UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

Wyatt Bury, LLC; Ballpark Investments LLC d/b/a Hope and Healing Counseling; Wyatt Bury; Pamela Eisenreich; and **State of Missouri *ex rel.* Missouri Attorney General Andrew Bailey,** Plaintiffs, v. **City of Kansas City, Missouri** and **Jackson County, Missouri,** Defendants.	Case No. 4:25-cv-00084-JAM **Plaintiffs' Suggestions in Support of Their Preliminary Injunction Motion**

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Introduction

Growing up can be hard. Some children face difficult problems—like trauma, anxiety, and depression. In our social-media age, more and more children question their perceived gender and sexual practices. In need of help, parents and caregivers often turn to professional counselors to walk their families through these issues. This case is about who gets to decide the views expressed in these counseling sessions: families (and their chosen counselors) or local government officials.

Enter Plaintiffs Wyatt Bury and Pamela Eisenreich. They are licensed counselors who counsel according to their belief that people flourish when they live by God's designs. For them, that means living consistently with one's God-given sex and reserving sexual activity for marriage between a man and a woman. This view is not unusual. Many people today worry about minors seeking irreversible drugs and surgeries to alleviate gender dysphoria. Others disagree and push for immediate transition efforts. There's an ongoing national debate. But Kansas City and Jackson County have slanted that debate. They have passed ordinances that silence certain views in counseling sessions on topics of gender and human sexuality. That violates the First Amendment. Governments cannot pick ideological winners and losers when it comes to speech or censor information that someone wants—whether in politics, sexual ethics, or counseling. Unwilling to live under the imminent threat of prosecution, the Counselors—and Missouri on behalf of similarly situated Missouri citizens—seek to preliminarily enjoin the City's and County's ordinances so they can freely offer counseling to give their clients the help their clients so desperately need and want.

Factual Background

The Counselors provide licensed counseling services in the City and County on various complex and sensitive issues. Verified Complaint (VC) ¶¶ 41–48. They work with minor and adult clients on a consensual basis to provide support,

challenge, and feedback so that their clients achieve their selected life and personal goals. *Id.* Their counseling always includes communication: asking questions, listening, and offering suggestions and guidance. *Id.* at ¶¶ 52–71. The Counselors' religious beliefs inform their view about human nature, including that sex is an immutable human trait, that God created marriage to be between one man and one woman, and that healthy sexual relationships occur within that marital relationship. *Id.* at ¶¶ 49–51. Many of the Counselors' clients share their beliefs and request them for that reason. *Id.* at ¶¶ 60–62. But the Counselors do not impose their faith on anyone; client participation is always voluntary. *Id.* at ¶ 52. Even so, the Counselors cannot provide any counseling that violates their faith. They can neither affirm nor facilitate the idea that someone's sex can be changed nor encourage same-sex marriage, relationships, or attractions. *Id.* at ¶¶ 82–94.

To ensure they speak consistently with their beliefs—and to give prospective clients fair notice—the Counselors want to take certain steps. *First*, they want to offer only counseling about marriage, sexuality, and gender identity consistent with their faith. *Id.* To that end, they would and sometimes do counsel clients to identify consistently with their sex and encourage them to pursue sexual activities and desires in the context of marriage between one man and one woman, even if that means helping their clients change or alter their perceived identity or sexual attractions. *Id.* at ¶¶ 162–238. *Second*, they want to be open about those beliefs by publishing them on their websites and other written materials—including their beliefs about pronoun usage, same-sex marriage, and other topics. *Id.* at ¶¶ 304–12; VC Exs. 5–6. *Third*, they want to ask prospective clients questions to learn whether the requested counseling would violate their beliefs. *Id.* at ¶¶ 294–95, 313, 322.

But the City and County forbid all this through several ordinances. The City and County each have a Counseling Ordinance that prevents the Counselors from seeking to "change," "eliminate," or "reduce" a minor's gender expression or same-

sex attraction. K.C. Ord. § 50-234(b)(1); Cnty. Ord. § 5575.1(a). The ordinances broadly cover all forms of so-called "conversion therapy," including therapy—like the Counselors'—that only involves private, consensual conversations. In a word, the Counseling Ordinances restrict the Counselors' speech on these matters.

Next, the City's Public Accommodation Ordinance has an Accommodation Clause which prohibits public accommodations (like the Counselors) from "refus[ing], withhold[ing] from, [or] deny[ing]" services "on account of" sexual orientation and gender identity. K.C. Ord. § 38–113(a). This clause requires the Counselors to provide counseling to affirm same-sex relationships and transition efforts because they provide counseling to affirm opposite-sex relationships and other identity-related topics and use pronouns inconsistent with a client's sex if asked. VC ¶¶ 239–57. The clause also prevents the Counselors from asking about those topics before agreeing to provide the service. *Id.* at ¶¶ 294–95.

And the City's Public Accommodation Ordinance contains a Publication Clause which makes it unlawful for public accommodations to "publish" "any written or printed communication" that states any "accommodations" (i) "will be refused, withheld from or denied" (Denial Clause) or (ii) that "the patronage" of any person "is unwelcome or objectionable or not acceptable" (Unwelcome Clause) because of a protected trait. K.C. Ord. § 38–113(a). This stops the Counselors from posting statements on their websites or other written materials, referring requests for counseling they cannot provide, and from explaining their religious beliefs on marriage, sexuality, and gender identity. VC ¶¶ 287, 304–23.

These ordinances have similar effects on similarly-situated Missouri citizens.

Some jurisdictions across the country have interpreted similar laws to ban speech that the Counselors want to engage in by mislabeling counselors' speech as "conduct," akin to a medical procedure like surgery. *Id.* at ¶ 144. The City and County wrongly adopted this same view. *Id.* at ¶¶ 141–43.

Knowing this, the Counselors often alter their counseling or refrain from addressing gender identity and sexual orientation to avoid liability, even though they regularly receive client requests for their help to address these issues. *Id.* at ¶¶ 162–238. Eisenreich often stays away from these topics with her clients, avoids posting certain statements, and refers prospective clients to other counselors. *Id.* at ¶¶ 193–212; 304–12. Even so, she sometimes still helps clients alter or change their perceived gender identity or eliminate or reduce unwanted same-sex attractions when asked after thoroughly evaluating the request and speaking with the client or the client's parents. *Id.* at ¶¶ 163–92. Bury wants to counsel minors; he currently doesn't for fear of violating the ordinances. *Id.* at ¶¶ 213–29. The objectively reasonable fear of prosecution has caused them to chill their speech, alter their counseling, and turn down prospective clients asking for help. *Id.* at ¶¶ 230–38.

After all, the penalties for violating the ordinances are severe—from $500 fines, to attorney's fees, to jailtime. The Counselors—and other similarly-situated Missouri citizens—now risk these penalties each day that they strive to help their clients succeed. To minimize those risks, the Counselors chill their speech. To protect them from these unconstitutional threats to their free speech, Plaintiffs request that the Court enter a preliminary injunction to protect the Counselors and similarly-situated Missouri citizens.

Argument

Plaintiffs seek a preliminary injunction to stop ongoing First Amendment violations. This requires them to show (1) likelihood of success on the merits; (2) irreparable harm without the injunction; (3) the equities tipping in their favor; and (4) the injunction serving the public interest. *Rodgers v. Bryant*, 942 F.3d 451, 455 (8th Cir. 2019). Plaintiffs focus on the first factor. They meet it because they have shown at least a "fair chance" of success. *Cigna Corp. v. Bricker*, 103 F.4th 1336,

1343 (8th Cir. 2024). So the other factors "are deemed to have been satisfied." *Rodgers*, 942 F.3d at 455 (cleaned up).

I. The Counseling Ordinances violate the First Amendment by banning the Counselors' speech on vital issues.

The Counseling Ordinances violate the Counselors' and other similarly-situated Missouri citizens' First Amendment rights by (A) regulating their speech to their minor clients (B) based on content and viewpoint. No matter how the City and County may try to reframe it, the ordinances apply here to (C) speech, not conduct.

A. The Counselors communicate with their clients through speech protected by the First Amendment.

The First Amendment prohibits the government from restricting (or "abridging") "the freedom of speech." U.S. Const. amend. I. This prevents the government "from dictating what we see or read or speak or hear." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002). Speech comes in many forms, but "written or spoken words" are the most basic kind. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569, 572–73 (1995). The Counseling Ordinances violate these principles facially and as applied here.

Facially, the ordinances restrict speech that seeks to change gender identity or sexual orientation. They do so because "conversion therapy" is not limited to conduct or physical treatments. K.C. Ord. § 50-234(b)(1); Cnty. Ord. § 5575.1(a). The ordinances broadly regulate "any practice" that seeks to change a minor's gender identity or sexual orientation. "Any practice" covers any written or oral communications by a counselor that seeks to alter "behaviors or gender expressions or to eliminate or reduce sexual or romantic attractions or feelings towards individuals of the same gender." *Id.* So "any practice" includes speech.

Equally problematic, the Counseling Ordinances regulate speech as applied to the Counselors and similarly situated Missouri citizens. During counseling

sessions, the Counselors communicate with their minor clients. VC ¶¶ 66–71. They listen to them and ask questions. *Id.* They discover the minor clients' desires and objectives. *Id.* at ¶ 68. They exchange ideas and suggestions about how they can help the minor clients meet their goals and flourish. *Id.* at ¶¶ 66–71, 162–92.

The Counselors' faith motivates these communications. Those religious beliefs include that each person should act and live consistent with their God-given sex and that sexual activity should be pursued in marriages between one man and one woman. *E.g.*, *id.* at ¶¶ 49–51. To the Counselors, living within these boundaries leads to human flourishing; living outside them causes harm. *Id.* And because the Counselors desire to see their clients prosper, the Counselors hope to explore these ideas when clients are receptive to them, and to help their clients to change their self-perceived gender identity or unwanted same-sex attraction. *Id.* at ¶¶ 162–92, 217–227. Many seek out the Counselors *because the clients want to actively address and even alter* their orientations, identities, and behaviors about sexual ethics. *E.g.*, *id.* at ¶ 236. And the Counselors help them or desire to help them change or alter their perceived gender identity or eliminate or reduce unwanted same-sex attractions. *Id.* at ¶¶ 162–92, 217–27. But the Counseling Ordinances forbid these consensual, voluntary, and client-initiated conversations. *Id.* at ¶¶ 126–47.

In sum, the Counselors speak with their clients (or want to) about many things, including gender identity and sexual orientation. Communicating with others and offering advice and guidance on sensitive topics is quintessential speech: "If speaking to clients is not speech, the world is truly upside down." *Otto v. City of Boca Raton*, 981 F.3d 854, 866 (11th Cir. 2020). The Counseling Ordinances regulate that speech. In doing so, they abridge speech and violate the Counselors' and similarly-situated Missouri citizens' First Amendment freedoms.

B. The Counseling Ordinances restrict the Counselors' speech based on its content and viewpoint.

The ordinances also restrict the Counselors' and similarly-situated Missouri citizens' speech based on content and viewpoint, again facially and as applied.

A facially content-based law "draws distinctions based on the message a speaker conveys." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). An as-applied content-based law "singles out specific subject matter" of a speaker "for differential treatment." *Id.* at 169. And an as-applied viewpoint-based law regulates speech because of the "particular views taken by speakers on a subject." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). The Counseling Ordinances do all three.

The Counseling Ordinances facially regulate statements about gender identity and sexual orientation. K.C. Ord. § 50-234(b)(1); Cnty. Ord. § 5575.1(a). To determine whether the counseling is legal, officials need to know what it is about: gender identity, sexual orientation, or something else. Counselors can address a minor's substance abuse, social anxiety, or study habits and suggest alternatives. But they cannot speak with minors about changing their sexual orientation, gender identity, or related behavior. "That is about as content-based as it gets." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020). Another court likewise concluded that a similar counseling ban was facially content-based because it limited communications on "a particular message." *Otto*, 981 F.3d at 863.

The Counseling Ordinances also restrict the Counselor's speech based on content as applied to them. The Counselors can discuss most topics with their clients. But they cannot "seek[s] to change" their clients' gender identity or sexual orientation through speech. K.C. Ord. § 50-234(b)(1); Cnty. Ord. § 5575.1(a). By applying *only* to some topics, the laws are altogether content based. *See Reed*, 576 U.S. at 169. As a result, the Counselors must alter their expression on gender

identity and sexual orientation—a classic consequence of a content-based law—because the content of their speech violates the laws. *NIFLA v. Becerra*, 585 U.S. 755, 766 (2018) (noting that content-based laws alter speech's content).

There's more. The ordinances restrict the Counselor's speech based on viewpoint by prohibiting speech on gender identity and sexual orientation that seeks to "change," "eliminate," or "reduce" same-sex attraction or gender expression while permitting speech that "provides support and assistance" for "gender transition[s]" or that provides "acceptance, support, and understanding" for same-sex attractions or transitioning genders. K.C. Ord. § 50-234(b)(1); Cnty. Ord. § 5575.1(a). Whether the City and County approve the speech or ban it depends on "the specific motivating ideology or the opinion or perspective of the speaker." *Rosenberger*, 515 U.S. at 829. Speech supporting the City's and County's views on gender identity and sexual orientation are acceptable, while contrary views are not. That's textbook viewpoint discrimination: the laws "disfavor[] certain ideas." *Iancu v. Brunetti*, 588 U.S. 388, 390 (2019). The ordinance's viewpoint-based regulation also makes them overbroad because a substantial number of their applications are unconstitutional in relation to any otherwise legitimate sweep. *Id.* at 398–99. The ordinances have the same effect on similarly-situated Missouri citizens.

C. The Counselors' speech is not transformed into conduct when they counsel minor clients.

The Counselors and similarly-situated Missouri citizens engage in speech even though they are licensed professionals. The Supreme Court has explained that protected speech on ideological subjects doesn't morph into regulable conduct based on the speech's function. Someone who "speaks for pay" engages in speech, not conduct. *303 Creative LLC v. Elenis*, 600 U.S. 570, 589–90, 593–94 (2023). Same with licensed professionals who speak with their clients. *NIFLA*, 585 U.S. at 771–72 ("Speech is not unprotected merely because it is uttered by 'professionals.'"). This

principle means that governments cannot pass "content-based laws that" regulate speech, and then recharacterize them as governing conduct. *Id.* at 755, 771, 772.

Consider *Holder v. Humanitarian Law Project*. 561 U.S. 1 (2010). There, advocacy organizations and individuals claimed that a federal ban on "material support" (including "expert advice or assistance") to terrorist organizations violated the plaintiffs' free-speech rights by preventing them from providing "legal training" and other advice. *Id.* at 10–16. The government said the statute regulated conduct, not speech, "because it *generally* function[ed] as a regulation of conduct." *Id.* at 27. The Court rejected that argument. Whether the plaintiffs could speak with the organizations "depend[ed] on what they sa[id]" to them. *Id.* The statute prohibited the plaintiffs from discussing only some topics—like "advice derived from 'specialized knowledge.'" *Id.* Because "the conduct triggering coverage under the statute consist[ed] of communicating a message," the statute penalized speech, not conduct. *Id.* at 28. And that speech did not receive less protection because it was spoken by professionals (lawyers) offering technical, specialized advice. *Id.* at 10, 14–15, 26–28; *NIFLA*, 585 U.S. at 771–72 (making this point).

Following *Holder*, courts routinely rebuff efforts to use laws that sometimes regulate conduct or professionals and apply them to regulate ideological speech by professionals. *See Telescope Media Grp. v. Lucero* (*TMG*), 936 F.3d 740, 756–57 (8th Cir. 2019) (rejecting argument that protected speech became conduct when done as an "economic activity"). They reject such efforts when rules like the Counseling Ordinances dictate the speech of counselors by applying them based on "the advice that therapists may give to their clients." *Otto*, 981 F.3d at 866–68.

Under these cases, the Counseling Ordinances punish the Counselors' speech because whether they violate the laws depends on what they say about changing or supporting a client's gender identity or sexual orientation. The Counselors' "therapy" consists only of written and spoken words. Nothing else the Counselors do

would trigger the ordinances. *See id.* at 865–68 (holding similar law restricted speech when "treatment … is entirely speech"). Because the "only conduct" the Counseling Ordinances seek "to punish" here "is the fact of communication, the statute regulates speech, not conduct." *Cohen v. California*, 403 U.S. 15, 18 (1971). For these reasons, the City and County wrongly regulate the Counselors' protected "speech" by "relabeling" it as unprotected "conduct." *Otto*, 981 F.3d at 865.

Even so, the Ninth and Tenth Circuits have reached a contrary conclusion. Those circuits held that similar laws regulated "professional conduct" and only incidentally burdened speech by equating a counselor's speech to non-expressive medical procedures or treatments—which are concrete physical actions. *Tingley v. Ferguson*, 47 F.4th 1055, 1077–78 (9th Cir. 2022); *Chiles v. Salazar*, 116 F.4th 1178, 1209, 1214 (10th Cir. 2024). The City, County, and others adopt this argument. VC ¶¶ 140–45. But that position contradicts First Amendment precedent and values.

"Speech is not conduct just because the government says it is." *TMG*, 936 F.3d at 752. For good reason. Otherwise, governments could ban speech by physicians and pharmacists about the medical use of marijuana or controversial drugs just by reimagining that speech as conduct. *Contra Conant v. Walters*, 309 F.3d 629, 637–38 (9th Cir. 2002) (protecting speech on marijuana use); *Stock v. Gray*, 663 F. Supp. 3d 1044 (2023) (protecting challenge to ivermectin's efficacy). Or a government could ban all counseling designed to encourage a minor to identify contrary to his or her sex or to support a minor's same-sex attractions. Even the City and County would recognize *that* as problematic. *See* VC ¶¶ 119–23. That the City and County apply different standards here shows that the ordinances prohibit the Counselors' speech because the City and County disagree with their views.

In the end, the government cannot disguise the First Amendment with an inaccurate nametag. The Counselors speak with their clients through written and spoken words. No amount of relabeling can change that speech into conduct.

II. Alternatively, the Counseling Ordinances violate the Fourteenth Amendment because they are vague and grant unbridled enforcement discretion as applied to the Counselors.

Alternatively, the Counseling Ordinances are vague and permit unbridled enforcement discretion as applied to the Counselors and other similarly-situated citizens of Missouri. A law is vague and grants unbridled enforcement discretion if it fails to give an "ordinary" person fair notice of what is prohibited or is so standardless that it "encourage[s] arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The ordinances do not give fair notice and authorize arbitrary enforcement.

They prohibit "any practice or treatment that seeks to change an individual's sexual orientation or gender identity." K.C. Ord. § 50-234(b)(1); Cnty. Ord. § 5575.1(a). This language is so broad that the Counselors cannot know when their speech qualifies. Although the ordinances seek to clarify what "change" means, those definitions add more confusion. Does exploring a minor's same-sex attractions count as "change"? What about questioning the potential source of a minor's professed gender confusion? Or asking minors about the potential harmful and irreparable consequences of body-altering surgeries to reflect their perceived identity? The Counselors have intentionally avoided asking these questions because they are unsure about how the ordinances answer them. VC ¶¶ 193–230.

How the Counseling Ordinances define "gender identity" and "sexual orientation" doesn't help either. For example, Jackson County defines "gender identity" to include "behavior or mannerisms" and "sexual orientation" to include heterosexuality. Jackson Cnty. Ord. § 5575.1(b), (e). Based on these definitions, Bury has referred minor children struggling with inappropriate sexual behaviors to other counselors because he cannot tell if attempts to change those behaviors violate the ordinances. VC ¶¶ 213–29.

As a result of these ambiguities, whether the Counselors' speech may qualify as trying to "change" gender identity or sexual orientation is left to the subjective judgments of enforcement authorities. That uncertainty has caused them to chill their speech. And that's the precise harm of vague laws like the Counseling Ordinances—they mandate "self-censorship." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). An injunction now would remedy that ongoing injury.

III. The City's Public Accommodation Ordinance violates the Counselors' First Amendment freedoms by compelling and restricting speech.

The Public Accommodation Ordinance violates the First Amendment rights of the Counselors and similarly-situated citizens of Missouri by (A) compelling and (B) restricting their speech and doing so (C) based on content and viewpoint.

A. The Accommodation Clause compels the Counselors to speak messages about sexuality and gender to which they object.

The First Amendment protects speakers' "autonomy to choose the content of [their] own message." *Hurley*, 515 U.S. at 573. So governments may not (1) compel someone to speak (2) a message that effects their desired expression. *E.g.*, *id.* at 572–73. The Accommodations Clause violates this principle as applied to the Counselors by forcing them to promote certain ideas and goals about gender identity and sexual orientation that contradict their religious beliefs. Here's how.

The Accommodation Clause requires public accommodations to provide the same "services, privileges, [or] advantages" to persons because of their sexual orientation, gender identity, or other characteristics. K.C. Ord. §§ 38–1(23), 38–113(a). These businesses may not "refuse, withhold from or deny," or "discriminate against any person" in providing these benefits. *Id.* The City explained that laws like this "regulat[e] commercial conduct" by requiring businesses "to provide the same services to members of the public." Br. of Local Gov'ts and Mayors as Amici Curiae 22 (K.C. Br.), *303 Creative LLC v. Elenis*, 600 U.S. 570 (No. 21-476) (filed

Aug. 19, 2022), 2022 WL 3598265, at *22 (signed by the City's attorney). The City then said that such "equal treatment" across transactions is required. *Id.* at *25–26. And—to the City—equal treatment is denied when a request is declined because the business objects to the message the request asks it to promote. *Id.* at *22, 25. As the City sees things, the "Free Speech Clause … does not mandate an exception from this uniform requirement," because these laws "regulate[] commercial conduct, not speech." *Id.* at *4, 22; *see also* VC ¶¶ 258–61 (describing similar interpretations).[1]

Meanwhile, the Counselors have a policy and practice of counseling their clients—both adults and minors—consistent with their religious beliefs. *See, e.g.*, VC ¶¶ 49–52. Based on those beliefs, the Counselors (1) provide counseling to encourage sexuality and marriage only in the context of the union of one man and one woman; (2) only offer counseling that would seek to harmonize an individual's gender identity with his or her biological sex; and (3) use pronouns only consistent with their clients' sexes. *E.g.*, *id.* at ¶¶ 82–89.

The City's ordinance makes these policies and practices illegal. To the City, the Counselors violate the ordinance by offering marital counseling to pursue only opposite-sex marriage, by endorsing only one view about sexuality and identity, and by declining to use pronouns based on a client's gender identity.[2] The City considers this to be conduct (not speech) and to be discrimination on account of sexual orientation or gender identity. VC ¶¶ 246–50. The City takes this position even though the Counselors gladly provide counseling to clients who identify as LGBT to address anxiety, career goals, and various other issues. *Id.* at ¶¶ 92–93.

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[1] The City consistently adopts the position that that public-accommodation laws regulate only "conduct" and have no "First Amendment … exemption." Br. of Counties as Amici Curiae 2–3, 17–25, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (No. 16-111) (filed Oct. 30, 2017), 2017 WL 5127319, at *2–3, 17–25 (signed by the City and its former mayor); VC ¶¶ 246–50.

[2] Many jurisdictions interpret laws like the City's to require the use of requested pronouns or else be liable for gender identity discrimination. VC ¶¶ 258–61.

But providing counseling that promotes same-sex marriage or relationships encourages the idea that one's sex can be changed, and using pronouns inconsistent with someone's sex violates the Counselors' views on marriage, sexuality, and identity. And because their counseling involves speech, providing this counseling would require them to express messages with which they disagree on those topics. For that reason, the Counselors cannot offer that counseling. VC ¶¶ 86–94.

Applied in this way, the City's ordinance regulates the Counselors' speech—not their conduct—because their counseling *is their speech*. This "peculiar" application has "the effect of declaring" the Counselors' speech itself "to be the public accommodation." *Hurley*, 515 U.S. at 572–73. In turn, the City compels speech by forcing the Counselors to counsel in support of same-sex marriage, to promote sexual attractions or gender identities, and to use pronouns in ways that violate their beliefs. But that alters the content of their desired speech on these topics. VC ¶¶ 277–84. The Counselors face a choice: speak against their beliefs to avoid violating the ordinance or speak as they wish under the threat of punishment.

As the Supreme Court just reiterated in *303 Creative*, that choice is "an impermissible abridgement of the First Amendment's right to speak freely." 600 U.S. at 589. There, Colorado defended using its public-accommodations law to compel a website designer to create custom websites that contradicted her beliefs about marriage. *Id.* at 580, 588–89. The Court rejected that argument. First, it noted that the custom websites were "pure speech" because they "communicate ideas." *Id.* at 586–87. Next, it held the government cannot misuse laws "to force an individual to speak in ways that … defy her conscience." *Id.* at 602–03. The Eighth Circuit holds that same line. *See TMG*, 936 F.3d at 752–58 (applying logic to protect wedding videographers). The City may not apply its ordinance to speech, call that speech conduct, and then force speakers to proclaim messages they disagree with.

The two-step analysis from *303 Creative* applies here. First, the ordinance regulates the Counselors' speech. *See supra* § I. Second, the ordinance alters the Counselors' speech by demanding that they provide counseling that supports same-sex marriage, same-sex attraction, or identities contrary to the client's sex and use pronouns inconsistent with sex. That's unconstitutional compelled speech—governments cannot force individuals to proclaim messages about marriage, gender identity, or pronouns that contradict their convictions. *See 303 Creative*, 600 U.S. at 602–03; *Beard v. Falkenrath*, 97 F.4th 1109, 1117 (8th Cir. 2024) (noting the First Amendment protects "the speaker['s]" choice on using "a pronoun"); *Meriwether v. Hartop*, 992 F.3d 492, 501–12 (6th Cir. 2021) (school policy could not force professor to use pronouns inconsistent with students' sex).

B. The Publication Clause restricts the Counselors' speech.

What's more, the Publication Clause restricts the Counselors' speech. It prohibits "written or printed communication[s], notice[s] or advertisement[s] to the effect that any of the accommodations … will be refused, withheld from or denied to any person" because of a protected characteristic. K.C. Ord. § 38–113(a). The clause also bans "written or printed communication[s]" that make "any person" feel "unwelcome or objectionable or not acceptable" at a public accommodation. *Id.*

The Publication Clause operates together with the Accommodation Clause. The former prohibits speech about activities that violate the latter. Because the Accommodation Clause requires the Counselors to provide counseling promoting views on sexuality and identity, the Publication Clause prohibits the Counselors from referring the requests for those views to others or publicizing their inability to provide that counseling. *See* K.C. Br. at 22 (explaining similar law "prohibits businesses from advertising their intent to engage in unlawful conduct").

But the Counselors have a First Amendment right to counsel consistent with their beliefs. *Supra* § III.A. So they have a reciprocal right to publicly explain why they made this choice. The City "cannot compel" the Counselors "to speak, so it cannot force them to remain silent either." *TMG*, 936 F.3d at 757 n.5. By taking a contrary view, the City uses the Publication Clause to ban the Counselors' speech about their constitutionally protected activities. That has caused the Counselors to censor themselves because of their objectively reasonable fear of prosecution if they publicly expressed themselves. VC ¶¶ 304–23.

C. The Public Accommodation Ordinance compels and restricts speech based on content and viewpoint.

Worse, the ordinance compels and restricts the Counselors' speech based on content and viewpoint. Recall that a law is facially content based if it distinguishes between the messages conveyed, and a law applies based on content or viewpoint if it singles out speech based on the subject matter or views expressed. *Supra* § I.B.

The Publication Clause facially regulates speech based on topic. It only restricts speech about a few categories—like "religion," "sexual orientation," and "gender identity." K.C. Ord. § 38–113(a). Any other topic is fair game. But on the sensitive areas supervised by the rule, public accommodations must refrain from speaking or risk prosecution. The distinction turns on content.

For similar reasons, the clauses' application here depends on content and viewpoint. The Accommodation Clause compels the Counselors to communicate messages they disagree with about marriage, sexuality, and gender identity. This necessarily "alters the content" of their desired speech and constitutes "a content-based regulation of speech." *NIFLA*, 585 U.S. at 776 (cleaned up). That clause is also content based because it "treat[s]" the Counselors' "choice to talk about" some topics—opposite-sex marriage, sexuality, and gender identity—"as a trigger for

compelling them to talk about" other topics—*e.g.*, promoting same-sex marriage, same-sex attraction, and gender transitions. *TMG*, 936 F.3d at 753.

Likewise, the Publication Clause bans the Counselors' speech based on content. The Counselors want to post statements on their websites explaining their religious beliefs about marriage and gender and their inability to counsel contrary to those beliefs. VC ¶¶ 304–23. But these statements violate the Publication Clause because they arguably "refuse" or "withhold" services (counseling that supports same-sex marriage, same-sex attraction, and gender transitions) or may make someone feel "unwelcome" because of sexual orientation or gender identity. K.C. Ord. § 38–113(a). The Counselors wouldn't violate that Clause if they posted their hours, rates, or insurance policies or commented on other matters. Once again, everything hinges on the content of the Counselor's published statements.

The Clauses also regulate speech based on viewpoint. They suppress only views on marriage and gender that the City disfavors. *See 303 Creative*, 600 U.S. at 597 (noting "the very purpose" of a similar state law was "eliminating ideas that differ[ed]" from the State's) (cleaned up). The Counselors can support opposite-sex and same-sex marriages through counseling. They can endorse the idea that people can change their sex. They just cannot provide counseling supporting *only* opposite-sex unions or *oppose* the notion that sex is changeable. In this way, the City prefers some views on sexuality and gender over others by blessing counselors who endorse its opinion and threatening counselors who don't. By treating the Counselors' beliefs worse than others, the City engages in viewpoint discrimination. *See Gerlich v. Leath*, 861 F.3d 697, 705–06 (8th Cir. 2017) (finding viewpoint discrimination because one student group with disfavored views was treated worse than groups with different views). The City's practice should end.

IV. The City's and County's Ordinances trigger and fail strict scrutiny.

The Counseling Ordinances and the Public Accommodation Ordinance compel and restrict speech based on content and viewpoint. There is no historical evidence of similar laws being used this way. *See 303 Creative*, 600 U.S. at 590–92; *NIFLA*, 585 U.S. at 766–77. That dooms the ordinances as applied to the Counselors and similarly-situated Missouri citizens. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 24–25 (2022) (articulating historical test).

At a minimum, strict scrutiny applies. *Reed*, 576 U.S. at 163. Strict scrutiny requires the City and County to show how applying their rules *to the Counselors' speech* serves a compelling interest in a narrowly tailored way. *Id.* They cannot.

At step one (compelling interest), the government must prove that the laws "address a real problem." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 822 (2000). To do so, it must produce tangible evidence—not "anecdote and supposition." *Id.* And, when defining the problem, the government must engage in a "precise analysis," *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021), that looks at "the actual speech being regulated, rather than how the law might affect others who are not before the court." *TMG*, 936 F.3d at 754. At step two (narrow tailoring), the government must show that applying the laws is "the least restrictive means to further" their interests and that "less restrictive alternative[s] would be ineffective." *Playboy Ent. Grp., Inc.*, 529 U.S. at 813, 824. The (A) Counseling Ordinances and (B) the Public Accommodation Ordinance falter at both steps.

A. The Counseling Ordinances fail strict scrutiny here.

The Counseling Ordinances do not serve a compelling interest in a narrowly tailored way as applied to the Counselors or similarly-situated Missouri citizens.

Compelling interest. The City and County may claim an interest in preventing minors from being exposed to "serious harms and risk." K.C. Ord. pmbl.;

Cnty. Ord. pmbl. But the "precise analysis" here requires them to show that the *Counselors' speech* poses that threat. *Fulton*, 593 U.S. at 541.

The Counselors counsel minors on a voluntary basis. If clients express an interest in achieving comfort with a gender identity congruent with their sex or reducing unwanted same-sex attractions, the Counselors try to assist their clients with those goals. VC ¶¶ 74, 79. In this context, the City and County have no basis to regulate these private, consensual conversations which are "the actual speech being regulated" here. *TMG*, 936 F.3d at 754. At most, the legislative findings allege harms based on reports from medical advocacy groups, but these "offer assertions rather than evidence, at least regarding the effects of purely speech-based" counseling. *Otto*, 981 F.3d at 868. In truth, there is no evidence that definitively concludes that talk-therapy about gender identity and sexual orientation —like the Counselors seek to engage in—harms minors. *See* VC ¶¶ 95–117.

What's more, the City's and County's real interest is to limit minors' exposure to ideas the government finds harmful—a decidedly illegitimate objective. *See Matal v. Tam*, 582 U.S. 218, 245–46 (2017) (equating state's interest in "preventing 'underrepresented groups' from … demeaning messages'" to silencing "ideas that offend"). The rules don't change when minors enter the picture. Speech "cannot be suppressed solely to protect the young from ideas … that a legislative body thinks unsuitable for them." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213–14 (1975). That's why, for example, courts rejected attempts to eliminate children's exposure to supposedly violent video games in the name of their "harmful effects on children." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 800–01 (2011); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 689 (8th Cir. 1992).

In any event, the City's and County's interests are not compelling because they allow other activities that undermine their interests. *Brown*, 564 U.S. at 802 (noting underinclusivity "raises serious doubts about" the government's sincere

interests). For example, the City allows Counselors to speak to minor clients about same-sex attraction and gender identity if they don't charge for the conversation or if they do so outside the counseling room, but not inside it. K.C. Ord. § 50-234(c). An interest cannot be compelling if a dollar or a door frame is all that separates permitted speech from prohibited speech. Other holes exist, too. The ordinances apply only to licensed "providers." K.C. Ord. § 50-234(b)(4); Cnty. Ord. § 5575.1(d). Countless persons who influence minors—like unlicensed therapists and peers—are unregulated. Even the definition of "provider" contains gaps. "Providers" includes professionals licensed under Chapters 334 and 337 of Missouri law but does not include other professionals who regularly interact with minors—teachers, school personnel, coaches, and clergy, to name a few. Mo. Rev. Stat. §§ 334.010(4), 337.505(2), (6), (9). By exempting professionals who undoubtedly have a significant impact on minors, the City and County define "providers" in an underinclusive way. If speech seeking to change sexual orientation and gender identity were as harmful as the City and County believe, they would prohibit these conversations too. These exceptions eviscerate any asserted interest here.

And the Counseling Ordinances are fundamentally underinclusive as to preventing harm to minors because they allow counselors to affirm a child's gender identity regardless of the consequences. Affirming a twelve-year-old girl's decision to cut off her breasts is legal; suggesting that she wait is illegal. That's backwards.

Narrow tailoring. Nor are the ordinances narrowly tailored. They are overinclusive. Neither the City nor County articulate the type of conversion therapy they find harmful to minors, so it is "virtually impossible to determine if the statute is narrowly drawn to regulate only that" type of therapy. *Video Software Dealers Ass'n*, 968 F.2d at 689. A more "precise law" that "defin[es] key terms" and excludes expression "would be less burdensome." *Id.* For example, if the City and County were concerned with conduct—like the use of aversive techniques—they could

specifically prohibit those practices only. Or if they feared involuntary counseling of minors, they could have targeted *that* counseling. But, as written, the ordinances prohibit counseling where *speech is the therapy* and where minors seek or consent to the Counselors' help. That shows the ordinances sweep too broadly by preventing minors from getting the counsel they desire—i.e., speech that cannot possibly be considered harmful. *See Brown*, 564 U.S. at 800, 804 (law was overinclusive when it presumed intended beneficiaries of restriction "*ought* to want" the restriction).

Less restrictive alternatives exist, too. *First*, the City and County could sponsor a publicity campaign explaining why they think conversion therapy is harmful or post a list of approved counselors. *See NIFLA*, 585 U.S. at 774–75 (suggesting similar approach). *Second*, they could exempt discussions of the "client's moral or religious beliefs or practices" like another Missouri city. Independence Ord. § 12.06.008(A)(1)(f). *Third*, they could protect the Counselors from engaging in speech that violates their religious beliefs as other states do. *E.g.*, I.C. § 54-3416 (Idaho). *Fourth*, they could rely on existing Missouri laws that already prohibit counselors from engaging in "misconduct, fraud, misrepresentation or dishonesty," require counselors to obtain "informed consent," and prohibit fostering "an exploitative relationship." *See* Mo. Rev. Stat. § 337.525(5), (13), (15); 20 CSR 2095-3.010(2), (8), (9); 20 CSR 2095-3.015(1). *Fifth*, they could use their ordinances to prevent counselors from engaging in fraudulent, harassing, or physically harmful behavior. K.C. Ord. §§ 2–1281, 50–159, 50–242; Cnty. Ord. § 5546. In short, other avenues protect minors from non-expressive conduct. *See McCullen v. Coakley*, 573 U.S. 464, 491–92 (2014) (holding buffer zone was overbroad because the state's interest could be achieved through other local and state laws). The City and County should use those avenues rather than restrict speech.

B. The Public Accommodation Ordinance also fails strict scrutiny here.

Similarly, the City lacks a compelling interest in applying its Public Accommodation Ordinance here, and it is not narrowly tailored anyway.

Compelling interest. The City may claim an interest in ending discrimination. If so, that interest is too "broadly formulated." *Fulton*, 593 U.S. at 541 (cleaned up). And it's not applicable. The Counselors gladly provide—and have provided—counseling services to clients who identify as gay, lesbian, or transgender on anxiety, trauma, and many other issues. VC ¶¶ 92–94. The Counselors' decision to take on a client always turns on the *what*, not the *who*—what counseling they're being asked to provide, not who asks. *Id.* The Supreme Court recently approved this "status and message" distinction. *303 Creative*, 600 U.S. at 595 n.3. While the government may prevent "status-based discrimination unrelated to expression," it may not infringe on "a speaker's right to control her own message." *Id.* Because the ordinance does the latter here, the City cannot put forward a legitimate interest in applying the law in this way to the Counselors.

The City also cannot have a compelling interest because its ordinance is underinclusive. It exempts certain lodging accommodations and associations and clubs with less than two hundred and fifty members. K.C. Ord. § 38–1(a)(24)(a), (g). These entities can blatantly discriminate without consequence. That undermines the City's interest in regulating the Counselors' speech.

Narrow tailoring. Less-restrictive alternatives exist, too. *First*, the City could apply its ordinance to stop actual status discrimination rather than regulating speech. *See 303 Creative*, 600 U.S. at 591–92 (explaining this distinction); *TMG*, 936 F.3d at 754–56 (same). *Second*, the City could extend its exemptions for small lodging accommodations and clubs to discrete services like counseling. K.C. Ord. § 38–1(a)(24)(a), (g). *Third*, the City could exempt businesses

that primarily engage in constitutionally protected activities, as other jurisdictions have done. *See* Utah Code Ann. § 34A-5-111 (interpreting Utah's law consistent with "the freedom of expressive association or the free exercise of religion"); Miss. Code § 11-62-5(5)(a) (exempting those who decline to create expression that violates their religious beliefs). That other jurisdictions achieve their goals while protecting expression in these ways proves the City's ordinance is not narrowly tailored. *See Ramirez v. Collier*, 595 U.S. 411, 428 (2022) (other states' practices showed Texas "ban on audible prayer" was not narrowly tailored).

V. The City's Unwelcome Clause facially violates the First and Fourteenth Amendments.

The Unwelcome Clause bans speech indicating someone's "patronage" is "unwelcome or objectionable or not acceptable." K.C. Ord. § 38–113(a). This language violates the First and Fourteenth Amendments because it is overbroad insofar as it regulates speech. To evaluate overbreadth, courts first "construe the challenged statute" and then determine whether that construction regulates "a substantial amount of protected expressive activity." *United States v. Williams*, 553 U.S. 285, 287, 293 (2008).

Step one. The Unwelcome Clause never defines "unwelcome," "objectionable," or "not acceptable." But the ordinance contains clues about what those terms mean. For example, a different clause prohibits businesses from displaying statements about refusing, withholding, or denying a service to any person. K.C. Ord. § 38–113(a). Giving "effect" to each word and "presum[ing]" the City did not "enact meaningless provisions," unwelcome, objectionable, or not acceptable must mean something different than refusing, withholding, or denying a service. *Dickemann v. Costco Wholesale Corp.*, 550 S.W.3d 65, 68 (Mo. 2018) (cleaned up).

Step two. Given that construction, the Unwelcome Clause silences a substantial amount of protected speech. The City prohibits housing accommodations

and employers from publishing some statements—but not "unwelcoming" ones. K.C. Ord. §§ 38–103(a)(4), 105(d)(3). This shows the City can satisfy its interests without broadly banning speech. Other courts have invalidated laws with similar language. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) (ban on "objectionable" publications was overbroad). The Unwelcome Clause's breadth prohibits a hardware store from displaying a Bible verse, a Halal market from posting a pro-Palestine window decal, or an amusement park from advertising about family day. *See 303 Creative LLC v. Elenis*, 6 F.4th 1160, 1214 (10th Cir. 2021), *rev'd in part*, 142 S. Ct. 1106 (2022) (Tymkovich, T., dissenting) (collecting other examples); VC ¶¶ 66–67. Those displays could make someone feel "unwelcome" based on religion, national origin, or familial status. K.C. Ord. § 38–113(a).

VI. The Counselors meet the other preliminary-injunction factors.

The Counselors meet the remaining injunction factors because they will likely succeed on the merits. *Child Evangelism Fellowship of Minnesota v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996, 1000, 1004 (8th Cir. 2012). "[T]he loss of First Amendment freedoms"—as the Counselors have experienced by chilling their speech—"unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Missouri also suffers irreparable harm when a municipality infringes on the state's sovereign authority, such as when a state cannot effectuate the policies embodied in its laws. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012). The policy of Missouri's SAFE statute is to turn minors away from chemical and surgical interventions and toward counseling, *see* Mo. Rev. Stat.§ 191.1720, but the Ordinances bar many minors from obtaining counseling that aligns with their own religious and philosophical viewpoints, which may deter those minors from obtaining any assistance at all. And the policy of Missouri's licensing statutes is to permit persons who meet the State's licensing requirements

to practice in all lawful ways in Missouri for the benefit of Missouri citizens, but the Ordinances place further, unlawful limitations on those practices. *See* Mo. Rev. Stat., Ch. 334, 337. "[T]he balance of the equities generally favors the constitutionally-protected freedom of expression." *Rodgers*, 942 F.3d at 458 (cleaned up). And "it is always in the public interest to protect constitutional rights." *Id.* (cleaned up). Meanwhile, neither the City nor County suffer harm from an injunction that requires them to apply their ordinances constitutionally. They can continue to regulate harmful conduct, just not the Counselor's speech.

Conclusion

The Counselors and similarly-situated Missouri citizens want to help people through their struggles. They believe that their clients have the best chance to succeed by living consistently with certain truths. Their clients reach out to them for that very help. But the City and County silence the Counselors' speech and thereby deprive their clients of help they seek. Plaintiffs ask this Court to grant this motion to stop this irreparable harm.

Respectfully submitted this 10th day of February, 2025.

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Certificate of Service

I hereby certify that on the 10th day of February, 2025, I electronically filed the foregoing document with the Clerk of Court using the ECF system. The foregoing document will be served via private process server with the Summons and Complaint to all defendants.

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