IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FATHER GERALD HARTZ, Appellants, v. JANE DOE, Appellee.	No. 97-3086
BISHOP LAWRENCE SOENS, ST. LAWRENCE CHURCH, and ROMAN CATHOLIC DIOCESE OF SIOUX CITY, IOWA, Appellants, v. JANE DOE, Appellee.	No. 97-3087

BRIEF OF AMICI CURIAE

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PRELIMINARY STATEMENT

This case involves a church congregation member's suit for damages resulting from sexual assault and civil rights violations by the defendant, her priest. She has sought relief under the Civil Rights Remedy of the Violence Against Women Act, 42 U.S.C. § 13981 (1996) (the "Civil Rights Remedy"), and has asserted claims of assault, battery, and intentional and negligent infliction of emotional distress under state law. This brief on behalf of amici curiae [1/] is in response to the defendants' challenge to her claims under the Civil Rights Remedy and addresses the constitutionality of that law and the standard for proving "gender-motivation" in a Civil Rights Remedy claim.

Congress passed the Civil Rights Remedy after a series of hearings held over four years that starkly documented the impact of violence against women on our national economy and how such violence keeps women from certain kinds of work, undermines workplace safety, decreases productivity, increases health care costs, and reduces consumer spending. As a law that seeks to deter gender-based violence and remedy states' failure to adequately respond to such violence, the Civil Rights Remedy, properly passed pursuant to both the Commerce Clause and Section Five of the Fourteenth Amendment, extends our country's long and vital tradition of civil rights laws that redress the impact of discrimination on our country's businesses and commercial networks and advances our collective commitment to equality.

QUESTIONS PRESENTED

Whether 42 U.S.C. §13981 is a proper exercise of Congress's authority under the Commerce Clause and Section Five of the Fourteenth Amendment?

[1/] Descriptions of each of the amici organizations are listed in the Appendix, which is attached at the end of this brief.

Whether the district court employed the proper standard for establishing "gender motivation and "gender animus" under 42 U.S.C. §13981?

STATEMENT OF FACTS

Amici adopt Plaintiff's statement of facts.

ARGUMENT

I. CONGRESS PROPERLY EXERCISED ITS AUTHORITY UNDER THE COMMERCE CLAUSE TO ENACT THE CIVIL RIGHTS REMEDY BECAUSE GENDER-BASED VIOLENCE HAS A SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE.

As four of the five courts to address the issue to date, including the court below, have recognized, Congress properly enacted the Civil Rights Remedy under its Commerce Clause powers because it rationally concluded that gender-based violence against women had a substantial effect on interstate commerce. See, Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997); Anisimov v. Lake, No. 97 C 263, 1997 U.S. Dist. LEXIS 12995 (N.D. Ill. Aug. 26, 1997); Seaton v. Seaton, 971 F. Supp. 1188 (D. Tenn. 1997); Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996).[2/]

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

The Supreme Court decision in United States v. Lopez, 514 U.S. 549 (1995),[3/] affirmed Congress' longstanding power to legislate under the Commerce Clause as long as Congress had a rational basis for concluding that the activity substantially affects interstate

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2/ The one case to reach a contrary conclusion is on appeal. Brzonkala v. Virginia Polytechnic, 935 F. Supp. 779 (W.D. Va. 1996), appeal docketed, Nos. 96-1814, 96-2316 (4th Cir. Sept. 30, 1996).

3/ 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.

commerce.[4/] Id., at 557 (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981)). By affirming that standard while declining to extend it, Lopez reinforces the vitality of the last half-century of Commerce Clause cases prohibiting public and private discrimination that substantially affect 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); see also, United States v. Gregory, 818 F.2d 1114, 1119 (4th Cir.) (extending Title VII to cover state officers found permissible under Commerce Clause), cert. denied, 484 U.S. 847 (1987); 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).

After Lopez, courts have upheld many federal statutes which criminalize a range of private and/or non-economic conduct, including:[5/]

- the Child Support Recovery Act, see, e.g., United States v. Hampshire, 95 F. 3d 999, 1003-04 (10th Cir. 1996), cert. denied, ___ U.S. ___, 117 S. Ct. 753 (1997); United States v. Mussari, 95 F. 3d 787, 790 (9th Cir. 1996), cert. denied, ___ U.S. ___, 117 S. Ct. 1567 (1997); U.S. v. Crawford, 1997 U.S. App. LEXIS 14992 (8th Cir. 1997); United States v. Sage, 92 F.3d 101, 107 (2d Cir. 1996), cert. denied, ___ U.S. ___, 117 S. Ct. 784 (1997); United States v. Nichols, 928 F. Supp. 302, 310 (S.D.N.Y. 1996), aff'd, 113 F.3d 1230 (2d Cir. 1997);

[4/] In reviewing and reaffirming earlier Commerce Clause precedents, the Lopez court divides 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 test, that gender-based violence substantially affects interstate commerce. While not discussed here, the Civil Rights Remedy also reflects Congress' power under the first and second tests.

[5/] 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).

- drug possession, trafficking, or manufacturing statutes, see, e.g., United States v. Rogers, 89 F.3d 1326 (7th Cir. 1996), cert. denied, ___ U.S. ___, 117 S. Ct. 495 (1996); United States v. Tucker, 90 F.3d 1135 (6th Cir. 1996); United States v. Leshuk, 65 F. 3d 1105, 1112 (4th Cir. 1995); United States v. Genao, 79 F.3d 1333, 1336-37 (2d Cir. 1996), (even when applied to purely personal use; United States v. Zorrilla, 93 F.3d 7 (1st Cir. 1996);

- the Hobbs Act, which criminalizes robbery and extortion; United States v. Bolton, 68 F.3d 396, 399 (10th Cir. 1995), cert. denied, ___ U.S. ___, 116 S. Ct. 966 (1996);

- laws banning possession or transfer of firearms, see, e.g., United States v. Wilks, 58 F.3d 1518, 1522 (10th Cir. 1995); U.S. v. Kocourek, No. 96-1963, 1997 U.S. App. LEXIS 13588 (8th Cir. 1997); U.S. v. Bates, 77 F.3d 1101 (8th Cir. 1996), cert. denied, 115 S. Ct. 215 (1996); U.S. v. Monteleone, 77 F.3d. 1086 (8th Cir. 1996);

- the federal carjacking law, see, e.g., United States v. Bishop, 66 F.3d 569, 580 (3d Cir.), cert. denied, ___ U.S. ___, 116 S. Ct. 681 (1995);

- laws banning conducting an illegal gambling operation, United States v. Wall, 92 F.3d 1444, 1452 (6th Cir. 1996), cert. denied, ___ U.S. ___, 117 S. Ct. 690 (1997).

Lopez supports legislation such as the Civil Rights Remedy because it 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). Lopez recognized that even wholly intrastate activity may be regulated. Id. at 555. In addition, Lopez poses no obstacle to Congress' regulation of actions by private individuals and other noncommercial entities, provided that their activity is sufficiently linked with interstate commerce to exert a substantial effect. See, Terry v. Reno, 101 F.3d 1412, 1416 (D.C. Cir. 1996); United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996); United States v. Soderna, 82 F.3d 1370, 1373-74 (7th Cir. 1996), cert. denied sub nom. Hatch v. United States, ___ U.S. ___, 117 S. Ct. 507 (1996); United v. Wilson, 73 F.3d 675, 685 (7th Cir. 1995); Bishop, 66 F.3d at 580; United States v. Scott, 919 F. Supp. 76, 79 (D.Conn. 1996). Because individual intrastate

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

B. The Court Should Defer To Congress' Rational Judgment To Address The Substantial Effect Of Gender-Based Violence On Interstate Commerce By Enacting The Civil Rights Remedy.

As Lopez and the court below points out, the legislative findings of Congress are particularly material to the Court in analyzing Congress' actions under the Commerce Clause. 514 U.S. at 562-63. The Anisimov, Seaton, Hartz and Doe courts properly credited four years of Congressional fact-finding which revealed the dramatic impact of gender-based violence on interstate commerce and showed that here, unlike in Lopez, a court "is not left to speculate or pile inference upon inference to perceive an explicit connection" between gender-based violence and interstate commerce. Anisimov, 1997 U.S. Dist. LEXIS 12995, at **17-23; Seaton, 971 F.Supp. at 1192-1194; Hartz, 970 F. Supp. at 1421; Doe, 929 F. Supp. at 610-11, 613-15 (internal quotations omitted).[6/]

In enacting the Remedy, Congress responded to the dramatic impact which gender-based violence has on women's free interstate movement and economic choices, including those involving education, employment, and travel. Crimes of Violence Motivated by

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[6/] The Brzonkala 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 distinguished "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) (in upholding Child Support Recovery Act, 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 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.

Gender: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary 5, 103d Cong., 1st Sess. (Nov. 16, 1993) ("1993 Crimes of Violence Hearing") (statement of Sally Goldfarb). Some of the dramatic effects documented in the legislative record are:

- 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).

- Nationally, violence against women costs employers between three to five billion dollars annually due to absenteeism. Women and Violence: Hearing Before the Senate Comm. on the Judiciary, 101st Cong., at 69 (1990) ("1990 Women and Violence Hearing") (statement of Helen Neuborne and Sally Goldfarb).[7/]

- 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.).[8/]

7/ 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 Review 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, 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.

8/ 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

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- Gender-based violence drains 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).

- Violence against women reduces consumer spending, which results in a decreased supply and demand for interstate products. 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").

- Women are deterred 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).

- Domestic violence compels women to flee from their home state, which increases 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. (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. (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).[9/]

[8/](...continued)

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 saw 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).

[9/] 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, Protecting Women's Welfare, supra n. 8, at 1146 ("For many abused women, the

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These substantial effects stand in marked contrast to the criminal conduct challenged in Lopez. There, the link to commerce was premised on the possibility that gun possession at school affected interstate commerce, because 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 term might adversely affect his or her contributions 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 effects on interstate businesses and commercial transactions.

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.[10/]

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

The Civil Rights Remedy also falls squarely within Congress' broad remedial powers under Section 5 of the Fourteenth Amendment ("Section 5") to pass laws that enforce equal protection rights as long as the "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,

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[9/](...continued)
only way to stop violence that continues after separation is to move a great distance away from the abuser").

[10/] 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 (1982); see also, United States v. Virginia, ___ U.S. ___, 116 S. Ct. 2264, 2274-75 (1996).

17 U.S. (4 Wheat.) 316 (1819)).[11/] Central to this power is the fundamental distinction between Section 1, which defines the scope of a direct constitutional violation, and Section 5, which grants Congress broad legislative power to enforce Section 1 by passing laws that redress conduct violative of civil rights, even if those acts, in and of themselves, do not violate the Constitution. For example, in Morgan, the Supreme Court upheld Congress' authority to ban literacy tests under the Voting Rights Act, even though a state could not be prohibited from adopting a literacy requirement for voting. Morgan, 384 U.S. at 648-49.[12/] In a more recent case, Boerne v. Flores, ___ U.S. ___, 117 S. Ct. 2157 (1997), the Supreme Court affirmed the Morgan framework and endorsed Congress' authority under Section 5 to remedy equal protection violations with laws that enforced Section 1. Given the absence of a legislative record justifying the need to prevent governmental laws from burdening the free exercise of religion, however, the Court found that Congress overstepped its authority in enacting the Religious Freedom Restoration Act. Id., at 2158 (1997).[13/] This

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11/ 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. Section 5 expressly authorizes Congress to "enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

12/ The nearly identical enabling clauses of the Thirteenth and Fifteenth Amendments further support the validity of the Morgan analysis. See, e.g., City of Rome v. United States, 446 U.S. 156, 177 (1980) (prohibiting electoral changes with discriminatory effect); Griffin v. Breckenridge, 403 U.S. 88, 104-5 (1971) (prohibiting race-based private conspiracies); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443-44 (1968) (prohibiting private racial discrimination); South Carolina v. Katzenbach, 383 U.S. 301, 325-27 (1996) (prohibiting literacy and other voting test and provisions).

13/ The Religious Freedom Restoration Act was intended to "to restore the compelling interest test," "to guarantee its application in all cases where free exercise of religion is substantially burdened," and "to provide a claim or defense to persons whose religious exercise is substantially burdened by the government." The Act applied to both "Federal and State law, ...the implementation of that law, whether stautory or otherwise, and whether adopted before or after [RFRA's enactment]. Boerne, 117 S.Ct. at 2162.

is in direct contrast to the legislative history of VAWA, which is replete with detailed findings documenting the failure of state criminal justice systems to remedy gender-based violence, a "classic" denial of equal protection that Congress acted to rectify. See, 1993 Senate Report at 55. The Boerne Court upheld Congress' power under Section 5 to reach conduct which violates equal protection rights as long as there is a "congruence" between the means used and the ends to be achieved. Boerne, at 2164. To hold otherwise would defeat the purpose of the enabling clause and limit Congress to replicating what the judiciary was already bound 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).

In addition, several modern Supreme Court cases uphold Congress' power under Section 5 to enact a remedial statute 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 U.S. v. Guest, 383 U.S. 745 (1966) and distinguishing the narrow scope of Section 1 from Congress' Section 5 powers. Carter, 409 U.S. at 423-24 & n.8. In Guest, six Justices of the Supreme Court specifically declared that Section 5 authorizes Congress to address private conduct. Guest, 383 U.S. at 762 (Clark, J., concurring, joined by Justices Black and Fortas) ("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.")[14/]; cf. Bellamy v. Mason's Stores, 508 F.2d 504, 507 (4th

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14/ The Supreme Court in Boerne also upheld the vitality of the Guest holding. Boerne, at 2166.

Cir. 1974) (recognizing Congress' authority to pass laws prohibiting private interference with citizens' equal protection rights).[15/]

B. Addressing Gender-Based Violence Which Denies Equal Protection To Women Through The Civil Rights Remedy Is A Legitimate End.

1. Gender-Based Violence Interferes With Women's Equal Protection Rights.

Congress rightly recognized that the destructive and debilitating effects of gender-motivated violence on its victims -- as well as the fear it inspires in all women -- undermines the guarantee 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). Congress compiled a voluminous record demonstrating the epidemic of violence against women. See, 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. Biden). By enacting the Civil Rights Remedy, Congress recognized that "[w]hen half the members of our society are at greater risk of

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15/ The lone case which 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 striking 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 perceived the statute was not "corrective legislation" that responded 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 Sections II B and C infra.

terror, brutality, serious injury and even death just because they are female, that is a form of discrimination." Crimes of Violence Motivated by Gender: Hearings on H.R. 113 Hearing Before the Subcomm. on Civil and Const. Rights of the House Comm. on the Judiciary, 103d Cong., 1st Sess. 5 (1993) (testimony of Sally Goldfarb) ("1993 Crimes of Violence Hearing").

2. The Civil Rights Remedy Addresses States' Failure to Address Gender-Based Violence.

Congress also sought through the Civil Rights Remedy to address the bias against gender-based crimes which persists notwithstanding formal legal reform. Congress cited study after study concluding that crimes disproportionately affecting women are treated less seriously than comparable crimes affecting men. See, e.g., 1993 Senate Report at 49.[16/] Police, prosecutors, juries and judges routinely subject female victims of rape and sexual assault, as well as domestic violence, to a wide range of unfair and degrading treatment which contributes to the low rates of reporting and conviction that characterize these crimes. See, e.g., 1993 Response to Rape at 2-6; accord, 1992 Violence Against Women Hearing at 75 (statement of Margaret Rosenbaum, Assistant State Attorney and Division Chief, Domestic Crimes Unit, Miami, Florida) (recognizing police officers' persistent failure 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 (statement of Marla Hanson).

16/ 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)).

gender." Hartz at 58 (citing 42 U.S.C. § 13981(d)(1)). In so doing, the district court followed Congress' explicit directive to evaluate these elements much like they evaluate discriminatory motivation and animus in other civil rights cases -- specifically, Title VII and 42 U.S.C. §§ 1981 and 1985(3). See, 1991 Senate Report at 52; 1990 Senate Report at 51.[18/] Accordingly, the 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 manifestations which 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.

As the district court also noted, hostile environment sexual harassment cases litigated under Title VII are particularly instructive in evaluating the types of proof courts use in assessing whether acts were committed "because of or on the basis of gender," See, Hartz at 63, (citing Kinman v. Omaha Pub. Sch. Dist., 94 F. 3d 463, 467 (8th Cir. 1996) and Quick v. Donaldson Co., Inc., 90 F. 3d 1372, 1377 (8th Cir. 1996)); See also, Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986). These cases illustrate a range of acts that can serve as proof in establishing gender-based motivation:

- sexual assaults. See, e.g., Tomka v. Seiler Corp., 66 F.3d 1295, 1305 (2d Cir. 1995); Brock v. United States, 64 F.3d 1421, 1423 (9th 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);

- direct propositions for sexual favors. See, e.g., Meritor, 477 U.S. at 60; Barnes v. Costle, 561 F.2d 983, 985 (D.C. Cir. 1977);

[18/] Congress also directed courts to apply "generally accepted guidelines for identifying hate crimes" which look at factors such as language, severity of the attack, absence of another apparent motive, patterns of behavior, and common sense ("burning a cross on a lawn has bias implications"). 1993 Senate Report at 53 n.61 (citing Center for Women Policy Studies, Violence Against Women as Bias Motivated Hate Crime (1990).

- repeated lewd or sexually suggestive comments. See, e.g., Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1449-50 (7th Cir. 1994); EEOC v. Hacienda Hotel, 881 F.2d 1504, 1514-15 (9th Cir. 1989); 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, Inc., 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. 1989); Hall v. Gus Constr. Co., 842 F.2d 1010, 1012-14 (8th Cir. 1988);

- derogatory epithets or nicknames. See, e.g., Lipsett v. University of Puerto Rico, 864 F.2d 881, 905 (1st Cir. 1988); Hall, 842 F.2d at 1013-14; Steiner v. Showboat Operating Co., 25 F. 3d 1459 (9th Cir. 1994);

- display of pornographic pictures. See, e.g., Carr v. Allison Gas Turbine Div., 32 F. 3d 1007, 1009 (7th Cir. 1994); Andrews v. Philadelphia, 895 F. 2d 1469, 1474 (3d Cir. 1990);

- 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, 510 U.S. at 319 ("you're a woman, what do you know?") (citation omitted); Price Waterhouse v. Hopkins, 490 U.S. 228, 235-36, 250-51 (1989); Doe v. 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, 895 F.2d at 1482 n.3 (3rd Cir. 1990).

Cases litigated under 42 U.S.C. §1985(3) also provide a template for defining the contours of "gender-motivation." See, 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); [19] see also, Griffin v. Breckenridge, 403 U.S. 88, 103 (1971) (inferring an intent to discriminate on the basis of race from the nature of the violent attacks by a group of whites against a group of African-Americans and whites believed to be civil rights workers);[20] S. Rep. No.102-197 at 50 (proof of gender-motivation established in the same way establish proof of race or sex discrimination under other civil rights laws). Evidence similar to that used in sexual harassment cases has established gender and other types of bias-based motivation in §1985(3) cases. See, e.g. Libertad v. Welch, 53 F. 3d. 428, 449 (1st Cir. 1995); Lac Du Flambeau v. Stop Treaty Abuse, 843 F.Supp. 1284 (W.D. Wis. 1994, aff'd, 41 F.3d 1190 (7th Cir. 1994), cert. denied, 115 S. Ct. 1923 (1995); Usher v. City of Los Angeles, 828 F. 2d 556, 561 (9th Cir. 1987); Bullock v. Dioguardi, 847 F. Supp. 553, 566-67 (N.D. Ill. 1993). The same types of criteria are to be used when evaluating gender-motivation and gender animus in VAWA civil rights remedy claims.

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[19] The "animus" language reinforces Congress's goal of proscribing gender-based, rather than "random" acts of violence. See 42 U.S.C. § 13981(e)(1); see, e.g., 1991 Senate Report at 48. The legislative history indicates that Congress used the terms "animus," to mean "purpose" as in "an animating force" and used the words "animus," "purpose" and "motivation" interchangeably, dispelling any notion that disparate impact--i.e., proof that a violent act disproportionately affects women--alone would be sufficient to merit recovery. See, Nourse at 30.

[20] While Congress directed courts to look to §1985(3) in analyzing gender motivation under the Remedy, there is a significant difference between the VAWA civil rights remedy and §1985(3) in that no proof of "invidious" discrimination is required under the VAWA civil rights remedy. Cf. Griffin, 403 U.S. at 102. Rather, the VAWA civil rights remedy 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).

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision upholding the constitutionality of the Civil Rights Remedy as within Congress' powers under the Commerce Clause and Section 5 of the Fourteenth Amendment and permit the Plaintiff to proceed with her claims consistent with the evidentiary standards described above.

Dated: October 10, 1997

Respectfully submitted,

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APPENDIX

STATEMENTS OF INTEREST

NOW Legal Defense and Education Fund ("NOW LDEF")

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 of 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) (appeal pending) (Docket No. 96-1814, 4th Cir.), 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. 628 (D. Conn. 1996) and lead amicus in Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997) and 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.

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")

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.

Equal Rights Advocates ("ERA")

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.

Iowa Coalition Against Domestic Violence ("ICADV")

The Iowa Coalition Against Domestic Violence was founded to represent and serve the interests of domestic violence victims. ICADV is interested in this case because it believes in the right of battered women to a civil rights remedy for the harm they have experienced.

Iowa Coalition Against Sexual Assault ("Iowa CASA")

The Iowa Coalition Against Sexual Assault is comprised of all twenty-nine sexual assault crisis centers in Iowa. The coalition was founded in 1982 to represent the interests of survivors of sexual assault and provide assistance to the centers serving those survivors. Iowa's twenty-nine centers serve approximately 5,000 survivors of sexual assault annually. Iowa CASA is interested in this case because it believes in the right of sexual assault survivors to a civil rights remedy for the harm they have experienced.

Jewish Women International ("JWI")

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 50,000 women in the United States and Canada, JWI continues to strengthen the lives of women, children and families through education, advocacy and action. JWI actively works to eliminate domestic violence and all violence against women. Most recently, JWI produced the Resource Guide for Rabbis on Domestic Violence to educate and counsel the Jewish community about domestic and family violence. JWI supports the Violence Against Women Act and believes that all women are entitled to seek redress under the VAWA Civil Rights Remedy.

National Alliance of Sexual Assault Coalitions ("NASAC")

The National Alliance of Sexual Assault Coalitions ("NASAC"), organized in September 1995, is a national organization focusing on public policy and public education to

end sexual violence. NASAC has developed a comprehensive grassroots communications network of state coalitions from across the United States who have extensive state public policy experience. As such, NASAC effectively advocates for the needs, rights and concerns of victims of sexual assault.

National Coalition Against Domestic Violence ("NCADV")

The National Coalition Against Domestic Violence is the only grassroots national organization representing a network of over 2,000 local programs and state coalitions serving battered women and children. NCADV was formed in 1978 to provide technical assistance, community awareness campaigns, public policy at the national level, national conferences and regional trainings on domestic violence. NCADV was instrumental in the passage of the Violence Against Women Act and works to eliminate gender-motivated violence against women and children. NCADV has participated as amicus curiae in numerous cases in support of the rights of women who have been victims of domestic violence, sexual assault, sexual harassment and other gender-motivated violence.

National Network to End Domestic Violence ("NNEDV")

The National Network to End Domestic Violence ("NNEDV") is a non-profit organization incorporated in the District of Columbia in 1995. NNEDV is a membership organization of state domestic violence coalitions from across the country who represent over 2,000 shelters and programs for battered women and their children. The National Network is active in every arena of public policy as it relates to domestic violence. NNEDV was also instrumental in assisting, drafting and passing the Violence Against Women Act. In addition, NNEDV has testified before Congress and other agencies on issues affecting battered women and their children.

Northwest Women's Law Center ("Law Center")

The Northwest Women's Law Center has worked actively on all fronts to protect and advance the legal rights of women and children throughout Washington, the Pacific Northwest and the nation in general. In particular, the Law Center was a leader in strengthening Washington state'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.

Women's Law Project ("WLP")

The Women's Law Project ("WLP") is a Philadelphia-based non-profit public interest legal center dedicated to improving the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. Since its founding in 1974, the Law Project has engaged in extensive activities challenging discrimination in employment, education, insurance, and in family matters relating to custody, support, domestic violence and divorce, including the elimination of gender based violence against women. The WLP has a strong interest in the availability of federal remedies under the Violence Against Women Act to stop the epidemic of violence against women in the forms of domestic violence, rape and sexual assault.

Women's Legal Defense Fund ("WLDF")

The Women's Legal Defense Fund ("WLDF"), founded in 1971, is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families.

CERTIFICATE OF SERVICE

I, Andrea B. Williams, an attorney admitted to practice, hereby declares, under penalty of perjury, that two (2) copies of the attached Brief of Amici Curiae, and the accompanying Certification of Service, were served by U.S. mail upon each of the attorneys listed below:

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Dated: 10/10/97

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