David A. Cortman, AZ Bar No. 029490
Jonathan A. Scruggs, AZ Bar No. 030505
Ryan J. Tucker, AZ Bar No. 034382
Katherine L. Anderson, AZ Bar No. 033104
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, Arizona 85260
(480) 444-0020
(480) 444-0028 (Fax)
dcortman@adflegal.org
jscruggs@adflegal.org
rtucker@adflegal.org
kanderson@adflegal.org

Attorneys for Plaintiff

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 NOTICE OF ERRATA REGARDING ECF NO. 56

On January 11, 2019, the Court requested that Docket Number 56 be re-filed. *See* ECF No. 71. Pursuant to the Court's instruction, attached as Exhibit 1 to this Notice of Errata is a copy of Hope Center's previously filed Opposition to Defendants' Motion for Federal Abstention (previously ECF No. 56) without the footers.

DATED: January 14, 2019.

By: s/ Ryan J. Tucker

David A. Cortman, AZ Bar No. 029490*
Jonathan A. Scruggs, AZ Bar No. 030505*
Ryan J. Tucker, AZ Bar No. 034382*
Katherine L. Anderson, AZ Bar No. 033104*
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, Arizona 85260
(480) 444-0020
(480) 444-0028 (Fax)
dcortman@adflegal.org
jscruggs@adflegal.org
rtucker@adflegal.org
kanderson@adflegal.org

Sonja Redmond, AK Bar No. 0605022
LAW OFFICE OF SONJA REDMOND
PO Box 3529
35202 Kenai Spur Hwy.
Soldotna, Alaska 99669
(907) 262-7846
(907) 262-7872 (Fax)
sredmond@greatlandjustice.com

* admitted pro hac vice

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2019, the foregoing was filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

Ryan A. Stuart
Meagan Carmichael
Assistant Municipal Attorney
Municipal Attorney's Office
P.O. Box 196650
Anchorage, Alaska 99519-6650

Sonja Redmond
LAW OFFICE OF SONJA REDMOND
PO Box 3529
35202 Kenai Spur Hwy.
Soldotna, Alaska 99669

/s/ Ryan J. Tucker
Ryan J. Tucker
Attorney for Plaintiff

David A. Cortman, AZ Bar No. 029490
Jonathan A. Scruggs, AZ Bar No. 030505
Ryan J. Tucker, AZ Bar No. 034382
Katherine L. Anderson, AZ Bar No. 033104
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, Arizona 85260
(480) 444-0020
(480) 444-0028 (Fax)
dcortman@adflegal.org
jscruggs@adflegal.org
rtucker@adflegal.org
kanderson@adflegal.org

Sonja Redmond, AK Bar No. 0605022
LAW OFFICE OF SONJA REDMOND
PO Box 3529
Soldotna, Alaska 99669
907-262-7846
907-262-7872 (Fax)
sredmond@greatlandjustice.com

Attorneys for Plaintiff

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 FOR FEDERAL ABSTENTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Code

Statute

BRIEF STATEMENT OF RELIEF SOUGHT AND AUTHORITIES

Plaintiff The Downtown Soup Kitchen d/b/a Downtown Hope Center (Hope Center) respectfully asks the Court to deny Defendants' Motion for Federal Abstention. Not only have Defendants (collectively Anchorage) failed to establish the applicability of *Younger v. Harris*, 401 U.S. 37 (1971) or its required elements, but exceptions to the doctrine apply here as well.

INTRODUCTION

Hope Center is a private, non-profit religious organization that offers free religious teaching, food, and safe shelter to homeless and hurting women in Downtown Anchorage, particularly to those women fleeing sexual abuse and sex-trafficking. And although Hope Center wants to keep ministering to these women, Anchorage interprets its public accommodation and fair housing laws to forbid this ministry. But before Anchorage could enforce its law, Hope Center filed this pre-enforcement suit to stop the future violation of its constitutional rights.

In response, Anchorage asks this Court to abstain under *Younger v. Harris* and not address the pending threat to Hope Center's rights because Anchorage is investigating to see if Hope Center violated these laws in the past when it politely referred a biological male to a hospital. But this abstention argument confuses the nature of these two proceedings—the investigation of *a past act* and this federal lawsuit seeking relief from *future enforcement*. Anchorage's argument would also make pre-enforcement cases impossible, requiring every pre-enforcement suit to be dismissed on either ripeness or abstention grounds. This argument should therefore be rejected for three reasons.

First, *Younger* abstention does not apply because Anchorage's ongoing investigation is not parallel to this lawsuit. Hope Center seeks relief not from past state actions but merely from prospective enforcement of state law. This is a *pre-enforcement* lawsuit. Conversely, the investigation matter Anchorage refers to is a complaint (First Complaint) filed by a private citizen

against Hope Center alleging past violations of Anchorage's Municipal Code (Code). These matters are not parallel—they are different, and both may proceed concurrently without threat of potential interference from this Court. As such, the *Younger* doctrine does not apply.

Second, *Younger* abstention does not apply because Anchorage's investigation satisfies none of the *Younger* requirements. To begin, the First Complaint is not an ongoing enforcement proceeding. Anchorage's deadline to make a determination in the First Complaint expired before it decided to self-abstain. According to its own Code, the matter should be over. Even so, the First Complaint is a mere investigation—not an enforcement proceeding. Next, the First Complaint is not a "quasi-criminal" enforcement action. It is not akin to a criminal prosecution, nor was it initiated by a state actor. For another thing, the Anchorage Equal Rights Commission (Commission) cannot establish an important state interest because it is not in an enforcement posture. Anchorage has not, and admittedly will not, commence formal enforcement proceedings against Hope Center. And on top of that, the First Complaint does not give Hope Center a full and fair opportunity to litigate its constitutional claims. The constitutional claims in this lawsuit are different and far broader than the issues raised in the First Complaint. The Commission is also structurally biased against Hope Center and the opportunity for state appellate review does not undo the unfairness at the Commission proceeding.

Third, this Court should not apply *Younger* because this lawsuit meets two of the *Younger* exceptions: bad faith and extraordinary circumstances. The Commission's 10-month long investigation of Hope Center without any reasonable expectation of issuing a determination shows bad faith and harassment. And those acts underscore the most damaging piece of this situation. Without obtaining equitable relief from this Court, the Hope Center's women's shelter will likely close its doors. That would hurt not only the people Hope Center serves, but the entire community

of Anchorage. The uncontested facts and legal argument below demonstrate that is unnecessary. *Younger* does not apply, so Anchorage's motion should be denied.

STATEMENT OF FACTS

Hope Center has helped those in downtown Anchorage for over thirty years. Compl. at ¶ 36, ECF No. 1. This private, non-profit organization offers free religious teaching, food, and safe shelter for homeless and hurting women, particularly those fleeing sexual abuse and sex-trafficking. Compl. at ¶¶ 2, 27, 47, 65-70, ECF No. 1. And although Hope Center wants to continue its ministry, Anchorage has threatened to end it through an unconstitutional application of its public accommodation and fair housing laws. Compl. at ¶¶ 4-11, 135-40, 148-50, 209-228, ECF No. 1.

The Code prohibits public accommodations from denying services based on sex or gender identity or stating those services will be denied. Compl. at ¶¶ 8, 114, ECF No. 1. It also forbids property owners or their agents from communicating any preference or limitation on the use of real property based on sex or gender identity. Compl. at ¶¶ 9, 119, ECF No. 1. Hope Center has not violated this law. Compl. at ¶¶ 10-13, 89-100, ECF No. 1. And the Code exempts homeless shelters, like Hope Center. Compl. at ¶¶ 10, 122, 179-80, ECF No. 1. But for the last ten months, Anchorage has used the Code and two administrative complaints to harass and pressure Hope Center to admit men into its women's only shelter, and to stop Hope Center's exercise of its religious beliefs. Compl. at ¶¶ 12-20, 118, 124, 137-40, 145-228, ECF No. 1.

On February 1, 2018, a private citizen filed the First Complaint. Compl. at ¶¶14, 89, 103, 135, ECF No. 1. Hope Center had directed an inebriated and injured transgender individual to a hospital—and even paid for the taxi—rather than admit the individual to the women's shelter. Compl. at ¶¶ 12, 94-97, ECF No. 1. The Commission pursued this complaint even though the

evidence shows that Hope Center did not discriminate against that individual. Compl. at ¶¶ 137-40, 145-49, ECF No. 1.

Hope Center asked the Commission to dismiss or close the First Complaint, but it refused to rule. Compl. at ¶¶ 145-47, 206-08, ECF No. 1. Instead, the Commission's Executive Director initiated a *second* complaint against Hope Center, accusing Hope Center *and its lawyer* of violating the Code by answering questions about the complaint in the media (Second Complaint). Compl. at ¶¶ 16, 151-54, ECF No. 1. The Commission recognized its egregious error in filing the Second Complaint by closing that case in October 2018, after the filing of this lawsuit. Defs.' Mot. for Federal Abstention at 4, ECF No. 43. But the First Complaint remains, even though the Commission has exceeded its statutory time limit for investigating that complaint. Two months ago, the Commission let a Code-mandated deadline pass without making a required determination on the First Complaint. Compl. at ¶¶ 18, 135, 208, ECF No. 1; Code § 5.50.010. Now, it is attempting to use that administrative case as a means for abstention relief.

Throughout this process, Anchorage has attempted to conflict out Hope Center's attorney, and then refused to recognize its new counsel or provide information about procedures at a fact finding conference. Compl. at ¶¶ 16-17, 151-71, 187-89, ECF No. 1. It then proceeded with that conference even though Hope Center's lead counsel was unavailable and then refused to allow a court reporter to transcribe the discussion**.** Compl. at ¶¶ 170-71, 187-89, ECF No. 1. The Commission staff has also personally criticized the Hope Center's counsel, telling them not to supplement discovery and then blaming them for not doing so. Compl. at ¶¶ 192-205, ECF No. 1. These undisputed facts prove Anchorage's bad faith, and standing alone justify denial of Anchorage's motion. But a ruling on that ground is not necessary. Anchorage cannot establish *Younger's* applicability, much less meet each of its required elements.

ARGUMENT

Federal courts have a "virtually unflagging obligation" to decide cases under their jurisdiction. *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). *Younger* "abstention remains an extraordinary and narrow exception to the general rule that federal courts 'have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Potrero Hills Landfill, Inc. v. Cty. of Solano*, 657 F.3d 876, 882 (9th Cir. 2011) (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358 (1989)).

Anchorage's motion seeks dismissal, but it is unclear under what basis it has been brought. The motion does not bring in facts outside Plaintiff's Complaint, so presumably it filed a facial attack under Rule 12(b)(1). And although the pleadings deadline is weeks away, Anchorage may be seeking relief under Rule 12(c).[1] Either way, the standard is the same. Courts must accept plaintiff's allegations as true and draw all reasonable inferences in the plaintiff's favor. *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986); *Ctr. for Biological Diversity v. Zinke*, 313 F. Supp. 3d 976, 981 (D. Alaska 2018). Under that standard, Anchorage's motion fails.

I. *Younger* does not apply as a threshold matter because this is a pre-enforcement challenge with no "parallel" state proceeding.

As a threshold matter, abstention requires a "parallel" state proceeding. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013). But there is none in this case for two reasons. First, this litigation and the Commission investigation involve different claims. While Anchorage points to the First Complaint where a private citizen brought discrimination claims against Hope Center, that complaint at most involves an administrative investigation into a third party's allegation of

[1] Hope Center understands Defendants' motion to dismiss to have been brought under Federal Rule of Civil Procedure 12(b) or 12(c).

past discrimination. Compl. at ¶ 135, ECF No. 1; Defs.' Mot. for Federal Abstention Ex. B, ECF No. 43-2.[2] In contrast, this lawsuit is a pre-enforcement case, which raises constitutional challenges to Anchorage Code §§ 5.20.020 and 5.20.050 and their *future* application against the Hope Center's religious activity, including its desire to publish and operate according to its religious beliefs. Compl. at ¶ 21, ECF No. 1. What takes place in one matter does not necessarily effect the other. Because Hope Center seeks relief not from past state actions but merely from prospective enforcement, a ruling from this Court would not interfere with Anchorage's executive functions in a way *Younger* disapproves. *Potrero Hills*, 657 F.3d at 885 (citing *Wooley v. Maynard*, 430 U.S. 705, 709-11 (1977)).

Second, the parties are different. In the First Complaint, a private individual brought a discrimination complaint against Hope Center. Compl. at ¶ 135, ECF No. 1; Defs.' Mot. for Federal Abstention Ex. B, ECF No. 43-2. But in this lawsuit, Hope Center brought claims against the Municipality of Anchorage, the Commission, and Pamela Basler, individually and in her official capacity as the Executive Director of the Commission. Compl. at ¶¶ 28-31, ECF No. 1. Neither the individual citizen nor any of the city defendants are parties to the First Complaint. Defs.' Mot. for Federal Abstention Ex. B, ECF No. 43-2. Because the First Complaint and this lawsuit are not "parallel" cases, *Younger* does not apply as a threshold matter. *Sprint*, 571 U.S. at 72; *Wooley*, 430 U.S. at 709-11.

II. This case is not an "extraordinary circumstance" requiring dismissal under *Younger*.

Even when cases are parallel, abstention applies only in "extraordinary circumstances." *Deakins*, 484 U.S. at 203; *see also Sprint*, 571 U.S. at 72 (noting that a federal court may not

[2] The Court may take judicial notice of this document and other filings in this case. FED. R. EVID. 201; *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986).

abstain "simply because a pending state-court proceeding involves the same subject matter"); *Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835, 841 (9th Cir. 2017) ("The Supreme Court has emphasized that the federal courts [are] obligat[ed] to exercise the jurisdiction given them including in cases involving parallel state litigation." (cleaned up)). Absent those "exceptional" circumstances, the general rule governs: federal courts generally exercise jurisdiction even when a pending state proceeding concerns the same subject matter. *Sprint*, 571 U.S. at 73.

As the Ninth Circuit recently noted, "[a]fter more than forty years of unchecked doctrinal expansion, the Supreme Court [in *Sprint Commc'ns, Inc. v. Jacobs*] changed course and made clear that *Younger* abstention was appropriate only in the two 'exceptional' categories of civil cases it had previously identified: (1) 'civil enforcement proceedings'; and (2) 'civil proceedings involving certain orders ... uniquely in furtherance of the state courts' ability to perform their judicial functions.'" *Cook v. Harding*, 879 F.3d 1035, 1039 (9th Cir. 2018) (citing *Sprint*, 571 U.S. at 78). *See also ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 759 (9th Cir. 2014) (concluding that *Sprint* resolved any "interpretive dilemmas" about the types of proceedings to which *Younger* applies when it "squarely" held that abstention in civil cases is limited to these two categories).

Recent Ninth Circuit cases clarify that courts should apply *Younger* abstention "only when the state proceedings: (1) are ongoing, (2) are quasi-criminal enforcement actions or involve a state's interest in enforcing the orders and judgments of its courts, (3) implicate an important state interest, and (4) allow litigants to raise federal challenges." *ReadyLink Healthcare*, 754 F.3d at 759. If these four threshold elements are established, the court then considers a fifth prong: (5) "whether the federal action would have the practical effect of enjoining the state proceedings and whether an exception to *Younger* applies." *Rynearson v. Ferguson*, 903 F.3d 920, 924-25 (9th Cir.

2018) (citing *ReadyLink Healthcare*, 754 F.3d at 759). Each of those requirements must be "strictly met." *Rynearson*, 903 F.3d at 925 (citing *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1148 (9th Cir. 2007)). Applied here, Anchorage has not met its burden to prove any element.

1. The First Complaint is not an ongoing enforcement proceeding.

This Court should not abstain under *Younger* because the First Complaint is neither "ongoing" nor an "enforcement proceeding."

As for ongoing, *Younger* abstention exists to avoid interference with ongoing state proceedings. *NOPSI*, 491 U.S. at 372. Without an ongoing state proceeding, courts do not abstain. For this reason, federal courts will keep jurisdiction even when a state proceeding is ongoing *at the time a federal suit begins*—so long as that state proceeding has stopped when the motion for abstention is filed.[3] *See, e.g.*, *Rocky Mountain Gun Owners v. Williams*, 671 F. App'x 1021, 1025, (10th Cir. 2016) ("The district court made a clearly erroneous factual finding that the parallel state court proceedings *were still ongoing at the time it granted the Secretary's motion to dismiss* on *Younger* abstention grounds." (emphasis added)); *Winter v. Wolnitzek*, 834 F.3d 681, 688 (6th Cir. 2016) ("In the absence of an ongoing enforcement action, *Younger* has no role to play, leaving us with authority, indeed an obligation, to resolve the case.").

But Anchorage fails this principle. In this instance, Anchorage's Ordinance required the Commission to issue a determination within 240 days of the filing of the First Complaint. Code § 5.50.010 ("The commission shall in any event issue its determination within 240 days after the filing of the complaint."). It did not. Instead, over 300 days have elapsed. And Anchorage

[3] One Ninth Circuit decision suggests that "[s]tate proceedings are 'ongoing' if they are initiated 'before any proceedings of substance on the merits have taken place in the federal court.'" *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 728 (9th Cir. 2017) (quoting *Hicks v. Miranda*, 422 U.S. 332, 349 (1975)). But this general statement is not applicable to these facts. Nor has the Supreme Court provided complete clarity on this subject. For example, the Supreme Court has twice left unanswered whether "an administrative adjudication and the subsequent state court's review of it count as a 'unitary process' for *Younger*." *Sprint*, 571 U.S. at 78; *NOPSI*, 491 U.S. at 369.

missed its 240-day deadline well before it stated it would self-abstain. P. Basler Aff. at ¶ 3, ECF No. 53. So statutorily, any "ongoing" matter must be over.

Moreover, Anchorage has even conceded that no ongoing proceeding exists. The Commission has "certif[ied] that [it] will undertake no investigative or enforcement actions regarding [the First Complaint], while this Court exercises jurisdiction in the matter." P. Basler Aff. at ¶ 3, ECF No. 53. As such, the First Complaint is not and will not be "ongoing" during this case. No discovery will be issued in that matter, no hearing set, no determinations made, no orders entered, and no opportunity for appeal. In essence, Anchorage willingly ceased any ongoing proceeding, and alleviated any possibility of "interference" were this Court to move forward. *See Gilbertson v. Albright*, 381 F.3d 965, 977-78 (9th Cir. 2004) ("[W]e are convinced that *Younger* abstention involves only such interference . . . that [] would have the same practical effect on the state proceeding as a formal injunction."). In light of this concession, this Court cannot possibly be interfering with any ongoing proceeding. Anchorage simply does not have an interest to proceed with a matter that Anchorage has willingly ceased.[4]

Moving from ongoing to enforcement, this Court should refuse to apply *Younger* because Anchorage's ongoing "proceeding" is a mere investigation, not an enforcement proceeding. A mere investigation that may or may not lead to future prosecution is not an "ongoing" proceeding under *Younger*. *Steffel v. Thompson*, 415 U.S. 452, 475 (1974). Courts therefore distinguish between "formal enforcement proceedings" and the preceding period which involves only a "threat of enforcement." *Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 519-20 (1st Cir. 2009). *Younger* applies during the former, not the latter. *Id*.

[4] This voluntary cessation also justifies this Court entering a preliminary injunction against Anchorage immediately. Anchorage cannot possibly be harmed by a court order stopping future enforcement if Anchorage is willing to stop its ongoing investigative 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.

Telco Communications, Inc. v. Carbaugh illustrates the point and applies this point to facts similar to this case. 885 F.2d 1225, 1227 (4th Cir. 1989). In *Telco*, a state agency began investigating Telco Communications for alleged wrongdoing. The agency notified Telco of the claims against it and invited Telco to attend a fact-finding conference. *Id.* The participants at the conference were not sworn in, there was no opportunity to examine or cross-examine individuals, and no record was maintained. *Id*. at 1228. After attending that conference, Telco filed suit in federal court to stop further agency action. *Id.* at 1227. In addition to a state claim, Telco also challenged certain state law provisions on First Amendment free speech grounds. *Id.* The state agency then asked the district court to abstain under *Younger*, but the court declined to do so. *Id.*

On appeal, the Fourth Circuit affirmed. It rejected the state agency's argument that "*Younger* abstention is required whenever a state bureaucracy has initiated contact with a putative federal plaintiff." *Id.* at 1229. The court instead held that "[w]here no formal enforcement action has been undertaken, any disruption of state process will be slight. While important state interests are present in connection with this or any state statute, the strength of those interests will be respected by any court assessing a plaintiff's constitutional claims." *Id.*

The Fourth Circuit also explained that "[The agency's] contention—that abstention is required whenever enforcement is threatened—would leave a party's constitutional rights in limbo while an agency contemplates enforcement but does not undertake it." *Id.* The court, therefore, noted that "the period between the threat of enforcement and the onset of formal enforcement proceedings may be an appropriate time for a litigant to bring its [constitutional] challenges in federal court." *Id.* Many other appellate courts concur.[5]

[5] *Google, Inc. v. Hood*, 822 F.3d 212, 218-20, 223 (5th Cir. 2016) (refusing to apply *Younger* even though the Mississippi attorney general was investigating, had served subpoenas on the federal plaintiff, and had threatened it with criminal prosecution and civil litigation because "*Younger* does not apply merely because a state bureaucracy has initiated contact with a putative federal plaintiff." (quotation omitted)); *Winter*, 834 F.3d at 686 (rejecting

The *Telco* rationale applies here because the First Complaint is still in the "investigative" phase, not the enforcement stage—as Anchorage's own abstention motion concedes. Defs.' Mot. for Federal Abstention at 2, ECF No. 43. In fact, the director of Anchorage's own Commission has testified that "[the Commission] has undertaken no enforcement action against Plaintiff regarding [the First Complaint], reached no decision as to whether [the Commission] has jurisdiction regarding [the First Complaint], and issued no determination as to whether the facts substantiate the alleged discriminatory conduct." P. Basler Aff. at ¶ 2, ECF No. 53. These concessions by themselves prove the lack of enforcement action and justify denying Anchorage's motion.

The underlying facts do as well. Any fact finding would be an informal conference where the parties receive and exchange information and Commission staff attempt to negotiate a voluntary settlement. Code § 5.50.020(A). And just like in *Telco*, the fact-finding conference Anchorage wants to hold provides no opportunity to cross-examine individuals and no record is taken. *Telco*, 885 F.2d at 1227-28; Compl. at ¶¶ 127-28, 187-89, ECF No. 1; Code § 5.50.020. All questions must be presented through Commission staff. Code § 5.50.020(A).[6] Anchorage's fact-finding conference is just as informal as the conference in *Telco*.

Younger because a finding of probable cause did not mean that a formal, judicial proceeding was pending); *Mulholland v. Marion Cty. Election Board*, 746 F.3d 811, 817 (7th Cir. 2014) ("The possibility that a state proceeding may lead to a future prosecution of the federal plaintiff is not enough to trigger *Younger* abstention; a federal court need not decline to hear a constitutional case within its jurisdiction merely because a state investigation has begun."); *Guillemard-Ginorio*, 585 F.3d at 519-20 (*Younger* did not apply when the insurance commission's investigation had been pending for two years, but no formal charges had been brought); *La. Debating and Literary Ass'n v. City of New Orleans*, 42 F.3d 1483, 1487-88 (5th Cir. 1995) (citing *Telco* and rejecting *Younger* abstention because no ongoing state proceedings even though discrimination complaints had been filed with the Human Rights Commission before filing of federal lawsuit); *see also Myers v. Thompson*, 192 F. Supp. 3d 1129, 1137-38 (D. Mont. 2016) (refusing to apply *Younger* because investigation had not progressed beyond investigatory stage).

[6] If at the conclusion of the investigation, which includes the fact finding conference, the Executive Director determines the discrimination complaint is supported by substantial evidence, she will serve that written determination on the parties. Code § 5.60.010. Afterwards, a conciliation conference is to be conducted with the respondent. Code § 5.60.040. If those settlement efforts fail, the case is then submitted to the Commission for formal review. Code § 5.70.010. A panel is appointed, a hearing is set, and evidence is received. Code §§ 5.70.020, 5.70.030, 5.70.110, 5.70.120. At the completion of this public hearing, the panel issues its order. Code §§ 5.70.130, 5.70.140. None of these formal proceedings have been commenced against Hope Center.

Finally, the same constitutional rationale from *Telco* applies in this case as well. Anchorage's contention—that abstention is required whenever enforcement is merely threatened—leaves Hope Center's constitutional rights in limbo while the Commission contemplates enforcement but does not undertake it. *Telco*, 885 F.2d at 1229. Hope Center is "'between the Scylla of intentionally flouting [Anchorage's ordinance] and the Charybdis of forgoing what [it] believes to be constitutionally protected activity in order to avoid becoming enmeshed' in enforcement proceedings." *Telco*, 885 F.2d at 1229 (quoting *Steffel*, 415 U.S. at 462). That uncertainty has chilled Hope Center's First Amendment freedoms. *See Zwickler v. Koota,* 389 U.S. 241, 252 (1967); *see also City of Houston v. Hill,* 482 U.S. 451, 467 (1987) (Court "particularly reluctant to abstain in cases involving facial challenges based on the First Amendment."). Hope Center's situation is analogous to an officer investigating a scene, issuing a warning and threatening arrest, and then leaving. *Steffel*, 415 U.S. at 459. *Younger* does not apply in that situation. *Id.* So it doesn't apply in this situation either. Hope Center simply does not have to first expose itself to prosecution to be entitled to challenge a law it claims chills and threatens its constitutional rights. *Id*.

The factual similarity between this case and *Telco* also distinguishes this case from the ones Anchorage cites—*Middlesex County Ethics Committee v. Garden Bar Association* and *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc*. Defs.' Mot. for Federal Abstention at 5-8, ECF No. 43. Neither of those cases involved investigations. In both of those cases, the regulating agencies had already investigated the allegations, already determined that probable cause existed, and already served formal charges on the entities. *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 623–24 (1986); *Middlesex Cty. Ethics Comm. v.*

Garden State Bar Ass'n, 457 U.S.423, 428 (1982); *Louisiana Debating & Literary Ass'n v. City of New Orleans*, 42 F.3d 1483, 1490 (5th Cir. 1995) (distinguishing *Middlesex* and *Dayton Christian Schools* on these grounds). None of that is true here. The First Complaint is still in the investigative phase, with no determination made, and no formal hearing set. Compl. at ¶¶ 207-28, ECF No. 1.

2. The First Complaint is not a "quasi-criminal" enforcement action or a case involving the state's interest in enforcing orders and judgments of its courts.

Courts apply *Younger* abstention in civil cases only in two "exceptional" situations: "(1) 'civil enforcement proceedings'; and (2) 'civil proceedings involving certain orders … uniquely in furtherance of the state courts' ability to perform their judicial functions.'" *Cook*, 879 at 1039 (citing *Sprint*, 571 U.S. at 78). And according to the Supreme Court, civil enforcement proceedings are proceedings generally "akin to a criminal prosecution" and routinely initiated by a state actor. *Id*. at 1040.

But Anchorage cannot justify applying *Younger* to this case because the First Complaint is not a civil enforcement proceeding—it is not akin to a criminal prosecution and it was not initiated by a state actor. To the contrary, the First Complaint was initiated by a private individual—not Anchorage. *Sprint*, 571 U.S. at 80; Defs.' Mot. for Federal Abstention Ex. B, ECF No. 43-2. No state actor has lodged a formal complaint against the Hope Center in the First Complaint. Likewise, that matter is not akin to a criminal prosecution. The investigation phase, including the procedures at the fact finding conference, has none of the protections or procedures required for a criminal prosecution. Compl. at ¶ 159, ECF No. 1; Code § 5.50.020. For example, no cross-examination is allowed and all questions must be submitted to Commission staff. Code § 5.50.020(A).

Next, *Younger* abstention should not apply to this civil case because the First Complaint is not a "civil proceeding[] involving certain orders … uniquely in furtherance of the state courts'

ability to perform their judicial functions." *Cook*, 879 F.3d at 1039. Anchorage has not argued this point, nor is it applicable. Anchorage is not seeking to enforce any order. Rather, Anchorage is merely investigating. The second *Younger* prong is not satisfied.

3. The Commission cannot establish an important state interest because it is not in an enforcement posture.

"Where the state is in an enforcement posture in the state proceedings, the 'important state interest' requirement is easily satisfied, as the state's vital interest in carrying out its executive functions is presumptively at stake." *Potrero Hills*, 657 F.3d at 883-84. But Anchorage has not satisfied this prong for two reasons.[7]

First, Anchorage has no important interest in carrying out its executive functions when it has not, and admittedly will not, commence formal enforcement proceedings against Hope Center. As explained above, the First Complaint is an investigation, not an enforcement proceeding. *Supra* pp. 8-13. And no matter what it is, Anchorage has promised not to proceed with it. *Supra* p. 9. As a result, Anchorage was not in an enforcement posture when this lawsuit was filed, it was not in an enforcement posture when it filed its abstention motion, it is not in an enforcement posture today, and it will not be in an enforcement posture during the pendency of this lawsuit.

To be sure, Anchorage claims that interpreting and applying its public accommodation law "implicates important state interests in eliminating sex and gender identity-based discrimination." Defs.' Mot. for Federal Abstention at 6, ECF No. 43. But "it is not the bare subject matter of the underlying [] law that [is] test[ed] to determine whether the state proceeding implicates an 'important state interest' for *Younger* purposes." *Potrero Hills*, 657 F.3d at 884. If that were the

[7] Anchorage also cannot satisfy the important state interest requirement because Anchorage has acted with bias and bad faith against Hope Center. *Compare Potrero Hills*, 657 F.3d at 883-84 (noting that state lacks an important state interest where the "state proceeding is motivated by a desire to harass or is conducted in bad faith." (citation omitted)) with *supra* pp. 20-22 (explaining how Anchorage has acted in bad faith).

case, then almost any civil lawsuit requiring the interpretation of a state law would pass this prong. *Id.* Instead, the content of state laws becomes "important" for *Younger* purposes only when coupled with the state's interest in enforcing such laws. *Id*. at 884-885. If the state is not in any type of enforcement posture against the federal plaintiff at the time the federal lawsuit is filed, then the "state's vital executive functions would not be unduly hampered by a federal court's adjudication of [the federal claims]." *Id*. at 885. For this reason, none of Anchorage's cited interests justify abstaining.

Second, Anchorage cannot establish any interest justifying abstention because of the pre-enforcement nature of Hope Center's suit. "Where a federal plaintiff seeks relief not from past state actions but merely from prospective enforcement of state law, federal court adjudication would not interfere with the state's basic executive functions in a way *Younger* disapproves." *Id.* at 885 (citing *Wooley*, 430 U.S. at 709-711). In contrast, Anchorage's theory would make pre-enforcement suits impossible. If Hope Center files suit before an investigation, Anchorage would move to dismiss for lack of ripeness. If Hope Center files suit during or after an investigation, then Anchorage moves to abstain based on *Younger*. But neither is correct. Pre-enforcements suits are possible and suited for precisely this situation: a real threat—as evidenced by the Commission's investigation—that has materialized before actual enforcement.

4. The First Complaint does not give Hope Center a full and fair opportunity to litigate its constitutional claims.

Federal courts do not abandon plaintiffs to biased state administrative forums. *E.g.*, *Gibson v. Berryhill*, 411 U.S. 564, 577–79 (1973) (declining to abstain under *Younger* where litigants could not get a fair hearing). Three factors show that Hope Center cannot fully and fairly litigate its federal claims in the Commission case. First, the First Complaint does not allow Hope Center to litigate all its federal claims. Second, the Commission is structurally biased against Hope Center.

And third, the opportunity for state appellate review does not undo the unfairness of the Commission proceeding. In short, *Younger* does not apply because the Commission is "incompetent . . . to adjudicate" the Hope Center's constitutional claims. *Id*. at 577.

a. Hope Center cannot raise many of its constitutional claims in the First Complaint.

The claims in this lawsuit are far broader and much different than the issues raised in the First Complaint. The Hope Center will not have *any* opportunity, much less a fair one, to litigate many of its constitutional claims before the Commission. The Second Complaint initiated by the Commission alleged that Hope Center and Mr. Clarkson's firm, Brena, Bell & Clarkson, P.C. ("BBC"), violated Anchorage Code §§ 5.20.020(A)(7) and/or 5.20.050. These bans prohibit public accommodations from stating service based on sex or gender identity would be denied and likewise stop property owners or their agents from communicating any preference or limitation on the use of real property based on sex or gender identity. Compl. at ¶¶ 153-54, ECF No. 1.

In the First Complaint, Hope Center will not be able to raise its as-applied and facial challenge to the Code publication bans, which Anchorage has interpreted to forbid Hope Center from posting its desired policies, and explaining the religious reasons why. *Id.* at ¶¶ 21, 216-27, 253-55, 258-82 & Prayer. Anchorage makes this point clear in its briefing: "Posting is not at issue in the pending [First Complaint]." Defs.' Opp'n to Mot. for Prelim. Inj. at 16, ECF No. 52. 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).

b. The Commission is structurally biased against the Hope Center.

The Commission's adjudicative procedures contravene constitutional limits. Compl. at ¶¶ 296-97, ECF No. 1. "[A]n unconstitutional potential for bias exists when the same person

serves as both accuser and adjudicator in a case." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016). People qualify as "accusers" if they approve a significant prosecutorial decision, even if they do not conduct an investigation or actively participate in the prosecution. *Id.* at 1907. Having approved a decision to prosecute, such individuals "cannot be, in the very nature of things, wholly disinterested in the [outcome]." *Id.* at 1906. There is an impermissible "risk" that they will be "psychologically wedded to [their] previous position." *Id.* (quotation marks omitted).

The Commission arrangement offends due process. After a discrimination complaint is filed, the Commission Director may serve discovery on any party. Code § 5.50.070(A). But Hope Center may not. Hope Center may only issue discovery after a determination is made. Code §§ 5.50.070(B), 5.60.040. And once a formal determination has been made by the Commission Director, a hearing panel is appointed by the Commission chair, and the Commission Director presents the case. Code §§ 5.60.010, 5.70.010(A), 5.70.020. Here, although the Commission Director failed to make a determination by the Code-mandated deadline, she is tasked with presenting any finding of discrimination to the hearing panel—a panel appointed solely by the Commission chair. *Id*. Worse yet, any formal determination of discrimination would be presented in the wake of the Commission's failed attempt to prosecute claims against Hope Center and its counsel in the Second Complaint. There is an impermissible risk that the Commission will be "psychologically wedded to their previous position." It would be very embarrassing for the Commission to admit again that it was wrong. Thus, the Commission's structure and procedure, particularly as applied to Hope Center, violates due process. *Younger* does not apply when the state proceeding is itself constitutionally deficient.

c. The opportunity for state appellate review does not undo the unfairness of the Commission proceeding.

Despite evidence of bias, Anchorage argues that *Younger* applies because state appellate courts can review whatever the Commission decides. Defs.' Mot. for Federal Abstention at 2, 7-8, ECF No. 43. But this argument ignores that the Hope Center has a right to "a neutral and detached [adjudicator] in the first instance." *Ward v. Vill. of Monroeville*, 409 U.S. 57, 61–62 (1972). Indeed, when the Supreme Court held that *Younger* abstention did not apply to a state administrative proceeding that was biased, it explicitly said that the availability of "judicial review, de novo or otherwise, . . . at the conclusion of the administrative proceedings" did *not* change the outcome. *Gibson*, 411 U.S. at 577. By the time the First Complaint reaches appellate review, it will be too late to protect the Hope Center's federal rights. It not only will have lost its chance at a fair proceeding from the start, but also will have already suffered some of the harm that this lawsuit seeks to prevent.

What's more, the unfair Commission proceeding will taint the entire process. Hope Center's constitutional claims depend in part on evidence of Commission hostility. Compl. at ¶¶ 19, 134, 197, 211, 238, 328-329, 333, 344, 353, 354, 370, ECF No. 1; Mem. in Supp. of Mot. for Prelim. Inj. at 7, 10, 12-14, ECF No. 30. So the strength of those claims will be directly impacted by the discovery, evidence allowed, and record created at the Commission. In addition, judicial review will be limited to the record in existence at the time of the Commission's decision. Alaska Stat. § 44.62.570; *see e.g.*, *Wieler v. United States*, 364 F. Supp. 2d 1057, 1062 (D. Alaska 2005). The Commission's hostility toward the Hope Center and its counsel will infect the determination, hearing, and judicial review process.

Moreover, the harm to Hope Center from an unfair Commission proceeding is great, regardless of what happens on a possible judicial review. The First Complaint was initiated over

300 days ago. Compl. at ¶ 135, ECF No. 1. Even if the Commission makes an immediate determination now, the public hearing, order from the hearing panel or officer, Commission order, possible reconsideration, and judicial review of that decision will take years. Hope Center simply does not have that much time. It must obtain immediate relief, or face the prospect of closing its doors to the homeless women of Anchorage. Compl. at ¶¶ 21, 64, 212-15, 229, ECF No. 1; Laurie Decl. at ¶ 52, ECF No. 32.

5. This lawsuit will not have the practical effect of enjoining the First Complaint because this lawsuit is different from that investigation.

In addition to Anchorage not satisfying the first four prongs described above, this Court should also not abstain because the relief requested in this lawsuit is different from the First Complaint. *See, e.g., Rynearson*, 903 F.3d at 927.

The First Complaint alleges sex and gender identity discrimination. Defs.' Mot. for Federal Abstention Ex. B, ECF No. 43-2. In contrast, this pre-enforcement lawsuit seeks in part to prevent Anchorage from enforcing certain Code sections, so that Hope Center can post its desired policies and remain open to biological women only. Mot. for Prelim. Inj. at 3-4, ECF No. 29. And Anchorage concedes that its pending investigation does not involve this issue. Defs.' Opp'n to Mot. for Prelim. Inj. at 16, ECF No. 52. In light of this admission, it is unclear Hope Center's requested relief will have any impact on the First Complaint.

Secondly, if the Commission had simply relied on the evidence already presented to them proving that the person was not admitted to the shelter because he was drunk, violent, and showed up after hours, they would have already closed the investigation. Regardless of timing, that is the outcome that the evidence requires the Commission to reach. And this lawsuit will have no practical effect on that outcome. The request here asks that the women's shelter be permitted to act and speak consistent with its religious beliefs in the future. Compl. at ¶ 21, ECF No. 1. This

court should not abstain simply because the Commission is abusing its authority to harass Hope Center based on a past incident.

6. In addition to the fact that Anchorage has not met all required elements, two exceptions to *Younger* apply.

In addition to the necessary *Younger* factors, courts also refuse to abstain if the ongoing state proceeding is characterized by bias, bad faith, harassment, or some other extraordinary circumstances that would make abstention inappropriate. *Kenneally v. Lungren*, 967 F.2d 329, 332 (9th Cir. 1992) (quotation omitted). Courts consider three factors when "determining whether a state action was commenced in bad faith or intended to harass: (1) whether it was frivolous or undertaken with no reasonably objective hope of success; (2) whether it was motivated by [the accused's] suspect class or in retaliation for the . . . exercise of constitutional rights; and (3) whether it was conducted in such a way as to constitute harassment and an abuse of prosecutorial discretion." *Weitzel v. Div. of Occupational Prof'l Licensing*, 240 F.3d 871, 875-77 (10th Cir. 2001). *see also Cal. Outdoor Equity Partners v. City of Corona*, No. CV 15-03172 MMM (AGRx), 2015 WL 4163346, at *9 (C.D. Cal. July 9, 2015). "Extraordinary circumstances" is not capable of exact definition, but includes the need for "pressing need for immediate federal equitable relief." *Kugler v. Helfant*, 421 U.S. 117, 125 (1975).

a. Anchorage is acting in bad faith and harassing the Hope Center.

First, the Commission's 10-month long investigation of the allegations made in the First Complaint shows bad faith and harassment. The evidence demonstrates "Jessie Doe" was referred to a hospital for non-discriminatory reasons. Compl. at ¶¶ 12-13, 89-102, 137-40, 145, ECF No. 1; Mem. in Supp. of Prelim. Inj. at 5, ECF No. 30. And based upon those undisputed facts, Hope Center sought dismissal or closure of that proceeding. Compl. at ¶¶ 18, 145, ECF No. 1. But the Commission has done nothing. Instead, the Commission is currently 60 days past its required

deadline of 240 days to issue a determination. Compl. at ¶¶ 135, 206-08, ECF No. 1. It had no reasonable expectation of issuing a discrimination determination before its own deadline, and it does not have one now. Such acts show bad faith and harassment. *See Baffert v. Cal. Horse Racing Bd.*, 332 F.3d 613, 621 (9th Cir. 2003) (bad faith typically means that a "prosecution has been brought without a reasonable expectation of obtaining a valid conviction"). And this bad faith standard is easily met here because all of the facts in the complaint must be taken as true and all reasonable inferences must be drawn in Hope Center's favor. *See Ctr. for Biological Diversity*, 313 F. Supp. 3d at 981.

Second, Anchorage's prosecution is motivated by the Hope Center's suspect class—religion. *Hamby v. Parnell*, 56 F. Supp. 3d 1056, 1062 (D. Alaska 2014) (including religion as a suspect class). Anchorage's interpretation of its laws has forced the Hope Center to stay silent about its religious policies and beliefs. And because of those views, Director Basler filed a frivolous Second Complaint against the Hope Center and its counsel. Compl. at ¶¶ 16, 151-54, ECF No. 1; Mem. in Supp. of Prelim. Inj. at 14.

Third, Anchorage's prosecution is oppressive and unjust. The Commission first sought to conflict out the Hope Center's attorney, and then refused to recognize its new counsel or provide information about procedures at a fact finding conference. Compl. at ¶¶ 16-17, 151-169, ECF No. 1; Mem. in Supp.of Prelim. Inj. at 14. It then proceeded with that conference even though the Hope Center's lead counsel was unavailable and then refused to allow a court reporter to transcribe the discussion. Compl. at ¶¶ 170-71, 187-89, ECF No. 1; Mem. in Supp. of Prelim. Inj. at 14. Commission staff has also personally criticized the Hope Center's counsel, telling them not to supplement discovery and then blaming them for not doing so. Compl. at ¶ 192-205, ECF No. 1; Mem. in Supp.of Prelim. Inj. at 14. And the Commission's refusal to dismiss the Commission case

despite being more than two months past the Ordinance deadline likewise shows bad faith. The Commission's intentional delay alone is evidence of this element. *San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose*, 546 F.3d 1087, 1093 (9th Cir. 2008) ("Plaintiffs' hypothetical example [of intentional delay by a state administrative agency] would fall under [the bad faith] exception….").

The foregoing discussion more than suffices to show bad faith and harassment. But if the Court disagrees, it should allow Hope Center to complete its discovery on this issue before ruling on Anchorage's motion. *Laub v. U.S. Dept. of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003) (non-moving party entitled to discovery in response to Rule 12(b)(1) motion); *Sica v. Connecticut*, 331 F. Supp. 2d 82, 88 (D. Conn. 2004) (allowing "limited discovery" for plaintiff "to buttress her claims that the *Younger* exceptions apply"). Hope Center has requested information on Anchorage's communications, the investigation itself, and its standard practices to determine whether they were deviated from in this case.[8]

b. The potential closure of the Hope Center's women's shelter is an "extraordinary circumstance" warranting immediate equitable relief.

Hope Center's women's shelter will likely close its doors if it does not get equitable relief from this Court. The inability of Hope Center to defend itself in the public square due to Anchorage's laws has hindered its ability to raise funds, leaving it in a tenuous financial state. Compl. at ¶¶ 21, 64, 212-15, 229, ECF No. 1; Laurie Decl. at ¶ 52, ECF No. 32 Such an event would be catastrophic for the city, and for the abused women who seek shelter at Hope Center. 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

[8] Anchorage's responses to Hope Center's current discovery requests are not due until January 4, 2019.

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."). These circumstances are "extraordinary" and likewise warrant an exception from *Younger*.

CONCLUSION

Hope Center simply wants to teach and help homeless women trying to escape from abuse, battery, and sex trafficking. But Anchorage will not even afford Hope Center a fair forum to decide whether the Constitution gives it that freedom. Federal court is the only tribunal that will give Hope Center that from start to finish. Hope Center asks this Court to deny Anchorage's motion for federal abstention and exercise its jurisdiction over this case.

Respectfully submitted this 5th day of December, 2018.

By: s/ Ryan J. Tucker

David A. Cortman, AZ Bar No. 029490*
Jonathan A. Scruggs, AZ Bar No. 030505*
Ryan J. Tucker, AZ Bar No. 034382*
Katherine L. Anderson, AZ Bar No. 033104*
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, Arizona 85260
(480) 444-0020
(480) 444-0028 (Fax)
dcortman@adflegal.org
jscruggs@adflegal.org
rtucker@adflegal.org
kanderson@adflegal.org

Sonja Redmond, AK Bar No. 0605022
LAW OFFICE OF SONJA REDMOND
PO Box 3529
Soldotna, Alaska 99669
907-262-7846
907-262-7872 (Fax)
sredmond@greatlandjustice.com

* admitted pro hac vice

Attorneys for Plaintiff

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:

Meagan Carmichael
Ryan A. Stuart
Assistant Municipal Attorney
Municipal Attorney's Office
P.O. Box 196650
Anchorage, Alaska 99519-6650

/s/ Ryan J. Tucker
Ryan J. Tucker
Attorney for Plaintiff