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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

THE DOWNTOWN SOUP KITCHEN, d/b/a, DOWNTOWN HOPE CENTER, Plaintiff, vs. MUNICIPALITY OF ANCHORAGE, ANCHORAGE EQUAL RIGHTS COMMISSION, and PAMELA BASLER, Individually and in her Official Capacity as the Executive Director of the Anchorage Equal Rights Commission, Defendants.	)	Case No. 3:18-cv-00190-SLG

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION (DOCKET 29)

Defendants (collectively "Municipality") oppose Plaintiff's Motion for Preliminary Injunction on the bases set forth herein.

I. FACTS

A. The Anchorage Equal Rights Commission (AERC) is a Municipal Commission.

According to the Complaint:

104. The Commission was established by Section 17.02 of the Anchorage Municipal Charter. AMC § 5.10.020.

105. It is an administrative agency within the Municipality of Anchorage.

106. Section 17.02 of the Anchorage Municipal Charter states that "[t]he assembly by ordinance shall establish an equal rights commission and prescribe its duties. The commission shall appoint its principal executive officer with the approval of the mayor. The principal executive officer shall serve at the pleasure of the commission."

107. The Commission is authorized to hire an Executive Director, subject to the approval of the mayor, who serves at the pleasure of the Commission. AMC § 5.10.040.

B. The AERC Interprets Municipal Code for Compliance with Municipal Equal Rights Ordinances.

According to the Complaint:

111. Anchorage's public accommodation law is found in AMC, Title 5, which was amended in 2015 to include "gender identity" among the grounds of discrimination prohibited by the title. AMC § 5.20.050.

C. AERC Proceedings are Pending with No Decision or Enforcement Action.

According to the Complaint:

14. The individual who sought access in January 2018 nonetheless filed a complaint with the Anchorage Equal Rights Commission ("Commission"), accusing the Hope Center of discriminating on the basis of sex and gender identity, despite clear evidence of the nondiscriminatory basis for that denial.

15. Although the Hope Center clearly did not violate the code, the Commission's Executive Director did not dismiss the complaint early on but continues to harass the Center through a now nearly 6 month "investigation."[1]

D. The Interpretation and Application of the Term "Public Accommodation" is Uniquely Municipal.

Issues in the AERC proceedings are twofold: (1) whether there is substantial evidence of discrimination by the Hope Center, which is a factual issue for AERC, and (2) whether the Hope Center is a public accommodation under municipal code such that the exceptions for homeless shelters found in two other code provisions do not apply. The two code sections that contain exceptions for homeless shelters are (1) the Fair Housing Act at AMC 5.25.030A, and (2) AMC 5.20.020 – Unlawful practices in the sale, rental or use of real property (which directly incorporates the exceptions described in the Fair Housing Act). However, the municipal code provision concerning public accommodations found at AMC 5.20.050 does not contain an exception for homeless shelters. The still-pending AERC complaint was filed under the public accommodation code. *See*, Exhibit A hereto (AERC Complaint No. 18-041).

According to the Complaint:

179. Section 5.20.020(A) specifically incorporates the exception for homeless shelters found at 5.25.030(A)(9).

181. Along with the specific exclusion from the ordinance, the Hope Center is also not a place of public accommodation.

[1] For clarification and background, the second complaint AERC filed against the Hope Center and its counsel has been settled and administratively closed. *See*, Exhibit B.

Plaintiff argues that the Hope Center is not a public accommodation under Municipal Code. *Complaint*, ¶¶ 181-186. Ultimately, whether the Hope Center is a public accommodation falls under AERC's mandate to investigate allegations and apply the municipal code, with rights of appeal to the state superior court. The definition of "public accommodation" under current Anchorage Municipal Code is distinct from state and federal definitions of public accommodations and represents a unique legal question that has not been interpreted by the courts.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 65 permits the court to grant a preliminary injunction. The Ninth Circuit provides two sets of criteria for preliminary injunctive relief. "To obtain a preliminary injunction, the moving party must show either (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in the moving party's favor. These two alternatives represent extremes of a single continuum, rather than two separate tests." *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1047 (9th Cir. 2007) (citations and quotations omitted).

The primary purpose of a preliminary injunction is to preserve the *status quo* until the action can be decided on the merits. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). It is considered an extraordinary and drastic remedy that should not be granted unless the movant carries its burden of persuasion by a clear showing. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quotation omitted). Thus, courts should exercise their power to issue preliminary injunctions sparingly. *Id.* Where federal abstention is

otherwise appropriate under the *Younger* doctrine, injunctive relief that effectively enjoins an ongoing state proceeding is precisely the type of interference *Younger* disapproves. *Gilbertson v. Albright*, 381 F.3d 965, 978 (9th Cir. 2004).

III. ARGUMENT

A. Plaintiff Cannot Demonstrate a Strong Likelihood of Success on the Merits In Order to Obtain the Requested Injunctive Relief.

Plaintiff cannot demonstrate a strong likelihood of success on the merits given the state of the law and the structure of the Anchorage Municipal Code. Accordingly, Plaintiff's request for a preliminary injunction should be denied.

1. AMC § 5.20 Sets Forth Neutral Laws of General Applicability that Meet the Rational Basis Test.

The Free Exercise Clause of the U.S. Constitution states that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof…." U.S. Const. Amend. I. The Free Exercise Clause applies to the states through the Fourteenth Amendment. *Swanner v. Anchorage Equal Rights Com'n*, 874 P.2d 274, 279 (Alaska 1994). "It grants absolute protection to freedom of belief and profession of faith, but only limited protection to conduct dictated by religious belief." *Id*. (citation omitted).

The U.S. Supreme Court rejected applying strict scrutiny for free exercise claims where the challenged law is generally applicable, or where the law is not directed at any particular religious practice or observance. *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 885 (1990). In *Smith*, the Court stated:

> We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself,"—contradicts both constitutional tradition and common sense.

Id. (citations and footnote omitted).

In *Smith*, "the Court analyzed a free exercise of religion claim under a rational basis test. Under this test, a rationally based, neutral law of general applicability does not violate the right to free exercise of religion even though the law incidentally burdens a particular religious belief or practice." *Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir. 1999) (citations omitted).

"The first step in determining whether a law is neutral is whether it discriminates on its face. 'A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context.'" *Swanner* at 279-280 (quoting *Church of the Lukumi Babalu Aye, Inc.v. City of Hialeah*, 580 U.S. 520, 533 (1993)). In this case, similar to *Swanner*, the AMC provisions that Plaintiff complains of do not contain any language singling out religious groups or practices, and they are facially neutral.

"Even when a law is facially neutral, however, it may not be neutral if it is crafted to impede particular religious conduct." *Id.* at 280. (citation omitted). The AMC

provisions were not crafted to impede particular religious conduct. The *Swanner* court analyzed AMC § 5.20.020 (one of the provisions about which Plaintiff complains), and found that the purpose of the Code "is to prohibit discrimination in the rental housing market… Additionally, these laws are generally applicable. They apply to all people involved in renting or selling property, and do not specify or imply applicability to a particular religious group. Therefore, at least under the general rule, no compelling state interest is necessary." *Id*.

Plaintiff argues that strict scrutiny applies to its free exercise of religion claim, because "Anchorage has acted with… hostility because it is using the Code to pressure Hope Center to change its religious beliefs and practices." Dkt. 30, at 18. Plaintiff claims this hostility is "most evident because the Code does not even cover Hope Center." *Id*. Plaintiff argues it is not a public accommodation and that the Code specifically exempts homeless shelters. *Id*.

However, whether or not the Hope Center is a public accommodation under AMC § 5.20.010 is a factual question requiring investigation by the AERC to determine. For example, the U.S. District Court for the District of Columbia found a homeless shelter met the local definition of a place of public accommodation, due in part to the fact that the shelter received substantial government funds from federal and local sources. *Hunter on behalf of A.H. v. District of Columbia*, 64 F.Supp.3d 158, 180 (D.D.C. 2014).

In this case, the AERC requested information from Plaintiff about its source of funding, but Plaintiff refused to cooperate with AERC proceedings, and instead filed the instant action in federal court. The AERC has been unable to complete its investigation as

a direct result of Plaintiff's refusal to cooperate. Plaintiff is directly responsible for any delay in the AERC proceedings about which it now complains. The fact that AERC has been unable to complete its investigation, due to Plaintiff's refusal to cooperate, is not evidence of any "hostility" toward the Hope Center's religious beliefs and practices. *See, Foreman v. Anchorage Equal Rights Comm.*, 779 P.2d 1199, 1203 (Alaska 1989) (court found no abuse of discretion when AERC extended timelines due in part to party's refusal to comply with AERC discovery requests.)

The AERC complaint at issue in this case (Complaint No. 18-041) alleges unlawful discriminatory practices in places of public accommodation under AMC § 5.20.050; it does not allege unlawful discrimination in housing practices under AMC §§ 5.25.030A or 5.20.020 – Unlawful practices in the sale, rental or use of real property. Exh. A. Although the second AERC complaint (Complaint No. 18-167) did allege unlawful discriminatory practices under the Fair Housing Act, that complaint was fully resolved through a written settlement agreement and closed. Exh. B. Any claims Plaintiff makes in regard to the second AERC complaint are moot.

None of the issues that Plaintiff points to in the AERC proceedings evidence "hostility" toward Plaintiff's religious beliefs and practices. Dkt. 30 at 19. Plaintiff essentially takes the position that the existence of the AERC proceedings manifests hostility. *Id*. However, the fact that the AERC and Plaintiff disagreed about the merits of the complaint and the procedures under the Code to investigate the complaint does not evidence hostility but rather suggests typical conduct among parties to an adversarial proceeding. Also, no less than six separate attorneys filed Notices of Appearance before

the AERC, and the AERC made good faith efforts to streamline communication with all counsel. This is not evidence of hostility toward Plaintiff.

For all of these reasons, Plaintiff cannot demonstrate a strong likelihood of success on the merits of its Free Exercise Clause Claim because the AMC contains neutral laws of general applicability that meet the rational basis test.

2. Defendants Have a Compelling Interest in Preventing Discriminatory Conduct in the Municipality.

"[T]he Free Exercise Clause of the Alaska Constitution is identical to the Free Exercise Clause of the United States Constitution…" *Swanner v. Anchorage Equal Rights Com'n*, 874 P.2d 274, 280 (Alaska 1994). The Alaska Supreme Court applies the *Sherbert* test to determine if an exemption is required to a facially neutral law under the Alaska Free Exercise Clause. *Id.* at 281 (footnote omitted). "[T]o invoke a religious exemption, three requirements must be met: (1) a religion is involved, (2) the conduct in question is religiously based, and (3) the claimant is sincere in his/her religious belief." *Id.* (citations omitted). Once these requirements are met, religious conduct may still be prohibited when competing government interests of the highest order are not otherwise served. *Id.* (citations and quotations omitted).

If Plaintiff meets all three requirements above, the analysis does not end. *Id.* at 282. "The question is whether … the governmental interest in abolishing improper discrimination … outweighs [Plaintiff's] interest in acting based on his religious beliefs." *Swanner* at 282. The *Swanner* court determined that the AERC has a compelling government interest in preventing discrimination. *Id.* at 283

"Allowing … discrimination that degrades individuals, affronts human dignity, and limits one's opportunities results in harming the government's … interest in preventing such discrimination." *Id.* at 283. Similar to *Swanner,* the AERC's interest will clearly suffer if an exemption is granted to allow Plaintiff to discriminate in a place of public accommodation, if it is determined AERC meets the municipal definition of public accommodation.

For all of these reasons, Plaintiff cannot prevail on its claim that Defendants' treatment of the Hope Center violates the Alaska Freedom of Religion Clause. The AERC has not determined that Plaintiff engaged in unlawful discrimination. The AERC has a compelling interest in preventing discrimination. The Court should abstain under the *Younger* doctrine, and the AERC should be allowed to complete its proceedings.

3. Plaintiff's As-Applied First Amendment Claims are Moot.

Plaintiff claims the AMC provisions regarding "publication bans" violate the First Amendment because they "ban Hope Center's religious expression based on content and viewpoint." Dkt. 30 at 22. However, neither of the Code provisions that Plaintiff cites to, AMC §§ 5.20.020(A)(7) and 5.20.050(A)(2), are at issue in the open AERC complaint (Complaint No. 18-041). Exh. A.

Although the second AERC complaint (Complaint No. 18-167) cited to AMC §§ 5.20.020(A)(7) and 5.20.050(A)(2), the second complaint was fully resolved through a written settlement agreement and closed. Exh. B. Because the second complaint is fully resolved, any and all of Plaintiff's claims regarding the second complaint are moot.

Plaintiff cannot therefore demonstrate a likelihood of success on the merits that §§ AMC 5.20.020(A)(7) and 5.20.050(A)(2) violate the First Amendment as-applied.

4. The Challenged AMC Provisions are Not Overbroad or Vague and Do Not Grant Unbridled Discretion.

Plaintiff claims that several AMC provisions are overbroad, vague, and grant unbridled discretion in violation of the First and Fourteenth Amendments. Dkt. 30 at 18-19. "In a facial challenge brought on First Amendment grounds, a local ordinance may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Harman v. City of Santa Cruz, California*, 261 F.Supp.3d 1031, 1043 (N.D. Cal. 2017) (citations and quotations omitted). "A statute must be sufficiently clear so as to allow persons of ordinary intelligence a reasonable opportunity to know what is prohibited." *Id*. at 1045 (citation and quotation omitted). "[A] law cannot condition the free exercise of First Amendment rights on the unbridled discretion of government officials." *Id*. at 1047 (citations and quotations omitted).

In this case, the AMC provisions Plaintiff complains of are not unconstitutionally vague or overbroad, and do not grant unbridled discretion. Persons of ordinary intelligence have a reasonable opportunity to know what is prohibited, and the Code does not grant "unbridled discretion" to government officials. The Code contains appeal procedures under AMC 5.80.030 to allow for judicial review of any order of the AERC, eliminating any concern about "unbridled discretion." For these reasons, Plaintiff cannot

demonstrate a strong likelihood of success on the merits of its First and Fourteenth Amendment facial challenges.

5. Plaintiff's Hybrid-Rights Claim is Unlikely to Succeed Because it Cannot Demonstrate Violation of a Companion Right.

"[T]o assert a hybrid-rights claim, a free exercise plaintiff must make out a colorable claim that a companion right has been violated - that is, a fair probability or a likelihood, but not a certitude, of success on the merits." *Miller* at 1207 (citations and quotations omitted). "We hold that a plaintiff does not allege a hybrid-rights claim entitled to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right or a claim of an alleged violation of a non-fundamental or non-existent right." *Id*. at 1208 (citation omitted).

This case does not present a hybrid situation. Plaintiff makes a free exercise claim unconnected with any companion right. Plaintiff argues their otherwise impermissible conduct in advocating discrimination, so long as it is accompanied by religious convictions, must be free from governmental regulation. Courts have never held that, and this Court should decline to do so now. *Smith* at 882. Plaintiff cannot demonstrate a strong likelihood of prevailing on the merits of its hybrid-rights claim because it cannot make a colorable claim that a companion right has been violated.

6. Plaintiff's Remaining Claims are Unlikely to Succeed Because They are Not Ripe for Review and the Court Should Abstain Under the *Younger* Doctrine.

Plaintiff's preliminary injunction motion advances several additional "as applied" challenges to AMC provisions. Dkt. 30 at 20-24. However, the AERC proceedings have not concluded because Plaintiff refuses to cooperate with those proceedings and has instead chosen to initiate the instant federal court action. The AERC investigation of the discrimination complaint against the Hope Center is open and ongoing, and AERC has rendered no decision nor undertaken any enforcement action against the Hope Center.

AERC's determination of the discrimination complaint, if decided in the Hope Center's favor, would render Plaintiff's claims in this action moot, or at least substantially change the nature of its alleged claims before the court. In addition, the Hope Center has a right to appeal from the AERC proceeding directly to Alaska Superior Court for consideration of challenges to AERC's jurisdiction as well as determination of state and federal constitutional challenges to Title 5. Again, adjudication of these claims by the Alaska Superior Court, if decided in the Hope Center's favor, would substantially alter Plaintiff's claims before this court and render some or all of the claims moot.

B. Plaintiff Cannot Demonstrate It Will Likely Suffer Irreparable Harm Absent the Requested Preliminary Injunction.

Even if Plaintiff were able to establish it is likely to succeed on the merits, it must additionally demonstrate it will *likely* suffer irreparable harm absent the requested preliminary injunction. Because Plaintiff cannot establish it is likely to suffer irreparable

harm without the requested injunctive relief, its Motion for Preliminary Injunction should be denied.

1. Plaintiff's Stated Desire to Post "Statements About Its Beliefs Regarding Sex and Gender Identity" Forms the Sole Basis for Its Claim of Irreparable Harm.

"Plaintiffs seeking preliminary relief must demonstrate that irreparable injury is *likely* in the absence of an injunction, not merely that it is possible." *Arc of California v. Douglas*, 757 F.3d 975, 990 (9th Cir. 2014) (internal quotations omitted) (emphasis in original). Issuance of a preliminary injunction based upon a "possibility" of harm is "inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

Here, Plaintiff argues it "suffers irreparable harm when the [Anchorage Municipal] Code violates constitutional rights." Plt.'s Memo. in Supp. of Mot. Prelim. Inj., p. 24 (Dkt. 30). Plaintiff points not to any current or anticipated future enforcement action by Defendants as the basis for these alleged constitutional violations, but rather Plaintiff's own belief that its stated desire to post "statements about its policies and beliefs on sex and gender identity" has been "chilled" due to Plaintiff's "treatment" by the Anchorage Equal Rights Commission (AERC). *Id.* at 11-16. Put another way, Plaintiff argues Defendants violated its constitutional rights by investigating a complaint of discrimination against Plaintiff, because the investigation allegedly caused Plaintiff to choose to "temporarily" refrain from posting statements about its policies and beliefs about sex and gender identity. *Id.* at 11.

While Plaintiff's preliminary injunction motion also includes cursory reference to "facial problems" with AMC § 5.20.050(A)(2), the thrust of its motion is clearly based upon its perception of Defendant's interpretation and application of Title 5 rather than a facial challenge to § 5.20.050(A)(2). *Compare* Plt.'s Memo. in Supp. of Mot. Prelim. Inj., pp. 1-18, 20-24, *with* pp. 18-19. (Dkt. 30). Moreover, Plaintiff cites Defendants' interpretation of Title 5 as the specific basis for its belief that it has been chilled in its desire to post statements about its policies and beliefs about sex and gender identity: "Anchorage's *interpretation* of its laws has forced Hope Center to stay silent about its religious policies and beliefs." *Id.* at 14 (emphasis supplied).

To be clear, AERC has undertaken no enforcement action against Plaintiff regarding AERC Complaint No. 18-041, reached no decision as to whether AERC has jurisdiction regarding Complaint No. 18-041, and issued no determination as to whether the facts substantiate the alleged discriminatory conduct. Defendants certify that they will undertake no investigative or enforcement actions regarding Complaint No. 18-041 while this Court exercises jurisdiction in the matter. Aff. of Pam Basler, ¶ 2 (filed herewith); Aff. of Wanda Greene, ¶ 2 (filed herewith).[2] Thus, Plaintiff can point to no irreparable injury it will likely suffer absent a preliminary injunction other than Plaintiff's belief that its stated desire to post "statements about its policies and beliefs on sex and gender identity" has been "chilled."[3] Plt.'s Memo. in Supp. of Mot. Prelim. Inj., p. 11 (Dkt. 30).

[2] Defendants have previously voluntarily certified "no investigative, decision-making, or enforcement actions will be undertaken" pending the Court's determination of Defendant's Motion for Federal Abstention (Docket 43). Def.'s Mot. to Stay, p. 2 (Dkt. 44).

[3] Plaintiff refers elsewhere in its briefing to alleged negative impacts on fundraising, but economic damages are typically remedied by a damages award and are not therefore considered "irreparable" for purposes of seeking a

2. The Court Should Not Countenance Plaintiff's Alleged Irreparable Injury or, in the Alternative, Should Afford *De Minimis* Weight to the Factor Under a Sliding Scale Approach.

Posting is not at issue in the pending AERC Complaint No. 18-041. In its preliminary injunction motion, Plaintiff cites no specific action by Defendants, other than Plaintiff's perceived "treatment" by the AERC, which bars it from posting. Plaintiff does not allege it has previously posted statements regarding its beliefs on these topics or that it has removed any such existing postings, nor does it argue that it desired to post these statements prior to the filing of the AERC complaints or its initiation of the instant federal court action. Rather, Plaintiff states it has "refrained" "temporarily" from posting these statements, thereby emphasizing that its decision to do so is both voluntary and impermanent.

On balance, Plaintiffs' recently-professed desire to post these statements appears squarely intended to form the basis for a "chilling effect" argument, in order to allege an irreparable injury where one does not otherwise exist. The Court should not countenance an alleged irreparable harm of Plaintiff's own manufacture. At a minimum, should the Court determine the posting issue represents an irreparable harm that Plaintiff is likely to suffer absent a preliminary injunction, the Court should afford *de minimis* weight to this factor under the sliding scale approach observed in the Ninth Circuit. *See, Shell Offshore Inc. v. Greenpeace, Inc.*, 864 F. Supp. 2d 839, 846–47 (D. Alaska 2012), aff'd, 709 F.3d 1281 (9th Cir. 2013) ("Under the 'sliding scale' approach to preliminary injunctions

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preliminary injunction. *See*, *Shell Offshore Inc. v. Greenpeace, Inc.*, 864 F. Supp. 2d 839, 850 (D. Alaska 2012), aff'd, 709 F.3d 1281 (9th Cir. 2013) ("[E]conomic damages are not traditionally considered irreparable harm because an economic injury can be later remedied by a damages award.").

observed in [the Ninth Circuit], the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another.") (internal quotations omitted).

C. The Balance of Equities and Public Interest Weigh Against Granting Plaintiff's Motion for Preliminary Injunction.

Because the government is a party to these proceedings, the final two factors of a preliminary injunction analysis – balancing the equities and weighing public interest – merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) ("The district court found that, although [plaintiff] satisfied the irreparable harm prong of the preliminary injunction analysis, neither the public interest nor the equities were in its favor. When the government is a party, these last two factors merge.") In balancing the equities, the specific weight to be assigned to particular harms is left to the district court's discretion. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010).

Here, Plaintiff seeks, among other injunctive relief, a sweeping enjoinder of direct or indirect enforcement of AMC § 5.20.050(A)(2)(b), which provides:

> **5.20.050 – Unlawful practices in places of public accommodation.**
> A. It is unlawful for a person, whether the owner, operator, agent or employees of an owner or operator of a public accommodation, to:
> (2) Publish, circulate, issue, display, post or mail a written or printed communication, notice or advertisement which states or implies that:
> (b) The patronage or presence of a person belonging to a particular race, color, sex, sexual orientation, gender identity, religion, national origin, marital status, age, or physical or mental disability is unwelcome, not desired, not solicited, objectionable or unacceptable.

Essentially, should Plaintiff's requested injunctive relief be granted, members of *all* recognized protected classes in the Municipality of Anchorage will be negatively impacted thereby.

AMC 5.20.050, most recently modified by the Anchorage Assembly in 2015,[4] is an enactment of the people of the Municipality of Anchorage via their duly-elected representatives in the Anchorage Assembly. Enjoinder of this enactment, even temporarily, constitutes an irreparable harm to the municipality. *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) ("[I]t is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined."). The Court must weigh this attendant harm to the municipality against the harm claimed by Plaintiff.

It should be noted that Plaintiff does not allege it has altered the operation of its women's shelter in any way in response to AMC § 5.20.050. Indeed, it is Plaintiff which seeks to alter the *status quo* by, apparently for the first time, posting statements about its policies and beliefs regarding sex and gender identity. It should be further noted that Defendants have taken no position as to whether Plaintiff is a "public accommodation" under Anchorage Municipal Code, i.e. whether AMC 5.20.050 applies to Plaintiff. That question is still under consideration before the AERC in its open, though voluntarily stayed, proceeding regarding AERC Complaint No. 18-041.

As set forth more fully in Defendant's pending Motion for Federal Abstention (Docket 43), the interpretation and application of the term "public accommodation" under

the Anchorage Municipal Code is distinct from state and federal definitions and represents a unique legal question not yet interpreted by the courts. Pursuant to the *Younger* doctrine, the Court should abstain from further proceedings in this matter because the AERC proceeding is ongoing, important state interests are implicated, and Plaintiff has an adequate opportunity to raise its federal claims within the AERC proceeding, in which Plaintiff enjoys a right of appeal to the Alaska Superior Court.

Plaintiff's requested injunctive relief represents precisely the type of direct interference with an ongoing state proceeding that *Younger* disapproves. *Gilbertson v. Albright*, 381 F.3d 965, 978 (9th Cir. 2004) ("*If* a state-initiated proceeding is ongoing, and *if* it implicates important state interests [. . .], and *if* the federal litigant is not barred from litigating federal constitutional issues in that proceeding, then a federal court action that would enjoin the proceeding, or have the practical effect of doing so, would interfere in a way that *Younger* disapproves.") (emphasis in original); *San Remo Hotel v. City and Cty. of San Francisco*, 145 F.3d 1095, 1104 (9th Cir. 1998) ("[T]he whole point of *Younger* abstention is to stop federal interference with state proceedings[.]").

Defendants and the public have a substantial interest in: (1) the comity of the courts and the orderly administration of ongoing state proceedings without interference in the form of federal injunctions; and (2) enforcing AMC § 5.20.050, which serves the fundamentally important purpose of protecting the rights of all protected classes in the Municipality of Anchorage. These interests will be irreparably harmed if Plaintiff's

[4] Anchorage Ordinance No. 2015-96 (S-1).

requested injunctive relief is granted and, on balance, the equities and public interest tip in favor of denying Plaintiff's requested relief.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiff's Motion for Preliminary Injunction (Docket 29) should be denied.

Respectfully submitted this 29th day of November, 2018.

REBECCA A. WINDT PEARSON
MUNICIPAL ATTORNEY

By: /s/ Ryan A. Stuart
Assistant Municipal Attorney
Alaska Bar No. 0706036

Certificate of Service
I certify that on 11/29/2018, a true and correct copy of the foregoing was served on:

Jonathan A. Scruggs
Ryan J. Tucker
Sonja Redmond
Kevin G. Clarkson
David Cortman
Katherine Anderson

by first class regular mail, if noted above, or by electronic means through the ECF system as indicated on the Notice of Electronic Filing.

/s/ Cathi Russell
Cathi Russell, Legal Secretary

DISCRIMINATION COMPLAINT

Complaint Number:18-041 Filing Date: 2/1/2018

NAME: [redacted] Phone:(907) 444-8568

Mailing Address: 100 West 13th Ave City, State: Anchorage, AK Zip: 99501

****

I ALLEGE THAT THE FOLLOWING NAMED: Public Accommodation

NAME: Downtown Hope Center Phone:

Mailing Address: 240 East 3rd Ave City, State: Anchorage, Alaska Zip: 99517

****

If this is an employment complaint, does this employer have more than fifteen (15) employees? ☐Yes ☐ No ☒ N/A

****

DISCRIMINATED AGAINST ME ON THE BASIS OF MY:

☐Race ☐ Religion ☒ Sex ☐ Color ☐ National Origin ☐ Disability ☐ Sexual Orientation ☐ Age ☐ Marital Status ☒ Gender Identity ☐ Retaliation

****

DATE OF MOST RECENT OR CONTINUING DISCRIMINATION: January 29, 2018

****

STATEMENT OF DISCRIMINATION:

I allege I have been discriminated against in violation of the following statute prohibiting unlawful discriminatory practices in places of public accommodation, Anchorage Municipal Code § 5.20.050.

Respondent operates a shelter in Anchorage, Alaska. On two occasions, most recently on January 29, 2018, Respondent refused me access to its shelter because of my sex and gender identity.

I allege the following discriminatory actions: **Denial of services/ Sex, Gender Identity**

1. I am female and transgender thus I belong to a protected class.
2. On January 29, 2018, and one other occasion I was denied full and equal enjoyment of Respondent's services, goods or facilities.
3. Members outside of my protected class were not treated in the same or similar manner.

I WILL advise the Commission if I change my address or telephone number(s); and I will cooperate fully in the processing of my discrimination complaint.

I SWEAR OR AFFIRM I have read the above complaint and it is true to the best of my knowledge, information and belief.

DATED at Anchorage, Alaska, this 1 day of February, 2018.

[redacted]

[redacted] Complainant

SUBSCRIBED AND SWORN TO before me on this 1st day of February, 2018.

NOTARY PUBLIC in and for ALASKA
My Commission Expires: 11/6/21

NATALIE K. DAY
My Commission Expires
NOTARY PUBLIC
Nov. 6, 2021
STATE OF ALASKA

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ANCHORAGE EQUAL RIGHTS COMMISSION

DISCRIMINATION COMPLAINT

Complaint Number: 18-167 Filing Date: 5/15/2018

NAME: Pamela Basler, Executive Director, for the Anchorage Equal Rights Commission Phone: (907) 343-4342

Mailing Address: 632 W. 6th Avenue, Suite 110 City, State: Anchorage, AK Zip: 99501

****

I ALLEGE THAT THE FOLLOWING NAMED: Respondent(s)

Downtown Hope Shelter, 240 E. 3rd Avenue, Anchorage, AK 99501, (907) 277-4302

AND/OR

Brena, Bell & Clarkson, P.C., 810 N Street, Suite 100, Anchorage, AK 99501, (907) 258-2000

****

If this is an employment complaint, does this employer have more than fifteen (15) employees? ☐ Yes ☐ No ☒ N/A

****

DISCRIMINATED AGAINST ME ON THE BASIS OF MY:

☐ Race ☐ Religion ☒ Sex ☐ Color ☐ National Origin ☐ Disability ☐ Sexual Orientation ☐ Age ☐ Marital Status ☒ Gender Identity ☐ Retaliation

****

DATE OF MOST RECENT OR CONTINUING DISCRIMINATION: March 8, 2018

****

STATEMENT OF DISCRIMINATION:

I allege the Respondent(s) committed unlawful discriminatory acts or practices in violation of the following statutes prohibiting unlawful uses of real property, Anchorage Municipal Code § 5.20.020, and/or unlawful practices in places of public accommodation, Anchorage Municipal Code § 5.20.050.

Respondents (the Downtown Hope Shelter and/or its identified spokesperson, Kevin Clarkson of Brena, Bell & Clarkson, P.C.) published, circulated, issued, displayed, posted, or mailed a written or printed communication, notice or advertisement, or caused to be circulated, issued or displayed, made, printed or published, a communication which states or implies that the use of Downtown Hope Center's real property and/or services or facilities will be refused to or denied to a person because of their sex and/or gender identity, in violation of Anchorage Municipal Code § 5.20.020(A)(7) and/or Anchorage Municipal Code § 5.20.050(A)(2).

An Anchorage Equal Rights Commission (AERC) complaint (No. 18-041) was filed against the Downtown Hope Center on February 1, 2018. Attorney Kevin Clarkson of Brena, Bell & Clarkson, P.C. notified the AERC on March 6, 2018, that his firm represented the Downtown Hope Center in regards to that complaint. Since March 8, 2018, Kevin Clarkson has been identified as the source of statements and information, published in various online and printed media sources, which implied or stated that transgender individuals would not be allowed to be "sheltered" at the Downtown Hope Center.

Respondents have refused to participate in proceedings related to AERC Complaint No. 18-041 that are required by the Municipality of Anchorage's Equal Rights law, and refused to provide critical information to the AERC on several occasions. As a result, it is not known whether Kevin Clarkson was speaking at the behest of or on behalf of the Downtown Hope Center when he made these communications.

I SWEAR OR AFFIRM I have read the above complaint and it is true to the best of my knowledge, information and belief.

DATED at Anchorage, Alaska, this 15th day of May, 2018.

Pamela Basler

Pamela Basler, Executive Director, *for the* Anchorage Equal Rights Commission

SUBSCRIBED AND SWORN TO before me on this 15th day of May, 2018.

NOTARY PUBLIC in and for ALASKA

My Commission Expires: 11/6/21

NATALIE K. DAY My Commission Expires NOTARY PUBLIC Nov. 6, 2021 STATE OF ALASKA

Municipality of Anchorage

AERC

632 West 6th Avenue, Suite 110 • Telephone: (907) 343-4342 • Fax: (907) 249-7328 • TTY: dial 711
Mailing Address: P.O. Box 196650 • Anchorage, Alaska 99519-6650
http://www.muni.org/aerc

Mayor Dan Sullivan

Anchorage Equal Rights Commission

Pamela Basler, Executive Director
Anchorage Equal Rights Commission
632 W. 6th Avenue, Suite 110
Anchorage, AK 99501

John B. Thorsness
Clapp, Peterson, Tiemessen, Thorsness & Johnson, LLC
711 H Street, Suite 620
Anchorage, AK 99501-3442

Re: **Pamela Basler, Executive Director, AERC et. al. v. Downtown Hope Center and/or Brena Bell & Clarkson**
AERC Complaint No.: 18-167

CLOSURE

PURSUANT to Anchorage Municipal Code, Title 5, and the powers of the Commission delegated to the Executive Director, the above-captioned case is closed for the following reason:

This complaint is administratively closed pursuant to Anchorage Municipal Code 5.60.020.A.

10-19-2018
DATE

Pamela T. Basler
PAMELA T. BASLER
EXECUTIVE DIRECTOR

Ryan A. Stuart
Assistant Municipal Attorney
Municipal Attorney's Office
P.O. Box 196650
Anchorage, Alaska 99519-6650
Phone: 907-343-4545
Fax: 907-343-4550
Email: uslit@muni.org

Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

THE DOWNTOWN SOUP KITCHEN, d/b/a, DOWNTOWN HOPE CENTER, Plaintiff, vs. MUNICIPALITY OF ANCHORAGE, ANCHORAGE EQUAL RIGHTS COMMISSION, and PAMELA BASLER, Individually and in her Official Capacity as the Executive Director of the Anchorage Equal Rights Commission, Defendants.	)	Case No. 3:18-cv-00190-SLG

[PROPOSED] ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

The Court having reviewed Plaintiff's Motion for Preliminary Injunction, and any opposition and reply thereto;

IT IS HEREBY ORDERED that Plaintiff's Motion for Preliminary Injunction is DENIED.

DATED:_____

_____
Sharon L. Gleason
United States District Judge

Certificate of Service
I certify that on 11/29/18, a true and
correct copy of the foregoing was served on:

Jonathan A. Scruggs
Ryan J. Tucker
Sonja Redmond
Kevin G. Clarkson
David Cortman
Katherine Anderson

by first class regular mail, if noted above, or by electronic means through the ECF system as indicated on the Notice of Electronic Filing.

/s/ Cathi Russell
Cathi Russell, Legal Secretary