Case:Case: 19-2236 19-2236 Document: 00117624371 Page: 1 Date Filed: 08/27/2020 Entry ID: 6363139

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Case No. 19-2236

NYDIA MERCEDES HERNÁNDEZ-GOTAY; FAUSTINO ROSARIO-RODRÍGUEZ; LUIS JOEL BARRETO-BARRETO; CARLOS QUIÑONES-FIGUEROA; LAURA GREEN

Plaintiffs – Appellants

CLUB GALLÍSTICO DE PUERTO RICO, INC.

Plaintiff

ASOCIACIÓN CULTURAL Y DEPORTIVA DEL GALLO FINO DE PELEA; ÁNGEL MANUEL ORTIZ-DÍAZ; JOHN J. OLIVARES-YACE; ÁNGEL LUIS NARVAEZ-RODRÍGUEZ; JOSÉ MIGUEL CEDEÑO

Plaintiffs

v.s.

UNITED STATES; DEPARTMENT OF AGRICULTURE; SONNY PURDUE, Secretary of the Department of Agriculture; UNITED STATES DEPARTMENT OF JUSTICE; WILLIAM P. BARR, Attorney General; DONALD J. TRUMP, President

Defendants - Appellees

Case No. 20-1084

ASOCIACIÓN CULTURAL Y DEPORTIVA DEL GALLO FINO DE PELEA; ÁNGEL MANUEL ORTIZ-DÍAZ; JOHN J. OLIVARES-YACE; ANGEL LUIS NARVAEZ-RODRÍGUEZ; JOSÉ MIGUEL CEDEÑO

Plaintiffs - Appellants

CLUB GALLÍSTICO DE PUERTO RICO, INC.; NYDIA MERCEDES HERNÁNDEZ-GOTAY; FAUSTINO ROSARIO-RODRÍGUEZ; LUIS JOEL BARRETO-BARRETO; CARLOS QUIÑONES-FIGUEROA; LAURA GREEN

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UNITED STATES; DEPARTMENT OF AGRICULTURE; SONNY PURDUE, Secretary of the Department of Agriculture; UNITED STATES DEPARTMENT OF JUSTICE; WILLIAM P. BARR, Attorney General; DONALD J. TRUMP, President

Defendants - Appellees

On Appeal from a Final Judgment entered by the United States District Court for the District of Puerto Rico

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***AMICUS CURIAE* BRIEF FOR THE PUERTO RICO ASSOCIATION OF MAYORS IN SUPPORT OF THE REVERSAL OF THE CHALLENGED JUDGMENT**

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CORPORATE DISCLOSURE STATEMENT

Amicus, the Puerto Rico Association of Mayors hereby certifies that it is a non-profit corporation chartered and with principal offices in the Commonwealth of Puerto Rico. None of the shares in the non-profit entity are publicly held nor is the Association an affiliate to a parent corporation.

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I. INTRODUCTION

Just as it did before the District Court, the Puerto Rico Association of Mayors once again appears as *amicus*, in support of plaintiffs and, more concretely, in support of a major cultural recreational activity that the People of Puerto Rico have enjoyed for centuries[1] and that is a significant cog in the economic engine of all 78 municipalities[2]. At issue in the instant case is the facial and as-applied constitutionality of P.L. 115-334, at § 12616, which amends Section 26(f)(3) of the Animal Welfare Act, 7 U.S.C. § 2156(f)(3) to redefine the term "state" to encompass "any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States", for purposes of existing criminal penalties for engaging in animal fighting ventures.

Needless to say, we will not address every single assignment of error asserted by the appellants. As in the District Court (which allowed our appearance as amicus and took our position into consideration[3]), we shall limit our appearance to asserting our thesis that the Congressional record does not support Congress' exercise of its authority under the Commerce Clause to enact the challenged amendment, a

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[1] Club Gallístico de P.R., Inc. v. United States, 414 F. Supp. 2d 191, 197-198 (D.P.R. 2019).

[2] Club Gallístico de P.R., Inc., 414 F. Supp. 2d at 213 ("The cockfighting industry injects $65 million annually into the Commonwealth's economy and generates a total of 11,134 direct, indirect and induced jobs").

[3] Club Gallístico de P.R., Inc., 414 F. Supp. 2d at 201.

constitutional defect that cannot be cured through the invocation of Article IV powers over the territory.

II. FED. R. APP. 29(a)(4)(E) STATEMENT

It is hereby certified that the undersigned attorneys authored the foregoing brief in its totality. It is further certified that the undersigned attorneys have not, in any way, funded the foregoing brief, as the same was commissioned, reviewed and authorized in its entirety by *amicus*, the Puerto Rico Association of Mayors.

III. DISCUSSION

Going into the 1787 Constitutional Convention, one of the Founding Father's 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 Section 8, Article I 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), the High 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.

Chief Justice Marshall's expansive view of Congress' authority under the Commerce Clause (U.S. Const. Art. I, Sec. 8, cl. 3) in Gibbons eventually became the backbone for enacting federal legislation on all sorts of matters traditionally relegated to the states, generating a sizable body of jurisprudence. The Justices have always been divided on how far Congress may act beyond the strict sense of

international, interstate or tribal commerce. See e.g. Champion v. Ames (the Lottery Case), 188 U.S. 321, 365 (1903) (Chief Justice Fuller writing the dissenting opinion in a 5-4 Court) (observing that, while Congress may certainly regulate the movement of lottery tickets across state lines, "[t]o hold that Congress has general police power would be to hold that it may accomplish objects not entrusted to the General Government"). Admittedly, a liberal reading of the Commerce Clause has allowed Congress to enact legislation to secure civil rights and employment benefits that many states were unwilling to recognize. See e.g. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261-262 (1964) (upholding Title II of the Civil Rights Act on Commerce Clause grounds); United States v. Darby, 312 U.S. 100, 113 (1941) (upholding Congress' power to establish national fair labor standards pursuant to its power to regulate interstate commerce).

As currently understood, Congress' power to regulate interstate commerce "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, **as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce**". United States v. Wrigtwood Dairy Co., 315 U.S. 110, 119 (1942) (emphasis added). As observed by this Honorable Court, the exercise of Commerce Clause authority has been held in cases in which the underlying statute seeks to either "protect, foster, and nourish

interstate commerce which has implicitly been equated with beneficial activity" or to distinguish "between interstate commerce which is beneficial and that which is not". White v. United States, 395 F.2d 5, 7 (1st Cir. 1968). The legislation being challenged in the instant case does not fit into this mold.

Based on the above, the mere invocation of interstate commerce does not suffice to allow Congress to legislate outside of its specifically delegated areas. The activity at issue must "**substantially**", rather than "trivially" or "incidentally" affect interstate commerce. United States v. López, 514 U.S. 549, 559 (1995). Where such a substantial effect on interstate commerce is found, Congress may legislate regarding "(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." Id. at 558-559. In all cases, the activity to be regulated must be "economic in nature". United States v. Morrison, 529 U.S. 598, 613 (2000); National Federation of Independent Business v. Sebelius, 567 U.S. 519, 550 (2012) ("The power to *regulate* commerce presupposes the existence of commercial activity to be regulated") (emphasis in the original).

The constitutionality of the extension of federal prohibition against animal fighting enterprises to the U.S. territories (pursuant to the Commerce Clause) has

never been tested before the instant case. We do note however that, in the context of the states, the matter has been decided by the Fourth, Sixth and Eighth Circuits. See United States v. Gilbert, 677 F.3d 613 (4th Cir. 2012); White v. United States, 601 F.3d 545 (6th Cir. 2010); Slavin v. United States, 403 F.3d 522 (8th Cir. 2005) (per curiam). We acknowledge the persuasive force of this precedent but nonetheless believe that the instant case is clearly distinguishable from it.

The Slavin Court did not really delve into the matter of Congress' authority to outright ban animal fighting enterprises but rather the outright interstate transportation of animals, which is not being disputed here. Slavin, 403 F.3d at 523-524. The White decision similarly lacks any in-depth discussion on the purported effect of the proscribed activity on interstate commerce, although it does observe that, at that time, the activity was not yet proscribed in Puerto Rico and the territories and that the plaintiff had not "ever derived any income from or engaged in any trade with individuals in Puerto Rico or U.S. territories". White, 601 F.3d at 553. That observation holds true for this case, as cockfighting in Puerto Rico remains an activity that does not involve significant interstate trade. Any effect of Puerto Rican cockfighting over interstate commerce is, at best, incidental in nature.

The Gilbert Court engaged in the most thorough analysis of all three decisions. The Fourth Circuit cited Congressional findings regarding the economic nature of animal fighting ventures in the United States, as well as the economic impact of said

activity. Gilbert, 677 F.3d at 624-625. Regarding the quintessential requirement of the economic activity substantially affecting interstate commerce, the Court generally relied on Congressional findings, without going into specifics. Id. at 626.

Indeed, legislative history has been deemed key in determining whether or not the Congressional invocation of authority under the Commerce Clause is valid. See e.g. Hodel v. Virginia Surface Mining & Reclamation Association, 452 U.S. 264, 276-277 (1981). In this regard, the District Court relied on the same portions of the congressional record cited by the Gilbert Court, which predated the amendment being challenged herein and were restricted to the interstate effect of animal game fighting in the 50 states. Club Gallístico de P.R., Inc., 414 F. Supp.2d at 206. The only portion of the legislative materials that was cited in the trial court's opinion dealt with and expressed desire to have uniform rules for states and territories. Id. The Commerce Clause is not concerned with uniformity between states and territories.

Only a valid exercise of the Commerce Clause would enable Congress to proscribe an activity so far removed from the objectives of a national government as cock fighting. By the like token, a valid finding that said activity has a substantial effect on the commerce between the 50 states (48 of which are connected by lands, and therefore by roads and railways) does not necessarily mean that the very same activity substantially affects interstate commerce when performed in a territory in

the middle of the Caribbean Sea[4]. It is much easier for goods and services to move across state lines within the 48 contiguous states and the District of Columbia than within the remaining two states and the other territories. For example, a commercial activity may move across state lines by crossing the George Washington Bridge from New York to New Jersey. The hard fact is that cockfighting in Puerto Rico is almost exclusively done using animals bred within the territory and only in venues (called "*galleras*" in Spanish) within the territorial jurisdiction. While people do bet on the outcome of cockfights, that activity is also fully restricted to Puerto Rico. The closing of legal cockfighting establishments and the criminalization of the entire industry beginning in 2019 has produced grave economic pain that has been felt entirely in Puerto Rico.

From the publicly available materials concerning the legislative history of the bill that extended the cockfighting prohibition to the territories, it does not appear that Congress bothered to look into how that activity, **as carried out in the territories**, substantially affected interstate commerce[5]. This explains why the factors enumerated in the previous paragraph were not taken into account and

[4] Only the District of Columbia (a very *sui generis* territory in its own right) is contiguous to the states. Puerto Rico and the Virgin Islands are hundreds of miles south of the continent and the remaining territories are much more distantly located in the Pacific Ocean, closer to Asia than to North America.

[5] https://www.congress.gov/congressional-report/115th-congress/house-report/661/1?overview=closed.

seriously calls into question whether or not the challenged amendment constituted a valid exercise of Commerce Clause authority. In fact, the amendment at issue in the instant case was introduced during the House debate by Rep. Hon. Peter Roskam (R-Ill.), in a statement, on the Floor, that does not contain a single allusion to any of the factors that would validly justify legislation under the Commerce Clause. Rather, the aforementioned legislator couched his proposal to ban cockfighting in the territories in very straightforward "uniformity" considerations, as well as his own personal views on the "appropriateness" of said activity[6]. This is a far cry from legislating to protect or otherwise regulate intestate commerce. In fact, when his amendment was opposed by the delegates from the territories, Rep. Roskam doubled

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[6] Concretely, the statement was to the effect that:

> So here is the situation: Animal fighting is inappropriate and wrong no matter where it happens. It is against the law in the continental United States, and, I should say, in all 50 States, and what we are proposing is to make that a standard in the territories as well.
>
> There are some elements of animal fighting that is illegal in territories, but not altogether. This has been a long journey. It is a 40-year journey in this country. It reached a crescendo about 10 years ago when a standard was created in all 50 States. What this amendment does, Mr. Chairman, is very simple: it proposes to do the same thing in the territories.

https://www.congress.gov/congressional-record/2018/05/18/house-section/article/H4213-2.

down and averred, with no support from empirical evidence in support of his position that:

> Mr. Chairman, this is a heartfelt issue obviously, but we are talking about rough stuff. We are talking about stuff that attracts gangs. We are talking about stuff that attracts drug trafficking. We are talking about stuff that attracts violence. We are talking about things that you would be ashamed to bring a child to. We are talking about things that if it were to happen in the well of this Chamber, many of us would look away because we would be shocked at the gratuitous violence[7].

The other person pushing for this amendment was Rep. Hon. Earl Blumenauer (D-Or.), who was similarly biased in his approach to this activity and argued for the same "uniformity" considerations as his colleague from Illinois. Rather than attempting to provide the congressional record with concrete findings upon which a court could have later concluded that the activity being proscribed had a substantial effect on interstate commerce. If anything, Rep. Blumenauer's remarks showed that he was not particularly well informed about the legality of that activity in Puerto Rico, as he incorrectly posited that "[i]t is already a felony in Puerto Rico, Guam, and the Virgin Islands"[8].

As applied to Puerto Rico and the other non-contiguous territories, a federal ban on cockfighting falls very short of the "substantially affecting" interstate

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[7] https://www.congress.gov/congressional-record/2018/05/18/house-section/article/H4213-2.

[8] https://www.congress.gov/congressional-record/2018/05/18/house-section/article/H4213-2.

commerce standard enunciated in López and progeny.

Of course, since we are talking about territories of the United States we cannot escape discussing whether the preceding Commerce Clause analysis is inconsequential given Congress' authority under the so-called "Territorial Clause" (Art. IV, Sec. 3, Cl. 2). While the historical colonial rule on the part of traditional European powers such as United Kingdom, France and Spain is frowned upon in modern times, the use of the euphemism "territory" is enough to make essentially the same practices more palatable in the context of jurisdictions such as Puerto Rico. This scheme of constitutional construction is grounded on Supreme Court jurisprudence from the early Twentieth Century[9]. For this reason, pretty much every political discussion, to wit: that Congress enjoys "plenary powers"[10] over territorial

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[9] It is well known that these so-called "Insular Cases" were decided mostly by a group of Supreme Court Justices that had just validated racial segregation in Plessy v. Ferguson, 163 U.S. 537 (1896), many of whom could still remember the days of slavery with differing degrees of fondness. If the same spirit of basic human dignity that animated decisions such as Obergerfell v. Hodges, 135 S. Ct. 2584 (2015) (striking state prohibitions against same sex marriage); Lawrence v. Texas, 539 U.S. 558 (2003) (striking prohibition against consented same sex relationships); Loving v. Virginia, 388 U.S. 1 (1967) (striking prohibition against interracial marriage); and most notably, Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) (ending racial segregation), then the bones of the Insular Cases must be unceremoniously tossed into the same grave in which Plessy and Scott v. Sanford, 60 U.S. 393 (1857) uneasily rest and evoke the same type of shame on the modern citizen as those decisions now do. We recognize however, that it is the Supreme Court's responsibility to effect this much needed paradigm change. Just as importantly, we need not change the law in this regard for our position to be validated.

[10] The Constitution does not use the phrase "plenary powers" to refer to the authority of any of the branches of government. The term has been however coined by the

affairs. This has given rise to a common belief that, because of such plenary powers, Congress operates in an extra-constitutional dimension of sorts that allows said body to legislate free from the constraints that it would have when legislating with regards to the states. This of course, is not entirely true. See Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment, LLC, 140 S. Ct. 1649, 1657 (2020) (holding that structural provisions of the U.S. Constitution apply to the enactment of legislation concerning the territories, notwithstanding Article IV considerations).

The fact that, despite its being inhabited by U.S. citizens, Article IV allows Congress to "dispose of and make all needful Rules and Regulations respecting the Territory or **other Property belonging to the United States**" (emphasis added), does not preclude an inquiry into Congress' authority to invoke the Commerce Clause as a basis for banning cockfighting **in all states and territories**. On its face, Article IV is designed to enable Congress to set forth the rules applicable to the governance and ultimate disposition of territories, nothing more. When legislating for any other purpose, particularly where the legislation at issue concerns the states,

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Judiciary in various circumstances, including to describe Congressional authority over the territories. 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").

Congress is bound by the limitations set forth in Article I.

Notwithstanding the existence of the Territorial Clause, Congress has traditionally refrained from legislating to regulate matters that are reserved to the states such as family law, estate and probate law and contract law. Moreover, there are many federal statutes (indeed, most of the federal law currently in the books) that applies equally to states and territories, all of which were enacted under the auspices of Article I. While Congress may invoke Article IV to exclude a territory from the application of a federal law from which a tangible benefit is derived, it must only be do so if it advances a rational, legitimate government interest. United States v. Vaello-Madero, 956 F.3d 12, 32 (1st Cir. 2020).

In contrast, when Congress chooses to flex its Article IV muscles, it is clear that it is legislating **solely for the territories**. For example, Section 101(b)(2) of the Puerto Rico Oversight, Management and Economic Stability Act (hereinafter referred to as "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).

Hence, when Congress merely decides to extend to the territories, legitimate

regulation that it is effecting upon the states, it simply exercises one of its Article I powers. For example, in making the provisions of the U.S. Judicial Code (Title 28 of the United States Laws Code) applicable to federal tribunals within the territory, Congress acts within the bounds of its explicit authority to "constitute Tribunals inferior to the supreme Court". U.S. Const. Art. I, Sec. 8. Under such circumstances, there is no need to invoke Article IV[11]. In other words, **when Congress legislates for both the states and the territories on equal terms, it necessarily does so under Article I and not under Article IV**.

Nothing in the legislative history of the Animal Welfare Act and the many amendments that said legislation has suffered throughout the years remotely suggests that Congress acted pursuant to its Article IV powers but rather, that it was invoking its expansive Commerce Clause authority. When, in 2018, Congress decided to extend the prohibition against cockfighting to the territories, it did so based on an abstract desire for "uniformity" and on the personal convictions of a majority of the legislators, neither of which is a viable justification under Article I.

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[11] 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).

On its face, we are not before a law that implicitly or explicitly reflects that the Animal Welfare Act was in any way designed to affect matters of territorial governance. Quite to the contrary, Congress sought **to legislate for the states** and in 2018, amended the definition of the term "state" to encompass the territories.

Whether or not Congress may specifically legislate under Article IV to, as a means of setting forth a "meaningful rule" for territorial governance under said constitutional provision is not something that needs to be decided in the instant case, as that was clearly not what Congress attempted to do in 2018. Such a discussion is proper in a context where Congress legislates specifically for the prohibition of cockfighting territories. To the extent that Congress sought to treat the territories as states for purposes of a legislation enacted pursuant to its authority to regulate interstate commerce, the analysis in this case must look into whether or not, as applied to the non-contiguous territories, the proscribed conduct has a substantial effect on interstate commerce.

PRAYER FOR RELIEF

Based on the above, it is respectfully requested from this Honorable Court that the District Court's judgment be hereby **REVERSED**.

CERTIFICATE OF SERVICE

Amici hereby certify that the Court's Electronic Filing System will serve true and exact copy of the foregoing on the following attorneys, whom the undersigned

attorneys will also serve, through U.S. Postal Service Priority Mail, with a hard copy of the brief:

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The system will also serve notice on any other attorney who has entered an appearance for the record.

Respectfully submitted in San Juan, Puerto Rico this 27th day of August, 2020.

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CERTIFICATE OF COMPLIANCE

It is hereby certified that the foregoing brief complies with the provisions set forth in Fed. R. App. P. 32, as it is 17 pages in length, contains 407 lines and 4,125 words of double-spaced, Times New Roman, 14 points font.

In San Juan, Puerto Rico this 27th day of August, 2020.

/S/ Jorge Martínez-Luciano
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