No. 18-185

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JANE DOE,

Plaintiff-Appellant,

v.

FRANKLIN LEE HAGENBECK, WILLIAM E. RAPP,
and the UNITED STATES,

Defendants-Appellees.

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

BRIEF OF *AMICI CURIAE*
SERVICE WOMEN'S ACTION NETWORK, NATIONAL LAWYERS GUILD'S MILITARY LAW TASK FORCE, NATIONAL VETERANS COUNCIL FOR LEGAL REDRESS, NATIONAL VETERANS LEGAL SERVICES PROGRAM, NOT IN MY MARINE CORPS, COMMON DEFENSE, GEORGIA MILITARY WOMEN, WOMEN VETERANS UNITED COMMITTEE, INC. AND PROTECT OUR DEFENDERS IN SUPPORT OF PLAINTIFF-APPELLANT JANE DOE AND URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Fed. R. App. P. 26.1 and 29(c)(1), *amici curiae* Service Women's Action Network, the National Lawyers Guild's Military Law Task Force, the National Veterans Council for Legal Redress, the National Veterans Legal Services Program, Not In My Marine Corps, Protect Our Defenders, Common Defense, Georgia Military Women and Women Veterans United Committee, Inc. certify that the *amici curiae* consist of seven private, nonprofit organizations, one service women and veterans networking group, and one bar association committee. None of the *amici curiae* has a parent company and no publicly held company has any form of ownership interest in any of the *amici curiae*.

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INTEREST OF *AMICI CURIAE*

Nine *amici curiae* have signed on to this brief in support of plaintiff-appellant Jane Doe.[1] They are each independent organizations that have varying focuses and objectives. Yet they are all united in their support of the arguments contained in this brief, which they believe are of central importance to their shared conviction that victims of sexual assault on military campuses must have an avenue for seeking legal redress for the unimaginable harm they have endured.

The Service Women's Action Network ("SWAN") is an independent nonprofit organization that aids servicewomen by, among other activities, securing equal opportunity and freedom to serve without discrimination, harassment, or assault. One avenue through which SWAN pursues these missions is participating, either directly or as *amicus curiae*, in federal litigation relating to such issues.

The National Lawyers Guild's Military Law Task Force ("MLTF") includes attorneys, legal workers, law students and "barracks lawyers" interested in draft, military and veterans issues. It is a standing committee of the National Lawyers Guild. The MLTF assists those working on military law issues as well as military

[1] Pursuant to Federal Rules of Appellate Procedure 29(a)(2) and 29(a)(4)(E) and the Second Circuit's Local Rule 29.1(b), the *amici curiae* state as follows: All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part. No party and no party's counsel contributed money that was intended to fund preparing or submitting this brief. No person – other than *amici curiae*, their members, or their counsel – contributed money that was intended to fund preparing or submitting this brief.

law counselors working directly with GIs. As part of its work, the MLTF engages in cases and projects addressing the human and civil rights of servicemembers and veterans. A priority area for the MLTF involves challenging the military's pandemic of sexual assault and sexual harassment, and its inability to provide justice to the victims/survivors of this misconduct.

The National Veterans Council for Legal Redress ("NVCLR") is a nonprofit veterans service organization that seeks to educate the public regarding the treatment of veterans with less than honorable discharge, to work toward society's acceptance of such veterans, to assist needy veterans and their families in dealing with problems resulting from less-than honorable veteran status, and to provide training and technical assistance to other non-profit veterans organizations.

The National Veterans Legal Services Program ("NVLSP") is an independent nonprofit organization that has worked since 1980 to ensure our nation's 25 million veterans and active duty personnel receive the federal benefits they have earned through service to our nation. NVLSP advocates before Congress, federal agencies, and courts to protect servicemembers and veterans. NVLSP's interest is acute when a party advocates an erroneous legal interpretation that adversely would affect large groups of servicemembers—even more so in cases where allegations are as troubling and important as Ms. Doe's.

Not In My Marine Corps is an independent nonprofit organization that seeks to bring to light stories of sexual assault and harassment among military service members. It provides resources for service women and men to report harassment or assault, take action to help themselves, and stand up for others.

Common Defense is a diverse, grassroots organization of United States veterans and military family members who fight to preserve the core values they swore to uphold and defend. Namely, Common Defense works to protect its communities from hate and violence, to serve on the front lines for social, economic, and global justice, and to champion a truly equitable and representative democracy.

Georgia Military Women is a social and professional networking group of over 2,600 members that works to connect female service women and veterans.

Women Veterans United Committee, Inc. ("WVUCI") is an independent nonprofit organization that seeks to honor the service and sacrifice of female veterans who have served faithfully in our military service and to form a sisterhood of support to foster camaraderie that can connect women veterans with others who understand the distinct pride of being a female service member.

Protect Our Defenders ("POD") is an independent nonprofit organization that works to transform the culture of harassment and rape in the military through legal reform, advocacy, public education, and *pro bono* services for survivors of

military sexual assault and harassment. It seeks to safeguard service members and civilians from sexual violence, improve safety, and promote equality in the military.

Given their experience and expertise, SWAN, MLTF, NVCLR, NVLSP, Not In My Marine Corps, Common Defense, Georgia Military Women, WVUCI and POD are well-positioned to describe the pervasive problem of sexual assault and misconduct within military institutions like West Point, and why Doe's Federal Tort Claims Act and Little Tucker Act claims should not have been dismissed. All of the *amici curiae* agree that Ms. Doe's case speaks directly to the core of their missions.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court erred when it dismissed Doe's Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1), ("FTCA") and Little Tucker Act, 28 U.S.C. § 1346(a)(2), claims, thereby improperly denying Doe an opportunity to prove her case and obtain relief for a rape she suffered as a student at the United States Military Academy ("West Point").

The *amici* offer four principal arguments in support of Doe's appeal.

First, the district court's decision carries with it intolerable consequences for Doe and the countless other female cadets who are the victims of sexual assault at military academies – a long-overlooked and inadequately addressed issue. This Court should reverse the district court's ruling both because it is erroneous, and because allowing it to stand would permit the continuation of harm as a result of barbaric, criminal conduct at military academies today.

Second, the *Feres* doctrine does not bar Doe's FTCA claim. Doe's sexual assault was not "incident to military service." It occurred at an academy serving primarily educational purposes and was perpetrated against a student, after curfew, and after a rule-breaking evening of drinking. The *Feres* doctrine is, to say the least, *widely* criticized, in this Circuit and across the country. Extending the doctrine to bar claims by cadets who have been sexually assaulted precludes redress for victims for a form of injury that *no* cadet should have to endure. While

the doctrine may be justified if applied to injuries or death that can occur in the course of military training or active duty, it should *not* be read to apply to rape and other forms of sexual assault of students.

Third, the district court incorrectly concluded that West Point's actions (and inactions) were part of its "discretionary functions." In particular, Doe alleges that certain Department of Defense directives were mandatory, yet West Point failed to implement them. The district court improperly ignored these allegations, and in so doing, dismissed valid claims that must be reinstated.

Finally, the district court incorrectly dismissed Doe's Little Tucker Act claim on the grounds that (i) the United States did not breach its contract with Doe and (ii) the claim sounded in tort. Neither conclusion is correct. *First*, the amended complaint contains unambiguous allegations that the United States breached the implied covenant of good faith and fair dealing present in every contract. *Second*, the Little Tucker Act claim is a breach of contract claim for damages separate and apart from Doe's FTCA claim; it does not "sound in tort."

The Court should reverse the district court's dismissal of Doe's FTCA and Little Tucker Act claims, reinstate those claims, and remand the case for further proceedings before the district court.

ARGUMENT

I. SEXUAL ASSAULT AT MILITARY ACADEMIES IS PERVASIVE AND DEVASTATING

In 2016 at West Point, *nearly six percent of freshman* women indicated that they experienced unwanted sexual contact. *See* Office of People Analytics, *2017 Service Academy Gender Relations Focus Groups Overview Report* ("OPA Report") at 19.[2] By sophomore year, *that number was more than twelve percent*, and by senior year, *more than a whopping fourteen percent of the female cadets* at West Point reported experiencing unwanted sexual contact. *Id.* In addition, *sixty-three percent* of these victims experienced *more than one incident* of unwanted sexual contact. *Id.* at 22. There can be no dispute that this is just not acceptable and needs to be addressed.

Yet the military academies have proven to be incapable of dealing with the problem. As the Department of Defense ("DOD") has noted, "[d]espite significant investments of attention, time, and resources, the 2016 estimated prevalence (occurrence) rate of unwanted sexual contact *increased* at all three Academies." DOD, *Annual Report on Sexual Harassment and Violence at the Military Service*

[2] Available at http://www.sapr.mil/index.php/research.

Academies, Academic Program Year 2016-2017 ("DOD Report") at 4 (emphasis added).[3]

The numbers confirm this. In 2016-2017, there were 112 reported sexual assaults at the United States military academies – up from 86 the year prior. *Id.* at 6. *Fifty* of those assaults occurred at West Point. *Id.* at 14. And these numbers are understated. The DOD estimates that in 2016, only thirteen percent of military academy students who responded to the DOD survey by indicating that they experienced unwanted sexual contact actually "reported the matter to a military authority." *Id.*, App. D at 3. In other words, the number of students at military academies affected by sexual misconduct is actually *much larger* than reported.

Part of the problem is that significant barriers to reporting sexual misconduct have made students reluctant to do so. *See* OPA Report at 108. These barriers include "fear of damaging one's reputation both at the Academy and later once he or she becomes an officer"; "concerns with getting in trouble for collateral misconduct"; "the lack of privacy and strenuous nature of the process"; "feared retaliation in the form of ostracism"; and "an Academy culture that fostered an environment of non-reporting." *Id.*

The situation is devastating. The harm the victims of sexual assault suffer is severe and long-lasting. As highlighted in another recent litigation, "[f]rom 2008-

[3] Available at http://www.sapr.mil/index.php/reports/sapro-reports.

2013, veterans filed over 29,000 claims related to disabilities caused by [military sexual trauma]. . . . [a]nd from 2010-2013, the overwhelming majority of those [military sexual trauma]-based claims (94%) were for PTSD." *Serv. Women's Action Network v. Sec'y of Veterans Affairs*, 815 F.3d 1369, 1373 (Fed. Cir. 2016) (internal citation omitted).

Although sexual assault is a crime, only *thirteen percent* of cases alleging such conduct in the United States military in 2016 were actually prosecuted and only *four percent* of the offenders were convicted of a sex offense. Protect Our Defenders, *Military Sexual Assault Factsheet* (Feb. 2018).[4]

In the face of these daunting facts and statistics, cases like this one take on increased importance and present one of the few and meaningful avenues for much-needed change.

II. THE *FERES* DOCTRINE DOES NOT BAR DOE'S FTCA CLAIM

The *Feres* doctrine, embodied in *Feres v. United States*, 340 U.S. 135 (1950) ("*Feres*"), does not apply. While the doctrine is designed to immunize injuries that occur in the course of *activity incident to military service*, such is not the case here. Doe is a victim of sexual assault that occurred at an educational institution, by a co-student with whom she was drinking and out past curfew. This is a far cry from

[4] Available at https://www.protectourdefenders.com/factsheet/.

injury or death that occurs during the course of military training, a helicopter crash or being at war – the types of activity incident to military service that fall squarely under the *Feres* doctrine. The Government's arguments, if accepted, would extend the doctrine beyond its purpose and reach a perverse result that should be rejected.

A. THE WIDELY CRITICIZED *FERES* DOCTRINE BARS ONLY THOSE CLAIMS INVOLVING ACTIVITY "INCIDENT TO SERVICE"

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994). Because "[s]overeign immunity is jurisdictional in nature," if the United States is immune from suit, the district court lacks subject matter jurisdiction to hear the claim. *Id.* The FTCA provides a waiver of this immunity. In particular, the United States is *not* immune from suit "in actions for money damages arising out of injury, loss of property, personal injury or death caused by the 'negligent or wrongful' act or omission of a government employee 'while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.'" *Fountain v. Karim,* 838 F.3d 129, 135 (2d Cir. 2016) (quoting 28 U.S.C. § 1346(b)(1)).

The Supreme Court in *Feres* created a limited exception to this rule. In particular, the Court in *Feres* held that "the Government is not liable under the

Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres* at 146.

The Court in *Feres* determined that such a rule was implied in the FTCA for three reasons. First, the Court noted that "[t]he relationship between the Government and members of its armed forces is 'distinctively federal in character,'" 340 U.S. at 143 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947)), and found it persuasive that no federal law permitted recovery of damages for claims arising incident to service. *Id*. at 144. Second, the FTCA was intended to impose liability on the government as if it were a private individual, but it was illogical to do so in the context of a soldier's relationship with his or her superior officers. *Id*. at 141-42. Third, the Court concluded that because military veterans are entitled to "uniform compensation for injuries or death of those in armed services," *id*. at 144, and in light of the fact that Congress did not provide any guidance on how to factor that compensation into a plaintiff's recovery under the FTCA, Congress must not have intended the FTCA to also permit recovery by service members for injuries incident to military service. *Id*. at 144-45.

Over the course of the sixty-eight years since *Feres* was decided, application of the *Feres* doctrine has been far from consistent. *See Taber v. Maine*, 67 F.3d 1029, 1039-42 (2d Cir. 1995) (summarizing the "incoherence" with which *Feres* has been applied). Moreover, the *Feres* doctrine has been *widely criticized*. *See*,

e.g., *Taber v. Maine*, 67 F.3d at 1039 (stating of the *Feres* court, "its willingness to ignore language, history, and the process of incremental law making (not to mention possible ways of dialoguing with Congress to discern the legislature's actual intent) was . . . remarkable."); *Ortiz v. U.S. ex rel. Evans Army Cmty. Hosp.*, 786 F.3d 817, 822 (10th Cir. 2015) ("Suffice it to say that when a court is forced to apply the *Feres* doctrine, it frequently does so with a degree of regret.") (collecting cases critical of *Feres*); *Ritchie v. United States,* 733 F.3d 871, 874 (9th Cir. 2013) ("For the past sixty-three years, the *Feres* doctrine has been criticized by countless courts and commentators across the jurisprudential spectrum.") (internal quotation marks omitted) (collecting cases).

Thus, *Feres* should be applied narrowly – it bars *only* those claims arising from activities that are "incident to service." *See Doe v. Hagenbeck*, 870 F.3d 36, 61–62 (2d Cir. 2017) (Chin, J., dissenting) ("While we do not, of course, have the authority to overrule *Feres*, we should not be extending the doctrine.").

B. THE DISTRICT COURT FAILED TO CONDUCT A *FERES* ANALYSIS OF DOE'S FTCA CLAIM

Here, the district court did not analyze whether the *Feres* doctrine barred Doe's FTCA claim. Its analysis of the *Feres* doctrine only related to Doe's claim brought under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) ("*Bivens*"), which was brought against the two individual defendants, not the United States. That aspect of the decision is not addressed in

the present appeal. Thus, this appeal involves only Doe's claims brought against the United States.

The district court erred when it failed to analyze whether Doe's FTCA claim – separate and distinct from her *Bivens* claim – is barred under *Feres*. In particular, the Supreme Court has recognized that FTCA and *Bivens* claims are *not* exclusive remedies; rather they provide "parallel, complementary causes of action." *Carlson v. Green*, 446 U.S. 14, 20 (1980). Because of this, a separate analysis must be done to determine whether the *Feres* doctrine bars each claim separate and distinct from one another. *See Gaspard v. United States*, 713 F.2d 1097 (5th Cir. 1983) (analyzing *Feres*'s application to each claim separately).

C. DOE'S FTCA CLAIM DOES NOT ARISE FROM ACTIVITIES INCIDENT TO SERVICE

Applying the *Feres* doctrine to Doe's FTCA claim, the Court faces the inescapable conclusion that the claim is *not* barred. The indicia this Court has identified as relevant in determining whether *Feres* applies are not present here.

This Court has held that the relevant inquiry in deciding whether *Feres* bars a plaintiff's FTCA claim is whether, in a context outside the military, the plaintiff's injuries would be covered by workers' compensation law.

In particular, the Court in *Taber*, 67 F.3d at 1050 held:

> [I]n assessing whether a military plaintiff's FTCA claim is barred, the court should proceed by considering *the same question that would determine whether the plaintiff would be entitled to receive standard*

> *workers' compensation payments* for his injury: was the plaintiff engaged in activities that fell within the scope of the plaintiff's military employment? Where the answer is "yes," so that the plaintiff would be entitled to receive standard workers' compensation payments, . . . the *Feres* doctrine applies, barring recovery under the FTCA. . . . [I]f the answer is "no," . . . there should be no *Feres* bar, absent unusual circumstances that would call into play the *Feres* discipline rationale.

(emphasis added). Doe's injuries would not be covered by workers' compensation, compelling the conclusion that Doe's FTCA claim did not arise incident to service.

Doe was not an employee of the United States at the time of the assault; her status at the time was that of a student. As the district court correctly noted, "[s]ince Doe resigned before entering her third year at West Point, she had no obligation to enlist as a soldier or enter into any military status, or to pay any money. She was a student . . . ." *Doe v. Hagenbeck,* 98 F. Supp. 3d 672, 689 n.5 (S.D.N.Y. 2015). Likewise, as the Hon. Denny Chin wrote in his dissent in the appeal resolving Doe's *Bivens* claim, Doe "was a student attending college: she was taking classes, participating in extracurricular activities, and learning to grow up and to be a self-sufficient and healthy individual." *Doe v. Hagenbeck*, 870 F.3d at 59. Because Doe was a student, *not* a service member, she would *not* be entitled to workers' compensation.[5]

[5] In addition, Doe and her assailant were engaged in a "frolic" when the assault occurred, further removing this from the workers' compensation application. *Bryan v. Bunis,* 208 A.D. 389, 391 (N.Y. App. Div. 1924).

Moreover, to the extent that the United States argues that *Wake v. United States,* 89 F.3d 53 (2d Cir. 1996) ("*Wake*") applies, the *amici* respectfully submit that the result is the same: Doe's injuries did not arise incident to service.[6]

In *Wake*, the Court held, "[i]n examining whether a service member's injuries were incurred "incident to service," the courts consider various factors, with no single factor being dispositive." *Id.* at 58. These factors include (i) "[t]he individual's status as a member of the military at the time of the incident giving rise to the claim"; (ii) "the relationship of the activity to the individual's membership in the service, as well as the location of the conduct giving rise to the underlying tort claim"; and (iii) "whether the activity is limited to military personnel and whether the service member was taking advantage of a privilege or enjoying a benefit conferred as a result of military service." *Id*.

None of these considerations apply here.

First, as mentioned, Doe was a student at the time of the rape. She was not enlisted or on active military duty.

Second, the activity that caused Doe's injuries – a rape – has absolutely *no relationship* to Doe's status or obligations as a student at West Point. Indeed, even

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[6] The *amici* agree with Doe that "[t]o the extent that the *Wake* test conflicts with that articulated in *Taber*, . . . the earlier decision in *Taber* must control." Pl. Opening Br. at 50 n.10 (citing *United States v. Moore*, 949 F.2d 68, 71 (2d Cir. 1991)).

if one were to treat students as military or quasi-military personnel, rape at the hands of a fellow student is not an injury one would expect to suffer as ancillary to, or incident to, being a student at West Point, as, for example, might be dehydration after a hike. Moreover, the rape occurred at around 1:00 a.m. – after curfew – in a boiler room of an administrative building, where the cadets were not permitted to be at that hour of night. The second *Wake* factor is not met.

Third, the activity was *not* limited to military personnel, and Doe was not taking advantage of a privilege or benefit she received because of her military status. Doe and her attacker were out past curfew and drinking alcohol, neither of which is a "privilege" or "benefit" conferred by virtue of military status. To the contrary, these activities were directly contrary to explicit West Point policy. As a result, the third and final *Wake* factor is also not met here.[7]

Respectfully, *amici* ask the Court to consider the consequences of a conclusion that sexual assault constitutes action "incident to military service." Such a holding would immunize the Government's failure to take effective action to prevent sexual assault at our military academies, and be tantamount to telling

[7] The Court's prior decision in this case dismissing Doe's *Bivens* claim contains a footnote which addresses the *Wake* factors in passing. *Doe v. Hagenbeck,* 870 F.3d at 45 n.7. However, any conclusions drawn in that footnote relate *only* to the *Bivens* claim. To the extent that they appear to apply to Doe's FTCA claim, they are purely *dicta*, as that claim was not properly before the Court in that appeal.

future students of the academies that studying to become a future military officer carries with it – as part of one's "service" – a risk of being raped or sexually assaulted at school without any legal recourse. Such assaults occur with alarming frequency. They should *not* be condoned by an extension of the *Feres* doctrine to immunize them in this Circuit. *See Doe v. Hagenbeck*, 870 F.3d at 61–62 (Chin, J., dissenting).

The *Feres* doctrine does *not* bar Doe's FTCA claim and there is strong public policy further compelling this result.

III. DOE'S FTCA CLAIM IS MERITORIOUS

The district court dismissed Doe's FTCA claim because it found that West Point officials were performing "discretionary functions" when they failed to properly implement the military's Sexual Assault Prevention and Response Program. *Doe v. Hagenbeck*, 98 F. Supp. 3d at 690-91. The district court's holding, however, flies in the face of credible allegations by Doe that certain of West Point's responsibilities were mandatory, not discretionary. The district court erred when it reached this conclusion.

As discussed above, the FTCA provides a waiver of sovereign immunity for civil suits seeking monetary damages from the United States for injuries suffered because of wrongful or negligent acts by a government employee, acting within the scope of his employment. *See Fountain v. Karim*, 838 F.3d at 135.

The FTCA contains several exceptions to this rule. One is that the United States does *not* waive sovereign immunity for "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a *discretionary function or duty* on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a) (emphasis added). The district court determined that the West Point official "had the responsibility under applicable statutes and regulations to implement policies and practices to reduce and eliminate discrimination based on gender . . . [but h]ow they did it, and the extent to which they did it, were discretionary functions, barring an FTCA claim against the United States." *Doe v. Hagenbeck*, 98 F. Supp. 3d at 690. That was error.

As Doe has explained, the Department of Defense's Directive 6495.01 ("Directive 6495.01"), as edited on November 7, 2008, and in effect when Doe was a student at West Point,[8] requires that "[t]he Secretaries of the Military Departments *shall* . . . [e]nsure compliance with [the DOD] Directive and establish policies and procedures to implement [the Sexual Assault Prevention and Response Program] . . . consistent with the provisions of th[e] Directive." *Id.* at § 5.5.1 (emphasis added). The use of the word "shall" admits to no "discretion." The actions commanded by the directive are required.

[8] Available as Exhibit A to Doe's Opening Brief in this appeal.

Among other things, Directive 6495.01 states that "[i]t is DOD's policy to . . . [p]rovide an immediate, trained response capability for each report of sexual assault . . . and ensure victims of sexual assault . . . receive timely access to appropriate treatment and services." *Id*. at § 4.3. Nonetheless, Doe alleges in her amended complaint that she did not receive appropriate treatment or services. In particular, she alleges that "the nurse treating Ms. Doe performed a vaginal exam and informed her that she had signs of vaginal tearing," but that "[t]he clinic did not perform any forensic collection or preservation of evidence of the sexual assault." Amend. Compl. ¶ 67. Doe further alleges that she was referred to a Sexual Assault Response Counselor, but that they met only once. *Id*. at ¶¶ 69-70. This cannot be said to constitute "appropriate treatment and services" as *required* under Directive 6495.01.

Moreover, Directive 6495.01 also states that it is DOD's policy to "ensure victims of sexual assault are protected [and] treated with dignity and respect." *Id*. at § 4.3. Doe's amended complaint specifically alleges she "felt that if she [filed] an unrestricted report [of the sexual assault], West Point officials and fellow cadets would label her a troublemaker and faker, which would irreparably hurt her chances for advancement in the military." Amend. Compl. at 72. Doe further alleges that fear of "the consequences of reporting sexual assault" is commonplace

among female cadets. *Id.* at 73. This is plainly inconsistent with Directive 6495.01.

At the very least, these allegations raise factual issues as to whether the DOD mandates that permitted no "discretion" were executed, precluding dismissal at the outset on "discretionary functions" grounds.

In addition, Doe's FTCA claim consists of five separate torts: negligent supervision, negligent training, common law negligence, negligent infliction of emotional distress, and abuse of process. Amend. Compl. at ¶¶ 109-128. The district court failed to consider each of these torts, and thus painted with too broad a brush when it dismissed the entire FTCA claim under the discretionary functions exception. For example, Doe alleges that West Point officials "abused legal process in their actions . . . [by] refus[ing] to properly investigate and punish incidents of sexual assault . . . [and by] establish[ing] and operat[ing] a system that discouraged and prevented Ms. Doe from pursuing an unrestricted report and/or criminal charges . . . without fear of retaliation." Amend. Compl. ¶ 122. To the extent that the district court's ruling deemed the officials' complete failure to follow the DOD mandates "discretionary functions," it was in error. Doe's allegations describe a circumstance in which a mandatory DOD directive appears to have been entirely ignored. Nothing in the DOD directive can be read to confer discretion to ignore it on those charged with executing it.

Accordingly, the Court should reinstate Doe's FTCA claim.

IV. DOE'S LITTLE TUCKER ACT CLAIM IS MERITORIOUS

The district court dismissed Doe's Little Tucker Act claim on the ground that the United States did not breach its contract – entered into when Doe signed an Agreement to Serve on June 30, 2008 – because it "performed the services it agreed to perform." *Doe v. Hagenbeck,* 98 F. Supp. 3d at 692.

This conclusion, made at the motion to dismiss stage, was error, in light of the allegations in the amended complaint. "Sovereign immunity shields the United States from suit absent a consent to be sued that is unequivocally expressed." *United States v. Bormes*, 568 U.S. 6, 9 (2012) (internal quotation marks omitted). "The Little Tucker Act is one statute that unequivocally provides the Federal Government's consent to suit for certain money-damages claims." *Id.* at 10. Here, Doe sued the United States asserting breach of contract, which is permitted under the Little Tucker Act. 28 U.S.C. § 1346(a)(2) ("The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of . . . [a]ny . . . civil action or claim against the United States, not exceeding $10,000 in amount, founded . . . upon any express or implied contract with the United States.").

There can be no reasonable dispute that a contract existed between Doe and the United States. On June 30, 2008, Doe signed an Agreement to Serve, which is

an educational services contract. Pursuant to this contract, Doe agreed to serve in the Army for eight years, including five on active duty. In consideration, the United States was to provide Doe with an education, room, and board at West Point free of charge.

The district court dismissed Doe's Little Tucker Act claim, concluding that the United States did not breach the contract. In particular, the district court concluded that "[t]he government did not stop providing Doe with an education, room, and board," and "[t]he government is not suing Doe for an alleged failure to reimburse it." 98 F. Supp. 3d at 692. In addition, the district court concluded that because Doe's "claim of constitutional violations . . . sound[ed] in tort," it could not be brought as a Little Tucker Act claim. *Id.* The district court erred for at least two reasons.

First, in addition to suing the United States for a breach of the express terms of the fully executed Agreement to Serve, Doe also sued for a breach of the covenant of good faith and fair dealing implied in that binding contract. *See Sec. Plans, Inc. v. CUNA Mut. Ins. Soc.*, 769 F.3d 807, 817 (2d Cir. 2014) ("New York law implies [a covenant of good faith and fair dealing] in all contracts."). In particular, Doe alleges in her amended complaint that the United States breached the covenant of good faith and fair dealing when it "creat[ed] and enforc[ed] policies and practices that fostered a sexually hostile environment and toleration of

violence against women, [and] failing to adequately punish perpetrators of sexual assault," among other things. Amend. Compl. ¶ 106. This breach prevented Doe from receiving the education guaranteed to her under the contract. As a result, Doe stated a claim for breach of contract against the United States.

Second, the district court misapprehended the nature of the Little Tucker Act claim. It does not "sound in tort." It is a breach of contract claim for damages, separate and apart from Doe's other claims. As such, the district court had jurisdiction over the claim. *See Kenney Orthopedic, LLC v. United States*, 88 Fed. Cl. 688, 704 (2009) (holding that the Court of Federal Claims had jurisdiction over a claim brought against the United States Department of Veterans Affairs which "alleged breach of the implied covenant of good faith and fair dealing," because "the conduct at issue[] arose from [a] Contract, to which the VA was a party.").

It was improper for the district court to dismiss Doe's Little Tucker Act claim.

CONCLUSION

The *amici curiae* urge the Court to reverse the district court's dismissal of Doe's FTCA and Little Tucker Act claims, reinstate those claims, and remand the case for further proceedings before the district court.

Dated: April 23, 2018 Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,335 words, excluding the parts of the brief exempted by Fed. R. Civ. P. 32(f).

2. The brief further complies with the requirements of Fed. R. App. P. 23(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that I am electronically filing the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on April 23, 2018.

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