Nos. 99-5, 99-29

In The

Supreme Court of the United States

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 THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and that criminal statutes are construed and applied in accordance with the United States Constitution.

The issue before this Court is the constitutionality of the Violence Against Women Act ("VAWA"). Although the criminal provisions of VAWA are not presently before the Court, the Court's ruling as to whether Congress acted within its permissible authority under the Constitution in creating the civil cause of action codified at 42 U.S.C. § 13981 will have a significant effect upon the growing trend of federalization of criminal law. The NACDL accordingly has a significant interest in the outcome of this case.

The NACDL asks the Court to hold Section 13981 unconstitutional, as it exceeds Congress's authority and disturbs the federal relationship between the national and State legal systems. *Amici curiae* in favor of the Petitioners have suggested

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[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amicus*, its members, or counsel contributed money or services to the preparation or submission of this brief.

that international law both mandates and authorizes Congressional enactment of Section 13981, and this argument, if true, presumably would also lead to federal criminal laws enacted on the same extra-constitutional basis. NACDL addresses these arguments as well, for they no less threaten to disrupt the current systems of criminal law.

SUMMARY OF ARGUMENT

1. In creating a general tort cause of action in Section 13981, Congress exceeded the bounds of its authority and disrupted the balance between state and federal systems of law. The Constitution creates a federal structure that places responsibility for the creation and development of the general common law with the State legislatures and courts. Article III limits the substantive jurisdiction of the federal courts, and the scope of the matters that Congress may assign to them, primarily to federal officers and institutions, or core federal functions, while placing few substantive restrictions on State legislation or Common Law. With respect to those latter areas, the federal government is restricted to providing an alternate forum, while applying the State law as the rule of decision.

The Framers pointed to these features as deliberate protections against the expansion of the federal government's lawmaking power to consume that of the States. The First Congress, in enacting the Judiciary Act of 1789, directed that all federal courts were to apply the law of the respective States as the rule of decision in cases brought before them. This Court in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), restated that restriction and emphasized its Constitutional basis: "*There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts.*" *Id.* at 78 (emphasis added). The Constitution does not permit Congress to enact a general law of torts or to create private civil causes of action that do not have a

clear Constitutional violation element or do not otherwise relate directly to federal enumerated powers. Rather, the Constitution sets out a sophisticated scheme of cooperation and innovation among the respective States to enhance and enforce popular control of the common law as part of the guarantee of republican government.

Enactment of Section 13981 threatens the States' enforcement of criminal law in addition to its intrusion into the State sphere of common law. The logic sustaining a civil cause of action such as Section 13981 necessarily opens the door to the creation of a general federal criminal code that could ultimately overwhelm and replace the State systems.

Among the more vocal objections to the Constitution at the time of ratification was the fear of unlimited federal power to legislate. In response, the Framers contended that the federal criminal legislative power was restricted to the enumerated crimes listed in the Constitution, and little else. The Constitution's proponents pointed to the broad and general jurisdiction of the States to legislate and try cases as the principal bulwark in defense of the common law. For most of the two centuries following, the greater part of criminal law was created, maintained and enforced by the respective States.

Despite the growing trend in recent decades for Congress to federalize more and more crimes, the Constitutional principles controlling remain the same. Federalization of crime harms the reputation and effectiveness of State criminal law systems while it adds to the burdens on, and potential harms resulting from, the power of the federal government. In a truly federal system, the Congress cannot unilaterally duplicate the general criminal or tort laws of the States. If the Congress can, as it has in the case of VAWA and Section 13981, proclaim the State systems defective while creating a duplicate legal code, it would only be a matter of time before the State systems are abolished as redundant.

2. A violation of the Fourteenth Amendment cannot occur without some significant involvement of a State, a State official, or one purporting to act under color of State law. *Moose Lodge No.*

107 v. Irvis, 407 U.S. 163 (1972). The United States in its Brief implicitly concedes this point. All congressional enactments addressing private actors' Fourteenth Amendment violations have limited their reach to acts taken in coordination with or on behalf of a State, or under color of State law. *E.g.*, 18 U.S.C. § 242; 42 U.S.C. § 1983; *see National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988).

Although purported to be in enforcement of the Fourteenth Amendment, Section 13981 makes none of the above distinctions. Its stated elements for a cause of action replicate those of a general cause of action sounding in intentional tort. The Section affixes liability not only to those who act with the State or under color of State law, but also to anyone else. The only additional element of the statute is the gender animus motivation requirement, yet motivation, as opposed to intent, has always been irrelevant to liability in either common law tort or constitutional torts. This Court has consistently rejected the notion that the Fourteenth Amendment creates any general federal tort liability. *Daniels v. Williams*, 474 U.S. 327 (1986); *Parratt v. Taylor*, 451 U.S. 527 (1981). Section 13981 accordingly is not an appropriate exercise of the Congress's enforcement powers under the Fourteenth Amendment.

3. Certain *Amici curiae* in support of the Petitioners have suggested in their Brief that both customary international law and the treaty obligations of the United States authorize, if not mandate, enactment of Section13981. This argument is not properly before the Court as one of the questions presented on certiorari, and should be dismissed. Supreme Ct. Rule 24.1(a); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991). It also was not one of the specific grounds cited by Congress as authority for the statute. If the Court should take up this argument, it nonetheless fails because the Constitution takes precedence over general international law and over treaties. *Reid v. Covert*, 354 U.S. 1 (1957). Nor can Congress find sources of authority in international law or treaties separate from the Constitution, which

is the sole source of authority for Congress and the United States. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270 (1992).

ARGUMENT

Amicus in support of the Respondents agrees with and supports the arguments of the Respondents with respect to the substantive scope of the powers that Congress may exercise under both the Commerce Clause and the Enforcement Clause of the Fourteenth Amendment. As the Respondents treat this aspect of the case exhaustively in their Brief, *amicus* wishes instead to present to the Court a supplemental argument: The methods chosen by Congress to implement this power in Section 13981 are inconsistent and inappropriate within the federal structure created by the Framers.

I. SECTION 13981 HAS AN OVERBREADTH THAT DISTURBS THE CONSTITUTIONAL BALANCE OF STATE AND FEDERAL SYSTEMS OF LAW.

This Court long ago set forth that the Congress's Commerce Power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, *other than are prescribed in the constitution.*" *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824) (quoted in *United States v. Lopez*, 514 U.S. 549, 553 (1995)) (emphasis added); *see also Lopez*, 514 U.S. at 568 (Kennedy, J., concurring). In recognition of the Court's "authority and responsibility to review congressional attempts to alter the federal balance," *Lopez*, 514 U.S. at 575 (Kennedy, J., concurring), the Court must consider Section 13981 within the context of "the design of the Government and ... the significance of federalism in the whole structure of the Constitution." *Id.*

If one assumes that Section 13981 were within the substantive scope of the Commerce Clause, that assumption would "not mitigate [the Court's] duty to recognize meaningful limits on

the commerce power of Congress." *Id.* at 580. For just as the Court has "inferred [the dormant Commerce Clause] from the constitutional structure as a limitation on the power of the States," *id.* at 579, the Court must similarly read from the construction of the entire Constitution a restriction on the power of Congress. The Court "must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern." *Id.* at 580.

A. States Determine the Common Law of Torts.

Section 13981 creates a cause of action in a victim of gender-motivated violence against another individual. 42 U.S.C. § 13981(c). The defendant individuals may include those "who act[] under color of any statute, ordnance, regulation, custom or usage of any State," *id.*, but are not limited to that class. Both State and federal courts have concurrent jurisdiction over this cause of action. *Id.* § 13981(e)(3). The statute restates a general cause of action sounding in tort for violence, qualified only by the element that a gender-based motivation propels the act.

The Framers at the time of the Constitutional Convention knew the variety of civil actions available at common law for redress of violent torts. *See, e.g.*, 3 William Blackstone, Commentaries *120-21 (describing forms of action including *trespass vi et armis*, assault, *insultus*, battery, and mayhem, among others). They were cognizant of the difference between torts committed among private individuals, and torts suffered at the hand of the Sovereign. *Id.* at *116 (for injury by the Crown, "the remedy in such cases is generally of a peculiar and eccentrical nature."). More tellingly, the Common Law even recognized torts raising gender-specific issues. *Id.* at *140, *143 (remedies for violence to spouses).

Against this background, the Framers did not envision the federal government invoking its legislative or judicial power to the broad and general extent that Section 13981 does. Article III, Section 2 of the Constitution delimits the federal "judicial Power" to encompass actions wherein the parties are specially identified:

the United States itself, the States as entities, foreign officials, and individuals of diverse citizenship[2]. U.S Const. art. III, § 2. Additionally, the specified subject matters of the Constitution, treaties, admiralty and federal laws merit federal jurisdiction. *Id.*

The Constitution places no similar restrictions upon the jurisdiction of State courts, other than to require the supremacy of the "Constitution and the Laws of the United States which shall be made in pursuance thereof" (including treaties) to State laws as rules of decision in the State courts.[3] *Id.* art. VI, cl. 2. The Constitution's guarantee of republican government may be seen as further assurance that the States might retain control of the substantive Common Law for individual wrongs, acting through their duly elected legislatures. *Id.* art. IV, § 4.

Absent the presence of core federal questions or federal officers, the federal judicial power only provides to private individuals a forum, rather than the governing law of decision, for their actions. The First Congress, including certain of the Framers, adhered to this concept in enacting the Judiciary Act of 1789. This Court, earlier in the present century, has had occasion to reassert this principle when interpreting and applying Section 34 of the Judiciary Act of 1789, also known as the Rules of Decision Act.

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature or by its highest court in a decision is not a matter of federal concern. *There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the*

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[2] Enactment of the Eleventh Amendment further restricted the scope of federal judicial power. U.S. Const. amend. XI.

[3] The Constitution removes certain subjects from the legislative authority of States. *Id.* art. I, § 10.

> *law of torts.* And no clause of the Constitution purports to confer such a power upon the federal courts.

Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (Brandeis, J.) (emphasis added). Federal courts have since therefore regularly looked to applicable State law for their rules of decision in cases raising issues of common law.[4] The Rules of Decision Act is codified at 28 U.S.C. § 1652 ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decisions in civil actions in the Courts of the United States, in cases where they apply.")[5]. *See also* 1 James Kent, Commentaries on American Law 318 (Legal Classics ed. 1986) (1826) ("we have not, under our federal government, any common law, considered as a source of *jurisdiction*") (emphasis original).

"It is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns." *Daniels v. Williams*, 474 U.S. 327, 333 (1986). "Our Constitution deals with the large concerns of the governors and the governed, but it does not purport

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[4] In reversing nearly one hundred years of interpretation of the Constitution and the Judiciary Act, this Court in *Erie* corrected "an unconstitutional assumption of powers ... which no lapse of time or respectable array of opinion should make us hesitate to correct." 304 U.S. at 79. This because "the unconstitutionality of the course pursued has now been made clear, and compels us to do so." *Id.* at 77-78.

[5] When tort claims arise against federal officers or employees in the course of their duties, an area wherein the argument for application of a general federal law might be strongest, Congress nonetheless has directed that the relevant State tort law shall apply. Federal Tort Claims Act, 28 U.S.C. § 2674 (United States liable "in the same manner and to the same extent as a private individual under like circumstances").

to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Id.* at 332.

Additional provisions of the Constitution show primary reliance on the State judicial systems to enforce the common law with respect to individuals. Full faith and credit "given in each State to the public Acts, Records, and judicial proceedings of every other State" assures that State courts will respect each other's process, apply the appropriate State law as a rule of decision according to choice of law principles, and recognize and enforce their respective common law judgments. U.S. Const. art. IV, § 1; *see* 1 James Kent, Commentaries on American Law, *supra*, at 377 ("The state courts are left to infer their own duty from their own state authority and organization"); *cf.* 28 U.S.C. §§ 1738-1739 (federal courts to give full faith and credit to State "Acts, records, and judicial proceedings" as would the courts of such State); *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1984) (O'Connor, J.) (fact that "claim is within the exclusive jurisdiction of the federal courts does not necessarily make § 1738 inapplicable.").

The federal plan also calls upon States to deliver up fugitives upon request, in furtherance of their respective criminal jurisdictions. U.S. Const. art. IV, § 2, cl.2; *see generally California v. Superior Ct. of Calif., San Bernardino Cty.*, 482 U.S. 400 (1987) (O'Connor, J.). But "[s]upervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States." *Erie*, 304 U.S. at 78-79; *see Sun Oil Co. v. Wortman*, 486 U.S. 717, 749 (1988) (O'Connor, J., concurring in part) (deviation from full faith and credit "ignores the language of the Constitution and leaves it without the capacity to fulfill its purpose").

All of these constitutional provisions detail a fairly intricate scheme designed to preserve and enhance the workings of the separate State judiciaries, individually and in cooperation, as the primary means for the enforcement and derivation of the common

law of torts. This system has operated without hindrance for the life of the Constitution, even as the Reconstruction Amendments otherwise altered the state-federal relationship. *See Sun Oil Co. v. Wortman*, 717 U.S. at 730 ("If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.") (quoting *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922)). The retention by the States of primary responsibility for the day to day redress of wrongs at common law between individuals spares the federal government a great burden and frees it to focus on matters peculiarly national or otherwise integral to its enumerated powers. Conversely, it retains to the people of the several States the safeguard of greater control of an important aspect of their daily lives: their interaction with governmental enforcement powers. Section 13981 contravenes these constitutional principles, as it is an "interference [that] contradicts the federal balance the Framers designed and that this Court is obliged to enforce." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

B. A General Federal Criminal Code Threatens to Subsume State Criminal Law.

Congress's enactment of legislation such as Section 13981 also threatens State criminal law regimes. For if the federal government may broadly declare the State legal systems to be so biased or flawed as to be broken, and it therefore may bypass the State courts with new federal civil causes of action, there is nothing in this logic to stop the Congress from enacting a general federal criminal code to take over day to day law enforcement from the States. This threat cannot be reconciled with a federal constitution.

This danger was one raised by antifederalist critics of the Constitution, and was expressly disavowed by the Framers. In response to the objection that federal legislative power "would tend to render the government of the union too powerful, and to enable it to absorb in itself those residuary authorities, which it

might be judged proper to leave with the states for local purposes," Alexander Hamilton wrote:

> There is one transcendent advantage belonging to the province of the state governments which alone suffices to place the matter in a clear and satisfactory light – I mean the ordinary administration of criminal and civil justice. This of all others is the most powerful, most universal and most attractive source of popular obedience and attachment. It is this, which – being the immediate and visible guardian of life and property – having its benefits and its terrors in constant activity before the public eye – regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake – contributes more than any other circumstance to impressing upon the minds of the people affection, esteem and reverence towards the government. This great cement of society which will diffuse itself almost wholly through the channels of the particular governments, independent of all other causes of influence, would ensure them so decided an empire over their respective citizens, as to render them at all times a complete counterpoise and not infrequently dangerous rivals to the power of the union.

The Federalist No. 17 (Alexander Hamilton) at 102, 104 (New York 1788) (Legal Classics ed. 1983).

This theme and assurance continued throughout the arguments in favor of ratification of the Constitution.

> The powers delegated by the proposed constitution to the federal government, are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negociation, and foreign commerce .... The

> powers reserved to the several states will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement and prosperity of the state.

The Federalist, *supra*, No. 45 (James Madison) at 82. In maintaining that the "federal and state governments are in fact but different agents and trustees of the people, instituted with different powers and designed for different purposes," Madison averred that the prevention of overlap or redundancy in the federal design precludes the event that the national or State government "will be able to enlarge its sphere of jurisdiction at the expence of the other." The Federalist, *supra*, No. 46 (James Madison) at 84.

> In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself.

The Federalist, *supra*, No. 51 (James Madison) at 119-120.

In the early years of the Republic, no less an authority than Thomas Jefferson, in authoring the 1798 Kentucky Resolutions protesting the federal Alien and Sedition Acts, adverted to this very threat and how it was to be avoided:

> [T]he Constitution of the United States, having delegated to Congress the power to punish treason, counterfeiting the securities and current coin of the United States, piracies, and felonies committed on the high seas, and offences against the law of nations, and no other crimes whatsoever; and it being true as a general principle, and one of the amendments to the Constitution having also declared, that "the powers not delegated to the United States by the Constitution, nor prohibited by

> it to the States, are reserved to the States respectively, or to the people," therefore ... all their other acts which assume to create, define, and punish crimes, other than those so enumerated in the Constitution, are altogether void, and of no force; and that the power to create, define and punish such other crimes is reserved, and, of right, appertains solely and exclusively to the respective States, each within its own territory.

Kentucky Resolutions, 2d *Resolved* cl. (1798), ***reprinted in*** The Portable Thomas Jefferson 281, 282 (Merrill Peterson ed. 1979).

For long after the ratification of the Constitution, States defined and prosecuted nearly all criminal conduct. Federal law limited itself to "injury to or interference with the federal government itself or its programs. .... Except in those areas where federal jurisdiction was exclusive (the District of Columbia and the federal territories) federal law did not reach crimes against individuals. Crimes against individuals ... were the exclusive concern of the states." Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 Annals Am Acad. Pol. & Sci. 39, 40 (1996). *See* 1 James Kent, Commentaries on American Law, *supra*, at 319 ("neither the constitution, nor the judicial acts founded upon it gave the federal courts a general jurisdiction in criminal cases").

Only in the late Nineteenth and the Twentieth Centuries did Congress begin to assert federal criminal jurisdiction over areas previously left to the States, and not without controversy. The growth in the federal fiscal ability by reason of both the modern American economy and the imposition of national income taxation has overwhelmingly reversed the relative balance between State and federal capabilities to address crime. And the nationalization of public opinion through modern communications media has given the federal government greater incentive and impetus to exercise its capability.

Yet the constitutional principle remains unchanged, that "preventing and dealing with crime is much more the business of

the States than it is of the Federal Government." *Patterson v. New York*, 432 U.S. 197, 201 (1977). There is an "historical American principle that the general police power lies with the states and not with the federal government, although there clearly is an appropriate sphere for federal criminal legislation." American Bar Association, Criminal Justice Section Task Force on Federalization of Criminal Law, The Federalization of Criminal Law 25 (1998) [hereinafter ABA Report]. *See also* The Federalist No. 14 (James Madison), *supra*, at 82 -83 ("it is to be remembered, that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects .... The subordinate governments ... will retain their due authority and activity.").

The threat remains in the present day trend to federalize growing areas of the criminal law. *See generally* William H. Rehnquist, *Address to the American Law Institute*, Remarks and Addresses at the 75th Annual ALI Meeting, May 1998, at 15-19 (1998); ABA Report 5-24. More than 40% of the federal criminal laws enacted since the Civil War have been enacted since 1970. ABA Report at 7. The 105th Congress alone considered approximately 1000 bills dealing with criminal statutes. *Id.* at 11 & n.15, App. C.

Federalization of criminal law harms our constitutional system even as it fails to live up to its promise of redressing crime. It diminishes the stature of the State courts in the eyes of their citizens. It "bestows new federal investigative power on federal agencies, broadening their power to intrude into individual lives." ABA Report at 27 ("Expanding, unreviewed federal power, when no strong case can be made for its existence, is contrary to the American wisdom against concentrating policing power in any one governmental entity."). Dual criminal systems can lead to disparate results for the same conduct, turning solely upon the forum in which the defendant may be tried. An increase in the volume and caseload of federal criminal cases reduces the separate and distinctive role of the federal courts, in addition to the obvious burden on their resources. *See* ABA Report 26-43.

"The principles of federalism and practical realities provide no justification for the duplication inherent in two criminal justice systems if they perform basically the same function in the same kind of cases." ABA Report at 55. VAWA, and Section 13981 in particular as it now comes before the Court, present a clear view of the path down which they inexorably lead. For if it makes no practical sense to have two duplicative systems of justice, and Congress explicitly premises the duplication, as VAWA is premised, on the bias and ineffectiveness of the State systems, then logic will sooner rather than later dictate the inevitable result: Congress will take it upon itself to legislate general crimes such as rape and spousal abuse, and replace the State courts.

The prior existence of the available State Common Law remedies, and their guarantee to the States by the Constitution, together suggest that the remedy devised by Congress in Section 13981 is accordingly neither necessary nor proper to the enforcement of the stated concerns in VAWA.

II. SECTION 13981 IS NOT A NECESSARY NOR PROPER MEANS OF ENFORCING THE FOURTEENTH AMENDMENT.

If there is a violation of the Fourteenth Amendment to be redressed by Congress, the Congress must logically direct its corrective towards those who commit the violation. Contrary to the Petitioner United States, *see* U.S. Brief at 47, a Fourteenth Amendment violation cannot occur without the involvement, however indirect, of a State or one acting under color of State law. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). The United States implicitly concedes this point throughout its argument. *E.g.*, U.S. Brief at 38 ("Congress may ... ascertain ... whether and how often ... *government action* entails the indiscriminate imposition of inequalities"), 41 ("*state action* based on inaccurate stereotypes;" "*state actors'* failure to treat domestic violence as seriously as other violence;" "record documenting *the States'* failure to

respond"), 42 ("discrimination by *state officials and state employees*") (emphases added).

When Congress has acted under the Enforcement Clause of the Fourteenth Amendment to reach private actors, it has still been limited to those private actors acting in coordination with, or on behalf of, a State, or under color of State law. *E.g.*, 18 U.S.C. § 242; 42 U.S.C. § 1983; *see National Collegiate Athletic Ass'n v. Tarkanian,* 488 U.S. 179, 192 (1988) ("the question is whether the state was sufficiently involved to treat that decisive conduct as state action"); *see also Bray v. Alexandria Women's Health Center*, 506 U.S. 263 (1993); *Zinermon v. Burch,* 494 U.S. 113 (1990).

Section 13981 makes no such distinctions. Although the Section does reach those persons acting under color of State law, it does not stop there. The stated elements of a cause of action under the Section contain no requirement of State action or color of State law. 42 U.S.C.§ 13981(e). The stated elements comprise those elements already held to state causes of action in the Common Law for torts or criminal acts. *See, e.g.*, Restatement (Second) of Torts § 8A (1965). The only contribution of Section 13981 is the gender animus element, which is decidedly irrelevant to both Common Law and constitutional liability. Oliver W. Holmes, Jr., The Common Law 54 (1881) ("the intent necessarily accompanying the act ends there."); *Daniels v. Williams*, 474 U.S. at 329-30 (restating ruling of *Parratt v. Taylor*, 451 U.S. 527, 534-35 (1981), that Section 1983 "contains no state of mind requirement independent of that necessary to state a violation of the underlying constitutional right.").

Those State actors who do violate the Fourteenth Amendment already face liability under the existing provisions of the Reconstruction Civil Rights Acts, 42 U.S.C. §§ 1983, 1985, 1986. All other potential defendants under Section 13981 face a general tort liability, without a basis in the Fourteenth Amendment. This Court has "reject[ed] the contention that the Due Process Clause embraces such a tort law concept." *Daniels v. Williams*, 474 U.S. at 335-36. No reason exists for the Fourteenth

Amendment's Equal Protection Clause to differ in this respect. Section 13981 accordingly duplicates existing remedies against State actors, while fabricating constitutional liability against actors who are by definition incapable of committing the constitutional wrong. A member of neither group is a necessary or proper defendant.

III. INTERNATIONAL LAW DOES NOT COMPEL OR AUTHORIZE ENACTMENT OF SECTION 13981.

Amici curiae "International Law Scholars and Human Rights Experts" (hereinafter *Amici*), in their Brief supporting the Petitioners, state a novel yet incorrect view of the mandates of customary international law upon the United States. Their assertion, that customary international law and international treaties empower and authorize the Congress to enact Section 13981, fundamentally misapprehends the relationship between the United States Constitution and international law.

As a threshold matter, the question of international law's relation to VAWA and Section 13981 was not an issue on which this Court granted certiorari, and should therefore be dismissed. Supreme Ct. Rule 24.1(a) ("the brief may not raise additional questions or change the substance of the questions"); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991) (Court does not ordinarily address issues raised only by *amicus curiae*).

Secondly, the VAWA statute does not directly refer to any international law or treaties, as Congress explicitly detailed its purported grounds in the Constitution yet omitted to mention any other sources of authority. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199, 2208 n.7 (1999) ("Since Congress was so explicit about invoking its authority under Article I and ... under the Fourteenth Amendment, we think this omission precludes consideration of" other unstated grounds).

A. "International Law" Does Not Supersede the Constitution.

The only source of power and authority for the federal government is the People of the United States, acting through the Constitution. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270 (1992) ("The United States is entirely a creature of the Constitution. Its power and authority have no other source.") (quoting *Reid v. Covert*, 354 U.S. 1, 5-6 (1957)); 494 U.S. at 277 (Kennedy, J., concurring) ("the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic"). The federal government, and the Congress specifically, can only act in accordance with the enumerated powers or prohibitions chosen by the People, acting through the original Constitutional Convention or subsequent amendment according to the Constitution's terms.

Within the provisions of the Constitution, the federal government is given what has been called the "Treaty Power." The President is authorized to negotiate and enter into treaties. U.S. Const. art. II, § 2, cl. 2. Those treaties do not take effect unless and until the Senate shall grant its advice and consent by a two-thirds vote. *Id.* The Senate may, in consenting to a treaty, condition its advice and consent on reservations, which are specific interpretative comments qualifying the effect of the treaty or its provisions as to the United States.

This Senatorial procedure is a peculiarity of the United States Constitution, with which other countries sometimes have difficulty. While their unitary governments consider a treaty effectively ratified upon their accession to the treaty, the United States cannot be so bound until the Senate shall have done its part.

Once ratified and in effect, any treaty to which the United States is a party has the effect of federal law. U.S. Const. art. VI, cl. 2. But like any federal statute, it has no priority or precedence over the Constitution itself. The President and the Senate may no more alter the provisions of the Constitution by a treaty, than the Congress in both houses may alter the Constitution by regular

federal legislation. The sole manner for amendment of the Constitution lies in the procedures set forth in Article V. U.S. Const. art. V.

The "Treaty Power" therefore refers only to the power of the federal government to negotiate and enter into treaties that should govern the affairs of the United States as a sovereign actor among nations. It does not confer upon the government an extra-constitutional source or method of deriving federal authority at home. *Contra* Brief of *Amici* at 29 ("it is impermissible to read the commerce Clause to invalidate and Act of Congress that advances our treaty and customary international commitments."). Neither the President nor the Congress can agree, by means of a treaty, to do anything that the Constitution forbids.

> [N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution. .... The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or the Executive and the Senate combined.

Reid v. Covert, 354 U.S. 1, 16-17 (1957).

Against these background principles, the arguments of the *Amici* that customary international law in general, and the International Convention on Civil and Political Rights[6] ("ICCPR") in particular, mandate and authorize Section 13981 are simply not true.

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[6] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

B. Congress Cannot Rely on "International Law" as an Independent Source of Authority.

1. Customary international law, or the "Law of Nations" as the Framers termed it, U.S. Const. art. I, § 8, cl. 10, is a very narrow and limited body of principles universally accepted as so fundamental as to be the irreducible minimum of acceptable humane conduct. The Law of Nations acted then and today acts upon international states as entities, rather than individuals. 4 William Blackstone, Commentaries *68 ("offences against the law of nations can rarely be the object of the criminal law of any particular state. For offences to this law are principally incident to whole states or nations").

Customary international law applies to the conduct of nations only when a custom or rule among nations has become so widespread and accepted that it is not only commonly taken as law among nations, but it is in fact obeyed by nations out of a sense of legal obligation (*opinio juris.*)[7] The instances of customary international law are rare, and the burden is upon the party asserting that a rule is one of customary international law to prove that it has attained that status.[8]

Much of customary international law has been codified in various modern treaties and conventions.[9] Throughout most of history, customary international law dealt primarily with relations

[7] *North Sea Continental Cases* (F.R.G. v. Den.), 1969 I.C.J. 3; Restatement 3d Foreign Relations § 102 comment c.

[8] *Case of the S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10.

[9] *E.g.*, Vienna Convention on the Law of Treaties, May 23, 1969, UN Doc. A/CONF. 39/27, Sen. Exec. Doc. L, 92d Cong. 1st Sess. 1971, 8 I.L.M. 679 (1969). Although *Amici* fail to mention it, *Amici* Brief at 4 n.2, the United States has not ratified the Vienna Convention, which accordingly is not U.S. law, even though it is the international standard most often cited.

between States and their governments, and had very little focus on individuals or their relationships to foreign governments. The few exceptions centered on universal peremptory norms against individual conduct considered to offend all civilized nations (*jus cogens*), such as piracy or slavery. The governing consideration for one government's actions towards the citizens or nationals of another State was (and to a large part remains) the ability and likelihood of that alien's State of nationality to exercise its diplomatic protection on his behalf.[10]

Customary international law, when determined by a court to exist, can provide the rule of decision in a case otherwise properly before that court. It is a special type of federal common law, subject to the precedence of the Constitution and federal statute. When, in the absence of contrary provision in the Constitution or federal law, there is a rule of customary international law applicable, federal courts will apply that rule of customary international law. *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations").

While a court should try to avoid reading a statute in conflict with accepted international law, the deference is not absolute, and it assuredly does not apply to the Constitution itself or its mandates. The continuing precedent of *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) (Marshall, C.J.), is better read in full quotation of the relevant passage:

> It has also been observed that an *act of Congress* ought never to be construed to violate the law of nations if any other possible construction remains, and, consequently, can never be construed to violate

[10] *Cf. Nottebohm Case* (Liech. v. Guat.), 1955 I.C.J. 4 (admissibility to international forum of claim on behalf of individual national); *Barcelona Traction Case* (Belg. v. Spain), 1970 I.C.J. 3 (same); *Mavromattis Palestine Concessions Case* (Greece v. Gr. Brit.), 1924 P.C.I.J. (ser. A) No. 2 (same).

> neutral rights, or to affect neutral commerce, further than is warranted by the law of nations *as understood in this country.*

6 U.S. at 64 (emphasis added). *Contra Amici* Brief at 28. Chief Justice Marshall chose therefore not to apply a federal law, criminalizing the sale of American-built ships for use in war, against an American-born defendant who claimed Danish citizenship while the United States held him still to be an American citizen. The Chief Justice thereby avoided international law questions of the rights of neutral citizens as affected by the attempted application of U.S. law to forfeit his ownership of the vessel. The case never raised the question of supremacy of the Constitution over federal statute or international law. *Contra Amici* Brief at 28.

Customary international law does not of itself compel nor empower Congress to act outside of the Constitution. With respect to other nations, as a coequal sovereign among nations the United States faces penalties of reputation rather than compulsion (short of war) if it fails to accede to other nations' views. *Brown v. United States,* 12 U.S. (8 Cranch) 110, 128 (1814) (Marshall, C.J.) (International "usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even wisdom, is addressed to the judgment of the sovereign."). International law "cannot be disregarded by [the sovereign] without obloquy, yet it may be disregarded. ... It is not an immutable rule of law, but depends on political considerations which may continually vary." 175 U.S. at 715 (Fuller, C.J., dissenting) (quoting *Brown v. United States*, 12 U.S. at 128). *See* John Chipman Gray, The Nature and Sources of the Law 131 (1927) ("The sanction which makes them operative as between nations is not a physical sanction; it is the sanction arising form the opinion of civilized nations that the rules are right, and that civilized nations are morally bound to obey them").

Congress has the power, but does not have any constitutional obligation, to enact laws governing offenses against the Law of Nations. Absent a Congressional statute specifically

doing so, the Court need not reach out to decide such questions. *See Williams v. Armroyd,* 11 U.S. (7 Cranch) 423 (1813) (Marshall, C.J.) (Despite Congressional resolution decrying French admiralty court's seizure of American vessel as violative of Law of Nations, rule of comity left the Court powerless to look beyond the French court's decree without specific Act of Congress telling it to do so).

Nor can customary international law force a court to rule contrary to the dictates of the Constitution. "International law" is not a supranational source of law, nor does it exude any supremacy over United States law akin to the Constitution and federal law's supremacy over the law of the respective States. *Cf. Erie*, 304 U.S. at 79 (noting "fallacy"' in "the assumption that there is a 'transcendental body of law outside of any particular State but obligatory within it'"). In modern years, the growing tendency has been for scholars to grossly overuse the term "customary international law" to cloak the policy preferences of academics with a presumed authority they otherwise do not merit. *E.g.*, Restatement (Third) of Foreign Relations Law of the United States § 701, Reporter's Note at ¶7 (1987) (cited in *Amici* Brief at 28); *cf. Sun Oil Co. v. Wortman*, 486 U.S. at 728-29 ("long established and still subsisting choice-of-law practices that come to be thought, by modern scholars, unwise, do not thereby become unconstitutional.").

While courts do regularly seek to avoid conflict between their rulings and the instances they can find of truly customary international law, the restriction, if any, of international custom lies only upon their interpretation of the statute, and not in their interpretation of the Constitution.

2. Treaties similarly cannot trump the Constitution. A treaty has the status of any ordinary federal statute. It must be duly enacted and comply with the Constitution. *Reid v. Covert*, 354 U.S. 1 (1957). Where there is conflict between a treaty and another treaty or federal statute, the ordinary rules of statutory interpretation apply. These rules include the general disfavoring of repeals by implication, the precedence of the specific over the

general, and the priority of the later enacted statute, among others. *See Whitney v. Robertson*, 124 U.S. 190 (1888).

Amici neglect to tell the Court, that in its advice and consent to the ICCPR, the Senate enacted certain reservations to the treaty, which have the full force and effect of law. Most relevant for present purposes is the proviso that "Nothing in this covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." S. Res. of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, art. IV, 138 Cong. Rec. S4781 (1991) (enacted).

Furthermore, the Senate resolution made clear that the ICCPR was not self-executing. *Id.* art. III (1) ("the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing."). The principles declared by Chief Justice Marshall still prevail in this area:

> A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but it is carried into execution by the sovereign power of the respective parties to the instrument.
>
> .... [W]hen the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

Foster & Elam v. Neilson, 27 U.S (2 Pet.) 253, 314 (1829) (Marshall, C.J.). Congress has not to date enacted legislation declared to be in furtherance and implementation of the ICCPR.

The ICCPR therefore has no legal effect upon individuals in the United States without a constitutionally enacted federal law specifically implementing the Covenant and its terms. Until such

time, it retains only the aspirational ideal of a nonbinding resolution. *See Fujii v. California*, 38 Cal. 2d 718, 724, 242 P.2d 617, 621-22 (1952) (United Nations Charter and the Universal Declaration of Human Rights have no compulsory effect in United States law without implementing legislation).[11] The ICCPR accordingly provides no basis for the Congressional enactment of VAWA or Section 13981.

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[11] *Amici* cite to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027 (1984), *as modified*, 24 I.L.M. 535 (1985), S. Treaty Doc. 100-20, as an alternate basis of authorization for VAWA. *Amici* Brief at 13,24. The Torture Victims Protection Act, 18 U.S.C. § 2340, already exists as the specifically designated implementing legislation for that Convention, thereby precluding the assignment of that role to VAWA. To hold otherwise would mean that VAWA implicitly repealed 18 U.S.C. § 2340, which *Amici* presumably do not intend.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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