FIRST LIBERTY

March 28, 2019

The Hon. Elaine Chao
U.S. Department on Transportation
1200 New Jersey Ave, SE
Washington, DC 20590

Re: Request for Investigation of Religious Discrimination

Secretary Chao:

First Liberty Institute is the nation's largest law firm dedicated exclusively to defending and restoring religious liberty for all Americans.

I write to request that the U.S. Department of Transportation open an investigation into whether allegations of religious discrimination by members of the City Council of San Antonio has caused the City of San Antonio to violate federal law protecting religious liberty and to fail to comply with the assurances of nondiscrimination required as a federal grant recipient.

Evidence of pervasive, intentional religious discrimination by members of the City Council of San Antonio.

As you are likely aware, on March 21, 2019, the City Council of San Antonio voted to approve a concessionaire agreement with Paradies Lagadère ("Paradies") to operate certain concession space in the San Antonio International Airport. The concessionaire contract forms part of a larger expansion and renovation project in Terminal A.[1] Paradies's contract proposal included Chick-fil-A as one of the restaurants it would bring to Terminal A.[2] Paradies's contract proposal received the highest recommendation, receiving 95.80 out of a possible 100 points (over 20 points more than the runner-up).[3] The City Council moved to follow the staff recommendation and adopt the Paradies Contract, but Councilman Roberto Treviño moved to approve the agreement with Paradies on the express condition that Chick-fil-A be excluded from the contract and

[1] *See* City of San Antonio Aviation Department, Request for Proposal for Food, Beverage, and Retail Prime Concessionaire For San Antonio International Airport at 3, Jan. 18, 2018, available at https://webapp1.sanantonio.gov/RFPFiles/RFP_3430_201801180304540.pdf.
[2] *See* San Antonio Legislation File No. 19-2246 Ex. 1 [hereinafter "Paradies Contract"] at 10, 35, 81, available at https://sanantonio.legistar.com/LegislationDetail.aspx?ID=3888304&GUID=EAFACDCC-CDE8-4B26-9CBC-9A63F95865F1.
[3] *See* San Antonio Legislation File No. 19-2246, Final Score Matrix, available at https://sanantonio.legistar.com/LegislationDetail.aspx?ID=3888304&GUID=EAFACDCC-CDE8-4B26-9CBC-9A63F95865F1.

replaced.[4] With that restaurant—and *only* that restaurant —so excluded, the City Council adopted the agreement. No other changes were made to the agreement by the City Council.

During the council's consideration of the agreement, and his motion to exclude Chick-fil-A, Councilman Treviño openly asserted that San Antonio should not contract with Chick-fil-A because of what he described as its supposed "legacy of anti-LGBTQ behavior," and suggested that the City should vet all future economic deals "to ensure they align with our core values as a city."[5] Importantly, *none* of the other businesses were asked to prove their commitment to any particular issue.

Seconding the motion, Councilman Manny Peláez took a significant amount of time during the debate on the pending agreement to lambaste, denigrate, and openly mock the otherwise upstanding corporate citizen of Chick-fil-A. He described Chick-fil-A as a "symbol of hate" because it has donated to religious charities that he considered to oppose LGBTQ rights. The City Councilman even went so far as to compare Chick-fil-A to such evils bearing public opprobrium as lottery kiosks and e-cigarette shops.[6]

Later, Councilman Trevino proudly claimed credit for the exclusion of an American business that is more profitable per restaurant than McDonald's, Starbucks, and Subway combined.[7] In a statement to the media issued by his office on the City Council of San Antonio's website, he explained:

> With this decision, the City Council reaffirmed the work our city has done to become a champion of equality and inclusion. San Antonio is a city full of compassion, and we do not have room in our public facilities for a business with a legacy of anti-LGBTQ behavior.
>
> Everyone has a place here, and everyone should feel welcome when they walk through our airport. I look forward to the announcement of a suitable replacement by Paradies.[8]

The City Council's allegations stem from a report[9] attacking the charitable giving of the privately-owned restaurant. In reality, Chick-fil-A donated to mainstream, faith-

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[4] *See* City Council A Session, Mar. 21, 2019, Vote Slips at 44, 46, available at https://sanantonio.legistar.com/DepartmentDetail.aspx?ID=22661&GUID=999BA422-A775-4DE3-8ABD-1B4851E69C96&Mode=MainBody.
[5] *See* Mar. 21, 2019 City Council A Session Video at 3:54–55 , available at https://sanantoniotx.new.swagit.com/videos/26748.
[6] *See id.* at 4:54–58
[7] https://www.entrepreneur.com/article/320615
[8] https://www.sanantonio.gov/Department-News/ArtMID/6798/ArticleID/15246/Councilman-Roberto-Trevi2410's-statement-regarding-airport-concession-agreement-with-Paradies-Lagard232re
[9] Josh Israel, *Chick-fil-A donated to anti-LGBTQ group*, ThinkProgress (Mar. 20, 2019), https://thinkprogress.org/chick-fil-a-anti-lgbtq-donations-tax-filings-62ca15281f17/; *see also* Chris Morris, *Chick-Fil-A Banned from San Antonio Airport*, Fortune (Mar. 22, 2019), http://fortune.com/2019/03/22/chick-fil-a-banned-san-antonio-airport/.

based charities and nonprofit organizations like the Salvation Army, Fellowship of Christian Athletes, and others, in accordance with its corporate purpose "[t]o glorify God by being a faithful steward of all that is entrusted to us and to have a positive influence on all who come into contact with Chick-fil-A."[10]

The San Antonio City Council engaged in unconstitutional religious discrimination making them ineligible for federal grants.

Federal taxpayers should not be required to subsidize religious bigotry. The San Antonio City Council may spend its taxpayer dollars as its citizens will tolerate. However, it cannot do so in a way that brazenly violates the First Amendment to the U.S. Constitution and Federal law. Here, the City of San Antonio appears to have openly engaged in religious discrimination, likely forfeiting their eligibility for Federal grant money, whether from the Department of Transportation or other Federal agencies.

The Supreme Court unequivocally explained that "[t]he Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993)). Accordingly, under this "basic principle" the "Court repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'" *Id.* (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)). Refusing to allow Chick-fil-A to compete for a concession space—an opportunity that constitutes a generally available benefit—on the basis of its religious beliefs violates this core constitutional protection. *See id.* at 2022 (finding denial of the opportunity to compete for a public program to violate the Free Exercise Clause).

Moreover, the City Council's decision to exclude Chick-Fil-A because of its support for certain charitable organizations the City Council disfavors violates clearly established constitutional law. "For at least a quarter-century, the United States Supreme Court has made clear that . . . [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Dep't of Tex. v. Tex. Lottery Comm'n*, 760 F.3d 427, 437 (5th Cir. 2014) (en banc) (quoting *Perry v. Sinderman*, 408 U.S. 593, 597 (1972)). This applies to organizations as well as individuals. *Id.* (holding that the unconstitutional conditions doctrine applies to charities) (citing *Citizens United v. Fed. Elections Comm'n*, 558 U.S. 310, 340 (2010))).

The Fifth Circuit squarely held that the government's denial of patronage on the basis of prior disfavored speech is unconstitutional. *See Kinney v. Weaver*, 367 F.3d 337, 360 (5th Cir. 2004) (stating "it would violate the Constitution for the Board to withhold public patronage . . . in retaliation for that newspaper's exercise of *first amendment*

[10] *See* Israel, supra n. 9 (criticizing the Chick-fil-A Foundation's donations to the Salvation Army and Fellowship of Christian Athletes, among others); Chick-fil-A, Who We Are, https://www.chick-fil-a.com/About/Who-We-Are.

rights." (quoting *North Miss. Commc'ns, Inc. v. Jones*, 792 F.2d 1330 (5th Cir. 1986))); *see also Blackburn v. City of Marshall*, 42 F.3d 925, 931–934 (5th Cir. 1995) (holding it would be unconstitutional for a city to retaliate against the exercise of First Amendment rights by revoking permission to use the police radio frequency).

The City Council's expressly discriminatory, religiously hostile reasons for excluding Chick-fil-A cannot justify its religious discrimination. *See, e.g.*, *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729–30 (2018). Members of the San Antonio City Council may disagree with the charitable giving of Chick-fil-A, but whatever disputes Councilmen Treviño and Peláez and their colleagues may have with Chick-fil-A "must be resolved with tolerance, without undue disrespect to sincere religious beliefs . . . ." *Id.* at 1732. Rather than extend such tolerance, the City of San Antonio pronounced Chick-fil-A unsuitable for inclusion within its territory. For such religious discrimination, the City of San Antonio should forfeit its eligibility for federal grant monies.

The City of San Antonio's council members violated local and federal policies requiring nondiscrimination.

Even if it was purporting to enforce a law or policy of nondiscrimination, the City Council's derogatory description of Chick-fil-A's charitable endeavors would render its actions in violation of the Free Exercise Clause. *See, e.g.*, *id.* at 1731 (explaining "the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or a religious viewpoint."). Yet, Chick-fil-A welcomes all customers.[11] The City Council cannot even claim to be enforcing a nondiscrimination ordinance. Quite the contrary, by excluding Chick-fil-A because of its charitable giving, the City Council both violated its own nondiscrimination ordinance, *see* San Antonio Code Sec. 2-550 ("It shall be the general policy of the city to prohibit discrimination on the basis of . . . religion. . . . and it is the express intent of this article to guarantee to all of our citizens fair and equal treatment under the law."), and the nondiscrimination provisions contained in the very contract it was considering, *see* Paradies Contract, *supra* n. 2, at 64–65 (incorporating various federal and municipal nondiscrimination law).[12]

Indeed, the City Council refused to even hear from Chick-fil-A prior to excluding them. Further, the City Council chose to ignore staff reports that Chick-fil-A (a) has no history of excluding *any* customer in a way that would violate San Antonio's nondiscrimination ordinance and (b) agreed to be bound by the terms of San Antonio's

[11] *See* Kelly Tyko, *Chick-fil-A banned from opening at San Antonio airport*, USA TODAY, https://www.usatoday.com/story/money/2019/03/22/chick-fil-ban-texas-council-bars-chain-airport-lgbtq-past/3247437002/ ("'We agree with the councilmember that everyone should feel welcome at Chick-fil-A,' [Chick-fil-A] said in the statement. 'In fact, we have welcomed everyone in San Antonio into our 32 local stores for more than 40 years.'"); *see also* Jonathan H. Adler, *No Airport Concessions for Opponents of Same-Sex Marriage?*, THE WASHINGTON POST (Aug. 21, 2015) ("[T]here is no evidence that Chick-fil-A discriminates against gay patrons, and it has restaurants in many cities that ban anti-gay discrimination.").

[12] Available at https://sanantonio.legistar.com/LegislationDetail.aspx?ID=3888304&GUID=EAFACDCC-CDE8-4B26-9CBC-9A63F95865F1.

nondiscrimination ordinance if accepted as a concessionaire. In other words, the only individuals in violation of the San Antonio nondiscrimination ordinance—and those of the Federal government—are the City Council members themselves.

So flimsy a rationale as the one the City Council provided—to avoid offending potential travelers who might disagree with Chick-fil-A's charitable history but to whom Chick-fil-A would serve a tasty chicken sandwich with pleasure—cannot hope to satisfy the demanding standard that strict scrutiny's compelling interest test imposes. *See Lukumi*, 508 U.S. at 546 (describing the compelling interest test); *Masterpiece*, 138 S. Ct. at 1731 ("Just as no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive.") (citation omitted).[13]

Importantly, multiple federal regulations governing the use of federal grant money preclude discrimination by grant recipients on the basis of religion. *See, e.g.*, 14 C.F.R. § 152.401 (prohibiting discrimination on the basis of "race, *creed*, color, national origin, or sex," in activities conducted with grant funds from the Airport and Airway Development Act) (emphasis added); 14 C.F.R. § 152.405 (requiring grantees "to ensure that no person shall, on the grounds of race, *creed*, color, national origin, or sex, be excluded from participating in any employment, contracting, or leasing activities . . . .") (emphasis added); *see also* 49 U.S.C. § 47,123 (prohibiting exclusion on the basis of "race, *creed*, color, national origin, or sex" from participation in activities carried out with grants under the Airport and Airway Improvement Act of 1982). The contract between San Antonio and Paradies contemplates the application of such regulations. *See* Paradies Contract, *supra* n.2, at 64 (requiring adherence to nondiscrimination regulations contained in 14 C.F.R. Part 152); *see also* 14 C.F.R. § 152.401(b) (requiring effectuation of nondiscrimination requirements through grantees' contracts and leases with third parties).

Given that the blatantly discriminatory statements by San Antonio city councilmembers against Chick-fil-A's religious beliefs culminated in the discriminatory exclusion of Chick-fil-A from participating in the airport concession contract at issue, the Department of Transportation, and any other federal agency administering relevant grants, ought to fully investigate whether federal grant money is funding violations of these (or other) provisions of federal law. *See, e.g.*, 14 C.F.R. §§ 152.423, 152.503, 152.505 (concerning investigation of grantee discrimination and grant suspension or termination). And, if San Antonio is found to be in violation of grant requirements, the grant recipient should be required to return the grant funds immediately.

[13] For similar reasons, the City Council's actions subject it to liability under the Texas Religious Freedom Restoration Act. *See* Tex. Civ. Prac. & Rem. Code § 110.003 (prohibiting government agencies from substantially burdening the free exercise of religion unless it "is in furtherance of a compelling governmental interest" and employs the "least restrictive means.").

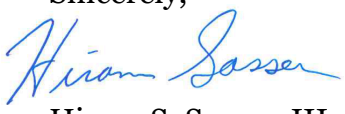
Conclusion and call for investigation.

At a minimum, all potential grant applications—without limitation to the airport improvement project—involving the City of San Antonio should be placed on indefinite suspension until the U.S. Department of Transportation—and any other federal agencies currently funding grants to the City of San Antonio—completes an investigation into these allegations of religious discrimination. Should it be determined that the City of San Antonio engaged in religious discrimination, it should be required to repay grant monies received from the federal government and, further, be disqualified from future Federal grant monies until such time as city leaders demonstrate an unequivocal commitment to abide by their own nondiscrimination ordinance, and those required by federal law and policy. Federal taxpayers should not be required to fund the bigotry of San Antonio's elected leaders.

San Antonio should welcome the opportunity to add so popular and successful a restaurant as Chick-fil-A to its airport food offerings, not discriminate against it because the City Council disapproves of its charitable choices. In fact, the Constitution, Federal, and Texas law require the City to provide Chick-fil-A an equal opportunity to compete regardless of what City officials may think of its beliefs. The City Council should reconsider its unconstitutional decision to exclude Chick-fil-A.

Should you have any questions related to this topic, you are welcome to contact me at any time.

Sincerely,



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