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UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

DONALD KNAPP; EVELYN KNAPP; HITCHING POST WEDDINGS, LLC, Plaintiffs, v.	Case No. 2:14-cv-441-REB **PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION**

CITY OF COEUR D'ALENE,

Defendant.

PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

COME NOW Plaintiffs, by and through counsel, and move this Court pursuant to Fed. R. Civ. P. 65(b) for a temporary restraining order and/or preliminary injunction restraining and enjoining Defendant and all persons acting at Defendant's direction, including its officers, agents, servants, and employees, from enforcing City Code § 9.56 (the "Ordinance") as applied to them. Plaintiffs also request that the temporary restraining order remain in effect until such time as the Court dissolves it or grants Plaintiffs' motion for preliminary injunction or other requested relief. Because this lawsuit is brought to vindicate Plaintiffs' First and Fourteenth Amendment rights, Plaintiffs further request that any bond requirement be waived. *See Gilmore v. Wells Fargo Bank N.A.*, 2014 WL 3749984, at *6 (N.D. Cal. July 29, 2014) ("[A] court … has the discretion to waive the bond requirement if there is a high probability of success that equity compels waiving the bond, the balance of the equities overwhelming favors the movant, it appears unlikely that the defendant will suffer any harm as a result of the preliminary injunction, or the requirement of a bond would negatively impact the movant's constitutional rights.").

This case merits expedited consideration. Donald and Evelyn Knapp are ordained ministers who own and operate a wedding chapel located in Coeur d'Alene, Idaho called the Hitching Post Wedding Chapel. Over the last 25 years, their religious mission has been to help people create, celebrate, and build lifetime, monogamous, one-man-one-woman marriages. And they have ensured that mission is respected by barring anyone but themselves and their employees from performing wedding ceremonies at, or on behalf of, the Hitching Post. But

because same-sex marriage is now legal in Idaho following a ruling by the United States Court of Appeals for the Ninth Circuit, Defendant has privately told the Knapps and publicly stated that the Knapps must perform religious, same-sex marriage ceremonies or violate the Ordinance, which bans places of public accommodation from discriminating based on sexual orientation.

The Knapps cannot perform same-sex marriage ceremonies and publicly bless same-sex marriages without violating their personal religious belief that marriage is a sacred union established by God between man and woman, their church's doctrine, their ordination vows, and their consciences. When a prospective customer called and asked if The Hitching Post would perform a same-sex wedding ceremony on October 17, 2014, they accordingly declined that request. For this single act, the Ordinance subjects the Knapps to up to 6 months in jail and $1,000 in fines. Each day the Knapps hold to their religious beliefs and decline to marry that couple constitutes a separate violation of the Ordinance and carries the same 6-month, $1,000-in-fines penalties. Thus, in one week this continuing violation of the Ordinance alone would subject the Knapps to imprisonment for over 3 years and $7,000 in fines.

Application of the Ordinance will imminently and irreparably harm the Knapps not only by depriving them of their fundamental rights to the freedom of speech, free exercise of religion, and substantive due process, but also by subjecting them to years of imprisonment and thousands of dollars in fines in just a few short days. Not only would this loss of liberty be irreparable, so too would be the Knapps' loss of their closely-held business, the source of their livelihood, which will quickly fold if they are unable to work or are subject to crippling fines. A temporary restraining order is urgently needed to prevent these irreparable injuries and to maintain the status quo while the Court considers the weighty constitutional matters presented in this case.

Plaintiffs therefore respectfully request that the Court issue a temporary restraining order

prohibiting Defendant from enforcing the Ordinance as applied to them. Only an order from this Court will forestall the immediate, irreparable, and irreversible harm posed to the Knapp's freedom as ordained ministers to speak only the religious rituals their religion prescribes and to earn a livelihood from their religious profession free from unreasonable interference by the state. Even one week without such an order will subject the Knapps to years of imprisonment and thousands of dollars in fines from which neither they nor their business will ever recover.

In short, Plaintiffs cannot wait for a preliminary injunction to issue. They respectfully request that the Court resolve this motion as soon as possible.

Respectfully submitted this 17th day of October, 2014.

By: /s/Virginia McNulty Robinson

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*Application for admission *pro hac vice* forthcoming.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of October, 2014, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

AND I FURTHER CERTIFY that on such date I served the foregoing on the following non-CM/ECF Registered Participants in the manner indicated:

Via a private process server along with a copy of the Complaint and via Electronic Mail:

Steve Widmyer
Mayor
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710 E. Mullan Ave
Coeur d'Alene, ID 83814

Michael C. Gridley
City Attorney
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DISTRICT OF IDAHO

DONALD KNAPP; EVELYN KNAPP; HITCHING POST WEDDINGS, LLC, Plaintiffs, v.	Case No. 2:14-cv-441-REB **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER**

CITY OF COEUR D'ALENE,

Defendant.

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INTRODUCTION

This case concerns the City of Coeur d'Alene's (the "City") efforts to compel two Christian ministers who own and operate a small wedding chapel to conduct religious, same-sex wedding ceremonies in violation of their sincerely held religious beliefs, their sacred ordination vows, and their consciences. Donald and Evelyn Knapp have been happily married for 47 years and have served as ordained ministers of the International Church of the Foursquare Gospel (the "Church") for 44 years and 36 years, respectively. Ver. Compl. ¶ 3, 50-56. They ministered at five churches in the Northwest before purchasing the Hitching Post business and leasing the wedding chapel that has served the Coeur d'Alene area since 1919. Ver. Compl. ¶ 46, 57, 67. The Knapps operate the Hitching Post as a closely-held, religious corporation. Ver. Compl. ¶ 5. It serves as an extension of the Knapps' "sincerely held religious beliefs" by facilitating their mission, as Christian ministers, to "help people create, celebrate, and build lifetime, monogamous, one-man-one-woman marriages as defined by the Holy Bible." *Id*.

But the City characterizes this centuries-old religious mission as "discrimination" and its City Attorney's Office has publicly threatened to enforce City Code § 9.56 (the "Ordinance") against the Knapps if they refuse to perform religious, same-sex marriage ceremonies now that same-sex marriage is legal in Idaho. *See* City Code § 9.56.030(B). The City's Ordinance prohibits sexual orientation discrimination in places of public accommodation and subjects the Knapps to up to 180 days imprisonment and $1,000 in fines for each religious, same-sex marriage ceremony they refuse to officiate in accordance with their sincerely held belief that marriage is a sacred union between one man and one woman. Ver. Compl. ¶ 13. The City thus compels the Knapps to either (1) undergo imprisonment and onerous fines, or (2) sacrifice their fundamental rights to free speech, free exercise, substantive due process, and equal protection.

On October 17, 2014, after same-sex marriage became legal in Idaho, a prospective customer called and asked if The Hitching Post would perform a same-sex wedding ceremony and, in accordance with their sincerely held religious beliefs, the Knapps declined. Ver. Compl. ¶ 264. For this single act, the Ordinance subjects the Knapps to up to 6 months in jail and $1,000 in fines. Ver. Compl. ¶ 13. The Ordinance also provides that each day the Knapps continue to decline to perform this same-sex marriage ceremony they commit a separate and distinct misdemeanor, subject to the same penalties. Ver. Compl. ¶¶ 13, 278. Thus, years of incarceration and thousands of dollars of fines will accrue to the Knapps in a matter of days over their decision to decline just one same-sex marriage ceremony, let alone additional requests they will decline in the coming days. Ver. Compl. ¶ 13-17, 265. This Court's immediate intervention is urgently needed to forestall the Knapp's loss of their liberty and their livelihood. Plaintiffs respectfully request that the Court issue a temporary restraining order enjoining the Ordinance's application to the Knapps and their closely-held business while this case is ongoing.

STATEMENT OF FACTS[1]

The Knapps believe that God has called them as ordained ministers to bless society by uniting people in marriages between one man and one woman. Ver. Compl. ¶ 3. They are "evangelical Christians who hold to historic Christian beliefs," including that "God created two distinct genders in His image, that God ordained marriage to be between one man and one woman, and that God intends for all sexual activity to occur within this one-man-one-woman marriage covenant." Ver. Compl. ¶¶ 81-84. The doctrines of their Church, the International Church of the Foursquare Gospel, also make clear that "[m]arriage is a biblical covenant relationship between a man and a woman established initially by God." Ver. Compl. ¶ 101.

[1] For sake of brevity, Plaintiff incorporates by reference the Verified Complaint's more complete statement of facts and provides an abbreviated summary here.

Ordained ministers, like the Knapps, have a religious duty to administer Church "ordinances, including marriage [but] only between a man and a woman." Ver. Compl. ¶ 102.

Over the course of their ministry, the Knapps have married roughly 35,000 male-female couples. Ver. Compl. ¶ 3. But, in keeping with their religious beliefs, the Knapps have declined to officiate at same-sex marriage or commitment ceremonies each time they have been asked, including on 2 occasions just this year. Ver. Compl. ¶ 8. To ensure that their religious beliefs about marriage are respected, the Knapps bar anyone but themselves and their employees from performing weddings at, or on behalf of, the Hitching Post. Ver. Compl. ¶ 115. And all employees agree not to "conduct wedding ceremonies or their equivalent" on behalf of the Hitching Post for "same-sex, polyamorous, bigamous, or any other relationship that is inconsistent with the [the Knapp's] belief that marriage is a union between man and woman." Ver. Compl. ¶ 124.

Couples wishing to obtain the Hitching Post's services for a minor fee of $80 to $102 per wedding ceremony sign an identical policy, which additionally promises that they are "requesting the Hitching Post to perform a wedding service between one biological male and one biological female" and not "any services that violate" the aforementioned rules. Ver. Compl. ¶ 131, 193. But the City Attorney Office's has stated that this practice violates the Ordinance, which makes it a misdemeanor "[t]o deny to or discriminate against any other person because of sexual orientation and/or gender identity/expression the full enjoyment of any of the accommodation, advantages, facilities or privileges of any place of public … accommodation." Ver. Compl. ¶ 270. The Ordinance defines a place of public accommodation very broadly to include "any public place … kept for gain, hire or reward, or where charges are made for … use of any property or facilities," or "for the rendering of personal services." Ver. Compl. ¶ 271.

The Knapps cannot comply with the Ordinance because officiating at religious, same-sex wedding ceremonies would violate their Christian beliefs and their ordination vows. Ver. Compl. ¶ 6-7, 105-07. And the wedding ceremonies the Knapps perform are unquestionably religious in nature. Ver. Compl. ¶¶ 162-90. Not only do the Knapps personally regard them as such, Ver. Compl. ¶ 190, but the State of Idaho authorizes the Knapps to perform wedding ceremonies solely because they are "minister[s] of the gospel of [a religious] denomination," Idaho Code § 32-303. The City's Ordinance thus seeks to compel the Knapps to administer an ordinance of their Church—marriage—in a manner that that violates their religious reliefs and their Church's teachings, *i.e.*, between members of the same sex. Ver. Compl. ¶ 107. Doing so would force the Knapps to engage in what they believe is sinful conduct and risks Church discipline, including the possible revocation of their ministerial licenses. Ver. Compl. ¶ 104-107. In addition to this incalculable spiritual toll, the Ordinance would end the Knapps' marriage ministry by literally putting them out of business. Ver. Compl. ¶ 347.

STANDARD OF REVIEW

"The standard for obtaining a preliminary injunction or a temporary restraining order is the same. In either case, the moving party must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to the moving party in the absence of preliminary relief, (3) that the balance of equities tips in favor of the moving party; and (4) that an injunction is in the public interest." *Idaho v. Coeur d'Alene Tribe*, No. 2:14-CV-00170, 2014 WL 4389839, at *9 (D. Idaho Sept. 5, 2014). Provided all four requirements are met, the Court may "apply a sliding scale test" under which "a stronger showing of one element may offset a weaker showing of another." *Id.* For example, "serious questions going to the merits and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two

elements of the … test are also met." *Morgan Keegan & Co. v. Drzayick*, No. 1:11-CV-0126, 2011 WL 5403031, at *3 (D. Idaho Nov. 8, 2011) (quotation omitted).

ARGUMENT

I. Plaintiffs Are Likely to Succeed on the Merits of Their Claims.

A. Application of the Ordinance to the Knapps and Their Marriage Ministry Violates Their Rights to Freedom of Speech.

The First Amendment's free speech protections undoubtedly apply to the spoken word. *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (noting the Constitution's particularly strong protection of the "spoken word"). And "private religious speech," including the Knapp's speech in conducting marriage ceremonies as ordained ministers, "is as fully protected under the Free Speech Clause as secular private expression." *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). Here, the Ordinance triggers strict scrutiny under the Free Speech Clause by compelling the Knapps to bless, and thus express approval of, same-sex marriages that run contrary to their religious beliefs, and by subjecting them to jail time and extensive fines unless they adopt a pro-same-sex-marriage viewpoint. The Ordinance cannot overcome that standard because it furthers no compelling interest and is far from narrowly tailored. *See infra* Part I.C. A temporary restraining order is therefore justified in this case.

1. The Ordinance Unlawfully Compels the Knapps to Bless Same-Sex Marriages In Violation of Their Religious Beliefs.

The First Amendment's purpose is to maintain "an open marketplace" of ideas "about political, economic, and social issues," such as same-sex marriage, in which differing perspectives "can compete freely for public acceptance without improper government interference." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012) (quotation omitted). One way in which government improperly interferes with this marketplace

of ideas is by "compel[ling] the endorsement of ideas that it approves." *Id.* That is precisely what the Ordinance does here. It requires the Knapps to bless same-sex marriages, against their religious beliefs, on pain of prison time and substantial fines.

It is "a basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say." *Agency for Int'l Dev. v. Alliance for Open Soc. Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (quotation omitted). The City is free to adopt the view "that discrimination on the basis of sexual orientation and gender identity/expression" is wrong and to promote that belief with its own speech. City Code § 9.56.010(A). But "'no official, high or petty, can prescribe what shall be orthodox in politics, … religion, or other matters of opinion or *force citizens to confess by word or act their faith therein*.'" *Agency for Int'l Dev.*, 133 S. Ct. at 2332 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)) (emphasis added).

Performing and thus blessing religious, same-sex wedding ceremonies would require the Knapps to engage in words—such as administering vows of lifelong commitment—and ritualistic acts—marriage is itself a Church ordinance—that promote the morality of same-sex unions. This would plainly violate the Knapps' religious beliefs, and their free speech right to choose "'what to say and what not to say.'" *Knox*, 132 S. Ct. at 2288 (quoting *Riley v. Nat'l Fed. of Blind of N.C.*, 487 U.S. 781, 797 (1988)).

Thus, the compelled-speech doctrine undoubtedly applies here. The Ordinance straightforwardly requires the Knapps to stop communicating their religious message that marriage is a sacred union between one man and one woman and to "personally speak the government's message" through words and acts affirming that same-sex marriage is moral and that refusing to conduct such ceremonies is wrong. *Rumsfeld v. Forum for Academic &*

Institutional Rights, Inc. ("FAIR"), 547 U.S. 47, 63 (2006). It also requires the Knapps "to host or accommodate another speaker's message," *i.e.*, same-sex couples' third party message that same-sex marriage is religiously valid and blessed in God's sight. *Id.* Neither is permissible under the Free Speech Clause.

The First Amendment protects the Knapps' "autonomy to choose the content of [their] own message." *Id.* (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995)). Through their policies and their refusal to officiate same-sex weddings or commitment ceremonies, the Knapps have unmistakably communicated a message that marriage is a sacred union ordained by God between man and woman. But the Ordinance seeks "to inhibit [the Knapps'] expression of [their] views in order to promote" the City's contrary view. *Pac Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 20 (1986). This effort to "alter [the Knapp's] message as a consequence of the government's coercive action" in the form of threatened imprisonment and substantial fines "is a proper object of First Amendment solicitude" because it "advance[s] some points of view by burdening the expression of others." *Id.* at 16, 20.

Joining same-sex couples in holy matrimony would not only involve the City's "outright compulsion of speech" contrary to the Knapps' beliefs, *Johanns v. Livestock Marketing* Ass'n, 544 U.S. 550, 557 (2005), it would also require the Knapps to "pledge allegiance to the [City's] policy of" eradicating all distinctions related to sexual orientation, *Agency for Int'l Dev.*, 133 S. Ct. at 2332. They could never again effectively communicate their religious message that marriage is only between a man and a woman because of the "evident hypocrisy" of saying one thing and doing another. *Id.* at 2331; *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 713 (2012) ("A religion cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious

precepts that he or she espouses."). Accordingly, the City's substantial "interference with [the Knapps'] desired message" violates the Free Speech Clause.[2] *FAIR*, 547 U.S. at 64; *see also Pac. Gas*, 475 U.S. at 9 (noting the government cannot "force[] speakers to alter their speech to conform with an agenda they do not set").

Complying with the City's demands would also force the Knapps to demonstrate "by word and sign [their] acceptance of the ... ideas" the Ordinance represents. *Barnette*, 319 U.S. at 633. For example, marrying same-sex couples would inevitably communicate that the Knapps accept that the City has the authority to insert itself into matters of faith and doctrine by determining who qualifies for the religious ritual of marriage. It would also broadcast that the City can levy the Knapps' standing in the community, as ordained ministers, to support religious claims that same-sex marriages are blessed in God's sight. Both of these propositions the Knapps stalwartly reject.

"At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). The City cannot simply waive its regulatory wand and transform the Knapps from proponents and administrators of the religious ordinance of one-man-one-woman marriage into instruments of its subversion. Government, at all levels, is barred from turning private individuals into "instrument[s] for fostering public adherence to an ideological point of view [they] find[] unacceptable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (holding the government may not force a couple to display a disagreeable motto on their license plate). Requiring "the utterance of a particular message favored by the [g]overnment" has long been held to violate the First Amendment. *Turner*, 512 U.S. at 641.

[2] It makes no difference that the Knapps charge a small fee for their services. "[A] speaker is no less a speaker because he or she is paid to speak." *Riley*, 487 U.S. at 801.

The Knapps have the Free Speech right "to refuse to foster ... an idea they find morally objectionable," *Wooley*, 430 U.S. at 715, including the concept that same-sex marriage is religiously valid. Their choices about what marriage is, what "merits celebration" as ordained by God, and what should be religiously blessed are "presumed" to lie "beyond the government's power to control." *Hurley*, 515 U.S. at 574-75; *Wooley*, 430 U.S. at 714 (recognizing citizens possess "the right to speak freely and the right to refrain from speaking at all"). In short, the City must propagate its views through a coalition of the willing, not an army of the conscripted. *See Turner*, 512 U.S. at 641-42.

2. The Ordinance is a Content and Viewpoint Based Regulation of Speech and Its Application to the Knapps is Presumptively Invalid.

"Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000). Indeed, any "[g]overnment action that stifles speech on account of its message ... pose[s] the inherent risk that the [g]overnment seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner*, 512 U.S. at 641. "Discrimination against speech because of its message is [thus] presumed to be unconstitutional." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). The Free Speech Clause bars government "from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* at 829.

Here, the City seeks to "prohibit what [the Knapps] want to do—provide [religious marriage ceremonies solely to one-man-one-woman couples] in the form of speech." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). And it seeks to ban that "expression simply because it disagrees with its message." *Johnson*, 491 U.S. at 416. Indeed, ministers who believe

in the validity of same-sex marriage are free to conduct their marriage ministries unimpeded. The Ordinance targets only dissenters like the Knapps for regulation and censure thus "burden[ing] disfavored speech by disfavored speakers." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663 (2011). The government may not do this regardless of "the particular mode in which [the Knapps choose] to express an idea," *Johnson*, 491 U.S. at 416, here, administering religious marriage rights solely to opposite-sex couples.

An essential holding of the First Amendment is that the government may not "suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner*, 512 U.S. at 642. The Ordinance does just that by forcing the Knapps "to associate with the views of other speakers," *i.e.*, same-sex couples who believe that same-sex marriages meet with divine approval, and it selects those "other speakers on the basis of their viewpoints," *i.e.*, by giving same-sex couples an affirmative right to religious wedding services the Knapps would otherwise decline to provide. *Pac. Gas*, 475 U.S. at 20-21.

Because the City designed the Ordinance to "target" those who believe same-sex marriage is immoral "and their messages for disfavored treatment," it "goes even beyond mere content discrimination to actual viewpoint discrimination." *Sorrell*, 131 S. Ct. at 2663. Rather than simply having "an effect on speech," the law is "directed at certain content," *i.e.*, speech that doesn't affirm same-sex marriage, "and is aimed at particular speakers," *i.e.*, those engaged in the economic life of the community who believe homosexual conduct is wrong. *Id.* at 2665. Indeed, the City's "expressed statement of purpose" in passing the Ordinance, *id.* at 2663, to declare that distinctions related to "sexual orientation and gender identity/expression" are wrong, City Code § 9.56.010(A), makes it quite "apparent that [the law] imposes burdens that are based on the content of speech and that are aimed at a particular viewpoint," *Sorrell*, 131 S. Ct. at

2663-64.

B. Forcing the Knapps to Comply With the Ordinance Violates their Fundamental Right to the Free Exercise of Religion.

"[B]elief and action cannot be neatly confined in logic-tight compartments." *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). The Free Exercise Clause "not only 'forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship' but also 'safeguards the free exercise of the chosen form of religion.'" *United States v. Ballard*, 322 U.S. 78, 86 (1944). Freely exercising one's religion "unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions," including performing religious marriage rituals, in short, "to be a minister of the type" the Knapps have been for decades. *McDaniel v.* Paty, 435 U.S. 618, 626 (1978). Applying the Ordinance to the Knapps violates this fundamental right, which "may not be submitted to vote" and does not "depend on the outcome of ... elections" to the City Council or any other public office. *Barnette*, 319 U.S. at 638.

1. Applying the Ordinance to the Knapps Constitutes Unlawful State Interference With Religious Affairs.

The Free Exercise Clause uniformly forbids a body of government from (1) compelling "affirmation of [a] religious belief," (2) punishing "the expression of religious doctrines it believes to be false," (3) imposing "special disabilities on the basis of religious views or religious status," and (4) lending "its power to one or the other side in controversies over religious authority or dogma." *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990). Applying the Ordinance to the Knapps violates their free exercise rights in all four ways.

Forcing the Knapps, as ordained ministers, to conduct a sex-sex marriage ritual would compel them to affirm a religious belief they do not hold, *i.e.*, that it is right and good to bless same-sex unions. This the City may not do. The Free Exercise Clause protects the Knapps'

ability "to engage in certain key religious activities, *including the conducting of* worship services and other *religious ceremonies and rituals*, as well as the critical process of communicating the faith" in manner that conforms with their religious beliefs. *Hosanna-Tabor*, 132 S. Ct. at 711-12. Government interference in such sensitive areas of religious practice is clearly impermissible, as the Constitution renders "[m]an's relation to his God ... no concern of the state." *Ballard*, 322 U.S. at 87.

By applying the Ordinance to the Knapps the City seeks to punish their expression of orthodox Christian views and failure to adopt the City's moral position that all distinctions related to sexual orientation are wrong. *But see Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014) (noting that the government cannot resolve "difficult and important question[s] of religion and moral philosophy"). And the City does so by imposing special disabilities, in the form of jail time and substantial fines, on the Knapps and their religious ministry.[3] Such blatant efforts to lend the City's power to those with progressive theological views about human sexuality and to imprison and fine those who disagree cannot stand under the First Amendment. *See Hosanna-Tabor*, 132 S. Ct. at 704 (noting that the Supreme Court's precedent "radiates ... a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of ... faith and doctrine" (quotation omitted)).

2. Because the Ordinance is Neither Neutral Nor Generally Applicable, Its Application to the Knapps Triggers Strict Scrutiny.

Outside of the ministerial context discussed above, the Free Exercise Clause subjects

[3] A closely-held corporation's free exercise rights are synonymous with those of its owners. *See Hobby Lobby*, 134 S. Ct. at 2768 ("protecting the free-exercise rights of corporations … protects the religious liberty of the humans who own and control those companies"); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009) (characterizing a closely-held corporation as "the instrument … by which [the owners] express their religious beliefs").

laws that burden religiously-motivated conduct to strict scrutiny if they are either not generally applicable or not religiously neutral. *Smith*, 494 U.S. at 879. The Ordinance's application to the Knapps is unlawful under this standard as well. First, unlike most "across-the-board criminal prohibition[s] on a particular form of conduct," *id.* at 884, the Ordinance does not apply generally to all members of society in the same way. It contains two broadly worded exceptions for (1) "[r]eligious corporations, associations, educational institutions, or societies," and (2) "expressive association[s] whose employment of a person protected by this chapter would significantly burden the associations' right of expressive association under *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000)." City Code § 9.56.040(B). Such exemptions "are of paramount concern when a law has the incidental effect of burdening religious practice," which the Ordinance—at a minimum—unquestionably does here. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993); *see also Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (1999) (Alito, J.) (explaining that concerns regarding the discriminatory effects of "individualized exemptions" are magnified by "categorical" exclusions). For the government cannot refuse to extend a system of exemptions "to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884.

The City, in this case, has no legitimate reason—compelling or otherwise—for granting a religious exemption from the Ordinance to other religious organizations, as well as secular expressive associations, but denying one to the Knapps. Not only are the Knapps' religious reasons for objecting to same-sex marriage the same as the exempted groups', but granting these groups an exception from the Ordinance "endangers [the government's] interests" in preventing "discrimination" based on sexual orientation to an identical degree. *See Lukumi*, 508 U.S. at 543 (concluding a law lacks general applicability when it "fail[s] to prohibit nonreligious conduct

that endangers [the government's] interests in a similar or greater degree"); *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.) (same). Hence, the Ordinance is not generally applicable and it is subject to strict scrutiny as applied to the Knapp's.

Second, the City has recognized—explicitly—that the morality of same-sex marriage is an important religious question for many citizens. That is why it exempted most religious organizations from the Ordinance's ban on sexual-orientation discrimination. *See* City Code § 9.56.040(B). "[M]any religions recognize marriage [in particular] as having spiritual significance." *Turner v. Safley*, 482 U.S. 78, 96 (1987); *see also id.* (noting that "marriage may be an exercise of religious faith as well as an expression of personal dedication"). The City consequently exempts most religious groups from the Ordinance's restrictions on places of public accommodation. Yet it has refused to do the same for the Knapps and their religious marriage ministry. *See Blackhawk*, 381 F.3d at 209 (explaining that for a law to be "neutral" it must "not target religiously motivated conduct either on its face or as applied in practice"). In so doing, the City has engaged in the "differential treatment of two religions," which is—by definition—not religiously neutral. *Lukumi*, 508 U.S. at 536; *see also id.* at 536 (recognizing that exempting kosher slaughterhouses but not other religious killings from a ban on animal cruelty is not religiously neutral and may constitute "an independent constitutional violation").

The Free Exercise Clause prohibits the City from "preferring some religious groups over" the Knapp's marriage ministry. *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953). Indeed, the Supreme Court has long held that government may "effect no favoritism among sects." *Larson v. Valente*, 456 U.S. 228, 246 (1982). Religious discrimination is inherent in the City's attempt "to say that some religiously motivated [groups]—the ones picked by the government—are exempt while others are not." *Conestoga Wood Specialties Corp. v. Sec. of U.S. Dep't of Health*

& Human Servs., 724 F.3d 377, 415 (3d Cir. 2013) (Jordan, J., dissenting), *rev'd by Hobby Lobby*, 134 S. Ct. 2751 (2014). This lack of neutrality triggers strict scrutiny, the "most rigorous" standard known to constitutional law, *Lukumi*, 508 U.S. at 546, and one the Ordinance—as applied to the Knapps—simply cannot overcome. *See infra* Part I.C.

3. The Ordinance's Application to the Knapps Also Triggers Strict Scrutiny Under the Hybrid-Rights Doctrine.

Regardless of whether a law is neutral and generally applicable, it triggers strict scrutiny under the Free Exercise Clause if it burdens the free exercise of religion "in conjunction with other constitutional protections, such as freedom of speech." *Smith*, 494 U.S. at 881. "[T]o assert a hybrid-rights claim, a free exercise plaintiff must make out a colorable claim that a companion right has been violated—that is, a fair probability or likelihood, but not a certitude of success on the merits." *Miller v. Reed*, 176 F.3d 1202, 1207 (1999) (quotation omitted).

Plaintiffs have amply made that showing here. As explained above, the Ordinance violates the Knapps' free speech rights by compelling them to express a message favorable to same-sex marriage, *Smith*, 494 U.S. at 882 (citing as hybrid-rights examples compelled speech precedents like *Wooley* and *Barnette* that "also involved freedom of religion"), and by discriminating against their religious viewpoint that marriage is only between a man and a woman. *See supra* Part I.A. It further violates, as explained below, the Knapps' substantive due process rights to earn a livelihood from their chosen profession free from unreasonable governmental interference, *see infra* Part I.D, Strict scrutiny thus applies and the City cannot show that applying the Ordinance to the Knapps satisfies that demanding test. *See infra* Part I.C.

4. The Unconstitutional Conditions Doctrine Forbids the Ordinance's Application to the Knapps.

Under the unconstitutional conditions doctrine, the government "may not deny a benefit

to a person on a basis that infringes his constitutionally protected interests." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *see also Alliance*, 133 S. Ct. at 2328 (same). For this would "allow the government to produce a result which it could not command directly" by penalizing … the exercise of citizen's constitutional rights. *Perry*, 408 U.S. at 597 (quotation and alteration omitted). The government thus violates the Constitution not only by prohibiting "the exercise of First Amendment rights," but also by "'deterr[ing], or chilling'" their exercise. *Bd. of Comm'rs, Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668, 674 (1996) (quotation omitted).

The City is prohibited from placing "conditions on public benefits … which dampen the exercise generally of First Amendment rights, however slight the inducement to the individual to forsake those rights." *Elrod v. Burns*, 427 U.S. 347, 358 n.11 (1976). And the Ordinance's inducements for the Knapps to forsake their free exercise and free speech rights in order to maintain the public benefit of operating a closely-held business are far from "slight." Loss of liberty is one of the most extreme sanctions the government has to offer and thousands of dollars in fines would quickly lead to the Knapps' financial ruin.

By making it impossible for the Knapps to enjoy the generally available right of citizens to own and operate a business and make a living through their chosen vocation, *see infra* Part I.D, and "exercise … simultaneously" their fundamental rights to free speech and the free exercise of religion, *see supra* Part I.A-B, the City has violated the unconstitutional conditions doctrine. *McDaniel*, 435 U.S. at 626. As the Supreme Court explained long ago, conditioning "the availability of benefits … upon [the Knapps'] willingness to violate a cardinal principle of [their] religious faith by surrendering [their] religiously impelled ministry effectively penalizes the free exercise of [their] constitutional liberties." *Id.* (quotation and alteration omitted).

C. Applying the Ordinance to the Knapps Further Violates the Idaho Free Exercise of Religion Protected Act ("FERPA").

FERPA prohibits "political subdivisions of th[e] [S]tate" of Idaho, Idaho Code § 73-401(3), including the City, from "substantially burden[ing] a person's exercise of religion," Idaho Code § 73-402(2), which is defined as "the ability to act or refusal to act in a manner substantially motivated by a religious belief," Idaho Code § 73-401(2), even if that burden results from a rule of general applicability" and is "facially neutral," Idaho Code § 73-402(1) & (2). Because, as explained above, the Ordinance renders it impossible for the Knapps to refuse to conduct same-sex wedding ceremonies and that refusal is motivated wholly by their sincerely held religious beliefs about marriage, FERPA's protections clearly apply.

To overcome them, the City must show that enforcing the Ordinance against the Knapps is "[e]ssential to further a compelling governmental interest" and "[t]he least restrictive means of furthering that … interest," *i.e.*, that strict scrutiny is satisfied. Idaho Code § 73-402(3). The City can do neither. Public accommodation laws designed to ensure that protected persons "will not be turned away merely on the proprietor's exercise of personal preference" do not serve a compelling interest when "applied to expressive activity." *Hurley*, 515 U.S. at 578. In this context, their "object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own." *Id.*

Applying the Ordinance to the Knapps thus serves only to do "exactly what the general rule of speaker's autonomy forbids," *id.*, which is to strip away the "autonomy to control one's own speech" and make "choices of content that in someone's eyes are misguided, or even hurtful," *id.* at 574. That interest is not legitimate, let alone compelling. *See id.* at 579 (noting that the First Amendment "has no more certain antithesis" than laws used to "produce thoughts and statements acceptable to some groups"); *Dale*, 530 U.S. at 657 (explaining that public

accommodation laws do not serve a "compelling interest" when they "materially interfere with the ideas" a person or group wishes "to express"). Nor is the City's interest in compelling the Knapps to perform religious, same-sex marriage rights compelling in practical terms. Because any number of civic officials and religious ministers are ready and willing to officiate at same-sex wedding ceremonies, there is no compelling need for the Knapps to do so. *See* Idaho Code § 32-303 (describing civic officials who may perform marriages); Ver. Compl. ¶¶ 337-45 (explaining that several Coeur d'Alene ministers will perform same-sex marriages).

Moreover, when there is "an existing, recognized, workable, and already-implemented" alternative that is "less restrictive" of constitutional freedoms, the government must use it. *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). Other religious actors are already exempted from the Ordinance's scope and there is no reason to exclude the Knapps from that exception. The City may also use "educational campaigns," "financial incentives[,] or counter-speech, rather than speech restrictions, to advance its [equality] interests." *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507-08 (1996) (plurality op.). All of these are less restrictive means of accomplishing the City's objectives that would not infringe upon the Knapp's rights.

D. Applying the Ordinance to the Knapps Violates Their Substantive Due Process Rights to Freedom of Conscience and to Earn a Living Through the Pursuit of Their Religious Vocation.

Under the Fourteenth Amendment, the Knapps have a protected liberty interest in engaging "in any of the common occupations of life, … to worship God according to the dictates of [their] own conscience[s], and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572 (1972) (quotation and alteration omitted). The Ordinance not only compels the Knapps to perform religious, same-sex marriage ceremonies in violation of their freedom of conscience,

it also forecloses their "right to earn a livelihood and to continue employment unmolested." *Truax v. Raich*, 239 U.S. 33, 38 (1915).

But owning and operating a business in our entrepreneurial society is unquestionably a "privilege[] long recognized … as essential to the orderly pursuit of happiness by free men." *Roth*, 408 U.S. at 572; *cf. Hobby Lobby*, 134 S. Ct. at 2783 (expressing concern that the Affordable Care Act would "effectively exclude [some religious] people from full participation in the economic life of the Nation."). Indeed, the Supreme Court has long held that the "right … to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts" of the Due Process Clause. *Greene v. McElroy*, 360 U.S. 474, 492 (1959). Because the Ordinance renders it impossible for the Knapps to operate their closely-held business based on their religious vocation and to exercise their fundamental rights of conscience, its application to them violates the doctrine of substantive due process. *Cf. Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring) (explaining that "freedom means" that all citizens have the right "to express [their religious] beliefs and to establish [their] religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community").

II. The Ordinances' Severe Compromising of the Knapps' First and Fourteenth Amendment Rights Establishes a Clear Showing of Irreparable Harm.

As explained above, *see supra* Part I, the Ordinance's application to the Knapps violates their First and Fourteenth Amendment rights to freedom of speech, the free exercise of religion, substantive due process, and equal protection. It is beyond dispute "that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod*, 427 U.S. at 373). Likewise, the Knapp's loss of liberty and their closely-held business, either because they are incarcerated and not able to work or because the City has financially ruined them through onerous fines, cannot be restored though

money damages. The Ordinance, for example, imposes 3.5 years in jail time and $7,000 in fines if the Knapps decline to perform a single same-sex wedding ceremony each day for a week. Plaintiffs have thus amply established that the Ordinance causes them irreparable harm.

III. The Balance of Harm and the Public Interest Tip Decidedly in the Knapps' Favor.

Because the Ordinance's application to the Knapps violates the First and Fourteenth Amendments, *see supra* Part I, the balance of the equities and the public interest tip decidedly in Plaintiffs' favor. It is well established that "the public interest and the balance of the equities favor preventing the violation of a party's constitutional rights." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014). That is even more apparent when the constitutional violation threatens to result in the Knapps' imprisonment or incurrence of substantial fines that would force them to close their doors and lose their livelihood. In stark contrast, "no substantial harm to others can be said to inhere" in preventing the Ordinance's application to the Knapps, *Déjà vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001), as "neither the [g]overnment nor the public generally can claim an interest in the enforcement of an unconstitutional law," *ACLU v. Ashcroft*, 322 F.3d 240, 251 n.11 (3d Cir. 2003) (quotation omitted). The balance of harm and the public interest thus both favor Plaintiffs.

CONCLUSION

The Ordinance's application to the Knapps will imminently and irreparably harm them. Its enforcement will deprive them of both their liberty and their constitutional rights. Moreover, every day the Ordinance stays in effect as applied to the Knapps jail time and fines accrue. Within a few short days, they could be facing thousands of dollars in fines and years in jail if this Court does not act. Plaintiffs therefore respectfully request that the Court issue a temporary restraining order enjoining the Ordinance's enforcement against them without delay.

Respectfully submitted this 17th day of October, 2014.

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*Application for admission *pro hac vice* forthcoming.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of October, 2014, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

AND I FURTHER CERTIFY that on such date I served the foregoing on the following non-CM/ECF Registered Participants in the manner indicated:

Via a private process server along with a copy of the Complaint and via Electronic Mail:

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