



VIA E-MAIL AND U.S. MAIL
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Re: Fairness West Virginia's Letter and the Constitutional Rights of Chick-fil-A

Gentlemen,

You recently received a letter from Fairness West Virginia (Fairness WV) encouraging you to “cease WVU’s business relationship with Chick-fil-A” until it “enact[s] a nondiscrimination policy” and “stop[s] their funding of organizations” that support the biblical definition of marriage. The letter came in response to recent statements made by Chick-fil-A’s president expressing the company’s religious views on marriage. We write in response to Fairness WV’s letter to inform you that the First Amendment protects Chick-fil-A’s right to express its opinion on marriage and other political and social issues and that any retaliation against Chick-fil-A based on its speech is a violation of federal law.

By way of introduction, Alliance Defending Freedom (formerly Alliance Defense Fund) is an alliance-building legal ministry that advocates for the right of people to freely live out their faith. We are committed to ensuring that students, faculty, and businesses with conservative, religious beliefs are free to exercise their First Amendment rights to speak on an equal basis with other members of the university community.¹

**Chick-fil-A Has the First Amendment Right to Express Its Opinion
on Important Social and Political Issues.**

The vitriol directed against Chick-fil-A is based solely upon the recent statements by Chick-fil-A President Dan Cathy that “We are very much supportive of the family -- the biblical definition of the family unit.”² But Mr. Cathy’s statement—which is an opinion shared by the

¹ Alliance Defending Freedom writes this letter on behalf of students, faculty, and organizations who share the same religious beliefs as Chick-fil-A. Although we do not represent Chick-fil-A, we are committed to protecting our clients from similar threats of religious discrimination.

² K. Allan Blume, *Guilty as charged, Cathy says of Chick-fil-A's stand on biblical and family values*, BAPTIST

majority of Americans³—is no less protected than those made by business leaders from other companies who have expressed a different opinion upon the issue of same-sex “marriage.” For example, Sergey Brin, President of Google, posted that Google would “publicly oppose Proposition 8.”⁴

There is no question that companies like Chick-fil-A and Google have the First Amendment right to publicly speak on important social issues, including same-sex “marriage.” In *Citizens United v. Federal Election Commission*, for example, the Supreme Court recently emphasized that it has long “rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’” 130 S. Ct. 876, 900 (2010). Protection of speech under the First Amendment is thus not dependent upon “[t]he identity of the speaker.” *Id.* (quoting *Pac. Gas & Elec. Co. v. Public Util. Comm’n of Cal.*, 475 U.S. 1, 8 (1986) (plurality opinion)). “[A]ssociations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster.” *Id.* (quoting *Pac. Gas*, 475 U.S. at 8). Indeed, “[t]he Amendment is written in terms of ‘speech,’ not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals.” *Id.* at 929 (Scalia, J., concurring). Thus, the First Amendment clearly protects Chick-fil-A’s expression.

The First Amendment Protects Chick-fil-A Against Retaliation or Discrimination.

The government violates the First Amendment when it discriminates or punishes a corporation because of its speech. In *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530, 534 (1980), the state of New York sought to restrict Consolidated Edison, a heavily regulated private utility company, from promoting nuclear power on the billing envelopes sent to customers. The Supreme Court held that even though New York had established ConEd’s monopoly and subjected it to extensive regulations, ConEd nonetheless had First Amendment rights that could not be trampled upon by the State: “Consolidated Edison’s status as a privately owned but government regulated monopoly [does not] preclude its assertion of First Amendment rights. We have recognized that the speech of heavily regulated businesses may enjoy constitutional protection.” *Id.* at 534 n1.

The First Amendment also prohibits retaliatory enforcement of licensing and permit regulations against a business for its protected speech activities. *See, e.g., Soranno’s Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989) (“If the plaintiffs can establish that the decision to suspend the permits was made because of Soranno’s exercise of constitutionally protected rights, they have established a first amendment violation, and are entitled to relief”). And it makes no difference whether the business is simply leasing space from the university or whether

PRESS, (Jul. 16, 2012), <http://www.bpnews.net/bpnews.asp?id=38271>.

³ *Married to marriage: 62% of Americans say it’s one man, one woman, nothing else*, ALLIANCE DEFENDING FREEDOM (June 16, 2011), <http://www.adfmedia.org/News/PRDetail/4914>.

⁴ Sergey Brin, *Our position on California’s No on 8 campaign*, Google Official Blog (September 26, 2008) <http://googleblog.blogspot.com/2008/09/our-position-on-californias-no-on-8.html>. Proposition 8 is the California Amendment defining marriage under state law as a union between one man and one woman, which was approved by over 52% of voters.

it has been hired as an independent contractor. The Supreme Court has “recognize[d] the right of independent government contractors not to be terminated for exercising their First Amendment rights.” *Bd. of County Com’rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668, 686 (1996).

Thus, no matter whether Chick-fil-A has a permit to operate a restaurant on your university’s campus, is leasing space in the food court, or is considered an independent contractor providing food service on behalf of the University, the First Amendment protects the company from retaliation based on its protected speech.

This is particularly true given that it is Chick-fil-A’s specific viewpoint on the subject of same-sex “marriage” that is the basis for which it is being targeted for removal from your campus. Starbucks has publicly stated that it supports “same-sex” marriage,⁵ but no one is demanding that Starbucks be excluded from campus. Such discrimination against particular viewpoints is unconstitutional, particularly in the university context. The Supreme Court has made it clear that universities “may not regulate speech based on its substantive content or the message it conveys.” *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). Nor may they proscribe speech based on “the specific motivating ideology or the opinion or perspective of the speaker.” *Id.* at 829. As such, the Supreme Court has repeatedly ruled against universities that restricted religious speech while permitting other viewpoints on the same topics. *Id.* at 826, 831 (public university’s denial of funding to student publication offering a Christian viewpoint amounted to unconstitutional viewpoint discrimination); *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (public university committed unlawful discrimination by prohibiting student group from using facilities based on its religious speech).

Especially troubling is Fairness WV’s complaint that Chick-fil-A financially supports “multiple anti-gay groups” and lists the Fellowship of Christian Athletes as one such group. As you are aware, West Virginia University has a thriving FCA Chapter.⁶ It is logical to believe Fairness WV would also support kicking FCA off campus because of its views on marriage. But the same principles that entitle FCA to voice its religious views without fear of discrimination at West Virginia University protects Chick-fil-A’s religious speech on marriage. As the Supreme Court stated, “[t]he mere disagreement of the [University] with the group’s philosophy affords no reason to deny it recognition.” *Healy v. James*, 408 U.S. 169, 187 (1972). And the First Amendment protection for speech likewise extends to Chick-fil-A’s financial support of several conservative, religious organizations like FCA that also support the “biblical definition of marriage.” *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (noting that financially supporting activities or causes “operate[s] in an area of the most fundamental First Amendment activities....The First Amendment affords the broadest protection to such...expression”).

In sum, Chick-fil-A has a First Amendment right to express its opinion on the important issue of marriage. And the University is prohibited from taking any action against Chick-fil-A, including banning the company from campus, based upon its speech and its financial support for the biblical definition of marriage.

⁵Andrew Garber, *Starbucks supports gay marriage legislation*, The Seattle Times (Jan. 24, 2012, 5:42 PM), at http://seattletimes.nwsources.com/html/politicsnorthwest/2017323520_starbucks_supports_gay_marriage.html.

⁶West Virginia University FCA, <http://www.mtneerfca.org/>.

There Is No Evidence That Chick-fil-A Has Violated Any State or Federal Non-Discrimination Laws.

Completely absent from the letter you received from Fairness WV is any evidence that Chick-fil-A engages in any discrimination against employees or customers based upon their sexual orientation. Chick-fil-A publicly notes on its website that “The Chick-fil-A culture and service tradition in our Restaurants is to treat every person with honor, dignity and respect – regardless of their belief, race, creed, sexual orientation or gender.”⁷ Indeed, several news sources have noted the lack of any evidence of actual discrimination by Chick-fil-A: “[T]here’s no evidence to suggest Chick-fil-A discriminates against gay and lesbian customers or employees.”⁸

Chick-fil-A’s public commitment to treat everyone with respect and the lack of any evidence of actual discrimination only underscore that Fairness WV’s demands are based solely upon the content of Chick-fil-A’s speech. Thus, Fairness WV is asking you to violate the Constitution by removing Chick-fil-A from your campus—to punish the company for speaking out on a pressing issue of public debate—an act that is completely unrelated to its food service. Such action is antithetical to the purpose for which the University, and every other university in our country, exists: to be a “marketplace of ideas” and a forum for free and open debate. *Healy*, 408 U.S. at 180.

Chick-fil-A doesn’t just voice a commitment to honor every person, it backs that commitment up through the millions of dollars in scholarships that it has given to its employees—who come from every race, gender, religion, and even sexual orientation—to allow them to pursue a college degree at institutions like yours. Since 1973, Chick-fil-A’s Leadership Scholarship Program has awarded over \$29 million in financial assistance to over 28,000 employees to attend more than 3,100 colleges and universities.⁹

The University ought to stand with businesses like Chick-fil-A who have shown an unequivocal commitment to the education of our nation’s youth. And more importantly, it ought to stand for the principles of free speech that not only protect the right of Chick-fil-A to express its views, but the right of every professor and student at West Virginia University to espouse unpopular ideas without fear of retribution or discrimination.

Targeting Chick-fil-A for Adverse Action Based Upon Its Speech Sets a Dangerous Precedent.

“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989). “Such speech cannot be restricted

⁷ Chick-fil-A FAQs, <http://www.chick-fil-a.com/FAQ#?category=1>.

⁸ Kayla Webley, *From Chick-fil-A to Amazon, Why Companies Take a Stand on Social Issues*, TIME (July 31, 2012) <http://business.time.com/2012/07/31/when-companies-go-political-from-chick-fil-a-to-amazon-why-companies-choose-to-take-a-stand-on-social-issues/?iid=biz-main-lede#ixzz22KQDJUvW>.

⁹ Chick-fil-A Leadership Scholarship Program Fact Sheet, <http://www.truettcathy.com/pdfs/ScholarshipFactSheet.pdf>

simply because it is upsetting or arouses contempt...Indeed, the point of all speech protection...is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011). Or succinctly put, "I disapprove of what you say, but I will defend to death your right to say it."¹⁰

Discriminating against individuals and companies whose views are not currently in favor with the ruling class sets a dangerous precedent. For speech that is "upsetting or arouses contempt" today may very well be the majority opinion tomorrow. If a future administration at West Virginia University shares Mr. Cathy's view on the definition of marriage, will it then have a precedent to kick off Starbucks or other companies on campus that have a different view? Could a pro-life administration exclude any business that has ever voiced a pro-abortion opinion?

The Supreme Court has wisely recognized that we must all tolerate speech with which we disagree in order "to provide adequate breathing space to the freedoms protected by the First Amendment." *Snyder*, 131 S. Ct. at 1219. Our universities are better places for students, faculty, and community when they foster the free exchange of ideas and support the right of everyone to express their views.

Conclusion

We hope that West Virginia University will stand firm against the unreasonable and unconstitutional demands of groups like Fairness WV. Not only would discriminating against Chick-fil-A be a clear violation of the First Amendment and expose the University to legal liability, but it would undermine the very lessons of free speech and tolerance that the University seeks to teach to its student body. Alliance Defending Freedom attorneys are available to discuss any questions you have and to provide assistance to the University in complying with its legal obligations under the Constitution.

Cordially,



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Alliance Defending Freedom, Senior Counsel

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Jeremiah G. Dys

The Family Policy Council of WV, President

¹⁰ Evelyn Beatrice Hall, *THE FRIENDS OF VOLTAIRE* 199 (1907) (summarizing Voltaire's attitude on freedom of speech).