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

Kevin G. Clarkson, AK Bar No. 8511149
Brena, Bell & Clarkson, P.C.
810 N Street, Suite 100
Anchorage, Alaska 99501
(907) 258-2000
(907) 258-2001 (Fax)
kclarkson@brenalaw.com

Sonja Redmond, AK Bar No. 0605022
LAW OFFICE OF SONJA REDMOND
35865 Sunset Park St.
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

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Federal Rule of Civil Procedure 65

Oral Argument Requested

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INTRODUCTION

This case is about the right of a faith-based homeless shelter to live out its faith, to speak its beliefs, and to help homeless women. The Downtown Soup Kitchen, also known as the Downtown Hope Center, has helped those in downtown Anchorage for over thirty years. 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. And although Hope Center wants to continue its ministry, Anchorage has threatened to end it through an unconstitutional application of its public accommodations and fair housing laws.

The Anchorage Municipal Code ("Code") prohibits public accommodations from denying services based on sex or gender identity or stating those services will be denied. 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. Hope Center has not violated this law. It is not a public accommodation, and the Code exempts homeless shelters, like Hope Center. But the last eight months, Anchorage has used the Code to investigate, 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.

In January 2018, the Anchorage Equal Rights Commission ("Commission") entertained a baseless complaint against Hope Center alleging sex and gender identity discrimination. The 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. The Commission has aggressively pursued this complaint even though the evidence shows that Hope Center did not discriminate against that individual but helped that person obtain medical care. In addition, 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 case in the media.

Hope Center cooperated with the Commission and asked to dismiss both complaints, but the Commission refused, insisting instead on meritless discovery. Meanwhile, the Commission's prosecution of Hope Center and its attorney forced Hope Center to stay silent about its policies and its religious beliefs about the differences between men and women. These actions are not only unconstitutional, they have handcuffed Hope Center's ability to defend itself in public and hindered its ability to raise funds. As a result, Hope Center is in a tenuous financial state, faces the prospect of closing its shelter, and needs immediate injunctive relief to stop Anchorage's unconstitutional targeting.

STATEMENT OF FACTS

Hope Center started because a few Anchorage church leaders wanted to share God's love with Anchorage's homeless.[1] Compl. at ¶ 35; Decl. of Sherrie Laurie ¶ 5. Operating initially out of a red house in downtown Anchorage, Hope Center provided around 300 free cups of soup each day to homeless and low-income families. Compl. at ¶ 37; Laurie Decl. ¶ 6. It also offered free showers and clothing handouts. Compl. at ¶ 38; Laurie Decl. ¶ 6.

In 2012, Hope Center moved to a new facility in downtown Anchorage. Compl. at ¶ 39; Laurie Decl. ¶ 7. Three years later, Hope Center expanded its mission to help the Brother Francis Shelter, a Catholic Social Services program that provides free emergency shelter for those in Anchorage. Compl. at ¶ 40; Laurie Decl. ¶ 8. Brother Francis often had to shelter more homeless than it could accommodate and struggled to provide safe shelter for women, many of whom had been abused by men. Compl. ¶ 41; Laurie Decl. ¶ 9. So Hope Center agreed to shelter the overflow of homeless women who went to Brother Francis. Compl. at ¶ 42; Laurie Decl. ¶ 9.

[1] All facts in Plaintiff's Verified Complaint are incorporated by reference, but a summary of facts is provided here.

Originally, Brother Francis checked individuals in and Hope Center transported them to its facility. Laurie Decl. ¶ 10. But the homeless community learned of Hope Center's "shelter" and began going to it directly. Laurie Decl. ¶ 10. The relationship between the two shelters was formalized in December 2017, resulting in payments of around $50,000 from Catholic Social Services to Hope Center. Laurie Decl. ¶ 11. Hope Center did not receive any funds directly from Anchorage or HUD. *Id*. And while the written agreement between Brother Francis and Hope Center is no longer in force, Hope Center today accepts both an overflow of women from Brother Francis, as well as some women who appear at or are referred to it. Laurie Decl. ¶ 12.

Hope Center's purpose is religious. Compl. at ¶ 65; Laurie Decl. ¶ 16. "Inspired by the love of Jesus, [it] offer[s] those in need support, shelter, sustenance, and skills to transform their lives." Compl. at ¶ 52; Laurie Decl. ¶ 16. And Hope Center lives out that religious mission through acts of service and the inculcation of Christian beliefs and values. Compl. at ¶¶ 66-70; Laurie Decl. ¶ 16. Those beliefs include that God creates people male or female, that a person's sex is an immutable God-given gift, and that a person should not deny his or her God-given sex. Compl. at ¶¶ 55-56 Laurie Decl. ¶ 16.

Hope Center also believes that women should be cherished, respected, and protected. Compl. at ¶ 57; Laurie Decl. ¶ 17. Providing shelter to women in need not only demonstrates that belief, it plays a critical role in developing their guest's understanding of God's design for them. Compl. at ¶ 62; Laurie Decl. ¶ 17. Guests are offered Christian counseling, teaching, and advice provided by staff and leaders associated with Hope Center. Compl. at ¶ 68; Laurie Decl. ¶ 18. They are also invited to participate in group prayer before meals, Bible studies, and group devotions. Compl. at ¶ 69; Laurie Decl. ¶ 18. The facility itself underscores Hope Center's religious mission. Laurie Decl. ¶ 20; Ex. M. Hope Center not only hosts church services, but it plays Christian music

and television, and has signs and décor with Christian messages throughout. Compl. at ¶ 69; Laurie Decl. ¶ 20. By loving, serving, and teaching homeless women in this environment, Hope Center seeks to encourage them to put their faith in Jesus Christ and free themselves from destructive addictions, habits, or situations. Compl. at ¶ 70; Laurie Decl. ¶ 20.

Because Hope Center shelters many homeless women who have been raped, beaten, trafficked, and threatened by men, Hope Center believes that biological males should not sleep with and disrobe next to females. Compl. at ¶¶ 60, 63; Laurie Decl. ¶¶ 26, 44-46. It therefore only accepts biological women to protect their physical, psychological, and emotional safety. Compl. at ¶¶ 60, 63, 72; Laurie Decl. ¶¶ 26, 44-46.

Hope Center desires to publish its admittance policy to those seeking refuge so they will know of the protection and care Hope Center provides. Laurie Decl. ¶ 43. It also wants to fulfill its religious belief to be upfront and honest with those individuals. Compl. at ¶¶ 59, 210; Laurie Decl. ¶ 43. According to its admittance policy, Hope Center shelter guests must be biological females, at least 18 years of age, not demonstrate dangerous behavior, be clean and sober, be exposed to or attend prayer meetings and devotionals, be able to meet their personal needs without assistance, and must respect shelter guidelines. Compl. at ¶ 72; Laurie Decl. ¶ 22; Ex. N & O.

Hope Center's Interaction with "Jessie Doe"

On January 26, 2018, Anchorage police officers dropped "Jessie Doe" off at Hope Center.[2] Compl. at ¶ 89; Laurie Decl. ¶ 27. Doe smelled strongly of alcohol, acted agitated and aggressive, and had an open wound above the eye. Laurie Decl. ¶ 27. Sherrie Laurie, Hope Center's Executive Director, was called to assess the situation. Laurie Decl. ¶ 27.

[2] The real name of the complainant is not disclosed in this filing to address privacy concerns.

Because Hope Center is a sober and clean shelter, Laurie explained that Doe could not stay because Hope Center did not accept individuals who were inebriated or under the influence of alcohol or drugs. Compl. at ¶¶ 93-98; Laurie Decl. ¶ 28. Laurie then recommended that Doe go to the hospital to receive medical care. Compl. at ¶ 96; Laurie Decl. ¶ 28. After much resistance, Doe agreed, and Laurie paid for a cab to take Doe to the emergency room. Compl. at ¶ 97; Laurie Decl. ¶ 28. Brother Francis eventually told Laurie that Doe had started a fight at Brother Francis, the police had been called, and Doe had been temporarily banned from Brother Francis property. Compl. at ¶ 95; Laurie Decl. ¶ 29.

The next day, Doe tried to be admitted at Hope Center again. Compl. at ¶ 99; Laurie Decl. ¶ 30. But Doe was not admitted because Doe had not stayed the previous evening, which is required by shelter policy, and because Doe sought entry at a time when the shelter was not accepting new guests. Compl. at ¶ 100; Laurie Decl. ¶¶ 30-32. Doe left Hope Center that day, but then filed a complaint with the Commission claiming sex and gender identity discrimination. Compl. at ¶¶ 102-103, 135; Laurie Decl. ¶¶ 32-33.

The First Commission Complaint

Doe filed a complaint ("First Complaint") with the Commission on February 1, 2018. Laurie Decl. ¶ 33; Tucker Decl. ¶ 11; Ex. H. Facing stiff penalties, Hope Center hired attorney Kevin Clarkson of Brena, Bell & Clarkson, P.C. Laurie Decl. ¶ 34. On March 6, 2018, Clarkson sent the Commission a letter, denied that Hope Center was a public accommodation, and explained that Hope Center referred Doe elsewhere because of inebriation and timing, both non-discriminatory reasons. Laurie Decl. ¶ 34; Tucker Decl. ¶ 3; Ex. A.

Although the Commission had enough information to dismiss the First Complaint, it continued to "investigate" by serving irrelevant and overbroad interrogatories with close to

30 different subparts. Compl. at ¶ 140; Tucker Decl. ¶ 9; Ex. F. For example, the Commission asked how Hope Center determines a guest's sex and whether there was storage at the facility for guests. Tucker Decl. ¶ 9; Ex. F. None of those requests sought information that could help evaluate Doe's complaint. They were meant to harass. But Hope Center provided more information. Compl. at ¶ 205; Tucker Decl. ¶ 9; Ex. F. It also answered questions about funding, explaining that it does not currently receive funds, directly or indirectly, from Anchorage or HUD. Tucker Decl. ¶ 9; Ex. F. It is funded by donations from churches, private businesses, non-profits, and individuals. Laurie Decl. ¶ 13.

Proposition 1

When Hope Center answered the First Complaint, Anchorage residents were about to vote on Proposition 1, an initiative about bathroom access and gender identity. Laurie Decl. ¶ 35. Anchorage media took interest in the Commission's action against Hope Center, and Hope Center received interview requests, including from the *Anchorage Daily News.* Compl. at ¶¶ 141-44; Laurie Decl. ¶ 35. Kevin Clarkson responded to these requests orally. Laurie Decl. ¶ 35. The *Anchorage Daily News* and other media outlets then published stories about the Commission's action, none of which were solicited by Hope Center. Laurie Decl. ¶ 35.

On April 23, 2018, Hope Center moved to dismiss the First Complaint. Laurie Decl. ¶ 36; Tucker Decl. 4; Ex. B. But rather than consider that motion, the Commission sent an unreasonable "settlement offer" to Hope Center. Compl. at ¶ 147; Laurie Decl. ¶ 36. Acceptance of this offer would have required Hope Center to violate its religious beliefs. It declined. Laurie Decl. ¶ 36.

The Second Commission Complaint

Although it could not find any wrongdoing and still refused to rule on the pending motion to dismiss, the Commission kept trying to force Hope Center to change its policies. Compl. at ¶ 150. On May 15, 2018, Director Basler filed a second complaint against Hope Center and its counsel. ("Second Complaint"). Compl. at ¶¶ 151-53; Laurie Decl. ¶ 37; Tucker Decl. ¶ 12; Ex. I. This complaint alleged that Hope Center and Clarkson's firm, Brena, Bell & Clarkson, P.C. ("BBC"), violated Code §§ 5.20.020(A)(7) and/or 5.20.050 when Clarkson (Hope Center's supposed real property "agent") spoke to the media about Hope Center shelter policies. Compl. at ¶¶ 153-54; Tucker Decl. ¶ 12; Ex.I. But Clarkson was Hope Center's attorney—not an "agent" of real property. Compl. ¶ 176; Laurie Decl. ¶ 38. And Clarkson did not make any written statements, the only kind Code § 5.20.050(A)(3) prohibits. Compl. at ¶ 177; Laurie Decl. ¶ 38.

When it filed the Second Complaint, the Commission set a fact finding conference and sent a "Request for Essential Information." Compl. at ¶ 155. Because this Second Complaint named Hope Center's attorney, it created a potential conflict and forced Hope Center to hire new counsel, Alliance Defending Freedom ("ADF"). Compl. ¶¶ 156-57; Laurie Decl. ¶ 39. On June 21, 2018, ADF attorneys entered appearances and one informed the Commission that he would serve as Hope Center's "contact person." Compl. at ¶ 157; Decl. of Sonja Redmond ¶¶ 3, 12; Ex. R; Tucker Decl. ¶ 5; Ex. C. But due to its continued hostility toward Hope Center, the Commission initially refused to correspond with ADF attorneys even though they had affiliated themselves with a local attorney. Compl. at ¶ 158; Redmond Decl. ¶¶ 4-6; Ex. S & T.

On June 29, 2018, ADF informed the Commission that counsel had a conflict with the unilaterally scheduled fact finding conference and had concerns about the conference

procedures. Tucker Decl. ¶ 6; Ex. D; Compl. at ¶ 159. These procedures had not been sent by the Commission as required, and it was unclear how evidentiary matters would be handled. Tucker Decl. ¶ 6; Ex. D. For example, the Commission had not clarified whether objections to documents and testimony would be allowed, a serious concern considering that questions at the conference had to be funneled through the Commission staff. *Id*. The June 29 letter also noted that Hope Center would supplement its interrogatory answers with more information on jurisdictional issues. Compl. at ¶ 160; Tucker Decl. ¶ 6; Ex. D.

The Commission's response to the June 29 Letter was surprising. Even though the Commission set the fact finding conference without asking for counsel's availability, the Commission denied the continuation request and did not answer any of the due process concerns. Tucker Decl. ¶ 6; Ex. D; Compl. at ¶¶ 169-70. A few days later, Hope Center's counsel sent another letter, noted disappointment with the Commission's refusal to reschedule, requested clarity again about the conference's procedures, and submitted responses to the Commission's Request for Essential Information. Tucker Decl. ¶ 7; Ex. E; Compl. at ¶ 171.

That same day, Hope Center filed a motion for lack of jurisdiction as to the Second Complaint. Tucker Decl. ¶ 7; Ex. E; Compl. at ¶ 172. This motion noted that the Commission did not properly plead a claim against Hope Center and that homeless shelters were exempted in the Code.[3] Tucker Decl. 7; Ex. E; Compl. at ¶ 178. And because Hope Center is a "shelter for the homeless" and all sections of an ordinance should be construed together, the Commission should dismiss the First and Second Complaints. Tucker Decl. ¶ 7; Ex. D.

[3] Section 5.20.020(A) specifically incorporates the exemption for homeless shelters found at Code § 5.25.030(A)(9).

Fact Finding Conference

On July 9, 2018, local counsel appeared at the fact finding conference for the Second Complaint with a court reporter; but the Commission refused to let the conference be transcribed. Compl. ¶¶ 187-89; Answer ¶¶ 187-89; Redmond Decl. ¶ 8. And instead of addressing allegations in the Second Complaint or Hope Center's public accommodation status, the Commission accused Hope Center of not truthfully answering interrogatories about the First Complaint. Redmond Decl. ¶ 9. The Commission also alluded to materials that supposedly proved inconsistencies in Hope Center's discovery responses about funding. Redmond Decl. ¶ 9. But the Commission played hide-the-ball and refused to show those materials to counsel, instead suggesting it might at some later point, which it still has yet to do. Redmond Decl. ¶ 9; Compl. at ¶¶ 190-91.

On July 13, 2018, Hope Center's local counsel emailed the Commission and again asked for materials promised during the fact finding conference. Redmond Decl. ¶¶ 10-11; Ex. U & V. But none came. *Id*. The Commission investigator instead suggested that the parties focus on settlement rather than exchange any more documents. Compl. at ¶ 193; Redmond Decl. ¶ 11; Ex. V. In that same email, the investigator also criticized Hope Center's original counsel with an unnecessary jab, stating that "[p]erhaps [Clarkson] will be more forthcoming with providing [] information to [ADF] than he has been to the Commission…." Compl. at ¶¶ 194-95; Redmond Decl. ¶ 11; Ex. V.

The Commission's Violations of the Code

The Commission's provocative behavior did not end at the fact finding conference. On August 3, 2018, the Commission accused Hope Center of not supplementing discovery responses even though it had previously tried to do so and had been instructed by the

Commission that no more documents need be exchanged. Compl. at ¶ 198; Tucker Decl. ¶¶ 8-9. Despite that attack, Hope Center amended its answers to the Commission's interrogatories in the First Complaint—not to correct any deficiencies, but to further explain how its original answers were truthful and why that complaint should be dismissed. Tucker Decl. ¶ 9; Ex. F. But the Commission did nothing in response. And it continues to do nothing, in violation of the Code.

Code § 5.50.010 requires the Commission to issue a determination within 240 days of the filing of a complaint. The First Complaint was filed over 270 days ago and has no basis in fact. Laurie Decl. ¶¶ 33, 40. Such inaction should have resulted in dismissal. But it hasn't. The only proper action the Commission has taken is dismissal of the Second Complaint. On October 2, 2018, the Commission dismissed the Second Complaint against Brena, Bell & Clarkson, P.C. and Hope Center by way of settlement, effectively agreeing that it should not have filed the matter. Laurie Decl. ¶ 41. But the First Complaint—and more importantly, Defendants' broad interpretation of the Code—still remain.

Anchorage interprets its law to stop Hope Center from helping others.

Hope Center wants to continue to allow only biological females into its women's shelter. Compl. at ¶ 209; Laurie Decl. ¶ 43. And due to the Commission complaints and associated publicity, Hope Center also desires to make its policies clear by posting them at the women's shelter and online. Compl. at ¶ 210; Laurie Decl. ¶ 43. But because of the Commission's hostile interpretation of Anchorage's public accommodation laws, Hope Center faces only burdensome options. Compl. at ¶ 211.

First, Hope Center could comply with Anchorage's interpretation of its laws and allow biological males to sleep in its shelter reserved for biological women, many of whom have been

abused by men or escaped sex trafficking. Compl. at ¶ 212; Laurie Decl. ¶¶ 26, 45-46. But Hope Center cannot do this because it places women at risk, defies common sense, and violates its religious beliefs. Compl. at ¶ 213; Decl. of S.D. ¶ 3-4, 6-13 ("SD Decl."); Decl. of G.O. ¶ 4-12 ("GO Decl."); Decl. of F.S. ¶ 3-6, 8-13 ("FS Decl."). Women who benefit from the shelter would not only feel unsafe if they had to sleep and undress next to men, they simply would not stay at the facility. Compl. at ¶ 214; Laurie Decl. ¶¶ 44-47; SD Decl. ¶ 8-10; GO Decl. ¶ 5, 7-10; FS Decl. ¶4-6. Hope Center cannot pursue its religious mission or teach its religious beliefs about loving those in need and about the difference between men and women when Anchorage forces Hope Center to put homeless women at risk. Compl. at ¶ 215; Laurie Decl. ¶¶ 44-48.

Second, Hope Center could violate Anchorage's interpretation of these laws by posting statements on Hope Center grounds and on its website explaining Hope Center's beliefs about sex and gender identity and explaining why its women's shelter only accepts women. But Hope Center will not take this second option because it does not want to violate Anchorage's laws and suffer its penalties. Compl. at ¶ 216-17; Laurie Decl. ¶ 49.

Third, Hope Center has refrained from posting statements about its policies and beliefs on sex and gender identity. Compl. at ¶¶ 221-24; Laurie Decl. ¶ 49. And Hope Center has temporarily done so is to avoid violating Anchorage laws. Compl. at ¶ 226; Laurie Decl. ¶ 49. Specifically, Hope Center has refrained from posting a statement (attached to Complaint as Exhibit 3) on its grounds where women are admitted into its shelter, as well as on its website under the tab "About the Women's Shelter," located at https://bit.ly/2A5Ijs3. Compl. at ¶ 223; Laurie Decl. ¶ 43. This chilling violates Hope Center's religious beliefs because it is religiously motivated to post these statements and obligated to follow God's calling to foster a safe environment for women seeking refuge. Compl. at ¶ 228: Laurie Decl. ¶ 43. It has also come at great cost. The inability to defend

itself in the public square has hindered its ability to raise funds, leaving it in a very tenuous financial state. Laurie Decl. ¶ 52. Left with no option that does not violate its faith or the law, Hope Center had no choice but to challenge Anchorage's unconstitutional acts. Each day, Hope Center loses its freedom to speak and exercise its religious beliefs.

ARGUMENT

To obtain a preliminary injunction, movants must show that (1) they will likely succeed on the merits, (2) they will likely suffer irreparable harm absent relief, (3) the balance of the equities tips in their favor, and (4) the public interest supports an injunction. *Shell Offshore Inc. v. Greenpeace, Inc*., 864 F.Supp.2d 839, 846 (D. Alaska 2012), *aff'd*, 709 F.3d 1281 (9th Cir. 2013). Movants can also obtain relief if they show serious questions going to the merits, the balance of harm tips sharply in their favor, and the other preliminary-injunction factors are met. *Short v. Brown*, 893 F.3d 671, 675 (9th Cir. 2018). All of these factors favor a preliminary injunction here.

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

Hope Center raises religious freedom, speech, due process, and privacy claims to justify its preliminary injunction request. Hope Center will likely succeed on each of them, but only one is necessary for the requested relief.

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

The Free Exercise Clause forbids the government from discriminating against religion. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993). State action "that is not neutral" toward religion "or not of general application must undergo the most rigorous of scrutiny." *Id*. at 546. But Anchorage fails this standard in two ways: (1) its interpretation of §§ 5.20.050 and 5.20.020 conveys hostility toward Hope Center's beliefs, and (2) exemptions in the Code show that it is not neutral or generally applicable.

The government fails to act neutrally when it manifests hostility toward religious people or religious beliefs. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n.*, 138 S. Ct. 1719, 1729–31 (2018); *Lukumi*, 508 U.S. at 534. "The Free Exercise Clause bars even '*subtle* departures from neutrality' on matters of religion," and its protection applies "upon even *slight* suspicion that … state [actions] stem from animosity to religion or distrust of its practices." *Masterpiece*, 138 S. Ct. at 1731 (cleaned up and emphasis added). When government acts with hostility toward religion, litigants establish a free-exercise violation without needing to satisfy strict scrutiny. *See id.* at 1729–32.

Anchorage has acted with such hostility because it is using the Code to pressure Hope Center to change its religious beliefs and practices. This is most evident because the Code does not even cover Hope Center. Hope Center's women shelter is not a public accommodation. *Infra* § I. It is not a "business or professional activity that is open to, accepts or solicits the patronage of, or caters or offers goods or services to the general public."[4] Code § 5.20.010. And the Code explicitly exempts "shelters for the homeless" like Hope Center. Code § 5.25.030(A)(9); *Monzulla v. Voorhees Concrete Cutting*, 254 P.3d 341, 345 (Alaska 2011) ("All sections of a statute 'should be construed together so that all have meaning and no section conflicts with another.'" (citation omitted)). The Commission also has no basis to say Hope Center violated Code § 5.20.020(A)(7) or any other part of Code Title 5. The denial at issue was clearly made pursuant to neutral criteria, yet Anchorage continues to investigate Hope Center anyway and to pressure Hope Center to change its practices.

[4] Anchorage's answer suggests that receiving government funds, directly or indirectly, somehow automatically transforms Hope Center into a public accommodation. Answer at ¶ 183. But receiving government funds does not by itself turn an organization into a public accommodation, and Hope Center's women's shelter does not receive government funding. Laurie Decl. ¶¶ 11, 13. To be sure, Hope Center previously received some funds from Catholic Social Services, but it no longer does so, and those funds came from Catholic Social Services, not Anchorage or HUD. *Id*. at ¶ 11, 12.

The only explanation for Anchorage's actions is its hostility toward Hope Center's religious beliefs and practices. This hostility is evident in multiple ways, including:

(1) Although someone sought access to Hope Center and it referred that person to a hospital for non-discriminatory reasons, the Commission has not dismissed the First Complaint;

(2) Director Basler filed a frivolous Second Complaint against Hope Center and its counsel, forcing Hope Center to obtain new counsel;

(3) The Commission has refused to rule on a pending motion to dismiss and instead pursued meritless discovery;

(4) The Commission has not issued a determination as required by the Code;

(5) Anchorage's interpretation of its laws has forced Hope Center to stay silent about its religious policies and beliefs;

(6) The Commission refused to recognize Hope Center's designated contact person or to provide information about procedures at the fact finding conference;

(7) Defendants proceeded with the fact finding conference for the Second Complaint even though lead counsel was unavailable and requested a continuation;

(8) The Commission refused to allow a court reporter to transcribe the fact finding conference;

(9) Defendants have criticized Hope Center and its counsel, telling them not to supplement discovery responses and then blaming them for not doing so; and

(10) The Commission has continued to "investigate" Hope Center for over eight months despite no evidence of it violating the Code or of the Code even covering Hope Center.

Supra p.4-10.

Moving from hostility to exemptions, Anchorage violates Free Exercise here too. "The Free Exercise clause protects religious observers against unequal treatment." *Lukumi*, 508 U.S. at 542 (cleaned up). But the Code fails this requirement because it exempts similarly situated groups but not Hope Center. For example, the Code allows single-sex dormitories and renters who share a "common living area[]" with the owner, lessor, or manager of a home to make classifications

Hope Center cannot. Code §§ 5.25.030(A)(8), 5.25.030(A)(2) and 5.20.020(B). But most astonishingly, the Code exempts homeless shelters, yet Anchorage applies the Code against Hope Center anyway. Code § 5.25.030(A)(9). The Code cannot be neutral or generally applicable when it exempts other groups from its requirements yet forces Hope Center to comply with these same requirements.

As these exemptions and Anchorage's actions show, Anchorage has ignored the text of its law, falsely accused Hope Center of violating that law, and investigated false accusations to pressure Hope Center to change its religious policies and beliefs. Individually, these events not only raise a "slight suspicion" that Anchorage's actions stem from religious animosity, they collectively demonstrate hostility that is blatant and egregious. *Lukumi*, 508 U.S. at 547; *Masterpiece*, 138 S. Ct. at 1730–32. And the Code's plain text and Defendants' application of it "have every appearance of a prohibition that society is prepared to impose upon [Hope Center] but not upon itself. *Lukumi*, 508 U.S. at 545 (cleaned up). That is the "precise evil … the requirement of general applicability is designed to prevent." *Id*. at 546.

B. Anchorage's treatment of Hope Center violates the Alaska Freedom of Religion Clause.

Under the Alaska Constitution, "[n]o law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof." Alaska Const. art. I, § 4. Alaska interprets this clause differently than its federal counterpart. *Huffman v. State*, 204 P.3d 339, 344 (Alaska 2009). This clause protects someone's conduct if (1) "a religion is involved, the conduct in question is religiously based, and the [person] is sincere in his or her religious belief"; and (2) "the conduct poses ... [no] substantial threat to public safety, peace or order," and "there are [no] competing governmental interests that are of the highest order and are not otherwise served." *Sharpe v.*

Sharpe, 366 P. 3d 66, 75 (Alaska 2016) (citing *Larson v. Cooper*, 90 P.3d 125, 131 (Alaska 2004)). Both parts of this two-part test are satisfied here.

First, Hope Center was founded on its Christian faith. Compl. at ¶¶ 35, 51; Laurie Decl. ¶¶ 5, 16. And its mission statement illustrates those beliefs. Compl. at ¶ 52; Laurie Decl. ¶ 16. Hope Center's conduct is also religiously based. Laurie Decl. ¶¶ 5, 16. Hope Center believes that women should be cherished, respected, and protected. Compl. at ¶ 57; Laurie Decl. ¶¶ 17-18. Providing shelter to hurting women not only demonstrates that belief, it plays a critical role in developing their guests' understanding of God's design for them. Compl. at ¶ 62; Laurie Decl. ¶¶ 16-17. And part of that care includes making clear its policies on admission to guests. Compl. at ¶ 59; Laurie Decl. ¶ 43. Hope Center desires to do this, not just for those seeking refuge, but to fulfill its religious belief to be open with those seeking access to its shelter. Laurie Decl. ¶ 43. Nor can anyone doubt Hope Center's sincerity. It takes seriously the tenets of its faith and its call to foster a safe environment for these women. *Supra* pp. 3-4.

Second, admitting only women into its shelter or posting its admittance policy poses no "substantial threat to public, safety, peace or order." The opposite is true. How Anchorage has interpreted its laws is a threat to the safety of the women who stay at Hope Center's shelter. Laurie Decl. ¶¶ 44-46; SD Decl. ¶ 3-4, 6-13; GO Decl. ¶ 4-12; FS Decl. ¶ 3-6, 8-13. There are no compelling state interests that could justify the burdens placed on the exercise of Hope Center's religious beliefs, *Frank v. State*, 604 P.2d 1068, 1073 (Alaska 1979); *see infra* § I.I (discussing strict scrutiny), especially in light of the exemptions in the Code.[5]

[5] Unlike *Swanner v. Anchorage Equal Rights Com'n*, 874 P.2d 274 (Alaska 1994), which found a compelling interest to stop discrimination in a commercial real property context, this case involves a religious non-profit that offers shelter for free and does not discriminate.

C. Code §§ 5.20.020(A)(7) and 5.20.050(A)(2) violate the First Amendment as-applied because they ban speech based on content and viewpoint.

Anchorage interprets §§ 5.20.020(A)(7) and 5.20.050(A)(2) (the "publication bans") to ban Hope Center's religious expression based on its content and viewpoint. Both provisions ban speech—speech that "indicates any preference, limitation, specification or discrimination based on" protected classifications, § 5.20.020(A)(7), and speech that "states or implies that … [t]he patronage or presence of a person … is unwelcome, not desired, not solicited, objectionable or unacceptable" based on protected classifications. Code § 5.20.050(A)(2). While Hope Center serves people of all backgrounds, including transgender individuals, Hope Center must communicate to its guests and the public that its women's shelter only accepts biological women in accord with its religious beliefs and the safety of the women in its shelter. Laurie Decl. ¶¶ 42-50; SD Decl. ¶ 13; GO Decl. ¶ 11. Indeed, Hope Center wants to post a particular statement to this effect. But it cannot do so. Based on Anchorage's filing of the Second Complaint, that communication violates the law because it communicates that biological males will be referred to another shelter. *See supra* pp. 6-10. Such a content and viewpoint based restriction violates the First Amendment.

The Free Speech Clause guarantees that government cannot "restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Content and viewpoint based restrictions on expression are "presumptively unconstitutional" and may only be justified by strict scrutiny. *Id.* at 2226-2227. A law is content-based if it facially "draws distinctions based on the message a speaker conveys." *Id.* at 2227. A law is also content-based if it "cannot be justified without reference to the content of the regulated speech" or was "adopted by the government because of disagreement with the message [the speech] conveys." *Id.* (cleaned up). Both are true here.

Facially, the publication bans restrict speech only on certain topics. For example, a person may speak freely about politics or political candidates but not about certain LGBT issues, because disfavored speech on LGBT issues triggers punishment. The same is true in application. Anchorage has already interpreted its law to stop Hope Center from speaking about gender issues. Under that interpretation, Hope Center cannot post its desired statement or discuss its religious beliefs on gender.

Moreover, Hope Center is silenced not just based on content but based on viewpoint too, "a more blatant and egregious form of content discrimination" *Reed*, 135 S. Ct. at 2230 (cleaned up). Because viewpoint discrimination is so harmful, strict scrutiny applies whenever the "[g]overnment discriminat[es] among viewpoints" by regulating speech based on "the specific motivating ideology or the opinion or perspective of the speaker," *Id.* (cleaned up) or by acting "based on hostility—or favoritism—towards the underlying message expressed." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992).

Yet, that is exactly what Anchorage does here. It interprets its publication bans to favor the message that gender is fluid and changeable, while punishing the message that gender is fixed. This is viewpoint discrimination, and it is unconstitutional.

D. Code § 5.20.050(A)(2) violates the First and Fourteenth Amendments because it is overbroad, vague, and grants unbridled discretion.

Besides banning Hope Center's speech, Code § 5.20.050 also contains facial problems that render it unconstitutional. First, some language in this provision is overbroad. It even forbids a statement that "implies" that someone is "unwelcome, not desired, not solicited, objectionable or unacceptable." These terms are so broad, they allow Anchorage to restrict any criticism about the beliefs, associations, or actions of protected class members anytime a public accommodation communicates. Courts have already found similar language overbroad. *Saxe v. State Coll. Area*

Sch. Dist., 240 F.3d 200, 215 (3d Cir. 2001) (school policy invalidated that banned "any unwelcome verbal … conduct which offends … because of" protected characteristics); *Armstrong v. D.C. Pub. Library*, 154 F. Supp. 2d 67, 77-80 (D.D.C. 2001) (regulation invalidated that denied library access to patrons with an "objectionable" appearance). Anchorage's treatment of Hope Center proves the point—Anchorage is using the broad language to silence Hope Center's publication and discussion of its religious beliefs about gender. *Supra* § I.A-C. That makes the ban facially overbroad because it "prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292 (2008).

Second, the same language mentioned above is unconstitutionally vague. A law is vague if it does not give ordinary citizens notice of what the law prohibits and allows, particularly when it suppresses the exercise of constitutional rights, as the publication ban does here. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982). The failure to define terms means Hope Center and other citizens are left with no direction as to what they can and cannot communicate. Defendants in turn have great leeway to apply the ban's terms against any viewpoint or any activity they dislike.

That unbridled discretion is another of the ban's fatal flaws. For the government to administer a law fairly, that law cannot delegate broad discretion to enforcement officials, nor open the door to arbitrary applications that could suppress particular viewpoints. *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). The publication ban does both. The law's broad and undefined terms enable city officials to apply the law on a whim and wield it to suppress unpopular views that conflict with Anchorage's progressive norm. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763 (1988). Such government control over speech threatens freedom of thought that is vital to a pluralistic society.

E. Code §§ 5.20.050 and 5.20.020 violate the hybrid-rights doctrine as-applied.

Code §§ 5.20.050 and 5.20.020 also violate the hybrid-rights doctrine. Under this doctrine, laws trigger strict scrutiny when they implicate free-exercise rights and at least one other constitutional right. *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999) (noting that "a hybrid-rights claim" is not subject to the "rational basis test"). *Employment Division v. Smith* identified several situations when this doctrine applies, including when laws implicate free exercise and "freedom of speech and of the press" claims—the exact situation here. 494 U.S. 872, 881 (1990).

To prove a hybrid-rights violation, a free exercise plaintiff must show a "colorable" violation of a companion constitutional right. *Miller*, 176 F.3d at 1207. This requires demonstrating a "fair probability" or "likelihood" but not "certitude" of success on the companion claim. *Id.* (cleaned up). Hope Center has surpassed this marginal threshold. As demonstrated above, §§ 5.20.050 and 5.20.020 implicate, severely burden, and violate its right to speak. *Supra* § I.C. At the very least, §§ 5.20.050 and 5.20.020 burden both speech and religion, which should justify raising the level of scrutiny to strict. Anchorage cannot meet this standard. *See* i*nfra* § I.I (explaining why law fails strict scrutiny).

F. Code §§ 5.20.050 and 5.20.020 violate the Fourteenth Amendment right to due process as-applied.

While a law is facially vague if it does not give ordinary citizens notice of what the law prohibits or allows, a law is vague as-applied if it fails to put the accused on notice that "his particular conduct was proscribed." *United States v. Harris*, 705 F.3d 929, 932 (9th Cir. 2013). Anchorage fails this standard in two ways.

First, Anchorage interprets §§ 5.20.050 and 5.20.020 to bar Hope Center's activities. But these provisions only cover public accommodations, and Hope Center's women shelter is not one. The Code defines public accommodations as a business or professional activity that serves the

general public. Code § 5.20.010. Hope Center's women's shelter is not a business or commercial enterprise, nor does it currently receive any government funds directly. Laurie Decl. ¶¶ 11, 13. Instead, Hope Center receives private donations from individuals, other non-profits, businesses, foundations, and churches. *Id*. at ¶ 13. It operates exclusively on a charitable basis. *Id.* Hope Center women's shelter does not conduct commercial transactions or other forms of "for profit" activities, and it does not cater to, or offer goods or services to, "the general public" for profit. *Id*.

Second, Anchorage interprets § 5.20.020(A)(7) to apply to Hope Center. But this provision only covers real estate agents. Section 5.20.020 makes it illegal for owners, lessors, managers, or agents to "[c]irculate, issue or display, make, print or publish, or cause to be made or displayed, printed or published, any communication, sign, notice, statement or advertisement with respect to the use, sale, lease or rental of real property that indicates any preference, limitation, specification or discrimination based on" sex or gender identity. Code § 5.20.020(A)(7). And it provides an important exemption. *See* Code § 5.20.020(A) ("With the exception of those conditions described in section 5.25.030A, as 'lawful practices', it is unlawful…"). "Shelters for the homeless" are specifically exempted from the Code's housing section**.** Code § 5.25.030(A)(9). Hope Center cannot possibly have notice that it violates a law that does not apply to it.

G. Code § 5.20.050 violates the Alaska Privacy Clause as-applied.

Article 1 § 22 of the Alaska Constitution states that "[t]he right of the people to privacy is recognized and shall not be infringed." Alaska Const. art. I, § 22. This article "fosters and protects those values and characteristics typical of and necessary for a free society." *City & Borough of Juneau v. Quinto*, 684 P.2d 127, 129 (Alaska 1984). The test for determining whether a person's right to privacy has been invaded is two-fold: "(1) did the person harbor an actual (subjective) expectation of privacy, and, if so, (2) is that expectation one that society is prepared to recognize as reasonable." *Id.* Both of those elements are met here.

First, guests of the women's shelter have an expectation of privacy when they enter the facility.[6] They are told that Hope Center is a loving and safe environment for women and do not expect to undress and sleep next to biological males. Laurie Decl. ¶¶ 43-46; GO Decl. ¶ 9; FS Decl. ¶ 10-11. Second, that expectation is one society should recognize as reasonable. In fact, the Ninth Circuit has already recognized the right to bodily privacy. *See York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) ("The desire to shield one's unclothed figured from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity."). Alaska courts have even recognized privacy interests in much broader contexts. *See K.L. v. Alaska, Dep't of Admin., Div. of Motor Vehicles*, No. 3AN–11–05341, 2012 WL 2685183, at *6 (Alaska Super. Ct. Mar. 12, 2012) (concluding that absence of any procedure allowing licensees to change the sex designation on their driver's license impermissibly interfered with transgendered person's right to privacy); *Breese v. Smith*, 501 P.2d 159, 168 (Alaska 1972) (recognizing a fundamental right to control one's hair style). Nor can Defendants identify any compelling interest that would override guests' privacy interests. *See infra* § I.I (explaining why law fails strict scrutiny). So Hope Center is likely to prevail on this claim as well.

H. Anchorage's application of the Code fails strict scrutiny.

Because §§ 5.20.050 and 5.20.020 violate Hope Center's constitutional rights, they must satisfy strict scrutiny, "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997). To survive strict scrutiny, Defendants must prove that these sections are narrowly tailored to serve a compelling interest. *Lukumi*, 508 U.S. at 546; *Frank*, 604 P.2d at 1073.

[6] Hope Center may bring privacy claims on behalf of its guests. *See Alaska Wildlife All. v. Rue*, 948 P.2d 976, 980 (Alaska 1997).

But broad generalities cannot satisfy this standard. Courts must "look[] beyond broadly formulated interests" in prohibiting discrimination in general and consider only Defendants' interest in applying the Code to Hope Center, "the particular claimant" whose constitutional rights are infringed. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 430-31 (2006). Anchorage cannot meet this standard for three reasons.

First, Anchorage has no compelling need to force Hope Center to stay silent and act contrary to its religious beliefs about gender. While Anchorage may have an interest to stop gender identity and sex discrimination generally, Anchorage must show it has a compelling interest to force a religious, women's only shelter to admit biological men and to stay silent about its beliefs. This it cannot do. As for gender identity discrimination, Hope Center does not discriminate on that basis. Compl. at ¶ 73; Laurie Decl. ¶ 42. Hope Center's shelter accepts people of all gender identities, so long as they are biological females. Laurie Decl. ¶ 42; Compl. at ¶ 73-74. Their gender identity is irrelevant. As for sex discrimination, Hope Center distinguishes men from women to help women, not hurt them. In the context of a homeless shelter for women—and particularly one for battered women—this distinction is not discrimination, but common sense. Laurie Decl. ¶ 44-46. Even Anchorage accepts this point. It exempts homeless shelters, same-sex dormitories, and other residential facilities that lodge persons from its ordinance. Code § 5.25.030. And Anchorage cannot justify compelling Hope Center to admit men when other homeless shelters around town accept men. *See* Laurie Decl. ¶ 47.

Second, Anchorage's interest in forcing Hope Center to accept biological males and to stay silent is massively underinclusive. *Brown v. Entm't Merchants Ass'n,* 564 U.S. 786, 801 (2011). Anchorage cannot claim a compelling interest to force Hope Center to do this when Anchorage allows other homeless shelters to make distinctions based on sex and gender identity. Likewise,

Anchorage cannot punish Hope Center for sex and gender identity discrimination when Anchorage allows other non-profit organizations to distinguish biological men from women and when Anchorage allows renters to make such distinctions when they share "common living areas" with someone. Code §§ 5.25.030(A)(2) and 5.20.020(B). These exemptions of similarly situated groups undermine any need to compel Hope Center.

Third, Anchorage's actions lack narrow tailoring. Anchorage can achieve its goal of stopping gender identity and sex discrimination without forcing Hope Center to accept biological males. In fact, Anchorage has already conceded the point when it exempted homeless shelters, private renters, and other non-profits from its law. There is no reason to treat Hope Center any different. This is particularly true because Hope Center is highly selective. Laurie Decl. ¶¶ 21-26; Ex. N & O; Compl. at ¶ 72. Stopping discrimination becomes less important in the private arena, when, for example, a private club chooses its members or an entity selectively chooses who receives benefits. *See Vejo v. Portland Pub. Schs.*, 204 F. Supp. 3d 1149, 1168 (D. Or. 2016) (explaining that public accommodation law did not apply to university program because it was too selective). The particular nature of what Hope Center does and who it helps make applying the Code to Hope Center unnecessary and unjustified.

II. The remaining preliminary injunction factors favor an injunction.

Irreparable harm. "[T]he deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017) (citation omitted). That means Hope Center suffers irreparable harm when the Code violates constitutional rights. Each day in fact, Hope Center loses the freedom to speak and a threat hovers over its right to exercise its religious beliefs. Nothing but an immediate injunction can remedy this harm.

Balance of equities. The equities favor Hope Center because the law places a premium on protecting constitutional rights. The laws discussed above irreparably harm Hope Center's

constitutional freedoms and significantly hinder its ministry. Meanwhile, an injunction will not harm Anchorage at all. Anchorage can achieve any valid interest through laws already on the books. It need not apply its law unconstitutionally. *See Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) (noting that "the balance of equities favors Appellees, whose First Amendment rights are being chilled").

Public interest. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002) (abrogated on other grounds). This is particularly true for First Amendment freedoms. "Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles." *Id.* Because the requested injunction will accomplish this, the public interest also favors a preliminary injunction protecting Hope Center.

CONCLUSION

Hope Center simply wants to teach and help homeless women trying to escape from abuse, battery, and sex trafficking. But Anchorage is trying to shut Hope Center's doors and shove hurting women out in the cold—merely because Anchorage dislikes the beliefs that inspire Hope Center to speak and to serve. That is unjustifiable and unconstitutional. A preliminary injunction is needed to ensure that Hope Center can continue to do what it does best: serve those in need.

Respectfully submitted this 1st day of November, 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

Kevin G. Clarkson, AK Bar No. 8511149
Brena, Bell & Clarkson, P.C.
810 N Street, Suite 100
Anchorage, Alaska 99501
(907) 258-2000
(907) 258-2001 (Fax)
kclarkson@brenalaw.com

Sonja Redmond, AK Bar No. 0605022
LAW OFFICE OF SONJA REDMOND
35865 Sunset Park St.
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 November 1, 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
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