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' OPENING BRIEF

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SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

There is a fierce, ongoing debate about how to help minors struggling with gender dysphoria and questions about sexuality. Counselors Wyatt Bury and Pamela Eisenreich seek to help minors pursue the goals of aligning their identity with their sex or avoiding unwanted same-sex attractions through voluntary conversations. But Kansas City and Jackson County passed ordinances that ban these conversations—even if clients seek them. If counselors address these topics, they may only encourage "gender transitions" or support same-sex behaviors. This content- and viewpoint-based censorship violates the First Amendment. And the ordinances restrict the Counselors' speech with no evidence their conversations cause harm and despite evidence that their preferred medicalized interventions cause irreversible damage.

Another City ordinance doubles-down on First Amendment infringements by compelling the Counselors to offer counseling on marriage and identity that contradicts their religious beliefs.

This case concerns important constitutional rights. The Supreme Court is considering a law like the counseling ordinances. *Chiles v. Salazar*, 145 S. Ct. 1328 (2025). And the Counselors and their clients suffer irreparable harm by chilling their speech to avoid liability. Because of these high stakes, the Counselors request that each side be permitted a 20-minute oral argument.

CORPORATE DISCLOSURE STATEMENT

Wyatt Bury, LLC, and Ballpark Investments LLC, d/b/a Hope and Healing Counseling, are limited liability companies. They have no parent corporation and no publicly held corporation owns 10% or more of their stock.

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INTRODUCTION

Wyatt Bury, Pamela Eisenreich, and their counseling practices (Counselors) help clients navigate some of life's most challenging issues. For most topics, the Counselors speak freely to help clients achieve their chosen goals. But for debated topics on gender identity and human sexuality, Kansas City and Jackson County passed ordinances to eliminate one voice in the counseling office. This censorship deprives families of information they want, censors counselors based on content and viewpoint, and violates the First Amendment many times over.

Two types of speech censorship are at issue. First, the City and County's *Counseling Ordinances* forbid counseling conversations that help minors align their identity with their sex or avoid unwanted same-sex attractions, while allowing conversations that encourage minors to embrace an identity that contradicts their sex, promote "gender transitions," or support same-sex behavior. The City and County offered no reliable evidence to show that the Counselors' conversations harm minors. Indeed, these conversations are voluntary, and roughly 90% of minors with gender dysphoria will naturally grow comfortable with their bodies. Worse, the ordinances risk serious harm by requiring counselors to encourage minors to transition, leading to a conveyor belt of lifelong, irreversible medical interventions. The City and County get the First Amendment and harm analysis exactly backwards.

Second, the City's *Public Accommodation Ordinance* forces the Counselors to provide counseling that encourages clients to embrace an identity contrary to their sex or to affirm same-sex marriage. The same ordinance also prohibits the Counselors from publishing their views on those topics. The ordinances thereby compel and restrict speech based on content and viewpoint, forcing the Counselors to promote one view while censoring other views in heated moral debates.

The district court brushed aside these First Amendment violations as efforts to regulate "professional conduct"—not speech. App.723; R. Doc. 48, at 23. And it compared the Counselors' counseling to treatments like "dispensing drugs" or "surgery"—even while acknowledging that their counseling involves only "verbal communication" and "conversations." App.734, 740; R. Doc. 48, at 34, 40.

That was error. The Counselors' communications with their clients trigger the ordinances. No independent conduct is at issue. So the ordinances regulate speech and do so in a "presumptively unconstitutional" way—by targeting speech based on content and viewpoint. *National Inst. of Fam. & Life Advocs. v. Becerra* (*NIFLA*), 585 U.S. 755, 766 (2018) (citation modified).

That's particularly true here, where the City and County's own evidence concedes it cannot prove any harm caused by the Counselor's voluntary conversations. To the contrary, that evidence identifies examples of the Counselors' speech benefiting children and helping

them avoid a lifetime of experimental drugs, surgeries, and harms. This record cannot justify viewpoint discrimination by satisfying strict scrutiny. This Court should reverse, reinstate the Counselors' claims, and enter the Counselors' requested injunction.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331 and and 1343 because the Counselors raise First and Fourteenth Amendment claims. On July 10, 2025, the district court partially denied the Counselors' preliminary-injunction motion and dismissed the claims corresponding to the denied portions of that motion for failing to state a claim. App.701–63; R. Doc. 48, at 1–63. This Court has jurisdiction over the denied preliminary injunction under 28 U.S.C. § 1292(a)(1). This Court also has jurisdiction over the dismissed claims that are "inextricably bound up" with the denied "injunction." *Fogie v. THORN Americas, Inc.*, 95 F.3d 645, 648 (8th Cir. 1996) (citation modified); *accord* App.796; R. Doc. 65, at 2 (district court recognizing that three of the dismissed claims "are inextricably bound up with" the Counselors' "injunction motion"). On August 7, 2025, the Counselors timely filed a notice of appeal. App.792; R. Doc. 58, at 1.

STATEMENT OF THE ISSUES

1. Do the Counseling Ordinances violate the First Amendment by prohibiting the Counselors from discussing certain views on gender identity and sexual orientation during voluntary conversations with minor clients? *See* U.S. Const. amend. I; *NIFLA*, 585 U.S. 755; *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010); *Cohen v. California*, 403 U.S. 15 (1971); K.C. Ord. § 50-234; Jackson Cnty. Ord. § 5575.1.

2. Does the Public Accommodation Ordinance violate the First Amendment by compelling and restricting the Counselors' speech on gender identity, marriage, and sexuality? *See* U.S. Const. amend. I; *303 Creative v. Elenis*, 600 U.S. 570 (2023); *Telescope Media Grp. v. Lucero* (*TMG*), 936 F.3d 740 (8th Cir. 2019); K.C. Ord. § 38-113.

3. Are the Counseling Ordinances vague and do they give unbridled discretion to enforcement officials as applied to the Counselors when the Ordinances employ a host of undefined, subjective, and malleable terms to restrict speech? *See* U.S. Const. amend. I and XIV; *Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658 (8th Cir. 2023).

4. Should this Court reinstate the Counselors' claims and issue a preliminary injunction when the Counselors are chilling their speech to avoid the credible enforcement threat posed by the challenged ordinances? *See Rodgers v. Bryant*, 942 F.3d 451, 455 (8th Cir. 2019).

STATEMENT OF THE CASE

I. The Counselors provide counseling consistent with their religious beliefs.

Wyatt Bury and Pamela Eisenreich are licensed professional counselors with their own counseling practices. App.22; R. Doc. 1, at 9. They counsel children, adults, and couples on a wide range of issues, including anxiety, depression, relationships, and marriage. App.23–24; R. Doc. 1, at 10–11. Eisenreich also counsels minors struggling with "distress about their gender identity and sexual attractions." App.152; R. Doc. 9-2, at 4.

Bury and Eisenreich provide counseling by asking questions, listening, and offering suggestions and guidance. App.25–26; R. Doc. 1, at 12–13. Though their clients set their own goals for counseling, the clients rely on the Counselors to guide the conversation and provide advice. App.144; R. Doc. 9-1, at 5; App.152; R. Doc. 9-2, at 4. During each session, the Counselors facilitate conversations to address the client's struggles. App.26; R. Doc. 1, at 13. The Counselors "listen and talk," "ask probing questions," and "help them work through their life circumstances, overcome their situations, and make connections in different areas of their lives." App.143; R. Doc. 9-1, at 4; App.151–52; R. Doc. 9-2, at 3–4. The Counselors never use "aversive techniques." App.38; R. Doc. 1, at 25.

The Counselors offer counseling consistent with their religious beliefs: that sexual relationships are reserved for marriage between one man and one woman, and that sex is a biological reality that cannot be changed. App.24–28; R. Doc. 1, at 11–15; App.144–45; R. Doc. 9-1, at 5–6; App.153; R. Doc. 9-2, at 5. The Counselors believe that following these principles leads to human flourishing. App.24; R. Doc. 1, at 11.

The Counselors typically ask their clients whether they would like to integrate faith with their counseling. App.25; R. Doc. 1, at 12. The Counselors' clients often share their beliefs and seek a counselor who understands their religious worldview. *Id.*; App.143–44; R. Doc. 9-1, at 4–5; App.151–52; R. Doc. 9-2, at 3–4. In those situations, their shared faith convictions guide their conversations. App.26; R. Doc. 1, at 13.

But the Counselors do not impose their faith or views on anyone; client participation is always voluntary. App.24; R. Doc. 1, at 11. At the start of a counseling relationship, the Counselors discuss the prospective clients' goals, assess whether it is a good fit, and get the client's approval to move forward. App.25; R. Doc. 1, at 12; App.143; R. Doc. 9-1, at 4; App.151–52; R. Doc. 9-2, at 3–4. If a requested conversation conflicts with the Counselors' religious beliefs, they generally refer the prospective client to another counselor. App.29; R. Doc. 1, at 16.

Once counseling begins, the Counselors build relationships with their clients, work towards the clients' goals, review those goals, and frequently re-establish consent to continue. App.143–44; R. Doc. 9-1, at

4–5; App.152–53; R. Doc. 9-2, at 4–5. If an irreconcilable conflict arises between the Counselors and their clients, the Counselors end the counseling relationship. App.25–27; R. Doc. 1, at 12–14.

The Counselors cannot provide any counseling that violates their faith. App.28–29; R. Doc. 1, at 15–16. For example, they cannot encourage the idea that someone can change their sex. App.28; R. Doc. 1, at 15. So the Counselors do not use pronouns inconsistent with a client's sex, promote social transitions, or help clients identify contrary to their sex. App.28, 58; R. Doc. 1, at 15, 45. And they do not offer counseling that supports, same-sex marriage, same-sex romantic relationships, or sexual activity outside marriage. *Id.*

But those issues come up. Clients have asked Eisenreich to refer to them with pronouns inconsistent with their sex, draft a letter diagnosing a minor with gender dysphoria so that he could begin medical procedures to alter his body, and provide counseling that would have affirmed a same-sex relationship. App.42–44, 58–59; R. Doc. 1, at 29–31, 45–46; App.153–55; R. Doc. 9-2, at 5–7. Consistent with her beliefs about what is best for clients, Eisenreich declined these requests.

Other issues related to gender identity, sexual orientation, and sexual behavior arise too. Bury has seen a minor who was having thoughts that "contradicted" the client's "understanding of biblical views of sexual ethics." App.145–46; R. Doc. 9-1, at 6–7. Bury also receives calls from parents asking him to counsel their minor children

to help them with inappropriate sexual behaviors and struggles with gender identity. App.48–49; R. Doc. 1, at 35–36.

Eisenreich similarly counsels minors and adults who identify as LGBT and "experience distress relating to their gender identity and sexual orientation." App.24, 27; R. Doc. 1, at 11, 14. Some of those minors have expressed a desire to reduce "their unwanted same-sex attractions" or to change or reduce their gender identity and sexual orientation. App.27, 42; R. Doc. 1, at 14, 29. Eisenreich sometimes pursues these issues when a client raises them. *Id.*

For example, one minor identified as a lesbian and expressed a desire to have a girlfriend. App.44–45; R. Doc. 1, at 31–32. After Eisenreich addressed other sources of stress and anxiety and questioned why the client thought she was same-sex attracted, the minor "presented as much more satisfied with her life" and no longer identified as a lesbian. *Id.* Eisenreich has also explored gender identity and sexuality with minor clients who identify as the opposite sex, claim to be same-sex attracted, or seek help changing other sexual behaviors. App.42–45; R. Doc. 1, at 29–32.

II. The Counselors' approach to gender identity and sexual orientation tracks current medical evidence.

The Counselors have witnessed a growing need to help minors address their struggles with gender identity and sexual orientation. App.30; R. Doc. 1, at 17. Prospective clients often request the

Counselors because they share their religious beliefs on gender and sexuality. App.25, 45, 50; R. Doc. 1, at 12, 32, 37. The Counselors expect these requests to continue. App.49–50; R. Doc. 1, at 36–37. And the Counselors desire to help these minors reconcile their gender identity with their sex and reduce feelings of unwanted same-sex attraction. App.145; R. Doc. 9-1, at 6; App.153; R. Doc. 9-2, at 5.

Scientific evidence supports the Counselors' approach. After all, as the County admits, minors' gender identity and sexual orientation can change. App.771; R. Doc. 53, at 8 (admitting complaint ¶ 99).

Multiple aspects of sexual orientation—"attraction, behavior, or identification"—can change and it is "'unscientific'" to say sexual orientation is "immutable." App.607–11; R. Doc. 31-2, at 10–14. "[C]linical studies of change-allowing therapy … reported successful change along the homosexual-to-heterosexual continuum and strong net psychological benefit." App.643; R. Doc. 31-2, at 46. This is especially true when religious beliefs motivate the individual. App.650–51; R. Doc. 31-2, at 53–54. Advocates of counseling censorship often ignore clients' religious convictions and identities. App.649–52; R. Doc. 31-2, at 52–55. By contrast, no reliable studies show harm directly linked to counseling on sexual orientation. App.652–58; R. Doc. 31-2, at 55–61.

On gender identity, "no studies" show that affirming a child's transgender identity "leads to more positive outcomes (mental, physical, social, vocation, or romantic)" than does "'watchful waiting' or ordinary

therapy." App.523; R. Doc. 31-1, at 84. Nor are there reliable studies showing "that affirmation of transgender identity in minors permanently reduces suicide or suicidal ideation, or improves long-term outcomes, as compared to other therapeutic approaches." App.454, 517–31; R. Doc. 31-1, at 15, 78–92.

But the "affirmative model" of gender identity—which "insists on immediate, unconditional support for the current identity"—typically "sets young people on a path to all-but-inevitable medicalized transition." App.451, 469; R. Doc. 31-1, at 12, 30. This "'conveyor belt' path" leads to hormones and interventions that make them "'patient[s] for life' with complex medical implications." App.453, 508–11; R. Doc. 31-1, at 14, 69–72. One comprehensive review found "no good evidence on the long-term outcomes of [these] interventions to manage gender-related distress." Hilary Cass, *Independent Review of Gender Identity Services for Children and Young People: Final Report* 13 (2024). Conversely, "multiple studies" show that "juvenile" gender dysphoria "does *not* persist through puberty" for "the large majority" of minors—88% according to one study. App.502–08; R. Doc. 31-1, at 63–69.

Despite this desistance, some professionals put minors on a path that leads to risks including sterilization, adverse sexual responses, cardiovascular harm, and more. App.532–40; R. Doc. 31-1, at 93–101; *United States v. Skrmetti*, 145 S. Ct. 1816, 1835–36 (2025) (cataloging some of these harms). Governments in Europe, the State of Missouri,

and most states recognize these harms and limit or ban these procedures. *See* App.32–34; R. Doc. 1, at 19–21; App.488–95; R. Doc. 31-1, at 49–56. The Counselors' compassionate counseling helps minors steer clear of this medicalized path.

III. The ordinances compel and restrict speech about gender identity and human sexuality.

Both the City and County passed ordinances that pose a problem for Bury and Eisenreich. The City's Counseling and Public Accommodation Ordinances apply to Bury and Eisenreich. App.22; R. Doc. 1, at 9. And the County's Counseling Ordinance applies to Bury. App.37–38, 51; R. Doc. 1, at 24–25, 38.

A. The Counseling Ordinances

The City's and the County's Counseling Ordinances are nearly identical. They ban so-called "conversion therapy," defined as "any practice or treatment that seeks to change an individual's sexual orientation or gender identity, including efforts to change behaviors or gender expressions or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender." K.C. Ord. § 50-234(b)(1); Jackson Cnty. Ord. § 5575.1(a). The County adds that "conversion therapy" includes "any therapeutic intervention imposed with the intent of promoting a particular sexual orientation and/or gender as a preferred outcome." Jackson Cnty. Ord. § 5575.1(a).

Both ordinances have a carveout. They allow counseling "that provides support and assistance to a person undergoing gender transition, or counseling that provides acceptance, support and understanding of a person or facilitates a person's coping, social support, and development," but only if "*such counseling does not seek to change sexual orientation or gender identity*." K.C. Ord. § 50-234(b)(1) (emphasis added); Jackson Cnty. Ord. § 5575.1(a).

The ordinances do not differentiate between conversation-based counseling and physically adverse techniques. App.711; R. Doc. 48, at 11 n.6; App.773; R. Doc. 53, at 10 (admitting Complaint ¶ 138). The ordinances even prohibit counseling when minors *voluntarily* seek to change their gender identity or unwanted same-sex attraction.

The ordinances impose fines between $500 and $1,000 for each violation. K.C. Ord. § 50-234(d); Jackson Cnty. Ord. § 5575.3.

B. The Public Accommodation Ordinance

The City's Public Accommodation Ordinance forbids "[d]iscriminatory practices" by public accommodations. The ordinance includes the Accommodation Clause and the Publication Clause.

The Accommodation Clause prohibits public accommodations from "refus[ing], withhold[ing] from[,] or deny[ing]" services "on account of" sexual orientation and gender identity. K.C. Ord. § 38-113(a). The City interprets this clause to require public accommodations to provide

the same services to members of the public regardless of sexual orientation or gender identity. App.51–53; R. Doc. 1, at 38–40. And the City applies this clause to any "place or business offering" its services "to the general public," K.C. Ord. § 38-1(a)(25), even if the offered service is expressive—like creating a custom cake or designing a website. App.51–52; R. Doc. 1, at 38–39 (citing the City's amicus briefs).

The Publication Clause makes it unlawful for public accommodations to "publish" "any written or printed communication" stating (i) that any "accommodations" "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).

Anyone can file complaints against public accommodations. App.56; R. Doc. 1, at 43. The City investigates complaints and can refer them to the City Attorney for prosecution. *Id.* The penalties are severe: significant fines, jail time, loss of City-issued business licenses, and damages, fees, and costs. K.C. Ord. §§ 38-35, 38-101(a), 38-206(a)-(b).

IV. The ordinances threaten the Counselors' speech.

The Counselors regularly receive requests from prospective clients asking for guidance on gender identity, sexuality, sexual behaviors, and marriage. App.42–50; R. Doc. 1, at 29–37. For this reason, the Counselors would like to be transparent about the counseling services they offer

and address these issues with clients as they arise. App.42–50, 57–62; R. Doc. 1, at 29–37, 44–49. But they face a substantial risk of being prosecuted under the ordinances.

The Counselors have tried to avoid liability under the Counseling Ordinances. Bury declines requests asking for his advice on topics related to sexuality and refers those requests to other counselors. App.47–49; R. Doc. 1, at 34–36. Bury also refrains from asking minor clients probing questions that could lead to discussions of sexuality. App.145–46; R. Doc. 9-1, at 6–7.

Likewise, Eisenreich often refers to other counselors "requests to counsel minors on topics of gender identity, sexual behavior, or sexual orientation." App.47; R. Doc. 1, at 34. Sometimes, when those issues arise during a counseling session with a minor, Eisenreich has "intentionally refrained from engaging" in those topics. App.45–47; R. Doc. 1, at 32–34. When she stays silent, she feels "hampered" in her "ability to help the client address" potential sources of "conflict and stress." App.46; R. Doc. 1, at 33; App.156; R. Doc. 9-2, at 8.

The Public Accommodation Ordinance also burdens the Counselors' speech. The Counselors offer counseling that affirms marriage between a man and a woman, promotes reconciling gender identity with sex, and uses pronouns consistent with a client's sex. App.52; R. Doc. 1, at 39. But the City's interpretation of the ordinance requires the Counselors to offer counseling that supports same-sex marriage,

encourages transition efforts, and uses pronouns that contradict a client's sex. *Id.* Anything less, the City says, and the district court agreed, is an "admitted discriminatory practice[ ]." App.208, 299; R. Doc. 20, at 15, 36; App.709–11; R. Doc. 48, at 9–11.

The Counselors desire to give prospective clients notice about how their faith informs their counseling services. The Counselors would like to publish statements on their websites and elsewhere explaining why they offer only counseling consistent with their faith—including their beliefs about pronoun usage, same-sex marriage, and other topics. App.60–62; R. Doc. 1, at 47–49 (referencing complaint exhibits five through seven). They would also like to ask prospective clients questions to learn whether the requested counseling would violate their beliefs. App.59–62; R. Doc. 1, at 46–49. But the Counselors have refrained from posting the statements or asking the questions because the Public Accommodation Ordinance bans them. App.60–62; R. Doc. 1, at 47–49; App.146; R. Doc. 9-1, at 7; App.156–57; R. Doc. 9-2, at 8–9.

V. The district court denies the Counselors' request for a preliminary injunction and dismisses the associated claims.

To stop the ordinances' chilling effect on them, the Counselors moved for a preliminary injunction. The City and County opposed and moved to dismiss the case, saying the Counselors lacked standing and failed to state a claim.

The district court first confirmed the Counselors' standing because they are subject to the ordinances and have "chill[ed] their speech." App.710; R. Doc. 48, at 10.

The court then turned to the Counselors' preliminary-injunction motion. The Counselors requested an injunction against the Counseling Ordinances because they (1) restrict the Counselors' speech on gender identity and sexual orientation and (2) are vague. App.705; R. Doc. 48, at 5. And they sought an injunction against the Public Accommodation Ordinance because it compels them to (1) use pronouns inconsistent with a client's sex; (2) promote a client's gender identity contrary to their sex; and (3) affirm same-sex relations and it also (4) restricts their speech on these topics. *Id.*

The court granted the Counselors' requested injunction against the Public Accommodation Ordinance for compelling them to use pronouns inconsistent with a client's sex. App.762; R. Doc. 48, at 62. But the court denied the rest of the preliminary-injunction motion. *Id.* For the same reasons it denied that motion, the court dismissed the Counselors' free-speech and vagueness claims against the ordinances.[1] App. 796; R. Doc. 65, at 2. The Counselors appealed.

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[1] The Counselors' compelled-pronoun usage, free exercise, and facial claims against the Public Accommodation Ordinance remain live. But the court dismissed the Counselors' free-exercise claims against the Counseling Ordinances and declined to certify that issue for this appeal. App.802; R. Doc. 65, at 8. And the court dismissed the State of Missouri.

STANDARD OF REVIEW

De novo review applies throughout this appeal. This Court reviews the "legal conclusions" of a preliminary-injunction denial de novo. *Lindell v. United States*, 82 F.4th 614, 618 (8th Cir. 2023). It takes "a fresh" view of "crucial facts" when a preliminary injunction appeal raises constitutional claims. *Johnson v. Minneapolis Park & Recreation Bd.*, 729 F.3d 1094, 1098 (8th Cir. 2013) (citation modified). And it reviews Rule 12(b)(6) dismissals de novo. *TMG*, 936 F.3d at 750.

SUMMARY OF ARGUMENT

The First Amendment protects counseling conversations. The Counselors talk with their clients, listen to them, and provide valuable guidance. Clients often seek their advice because they value their opinions and share their faith background.

But the City and County's Counseling Ordinances restrict the Counselors' speech. As applied here, the ordinances *only* regulate the Counselors' speech—not any separately identifiable conduct. And they burden speech based on its content and viewpoint. The Counselors may promote gender transitions or same-sex attractions, but they may not encourage clients to identify with their sex or help clients address unwanted same-sex attractions.

The City's Public Accommodation Ordinance compels *and* restricts the Counselors' speech. The City interprets the ordinance to compel the Counselors' speech by forcing them to offer counseling that supports

same-sex marriage and that affirms clients' decisions to identify contrary to their sex even though promoting those views violates their religious beliefs. The ordinance also bans speech by forbidding the Counselors from publishing statements that explain how their religious beliefs on identity, marriage, and sexuality influence their counseling.

Because the ordinances regulate speech based on content and viewpoint, they must—but cannot—pass heightened scrutiny. The Counseling Ordinances do not further a compelling interest because the governments offered no evidence to show that the Counselors' speech causes harm. On the contrary, the Counseling Ordinances harm vulnerable youth by depriving them of beneficial counseling. And as for the Public Accommodation Ordinance, the anti-discrimination interests cannot save it. The City and County agreed that the Counselors serve all people. Nor are the Counseling and Public Accommodation Ordinances narrowly tailored. The Counselors proposed many alternatives below. The City and County never refuted them.

Alternatively, the Counseling Ordinances are vague and allow arbitrary enforcement. They employ terms like "change," "eliminate," "reduce," facilitate[ ]," "explor[e]," "development," "assist[ ]" "appearance, expression, behavior," "mannerisms," "preference," "practice," "sexual orientation," and "gender identity," which are undefined, subjective, and malleable.

The Counselors have also satisfied the remaining preliminary-injunction factors. They suffer irreparable harm from chilling their speech. And the equities and public interest favor an injunction because governments have no interest in enforcing laws in unconstitutional ways. Because the Counselors are likely to succeed on the merits of their claims, this Court should direct the district court to enter the Counselors' requested injunction and reinstate the associated claims.

ARGUMENT

I. The Counseling Ordinances ban the Counselors' speech.

The First Amendment prohibits the government from abridging "the freedom of speech." U.S. Const. amend. I. It protects the "rights of professionals" like the Counselors. *NIFLA*, 585 U.S. at 771. "[O]rdinary First Amendment principles" apply to professionals and non-professionals alike. *Id.* at 773.

The Counseling Ordinances violate these basic principles. The district court held otherwise by relying on a First Amendment exception that authorizes "regulations of professional *conduct* that incidentally burden speech." *Id.* at 769 (emphasis added). But that exception does not apply here. The Counseling Ordinances target the Counselors' speech—not their conduct—and impose a direct burden on their expression.

A. The Counselors' conversations with clients are protected speech.

The first question is whether the Counselors' conversations count as protected speech. They do.

The First Amendment protects "the use of words or language," including "spoken words." *Hess v. Indiana*, 414 U.S. 105, 107 (1973). "[C]onversation[s]," in particular, facilitate "the transmission of ideas." *McCullen v. Coakley*, 573 U.S. 464, 488 (2014) (sidewalk counseling protected). And "communicat[ing] ideas" is classic expression. *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 790 (2011).

The Counselors convey messages to their clients. They listen, ask questions, learn about client goals, exchange ideas, and offer suggestions to help their clients meet those goals and flourish. App.26, 42–45; R. Doc. 1, at 13, 29–32; App.144; R. Doc. 9-1, at 5; App.152; R. Doc. 9-2, at 4. Often, these conversations help clients become "much more satisfied with" their lives, App.45; R. Doc. 1, at 32, or provide insight that "may not" have been "immediately clear," App.144; R. Doc. 9-1, at 5.

The district court conceded the communicative nature of the Counselors' conversations (even though it mislabeled those conversations as conduct—more on that next). The court acknowledged their counseling relies on "speech" and "verbal communication." App.734, 739; R. Doc. 48, at 34, 39. It said, "talk therapy" helps clients with "self-discovery and progress towards mental or emotional goals

guided by a professional counselor." App.740; R. Doc. 48, at 40. And it defined the Counselors' "counseling" as *nothing but* expressive—"engag[ing] in a conversation with a client" to "guide" them "through a process of self-discovery to work towards mental or emotional or relational goals the client sets for herself." *Id.* The First Amendment protects these exchanges.

B. The ordinances regulate speech here, not conduct.

Despite acknowledging the expressive nature of the Counselors' conversations, the district court relabeled this speech as "conduct," reasoning that the Counseling Ordinances "regulat[e] professional conduct" not "speech as speech." App.732, 734; R. Doc. 48, at 32, 34. But the ordinances burden only the Counselors' speech—not their conduct—and their message triggers the ordinances.

Some laws regulate conduct with an incidental effect on speech. Such laws prohibit activities regardless of the message. Exhibit A: a law that bans "outdoor fires," but applies to a person who "burn[s] a flag." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (citation modified). Other laws directly burden speech. Those laws apply *because of the speaker's message*. Courts distinguish the two categories by evaluating how an "ordinance operates" and "the particular activity in which an actor seeks to engage." *Ness v. City of Bloomington*, 11 F.4th 914, 923 (8th Cir. 2021). Consider 85 years of precedent.

Start with *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Jesse Cantwell, a Jehovah's Witness, was convicted of breaching the peace for publicly playing "a phonograph record" criticizing the Catholic Church. *Id.* at 300, 303. The Supreme Court agreed that breach-of-peace offenses normally "embrace[ ] a great variety of conduct." *Id.* at 308. But Cantwell's only "conduct" was "the effect of his communication upon his hearers." *Id.* at 309. "[C]onstitutional guarantees" prohibited his punishment for that "communication." *Id.* at 311.

Next consider *Cohen v. California*, 403 U.S. 15 (1971). California convicted Paul Cohen for "offensive conduct" when he wore a jacket emblazoned with a provocative message. *Id.* at 16. But the Supreme Court held that applying the statute regulated speech, not conduct, because the conviction "rest[ed] upon … the words Cohen used to convey his message." *Id.* at 18. "The only 'conduct' which the State sought to punish is the fact of communication." *Id.* Besides Cohen's "message," there was no "separately identifiable conduct." *Id.*

After that came *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). An attorney and nonprofits challenged a federal law banning "material support" to terrorist organizations because it restricted legal advice. *Id.* at 8, 14. The government argued the law regulated "conduct, not speech." *Id.* at 26. The Supreme Court disagreed. Building on *Cohen*, the law applied "depend[ing] on what" plaintiffs "sa[id]" and

their "message" was "the conduct triggering coverage under the statute." *Id.* at 27–28.

Last came *303 Creative v. Elenis*, 600 U.S. 570 (2023). Colorado threatened to apply its public-accommodation law to force a graphic artist to create websites expressing messages about marriage. Colorado argued that its law regulated the artist's "'conduct,' not her speech." *Id.* at 597. But the Supreme Court held that the "burden on speech" was not "incidental" because Colorado applied its law to "interfere with her desired message." *Id.* at 596–97 (citation modified). This Court applied similar logic to Minnesota's public-accommodation law when it threatened videographers' speech. *TMG*, 936 F.3d at 751–58.

In each case, it did not matter that the laws could also "be described as directed at conduct" like providing "lodging" for terrorists or "barring breaches of the peace." *Holder*, 561 U.S. at 27–28. What mattered was that the laws infringed speech "as applied" to those plaintiffs. *Id.* at 28. And the First Amendment analysis does not change when laws regulate professionals. *See NIFLA*, 585 U.S. at 767.

To summarize: a law burdens speech—not conduct—when it is "trigger[ed]" by words "communicating a message." *Holder*, 561 U.S. at 28; *accord TMG*, 963 F.3d at 753. Here, the Counseling Ordinances apply to the Counselors' speech based on the messages they communicate. A counselor's speech may support a minor's "gender transition" or same-sex attraction. K.C. Ord. § 50-234(b)(1); Jackson

Cnty. Ord. § 5575.1(a). But the Counselors' speech may not encourage a minor to accept his body and "change" his "gender identity," "expressions," or "behaviors" to align with it. What matters is what the Counselors say.

The district court tried to distinguish *Holder*, *303 Creative*, and *Telescope Media Group* (it did not grapple with *Cantwell* or *Cohen*). It first found *NIFLA* "[m]ore instructive" than *Holder*. App.726; R. Doc. 48, at 26. But *NIFLA* recognized that *Holder* involved "the First Amendment rights of professionals" to "provide[ ] specialized advice." 585 U.S. at 771. *NIFLA* also said that speech did not become conduct just because the speech occurs in the context of "public health." *Id.* (citation modified). Both *NIFLA* and *Holder* establish that the Counseling Ordinances regulate the Counselors' speech—even if communicated in a professional setting.

The district court then cabined *303 Creative* and *Telescope Media Group* to the public-accommodation context. App.724, 736–37, 739–40; R. Doc. 48, at 24, 36–37, 39–40. But the Counselors' speech is not "a separate category of speech that is subject to different" First Amendment "rules." *NIFLA*, 585 U.S. at 767. Those cases control because they followed and applied "foundational" First Amendment "principles." *303 Creative*, 600 U.S. at 585; *accord TMG*, 936 F.3d at 750–58.

Applying the Counseling Ordinances to the Counselors thus "does not simply have an effect on speech"—it "is directed at certain content"

and views. *Sorrell*, 564 U.S. at 567. That direct burden on speech demands strict scrutiny under the First Amendment. *Holder*, 561 U.S. at 28–39. The ordinances cannot withstand the heat of that review.

C. The ordinances burden speech directly here, not incidentally.

The district court's conclusion that the Counseling Ordinances regulated conduct clouded the rest of its analysis. Based on that conclusion, the court converted the Counselors' conversations from speech into a "treatment" or "procedure" carried out through "verbal communication." App.734; R. Doc. 48, at 34. From there, the court determined that the ordinances only "incidentally burden[ ]" the Counselors' "speech." App.724, 732, 734; R. Doc. 48, at 24, 32, 34. But the court drew the line in the wrong place. The First Amendment's text distinguishes "speech and conduct"—not treatment and non-treatment. *NIFLA*, 585 U.S. at 769.

The Counselors counsel by speaking with clients. *E.g.*, App.25–26; R. Doc. 1, at 12–13. The Counseling Ordinances regulate that speech. There is no related conduct, and the lack of regulated conduct means that the speech-incidental-to-conduct rules do not govern. When distinguishing speech and conduct, governments "cannot foreclose the exercise of [First Amendment] rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963). After all, "[s]peech is not conduct just because the government says it is." *TMG*, 936 F.3d at 752.

But the district court leaned into the City and County's labeling game. After affixing the "treatment" label, the court likened the Counselors' "talk therapy" to performing a "surgery" or writing a "prescription," it minimized the ordinances' First Amendment burdens. App.734; R. Doc. 48, at 34. To be sure, some courts have reached similar conclusions through similar mislabels. *See Tingley v. Ferguson*, 47 F.4th 1055, 1072–73, 1078, 1082 (9th Cir. 2022) (defining speech-based counseling as "treatment"); *Chiles v. Salazar*, 116 F.4th 1178, 1204–10 (10th Cir. 2024), *cert. granted*, 145 S. Ct. 1328 (2025) (same).

But better-reasoned cases hold the opposite. In an analogous case, the Eleventh Circuit "rejected the practice of relabeling controversial speech as conduct." *Otto v. City of Boca Raton*, 981 F.3d 854, 861 (11th Cir. 2020). It first looked to the law's "effect—whether it restricts or penalizes speech." *Id.* at 862. The only "'treatment'" the law regulated was the counselors' speech, which "consist[ed]—entirely—of words." *Id.* at 865. So the First Amendment protected that speech. *Id.* at 865–68.

NIFLA supports the Eleventh Circuit's view. The opinion presupposed that "doctor-patient discourse"—where "[d]octors help patients make deeply personal decisions" about their health—is speech. 585 U.S. at 771. This included physicians advising "patients about the use of birth control" or "the benefits of medical marijuana." *Id.* at 772. The Court even assumed that "counselors" discussing "the wisdom of divorce" with clients qualifies as speech. *Id.*

The district court acknowledged that *NIFLA* controls. But it applied an exception. It thought the ordinances "incidentally" burdened the Counselors' speech through a "professional conduct" regulation. *NIFLA*, 585 U.S. at 768. For that thread of an exception, the court pulled on *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *Casey* "upheld a law requiring physicians to obtain informed consent before they could perform an abortion." *NIFLA*, 585 U.S. at 769. That law regulated doctor-patient communications to obtain informed consent *for a medical procedure*. *Id.* at 770. Without the conduct (procedure), there was no need for the speech (informed consent). So the speech was incidental to the conduct.

This Court recently applied *Casey* to a law that prohibited "gender transition procedure[ ]" referrals. *Brandt through Brandt v. Griffin*, 147 F.4th 867, 888–91 (8th Cir. 2025). The referrals were "writing, typing, or verbal communication." *Id.* at 890 (citation modified). But "gender transition procedures" included "medical or surgical service[s]," such as "genital … surgery," "puberty-blocking drugs," and "cross-sex hormones." *Id.* at 878 (quoting Arkansas law). Because the referrals were "part of the treatment process," and that treatment involved only conduct, the referrals received less First Amendment protection. *Id.* at 889. The outcome would have been different if "'the only conduct which the State sought to punish was the fact of communication'"—as the ordinances do here. *Id.* at 890 (quoting *Otto*, 981 F.3d at 866).

Unlike *Casey*, the ordinances here are "not tied to a procedure at all." *NIFLA*, 585 U.S. at 770. The City and County broadly prohibit "*any* practice" "that seeks to change an individuals' sexual orientation or gender identity," including pure conversations disconnected from any regulated medical conduct. K.C. Ord. § 50-234(b)(1); Jackson Cnty. Ord. § 5575.1(a). All agree this web catches the Counselors' "words," Tr. at 58, "verbal communication," App.739; R. Doc. 48, at 39, and "conversations," App.773; R. Doc. 53, at 10 (admitting Complaint ¶ 138). And that is all the ordinances regulate here—the Counselors engage in no "separately identifiable conduct." *Cohen*, 403 U.S. at 18. So the ordinances regulate the Counselors' "speech as speech." *NIFLA*, 585 U.S. at 770. The district court was wrong to relabel their speech as treatment and analyze it as conduct.

D. The City and County's position allows governments to silence speech at their discretion.

To bolster their speech-is-treatment argument, the City and County sketched a hasty history of States' authority over "public health." App.219; R. Doc. 20, at 26. The district court, the City, and the County also made passing references to licensing requirements. *Id.*; App.732–34; R. Doc. 48, at 32–34. Neither are in jeopardy—or even apply—here. Conversely, the City's and County's arguments give governments free rein to suppress disfavored views by reimagining speech as conduct.

None of the academic or common-law sources cited by the City and County authorized local governments to suppress speech in the name of public health. They also cited nothing from the founding era. No surprise. "[W]hen the Fourteenth Amendment was ratified in 1868, the scope of professional power was at an all-time low." Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 Seattle U. L. Rev. 885, 955–56 (2000). And during that period, restrictions on "the advice-rendering subset of professional practice" struck Americans as "singularly repugnant." *Id.* at 956.

Nor did the City and County identify any analogous licensing law that adopts a broad, viewpoint-based prophylactic ban on speech. For good reason—licensing rules are different. They typically establish objective competency requirements for *who* can practice, not *what* licensed practitioners can say to clients. The licensing analogy is particularly ill-suited here. The State of Missouri—the actual licensing authority, App.733; R. Doc. 48, at 33 n.24—*supports* the Counselors. It is odd to invoke professional licensure rules to justify suppressing speech when the licensing authority approves of the speech.

With zero historical examples, the City and County press onward, saying "licensing always trumps." Tr. at 62. But their claim—embraced by the district court—has no limits beyond the governments' discretion. On their theory, governments could:

1. Ban counselors from *affirming* a minor's social transition, as the district court acknowledged, App.733; R. Doc. 48, at 33 n.24;

2. Prohibit attorneys from offering legal advice to clients on divorce or immigration, *contra Button*, 371 U.S. at 429–45 (holding professional conduct rule could not ban NAACP's litigation practices);

3. Forbid tattoo artists from creating tattoos depicting religious symbols, Mo. Ann. Stat. § 324.522(1) (requiring "a license" for any "practitioner of tattooing"); or

4. Prevent professional sign-language interpreters from translating a Democratic political rally, Mo. Ann. Stat. § 209.321(1) (requiring a "license" to "engage in the practice of interpreting").

As these examples highlight, the City and County's position gives governments "unfettered power" to suppress speech through "licensing requirement[s]." *NIFLA*, 585 U.S. at 773. The far-reaching consequences of the City and County's arguments reveal their flaws. Courts have rejected similar arguments. *Id.*

II. The Public Accommodation Ordinance compels and restricts the Counselors' speech on important topics.

The City's Public Accommodation Ordinance also violates the Counselors' free-speech rights. Like the Counseling Ordinances, this ordinance burdens the Counselors' speech, not their conduct. And this ordinances' Accommodation and Publication Clauses compel and restrict the Counselors' speech on gender identity and marriage.

A. The Accommodation Clause compels speech.

The First Amendment protects speakers' "autonomy to choose the content of [their] own message." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569, 573 (1995). To preserve that autonomy, the government may not (1) compel someone to speak (2) a message that alters their desired expression. *E.g.*, *id.* at 572–73. The Accommodation Clause does both.

1. The clause compels the Counselors' speech.

The Accommodation Clause requires public accommodations to provide the same "services, privileges," or "advantages" to persons because of their sexual orientation, gender identity, and other characteristics. K.C. Ord. §§ 38-1(28), 38-113(a). These businesses may not "refuse, withhold from or deny," or "discriminate against any person" in providing these benefits. K.C. Ord. § 38-113(a).

As applied here, the clause regulates the Counselors' speech because that is the service, privilege, or advantage they provide. Their counseling consists of listening, asking questions, and offering advice. 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. That is speech. The Counselors use "spoken words as mediums of expression." *Hurley*, 515 U.S. at 569. So the clause has the "peculiar" application of "declaring" the Counselor's speech itself "to be the public accommodation." *Id.* at 572–73.

The district court acknowledged all this. App.740; R. Doc. 48, at 40. It described the Counselors as having "a conversation with a client" to "guide" them "through a process of self-discovery." *Id.* Even so, the district court held that the Counselors' marital counseling and counseling on gender identity was not a "'form of expression.'" *Id.* The court gave three mistaken justifications.

First, the court questioned whether "*counseling is speech*." App.739; R. Doc. 48, at 39. But the analysis should have focused on the Counselors' specific counseling—i.e., counseling with words. *See Hurley*, 515 U.S. at 568–69 (separating expressive parades from "a group of people" marching); *TMG*, 936 F.3d at 751 (distinguishing "simple recordings" from creative videos).

Second, the court said that "the wedding websites" and "videos" in *303 Creative* and *Telescope Media* cases "*were themselves* speech," while the Counselors' "[c]ounseling lacks the same ultimate communicative or expressive character." App.739; R. Doc. 48, at 39. That distinction doesn't work. The websites and videos were protected speech because they were "modes of expression" that "communicate ideas." *303 Creative*, 600 U.S. at 587; *accord TMG*, 936 F.3d at 751 (acknowledging videos "convey a message"). So too here. Counselors communicate with their clients about ideas for relating to themselves, others, and their communities. App.24–26; R. Doc. 1, at 11–13. Words spoken during

"conversation[s] … transmi[t] … ideas" and thus are speech. *McCullen*, 573 U.S. at 488.

Third, the court suggested that counseling involves only the client's speech. App.740; R. Doc. 48, at 40. The Supreme Court and this Court have rejected similar arguments. *See 303 Creative*, 600 U.S. at 588 (holding designer's websites were her speech though she "may combine with the couple's [speech] in the final product"); *TMG*, 936 F.3d at 751 (holding videographers' videos were their speech though customers had "some say over the finished product"). The district court's conclusion is also at odds with the facts. The Counselors' clients often rely on them to lead the conversations and give advice. App.26; R. Doc. 1, at 13. And the Counselors retain ultimate "control" over everything they say in a counseling session. App.144; R. Doc. 9-1, at 5; App.151; R. Doc. 9-2, at 3.

The district court also undermined its own reasoning. It concluded that the Accommodation Clause burdened the Counselors' speech by forcing them to use pronouns "that do not align with the client's sex." App.741–43; R. Doc. 48, at 41–43. In doing so, the court acknowledged that the Counselors' use of "pronouns of clients" *during counseling* was the Counselors' speech. App.742; R. Doc. 48, at 42. Because the Counselors' use of pronouns in counseling is *their* speech, and because they use pronouns as part of their counseling, it is hard to see how the rest of

their counseling—like offering advice and guiding conversations—is not also their expression.

At minimum, counseling involves the Counselors' *and* their client's speech. But that is true of any meaningful conversation. The Counselors' speech doesn't lose protection just because they "may combine [it] with the" clients'. *303 Creative*, 600 U.S. at 588. Their counseling is speech, and the First Amendment prevents the Accommodation Clause from compelling that speech.

2. The clause alters the Counselors' message.

Worse, the Accommodation Clause compels the Counselors to speak messages they oppose.

The City adds a same-service gloss to the Accommodation Clause. App.51–52; R. Doc. 1, at 38–39. Under this interpretation, the City says that counselors who provide counseling for opposite-sex marriages must support same-sex marriages because the "counseling should be the same regardless of the gender identity or sexual orientation of the couple." App.228; R. Doc. 20, at 35. Likewise, according to the City, counselors must provide counseling that supports views the Counselors believe to be "sinful" because they are "offering advice on the basis of medical treatment." Tr. at 77–78.

But the Counselors follow a policy and practice of counseling consistent with their religious beliefs. App.24; R. Doc. 1, at 11. The

Counselors provide and offer counseling that (1) encourages sexuality and marriage only in the context of the union of one man and one woman; (2) seeks to harmonize an individual's gender identity with his or her sex; and (3) uses pronouns consistent with their clients' sexes. *E.g.*, App.28–30; R. Doc. 1, at 15–17. The Counselors decline requests that conflict with these convictions. App.28; R. Doc. 1, at 15; App.153, 155; R. Doc. 9-2, at 5, 7.

Under the City's interpretation of the Accommodation Clause, the Counselors must also provide and offer counseling that (1) promotes same-sex unions; (2) encourages an individual to identify as contrary to their sex; and (3) refers to clients with pronouns inconsistent with their sex. App.51–53; R. Doc. 1, at 38–40. The City requires the Counselors to provide this counseling even if they find it "sinful" and even if they are not competent to provide it. Tr. at 77–79. Because the Counselors don't offer this kind of counseling, they engage in "admitted discriminatory practices," App.208; R. Doc. 20, at 15, and risk fines, damages, and jail time, K.C. Ord. §§ 38-101(a), 38-206.

As to pronouns, the district court recognized that compelled pronoun usage violated the First Amendment. App.742; R. Doc. 48, at 42. But the same is true of the burdens on the Counselors' relational and gender-identity counseling.

The clause's application to that counseling changes the Counselors' desired speech. It "seeks to compel speech" on marriage,

identity, and sexuality that the Counselors "do[ ] not wish to provide." *303 Creative*, 600 U.S. at 588. It requires them to "align" their "views" with the City even if it "def[ies]" their "conscience." *Id.* at 602–03. And it puts the Counselors to an untenable choice: If they wish "to speak, [they] must either speak as the [City] demands or face sanctions for expressing [their] own beliefs." *Id.* at 589. That compulsion violates their "right to speak freely." *Id.*

The Accommodation Clause need not overreach in this way to accomplish its purposes. After all, the City agrees that the Counselors "provide services" to "Christians," "non-Christians," and members of the LGBT community. App.224–25; R. Doc. 20, at 31–32. The Counselors just decline to promote views of gender identity and sexuality in their counseling that contradicts their beliefs. The First Amendment protects the Counselors' choice to "control [their] own message," which is a different thing from "status-based discrimination." *303 Creative*, 600 U.S. at 595 n.3.

B. The Publication Clause restricts the Counselor's protected speech.

The Publication Clause also restricts the Counselors' speech about constitutionally protected activities. *See 303 Creative*, 600 U.S. at 581 n.1, 598 n.5; *TMG*, 936 F.3d at 757 n.5. The district court agreed and correctly held that the Publication Clause could not ban the Counselors

from posting their pronoun policy because the First Amendment protects pronoun usage. App.744; R. Doc. 48, at 44.

But the First Amendment also protects the Counselors' counseling on marriage and gender identity. By banning the Counselors' statements on those subjects, the Publication Clause "regulate[s] protected speech"—it prevents the Counselors from explaining their "position to the public." *Emilee Carpenter, LLC v. James*, 107 F.4th 92, 101 n.1 (2d Cir. 2024). The Counselors should be free to post these statements without threat of punishment. App.60–62; R. Doc. 1, at 47–49; App.128; R. Doc. 1-5, at 2; App.130; R. Doc. 1-6, at 2.

III. The ordinances regulate the Counselors' speech based on content and viewpoint.

A speech regulation is content-based "if it targets speech based on its communicative content." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 69 (2022) (citation modified). This happens when a law "applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* A viewpoint-based law regulates speech because of the "particular views taken by speakers on a subject." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). "Viewpoint discrimination" is a "more blatant" and "egregious form of content discrimination." *Id.* The ordinances do both.

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

The Counseling Ordinances are content-based burdens on speech because they single out speech on a specific "subject matter." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). The City and County agree. They say the ordinances only govern "specific topics." App.214; R. Doc. 20, at 21. Those topics involve speech about "behaviors," "expressions," and "attractions" related to sexual orientation and gender identity. All other topics are fair game. So the Counselors can encourage minors to alter their study habits or eliminate destructive drinking patterns, but they cannot affirm those same clients' goals to "reduce" unwanted same-sex attractions or "change" their "gender expression[ ]" to match their sex. K.C. Ord. § 50-234(b)(1); Jackson Cnty. Ord. § 5575.1(a). Classifying speech as permitted or prohibited depends on its content.

The Counseling Ordinances also restrict speech based on viewpoint because they "distinguish[ ] between two opposed sets of ideas." *Iancu v. Brunetti*, 588 U.S. 388, 394 (2019). The ordinances allow counseling conversations about a minor's gender identity and sexual orientation; but they forbid a certain point of view.

On gender identity, the ordinances allow counselors to speak messages "support[ing]" or "assist[ing]" a "gender transition." K.C. Ord. § 50-234(b)(1); Jackson Cnty. Ord. § 5575.1(a). But they forbid speech discouraging minors from pursuing this course or encouraging minors to

"change" identity by realigning with their sex. The County's ordinance does more. It prohibits counseling that "promot[es] a particular" "gender [identity] as a preferred outcome," *unless* that preferred outcome supports a "gender transition." Jackson Cnty. Ord. § 5575.1(a). Speech supporting change in one direction—transitioning—is allowed, but speech challenging that path or supporting a different course is censored.

On sexual orientation, the ordinances allow counselors to support the status quo of their clients' asserted identities, behaviors, attractions, and feelings. But counselors may not support those clients' pursuit of "change" in those areas. K.C. Ord. § 50-234(b)(1); Jackson Cnty. Ord. § 5575.1(a).

The ordinances even engage in viewpoint discrimination as between gender identity and sexual orientation. By exempting counseling that assists a person "undergoing gender transition," but having no similar carveout for sexual orientation, the ordinances "codify a particular viewpoint—sexual orientation is immutable, but gender is not." *Otto*, 981 F.3d at 864.

These results impermissibly "discriminate against speech based on the ideas or opinions it conveys." *Iancu*, 588 U.S. at 393. By singling out certain ideas on gender identity and sexual orientation, the ordinances "seek[ ]" to "excise" these "viewpoints from the public dialogue." *303 Creative*, 600 U.S. at 588.

Accordingly, the Counselors must censor themselves. *See* App.45–49; R. Doc. 1, at 32–36. Eisenreich does so during counseling sessions with minors to avoid addressing the "source" of a client's "conflict and stress" when doing so could trigger the ordinances. *Id.* The County admitted its ordinance casts a similar chill over other similarly situated counselors. App.765; R. Doc. 53, at 2 (admitting complaint ¶ 18).

In a nutshell, these ordinances restrict the Counselors' speech, deprive willing listeners of ideas they seek, and elevate the voices of counselors with contrary perspectives—all based on content and viewpoint. This violates the First Amendment.

B. The Public Accommodation Ordinance compels and restricts the Counselors' speech based on content and viewpoint.

The City's Public Accommodation Ordinance likewise compels and restricts speech based on content and viewpoint.

In application, the ordinance regulates the Counselors' speech on topics like sexual orientation, gender identity, and race. K.C. Ord. § 38-113(a). The Accommodation Clause compels the Counselors' speech only on those topics; the Publication Clause restricts speech only on those topics. The ordinance imposes no burdens on other subjects. "That is about as content-based as it gets." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 619 (2020) (plurality opinion).

The Accommodation Clause has other problems too. As the City admits, it compels the Counselors to "offer[ ] advice" they find "sinful"—such as counseling that promotes views on marriage that conflict with their faith. Tr. at 77. The City believes, for example, that counseling to encourage opposite-sex and same-sex marriage "should be the same." App.228; R. Doc. 20, at 35. Because the Counselors disagree, the ordinance necessarily "alters the content of" their speech. *NIFLA*, 585 U.S. at 766 (citation modified). The Clause also treats the Counselors' "choice to talk about" opposite-sex marriage and identity-related issues "as a trigger for compelling" them to affirm same-sex marriage or identities inconsistent with sex. *TMG*, 936 F.3d at 753. Both applications rely on content.

The Accommodation Clause also suppresses "particular views" on gender identity and marriage that the City and County disfavor. *Rosenberger*, 515 U.S. at 829; *accord 303 Creative*, 600 U.S. at 588 (noting same purpose of Colorado's antidiscrimination law). The ordinance allows counselors to support same-sex *and* opposite-sex unions. And they can affirm a person's desire to identify consistent with or contrary to their sex. But they cannot offer *only* counseling that encourages opposite-sex unions or affirms a desire to identify consistent with one's sex. That is viewpoint discrimination.

The Publication Clause also restricts speech based on viewpoint. While the Denial Clause can forbid posts about denials of service if

those services involve conduct and not protected speech (§ II.B), the Unwelcome Clause extends far beyond denials, making it illegal to publish a post indicating that "patronage" is "unwelcome or objectionable or not acceptable" because of protected traits. K.C. Ord. § 38-113(a). But "unwelcome," "objectionable," or "not acceptable" connote a viewpoint. Those terms allow "positive" statements about certain topics, but not statements that some may view as "derogatory," "offensive," or contrary to "society's sense of decency or propriety." *Iancu*, 588 U.S. at 393–94 (citation modified).

To make matters worse, the Unwelcome Clause bans only speech conveying those views about some traits. That makes the clause like the law invalidated in *R.A.V. v. City of St. Paul* which banned unprotected content that "arouse[d] anger, alarm or resentment" based on certain characteristics. 505 U.S. 377, 391–94 (1992) (finding "viewpoint discrimination"). The Unwelcome Clause and the *R.A.V.* law both single out certain views about certain classifications for disfavored treatment, facially and as-applied. The City's Unwelcome Clause just goes further by threatening the Counselors' constitutionally-protected speech. App.128; R. Doc. 1-5, at 2; App.130; R. Doc. 1-6, at 2. That threat should be put to rest.

IV. The ordinances do not survive heightened scrutiny.

The ordinances cannot pass heightened scrutiny as applied to the Counselors' speech.

A. The ordinances trigger and fail strict scrutiny.

The ordinances trigger strict scrutiny because they compel and restrict the Counselors' speech based on content and viewpoint. *See Reed*, 576 U.S. at 166. Strict scrutiny requires the City and County to show that their ordinances are "narrowly tailored to serve compelling state interests." *Id.* at 163. They cannot make that showing.

To show a compelling interest, the City and County must engage in a "precise analysis" beyond "broadly formulated interests." *Fulton v. City of Phila.*, 593 U.S. 522, 541 (2021). The interest must be specific to the Counselors' "speech being regulated." *TMG*, 936 F.3d at 754. And the City and County must produce tangible evidence—not "anecdote and supposition"—that the ordinances "address a real problem" here. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 822 (2000).

Narrow tailoring requires the City and County to show that applying the ordinances to the Counselors is "the least restrictive means to further" their interests. *Id.* at 813. The ordinances cannot be "overinclusive" or "underinclusive." *281 Care Comm. v. Arneson*, 766 F.3d 774, 787 (8th Cir. 2014) (citation modified). If a "less restrictive alternative" exists, the City and County "must use it" or "adduce[ ] … evidence" showing it "would not be effective." *Playboy Ent. Grp., Inc.*, 529 U.S. at 815, 824.

1. The Counseling Ordinances fail strict scrutiny.

The Counseling Ordinances do not serve a compelling interest in a narrowly tailored way as applied to the Counselors' speech.

Compelling interest. The City and County claim an interest in avoiding "serious harms" to minors. App.202; R. Doc. 20, at 9. That interest is too "broadly formulated." *Fulton*, 593 U.S. at 541. And when the ordinances censor the voluntary counseling at issue here, they undermine the City and County's interests by actually harming minors.

The Counselors counsel minors on a voluntary basis and help them work towards goals they set for themselves. App.27; R. Doc. 1, at 14. The County conceded that gender identity, sexual orientation, and sexual behavior can change over time. App.771; R. Doc. 53, at 8 (admitting complaint ¶ 99). Those minors may set goals of identifying consistent with their sex or avoiding same-sex attractions and behaviors. Such goals are often informed by the client's religious beliefs. *See* App.143; R. Doc. 9-1, at 4; App.151–52; R. Doc. 9-2, at 3–4.

Even the City and County's expert recognized that "it is more conceivable, and less emotionally disruptive, for an individual to contemplate changing sexual orientation than to disengage from a religious way of life." App.650–51; R. Doc. 31-2, at 53–54 (quoting Dr. Haldeman's publication). The City and County's key evidence—the American Psychological Association's 2009 report, App.203–05; R. Doc. 20, at 10–12—also admitted that some attested that "they … benefited"

from counseling that "helped them live in a manner consistent with their faith," and that they have found a "fulfilling" life by "resolv[ing] the tension between values and sexual orientation by choosing celibacy." Am. Psychological Ass'n, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* 3, 43, 61 (Aug. 5, 2009), https://perma.cc/KX75-3KW4 (APA Report); *accord* App.649–52; R. Doc. 31-2, at 52–55.

Weighed against these benefits, *no* study shows that this type of counseling—voluntary conversations between a licensed counselor and a minor—causes harm. App.450, 474, 523, 548–50; R. Doc. 31-1, at 11, 35, 84, 109–11; App.635–58; R. Doc. 31-2, at 38–61. The City's and County's own evidence proves the point.

For example, the 2009 APA Report acknowledged the "lack of published research" on sexual-orientation-change efforts "among children." APA Report 72. And the report noted that the studies on adults reveal "a dearth of scientifically sound research on … safety," no "valid causal evidence" of "harm," and no "causal attributions for harm." *Id.* at 42.

The lack of "a direct causal link" dooms the City's and County's interests. *Brown*, 564 U.S. at 800; *accord Interactive Digit. Software Ass'n v. St. Louis Cnty.*, 329 F.3d 954, 959 (8th Cir. 2003) (requiring "empirical support" for assertion that video games "cause psychological harm to minors"). Their studies contain "very low quality" evidence, old

data, and ill-defined terms; rely on obsolete practices—like aversive techniques—and outdated methods of approaching sexual orientation; suffer from methodological bias; and fail to distinguish between gender identity and sexual orientation. App.475–84, 513–17, 542–47; R. Doc. 31-1, at 36–45, 74–78, 103–08; App.615–34, 636–42, 658–69; R. Doc. 31-2, at 18–37, 39–45, 61–72. Courts reject studies with such "significant" "flaws in methodology." *Brown*, 564 U.S. at 799–800; *accord Interactive Digit. Software Ass'n*, 329 F.3d at 959 (discarding "ambiguous" studies "conducted on adults, not minors").

Worse, the City and County's approach harms minors. The ordinances cut off distressed kids and their families from the counseling they seek. App.25; R. Doc. 1, at 12. Yet the ordinances allow counselors to encourage minors to "undergo[ ] gender transition," K.C. Ord. § 50-234(b)(1); Jackson Cnty. Ord. § 5575.1(a), which often leads them to alter their bodies and become lifelong medical patients. App.453–55, 508–11; R. Doc. 31-1, at 14–16, 69–72. To put that into perspective, the ordinances permit conversations that would encourage a 14-year-old girl's decision to pursue a mastectomy but prohibit conversations that would help that same girl identify with her body to avoid surgically altering it. That inverts the City and County's claimed desire to prevent "serious harms."

Narrow tailoring. Nor are the ordinances narrowly tailored. They are overinclusive. They reach beyond physically-intrusive conduct

and ban voluntary speech-based counseling. App.773; R. Doc. 53, at 10 (admitting complaint ¶ 138).

The ordinances also sweep broadly by banning efforts to change any gender identity, gender expression, or sexual-orientation-related identity, behavior, attraction, or feeling. So the Counselors may not help an adolescent girl who wants to stop identifying as a boy. Nor may they help a devout 17-year-old boy's desire to address unwanted same-sex behavior. The ordinances operate in this way despite evidence showing that such counseling can be beneficial and the complete absence of evidence showing harm. In this way, the ordinances "burden substantially more speech than is necessary." *McCullen*, 573 U.S. at 486.

The ordinances are also underinclusive. The City and County invoke an interest in prohibiting harmful counseling. But they allow other activities that undermine their interests. The City even allows aversive techniques if the providers are not "compensat[ed]." K.C. Ord. § 50-234(c). The Counselors can "refer minor clients" to counselors outside the City and County without penalty. App.220; R. Doc. 20, at 27. And the ordinances do not apply to countless persons who influence minors—like unlicensed therapists, teachers, and coaches—because they are either not licensed or are not "providers" based on state-law exemptions. Mo. Ann. Stat. §§ 334.010(4)(1)-(2), 337.505(2). These big holes "raise serious doubts about" the City and County's interests and are "alone enough to defeat" the ordinances. *Brown*, 564 U.S. at 802.

Finally, many less restrictive alternatives exist:

1. Sponsoring a "public-information campaign" to express the governments' views, *see NIFLA*, 585 U.S. at 774–75;

2. Publishing "a database accessible through the Internet" of counselors the City and County endorse, *see United States v. Alvarez*, 567 U.S. 709, 729 (2012) (plurality opinion) (proposing a similar alternative).

3. Exempting discussions of the "client's moral or religious beliefs or practices" like another Missouri city does, *see* Independence Ord. § 12.06.008(A)(1)(f), https://perma.cc/JH8F-9F5W; *Ramirez v. Collier*, 595 U.S. 411, 429 (2022) (governments must "explain why" a less restrictive option in "other jurisdictions" would not work in their locales); or

4. Relying on existing Missouri laws that prohibit "misconduct, fraud, misrepresentation or dishonesty," require counselors to obtain "informed consent," and ban "exploitative relationship[s]," *see* Mo. Ann. Stat. § 337.525(2)(5), (13), (15); 20 Mo. Code Regs. Ann. 2095-3.010(2), (8), (9); 20 Mo. Code Regs. Ann. 2095-3.015(1).

The Counselors suggested most of these alternatives below. App.187; R. Doc. 10, at 29. The City and County had no substantive response. At most, they said—without explanation or citation—that the ordinances are "tailored to address only therapeutic interventions known to seriously harm minors." App.212; R. Doc. 20, at 19. But they offered no evidence to meet their "obligation" to show that the above alternatives would be "ineffective." *Playboy Ent. Grp., Inc.*, 529 U.S. at 816.

2. The Public Accommodation Ordinance fails strict scrutiny.

The Public Accommodation Ordinance has similar flaws. The City cannot show that it serves a compelling interest in a narrowly tailored way as applied to the Counselors' speech.

Compelling interest. The City claimed an interest in "preventing discrimination." App.228; R. Doc. 20, at 35. But the City produced no evidence of "an actual" discrimination "problem in need of solving." *Brown*, 564 U.S. at 799. The City's interest is also too "broadly formulated." *Fulton*, 593 U.S. at 541. And it doesn't apply here.

As the City admits, the Counselors "provide services" to "Christians," "non-Christians," and clients who identify as LGBT. App.224–25; R. Doc. 20, at 31–32. The Counselors' decision to take on a client always turns on *what* counseling they're being asked to provide ("message"), not *who* asks ("status"). *303 Creative*, 600 U.S. at 595 n.3. The City accepts this distinction. Sometimes. It says that a "substance abuse counselor" could decline requests beyond his "expertise" because that would not be "turning away" clients "based on [their] protected category." Tr. at 78. But the City's refuses to recognize this same distinction here, revealing that this application of the ordinance does not prevent discrimination—it targets and compels the Counselors' speech. Laws serve no "legitimate interest" when they do that. *Hurley*, 515 U.S. at 578; *303 Creative*, 600 U.S. at 585–87 (collecting cases).

Narrow tailoring. The ordinance also lacks narrow tailoring. The ordinance is underinclusive. It allows certain lodging accommodations and associations and clubs with fewer than 250 members to discriminate without consequence. K.C. Ord. § 38-1(a)(24)(a), (g). That undermines the City's interest in regulating the Counselors' speech.

And less restrictive alternatives exist, such as:

1. Applying the 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);

2. Extending the exemptions for small lodging accommodations and clubs to discrete services like counseling, K.C. Ord. § 38-1(a)(24)(a), (g); or

3. Exempting businesses that engage in constitutionally protected activities, as other jurisdictions have done, *see* Utah Code Ann. § 34A-5-111 (applying law consistent with "the free exercise of religion"); Miss. Code § 11-62-5(5)(a) (exempting those who decline to create expression that violates their religious beliefs).

Again, the Counselors offered alternatives below. App. 188–89; R. Doc. 10, at 30–31. But the City ignored them. Narrow tailoring prohibits the City from adopting this head-in-the-sand strategy.

B. The ordinances fail even intermediate scrutiny.

The district court declined to apply strict scrutiny based on a double fault. First, the court believed the ordinances incidentally burdened the Counselors' speech. App.734; R. Doc. 48, at 34. That was mistaken because the ordinances directly burden the Counselors' speech

based on content and viewpoint. Second, despite being "somewhat persuaded" that intermediate scrutiny applied, the court adopted rational-basis review. App.751; R. Doc. 48, at 51. That compounded its first error. Even accepting the district court's incorrect incidental-burden rationale, the ordinances should have received at least intermediate scrutiny. *See Griffin*, 147 F.4th at 890 (collecting cases).

Under intermediate scrutiny, the City and County must show the ordinances are "narrowly tailored to serve a significant governmental interest." *McCullen*, 573 U.S. at 486. They cannot.

Significant interest. The ordinances do not further a significant government interest as applied here.

The Counseling Ordinances eliminate voluntary counseling that helps minors pursue their goal to stop identifying as the opposite sex, even though most minors with gender dysphoria desist after puberty. App.31–32; R. Doc. 1, at 18–19. They also ban counseling for religious minors who seek to avoid unwanted same-sex behaviors, even though the government's own evidence reveals that this counseling helps some. APA Report 3, 43, 61. And the City and County offered no competent evidence that counseling conversations like the Counselors' cause harm. *See* App.450, 474, 542–47; R. Doc. 31-1, at 11, 35, 103–08; App.615–34, 636–42, 658–69; R. Doc. 31-2, at 18–37, 39–45, 61–72.

And the Public Accommodation Ordinance's anti-discriminatory interests are similarly misplaced. The Counselors do not discriminate. The City agrees. App.224–25; R. Doc. 20, at 31–32.

Narrow tailoring. Nor are the ordinances narrowly tailored. They are "wildly underinclusive" because they exempt or do not regulate many activities that undermine the City's and County's asserted interests. *NIFLA*, 585 U.S. at 774–75. The City and County never "considered different methods that other jurisdictions"—including some in Missouri—"have found effective" to prevent the harms they seek to stop. *McCullen*, 573 U.S. at 490–94 (analyzing other governments' approaches). The City and County never explained how more "generic" laws that prevent harassment, fraud, exploitation, and the like are inadequate. *Id.* at 492–94 (questioning why "existing" laws were insufficient). Any one of these oversights defeats narrow tailoring.

The district court believed that the Counselors didn't "address" the "lesser standard" of intermediate scrutiny. App.735; R. Doc. 48, at 35. Not so. The Counselors explained how the ordinances were not narrowly tailored and provided alternatives. App. 187–89; R. Doc. 10, at 29–31. The City and County had no response. Their silence shows the ordinances cannot satisfy intermediate scrutiny. *McCullen*, 573 U.S. at 487–94 (resolving intermediate scrutiny solely on tailoring prong). The City and County—not the Counselors—have the burden under intermediate scrutiny. They didn't meet it.

V. The Counseling Ordinances are vague.

Alternatively, the Counseling Ordinances are void for vagueness under the Due Process Clause. This doctrine addresses "two connected but discrete" concerns and demands "rigorous adherence" when "speech

is involved." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Laws must (1) inform "regulated parties" about "what is required of them" and (2) provide "guidance" to prevent "arbitrary or discriminatory" enforcement. *Id.* The ordinances do neither.

Vagueness. A law must give "adequate notice of the proscribed conduct." *Parents Defending Educ.*, 83 F.4th at 668 (citation modified). But the ordinances use broad terms with undefined, subjective, and shifting meanings.

For example, the ordinances prohibit "treatment that seeks to change," "eliminate," or "reduce" a minor's sexual orientation or gender identity. K.C. Ord. § 50-234(b)(1); Jackson Cnty. Ord. § 5575.1(a). But they allow counseling that "facilitates" an individual's "identity exploration and development" or "assist[s]" a "gender transition." None of these terms are defined. The terms "transition," "exploration" and "development" themselves connote "change"—and the ordinances neither define them nor offer any objective basis for distinguishing between them.

Nor do the definitions add clarity. "Gender identity" includes "appearance, expression, behavior or mannerisms" and "preference or practice." K.C. Ord. § 50-234(b)(2), (5); Jackson Cnty. Ord. § 5575.1(b). "Sexual orientation" includes "attraction[s]" and "heterosexual" behaviors. K.C. Ord. § 50-234(b)(5); Jackson Cnty. Ord. § 5575.1(e). If the Counselors encourage a teenage girl to feel more comfortable wearing traditionally feminine clothing, is that permissible gender-identity

"development" or prohibited gender-identity "change"? What about if the Counselors discourage a teenage boy from viewing heterosexual pornography? Is that changing sexual orientation by eliminating a heterosexual "behavior"? The ordinances provide no answer.

"Gender identity" and "sexual orientation" suffer from more obscurity. "Gender identity" is a "capacious concept." *Parents Defending Educ.*, 83 F.4th at 669. And as the County admits (and science reveals), minors' gender identity and sexual orientation can—and often do—change. App.771; R. Doc. 53, at 8 (admitting Complaint ¶ 99); App.502–08; R. Doc. 31-1, at 63–69; App.607–11; R. Doc. 31-2, at 10–14. In a recent study, half of the young people who identified as transgender during a two-year period showed a pattern of fluctuating identities. App.506; R. Doc. 31-1, at 67. What qualifies as gender-identity "change" during one session may not be in the next—the Counselors must guess. And the City's ordinance limits its definition of "sexual orientation" to "consenting adults." K.C. Ord. § 50-234(b)(5). But the ordinance applies only to minors. So how is the definition even relevant?

The district court brushed aside these concerns because it believed the ordinances were clear "*as applied*" to the Counselors' "particular conduct." App.745; R. Doc. 48, at 45 (citing *Holder*). But that misread the complaint's allegations. The Counselors have avoided counseling touching on gender identity or sexual orientation because they are unsure how the ordinances apply. App.45–49; R. Doc. 1, at 32–36. And

Bury has referred minor children struggling with certain sexual behaviors because he cannot tell if attempts to change those behaviors violate the ordinances. *Id.*

The ordinances' ambiguity causes the Counselors to "steer far wider of the unlawful zone" than if the ordinances were clear. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). This inflicts the harm the void-for-vagueness doctrine is designed to prevent: "self-censorship." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988).

Unbridled discretion. The above terms' "lack of clarity" also make the ordinances "susceptible to arbitrary enforcement." *Parents Defending Educ.*, 83 F.4th at 669. They are subject to "unpredictable," "ad hoc," and "subjective" "interpretations." *Id.* (citation modified). Again, the district court, citing *Holder*, downplayed this discretion by believing the ordinances were not vague "*as applied*" to the Counselors. App.745; R. Doc. 48, at 45. True, *Holder* held that plaintiffs cannot raise as-applied vagueness challenges to laws that "clearly proscribe[ ]" their speech. 561 U.S. at 20. But *Holder* never addressed whether the statute "grant[ed] too much enforcement discretion." *Id.* So *Holder*'s "clearly proscribed" logic does not apply to the Counselors' unbridled discretion claim. *See Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. District of Columbia*, 846 F.3d 391, 409–10 (D.C. Cir. 2017) (interpreting *Holder* this way).

VI. This Court should reinstate the Counselors' claims and direct the district court to enter the Counselors' requested injunction.

The Counselors deserve a preliminary injunction because (1) they are likely to prevail on the merits; (2) they suffer irreparable harm without the injunction; (3) the equities tip in their favor; and (4) the injunction serves the public interest. *Rodgers*, 942 F.3d at 455.

On the merits, the Counselors will likely succeed for the reasons already discussed. Because this is a First Amendment case and the Counselors meet the first factor, the remaining injunctive factors are "deemed to have been satisfied." *Id.* (citation modified).

Even so, the Counselors meet the other factors on their own terms. To avoid prosecution, the Counselors have chilled their speech by avoiding gender-identity and sexual-orientation topics during counseling sessions, referring prospective clients to other counselors, and refraining from posting statements about their faith-based approach to counseling. App.45–49, 60–62; R. Doc. 1, at 32–36, 47–49. This "loss of First Amendment freedoms … unquestionably constitutes irreparable injury." *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2364 (2025) (citation modified). Next, the "equities … favor[ ] the constitutionally-protected freedom of expression." *Rodgers*, 942 F.3d at 458. Finally, "it is always in the public interest to protect constitutional rights," *id.*, and the City and County can continue to protect their interests by enforcing

their ordinances to prevent non-expressive conduct. They just cannot censor the Counselors' speech.

This Court may grant the Counselors' requested injunction "in the first instance." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 n.21 (10th Cir. 2013) (en banc) (collecting cases). Exercising this authority is particularly appropriate here because the likelihood-of-success prong drives the analysis. And that prong hinges on a legal issue—the First Amendment's application to the ordinances. The Counselors ask the Court to exercise that authority to put an end to their ongoing and irreparable injuries.

In doing so, this Court must first reinstate the Counselors' claims. The district court dismissed the claims that were the subject of the denied preliminary-injunction motion for the same reasons it denied the motion. *See* App.750, 752, 763; R. Doc. 48, at 50, 52, 63 (referencing analysis "above"). But the Counselors' claims need only be "plausible." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation modified). By proving a likelihood of success on the merits, the Counselors have necessarily shown that their claims are plausible. *See Interactive Digit. Software Ass'n*, 329 F.3d at 960 (reversing denial of summary judgment, implicitly reinstating claims dismissed *"sua sponte*," and ordering district court to enter "injunction").

The Counselors ask this Court to revive those claims and grant their requested injunction.

CONCLUSION

The Counseling Ordinances and the Public Accommodation Ordinance violate the Counselors' freedom of speech with no sufficient justification. This Court should reverse the district court, reinstate the Counselors' claims, and enter the Counselors' requested injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,784 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.

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2025, 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.

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