**UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

No. 19-2236

Nydia Mercedes Hernandez-Gotay; Faustino Rosario-Rodriguez; Luis Joel Barreto-Barreto; Carlos Quinones-Figueroa; Laura Green,
Plaintiffs - Appellants,

Club Gallistico De Puerto Rico, Inc.,
Plaintiff,

Asociacion Cultural Y Deportiva Del Gallo Fino De Pelea; Angel Manuel Ortiz-Diaz; John J. Olivares-Yace; Angel Luis Narvaez-Rodriguez; Jose Miguel Cedeno,
Plaintiffs,

v.

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.

No. 20-1084

Asociacion Cultural y Deportiva Del Gallo Fino De Pelea; Angel Manuel Ortiz-Diaz; John J. Olivares-Yace; Angel Luis Narvaez-Rodriguez; Jose Miguel Cedeno,
Plaintiffs - Appellants,

Club Gallistico De Puerto Rico, Inc.; Nydia Mercedes Hernandez-Gotay; Faustino Rosario-Rodriguez; Luis Joel Barreto-Barreto; Carlos Quinones-Figueroa; Laura Green,
Plaintiffs,

v.

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 THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO**

# APPELLANTS' BRIEF

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S/Félix Román Carrasquillo
Félix Román & Associates P.S.C.
P.O. BOX 9070 San Juan,
Puerto Rico, 00908
Tel. (787) 723-3970
romanlawpr@gmail.com
U.S.C.A. No. 85867

S/Rafael Ojeda
RAFAEL OJEDA DIEZ
OJEDA & OJEDA LAW OFFICES PSC
rafaelojeda@ojedalawpr.com
U.S.C.A. No. 24076
Phone (787) 728-4120
Fax (787) 724-3380

s/ EDWIN PRADO-GALARZA, ESQ.
Attorney at Law
Prado, Núñez & Asociados, P.S.C.
403 Del Parque St., Suite 8
San Juan, PR 00912
T. (787) 977-1411
F. (787) 977-1410
Pradolaw10@gmail.com
First Circuit No.: 39421

s/ María A. Domínguez
María A. Domínguez
First Circuit No. 1053269

DMRA Law LLC
Centro Internacional de Mercadeo
Torre 1, Suite 402
Guaynabo, PR 00968
787-331-9970

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## REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Fundamental rights were taken away by Congress—where Appellants and other residents of Puerto Rico, have no real political representation. This case implicates fundamental constitutional rights and presents questions of abiding public concern. An oral argument would assist this Court by providing clarification of the issues beyond the written briefs.

## I. JURISDICTIONAL STATEMENT

The District Court entered a final judgment disposing of the claims of all parties in this action on October 29, 2019. Joint Appendix at pp. 13 and 15. Appellants Club Gallístico de Puerto Rico Inc., Luis Joel Barreto, Faustino Rosario Rodríguez, Carlos Quiñones Figueroa, Nydia Mercedes Hernández, and Laura Green filed a notice of appeal on November 19, 2019. *Id.* at p. 13. Appellants Asociación Cultural y Deportiva del Gallo Fino de Pelea, Ángel Manuel Ortiz-Diaz, John J. Olivares-Yace, Ángel Luis Narváez-Rodríguez, and José Miguel Cedeño filed a notice of appeal on December 30, 2019. *Id.* These appeals are timely pursuant to Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure because the notices of appeal in this civil case were filed within 60 days of the District Court's decision, and at least one of the parties is the United States, a United States Agency, or a United States officer or employee sued in an official capacity. *See* Fed. R. App. P. 26(a)(1). This Court has appellate jurisdiction over this matter pursuant to 28 U.S.C. §§ 41 and 1291.

## II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in holding that the Appellants' cockfighting activities are not protected by the First Amendment.
2. Whether the District Court erred in holding that Congress' ban of cockfighting and cockfighting-related activities in Puerto Rico do not violate the Due Process Clause.
3. Whether the District Court erred in holding that Congress had the authority under the Commerce Clause to ban cockfighting and cockfighting-related activities in Puerto Rico.
4. Whether the District Court erred in holding that Congress's ban on cockfighting and cockfighting-related activities in Puerto Rico do not violate the Territorial Clause.

## III. STATEMENT OF THE CASE

Section 12616 of the Agriculture Improvement Act of 2018 ("Section 12616") amended 7 U.S.C. § 2156 to extend the federal cockfighting prohibition to Puerto Rico, American Samoa, Guam, Northern Mariana Islands, and the Virgin Islands. Pub.L. 115-334, Title XII, § 12616(a) to (c), Dec. 20, 2018, 132 Stat. 5015. Prior to this amendment, 7 U.S.C. § 2156 contained an exception to the cockfighting prohibition in states or territories where cockfighting was legal. At the time of the amendment, all 50 states had already criminalized cockfighting. Hence, this amendment effectively criminalized cockfighting in Puerto Rico, even though the activity was legal under Puerto Rico law.

Thereafter, the Appellants filed two separate lawsuits in the United States District Court for the District of Puerto Rico seeking a declaratory judgment and injunctive relief impugning the constitutionality of this amendment. Joint Appendix at pp. 17-91. The District Court consolidated both cases as the cases shared several overlapping arguments. Joint Appendix at p. 7, Docket No. 15. The parties jointly moved for a fast-track briefing schedule, which was adopted by the District Court. *Id.* at p. 8, Docket No. 25. The schedule set a deadline for the Appellants to jointly file a motion for summary judgment, a deadline for Appellees to oppose the Appellants' motion for summary judgment and file their own motion for summary judgment, and a deadline for the Appellants to jointly oppose Appellees' motion for summary judgment. Additionally, the District Court set a deadline for any *amicus* brief. *Id.*

After evaluating the motions for summary judgment and the *amicus* briefs, the District Court found the law to be constitutional, denied Appellants' motion for summary judgment, and entered summary judgment in the Appellees' favor. *Id.* at pp. 120-49. In doing so, the District Court held that Congress had the authority to ban cockfighting in Puerto Rico pursuant to the Commerce Clause and the Territorial Clause, that cockfighting was not protected under the First Amendment, that Appellants' Procedural Due Process rights were not violated as

Appellants had not been deprived of any cognizable liberty or property interest, and that Appellants' Substantive Due Process rights were not violated as there was a rational basis for the cockfighting ban. *Id.* at pp. 133-145. The Appellants hereby request a reversal of the District Court's decision and a determination that Section 12616 is unconstitutional for the reasons discussed herein.

## IV. SUMMARY OF THE ARGUMENTS

### A. First Amendment

Appellants and the people of Puerto Rico use cockfighting to perpetuate the island's culture and deep sense of self-determination and cultural autonomy that is profoundly rooted in the island's inhabitants. For many Puerto Ricans, cockfighting is a tradition that is indelibly weaved into Puerto Rican culture as a fundamental tradition existing from the time of Spanish colonists and meant to be passed down from generation to generation. Essentially, cockfighting is more than a mere duel between animals; it is perhaps the ultimate expression of Puerto Rico's cultural identity. The Federal ban on cockfighting on the island has salted the wound of resentment felt by many Puerto Ricans who have been prevented from the right to protect their cultural heritage.

The First Amendment protects the valued rights of freedom of speech and freedom of association of all Puerto Ricans. The criminalization of cockfighting infringes on both of these rights as the law is not "within the constitutional power of the Government" and did not "further[] an important or substantial Government interest" because the congressional exercise falls outside of the confines of Congress' powers under the Commerce Clause. The Appellants have a right to perpetuate their culture through preserving an activity that has been an integral part of their heritage, and which has been enjoyed as an expression of the right to assemble in cockfighting events. Section 12616 seeks to prevent Appellants from exercising these fundamental rights and subsumes those rights to a Federal expression that seeks to impose

moral and historical commitments which have no place in Puerto Rico, its history, or its culture. Most importantly, because the law at issue categorically bans cockfighting in Puerto Rico, its effect upon Appellants' First Amendment freedoms is excessive and cannot be constitutionally supported. As such, this Court must reverse the District Court's holding.

**B. Due Process**

By enacting Section 12616, Congress violated Appellants' procedural and substantive Due Process rights under the Fifth and Fourteenth Amendment to the U.S. Constitution. By criminalizing cockfighting in Puerto Rico, Congress targeted a discrete group of people who do not have voting representation in that legislative body and are excluded entirely from the American electoral process. Congress effectively prohibited Puerto Ricans from engaging in an activity that is not only permissible under their laws (and with the blessing of the United States had been since 1933) but also has been a fundamental and integral part of their culture for centuries. In doing so, Congress imposed its own sense of "morality" upon the "immoral" who practice cockfighting in Puerto Rico without affording them a fair opportunity to be heard and to participate in a meaningful way in the legislative process.

**C. Commerce Clause**

Congress exceeded its authority by using the Commerce Clause to ban cockfighting and cockfighting-related activities in Puerto Rico. Prior to the 2018 amendment, cockfighting in Puerto Rico was effectively limited to intrastate activity that represented the cultural traditions of the people of Puerto Rico. Congress' attempts to justify this intrusion into Puerto Rico's way of life are futile. Careful analysis of the legislative discussions demonstrate that the true purpose of the amendment was to force its own moral judgment on the people of Puerto Rico. Congress' attempts to resolve a moral discussion without constitutional authority and without a clear understanding of how the underlying facts will operate to erode Puerto Rico's cultural heritage, and to impose its will on the island, thus assailing the democratic process of

representative government. The 2018 amendment should be struck down as Congress had no authority to ban cockfighting and cockfighting-related activities in Puerto Rico.

**D. Territorial Clause**

Rather than leaving it to the residents of Puerto Rico to decide the legality of cockfighting, the amendment unconstitutionally prohibits, eliminates, and criminalizes cockfighting and cockfighting-related activities in Puerto Rico. Cockfighting is a cultural tradition in Puerto Rico going back hundreds of years.

Section 12616 adversely impacts bedrock principles of federalism and rights protected under the United States Constitution. Section 12616 undermines longstanding Puerto Rico laws holding that live bird fighting ventures in Puerto Rico are legal and establishing it as a cultural right for all Puerto Ricans. Section 12616 also undermines Section 27 of the Universal Declaration of Human Rights of the United Nations ("Everyone has the right freely to participate in the cultural life of the community [and] to enjoy the arts."), which has been in force since 1948. Section 12616 permanently imposes these burdens and sanctions on the already struggling economy of Puerto Rico as part of an arbitrary process and without allowing the island an opportunity to rebut the ban. Congress exceeded its authority under the Territorial Clause when it banned cockfighting and cockfighting-related activities in Puerto Rico.

## V. ARGUMENTS

The District Court found that Congress had the authority to ban cockfighting in Puerto Rico pursuant to the Commerce Clause and Territorial Clause, that cockfighting was not protected under the First Amendment, and that Appellants' Due Process rights were not violated, as they had no cognizable liberty or property interest, and Section 12616 passed the rational-scrutiny test. Joint Appendix at pp. 133-145. The Appellants hereby request a reversal of the District Court's decision and a determination that Section 12616 is unconstitutional.

Appellate review of a lower court's decision regarding the constitutionality of a statute is *de novo*. *United States v. Lewko*, 269 F.3d 64, 67 (1st Cir. 2001); *United States v. Marenghi*, 109 F.3d 28, 31 (1st Cir. 1997). Additionally, review of a summary judgment is also *de novo*. *Carlson v. Univ. of New England*, 899 F.3d 36, 42-43 (1st Cir. 2018) (citing *Town of Westport v. Monsanto Co.*, 877 F.3d 58, 64 (1st Cir. 2017)). "Summary judgment is appropriate when 'the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* at 43 (citing Fed. R. Civ. P. 56(a)). As the District Court entered summary judgment in favor of Appellees, "[t]he court must view the facts in the light most favorable to [Appellants] and draw all reasonable inferences in [their] favor." *Id.* (citing *Billings v. Town of Grafton*, 515 F.3d 39, 41 (1st Cir. 2008)).

Congress' actions are not within the limited scope of powers conferred on it by the Commerce Clause or Territorial Clause and they infringe on the First Amendment and Due Process rights of all Puerto Ricans. The Appellants set forth these arguments in separate sections to facilitate the discussion of each individual topic, but there is a tendency for these arguments to overlap. For the reasons set forth below, the District Court's judgment should be reversed and Section 12616 should be struck down as unconstitutional.

## A. First Amendment

### *i. Appellants' Freedom of Speech*

Appellants attempt to perpetuate the island's culture and the deeply rooted sense of self-determination and cultural autonomy reflected in cockfighting. For many Puerto Ricans, cockfighting is a fundamental vehicle of Puerto Rican cultural expression, through which they pass important knowledge and traditions of their culture from one generation to the next. In a very real sense, cockfighting is an expression or magnification of the Puerto Rican cockfighting enthusiasts' self and, thus, must be interpreted as something other than a mere duel between animals, conducted for entertainment or, according to some, sheer cruelty.

By incorrectly finding that "[a] live-bird fighting venture does not fall within any expressive or non-expressive protected conduct," the District Court ignored the cultural and value-expressive function of cockfighting in Puerto Rico. Joint Appendix at p. 143. Indeed, rather than being a mere duel between animals conducted for entertainment or sheer cruelty, Puerto Rican cockfighting is a form of expression situated at the core of Puerto Rico's values of freedom-of-expression. As such, and for the reasons stated infra, because the live-bird prohibition of Section 12616 unduly burdens the Appellants' fundamental First Amendment right to speech, Appellants are entitled to the full protection of the First Amendment and the District Court's holding should be reversed.

Admittedly, the Supreme Court has stated that it "cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). The *O'Brien* Court held that when "speech" and "nonspeech" elements are combined with the same course of conduct, a sufficiently important government interest in regulating the nonspeech elements can justify limitations on First Amendment freedoms only if, however, these limitations are "incidental." *Id*. The Supreme Court has also acknowledged that a particular conduct may be "sufficiently imbued with elements of communication" so as to implicate the First Amendment. *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). To determine whether a particular activity is a form of protected expression, courts must consider the factual context and environment in which the particular activity is undertaken. *See Spence*, 418 U.S. at 410. While, as recognized by the District Court in its *Opinion and Order* (Joint Appendix at p. 143), "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word," a law directed at the communicative nature of conduct must, like a law directed at pure speech, be justified "by a more demanding standard" than the *O'Brien* test. *Holder v.*

*Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (citation omitted); *Johnson*, 491 U.S. at 406 (citations omitted).

In denying the Appellants' freedom of expression argument, the District Court also cited to *United States v. Stevens*, 559 U.S. 460 (2010) and agreed with the Appellees that "the depiction of animal cruelty may be considered protected expression, but not the conduct itself." Joint Appendix at p. 143. In doing so, the District Court agreed with Appellees' characterization of cockfighting in Puerto Rico as "animal cruelty" and noted that *Stevens* "establishes a distinction between an artistic expression, such as depicting a wounded or dead animal, from a non-artistic conduct, i.e. participating in animal fights that may lead to injury or death of participating animals." *Id*. at pp. 143-144. While Appellants agree with the District Court's reading of *Stevens*, its application to this case is misplaced and the Appellees' arguments are based on the mistaken assumption that cockfighting in Puerto Rico equates to sheer animal cruelty rather than an expression of Puerto Rican culture.

As stated by Appellants in their *Motion for Summary Judgment* before the District Court, it is difficult to come up with any activity that is more ingrained into Puerto Rico's history and culture than cockfighting. A centuries-old tradition in Puerto Rico, cockfighting in the island dates to the early days of the Spanish colony. It was officially established in Puerto Rico on April 5, 1770, by Spanish Governor Don Miguel de Muesas. In 1825, the Spanish General Miguel de la Torre created the first official cockfighting regulation in Puerto Rico. In 1933, the U.S. administration under Governor Robert H. Gore declared it an official sport in the island, considered a family activity that had been taken from one generation to the next and widely regarded an essential part of the Puerto Rican patrimony and folklore. As stated by Appellants in their motion, in Puerto Rico, cockfighting has transcended the cockpit and spawned into common expressions of day-to-day life, becoming a fundamental representation of cultural autonomy and self-determination for a vast majority of Puerto Ricans.

Puerto Rican writers of notable importance have documented the cultural significance of cockfighting in Puerto Rico throughout the years. Dr. Manuel A. Alonso Pacheco, considered to be the first Puerto Rican writer to make the island his literary subject, emphasized the importance of cockfighting in Puerto Rico in his work *El Gíbaro*[1] in 1845. *See* Juan Llanes Santos, "Beaks and Spurs: Cockfighting in Puerto Rico", https://www.nps.gov/nr/feature/places/pdfs/64501213.pdf. [2] Equating cockfighting to an idolatrous cult, Dr. Alonso Pacheco observed that, when it was time to establish a new town in the island, it was not uncommon for the town settlors at the time to prioritize the building of a cockpit over the building of a town church. *Id*. at Section number E, pp. 11-12. Similarly, Manuel Fernandez Juncos, a renowned Puerto Rican journalist, poet, author and humanitarian, stressed the importance of cockfighting and cockpits in Puerto Rico through his early journalistic work. *Id*. at Section number E, pp. 12-13. In an article published by Fernandez Juncos in the late nineteenth century, he indicated that in every location of importance in the island there was "an octagonal building, which roof, in the shape of an umbrella, exceed[ed] in height the private homes, with that air of superiority that distinguishe[d] [] public buildings" in Puerto Rico at the time. *Id*. This octagonal building was, of course, a cockpit. Their grandiose view of cockfighting and cockpits as a fundamental element of the island's culture has survived to this date.

For Appellants, their roosters are valued pets, with unique names, special diets, and grooming rituals. To them, their roosters are an expression of their own self through which they amplify their own sense of courage, strength, resiliency, and cultural pride. They engage

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[1] Now spelled "Jíbaro", Dr. Alonso Pacheco's book was a collection of verses whose main themes were the humble, Puerto Rican, country farmer and the customs of Puerto Rico.

[2] The United States' Department of the Interior National Park Service authorized "Beaks and Spurs: Cockfighting in Puerto Rico" into the National Register of Historic Places in 2014 after it determined that Llanes Santos' historical narrative of cockfighting in Puerto Rico met the National Register documentation standards.

in cockfights for the purpose of expressing their sense of self-determination. Cockfighting is a tangible, visible, and "real" way for Appellants to express and preserve an important element of the island's rich cultural heritage. To many Puerto Ricans, like Appellants, cockfighting is the embodiment of Puerto Rican art and culture through an important event of everyday life, where "violence" is not pointless or sadistic. The District Court, however, agreed with Appellees that no aspect of Section 12616 curtailed Appellants' ability to speak in favor of cockfighting and its importance to Puerto Rican culture merely because Appellants remain free to associate and assert their support for cockfighting. *See* Joint Appendix at p. 144. The District Court's holding, however, is concerned only with what is obvious. A more in-depth view into cockfighting in Puerto Rico would have led the District Court to conclude that it is imbued with sufficient elements of communication and deserving of the First Amendment's full protection. The ability to express support for cockfighting does not operate to preserve this cultural activity for the island or posterity.

In their *Motion for Summary Judgment*, Appellees cite to *United States v. Stevens*, 559 U.S. 460 (2010) to claim that the Supreme Court recognized the "tradition excluding . . . animal cruelty from the 'freedom of speech' codified in the First Amendment." While *Stevens* stands for this proposition, here, the Appellees and the District Court's reliance in *Stevens* is misplaced. In *Stevens*, the Supreme Court held that a federal statute criminalizing the commercial creation, sale, or possession of depictions of animal cruelty was substantially overbroad, and thus, the statute was facially invalid under the First Amendment's protection of speech. *Stevens*, 559 U.S. at 482. The Supreme Court did not, however, address the definition of "animal cruelty" or whether the conduct being depicted in the videos sold by Robert J. Stevens in that case falls within this definition and, thus, lacks the full protection of the First Amendment. Neither does *Stevens* consider whether cockfighting falls within this definition. On the contrary, the Supreme Court in *Stevens* recognized that "although there may be a broad

societal consensus against cruelty to animals, there is substantial disagreement on what types of conduct are properly regarded as cruel. Both views about cruelty to animals and regulations having no connection to cruelty vary widely from place to place." *Id*. at 476 (internal quotations and citation omitted).[3] To illustrate its point, the *Stevens* Court specifically stated that "[e]ven cockfighting long considered immoral in much of America . . . is legal in Puerto Rico." *Id*. at 477.

By relying in *Stevens* to support its holding, the District Court agreed with Appellees' underlying categorical argument that cockfighting in Puerto Rico, like in the United States mainland, is considered animal cruelty. As discussed herein, the cultural significance and relevance of cockfighting in the everyday life of Puerto Ricans, coupled with the fact that cockfighting is still legal under the island's laws, quite clearly demonstrates that a vast majority of Puerto Ricans do not consider cockfighting to be even remotely immoral. In fact, it is an expression of honored Puerto Rican culture and of the island's self-determination. Admittedly, as the District Court recognized, it is "undisputed" that the Animal Welfare Act's ("AWA") statement of policy includes a rejection of animal violence. *See* Joint Appendix at p. 143. However, by criminalizing cockfighting in Puerto Rico, the U.S. Congress implemented its own cultural ideals of proper assimilability and nation building that characterizes the United States' history of conquest and colonial domination. The collateral damage of such implementation is undisputedly an infringement upon Appellants' freedom of expression based on the U.S. Congress' deliberate ignorance of the right of Puerto Ricans to define morality

[3] In the mainland United States, for example, activities that result in the prolonged injury or death of animals continue to be widely practiced. During the days of man's early civilization perhaps hunting was an essential component of human survival, but today hunting is nothing more than a sport, valued by some and condemned by others. Yet hunting is widely permitted across national and state parks, public lands and even in wildlife refuges. See U.S. Fish and Wildlife Service, "2011 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation" (Washington, D.C.: GPO, 2012) 22. It is evident that the definition of animal cruelty and the legislation of morality is a prerogative that responds to varied political and social interests.

according to their cultural heritage and customs. Because Appellants' seek to express their culture and deeply rooted sense of self-determination through cockfighting, and not to condone animal cruelty and immorality, they are entitled to the full protections of the First Amendment and, thus, the District Court's holding must be reversed.

As discussed above in detail, because cockfighting in Puerto Rico is imbued with sufficient elements of communication, it is expressive conduct fully protected by the First Amendment. Consequently, the District Court erred in applying the more lenient *O'Brien* standard as proposed by the Appellees, rather than a heightened standard under *Johnson*. However, by criminalizing cockfighting in Puerto Rico, Section 12616 unduly burdens the Appellants' fundamental First Amendment right to speech. The law fails to survive even the more lenient *O'Brien* test. As such, it must then necessarily fail under *Johnson*. Appellants limit their discussion to the District Court's application of the *O'Brien* test, as explained below, which warrants a reversal of the District Court's holding.

Contrary to the Appellee's contention before the District Court, Section 12616 fails to pass muster under *O'Brien*. Under *O'Brien*, a content-neutral government regulation that infringes upon the freedom of speech can be justified only if: (1) it is within the constitutional power of the Government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *O'Brien,* 391 U.S. at 377.

As discussed in detail in the succeeding sections, the Section 12616 amendments that criminalize cockfighting in Puerto Rico are not "within the constitutional power of the Government" and did not "further[] an important or substantial Government interest" because they fall outside of the confines of Congress' powers under the commerce clause. In amending Section 12616, Congress exceeded its authority by addressing moral issues that are legally (and

traditionally) left to the democratic practices of the states and the Commonwealth of Puerto Rico. There was no appropriate Federal Government interest in regulating cockfighting in Puerto Rico, where the activity has been highly regulated by its local government, and the inhabitants substantially disagree with the U.S. Congress' characterization of their national sport as cruel and immoral. Most importantly, because the law at issue categorically bans cockfighting in Puerto Rico, its effect upon Appellants' First Amendment freedoms, as herein discussed, is nothing short of excessive and in no way incidental in nature. As such, this Court must reverse the District Court's holding.

***ii. Appellants' Freedom of Association***

Appellees argued, and the District Court agreed, that no aspect of Section 12616 curtailed Plaintiffs' ability to assemble to discuss and express their views regarding cockfighting and other cultural issues. Joint Appendix at p. 144. The District Court notes that "the First Amendment does not protect assembly for unlawful purposes or to engage in criminal activity." Id. Because Section 12616's cockfighting prohibition also infringes upon the Appellants' freedom of association and deters Appellants from engaging in expressive association, the District Court's holding must be reversed.

The First Amendment protects freedom of association as an activity innately associated with the principle of liberty. U.S. Const. amend. I ("Congress shall make no law . . . abridging. . . the right of the people peaceably to assemble. . ."). The Supreme Court has stated that "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 460-61 (1958) (internal quotation marks and citations omitted). For purposes of the First Amendment protection of freedom of assembly, "it is immaterial whether the beliefs sought to be advanced by association pertain to

political, economic, religious *or cultural matters*, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id*. (emphasis ours). The freedom of expressive association "accords protection to collective effort on behalf of shared goals" to help "in *preserving* political and *cultural diversity* and in shielding dissident expression from suppression by the majority." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (emphasis ours).

Certainly, Appellants allege a collective effort and seek to preserve their cultural heritage and autonomy through cockfighting. There can be no doubt that Section 12616 curtails Appellants' right to freely associate with respect to a cultural matter of great importance to the associational freedoms of their members. When applied to Appellants, Section 12616 hampers their ability to express their views, sense of self-determination, and cultural autonomy. Congress' alleged interest in eradicating animal cruelty in live-bird fights, which is in direct conflict with Puerto Ricans' view of cockfighting as an important cultural symbol and vehicle of cultural expression, does not justify the impact that the application of Section 12616 has on the Appellants' associational freedoms.

To this point, "[e]veryone has the right freely to participate in the cultural life of the community [and] to enjoy the arts." Universal Declaration of Human Rights, Art. 27. The right to participate in culture is a civil as well as a political freedom. Although this right helps to legitimize political self-governance, it transcends that purpose. Cultural democracy, and therefore cultural freedom, is a necessary component of a free society, even in countries that are not fully democratic or democratic at all. A cultural theory of free speech offers a much more convincing explanation of why a great deal of expression that seems to have little to do with political self-government enjoys full First Amendment protection. People influence and reshape each other over time by living and participating in cultures of belief and opinion, and by operating within networks of cultural power and organized knowledge. *See* Jack M. Balkin,

Cultural Democracy and the First Amendment, 110 Nw. U. L. Rev. 1053 (2016), https://scholarlycommons.law.northwestern.edu/nulr/vol110/iss5/3. Cultures feature powerful institutions and practices—like families, educational organizations, science, and religion—that produce, alter, and reproduce beliefs and opinions. People come to know themselves through their assimilation, alteration, and rejection of the cultures they inhabit and that inevitably inhabit them. Freedom of speech is about power—cultural power. People have a right to participate in the forms of cultural power that reshape and alter them, because what is literally at stake is their own selves. *Id*. This is precisely what is at stake for Appellants' in this case.

Without a doubt, the criminalization of cockfighting in Puerto Rico deters Appellants from assembling to discuss and express their views regarding cockfighting. Once more, the District Court's holding as it pertains to Appellant's freedom of assembly claim is concerned only with what is obvious. While, arguably, Appellants can come together to discuss their views regarding cockfighting, Section 12616 eliminates the reason for why Appellants would want to assemble in the first place. By criminalizing cockfighting in Puerto Rico, Congress destroyed the purpose behind Appellants' association and the basis for their existence as a group. The Appellants have a right to perpetuate their culture through assembly and cockfighting. Section 12616 seeks to prevent Appellants from exercising such right and, instead, reflects moral and historical commitments which have no place in Puerto Rico, its history, or culture.

**B. <u>Due Process</u>**

By enacting Section 12616, Congress violated Appellants' procedural Due Process rights under the Fifth and Fourteenth Amendment to the U.S. Constitution. Specifically, by criminalizing cockfighting in Puerto Rico, Congress targeted a discrete group of individuals who do not have voting representation in that legislative body, thereby prohibiting them from engaging in an activity that is not only permissible under their laws (and with the blessing of

the United States since 1933) but also has been a fundamental, integral part of their culture for hundreds of years. In doing so, Congress imposed its own sense of "morality" upon the "immoral" who practice cockfighting in Puerto Rico without affording them a fair opportunity to be heard at a meaningful time and in a meaningful manner.

In denying Appellants' arguments, the District Court agreed with Appellees and held that Appellants "do[] not have a cognizable liberty or property interest deprived by the enactment of the Section 12616 amendments." Joint Appendix at p. 144. The District Court further reasoned that even if Appellants had a valid liberty or property interest, "the legislative process itself provides citizens with all of the process they are due." *Id*. (quoting *Correa-Ruiz v. Fortuño*, 573 F.3d 1, 15 (1st Cir. 2009)). Finally, the District Court also concluded that "[t]he fact that [Appellants] were unable to effectively lobby against the approval [of] Section 12616 cannot be remedied by a court of law as it involves a political task delegated to the political branches of the government." Joint Appendix at p. 145. But Appellants do have a cognizable liberty interest in cockfighting, and Congress deprived them of that liberty interest in the absence of a constitutionally adequate process. For this reason, the District Court's judgment must be reversed.

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. In evaluating a procedural due process claim under the Fourteenth Amendment, courts must determine "whether [the plaintiff] was deprived of a protected interest, and, if so, what process was he due." *Garcia-Gonzalez v. Puig Morales*, 761 F.3d 81, 88 (1st Cir. 2014). As such, to establish a procedural due process violation, "the plaintiff must identify a protected liberty or property interest and allege that the defendants, acting under color of state law, deprived [him] of that interest without constitutionally adequate process." *Gonzalez-Droz v. Gonzalez-Colon*, 660 F.3d 1, 13 (1st Cir. 2011). The basic guarantee of

procedural due process is that, "before a significant deprivation of liberty or property takes place at the state's hands, the affected individual must be forewarned and afforded an opportunity to be heard 'at a meaningful time and in a meaningful manner'." *Id*. (quoting *Amsden v. Moran*, 904 F.2d 748, 753 (1st Cir. 1990). "No rigid taxonomy exists for evaluating the adequacy of state procedures in a given case; rather, *due process is flexible and calls for such procedural protections as the particular situation demands*." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (emphasis ours).

In the case of *Board of Regents v. Roth*, the Supreme Court attempted to clarify the concept of "liberty" in the context of the Due Process Clause and stated:

> While this court has not attempted to define with exactness the liberty . . . guaranteed (by the Fourteenth Amendment), the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally *to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men. In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed*.

*Board of Regents v. Roth*, 408 U.S. 564, 572 (1972) (emphasis ours). In a more recent opinion, in the case of *Lawrence v. Texas*, the Supreme Court clarified that liberty presumes an autonomy of self that includes freedom of thought, belief, and expression. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003). In revoking its decision in *Bowers v. Hardwick*, the Supreme Court emphasized that its obligation is to define the liberty of all and not to mandate its own moral code. *Id*. at 571. Unquestionably, to recognize a liberty interest not expressly listed in the Constitution, but considered fundamental to an individual (or a group of individuals), the Supreme Court has many times focused on the importance and impact of that liberty interest on the life of the individual or group.

Here, Appellants have a cognizable liberty interest in exercising their First Amendment rights to freedom of speech and assembly, as described in the preceding section. Far from

considering cockfighting as an immorality, Puerto Ricans see cockfighting as a cultural necessity that defines them as a group or an ethnicity. For a vast majority of Puerto Ricans, like Appellants, cockfighting is a manifestation of their life and identity, which transcends the physical act of two roosters fighting. Given the territorial, colonial, and insular nature of Puerto Rico, more than in any other state in the United States, all of which banned cockfighting at a local level before Congress enacted Section 12616, cockfighting in Puerto Rico is considered a form of cultural resistance. By criminalizing cockfighting in Puerto Rico, Congress ignored Puerto Rico's cultural autonomy and, instead, imposed upon Puerto Rico its own moral code (that of the people of the mainland United States).[4] Congress' action ignored the fact that cockfighting is still legal under the island's laws and highly regulated by its legislative bodies.

Before it deprived Appellants of their liberty interest, Congress did not afford them a fair opportunity to be heard in a meaningful manner in relation to Section 12616. The case cited by the District Court to support its holding, *Correa-Ruiz v. Fortuño*, 573 F.3d 1, 15 (1st Cir. 2009), is inapposite to the case at hand. In *Correa-Ruiz* the plaintiffs asserted that their Fourteenth Amendment right to due process was violated when, pursuant to local Law 181, the legislature of Puerto Rico lowered the mandatory retirement age by ten years without providing them an opportunity to demonstrate their physical and mental fitness to continue to work. *Id.* at 14. This Court noted that no violation occurs when the legislature which created a statutory entitlement alters or terminates the entitlement by subsequent legislative enactment. *Id*. This Court reasoned that the legislative process itself provided citizens with the due process to which they were entitled. *Id*. at 14-15. This Court did not consider, however, whether the same would

[4] In the preceding section, Appellants discuss why Section 12616 fails to pass muster under the Constitution. For the same reasons as noted above, Section 12616 fails as an unjustified violation of Appellants' Fifth and Fourteenth Amendment substantive due process rights.

be true in the context of federal legislation and Puerto Rico's lack of meaningful representation in Congress.

Because the Commonwealth of Puerto Rico and, thus, Appellants do not have meaningful representation in Congress, the legislative process in the U.S. Congress cannot be "all the process that is due" to Appellants in regards to the deprivation of this important liberty interest. Indeed, the Supreme Court has stated that *due process is flexible and calls for such procedural protections as the particular situation demands*." *Morrissey*, 408 U.S. at 481 (emphasis ours). While Puerto Rico is represented in Congress by a House of Representatives delegate (the "Resident Commissioner"), this delegate does not have the same privileges as a state representative and does not enjoy any voting rights. As such, by its very nature, Puerto Rico's representation in the legislative process of Congress is not at all meaningful. This is particularly true in relation to Congress' enactment of Section 12616 because all 50 states had already banned cockfighting at a local level, which left Puerto Rico to fend for itself in a legislative process which is evidently oblivious to its history and culture. A more in-depth view of the history and significance of cockfighting in Puerto Rico demonstrates that Congress' legislative process was insufficient in this case and that this particular situation demanded additional procedural protections.

In a literal sense, due process rights are the guarantee that a person has the right to a "fair process" before the government can deprive him of life, liberty, or property. Here, Appellants were deprived of a fundamental liberty interest without being afforded a fair process. As such, the District Court erred in denying Appellants' *Motion for Summary Judgment* as it pertains to Appellants' due process claims and its judgment must be reversed.

**C. <u>Commerce Clause</u>**

The District Court ruled that Congress had the power to enact Section 12616 and extend the prohibition of cockfighting and cockfighting-related activities in Puerto Rico under the

guise of the Commerce Clause. For the reasons set forth below, this was an error that should be corrected on appeal.

***i. Applicable Law***

"The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 1 Cranch 137, 176, 2 L.Ed. 60 (1803) (Marshall, C. J.). "As James Madison wrote: 'The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.'" *United States v. Lopez*, 514 U.S. 549, 552, 115 S. Ct. 1624, 1626, 131 L. Ed. 2d 626 (1995) (citing The Federalist No. 45, pp. 292–293 (C. Rossiter ed. 1961)). The Supreme Court has acknowledged the advantages of this structure of government:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

*Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S. Ct. 2395, 2399, 115 L. Ed. 2d 410 (1991) (citing McConnell, Federalism: Evaluating the Founders' Design, 54 U. Chi. L. Rev. 1484, 1491–1511 (1987) and Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 1, 3–10 (1988)). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory*, 501 U.S. at 458, 111 S. Ct. at 2400, 115 L. Ed. 2d 410.

Perhaps the strongest grant of authority to the federal government is found in the ever-controversial Commerce Clause of the Constitution: "The Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian

tribes." U.S. Const. art. I, § 8, cl. 3. Although not a state of the union, First Circuit precedent holds that the Commerce Clause applies to Puerto Rico. *See Trailer Marine Transp. Corp. v. Rivera Vazquez*, 977 F.2d 1, 6-9 (1st Cir. 1992). Though the power to regulate commerce is broad, the Supreme Court has nonetheless cautioned Congress that this power is not unbridled:

> In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." 301 U.S., at 37, 57 S. Ct., at 624.

*Lopez,* 514 U.S. at 556–57, 115 S. Ct. at 1628–29, 131 L. Ed. 2d 626. It should also be noted that "[u]nder our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'" *Id.* at 561 n. 3 (citing *Brecht v. Abrahamson*, 507 U.S. 619, 635, 113 S. Ct. 1710, 1720, 123 L. Ed. 2d 353 (1993) and *Engle v. Isaac*, 456 U.S. 107, 128, 102 S. Ct. 1558, 1572, 71 L.Ed.2d 783 (1982)).

The Supreme Court has directed that there are three categories of activity that Congress may regulate under the Commerce Clause:

> First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce . . . i.e., those activities that substantially affect interstate commerce.

*Lopez*, 514 U.S. at 558-59, 115 S. Ct. at 1629-30, 131 L. Ed. 2d 626 (internal citations omitted). As the third category—the power to regulate activities that substantially affect interstate commerce—is frequently the most difficult to appraise, the Supreme Court has identified four factors to aid in the analysis:

> (1) whether the statute regulates economic or commercial activity; (2) whether the statute contains an "express jurisdictional element" that limits the reach of its provisions; (3) whether Congress made findings regarding the regulated activity's impact on interstate commerce; and (4) whether "the link between [the regulated activity] and a substantial effect on interstate commerce was attenuated."

*United States v. Morales-de Jesus*, 372 F.3d 6, 10 (1st Cir. 2004) (citing *United States v. Morrison*, 529 U.S. 598, 610-12, 120 S. Ct. 1740, 146 L.Ed.2d 658 (2000)).

"When Congress legislates pursuant to a valid exercise of its Commerce Clause authority, we scrutinize the enactment according to rational basis review." *Lewko*, 269 F.3d at 67 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981)). Although this would appear to be a modest standard at first glance, the Supreme Court has previously stricken down certain federal laws for failing to satisfy this standard. *See Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626; *see also Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 146 L.Ed.2d 658.

***ii. Legal Analysis***

The District Court stated that the main rationale behind the 2018 amendment that banned cockfighting in Puerto Rico, according to the congressional record, was to equate the legal standard applicable to the nation's 50 states to all its territories, irrespective of other purported "moral" considerations articulated in the House of Representative session debate. For this reason, the District Court deferred to Congress's findings and determined that there was a rational basis to regulate live-bird fighting in the Commonwealth of Puerto Rico and other territories because it affected interstate commerce and the means of regulation were reasonably adapted to that end. Joint Appendix at p. 139.

The District Court's opinion is in apparent tension with *Lopez* and *Morrison*. In *Lopez*, the Supreme Court invalidated the Gun-Free School Zones Act of 1990, which made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone," ruling that Congress had exceeded its constitutional authority under the Commerce Clause when it passed a law prohibiting gun possession in local school zones. *Lopez*, 514 U.S. 549. Only 5 years later, the Supreme Court decided *Morrison* on the same rationale with respect to a federal statute giving victims of

domestic violence the ability to sue for civil damages in federal court. *Morrison*, 529 U.S. 598. This Court should respectfully follow suit and deem the 2018 amendment unconstitutional as Congress exceeded its authority under the Commerce Clause.

"The Constitution requires a distinction between what is truly national and what is truly local." *Lopez*, 514 U.S. at 568, 115 S. Ct. 1624 (citing *Jones & Laughlin Steel*, 301 U.S. at 30, 57 S.Ct. 615). If the Federal Government were "to take over the regulation of entire areas of traditional state concern," including "areas having nothing to do with the regulation of commercial activities," then "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Id.* at 577 (Kennedy, J., concurring). Here, the lack of adequate and persuasive findings should have led the Court to invalidate the statute under the Commerce Clause even though nothing more than a rational basis review is normally afforded in such cases.

The prohibition of cockfighting and cockfighting-related activities invoke the third class of commerce regulation: "Congress' commerce authority . . . to regulate those activities . . . that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59, 115 S. Ct. at 1629-30, 131 L. Ed. 2d 626. Hence, the proper analysis should start with the four factors addressed in *Lopez* and *Morrison*:

> (1) whether the statute regulates economic or commercial activity; (2) whether the statute contains an "express jurisdictional element" that limits the reach of its provisions; (3) whether Congress made findings regarding the regulated activity's impact on interstate commerce; and (4) whether "the link between [the regulated activity] and a substantial effect on interstate commerce was attenuated."

*United States v. Morales-de Jesus*, 372 F.3d 6, 10 (1st Cir. 2004) (citing *Morrison*, 529 U.S. at 610-12, 120 S.Ct. 1740, 146 L.Ed.2d 658). After evaluating these factors, it will become apparent that Congress had no rational basis to ban these activities of great cultural importance to the people of Puerto Rico.

We begin with the first and fourth factor, which will be discussed in tandem as the arguments intersect. The statute as amended does not truly regulate economic or commercial activity. Congress overstepped its bounds by placing its own morality above those of the people of Puerto Rico. Any effect on commerce caused by this amendment is merely incidental and attenuated as it is clear from the congressional record that the only true consideration used by Congress in passing this law was to stop what it perceived as animal cruelty without having a proper understanding of the importance of cockfighting in Puerto Rico and the measures taken by Puerto Rico to curb any potential animal cruelty.

Moreover, it should also be noted that the representatives in Congress added Section 12616, the challenged section, at the last minute to hundreds of other unrelated sections of the omnibus bill known as The Agriculture Improvement Act of 2018. In doing so, Congress failed to consider the ramifications to the people of Puerto Rico. This amendment was proposed and passed to appease animal-rights activists without any fear of political backlash, as Puerto Rico has no real representation in Congress and its residents cannot cast a vote in the presidential election.

We now turn to the second factor—whether the statute has an express jurisdictional element limiting its reach. The statute as amended does contain a "an express jurisdictional element"; however, its application in practice would be difficult. We will briefly review the complex provisions of the current statute to facilitate this discussion.

The statute makes it a crime in Puerto Rico to sponsor or exhibit a live bird in an "animal fighting venture." 7 U.S.C. § 2156(a)(1). Moreover, it is a crime in Puerto Rico for someone to "sell, buy, possess, train, transport, deliver, or receive any animal for purposes of having the animal participate in an animal fighting venture." 7 U.S.C. § 2156(b). Further, the law also makes it a crime in Puerto Rico to "sell, buy, transport, or deliver in interstate or foreign commerce a knife, a gaff, or any other sharp instrument attached, or designed or

intended to be attached, to the leg of a bird for use in an animal fighting venture." 7 U.S.C. § 2156(d). Additionally, the law also deems it a crime in Puerto Rico to use the mail or "any instrumentality of interstate commerce for commercial speech for purposes of advertising an animal" or the sharp instruments described previously in any way that furthers "an animal fighting venture except as performed outside the limits of the States of the United States." 7 U.S.C. § 2156(c). It is also a crime in Puerto Rico to simply attend an animal fighting venture. 7 U.S.C. § 2156(a)(2)(A). Finally, the law also outlaws the act of causing "someone under the age of 16 to attend an animal fighting venture." 7 U.S.C. § 2156(a)(2)(B).

A careful reading of each of these provisions demonstrates that the common hook is the term "animal fighting venture," which is defined as an "event, in or affecting interstate commerce, that involves a fight . . . between at least 2 animals for purposes of sport, wagering, or entertainment." 7 U.S.C. § 2156(f)(1). Hence, there is a requirement that the prohibited activity be in or affect interstate commerce. However, the broad scope of the term "in or affecting interstate commerce" could essentially be used in such a way that it would capture all forms of cockfighting in Puerto Rico. *See generally Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942) (finding that a farmer's production of wheat for his own consumption substantially affected interstate commerce). Thus, the jurisdictional language contained in the statute is simply Congress' way of paying lip service to the Judicial Branch's Commerce Clause requirements to avoid judicial scrutiny. But applying this statute in full force to Puerto Rico would effectively "obliterate the distinction between what is national and what is local and create a completely centralized government." *Jones & Laughlin Steel* 301 U.S. at 37, 57 S. Ct., at 624. The interstate-commerce hook is but an illusion.

Moving on to the third factor, there are no congressional findings regarding the amendment's impact on interstate commerce. The District Court relies on congressional statements dating back to the original law over 40 years ago. Joint Appendix at pp. 136-37.

Even those congressional findings are difficult to apply to the circumstances surrounding the challenged amendment.

For instance, even before the 2018 amendment, a person in Puerto Rico could not legally transport any gamecock or gamecock paraphernalia to or from any of the 50 states. This means that, almost by definition, there is no effect on interstate commerce, or at least any legitimate findings of such. Given the absence of the interstate aspects of cockfighting (e.g., trade in paraphernalia and interstate movement of the birds), all that it is left is local or intrastate cockfighting. Such local cockfighting does not produce any substantial impact on interstate commerce: Congress took care in 2002 and 2007 to eliminate its impact. More than economic, the significance of cockfighting is a cultural one. Whether cultural or commercial, cockfighting in Puerto Rico does not substantially impact interstate commerce. Absent a substantial impact of a purely local cultural activity, Congress lacks jurisdiction to prohibit the practice of cockfighting in Puerto Rico under the Commerce Clause of the Constitution.

Section 12616 unreasonably and arbitrarily removed a power delegated to Puerto Rico by previous legislation to authorize live bird fighting ventures. Had there been any "commerce" justification to ban the exclusion granted to the territories, Congress certainly did not express it during the debate of the amendment. The sponsor of the amendment supported the amendment during the debate in the House of Representatives on two main grounds: a moral judgment regarding cockfighting and its propensity to involve criminal practices:

> Mr. ROSKAM: 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.

How could a "commerce" justification materialize without further explanation? The *Lopez* court specifically rejected this contention when no nexus to interstate commerce was to be found. In this case there is no such nexus to interstate commerce. In other words, the

legislation does not furnish sufficient evidence of its goals and purposes to justify its ends in the face of Commerce Clause authority and equal protection challenges.

"[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 311, 101 S. Ct. 2352, 2391, 69 L. Ed. 2d 1 (1981) (Rehnquist, J., concurring in judgment). "[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273, 85 S. Ct. 348, 366, 13 L. Ed. 2d 258 (1964) (Black, J., concurring).

The statements provided by Congress during the passage of the challenged amendment demonstrate no concern whatsoever regarding the effect of cockfighting on interstate commerce. This is not surprising as Congress' intent was to prohibit cockfighting based exclusively on reasons of morality, which should have properly been left to Puerto Rico to define. Without more, Congress should not be allowed to mandate its own moral code upon the people of Puerto Rico.

After weighting these four factors and considering the fact that Puerto Rico has no political power in the United States government, this Court should determine that Congress overstepped its bounds by recklessly extending this cockfighting prohibition to Puerto Rico. Congress should know by now that "[t]he Constitution requires a distinction between what is truly national and what is truly local." *Lopez*, 514 U.S. at 568, 115 S. Ct. 1624 (citing *Jones & Laughlin Steel*, 301 U.S. at 30, 57 S. Ct. 615). Moreover, "[C]ongress cannot punish felonies generally." *Cohens v. Virginia*, 6 Wheat. 264, 426, 428, 5 L. Ed. 257 (1821) (Marshall, C.J.). Congress exceeded its constitutional authority by legislating in an area that belongs to the people of Puerto Rico. Even Congress' half-hearted attempt to justify this amendment under

the broad powers of the Commerce Clause fails as there is no rational relationship between cockfighting and interstate commerce. To decide otherwise would "obliterate the distinction between what is national and what is local and create a completely centralized government." *Jones & Laughlin Steel* 301 U.S. at 37, 57 S. Ct., at 624.

**D. Territorial Clause**

Appellees suggested that, in any event, once all states locally legislated to prohibit cockfights, Congress had the power to then move to prohibit the practice within Puerto Rico under the Territorial Clause of the Constitution. The District Court agreed and held that the "Section 12616 amendments were specifically enacted to extend an already nationwide prohibition to the territories" and that "[a]ll federal laws, criminal and civil in nature, apply to Puerto Rico as they apply to the States, unless otherwise provided" by Congress. Joint Appendix at p. 140 (citations omitted). Because Congress attempts to legislate as to a purely local intrastate affair (as discussed in the preceding section) through Section 12616, Congress also exceeded its power under the Territorial Clause and, thus, the District Court's holding must be reversed.

The Territorial Clause of the Constitution states that: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." U.S. Const. art. IV, § 3. Since Puerto Rico adopted its constitution in 1952, however, the United States and Puerto Rico have forged a distinctive political relationship, built on the island's evolution into a constitutional democracy exercising local self-governance. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863; 579 U. S. ____ (2016). Indeed, throughout the years, the "federal government's relations with Puerto Rico changed from being bounded merely by the territorial clause . . . to being bounded by the United States and Puerto Rico Constitutions . . . and the rights of the people of Puerto Rico as United States citizens." *United States v. Mercado-Flores*, 312 F. Supp. 3d 249, 253 (D.P.R. 2015) (quoting

*Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 41-42 (1st Cir. 1981). While the Territorial Clause continues to allow Congress to treat Puerto Rico differently from the states inasmuch as federal legislation is concerned, it does not allow Congress to legislate as to purely local intrastate affairs governed by Puerto Rico. *Mercado-Flores*, 312 F. Supp 3d at 255.

To this point, this Court has stated that matters of criminal law "should be meted out by the state under its plenary police power, and not by the Federal Government with its limited jurisdictional reach." *See United States v. Joubert*, 778 F.3d 247 (1st Cir. 2015) (citing *López*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) ("The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the State Governments are numerous and indefinite." (quoting The Federalist No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)). Congress does not have the authority to criminalize any behavior that it desires. Rather, its power is limited, *inter alia*, by the Commerce Clause. *United States v. Lopez*, 514 U.S. 549, 552-53 (1995). "Matters of crime control have traditionally been reserved to the states and for good reason . . . federal criminal statutes need to be interpreted narrowly, to ensure that the courts are not extending federal jurisdiction beyond the point envisioned by Congress and intruding into realms specifically left to the Commonwealth." *See United States v. Diaz-Rosado*, 857 F.3d 116, 121 (1st. Cir. 2017) (Torruella, J., concurring)).

Well before the 2018 amendments to the AWA, all 50 states had outlawed cockfighting through local legislation. Therefore, the Section 12616 amendments primarily affect Puerto Rico, where cockfighting was still legal (and with the blessing of the United States had been since 1933), and where it continues be legal under local laws. These Congressional actions took place in the interstate commerce sphere, although Congress has demonstrated no concern whatsoever regarding the effect of cockfighting on interstate commerce. Because cockfighting

has been outlawed by all 50 states, it is difficult to understand how the mere existence of cockfighting in Puerto Rico satisfies the jurisdictional elements of an interstate activity.

As such, Appellants submit that Puerto Rico should be left to determine, pursuant to its local self-governance, if it should criminalize laws associated with live bird fighting. Puerto Rico should also be permitted to determine which manifestations, customs or traditions are considered an indelible part of its culture. Congress cannot unilaterally annul duly approved laws that recognize a manifestation or tradition of cultural law, such as the Puerto Rico Gamecocks of the New Millennium Act—Act No. 98 of July 31, 2007, under the guise of the Territorial Clause. Nor can Congress shield itself behind the Territorial Clause to violate the fundamental rights of the people of Puerto Rico, as described herein.

From the outset, the preemption of a law that recognizes a tradition, which by default is an internal matter of Puerto Rico, is an unjustified invasion of the autonomy of Puerto Rico and an overreach by Congress under the Territorial Clause. To hold otherwise, is to hold the people of Puerto Rico hostage and at the mercy of a political majority that ignores its cultural and political autonomy. Because Congress exceeded its powers under the Territorial Clause, the District Court's holding should be reversed.

## VI. CONCLUSION

> Puerto Rico is suffering through multiple crises. Two are obvious: a financial crisis triggered by the island's public debts and the humanitarian crisis brought on by Hurricanes Irma and María. One is not: the island's ongoing crisis of constitutional identity. Like the hurricane, this crisis came from outside the island. Congress, the U.S. Supreme Court, and the Executive Branch have each moved in the last twenty years to undermine the "inventive statesmanship" that allowed for Puerto Rico's self-government with minimal interference from a federal government in which the people of Puerto Rico had, and have, no representation.

Issacharo, Samuel; Bursak, Alexandra; Rennie, Russell; and Webley, Alec (2019) "What Is Puerto Rico?" Indiana Law Journal: Vol. 94: Iss. 1, Article 1.5

[5] Available at: hps://www.repository.law.indiana.edu/ilj/vol94/iss1/.

Appellants assert the freedom to participate in the various activities connected with cockfighting in accordance with the recognition and protection afforded that activity by Puerto Rico law, the First Amendment, and the Due Process Clause. Puerto Ricans are entitled to exercise and perpetuate their cultural rights free from federal interference and limitations imposed under the guise of the Commerce and Territorial Clauses.

The Puerto Rico Gamecocks of the New Millennium Act—Act No. 98 of July 31, 2007, is the representation of Puerto Rico's assessment that cockfighting is not an expression of animal cruelty nor any criminal activity. In fact, cockfighting is perhaps the ultimate form of cultural expression by Puerto Ricans. It is a practice that has been passed down from generation to generation for centuries. Congress should not be allowed to ban this practice based on an uninformed moral judgment, especially considering the exclusion of Puerto Rico from voting representation in Congress and from the American electoral process. This Court should respectfully strike down Section 12616 as a Congressional exercise that has improperly exceeded its constitutional authority and disregarded the freedoms and traditions of all Puerto Ricans.

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT AND TYPE-STYLE REQUIREMENT**

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 10550 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 12-point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(C)(i), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

**CERTIFICATE OF FILING AND SERVICE**

**WE HEREBY CERTIFY** that on this same date, August 12, 2020, we electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record. We also certify that we will serve a copy of the petition and its appendix via certified mail to the following people:

John S. Koppel
U.S. Dept. of Justice, Civil Division
950 Penna Ave. NW, Room 7264
Washington, DC 20530

Carlos E. Rivera-Justiniano
P.O. Box 9022228
San Juan, Puerto Rico 00902-2228

Raúl Castellanos-Malavé
Development & Construction Law Group LLC
PMB 443, Suite 112
100 Grand Paseos Boulevard
San Juan, PR 00926-5910

Veronica Ferraiuoli-Hornedo
Office of The Resident Commissioner
1609 Longworth House Office Building
Washington, DC 20515

Juan Carlos Albors
100 Road 165, Suite 706
Guaynabo, PR 0096

Jorge Martínez-Luciano
M.L. & R.E. Law Firm
513 Juan J. Jimenez St
San Juan, PR 00918

Sheila J. Torres-Delgado
Aldarondo & Lopez Bras, PSC
ALB Plaza Suite 40016
Road 199, Guaynabo, PR 00969

S/Félix Román Carrasquillo
Félix Román & Associates P.S.C.
P.O. BOX 9070 San Juan,
Puerto Rico, 00908
Tel. (787) 723-3970
romanlawpr@gmail.com
U.S.C.A. No. 85867

S/Rafael Ojeda
RAFAEL OJEDA DIEZ
OJEDA & OJEDA LAW OFFICES PSC
rafaelojeda@ojedalawpr.com
U.S.C.A. No. 24076
Phone (787) 728-4120
Fax (787) 724-3380

s/ EDWIN PRADO-GALARZA, ESQ.
Attorney at Law
Prado, Núñez & Asociados, P.S.C.
403 Del Parque St., Suite 8
San Juan, PR 00912
T. (787) 977-1411
F. (787) 977-1410
Pradolaw10@gmail.com
First Circuit No.: 39421

s/ María A. Domínguez
María A. Domínguez
First Circuit No. 1053269

DMRA Law LLC
Centro Internacional de Mercadeo
Torre 1, Suite 402
Guaynabo, PR 00968
787-331-9970

# APPELLANTS' ADDENDUM

**Case Nos. 19-2236 & 20-1084**

**UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

**Club Gallístico de Puerto Rico Inc., Luis Joel Barreto Barreto, Faustino Rosario Rodríguez, Carlos Quiñones Figueroa, Nydia Mercedes Hernández, and Laura Green**

Plaintiffs – Appellants

v.

**United States of America; Department of Agriculture; Defendant Sony Purdue as Secretary of the Department of Agriculture; United States Department of Justice, a Department of the United States, and William P. Barr, Acting Attorney General of the United States Department of Justice**

Defendants – Appellees

&

**Club Gallistico de Puerto Rico, Inc., Nydia Mercedes Hernandez-Gotay, Mr. Faustino Rosario-Rodriguez, Luis Joel Barreto-Barreto, Carlos Quinones-Figueroa, Laura Green, Asociacion Cultural y Deportiva del Gallo Fino de Pelea, Angel Manuel Ortiz-Diaz, John J. Olivares-Yace, Angel Luis Narvaez-Rodriguez, and Jose Miguel Cedeno**

Plaintiffs – Appellants

v.

**United States of America, Department of Agriculture, Sonny Purdue, United States Department of Justice, William P. Barr, and Donald Trump**

Defendants – Appellees

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF PUERTO RICO**

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF PUERTO RICO**

| | |
|---|---|
| **CLUB GALLISTICO DE PUERTO RICO INC. et al.,**<br><br>**Plaintiffs,**<br><br>**v.**<br><br>**UNITED STATES OF AMERICA et al.,**<br><br>**Defendants.** | **CIVIL NO. 19-1481 (GAG); (consolidated with Civil No. 19-1739 (GAG))** |

**OPINION AND ORDER**

"What's good for the goose is good for the gander." This well-known proverb illustrates the central issue in the case at bar: equal treatment before the law. In United States v. Pedro-Vidal, 371 F. Supp. 3d 57 (D.P.R. 2019), the Court noted that since the territory of Puerto Rico's acquisition in 1898, "Congress has enacted thousands of federal laws that apply therein." Id. at 58. Moreover,

> Congress has the authority to enact laws that apply to citizens in the territory of Puerto Rico *exactly* as they would to citizens in the States. However, by way of legislation, Congress may treat differently citizens in the territory, for example, those which cap Social Security, Medicare, and Veteran benefits.

Id. at 58-59. The Pedro-Vidal case involved the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. §§ 3591-3598, and whether it applied to the Commonwealth of Puerto Rico just as in every state. The Court ruled that it did. Similarly, Section 12616 of the Agriculture Improvement Act of 2018, *infra*, that amends the Animal Welfare Act of 1966 (AWA), *infra*, falls within that first category of laws. Under the Commerce Clause, Congress has the unquestionable authority to treat the Commonwealth *equally* to the states. Neither the Commonwealth's political status, nor the Territorial Clause, impede the United States Government from enacting laws that apply to all citizens of this Nation alike, whether in a state or territory.

On May 22, 2019 Club Gallístico de Puerto Rico, Inc. ("Club Gallístico") and other plaintiffs[1] filed a Complaint (Civil No. 19-1481 (GAG)), pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, against the President of United States, the United States Government, and other defendants[2] alleging that the recent Section 12616 amendments to the AWA which extend the prohibition on animal fighting ventures to the Commonwealth of Puerto Rico and other territories violate bedrock principles of federalism and rights protected under the United States Constitution. On August 1, 2019, Asociación Cultural y Deportiva del Gallo Fino de Pelea ("Asociación Cultural") and other plaintiffs[3] filed a parallel complaint (Civil No. 19-1739 (GAG)), against the United States Government and all other defendants proffering similar allegations as in Club Gallístico's suit and pleading additional constitutional rights violations. On August 5, 2019, this Court consolidated both actions.[4]

The two lead Plaintiffs, Club Gallístico and Asociación Cultural, are both non-profit organizations involved in the Commonwealth of Puerto Rico's cockfighting industry. (Docket Nos. 1; 16). The former operates one of the largest and "most visited" cockfighting arenas in the island and the latter is an association whose goal is to promote and preserve cockfighting in the territory. Id. The remaining Plaintiffs have participated in the Commonwealth's cockfighting world as cockpit owners, cockpit judges and other officials, gamecock breeders and owners, artisans, and otherwise cockfighting enthusiasts. They all request this Court to issue a declaratory judgment holding that the

[1] The other plaintiffs include Mr. Luis Joel Barreto Barreto, Mr. Faustino Rosario Rodríguez, Mr. Carlos Quiñones Figueroa, and Mrs. Nydia Mercedes Hernández. (Docket No. 1).
[2] The other defendants are: the U.S. Attorney General, the U.S. Department of Justice, the U.S. Secretary of Agriculture and the Department of Agriculture. (Docket No. 1).
[3] The other plaintiffs include Mr. Ángel Manuel Ortiz Díaz, Mr. John J. Oliveras Yace, Mr. Ángel Luis Narváez Rodríguez and Mr. José Miguel Cedeño. (Docket No. 16).
[4] On this date, Club Gallístico and others amended their original complaint to include a new plaintiff, Mrs. Laura Green. (Docket No. 21).

Section 12616 amendments are unconstitutional. Following the filing of the Complaints, the parties agreed to a fast-tracked briefing schedule for summary judgment cross-motions and replies.

Currently, pending before the Court are Plaintiff Club Gallístico and others' Motion for Summary Judgment (Docket No. 34) and Defendant United States and others' Cross-Motion for Summary Judgment.[5] (Docket No. 38).

## I. Background

### A. Legal History of Cockfighting

According to the Encyclopedia Britannica, *cockfighting* is "the sport of pitting gamecocks to fight and the breeding and training of them for that purpose." *Cockfighting*, Encyclopædia Britannica (2016). Similarly, renowned folklorist Alan Dundes indicates that "[t]he cockfight, in which two equally matched roosters -typically bred and raised for such purposes and often armed with steel spurs (gaffs)—engage in mortal combat in a circular pit surrounded by mostly if not exclusively male spectators, is one of the oldest recorded human games or sports." A. Dundes, THE COCKFIGHT: A CASEBOOK vii (University Wisconsin Press, 1994). Professor Dundes further highlights that the contest has been "banned in many countries on the grounds that that [it] constitutes inhumane cruelty to animal" yet "continues to flourish as an undergrounds or illegal sport." Id.

In colonial North America, cockfighting was introduced at an early date and reached its peak popularity between 1750 and 1800, notably in the colonies that extended from North Carolina to New York. Ed Crews, *Once Popular and Socially Acceptable: Cockfighting*, The Colonial Williamsburg Journal (Autumn 2008) available at https://www.history.org/Foundation/journal/Autumn08/rooster.cfm. Nonetheless, during these

[5] For purposes of this Opinion and Order, the Court will either refer to Plaintiffs and Defendants collectively or only to lead Plaintiff Club Gallístico and/or Defendant United States. Notwithstanding, the Court's reasonings and rulings equally apply to all Plaintiffs and Defendants.

years colonial authorities occasionally tried to ban it. For example, in 1752, the College of William and Mary directed its students to avoid it all together. Id. Following the Revolutionary War, "some citizens of the new United States looked upon cockfighting as an unsavory vestige of English culture and advocated its abandonment." Id. By the mid-1800s, cockfighting was mostly considered "cruel and wrong" and several states had passed laws against animal cruelty, including Massachusetts. Id.; see also Commonwealth v. Tilton, 49 Mass. 232 (1844).

In the case of Puerto Rico, historians posit that cockfighting has been practiced in the island since the late eighteenth century. Following the United States' acquisition of the territory in 1898, General Guy Vernor Henry, the island's second military governor, enacted a law forbidding animal cruelty, which specifically included cockfights. See BEAKS AND SPURS: COCKFIGHTING IN PUERTO RICO, National Register of Historic Places Multiple Property Documentation Form, National Parks Services (May 29, 2014). This prohibition lasted until August 12, 1933 when Governor Robert Hayes Gore approved a law, authored by then Senate President Rafael Martínez Nadal, making these contests legal once again. In the decades following this law's approval, others were passed that sought to regulate every aspect of this industry. The most recent of these laws is the Puerto Rico Gamecocks of the New Millennium Act, Act 98-2017 as amended, P.R. LAWS ANN. tit. 15, §§ 301 *et seq.* Under this Act, the Commonwealth's government enabled cockfighting; delegated its oversight to the Sports and Recreation Department; authorized the issuance of licenses to cockpits, gamecock breeders, and cockfight judges; and, established penalties for anyone who violated this law. Id.

On the other hand, and as detailed in the subsequent section, since 1976 Congress has progressively outlawed cockfighting throughout the Nation. Parallel to efforts at the federal level, all fifty states, and the District of Columbia, have effectively prohibited these fighting ventures. See

COCKFIGHTING LAWS, National Conference of State Legislatures, Vol. 22, No. 1 (January 2014). Louisiana's ban passed in 2007 and it is the most recent state legislative action in this direction. Id. Although cockfighting remains illegal in all states, punishments vary across the board; some states prohibit ancillary activities, thirty-one states permit possession of cockfighting implements and twelve states allow possession of fighting live-birds, even though cockfighting itself remains illegal. Id. Until the passage of the Agriculture Improvement Act of 2018, the only jurisdictions that had not proscribed cockfights comprised the Commonwealth of Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands and the United States Virgin Islands. Id.

**B. The Animal Welfare Act of 1966**

In 1966, Congress enacted the Laboratory Animal Welfare Act (LAWA) primarily "to protect the owners of dogs and cats from theft of such pets" and to prevent the sale or use of stolen pets and ensure humane treatment in research facilities. See Laboratory Animal Welfare Act, 7 U.S.C. §§ 2131-2159 (1994 & Supp. V). Four years later, the Animal Welfare Act of 1970 amended the LAWA to more generally address issues concerning mammal and bird brutality. In 1976, and relevant to this case, the Animal Welfare Act Amendments of 1976 outlawed for the first-time all animal fighting ventures in which animals were moved in interstate or foreign commerce. See P. L. No. 94-279, 90 Stat. 417 (1976). An animal fighting venture extended to any event involving a fight "between at least two animals" for purposes "of sport, wagering, or entertainment", except events where animals hunt other animals. Id. Anyone found engaging in these activities was subject to a monetary fine ($5,000 maximum) or imprisonment (1-year maximum). Id. Nonetheless, the amendments contained a provision, sub-section (d), which exempted live-bird fighting ventures if the fight occurred "in a State where it would be in violation of the laws thereof." Id. For purposes

of the AWA, the term "State" included, and *still does*, "the Commonwealth of Puerto Rico, and any territory or possession of the United States." Id.

Following this initial ban, Congress has gradually expanded the range of animal fighting prohibitions, notably those concerning live-bird fights. In 2002, the Farm Security and Rural Investment Act of 2002, P. L. No. 107-171, 116 Stat. 134 (2002), limited the live-bird exemption through a "Special Rule for Certain States" provision which applied to persons who sponsored or exhibited live-birds in a fighting venture only if said persons knew that "any bird in the fighting venture was knowingly bought, sold, delivered, transported, or received in interstate or foreign commerce." Id. In 2007, the Animal Fighting Prohibition Enforcement Act, Pub. L. No. 110-22, 121 Stat. 88 (2007), increased the imprisonment penalty to a 3-year maximum and made it unlawful for a person to "knowingly sell, buy, transport, or deliver in interstate or foreign commerce a knife, a gaff, or any other sharp instrument attached, or designed or intended to be attached, to the leg of a bird" for purposes of a live-bird fighting venture. Id. The "sharp instruments" prohibition applied equally to all "States", as defined under the AWA. Id. Pursuant to these amendments, Congress also modified the wording of the 1976 original exemption, sub-section (d). Given the 2002 "Special Rule for Certain States" provision, sub-section (d) was now limited to exempt these States from complying with the prohibition on the use of the mail service of the United States Postal Service for purposes of promoting or furthering an animal fighting venture. Id.

The following year, the Food Conservation and Energy Act of 2008, P. L. No. 110-234, 122 Stat. 923 (2008), increased yet again the imprisonment sentence to a five-year maximum and expanded the prohibitions to generally include "possessing" and "training" animals for fighting purposes. Id. Like the 2007 amendments, Congress made no exemptions for States that lawfully permitted animal fighting ventures. Finally, in 2014 the Agricultural Act of 2014, P. L. No. 113-79,

128 Stat. 649 (2014), banned the attendance to animal fights, or causing individuals less than 16 years old to attend such activities. Likewise, Congress did not make an exception for jurisdictions which had not proscribed live-bird fighting.

To summarize, prior to the enactment of the Section 12616 amendments of 2018, at the federal level a person could not knowingly sponsor or exhibit a live-bird in a fighting venture, except in jurisdictions where it was legal pursuant to the "Special Rule for Certain States" provision, 7 U.S.C. § 2156(a)(3), unless the person knew that the birds participating in the fight were "bought, sold, delivered, transported or received" in interstate or foreign commerce for this purpose. Similarly, a person could not: (1) attend an animal fighting venture or cause a minor younger than 16 years old to attend; (2) possess or train any animal for purposes of a fighting venture; and (3) sell, buy, transport or deliver in interstate commerce any sharp instruments to be attached to a live-bird's leg for fighting. Finally, it was illegal to use the U.S. Postal Service to advertise an animal fighting venture or promote sharp instruments designed for live-bird fights, except if this transpires in a state were live-bird fighting was legal under sub-section (d), 7 U.S.C. § 2156(d).

## II. Motions for Summary Judgment

The parties have both filed statement of uncontested facts and objections to each other's. On the one side, Defendants allege that Plaintiffs fail to comply with Local Rule 56 and FED. R. CIV. P. 56 because most of their proposed facts are immaterial, conclusory or contain information lacking sufficient knowledge to assess its veracity or falsity. (Docket No. 39 at 1-2). For this reason, Defendant United States proposes its own set of seven (7) undisputed facts. Id. at 13-14. On the other hand, Plaintiff Club Gallístico's objects to Defendants' proposed facts and contends that most statements concern questions of law that should be disregarded. (Docket No. 58 at 1).

### A. Local Rule 56

Under Local Rule 56, L. Cv. R. 56, if a party improperly controverts the facts, the Court may treat the opposing party's facts as uncontroverted. See Puerto Rico Am. Ins. Co. v. Rivera-Vazquez, 603 F.3d 125, 130 (1st Cir. 2010). Similarly, the Court can ignore "conclusory allegations, improbable inferences, and unsupported speculation." Rossy v. Roche Prod., Inc., 880 F.2d 621, 624 (1st Cir. 1989). Because Plaintiffs filed the present Complaint pursuant to the Declaratory Judgment Act and plead a pre-enforcement facial, and at times as-applied, constitutional challenge to Section 12616, the Court will only consider those undisputed and uncontested facts which are essential to evaluate these contentions.

**B. Relevant Facts**

On December 20, 2018 Congress approved the Section 12616 amendments, under the Agriculture Improvement Act of 2018, PL 115-334, 132 Stat. 4490 (2018). (Docket Nos. 39 ¶ 1; 58 ¶ 1). The provisions of Section 12616 go into effect one year after the date of its enactment, to wit, December 20, 2019. (Docket Nos. 39 ¶ 2; 58 ¶ 2). These amendments eliminate the "Special Rule for Certain States" and sub-section(d) provisions contained in the "Animal Fighting Venture Prohibition" section of the AWA, 7 U.S.C. § 2131 *et seq*. (Docket Nos. 34 ¶ 12; 39 ¶ 3). The ultimate effect, thus, is the prohibition of animal fighting ventures, including live-bird fighting, in every United States jurisdiction, including the Commonwealth of Puerto Rico. Id.

All plaintiffs have participated in animal fighting events, specifically those involving live-birds, either operating or assisting in the operation of these ventures in a manner that might be construed as sponsoring or exhibiting an animal fighting ventures. (Docket No. 34 ¶¶ 4; 29). Plaintiffs have also bought or sold live-birds, and "sharp instruments" as defined by the AWA, in interstate commerce for fighting and non-fighting purposes. (Docket No. 34 ¶¶ 26-27).

Besides the parties, the Commonwealth of Puerto Rico, the Resident Commissioner (the sole representative in Congress from the Commonwealth), the Commonwealth's House of Representatives and Senate, the Asociación de Alcaldes (Mayors' Association),[6] the Municipality of Mayagüez, and Attorney Juan Carlos Albors have presented briefs, as *amici curiae*, in support of Plaintiffs.[7]

**C. Arguments in Support of Motions for Summary Judgment**

Plaintiffs' Motion for Summary Judgment arguments can be classified in two main categories: structural constitutional violations, notably to federalism principles, and fundamental rights infringements. First, Plaintiff Club Gallístico claims that Section 12616: (1) exceeds Congress's authority to regulate and legislate cockfighting activities under the Commerce Clause and the Territorial Clause; (2) violates the Tenth Amendment's anti-commandeering doctrine; (3) constitutes a bill of attainder, and (4) is "locally inapplicable" to the Commonwealth of Puerto Rico pursuant to the Federal Relations Act, 48 U.S.C. § 734. As for the second line of arguments, Plaintiffs assert that Section 12616 specifically infringes a "cultural right" to cockfighting and more broadly violates their First Amendment freedom of speech and association rights, their Fifth Amendment substantive and procedural Due Process rights, and limits their right to travel. Finally, Plaintiffs assert that the enforcement provision of Section 12616 effectively amounts to an impermissible taking of their property because it has devalued and, thus, requires a just compensation.

In turn, Defendants posit in their Cross-Motion for Summary Judgment that, pursuant to the

[6] The Court notes that this party's brief was originally stricken from the record (Docket No. 46) as it referred to the President of the United States in an improper manner. A corrected brief was filed the next day. (Docket No. 48).

[7] The Court also notes that it did not consider the untimely filed *amicus* brief by the Animal Wellness Foundation, in support of Defendants' cross-motion for summary judgment. (Docket No. 76).

Commerce Clause and the Territorial Clause, Congress can restrict animal fighting in the fifty States and extend this prohibition to all territories. Defendants also contend that the Tenth Amendment does not apply to the Commonwealth of Puerto Rico and that Section 12616 preempts, through the Supremacy Clause any law or regulation that legalizes cockfighting in the territory. Similarly, Defendant further argues that Section 12616 does not meet the exceptional requirements that produce a bill of attainder, that Congress explicitly intended the amendments to apply it in the territory and that no physical or regulatory taking has, or will, occur because property devaluation needs no compensation. Consequently, Defendants conclude that Section 12616 does not violate the Constitution in any form or manner. Additionally, Defendants aver that Plaintiff Club Gallístico lacks standing to challenge several AWA provisions because they were not contested within the general six-year statute of limitations, under 28 U.S.C. § 2401(a).

Plaintiffs' Reply to Defendants' motion for summary judgment rehashes most of their main arguments and, additionally, argues that they have standing to attack those AWA provisions that now fully apply to the Commonwealth. (Docket No. 57).

Grounded on the foregoing analysis, Plaintiff Club Gallístico and others' Motion for Summary Judgment is **DENIED** and Defendant United Sates and others' Cross-Motion for Summary Judgment is **GRANTED**.

**D. Standard of Review**

Summary judgment is appropriate when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). See FED. R. CIV. P. 56(a). A "genuine" issue is one that could be resolved in favor of either party, and a "material fact" is one that has the potential of affecting the outcome of the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-50 (1986); see also Calero-Cerezo

v. U.S. Dep't of Justice, 355 F.3d 6, 19 (1st Cir. 2004). Under Rule 56, "[t]he evidence illustrating the factual controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve." Medina-Muñoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990). Under this standard, "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id. (citing Anderson, 477 U.S. at 249-50). Finally, summary judgment may be appropriate if the parties "merely rest upon conclusory allegations, improbable inferences, and unsupported speculation." Rossy, 880 F.2d at 624; see also Rivera-Rivera v. Medina & Medina, Inc., 898 F.3d 77, 87 (1st Cir. 2018).

"Cross-motions for summary judgment do not alter the summary judgment standard, but instead simply require [the Court] to determine whether either of the parties deserves judgment as a matter of law on the facts that are not disputed." Wells Real Estate Inv. Trust II, Inc. v. Chardon/Hato Rey P'ship, S.E., 615 F.3d 45, 51 (1st Cir.2010) (citing Adria Int'l Group, Inc. v. Ferré Dev. Inc., 241 F.3d 103, 107 (1st Cir.2001)) (internal quotation marks omitted). Although each motion for summary judgment must be decided on its own merits, "each motion need not be considered in a vacuum." Watchtower Bible Tract Soc'y of New York, Inc. v. Municipality of Ponce, 197 F. Supp. 3d 340, 348 (D.P.R. 2016) (citing Wells Real Estate, 615 F.3d at 51). "Where, as here, cross-motions for summary judgment are filed simultaneously, or nearly so, the district court ordinarily should consider the two motions at the same time, applying the same standards to each motion." Wells Real Estate, 615 F.3d at 51 (quoting P.R. American Ins., 603 F.3d at 133) (internal quotation marks omitted).

Besides this well-known standard, the Court also considers the Supreme Court's formulations for assessing a declaratory judgment that challenges statutes, facially and as-applied, grounded on constitutional rights violations. See Libertarian Party of New Hampshire v. Gardner,

843 F.3d 20, 24 (1st Cir. 2016). See also Gillian E. Metzger, Facial and As-Applied Challenges Under the Roberts Court, 36 FORDHAM URB. L. J. 773, 796 (2009). The Declaratory Judgment Act serves the valuable purpose of enabling litigants to clarify legal rights and obligations before acting upon them. Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 534-35 (1st Cir. 1995). The question in declaratory judgments is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 (2007). For this reason, "federal courts retain substantial discretion in deciding whether to grant declaratory relief." Ernst & Young, 45 F.3d at 534.

On the other hand, in United States v. Salerno, 481 U.S. 739, the Supreme Court held that a pre-enforcement facial challenge can only succeed where the plaintiff "establishes that no set of circumstances exists under which the Act would be valid." Id. at 745. See also Hightower v. City of Bos., 693 F.3d 61, 77-78 (1st Cir. 2012) ("[T]hat the statute lacks any plainly legitimate sweep.") (citations omitted) (internal quotation marks omitted). Similarly, in an as-applied challenge, when plaintiff alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder" he or she "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." Babbitt v. United Farm Workers Nat'l. Union, 442 U.S. 289, 298 (1979) (internal quotation marks omitted). See also Sindicato Puertorriqueño de Trabajadores v. Fortuño, 699 F.3d 1, 9 (1st Cir. 2012); McGuire v. Reilly, 230 F. Supp. 2d 189, 191 n. 5 (D. Mass. 2002), aff'd, 386 F.3d 45 (1st Cir. 2004).

In the end, a fundamental premise of judicial review requires courts to presume that all legislation is constitutional. When presented with a claim to invalidate a congressional enactment, a

court must find a "plain showing that Congress has exceeded its constitutional bounds." United States v. Morrison, 529 U.S. 598, 607 (2000).

## III. Discussion

### A. Standing

Defendants argue that Plaintiffs lack standing to challenge the constitutionality of several provisions contained in the AWA that were "unaffected by [Section] 12616 [] and have applied to Puerto Rico for years." (Docket No. 38 at 6). Specifically, Defendant United States posits that Plaintiff Club Gallístico's motion for Summary Judgment attempts to invalidate the prohibition on: (1) attending animal fighting venture; (2) possessing live-birds intended for fighting, and (3) selling and/or buying "sharp instruments" designed for live-bird fights. See 7 U.S.C. §§ 2156(a)(2); 2156(b); 2156(e). Defendants assert that these provisions applied to the Commonwealth prior to Section 12616's passage. These statutory prohibitions, as explained by Defendants, were enacted in 2014, 2002, and 2007, accordingly. Thus, they cannot be challenged because any such action would fall outside the six-year statute of limitations, under 28 U.S.C. § 2401(a) ("[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.")

Plaintiffs contend that Defendants' argument "makes no sense" because "How can Plaintiffs *Sponsor or exhibit* their birds for cockfighting if *possessing* gamecocks is illegal? How can Plaintiffs *Sponsor or exhibit* their birds for cockfighting *if they cannot attend* cockfights?" (Docket No. 57 at 4) (emphasis in original). To support this assertion, Plaintiff Club Gallístico claims that "the statute of limitations applicable was equitably tolled, simply because the [a]gencies in charge of enforcement did not do so. So there was no need to seek redress [,] because in [the Commonwealth] cockfighting is, and was, legal during the statutory period [and] the limitations period had not run."

(Docket No. 57 at 5-6). Similarly, Plaintiffs advance that their Complaint was timely filed under the "reopener doctrine" and that their claims are not barred by laches. Id. at 7-8.

The doctrine of standing involves "both constitutional and prudential dimension." Mangual v. Rotger-Sabat, 317 F.3d 45, 56 (1st Cir. 2003). "An inquiry into standing must be based on the facts as they existed when the action was commenced." Id. To satisfy "Article III's personal stake requirement vis-à-vis a statutory challenge," plaintiffs bear the burden of demonstrating that they: (1) have suffered an actual or threatened injury in-fact, which is (2) fairly traceable to the statute, and (3) can be redressed by a favorable decision. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); see also Ramírez v. Sanchez Ramos, 438 F.3d 92, 97 (1st Cir. 2006)

Given the declaratory remedy sought by Plaintiffs, and the Supreme Court's standard for evaluating facial and as-applied challenges to statutes, the Court holds that Plaintiffs indeed have standing to challenge the constitutionality of Congress' extension of the animal fighting prohibition to the Commonwealth of Puerto Rico and those provisions that have existed prior to Section 12616's approval. When assessing alleged constitutional rights violations, "a credible threat of present or future prosecution itself works an injury that is sufficient to confer standing, even if there is no history of past enforcement." New Hampshire Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 13 (1st Cir. 1996) (citing Doe v. Bolton, 410 U.S. 179, 188 (1973)). Nonetheless, the fact that these provisions have not been *frequently* enforced or prosecuted by the federal government does not entail that they have not been applicable to the Commonwealth since 2002, 2007 and 2014, respectively.[8]

**B. Federalism, Commerce Clause and Territorial Clause**

[8] In 2016, the Federal Government filed a criminal complaint against defendant Mr. Ehbrín Castro-Correa, for violating 7 U.S.C. § 2156(b) by unlawfully possessing and training dogs for fighting purposes. Following trial, a jury found Mr. Castro-Correa guilty of this charge and he was sentenced to twenty-one months of imprisonment by this same Court. See United States v. Castro-Correa, No. 16-153 (PG/GAG).

The Federalism doctrine involves the shared distribution of power between our national and state governments, while separation of powers principles establish a system of "checks and balances" between the three branches of government. See Erwin Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1 (5th Ed., 2015). In the present case, both doctrines are intertwined. When the citizens of a state, or territory, challenge the legislative and executive's powers to act and regulate their affairs, the judicial branch asserts its power and is called to solve the controversy. However, a court cannot sit as a "super-legislator" to amend or repeal the work of the other branches, absent a clear showing that they have exceeded the limits of the Constitution. Under our federalist structure and the separation of powers framework, Congress has the undeniable authority to treat the Commonwealth of Puerto Rico *uniformly* to the States and eliminate live-bird fighting ventures across every United States jurisdiction. The source of this authority rests primarily in the Commerce Clause and Supremacy Clause and alternatively in the Territorial Clause.

**a. Commerce Clause**

Plaintiffs' main argument involves an allegation that Section 12616 was not enacted to regulate interstate commerce, under the Commerce Clause, but rather "to burden [them] on the basis of their identity as residents of a territory" and does not pass rational basis review. (Docket No. 34 at 21). In support, Plaintiff Club Gallístico avers that these amendments are essentially a "criminal law that have nothing to do with commerce," Id. at 24, and that Congressional findings do not support the same because "no committee and/or public hearings . . . were scheduled." Id. at 42. Plaintiff Club Gallístico further contends that other states have on "their own volition and choosing, decided to make cockfighting illegal, not the federal government." Id. at 26. Finally, Plaintiffs assert that Congress cannot ban these fighting events based on "moral concerns" as reflected from the

statements made by members of Congress during the House of Representatives session debate about the Section 12616 amendments.

On the other hand, the United States argues that other federal courts "have had no difficulty finding the animal fighting prohibition, as applied to the states, to be an appropriate exercise of the Commerce Clause." (Docket No. 38 at 8). Thus, in this case, the same analysis should apply. In United States v. Gilbert, 677 F. 3d 613 (4th Cir. 2012), the Court held that "Congress acted within the limitations established by the Commerce Clause in enacting the animal fighting statute." Id. at 624.[9] Plaintiffs contend that Gilbert should not apply because the case is of "criminal nature." (Docket No. 57 at 8-9). Such proposition is flawed. Congress, pursuant to the Commerce Clause, may enact both civil and criminal laws. See generally United States v. López, 514 U.S. 549 (1995).

The Commerce Clause 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. Congress moreover has the authority under the Commerce Clause to regulate commerce with the Commonwealth of Puerto Rico. Trailer Marine Transport Corp. v. Rivera Vazquez, 977 F.2d 1, 7, n. 3 (1st Cir. 1992); accord Estado Libre Asociado v. Northwestern Selecta, 185 P.R. Dec., P.R. Offic. Trans., 40 (P.R. 2012). See also Consejo de Salud Playa de Ponce v. Rullán, 586 F. Supp. 2d 22, 37 (D.P.R. 2008).

The judicial test for analyzing a challenge under the Commerce Clause has evolved over the past decade following the Supreme Court's rulings in United States v. López and United States v. Morrison, 529 U.S. 598 (2000); see also Gonzales v. Raich, 545 U.S. 1 (2005). In this Circuit, there are four factors to consider when determining if a statute regulates an activity that has a substantial

[9] Defendants also cite, in support of their Commerce Clause position, the following cases: United States v. Lawson, 677 F.3d 629 (4th Cir. 2012); Slavin v. United States, 403 F.3d 522 (8th Cir. 2005); United States v. Thompson, 118 F. Supp. 2d 723 (W.D. Tex. 1998); United States v. Bacon, 2009 WL 3719396 (S.D. Ill. Nov. 5, 2009).

effect on interstate commerce: (1) whether the statute regulates economic or commercial activity; (2) whether the statute contains an "express jurisdictional element" that limits the reach of its provisions; (3) whether Congress made findings regarding the regulated activity's impact on interstate commerce, and (4) whether the link between the regulated activity and a substantial effect on interstate commerce was attenuated. United States v. Morales-de Jesus, 372 F.3d 6, 10 (1st Cir. 2004) (citing Morrison U.S. 529 at 610-12). When Congress legislates pursuant to a valid exercise of its Commerce Clause authority, the Court scrutinizes the enactment according to rational basis review. See United States v. Lewko, 269 F.3d 64, 67 (1st Cir. 2001).

When considering the factors set forth by the Supreme Court, and reiterated by the First Circuit, the Court finds that Section 12616 does not exceed the Commerce Clause's limits. First, it is unquestionable that the amendments being challenged forbid a quintessential economic activity. As Plaintiffs and several *amici* parties admit, live-bird fights in the Commonwealth are not only considered a commercial activity but also an allegedly lucrative one.[10] Second, the extension of the animal fighting prohibition to the Commonwealth of Puerto Rico and other territories implies that the statutory definition of "animal fighting prohibition venture" now applies fully to the territory. The current definition states that this event must be one "in or affecting interstate or foreign commerce." 7 U.S.C. § 2156(g)(1). This wording meets the Supreme Court's concern, as expressed in López and Morrison, as to whether the statute at hand has a nexus to interstate commerce.

As to the third factor, provided that Section 12616 extends to the Commonwealth and the other territories an *existing* prohibition, the Court reviews initially the Congressional Committee findings dating back to the original enactment of the animal fighting statute and subsequently those on recent amendments. The Sixth Circuit's decision in Gilbert, *supra*, points out, these fighting

[10] The Court addresses in a separate section the economic impact, presented by Plaintiffs and *amici* parties, on the live-bird fighting prohibition.

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." Gilbert, 677 F. 3d at 625 (citing H.R. Rep. No. 94-801, at 761 (1976)) (quotation marks omitted). Additionally, members of Congress have also considered the connection between animal fighting and avian diseases and the economic consequences that would accompany a "bird flu" pandemic. See 153 Cong. Rec. S451-52 (daily ed. Jan. 11, 2007) (Statement of Sen. Cantwell); 153 Cong. Rec. E2 (daily ed. Jan. 5, 2007) (Statement of Rep. Gallegly). On May 18, 2018, the House of Representative debated the Section 12616 amendments currently being challenged. The proponents, Rep. Peter Roskam (R-Ill.) and Rep. Earl Blumenauer (D-Ore.), noted that Section 12616 sought to extend to the territories the legal standard that already existed with respect to the fifty States. 64 Cong. Rec. 80, H 4213, at H 4221 (daily ed. May 18, 2018) (statement of Rep. Roskam). Moreover, their intention was to close "a loophole" because Congress "***should have no separate rules for States, territories, or anywhere under our jurisdiction***." 164 Cong. Rec. 80, H 4213, at H 4222 (daily ed. May 18, 2018) (statement of Rep. Blumenauer) (emphasis added).[11]

When analyzing these Congressional findings as whole, the Court finds that they are sufficient to support the assertion that live-bird fighting events have a substantial effect on interstate commerce. Therefore, the nexus between extending the live-bird fighting prohibition to the Commonwealth and other territories is not attenuated. On the contrary, there exists a direct connection between the means and the end because live-bird fighting ventures are essentially commercial endeavors that encompass a substantial interstate activity as plainly defined by the statute. The Court notes that lead Plaintiff Club Gallístico described itself in the Amended Complaint

[11] To date, nonetheless, there continues to exist federal legislation which discriminates against the United States citizens residing in the territories. See United States v. Vaello Madero, 356 F. Supp. 3d 208 (D.P.R. 2019); Consejo de Salud Playa de Ponce v. Rullán, 586 F. Supp. 2d 22, 23 (D.P.R. 2008).

as a "tourism mecca" where "many fans and tourists . . . yearly flock the territory to participate and/or enjoy the sport;" which includes "visitors from all over the world." (Docket No. 21 ¶¶ 8-9). If taken as true, then the effect on interstate commercial activity is undeniable.

As part of the rational basis analysis, the Court will first entertain arguments concerning general aspects of federalism put forward by Plaintiffs and several *amici* parties. The fact that every State in the Nation has already banned live-bird fights, does not hinder Congress from reinforcing its illegality at the federal level. The animal fighting prohibition has been the law of the land since 1976, yet it created an exemption for States, as defined by the AWA, that specifically permitted live-bird fights in their jurisdictions. As detailed in the introductory section, Congress has progressively closed this legal gap between both "sovereigns" and has now established a federal threshold as to prohibitions on animal fighting activities, particularly live-bird fights. At a state level, every one of the Nation's fifty states, and the District of Columbia, can prosecute any person who unlawfully engages in these events. This state prerogative does not impede the federal government's authority, under its police power, to likewise prosecute these offenses at a federal level. Under Section 12616, the United States can now prosecute people who participate in live-bird fighting events *even* if that jurisdiction legally permits that activity, pursuant to the "Conflict with State Law" provision of the AWA, 7 U.S.C. § 2156(i)(1) ("The provisions of this chapter shall not supersede or otherwise invalidate any such State, local, or municipal legislation or ordinance relating to animal fighting ventures except in case of a direct and irreconcilable conflict between any requirements thereunder and this chapter or any rule, regulation, or standard hereunder"). Following the elimination of the AWA's "Special Rule for Certain States" and sub-section(d) provisions, there exists a "direct and irreconcilable conflict" with all jurisdictions, like the Commonwealth of Puerto Rico, that legally allow these activities. For practical purposes, absent the exemptions and under the "Conflict with

State Law" provision, Congress has superseded the Puerto Rico Gamecocks of the New Millennium Act and any other Commonwealth regulations involving live-bird fights. See U.S. CONST. ART. VI; Brown v. United Airlines, Inc., 720 F.3d 60, 63 (1st Cir. 2013) ("A state law that offends the Supremacy Clause is a nullity.") (internal quotation marks omitted). See also Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (Even in the absence of a direct conflict, a state law violates the Supremacy Clause when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.")

The main rationale behind these amendments, according to the Congressional record, was to equate the legal standard applicable to the Nation's fifty States to all its territories, irrespective of other purported "moral" considerations articulated in House of Representative's session debate. For this reason, this Court must defer to Congress's findings on the matter and determine that there exists a rational basis to regulate live-bird fighting in the Commonwealth and other territories because it affects interstate commerce and the means of regulation, a comprehensive prohibition of these fighting ventures is reasonably adapted to that legislative end. See Heller v. Doe, 509 U.S. 312, 321 (1993) ("[C]ourts are compelled under rational basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational basis review because it is not made with mathematical nicety or because in practice it results in some inequality.")

**b. The Territorial Clause**

The Territorial Clause gives Congress authority 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. Congress's ultimate source of authority over the Commonwealth of Puerto Rico only applies in this case insomuch it decides whether and how a federal statute applies to Puerto Rico. Antilles

Cement Corp. v. Fortuño, 670 F.3d 310, 320 (1st Cir. 2012). In this aspect, "[a]ll federal laws, criminal and civil in nature, apply to Puerto Rico as they apply to the States, *unless otherwise provided*." Consejo de Salud Playa de Ponce, 586 F. Supp. 2d at 37 (emphasis added). The Section 12616 amendments were specifically enacted to extend an already nationwide prohibition to the territories.

**c. Tenth Amendment and Bill of Attainder**

Plaintiffs posit that by enacting Section 12616, Congress is requiring the Commonwealth "to enforce a federal law" and dictating "what the Puerto Rico legislature may and may not do, as it pertains to cockfighting" in direct violation of the Tenth Amendment and anti-commandeering doctrine. (Docket No. 34 at 47-49). Defendants counter this position advancing that the Tenth Amendment's federalism protections do not apply to the Commonwealth. (Docket No. 38 at 21).

The Court agrees with Defendants. It is well settled that "[the]he limits of the Tenth Amendment do not apply to Puerto Rico, which is 'constitutionally a territory,' because Puerto Rico's powers are not '[those] reserved to the States' but those specifically granted to it by Congress under its constitution." Franklin California Tax-Free Tr. v. Puerto Rico, 805 F.3d 322, 344-45 (1st Cir. 2015), aff'd, 136 S. Ct. 1938 (2016) (quoting United States v. Lopez Andino, 831 F.2d 1164, 1172 (1st Cir. 1987) (Torruella, J., concurring)). Likewise, as the Court previously articulated, Congress, under both the Commerce Clause and Supremacy Clause, has essentially preempted the law and regulations that legalized live-bird fighting ventures in the Commonwealth.

On the other hand, Plaintiffs argue that the Section 12616 amendments create "an unconstitutional bill of attainder aimed and [at] preventing conduct that Congress fears they might engage in . . . the violation of laws of those states banning cockfighting and/or certain paraphernalia or specific activities." (Docket No. 34 at 51). Similarly, Plaintiff Club Gallístico avers that these

amendments "clearly singles out an easily identifiable group of people" and punishes them for engaging in a "cultural right." Id.

For a statute to qualify as a bill of attainder it must: (1) specify the affected person or group, (2) impose punishment by legislative decree, and (3) dispense with a judicial trial. Elgin v. U.S. Dep't of Treasury, 641 F.3d 6, 19 (1st Cir. 2011). The Supreme Court "has struck down statutes on bill of attainder grounds only *five times* in the nation's history." Id. (emphasis added). The Section 12616 amendments do not come even close to meeting these requirements. As Defendants correctly point out in their cross-motion, these amendments: (1) "identif[y] particular proscribed conduct, which would amount to a violation no matter who performed it" and (2) "establish[] a general norm for conduct and allows for violations of the act to be adjudicated by the *Judiciary*, not the Legislature." (Docket No. 38 at 22).

**d. Puerto Rico Federal Relations Act**

Plaintiff Club Gallístico and other *amicis* argue that Section 12616 is "locally inapplicable" under the Puerto Rico Federal Relations Act, 48 U.S.C. § 734. The test for examining whether a law can be "locally inapplicable" to the Commonwealth is well-established under First Circuit's precedent. The inquiry as to whether a statute applies to the Commonwealth of Puerto Rico entails "matters of congressional intent." United States v. Acosta-Martínez, 252 F.3d 13, 18 (1st Cir. 2001) (citing People of Puerto Rico v. Shell Co., 302 U.S. 253, 258 (1937)). "If Congress has made clear its intent that a federal statute apply to Puerto Rico, then the issue of whether a law is otherwise 'locally inapplicable' does not, by definition, arise." Id.

It is unquestionable that Section 12616 applies to the Commonwealth. As Defendants point out the title for the amendments *explicitly* reads: "Extending prohibition on animal fighting to the

territories" and the legislative history shows Congress's undeniable intention to extend the animal fighting venture prohibition to the Commonwealth. (Docket No. 38 at 22).

**C. Plaintiffs' Constitutional rights claims**

Plaintiffs argue that Section 12616 violates several rights under the Constitution of the United States. At the outset, Plaintiffs posit that cockfighting should be classified as a fundamental "cultural right" pursuant to the United Nations' Universal Declaration of Human Rights and the Puerto Rico Gamecocks of the New Millennium Act. (Docket No. 34 at 8). No such right exists in our Federal Constitution and the Supreme Court has consistently rejected any expansion to the Bill of Rights. See Washington v. Glucksberg, 521 U.S. 702, 720 (1997).[12] Plaintiff Club Gallístico aims to establish a "cultural right" by drawing parallels to other fundamental rights, such as freedom of speech and association, free exercise of religion, substantive and procedural due process, equal protection, and right to travel, among others, attempting to trigger a strict or heightened scrutiny analysis. The Court applauds Plaintiffs' legal creativity, however rejects said argument. The AWA, and the Section 12616 amendments, can only be construed as socioeconomic legislation and, as previously discussed, satisfy a rational basis scrutiny. Nonetheless, the Court will address Plaintiffs' constitutional rights claims *seriatim*.

**a. First Amendment**

Plaintiffs' First Amendment claim is two-fold. First, they allege that the live-bird prohibition "facially targets conduct," unduly burdening their right to speech and that said prohibition does not survive a judicial challenge under the test for symbolic protected expression enunciated in United

[12] Even a wide-ranging analysis of the Ninth Amendment, U.S. CONST. amend. IX, does not seem to contemplate this sort of "cultural rights." Id. ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."). Justice Robert Jackson once stated, "Ninth Amendment rights . . . are still a mystery to me." Robert H. Jackson, The Supreme Court in The American System of Government 74-75 (1955).

States v. O'Brien, 391 U.S. 367 (1968). (Docket No. 34 at 22-23). Furthermore, Plaintiff Club Gallístico contends that these amendments violate their right to free association because Plaintiffs are entitled to "perpetuate their culture through assembly and cockfighting." (Docket No. 34 at 21-22). Defendant United States opposes these arguments asserting that Section 12616 has not "curtailed Plaintiffs' ability to speak or associate in favor of cockfighting and its importance to Puerto Rican culture" and that pursuant to United States v. Stevens, 559 U.S. 460 (2010), the depiction of animal cruelty may be considered protected expression, but not the conduct itself. Alternatively, Defendants point out that the amendments comply with the O'Brien test.

The Court agrees with Defendants. A live-bird fighting venture does not fall within any expressive or non-expressive protected conduct. Even if it falls under a protected category, "[t]he government has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." Texas v. Johnson, 491 U.S. 397, 406 (1989). On this issue, the Supreme Court has constantly rejected the "view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." O'Brien, 391 U.S. at 376; see also Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993). It is undisputed that the AWA's statement of policy, and legislative aim over the decades, includes a rejection of animal violence. 7 U.S.C. § 2131 ("The Congress further finds that it is essential to regulate the . . . care, handling, and treatment of animals . . . by persons or organizations engaged in using them . . . for exhibition purposes . . . or for any such purpose or use.") In this aspect, "expressive activities that produce special harms distinct from their communicative impact" are not entitled to constitutional protection. Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984). Moreover, the Court agrees with Defendants' reading of Stevens, which establishes a distinction between an artistic expression, such

as depicting a wounded or dead animal, from a non-artistic conduct, i.e. participating in animal fights that may lead to injury or death of participating animals.

As for the right to association claim, the Section 12616 amendments, will not prohibit Plaintiffs from assembling to discuss and express their views regarding cockfighting and other cultural issues. Nevertheless, the First Amendment does not protect assembly for unlawful purposes or to engage in a criminal activity. See De Jonge v. Oregon, 299 U.S. 353, 364-65 (1937); see also Scales v. United States, 367 U.S. 203, 229-30 (1961). Additionally, in support of these claims, Plaintiffs fleetingly mention in their Motion for Summary Judgment the Supreme Court's decision in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) in which a Florida city ordinance that prohibited ritual animal sacrifices was struck down. There is no doubt that partaking in live-bird fighting ventures does not violate the Free Exercise Clause, nor can it be classified as a protected religious belief.[13]

**b. Substantive and Procedural Due Process**

Plaintiffs claim that Congress violated their procedural Due Process rights because "Puerto Rico has no real political representation" in the federal legislative branch and consequently had no opportunity to participate in Section 12616's enactment. (Docket No. 34 at 42-43). Moreover, they argue that Congress deprived them of a meaningful opportunity to be heard. Id.

The Court finds this argument to be unfounded. Plaintiff Club Gallístico does not have a cognizable liberty or property interest deprived by the enactment of the Section 12616 amendments. Even if Plaintiffs had a valid property interest, "the legislative process itself provides citizens with all of the process they are due." Correa-Ruiz v. Fortuño, 573 F.3d 1, 15 (1st Cir. 2009) (citations omitted) (quotation marks omitted). The Commonwealth of Puerto Rico might not have a voting

[13] It is worth noting that Plaintiffs seemed to have abandoned this argument when opposing Defendants' cross-motion for summary judgment.

member in Congress, but its Resident Commissioner participated in the House of Representatives legislative session debating this issue and strongly voiced her opposition. See 164 Cong. Rec. 80, H 4213, at H 4222 (daily ed. May 18, 2018) (statement of Rep. González-Colón). The fact that Plaintiffs were unable to effectively lobby against the approval Section 12616 cannot be remedied by a court of law as it involves a political task delegated to the political branches of government. In this respect, the Court reminds Plaintiffs that "[t]he entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself *about the particular policies that affect his destiny*." Atkins v. Parker, 472 U.S. 115, 131 (1985) (emphasis added). More so, despite the undemocratic predicament existing in the Commonwealth of Puerto Rico, the utter lack of consent of the governed *per se* does not violate the Constitution. See Pedro-Vidal, 371 F. Supp. 3d at 59.

On the other hand, Plaintiff Club Gallístico also avers that Section 12616 amendments infringe their substantive Due Process cultural right to "cockfighting." (Docket No. 38; 53). As the court already pointed out, such right does exist under our constitutional framework and where there "is no fundamental right or suspect classification involved" a rational basis test shall be applied. Hammond v. United States, 786 F.2d 8, 13 (1st Cir. 1986). Once again, Section 12616 complies with the requirements for this easily-met judicial scrutiny. The Court notes that Plaintiffs presented an "equal protection" claim pursuant to the Due Process Clause, yet barely develop it in their motions and reply. As discussed at the beginning of this Opinion and Order, this action, if anything, illustrates an equal treatment before the law, rather than an unequal one.

**c. Right to Travel**

Plaintiff Club Gallístico contend that under Section 12616 its members will not be able to travel freely within the United States "to practice and perpetuate their culture" (Docket No. 34 at

56). Although the Constitution protects a right to travel interstate and abroad, it is not an absolute constitutional guarantee. This right does not entail a fundamental right to travel for an illicit purpose. See Hoke v. United States, 227 U.S. 308, 320-323 (1913). See also Jones v. Helms, 452 U.S. 412, 418-19 (1981). Following the approval of these amendments, any travel involving live-birds, or sharp instruments intended for fighting, shall constitute an unlawful act, outside of any constitutionally protected activity.

**D. Takings Clause**

Finally, Plaintiffs put forward that the prohibition takes their "real and personal property without just compensation" and that they are "no longer able to maintain, support, or sell their gamecocks because these breeds are considered by the market to be useless for any non-cockfighting purpose." (Docket 34 at 57). Moreover, Plaintiffs argue that their cockpits "are no longer able to be maintained, supported, or sold at their true value as these properties exist and are regulated for the specific purpose of cockfighting." Id. at 58. As to this specific allegation, Plaintiff Club Gallístico adds objection to Defendants' cross-motion that they "should have been on notice that this prohibition was coming and that their investments carried some risks." (Docket 57 at 34).

To analyze this contention, the Court need only assess whether the Section 12616 amendments constitute reasonable exercise of Congress' police power even if they substantially have the effect of reducing the value of certain property or prohibiting the most beneficially economic use of said property. See Philip Morris, Inc. v. Reilly, 312 F.3d 24, 33 (1st Cir. 2002); Andrus v. Allard, 444 U.S. 51 (1979). In Andrus, the Supreme Court considered the Eagle Protection Act and the Migratory Bird Treaty Act which, among other things, made it unlawful to possess or transport bald or golden eagles or to engage in such activities with respect to migratory birds. As a general norm, the Supreme Court reiterated that "[t]he Takings Clause . . . preserves governmental power to

regulate, subject only to the dictates of justice and fairness." Id. at 65 (quotation marks omitted). Under this premise it held that the simple prohibition of the sale of lawfully acquired property did not amount to a Fifth Amendment's taking violation. Like the Supreme Court's reasoning in Andrus, in the present case, Section 12616 does not violate the Takings Clause. Even if these recent amendments prevent the most profitable use of Plaintiffs' properties because their value is reduced, this does not necessarily equate to a taking.

As to Plaintiff Club Gallístico's "investment-backed expectation" argument, this Court highlights that: "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." Connolly v. Pension Ben. Guar. Corp., 475 U.S. 211, 227 (1986); see also Puerto Rico Tel. Co. v. Telecommunications Regulatory Bd. of Puerto Rico, 189 F.3d 1, 17 (1st Cir. 1999). As Plaintiffs themselves affirm, live-bird fighting venture have been a highly regulated industry in the Commonwealth. (Docket No. 34 at 12).

**E. Economic Impact**

The Court considers necessary to address a central position to Plaintiffs and several *amici* briefs, notably that of the Commonwealth's Senate: the alleged economic impact that the live-bird fighting prohibition could have in the Commonwealth's already precarious economy. The cockfighting industry injects $65 million annually into the Commonwealth's economy and generates a total of 11,134 direct, indirect and induced jobs. See Plaintiffs' Economic Impact Study of the Cockfighting Report (March 2019) (Docket No. 2-4).[14]

[14] Similarly, according to the Senate, the cockfighting industry "has an impact of about eighteen (18) million dollars on the local economy and creates over twenty thousand (20,000) direct and indirect jobs." (Docket No. 60 at 6).

The Court clearly understands the dire economic impact that the cockfighting ban may have. However, without a valid legal ground, a federal court simply cannot sit as a "super-legislator" to amend or repeal the work of Congress. See City of New Orleans v. Dukes, 427 U.S. 297, 303, (1976) ("[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.") As discussed throughout this Opinion and Order, the Section 12616 amendments meet the rational basis standard; a judicial scrutiny which "is not a license for courts to judge the wisdom, fairness or logic of legislative choices." Heller, 509 U.S. at 319.

**F. Conclusion**

The Court hereby **DENIES** Plaintiffs Club Gallístico and others' Motion for Summary Judgment (Docket No. 34) and **GRANTS** the United Sates' Cross-Motion for Summary Judgment. (Docket No. 38). The Court further holds that it will not grant any stay pending the parties' appeals before the First Circuit. Judgment shall be entered accordingly.

**SO ORDERED.**

In San Juan, Puerto Rico this 28th of October, 2019.

*s/ Gustavo A. Gelpí*
GUSTAVO A. GELPI
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF PUERTO RICO**

**CLUB GALLISTICO DE PUERTO RICO INC. et al.,**

**Plaintiffs,**

**v.**

**UNITED STATES OF AMERICA et al.,**

**Defendants.**

**CIVIL NO. 19-1481 (GAG); (consolidated with Civil No. 19-1739 (GAG))**

**JUDGMENT**

Pursuant to the Court's Opinion and Order at Docket No. 77, judgment is hereby entered **DISMISSING** the instant action in favor of Defendant United States and others.

**SO ORDERED.**

In San Juan, Puerto Rico this 28th of October, 2019.

*s/ Gustavo A. Gelpí*
GUSTAVO A. GELPI
United States District Judge