



Sister Denise A. Roche
Chair, Board of Commissioners
Niagara Frontier Transportation Authority
181 Ellicott Street
Buffalo, NY 14203

April 1, 2019

Dear Sister Denise:

I write as one member of the U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole¹ regarding the exclusion of Chick-fil-A from the Buffalo Niagara International Airport.² This exclusion plainly violates the First Amendment and is contrary to the American tradition of respecting freedom of religion and belief.

According to news reports, the NFTA revoked its decision to include Chick-fil-A in an upgrade to the airport's dining options after Assemblyman Sean Ryan criticized Chick-fil-A on social media.

"I strongly urge the NFTA to reverse this decision," the Democratic lawmaker wrote online. "I don't believe the leadership of the NFTA intends to help spread hate and discrimination, but allowing a corporation like Chick-fil-A to do business at the Buffalo Niagara International Airport will help to fund continued divisive anti-LGBTQ rhetoric. New York is a welcoming state that celebrates diversity."

"The views of Chick-fil-A do not represent our state or the Western New York community, and businesses that support discrimination have no place operating in taxpayer-funded public facilities," he concluded.³

The wholesale lack of self-awareness in that statement is astonishing. Exclusion in the name of ostensible inclusion; intolerance in the name of tolerance.

¹ The U.S. Commission on Civil Rights is an independent, bipartisan, fact-finding agency comprised of eight members. 42 U.S.C. § 1975.

² Hans Bader, "Chick-fil-A banned from Buffalo airport," Liberty Unyielding, March 31, 2019, <https://libertyunyielding.com/2019/03/31/chick-fil-a-banned-from-buffalo-airport/>; Janine Puhak, "Chick-fil-A pulled from Buffalo airport after company's alleged 'anti-LGBTQ rhetoric' sparks backlash," Fox News, <https://www.foxnews.com/food-drink/chick-fil-a-pulled-from-buffalo-airport-over-companys-alleged-anti-lgbtq-rhetoric-sparks-backlash>.

³ Janine Puhak, "Chick-fil-A pulled from Buffalo airport after company's alleged 'anti-LGBTQ rhetoric' sparks backlash," Fox News, <https://www.foxnews.com/food-drink/chick-fil-a-pulled-from-buffalo-airport-over-companys-alleged-anti-lgbtq-rhetoric-sparks-backlash>



Although I am consistently disappointed in the demonstrated quality of American education, even I am surprised that elected officials could still be unaware that the government is more constrained in its ability to silence speech than are private actors. Quite simply, *because* the Buffalo airport is funded by taxpayers and run by the government, vendors cannot be excluded based on their speech or their religious beliefs.

The First Amendment protects the free speech rights of contractors in their dealings with government officials. This means that government officials are prohibited from terminating contractors based on their speech.⁴ “Speech” includes monetary donations to organizations that government officials may not like.⁵ And as First Amendment scholars point out, governments may not refuse to hire contractors because of their speech, nor may they pressure contractors into taking action against a third party.⁶

Further, the number of *factual* errors in the statement quoted above is as astonishing as the lack of self-awareness. There’s no evidence that Chick-fil-A discriminates against LGBT individuals in hiring or conditions of employment. (if such claims should suddenly pop up, the lack of a history of discrimination before the EEOC would make such claims deeply suspect.) There is no evidence that Chick-fil-A refuses to serve LGBT individuals at their restaurants. The sole issue is monetary donations made by the Chick-fil-A Foundation to some religious-based organizations that support the traditional understanding of marriage. Virtually *every* elected official, including former President Barack Obama, publicly ascribed to this very same understanding of marriage until at least 2012.⁷ Indeed, I respectfully submit that if the Authority were to apply its ban consistently, Buffalo Niagara International Airport would be largely vacant.

The American public’s relationship with the Supreme Court is not that of “*Roma locuta, causa finite est.*” Americans remain free to believe and to say that they believe marriage is only between a man and a woman, and even to publicly advocate for governmental recognition of such, *just as advocates for same-sex marriage were free to advocate for government recognition of same-sex marriage.* The only manifest evidence of discrimination in this matter is by the NFTA. The NFTA is engaging in discrimination on the basis of speech and religion. This is every bit as prohibited by the First Amendment when directed at traditional Christians as it

⁴ Board of County Commissioners v. Umbehr, 518 U.S. 668 (1996); O’Hare Truck Service v. City of Northlake, 518 U.S. 712 (1996).

⁵ One might think it is impossible to be pettier than to ban a chicken sandwich shop because you don’t like the owners’ beliefs. The NFTA somehow manages to sink even lower and oppose people standing out in the cold, ringing bells to raise money for the poor. In NFTA’s defense, smug if oblivious righteousness is a powerful intoxicant.

⁶ Eugene Volokh, “San Antonio Likely Violating Chick-Fil-A’s First Amendment Rights,” The Volokh Conspiracy, Mar. 26, 2019, <https://reason.com/volokh/2019/03/26/san-antonio-violates-chick-fil-as-first>; Hans Bader, San Antonio violates Chick-fil-A’s First Amendment rights,” Liberty Unyielding, Mar. 24, 2019, <https://libertyunyielding.com/2019/03/24/san-antonio-violates-chick-fil-as-first-amendment-rights/>.

⁷ Katy Steinmetz, “See Obama’s 20-Year Evolution on LGBT Rights,” Time, April 10, 2015, <http://time.com/3816952/obama-gay-lesbian-transgender-lgbt-rights/>.



would be if NFTA blocked the opening of a Muslim, Jewish, or Buddhist-owned restaurant because of the owner's religion.

In 2013, the Commission held a hearing on conflicts between nondiscrimination and religious liberty. The types of conflicts envisioned at that briefing were cake bakers who were asked to bake cakes for same-sex weddings and Catholic nuns required to provide contraceptive coverage.⁸ These were legitimate constitutional issues. The idea of a transportation board banning a fast-food restaurant because the restaurant's owners gave money to organizations that espouse traditional religious beliefs in regard to marriage would have been too far-fetched to consider.

I urge the NFTA to rescind its ban of Chick-fil-A. Failing that, I expect Chick-fil-A likely will sue the NFTA members in their official and personal capacities. I doubt the taxpayers of Buffalo will consider the legal fees and damages the NFTA will incur to be worth Board members' exercise in political virtue.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter Kirsanow".

Peter Kirsanow
Commissioner

⁸ See U.S. Commission on Civil Rights, *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties*, Written Statement of Alan Brownstein, at 177 (2016), <https://www.usccr.gov/pubs/docs/Peaceful-Coexistence-09-07-16.PDF>; see also U.S. Commission on Civil Rights, *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties*, Written Statement of Leslie C. Griffin, at 220-221 (2016), <https://www.usccr.gov/pubs/docs/Peaceful-Coexistence-09-07-16.PDF>.