Nos. 99-5; 99-29

In the Supreme Court of the United States

GRANTED

UNITED STATES OF AMERICA,
Petitioner,
v.
ANTONIO J. MORRISON, *et al.*,
Respondents.

CHRISTY BRZONKALA,
Petitioner,
v.
ANTONIO J. MORRISON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF PETITIONER CHRISTY BRZONKALA

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QUESTIONS PRESENTED

1. Whether Congress acted within the scope of its Commerce Clause authority when it enacted 42 U.S.C. § 13981 (the "VAWA Civil Rights Remedy"), the provision of the Violence Against Women Act that creates a supplemental private right of action for victims of gender-motivated violence, based on extensively documented findings that discriminatory violence creates significant barriers to participation by women in interstate commerce?

2. Whether Congress' enactment of the VAWA Civil Rights Remedy (42 U.S.C. § 13981) was a permissible exercise of its authority under Section Five of the Fourteenth Amendment?

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OPINIONS BELOW

The opinions of the court of appeals are reported at 169 F.3d 820 (4th Cir. 1999) (*en banc*) and 132 F.3d 949 (4th Cir. 1997), and are reproduced in the Appendix accompanying the Petition of the United States in this case ("App.") at 1a and at 282a. The opinion of the district court is reported at 935 F. Supp. 779 (W.D. Va. 1996) and is reproduced at 350a.

STATEMENT OF JURISDICTION

The first decision of the United States Court of Appeals for the Fourth Circuit was entered on December 23, 1997, and was vacated on February 5, 1998. The *en banc* court of appeals decision was entered March 5, 1999. The Court extended the time for filing the Petition for Certiorari until June 30, 1999. The United States intervened in the proceedings below. The Court granted the Petition for Certiorari on September 28, 1999. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 8, cls. 3, 18; U.S. Const. amend. XIV; 42 U.S.C. § 13981; 28 U.S.C. § 1445(d).[1]

STATEMENT OF THE CASE

A. Factual Background

Christy Brzonkala ("Brzonkala") brought this case under the Civil Rights Remedy of the Violence Against Women Act of 1994, Pub. L. No. 103-322, § 40302, 108 Stat. 1902, 1941 (codified at 42 U.S.C. §13981) (the "Civil Rights Remedy"), against respondents Antonio Morrison ("Morrison") and James Crawford ("Crawford"). The two respondents took turns raping the eighteen-year-old Brzonkala in September 1994, just after she enrolled as a freshman at Virginia Polytechnic Institute ("Virginia Tech"), a state-funded institution. At the time of the gang rape, which occurred in Brzonkala's own college dormitory, respondents Morrison and Crawford were also enrolled at Virginia Tech and both were members of its varsity football team. J.A. 15 (Am. Comp., ¶¶ 9, 10).

[1] The text of the pertinent constitutional and statutory provisions are reproduced in Appendix A to this brief.

Thirty minutes after Brzonkala first met Morrison and Crawford, Morrison pushed her down by her shoulders on a dormitory bed, disrobed her, and forced her to submit to vaginal intercourse while he pinned her with his hands and pressed his knees against her legs. J.A. 15-16 (Am. Comp., ¶¶ 13, 17, 18). When Morrison had finished raping Brzonkala, Crawford exchanged places with Morrison. Crawford forced Brzonkala to submit to vaginal intercourse a second time by again pinning her arms down and placing his knees against her legs. *Id.* at 16 (Am. Comp., ¶ 19). Finally, Morrison and Crawford changed places yet again and Morrison forced Brzonkala to submit to unwanted vaginal intercourse a third time. *Id.* at 17 (Am. Comp., ¶ 20).

Neither Morrison nor Crawford used condoms while repeatedly raping Brzonkala. J.A. 17 (Am. Comp., ¶ 21). After the third rape, however, Morrison threatened Brzonkala by stating "you better not have any fucking diseases." *Id.* (Am. Comp., ¶ 22). When Morrison and Crawford finally released Brzonkala, Morrison continued his assaultive and menacing conduct by silently stalking Brzonkala, following her until she reached her own dormitory room. *Id.* (Am. Comp., ¶ 23).

In the months following the gang rape, Morrison announced publicly in the dormitory dining hall that he "like[d] to get girls drunk and fuck the shit out of them." J.A. 18 (Am. Comp., ¶ 31). Morrison and Crawford received support for their violent behavior towards women from other male athletes at Virginia Tech. For example, after Brzonkala filed a complaint with the school against Morrison and Crawford alleging a violation of Virginia Tech's sexual assault policy, she learned that another male student athlete had been overheard telling Crawford that he should have "killed the bitch." *Id.* at 20 (Am. Comp., ¶ 42).

The sexual assaults by Morrison and Crawford ended Brzonkala's education at Virginia Tech, thereby limiting her career opportunities and earning potential. Brzonkala was a tuition-paying student at Virginia Tech. After the gang rape, she became depressed and withdrawn, stopped attending classes and attempted to commit suicide. Although Brzonkala sought treatment by a psychiatrist and received anti-depressant medication, the rape rendered her unable to function as a college student and she sought a retroactive withdrawal from Virginia Tech for the 1994-95 academic year. J.A. 17-18 (Am. Comp., ¶¶ 26, 27, 29).

In early 1995, Brzonkala filed a complaint with Virginia Tech against Morrison and Crawford under the school's sexual assault policy. J.A. 18 (Am. Comp., ¶ 32). During the hearing on Brzonkala's complaint before the Virginia Tech Judicial Committee, Morrison confessed that he had sexual contact with Brzonkala notwithstanding that she had twice told him "no." *Id.* at 21 (Am. Comp., ¶¶ 47, 48). The Judicial Committee found insufficient evidence to punish Crawford, but found Morrison guilty of sexual assault and sentenced him to immediate suspension for two semesters. *Id.* at 22 (Am. Comp., ¶¶ 53, 54). In May 1995, following an appeal by Morrison, the Virginia Tech appeals officer upheld the Judicial Committee's sentence. *Id.* (Am. Comp., ¶ 55).

Subsequently, in July 1995, Virginia Tech officials advised Brzonkala that Morrison planned to challenge his conviction under the sexual assault policy, and that Virginia Tech would not defend in court the Judicial Committee's decision to suspend Morrison for two semesters. She was informed that Virginia Tech instead intended to hold a re-hearing to revisit its determination of the football players' culpability. J.A. 22-23 (Am. Comp., ¶ 57). Brzonkala was nonetheless assured by school officials that they believed her account of the gang rape and that the second hearing was nothing more than a technicality, designed to cure Virginia Tech's error in bringing the original complaint under the school's sexual assault policy, which had not yet been widely distributed to students. *Id.* at 23 (Am. Comp., ¶ 58).

Brzonkala was thus required to return to Virginia Tech for a second hearing before the Judicial Committee and to engage and pay for her own legal counsel to represent her in that hearing. J.A. 23-24 (Am. Comp., ¶ 60). In preparation for the hearing, Morrison was permitted complete access to the transcript and exhibits from the initial hearing, while Brzonkala was denied any access to these crucial materials. *Id.* at 24 (Am. Comp., ¶ 62). In addition, Morrison was given advance notice sufficient to allow him to procure sworn affidavits from student witnesses who testified at the first hearing. Brzonkala was given no such notice, which effectively barred her from submitting the student testimony she sought to introduce. *Id.* (Am. Comp., ¶ 63).

Although the Judicial Committee informed Brzonkala that the second hearing constituted a *de novo* consideration of the gang rape allegations, she was instructed to avoid any mention of Crawford in her own testimony because the claim against him had been dismissed in the original proceeding (under the sexual assault policy that Virginia Tech subsequently deemed inapplicable). In order to comply with the Judicial Committee's mandate, Brzonkala was forced to give incomplete and diluted testimony about the gang rape that excluded Crawford's central role in sexually assaulting her. Notwithstanding Virginia Tech's instructions to Brzonkala that Crawford's conduct and role would not be considered, Crawford himself received notice of the second hearing and was present in an adjacent room during the proceeding.[2] J.A. 24-25 (Am. Comp., ¶ 65).

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[2] Crawford was later indicted on charges of rape and attempted sodomy in connection with the 1996 gang rape of another female Virginia Tech student. *See Virginia* v. *James L. Crawford*, Conviction and Sentencing

The Judicial Committee again found Morrison guilty and sentenced him to the same two-semester suspension. J.A. 25 (Am. Comp., ¶ 67). Inexplicably, Morrison's count of conviction was changed from "sexual assault" to "using abusive language." Morrison appealed. On August 21, 1995, without any notice to Brzonkala, Virginia Tech set aside Morrison's punishment. *Id.* at 25-26 (Am. Comp., ¶¶ 68, 70). On August 22, 1995, Brzonkala learned through reading the newspaper that Morrison would return to Virginia Tech for the Fall 1995 semester, apparently on a full athletic scholarship. *Id.* (Am. Comp., ¶ 69).

After learning that Morrison was permitted to enroll at Virginia Tech for the Fall 1995 semester, and because of the way Virginia Tech officials had repudiated her complaint, Brzonkala feared for her personal safety and canceled her plans to return to school at Virginia Tech for the Fall 1995 semester. Brzonkala did not attend any other college or university during the Fall 1995 term. J.A. 27 (Am. Comp., ¶ 76). While Virginia Tech refunded Brzonkala's tuition for the 1994-95 academic year, she did not receive a refund of monies that she paid for her room, board, books and fees, nor compensation for the legal and travel expenses associated with the second hearing. *Id.* (Am. Comp., ¶ 77).

B. Statutory Background

The Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified in scattered sections of 18 U.S.C. and 42 U.S.C.) ("VAWA") was the product of more than four years of congressional deliberation, including nine

Order (Sept. 5, 1997) (Montgomery County, Va.) (Circuit Court) (certified copy lodged with Clerk of Court). Crawford pleaded guilty to the lesser charge of attempted aggravated sexual assault, and was sentenced to twelve months in prison. *Id.* The sentencing court suspended the entire prison sentence and placed Crawford on "unsupervised probation." *Id.* at 2.

hearings with more than 100 witnesses submitting testimony.[3] Through these proceedings, Congress exhaustively explored the problem of violence against women -- a problem that Congress termed "a national tragedy played out every day in the lives of millions of American women at home, in the workplace, and on the street." S. Rep. No. 102-197, at 39 (1991) ("1991 S. Rep."). One of VAWA's key components is the "Civil Rights Remedies for Gender-Motivated Violence Act," 42 U.S.C. §13981 (the "Civil Rights Remedy"), under which Christy Brzonkala's claim arises.[4] This provision was the product of a bi-partisan effort to address the issue of gender-motivated violence. S. Rep. No. 103-138, at 40 (1993) ("1993 S. Rep."). The Civil Rights Remedy declares that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender," 42 U.S.C. § 13981(b), and creates a private cause of action against any "person . . . who commits a crime of violence motivated by gender." *Id.* §13981(c).[5] Congress established the Civil Rights Remedy

[3]Where, as here, a federal statute is the product of several years of congressional consideration, this Court considers the entire legislative record in evaluating the legislative findings. *See, e.g., Hodel* v. *Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 278-80 & n.19 (1981) (relying on legislative record compiled over six years).

[4]In addition to the Civil Rights Remedy, VAWA funded state training programs to improve law enforcement's response to domestic violence and sexual assault, supported social service programs to local communities assisting victims, and enacted federal felonies to address interstate violence. Only the Civil Rights Remedy is at issue here. The interstate violence felonies have been uniformly upheld against constitutional challenge. *See, e.g., United States* v. *Gluzman*, 154 F.3d 49, 50-51 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 1257 (1999) (18 U.S.C. § 2261).

[5] A "crime of violence" is defined as an act or acts that would constitute a felony under existing federal or state law, "whether or not those acts have actually resulted in criminal charges, prosecution, or conviction." *Id.* § 13981(d)(2). A crime is "motivated by gender" if it is "committed because

> to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.

Id. § 13981(a).

In examining the national problem of violence against women, Congress thoroughly investigated and extensively documented the effects of gender-motivated violence and state and local responses. Congress concluded that "crimes of violence motivated by gender have a substantial adverse effect on interstate commerce." H.R. Conf. Rep. No. 103-711, at 385 (1994) ("1994 Conf. Rep."). See also 1993 S. Rep. 42, 54; 1991 S. Rep. 43-48, 53. Further, Congress found that "existing bias and discrimination in the criminal justice system often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress of the laws to which they are entitled." 1994 Conf. Rep. 385. Of particular concern was "the underlying attitude that . . . violence [against women] is somehow less serious than other crime." 1993 S. Rep. 38; see also Majority Staff of Senate Comm. on the Judiciary, 103d Cong., 1st Sess., *The Response to Rape: Detours on the Road to Equal Justice* 1-2 (Comm. Print 1993) ("Maj. Staff Rep.").

Before reaching its final form, the Civil Rights Remedy was honed through the legislative process. Addressing concerns raised by the Conference of Chief Justices and the Judicial Conference of the United States, Congress expressly limited the Civil Rights Remedy so that it would reach only conduct that

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of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." *Id.* § 13981(d)(1). The Civil Rights Remedy permits recovery of both compensatory and punitive damages and other forms of relief. *Id.* § 13981(c). Although gender-motivated violence disproportionately affects women, the law is drafted in gender-neutral terms. *Id.* § 13981; *see* 1993 S. Rep. 37-38.

was already unlawful, would not interfere with the enforcement of existing state criminal and civil laws, and would preserve a proper role for state courts.[6] The Remedy excludes any cause of action for "random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender." 42 U.S.C. § 13981(e)(1). It further prohibits federal courts from asserting supplemental jurisdiction over claims for divorce, alimony, equitable distribution of marital property, or child custody decrees, *id.* § 13981(e)(4); permits Civil Rights Remedy claims to be brought in either federal or state court, *id.* § 13981(e)(3); and prohibits removal of actions filed in state court. 28 U.S.C. § 1445(d). As Senator Hatch explained, the Civil Rights Remedy "take[s] into consideration the role of the Federal Government versus the role [of] the State[s]." *Violent Crimes Against Women: Hearing Before the Senate Comm. on the Judiciary*, 103d Cong. 81 (1993) (S. Hearing No. 103-726, Apr. 13, 1993) ("Apr. 1993 S. Hearing").

Congress made extensive legislative findings concerning the substantial effects of gender-motivated violence on interstate commerce and the states' continued inability fully to address discriminatory responses to gender-motivated violence by state and local justice systems. Because the legislative record is massive, space limitations permit only a brief overview of

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[6] After Congress made these changes, the Judicial Conference withdrew its opposition. *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 70-71 (1993) ("1993 H. Hearing"). (Letter from Stanley Marcus, Chairman, Ad Hoc Committee on Gender-Based Violence). The National Association of Women Judges consistently endorsed VAWA, including the Civil Rights Remedy, beginning in 1992. *Id.* at 30-32.

Congress' findings and the voluminous evidence supporting them.[7]

The Substantial Effects of Gender-Based Violence on Interstate Commerce:

Congress explicitly concluded that gender-motivated violence has pervasive effects on interstate commerce:

> by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products; a Federal civil rights action . . . is necessary . . . to reduce the substantial adverse effects on interstate commerce caused by crimes of violence motivated by gender . . . .

1994 Conf. Rep. 385. *Accord* 1993 S. Rep. 54 ("Gender-based crimes and the fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy."); 1991 S. Rep. 53.

Congress concluded that gender-motivated violence affects interstate commerce by serving as a substantial barrier to women's employment opportunities and other economic activities, finding that:

[7] *See* Appendix B, submitted with this Brief (listing hearings and witnesses). For a more detailed description of the legislative history, *see* Brief of Senator Joseph R. Biden, Jr. as *Amicus Curiae* in Support of Petitioners.

> Gender-based violence bars its most likely targets -- women -- from full participation in the national economy. For example, studies report that almost 50 percent of rape victims lose their jobs or are forced to quit because of the crime's severity. Even the fear of gender-based violence affects the economy because it deters women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence.

Id. (footnote omitted); 1994 Conf. Rep. 385. Congress specifically found that women justifiably "refuse higher paying night jobs in service/retail industries because of the fear of attack," noting that homicide is the leading cause of women's death at work. 1993 S. Rep. 54 n.70. See also 1991 S. Rep. 38 ("nearly 50 percent [of women] do not use public transit alone after dark" for fear of rape); *id.* (fear of violence "takes a substantial toll on the lives of all women," for example, "in lost work"); S. Rep. No. 101-545, at 33, 37 (1990) ("1990 S. Rep.") (gender-motivated violence causes "lost careers, decreased productivity" and "takes its toll in employee absenteeism and sick time for women who either cannot leave their homes or are afraid to show the physical effects of the violence"); *Violence Against Women: Victims of the System: Hearing Before the Senate Comm. on the Judiciary*, 102d Cong. 240 (1991) ("1991 S. Hearing") (testimony of National Federation of Business and Professional Women) (noting that harassment by batterers reduces battered women's ability to maintain or secure employment); *Hearing on Domestic Violence: Hearing Before the Senate Comm. on the Judiciary*, 103d Cong. 17-18 (1993) (S. Hearing No. 103-596, Feb. 1, 1993) ("Feb. 1993 S. Hearing") (statement of James Hardeman, Manager, Counseling Dep't, Polaroid Corp.) (detailing impact of domestic violence on business' bottom line, including attendance, performance, increased medical claims).

Domestic violence has a particularly strong negative impact on the workplace, because "[w]omen who either cannot leave their homes or are afraid to show the physical effects of the violence" either forgo work or are hampered in their ability to work. 1991 S. Hearing 241 (testimony of National Federation of Business and Professional Women). Witnesses' accounts detailed how batterers prevent or interfere with their partners' jobs. See, *e.g.*, *Domestic Violence: Not Just a Family Matter: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 103d Cong. 17 (1994) (testimony of Karla Digirolamo) (husband either kept partner at home or she was unable to leave because of the visible injuries); Apr. 1993 S. Hearing 55, 57-58 (Barbara Wood, Executive Director, Turning Point) (husband followed woman to work, during breaks and during lunchtime to make sure she spoke to no one); *accord* 1991 S. Hearing 242 (study showed one-third of battered women reported that their abusers prevented them from working).

Congress also noted the economic and commercial impacts of gender-motivated violence outside of the workplace. It found that gender-motivated violence can force victims into poverty, and that many victims need to seek the support of government benefits and social services. *E.g.*, 1990 S. Rep. 37 ("as many as 50 percent of homeless women and children are fleeing domestic violence"). Additional evidence revealed that violence against women gives rise to significant health care and government expenditures, and other costs that affect the economy at large. 1993 S. Rep. 41. See also 1990 S. Rep. 33 ("*Partial* estimates show that violent crime against women costs this country at least 3 billion -- not million, but billion -- dollars a year") (emphasis added).

Finally, in a finding that has disturbing resonance for this case, Congress found that the "devastation" and potential economic and employment effects of gender-motivated violence

are "often magnified for young women attending college," *id.* at 44, and that "rape on campus is widespread and poses a grave threat not only to students' physical well-being but also to their educational opportunities." 1991 S. Rep. 62; see *Violence Against Women: Fighting the Fear: Hearing Before the Senate Comm. on the Judiciary*, 103d Cong. 41 (1993) (S. Hearing No. 103-878, Nov. 12, 1993) ("Nov. 1993 S. Hearing") (victim testimony recounting lost concentration and interest in school after sexual assault on campus). Congress observed that it is not unusual for many student victims, particularly freshmen, to "drop out of school altogether" and that other student victims "feel it necessary to interrupt [their] college career[s] simply to avoid [their] attacker[s]." 1990 S. Rep. 44.

States' Persistent Inability to Remedy the Problem:

Congress made extensive findings that State efforts have been inadequate to protect women from gender-motivated violence and that the Civil Rights Remedy was necessary to ensure equal protection of the laws. Congress expressly found:

> State and Federal criminal laws do not adequately protect against the bias element of crimes of violence motivated by gender, which separates these crimes from acts of random violence, nor do these adequately provide victims of gender-motivated crimes the opportunity to vindicate their interests; existing bias and discrimination in the criminal justice system often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled; . . . a Federal civil rights action as specified in this section is necessary to guarantee equal protection of the laws . . . and the victims of crimes of violence motivated by gender have a right to equal

> protection of the laws, including a system of justice that is unaffected by bias or discrimination and that, at every relevant stage, treats such crimes as seriously as other violent crimes.

1994 Conf. Rep. 385-86. See also 1993 S. Rep. 41 (citing Washington, D.C. study finding that, in 85% of cases where a woman was found bleeding, police failed to arrest her attacker); *id.* at 44 ("State remedies are inadequate to fight bias crimes against women"); *id.* at 55 (Act "provides a necessary remedy to fill the gaps and rectify the biases of existing State laws"); 1991 S. Hearing 135-36 (testimony of Gill Freeman, Chair, Florida Supreme Court Gender Bias Study Implementation Committee) (citing examples of state court judges' gender bias, including judge's comment to convicted rapist that he should learn to "'take the women out to dinner first, like the rest of us'").

This systemic discrimination is often embodied in formal legal barriers to civil and criminal suits, which Congress found were rooted in a long history of discriminatory treatment. As of 1990, seven states still did not permit prosecutions of marital rape; 26 additional states allowed marital rape prosecutions only under limited circumstances, such as when there is evidence of physical injury; and numerous other states limited prosecutions of cohabitants or dating companions. 1993 S. Rep. 42; 1991 S. Rep. 45 & nn.49-50, 54; 1990 S. Rep. 41 n.78. Ten states still formally barred women from bringing tort actions against their abusive husbands. *Women and Violence: Hearing Before the Senate Comm. on the Judiciary*, 101st Cong. 64 (1990) ("1990 S. Hearing") (statement of Helen Neuborne, Executive Director, NOW Legal Defense and Education Fund). State laws limiting rape shield provisions to criminal prosecutions exposed women bringing tort actions for sexual assault to intrusive questioning about consensual sexual activity unrelated to the attack. 1991 S. Rep. 46 (citing Iowa

civil case in which judge permitted questioning about victim's "sex life after the rape," her use of birth control and her "reputation of having 'wild parties'"). Further, although almost every state had enacted hate crime legislation, Congress found that "less than a dozen cover gender bias." 1993 S. Rep. 48.

Congress also found systemic discrimination reflected in a host of informal -- but entrenched -- practices that "[a]t every step of the way" "pose[] significant hurdles for victims of sexual assault." *Id.* at 42. Reviewing states' own gender bias task force reports, Congress noted that, "[s]tudy after study commissioned by the highest courts of the states -- from Florida to New York, California to New Jersey, Nevada to Minnesota -- has concluded that crimes disproportionately affecting women are often treated less seriously than comparable crimes against men." 1991 S. Rep. 43. See *id.* at 33-35, 41. For example, "[p]olice may refuse to take reports; prosecutors may encourage defendants to plead to minor offenses; judges may rule against victims on evidentiary matters; and juries too often focus on the behavior of the survivors -- laying blame on the victims instead of on the attackers." 1993 S. Rep. 42.

The legislative record demonstrated that state officials often subject female victims of violence to treatment that prosecuting witnesses in other assault or battery cases would never face. Some state and local authorities authorize psychiatric exams or polygraph tests of rape victims, casting doubt on their credibility as witnesses. 1991 S. Rep. 45; *id.* at 45-46. See also *id.* at 46-47 ("[j]udges and juries expect more corroboration in sexual assault cases than in other cases of a similar class, even when there is no such legal requirement"); *id.* at 47 ("survivors must also face pervasive victim-blaming attitudes"); *id.* ("in some counties, acquaintance rape cases simply are not prosecuted"). Judges still issue the antiquated jury instruction that rape is an accusation "'easily to be made and hard to be proved, and harder to be defended by the party

accused, tho' ever so innocent,"despite several courts' rejection of the instruction. 1991 S. Rep. 46; see 1993 S. Rep. 45.

Congress found that, as a result of these practices, state criminal and civil justice systems preclude a large proportion of victims of gender-motivated violence from obtaining redress. For example, Congress found:

> [O]ver 60 percent of rape reports do not result in arrests; and a rape case is more than twice as likely to be dismissed as a murder case and nearly 40 percent more likely to be dismissed than a robbery case. Less than half of the individuals arrested for rape are convicted of rape. In comparison, 69 percent of those arrested for murder are convicted of murder, and 61 percent of those arrested for robbery are convicted of robbery. Finally, over one-half of all convicted rapists serve an average of only 1 year or less in prison.

1993 S. Rep. 42 (footnotes omitted). See also *id.* at 38 ("Almost one-quarter of convicted rapists never go to prison and another quarter received sentences in local jails where the average sentence is 11 months."). This discrimination pervades the civil system as well, where a victim seeking damages for sexual assault must be prepared to risk embarrassing and harassing questions about the intimate details of her sex life because rape shield laws do not apply. 1991 S. Rep. 46.

Throughout the legislative process, Congress solicited input from the states about the problem of gender-motivated violence. The states candidly acknowledged their inability to provide adequate remedies to victims of gender-motivated violence and recognized that the proposed federal law would provide much-needed, and welcomed, assistance. State and local officials and

law enforcement officers presented testimony to that effect,[8] and much of the legislative evidence of the states' institutional discrimination came directly from reports prepared by state courts and submitted for Congress' consideration. See 1991 S. Rep. 43-44 & n.40 (citing numerous state task force reports); 1993 S. Rep. 45 n.29, 46 n.35, 49 n.52 (same); Maj. Staff. Rep. 5 n.7 (same). Finally, in a striking display of State support for a federal civil rights law, 41 state Attorneys General from 38 states urged Congress to enact the Civil Rights Remedy, stating that:

> the current system for dealing with violence against women is inadequate. Our experience as Attorneys General strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership and federal funds. [VAWA] would begin to meet those needs by, *inter alia*, . . . creating a specific federal civil rights remedy for the victims of gender-based crimes . . . .

1993 H. Hearing 34-36 (1993) ("Attorneys General Letter"); *accord* 1991 S. Hearing 37-39 (Resolution of the National Association of Attorneys General unanimously urging VAWA's passage).

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[8] *See, e.g.*, Bonnie Campbell, Iowa Attorney General, and Roland Burris, Ill. Attorney General (1991 S. Hearing 33, 65-66); Duluth Police Chief Miletich (*Domestic Violence: Terrorism in the Home: Hearing Before the Subcomm. on Children, Family, Drugs, and Alcoholism of the Senate Comm. on Labor and Human Resources*, 101st Cong. 90, 93 (1990)); Sarah M. Buel, Director, Domestic Violence Unit, District Attorney's Office, Suffolk County, Mass. (Feb. 1993 S. Hearing 4); Margaret Rosenbaum, Assistant State Attorney, Miami, Fl., and Gy Pfeiffer, Chief Magistrate of Crisp City, Ga. (*Violence Against Women: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong. 70, 75, 86 (1992)); Kimberly Hornak, Salt Lake County Attorney's Office (Apr. 1993 S. Hearing 44).

C. Procedural Background

On December 27, 1995, Brzonkala filed suit against Morrison, Crawford and Virginia Tech in the United States District Court for the Western District of Virginia. Her amended complaint, filed March 1, 1996, alleged, in part, that Morrison and Crawford brutally gang-raped her, which was the basis for her claim pursuant to the Civil Rights Remedy.

Defendants Morrison and Crawford moved to dismiss Brzonkala's Civil Rights Remedy claim on the grounds that she had not stated a claim and that the Civil Rights Remedy was unconstitutional. The United States intervened as of right to defend the law's constitutionality. On July 26, 1996, the district court held that Brzonkala's complaint stated a claim under the Civil Rights Remedy, but struck down the law as unconstitutional. App. at 402a. The district court held that Congress lacked authority to enact the law under either the Commerce Clause or Section 5 of the Fourteenth Amendment. *Id.* at 376a, 398a.

On December 23, 1997, a panel of the Fourth Circuit reversed, holding that Brzonkala's complaint stated claims under the Civil Rights Remedy, and that Congress had constitutionally exercised its commerce powers when it enacted the Civil Rights Remedy. The court concluded that the law was a rational response to the legislative record, which documented the myriad ways gender-based violence interferes with women's full participation in interstate commerce and otherwise affects interstate movement and activities of women. App. at 310a.

The Fourth Circuit vacated the panel opinion and granted rehearing *en banc* on February 5, 1998. On March 5, 1999, the *en banc* court unanimously held that Brzonkala had stated a claim pursuant to the Civil Rights Remedy, but, in a 7-4 decision, concluded that the law was unconstitutional because it exceeded Congress' powers under both the Commerce Clause and the Fourteenth Amendment. App. at 6a.[9] The dissenting judges would have upheld the law under the Commerce Clause and therefore did not address the scope of Congress' authority under Section 5. *Id.* at 224a n.1.

SUMMARY OF ARGUMENT

This Court has made a "definitive commitment to [a] practical conception of [Congress'] commerce power," *United States* v. *Lopez*, 514 U.S. 549, 573 (1995) (Kennedy, J. concurring), and thus has rejected the kind of formalistic, bright-line rule the Fourth Circuit adopted in this case. *Id.* at 567; *id.* at 569-74 (Kennedy, J., concurring). Under this Court's pragmatic approach, the Civil Rights Remedy is constitutional, because it is supported by four important factors relevant to Commerce Clause analysis. Each of these factors provides a principled basis for distinguishing *Lopez*, and collectively these considerations provide ample grounds to uphold the Civil Rights Remedy as constitutional.

First, like the anti-discrimination legislation upheld in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 261-62 (1964), and *Katzenbach* v. *McClung*, 379 U.S. 294, 305 (1964), the Civil Rights Remedy seeks to eliminate a substantial barrier to the full participation of a specific group -- here, women -- in the national economy and interstate commerce. As Congress found, the widespread and pervasive effects of gender-based violence, like the consequences of racial discrimination, affect the most basic of economic activities, including where women live and if and where they are able to work.

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[9] Brzonkala also brought a claim against Virginia Tech under Title IX of the Education Amendments of 1972. That claim was dismissed by the district court but reinstated by the panel. The *en banc* court remanded the Title IX claim to the district court for reconsideration following this Court's ruling in *Davis* v. *Monroe County Board of Education* 119 S. Ct. 1661, 1676 (1999). No issues concerning the Title IX claim are before the Court.

Second, Congress expressly and reasonably found, based on extensive hearings, that gender-based violence substantially affects interstate commerce. In particular, Congress reasonably relied on compelling empirical data, showing, *inter alia*, that nearly 50 percent of rape victims lose or are forced to quit their jobs; that homicide is the leading cause of death for women at work; and, that violence against women causes many college students to interrupt or terminate their college education.

Third, Congress expressly and reasonably found that the states have not remedied the national problem of gender-based violence. Again, the proof includes hard empirical evidence. For example, rape cases have higher dismissal and lower conviction rates than other violent crimes. Indeed, 41 state Attorneys General urged Congress to adopt the Civil Rights Remedy because "the current system for dealing with violence against women is inadequate."

Fourth, the Civil Rights Remedy is not a criminal law and it does not displace any state laws or interfere with any state programs. This contrasts starkly with *Lopez*, where the statute was a criminal law whose "intrusion on state sovereignty" was "significant" because it displaced both state laws and state programs. *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

These factors also demonstrate that the Civil Rights Remedy is supported by the Necessary and Proper Clause, which traditionally has guided this Court's interpretation of the Commerce Clause. See *New York* v. *United States*, 505 U.S. 144, 158-59 (1992). The Civil Rights Remedy is necessary because, as Congress found, gender-motivated violence creates a substantial barrier to participation in interstate commerce, and the states have been unable to respond adequately to that problem. The Remedy is proper because it supplements, but

does not supplant, state efforts. Thus, the Civil Rights Remedy appropriately respects states' prerogatives and preserves their power to devise their own solutions to the problem of gender-based violence.

The Fourth Circuit's bright-line rule, that Congress may regulate intrastate activity only if it is "economic," not only transgresses *Lopez*'s rejection of bright-line rules, it is unnecessary and unwise. It is unnecessary because the Commerce Clause factors discussed above and the Necessary and Proper Clause set principled limits on Congress' commerce power. The statute in *Lopez* was unconstitutional because it exceeded those limits. The Fourth Circuit's unprecedented approach is unwise because it would deprive Congress of the practical flexibility to respond to future national problems that severely affect the national economy.

Finally, the Civil Rights Remedy is also a constitutional exercise of Congress' power under Section 5 of the Fourteenth Amendment. Based on an extensive inquiry described in the detailed legislative record, Congress identified equal protection violations analogous to those supporting other civil rights laws enacted under Section 5. Congress found that state laws and law enforcement policies and practices treated violent crimes against women less seriously than comparable crimes against men, and that historic and enduring discrimination against women seeking redress for those crimes denied women equal protection of the laws. The Civil Rights Remedy is a congruent and proportionate response because it authorizes a cause of action where bias and discrimination have historically barred relief.

ARGUMENT

I. THE CIVIL RIGHTS REMEDY IS WITHIN CONGRESS' COMMERCE POWER.

Congress' exercise of its Commerce Clause authority is best analyzed on a case-by-case basis, rather than through rigid application of generalized, abstract tests that may not fit specific cases. The Civil Rights Remedy is constitutional because it is supported by four factors established by this Court's Commerce Clause decisions, as affirmed in *United States* v. *Lopez*, 514 U.S. 549, 568 (1995): (1) The Civil Rights Remedy removes discriminatory barriers to the participation of a specific group of persons in interstate commerce and the national economy; (2) Congress reasonably found that gender-based violence has a substantial effect on interstate commerce; (3) Congress reasonably found that states were unable adequately to remedy the problem; and (4) the Civil Rights Remedy does not infringe on state sovereignty by displacing state laws or programs. The Court need not decide whether satisfaction of three or fewer of these factors would be sufficient to sustain a different statute, because the Civil Rights Remedy satisfies all four factors.

A. The Civil Rights Remedy Is Constitutional Because It Is Fully Consistent With Four Critical Factors Established By This Court's Commerce Clause Decisions.

The modern Court has taken a pragmatic approach to evaluating Congress' power to regulate intrastate activity. Consistent with the Court's Commerce Clause jurisprudence over the last 60 years, *Lopez* expressly rejected any rigid, formalistic test for determining whether particular legislation is within the commerce power, because Congress' power to regulate in the ever-changing area of commerce and the national economy cannot be reduced to "precise formulations." *Lopez*, 514 U.S. at 567; see *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). As Justices Kennedy and O'Connor explained in their concurring opinion in *Lopez* (the "Kennedy-O'Connor concurrence"), previous attempts to establish formalistic tests were wrong and proved unworkable. See *Lopez*, 514 U.S. at 573 (Kennedy, J., concurring) (affirming Court's "definitive commitment" to a "practical conception of the commerce power"). Thus, Congress' commerce power is commensurate with the "purpose to build a stable national economy." *Id.* at 574 (Kennedy, J., concurring); see *id.* at 579 (Kennedy , J., concurring).

1. The Commerce Clause Authorizes Congress To Combat Discriminatory Conduct That Creates A Substantial Barrier To The Full Participation Of Specific Groups In The National Economy.

a. Twice in modern history, the Court has upheld as within the commerce power federal anti-discrimination legislation, that, like the Civil Rights Remedy, was aimed at removing documented intrastate barriers to the participation of specific groups of persons in interstate commerce and the national economy. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 252-53 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294, 299-301 (1964), cited with approval in *Lopez*, 514 U.S. at 557. The rationale of these two landmark decisions upholding the Civil Rights Act of 1964 is that pervasive discrimination against specific groups of people had a substantial negative impact on the economy, far beyond that attributable to the specific acts of private discrimination. The Court reasoned that such pervasive and cumulative impact is a proper basis for federal intervention.

In *Heart of Atlanta*, a motel refused to rent rooms to African-Americans. 379 U.S. at 243. The Court upheld the statute's prohibition of discrimination in accommodations because the legislative record was "replete with evidence of the burdens that discrimination by race or color places upon

interstate commerce." *Id.* at 252. Specifically, Congress found that racial discrimination in accommodations was a "nationwide" problem that "had the effect of discouraging travel on the part of a substantial portion of the Negro community." *Id.* at 253; see also *id.* at 275-76 (Black, J., concurring).

Similarly, in *McClung*, the statute was applied to a local family restaurant that refused to serve African-Americans. Although the restaurant procured some food supplies from outside the state, it served mostly local residents. 379 U.S. at 296-97. As in *Heart of Atlanta*, the Court noted that the legislative record was "replete with testimony of the burdens placed on interstate commerce by racial discrimination in restaurants." *Id.* at 299. Specifically, "there was an impressive array of testimony that discrimination in restaurants had a direct and highly restrictive effect upon interstate travel by Negroes. . . . This obviously discourages travel and obstructs interstate commerce." *Id.* at 300. Further, evidence showed that "discrimination deterred professional, as well as skilled, people from moving into areas where such practices occurred and thereby caused industry to be reluctant to establish there." *Id.* In light of this evidence, this Court held that Congress "had a rational basis for finding that racial discrimination in restaurants" had a substantial adverse effect on interstate commerce. *Id.* at 304.

Although in both *Heart of Atlanta* and *McClung* the specific private acts of discrimination were nominally "economic," Congress and the Court were primarily concerned with the more general and pervasive effects of widespread racial discrimination on the economy. The Court held that Congress had power to reach intrastate discriminatory activities "which directly *or indirectly* burden or obstruct interstate commerce." *Id.* at 302 (emphasis added). As Justice Black recognized, discrimination can impose a variety of "obstructions" and

"restraints" on interstate commerce, and individual acts of discrimination must be analyzed with "regard to the fact that [a] single local event when added to many others of a similar nature may impose a burden on interstate commerce." *Heart of Atlanta*, 379 U.S. at 275 (Black, J., concurring).

The Commerce Clause thus allows Congress to regulate discriminatory activity when it has a rational basis for finding that discrimination against a particular group creates a substantial barrier to its effective participation in interstate commerce, even where the discriminatory activity is not motivated by economic reasons. See, *e.g.*, *id.* at 243-44, 257, 260 (discriminatory barriers to participation in commerce motivated by racial animus and bias); cf. *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 583-84 (1997) (Commerce Clause applies regardless of whether activity at issue is profit-driven); *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 262 (1994) (predicate acts under RICO, federal statute enacted pursuant to commerce power, need not be economically motivated). Because the Gun Free School Zones Act (GFSZA) was not civil rights antidiscrimination legislation aimed at ensuring that entire groups were not unfairly excluded from participating in the national economy, the statute in *Lopez* was not supported by this significant element of Congress' commerce power.

b. In enacting the Civil Rights Remedy, Congress expressly found that gender-motivated violence against women was both a national civil rights problem and a barrier to full participation of women in the national economy. The Civil Rights Remedy expressly states that its purpose is "to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action." 42 U.S.C.

§ 13981(a). Like the 1964 Civil Rights Act provisions affirmed in *Heart of Atlanta* and *McClung*, the Civil Rights Remedy is anti-discrimination legislation designed to remove a barrier that prevents women from "full partic[ipation] in the national economy." 1993 S. Rep. 54. Like racial discrimination, gender-based violence causes real, direct economic effects, most starkly reflected in the ways it causes women to forgo certain jobs, and to lose others. See *supra* at 10-13.

Also, like the Civil Rights Act of 1964, the Civil Rights Remedy responds to the cumulative economic impact of discriminatory conduct. See, *e.g.*, 1993 S. Rep. 54-55; 1990 Sen. Rep. 43 ("Gender-based crimes and the fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy."). Congress' findings concerning that economic impact are not merely reasonable, they are compelling. See *supra* at 10-13; *infra* at 28-29.

2. Congress Reasonably Found That Gender-Based Violence Substantially Affects Interstate Commerce.

a. As *Lopez* reaffirmed, intrastate activity is within the commerce power if a "rational basis" exists for Congress to conclude "that a regulated activity sufficiently affect[s] interstate commerce." 514 U.S. at 557; see *Fry* v. *United States*, 421 U.S. 542, 547 (1975) ("Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States."). The scope of the commerce power is determined by the presence of a substantial *effect* on interstate commerce, whatever the kind of activity, not by categorization of the activity at issue. *E.g.*, *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 121 (1942) ("It is the effect upon interstate commerce . . . not the source of the injury which is the criterion of Congressional power."); *United States* v. *Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, 464 (1949) ("If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.").

While a reviewing court must, of course, make its own judgment as to whether Congress had a rational basis for its conclusions regarding the effects of the regulated activity, the court "must defer to a congressional finding that a regulated activity affects interstate commerce 'if there is any rational basis for such a finding.'" *Preseault* v. *ICC*, 494 U.S. 1, 17 (1990); see *Lopez*, 514 U.S. at 557; see also *McClung*, 379 U.S. at 303-04 ("where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end"). As the Kennedy-O'Connor concurrence explained, "[w]hatever the judicial role, it is axiomatic that Congress does have substantial discretion and control over the federal balance." *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring); *id.* at 579 ("The substantial element of political judgment in Commerce Clause matters leaves our institutional capacity to intervene more in doubt" than in other areas of constitutional law.) (Kennedy, J., concurring). Explicit congressional findings regarding the effect of the regulated activity on interstate commerce assist the courts in understanding and evaluating Congress' judgment about the effects of the regulated activity, even where -- unlike here -- "no . . . effect [i]s visible to the naked eye." *Id.* at 563.[10]

[10]Because the extent to which gender-motivated violence affects interstate commerce is a highly fact-intensive inquiry into societal facts, *see supra* at 6-13, that determination is peculiarly within the institutional competence of the legislature, and outside the competence of the judiciary. As the Court has held, "[w]hen Congress makes findings on essentially factual issues... those findings are of course entitled to a great deal of deference, inasmuch

Lopez held that the GFSZA was not founded on a rational congressional determination that the regulated activity substantially affected interstate commerce. *Id.* at 562-64. Indeed, there were no congressional findings whatsoever concerning the effect of the regulated activity on commerce. As the government conceded in that case, "'[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.'" *Id.* at 562 (quoting brief for United States) (alterations in original).

b. Here, the substantial effects on commerce and the national economy are plain. Based on extensive hearings conducted over a period of more than four years, Congress expressly found that gender-motivated violence substantially affects interstate commerce in myriad ways, including "deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business[es], and in places involved, in interstate commerce." 1994 Conf. Rep. 385. Congress further found that gender-based violence reduces women's employment opportunities and productivity, thereby reducing national economic productivity; increases the costs of health care and absenteeism; reduces both the supply of and demand for interstate products; reduces consumer spending; and bars women from full participation in the national economy. See, *e.g.*, *id*; 1993 S. Rep. 54; see generally *supra* at 6-17.

The link between violence against women and commerce is clear and direct: such violence prevents women's very participation in the national economy. The detrimental effect is not just a matter of inference, it is reflected in sobering data and statistics. To cite but a few examples, Congress found that

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as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985).

nearly 50 percent of rape victims lose, or are forced to quit, their jobs, and that homicide is the leading cause of death for women at work. See *supra* at 11. Gender-motivated violence causes women to forgo or lose jobs; impedes women from traveling to and from work; decreases productivity; and, particularly germane to Brzonkala, forces women to interrupt or drop out of the college education that has become necessary for full participation in a modern economy. See *supra* at 10-13. Because Congress' findings of these and other substantial effects of gender-based violence against women on commerce and the national economy are express, rational and well-supported, this Court should defer to the judgment of Congress and uphold the Civil Rights Remedy. See, *e.g.*, *Prescault*, 494 U.S. at 17; *supra* at 6-17.

3. Congress Reasonably Found That The States Have Not Remedied The Problem.

a. Under the "practical conception" of Congress' commerce power, *Lopez*, 514 U.S. at 572 (Kennedy, J., concurring), congressional exercise of that authority to address intrastate activities affecting interstate commerce is most appropriate when Congress reasonably finds that the states have been unwilling or unable to remedy the problem at issue. See, *e.g.*, *Perez* v. *United States*, 402 U.S. 146, 150 (1971) (upholding statute criminalizing wholly intrastate loan-sharking, based in part on congressional finding that "[t]he problem simply cannot be solved by the states alone. We must bring into play the full resources of the Federal Government.").

Indeed, the Framers recognized that it was imperative that the national government have the power to remedy national problems that the states were unable to resolve. On July 17, 1787, the Constitutional Convention adopted the following resolution describing the powers of the national legislature:

> That the Natl. Legislature ought to (possess) the Legislative Rights vested in Congs. by the Confederation. . . . and moreover to legislate in all cases for the general interests of the Union, and also *in those to which the States are separately incompetent* . . . .

Sixth Virginia Resolution, 2 *Records of the Federal Convention of 1787*, at 16-17, 21 (M. Farrand ed. 1911) (emphasis added) (footnote omitted).[11]

In *Lopez*, there were no congressional findings concerning states' inability to address gun possession at schools. Rather, the States were implementing criminal laws outlawing possession of firearms on school grounds, and crafting other pragmatic local solutions to the problem. *Lopez*, 514 U.S. at 581-82.

b. Here, Congress' findings that the states were unable adequately to address the problem of violence against women are compelling. Congress found that existing state efforts were inadequate to combat the pervasive problem of gender-motivated violence; that formal and informal barriers erected by state justice systems effectively precluded meaningful relief for many women victimized by gender-based violence; and that a national remedy was therefore necessary to address the widespread problem of violence against women and its attendant effects on the national economy. See *supra* at 6-17.

The bases for Congress' findings included formal impediments like state interspousal immunities and evidentiary rules, and statistical, empirical proof. As recounted above, a rape case is "more than twice as likely to be dismissed as a murder case and nearly 40 percent more likely to be dismissed

[11]The Convention unanimously passed a motion delegating to the "Committee of Detail" the task of distilling the resolutions adopted by the full Convention to the single document that became the Constitution. 2 *Records of the Federal Convention of 1787*, at 95 (M. Farrand ed. 1911).

as a robbery case." *Supra* at 16. The vast majority of rape reports do not result in arrests; rape cases are far more likely to result in acquittals than cases involving other comparable violent crimes; and even convicted rapists serve an average of only one year in jail. *Id.*

Unlike the problem of firearm possession in schools at issue in *Lopez*, here the states themselves recognized the need for a federal remedy to address this invidious and persistent problem. Forty-one state Attorneys General from 38 states urged Congress to adopt the Civil Rights Remedy, concluding, based on their experience as Attorneys General, that the existing system for dealing with violence against women was "inadequate" and that "the problem of violence against women is a national one, requiring federal attention . . . ." 1993 H. Hearing 34-36 (Attorneys' General Letter).

When, as here, history and logic provide reason to fear that bias in the state courts will affect a particular kind of claim, it is both rational and reasonable to provide a forum for such claims in the federal courts. The federal courts have institutional safeguards against bias -- *e.g.*, Presidential appointment rather than election, Senate scrutiny prior to confirmation, life tenure, salary protection -- that are not universally replicated in the state courts. Federal courts thus can provide an alternative forum for redress in those circumstances, such as gender-motivated violence, when state measures are concededly ineffectual.[12]

[12]Of course, under the Civil Rights Remedy, victims of gender-based violence remain free to pursue their remedies in state court. *See supra* at 9.

4. The Civil Rights Remedy Does Not Intrude On State Sovereignty Or Traditional State Functions, Nor Does It Impair The States' Ability To Respond To Gender-Motivated Violence.

a. An important function of this Court's Commerce Clause jurisprudence is to preserve the federal-state balance. See, *e.g.*, *Lopez*, 514 U.S. at 557; *id.* at 580 (Kennedy, J., concurring) (to determine whether act is within commerce power, Court "must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern"). Justice Black aptly described the federal-state balance inherent in the concept of federalism:

> The concept does not mean blind deference to "States Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government . . . will not unduly interfere with the legitimate activities of the States.

Younger v. *Harris*, 401 U.S. 37, 44 (1971).

This Court has emphasized the primacy of state interests in the federalism balance in instances in which a federal statute commands a state what it must or cannot do. Thus, principles of federalism prevent the national government from "commandeering" state government by compelling states to enact or administer a federal regulatory program, see *New York* v. *United States*, 505 U.S. 144, 161 (1992); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 268 (1981); by requiring them to assume private entities' damages liability, *New York*, 505 U.S. at 175-76; by obligating state criminal law enforcement officials to administer and execute

federal law, *Printz* v. *United States*, 521 U.S. 898, 905 (1997); or by authorizing certain lawsuits by private individuals that seek to impose financial liabilities or obligations on the States, *Alden* v. *Maine*, 119 S. Ct. 2240, 2246 (1999).

In important respects, the statute at issue in *Lopez* prohibited the states from carrying out their own solutions and programs regulating firearms and education. It therefore overrode and displaced state authority in two areas of traditional state concern, criminal law and education. See *Lopez*, 514 U.S. at 561 n.3; *id.* at 580 (Kennedy, J., concurring). In addition, by precluding the states from implementing their own alternative solutions, such as programs involving turning in guns at schools, the GFSZA "foreclose[d] the states from experimenting . . . in an area to which States lay claim by right of history and expertise." *Id.* at 583 (Kennedy, J., concurring). As the Kennedy-O'Connor concurrence emphasized, the GFSZA's "intrusion on state sovereignty" was "significant." *Id.*

b. The Civil Rights Remedy is different in kind from the GFSZA and other statutes this Court has invalidated on federalism grounds. The Remedy does not impose obligations or liabilities on the states, or compel the states to administer federal programs. Compare *supra* at 32-33. Nor does it displace state criminal law or interfere with the states' ability to carry out their own programs.

The Constitution permits the federal government to exercise concurrent jurisdiction in areas that are of national and local concern. As this Court's touchstone opinion in *Gregory* v. *Ashcroft* states: "Congress may legislate in areas traditionally regulated by the States." 501 U.S. 452, 460 (1991); see *Alden*, 119 S. Ct. at 2247 (Founders created system requiring that, where national government has the power to regulate, the "State and Federal Governments would exercise concurrent authority over the people"). The Civil Rights Remedy exercises such

concurrent jurisdiction and strictly circumscribes federal court jurisdiction. It is not a criminal law, it neither displaces any state laws nor preempts any state court jurisdiction, and it expressly prevents the federal courts from adjudicating domestic relations matters. See 42 U.S.C. § 13981(e)(4). Indeed -- in stark contrast to *Lopez* -- the Civil Rights Remedy is entirely supplemental, because it does not displace a single state or local law, regulation, or program. As the Kennedy-O'Connor concurrence recognized, the modern Court has never struck down a federal statute on Commerce Clause or other federalism grounds absent an "intrusion on state sovereignty" that was "significant." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). Here, there is *no* intrusion whatsoever.

Rather, the Civil Rights Remedy is a model of cooperative federalism. It attempts to address a national problem that has stymied the states, and preserves to the states the right and capacity to take whatever additional preventive measures they deem appropriate. See *Hodel*, 452 U.S. at 289 (upholding statute providing for cooperative federalism); cf. *FERC* v. *Mississippi*, 456 U.S. 742, 783 n.12 (1982) (O'Connor, J., concurring in part and dissenting in part) ("'A federal system implies a partnership, all members of which are effective players on the team and all of whom retain the capacity for independent action. It does not imply a system of collaboration in which one of the collaborators is annihilated by the other.'") (quoting L. White, *The States and the Nation* 3 (1953)). The Civil Rights Remedy leaves the states completely free to address the problem of gender-motivated violence with their own alternative solutions, thus preserving their role as "laboratories of democracy." See *Lopez*, 514 U.S. at 582-83 (Kennedy, J., concurring); *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932).

The Civil Rights Remedy, moreover, does not address a matter of purely local concern. Rather, it addresses a problem of national dimension with national consequences. This Court has recognized on numerous occasions that the commerce power properly confers on Congress substantial power to address national problems -- such as the discrimination addressed in *Heart of Atlanta* and *McClung* -- even where the activity at issue is conducted intrastate.[13] Civil rights and anti-discrimination legislation are historic functions of the federal government. See *supra* at 23-26; see generally, *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 345-55 (1993) (O'Connor, J., dissenting) (Reconstruction-era civil rights statute was intended to reach all conspiracies to deprive a person of equal protection of the laws that were motivated by "class-based-animus," including animus against women.).

This Court in *Lopez* did not condemn Congress to stand idly by and watch as discrimination excludes a large segment of the nation's population from participating in interstate commerce on an equal footing, while the states remain incapable of responding to the problem effectively. Rather, the Commerce Clause properly empowers Congress to address the national economic problem posed by gender-based discriminatory violence.

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[13] *See, e.g., NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 24, 49 (upholding National Labor Relations Act, which was enacted to address national problems of "'strikes,'" and "'industrial strife and unrest'") (quoting 29 U.S.C. § 151); *see also, FERC* v. *Mississippi*, 456 U.S. 742, 771 (upholding federal power to regulate intrastate power generation, transmission, and rates in response to a national energy crisis); *Wickard* v. *Filburn*, 317 U.S. 111, 118-29 (1942) (upholding application of Agricultural Adjustment Act of 1938 to intrastate wheat consumption; Act was designed to address national problem of commodity price fluctuations and price extremes).

B. The Civil Rights Remedy Is Also Supported By The "Necessary And Proper" Clause.

The Court has recognized that the "Necessary and Proper Clause," U.S. Const. art. I, § 8, cl. 18, defines both the scope and the limits of Congress' power to regulate intrastate activity under the Commerce Clause. See *New York*, 505 U.S. at 158 (Court's construction of commerce power is "guided . . . by the Constitution's Necessary and Proper Clause"); *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 585 (1985) (O'Connor, J., dissenting) (noting that Necessary and Proper Clause is source of congressional power to regulate intrastate activity affecting interstate commerce, and has served as the basis for "every recent decision concerning the reach of Congress to activities affecting interstate commerce") (citing, *inter alia*, *Heart of Atlanta Motel*, 379 U.S. at 258-59; *Wickard* v. *Fillburn*, 317 U.S. 111, 124 (1942); *United States* v. *Darby*, 312 U.S. 100, 124 (1941)). When applied in conjunction with federalism concerns, the Necessary and Proper Clause provides an important textual limit on congressional regulation of intrastate activity.[14]

First, the crux of the Court's decisions holding that the commerce power extends to intrastate activity is that the Necessary and Proper Clause provides Congress with the authority to regulate intrastate activities where such regulation is *necessary* to the effective exercise of Congress' power and responsibility to regulate commerce. See, *e.g.*, *United States* v. *Darby*, 312 U.S. 100, 116-17 (1941). Thus, Congress may

[14] The statute at issue in *Lopez* was neither necessary nor proper. It was not necessary because national legislation was not needed to protect interstate commerce and because state law and programs were already addressing the problem. *See supra* at 32. It was not proper because it "significant[ly]" intruded on state sovereignty by displacing state laws and programs and foreclosing future efforts by the States to address the problem. *See id.*

"resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." *Id.* at 124; see *Garcia*, 469 U.S. at 584-86 (O'Connor, J., dissenting); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43-49 (1937); see generally, *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 411-21 (1819). In *Wickard* v. *Fillburn*, the Court unanimously held that the commerce power extended to wholly intrastate consumption of wheat, because regulation of that activity was *necessary* to the effective implementation of Congress' regulation of commerce in wheat. 317 U.S. at 129. In so holding, the Court made clear that "even if [the] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Id.* at 125. Separation of powers principles require judicial deference to rational congressional judgments regarding the necessity of a particular means or method to effectuate the commerce power. See, *e.g.*, *Darby*, 312 U.S. at 120-21; *Legal Tender Case*, 110 U.S. 421, 450 (1884); *M'Culloch*, 17 U.S. at 421.

The Civil Rights Remedy was *necessary* to the removal of substantial, discriminatory barriers to the participation of women in commerce and the national economy. Congress made clear, explicit, and compelling findings that gender-motivated violence creates a substantial barrier to participation in commerce, and has a significant detrimental effect on it. See *supra* at 6-13. Congress' rational findings that state efforts had not adequately responded to the national problem of violence against women, and its deleterious effects on interstate commerce, further demonstrate the Remedy's necessity. See *supra* at 9-17.

Second, federal courts' role in deciding whether congressional regulation is "proper" is to ensure that state interests and sovereignty are adequately protected against undue

intrusion by the national government. See *Gregory*, 501 U.S. at 458-59. When a court determines that congressional regulation under the commerce power unduly intrudes on the powers and interests of the states, that regulation is not "proper" because it trespasses on powers and functions of the States protected by the plan of the Constitution. See, *e.g.*, *Lopez*, 514 U.S. at 574-76 (Kennedy, J., concurring); *Gregory*, 501 U.S. at 458-59.

The cooperative solution embodied in the Civil Rights Remedy is proper because it supplements -- but does *not* supplant -- state efforts to address a serious problem. As discussed, *supra* at 31-35, unlike the GFSZA at issue in *Lopez*, the Civil Rights Remedy in no way interferes with or limits the states' power or options to address the problem. The Civil Rights Remedy maintains the power and role of the states inherent in the structure of the Constitution, preserving the dual sovereignty that is the genius of our federal system.

C. The Fourth Circuit's Formalistic Bright Line Rule Is Unprecendented, Unnecessary, And Unwise.

The formalistic "bright line" test fashioned by the Fourth Circuit, which would prohibit Congress from regulating any intrastate conduct that is not "economic," is unprecedented, unnecessary, and unwise. See *Brzonkala* v. *Virginia Polytechnic Inst.*, 169 F.3d 820, 832-40 (4th Cir. 1999). It presents a significant risk of compromising Congress' future ability to address unanticipated national problems that states have been unable to remedy, but that Congress could address without intruding on state sovereignty. *First*, the novel test fashioned below is flatly inconsistent with *Lopez*, in which the Court rejected a bright line test, finding "[t]hese are not precise formulations, and in the nature of things they cannot be." *Lopez*, 514 U.S. at 567; see also *id.* at 568 (Kennedy, J., concurring) (*Lopez* holding was "necessary though limited"). History teaches that rigid, formalistic tests are both unwise and

unworkable in this area of the law. See, *e.g.*, *id.* at 569-74 (Kennedy, J., concurring) (describing content-based distinctions previously discarded by the Court as unworkable, including distinctions between "manufacturing" and "commerce," and between "direct" and "indirect" effects on commerce).

Second, the Fourth Circuit's bright line test is unnecessary because, as Petitioner has demonstrated, both a sensible analysis of four factors derived from this Court's Commerce Clause cases, and the Necessary and Proper Clause provide principled, practical limitations on Congress' power. It was precisely on the basis of those considerations that the Court declared the GFSZA unconstitutional in *Lopez*. Moreover, whether or not an activity is itself economic has never been the test of whether a particular regulation is within the power conferred by the Commerce Clause. The Court confirmed in *Lopez* that the proper inquiry is whether the activity at issue -- whatever its character -- "substantially affect[s]" interstate commerce. *Lopez*, 514 U.S. at 559; see *supra* at 26-28.

Third, the rigid and formalistic test adopted by the Fourth Circuit would deprive the national government of the latitude and flexibility to provide national solutions. Congress' ability to address serious future national problems -- even if the states themselves were not able to address them -- would depend entirely on whether the activity Congress proposed to regulate is characterized as "economic." Such an inflexible test could seriously compromise the ability of the national government to fulfill its intended functions. Cf. *New York*, 505 U.S. at 157 ("the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role"). As Judge Friendly explained,

> The genius of the Framers lay in devising a unique form of federalism -- one in which a national government was authorized to act directly on the people within the powers

> confided to it rather than solely on the states, and *was endowed with an amplitude of powers which might or might not be used as the future would dictate.*

Henry J. Friendly, *Federalism: A Foreword*, 86 Yale L.J. 1019, 1019 (1977) (emphasis added).

Rigid, bright line judicial rules limiting congressional power ignore the fundamental wisdom underlying judicial restraint: courts cannot know what the future will hold, and bright line rules, once judicially created, cannot be quickly set aside by a majority in Congress or the electorate. As the Kennedy-O'Connor concurrence explained, the Court "[is] often called upon to resolve questions of constitutional law not susceptible to the mechanical application of bright and clear lines" because of the "political judgment[s particularly involved in resolving] Commerce Clause matters." *Lopez*, 514 U.S. at 579 (Kennedy, J., concurring). Thus: "[t]he history of the judicial struggle to interpret the Commerce Clause . . . counsels *great restraint* before the Court determines that the Clause is insufficient to support an exercise of the national power." *Id.* at 568 (Kennedy, J., concurring) (emphasis added).[15]

The Fourth Circuit's bright line test is fundamentally at odds with a "practical" approach to the commerce power, *id.* at 571-74 (Kennedy, J., concurring). Such a formalistic approach would lead to the very real possibility that *no level of government* could or would address potentially serious national problems. Such an unwise approach to the Commerce Clause was rejected during the New Deal, see, *e.g.*, *North American Co.* v. *SEC*, 327 U.S. 686, 705 (1946) (The "commerce clause does not operate so as to render the nation powerless to defend

[15] *See generally*, Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999) (explaining the value and benefits of incremental adjudication and the pitfalls of jurisprudence that relies on inflexible rules).

itself against economic forces that Congress decrees inimical or destructive of the national economy."), and should not be resurrected.

D. The Fourth Circuit's Facial Invalidation Of The Civil Rights Remedy Was Erroneous.

The Fourth Circuit held the Civil Rights Remedy facially invalid. *Brzonkala*, 169 F.3d at 889. However, a court may hold a federal statute facially invalid *only* if "no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987); see *National Endowment for the Arts* v. *Finley*, 118 S. Ct. 2168, 2175 (1998). The Fourth Circuit's facial invalidation of the Civil Rights Remedy was erroneous because -- even if a direct effect on economic activity were constitutionally required, which it is not -- there are numerous circumstances, including those in this case, in which the statute would be valid. For example, Congress may regulate gender-motivated violence that directly impedes an economic transaction, such as getting a job, receiving paid-for services, or exercising contractual rights. See *Perez*, 402 U.S. at 156-57 (upholding federal statute criminalizing loan-sharking and threatened violence impeding wholly intrastate activity). As the legislative history shows, gender-motivated violence frequently causes women to lose jobs, or to forgo the benefits of services they have purchased or contractual rights. See *supra* at 6-13.

As applied to the facts in this case, the statute is valid, even if a direct effect on economic activity is required. Brzonkala paid tuition, fees, and room and board to attend Virginia Tech in the Fall of 1994. J.A. 27 (Am. Comp., ¶¶ 76-77). Plainly, paying substantial fees for a college education is an economic activity. See, *e.g.*, *United States* v. *Brown Univ.*, 5 F.3d 658, 666 (3rd Cir. 1993) (paying college fees "is a quintessential commercial transaction"). As a direct result of respondents' gender-motivated sexual assault on Brzonkala, she was forced

to withdraw from college and has never received the education she sought. See J.A. 27 (Am. Comp., ¶¶ 76-77). Because Congress unquestionably has the power to protect citizens from gender-motivated violence that, as here, directly interferes with their exercise of contractual and economic rights, the Civil Rights Remedy is valid on its face, and as applied to this case, even if, *arguendo*, it might not constitutionally be applied in some other circumstances.

II. THE CIVIL RIGHTS REMEDY IS CONSTITUTIONAL SECTION FIVE LEGISLATION THAT ENFORCES WOMEN'S EQUAL PROTECTION RIGHTS.

A. Congress Enacted The Civil Rights Remedy To Deter Or Remedy Pervasive Equal Protection Violations.

The VAWA Civil Rights Remedy, enacted pursuant to "[S]ection 5 of theFourteenth Amendment," 42 U.S.C. §13981(a), falls squarely within Congress' authority to enact prophylactic laws that "'deter[] or remed[y] constitutional violations.'" *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 119 S. Ct. 2199, 2206 (1999); *accord City of Boerne* v. *Flores*, 521 U.S. 507, 518-20 (1997). To evaluate the law under Section 5, the Court first must "identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy," as "judged with reference to the historical experience . . . it reflects." *Florida Prepaid*, 119 S. Ct. at 2206-07 (citing *Boerne* 521 U.S. at 519-20, 525). In stark contrast to the record in either *Florida Prepaid* or *Boerne*, Congress here identified numerous equal protection violations in state laws and law enforcement practices that reflected a history of "subsisting and pervasive" discriminatory practices that deny women equal protection of the laws. See *Boerne*, 521 U.S. at 525; see *supra* at 13-17.

Just as this Court recognized "the necessity of using strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights" stemming from this country's history of racial discrimination, see *Boerne*, 521 U.S. at 526, so too did Congress enact the Civil Rights Remedy to help counteract practices motivated by discrimination that persisted at the state level. Indeed, the record supporting the Civil Rights Remedy closely resembles the evidence of equal protection violations supporting enactment of other anti-discrimination legislation under the 14th and 15th Amendments' enforcement clauses.[16] That record documented historic and systemic discrimination despite some remedial laws; statistical disparities in voter registration and statewide office-holding; the ineffectiveness of previous law reform efforts; and discriminatory mistreatment of African-Americans. See *id.* at 525-27 (discussing record held sufficient to support exercise of enforcement clause powers in *South Carolina* v. *Katzenbach*, *City of Rome* v. *United States*, *Oregon* v. *Mitchell*, and *Katzenbach* v. *Morgan*).

The record here is at least as strong. As recounted more fully in Section II, *supra*, Congress identified and responded to this country's long history of discriminatory treatment of women seeking redress for crimes of violence. For example, Congress found that state law enforcement policies and practices treated violence committed against women less seriously than comparable violence directed against men. See *supra* at 14-15. Such differential class-based treatment strikes

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[16] The same framework governs analyses of the enforcement clauses of the 13th, 14th and 15th amendments. *See, e.g.*, *Oregon* v. *Mitchell*, 400 U.S. 112, 127-28 (1970); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 326-27 (1966).

at the heart of the equal protection clause.[17] Congress also sought to remedy the effects of formal barriers to redress such as marital rape and interspousal tort immunities, which Congress found reflected and perpetuated outdated stereotypes.[18] Moreover, state officials' stereotypic treatment of women complainants, exemplified by comments about dress or appearance or declarations that "she asked for it," is conduct this Court consistently has held indicates discriminatory intent.[19]

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[17] *See, e.g., DeShaney* v. *Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 197 n.3 (1989) (noting that the "State may not . . . selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause"); *Balistreri* v. *Pacifica Police Dep't*, 901 F.2d 696, 701 (9th Cir. 1990) (upholding equal protection claim for police discriminatory treatment of domestic violence complaint, reasoning that remarks such as officer's response to domestic violence victim that he "'did not blame plaintiff's husband for hitting her,'" indicate "an intention to treat domestic abuse cases less seriously than other assaults, as well as an animus against abused women"); *Watson* v. *City of Kansas City*, 857 F.2d 690, 696-97 (10th Cir. 1988) (establishing that police policy treating domestic violence claims less seriously than nondomestic violence claims could violate women's equal protection based on proof, *inter alia*, of discriminatory intent consistent with *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 274 (1979)).

[18] Although the Court is not presented with the issue here, several states have struck marital rape exemptions on the ground that they violate the Fourteenth Amendment's equal protection clause. *See, e.g., People* v. *Liberta*, 474 N.E.2d 567, 573 (N.Y. 1984) (striking marital rape law as resting on "archaic notions" and violating equal protection); *see also, e.g., Moran* v. *Beyer*, 734 F.2d 1245, 1248 (7th Cir. 1984) (striking interspousal immunity law as violating equal protection).

[19] *See, e.g., United States* v. *Virginia*, 518 U.S. 515, 541 (1996) (citing *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 725 (1982) (rejecting gender-based classification based on "archaic and stereotypic notions")); *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 250-51, 256 (1989) (recognizing sex stereotyped remarks as evidence of discriminatory motive).

Consistent with its legislative role, Congress was not limited to reviewing adjudicated cases of equal protection violations. See *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 665-66 (1994) (plurality opinion) (contrasting legislative with judicial fact-finding); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (upholding Congress' Section 5 power to define circumstances that threaten equality).[20] As detailed above, see *supra* at 13-17, the legislative record included evidence that statistical disparities in prosecution and conviction rates for violent crimes against women stemmed from deep-rooted discriminatory attitudes concerning women's credibility and historic acceptance of sexual violence against women. Congress also considered rules and practices requiring proof of corroboration or "utmost resistance" and the continued use of outdated jury instructions, which held the predominantly female victims of sexual assaults to different standards than victim witnesses in other crimes, and reflected stereotypes about women's credibility. These and other examples detailed by state gender bias task force reports documented the unconstitutional "evil or wrong" Congress sought to remedy.

B. The Civil Rights Remedy Is A Congruent And Proportionate Response To The Legislative Record Of Equal Protection Violations.

Congress' enactment of the Civil Rights Remedy as part of its comprehensive VAWA scheme is both proportionate to the violations Congress sought to redress and congruent with previous federal responses to class-based violence States were unable fully to remedy. Because the Civil Rights Remedy directly responds to the violations Congress identified, it falls

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[20] *Accord South Carolina*, 383 U.S. at 330 (approving Congress' reliance on "any probative source" in considering Section 5 legislation); *see also Fullilove* v. *Klutznick*, 448 U.S. 448, 478 (1980) (Upholding Section 5 legislation even absent evidence of intentional discrimination in legislative record).

well within Congress' """wide latitude""" in crafting measures that remedy or prevent unconstitutional acts. *Florida Prepaid*, 119 S. Ct. at 2206 (quoting *City of Boerne*, 521 U.S. at 517); see *Ex parte Virginia*, 100 U.S. 339, 345-46 (1880).

For example, because bias by state officials had barred access to the justice system, the Civil Rights Remedy authorizes a claim that the victim controls. 1990 S. Rep. 42. The availability of federal jurisdiction affords victims the opportunity to be heard by judges who are insulated from local political and other pressures -- a particularly critical factor in smaller communities, where bias may be compounded by familiarity.[21] As a service provider in rural Utah testified, officials in her community "frequently know the perpetrators and/or are related to them" and take the accused "out for coffee" instead of addressing the violence.[22]

Rather than usurping states' authority, Congress carefully crafted the Civil Rights Remedy to avoid any encroachment on areas of traditional state concern. For example, to maintain states' traditional role in adjudicating family law matters, the statute expressly prohibits federal courts from exercising supplemental jurisdiction over divorce and custody actions. Because it requires proof of gender-motivation, the Civil Rights Remedy does not create a "general federal tort law." See *Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971) (42 U.S.C. § 1985(3) avoids "constitutional shoals" of a general tort law by requiring proof of discriminatory motivation). Instead, like other federal civil rights laws, the Civil Rights Remedy

[21] 1990 S. Rep. 42. *Accord* 1991 S. Hearing 105 (statement of Cass R. Sunstein) (recognizing federal remedy for gender violence as responsive to bias in state criminal justice system).

[22] Apr. 1993 S. Hearing 61 (statement of Barbara Wood).

vindicates the "unique individual and societal harm" caused by bias-inspired crime. 1993 S. Rep. 50 (citing *Wisconsin* v. *Mitchell*, 113 S. Ct. 2194 (1993)).

Finally, respecting the limits of congressional authority, the Civil Rights Remedy does not effect a substantive transformation of equal protection rights by equating private conduct with equal protection violations. Instead, Congress responded to the discriminatory conduct of state actors. Compare *Boerne* 521 U.S. at 533 (critiquing Religious Freedom Restoration Act for attempting substantive transformation of constitutional law). Having identified constitutional violations, Congress is not limited to prescribing a remedy directed solely at unconstitutional acts. See *Florida Prepaid*, 119 S. Ct. at 2206; *Boerne*, 521 U.S. at 517-18. Nor is Congress limited to remedies that directly regulate state action; modern Supreme Court cases confirm Congress' Section 5 power to enact remedial statutes regulating the conduct of private individuals as a means to prevent state violations from occurring. See *District of Columbia* v. *Carter*, 409 U.S. 418, 424 n.8 (1973) (citing the separate opinions in *United States* v. *Guest*, 383 U.S. 745, 762 (1966) (Clark, J., concurring), referencing Court majority's agreement that Congress may regulate private conduct under Section 5).

This Court never has struck Section 5 legislation extending to private conduct where, as here, Congress enacted the law in response to a documented record of historic discrimination fueling equal protection violations. Two Reconstruction-era decisions striking laws that regulated private conduct cast no doubt on the constitutionality of Congress' actions here. In the *Civil Rights Cases*, the Court struck a public accommodations law that made "no reference whatever to any supposed or apprehended violation of the fourteenth amendment on the part of the states" and was not "corrective legislation" enacted in response to a constitutional violation by state officials. 109

U.S. 3, 13, 14 (1883). In *United States* v. *Harris*, the Court struck a predecessor to 18 U.S.C. § 241 because it rendered "private persons . . . liable to punishment for conspiring to deprive any one of the equal protection of the laws," with no basis in state action. 106 U.S. 629, 639 (1883).

The Civil Rights Remedy is premised on substantive findings of equal protection violations by state actors. Such an alternative to state remedies is particularly appropriate where, as here, Congress responded to an extensive record of bias among the very state institutions entrusted with providing redress to women victimized by violence.

CONCLUSION

The opinion of the Fourth Circuit should be reversed and the case remanded for further proceedings.

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