Camille Turner

No. 99-01749

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

John C. YOUNG,

ANDREW D. SMITH,
GEORGE SHERMAN,
DOUGLAS JACKSON
&
DAVIS MILITARY INSTITUTE, Petitioners,

v.

Susan E. HARLAN, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTEENTH CIRCUIT

BRIEF FOR THE PETITIONERS

Counsel for Petitioners

#302

QUESTIONS PRESENTED

1. Does the Violence Against Women Act, 42 U.S.C. § 13981, constitute a valid legislative enactment under the Commerce Clause of the United States Constitution?

2. Does the Violence Against Women Act, 42 U.S.C. § 13981, constitute a valid exercise of congressional powers under Section 5 of the Fourteenth Amendment?

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STATEMENT OF THE CASE

Susan E. Harlan ("Harlan") was a sophomore attending Davis Military Institute ("DMI") in the fall of 1997. On the evening of November 17, 1997, Harlan attended a party held outside of Nevin Hall, a female dormitory located on the DMI campus. During the party, two male students attired in DMI athletic clothing approached Harlan. The two men violently assaulted Harlan after she admitted them to the restroom located inside the dormitory. Harlan later identified the two male students as John C. Young ("Young") and Andrew D. Smith ("Smith") and subsequently initiated a complaint against them under DMI's sexual assault policy. DMI's honor council dismissed Young from DMI but absolved Smith of all responsibility for the incident. Young appealed this verdict, but the Vice Commandant of DMI, George Sherman, upheld the honor council's decision.

Upon orders from the DMI Commandant, Douglas Jackson, the matter was reopened. The Vice Commandant conducted a new hearing, summarily reversed his previous decision, and reinstated Young's diploma. Harlan subsequently withdrew from DMI and enrolled in Davis University.

Respondent Harlan initiated this action against the Petitioners in the District Court for the Western District of Davis alleging, *inter alia*, violations of the Violence Against Women Act ("VAWA" or "the Act"), 42 U.S.C. § 13981. Petitioners

moved to dismiss the suit under Rule 12(b)(6) of the Federal Rules of Civil Procedure upon the grounds that the VAWA exceeded congressional powers for the enactment of the statute. Petitioners first argued in the District Court that the Act did not constitute a valid legislative enactment under the Commerce Clause of the Constitution.

Respondent Harlan maintained in her reply that because the VAWA addressed conduct that "substantially affects" interstate commerce, the Act was constitutionally permissible under the Commerce Clause.

Petitioners further argued in support of their motion to dismiss that the VAWA failed to constitute appropriate legislation to enforce the substantive guarantees of Section 5 of the Fourteenth Amendment, for the VAWA did not reach conduct attributable to state actors. Respondent Harlan replied that the reach of the VAWA did extend to cover actions of private individuals, for the legislative history of the Act indicated that the Act was promulgated to remedy deficiencies of state laws and deficiencies within state judicial systems.

The District Court granted Petitioners' motion to dismiss, finding that the VAWA exceeded congressional authority for the enactment of legislation under both the Commerce Clause and Section 5 of the Fourteenth Amendment.

The United States Court of Appeals for the Sixteenth Circuit reversed the decision of the District Court, finding the VAWA constitutional under both the Commerce Clause and Section 5 of the Fourteenth Amendment, and remanded the case to the District Court for further proceedings.

Petitioners filed a petition for a writ of certiorari, which this Court granted on August 16, 1999.

SUMMARY OF THE ARGUMENT

The VAWA does not constitute a valid legislative enactment under the Commerce Clause of the United States Constitution. In order for the VAWA to be upheld as constitutional, it must be shown to regulate an activity which "substantially affects" interstate commerce. The test by which an activity is judged to "substantially affect" interstate commerce was discussed by this Court in *United States v. Lopez*, 514 U.S. 549 (1995). As the differences between the statute at issue in *Lopez* and the VAWA are insignificant and the similarities are many, a reasonable adherence to the *Lopez* holding confirms that the VAWA is not a valid exercise of Congress' commerce power.

The VAWA also does not constitute a valid exercise of congressional powers under Section 5 of the Fourteenth Amendment. The VAWA's attempt to remedy discrimination by private individuals who commit gender-based violent crime is an illegitimate Fourteenth Amendment end, as state action is necessary to give rise to a valid equal protection concern. Furthermore, the VAWA does not remedy existing deficiencies in the state criminal justice system, the legitimate Fourteenth Amendment concern it purports to address.

ARGUMENT

I. THE VAWA DOES NOT CONSTITUTE A VALID LEGISLATIVE ENACTMENT UNDER THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The Commerce Clause of the Constitution delegates to Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. 1, § 8, cl. 3. This Court has identified three broad categories of activity that Congress may regulate under the commerce power: the use of the channels of interstate commerce, the protection of the instrumentalities of interstate commerce, and those activities that "substantially affect" interstate commerce. *See Perez v. United States*, 402 U.S. 146, 150 (1971); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276-77 (1981).

It is clear that the VAWA does not attempt to regulate the use of the channels of interstate commerce or to protect an instrumentality of interstate commerce, so if VAWA is to be sustained as a constitutional exercise of Congress' power, it must be shown to "substantially affect" interstate commerce.

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court discussed the requirements of the "substantial effects" test. The *Lopez* Court elaborated upon four factors to be considered by a reviewing court when making an independent inquiry into the propriety of Commerce Clause legislation: the nature of the

regulated activity, the existence of a jurisdictional element limiting the statute to activities occurring interstate, the existence of legislative history and findings, and the practical effect of upholding a broad delegation of the commerce power. *See id.* at 559-68.

A. **Gender-based violence is not an essential part of the regulation of economic activity.**

In *Lopez*, 514 U.S. at 560, this Court determined that the "economic nature" of the regulated activity was an important factor to consider in determining the constitutionality of the legislation at issue. This Court held that the activity regulated by § 922(q) of the Gun-Free School Zones Act of 1990 had "nothing to do with 'commerce' or any sort of economic enterprise," *id.* at 561, and was therefore distinguishable from those prior cases involving economic activity in which the constitutionality of the legislation under the Commerce Clause was upheld. *See Hodel*, 452 U.S. 264 (1981) (coal mining); *Perez*, 402 U.S. 146 (1971) (extortionate credit transactions); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (restaurants utilizing substantial interstate supplies); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (hotels catering to interstate guests); *Wickard v. Filburn*, 317 U.S. 111 (1942) (wheat production).

The language of the VAWA restricts the subject matter of the Act to "crime[s] of violence motivated by gender." 42 U.S.C. § 13981 (1994). Here, as in *Lopez*, the subject matter of the VAWA is neither commercial nor economic in nature. Thus following the holding in *Lopez*, the nature of the VAWA's regulated activity does not support the contention that the VAWA is a constitutional exercise of the commerce power.

B. The VAWA lacks a jurisdictional element permitting a case by case inquiry as to whether the act of violence in question affects interstate commerce.

Statutes in which Congress has placed a jurisdictional element restricting the reach of its regulatory power to those activities occurring interstate have been upheld by this Court as constitutional exercises of congressional power. *See United States v. Bass*, 404 U.S. 336 (1971) (interpreting 18 U.S.C. § 1202 (a) as requiring proof of an additional nexus to *interstate* commerce in order to convict a felon of receiving, possessing, or transporting a firearm in commerce); *Cleveland v. United States*, 329 U.S. 14 (1946) (making an offense of the *interstate* transportation of any woman or girl for the purpose of prostitution or any other immoral purpose).

It follows that where Congress *fails* to include an express jurisdictional element that restricts the scope of the statute

to interstate activity, the constitutionality of the statute will be questioned. *See Lopez*, 514 U.S. at 562.

In the case at hand, no express jurisdictional restriction limiting the reach of the VAWA to interstate activity appears in the text of the statute. Thus, as in *Lopez*, the lack of such a jurisdictional element supports the contention that the VAWA is not a constitutional exercise of the commerce power.

C. **Express congressional findings as to the effect of gender-based violence upon interstate commerce are not dispositive of the constitutionality of the VAWA.**

In *Lopez*, no congressional findings were before the Court connecting the activity at issue (i.e., possession of a firearm in a school zone) to a detrimental effect upon interstate commerce. *See* 514 U.S. at 563. In contrast, this Court has been provided with an extensive legislative history of the VAWA that describes the "substantial effect" that gender-based violence has upon interstate commerce. *See* H.R. Conf. Rep. No. 103-711, at 385-86 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853-54.

However, even if extensive legislative findings exist in support of the legislation in question, this Court has asserted that "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Lopez*, 514 U.S. at 557 n.2 (quoting

Hodel, 452 U.S. at 311 (Rehnquist, J., concurring)). This Court has further stated that "[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." *Id.* (quoting *Heart of Atlanta Motel*, 379 U.S. at 273 (Black, J., concurring)).

Therefore it is clear, based upon the Court's statements presented above, that the existence of extensive congressional findings in support of the "substantial effect" of gender-based violence upon interstate commerce is not dispositive of the constitutionality of the VAWA. Here, as in *Lopez*, the Court is vested with complete discretion in determining the scope of regulatory power extended to Congress under the Commerce Clause, and the Court is free to discount congressional findings in support of the VAWA.

D. **Permitting the VAWA to stand as a constitutional exercise of the commerce power inappropriately shifts the balance of governmental power away from the states.**

This Court noted the importance of the division of authority between the Federal and state governments mandated by the U.S. Constitution in *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (remarking that "a healthy balance of power between the States and the Federal Government will reduce the risk of

tyranny and abuse from either front"). With respect to the relationship of this balance of state and Federal powers to the Commerce Clause, this Court has stated that the commerce power:

> must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so direct and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).

The *Lopez* Court determined that the extension of the commerce power to regulate the possession of firearms in school zones would have the practical effect of tipping this mandated balance of power toward the side of Federal Government. To that end, the *Lopez* Court stated, "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." 514 U.S. at 567.

Similarly, upholding the constitutionality of the VAWA would have the practical effect of tipping the balance of Federal and state governmental power away from the states. Both activities (i.e., possession of a firearm in a school zone and gender-based violence) are sufficiently remote from interstate commerce to permit this Court to adhere to the holding in *Lopez*

and refuse to "pile inference upon inference" in order to hold the legislation constitutional.

II. THE VAWA DOES NOT CONSTITUTE A VALID EXERCISE OF CONGRESSIONAL POWERS UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

The Fourteenth Amendment states in part that "[n]o State shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Fourteenth Amendment further states that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. In the past Section 5 has been viewed as "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

However, this Court has placed limitations upon the powers granted to Congress under Section 5. This Court has consistently held that "[i]t is a commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under the color of its authority." *United States v. Guest*, 383 U.S. 745, 755 (1966). Furthermore, this Court has determined that Congress' act must remedy a legitimate Fourteenth Amendment concern before

the legislation will be sustained as a constitutional exercise of congressional power. *Morgan*, 384 U.S. at 652-53. The importance of necessary limitations placed upon Congress' power to legislate under the Fourteenth Amendment were reaffirmed recently by this Court in *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803)): "[i]f Congress could define its own power by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'"

A. **A private individual criminal's conduct lacks sufficient contacts to state action to give rise to a legitimate equal protection concern.**

This Court has held that some state involvement in the invasion of equal protection rights is required for Congress to invoke Section 5 of the Fourteenth Amendment. *See NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988) (stating that "as a general matter, the protections of the Fourteenth Amendment do not extend to private conduct abridging individual rights"); *see also Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (stating that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful"); *The Civil Rights Cases*, 109 U.S. 3, 11 (1883) (stating that an "individual invasion of individual rights is not the subject matter of the Fourteenth Amendment").

Here, the behaviors which the VAWA addresses (i.e., gender-based crimes of violence) are purely private acts of individual criminals. The language of the VAWA indicates that "[a]ll *persons*...who commit[] a crime of violence motivated by gender and thus deprive[] another of the right declared in subsection (b) of this section shall be liable to the party injured...." 42 U.S.C. § 13981 (c) (1994) (emphasis added). No express references to state action or actors are contained within the text of the VAWA. Furthermore, according to Davis Penal Code § 508.090, private individuals who commit violent crimes of this nature are acting contrary to Davis state law and are subject to criminal sanctions. This Court held that if an act is unlawful, then it cannot be ascribed to any governmental decision. *See Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 940 (1982). Therefore, as the scope of the VAWA does not extend to cover either direct or indirect state action, it is clear that the VAWA does not constitute a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment.

However, some authority indicates that Congress may, through legislation under Fourteenth Amendment authority, address purely private conduct. This Court has stated, with respect to congressional legislation under Section 5 of the Fourteenth Amendment, "[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are

appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Morgan*, 384 U.S. at 650 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).

Although this sweeping statement suggests that the scope of the Fourteenth Amendment may extend to encompass private conduct, the applicability of the *Morgan* holding to the case at hand is limited. In *Morgan*, Congress enacted the legislation at issue to combat state action that was causing a denial of equal protection, and thus the holding of that case is limited to those situations involving state action. The *Morgan* holding does not permit Congress, as it did in this case, to enact legislation against purely private actions causing a denial of individual equal protection rights.

B. **The VAWA provides no remedy for the state criminal justice system's deficiencies.**

The legislative history of the VAWA indicates that:

> State and Federal criminal laws do not adequately provide victims of gender-motivated crimes the opportunity to vindicate their interests; existing bias and discrimination in the criminal justice system often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled.

H.R. Conf. Rep. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1895.

One of Congress' purposes in drafting the VAWA was to address these perceived shortcomings. The remedy of these deficiencies in state criminal justice systems may indeed be categorized as a legitimate Fourteenth Amendment end, and this Court has upheld congressional legislation under Section 5 of the Fourteenth Amendment when Congress' act would remedy the legitimate equal protection concern. *See Morgan*, 384 U.S. at 652-53. *Morgan* can be distinguished from the case at hand, however, in that the Court found that the congressional legislation at issue would *in fact* remedy the legitimate equal protection concern.

Such is not the case here, for the VAWA provides no remedies for the deficiencies that Congress purports to correct. The VAWA provides a victim of gender-based violence with a cause of action against the attacker. The victim may recover, *inter alia*, actual damages sustained as well as punitive damages. The VAWA does not provide a victim with a cause of action against the state. The victim can neither stop the denial of equal protection rights through injunctive relief nor recover damages for injury sustained as a result of the denial of equal protection.

Thus it is clear that the VAWA does nothing to further the legitimate Fourteenth Amendment ends to which Congress alluded in the legislative history of the VAWA. The VAWA is not directed at remedying the conduct of the Fourteenth Amendment

violator, the state, and therefore cannot be held as a constitutional exercise of congressional power under Section 5 of the Fourteenth Amendment.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request this Court to reverse the ruling of the Sixteenth Circuit Court of Appeals and declare that the VAWA exceeds congressional authority for the enactment of legislation under both the Commerce Clause and Section 5 of the Fourteenth Amendment.

Respectfully submitted,

Counsel for Petitioners #302

September 1999