UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DEBRA CULBERSON, CHRISTINA MARIE CULBERSON, and ROGER CULBERSON, Plaintiffs, v. VINCENT DOAN, LAWRENCE BAKER, TRACEY BAKER, RICHARD PAYTON, and VILLAGE OF BLANCHESTER, Defendants.	)	Case No. C-1-97-965 Judge S. Arthur Spiegel

BRIEF OF AMICI CURIAE

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PRELIMINARY STATEMENT

In this action, Plaintiffs seek to recover damages for the slaying of Carrie Culberson, their 22-year-old daughter and sister, who died by the hand of her ex-boyfriend, Vincent Doan. The defendants include Doan, who has been convicted of Culberson's murder, and those who assisted Doan in committing and covering up the crime. Among other claims, plaintiffs have asserted Culberson's right to be free from gender-motivated violence, established by the Civil Rights Remedy of the 1994 Violence Against Women Act ("VAWA"), 42 U.S.C. § 13981 (1996) (the "Civil Rights Remedy" or "the Remedy"). Defendant Doan has moved to dismiss that count, asserting that plaintiffs have not stated a claim and that the Remedy is unconstitutional.

This amici curiae brief supports the constitutionality of the Civil Rights Remedy and sets forth the standard for analyzing one of its key statutory elements, gender motivation. The Remedy allows victims of gender-motivated violent crimes such as rape, sexual assault, and domestic violence to hold the perpetrators accountable in federal court. As a statute designed to combat bias-motivated violence, the Remedy extends our country's long and vital tradition of civil rights laws that redress the impact of discrimination on our commercial networks and advance our collective commitment to equality.

ABBREVIATED INTRODUCTORY SUMMARY

Pursuant to S.D. Ohio L.R. 7.2(a), amici's abbreviated introductory summary of all points raised and of the primary authorities relied upon in their memorandum follows:

First, amici argue that the Civil Rights Remedy is a legitimate exercise of Congress' authority under the Commerce Clause, U.S. Const. art. I., § 8, cl. 3 (the "Commerce Clause")

to regulate conduct that substantially affects interstate commerce. Congress passed the Remedy after four years of hearings that documented the impact of violence against women on the national economy: preventing women from performing certain kinds of work, undermining workplace safety, decreasing productivity, increasing health care costs, and reducing consumer spending. Finding that discrimination in the criminal justice system often deprives victims of violent gender-motivated crimes of redress, Congress chose to create a private federal right of action. Accordingly, eight of the nine courts to address the constitutionality of the Civil Rights Remedy have held that Congress rationally concluded that gender-based violence against women has a substantial effect on interstate commerce, and that the Remedy is reasonably adapted to its intended purpose.

In the section of the brief concerning the Commerce Clause, the primary authorities upon which amici rely include United States v. Lopez, 514 U.S. 549 (1995); S. Rep. No. 103-138 (1993); Violence Against Women: Victims of the System: Hearing Before the Senate Comm. on the Judiciary, 102d Cong. 65 (1991); Women and Violence: Hearing Before the Senate Comm. on the Judiciary, 101st Cong. 29 (1990); C.R.K. v. Adrian L. Martin, Civ. A. No. 96-1431 (D. Kan. July 10, 1998); Timm v. DeLong, No. 8:98CV43 (D. Neb. June 22, 1998); Mattison v. Click Corp., Civ. A. No. 97-CV-2736, 1998 U.S. Dist. LEXIS 720 (E.D. Pa. Jan. 27, 1998); Crisonino v. New York City Hous. Auth., 985 F. Supp. 385 (S.D.N.Y. 1997); 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, 134 F.3d 1339 (8th Cir. 1998); Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996).

Next, amici argue that the Civil Rights Remedy is also supported by Congress' authority under Section 5 of the Fourteenth Amendment, U.S. Const. amend. XIV, § 5 ("Section 5") to enact appropriate legislation to secure women's equal protection rights. Combating gender discrimination is a legitimate legislative end, and the Civil Rights Remedy is plainly adapted to address Congress' concerns about gender-based violence and the states' failures to adequately redress that violence.

In the section of the brief concerning Section 5, the primary authorities upon which amici rely include Timm v. DeLong, No. 8:98CV43 (D. Neb. June 22, 1998); Katzenbach v. Morgan, 384 U.S. 641 (1966); City of Boerne v. Flores, 117 S.Ct. 2157 (1997); District of Columbia v. Carter, 409 U.S. 418 (1973); United States v. Guest, 383 U.S. 745 (1966); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); United States v. Virginia, 518 U.S. 515 (1996); S. Rep. No. 103-138 (1993); S. Rep. No. 102-197 (1991); 1992 Violence Against Women Hearing.

Finally, amici set forth the standard for evaluating a key statutory element of the Remedy: whether the crime is "motivated by gender." This Court should apply a totality of the circumstances test to determine gender motivation, taking into account derogatory statements, epithets, patterns of behavior, the nature and severity of the defendant's actions, and any other factors that indicate that the defendant targeted the victim because of her gender. Most courts interpreting the Remedy correctly have relied on this type of circumstantial evidence to find that violent acts were gender-motivated. Other types of civil rights cases, notably actions under 42 U.S.C. §§ 1981, 1983, 1985(3), and Title VII, also provide guidance for evaluating gender motivation.

The primary authorities upon which amici rely in their discussion of the gender motivation element include Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2; 42 U.S.C. § 1981; 42 U.S.C. § 1983; 42 U.S.C. §1985(3); S. Rep. No. 102-197 (1991); S. Rep. No. 103-138 (1993); Anisimov v. Lake, 982 F. Supp. 531 (N.D. Ill. 1997); Crisonino v. New York City Hous. Auth., 985 F. Supp. 385 (S.D.N.Y. 1997); Mattison v. Click Corp., Civ. A. No. 97-CV-2736, 1998 U.S. Dist. LEXIS 720 (E.D. Pa. Jan. 27, 1998); McCann v. Rosquist, 998 F. Supp. 1246 (D. Utah), appeal docketed, No. 98-4049 (10th Cir. Mar. 26, 1998); Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997), rev'd on other grounds, 134 F.3d 1339 (8th Cir. 1998); Brzonkala v. Virginia Polytechnic & St. Univ., 132 F. 3d 949 (4th Cir. 1997), reh'g en banc granted Feb. 5, 1998.

STATEMENT OF FACTS

Amici[1] adopt Plaintiffs' statement of facts.

ARGUMENT

I. THE CIVIL RIGHTS REMEDY IS A CONSTITUTIONAL EXERCISE OF CONGRESS' AUTHORITY UNDER THE COMMERCE CLAUSE TO REGULATE CONDUCT THAT SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE.

As eight of the nine courts to address the constitutionality of the Civil Rights Remedy have recognized, Congress properly enacted the Remedy under its Commerce Clause powers because it rationally concluded that gender-based violence against women has a substantial effect on interstate commerce, and because the Remedy is reasonably adapted to its intended

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[1] Each amicus organization is described in the Appendix, which is attached to this brief.

purpose. See C.R.K. v. Adrian L. Martin, Civ. A. No. 96-1431 (D. Kan. July 10, 1998) (attached hereto at Tab 1); Timm v. DeLong, No. 8:98CV43 (D. Neb. June 22, 1998) (attached hereto at Tab 2); Mattison v. Click Corp., Civ. A. No. 97-CV-2736, 1998 U.S. Dist. LEXIS 720 (E.D. Pa. Jan. 27, 1998) (attached hereto at Tab 3); Crisonino v. New York City Hous. Auth., 985 F. Supp. 385 (S.D.N.Y. 1997); 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, 134 F.3d 1339 (8th Cir. 1998); Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996).[2]

A. The Court Should Defer To Congress' Rational Conclusion That Gender-Based Violence Substantially Affects Interstate Commerce.

Courts must uphold statutes enacted under Congress' Commerce Clause powers as long as Congress had a rational basis for concluding that the regulated activity substantially affects interstate commerce. United States v. Lopez, 514 U.S. 549, 559 (1995). Courts should review legislative findings, including committee reports, when evaluating the rationality of Congress' judgment. Id. at 562-63. VAWA's four-year legislative history documenting the substantial impact of gender-based violence on interstate commerce demonstrates that Congress acted rationally in enacting the remedy. See C.R.K., slip op. at 8; Timm, slip op. at 14-19; Mattison, 1998 U.S. Dist. LEXIS 720, at *18-19; Crisonino, 985 F. Supp. at 395; Anisimov, 982 F. Supp. at 537; Seaton, 971 F. Supp. at 1192; Hartz, 970 F. Supp. at 1421; Doe, 929 F.

[2] The one district court to reach a contrary conclusion was reversed on appeal by a panel; a decision en banc is pending. Brzonkala v. Virginia Polytechnic & St. Univ., 935 F. Supp. 779 (W.D. Va. 1996), rev'd, 132 F.3d 949 (4th Cir. 1997), vacated, reh'g en banc granted Feb. 5, 1998.

Supp. at 611. Specifically, Congress found that gender-based violence interferes with women's economic choices, freedom of movement, education and employment:

- Women frequently leave their jobs or are fired as a result of gender-motivated violence. S. Rep. No. 103-138, at 54 n.69 (1993) ("1993 Senate Report") (noting that almost 50 percent of rape victims lose their jobs or are forced to quit in the aftermath of the crime).

- Women across the country are forced to give up job opportunities in locations and during hours when the risk or fear of violence is increased, particularly in higher paying night jobs and in service and retail industries. 1993 Senate Report at 54 n.70; see also Violence Against Women: Victims of the System: Hearing Before the Senate Comm. on the Judiciary, 102d Cong. 65 (1991) ("1991 Violence Against Women Hearing") (statement of Professor Burt Neuborne, Professor of Law, New York University).

- In the workplace, homicide is the leading cause of death for women. 1993 Senate Report at 54 n.70 (homicide causes 42 percent of women's deaths and only 12 percent of men's); see also Hidden Violence Against Women at Work, Women in Pub. Service (Fall 1995). Nearly one-fifth of these workplace deaths are committed by women's intimate partners. Bureau of Labor Statistics News (Aug. 3, 1995) (calculated by reviewing data in 1994 Census of Fatal Occupational Injuries).

- Violence against women also has a direct destructive impact on American business itself because women represent 50% of the nation's work force and 36% of its executives. See Crimes of Violence Motivated by Gender: Hearings Before the Subcomm. on Civil and Const. Rights of the House Comm. on the Judiciary, 103d Cong. 5, 43 (1993) ("1993 Crimes of Violence Hearing") (statement of Burt Neuborne).[3]

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[3] See also Melanie Shepard and Ellen Pence, The Effect of Battering on the Employment Status of Women, 3 Affilia 55 (1988) (one-half of battered women reported harassment at work by their abusers, and one quarter had lost a job due, at least in part, to the effects of domestic violence); Connie Stanley, Domestic Violence: An Occupational Impact Study 17 (Tulsa, Oklahoma, July 27, 1992) (50% of battered women surveyed reported lost workdays, 60% had been reprimanded, and 70% reported difficulty in performing their job, due to abuse); Louise Laurence & Roberta Spalter-Roth, Measuring the Costs of Domestic Violence Against Women and the Cost-Effectiveness of Interventions 25 (Institute for Women's Policy Research, Victims' Services, & the Domestic Violence Training Project, May 1996) (60% of battered women reported lateness at work due to abuse); Martha F. Davis & Susan J. Kraham, Protecting Women's Welfare in the Face of Violence, 22 Fordham Urb. L.J. 1141, 1151-52 & nn.60-75 (1995).

- Nationally, violence against women costs employers between three and five billion dollars annually due to absenteeism. Women and Violence: Hearing Before the Senate Comm. on the Judiciary, 101st Cong. 29, 69 (1990) ("1990 Women and Violence Hearing") (statement of Helen Neuborne and Sally Goldfarb).[4]

- Employers have responded to the effect on "such bottom line issues as tardiness, poor performance, increased medical claims, interpersonal conflicts in the workplace, depression, stress and substance abuse" by taking direct action to reduce their costs and protect their employees. Hearing on Domestic Violence: Hearing on S. 596 Before the Senate Comm. on the Judiciary, 103d Cong. 15 (1993) (statement of James Hardeman, Polaroid Corp.).[5]

Moreover, Congress recognized numerous other ways in which gender-based violence affects interstate commerce and the national economy:

- creating an increased need for government benefits. See S. Rep. No. 101-545, at 37 (1990) ("1990 Senate Report") (as many as 50 percent of homeless women and children are fleeing domestic violence).[6]

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[4] Other estimates confirm the massive cost of gender-motivated violence in lost productivity, increased health care costs, higher turnover, and lowered productivity. See, e.g., Joan Zorza, Woman Battering: High Costs and the State of the Law, Clearinghouse Rev. 383, 385 (Spec. Issue 1994) (estimating total cost at $13 billion); Patricia Horn, Beating Back the Revolution: Domestic Violence's Economic Toll on Women, Dollars & Sense, Dec. 1992, at 12, 21 (domestic violence costs employers hundreds of thousands of lost paid days of work annually). These figures do not begin to address the costs of additional security, liability and employee assistance benefits.

[5] In addition, a recent study found that one-third of business executives surveyed thought domestic violence affected their balance sheet, nearly half recognized that it harms productivity, and two-thirds agreed that their company's financial health would improve if the company addressed domestic violence. Roper, Starch, Addressing Domestic Violence: A Corporate Response at 8-11 (1994) (survey conducted for Liz Claiborne). Three-fourths of human resources professionals surveyed viewed domestic violence as a workplace issue. Charlene Marmer Solomon, Talking Frankly About Domestic Violence, Personnel J., April 1995, at 63, 65. Ninety-four percent of corporate security and safety directors ranked domestic violence as a "high" security concern in their workplaces. National Safe Workplace Institute, Domestic Violence Moves Into the Workplace, Workplace Violence & Behavior Letter 1, 2 (Nov. 1994).

[6] Violence makes women poor, by forcing them to leave their jobs and/or homes, and keeps them poor, by hindering efforts by poor women to become self-sufficient and to

- draining the nation's medical services. See, e.g., 1991 Violence Against Women Hearing at 65 (Testimony of Roland W. Burris, Attorney General of Illinois); id. at 240 (medical costs related to domestic violence cost an estimated $100,000,000 per year) (testimony of National Federation of Business and Professional Women).

- reducing consumer spending, which results in a decreased supply and demand for products sold in interstate commerce. Violent Crime Control and Law Enforcement Act of 1994, H.R. Conf. Rep. No. 103-711, at 385 (1994) ("1994 Conference Report"); S. Rep. No. 102-197, at 38 (1991) ("1991 Senate Report") (finding that "three-quarters of women never go to the movies alone after dark because of the fear of rape and nearly 50 percent do not use public transit alone after dark for the same reason").

- deterring women from interstate travel due to fear of gender-motivated violence. 1993 Senate Report at 54; 1990 Women and Violence Hearing at 69 (statement of Helen Neuborne and Sally Goldfarb) (recognizing fear of gender-motivated crime as "a barrier to mobility, particularly for those women who have no alternative to public transportation," and recognizing consequent negative impact on employment opportunities).

- compelling women to flee from their home state, which involves interstate travel and related commercial activities. See, e.g., Domestic Violence: Not Just a Family Matter: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 103d Cong. 15 (1994) (statement of Karla Digirolamo); see also Violence Against Women: Fighting the Fear: Hearing on S.11 Before the Senate Comm. on the Judiciary, 103d Cong. 32 (1993) (testimony of Barbara Michaud) (recognizing that stalking victims engage in commerce when they attempt to escape by changing day-care providers, grocery stores, telephone numbers, and by purchasing security systems, car phones, guns and guard dogs).[7]

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complete welfare-to-work and other job training programs. See, e.g., Catherine T. Kenney and Karen R. Brown, Report From the Front Lines: The Impact of Violence on Poor Women (NOW Legal Defense and Education Fund 1996); Davis & Kraham, supra note 2, at 1151-52 & nn.60-75; Jody Raphael, Prisoners of Abuse: Domestic Violence and Welfare Receipt (Taylor Institute 1996).

[7] See also Joan Zorza, Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women, 29 Fam. L.Q., Summer 1995, at 273, 302 ("Given how harmful domestic violence is to the intended victim . . . many battered women will want to get away from their abusers by moving out-of-state."); Davis & Kraham, supra note 2, at 1146 (to same effect). The impact is all the more profound given the epidemic scope of gender-based violence. See,

These extensive findings demonstrate Congress' recognition of the "explicit connection" between gender-based violence and interstate commerce, to which this Court should defer. See C.R.K., slip op. at 8; Timm, slip op. at 14; Mattison, 1998 U.S. Dist. LEXIS 720, at *21; Crisonino, 985 F. Supp. at 393-96; Anisimov, 982 F. Supp. at 537-38; Seaton, 971 F. Supp. at 1192-4; Hartz, 970 F. Supp. at 1413-23; Doe, 929 F. Supp. at 610-11, 613-15.[8]

B. The Lopez Decision Leaves Congress' Authority To Enact The Civil Rights Remedy Undisturbed.

The Supreme Court decision in United States v. Lopez[9] affirmed Congress' longstanding power to legislate under the Commerce Clause where there is a rational basis for

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e.g., S. Rep. No. 102-118, at 3 (1992) ("1992 Senate Report"); 1993 Senate Report at 38; Violence Against Women: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 102d Cong. 63 (1992) ("1992 Violence Against Women Hearing") (statement of William F. Schenck, County Prosecutor, Greene County, Ohio); 1991 Violence Against Women Hearing at 2 (statement of Sen. Joseph Biden).

[8] Only the subsequently-reversed Brzonkala district court, now pending en banc review, failed to properly defer to these Congressional findings. That court conceded that "[a] reasonable inference from the congressional findings is that violence against women has its major effect on the national economy," 935 F. Supp. at 792 (emphasis added), but then erroneously sought to distinguish effects on the "national economy nationwide" from effects on "interstate commerce" without any support, id., and despite contrary determinations by other courts. See, e.g., United States v. Kegel, 916 F. Supp. 1233, 1238 (M.D. Fla. 1996) (holding "that there is ultimately a substantial impact upon the intercourse of the national economy and, therefore, upon interstate commerce" of willful non-payment of child support); accord United States v. Collins, 921 F. Supp. 1028, 1036 (W.D.N.Y. 1996). The Brzonkala district court also conceded that the adverse effect of the regulated activity is more direct here than in Lopez, but ignored the distinction with virtually no analysis. See Brzonkala, 935 F. Supp. at 790-91. Courts subsequently analyzing the constitutionality of the Civil Rights Remedy have roundly criticized the Brzonkala district court for its shoddy analysis. See, e.g., Crisonino, 985 F. Supp. at 396 n.15; Seaton, 971 F. Supp. at 1194.

[9] That case struck down the Gun-Free School Zones Act, which made it a federal crime to possess a firearm within 1,000 feet of a school, finding the law's connection with interstate commerce too tenuous. Lopez, 514 U.S. at 551 n.1, 561.

concluding that the regulated activity substantially affects interstate commerce.[10] See id., 514 U.S. at 557 (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981)). By endorsing that standard, Lopez reinforces the vitality of the last half-century of Commerce Clause cases prohibiting public and private discrimination that in the aggregate affects interstate commerce. See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252-53 (1964) (Civil Rights Act of 1964); Katzenbach v. McClung, 379 U.S. 294, 299-301 (1964) (same); EEOC v. Wyoming, 460 U.S. 226, 231 (1983) (Age Discrimination in Employment Act); Abbott v. Bragdon, 912 F. Supp. 580, 592-95 (D. Me. 1995) (Americans with Disabilities Act), aff'd, 107 F.3d 934 (1st Cir. 1997), vacated on other grounds, Bragdon v. Abbott, No. 97-156, 1998 U.S. LEXIS 4212 (June 25, 1998).

Lopez affirmed the traditional rule that "where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence." Lopez, 514 U.S. at 558 (quotation omitted). Even wholly intrastate activity may be regulated. Id. at 555. Nothing in Lopez requires that Commerce Clause legislation contain a jurisdictional element limiting the law to situations involving only interstate commerce.[11]

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[10] In reviewing and reaffirming earlier Commerce Clause precedents, the Lopez court divided them into three categories: 1) regulation of the channels of interstate commerce; 2) regulation of persons and things in interstate commerce; and 3) regulation of activity that substantially affects interstate commerce. Lopez, 514 U.S. at 558-59. This brief focuses on the third category, that gender-based violence substantially affects interstate commerce. While not addressed in this brief, the Civil Rights Remedy also constitutes a legitimate exercise of Congress' power under the first and second categories.

[11] See, e.g., United States v. Genao, 79 F.3d at 1333, 1335-36 (2d Cir. 1996) (drug possession); United States v. Wilson, 73 F.3d 675, 685-86 (7th Cir. 1995) (Freedom of Access to Clinic Entrances (FACE)), cert. denied sub nom. Skott v. United States, 117 S. Ct. 46 (1996); United States v. Leshuk, 65 F. 3d 1105, 1112 (4th Cir. 1995) (drug manufacture);

Nor did Lopez curtail Congress' power to enact legislation to redress private or non-economic conduct under the Commerce Clause. Following Lopez, the Sixth Circuit and numerous other federal courts have upheld myriad federal statutes that regulate private and/or non-economic conduct that has a substantial effect on interstate commerce, including the following:[12]

- the Child Support Recovery Act, see, e.g., United States v. Bongiorno, 106 F.3d 1027 (1st Cir. 1997), United States v. Williams, 121 F.3d 615, 619 (11th Cir. 1997), cert. denied, 118 S. Ct. 1398 (1998); United States v. Hampshire, 95 F. 3d 999, 1003-04 (10th Cir. 1996), cert. denied, 117 S. Ct. 753 (1997); United States v. Mussari, 95 F. 3d 787, 790 (9th Cir. 1996), cert. denied sub nom Schroeder v. United States, 117 S. Ct. 1567 (1997); United States v. Sage, 92 F.3d 101, 107 (2d Cir. 1996), cert. denied, 117 S. Ct. 784 (1997);

- drug possession, trafficking, or manufacturing statutes, see, e.g., United States v. Allen, 106 F.3d 695, 701 (6th Cir. 1997); United States v. Zorrilla, 93 F.3d 7 (1st Cir. 1996); United States v. Dixon, 132 F.3d 192, 202 (5th Cir. 1997), cert. denied, 118 S. Ct. 1581 (1998); United States v. Allen, 106 F.3d 695, 700-01 (6th Cir. 1997), cert. denied, 117 S. Ct. 2467 (1997), even when applied to purely personal use, see, e.g., Leshuk, 65 F. 3d at 1112;

- laws banning possession or transfer of a firearm, see, e.g., United States v. Turner, 77 F.3d 887, 889 (6th Cir. 1996); United States v. Cardoza, 129 F.3d 6, 10-13 (1st. Cir. 1997); United States v. Rybar, 103 F.3d 273, 282-85 (3rd Cir. 1996), cert. denied, 118 S. Ct. 46 (1997); United States v. Wilks, 58 F.3d 1518, 1521-22 (10th Cir. 1995);

- the federal carjacking law, see, e.g., United States v. McHenry, 97 F. 3d 125, 127 (6th Cir. 1996); United States v. Coleman, 78 F. 3d 154, 160 (5th Cir. 1996); United States v. Rivera-Figueroa, Nos. 96-1112, 96-1290, 96-1291, 96-1292, 1998 U.S. App. LEXIS 8784, at *4-5 (1st Cir. May 5, 1998); United States v. Bishop, 66 F.3d 569, 580 (3d Cir. 1995); and

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United States v. Scott, 919 F. Supp. 76, 79 (D. Conn. 1996) (FACE); accord Terry v. Reno, 101 F.3d 1412, 1416 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 2431 (1997).

[12] See generally Johanna R. Shargel, In Defense of the Civil Rights Remedy of the Violence Against Women Act, 106 Yale L.J. 1849, 1857-71 (1997); Kerrie E. Maloney, Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provisions of the Violence Against Women Act After Lopez, 96 Colum. L. Rev. 1876 (1996).

- laws regulating interference with access to reproductive health services, see, e.g. Hoffman v. Hunt, 126 F.3d 575, 587-88 (4th Cir. 1997), cert. denied, 118 S. Ct. 1838 (1998); Terry, 101 F.3d at 1416; United States v. Soderna, 82 F.3d 1370, 1373-74 (7th Cir. 1996), cert. denied sub nom. Hatch v. United States, 117 S. Ct. 507 (1996).

Because individual intrastate acts of gender-based violence such as domestic violence and rape in the aggregate have a substantial effect on interstate commerce, Congress may properly penalize those acts under its Commerce Clause powers.

The extensive documentation of the substantial impact of gender-related violence on interstate commerce, as set forth in section I(A), supra, stands in marked contrast to the criminal conduct challenged in Lopez. There, the link between that conduct and commerce rested on the mere possibility that gun possession at school could affect interstate commerce: the presence of guns might lead to gun violence or fear of gun violence, which in turn could impair a student's education, which over the long run might adversely affect his or her contribution to the workforce, which in turn could hurt interstate commerce. See 514 U.S. at 563-67. By contrast, the Civil Rights Remedy addresses actual violence, with documented and particularized present-day effects on interstate businesses and commercial transactions. Indeed, "the record in support of Congress' authority to enact [the Remedy] could not be more different. . .than that facing the Lopez Court." Crisonino, 985 F. Supp. at 395.

C. The Civil Rights Remedy Is Reasonably Adapted To Its Intended Purpose.

Once a court determines that Congress had a rational basis for enacting the statute at issue, the only remaining question is whether the means chosen by Congress to implement its objective are "reasonably adapted to the end permitted by the Constitution." Doe, 929 F. Supp. at 612, citing Hodel, 452 U.S. at 276. Congress expressly found that "bias and

discrimination in the criminal justice system often deprive[s] victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled." Anisimov, 982 F. Supp. at 539-40, quoting H.R. Conf. Rep. No. 103-711 at 385 (1994).[13] In enacting VAWA, Congress chose to address the effects of gender-based violence on interstate commerce by providing a private right of action so that victims can secure compensation for their losses. Congress thus rationally responded to the impact of gender-based violence on interstate commerce, and to the states' inadequate response to that impact, by enacting the Remedy. See id.; Timm, slip op. at 17; Mattison, 1998 U.S. Dist. LEXIS 720, at *19; Crisonino, 985 F. Supp. at 396; Anisimov, 982 F. Supp. at 539-40; Seaton, 971 F. Supp. at 1193-1195; Hartz, 970 F. Supp. at 1423; Doe, 929 F. Supp. at 616.

Moreover, as a civil rights statute, the Remedy "falls within the traditional purview of federal regulation." Hartz, 970 F. Supp. at 1423; see also 1993 Senate Report at 50-51. It defers to state definitions of crimes and "clearly supplements rather than supplants state regulations of criminal and family law matters." Id.; see also Timm, slip op. at 24-25, n.9 ("federal action is particularly appropriate when, as is the case with violence against women, there is compelling evidence that the states have not successfully protected the rights of a class of citizens"). For these reasons, courts overwhelmingly have concluded that the Remedy is reasonably adapted to achieve Congress' legitimate legislative ends; Doe, 929 F. Supp. at 615-616 (recognizing that the Remedy leads to no impermissible encroachment on states' traditional powers due to unique harm of civil rights violations); See Timm, slip op. at 17; Mattison, 1998 U.S. Dist. LEXIS 720, at *19; Crisonino, 985 F. Supp. at 396; Anisimov,

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[13] Congress' extensive findings documenting the need to remedy states' failures to address gender-based violence are discussed in more detail in section II.B, infra.

982 F. Supp. at 539-40; Seaton, 971 F. Supp. at 1194; Hartz, 970 F. Supp. at 1423; Brzonkala, 132 F.3d at 974 n. 17; Doe, 929 F. Supp. at 617.

II. THE CIVIL RIGHTS REMEDY IS A CONSTITUTIONAL EXERCISE OF CONGRESS' AUTHORITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT TO ENACT APPROPRIATE LEGISLATION TO SECURE WOMEN'S EQUAL PROTECTION RIGHTS.[14]

As at least one court has recognized, the Civil Rights Remedy is additionally supported by Congress' power under Section 5 of the Fourteenth Amendment to redress discrimination.[15] In Timm v. DeLong, the court upheld Congress' Section 5 authority to enact the Remedy, finding that Congress responded to states' failures "to protect the equal rights of women from the immense and invidious problem of gender-based violence." Timm, slip. op. at 33-35. All other courts upholding the Civil Rights Remedy found it unnecessary to address the scope of Congress' Section 5 powers once they held the Remedy constitutional under the Commerce Clause. See C.R.K., slip op. at 8; Crisonino, 985 F. Supp. at 390; Anisimov, 982 F. Supp.

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[14] While the Remedy is gender-neutral, Congress recognized that women overwhelmingly are the victims of gender-motivated violence. See 1993 Senate Report at 37-38; 1991 Senate Report at 36, 54; 1990 Senate Report at 30-31. Consequently, this brief refers throughout to gender-motivated violence against women. It is "firmly established" that the Fourteenth Amendment guarantees to women equal protection of the laws. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982); see also United States v. Virginia, 518 U.S. 515, 560 (1996).

[15] Section 5 expressly authorizes Congress to "enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. Section 1 of the Fourteenth Amendment ("Section 1") prohibits states from depriving individuals of equal protection of the laws. U.S. Const. amend. XIV, § 1.

at 540; Seaton, 971 F. Supp. at 1193-1194 n.1; Hartz, 970 F. Supp. at 1423 n. 38; Doe, 929 F. Supp. at 612 n.5.[16]

A. Long-Standing Precedent Authorizes Civil Rights Legislation That Enforces The Fourteenth Amendment's Guarantee Of Equal Protection By Penalizing Private Individuals' Conduct.

As the Timm court recognized, the Civil Rights Remedy falls squarely within Congress' broad remedial power under Section 5 of the Fourteenth Amendment ("Section 5") to pass laws that enforce equal protection rights as long as Congress' "end [is] legitimate" and the statute is "plainly adapted to that end." Katzenbach v. Morgan, 384 U.S. 641, 650 (1966) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)). Critical to that power is the fundamental distinction between Section 1, which defines the scope of a direct constitutional violation, and Section 5, which grants Congress broad remedial legislative powers to enforce Section 1 rights. Congress can pass laws under Section 5 that redress civil rights violations by proscribing conduct that does not itself violate the Constitution. Morgan, 384 U.S. at 648-49.[17] The Morgan Court, for example, upheld Congress' authority to ban

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[16] Only one district court has rejected Section 5 as a basis for the Civil Rights Remedy. The Brzonkala district court decision, which was reversed and is now vacated pending rehearing en banc, erroneously bifurcated Congress' goals into two narrow and distinct "ends" it then concluded the Remedy did not adequately address: to redress 1) individual acts of violence, and 2) the failures of state law enforcement systems. Brzonkala, 935 F. Supp. at 797, 800. In framing the issue that way, the court obscured Congress' legitimate goals of correcting discriminatory attitudes against women, filling gaps in existing laws, and remedying gender bias in state law enforcement, which deny women legal redress. The civil remedy Congress enacted is plainly adapted to those ends because it provides the redress Congress recognized had been denied. Moreover, the Brzonkala court ignored Congress' extensive record linking failed law enforcement efforts to individual acts of violence, id. at 797, thereby violating the applicable deferential standard of review. See Morgan, 384 at 653.

[17] Accord United States v. Guest, 383 U.S. 745, 762 (1966) (Clark, J., concurring); id. at 777 (Brennan, J., concurring in part, dissenting in part); see also Fitzpatrick v. Bitzer, 427 U.S. 445, 453 n.9 (1976) (upholding Title VII amendments); Oregon v. Mitchell, 400 U.S.

literacy tests under the Voting Rights Act, even though a state constitutionally could not be prohibited from adopting a literacy requirement for voting. 384 U.S. at 648-49.

As the Supreme Court recognized in Morgan, limiting Congress' Section 5 powers to enacting laws proscribing only conduct that itself violates Section 1 would defeat the purpose of the enabling clause and would empower Congress only to replicate what the federal judiciary already was obligated to do. Morgan, 384 U.S. at 648-49; see also Archibald Cox, The Role of Congress in Constitutional Determinations, 40 U. Cinn. L. Rev. 199, 257-59 (1971). Congress' authority under the nearly-identical enabling clauses of the Thirteenth and Fifteenth Amendments to prohibit civil rights violations that do not violate the Constitution further supports the Supreme Court's analysis in Morgan. See, e.g., Rome v. United States, 446 U.S. 156, 177 (1980); Griffin v. Breckenridge, 403 U.S. 88, 104-05 (1971); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443-44 (1968); South Carolina v. Katzenbach, 383 U.S. 301, 325-27 (1966).

In its most recent decision addressing the scope of Section 5, the Supreme Court affirmed the Morgan framework and endorsed Congress' authority under Section 5 to pass laws that enforce Section 1's equal protection rights. City of Boerne v. Flores, 117 S. Ct. 2157 (1997) (analyzing the constitutionality of the Religious Freedom Restoration Act (RFRA)). The Boerne Court upheld Congress' power under Section 5 to regulate conduct that violates equal protection rights as long as there is a "congruence" between the means used and the ends to be achieved. Id. at 2164. Although the absence of a legislative record justifying the need to

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112, 117-18 (1970) (upholding federal 18-year-old voting age); cf. United States v. Bledsoe, 728 F.2d 1094, 1097 (8th Cir. 1984) (applying 18 U.S.C. § 245 to private individuals), see also Shargel, supra note 11, at 1878-81.

prevent laws from burdening the free exercise of religion, inter alia, led the Boerne Court to conclude that Congress had overstepped its authority in enacting RFRA, 117 S. Ct. at 2158, the legislative history of VAWA reflects a proper exercise of Congress' Section 5 powers. Unlike Boerne, the Remedy's history is replete with detailed findings documenting the failure of state justice systems to address gender-based violence. See section II.B, infra; see also 1993 Senate Report at 55. Thus Congress' enactment of the Civil Rights Remedy to provide victims of gender-based violence a legal remedy in response to legislative findings that they had been systematically denied both access to the courts and proper redress under the state justice system is fully consistent with Boerne.

Other modern Supreme Court cases confirm that Congress has the power under Section 5 to enact remedial statutes regulating the conduct of private individuals. A unanimous Supreme Court in District of Columbia v. Carter, 409 U.S. 418 (1973), ratified that proposition, citing the Court's decision in Morgan and the separate opinions in United States v. Guest, 383 U.S. 745, 762 (1966), and distinguishing the narrow scope of Section 1 from Congress' Section 5 powers. Carter, 409 U.S. at 424 n.8. In Guest, six Justices of the Supreme Court specifically declared that Section 5 authorizes Congress to address private conduct. As set out in Justice Clark's opinion: "there now can be no doubt that the specific language of Section 5 empowers the Congress to enact laws punishing all conspiracies -- with or without state action -- that interfere with Fourteenth Amendment rights." 383 U.S. at 762 (Clark, J., concurring, joined by Justices Black and Fortas). The separate opinion of Justice Brennan, joined by Chief Justice Warren and Justice Douglas, reiterated that statement and pointed out that a majority of the Court agreed with that interpretation of Congress' Section 5 power. Id. at 782 (Brennan, J.,

concurring in part and dissenting in part); cf. Bellamy v. Mason's Stores, 508 F.2d 504, 507 (4th Cir. 1974) (recognizing Congress' authority to pass laws prohibiting private interference with citizens' equal protection rights).[18]

B. Addressing Gender-Based Violence That Denies Equal Protection To Women Is A Legitimate Legislative End.

Gender discrimination is a legitimate equal protection concern. See Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982); see also United States v. Virginia, 518 U.S. 515, 560 (1996). By enacting the Civil Rights Remedy, Congress recognized that the disproportionate rate of violence committed against women evidences a form of discrimination similar to other hate crimes. See 1993 Senate Report at 49 (citing testimony of Prof. Burt Neuborne); accord 1993 Crimes of Violence Hearing at 5 (testimony of Sally Goldfarb). Moreover, federal courts have acknowledged that sexual assault is a form of discrimination against women in numerous contexts, including civil claims against public officials under 42 U.S.C. § 1983, see, e.g., Carrero v. New York City Hous. Auth., 890 F.2d 569 (2d Cir. 1989), and Title VII employment discrimination cases, see, e.g., Meritor Sav. Bank FSB v. Vinson, 477 U.S. 57 (1986); Gilardi v. Schroeder, 833 F.2d 1226 (7th Cir. 1987). In enacting VAWA, Congress rightly recognized that the destructive and debilitating effects of gender-

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[18] The lone case that limits Congress' Section 5 power to govern the conduct of private individuals, The Civil Rights Cases, 109 U.S. 3 (1883), is clearly distinguishable. In that 1883 case, which struck down a Reconstruction-era public accommodations law, the Supreme Court was troubled by Congress' failure to refer "to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States," and its perception that the statute was not "corrective legislation" enacted in response to a constitutional violation by state officials. See id. at 13-14. By contrast, the Civil Rights Remedy's legislative record is replete with detailed findings documenting states' egregious failures to remedy gender-based violence, and responds to those failures of both substantive law and state enforcement. See Section II.C infra.

motivated violence on its victims -- as well as the fear it inspires in all women -- undermine the promise of equal protection contained in the Fourteenth Amendment. See 1994 Conference Report at 385-86; 1993 Senate Report at 48, 55; 1991 Senate Report at 53; cf. Morgan, 384 U.S. at 652 (relying on Congress' express declaration that the statute was enacted to secure Fourteenth Amendment rights).

Extensive and detailed findings document Congress' intent to remedy states' failures properly to address gender-based violence. Congress cited numerous studies concluding that crimes disproportionately affecting women are treated less seriously than comparable crimes affecting men. See, e.g., 1993 Senate Report at 49.[19] Police, prosecutors, juries and judges in state justice systems routinely subject female victims of rape, sexual assault, and domestic violence to a wide range of unfair and degrading treatment that contributes to the low rates of reporting and conviction that characterize these crimes. See, e.g., Majority Staff of Senate Comm. on the Judiciary, 103rd Cong., Response to Rape: Detours on the Road to Equal Justice, 2-6 (Comm. Print 1993) ("1993 Response to Rape"); accord 1992 Violence Against Women Hearing at 75 (statement of Margaret Rosenbaum, Assistant State Attorney and Division Chief, Domestic Crimes Unit, Miami, Florida) (recognizing that police officers persist in failing

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[19] See generally 1993 Senate Report at 49; 1991 Senate Report at 46-47, 49 (citing, e.g., Illinois Task Force, Gender Bias in the Courts at 99 (1990); Summary Report of the Connecticut Task Force, Gender, Justice and the Courts at 18 (1991); Gender Bias Study of the Court System in Massachusetts at 107 (1989); Report of the Florida Gender Bias Commission at 156 (1990); Supreme Court of Georgia, Gender and Justice in the Courts at 93 (1991)).

to treat domestic violence as a "real crime"); 1991 Senate Report at 39; 1992 Violence Against Women Hearing at 2, 70; 1990 Women and Violence Hearing at 29-30.[20]

Recent cases confirm that state judicial systems continue to fail to take domestic violence and sexual assault seriously and thus doubly victimize women who have survived gender-motivated crimes. See, e.g., State v. Peacock, No. 94-CR-0943 (Md. Cir. Ct. Oct. 17, 1994) (stating sympathy for defendant who pled guilty to the murder of his wife after discovering her adultery, and sentencing him to a minimal eighteen-month term to be served on work release). As Congress heard during testimony on VAWA: "One has only to count the number of women murdered in the past year by subjects of outstanding orders of 'protection' issued by local courts to realize the toothless quality of much state and local 'protection'." 1993 Crimes of Violence Hearing at 41 (statement of Prof. Burt Neuborne).

Congress recognized that state legal systems' long histories of treating gender-based crimes less seriously than other crimes demanded federal legislative action. 1993 Senate Report at 42; see also 1993 Response to Rape at 1-2; 1991 Senate Report at 43-48. See generally Reva B. Siegel, The Rule of Love: Wife Beating as Prerogative and Privacy, 105 Yale L.J. 2117, 2163 n.163, 2174 (1996) (documenting formal sanctioning of violence in marriage). The Civil Rights Remedy was designed to address the bias against gender-based crimes that, notwithstanding formal legal reform, denies women meaningful remedies through state courts.

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[20] See also Report On District Of Columbia Police Response To Domestic Violence (1990), reprinted in 1992 Violence Against Women Hearing 101.

C. The Civil Rights Remedy Is Plainly Adapted To Address Congress' Concern With Gender-Based Violence.

This Court must defer to Congress' attempt to redress the problem of violence against women as long as it can "perceive a basis upon which the Congress might resolve the conflict as it did." Katzenbach v. Morgan, 384 U.S. 641, 653 (1966); accord Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989) (upholding Congress' Section 5 power to define circumstances that threaten equality). By enacting the Civil Rights Remedy, Congress chose to address the states' documented failures to address gender-motivated violence, see Section II.B, supra, by providing unique relief that previously was unavailable.

Before the Remedy, victims of gender-based violence had no recourse in federal courts to seek civil redress for the most common forms of such discriminatory violence -- attacks by private individuals. See 1993 Crimes of Violence Hearing at 10-11 (statement of Sally Goldfarb). With the Remedy enacted, a woman can seek redress in the form of compensatory damages from her attacker, even when state law enforcement agencies fail to prosecute or when state criminal statutes or civil laws prove inadequate. The Remedy provides a uniform national standard for securing equal protection rights, in contrast with the patchwork of inconsistent, inadequate and under-enforced state criminal and civil laws. 1991 Senate Report at 53; 1991 Senate Report at 48. Federal judges and juries "are better insulated from the kind of local pressures that frequently put the victim . . . on trial." Id.

Based upon these extensive legislative findings, the Timm court determined that Congress had ample evidence from which to conclude that "the states' inability or unwillingness to afford women equal protection constitutes a sanction by the state of the 'wrongful acts' of private individuals." Timm, slip op. at 34. Such state sanctioning of unequal treatment under

the law is the appropriate subject of Congressional action. Id. at 31-34. The Timm court concluded that VAWA is appropriate as "an ancillary remedy ensuring equal treatment of individuals by the government," and "only impinges upon states by prohibiting states from denying women redress of civil rights injuries." Id. at 35-36.

In sum, the Remedy rationally responds to legitimate Congressional concerns about the failure of state criminal justice systems to address gender-based violence by creating a civil remedy in federal court. Grounded in extensive legislative findings documenting the systematic denial of women's access to the justice system, the Remedy should be upheld as a constitutional expression of Congress' authority under Section 5 to pass laws that enforce equal protection rights.

III. THE COURT SHOULD APPLY A "TOTALITY OF THE CIRCUMSTANCES" TEST TO DETERMINE GENDER MOTIVATION UNDER THE CIVIL RIGHTS REMEDY.

In addition to upholding the constitutionality of the Civil Rights Remedy, courts must interpret the statutory element of gender motivation.[21] To satisfy this element, a plaintiff must establish by a preponderance of the evidence that the alleged crime of violence was "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). Although expressed as a two-part analysis, the legislative history indicates that this definition was drafted with the single goal of ensuring that

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[21] The Remedy requires a plaintiff to prove that the defendant committed (1) a "crime of violence" (2) that was "motivated by gender." 42 U.S.C. § 13781(c). Those two requirements are defined at § 13781(d).

only gender-motivated crimes, rather than random acts of violence, form the basis for a VAWA recovery.[22] See S. Rep. No. 138 at 52.

A. Courts Interpreting The Civil Rights Remedy Have Correctly Relied On Circumstantial Evidence Of Bias To Find That Violent Acts Were Motivated By Gender.

Congress explicitly directed courts to examine the "totality of the circumstances" when evaluating discriminatory motivation, much as they do in civil rights cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 ("Title VII"), and 42 U.S.C. §§ 1981, 1983, and 1985(3). 1991 Senate Report at 52; 1990 Senate Report at 51; see also Hartz, 970 F. Supp. at 1406-08. Accordingly, this court should weigh all available evidence, including derogatory statements, epithets, patterns of behavior, the nature and severity of the defendant's actions, and any other factors that indicate that the defendant targeted the victim because of her gender. See 1993 Senate Report at 52, n. 61; 1991 Senate Report at 50, n. 72.[23]

Following Congressional direction, courts analyzing Civil Rights Remedy cases have applied established civil rights standards to identify evidence of bias in alleged violent crimes. For example, allegations that a woman's employer made inappropriate sexual advances -- including fondling her, attempting to remove her clothing, grabbing her breasts, and raping her

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[22] The legislative history indicates that Congress equated the term "animus" with "purpose" and "motivation," dispelling any notion that disparate impact -- i.e., proof that a violent act disproportionately affects women -- alone would be sufficient to merit recovery. See 1991 Senate Report at 48; Victoria F. Nourse, Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy, 11 Wis. Women's L.J. 1, 29-30 (Summer 1996).

[23] Congress also directed courts to apply "generally accepted guidelines for identifying hate crimes," which consider factors such as language, severity of the attack, absence of another apparent motive, patterns of behavior, and common sense. 1993 Senate Report at 53 n.51, citing Center for Women Policy Studies, Violence Against Women as Bias Motivated Hate Crime (1990).

-- were found to state a claim of gender motivation. Anisimov, 982 F. Supp. at 541. Another court found that allegations that a male supervisor called a female employee a "dumb bitch" and later shoved her to the ground would allow a reasonable jury to infer gender motivation. Crisonino, 985 F. Supp. at 391. See also Mattison, 1998 U.S. Dist. LEXIS 720, at *23-24 (holding that allegations of sexual assault, battering and sexual harassment by a supervisor could fulfill the gender motivation requirement); cf. McCann v. Rosquist, 998 F. Supp. 1246, 1253 (D. Utah), appeal docketed, No. 98-4049 (10th Cir. Mar. 26, 1998) (concluding that allegations of sexual assault and sexual harassment by a supervisor could be gender-motivated, although rejecting complaint on other grounds).[24]

Courts have recognized gender motivation not only in cases of workplace assaults, but in a broad range of settings. For example, where a plaintiff alleged that her priest sexually

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[24] One court incorrectly interpreted the gender motivation requirement in a manner that is supported neither by case law nor by the Remedy's legislative history. In Braden v. Piggly Wiggly, No. 97-T-1517-N, 1998 U.S. Dist. LEXIS 6566 (M.D.Ala. May 7, 1998) at *10-12 (attached hereto at Tab 4), the court held that the plaintiff's allegation of "sexual assault," without more, was insufficient to satisfy the gender motivation requirement. However, the plaintiff was permitted to amend her complaint to avoid dismissal. Id. Although the Braden court's reasoning was unclear, it appeared to require either that gender animus be a statutory component of the underlying crime, or that the plaintiff allege "harassing sexual behavior, unwanted sexual advances, or actual statements to suggest that the defendant targeted [the plaintiff] because of her sex" in addition to a violent crime. While such evidence is relevant to proof of gender motivation, nothing in the statute or its legislative history suggests that alleging such conduct or statements is a prerequisite to a claim under the Remedy, or that the nature or circumstances of a sexual assault could not themselves constitute sufficient evidence of bias motivation. Nor is there any legal basis for requiring that the underlying crime of violence itself include an element of gender animus. Several other courts dismissed claims absent any evidence of gender motivation. See Wesley v. Don Stein Buick, Inc., 985 F. Supp. 1288, 1300 (D. Kan. 1997) (requiring plaintiff to amend her complaint to satisfy gender motivation element where plaintiff merely alleged that she was female and that the individual defendants committed aggravated assault); Wilson v. Diocese of N.Y. of the Episcopal Church, 96 Civ. 2400 (JGK), 1998 U.S.Dist. LEXIS 2051 (S.D.N.Y. Feb. 23, 1998) at *41 (attached hereto at Tab 5) (plaintiff's claim dismissed for failure to produce any evidence of gender motivation).

assaulted her, the court "had little doubt" that such allegations of sexual assault or sexual exploitation satisfied the gender-motivation requirement. Hartz, 970 F. Supp. at 1406. The Fourth Circuit panel in Brzonkala held that a gang rape of a college student in a dormitory was motivated by gender, taking into account allegations that the plaintiff was raped three times by two virtual strangers within minutes of meeting them; that she twice told a defendant "no" before the alleged rape; that there was no other apparent motive for the act, such as robbery or theft; and that one of the defendants made sexist statements during and after the rape.[25] 132 F.3d at 963-64.

Courts have not hesitated to recognize gender bias in unwanted sexual contact regardless of defendants' assertions that they were motivated by affection or "affinity" for the victim. In Mattison, 1998 U.S. Dist. LEXIS 720, at *24-25, the court ruled that the defendant's assertions of affinity were "overshadowed" by allegations of violent abuse that demonstrated disrespect for women. The McCann court also noted that a defendant's protestations of affection toward the victim do not negate the discriminatory motivation contemplated by Congress:

> [T]he perception that a man is somehow less culpable in taking inappropriate liberties with members of the female gender if his motivations are amorous, seems to be just the type of 'animus' that is a focus of concern in gender discrimination. Regardless of the amorous intentions of the perpetrator, non-consensual expressions of affection that rise to the nature of those alleged in this action are laden with disrespect for women.

998 F. Supp. at 1253. Similarly, courts have rejected the suggestion that the voluntariness of a woman's acts precludes a finding of gender motivation under the Remedy. See Anisimov, 982 F. Supp. at 540-541 ("[W]hether [the victim] voluntarily entered [defendant's] car or office is no more relevant to her civil rights claim than if an African-American family voluntarily moved

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[25] For example, that defendant announced publicly that he "liked to get girls drunk and fuck the shit out of them." Brzonkala, 132 F.3d at 953.

into a 'white neighborhood' and found a burning cross on their lawn. Neither victim 'asked for it'").[26]

B. Other Types Of Civil Rights Cases Provide Guidance For Evaluating Gender Motivation.

The legislative history of VAWA confirms that courts should look to the ways courts evaluate evidence of bias under other laws when determining whether a crime is gender-motivated. Congress explicitly stated that other civil rights statutes, notably 42 U.S.C. §§ 1981, 1983, 1985(3), and Title VII, would offer "substantial guidance" in assessing evidence under this statutory element. S. Rep. No. 138 at 52-53, 64.

First, hostile environment sexual harassment cases litigated under Title VII are highly instructive in determining whether acts were committed "because of gender or on the basis of gender." Hartz, 970 F. Supp. at 1408, citing Kinman v. Omaha Pub. Sch. Dist., 94 F. 3d 463, 467 (8th Cir. 1997); see also Oncale v. Sundowner Offshore Serv., Inc., 118 S. Ct. 998 (1998) (recognizing that circumstantial evidence of both sexual and non-sexual conduct may reflect gender discrimination in sexual harassment cases). These cases illustrate a range of acts that can establish gender-based motivation:

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[26] Only the district court in Brzonkala wrongly suggested that a plaintiff's voluntary relationship with a defendant might jeopardize a claim of gender motivation. The court recognized the gang-rape allegations of that case as gender-motivated, but opined that acquaintance rapes might fare differently. 935 F. Supp. at 784-85. However, that distinction has been rejected by other courts as well as by the appellate panel. See Brzonkala, 132 F.3d at 963-64; Anisimov, 982 F. Supp. at 541 (criticizing Brzonkala district court approach to gender motivation element); Braden, 1998 U.S. Dist LEXIS 6566, at *12 ("this court cannot even fathom a common sense basis for such a generic distinction [set forth in Brzonkala]. Rape is rape, and it is doubtful that a woman . . . who had been violently invaded and attacked, would take comfort in the fact that it was a date (or 'friend') who did it; regrettably, a date and a 'friend' can be motivated by gender animus too").

- sexual assaults, see, e.g., Brock v. United States, 64 F.3d 1421, 1423 (9th Cir. 1995); Tomka v. Seiler Corp., 66 F.3d 1295, 1305 (2nd Cir. 1995); Yaba v. Roosevelt, 961 F. Supp. 611, 620 (S.D.N.Y. 1997); Al-Dabbagh v. Greenpeace, Inc., 873 F. Supp. 1105, 1110-11 (N.D. Ill. 1994); Campbell v. Kansas State Univ., 780 F. Supp. 755, 762 (D. Kan. 1991);

- repeated lewd or sexually suggestive comments, see, e.g., EEOC v. Hacienda Hotel, 881 F.2d 1504, 1514-14 (9th Cir. 1989); Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1449-50 (7th Cir. 1994); Bundy v. Jackson, 641 F.2d 934, 944-45 (D.C. Cir. 1981);

- touching in a sexually suggestive manner, see, e.g., Hutchison v. Amateur Elec. Supply, 42 F.3d 1037, 1042-43 (7th Cir. 1994); Paroline v. Unisys Corp., 879 F.2d 100, 103, vacated in part on other grounds, 900 F.2d 27 (4th Cir. 1990); Hall v. Gus Constr. Co., 842 F.2d 1010, 1012-14 (8th Cir. 1988);

- derogatory epithets or nicknames, see, e.g., Steiner v. Showboat Operating Co., 25 F.3d 1459 (9th Cir. 1994) cert. denied, 513 U.S. 1082, 115 S. Ct. 733 (1995); Lipsett v. University of Puerto Rico, 864 F.2d 881, 905 (1st Cir. 1988); Hall, 842 F.2d at 1013-14;

- non-sexual physical conduct, when part of an overall pattern of differential treatment based on the plaintiff's sex, see, e.g., Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987); Beardsley v. Webb, 30 F.3d 524, 528 (4th Cir. 1994);

- comments reflecting negative and stereotyped gender-based views, see, e.g., Harris v. Forklift Sys., Inc., 510 U.S. 17, 19 (1993) ("you're a woman, what do you know?") (citation omitted); Price Waterhouse v. Hopkins, 490 U.S. 228, 235-36, 250-51 (1989); Doe by Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997);

- patterns of similar conduct toward other women, see, e.g., Paroline, 879 F.2d at 103; Andrews v. Philadelphia, 895 F.2d 1469, 1482 n.3 (3rd Cir. 1990).

Cases litigated under 42 U.S.C. § 1985(3) also provide guidance in defining the contours of gender motivation. See Nourse, supra at 29-30; S. Rep. 103-138, at 51 n.59; S. Rep. 102-197, at 49-50, n. 69 (proof of gender motivation can be established in the same way as proof of

race or sex discrimination under other civil rights laws).[27] Courts routinely use circumstantial evidence similar to that found in sexual harassment cases to infer the bias-based motivation § 1985(3) requires. Racial slurs and epithets, for example, evidence bias motivation underlying assaults. Fisher v. Shamburg, 624 F.2d 156, 158 (10th Cir. 1980); Hawk v. Perillo, 642 F. Supp. 380, 392 (N.D. Ill. 1985); Spencer v. Casavilla, 839 F. Supp. 1014, 1016 (S.D.N.Y. 1993); Usher v. Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987); Bell v. Milwaukee, 746 F.2d 1205, 1259 (7th Cir. 1984). Written and symbolic messages also can establish bias. See, e.g., Lac Du Flambeau v. Stop Treaty Abuse, 843 F. Supp. 1284, 1292-93 (W.D. Wis.), aff'd, 41 F.3d 1190 (7th Cir. 1994), cert. denied, 514 U.S. 1096 (1995) (signs bearing racially offensive messages); Johnson v. Smith, 878 F. Supp. 1150, 1155 (N.D. Ill. 1995) (conspiracy to burn a cross on the lawn of the home of an African-American family).

Finally, prosecutions under 18 U.S.C. § 245, the federal criminal civil rights statute, show that the same types of circumstantial evidence can establish motivation in criminal bias crime prosecutions. As in § 1985(3) cases, courts rely on such evidence as statements reflecting a defendant's prejudice against a particular protected class, see United States v. Dunnaway, 88 F.3d 617 (8th Cir. 1996); United States v. Ebens, 800 F.2d 1422 (6th Cir. 1986); discriminatory epithets, see United States v. Makowski, 120 F.3d 1078 (9th Cir. 1997); a defendant's participation in a supremacist group, see Dunnaway, 88 F.3d at 618-9; United

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[27] While Congress directed courts to look to § 1985(3) in analyzing gender motivation under the Remedy, there is a significant difference between the two statutes in that § 1985(3), but not the Remedy, requires proof of "invidious" discrimination. Cf. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). The Remedy simply requires proof that the acts were gender-motivated, without any qualifier. Nourse, supra at 8-9. Nevertheless, even under § 1985(3), gender-based animus does not require proof of malicious motivation. See Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993).

States v. Lane, 883 F.2d 1484 (10th Cir. 1989); or a pattern of committing bias crimes, see United States v. Woodlee, 136 F.3d 1399 (10th Cir. 1998); United States v. Franklin, 704 F.2d 1183 (10th Cir. 1983).

These cases make clear that the universe of circumstantial evidence on which courts rely to infer discriminatory motivation is the same whether the court is analyzing a sexual harassment case, a civil rights case, or a criminal civil rights prosecution. This Court should draw on this wealth of precedent, as well as on the decisions already rendered under VAWA, to analyze circumstantial evidence of gender motivation under the Civil Rights Remedy.

CONCLUSION

For the foregoing reasons, this Court should uphold the constitutionality of the Civil Rights Remedy on the grounds that it is well within Congress' power under both the Commerce Clause and Section 5 of the Fourteenth Amendment. The Court should permit plaintiffs to proceed with their claims, and should apply a totality of the circumstances test to assess gender motivation under the Civil Rights Remedy.

Respectfully submitted,

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Dated: September ___, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of September, 1998, a true copy of the herein document was mailed to the attorney of record for each party.

_____
Lisa Meeks

APPENDIX

STATEMENTS OF INTEREST

NOW Legal Defense and Education Fund

NOW Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and to secure equal rights for women. NOW LDEF was founded as an independent organization in 1970 by leaders of the National Organization for Women, and has been engaged on many fronts in efforts to eliminate gender-motivated violence. Most notably, NOW LDEF chaired the national task force that was instrumental in passing the historic Violence Against Women Act ("VAWA"). It houses a national legal clearinghouse tracking legal developments under the Act and is litigating the initial cases brought under the VAWA's Civil Rights Remedy. NOW LDEF is co-counsel in Brzonkala v. Virginia Polytechnic, 935 F. Supp. 779 (W.D. Va. 1996), rev'd, 132 F.3d 949 (4th Cir. 1997), vacated pending reh'g en banc, Feb. 5, 1998, a case that involves the very question at issue here, the constitutionality of the Civil Rights Remedy of the VAWA. NOW LDEF was also co-counsel in Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996), and was lead amicus in Mattison v. Click Corp., Civ. 97-CV-2736, 1998 U.S. Dist. LEXIS 720 (E.D. Pa. Jan. 27, 1998); Crisonino v. New York City Hous. Auth., 985 F.Supp. 1375 (S.D.N.Y. 1997); and Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997), rev'd on other grounds, 134 F.3d 1375 (8th Cir. 1998), other cases involving the constitutionality of the Civil Rights Remedy. In addition, NOW LDEF has participated as counsel and as amicus curiae in numerous other cases in support of the rights of women who have been the victims of domestic and other gender-motivated violence.

ACTION OHIO Coalition for Battered Women

ACTION OHIO is a statewide coalition of persons and organizations working toward the eradication of family violence in our society. It was founded in 1975 to promote greater legal protections for victims of domestic violence, to increase the availability and quality of domestic violence shelters and other services, and to increase public awareness of the problem of domestic violence. ACTION OHIO provides coalition support, educational materials and seminars, legislative advocacy, and technical assistance to domestic violence shelters, victim advocates, law enforcement agencies, attorneys, the judiciary, medical providers, and the general public. During the past three years, ACTION OHIO has published Justice for Ohio's Domestic Violence Victims: An Easy Guide to Using the Justice System and played an especially prominent role in assisting local law enforcement agencies and domestic violence task forces to implement comprehensive domestic violence protocols. ACTION OHIO believes that the civil rights remedy of the Violence Against Women Act (VAWA) is an essential tool to combat and remedy severe, gender-motivated domestic violence. Therefore, the outcome of the Culberson case will have a significant impact on domestic violence victims in Ohio.

Anti-Defamation League

Since its founding in 1913, the Anti-Defamation League ("ADL") has pursued the objective set out in its charter "to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." ADL remains vitally interested in protecting the civil rights of all persons, and has previously filed numerous amicus curiae briefs in support of landmark federal civil rights laws. The League is responsible for developing legislation which responds specifically, through enhanced penalties, to bias-motivated criminal conduct, a law which was upheld as constitutional in Wisconsin v. Mitchell, 508 U.S. 476 (1993).

Ayuda, Inc. ("Ayuda")

Ayuda, Inc. is a non-profit tax exempt organization founded in 1971 which offers legal representation to indigent Spanish-speaking and foreign born residents of the District of Columbia. Since 1985, Ayuda has represented 98% of all Spanish-speaking victims of domestic violence in the District of Columbia who turn to the D.C. court for protection. Ayuda also serves as a national advocate for battered women with expertise in serving immigrant and refugee women and children and training judges, policy and health professionals on domestic violence.

Center for Women Policy Studies

The Center for Women Policy Studies, founded in 1972, is a national nonprofit, multiethnic and multicultural feminist policy research and advocacy institution. The Center addresses cutting-edge issues that have significant future implications for women. In 1991, the Center published Violence Against Women as Bias Motivated Hate Crime: Defining the Issues, which placed rape and battering in the context of bias motivated hate crimes, and contributed to the passage of 42 U.S.C. 1398(c). In 1992, the Center convened a National Think Tank on Civil Rights Remedies for Violence Against Women.

Connecticut Women's Education and Legal Fund, Inc.

The Connecticut Women's Education and Legal Fund, Inc. (CWEALF) is non-profit women's rights organization. Incorporated in 1973, CWEALF has over 1,400 members. The mission of organization is to work through legal and public policy strategies and community education to end sex discrimination in the state's education judicial, social service and employment systems. For nearly 25 years, CWEALF has provided legal information and referrals to women facing domestic violence. CWEALF has also worked collaboratively with state domestic violence programs to improve laws and policies regarding this issue.

Equal Rights Advocates

Equal Rights Advocates (ERA) is one of the oldest public interest law firms specializing in educational and litigation efforts to eliminate gender discrimination and secure equal rights. Begun in 1974 as a teaching law firm focused on sex-based discrimination, ERA has evolved into a legal organization with a multi-faceted approach to addressing women's issues. Its current work includes impact litigation, advice and counseling, public education, and public policy initiatives. ERA has been engaged in both educational and litigation efforts to eliminate gender-motivated violence. It has participated as counsel and amicus curiae in numerous cases in which women have been subjected to gender-motivated violence.

Jewish Women International

Jewish Women International (JWI) was founded in 1897 as B'nai B'rith Women by a group of Jewish women who sought to improve the quality of life for women in their communities. Now an organization of over 40,000 women in the United States and Canada, JWI continues to strengthen the lives of women and families through education, advocacy and action. JWI actively works to eliminate domestic violence and all violence against women and children. JWI published a *Resource Guide for Rabbis on Domestic Violence* (1996 latest edition) to educate and counsel the Jewish community about domestic and family violence. JWI coordinates and participates in conferences and events to raise the level of public awareness about the issues of domestic violence and has participated as amicus curiae in several cases in support of the rights of women who have been the victims of domestic violence. JWI supports the Violence Against Women Act II and believes that all women are entitled to seek redress under the VAWA Civil Rights Remedy.

National Coalition Against Domestic Violence

The National Coalition Against Domestic Violence (NCADV) was formed in 1978 to provide a national network of programs and state coalitions serving battered women and their children. NCADV provides technical assistance, public policy advocacy, community awareness campaigns, general information and referrals. NCADV was instrumental in the task force that successfully worked to pass the Violence Against Women Act. NCADV has also signed on an amicus curiae to numerous cases in support of the rights of women who have been victims of domestic violence, sexual assault and other gender-motivated violence.

National Partnership for Women & Families

The National Partnership for Women & Families is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, quality health care, and policies that help women and men meet the dual demands of work and family. Since its founding in 1971 as the Women's Legal Defense Fund, the National Partnership for Women

& Families has worked to advance the rights of women through participation in significant cases, including virtually every sex discrimination case that has come before the U.S. Supreme Court, and several cases concerning the constitutionality of the Violence Against Women Act, including Father Hartz v. Doe, 134 F.3d 1339 (8th Cir. 1998), Doe v. Doe, 929 F. Supp 608 (D. Conn., 1996), and Brzonkala v. Virginia Polytechnic, 132 F.3d 949 (4th Cir, 1997) *rehearing en banc granted, opinion vacated February 15, 1998.* The National Partnership also advocates for policies to ensure that victims of domestic violence have access to employment, health insurance, job training and education programs, public assistance, and child support services that can help the achieve financial security and escape abuse.

Northwest Women's Law Center

The Northwest Women's Law Center is a non-profit public interest organization dedicated to protecting the legal rights of women through litigation, education, legislation and the provision of legal information and referral services. Since its founding in 1978, the Law Center has worked actively on all fronts to protect and advance the legal rights of women and children throughout Washington and the Pacific Northwest. The Northwest Women's Law Center has worked on many fronts to eliminate violence against women. In particular, the Law Center was a leader in strengthening Washington's domestic violence laws and has assisted attorneys who have sought asylum for their clients under the VAWA. In addition, the Law Center represents victims of violence in civil rights lawsuits challenging police enforcement of domestic violence laws and the provision of interpreter services by cities and counties in Washington State for deaf victims of violence.

Ohio Domestic Violence Network

The Ohio Domestic Violence Network is a not-for-profit organization incorporated in the State of Ohio for the following purposes:

> ODVN is a membership organization of shelters, domestic violence programs, batterer intervention programs, legal advocacy programs, and other legal, social service or advocacy organizations providing services and advocacy to victims and perpetrators of domestic violence.
>
> ODVN provides training and technical assistance to domestic violence programs, the legal community, the medical community, the social service community and other interested parties on issues of domestic violence. ODYN operates a toll-free information and referral line that provides access to local domestic violence program hot-lines 24 hours a day.

The Ohio Domestic Violence Network submits this statement of interest to assist the NOW Legal Defense and Education Fund to represent it as *amicus curiae* in Culberson v. Doan pending before the United State District Court for the Southern District of Ohio.