Nos. 96-1814(L) and 96-2316

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

CHRISTY BRZONKALA,

Plaintiff-Appellant,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellant,

v.

VIRGINIA POLYTECHNIC INSTITUTE

& STATE UNIVERSITY, *et al.*,

Defendants-Appellees.

On Appeal from the

United States District Court

for the Western District of Virginia

BRIEF OF APPELLEES MORRISON AND CRAWFORD

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Statement Of The Issues

In addition to the issues identified in appellants' briefs, this appeal also presents the following issue:

Did the amended complaint in this action state a claim under 42 U.S.C. § 13981 against defendants Morrison and Crawford?

Statement Of Facts

Morrison and Crawford vigorously deny that any rape took place. But because this is an appeal from a judgment dismissing the action for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), they are precluded from disputing the allegations set forth in the amended complaint (the "Complaint"). Accordingly, they adopt the statement of facts set forth in the brief of the Department of Justice for the United States (DOJ Br. 16).

Statement Of The Case

This appeal involves 42 U.S.C. § 13981 (the "Act"), which provides a federal tort remedy for the victims of violence motivated by gender-animus. After a lengthy analysis, the Court below concluded that Congress lacked the authority under the United States Constitution to create this federal tort remedy.

A. The Statutory Framework

The Act provides a tort remedy for a "crime of violence motivated by gender." That key phrase is defined as follows:

> [T]he term "crime of violence motivated by gender" means 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). There are, then, two requirements that a plaintiff must state and prove, each of which must be given independent meaning: (1) the crime of violence must be perpetrated because of gender and (2) the act must be perpetrated with a gender-based animus.

Although Congress left it to the Courts to determine the meaning of these requirements, it made clear that it did not believe that all rapes or violent attacks against women would be covered. See S. Rep. 138, 103rd Cong., 1st Sess., p. 51 (1993) (JA 270) (the Act "does not create a general Federal law for all assaults or rapes against women").

Although ostensibly motivated by "systemic" bias in state courts, the Act gives state courts concurrent jurisdiction. 42 U.S.C. § 13981(e)(3). Moreover, if a claim is brought in state court, neither party can remove. 28 U.S.C. § 1445(d); Pub. L. 103-322, § 40302(e)(5). No prior criminal "complaint, prosecution, or conviction" is required for an action to be brought. 42 U.S.C. § 13981(e)(2). Prevailing plaintiffs in claims brought under the Act are entitled to their attorneys' fees under 42 U.S.C. § 1988(b). See Pub. L. 103-322, § 40303.

Finally, the four-year statute of limitations set forth in 28 U.S.C. § 1658 would apply to any claim under the Act. This

is considerably longer than the limitations periods for intentional torts in most states, including Virginia. Va. Code Ann. § 8.01-243 (Michie's 1996) (two years).

B. The Proceedings Below

The original complaint in this action was filed on or about December 27, 1995 (JA 17-36), asserting claims under Title IX, the Act, and 42 U.S.C. § 1985 against Virginia Tech, Morrison and Crawford. After both Virginia Tech and Morrison moved to dismiss, the parties agreed that plaintiff would file an amended complaint and that defendants would respond expeditiously thereto. Record On Appeal ("ROA"), Doc. 10.

The Complaint (JA 66-115) added two new parties, Cornell Brown and William Landsidle and a variety of new claims. (Claims against both of these parties were eventually dismissed, the claims against Brown based in part on plaintiff's own motion for voluntary dismissal. ROA, Doc. 53. Plaintiff does not appeal those orders.) Plaintiff asserted claims against Morrison and Crawford under the Act and under state tort law. (JA 96-106). Shortly thereafter, defendant Morrison moved to dismiss the Complaint on the grounds, inter alia, that Congress had no authority to adopt the Act and that the Court had no jurisdiction over the state tort claims. (Crawford joined Morrison's motion (ROA, Doc. 32), and Virginia Tech also renewed its motion to dismiss.) Although the parties had initially agreed to brief the motions to dismiss on a fast track (JA 126), the Court below allowed both the United States as intervenor and various amici to submit briefs on the question of the constitutionality of the Act. ROA, Docs. 29, 30. (The brief of the amici is reproduced in full in the joint appendix. See JA 166-444.)

C. The Decision Below

The Court below (Kiser, J.) dismissed plaintiff's claims under the Act in an order and judgment dated July 26, 1996. (JA 466). The pendent state claims were dismissed without prejudice. Id. The final judgment was accompanied by an extensive decision setting forth the Court's analysis of the issues. JA 467-507.

1. The Statutory Analysis. -- The Court first addressed the contentions of Morrison and Crawford that the Complaint did not state a claim under the Act because no inference of "gender animus" could be made from its allegations. The Court rejected that argument. More specifically, the Court relied upon the allegations in the Complaint that (1) Morrison and Crawford allegedly engaged in "gang rape"; (2) the rapes were closer to "stranger rape" than "date rape" which made them less likely, according to the Court, to involve a misunderstanding, personal animus, or overheated sexual passion; (3) some months after the alleged incident, Morrison was allegedly overheard saying that he liked to "get girls drunk and fuck the shit out of them." JA 473-75. The last of these three allegations was apparently of some significance to the Court below; it did not reach the question of whether the allegations against Crawford (against whom the first two allegations were applicable) stated a claim under the Act. (Judge Kiser also mentioned another alleged statement of Morrison -- that he told plaintiff that she "better not have any fucking diseases" -- but correctly concluded that this statement only reflected disrespect for plaintiff, and found its relevance to gender animus "questionable" (JA 474).)

2. The Commerce Clause Analysis. -- The Court then analyzed the question of the Act's constitutionality, considering first whether the Act could be justified as legislation designed to "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., art. I, § 8. The Court extensively analyzed United States v. Lopez, 115 S. Ct. 1624 (1995), the recent Supreme Court decision declaring the Gun-Free School Zones Act (18 U.S.C. § 922(q)) an unconstitutional exercise of Congress's Commerce Clause authority. Considering the three permissible categories of regulation that the Supreme Court had identified in Lopez (viz., regulating the channels of interstate commerce, regulating the instrumentalities of interstate commerce, and regulating activity which substantially affects interstate commerce), Judge Kiser concluded, just as in Lopez, that only the third category was relevant. JA 477.

Judge Kiser then identified the four elements that the Lopez Court had found crucial in declaring that the Gun-Free School Zones Act ("GFSZA") did not regulate activity substantially affecting interstate commerce: (1) whether the regulated activity is economic in nature, (2) the presence of a jurisdictional requirement in the law itself, (3) the importance of legislative history, and (4) the practical implications of accepting an argument that the regulated activity "substantially affects" interstate commerce. JA 477-81.

Judge Kiser compared the similarities and differences between the Act and the GFSZA and concluded that the similarities (like the non-economic nature of the activity being regulated, the absence of any jurisdictional requirement, and the practical implications of recognizing the effects on commerce of the regulated activity as "substantial") outweighed the differences. He considered three possible differences: (1) that Congress made more extensive findings with respect to the Act than they had with the GFSZA; (2) that the Act provides for civil liability rather than criminal; and (3) that "fewer steps of causation" are involved in going from the regulated activity to an effect on interstate commerce.

With respect to congressional findings underlying the Act, the Court below found that the Lopez Court specifically had denied any necessity for Congress to make findings. In addition, it recognized that Congress had amended the GFSZA to add such findings (and that such findings were before the Court when Lopez was argued and decided), and that the Court specifically considered the effects on interstate commerce that had been proffered by the Solicitor General. JA 482-83. With respect to the Act, Judge Kiser also noted that only one House found a "substantial effect" on interstate commerce, the Senate having held only that the "modest" threshold of interstate commerce that it believed applicable prior to Lopez had been crossed. JA 481-82. Accordingly, Judge Kiser concluded that the existence of legislative findings for the Act did not distinguish Lopez.

With respect to the civil nature of the Act, the Court below simply noted that the Act defines the conduct that it regulates in terms of criminal law (see 42 U.S.C. § 13981(d)(2)(A)) and that, in any event, the Supreme Court has never analyzed criminal and civil laws passed pursuant to Congress's Commerce Clause authority any differently. JA 484.

With respect to the steps of causation, Judge Kiser stated that the Act might involve activity one step closer to interstate commerce since it regulated actual violence instead of conduct (gun-ownership near schools) that could lead to violence. The Court found this difference unimportant because gun-ownership is sufficiently close to acts of violence -- indeed, the entire body of federal gun control law is based on the assumption that one leads to the other -- and because the alleged effects touted by the government for both laws, such as the unwillingness of people to travel, did not require actual violence, but only the threat of violence. JA 485. See also VAASA Amici Br. 5, 8 (violence instills fear in all women); DOJ Br. 7. The Court below also found plaintiff's argument that violence against women affects their ability to participate in the economy (thus affecting interstate commerce) essentially similar to the argument proffered, and rejected, in Lopez that disruption of the educational process affects students' ultimate ability to participate in the economy (thus affecting interstate commerce). JA 486.

The Court below found that any differences between the two statutes were outweighed by the similarities. It noted that the Act does not regulate economic activity (JA 486-88); that it does not have a jurisdictional requirement (JA 488-89); and that the "practical implications" of concluding that gender-based animus-motivated violence substantially affects interstate commerce would be to grant to Congress the authority to regulate virtually all of criminal law and domestic relations law (JA 489-91). Accordingly, it concluded that the Act could not be justified as a regulation of interstate commerce.

3. The Section 5 Analysis. -- In analyzing whether Congress had the authority under Section 5 of the Fourteenth Amendment to pass the Act, the Court began by noting that, while Section 1 of that amendment (which precludes states from denying persons equal protection of the laws) has been held to reach some private conduct, that private conduct must have some connection to the state. JA 492. While noting dicta suggesting that Congress might be able to reach purely private conduct under Section 5, the Court below held that The Civil Rights Cases, 109 U.S. 3 (1883) precluded any finding that Congress had the authority to reach the conduct regulated under the Act. Citing Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989) for the proposition that lower courts are not to presume that the Supreme Court implicitly has overruled its precedents, the Court concluded that it was without authority to hold Congress's Section 5 power as broad as needed to sustain the Act. JA 493.

Nonetheless, the Court below engaged in an extensive analysis to determine whether the Act could survive a means/ends analysis. It concluded that remedying private discriminatory acts unrelated in the specific instance to any state rule of conduct or otherwise chargeable to the state was not a legitimate end under the Fourteenth Amendment. JA 498-504. The Court then concluded that remedying state bias against women was a legitimate end under the Fourteenth

Amendment, but that the Act was not "plainly adapted" to that end. JA 504-06. Specifically, the Court held that the Act "provides no remedy for the deficiencies [in a state's criminal law system]" because "[i]t does not provide a remedy to the victim for the denial of the victim's equal protection rights by either undoing or stopping the specific equal protection violation or by compensating the victim for the violation, nor does it provide a remedy against the Fourteenth Amendment violator." JA 504-05 (emphasis added).

Having concluded that neither the Commerce Clause nor Section 5 of the Fourteenth Amendment of the United States Constitution granted Congress authority to pass the Act, the Court ruled that the Act was unconstitutional and granted the Rule 12(b)(6) motion of Morrison and Crawford. The Court declined to exercise supplemental jurisdiction over plaintiff's state law claims. JA 507.

Summary Of Argument

For all their discussion of how "traditional" the tort remedy provided by the Act is, appellants and their amici propose a radical restructuring of our Constitutional order and ask this Court both to raze the old order and build a new one. In short, they ask this Court to go where no Supreme Court authority has ever gone.

Appellants offer two purported bases for the Act: Section 5 of the Fourteenth Amendment and the Commerce Clause. No Supreme Court case has ever held that Congress has the authority under Section 5 of the Fourteenth Amendment to reach private conduct having no connection whatsoever to state rules or state action. No Supreme Court case has ever held that Congress has the authority under Article I, § 8 to regulate entirely non-economic activity having an effect on interstate or foreign commerce that can be perceived only through an attenuated chain of causation.

The dangerous implications of appellants' arguments cannot be overstated. What they propose is nothing less than this Court granting Congress a complete police power that it can use to replicate or replace state law as it sees fit. As shown below, both of their arguments can be used to justify virtually any law, in any area, that Congress chooses. Neither can be limited or constrained in any principled way. Either would doom the Constitutional federalism enacted by the Founding Fathers to a premature death.

Argument

I.

APPELLANTS ERR IN ASSERTING THAT CONGRESS'S SECTION

5 AUTHORITY CAN SUSTAIN THE ACT'S TORT REMEDY

AGAINST PRIVATE INDIVIDUALS

Judge Kiser correctly ruled that Section 5 of the Fourteenth Amendment cannot be used to sustain the Act. The arguments cited by appellants, and the authorities they adduce, fail to demonstrate otherwise. Indeed, the arguments reflect a theory of the Fourteenth Amendment which would give Congress unbounded power.

A. Appellants' Argument Ignores Binding

Supreme Court Precedent

Appellants do not generally dispute that Congress cannot simply reach private discrimination without any predicate at all. Rather, each of them, and their amici, asserts that the Act's tort remedy is a Constitutional remedy for the "systemic" bias in state law and state courts uncovered by Congress during the legislative hearings leading up to the passage of the Act. E.g., DOJ Br. 22-23; Brzonk. Br. 32. But Congress has passed legislation of this kind before in our nation's history. In three different cases covering a century of precedent, involving three different pieces of legislation, the Supreme Court has rejected any basis in Section 5 for such legislation.

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). The legislative history of that law is well known. "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." Jett v. Dallas Independent School Dist., 491

U.S. 701, 722 (1989). In the debate over the bill, Congressmen repeatedly emphasized the failure of the states to remedy these problems. Thus, for example, then-Representative James Garfield argued that

> the chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them.

Cong. Globe, 42nd Cong., 1st Sess, Appendix 153 (1871). See also Cong. Globe, 42nd Cong., 1st Sess, 653 (1871) (Sen. Osborn) ("The State courts . . . are utterly powerless then . . . Justice is mocked, innocence punished, perjury rewarded, and crime defiant in the halls of justice"); id., 457 (Rep. Coburn) ("We find that the commission of a certain high class of crimes is not noticed; that the offenders are not arrested, put on trial or punished . . . "); id., 481 (Rep. Wilson). See also id., Appendix 78 (Rep. Perry) ("Sheriffs having eyes to see, see not; judges having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices"); id., Appendix 196 (Rep. Snyder).

Despite this legislative history, the Supreme 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. The Court specifically rejected the idea that the Fourteenth Amendment permitted Congress to reach private conduct, or that systemic bias (without a showing of any bias or other equal protection violation in the specific case) permitted Congress to arrogate powers belonging to the States. 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)). (The indictment alleged that African-Americans were beaten while in the custody of a deputy sheriff in Tennessee. Id. at 630.)

In The Civil Rights Cases, 109 U.S. 3 (1883), decided later that same year, the 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. Id. at 9.

The purpose of the legislation was manifest from its well-known legislative history. 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. Sen. Charles Sumner, the prime sponsor of the law in the Senate, read various letters from African-Americans and others describing just this situation:

> The Legislature of South Carolina has passed a law giving precisely the right contained in your "supplementary civil rights bill." But such a law remains a dead letter on her statute-books because the State courts, comprised largely of those whom the Senator wishes to obtain amnesty for, refuse to enforce it.

Cong. Globe, 42nd Cong., 1st Sess. 430 (1872) (letter from F.L. Cardozo, Secretary of the State of South Carolina).

> Local or state legislation will necessarily be partial and vacillating. Besides our experience is to the effect that the local State governments are unreliable for the enforcement or execution of laws for this purpose.
>
> In Arkansas, for example, a statute was enacted by the General Assembly of 1868 for the purpose of securing the equal rights of colored persons upon steamboats, railroads, and public thoroughfares generally. The provisions of the statute were deemed good, if not entirely sufficient; yet to the present time, gross indignities continue to be perpetrated upon colored travelers, men and women, while those charged under oath to see the laws faithfully executed look on with seeming heartless indifference, while the law remains a dead letter on the statute-book.

Id., 726-27 (1872) (letter from E.A. Fulton). See also id., 726 (1872) (letter from R.G.L. Paige). See also, e.g., 2 Cong. Rec. 383 (1874) (Rep. Ransier) ("Mr. Speaker, the States will not give us protection in these matters, and well do these

`State-rights' men know this"); 2 Cong. Rec. 457 (1874) (Rep. Butler) ("The learned gentleman from Georgia [Mr. STEPHENS] agrees with me that every colored man now has all the rights which this bill gives him, but insists it is the States' duty to enforce them. But because of prejudice the States will not enforce them"); 3 Cong. Rec. 945 (1875) (Rep. Lynch) ("You may ask why we do not institute civil suits in the State courts. What a farce! Talk about instituting a civil-rights suit in the State courts of Kentucky, for instance, where the decision of the judge is virtually rendered before he enters the court-house, and the verdict of the jury substantially rendered before it is impaneled . . ."); See also 2 Cong. Rec. 427 (1874) (Rep. Stowell); 3 Cong. Rec. App. 15 (1875) (Rep. A. White).

In The Civil Rights Cases, 109 U.S. 3 (1883), the Court found the first two sections of the 1875 Act unconstitutional. The Court noted that Congress did indeed have the power under Section 5 "[t]o adopt appropriate legislation for correcting the effects of such prohibited state law and state acts, and thus to render them effectually null, void and innocuous." The Civil Rights Cases, 103 U.S. at 11. But the statute there, despite its legislative history, was not "appropriate" because it did not attempt to remedy any specific instances of improper state action. Thus, the 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, the 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 and act directly on individual conduct.

Nearly a century later, in General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982), the Supreme Court addressed (albeit in dicta) the constitutionality of 42 U.S.C. § 1982, which grants all citizens the same right to purchase and lease property as is enjoyed by white citizens, and which indisputably reaches wholly private conduct. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (so holding). The Court in General Building Contractors noted that Section 1982 had been passed twice: once as part of Section 1 of the Civil Rights Act of 1866 (14 Stat. 27), prior to the passage of the Fourteenth Amendment, and again in Section 18 of the Enforcement Act of 1870 (16 Stat. 140), which was passed pursuant to Section 5 of the Fourteenth Amendment. General Building Contractors, 458 U.S. at 384-85 & n.11. The Court further stated that "[t]he principal object of the legislation was to eradicate the Black Codes, laws enacted by Southern legislatures imposing a range of civil disabilities on freedmen." Id. at 386. Despite this purpose the Court stated that the reach of Section 1982 to private conduct depended upon the Thirteenth Amendment, not the Fourteenth.

> It is true that [42 U.S.C.] § 1981, because it is derived in part from the 1866 Act, has roots in the Thirteenth as well as the Fourteenth Amendment. Indeed, we relied on that heritage in holding that Congress could constitutionally enact § 1982, which is also traceable to the 1866 Act, without limiting its reach to "state action." See Jones v. Alfred H. Mayer, 392 U.S. 409, 438 (1968).

Id. at 390 n.17 (emphasis added). See also, e.g., McCrary v. Runyon, 515 F.2d 1082, 1086 (4th Cir. 1975) (en banc), aff'd, 427 U.S. 160 (1976) ("The [Supreme] Court [in Jones v. Mayer] concluded that, unlike the Fourteenth Amendment, the Thirteenth reached private conduct in which no state action was involved" (emphasis added)).

Thus, the Supreme Court repeatedly has rejected the argument that DOJ and Brzonkala present here: that Congress can reach private conduct under Section 5 of the Fourteenth Amendment. Their facile efforts to distinguish The Civil Rights Cases and Harris miss the point entirely. Each of them contends that those cases are distinguishable because the Court found no "state action" or was not addressing Congress's power to reach private conduct as a remedy for systemic state equal protection violations. DOJ Br. 22 n.11; Brzonk. Br. 30. But the Court in each of those cases did not focus on the well-known overall purpose of the legislation, but rather focused on the specific mechanics of each statute, and the statute's failure to address some specific violation of the equal protection clause. That is why Section 4 of the 1875 Act was "entirely corrective" (see n., supra), and the first two sections were not.

Indeed, the notion that Congress was not reacting, at least in part, to systemic failures in state law enforcement in passing the civil rights laws of the 1860's and 1870's is remarkably ahistorical. The failures of southern states to protect the rights of African-Americans like Morrison and Crawford during the post-Civil War period were far more egregious and pernicious than those imposed upon women in the 1990's. In their more candid moments, Brzonkala and her amici concede that the background and purpose of the Reconstruction Era statutes cannot be distinguished from those of the Act. E.g., Brzonk. Br. 33 (the tort remedy in the Act 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"); VAASA Amici Br. 2 ("Just as it did in the context of Reconstruction-era civil rights laws, in the face of inadequate responses from state laws and legal systems . . . "), 10, 14, 19; Academic Amici Br. 2 ("Just as anti-lynching legislation [struck down in Harris] responded to the fact that some African-Americans were not effectively protected by state law against attack because they were African-American, so too are some women . . . not effectively protected by state law . . ."). Congress could not reach private conduct under Section 5 in addressing far more pernicious and overt state racial bias of the nineteenth century; a fortiori, it cannot reach private conduct based upon the "subtle" (DOJ Br. 26; Academic Amici Br. 22) bias of states today.

B. Appellants' Authorities And Arguments

Are Not To The Contrary

To avoid the effect of binding Supreme Court precedent, appellants cite ambiguous dicta and irrelevant holdings from Supreme Court cases in the late 1960's and early 1970's and suggest that Judge Kiser erred in applying the "means/ends" test applicable to Section 5.

1. Appellants' Authority Does Not Overrule Binding Precedent. -- Brzonkala and her amici first cite United States v. Guest, 383 U.S. 745 (1966) and District of Columbia v. Carter, 409 U.S. 418 (1973) for the proposition that Congress can reach any private conduct under Section 5. Neither case can be used to support that proposition.

In United States v. Guest, the Court considered the scope of 18 U.S.C. § 241, which precludes conspiracies to deprive individuals of their rights under the Constitution. It concluded that an indictment that had accused the defendants of depriving African-Americans of their rights by causing their arrest by state officials stated a violation of that statute since it presented the requisite state action. Id. at 755 ("It is a commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State . . . This has been the view of the Court from the beginning" citing, inter alia, The Civil Rights Cases). The Court's opinion, written by Justice Stewart, specifically stated that it dealt only with "issues of statutory construction, not with issues of constitutional power." Guest, 383 U.S. at 749. Id. at 755 ("nothing said in this opinion goes to the question of what kinds of other and broader legislation Congress might constitutionally enact under § 5 . . . "). See also VAASA Amici Br. 21-22.

Three concurring justices joined the opinion of the Court, but also stated in dicta that Congress had the power under Section 5 to "punish[] all conspiracies -- with or without state action -- that interfere with Fourteenth Amendment rights." Id. at 762 (Clark, J., concurring). In dissent, Justice Brennan (for himself and two others) emphasized that the indictment alleged a conspiracy to interfere with the equal (i.e., non-discriminatory) utilization of publicly-owned facilities, and concluded both that § 241 was intended to reach that conspiracy regardless of any state action and that Congress had the power to pass such a law. He distinguished that allegation from other forms of private discrimination. Id. at 780-81.

Three immediate impediments preclude the use of any of this dicta to support appellants' argument here. First, of course, it is dicta. Second, the Court subsequently has emphasized that its holdings are not determined by some process of head-counting dissents and concurrences, but rather by the narrowest holding of Justices concurring in the judgment of the Court. E.g., Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 765 n.9 (1987) ("our settled jurisprudence" is that "when no single rationale commands a majority, `the holding of the Court may be viewed as that position taken by those Members who concurred in the judgmen[t] on the narrowest grounds'" (emphasis added)). Third, the Guest dissenters would require at least some connection to state facilities in the specific instance, and the concurrence is, at best, extraordinarily ambiguous. (As the VAASA amici recognize, the Court in United Brotherhood of Carpenters and Joiners v. Scott, 463 U.S. 825, 831 (1983), concluded that the "Fourteenth Amendment rights" referred to by the Guest concurrers must entail notions of state action. VAASA Amici Br. 22-23 n.10.)

Appellants fare no better with District of Columbia v. Carter, 409 U.S. 418 (1973). That case involved whether the District of Columbia could be sued under 42 U.S.C. § 1983. (Its holding, that it could not, has been legislatively overruled.) In a double-negative footnote, the Court simply noted as dicta the possibility that Congress might have the authority under Section 5 of the Fourteenth Amendment to reach private conduct. Id. at 424 n.8 ("This is not to say, of course, that Congress may not . . ."). (The VAASA amici misquote the Carter Court in a quixotic effort to make the

footnote seem less ambiguous. VAASA Amici Br. 17.)

Brzonkala also cites Bellamy v. Mason Stores, Inc. (Richmond), 508 F.2d 504 (4th Cir. 1974) (Brzonk. Br. 29-30), in which the Court dismissed a Section 1985(3) claim based solely on private conduct. Two members of the panel then stated in dicta that Congress could reach private interference with students' attendance at public school because it would "aid and implement the duty of the state" (id. at 507) under the Equal Protection Clause. (Thus, like the dissenters in Guest, the Bellamy panel's dicta would require some connection with state facilities.) Judge Boreman concurred in the result, finding both that Section 1985(3) did not cover the private conduct at issue, and that Congress lacked the authority to do so under the Fourteenth Amendment. Subsequent Fourth Circuit authority (including an en banc decision) demonstrates that the Court does not view Bellamy as having concluded that Congress can reach any kind of private discriminatory conduct. Ward v. Connor, 657 F.2d 45, 48 n.5 (4th Cir. 1981), cert. denied, 455 U.S. 907 (1982) (in a case involving kidnapping because of religious beliefs, Court refuses to reach the "troublesome question of congressional power under § 5 of the Fourteenth Amendment which confronted us in [Bellamy]"); McCrary v. Runyon, 515 F.2d 1082, 1086 (4th Cir. 1975) (en banc), aff'd, 427 U.S. 160 (1976) ("The [Supreme] Court [in Jones v. Mayer] concluded that, unlike the Fourteenth Amendment, the Thirteenth reached private conduct in which no state action was involved" (emphasis added)).

Most importantly, none of the foregoing cases actually involved any question of the scope of Congressional authority under Section 5. In other words, all of the statements on which appellants rely are dicta. They just do not control. See, e.g., Wittmer v. Peters, 87 F.3d 916, 919 (7th Cir. 1996) ("[T]here is a reason that dicta are dicta and not holdings, that is, are not authoritative. . . Such [other] cases were not, at least insofar as one can glean from the opinions, present to the minds of the judges when they . . . [used] the sweeping dicta that we have mentioned. The weight of judicial language depends on context . . . "); Fulton v. Warden, Md. Penitentiary, 744 F.2d 1026, 1031 n.4 (4th Cir. 1984), cert. denied, 473 U.S. 907 (1985) (statement in earlier case was "unquestionably dictum and not binding on this panel). If this case were to be decided by dicta, the dicta of the Court in General Building Contractors -- far less ambiguous and adopted by a majority of the Court in the 1980's -- should control. But dicta should not control. Rather, the on-all-fours holdings of Harris and The Civil Rights Cases should.

Finally, appellants rely heavily on Katzenbach v. Morgan, 384 U.S. 641 (1966). Morgan upheld Section 4(e) of the Voting Rights Act of 1965, which prohibited enforcement of New York State's English literacy requirement in any election, as "plainly adapted" to remedying State discrimination and a proper exercise of Congressional authority under Section 5. Katzenbach v. Morgan, 384 U.S. at 645 n.3.

Morgan also held that Congress's remedial power was not limited to violations of Section 1 of the Fourteenth Amendment, and, from this, appellants conclude that Congress can reach purely private conduct under Section 5 (e.g., DOJ Br. 21-22). But Morgan, which dealt only with various forms of state conduct, never said any such thing, and the conclusion is not required by the premise. In fact, while the Court has indicated that Congress has some latitude under Section 5 in defining state conduct that implicates Section 1 concerns (even if it does not specifically violate Section 1), the Court has never held that the "state action" doctrine is any different under the two sections. Quite the contrary; it has always indicated that they are the same. E.g., 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)).

As DOJ recognizes, Morgan did not set forth a novel standard, but rather the same standard that the Court always has used under Section 5. DOJ Br. 20 (citing 1880 case of Ex Parte Virginia for the proposition that Congress can pass "appropriate" legislation "adapted" to the objects of the Fourteenth Amendment). See also The Civil Rights Cases, 103 U.S. at 11 (Congress can "adopt appropriate legislation"). Appellants' efforts to use the Morgan standard to suggest that Congress can reach private conduct under Section 5, then, must fail. The remedy chosen by Congress is not "plainly adapted" or "appropriate" to remedying a Fourteenth Amendment violation because The Civil Rights Cases and Harris have held that it is not.

* * *

Ultimately, although they try to distinguish The Civil Rights Cases and Harris, appellants hope to convince this Court simply to disregard them. E.g., Brzonk. Br. 31 (modern courts only rely on The Civil Rights Cases when discussing the

state action requirement under Section 1) & n.21 (questioning whether that case "still controls" Congress's Section 5 powers). But those cases were not Section 1 cases. The Supreme Court has not overruled their Section 5 holdings (e.g., Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970)), and it continues to cite them with approval. E.g., Romer v. Evans, 116 S. Ct. 1620, 1625 (1996) ("it was settled early that the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodations, Civil Rights Cases, 109 U.S. 3, 25 (1883)").

Not surprisingly, then, most of the Courts considering the cases relied upon by appellants have concluded that Section 5 still does not reach private conduct. E.g., Murphy v. Mt. Carmel High School, 543 F.2d 1189, 1194 (7th Cir. 1976) ("Therefore, faced with these precedents [including Guest] and inconclusive legislative history, we do not find in section 5 the congressional authority which would permit Congress to enact a right of action against private parties, without any state involvement, for infringement of interests which are protected from state impairment by the Fourteenth Amendment"); Baer v. Baer, 450 F. Supp. 481, 493-96 (N.D. Cal. 1978) (reviewing precedents, including Katzenbach v. Morgan, Oregon v. Mitchell, and Guest, and holding that Congress did not have the authority under Section 5 to reach private discrimination); United States v. Wilson, 880 F. Supp. 621, 635-36 (E.D. Wisc.), rev'd on other grounds, 73 F.3d 675 (7th Cir. 1995), cert. denied, 117 S. Ct. 46 (1996) ("the views expressed in Katzenbach v. Morgan, Guest and Carter are insufficient to overcome the weight of over 100 years of Fourteenth Amendment jurisprudence which holds that Congress has no power to reach merely private conduct under the Fourteenth Amendment"); Hoffman v. Hunt, 923 F. Supp. 791, 819-20 (W.D.N.C. 1996) (rejecting Section 5 as authority for FACE; "[e]ven though some former justices of the Supreme Court have expressed the view that [the Fourteenth Amendment] might [reach private conduct], the Supreme Court has never ruled that way"). Cf. Wilson-Jones v. Caviness, 99 F.3d 203, 210 (6th Cir. 1996) ("Each case we could locate where legislation was upheld under the Fourteenth Amendment's enforcement clause concerned discrimination by state actors . . . " (emphasis added)).

The courts noted above recognized, as Judge Kiser did, that the lower courts (including this one) cannot overrule binding Supreme Court precedent. Rodriguez De Quijas v. Shearson/

American Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions").

2. The Means/Ends Analysis. -- Although binding precedent undermines appellants' claim that Section 5 authorized the Act, Judge Kiser nonetheless went through an extensive analysis to show that those cases were correctly decided and that the remedy in the Act fails the means/ends test used in Ex Parte Virginia and Katzenbach v. Morgan. Appellants' attack on this analysis misses the point. Judge Kiser's "primary concern" was not, as DOJ claims, "overbreadth and underbreadth [sic]" (DOJ Br. 25), although those features are certainly symptoms of the problem. Rather, while the tort remedy in the Act may be a response to state bias, it is not a solution for that bias. (Appellants avoid this problem by playing fast and loose with the word "remedy." While the Act may provide a "remedy" for victims of private violence, it does not remedy -- in the sense of "correct" -- any state biases.) If, by chance, state bias or neglect would have precluded a recovery in state court in a specific case brought under the Act, that bias still exists even if a recovery is had under the Act. The Act creates no incentives for States (and, indeed, may provide a disincentive since the States now know that the federal law will provide its own remedy). State bias is unaffected by the Act.

Judge Kiser could have gone further. Virtually all of the "biases" identified in appellants' briefs refer to inadequacies in state criminal law. E.g., DOJ Br. 9-15. Congress nonetheless provided a civil remedy, and the few alleged flaws in state civil proceedings are barely addressed by the Act. (Biased juries and judgment-proof defendants have not been repealed. The applicable federal "rape shield" law (Fed. R. Evid. 412(b)(2)) only modestly amends the normal relevance-prejudice balancing test and, as a rule of evidence, is inapplicable in a proceeding under the Act brought in state court.) Indeed, if state court systems are the problems, it makes no sense to give them concurrent jurisdiction to hear claims under the Act (with no possibility of removal).

3. The Other Authorities Relied Upon By Appellants Are Of No Assistance To Them. -- The other authorities relied upon by appellants can be dealt with briefly. Brzonkala notes that Congress has the authority under the enforcement sections of the Thirteenth and Fifteenth Amendments to regulate conduct that is not violative of the self-executing provisions of those amendments. Brzonk. Br. 28 n.16. This may be true, but insofar as reaching private conduct is

concerned, the Supreme Court and the Fourth Circuit (as already noted) distinguish the enforcement clauses of the Thirteenth and Fourteenth Amendments. Moreover, like Section 5 of the Fourteenth Amendment, Congress's power under Section 2 of the Fifteenth Amendment is limited to regulating state conduct. E.g., James v. Bowman, 190 U.S. 127, 139 (1903) ("a statute which purports to punish purely individual action cannot be sustained as an appropriate exercise of [Congress's power under Section 2 of the Fifteenth Amendment]").

DOJ also cites Fullilove v. Klutznick, 448 U.S. 448 (1980) (DOJ Br. 20-21 & n.9), but that case hardly helps it. In Fullilove, the Court held that Congress could have achieved the results of the Public Works Employment Act of 1977 (regulating both private contractors and state entities receiving federal funds) "through the Commerce Power insofar as the program objectives pertain to the action of private contracting parties, and through the power to enforce the equal protection guarantees of the Fourteenth Amendment insofar as the program objectives pertain to the action of state and local grantees." Id. at 475 (emphasis added). If Section 5 were sufficient to reach the private contractors, no reference to the Commerce Clause would have been necessary. See also, e.g., E.E.O.C. v. Elrod, 674 F.2d 601, 607 (7th Cir. 1982) (modern civil rights legislation has relied upon the Commerce Clause because Congress cannot reach private conduct under Section 5 of the Fourteenth Amendment).

C. Appellants' Arguments Would Give

Congress Unlimited Authority

As the Court did in United States v. Lopez, 115 S. Ct. at 1632, "[w]e pause to consider the implications of the Government's argument." As the reports cited by DOJ reflect, perceptions of bias in our state court systems are not limited to their response to violent acts motivated by gender animus. DOJ Br. 9-10 n.6. Indeed, these reports generally find bias in most of domestic relations law.

Domestic relations law is hardly alone. Scholars have suggested that much of tort law contains inherent bias. E.g., Jane Goodman, et al., Money, Sex, and Death: Gender Bias In Wrongful Death Damage Awards, 25 Law & Soc'y Rev. 263, 282 (1991) (survivors of women given inadequate awards in wrongful death cases because of "strong stereotypes about male and female roles in the home"); Martha Chamallas & Linda Kerber, Women, Mothers, and the Law of Fright: A History, 88 Mich. L. Rev. 814 (1990) (physical-impact requirement for infliction of emotional distress claims reflects gender bias and discriminates against women). Binding contracts can reflect bias to those who believe that the law should compensate for cultural factors that encourage women to be more conciliatory and men more aggressive. Mary Pat Treuthart and Laurie Woods, Mediation -- A Guide For Advocates And Attorneys Representing Battered Women 13-14, 75 (1990) (arguing that prenuptial agreements discriminate against women for that reason).

If "`gender bias permeates the [state] court system'" (DOJ Br. 10; Academic Amici Br. 10), appellants' theories would grant Congress an unlimited power to replace state law. See also, generally, Symposium: Is The Law Male?, 69 Chi-Kent L. Rev. 293 (1993) (various articles, several by some of the academic amici, describing gender bias in various substantive areas of the law). It could create its own statutes on marriage and divorce, torts, contracts, and any other area in which it perceives gender bias in either substantive law or enforcement mechanisms. Nor would Congress be limited to merely replicating state law. Pursuant to its authority under Article VI of the Constitution, Congress can choose to preempt state law in any area of legislative competence. E.g., Morales v. Trans World Airline, 504 U.S. 374, 383 (1992) (pre-emption "`is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose'").

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 from, say, pickpockets if it deems the states to be doing an inadequate job. Compare Bray, 506 U.S. at 278 ("A burglar does not violate the Fourth Amendment, for example, nor does a mugger violate the Fourteenth"). As the Seventh Circuit recently noted, in upholding Congress's Section 5 authority under the Religious Freedom Restoration Act, even a much more limited vision of Section 5 authority would create grave concerns for our federal system of government. Sasnett v. Sullivan, 91 F.3d 1018, 1022 (7th Cir. 1996) ("We are mindful that by progressively incorporating almost the entire Bill of Rights, expansively interpreted, into the due process clause of the Fourteenth Amendment, the Supreme Court has greatly enlarged the reach of section 5 . . . , and we share the state's anxiety lest the clause swallow up the remaining powers of state government"). The Seventh

Circuit found a Section 5 power limited only to regulating state conduct worrisome in its scope. A Section 5 power which could do that and replicate or replace state common law and criminal law altogether would undermine conclusively the federal structure of our Constitution.

II.

APPELLANTS ERR IN ASSERTING THAT THE ACT IS A PROPER

EXERCISE OF CONGRESS'S POWER TO REGULATE

INTERSTATE OR FOREIGN COMMERCE

As the Court noted in Lopez, the determination of whether a law regulates interstate or foreign commerce is ultimately a question for the judiciary. Lopez, 115 S. Ct. at 1629 n.2 ("[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so"). The question of whether gender-based, animus-motivated violence substantially affects interstate commerce is one for this Court.

Judge Kiser correctly analyzed United States v. Lopez and the similarities and differences between the GFSZA and the tort remedy provided by the Act. Appellants' efforts to refute the analysis of the Court below ignore Lopez and its holding, diminish the importance of the similarities, and tout the importance of minimal or non-existent differences.

A. The Similarities Between This

Case And *Lopez*

Of the similarities mentioned by Judge Kiser, the non-commercial nature of the activity regulated and the absence of a jurisdiction prerequisite are not disputed by appellants. There is no jurisdictional requirement in the Act. And it is hard to envision an activity more non-economic than the violence regulated by the Act. Indeed, any possible connection to commerce is virtually written out of the statute. By definition, the Act only covers activity when a significant motivation is gender animus, a plainly non-commercial motive.

Faced with these similarities to the GFSZA, appellants downplay the importance of these factors in Lopez (and misrepresent Judge Kiser's opinion). E.g., Brzonk. Br. 36 ("[T]he court below interpreted Lopez as limiting valid Commerce Clause legislation to laws that (1) have a jurisdictional element linking the activity to interstate commerce or (2) regulate economic activity. . . Nothing in Lopez imposes these prerequisites"); DOJ Br. 34 ("Lopez did not . . . hold that Congress was limited to the direct regulation of economic activity under the Commerce Clause").

Contrary to Brzonkala's misstatement, Judge Kiser never said that these factors alone were dispositive, simply that they were factors. In that, he was well-supported by Lopez. Indeed, the nature of the regulated activity was deemed a very important factor in Lopez. Lopez, 115 S. Ct. at 1630 ("[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, 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"); id. at 1631 (GFSZA cannot be sustained "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 1634 ("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 Lopez Court thus repeatedly referred to the non-economic nature of the activity being regulated. Efforts to diminish the significance of this finding, by necessity, must ignore the opinion.

B. The Alleged Differences Between

This Case And *Lopez*

Appellants argue that Judge Kiser underestimated the differences between the Act and the GFSZA, particularly the findings of Congress and the purported connection to interstate or foreign commerce. They are wrong.

1. Findings. -- The Congressional findings related to the Act do not help appellants for the reasons that Judge Kiser stated, viz., findings were before the Court in Lopez, the Lopez Court said that findings were not necessary, the Court considered the Solicitor General's theories as to why the GFSZA substantially affected interstate commerce, and, with respect to the Act, only one house made a finding that violent acts motivated by a gender-based animus substantially affects interstate commerce. Compare S. Rep. 138, 103rd Congress, 1st Sess., 54 (1993) (JA 273) ("The Commerce Clause is a broad grant of power allowing Congress to reach conduct that has even the slightest effect on interstate commerce") with Lopez, 115 S. Ct. at 1630 ("test requires an analysis of whether the regulated activity `substantially affects' interstate commerce" (emphasis added)).

If Congressional findings were sufficient, the GFSZA now would be constitutional since findings have been made. But no one claims that it is. (Appellees are unable to locate any reported case in which the government is prosecuting someone under that law.) Indeed, even DOJ recognizes that it is not. The President has suggested further amendments to the GFSZA, on the advice of Attorney General Reno, to meet the requirements of Lopez. 31 Weekly Comp. Pres. Doc. 809 (May 10, 1995).

2. Connection To Interstate Commerce. -- Appellants also argue that gender-based, animus-motivated violence has a much closer connection to interstate or foreign commerce than the possession of guns around schools. E.g., DOJ Br. 28 ("substantial and direct"), 30 ("direct and expressly declared"), 31 ("direct and substantial"); Brzonk. Br. 38 ("far more directly connected"). Again, they err.

Two points deserve emphasis at the outset. First, at some level of causation everything can be deemed to affect interstate commerce. Lopez at 1628-29 ("the scope of the interstate commerce power `must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government'") (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)). See also 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. The Lopez majority meant that the relationship between the regulated activity and interstate commerce must be strong enough or close enough to justify federal intervention . . ."). The question, then, is not whether rape affects interstate commerce but whether it affects it in some way that the possession of guns around schools does not.

Second, most of the statistics appellants cite refer to all violence against women, and not the more limited activity covered by the Act. Indeed, it is hard to imagine that the Act will have any significant effect on, for example, women's willingness to travel interstate. One would have to believe that women do not travel interstate solely because of their fear of violent felonies motivated by a gender-based animus, and not from fear of the more widespread random acts of violence, non-animus motivated rapes and assaults, and non-felonious crimes, all of which are excluded from the Act's coverage.

With these factors in mind, the statistics and findings cited by appellants do not distinguish the Act from the statute in Lopez. The general "findings" of Congress -- that violence "restricts movements," "increases health expenditures," and "reduces consumer spending" -- are so general and conclusory as to be of little assistance to this Court. See Lopez, 115 S. Ct. at 1656 n.2 (Souter, J., dissenting) (findings relating to GFSZA "express[] what is obviously implicit in the substantive legislation, at such a conclusory level of generality as to add virtually nothing to the record").

The more specific arguments used by appellants sound remarkably like arguments that were made (or easily could have been made) about guns near schools. Compare, e.g., DOJ Br. 30 ("violence against women `deter[s] potential victims from traveling interstate . . .'") with Lopez, 115 S. Ct. at 1632 ("violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe"). Itemizing the "costs" of domestic violence or violence against women on the economy in general -- see DOJ Br. 30 ($3-5 billion for domestic violence, $5-10 billion for violence against women) -- says nothing at all about the effects of the conduct regulated by the Act on interstate commerce. (Brzonkala chastises Judge Kiser for distinguishing between the "national economy" and interstate commerce (Brzonk. Br. 39), but, of course, it is the Constitution that makes that distinction.) In a $7 trillion economy (see World Almanac and Book Of Facts 114 (1996); cf. Lopez, 115 S. Ct. at 1664 (Breyer, J. dissenting) ($5.5 trillion

in 1990)), economic effects around 0.1% of the economy hardly compel a conclusion that the acts in question substantially affect the smaller part of the economy specifically encompassing interstate commerce.

In order to go from the very serious harm to the individual from violence to a substantial effect on interstate commerce, the need for inferences and guesswork is as strong here as in Lopez. Appellants refer to the fact, for example, that 50% of rape victims lose their jobs. See DOJ Br. 30. Even ignoring the problems in using this statistic -- the Act does not regulate all rapes and there is no control group cited to which the percentage can be compared -- the rape rate for women (who constitute approximately half of the population) is still miniscule in comparison to the unemployment rate. Statistical Abstract of the United States 1995 204 (Table 318) (0.08% including both reported and unreported rapes). Thus, appellants ask this Court to infer that (1) women who lose their jobs because of rape had jobs that somehow involved interstate commerce, (2) these individuals cannot be adequately replaced despite the much larger unemployment rate, and (3) the inability to replace those workers will substantially affect the ability of those businesses to trade some unidentified good or service in interstate commerce. These are the kinds of inferences which the Court rejected in Lopez.

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, 115 S. Ct. at 1630 (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. So, too, as Judge Kiser pointed out, the Commerce Clause cases relied upon by appellants have involved a specific commodity or kind of interstate commerce. JA 488. If Wickard reflects the most far reaching example of permissible Commerce Clause authority, the Act here goes well beyond that authority.

C. The Practical Implications

An enumeration "presupposes something not enumerated." Gibbons v. Ogden, 22 U.S. 1, 195 (1824); see also Lopez, 115 S. Ct. at 1634. Appellants' arguments render the concept of enumerated powers irrelevant.

The most important similarity found by Judge Kiser between the Act and the GFSZA was the practical implications of recognizing a Commerce Clause authority as sweeping as that needed to sustain each of them. JA 489-91. His conclusions cannot be (and are not) disputed. Plainly, if Congress has the authority to regulate some rapes and assaults, it has the authority to regulate all rapes and assaults. If Congress can regulate crimes which are non-commercially motivated (i.e., motivated by gender-animus), it can regulate crimes which have an economic motivation (like pickpocketing). If it can regulate matters that "increase medical costs," it can regulate our diets and exercise habits. If it can regulate activity having an effect on the economy through various causal mechanisms, it can regulate virtually anything. Because Congress can displace state law when it is acting within its authority, it could create a national criminal law or a national domestic relations law, eliminating the states' versions. Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 549 (1985) ("the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace"); Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 780 (1947) (Congress "can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause"); Kelley v. United States, 69 F.3d 1503, 1509-10 (10th Cir. 1995), cert. denied, 116 S. Ct. 1566 (1996); Morgan v. Sec'y Of Housing and Urban Development, 985 F.2d 1451, 1455 (10th Cir. 1993) (Tenth amendment does not apply when Congress regulates conduct of private citizens).

Appellants do not take this argument on directly. Rather, they try to avoid it by asserting that (1) the Act itself does not dramatically affect the relation between the national and state levels of government (Brzonk. Br. 39-40; DOJ Br. 32) and (2) Congress has additional Commerce Clause authority when it is dealing with "civil rights" or in an area where the states have not adequately carried out their duties.

The first argument is irrelevant. As both Lopez and the Court below held, it is the logic of the argument used to support the law which is dispositive, not whether Congress used the full extent of that logic in a specific instance. JA 490-91. The logic here has no stopping point.

In any event, virtually everything that appellants say about the Act, and its "respect[] of state law enforcement" (DOJ Br. 32) could have been (and was) said about the GFSZA. That act exempted, inter alia, the possession of a gun licensed by the State or a political subdivision of the State. 18 U.S.C.A. § 922(q)(2)(B)(ii) (West Supp. 1996). It reserved the rights of States and localities to enact statutes establishing gun-free school zones. 18 U.S.C.A. § 922(q)(4) (West Supp. 1996). See also 18 U.S.C.A. § 927 (West Supp. 1996) (further expressing Congress's desire not to preempt State law). Moreover, like the GFSZA, the Act displaces state prerogatives -- in establishing a statute of limitations which weighs the competing interests of righting wrongs and avoiding stale evidence, in determining whether the American Rule should be reversed -- by regulating acts (intentional torts) traditionally under state aegis. See William H. Rehnquist, Welcoming Remarks: National Conference On State-Federal Judicial Relationships, 78 Va. L. Rev. 1657, 1660 (1992) (proposed Violence Against Women Act of 1991 "ha[s] the potential to create needless friction and duplication among the state and federal systems").

The second argument, touted primarily by DOJ, asserts that there are no federalism concerns where Congress is acting to protect "civil rights" that the states have failed to protect. DOJ Br. 32-33. (DOJ does not state what a "civil right" is, except that it apparently excludes the right of schoolchildren to go to violence-free schools.) DOJ offers no case law to support the theory that findings of state failure (or legislation in the "civil rights" area) augments Congress's power under the Commerce Clause. Compare 18 U.S.C.A. § 922(q)(1) (West Supp. 1996) (finding under the GFSZA that states are unable to handle gun-related crime on their own). Once the logic of the argument "connecting" violent acts to interstate commerce is accepted, Congress can extend that argument anywhere it chooses.

* * *

No one disputes that violence against women is a serious societal problem. But the notion that Congress's main concern with it was its effects on interstate commerce trivializes the problem. To be sure, Congressional willingness to stretch the Commerce Clause as an expedient tool to reach societal problems is not unique to the Act, or even confined to any political view. See David B. Kopel and Glenn H. Reynolds, Shirt-pocket Federalism: *Lopez* And The Partial Birth Abortion Ban (1996) (available on the Internet, http://i2i.org/SuptDocs/IssuPprs/ippba.htm) (questioning whether jurisdictional standard of proposed partial-birth abortion statute -- applying only to physician performing abortions "in or affecting interstate or foreign commerce" -- can be met after Lopez). But that only underscores the importance the Courts play in preserving our Constitutional structure.

III.

THE COMPLAINT FAILS TO STATE A CLAIM UNDER THE ACT

AGAINST MORRISON OR CRAWFORD

Judge Kiser reached the Constitutional questions because he concluded that the Complaint stated a claim against Morrison. Judge Kiser erred in this limited respect. The Complaint fails to assert a claim against either Morrison or Crawford.

All rapes evince a lack of respect for the victim as an individual. Not all of them evince a lack of respect for women as a gender (as Congress recognized in the legislative history of the Act), much less are they all motivated by an animus against women. See, e.g., Hearings Before The Subcommittee On Civil And Constitutional Rights Of The Committee On The Judiciary, 103rd Cong., 1st Sess., Serial No. 51, at p. 97 (November 16, 1993) (statement of James P. Turner, Acting Ass't Attorney General, Civil Rights Division, U.S. Department of Justice) ("There must be some showing of hostility toward the gender of the victim"). Distinguishing between rapes that are motivated by such hostility and animus, and those that are not, is crucial in limiting the Act to its intended scope.

There are many motivations for rape other than gender animus, generalized anger and sexual self-indulgence being perhaps only the most obvious. None of the stated reasons relied upon by Judge Kiser is inconsistent with sexual self-indulgence as the sole motive for the acts alleged in the Complaint. (The statement concerning diseases, which Judge Kiser did not rely upon to any significant degree, is probably most consistent with self-preservation.) Rape cannot, in and of itself, constitute the "proof" of gender animus. See, e.g., Valanzuela v. Snider, 889 F. Supp. 1409, 1420 (D. Colo. 1995) (summary judgment granted against plaintiff asserting claim under Section 1985(3) based upon

repeated sexual assaults and rapes by a police officer, against whom numerous complaints of improper sexual contact with females previously had been lodged; "there is no evidence that any of the Defendants selected their complained of actions because of the adverse effect they would have on [women]. Accordingly, there is no evidence that Defendants had the discriminatory animus against the class necessary to sustain the conspiracy claim").

While Judge Kiser is no doubt correct that an explicit statement of hatred towards women is unnecessary, something more than the meager allegations in the Complaint must be required. Without such a requirement, the Act will become the general law against rape that Congress wanted to avoid.

Conclusion

For the foregoing reasons, this Court should affirm Judge Kiser's judgment dismissing the Complaint.

Respectfully submitted,

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Pursuant to Rules 25(a)(2)(B)(ii) and 26(d) of the Federal Rules of Appellate Procedure, I also certify that, on

December 20, 1996, I will dispatch this brief to the Clerk of the Court by a commercial carrier for delivery within three calendar days.

Michael E. Rosman