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

SUPPLEMENTAL BRIEF OF APPELLEES MORRISON AND CRAWFORD

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I.

CITY OF BOERNE V. FLORES FURTHER DEMONSTRATES THAT SUBTITLE C CANNOT BE SUSTAINED UNDER CONGRESS'S SECTION 5 AUTHORITY

The principal brief of defendants-appellees Morrison and Crawford ("Mo./Cr. Br.") demonstrates that Congress had no authority under Section 5 of the Fourteenth Amendment to pass Subtitle C of Title IV of Public Law 103-322, codified primarily at 42 U.S.C. § 13981. (This brief will refer to Subtitle C as the "Act" and all of Title IV as "VAWA.") See Mo./Cr. Br. 11-35. The recent decision of the Supreme Court in City of Boerne v. Flores, 117 S. Ct. 2157 (1997), in which the Court, virtually without dissent, struck down the Religious Freedom Restoration Act of 1993 ("RFRA") as outside the scope of Congress's Section 5 authority, further demonstrates that Congress overstepped its authority in passing the Act.

A. *Flores* Explicitly Reaffirms The Holdings Of The *Civil Rights Cases* and *United States v. Harris*, And Further Demonstrates That The Act Is Not Remedial

In Flores, the Court explicitly upheld the Section 5 holdings and analyses of United States v. Harris, 106 U.S. 629 (1883) and the Civil Rights Cases, 109 U.S. 3 (1883). Flores, 117 S. Ct. at 2166, 2170. While the Court noted that the specific holdings of those cases "might" have been "superseded" or "modified," it emphasized that their treatment of Congress's Section 5 power as "corrective or preventive . . . has not been questioned." Id. at 2166.

The cases cited by the Court to support its statement that the holdings of the Civil Rights Cases and Harris "might" have been modified or superseded further underscore that nothing has affected their Section 5 analysis. The first, Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964), was, of course, a Commerce Clause case and specifically distinguished the Civil Rights Cases on that ground. Heart of Atlanta Motel, 379 U.S. at 250 (distinguishing the Civil Rights Act of 1875 because that statute "broadly proscribed discrimination in `inns, public conveyances on land or water, theaters, and other places of public amusement,' without limiting the categories of affected businesses to those impinging upon interstate commerce. In contrast, . . . 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"). The decision of the Court in United States v. Guest, 383 U.S. 745 (1966) (the other case cited in Flores) specifically cited both Harris and the Civil Rights Cases for the proposition that the Fourteenth Amendment protects individuals against state action (Guest, 383 U.S. at 755), and held only that certain alleged private conduct violated the right to travel (id. at 757-60), which was "quite independent of the Fourteenth Amendment" (id. at 759 n.17). Conspicuously, the Court in Flores cited only the opinion of the Court in Guest, and did not cite the concurring and dissenting opinions, which Brzonkala has cobbled together as "proof" that Congress can reach private conduct under Section 5.

The reaffirmation of Harris and the Civil Rights Cases undermines appellants' arguments in a number of ways. First, and most obviously, Brzonkala's insistence that "[m]odern cases" do not rely upon the Civil Rights Cases "when discussing the scope of Section 5" (Brzonk. Br. 31 & n.21); that Harris and the Civil Rights Cases are "outdated" (Brzonk. R. Br. 9) and "inconsistent[] with modern case law" (id. 11 n.12); and that it "overstates the case law" to suggest that "those outdated cases remain good law" (id. 11 n.13) is now thoroughly discredited. Even Brzonkala must admit that Flores is a "modern" case.

Second, given the legislative history of the statutes at issue in Harris and the Civil Rights Cases -- described in appellees' principal brief (Mo./Cr. Br. 12-18) -- the reaffirmation of those cases demonstrates that the Act here cannot be remedial. The evidence of state neglect of African American rights that undergirded those statutes was far greater, and reflected state conduct far more pernicious, than the evidence before the Congress that passed the Act. See also Part "B," below.

Appellants' efforts to distinguish the legislative history of the statutes at issue in Harris and the Civil Rights Cases are weak. Indeed, Brzonkala barely tries. Rather, once again referring to "modern Section 5 case law," she asserts that the decisions struck down the statutes "without reference to Congress' intent" and, accordingly, they do not prevent this Court from upholding the Act. Brzonk. R. Br. 11. If Brzonkala means to suggest that the Court was somehow ignorant of conditions in the country at the time because it did not refer to legislative history, it is both insulting and ahistorical. The Court did not refer to legislative history because the Court almost never referred to legislative history at that time. Gregory E. Maggs, The Secret Decline Of Legislative History: Has Someone Heard A Voice Crying in the Wilderness?, 1994 Pub. Int. L. Rev. 57, 63 & n.21 (Roger Clegg and Leonard Leo, eds. 1994) ("The Supreme Court began to cite legislative history as we now know it around the close of the nineteenth century," citing cases from the 1890s).

DOJ's efforts fare no better. It asserts that the Act is distinguishable from the statutes in Harris and the Civil Rights Cases because it does not "impose a constitutional norm on private conduct" in that it "neither prohibits nor requires any conduct that is not already prohibited or required by law." DOJ R. Br. 6. To the extent this is comprehensible -- is it one distinction or two? -- it is a distinction without any basis in the decisions of the Court in those cases, or, for that matter, the Act. DOJ does not say what the "constitutional norm" is, but presumably it is the "norm" of non-discrimination, which, of course, is imposed upon private conduct by the Act. And, as the legislative history of the 1875 Act demonstrates, Congress prohibited and/or required conduct that was already prohibited and/or required by state common law. See Mo./Cr. Br. 15-17 & n.6. Civil Rights Cases, 109 U.S. at 25 ("Innkeepers and public carriers, by the laws of all the states . . . are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them"). (DOJ's suggestion that, if a state had no laws at all against

assault at all, Congress's Section 5 power would diminish, is also counterintuitive -- to say the least.)

Flores makes a number of other relevant observations concerning the "remedial" nature of Section 5. First, the Court emphasized that remedial nature by quickly recounting the failed history of the proposed Bingham amendment to the Constitution (Flores, 117 S. Ct. at 2164-65), and pointing out that the proposal which eventually became the Fourteenth Amendment replaced the Bingham proposal because it "did not raise the concerns expressed earlier regarding broad congressional power to prescribe uniform national laws with respect to life, liberty, and property." Id. at 2165. In fact, the defeat of the Bingham proposal demonstrates that the authors of the Fourteenth Amendment did not want to give Congress any authority to reach private conduct. Under appellants' theory, in contrast, Congress could create a national criminal law simply by finding that state systems of criminal law are biased. Cf. Developments In The Law -- Race and the Criminal Process, 101 Harv. L. Rev. 1472 (1988) (arguing that bias pervades criminal justice system).

Second, while agreeing that Congress should have latitude in determining what is remedial, the Court nonetheless insisted that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Flores, 117 S. Ct. at 2164. Although the Court did not specify a review standard, this statement, and the ultimate determination that RFRA was not "remedial," demonstrates a standard far above the "rational review" analysis associated with economic legislation under the Equal Protection clause.

As Judge Kiser's opinion notes, the Act is not remedial because it requires no violation to take effect, does not apply to many identical violations by State actors (where the underlying tort is not animus-motivated), and does not "correct" the violation by the State at all. Here, too, Flores is instructive. The Court noted that the parts of the Voting Rights Act upheld by its previous decisions all had limitations of scope and duration; in contrast, RFRA "applies to all federal and state law" and "has no termination date or termination mechanism." Flores, 117 S. Ct. at 2170. While the Court did not require such limiting elements under Section 5, their absence led it to conclude that the statute "reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved." Id. at 2171.

So, too, with the Act. Indeed, DOJ's principal brief contains a striking example of the remedial gap. It spends several pages describing Congress's findings with respect to the bias of state criminal justice systems in handling domestic violence cases. DOJ Br. 12-14. Even the bill's Senate sponsor conceded that the Act "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." S. Rep. 102-197, 102nd Sess., 1st Sess. 69 (1991) (Statement by Sen. Joseph Biden) (emphasis added).

B. *Flores* Demonstrates There Was No Underlying Constitutional Violation

Flores reviewed the legislative history of RFRA to determine "the evil presented" and concluded that the legislative history "lack[ed] examples of modern instances of generally applicable laws passed because of religious bigotry." Flores, 117 S. Ct. at 2169. The legislative history disclosed that "`deliberate persecution [wa]s not the usual problem," but rather that Congressional hearings emphasized "laws of general applicability which place incidental burdens on religion." Id. The Court concluded that these laws could not reasonably be characterized as "examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices" or as reflecting "some widespread pattern of religious discrimination in this country." Id. (emphasis added).

The legislative history of VAWA is similarly wanting. Indeed, Congress heard extensive testimony concerning the tremendous strides States were making, and sincere efforts by state actors to combat rape, domestic violence, and violence against women in general -- and that they primarily needed support and funds. Violent Crimes Against Women: Hearing Before the Committee On The Judiciary, United States Senate, 103rd Cong., 1st Sess. 25 (1993) (Utah Hearings) (every state has legislation providing civil protective orders for victims of domestic violence, and there has been a huge increase in their use because law enforcement officials refer victims to that process); Domestic Violence: Not Just A Family Matter -- Hearing Before The Subcommittee On Crime And Criminal Justice Of The Committee On The Judiciary, House Of Representatives, 103rd Cong., 2nd Sess., 131 (1994) (results of Attorney Generals survey by Minnesota AG Hubert H. Humphrey III show that "[t]hroughout the country, Attorney Generals have developed innovative projects to prevent domestic violence" and "have produced a number of excellent resources to prevent sexual violence in their states"); Violence Against Women: Fighting The Fear -- Hearing Before The Committee On The Judiciary, United States Senate, 103rd Cong., 1st Sess. (1993) (Maine Hearings) at 11 (describing police's development of a scale to assess domestic violence situations), 12 (Maine Legislature permits warrantless

arrests in domestic violence cases), 42-43 (crimes against women has been subject of increasing public attention and significant advances, which has been accompanied by "a spirit and commitment" in the State to address this problem), and 47 (police will "do the best they can with what they know," but do not receive sufficient training).

Further, Congress did not believe that rules about marital rape or requirements of corroboration rose out of some animus against women. Rather, it fully understood that States were "[f]earful of unfounded rape complaints." S. Rep. 102-197, at 45 (1991). So, too, Congress plainly understood the reluctance of prosecutors to present criminal cases involving "acquaintance rape." Id. at 47 (referring to difficulty in meeting "beyond a reasonable doubt" standard). And it is true, as DOJ asserts, that Congress heard testimony concerning the low rates of civil recovery in rape cases (see DOJ Br. 15) -- but it also heard why. Women And Violence: Hearing Before The Committee Of The Judiciary, United States Senate, 101st Cong., 2nd Sess. 39, 44 (1990) (judgment-proof defendants).

If state actors were really acting out of some hostility or animus to women, it would be hard to understand why Congress would appropriate $1.6 billion to aid such individuals, DOJ Br. 2, and why state courts were given concurrent jurisdiction under the Act, with no possibility of removal. Actually, the motivation of Congress is fairly clear from the legislative history. It was not to "remedy" any biased procedures of state law; it was to "send a signal" that the federal government will not tolerate violence against women. E.g., S. Rep. 103-138, 103rd Cong., 1st Sess. 50 (1993) (The Act "has the entirely different function [from State tort law] of providing a special societal judgment that crimes motivated by gender bias are unacceptable because they violate the victims' civil rights"). Nor should it. But our Congress is one of enumerated powers. "Signal-sending" is not one of them.

II.

AS AN EXERCISE OF COMMERCE CLAUSE AUTHORITY, THE ACT HAS NO LIMITING PRINCIPLE WHICH WOULD PRECLUDE GRANTING CONGRESS A GENERAL POLICE POWER

Appellees have set forth their analysis of more recent appellate cases interpreting United States v. Lopez, 514 U.S. 549 (1995), including this Court's recent panel opinion in Hoffman v. Hunt, 126 F.3d 575 (4th Cir. 1997), in their petition for rehearing. They incorporate that analysis here by reference. Without repeating it in toto, the fundamental lesson of Lopez is that, rationales supporting Congressional legislation under the Commerce Clause cannot be sustained if they grant Congress unlimited powers. Hoffman v. Hunt, 126 F.3d at 587-88 (Freedom of Access to Clinic Entrances Act "does not suffer from the fundamental defect underlying the [Gun-Free School Zone Act]: Acceptance of the proposition that Congress possesses the authority under the Commerce Clause to regulate the activity at issue in FACE will not effectively remove all limitations on Congress' commerce power" (emphasis added)).

No such limiting principle can sustain the Act. Since it regulates only a small portion of violent crimes, accepting that its limited effect on interstate commerce is sufficient under the Commerce Clause requires the conclusion that Congress can create a general criminal code. But see United States v. Kagama, 118 U.S. 375, 378-79 (1886) (Indian commerce clause could not sustain a system of criminal laws for Indians living on their reservations); United States v. Bird, 124 F.3d 667, 678 n.13 (5th Cir. 1997) (Congress lacks authority to pass general criminal laws).

Rather, the only "limiting" feature of appellants' theories is that, if Congress has made findings, judicial inquiry is at an end. This is contrary to repeated Court holdings that Congress need not make findings, and inconsistent with the reasoning of Lopez which barely mentioned, and certainly did not rely upon, the absence of findings. Indeed, merely requiring findings does not "limit" Congress at all. Cf. Seminole Tribe v. Florida, 116 S. Ct. 1114, 1127 (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, 116 S. Ct. 1114 (1996)). See also Lopez, 514 U.S. at 580 (Kennedy, J. concurring) ("In 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").

Appellants emphasize that Lopez did not change the review standard of Congressional findings, and that such findings need only be "rational," but that misses the point of Lopez. Congress must be "rational" in determining that the

regulated activity "substantially affects" interstate commerce. Lopez made clear that "substantially" has both qualitative and quantitative elements to it -- that is, in addition to "affecting" a large quantity of interstate commerce, there must also be a close qualitative relationship between the regulated activity and interstate commerce. United States v. Bird, 124 F.3d at 677 n.11 ("in determining 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; effects which are too indirect, remote, or attenuated -- or are seen only by piling `inference upon inference' -- are not substantial. Our use of `substantially' hence embraces both quantitative and qualitative measures"); Hoffman v. Hunt, 126 F.3d at 587 (obstructing health care facilities, "while not itself economic or commercial [activity], is closely and directly connected with an economic activity"); Deborah Jones Merritt, Commerce!, 94 Mich. L. Rev. 674, 679 (1995) (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 . . .").

Congress made no findings about the "qualitative" connection between gender-based animus-motivated violence and interstate commerce. Even if it had, how much deference should such a finding be given? After all, unlike a "quantitative" measure of interstate commerce affected, whether something is, for example, "economic" activity or not is a straightforward question to which Congress has no particular institutional expertise. And to characterize the "activity" involved here as "economic" would divest that word of any meaning. See Mo./Cr. Br. 36-37.

Even if the "substantially affects" requirement only related to quantitative effects, Congressional findings here are wanting. The broad findings in the final conference report -- the only findings that specifically refer to interstate commerce -- were made "at such a conclusory level of generality as to add virtually nothing to the record." Lopez, 514 U.S. at 612 n.2 (Souter, J., dissenting). The more specific "findings" identified by appellants in their briefs relate only to the "costs" of violence as a whole -- but that is just not "commerce with foreign Nations, and among the several States, and with the Indian Tribes," and those words have not yet been deleted from Article I, § 8. Indeed, those "costs" findings do not even bother to relate the costs to the conduct regulated by the Act. Compare DOJ Br. 5-7 (describing costs of domestic violence) with S. Rep. 102-197, at 69 (1991) (The Act "does not cover everyday domestic violence cases") (Sen. Biden). By any definition, Congress had no evidence to conclude that gender-based animus-motivated violence substantially affects interstate commerce.

Conclusion

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

Respectfully submitted,

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