Nos. 99-5 and 99-29

In the Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*,
v.
ANTONIO J. MORRISON, ET AL., *Respondents*.

CHRISTY BRZONKALA, *Petitioner*,
v.
ANTONIO J. MORRISON, ET AL., *Respondents*.

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

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

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INTEREST OF AMICUS CURIAE[1]

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

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

to the family, marriage, children, education and employment; and to promote fair treatment in and access to the media for women of all vocations. Eagle Forum ELDF believes that the family rights of women are best defended and strengthened by maintaining jurisdiction over family law at the state, rather than the federal, level.

SUMMARY OF ARGUMENT

As the Fourth Circuit correctly held, federal laws regulating non-economic activity under the Commerce Clause must contain a jurisdictional element to ensure a sufficient relationship between the activity and interstate commerce. *See Brzonkala* v. *Virginia Polytechnic Institute and State University*, 169 F.3d 820, 831 (CA4 1999) (en banc). Unlike federal laws regulating economic activity, regulation of non-economic activity may not be justified based on the activity's aggregate effect of commerce. Rather, it must be targeted at only those instances of non-economic activity having specific connection to interstate commerce. The private cause of action created by the Violence Against Women Act ("VAWA"), 42 U.S.C. § 13981, lacks such a jurisdictional element and regulates intrastate non-economic behavior without any specific connection to interstate commerce.

Eagle Forum ELDF specifically calls this Court's attention to § 13981's regulation of domestic violence that has no interstate element and that is wholly non-economic in nature. Any Commerce Clause justification that would allow federal regulation of this aspect of domestic relations would equally support federal regulation of every aspect of marriage, divorce, and family law. But family law is perhaps the quintessential example of a local concern beyond the reach of federal regulation under the Commerce Clause. In addition to the precedential implications for family law, § 13981 itself significantly interferes with state law by undermining balanced state remedies to the complex and intractable problem of violence within intimate and ongoing relationships. It is nei-

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

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

Again calling attention to the example of domestic violence, § 13981 penalizes purely private conduct that is not attributable to state actors and that is unrelated to private interference with state legal processes. It does not in any sense "enforce" a prohibition directed at the states. Rather, it seeks to ameliorate the second-degree consequences of alleged state discrimination by providing a separate and independent remedy for the prior non-state action. In this way, § 13981 merely bypasses the states rather than corrects them and offers up a "separate but equal" legal regime in competition with the supposedly flawed – and unaltered – state legal regime. But ameliorating the effects of discrimination through a separate law of domestic violence runs counter to both federalism and equal protection principles.

Furthermore, because the Fourteenth Amendment argument in support of § 13981 depends upon alleged state bias that has no identifiable effect on the incidence of violence against women, claims under the law can continue indefinitely even after the constitutional predicate of state discrimination has ended. To allow constitutionality to turn on factors unrelated to the elements of the statute would subject § 13981 to continuous constitutional challenge dependant upon the constantly changing content and administration of state law. Constitutionality in such a case could never be finally settled; a result that surely casts doubt on the validity of the underlying justification.

Finally, Eagle Forum ELDF rejects the claim of certain *amici* that congressional "Treaty Power," as it relates to the International Covenant on Civil and Political Rights (ICCPR), provides authority for § 13981. Like the Commerce Clause argument, this argument proves far too much, as it would amount to an unlimited delegation of power to the federal government. Exclusive state jurisdiction over marriage and domestic relations, which is at the core of our constitutional federalism, cannot be trumped by an international treaty never approved by the House of Representatives and the States themselves. Furthermore, Congress itself did not even cite this overstated power as a basis for VAWA, much less for § 13981.

ARGUMENT

I. The Commerce Clause Does Not Create Federal Authority over Intrastate Domestic Violence.

Federal regulation of non-economic activities under the Commerce Clause must include a jurisdictional element to the regulation itself, and may not be predicated on the aggregate social effects of local activity. *See Brzonkala,* 169 F.3d at 831-44. Section 13981's regulation of gender-based violence lacks any requirement that the violence have some connection to interstate commerce, and therefore would cover a wide range of non-economic intrastate activity. It thus exceeds the authority granted the federal government under the Commerce Clause.

Petitioners rely primarily on the claim that the aggregate social costs of gender-based violence affect productivity and ultimately commerce. *See* U.S. Br. at 17, 23-27; Brzonkala Br. at 10-13, 20, 28-29. But petitioners cannot cite a single case where this Court has applied such a theory to non-economic activity. Rather, the Court has consistently required a jurisdictional element for regulation of such activity.

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

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

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

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

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

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

this Court rejected the argument that Congress could regulate social activities merely if they are related to the economic productivity of its citizenry. This Court found the "productivity" argument to be unacceptable, in part because it could justify federal regulation of "family law (including marriage, divorce, and child custody)." 514 U.S. at 564.

Section 13981, however, attempts to do precisely that: regulate domestic violence, which is an area central to family law. Like the statute invalidated in *Lopez*, § 13981 "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. … It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect interstate commerce. [It] contains no jurisdictional element which would ensure, through case-by-case inquiry, that the [gender-motivated violence] in question affects interstate commerce." 514 U.S. at 561.

In its brief, the United States denies any requirement in *Lopez* of a jurisdictional element, arguing that *Lopez* applied the "substantial effect" test of *Wickard v. Filburn*, 317 U.S. 111 (1942), to the non-economic activity of gun possession near schools. U.S. Br. at 30-31. The United States further argues that the earlier cases cited by *Lopez* "did not address whether the underlying activity was sufficiently commercial to justify regulation under the Commerce Clause. U.S. Br. at 31 (discussing *Wickard*, *McClung*, and *Heart of Atlanta Motel*). These arguments are particularly disingenuous because, as the Fourth Circuit noted, and the United States chooses to ignore, *Lopez* repeatedly and emphatically drew a distinction between regulation of economic and non-economic activity. 514 U.S. at 558, 559-60, 561, 566, 567. Contrary to the United States' claim, *Lopez* did not "appl[y]" *Wickard*, it distinguished it as "involv[ing] economic activity in a way that the possession of a gun in a school zone does not" and thus *rejected* its application to the non-economic activity of gun

possession near schools. *Id.* at 560; *see also id.* at 566 ("Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. … The Constitution mandates this uncertainty ….").[3]

For Congress to regulate activity under the Commerce Clause, the activity itself must be, in a word, commercial. As Justice Thomas wrote in *Lopez*, "the power to regulate 'commerce' can by no means encompass authority over mere gun possession, any more than it empowers the Federal Government to regulate marriage, littering, or cruelty to animals, throughout the 50 States. Our Constitution quite properly leaves such matters to the individual States, notwithstanding these activities' effects on interstate commerce." *Lopez*, 514 U.S. at 585 (Thomas, J., concurring).[4]

The government's alternative argument is that "even if Congress were limited after *Lopez* to regulating intrastate activity that has some economic component," § 13981 meets the

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

[4] If the § 13981 civil remedy were upheld as sufficiently related to interstate commerce, so too would criminal penalties have to be upheld with the jurisdictional element removed. That Congress in this instance *chose* to include a jurisdictional element in the criminal provisions is beside the point. There is no commerce-based distinction between regulating commerce through criminal rather than civil measures. Any judicial interpretation of the Commerce Clause adequate to uphold § 13981 without a jurisdictional element would be adequate to sustain a criminal measure lacking a jurisdictional element. Whether some separate constitutional limit might check federal criminal law does nothing to justify destroying the independent check of the Commerce Clause's limited grant of power.

test because it "is designed to remedy gender-motivated violence that occurs at, or en route to, workplaces, retail establishments, and interstate transportation terminals *as well as in other settings*." U.S. Br. at 32 (emphasis added). The problem, of course, is that § 13981 is not limited to business settings, in contrast to the statute at issue in *Heart of Atlanta Motel*. That some minuscule subset of the cases reached by § 13981 might occur in a commercial context does not validate the sweeping regulation of the majority of non-economic cases.[5] The lack of a jurisdictional limitation renders § 13981 unconstitutionally broad.

B. Aggregate Social Costs of Intrastate Non-Economic Activities Do Not Establish Commerce Clause Jurisdiction.

Even if a particular jurisdictional element were not required, the general legal requirement of a substantial effect on interstate commerce cannot be satisfied by the mere aggregation of the social costs of local activity. Petitioners' reliance on the economic consequences of violence against women fails to distinguish such violence from any other local activity. Virtually every social problem has a monetary cost on society. Murder does. Suicide does. Divorce does. Addiction does. Elderly care does. Burglary does. Depression does. Accidents do. Accepting petitioners' rationale, therefore, would turn Commerce Clause authority into an unlimited federal police power and no area of state law would be beyond the reach of the Commerce Clause.

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[5] That § 13981 provides money damages for various economic injuries, U.S. Br. at 32, does not render it a regulation of interstate commerce. If it did, then the commerce power would extend to the entirety of tort law, contract law, and any other body of law in which damages may be recovered. That, of course, means *all* law. If the mere provision of damages were enough to create the requisite effect on interstate commerce, then there is nothing the federal government could not regulate through the creation of causes of action for its own or others' benefit.

The supporters of § 13981 argued at hearings that the monetary cost of violence against women is "'at least 3 billion … dollars a year,'" U.S. Br. at 6 (quoting Senate Report), and, including "'health care, criminal justice and other social costs of domestic violence,'" as much as $5 to $10 billion annually. *Brzonkala*, 169 F.3d at 914 (Motz, J., dissenting) (quoting Senate Report).[6] But other local phenomenon exact an equal or greater toll on society. For example, roughly 22,000 persons were murdered in 1994.[7] If the victims' average expected lifetime earnings exceeded an inflation-adjusted $200,000 (10 years at $20,000 per year),

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[6] These figures, however, include many types of violence against women other than that motivated by animus towards women, as required by § 13981. Yet Congress engaged in no discernable fact-finding about the monetary cost of the violence that it regulates in § 13981: violence against women *because* of gender *and* motivated by animus against women. Rather, it evaluated data on all violence against women, never identified what portion of that violence was motivated by gender animus, and then made conclusory statements that such *subcategory* of violence had a substantial impact on the economy. *See Brzonkala,* 169 F.3d at 849-51. But there are reasons to believe that the costly violence cited by Congress is not necessarily motivated by animus towards women, including that a significant amount of domestic violence is perpetrated by women against men. For an objective look at domestic violence statistics, *see* Carey Goldberg, "Spouse Abuse Crackdown, Surprisingly, Nets Many Women," New York Times, Nov. 23, 1999, at A16 ("Defenders of battered women long struggled to persuade authorities to crack down on brutal men who reigned by the fist at home. But those crackdowns have produced an unexpected consequence: in some places, one-quarter or more of arrests for domestic assault are not of men but of women. In Concord, N.H., nearly 35 percent of domestic assault arrests this year have been of women, up from 23 percent in 1993. … And in Boulder County, Colo., one-quarter of defendants charged in domestic violence cases through September were women. … A different federal poll, the National Violence Against Women survey … found that … 1.5 million women and 835,000 men annually were raped or assaulted by an intimate partner, a ratio of just under two to one."). Domestic violence is more a problem regarding conflict in intimate relationships than one of gender discrimination.

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

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

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

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

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

- *Alimony*. The payment of alimony is an actual economic transaction, and thereby implicates commerce to a much

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[8] *See id.* at 74, Table No. 90.

greater degree than the domestic violence regulated by § 13981.

- *Marital Property Rights.* Like alimony, the division of marital property involves inherently economic matters and likely has a greater monetary impact than the behavior regulated by § 13981.
- *Child Custody.* Child custody disputes are enormously disruptive of the lives, productivity and wealth of all involved, create inefficiencies of joint custody, and may involve interstate custody issues. The connection to interstate commerce is thus at least as strong as in the case of gender-motivated domestic violence.
- *Marriage and Divorce*. The institution of marriage has a tremendous financial impact on society, altering consumption patterns in things such as housing and food, and triggering altered treatment in insurance, taxes, car rentals, and other economic transactions. Divorce has an equal and opposite impact, and has tremendous transaction costs that impact the economy. The speculative effect on commerce from that unknown percentage of violence that is motivated by gender animus is small compared to the economic impact of marriage and divorce.
- *Adoption*. As any parent and many others well know, adding a child to a household has an enormous impact on consumption, productivity, and the use of interstate goods and services such as food, toys, and television. The aggregate effects of the many adoptions around the country would form as good an excuse for federal regulation as the effects alleged to justify § 13981.

Each of the above issues has traditionally been within the exclusive jurisdiction of the states, and heretofore has been considered unrelated to interstate commerce absent a specific interstate element to the activity. Yet there is absolutely nothing in the petitioners' construction of the Commerce Clause

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

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

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

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

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

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

tessentially a local problem. Section 13981 is already in conflict with the rapidly developing state laws in this area, and such conflicts will only increase as state remedies are optimized.

For example, numerous state legislatures have passed "primary aggressor" laws that take a more comprehensive approach to evaluating the complex and ongoing interactions that periodically erupt in domestic violence. Backed by many women's groups, these laws place a heavy emphasis on prompt and detailed investigation of all charges of domestic violence and require the local police to examine a variety of factors with respect to a domestic dispute in order properly to ascertain fault and take appropriate remedial action. The guilty party is not always the person who struck first or most violently and is not always a man.

The California primary aggressor statute is illustrative. The investigator must identify the "primary aggressor" by considering, in addition to interviewing witnesses and examining evidence of actual violence, the following:

> (i) the intent of the law to protect victims of domestic violence from continuing abuse;
>
> (ii) the threats creating fear of physical injury;
>
> (iii) the history of domestic violence between the persons involved; and
>
> (iv) whether either person acted in self defense.

Cal. Penal Code § 836(c)(3) (West Supp. 1999). California also requires that each and every law enforcement agency develop, adopt and implement written policies and standards for officers' responses to domestic violence calls, treat domestic violence as alleged criminal conduct, and encourage the arrest of domestic violence offenders if there is probable cause that an offense has been committed. *Id*. § 13701.

An Ohio statute is similar, requiring a peace officer to determine the primary aggressor by considering any "history

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

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

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

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

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

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

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

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

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

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

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

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

Recognizing that § 13981 does not operate against the states and does not prevent or punish unlawful state discrimination, petitioners instead argue that the law is a response to such discrimination in that it independently gives crime victims what they cannot get from the state: vindication and compensation from the private criminals. Petitioner Brzonkala argues, for example, that § 13981 is intended to "remedy *the effects* of formal barriers to redress such as marital rape and interspousal tort immunities, which Congress found reflected and perpetuated outdated stereotypes." Brzonkala Br. at 44 (emphasis added). Petitioners also argue that § 13981 responds to "bias by state officials [barring] access to the justice system" by "authoriz[ing] a claim that the victim controls" and by providing "victims the opportunity to be heard by judges who are insulated from local political and other pressures." Brzonkala Br. at 46; *see also* U.S. Br. at 37 (redress "that the victim, not the State, controls").

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

The language of the Fourteenth Amendment limits Congress' power to *enforcement* of the substantive commands of the Fourteenth Amendment. Section 5 of the Fourteenth Amendment states that "[t]he Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. Const., Amend. XIV, sec. 5. The relevant provision Congress claims to be enforcing by § 13981 is the command that "*[n]o state shall deny* to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV, sec. 1 (emphasis added). In order to "enforce"

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

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

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

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

Section 5's focus on the perpetrators of the *constitutional* violation – *i.e.*, the state or its agents – is reflected in the uniform holdings of this Court that the Fourteenth Amendment does not apply to purely private actors. Those holdings are amply reviewed in the opinion below, and petitioners do nothing more than repeat objections that were exhaustively debunked by the Fourth Circuit. *See Brzonkala,* 169 F.3d at 862-889.

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

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[14] In many ways, this case resembles an unconstitutional conditions case, with the state allegedly denying women the benefits of vindication and compensation based solely on their gender. The typical solution in such a case is to strike down the discriminatory barrier to the state benefits, not to have a different entity provide separate but supposedly equal benefits. This Court said as much in *Brown* v. *Board of Education*, 347 U.S. 483, 495 (1954), and the principle is equally applicable in this context. State discrimination in the provision of benefits such as law enforcement does not become less discriminatory due to federal efforts to offset the effects of such discrimination.

[15] The provision of federal jurisdiction likewise does not address the alleged violations. The statute does not provide federal jurisdiction over claims under state law, but only over claims under the newly enacted federal substantive law. The law is thus unlike diversity jurisdiction, which ensures that prejudice in the application of existing state law does not occur and that *state* laws are equally applied to non-citizens of the state. By supplanting not only the forum, but the substantive law as well, while leaving intact the allegedly discriminatory systems and laws in the states, the new law does nothing to remedy the violations alleged.

protects the individual against state action, not against wrongs done by individuals. … This has been the view of the Court from the beginning." 383 U.S. at 755 (citations and quotation marks omitted). The Court had no occasion to discuss the threshold level of state action involved because "the indictment in fact contains an express allegation of state involvement sufficient at least to require the denial of a motion to dismiss." 383 U.S. at 756.

In *Katzenbach* v. *Morgan*, the Court held that Congress has the power to invalidate state laws requiring English literacy by voters. The statute at issue operated directly against the state and its subdivisions and hence did not seek to enforce the Fourteenth Amendment by regulating purely private conduct. 384 U.S. at 647 ("Such exercises of state power are no more immune to the limitations of the Fourteenth Amendment than any other state action."). That the law forbade state acts that did not *necessarily* violate the Fourteenth Amendment does not help petitioners in this case. A determination of state discrimination turned on a number of legislative facts regarding the need for and consequences of an English-only voting restriction. The Court was willing to defer to congressional findings leading to the general conclusion that the state laws "constituted an invidious discrimination in violation of the Equal Protection Clause," 384 U.S. at 656, even though it might not have substituted a judicial determination regarding legislative facts for a state determination in an individual case. That Congress identified sufficient facts giving rise to Fourteenth Amendment violations, and then acted directly to forbid such violations, was sufficient. In this case, by contrast, § 13981 does nothing to forbid the states from committing the violations that Congress purported to find. It does not act on the states at all.

Finally, in *Carter* the issue under consideration had nothing to do with the scope of Congress' Section 5 authority. The footnoted assertion by Justice Brennan in that case that Congress might "proscribe purely private conduct" is the pur-

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

Neither petitioners nor their amici can cite a single precedent for applying the Fourteenth Amendment to private conduct completely removed from state action. Instead, petitioner Brzonkala argues that "[t]his Court never has struck Section 5 legislation extending to private conduct where, as here, Congress enacted the law in response to a documented record of historic discrimination fueling equal protection violations." Brzonkala Br. at 47. This distortion was the subject of extensive discussion by the Fourth Circuit, *see* 169 F.3d at 870-73, and it is reckless to merely repeat it on appeal without even an attempt to address the Fourth Circuit's recitation of the plain historical record refuting it.

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

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

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

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

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

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

Even were it permissible for Section 5 enforcement legislation to operate on the effects, rather than the causes, of state discrimination, § 13981 is still unconstitutional because it is not proportional to the violation asserted. Under § 13981, any victim of gender-based violence can sue, regardless of the existence of state discrimination or its impact on the plaintiff. The most palpable example of such overbreadth is that a victim of such violence may sue under § 13891 even if her assailant has been convicted and punished in state court and even if she has successfully sued and recovered under existing state civil remedies. This flaw is caused by the lack of a jurisdictional requirement in § 13981 that the plaintiff make at least a colorable showing that she was the victim of state discrimination before invoking a supposed means of enforcing against such discrimination.

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

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

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

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

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

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

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

any defendant. Not only would such a result be a nightmare for the administration of justice, it strongly suggests that the interpretation of the Fourteenth Amendment leading to the result is incorrect. A correct interpretation of the Fourteenth Amendment enforcement authority is not subject to such absurd consequences. Where legislation operates directly against the acts violating or threatening to violate the Amendment, changes in the background facts make no difference to the validity of the law.

The federal cause of action for constitutional violations provided by 42 U.S.C. § 1983 is an example of a proper tethering of the enforcement authority to constitutional violations. If the state and its agents stop discriminating, there may little occasion to invoke § 1983, but the legislation itself would remain valid and constitutional. Its application is triggered by the particular acts of state discrimination whenever they may occur, and thus enforces the constitutional prohibition entirely apart from whether there exist any *present* violations. Any time in the future that § 1983 was invoked, the constitutional predicate for its action would be satisfied. By contrast, even where all state discrimination ceased, § 13981's remedy against private persons would continue to be invoked with no needed connection to the constitutional predicate. The only legal requirement is that the criminal was biased, not that the state discriminated. Claims under § 13981 would continue or even increase if the states more vigorously enforced their laws against rape or domestic abuse. (A state conviction would go a long way towards establishing a plaintiff's case under § 13981.)

III. Congressional "Treaty Power" Does Not Extend to Domestic Relations.

Amici Curiae International Law Scholars and Human Rights Experts argue that § 13981 is supportable as an exercise of treaty power, in particular as implementation of the International Covenant on Civil and Political Rights (ICCPR).

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

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

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

> "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the gov-

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

> ernment or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent."

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

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[18] *Reid* is consistent with the doctrine that treaties and statutes are of equivalent legal status. "It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument." *Reid*, 354 U.S. at 18. *See also Head Money Cases*, 112 U.S. 580, 599 (1884) ("The Constitution gives [a treaty] no superiority over an act of Congress in this respect [of priority], which may be repealed or modified by an act of a later date. Nor is there anything in its essential character, or in the branches of the government by which the treaty is made, which gives it this superior sanctity."); Henkin, *Lexical Priority or "Political Question": A Response*, 101 Harv. L. Rev. 524, 533 (1987) (noting that treaties have no greater legal weight than acts of Congress).

Amici rely on several statements by the Executive branch asserting that VAWA represents an implementation of the ICCPR treaty. But these assertions were all made well after the passage of VAWA in 1994, and thus amount to nothing more than a *post hoc* attempt to salvage the jurisdictional defect of § 13981. *Reid*, 354 U.S. at 15-17. The Executive branch does not have quasi-judicial authority in passing judgment on the jurisdictional merits of enacted legislation. That task necessarily belongs to the judiciary. Furthermore, before this Court should undertake to consider such a sweeping and unprecedented assertion of Congressional authority to implement the treaty power, it should at least be incumbent upon Congress to make plain its intent to raise the constitutional question. After-the-fact assertions by the Executive that Congress intended to test the limits of the Constitution are not enough.

Amici rely heavily on *Missouri v. Holland*, 252 U.S. 416 (1920), which concerned a treaty to protect migratory birds that passed through Canada and the United States. In that decision, however, the Court expressly limited its holding to "a national interest [that] … can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein." 252 U.S. at 435. In contrast, § 13981 does not concern any matter that requires "national action in concert with that of another power." Nor does § 13981 concern "subject-matter [that] is only transitorily within the State." To the contrary, § 13981 regulates subject-matter that, for the most part, occurs solely within a state, without any connection with foreign nations or even with other states.

United States v. Arjona, 120 U.S. 479 (1887), likewise fails to support extension of the treaty power to strictly domestic matters. There the Court upheld a statute that criminalized private counterfeiting of securities of foreign governments. The holding stands for the simple proposition that "[t]he law of nations requires every national government to

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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Dated: December 13, 1999.