This complaint is filed on behalf of women as a class against the United States Commission on Civil Rights as it pertains to the enforcement of Title IX and other relevant federal and constitutional standards with regard to the redress of discrimination in education on the basis of sex when it occurs in the form of sexual assault and other forms of sex and gender-based violence.

Specifically, this complaint alleges that this Commission has completely failed to address sex and gender-based discrimination in education and by such failure has, itself, perpetuated and engaged in said discrimination.

In support of this matter, complainants note that this Commission has issued multiple reports and letters admonishing and directing covered entities to strictly adhere to and comply with civil rights laws. For example, this Commission has addressed discrimination in connection with Military Sexual Assault, violence and bullying, and disparate school discipline on the basis of race. This Commission has never issued a report or released guidance pertaining to the redress of gender and sex-based discrimination on behalf of women as a class when it occurs in the form of sexual and other forms of gender-based violence. Furthermore and most disturbingly, this Commission has only one reference to the problem of sexism in education, which reference pertains only to sports equity for females. In fact, a keyword search for the phrase "sexual assault" at the Commission's website yielded disturbing results in that the problem of sexual assault is discussed as a civil rights problem only in the context race-based discrimination of sexual assaults perpetrated against racial minorities.

This complaint seeks a remedy in the nature of full reform of Commission policies and procedures to provide explicit guidance and detailed information regarding the nature of sex and gender-based violence in education as a civil rights harm that must be addressed under civil rights standards on par with those applicable to the redress of other forms of civil rights violence such based on race, national origin, etc.

Complainants also request that this Commission issue a formal letter directing all schools that receive federal funds as follows:

A. Schools must define all forms of discrimination, harassment and violence on the basis of sex and/or gender using civil rights definitions such as "unwelcomeness" and "offensiveness," and not criminal law terms such as "force" and "non-consent."

B. Schools must apply a "preponderance of the evidence" standard during the investigation and redress of discrimination, harassment and violence that occurs on the basis of sex and/or gender.

C. Schools must state that they provide "prompt, effective and equitable" redress, and in fact provide "prompt, effective and equitable" redress, in response to discrimination, harassment and violence that occurs on the basis of sex and/or gender.

D. Schools may not comply with the SaVE Act (or any other law) that requires or allows the redress of discrimination, harassment and violence under weaker, less protective or disparate standards compared to the redress of other civil rights harms based on race, national origin, etc. The SaVE Act took effect on March 7, 2014. (20 U.S.C. 1092 (2013), (modifying Section 485(f) of the Higher Education Act of 1965 (20 U.S.C. 1092(f)), and § 304 of the Violence Against Women Reauthorization Act of 2013). SaVE conflicts in many ways with civil rights laws and allows or requires the redress of civil rights harms based on sex and gender to be subjected to weaker, less protective or disparate standards compared to the redress of other civil rights harms based on race, national origin, etc. This Commission must clearly state that SaVE's less protective standards cannot be enforced because they violate women's equal protection and due process rights.

E. The Department of Education (DOE) issued public guidance after SaVE was enacted on March 7, 2014 stating that schools must comply with its April 4, 2011 "Dear Colleague Letter." (DCL). The DCL conflicts with SaVE on many substantive issues, including the issues presented here. While the DOE's guidance states that comply with "both" civil rights laws and the

DCL, this Commission should make clear that civil rights standards prevail when compliance with "both" is not possible.

F. One in four to one in five women is victimized by rape or attempted rape during college. https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf, pp. xii-xiii and 2-1 (2007); U.S. Department of Justice Office of Community Oriented Policing Services, *Acquaintance Rape of College Students*, March 28, 2002, http://www.cops.usdoj.gov/pdf/e03021472.pdf; https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf.

G. Given that approximately 916,000 women graduated from post-secondary schools in 2009, http://www.census.gov/prod/2012pubs/p20-566.pdf, this means about a million college women will be victimized by sexual assault over the next four years. By comparison, about 26,000 sexual assaults occur in the military each year, http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf, a number which includes not only rape and attempted rape, but also relatively minor sexual touching not rising to the level of attempted rape. Approximately 30% of sexual assault victims in the general population file reports. http://www.rainn.org/get-information/statistics/reporting-rates
A similar number of military victims file reports. http://www.usccr.gov/pubs/09242013_Statutory_Enforcement_Report_Sexual_Assault_in_the_Military.pdf, p.8. The number is much lower for college victims where only 5-12% of victims file reports. http://www.nij.gov/publications/pages/publication-detail.aspx?ncjnumber=182369 (2001) (5%); https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf, 5-22 (2007) (12.9%).

H. Female students in the United States have endured pervasive unequal treatment, harassment, and violence on the basis of sex throughout all levels of education. Sadker, & Zittleman, *Still Failing at Fairness, How Gender Bias Cheats Girls and Boys in School and What We Can Do About It*, Scribner Press 2009; www.hks.harvard.edu/centers/carr/research-

publications/carr-center-working-papers-series/caplan-and-ford-%22the-voices-of-diversity-%22. Women, including female postsecondary students, suffer disproportionately high rates of domestic and dating violence. Women are less likely than men to be victims of violent crimes overall, but women are 5 to 8 times more likely than men to be victimized by an intimate partner. *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends*, U.S. Department of Justice, March, 1998; violence by an intimate partner accounts for about 21% of violent crime experienced by women and about 2% of the violence experienced by men. *Id.* 92% of all domestic violence incidents are committed by men against women. *Violence Against Women*, Bureau of Justice Statistics, U.S. Department of Justice, January, 1994; 84% of raped women know their assailants and 57% of rapes occur on a date. Koss, M.P. (1988). *Hidden Rape: Incidence, Prevalence and descriptive Characteristics of Sexual Aggression and Victimization in a National Sample of College Students*. In Burgess, A.W. (ed.) *Sexual Assault*. Vol. II. New York: Garland Pub. sexual assault, Nine out of ten rape victims are female, U.S. Department of Justice, *2003 National Crime Victimization Survey*. 2003; Women aged 16-24 are four times more likely to be raped than any other population group. Koss, M.P., *id*. 8% of women and 2% of men in the United States have been stalked at some time in their life. 78% of stalking victims identified in a survey were women, and 22 percent were men. Thus, four out of five stalking victims are women. By comparison, 94 percent of the stalkers identified by female victims and 60 percent of the stalkers identified by male victims were male. Overall, 87 percent of the stalkers identified by the victims were male National Institute of Justice 1998. *Stalking in America: Findings from the National Violence Against Women Survey*. In fact, a student is more likely to be victimized by sexual assault if she attends college than if she does not. National Institute of Justice & Centers for Disease Control & Prevention. *Prevalence, Incidence and Consequences of Violence Against Women Survey*. 1998 (One in four students in the United States is victimized by rape or attempted rape during college, see n.1, while one in six American women is the victim of an attempted or completed rape in her lifetime.)

I. Any law, such as SaVE, which has the purpose and effect of subjecting the redress of sexual violence (and other forms of gender-based violence and discrimination on the basis of sex) to inherently unfair legal standards and standards different, disparate, and less protective than those applied to the redress of violence on the basis of other protected class categories such as race, color and national origin, cannot constitutionally be enforced. Such laws violate women's equal protection and due process rights and rights protected under Title IX of the Education Amendments of 1972 and its implementing regulation, 34 C.F.R. Part 106, (Title IX) and Title IV of the Civil Rights Act of 1964 (Title IV).

J. Discrimination on the basis of sex includes sexual assault and gender-motivated harassment and violence. Modeled after Title VI of the Civil Rights Act of 1964 which provides that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance," 42 U.S.C. §§ 2000d–2000d-7, Title IX uses exactly the same enabling language in forbidding discrimination "on the basis of sex" in education. Title IX specifically provides that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance…" 20 U.S.C. § 1681(a).

K. Certain provisions of SaVE are facially unconstitutional because Congress lacks authority to regulate violence against women. *See U.S. v. Morrison*, 529 U.S. 598 (2000); (Congress has no authority to regulate violence against women under civil rights laws or the Commerce Clause); *N'tl Federation of Independent Business v. Sebelius*, 567 U.S. ___ (2012) (Congress exceeds its authority under the Spending Clause if it requires states to discriminate as a condition of receiving federal funds or if it imposes too heavy a burden on the states as a quid pro quo for receiving federal funds.)

L. The Title IX regulation specifically provides that schools may not treat violence against women differently or apply different, disparate, or less protective standards in connection with administrative grievance procedures. Justice Department Announces Investigations of the Handling of Sexual Assault Allegations by the University of Montana, the Missoula, Mont., Police Department and the Missoula County Attorney's Office, Department of Justice (May 1, 2012), http://www.justice.gov/opa/pr/2012/May/12-crt-561.html (announcing Title IX compliance review and Title IV investigation of the University of Montana and noting, "Title IX of the Education Amendments of 1972 and Title IV of the Civil Rights Act of 1964 each prohibit sex discrimination, including sexual assault and sexual harassment in education programs"); Resolution Agreement, http://www.justice.gov/crt/about/edu/documents/montanaagree.pdf (announcing resolution agreement with the University of Montana and noting that Title IV and Title IX are subject to the same regulations to ensure enforcement of rights regarding discrimination, harassment, and violence in education "on the basis of sex." 28 C.F.R. Part 54 and 34 C.F.R. Part 106).

M. SaVE by its terms modifies the "Clery Act," 20 USC 1092 (f); 34 CFR 668.46(b)(11)(vi), but clearly affects civil rights laws such as Title IX because, for example, SaVE covers all forms of violence against women, including sexual assault, and Title IX covers the same conduct. Indeed, a penetration offense defined as "rape" under SaVE is per se "sexual harassment" under Title IX. Even a single assault not rising to the level of rape can be sufficient to constitute a civil rights injury: *Berry v. Chi. Transit Auth.*, 618 F.3d 688, 692 (7th Cir. 2010) (in the Title VII context, "a single act can create a hostile environment if it is severe enough, and instances of uninvited physical contact with intimate parts of the body are among the most severe types of sexual harassment"); *Turner v. Saloon, Ltd.*, 595 F.3d 679, 686 (7th Cir. 2010)(noting that "'[o]ne instance of conduct that is sufficiently severe may be enough,'" which is "especially true when the

touching is of an intimate body part" (quoting *Jackson v. Cnty. of Racine*,474 F.3d 493, 499 (7th Cir. 2007)); *McKinnis v. Crescent Guardian, Inc.*, 189 F. App'x 307, 310 (5th Cir. 2006) (holding that "'the deliberate and unwanted touching of…intimate body parts can constitute severe sexual harassment'" in Title VII cases (quoting *Harvill v. Westward Commc'ns, L.L.C.*, 433 F.3d 428, 436 (5th Cir. 2005)).

N. Before SaVE took effect on March 7th, 2014 schools were obligated to provide "equitable" redress. 34 C.F.R. § 106.8 (b); Sexual Harassment Guidance, http://www.ed.gov/about/offices/list/ocr/docs/shguide.html. "Equitable" redress is also mandatory under Title IV and Title VI. An early iteration of SaVE expressly required schools to provide "equitable" redress, See, e.g., H.R. 2016 – Campus SaVE Act, § 3,(6)-(8)(B)(v)(I)(aa) available at https://www.govtrack.us/congress/bills/112/hr2016/text (last visited Jan. 30, 2014), but that language was removed before the bill was signed into law. *See id.* at 8(B)(iv)(1)(aa) ("[D]isciplinary" procedures "shall provide a prompt, fair and impartial investigation and resolution.") By removing the requirement of "equity," Congress allows and/or requires schools to provide inequitable redress by applying different, disparate, and less protective legal standards compared to the redress of violence on the basis of other protected class categories such as race, color and national origin, in violation of women's equal protection and due process rights.

O. Similar to the way in which the word "equitable" was initially included and then removed, SaVE's original language mandated application of a "preponderance of the evidence" standard in redress proceedings related to violence on the basis of sex, H.R. 2016 – Campus SaVE Act, § 3,(6)-(8)(B)(v)(I)(aa) available at https://www.govtrack.us/congress/bills/112/hr2016/text (last visited Jan. 30, 2014). but that mandate was later removed. *Id.*, at § 8(A)(ii) ("a statement of the standard of evidence that will be used during any institutional conduct proceeding.")

P. Before SaVE took effect, the "preponderance of the evidence" standard was mandatory. But under SaVE, schools may apply a standard of proof more rigorous than "preponderance of the evidence." Congressional intent on this point is confirmed by testimony noting that the "preponderance of the evidence" language was expressly removed from SaVE to allow schools to apply a more burdensome standard of proof. One Congressman was strikingly candid about the reason the word "equitable" was stricken: "The majority bill said that college campuses must provide for 'prompt and equitable investigation and resolution' of charges of violence or stalking. This would have codified a proposed rule of the Department of Education that would have required imposition of a civil standard or preponderance of the evidence for what is essentially a criminal charge, one that, if proved, rightly should harm reputation. But if established on a barely "more probable than not" standard, reputations can be ruined unfairly and very quickly. The substitute eliminates this provision." (Testimony of Senator Grassley, Iowa, 158 Cong Rec. S 2761, Congressional Record, Sen., 112th Congress, 2nd Session Senate, April 26, 2012; Violence Against Women Reauthorization Act of 2011, Reference: Vol. 158, No. 61).

Q. Because "equitable" redress, the "preponderance of evidence" standard and application of civil rights definitions of offenses, instead of more onerous criminal law definitions, remain mandatory in the redress of violence on the basis of other protected class categories such as race, color and national origin, SaVE is facially unconstitutional because it authorizes the discriminatory treatment of violence on the basis of sex.

R. In practice, this means that if a male student is physically beaten on the basis of his national origin, officials would be obligated to resolve the matter in an "equitable" manner including application of a "preponderance of the evidence" standard. However, if exactly the same violence is perpetrated against a female student on the basis of her sex, (for example, a victim is badly beaten by an abusive boyfriend), the matter need not be resolved "equitably," and school officials would be permitted to assess the evidence under the rigorous criminal law standard of proof "beyond a

reasonable doubt." Application of any standard more strict than mere preponderance would subject violence on the basis of sex to additional burdens and make such civil rights harms more difficult to prove compared to violence on the basis of other protected class categories such as race, color and national origin. Even more strangely, it would subject the redress of certain claims to absurd dual assessments. For example, if a black woman is sexually assaulted on the basis of her race and her sex at a school that opts to apply a "beyond a reasonable doubt" standard under SaVE, the redress of that incident would be subjected to a "preponderance of the evidence standard" only as to those aspects of the attack that occurred on the basis of her race. Aspects of that very same attack that occurred "on the basis of sex" would be assessed under a "beyond a reasonable doubt" standard.

S. SaVE further subjects violence on the basis of sex to inequitable redress by authorizing schools to provide a non-prompt "final determination." Specifically, SaVE provides that schools must conduct a "prompt investigation and resolution" Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 89 (2013), of a matter involving violence on the basis of sex, but schools need not be prompt when rendering a "final determination." The obligation regarding "final determinations" is addressed separately in SaVE, apart from provisions related to "investigations and resolutions," and expressly provides that schools must develop policies that describe "possible sanctions" that "may" be imposed "following the final determination" of a grievance proceeding involving violence on the basis of sex, including "rape and acquaintance rape." Section B(II)(ii) (Each institution shall develop and disseminate a policy to address "…possible sanctions…that such institution may impose following the final determination regarding rape, acquaintance rape, domestic violence, dating violence, sexual assault and stalking.")

T. In practice, this means the "final determination" of a student's complaint alleging violence on the basis of her sex can remain open for years. Indeed, because SaVE imposes no time limit whatsoever on "final determinations,"

a complaint need not be "finally determined" until the day of graduation, if at all. (Which explains why a student at James Madison University was recently expelled AFTER graduation, an otherwise irrational action, see Tyler Kincade, Huffington Post, June 18, 2014).

U. This lack of promptness in "final determinations" is inherently unfair and inhibits victimized students' access to oversight agencies such as OCR. Without "promptness" in the investigation, resolution and final determination, a student cannot be protected from discrimination during her education. Thus, SaVE unconstitutionally subjects violence on the basis of sex to inherently unfair standards and standards different, disparate, and less protective than those applicable to the redress of violence on the basis of other protected class categories such as race, color and national origin.

V. SaVE states that notice of the fact that a change has been made to an initial decision is to be provided to the victim only at some unspecified time "prior to the time the results become final," (§ III (cc)) and that notice that the change is in fact "final" need not be provided until after the change "becomes final." (§ III (dd)) (emphasis added), which could be as late as the day of graduation, if not later. This means the victim is unable to defend and protect her personal and civil rights in proceedings that follow the initial decision. For example, if a student offender is found responsible after the first disciplinary hearing, but then he files an appeal or a request for rehearing, the victim will only be notified of the results of that appeal or rehearing after the change is made to the original finding. This is inherently unfair as it means that if the results become final on the day of graduation, the victim could be informed of the fact her assailant was ultimately not held responsible, and the fact that the decision is final and unreviewable, as she is literally walking across the stage to receive her diploma. This subjects violence on the basis of sex to inherently unfair standards, and different, disparate, and less protective standards compared to the redress of violence on the basis of other protected class categories such as race, color and national origin.

W. Lack of advance notice that a change could be made to a finding of responsibility or a determination of punishment interferes with a victim's due process rights, rights, including her right to be heard. For example, the scope and impact of a victim's rights under Title IX is commonly in dispute during redress proceedings, and during appeals and re-hearings. Under SaVE, because a victim need not be informed that her rights are being construed or even violated in appeals and re-hearings, she has no hope of protecting her rights during the time that the initial decision is being overturned or amended, even if the reason is due to a wrongful application of her rights.

X. SaVE provides in Section 16(B) that the Secretary of Education "shall seek the advice and counsel of the Attorney General of the United States and the Secretary of Health and Human Services…" when "preventing and responding to" violence on the basis of sex. By mandating that such "advice and counsel" be sought when "responding" to institutions of higher education about matters involving violence on the basis of sex, SaVE imposes unfair and needless burdens on students seeking to enforce their rights through the assistance of the DOE as the primary responsible federal oversight agency. This unconstitutionally subjects violence on the basis of sex to additional burdens, including needless delays, thus subjects such violence to different, disparate, and less protective standards compared to violence on the basis of other protected class categories because such "advice and counsel" from the DOJ and DHHS is not required when the DOE is "responding" to institutions of higher education about matters involving violence on the basis of other protected class categories such as race, color and national origin.

Y. SaVE authorizes schools not to comply with annual statistical reporting or respond at all to violence on the basis of sex unless such violence is actually reported to school officials or law enforcement officials. Section 8(A)(ii) (Each institution shall develop and distribute a policy regarding the "procedures each institution will follow once an incident of [violence on the basis of sex has] been reported…") While actual notice has long been

required to establish a school's liability in civil liability proceedings, actual or constructive notice was sufficient for institutional and regulatory enforcement of civil rights laws prior to the enactment of SaVE. Constructive notice includes, according to the DCL for example, anonymous or third-party reports such as a newspaper story of a fraternity party describing incidents of sexual assault. By limiting schools' responsibility to matters that were actually "reported," SaVE authorizes schools to subject the redress of violence on the basis of sex to different, disparate, and less protective legal standards compared to violence on the basis of other protected class categories such as race, color and national origin, to which schools must respond and which must be measured for statistical purposes under actual and constructive notice standards. In practice this means school officials can ignore with impunity violence on the basis of sex when not reported, even if the violence is sufficiently obvious that officials "should know" or actually do know about it. However, if violence occurs on the basis of any other protected class category, such as race, color or national origin, officials must respond and measure for statistical purposes even if the incident is not reported so long as they knew or should have known that the incident occurred. See DCL where the DOE notes that constructive knowledge "is the standard for administrative enforcement" of civil rights laws, such as Title IX, and in court cases where Petitioners are seeking injunctive relief. *See* 2001 Guidance at ii-v, 12-13. The standard in private lawsuits for monetary damages is actual knowledge and deliberate indifference. *See Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 643, 648 (1999)." This will disproportionately undermine schools' response to and reporting of violence on the basis of sex because, as noted above, such violence is rarely officially reported.

Z. SaVE also authorizes schools not to provide statistical reporting on matters involving violence on the basis of sex unless such violence causes bodily injury. Section f(1)(F)(IX)(ii)(Statistical reporting is required for "the crimes described in subclauses (I) through (VIII) of clause (i) of larceny-theft, simple assault, intimidation, and destruction, damage, or vandalism

of property, and of other crimes involving bodily injury to any person…in which the victim is intentionally selected because of the actual or perceived race, gender, religion, national origin, sexual orientation, gender identity, ethnicity, or disability of the victim that are reported to campus security authorities or local police agencies, which data shall be collected and reported according to category of prejudice; and of domestic violence, dating violence, and stalking incidents that were reported to campus security authorities or local police agencies.") (emphasis added). While bodily injury is also required as a prerequisite to statistical reporting on matters involving violence on the basis of other protected class categories such as race, color and national origin, this provision will disproportionately inhibit the accurate reporting of statistics involving sexual assault, which is the most common form of violence that occurs on the basis of a protected class category and it rarely causes injury.

AA. SaVE authorizes schools not to provide victims with individualized and personal notice of their rights under civil rights laws unless there is an actual "report" of an incident. In practice, this means that if an official is aware that a particular student was raped at a party, but there has been no actual report of the incident, he or she would have no obligation to inform the victim of her rights. While such rights are more passively available in student handbooks, victims are more likely to report and/or assert their rights with individualized notice at a time when such rights can be understood in a personal context. Without individualized notice of rights, violence on the basis of sex is subjected to inherently unfair standards because victims are less likely to achieve effective redress on campus, or enforcement of rights via civil legal proceedings and federal and state oversight agencies.

BB. The DOE has defined violence on the basis of sex to include "rape," "sexual assault", "sexual battery", and "sexual coercion." SaVE defines "sexual assault" in two distinct ways. For the purpose of annual statistical reporting of campus crimes, "sexual assault" is defined as "a forcible or nonforcible sexual offense" under the Uniform Crime Reporting System of

the Federal Bureau of Investigation. For the purpose of providing administrative redress proceedings on campus, "sexual assault" is defined as "any nonconsensual sexual act proscribed by Federal, tribal, or State law, including when the victim lacks capacity to consent. With regard to such redress proceedings, SaVE requires schools to incorporate and apply state criminal law standards to a determination of whether violence on the basis of sex, including sexual assault, occurred. Violence Against Women, 113 Pub. L. No. 4, 127 Stat. 54; 29 U.S.C.S. § 3925 (23); 109 Pub. L. No. 162, 119 Stat. 2960. While not every violation of every state's incorporated criminal code will constitute a civil rights violation, every incorporated state criminal code necessarily includes conduct that can constitute a civil rights violation.

CC. SaVE threatens women's rights at because it requires or allows different, disparate, and less protective standards that which is required by civil rights laws such as the civil rights standards of "severe or pervasive" and "unwelcome."

DD. SaVE violates core principles of federalism and threatens women's equal protection and due process rights by subjecting the redress of their federal claims to different, disparate, and less protective legal standards based on which state the offense occurred in. See compilation of statutes compiled by American Prosecutors Research Institute, available at http://www.arte-sana.com/articles/rape_statutes.pdf (noting wide disparity among the states as to whether proof of force is required.)

EE. SaVE further threatens women's equal protection and due process rights by authorizing the redress of federal civil rights violations under state criminal law standards because, for example, the state criminal code in many states is a more rigorous standard than the federal civil rights standard of unwelcomeness." *See id.* By contrast, under federal civil rights laws, conduct is uniformly assessed under a single standard to determine whether it was "unwelcome." "Unwelcome" is defined as conduct the student "did not request or invite it and considered the conduct to be

undesirable or offensive. The age of the student, the nature of the conduct, and other relevant factors affect whether a student was capable of welcoming the sexual conduct. "A student's submission to the conduct or failure to complain does not always mean that the conduct was welcome." http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.html.

FF. Assessing federal civil rights injuries under state criminal law standards subjects violence on the basis of sex to as many as fifty different state standards such that students in some states will be better protected from civil rights injuries than students in other states depending on how an offender's actions are defined by a particular state's criminal code. In practice, this means a victim who is raped on campus in a state where the criminal law definition of rape is very strict will have her redress proceedings subjected to different, disparate, and less protective legal standards compared to redress proceedings on behalf of a victim in a different state who experiences exactly the same harm, only a few miles away, in a state where the criminal law definition of non-consent is less onerous. This different, disparate, and less protective treatment of two victims who suffered exactly the same violence is unconstitutional and offends core principles of federalism by allowing state law definitions to dictate whether a federal civil rights offense occurred.

GG. Because SaVE covers violence on the basis of sex, a student who endures non-violent verbal harassment will have her civil rights redressed under less burdensome/more protective standards, such as application of the "unwelcomeness" standard, compared to a student who endures a violent sexual assault, which will be redressed under different, disparate, and less protective standards, such as application of the state criminal law definition of "non-consent." This means violent sex offenders are less likely to be held responsible for discrimination on the basis of sex compared to non-violent verbal harassers. Notably, while SaVE requires training on state criminal law standards, it requires no training whatsoever on the civil rights standard of "unwelcomeness."

HH. Because SaVE covers violence on the basis of sex, violence on the basis of other protected class categories, such as race, color and national origin, will be assessed under more protective civil rights standards.

II. SaVE nowhere requires that procedures for redressing violence on the basis of sex afford victims the same procedural and substantive protections as those that apply to violence on the basis of other protected class categories such as race, color, and national origin.

JJ. Alongside less protective standards, SaVE is silent on the need for schools to comply with civil rights laws at all. Indeed, SaVE lacks the kind of language, typically included and necessary in new statutes that might encroach on important rights that would protect against unintended diminution. For example, in 1994, Congress amended the General Education Provisions Act (GEPA) to state that nothing in GEPA "shall be construed to affect the applicability of Title VI of the Civil Rights Act of 1964, Title IX of Education Amendments of 1972, Title V of the Rehabilitation Act of 1973, the Age Discrimination Act, or other statutes prohibiting discrimination, to any applicable program." 20 U.S.C. § 1221(d). The DOE has interpreted that provision to mean that the federal educational records privacy act (FERPA), which was enacted as part of GEPA, applies in the context of Title IX enforcement proceedings on campus, but if there is a conflict between the requirements of FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions. *See* 2001 Guidance at vii. SaVE nowhere states that nothing "shall be construed to limit or inhibit existing legal protections under Title IX, Title IV and Title VI and related regulatory schemes, guidelines, case law and interpretive guidance from the Department of Education and Department of Justice." The absence of such language ensures SaVE's discriminatory application in the redress of violence on the basis of sex such that conflicts between Title IX and SaVE

will be resolved in favor of SaVE even if such resolution interferes with the primary purpose of Title IX by preventing equitable redress.

KK. SaVE's requirements and enabling provisions, individually and collectively, violate women's rights under Title IX, Title IV and the First and Fourteenth Amendments to the United States Constitution. Relief from this Commission is necessary to protect the rights of all female students.

LL. While this Commission may lack the authority of a court to enjoin SaVE's enforcement, it can and should seek or issue corrective guidance declaring certain provisions in SaVE unconstitutional and unenforceable.