Kent Bisson

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 RESPONDENT

Counsel for Respondent

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September 1999

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 to the United States Constitution?

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STATEMENT OF THE CASE

Senator Joseph R. Biden has characterized the epidemic of gender-based violence as a "national tragedy" that is "played out everyday in the lives of American women." Although the statistics on such crime are horrifying, the situation is even more alarming than statistics indicate due to the reluctance of many women to report such crimes. There appear to be several causes for this reluctance, not the least of which is apparent gender bias in state law enforcement and judicial systems. Only recently has Congress recognized the severity of the problem and taken action.

After four years of hearings in which large amounts of evidence were produced concerning the effects of gender-based violence, Congress passed the Violence Against Women Act of 1994 (VAWA) in September 1994. *See* 42 U.S.C. § 13981 (1994). The statute was designed to address "the escalating problem of violent crime against women." S. Rep. No. 103-138, at 37(1993). Congress based its authority to enact the VAWA on "section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution." 42 U.S.C. § 13981(a). The VAWA provides for a cause of action against a person "who commits a crime of violence motivated by gender" and provides that such person "shall be liable to the party injured,

in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief . . .." 42 U.S.C. § 13981(c).

Respondent Harlan, while a student at the Davis Military Institute (DMI) in 1997, was violently attacked by DMI soccer player John C. Young while his DMI soccer teammate Andrew D. Smith stood by with a knife and blocked Harlan's path when she attempted to escape. Both Smith and Young threatened to rape Harlan if she did not learn her "place" and Young told Harlan that he was "going to show all women at DMI who was in charge" and that "it's time DMI women learned their place." Left bound and bleeding on the floor, Harlan sought medical treatment from the DMI infirmary, but was told that she should not seek further medical treatment elsewhere nor should she report the attack to the police.

Harlan filed a complaint under the DMI Sexual Assault Policy and later learned that Young stated, apparently referring to Harlan, that he should "have gutted that stupid woman when I had the chance" and had further stated that he "had finally gotten even with the women at DMI" and "women don't belong here and we'll show those bitches their place."

Harlan brought a suit against Young, Smith, DMI, and two school officials in the District Court for the Western District of Davis under the VAWA, asserting that DMI knew of the attacks,

but did not punish the violent offenders and allowed a hostile environment to exist at DMI. While the District Court determined that Harlan had an adequate claim under the VAWA, it dismissed the case, claiming that the VAWA exceeded congressional powers for the enactment of statutes, particularly the Commerce Clause and Section 5 of the Fourteenth Amendment.

The United States Court of Appeals for the Sixteenth Circuit agreed with the District Court that Harlan had an adequate claim under the VAWA in regard to Young, but reversed and remanded the case to the District Court for further proceedings, affirming that the enactment of the VAWA was supported by both the Commerce Clause and the Fourteenth Amendment.

Petitioner Young filed a petition for a writ of certiorari, which this court granted on August 16, 1999.

SUMMARY OF THE ARGUMENT

Congress acted within its authority in enacting the VAWA in accordance with both the Commerce Clause and Section 5 of the Fourteenth Amendment. Using "rational basis" criteria, Congress reasonably concluded that gender-based crime substantially affects interstate commerce. In invalidating the statute, the District Court erred in concluding that a statute must regulate economic activity to be constitutional under the Commerce Clause. Prior to enacting the VAWA, Congress held four years of hearings, which included testimonial, statistical, and documentary evidence as to the effects of violence against women on interstate commerce. Congress thus used a "rational basis" in enacting the VAWA.

The VAWA constitutes a valid exercise of congressional powers under Section 5 of the Fourteenth Amendment to the United States Constitution. Congressional enactments are entitled to a "strong presumption of validity and constitutionality." Even an appearance of partiality by State officials is sufficient for Congress to use its Fourteenth Amendment powers. The VAWA is a civil rights statute intended to correct the problem of gender bias prevalent in state judicial and law enforcement systems, and as such falls under Section 5 of the Fourteenth Amendment.

ARGUMENT

I. THE VIOLENCE AGAINST WOMEN ACT, 42 U.S.C. § 13981, CONSTITUTES A VALID LEGISLATIVE ENACTMENT UNDER THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

A. "A RATIONAL BASIS EXISTS FOR CONCLUDING THAT" CRIMES MOTIVATED BY GENDER SUBSTANTIALLY AFFECT INTERSTATE COMMERCE.

This Court recently reiterated its long held belief that there are "three broad categories of activity that Congress may regulate" under the Commerce Clause, one of which is "those activities having a substantial relation to interstate commerce . . .." *United States v. Lopez*, 514 U.S. 549, 558 (1995). While *Lopez* has been cited in support of a limitation of the Commerce Clause to regulating economic activity, in fact the Court stated that "to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question affected interstate commerce . . . they are lacking here." *Id.* at 563. Unlike the statute at issue in *Lopez*, in which Congress failed to include findings regarding the effects of the activity being regulated (firearms possession in school zones), enactment of the VAWA was preceded by four years of hearings relating to the effects of gender-based violence, including economic effects. In the statute at issue in *Lopez*, however, the Government argued "that Congress has accumulated institutional expertise regarding the regulation of firearms through previous enactments." *Id.* at 563. The Court

found that the findings pertaining to previous enactments were unrelated to the statute at issue and thus could not be used to justify the Gun Free School Zones Act (GFSZA). *Id.* at 563. Considering the volume of evidence presented to Congress supporting enactment of the VAWA, it cannot be compared to the GFSZA in *Lopez*.

The failure of States to protect women from gender-based violence makes women less likely to travel and reluctant to take jobs in which their safety is less assured, triggering the power of Congress to use the Commerce Clause to correct the problem. This Court has held that purely local activities affecting travel can be regulated. *See Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). The Court reasoned that discrimination against blacks caused them to have problems finding accommodations while traveling, hence restricting their right to travel. The *Heart of Atlanta* Court held that Congress has the power to regulate the "local incidents" of interstate commerce "which might have a substantial and harmful effect upon that commerce" and that "if [Congress] had such a [reasonable] basis" that the motel "has no 'right' to select its guests as it sees fit, free from government regulation." *Id.* at 258, 259. At the same time that *Heart of Atlanta* was decided, the Court also heard the case of *Katzenbach v. McClung*, 379 U.S. 294 (1964), which involved discrimination against blacks in

restaurants. One of the arguments this Court used to justify Congress's power to ban such discriminatory practices was that the limited choices of places available at which blacks were allowed to eat "obviously discourages travel and obstructs interstate commerce for one can hardly travel without eating." *Id.* at 300. If the failure of motels and restaurants to accommodate blacks, which discouraged the travel of blacks, is sufficient ground for Congress to invoke the Commerce Clause, it is logical that the epidemic of violence inhibiting the travel and occupational mobility of women would also justify Congressional action on the same basis.

There can be little doubt that large numbers of workers losing their jobs in the wake of being the victims of gender-based crime is a cause of strife among women, ultimately affecting interstate commerce. In *National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1936), the NLRB ordered an employer to reinstate workers who were fired because of their union efforts. The Court ruled that Congress acted within its authority under the Commerce Clause because a "[r]efusal to confer and negotiate has been one of the most prolific causes of strife" affecting interstate commerce. *Id.* at 42. During the hearings that preceded the passage of the VAWA, Congress was confronted with studies showing that "almost 50% of rape victims lose their jobs or are forced to quit in the

aftermath of the crime." S. Rep. No. 103-138, at 54 (1993). Having little recourse against their assailants - along with the prospect of losing their jobs - is certainly "one of the most prolific causes of strife" for American women enduring this tide of gender-based violence.

B. A STATUTE DOES NOT HAVE TO REGULATE ECONOMIC ACTIVITY TO BE CONSTITUTIONAL UNDER THE COMMERCE CLAUSE.

While gender-based violence may not directly affect commerce, the effects of the crime have a tremendous indirect effect, as the hearings before Congress demonstrated. The limits of the Commerce Clause were probably reached in *Wickard v. Filburn*, 317 U.S. 111 (1942), in which the Court ruled that even wheat consumed on the farm where it was raised was subject to the agricultural quotas set by the Secretary of Agriculture under the Agriculture Adjustment Act of 1938. The *Wickard* Court established the "cumulative effect" principle, which stated that even non-commercial acts that indirectly affect commerce can be regulated by Congress. The court in *Doe v. Doe*, 929 F. Supp. 608 (D. Conn. 1996), while reviewing the constitutionality of the VAWA, concluded that "the statistical, medical, and economic data before the Congress adequately demonstrate the rational basis for the findings that gender-based violence has a substantial effect on interstate commerce." *Id.* at 615. *United States v. Lopez*, 514 U.S. 549 (1995), has been interpreted by

many as a ban on Congressional regulation of non-commercial activity, but the decision appears to have actually been based on the fact that the Court could not determine, by "evaluat[ing] the legislative judgment that the activity in question substantially affected interstate commerce." *United States v. Lopez*, 514 U.S. 549, 563 (1995). While *Lopez* dealt with an assumption, without supporting evidence, that possession of a firearm near a school increases the likelihood of violent crime, the VAWA deals with heinous crimes actually committed because of the victim's gender, which have been shown to have a major impact on the economy and interstate commerce.

There have been a series of challenges to the constitutionality of the Freedom of Access to Clinic Entrances Act (FACE). In many of these cases, those challenging FACE have asserted that Congress may not regulate non-commercial intrastate activities under its Commerce Clause power. In only one of these cases, *United States v. Wilson*, 880 F. Supp. 621 (E.D. Wis. 1995), did the court hold that FACE is not within Congress's commerce power. However, the District Court's holding in *Wilson* was reversed by the Seventh Circuit, which explained that "[t]here is no authority for the proposition that Congress's power extends only to the regulation of commercial entities." *United States v. Wilson*, 73 F.3d 675, 684 (7th Cir. 1995). This assertion concerning the Commerce Clause was echoed

by the Eighth and Eleventh Circuits in *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996) and *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1996), both cases also addressing he constitutionality of FACE under the Commerce Clause. It should be noted that FACE goes much farther than VAWA in regulatory power in that it provides for criminal penalties, in addition to the civil penalties provided for in the VAWA. *American Life League v. Reno*, 47 F.3d 642, 647 (4th Cir. 1995). The District Court of Connecticut pointed out that not only had FACE been upheld by the courts as constitutional under the Commerce Clause, but also legislation regulating activities with a questionable connection to commerce such as "carjacking, failure to pay child support, possession of a firearm by a felon, intrastate possession and/or sale of narcotics, . . ., and the Beef Promotion and Research Act of 1985." *Doe v. Doe*, 929 F. Supp. 608, 615 (D. Conn. 1996). Just as the prospect of facing hostile and possibly violent protesters at an abortion clinic tends to discourage women from crossing state lines to exercise their birth control options, the prospect of being a victim of gender-based violence creates a climate of fear, which discourages many women from undertaking interstate travel and accepting jobs involving interstate travel. These consequences of gender-based violence underscore the need for, and ensure the constitutionality of, the VAWA.

C. CONGRESS ACTED WITHIN REASONABLE LIMITS IN ENACTING THE VIOLENCE AGAINST WOMEN ACT.

This Court has generally given deference to Congress when it acted within reasonable limits in pursuit of legitimate goals. *See United States v. Darby*, 312 U.S. 100 (1940) The power of Congress to "punish offenses against the property rights of State banks" was questioned in *Westfall v. United States*, 274 U.S. 256, 258 (1927). In response, this Court answered that the U.S. is interested "in the solvency of and financial condition of [Federal Reserve] members" and that it "may punish acts injurious to the System." *Id.* at 258. In *Darby*, 312 U.S. 100, the Court stated that Congress "may choose the means reasonably adapted to the attainment of the permitted end, even though they involve the regulation of intrastate activities." *Id.* at 120. The end to be attained in *Darby* was preventing the employment of workers at substandard conditions and the means of achieving it was wage and hour regulations under the Fair Labor Standards Act. Surely, allowing victims of gender-based violence to sue their assailants is a means "reasonably adapted" to achieve what must certainly be "permitted end[s]," reduction of such crimes and compensation of victims.

II. THE VIOLENCE AGAINST WOMEN ACT, 42 U.S.C. § 13981, CONSTITUTES A VALID EXERCISE OF CONGRESSIONAL POWERS UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. EVERY ACT OF CONGRESS IS ENTITLED TO A "STRONG PRESUMPTION OF VALIDITY AND CONSTITUTIONALITY."

It is difficult to conceive of a more deeply vexing problem than the pervasiveness of gender-based violence and the failure of the States to adequately deal with it. It has been the practice of this Court to defer to the wisdom of Congress in addressing such problems. Justice Stevens, in his concurrence in *Bowsher v. Synar*, 478 U.S. 714 (1985) reiterated the long-standing wisdom of the Court concerning decisions of constitutionality of Congressional enactments:

> "When this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should do so only for the most compelling reasons." *Id.* at 736 (Stevens, J., concurring).

Justice Thomas, in *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993), stated that "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." Instead of "rational speculation unsupported by evidence or empirical data," Congress was presented with four years of evidence and empirical data to support passage of the legislation. Even Chief Justice Marshall felt that the Court should strike down a law as beyond the powers of Congress only where it was obvious

that no constitutionally-specified object was being pursued. *See McCulloch v. Maryland*, 17 U.S. 316, 323 (1819).

This Court should not strike down the VAWA unless it is clearly concluded that there is a "compelling reason" for such action, which has yet to be presented to this Court.

B. THE INVOLVEMENT OF THE STATE NEED NEITHER BE EXCLUSIVE OR DIRECT IN ORDER TO CREATE RIGHTS UNDER THE EQUAL PROTECTION CLAUSE.

There is ample evidence that the disproportionate amount of gender-based violence directed at women reflects failures of the states in their executive and judicial functions to protect the rights of women. *See, e.g.*, S. Rep. No. 102-197, at 43-44 (1991); S. Rep. No. 103-138, at 49-50 (1993). The Supreme Court stated in *United States v. Guest*, 383 U.S. 745, 755 (1965):

> "that the involvement of the State need [not] be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation."

Guest dealt with individuals conspiring to deny blacks the use of state facilities by making false reports leading to their arrest and the Court found that the arrests constituted state action in denying the victims of the conspiracy their civil rights. *Id.* At 756. The action of the state justice system in *Guest* is similar to the tacit (and sometimes active) cooperation

of the States in allowing many perpetrators of gender-based violence to go unpunished. While the VAWA allows action only against individuals directly responsible for violent attacks, the failure of the States to protect women from gender-based violence is definitely "one of several co-operative forces leading to the constitutional violation" of women's civil rights.

Present case, in which a representative of the State of Davis, the Vice Commandant of DMI, imposed no punishment on the perpetrators of a violent assault, and the DMI medical staff discouraged reporting the incident to the police, demonstrates that crimes against women are often not taken seriously by those responsible for enforcing the law - in this case representatives of a state supported educational institution. *Harlan v. Young*, No. 99-1819M, slip op. at 1 (16th Cir. 1999). Harlan's fear of reprisals for reporting her attackers caused her to forfeit her full academic scholarship by transferring to another school. *Id.* at 3. While a causal connection can never be proven, it is believable that the trauma endured by Harlan caused her to lose her position as first in her class at Davis Military Institute, which could affect her ability to secure desired employment or admission to graduate or professional schools of her choice. *Id.* at 1-2. The change in Harlan's financial status occasioned by her loss of the scholarship will leave her in a more

precarious financial position, further restricting her choices concerning further schooling and careers upon undergraduate graduation. While giving victims of such violence a cause of action against their assailants is not a perfect solution to the problem of lax enforcement by state officials, it is certainly an improvement over victims having no recourse in the event that justice is not done by State officials, who have been too often shown to be a part of the problem of, rather than a solution to, gender-based violence.

C. THIS COURT HAS RECOGNIZED THE NECESSITY OF USING STRONG REMEDIAL AND PREVENTIVE MEASURES TO RESPOND TO DISCRIMINATION.

There have been attempts to associate present case with the issues in *City of Boerne v. Flores*, 521 U.S. 507 (1997), in which the Religious Freedom Restoration Act (RFRA) was ruled unconstitutional because it gave Congress the power to alter "the Fourteenth Amendment's meaning. ..." *Id.* at 529. In distinguishing *Boerne* from *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), Justice Kennedy pointed out that the Voting Rights Act was passed in response to pervasive discrimination against blacks in voting registration, while there is no evidence of similar religious bigotry necessitating passage of the RFRA. *Boerne*, 521 U.S. at 530. In contrast to addressing a recognized and well defined problem, as the VAWA does, the RFRA's "sweeping coverage ensures its intrusion at every level

of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." The VAWA, on the other hand, neither displaces nor calls into question any state law. The Court argued that the RFRA represented an expansion of the scope of the Fourteenth Amendment and that "[i]f Congress could define its own powers by altering the Fourteenth Amendment's meaning" the Constitution would be subject to change at the will of Congress without "the difficult and detailed amendment process contained in Article V." *Boerne*, 521 U.S. at 529. Rather than allowing Congress to question any state law, the VAWA merely gives victims of gender-based violence a federal cause of action against assailants.

D. THE APPEARANCE OF PARTIALITY BY STATE OFFICIALS IS ENOUGH TO TRIGGER FOURTEENTH AMENDMENT ACTION BY THE FEDERAL GOVERNMENT.

Women often face bias in the "traditional State law sources of protection." S. Rep. No. 103-138, at 49 (1993). Further:

> "Study after study has concluded that crimes disproportionately affecting women are often treated less seriously than crimes affecting men. Collectively, these reports provide overwhelming evidence that gender bias permeates the court system and that women are most often its victims." *Id.* at 49.

The case of *Yick Wo v. Hopkins*, 118 U.S. 356 (1885), involved San Francisco officials selectively enforcing codes concerning operation of laundries in a way that favored Caucasians and discriminated against Chinese citizens. Regarding the ordinance

by which the Chinese laundries were discriminated against, this Court held that:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Id.* at 373,374.

While the Fourteenth Amendment is closely identified with race discrimination, as in *Yick Wo*, this Court has also used it to invalidate gender-based distinctions not "substantially related to" achievement of governmental objectives. *Kirchberg v. Feenstra*, 609 F.2d 727, (5th Cir. 1979). State alimony statutes favoring women have been found to violate equal protection of the Fourteenth Amendment. *See Orr v. Orr*, 440 U.S. 268 (1979). Statutes and ordinances drawing gender distinctions in the regulation of drinking alcohol have been struck down on the same grounds. *See Craig v. Boren*, 429 U.S. 190 (1976).

Discriminatory attitudes against women often frustrate their claims in State criminal courts. *See* H.R. Rep. No. 103-711 at 385-386 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1854; S. Rep. No. 103-138 at 41-42, 49 (1993); S. Rep. No. 102-197 at 43-48 (1991); S. Rep. No. 101-545 at 42 (1990). The VAWA permits victims themselves, rather than biased and politically motivated state prosecutors, to assert claims. Evidence presented to Congress left no doubt that most, if not all

States, are guilty of harboring a long-standing systemic gender bias in their judicial and law enforcement systems. *See, e.g.*, S. Rep. No. 102-197,at 44-45 (1991). This bias includes 300 years of "legally sanctioned disbelief" of rape claims. *Id.* There are still four states retaining marital exemptions to laws prohibiting rape and a substantial number of states impose lesser penalties on those convicted of marital rape or impose higher legal standards for proving marital rape. Johanna R. Shargel, Note, *In Defense of the Civil Rights Remedy of the Violence Against Women Act*, 106 Yale L.J. 1849, 1872 n. 124 (1997). Some states have higher legal standards for proving sexual assault against cohabitants and dating companions and still others have adopted the interspousal immunity doctrine, preventing battered women from suing their husbands to recover damages for medical expenses. *Id.* at 1872. This Court has upheld the rights of resident aliens to operate laundries and it will certainly recognize the importance of upholding the rights of our own citizens to be free from gender-based violence by upholding the constitutionality of the VAWA.

E. THE VIOLENCE AGAINST WOMEN ACT IS A CIVIL RIGHTS STATUTE AND NOT A CRIMINAL STATUTE AND DOES NOT DISPLACE STATE CRIMINAL LAW.

Gender-motivated crimes of violence undermine the equal protection guarantees of women and are a violation of their civil rights. Just as federal intervention was required to

guarantee equal protection to blacks in the 1960's, so Congress recognized the necessity of acting to protect women against bias in State law enforcement and judicial systems by providing victims of gender-motivated violence a civil remedy to combat the epidemic of violence and State endorsed discrimination to which they are subjected. *See, e.g.* S. Rep. No. 102-197, at 43-44 (1991); S. Rep. No. 103-138, at 49-50 (1993). Significantly, the VAWA, by offering a civil rather than criminal remedy, achieves its goals without usurping any existing state criminal codes or initiatives, preserving federalism. The civil rights provision of the VAWA is clearly appropriate for providing women with much needed Fourteenth Amendment protection, and in that respect, is a legitimate exercise of Congress' Equal Protection power.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests this Court to affirm the ruling of the Sixteenth Circuit Court of Appeals and declare the Violence Against Women Act constitutional.

Respectfully submitted,

Counsel for Respondent

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