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 AMICUS CURIAE INDEPENDENT WOMEN'S FORUM IN SUPPORT OF RESPONDENTS

Filed December 13, 1999

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Independent Women's Forum ("IWF") is a nonprofit, nonpartisan organization founded by women to foster public education about legal, social and economic policies, particularly those affecting women and families. IWF supports policies that promote individual responsibility, limited government, and economic opportunity.

IWF has sponsored public debate, provided legislative analysis, and offered congressional testimony criticizing the Violence Against Women Act, 42 U.S.C. § 13931, *et seq.*, ("VAWA"), and its civil remedy provision, 42 U.S.C. § 13981. IWF believes the provisions of VAWA are largely, and expensively, ineffective at preventing and punishing violent crime. Fundamental principles of federalism require that States retain their right and obligation to regulate local and purely private activities. U.S. Const. amend. X. The Constitution forbids the federal government from encroaching on State powers precisely so that citizens may demand from local governments a level of service and protection that suits their own needs. IWF believes that the personal safety of women and other citizens will be best secured by encouraging local enforcement and prosecution of violent crimes.

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[1] In accordance with Supreme Court Rule 37.6, amicus curiae represents that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus, has made any monetary contribution to the preparation or submission of this brief. All parties to these consolidated cases have consented to the filing of this brief urging affirmance, and the letters of consent have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States Court of Appeals for the Fourth Circuit correctly concluded on rehearing *en banc* that 42 U.S.C. § 13981 unlawfully extends Congressional power into areas traditionally reserved to the States in violation of well-settled principles of federalism and this Court's analysis in *United States v. Lopez*, 514 U.S. 549 (1995). It correctly discerned that reliance on the Commerce Clause to support VAWA lacks any logical limits and would justify almost any exercise of Congressional authority over any activity that could be found to have some remote economic effect.

Plaintiffs and their amici here argue for the same expansive definition of the commerce power rejected in *Lopez*. Under their proposed definition, wherever economic effects (however attentuated) could be discerned, Congress would have authority to regulate and potentially to occupy the field, even if that field were the civil and criminal justice systems of all states. The *Lopez* court confirmed prior jurisprudence rejecting any general police power vested in the federal government by the Constitution. Yet, Congress relied explicitly on what can only be reasonably characterized as an assertion of police power in enacting VAWA. Plaintiffs' belated attempt to justify VAWA's civil remedy under the Necessary and Proper Clause, an argument not raised before the Fourth Circuit, cannot save VAWA from judicial scrutiny because if the outer limits of the Commerce Clause have been exceeded, VAWA is not "necessary and proper" to the exercise of power under the Commerce Clause.

The Fourth Circuit also correctly rejected the argument advanced by Plaintiffs that Congress could enact the VAWA under § 5 of the Fourteenth Amendment. If the state action requirement of the Fourteenth Amendment is

ever discarded, this Court will have untethered its jurisprudence both from the text and history of the Fourteenth Amendment and will have created an unauthorized general federal police power.

ARGUMENT

1. Congress Lacks The Authority Under The Commerce Clause To Enact The Violence Against Women Act.

The Court in *Lopez* recognized that without an enforceable requirement that the subject matter regulated either be truly economic in nature or directly affect economics, the Commerce Clause would be without any coherent limitation that could be squared with settled conceptions of federalism.

> We pause to consider the implications of the Government's arguments. The Government admits, under its 'costs of crime' reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's 'national productivity' reasoning, Congress could regulate any activity that it found was related to the productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of [18 U.S.C.] § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States have

> historically been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.

514 U.S. at 564. Here, Plaintiffs and their amici offer the same or indistinguishably similar arguments about economic effects that this court found insufficient in *Lopez*. *See, e.g.*, Brzonkala Brief at 28-29; United States Brief at 6-8. *See also Lopez*, 514 U.S. at 563-64.

In *Lopez*, the Court identified four considerations to be examined when inquiring whether the regulated activity "substantially affects" interstate commerce: (1) whether the regulation of the activity is an essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated; (2) whether the statute under which Congress regulates contains a jurisdictional element of interstate commerce; (3) Congress' formal legislative findings; and (4) the impact of the regulation on areas in which the States have traditionally been sovereign. 514 U.S. at 559-64. It is axiomatic that the "regulation of noneconomic conduct remote from interstate commerce," *Brzonkala v. Virginia Polytechnic Inst. and State Univ*, 169 F.3d 820, 840 (4th Cir. 1999), fails the *Lopez* analysis because "[t]he power to 'legislate generally upon' life, liberty, and property . . . [is] 'repugnant' to the Constitution." *City of Boerne v. Flores*, 521 U.S. 507, 525 (1997) (citation omitted). The Fourth Circuit properly weighed these factors in finding that VAWA was not economic regulation. VAWA is not a part of any larger scheme of economic regulation and it manifestly lacks any jurisdictional requirements linked to interstate commerce. Its intrusion into areas of traditional state concern easily outweighs Congress' findings of

commercial impact, findings which are in any event predicated on the same limitless definition of what commerce means rejected in *Lopez*.

(a) The Areas In Which The States Have Traditionally Been Paramount Should Be Protected Against A Federal Claim To Regulate Anything That Remotely Affects Commerce.

The ultimate justification for keeping areas of domestic relations, criminal law, and education in local hands rests both on principle and prudence. *Lopez*'s conclusion that federalism must be maintained is sound in principle because that is what the Constitution says and is what the Founders intended. That conclusion is also reinforced by prudential concerns of particular interest to the IWF. The IWF submits that the presence of significant institutional capacities at the state level for dealing with family policies, and a minimal level of federal competence and experience in this area, makes sporadic federal intrusions in service of symbolism and "feel good" politics an undesirable policy.

In *Ankenbrandt v. Richards*, 504 U.S. 689, 703-04 (1992), this Court noted that the domestic relations exception to federal court jurisdiction rests not only on respect for long-held understandings but also on sound policy considerations. State courts already have the close association with state and local organizations that handle the issues that arise from conflicts over divorce, alimony, and child custody and support decrees. Moreover, state courts have a special proficiency developed over the past century and a half in handling these issues.

Moreover, allowing comprehensive federal regulation in such an area under the guise of the commerce power would offend the constitutional scheme in the additional sense that the function of the states as laboratories of public policy, particularly in areas where they have special expertise, would be negated by uniform, "top-down" solutions. *See Lopez*, 514 U.S. at 581 (Kennedy, J., concurring). While no reasonable person supports violence against women any more than threats of firearms in schools, there can be considerable differences of opinion about how to address the problem. "In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Id.*

(b) Congress Has Improperly Asserted A Claim To A General Police Power In The Act And Plaintiffs Are Proposing That Congress Be Permitted To Determine The Scope of Its Own Commerce Power Contrary To The Fundamental Principle Of Judicial Review.

When VAWA was passed, Congress explicitly invoked promotion of public safety and health as one justification for the Act. *See* 42 U.S.C. § 13981(a). While as a matter of strict legal analysis this Court may regard the Congressional claim of a power to legislate on grounds of health and safety as surplusage if actual sources of Congressional authority are sufficient, the claim to an exercise of police power invites and requires careful scrutiny, for an important precedent is being set. Furthermore, given the anti-Federalist bias reflected in VAWA, this Court should not be surprised to find that 42 U.S.C. § 13981 contains no limiting jurisdictional

requirement, *Brzonkala*, 169 F.3d at 869-70, one of the obligatory factors to be considered under *Lopez*. *Lopez*, 514 U.S. at 564-66. *See also* United States Brief at 32 n.15.

Congress did, of course, state in 42 U.S.C. § 13981 its secondary reliance on the Commerce Clause and the House of Representatives did declare that "crimes of violence motivated by gender have a substantial effect on interstate commerce." H.R. Conf. Rep. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853. And certainly such recitations and findings should be considered under *Lopez*. But, as this Court has observed, simply because Congress concludes that a particular activity substantially affects interstate commerce does not make it so. *Lopez*, 514 U.S. at 557 n.2. Permitting Congress to set the scope of its own power violates the principle of judicial review set out in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *United States v. Wilson*, 73 F.3d 675, 679 (7th Cir.), *cert. denied*, 519 U.S. 806 (1996). Whether particular activities affect interstate commerce sufficiently to come within the power of Congress to regulate them pursuant to the Commerce Clause is a judicial, not a legislative, question. *Lopez*, 514 U.S. at 557 n.2. Congress may not use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. *Id.* at 558. In this case, this Court should continue to heed the Framers by treating Congressional claims of omnicompetence with skepticism.

> It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it.
>
> The founders of our republics . . . seem never for a moment to have turned their eyes from

> the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations; which by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations . . . . [It] is against the enterprising ambition of this department, that the people ought to indulge all their jealousy and exhaust all their precautions. 'The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive and less susceptible of precise limits, it can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the coordinate departments. It is not unfrequently a question of real-nicety in legislative bodies, whether the operation of a particular measure, will, or will not extend beyond the legislative sphere.'

Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 253, 273-74 (1991) (quoting *The Federalist No. 48* 332-34 (J. Cooke ed. 1961)).

(c) The Alleged Approval Of The Act By Certain State Officials Is Constitutionally Irrelevant.

This Court has observed that "'the States occupy a special and specific position in our constitutional system . . .

.' The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (citations omitted). The invitation of certain state Attorneys General, holding their places for the moment, to uphold federal regulation in this area, Brzonkala Brief at 17; United States Brief at 12 n.5; State Attorneys General Brief at 1, and the similar appeals of state gender task forces, United States Brief at 9-11, 47-48; Brief Amici Curiae of the States of Arizona, *et al.*, at 19-20; Brief Amici Curiae of Law Professors at 22 n. 28, are simply irrelevant to constitutional analysis. As this Court held in *New York v. United States*, 505 U.S. 144, 181-82 (1992), the consent of state officials cannot revive a constitutionally infirm Congressional enactment. Separation of powers is a principle of constitutional hygiene which no official of the day can give away.

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals . . . . The constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States . . . . State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution.

New York, 505 U.S. at 181-82. The Constitution withholds power from the officials at all levels of government to alter the constitutional scheme on the well-founded suspicion that temporary political expediency will sometimes triumph over enduring principles. *See id.* at 182-83.

(d) Plaintiffs And Their Amici Misuse "Legislative History."

Plaintiffs and their amici argue at length that evidence heard by Congress should be deemed highly persuasive on the wisdom of VAWA's intrusion into the powers of the several States. *See, e.g.*, Brzonkala Brief at 10-17; United States Brief at 28-32. This is a clear misuse of "legislative history."

This Court has stated that in using legislative history it is the Committee Reports on the bill that represent the considered and collective understanding of the members involved. *Garcia v. United States*, 469 U.S. 70, 76 (1984). The Court has eschewed reliance on the comments of a single member. *Compare Garcia*, 469 U.S. at 76, *with* Brief Amicus Curiae of Senator Joseph R. Biden, Jr., at 12 n.14. Certainly, it cannot be presumed that committee reports issuing from only one house of Congress years before the statute in question was actually passed somehow establish the "intent" of a later Congress. *See Shannon v. United States*, 512 U.S. 573, 583 (1994) (observing that members of this Court have differing views on the role of legislative history even when it is comprehensive and accurate); Brief Amicus Curiae of Senator Joseph R. Biden, Jr., at 1-2 (noting that three different Congresses were involved in VAWA). Hence, a recitation of what members of Congress merely heard, *see, e.g.*, United States Brief at 7-8 & n.3-4 (hearings); Brzonkala Brief at 11-12 (statements of non-members), is not authority for what Congress found. *See*

Landgraf v. USI Film Prods., 511 U.S. 244, 263 n.15 (1994) (partisan statements carry little weight). Here, one house made no finding at all of any substantial effect on interstate commerce. *See Brzonkala*, 169 F.3d at 850.

Nor is the matter much advanced by citing "legislative history" to support Plaintiffs' pseudo legal reasoning and terminology. They use the terms "systemic" bias, United States Brief at 50 n.23, and "systemic" discrimination, Brzonkala Brief at 14-15, 43, which are vague terms borrowed from employment law. *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 245 (1989) (Title VII); *E.E.O.C. v. Shell Oil Co.*, 466 U.S. 54, 58 (1984) (employment); *Cannon v. University of Chicago*, 441 U.S. 677, 706 (1979) (Title IX). These terms lack any evident connection to the constitutional issues at hand, beyond seeking to establish a pejorative tone. Moreover, even in discrimination cases, this Court has consistently rejected the argument that societal discrimination alone warrants inattention to constitutional requirements. See *United States v. Virginia*, 518 U.S. 515, 547 (1996).

The Commerce Clause imposes its own requirement of a reasonable relationship between the end and the means. The discretion accorded Congress under the Commerce Clause "is subject to only one caveat - that the means chosen by it must be reasonably adapted to the end permitted by the Constitution." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262 (1964).

If mere congressional findings alleging disparities in treatment in tortfeasors and criminals by the legal systems of the various States were sufficient to invoke plenary federal power to legislate in the field, there would be no limit on federal authority. Such a sweeping claim is no more plausible than, to use the example employed by the Fourth

Circuit, to establish a national regulatory authority over commercial effects of insomnia. *See Brzonkala*, 169 F.3d at 839.

Interestingly, if a remote effect on economics is all that matters under the Commerce Clause, then Congress could just as easily have adopted a bill intended to particularly protect men instead of adopting the VAWA. Men are 77.1% of murder victims. Federal Bureau of Investigation, *Crime in the United States: 1993 Uniform Crime Reports* at 16. Even apart from murder, men are much more likely to be victims of violent crime. Bureau of Justice Statistics, *Criminal Victimization in the United States 1993* (May 1996) (NCJ-151657) at 10 Table 2 (violent crime rate is 60.9 per thousand for males and 42.3 per thousand for females). Except for rape/sexual assault, the victimization rate for every category of violent crime was higher for males than females. *National Crime Victimization Survey: Criminal Victimization 1994* (Apr. 1996) (NCJ-158022) at 5.

Furthermore, men are punished more severely than women. Women generally receive substantially shorter average sentences than do men for the same crimes. Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 1993* (1994) at 615. Approximately 95.5% of state prison inmates are men. *Id.* at 611. Among federal prisoners, 92.3% are men. *Id.* at 628. And men killing their wives receive substantially longer sentences (excluding life sentences and the death penalty) than do women who kill their husbands, with sentences for unprovoked spousal killings averaging seventeen years for men compared to seven for women. Bureau of Justice Statistics, *Spouse Murder Defendants in Large Urban Counties* (Sept. 1995) (NCJ-156831) at 3.

Besides relying on advocacy research, Plaintiffs and their amici, like the groups that originally supported VAWA before Congress, have omitted some key facts. Most violent crime is committed by men, against men. The Bureau of Justice Statistics reports that over 67% of homicides are male-on-male. U.S. Department of Justice, Bureau of Justice Statistics, *Homicide Trends in the U.S.: Gender* (last modified Jan. 4, 1999) (http: //www.ojp.usdoj.gov/bjs/homicide/gender.htm.) For every violent crime except rape, males are victimized at higher *rates* than females. Bureau of Justice Statistics, *Victim Characteristics* (last modified Jan. 2, 1999) (http://www/oip.usdoj.gov/bjs/cvict_v.htm.) Looking at activities that might arguably involve "interstate commerce," males are more likely than females to be victims of workplace violence, Bureau of Justice Statistics, *Workplace Violence: 1992-1996*, (July 1998) (NCJ 168634) at 2, 6, and violence while traveling. Bureau of Justice Statistics, *Sex Differences in Violent Victimization* (Sept. 1997) (NCJ-164508) at 8. ("Females were more likely to be victimized in a private home ... than any other place.") Over 90% of workplace fatalities are males. Bureau of Labor Statistics, *Fatal Occupational Injuries by Selected Worker Characteristics and Event or Exposure* (1994) at 1. (last modified July 29, 1996) (http://www.bis.gov./cfoi/cftb0028.txt). The reports of disparity in workplace murder *rates* result from the fact that men are killed by many other causes (*e.g.*, accidents), which affect women less. *See* Kingsley R. Browne, *Sex and Temperament in Modern Society*, 37 Ariz. L. Rev. 971, 979 (1995). Given the large disparity in victimization rates, it seems most unlikely that the costs of violent crime against women exceed, or are even disproportionate to, the costs of violence against men.

The only violent crimes that disproportionately victimize women, rape and sexual assault, have declined

steadily since 1980. This remains true even though "rape" was recently redefined to include attempts, verbal threats, and "psychological coercion" in the National Crime Victimization Survey. Bureau of Justice Statistics, *Rape Trends* (last modified Jan. 14, 1999) (http://www.ojp.usdoj.gov/bis/glance/rape.htm.) Reported rapes on campuses are a minute percentage of total enrollments (*e.g.*, less than 500 of 5,000,000 total enrollment). Even assuming that only a small percentage of rapes are reported, the campus rate is well below one percent. Neil Gilbert et al., *Was It Rape? An Examination of Sexual Assault Statistics* 11 (1995); Federal Bureau of Investigation, *Crime in the United States: Uniform Crime Reports* 158-67 (1994).

VAWA provides grant incentives for states to adopt mandatory arrest policies, 42 U.S.C. § 3796hh, which require police to make an arrest of the partner they judge to be at fault (or even both partners) when called to a domestic assault scene. These policies have produced an unexpected result: substantial increases in arrests of women. Advocates and social scientists suggest various explanations, but "virtually no one claims to fully understand the phenomenon, which mystifies because it so diverged from the widely accepted estimate that 95% of batterers are men." Even Bonnie J. Campbell, Director of the Department of Justice's Violence Against Women Office, admits, "We are seeing numbers that suggest that young women are getting more aggressive." Carey Goldberg, *Spouse Abuse Crackdown, Surprisingly, Nets Many Women*, N.Y Times, Nov. 23, 1999, at A1, A14. (http://www.nytimes.com/yr/mo/day/news/national/ domestic-abuse.html).

Statistics from the Department of Justice Office of Juvenile Justice and Delinquency Prevention show that between 1981 and 1997, violent crime by girls increased

107%, compared to a 27% increase for boys. Terry Carter, *Equality With a Vengeance*, ABA Journal, Nov. 1999, at 22. Gang activity by girls also has become a notable problem. *See* Chicago Crime Commission, *The Girls Behind the Boys: Girls in Gangs* (1999). These facts belie the underlying premise of VAWA, that women as a group are subject to oppression by men as a group. The truth is far more complex.

Although violence against women has declined since 1976, "female-to-male violence showed no decline and was actually higher and about as severe as male-to-female violence." Richard J. Gelles, *The Missing Persons of Domestic Violence: Battered Men*, The Women's Quarterly, Autumn 1999, at 18, 20.

Professor Gelles emphasizes therein that women, usually smaller and weaker than men, are more likely to be injured as a result of partner violence, but that rates of assault are about equal for men and women.

Statistics are a particularly treacherous basis for constitutional reasoning particularly when the need for federal action is premised on a failure to act in accordance with the policy preferences of a certain intellectual faction of the population. A rule permitting Congress to "regulate commerce" by taking over traditional state functions based on transient views of the meaning of sociological data would simply not be principled Commerce Clause jurisprudence nor would it comport with *Lopez*. Furthermore, much of what Plaintiffs present as factual legislative history is demonstratively specious.

The four Senate Judiciary Committee hearings in 1990 and 1991 presented only witnesses who supported the bill. Cathy Young, *The Sexist Violence Against Women Act*,

Wall St. J., Mar. 23, 1994, at A15. Ms. Young reported that when a men's rights proponent asked to testify about gender bias in the bill (it originally literally granted rights only to women and not men), he was told to submit a statement for the written record. "He did so; when the record appeared, his statement was not included." *Id.*

Those who testified in favor of VAWA generally represented the very groups and interests that stood to gain from the five-year, $1.6 billion federal spending authorization under VAWA. Many such organizations and agencies, including the States, have filed briefs amici curiae in support of Plaintiffs.

Most of the "evidence" in the legislative history supporting VAWA is not factual data, but advocacy research consisting of the selective use of anecdotes and rhetoric to support a predetermined political result. Philosophy professor Christina Hoff Sommers devoted two chapters of her 1994 book *Who Stole Feminism?* to an exposé of the "noble lies" told by gender feminists to support their claims that the "patriarchy" uses systematic violence to oppress women as a class. Christina Hoff Sommers, *Who Stole Feminism?* 188-226 (1994).

Professor Sommers also dissected a media hoax that took the country by storm at the start of the 103d Congress (which eventually passed the then-pending VAWA bill). Days before Super Bowl Sunday in 1993, a coalition of women's groups called a press conference at which they claimed that a study by Old Dominion University had found a 40% increase in police reports of beatings and hospital admissions in Northern Virginia after football games won by the Washington Redskins during the 1988-89 season. *Id.* at 189. Journalists and commentators all over the country spread the alarm, including interviews of domestic violence

specialists who surmised, for example, that "provocatively dressed cheerleaders at the game may reinforce abusers' perceptions that women are intended to serve men." *Id.* at 190. Washington Post reporter Ken Ringle checked the sources, however, and found that the researchers whose work was cited denied having made any such findings or statements. Professor Sommers summarized the incident this way, *id.* at 15:

> No study shows that Super Bowl Sunday is in any way different from other days in the amount of domestic violence. Though Ringle exposed the rumor, it had done its work: millions of American women who heard about it are completely unaware that it is not true. *Id.* at 15.

Most of the supposed "facts" relied on by Congress in enacting VAWA and reiterated in briefs by Plaintiffs and their amici are, like the Super Bowl hoax, not true. Richard J. Gelles, Ph.D., a professor in the Child Welfare and Family Violence Department of the University of Pennsylvania School of Social Work, is one of the nation's foremost experts on this subject. He is the author or co-author of scores of publications, including (with Murray A. Straus) *Intimate Violence* (1988) and *Physical Violence in American Families: Risk Factors and Adaptations to Violence in 8,145 Families* (1995).

Professor Gelles has analyzed the content and sources of several common statements about domestic violence and found them to be unsupported, misleading or outright false.[2]

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[2] Professor Gelles has given permission to the Independent Women's Forum, among others, to reprint his memorandum, "Domestic Violence Factoids," which is reproduced in Appendix A.

Many of the same distortions appeared in the legislative history of VAWA and now reappear in the briefs of Plaintiffs and their amici, as though continued reliance on false statistics and nonexistent studies could somehow gives VAWA constitutional credibility, *e.g.*, United States Brief at 23-30; Brief Amici Curiae of National Network to End Domestic Violence, *et al.*, at 4-8, 16-22; Brief Amici Curiae of Lawyers' Committee for Civil Rights Under Law, *et al.*, 6-13; Brief Amicus Curiae of Senator Joseph R. Biden, Jr., *passim*.

Plaintiffs and their amici also cite congressional findings based on various state "Gender Bias Task Forces" dating from the mid-1980s to the early 1990s. The brief amici curiae of 35 state Attorneys General and Puerto Rico details the results of these state task forces, which generally found state efforts "inadequate." Brief Amici Curiae of the States of Arizona, *et al.*, 15-20. In fact, however, it has to be admitted that the states have not been inactive in this field. "States' longstanding efforts to address pervasive gender-based violence . . . have included significant legislative changes in domestic violence and sexual assault statutes." *Id.* at 20. Thus, when they conclude that those efforts "have thus far fallen far short of eliminating a widespread problem," they are making an assumption that more of the same at the federal level is needed. *Id.* No support is offered for the implicit assumption that federal efforts would be more effective.

Ideological distortions have produced a law that is not only unconstitutional, but harmful to the victims it purports to help. As Prof. Sommers notes, "Battered women don't need untruths to make their case before a fair-minded public that hates and despises bullies; there is enough tragic truth to go around." Christina Hoff Sommers, *Who Stole Feminism?*, at 17.

Unfortunately, VAWA was based on advocates' rhetoric, rather than honest scientific research. As a result, many VAWA programs are counterproductive (such as the mandatory arrest policies discussed above)[3] and even dangerous. VAWA uses the promise of federal grants to encourage treatment of offenders, but standardized programs are unsuitable for effectively treating the myriad of individual problems that are associated with intimate violence. Thus, according to some experts, "the man comes out of a useless mandated treatment program no less violent than when he went in, but with a clean bill of health." Sally L. Satel, M.D., *It's Always His Fault*, The Women's Quarterly, Summer 1997, at 4, 7 (quoting Prof. Richard M. McFall, Indiana University).

Dr. Satel, a practicing psychiatrist, reviewed numerous VAWA programs and concluded:

> [T]he battered women's movement has outlived its useful beginnings, which [were] to help women leave violent relationships and persuade the legal system to take domestic abuse seriously. Now they have brought us to a point at which a single complaint touches off an irreversible cascade of useless and often destructive legal and therapeutic events. This could well have a chilling effect upon victims of real violence, who may be reluctant to file police reports or to seek help if it subjects them to further battery from the authorities.

Id. at 10.

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[3] *See supra* p.14.

Of course, there already exist federal causes of action that protect citizens against deprivation of federal civil rights, including the Equal Protection Clause's guarantee against governmental discrimination based on sex. If there really were demonstrable state bias in state criminal justice systems in the sense of intentional discrimination, an equal protection remedy would already exist. There is no need to dishevel the Constitution to provide that protection. Besides, the civil remedy provision of VAWA has a peculiar disconnect with the claimed "legislative history" of state bias and failure - its rule barring removal to federal court, 28 U.S.C. § 1445(d). It is odd, in light of the purported justification for the Act, that Congress would confine these cases to the same state court systems whose "invidious discrimination" against women supposedly justified enactment of VAWA in the first place. *See* 42 U.S.C. § 13981(e)(3).

Brzonkala's contention that 42 U.S.C. § 13981 is constitutional under the Necessary and Proper Clause, not argued below, adds nothing of substance to the debate. If VAWA falls beyond the outer limit of the Commerce Clause, then passage of VAWA was not a "necessary or proper" exercise of commerce power. *Printz v. United States*, 521 U.S. 898, 923-24 (1997).

The theory that any perceived evil, no matter how much a traditional concern of state or local government, demands sweeping federal intervention and regulation displays a lack of patience with democratic processes. States in the exercise of their own public policy may wish to address the problems with distinct solutions tailored to local or statewide concerns. That such responses may vary is not evidence of the failure of our system of government but of its

success, proving that the grand constitutional structure protecting our liberties is working.

> The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided . . . by the Congress . . . . With all of the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted constraints spelled out in the Constitution.

I.N.S. v. Chadha, 462 U.S. 919, 959 (1983) (citations omitted).

2. Congress Has No Power Under the Fourteenth Amendment To Regulate Purely Private Action.

Plaintiffs and their amici ask this Court to adopt an extreme anti-federalistic rule that § 5 of the Fourteenth Amendment grants Congress broad power to regulate purely private conduct upon a congressional finding that State inaction has resulted in statistical inequality. This plea for a sweeping federal power is foreclosed by history and

precedent. More than a century ago, Congress passed a statute that by its terms sought to provide a remedy against private persons for deprivations of federal civil rights, now codified as 42 U.S.C. § 1985(3). This Court's treatment of 42 U.S.C. § 1985(3) in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), and *United Brotherhood of Carpenters & Joiners of Am., Local 610 v. Scott*, 463 U.S. 825, 828-29 (1983), is as instructive on the question of Congressional authority as it is destructive to Plaintiffs' case. The relevance of that statute is also heightened because Congress cited it as a precedent for VAWA. S. Rep. No. 103-138, at 64 (1993).

Despite Congress' assertion to the contrary, § 1985(3), as interpreted by this Court, does not support sweeping assumptions of omnicompetence that underlie VAWA. Section 1985(3) was originally enacted as § 2 of the Civil Rights Act of 1871. In *United States v. Harris*, 106 U.S. 629, 637-40 (1883), the criminal provision of the Act was held unconstitutional as exceeding the boundaries of Congress' power under § 5 of the Fourteenth Amendment. *Brzonkala*, 169 F.3d at 865. For many years, the analogous civil provision, 42 U.S.C. § 1985(3), was construed as reaching only conspiracies under color of state law. *Collins v. Hardyman*, 341 U.S. 651 (1951). Then in *Griffin v. Breckenridge*, 403 U.S. 88, 95-96 (1971), this Court held that, at least as to certain limited facts, the statute could reach private action violating the guarantees of the Thirteenth Amendment, an amendment not requiring state action. It was this distinctly limited right of action against purely private deprivations of federal rights that this Court explained in *Bray*.

Bray v. Alexandria Women's Health Clinic involved a § 1985(3) claim against antiabortion groups allegedly obstructing and interfering with women seeking abortions.

Section 1985(3) requires the plaintiff to allege and prove four elements: (1) a conspiracy (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, and (3) an act in furtherance of the conspiracy, (4) whereby a person is either injured in his property or deprived of any right or privilege of a citizen of the United States. *United Brotherhood of Carpenters*, 463 U.S. at 828-29. The district court granted an injunction against the challenged activity and the Fourth Circuit affirmed. *National Org. for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990), *rev'd in part, vacated in part sub nom. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). This Court reversed, holding that plaintiff showed neither the required animus nor any interference with federal rights protected against encroachment by private persons. *Bray*, 506 U.S. at 268.

This Court held that to reach private actors, the right infringed must be one protected not only against governmental, but also against private, interference. *Bray*, 506 U.S. at 275. The range of such rights is exceedingly narrow. *Id.* at 278. This Court has recognized two – the Thirteenth Amendment right to be free from involuntary servitude, *United States v. Kozminski*, 487 U.S. 931 (1988), and, in the same Thirteenth Amendment context, the right to interstate travel, *United States v. Guest*, 383 U.S. 745, 759 n.17 (1966). *Id.* It has rejected a claim that an alleged private conspiracy to infringe First Amendment rights violated § 1985(3), holding that the statute cannot not apply to a right protected only against state interference, but only to one also protected against private interference. *Id.* (citing *United Brotherhood of Carpenters*). As the *Bray* Court said:

> There are few such rights. The right to abortion is not among them. It would be most

> peculiar to accord it that preferred position, since it is much less explicitly protected by the Constitution, than, for example, the right of free speech rejected for such status in *Carpenters*. Moreover, the right to abortion has been described in our opinions as one element of a more general right of privacy, or of Fourteenth Amendment liberty, and the other elements of those more general rights are obviously not protected against private infringement. (A burglar does not violate the Fourth Amendment, for example, nor does a mugger violate the Fourteenth).

Id.

Thus, *Bray* makes it clear that Congress' power to reach and regulate private tortious action is extremely narrow, and in doing so, *Bray* built on a consistent line of cases limiting the federal power to regulate private conduct. As this Court stated in *United Brotherhood of Carpenters*:

> Had § 1985(3) in so many words prohibited conspiracies to deprive any person of the Equal Protection of the laws guaranteed by the Fourteenth Amendment or of Freedom of Speech guaranteed by the First Amendment, it would be untenable to contend that either of those provisions could be violated by a conspiracy that did not somehow involve or affect a state. 'It is commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under color of authority. The Equal Protection Clause "does not . . . add any thing to the rights which one citizen has under the Constitution against another."

> As Mr. Justice Douglas more recently put it, "The Fourteenth Amendment protects the individual against state action, not against wrongs done by individuals." This has been the view of the Court from the beginning. It remains the Court's view today.' *United States v. Guest*, 383 U.S. 745, 755 (1966).

463 U.S. at 831-32 (citations partially omitted).

This Court's construction of *United States v. Guest* in both *Bray* and *United Brotherhood of Carpenters* refutes various attempts to bootstrap concurrences in *Guest* into a contrary principle. *See* United States Brief at 47 n.28. One federal court has already explicitly stated that the argument that the concurrences in *Guest* stand for a Congressional power under the Fourteenth Amendment to enact laws punishing conspiracies regardless of state action is unsound, observing that "[w]hile what could loosely be termed a 'majority' expressed such a view, the matter is only one of academic interest since the opinion of the Court stated the exact opposite." *United States v. Wilson*, 880 F. Supp. 621, 635 (E.D. Wis.), *rev'd on other grounds*, 73 F.3d 675 (7th Cir. 1995). The *United Brotherhood of Carpenters* Court explicitly held that the Fourteenth Amendment *does not* provide authority to proscribe exclusively private conspiracies generally. 463 U.S. at 862-63.

Moreover, *Griffin* does not create a broad federal right to regulate private conduct. *See* Brzonkala Brief at 46; Brief Amicus Curiae of Senator Joseph R. Biden, Jr., at 17. In *Griffin*, this Court limited its holding by observing that it need not find the language of the governing statute constitutional in all its possible applications in order to uphold its facial constitutionality as applied to the particular complaint. *Griffin*, 403 U.S. at 104. That decision also

relied on Congressional power under the Thirteenth Amendment and the constitutionally protected right to travel, which do not rest on Fourteenth Amendment grounds. *Id.* at 104-06. Moreover, the *Griffin* Court held that an attempt to construe the statute as a general federal tort law would be unconstitutional. *Id.* at 101-02. In *United Brotherhood of Carpenters*, the Court stated that *Griffin* did not hold that when the alleged conspiracy is aimed at a right protected only against state interference (such as the equal protection violations alleged here), a § 1985(3) plaintiff need not prove state involvement. 463 U.S. at 862.

Bray also is fatal to attempts by Plaintiffs to string together general statements or dicta to argue that Congress' enforcement power "may at times also include the power to define situations which Congress determines threaten the principles of equality and to adopt prophylactic rules to deal with those situations." United States Brief at 37 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (O'Connor, J., concurring)). As Justice O'Connor stated in *Bray*, the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." *Bray*, 506 U.S. at 354 (O'Connor, J., dissenting).

Brzonkala attempts to avoid the obvious result dictated by this jurisprudence by concluding that VAWA grants a substantive right "premised on substantive findings of equal protection violations by state actors" to be free of violent crime motivated by gender-based animus. Brzonkala Brief at 48. But this argument begs the question of the source of Congressional power to create a general right to freedom from tortious acts of private individuals. *See Brzonkala*, 169 F.3d at 852. Just as the Court rejected the Equal Protection Clause of the Fourteenth Amendment as a valid source of power to regulate private conduct in *United Brotherhood of Carpenters*, so too has it rejected any right to

be free of violent crimes stemming from the Amendment's Due Process Clause:

> Nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of minimal level of safety and security . . . . [I]ts language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means . . . . Its purpose was to protect the people from the State, not to ensure that the State protected them from each other.

DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 195-96 (1989). Thus, there is no Fourteenth Amendment right to protection against the tortious conduct of others.

If Congress actually enjoyed the expansive power under § 5 of the Fourteenth Amendment that Plaintiffs and their amici claim, it would be difficult to account for an entire body of Fourteenth Amendment jurisprudence from this Court determining when private conduct becomes sufficiently involved with governmental action to invoke the Amendment. Nor can a case frequently cited by Plaintiffs and their amici, *Heart of Atlanta Motel*, be reconciled with their theory, since the Court there used the Commerce Clause to uphold the constitutionality of Title II of the Civil Rights Act of 1964, rejecting, at least by implication, Justice Douglas' opinion that Congress' § 5 power was sufficient. *See Heart of Atlanta Motel*, 379 U.S. at 281.

Clearly, Plaintiffs' theory defies any historical understanding of state action analysis. *See Brzonkala*, 169 F.3d at 885. It also ignores the second part of the test set forth in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982), that the challenged action be undertaken by one who may be fairly said to be a state actor – a state official or one who obtained significant aid from the State or whose acts are otherwise chargeable to the State. The police, prosecutors, judges and court personnel of this nation would no doubt be surprised to learn that their efforts, unappreciated as though they might be, are not *deterring* but instead *causing* a class of criminals to deprive victims of crimes of violence of their civil rights. Such arguments, however earnestly made, are constitutionally fanciful and provide no justification for Plaintiffs' flawed public policy goals of overturning federalism and creating the "potential for Orwellian mischief." *Arizona v. Evans*, 514 U.S. 1, 25 (1995) (Ginsburg, J., dissenting).

CONCLUSION

Plaintiffs and their amici argue for upholding the constitutionality of the civil remedy provision of the Violence Against Women Act, 42 U.S.C. § 13981, on grounds that threaten the constitutional rights of all citizens. If Congress had the authority to regulate all activities that have a discernable effect on commerce, however remote or indirect it might be, then there would be no area of life exempt from federal regulation. The well-established state action requirement of the Fourteenth Amendment exists to limit government encroachments. Those urging the constitutionality of VAWA are slighting longstanding and well-settled conceptions of the value of federalism to the preservation of our liberty. As amicus curiae, the Independent Women's Forum respectfully asks this Court to

affirm the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully Submitted,

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