

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF ALASKA

3 THE DOWNTOWN SOUP KITCHEN,))
4 Plaintiff,))
5 vs.) CASE NO. 3:18-cv-00190-SLG)
6 MUNICIPALITY OF ANCHORAGE,))
7 ET AL.,))
8 Defendants.))
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10 TRANSCRIPT OF ORAL ARGUMENT ON PENDING MOTIONS
(DKT 29, 43, 44, 62 and 68)
11 **BEFORE THE HONORABLE SHARON L. GLEASON, DISTRICT JUDGE**
January 11, 2019; 1:32 p.m.
12 Anchorage, Alaska

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Federal Official Court Reporter
25 Transcript Produced from the Stenographic Record

1 (Call to Order of the Court at 1:32 p.m.)

2 DEPUTY CLERK: All rise. Her Honor, the Court,
3 the United States District Court for the District of
4 Alaska is now in session, the Honorable Sharon L.
5 Gleason presiding.

6 Please be seated.

7 THE COURT: Good afternoon. We are on record
8 this afternoon in The Downtown Soup Kitchen versus the
9 Municipality of Anchorage, et al.

10 And I have Mr. Cortman; is that correct?

11 MR. CORTMAN: Yes, Your Honor.

12 THE COURT: Very good. Who do you have with
13 you?

14 MR. TUCKER: Mr. Tucker, Ryan Tucker.

15 THE COURT: Good afternoon. Mr. Stuart?

16 MR. STUART: Yes, ma'am.

17 THE COURT: And Ms. Carmichael. We're here on
18 three motions.

19 Before we get started though, I did want to
20 request of the plaintiff to refile what you filed at
21 Docket 30 and Docket 56. You probably were unaware how
22 we put the footer on the bottom, and it is directly
23 overlaying on your footer and then it's hard for us to
24 cite when we get to writing an order. So just do a
25 notice of errata and attach those, 30 and 56, which were

1 the memorandum to the preliminary injunction is 30.
2 That was only half the pages, but probably easier to
3 just do the whole document again. And 56 was, I
4 believe, your opposition on the abstention.

5 So in any event, ready to proceed?

6 MR. TUCKER: Yes, Your Honor.

7 THE COURT: Ready to proceed?

8 MR. STUART: Yes, Your Honor.

9 THE COURT: Go right ahead, please. I gave
10 20 minutes per side. The issues are pretty interwoven,
11 so I can hear from plaintiff on all three of the
12 motions, is my thought, and then from the Municipality.

13 MR. TUCKER: May it please the Court, this case
14 is about whether a faith-based women's shelter can be
15 forced to allow biological men to sleep alongside women,
16 women who have been victims of rape, sexual abuse and
17 domestic violence, in a shared overnight sleeping
18 facility.

19 Anchorage believes the answer to that question
20 is yes. Hope Center disagrees, prompting it to seek
21 relief from this Court.

22 Now, Your Honor, I will first take up our
23 motion for preliminary injunction and follow up with
24 abstention. Like you said, I'll try to weave in those
25 arguments. As to on the motion to stay, that seems

1 somewhat moot to me since we're here today.

2 THE COURT: I haven't done anything, so there
3 you go.

4 MR. TUCKER: So first with regard to the
5 preliminary injunction motion.

6 THE COURT: I should say I've read everything.
7 I want to make that clear. Go right ahead.

8 MR. TUCKER: There is four what I'll call
9 general claims for relief: The religious freedom
10 claims, speech, due process, privacy claims.

11 I want to spend about half my time delving into
12 those, but before I do that, just a brief recitation of
13 the facts.

14 THE COURT: Like I said, I've read the entire
15 complaint and the filings, but if you wanted to restate
16 them, that's fine.

17 MR. TUCKER: No, Your Honor. Considering that,
18 I think I'll move forward to the preliminary injunction.

19 THE COURT: I guess my one questions would be:
20 As I read the City's briefing, there has been no further
21 activity in the first complaint, at least as of when the
22 parties finished the briefing late last year. Has there
23 been any activity? I assume not.

24 MR. TUCKER: No, Your Honor. It's a great
25 question because it relates to both the preliminary

1 injunction and abstention issues as well. Just by way
2 of background, we filed a motion to dismiss in what I
3 call the first complaint back in April of 2018. That
4 motion has never been ruled upon. It's still sitting
5 there.

6 The only additional item that took place, other
7 than Mr. Clarkson's letter in March and then our motion
8 to dismiss in April, was some discovery requests that
9 the Commission sent us. We responded to those requests
10 at the beginning of July.

11 And so since July to the present, about six,
12 seven months, absolutely nothing has taken place in that
13 proceeding.

14 So going back to the preliminary injunction.

15 THE COURT: Just so I'm clear, is it your
16 position that when you responded to the discovery, you
17 provided the information that was sought?

18 MR. TUCKER: Absolutely, Your Honor. Attached
19 to our preliminary injunction or our memo, we have
20 actually the interrogatory answers. And I can point
21 Your Honor to those if you would like.

22 THE COURT: I see that.

23 MR. TUCKER: And so we have received no
24 feedback from them following up on those
25 interrogatories.

1 THE COURT: Thank you. Go ahead, please.

2 MR. TUCKER: So with regard to the preliminary
3 injunction, we have got, of course, our religious
4 claims.

5 First, with regard to Federal Free Exercise.
6 Federal Free Exercise we prevail on, or it can be
7 subdivided really into two different areas.

8 We have got hostility and we also have
9 exemptions. I'm not going to recount every single item
10 that we have on hostility, but there were a couple that
11 I did want to highlight.

12 First, Anchorage knows that the Hope Center did
13 not discriminate when the individual showed up at the
14 facility. He was drunk and he was injured, and, at that
15 time, we paid for an ambulance to take him to the
16 hospital. And then when he came back, he was not
17 allowed entry because he showed up at the wrong time.

18 Despite the fact that Anchorage knows that
19 there was no discrimination there, Anchorage is still
20 coming after the Hope Center in not only that first
21 complaint, but Your Honor saw of course the second
22 complaint was filed as well.

23 THE COURT: But everybody agrees, as I
24 understand it, the second complaint has been completely
25 resolved?

1 MR. TUCKER: The second complaint was resolved.
2 It was resolved with Mr. Clarkson, and then the City
3 informed us that that was dismissed. We were not part
4 of that settlement discussion.

5 So you have a situation where on the one hand
6 the Commission is coming after the Hope Center on a
7 non-discriminatory basis, and as Your Honor pointed out
8 initially talking about the timing of it, we're held in
9 limbo. We're almost being held hostage, quite frankly,
10 because nothing has transpired in the Commission
11 proceeding, and instead we have heard nothing but
12 silence.

13 In fact, the Commission is now 100 days past
14 their deadline to make a determination statutorily. So
15 they're utilizing in essence this Commission proceeding
16 in an attempt really to try to force us to change our
17 policies because they know what our policies are.

18 In fact, the interrogatories, Your Honor,
19 mention -- we respond with those answers explaining what
20 indeed our policies are. So you have that as an example
21 of hostility.

22 I mentioned the deadline. They are 100 days
23 past that. The code itself doesn't even cover us.
24 We're not a for-profit business, a commercial
25 enterprise. We don't meet the definition of public

1 accommodation. That's not something that Your Honor
2 necessarily has to opine upon, but the Commission knows
3 that we're not a place open to the general public, and
4 that's yet another reason that shows hostility. But
5 perhaps one of the most --

6 THE COURT: I thought their response on that
7 was that, yes, that may be true under some components of
8 the Anchorage Municipal Code, but not under the
9 5.20.020.

10 MR. TUCKER: Are you mentioning the distinction
11 they make where, on the exemption part, where there is a
12 homeless shelter exemption? And I believe Counsel or
13 Anchorage's argument is going to be or has been that,
14 well, that falls under a different chapter and so
15 therefore it doesn't apply.

16 That argument quite frankly is I think
17 nonsensical. I think when you look at the code, any
18 statute, any law, you have to read it in the context.
19 This is all within Title 5.

20 And, Your Honor, that particular code
21 provision, the Commission, that second complaint we were
22 just talking about, the Commission filed that complaint
23 premised off that particular chapter, so I think it's --

24 THE COURT: The 5.25?

25 MR. TUCKER: That's correct. So I divide that

1 -- where they mention it, that there is a fair housing
2 section and a public accommodation section, that fair
3 housing section, that was the genesis, or at least was
4 included in part in that second complaint.

5 So the exemptions, Your Honor, that's a great
6 transition really to the second reason why we prevail on
7 our Federal Free Exercise claim because we have a
8 specific exemption. We shouldn't be here at all. That
9 that should have been dismissed right from the get-go
10 and it wasn't.

11 Instead, here we are 100 days past that time.
12 Now, in addition to Federal Free Exercise, we also have
13 our Alaska Freedom of Religion clause claim as well,
14 and, of course, there is two components to that. There
15 is the religion component, and I think that our evidence
16 that we have provided to the Court shows what the Hope
17 Center is about, its mission.

18 The affidavits that we have included also show
19 the religious component there as well. The second
20 corollary to that or second component is that the
21 conduct poses no substantial threat to public safety.
22 Of course, it's the exact opposite here.

23 What we're trying to do is to protect these
24 women who seek shelter at the Hope Center which, by the
25 way, I would be remiss if I didn't tell Your Honor, one

1 thing that's really important factually to this, and
2 it's included in the declarations, but I think it might
3 possibly be missed, is that with regard to one of those
4 women, and I believe the executive director as well,
5 they made clear that at least in the city itself, there
6 may be other shelters that obviously take in women and
7 take in both men and women, but the Hope Center is
8 really the only shelter in the entire city where women
9 seeking long-term help can actually go.

10 And so that's one of the key components, and at
11 least factually I just want the Court to understand is
12 that if the Hope Center is forced to allow biological
13 men into its facility, then it will have to shut down.
14 That, of course, underscores why, because it violates
15 its religious beliefs, that underscores why this
16 preliminary injunctive relief is so necessary.

17 THE COURT: So if you had spent one night there
18 and you came back at 2:00 the next day, you could go in?
19 It's only when you're a new guest that you need to come
20 at 5:45? Am I correct on that?

21 MR. TUCKER: That's correct. In this
22 individual's instance, he showed up at the wrong time.
23 He was not there the night before, and he was not
24 discriminated against. He wasn't sent on his way for
25 any other reason than the fact that initially he was

1 drunk and he was injured. In the second instance, he
2 was late.

3 And the Commission knows that. And I think the
4 reason that they are holding onto it, again, is to just
5 hold us hostage and try to get us to change our beliefs.

6 We have our Alaska Freedom of Religion clause
7 claim. Now, since I may not have an opportunity to
8 stand up here and rebut it --

9 THE COURT: I will give you a brief opportunity
10 at the end, but if there is something you wanted to say
11 now, go right ahead.

12 MR. TUCKER: I suspect they will probably get
13 up and point to Swanner, and Your Honor may have been
14 thinking that as well, but Swanner is clearly different
15 than this situation.

16 Swanner, number one, didn't involve exemptions.
17 You didn't have exemptions in the Swanner scenario. The
18 second point, there is several different, but the two
19 big ones, I believe, Swanner also involved a commercial
20 business, not a religious nonprofit.

21 And so I think those are number one and number
22 two reasons why Swanner is in fact different to this
23 scenario.

24 Let's talk about speech. We, of course, say in
25 our briefing and have brought to the Court the fact that

1 these what we call publication bans, that's 5.20.020 and
2 then 5.20.050, violate the First Amendment based on
3 their content and viewpoint.

4 As it relates to content, you know, a person
5 may speak freely about politics or some other issue, but
6 as it relates to, say, LGBT issues, in that instance,
7 they can't because disfavored speech in that instance
8 will be punished. We have that as a content argument.

9 Also viewpoint as well, which is arguably even
10 more supporting to the case law. The message that
11 gender fluid -- the message that gender is fluid and
12 changeable is okay, but anything contrary to that is
13 not, and so you have a viewpoint discrimination as well.

14 We also have the publication ban violates the
15 First and Fourteenth Amendments because of their
16 overbreadth, the vagueness and unbridled discretion.
17 Again, I think anyone looking at the language of the
18 code where it says that a statement that implies someone
19 is, quote, "unwelcome, not desired, not solicited,
20 objectionable or unacceptable," you look at that
21 language, my first take on it when I saw that was, was
22 that even defined, what does that mean. We have run
23 across this a few times.

24 In fact, other courts have as well. The Saxey
25 decision out of the Third Circuit; Brush and Nib is a

1 case down in Arizona as well, and those courts looked at
2 that and said no, that language is unconstitutional.
3 It's included within there. We cite those cases.

4 THE COURT: Do either of those cases use the
5 word "implies," or was it different language that was
6 non-vague?

7 MR. TUCKER: I believe "implies" is actually
8 there. I can double-check that, but I think it is. And
9 of course, that vagueness, the fact that those things --
10 that those words are not in fact defined also leads to
11 the possibility that on a whim Anchorage can determine
12 whether or not it wants to pursue it.

13 And of course that in and of itself is
14 unconstitutional. That unbridled discretion is
15 unconstitutional.

16 Hybrid rights, again, I'm not going to spend
17 too much time on that other than the fact that it's
18 recognized in the circuit, obviously are speech and
19 religion claims, give rise to such scrutiny if the Court
20 even needed to get there.

21 THE COURT: As I understand it, there was some
22 dispute in the briefing about whether or not the posting
23 issue is still a live controversy. As I understand your
24 position, it is because you feel you can't post now
25 while the Commission has the complaint.

1 MR. TUCKER: Great question, Your Honor,
2 because that revolves around both motions. Yes, it is.
3 Just to be clear, we have -- after we sort of reached
4 the stalemate last summer, during that time, there was a
5 lot of media attention that was focused on the complaint
6 filed against Mr. Clarkson. Local media reported on it.

7 At that time, questions were being asked of us,
8 both externally as well as internally. We had people
9 come to us and say, "Do you admit men into this
10 facility?" We had women, more importantly perhaps, that
11 came to us and said, "Look, if you're going to let in a
12 biological man, I would rather go sleep in the woods,
13 even on a night like last night in subzero weather, than
14 have to be forced to be sleep next to a biological man."

15 And so Sherrie Laurie said, "My goodness, we
16 need to make this clear." I understand Anchorage makes
17 light of the fact they think that this is some sort of
18 manufactured exercise. I can assure the Court that it
19 is not.

20 They need to have the ability to post to the
21 public, and also, quite frankly, to the women that are
22 seeking refuge there exactly what their policy is.

23 And so that has -- I think we're two ships
24 passing in the night. Opposing counsel says in their
25 briefs, well, this second complaint -- there is some

1 confusion I think as to whether that second complaint
2 has somehow resolved that issue. It hasn't.

3 Certainly we know that Anchorage will come
4 after us by virtue of the fact that they went after Mr.
5 Clarkson and also us, by virtue of the fact that we were
6 supposedly violating the publication ban, but that is an
7 issue. We need to be able to post, but we also need to
8 be able to practice, to allow only biological women into
9 our facility.

10 THE COURT: Thank you.

11 MR. TUCKER: And then a couple more claims,
12 Your Honor. The Alaska Privacy Clause as well. You
13 know, oftentimes you look at that and you think of it in
14 the terms of, well, is that financial records or
15 subpoena, situations like that.

16 I think though when you look at this language
17 in the Alaska Constitution, which, of course, not all
18 states have, I think we meet this two-part test.

19 Did the person harbor an actual subjective
20 expectation of privacy? Every woman that walks in there
21 certainly is told and expects to have privacy, that if
22 -- the Hope Center, just to give Your Honor some idea as
23 to what it looks like, I would say it's about half the
24 size of this room, the area where they sleep.

25 Exhibit P to our preliminary injunction

1 actually is a picture. I would encourage you to look at
2 that so you can see. Those mattresses that are laid
3 out, they are three feet apart from one another, so they
4 are extremely close.

5 I think the women there have an expectation
6 that when they show up, they can change, if necessary,
7 but when they are sleeping, there is also the
8 expectation of privacy as well. I think that is one
9 that is reasonable. This is the second factor, and one
10 that society should be prepared to recognize.

11 The Ninth Circuit of course has recognized the
12 right to bodily privacy as well, and Alaska courts have
13 recognized privacy interests in a much broader context,
14 so I think we prevail on that.

15 And so, Your Honor, I think, you know, unless
16 Your Honor has --

17 THE COURT: I guess the question is: To what
18 extent does your client have the standing, if you will,
19 to raise the privacy issues of the women that might be
20 seeking shelter?

21 MR. TUCKER: Your Honor, again, a great
22 question. We did mention that, I think. If you look at
23 the Alaska Wildlife versus Rue case. It's 948 P.2d 976.
24 The pinpoint cite is 980. It's an Alaska 1997 case. I
25 believe that case stands for the proposition that we do

1 in fact have the ability to raise those claims on their
2 behalf.

3 THE COURT: Then did you give any thought to
4 whether, if the Court were to deny the abstention motion
5 and go forward on your motion, I'm expressing no
6 opinion, just a hypothetical, whether -- on occasion I
7 have sought certification from the state Supreme Court
8 on questions of state law -- on occasion they granted it
9 -- and what your thoughts are on that with regard to the
10 state constitutional claims?

11 MR. TUCKER: Well, Your Honor, I don't think
12 that's necessary for I would say a handful of reasons.
13 Number one, I don't think you even need to get there by
14 virtue of all the other claims we put forward. I think
15 it's very clear that we went on Federal Free Exercise
16 claims.

17 THE COURT: So not reach the state
18 constitution?

19 MR. TUCKER: I don't think you even need to get
20 there. Obviously, we think that all of these are solid.
21 We could have thrown in the whole kitchen sink,
22 obviously, in our preliminary injunction motion, and we
23 didn't. There are other claims that we didn't bring to
24 Your Honor's attention.

25 I don't think in this instance this is

1 something that is so novel that it would require such an
2 analysis. I think it's something that on its face I
3 think it's fairly clear, and even, quite frankly,
4 commonsensical that someone looking at this could think
5 that these women have an expectation of privacy, and
6 that's one that society should recognize.

7 Now, going to the abstention argument. Again,
8 I mentioned a couple of these points moments ago, but I
9 would be remiss if I didn't say at the outset that I
10 believe Anchorage has already conceded the abstention
11 argument.

12 When Anchorage filed their response to our
13 preliminary injunction motion, they included within it
14 some declarations. The declarations had some important
15 concessions within it.

16 And that concession states that the Commission
17 will undertake no investigative or enforcement action
18 regarding that underlying first complaint.

19 THE COURT: So long as the federal case is
20 pending?

21 MR. TUCKER: That's correct, Your Honor. And
22 in fact, I think it's also important for the Court to
23 know in particular, because I don't think this was a
24 case cited at all in any of the briefing and it's
25 something I wanted to bring to the Court's attention, I

1 think that the Walnut Properties decision, it's Walnut
2 Properties versus City of Whittier, 861 F.2d 1102, it's
3 a 1988 Ninth Circuit case, that case says that when a
4 state court abstains, Younger does not apply.

5 So you have a situation like this where there
6 is more or less a self staying, which is what the
7 Commission did, when there is nothing going on, when you
8 have no ongoing proceeding, then how can the federal
9 court interfere at all with nothing, in essence? And so
10 that case right there I think clearly shows that as
11 well.

12 Just on its face, the declarations themselves
13 say we're not going to do anything, so how can the
14 federal court interfere with anything when they are not
15 doing anything over there, and they haven't been doing
16 anything. Of course, that again underscores our
17 hostility.

18 Younger has five elements, and at least if you
19 look at the Rynearson case out of the Ninth Circuit, I
20 recognize that in some instances they make it three and
21 other instances it's five. Rynearson was a 2018 case,
22 and so that's why we went with the five prongs, but
23 every single one of those has to be met. And abstention
24 is the exception, not the rule. And those cases talk
25 about the fact that courts have an unflagging obligation

1 to keep cases that are in the Court's jurisdiction.

2 And you know, looking at those cases, one thing
3 that I think really permeates the entire abstention
4 analysis is the fact that this is a pre-enforcement
5 case. This is a pre-enforcement challenge, and I think
6 that's something that may have gotten lost in the
7 shuffle between the two respective sides.

8 We're seeking relief, not based on prior state
9 acts, but on prospective or future enforcement. When
10 you have that, Younger just flat out doesn't apply. So
11 the mere fact we have a pre-enforcement challenge means
12 we have no abstention issue. Wooley is cited to in
13 these Younger cases. You've got Steffel. You've got
14 other Supreme Court precedent that make that point.

15 But that being said, again, you have five
16 components to abstention, the first being ongoing
17 enforcement, which, again, Anchorage has conceded they
18 do not have.

19 And as to that second part, sometimes you can
20 look at this ongoing enforcement as more or less two
21 items: Ongoing and then enforcement. And courts make a
22 distinction between an investigative phase versus formal
23 enforcement.

24 And I think Anchorage, even its declaration,
25 the language I just read, Your Honor, they make that

1 distinction themselves. They say "investigative" or
2 "enforcement proceeding," so they make that distinction.
3 The code itself makes that distinction. There is
4 language in the code that talks about the investigative
5 phase and the formal phase.

6 And I think the case law that we cited to,
7 which I won't bore the Court with, that shows that
8 distinction as well.

9 Now, there is some Ninth Circuit cases that
10 say, well, maybe just look at what the federal court is
11 -- where you are in the federal court. Are you in the
12 infancy of those proceedings?

13 Here, you know, we were just talking about the
14 need to correct a couple items with the Court, we're on
15 like number 71 or something as to where we are on this
16 list. We're much further along. As the Court can tell,
17 we're way further along in this proceeding than we are
18 over there, because the only thing that's happened there
19 is the motion to dismiss.

20 The second component that you have under
21 Younger is what is often referred to as like a quasi
22 criminal enforcement action. I will not belabor the
23 point, but the fact that you don't have an enforcement
24 action, you're not pursuing an enforcement action means
25 you don't have that second component either.

1 The third component is whether the State has an
2 interest or not, and the question is not whether
3 Anchorage has an interest in eradicating discrimination.
4 That's not the point. Instead when you're looking at
5 that state interest component, Potrero Hills, which is a
6 Ninth Circuit case, looks at it and says, you know, if
7 the State is not enforcing its laws, then it's not
8 showing an interest, it doesn't have that State interest
9 component.

10 And so when you're not enforcing, you're not
11 attempting to enforce, they can't meet the State
12 interest component.

13 The fourth element as well -- I'm sort of
14 hitting the highlights, Your Honor, because of the time.
15 And I think this one I'll end on and reserve the balance
16 of my time, but one of the Younger components says that
17 the party must have a full and fair opportunity to
18 litigate its claims.

19 In this instance, we would have no opportunity,
20 we don't have any opportunity, nor do we want to because
21 that Commission proceeding can continue on its way. We
22 don't need to do anything relative to that here. It's
23 another reason why abstention doesn't apply.

24 But we cannot raise our federal constitutional
25 claims over there in the Anchorage Commission. I can't

1 go to the Commission and say, "Well, I want to file my
2 pre-enforcement challenge relative to these bans on my
3 ability to speak."

4 Because what's happening here is apples and
5 oranges to what's happening there, I don't have a full
6 and fair opportunity to litigate those claims over there
7 either.

8 With that, Your Honor, unless you have other
9 questions, I'll take a seat. And then if Your Honor
10 would allow me just a few seconds to respond.

11 THE COURT: Sure. That sounds good. Thank
12 you.

13 Mr. Stuart, ready to proceed?

14 MR. STUART: Yes, Your Honor. Thank you. May
15 it please the Court, I would be happy to address
16 specifically any issues the Court would particularly
17 like to hear on, but I'd also like to share some
18 information regarding the Anchorage Equal Rights
19 Commission and what it is generally, I think would be
20 helpful.

21 THE COURT: Sure, go right ahead.

22 MR. STUART: So the Anchorage Equal Rights
23 Commission was established by the Anchorage Charter in
24 1975. It's the municipal law enforcement agency charged
25 with prevention and elimination of unlawful

1 discrimination under Title 5 of the Municipal Code.

2 It also enforces the ADA and Title 7 under a
3 work-share agreement with the EEOC.

4 Generally speaking, if an individual believes
5 they have been unlawfully discriminated against in the
6 Municipality, they may file a complaint with the AERC
7 and the AERC will begin enforcement proceedings.

8 Now, the first phase of AERC enforcement
9 proceedings is investigatory, and AERC will request at
10 that time information from the respondent regarding the
11 allegation set forth in the complaint before the AERC,
12 and the AERC may also request additional discovery from
13 the respondent and/or schedule a fact-finding conference
14 in the matter.

15 THE COURT: So would you agree that the current
16 case, the first complaint, is in that phase at this
17 time?

18 MR. STUART: At the time that this lawsuit was
19 filed, it was in that phase, and it remains in that
20 phase as we stand here before the Court today.

21 THE COURT: Is there discovery that the
22 Commission has sought that you're asserting has not been
23 provided?

24 MR. STUART: Yes, Your Honor. So although
25 opposing counsel has suggested that there has been no

1 proceedings, nothing has happened, suggested there is no
2 explanation for why there has been no further
3 proceedings, I point out that he says there's been no
4 proceedings since July. This lawsuit was filed in
5 August.

6 Now, under code, the Anchorage Equal Rights
7 Commission has a 240-day timeline from the time the
8 complaint is filed in which to make a determination
9 about whether there is substantial evidence of
10 discrimination supporting the complaint or not.

11 This lawsuit was filed on day 196 of that
12 timeline, at a time when the AERC was still attempting
13 to resolve conflicting information before them about
14 facts attendant and relevant to determination of whether
15 there was substantial evidence of discrimination in the
16 complaint.

17 Even if Hope Center had filed this lawsuit on
18 day 241, it would not disturb that analysis, because
19 under Swanner, we know that the AERC's timeline is not
20 immutable and it can be extended for good reason,
21 particularly where, as here, the respondent bears some
22 responsibility for delays in the underlying proceeding.

23 So to suggest that this proceeding was going
24 nowhere is simply at odds with the facts. The reason
25 that it could no longer proceed and the AERC chose to

1 voluntarily stay the proceeding at the time this lawsuit
2 was filed was because this lawsuit was filed.

3 THE COURT: So I read some of the briefing by
4 the Municipality, perhaps incorrectly, but to suggest
5 that the plaintiff here was not cooperating in the
6 investigation. Is that your position?

7 MR. STUART: The plaintiff, as in the
8 complainant in the underlying AERC complaint?

9 THE COURT: The Downtown Soup Kitchen, that the
10 Hope Center was not cooperating with the Commission.

11 MR. STUART: Oh, thank you, Your Honor, for
12 that clarification. I think that what can fairly be
13 said about the evidence before the Court is that there
14 were live and ongoing communications and disputes about
15 the contours of the discovery sought by AERC and what it
16 meant and what the relevance was to AERC's analysis.

17 To my eye, those communications and filings
18 look very typical of what you would expect in
19 communications between the parties involved in a
20 contested enforcement action.

21 THE COURT: Go ahead, please. Thank you.

22 MR. STUART: So when the investigatory phase
23 concludes, the AERC must determine whether or not the
24 complaint is supported by substantial evidence, and, if
25 so, they will issue a written determination to that

1 effect; and, if not, they also issue a written
2 determination, but will issue a closure as well at that
3 time.

4 If they do determine there is substantial
5 evidence of discrimination, the matter is scheduled for
6 a conciliation conference in order to try to explore an
7 agreed-upon resolution.

8 THE COURT: So if I were to grant the motion
9 for federal abstention that the Municipality filed,
10 what, in your mind, would be -- what would happen?

11 MR. STUART: I think at that point what would
12 happen is that the stay voluntarily entered into by AERC
13 during the pendency of this suit, assuming that the
14 abstention resulted in dismissal, would also dissolve
15 the stay in place before the AERC and they would resume
16 the timeline and phase that they were in at the time it
17 was disturbed by the filing of this lawsuit by Hope
18 Center.

19 THE COURT: As I understood the plaintiff,
20 there was a concern about an ability to bring, in
21 essence, a pre-enforcement challenge before the
22 commission. In your mind, could the Hope Center raise
23 its federal constitutional challenges before the
24 Commission?

25 MR. STUART: Absolutely, Your Honor. I think

1 we can see support for that proposition in the Middlesex
2 case where the Court held that even where the underlying
3 proceeding itself, the body may lack the ability to,
4 say, adjudicate whether a factual challenge to a
5 constitutional provision is in fact substantiated.

6 Though they can't do that, they can still be
7 mindful of the contours that are implicated by the
8 constitutional claims raised there and can conform their
9 actions and activities to that.

10 What's more is here we have the additional
11 safeguard that the Hope Center enjoys a right of appeal
12 to the Alaska Superior Court. And regarding the
13 pre-enforcement challenge that you mentioned, you also
14 astutely raised the fact that this could potentially be
15 brought to the attention and certification be sought
16 before the Alaska Supreme Court.

17 Now, whether any of these bodies would or could
18 do that and what the outcome would be we don't know
19 because Hope Center has not endeavored to do that.

20 THE COURT: Thank you.

21 MR. STUART: Briefly returning to AERC
22 procedure, if conciliation efforts fail, the matter
23 proceeds to a public hearing phase before a panel of
24 commissioners, after which, the hearing panel issues a
25 written order.

1 Once the written order is issued by the hearing
2 panel, the parties may appeal that order to the Alaska
3 Superior Court. In this specific proceeding, referring
4 to proceedings on complaint number one before the AERC,
5 a member of the community contacted AERC in or around
6 January of 2018 and alleged they had been illegally
7 denied service by Downtown Hope Center on the
8 discriminatory basis of sex and gender identity.

9 Accordingly, AERC opened a file and began
10 proceedings, as I've just described to you. Those
11 proceedings in the matter are still open and unresolved,
12 though voluntarily stayed at this time pending
13 resolution of this matter.

14 In the AERC proceedings, Hope Center has
15 contested the complainant's factual allegations and also
16 moved to dismiss the complaint on grounds that Hope
17 Center is not a public accommodation under the municipal
18 code. Public accommodation as defined under the code
19 is, quote, "any business or professional activity that
20 is open to, accepts or solicits the patronage of or
21 caters or offers goods or services to the general
22 public, subject only to the conditions and limitations
23 established by law and applicable alike to all persons."

24 THE COURT: Which part of the code are you
25 quoting from?

1 MR. STUART: This is AMC 5.20.010.

2 THE COURT: All right. Thank you.

3 MR. STUART: As written, this is a broad
4 definition and one which the Alaska courts have not
5 interpreted. They have also not considered whether a
6 provision like this might include an operation such as
7 the Hope Center.

8 Contrary to Hope's repeated assertions
9 throughout these proceedings, and including here today,
10 there is no homeless shelter exception in the public
11 accommodation code chapter. I understand their argument
12 to be that it's sort of close enough in the code to
13 count, but if you look at the specific homeless shelter
14 exception, it refers to, quote, "this chapter," 5.25,
15 not 5.20, under which AERC complaint number one was
16 filed.

17 So I think it is actually quite clear on its
18 face that this exception is narrowly confined to a
19 section of the code that is not implicated in AERC
20 complaint number one. There is no homeless shelter
21 exception attendant here. And if there is, it is on a
22 legal theory that cannot fairly be described as obvious.

23 So the AERC, forced with trying to perform a
24 reasonable analysis of what public accommodation means
25 in this context without the benefit of legal guidance,

1 also necessarily considers factual matters, such as
2 whether the putative public accommodation receives
3 public funding, and so sought discovery on that basis.

4 AERC also simultaneously sought information
5 from Municipal sources. When AERC received information
6 from Hope Center and received information from the
7 Municipality, that information appeared to conflict, so
8 AERC sought additional information from Hope Center
9 trying to reconcile what appeared to be conflicting
10 information about their sources of funding.

11 AERC also sought an interview with Hope
12 Center's executive director in order to clarify these
13 issues. That request was never responded to. It is
14 still live and pending.

15 As mentioned, AERC has 240 days to determine
16 whether a complaint is supported by substantial
17 evidence. This complaint before Your Honor was filed on
18 day 196 of that timeline. I think it's also fair to
19 note at this point that in the AERC proceedings, Hope
20 Center has had as many as nine attorneys involved at
21 various times from as many as four different firms and
22 as many as three different states, various times,
23 various capacities, and it is their right to do so, but
24 necessarily that is a logistical challenge for an agency
25 such as AERC that has one investigator assigned to this

1 complaint and has an entire staff of six.

2 So it necessarily is a taller order of business
3 to try to coordinate communications and schedules with a
4 sometimes unclear and rotating cast of participants in
5 this proceeding. And that is especially true where, as
6 here, AERC in the more typical case is geared towards
7 interacting more commonly with unrepresented members of
8 the public who are involved in this process.

9 THE COURT: You're almost saying it's easier to
10 work with self-represented litigants than nine lawyers.

11 MR. STUART: I would hesitate to say that.

12 THE COURT: Fair enough.

13 MR. STUART: The parties are now before the
14 Court under circumstances which I feel are very, very
15 similar to that of the parties in the Dayton case. We
16 appear to squarely fit the narrow category of cases for
17 which Younger abstention is appropriate and that we have
18 an ongoing civil enforcement proceeding involving
19 important state interests in which the plaintiff can
20 raise their constitutional claims.

21 THE COURT: What's your response to the
22 argument your colleague was making about the difference
23 between the investigative stage versus the enforcement
24 stage and application of Younger abstention?

25 MR. STUART: I think my colleague attempts to

1 draw a distinction where one does not exist. AERC is a
2 law enforcement agency, and they had accepted a
3 complaint and they were proceeding in a matter in which
4 they were attempting to resolve factual issues involving
5 both a plaintiff or a complainant and a respondent, and
6 how you could try to liken that to what in their
7 briefing I believe they refer to at times as a mere
8 investigation is difficult to reconcile with other
9 claims they have made regarding the bad faith, bias,
10 hostility, harassment, et cetera that they claim were
11 attendant to the AERC proceedings.

12 Plaintiff has also argued that these
13 proceedings were not ongoing because more than 240 days
14 have now elapsed. I think we have discussed our
15 position on that argument.

16 Plaintiff argues that AERC -- the AERC
17 proceeding is not a civil enforcement proceeding. As
18 you mentioned, that is actually an investigation, and I
19 would mention that in doing so it likens this matter to
20 cases such as the 2016 Google decision out of the Fifth
21 Circuit in which the Fifth Circuit held that Younger
22 abstention is not required, quote, "merely because a
23 state bureaucracy has initiated contact with a putative
24 federal plaintiff."

25 Now, this is plaintiff's citation, but a

1 plaintiff here can characterize AERC's proceedings as
2 mere initiation of contact with Hope Center by AERC.
3 It's typical to countenance the other characterizations
4 of alleged harassment, bad faith, bias, hostility, et
5 cetera.

6 I would also argue that plaintiff or respondent
7 in the AERC proceeding also understood the posture of
8 AERC's proceedings through this lens. We can see that
9 by their involvement of counsel, their filing of motions
10 to dismiss, their formal replies to discovery sought and
11 requested. I frankly don't think it is a particularly
12 persuasive argument to suggest that anything about this
13 AERC proceeding makes it less of an enforcement action
14 because there was some investigative component involved
15 with it.

16 The interest that is being served by AERC under
17 the mandate is elimination of prohibited discrimination.
18 Under Dayton this clearly satisfies the important state
19 interest requirement for Younger abstention, and that's
20 not surprising, because as the Ninth Circuit held in
21 Potrero Hills in 2011, "Where the state is in an
22 enforcement posture in state proceedings, the important
23 state interest requirement is easily satisfied."

24 Lastly, and as we discussed a little bit
25 previously, Hope Center does have an adequate

1 opportunity to raise its constitutional claims before
2 the AERC and the Alaska Superior Court, and the test for
3 sufficiency here is provided in the Ninth Circuit by the
4 Hirsh case, in which they employed a standard of whether
5 state procedural law bars presentation of the federal
6 claims on appeal from the agency enforcement proceeding
7 as the line at which sufficiency does or does not attach
8 to availability of review.

9 Pennzoil, a 1987 Supreme Court decision, also
10 says that where, as here, plaintiff has not attempted to
11 raise its federal claims in state court, the federal
12 court should assume state procedures will afford an
13 adequate opportunity, absent unambiguous authority to
14 the contrary.

15 Now, plaintiff has failed to raise its claims
16 before in state court, and it's failed to provide
17 unambiguous authority that those procedures would not
18 afford an adequate remedy. Plaintiff is not claiming
19 state procedural law bars its claims, not claiming that
20 they've tried and failed to raise claims before a state
21 court, and the Court, I believe this Court is in a
22 position where it is required to conclude that Younger,
23 for Younger analysis purposes, plaintiff does have
24 adequate opportunity to raise the constitutional claims
25 in the AERC proceedings.

1 While only a narrow category of cases fit the
2 Younger criteria, this is one of those cases. Plaintiff
3 has effectively abandoned the AERC proceeding midstream
4 in order to file this suit, and we do not know what the
5 outcome of the AERC proceeding would have been or will
6 be because that enforcement action was essentially
7 abandoned in motion by Hope Center here.

8 The Municipality argues the Court should
9 abstain under Younger to allow the AERC proceedings to
10 conclude in their natural course and without the direct
11 interference via federal injunction that specifically
12 offends Younger.

13 Turning to the other motion, or one of the
14 other motions, plaintiff's request for preliminary
15 injunction, on that note, they are asking the Court to
16 move in a diametrically opposed direction from
17 abstention, which is to grant preliminary injunction,
18 the specific action that is offensive to Younger under
19 Younger abstention analysis.

20 We know the most basic premise of a preliminary
21 injunction is to preserve the status quo until a
22 decision can be rendered on the merits. In order to get
23 there, plaintiff needs to establish a likelihood of
24 success on the merits, irreparable injury likely to
25 occur absent the injunction, balance of equities tip in

1 their favor and public interest supports the injunction.

2 Plaintiff can also offset a weaker showing on
3 the merits of its claims by establishing that the
4 balance of harms tips sharply in their favor, but only
5 if the other preliminary injunction factors are also
6 present.

7 I would be happy to address individual
8 arguments about the likelihood of success on the merits
9 of plaintiff's specific claims that they have used as
10 the basis of their preliminary injunction motion, but
11 from the Municipality's perspective, regardless of the
12 Court's view of the relative strength of plaintiff's
13 claims, or its balancing of the hardships, plaintiff has
14 not established an adequate basis for preliminary
15 injunction because they cannot prove it is likely to
16 suffer an irreparable injury absent the requested
17 injunction.

18 Plaintiff has at various times suggested a
19 negative financial impact for plaintiff associated with
20 this matter, but we know that financial injury, even if
21 established, cannot form the basis of an irreparable
22 injury because, by definition, a financial injury is
23 repairable.

24 THE COURT: I guess I heard at least today from
25 plaintiff that if the Hope Center was required to accept

1 biological males that it would close its doors. If that
2 were to be the case, how would that fall within the
3 irreparable injury construct?

4 MR. STUART: I still think it's an open
5 question as to whether even that, a literal existential
6 question related to finances would be a sufficient basis
7 to find an irreparable injury.

8 Clearly I think it would militate more in that
9 direction, but I would caution the Court that nowhere in
10 the many affidavits and other documents provided by
11 plaintiffs in support of these motions does it ever say
12 that closure is imminent or that they will be forced to
13 close. That is an argument of counsel. That is not a
14 fact before the Court, to the best of the Municipality's
15 information and belief.

16 Plaintiff argues its constitutional rights are
17 being violated because it has been chilled in its speech
18 and religious exercise, and thus concludes that the
19 irreparable injury prong is satisfied. And while
20 constitutional violations may constitute irreparable
21 injury, there is no authority for the proposition that
22 merely alleging constitutional violations establishes an
23 irreparable injury is likely to occur without injunctive
24 relief.

25 In *Younger* the Supreme Court squarely rejected

1 the notion that the existence of a chilling effect, even
2 in the area of First Amendment rights, is sufficient to
3 prohibit state action. If a chilling effect alone is
4 insufficient to prohibit state action, it is also
5 logical that it's insufficient to establish a likely
6 irreparable injury to occur in the absence of a
7 preliminary injunction.

8 Moreover plaintiff's argument that a chilling
9 effect exists is based upon its own subjective
10 interpretations and suspicions of AERC's actions and
11 motivations. They are purely speculative before the
12 Court at this point.

13 Plaintiff argues it has been specifically
14 chilled in its desire to post statements about its
15 beliefs regarding sex and gender identity, but also
16 conceded it had never been motivated previously to
17 undertake this action until after it filed this lawsuit
18 in August.

19 In other words, it was not motivated to
20 undertake the action it claims it's chilled from until
21 after the events it claims created the chilling effect.

22 The plaintiff here is essentially not
23 requesting a preliminary injunction to maintain the
24 status quo. They are asking for a broad injunction in
25 order to deviate from the status quo. While they

1 characterize their request for relief as narrow, they
2 are specifically asking for a sweeping enjoinder of any
3 direct or indirect enforcement of AMC 5.20.050(A)(2)(b),
4 which prohibits public accommodations from
5 discriminating on the basis of race, color, sex, sexual
6 orientation, gender identity, religion, national origin,
7 marital status, age, physical disability or mental
8 disability.

9 These are not narrow categories of the public
10 who would be negatively impacted by plaintiff's
11 requested injunctive relief, and such relief certainly
12 does not constitute maintenance of the status quo.

13 Also, I don't think we should lose sight of the
14 fact that this code provision was enacted by the people
15 of the Municipality of Anchorage, and the Municipality
16 has an important interest in eliminating unlawful
17 discrimination, as was the case in Dayton. And we know
18 from Coalition for Economic Equality out of the Ninth
19 Circuit in '97 that the Government suffers irreparable
20 injury whenever an enactment of its people or their
21 representatives is enjoined.

22 So while here plaintiff has not shown a likely
23 irreparable injury that it will suffer in the absence of
24 a preliminary injunction, defendants have shown that
25 they will suffer an irreparable injury if plaintiff is

1 granted its requested injunctive relief.

2 The balance of equities tip in favor of
3 defendant on this point and the public interest is not
4 served by an injunction which would prevent defendants
5 from enforcing its laws prohibiting illegal
6 discrimination in this community.

7 So in summary, and, again, I would be happy to
8 revisit any specific questions the Court might have, but
9 the parties are essentially urging the Court to proceed
10 in opposite directions. Because the criteria for
11 Younger abstention are satisfied here, Municipality
12 argues that abstention on that basis is appropriate. In
13 the interest of comity and efficient judicial
14 administration, plaintiff's motion for preliminary
15 injunction should be denied because they failed to make
16 the showing necessary to obtain that extraordinary
17 relief and the Court's enjoinder of the AERC proceedings
18 is offensive to Younger.

19 THE COURT: In your mind, what would happen in
20 this case if the Court -- just a hypothetical -- were to
21 deny both motions? Then is there discovery that would
22 need to take place, or really isn't the briefing already
23 before the Court on the merits, or is there more?

24 MR. STUART: That's an excellent question, Your
25 Honor. If the Court were to deny both motions and no

1 preliminary injunction were to issue, an abstention were
2 not exercised, then I believe, because there are
3 significant questions of both fact and law that are
4 implicated in the broad and numerous claims here, that
5 we can reliably expect that additional briefing and
6 proceedings to develop that record in order to make any
7 determinations would be required.

8 I don't feel that sufficient information is
9 before the Court to reach any ultimate determinations at
10 this point.

11 THE COURT: Thank you.

12 MR. STUART: Thank you, Your Honor.

13 MR. TUCKER: Your Honor --

14 THE COURT: Go ahead, please, Mr. Tucker.

15 MR. TUCKER: Thank you. Just a few brief
16 responses to that.

17 One of the points Counsel made was that there
18 is a -- there are open issues still pending, and Your
19 Honor asked questions about are there pending issues in
20 the Commission proceeding. And I would just point Your
21 Honor to Exhibit V.

22 THE COURT: V?

23 MR. TUCKER: V as in Victor. In that e-mail,
24 the statement from the investigator, the Commission says
25 in part that in an effort to not distract what should be

1 the immediate concerns of the parties regarding
2 settlement, we are not going to require respondents to
3 provide any supplemental information at this time.

4 To give the Court some context there, there was
5 a question as to whether anything else was owed,
6 anything in addition. We have got the Commission
7 telling us in July, mid-July 2018, "You don't owe us
8 anything."

9 Now, shortly afterwards, there was a fairly
10 pointed e-mail that I personally received. It's also I
11 think another hostility point, but Exhibit F was an
12 exchange between me and that same investigator where we
13 discuss really the same issue. I point out to him that
14 we provided -- you told us don't give us anything and
15 then you turn around and complain about not giving
16 something to us, meaning the Commission was complaining
17 that somehow we hadn't given them something. I said,
18 "Wait a second, you told me you didn't need anything."
19 So I tried to set the record straight here.

20 In addition to that, one comment I heard
21 Counsel make just moments ago was, well, we also asked
22 to take an interview with Ms. Laurie, the executive
23 director. If you look at Exhibit F, my statement says,
24 "With regard to your request to interview Ms. Laurie,
25 can you please provide to us the parameters on which

1 such meeting would take place." That was August 9,
2 2018. The response: Nothing.

3 That's the way this case or the Commission
4 proceeding has been since then. And, Your Honor, again,
5 it's the hold hostage theme I had earlier. They are
6 saying on the one hand -- really saying nothing. They
7 are trying to hold that in abeyance over our heads in an
8 effort to try to force us to change our policies.

9 A couple other points. On the appellate point,
10 the idea being that, well, any potential issues can be
11 remedied up on appeal on the state side. Well, we have
12 the right to a neutral adjudicator in the first
13 instance.

14 So all of the hostility, the bias allegations
15 and evidence that we include in that, that resonates at
16 the most base level, and then you have to deal with that
17 record on the way up.

18 We have the right to a neutral adjudicator in
19 the first instance over there. So the idea that somehow
20 the appellate process on the state side is going to
21 resolve this is just not justifiable.

22 In addition to that, there was a comment made
23 about the number of attorneys. Well, the reason that we
24 had these number of attorneys is because the Commission
25 conflicted out Hope Center's first counsel. The Hope

1 Center -- when the Commission went after Mr. Clarkson,
2 that created a situation that necessarily meant
3 additional counsel had to get involved.

4 The fact that they went after Hope Center's
5 counsel is yet another element of hostility to further
6 substantiate our religious claims.

7 The Dayton case, that's cited quite a bit by
8 opposing counsel. If Your Honor looks at Louisiana
9 Debating, Fifth Circuit case, the Telco decision out of
10 the Fourth, the Mulholland case, the Seventh, all of
11 these cases -- Louisiana Debating is very good about
12 showing -- or better articulating the threat or the
13 investigative phase versus the formal proceeding.

14 It takes Dayton and underscores the fact that
15 in those situations you had a probable cause charge, an
16 institution of actual formal enforcement proceedings.
17 You have that in Dayton. You don't have that here.
18 Dayton is not applicable.

19 There was a comment made about Hope Center
20 abandoning the Commission proceeding. Again, relative
21 to my first point after I got up here, we didn't abandon
22 anything. We have been waiting now well over 100 past
23 days for a determination. And we know why we're not
24 getting it in the state commission proceeding, it's
25 because there is no discrimination to be found. And

1 they don't like that end result, so they are going to
2 use that against us and hold it over our heads.

3 Again, we didn't hold up anything over there.
4 More importantly, it doesn't matter. Tomorrow the
5 Commission can issue a finding over there, or yesterday
6 or ten days ago. I think statutorily they have already
7 blown that deadline, so that's a fight for another day,
8 but the idea that somehow we're to blame is not
9 accurate.

10 The status quo, the status quo is that we have
11 always been an organization that was only letting in
12 biological females. It wasn't until this individual
13 showed up now a year ago, which in and of itself, again,
14 I think the fact I'm standing here a year almost to the
15 day I think shows hostility, but now over a year ago, we
16 didn't have this issue come up. This was -- when you
17 say women's shelter, it was fairly self-explanatory who
18 was allowed into the shelter and who had to go to
19 another place within the city.

20 And so the status quo has always been that we
21 were limited to biological females. It's really again
22 to underscore the mission that we have in taking care of
23 these women that need that refuge.

24 The chilling effect, Your Honor posed a
25 question about what if I deny both, you know, what if I

1 deny abstention and I deny the preliminary injunctive
2 request. Your Honor, the problem there is that we
3 talked initially about the chilling effect on our
4 speech, the fact that we need to be able to post, to
5 tell others what our policies are.

6 If Your Honor were to deny both, then that
7 problem still remains. And the promise that, well, Your
8 Honor, we're not going to do anything during the
9 pendency of this lawsuit, so there is no harm there,
10 this voluntary cessation argument, there is cases that
11 we cite in the briefing about that, that's not what the
12 law is, and for obvious reason, Anchorage could turn
13 around tomorrow and institute or file another complaint
14 against us in that instance.

15 So we continue to be chilled. Our First
16 Amendment freedoms are curtailed, and so that's why
17 we're here today. We need help from this Court to be
18 able to not just post, but to allow only biological
19 women into the facility and to be able to protect those
20 women. Thank you.

21 THE COURT: Thank you. Thank you both. Very
22 well briefed and argued today. It's quite helpful.

23 I'll take the matters under advisement and
24 issue a written decision in due course. We'll go off
25 record at this time.

