PACIFIC JUSTICE INSTITUTE –
Center for Public Policy

P.O. Box 276600
Sacramento, CA 95827.
telephone: (916) 857-6900

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SENT VIA E-MAIL
Sen. Michael Dembrow, Chair
Sen.MichaelDembrow@oregonlegislature.gov
Sen. Chuck Thomsen, Vice-Chair
Sen.ChuckThomsen@oregonlegislature.gov
Sen. Sara Gelser, Member
Sen.SaraGelser@oregonlegislature.gov
Sen. Chris Gorsek, Member
Sen.ChrisGorsek@oregonlegislature.gov
Sen. Art Robinson, Member
Sen.ArtRobinson@oregonlegislature.gov
Oregon Senate Committee on Education
900 Court St. NE
Salem, OR 97301

Re: SB 223 (Private School Registration With Oregon Department of Education) – **Strongly Oppose**

Dear Sen. Dembrow *et al.*:

The Pacific Justice Institute – Center for Public Policy (PJI) is a non-profit law firm[1] devoted to advocating for religious liberty and parental rights. I write to the Senate's Committee on Education in my capacity as constitutional law attorney with PJI to strongly urge you and your fellow senators to vote against Senate Bill 223 (SB 223), as this proposed legislation, if enacted, would infringe on religious freedom, the right of parents to make informed educational decisions they feel are in their children's best interests, and the right of private school students to receive access to places of public accommodation as required under both ORS 659A.400 and the Oregon Constitition's Privileges and Immunities Clause.

In 1925, the U.S. Supreme Court struck down Oregon's then-impending Compulsory Education Act (the "CEA"), which Oregon voters adopted via the initiative process in 1922. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). The CEA, which was to take effect on September 1, 1926, would have required "every parent, guardian or other person having control or charge or custody of a child between eight and sixteen years to send him [or her] 'to a public school for the period of time a public school shall be held during the current year' in the district where the child resides[.]" *Id.* at 530. Failure to send a child to a public school was punishable as a misdemeanor. *Id.* The only exceptions were for children who either were not considered "normal" (i.e., children with special needs), had completed the eighth grade, lived a considerable distance from the nearest public school, or whose parent or guardian had been granted special permission from their county's superintendent of schools to keep their children at home. *Id.* at 530-31. The CEA contained no provision

[1] This non-profit corporation is organized pursuant to Internal Revenue Code § 501(c)(4).

allowing for parents to send their children to religious private schools to receive "[s]ystematic religious instruction and moral training in accordance with the tenets of" their faith. *Id.* at 531-32. In declaring the CEA unconstitutional in violation of the Fourteenth Amendment's Equal Protection Clause, the Supreme Court noted that "the inevitable practical result of enforcing" the CEA would be the destruction of religious private schools. *Id.* at 534. The nation's highest court further held that not only would the CEA, upon going into effect, "unreasonably interfere[ ] with the liberty of parents and guardians to direct the upbringing and education of children under their control," there was no interest compelling enough to support the State's desire "to standardize its children by forcing them to accept instruction from public teachers only." *Id.* at 534-35.

Nearly 100 years later, Oregon legislators apparently ***still*** have not learned the lesson the Supreme Court handed down in *Pierce*. Instead of compelling children to attend public schools, however, the Legislature is trying another route that is equally coercive and every bit as harmful: SB 223, if enacted, would, in essence, mandate that private schools register with the Oregon Department of Education ("ODE"). While Section 3 of SB 223 declares that "[a] private school ***may*** become a registered private school in the manner provided by sections 1 to 5 of this 2021 Act" (emphasis added), a closer look at the bill's language makes clear that registration with the ODE is anything but optional: SB 223 expressly "[l]imits participation in interscholastic activities by private schools to private schools that are registered[.]" *See* § 10(1)(e)(E). In other words, if a Christian, Catholic, or other religious private school wishes to participate in interscholastic athletics or other competitions – such as speech-and-debate tournaments, academic decathlons, or science fairs – alongside public schools as members of the Oregon School Activities Association ("OSAA"), the school must submit to governance by the ODE, which would then exercise control over such matters as the school's curriculum and hiring practices. Even granting that SB 223 contains language stating that the ODE would "take into consideration … [t]he unique qualities of private education while seeking to further the opportunities of students enrolled in private schools" [*see* § 2(2)(a)], there exists a grave danger that the ODE will use its power to interfere with the religious missions of the private schools that have submitted to its oversight. This, the ODE cannot do: "If there is one fixed star in our constitutional constellation, it is that ***no official, high or petty***, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion and or force citizens to confess by word or act their faith therein." *Barnette v. W. Va. State Bd. of Educ.*, 319 U.S. 624, 642 (1943) (emphasis added).

Furthermore, while SB 223 claims to have as its goal "further[ing] the opportunities of students enrolled in private schools" [*see* § 2(2)(a)], the bill, if enacted, would have the opposite effect: Because they would be excluded from OSAA-sanctioned events, athletes at non-registered private schools would be denied the opportunity to test themselves against the best athletes the State's public schools have to offer, whether in league matchups or in state playoffs. Not only that, whether in athletic or academic competitions, SB 223 would deny students at non-registered private schools the same opportunities public-school students have to be noticed by college recruiters and receive scholarship offers when competing on Oregon's grandest stages. Public-school students would likewise miss out on interacting with, and perhaps befriending, students at non-registered private schools. Opportunities would be diminished for all Oregon students, regardless of what schools they attend, if the Legislature enacts SB 223.

Enacting SB 223 would also undermine the anti-discriminatory purpose underlying Oregon's public accommodation law: ORS 659A.403(1) declares that "all persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction or discrimination on account of … religion[.]" ORS 659A.400(1) defines "place of public accommodation" as "[a]ny place or service offering to the public accommodations, ***advantages***, facilities or ***privileges*** whether in the nature of goods, services, lodgings, amusements, transportation or otherwise" (emphasis added). The language of ORS 659A.400(1) indicates that a "place of public accommodation" does not have to be a brick-and-mortar building – the term "service" indicates that "a place of public accommodation" can be an organization. The OSAA would certainly qualify. *See Bingham v.*

Oregon Sch. Activities Assn., 37 F. Supp. 2d 1189, 1192 (D. Or. 1999) [declaring the OSAA to be "a collective entity of membership schools – most of them public – empowered to make rules concerning interscholastic athletic competition among its constituent members"]; *see also id.* at 1202 [declaring athletics to be part of the "goods, services, facilities, privileges, advantages, and accommodations" offered by the OSAA and its member schools to students].

On a related note, the Legislature would do well to keep in mind the Oregon Constitution's Privileges and Immunities Clause, which declares, "No law shall be passed granting to any citizen or ***class of citizens*** privileges, or immunities, which, upon the same terms, ***do not equally belong to all citizens***." Or. Const. art. I, § 20 (emphasis added). If enacted, SB 223 would, on its face, violate the Privileges and Immunities Clause: Non-registered private schools would constitute a "class of citizens" that faces subjection to extreme, government-mandated ostracization for instilling in students religious and moral views that the secular world deems unpopular – views that the ODE would all but certainly prohibit registered private schools from teaching. *See Advanced Drainage Sys. v. City of Portland*, 214 Or. App. 534, 540 (2007) [quoting *Cox v. State of Oregon*, 191 Or. App. 1, 9 (2003) (Schuman, J., concurring), which declares that "(a) system that distributes privileges or immunities based on membership in a 'true' class is subjected to a demanding level of scrutiny if it is 'based on … traits on the basis of which class members are subjected to ***adverse social or political stereotyping or prejudice***" (emphasis added)]. The law would likewise deprive students at non-registered private schools – i.e., a class of citizens – the same opportunities available to students at public schools and registered private schools in violation of the Privileges and Immunities Clause.

The State has raised no concerns that children in private schools are underperforming academically or that private schools are endangering students' health and safety, even in the face of the COVID-19 pandemic. The only real purpose behind SB 223 seems to be to drive religious private schools out of business and deprive parents of a meaningful choice concerning where their children will receive the most beneficial educational opportunities. This, in and of itself, is an invalid exercise of the State's power. *See Pierce*, 268 U.S. at 535 [noting that the CEA threatened Oregon's private schools "with destruction through the unwarranted compulsion which (the State is) exercising over present and prospective patrons of (private) schools"]. It is also an exercise that will not go unchallenged: The Legislature should consider itself warned that private schools from all corners of the State – not to mention parents of private-school students, and perhaps even the students themselves – are prepared to seek invalidation of SB 223 in federal court if SB 223 becomes law.

Based on the foregoing, PJI strongly recommends that the Legislature not enact SB 223.

Very truly yours,

Ray D. Hacke

Ray D. Hacke
Staff Attorney
Pacific Justice Institute
P.O. Box 5229
Salem, OR 97304
Phone: (503) 917-4409
E-mail: rhacke@pji.org