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 FOR RESPONDENT ANTONIO J. MORRISON

Filed December 13, 1999

## QUESTIONS PRESENTED

1. Is a federal law that provides a civil remedy for a victim of a violent felony, perpetrated by a private individual motivated by an animus based upon gender, a law within Congress's power to regulate "commerce with foreign nations, among the several states, and with the Indian tribes"?

2. Is a federal law that provides a civil remedy for a victim of a violent felony, perpetrated by a private individual motivated by an animus based upon gender, a law within Congress's power to enforce the constitutional provision stating that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws"?

3. Did the amended complaint in this action state a claim pursuant to that federal law, 42 U.S.C. § 13981?

## TABLE OF CONTENTS


QUESTIONS PRESENTED . . . . . . . . . . . . . . . . . . . . i

TABLE OF CONTENTS . . . . . . . . . . . . . . . . . . . . . ii

TABLE OF AUTHORITIES . . . . . . . . . . . . . . . . . . vi

STATEMENT OF THE CASE . . . . . . . . . . . . . . . 1

A. Statutory Background . . . . . . . . . . . . 1

B. Legislative History . . . . . . . . . . . . . . 2

1. Subtitle C . . . . . . . . . . . . . . . . . . 2

2. Hate Crimes . . . . . . . . . . . . . . . . . 5

C. Factual Allegations . . . . . . . . . . . . . . 8

D. Proceedings In The Courts Below . . . . 8

E. The State Court Actions . . . . . . . . . . . 10

SUMMARY OF ARGUMENT . . . . . . . . . . . . . . . 11

ARGUMENT . . . . . . . . . . . . . . . . . . . . . . . . . . 14

I. THE COMMERCE CLAUSE DOES NOT AUTHORIZE CONGRESS TO REGULATE GENDER-BASED ANIMUS-MOTIVATED FELONIES . . 14





A. Subtitle C Does Not Regulate Activity That "Substantially Affects" Interstate Commerce . . 15

B. Petitioners' Cases Are Distinguishable . . . . . . . . . . . 20

C. "Findings" Do Not Distinguish Lopez . . . . . . . . . . . . . . . . . 23

1. The Findings . . . . . . . . 23

2. The "Absence" Of "Findings" In Lopez . . . 24

3. "Findings" Provide No Substantive Limit . . . . . 26

D. Petitioners' Other Distinctions Are Meritless . . . . . . . . . . . . 28

1. Congress's "Finding" That The States Have Been Ineffective . . . . . . 29

2. "Displacement" Of State Law . . . . . . . . . . 29

3. Traditional State Areas Of Regulation . . . . . . . . 31

4. The Necessary And Proper Clause . . . . . . . 32

E. Petitioners' Rationale Would Lead To A General Police Power For Congress Inconsistent With The Doctrine Of Enumerated Powers . . . . . . . . . . . . . . . . 33

II. SECTION 5 DOES NOT AUTHORIZE CONGRESS TO REGULATE FELONIES COMMITTED BY PRIVATE INDIVIDUALS . . . . . . . . . . . . . . . . 35

A. The Plain Meaning Of Section 5 Demonstrates That Section 13981 Does Not "Enforce" The Prohibition In Section 1 Against Denials Of Equal Protection . . . . . . . . . . . . . . . 35

B. This Court's Binding Authority Undermines Petitioners' Section 5 Argument . . . . . . . . . . . . . . . 37

C. Section 13981 Is Not A Congruent And Proportional Response To Likely Constitutional Violations . . . . . . 43

1. Legislative History Does Not Demonstrate Widespread Violations Of The Fourteenth Amendment . . . . . . . . . 44





2. Subtitle C Is Not Congruent And Proportional . . . . . . . . . 47

D. Petitioners' Theory Would Grant Congress An Unlimited General Police Power . . . . . . . 48

III. THE AMENDED COMPLAINT FAILS TO STATE A CAUSE OF ACTION UNDER SECTION 13981 . . . 50

CONCLUSION . . . . . . . . . . . . . . . . . . . . . . . . 50

## TABLE OF AUTHORITIES

*Cases*


*Balistreri v. Pacifica Police Dep't*, 901 F.2d 696 (9th Cir. 1988) . . . . . . . . . . . . . . . . . . . . . . 46

*Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) . . . . . . . . . . . . . . . . . . . . . . . . 49

*Burbank-Glendale-Pasadena Airport Authority v. City of Burbank*, 136 F.3d 1360 (9th Cir. 1998) . . . . . . . . . . . . . . . . . . . . . . . . . . . 10

*City of Boerne v. Flores*, 521 U.S. 507 (1997) . 9, *passim.*

*City of New York v. F.C.C.*, 486 U.S. 57 (1988) . . . . 30

*Civil Rights Cases*, 109 U.S. 3 (1883) . . . . . . . . 9, 39-43

*College Savings Bank v. Florida Prepaid Post-secondary Education Expense Bd.*, 119 S. Ct. 2219 (1999) . . . . . . . . . . . . . . . . . . . . . . 36

*DeShaney v. Winnebago County Dep't Of Social Services*, 489 U.S. 189 (1989) . . . . . . . . . . . 46

*District of Columbia v. Carter*, 409 U.S. 418 (1973) . . 43

*Eagleston v. Guido*, 41 F.3d 865 (2d Cir. 1994) . . . . . 46

*Ex parte Virginia*, 100 U.S. 339 (1879) . . . . . . . . 36, 40

*Fletcher v. Town of Clinton*, 1999 WL 997806 (1st Cir. Nov 8, 1999) . . . . . . . . . . . . . . . . . . . 45





*Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199 (1999) . . . . . . . . . . . . . . . . . . 27, 44, 47

*Garcia v. San Antonio Metropolitan Transit Ass'n*, 469 U.S. 528 (1985) . . . . . . . . . . . . . . . . . . 13

*General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982) . . . . . . . . . . . . . . . . . 41

*Gibbons v. Ogden*, 22 U.S. 1 (1824) . . . . . . . . . . . . 11

*Gregory v. Ashcroft*, 501 U.S. 452 (1991) . . . . . . . . . 11

*Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974) . . . . . . . . . . . . . . . . . . . . . . . . . . 19

*Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995) . . . . . . . 1

*Hans v. Louisiana*, 134 U.S. 1 (1890) . . . . . . . . . . . 27

*Head v. New Mexico Bd. Of Examiners In Optometry*, 374 U.S. 424 (1963) . . . . . . . . . . . . . . . 31

*Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) . . . . . . . . . . . . . . . . . . 21, 22

*Hynson v. City of Chester*, 864 F.2d 1026 (3d Cir. 1988) . . . . . . . . . . . . . . . . . . . . . . . . . . 46

*Jett v. Dallas Independent School Dist.*, 491 U.S. 701 (1989) . . . . . . . . . . . . . . . . . . . . . . . . 38

*Jones v. Rath Packing Co.*, 430 U.S. 519 (1977) . . . . 30

*Kansas v. Colorado*, 206 U.S. 46 (1907) . . . . . . . . . 35

*Katzenbach v. McClung*, 379 U.S. 294 (1964) .... 21, 22

*Katzenbach v. Morgan*, 384 U.S. 641 (1966) ........ 9

*Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) ... 41

*M'Culloch v. Maryland*, 17 U.S. 316 (1819) ..... 32, 33

*Maryland v. Wirtz*, 392 U.S. 183 (1968), *overruled*, *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled*, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) ........................ 25, 26

*McKee v. City of Rockwall*, 877 F.2d 409 (5th Cir. 1989) .......................... 46

*Nicpon v. Nicpon*, 145 Ill. App. 3d 464, 495 N.E.2d 1193 (1986) ...................... 45

*Northern Securities Co. v. United States*, 193 U.S. 197 (1904) ........................ 27

*Opoka v. Immigration and Naturalization Service*, 94 F.3d 392 (7th Cir. 1996) ............... 10

*Paiewonsky v. Paiewonsky*, 446 F.2d 178 (3d Cir. 1971) .......................... 45

*Patsy v. Bd. Of Regents Of State Of Florida*, 457 U.S. 496 (1982) .................. 38, 42

*Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) ... 27

*Perez v. United States*, 402 U.S. 146 (1971) ....... 29



*Personnel Administrator v. Feeney*, 442 U.S. 256 (1979) ........................... 46

*Printz v. United States*, 521 U.S. 898 (1997) ....... 32

*Sable Communications, Inc. v. F.C.C.*, 492 U.S. 115 (1989) ........................ 27

*Seminole Tribe v. Florida*, 517 U.S. 44 (1996) ...... 27

*Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) ........................... 31

*Southland Corp. v. Keating*, 465 U.S. 1 (1984) ..... 29

*Thompson v. Thompson*, 218 U.S. 611 (1910) ...... 45

*Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984) .................... 46

*United States v. Bird*, 124 F.3d 667 (5th Cir. 1997) ... 14

*United States v. Cruikshank*, 25 F. Cas. 707 (C.C.D. La. 1874) (No. 14897), *aff'd*, 92 U.S. 542 (1875) .................. 38

*United States v. Guest*, 383 U.S. 745 (1966) ....... 43

*United States v. Harris*, 106 U.S. 629 (1883) .. 9, *passim.*

*United States v. Jones*, 178 F.3d 479 (7th Cir. 1999), *cert. granted*, 1999 WL 699893 (U.S. November 15, 1999) .................. 6

*United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995) .............. 17

*United States v. Lopez*, 514 U.S. 549 (1995) . . 9, *passim.*

*United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460 (1949) . . . . . . . . . . . . . . . . . . 23

*United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942) . . . . . . . . . . . . . . . . . . . . . . . . . 23

*Varholla v. Varholla*, 56 Ohio St. 2d 269, 383 N.E.2d 888 (1978) . . . . . . . . . . . . . . . . . . 45

*Watson v. Kansas City*, 857 F.2d 690 (10th Cir. 1988) . . . . . . . . . . . . . . . . . . . . . . . . . . . 46

*Wickard v. Filburn*, 317 U.S. 111 (1942) . . . . . . . 17, 20

*Wolfe v. North Carolina*, 364 U.S. 177 (1960) . . . . . . 48

*Constitutional Provisions, Statutes, Rules*

18 U.S.C. § 2262 . . . . . . . . . . . . . . . . . . . . . . . . 33

18 U.S.C. § 245 . . . . . . . . . . . . . . . . . . . . . . . . . . 5

18 U.S.C. § 922(q) . . . . . . . . . . . . . . . . . . 9, *passim.*

18 U.S.C. § 2241 . . . . . . . . . . . . . . . . . . . . . . . . . 7

18 U.S.C. § 2261 . . . . . . . . . . . . . . . . . . . . . . . . 33

18 U.S.C. § 2262 . . . . . . . . . . . . . . . . . . . . . . . . 33

28 U.S.C. § 1445(d) . . . . . . . . . . . . . . . . . . . . . . 2



28 U.S.C. § 1658 . . . . . . . . . . . . . . . . . . . . . . . . . 2

28 U.S.C.A. § 994 (West. Supp. 1999) . . . . . . . . . . . 7

42 U.S.C. § 1988(b) . . . . . . . . . . . . . . . . . . . . . . . 2

42 U.S.C. § 13981 . . . . . . . . . . . . . . . . . . . . i, *passim.*

Civil Rights Act of 1871 (17 Stat. 13) (the "Ku Klux Klan Act") . . . . . . . . . . . . 37, 38, 42

Civil Rights Act of 1875 (18 Stat. 335) . . . . . . 39, 40, 42

Pub. L. 103-322 . . . . . . . . . . . . . . . . . . . . 1, *passim.*

Rule 12(b)(6), Fed. R. Civ. P. . . . . . . . . . . . . . . . . . 8

U.S. Const. amend. XIV § 1 . . . . . . . . . . . . . i, *passim.*

U.S. Const. amend. XIV § 5 . . . . . . . . . . . . 3, *passim.*

U.S. Const. art. I, § 8, cl. 3 . . . . . . . . . . . . . i, *passim.*

Va. Code Ann. § 8.01-243 (Michie's 1996) . . . . . . . . . 2

*Other Authorities*

31 Weekly Comp. Pres. Doc. (May 10, 1995) . . . . . . 25

Alfred Avins, *Federal Power To Punish Individual Crimes Under The Fourteenth Amendment: The Original Understanding*, 43 Notre Dame Lawyer 317 (1968) . . . . . . . . . . . . . . . . . . . 41

American Bar Ass'n, *The Federalization Of Criminal Law* 30 (1998) . . . . . . . . . . . . . . . . . . . . . 48

Brief for United States, *United States v. Lopez*, 514 U.S. 549 (1995), 1994 WL 242541 . . . . . . . . . . . 22, 31

Deborah Jones Merritt, *Commerce!*, 94 Mich. L. Rev. (1995) . . . . . . . . . . . . . . . . . . . . . . . 15

*Developments In The Law -- Race and the Criminal Process*, 101 Harv. L. Rev. (1988) . . . . . . . . 49

*Final Report of the Equality in the Courts Task Force, State of Iowa* (1993) . . . . . . . . . . . . . 49

*Final Report Of The Task Force On Racial And Ethnic Bias And Task Force On Gender Bias In The D.C. Courts* (1992) . . . . . . . . . . . . . . 49

*Gender and Justice: Report of the Vermont Task Force on Gender Bias in the Legal System* (1991) . . . . . . . . . . . . . . . . . . . . . . . . . 49

Grant S. Nelson and Robert J. Pushaw, *Rethinking The Commerce Clause: Applying First Principles To Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 Iowa L. Rev. 1 (1999) . . . . . 34

H.R. 77, 106th Cong. (1999) . . . . . . . . . . . . . . . . . . . 5

H.R. 1082, 106th Cong. (1999) . . . . . . . . . . . . . . . . 5

H.R. 3081, 105th Cong. (1997) . . . . . . . . . . . . . . . . 5

H.R. Conf. Rep. No. 103-711 (1994) . . . . . . . . . . . . 24



*Hearing On Domestic Violence: Hearing Before The Senate Judiciary Committee*, 103rd Cong. (1993) . . . . . . . . . . . . . . . . . . . . . . . . . 20

*Hearings Before The House Judiciary Committee on H.R. 1082* (August 4, 1999) (available on Westlaw) . . . . . . . . . . . . . . . . . . . . . . . . . 5

*Hearings Before The House Judiciary Committee On H.R. 3081* (July 22, 1998) (available on Westlaw) . . . . . . . . . . . . . . . . . . . . . . . . 5-7

Lawrence H. Tribe, *Constitutional Law*, (3d ed. 1999) . . . . . . . . . . . . . . . . . . . . . . 16, 27, 34

*Louisiana Task Force on Women in the Courts, Final Report* (1992) . . . . . . . . . . . . . . . . . . . . . 49

National Institutes of Health, *Statistics Related To Overweight And Obesity*, NIH Publication No. 96-4158 (July 1996) . . . . . . . . . . . . . . 23

Random House Unabridged Dictionary (2d ed. 1993) . . 36

*Report of the Fairness and Equality Committee of the Supreme Court of Idaho* (1992) . . . . . . . . . . . 49

S. 622, 106th Cong. (1999) . . . . . . . . . . . . . . . . . . . 5

S. 1529, 105th Cong. (1997) . . . . . . . . . . . . . . . . . . 5

S. Rep. 101-545 (1990) . . . . . . . . . . . . . . . . . . . . . 2

S. Rep. 102-197 (1991) . . . . . . . . . . . . . . . . . . . 1, 3

S. Rep. 103-138 (1993) . . . . . . . . . . . . . . . . . . . 1, 4

*The Effects of Gender In The Federal Courts: The Final Report Of The Ninth Circuit Gender Bias Task Force*, 67 S. Cal. L. Rev. 745 (1994) . . . . . . . . . . . . . . . . . . . . . . . . . 48

*The Gender, Race, and Ethnic Bias Task Force Project In The D.C. Circuit* (1995) . . . . . . . . 48

*The Hate Crimes Prevention Act of 1998: Hearing Before The Committee On The Senate Judiciary Committee On S.J. Res. 1529*, 105th Cong. (1998) . . . . . . . . . . . . . . . . 5-7, 33

*Violence Against Women: Victims Of The System: Hearing Before The Senate Judiciary Committee On S.15* , 102nd Cong. (1991) . . . . . . . . . 3

Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* (1996) . . . . . . . . . . 48

## STATEMENT OF THE CASE

A. Statutory Background

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 ("Subtitle C") of Title IV of Public Law 103-322. Title IV is often referred to as the Violence Against Women Act ("VAWA").

Subtitle C provides a tort remedy for a "crime of violence motivated by gender." 42 U.S.C. § 13981(c). Gender-motivated violence is a term of art defined to mean "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) (emphasis added). The gender-*motivated* violence that a plaintiff must state and prove, thus, has *two* independent requirements: (1) the crime of violence must be perpetrated on the basis of gender and (2) the act must be motivated by a gender-based animus. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) (Court should "avoid a reading which renders some words altogether redundant."). *See also* Amicus Brief Of Senator Joseph Biden ("Biden Amicus Br."), 16.

Congress made clear that Subtitle C 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"); Biden Amicus Br. 17 (quoting statement of Senator Hatch). So, too, the "author of VAWA" (Biden Amicus Br. 1) made clear that Subtitle C, *even prior to the addition of the "animus" requirement in 1993* (*see* Biden Amicus Br. 16-17), 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).

Although it is said to respond to "systemic" bias in state courts, Subtitle C gives state courts concurrent jurisdiction. 42 U.S.C. § 13981(e)(3). Moreover, if a claim is brought in state court, neither party may remove. 28 U.S.C. § 1445(d); Pub. L. 103-322, § 40302(e)(5). 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.

The four-year statute of limitations set forth in 28 U.S.C. § 1658 would apply to any claim under Section 13981. This is longer than the limitations periods for intentional torts in Virginia and most other states. Va. Code Ann. § 8.01-243 (Michie's 1996) (two years).

B. Legislative History

1. Subtitle C. -- A civil remedy like that in Subtitle C was first proposed in 1990 in S. 2754. Biden Amicus Br. 2. The proposal declared (in Section 301(b)) that all persons within the United States had a "right[], privilege[], or immunit[y]" to be free from "crimes of violence overwhelmingly motivated by the victim's gender," and provided a cause of action (in Section 301(c)) against those who deprive another of the rights, privileges, and immunities "secured by the Constitution and laws as enumerated in subsection (b)." S. Rep. 101-545 at 23.[1] The report declared that Congress had the right to pass such a law pursuant to "the commerce clause, the fourteenth amendment, the right to travel, and other rights protected by the privileges and immunities clause." *Id.* at 43.

[1] The word "overwhelmingly" served little purpose since "a crime of violence overwhelmingly motivated by . . . gender" was defined as a "crime of violence . . . motivated by gender." *Id.* (§ 301(d)).



The U.S. Justice Department opposed this first version of Subtitle C. *See* Letter from Bruce C. Navarro, Deputy Assistant Attorney General, To Honorable Joseph R. Biden Dated October 1990 (Lodged Doc. No. 1), 6-8. (Twelve copies of all "lodged" documents have been lodged with the Clerk of the Court.) Noting that the bill "appear[ed] to be predicated upon the Fourteenth Amendment," the Justice Department was "concerned that a cause of action based on acts that were not committed under color of state law may be unsupported by the Constitution . . . [W]e are unable to discern the authority for reaching purely private action." *Id.* at 8.

S.15 was introduced the next year in the 102nd Congress. Biden Amicus Br. 2. In April 1991, the Justice Department reiterated its objections to Subtitle C. *See* Letter from Bruce C. Navarro, Deputy Assistant Attorney General, To Honorable Joseph R. Biden Dated April 9, 1991 (Lodged Doc. No. 2), 14. Around that same time, one of Brzonkala's current attorneys testified, proposing the addition of "findings" so that Subtitle C could be validated pursuant to the Commerce Clause and Section 5 of the Fourteenth Amendment. *Violence Against Women: Victims Of The System: Hearing Before The Senate Judiciary Committee On S.15*, 102nd Cong. 104 (1991) (testimony of Cass Sunstein) (Subtitle C should be amended because "[t]here is nothing in [it] that refers to commerce at all, which I believe is a mistake, because the court likes to see findings both in the statute and the history"); *id.* 104-05 (avoid Justice Department's Fourteenth Amendment concern by amending statute to find that Congress is responding to state biases); *id.* 106-24 (Statement of Cass Sunstein). *See also* Pet. App. 151a-52a & n.32. The next version of S.15 contained a proposed civil remedy that had findings reflecting these suggestions. S. Rep. No. 102-197 at 27-28.

In the 103rd Congress, a new version of VAWA was introduced, with a civil remedy similar to Section 13981. S. Rep. No. 103-138 at 29-31. For the first time, the phrase "crime of violence motivated by gender" was defined to include an "animus" requirement, thus significantly limiting the acts covered under the statute. *Id.* at 30, 50. Biden Amicus Br. 16-17. Although the new definition substantially narrowed the scope of the covered conduct, Congress later heard no testimony at all about the specific acts covered under the revised provision, and how those acts might affect interstate commerce. Indeed, the Senate Committee report purporting to justify the constitutionality of the civil remedy referred to the effect of *all* gender-*based* violent crimes (ignoring the fact that the proposal now only covered such crimes that were *also* animus-motivated). S. Rep. No. 103-138 at 54-55. Concluding that Congress could regulate anything "that has even the slightest effect on interstate commerce" (*id.* at 54), the report found that the bill was within Congress's authority.

As the United States notes (U.S. Br. 11 n.5), state officials weighed in on both sides of the proposal. *See also* Conference Of Chief Justices Resolution IX on Violent Crime Control and Law Enforcement Act of 1994 (Lodged Doc. No. 3) (opposing Senate version of H.R. 3355, *i.e.*, S.15, because it "would result in the . . . inefficient use of the special but limited resources of the federal courts" and "assumes without foundation that states have been unresponsive and ineffective in addressing crime"). The Judicial Conference of the United States opposed early versions of VAWA. It continued to express concerns throughout consideration of the proposals by Congress. Report Of The Proceedings Of The Judicial Conference Of The United States, September 20, 1993, 59-60 (Lodged Doc. No. 4) (reiterating concerns expressed in 1991 resolution opposing earlier version of VAWA and "general



concerns with the trend in Congress to federalize traditional state crimes and causes of action").

2. Hate Crimes. -- A brief examination of recent proposals to expand 18 U.S.C. § 245, the federal hate crime statute, illuminates a much different view of the "pervasive" state bias petitioners rely upon. These proposals would include gender-based (but not necessarily animus-motivated) willful inflictions of bodily injury under Section 245, as well as those based upon disability and sexual orientation. (The proposals also expand coverage of acts based upon race, color, national origin, and religion.)

First, all of the proposals to expand Section 245 require, unlike Section 13981, a specific jurisdictional nexus between any gender-based conduct and interstate commerce. *See* S. 1529, 105th Cong. § 4(2) (proposed § 245(c)(2)(B)); H.R. 3081, 105th Cong. § 4(2); S. 622, 106th Cong. § 4(2); H.R. 77, 106th Cong. § 4(2); H.R. 1082, 106th Cong. § 4(2). According to the Justice Department officials, the purpose of the jurisdictional element is to avoid becoming "mired in constitutional litigation." *The Hate Crimes Prevention Act of 1998: Hearing Before The Committee On The Senate Judiciary Committee On S.J. Res. 1529*, 105th Cong. 18 (1998) ("*1998 Senate Hate Crimes Hearings*") (Statement of Deputy Attorney General Eric Holder); *Hearings Before The House Judiciary Committee On H.R. 3081* (July 22, 1998) ("*1998 House Hate Crimes Hearings*"), 1998 WL 514008 (Statement of William Lann Lee) ("*Lee Statement*"), "Interstate Commerce Requirement"; *Hearings Before The House Judiciary Committee on H.R. 1082* (August 4, 1999) ("*1999 House Hate Crimes Hearings*"), 1999 WL 20011032 (Statement Of Eric Holder) ("*Holder 1999 Statement*"), "Federalization and Jurisdiction." *See also 1998 Senate Hate Crimes Hearings* 65, 66 (Holder responding to questions from Sens. Ashcroft and

Torricelli). Even with required ties to interstate commerce, some scholars questioned whether a weak nexus would be sufficient to avoid constitutional difficulties. *E.g.*, *1998 House Hate Crimes Hearings*, 1998 WL 12763003 (Statement of John C. Harrison). *Compare United States v. Jones*, 178 F.3d 479, 480 (7th Cir. 1999) ("pretty slight" connection to interstate commerce met jurisdictional nexus under arson statute and was constitutional), *cert. granted*, 1999 WL 699893 (U.S. November 15, 1999).[2]

Second, none of the proposals find that states have engaged in bias against women. In fact, Justice Department officials repeatedly have emphasized that state and local jurisdictions would retain the primary role for all "hate crimes." *1998 Senate Hate Crimes Hearings* 7, 8, 10 (Testimony of Eric Holder), 13 (Holder Statement), 64 (Holder response to written questions from Sen. DeWine); *Lee Statement*, "Overview"; *Holder 1999 Statement*, "Gaps In Current Law." Local law enforcement officials would also handle "virtually all gender-motivated hate crimes." *1998 Senate Hate Crimes Hearings* 17 (Holder Statement); *Lee Statement*, "Gender"; *Holder 1999 Statement*, "Gender." *See also 1998 Senate Hate Crimes Hearings* 67 (Holder responses to questions from Sen. Torricelli). The Justice Department testified that "[s]tate and local officials are on the front lines and do an enormous job in investigating and prosecuting hate crimes that occur in their communities" (*Holder 1999 Statement*, "Prosecutions: Current Law"). Rather than a reaction to state biases or inadequacies, the legislation was needed primarily so that federal officials could "work effectively as partners with State and local law enforcement officials." *1998 Senate Hate Crimes Hearings* 7 (Holder Testimony); *Lee Statement*, "The 'Federally Protected Activity' Requirement"; *Holder 1999 Statement*, "Federalism."

Finally, the hearings have disclosed that, even without any "animus" requirement, "hate crimes" in general are relatively unusual events. *E.g.*, *1998 Senate Hate Crimes Hearings* 7 (Holder Testimony) (adding gender, disability, and sexual orientation as categories would result only in a "modest increase" in the average of six federal prosecutions per year under the Section 245); *id.* 64 (Holder responding to questions from Sen. DeWine) ("the number of federal prosecutions of gender-motivated hate crimes would be limited"). In fact, although 18 U.S.C. § 2241 covers a wide array of sexual assaults in federal enclaves and territories, and current sentencing guidelines permit enhancements whenever a victim is selected because of gender (*without* any "animus" showing required) -- *see* Public Law 103-322, § 280003(a) (note to 28 U.S.C.A. § 994 (West. Supp. 1999) at 115) -- the Justice Department has apparently *never* sought a sentence enhancement for gender-based crime. *1998 Senate Hate Crimes Hearings* 64 (Holder responding to questions from Sen. DeWine). *Compare 1998 House Hate Crimes Hearings*, 1998 WL 12763006 (Testimony of Richard Devine, Illinois County State's Attorney) (describing sentence enhancement state prosecutors obtained against animus-motivated serial rapist).

---

[2] Brzonkala's lawyer testified again about the Fourteenth Amendment, somewhat more cautiously than in his VAWA testimony, and again urged additional findings. *1998 House Hate Crimes Hearings*, 1998 WL 514016 (Statement of Cass Sunstein) ("there is a plausible argument that Congress can reach private conduct under the fourteenth amendment, but the current Supreme Court is not likely to accept this argument" and a "plausible" argument that Congress can reach private conduct because of state failures "to provide acceptable (or equal) protection against hate crimes, but this argument should depend on explicit findings and a good factual record"). To date, no proposal contains such findings.

C. Factual Allegations

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. For purposes of this brief, then, respondent Morrison must assume the truth of the allegations in the amended complaint ("Am. Com.") in this action. Accordingly, Morrison adopts the "facts" in the Brief of the United States ("U.S. Br.") 11-12.

D. Proceedings In The Courts Below

The original complaint was filed on or about December 27, 1995, the amended complaint shortly thereafter. Plaintiff Brzonkala asserted claims against Morrison and Crawford under Subtitle C and under state tort law. Defendants Morrison and Crawford moved to dismiss the amended complaint, and the United States intervened to defend the constitutionality of Subtitle C. The District Court dismissed Brzonkala's claims under Section 13981 in an order and judgment dated July 26, 1996. It declined to exercise supplemental jurisdiction over the state law claims, and dismissed them without prejudice. Pet. App. 402a-03a.

On December 23, 1997, a divided panel of the Fourth Circuit reversed the decision of the District Court. It held that Subtitle C was a legitimate exercise of Congress's Commerce Clause power. 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.

Although the District Court and the *en banc* Court of Appeals took slightly different approaches, each arrived at the same conclusion. With respect to the Commerce



Clause, the first enumerated power on which petitioners relied, the District Court considered factors it gleaned from this Court's opinion 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"). The District Court compared the similarities and differences between Subtitle C and the GFSZA with respect to those factors, and concluded that the similarities outweighed the differences. Pet. App. 365a-376a. The Fourth Circuit focused on the non-economic nature of the conduct: it concluded from *Lopez* 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. It concluded that whether the non-economic nature of the activity rendered the statute dispositively unconstitutional or only presumptively so was not of consequence in this case because any other factors also weighed against the statute's constitutionality. Pet. App. 31a-51a.

With respect to Section 5 of the Fourteenth Amendment, the District Court applied a means/ends analysis derived from *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and concluded that Subtitle C was not "plainly adapted" to correct state bias. Pet. App. 399a-401a. The *en banc* Court of Appeals, on the other hand, first focused more closely on this Court's opinions in *United States v. Harris*, 106 U.S. 629 (1883) and the *Civil Rights Cases*, 109 U.S. 3 (1883). It analyzed each case, and the legislative history of the statute at issue in each one, in detail. Pet. App. 104a-111a, 119a-21a, 124a-25a. The Fourth Circuit concluded that the constitutionality of Subtitle C was controlled by those precedents. Nonetheless, it also applied *City of Boerne v. Flores*, 521 U.S. 507 (1997) and engaged in a "means/ends" analysis to determine if Subtitle

C was appropriate prophylactic legislation for enforcing likely Section 1 violations. It concluded that the legislative history did not demonstrate the kind of purposeful discrimination by state actors required for prophylactic legislation, Pet. App. 151a-60a, and also that there was no "congruence and proportionality" between Section 13981 and any violation of the Equal Protection Clause (Pet. App. 160a-63a).

E. The State Court Actions

Shortly after the dismissal of the action in the District Court, Brzonkala commenced an action in the Circuit Court of the City of Chesapeake against Morrison and Crawford for, *inter alia*, common law assault and battery. City of Chesapeake Circuit Court At-Law No. CL96-814. The "motion for judgment" (Virginia's version of a complaint) noted the dismissal of the federal action and stated that "[p]laintiff will not appeal the federal court's dismissal of her common-law claims, but rather brings those common-law claims under the exclusive jurisdiction of this honorable Court." Lodged Doc. No. 5 ¶ 14. Plaintiff later voluntarily moved to non-suit that action, it was dismissed on August 26, 1997, and she has not refiled it. Lodged Doc. No. 6. A separate state lawsuit, filed in the Circuit Court of Montgomery County (Case No. V-10569) and alleging that Morrison, Crawford, and another student, *inter alia*, interfered with Brzonkala's contract with Virginia Tech by falsely testifying at University hearings, was also non-suited and not refiled. *See* Lodged Docs. 7-8.[3]

[3] Although these proceedings are not in the record (Pet. App. 191a (Niemeyer, J., concurring)), this Court may take judicial notice of official proceedings in another court. *E.g.*, *Burbank-Glendale-Pasadena Airport Authority v. City of Burbank*, 136 F.3d 1360, 1364 (9th Cir. 1998); *Opoka v. Immigration and Naturalization Service*, 94 F.3d (continued...)



## SUMMARY OF ARGUMENT

The Constitution created a federal government of enumerated powers "to ensure protection of our fundamental liberties." *Lopez*, 514 U.S. at 552 (*quoting Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)); *Lopez*, 514 U.S at 576 (Kennedy, J., concurring) ("it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one"). Morrison has a right to be free from an overreaching Congress, just as he has the right to be free from a Congress that would pass a law abridging freedom of speech. Thus, petitioners err in believing that the number of states who do or do not support a federal tort remedy is of any consequence. Even if all of them supported it, they cannot defeat this constitutional protection of individual liberty.

In *Lopez*, this Court reaffirmed the proposition that an "enumeration presupposes something not enumerated." *Lopez*, 514 U.S. at 566 (*quoting Gibbons v. Ogden*, 22 U.S. 1, 195 (1824)). Concerned that expansive interpretations of Congressional powers would leave nothing "unenumerated," and lead to an arrogation of power threatening individual liberty, this Court recently confirmed the limits to two of those powers -- the Commerce Clause and Section 5 of the Fourteenth Amendment -- in *Lopez* and *City of Boerne*. Petitioners have relied on only those two powers, and the Fourth Circuit properly concluded that those cases controlled here. In fact, when compared to *Lopez* and *City of Boerne*, this is an *a fortiori* case.

[3](...continued)
392, 394 (7th Cir. 1996) (court "has the power [and] . . . the obligation to take judicial notice of the relevant decisions of courts . . . , whether made before or after the decision under review").

With respect to the Commerce Clause power in Article I, § 8, one could at least argue, as Justice Breyer's dissent in *Lopez* did, that schools have a special relationship to interstate commerce given their own commercial dealings and their role in the economic development of their charges. One could at least argue, as Justice Stevens's dissent did, that guns are a commodity whose possession must be regulated to control their trade in interstate commerce.

Subtitle C regulates violence. Petitioners' theory is that any human behavior that, when aggregated across the population, could affect our collective capacity to consume, produce, or move in interstate commerce is within Congress's power to regulate. As both courts below recognized, that includes anything that affects our physical, mental, or emotional health because our health certainly affects our ability to work, buy, and travel. It includes all crime. It includes all activities which inflict injuries unintentionally. As the lower courts found, it also includes insomnia, obesity, and a lack of exercise. Pet. App. 38a, 380a-81a.

To avoid these obvious consequences, petitioners identify various criteria which they claim *might* limit Congress's Commerce Clause power. Perhaps, they assert, Congress cannot reach everything if it has not made findings, or if the states are doing a good job, or if the statute displaces state policies, or if it is not a "civil rights" law. These "limits" are not only bereft of any precedent to support them, but actually contradict well-established authority. Just as important, all of these limits have one thing in common: none of them has anything to do with "commerce." None relate to whether Congress is regulating "[c]ommerce with foreign nations, among the states, and with the Indian tribes." Under these theories, it is not the *enumeration* which presupposes something not enumerated; it is other, extra-constitutional things.



In the end, petitioners do not ask this Court to apply *Lopez*, but to ignore it. Pet. App. 76a, 81a-82a.[4]

With respect to Section 5, the Religious Freedom Restoration Act ("RFRA") at issue in *City of Boerne* at least sought to regulate those purportedly violating Section 1 of the Fourteenth Amendment: state governments. Here, petitioners argue that, although it is the states who have been violating the prohibitions of Section 1, Congress can "enforce" those prohibitions by letting those violators off the hook and punishing private parties whose conduct could not possibly violate Section 1. This Court has never sanctioned any such theory under Section 5. In fact, as the Fourth Circuit recognized, this Court rejected it long ago, and with good reason. If Congress could replace state law anytime it was dissatisfied with the way in which States were, for example, protecting "property" and "liberty" from private invasions, its Section 5 powers would be limited only by its "underdeveloped capacity for self-restraint." *Garcia v. San Antonio Metropolitan Transit Ass'n*, 469 U.S. 528, 588 (1985) (O'Connor, J., dissenting).

Petitioners' positions require this Court to reject both venerable and recent precedents, and to embrace explicitly a constitutional theory that places no meaningful limit on Congressional power.

---

[4] *See also, e.g.*, Plaintiff's Memorandum In Opposition To Defendants' Motion To Dismiss Filed 3/15/96 (J.A. 6) 12 (noting that the "true significance" of *Lopez* was the Court's "surprising unwillingness . . . to apply 'rational basis' analysis," whereby courts "hypothesize situations whereby the stream of interstate commerce may be affected in any conceivable way"; and urging the court to apply such "rational basis analysis" anyway).

## ARGUMENT

### I. THE COMMERCE CLAUSE DOES NOT AUTHORIZE CONGRESS TO REGULATE GENDER-BASED ANIMUS-MOTIVATED FELONIES

Congress cannot regulate felonious conduct pursuant to its power to regulate "commerce . . . among the states" because the activity being regulated is wholly non-economic in nature and because recognition of such a power would authorize Congress to regulate virtually anything.

In *Lopez*, the Court identified three categories of Commerce Clause legislation: laws regulating the channels of interstate commerce, laws regulating the instrumentalities of interstate commerce, and laws regulating activities which substantially affect interstate commerce. *Lopez*, 514 U.S. at 558-59. As in *Lopez*, the first two categories are "quickly disposed of" (*id.* at 559). Subtitle C does not regulate the "channels" or "instrumentalities" of interstate commerce, and, as in the court below, petitioners do not suggest otherwise. Pet. App. 16a-17a n.4. Subtitle C, then, can be sustained only if it regulates activity that "substantially affects" interstate commerce.

As the lower court noted, the phrase "substantially affects" (as interpreted in *Lopez*) is a term of legal art. Pet. App. 17a, 197a (Niemeyer, J., concurring). Mere quantitative effects on interstate commerce -- *i.e.*, any possible change in the volume of interstate commerce -- are insufficient since virtually any human activity can have such effects. Pet. App. 48a. *See also Lopez*, 514 U.S. at 558-59 ("Congress' commerce authority includes the power to regulate those activities having a substantial *relation* to interstate commerce" (emphasis added)); *United States v. Bird*, 124 F.3d 667, 677 n.11 (5th Cir. 1997) ("in determin-



ing whether the regulated intrastate activity substantially affects interstate commerce, 'substantial' must be understood to have reference not only to a quantitative measure but also to qualitative ones"); Deborah Jones Merritt, *Commerce!*, 94 Mich. L. Rev. 674, 679 (1995) (Court in *Lopez* rejected simple quantitative measure of "substantial" effects; "[t]he majority's use of 'substantial effect' is more akin to the notion of proximate cause in tort law"). In *Lopez*, this Court held that the qualitative connection to commerce is considered in light of the nature of the activity regulated.

#### A. Subtitle C Does Not Regulate Activity That "Substantially Affects" Interstate Commerce

In determining that possession of guns near schools did not "substantially affect" interstate commerce, this Court laid great weight on the non-economic nature of the activity being regulated. *Lopez*, 514 U.S. at 559-60 ("[W]e have upheld a wide variety of congressional Acts regulating intrastate *economic* activity where we have concluded that the activity substantially affected interstate commerce . . . Where *economic activity* substantially affects interstate commerce, legislation regulating that activity will be sustained. Even *Wickard* [*v. Filburn*, 317 U.S. 111 (1942)], which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved *economic activity* in a way that the possession of a gun in a school zone does not" (emphasis added)); *id.* at 561 (GFSZA "is not an essential part of a larger regulation of economic activity . . . It cannot be sustained, *therefore*, under our 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" (emphasis added)); *id.* at 567 ("The possession of a gun in a local school zone is in no sense an *economic activity* that might, through repetition elsewhere, substantially affect any sort of interstate commerce" (emphasis added)).

The dissenters in *Lopez* understood the "*critical* distinction between 'commercial' and noncommercial 'transaction[s].'" *Lopez*, 514 U.S. at 627 (Breyer, J., dissenting (emphasis added)). So have most commentators. *E.g.*, 1 Lawrence H. Tribe, *Constitutional Law*, § 5-4 at 819 (3d ed. 1999) ("rather than focusing on the quantity of the regulated activity's effects, the Court was attempting to reconfigure its precedents to focus more attention on the *nature of the underlying activity* -- paying particular attention to whether or not that activity could itself be described as part of an economic enterprise" (emphasis in original)). The court below amassed numerous quotes from the majority decision, concurrences, and dissents in *Lopez*, all demonstrating this Court's focus on this key factor (Pet. App. 18a-22a). *See also* Pet. App. 83a, 198a-99a (Niemeyer, J. concurring). The court below assumed that no reasonable reader could then gainsay the importance of that factor.

Plainly, it underestimated petitioners. Continuing the pattern they have followed throughout this litigation,[5]

---

[5] *See* Pet. App. 80a-82a. Indeed, in this Court, when challenged to explain what significance the non-economic nature of the conduct had in *Lopez*, Brzonkala responded that there was no reason "why petitioners should have provided any such explanation" because *Lopez* just "restate[d] the traditional test." Brzonkala Certiorari Petition Reply Brief 8.

Among all the briefs submitted by petitioners and their amici, only one even mentions this Court's reliance in *Lopez* on the non-economic nature of the conduct being regulated -- and that brief inexplicably refers to the opinion of this Court as the "plurality opinion." Brief Of Amici NYC Bar Ass'n, *et al.*, 10-11.



petitioners give no weight at all to the nature of the underlying activity. *E.g.*, Brzonk. Br. 39 ("has never been the test"). The closest they come is the United States' masterful understatement that the *Lopez* Court "*observed* that the GFSZA neither regulated a commercial activity nor contained a jurisdictional element." U.S. Br. 30 (emphasis added). (Subtitle C also lacks a jurisdictional element.) The United States quickly then asserts that those features were "not dispositive" because the *Lopez* Court quoted *Wickard v. Filburn*, 317 U.S. 111 (1942) -- in the section of the opinion in which this Court simply reviewed its past precedents. The United States ignores this Court's distinction of *Wickard*: that it involved "economic activity" in a way that the possession of guns around schools does not.

Subtitle C regulates non-economic violent activity. Indeed, it is hard to envision an activity more non-economic than the violence regulated by the Act. Not only is such violence generally non-economic, but the Act only covers such violence when a significant motivation is gender animus, a non-commercial motive.

Nonetheless, the United States tries several tacks to avoid this conclusion. First, it asserts that the felonies regulated by Subtitle C have an "economic component" because they *might* take place at work or at a store or at a bus terminal. U.S. Br. 18, 32. But any activity *might* occur at a place where commerce is transacted; that hardly means that it is "economic activity." The possession of a gun near a school *might* be for the purpose of selling it -- as was true in *Lopez*. *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993) (Lopez intended to sell his gun for $40 for use in a gang war), *aff'd*, 514 U.S. 549 (1995).

The United States also argues that Subtitle C is designed to remedy inadequate state mechanisms for compensating victims, and those mechanisms are "economic activity." U.S. Br. 18, 32. This is an evident bootstrap argument. An activity is not economic because it might result in a lawsuit for monetary compensation. Here, Subtitle C regulates violence, not the "activity" of providing a cause of action. The United States' argument would give Congress the authority to "regulate" all of domestic relations law (by setting up its own) if it were dissatisfied with the manner in which states distribute marital property.

For her part, Brzonkala assails the Fourth Circuit for creating a "bright line" test. In one of her few references to the majority opinion in *Lopez*, she notes that this Court stated that the distinction between economic and non-economic activity cannot be a "precise formulation." Brief of Petitioner Christy Brzonkala ("Brzonk. Br.") 38 (*quoting Lopez*, 514 U.S. at 567). But the Fourth Circuit never said there was a "bright line" or a "precise formulation." It simply held that the activity regulated here falls on the non-economic side of the line. There may be hard cases. This is just not one of them. And it is a virtue of the Fourth Circuit's opinion, not a flaw, that it reads *Lopez* to limit the scope of Congressional authority in an articulable way.

In any event, the Fourth Circuit also held that even if the non-economic nature of the activity were only a presumptive disqualification, Subtitle C is still unconstitutional. Pet. App. 31a-51a. The District Court considered a whole array of factors from *Lopez*; it did not view *any* of them as dispositive, and yet arrived at the same conclusion. Pet. App. 365a-382a.

Brzonkala now asserts that the Fourth Circuit's "facial invalidation" of Subtitle C was improper because "paying substantial fees for a college education is an economic activity" and Brzonkala "was forced to withdraw



from college" as a "direct result" of defendants' alleged conduct. Brzonk. Br. 41-42. This is an argument that Brzonkala did not make in the court below. She also ignores that this Court invalidated the GFSZA on its face. Further, it is not clear how Brzonkala defines "direct result." The amended complaint alleges that she withdrew eleven months after the assault and only because Virginia Tech had concluded that Morrison did not assault her. J.A. 26-27 (¶¶ 70-76); Brzonk. Br. 6. (Apparently, Virginia Tech's earlier conclusion that Crawford had not assaulted her (J.A. 22 (Am. Com. ¶ 52)) was insufficient to warrant withdrawal.) The connection she cites between the alleged attack and the failure of an intrastate commercial transaction nearly one year later is far weaker than the connection between the possession of a gun at issue in *Lopez* and an *immediate* commercial transaction -- its sale for $40.

Brzonkala would have this Court append a jurisdictional requirement of some kind onto Subtitle C, but which one? The narrow "in commerce" requirement of the Clayton Act (*see Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974)) or something else? This Court was unwilling to rewrite the statute in *Lopez*, and it should not do so here. Congress considered the matter and evidently wanted a statute just this broad.

The characterization of gender-based, animus-motivated felonies as non-economic activity is confirmed by the tenuous connection these acts have to "commerce . . . among the states." In order to go from the very serious harm to an individual to a substantial effect on interstate commerce, the need for inferences is no different from *Lopez*. For example, petitioners refer to testimony concerning Polaroid to establish such a connection. U.S. Br 24 n.8; Brzonk. Br. 11. A Polaroid executive did describe a program at Polaroid for battered women, but did not identify whether those women would have been covered by Subtitle C. *Hearing On Domestic Violence: Hearing Before The Senate Judiciary Committee*, 103rd Cong. 15-16 (1993) (Statement of James Hardeman). Of course, Subtitle C is not limited to women who work, but covers all people. But even if it were so limited, simply assuming that, because women work at Polaroid and Polaroid ships products in interstate commerce, every aspect of those women's well-being "substantially affects" interstate commerce is no different from assuming that violence at schools affects how much interstate commerce those schools can engage in. Each assumption requires inferences that *Lopez* rejected.

These inferences can be compared with those required in *Wickard v. Filburn*, 317 U.S. 111 (1942), which the *Lopez* Court called "perhaps the *most far reaching example* of Commerce Clause authority over intrastate activity." *Lopez*, 514 U.S. at 560 (emphasis added). In *Wickard*, the Court held that "[t]he effect of consumption of homegrown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop. Consumption on the farm where grown appears to vary in an amount *greater than 20 per cent* of average production." *Wickard*, 317 U.S. at 127 (emphasis added). It hardly required a massive leap of faith for the Court to conclude that so high a proportion of wheat would affect the price of wheat shipped in interstate commerce. If *Wickard* reflects "the most far reaching example" of permissible Commerce Clause authority, Section 13981 goes well beyond that authority.

**B. Petitioners' Cases Are Distinguishable**

Petitioners rely on a series of pre-*Lopez* cases. These cases are distinguishable for precisely the same reasons they were distinguished in *Lopez*.



Petitioners claim that *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964) stand for the proposition that Congress is within its Commerce Clause powers whenever it tries to removes barriers to participation in the economy, and that Subtitle C is such an effort. U.S. Br. 23-28; Brzonk. Br. 23-26. But those cases did not authorize Congress to remove any and all "barriers" to shopping, work, and travel. Rather, and contrary to the assertions of the United States (U.S. Br. 27 n.15), this Court relied significantly on the fact that the statute in question reached only businesses (certain hotels and restaurants) with close ties to interstate commerce. *Heart of Atlanta Motel*, 379 U.S. at 250 ("Title II [of the Civil Rights Act of 1964] is carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people"); *Katzenbach v. McClung*, 379 U.S. at 302 (the Commerce Clause "power extends to activities of *retail establishments* . . . which directly or indirectly burden or obstruct interstate commerce" (emphasis added)); *id.* at 304 ("Congress prohibited discrimination only in those establishments having a close tie to interstate commerce, *i.e.*, those . . . serving food that has come from out of the State"). So limited, the activities being regulated had a close, proximate connection to interstate commerce. *E.g.*, *Heart of Atlanta Motel*, 379 U.S. at 253 ("testimony indicated a *qualitative as well as quantitative effect* on interstate travel by Negroes. The former was the obvious impairment of the Negro traveler's pleasure and convenience that resulted when he continually was uncertain of finding lodging" (emphasis added)).[6]

---

[6] The United States asserts that this Court was unconcerned with whether the statute was limited to restaurants with a specific interstate connection. U.S. Br. 27 n.15 (*quoting McClung*, 379 U.S. at 304-
(continued...)

Petitioners' "barrier" argument also does not distinguish *Lopez*. As the District Court noted (Pet. App. 375a), *Lopez* rejected an argument that violence around schools precludes schoolchildren from full participation in the economy. *See* Brief for United States, *United States v. Lopez*, 514 U.S. 549 (1995), 1994 WL 242541, 22 ("Congress had ample basis as well to conclude that such impediments [caused by school violence] to the educational process would have substantial deleterious effects on the functioning of the national economy" because students were graduating from school without the skills to be productive workers in a global economy). More importantly, *Lopez* distinguished *Heart of Atlanta Motel* and *McClung* -- not because guns in schools did not create "barriers" but because, unlike the activity regulated by Title II of the Civil Rights Act of 1964, the activity regulated by the GFSZA was not economic in nature. *Lopez*, 514 U.S. at 559 (*McClung* and *Heart of Atlanta Motel* were cases involving laws that regulated, respectively, "restaurants utilizing substantial interstate supplies," and "inns and hotels catering to interstate guests"); *see also id.* at 573 (Kennedy, J., concurring) (*Heart of Atlanta Motel* and *McClung* were "examples of the exercise of federal power where *commercial transactions were the subject of regulation*" (emphasis added)).

Nor does petitioners' argument distinguish much else. All violent crime creates a barrier to participation in the economy. Murder victims, to cite an obvious example, are precluded from participating in the economy. All sorts of health problems create barriers for those who suffer from

[6](...continued)
05). The portion of the case they quote, though, only demonstrates that the Court was not particularly concerned with whether the *regulation* would substantially affect interstate commerce; it was sufficient that the regulated activity (restaurants with interstate connections) did.



them.[7] To avoid this obvious consequence, Brzonkala suggests that Congress can regulate only "discriminatory activity" that creates a barrier to participation in interstate commerce. Brzonk. Br. 25. But this limit makes no sense. The more common non-discriminatory violence against women creates a more widespread "barrier" than gender-based, animus-motivated violence.

Petitioners also cite cases like *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942) and *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460 (1949) to support the proposition that the nature of the underlying activity is irrelevant. Brzonk. Br. 26-27; U.S. Br. 31. But both of those cases dealt with intrastate commercial activity (sale of milk in *Wrightwood*, the production of women's sportswear for interstate sale in *Women's Sportswear*). The Court's language in those cases cannot be applied to a question -- whether Congress can regulate activity wholly non-economic in nature -- that was not before it.

### C. "Findings" Do Not Distinguish Lopez

Petitioners also rely heavily on the fact that Congress made findings concluding that the "gender-based" violence substantially affects interstate commerce. This reliance misconstrues *Lopez*.

1. <u>The Findings</u>. -- At the outset, the "findings" themselves are extraordinarily weak support. This is reflected in petitioners' briefs, in which they repeatedly

[7] *E.g.*, National Institutes of Health, *Statistics Related To Overweight And Obesity*, NIH Publication No. 96-4158 (July 1996), *available at* www.niddk.nih.gov/health/nutrit/pubs/statobes.htm (300,000 preventable deaths per year caused by poor diet and inactivity).

refer to statistics identifying the "costs" to the "economy" of *all* domestic violence or *all* violence against women, activity largely uncovered by Subtitle C. U.S. Br. 6-7, 24-26; Brzonk. Br. 10-13.[8] Of course, gender-based animus-motivated violence against women is a subset of all violence against women (and all violence of any kind). Once more petitioners suggest an argument which, if it proves anything, proves too much.

The only "findings" concerning *gender-based, animus-motivated* violence are in the final Conference Report, findings so broad and conclusory that they state little more than what would be obvious about violence as a whole. U.S. Br. 5; H.R. Conf. Rep. No. 103-711 at 385. *See Lopez*, 514 U.S. at 612 n.2 (Souter, J., dissenting) (GFSZA findings are expressed "at such a conclusory level of generality as to add virtually nothing to the record").

2. The "Absence" Of "Findings" In Lopez. -- As both courts below emphasized (Pet. App. 63a, 371a-73a), this Court *had* findings before it in *Lopez*.[9] Although the

---

[8] Brzonkala misstates the record by referring to Congress's "findings" concerning "gender-motivated" violence where the actual report refers only to all domestic violence or all violence against women. Brzonk. Br. 11-12 (citing S. Rep. No. 101-545 for purported propositions that "*gender-motivated* violence causes 'lost careers . . . '" and "*gender-motivated* violence can force victims into poverty" (emphasis added)).

[9] 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

(continued...)



government did not rely on them, this Court was aware of them. *Lopez*, 514 U.S. at 563 n.4. The suggestion that the constitutional flaw in the GFSZA already had been remedied, but that this Court simply chose not to mention that fact, is a remarkable and inappropriate attribution to this Court. Moreover, it is inconsistent with the government's own position after *Lopez* was decided. The Justice Department did not consider the previous findings sufficient or suggest additional findings; rather, it proposed adding a jurisdictional element. 31 Weekly Comp. Pres. Doc. 809 (May 10, 1995) ("The legislative proposal [recommended by Attorney General Reno after *Lopez*] would amend the Gun-Free School Zones Act by adding the requirement that . . . the firearm has 'moved in or the possession of such firearm otherwise affects interstate or foreign commerce'").

Further, this Court specifically stated that, although findings might be helpful, they were not required. *Lopez*, 514 U.S. at 562. Nor is any legislative record required. *Maryland v. Wirtz*, 392 U.S. 183, 190 n.13 (1968) ("We are not concerned with the manner in which Congress reached its factual conclusions"), *overruled on other grounds*, *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled*, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). *Compare* U.S. Br. 29 n.15. Indeed, the analysis of the Fair Labor Standards Act ("FLSA") in *Wirtz* entirely undermines petitioners' reliance on findings. *Wirtz* regulated activity related to (*inter alia*) schools, just as in *Lopez*, and this Court

---

[9](...continued)
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. § 922(q)(1).

recognized that schools "obviously purchase a vast range of out-of-state commodities." *Wirtz*, 393 U.S. at 201. There were no findings, just as petitioners claim there were none in *Lopez*. The FLSA amendment in *Wirtz* was constitutional, and the GFSZA was not, because the former regulated the payment of wages to individuals employed by enterprises engaged in commerce (*Wirtz*, 393 U.S. at 186-93) and the latter regulated the possession of guns. It was the nature of the regulated activity that made the difference in outcomes.

Finally, this Court in *Lopez* considered the government's arguments (as well as those of the dissent) 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's power is unlimited. Petitioners' arguments here bear a striking resemblance to the arguments made by the government in *Lopez*. *Compare* U.S. Br. 5 (crimes of violence motivated by gender "have a substantial adverse effect on interstate commerce by deterring potential victims from traveling interstate") *with Lopez*, 514 U.S. at 564 ("violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe"). *Compare* Brzonk. Br. 12-13, 20, 29 (discussing effects of violence on college campuses on women's educational opportunities and employment prospects) *with Lopez*, 514 U.S. at 564 (government argues that guns around schools threatens the learning environment for students and leads to a less productive citizenry).

3. <u>"Findings" Provide No Substantive Limit</u>. -- Requiring Congress to make findings provides no substantive limit to its power, just a procedural one. At some level of for-want-of-a-nail-the-kingdom-was-lost causation, everything can be connected to interstate commerce. *Lopez*, 514 U.S. at 580 (Kennedy, J. concurring) (Congressional power must be limited even though "[i]n a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence"); *Northern Securities Co. v. United States*, 193 U.S. 197, 402 (1904) (Holmes, J. dissenting) ("Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce"). See also Tribe, *Constitutional Law*, § 5-4 at 818 n.47 ("A resourceful legislator (or legislative assistant) could likely compile an impressive array of materials connecting just about any activity to the national economy"). If *Lopez* means only that Congress can regulate non-economic conduct if it says it is regulating interstate commerce, it means very little. *Cf. Seminole Tribe v. Florida*, 517 U.S. 44, 64 (1996) ("'If *Hans* [*v. Louisiana*, 134 U.S. 1 (1890)] means only that federal question suits for money damages against the States cannot be brought in federal court unless Congress clearly says so, it means nothing at all'" *quoting Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 36 (1989) (Scalia, J., dissenting), *overruled*, *Seminole Tribe v. Florida*, 517 U.S. 44 (1996)).



This Court owes Congress deference in any statute it passes, be it Congress's determinations that something constitutes an "important" or "compelling" governmental interest or its determinations that something is "commerce among the states," but "whatever deference is due legislative findings would not foreclose [this Court's] independent judgment of the facts bearing on an issue of constitutional law." *Sable Communications, Inc. v. F.C.C.*, 492 U.S. 115, 129 (1989). Surely the Court's recent cases rejecting Congress's efforts to legislate under Section 5, like *City of Boerne* and *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199 (1999), demonstrate this. In each instance, Congress made explicit findings, based upon a legislative record, that States were violating Section 1 and that legislation to enforce

Section 1 was needed. In each instance, this Court reviewed those findings and found them wanting. Unless there is some sliding scale of enumerated powers -- and petitioners offer no reason why there should be -- deference must have limits under the Commerce Clause as well.

Thus, petitioners' emphasis on deference to Congressional findings (*e.g.*, Brzonk. Br. 27; U.S. Br. 22) misses the point. The issue is not whether Congress rationally found that gender-based animus-motivated violence "substantially affects" interstate commerce as *it* understands the phrase "substantially affects." Rather, the issue is whether it properly found that the activity "substantially affects" interstate commerce as *this Court* used it in interpreting the Constitution in *Lopez*. Since, as shown above, Congress's findings cannot meet the standard set by this Court's interpretation of "substantially affects" in *Lopez*, they cannot be sufficient to render the statute constitutional.

If it is to remain true that "the enumeration presupposes something not enumerated," findings cannot make the difference. If they do then what has been recognized as a fundamental constitutional limit on Congress's power from the time of Chief Justice Marshall to today would have been reduced to a formality, easily satisfied by Congressional staffs and special interest groups eager to provide whatever testimony is necessary to construct such a Congressional record. On the other hand, if this Court must determine for itself whether the criteria set out in *Lopez* have been respected, then the integrity of the constitutional scheme is preserved, without sacrificing powers that have been found necessary to address economic problems of national scope.

**D. Petitioners' Other Distinctions Are Meritless**

Petitioners try other ways to distinguish *Lopez*,



mostly through a series of federalism-related arguments. These arguments are wrong in many different ways. First, the "distinctions" have nothing to do with "commerce among the states." Second, the facts here are not distinct from *Lopez* in any meaningful way. Third, the "distinctions" petitioners offer have no basis in law.

1. Congress's "Finding" That The States Have Been Ineffective. -- Petitioners emphasize that Congress found that the States were doing an inadequate job in responding to gender-based animus-motivated violence. Brzonk. Br. 29-31; U.S. Br. 35. Between the two of them, they cite only one case, *Perez v. United States*, 402 U.S. 146 (1971) (Brzonk. Br. 29), to support the proposition that Congress's commerce power expands when it makes such a finding or contracts when it does not.[10] But Brzonkala's suggestion that certain floor remarks of one Senator quoted by this Court in *Perez* played some role in this Court's decision to uphold the statute is unsupported by anything in the opinion. *Perez*, 402 U.S. at 155-57.

This argument also fails for one of the same reasons the general "legislative findings" argument fails. There was such a "finding" before this Court in *Lopez*. *See* n.9, *supra*. Again, petitioners are reduced to arguing that this Court simply ignored an important finding that, in petitioners' view, had remedied the flaw in the statute.

2. "Displacement" Of State Law. -- Remarkably,

[10] Neither petitioner explains how this proposition can be reconciled with the numerous authorities stating that the commerce power is plenary when it is regulating private conduct and acting properly within that power. *E.g.*, *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984) ("At least since 1824 Congress' authority under the Commerce Clause has been held plenary").

after arguing that "impediments like state interspousal immunities and evidentiary rules" (Brzonk. Br. 30) required federal intervention, Brzonkala then argues at length that Subtitle C should be upheld because it does not displace any of those state impediments. Brzonk. Br. 32-35. *See also* U.S. Br. 35. Not only is petitioners' argument here internally inconsistent and unsupported by any case law, it is fundamentally inconsistent with the basic constitutional scheme. *If* Congress is acting within its enumerated powers, it has the ability to displace (*i.e.*, preempt) whatever it chooses.[11] Petitioners' argument is that this Court should assess whether something is within Congress's enumerated powers by asking how much state law it has displaced. It turns constitutional law on its head.[12]

---

[11] *See, e.g., 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 . . . "); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) ("[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").

[12] Petitioners seem to believe that Justice Kennedy's concurrence in *Lopez* supports this startling theory. Brzonk. Br. 32-34; U.S. Br. 31. In fact, the Kennedy concurrence merely points out that the threat to individual liberty is at its apex when Congress regulates in areas of traditional state activity because lines of political accountability are confused. *Lopez*, 514 U.S. at 576-77 (Kennedy, J., concurring). That insight simply suggests that this Court's concern over cabining Congress's authority within constitutional limits should be heightened when Congress regulates in an area of traditional state authority, not that it should abandon an unbroken line of precedent permitting Congress to both legislate and preempt whenever it is properly within one of its enumerated powers.



Further, petitioners misstate the facts of *Lopez* when they assert that the GFSZA "*prohibited* the states from carrying out their own solutions . . . regulating firearms and education" (Brzonk. Br. 33 (emphasis added)) and suggest that it somehow precluded states from prosecuting violations of their own law (U.S. Br. 33). In fact, as the court below noted (Pet. App. 42a n.10), the GFSZA did not preempt any state law, permitted states to establish their own gun-free zones, and exempted guns licensed by states or localities. Petitioners *repeatedly* insist that Subtitle C "supplements, but does not supplant" state law (U.S. Br. 18, 33; Brzonk. Br. 20-21, 38), but the same thing could have been said about the GFSZA. In fact, it was. Brief for United States, *United States v. Lopez*, 514 U.S. 549 (1995), 1994 WL 242541, *29 (GFSZA "supplements rather than supplants" state efforts).

Indeed, as the Fourth Circuit found, in the modest way that the GFSZA did "supplant" state prerogative -- 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) -- Subtitle C does even more. Pet. App. 44a.

3. Traditional State Areas Of Regulation. -- If, as petitioners suggest, Congress were precluded from displacing state policy in traditional areas of state regulation, that would only further demonstrate the unconstitutionality of the civil remedy. Subtitle C provides remedies for intentional torts, a traditional area of state regulation. *E.g.*, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (recognizing "the States' traditional authority to provide tort remedies to their citizens"); *Head v. New Mexico Bd. Of Examiners In Optometry*, 374 U.S. 424, 443 (1963) (Brennan, J., concurring) (noting concession by Solicitor General that Congressional regulation in

Communications Act of 1934 "intended the survival of certain 'traditional' state powers and remedies -- particularly common-law tort and traditional criminal sanctions").

To evade this conclusion, petitioners insist that Subtitle C is civil rights legislation. U.S. Br. 34. As the Fourth Circuit noted, though, the Constitution provides no special dispensation for laws labelled "civil rights" laws. Pet. App. 70a-76a.

4. The Necessary And Proper Clause. -- Brzonkala tries to distinguish *Lopez*, and provide some textual support for her other arguments, by relying on the Necessary and Proper Clause, "the last, best hope of those who defend *ultra vires* congressional action." *Printz v. United States*, 521 U.S. 898, 923 (1997). *See* Brzonk. Br. 36-38. *See also* U.S. Br. 21-22 n.7. She claims that the GFSZA was not "necessary because national legislation was not *needed* to protect interstate commerce and because state law and programs were already addressing the problem." Brzonk. Br. 36 n.14 (emphasis added). Further, it was not "proper" because it intruded on state sovereignty and foreclosed future efforts by the States to address the problem. *Id.*

This is an unusual reinterpretation of the Necessary and Proper Clause (as well as *Lopez*). That clause always has been understood to provide what was implicit in the Constitution itself: to permit any legislation appropriate to reach a constitutional end. *M'Culloch v. Maryland*, 17 U.S. 316, 413-20 (1819) (rejecting contention that a law must be "necessary" in a strict sense). The suggestion that this Court should review Congressional legislation for "need" would invite far more judicial activism than anything remotely suggested by the court below. *See* Pet. App. 168a-189a (Wilkinson, C.J., concurring) (discussing judicial activism generally).



Brzonkala correctly asserts that the Necessary and Proper Clause simply permits Congress to reach intrastate commerce that "substantially affects" interstate commerce. Brzonk. Br. 36. The reasons why the GFSZA was not "necessary and proper," then, are the same reasons why it did not "substantially affect" interstate commerce.[13]

**E. Petitioners' Rationale Would Lead To A General Police Power For Congress Inconsistent With The Doctrine Of Enumerated Powers**

Petitioners' arguments would give Congress the power to pass virtually any legislation at all because all human activity has economic consequences of one kind or another. *That* was the "federalism" concern that animated the Court in *Lopez*, not the concerns petitioners emphasize. *Lopez*, 514 U.S. at 564 ("We pause to consider the implications of the Government's arguments . . . [I]f 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"); *id.* ("Justice Breyer . . . is unable to identify any activity that the States may regulate but Congress may not"); *id.* at 565 ("Justice Breyer's rationale lacks any real limits because, depending on the level of generali-

---

[13] In *M'Culloch*, this Court did note that a law might not be "necessary and proper" if it were a pretext for the regulation of something outside the enumerated powers. *M'Culloch*, 17 U.S. at 423. Although this Court has not generally considered Congress's motive, it can hardly be disputed that the real purpose of VAWA was not to address a problem in interstate commerce, but to do something about violence against women, *see, e.g*, U.S. Br. 3, and Subtitle C's primary purpose was to send a "signal." *See also 1998 Senate Hate Crimes Hearings* 16 (Holder Statement) (criminal provisions of VAWA (18 U.S.C. §§ 2261, 2262) were inadequate because they *did not* have a "gender motivation" requirement and prosecutions under them were thus unable to attach a "stigma."

ty, any activity can be looked upon as commercial"); *id.* at 566 (enumerated powers should be "interpreted as having judicially enforceable outer limits"); *id.* at 580 (Kennedy, J., concurring) (there must be "meaningful limits on the commerce power").

As the lower courts have demonstrated, any human activity, and certainly all crime, can be connected to "the national economy" in the same way that gender-based, animus-motivated crime can. Petitioners do not identify any activity that cannot. Brzonkala does claim, though, that her "four factors derived from the Court's Commerce Clause cases, and the Necessary and Proper Clause provide principled, practical limitations on Congress's power." Brzonk. Br. 39. (The "four factors" are Congress's power to remove barriers to participation in the economy, Congressional findings, Congressional findings of State inadequacy, and an absence of intrusion on State sovereignty.) But this is nonsense. The first "factor" plainly does not limit anything (even if Brzonkala contends that "removing barriers" is the *only* thing Congress can do). "Findings" do not provide a *substantive* limit of any kind, and have never been required by this Court. Brzonkala's last "factor," and the Necessary and Proper Clause, provide limits only by an extraordinary reinterpretation of this Court's jurisprudence.

Ultimately, petitioners' argument amounts to the proposition that Congress should be able to regulate any problem it deems sufficiently important. Brzonkala's citation to the Sixth Virginia Resolution submitted to the Committee on Detail makes this clear. Brzonk. Br. 30. That resolution *might have* given Congress the power that Brzonkala would now give it. But it was not adopted and was never sent to the states. Tribe, *Constitutional Law*, § 5-2 at 795; Grant S. Nelson and Robert J. Pushaw, *Rethinking The Commerce Clause: Applying First Principles To Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 Iowa L. Rev. 1, 25-26 n.104, 96 (1999). Petitioners want this Court to reverse that decision of the Convention and the nation. *See also Kansas v. Colorado*, 206 U.S. 46, 89 (1907) ("the proposition that there are legislative powers affecting the nation as a whole which belong to [Congress], although not expressed in the grant of powers, is in direct conflict with the doctrine of enumerated powers"); *id.* at 92 ("it may well be that no power is adequate for [the reclamation of arid lands] other than that of the national government. But, if no such power has been granted, none can be exercised").



As this Court noted, Congress will never be powerless. *Id.* (noting that many arid lands were in the territories over which Congress had plenary control). VAWA's many other provisions, not at issue here, demonstrate that. But the fact that Congress has some power to address every problem does not mean that it may do so in any way it chooses. The Constitution still says otherwise.

## II. SECTION 5 DOES NOT AUTHORIZE CONGRESS TO REGULATE FELONIES COMMITTED BY PRIVATE INDIVIDUALS

Subtitle C regulates felonious conduct regardless of whether the perpetrators act under color of state authority. To the extent it reaches private conduct like that at issue in this case, Section 5 of the Fourteenth Amendment does not authorize it.

### A. The Plain Meaning Of Section 5 Demonstrates That Section 13981 Does Not "Enforce" The Prohibition In Section 1 Against Denials Of Equal Protection

In assessing the scope of Section 5, this Court "begin[s] with its text." *City of Boerne*, 521 U.S. at 519. Section 5 grants Congress the power to "enforce by appropriate legislation" the other provisions of the Fourteenth Amendment. When used in the context of "enforcing" a rule or prohibition, the word "enforce" means to "compel obedience to." Random House Unabridged Dictionary 644 (2d ed. 1993). *Cf. City of Boerne*, 521 U.S. at 517 (Congress may pass laws under Section 5 that "tend[] to enforce submission to the prohibitions [the fourteenth amendment] contain[s]" *quoting Ex parte Virginia*, 100 U.S. 339, 345-46 (1879)); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 119 S. Ct. 2219, 2224 (1999) ("the term 'enforce' is to be taken seriously"). In regulating private conduct like that alleged in this case, Subtitle C fails this most fundamental test of validity.

If a jurisdiction failed to arrest criminals, and did not permit tort suits against them for the harm they caused, but instead offered a compensation package to those injured by crime, no one would say that that jurisdiction was "enforcing" its criminal law. So, too, here. Subtitle C does not "compel obedience" or "submission" to the prohibitions of Section 1 because it does not prohibit or deter states or state officials from doing anything. For the same reason, it does not "enforce" any citizen's right to equal treatment *from* a state or state official.[14]

Petitioners' linguistic device is to use words like

[14] The United States suggests that Subtitle C enforces Section 1 prohibitions by allowing crime victims to avoid state justice systems. U.S. Br. 44 n.24. (Under this theory, it seems, Congress can "enforce" Section 1 by taking whole areas of authority from the states, and thus avoiding any possible Section 1 violations in those areas.) Even assuming that would be proper "enforcement" legislation, Subtitle C does not allow any victim to avoid state criminal processes.



"correct" and "remedy" that this Court has used in the past as synonyms for "enforce," or as examples of ways to enforce the Section 1 prohibitions, and to use those words so that they no longer have any connection with the text of Section 5. For example, one can "correct" or "remedy" an Equal Protection violation, and even simultaneously "correct the effects" of that violation, by permitting a civil lawsuit against a state official who perpetrated the violation. This would deter state officials generally from committing those violations and thus "enforce" (or compel obedience to) the Section 1 prohibition against unequal protection. But this Court has never held that one can "correct the effects" or "remedy" a Section 1 violation simply by providing a mechanism for obtaining compensation for the victim, through either a general fund or a civil suit against a private party. That does not "enforce" anything in Section 1. This Court has never ruled otherwise.

**B. This Court's Binding Authority Undermines Petitioners' Section 5 Argument**

In *United States v. Harris*, 106 U.S. 629 (1883), the Court considered the criminal provisions of Section 2 of the Civil Rights Act of 1871 (17 Stat. 13) (also known as the Ku Klux Klan Act).[15] The legislative history of that law is well known, and was described by the Fourth Circuit in

[15] The criminal provision of Section 2 provided that "if two or more persons in any state or territory conspire or go in disguise upon the highway or on the premises of another for the purpose of depriving either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within such state or territory the equal protection of the laws, each of said persons shall be punished . . ." *Harris*, 106 U.S. at 629.

great detail. Pet. App. 119a-20a, 124a-25a. *See also, e.g.*, *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 722 (1989) ("The immediate impetus for the bill was evidence of widespread acts of violence perpetrated against the freedmen and loyal white citizens by groups such as the Ku Klux Klan"); *Patsy v. Bd. Of Regents Of State Of Florida*, 457 U.S. 496, 505-06 (1982) ("A major factor motivating [the bill, including § 2] was the belief of the 1871 Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights"; citing legislative history and noting "the mistrust that the 1871 Congress held for the factfinding processes of state institutions").

Despite this legislative history, this Court rejected Section 5 of the Fourteenth Amendment as a basis for reaching private conduct under the Ku Klux Klan Act. *Harris*, 106 U.S. at 637-40. Quoting a decision of Justice Bradley sitting as a circuit court judge, the Court held that Section 5 "is a guaranty of protection against the acts of the state government itself":

> [T]he power of congress . . . to legislate for the enforcement of such a guaranty, does not extend to the passage of laws for the suppression of crime within the states . . . The enforcement of the guaranty does not require *or authorize* congress to perform "the duty that the guaranty itself supposes it to be the duty of the state to perform, and which it requires the state to perform."

*Harris*, 109 U.S. at 638 (*quoting United States v. Cruikshank*, 25 F. Cas. 707, 710 (C.C.D. La. 1874) (No. 14897), *aff'd*, 92 U.S. 542 (1875)) (emphasis added)). In addition, this Court also specifically rejected the idea that systemic bias (without a showing of any bias or other equal



protection violation in the specific case) permitted Congress to reach private conduct. *Id.* at 639 (the statute "is not limited to take effect only in case the state shall [violate the Fourteenth Amendment]. It applies, no matter how well the state may have performed its duty . . . In the indictment *in this case* . . . there is no intimation that the state of Tennessee has passed any law or done any act forbidden by the fourteenth amendment" (emphasis added)).

In the *Civil Rights Cases*, 109 U.S. 3 (1883), decided later that same year, this Court considered the constitutionality of the first two sections of the Civil Rights Act of 1875 (18 Stat. 335). That law provided all persons in the United States the right to "the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement" regardless of race or color or previous condition of servitude. It provided for criminal sanctions and civil suits against those who refused to provide such equal treatment, but gave plaintiffs an election of "proceed[ing] under their rights at common law and by state statutes." Id. at 9.

The purpose of the legislation was manifest from its well-known legislative history, which is again described at length in the opinion of the Fourth Circuit. Pet. App. 120a-21a. Throughout the course of extended debates on the law, lasting from 1871 to its passage in 1875, Congress repeatedly heard that the states were failing to enforce then-existing common-law and statutory rights of African-Americans to equal treatment. *Id.*

This Court found the first two sections of the 1875

Act unconstitutional.[16] The Court noted that Section 1 was "prohibitory in its character, and prohibitory upon the states." *Id.* at 10. In considering the scope of Section 5, it asked rhetorically: "To enforce what? To enforce the prohibition [in Section 1]." *Id.*, 103 U.S. at 11. The "power given to congress to legislate [was] for the purpose of *carrying such prohibition into effect*." *Id.* (emphasis added). But the statute there, *despite* its legislative history demonstrating a failure by the states to protect the rights of African Americans, did not "carry such prohibition into effect" because it did not attempt to correct improper *state* action. Thus, this Court concluded, the first two sections were "not corrective legislation" because they were "primary and direct . . . tak[ing] immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement." *Id.* at 19. In short, this Court ruled that Congress, in an effort to remedy perceived defects in state procedure pursuant to its admitted authority under Section 5 of the Fourteenth Amendment, could not *replace* that procedure with its own to act directly on individual conduct.

This Court has reaffirmed the holdings of *Harris* and the *Civil Rights Cases*, and the principles that Congress's power to "enforce" the Section 1 prohibitions does not extend to passing laws against private conduct. *E.g.*, *City of Boerne*, 521 U.S. at 524-25 (reaffirming Section 5 analysis of, *inter alia*, the *Civil Rights Cases* and *Harris*;

[16] This Court contrasted the first two sections of the Civil Rights Act of 1875 with the fourth section, which precluded disqualification of a citizen from jury duty on the basis of race or color, and which had been sustained in *Ex Parte Virginia*, 100 U.S. 339 (1879). This Court found that an indictment against a *state officer* under that fourth section to be "entirely corrective in its character." *Civil Rights Cases*, 109 U.S. at 15.



"The power to 'legislate generally upon' life, liberty, and property, as opposed to the 'power to provide modes of redress' *against* offensive state action, was 'repugnant' to the Constitution" (emphasis added), *quoting* the *Civil Rights Cases*, 109 U.S. at 15); *id.* at 545-46 (O'Connor, J., dissenting) (agreeing with Court's Section 5 analysis); *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 386, 390 n.17 (1982) (although 42 U.S.C. §§ 1981 and 1982 reached private conduct, and although the "principal object [of their passage] . . . was to eradicate the Black Codes, laws enacted by Southern legislatures imposing a range of civil disabilities on freedmen," the statute's reach to private conduct could not depend upon Section 5 of the Fourteenth Amendment: "we relied on [Thirteenth Amendment] heritage in holding that Congress could constitutionally enact § 1982 . . . *without limiting its reach to 'state action'*" (emphasis added)); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982) (citing the *Civil Rights Cases* and stating that "[c]areful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of *federal law* and *federal judicial power*" (emphasis added)).[17]

[17] This well-recognized limit on federal legislative power is consistent with the rejection of the Bingham Amendment, described in detail in *City of Boerne*, 521 U.S. at 520-24. That proposal might have given Congress the right to act directly on private conduct to protect people's rights, and its defeat demonstrated the country's unwillingness to so radically change the constitutional design. *E.g.*, Alfred Avins, *Federal Power To Punish Individual Crimes Under The Fourteenth Amendment: The Original Understanding*, 43 Notre Dame Lawyer 317, 327 (1968) ("The remedy that Congress did propose [in the Fourteenth Amendment] was that if state officials were derelict in their duty . . . then under the fifth section Congress could enforce the first section by punishing such state officials for their willful dereliction . . . But *in no event* did the framers in the Thirty-Ninth

(continued...)

Petitioners' efforts to distinguish *Harris* and the *Civil Rights Cases* expose their "breathtaking ahistoricism" (Pet. App. 123a). They do not even try to dispute the Fourth Circuit's extensive description of the legislative history of the Civil Rights Acts of 1871 and 1875, demonstrating (as this Court noted in *Patsy*) that the Reconstruction Congress was trying to "remedy" failures in state processes and state enforcement of the rights of African Americans. Brzonkala just claims that there were no constitutional violations involved in either case. Brzonk. Br. 47-48. Not only is this historically absurd, it is precisely the opposite of her position in the lower court. Brzonk. Fourth Circuit Principal Br. 33 (the remedy in Subtitle C is "*much like the Reconstruction-era statutes* [that] addressed systematic, and frequently private, acts of racially-motivated violence, driven by prejudice *and aggravated by failed state law enforcement systems*" (emphasis added)).

The United States asserts that both statutes failed because the Congresses that passed them thought that private conduct could violate the Fourteenth Amendment. U.S. Br. 46-47. To support this proposition, it cites only the fact that the 1871 Act used the words "equal protection of the laws." It cites nothing at all from the first two sections of the 1875 Act (other than the fact that, just like Subtitle C, it reached private conduct), nor does it respond to the Fourth Circuit's conclusion that Congress had the same misunderstanding about Subtitle C. Pet. App. 153a.

[17](...continued)
Congress contemplate that private criminals could be punished by federal authority under the fifth section of the fourteenth amendment. The defeat of the original Bingham draft shows that Congress wanted to foreclose even the *possibility* that such a power might be derived from the proposed amendment" (emphasis added)).



There are many things wrong with this argument, even assuming that it would be appropriate to decide the scope of Congress's power based on what it "thought" instead of what it did. First, it just blinks reality to argue that Congress was not trying to remedy state failures to enforce the laws in the civil rights statutes at issue in those cases. Second, there is nothing in either opinion that supports the United States's theory. Indeed, *Harris* specifically approved the "erroneous" proposition that the United States attributes to Congress. *Harris*, 106 U.S. at 643 (private parties can deprive another of the "equal protection of the laws"). Rather, both cases were decided upon the fact that the statutes operated uniformly without regard to remedying a specifically-identified Section 1 violation, did not act upon the states or state officials, and thus did not render state violations "effectually null, void and innocuous." *Civil Rights Cases*, 103 U.S. at 11.

Both petitioners briefly mention *dicta* from *United States v. Guest*, 383 U.S. 745 (1966) and *District of Columbia v. Carter*, 409 U.S. 418 (1973) to suggest that Congress can directly reach private action. Brzonk. Br. 47; U.S. Br. 47-48. They make no effort to address the Fourth Circuit's extensive discussion of those cases (Pet. App. 136a-41a), which effectivly rebuts any such suggestion.

### C. Section 13981 Is Not A Congruent And Proportional Response To Likely Constitutional Violations

Congress also has the authority under Section 5 to pass "preventive" or "prophylactic" rules addressed to conduct that does not necessarily violate Section 1. *City of Boerne*, 521 U.S. at 532 ("Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional"). As the Fourth Circuit recognized, this Court has never sanctioned such "preventive" rules applied to purely private conduct. Pet. App. 128a-30a. As it also correctly held, even as an original matter, Subtitle C cannot be construed as "preventive" legislation.

1. Legislative History Does Not Demonstrate Widespread Violations Of The Fourteenth Amendment. -- Prophylactic rules reaching conduct that does not itself violate the Fourteenth Amendment may be proper when Congress is responding to widespread violations of a particular kind. *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199, 2210 (1999) (Patent Remedy Act was not proper prophylactic legislation under Section 5 because "[t]he legislative record thus suggests that [it] does not respond to a history of 'widespread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic legislation" *quoting City of Boerne*, 521 U.S. at 526).

The legislative history of Subtitle C is similarly wanting. While anecdotal instances of "state bias" were identified, the legislative history generally reveals that states are making great efforts to combat all forms of violence against women. Pet. App. 155a-56a. Even the United States concedes that the States have not "established a deliberate policy of discriminating against women" or even against "victims of gender-motivated violence." U.S. Br. 42. (Conspicuously, petitioners' state amici make no Section 5 argument at all. *Cf.* Brief of Amici Arizona, *et al.*, 2 (state efforts to combat gender-motivated violence have been "substantial").

The "evidence" relied upon by petitioners further supports the Fourth Circuit's conclusion. Petitioners argue that systemic discrimination is reflected by marital rape



exceptions, limiting rape shield laws to criminal prosecutions (thus "expos[ing] women bringing tort actions for sexual assault to intrusive questioning" (Brzonk. Br. 14)), failing to pass hate-crime laws which include gender, jury instructions suggesting that rape charges are hard to both prove and disprove, and requiring corroboration from complaining witnesses. Brzonk. Br. 14-16; U.S. Br. 8. But while these things might not represent good policy, they do not reflect the intent to discriminate that the Fourteenth Amendment requires.[18]

Petitioners also assert that states take "gender-motivated" crimes less seriously than other crimes. Brzonk. Br. 15; U.S. Br. 8, 37, 38. Assuming *arguendo* the truth of this counterintuitive claim, petitioners do not contend that the victims of such crimes are *exclusively* women or that male victims of such crimes are treated better than female victims. Their efforts to show that states take these crimes less seriously than others *because* the victims are disproportionately women amount to *ipse dixit* assertions of long-discarded doctrines.[19] These are not examples of

[18] Tort immunity, for example, although it has been eliminated virtually everywhere for severe intentional torts, was justified in recent years only by the state interest in marital harmony and avoiding potentially fraudulent claims against insurance companies. *Thompson v. Thompson*, 218 U.S. 611 (1910); *Paiewonsky v. Paiewonsky*, 446 F.2d 178, 182 (3d Cir. 1971); *Nicpon v. Nicpon*, 145 Ill. App. 3d 464, 495 N.E.2d 1193 (1986); *Varholla v. Varholla*, 56 Ohio St. 2d 269, 383 N.E.2d 888 (1978).

[19] The lower rates of conviction and prosecution, for example, might be attributable to the well-known phenomenon, discussed during the hearings on VAWA, of victims declining to assist in prosecuting certain crimes. *Fletcher v. Town of Clinton*, 1999 WL 997806, *8 (1st Cir. Nov 8, 1999) (noting evidence that a high percentage of domestic violence victims are uncooperative).

gender-based violations of the Equal Protection clause. *Personnel Administrator v. Feeney*, 442 U.S. 256, 272 (1979) (rules or practices with disproportionate impact are unconstitutional only if they can be traced to an unconstitutional purpose).[20]

Petitioners cite various lower court cases to demonstrate that state failure to take certain crimes seriously constitute "equal protection" violations. U.S. Br. 41; Brzonk. Br. 44 n.17. Not one of these cases found a sex-discriminatory policy after trial. Two of their cases simply found that allegations stated a cause of action. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 701 (9th Cir. 1988) (*pro se* complaint liberally construed); *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984). Another (*Hynson v. City of Chester*, 864 F.2d 1026, 1033 (3d Cir. 1988)) simply remanded the case to the district court to apply a new legal standard it had stated. The last, *Watson v. Kansas City*, 857 F.2d 690 (10th Cir. 1988), actually affirmed the *dismissal* of a claim for sex discrimination, finding no evidence of a discriminatory purpose, and found only an issue of fact as to whether the city treated domestic violence cases differently from other cases.[21] *See also McKee v. City of Rockwall*, 877 F.2d 409, 416 (5th Cir. 1989) (en banc) (no evidence of either sex discrimination or

---

[20] Nor do they violate due process. *DeShaney v. Winnebago County Dep't Of Social Services*, 489 U.S. 189, 197 (1989) ("a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause").

[21] That claim would be subject to rational basis scrutiny, and the issue of whether it could be justified under such scrutiny was not before the court in *Watson*. *Cf. Eagleston v. Guido*, 41 F.3d 865, 878 (2d Cir. 1994) (differential treatment of domestic violence passes rational basis scrutiny).



differential treatment for domestic violence cases).

In short, "widespread and persisting deprivation of constitutional rights" is wholly absent from both the legislative history and petitioners' cases.

2. Subtitle C Is Not Congruent And Proportional. -- This Court has held that prophylactic legislation must have "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Florida Prepaid*, 119 S. Ct. at 2206, *quoting City of Boerne*, 521 U.S. at 519-20. Here, Subtitle C cannot be deemed proportional to the injury claimed. As both courts below recognized, any coincidence between a Section 1 violation and a claim under Section 13981 is pure fortuity. State failure can occur outside of gender-based animus-motivated felonies and those felonies can take place in the many states in which state procedures are adequate. Pet. App. 160a-63a, 399a-401a. And, of course, Subtitle C does nothing to the purported state violators of Section 1.

Perhaps petitioners focus on so many different purported flaws in the state systems in the hopes that this Court will not notice that Subtitle C is not a particularly good remedy for any one of them. If marital tort immunities are the problem, Subtitle C's application to torts between non-married people and its application to the vast majority of states that have abrogated that exemption, is grossly overbroad. If actors in the state criminal justice system are the problem, a civil lawsuit does not remedy it, certainly not more than the remedy the states already provide: a civil tort remedy that does *not* require a showing of gender-animus and where "the victim, not a state prosecutor, controls the process." U.S. Certiorari Petition Reply Br. 9 n.2. *Cf.* U.S. Br. 19. If state evidentiary rules or other aspects of state civil jury trials are the problem, it makes no sense to give, as Congress did, non-removable concurrent jurisdiction to the states.[22] And if the problem is that the gender-bias in society has permeated aspects of the state court system in general, a remedy in federal court will not solve the problem. Federal court task forces find the same phenomenon. *See, e.g.*, *The Effects of Gender In The Federal Courts: The Final Report Of The Ninth Circuit Gender Bias Task Force*, 67 S. Cal. L. Rev. 745 (1994); *The Gender, Race, and Ethnic Bias Task Force Project In The D.C. Circuit* (1995).[23]

**D. Petitioners' Theory Would Grant Congress An Unlimited General Police Power**

In *City of Boerne*, 521 U.S. at 529, this Court held that if Congress could define its own powers under Section 5, "it is difficult to conceive of a principle that would limit congressional power." As the Fourth Circuit found, perceptions of bias in our state court systems are not limited to their response to violent acts motivated by gender animus. Pet. App. 74a-75a; 164a-66a. Indeed, the task force reports relied upon by Congress generally find bias in most of

[22] State rules of practice apply in state court even when federal rights are at issue. *Wolfe v. North Carolina*, 364 U.S. 177, 195 (1960); 16B Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d*, § 4023 (1996).

[23] Petitioners and/or Congress's reliance on the lenient sentences given rapists (Brzonk. Br. 16) is misplaced for the same reason. Rape sentences are shorter in federal court. American Bar Ass'n, *The Federalization Of Criminal Law* 30 (1998) (Chart 7 illustrating Department of Justice statistics).



domestic relations law.[24] Some scholars have argued that much of criminal, tort, and contract law contains inherent bias. Pet. App. 74a-75a (citing authorities); *Developments In The Law -- Race and the Criminal Process*, 101 Harv. L. Rev. 1472 (1988) (arguing that bias pervades criminal justice system). Petitioners' theory would allow Congress to legislate comprehensively in all such areas just by finding "systemic" bias.

Further, the Equal Protection Clause is not the only provision in Section 1 of the Fourteenth Amendment. Appellants suggest no reason why, under their theory, Congress's Section 5 authority should not enable it to enforce the Due Process Clause against private deprivations of property by, say, pickpockets if it deems the states to be inadequately attentive to this class of crime. *Compare Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 278 (1993) ("A burglar does not violate the Fourth Amendment, for example, nor does a mugger violate the Fourteenth").

[24] *E.g.*, *Final Report Of The Task Force On Racial And Ethnic Bias And Task Force On Gender Bias In The D.C. Courts* 169 (1992) ("courts hold mothers to a higher standard of behavior"); *Gender and Justice: Report of the Vermont Task Force on Gender Bias in the Legal System* 101 (1991) (courts place more weight on "[w]omen's alleged misconduct during marriage and following separation" than men's in awarding custody); *Louisiana Task Force on Women in the Courts, Final Report* 64-65 (1992) (sexual stereotyping works against both sexes in different contexts); *Report of the Fairness and Equality Committee of the Supreme Court of Idaho* 12 (1992) ("women are held to a higher and different standard than fathers and are judged more harshly than men"); *Final Report of the Equality in the Courts Task Force, State of Iowa* 131 (1993) (citing stereotypes "that operate to the disadvantage of women (they are subject to heightened moral scrutiny and heightened scrutiny of parenting and personal behavior than fathers)").

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

For the reasons stated in the brief of Respondent Crawford, this Court may affirm the judgment of the Fourth Circuit on the ground that the amended complaint in this action did not state a cause of action under Section 13981.

## CONCLUSION

The judgment of the *en banc* Court of Appeals should be affirmed.

Respectfully submitted,

Michael E. Rosman
*Counsel of Record*
Hans F. Bader
CENTER FOR
INDIVIDUAL RIGHTS
1233 20th St., NW
Suite 300
Washington, DC 20036
(202) 833-8400

W. David Paxton
GENTRY LOCKE
RAKES & MOORE
800 Crestar Plaza
P.O. Box 40013
Roanoke, VA 24038-0013
(540) 983-9300

Charles Fried
1525 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4636