

APPEAL NO. 25-2566
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

WYATT BURY, LLC; BALLPARK INVESTMENTS, LLC, doing business as
Hope & Healing Counseling; WYATT BURY; PAMELA EISENREICH,
Plaintiffs-Appellants,
STATE OF MISSOURI ex rel. MISSOURI ATTORNEY GENERAL CATHERINE L.
HANAWAY,
Plaintiff,
v.
CITY OF KANSAS CITY, MISSOURI; JACKSON COUNTY, MISSOURI,
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Missouri
Case No. 4:25-cv-00084-RK

APPELLANTS' REPLY BRIEF

MICHAEL K. WHITEHEAD
WHITEHEAD LAW FIRM, LLC
229 S.E. Douglas Street
Suite 210
Lee's Summit, MO 64063
(816) 210-4449
Mike@TheWhiteheadFirm.com

JONATHAN R. WHITEHEAD
LAW OFFICES OF JONATHAN R.
WHITEHEAD, LLC
229 S.E. Douglas Street
Suite 210
Lee's Summit, MO 64063
(816) 398-8305
Jon@WhiteheadLawLLC.com

JONATHAN A. SCRUGGS
BRYAN D. NEIHART
HENRY W. FRAMPTON, IV
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

jscruggs@ADFlegal.org
bneihart@ADFlegal.org
hframpton@ADFlegal.org

JAMES A. CAMPBELL
JOHN J. BURSCH
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, DC 20001
(202) 393-8690
jcampbell@ADFlegal.org
jbursch@ADFlegal.org

Attorneys for Appellants

TABLE OF CONTENTS

Table of Authorities.....	iii
Introduction.....	1
Argument.....	2
I. Strict scrutiny applies because the ordinances restrict the Counselors’ speech based on content and viewpoint.	2
II. The Counseling Ordinances regulate the Counselors’ speech based on its communicative content.	4
A. The ordinances cannot transform the Counselors’ conversations with clients into conduct.....	5
B. The ordinances control the Counselors’ words and impose a direct restriction on speech.....	8
C. The ordinances are unlike other licensing laws or healthcare regulations.	10
III. The Public Accommodation Ordinance compels and restricts the Counselors’ speech.	12
A. The Accommodation Clause forces the Counselors to speak messages that violate their beliefs.....	12
1. The clause is triggered by the Counselors’ speech, not their conduct.	13
2. The clause directly burdens the Counselors’ speech by changing it.....	15
B. The Publication Clause restricts the Counselors’ desire to explain their constitutionally protected activities.	18
IV. The ordinances trigger strict scrutiny but fail any level of heightened review.	20

A.	The City and County cannot show they tailored the Counseling Ordinance to serve a compelling interest.....	21
B.	The City makes almost no effort to show that the Public Accommodation Ordinance satisfies any scrutiny.	24
V.	The Counseling Ordinances are vague and cause the Counselors to censor their speech.....	25
VI.	The Counselors deserve a preliminary injunction after their underlying claims are reinstated.....	26
Conclusion		29
Certificate of Compliance.....		31
Certificate of Service		32

TABLE OF AUTHORITIES

Cases

<i>303 Creative, LLC v. Elenis</i> , 600 U.S. 570 (2023)	passim
<i>Boy Scouts of America v. Dale</i> , 530 U.S. 640 (2000)	13
<i>Cantwell v. State of Connecticut</i> , 310 U.S. 296 (1940)	5
<i>Capital Associated Industries, Inc. v. Stein</i> , 922 F.3d 198 (4th Cir. 2019)	11
<i>Catholic Charities of Jackson, Lenawee, & Hillsdale Counties v. Whitmer</i> , 162 F.4th 686 (6th Cir. 2025).....	passim
<i>Chiles v. Salazar</i> , 116 F.4th 1178 (10th Cir. 2024).....	9
<i>Chiles v. Salazar</i> , 145 S. Ct. 1328 (2025)	9
<i>City of Boerne v. Flores</i> , 521 U.S. 507 (1997)	24
<i>Cohen v. California</i> , 403 U.S. 15 (1971)	5–6
<i>Consolidated Edison Company of New York v. Public Service Commission of New York</i> , 447 U.S. 530 (1980)	17–18
<i>Cornelio v. Connecticut</i> , 32 F.4th 160 (2d Cir. 2022)	26
<i>Coteau Properties Company v. Department of Interior</i> , 53 F.3d 1466 (8th Cir. 1995)	26

<i>Del Castillo v. Secretary, Florida Department of Health,</i> 26 F.4th 1214 (11th Cir. 2022)	11
<i>EMW Women’s Surgical Center, P.S.C. v. Beshear,</i> 920 F.3d 421 (6th Cir. 2019)	8
<i>Green v. Miss United States of America, LLC,</i> 52 F.4th 773 (9th Cir. 2022)	17
<i>Hines v. Quillivan,</i> 982 F.3d 266 (5th Cir. 2020)	11
<i>Holder v. Humanitarian Law Project,</i> 561 U.S. 1 (2010)	5–7
<i>Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,</i> 515 U.S. 557 (1995)	2, 13–14, 18
<i>NAACP v. Button,</i> 371 U.S. 415 (1963)	7, 12
<i>NIFLA v. Becerra,</i> 585 U.S. 755 (2018)	passim
<i>Ohralik v. Ohio State Bar Association,</i> 436 U.S. 447 (1978)	7
<i>Otto v. City of Boca Raton,</i> 981 F.3d 854 (11th Cir. 2020)	9–11
<i>Parents Defending Education v. Linn Mar Community School District,</i> 83 F.4th 658 (8th Cir. 2023)	25
<i>Pickup v. Brown,</i> 740 F.3d 1208 (9th Cir. 2014)	28–29
<i>Pittsburgh Press Company v. Pittsburgh Commission on Human Relations,</i> 413 U.S. 376 (1973)	19

<i>Planned Parenthood of Southeastern Pennsylvania v. Casey</i> , 505 U.S. 833 (1992)	8
<i>Reed v. Town of Gilbert</i> , 576 U.S. 155 (2015)	4
<i>Rumsfeld v. Forum for Academic and Institutional Rights, Inc.</i> , 547 U.S. 47 (2006)	10, 14
<i>Schmitt v. Rebertus</i> , 148 F.4th 958 (8th Cir. 2025).....	27
<i>Sorrell v. IMS Health Inc.</i> , 564 U.S. 552 (2011)	7
<i>Telescope Media Group v. Lucero</i> , 936 F.3d 740 (8th Cir. 2019)	passim
<i>Tingley v. Ferguson</i> , 47 F.4th 1055 (9th Cir. 2022).....	9
<i>United States v. Moua</i> , 145 F.4th 929 (8th Cir. 2025).....	27
<i>Verlo v. Martinez</i> , 820 F.3d 1113 (10th Cir. 2016)	27
<i>Vizaline, L.L.C. v. Tracy</i> , 949 F.3d 927 (5th Cir. 2020)	11
<i>Williams v. United Parcel Service, Inc.</i> , 963 F.3d 803 (8th Cir. 2020)	20
<i>Wollschlaeger v. Governor, Florida</i> , 848 F.3d 1293 (11th Cir. 2017)	11
<u>Statutes</u>	
Jackson Cnty. Ord. § 5575.1	3, 6
K.C. Ord. § 38-1	13
K.C. Ord. § 38-35	20

K.C. Ord. § 38-101	20
K.C. Ord. § 38-113	13, 19
K.C. Ord. § 38-206	20
K.C. Ord. § 50-234	3, 6

Other Authorities

Hilary Cass, <i>Independent Review of Gender Identity Services for Children and Young People: Final Report</i> (2024)	22
<i>Patient awarded \$2M by jury in malpractice suit over gender-care surgery</i> , ABA Journal (Feb. 4, 2026)	24
<i>Transition</i> , Cambridge Dictionary	3

INTRODUCTION

The City and County do not dispute six key points. *First*, the counseling at issue here consists solely of words. *Second*, the ordinances censor those words based on content. *Third*, no study shows that a minor's voluntary counseling conversations with a licensed counselor causes harm. *Fourth*, the counseling here benefits some people. *Fifth*, that counseling may help some avoid harmful medical procedures. *Sixth*, the City and County can achieve any valid goals they assert in narrower ways.

The failure to dispute these points stacks the merits deck against the City and County. They hope that describing the Counselors' speech as conduct is the ace up their sleeve. But decades of precedent call their bluff. Laws that often cover conduct still violate the First Amendment when they directly regulate expression. That direct regulation is happening here. The ordinances apply to the Counselors *because of* the content and viewpoint of their speech. The ordinances do not regulate any separately identifiable conduct. So the speech-incidental-to-conduct exception is a losing hand for the City and County.

Protecting the Counselors will not prevent governments from regulating healthcare, banning conduct, or stopping discrimination. Rather, it will stop governments from censoring vital conversations about critical questions of identity, sex, and gender.

ARGUMENT

I. Strict scrutiny applies because the ordinances restrict the Counselors' speech based on content and viewpoint.

The Counselors' counseling involves words and the Counseling and Public Accommodation Ordinances apply because of the content of the Counselors' speech. So the ordinances must satisfy strict scrutiny.

The City and County do not contest that the counseling offered by the Counselors here consists of words—listening, asking questions, providing advice, and engaging in dialogue. Opening.Br.20–21, 30–31. The City and County agree that the Counselors “listen” and “offer assistance.” Response.Br.21. The County admits that its ordinance bans counseling that consists of “only conversations.” App.773; R. Doc. 53, at 10 (admitting complaint ¶ 138); App.38; R. Doc. 1, at 25 (complaint ¶ 138). And the district court held that the Counselors' use of “pronouns for clients” in counseling is the Counselors' own speech, App.741–43; R. Doc. 48, at 41—a conclusion the City does not oppose, Response.Br.17. The First Amendment protects these “spoken words.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995).

Nor do the City and County deny that the ordinances regulate the Counselors' speech based on content. Opening.Br.37–42. To the contrary, they admit that laws like the ordinances are “typically” content-based because they apply “to specific topics.” Response.Br.10; App.214; R. Doc. 20, at 15. Meanwhile, the City's Accommodation

Clause compels speech based on content (sexual orientation and gender identity) and viewpoint by requiring counselors to affirm a client's identity contrary to his or her sex and to promote same-sex *and* opposite-sex unions. Opening.Br.40–41. The City's Publication Clause restricts speech in similar ways. Opening.Br.41–42.

In one stand-alone sentence, the City and County disclaim the Counseling Ordinances' viewpoint-based application—saying they “apply equally” no matter the view on gender identity or sexual orientation. Response.Br.25. But they misread the ordinances.

On gender identity, the ordinances forbid counseling that “seeks to change” a minor's “sexual orientation or gender identity” to align with her religious beliefs or biological sex. K.C. Ord. § 50-234(b)(1); Jackson Cnty. Ord. § 5575.1(a). But the ordinances permit “counseling that provides support and assistance to a person undergoing gender transition”—meaning a transition away from one's biological sex. *Id.* That favors a viewpoint. The ordinances cover only the process of making “changes” to depart from one's sex “at birth.” *Transition*, Cambridge Dictionary, perma.cc/9WN2-A3L6. But the ordinances ban attempts to realign a minor's identity with his or her sex.

On sexual orientation, the ordinances allow counseling that helps a minor “cop[e]” with his or her sexual orientation, but not “change” it. K.C. Ord. § 50-234(b)(1); Jackson Cnty. Ord. § 5575.1(a). That promotes the idea that sexual orientation is immutable and silences contrary

views. See *Cath. Charities of Jackson, Lenawee, & Hillsdale Cntys. v. Whitmer* (*Cath. Charities*), 162 F.4th 686, 692 (6th Cir. 2025). The County silences this view even though it admits minors’ sexual orientation “can and sometimes do change.” App.771; R. Doc. 53, at 8 (admitting complaint ¶ 99). So the City and County are wrong to say that the ordinances apply to viewpoints “equally.” Response.Br.25.

Taken together, these propositions show that the ordinances are “presumptively unconstitutional.” *NIFLA v. Becerra*, 585 U.S. 755, 766 (2018) (citation modified). Content and viewpoint discrimination demands strict scrutiny. See *Reed v. Town of Gilbert*, 576 U.S. 155, 166 (2015). In short, the ordinances face a steep uphill climb which neither the City nor the County can summit.

II. The Counseling Ordinances regulate the Counselors’ speech based on its communicative content.

The City and County primarily argue that the Counselors’ words are “conduct,” not speech. They also suggest that the ordinances only incidentally burden the Counselors’ speech, like supposedly analogous licensing requirements. But these arguments fail. *First*, the ordinances apply here to the Counselors’ words—their speech—not to any separately regulated conduct. *Second*, the ordinances imperil the Counselors’ speech directly. *Third*, the ordinances are unlike any historical licensing regime or healthcare regulation. So strict scrutiny applies.

A. The ordinances cannot transform the Counselors' conversations with clients into conduct.

Laws that generally regulate conduct must undergo strict scrutiny when they are applied to restrict speech based on its communicative content. Opening.Br.21–25 (collecting cases). The City and County reject this principle here because, they claim, the Counseling Ordinances regulate only “conduct” or “professional conduct.” Response.Br.7–16. But the Counselors’ conversations with their clients—not a physical procedure or any other “separately identifiable” conduct—are what trigger the ordinances. *Cohen v. California*, 403 U.S. 15, 18 (1971). That means the ordinances regulate the Counselors’ speech. So the City and County’s conduct “argument faces strong headwinds”—headwinds too strong for them to clear. *Cath. Charities*, 162 F.4th at 695 (rejecting same argument in a case involving a similar counseling restriction).

The gale comes from 85 years of precedent. Opening.Br.21–23. The City and County never even mention two anchor cases. Response.-Br.7–16 (omitting *Cohen* and *Cantwell v. Connecticut*, 310 U.S. 296 (1940)). But those cases held that breach-of-the-peace statutes—which usually prohibit conduct—violate the First Amendment as applied to individuals’ communications. Opening.Br.21–23. Though such laws “generally function” as conduct regulations, they are unconstitutional when they are “directed” at “what” the “speech communicate[s].” *Holder v. Humanitarian L. Project*, 561 U.S. 1, 27–28 (2010).

So too here. The ordinances permit the Counselors to engage in speech that “provides support and assistance” to a minor’s “gender transition” or that “facilitate[s] a person’s coping, social support, and development” of same-sex attraction, but the ordinances forbid the Counselors from using speech to encourage a minor to accept his body and “change” his “gender identity,” “gender expressions,” or sexual “behaviors.” K.C. Ord. § 50-234(b)(1); Jackson Cnty. Ord. § 5575.1(a).

The City and County try to distinguish *Holder* by labeling the Counselors’ speech as “treatment.” Response.Br.10–11 n.3. But that mirrors the federal government’s labeling error in *Holder*. There, the government said the law regulated “conduct, not speech” because “material support” for terrorism “most often does not take the form of speech.” *Holder*, 561 U.S. at 26. Likewise, here, the City and County call the Counselors’ speech “treatment” because the Counseling Ordinances may also regulate conduct. But *Holder* looked beyond how the “material support” law “*generally* function[ed].” *Id.* at 27–28 (citing *Cohen*). It instead focused on how the law applied to the plaintiffs’ desired activities—“speak[ing]” to various groups and providing “advice.” *Id.* at 27. With that narrower inquiry, the law burdened the plaintiffs’ speech because their “conduct triggering coverage under the statute consists of communicating a message.” *Id.* at 28. The same is true of the ordinances’ application to the Counselors’ speech.

Holder also rebuts the City and County’s attempt to label the Counselors’ speech “professional conduct.” Response.Br.11 n.3. The plaintiffs in *Holder* included a “retired” judge and “a human rights organization” that hoped to provide “legal training” on the “use of international law.” 561 U.S. at 10, 27. Their use of “specialized knowledge” as professionals did not convert their speech into conduct. *Id.* at 27. That holding echoes decades of jurisprudence protecting First Amendment rights against “labels of ‘nonprofessional conduct.’” *NAACP v. Button*, 371 U.S. 415, 423, 429, 432–45 (1963) (holding professional misconduct law could not apply to NAACP’s litigation “objectives”).

Trying a different tack, the City and County rely on *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978), an attorney-discipline case, to show how “professional conduct” laws interact with “expressive speech.” Response.Br.9. But *Ohralik* dealt with “commercial speech.” 436 U.S. at 453. That doctrine “does not apply here” because the ordinances are not limited to “purely factual and uncontroversial information.” *NIFLA*, 585 U.S. at 768 (citation modified). The ordinances instead restrict the Counselors’ speech on identity and sexuality because the City and County “disagree[] with the message” the Counselors convey. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011). That kind of restriction always “requires heightened scrutiny.” *Id.*

B. The ordinances control the Counselors' words and impose a direct restriction on speech.

The Counseling Ordinances also regulate the Counselors' speech directly, not incidentally. The City and County agree that *NIFLA* “control[s]” this analysis. Response.Br.8. But they misread that case.

True, *NIFLA* held that “States may regulate professional conduct, even though that conduct incidentally involves speech.” Response.Br.8. But, to demonstrate that principle within the professional context, *NIFLA* discussed *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992). The *Casey* law regulated professional conduct—the performance of a “medical procedure” and the obtaining of “informed consent to perform [the] operation.” *NIFLA*, 585 U.S. at 770. Getting informed consent requires doctor-patient communication. That speech is incidental to regulable conduct because the speech is a “condition precedent to” performing a procedure. *Cath. Charities*, 162 F.4th at 695. The City and County cite other informed-consent cases that rely on this same principle. Response.Br.15 (citing *EMW Women’s Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 429 (6th Cir. 2019)).

But here, the Counseling Ordinances, as applied to the Counselors, are not triggered by conduct but simply by the words they use to discuss gender and sexuality issues. Opening.Br.28. There is no “conduct” separate from their speech. The lack of such conduct means that the speech-incidental-to-conduct rules do not govern, and informed-

consent laws are inapplicable. In *NIFLA*, for example, clinics needed to “provide a government-drafted script about the availability of state-sponsored services.” 585 U.S. at 766. That requirement applied to “all interactions” with “clients,” was “not tied to a procedure,” and applied “regardless of whether a medical procedure is ever sought, offered, or performed.” *Id.* at 770. Because the requirement was not connected to any conduct, it regulated “speech as speech.” *Id.* Same here.

The City and County emphasize decisions by the Ninth and Tenth Circuits adopting the City and County’s reading of *NIFLA*. Response.-Br.13–14. But—like the City and County—those decisions wrongly applied the speech-incidental-to-conduct exception to counseling that involves nothing but speech. *See Chiles v. Salazar*, 116 F.4th 1178, 1208–09 (10th Cir. 2024) (applying exception to “verbal language”), *cert. granted*, 145 S. Ct. 1328 (2025); *Tingley v. Ferguson*, 47 F.4th 1055, 1074–75, 1082 (9th Cir. 2022) (same for “treatments ‘consist[ing] entirely of speech’”).

Better reasoned decisions conclude that governments cannot apply prophylactic laws to regulate speech in counseling. *See Cath. Charities*, 162 F.4th at 695–96; *Otto v. City of Boca Raton*, 981 F.3d 854, 861–62, 865–68 (11th Cir. 2020). These cases did not “skip” a step. Response.-Br.15. The Court in *NIFLA* first looked at the “licensed notice,” decided it was “a content-based regulation of speech,” rejected arguments related to conduct, and applied heightened scrutiny. 585 U.S. at 766–68.

These cases followed the same path. *See Cath. Charities*, 162 F.4th at 692–93, 95–96; *Otto*, 981 F.3d at 861–62. This Court should too.

Shifting gears, the City and County rely on *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*, 547 U.S. 47 (2006).

Response.Br.11. The Solomon Amendment challenged there required schools to host military recruiters. But the schools were “not speaking when they host[ed].” *FAIR*, 547 U.S. at 64–65. Because giving access to non-expressive property (like empty rooms) was conduct, any speech regulation there was “plainly incidental to the Solomon Amendment’s regulation of conduct.” *Id.* at 62. By contrast, the ordinances violate the First Amendment by “interfer[ing]” with the Counselors’ “desired message” when speaking to clients. *Id.* at 64.

C. The ordinances are unlike other licensing laws or healthcare regulations.

The City and County claim the Counseling Ordinances are like other licensing laws that “regulate health treatment.” Response.Br.24. But they do not identify any licensing law or analogous history that remotely resembles their counseling restrictions. *See* Opening.Br.29. And none of their cited cases involved a law that preemptively censored voluntary counseling based on viewpoint, let alone banned conversations about debated moral and religious issues.

The City and County start with four federal appellate cases that they say rejected free-speech claims to licensing laws. Response.Br.12,

15–16. The first case upheld a Florida “licensing scheme” that required dietitians to be licensed. *Del Castillo v. Sec’y, Fla. Dep’t of Health*, 26 F.4th 1214, 1220 (11th Cir. 2022). The next two cases—from Texas and from Mississippi—held that state licensing laws were not “categorically exempt[]” from the First Amendment. *Vizaline, L.L.C. v. Tracy*, 949 F.3d 927, 934 (5th Cir. 2020); *Hines v. Quillivan*, 982 F.3d 266, 272 (5th Cir. 2020). The final case sustained a North Carolina law forbidding corporations from practicing law. *Cap. Associated Indus., Inc. v. Stein*, 922 F.3d 198, 208 (4th Cir. 2019).

The City and County next reference three Supreme Court cases. Response.Br.24. Those cases enforced prohibitions on nonprofessionals practicing medicine without a license.

All these cases are irrelevant. The Counselors’ case “is not about licensure requirements.” *Otto*, 981 F.3d at 866. Laws screening *who* can practice a profession differ from those regulating *what* licensed professionals can “say on a given topic in practicing their profession.” *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1309 (11th Cir. 2017) (en banc). One of the City and County’s own cases distinguished between laws that “target” a profession’s “communicative aspects” from those that “focus more broadly on the question of who may conduct themselves” within the profession. *Stein*, 922 F.3d at 208. The ordinances fall into the former category by dictating what the Counselors can say to clients.

Nor can reliance on a “general tradition of regulation” through licensing come close to “validat[ing]” their “content- and viewpoint-based restrictions on speech.” *Cath. Charities*, 162 F.4th at 693–94 (collecting examples). The City and County must identify a “long-settled tradition of regulating speech in the same way that” the Counseling Ordinances regulate the Counselors’ speech. *Id.* at 694; *Button*, 371 U.S. at 428, 439, 439 n.18 (reasoning that “common-law offenses” and “maintenance and champerty” are insufficient to censor the NAACP’s “modes of expression and association”). The City and County offer nothing but a general regulatory history. Such a generalized history cannot justify the City’s and County’s censorship. So the Counseling Ordinances must run the full First Amendment gauntlet.

III. The Public Accommodation Ordinance compels and restricts the Counselors’ speech.

The City’s Public Accommodation Ordinance compels and restricts the Counselors’ speech on the topics of gender identity and marriage. So the ordinance must satisfy strict scrutiny. It doesn’t.

A. The Accommodation Clause forces the Counselors to speak messages that violate their beliefs.

The City never disputes that a two-part test controls the Counselors’ compelled-speech claims against the Accommodation Clause. Opening.Br.31. The Counselors meet that test because (1) their counseling is their speech and (2) the clause alters their speech.

1. The clause is triggered by the Counselors’ speech, not their conduct.

The Accommodation Clause regulates the Counselors’ speech because that is the “service[]” or “advantage[]” they offer to the public. K.C. Ord. §§ 38-1(a)(25), 38-113(a); Opening.Br.31–32.

To avoid that result, the City again mislabels the Counselors’ speech as “conduct.” Response.Br.17–20. But calling speech conduct does not make it so. *See Telescope Media Grp. v. Lucero (TMG)*, 936 F.3d 740, 752 (8th Cir. 2019). The Counselors’ counseling consists of listening, asking questions, and offering advice, as the district court recognized. *See* App.24–26; R. Doc. 1, at 11–13; App.143–44; R. Doc. 9-1, at 4–5; App.151–54; R. Doc. 9-2, at 3–6; App.740; R. Doc. 48, at 40. So the “problem with” the City’s “theory” is that the conduct it refers to is communication. *TMG*, 936 F.3d at 756–57 (rejecting similar conduct argument as applied to “the making of videos”).

Case after case rejects arguments like the City’s when public accommodation laws have the “peculiar” result of applying to expression. *Hurley*, 515 U.S. at 572–73 (parades); *303 Creative, LLC v. Elenis*, 600 U.S. 570, 593–94 (2023) (wedding websites); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656–61 (2000) (expressive association); *TMG*, 936 F.3d at 756–58 (videos). In those cases, the First Amendment applies because the laws target speech—even though in other situations the laws may generally regulate conduct. *TMG*, 936 F.3d at 752.

This distinction harmonizes *Hurley* and *FAIR* (which the City again cites) and proves this case resembles *Hurley*. While the equal-access policies in both cases facially regulated conduct, the law in *Hurley* compelled access to “speech itself,” altering the parade’s expressive content. 515 U.S. at 573. In contrast, the policy in *FAIR* compelled access to the law schools’ empty rooms. But empty rooms do “not speak[.]” *FAIR*, 547 U.S. at 64.

So the law in *FAIR* “did not interfere with the law schools’ expression or coopt their speech.” *TMG*, 936 F.3d at 758. If it had, the outcome would have been different. *FAIR*, 547 U.S. at 64 (recognizing governments may not “interfer[e]” with speakers’ messages or “affect” their “speech”). And because the Accommodation Clause regulates the Counselors’ speech, *Hurley*, not *FAIR*, controls.

Even so, the City seeks to distinguish *Hurley*, *303 Creative*, and *Telescope Media Group* by claiming that counseling is not as “inherently expressive” as parades, websites, and videos. Response.Br.21. But like parades, websites, and videos, the Counselors’ counseling communicates ideas through expression. Opening.Br.32–33. That means their counseling through “spoken words” is speech. *Hurley*, 515 U.S. at 569.

Pivoting, the City suggests the Counselors do not even speak when they counsel. To the City, the Counselors “listen,” “act as a forum for the speech of others,” and do not offer their own “opinions or ideas.” Response.Br.21–22. These claims ignore the facts. The Counselors talk

with their clients, ask them questions, engage in dialogue, and give advice. *E.g.*, App.26; R. Doc. 1, at 13; App.143–44; R. Doc. 9-1, at 4–5; App.152; R. Doc. 9-2, at 4. Giving one’s advice expresses one’s views.

And their counseling is *their* speech. It makes no difference that counseling addresses the lives of other people, *contra* Response.Br.20–21, just as a website designer does not lose First Amendment protection by “combin[ing]” her expression “with the couple’s in the final” wedding website design, *303 Creative*, 600 U.S. at 588. Nor is counseling a “forum” devoid of the Counselors’ own speech. Response.Br.21. Clients see the Counselors for their advice and guidance. App.143; R. Doc. 9-1, at 4; App.152; R. Doc. 9-2, at 4. That’s why clients care about who their counselor is. And, as the district court held—and the City does not dispute—the Counselors engage in their own speech when they refer to clients using pronouns during counseling. Opening.Br.33–34. There is no logical basis to sequester pronouns from the rest of the Counselors’ speech in counseling.

2. The clause directly burdens the Counselors’ speech by changing it.

The City does not deny that the Accommodation Clause’s same-service requirement forces the Counselors to offer and provide counseling that (1) promotes same-sex unions; (2) encourages clients to identify contrary to their sex; or (3) supports messages the Counselors’ consider “sinful.” Opening.Br.34–35. Those requirements alter the

content of the Counselors' expression by compelling them to express views that they oppose and by requiring them to align their speech with the City's views or risk prosecution. Opening.Br.35–36, 41. That is “more than enough[]” to violate “the First Amendment’s right to speak freely.” *303 Creative*, 600 U.S. at 589.

The City says the clause does not affect the Counselors' speech because it only prohibits them from “turn[ing] away” clients because of a protected characteristic. Response.Br.19. But the City acknowledges that the Counselors “conceded that they” serve clients no matter who they are. App.224–25; R. Doc. 20, at 25–26. And the Counselors' service here is counseling that consists solely of speech. So the Counselors deny counseling requests only based on the “message” they would promote, not the “status” of the client who seeks the counseling. *303 Creative*, 600 U.S. at 595 n.3. The clause would infringe on the Counselors' “right to control [their] own message” if, as the City urges, it forced the Counselors to accept counseling that promotes messages that violate their beliefs. *Id.*

Contrary to the City's suggestions, the City's desired result necessarily “interferes” with the Counselors' “speech.” *TMG*, 936 F.3d at 752. “[A]t a minimum,” the City's interpretation requires the Counselors to “convey a different message” than their desired ones—that healthy sexuality occurs in the context of marriage between one man and one woman and that sex is immutable. *Id.* at 752–53. In that

way, the Accommodation Clause interferes with the Counselors' speech based on its content *and* viewpoint. Opening.Br.40–41.

The City also says the clause does not compel the Counselors' speech because supporting opposite-sex and same-sex marriages or relationships “should be the same.” Response.Br.21. But the idea that “there is no meaningful difference” between same-sex and opposite-sex marriage is “*the opposite*” message that the Counselors hope “to make.” *Green v. Miss United States of Am., LLC*, 52 F.4th 773, 785 (9th Cir. 2022) (rejecting claim that including a male who identified as female in pageant supports the same message as including biological women). The Counselors believe that marriage is the union of one man to one woman. App.144; Doc. 9-1, at 5; App.153; R. Doc. 9-2, at 5. Treating same-sex and opposite-sex unions as “the same” would violate the Counselors' beliefs. What's more, the Counselors' counseling involves speech unique to each client. App.143; Doc. 9-1, at 4; App.151; R. Doc. 9-2, at 3. So they cannot just “repurpose” their speech about “marriages” they do “endorse” for marriages they do “*not*” endorse. *303 Creative*, 600 U.S. at 593.

Doubling down, the City says the clause does not affect the Counselors' message because they can still promote their views “individually” or “disaffiliate themselves with the ideologies or viewpoints of their clients.” Response.Br.17, 19–20. But this speak-elsewhere option has been “consistently rejected.” *Consol. Edison Co. of*

N.Y. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 530, 541 n.10 (1980). And the Counselors’ “freedom” of speech “would be empty” if “the government could require” them “to affirm in one breath that which they deny in the next” through disaffiliation. *Hurley*, 515 U.S. at 573, 576 (citation modified).

As a last resort, the City claims the clause does not require the Counselors “to promote *any* views.” Response.Br.19. This Court called a similar argument “implausib[le]” in *Telescope Media Group*. 936 F.3d at 753. There, Minnesota said its law did not require the videographers “to convey any specific message” about same-sex marriage. *Id.* This Court rejected that argument because it was “unlikely that any same-sex couple would request a video condemning their marriage.” *Id.* It is equally unlikely that a same-sex couple would seek a counselor who declines to support their union. The City implicitly recognizes this by defining marriage counseling as “help for married couples.” Response.-Br.20. That definition, combined with the City’s same-service requirement, forces the Counselors to offer counseling that would support same-sex marriages because they offer counseling that promotes opposite-sex marriages. That is compelled speech.

B. The Publication Clause restricts the Counselors’ desire to explain their constitutionally protected activities.

The City claims that the Publication Clause does not restrict the Counselors’ speech because it only prohibits them from “indicat[ing] a

discriminatory intent to exclude certain classes of persons.” Response.-Br.22. That mischaracterizes the Counselors’ desired expression. The Counselors hope to post statements explaining their religious beliefs and how those beliefs affect their counseling on gender identity and sexuality. App.128; R. Doc. 1-5, at 2; App.130; R. Doc. 1-6, at 2. The First Amendment protects that expression.

To be sure, laws can ban speech about *illegal* and *constitutionally unprotected* activities. See *Pittsburgh Press Co. v. Pittsburgh Comm’n on Hum. Rels.*, 413 U.S. 376, 389 (1973) (banning employment post proposing “illegal” commercial activities). But laws cannot ban speech about *legal* and *constitutionally* protected activities. See *303 Creative*, 600 U.S. at 581 n.1; *TMG*, 936 F.3d at 757 n.5. Because the First Amendment protects the Counselors’ right to speak in counseling consistent with their beliefs, the City cannot ban them from publicly explaining their choice.

The Counselors are not “presumptuous” to fear prosecution under the Unwelcome Clause. Response.Br.22. That clause prohibits the Counselors from posting any statement “to the effect that” someone’s “patronage ... is unwelcome or objectionable or not acceptable” because of a personal characteristic. K.C. Ord. § 38-113(a). Its exceedingly broad text imposes a viewpoint-based speech restriction. Opening.Br.42; App.55; R. Doc. 1, at 42. Almost anyone can file a complaint with the City if he or she feels “unwelcome.” And the City can imprison violators

of the Unwelcome Clause. K.C. Ord. § 38-101(a). The Counselors need not risk spending time in a jail cell for posting their constitutionally protected speech.

IV. The ordinances trigger strict scrutiny but fail any level of heightened review.

The Counseling and Public Accommodation Ordinances compel and censor speech based on content and viewpoint and must survive strict scrutiny. Opening.Br.43–48. The City and County “have not come close to making that showing; indeed they have hardly tried.” *Cath. Charities*, 162 F.4th at 696. The City and County offer no evidence to show that the ordinances serve a compelling interest here in a narrowly tailored way. Their brief does not include a *single* record citation. That is enough to flunk strict scrutiny because this Court need “not comb through” the “record” to build the City and County’s “argument” when they have “failed to cite evidence from the record.” *Williams v. United Parcel Serv., Inc.*, 963 F.3d 803, 807 n.3 (8th Cir. 2020) (citation modified).

Rather than engaging with strict scrutiny, the City and County hang their hats on rational-basis review. Response.Br.23. But that’s the wrong standard under their own argument. Intermediate scrutiny would apply even using their incorrect speech-incidental-to-conduct analysis. Opening.Br.50–52. The ordinances fail to satisfy that standard for similar reasons why they fail strict scrutiny. *Id.*; Becket.Am.Br.26–

29. The City and County do not argue otherwise—they never mention intermediate scrutiny.

A. The City and County cannot show they tailored the Counseling Ordinance to serve a compelling interest.

The City and County do not dispute that (1) strict scrutiny requires them to prove the Counselors’ counseling conversations *cause* harm; (2) their own materials concede they cannot prove causation; (3) many have experienced life-changing benefits from the counseling the Counselors want to provide; (4) the ordinances are underinclusive in several ways—including by exempting uncompensated therapy; and (5) less restrictive alternatives exist. Opening.Br.44–48; App.649–52; R. Doc. 31-2, at 48–51. Their silence on these points gives the game away.

Despite this, the City and County rely on the alleged “harms” of conversion therapy to justify restricting the Counselors’ speech. Response.Br.7, 9, 23. But their brief contains *zero* citations to the record or to any study. That absence necessarily means that the City and County have not identified a single study that focuses on the issue here: voluntary counseling by licensed professionals with minors. Opening.-Br.45; App.451; R. Doc. 31-1, at 7; *Cath. Charities*, 162 F.4th at 696 (criticizing reliance on “a handful of studies—some of which concern aversive therapies, which the plaintiffs do not employ”). A broad reference to “scores of professional medical organizations” does not save the City and County. Response.Br.23. These groups have been wrong,

they can be “manipulated,” and they have based their policies on inaccurate conclusions, shoddy studies, ideologically driven outcomes, and opaque voting processes. *See* App.474–85; R. Doc. 31-1, at 30–41; App.658–69; R. Doc. 31-2, at 57–68; *NIFLA*, 585 U.S. at 771 (citation modified); *Therapeutic.Choice.Am.Br.*8–14, 29–35.

Amici supporting the City and County try to fill the evidentiary hole with survey data. *Trevor.Proj.Am.Br.*11–16. But this data is legally irrelevant. Most of the data post-dates the ordinances’ enactment, and the City and County offer no evidence to show they relied on the data. Plus, amici’s understanding of “conversion therapy” reaches far beyond voluntary counseling. And amici’s data includes people who were “threatened with conversion therapy” and did not undergo it. *Id.* at 11.

Amici also mistakenly claim support from the Cass Review. *Trevor.Proj.Am.Br.*28. Far from supporting the City and County, that review decries efforts—including “legislation”—that “equate” coercive “conversion therapy” with voluntary counseling that discusses clients’ “concerns and experiences” to “alleviate their distress.” Hilary Cass, *Independent Review of Gender Identity Services for Children and Young People: Final Report* 150, 202 (2024). Those legislative efforts make counselors “fearful” and “prevent young people from getting the emotional support they deserve.” *Id.* Yet by defining “conversion therapy” broadly, that’s exactly what the City and County have done.

Elsewhere, amici criticize the conclusions of one of the Counselors' experts, Dr. Sullins. Trevor.Proj.Am.Br.25–27. The criticism is so ill-founded that the City and County do not even share it. Dr. Sullins explained his rigorous methodology, detailed the results of his studies, and has debated the outcomes of various studies in academic literature. App.652–58, 664, R. Doc. 31-2, at 51–57, 63. His research reveals that some studies that purport to show supposed harm from “conversion therapy” “are demonstrably false” because of the failure to control for time, causality, and other factors. App.653–55; R. Doc. 31-2, at 52–54. That there is an ongoing debate proves the point: the City and County “have not established the direct causal link” between harms to their interests and the Counselors’ speech. *Cath. Charities*, 162 F.4th at 696 (citation modified); Becket.Am.Br.17–18. Without that link, the City and County cannot meet strict scrutiny.

Worse, the City and County never dispute that their ordinances will harm some gender-dysphoric minors. For example, they do not refute that most minors—up to 88% in one study, App.502–03; R. Doc. 31-1, at 58–59—who experience juvenile gender dysphoria eventually identify consistent with their sex after puberty. Opening.Br.10. The County goes further and admits that minors’ gender identity can change. App.771; R. Doc. 53, at 8 (admitting complaint ¶ 99). But the Counseling Ordinances prevent the Counselors from helping minors identify consistent with their sex while allowing support for “gender

transition,” which puts minors on a dangerous medicalized path with known risks. Opening.Br.10, 46; Becket.Am.Br.10–14. The path is so risky for minors that it can lead to costly medical malpractice suits. *Patient awarded \$2M by jury in malpractice suit over gender-care surgery*, ABA Journal (Feb. 4, 2026), <https://perma.cc/4NM9-9A42> (reporting a \$2 million malpractice judgment against providers who pushed minor towards receiving a double mastectomy which “left her disfigured”). So the City and County undermine their own interests by permitting the harmful and banning the helpful.

B. The City makes almost no effort to show that the Public Accommodation Ordinance satisfies any scrutiny.

Nor has the City shown that its Public Accommodation Ordinance satisfies strict scrutiny here. The City asserts one interest: ensuring that no one is “turn[ed] away” because of their “sexual orientation or gender identity.” Response.Br.19. But that interest does not fit because the Counselors serve clients “regardless of their personal characteristics.” App.29; R. Doc. 1, at 16. The Counselors just object to expressing certain messages. Opening.Br.49 (noting this distinction). And the City never claims that the ordinance is narrowly tailored and never explains how the Counselors’ proposed alternatives would undermine its interests. Opening.Br.50. The City cannot meet “the most demanding test known to constitutional law” on such a scant record. *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

V. The Counseling Ordinances are vague and cause the Counselors to censor their speech.

The Counseling Ordinances also violate the Due Process Clause because they are vague and give enforcement officials unbridled discretion. Opening.Br.52–55. The City and County argue that there is “nothing vague about” the ordinances because they are “easy to understand.” Response.Br.24. But the City and County ignore that their ordinances fail to define some terms and use other terms subject to multiple meanings. Opening.Br.53–54. Those unclear terms and meanings make the Counseling Ordinances vague. *Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658, 668–69 (8th Cir. 2023) (holding policy to “respect a student’s gender identity” was vague because it “fail[ed] to define” terms and used broad “concept[s]”).

The City and County also claim the Counselors “understand” the ordinances. Response.Br.24. They don’t—they chill their speech because they are unsure whether the ordinances cover it. The Counselors refrain from “asking follow-up questions that could lead” to talking about “sexuality,” “tread carefully” in conversations to avoid discussing sexual behaviors, often refer minors struggling with sexuality or gender issues, and do not know how the ordinances apply to “sexual behaviors, including pornography, inappropriate opposite-sex relationships with other minors, or inappropriate sexual relationships with adults.” App.46–49; R. Doc. 1, at 33–36; App.145–46; R. Doc. 9-1, at 6–7; App.154; R. Doc. 9-

2, at 6. In any event, the Counseling Ordinances violate the unbridled discretion doctrine, which applies even if the ordinances were not vague as applied to the Counselors. Opening.Br.55. The City and County never address this separate, independent argument.

VI. The Counselors deserve a preliminary injunction after their underlying claims are reinstated.

The City and County do not disagree that this Court can weigh the preliminary injunction factors in the first instance. *See* Opening.Br.56–57. Instead, they dispute the Counselors’ entitlement to an injunction. Response.Br.25–26. But the Counselors deserve an injunction because they meet the four preliminary-injunction factors.

First, they are likely to succeed on the merits. That means this Court should reinstate the Counselors’ underlying claims because the district court “was distinctly premature” to dismiss those claims “with prejudice” when the Counselors have shown “a likelihood of success on the merits.”¹ *Coteau Props. Co. v. Dep’t of Interior*, 53 F.3d 1466, 1481 (8th Cir. 1995); Opening.Br.57. The likelihood of success also means that the other preliminary-injunction factors are satisfied. Opening.-

¹ This Court should revive the Counselors’ claims even under intermediate scrutiny. Courts should not dismiss constitutional claims based on the government’s unsupported argument that it meets heightened scrutiny because the government must support its interests with evidence—evidence that cannot be considered at the motion-to-dismiss stage. *See Cornelio v. Connecticut*, 32 F.4th 160, 172 (2d Cir. 2022) (collecting cases).

Br.56; *Schmitt v. Rebertus*, 148 F.4th 958, 970 (8th Cir. 2025) (noting injunctive factors are generally satisfied after showing a likely First Amendment violation).

Second, the Counselors suffer irreparable harm from chilling their speech. Opening.Br.56. The City and County list irreparable harm as a preliminary-injunction factor. Response.Br.22. Apart from that, the City and County never analyze irreparable harm. Their “undeveloped argument” on this factor “waive[s]” any argument against irreparable harm. *United States v. Moua*, 145 F.4th 929, 935 (8th Cir. 2025) (deeming argument waived when it was “mentioned ... only once”); *Verlo v. Martinez*, 820 F.3d 1113, 1127 (10th Cir. 2016) (applying waiver to defendant’s failure to contest irreparable harm factor). In any event, the Counselors tried to operate despite the ordinances’ burdens but kept receiving requests that put them at risk of violating the law. App.145–47; R. Doc. 9-1, at 6–8; App.155–57; R. Doc. 9-2, at 7–9. Based on those ongoing requests, the district court correctly found that the Counselors filed suit when they faced a credible enforcement threat. App.709–11; R. Doc. 48, at 9–11. Neither the City nor the County claim that finding was an abuse of discretion, much less provide a viable basis to overturn that ruling or to question the Counselors’ irreparable harm from forgoing their First Amendment freedoms.

Third, the equities favor the Counselors. The City and County do not dispute that the equities favor protecting constitutional rights.

Opening.Br.56. They just disagree that the ordinances infringe on the Counselors’ constitutional rights. Response.Br.25–26. Because the Counselors have shown the ordinances violate their First and Fourteenth Amendment rights, the equities here favor an injunction.

Finally, the Counselors’ requested injunction serves the public interest. The City and County disagree. They say the injunction may “harm” minors and cause “discrimination.” Response.Br.7, 17. They also imply an injunction would disrupt professional licensing schemes. Response.Br.24. Not so.

An injunction here would allow minors to freely address gender identity and sexuality issues through voluntary counseling with the Counselors. That counseling may benefit some minors by helping them avoid a path of harmful medical interventions with lifelong consequences. App.44–45; R. Doc. 1, at 31–32; App.451, 453, 508–11, 537–42; R. Doc. 31-1, at 7, 9, 64–67, 93–98; App.649–52; R. Doc. 31-2, at 48–51.

Next, the Counselors serve clients no matter their personal traits, so the City’s anti-discrimination interests do not apply here. App.29; R. Doc. 1, at 16; App.142; R. Doc. 9-1, at 3; App.151; R. Doc. 9-2, at 3.

And the Counselors’ requested injunction does not disrupt the City and County’s authority to oversee healthcare professionals. They may regulate conduct, proscribe unprotected speech, incidentally burden speech, and regulate speech incidental to conduct. *See Pickup v. Brown*, 740 F.3d 1208, 1219 (9th Cir. 2014) (O’Scannlain, J., dissenting from

denial of rehearing en banc). They just cannot enforce content- and viewpoint-based speech codes against the Counselors. By contrast, the City and County’s “licensing always trumps” approach, Tr. at 62, would imperil the expression of other counselors, attorneys, tattoo artists, sign-language interpreters, and many others, Opening.Br.30. The City and County never deny that their logic leads to that censorial outcome. In fact, they embrace it. They say their theory applies regardless of the “quantity of words used.” Response.Br.11. So their position endangers all professionals, even those who use *only* words and nothing else.

CONCLUSION

The City and County cannot justify restricting the Counselors from speaking with clients about some of life’s hardest questions of identity and sexuality or compelling the Counselors to support ideas that violate their beliefs. This Court should reverse the district court by reinstating the claims underlying the Counselors’ preliminary-injunction motion and remand to the district court to enter the Counselors’ requested preliminary injunction.

Respectfully submitted,

Dated: February 26, 2026

By: /s/ Bryan D. Neihart

MICHAEL K. WHITEHEAD
WHITEHEAD LAW FIRM, LLC
229 S.E. Douglas Street
Suite 210
Lee's Summit, MO 64063
(816) 210-4449
Mike@TheWhiteheadFirm.com

JONATHAN R. WHITEHEAD
LAW OFFICES OF JONATHAN R.
WHITEHEAD, LLC
229 S.E. Douglas Street
Suite 210
Lee's Summit, MO 64063
(816) 398-8305
Jon@WhiteheadLawLLC.com

JONATHAN A. SCRUGGS
BRYAN D. NEIHART
HENRY W. FRAMPTON, IV
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
jscruggs@ADFlegal.org
bneihart@ADFlegal.org
hframpton@ADFlegal.org

JAMES A. CAMPBELL
JOHN J. BURSCH
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001
(202) 393-8690
jcampbell@ADFlegal.org
jbursch@ADFlegal.org

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,495 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Office 365.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14-point Century Schoolbook.

Dated: February 26, 2026

/s/ Bryan D. Neihart
Bryan D. Neihart
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2026, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

/s/ Bryan D. Neihart

Bryan D. Neihart

Attorney for Appellants