In the Supreme Court of the United States

Nos. 99-5 and 99-29

UNITED STATES OF AMERICA, *Petitioner*,

v.

ANTONIO J. MORRISON, ET AL., *Respondents*.

CHRISTY BRZONKALA, *Petitioner*,

v.

ANTONIO J. MORRISON, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Eagle Forum Education & Legal Defense Fund ("Eag Forum ELDF") is an Illinois nonprofit corporation organiz in 1981. Its purpose is to study and research problems co cerning the status of women and their civil, legal, econom and social rights by means of conferences, lectures, radio a television broadcasts, study groups, mailings, and the pub cation of papers, books, periodicals and legal memoranda; train women by the above means to advance the status women and to defend their rights, especially those pertaini

[1] No counsel for a party authored this brief in whole or in part, nor did a person or entity, other than Eagle Forum Education & Legal Defe Fund, its members, or its counsel make a monetary contribution to t preparation or submission of this brief.

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SUMMARY OF ARGUME

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ther constitutional nor prudent for Congress to impose its on
size-fits-all view of domestic relations on the states.

The Fourth Circuit was likewise correct that Congres
power to "enforce" the Fourteenth Amendment's prohibiti
against state denial of equal protection "does not extend
purely private conduct," but rather is limited to legislati
against the states themselves and those acting as agents of,
in collusion with, the states. *Brzonkala,* 169 F.3d at 862.

Again calling attention to the example of domestic vi
lence, § 13981 penalizes purely private conduct that is n
attributable to state actors and that is unrelated to private i
terference with state legal processes. It does not in any sen
"enforce" a prohibition directed at the states. Rather, it seek
to ameliorate the second-degree consequences of alleged sta
discrimination by providing a separate and independent ren
edy for the prior non-state action. In this way, § 1398
merely bypasses the states rather than corrects them and o
fers up a "separate but equal" legal regime in competitio
with the supposedly flawed – and unaltered – state legal r
gime. But ameliorating the effects of discrimination throug
a separate law of domestic violence runs counter to both fed
eralism and equal protection principles.

Furthermore, because the Fourteenth Amendment argu
ment in support of § 13981 depends upon alleged state bia
that has no identifiable effect on the incidence of violenc
against women, claims under the law can continue indef
nitely even after the constitutional predicate of state discrim
nation has ended. To allow constitutionality to turn on factor
unrelated to the elements of the statute would subject § 1398
to continuous constitutional challenge dependant upon th
constantly changing content and administration of state law
Constitutionality in such a case could never be finally settled
a result that surely casts doubt on the validity of the underly

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I. The Comme
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This limiting requirement is especially apropos with regard to the traditional state province of domestic relations and the quintessentially non-economic phenomenon of domestic violence. To endorse petitioners' "social cost" justification in the context of the domestic violence covered by § 13981 would necessarily extend Commerce Clause authority to every significant area of life and remove all meaningful distinction between state and federal authority. And, through § 13981 itself, it would significantly interfere with existing and future state laws targeted at the complex and varied problem of domestic violence.

A. Federal Regulation of Non-Economic Activity Lacking a Jurisdictional Element Exceeds Commerce Clause Authority.

Unlike the criminal provisions of VAWA, *e.g.*, 18 U.S.C. §§ 2261, 2262, 2265, the cause of action created by § 13981 contains no requirement that the violence alleged by a plaintiff be related to interstate commerce. This lack of a jurisdictional element results in federal regulation of wholly local non-economic activity with no direct connection to interstate commerce.[2]

As the Fourth Circuit explained, limiting application of the "substantially affects" test to economic activities is an essential limit on the Commerce Clause set out in this Court's many cases on that Clause. *See Brzonkala,* 169 F.3d at 836.

The decision in *United States v. Lopez*, 514 U.S. 549 (1995), confirms the jurisdictional defect of § 13981. There

[2] Indeed, it is particularly ironic that violence against women that is motivated *purely* by economic motives and occurs directly in the channels of interstate commerce would *not* be covered by § 13981. The cause of action applies only to violence motivated by gender animus. 42 U.S.C. § 13981(d)(1); *id.* § 13981(e)(1). A train-station robbery for money or the murder of one woman by another to eliminate a particular competitor for a promotion both have connections to commerce or economic activity yet lack gender animus, and therefore neither would be covered under § 13981.

ity of its citizenry. This Court found the "produc-
gument to be unacceptable, in part because it could
deral regulation of "family law (including marriage,
d child custody)." 514 U.S. at 564.

this Cou 13981, however, attempts to do precisely that:
social ac omestic violence, which is an area central to family
productiv e the statute invalidated in *Lopez*, § 13981 "by its
tivity" a nothing to do with 'commerce' or any sort of eco-
justify fe terprise, however broadly one might define those
divorce, it cannot, therefore, be sustained under our cases

Sectig regulations of activities that arise out of or are con-
regulate th a commercial transaction, which viewed in the
law. Lik substantially affect interstate commerce. [It] con-
terms ha jurisdictional element which would ensure, through
nomic e case inquiry, that the [gender-motivated violence] in
terms. .. affects interstate commerce." 514 U.S. at 561.

upholdin brief, the United States denies any requirement in
nected w a jurisdictional element, arguing that *Lopez* applied
aggregat stantial effect" test of *Wickard v. Filburn*, 317 U.S.
tains no 2), to the non-economic activity of gun possession
case-by-c ses. U.S. Br. at 30-31. The United States further
question at the earlier cases cited by *Lopez* "did not address

In its the underlying activity was sufficiently commercial
Lopez of regulation under the Commerce Clause. U.S. Br. at
the "sub ssing *Wickard*, *McClung*, and *Heart of Atlanta Mo-*
111 (194 se arguments are particularly disingenuous because,
near sch th Circuit noted, and the United States chooses to
argues th *pez* repeatedly and emphatically drew a distinction
whether regulation of economic and non-economic activity.
to justify at 558, 559-60, 561, 566, 567. Contrary to the
31 (disc tes' claim, *Lopez* did not "appl[y]" *Wickard*, it dis-
tel). The it as "involv[ing] economic activity in a way that
as the Fe ssion of a gun in a school zone does not" and thus
ignore, *L* its application to the non-economic activity of gun
between
514 U.S
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tinguishe
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rejected

rejected the argument that Congress could regulate
ivities merely if they are related to the economic

mittedly, a determination whether an intrastate ac power
commercial or noncommercial may in some cases
legal uncertainty. ... The Constitution mandates th
tainty ...."[3]

For Congress to regulate activity under the Co
Clause, the activity itself must be, in a word, comme
Justice Thomas wrote in *Lopez*, "the power to regula 56 ("Ad-
merce' ca by no means encompass authority over r ivity as
possessio any more than it empowers the Federal result in
ment to regulate marriage, littering, or cruelty to s uncer-
throughou the 50 States. Our Constitution quite
leaves suc matters to the individual States, notwith
these activ ties' effects on interstate commerce." *Lo*
U.S. at 585 (Thomas, J., concurring).[4]

The government's alternative argument is that
Congress were limited after *Lopez* to regulating intra
tivity that has some economic component," § 13981 n

[3] The Civil Rights Act of 1964 also concerned economic activi
ness practices entailing repugnant racial discrimination. Title
Civil Rights Act expressly limited its scope with various juri
elements. In *Heart of Atlanta Motel, Inc.* v. *United States*, this
held the Act by expressly relying on its jurisdictional limitation
plicability of Title II is carefully limited to enterprises having a
substantial relation to the interstate flow of goods and peop
where state action is involved." 379 U.S. 241, 250-51 (1964)

[4] If the § 13981 civil remedy were upheld as sufficiently relate
state commerce, so too would criminal penalties have to be up
the jurisdictional element removed. That Congress in this insta
to include a jurisdictional element in the criminal provisions is
point. There is no commerce-based distinction between regula
merce through criminal rather than civil measures. Any judicia
tation of the Commerce Clause adequate to uphold § 13981 wit
risdictional element would be adequate to sustain a criminal
lacking a jurisdictional element. Whether some separate con
limit might check federal criminal law does nothing to justify
the independent check of the Commerce Clause's limited grant o

possession near schools. *Id.* at 560; *see also id.* at 5

test because it "is designed to remedy gen… lence that occurs at, or en route to, work… lishments, and interstate transportation ter… tings, in contrast to the statute at issue i… *Motel*. That some minuscule subset of th… § 13981 might occur in a commercial co… date the sweeping regulation of the majori… cases.[5] The lack of a jurisdictional limitati… unconstitutionally broad.

B. Aggregate Social Costs of Intrast… Activities Do Not Establish Com… risdiction.

Even if a particular jurisdictional el… quired, the general legal requirement of a … interstate commerce cannot be satisfied by … tion of the social costs of local activity. … on the economic consequences of violer… fails to distinguish such violence from an… ity. Virtually every social problem has … society. Murder does. Suicide does. Di… tion does. Elderly care does. Burglary … does. Accidents do. Accepting petitione… fore, would turn Commerce Clause autho… ited federal police power and no area of … beyond the reach of the Commerce Clause.

[5] That § 13981 provides money damages for var… U.S. Br. at 32, does not render it a regulation of in… did, then the commerce power would extend to … contract law, and any other body of law in which … were enough to create the requisite effect on int… there is nothing the federal government could n… creation of causes of action for its own or others' b…

The suppo…

monetary cost … § 13981 … billion … dol… violence against women is "'at least 3 Report), and, …ars a year,'" U.S. Br. at 6 (quoting Senate other social co… including "'health care, criminal justice and billion annuall… domestic violence,'" as much as $5 to $10 dissenting) (qu… *Brzonkala*, 169 F.3d at 914 (Motz, J., phenomenon e… Senate Report).[6] But other local example, roug… equal or greater toll on society. For the victims' av… persons were murdered in 1994.[7] If inflation-adjust… expected lifetime earnings exceeded an …ed $2…,000 (10 years at $20,000 per year),

[6] These figures, h… however, include many types of violence against women other than that m… § 13981. Yet Co… motivated by animus towards women, as required by monetary cost of t… gress engaged in no discernable fact-finding about the women *because* … violence that it regulates in § 13981: violence against Rather, it evaluate… gender *and* motivated by animus against women. what portion of th… data on all violence against women, never identified made conclusory … violence was motivated by gender animus, and then stantial impact on … statements that such *subcategory* of violence had a sub- there are reasons … economy. *See Brzonkala*, 169 F.3d at 849-51. But not necessarily m… believe that the costly violence cited by Congress is significant amoun… motivated by animus towards women, including that a men. For an ob… of domestic violence is perpetrated by women against Goldberg, "Spous… objective look at domestic violence statistics, *see* Carey New York Times, … Abuse Crackdown, Surprisingly, Nets Many Women," long struggled to … Nov. 28, 1999, at A16 ("Defenders of battered women reigned by the fis… persuaded authorities to crack down on brutal men who expected conseque… at home. But those crackdowns have produced an un- domestic assault a… ce: in some places, one-quarter or more of arrests for 35 percent of dom… not of men but of women. In Concord, N.H., nearly from 23 percent in … assault arrests this year have been of women, up of defendants cha… ged in … And in Boulder County, Colo., one-quarter women. … A … domestic violence cases through September were Women survey … Different federal poll, the National Violence Against annually were rap… found that … 1.5 million women and 835,000 men under two to one." … or attacked by an intimate partner, a ratio of just flict in intimate rel… Domestic violence is more a problem regarding con- … than one of gender discrimination.

[7] Statistical Abstra… of the United States 1996, at 2034, Table No. 314.

then the total annual monetary cost of murder would be in excess of $4.4 billion. But surely Congress could not justify regulating common law murder merely by holding hearings based on this monetary cost. Each year more than 1,000,000 couples file for divorce, which typically requires legal fees, court costs, and substantial charges to maintain two households instead of one.[8] If the average total cost of a divorce exceeds $15,000, then divorce imposes a monetary cost on the nation in excess of $15 billion per year. But surely such monetary estimates do not confer jurisdiction on Congress to regulate divorce under the Commerce Clause.

Monetary costs to society of a vice do not substantially affect interstate commerce within the meaning of Commerce Clause precedents. The alleged economic effects from the domestic violence regulated by § 13981 are not intrinsic to the activity, but are merely second-order effects associated with any societal problem.

Domestic violence, like the possession of a gun, "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Lopez*, 514 U.S. at 567. While it is at least plausible (if not always persuasive) for Congress to assert a need to regulate local *economic* activity in order to regulate interstate markets, it becomes mere sophistry for Congress to claim that the regulation of purely local domestic violence in any way affects interstate commerce so as to interfere with federal regulation of such commerce.

If the federal civil remedy provision of VAWA is upheld, then virtually all other aspects of domestic relations would be subject to federal interference as well:

- *Alimony*. The payment of alimony is an actual economic transaction, and thereby implicates commerce to a much greater degree than th
§ 13981.
- *Marital Property Righ*
marital property involv
likely has a greater m
regulated by § 13981.
- *Child Custody*. Child
disruptive of the lives
volved, create inefficie
volve interstate custod
state commerce is thus
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- *Marriage and Divorce*
tremendous financial
sumption patterns in th
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pared to the economic
- *Adoption*. As any p
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and services such as
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would form as good
the effects alleged to j

Each of the above issues
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[8] *See id.* at 74, Table No. 90.

ivity. Yet there is absolutely noth-
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e domestic violence regulated by

s. Like alimony, the division of
es inherently economic matters and
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custody disputes are enormously
productivity and wealth of all in-
ies of joint custody, and may in-
issues. The connection to inter-
at least as strong as in the case of
stic violence.

The institution of marriage has a
mpact on society, altering con-
ings such as housing and food, and
ment in insurance, taxes, car rent-
ic transactions. Divorce has an
pact, and has tremendous transac-
the economy. The speculative ef-
n that unknown percentage of vio-
by gender animus is small com-
mpact of marriage and divorce.

arent and many others well know,
sehold has an enormous impact on
vity, and the use of interstate goods
ood, toys, and television. The ag-
any adoptions around the country
an excuse for federal regulation as
stify § 13981.

as traditionally been within the ex-
states, and heretofore has been con-
state commerce absent a specific in-

that would not equally authorize federal intrusion into these areas of local activity and state concern.

In sum, no amount of estimated societal cost justifies intrusion by Congress into traditional state areas like domestic relations. The amendment process, not the Commerce Clause, is the only permissible means for shifting such authority from the states to the federal government.[9]

C. Section 13981 Interferes with Traditional State Sovereignty over Domestic Relations.

Not only does § 13981 rely upon a legal theory of unlimited federal power, it also supplants and undermines state efforts to provide a balanced response to the nuanced local problem of domestic violence. As the "laboratories for experimentation" operating under our federalism,[10] states have been vigorously refining their local remedies to what is quin-

[9] The claim that the states support VAWA and hence there is no intrusion, U.S. Br. at 10, 36, is both misleading as to the predicate and incorrect as to the conclusion. First, there is no indication that the states support § 13981 as opposed to the other aspects of VAWA. While one might expect state enthusiasm over huge federal grants for education and training, 42 U.S.C. § 3796gg, and state endorsement of VAWA's mechanisms for dealing with cross-border violence beyond any one state's control or for interstate enforcement of restraining orders, 18 U.S.C. §§ 2261, 2262, 2265, it is untenable to argue that states would endorse § 13981's rejection and bypass of state law. Nothing in petitioners' briefs suggest state support for § 13981 in particular, as opposed to those other provisions of VAWA not here being challenged. Furthermore, even if various State Attorney Generals *did* support § 13981 in particular, that does not constitute "state" support. If the states truly supported the cause of action created by § 13981, one would at least expect them to adopt analogous state-law causes of action and to abrogate the various state-law defenses with which § 13981 dispenses. That they have not done so suggests that the "states," as represented by their law-making bodies, do not support § 13981. Though some members of state executive branches might think otherwise and repudiate their own state laws, such dissension within the states does not constitute "state" support for § 13981.

[10] *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring).

tessentially a local problem. Sectio
flict with the rapidly developing st
such conflicts will only increase a 981 is already in conmized. aws in this area, and

For example, numerous state 13 e remedies are opti- "primary aggressor" laws that take ate l proach to evaluating the complex s sta atures have passed that periodically erupt in domestic v e comprehensive apwomen's groups, these laws pla iegi ngoing interactions prompt and detailed investigation mo ce. Backed by many violence and require the local poli and heavy emphasis on factors with respect to a domestic d olen charges of domestic ascertain fault and take appropria e a examine a variety of guilty party is not always the perso f al in order properly to violently and is not always a man. e to medial action. The

The California primary aggres spu e struck first or most The investigator must identify th e r considering, in addition to intervie wstatute is illustrative. ining evidence of actual violence, t mary aggressor" by

(i) the intent of the law to pro sor witnesses and exam- violence from continuing abuse; a "p owing:

(ii) the threats creating fear of wing victims of domestic e fo

(iii) the history of domestic v ect sical injury; sons involved; and

(iv) whether either person act e between the per- phy

Cal. Penal Code § 836(c)(3) (Wes olen self defense. also requires that each and every l velop, adopt and implement writte pp. 1999). California officers' responses to domestic vied in forcement agency de- violence as alleged criminal condu Su es and standards for of domestic violence offenders if w e calls, treat domestic an offense has been committed. *Id* spo encourage the arrest

An Ohio statute is similar, re lenc 's probable cause that determine the primary aggressor ct, a 3701. hering a peace officer to § 1 sidering any "history

of domestic violence or any other violent acts by either person involved," whether "the alleged violence was caused by a person acting in self-defense," "[e]ach person's fear of physical harm, if any, resulting from" threats or prior violence, and the "comparative severity of any injuries suffered by the persons involved in the alleged offense." Ohio Rev. Code Ann. § 2935.03(B)(3)(d) (Page Supp. 1998). Other states have recently enacted similar laws.[11]

By recognizing that any given example of domestic violence is usually one event in a much larger cycle of interactions that preceded and will follow the violence, these state laws offer a far more sophisticated and precise response to the larger problem of which domestic violence is a part than does the crude one-size-fits-all federal remedy of § 13981. Developing state remedies promote prompt and detailed investigation of claims of domestic violence and the broader circumstances surrounding those claims. Section 13981, by contrast, discourages resort to state enforcement or investigatory processes, which appears to be its purpose. *See* § 13981(e)(2); U.S. Br. at 44 n. 24; Brzonkala Br. at 48. The statute encourages potential plaintiffs to make unchecked allegations years

[11] *See, e.g.*, Colo. Rev. Stat. Ann. § 18-6-803.6(2) (West 1999); D.C. Metro. Police Dep't., General Order 304.11, Intrafamily Offenses 10-12 (Jan. 12, 1998); Fla. Stat. Ann. § 741.29(4)(b) (West Supp. 1999); Haw. Rev. Stat. § 571-46(9) (1989) (basing child custody determinations on state primary aggressor rule); Iowa Code Ann. § 236.12 (West 1994); Md. Ann. Code art. 27-594B(d)(2) (1996); Mich. Comp. Laws Ann. § 776.223(b)(ii) (West Supp. 1999); Mo. Ann. Stat. § 455.085(3) (West 1997); Mont. Code Ann. § 46-6-311(2)(6) (1997); N.H. Rev. Stat. Ann. § 173-B:9 (1994); N.Y. Crim. Pro. Law § 140.10(4)(c) (Consol. Supp. 1999); R.I. Gen. Laws § 12-29-3(c)(2) (1994); S.C. Code Ann. § 16-25-70(D) (Law Co-op. Supp. 1998); Utah Code Unann. § 77-36-2.2(3) (1998); *see also* "Arrests of Women Increase Under Calif. Domestic Violence Law," Wash. Post, Nov. 26, 1999, at A11 ("Police in at least 24 states now receive training in how to decide who is the 'primary aggressor,' a term that does not necessarily mean the person who struck the first blow or even caused the most damage, according to the National Council of Juvenile and Family Court Judges.").

later in federal court without the benefit of a contemporary investigation. Section 13981 also undermines the states' judgment that a multi-factor consideration of action and reaction in domestic situations is essential to identifying the wrongdoing and breaking the cycle of violence. Ignoring the overall context of violence, § 13981 allows any allegation of isolated violence to constitute the basis for a federal cause of action regardless of the history between the parties. Section 13981 thereby allows a federal cause of action for an alleged felony that is separated from aggression that may have preceded and incited it. And by allowing a delayed cause of action by a person who was or would have been determined a primary aggressor under state law, § 13981 repudiates state resolution of a multifaceted problem and arguably creates a new tool of aggression through the federal courts.[12]

The United States omits any mention of the developing state laws, like the primary aggressor statutes, and argues that § 13981 "displaces no state law and prohibits no state action." U.S. Br. at 33. But § 13981 displaces state law in the same way that the federal gun statute in *Lopez* did: It creates a federal alternative to state law that would trade off with state remedies regardless of whether the statute technically leaves state law intact. Furthermore, by allowing primary aggressors to sue on isolated instances taken out of the full context of the relationship, § 13981 frustrates final state resolutions of diffi-

[12] In a variety of circumstances, § 13981 could undermine state law in a particularly perverse way. As supporters of § 13981 concede, in about one-sixth of the cases domestic violence is perpetrated by a woman against a man, and there are inevitably cases of domestic violence between two females. Brief of Amici National Network to End Domestic Violence *et al.*, at 4 & n. 6 (citing United States Department of Justice, *Bureau of Justice Statistics Special Report: Violence Against Women: Estimates from the Redesigned Survey* 1 (1995)). If the victim complains to state authorities about violence perpetrated by the other, than the perpetrator will be free to undermine that process by suing in federal court.

cult domestic disputes.[13] Section 13981 thus operates to "foreclose[] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term." 514 U.S. at 583 (Kennedy, J., concurring).

II. Enforcement Under the Fourteenth Amendment Must Be Directed Against Discrimination by State Actors, Not at Purely Private Behavior.

As this Court has reiterated for over 100 years, while the Fourteenth Amendment enables Congress to eradicate discrimination caused by government, it does not extend to purely private conduct like domestic relations. *See, e.g.*, *City of Boerne* v. *Flores*, 521 U.S. 507, 522-23 (1997); *United States* v. *Harris*, 106 U.S. 629, 638-39 (1883); *Civil Rights Cases*, 109 U.S. 3, 11-12 (1883).

Although petitioners acknowledge this basic principle, they claim that Congress is entitled to regulate purely private actors if and when such regulation is designed as a *response* to state-based discrimination. Such a reading has never been endorsed by this Court and would distort the language and subsequent application of Section 5 of the Fourteenth Amendment.

[13] Section 13981 also allows claims to be brought up to four years after the alleged incident, and without any contemporaneous, independent investigation. 28 U.S.C. § 1658. This conflicts with the shorter, and more sensible, statute of limitations in effect in most states. *See, e.g.*, Va. Code § 8.01-243A ("every action for personal injuries, whatever the theory of recovery … shall be brought within two years after the cause of action accrues").

A. Ameliorating the Effects of State Discrimination Is Not Enforcement of a Prohibition Against State Discrimination

Recognizing that § 13981 does not operate against the states and does not prevent or punish unlawful state discrimination, petitioners instead argue that the law is a response to such discrimination in that it independently gives crime victims what they cannot get from the state: vindication and compensation from the private criminals. Petitioner Brzonkala argues, for example, that § 13981 is intended to "remedy *the effects* of formal barriers to redress such as marital rape and interspousal tort immunities, which Congress found reflected and perpetuated outdated stereotypes." Brzonkala Br. at 46 (emphasis added). Petitioners also argue that § 13981 responds to "bias by state officials [barring] access to the justice system" by "authoriz[ing] a claim that the victim controls" and by providing "victims the opportunity to be heard by judges who are insulated from local political and other pressures." Brzonkala Br. at 46; *see also* U.S. Br. at 37 (redress "that the victim, not the State, controls").

But providing a separate path to a supposedly "equal" result is not "enforcement" of the Fourteenth Amendment's prohibition on state denial of equal protection and has no effect on state discrimination itself. Congress must focus on the *mechanism*, not the *effect*, of state-sponsored discrimination. *cause* or the

The language of the Fourteenth Amendment limits Congress' power to *enforcement* of the substantive commands of the Fourteenth Amendment. Section 5 of the Fourteenth Amendment states that "[t]he Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. Const., Amend. XIV, sec. 5. The relevant provision Congress claims to be enforcing by § 13981 is the command that "*[n]o state shall deny* to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV, sec (emphasis added). In order to "enforce"

this limitation on state action, Section 5 legislation must be directed against, or at least affect, those who have violated or would violate the limitation.

Petitioners adopt the novel position that legislation ameliorating the secondary consequences of state discrimination enforces the Fourteenth Amendment regardless of whether the remedy is directed at or even involves the perpetrators of the violation. But on this reasoning Congress could simply give money to women crime victims and claim that it was enforcing the Fourteenth Amendment by providing otherwise uncertain compensation. Such an approach is akin to attempting to cure a disease (state-sponsored discrimination) through cosmetic treatment of a symptom (absence of compensation for private violence). Yet that is precisely the unconstitutional approach taken by § 13981.

Ameliorating the downstream effects of a violation of the Fourteenth Amendment in a manner that neither punishes nor deters that violation or future violations is not enforcement of the prohibition against discrimination. Women may receive a proxy (federally extracted money) of what they would have received from the state, but that proxy neither negates the existence of the alleged equal protection violation nor does it deter future violations by the state. In fact, any existing equal protection violation would continue unabated even after § 13981 were invoked, and such an alternative legal regime increases the likelihood of further violations by reducing the public pressure on the states to improve their own justice systems. *Cf. Lopez,* 514 U.S. at 577 ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.") (Kennedy, J., concurring). Section 13981 allows unconstitutional state behavior simply to be ignored while alleged victims turn to federal rights and federal courts. The statute thus supplants state

processes without enforcing the requirement that [illegible] seems not discriminate.[14] Indeed, even petitioner Brzonk[illegible]ative to to recognize that § 13981 merely provides "an alte[illegible]medy to state remedies," Brzonkala Br. at 48, rather than a [illegible] state violations of the Fourteenth Amendment.[15]

Section 5's focus on the perpetrators of the *con[illegible]stitutional* violation – *i.e.*, the state or its agents – is reflected in [illegible] the uniform holdings of this Court that the Fourteenth Am[illegible]endment does not apply to purely private actors. Those ho[illegible]ldings are amply reviewed in the opinion below, and petit[illegible]ioners do nothing more than repeat objections that were exh[illegible]austively debunked by the Fourth Circuit. *See Brzonkala,* 16[illegible] F.3d at 862-889.

The citations by petitioners and their amici [illegible] *United States* v. *Guest*, 383 U.S. 745 (1966), *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), and *District of Columbia* v. C[illegible]rter, 409 U.S. 418, 424 n. 8 (1973) are particularly unava[illegible]ing. In *Guest*, this Court reiterated that "[t]he Fourteenth Am[illegible]endment

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[14] In many ways, this case resembles an unconstitutional cond[illegible]tions case, with the state allegedly denying women the benefits of vind[illegible]cation and compensation based solely on their gender. The typical soluti[illegible]ion in such a case is to strike down the discriminatory barrier to the state ben[illegible]efits, not to have a different entity provide separate but supposedly equ[illegible]benefits. This Court said as much in *Brown* v. *Board of Education*, 34[illegible]7 U.S. 483, 495 (1954), and the principle is equally applicable in this co[illegible]ntext. State discrimination in the provision of benefits such as law enforc[illegible]ement does not become less discriminatory due to federal efforts to offse[illegible]the effects of such discrimination.

[15] The provision of federal jurisdiction likewise does not ad[illegible]dress the alleged violations. The statute does not provide federal juris[illegible]diction over claims under state law, but only over claims under the newly e[illegible]nacted federal substantive law. The law is thus unlike diversity jurisdi[illegible]ction, which ensures that prejudice in the application of existing state law d[illegible]oes not occur and that *state* laws are equally applied to non-citizens of t[illegible]he state. By supplanting not only the forum, but the substantive law as well, while leaving intact the allegedly discriminatory systems and laws i[illegible]n the states, the new law does nothing to remedy the violations alleged.

directly to forbid such violations, was sufficient. In this ...ev contrast, § 13981 does nothing to forbid the states committing the violations that Congress purported to ... does not act on the states at all.

protects ...ally, in *Carter* the issue under consideration had noth-
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minati... *Katzenbach* v. *Morgan*, the Court held that Congress
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violati... 384 U.S. at 647 ("Such exercises of state power are
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nation... ...ent than any other state action."). That the law for-
an inc... acts that did not *necessarily* violate the Fourteenth
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F... ...on of the Equal Protection Clause," 384 U.S. at 656,
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Section 5 legislation extending to private conduct where, as here, Congress enacted the law in response to a documented record of historic discrimination fueling equal protection violations." Brzonkala Br. at 47. This distortion was the subject of extensive discussion by the Fourth Circuit, *see* 169 F.3d at 870-73, and it is reckless to merely repeat it on appeal without even an attempt to address the Fourth Circuit's recitation of the plain historical record refuting it.

est of dicta, having nothing to do with the case and citing non-authoritative opinions as support. 409 U.S. at 424 n. 8. Furthermore, even that dictum is ambiguous in its application to this case. One might speculate about Section 5 legislative authority over a "purely private" conspiracy to disrupt, manipulate, or deny access to state legal processes or facilities in a manner that would deny certain groups equal protection of the state laws, without suggesting Congressional authority to regulate private-on-private conduct that is in no way directed at state processes or facilities. Indeed, the citation to *Guest* suggests that such is the scenario Justice Brennan had in mind, not a law directed at private actions unrelated to public facilities. *See Guest*, 383 U.S. at 762 (Clark, J., concurring) (opining on Congressional "power to punish private conspiracies that interfere with ... the right to utilize public facilities"); *id.* at 780-81 (Brennan, J., dissenting) ("Whatever may be the status of the right to equal utilization of privately owned facilities, ... it must be emphasized that we are here concerned with the right to equal utilization of public facilities owned or operated by or on behalf of the State."). Even the overreaching dictum in *Carter*, therefore, does not reach far enough to sustain § 13981's action covering private violence not aimed at denying access to state processes or facilities.

Neither petitioners nor their amici can cite a single precedent for applying the Fourteenth Amendment to private conduct completely removed from state action. Instead, petitioner Brzonkala argues that "[t]his Court never has struck

The United States also argues that "Section 13981 is properly viewed as 'corrective legislation, that is, such as may be necessary and proper for counteracting ... such acts and proceedings as the States may commit or take, and which by the [Fourteenth] amendment they are prohibited from committing or taking.' *Civil Rights Cases*, 109 U.S. at 13-14." U.S. Br. at 48. This argument takes the phrase "corrective legislation" grossly and deceptively out of context. In the text immediately preceding the passage quoted by the United States, the Court makes clear that it rejects the very core of the United States' position that an alternative federal remedy can "correct" a state denial of rights:

> It is absurd to affirm that, because the rights of life, liberty, and property (which include all civil rights that men have) are by the amendment sought to be protected against invasion on the part of the state without due process of law, congress may, therefore, provide due process of law for their vindication in every case; and that, because the denial by a state to any persons of the equal protection of the laws is prohibited by the amendment, therefore congress may establish laws for their equal protection.

Civil Rights Cases, 109 U.S. at 13. Correction and counteraction of unconstitutional state laws and actions is not to be had by the creation of competing federal laws, but rather must be directed against the unconstitutional state action itself. The proper scope of Section 5 authority described in the *Civil Rights Cases* is "merely power to provide modes of redress *against* such state legislation or action." *Id.* at 15 (emphasis added).

In the end, amelioration or compensation is not enforcement when not a means of preventing or deterring the state constitutional violations themselves. The creation of a "separate but equal" regime of federal law as an alternative to unaltered and allegedly discriminatory state justice systems not only exceeds Congress' Section 5 authority, it offends princi-

ples of both equal protection and federalism. If the states are discriminating against women, it is their duty to end such discrimination and Congress' right to force them to abandon discriminatory ways. But it is not Congress' prerogative to set up a parallel and wholly separate system of regulation to compete with state law in any field in which it perceives error.[16]

Section 13981 Is Not Proportional to the Alleged Violations Due to the Lack of a Jurisdictional Element Tied to State Discrimination.

Even were it permissible for Section 5 enforcement legislation to operate on the effects, rather than the causes, of state discrimination, § 13981 is still unconstitutional because it is disproportional to the violation asserted. Under § 13981, any victim of gender-based violence can sue, regardless of the presence of state discrimination or its impact on the plaintiff. The most palpable example of such overbreadth is that a victim of such violence may sue under § 13891 even if her assailant has been convicted and punished in state court and she has successfully sued and recovered under existing state civil remedies. This flaw is caused by the lack of a jurisdictional requirement in § 13981 that the plaintiff make at least a colorable showing that she was the victim of state discrimination before invoking a supposed means of enforcement against such discrimination.

Indeed, a § 13981 action is entirely removed from state discrimination. The statute expressly mandates that "[n]othing in this

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[16] Other aspects of VAWA – such as education and training of state officials – may act directly to correct and prevent state discrimination is relevant to the constitutionality of the civil action provision. Those separate provisions do not transfer their constitutionality to the unconstitutional § 13981. Likewise, the claim that the civil suit provision may deter *criminals* from discriminating against women is not relevant to the Fourteenth Amendment analysis because that private discrimination is not a constitutional violation and is not causative of state discrimination.

section requires a prior criminal complaint, prosecution, or conviction," and thereby creates a remedy regardless of whether the state has discriminated. 42 U.S.C. § 13981(e)(2). Instead of working to reform state-based discrimination, § 13981 essentially bypasses and abandons it.

Furthermore, even assuming some instances of discrimination, in many other instances the action provided by § 13981 is tantamount to giving money to women who have suffered no demonstrable discrimination simply because some *other* women may have suffered discrimination. That is not enforcement of the Fourteenth Amendment's prohibition against state discrimination.

In much the same way as a jurisdictional element in Commerce Clause cases ensures that Congress is not overstepping its limited authority, so too would a jurisdictional element requiring some demonstration of state discrimination ensure that Congress hews to its limited Fourteenth Amendment enforcement authority. Indeed, petitioners do not cite a single case upholding Fourteenth Amendment enforcement authority where the relevant law lacked a state-action jurisdictional element.

C. Courts Will Be Unable To Resolve with Finality the Contingent Constitutionality of Laws Targeted at Second-Order Effects Rather than at Fourteenth Amendment Violations.

If the entire predicate of Fourteenth Amendment authority for § 13981 turns on the present existence of discrimination in the states and the consequent effect of that state discrimination, but the cause of action does not require evidence of such discrimination, then the Court would have to repeatedly review the constitutionality of § 13981. Once unconstitutional state action had ceased, § 13981 would become unconstitutional. Such contingent constitutionality can never be settled with finality and would be subject to repeated challenge by

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y would such a result be a nightmare of justice, it strongly suggests that the Fourteenth Amendment leading to the correct interpretation of the Fourteenth ment authority is not subject to such ab- Where legislation operates directly ating or threatening to violate the in the background facts make no differ- the law.

of action for constitutional violations § 1983 is an example of a proper teth- authority to constitutional violations. ns stop discriminating, there may little 983, but the legislation itself would stitutional. Its application is triggered by ate discrimination whenever they may es the constitutional prohibition entirely ere exist any *present* violations. Any § 1983 was invoked, the constitutional would be satisfied. By contrast, even nination ceased, § 13981's remedy s would continue to be invoked with no ne constitutional predicate. The only at the criminal was biased, not that the laims under § 13981 would continue or states more vigorously enforced their omestic abuse. (A state conviction towards establishing a plaintiff's case

Treaty Power" Does Not Extend to

nternational Law Scholars and Human that § 13981 is supportable as an exer- n particular as implementation of the on Civil and Political Rights (ICCPR).

But neither they nor petitioners cite anything to suggest that Congress enacted § 13981 to implement the ICCPR or any other treaty. Such a *post hoc* rationalization for § 13981 as an exercise of treaty power is untenable and, in any event, is contrary to the essence of federalism.

The President and the Senate cannot transfer, by treaty, authority over purely intrastate matters like domestic violence from the States to Congress. The Supreme Court considered and rejected an attempted use of the treaty power in *Reid v. Covert*, 354 U.S. 1 (1957), which *amici* fail to distinguish or even reference. *Reid*, coincidentally, involved domestic violence in which male military officers stationed abroad were murdered by their wives. This Court held that Congress had exceeded its constitutional authority in authorizing trial of the defendants before military tribunals, pursuant to the Congressionally mandated Article 2(11) of the Uniform Code of Military Justice, 50 U.S.C. § 552(11), rather than in conventional courts. 354 U.S. at 5. In so holding, the Court rejected the argument of the government that the statutory mandate to use military rather than conventional courts in such cases was necessary and proper in light of United States' obligations under treaties with England and Japan.[17]

"The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." 354 U.S. at 16. As the *Reid* Court further explained:

> "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent."

Id. at 17-18 (quoting *De Geofroy* v. *Riggs*, 133 U.S. 258, 267 (1890)); *see also Boos v. Barry*, 485 U.S. 312, 324 (1988) ("'rules of international law and provisions of international agreements of the United States are subject to the Bill of Rights and other prohibitions and restrictions or requirements of the Constitution and cannot be given effect in violation of them.'") (quoting 1 Restatement of Foreign Relations Law of the United States 131, Comment a, p. 53 (Tent. Draft No. 6, Apr. 12, 1985)). The exclusive authority of the States over domestic relations plainly qualifies as "arising from the nature of the government itself and of that of the States." Simply put, the structural requirements of federalism cannot be trumped by an international agreement never embraced by the states themselves. Congress therefore cannot usurp authority over marriage, divorce and other local issues under the guise of treaty power.[18]

[17] *See* 354 U.S. at 42 (Frankfurter, J., concurring) (citing the agreement with Great Britain, 57 Stat. 1193, E. A. S. No. 355, and the United States of America (Visiting Forces) Act, 1942, 5 & 6 Geo. VI, c. 31; and the 1952 Administrative Agreement with Japan, 3 U.S. Treaties and Other International Agreements 3341, T. I. A. S. 2492).

[18] *Reid* is consistent with the doctrine that treaties and statutes are of equivalent legal status. "It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument." *Reid*, 354 U.S. at 18. *See also Head Money Cases*, 112 U.S. 580, 599 (1884) ("The Constitution gives [a treaty] no superiority over an act of Congress in this respect [of priority], which may be repealed or modified by an act of a later date. Nor is there anything in its essential character, or in the branches of the government by which the treaty is made, which gives it this superior sanctity."); Henkin, *Litigation and Treaties: A Response*, 101 Harv. L. Rev. 523, 533 (1987) (noting that treaties have no greater legal weight than acts of Congress).

use 'due diligence' to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof; and because of this the obligation of one nation to punish those who within its own jurisdiction counterfeit the money of another nation has long been recognized." 120 U.S. at 484. The nexus of the targeted activity to commerce and to foreign relations is compelling in such counterfeiting, but completely lacking in the domestic violence governed by § 13981.

In the end, *amici* cannot offer a single example where legislation implementing the treaty power has been upheld absent some connection between the conduct regulated and foreign nations, citizens, trade, or property. Wholly domestic matters such as violence between United States citizens occurring entirely within the United States and having no connection to the property or citizens of foreign governments are simply not "proper subjects of negotiation between our government and the governments of other nations." *De Geofroy*, 133 U.S. at 265. The treaty power offers no added authority to regulate such matters.

Finally, while it is unnecessary to review the treaty itself in connection with this case, it is worth noting that the language of the ICCPR would confer virtually unlimited federal authority over a plethora of local matters. According to *amici*, the treaty creates sweeping affirmative rights like a right to the "highest attainable standard of physical and mental health," a right to "just and favorable work conditions," a "right to ... security of the person" and "equality of rights and responsibilities of spouses as to marriage and its dissolution." Brief *Amici Curiae* on Behalf of International Law Scholars and Human Rights Experts, at 8-9 & n. 8 (describing U.N. interpretation of ICCPR). It is unclear what, if anything, these broad platitudes might mean (*e.g.*, universal health care? guaranteed employment? abolition of the death penalty?), or how varying interpretations may be in conflict with legislation enacted by Congress both before and after ap-

proval of the treaty. What is clear, however, is that if these generalities were a source of federal legislative authority, then nothing would be beyond Congress' grasp and we would have the full-blown federal police power repeatedly eschewed by the Framers and by this Court. Nothing in this treaty authorizes or justifies disrupting federalism and the traditional jurisdiction of the States over domestic relations.

CONCLUSION

For the foregoing reasons, the decision of the Fourth Circuit should be affirmed in its entirety.

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