Nos. 99-5; 99-29

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

-and-

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

MOTION BY ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Association of the Bar of the City of New York (the "Association") respectfully moves for leave to file a brief annexed hereto as *amicus curiae*. Petitioners have consented to the filing of this brief but one of the Respondents has denied consent.

The Association of the Bar of the City of New York is a professional association of approximately 21,000 attorneys. While the majority of its members practice in New York City, the Association has members in nearly every state and in over fifty countries. The Association is chartered to study, address and promote the rule of law and, where appropriate, the reform of the law. The Association, by its Committee on Federal Legislation, has followed with interest the recent development of restrictions on Congressional power to enact legislation it believes is in the national interest and has issued a report to be published in the November-December, 1999 issue of its publication, *The Record*, dealing with "The New Federalism." The Association's Committee on Civil Rights has been vigilant in pursuing legislative efforts to protect the civil rights of all Americans, particularly those groups whose legal rights have historically been subject to private abuse and legal discrimination. The Association's Committee on Sex and Law is dedicated to eradicating all forms of gender discrimination, and has been a strong advocate for measures which target barriers to women's full participation in civic life. All three Committees have joined together to prepare and submit this brief expressing the point of view of the Association.

It respectfully requested that this Court grant leave to the Association as *amicus curiae* to submit this brief to present its position that this Court should uphold Congressional power to pass legislation in the national interest to protect the civil rights of women against private acts of violence, especially in light of Congressional findings that state enforcement of laws against such acts of violence is inadequate and that such acts substantially affect interstate commerce.

Respectfully submitted:

Dated: New York, N.Y.
November 10, 1999

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INTEREST OF AMICUS[1]

The statement of the interest of *amicus* is set forth in the accompanying motion for leave to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Association believes that the decision of the *en banc* court below is patently incorrect. It presents an anachronistic view of Congress' legislative power under the Commerce Clause, based on an erroneous interpretation of this Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), which struck down the Gun-Free School Zones Act ("GFSZA"), 18 U.S.C. §922(q)(1)(A). It has long been established that Congress, which represents the broadest expression of the People's will, must be given substantial leeway to solve problems on a national basis. This Court first upheld this broad view of Congressional power in Chief Justice Marshall's decision for the Court 180 years ago in *McCulloch v. Maryland*, 4 Wheat. 316 (1819).

In this century, Congress has increasingly used its legislative power to deal not only with purely economic problems which must be resolved on a national basis, but also with the persistent problems of public and private discrimination. The series of civil rights laws passed from

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[1] Pursuant to Rule 37.6, this brief was authored, prepared and paid for in its entirety by the Association of the Bar of the City of New York.

1964 to the present are among the most significant and important legislative acts of this century, reaffirming the *nation's* promise to ensure -- where the exercise of state police power has proven inadequate – that all persons must be treated equally, regardless of their race, color or gender, and must not be subject to private mistreatment or abuse.

The decision of the Fourth Circuit represents a constricted view of national power that has been repeatedly rejected by this Court in upholding Congress' exercise of its powers with respect to both purely economic matters and civil rights. Its analysis of the Commerce Clause should not be accepted and endorsed by this Court. The civil remedy provisions of the Violence Against Women Act ("VAWA") were properly enacted pursuant to a valid constitutional source of Congressional power. Based on a legislative record compiled over a four-year period, Congress concluded that violence against women is an economic and social problem of the first magnitude that is national in scope and that required a civil remedy on behalf of female victims. Congress specifically found that such violence has a major impact on the national economy: "[g]ender based violence bars its most likely targets -- women -- from full [participation] in the national economy." S. Rep. 103-138 (1993) at 54. Congress concluded that women who are raped or beaten by strangers or battered and abused by their domestic partners are impeded from going to work and do not earn to their full potential. Congress estimated that domestic violence costs employers $3 to $5 billion in absenteeism. In addition, it results in $5 to $10 billion in annual expenditures to repair the effects of gender-based violence -- through health care, diversion programs, and other social costs. See S. Rep. No. 101-545 at 33 (1990). *See also* S. Hrg. 102-369, 102d Cong., 1st

Sess.; Hearing before the Senate Committee on the Judiciary, *Violence Against Women: Victims of the System* (April 9, 1991).

Based on this record, Congress validly concluded that the effect on interstate commerce was significant enough to require civil remedies in addition to those already existing on the state level, particularly since the states are not adequately responding to the problem and, indeed, encouraged the federal government to act.

The decision of the court below was based on an erroneous reading of this Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995). In *Lopez,* this Court noted that Congress can regulate an activity under the Commerce Clause if any one of the following three conditions are met: (1) channels of interstate commerce are involved; or (2) Congress is dealing with the "instrumentalities of interstate commerce" or "persons or things in interstate commerce"; or (3) Congress is regulating those "*activities [that have] a substantial relation to interstate commerce.*" 514 U.S. at 558-59. (emphasis added).

The court below added a gloss to the *Lopez* decision that simply cannot be found in the holding of that case and is not supported by other decisions of this Court. The Fourth Circuit held that if intrastate activity is being regulated by Congress, the conduct itself must be *economic* in nature, no matter how substantial the conduct's effect on interstate commerce. That is, even if à non-economic activity substantially affects interstate commerce, it is beyond Congress' reach. Thus the Fourth Circuit stated: "[The Court] had never extended the substantially affects test to uphold the regulation of a non-economic activity in the absence of a jurisdictional

element," 169 F.3d at 831. As shown below, this Court's upholding of the Public Accommodations provisions of the 1964 Civil Rights Act in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964), as well as this Court's upholding of the law criminalizing extortionate credit transactions in *Perez v. United States*, 402 U.S. 146 (1971), shows that the analysis offered by the Fourth Circuit is demonstrably wrong.

Indeed, the analysis of the court below threatens to undermine one of the most important legal developments of this century: the national commitment to civil rights protection exemplified by the 1964 Civil Rights Act. While the Fourth Circuit gave only a passing reference to *Heart of Atlanta* and *Katzenbach v. McClung,* the same analysis that those decisions applied to sustain the validity of the 1964 Civil Rights laws is applicable here and shows that the VAWA is constitutional.

In enacting the civil remedy provisions of the VAWA, as in enacting the 1964 Civil Rights Act, Congress acted in accordance with the national interest and a national consensus pursuant to a valid grant of power under the Commerce Clause of the Constitution.

ARGUMENT

POINT I

CONGRESS VALIDLY ENACTED THE VAWA PURSUANT TO ITS POWER UNDER THE COMMERCE CLAUSE.

We note at the outset that the question of whether Congress, the representative of the national will in its legislative capacity, has the power to act on behalf of the people in passing a specific law reflects on certain first principles in our Constitutional scheme. This case does not deal with the question of whether a Congressional enactment conflicts with a specific constitutional provision, such as the First Amendment. Nor does it deal with Congress' power to restrict or impinge directly upon the power of the States, who are protected by the Tenth and Eleventh Amendments. *See College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S.Ct. 2219 (1999); *Alden v. Maine*, 119 S.Ct. 2240 (1999). Nor does it deal with any separation of powers problems, such as Congress invading the prerogative of the Executive or the Courts. *See Clinton v. City of New York*, 118 S.Ct. 2091 (1998).

We are dealing solely with the pure issue of the source of Congressional power, that is, whether the Constitution provides a basis for Congressional action, given the specific and limited grants in Article I, Section 8, as augmented by the Necessary and Proper Clause?

The decision of the Fourth Circuit is anti-majoritarian in the extreme. The decision below makes it considerably more difficult for the national Congress – surely expressing the desires and wishes of "We the

People" – to address problems of national dimension on a national basis. The approach of the court below is similar to that expressed by the Anti-Federalists before and after the ratification of the Constitution, who viewed any grant of power to a national government as a potential threat to liberty. These concerns had some force at the time of the founding of the republic, when a strong central government was thought capable of using its standing army to overthrow the power of individual states and impose tyrannical rule over its citizens. See Akhil Amar "The Bill of Rights as a Constitution," 100 *Yale L. J.* 1131, 1162-65 (1991). But any resurrection of these concerns now is anachronistic at best.

We believe that there is no proper basis to impose dramatic new restrictions on Congress' power to legislate in the national interest. Congress, which represents the concerns of the entire nation, must be permitted to legislate in areas where it believes States have failed sufficiently to act, so long as there is a proper record of the basis for its action, and the Constitutional grant of power is shown.

How far Congress can legislate in the national interest has been debated in almost every decade of the nation's history. For example, almost immediately after the nation was founded, the Federalists and Jeffersonians confronted the issue of whether Congress had the power to charter the Bank of the United States in the 1790's. During the Monroe Presidency, the question arose whether Congress could provide for "internal improvements." Before the Civil War, the question of Congressional power arose in many forms, particularly over the "nullification" debate in the 1830's. See Gerald Gunther and Kathleen Sullivan, *Constitutional Law* 101, 103, 104 (13th Ed. 1997).

Disputes arose over Congress' power to engage in economic regulation during the Progressive Era in the 1890's and 1900's and over New Deal efforts to deal with the depression in the 1930's. In all of these instances, it was ultimately determined that the national government must be afforded the power to resolve national problems on a nationwide basis. See generally *Lopez*, 514 U.S. at 572-574 (Kennedy, J. concurring).

This Court has responded to and rejected challenges that sought to restrict unduly Congressional authority to act in a series of landmark decisions, such as *McCulloch v. Maryland*, 4 Wheat. 316 (1819) and *Gibbons v. Ogden*, 9 Wheat. 1 (1824), in each of which this Court upheld the exercise of national power. Chief Justice Marshall wrote in *McCulloch*: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." 4 Wheat. at 421. He also wrote in *Gibbons* concerning the extent of Congressional power under the Commerce Clause: "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitation other than are prescribed in the Constitution." 9 Wheat. at 196.

After the Civil War and into this century, this Court has continued to uphold Congress' power to "prescribe the rule by which commerce is to be governed." The Court ultimately rejected efforts to derail important New Deal legislation on the grounds that Congress exceeded its power under the Commerce

Clause, *see Wickard v. Filburn*, 317 U.S. 111 (1942); *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1 (1937); *see also United States v. Darby*, 312 U.S. 100, 118 (1941), where this Court upheld the Fair Labor Standards Act, stating:

> The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

Furthermore, as described in greater detail in the next section, Congress utilized its power under the Commerce Clause to pass significant legislation protecting and expanding civil rights, an exercise of power which this Court upheld in *Heart of Atlanta* and *Katzenbach v. McClung*.

It is simply not true, as the Fourth Circuit asserted, that Congress must avoid legislating in areas to "'which the States lay claim by right of history and expertise,'" [citing *Lopez*, 514 U.S. at 583 (Kennedy, J. concurring);] such as family law, domestic relations or violent crime, "conduct that has been traditionally regulated by the States through their criminal codes" against classically criminal conduct, 169 F.3d at 840. Thus Congress has often legislated in the area of family law, passing laws concerning deadbeat fathers, (18 U.S.C. §228), prohibiting parental kidnapping, (18 U.S.C. §1073) and prohibiting sexual exploitation of children (18 U.S.C. §2251 *et seq.*).

In addition, Congress has passed numerous laws based solely on an "affecting commerce" rationale, such as laws prohibiting extortionate credit transactions (18 U.S.C. §891 *et seq.)*, ownership of weapons of mass destruction (18 U.S.C. §2332a), arson (18 U.S.C. §844(1)), possession of child pornography (18 U.S.C. §2253(a)(4)(B)), possession of a semiautomatic assault weapon, (18 U.S.C. §922(v)(1)) or damage to religious property (18 U.S.C. §247(b)).

The idea that there are broad activities of national life that Congress cannot touch because the states also legislate in those areas or legislated in those areas first is contrary to our Constitutional structure.

The Fourth Circuit turned its back on this Constitutional history and development by misinterpreting this Court's decision in *Lopez*. The Fourth Circuit held that under *Lopez*, absent a showing that either the channels or instrumentalities of interstate commerce were involved, Congress cannot rely on its Commerce Clause power unless two showings are made, satisfactory to a court examining the justification for the legislation: (1) the activity regulated by Congress must have a substantial effect on interstate commerce; and (2) the activity regulated must be economic in nature. Having set up this two-pronged test, the Court below concluded that since gender-motivated violence -- the activity regulated by Congress under the VAWA -- is not "economic," there was no basis for Congressional action in this area, regardless of whether such conduct has a substantial

effect on interstate commerce, as four years of Congressional hearings showed it had. [2]

Only the first of these two showings described by the court below can be found in *Lopez* as the basis for invalidating Congressional legislation.

This Court did explicitly hold in *Lopez* that there must be a "substantial effect" on interstate commerce and did provide that Congressional findings of such an effect is not binding on a court.

But the Fourth Circuit's additional prerequisite, *i.e.* that Congress can only regulate an "economic" activity, is based on a misinterpretation of this Court's *Lopez* decision. This Court noted in the plurality opinion in *Lopez*:

> [We] have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce. Examples include . . . intrastate extortionate credit transactions, *Perez*, *supra*, restaurants utilizing substantial interstate supplies, *McClung*, *supra*, inns and hotels catering to interstate guests, *Heart of Atlanta Motel, supra*, and production and consumption of homegrown wheat, *Wickard v. Filburn*, 317 U.S. 111 (1942). These examples are by no means exhaustive, but the pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.

514 U.S. at 559-60.

In reaching the decision in *Lopez*, neither the plurality opinion by Chief Justice Rehnquist nor the concurring opinion by Justice Kennedy overruled any of this Court's prior Commerce Clause decisions. Indeed, Chief Justice Rehnquist quoted the teaching of *Wickard v. Filburn*, 317 U.S, 111 (1942) that "*even if appellee's activity may 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* ." 317 U.S. at 125 (emphasis added), quoted in *Lopez*, 514 U.S. at 556. See also *United States v. Wrightwood Dairy Co.* 315 U.S. 110, 121 (1942) ("it is the effect upon interstate commerce or upon the exercise of the power to regulate it, not the source of the injury, which is the criterion of Congressional power").

Included in this Court's analysis in *Lopez* was *Perez v. United States*, 402 U.S. 146 (1971). In that case, this Court upheld the validity of the extortionate credit transaction law, which made it a crime to make any loan coupled with a threat to use violence if the loan is not repaid, 18 U.S.C. §891 *et seq.* The federal statute criminalized loan sharking at the local level because the

[2] While Congressional findings that the intrastate conduct to be regulated has a substantial effect on interstate commerce is not binding on the courts in determining whether Congress has constitutionally exercised its legislative power under the Commerce Clause, this Court has repeatedly held that "we must defer to a Congressional finding that a regulated activity affects interstate commerce 'if there is any rational basis for such a finding.' . . " *Presault v. Interstate Commerce Commission*, 494 U.S. 1, 17 (1990). *Accord Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276 (1981); *Katzenbach v. McClung*, 379 U.S. 294, 303

conduct being regulated had a sufficient effect on interstate commerce. What Congress was regulating was not the economic or commercial aspects of the activity, *i.e.*, the making of the loan, but the threat of violence in enforcing collection, a non-economic activity.

The analysis of the Fourth Circuit would undermine numerous other criminal laws passed by Congress where there was no requirement that a "person or thing" moved in interstate commerce.

One group of laws contains as a jurisdictional element a requirement that the activity must "substantially affect" commerce. Thus the federal arson statute, 18 U.S.C. §844(i), reads: "Whoever, maliciously damages or destroys . . . by means of fire or explosive any building . . . used in interstate or foreign commerce or *in any activity affecting commerce* . . . shall be imprisoned . . . " (emphasis added). But arson is surely not an "economic" activity as the term is used by the Fourth Circuit. If Congress's power is limited to regulating only "economic" activity in this sense, then Congress lacks the power to pass such a law or others similar to it, where the only connection to commerce is the addition of the "substantially affects" jurisdictional element to the prohibitions of the law. *See also* 18 U.S.C. §2332a, (prohibiting the use of weapons of mass destruction against a person in the United States "[where] the results of such use affect interstate or foreign commerce"); 18 U.S.C. §247(b) (criminalizing the damaging or destruction of religious property where the offense is "in or affects interstate or foreign commerce"). Yet these laws and others with a similar jurisdictional element have consistently been upheld by federal courts across the country, as shown below.

Other federal laws are based on a theory that the activity regulated by Congress substantially affects commerce, but a showing of such an effect is not a jurisdictional element of the statute, that is, the "substantially affects" requirement need not be shown in every individual case. It is enough that Congress originally concluded that the activity affected commerce to the requisite degree.

Among such laws are the Freedom of Access to Clinics Act, (18 U.S.C §248), laws penalizing possession of semiautomatic assault weapons, (18 U.S.C. §922(v)(1)); laws penalizing the intrastate possession of child pornography (18 U.S.C. §2252(a)(4)(B)) and laws criminalizing the intrastate possession of eagle parts (16 U.S.C. §668).

Lower federal courts have consistently upheld the validity of these enactments and have rejected the "commercial" or "economic" requirement posited by the Fourth Circuit. See *United States v. Jones*, 178 F.3d 479 (7th Cir. 1999)(upholding federal arson statute as applied to the torching of a single private residence); *United States v. Rodia*, 1999 WL 959625 (3d Cir. October 20, 1999)(upholding provision prohibiting the intrastate possession of child pornography based on a "substantially affects" theory); *Navegar Incorporated v. United States*, 1999 WL 798068 (D.C. Cir. October 8, 1999)(upholding provision prohibiting intrastate possession of semiautomatic assault weapon based on a "substantially affects" theory).

See also; United States v. Bramble, 103 F.3d 1475, 1490-82 (9th Cir. 1996) (upholding the provision of the Eagle Protection Act which criminalized the intrastate possession of eagle parts as a valid exercise of Congress'

Commerce Clause power because of the substantial effect on interstate commerce, rejecting the argument that the simple possession of eagle parts has nothing to do with commerce or any economic enterprise); *National Ass'n of Home Builders v. Babbitt,* 130 F.3d 1041, 1049-52 (D.C. Cir. 1997), *cert. denied,* 118 S. Ct. 2340 (1998) (upholding the portion of the Endangered Species Act making it unlawful to possess certain endangered species, including those that exist only on an intrastate basis, holding that "the proper test of whether an activity can be regulated under the Commerce Clause is not whether the activity itself is commercial or economic but rather whether the activity has a substantial effect on interstate commerce"); *United States v. Wilson,* 73 F.3d 675, 685 (7th Cir. 1995) (upholding the constitutionality of the Freedom of Access to Clinics Entrance Act and rejecting the argument that obstructing access to abortion clinics was a non-economic activity that the commerce power could not reach after *Lopez*); *United States v. Parker,* 108 F.3d 28, 30 (3d Cir.), *cert denied,* 118 S. Ct. 111 (1997) (Child Support Recovery Act case in which the Third Circuit rejected the argument that "*Lopez* created a bright line rule establishing that unless an activity is commercial or economic it is beyond the reach of Congress under the Commerce Clause")

In addition, the public accommodation sections of the Civil Rights Act of 1964 were "economic" only in the broadest sense of the term. It was not the act of selling food or the providing of lodging to transient guests that was regulated, but the racial discrimination associated with those activities. In *McClung*, for example, the interstate nexus was the fact that 46% of the food purchased by the restaurant was purchased in interstate commerce, but that was not the activity being regulated. It was the discriminatory conduct in selling food that was

being regulated. Nevertheless this Court affirmed the validity of the law. Like gender violence, racial discrimination might not be "economic" activity, but it is related to and affects interstate commerce.

The concurring opinion of Justices Kennedy and O'Connor in *Lopez* placed the "commercial" requirement in better balance. The concurring opinion noted that "neither the actors nor their conduct [under the GFSZA] has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus," 514 U.S. at 580. Justice Kennedy further noted that the federal statute in that case intruded "on a matter of traditional state concern," *i.e.* education, where the States had already acted to prevent the evil at issue here, namely children carrying guns at or near schools, 514 U.S. at 581 (noting that 40 states outlaw the possession of firearms at or near school grounds).

Applying that test to the law at issue here, this Court should sustain the validity of the civil remedy provision of VAWA. The law clearly has the purpose of preventing gender-based violence that imposes substantial economic costs on the nation. Further, the justification for the law is that Congress found that the States could not solve the problem themselves; indeed, they sought the assistance of the federal government in a spirit of cooperative federalism.

The Fourth Circuit did not insist that economic activity must always be the focus of Congress' regulation:

> We could perhaps reconcile with these "first principles" of federalism a holding that Congress may regulate, even in the absence of jurisdictional elements, non-economic activities that are related

> to interstate commerce in a manner that is clear, relatively direct, and distinct from the type of relationship that can be hypothesized to exist between every significant activity and interstate commerce. . . . . In this case, however, we can discern no such distinct nexus between violence motivated by gender animus and interstate commerce. 169 F.3d at 837-38.

With all due respect, Congress did thoroughly and exhaustively show the necessary nexus, as the dissent below explained

> Proper application of the mandated rational basis standard of judicial review simply does not permit the result reached by the majority. That standard requires us to answer a single question: did Congress have a rational basis for finding, as it expressly did, that serious violence motivated by gender animus has "a substantial adverse effect on interstate commerce by deterring potential victims from traveling interstate, from engaging in employment in interstate commerce, 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." H.R. Conf. Rep. No. 103-711, at 385. Congress so found only after four years of hearings and consideration of massive amounts of testimony, statistics, and other evidence. Analysis of this legislative record unquestionably demonstrates that each one of Congress's findings as to the substantial, deleterious impact of gender-based violence on interstate commerce is grounded in abundant

> evidence. In fact, it is hard to envision more careful legislative consideration, a more complete legislative record, or more amply supported legislative findings. In light of the voluminous, persuasive record and the extensive deliberation supporting Subtitle C, my independent evaluation of Congress's "legislative judgment," *Lopez*, 514 U.S. at 563, 115 S.Ct. 1624, compels me to conclude that Congress had a rational basis for finding that gender-based violence substantially affects interstate commerce.

169 F.3d at 916 (Motz, J, dissenting).

Congress also noted that "the cost" of gender-motivated violence "is staggering." S. Rep. No. 101-545, at 33 (1990). Domestic violence alone is estimated by Congress to cost employers "$3 to $5 billion annually due to absenteeism in the workplace." Women and Violence: *Hearing Before the Committee on the Judiciary*, 101st Cong. 58 (1990) (statement of Helen K. Neuborne) (emphasis added). Furthermore, "estimates suggest that we spend $5 to $10 billion a year on health care, criminal justice, and other social costs of domestic violence." S. Rep.No. 103-138, at 41. Congress also noted "[i]t is not a simple matter of adding up the medical costs, or law enforcement costs, but of adding up all of those expenses plus the costs of lost careers, decreased productivity, foregone educational opportunities, and long-term health problems." S. Rep. No. 101-545, at 33. The Congress report also found:

> Over 1 million women in the United States seek medical assistance each year for injuries sustained by [actions of] their husbands or other partners. As many as 20 percent of hospital emergency

room cases are related to wife battering.

> But the costs do not end there: woman abuse "has a devastating social and economic effect on the family and the community." ... It takes its toll in homelessness: one study reports that as many as 50 percent of homeless women and children are fleeing domestic violence. It 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.

Id. at 37 (footnote omitted).

Congress further made a finding that the fear of violence "takes a substantial toll on the lives of all women, in lost work, social, and even leisure opportunities." S. Rep. No. 102-197, at 38 (1991) (emphasis added):

> women often refuse higher paying night jobs in service/retail industries because of the fear of attack. Those fears are justified: the No. 1 reason why women die on the job is homicide and the highest concentration of those women is in service/retail industries .... 42 percent of deaths on the job of women are homicides; only 12 percent of the deaths of men on the job are homicides.

S. Rep. No., 103-138, at 54 n.70 (citations omitted).

These findings amply justify the Congressional judgment that violence women has a substantial effect on interstate commerce. The decision of the Fourth Circuit must be set aside.

POINT II

THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S UPHOLDING OF CONGRESS' EXERCISE OF ITS POWER UNDER THE COMMERCE CLAUSE TO PROTECT THE CIVIL RIGHTS OF ABUSED AND INJURED PERSONS NOT ADEQUATELY PROTECTED BY STATE LAW.

Among the proudest moments in this nation's history was the passage of the 1964 Civil Rights Act, prohibiting discrimination by reason of race and color in places of public accommodation. That law, and the civil rights laws that followed, helped fulfill the promise of the Fourteenth Amendment that all persons are entitled to the equal protection of the laws. Congress prohibited a wide variety of discriminatory acts in employment, housing and education by both private and public entities, finding that the states were not adequately eliminating discriminatory conduct in each of these areas.

This Court sustained the validity of the Congressional enactments under the Commerce Clause in a series of significant cases, including *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964).

Those decisions explicitly relied upon the Commerce Clause to sustain Congressional power to pass the laws in question. In *McClung*, this Court noted that the public accommodations provision could be sustained only on the basis that a substantial amount of the food that was eventually served at the restaurant had moved in interstate commerce.

> There is no claim that interstate travelers frequented the restaurant. The sole question, therefore, narrows down to whether Title II, as applied to a restaurant annually receiving about $70,000 worth of food which has moved in commerce, is a valid exercise of the power of Congress. The Government has contended that Congress had ample basis upon which to find that racial discrimination at restaurants which receive from out of state a substantial portion of the food served does, in fact, impose commercial burdens of national magnitude upon interstate commerce.

379 U.S. at 298-99.

This Court sustained that finding. It noted that Congress had ample basis to conclude that there were serious and significant "[b]urdens placed on interstate commerce by racial discrimination in restaurants." *Id.* at 299. The effect was described as follows:

> A comparison of per capita spending by Negroes in restaurants, theaters, and like establishments indicated less spending, after discounting income differences, in areas where discrimination is widely practiced. This condition, which was especially aggravated in the South, was attributed in the testimony of the Under Secretary of Commerce to racial segregation. . . . This diminutive spending springing from a refusal to serve Negroes and their total loss as customers has, regardless of the absence of direct evidence, a close connection to interstate commerce. The fewer customers a restaurant enjoys the less food it sells and consequently the less it buys. *Id*

This Court stated:

> We believe that this testimony afforded ample basis for the conclusion that established restaurants in such areas sold less interstate goods because of the discrimination, that interstate travel was obstructed directly by it, that business in general suffered and that many new businesses refrained from establishing there as a result of it.

Id. at 300.

This Court rejected the argument that restaurants constituted "local" activity beyond the reach of Congress to regulate or that Congress' power ended when the food reached its destination at Ollie's Barbecue. It noted that Congress had properly determined that refusal of service to African-Americans imposed burdens on the interstate flow of food and upon the movement of products generally: "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." *Id.* at 303-04.

This Court concluded:

> The power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere. The Civil Rights Act of 1964, as here applied, we find to be plainly appropriate in the resolution of what the Congress found to be a national

> commercial problem of the first magnitude. We find it in no violation of any express limitations of the Constitution and we therefore declare it valid.

Id. at 305.

Every part of the *McClung* analysis applies to this case. As noted above, the Congressional findings on the effect on interstate commerce of gender-based violence were at least as extensive as the findings upholding the Civil Rights Act at issue in *McClung*. The "local" nature of the activity was not a basis to reject Congressional power to correct the problem. There was also a finding that state enforcement could not resolve the crisis, just as here. The notion that Congress could pass an important civil rights law based upon the movement of $70,000 worth of food products across state lines, but could not provide remedies for domestic violence (which caused $5 billion loss in absenteeism and $10 billion in health care and other social costs), because the first activity was "economic" while the second purportedly was not, should be rejected by this Court.

CONCLUSION

For the reasons stated above, *amicus curiae*, the Association of the Bar of the City of New York requests that the decision below be reversed.

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