

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

WALT DISNEY PARKS AND
RESORTS U.S., INC.,

Plaintiff,

v.

RONALD D. DESANTIS, in his official
capacity as Governor of Florida, et al.,

Defendants.

Case No. 4:23-cv-163-AW-MJF

**BRIEF OF THE LEADERSHIP NOW PROJECT AS *AMICUS CURIAE* IN
SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS'
MOTIONS TO DISMISS**

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 7.1, the undersigned counsel certifies that The Leadership Now Project is an unincorporated association of business leaders with no parent corporation and no stock.

/s/ Beth S. Brinkmann

Beth S. Brinkmann

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FDA v. All. for Hippocratic Med.,
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 Frederick F. Reichheld & W. Earl Sasser, Jr., *Zero Defections: Quality Comes to Services*, Harv. Bus. Rev. (Sept.-Oct. 1990)9
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 Morning Consult, *Talent Trends & State Social Policies: 2023 Impact on Businesses in the U.S.*, Ctr. Bus. & Soc. Just. (Feb. 2023).....11
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Aris Folley, *Mississippi Law Enforcement Agency Says It Will No Longer Buy Nike Brand Following Kaepernick Ad*, The Hill (Sept. 15, 2018).....17

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Emery P. Dalesio & Jonathan Drew, *AP Exclusive: Price Tag of North Carolina’s LGBT Law: \$3.76B*, Associated Press (Mar. 27, 2017)23

Greg Turner, *Mayor Menino on Chick-fil-A: Stuff It*, Boston Herald (July 20, 2012)15

Hal Dardick, *Alderman to Chick-fil-A: No Deal*, Chi. Tribune (July 25, 2012)15

John Hamburger, *Chick-fil-A’s Earnings Top \$1 Billion for Second Straight Year*, Franchise Times (updated Apr. 13, 2023).....14

K. Allan Blume, *‘Guilty As Charged,’ Cathy Says of Chick-fil-A’s Stand on Biblical & Family Values*, Baptist Press (July 16, 2012).....14

Kaitlyn Radde & Sarah McCammon, *Walgreens Won’t Sell Abortion Pills in Red States That Threatened Legal Action*, NPR (Mar. 4, 2023).....18

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Richard Fausset, *Georgia Passes Bill That Stings Delta Over N.R.A. Position*, N.Y. Times (Mar. 1, 2018).....20

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Robert Safian, *Facebook, Airbnb, Uber, and the Struggle to Do the Right Thing*, Fast Company (Apr. 11, 2017).....8

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Press Release, McDonald’s USA, *McDonald’s President Criticizes California’s Anti-Business Policies* (Jan. 26, 2023).....13

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The **Leadership Now Project** (“Leadership Now”) is a national membership organization of business leaders committed to ensuring that the United States has a strong democracy and economy.

Leadership Now offers its members at a State and national level an innovative model for sustained and strategic engagement to strengthen democracy. Leadership Now supports a set of core principles that include defending the rule of law, increasing competitiveness in the political system to improve the quality of governance, supporting civic participation, and planting seeds for longer-term national growth and prosperity. Preserving responsive, democratic government is critical to the American economy, central to the organization’s mission, and touches the lives of all Americans.

INTRODUCTION

In American society, the free market is nearly as revered as free speech. Over time, America's economy has become the most prominent measure of the Nation's success. Two of the basic characteristics of the free market system that substantially contribute to that success are contract and competition. Government retaliation is inimical to the Nation's commitment to a free market because it can interfere with both.

Contracts protect businesses' interests and set the stage for innovation. Contract rights, however, are meaningless absent confidence of the parties and the public that they can be enforced. And that confidence only exists when the government reliably and consistently recognizes and enforces contractual relationships, which lay the foundation for economic development and sustained growth.

Competition also is key to the free market system for many reasons, including because it leads to innovation and creation. American businesses compete to produce the best goods and services of the greatest interest to customers at the lowest cost, as well as to attract productive employees and investors willing to provide capital to a business in exchange for potential financial returns. To gain and maintain a competitive edge, businesses may choose to adapt their products, services, and operations to respond to the evolving interests of their customers, employees, and

shareholders. If businesses fail to adapt to these evolving needs, it can affect their overall competitive strength by limiting customer appeal, disrupting their workforce, and dissuading investment, all with consequences for their ultimate financial performance.

Government retaliation or threatened retaliation against businesses solely for what they may or may not say undermines the free market's success by replacing accountability and consistency with uncertainty and instability. If parties cannot trust the government to recognize and enforce their contracts, parties will limit their business dealings or be forced to protect their investment through other means, such as arbitration, which may drive up the cost of innovation. And if the government can punish businesses for the actions they take or the statements they make in response to interests of customers, employees, or shareholders, it necessarily hinders the exercise of business judgment that is key to competition.

Defendants' retaliatory government actions against Disney for its constitutionally protected speech represent an egregious example of an increasing phenomenon that threatens to disrupt the free market. In the recent past, government retaliation against other American businesses has included, among other things, city officials threatening to deny building permits to a business guided by Christian values because of that business's protected speech. Now, a governor has directly retaliated against a business by repudiating contracts that laid the foundation for a

\$17 billion capital investment in his State. Although it is appropriate that the government plays a role in regulation that impacts business practices, such as setting road safety requirements or food safety, government action that is direct retribution based solely on an individual business's free speech is unconstitutional.

This alarming trend of intensifying unconstitutional government action must be stopped. If left uncorrected, it risks becoming commonplace and compounding the chill already being felt in the marketplace. This Court should deny Defendants' motions to dismiss because Disney has clearly alleged government retaliation against it for its constitutionally protected speech, in violation of the First Amendment.

ARGUMENT

I. Government Retaliation Against Businesses Threatens Basic Tenets of the American Marketplace and Economic Success.

Government retaliation undermines the stability and flexibility that the American economy needs to thrive. Our free market system relies on the government to enforce business contracts and ensure competition in that economy. These well-established government functions allow, and indeed incentivize, American businesses to innovate and respond to the interests and needs of customers, employees, and investors. This benefits the economy by keeping prices low, quality high, and variety abundant. Government retaliation jeopardizes these benefits by upsetting settled expectations and thwarting businesses' competitiveness

by forcing them to respond to the government's dictate rather than interests of their customers, employees, and shareholders.

A. Government Retaliation Jeopardizes Economic Growth and Deters Investment, Especially When It Interferes with Contracts.

Economic development and sustained growth require the government to honor and support enforcement of contracts.¹ Recognizing that public confidence in contractual relationships is central to building an economy, the Framers forbade States from passing “[l]aw[s] impairing the Obligation of Contracts.” U.S. Const. art. I, § 10, cl. 1. They understood that compelling States to “treat[] existing contracts as ‘inviolable’ would benefit society by ensuring that all persons could count on the ability to enforce promises lawfully made to them—even if they or their agreements later prove unpopular with some passing majority.” *Sveen v. Melin*, 138 S. Ct. 1815, 1827 (2018) (Gorsuch, J., dissenting); *see also U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 15 (1977) (stating “debates in the Constitutional Convention” made “clear” that the Contracts Clause was intended to “promot[e] confidence in the stability of contractual obligations”).

Confirming those insights of the Founders, research demonstrates that

¹ Anat R. Admati, *Democracy and Prosperity Require Uncorrupted Governments*, Insights by Stanford Bus. (Feb. 14, 2020), <https://perma.cc/WJS9-AQMV> (noting the government “enable[s] markets” and “protect[s] stakeholders” by “enforcing contracts,” among other things).

societies benefit economically when parties can rely on the government to enforce contracts. Overall, countries in which parties can rely on contracts experience better credit markets, greater foreign investment, more secure tax revenues, and higher levels of economic development.² But if governments can retaliate against businesses by intentionally interfering with their contracts, such retaliation will unsettle parties' confidence in contracting and jeopardize future negotiations and agreements, threatening economic growth and investment.

That is what happened here. Disney contacted Florida Governor Ron DeSantis to express concern over the impact the State's proposed Parental Rights in Education Act, H.B. 1557, 124th Reg. Sess. (Fla. 2022), would have on Disney's business, customers, employees, and shareholders. The Governor warned Disney that it "shouldn't get involved" because it would not "work out well for [Disney]."³ Shortly after receiving this warning, Disney World issued a public statement welcoming "ALL" guests to its park and formally opposing H.B. 1557 and "any legislation that infringes on basic human rights," "in solidarity and support [of its]

² World Bank, *Doing Business: Enforcing Contracts* (May 2019), <https://perma.cc/38MU-W553>.

³ Kimberly Leonard, *Florida Gov. Ron DeSantis Said He Warned Disney Not to Get Involved in Schools Debate: 'It's Not Going to Work Out Well for You,'* Bus. Insider (June 8, 2022), <https://perma.cc/RJ3F-BNEC>.

Cast, Crew, and Imagineers.”⁴ After H.B. 1557 became law, The Walt Disney Company stated that its “goal” was for the law “to be repealed by the legislature or struck down in the courts.”⁵

In response to this constitutionally protected speech by Disney on an issue of public concern, the Governor retaliated against Disney by working with the Florida legislature and the other Defendants to repudiate Disney’s contracts and severely restrict Disney’s authority to manage its own business.

This case illustrates how government retaliation, especially when it targets a business contract and interferes with a business’s most important expectations, makes decisions about investment and innovation much more difficult generally. Although the full impact of this specific retaliatory action is still to be seen, the uncertainty and market volatility created by the threat of similar retaliatory actions is likely to have impacts well beyond the targeted business to chill the entire market and to undermine the established and essential practices that sustain the American economy.

⁴ Andrew Krietz, *Disney Releases Statement As DeSantis Prepares to Sign Bill Limiting Teachings About Sexual Orientation, Gender*, WTSP (Mar. 22, 2022), <https://perma.cc/TK8P-RM5X> (emphasis added).

⁵ Press Release, The Walt Disney Co., Statement on Signing of Florida Legislation (Mar. 28, 2022), <https://perma.cc/L6AT-DMLN>.

B. Government Retaliation Hinders Businesses' Ability to Determine How to Respond to Customer, Employee, and Shareholder Interests.

For businesses to drive “an economy that serves all Americans,” they must be able to address the evolving interests of various stakeholders.⁶ Such responsiveness extends beyond product development. Businesses must also determine how best to adapt their operations and practices to the ever-changing interests of their customers, to recruit and retain productive employees, and to attract investors.⁷ Government retaliation and the threat of such retaliation hinders businesses' flexibility to respond consistent with their business judgment, to the detriment of businesses' customers, workforce, investors, and overall financial performance.

Customer interests are an especially important factor in business judgments because experience has demonstrated that business efforts to cultivate existing customer loyalty leads to long-term economic return. Research suggests that

⁶ Press Release, Business Roundtable, Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy That Serves All Americans’ (Aug. 19, 2019), <https://perma.cc/CH5Q-9GMA>.

⁷ See, e.g., Robert Safian, *Facebook, Airbnb, Uber, and the Struggle to Do the Right Thing*, Fast Company (Apr. 11, 2017), <https://www.fastcompany.com/40397294/facebook-airbnb-uber-and-the-struggle-to-do-the-right-thing> (“[C]ompanies are increasingly seeking to align their commercial activities with larger social and cultural values—not just because it makes them look good, but because employees and customers have started to insist on it.”); George A. Riedel, *Dick’s Sporting Goods: Getting Out of the Gun Business (A)*, Harv. Bus. Sch. Case Study 321-024 (revised Jan. 2022).

businesses are 14 times more likely to sell a product to an existing customer than a new customer.⁸ And once committed to a company, existing customers are 50% more likely to try new products, on average spending 31% more than new customers.⁹ Taken together, this contributes to significant long-term gain: a 5% increase in customer retention rates can increase profits by 25% to 95%.¹⁰

Realizing the economic benefits that existing customers bring, businesses regularly solicit customer feedback and respond to it.¹¹ Sometimes, responding may mean adjusting a product or service; in other contexts, responding may extend to the business issuing a statement addressing customer interests or current events. When companies fall short or fail to effectively implement customer feedback, customers may take their business elsewhere. The threat of government retaliation against businesses for such statements can interfere with businesses' ability to respond to customers. That can limit businesses' implementation options and dampen their

⁸ Patricia Rioux, *The Value of Investing in Loyal Customers*, Forbes (Jan. 29, 2020), <https://perma.cc/UM76-NF4D> (citing Paul W. Farris et al., *Marketing Metrics: The Definitive Guide to Measuring Marketing Performance* (2d ed. 2011)).

⁹ *Id.*

¹⁰ Frederick F. Reichheld & Phil Schefter, *The Economics of E-Loyalty*, Harv. Bus. Sch. (July 10, 2000), <https://perma.cc/55SK-J23B> (citing Frederick F. Reichheld & W. Earl Sasser, Jr., *Zero Defections: Quality Comes to Services*, Harv. Bus. Rev. (Sept.-Oct. 1990), <https://perma.cc/6E4Y-MXV4>).

¹¹ Sophia Bernazzani, *Here's Why Customer Retention Is So Important for ROI, Customer Loyalty, and Growth* (Oct. 2019), <https://perma.cc/6TC4-HMYV>; Toni Matthews-El & Cassie Bottorff, 14 Customer Retention Strategies That Work In 2023, Forbes (Aug. 22, 2022), <https://perma.cc/97LY-584M>.

ability to retain customers.

In addition to customers, employees also shape the operations of the businesses for which they work and may affect the public speech of the company. To recruit, retain, and maintain a productive workforce—particularly with today’s labor shortages—businesses must be able to exercise their full discretion when responding to employees’ concerns, particularly because whether and when to respond to any specific request is a complicated decision that requires the weighing of company-specific factors. Increasingly, Americans want to work for companies that share their values. Recent studies show that 76% of Americans want to work for companies that have a positive impact on the world.¹² More than half of employees surveyed said they would consider resigning from their jobs if their companies’ values did not align with their own, and just under half indicated they already had left a job for that reason.¹³ For many employees, knowing that their employer has common values is not enough. Instead, employees are increasingly calling on their employers to “take[] actionable steps” to promote these values internally through workplace policies and practices and externally through

¹² See Alena Darmel, *More and More Talent Ready to Leave Companies Over Misalignment of Values*, Sustainable Brands (Feb. 16, 2023), <https://perma.cc/J448-KS28> (citing Andrew S. Winston & Paul Polman, *Net Positive: How Courageous Companies Thrive by Giving More Than They Take* (Harv. Bus. Press 2021)).

¹³ See *id.*

investments, donations, and advocacy.¹⁴

The restraints that government retaliation put on business judgment also undermine a company's ability to work fully to the benefit of its shareholders. Shareholders play a vital role in a company's growth by providing capital for future development. Companies entice individuals and entities to invest by providing for the possibility of financial return, and give shareholders the opportunity to ensure that return by overseeing the company's management and approving major corporate actions.¹⁵ Shareholders range from individual families to pension plans investing the retirement funds of millions of employees, all relying on the investment performance of the shares that they hold to fund, among other things, retirement, college tuition, or a down payment on a house. Government retaliation and the threat of such retaliation necessarily limit the exercise of a company's business judgment, which in turn prevents companies from managing their operations in a way that is most likely to increase the value of the company's shares. This can directly impact the value of individuals' retirement and other savings, and constrain a company's growth and development by deterring investors from additional investments, both of

¹⁴ Morning Consult, *Talent Trends & State Social Policies: 2023 Impact on Businesses in the U.S.* at 3, Ctr. Bus. & Soc. Just. (Feb. 2023), <https://perma.cc/2ZA9-LGNC>.

¹⁵ Philip Meagher, *Shareholder Rights and Responsibilities in Corporate Governance*, LearnSignal (Jan. 16, 2023), <https://perma.cc/D3R8-8Q89>.

which affect the overall economy.

II. A Recent Increase in Government Retaliation Against Businesses for Their Constitutionally Protected Speech Chills Businesses' Responsiveness to Customer, Employee, and Shareholder Interests and Related Speech, Harming Economic Potential and Growth.

Government retaliation against businesses for constitutionally protected speech threatens to disrupt the free market. By taking adverse actions against a business for speech with which it disagrees, the government limits the views that a business can expound without fear of retribution, thereby overriding a business's ability to determine how best to respond to customer, employee, and shareholder interests. As described above, these limitations dramatically circumscribe business judgment, which in turn affects a business's bottom line. This deters not only the targeted business from certain opportunities, perhaps from even staying in the market, but also other businesses, because fear of suffering similar adverse government action chills their inclination to respond to customer, employee, and shareholder interests as well. *See* Disney Opp'n to CFTOD Defs.' MTD 22–23 (ECF No. 60-1).

A. Government Retaliation Creates a Chilling Effect on Business Responsiveness And Related Speech.

It is well-settled that the First Amendment protects businesses' right to speak (or not to speak) and to petition the government on matters of public concern. *See, e.g., Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 355 (2010); *First Nat'l*

Bank of Bos. v. Bellotti, 435 U.S. 765, 776–77 (1978). And although the government may deny a benefit to an entity “for any number of reasons, there are some reasons upon which the government may not rely”—most principally, the entity’s “interest in freedom of speech.” *Perry v. Sinderman*, 408 U.S. 593, 597 (1972); *see also, e.g., Bd. of Cnty. Comm’rs v. Umbehr*, 518 U.S. 668, 674 (1996); *Ga. Ass’n of Educators v. Gwinnett Cnty. Sch. Dist.*, 856 F.2d 142, 144 (11th Cir. 1988); Disney Opp’n to St. Defs.’ MTD 8–9 (ECF No. 58). With those protections in place, American businesses often speak on a variety of issues relevant to their operations and the interests of their customers, employees, and shareholders.¹⁶

Despite this established constitutional protection, instances of government retaliation in response to protected speech have increased in recent years, with the harm to our system compounding each time. Although the government retaliation against Disney in contracting is especially egregious, each retaliatory act from the government undermines American business and confidence in the market, no matter

¹⁶ *See, e.g.*, U.S. Chamber of Commerce Letter to Members of the S. Comm. on the Judiciary Opposing S. 1094, the “Journalism Competition and Presentation Act (JCPA) of 2023” (June 15, 2023), <https://perma.cc/7JQY-9GFS> (opposing bill for immunizing publishers from antitrust violations); Press Release, McDonald’s USA, McDonald’s President Criticizes California’s Anti-Business Policies (Jan. 26, 2023), <https://perma.cc/Z7RL-L8GD> (criticizing California’s passage of AB257, calling the State “a dramatic case study of putting bad politics over good policy”); Letter from Over 100 Business Leaders to Gov. Pat McCrory (Mar. 31, 2016), <https://perma.cc/56RH-7U6E> (supporting repeal of North Carolina’s H.B. 2).

the government actor.

For example, during the past decade, local government officials in various cities have refused to allow the restaurant chain, Chick-fil-A, to enter or expand operations in their localities because of the restaurant's protected speech. Chick-fil-A is a multi-billion dollar family-owned enterprise¹⁷ that operates its business based on founder Truett Cathy's belief that "Biblical principles . . . were also good business principles."¹⁸ Consistent with this mission, Chick-fil-A donated substantial sums of money to religiously affiliated organizations over the years, some of which opposed same-sex marriage.¹⁹ Attention was brought to the issue when, in 2012, Chick-fil-A's then-President and Chief Operating Officer Dan Cathy expressed opposition to same-sex marriage, stating that "we are inviting God's judgment on our nation" by "'hav[ing] the audacity to define what marriage is[.]'"²⁰

¹⁷ See John Hamburger, *Chick-fil-A's Earnings Top \$1 Billion for Second Straight Year*, Franchise Times (updated Apr. 13, 2023), <https://perma.cc/PFY5-3TD4>.

¹⁸ Chick-fil-A, *Culture & Values*, <https://perma.cc/7HJY-XC7T>.

¹⁹ See, e.g., Amanda Holpuch, *Chick-fil-A Wades out of Gay Rights Debacle with Move to Cut Off Donations*, Guardian (Sept. 19, 2012), <https://perma.cc/R4SZ-QYQX>.

²⁰ Kim Bhasin, *Chick-fil-A Admits That It's Against Gay Marriage, Which Is 'Inviting God's Judgment on Our Nation,'* Bus. Insider (July 18, 2022), <https://perma.cc/4PST-NCGN>; see also K. Allan Blume, *'Guilty As Charged,' Cathy Says of Chick-fil-A's Stand on Biblical & Family Values*, Baptist Press (July 16, 2012), <https://perma.cc/9T4H-RCTN>.

Days later, mayors and other city leaders in Boston,²¹ Chicago,²² and San Francisco²³ announced they would prevent Chick-fil-A from expanding in their cities because of Cathy's comments. Law professors,²⁴ the ACLU,²⁵ and other mayors²⁶ condemned these government leaders' comments as violations of the First

²¹ Boston Mayor Thomas M. Menino vowed to block Chick-fil-A from building a storefront on Boston's Freedom Trail. "We're an open city, we're a city that's at the forefront of inclusion," Menino told The Boston Herald, "[a]nd we're not going to have a company, Chick-fil-A or whatever the hell the name is, on our Freedom Trail." Greg Turner, *Mayor Menino on Chick-fil-A: Stuff It*, Boston Herald (July 20, 2012), <https://perma.cc/GQ58-JQLW>.

²² Chicago Alderman Proco "Joe" Moreno announced that he would block Chick-fil-A's effort to build a second Chicago store. "You have the right to say what you want to say," Moreno said at the time, "but zoning is not a right." Hal Dardick, *Alderman to Chick-fil-A: No Deal*, Chi. Tribune (July 25, 2012), <https://perma.cc/ATZ7-Z9SK>.

²³ In a series of tweets, Mayor Ed Lee said: "Very disappointed #ChickFilA doesn't share San Francisco's values & strong commitment to equality for everyone . . . Closest #ChickFilA to San Francisco is 40 miles away & I strongly recommend that they not try to come any closer." @mayoredlee, Twitter (July 26, 2012 7:36 PM), <https://perma.cc/5B89-P86Y>; *id.* (July 26, 2012 7:37 PM), <https://perma.cc/P2BK-C82Z>.

²⁴ Eugene Volokh, *No Building Permits for Opponent of Same-Sex Marriage*, Reason: The Volokh Conspiracy (July 25, 2012), <https://perma.cc/P6XV-P93N>.

²⁵ Press Release, ACLU Illinois, Statement on Chick-fil-A Matter (July 26, 2012), <https://perma.cc/4K4C-36GF> ("In this instance, the Alderman is using his governmental authority to exclude a business from opening its doors simply because the corporate leadership has expressed anti-LGBT views in the public. This use of government authority simply is not permissible under our Constitution.").

²⁶ Michael M. Grynbaum, *Mayor Says Banning Chick-fil-A Is Wrong*, N.Y. Times (July 27, 2012), <https://perma.cc/D95U-ZD3J> (quoting then-New York City Mayor Michael Bloomberg: "It's inappropriate for a city government, or a state government, or the federal government to look at somebody's political views and

Amendment. Similar local government responses occurred in 2015 and again in 2019, as the city councils of Denver,²⁷ Buffalo,²⁸ and San Antonio²⁹ voted against Chick-fil-A opening restaurants in their airports because of the company’s “legacy” of anti-LGBTQ views.³⁰ These retaliatory government actions motivated investigations of the localities under State³¹ and federal³² anti-discrimination laws, and inspired legislation in Texas to prevent adverse government actions based on religious affiliations.³³ As the sponsor of the Texas “Save Chick-fil-A Bill” explained, the legislation was necessary because other local businesses that “didn’t have the reputation Chick-fil-A has or the support [it] ha[s]” needed reassurance that

decide whether or not they can live in the city, or operate a business in the city, or work for somebody in the city.”).

²⁷ Jonathan H. Adler, *No Airport Concessions for Opponents of Same-Sex Marriage?*, Reason: The Volokh Conspiracy (Aug. 21, 2015, 11:14 AM), <https://perma.cc/FR5A-DXVX>.

²⁸ Alexa Lardieri, *FAA Investigates Texas, New York Airports Banning Chick-fil-A Restaurants*, U.S. News & World Report (May 28, 2019), <https://www.usnews.com/news/politics/articles/2019-05-28/faa-investigates-texas-new-york-airports-banning-chick-fil-a-restaurants>.

²⁹ Mark Osborne, *San Antonio City Council Votes to Stop Chick-fil-A from Opening at Airport*, ABC News (Mar. 24, 2019), <https://perma.cc/9CER-SQQP>.

³⁰ *Id.*

³¹ See Letter from Ken Paxton, Att’y Gen., Tex., to Ron Nirenberg, Mayor, City of San Antonio (Mar. 28, 2019), <https://perma.cc/GRA8-ZZ4J>.

³² See Lardieri, n.28, *supra* (outlining the Federal Aviation Administration’s investigation into San Antonio and Buffalo airports).

³³ See S.B. 1978, 86th Leg., Reg. Sess. (Tex. 2019).

they would not be subject to retaliatory actions by the government based on their proclamations of faith.³⁴

Officials at the State level have also retaliated against companies engaged in constitutionally protected speech. In 2018, Nike started an advertising campaign featuring former San Francisco 49ers quarterback Colin Kaepernick.³⁵ In response, the Commissioner of Mississippi's Department of Public Safety announced he would ban the Department from buying Nike products, taking the view that: "As commissioner of the Department of Public Safety, I will not support vendors who do not support law enforcement and our military."³⁶

And just this year, the California Governor announced California would stop doing business with Walgreens³⁷ after the company announced it would not

³⁴ See Interview by Jennifer Kielman with Bryan Hughes, Senator (R-Mineola), in Tyler, Tex. (Jun. 13, 2019) (8:21–41), <https://perma.cc/4VU8-PXVA> ("Think about this: they picked on Chick-fil-A. A company that everybody loves, very sympathetic. What if it was Joe's Taco Stand or Jim's Window Cleaning Service, that no one knows about? . . . Some local business that didn't have the reputation Chick-fil-A has or the support they have, we wouldn't even know about it.").

³⁵ Guardian Sports, *Nike Releases Full Ad Featuring Colin Kaepernick*, YouTube (Sept. 7, 2018), <https://youtu.be/-grjIUWkoBA>.

³⁶ Aris Folley, *Mississippi Law Enforcement Agency Says It Will No Longer Buy Nike Brand Following Kaepernick Ad*, The Hill (Sept. 15, 2018), <https://perma.cc/CZ2V-HE3M>.

³⁷ @GavinNewsom, Twitter (Mar. 6, 2023, 1:32 PM), <https://perma.cc/S5W7-HH7B> ("California won't be doing business with @walgreens -- or any company that cowers to the extremists and puts women's lives at risk. We're done.").

distribute the abortion medication mifepristone in 21 States that had threatened the pharmacy with legal liability if it tried to sell the medication within those States.³⁸ Although the Governor’s planned action against Walgreens could not have immediate effect due to contracts the State of California had with the company,³⁹ reports after his announcement have indicated that other retail pharmacies have remained silent as to whether they will dispense mifepristone.⁴⁰ While the government is free to select with whom it will do business, it cannot foreclose market options for a business based on the business’s First Amendment protected speech.

And of equal concern, State actors have retaliated against businesses when they attempt to take a neutral position in an ongoing public dispute. Following the

³⁸ Kaitlyn Radde & Sarah McCammon, *Walgreens Won’t Sell Abortion Pills in Red States That Threatened Legal Action*, NPR (Mar. 4, 2023), <https://perma.cc/RCY5-PL3X>.

³⁹ Lynn La, *Newsom’s Threat to Walgreens Fizzles*, CalMatters (Apr. 7, 2023), <https://perma.cc/P8WR-NC2G> (noting California is “legally bound to continue doing business with Walgreens through the State’s massive Medicaid program”).

⁴⁰ See Press Release, Walgreens, *Walgreens and Mifepristone: The Facts* (updated July 11, 2023), <https://perma.cc/PA4C-LBED> (observing that “[s]ome major retail pharmacies have not yet indicated if they will even participate in the FDA program to dispense mifepristone” and “[s]everal major retail pharmacies have not indicated whether they will seek certification at all”). Such silence could be attributable to any number of factors, including ongoing litigation regarding FDA’s approval of mifepristone. See *All. for Hippocratic Med. v. FDA*, No. 2:22-CV-223-Z, 2023 WL 2825871 (N.D. Tex. Apr. 7, 2023) (staying FDA’s 2000 approval of mifepristone and related agency action), *stay granted in part*, No. 23-10362, 2023 WL 2913725 (5th Cir. Apr. 12, 2023), *stayed in full sub. nom. FDA v. All. for Hippocratic Med.*, No. 22A902, 2023 WL 2942266 (U.S. Apr. 14, 2023).

2018 mass school shooting at Marjory Stoneman Douglas High School in Parkland, Florida, Atlanta-based Delta Airlines announced on Twitter that it would stop offering discounted flight rates to members of the National Rifle Association.⁴¹ The airline explained that it “support[ed] the 2nd Amendment,” but its decision “reflect[ed] the airline’s neutral status in the current national debate over gun control amid recent school shootings” and was intended to keep the company “from entering this debate[.]”⁴² In response to Delta’s announcement, the Lieutenant Governor of Georgia declared he would “kill any tax legislation that benefits @Delta unless the company changes its position and fully reinstates its relationship with @NRA.”⁴³ Days later, Georgia lawmakers passed—and the Governor signed—a bill stripping Delta of a \$50 million jet fuel sales tax exemption.⁴⁴ Although the Governor later signed an executive order suspending collection of the tax, the explicit government

⁴¹ @Delta, Twitter (Feb. 24, 2018, 8:32 AM), <https://perma.cc/M3S8-H5HL> (“Delta is reaching out to the NRA to let them know we will be ending their contract for discounted rates through our group travel program. We will be requesting that the NRA remove our information from their website.”).

⁴² *Delta Explains Decision to Cut Ties with NRA*, WSB-TV (Feb. 25, 2018), <https://perma.cc/M8N2-CSA6>.

⁴³ @CaseyCagle, Twitter (Feb. 26, 2018, 2:02 PM), <https://perma.cc/9JLR-QB6G> (“I will kill any tax legislation that benefits @Delta unless the company changes its position and fully reinstates its relationship with @NRA. Corporations cannot attack conservatives and expect us not to fight back.”).

⁴⁴ Richard Fausset, *Georgia Passes Bill That Stings Delta Over N.R.A. Position*, N.Y. Times (Mar. 1, 2018), <https://perma.cc/A59C-Y83M>.

threat to business remains even though, in this instance, the Governor recognized that eliminating the jet fuel tax exemption would “plac[e] Georgia airports at a competitive disadvantage” against other airline-hub States.⁴⁵

While State and local governments have increasingly sought to punish businesses for exercising their First Amendment rights, this case involves an alarming new step: Defendants, as State officials, have used the coercive power of the State to usurp business contracts. If left to stand, this egregious violation of Disney’s rights threatens to undermine business dealings now and in the future.

B. Government Retaliation Compounds Political Risk for Businesses, Which Can Lead to Capital Flight and Undermine Economic Potential and Growth.

Although litigation by a business against the government for its retaliation in violation of the First Amendment may provide some relief for targeted businesses, that is only after the fact and inadequate to eliminate the chill on the speech already silenced. Moreover, it comes at a cost that many businesses smaller than Disney may not be able to support. Such litigation also does little to alleviate the instability that government retaliation causes in the market. The effects of such retaliation can

⁴⁵ Exec. Order of Georgia Governor Nathan Deal Suspending the Collection of Sales and Use Tax on Jet Fuel (July 30, 2018), <https://perma.cc/CN9A-YN7E>. In 2021, the Georgia House passed a bill stripping Delta of its jet fuel tax break in response to Delta’s criticism of the State’s new restrictive voting laws. The legislative session ended before the Senate took up the bill. Robert Hart, *Georgia House Passes Bill Stripping Delta of a Multimillion Tax Break After It Slammed the State’s New Voting Restrictions*, *Forbes* (Apr. 1, 2021), <https://perma.cc/3HB4-WJ9Z>.

never be truly known or quantified, but it certainly does not make those effects any less real. *See* Disney Opp’n to CFTOD Defs.’ MTD 22 (“State officials tout their attacks as efforts to force “Disney and other woke corporations” to adhere to the State-prescribed orthodoxy, putting *all* businesses on notice that Florida is a place where unapproved viewpoints “go[] to die.” (citations omitted)). By jeopardizing basic tenets of American business, government retaliation eliminates a traditional and significant element of stability in the American economic system. That additional uncertainty can deter investment and drive businesses to pursue opportunities elsewhere.

In today’s global economy, a certain degree of economic risk to business follows from political change.⁴⁶ For example, elections—even well-established elections in our democracy—tend to drive up the average weighted cost of capital because the results can affect foreign and domestic policy, which inevitably affects trade and business operations.⁴⁷ Because businesses know to expect such risks from elections, however, they can factor in anticipated response costs on the front end.

Unlike elections, government retaliation against businesses for constitutionally protected First Amendment activity risks much greater instability

⁴⁶ *See* Babu John-Mariadoss, *Core Principles of International Marketing* § 4.3 (Wash. State Univ. 2018), <https://perma.cc/4PWZ-EW7X>.

⁴⁷ Courtney Rickert McCaffrey, *How Political Risk Affects Five Areas at the Top of the C-Suite Agenda*, Ernst & Young (Oct. 29, 2020), <https://perma.cc/86XT-XYMR>.

and unpredictability, including jeopardizing contractual expectations for the government-targeted business in situations like Disney's. To compensate, businesses must invest more capital to secure their investments, which in turn drives up the costs of innovation and development.⁴⁸ This reduces businesses' incentive to innovate, decreases shareholder returns, and increases customer costs.⁴⁹

When political risk presents an impediment to the business operations of companies, the companies may choose to abandon the market and relocate elsewhere. Capital flight frequently accompanies political uncertainty, often with drastic consequences for the communities from which businesses depart.⁵⁰ For example, in March 2016, PayPal announced plans to build a \$3.6 million global operations center in Charlotte, North Carolina, bringing more than 400 skilled jobs to the region.⁵¹ But the next month, PayPal President and CEO Dan Schulman

⁴⁸ *Id.*

⁴⁹ *See, e.g.*, Open Letter from Business Leaders in Support of FDA's Authority to Regulate Medicines (Apr. 10, 2023), <https://perma.cc/W5VM-239F> (explaining that adding uncertainty to the "already inherently risky work of discovering and developing new medicines" will "reduc[e] incentives for investment" and innovation in biopharmaceutical industry); Open Letter to President Joseph R. Biden & Congressional Leaders from Concerned Business Leaders Regarding Debt Ceiling Negotiations (May 16, 2023), <https://perma.cc/Z7GV-CADY> (explaining how defaulting on the nation's debt would weaken our financial systems and jeopardize benefit payments).

⁵⁰ *See, e.g.*, Quan Vu Le & Paul J. Zak, *Political Risk and Capital Flight*, 25 *J. Int'l Money & Fin.* 308, 309 (2006).

⁵¹ *See* Susanna Kim, *PayPal Drops Plan to Build \$3.6M Facility in NC Because of*

announced that PayPal would “seek an alternative location for [PayPal’s] operations center” because North Carolina had enacted a law that would deprive “members of [PayPal’s] teams” of “equal rights.”⁵² By some estimates, North Carolina lost nearly \$525 million in just one year from capital flight attributable to the political and social instability that law caused.⁵³

* * * *

The impact of the government’s retaliation against Disney for its constitutionally protected speech extends far beyond the already significant damage caused by the government’s repudiation of two contracts that laid the foundation for \$17 billion in investment and 13,000 new jobs. It also chills incalculable investment by intimidating American businesses into silence. And that necessarily infringes on the ability of American businesses to exercise their business judgment to respond to the interests of their customers, employees, and shareholders. All of this undermines economic growth by hindering competition, discouraging innovation, and

Controversial Law, ABC News (Apr. 5, 2016), <https://perma.cc/A8DC-QFCF>.

⁵² Press Release, PayPal, Statement from Dan Schulman, President & CEO, PayPal Withdraws Plan for Charlotte Expansion (Apr. 5, 2016), <https://perma.cc/6MRT-P9AP>.

⁵³ Emery P. Dalesio & Jonathan Drew, *AP Exclusive: Price Tag of North Carolina’s LGBT Law: \$3.76B*, Associated Press (Mar. 27, 2017), <https://web.archive.org/web/20170327182441/http://bigstory.ap.org/article/fa4528580f3e4a01bb68bcb272f1f0f8/ap-exclusive-bathroom-bill-cost-north-carolina-376b>.

irrevocably altering the fundamental practices of American businesses that have contributed profoundly to creating a robust and growing economy.

CONCLUSION

For the foregoing reasons and those set forth in Disney's briefs in opposition, the Court should deny Defendants' motions to dismiss.

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