15-1890

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JANE DOE,
Plaintiff-Appellee,
v.
LT. GEN. FRANKLIN LEE HAGENBECK
and BRIG. GEN WILLIAM E. RAPP,
Defendants-Appellants,
UNITED STATES OF AMERICA,
Defendant.

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, HUMAN RIGHTS AND GENDER JUSTICE CLINIC AT THE CITY UNIVERSITY OF NEW YORK SCHOOL OF LAW, HUMAN RIGHTS WATCH, NATIONAL ALLIANCE TO END SEXUAL VIOLENCE, NATIONAL CENTER ON DOMESTIC AND SEXUAL VIOLENCE, AND NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF PLAINTIFF-APPELLEE

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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, Human Rights and Gender Justice Clinic at the City University of New York School of Law, Human Rights Watch, National Alliance to End Sexual Violence, National Center on Domestic and Sexual Violence, and National Women's Law Center.

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.

Sandra S. Park
Sandra S. Park
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March 17, 2016

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STATEMENT OF INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the U.S. Constitution. Through its Women's Rights Project, 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

[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.

workplaces and educational institutions, which extends to freedom from sexual harassment and violence for women serving in the military and in military academies.

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.

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 has a long history of working to end sexual assault and harassment in the military services. 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,

including numerous cases addressing the scope of the Constitution's guarantees of equal protection of the laws. The Center has long sought to ensure that rights and opportunities are not restricted for women or men and that all individuals enjoy the protection against such discrimination promised by the Constitution.

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") 60; 10 U.S.C. § 4348; 32 C.F.R. § 217.4(d).

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. (JA 15-24). 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 the

Department of Defense's own directives on 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, a combat veteran. She suffered severe anxiety and isolation, and ultimately resigned prior to the start of her third year.

Doe brought claims against 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, alleging due process, equal protection, and statutory violations and seeking declaratory relief and damages. When Doe was enrolled, Hagenbeck was Superintendent of West Point and served as Chair of its Sexual Assault Review Board, the primary oversight body of West Point's sexual assault prevention program. (JA 12). Rapp was West Point's Commandant of Cadets, responsible for administration and training of cadets. Hagenbeck and Rapp, who were responsible for implementing sexual harassment and violence prevention policies and ensuring equal educational opportunities for all cadets on the West Point campus, failed to do so. (JA 17, 29). Therefore, Defendants are subject to suit for creating the policies and customs that caused or permitted the violation of Doe's equal protection right to an education free from sex discrimination.

The district court allowed Doe's equal protection claim to proceed, but dismissed her other claims. In doing so, Judge Hellerstein rejected the defendants'

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:

> Hagenbeck and Rapp cannot rely on *Feres* if, as alleged, their conduct caused gender discrimination against women, unless it is evident from the complaint, or shown by an answer and subsequent proofs, that military discipline or its command structure is compromised.

(JA 60).

Judge Hellerstein's ruling was correct: *Feres* does not categorically prevent *Bivens* claims brought by cadets for equal protection violations based on sex discrimination. No circuit court has applied *Feres* to preclude constitutional claims by a cadet against a military academy. If *Feres* applied, it would serve to block equal protection claims from any cadet, leaving women in Doe's position without access to a court and bereft of any remedy for violations of well-established constitutional rights, including their right to an education free from sex discrimination. This is particularly troubling because Doe's suit challenges Defendants' failures to comply with the directives of the Department of Defense (DoD), and thus advances DoD policy and procedures. *Amici* urge this court to affirm the district court's ruling and allow Doe's claim to proceed on the merits, consistent with the intent and purpose of the equal protection clause and international human rights law, which requires governments to prevent, respond to, and remedy gender-based violence with due diligence. *Amici* explain how the

district court's recognition of a *Bivens* remedy was both consistent with and affirmed by international law.

ARGUMENT

I. FEMALE CADETS EXPERIENCE SERIOUS SEX DISCRIMINATION, INCLUDING SEXUAL HARASSMENT AND VIOLENCE, THAT WEST POINT'S LEADERS FAILED TO ADDRESS AND PREVENT.

Sexual violence and gender-based discrimination 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 of stopping sexual harassment and violence on them, failed to comply with the Department of Defense's own regulations governing sexual assault, and maintained inadequate internal accountability systems due to subsequent retaliation and harm to complainants' careers. (JA 14-25). These policies and practices undermined her access to an educational environment free from sex discrimination.

DoD's own research confirms West Point's creation of an educational environment that discriminates against women. In 2010, the year Doe resigned from West Point, DoD found that 51% of women at West Point indicated that they experienced gender-related harassment and 94% of women indicated that they experienced sexist behavior. Defense Manpower Data Center, *2010 Service*

Academy Gender Relations Survey v (2010) [hereinafter "2010 DoD Survey"], http://bit.ly/21jGf3e. 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.*

Notably, in 2011, DoD concluded that West Point was not in compliance with several DoD directives for instituting prevention strategies and only partially in compliance with directives for increasing victim confidence in reporting and improving sexual violence response. Department of Defense, SAPR, *Annual Report on Sexual Harassment and Violence at the Military Service Academies, Academic Program Year 2010-2011* 24, 29, 36 (2011) [hereinafter "2011 DoD Report"], http://bit.ly/22dG4MD. While West Point purported to encourage more reporting of sexual assault, DoD cited the academy for failing 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. According to 61% of female cadets who chose

not to report, concerns about harm to their reputations and standing at West Point were reasons they did not report. *Id.* at 48, Table 20.

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. *Marquet v. Gates*, Complaint, No. 12-CV-3117, ¶ 14 (S.D.N.Y. 2012). However, reporting the rape did not lead to any remedial or punitive action. Marquet was still compelled to see the perpetrator every day, and West Point did not alter her duties, which included daily emptying of his trash. *Id.* Depressed and suicidal, Marquet ultimately resigned from West Point. Like Doe, Marquet filed suit seeking accountability for violations of her constitutional rights. The district court applied *Feres* to summarily dismiss the claims, and Marquet filed but withdrew her appeal. *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 its first opportunity to reconcile the competing jurisprudence on equal protection and *Feres* when a *Bivens* claim is brought by a cadet. Its decision will determine whether cadets have access to traditional and important remedies for sex discrimination.

II. *FERES* DOES NOT APPLY TO BAR DOE'S EQUAL PROTECTION CLAIMS.

The Court should not extend the *Feres* doctrine to categorically preclude cadets from seeking accountability for serious and life-changing discrimination, harassment and violence. As Judge Hellerstein rightly observed, courts have an obligation to enforce the constitutional right to equal protection. Just as courts enforce a woman's right of admission to military academies, they must enforce her constitutional rights once she is enrolled. (JA 60). Moreover, none of the rationales underlying the *Feres* doctrine applies in this case, and thus none can serve as a "factor counselling hesitation" in this Court's recognition of a *Bivens* remedy.

A. The Equal Protection Guarantee Prohibits Sex Discrimination, Including Governmental Policies or Practices that Result in Gender-Based Violence.

Applying the *Feres* doctrine to deny cadets like Doe a remedy under the equal protection clause for pervasive sex discrimination would conflict with a foundational body of law enforcing this constitutional prohibition, including in the military and educational contexts. The Equal Protection Clause of the Fifth and Fourteenth Amendments of the United States Constitution confers a "federal constitutional right to be free from gender discrimination." *Davis v. Passman*, 442 U.S. 228, 245 (1979). *See also Fitzgerald v. Barnstable School Committee*, 555 U.S. 246 (2009); *United States v. Virginia*, 518 U.S. 515 (1996); *Mississippi Univ.*

for Women v. Hogan, 458 U.S. 718 (1982); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971). A *Bivens* remedy is generally available as redress for an equal protection violation based on sex discrimination, as the award of damages is a "remedial mechanism normally available in the federal courts." *Davis*, 442 U.S. at 248.

Equal protection violations may arise when: 1) there is a policy or practice that denigrates women, results in gender-based violence or harassment, or treats victims of gender-based violence differently from others who are similarly situated; 2) discrimination against women is a motivating factor; and 3) the plaintiff was injured by the policy or practice. *See, e.g.*, *Fitzgerald*, 555 U.S. at 258; *Virginia*, 518 U.S. at 532-33; *Eagleston v. Guido*, 41 F.3d 865, 878 (2d Cir. 1994). When these elements are met, the government must show that the challenged policy or practice survives heightened scrutiny – i.e., that there is an "exceedingly persuasive justification," and that the policy serves "important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Virginia*, 518 U.S. at 531, 533.

Applying this framework, the Supreme Court repeatedly has adjudicated equal protection claims involving sex discrimination in the military and military-related contexts. *Virginia*, 518 U.S. at 515; *Frontiero*, 411 U.S. at 680; *see also*

Fitzgerald, 555 U.S. at 257 (observing that students could bring equal protection claims pursuant to section 1983 against military service schools that are exempt from Title IX liability); *Crawford v. Cushman*, 531 F.2d 1114 (2d Cir. 1976) (ordering an award of damages for former servicewoman who was discharged based on a regulation that violated her equal protection rights). The fact that in some of these cases plaintiffs sought injunctive relief that, in contrast to damages claims, would fundamentally change the policies and practices of the military institutions did not prevent the Supreme Court from deciding them. Thus, in *Virginia* the Court held that women could not constitutionally be excluded from the Virginia Military Institute and instead offered an alternative program. 518 U.S. at 535-36, 547-54. And in *Frontiero*, a suit brought by an Air Force officer against the Secretary of Defense, the Court struck down federal laws treating spouses of servicemen and servicewomen differently for the purposes of residential allowances and benefits. 411 U.S. at 688-91.

Furthermore, the Supreme Court and lower courts have recognized that plaintiffs can bring equal protection damages actions against governmental bodies if their policies or practices result in, or discriminatorily respond to, gender-based violence, such as sexual harassment and domestic violence. *See, e.g.*, *Fitzgerald*, 555 U.S. at 258; *Eagleston*, 41 F.3d at 878; *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 701-02 (9th Cir. 1988); *Hynson v. City of Chester Legal Dep't*, 864 F.2d

1026, 1029-31 (3d Cir. 1988); *Watson v. City of Kansas City, Kan.*, 857 F.2d 690, 696-97 (10th Cir. 1988); *Smith v. City of Elyria*, 857 F. Supp. 1203, 1211-12 (N.D. Ohio 1994); *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1526-29 (D. Conn. 1984). In all of these cases, courts said plaintiffs could pursue equal protection claims by showing a governmental policy or practice of dismissing or failing to take seriously their complaints about gender-based violence, evidence of discriminatory intent, and injury.[2]

Doe adequately pled an equal protection claim. She alleged that defendants Hagenbeck and Rapp are liable as supervisors under the equal protection clause because they were personally responsible for creating and perpetuating policies and practices that promoted unconstitutional discrimination against women, and because they failed to institute training for cadets, faculty, administrators, and staff on sexual assault and sexist behaviors and how to effectively prevent and end them. (JA 15-29). These policies and practices violated DoD directives and explicitly treated female cadets differently by, for example, compelling women, but not men, to take regular STD tests and self-defense training based on the gender stereotype that it is the responsibility of women to prevent the spread of disease and to protect themselves from aggression. (JA 19). Rather than

[2] *See* Julie Goldscheid, *Rethinking Civil Rights and Gender Violence*, 14 Geo. J. Gender & L. 43, 70-72 (2013) (discussing courts' recognition of equal protection claims brought by gender-based violence victims for discriminatory treatment by government).

instituting sexual assault prevention training that emphasized the prohibition on assaulting women, West Point implemented training that put the burden on women to avoid victimization. (JA 16-20). Doe also pled that the support services in place for cadets who experience sexual violence were inadequate, and that West Point personnel informally advised female cadets that reporting sexual assaults would threaten their military careers. (JA 18, 23-24). These policies and practices evinced discriminatory intent, based on the differential treatment of female cadets and the assumption that they bore the burden of stopping sexual assault. As a result of the hostile educational environment created by Defendants' actions, Doe experienced severe anxiety, fear, and isolation and was ultimately compelled to resign. (JA 20-24). Under prevailing equal protection precedent, she clearly has articulated a constitutional violation.

B. The Principles Underlying *Feres* Do Not Justify Denying Doe a *Bivens* Remedy.

Defendants urge this Court to extend the *Feres* doctrine to bar any cadet from bringing a *Bivens* claim. Br. for Defs.-Appellants at 12-22. The Court should reject this argument. As discussed in detail by Doe, in light of *Taber v. Maine*, 67 F.3d 1029 (2d Cir. 1995), the *Feres* principles do not apply. Moreover, because Doe challenges Defendants' failure to follow the DoD's own directives, the primary rationale for foreclosing a remedy under *Feres* is inapplicable. *Feres*

and the military academy context should not serve as a "special factor" to deprive Doe of a long-recognized *Bivens* remedy for sex discrimination.

As a preliminary matter, *Amici* note that they could find no case where a court of appeals applied *Feres*, a doctrine which was established in the context of a Federal Tort Claims Act suit, to preclude a remedy under *Bivens* sought by a cadet. *Feres* does not bar constitutional suits in all military settings: "This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." *Chappell v. Wallace*, 462 U.S. 296, 304 (1983). Thus, the Court should exercise caution in foreclosing a remedy for plaintiffs like Doe – students who disenrolled from the academy before incurring the obligation to enlist as soldiers or enter into any military service, JA 60, 10 U.S.C. § 4348, 32 C.F.R. § 217.4(d), but who have constitutional rights to an education free from sex discrimination.

Extrapolating from *Feres*, courts have barred damages suits only where the alleged injuries "arise out of or are in the course of activity incident to service," *Feres*, 340 U.S. at 146, and implicate military discipline and decision-making.[3] "[S]ervice-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military

[3] *Feres* originally relied on three rationales that have since been largely discarded by the courts. *United States v. Johnson*, 481 U.S. 681, 693-700 (Scalia, J., dissenting); *United States v. Shearer*, 473 U.S. 52, 57 (1985); *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957).

mission." *Johnson*, 481 U.S. at 691. Yet, this rationale has little force in the military academy context, where cadets are tasked with educational attainment. As the district court found, the constitutional protection that authorizes the admission of women to military academies must extend to their experiences after enrollment. Most significantly, the doctrine should not be extended to cases where West Point violates its own directives, as Doe alleges here. *See Ritchie v. United States*, 733 F.3d 871, 879 (9th Cir. 2013) (Nelson, 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," as alleged by plaintiff Doe).

Judicial review of equal protection claims charging Hagenbeck and Rapp with creating and implementing policies and practices that violated directives applicable at West Point would not second-guess or undermine the military discipline structure. Courts regularly review military decisions to determine whether they contravene military policies and regulations. *Crawford v. Cushman*, 531 F.2d 1114, 1120 (2d Cir. 1976) (citing cases); *Wenger v. Monroe*, 282 F.3d 1068, 1072 (9th Cir. 2002). Doe alleges that Defendants did not comply with relevant procedures and directives, thereby causing her to experience sex discrimination, including harassment and rape, at West Point in violation of the equal protection guarantee. Her case, therefore, does not challenge any discretion

exercised by the Defendants but merely holds them accountable for failing to follow procedures and directives in force at West Point. She does not question the chain of command; rather, she alleges that Defendants refused to implement DoD's own policies and, in the process, violated the Constitution.

If this Court denies Doe a *Bivens* remedy, there will be no meaningful relief available. Due to the discrimination she suffered, Doe withdrew from West Point, and thus cannot benefit from any future injunctive relief. For her, it is damages or nothing. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971). And any damages award to Doe, while holding West Point's leaders accountable for the constitutional injury, would not compel them to make any particular change to policy or practice, preserving their decision-making authority.

Finally, *Feres* should not be further extended when support for it is waning. In 1987, when the Supreme Court last upheld the doctrine in a 5-4 ruling, four 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). Numerous other courts of appeals judges have echoed these sentiments. *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 deep and widespread concerns about the *Feres* doctrine, *Amici* urge the court to refrain from expanding *Feres* to bar claims brought by cadets seeking vindication of their equal protection rights. Doe brought suit based on repeated and pervasive sex discrimination and gender-based violence and harassment. This Court should not presume that her right to address that discrimination under the equal protection doctrine improperly infringes on the autonomy of West Point's military leadership at this early stage of litigation, particularly in these circumstances, where Doe challenges West Point's failure to follow its own directives and procedures. Enrollment in a military academy should not be tantamount to giving up one's civil rights.

III. RECOGNIZING AN EQUAL PROTECTION CLAIM WOULD BE CONSISTENT WITH THE UNITED STATES' INTERNATIONAL HUMAN RIGHTS OBLIGATIONS.

As *Amici* have explained, Jane Doe has a remedy under the Equal Protection Clause of the Constitution. This conclusion 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. In particular, 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 simply 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 n.8, 718 n.16, 734-35 (1997) (Rehnquist, C.J.) ("Examining our Nation's history, legal traditions, and practices," "Anglo-American common-law tradition," and the practices "in almost every western democracy" including a Dutch law to decide whether Washington's ban on physician-assisted suicide violated the Due Process Clause of the Fourteenth Amendment). *Amici* urge this Court to look to international law to affirm the district court's well-reasoned opinion that *Feres* does not apply to bar Doe's equal protection claim under the U.S. Constitution.

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 affirm the District Court's opinion that *Feres* does not apply to deprive Doe of a remedy under the Equal Protection Clause. Such an approach would be consistent with U.S. Supreme Court precedent in which the Court has repeatedly cited to

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 the constitutionality 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." *Graham*, 560 U.S. 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).[4]

[4] *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, 830-31 (1988) (Stevens, J.) (looking to the opinions and practices of "other nations that share our Anglo-American heritage" and "leading members of the Western

The Supreme Court has also found international law and practice relevant as a guide to the interpretation of constitutional provisions other than the Eighth Amendment. *See Glucksberg*, 521 U.S. at 710 n.8, 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, joined by Breyer, J.) (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).

The Second Circuit, 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 (2009); *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980), and, more broadly, as an aid in interpreting U.S.

European community" as aids to the proper interpretation of the Eighth Amendment).

laws. *See, e.g.*, *Yousef v. United States*, 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. Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) and *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).

Resort to international law and practice in this case would be particularly apt given that Doe's claims implicate her constitutional rights to liberty and equality and because there is a rich trove of international authorities that address these very issues.

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).[5] 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

[5] *See also* International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (Mar. 23, 1976) ["ICCPR"]. The U.S. Senate ratified the ICCPR in 1992, 138 Cong. Rec. S4781, S4783-4 (daily ed. April 2, 1992), and the Covenant entered into force for the United States in September of that year. As a duly ratified treaty, 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 (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 (Convention of Belem do Para), 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) [hereinafter, Istanbul Convention]; *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*].

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 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 19, at ¶¶ 8-9; Istanbul Convention, art. 5; *Lenahan*, at ¶¶ 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, at ¶¶ 6-7; CEDAW, art. 2; U.N. CEDAW Comm., Gen. Recommendation No. 19, at ¶ 24(a)-(v); *Lenahan*, at ¶¶ 117-118; *Opuz*, at ¶ 128. A State's failure to exercise due diligence to protect women from violence violates, *inter alia*, their right to equal protection of the law. *Opuz*, at ¶ 191; *Lenahan*, at ¶ 111.

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, at ¶ 24(i). *See also Lenahan*, at ¶¶ 118-20; *Opuz*, at ¶¶ 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*, at ¶ 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, at ¶¶ 15-16 (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 a third party. *Opuz*, at ¶ 129. *See also Lenahan* at ¶ 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*, at ¶ 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. Issuance of the restraining order meant that the authorities knew of a real and immediate risk of violence against Ms. Lenahan and her children, yet they failed to take reasonable steps to enforce its terms. Therefore, 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, at ¶ 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. The European Court held the government responsible because the Turkish criminal justice system did not have an adequate deterrent effect to prevent repeated acts of violence against the petitioner and her mother by petitioner's estranged husband, resulting in the latter's death. In particular, the Court found the petitioner had inadequate recourse to criminal and civil remedies. Eur. Ct. H.R., App No. 33401/02, at ¶¶ 152-53, 175-76 (June 9, 2009). *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) (citing widely-ratified human rights treaties, numerous U.N. resolutions and declarations by other inter-governmental organizations, and the laws and practices of other nations, evidencing the establishment of a rule of customary international law). As a rule of customary international law, the 'due diligence' obligation therefore forms part of U.S. law. *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. Applying *Feres* Would Violate U.S. Human Rights Obligations.

As discussed, international law imposed affirmative obligations on Defendants to take reasonable measures to protect women on the West Point campus from sex discrimination and other acts of gender-based violence committed by state and non-state actors. As part of this due diligence obligation and general international human rights law, the United States was obligated to provide victims and survivors of such violence, like Doe, with effective remedies. Defendants were 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, *infra*; *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 Defendants failed to implement reasonable and appropriate measures to protect, respond to, and remedy this violence that were mandated by DoD itself, such as its directives on sexual violence prevention and response. Defendants 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 maintained discriminatory policies and ignored the harm their actions and inaction were causing. Because Defendants failed to exercise due diligence to protect Doe from discriminatory treatment, including rape by one of her fellow cadets, Defendants are responsible for these egregious human rights violations.

Application of the *Feres* doctrine to deny Doe her only 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, Judge Hellerstein's refusal to extend *Feres* to equal protection claims brought by cadets

was correct, as his analysis is 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 equal protection claim to proceed.

Respectfully submitted,

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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 6,810 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/_____
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March 17, 2016

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2016, I filed and served the foregoing BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, HUMAN RIGHTS AND GENDER JUSTICE CLINIC AT THE CITY UNIVERSITY OF NEW YORK SCHOOL OF LAW, HUMAN RIGHTS WATCH, NATIONAL ALLIANCE TO END SEXUAL VIOLENCE, NATIONAL CENTER ON DOMESTIC AND SEXUAL VIOLENCE, AND NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF PLAINTIFF-APPELLEE via this Court's electronic filing system.

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