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,

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

SUPPLEMENTAL BRIEF FOR INTERVENOR-APPELLANT UNITED STATES

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I. THE VAWA'S CIVIL RIGHTS PROVISION IS A VALID EXERCISE OF CONGRESS'S POWER UNDER THE COMMERCE CLAUSE.

A. In sustaining the civil rights provision of the Violence Against Women Act (VAWA) on Commerce Clause grounds, the panel majority adhered to the inquiry mandated by United States v. Lopez, 514 U.S. 549 (1995). As Lopez reaffirmed, the relevant inquiry in a Commerce Clause challenge of this kind is "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." Id. at 557. As the panel majority noted, a reviewing court undertaking this inquiry owes great deference to congressional judgment. Op. at 27-28.

In enacting the VAWA, both Houses of Congress were mindful of the limitations on the Commerce Clause power and explicitly stated their finding that gender-motivated violence substantially affects interstate commerce. The Conference Report declared:

> [C]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce; crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.

Conference Report to accompany H.R. 3355, H.R. Rep. No. 103-711, at 385 (1994).

The findings in the Conference Report are based on a massive legislative record and echo statements made throughout the four years of legislative consideration. For example, the 1993 Senate Report explained that "[g]ender-based crimes and the fear of gender-based crimes restrict[] movement, reduce[] employment

opportunities, increase[] health expenditures, and reduce[] consumer spending, all of which affect interstate commerce and the national economy." S. Rep. No. 103-138, at 54 (1993). The Report went on to observe that "[g]ender-based violence bars its most likely targets - women" - from full participation in the national economy, noting, for example, that "almost 50 percent of rape victims lose their jobs or are

forced to quit in the aftermath of the crime." Ibid.

The Senate Report explained that "[e]ven the fear of genderbased violence affects the economy because it deters women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence." Ibid. For example, women often refuse higher paying night jobs in service and retail industries precisely because they fear attack. Id. at 54 n.70. See also i. at 41 ("estimates suggest that we spend $5 to $10 billion a year on health care, criminal justice and other social costs of domestic violence"); S. Rep. No. 101-545, at 33 (1990)(noting economic impact of violence as measured by factors such as lost careers and decreased productivity and noting that "[p]artial estimates show that violent crime against women costs this country at least 3 billion * * * dollars a year"); id. at 37 ("as many as 50 percent of homeless women and children are fleeing domestic violence").

In short, Congress, well in advance of the decision in Lopez, legislated with regard to the limitations on its powers and rationally concluded after years of investigation that gendermotivated violence has a substantial impact on interstate commerce.

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The contrast to the Gun Free School Zones Act at issue in Lopez is stark. The Gun Free School Zones Act criminalized possession of a firearm in the vicinity of a school. In enacting the statute, Congress did not identify the nexus between mere possession of a gun and interstate commerce.

The absence of an apparent connection between possession of a gun near a school and interstate commerce was not remedied by findings of any sort and found no support in a legislative record of the kind presented in this case.) Thus, the Court found that the effect of gun possession on interstate commerce could be posited only hypothetically and that it would be necessary to "pile inference upon inference" to sustain the statute. Lopez, 514 U.S. at 567.[2]

The Court made clear that congressional findings -- including committee findings (i. at 562) - would not only be considered but would be particularly significant where the nexus to interstate commerce is not otherwise apparent. Such findings "would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye." Id. at 563.

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[1]After the court of appeals had invalidated the Gun Free School Zones Act for want of findings, Congress amended the statute to add findings about the effect on commerce. See 514 U.S. at 563 n.4. These findings were not based upon a legislative record; the government did not rely upon them in defending the statute; and the Supreme Court did not address or even describe the findings. Id. See id. atat 612 n.2 (Souter, J. dissenting) (describing "these particular afterthoughts" as "conclusory"). ~

[2] The Court described what it believed to be the necessary chain of inferences: possession of a gun in a school zone (1) might lead to violent crime (2) which might threaten the learning process (3) which might ultimately produce less productive citizens (4) which might, cumulatively, impair the national economy. See 514 U.S. at 563-64 (describing the government's argument); id.at 565 (describing the

dissent's argument).

The panel dissent correctly noted that a court is not bound by congressional findings. Congress cannot, by fiat, establish a substantial effect on interstate commerce where none exists, and a court must conduct an independent evaluation. But, as the panel majority rightly recognized, the independent judicial evaluation is one that pays due deference to the findings and judgments of the legislative branch. After reviewing the legislative record, the panel concluded that Congress had a rational basis for finding a substantial connection between gender-motivated violence and interstate commerce. That conclusion is unassailable.

B. Federalism concerns were, of course, crucial in Lopez. The Court believed that the Gun Free School Zones Act threatened to "obliterate the distinction between what is national and what is local," Lopez, 514 U.S. at 567 (internal quotation marks and citation omitted), by intruding without justification into areas of traditional state concern such as education and police power.

But the Supreme Court's concern with federalism did not lead it to overrule any precedent or to confine Congress's authority under the Commerce Clause to the regulation of economic activity. Instead, as Justice Kennedy's concurring opinion (joined by Justice O'Connor) makes particularly clear, Congress may regulate activity without an evident connection to interstate commerce. But, when it does so, a reviewing court may ask whether Congress has upset an established balance of federal and state authority. In this way, courts may ensure that the interconnected nature of the national economy does not erase all distinctions between national and local spheres of authority.

Justice Kennedy explained that where "neither the purposes nor the design of the statute have an evident commercial nexus," 514 U.S. at 580, a court should not assume the statute's validity. Instead, a court should examine whether the congressional enactment impermissibly contravenes principles of federalism. In such cases a court may ask "whether the exercise of national power seeks to intrude upon an area of traditional state concern." Ibid.

Accordingly, consistent with the teachings of Lopez, the panel did not limit its analysis to assessing the rational basis for the congressional finding that gender-motivated violence has a substantial effect on interstate commerce. Instead, the panel further examined whether the civil rights provision of the VAWA improperly upsets the allocation of authority between the federal and state governments.

As the panel majority concluded, the VAWA raises none of the federalism concerns the Court found present in the Gun Free School Zones Act. In the Court's view, the Gun Free School Zones Act "inappropriately overr[ode] legitimate state firearms laws with a new and unnecessary Federal law." Id.at 561 n.3 (internal quotation marks and citation omitted). Justice Kennedy believed that the Act foreclosed "the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise." Id. at 583 (Kennedy, J., concurring). In contrast, the VAWA displaces no state law. To the contrary, it incorporates by reference pre-existing definitions of

prohibited activity, see § 13981(d)(2), and simply provides a new, civil, remedy for victims of gender-motivated crime. [3]

Most significantly, Congress enacted the VAWA to redress a problem that was created by state justice systems, and to ensure the protection of civil rights - a quintessential federal responsibility. When Congress acts to correct systemic state failures and creates a wholly non-intrusive remedy, federalism cannot be invoked to condemn the federal statute - a point recognized by the panel dissent. See Op. at 47-48 n.1 (Luttig, J., dissenting) ("[i]t may be * * * that congressional findings that the civil rights of women are being violated bear on the question of whether a statute impermissibly encroaches on traditional state functions"). Nor can a statute premised on systemic state failure of this kind presage an open-ended expansion of federal power into domains properly reserved to the states.

In sum, the panel majority properly undertook the two-step inquiry contemplated by Lopez when a statute does not, on its face, have an evident commercial nexus. First, looking to the legislative record and legislative findings (which the Lopez Court was unable to do), it assured itself of a rational basis for the exercise of Congress's Commerce Clause authority. Second, the Court made the further determination that the statute does not improperly upset the

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[3] The VAWA also expressly precludes efforts to assert pendent federal jurisdiction over state law actions concerning divorce, alimony, equitable distribution of property, and child custody. See § 13981(e)(4).

allocation of federal and state authority. As the panel majority concluded, the statute should be sustained. [4]

II. **THE VAWA'S CIVIL RIGHTS PROVISION IS A VALID EXERCISE OF CONGRESS'S POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.**

As we showed in our opening and reply briefs, the VAWA's civil rights provision is also a valid exercise of Congress's power under § 5 of the Fourteenth Amendment. The Supreme Court's decision in City of Boerne v. Flores, 117 S. Ct. 2157 (1997), confirms that analysis.

The Flores Court reaffirmed that § 5 "is 'a positive grant of legislative power'" that permits Congress to decide "'whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." Id. at 2163, 2172 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)). The Court likewise reaffirmed that § 5 gives Congress exceptionally broad discretion in choosing the means by which it will enforce these guarantees. Id. at 2163.

The Court made clear that the question whether legislation falls within the broad scope of Congress's authority under § 5 is distinct from the question whether particular conduct violates § 1 of the Fourteenth Amendment. Thus "[1]egislation which deters or remedies constitutional violations can fall within the sweep of

[4] Every court to consider the validity of the VAWA's civil rights provision with the exception of the district court in this case, has upheld the statute on Commerce Clause grounds. Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996); Anisimov v. Lake, 982 F. Supp. 531 (N.D. Ill. 1997); Seaton v. Seaton, 971 F. Supp. 1188 (E. D. Tenn. 1997); Doe v. Hartz, 970 F. Supp. 1375 (N. D. Iowa 1997), rev'd on other grounds, 1998 WL 24118 18th Cir., Jan. 26, 1998); Crlsonino v. New York City Hous. Auth., 96-CV-9742 (HB), 1997 WL 726013 (S.D.N.Y. Nov. 18, 1997); Mattison v. Click Corp. of America. Inc., Sieve. A. No. 97-CV-2736, 1998 WL 32597 (E.D. Pa. Jan. 27, 1998).

Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States." Id. (citing Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), and other civil rights cases).

"[A]s broad as congressional enforcement power is, it is not unlimited." Id.(citation omitted). The Flores Court stressed that Congress's § 5 power is "remedial," not "substantive." Id.at 2164. Congress may not enact legislation that "alters the meaning" of the Constitution, id., because the § 5 power is "corrective or preventative, not definitional." Id. at 2166.

The Flores Court thus held that Congress exceeded its § 5 power in enacting the Religious Freedom Restoration Act (RFRA), because the statute attempted to redefine the substantive scope of the Fourteenth Amendment. The RFRA was passed in direct response to the Court's decision in Employment Div. v. Smith, 494 U.S. 872 (1990), which had held that the states did not need a compelling justification to apply neutral, generally applicable laws to religious practices. The manifest purpose of the RFRA was to redefine the scope of the Free Exercise Clause by reimposing the compelling interest test. Flores, 177 S. Ct. at 2162. Because § 5 gives Congress the power only to enforce - not to redefine constitutional rights, the Court held that the RFRA was not directed at a legitimate constitutional end.

The VAWA's civil rights provision in no sense redefines the substantive prohibitions of the Fourteenth Amendment. To the contrary, it plainly provides a remedy for recognized constitutional

violations. Indeed, the district court acknowledged that the statute's goal of "correcting the differential treatment arising out of gender discrimination is a legitimate Fourteenth Amendment concern." JA 504. The Vase civil rights provision is thus "'corrective legislation; that is, such as may be necessary and proper for counteracting laws such as the States may adopt or enforce, and which, by the [fourteenth] amendment, they are prohibiting from making or enforcing.'" Id.at 2166 (quoting the Civil Rights Cases, 109 U.S. 3, 13-14 (1883)).

The government in Flores had advanced one legitimate constitutional end: namely, that the RFRA was intended to block state laws that, though neutral on their face, were enacted with the unconstitutional object of targeting religious practices. See Flores, 117 S. Ct. at 2168. The Court concluded, however, that this end was too thin a reed on which to rest the enactment.

The Court emphasized, first, that there was no evidence in the RFRA's legislative record of generally

applicable laws passed because of religious bigotry. Id. at 2169 ("[t]he history of persecution in this country detailed in the hearings mention[ed] no episodes occurring in the past 40 years").

The Court next stressed the RFRA's extraordinarily expansive scope. "Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." Id. at 2170. The Court explained that "[a]ny law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion." Id.The Court found this

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"considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of its citizens" to be "so out of proportion" to the proffered constitutional objective that it could not "be understood as responsive to, or designed to prevent, unconstitutional behavior." Id.at 2170, 2171.

The VAWA suffers neither of the defects identified by the Flores Court. The legislative record leaves no doubt that the VAWA was enacted for a purpose within the purview of the Fourteenth Amendment. See Gov't Br. at 9-16. And the remedy chosen is entirely non-intrusive. Unlike the RFRA, the VAWA displaces no state law and prohibits no state action. Instead, the VAWA simply provides a supplemental federal remedy to those whose injuries are apt to go unvindicated in state court. The VAWA's civil rights provision should therefore be sustained.

Respectfully submitted,

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