JONES DAY

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DIRECT NUMBER: [redacted]

December 2, 2024

VIA U.P.S. OVERNIGHT AND EMAIL

Board of Directors President Daniel Nichols,
Waterville Central School District
Superintendent Dr. Jennifer Spring
Principal Dr. Steve Grimm
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Waterville, NY 13480
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Re: Waterville's Violation of Student's Civil and First Amendment Rights to Start an Official Bible Club

Dear President Nichols, Superintendent Spring, and Principal Grimm:

Along with the First Liberty Institute, I am counsel for Elijah Nelson, an eighth-grade student at Waterville Jr./Sr. High School, which has repeatedly denied his request to form an official Bible club. We write to explain how this denial violates Elijah's civil rights and First Amendment freedoms, and request that you promptly remedy these wrongs by allowing him to form the club—on the same terms and conditions that govern other student clubs. "Respect for religious expression is indispensable to life in a free and diverse Republic," including in such a Republic's public schools. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 (2022). Waterville needs to dispense with its "hostility toward the religious viewpoint" and show Elijah and his fellow students that respect. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 118 (2001).

We understand that the School requires three things of a student who wants to form an official club: First, the student must describe the proposed club's mission and goals, its intended activities, how often it will meet, and any fundraisers it will hold. *See* Exhibit 1 (new club proposal form). Second, the student must include the signatures of students who are interested in attending the club's meetings. Last, the student must meet with the principal to review the proposal.

Elijah did all of this. He submitted a proposal to the School on January 4 of this year. *See* Exhibit 2 (Bible club proposal). In it, he explained that the Bible club would study the world's most widely published book to promote character development, mental health, critical thinking, group collaboration, and reading comprehension. He also explained that the club would meet weekly for Bible study, either before school or during the lunch hour. He specified that the club would be open to any student with interest. And he proposed that local ministers might be invited

to assist the students, just as other clubs, like the School's Gay Straight Alliance, host outside speakers. Finally, he noted that he had already submitted student signatures and discussed the club with the principal.

Yet the School denied Elijah's request—only because the club would be religious. In January and October exchanges with Elijah's father, Daniel, Assistant Principal Lindsay Owens explained that the School would not officially recognize the Bible club because lawyers for the District had advised her that recognizing a religious club would unconstitutionally "endorse" religion. *See* Exhibit 3 (recording of January phone call), Exhibit 4 (October email correspondence). Ms. Owens gave Elijah two alternatives: The club could meet informally during lunch while a staff member supervised the students without participating in the group's activities; or the club could apply as an outside organization to use the School's facilities after hours. But because the District believed it "cannot have a school-sponsored club associated with a religion," the School would not "officially" recognize, "fund," or "sponsor[]" the Bible club as it would any other club. Exhs. 3, 4.

The advice Ms. Owens apparently received was flawed, and the School's conclusion was legally incorrect. Rather than honoring its students' rights consistent with federal law and the U.S. Constitution, as Ms. Owens perhaps sought to do, the School actually violated those rights. It may not lawfully deny official recognition to a student club simply for being "associated with a religion." This is so for several reasons.

First, the School has violated the federal Equal Access Act.

For forty years, the Equal Access Act has prohibited schools from denying religious clubs "equal access," or "discriminat[ing] against" them, whenever two conditions are met: The school is a "public secondary school" that receives federal funds, and it has a "limited open forum." 20 U.S.C. § 4071(a). A "limited open forum" exists "whenever" a school "grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." § 4071(b). So it is enough that a school allows *any* such student group to meet on school grounds. *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 237 (1990). A religious club is a "noncurriculum" group. *Id.* at 238. And noninstructional time is "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends," 20 U.S.C. § 4072(4), such as lunch, *Ceniceros v. Bd. of Trustees of the San Diego Unified Sch. Dist.*, 106 F.3d 878, 880 (9th Cir. 1997).

If a schools satisfies these conditions, it must grant "equal access in the form of official recognition by the school," with all that that "allows," without regard to whether the speech at the club's meetings would be religious. *Mergens*, 496 U.S. at 247; *see* § 4071(a). If it does not, students may vindicate their rights by suing under the longstanding civil-rights statute, 42 U.S.C. § 1983, and recovering attorney's fees on successful claims. *SAGE v. Osseo Area Sch.-Dist. No. 279*, 471 F.3d 908, 909–10 (8th Cir. 2006); *Gierlinger v. Gleason*, 160 F.3d 858, 876 (2d Cir. 1998).

Waterville Jr./Sr. High School meets both conditions: It receives federal funds, *see* https://go.boarddocs.com/ny/waterville/Board.nsf/Public (minutes of October Board meeting at which federal/special aid fund warrants were approved), and it has at least *22* extracurricular clubs

and activities. *See* www.watervillecsd.org/jr-sr-high-school/hs-clubs-activities/. Elijah's proposed Bible club would be a noncurriculum activity under the Supreme Court's decision in *Mergens*. And it would meet during noninstructional time on school grounds, either before classroom instruction begins or during lunch. Exh. 2.

Thus, the School may not "deny equal access or a fair opportunity to, or discriminate against," Elijah in his desire "to conduct a meeting within [its] limited open forum on the basis of the religious … content of the speech at such meetings." § 4071(a). The Supreme Court requires a "broad construction" of "equal access." *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 862 (2d Cir. 1996). And the Act defines a "meeting" broadly to include the "activities of student groups" permitted in the limited open forum that are "not directly related to the school curriculum." § 4072(3). In short, Elijah's club deserves "official recognition by the school," not denial simply for being religious. *Mergens*, 496 U.S. at 247.

If the School's concern is that complying with the Equal Access Act would conflict with the U.S. Constitution's Establishment Clause, it need not worry. The Supreme Court rejected that view nearly *a quarter-century ago*. *Id.* at 247–53 (plurality op.); *id.* at 260–62 (op. of Kennedy, J.). And it has since confirmed that, as *Mergens* itself anticipated and we explain below, the Establishment Clause requires only that a secondary school operate with "neutrality" between religious and nonreligious groups. *Id.* at 251 (plurality); *id.* at 260–61 (Kennedy, J.).

Second, and in any event, the School's refusal to recognize the Bible club also violates Elijah's constitutional rights.

It violates *two* clauses of the First Amendment. As the Supreme Court recently ruled in a high-profile victory for another First Liberty client, the Free Speech Clause and Free Exercise Clause "work in tandem" to "doubly" protect "expressive religious activities." *Kennedy*, 597 U.S. at 523.

Start with *free speech*. When the government opens what courts call a "limited public forum," it may not discriminate against or exclude expression of religious viewpoints on subjects on which it allows expression of *non*religious viewpoints. *Good News Club*, 533 U.S. at 112. The government creates a limited public forum when it opens up a nonpublic forum but limits expressive activity to certain speakers or subjects. *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009). Restrictions on speech in that forum must be viewpoint neutral and reasonable. *Id.*; *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995). A religious viewpoint is a "standpoint from which a variety of subjects may be discussed and considered." *Rosenberger*, 515 U.S. at 831. That a viewpoint is religious does not somehow keep it from being a perspective about subjects, like "character development," that are not. *Good News Club*, 533 U.S. at 111.

The First Amendment right to *free exercise of religion*, for its part, ensures that religious believers may "live out" their faith "in daily life"—including in life at public schools. *Kennedy*, 597 U.S. at 524, 527. It prohibits denying a generally available benefit because of the applicant's religious identity or character. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 466 (2017); *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 475 (2020). As the Supreme Court held in another recent victory for a First Liberty client, the government need not provide a given benefit,

but, once it does, it cannot disqualify otherwise-eligible beneficiaries because they are religious. *Carson v. Makin*, 596 U.S. 767, 779–80 (2022). In short, any departure from "neutrality" that burdens religious exercise is presumptively unconstitutional. *Kennedy*, 597 U.S. at 526. And, although a government may justify an exception if it can clear the high requirements of "strict scrutiny," it fails to do so by invoking an interest in separating church and state more strictly than the Establishment Clause requires. *Carson*, 596 U.S. at 781; *Espinoza*, 591 U.S. at 484–85.

Under these rules, the School has violated Elijah's First Amendment rights. It is not close.

Begin again with free speech. The School discriminated against Elijah's religious viewpoint by declining to officially recognize the Bible club while recognizing clubs that offer nonreligious perspectives on the same subjects in the limited public forum of student clubs. The School through its official clubs has opened a limited public forum by creating zones in which expression is allowed but limited based on speaker (student clubs) and subject-matter (topics that the District approves as nonduplicative and "consistent with" its mission and policies, *see* Exh. 1). And Elijah's Bible club would offer a religious perspective on subjects that the School's official clubs may, and *already do*, address. For example, the Gay Straight Alliance offers "personal and social support" to students grappling with questions of identity, community, and character—just as the Bible club would offer a Christian, biblical perspective on "character development," "group collaboration," and "mental health." www.watervillecsd.org/jr-sr-high-school/hs-clubs-activities/; Exh. 2. And the International Club "promote[s] global cultural awareness"—just as the Bible club would promote literacy about, and comprehension of, the world's "most widely published book," which has had "a prominent place in society around the globe for thousands of years." www.watervillecsd.org/jr-sr-high-school/hs-clubs-activities/; Exh. 2. There is "no logical difference" between Elijah's "invocation of Christianity" as the "foundation" for the Bible club's viewpoint on these important issues and other clubs' invocation of *their* "foundations for thought or viewpoints" on the same issues. *See Good News Club*, 533 U.S. at 111. Accordingly, the Bible club must be "treated neutrally and given access to speak about the same topics as are other groups." *Id.* at 114. The School may not treat the Bible club worse than it would treat nonreligious groups.

The Free Exercise Clause compels the same conclusion, because the School's policy against recognizing religious groups is impermissible religious targeting. The School's position—that it "cannot have a school-sponsored club associated with a religion," Exh. 4—excludes otherwise-eligible clubs from the benefits of official recognition based *solely* on religious identity or character. This policy of *explicit* "status-based discrimination" would have to withstand strict scrutiny. *Carson*, 596 U.S. at 786. Yet it cannot, just as it did not in *Trinity Lutheran* or *Espinoza* or *Carson*: Although a government may not justify incursions on free exercise by citing anti-establishment interests stricter than the Establishment Clause requires, that is precisely what the School has done. *Id.* at 781; *Espinoza*, 591 U.S. at 484–85. Indeed, the Supreme Court has "repeatedly" underscored why official recognition of the Bible club on an equal footing with other clubs would *not* violate the Establishment Clause. *Espinoza*, 591 U.S. at 474.

The Assistant Principal told Mr. Nelson that the School had to reject his son's request because the School could not "endors[e] a certain religion." Exh. 3. That concern is anachronistic and

misplaced. Although endorsement did once feature in the Supreme Court's Establishment Clause decisions (such as the plurality opinion in *Mergens*), it does not now. Indeed, the Supreme Court "long ago abandoned *Lemon* [*v. Kurtzman*, 403 U.S. 602 (1971),] and its endorsement test offshoot." *Kennedy*, 597 U.S. at 534. Today, the Establishment Clause never requires—and never allows—the government to discriminate against religious persons and organizations when granting benefits. *Carson*, 596 U.S. at 781; *Espinoza*, 591 U.S. at 474; *Shurtleff v. City of Boston*, 596 U.S. 243, 261 (2022) (Kavanaugh, J., concurring) (noting that the Court has "repeatedly" held that a government "does not violate the Establishment Clause merely because it treats religious persons, organizations, and speech equally with secular persons, organizations, and speech"). And the Court has similarly "rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate," as here, in school club "programs neutral in design." *Rosenberger*, 515 U.S. at 839.

The School is out of line. It has denied Elijah's request simply because of its religious nature, and it has thereby violated the Constitution, federal law, and its students' rights. Please direct all further communication on this matter to me, and promptly confirm that you have approved Elijah's Bible club—on the same terms and conditions that govern official clubs. Given the delay already, and with the Christmas season approaching, if we do not hear from you by December 11, we will assume you refuse to reconsider your denials and will proceed as our client directs, which might include litigation and the attorney's fees that a winning claim earns under any of the legal grounds I have explained.

Sincerely,

C. Kevin Marshall

Enclosures: Exhibit 1 (new club proposal form)
Exhibit 2 (Bible club proposal)
Exhibit 3 (recording of January phone call) (via email only)
Exhibit 4 (October email correspondence)

cc: Keisha T. Russell
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