No. 20-0725

In the Supreme Court of Texas

PATRICK VON DOHLEN, BRIAN GRECO, KEVIN JASON KHATTAR, MICHAEL KNUFFEKE, AND DANIEL PETRI,

Petitioners,

v.

CITY OF SAN ANTONIO,

Respondent.

On Petition for Review
from the Fourth Court of Appeals, San Antonio
No. 04-20-00071-cv

BRIEF FOR AMERICA FIRST LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE

America First Legal Foundation ("AFL") is a national, nonprofit organization. AFL works to promote the rule of law in the United States, prevent executive overreach, to ensure due process and equal protection for all Americans, and to encourage the diffusion of knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States.

AFL has a substantial interest in this case. The City of San Antonio subjected Chick-fil-A to government discrimination and hostility simply because it supported religious organizations that adhered to a traditional understanding of marriage. These convictions—held by Christians, as well as traditional Jews, Muslims, and followers of numerous other religions for thousands of years—have been subjects of lively and heated debate. They should not be the basis for governmental discrimination. AFL has a strong interest in seeing that any government, whether at the federal, state, or local level, respects the speech, association, and religious expression of every American citizen.[1]

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[1] No party has paid a fee in connection with this brief. *See* Tex. R. App. P. 11(c).

SUMMARY OF ARGUMENT

This case is about much more than the purveyor of delicious chicken sandwiches served with unrivaled customer service. Nor is it simply about the longstanding views held by most cultures and religious groups, shifting social values among certain segments of society, or even a mistaken holding by the Texas Fourth Court of Appeals. More broadly, this case is about the City of San Antonio's retaliation against a private contactor based on their speech in direct violation of the First Amendment, and the Texas Legislature's efforts to correct government-sanctioned "cancel culture," a currently vogue phenomenon that threatens to undermine Americans' fundamental liberty to believe, think, and speak.

The First Amendment ensures that the government cannot "cancel" or refuse to award a contract based on a contractor's protected expression or views. And a long line of cases establishes that the government cannot "cancel" contractors because the contractor thinks things that the government disagrees with, or says things that the government disagrees with, but does not affect their ability to work. Here, the City of San Antonio did just that when it specifically excluded Chick-fil-A restaurants from the city-operated airport.

The City of San Antonio's conduct is egregious and unconstitutional. The Texas Legislature recognized the City of San Antonio's illegal conduct. It quickly passed legislation to provide redress against those who flout constitutional protections. But the Fourth Court of Appeals

cast doubt on the ability of the legislature to provide an effective deterrent to "cancel culture" actions that are unquestionably illegal when carried out by government actors. This is a significant matter, not only for San Antonio, but for the jurisprudence of the entire state. *See* Tex. Gov't Code § 22.001(a). And this case provides the Supreme Court of Texas with an opportunity to ensure the effectiveness of legislative remedies to correct such blatantly unconstitutional actions.

ARGUMENT

I. The Government Cannot Discriminate Against Private Contractors Because of their Protected First Amendment Activities.

The law is clear: Government cannot discriminate against contractors because of their speech. And the government cannot discriminate against contractors because they associate with groups that themselves exercise their First Amendment rights in ways that the government does not approve.

That the First Amendment applies to government economic decisions is a basic principle underlying an extensive body of cases involving public employees and contractors. The "modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of

speech' even if he has no entitlement to that benefit." *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). The government cannot penalize public employees for their speech or political affiliation unrelated to the job. *See Wieman v. Updegraff*, 344 U.S. 183 (1952); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980). The same goes for contractors. *See O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 714-15 (1996); *see also Kinney v. Weaver*, 367 F.3d 337, 356 (5th Cir. 2004) ("[T]he First Amendment analysis applicable to claims by public employees also applies to First Amendment claims brought by the government's independent contractors.").

In the Supreme Court's first case involving a contractor, a local trash collection company lost its contract with the county after its owner criticized the county board. *Umbehr*, 518 U.S. at 671. In a second case, a towing company lost a contract to serve the town after the owner refused to support the mayor's reelection and instead supported the opposing candidate. *O'Hare*, 518 U.S. at 715. In both cases, the Supreme Court was unequivocal: the government's action violated the First Amendment. And

while both Supreme Court cases involved the termination of *existing* contracts, the contract does not have to be already in effect to implicate the First Amendment. *See Oscar Renda Contracting, Inc. v. City of Lubbock*, 463 F.3d 378, 383-86 (5th Cir. 2006).

It is well-established that employees and contractors do not abandon their First Amendment rights when they choose to work with a government entity. *Pickering*, 391 U.S. at 568. There are many cases involving government entities trying to reward supporters and punish opponents. *See, e.g., Umbehr*, 518 U.S. at 671; *O'Hare*, 518 U.S. at 715. The Supreme Court has repeatedly said that is not permissible, even though there have been examples of political patronage throughout American history. *Umbehr*, 518 U.S. at 681; *O'Hare*, 518 U.S. at 717–18.

II. The City of San Antonio "Canceled" Chick-fil-A Because City Council Members Objected to Chick-fil-A's Religious Beliefs.

The City of San Antonio "canceled" Chick-fil-A because it disagreed with the religious groups supported by Chick-fil-A's owners. Specifically, the City of San Antonio used its authority to deny a contract to a business because of the beliefs of the business's owners and because of the religious organizations the business supports. *See* City Council A Session Video,

Mar. 21, 2019, at 4:54:45, at https://sanantoniotx.new.swagit.com/videos/26748 (last visited on April 23, 2020). Chick-fil-A's charitable giving supported the Salvation Army, which serves several million people annually with its need-based aid programs, and the Fellowship of Christian Athletes, which offers summer sports-camp programs. *See, e.g., 2019 Financial Summary, Salvation Army Annual Report*, https://salvationarmyannualreport.org/financials/; Fellowship of Christian Athletes, *What is FCA?*, https://www.fca.org/what-is-fca. These organizations and Chick-fil-A's CEO also publicly affirmed their belief that sexual activity should be limited to marriage between a man and a woman. *See* Pet. 6.

Because San Antonio City Council members characterized these beliefs as bigoted, Chick-fil-A lost a contract. One council member said he opposed giving a contract to Chick-fil-A because the restaurant chain had a "legacy of anti-LGBTQ behavior." City Council A Session Video at 3:53:25. Another said he opposed doing business with Chick-fil-A because Chick-fil-A was "funding anti-LGBTQ organizations." *Id.* at 4:54:45. The City of San Antonio discriminated against Chick-fil-A for its imputed beliefs about marriage and its association and support for others who shared that belief. It refused to allow Chick-fil-A to do business in the

airport not because Chick-fil-A makes a bad chicken sandwich, nor because Chick-fil-A would refuse to serve or hire people based on their sexual orientation. In fact, no one even suggested that. The City of San Antonio simply decided to punish those with whom it disagreed.

Shutting down philosophical opponents is an all-too-familiar move in today's civic culture. The controversies are countless, with many familiar scenarios to anyone keeping up with the news: colleges "canceling" unpopular speakers scheduled to speak on a campus,[2] news organizations harassing or firing columnists and commentators because of the positions they have taken (or the positions that they have published),[3] social-media

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[2] *See, e.g.*, Rafael Walker, *How Canceling Controversial Speakers Hurts Students*, Chron. Higher Ed. (Feb. 8, 2017), https://www.chronicle.com/article/how-canceling-controversial-speakers-hurts-students/ (listing instances of speakers invited to campus but then canceled).

[3] *See, e.g.*, Jeffrey A. Trachtenberg & Lukas I. Alpert, *Bari Weiss Quits New York Times Opinion, Alleging Hostile Work Environment*, Wall Street J. (July 14, 2020), https://www.wsj.com/articles/bari-weiss-quits-new-york-times-opinion-alleging-hostile-work-environment-11594762712 (columnist alleging that she was resigning after being subjected to mockery and mistreatment for her controversial views); Rishika Dugyala, *NYT Opinion Editor Resigns After Outrage Over Tom Cotton Op-Ed*, Politico (June 7, 2020), https://www.politico.com/news/2020/06/07/nyt-opinion-bennet-resigns-cotton-op-ed-306317 ("The *New York Times* announced . . . that its editorial page editor had resigned after backlash from the public and the company's own employees" about a politically-controversial op-ed).

companies applying different standards to political content that the company disfavors,[4] and more. Sometimes these controversies raise tough questions. For instance, should a newspaper always publish both sides of an issue or can it sometimes just promote its own viewpoint? But if there is one issue that should *not* be controversial, it is that *government* ought not "cancel" or punish citizens for what they think. Yet that is exactly what happened here.

It is not as though San Antonio thought that Chick-fil-A was channeling government money to illegal activities. Nor was there any claim that the organizations that Chick-fil-A supported discriminated in impermissible ways in their hiring, firing, or service. And even *if* there were an allegation that one or another of the groups supported by Chick-fil-A engaged in illegal discrimination, that would not be enough to justify penalizing Chick-fil-A, for there is no allegation that Chick-fil-A was trying to promote illegal ends. *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982) ("For liability to be imposed by reason of association

[4] Steven Nelson, *Twitter CEO Jack Dorsey Falsely Tells Senators Company Lifted Ban on Post Exposé*, N.Y. Post (Oct. 28, 2020), https://nypost.com/2020/10/28/twitter-ceo-anyone-can-tweet-post-articles-after-censorship/.

alone, it is necessary to establish that the group itself possessed unlawful goals *and that the individual held a specific intent to further those illegal aims*. 'In this sensitive field, the State may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'") (cleaned up); *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1290 (3d Cir. 1994) (a member of an organization does not necessarily endorse all the actions taken by the association).

San Antonio penalized religious speech and association with religious organizations because of their speech. This is far beyond old-fashioned (but still unconstitutional) patronage. A government entity told a private contractor that it cannot support organizations that agree with its religious convictions about marriage and ethics. San Antonio's conduct flies in the face of the most fundamental principle of modern free speech law—that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

The City of San Antonio had more than adequate notice that its actions were illegal because the law is clear. And this was not the first time

Chick-fil-A has been the subject of discrimination by local officials who disapproved the company's stance on traditional marriage. Over the last ten years, several cities have hassled Chick-fil-A for its position on marriage. Repeatedly, legal scholars and commentators have pointed out that this kind of discrimination is illegal:

- Cornell law professor Michael Dorf: "[T]he First Amendment to the U.S. Constitution forbids government officials from discriminating against a person or business based on the viewpoints expressed by the person or by a representative of the business."[5]
- William and Mary Law School professor Nathan Oman: "Legally speaking, this isn't a hard case. [The city official] has announced his intention to violate the First Amendment."[6]
- ACLU attorney Adam Schwartz: "When an alderman refuses to allow a business to open because its owner has expressed a viewpoint

[5] Michael C. Dorf, *Why the Chick-fil-A Controversy Raises Tough Questions About Government Power to Regulate Business Based on Owners' Political Spending*, Verdict (Aug. 1, 2012), https://verdict.justia.com/2012/08/01/why-the-chick-fil-a-controversy-raises-tough-questions-about-government-power-to-regulate-business-based-on-owners-political-spending.

[6] Nathan B. Oman, *Chick-fil-A and the Problem of Soft Censorship*, Deseret News (Jul. 29, 2012), https://www.deseret.com/2012/7/29/20426465/nathan-b-oman-chick-fil-a-and-the-problem-of-soft-censorship.

the government disagrees with, the government is practicing viewpoint discrimination."[7]

When San Antonio's City Council voted to deny Chick-fil-A a contract because of its First Amendment activities, it violated the First Amendment. This is not a novel issue. It is one that has, unfortunately, arisen before, and its illegality has been pointed out repeatedly.

III. The Texas Legislature Provided a State Law Remedy for San Antonio's Unconstitutional Discrimination and It Should Be Given Full Force and Effect.

The Texas Legislature had good reason to be concerned about local governments violating the First Amendment and discriminating on the basis of religion and speech. As outlined above, the City of San Antonio had already done so, egregiously. Over the previous ten years, other cities had threatened similar actions. That was what led to the passage of sections 2400.001–.004 of the Texas Government Code, and that is what led to this case.

[7] Joshua Rhett Miller, *Legal Eagles Cry Fowl Over Politicians' Plans to Block Chick-fil-A*, Fox News (Jul. 26, 2012), https://www.foxnews.com/politics/legal-eagles-cry-fowl-over-politicians-plans-to-block-chick-fil-a.

The Fourth Court of Appeals threw out the case on a theory of immunity that the Legislature specifically said was inapplicable. The Court of Appeals' decision leaves the statute under a cloud of doubt and confusion. The petitioners and other amici have explained how the decisions below did not follow the law. *See* Pet. 14–16; Br. Amicus Curiae Governor of Texas, 4–9; Br. Amici Curiae Texas Values and Texas Pastor Council, 2–5; Br. Amici Curiae Members of Legislature, 4–8. But this case is of even greater importance than just proper statutory interpretation because the Fourth Court of Appeals disregarded the Texas Legislature's attempt to protect constitutional principles. In the face of such blatant judicial disregard, the legislature is hamstrung. The Texas Supreme Court is the one actor that can clarify the applicability of this important legislation, which enables the Legislature to proactively protect our fundamental freedoms in the future.

In light of the serious constitutional issues in the background of this case, as well this Court's solemn obligation to protect and defend the Constitution of the United States, the Court should grant the petition for review and enforce the clear and explicit waiver of governmental immunity in Government Code section 2400.004.

PRAYER

The petition for review should be granted.

Respectfully submitted.

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Microsoft Word reports that this brief contains 2382 words, excluding the portions of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

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