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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,

v.

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

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION TO STAY
PROCEEDINGS PENDING
RESOLUTION OF DEFENDANTS'
MOTION FOR ABSTENTION**

Defendants (collectively Anchorage) ask this Court to stay all proceedings in this case—including Plaintiff’s (Hope Center’s) Motion for Preliminary Injunction—until this Court rules on Anchorage’s Motion for Abstention. But Anchorage sought to justify its stay without mentioning a single case. Because Anchorage has not met, much less cited, an appropriate test for deciding a motion to stay, Anchorage’s motion should be denied.

ARGUMENT

Although it is unclear under what standard Anchorage requests a stay, “[t]he proponent of a stay bears the burden of establishing its need.” *Clinton v. Jones*, 520 U.S. 681, 708 (1997) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936)). “[I]f there is even a fair possibility that the stay for which [the movant] prays will work damage to someone else,” the movant “must make out a clear case of hardship or inequity in being required to go forward.” *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (quoting *Landis*, 299 U.S. at 255).

In considering a motion to stay, “the competing interests which will be affected by the granting or refusal to grant a stay must be weighed.” *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005). Generally, these factors include: (1) the possible damage which may result from granting of the stay; (2) the hardship or inequity which a party may suffer in being required to go forward; and (3) the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.¹ *Id.* Applied here, Anchorage has failed to carry its burden and establish any of these factors. In fact, these factors weigh heavily against the requested stay.

¹ Courts have also considered other factors depending on the nature and status of the action as well as the relief requested. *See, e.g., Texas Partners v. Conrock Co.*, 685 F.2d 1116, 1118 (9th Cir. 1982); *Skellercup Indus. Ltd. v. City of Los Angeles*, 163 F.R.D. 598, 601 (C.D. Cal. 1995). Because Anchorage failed to cite any authority, it is difficult to determine the basis of its request. But under any standard, the balance of factors weighs against the requested stay.

1. The Hope Center and others would be harmed by a stay.

A stay would cause damage in at least two ways. First, Hope Center’s Motion for Preliminary Injunction asks this Court to enjoin Anchorage from enforcing sections of Anchorage’s Code that prevent it from protecting homeless women in the community and that silence Hope Center’s desired speech. Constitutional rights are at stake, and as this Court has previously recognized, “the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Shell Offshore, Inc. v. Greenpeace, Inc.*, No. 3:15-cv-00054-SLG, 2015 WL 11122099, at *2 (D. Alaska June 15, 2015) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Each day, the Hope Center loses the freedom to speak and a threat hovers over its right to exercise its religious beliefs. The mere existence of Hope Center’s request for injunctive relief is enough to justify denying Anchorage’s request. *See Lockyer*, 398 F.3d at 1110 (noting that stay more justifiable in case that only seeks damages as opposed to case that alleges “continuing harm” and seeks “injunctive or declaratory relief”).

Second, there is not just a “fair possibility,” but a certainty, “that the stay [Anchorage seeks] will work damage to someone else.” *CMAX, Inc.*, 300 F.2d at 268. The homeless women who seek shelter at the Hope Center, as well as the entire community, will be damaged by further delay of these proceedings. Anchorage has a homeless problem, and without immediate clarity from this Court, the safety and privacy interests of the abused women who seek shelter at the Hope Center will remain in flux. S.D. Decl. at ¶ 9, ECF No. 34 (“I spent time on the streets and I know how hard it can be out there. But if the Hope Center were forced to let any biological man into the women’s shelter, I would leave even if it meant sleeping in the woods. I would rather sleep in the woods than sleep in the same area as a biological man.”).

Nor can Anchorage avoid these harms by promising not to investigate or decide the pending “AERC Complaint” against Hope Center. Defs.’ Mot. to Stay 2, ECF No. 44. Defendants do not get to avoid judicial review by voluntarily ceasing their unconstitutional actions for a limited time, particularly when they reserve the authority to enforce in the future. *See F.T.C. v. Affordable Media*, 179 F.3d 1228, 1238 (9th Cir. 1999) (affirming grant of preliminary injunction because “[t]he standard for the voluntary cessation exception to mootness is whether the defendant is free to return to its illegal action at any time.” (cleaned up)); *Rouser v. White*, 707 F. Supp. 2d 1055, 1070-1071 (E.D. Cal. 2010) (granting motion for preliminary injunction even though defendants argued they were “already in compliance with most of the terms of his proposed preliminary injunction” because “the Supreme Court has held that voluntary cessation of allegedly illegal conduct by a defendant does not moot a plaintiff’s claim for injunctive relief.” (citation omitted)); *Consumers Union of U.S., Inc. v. Theodore Hamm Brewing Co.*, 314 F. Supp. 697, 701 (D. Conn. 1970) (“[T]he defendant’s voluntary cessation of the activity is not a ground for a denial of a preliminary injunction.” (citing cases)). Indeed, if defendants could defeat preliminary injunction requests and delay judicial proceedings by mere voluntary cessation, they would always do so.

Moreover, Anchorage’s willingness to stop its investigation temporarily does not remove all of the harm. One of the problems caused by Anchorage’s Code is self-censorship, a harm created by the mere existence of the ordinance and one that is realized without actual prosecution. *Am. Booksellers Found. for Free Expression v. Sullivan*, No. 3:10-cv-0193-RRB, 2010 WL 11453161, at *3 (D. Alaska Oct. 20, 2010) (citing *Virginia v. Am. Booksellers Ass’n, Inc.*, 484 U.S. 383, 393 (1988)).

If anything, Anchorage’s willingness to stop for a limited time *justifies* this Court immediately entering a preliminary injunction. Anchorage cannot possibly be harmed by a court

order ensuring that Anchorage will temporarily stop its unconstitutional activities if Anchorage is willing to stop its behavior on its own. Anchorage's willingness to stop shows that Anchorage will suffer no harm, the equities favor Hope Center, and the public interest favors Hope Center. With its motion to stay, Anchorage has conceded that most of the preliminary injunction factors favor Hope Center, and this Court can quickly grant Hope Center's motion without any fear of harming Anchorage or anyone else.

2. Anchorage will not be harmed in requiring it to move forward.

The only "harm" Anchorage mentions it will face is filing a response to the Motion for Preliminary Injunction. But that alleged "harm" was rendered moot by this Court's order denying the motion for shortened time and Anchorage's subsequent filing of its response. *See* 11/28/18 Text Order, ECF No. 50 and Defs.' Opp'n to Mot. for Prelim. Inj., ECF No. 52. Even so, merely being required to defend a suit does not constitute a clear case of hardship or inequity. *Lockyer*, 398 F.3d at 1112. And this point carries particular weight because Anchorage addressed *Younger* abstention in its response to Hope Center's motion for preliminary injunction.

In this respect, Anchorage has made no attempt to "make out a clear case of hardship or inequity," a failure which not only weighs in Hope Center's favor, but is dispositive of the motion to stay. *Id.* (quoting *Landis*, 299 U.S. at 255).

3. The interests of judicial economy weigh in favor of resolving the preliminary injunction request first.

The only stay factor Anchorage does address is whether judicial economy is served by staying all of the proceedings in this case until this Court rules on the motion for abstention. But "while it is the prerogative of the district court to manage its workload, case management standing alone is not necessarily a sufficient ground to stay proceedings." *Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (citing *Lockyer*, 398 F.3d at 1112).

And this is probably for good reason. Because each court has a substantial workload, it is often unclear, if not impossible, to determine when a particular motion may be resolved. But delay in resolution of an injunction request—and in particular in the First Amendment context—is harmful to the injured party. *Elrod*, 427 U.S. at 373.

Moreover, Anchorage’s justification for a stay—consideration of *Younger* abstention—carries no weight because *Younger* abstention does not apply here, as explained in Hope Center’s concurrently filed opposition to abstention. It makes no sense to delay considering a viable request for immediate injunctive relief—and effectively denying that request—simply because a party raises an abstention defense that may be wrong. And this logic applies with particular force when Hope Center filed its injunction request first and Anchorage could have raised—but did not raise—its abstention defense earlier. Unjustified delay should not be rewarded.

But setting that aside, judicial economy cannot justify a stay when the parties can brief and this Court can decide the injunction request and abstention issue simultaneously. Anchorage has filed its abstention motion and Hope Center will respond in due course. Anchorage has also raised that abstention defense in its response to Hope Center’s injunction request. Better to decide the issues simultaneously than delay consideration of a motion alleging irreparable harm.

Indeed, courts routinely consider motions for preliminary injunction before or alongside motions to dismiss. That same logic also applies to Anchorage’s motion for abstention. *See, e.g., DaSilva v. Wells Fargo Bank, N.A.*, No. 3:10-cv-00381-RCJ-VPC, 2010 WL 4258528, at *1 (D. Nev. Oct. 20, 2010) (deciding motion for preliminary injunction and deferring decision on motion to dismiss); *Singh v. Ilchert*, 784 F. Supp. 759, 762 (N.D. Cal. 1992) (noting that court had previously denied motion for preliminary injunction and deferred ruling on cross-motion to dismiss); *Nat. Res. Def. Council, Inc. v. Winter*, 645 F. Supp. 2d 841, 845 (C.D. Cal. 2007)

(considering motion for preliminary injunction and motion to dismiss simultaneously); *Deer Valley Resort Co. v. Christy Sports, LLC*, No. 2:07-CV-00904DAK, 2007 WL 4570664, at *1 (D. Utah Dec. 21, 2007) (considering motion to dismiss and preliminary injunction simultaneously).

In light of this, the only “harm” Anchorage identifies to judicial economy is a little more work it has to do. But when it comes to seeking a stay, that is no harm at all.

CONCLUSION

Anchorage failed to cite any authority or articulate a standard for seeking a stay. But under any standard, the balance of interests weighs against the requested stay. Hope Center therefore asks this Court to deny this request.

Respectfully submitted this 5th day of December, 2018.

By: /s/ Ryan J. Tucker

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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2018, the foregoing was filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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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,

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MUNICIPALITY OF ANCHORAGE,
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Case No. 3:18-cv-00190-SLG

**[PROPOSED] ORDER DENYING DEFENDANTS' MOTION TO STAY
PROCEEDINGS PENDING RESOLUTION OF
DEFENDANTS' MOTION FOR ABSTENTION**

The Court has reviewed Defendants' Motion to Stay Proceedings Pending Resolution of Defendants' Motion for Abstention (ECF No. 44) and Plaintiff's Opposition.

IT IS HEREBY ORDERED that Defendants' Motion to Stay Proceedings Pending Resolution of Defendants' Motion for Abstention (ECF No. 44) is DENIED.

DATED: _____

Hon. Sharon L. Gleason
United States District Court Judge