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

BRIEF OF RITA GUZMAN AS *AMICA CURIAE* IN SUPPORT OF RESPONDENTS

Filed December 13, 1999

QUESTIONS PRESENTED

1. Whether Congress's power "to regulate Commerce * * * among the several States" (U.S. Const. art. I, § 8, cl. 3), when interpreted in light of the independent constitutional restrictions on congressional power embodied in the Domestic Violence Clause (U.S. Const. art. IV, § 4), includes the authority to regulate "gender-motivated" violence within the States through the creation, under the Violence Against Women Act of 1994, 42 U.S.C. § 13981, of a new federal cause of action available to the victims of such violence.

2. Whether 42 U.S.C. § 13981 is a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment.

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INTEREST OF THE *AMICA CURIAE*

Rita Gluzman is a federal prisoner who was convicted, in April 1997, of violating one of the criminal proscriptions of the Violence Against Women Act ("VAWA"), 18 U.S.C. § 2261(a)(1), which makes it a crime to engage in "interstate domestic violence." See *United States* v. *Gluzman*, 953 F. Supp. 84 (S.D.N.Y. 1997), aff'd, 154 F.3d 49 (2d Cir. 1998), cert. denied, 119 S. Ct. 1257 (1999).[1] The new federal "interstate domestic violence" offense occurs when any "person" — man or woman — "travels across a State line * * * with the intent to injure, harass, or intimidate that person's spouse or intimate partner," and, "in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner." 18 U.S.C. § 2261(a)(1). Gluzman is currently serving a life sentence in federal prison on the basis of her VAWA conviction.

Because she was charged under VAWA rather than for the traditional state crime of homicide, Rita Gluzman is in a unique position to provide this Court with a fuller understanding of VAWA's operation and constitutional defects. *Amica*'s experience in challenging her conviction has brought to light important arguments and materials that are directly relevant to the proper resolution of the Commerce Clause issue before the Court. *Amica* has a strong interest in ensuring that VAWA be invalidated as beyond Congress's Commerce Clause power.

SUMMARY OF ARGUMENT

Under this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), Congress's power to regulate interstate commerce does not include the power to regulate "gender-motivated" violence within the States. Accordingly, Section 13981 of the Violence Against Women Act ("VAWA") cannot be sustained as a proper exercise of Commerce Clause authority.

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[1] Pursuant to Supreme Court Rule 37, letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. This brief was funded by Rita Gluzman and was written entirely by her counsel.

I. The Court should take this opportunity to recognize the structural limits on the Commerce Clause that are reflected in other provisions of the Constitution, including the Domestic Violence and Guarantee Clauses of Article IV, Section 4. Long overlooked by this Court, the Domestic Violence Clause in particular provides compelling structural evidence that the States retain primary authority to regulate violent crime within their borders and that Congress's power to regulate such conduct pursuant to the Commerce Clause is correspondingly limited. Recent scholarship has provided fresh insight into the importance of these structural limitations on the Commerce Clause.

II. Contrary to the suggestion of petitioners and their *amici*, VAWA does not represent the culmination of a painstaking, careful and exhaustive investigation by Congress conducted over many years. VAWA failed to win passage in either the House or the Senate in the 101st and 102d Congresses. In addition, as even Senator Biden admitted at the time, Section 13981 was enacted by the 103d Congress largely in response to the sensational, highly publicized murder of Nicole Brown Simpson. Significantly, that event spurred a number of States to take immediate legislative steps to combat domestic violence, even before VAWA was enacted, but there is no evidence that these developments did anything to slow Congress down. Finally, in enacting VAWA Congress ignored serious concerns expressed by the Department of Justice itself about the need for, and constitutionality of, the legislation. Under these circumstances, deference to Congress's "findings" would be especially inappropriate.

III. Section 13981 regulates activity — gender-motivated violence — that plainly is not commercial in nature. Here, as in *Lopez*, "neither the actors nor the conduct have a commercial character, and neither the purposes nor the design of the statute have an evident commercial nexus." *Lopez*, 514 U.S. at 580 (Kennedy, J., joined by O'Connor, J., concurring). Moreover, Section 13981 regulates in several areas of traditional state authority. As the Department of Justice explained in opposing VAWA in the 101st and 102d Congresses, VAWA regulates in the area of family and domestic relations law, which has always

been the responsibility of the States. And it duplicates state intentional tort law, which already regulates violent, injury-causing conduct by private actors. The Court should make clear, moreover, that *Lopez*'s inquiry into whether the regulated activity is "commercial" in nature and a subject of traditional state authority is also relevant to legislation involving the "channels" and "instrumentalities" of interstate commerce. Unless the Court does so, the government will continue to evade *Lopez* in the lower courts by resort to overbroad interpretations of "channels" and "instrumentalities."

IV. The Court's resolution of the Commerce Clause issue in this case should be informed by two additional considerations that bear on the constitutional analysis. *First*, if Congress has the power under the Commerce Clause to regulate a subject matter, then (at least in the absence of structural limitations) it also has the power, under the Supremacy Clause, to *completely preempt* state authority in that area. *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985). Because the power to regulate includes the power to regulate exclusively, this Court should ask whether the Commerce Clause confers on Congress the power to regulate domestic violence and gender-motivated violence to the complete exclusion of the States. It obviously does not.

Second, Congress has very broad authority under the Spending Clause to address serious social problems that are beyond the reach of Congress's regulatory powers. Not only does Congress's power to spend extend well beyond the direct grants of legislative authority contained in Article I, but it is also subject to fewer restrictions imposed by other provisions of the Constitution (including the Domestic Violence Clause). See *South Dakota* v. *Dole*, 483 U.S. 203, 206-12 (1987). Accordingly, there is nothing to prevent Congress from offering the States substantial grants to combat gender-motivated or domestic violence, as indeed Congress has done in VAWA. Nor is Congress prohibited from offering compensation directly to victims of domestic or gender-motivated violence, if it does so through the spending power (by creating, for example, a national

fund for compensating crime victims). In short, Congress is fully capable of achieving the compensatory, remedial and symbolic objectives underlying Section 13981 without regulating the conduct of private individuals, encroaching on state authority, or further burdening the federal courts.

ARGUMENT

In recent decades, Congress has enthusiastically added to the burden of the federal courts by creating new causes of action and by federalizing a wide array of traditional state crimes. Calls for restraint or moderation by the Chief Justice of the United States, other members of the federal judiciary, and legal academics concerned about the future of the federal courts have invariably fallen on deaf ears, the casualty of political forces that impel Members of Congress and Presidents of both parties to demonstrate that they are "tough on crime" as well as the illusion that any serious social problem in this country must, of course, have a federal regulatory solution. Nowhere is the problem of overfederalization greater than in the area of violent crime, where the hydraulic pressure to take legislative action is fueled by round-the-clock television and other media coverage capable, in short order, of transforming a heinous or sensational local crime into yet another provision of Title 18 of the United States Code. This is an area, in short, where the so-called "political checks" of federalism have totally broken down.

The Violence Against Women Act, including the novel federal damages remedy for female and male victims of "gender-motivated" violence that is at issue in this case (42 U.S.C. § 13981), represents one of the latest chapters in this unfolding story. The statute creates several new crimes in the area of domestic relations (18 U.S.C. §§ 2261, 2262), an area long regarded as the exclusive province of state governments; a novel intentional-torts provision that regulates "gender-motivated" violence in the States and is duplicative of state tort law; and a variety of other measures aimed at combating, directly or indirectly, domestic violence and other violent crime within the States. Enacted before this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), and spurred by the sensationalistic media coverage of the tragic murder of Nicole Brown Simpson, VAWA's intentional tort provision is premised upon a sweeping theory of Congress's authority "[t]o regulate Commerce * * * among the several States" (U.S. Const. art. I, § 8, cl. 3).

In *Lopez*, this Court set about the task of restoring some meaning to the limits on Congress's power to regulate interstate commerce under a Constitution of enumerated powers. VAWA, however, can be upheld as a valid exercise of Commerce Clause authority only by resort to legal theories that would permit the federal government to federalize *any* crime of violence and *any* intentional tort. This Court should take this opportunity to reaffirm *Lopez* and strengthen its jurisprudential foundations.

I. The Court Should Recognize The Structural Limitations On The Commerce Clause

In a recent scholarly article, Professor Jay Bybee has persuasively demonstrated that the Domestic Violence Clause of Article IV of the Constitution — a "[l]ong ignored" provision that represents the "one Clause in the Constitution that actually links Congress, the states, and the problem of local crime" — provides powerful evidence of the limits on Congress's power under the Commerce Clause to regulate violence within the States. Bybee, *Insuring Domestic Tranquility:* Lopez, *Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 3-4 (1997). Other scholars, moreover, have shown through their recent work that additional limits on the Commerce Clause power are strongly suggested by the Guarantee Clause of Article IV. The Court should take the opportunity presented by this case to recognize this structural basis for *Lopez*'s holding and for the real limits imposed by the Constitution on Congress's ability under the Commerce Clause to federalize traditional state-law crimes of violence.

A. *The Domestic Violence Clause*. Article IV, Section 4, includes both the Domestic Violence Clause and the Guarantee Clause. It provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; *and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.*

U.S. Const. art. IV, § 4 (emphasis added). By its plain terms, the Domestic Violence Clause requires as a precondition to federal intervention a proper request from a State, made by the body most accountable to the people (the legislature) — unless the legislature "cannot be convened." The Clause thus represents at once a delegation of enumerated power to the federal government, an obligation placed on the federal government to intervene ("shall protect"), and a reservation of state authority over certain threats to the public order occurring within the States. Moreover, as we next explain, the text, history, and longstanding Executive Branch interpretation of the Domestic Violence Clause all demonstrate that the provision authorizes federal intervention to deal not only with uprisings and insurrections (such as Shays' Rebellion), but also with problems of pervasive violence within the States.

The language of the Domestic Violence Clause contrasts with the narrower wording of the Militia Clause of Article I, which confers on Congress the power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress *Insurrections*, and repel Invasions." U.S. Const. art. I, § 8, cl. 15 (emphasis added).[2] As Professor Bybee has noted, the delegates to the Constitutional Convention, in drafting the Domestic Violence Clause, expressly "refused to substitute the term 'insurrections' for 'domestic violence,' a proposal that would have coupled the terms 'invasion' and 'insurrection' in the Domestic Violence Clause just as they are in the Militia Clause." Bybee, *supra*, 66 GEO. WASH. L. REV. at 34; see 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 467 (M. Farrand ed., revised ed. 1966). Instead, they opted for the broader term "domestic Violence."

[2] Congress has enacted several statutes to implement the Militia Clause, Domestic Violence Clause, and Guarantee Clause. See 10 U.S.C. §§ 331-333.

The plain meaning of the phrase "domestic Violence" is exceedingly broad. In 1787, as today, the adjective "domestic" could mean either (1) "of one's own country" or "internal" (in contradistinction to "foreign"), or (2) "having to do with the home" or family. See WEBSTER'S NEW WORLD DICTIONARY 405 (3d College ed. 1988); S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (Times Books 1983). Read in context, of course, it is the former meaning that was intended. Equally broad is the expansive term "Violence," which encompasses a wide range of human activities, many of which are traditionally the subject of criminal proscriptions under state law. "Domestic violence," in short, meant violence within the States.[3]

Not surprisingly, early commentators found in the broad language of the Domestic Violence Clause an important guarantee of state prerogatives. William Rawle, for example, wrote that the Clause was not limited to situations involving "violent efforts of a party to alter [a state's] constitution":

> If from any other motives, or under any other pretexts, the internal peace and order of the state are disturbed, and its own powers are insufficient to suppress the commotion, it becomes the duty of its proper government to apply to the

[3] The debates during the Convention over the Guarantee and Domestic Violence Clauses confirm that "domestic Violence" had a much broader meaning than "insurrection." See, *e.g.*, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 47 (Wilson) (stating that "[t]he object" of the Guarantee Clause "is merely to secure the States agst. *dangerous commotions*, insurrections, and rebellions") (emphasis added); *ibid.* (Randolph) (explaining the provision had two different objects: "1. to secure Republican government. 2. to suppress domestic *commotions*") (emphasis added).

> Union for protection. * * * At the same time it is properly provided, in order that such interference may not wantonly or arbitrarily take place, that it shall only be on the request of the state authorities: otherwise the self-government of the state might be encroached upon at the pleasure of the Union * * * .

W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 299 (2d ed. 1829).

Similarly, Joseph Story explained that, as a consequence of the Domestic Violence Clause,

> every pretext for intermeddling with the domestic concerns of any state, under color of protecting it against domestic violence, is taken away by that part of the provision, which renders an application from the legislature, or executive authority of the state endangered necessary to be made to the general government, before its interference can be at all proper.

3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES ¶ 1819, at 684-85 (Fred B. Rothman & Co. 1991) (1833 ed.) (citing ST. G. TUCKER, I BLACKSTONE'S COMMENTARIES App. 367 (1803)). Thomas Cooley held the same view of the clause as Story. See T. COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 198 (Boston, Little Brown & Co., 1880) (also citing ST. G. TUCKER). For these early commentators, "'domestic violence' referred not only to insurrection, but also to other crimes as well. * * * [It] covered not only direct threats to the government's authority, but actions that indirectly threatened the government by challenging its ability to protect its citizens." Bybee, *supra*, 66 GEO. WASH. L. REV. at 39 (footnote omitted).

The Executive Branch has long given effect to the broad meaning of the term "domestic Violence" in Article IV of the Constitution. As early as 1857, for example, Attorney General Cushing explained that the term encompasses "robbery, burglary, arson, rape, and murder, by wholesale." *Yazoo City Post Office Case*, 8 Op. Atty Gen. 489, 1857 U.S. AG LEXIS 55, at *10-11 (1857). More recently, the Justice Department has explained that "it is not necessary that there be political overtones or actual attempts to overthrow government in order to invoke Federal authority; a riot can, for example, form the basis for Federal intervention with military forces." U.S. DEP'T. OF JUSTICE, THE USE OF MILITARY FORCE UNDER FEDERAL LAW TO DEAL WITH CIVIL DISORDERS AND DOMESTIC VIOLENCE 2 (1980). "Presidents have honored requests in varied situations of violence that extended well beyond 'insurrection' in the narrow sense of a political uprising." *Id.* at 4.[4]

Regardless of the precise scope of the Domestic Violence Clause, and whether it would cover a situation where (as petitioners claim existed prior to VAWA's passage) state institutions have failed to protect citizens against widespread violence of a particular kind (*i.e.*, gender-motivated violence), the Clause provides compelling structural evidence of "the primacy of the states in addressing domestic violence within their borders." Bybee, *supra*, 66 GEO. WASH. L. REV. at 4. It also serves as a "reaffirmation of the enumerated powers doctrine and a promise of federal nonintervention that prohibits not only the uninvited use of federal forces to combat crime, but also forbids *federal legislation* that displaces the states' obligation to protect their citizens by suppressing domestic violence." *Ibid.* (emphasis added) (footnote omitted); see also *id.* at 5 (Domestic Violence Clause "provides a guarantee to the states that the federal government will not interfere with a state's administration over crime" and covers "not only to the use of federal troops, but also * * * federal legislation that threatens to

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[4] For a catalogue of incidents in which federal involvement in domestic disturbances has been sought or obtained, see F. WILSON, U.S. ARMY, FEDERAL AID IN DOMESTIC DISTURBANCES, 1787-1903, S. Doc. 57-209 (1903); OFFICE OF THE JUDGE ADVOCATE GENERAL, FEDERAL AID IN DOMESTIC DISTURBANCES, 1903-1922, S. Doc. 67-263 (1923) (supplementing F. WILSON, *supra*). See also B. RICH, THE PRESIDENTS AND CIVIL DISORDER (1941).

displace or co-opt the states' responsibility against domestic violence").[5] "The Domestic Violence Clause" in short, "plays the role of a Tenth Amendment for crime." *Id.* at 4. Cf. *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 514 (1996) (Twenty-first Amendment "delegated to the several States the power to prohibit commerce in, or the use of, alcoholic beverages").[6]

The Executive Branch has acknowledged the critical role played by the Domestic Violence Clause in ensuring the proper allocation of authority between state and federal governments (U.S. DEP'T. OF JUSTICE, *supra*, at 1):

> Under the Constitution and laws of the United States, the protection of life and property and the maintenance of public order are primarily the responsibilities of state and local governments, which have the necessary authority to enforce the laws. The Federal government may assume this responsibility and this authority only in certain limited instances.

B. *The Guarantee Clause.* Recent scholarship has also suggested that the Guarantee Clause "implies a modest restraint on federal power to interfere with state autonomy," because the

[5] Because the Domestic Violence Clause applies to "[t]he United States," it obviously covers action by all three branches of the federal government.

[6] This Court has long recognized the limits on Congress's — and the federal courts' — power to regulate violent crime within the states. See, *e.g.*, *United States* v. *Cruikshank*, 92 U.S. 542, 553-54 (1875) ("It is no more * * * within the power of the United States to punish for a conspiracy to * * * murder within a State, than it would be to punish for * * * murder itself."); *Cohens* v. *Virginia*, 19 U.S. 264, 426 (1821) ("Congress has a right to punish murder in a fort, or other place within its exclusive jurisdiction; but no general right to punish murder committed within any of the States"); *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812) (federal courts lack power to create common law crimes).

"states cannot enjoy republican governments unless they retain sufficient autonomy to establish and maintain their own forms of government." Merritt, *The Guarantee Clause And State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 2 (1988). In like manner, Professor Tribe has argued that the Guarantee Clause's text "provides a compelling justification for the Court to use Article IV as a basis for marking the outer limits and inviolate spheres of state autonomy." 1 L. TRIBE, AMERICAN CONSTITUTIONAL LAW, at 910 (3d ed. 2000). He explains (*ibid.* (emphasis in original)):

> Enforcement of the Guarantee Clause would ensure that Congress would be unable to deny the states *some* symbolic corollaries of independent status; *some* revenue with which to operate; *some* sphere of autonomous lawmaking, law-enforcing, and dispute-resolving competence; and *some* measure of choice in selecting a political and administrative structure.

Under that reading, the Guarantee Clause might well prevent the federal government from passing a comprehensive national criminal code, family and domestic relations statute, or education law, especially if such statute displaced *all* state authority. Put differently, it is difficult to see how the States could continue to function in a republican form of government if they are completely or largely divested of power over traditional areas of authority such as criminal law. Cf. *New York* v. *United States*, 505 U.S. 144, 185 (1992) (federal statutory provisions could not "reasonably be said to deny any State a republican form of government" because "[t]he states * * * retain the ability to set their legislative agendas" and "state government officials remain accountable to the local electorate").[7]

[7] *Luther* v. *Borden*, 48 U.S. (7 How.) 1 (1849), does not require this Court to ignore the structural evidence contained in the text of the Domestic Violence and Guarantee Clauses in assessing the scope of Congress's authority under the Commerce Clause. In *Luther*, the Court refused to decide, in the wake of Dorr's Rebellion, which of two rival governments was the legitimate government of Rhode

C. *The Relevance Of Structural Evidence*. The Court has not hesitated to rely on structural evidence in interpreting the scope of Congress's enumerated powers. For example, in *Railway Labor Executives' Ass'n* v. *Gibbons*, 455 U.S. 457 (1982), the Court invalidated the Rock Island Railroad Transition and Employee Assistance Act ("RITA") on the ground that the law targeted a single bankrupt railroad and thus violated the "uniformity clause" of the Bankruptcy Clause. U.S. Const. art. I, § 8, cl. 4 (granting Congress the power to "establish * * * uniform Laws on the subject of Bankruptcies throughout the United States"). The Court rejected the notion that Congress could avoid this limitation in the Bankruptcy Clause by resorting to the Commerce Clause. "[I]f we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause," the Court explained, "we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws." 455 U.S. at 468-69.

The same is true here. Congress lacks the power to pass laws under the Commerce Clause that circumvent limitations on federal authority in the Domestic Violence (and Guarantee) Clauses. More importantly for present purposes, the Domestic Violence Clause supplies "independent reinforcement for the step the Court took in *Lopez* to rein in congressional attempts to

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Island, explaining that the issue was nonjusticiable because "it rests with Congress to decide what government is the established one in a State." *Id.* at 42. Similarly, the Court stated that "[i]t rested with Congress" to "determine upon the means proper to be adopted" to carry out or implement the Domestic Violence Clause. *Ibid.* As this Court made clear in *New York* v. *United States*, however, *Luther* does not stand for the proposition that *all* claims under the Guarantee Clause are nonjusticiable. 505 U.S. at 183-86. See also 1 L. TRIBE, *supra*, at 911-12 & n.34. And, in any event, even if the Guarantee and Domestic Violence Clauses do not confer judicially enforceable rights upon individuals, it does not follow that the clauses cannot be enforced by the States or taken into account by this Court in interpreting other provisions of the Constitution.

federalize crime and may even justify closer scrutiny of such legislation." Bybee, *supra*, 66 GEO. WASH. L. REV. at 5. Because the Domestic Violence Clause directly addresses the respective roles of the state and federal governments in dealing with violence within the States, it provides strong textual support for this Court's skepticism, in *Lopez*, concerning congressional attempts to regulate violence within the States under the Commerce Clause.

D. *The Benefits Of Relying On Structural Evidence*. If the Court were to make clear in this case that the Domestic Violence Clause imposes limits on Congress's authority under the Commerce Clause to regulate violent crime within the States, this would have the salutary effect of reining in Congress's continuing efforts to federalize traditional state-law crimes.

"Since the 1970s, Congress has vastly increased the federal government's jurisdiction over crime," largely by "criminaliz[ing] a variety of activities traditionally considered to be purely state matters." Hollon, *After the Federalization Binge: A Civil Liberties Hangover*, 31 HARV. C.R.-C.L. L. REV. 499, 499 (1996); AMERICAN BAR ASS'N, TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 7 (1998) ("ABA REPORT") ("More than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970.") (emphasis omitted). Even before Congress enacted the 1994 Crime Bill — which included VAWA's crime of "interstate domestic violence" and many other newly minted federal offenses, there were well in excess of 3,000 federal criminal laws on the books. ABA REPORT, at 94.[8]

Some of these new federal crimes have been created in

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[8] The list of activities that Congress has seen fit to punish as federal offenses today includes the physical disruption of a zoo, circus, or rodeo by a person who travels across a state line, 18 U.S.C. § 43; the interstate transportation of water hyacinths, *id.* § 46; and the transportation across state lines of dentures without the permission of a local dentist, *id.* § 1821.

response to a single, sensational event that received widespread publicity. See ABA REPORT, at 11-12.[9] Others, of which the provision involved in this case may well be an example, appear to be well-intentioned but largely symbolic (if VAWA's architect, Senator Biden, is to be believed). See Letter of Bruce Navarro, Deputy Assistant Attorney General, Department of Justice, to Chairman Joseph Biden, Jr., at 6 n.2 (Oct. 1990) ("1990 DoJ Letter") (quoting the following statement of Sen. Biden: "I hear commentators on television * * * saying, 'Well, will this stop violence against women * * * ?' The answer is no. That is not my intention. My intention * * * is to change the nation's attitude.").[10] See also J. JACOBS & K. POTTER, HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS 65 (1998) (noting "proliferation of hate crime laws in the 1980s and 1990s" and arguing that such laws "are symbolic statements requested by advocacy groups for material and symbolic reasons and provided by politicians for political reasons").

Needless to say, the widening gyre of federal criminal

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[9] Examples include the Lindbergh Kidnaping Act, 18 U.S.C. § 1201, and the federal carjacking statute, *id.* § 2119. See Bonner, *The Federalization of Crime: Too Much of a Good Thing?*, 32 U. RICH. L. REV. 905, 915 (1998) (carjacking statute was enacted "partially, if not wholly, in response to a single particularly grizzly incident of carjacking": the abduction of Pamela Basu and her daughter in suburban Maryland in 1992); *id.* at 917 ("[T]he fact that the perpetrators of the Basu incident were tried, convicted, and sentenced to life in prison by state prosecutors in a state court raises questions about the need for a new federal carjacking solution in the first place.").

[10] Deputy Assistant Attorney General Navarro's letter was the first of two Justice Department letters sent to Chairman Biden expressing serious concerns about the need for, and constitutionality of, VAWA. Neither letter is mentioned in Senator Biden's *amicus* brief or in the Solicitor General's brief. To our knowledge, neither letter was included by Senator Biden in the legislative record. For the Court's convenience, we have lodged 12 copies of both letters with the Clerk.

jurisdiction has had a major impact on the federal courts' workload. Between 1980 and 1998, the number of criminal cases filed in the federal courts rose from 27,968 to 57,691. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving The Federal Judiciary From The Federalization of State Crime*, 43 U. KAN. L. REV. 503, 505 (1995); Rehnquist, *The 1998 Year-End Report on the Federal Judiciary*, at 13 n.2 (1999).

Various Members of this Court have long urged Congress to exercise greater restraint in the creation of new federal offenses. See, *e.g.*, *Chief Justice's 1991 Year-End Report on the Federal Judiciary*, 24 THE THIRD BRANCH, at 2 (1992) (describing the "serious" impact of "the caseload crisis on the federal courts"). Most recently, the Chief Justice warned (*1998 Year-End Report*, *supra*, at 4):

> The pressure in Congress to appear responsive to every highly publicized societal ill or sensational crime needs to be balanced with an inquiry into whether states are doing an adequate job in these particular areas * * * . Federal courts were not created to adjudicate local crimes, no matter how sensational or heinous the crimes may be. State courts do, and can, and should handle such problems.

Every plea from the judiciary for greater restraint has fallen on deaf ears in the halls of Congress. This is plainly an area where the political checks of federalism have completely broken down. Miner, *Federal Court Reform Should Start At The Top*, 77 JUDICATURE 104, 105 (1993). Even after *Lopez*, Congress has continued to expand the catalogue of federal crimes. See ABA REPORT, at 92-93 n.3 (citing numerous crimes created in 1997-98); *id.* at 11 ("An estimated 1,000 bills dealing with criminal statutes were introduced in the most recent Congress.") (footnote omitted). Fortunately, the Constitution supplies an antidote to this serious problem of overfederalization: the structural limitations on the Commerce Clause that have previously gone unrecognized and unenforced. Those limitations strongly suggest that Congress lacks the authority, under the Commerce Clause, to federalize traditional, state-law crimes that

target violence within the States.

II. VAWA Provides A Compelling Illustration Of The Need To Enforce The Constitution's Structural Limitations On The Commerce Clause

In urging this Court to uphold Section 13981 of VAWA as a valid exercise of Congress's power to regulate interstate commerce and to enforce the Fourteenth Amendment, petitioners and their supporting *amici* place substantial emphasis on the existence of legislative findings. See Brief of Petitioner Brzonkala ("Brzonkala Br.") 20, 26-29, 42-48; U.S. Br. 17, 22-23, 29-30, 38. They also seek to portray the statute as the culmination of a painstaking, careful and exhaustive investigation by Congress. See, *e.g.*, U.S. Br. 17, 23 (Congress's findings "arrived at * * * after four years of study"); *id.* at 38 (urging deference because of Congress's "unique institutional capacity to gather information on a comprehensive basis"); Brief of Senator Biden As *Amicus Curiae* ("Biden Br.") 1-2 (suggesting that "Congress" conducted a "four-year investigation" which resulted in a "massive legislative record"). As we next explain, this picture bears little relationship to reality.

A. The Failure To Enact The Violence Against Women Act In The 101st And 102d Congresses

1. *The 101st Congress*. On June 19, 1990, Senator Biden introduced S. 2754, the Violence Against Women Act of 1990. S. Rep. 545, 101st Cong., 2d Sess. 29 (1990). The Senate Judiciary Committee, which was chaired by Senator Biden, staged hearings on S. 2754 on June 20, August 29, and December 11, 1990. *Ibid.*; S. Rep. 138, 103d Cong., 1st Sess. 39 (1993) ("S. Rep. 138"). On October 4, 1990, Senator Biden offered a substitute bill for S. 2754 during an executive business meeting, and the Judiciary Committee reported the bill favorably by a voice vote. S. Rep. 138, *supra*, at 39. "No other action was taken on the bill prior to the end of the 101st Congress." *Ibid.* Thus, VAWA failed to pass either the Senate or the House in the 101st Congress.

As explained above (see note 10, *supra*), during the 101st Congress the Department of Justice sent a letter to Senator Biden expressing "serious concerns" about S. 2754, including the bill's proposed "damages remedy for crimes of violence motivated by the victim's gender." See 1990 DoJ Letter, *supra*, at 1, 6-8. "[W]e cannot support the creation of a duplicative federal damage remedy," Deputy Assistant Attorney General Bruce Navarro explained, "particularly without a showing that current state remedies are inadequate." *Id.* at 6. The Department outlined several reasons to doubt the need for, and effectiveness of, the proposed damages remedy:

> First, * * * [p]roviding a federal cause of action against the rapist, who will frequently be judgment-proof, is not likely to be an effective deterrent, as you candidly acknowledged in the statement you released at a June 20 hearing you held on this subject.
>
> Second, in those cases where damages could be recovered, the new federal remedy provides little that is unavailable through existing state remedies. We are unaware of any state that lacks a cause of action for the intentional tort of battery, nor have we heard that many women have encountered problems in recovering punitive damages against the offender under state law.

Ibid. (emphasis in original) (footnote omitted).

The Department also expressed "serious concerns" about "the doubtful constitutional basis for the bill's cause of action insofar as it covers underlying acts that were not taken under color of state law." 1990 DoJ Letter, at 6. The Department elaborated:

> [W]e are unable to discern the authority for reaching purely private action. Unlike other civil rights legislation based on the commerce clause * * * or the Thirteenth Amendment * * *, either [of] which may constitutionally reach *certain* types of private conduct, this bill appears to be based upon the Fourteenth Amendment. But that amendment, by its

> plain terms and through consistent judicial interpretation, *reaches only state action*, and we have serious doubts that section 5 of the amendment supports legislation reaching the purely private conduct of a person who rapes or sexually assaults a woman, even if *Katzenbach v. Morgan*, 384 U.S. 641 (1966), is taken at face value.

Id. at 8 (emphasis added). Compare U.S. Br. 36-50.

The Justice Department also criticized S. 2754's proposed "creat[ion of] two new federal offenses relating to spousal abuse (interstate traveling to commit spousal abuse and interstate violation of protective orders)." 1990 DoJ Letter, at 4. "In our view," Deputy Assistant Attorney General Navarro explained,

> these two new offenses represent an enormous increase in federal law enforcement responsibility in a subject-matter area which has traditionally been one of the most decidedly local. *Family and domestic relations law, including its criminal aspects, has always been appropriately left to the states*, and we in the federal government should be most reluctant to federalize it.

Ibid. (emphasis added).[11]

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[11] The Justice Department also questioned the need for other aspects of S. 2754, including the bill's provisions encouraging "pro-arrest policies in cases of spousal or family violence," which the Department viewed as unnecessary in view of the broad advances in this area made at the state level:

> Forty states have made progress toward adopting pro-arrest policies and laws. Thirty states authorize policies officers to make an arrest for misdemeanor assault in domestic violence cases on the basis of probable cause alone, without having witnessed the assault or having an arrest warrant. Ten others have *mandated* arrest if probable cause exists. The trend is decidedly in the direction of pro-arrest policies; more than half of law enforcement agencies in cities with populations greater than 500,000 have such policies.

2. *The 102d Congress.* Senator Biden reintroduced VAWA in the 102d Congress as S.15. See H.R. Rep. 395, 103d Cong., 1st Sess. 28 (1993) ("H.R. Rep. 395"). Under Senator Biden's stewardship, the Judiciary Committee held a hearing on S. 15 on April 9, 1991. *Ibid.* After Senator Biden offered a modified version of S. 15, the bill was voted favorably out of committee by a voice vote on October 29, 1991. *Ibid.*; S. Rep. 197, 102d Cong., 1st Sess. 36 (1991). "No other action was taken on the bill prior to the end of the 102d Congress." S. Rep. 138, *supra*, at 39. VAWA failed to pass either the Senate or the House in the 102d Congress.

In connection with the April 9, 1991 Senate hearing, the Department of Justice sent Senator Biden a second letter reiterating its "serious concerns" about S. 15. See Letter of W. Lee Rawls, Assistant Attorney General, Department of Justice, to Chairman Joseph Biden, Jr. (April 9, 1991) ("1991 DoJ Letter"); see also note 10, *supra*. Referring to the damages remedy for gender-motivated violence, the Department stated:

> This title, which in a nutshell creates a federal damage remedy for rape, no matter who the offender or what the circumstances, is a minimally modified version of title III of S. 2754, on which we provided extensive comments in our letter on that bill last year. Since the concerns we expressed were not taken into account in S. 15, our views remain exactly the same.

1991 DoJ Letter, at 14; see also *id.* at 16-17 (bill would have the effect of "taking these tort claims out of the state courts, where they have been for two centuries, and putting them in the federal courts"). With regard to VAWA's new federal domestic relations crimes, the Department reiterated its concern that "family and domestic relations law is fundamentally local in nature, and we question the wisdom of federalizing it." *Id.* at 9.

1990 DoJ Letter, at 5 (emphasis in original). As enacted, VAWA included the post-arrest provisions that the Justice Department, in 1990, thought were unnecessary. See 42 U.S.C. § 3796hh.

The issue of overfederalization also came up in the House of Representatives during the 102d Congress. H.R. 1502, a House bill similar to S.15, was reported favorably by the Subcommittee on Crime and Criminal Justice during the 102d Congress. H.R. Rep. 395, *supra*, at 28. At a hearing before that subcommittee, Senator Biden appeared as a witness and urged enactment of H.R. 1502. *Violence Against Women: Hearing Before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary*, 102d Cong., 2d Sess. 7-12 (Feb. 6, 1992). Addressing concerns raised by Chief Justice Rehnquist about the bill's expansion of the workload of the federal courts, Senator Biden stated:

> We have got a Chief Justice who, I respectfully suggest, does not know what he is talking about, when he criticizes this legislation. What he is referring to is the one section of the bill that refers to making violence against women a hate crime * * * . * * * Now, the Chief Justice and others have suggested that the bill may burden the Federal courts unnecessarily. Let me tell you something. We have, under title [18] * * * , provisions making it a Federal crime if you move across a State line with falsely made dentures * * * [or] a cow * * * . * * * If we can take care of cows, maybe the vaulted [sic] chambers of the Supreme Court could understand it may make sense to worry about women * * *.

Id. at. 7-8. Thus, Senator Biden's rationale for why Congress should not be concerned about increasing the workload of the federal courts was because those courts had already been assigned responsibilities that were trivial or unimportant.

B. The Circumstances Surrounding Passage Of The Violence Against Women Act In The 103d Congress

On the first day of the 103d Congress, Senator Biden re-introduced VAWA in the form of S. 11, a modified version of the bill that had failed to win passage in the 102d Congress. S. Rep. 138, *supra*, at 40. Under Biden's stewardship, the Senate Judiciary Committee staged additional hearings on S. 11 in February, April, and November of 1993. See Biden Br. 2 n.3.

S. 11 was reported favorably out of the Judiciary Committee on November 17, 1993, and it was immediately added as an amendment to the pending crime bill, which was passed by the Senate. S. Rep. 138, *supra*, at 29; Biden Br. 3 n.4.

H.R. 1133, a bill similar to S. 11, was introduced in the House by Representative Pat Schroeder and others. H.R. Rep. 395, *supra*, at 28. On November 16, 1993, a House subcommittee conducted a hearing at which an organization of 57 chief justices of the States, territories, and the District of Columbia took the extraordinary step of publicly opposing H.R. 1133's creation of a federal cause of action for gender-motivated violence. See *Crimes of Violence Motivated By Gender: Hearing Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 103d Cong., 1st Sess. 77-84 (Nov. 16, 1993) (letter with attachments) ("*1993 House Hearings*"). Four days later, on November 20, H.R. 1133 was reported out of the House Judiciary Committee, but only after the Committee dropped the controversial damages provision from the bill. Biden Br. 3 n.5. The House passed H.R. 1133 in this form on the same day. See *id.* at 3 n.4. On April 14, 1994, the House again passed the Violence Against Women Act (without the damages provision) as part of the crime bill. *Ibid.*

Both chambers then appointed conferees to address the differences between the House and Senate crime bills. 140 Cong. Rec. S 6018, 6108 (May 19, 1994) (Senate agreed to House's request for a conference). The conferees met for the first time on June 16, 1994. 140 Cong. Rec. D 688 (June 16, 1994).

Three days before the Senate and House conferees' first meeting, an event occurred that would transfix the nation. As one commentator has succinctly explained:

> On June 13, 1994, a double murder in Southern California created more than a year's worth of sensational headlines and put the problem of domestic violence in the national spotlight. The bodies of Nicole Brown Simpson and Ronald Goldman were found stabbed to death outside Simpson's condominium. Several days later, police arrested Nicole

> Brown Simpson's ex-husband, football star O.J. Simpson, and charged him in the double murder. Almost immediately, the media revealed Simpson's history as an abusive husband. Recordings of a fearful Nicole Brown Simpson telephoning the emergency 9-1-1 center, relating her distress over an impending attack of her ex-husband, were broadcast across the world.

McKinley, *The Violence Against Women Act After* United States v. Lopez: *Will Domestic Violence Jurisdiction Be Returned to the States?*, 44 CLEV. ST. L. REV. 345, 345-46 (1996).

These sensational events had a profound impact on the political process, including in Congress. According to press accounts, during the initial meetings of the Senate and House conferees, VAWA was "imperiled partly by funding disagreements" (arising out of the House's desire to spend $700 million, much less than the $1.8 billion proposed by the Senate). *Lawmakers Push Domestic Violence Bill*, THE PHOENIX GAZETTE, June 29, 1994, at A7; accord Hohler, *Pressure Builds for Bill to Counter Domestic Violence*, BOSTON GLOBE, June 29, 1994, at 12. On June 22, 1994, however, a rally was held on Capitol Hill by supporters of VAWA who demanded that the bill be included in the pending crime bill. Edmonds, *A Call to Arms Against Spouse Abuse*, USA TODAY, June 23, 1994, at 3A. On June 28, Representative Patricia Schroeder and others, "[i]nvoking the name of Nicole Brown Simpson, * * * urged a panel of colleagues to loosen a legislative logjam and swiftly approve a sweeping bill aimed at curbing domestic violence." *Lawmakers Push Domestic Violence Bill, supra*, at A7.

On June 30, the same day that a hearing was held in the O.J. Simpson case, a series of events unfolded in Washington. President Clinton issued a letter condemning domestic violence as a national "crisis" and stating, in an apparent reference to Nicole Brown Simpson's 911 call, "We can no longer ignore the pleas of those in desperate need." Gordon, *Washington Focuses on Domestic Violence as Simpson Faces Evidence*, ASSOCIATED PRESS, June 30, 1994. In the House, a subcommittee convened

hearings on domestic violence even though VAWA was already in the hands of House and Senate conferees. See *Domestic Violence: Not Just A Family Matter: Hearing Before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary*, 103d Cong., 2d Sess. (June 30, 1994) ("*June 1994 Hearings*"). Following a grant of permission to the media to televise the proceedings, the hearing began with an explicit mention of the Simpson case and featured House members taking turns denouncing domestic violence, followed by the graphic testimony of five victims. See *id.* at 1-24.[12]

By mid-July of 1994, less than a month after Nicole Brown Simpson's murder, it could fairly be said that VAWA was "rocketing toward final passage, fueled largely by national publicity about O.J. Simpson's history of domestic abuse." Cummings, *Breaking Through*, ATLANTA CONSTITUTION, July 13, 1994, at A6. On July 13, press reports suggested that the conferees had reached general agreement on most of the crime bill, including an agreement to include the controversial damages provision relating to gender-motivated violence. *Ibid.* Senator Biden, who was a conferee for the Senate, confirmed this at a July 19, 1994 press conference. *Major Leader Special Transcript*, FEDERAL NEWS SERVICE, July 19, 1994, at 4.

Senator Biden himself candidly acknowledged the critical role played by the Simpson case in the conferees' ultimate decision to include the controversial damages provision:

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[12] At the hearing, Senator Biden criticized the House for omitting the civil damages provision that had been included in the Senate bill and elaborated on how that provision might have helped Nicole Brown Simpson. *June 1994 Hearings*, at 32 ("[T]here is the ability to say I will take the estate in Brentwood, thank you very much."); see also Bender, *Roth Shelves Principle, Votes for Spending Bill*, GANNETT NEWS SERVICE, July 1, 1994 ("[T]he death of one woman has reignited the fury over domestic violence. The fever-pitch coverage of the death of Nicole Brown Simpson will help the bill pass, Biden said. *'Now it's a stampede.'*") (emphasis added).

> Biden, a supporter of the Violence Against Women Act, conceded that the publicity surrounding O.J. Simpson's history of domestic violence played a major role in persuading House members to accept the toughest language on that provision. "I could assume that they realized I was right all along, but somehow I doubt that," the senator said.

Ibid.; see also Mehle, *Schroeder Calls Crime Bill Historic*, DENVER ROCKY MOUNTAIN NEWS, Aug. 22, 1994, at 3A ("'The whole violence against women acts is a very new focus . . . A lot of it might be attributed to the O.J. Simpson fallout.'") (quoting Rep. Schroeder).

Significantly, the Simpson case also catalyzed immediate action at the state level. As one newspaper reported only ten days after Nicole Brown Simpson's murder, "The public drumbeat is starting to spur action":

> States are rushing to toughen spousal abuse laws. In New York Tuesday, state legislators reached agreement on a bill that would require police to arrest suspected spouse-beaters. The New Jersey Assembly on Monday passed a package of six domestic violence bills drafted in the past year. Lawmakers in California are renewing a push for proposals to hold defendants in spousal abuse cases longer and set up a registry of restraining orders.

Edmonds, *supra*, at 3A; see also Armstrong, *Colorado Offers Answers on Domestic Violence*, CHRISTIAN SCIENCE MONITOR, July 19, 1994, at 3 (discussing developments in other states); *ibid.* ("Amid the klieg-light attention over the O.J. Simpson case, lawmakers from Washington D.C., to Washington State are revisiting whether to tighten domestic-abuse laws."). There is no evidence that these contemporaneous efforts by the States to address the problem of domestic violence, which obviously diminished the need for federal action, had any impact on the conferees in the month between Nicole Simpson's murder and the time the conferees reportedly agreed to include the VAWA damages provision.

As the foregoing account of VAWA's legislative history makes clear, it is simply not accurate to describe Congress's enactment of Section 13981 as the culmination of a careful, deliberate, thorough investigation conducted over four years. The bill failed to pass either chamber in the 101st Congress. It failed to pass either chamber in the 102d Congress. While both chambers of the 103d Congress finally passed the bill, the House version did not include the controversial damages provision at issue in this case. It was only when the news broke of a sensational crime that the conferees opted to include the damages provision from the Senate bill.

The primary impetus behind Section 13981's enactment, then, was all-too-familiar: a sensational public event that gripped the nation, dominated the media, and spurred Congress to take precipitous action. See also note 9, *supra*. Senator Biden himself all but admitted that this was what made the difference in Section 13981's acceptance by the conferees. Section 13981 was enacted, moreover, even though Nicole Brown Simpson's death also spurred *the States* to undertake immediate legislative reforms in the area of domestic violence. And it was enacted even though the Department of Justice had voiced concerns about the need for VAWA and its constitutionality. Finally, there is the dismissive treatment by Senator Biden of the Chief Justice's concerns about burdening the federal courts. All in all, Section 13981 provides a textbook illustration of why substantial deference to Congress's "judgments" about its authority to legislate under the Commerce Clause is unwarranted.[13]

III. VAWA Regulates Noncommercial Activity In An Area Of Traditional State Authority

A. In *United States* v. *Lopez*, 514 U.S. 549 (1995), this Court placed "enormous emphasis" on the "distinction between

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[13] See also 1 L. TRIBE, *supra*, at 818 n.47 ("A resourceful legislator (or legislative assistant) could likely compile an impressive array of materials connecting just about any activity to the national economy.").

regulation of commercial or economic activities and regulation of noncommercial, non-economic activities," as Judge Luttig's opinion ably demonstrates. *Brzonkala* v. *Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 832, 833 & n.5 (4th Cir.) (en banc), cert. granted, 68 U.S.L.W. 3177 (1999). That distinction, of course, flows directly from the text of the Commerce Clause, which confers on Congress the limited authority "[t]o regulate *Commerce* * * * among the several States." U.S. Const. art. I, § 8, cl. 3 (emphasis added). As Professor Tribe has correctly observed, this distinction does not suffer from the same flaws as the earlier lines this Court has drawn in attempting to delineate limits on the Commerce Clause:

> The problem with the pre-1937 doctrine was not so much that it attempted to define commerce — something one can hardly avoid when defining the power to *regulate* "commerce" — as that it did so in arbitrary ways, ways seemingly insensitive to economic realities. The pre-1937 Court made distinctions * * * between different *kinds of economic activity* (all of which seemed to involve "commerce" to the naked eye) without ever presenting a coherent explanation of *why* one kind of economic activity would be deemed "commerce" and another would not, * * * . The *Lopez* Court attempted to avoid * * * these * * * distinctions by settling on the seemingly more comprehensible and more readily defensible dichotomy between regulating, for whatever purpose, activity that is in *any* sense economic or commercial in nature, and regulating activity that plainly is not.

1 L. TRIBE, *supra*, at 822 (emphasis in original).

It is clear that the activity regulated by 42 U.S.C. § 13981 — violent criminal conduct that is motivated by gender — is not commercial in nature. Indeed, like the conduct at issue in *Lopez*, gender-motivated violence is activity in which "neither the actors nor the conduct have a commercial character, and neither the purposes nor the design of the statute have an evident commercial nexus." *Lopez*, 514 U.S. at 580 (Kennedy, J.,

joined by O'Connor, J., concurring). See *Brzonkala*, 169 F.3d at 834-36.

B. Section 13981 also regulates in several areas of traditional state authority. To begin with, the provision is clearly connected to state-law crimes of violence. Beyond that, it is duplicative of state intentional tort law. See Brief of the Association of American Trial Lawyers As *Amicus Curiae*, at 15 ("Virtually all violent conduct that inflicts or threatens physical harm to a person that would be punishable as a felony also constitutes an intentional tort under state law.").

Perhaps most importantly, it "is undisputed that a primary focus" of Section 13981 "is domestic violence, a type of violence that, perhaps more than any other, has traditionally been regulated not by Congress, but by the several States." *Brzonkala*, 169 F.3d at 842. Indeed, several of petitioners' *amici* underscore this point by suggesting that *most or all* domestic violence is actionable under Section 13981. See, *e.g.*, Brief of *Amici Curiae* AYUDA, Inc., *et al.*, at 8 ("As with domestic violence generally, domestic violence against immigrants is gender-specific.").

The "regulation of domestic relations * * * has long been regarded as a virtually exclusive province of the States." *Sosna* v. *Iowa*, 419 U.S. 393, 404 (1975). More than a century ago, this Court explained that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not the laws of the United States." *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890). That principle has been "consistently recognized" in this Court's cases. *Rose* v. *Rose*, 481 U.S. 619, 625 (1987); see also *Thompson* v. *Thompson*, 484 U.S. 174, 186 n.4 (1988) (referring to "the longstanding tradition of reserving domestic relations matters to the States"); *Santosky* v. *Kramer*, 455 U.S. 745, 771 (1982) (dissent) ("[T]he Court has scrupulously refrained from interfering with state answers to domestic relations

questions.").[14]

As explained above (at 17-19), the Justice Department vigorously opposed the enactment of Section 13981 in the 101st and 102d Congresses on the ground that it was duplicative of state intentional tort law and intruded upon traditional state authority over "domestic relations." So great was VAWA's incursion on traditional state authority in this area that an organization of state chief justices took the extraordinary step of publicly opposing the legislation. See Conference of Chief Justices, Resolution X, reprinted in *1993 House Hearings, supra*, at 83. The state chief justices explained that "spousal and sexual violence and all legal issues involved in domestic relations historically have been governed by state criminal and civil law," and that "state courts have the primary responsibility for administering a coherent and comprehensive system of civil, criminal, and domestic relations law and have the structure, experience and procedures for the proper disposition of all cases within their systems." *Ibid.*

C. Because it is rooted in the text of the Commerce Clause, the critical distinction articulated in *Lopez* between commercial and non-commercial activities is also relevant to Commerce Clause cases involving both the "channels" and the "instrumentalities" of interstate commerce. Equally relevant in such cases is the concern over congressional intrusion into areas of traditional state authority. The contrary assumption of many

[14] So deeply embedded is this principle that the federal courts have long recognized a "domestic relations" exception to diversity jurisdiction. *Ankenbrandt* v. *Richards*, 504 U.S. 689 (1992). See also *Thompson*, 484 U.S. at 186-87 (refusing to infer an implied right of action under the Parental Kidnaping Prevention Act of 1980, 28 U.S.C. § 1738A, because that would "entangle" the federal courts "in traditional state-law questions that they have little expertise to resolve"); *Lehman* v. *Lycoming County Children's Servs. Agency*, 458 U.S. 502, 511-12 (1982) (holding that "special solicitude for state interests" in area of family relations requires exclusion from federal habeas of challenges to child custody decisions).

lower courts, based on a misreading of this Court's decision in *Lopez*, has encouraged the government to argue for overbroad readings of "channels" and "instrumentalities" in order to evade scrutiny under *Lopez*. Unless this Court makes clear that these bedrock concepts, rooted in the text and structure of the Constitution, apply with equal force to all types of Commerce Clause cases, the Court's recent efforts to enforce the limits on the Commerce Clause will be easily circumvented.[15]

IV. Several Additional Factors Should Inform The Court's Commerce Clause Analysis In This Case

The Court's Commerce Clause cases have not always taken note of two very important considerations bearing on the constitutional inquiry, both of which support affirmance here.

First, in evaluating the extent of incursion by Congress into traditional areas of state authority as well as the logical implications of the government's theory of Commerce Clause power, the Court should take account of the fact that if Congress has the power under the Commerce Clause to regulate a subject matter, then it also has the power, under the Supremacy Clause, to *completely preempt* state authority in that area. *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985). In this case, for example, if Congress has the authority

[15] For a detailed explanation of the problem of attempted governmental circumvention in the lower courts, of why the *Lopez* framework is important in certain cases involving the "channels" of interstate commerce (especially those in which Congress federalizes a traditional state crime merely by tacking on an element of interstate travel), and of why cases such as *Caminetti* v. *United States*, 242 U.S. 470 (1917), are not to the contrary, see Petition for a Writ of Certiorari, *Gluzman* v. *United States*, No. 98-1326, at 23-30. For a thorough examination of the Commerce Clause, including a persuasive argument for further refinements, see Nelson & Pushaw, *Rethinking The Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1 (1999) (forthcoming).

under the Commerce Clause to enact Section 13981, it also possesses the power to displace entirely state intentional torts laws relating to the violent conduct of private individuals. It could also promulgate a national domestic relations law that would completely supplant state authority in this area. Such a role for the federal government, we submit, is unthinkable.

Second, in evaluating the consequences of ruling that Commerce Clause power does not exist in a particular case, this Court should bear in mind that the Commerce Clause is not the only basis for congressional action. Significantly, Congress has exceedingly broad authority to address social problems through the Spending Clause. See *South Dakota* v. *Dole*, 483 U.S. 203, 206-12 (1987) (Spending Clause power extends beyond direct grants of legislative authority and is not subject to limitation by other constitutional provisions in same manner). Thus, there is nothing to prevent Congress from offering the States substantial financial assistance in combating gender-motivated and domestic violence, as indeed Congress has done in VAWA. Moreover, Congress presumably could exercise its broad power under the Spending Clause to set up a national fund for compensating victims of gender-motivated violence, and thereby achieve exactly the same compensatory, remedial and symbolic objectives claimed for Section 13981 (without, however, either regulating the conduct of private actors or burdening the federal courts). Arguments about the baleful or catastrophic consequences of invaliding a congressional statute under the Commerce Clause are therefore usually grossly exaggerated if not entirely unfounded.[16]

CONCLUSION

The judgment should be affirmed.

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[16] *E.g.*, Biden Br. 4 (stating, incorrectly, that this case "tests whether Congress has power to address significant national problems that it has determined obstruct interstate commerce and threaten principles of equality").

Respectfully submitted.

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