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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

HOPE CENTER'S REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION
(Oral Argument Requested)

Downtown Hope Center v. MOA; 3:18-cv-00190-SLG

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INTRODUCTION

Hope Center needs relief to stop a law that chills its speech and threatens its rights. In response, Anchorage asks this Court to abstain because the city has begun "enforcing" its law, to dismiss this lawsuit because the city has not yet "enforced" its law, and to deny injunctive relief because the city needs to "enforce" its law—a law the city says it will not enforce until this lawsuit ends. These positions conflict and are meritless.

In reality, Anchorage has begun to investigate whether Hope Center's past act violated its law—and done so in a way that contradicts its law and indicates religious hostility. Anchorage simply confuses its investigation of *a past act* and this lawsuit, which seeks relief from *future enforcement*. Anchorage also gets jurisdiction wrong. Under Anchorage's theory, pre-enforcement cases are impossible. If Hope Center sues before an investigation, the suit lacks ripeness. If Hope Center sues during or after an investigation, this Court must abstain. Neither is correct. Pre-enforcement cases are suited for this precise situation—to stop future yet imminent enforcement.

This situation fits the bill. Anchorage has threatened to enforce its law, never disavowed its intent to enforce, and defended its authority to enforce, both to stop Hope Center from posting its desired statement and from operating according to its beliefs. And although Anchorage says it will *temporarily* stay its sword *because of this lawsuit*, voluntary cessation like this never justifies withholding review. It merely proves an injunction will not harm Anchorage. In light of this, this Court should immediately protect Hope Center from a law that is threatening and chilling its constitutional freedoms.

ARGUMENT

I. This Court has jurisdiction to hear Hope Center's claims.

According to Anchorage, the claims in this case are not ripe, moot, and should be dismissed under *Younger* abstention. These arguments are incorrect.

A. Hope Center's claims are ripe.

Plaintiffs can bring pre-enforcement challenges when they allege (1) an intention to engage in a course of conduct arguably affected with a constitutional interest that is (2) arguably proscribed by a statute and (3) there is a credible threat of prosecution. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). Although Anchorage does not specify which claims it challenges, all of Hope Center's claims meet the *Driehaus* test.[1]

First, the Code prohibits public accommodations and property owners from denying services based on sex or gender identity or from saying they will do so. Code § 5.20.050(A)(2); Code § 5.20.020(A)(7). Hope Center wants to admit only biological women to its women's shelter and wants to publish statements saying as much. But Anchorage thinks these actions violate the Code. Indeed, Anchorage is currently investigating Hope Center for violating the Code by declining to accept a biological male into its women's shelter. Compl. ¶ 12, ECF No. 1. So Anchorage has clarified what it thinks is permissible. Hope Center in turn has not spoken, chilled its own speech to avoid violating the law, and stands in perpetual fear of the law being enforced against it.

[1] Hope Center's verified facts are uncontroverted and must be accepted as true. *Harris v. Wells Fargo Bank, N.A.*, 2018 WL 4896727, at *1 (W.D. Tenn. Oct. 9, 2018).

In response, Anchorage states that the Commission has not yet enforced the Code. Opp'n 15, ECF No. 52. But Hope Center does not have to violate the law to challenge it. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). Hope Center merely has to identify conduct that "arguably falls within the statute's reach" and that Anchorage will "credibly" enforce its statute. *Driehaus*, 573 U.S. at 158. Because Anchorage has not disavowed enforcement and because enforcement is imminent (as the ongoing investigation shows), Hope Center easily meets this test. *See LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000) ("Government's failure to disavow application of" law supports jurisdiction.).

B. Hope Center's claims are not moot.

An issue is moot if there is not a "present controversy" for which "effective relief can be granted." *Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545, 559 (9th Cir. 2009) (citation omitted). Here, Anchorage says the ongoing investigation "would render" Hope Center's claims "moot" "if decided in the Hope Center's favor." Opp'n 13. But claims cannot be mooted by future speculative events. Anchorage also concedes that Hope Center's publication ban claims are not "at issue in the open AERC complaint." Opp'n 10. So what happens in the investigation is both irrelevant and speculative.

Anchorage also argues that Hope Center's publication ban challenges are "moot" because they were resolved when Anchorage dismissed the Second Complaint against Hope Center. Opp'n 10. Not true. That Second Complaint dealt only with counsel's statement to the media—not whether *Hope Center* can post its statements. Anchorage has never confronted that issue or disavowed enforcing its law in this new situation.

C. Anchorage's recent concessions undermine its abstention argument.

Although Anchorage argued *Younger* abstention elsewhere and Hope Center refuted those arguments, Anchorage's recent response undermines abstention even more. As Anchorage now admits, Hope Center cannot raise its as-applied or facial publication ban challenges in the ongoing investigation. Opp'n 16. Because these claims cannot "be raised" in the state proceeding, they are "not barred" by *Younger*. *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975).

II. Hope Center will likely succeed on the merits of its claims.

Hope Center raises religious freedom, speech, due process, and privacy claims to justify its preliminary injunction request. Anchorage responded to some of these, but not others and effectively conceded Hope Center's arguments.

A. Anchorage's treatment of Hope Center violates the Free Exercise Clause.

Anchorage has shown hostility toward Hope Center by unjustifiably using its law to pressure Hope Center to change its beliefs and its religiously motivated conduct. While Anchorage primarily defends its law as facially neutral and generally applicable, Opp'n 5-6, that does not resolve whether Anchorage is using its law to target religious beliefs. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

In response to the hostility point, Anchorage says it has not yet determined if Hope Center is a public accommodation or if its law applies. Hope Center's public accommodation status—says Anchorage—is a "factual question" that the Commission should determine. Opp'n 7. But that is the wrong question. The legally significant question

is whether Anchorage's imminent enforcement and ongoing investigatory acts show hostility toward Hope Center's religious beliefs. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719, 1731 (2018) (government "cannot impose regulations that are hostile to [citizens'] religious beliefs").

To be sure, one factor in that analysis is whether Anchorage is interpreting and threatening to enforce its law against Hope Center contrary to what that law says. But what a law means is a legal question, not a factual one. *Kent v. Principi*, 389 F.3d 1380, 1384 (Fed. Cir. 2004). And whether the government is acting with religious hostility is also a legal question. *Masterpiece*, 138 S. Ct. at 1731-32. Anchorage cites no case saying courts should delay this legal determination. If a police department began to investigate and threatened to arrest a peaceful religious pamphleteer for not obtaining a parade permit, a court would not wait for that investigation to finish. If Anchorage wants to interpret its law to not cover Hope Center, Hope Center would welcome that. But Anchorage must actually take that position. It has not. Anchorage cannot threaten to enforce its law in a way that threatens Hope Center's rights, defend its authority to enforce its law, and then ask this Court to wait and see on the hope that Anchorage might enforce its law correctly.

Anchorage's "wait and see" defense also overlooks all the other evidence of Anchorage's hostility. No matter Hope Center's public accommodation status, Hope Center did not discriminate against Jessie Doe. Compl. ¶¶ 12, 94-97, 137-40, 145-49. Anchorage does not dispute those facts, yet it continues to investigate and threaten Hope Center contrary to what its law requires. That by itself proves hostility.

To justify this ongoing investigation, Anchorage blames Hope Center for "refus[ing] to cooperate with AERC proceedings." Opp'n 7. But the uncontroverted evidence shows the opposite—Hope Center did provide funding information. Tucker Decl. ¶ 9, ECF No. 31; Mot. Ex. F, ECF No. 29-1; Compl. ¶ 205. Even more, Anchorage cannot explain why funding affects, much less controls, whether Hope Center violated the law in the past. Nothing in Anchorage's law ties the definition of public accommodation to public funding. And though Anchorage cites one case to say public funding affects public accommodation status, that case involved a public accommodation law with much broader language than Anchorage's law. *Hunter v. Dist. of Columbia*, 64 F.Supp.3d 158, 180 (D.D.C. 2014). That case relied on this broader language, not on government funding, to find a homeless shelter was a public accommodation. *Id*. And government funding does not change the undisputed fact that Hope Center did not discriminate or violate the law.

Moving from unjustified threats to timing, Anchorage's religious hostility becomes even clearer. The Code required Anchorage to issue a determination within 240 days of filing the First Complaint. Code § 5.50.010. It did not. Instead, Anchorage told this Court it would self-abstain well after its statutory deadline. P. Basler Aff. ¶ 3, ECF No. 53. While Anchorage cites *Foreman v. Anchorage Equal Rights Commission* to excuse its actions, the Commission in that case issued an extension order and did so before the deadline. 779 P.2d 1199, 1203 (Alaska 1989). Not true here. The only explanation for Anchorage acting this way—for disregarding its own statutory rules and for investigating and threatening Hope Center under a law it did not violate—is disdain for Hope Center's religious beliefs.

B. Appellate review does not remedy the Code's facial Free Speech problems.

As stated in Hope Center's motion, courts have invalidated language similar to Code § 5.20.050 as vague and overbroad. Mem. in Supp. 18-19, ECF No. 30; *see also Brush & Nib Studio, LC v. City of Phoenix*, 418 P.3d 426, 442 (Ariz. Ct. App. 2018), *review granted* (Nov. 20, 2018). In response, Anchorage says that the Code's appellate review process "eliminate[es] any concern about 'unbridled discretion.'" Opp'n 11. But Anchorage cites no case justifying that. In reality, a facially vague law chills speech and causes self-censorship. That occurs before and cannot be remedied by an appeal process.

C. Code §§ 5.20.050 and 5.20.020 violate the hybrid-rights doctrine by burdening both speech and religion.

Anchorage suggests that Hope Center "makes a free exercise claim unconnected with any companion right." Not so. Code §§ 5.20.050 and 5.20.020 implicate, severely burden, and violate its right to speak. *See* Mem. in Supp. 18-19.

D. Anchorage fails to address several of Hope Center's arguments.

Anchorage's opposition does not address the merits of Hope Center's as-applied Free Speech claim or the bulk of its Free Exercise clam. That concedes Hope Center's argument. *See Walsh v. Nev. Dep't of Human Res.*, 471 F.3d 1033, 1037 (9th Cir. 2006).

E. Anchorage's compelling interest argument ignores the uncontested facts and the exemptions in the Code.

Citing *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274 (Alaska 1994), Anchorage contends it has a compelling interest to stop discrimination. Opp'n 9. But this ignores several key points. First and foremost, Hope Center does not discriminate.

Hope Center referred Jessie Doe to a hospital because Doe was injured. Compl. ¶¶ 89-100. Hope Center would serve Doe in the future with food and a shower and would accept biological women into its shelter no matter their gender identity. Laurie Decl. ¶ 42, ECF No. 32. Giving battered women a safe space is not discrimination.

Second, *Swanner* involved a commercial business, not a religious non-profit seeking to protect battered women. "[T]he text of the First Amendment itself … gives special solicitude to the rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171, 189 (2012). Courts must "loo[k] beyond broadly formulated interests" and consider only Anchorage's interest in applying the Code to Hope Center, "the particular claimant." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014) (cleaned up).

Third, *Swanner* did not confront a party that qualified for exemptions in a law. Mem. in Supp. 14-15. Anchorage never explains why it can exempt single-sex dormitories and renters who share a "common living area[]" and other homeless shelters but not Hope Center. At most, Anchorage dismisses the shelter exemption because it appears in the housing section, not the public accommodation one. But that reading makes the shelter exemption a dead letter that would never apply. That reading also fails to construe the whole Code together to avoid conflicts between Code sections. And fourth, Anchorage's hostility is per se unconstitutional. Hope Center does not need to satisfy strict scrutiny because Anchorage is acting with hostility. *Masterpiece*, 138 S. Ct. at 1729–32.

III. Hope Center is likely to suffer irreparable harm.

Hope Center is suffering the irreparable harms of having its constitutional rights violated. Anchorage's acts either chill Hope Center's speech or threaten imminent enforcement that will stop Hope Center from operating consistent with its beliefs. "It is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (cleaned up).

As to the chilling harm, Anchorage basically rehashes its ripeness argument, denying injury because Anchorage has not yet enforced its law. But that is not necessary. Anchorage also tries to negate irreparable harm by promising not to take any "investigative or enforcement actions regarding" the First Complaint during this litigation. Opp'n 15. But that does little because Anchorage thinks "posting" is not an issue in the First Complaint. So if Hope Center posts tomorrow, Anchorage could initiate a new complaint against Hope Center. What's more, Anchorage's promise did not come until this litigation. Litigation-motivated promises simply do not negate irreparable harm, particularly when officials reserve the authority to enforce in the future. Opp'n to Mot. to Stay 3-4 (citing cases), ECF No. 55. Indeed, if defendants could defeat preliminary injunction requests by mere voluntary cessation, they would always do so. If anything, Anchorage's "promise" justifies this Court entering a preliminary injunction. An order requiring Anchorage to stop its actions cannot possibly harm Anchorage if Anchorage is willing to stop on its own.

Finally, Anchorage accuses Hope Center of manufacturing a desire to post statements. Opp'n 16. But Anchorage cites no facts to support this charge. Hope Center did not realize the need to post its policies and beliefs until a man attempted to access its

women's shelter and filed a complaint. Laurie Decl. ¶ 3, attached here as Ex. W. Now, after that incident, after Anchorage began to investigate, and after media attention, Hope Center began receiving similar requests. *Id.* So it is vital that Hope Center post its policies and obtain clarity whether it can exercise its rights, both for itself and for the battered women it serves. *Id.* at ¶¶ 3-4. Each request adds to the continual pressure Hope Center has of violating the Code.

IV. The equities and public interest favor Hope Center.

The balance of equities and public interest weigh in favor of granting Hope Center's relief for three reasons. First, Anchorage cannot possibly be harmed when it has temporarily stopped enforcement. Second, Hope Center does not seek a "sweeping" injunction as Anchorage argues. Hope Center only seeks relief from enforcement of (1) Code § 5.20.050 and § 5.20.020 as-applied to it posting its desired policies, discussing its beliefs, and opening its shelter to biological women only and (2) Code § 5.20.050(A)(2)(b), both facially and as-applied to Hope Center posting its desired policies and discussing its religious beliefs. Mot. for Prelim. Inj. 3-4, ECF No. 29. This is narrow relief that applies primarily to Hope Center alone. And third, Hope Center does not seek to alter the status quo. The status quo is Anchorage not enforcing its Code against Hope Center.

CONCLUSION

A preliminary injunction is needed to ensure that Hope Center can continue to do what it does best: serve homeless and hurting women.

DATED: December 13, 2018.

By: s/ Ryan J. Tucker

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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 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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