18-185

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JANE DOE,
Plaintiff-Appellant,
v.
LT. GEN. FRANKLIN LEE HAGENBECK, BRIG. GEN WILLIAM E. RAPP, UNITED STATES OF AMERICA,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, END RAPE ON CAMPUS, HUMAN RIGHTS AND GENDER JUSTICE CLINIC AT THE CITY UNIVERSITY OF NEW YORK SCHOOL OF LAW, HUMAN RIGHTS WATCH, KNOW YOUR IX, NATIONAL ALLIANCE TO END SEXUAL VIOLENCE, NATIONAL CENTER ON DOMESTIC AND SEXUAL VIOLENCE, NATIONAL WOMEN'S LAW CENTER, NEW YORK LEGAL ASSISTANCE GROUP, AND SURVJUSTICE IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* file the following statement of disclosure:

The *amici curiae* include the American Civil Liberties Union, American Association of University Women, End Rape on Campus, the Human Rights and Gender Justice Clinic at the City University of New York School of Law, Human Rights Watch, Know Your IX, National Alliance to End Sexual Violence, National Center on Domestic and Sexual Violence, National Women's Law Center, the New York Legal Assistance Group, and SurvJustice.

The *amici* certify that none of the *amici* has a parent corporation or a publicly held corporation that owns 10% or more of its stock.

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April 23, 2018

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STATEMENT OF INTEREST OF AMICI[1]

The *amici* are organizations advocating for the civil and human rights of survivors of gender-based violence, including victims of sexual assault. They submit this brief to inform the Court of the importance of the availability of damages remedies to survivors of sexual violence at military academies and that such remedies are consistent with prevailing case law and international human rights law. More detailed descriptions of each *amicus* appear in the addendum.

STATEMENT OF CASE AND SUMMARY OF ARGUMENT

Jane Doe is a former cadet at the U.S. Military Academy (West Point). West Point is a four-year coeducational service academy, where students, also referred to as cadets, have access to an array of academic offerings and opportunities. Upon graduation, cadets are generally commissioned into the Army as second lieutenants. However, cadets like Doe who disenroll from West Point prior to their third year do not have an obligation to enlist. Joint Appendix ("JA") 89; 10 U.S.C. § 4348; 32 C.F.R. § 217.4(d).

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[1] Pursuant to Local Rule 29.1, *amici curiae* inform the Court that all parties have consented to the filing of this brief. *Amici* also confirm that (1) no counsel to any party authored this brief, in whole or in part; (2) no party or party's counsel contributed money intended to fund preparing or submitting the brief; and (3) no person other than *amici* and their counsel contributed money intended to fund preparing or submitting this brief.

As detailed in her complaint, Doe was subjected to harassment and discriminatory attitudes on a consistent basis following her admission to West Point in 2008. JA44-53. West Point officials failed to establish and implement effective procedures and training on sexual assault, harassment, and their prevention. Instead, they condoned sexist and derogatory chanting and comments by other cadets, provided sexual assault prevention training that placed the burden on female cadets for stopping sexual assault, required mandatory sexually transmitted disease testing for female cadets only, did not comply with directives from the Department of Defense (DoD) for reporting on and preventing sexual violence, and instead fostered a system that resulted in retaliation against complainants. In May 2010, during her second year of training, Doe was raped by another cadet. She suffered severe anxiety and isolation, and ultimately resigned prior to the start of her third year.

Doe brought claims against the United States, Lt. Gen. Franklin Lee Hagenbeck and Brig. Gen. William E. Rapp under the U.S. Constitution, the Little Tucker Act, and the Federal Tort Claims Act (FTCA), alleging due process, equal protection, and statutory violations and seeking declaratory relief and damages. The district court allowed Doe's equal protection claim to proceed, but dismissed her other claims. JA94. In doing so, Judge Hellerstein rejected the defendant's argument that the *Feres* doctrine – derived from *Feres v. United States*, 340 U.S.

135 (1950) – applied to summarily deprive Doe of a *Bivens* remedy for her equal protection claim. JA89. In a divided opinion, the Second Circuit reversed the district court's ruling on appeal, applying the *Feres* doctrine to bar *Bivens* remedies for equal protection violations. JA100 [hereinafter "*Doe I*"]. In his dissent, Judge Chin asserted that the *Feres* doctrine should not apply because the alleged rape did not arise "incident to military service," and that its application in the instant case was an unwarranted extension of a widely criticized doctrine. JA132. Doe now seeks review of the dismissal of her FTCA and Little Tucker Act claims.[2]

Feres should not be applied to bar Doe's claims, including the remaining FTCA claims. Such a ruling would leave cadets who have suffered sexual assault without access to a court and bereft of any remedy for violations of their rights, in sharp contrast to students attending civilian universities across the country. This is particularly troubling because Doe's suit challenges the Defendant's failures to comply with the directives of the DoD, and thus advances DoD policy and procedures. *Amici* urge this court to allow Doe's case to proceed on the merits, consistent with the express terms, intent, and purpose of the FTCA as well as

[2] Doe's brief concedes that this Court's decision on her *Bivens* Equal Protection claim forecloses relief on her *Bivens* Due Process claim, but preserves both for potential further review. This brief focuses on Doe's ability to proceed with her FTCA claims.

international human rights law, which requires states to provide remedies to individuals subjected to gender-based violence.

ARGUMENT

I. CADETS EXPERIENCED SEXUAL HARASSMENT AND VIOLENCE THAT WEST POINT'S LEADERS FAILED TO ADDRESS AND PREVENT.

Sexual violence and harassment is a devastating and pervasive problem at West Point, and is fostered in large part by the failure of leadership to take effective measures to address and prevent it. In her Complaint, Doe described policies, practices, and customs that denigrated female cadets, placed the responsibility for stopping sexual harassment and violence on them, failed to comply with DoD regulations governing sexual assault at military academies, and maintained inadequate internal accountability systems regarding subsequent retaliation and harm to complainants' careers. JA44-53. Doe's rape occurred in the context of these policies and practices.

DoD's own research confirms West Point's creation of an educational environment that fosters sexual violence. In 2010, the year Doe resigned from West Point, DoD found that 51% of women at West Point indicated that they experienced sexual harassment and 94% of women indicated that they experienced sexist behavior. Defense Manpower Data Center, *2010 Service Academy Gender Relations Survey*, at v (2010) [hereinafter "2010 DoD Survey"]. Over 9% of West

Point women reported that they experienced unwanted sexual contact in 2010, and 94% of these women said that the offender was a fellow cadet. *Id.* at iv.

Notably, DoD concluded in 2011 that West Point was not in compliance with DoD Policy with respect to reducing sexual harassment and assault involving cadets. Department of Defense, SAPR, *Annual Report on Sexual Harassment and Violence at the Military Service Academies, Academic Program Year 2010-2011*, at 24 (2011) [hereinafter "2011 DoD Report"]. The report also concluded that West Point was only partially in compliance with DoD Policy for improving victim confidence in reporting and for responding to sexual violence. *Id.* at 29, 36. While West Point purported to encourage more reporting of sexual assault, DoD found that the academy failed to provide clear and complete information on how to report a sexual assault. *Id.* at 33. Moreover, DoD determined that West Point failed to provide required training to all cadets, thus falling short of DoD's minimum standards, and lacked an institutionalized comprehensive sexual assault prevention and response curriculum. *Id.* at 24, 28.

The military's own procedures for redress are undermined by this discriminatory environment. Only 14% of West Point female cadets who said they were victims of sexual assault during the 2009-10 academic year reported the incident. 2010 DoD Survey at 58. Sixty-one percent of female cadets who chose

not to report cited concerns about harm to their reputations and standing at West Point as reasons for not reporting. *Id.* at 48, Table 20.

Recent DoD statistics indicate that West Point has failed to reform its culture of sexual harassment and assault in the years since Doe resigned. Over 10% of West Point women reported that they experienced unwanted sexual contact in 2016, an increase from the 9.1% of West Point women who reported such contact in 2010. Office of People Analytics, *2016 Service Academy Gender Relations Survey: Overview Report*, at xiii (2017) [hereinafter "2016 OPA Report"]. Moreover, of the West Point women who reported experiencing unwanted sexual contact, only 5% reported their assaults in 2016, down from the 14% who reported their assaults in 2010. *Id*. at xiv; 2010 DoD Survey at 58.

A case brought against West Point in 2012 exemplifies the failure of the internal reporting system and its serious impact on female cadets. In 2011, Karley Leah Marquet reported that she was raped by an upperclassman. Complaint, *Marquet v. Gates*, No. 12-CV-3117, ¶ 14 (S.D.N.Y. 2012). However, reporting the rape did not lead to any remedial or punitive action. According to her complaint, she was compelled to see the perpetrator daily, and West Point did not alter her duties, which included emptying his trash. *Id.* Depressed and suicidal, Marquet ultimately resigned from West Point. Like Doe, Marquet filed suit seeking accountability for violations of her rights. The district court summarily dismissed

her constitutional claims. *Marquet v. Gates*, No. 12-CV-3117 (S.D.N.Y. Sept. 11, 2013), *appeal withdrawn*, No. 13-3908 (2d Cir. Jan. 13, 2014).

This case presents the Court with an opportunity to recognize that survivors of sexual violence at military colleges are entitled to pursue FTCA claims. To hold otherwise would foreclose victims' access to traditional and important remedies for campus sexual violence.

II. SURVIVORS OF SEXUAL VIOLENCE AT MILITARY ACADEMIES, LIKE THOSE AT CIVILIAN UNIVERSITIES, ARE ENTITLED TO DAMAGES REMEDIES WHERE SCHOOLS FAIL TO PROTECT THEM FROM SUCH VIOLENCE.

If this Court bars Doe's remaining claims, cadets at military academies will be left without any damages remedies when their academies fail to adequately respond to complaints of sexual violence or to reform a pervasive culture of sexual harassment. By contrast, students at civilian universities have damages remedies available to them when they suffer identical harms. *See, e.g.*, *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999); *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009). Like student survivors at civilian universities who seek damages remedies, Doe "seeks recourse for injuries caused by purported failures on the part of school administrators acting in an academic capacity overseeing a learning environment for students." JA134 (Chin, J., dissenting). This Court should not

create a divided system of justice that categorically denies remedies to student survivors of sexual violence at military academies.

Faced with West Point's refusal to reform its widespread culture of sexual harassment and its failure to ensure her safety and well-being after she disclosed her assault, Jane Doe confronted an excruciating choice: she could suffer in silence while continuing to attend school with her assailant, she could file an unrestricted report and risk harming her career prospects, or she could withdraw from West Point and give up on her dream of service. State and federal courts have repeatedly recognized that students attending civilian universities should never have to make this choice. *See infra*. Instead, courts have awarded students financial redress when their universities failed to respond reasonably to a hostile learning environment caused by pervasive sexual harassment or violence. *See infra*. Legal action also has compelled universities to institute reforms such as improved prevention training, improved reporting mechanisms, and counseling and other services to ensure that sexual harassment and violence will not continue to obstruct students' access to educational opportunities. *See infra*. If this Court dismisses Doe's remaining claims, it will deny Doe any remedies. It will also signal that unlike civilian universities, military academies are under no legal obligation to reform a culture of sex discrimination and sexual violence that makes it impossible for student survivors to learn and thrive.

Survivors of sexual violence depend on the availability of damages to offset the high economic burdens that result from sexual assault, including costs associated with medical treatment and mental health services to address trauma-related anxiety. *See* Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX,* 125 Yale L.J. 2106, 2110, 2116 (2016). Survivors often struggle with academics, resulting in declining grades and loss of scholarships or employment opportunities, causing them to drop out or transfer schools. *Id*. at 2108-10, 2115-16, 2119. The costs associated with sexual assault are enormous, ranging from $87,000 to $240,776 per rape. *See* White House Council on Women and Girls, *Rape and Sexual Assault: A Renewed Call to Action*, at 15 (2014). These high economic costs mean that damages actions are an essential way—and often the only way—for survivors to receive the compensation necessary to rebuild their lives. Damages remedies are no less critical for student survivors of sexual violence at military academies.

Decades of Supreme Court precedent recognize the importance of both compensatory damages and injunctive relief for student survivors of sexual harassment and assault. *See, e.g.*, *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60 (1992) (finding an implied private right of action to seek a damages remedy under Title IX for students facing sex discrimination and sexual harassment); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (establishing that a student who

is sexually harassed by a teacher can bring a damages action against a school under Title IX if the school reacts with deliberate indifference despite actual knowledge of the harassment); *Davis*, 526 U.S. at 633 (holding that a student who is sexually harassed by a peer can bring a damages action against a school under Title IX if the school acts with "deliberate indifference to known acts of [severe, pervasive, and objectively offensive] harassment in its programs or activities"); *Fitzgerald*, 555 U.S. at 255 ("In a suit brought pursuant to [Title IX's] private right [of action], both injunctive relief and damages are available.").

Although Title IX does not apply to military academies, 20 U.S.C. § 1681(a)(4), the Supreme Court unanimously has held that Title IX was not meant to be an exclusive remedial scheme for student survivors of sexual harassment and violence and that survivors can bring parallel and concurrent claims under the Equal Protection Clause. *Fitzgerald*, 555 U.S. at 255-58. Supreme Court precedent also affirms the importance of providing redress to female students at military academies who, because of their gender, are denied an "equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *United States v. Virginia*, 518 U.S. 515, 532 (1996).

Some student survivors have successfully brought common law tort claims against their civilian universities for failing to protect them from reasonably foreseeable acts of sexual violence by their peers. For example, a federal district

court denied a university's motion to dismiss a survivor's negligence claim where six other students had reported assaults by the alleged assailant, a member of the football team, yet the university failed to investigate the reports or institute reforms. *Hernandez v. Baylor Univ.*, 274 F. Supp. 3d 602, 618–21 (W.D. Tex. 2017). The survivor further alleged that the university had put her at heightened risk of assault by concealing sexual violence complaints against football players and diverting those complaints away from the typical disciplinary process, leading to a perception that football players were "above the rules." *Id*. at 620. The case later settled for an undisclosed amount. *See* Jim Vertuno, *Lawyer: Baylor Settles With Woman Who Said Rape Was Ignored*, Associated Press, Aug. 16, 2017.

The availability of damages remedies has empowered student survivors of sexual violence to hold their schools accountable for past harms and compel their schools to institute meaningful reforms. For example, five students sued the University of Connecticut, alleging that the university had responded with deliberate indifference to their complaints of sexual harassment and assault. *See Luby et al. v. Univ. of Connecticut*, No. 3:13-cv-01605 (D. Conn. Nov. 1, 2013). The University paid the students a combined $1.28 million settlement award and instituted a range of reforms, including launching a revised sexual harassment training program for employees, creating the position of assistant dean of students for victim support services, and developing a special victims unit within the

university's police department. *See* Tatiana Schlossberg, *UConn to Pay $1.3 Million to End Suit on Rape Cases*, N.Y. Times, July 18, 2014.

For survivors like Doe, damages actions are the only way to seek relief and hold their institutions accountable, as many are forced to leave their educational institutions following sexual violence. *See* Bolger, *supra*, at 2110, 2119; *Alexander v. Yale Univ.*, 631 F.2d 178, 184 (2d Cir. 1980) (holding former students who had experienced sexual harassment and violence lacked standing to seek injunctive relief). But even if Doe had standing to seek injunctive relief, a prospective remedy would be inadequate to compensate her for the harms she already suffered as a result of West Point's failure to protect her from sexual harassment and violence. Additionally, the likelihood that a survivor enrolled at an institution such as West Point would bring an action seeking injunctive relief is extremely slim, given that only 5% of West Point women who experienced unwanted sexual contact even *reported* that they were a victim of sexual assault. *See* 2016 OPA Report at xiv. Almost half of West Point women who suffered unwanted sexual contact in 2016 but did not report it stated that they did not want to hurt their reputation and standing. *Id*. at 399. Similarly, Doe chose not to file an unrestricted report while she was enrolled at West Point because she was concerned about damaging her career prospects and placing her reputation in jeopardy. JA52. These same concerns, in addition to the emotional and financial

costs associated with litigation, also prevent enrolled student survivors from filing legal actions for injunctive relief.

As the District Court recognized, the "burdens foisted upon [female cadets at West Point] were . . . insidious, with direct effects to their morale, mental and physical stability, and ability to persevere." JA89. Damages actions must remain available to compensate survivors and hold military academies, like other universities, accountable for sexual violence in the circumstances presented here.

III. *FERES* DOES NOT BAR DOE'S FTCA CLAIMS.

Amici urge this Court to allow Doe's FTCA claims to proceed. In particular, *amici* argue here that the *Feres* doctrine should not be applied to bar her suit.

The *Feres* doctrine is a judicially-created exception to the FTCA that bars all claims arising out of injuries incurred incident to military service. *Feres v. United States*, 340 U.S. 135, 146 (1950); *United States v. Johnson*, 481 U.S. 681, 686 (1987) (citing *Feres*, 340 U.S. at 146). The three rationales for the doctrine include: "(1) the 'distinctly federal' relationship between the Government and members of its armed forces; (2) the existence of a uniform system of 'generous statutory disability and death benefits' for members of the military; and (3) the need to preserve the military disciplinary structure and prevent judicial involvement in sensitive military matters." *Wake v. United States*, 89 F.3d 53, 57–58 (2d Cir. 1996) (citing *Johnson*, 481 U.S. at 688–691; *United States v. Stanley*,

483 U.S. 669, 682–683 (1987)). Courts consider these rationales when determining whether an injury was incurred incident to military service, thus shielding the government from claims brought under the FTCA. *Taber v. Maine*, 67 F.3d 1029, 1049-50 (2d Cir. 1995).

As discussed by Doe, none of these rationales supports denial of Doe's FTCA claims. The first rationale has little bearing here, as the absence of an alternative system of compensation for Doe means there is no "uniform federal scheme" that would be displaced by "the contingencies of local tort law." *See Taber*, 67 F.3d at 1049. And the second and third rationales strongly support recognition of an FTCA remedy for Doe. As noted above, there is no alternative system to compensate Doe for her injuries; Doe's claims are her only remedy. The third rationale – "to avoid civilian court scrutiny of military discipline and policies," *Wake*, 89 F.3d at 62; *United States v. Shearer*, 473 U.S. 52, 58 (1985) – is implicated when a service member's complaint "calls into question basic choices about the discipline, supervision, and control" of a service member. *Shearer*, 473 U.S. at 58. Judicial scrutiny of these choices should be avoided because they "are essentially professional military judgments." *Id*. The Supreme Court has long recognized that such decisions, however, are "subject *always* to civilian control of the Legislative and Executive Branches." *Chappell v. Wallace*, 462 U.S. 296, 302 (1983); *see also Stanley*, 483 U.S. at 682 (noting "the insistence [. . .] with which

the Constitution confers authority over the Army, Navy, and militia upon the political branches"); *cf. Jentoft v. United States*, 450 F.3d 1342, 1349 (Fed. Cir. 2006) (noting congressional constitutional authority over the military and declining to apply *Feres* to bar a claim under the Equal Pay Act). Accordingly, to the extent that military decision-making exceeds the parameters of the civilian controls set forth by the legislative and executive branches, *Feres* should not insulate such decision-making from judicial review.

Therefore, the third *Feres* rationale does not apply where, as Doe alleges, a cadet's injuries resulted from her military academy violating applicable military directives. *See Ritchie v. United States*, 733 F.3d 871, 879 (9th Cir. 2013) (Nelson, J., concurring) (*Feres*' concern for preventing judicial interference with military discipline structure "has no relevance in cases where the military contravenes its own regulations and procedures"). Courts regularly review military decisions to determine whether they contravene applicable military policies and regulations. *See Chappell*, 462 U.S. at 303 (noting that decisions by the Board for the Correction of Naval Records are subject to judicial review); *Clinton v. Goldsmith*, 526 U.S. 529, 539–40 (1999) (listing ways a discharged service member might have recourse to federal courts); *Crawford v. Cushman*, 531 F.2d 1114, 1120 (2d Cir. 1976) (citing cases); *Wenger v. Monroe*, 282 F.3d 1068, 1072 (9th Cir. 2002). Moreover, although any damages award to Doe would hold West Point's leaders

accountable for her injuries, it would not compel any particular change to policy or practice, thereby preserving their decision-making authority.

No circuit court has considered the specific facts and law plead in this case: whether *Feres* bars FTCA claims for sexual assault in a military academy where the assault allegedly resulted from the defendant's violation of applicable DoD directives. Other sexual assault cases where plaintiffs raised claims based on a violation of applicable military directives are factually and legally distinguishable.

Doe I addressed whether special factors counseled hesitation in the creation of a *Bivens* remedy. JA146. *Klay* and *Cioca* involved *Bivens* rather than FTCA claims, and did not involve cadets at military academies. *See Klay v. Panetta*, 758 F.3d 369, 375–76 (D.C. Cir. 2014); *Cioca v. Rumsfeld*, 720 F.3d 505, 516 (4th Cir. 2013). In other circuit decisions involving sexual assault in a military context, courts did not consider whether the alleged conduct violated a congressional act or DoD directive. *See, e.g.*, *Smith v. United States*, 196 F.3d 774 (7th Cir. 1999) (Plaintiffs did not allege violation of any congressional act or federal policy); *Mackey v. Milam*, 154 F.3d 648 (6th Cir. 1998) (same); *Gonzalez v. U.S. Air Force*, 88 F. App'x 371, 376–77 (10th Cir. 2004) (same); *Morris v. Thompson*, 852 F.3d 416, 419–20 (5th Cir. 2017) (same).

In *Klay*, the plaintiffs alleged that their injuries were at least partially caused by the defendant's failure to follow applicable statutory directives designed to

address sexual assault in the military. *Klay*, 758 F.3d at 375. The plaintiffs argued that adjudication of that aspect of their suits would not constitute impermissible judicial scrutiny of military decision-making because military leaders lack the authority to violate congressional mandates. *Id*. at 375-375. The D.C. Circuit did not directly address the argument that violations of statutory mandates fall outside the scope of the third *Feres* rationale. Instead, the court determined that Congress's extensive legislative activity on the topic of sexual assault in the military, combined with its choice not to authorize a claim for damages was a special factor counseling hesitation in the creation of a *Bivens* remedy independent of *Feres*' incident to service rule. *Id.* at 376-377; *see also Stanley*, 483 U.S. at 683.

The plaintiffs in *Cioca* also alleged that judicial review of the military's violation of statutory directives would not interfere with military discipline. *Cioca*, 720 F.3d at 516. The Fourth Circuit, however, declined to recognize a *Bivens* remedy based on that argument, reasoning that it was the province of Congress to determine whether or not a suit for damages would advance or impede military discipline. *Id.* Like *Klay*, *Cioca* did not consider whether the third *Feres* rationale should apply to insulate military decision-making that violates applicable statutory mandates.

Like *Cioca*, the *Doe I* majority noted that creating a *Bivens* remedy "would be inconsistent with courts' traditional reluctance 'to intrude upon the authority of

the Executive in military [. . .] affairs'" absent congressional authorization. JA127 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017)). The majority also echoed *Klay's* rationale that, irrespective of the applicability of *Feres*, Congress's activity in the field constitutes an independent special factor counseling hesitation in the creation of a *Bivens* remedy. *Id*. (quoting *Ziglar*, 137 S. Ct. at 1858); *see also Klay*, 758 F.3d at 376-377.

The rationales for denying *Bivens* remedies in *Klay*, *Cioca*, and *Doe I* do not apply to Doe's FTCA claims, because FTCA claims are authorized by Congress. *See Ziglar*, 137 S. Ct. at 1862 (quoting *Stanley*, 483 U.S. at 683) (in deciding whether to create a *Bivens* remedy, "the question is only whether 'congressionally uninvited intrusion' is 'inappropriate'"); *Klay*, 758 F.3d at 376-77 (noting that "courts will be duty-bound to adjudicate" damages actions if authorized by Congress); *Cioca*, 720 F.3d at 516 (deferring to Congress the question of "whether a damages remedy would interfere with the military"); JA131 ("it is for Congress to determine whether affording a money damages remedy is appropriate for a claim of the sort that Doe asserts"). Moreover, declining to extend the judicially created *Feres* doctrine to bar a congressionally authorized FTCA claim would be consistent with the deference espoused by *Klay*, *Cioca*, and *Doe I*.

Finally, this Court should not endorse further expansion of *Feres* to bar all remedies to military cadets who suffer sexual violence when support for the

doctrine is waning. Four Supreme Court Justices joined a scathing dissent that rejected all the bases for the *Feres* doctrine, including "the post-hoc rationalization of 'military discipline,'" and concluded that "*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received." *Johnson,* 481 U.S. at 700 (1987) (Scalia, J., dissenting) (internal citations omitted); *see also Ritchie*, 773 F.3d at 874; *Purcell v. United States*, 656 F.3d 463, 465 (7th Cir. 2011); *Regan v. Starcraft Marine, LLC*, 524 F.3d 627, 633 (5th Cir. 2008); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1341 (11th Cir. 2007); *Hinkie v. United States*, 715 F.2d 96, 97 (3d Cir. 1983).

Given the limitations articulated in *Chappell* and *Stanley* and the deep and widespread concerns expressed about the *Feres* doctrine, this Court should refrain from expanding it to categorically bar FTCA claims brought by cadets seeking redress for sexual assault at military academies. At this early stage of litigation, the Court should not presume that a suit by a cadet challenging West Point's failure to follow applicable DoD directives and procedures regarding sexual assault at military academies improperly infringes on the autonomy of West Point's military leadership.

IV. RECOGNIZING DOE'S FTCA CLAIMS WOULD BE CONSISTENT WITH THE UNITED STATES' INTERNATIONAL HUMAN RIGHTS OBLIGATIONS.

Permitting Doe to proceed with her FTCA claims is affirmed by international law, which recognizes that women have a right to state protection from gender-based violence – including sexual harassment and assault – and obligates governments to prevent and respond to such violence with due diligence. This due diligence obligation and human rights law generally requires that victims and survivors be afforded remedies, including both access to a court and, in appropriate cases, substantive remedies.

Amici cite to international authorities not as binding precedent but rather because "the express affirmation of certain fundamental rights by other nations and peoples underscores the centrality of those same rights within our own heritage of freedom." *Roper v. Simmons*, 543 U.S. 551, 578 (2005); *see also Washington v. Glucksberg*, 521 U.S. 702, 710-11, 718 n.16, 734-35 (1997). *Amici* urge this Court to look to international law to conclude that *Feres* should not be extended to completely prohibit students at military academies from seeking relief for their injuries arising from sexual violence and harassment.

A. International Law Provides Strong Persuasive Authority for Interpreting the Issue Before This Court.

This Court should look to international law as persuasive authority to find that *Feres* does not apply to deprive Doe of a remedy. Such an approach would be

consistent with U.S. Supreme Court precedent in which the Court has repeatedly cited international law and practice to inform its decisions on the scope of rights guaranteed by the Constitution. Most recently, in *Graham v. Florida*, 560 U.S. 48 (2010), the Supreme Court affirmed the relevance of international law and practice to the proper interpretation of the Eighth Amendment. In its analysis of Florida's juvenile life without parole policies, the Supreme Court examined the juvenile sentencing practices of other countries, continuing the Court's "longstanding practice in noting the global consensus against the sentencing practice in question." *Id.* at 80. The Court noted that even in the absence of on-point international law binding on the United States, international law, agreements and practices are "relevant to the Eighth Amendment … because the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it." *Id*. at 82; *see also Roper,* 543 U.S. at 575-78 (citing the U.N. Convention on the Rights of the Child and other international authorities in support of the Court's conclusion that the death penalty for persons below eighteen years of age is unconstitutional).[3]

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[3] *See also Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (examining the opinions of "the world community" to support its conclusion that execution of persons with severe intellectual disabilities would offend the standards of decency required by the Eighth Amendment); *Thompson v. Oklahoma*, 487 U.S. 815, 830-

The Supreme Court has also found international law and practice relevant as a guide to the interpretation of other constitutional provisions. *See Glucksberg*, 521 U.S. at 710-11, 718 n.16, 734-35; *Lawrence v. Texas*, 539 U.S. 558 (2003) (referencing a decision of the European Court of Human Rights to determine that a Texas sodomy law violated plaintiff's privacy rights under the due process clause of the Fourteenth Amendment); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (citing the International Convention on the Elimination of All Forms of Racial Discrimination and Convention on the Elimination of All Forms of Discrimination against Women, and noting that the Court's opinion supporting Michigan's affirmative action program "accords with the international understanding of the office of affirmative action"); *see generally*, Sarah H. Cleveland, *Our International Constitution*, 31 Yale J. Int'l L. 1 (2006) (examining the Supreme Court's use of international law and practice in constitutional analysis).

This Court too has a long history of looking to international law and practice as sources of authority in deciding cases under the Alien Tort Statute, 28 U.S.C. § 1350, *see, e.g.*, *Abdullahi v. Pfizer*, 562 F.3d 163 (2d Cir. 2009); *Filartiga*

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31 (1988) (looking to the opinions and practices of "other nations that share our Anglo-American heritage" and "leading members of the Western European community" as aids to the proper interpretation of the Eighth Amendment).

v. Pena-Irala, 630 F. 2d 876 (2d Cir. 1980), and, more broadly, as an aid in interpreting U.S. laws. *See, e.g.*, *United States v. Yousef*, 327 F.3d 56, 92-94 (2d Cir. 2003) (recognizing customary international law as "part of the law of the United States" and "where legislation is susceptible to multiple interpretations, the interpretation that does not conflict with the law of nations is preferred" (citing *Murray v. The Charming Betsey*, 6 U.S. (2 Cranch) 64 (1804); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (internal quotations omitted)); *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring) (looking to decisions of Constitutional Courts in Germany and Italy to gauge whether Federal Sentencing Guidelines violate equal protection).

Looking to international law and practice in this case would be particularly apt given that Doe's claims implicate her right to state protection from gender-based violence and the rich trove of international authorities that address this very issue.

B. International Law Obligates States to Prevent, Respond to and Remedy Gender-Based Violence with Due Diligence.

International law prohibits violence against women as an extreme form of sex discrimination and obligates governments to prevent and respond to it with due diligence. The United Nations' Committee on the Elimination of Discrimination against Women, the body tasked with monitoring implementation of the Convention on the Elimination of All Forms of Discrimination against Women,

Dec. 18, 1979, 1249 U.N.T.S. 13 (1981) ["CEDAW"], has long recognized the close inter-relationship between sex discrimination and gender-based violence:

> Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of [CEDAW].

U.N. CEDAW Comm., General Recommendation No.19: Violence Against Women, U.N. Doc. A/47/38 (1992).[4] Stemming from a State's general obligation to respect and ensure human rights, governments must exercise due diligence to prevent, investigate and punish acts of violence against women – whether those acts are perpetrated by the State or by private persons – and ensure victims and survivors adequate compensation. *See, e.g.*, ICCPR, art. 2; U.N. Human Rights Comm., Gen. Comment No.31: The Nature of the General Legal Obligation

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[4] *See also* U.N. CEDAW Comm., General Recommendation No.35 on gender-based violence against women, updating general recommendation No.19, U.N. Doc. C/GC/35 (2017); International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (Mar. 23, 1976) ["ICCPR"]. As a duly ratified treaty, 138 Cong. Rec. S4781, S4783-4 (daily ed. April 2, 1992), the ICCPR is "supreme Law of the Land." U.S. Const. art. VI. Human Rights Comm., Gen. Comment No.28: Equality of Rights Between Men and Women (art. 3), ¶¶ 10, 11, 14, 16, 21, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000) (identifying protection from violence and subordination in the family as implicit under articles 6,7, 9,12,18, and 24 of the ICCPR); Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, arts. 5,6, June 9, 1994, 33 I.L.M. 1534 (1995); Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), May 11, 2011, arts. 3,4, C.E.T.S. No.210 (2011); *Lenahan (Gonzales) and Others v. United States*, Case 12.626, Inter-Am. Comm'n H.R., ¶ 111 (2011) [hereinafter, *Lenahan*]; *Opuz v. Turkey*, Eur. Ct. H. R., App. 33401, ¶ 191 (2009) [hereinafter, *Opuz*].

Imposed on States Parties to the Convention (art. 2), U.N. Doc. CCPR/C/74/CRP.4/Rev.6 (2004); CEDAW, arts. 2(e), 2(f) & 5; U.N. CEDAW Comm., Gen. Recommendation No.19, ¶¶ 8-9; Istanbul Convention, art. 5; *Lenahan*, ¶¶ 115-118; *Opuz*, at ¶ 128. Governments meet their obligation primarily by adopting laws, policies and practices aimed at addressing violence against women and establishing mechanisms for their effective enforcement. *See, e.g.*, U.N. Human Rights Comm., Gen. Comment No.31, ¶¶ 6-7; CEDAW, art. 2; U.N. CEDAW Comm., Gen. Recommendation No.19, at ¶ 24(a)-(v); *Lenahan*, ¶¶ 117-118; *Opuz*, ¶ 128.

A key component of the due diligence obligation is provision of remedies to victims and survivors. Remedies serve both a preventative and restorative function. They must be "effective," and include "penal sanctions, civil remedies and compensatory provisions." U.N. CEDAW Comm., Gen. Recommendation No.19, ¶ 24(i); *see also Lenahan,* ¶¶ 118-20; *Opuz*, ¶¶ 129-30. "Effectiveness" requires that victims and survivors be afforded access to a court capable of adjudicating the merits of a claim. *See, e.g.*, *Lenahan*, ¶ 173 (remedies must be "available and effective" and tribunals capable of establishing whether or not rights were violated); *Vrountou v. Cyprus*, Eur. Ct. H. R. App. 33631/06, ¶¶ 90-91 (2015) (a court must be capable of addressing the substance of a claim and where appropriate grant relief). Provision of effective remedies to victims and survivors

of gender-based violence is also required by independent human rights obligations. *See, e.g.*, ICCPR, art. 2(3); U.N. Human Rights Comm., Gen. Comment No. 31(States must ensure that individuals have "accessible and effective remedies"); CEDAW, art. 2(c) (States must "ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination."); *Vertido v. Philippines*, U.N. CEDAW Comm., Communication No.18/2008, CEDAW/C/46/D/18/2008 (July 16, 2010).

Where government officials fail to take reasonable measures to prevent, respond to, and remedy violence against women with due diligence, States may be held responsible for the acts and omissions of those officials and, where it is "established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk" of such violence, the acts of private individuals. *Opuz*, ¶ 129; *see also Lenahan*, ¶ 132 ("authorities knew of a situation of real and immediate risk"). In both situations, responsibility attaches because of the State's failure "to act with due diligence to prevent, investigate, sanction and offer reparations for acts of violence against women." *Lenahan*, ¶ 126; *see also* Istanbul Convention, art. 5.

The due diligence standard is well-established under international law. In the *Lenahan* case, the Inter-American Commission on Human Rights found that the United States had violated its obligations to act with due diligence to protect

petitioner, Ms. Lenahan, a Colorado domestic violence survivor, by failing to adequately enforce the terms of a restraining order to protect her and her daughters from violence by her estranged husband, which resulted in the deaths of Ms. Lenahan's three children. The Commission found the United States responsible for violations of Ms. Lenahan's right to be free from discrimination and to equal protection, and her own and her children's rights to life, not because of the acts themselves, but because the United States had failed to act with due diligence to prevent the violations or to effectively respond to them. The Commission highlighted the importance of judicial remedies as part of the U.S. government's due diligence obligation, noting that they should encompass:

> the right of every individual to go to a tribunal when any of his or her rights have been violated; to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that establishes whether or not a violation has taken place; and the corresponding right to obtain reparations for the harm suffered . . .

Lenahan, ¶ 172.

Similarly, in the *Opuz* case, the European Court of Human Rights held Turkey responsible for the violation of petitioner's right to life by her estranged husband. *Opuz*, ¶ 153. The Court found the petitioner had inadequate recourse to criminal and civil remedies to prevent repeated acts of violence against the petitioner and her mother, resulting in the latter's death. *Id. at* ¶¶ 152-53. *See also M.C. v. Bulgaria*, Eur. Ct. H.R., App. No.39272/98, at ¶¶ 185-87, 191-94 (2004)

(holding Bulgaria responsible for petitioner's rape in part due to systemic failures in the Bulgarian justice system, resulting in inadequate investigations into rape cases and lack of effective remedies, both criminal and civil, for victims and survivors).

Indeed, the right to state protection from gender-based violence and a government's concomitant due diligence obligation to effectively prevent, respond to, and remedy such violence is now so universally accepted that it has acquired the status of customary international law. *See, e.g.*, Yakin Erturk (Special Rapporteur on Violence Against Women), *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women*, *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, U.N. Doc. E/CN.4/2006/61 ¶¶ 14-29 (Jan. 20, 2006). As a rule of customary international law, the 'due diligence' obligation therefore forms part of U.S. law. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.")

C. Extending *Feres* To Bar Ms. Doe's Claims Would Violate U.S. Human Rights Obligations.

As discussed, international law imposed affirmative obligations on the Defendant to take reasonable measures to protect women on the West Point campus from sex discrimination and other acts of gender-based violence committed by the state and private individuals and to provide survivors with

effective remedies. The Defendant was also well aware that Doe and other female cadets faced a real and immediate risk of physical and verbal abuse on the West Point campus. *See, e.g.*, Part I, *supra*; *see also* Rashida Manjoo (Special Rapporteur on Violence Against Women, Its Causes and Consequences), *Mission to the United States of America*, U.N. Doc. A/HRC/17/26/Add.5, ¶¶ 22-31 (June 6, 2011) ("[s]exual assault and harassment of women in the military has become progressively acknowledged as a pervasive form of violence against women in the United States"). Yet the Defendant failed to implement reasonable and appropriate measures to protect, respond to, and remedy this violence that were mandated by DoD itself, as set forth in its directives on sexual violence prevention and response. The Defendant had the power to introduce these and other new policies and practices to more effectively combat sex discrimination, including sexual harassment and violence, and to establish improved standards for handling investigations and punishing perpetrators. Instead, they ignored the harm their actions and inaction were causing. Because the Defendant failed to exercise due diligence to protect Doe from discriminatory treatment, including rape by one of her fellow cadets, the Defendant is responsible for these egregious human rights violations.

Application of the *Feres* doctrine to deny Doe any civil remedy would violate the United States' obligation to prevent, respond to and remedy gender-

based violence with due diligence, and the government's independent obligation to provide Doe with an effective remedy for her injuries. Therefore, a decision by this Court determining that Doe may pursue her FTCA claims would be both consistent with and affirmed by international law.

CONCLUSION

For the reasons stated above and by Doe, *amici* respectfully urge the Court to allow Doe's case to proceed.

Respectfully submitted,

Dated: April 23, 2018

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,927 words, excluding the parts of the brief exempted by Fed. R. App. 32(A)(7)(B)(iii).

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ Sandra S. Park
Sandra S. Park
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April 23, 2018

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2018, I filed and served the foregoing BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, END RAPE ON CAMPUS, HUMAN RIGHTS AND GENDER JUSTICE CLINIC AT THE CITY UNIVERSITY OF NEW YORK SCHOOL OF LAW, HUMAN RIGHTS WATCH, KNOW YOUR IX, NATIONAL ALLIANCE TO END SEXUAL VIOLENCE, NATIONAL CENTER ON DOMESTIC AND SEXUAL VIOLENCE, NATIONAL WOMEN'S LAW CENTER, NEW YORK LEGAL ASSISTANCE GROUP, AND SURVJUSTICE IN SUPPORT OF PLAINTIFF-APPELLANT via this Court's electronic filing system.

/s/ Sandra S. Park
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ADDENDUM: INTEREST OF *AMICI CURIAE*

The **American Civil Liberties Union** (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 2 million members dedicated to the principles of liberty and equality embodied in the U.S. Constitution. Through its Women's Rights Project, co-founded in 1972 by Ruth Bader Ginsburg, the ACLU has taken a leading role in recent years advocating for the rights of survivors of gender-based violence. The ACLU's Human Rights Program, founded in 2004, works to bring a human rights analysis to its United States advocacy. Together, they have sought to strengthen governments' responses to gender-based violence and the remedies available to victims and survivors.

In 1881, the **American Association of University Women** (AAUW) was founded by like-minded women who had defied society's conventions by earning college degrees. Since then it has worked to increase women's access to higher education through research, advocacy, and philanthropy. Today, AAUW has more than 170,000 members and supporters, 1,000 branches, and 800 college and university partners nationwide. In adherence with its member-adopted Public Policy Program, AAUW supports freedom from violence and fear of violence in all workplaces and educational institutions, which extends to freedom from sexual harassment and violence for women serving in the military and in military academies.

End Rape on Campus (EROC) is a national 501(c)(3) nonprofit organization that works to end campus sexual violence through direct support for survivors and their communities; prevention through education; and policy reform at the campus, local, state, and federal levels. We seek to change culture in order to create a world free from sexual violence, and believe that all should have access to an education free from violence.

The **Human Rights and Gender Justice Clinic** (HRGJ) at the City University of New York (CUNY) School of Law is devoted to defending and implementing the rights of women under international law and ending all forms of discrimination. HRGJ is part of the nonprofit clinical program, Main Street Legal Services, Inc. at CUNY School of Law.

Human Rights Watch is a non-profit, independent organization and the largest international human rights organization based in the United States. For nearly 40 years, Human Rights Watch has investigated and exposed human rights violations and challenged governments to protect the human rights of all people. Human Rights Watch investigates allegations of human rights violations in more than 90 countries around the world, including the United States, by interviewing witnesses, gathering information from a variety of sources, and issuing detailed reports. Where human rights violations have been found, Human Rights Watch

advocates for the enforcement of those rights with governments, international organizations, and in the court of public opinion.

Know Your IX is a survivor- and youth-led project of Advocates for Youth that aims to empower students to end sexual and dating violence in their schools. Schools can play a critical role in protecting survivors' access to education after a sexual assault. But instead of shouldering this important responsibility, West Point and other military academies have opted to sweep violence under the rug. No cadet should be forced to endure sexual violence as the price of their education.

The **National Alliance to End Sexual Violence** (NAESV) is the voice in Washington for the 56 state and territorial sexual assault coalitions and 1300 local rape crisis centers working to end sexual violence and support survivors. NAESV supports the rights of cadets to attend military academies, free from sexual violence, and to obtain compensation when institutions fail to provide a safe educational environment for its students.

The **National Center on Domestic and Sexual Violence** (NCDSV) has a long history of working to end sexual assault and harassment in the military services. The President of our Board of Directors, Deborah D. Tucker, co-chaired the Defense Task Force on Domestic Violence 2000-2003 which also made recommendations on sexual violence issues and co-chaired the Military Committee of National Task Force on Sexual and Domestic Violence 2005-2015. NCDSV

believes this case demonstrates yet again the ongoing need for greater clarity about what is discriminatory behavior that supports the view of women as objects to be exploited rather than fellow servicemembers to be respected.

The **National Women's Law Center** (NWLC) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and opportunities and the corresponding elimination of sex discrimination from all facets of American life. This includes not only the right to an educational environment that is free from all forms of discrimination and harassment, but also access to effective means of enforcing that right and remedying such conduct. The Center focuses on issues of key importance to women and their families, including economic security, employment, education, health, and reproductive rights, with special attention to the needs of low-income women, and has participated as counsel or Amicus Curiae in a range of cases before the Supreme Court and Federal Courts of Appeals to secure the equal treatment of women under the law.

Founded in 1990, the **New York Legal Assistance Group** (NYLAG) provides high quality, free civil legal services to low-income New Yorkers who cannot afford attorneys. NYLAG has two distinct projects that focus on veterans' legal needs, the Public Benefits Unit's Veterans Access to Benefits Project and LegalHealth's Veterans Initiative. In 2017, these projects served a combined 1199 veterans with 1761 legal issues. The Veterans Access to Benefits Project at

NYLAG helps veterans with VA compensation claims and appeals, and conducts informational sessions to direct veterans toward programs and resources that most appropriately meet their financial, housing, legal, employment and other needs. LegalHealth's Veterans Initiative has medical-legal partnership clinics at three VA medical centers in New York City and Long Island. Using the medical-legal partnership model, attorneys coordinate with medical staff to identify and help veterans with issues including eviction prevention, VA benefits cases, advance planning, and debt collection.

SurvJustice is a D.C.-based national nonprofit organization that increases the prospect of justice for all survivors through legal assistance, policy advocacy, and institutional training. Our legal assistance enforces victims' rights to hold both perpetrators and enablers of sexual violence accountable in campus, criminal, and civil systems. Our policy advocacy creates victims' rights to improve systems of justice, and our institutional trainings help develop norms to better prevent and address sexual violence. By working on these fronts, SurvJustice creates accountability that serves to decrease the prevalence of campus sexual violence throughout the United States. Founded in 2014, it is still the only national organization that provides legal assistance to survivors in campus hearings across the country.