THE NATIONAL CENTER FOR LAW & POLICY

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Via Email, Facsimile and U.S. Mail

Senate Judiciary Committee
State Capitol, Room 2187
Sacramento, CA 95814
Fax: (916) 403-7394
Email: sjud.fax@sen.ca.gov

Senator Hannah-Beth Jackson (Chair)
Senator John M. W. Moorlach (Vice Chair)
Senator Joel Anderson
Senator Robert M. Hertzberg
Senator Mark Leno
Senator Bill Monning
Senator Bob Wieckowski

Re: SB 1146 Will Cripple & Destroy California's Religious Colleges & Universities—Requested Action: Oppose Unless Amended

Dear Senators,

Thank you for your careful and prompt attention to the urgent legislative matters addressed in this legal opinion memorandum. Please be advised that The National Center for Law & Policy (NCLP) is a California-based non-profit 501(c)(3) legal defense organization which focuses on the protection and promotion of religious freedom, the freedom of speech, and related civil liberties. The NCLP engages in constitutional litigation in state and federal courts and is also active in the areas of public policy and education.

Because SB 1146 is an existential threat to church autonomy, self-governance of religious corporations, and religious liberty, we strongly urge that the Senate Judiciary Committee oppose SB 1146, unless amended. We are writing you today on behalf of California's diverse pervasively religious institutions, universities, and colleges in California who desire the freedom to live according to the dictates of the diversity of their Holy Scriptures, religious teachings, and spiritually informed consciences.

SB 1146, introduced on March 28, 2016 (gutted and amended) by Senator Ricardo Lara, seeks to upset the existing status quo of government acknowledgement of, accommodation of, and tolerance of religious institutions in California. This is accomplished by creating a new private cause of action that would allow faculty, staff, and students to sue religious colleges and universities seeking monetary damages and injunctive relief if the person believes he or she has

been denied equal rights or opportunities on the basis of gender identity, gender expression, or sexual orientation at a religious institution. Currently, these pervasively religious colleges and universities can currently can lawfully assert a religious exemption under federal Title IX and California Education Code § 66271. We believe these religious exemptions are mandated by well-established constitutional law.

1. Both the federal and state constitutions protect religious freedom

The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." By forbidding the "establishment of religion" and guaranteeing the "free exercise thereof," the Religion Clauses ensured that the Federal Government[1] would have no role in filling ecclesiastical offices or otherwise controlling religious institutions. The Establishment Clause prevents the government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own. Article 1, § 4 of the California Constitution affirms, "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion."

The historical precedents for religious freedom are well established. Thomas Jefferson affirmed that our fundamental civil right of religious freedom and conscience, when writing in 1777:

> "Almighty God hath created the mind free...All attempts to influence it by temporal punishments or burthens...are a departure from the plan of the Holy Author of our religion...No man shall be **compelled** to frequent or support any religious worship or ministry **or shall otherwise suffer on account of his religious opinions or belief, but all men shall be free to profess and by argument to maintain, their opinions in matters of religion** (emphasis added)."[2]

James Madison confirmed the foundational American principals of the rights of conscience and religious freedom later in 1785 when he wrote:

> "Because we hold it for a fundamental and undeniable truth, that religion or *the duty which we owe to our Creator* and the manner of discharging it, **can be directed *only by reason and conviction, not by force or violence***. The Religion then of every man **must be *left to the conviction and conscience of every man*; and it is the right of every man to exercise it as these may dictate** (emphasis added)."[3]

If the First Amendment's religious Establishment and Free Exercise clauses mean anything, they must at least mean this: Neither the federal government nor any state should ever be allowed to

[1] The First Amendment has been incorporated and applied to the states via the 14th Amendment.
[2] The Virginia Statute for Religious Freedom (1777)
[3] Memorial and Remonstrance against Religious Assessments (1785).

coercively control the religious beliefs and practices of churches, religious institutions, or individuals. SB 1146 would interfere with and ultimately destroy the rights of conscience and religious freedoms of religious colleges and universities, whose sacred religious teachings may not allow them to accept or embrace gender self-identity, transgenderism, or homosexual conduct. As is discussed further below, both Religion Clauses bar the government from interfering with the religious beliefs or practices of a religious university or college relating to its interactions and decisions regarding professors, staff, or students.

2. SB 1146 specifically targets California's religious colleges and universities which are currently appropriately exempt under existing state and federal law.

Federal Title IX requires that educational institutions receiving federal funding cannot discriminate "on the basis of sex." However, religious freedom and right to religious conscience is in fact the reason that 20 U.S.C. Sec. 1681(a)(3)) specifically excepts from Title IX's non-discrimination provisions "an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization."

California's Education Code § 66271 also exempts religious institutions, recognizing, honoring, and accommodating religious conscience ("This chapter shall not apply to an educational institution that is controlled by a religious organization if the application would not be consistent with the religious tenets of that organization" (emphasis added)). However, SB 1146's proposed revision to § 66271 would broadly target religious universities and colleges, only narrowly exempting specific portions or programs of ministerial training or theological inculcation ("This chapter shall not apply to **educational programs or activities** offered by an educational institution that is controlled by a religious organization to prepare students to become **ministers** of the religion, to enter upon some other **vocation of the religion**, or to teach **theological** subjects pertaining to the religion, if the application of this chapter would not be consistent with the religious tenets of that organization" (emphasis added)).

For many years, California's religious colleges and universities receiving federal funds have reasonably relied upon state Education Code § 66271 and federal Title IX's appropriate religious exceptions, providing these institutions with the freedom to conduct their internal spiritual affairs and day to day operations related to its professors, staff and students in a manner consistent with the institution's particular religious beliefs and practices. SB 1146 pierces the existing shield of protection and seeks to, by government fiat, coercively end religious accommodation, religious autonomy, and religious tolerance of California's pervasively religious colleges and universities. It accomplishes this ignoble feat by asserting that the state has a right to distinguish between the presumably "religious" and the presumably "secular" portions of a pervasively religious college or university, and to invasively regulate, by litigation , that which it unilaterally deems *secular*.

3. Lawsuits, damage awards, and injunctive relief would destroy California's religious colleges and universities.

The power to litigate is the power to destroy. Pursuant to SB 1146, anyone claiming discrimination including, but not limited to, students, faculty, and staff, could sue California's pervasively religious colleges and universities seeking damages and injunctive and declaratory

relief ("Section 66292.5 is added to the Education Code, to read: **66292.5.** (a) Any individual who is denied equal rights or opportunities on the basis of **gender identity, gender expression, or sexual orientation** by a postsecondary educational institution that claims an exemption pursuant to Section 901(a)(3) of the federal Title IX of the Education Amendments of 1972 (20 U.S.C. Sec. 1681(a)(3)) may seek **appropriate remedies both at law and in equity through a civil action**, including the award of monetary damages, for intentional violations of this chapter" (emphasis added)). This litigation could severely harm, if not bankrupt, pervasively religious institutions that, because of existing religious creeds, cannot bend to the state's will.

SB 1146 is a direct assault on religious freedom and rights of conscience of individuals and organizations which have, since the beginning of our nation, been solemnly protected and defended by the First Amendment's Establishment Clause, Free Exercise Clause, and Free Speech clause (the freedom of expression also includes religious speech). As written, SB 1146 would open up a virtual Pandora's box of lawsuits against religious institutions involving any number of issues including, but not limited to, admissions, dorm assignments, financial aid, sports teams, student life, codes of conduct, mandatory chapel services, restroom usage, faculty and staff hiring, faculty and staff discipline and faculty and staff terminations, etc.). Courts could not only award financially crippling damage awards but would have the power to invasively control the faith-based internal decisions and activities of pervasively religious colleges and universities.

If SB 1146 is passed, these institutions would face a Hobson's choice: either refuse federal funds and face potential financial annihilation, compromise the institution's sincerely held religious beliefs and practices, or face the prospect of financially crippling litigation, civil damages and injunctions against its religious beliefs. Beyond the scourge of damage awards, Courts would have the power to invasively pierce the religious veil these institutions have long enjoyed and make coercive determinations as to what activities are religious and which are not, having the power to enjoin institutional religious activities the court deems are not theological "enough." It must not be ignored that the significant erosion of a religious exemption is but a short step away from completely removing the religious exemption altogether.

This is legally unacceptable and offers no comfort to California's pervasively religious institutions. The handwriting is on the wall. The death knell is at hand. As religious colleges and universities are coercively secularized, many if not most alumni and other donors will have little to no motivation to give to these schools because they will have, by government force, lost their religious distinctiveness.

In a free nation, where religious liberty is robustly protected and rights of conscience are celebrated, no religious institution should be backed into the corner in this way. SB 1146 improperly presumes that it is the role of the government to control the internal affairs of religious institutions. A more Orwellian violation of the long standing American principle of religious freedom, often described as the separation of church and state, cannot be imagined.

4. Pervasively religious California colleges and universities must remain free to govern themselves.

In 2012 the U.S. Supreme Court unanimously ruled (9-0) in *Hosanna-Tabor v. EEOC*, that federal discrimination laws to not apply to religious organizations' selection of religious leaders. All nine Supreme Court justices agreed with the decision written by Chief Justice John Roberts that "the Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." As Robert's acknowledged in *Hosanna-Tabor*, "our opinion in Watson **'radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'"** (*Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 704, 181 L. Ed. 2d 650 (2012) (citing *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U. S. 94, 116 (1952) (emphasis supplied.)).

The First Amendment bars courts from inquiring into the disciplinary decisions of religious institutions. As the U.S. Supreme Court explained, the First Amendment "permit[s] hierarchical religious organizations to establish **their own rules and regulations for internal discipline and government**, and to create tribunals for adjudicating disputes over these matters." *Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich*, 426 U. S. 696, 724 (1976) (emphasis added). When ecclesiastical tribunals decide such disputes, the court further explained, "the Constitution requires that civil courts accept their decisions as binding upon them." *Id.*, at 725. Thus, the court held that by inquiring into whether the Church had followed its own procedures, the State Supreme Court had "unconstitutionally undertaken the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals" of the Church. *Id.*, at 720.

Many of California's religious colleges and universities are pervasively religious. In these institutions, religious faith is comprehensively integrated into every aspect of campus life. Faculty and staff members are required to ascribe to and adhere to religious creedal statements of faith and conduct. Religion profoundly impacts not only the beliefs and thinking of faculty and staff but also their words and their actions. Many classes, including math and science, are begun with devotionals and prayers. Many of these schools have mandatory chapel programs, involving discussion of Holy Scriptures, worship, and prayer. Opportunities abound to live out one's faith, including participating in efforts to serve the poor and alleviate suffering.

Indeed, most religious traditions in fact teach that there can be no neat, clean separation between one's *religious* self and one's *non-religious* self—no neat dividing line between the secular and the sacred. Indeed, the sacred text for Christians and Jews declares that in fact everything is religious or theological, "The earth is the LORD's, and everything in it, the world, and all who live in it...." (Psalm 24:1 (NIV)). Religious beliefs and practices influence every area of college life including, but not limited to, admissions, financial aid, dorm assignments, eating in the cafeteria, student life, departments and majors, chapel programs, and graduation. When one understands how comprehensively religion is integrated at these institutions, one quickly realizes that it is artificial construct and a fool's errand to even begin to inquire into what portions of religious colleges and universities are *theological* and what portions are not. Neither is it a

legitimate use of government power to invasively intrude on these fundamentally theological questions in a truly free nation. If enacted, SB 1146 would destroy authentic educational diversity in California higher education by crippling if not decimating religious colleges and universities, which simply desire to remain faithful to their religious beliefs and creeds.

If religious liberty means anything, California's religious universities and colleges must remain free to decide for themselves, free from state control or pressure, matters of self-governance, especially those relating to faith and doctrine. SB 1146 violates the First Amendment and *Hosanna-Tabor* to the extent that it would limit the freedom or discretion of a religious university or college related to hiring, disciplining, or terminating a professor or staff member. It also violates the First Amendment to the extent that it would limit the self-governance and associational rights of a religious university or college related to making decisions about students, including admissions, financial aid, and student life, guided by its religious conscience, including sacred texts, religious principles, and spiritual beliefs.

In conclusion, SB 1146 fosters impermissible government interference in the sensitive internal beliefs and decisions of religious universities and colleges, related to the institution's sincerely held religious beliefs and practices. Therefore, we strongly urge you to please oppose SB 1146, unless it is amended to protect religious institutions. SB 1146 gives California judges the unprecedented authority and virtually unbridled discretion to invasively interfere with religious colleges and universities by determining what portions of the institutions are "religious" and which portions are not. It is foolish to think that the *sacred* should be or can be neatly *separated* from the secular. If the judge finds the portion of the institution challenged is "not religious," then the judge would have the coercive power to award financial damages and invasively dictate religious beliefs and behavior in the form of declaratory and injunctive relief against religious colleges and universities.

Simply put, state coerced secularization of religious institutions is blatantly unconstitutional. America was founded by those fleeing religious tyranny and persecution in Europe. Religious freedom is an American civil right worth fighting for and worth preserving. An inclusive view of America acknowledges, honors, and tolerates a wide diversity of religious beliefs and practices. SB 1146 denigrates religious freedom by coercively forcing religious institutions into a government approved mold. The ominous result will be the destruction of pervasively religious colleges and universities in California. This is not freedom; it is tyranny and must be opposed.

For the cause of liberty and justice, please oppose SB 1146, unless amended. Thank you!

Sincerely,

Dean R. Broyles, Esq.
President & Chief Counsel
The National Center for Law & Policy