FIRST LIBERTY

April 9, 2024

Board of Directors, Issaquah School District 411
Superintendent Heather Tow-Yick
Susan Mundell
5150 220th Ave SE
Issaquah, WA 98029
[redacted]

Principal Amy Allison
Creekside Elementary School
20777 Southeast 16th St
Sammamish, WA 98075
[redacted]

***Sent via U.S. mail and email***

**Re: Creekside Elementary School's Violation of Students' First Amendment Rights by Denying Interfaith Prayer Club**

Dear Board of Directors, Superintendent Tow-Yick, Principal Allison, and Ms. Mundell:

First Liberty Institute is the nation's largest law firm dedicated exclusively to defending and restoring religious liberty for all Americans. We successfully represented Coach Joseph Kennedy at the United States Supreme Court. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022). In that case, the Supreme Court made clear that the Free Exercise Clause protects religious practices by both students and employees in public school settings.

We represent two students at Creekside Elementary School, L.A.W. and J.W., who want to start an interfaith prayer club at their school. Unfortunately, Creekside Elementary School Principal Amy Allison refused L.A.W. and J.W.'s interfaith prayer club while permitting other, non-religious clubs to meet. Such anti-religious discrimination violates the First Amendment's free exercise and free speech clauses. We write to request the immediate approval of L.A.W. and J.W.'s request to start an interfaith prayer club. Please direct all communications concerning this matter to my attention rather than communicating with our clients.

## I. Factual Background

L.A.W. and J.W. are students with kind hearts, stellar academic records, and vibrant faiths. L.A.W. and J.W. believe that religious freedom is important for students of all faiths, and that the students in their school need a safe place to be able to support each other in their beliefs. L.A.W. and J.W. have friends from many different faiths who feel marginalized. L.A.W. has had an especially difficult experience as a religious student in fifth grade. Because of her experience, L.A.W. and J.W. decided to start an interfaith prayer club so that students like her could have a place after school where they feel safe and welcome, and where they can bring students together to serve their community. The club would be open to all students, regardless of their faith background, and L.A.W. and J.W. have many ideas for club activities, including prayer and community service.

On February 2 and 6, L.A.W. and her mother, whom we also represent, met with Principal Allison. L.A.W. explained her vision for the prayer club: all grades are welcome, all religions and beliefs are welcome, and the goal is to help others feel included in a powerful, positive and non-dividing way to help others in the community. L.A.W. explained that the club would be student-led, but that if a sponsor was required, she knew some staff and other adults who would be willing to volunteer. She also offered to host a fundraiser with her friends for the club if that were necessary.

Principal Allison told L.A.W. that she could not have an interfaith student prayer club, but that L.A.W. "could fill out an application to pay to use the school after school; I would allow that." When L.A.W. asked why she would have to pay as an outside group when there are other student clubs who don't have to pay, Principal Allison responded, "I am sorry, [L.], I just can't tell you what you want to hear," and "we can't allow it."

On March 8, Principal Allison reiterated, "Per our meeting, we discussed that the process of establishing clubs for this school year has ended as of the end of October. No new clubs are being added at this time." Principal Allison made this statement despite permitting a Pride Club to begin the same month that L.A.W. and J.W. wanted their interfaith prayer club to start meeting. On March 12, L.A.W. sent an email saying, "It is my last year at Creekside, and I am really excited about my faith club. I already have some ideas planned. Is there any way you could please change your mind?" Principal Allison did not respond to L.A.W.'s email.

## II. Legal Analysis

As the Supreme Court's holding in *Kennedy v. Bremerton School District* made clear, the First Amendment protects the ability of students and employees to express their faith in public schools. The Court in *Kennedy* explained that the clauses of the First Amendment "work in tandem. Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping

protection for expressive religious activities." 597 U.S. at 524. The result is that the First Amendment "doubly protects religious speech." *Id.*

These First Amendment protections extend to elementary school students expressing their sincere religious beliefs through voluntary clubs—including L.A.W. and J.W. Yet the Issaquah School District flouted its First Amendment obligations when Creekside refused to allow a student-led interfaith prayer club. Its unlawful action violates both the Free Exercise Clause and the Free Speech Clause.

### A. Creekside Elementary School violated the Free Exercise Clause when it treated non-religious clubs more favorably than the prayer club.

The Free Exercise Clause provides robust protection for religious students seeking to express their faith through after-school clubs. Just last year, ten federal judges on the Ninth Circuit Court of Appeals held that a school district violated the First Amendment when it allowed non-religious clubs to select their own leaders but stamped a Christian club out of existence because of its religious beliefs. *Fellowship of Christian Athletes v. San Jose Unified School District,* 82 F.4th 664, 672 (9th Cir. 2023). Citing *Kennedy*, the Court held that "[u]nder the First Amendment's protection of free exercise of religion and free speech, the government may not 'single out' religious groups 'for special disfavor' compared to similar secular groups." *Id.* The Court explained that the Free Exercise Clause has "three bedrock requirements" "that the government may not transgress," unless it can meet strict scrutiny, the most difficult test in constitutional law. *Id.* at 686. First, under *Tandon v. Newsom*, "the government may not 'treat . . . comparable secular activity more favorably than religious exercise.'" *Id.* at 688. Second, under *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, "the government may not act in a manner 'hostile to . . . religious beliefs' or inconsistent with the Free Exercise Clause's bar on even 'subtle departures from neutrality.'" *Id.* at 686. Third, under *Fulton v. City of Philadelphia*, a "'generally applicable' policy may not have a 'mechanism for individualized exemptions.'" *Id.* Creekside's refusal to allow a prayer club fails all three requirements.

First, government actors run afoul of the Free Exercise Clause when they "treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021). In *Tandon*, the Supreme Court held that prohibiting private worship gatherings while granting exceptions for comparable secular activities triggered strict scrutiny under the Free Exercise Clause. The Ninth Circuit applied this to the student club context, finding a "pattern of selective enforcement favoring comparable secular activities." *Fellowship of Christian Athletes*, 82 F.4th at 689; *see also InterVarsity Christian Fellowship v. Univ. of Iowa*, 408 F. Supp. 3d 960, 983 (S.D. Iowa 2019), *aff'd*, 5 F.4th 855 (8th Cir. 2021) (strict scrutiny triggered when University made impermissible "value judgment that its secular reasons for deviating from the Human Rights Policy are more important than InterVarsity's religious reasons" for selecting leaders who share its beliefs).

Second, when "official expressions of hostility" accompany "policies burdening religious exercise," that is an automatic Free Exercise violation. *Kennedy*, 509 U.S. at 525 n.1 (citing *Masterpiece Cakeshop*, 138 S. Ct. at 1731); *see also Fulton*, 593 U.S. 522, 533 (2021) ("Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature.") The Free Exercise Clause also prohibits "subtle departures from neutrality," and "covert suppression of particular religious beliefs." *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 534 (1993). In the student club context, the Ninth Circuit held that revoking an existing club's approval sent a message of hostility to religious students. *Fellowship of Christian Athletes*, 82 F.4th at 690.

Third, "the mere existence of government discretion is enough to render a policy not generally applicable." *Id.* at 685. In *Fulton v. City of Philadelphia,* the Supreme Court unanimously held that under the Free Exercise Clause, strict scrutiny is triggered when government decisionmakers have discretion whether to grant or deny exemptions from their policies, even if those policies appear neutral. *See Fulton*, 593 U.S. at 537 ("The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given").

Here, Creekside allows many other student clubs such as the Creekside Choir, Creekside Marimba Club, Global Reading Challenge, Green Team, Pride Club, Safety Patrol, and Student Council.[1] Other clubs advertised on the PTSA's website include the Chess Club, Destination Imagination, Geography Club, Math Club, and Toastmasters Club through the Youth Leadership Program.[2] At least one of these, the Pride Club, began operating the same month that L.A.W. and J.W. wanted to begin their interfaith prayer club. Thus, Creekside is treating non-religious clubs more favorably than a religious club, which triggers strict scrutiny. The school's actions of permitting and promoting other clubs while prohibiting L.A.W. and J.W.'s interfaith prayer club also sends a message of hostility to L.A.W., J.W., and other religious students that their voices are not welcome. By singling out a religious club and providing it inferior access to school resources than what it provides to other noncurricular groups, the District shows a hostility to religion that violates the Free Exercise Clause.

Furthermore, Creekside's principal and District staff have complete discretion to decide whether to approve or deny student clubs. Principal Allison's responses to L.A.W. made this clear, claiming that she and other staff decided at a meeting in October where they were going to allocate funds.[3] Students and parents had no idea that this meeting occurred, and there was no opportunity for input. There was no application process; the principal can simply approve or deny for any reason, and the clubs which pass muster are apparently the ones advocated by teachers—even when parents and students have

[1] "Activities," Creekside Elementary School, https://creekside.isd411.org/student-life/activities.
[2] "Programs," Creekside PTSA, https://creeksideptsa.ourschoolpages.com/Program.
[3] Notably, the Pride Club and other clubs are not listed on the District's October 2023 budget – only "Choral," "Environmental Camp," and an unallocated "General Student Body" fund of $14,409.

expressed that other clubs would be more helpful to the community. Indeed, if all clubs truly had to launch in October, the Pride Club received a special exemption, since it did not launch until late January—the week before Principal Allison denied the prayer club. Thus, Creekside's practice triggers strict scrutiny under the Free Exercise Clause.

Principal Allison's suggestion that L.A.W. could apply and pay to use the school's facilities as if she were an outside organization is an unlawful sidestep of the law's requirements. As the Supreme Court has repeatedly held, religious clubs must be afforded the same recognition, access, and rights as other noncurricular clubs. *See Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 236 (1990) ("Thus, even if a public secondary school allows only one 'noncurriculum related student group' to meet . . . the school may not deny other clubs, on the basis of the content of their speech, equal access to meet on school premises during noninstructional time.").[4] More broadly, "[t]he Free Exercise Clause 'protect[s] religious observers against unequal treatment and subjects to the strictest scrutiny laws that target the religious policies for 'special disabilities' based on 'their religious status.'" *Trinity Lutheran v. Comer*, 582 U.S. 449, 458 (citing *Lukumi*, 508 U.S. at 533, 542).

### B. Creekside Elementary School violated the Free Speech Clause when it refused to allow a prayer club yet allowed other noncurricular clubs.

For decades, Supreme Court precedent has consistently held that public schools that allow some clubs cannot exclude others on the basis of their religious viewpoint. In *Good News Club v. Milford Central School*, 533 U.S. 98, 111–12 (2001), a Christian family sued their school district when the elementary school refused to allow a religious club for elementary-age students to meet after school. The Supreme Court held that the school district violated the Free Speech Clause when it excluded a Christian club from meeting at school because of its religious viewpoint. *Id.*; *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) (university's refusal to fund student publication from religious perspective because violated Free Speech Clause); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993) (excluding religious perspective when other perspectives were allowed "discriminates on the basis of viewpoint").

Here, Creekside is allowing at least 12 noncurricular student clubs to exist. Beyond Creekside, the Issaquah School District allows dozens of other student organizations to meet and operate using school facilities at no additional charge across its 16 elementary schools, 6 middle schools, and 5 high schools. Given all this, the Issaquah School District is operating in a limited public forum. Under settled Supreme Court precedent in *Good News Club, Rosenberger,* and *Lamb's Chapel*, because the District allows other noncurricular clubs, it cannot exclude L.A.W. and J.W.'s prayer club from meeting on an equal basis with the other clubs.

[4] While *Mergens* is an Equal Access Act case, focused on secondary schools, the same concepts apply here. And Free Exercise protections apply to students at all grade levels.

## III. Conclusion

This is a time-sensitive matter. No later than April 22, 2024, please provide your written assurances that the Issaquah School District and Creekside Elementary School will approve our clients' request to start a prayer club and permit the club to begin meeting no later than April 29, 2024. If we do not hear from you and receive those assurances by that time, we will proceed as our clients direct, likely pursuing all available legal remedies.

Sincerely,

Kayla A. Toney

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