of Learned Hand* 189-90 (1952).

Individual liberty includes "the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster." *U.S. v. Topco Assoc.,* 405 U.S. 596, 611 (1972). And market access is a fundamental component of personal liberty. *Cf. Allgeyer v. State of La.*, 165 U.S. 578, 589 (1897) (holding that "the term [liberty] is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; . . . to live and work where he will; . . .; [and] to pursue any livelihood or avocation"). Without it, there cannot be personal liberty. For it is one of the most significant ways in which individuals exert their moral agency within society.

ILE believes that prosperity comes when government respects the dignity of each person and his or her right to act as a moral agent. The United States, after all, is the "the land of the free." Individuals can hunt and kill animals for

entertainment, but cannot breed a *fowl or rooster* for cockfights to earn their livelihood?[4]

Upholding the AWA amendments would treat a segment of Puerto Ricans as "barbarians and semi-barbarians. . ." William G Sumner, *The Conquest of the United States by Spain*, 8 Yale L.J. 168, 189 (1899). And it would thus violate their individual liberty. For Puerto Ricans—indeed, all Americans—should have the opportunity, as United States citizens, to access the market, determine their own future, and thus have the opportunity for individual flourishing. After all, "[d]evelopment is the process through which individuals are empowered to meet their objectively justifiable interests." J. Mahoney, *Colonialism and Postcolonial Development: Spanish America in Comparative Perspective* 4 (2010).

As Justice Holmes quipped almost a century ago, referring to Puerto Rico's civil-law tradition, "[w]hen we contemplate . . . [its] system from the outside it seems like a wall of stone. . ." *Diaz v. Gonzalez*, 261 U.S. 102, 106 (1923). "But," he continued, "to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values. . ." *Id.* The same holds true for the misinformed perception of cockfighting culture in Puerto Rico.

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[4] The definition for "animal fighting venture" expressly excludes "any activity the primary purpose of which involves the use of one or more animals in hunting another animal." 7 U.S.C. § 2156(f)(1).

To make matters worse, Congress's cockfighting prohibition would harm an island mired in an economic and demographic downward spiral for almost two decades. *See generally Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC* 140 S. Ct. 1649, 1673-74 (2019) (Sotomayor, J., concurring) (recounting the island's serial "economic setbacks," after "Congress repealed Puerto Rico's favorable tax credits, and manufacturing growth deflated, precipitating a prolonged recession. Steady outmigration correlated with persistently high unemployment rates") (citation omitted). As of April 2018, the economy was $16 billion smaller in real terms, the population was nearly half a million smaller than in 2005, over 40% of it lived below the poverty line, and ~47% were dependent on Medicaid. *See 2019 Fiscal Plan for Puerto Rico: Restoring Growth and Prosperity as Certified by the Financial Oversight and Management Board for Puerto Rico* 8 (May 9, 2019), https://tinyurl.com/ya8vj52m.

Against this backdrop, a ban on cockfighting in Puerto Rico will have the immediate effect of eliminating an industry that has created jobs for many generations of Puerto Ricans. Yet the Island's "formal labor force participation rate is only-41%, far from the U.S. average (62%) . . ." *Id.* at 51. World Bank data says that "Puerto Rico's formal labor force participation rate is currently the seventh lowest in the world and has not ranked higher than the bottom 20 in at least the last thirty years." *Id.*

The upshot is that the AWA amendments serve neither an important nor a significant government interest. But they no doubt are the antithesis of the Congressional action needed "to avert the

consequences of unreliable electricity, transportation, and safe water—consequences that members of the Executive and Legislature have described as a looming "humanitarian crisis." *Puerto Rico v. Franklin California Tax-Free Tr.*, 136 S. Ct. 1938, 1954 (2016) (Sotomayor, J., dissenting) (citation omitted).

CONCLUSION

For the reasons stated, and those offered by the petitioner and other *amici*, this Court should grant the petition, reverse the decision below (or alternatively remand the case for findings), and set straight its Commerce Clause jurisprudence.

Respectfully submitted,

Arturo V. Bauermeister
B&D LLC
1519 Ponce de León Ave.
Ste. 501
San Juan, PR 00909
(787) 931-0941
arturo@bdlawpr.com

Rubén T. Nigaglioni*
**Counsel of Record*
José A. Bagué Soto
Roberto Santana
DTS LAW LLC
221 Plaza Ste. 801
San Juan, PR 00917
(787) 754-8700
rtn@nigaglionilaw.com
Counsel for *Amicus Curiae*

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