

No. 20-559

In The
Supreme Court of the United States

—◆—
JANE DOE, PETITIONER

v.

UNITED STATES OF AMERICA
—◆—

*ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*
—◆—

**BRIEF FOR GRADUATES OF U.S.
SERVICE ACADEMIES AS AMICI CURIAE
SUPPORTING PETITIONER**
—◆—

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NOVEMBER 30, 2020

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**BRIEF FOR GRADUATES OF
U.S. SERVICE ACADEMIES
INTEREST OF AMICI CURIAE¹**

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INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner persuasively argues that this case presents an ideal opportunity to clarify the bounds of the *Feres* Doctrine. Amici support that position and wish to further explain the ongoing crisis of sexual violence at the nation's military service academies. As graduates of those institutions, amici have unique insight into the culture that has allowed sexual harassment and assault to run rampant on campus, the lasting harms it inflicts on students long after they leave or graduate, and the urgent need to allow those like petitioner to seek relief in court.

Women enrolled in U.S. service academies are subjected to pervasive sexual violence. One in six is sexually assaulted each year. Half are sexually harassed. But few feel comfortable filing complaints. For good reason: despite efforts at reform, school leaders have failed these women at nearly every turn. Some faculty openly tolerate misogyny. Female students are told that aggressive sexual advances are inevitable, and that avoiding rape is their responsibility. Sexual violence is treated like a joke, the subject of marching songs. Meanwhile, women are advised that reporting sexual assault—or even seeking counseling for sexual assault—will ruin their careers. Victims often do not receive appropriate treatment or counseling. And when they file formal complaints, victims face the prospect of being hounded out of the academy by fellow students. Many women leave military service soon after being assaulted.

Jane Doe is a victim of this broken system. She was raped by a fellow student, after hours, during recreational activity. She did not receive appropriate treatment. And while her assailant faced no consequences, Doe resigned, forfeiting her hard-won educational opportunities. West Point is a college that, like any other, is obligated to protect its students. Doe's injuries—and the systematic culture of sexual violence that permitted them to occur—should not be beyond legal remedy. The petition should be granted.

ARGUMENT

PROPER APPLICATION OF THE *FERES* DOCTRINE TO SEXUAL ASSAULT IS A MATTER OF PRESSING NATIONAL IMPORTANCE

A. There Is An Unchecked Epidemic Of Sexual Assault And Sexual Harassment At U.S. Service Academies

Data from the Department of Defense show an entrenched pattern of sexual violence against women at the United States Military, Naval, and Air Force academies. The figures are stark. About one in six enrolled women indicated they were sexually assaulted during the 2017-2018 academic term. Dep't of Def., *Annual Report on Sexual Harassment and Violence at the Military Service Academies, Academic Program Year 2017-2018* 18 (2019).² These numbers have only worsened: the number of all sexual assaults has surged by nearly 50 percent in recent years—from

² https://evawintl.org/wp-content/uploads/APY17-18_MSA_Report_FINAL.pdf.

about 507 assaults in the 2015-2016 academic year to about 747 during the 2017-2018 academic year.³ Despite those figures, which are based on Defense Department anonymous surveys, the academies combined received just over 100 reports of such incidents annually during that period. *Id.* at 25. And while the Defense Department only publishes prevalence numbers every other year, there are strong indications that the incidence of sexual assault has continued to climb: reported sexual assaults, which comprise only a fraction of all assaults, rose by a third during the 2018-2019 term. Dep't of Def., *Annual Report on Sexual Harassment and Violence at the Military Service Academies, Academic Program Year 2018-2019* 5 (2020).⁴

Outright assault is not the only form of sexual aggression. Sexual harassment is commonplace and even less frequently reported at the service academies. Amici can attest that almost every woman is harassed during her four years at an academy. Official records bear that out. Among those anonymously surveyed, half of all women enrolled in the service academies experienced sexual harassment just during the 2017-2018 academic year. Dep't of Def. 2017-2018 Report, *supra*, at 22 (2019). But despite the staggering prevalence of harassment across all three schools, not

³ While sexual assault is far less prevalent among men enrolled in service academies, they have also experienced an increase in incidents: 3.4 percent of anonymously surveyed male students experienced sexual assault in 2017-2018, up from 1.4 percent in 2015-2016. *Ibid.*

⁴ https://www.sapr.mil/sites/default/files/_DoD_Annual_Report_on_Sexual_Harassment_and_Violence_APY18-19.pdf.

one student felt comfortable filing a formal complaint during the 2017-2018 term. *Id.* at 5. And informal complaints of sexual harassment actually dropped from sixteen complaints in 2016-2017 to just seven in 2017-2018. *Ibid.*

Victims' reticence to report reflects an absence of accountability. Stories of severe harassment frequently appear in the news. Male students have groped female students and shared sexually explicit emails referencing them, while school administrators have done little to punish this inappropriate behavior. See Dep't of Def., *Annual Report on Sexual Harassment and Violence at the Military Service Academies Academic Program Year 2012-2013* 45, 58 (2014);⁵ see also Craig Whitlock, *McMaster Rebuked by Army in 2015 for His Handling of Sexual Assault Case*, WASH. POST (Mar. 2, 2017).⁶

Inadequately deterred, these problems have long persisted. Women enrolled in service academies have been subjected to misogynistic degradation and sexual assault since those institutions first began admitting women in 1976. See Esther B. Fein, *The Choice*, N.Y. TIMES MAG. (May 5, 1985);⁷ Grace Lichtenstein, *A Year*

⁵ https://www.sapr.mil/public/docs/reports/FINAL_APY_12-13_MSA_Report.pdf.

⁶ https://www.washingtonpost.com/investigations/mcmaster-rebuked-by-army-in-2015-for-his-handling-of-sexual-assault-case/2017/03/02/e8421a8e-fe8b-11e6-8ebe-6e0dbe4f2bca_story.html.

⁷ <https://www.nytimes.com/1985/05/05/magazine/the-choice.html>.

Later, N.Y. TIMES (Sept. 11, 1977);⁸ Elizabeth Aguilera et al., *Roots of Sexual-Abuse Problem at Air Force Academy Run Deep*, DENVER POST, Aug. 17, 2003. Amici, who all graduated from service academies, have witnessed much of this behavior firsthand.

Similar problems await those women who graduate from service academies under these conditions. Overall, one in three women in service have experienced military sexual trauma. Dep't of Veterans Affairs, *Military Sexual Trauma General Fact Sheet 1* (2020).⁹ About 6.2 percent of active-duty women in the U.S. military were sexually assaulted in the year leading up to a 2019 Defense Department study, up from 4.3 percent of women surveyed in 2016. Dep't of Def., *Annual Report on Sexual Assault in the Military Fiscal Year 2018 3* (2019).¹⁰ And 40 percent of women who report sexual assault are separated from service soon after, many within a year of being attacked. Inspector General, Dep't of Def., *Evaluation of the Separation of Service Members Who Made a Report of Sexual Assault 4*, 36-38 (2016).¹¹

Meanwhile, the military has failed to adequately investigate and prosecute assailants among its ranks.

⁸ <https://www.nytimes.com/1977/09/11/archives/a-year-later-how-women-are-faring-at-the-air-academy.html>.

⁹ https://www.mentalhealth.va.gov/docs/mst_general_fact_sheet.pdf.

¹⁰ https://www.sapr.mil/sites/default/files/DoD_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.

¹¹ <https://media.defense.gov/2016/May/09/2001714241/-1/-1/1/DODIG-2016-088.pdf>.

Of 1,904 cases of alleged penetrative sexual assault by active duty service members reviewed in a recent Defense Department report, more than 70 percent resulted in no administrative, nonjudicial, or judicial action against the accused. Defense Advisory Committee, *Report On Investigative Case File Reviews For Military Adult Penetrative Sexual Offense Cases Closed In Fiscal Year 2017 11* (2020).¹² And even among those 235 cases that went to trial, most (144) ended in acquittal. *Ibid.* In one recent case, a West Point cadet sentenced to 21 years in prison for raping a fellow student in her sleeping bag had his conviction overturned because the victim did not scream to alert nearby cadets to the assault. Derrick Bryson Taylor, *West Point Cadet's Rape Conviction Is Overturned, Drawing Criticism*, N.Y. TIMES (June 9, 2019).¹³ The accused returned to West Point. *Ibid.*

B. Service Academies Have Fostered An Environment That Tolerates And Sometimes Encourages Sexual Violence Against Women

Rampant sexual assault and harassment at the service academies is no accident. It is the product of a toxic culture of misogyny, permitted and sometimes even encouraged by school administrators and faculty, and in violation of Defense Department policies. By the Defense Department's own account, some leaders have "endors[ed] toxic behaviors" and display "apath[y]

¹² https://dacipad.whs.mil/images/Public/08-Reports/08_DACIPAD_CaseReview_Report_20201019_Final_Web.pdf.

¹³ <https://www.nytimes.com/2019/06/09/nyregion/west-point-cadet-rape-case.html>.

to sexual assault and harassment.” Dep’t of Def. 2018-2019 Report, *supra*, at 5 (2020). Those attitudes have created a “stereotypical male culture” characterized by an “inability or unwillingness to recognize disrespectful experiences as ‘unacceptable,’” where “sexually harassing behaviors are perceived as lacking severity or seen as ‘normal,’” and where students are deterred “from seeking assistance, reporting, or intervening with sexual harassment.” *Ibid.* Likewise, “[p]erceived stigma about sexual assault reporting” deters students from seeking help from academy staff. *Id.* at 7.

Despite some recent efforts at reform, the Defense Department has “found little evidence of change in long-standing attitudes that deter reporting and help-seeking,” and students continue to fear “that reporting will negatively impact their academic and military careers.” *Id.* at 6. The Defense Department’s Office of Inspector General has repeatedly found that service academies have failed to follow appropriate practices relating to sexual assault, including lacking procedures to document informal reports of sexual assault or referrals to victim support services, and failing to report incidents of sexual assault to Congress as required by law. *Evaluation of the Department of Defense’s Handling of Incidents of Sexual Assault Against (or Involving) Cadets at the United States Military Academy* (March 24, 2020);¹⁴ *Evaluation of the DoD’s Handling of Incidents of Sexual Assault Against*

¹⁴ <https://media.defense.gov/2020/Mar/26/2002270146/-1/-1/1/DODIG-2020-073.pdf>.

(or Involving) Cadets at the United States Air Force Academy (Sept. 30, 2019).¹⁵

Petitioner's experience at West Point was the direct result of these failings. Male cadets felt empowered to be sexually aggressive toward women because West Point faculty and administrators ignored abusive behavior and discussed sex in ways that degraded women. School "faculty openly joked with male cadets about having sex with female cadets, lament[ed] the lack of 'sexual opportunities' at West Point, and advis[ed] male cadets to 'seize any chance to have sex.'" Pet. App. 72a. Students marched through campus singing "team building" songs with violent lyrics that objectified women. Pet. App. 72a-73a. These songs included lines such as "I wish that all the ladies were holes in the road/and I was a dump truck/I'd fill 'em with my load" and "I wish that all the ladies/were statues of Venus/and I was a sculptor/I'd break 'em with my penis." *Ibid.*

While male students were allowed or encouraged to demean women, female students were informally advised that reporting sexual assault would destroy their military careers. Pet. App. 73a. They were "taught that the prevention of sexual assault was 'a woman's responsibility' and it was the women's job to say 'no' when faced with inevitable advances from their male colleagues." *Doe v. Hagenbeck*, 98 F. Supp. 3d 672,

¹⁵ <https://media.defense.gov/2019/Oct/02/2002189371/-1/-1/1/DODIG-2019-125.pdf>.

678 (S.D.N.Y. 2015), *rev'd in part*, 870 F.3d 36 (2d Cir. 2017); Pet. App. 112a.

Formal guidance was not much better. Minimal sexual assault training offered by West Point put the onus on women to say “no,” rather than on men to not rape, because advances from male colleagues were “inevitable.” Pet. App. 47a. First and second year cadets received approximately four hours of “Respect training” per academic year, only a fraction of which discussed sexual assault. Pet. App. 111a-112a. In 2011, the Defense Department found that West Point was “not in compliance” with sexual assault training policies and was employing a “deficient” prevention program that failed to meet “the Department’s minimum standard.” *Annual Report on Sexual Harassment and Violence at the Military Service Academies Academic Program Year 2010–2011* at 24, 28 (2011).¹⁶

West Point continued to fail petitioner after she was raped and sought medical attention. She feared that if she named her assailant, fellow students would retaliate against her and that the school would punish her without imposing consequences on her attacker. Pet. App. 22a; 117a. Her fears were well founded. The school did not provide appropriate medical treatment or psychological counseling. She received no offer of support until two weeks after the rape, when she received a single email from a counselor. Pet. App. 118a. And despite making two visits to a campus

¹⁶ https://sapr.mil/public/docs/reports/FINAL_APY_10-11_MSA_Report.pdf.

health clinic, she never received a forensic examination as required by mandatory regulations. Pet. App. 62a; Dep't of Def., *Directive 6495.01: Sexual Assault Prevention and Response Program 2*, 13 (2008). Fearing retaliation and punishment, Doe chose not to name her rapist, who faced no consequences for his actions. Pet. App. 76a.

The facts of this case echo the lived experiences of many women who have attended the service academies both before and after petitioner. Amici can attest that the entrenched culture of sexual violence is, again, nothing new. Since women were first admitted to service academies in 1976, school leaders have proved ill-equipped to investigate and remedy pervasive sexual harassment and assault. And at times they have actively fostered the toxic environment that leads to harassment and assault. Even good-faith efforts at reform have fallen short.

When West Point cadet Madeline Lewis accused the school's star quarterback of raping her in 2014, the academy treated her like "a vial of poison," punishing her when it concluded that the incident was consensual, while providing the accused with mentoring. James LaPorta, *Cadet Run Out of West Point After Accusing Army's Star Quarterback of Rape*, *The Daily Beast* (Dec. 8, 2017).¹⁷ Fellow students began calling Lewis "the whore of the corps" and told Lewis "she should be 'taken out back' and shot 'like Old Yeller.'"

¹⁷ <https://www.thedailybeast.com/cadet-run-out-of-west-point-after-accusing-armys-star-quarterback-of-rape>.

Ibid. The abuse continued even after Lewis complained to school leadership, and like petitioner, she eventually left West Point. *Ibid.*

In another disturbing recent incident, a male student at the Naval Academy broke into dormitories on four separate occasions, sexually assaulting three fellow students. Editorial Board, *Charges against midshipmen raise concern about Naval Academy's commitment to addressing sexual assault*, BALT. SUN (Nov. 1, 2019).¹⁸ Despite the fact that the incidents occurred over a 15-month period, the school failed to prevent the repeated attacks. *Ibid.*

The academies' failings have inflicted significant damage on the victims of sexual violence. Many, like petitioner, have been forced to abandon their career aspirations after investing the considerable mental, academic, and physical labor necessary to gain entrance to a service academy. What is more, many victims suffer lasting physical, psychological, and social harm from sexual assault. "Evidence shows that long-term effects" of sexual victimization "can be serious and wide ranging, including physical (e.g., chronic health problems, pain, obesity), mental (e.g., post-traumatic stress, depression), and behavioral (e.g., substance abuse, eating disorders, employment difficulties, relationship problems) consequences." Valerie A. Stander & Cynthia J. Thomsen, *Sexual*

¹⁸ <https://www.baltimoresun.com/opinion/editorial/bs-ed-1103-sexual-assault-naval-academy-20191101-vxaliez4zbxnm7pwvjc-mia3ma-story.html>.

Harassment and Assault in the U.S. Military: A Review of Policy and Research Trends, 181 *Military Medicine* 20, 22 (2016) (Supplement 1). For those who manage to stay in the military despite such experiences, “operational stressors such as combat exposure may further add to these cumulative effects.” *Ibid.* Sexual trauma and abuse is the aspect of military service most likely to affect women’s mental health. Service Women’s Action Network, *The Mental Wellness Needs of Military Women: Community Driven Solutions* 13 (2018).¹⁹ And female veterans are almost “250 percent more likely to kill themselves than civilian women.” Jay Price, *Battling Depression And Suicide Among Female Veterans*, National Public Radio (May 29, 2018).²⁰

C. The *Feres* Doctrine Should Not Stand As A Barrier To Addressing This Vital Issue

In *Feres v. United States*, this Court held that the Federal Tort Claims Act did not waive sovereign immunity for injuries to service members that “arise out of or are in the course of activity incident to [military] service.” 340 U.S. 135, 146 (1950). As petitioner ably explains, that reading is contrary to the text of the statute, lacks a coherent rationale, and has generated inconsistent results in the courts of appeals. But even putting those points aside, petitioner’s injury is far afield from “activity incident to service.” She was raped by a fellow student while engaging in

¹⁹ <https://www.servicewomen.org/wp-content/uploads/2018/02/2018-Annual-Summit-Report-Final.compressed.pdf>.

²⁰ <https://www.npr.org/2018/05/29/614011243/battling-depression-and-suicide-among-female-veterans>.

recreational activity unrelated to any school event or military service. In this respect, petitioner is similarly situated to thousands of women across the country.

Faced with inadequate protections, indifferent administrators, unsuccessful criminal prosecutions, and under-deterrence, victims of sexual assault on college campuses have increasingly turned to civil litigation against the institutions that have failed to protect them. Much of that litigation falls under Title IX, from which the service academies are exempt. *See* Greta Anderson, *More Title IX Lawsuits by Accusers and Accused*, INSIDE HIGHER ED (Oct. 3, 2019);²¹ 20 U.S.C. § 1681(a)(4). But victims of campus sexual assault have also relied on precisely the kind of claims at issue here: negligence and contract claims against educational institutions that have fostered an environment of pervasive sexual violence. *See Doe 1 v. Baylor Univ.*, 240 F. Supp. 3d 646, 653 (W.D. Tex. 2017) (suit by 10 victims of sexual assault at Baylor University alleging violations of Title IX, state tort law, and state contract law in perpetuating “a widespread pattern of discriminatory responses to female students’ reports of sexual assault”); *see also Shank v. Carleton Coll.*, 232 F. Supp. 3d 1100 (D. Minn. 2017) (Title IX, tort, and contract claims); *Ross v. Univ. of Tulsa*, 180 F. Supp. 3d 951 (N.D. Okla. 2016) (Title IX and tort claims); *Facchetti v. Bridgewater Coll.*, 175 F. Supp. 3d 627 (W.D. Va.

²¹ <https://www.insidehighered.com/news/2019/10/03/students-look-federal-courts-challenge-title-ix-proceedings>.

2016) (same); *Doe v. Emerson Coll.*, 153 F. Supp. 3d 506 (D. Mass. 2015) (same).

Those suits are necessary to address the epidemic of campus sexual assault. Indeed, “the most effective way to stop campus sexual assault is to confront the reality of its perpetration, identify the cultural components that enable its normalization, and build the institutional capacity of schools to prevent and address it.” Diane L. Rosenfeld, *Uncomfortable Conversations: Confronting the Reality of Target Rape on Campus*, 128 HARV. L. REV. F. 359, 359 (2015). When educational institutions prove unable or unwilling to do so by other means, victims have no choice but to seek redress in court.

U.S. service academies should not be immune from that reckoning. They are first and foremost institutions of higher learning. See, e.g., Bruce Keith, *The Transformation of West Point as a Liberal Arts College*, 96 Liberal Education (Spring 2010) (“West Point is, first and foremost, a liberal arts college.”).²² They offer a wide variety of academic majors, from English to Environmental Science, and the vast majority of their curricula is unrelated to military matters. U.S. Military Academy at West Point, *Academics: Majors and Minors*.²³ They often compete with and compare themselves to the Ivy League schools. They participate in a

²² <https://www.aacu.org/publications-research/periodicals/transformation-west-point-liberal-arts-college>.

²³ <https://www.westpoint.edu/academics/majors-and-minors>. (last visited Nov. 23, 2020).

broad range of NCAA Division I and Division II sports, from golf to volleyball. While they of course provide military training, students effectively do not incur binding military service obligations until the beginning of their third year. See U.S. Military Academy, *Army Regulation 150-1, United States Military Academy Organization, Administration, and Operation 25* (2019) (waiving service obligations if students withdraw before beginning their third year of academic classes).²⁴ And even among those who graduate, many leave the military as soon as their service obligations expire. See Michael L. Hansen & Shanthi Nataraj, RAND Arroyo Center, *Identifying Civilian Labor Market Realities for Army Officers Making Stay/Leave Decisions* (2012) (noting that only 44 percent of West Point commissioned officers stay past their required eight years of service).²⁵

When combined with the exemption from Title IX, overbroad application of *Feres* has left students at these schools without any way to access the same avenues of judicial relief open to their civilian peers. Women enrolled in U.S. service academies have been subject to severe sex discrimination. After more than a decade of attempted self-correction, the problem has only gotten worse. And the brightest aspiring officers have been condemned to an impossible choice: endure years of sexual aggression or abandon their careers.

²⁴ https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN5862_AR150-1_FINAL.pdf.

²⁵ https://www.rand.org/pubs/research_briefs/RB9653.html.

This case presents an opportunity to correct that manifest injustice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOVEMBER 30, 2020