Granted

Nos. 99-5, 99-29

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER

V.

ANTONIO J. MORRISON, ET AL., RESPONDENTS

CHRISTY BRZONKALA, PETITIONER

V.

ANTONIO J. MORRISON, ET AL., RESPONDENTS

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

BRIEF OF LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICI CURIAE*

This case brings into play two of our basic constitutional commitments: first, to a federal system that both guarantees the States a major role and gives Congress broad responsibility over interstate commerce, and second, to a nationwide guarantee that all persons enjoy the equal protection of the laws. Amici, law professors (identified in an addendum below) who teach and write about constitutional law, the federal courts or jurisprudence, will discuss how the Violence Against Women Act (VAWA) civil rights remedy is an apt response to the combined demands of these constitutional commitments.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1994, Congress enacted VAWA, a multi-faceted statute responding to the inequality that women victims of violence encounter in state justice systems and to the economic injuries that this violence creates. The statute provides funding to the states for criminal law enforcement against perpetrators of violence, and for a variety of other assistance. *See generally* 42 U.S.C. §§13931-14040. The provision at issue here, Section 13981, creates a new federal civil rights remedy for victims of violence resulting from "animus based on the victim's gender."

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[1] Consent has been given by the four parties to amici to file this brief. In accord with Rule 37.6, no counsel for a party has authored the brief in whole or in part nor has any one but amici and their counsel funded its preparation and submission.

Unlike recent legislation invalidated by this Court, the new civil rights remedy was enacted after four years of deliberate congressional consideration of the ways violence against women implicated two of Congress' basic constitutional responsibilities: to protect interstate commerce and guarantee equal protection. Much of the evidence came from state officials, and specifically state judiciaries, which reported that state and local police, prosecutors and judges were not yet providing equal protection for women. Congress responded with substantial funding resources for the states, but concluded that a supplemental civil rights remedy was also necessary. This provision was drafted and redrafted to respond to concerns of both state and federal judges that state courts remain the adjudicators of domestic relations law. Congress narrowed the statutory cause of action to the most serious offenses, prohibited supplemental jurisdiction over any state law claims involving divorce, alimony or child custody, and denied removal of state claims. *See* 42 U.S.C § 13981(d), (e)(1), (4); 28 U.S.C. § 1445 (d).

Creation of this civil rights remedy is well within Congress' powers under the Commerce Clause and the Fourteenth Amendment. It is respectful of the federalism principles articulated by this Court in *United States v. Lopez*, 514 U.S. 549 (1995) and *City of Boerne v. Flores*, 521 U.S. 507 (1997). It is consistent with long-established constitutional allocations of powers to the federal courts and the Congress. It should be upheld.

I. The national government has power, under the Commerce Clause, to protect interstate and foreign commerce from injurious obstructions, whatever their source, so long as the regulated activities "substantially affect" commerce. *Lopez*, 514 U.S. at 559; *see NLRB v. Jones & Laughlin Steel Corp.*,

301 U.S. 1, 37 (1937). Since the 1960s, this Court and the Congress have recognized the need to protect the national economy from the injurious effects of discrimination that disable members of historically subordinated groups from participating fully in national economic life. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). Congress called on this power to enact VAWA.

Through its many hearings, Congress identified specific harms to interstate commerce that amply satisfied the *Lopez* requirement of a "substantial effect" on interstate commerce. Extensive evidence from business organizations, mental health professionals and individuals made plain that the special hazards of violence faced by women limited their choices, affecting the jobs women took, and the times, hours, and places they worked. Violence against women harmed the national economy in terms of workplace productivity, the dollars lost to absenteeism, and health care costs. The record fully supports the conclusion that violence against women "restricts movement [and] reduces employment opportunities."[2]

Unlike the statute in *Lopez*, VAWA's civil remedy is based on a well-identified and substantiated need to protect commerce from the injurious effects of an environment of violence against a "quasi-suspect" class of persons, women, long treated by law and still treated by many as less than fully deserving of participation in economic life. Congress' approach is limited; it made no claim to general police powers nor did it "federalize" criminal or tortious acts based on some speculative and remote economic impact.

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[2] S. Rep. No. 103-138, 54-55 (1993).

In reviewing the extensive factual basis established for congressional action, the Court must take care not to initiate a new era of judicial second-guessing of matters properly for the legislature. Such an enterprise has no limits or boundaries. Rather than embark on a boundless oversight role, this Court should respect Congress' decision to protect the Nation's economy from injuries that spring from gender-based threats of violence.

II. Congress' extensive record demonstrates that state criminal justice systems deny women equal protection of the laws in the most fundamental sense: States fail to treat violent assaults against women as seriously as they treat violent assaults against men. Until recently, states regulated rape and domestic violence in explicitly sex-based terms; and Congress learned that this understanding of rape and domestic violence as assaults on women remains pervasive. Numerous witnesses and studies commissioned by the state judiciaries reported that official responses to violence continue to be shaped by stereotypical thinking. From the initial report to the police through prosecution, trial and sentencing, state actors take crimes against women less seriously than other crimes. This differential treatment violates the core command of the Equal Protection Clause: that women are entitled to the same protection from assault as men enjoy.

In creating VAWA's civil rights remedy, the Congress sought to enforce -- not to revise -- the core guarantees of the Equal Protection Clause. The exercise of this enforcement power raises none of the concerns addressed in *City of Boerne v. Flores*. The basic purpose of the Court's proportionality test was to prohibit pretextual uses of the enforcement power. Where there is no evidence of pretext, Congress's remedial powers under the Fourteenth

Amendment are broad and Congress is entitled to "wide latitude" to design effective remedies. *See Boerne*, 521 U.S. at 520.

Congress' decision to create a civil remedy is consistent with its larger purpose in enacting VAWA: to work in partnership with the States to eradicate historic forms of bias against women. Creating new damage or injunctive remedies against the states or their officers might have discouraged federal-state cooperation and interfered with the everyday administration of criminal justice. By contrast, VAWA's narrowly crafted civil remedy encourages state and local governments to work with victims of gender motivated violence, leaving states as the primary guarantors of protection of their citizens from violent assaults.

ARGUMENT

I. VAWA Is An Appropriate Exercise of the Commerce Clause Power to Protect the Nation's Economy From Injuries Resulting From Violence Directed At Women.

This Court recognizes that Congress does not have a general police power. It cannot regulate simply because of a remote or slight relationship between a local activity and the national economy. *United States v. Lopez*, 514 U.S. 549 (1995). But Congress can fully protect interstate and foreign commerce from injurious obstructions as long as the regulated activities have a substantial effect on commerce. In its "watershed case"[3] of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), this Court concluded that Congress' Commerce Clause "power is plenary and may be

[3] *United States v. Lopez*, 514 U.S. 549, 555 (1995).

exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.'" *Jones & Laughlin*, 301 U.S. at 37 (citing *Second Employers' Liability Cases*, 223 U.S. 1, 51). Acting under this authority, Congress has long protected the Nation's economy from the injurious effects of discrimination against racial minorities and women.

A. The Commerce Clause Empowers Congress To Protect The Economy From Injuries Stemming from Discrimination.

By the 1960s, both the Congress and the Court came to understand that one "'source of the dangers which threaten'" commerce, *Jones & Laughlin*, 301 U.S. at 37, is discrimination. *See Heart of Atlanta Motel v. United States*, 379 U.S. at 257; *Katzenbach v. McClung*, 379 U.S. at 300-01. The Court did not uphold the challenged anti-discrimination laws because of the "insignificant" amounts of food purchased in interstate commerce, *McClung*, 379 U.S. at 300-01, but because systematic, invidious discrimination itself harms interstate commerce.[4] This same power provides ample constitutional foundation for the civil rights remedy of VAWA.

In affirming Congress' leading role in addressing such discriminatory barriers, the Court described the record before Congress as "replete with testimony of the burdens placed on interstate commerce by racial discrimination in

[4] As the Court noted, the "absence of direct evidence connecting discriminatory restaurant service with the flow of interstate food [on which appellees had relied], given the evidence as to the effect of such practices on other aspects of commerce" was not crucial. *McClung*, 379 U.S. at 304-05.

restaurants," including lowered per capita spending by the victims of the discrimination, the effect of discrimination in discouraging travel, and the deterrence to professional and skilled people moving into areas where such practices occurred. *McClung*, 379 U.S. at 299-300. Likewise, *Heart of Atlanta Motel* upheld the statute because of the "overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse." 379 U.S. at 257. As the Court explained,

> "It was this burden which empowered Congress to enact appropriate legislation, and given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce . . .was also deemed a social and moral wrong." *Id.*

This history, recognized in *Lopez*, confirms that Congress has the power to protect the national economy from the injurious effects of pervasive discrimination that blocks historically subordinated groups from equal participation in national economic life. This well-settled constitutional doctrine is now woven into the fabric of our national life and public commitments.

B. Congress Acted On A Compelling Record Showing Direct and Substantial Injuries to Commerce.

The evidence before Congress reflected a pattern of gender motivated violence that was part of a framework of law and practice discriminating against women persisting into the modern era.[5] In hearings around the country,

[5] For example, state laws prohibited women from entering particular

congressional committees learned how such violence prevents women from competing with men for jobs and income in the marketplace.

Several organizations presented data detailing the barriers. James Hardeman, a Manager in the Polaroid Corporation, described the workplace disruption and poor job performance caused by violence against female employees. He explained how the creation of workplace-based counseling groups responded to battering -- when violence against women stopped, women "secured better jobs" in the company.[6]

The President of the National Federation of Business and Professional Women (a bipartisan organization of 120,000 members) described the "enormous" "costs in lost employment opportunities" to women victims of violent assault:

> "Violent crimes committed against women employees directly impact their ability to perform at work, their absenteeism rates and the medical benefit costs to the employer. . . .[W]omen find their employment

professions, *see, e.g., Goesart v. Cleary*, 335 U.S. 464 (1948) (upholding state law excluding women from bar-tending) and provided legal preferences to husbands over wives in various capacities, *see, e.g., Reed v. Reed*, 404 U.S. 71 (1971) (invalidating preference for male over female executors). For discussion of sex-based laws regulating sexual assaults, see *infra* at 18-23.

[6] *See Hearing on Domestic Violence: The Need to Concentrate the Fight Against an Escalating Blight of Violence Against Women, Hearing Before the Senate Comm. on the Judiciary*, 103d Cong. 16 (Feb. 1, 1993) (statement of James Hardeman, Manager, Counseling Department, Polaroid Corp.) [hereinafter *Senate Hearing 1993*]

> options in life sharply reduced."[7]

See also Senate Hearing 1993 at 241 (discussing constraints on women's employment because of fear of violence when using public transportation). The Federation also detailed the high rates at which raped women left their jobs, how men prevented women from leaving their homes to go to work, and how violence against college-aged women impaired their ability to pursue an education, thereby reducing their economic opportunities.[8]

[7] *Violence Against Women: Victims of the System, Hearing on S. 15 Before the Senate Comm. on the Judiciary*, 102d Cong. 239-41 (Apr. 9, 1991) (statement of Elizabeth Athanasakos, National President, National Federation of Business and Professional Women, Inc.) [hereinafter *Senate Hearing 1991*]

[8] Congress also received evidence that as many as 3-4 million women a year were victims of domestic violence, 137 Cong. Rec. H. 20, 29230 (1991) (Rep. McDermott), and that survey data showed that 9.3% of abused women reported taking time off from their jobs because of domestic violence. *See Senate Hearing 1991, supra* note 7, at 240 (statement of National Federation of Business and Professional Women). *See also* S. Rep. No. 102-197, at 53 (1991) (noting studies reporting that almost 50% of rape victims lose their jobs or must quit because of the severity of the crime).

Many victims of sexual assault reported difficulties in keeping or finding employment.[9] The Commission on the Status of Women of New York City reported that

> "The economy, and therefore everyone's standard of living are affected in numerous ways when women are the victims of violence. . .when women do not accept jobs because they fear the hours they would need to work would be too risky . . ."[10]

Congress learned of other adverse effects on the national economy. The National Federation of Business and Professional Women emphasized the substantial adverse effect of violence against female employees on small businesses.[11] Witnesses estimated that businesses lost $3-5 billion annually "due to absenteeism" and loss of productivity related to violence against women.[12] Physicians testified, for example, that at least 37% of female hospital

[9] *See, e.g., Senate Hearing 1991*, supra note 7, at 131-33 (testimony of Amy Kaylor, from Toledo, Ohio); *Violence Against Women: Fighting the Fear, Examining the Rise of Violence Against Women in the State of Maine and Other Rural Areas, Hearing Before the Senate Comm. on the Judiciary*, 103d Cong. 13-17 (Nov. 12, 1993) (testimony of Lisa); *Violence Against Women, Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong. 55-58 (Feb. 6, 1992) (testimony of Jane Doe of New York City) [hereinafter *1992 House Subcomm. Hearing*].

[10] *1992 House Subcomm. Hearing, supra* note 9, at 116 (statement of New York City Commission on the Status of Women); *see id* at 117 (also noting harm to economy when women "cannot work because of possessive/abusive spouses, or they are limited to working in places where the spouse can maintain control or contact").

[11] *Senate Hearing 1991, supra* note 7 at 239-40.

[12] *See id.* at 240; *Women and Violence, Hearing Before the Senate Comm. on the Judiciary*, 101st Cong. 58 (Jun. 20, 1990) (statement of Helen R. Neuborne, Exec. Dir., NOW Legal Defense & Educ. Fund).

emergency room cases are due to abuse, and Representatives learned of the Surgeon General's conclusion that "battery is the single largest cause of injury among women."[13] Health care costs, by some estimates, were $5-10 billion per year.[14]

In sum, as the Senate Judiciary Committee reported, the prevalence of violence against women in the United States "restricts movement [and] reduces employment opportunities" for women. S. Rep. 103-138, at 54 (1993).[15] The conclusion Congress reached—that violence against women, directed at them as women, harms the national economy by preventing women's equal participation, *id*—is one that should come as no surprise to this Court, which has reviewed the harmful effects of gendered violence in a variety of settings.[16]

[13] *See Violent Crimes Against Women: The Problems of Violence Against Women in Utah and Current Remedies, Hearing before the Senate Comm. on the Judiciary*, 103d Cong. 74 (Apr. 13, 1993) (statement of Dr. John Nelson, Deputy Director, Utah Dept of Health); *1992 House Subcomm. Hearing, supra* note 9 at 1 (statement of Rep. Schumer).

[14] Majority Staff Report, Senate Comm. On the Judiciary, 103d Cong., 1st sess., *The Response to Rape: Detours on the Road to Equal Justice* 14 (Comm. Print S. 103-147, 1993) (citing article in American Medical News).

[15] *See* H.R. Conf. Rep. No. 103-711, at 385 (1994) (violence against women "deter[s] potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business . . . in interstate commerce" with "substantial adverse effect on interstate commerce. . . diminishing national productivity [and] increasing medical and other costs").

[16] *See, e.g., Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (sexual harassment in workplace); *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661 (1999) (assaultive behavior toward schoolgirl). In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Court noticed the relationship between women's freedom from physical violence in the most intimate spheres of their lives and their ability to participate with

C. Upholding VAWA Will Open No Constitutional Floodgates Because, In Contrast to *Lopez*, Congress Sought To Advance A Traditional Federal Interest -- Freeing Commerce From Injuries Inflicted By Specific Patterns of Discriminatory Conduct.

Lopez does not question Congress' power to identify and respond to obstructions to commerce. The Gun Free School Zones Law invalidated in that case was the subject of a single hearing, at which constitutional questions about Congress' power were raised but not addressed. The government's brief did not suggest that Congress had actually considered the relationship between schoolyard violence and the national economy.[17] And the government defended the statute with a generic 'cost of crime rationale' that provided no way to delimit the range of permissible exercises of the federal commerce power over crime.

In contrast, when enacting VAWA, Congress undertook a serious effort at determining the economic effects of harms from discrimination, an area in which federal regulatory power is well-established. The legislative record leaves no doubt that Congress had a more than

equality in the national economy, striking down a spousal notification provision in part because of its potential for violence. This Court explained that "for two decades of economic and social developments" people had made choices in reliance on the availability of abortion, and that women's "ability . . . to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Id.* at 856.

[17] *See* Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 Harv. L. Rev. 2180, 2239 & n. 255 (1998) (describing congressional record and Government's Brief in *Lopez*).

"rational" basis on which to conclude that violence against women had very substantial effects on interstate commerce. The detailed findings and extensive legislative record make more than plain to the "naked eye," *Lopez,* 514 U.S. at 563, the injurious effects to the national economy resulting from past failures to deter, prevent and penalize violence against women.

Unlike the broadreaching relationship between violence and the economy asserted in *Lopez*, VAWA addresses a circumscribed arena. The direct effects of violence against women on their participation in the national economy were thoroughly documented—grown women lost jobs, time from work, economic opportunities. By contrast, the link between gun possession near schools to the national economy seemed remote to this Court, built on a long chain of assumed events.

Upholding VAWA will not "open the floodgates" to an unlimited congressional power to federalize civil and criminal law. To date, counsel have identified only 51 cases with reported decisions in which plaintiffs asserted civil claims under VAWA, and of these 23 (or 45%) involve workplace (14/51), other commercial (2/51) or educational (7/51) settings.[18]

[18] Cases involving workplace-related claims against employers or other employees include McCann v. Rosquist, 185 F.3d 1113 (10th Cir 1999); Henderson v. Heartland Press Inc., 1999 U.S. Dist. LEXIS 16466 (N. D. Iowa 1999); Grace v. Thomason Nissan, 1999 U.S. Dist. LEXIS 12711 (D. Ore. 1999); Whitaker v. Mercer County, 1999 U.S. Dist. LEXIS 14680 (D.N.J. 1999); Manikhi v. Mass. Transit Admin., 733 A.2d 372 (Md. Ct. Spec. App. 1999); Avila-Franco v. Worrell, 1998 U.S. Dist. LEXIS 12129 (D.D.C. 1998); Mattison v. Click Corp., 1998 WL 32597 (E.D. Pa. 1998); Randa Truong v. Smith, 28 F. Supp. 2d 626 (D. Colo. 1998); Braden v. Piggly Wiggly, 4 F. Supp. 2d 1357 (M.D. Ala. 1998);

Finley v. Higbee Co., 1998 U.S. Dist. LEXIS 21010 (N.D. Ohio 1998); Anisimov v. Lake, 982 F. Supp. 531 (N.D. Ill. 1997); Newton v. Coca-Cola Bottling Co., 958 F. Supp. 248 (W.D.N.C. 1997); Crisonino v. New York City Housing Auth., 985 F. Supp. 385 (S.D.N.Y. 1997); Bell v. Cuyahoga Community College, 1998 Ohio App. LEXIS 3741 (Ohio Ct. App. 1998). Other commercial settings include Wesley v. Don Stein Buick, Inc., 985 F. Supp. 1288 (D. Kan. 1997) (claim by customer against salesman); Palazzolo v. Ruggiano, 993 F. Supp. 45 (D.R.I. 1998) (claim by patient against psychiatrist). Cases involving educational settings include this case and Gross v. Weber, 186 F. 3d 1089 (8th Cir. 1999) (claim by former student against former teacher); Doe v. Old Rochester Regional Sch. Dist., 56 F. Supp. 2d 114 (D. Mass. 1999) (claim by student against teacher); Liu v. Striouli, 36 F. Supp. 2d 452 (D.R.I. 1999) (claim by graduate student against professor/advisor); Ericson v. Syracuse Univ., 35 F. Supp. 2d 326, 45 F. Supp. 2d 344 (S.D.N.Y. 1999) (claim by student against coach); Thorpe v. Virginia State Univ., 6 F. Supp. 2d 507 (E.D. Va. 1998) (claim by student against student); B.F. v. Smith, 1998 Minn. App. LEXIS 300 (Minn. Ct. App. 1998) (same). Six cases involved claims against police, security or parole officers, *see e.g.*, Williams v. Bd. of County Commrs, 1999 U.S. Dist. LEXIS 13532 (D. Kan. 1999); Harris v. Zappan, 1999 U.S. Dist. LEXIS 8404 (E.D. Pa. 1999). One case involved claims against social acquaintances, *see* Doe v. Walker, 1999 U.S. App. LEXIS 24625 (1st Cir. 1999); one was by a parishioner against a minister, *see* Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997); one involved an alleged assault in a federal prison, *see* Thomasson v. United States, 1999 U.S. Dist LEXIS 13534 (D. Kan 1999); and one arose from an attack by a stranger, *see* Bridges v. City of Dallas, 1998 U.S. Dist LEXIS 8925 (N.D. Tex. 1998). Fourteen of the 51 cases involved claims against present or former spouses or boyfriends, *see, e.g.*, Kuhn v. Kuhn, 1999 U.S. Dist LEXIS 11010 (N.D. Ill. 1999) (spouse); Culberson v. Doan, 1999 WL 765970 (S.D. Ohio 1999) (boyfriend). (Four of the 51 cases did not have reported descriptions of the factual settings.)

Of course, assaults outside the workplace can also have a direct effect on the workplace, and the fact that violence occurs in family settings, as well as commercial, educational, prison, religious, and social settings, does not preclude federal jurisdiction. *Cf. Ankenbrandt v. Richards*, 504 U.S. 689, 704 (1992) ("domestic relations" exception to federal jurisdiction does not preclude tort action for assaults by father on children but applies only to divorce, child custody and alimony).

As the States' chief law enforcement officers recognized in urging Congress to enact VAWA,[19] the federal and the state governments have concurrent and complementary roles to play in this effort. Congress gave careful attention to federalism concerns in the lengthy drafting process, designing a civil cause of action that does not supplant any state remedies, and which limits the federal remedy to the most egregious instances of gender motivated violence. No state processes are reorganized by federal mandate. No state officials' time or tasks are commandeered. Establishing a federal remedy against perpetrators of gender-motivated violence is an appropriate means of removing barriers to the full and equal participation of women in the economic life of the nation.[20]

D. When Congress Deliberately Gathers Facts To Address A Problem Of National Import, The Court Must Be Careful Not To Intrude Lest It Violate The Separation of Powers.

Congress has the primary constitutional responsibility for developing appropriate responses to national economic problems. For most of our constitutional history, the Court

[19] *See Senate Hearings 1991*, *supra* note 7 at 37-38 (National Association of Attorneys General Resolution supporting enactment).

[20] The absence of a case-by-case inquiry into whether a particular act of gender motivated violence affects commerce cannot be fatal to the question of Congress' power here. For in *Katzenbach v. McClung*, a similar argument was made, that Congress should have provided for a case-by-case determination that "racial discrimination in a particular restaurant affects commerce." 379 U.S. at 303. The Court decisively rejected this contention. "Confronted as we are with the facts laid before Congress, we must conclude that it had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce. " *Id.* at 304.

has heeded the words of *McCulloch v. Maryland*, 17 U.S. 316, 423 (1819), that "where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government . . . to inquire into the degree of [the law's necessity] would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."[21] When Congress began to respond to the economic challenges of late 19th and early 20th centuries, the Court repeatedly overturned legislation, asserting categorical limits on the commerce power.[22] Judicial attempts to constrain congressional development of economic policy came to a close in the late 1930s and 1940s, as the Court came to defer to Congress' superior capacity to define and respond to a wide range of problems with a significant impact on the national economy.

In the last decade, the Court has increased its scrutiny of the basis for congressional action. Unsupported assertions of a national interest, *see Lopez*, 514 U.S. at 567, pretextual justifications to support action actually aimed at a goal outside of national power, *see Boerne*, 521 U.S. at 532, or de minimis examples of a potential problem not yet of serious national import, *see Florida Prepaid Postsecondary Ed. Exp. Bd. v. College Savings Bank*, 119 S. Ct 2199, 2210

[21] *See also id* at 421 (Constitution gives Congress discretion to carry out its powers "in the manner most beneficial to the people.").

[22] *See, e.g., Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918) (invalidating federal law regulating movement of goods produced by child labor on ground that conditions of production were reserved to the states), overruled in *United States v. Darby*, 312 U.S. 100, 115-17 (1941); *Carter v. Carter Coal Co.*, 298 U.S. 238, 308-09 (1936) (invalidating Bituminous Coal Conservation Act on ground that only states could regulate terms of work in mines, notwithstanding the magnitude of coal strikes' effects on Nation's economy); for discussion, *see* BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE §5.02-.04 (1999).

(1999), will not suffice. Requirements of substantiation, however, should not be translated into requirements that congressional "findings" mimic the judicial process. Rules of evidence do not and should not apply, nor should court-based burdens of proof arguments. Indeed, as Justice Kennedy, concurring in *Lopez* counseled, judicial review should be predicated upon "great restraint." *Lopez*, 514 U.S. at 568. *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992)(Kennedy, J., concurring) (noting Congress' "power to define injuries and articulate chains of causation" for standing purposes).

A decision striking down VAWA would be wholly inconsistent with the Court's foundational jurisprudence on congressional power from 1937 forward. Were the Court to conclude that the evidence of direct and substantial effects on commerce was not sufficient in this case, a host of congressional statutes would be open to question. Indeed, challenges are already underway to a wide variety of federal statutes, including the Endangered Species Act, the Clean Water Act, CERCLA, the Child Support Recovery Act, and many others.[23]

What principles would guide this Court as it worked through the many statutes so challenged? How many witnesses, what kind of documentary material, and how long a hearing would suffice? The edifice of national power would be subject to repeated challenges as the Court reweighed the probative value of legislative investigations that form the predicate for congressional action.

But the Court should not and need not embark on

[23] *See* Antony Barone Kolenc, *Commerce Clause Challenges After United States v Lopez*, 50 Fla. L. Rev. 867, 905-06, 914 (1998).

such an enterprise. The question under our Constitution is not what injuries to commerce the Court might find (nor, as to the Fourteenth Amendment, what remedies for constitutional discrimination the Court could give). The question is whether Congress had an adequate basis for acting under the Commerce Clause in creating the civil rights remedy in VAWA. As we have shown, the record before Congress was more than adequate to demonstrate that this is an arena in which Congress can lawfully act. To overturn this law, enacted with care and deliberation on this record, would indeed be to "pass the line which circumscribes the judicial department . . . to tread on legislative ground." *McCulloch v. Maryland*, 17 U.S. at 423.

II. THE VIOLENCE AGAINST WOMEN ACT IS AN APPROPRIATE EXERCISE OF CONGRESS' POWERS TO ENFORCE THE FOURTEENTH AMENDMENT.

A. Congress Found Pervasive and Entrenched Patterns of Sex Discrimination in State Criminal Justice Systems.

Congress enacted VAWA's civil rights remedy after years of hearings that documented widespread patterns of sex discrimination in state criminal justice systems. The evidence before Congress demonstrated that states deny women equal protection of the laws in the most fundamental sense: States fail to treat violent assaults against women as seriously as they treat other forms of violent assault. The pattern of sex discrimination Congress uncovered is pervasive, entrenched, and openly acknowledged by the state judiciaries themselves:

> "Study after study commissioned by the highest courts of the States . . . has concluded that crimes disproportionately affecting women are often treated less seriously than comparable crimes against men. Collectively these reports provide overwhelming evidence that gender bias permeates the court system and that women are most often its victims."

S. Rep. No. 102-197, at 43-44 (1991) (internal quotations omitted) (citing Gender Bias Task Force Reports from 17 states); *accord* S. Rep. No. 103-138, at 49 (1993).

For centuries States have regulated rape and domestic violence as assaults against women, and this explicit understanding of the gender of the victims not only shaped how state actors regulated such assaults in the past. As Congress recognized, gender-based discrimination continues in the administration of the criminal law today.

Historically, States regulated domestic violence in explicitly sex-based terms:

> "Until the 20th century, our society effectively condoned family violence, following a common-law rule known as the 'rule of thumb,' which barred a husband from 'restraining a wife of her liberty by chastisement with a stick thicker than a man's thumb.'"[24]

Long after States formally repudiated a husband's common-

[24] S. Rep. No. 103-138, at 41 (1993); *see generally* Reva B. Siegel, *'The Rule of Love': Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2123-25 (1996) (discussing treatises and cases recognizing the husband's common-law prerogative to "chastise" or "correct" his wife).

law prerogatives, law enforcement officials often refused to intervene when husbands beat their wives. Until quite recently, this denial of equal protection was announced in openly sex-based terms.[25]

Like domestic violence, rape is a form of assault that States have traditionally defined and punished in explicitly sex-based terms. Following the common law, they also allowed husbands to rape their wives with impunity. While most States have now repealed or revised the marital rape exemption, the record before Congress showed that, even after these reforms, many States still refuse to protect women from husbands who rape or assault them.[26]

In short, until quite recently, States often defined and regulated rape and domestic violence in overtly sex-based

[25] *See* Siegel, *supra* note 24, at 2150-74. As late as 1975, the Oakland Police Department's *Training Bulletin on Techniques of Dispute Intervention* warned that "arrest will only aggravate the dispute or create a serious danger for the arresting officers . . . when a husband or father is arrested in his home." Del Martin, *Battered Wives* 93-94 (1976) (quoting Oakland Police Department's training bulletin). Congress could reasonably find that such discriminatory practices did not come to an end with the elimination of gender-specific language from police manuals. *See, e.g., 1992 House Subcomm. Hearing, supra* note 9, at 2 (statement of Rep. Charles Schumer) ("For hundreds of years, the legal system explicitly condoned violence against women. . . . . The rule of thumb now is that domestic violence cases are nothing but lovers' quarrels that are best left to be resolved without the police and the courts.").

[26] When the Congress first began to consider the problem of violence against women, it found that seven states did not define marital rape as a crime and 26 other states allowed prosecutions only under restricted circumstances. S. Rep. No. 102-197, at 45 n. 50 (1991)(citation omitted); this pattern persists today. *See* Jennifer Gaffney, *Amending the Violence Against Women Act: Creating a Rebuttable Presumption of Gender Animus in Rape Cases*, 6 J. L. & Pol'y 247, 259 n. 51 (1997) (discussing current status of marital rape exemption).

terms; some States still do.[27] Even if a State revises its rape law in gender-neutral language, legislators, police, prosecutors, judges, assailants and victims still understand rape as a form of assault by men against women. As witnesses emphasized, gender norms that have organized the criminal justice system for centuries cannot be eliminated by fiat or transformed overnight. As the Congress recognized, State responses to assaults traditionally directed at women have been deeply infected by various forms of stereotypical reasoning:

> "If these cases had involved the typical male assault victim, our reactions might be far different. Typically, we do not ask whether the victim of a barroom brawl is a real victim; we do not comment that the victim deserved to be hit; we do not inquire whether there was resistance or whether the victim said "no" persistently enough; we do not believe that the crime may have been fabricated altogether. Until the stereotypes upon which these scenarios are built seem as foreign for the victims of rape and domestic violence as they do for the victims of barroom brawls, our criminal justice system will pose barriers for

[27] With the rise of modern sex discrimination doctrine, states have generally rewritten their rape law in formally gender-neutral terms, yet many exceptions remain. *See, e.g.,* ALA. CODE § 13A-6-61(a), 13A-6-62 (a) (1999) (gender-specific definition of first- and second-degree rape); GA. CODE ANN. § 16-6-1(a) (1999) (gender-specific definitions of rape); IDAHO CODE § 18-6101 (1999) (gender-specific definition of rape); *see generally* MODEL PENAL CODE § 213. 1 (1) (1980) (originally adopted 1962; current through A.L.I. annual meeting, 1998 (WL 1999)) (defining rape as a crime committed by "[a] male who has sexual intercourse with a female not his wife").

> women it does not pose for others in our society."

S. Rep. No. 102-197 at 34 (1991).

Recent law reform efforts demonstrate just how difficult it is to alter the invidious gender-based attitudes and assumptions that have become institutionally entrenched under centuries of prior practice.[28] "The sad fact is that law reform has failed to eradicate the stereotypes that drive the system to treat these crimes against women differently from other crimes." S. Rep. No. 102-197, at 46 (1991). As the Senate Judiciary Committee concluded:

> "From the initial report to the police through prosecution, trial, and sentencing, crimes against women are often treated differently and less seriously than other crimes. Police may refuse to take reports; prosecutors may encourage defendants to plead to minor offenses; judges may rule against victims on evidentiary matters; and juries too often focus on the behavior of the survivors-laying blame on the victims instead of on the attackers." S. Rep. No. 103-138, at 42 (1993).

[28] Numerous state gender bias task forces reported that invidious gender-based reasoning concerning violence against women lingers at every level of the State justice systems. *See, e.g.*, *Report of the Illinois Task Force on Gender Bias in the Courts* 135 (1990) ("there continue to be problems in the following areas: . . . continuing police resistance in considering domestic violence a serious crime; . . . selective prosecution of domestic violence cases, accompanied by high rates of dismissal of these cases or reduction of the charges; . . . reluctance to impose prison sentences and the imposition of disproportionately low sentences in domestic violence cases. . . ."); *Utah Task Force on Gender and Justice* 60 (1990) ("Skeptical regard for the victim's credibility is a continuing problem in both [domestic violence and acquaintance rape] especially in interactions with law enforcement officers and prosecutors."); *Kentucky Task Force on Gender Fairness in the Courts* 28 (1992) ("Sex role stereotypes which blame the victim have played an important negative role in the lack of responsiveness in domestic abuse proceedings"); *Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System* 103 (1991) ("Police are reluctant to charge and prosecute cases of acquaintance rape and police do not charge a husband with the rape of his wife").

B. Failure to Provide Women Equal Protection from Assault is a Core Violation of the Equal Protection Clause.

After years of hearings, Congress concluded that "bias and discrimination in the [state] criminal justice system often deprive[] victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled." H. R. Conf. Rep. No. 103-711, at 385 (1994). The detailed testimony gathered, as well as the numerous state task force reports examined in the legislative process, did not simply uncover a long history of explicitly sex-based regulation. It established that, even today, state actors responsible for protecting citizens against assault repeatedly engage in decision-making riddled with invidious stereotypical judgments about women.

These congressional hearings established an ongoing, pervasive, and deeply entrenched pattern of official state action that violated the core guarantee of the Fourteenth Amendment: that state governments afford equal protection of the laws to all persons, regardless of their race or gender. Blacks as well as whites, women as well as men, are entitled to protection by police, prosecutors, and the criminal justice system. Failure to provide such protection on equal terms is

a denial of equal protection of the laws in its most basic sense. This concern clearly motivated the framers of the Fourteenth Amendment, who feared that state governments would fail to protect freed slaves from crimes of violence perpetrated by private actors.[29]

Affording women equal protection of the laws means treating crimes of violence perpetrated against women as seriously as crimes against men.[30] Where state officials fail to do so because of archaic stereotypes about women's proper role in society, they violate the clearest command of the Equal Protection Clause.[31] As this Court has often recognized, official discrimination against women may take the form, not of overt hatred, but of outmoded and archaic views about women's roles and their relationships to men. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 532-34 (1996); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135-42 (1994); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (referring to Nation's "long and unfortunate history of sex discrimination. Traditionally, such

[29] *See* JACOBUS TENBROEK, EQUAL UNDER LAW 157-208 (1965).

[30] The Equal Protection Clause guarantees persons equal protection of the laws in all spheres; state actions affecting persons in family relationships are no exception to this guarantee. *See Loving v. Virginia*, 388 U.S. 1 (1967); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Orr v. Orr*, 440 U.S. 268 (1979); *see also* Jill Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. Rev. 1297, 1335-53 (1998).

[31] This is not a case concerning a gender-neutral law or policy that incidentally impacts women, but a case concerning a long history of sex-based reasoning in criminal and civil law enforcement that leads state actors to treat violence against women less seriously than violence against men. There is abundant evidence of discriminatory purpose within the meaning of *Washington v. Davis*, 426 U.S. 229 (1976); *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); and *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979).

discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."); *see also Planned Parenthood v. Casey*, 505 U.S. 833, 893, 898 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (striking down spousal notice requirement because it could provoke domestic violence, and perpetuate constitutionally offensive common-law assumptions about a husband's dominion over his wife).

C. The Civil Rights Remedy is Well Within Congress' Broad Power to Remedy Violations of the Fourteenth Amendment.

1. The Civil Rights Remedy is Not a Pretext for Independent Congressional Interpretation of the Constitution.

Congress has broad powers to enforce the Fourteenth Amendment, and may legislate to prevent and remedy violations of its terms. *See, e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966). But the power to enforce the amendment does not entitle Congress to revise the Court's interpretation of its commands. Because "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern," *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997), this Court evaluates legislation by asking whether there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520. The test of proportionality is designed primarily to determine whether enforcement-clause legislation is actually crafted to remedy violations of constitutional rights. *Cf. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119

S.Ct. 2219, 2225 (1999)(noting that remedy must be genuine attempt to enforce constitutional rights). If the use of remedial power is not pretexual, Congress must be given "wide latitude" to decide how best to remedy constitutional violations. *Boerne*, 521 U.S. at 520.

This case raises very different issues from those confronted in *Boerne*. In that case, the Court saw Congress' use of remedial power as a pretext for revising the judiciary's interpretation of the Constitution's meaning.[32] In this case, there is no evidence of a similar congressional effort at substantive reinterpretation. As a consequence, this Court should give Congress "wide latitude" in determining the most appropriate methods of remedying systemic and continuing violations of the Fourteenth Amendment.

2. Congress Sought to Work in Partnership with the States in Remedying Constitutional Violations While Respecting the States' Primary Role in Criminal Law Enforcement, and Narrowly Tailored the Civil Rights Remedy to Achieve These Ends.

[32] In *Boerne*, there was abundant evidence that members of Congress disagreed with the Court's decision in *Employment Div. v Smith*, 494 U.S. 872 (1990), and sought to pass the Religious Freedom Restoration Act (RFRA) to 'overrule' this decision by statute. *See Boerne*, 521 U.S. at 515-16. Nevertheless, before this Court, defenders of RFRA argued that Congress was only attempting to enforce *Smith* through prophylactic legislation. The Court found this characterization of Congress' purpose in enacting RFRA unpersuasive. The Court saw a clear lack of proportion between the sparse contemporary history of intentional religious discrimination in the United States and the "[s]weeping coverage" of RFRA. *Id.* at 532. Hence this Court saw RFRA as neither a genuine attempt at remedying constitutional violations as defined in *Smith* nor an appropriate means for achieving that end. The proportionality test introduced in *Boerne* thus functioned to distinguish pretextual uses of remedial power from genuine ones.

In enacting VAWA, Congress sought to work with the States as partners in remedying and preventing violence against women. State task forces across the nation had discovered pervasive gender bias in state and local law enforcement, and state officials looked to Congress for help in solving a national problem.[33] Congress responded, through VAWA, by authorizing $1.6 billion in funds, mostly to States, local governments and Indian tribes to pay for (a) rape prevention and education programs, (b) victim services programs, (c) improved security in public transit, (d) the construction and maintenance of battered women's shelters, and (e) funding for additional law enforcement to assist with prosecution of cases of violence against women.[34] The civil rights remedy was yet another element in this federal-state partnership. It is not an isolated intervention but part of a total nationwide program to support and supplement state and local law enforcement while respecting the primary role of state governments in protecting citizens from violent assault.

[33] *See Crimes of Violence Motivated by Gender, Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm.on the Judiciary*, 103d Cong. 35 (Nov. 16, 1993) (letter from 41attorneys general) ("Our experience as Attorneys General strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds."); *see also* S. Rep. 103-138 at 39 (describing hearing held during 102d Congress in which attorneys general of Illinois and Iowa "testified in support of a comprehensive Federal response to violence against women, particularly the need for a civil rights remedy"); *Senate Hearing 1991, supra* note 7 at 137 (Gill Freeman, Chair, Florida Supreme Court Gender Bias Study Implementation Commission) ("The message I received from one law enforcement officer was: Please tell Congress we are drowning; we need help.").

[34] *See* CONGRESSIONAL QUARTERLY ALMANAC, 103d Cong., 2d sess, v. L, at 274 (1994); *see also* JOSEPH R. BIDEN, SAFER STREETS, SAFER HOMES 20, 29-37 (Sept. 1999) ($1.4 billion so far appropriated for VAWA programs).

Congress' decision to create a civil remedy is consistent with Congress' larger purpose in enacting VAWA: to work in partnership with the States to eradicate historic forms of bias against women in the criminal justice system. The new remedy vindicates the dignitary and material interests of victims of gender-motivated violence, and promotes a legal order in which all members are recognized as equally worthy of protection from assault. Yet, like the larger statute of which it is a part, the civil rights remedy furthers these equal protection values in a federalism-friendly fashion.

Given Congress' interest in working with the States, it is not surprising that it chose a civil action rather than permitting injunctive or monetary relief against state officials for discriminatory underprosecution. Such alternatives would have required state and local officials to defend their actions against charges of sex discrimination in federal court. Given its broad remedial discretion, Congress surely has power to conclude that suits against state officials would not promote a federal-state partnership conducive to reform. Moreover, unlike the legislation at issue in the *College Savings* cases, Congress did not create a right of action against states for damages. Instead, the funding provisions of VAWA sought to enhance the fiscal capacity of the states to prosecute violence against women.

For these reasons, Congress had ample authority to create a civil cause of action against the perpetrators of gender motivated violence. The VAWA civil rights remedy does not commandeer state officials. It does not drain the coffers of state law enforcement agencies, and it does not displace state government functions. This solution allows the federal government to take an important leadership role

while leaving the states with primary responsibility for protecting citizens from physical assault.[35]

3. The Civil Rights Remedy in VAWA Is National Because It Deals With a National Problem.

Congress did not attempt to limit VAWA to particular States and local governments with histories of underenforcement for two reasons. First, the record makes clear that the problem of underenforcement was national. A nationwide solution, like the nationwide suspension of literacy tests in *Oregon v. Mitchell,* "may be reasonably thought appropriate when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country." 400 U.S. 112, 284 (1970) (Stewart, J., concurring).

Second, Congress' desire to work with states rather than against them also explains its creation of a nationwide remedy. Had Congress attempted to single out individual states as especially culpable, it would have been more

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[35] Although the civil rights remedy as initially introduced would have applied to a broader range of violence against women, Congress took federalism values into account in deciding to limit the remedy to those cases of violence where plaintiffs could show that the violence was "due. . . to animus based on the victim's gender." 42 U.S.C. § 13981(d)(1). Congress' decision to focus the civil remedy on the most openly biased forms of violence against women, rather than the full range of violent assault against women, represents a federalism-sensitive judgment about the circumstances in which it was most important to make federal fora available, and presents none of the pretext or separation-of-powers concerns with which *Boerne* is concerned. *Boerne*'s proportionality test is surely not intended to call into constitutional question congressional acts of restraint motivated by federalism considerations. From this perspective, VAWA's civil remedy meets any reasonable understanding of proportionality and congruence.

difficult to gain cooperation for necessary reforms in the states that most needed them. By making the civil rights remedy applicable to all jurisdictions, and by distributing funds nationwide, Congress avoided identifying particular states as especially blameworthy, and made clear that it wanted to pursue reform by working with all states on an equal footing.

The VAWA remedy is thus a proportionate and congruent response to state violations of the Fourteenth Amendment, narrowly crafted to protect federalism interests, and well within Congress' enforcement powers as defined by this Court's recent cases.

CONCLUSION

For these reasons, the judgment below holding VAWA's civil remedy unconstitutional should be reversed.

Respectfully submitted

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