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 RESPONDENT JAMES LaDALE CRAWFORD

Filed December 13, 1999

QUESTIONS PRESENTED

1. To the extent it provides for a lawsuit between private individuals, is 42 U.S.C. § 13981 within Congress's power to regulate "commerce . . . among the states" or to enforce the prohibition against states "deny[ing] to any person within its jurisdiction the equal protection of the laws"?

2. Did the amended complaint in this action state a claim pursuant to 42 U.S.C. § 13981?

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STATEMENT OF THE CASE

A. Allegations Of The Complaint

The order of the court below affirmed a judgment of the District Court dismissing the action upon a Rule 12(b)(6) motion for failure to state a claim. Accordingly, for purposes of this brief, Crawford must assume the truth of the allegations set forth in the amended complaint in this action.

Brzonkala is a resident of Fairfax, Virginia. J.A. 14 (Amended Complaint ("Am. Com.") ¶ 7). She alleges that Morrison and Crawford engaged in a sexual assault on her "[o]n the night of September 21-22, 1994" in "a student room on the third floor" of Brzonkala's dormitory at Virginia Polytechnic Institute and State University ("Virginia Tech"). J.A. 15 (Am. Com. ¶ 13). She further alleges that, after the assault, Morrison then told her that she "better not have any f***g diseases" and "clad only in his underwear followed wordlessly behind [her]" through the dorm building, from the third floor to Brzonkala's suite on the second floor. J.A. 17 (Am. Com. ¶¶ 22-23). Sometime within the next five months, Morrison reportedly was overheard in the dining hall to say "I like to get girls drunk and f**k the s**t out of them." J.A. 18 (Am. Com. ¶ 31). But Brzonkala asserts that "she was not inebriated at the time of the assaults." J.A. 16 (Am. Com. ¶ 14).

Brzonkala knew the given names of her purported assailants and knew that they were members of Virginia Tech's football team. J.A. 16 (Am. Com. ¶ 13). Despite this, and although the alleged attack took place in her own dormitory one floor above her own room, she apparently made no effort to ascertain their identity after the alleged attack. Id.

Brzonkala did not preserve any physical evidence from the alleged rapes and "did not bring criminal charges against Morrison or Crawford." J.A. 18 (Am. Com. ¶ 33). Nonetheless, Brzonkala "approved and . . . participat[ed] in a [subsequent] criminal investigation about events which occurred on September 21-22, 1994 by the Virginia State Police," J.A. 14 (Am. Com. ¶ 4). The record does not disclose the outcome of that investigation.[1]

The amended complaint in this action sought a remedy pursuant to 42 U.S.C. § 13981 ("Section 13981"), which is the main part of Subtitle C of Title IV of Public Law 103-322, referred to as the Violence Against Women Act ("VAWA").

B. Statutory Background

As petitioners stress, Congress is not obligated to follow any particular procedures or evidentiary rules in holding hearings. Brief of the United States ("U.S. Br.") 38; Brief of Christy Brzonkala ("Brzonk. Br.") 45. In practice, this means that Congress can "find" virtually anything that it is determined to find by stacking the evidentiary deck. VAWA provides an object lesson in this process. Three different Congresses (the 101st, 102nd and

[1] In fact, in 1996, the Grand Jury of the Circuit Court of Montgomery County, Virginia returned "not a true bill" with respect to the Brzonkala allegations against Morrison and Crawford. (That is, the grand jury refused to indict.) The matter was presented to the Grand Jury by Virginia State Police investigators who had conducted probably the most extensive investigation in the history of the Commonwealth of Virginia in a rape investigation. Ms. Brzonkala was invited to appear before the Grand Jury and give testimony, but chose not to appear. Although not in the record, the grand jury's decision is a matter of public record of which this Court may take judicial notice.

103rd) held hearings related to VAWA over four years. Petitioners and their amici cite many anecdotes from the legislative history, from testimony of victims of violence who claimed that state police officers, prosecutors, or magistrates were insensitive or neglectful in the handling of their cases (e.g., U.S. Br. 9-10). Congress invited no state officials accused of bias or neglect to respond. Petitioners cite many statistics demonstrating the disparate impact certain kinds of violence has upon women. These statistics are far from undisputed, and many researchers have concluded that domestic violence affects men as well as women, and that the justice system treats women favorably. (This research is cited in the briefs of some of respondents' amici.) Not once was any researcher with a different perspective asked to testify before Congress.[2] Given this, it is hardly surprising that Congress concluded that it had the constitutional power to pass Section 13981. What is surprising is the weakness of the evidence supporting its conclusions.

A VAWA-like proposal was first submitted in 1990 in S. 2754. From the outset, even the proposal's sponsors admitted that it would do little to reduce violent crime against women. E.g., Women And Violence: Hearing Before The Senate Judiciary Committee, 101st Cong., Part 1, 2 (1990) ("1990 Hearings") (opening Statement of Chairman Biden) ("I don't expect that making this a civil rights violation will solve this problem. People will not

[2] Indeed, even the Department of Justice's own statistics rarely saw the light of day. Bureau of Justice Statistics, Violence Between Intimates 4-5 (Nov. 1994, NCJ 149259) (also available at http://blackstone.ojp.usdoj.gov/bjs/pub/pdf/vbi.pdf) (women are more likely to report violent crimes than men; police respond, take police reports, and question witnesses in cases of attacks on women largely without regard to whether the woman's attacker is an intimate or not).

say, 'I was thinking of committing a crime of violence and raping that woman, but now that it is a civil rights violation, I won't do it because I may be sued in Federal court.' But it does say . . . there is a need for the national psyche to acknowledge that there is something horribly wrong. The law should reflect that attitude").

The 1990 proposal was not based on bias in state civil justice systems. Indeed, while referring to the statistic petitioners now cite concerning the low percentage of civil jury trials for rape victims (e.g., U.S. Br. 10) -- a not altogether surprising statistic since the numerator is the number of civil jury trials alleging rape and the denominator includes those plus all bench trials, settlements, and cases never filed or dropped in which rape could have been alleged (S. Rep. 101-545 at 42 & n.86 (1990)) -- the Senate Report explicitly stated that the statistic was "not intended to suggest intentional failures by states to enforce or pass civil laws to protect victims" (id. at 42). Indeed, the hearings underscored that obtaining a civil recovery was difficult because most defendants were judgment-proof. 1990 Hearings, 39 (testimony of Marla Hanson) ($78 million judgment could not be collected); id. at 44 (testimony of William Olson) (most perpetrators are near judgment-proof). Pet. App. 154a.

The proposal introduced in 1991 (S. 15, 102nd Cong. (1991)) also did not rely upon state failure to enforce state laws. To the contrary, the civil remedy

> does not permit a claim because a municipality, State or the Federal Government has "failed to protect" a citizen. Current law announced by the Supreme Court bars such claims and there is nothing in [the civil remedy proposal] that would overrule the Court's due process analysis. See DeShaney v. Winnebago, 489 U.S. 189 (1989).

S. Rep. 102-197 at 69 (1991) (emphasis added).

In the early hearings, prosecutors testified that many cases of sexual violence had been difficult to bring to trial because many female victims preferred plea bargains to a day in court where they would have to relive the crime. Id. at 47, 102 (testimony of Linda Fairstein).

Despite subsequent efforts to fit the statute within Congress's power to enforce the Equal Protection Clause -- by "finding" state bias permeated the justice system -- throughout the course of the hearings, Congress heard significant testimony from many sources describing the extensive efforts by states to fight domestic violence, sexual assault, rape, and other crimes in which women are significantly affected. See Pet. App. 154a-56a (citing testimony and hearings). See also Hearings On Domestic Violence: Hearing Before The Senate Judiciary Committee, 103rd Cong. 33 (1993) (noting recently passed legislation in Massachusetts); Violence Against Women: Fighting The Fear -- Hearings Before The Senate Judiciary Committee , 103rd Cong. 11-12 (1993) (describing development by police in Maine of a scale to assess domestic violence situations, and Maine Legislature's permitting warrantless arrests in domestic violence cases); id. at 43 (Statement of John Atwood) (describing "spirit of commitment" in Maine); Violent Crimes Against Women: Hearings Before the Senate Judiciary Committee, 103rd Cong. 37 (1993) (domestic violence identified as a priority in Utah prosecutor's office); Violence Against Women: Hearing Before Subcommittee On Crime And Criminal Justice Of The House Judiciary Committee, 102nd Cong. 60 (1992)

(Ohio legislation noted); Violence Against Women: Victims of the System: Hearing Before the Senate Judiciary Committee, 102nd Cong. 25 (1991) (Statement of Bonnie Campbell) (Iowa is "more mobilized than ever to stop this scourge [of domestic violence]"); 1990 Hearings, 47, 52 (1990) (Statement of Linda Fairstein) (NY County District Attorney's office has devoted "extraordinary resources" to Sex Crimes Prosecution Unit); S. Rep. 101-545 at 38 (noting the wide availability of protective orders).

Finally, there was little evidence presented that the various aspects of state procedure about which Congress or witnesses had concerns -- the absence of protective evidentiary rules in civil cases, short statutes of limitations, and virtually extinct tort immunities -- were maintained by the States because of intentional sex discrimination against women. Pet 154a. Cf. S. Rep. 102-197 at 47 (1991) (beyond a reasonable doubt standard made conviction on "acquaintance rape" charges difficult).

Indeed, the primary purpose of Section 13981 appears to have been to "send a signal" that violence against women should not be tolerated. S. Rep. 103-138 at 50 (1993) (send a "special societal judgment"); Pet. App. 160a. No doubt such signal-sending is politically popular. Or, as the author of VAWA put it when discussing the chances for additional amendments to VAWA, "everybody's afraid to say no." Speech Of Senator Joseph Biden Before The National Association Of Attorney Generals (March 13, 1998) (C-SPAN television broadcast).

Because of concerns that the early proposals would allow claims that would inundate the federal courts, the sponsors of VAWA narrowed Section 13981 in 1993 so that it would apply only to gender-based and animus-

motivated felonies. Amicus Brief of Sen. Biden ("Biden Amicus Br.") 16-17. At that time, Congress made clear that Section 13981 did not cover all rapes or violent attacks against women. See S. Rep. 103-138 at 51 (1993) (the civil remedy "does not create a general Federal law for all assaults or rapes against women"). Even before that statutory narrowing, the self-proclaimed "author of VAWA" (Biden Amicus Br. 1) made it clear that Section 13981, did not cover most cases of domestic violence. S. Rep. 102-197, at 69 (1991) (the civil remedy "does not cover everyday domestic violence cases . . . This is stated clearly in the committee report and it is the only fair reading of the statutory language") (Statement by Sen. Biden).

VAWA eventually passed both houses of Congress, and was signed by the President in September 1994. As passed, Section 13981 creates a new tort claim against the perpetrators of "crimes of violence motivated by gender." 42 U.S.C. § 13981(c). Subsection (d) provides that gender-motivated violence is "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." 42 U.S.C. § 13981(d)(1). A "crime of violence" is, in turn, defined as an act or series of acts that (1) "would constitute" either (a) a felony against the person or (b) a felony against property that presents "a serious risk of physical injury to another" and (2) that constitutes an act of violence pursuant to 18 U.S.C. § 16. 42 U.S.C. § 13981(d)(2)(A).

Perhaps somewhat redundantly, an "act of violence" is defined in 18 U.S.C. § 16 as (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its

nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. It is difficult to envision a felony that would meet the first part of the definition of "crime of violence" and not also be an "act of violence" under 18 U.S.C. § 16.

Section 13981 gives state courts concurrent jurisdiction. 42 U.S.C. § 13981(e)(3). Prevailing plaintiffs in claims brought under Section 13981 are entitled to recover their reasonable attorneys' fees. See 42 U.S.C. § 1988(b); Pub. L. 103-322, § 40303.

Because Section 13981 became law in 1994, the four-year statute of limitations set forth in 28 U.S.C. § 1658 applies to any claim under Section 13981, longer than the limitations periods for intentional torts in most states.

C. Proceedings In The Courts Below

Brzonkala filed the original complaint on or about December 27, 1995, and filed the amended complaint shortly thereafter. The amended complaint added two new parties, Cornell Brown and William Landsidle and a variety of new claims. (Claims against both of these parties were eventually dismissed; the claims against Brown were dismissed in part on plaintiff's own motion for voluntary dismissal. J.A. 9-10.) The amended complaint asserted claims under Section 13981 and state tort law against Morrison and Crawford, and a Title IX claim against Virginia Tech. Shortly thereafter, defendants Morrison and Crawford moved to dismiss the amended complaint on the grounds that the amended complaint failed to state a claim under Section 13981, that Section

13981 could not be constitutionally applied to them, and that the court had no jurisdiction over the state tort claims. The United States intervened to defend the constitutionality of Section 13981.

1. The District Court's Decision

The District Court dismissed plaintiff's claims under Section 13981 in an order and judgment dated July 26, 1996. The pendent state claims were dismissed without prejudice. Pet. App. 402a-03a.[3]

The District Court first addressed respondents' contention that the amended complaint did not adequately allege "gender animus." The court rejected that argument, citing the allegations in the amended complaint that (1) Morrison and Crawford allegedly engaged in "gang rape"; (2) the alleged rapes were closer to "stranger rape" than "date rape" which made them less likely, according to the Court, to involve a misunderstanding, personal animus, or overheated sexual passion; and (3) some months after the alleged incident, Morrison was allegedly overheard saying that he liked to "get girls drunk and f**k the s**t out of them." Pet. App. 359a-60a. The court concluded that these allegations stated a claim against Morrison. It did not decide whether a claim had been alleged against

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[3] The Title IX claims against Virginia Tech had been dismissed by an earlier order. See J.A. 9 (Docket Entries 46-47). On appeal the en banc Fourth Circuit unanimously upheld the dismissal of Brzonkala's Title IX "disparate treatment" claim against Virginia Tech. Pet. App. 8a-9a n.2; Pet. App. 218a (Motz, J. dissenting). The full court remanded Brzonkala's Title IX "hostile environment" claim to the District Court to await this Court's decision in Davis v. Monroe County Bd. Of Educ., 526 U.S. 629 (1999). Pet. App. 8a-9a n.2. It currently remains before the District Court.

Crawford. Pet. App. 361a-62a.

The District Court then analyzed the constitutionality of Section 13981, considering first whether Section 13981 could be justified as legislation designed to "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., art. I, § 8, cl. 3. The court applied this Court's reasoning in United States v. Lopez, 514 U.S. 549 (1995), holding that Congress exceeded its authority under the Commerce Clause in passing 18 U.S.C. § 922(q), the Gun-Free School Zones Act ("GFSZA"). Considering the three permissible categories of regulation this Court had identified in Lopez (viz., regulating the channels of interstate commerce, regulating the instrumentalities of interstate commerce, and regulating activity that substantially affects interstate commerce), the District Court concluded, just as in Lopez, that the first two categories were inapplicable. Pet. App. 363a-64a.

The District Court then considered four factors from Lopez to determine whether Section 13981 was a proper exercise of Congress's authority under the third category: (1) whether the regulated activity is economic in nature, (2) the presence of a jurisdictional requirement in the law itself, (3) the importance of legislative history, and (4) the practical implications of accepting an argument that the regulated activity "substantially affects" interstate commerce. Pet. App. 365a-69a.

The District Court compared the similarities and differences between Section 13981 and the GFSZA and concluded that the similarities (the non-economic nature of the activity being regulated, the absence of any jurisdictional requirement, and the practical implications of recog-

nizing the effects on commerce of the regulated activity as "substantial") outweighed the differences. It considered three possible differences: (1) Congress made more extensive findings with respect to Section 13981 than it had with the GFSZA; (2) Section 13981 provides for civil liability rather than criminal; and (3) "fewer steps of causation" are involved in going from the regulated activity to an effect on interstate commerce. Pet. App. 371a-76a.

With respect to congressional findings underlying Section 13981, the District Court found that this Court specifically had denied any necessity for Congress to make findings. In addition, it recognized that Congress had amended the GFSZA to add such findings (and that such findings were before this Court when Lopez was argued and decided),[4] and that this Court specifically considered the effects on interstate commerce proffered by the Solicitor General. Accordingly, the District Court concluded that the existence of legislative findings for Section 13981 did not distinguish Lopez. Pet. App. 371a-73a.

With respect to the civil nature of Section 13981, the District Court noted that the Act defines the conduct that it regulates in terms of criminal law (see 42 U.S.C.

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[4] In Section 320904 of Public Law 103-322, Congress amended the GFSZA to set forth findings that crime is a nationwide problem which is exacerbated by the interstate movement of drugs, guns, and criminal gangs; firearms and their component parts move easily in interstate commerce and guns have been found in increasing numbers around schools; citizens fear to travel through certain parts of the country due to concern about violent crime and gun violence; the occurrence of violent crime in school zones has resulted in a decline in the quality of education, which in turn has had an adverse impact on interstate commerce; and States are unable to handle gun-related crime on their own. 18 U.S.C.A. § 922(q)(1).

§ 13981(d)(2)(A)) and that, in any event, this Court has never analyzed criminal and civil laws passed pursuant to Congress's Commerce Clause authority any differently. Pet. App. 373a-74a.

With respect to the steps of causation, the District Court found any difference unimportant because gun-ownership is sufficiently close to acts of violence -- indeed, the entire body of federal gun control law is based on the assumption that one leads to the other -- and because the alleged effects touted by the government for both laws, such as the unwillingness of people to travel, did not require actual violence, but only the threat of violence. Pet. App. 374a-76a. The District Court specifically addressed Brzonkala's argument that violence precluded women from full participation in the economy. It concluded that it was similar to the argument, rejected in Lopez, that violence around schools precluded schoolchildren from full participation in the economy. Pet. App. 375a.

Because any differences between the two statutes were outweighed by the similarities, the District Court concluded that Congress had no authority to pass Section 13981 as a regulation of interstate commerce. Pet. App. 376a-82a.

In analyzing whether Congress had the authority under Section 5 of the Fourteenth Amendment to reach the private conduct regulated by Section 13981, the District Court began by noting that the Civil Rights Cases, 109 U.S. 3 (1883) precluded any finding that Congress had such authority. Pet. App. 385a. Nonetheless, the District Court engaged in an extensive analysis to determine whether Section 13981 could survive a means/ends test, presaging this Court's subsequent decision in City of Boerne v.

Flores, 521 U.S. 507 (1997). It concluded that remedying private discriminatory acts unrelated in the specific instance to any state rule of conduct or otherwise chargeable to the state was not a legitimate end under the Fourteenth Amendment. Pet. App. 391a-98a. The court then concluded that remedying state bias against women was a legitimate end under the Fourteenth Amendment, but that Section 13981 was not "plainly adapted" to that end. Pet. App. 399a-401a.

Concluding that neither the Commerce Clause nor Section 5 of the Fourteenth Amendment of the United States Constitution granted Congress authority to reach the non-economic, private conduct covered by Section 13981, the court granted the Rule 12(b)(6) motion of Morrison and Crawford. The court declined to exercise supplemental jurisdiction over Brzonkala's state law claims.

2. Proceedings In The Fourth Circuit

On December 23, 1997, a divided panel of the Fourth Circuit reversed the decision of the District Court. It held that Section 13981 was a legitimate exercise of Congress's Commerce Clause power, but did not determine whether Section 5 of the Fourteenth Amendment could sustain Section 13981. Pet. App. 282a. On February 2, 1998, the full court vacated the opinion of that panel and ordered the case reheard en banc in March 1998. Pet. App. 13a. One year later, the full court affirmed the judgment of the District Court.

The en banc court first concluded that the allegations of the amended complaint did state a claim against Morrison, relying on an offensive statement he allegedly made (at some undefined time during the five months

following the alleged sexual assault). Pet. App. 14a. The Fourth Circuit noted that the allegations did not "necessarily compel the conclusion that Morrison acted from animus toward women as a class" and "might not even be sufficient, without more, to defeat a motion either for summary judgment or for a directed verdict." Id. The court also did not reach the question of whether the amended complaint stated a claim against Crawford. Id. n.3.

Reaching the constitutional issue, the court first concluded that Section 13981 could not be sustained as an exercise of Congress's Commerce Clause authority. It noted that the phrase "substantially affects interstate commerce" was a term of "legal art" (Pet. App. 17a) that required an examination of the factors considered important in Lopez. It cited numerous passages from Lopez all supporting the proposition that this Court, in concluding that Congress exceeded its powers, placed great emphasis on the non-economic nature of the activity being regulated by the GFSZA. The Fourth Circuit concluded that the non-economic nature of the activity being regulated was an important, if not dispositive, factor in defining the outer limits of the phrase "substantially affects interstate commerce." Pet. App. 18a-20a & 20a-22a n.5 (numerous different cites from Lopez majority opinion, concurrences, and dissents).

The court concluded that Section 13981 regulated, and was intended to regulate, non-economic activity, and was not part of a larger scheme regulating economic activity. Pet. App. 24a-27a. Since, in addition, Section 13981 had no jurisdictional element, the court concluded that it did not "substantially affect" interstate commerce, and thus could not be sustained under Congress's authority to regu-

late "commerce among the several states." Pet. App. 31a.

Nonetheless, the en banc court went on to assess Section 13981 under the assumption that the regulation of non-economic activity rendered the statute only presumptively unconstitutional. Pet. App. 31a-32a. It noted the arguments identifying the effects gender-based, animus-motivated violence have on interstate commerce "closely resemble, and are functionally equivalent to, the arguments advanced by the government in Lopez" (Pet. App. 35a). Accepting these arguments would "effectively . . . remove all limits on federal authority, and . . . render unto Congress a police power impermissible under our Constitution" (Pet. App. 40a). See also Pet. App. 90a-91a & 91a-92a n.23 (taking quote from dissent and showing that, by removing the words "gender-based," it equally supports the regulation of all violent crime). Thus, the court concluded that the other factors identified in Lopez also militated in favor of its conclusions.

The Court of Appeals then proceeded to consider each argument that petitioners offered to distinguish Lopez. It first rejected petitioners' argument that this Court relied heavily on the absence of Congressional findings in Lopez and/or that this Court concluded that it would have to "pile inference upon inference" (Lopez, 514 U.S. at 567) to conclude that possession of guns substantially affected interstate commerce solely because of an absence of Congressional findings. Pet. App. 52a-64a. The Fourth Circuit concluded that the argument more nearly described the decision of the Fifth Circuit in Lopez, which had relied entirely on the absence of findings, rather than the opinion of this Court. Pet. App. 60a-61a. It recognized that this Court specifically had held that legislative findings were not necessary and opined that "one would have to ignore

everything the [Supreme] Court said in [Lopez], other than its single, passing allusion to the statute's lack of findings" to conclude that the constitutional flaw in the GFSZA could be remedied by such findings. Pet. App. 62a.

Like the District Court, the Fourth Circuit also noted that this Court had findings before it, and that Lopez thus would have been an "unusual case" to announce a rule that Congress must engage in procedural formalities similar to the rules imposed upon administrative agencies. Pet. App. 63a. See also id. (under government's view, Lopez "would have constituted little more than historical irrelevancy"). Finally, the Court noted that the government's own position subsequent to Lopez demonstrated that "findings" were insufficient. Pet. App. 64a.

In addressing petitioners' remaining arguments, the en banc Court of Appeals concluded that (1) there was no special consideration in the Constitution for laws labelled "civil rights" laws, that rubric being undefined in or outside of the Constitution, and that any such law must be passed pursuant to a specific enumerated power (Pet. App. 70a-76a), (2) pre-Lopez cases did not require it to uphold Section 13981 for the same reasons they did not require this Court to sustain the GFSZA, i.e., because the earlier decisions involved statutes which regulated "economic activity" in a way that the possession of guns around schools or violent gender-based animus-motivated felonies did not (Pet. App. 80a-83a), and (3) petitioners' arguments that Section 13981 did not offend principles of federalism misunderstood the principle of federalism that motivated this Court in Lopez, viz., the logical consequences of the arguments proffered to uphold the GFSZA as opposed to the particular intrusiveness of any specific law (Pet. App. 88a). (On this last point, the Fourth Circuit noted that the

GFSZA was careful to leave intact state definitions, and did not preempt state law -- indeed, it concluded that the GFSZA was more respectful of state law than Section 13981. Compare Pet. App. 42a n.10 with Pet. App. 44a.)

The Fourth Circuit then turned to Section 5 of the Fourteenth Amendment, the other proposed basis for constitutional power to pass Section 13981. After noting the history of the Amendment -- and specifically, the failed Bingham Amendment which would have given Congress a general power to legislate with respect to private conduct traditionally regulated by the states -- the court concluded that Section 5 only permitted Congress to legislate directly against state action. The Fourth Circuit found support for that conclusion in two decisions of this Court: United States v. Harris, 106 U.S. 629 (1883) and the Civil Rights Cases, 109 U.S. 3 (1883), which the Fourth Circuit analyzed in great detail. Pet. App. 104a-111a. It noted that each case involved a civil rights statute that had been passed only after extensive evidence had been presented demonstrating that the States had failed to protect African Americans (like respondents) against private harms violative of state law. Pet. App. 119a-21a, 124a-25a.

The Fourth Circuit then considered their efforts to distinguish the Civil Rights Cases and United States v. Harris, and rebutted them. Pet. App. 119a-25a. The Court of Appeals rejected the petitioners' argument that Harris and the Civil Rights Cases had been "tacitly" overruled by later cases. Pet. App. 126a-44a. The Fourth Circuit noted that this Court had just reaffirmed the Section 5 analysis of those cases in City of Boerne v. Flores, 521 U.S. 507, 524-25 (1997). Pet. App. 104a, 141a-42a.

Although it deemed the matter controlled by

binding precedent, the Fourth Circuit also applied City of Boerne and engaged in a "means/ends" analysis to determine if Section 13981 was appropriate prophylactic legislation for preventing likely Section 1 violations. It concluded that much of the legislative history did not demonstrate the kind of purposeful discrimination by state actors required by the Equal Protection Clause. Pet. App. 151a-60a. Rather, its review of VAWA, and its overall structure and legislative history, demonstrated that Section 13981 was designed to send a "signal" that might overcome subtle societal prejudices. Pet. App. 160a.

The Fourth Circuit also concluded that there was no "congruence and proportionality" between Section 13981 and any violation of the Equal Protection Clause. It found that the statute does nothing to remedy or correct discriminatory enforcement of laws by the States and that the existence or non-existence of a cause of action under Section 13981 in any specific case has nothing to do with any finding of an Equal Protection violation. Pet. App. 160a-63a.

Finally, the Fourth Circuit concluded that petitioners' bold theory of Section 5 would allow Congress to regulate directly in any area (like criminal law and domestic relations) in which there is any evidence of gender or racial bias in state procedures or institutions. It noted that the same studies relied upon in passing Section 13981 also found bias in many other areas of law, and would (under petitioners' theory) permit Congressional takeover of such areas. Pet. App. 164a-66a. See also Pet. App. 74a-76a, 89a. So, too, a finding of State "failure" to enforce robbery or burglary laws protecting property rights against private invasion would permit Congress to regulate those areas as well, as a means of enforcing the Section 1

provision precluding State deprivations of property without due process. Pet. App. 165a. The Fourth Circuit concluded that it could not give its imprimatur to such expansive theories of Congressional authority under Section 5. Pet. App. 166a.

Chief Judge Wilkinson and Judge Niemeyer joined the majority opinion, but each also wrote separate concurrences. Pet. App. 169a-209a. Four judges dissented. The dissenters agreed with the majority that the amended complaint stated a claim against Morrison, but also asserted that it stated a claim against Crawford because Morrison's purported statement months after the alleged rape were "in furtherance of a conspiracy." Pet. App. 223a. The dissent did not explain how the "conspiracy" was furthered by the statement.

The dissent also concluded that Section 13981 was a proper exercise of Congress's authority under the Commerce Clause. In the dissent's view, "[t]he Lopez Court never held that the challenged statute exceeded Congress's authority because it did not [regulate a commercial activity or have an interstate commerce requirement]." Pet. App. 241a (emphasis in original). Rather, Lopez held only that the regulation of "non-economic" activity would trigger a second level review to determine "the possible representative superiority of the states." Pet. App. 264 n.11. (The dissent did not explain how to assess "representative superiority" except to say that history might be a guide, but it could not be dispositive. Pet. App. 267a n.12.) The dissent also viewed the characterization of gender-based, animus-motivated violence as non-economic as an "unfounded categorical assertion[]." Pet. App. 248a n.7.

Responding to the majority's concern that the peti-

tioners' theories would give Congress a general police power, the dissent concluded that the absence of any practical limitation on a Commerce Clause theory was not a dispositive factor. Pet. App. 268a.

SUMMARY OF ARGUMENT

The constitutional analysis of both courts below was fair, thorough, and correct. Crawford joins in the arguments set forth in the brief of respondent Morrison that so demonstrate.

Petitioners try to evade the holding of Lopez through various non-existent or unimportant factual differences. Examining those so-called "distinctions" leads to the conclusion that petitioners do not seek to distinguish Lopez so much as have this Court essentially overrule it. But they do not ask this Court to do so, perhaps realizing that they lack the "special justification" required to overturn a significant precedent of such recent vintage. Arizona v. Rumsey, 467 U.S. 203, 212 (1984).

Similarly, petitioners' argument pursuant to Section 5 of the Fourteenth Amendment is a creative reinterpretation of American history and this Court's decisions in United States v. Harris, 106 U.S. 629 (1883) and the Civil Rights Cases, 109 U.S. 3 (1883). They simply ignore the history that the Fourth Circuit set forth in such detail.

The courts below did not reach the question of whether the amended complaint stated a claim against Crawford. It did not. Although the exact definition of "animus" is, to be sure, somewhat mysterious, it should be interpreted narrowly so as to interfere with the minimum

amount of traditional state authority.

Even with a narrow definition of "animus," though, Section 13981 displaces state prerogative in areas of traditional state authority, viz., torts and intrafamilial relations. Although intrusion into areas where states have traditionally regulated is not, of itself, a reason to declare Section 13981 unconstitutional, such encroachment further supports the conclusion of the courts below that Section 13981 lies outside Congress's enumerated powers.

ARGUMENT

I. THE COMMERCE CLAUSE ANALYSIS IS GOVERNED BY *LOPEZ*, WHICH UPHOLDS THE DOCTRINE OF ENUMERATED POWERS

As the courts below held, the Commerce Clause analysis in this case is governed by this Court's decision in United States v. Lopez, which held that Congress cannot regulate conduct wholly non-economic in nature because recognition of such a power would authorize Congress to regulate virtually anything.[5] This Court held that the

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[5] The government defends Section 13981 with the following logic: 1) women experience violent crime; 2) they become fearful; 3) they lose their jobs, experience prolonged periods of decreased productivity and absenteeism, refuse high-paying, high-risk night jobs, refrain from using public transportation, etc.; 4) they do not make and spend money in the same way they would without having experienced violent crime. U.S. Br. 6-7. This is the same pattern of attenuated logic envisioned by the Lopez majority that could support the conversion of the commerce power into a general police power with no functional limitations. "Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal

(continued...)

GFSZA could not be upheld pursuant to this Court's cases "upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." Lopez, 514 U.S. at 561 (emphasis added). Petitioners' primary argument appears to be that there was another line of cases, unmentioned by this Court in Lopez, which upholds regulations of activities that are not connected with a commercial transaction but which, viewed in the aggregate, substantially affect interstate commerce. Nothing in Lopez supports that argument.

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[5](...continued)
power, even in areas such as criminal law enforcement or education where States historically have 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." Lopez, 514 U.S. at 564.

VAWA rests on the legal fiction that "interstate commerce" need be neither interstate nor commercial. To wit, if any goods or commodities related to the regulated activity cross an interstate boundary at some point -- no matter how remote from the activity itself -- invocation of the clause is justified. Likewise, if the regulated activity influences commercial activity in any way logically connected to commerce that crosses state lines, exercise of commercial power is similarly justified. Unfortunately, engaging in this fiction undermines the moral and legislative authority of Congress and the integrity of the Constitution just as surely as defending slavery based on the fiction that African-Americans were not persons degraded defenders of that ideology. In his dissent in Korematsu, Justice Jackson expressed concern regarding the danger of creative judicial construction. "All who observe the work of courts are familiar with what Judge Cardozo described as 'the tendency of a principle to expand itself to the limit of its logic.'" Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

In declaring that the GFSZA could not be sustained as Commerce Clause legislation, this Court preserved the doctrine of enumerated powers and the notion that the national government's powers cannot be limitless. Madison succinctly described the mechanics of that doctrine:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects as war, peace, negotiation and foreign commerce . . . The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45 at 292-93 (James Madison) (Clinton Rossiter ed., 1961).

Even the most ardent nationalists among the supporters of the Constitution understood that Congress lacked a general power to pass criminal and social legislation. The Federalist No. 17 at 120 (A. Hamilton) (Clinton Rossiter ed. 1961) ("province of the State governments" included "the ordinary administration of criminal and civil justice"); 2 Debates In The Several State Conventions On The Adoption Of The Federal Constitution 267-68 (Jonathan Elliot ed. 1836) (quoting Alexander Hamilton: the objection that the nation was too diverse for one national government would have greater force if Congress could "new-model the internal policy of any state, . . . alter, or abrogate . . . [a State's] civil and criminal

institutions . . . , [or] penetrate the recesses of domestic life, and control, in all respects, the private conduct of individuals"). This Court always has shared that understanding. Cohens v. Virginia, 19 U.S. 264, 428 (1821) ("Congress cannot punish felonies generally"). Unless we attribute a foolish naivete to those with that understanding, they surely knew that people injured or killed by crime (or any other cause) have a diminished collective ability to participate in the economy, and crime was not unknown to them. But a commerce power that broad would have rendered other powers gratuitous.[6]

Although the proper role of enumerated powers has been questioned numerous times, the initial purpose of the doctrine is well-addressed in Justice Kennedy's Lopez concurrence:

> There is irony in [the Court's uncertainty over its authority to enforce enumerated powers], because of the four structural elements in the Constitution just mentioned, federalism was the unique contribution of the Framers to political science and political theory. See Friendly, Federalism: A Forward, 86 Yale L. J. 1019 (1977); G. Wood, The Creation of the American Republic, 1776-1787, pp. 524-532, 564 (1969). Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one. "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51, p. 323 (C. Rossiter ed. 1961) (J. Madison).

Lopez, 514 U.S. at 575-576 (Kennedy, J., concurring). Crawford does not ask this Court to create a bright line test. He asks this Court to affirm the doctrine of enumerated powers and its importance to the constitutional structure governing these United States.

[6] Indeed, as the briefs of amici Rita Gluzman and Clarendon Foundation describe in greater detail, petitioners' interpretation of the Commerce Clause permits Congress to circumvent the procedural requirements of the Domestic Violence Clause in Article IV, § 4. Cf. Railway Labor Executives Ass'n v. Gibbons, 455 U.S. 457, 468-69 (1982) (Commerce Clause cannot be used to circumvent uniformity requirement appurtenant to the bankruptcy power).

II. CONGRESSIONAL FINDINGS DO NOT DISTINGUISH *LOPEZ*

Petitioners offer various ways to "distinguish" Lopez. One is the fact that Section 13981 has "findings" associated with it.

But as both courts below emphasized (Pet. App. 63a, 371a-73a), this Court had findings before it in Lopez. See n.4, supra. In fact, the "findings" concerning gender-based, animus-motivated violence for Section 13981 are quite similar to the findings made by Congress with respect to the GFSZA. Compare 18 U.S.C. § 922(q)(1) with H. Conf. Rep. 103-711 at 385 (1994). Indeed, the only significant difference between them is that the findings for the GFSZA were actually voted upon by Congress; the findings for Section 13981 appear only in a conference report. (It is particularly curious because the findings for

the GFSZA appeared in precisely the same public law as Section 13981. Petitioners offer no explanation as to why one set of findings made it into the U.S. Code and the other did not.)

Moreover, this Court in Lopez considered the government's arguments as to the effects of guns on school grounds on the merits. It did not reject them because Congress had not adopted them, but rather because they would lead to the conclusion that Congress has a plenary police power.

And just as findings generally do not distinguish Lopez, so, too, findings that the states are doing a poor job do not distinguish Lopez. There was just such a "finding" before this Court in Lopez. See n.4, supra. Moreover, as Congress demonstrated with the GFSZA, it is relatively easy for Congress to make a finding that it is dissatisfied with the way the States are handling a particular problem. See, e.g., 15 U.S.C. § 2051(a)(4) (product safety); 15 U.S.C. § 2201(5) (fire prevention requires federal assistance); 16 U.S.C. § 1451(h) (coastal zone management); 20 U.S.C. § 1400(b)(8) (education of handicapped children); 20 U.S.C. § 8331(6) ("writing has been historically neglected in the schools and colleges"); 42 U.S.C. § 4901(a)(3) (control of noise requires federal action); 42 U.S.C. § 5601(a)(8) (juvenile justice systems); 42 U.S.C. § 10801(a)(4) (rights of the mentally handicapped); United States v. Culbert, 435 U.S. 371, 380 (1978) ("Congress apparently believed . . . that the States had not been effectively prosecuting robbery and extortion affecting interstate commerce"). See generally Pet. App. 188a (Wilkinson, C.J., concurring) (such "findings" will "in practice, . . . mean that when the state experimentation that our federal system envisages does not take the precise form

that Congress prefers, Congress can impose a uniform rule").

III. SECTION 13981 CANNOT BE DISTINGUISHED FROM THE GFSZA ON THE GROUND THAT IT DOES NOT DISPLACE STATE POLICY IN AREAS OF TRADITIONAL STATE CONCERN

Petitioners also argue that Section 13981 is distinguishable from the GFSZA because the latter "supplanted" state policies in areas of traditional state concern, and Section 13981 does not. But this argument is both irrelevant and untrue.

A. Petitioners' Argument Is Irrelevant

First, petitioners do not explain how intrusion of a statute into areas traditionally regulated by the states bears on whether it is a constitutional exercise of the Commerce Clause. It is well-settled that if Congress is acting within its enumerated powers, it may regulate in areas of traditional state concern. United States v. Culbert, 435 U.S. at 379 (Hobbs Act punished conduct already punishable under state robbery and extortion statutes; maxim against upsetting federal-state balance applies only when the statute is ambiguous and, in the Hobbs Act, "there is no question that Congress intended to define as a federal crime conduct that it knew was punishable under state law"). Indeed, its power to regulate commerce has always been held to be plenary. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) ("This power is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution" quoting Gibbons v.

Ogden, 22 U.S. 1 (1824)).[7]

Indeed, Brzonkala seems to concede as much, but suggests that perhaps Congress only has "concurrent" jurisdiction in such traditional areas. Brzonk. Br. 33-34. That position is untenable. When Congress is acting within its powers, it can preempt state law pursuant to its authority under Article VI. City of New York v. F.C.C., 486 U.S. 57, 63 (1988) ("When the Federal Government acts within the authority it possesses under the Constitution, it is empowered to pre-empt state laws to the extent it is believed that such action is necessary to achieve its purposes. The Supremacy Clause of the Constitution gives force to federal action of this kind . . . "); Aloha Airlines v. Director of Taxation Of Hawaii, 464 U.S. 7, 14 n.10 (1983) (Federal law preempted state taxation of airlines; "Congress clearly has the authority to regulate state taxation of air transportation in interstate commerce"); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) ("The first inquiry is whether Congress, pursuant to its power to regulate commerce . . ., has prohibited state regulation of the particular aspects of commerce involved in this case . . . [W]hen Congress has 'unmistakably . . . ordained' . . . that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall" (emphasis added)).

[7] Just as there is no "domestic relations" exception in Article III of the Constitution governing federal court jurisdiction (Ankebrandt v. Richards, 504 U.S. 689 (1992)), Article I does not preclude Congressional regulation of that area if Congress is acting within its enumerated powers. See, e.g., Amici Brief of NYC Bar Ass'n, et al., 8-9.

B. Section 13981 Displaces State Policy In Areas Of Traditional State Concern

If displacement of state policies were relevant to the determination of the scope of Congressional power under the Commerce Clause, it would further militate against Section 13981. Petitioners claims that the GFSZA imposed significantly on state sovereignty, but, as the court below found, the GFSZA did not generally intrude on state policy. Pet. App. 42a n.10. Intrusion occurred only in the limited sense that individuals in states that had no rule concerning possession of guns around schools might be subject to criminal liability (if their guns were not state-licensed). Section 13981 does exactly the same thing, and more so. Pet. App. 44a. And it does it in the area of civil tort law, a traditional area of state regulation. Pet. App. 41a, 73a-74a, 205a (Niemeyer, J., concurring). See also Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) (recognizing "the States' traditional authority to provide tort remedies to its citizens"). For example:

* An individual with a claim time-barred under state law can still seek redress under Section 13981 (even in state court) because the four-year statute of limitations displaces the statute of limitations a state would apply to gender-based animus-motivated violent torts. Those state statutes of limitations reflect the state's weighing of the competing interests of providing remedies and avoiding stale evidence. Cf. Guaranty Trust Co. v. York, 326 U.S. 99 (1945) (federal courts should apply state statute of limitations when applying state law in federal court pursuant to diversity jurisdiction).

* States that conclude that attorneys' fee awards largely available only to plaintiffs cause unnecessary

litigation cannot prevent such litigation between its citizens where a plaintiff can allege a gender-based animus-motivated tort under Section 13981. See Richard Posner, Economic Analysis Of Law 576 (4th ed. 1992) ("indemnity [of attorneys' fees] in favor just of plaintiffs encourages [nuisance suits]").

* Some of petitioners' amici report that states have been limiting the amount of punitive damages awards that can be obtained in tort cases. See Amici Brief of Nat'l Network To End Domestic Violence, et al. ("Nat'l Network Amici Br."), 14, 15 & n.38. Section 13981 precludes states from enforcing that tort policy.

* Consensual sex with a minor is prosecuted criminally everywhere, but some states consider consent a defense to a civil action on the theory that the law may otherwise encourage underage girls to have sex and sue for damages. E.g., Michelle T. v. Crozier, 173 Wisc. 2d 681, 685, 495 N.W.2d 327, 329 (1993); Barton v. Bee Line, 238 A.D. 501, 265 N.Y.S. 284 (App. Div. 1933). Cf. L.K. v. Reed, 631 So. 2d 604, 607 (La. App. 1994) (comparative fault based upon consent). These efforts to lower the incentives for premature sex by underage girls can be circumvented by a Section 13981 lawsuit because the federal law permits a civil suit for any felony against the person. (The lower courts generally hold that statutory rape is an "act of violence" under 18 U.S.C. § 16. E.g., United States v. Velazquez-Overa, 100 F.3d 418, 419-20 (5th Cir. 1996); United States v. Riley, 183 F.3d 1155, 1160-61 (9th Cir. 1999); cf. United States v. Shannon, 110 F.3d 382, 387-88 (7th Cir. 1997) (same result under

Sentencing Guidelines).)[8]

Section 13981 also displaces the state policy decisions implicit in laws governing the intersection of torts and intrafamilial relationships. Section 13981(d)(2)(B) states that plaintiffs can sue for acts that would be felonies "but for the relationship between the person who takes such action and the individual against whom such action is taken." This "ignore the relationship" mandate has some startling consequences:

* While virtually no state gives parents "immunity" from serious tortious conduct anymore (see Herzefeld v. Herzefeld, 732 So.2d 1102, 1103 & 1103-04 n.2 (Fla. App.), review granted, 740 So. 2d 528 (1999)),[9] the common law usually recognizes that the parental relationship creates certain privileges concerning corporal punishment that do not exist between strangers. Restatement (Second) of Torts, § 895G, comment k (1979) (recognizing the "privilege of parental discipline"; the "intimacies of family life also involve intended physical contacts that would be actionable between strangers but

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[8] Determination of whether a particular crime is an "act of violence" is done on a categorical, rather than case-by-case, basis. Velazquez-Overa, 100 F.3d at 420-21.

[9] Interestingly, the Herzefeld court indicates that Louisiana is the only state with a parental immunity doctrine. Herzefeld, 732 So. 2d at 1103-04 n.2. In fact, Louisiana appears to have a tolling provision precluding suit only while the child is a minor. Steele v. Steele, 732 So. 2d 546, 548 (La. App. 1999) (immunity for torts lasts until minor reaches maturity, but statute of limitations is tolled). Cf. Duplechin v. Toce, 497 So. 2d 763, 765 (La. App. 1986) (Louisiana recognizes marital immunity only during time of marriage; wife can sue husband for beating her after divorce becomes final). Of course, Section 13981 displaces that state tolling policy.

may be commonplace and expected within the family"). The mother who, believing boys are more troublesome and in greater need of discipline than girls, and gives corporal punishment only to her sons, will not receive the benefit of that common-sense rule under the mandate of Section 13981(d)(2)(B) that relationships must be ignored. (Battery against a minor is considered a felony in many jurisdictions. E.g., Ariz. Rev. Stat. Ann. §§ 13-1204(A)(6), 13-1204(B) (West 1989)).

* Similarly, while marital immunities for serious harms are rare (see Brief of Amicus State of Alabama (Appendix); Nat'l Network Amici Br. 14), presumptions often underlie sexual contact within the marriage relationship. Restatement (Second) of Torts, § 895F, comment h (1979) ("concept of consent to an intentional physical contact carries a much broader scope of application within the marital relationship than it does for other parties").[10] The ignore-the-relationship mandate of Section 13981 could lead to claims of animus-based sexual torts for any unwanted sexual touching (which, again, usually constitutes a felony between strangers) within a

[10] Similarly, state criminal laws recognize certain exemptions for less severe sexual contact that would be felonious between unmarried individuals. Ariz. Rev. Stat. Ann. §§ 13-1401.5(b), 13-1404, 13-1406.01(A), 13-1407(D) (West 1989 & Supp. 1998) (spouses exempt from prohibitions against, inter alia, sexual contact without consent, including while victim is asleep); Conn. Gen. Stat. Ann. §§ 53a-51, 53a-65, 53a-70b, 53-72a (West 1994 & Supp. 1999) (spouses exempt from felony of sexual contact by use of force or attempted sexual contact by use of force); Wash. Rev. Code Ann. §§ 9A.44.050, 9A.44.100 (West 1988 & Supp. 1999) (spouses exempt from "indecent liberties" felony); Wyo. Stat. §§ 6-1-304, 6-2-304, 6-2-307 (Michie 1997) (marriage is defense to felony of attempt at sexual contact by force).

marriage.

* As certain amici unartfully mention (see Amici Brief For Lawyers' Committee Under Civil Rights, et al. 8), most states provide exemptions to their statutory rape laws for married couples, recognizing that couples with a retarded or underage wife would be forbidden by state law from having sexual relations. Section 13981's requirement that the relationship be ignored permits a woman in such a marriage to claim that her animus-motivated husband's consensual sex with her constituted "statutory rape" at any time within the generous statute of limitations provided.

Finally, Section 13981 displaces state prerogative by elevating the importance of gender-based animus-motivated crime. That was its purpose, of course. S. Rep. 103-138 at 50 (1993) (send a "special societal judgment"). But it is hardly an uncontroversial one. Many think that singling out certain motivations for special treatment improperly diminishes the importance of identical crimes with different motivations (even different "hate-based" motives not included in the statute), leads to the balkanization of American society, or creates other problems. E.g., James B. Jacobs & Kimberly Potter, Hate Crimes: Criminal Law And Identity Politics 8 (1998); Hearings Before The House Judiciary Committee on H.R. 1082 (August 4, 1999), 1999 WL 20011034 (Statement Of Daniel E. Troy) (hate crimes moves away from Biblical and constitutional requirements of equal treatment); id., 1999 WL 20011043 (Statement of Heidi M. Hurd) (creates unique mens rea issues inconsistent with criminal law and punishes bad character). Perhaps these arguments are persuasive, perhaps not. But Section 13981 displaces a state's decision not to send a signal that gender-based animus-motivated crime within its jurisdiction is different

from other serious crime against women (or anyone else) -- just as the GFSZA displaced a state's policy not to give special attention to the possession of guns in school zones.

Just after insisting that Section 13981 is a "model of cooperative federalism," (Brzonk. Br. 34), though, Brzonkala insists that Section 13981 "addresses a problem of national dimension with national consequences." Id. 35. The same could be said about violence in schools. "National" problems (in the sense that they occur in many places) are not always problems of "interstate commerce." Pet. App. 207a-08a (Niemeyer, J., concurring).

IV. LOPEZ CANNOT BE DISTINGUISHED ON THE GROUND THAT SECTION 13981 IS A CIVIL REMEDY OR A CIVIL RIGHTS LAW

The United States asserts that this Court placed great emphasis on the fact that the GFSZA was a criminal statute. U.S. Br. 33-34. See also Brzonk. Br. 33-34. In fact, this Court has never differentiated between civil and criminal law in assessing the scope of Congress's power to regulate "commerce among the states." See Pet. App. 373a-74a. And, as shown above, civil law has the same capacity to interfere with state policy choices as criminal law.

Petitioners also insist that Section 13981 is civil rights legislation "in the classic sense." U.S. Br. 34. They assert that because "civil rights" is an historic function of the federal government -- albeit one in which Congress took an extended leave of absence (Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 245 (1964) (82-year gap between civil rights legislation) -- any legislation with that label cannot possibly invade an area of traditional state

regulation. U.S. Br. at 34-35; Brzonk. Br. 35. They conveniently ignore that gun control has also been an historic federal function. See United States v. Lopez, 2 F.3d 1342, 1348-59 (5th Cir. 1993) (describing that history), aff'd, 514 U.S. 549 (1995); Pet. App. 74a n.17.

Petitioners do not define "civil rights" (much less "civil rights in the classic sense"), except to imply that it does not include the right of schoolchildren to go to violence-free schools. It is a phrase not only absent from the Constitution, but difficult to define when used elsewhere (as in 28 U.S.C. § 1343(4)). Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 620-21 (1979) ("Arguably, a statute that is intended to provide at least a minimum level of subsistence for all individuals could be regarded as securing . . . 'civil rights.' We are persuaded, however, that . . . th[is] term[] ha[s] a more restrictive meaning as used in the jurisdictional statute"); Dawson v. Myers, 622 F.2d 1304, 1309 n.6 (9th Cir. 1980) ("unclear" whether due process and equal protection claims based on Medicaid eligibility rules were "civil rights" claims for purpose of Section 1343(4)), vacated on other grounds, Beltran v. Myers, 451 U.S. 625 (1981).

In any event, providing damages remedies for invasions of bodily integrity is a "civil right" that the common law has recognized since prior to the founding of this country. Pet. App. 41a, 73a-74a, 205a (Niemeyer, J., concurring). Defining a subset of such invasions, like gender-based and animus-motivated invasions of bodily integrity, does not change that at all.

* * *

The Commerce Clause is a source of great federal

authority. Today, though, Congress threatens to be use it as the plenary police power that the Constitution withheld. Congressional willingness to stretch the Commerce Clause as an expedient tool to reach societal problems is not unique to Section 13981, or even confined to any particular political view. Recently, it has been used to threaten to regulate partial-birth abortions and doctor-assisted suicide, as well as violence against women. But that only underscores the importance this Court plays in preserving our constitutional structure.

V. SECTION 13981 IS NOT PROPER LEGISLATION TO ENFORCE THE FOURTEENTH AMENDMENT

As the Fourth Circuit correctly held, United States v. Harris, 106 U.S. 629 (1883) and the Civil Rights Cases, 109 U.S. 3 (1883) preclude the conclusion that Section 5 of the Fourteenth Amendment authorized Congress to pass Section 13981. The legislative history of the civil rights statutes at issue in those cases, described in detail by the Fourth Circuit, demonstrates that Congress was trying to remedy the failure of states to enforce the rights of African Americans like Morrison and Crawford. See also Alfred Avins, The Civil Rights Act of 1875 And *The Civil Rights Cases* Revisited: State Action, The Fourteenth Amendment, And Housing, 14 UCLA L. Rev. 5, 15 (1966) (there were "numerous complaints throughout the debates [on the 1875 Civil Rights Act] that the common law remedy was of no avail because Negroes could not get equal justice in state courts"); John Harrison, Reconstructing The Privileges Or Immunities Clause, 101 Yale L.J. 1385, 1425-26 (1992) (Civil Rights Act of 1875 was passed, in part, because "many Republicans believed that the states were not enforcing the common law rule of nondiscrimination, but were instead permitting common carriers to violate it at the

expense of blacks").

Petitioners' efforts to distinguish Harris and the Civil Rights Cases basically assumes that this Court was unaware of that history. But, as the Fourth Circuit recognized (Pet. App. 121a-22a n.27), this Court specifically stated in the Civil Rights Cases that it "carefully considered" the "arguments of distinguished senators, advanced while the law was under consideration, claiming authority to pass it by virtue of [the Fourteenth] [A]mendment." Civil Rights Cases, 109 U.S. at 10. That, in and of itself, was unusual because this Court rarely made references to any legislative history until after the Civil Rights Cases was decided. Gregory E. Maggs, The Secret Decline Of Legislative History: Has Someone Heard A Voice Crying in the Wilderness?, 1994 Pub. Int. L. Rev. 57, 63 & n.21 (Roger Clegg and Leonard Leo, eds. 1994) ("The Supreme Court began to cite legislative history as we now know it around the close of the nineteenth century," citing cases from the 1890s).[11]

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[11] The United States also asserts that this Court declared the 1871 Act unconstitutional because it used the words "equal protection" in the context of a law against private parties. U.S. Br. 46. As the early drafts of Section 13981 demonstrate, Congress still occasionally uses words from the Fourteenth Amendment like "equal protection" or "privileges and immunities" when describing laws that primarily reach private conduct. S. Rep. 101-545 at 23. See also, e.g., 29 U.S.C. § 2601(b)(4) (although neither Congress nor private individuals are subject to the Fourteenth Amendment, Congress expresses concern that goals of the Family and Medical Leave Act, largely applicable to private employers, be "accomplish[ed] . . . consistent with the Equal Protection Clause of the Fourteenth Amendment, minimiz[ing] the potential for employment discrimination on the basis of sex"). More important, this Court has specifically held that there is "nothing inherent in the phrase [equal protection] that requires the action

(continued...)

This Court recently upheld the Section 5 analysis of Harris and the Civil Rights Cases. City of Boerne, 521 U.S. at 524-25 (Section 5 analysis of, inter alia, the Civil Rights Cases and Harris "has not been questioned"); id. at 545-46 (O'Connor, J., dissenting) (agreeing with Court's Section 5 analysis). Given that, the Fourth Circuit's conclusion that Section 13981 cannot be sustained as an exercise of Congress's authority under Section 5 of the Fourteenth Amendment was correct.

VI. THE AMENDED COMPLAINT FAILS TO STATE A CAUSE OF ACTION UNDER SECTION 13981

Crawford was completely successful in the court below, and thus could not file a cross-petition. Northwest Airlines, Inc. v. County of Kent, 510 U.S. 355, 365 n.8 (1994). Nonetheless, as set forth in his opposition to the petition for certiorari (Cert. Opp. 10 n.3), he may raise any argument properly raised that would support the judgment of the courts below. This Court may affirm on any such ground. County of Kent, 510 U.S. at 364; Thigpen v. Roberts, 468 U.S. 27, 30 (1984) (affirming on ground not relied upon by the court below and not addressed in the petition for certiorari).

Here, a reasonable statutory construction could avoid a constitutional question. Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 575 (1988). This Court may and should apply a narrowing construction to Section 13981 so

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[11](...continued)
working the deprivation to come from the State." Griffin v. Breckenridge, 403 U.S. 88, 97 (1971), citing Harris, 106 U.S. at 643.

as to avoid the constitutional questions while affirming the judgment of the Courts below. Moreover, a narrow construction is proper when a federal statute purports to regulate in an area traditionally governed by state law. United States v. Bass, 404 U.S. 336, 349 (1971) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance").

The courts below reached the constitutional questions because they concluded that the amended complaint stated a claim against Morrison. They never reached the question of whether the amended complaint stated a claim against Crawford. In fact, it does not state a claim against either Morrison or Crawford, and the judgment in their favor can be affirmed on that ground.

Brzonkala alleges that Crawford raped her. No comments are attributed to him and there is nothing in the complaint from which an animus based on gender can be attributed to Crawford. All rapes evince a lack of respect for the victim as an individual. Not all of them evince a lack of respect for women as a gender (as Congress recognized in the legislative history of the Act), much less are they all motivated by an animus against women. There are many motivations for rape other than gender animus, generalized anger and sexual self-indulgence being perhaps only the most obvious.

The dissent in the court below concluded that a claim was stated against Crawford because Brzonkala alleges that Crawford conspired with Morrison to rape her, and statements by Morrison thus could be attributed to Crawford. Pet. App. 223a. The cases cited by the dissent to support this proposition all stand for the proposition that statements made in furtherance of a conspiracy can be

attributed to co-conspirators. Morrison's statements came after the completion of the objective of this purported conspiracy, and cannot even plausibly be considered statements made in furtherance of it. After all, the statements are being used to identify Morrison's motive. No law requires that everyone in a conspiracy have the same motive.

Even if those statements could be attributed to Crawford, it does not matter because those statements do not indicate any gender-animus on the part of Morrison at the time that he allegedly committed the acts in question. The first of the two alleged comments ("you better not have any f***g diseases") does not evince gender-animus at all, but rather a concern for self-preservation. The second purported comment ("I like to get girls drunk and f**k the s**t out of them"), even if it evinced such animus, is alleged to have been said at some unspecified time in the five months after the purported rape. (Its connection to this case is unclear since Brzonkala steadfastly asserts that she was not drunk on the night of her alleged attack.) Even reading the allegations of the amended complaint liberally, it is asking too much to assume that any gender-animus comments that a defendant ever has uttered can be used to demonstrate gender-animus at the time of the purported act in question.

It is no doubt correct that an explicit statement of hatred of women is unnecessary, but something more than the slim allegations of the amended complaint should be required. Without such a requirement, Section 13981 will become the general law against rape that Congress sought to avoid.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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