

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

MAYDAY HEALTH,

Plaintiff,

v.

MARTY J. JACKLEY, Attorney General of
South Dakota, in his official capacity,

Defendants.

Case No. 1:26-cv-00078-KPF

**DECLARATION OF ADAM S. SIEFF IN SUPPORT OF
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

I, Adam Sieff, declare as follows:

1. I am a partner with the law firm of Davis Wright Tremaine LLP and represent Plaintiff Mayday Health. I make this declaration based on personal knowledge, except where specified as made on information and belief. If called, I would testify competently thereto.

2. Attached hereto as **Exhibit 1** is a true and correct copy of the transcript of the January 16, 2026 proceedings in the above-captioned matter.

3. Attached hereto as **Exhibit 2** is a true and correct copy of the transcript of the February 20, 2026 Motions Hearing in *State of South Dakota vs. Mayday Medicines, Inc., d/b/a Mayday Health, and Allover, LLC, d/b/a Momentara*, No. 32CIV25-329, Sixth Judicial Circuit of South Dakota.

4. Attached hereto as **Exhibit 3** is a true and correct copy of the transcript of the February 11, 2026 proceedings in the above-captioned matter.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Los Angeles, California
March 2, 2026

By: /s/ Adam S. Sieff
Adam S. Sieff

Exhibit 1

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 MAYDAY HEALTH,

4 Plaintiff,

5 v.

26 Cv. 00078 (KPF)

6 MARTY J. JACKLEY,
7 Attorney General of South Dakota,

8 Defendant.

TRO (Remote)

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9
10 January 16, 2026
2:05 p.m.

11 Before:

12 HON. KATHERINE POLK FAILLA,

13 District Judge

14 APPEARANCES

15 DAVIS WRIGHT TREMAINE LLP
Attorneys for Plaintiff

16 BY: ADAM SIEFF
17 LAURA R. HANDMAN
18 CHELSEA KELLY
AMBIKA KUMAR
NICOLE SAAD BEMBRIDGE

19 MARTY J. JACKLEY (Appearing *Pro Se*)
20 Attorney General of South Dakota

21 OFFICE OF THE ATTORNEY GENERAL SOUTH DAKOTA
Attorneys for Defendant
22 BY: AMANDA MIILLER
23
24
25

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1 (Case called)

2 THE DEPUTY CLERK: Counsel, please state your name for
3 the record, beginning with plaintiff.

4 MR. SIEFF: Good morning, your Honor. This is Adam
5 Sieff, of Davis Wright Tremaine, for plaintiffs, Mayday Health.
6 With me on the line are my colleagues, Laura Handman, Chelsea
7 Kelly, Ambika Kumar, and Nicole Saad Bembridge.

8 THE COURT: Thank you very much. Good afternoon to
9 each of you.

10 This is Judge Failla, and I think you all have
11 realized, I am the judge to whom this case has been assigned.

12 Mr. Jackley, do I have you on the line as well, sir?

13 MR. JACKLEY: You do, your Honor. Marty Jackley,
14 South Dakota Attorney General. Also appearing with me is my
15 civil chief, Amanda Miiller, and that is M-i-i-l-l-e-r.

16 THE COURT: Good afternoon to both of you. Thank you
17 very much for appearing on such short notice, but candidly,
18 sir, it's been short notice for me as well.

19 Mr. Jackley, should I be directing my questions this
20 afternoon to you or to Ms. Miiller?

21 MR. JACKLEY: To me, your Honor.

22 THE COURT: Thank you, sir.

23 So, Mr. Sieff, from my perspective, what I have
24 received from you to date, I received a complaint a few weeks
25 ago, earlier in the week I received what I believed was a

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1 preliminary injunction motion, and last evening, at about 10
2 after 9, I received a motion for a temporary restraining order.
3 I did not check my docket sheet in the minutes before I got on
4 the call today. Was anything else filed from your client's
5 perspective, sir?

6 MR. SIEFF: Not from us, your Honor.

7 THE COURT: Thank you.

8 Mr. Jackley, I have had a chance to review those
9 written materials that you have just heard me list. And I
10 didn't think you were afforded enough time to actually respond
11 to anything, so why don't I begin by asking, have you had a
12 chance to review the complaint and the injunctive relief
13 papers?

14 MR. JACKLEY: I have, your Honor.

15 THE COURT: Thank you.

16 It was my understanding, from a conversation my law
17 clerk had with Mr. Sieff last evening, that your office is
18 opposing the request for a temporary restraining order. Is
19 that correct?

20 MR. JACKLEY: That is correct, your Honor.

21 May I ask the Court just so that I get direction. Me
22 and my office have made the *pro hac* appearance filings, but
23 they have not been accepted yet. I just want to be respectful
24 in not making an appearance out of place.

25 THE COURT: I appreciate you saying that. I did

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1 understand and I thought I had seen Ms. Miiller's application
2 for *pro hac vice* admission. You filed one as well for
3 yourself, sir?

4 MR. JACKLEY: Your Honor, mine is in the process.
5 Once I receive the certificate of good standing, it will be
6 officially filed, but it is in the works.

7 THE COURT: Fair enough.

8 Mr. Jackley, given that fact and the representations
9 you have made to me, and also given the fact that you have only
10 known about this motion for less than 24 hours, if it is your
11 wish to be the oralist today, I will admit you *pro hac vice* for
12 purposes of this proceeding so that you can make the arguments
13 you wish to make.

14 MR. JACKLEY: Thank you, your Honor. That would be my
15 request.

16 THE COURT: That request is granted.

17 So, what I am seeing on the docket with respect to
18 your side, sir, is the *pro hac vice* motion, and I understand
19 another is coming. Given that, may I please hear from you
20 orally as to the reasons you oppose the request for a temporary
21 restraining order.

22 MR. JACKLEY: Thank you, your Honor. Of course.

23 I am requesting a limited appearance to contest
24 jurisdiction only. I would request a further opportunity, if
25 necessary, to present our arguments in writing.

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1 The gist of the state of South Dakota's resistance is
2 there does not exist personal jurisdiction, neither under the
3 long-arm jurisdiction or under minimum contacts. I can get
4 into more detail on that. And then, secondary, based upon
5 *Younger* abstention.

6 I would advise the Court this matter was actually set
7 for a hearing today at 9:00 in South Dakota. The plaintiffs
8 requested a continuance over the state's objection. The court
9 was gracious and gave them a continuance in order for them to
10 prepare for the preliminary injunction hearing set in South
11 Dakota.

12 THE COURT: And I am going to ask you a couple of
13 follow-up questions because I saw in the preliminary injunction
14 submissions the fact that a proceeding had been brought in
15 South Dakota. I believe it was last month, sir.

16 May I ask, have those papers been served on Mayday?
17 And that's what I will refer to the entity here as. As of the
18 time that the preliminary injunction motion was filed, I did
19 not have a sense that they had been served. Have they been
20 served?

21 MR. JACKLEY: Your Honor, it is the state's position
22 that that action was filed on or about December 29th, that
23 under state statute, because it's the consumer division, it is
24 allowed by notice that it has been accomplished. It has also
25 been accomplished by personal service, but I do believe that

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1 plaintiffs are contesting that.

2 THE COURT: I see. Of course, there hasn't been
3 enough time, this only having been filed at the end of
4 December, to have a judge in South Dakota to speak to the issue
5 of proper service. So you believe they have been served, they
6 believe they haven't, and that is a fight that I don't get to
7 resolve.

8 Tell me more, please, sir, about the hearing. When
9 you say 9 a.m., I guess that's 9 a.m. your time, which is
10 probably closer to 11 or 12 my time. So when was it set down
11 for a hearing, sir?

12 MR. JACKLEY: The hearing was scheduled for today at 9
13 a.m. Central Standard Time.

14 THE COURT: Excuse me, sir. I wasn't clear. I
15 understand when the hearing was scheduled for. When was it
16 scheduled? Because I would not have scheduled this for the
17 time I scheduled it had I known that there was a hearing in the
18 South Dakota court.

19 MR. JACKLEY: It was scheduled approximately two weeks
20 ago.

21 THE COURT: I see. It may be that plaintiff will tell
22 me that they did not get word of it because they don't believe
23 they have been served, but I will let them fight their own
24 battles a little bit later.

25 I appreciate knowing, and I thank the court in South

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1 Dakota for allowing me the opportunity to use this time this
2 afternoon.

3 Has that proceeding, that hearing, been rescheduled,
4 sir?

5 MR. JACKLEY: Yes, your Honor.

6 THE COURT: For what date and time, please, so that I
7 don't conflict again.

8 MR. JACKLEY: February 2, at 1:00 Central Standard
9 Time.

10 THE COURT: Thank you for letting me know.

11 Let's go back then, please. Why don't we begin with
12 your arguments on personal jurisdiction. So I guess you and I
13 are both looking at New York's long-arm statute. Tell me why
14 you believe the conduct that is alleged in the complaint before
15 me does not implicate personal jurisdiction in New York.

16 MR. JACKLEY: Your Honor, it is the state's position
17 that there is no long-arm jurisdiction under New York Civil
18 Procedure 302(a). I, as attorney general, under my statutory
19 duty, have sent a cease and desist letter for activity
20 occurring in South Dakota, and that is not enough under New
21 York law to qualify as a business transaction. And I would
22 cite *America/International 1994 Venture v. Mau*, 146 A.D.3d 40,
23 at page 53. It's a 2016 decision.

24 I would also argue that sending a lawful cease and
25 desist letter under South Dakota law does not qualify as a

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1 tortious act because we have not derived any revenue, and none
2 of the five factors in the *Traver v. Officine* case, 233 F.Supp.
3 2d 404, page 412 (N.D.N.Y. 2002), have not been satisfied.

4 THE COURT: OK. Now, you have seen the complaint in
5 this case, sir?

6 MR. JACKLEY: I have, your Honor.

7 THE COURT: I am just looking back at their arguments
8 as to personal jurisdiction. They are suggesting that what you
9 sent to them was a threat. You're suggesting to them it is a
10 cease and desist letter. And it is for that reason that you
11 believe there is not personal jurisdiction. As well, I think I
12 heard you say there aren't minimum contacts sufficient here?

13 MR. JACKLEY: Correct. There are no minimum contacts,
14 either a general jurisdiction or specific jurisdiction. There
15 is no general jurisdiction here because defendant is not at
16 home in New York. And there is no specific jurisdiction here
17 because South Dakota did not purposefully avail itself of the
18 privilege of conducting activities within the forum state.

19 We simply have, here in South Dakota, there has been
20 placards put up in gas stations here in South Dakota. Pursuant
21 to my statutory authority, the governor requests that the
22 attorney general address it. I addressed it with a cease and
23 desist order. When the cease and desist order did not work, as
24 a measured response, rather than invoking criminal
25 jurisdiction, I simply filed for preliminary injunction in

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1 relation to those signs that exist here in South Dakota.

2 THE COURT: You just said a moment ago, sir, that you
3 engaged in a measured response by filing the civil enforcement
4 action. Is it a criminal prosecution?

5 MR. JACKLEY: Under South Dakota law, there are tools
6 available to the attorney general and there is certain conduct.
7 One option is, under our statutes, we are allowed probably the
8 most measured response of a cease and desist letter, giving the
9 opportunity for a response, an opportunity to be heard and
10 considered by the attorney general. That occurred.

11 My understanding is all but one or two of the signs
12 have been removed. Because signs still remain up in South
13 Dakota, I chose to file a preliminary injunction case, which is
14 what I have indicated to the Court will be heard on
15 February 2nd. I would advise the Court, as former United
16 States attorney and attorney general, solicitation is a
17 criminal act in South Dakota, but nothing has been filed on
18 that measure at this time.

19 THE COURT: I see. All right.

20 You mentioned the signs. These are the signs in the
21 gas stations, sir, and not just the website?

22 MR. JACKLEY: Yes. I would call them a placard. When
23 you go to a gas station, there will be a placard above the
24 pump, or as part of the pump, that contains an advertisement.
25 So those placards exist here in South Dakota.

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1 THE COURT: You will excuse my ignorance, sir. When I
2 am at a gas station here in the East Coast, the signs that I am
3 seeing are electronic, in the sense that I have seen multiple
4 ads at once while I am waiting for my tank to fill. In South
5 Dakota, are you talking about a physical hard copy placard,
6 that's why you're using that term?

7 MR. JACKLEY: Yes.

8 THE COURT: There were some that were up and most have
9 been removed, but not all?

10 MR. JACKLEY: It is my understanding, from various
11 statements by the plaintiff, that the original or at least the
12 original count was 30. That at the time of the filing, it was
13 14. That at the time of the filing of the preliminary
14 injunction, it was two. And now it is my understanding it is
15 down to one.

16 THE COURT: Now, sir, if they were to remove the one,
17 would you continue with the civil enforcement action?

18 MR. JACKLEY: I would not, your Honor.

19 THE COURT: Just so that I am clear, it's not the
20 existence of the website per se, it's these placards that
21 you're construing as solicitation, or am I getting ahead of
22 myself?

23 MR. JACKLEY: That is our position, your Honor. You
24 are not getting ahead of yourself. That is our position.

25 THE COURT: I see. All right. I understand.

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1 By talking to me about personal jurisdiction, and as
2 well about *Younger* abstention, do I understand that you don't
3 believe that you and I should be discussing the merits of the
4 First Amendment claims today, that really there are these
5 threshold jurisdictional issues that I have to work my way
6 through first?

7 MR. JACKLEY: That is the state's position. This is a
8 limited appearance to contest jurisdiction.

9 THE COURT: Thank you.

10 Let's then, please, talk about *Younger* abstention. I
11 don't mean to cut you off, sir, if there are more personal
12 jurisdiction issues that you wish to raise.

13 MR. JACKLEY: There are not, and I would be prepared
14 to talk in answering questions regarding *Younger*.

15 THE COURT: Please go ahead, sir.

16 MR. JACKLEY: It is the state's position that the
17 *Younger* abstention, federal courts must defer to certain state
18 proceedings, and I would point out that there are ongoing state
19 proceedings right now. They include a catalogue of them:
20 State criminal jurisdiction and civil enforcement proceedings
21 and civil proceedings. And I would specifically cite *Sprint v.*
22 *Jacobs*, 571 U.S. 69, page 73. And that, of course, is a
23 Supreme Court decision.

24 THE COURT: Actually, as I am talking to you, sir, I
25 took down some notes beforehand about *Younger* abstention. So

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1 let me please understand this. You are invoking it based on
2 the existence of a civil enforcement action, correct?

3 MR. JACKLEY: Yes. Both in regarding to a cease and
4 desist, as well as regarding the filing of a preliminary or
5 permanent injunction.

6 THE COURT: All right. Go ahead. I will let you
7 continue with your argument, sir.

8 MR. JACKLEY: That would be the extent of my argument,
9 your Honor.

10 THE COURT: Thank you very much.

11 Mr. Sieff, let me please turn to you.

12 Mr. Sieff, I will tell you, and you will all learn
13 this, I try to be as transparent as possible in my
14 communications with the parties. I wasn't sure about the
15 personal jurisdiction issue, but I actually thought I had
16 personal jurisdiction. I did spend a chunk of my morning this
17 morning thinking through *Younger* abstention issues akin to
18 those described by Mr. Jackley just now.

19 So, Mr. Sieff, why don't you begin with personal
20 jurisdiction and then with *Younger* abstention, please.

21 MR. SIEFF: Thank you, your Honor. And when I address
22 *Younger*, I am more than happy to address what was scheduled to
23 be a hearing this morning that we were prepared to attend but
24 was continued for other reasons, but we'll come back to that.

25 Starting with personal jurisdiction, this case is just

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1 like three other cases, three federal appellate courts -- or at
2 least two federal appellate courts and then the Second Circuit
3 in a factually similar circumstance held sufficient to assert
4 personal jurisdiction in the federal district court over an
5 out-of-state attorney general.

6 The first case that you should know about is the *Media*
7 *Matters for America v. Paxton*, which was a D.C. Circuit
8 decision from last year, where virtually the exact same conduct
9 transpired, where the attorney general of Texas sent a demand
10 into the district, and the process server—in that case they
11 actually effectuated service—attempted to effectuate service
12 on the plaintiff in the forum state. And then the effect of
13 those contacts was to create censorship-based effects, that
14 have affected Mayday here as it did *Media Matters* there, in
15 their ability to engage in publication-related activities and
16 recording, and just as importantly, publish information that's
17 available to people in those forum states. That's case number
18 one.

19 A second case --

20 THE COURT: Before you proceed to your second case,
21 sir, can I please have the citation for the first case?

22 MR. SIEFF: Yes. It is in paragraph 10 of our
23 complaint, and I will read it to you.

24 THE COURT: I see it. And then you have *Defense*
25 *Distributed v. Grewal* and then *Twitter v. Paxton*. Are these

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1 the three cases that you are going to be citing to me?

2 MR. SIEFF: Those three. And then the one you will
3 see a few lines down, which is the *Grand River Six Nations*
4 case, which is a Second Circuit case, asserting personal
5 jurisdiction over out-of-state attorneys general whose
6 purposeful New York conduct created the basis for jurisdiction,
7 just as it does here, under the same long-arm statute. And the
8 long-arm statute in New York, in our view, is materially
9 indistinguishable from the ones at issue in the three cases
10 cited in the beginning of that same paragraph.

11 So, we think that the Court's inclination to find
12 personal jurisdiction is correct. We think that the contacts
13 here are more than sufficient and had been judicially
14 recognized by multiple federal courts as sufficient to find
15 personal jurisdiction in a matter like this one. But what you
16 have is an out-of-state attorney general reaching into that
17 state, be it letters and demands and threats, to purposefully
18 halt and, at a minimum, chill the speech of a speaker in that
19 state, who is speaking not just to people in that state, but
20 across the country.

21 So, we think that this body of law is sufficient to
22 demonstrate that the type of tortious activities or
23 constitutional tort actions that we have, that this type of
24 constitutionally tortious activity is one that the Court has
25 jurisdiction to hear and to hear our Section 1983 claim arising

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1 out of those contexts in that tortious activity.

2 If the Court has no further questions on jurisdiction,
3 I am happy to turn to *Younger*.

4 THE COURT: It's not that I don't or do have
5 additional questions. I want the totality of your arguments
6 for personal jurisdiction, but if what you're going to say is,
7 look, we thought this through already and we have articulated
8 in our complaint what we believe the bases of jurisdiction are,
9 that's fine too. I don't have specific questions. I do want
10 to hear from you because I did not know, until Mr. Jackley
11 raised the personal jurisdiction issue, that that was an issue.
12 So I do want to hear your arguments with whatever degree of
13 specificity you would like to make them.

14 MR. SIEFF: I will add, then, in that case, Section
15 302(1), (2) and (3) all seem to squarely cover in technical
16 terms what the attorney general has done here. And for the
17 same reason that the courts in the cases that we have cited
18 asserted jurisdiction over comparable acts as comporting with
19 the minimum due process, we believe the long-arm statute
20 embraces that conduct here, and the Constitution recognizes
21 that the assertion of personal jurisdiction over that conduct
22 is permissible and appropriate, and this Court may accordingly
23 hear the claims that we have arising from and are related to
24 that conduct.

25 THE COURT: Thank you. With that in mind then, let's

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1 please turn to the issue of *Younger* abstention.

2 MR. SIEFF: Thank you, your Honor.

3 There are three answers with respect to *Younger*. And
4 it relates to the issue with respect to what Mr. Jackley
5 referred to as the hearing that was scheduled today.

6 There is no ongoing proceeding, first of all, in South
7 Dakota. There is no complaint. There is no summons filed.
8 That's indisputable. And until yesterday, we had not even been
9 served with the sole pleading that exists in any South Dakota
10 court, which is a motion to enjoin our speech. That was only
11 served by personal service. I received notification from our
12 client that they were served with a motion by 3:00, but that
13 motion did not initiate or commence any action that is
14 cognizable. And at the time that we filed this case on
15 January 6, all that we had was a threat of enforcement and some
16 indication that the attorney general intended to go to court to
17 bring the enforcement action against us.

18 So we think, as the Supreme Court noted in *Ellis v.*
19 *Dyson*, 421 U.S. 426, at 432, that because all that existed at
20 the time that we filed was a threat of bringing an enforcement
21 action, colored both by the cease and desist letter sent to New
22 York to cease our New York-based publishing operations, and
23 also by what we learned about through news reports and social
24 media posts was this motion that was lodged in a South Dakota
25 court, we don't believe that there is an ongoing proceeding at

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1 all which would trigger any aspect of *Younger*.

2 THE COURT: I am going to ask you to pause for a
3 moment, please, sir. Mr. Jackley represented to me that the
4 action in South Dakota was filed on December 29. Is that
5 incorrect?

6 MR. SIEFF: What Mr. Jackley is referring to is that
7 his office lodged a motion, notice of just a motion, on the
8 29th. There is no action that was filed. There is no
9 complaint or summons. It lodged a motion in a South Dakota
10 court on or around that date. And we received notice of it
11 through news reports. I believe his office issued a press
12 release in saying they had lodged that motion. They didn't
13 file a complaint or summons, or serve a complaint or summons on
14 us. They didn't even serve that motion on us.

15 THE COURT: I am going to ask you to pause for a
16 moment.

17 Finish your sentence. Go ahead.

18 MR. SIEFF: Your Honor, I was just going to say we
19 learned on or around that date through the press, through
20 social media, that some type of motion had been filed in court.
21 But an action, an action and a proceeding had not begun, and
22 there is none today.

23 THE COURT: I am looking at *Sprint* and other cases
24 that I took notes on as I'm talking to you. I guess we are in
25 agreement there is not an ongoing state criminal prosecution.

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1 The question is, is this a civil proceeding that is akin to a
2 criminal prosecution? It would say not. Then it would be a
3 civil proceeding involving certain orders uniquely in
4 furtherance of state court's ability to perform their judicial
5 functions. Would you agree with me that those are the
6 exceptional circumstances where *Younger* abstention typically
7 applies?

8 MR. SIEFF: Yes, your Honor, I agree that those are
9 the criteria necessary. And our position is, in the first
10 instance -- and there are numerous reasons why *Younger* doesn't
11 apply, and I can get to those too, but at the threshold, we
12 agree that those are the three circumstances that are essential
13 conditions for it to apply at all, and our position is that
14 none of those are met here.

15 THE COURT: I understand that is your position. The
16 cease and desist order I am not sure qualifies as any of
17 these -- I need to understand a little bit more this proceeding
18 filed in South Dakota, which you tell me is just a motion. But
19 the question is, is that motion a civil proceeding involving an
20 order uniquely in furtherance of a state court's ability to
21 perform their judicial functions? I don't know. I am just
22 looking at a case from the District of Vermont where these
23 state interests include: Safeguarding child welfare, managing
24 interstate utilities, regulating attorney conduct, overseeing
25 state election processes. I suspect there are more.

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1 Please help me understand why this particular motion
2 would not qualify under the third category of proceedings.

3 MR. SIEFF: I believe that the type of cases that have
4 found that the third type of proceeding is met have involved
5 some type of engagement of the judiciary in an actually
6 adversarial process. It might be an attorney bar investigation
7 or some other process in a judicial court run by the state that
8 is indeed adversarial. And the key here is that the action has
9 been commenced in that body.

10 Here, there was nothing commenced in any court that
11 would recognize the existence of an adversarial proceeding.
12 That is why, once we eventually got wind of what was happening,
13 South Dakota counsel made a special appearance to alert the
14 court that we intended to contest the existence of an action.
15 And the court, the South Dakota court, by its own motion,
16 scheduled a hearing, originally set for this morning, to
17 discuss with the state whether it had, in fact, commenced an
18 action at all. And it did so before and only keyed us into the
19 conversation after we alerted the court that we had filed a
20 federal action. So we were prepared to make a special
21 appearance at the hearing that the court had ordered and
22 intended to ask the state about on its own motion.

23 So to go back to your question about *Younger*, there is
24 not at this moment, was not at the time that we filed any of
25 the pleadings in this case, an ongoing proceeding. We are sort

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1 of in this unusual liminal space where the government has told
2 us they intend to sue us. They appear to have tried to sue us,
3 but didn't actually. But in so doing, they have told us what
4 they intend to do to punish us and censor our speech.

5 And so for that reason, we think that our claims are
6 both ripe and justiciable. *Younger* doesn't apply. And I can
7 get into more reasons why, even if the Court were inclined to
8 believe that the third *Younger* criterion existed, the threshold
9 criterion for an ongoing proceeding, there is another reason,
10 and an important other reason, why *Younger* is not a bar in this
11 action.

12 THE COURT: I promise you that I will, but I am one
13 step behind you, sir, and I am trying to catch up to where you
14 are.

15 So, I guess a question that I have is, is there no
16 utility in letting in my hearing from the South Dakota court,
17 or the South Dakota whatever, about whether they believe an
18 action has been commenced?

19 MR. SIEFF: I think the answer to that question leads
20 to my second argument, which is that even if there were an
21 action that were ongoing -- and again, we don't think that the
22 South Dakota court will find that there is one, but even if
23 there were some type of ongoing proceeding, number one, we need
24 a temporary restraining order in the interim. I understand
25 that you are key to assess your jurisdiction. The point is,

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1 even if there were an ongoing proceeding, *Younger* has no
2 application where the state action, if it exists, was brought
3 to retaliate against or deter First Amendment protected
4 activity. This is a well-established exception to *Younger*.
5 The Second Circuit recognized it in a case called *Cullen v.*
6 *Fliegner*, 18 F.3d, at 103-04, and it was applied in the Eastern
7 District of New York in a case that I think is relevant here,
8 *Brooklyn Institute of Arts v. City of New York*, 64 F.Supp. 2d,
9 the relevant passage is 195-96.

10 Now, these are just two cases. There are cases from
11 courts across the country. But the point is that *Younger* is a
12 comity-based doctrine. Notwithstanding the fact that it
13 continues to have vitality, the courts recognized that it has
14 no application where the state's interest is illegitimate
15 because it has undertaken to retaliate against or deter First
16 Amendment protected activity.

17 So, in the *Brooklyn* case, what you had was a situation
18 akin to ours, in the *Cullen* case as well, but the state action
19 was found to have been brought, it was alleged to have been
20 brought in order to punish a speaker, in that case it was a
21 museum, for putting on speech that the government, for whatever
22 reason, found objectionable. And in that case, and in others,
23 *Younger* has no application. So, too, in *Cullen*, which was a
24 case about discipline against a public school teacher. It was
25 understood and alleged that the public school teacher was

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1 disciplined in retaliation for his protest of school policy.
2 And notwithstanding the existence of, in each of those cases,
3 actual ongoing proceedings, which again we don't have here, but
4 notwithstanding those ongoing proceedings, because those
5 proceedings were part of an ongoing effort to retaliate against
6 and deter the plaintiff's exercise of First Amendment rights,
7 the federal court was not divested of jurisdiction in deference
8 to those types of government purposes.

9 So, that to us is controlling, and you will see that
10 our complaint is full of allegations and our motion is full of
11 evidence supporting those allegations. So we think that even
12 if the Court thought *Younger* ought to apply because those
13 criteria are met, it cannot, it cannot because of this
14 exception.

15 One last point, your Honor, if I may. At an absolute
16 minimum, *Younger* has no application to our claims for
17 prospective relief. The Supreme Court addressed this squarely
18 in *Wooley v. Maynard*, 430 U.S. at 711. The case involved
19 there, the plaintiff sought relief for future charges that the
20 state government might bring against the plaintiff. And here,
21 you will note, in our complaint and in the request that we have
22 for relief, we have two causes of action. We seek relief from
23 the government's prior restraint and retaliation against our
24 existing speech, and we also seek prospective relief from any
25 prior restraint or retaliation the government might wield

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1 against our speech in the future.

2 So, even if you agree with Mr. Jackley that *Younger*
3 applies, and it doesn't, and even if you disagree with me that
4 the bad faith and illegitimate purpose exception, the
5 retaliation exception to *Younger* doesn't apply, and again, it
6 does too, at an absolute minimum, *Younger* cannot apply to our
7 request for prospective relief. So the Court can and should,
8 at an absolute minimum, take jurisdiction over that portion of
9 our claim.

10 THE COURT: Let me ask you this question, sir. A lot
11 of your injunctive relief briefing is focused on what I will
12 call the *NIFLA* case, 160 F.4th 360, a Second Circuit decision
13 from last month, I believe.

14 So, first of all, I am correct, that is a lot of your
15 discussion about First Amendment issues, yes?

16 MR. SIEFF: Yes. We think that case is on point.

17 THE COURT: But you know that that case began with an
18 extensive *Younger* abstention discussion, and it seemed there
19 that the panel, and I believe the opinion was written by Judge
20 Bianco, but the panel seemed very concerned or moved by the
21 fact that *NIFLA* was not itself a party in the civil enforcement
22 actions that were being brought by the New York Attorney
23 General. And so, in reading that, one might think that the
24 converse would be true, that where the entity in question
25 filing the federal lawsuit was the named party in the

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1 enforcement actions, that perhaps *Younger* abstention should
2 apply.

3 So, you may just tell me that, for all the reasons you
4 have just stated, I have totally misperceived the case, and
5 that's fine. But I do want you to engage with it just because
6 so much time was spent drawing that line in the *NIFLA* case.

7 MR. SIEFF: Absolutely, your Honor. That case is, in
8 a *Younger* aspect of the case, inapposite. In that case, what
9 you had was *NIFLA* and you had other organizations that *NIFLA*
10 supported and engaged in independent activities related to, in
11 one hand, providing, and another hand, publicizing the
12 availability of an abortion reversal procedure. And the
13 attorney general's office had brought an action only against
14 the provider. Which, by the way, is a less restrictive
15 alternative that Mr. Jackley could have pursued in this case.
16 In that case, you had claims against provider, but no claims
17 against *NIFLA*. So the *Younger* analysis was addressing a
18 separate issue.

19 In this case, there is no proceeding against Mayday
20 for a different reason, which is that no action was filed
21 against anyone. It's not that we have been named in an action
22 pending alongside another organization, or that another
23 organization was named and we weren't. It's that there is no
24 action at all. So maybe that is repeating some of what I was
25 saying earlier, but the first key distinction is that in that

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1 case there was an action, in this case there is zero action.

2 But beyond that, because that case concluded that
3 there was an action that just didn't involve *NIFLA*, it had no
4 reason to reach the type of *Younger* exception cases, which I
5 just spoke with you about, the *Cullen* case, for example. It
6 did not need to engage in that because, at the threshold, it
7 found that, well, there is an action, but it doesn't involve
8 *NIFLA*. Here, you can reach the same threshold determination
9 for a different reason. There is no action, but at a minimum,
10 *NIFLA* said nothing about what happens when there is an action,
11 in the event the Court determines that there is one here, we
12 disagree with that, but it says nothing about what you do next.
13 What you do next, in that eventuality, is you look to see
14 whether an exception applies or what the scope of the
15 abstention is.

16 So, *NIFLA* we think is extremely informative as to how
17 to apply the merits in this case, but we think the *Younger*
18 discussion, if anything, supports the conclusion that we have
19 here, insofar as the court in its *Younger* discussion emphasized
20 that *Younger* is an exceptional doctrine; it is an exception to
21 the rule the exercise of jurisdiction. It says, there are only
22 a, quote, small number of cases in which the holding is
23 authorized equitable belief that undue interference with state
24 proceedings is the normal thing to do. None of those
25 exceptional reasons for abstention exist here.

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1 THE COURT: All right. Sir, I did not mean to derail
2 you, if there are other arguments that you wish to make about
3 *Younger* abstention or something else.

4 MR. SIEFF: No. If the Court wants to hear argument
5 on the merits, we are happy to discuss it. If the Court wants
6 to keep this hearing to jurisdiction, I understand that. But
7 we came to court and we were loath to file an emergency motion,
8 and we appreciate the Court's time and Mr. Jackley has offered
9 his time in preparing and coming here today to discuss it.

10 We filed this application because there is real
11 irreparable harm. There are things that our client would like
12 to publish but are refraining from publishing, that they seek
13 the breathing space to publish. And this is a straightforward
14 First Amendment case in those respects. It is a case over
15 which the Court has jurisdiction, as we discussed, and it's a
16 case where *Younger* doesn't apply, because if the Court were
17 required to abstain in this case, it would swallow whole the
18 Section 1983 remedies that Congress enacted. That's why these
19 exceptions exist. That's why *Younger* is limited to
20 circumstances where there truly is an ongoing proceeding.

21 So, I would love to dive into the First Amendment
22 analysis. It seemed like you were limiting your interest at
23 the moment to jurisdiction. So I will ask the Court if you
24 would like me to proceed there. Otherwise, I think you have
25 heard me on *Younger* and you have heard me on personal

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1 jurisdiction.

2 THE COURT: I have. And for that reason, let me
3 please return to Mr. Jackley.

4 Mr. Jackley, I appreciate everything that you have
5 said, and I want to think very seriously about the arguments
6 you have made about personal jurisdiction and about *Younger*
7 abstention, because I am concerned about staying in my lane, as
8 I should.

9 You have heard me discuss the *NIFLA* case, which you
10 see as well referenced repeatedly in the plaintiff's briefing
11 in this matter. It seemed to me that if I had jurisdiction, by
12 which I mean I had personal jurisdiction, subject matter
13 jurisdiction, and no basis to abstain, that indeed there might
14 be some serious questions or a likelihood of success in light
15 of that *NIFLA* decision from the Second Circuit.

16 Do you now, sir, want to address the merits of the
17 plaintiff's argument or are you really focusing on the
18 jurisdictional issues at this time?

19 MR. JACKLEY: Your Honor, I am focusing on the
20 jurisdictional issues, and I would ask for a brief moment to
21 respond to both personal jurisdiction and *Younger*.

22 THE COURT: Absolutely. My point, sir, was I wanted
23 to give you the chance to speak to the merits if you wanted to.
24 I did not know how familiar you were with the *NIFLA* case. I
25 have had to live with it the last two months. Let me, please,

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1 hear from you in reply on the jurisdictional issues we have
2 been discussing.

3 MR. JACKLEY: As pertaining to personal jurisdiction,
4 I would note that what counsel has relied upon, including the
5 *Paxton* case, those were dramatically different than this case.
6 Those were civil enforcement demands, a completely different
7 statutory alternative, different resolves, different
8 enforcement, not the same thing. Therefore, those cases don't
9 apply.

10 If you look, and I think it goes to *Younger* also, what
11 this is. Under South Dakota law, our statutes allow for a
12 special proceeding for civil enforcement. We did exactly that.
13 Under S.D.C.L. 37-24-23, our legislature and our laws allow for
14 a civil action of this nature. This action was filed on
15 December 29th in state court.

16 I would note for the record, on January 12,
17 plaintiff's counsel made their appearance in that action. I do
18 acknowledge that yesterday, January 15, at 11:43, plaintiff's
19 counsel requested for a continuance, didn't mention a TRO being
20 filed but indicated they needed more time to prepare. Then
21 late that evening a TRO was filed in federal court.

22 This is a deceptive trade practice action. It's a
23 special proceeding. It fits directly in line with the *Younger*
24 abstention, where federal courts must defer to certain state
25 proceedings, including civil enforcement proceedings and civil

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1 proceedings involving certain orders that are uniquely in
2 furtherance of state court's ability to perform their judicial
3 functions. South Dakota state law specifically authorizes
4 this. I again cite S.D.C.L. 37-24-23, and it would be against
5 the concept of *Younger*, and the long-established law on
6 *Younger*, for a federal court to step in, especially under these
7 facts, when it's filed pursuant to S.D.L.C. 37-24-23, an action
8 was proceeding, counsel sought a continuance for reasons they
9 weren't prepare, and then filed for a TRO that night.

10 THE COURT: I understand the procedural history, sir.

11 Are there other arguments you wish to make?

12 MR. JACKLEY: No, your Honor.

13 THE COURT: I am going to place the parties on hold
14 for a moment. I ask for your patience. I will get back to you
15 as soon as I can. Thank you very much.

16 (Recess)

17 THE COURT: Mr. Sieff, are you still on the line?

18 MR. SIEFF: Yes, your Honor.

19 THE COURT: Thank you so much.

20 Mr. Jackley, are you still on the line as well?

21 MR. JACKLEY: Yes, your Honor.

22 THE COURT: I thank you very much.

23 Counsel, first of all, I thank you for your patience.
24 I have been trying, in the few minutes that I had, to see if I
25 could put together an answer, but, as I have to confess to you,

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1 I would much prefer to get this correct than to get this to you
2 quickly. I want to look at the provisions that each of you has
3 cited to me, both statutory provisions and cases. So what I
4 propose, if this works for your respective schedules, is if we
5 could reconvene this phone call at 6 p.m. my time or, if you
6 will, three hours from now. And that is because I actually
7 have a classified proceeding in another matter that begins in
8 two minutes.

9 Mr. Jackley, does your schedule permit you or Ms.
10 Miiller to get back on the phone in three hours' time?

11 MR. JACKLEY: Yes, your Honor.

12 THE COURT: Mr. Sieff, same for you and your team or a
13 subset thereof?

14 MR. SIEFF: Yes, your Honor.

15 THE COURT: Please call the number that you used last
16 time to dial in, and I will have an answer for you at that
17 time. I thank you both very much. I know you have been
18 working very hard on this, but I too want to come to this table
19 armed with the information I need. I will be looking at that
20 now. I will see you in three hours. Take care, everyone.

21 We are adjourned.

22 (Adjourned)

23

24

25

Exhibit 2

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
 2 COUNTY OF HUGHES) SS
) SIXTH JUDICIAL CIRCUIT

3)
 4 STATE OF SOUTH DAKOTA,) 32CIV25-339
 5)
 6 Plaintiff,)
 7) TRANSCRIPT OF
 8 vs.) MOTIONS HEARING
 9)
 10)
 11)
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 25)

11 BEFORE: THE HONORABLE MARGO NORTHRUP,
 12 Circuit Court Judge of the Sixth Judicial
 13 Circuit, on the 20th day of February, 2026.

14 APPEARANCES:

15 MR. MARTY JACKLEY
 16 MS. AMANDA MIILLER
 17 MR. JACOB DEMPSEY
 18 Attorney General's Office
 19 1302 E. Hwy 14
 20 Pierre, South Dakota 57501;
 21 Attorney for the Plaintiff.

22 MR. JAMES LEACH
 23 Attorney at Law
 24 1617 Sheridan Lake Road
 25 Rapid City, South Dakota 57702;
 Attorney for the Defendants.

2

1 (The following was transcribed from digital
 2 recording.)
 3 THE COURT: All right. Let's go ahead and go
 4 on the record. This is the time and place scheduled
 5 for a hearing in the State of South Dakota v. Mayday
 6 Medicines, Incorporated, doing business as Mayday
 7 Health and Allover, LLC, doing business as Momentara.
 8 Why don't we start with the attorneys noting
 9 their appearance for the record and we can start on
 10 behalf of the State.
 11 MR. DEMPSEY: Your Honor, Jake Dempsey
 12 representing the State. I'm here with Attorney
 13 General Marty Jackley and Assistant Attorney General
 14 Mandy Miiller.
 15 THE COURT: All right. Thank you.
 16 MR. LEACH: Your Honor, Jim Leach specially
 17 appearing for Mayday.
 18 THE COURT: All right. Thank you. All right.
 19 Well, the purpose of the hearing today was to address
 20 some of the Court's jurisdictional concerns but I got
 21 notice that the State on Wednesday have served a
 22 Summons and Complaint on Mayday and so I'm just
 23 wondering what the purpose of the hearing is today at
 24 this point. Do you still contest what -- the
 25 jurisdiction issues existing?

3

1 MR. LEACH: Absolutely, Your Honor. To
 2 explain, when we filed our motion, you know, we had
 3 what we had and we think it's clear there is no
 4 jurisdiction. I'm prepared to argue that. I will
 5 argue that unless we're going to have some kind of
 6 stipulation.
 7 Now, apparently, the Summons and Complaint -- a
 8 Summons and Complaint was served on February 18th. I
 9 say apparently because I don't actually know what
 10 happened. I just received a bunch of papers yesterday
 11 afternoon. If that's the case, then they have at
 12 least attempted to start a completely new action, not
 13 this action.
 14 This action was never properly commenced for
 15 the reasons that I'll explain if we get into the
 16 merits and without it being properly commenced, the
 17 Court's only option is to dismiss. If they have in
 18 fact commenced a new action, then that will proceed as
 19 any new action proceeds but I certainly am not here to
 20 appear in any capacity with respect to the possible
 21 new action.
 22 THE COURT: All right. And so your position is
 23 that the Summons -- by filing the Summons and
 24 Complaint, they haven't cured the jurisdictional
 25 issues that existed when they started the file; is

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1 that correct?
 2 MR. LEACH: That's right. I don't think
 3 they're curable. I think what it may have done is to
 4 commence an action for the first time because we know
 5 there's no action before there's a Summons issued and
 6 properly served, and I don't even know right now if
 7 the Summons was properly served or not. That's
 8 something that certainly we will be looking at but
 9 right now I have no idea.
 10 THE COURT: All right. Thank you.
 11 What is the State's position?
 12 MR. DEMPSEY: Your Honor, this action was
 13 properly commenced in the first place. As I've laid
 14 out in my briefing -- well, first of all, this Court
 15 has personal jurisdiction. The Defendant hasn't
 16 really contested it regarding the -- (inaudible) -- of
 17 contact so presumably they agreed. But there's been
 18 purposeful availment to our advertising market and so
 19 the Court has personal jurisdiction. That argument is
 20 laid out in the pre-hearing brief on jurisdiction
 21 procedure.
 22 Regarding the present argument, this is a
 23 special civil enforcement action under 37-24-23. I
 24 laid out in my reply brief there are many cases,
 25 including the Matter of Carver case where the Supreme

5

1 Court recognized as recently as 2024 that an action
 2 can be commenced without a Summons and Complaint when
 3 the statute allows for it and that creates the
 4 proceeding. 37-24-23 is just such an action --
 5 THE COURT: Mr. Dempsey, then how do you
 6 explain State v. Western Capital Corporation,
 7 290 N.W.2d 467, which is a 1990 case? I don't believe
 8 either of the parties cited it but it says that, and
 9 I'll quote, "The Supreme Court has recognized that
 10 cases brought under 37-24-6 are criminal in nature and
 11 when the State brings an action for an injunction
 12 pursuant to SDCL 37-24-23, it is a civil proceeding."
 13 It seems to me that that's directly on point, that
 14 this case is a regular civil proceeding. I don't see
 15 the words special enforcement action anywhere in the
 16 code so explain to me how this is distinguishable from
 17 your position.
 18 MR. DEMPSEY: So under the consumer protection
 19 statute, a case can be brought either criminally or
 20 civilly.
 21 THE COURT: Correct, and that's what this case
 22 stands for.
 23 MR. DEMPSEY: The civil action is found in
 24 23 -- 37-24-23 and the plain language of that statute
 25 says that it's commenced upon the giving of

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1 appropriate notice. 15-6-81(a) says that actions can
 2 be commenced in ways other than the standard Summons
 3 and Complaint, including but not limited to Appendix A
 4 of that statute. And then we have In the Matter of
 5 Carver, we have In Re: K --
 6 THE COURT: Which is an abuse and neglect
 7 matter; correct?
 8 MR. DEMPSEY: Yes, but those are cases, civil
 9 proceedings that are commenced without a Summons and
 10 Complaint and the court held that they're able to do
 11 that because those are not -- it's in the statute that
 12 there's a special way to commence it.
 13 So here we have upon giving of appropriate
 14 notice in 37-24-16 and 37-24-16 lays out what
 15 appropriate notice is. It explicitly excludes a
 16 Complaint in sub 3 as if a Complaint were filed or
 17 other filing that started a civil proceeding so that
 18 explicitly conflicts with that statute. That means
 19 that under the Carver case, under the D.K. case we're
 20 under a special statutory method of commencement and
 21 that's found in 37-24-16 and 37-24-23. The State has
 22 complied with those.
 23 THE COURT: Let's assume that the Court
 24 disagrees. And has the Summons and Complaint that was
 25 filed this week cured those defects?

7

1 MR. DEMPSEY: Yes, absolutely. The State's
 2 position is that the issues are rendered moot. The
 3 Summons and Complaint wasn't necessary but we have a
 4 public health emergency going on. We want to get to
 5 the merits on the injunction so that we can put a stop
 6 to that.
 7 THE COURT: All right. And so what is your
 8 suggestion on a path forward?
 9 MR. DEMPSEY: We continue, that if the Court
 10 finds that this was a valid action, that there's also
 11 been a Summons and Complaint that would have cured any
 12 potential defect, had it existed, there's no reason to
 13 say that there's a new action. We could just stay in
 14 this file and file it on this record.
 15 THE COURT: Okay. Thank you.
 16 Would you like to respond, Mr. Leach?
 17 MR. LEACH: Sure. Just to clear out one point
 18 that my colleague just made, we haven't agreed to
 19 anything. He said that, well, we haven't objected to
 20 in personam jurisdiction. We just haven't addressed
 21 that at this point because there's been no reason to
 22 because transparently there was no action commenced.
 23 As to the merits, I think everybody here
 24 learned that -- a long time ago that an action is
 25 commenced by proper service of a Summons. Here there

8

1 was no Summons until February 18th, and there was no
 2 proper service until at least February 18th and, as I
 3 said, I don't know if there was proper service then or
 4 not. That's one thing we'll be looking at.
 5 The State's entire theory rested on this
 6 statute 37-24-23 and I'm prepared to walk through
 7 that. I brought an extra hard copy for you and the
 8 State if you'd like one.
 9 THE COURT: I have a copy, thank you.
 10 MR. LEACH: Okay. So it says the Attorney
 11 General may bring an action. Sounds good. We all
 12 know what an action is and we all know that an action
 13 is commenced by filing and serving in the proper
 14 manner a Summons -- in the name of the State to
 15 restrain by temporary or permanent injunction. That's
 16 just fine. That's rule 65. Rule 65 has its own
 17 procedures and we know that's part of the Rules of
 18 Civil Procedure and starts with a Compliant and
 19 Summons.
 20 And then it says upon the giving of appropriate
 21 notice to that person -- appropriate notice, of
 22 course, being a fundamental element of due process --
 23 and it then says what the notice shall state. It
 24 shall state generally the relief sought, be served in
 25 accordance with 37-24-16, and at least three days

9

1 before any hearing in the action.
 2 So I go from there to look at 37-24-16 and what
 3 it says under subsection 3 is, as to any person other
 4 than a natural person -- that's Mayday. Mayday
 5 obviously is a corporation. It's not a natural
 6 person -- in the manner provided in the Rules of Civil
 7 Procedure as if a Complaint or other pleading which
 8 institutes a civil proceeding -- civil proceeding has
 9 been filed.
 10 Well, okay, so let's look at those Rules of
 11 Civil Procedure. Takes us straight to 15-6-4(d) which
 12 says the Summons shall be served by delivering a copy
 13 thereof and subparagraph 1, if the action is against a
 14 business entity, on the president, partner or other
 15 head of the entity, officer, director or registered
 16 agent thereof. Well, the State finally did that,
 17 allegedly, on February 18th but never before then.
 18 There's no proper service of the notice
 19 pursuant to 37-24-16, the notice coming from 37-24-23,
 20 if you work through those statutes and it makes sense
 21 what they're doing because you got to have personal
 22 service of a Summons to commence an action and bring
 23 the Defendant into court and jurisdiction.
 24 Fundamental components of due process.
 25 The case Black v. Circuit Court of the Eighth

10

1 Judicial Circuit I think is the one most on point.
 2 And you're correct; I did not cite the case you
 3 mentioned. I didn't find that case. But in Black
 4 we've got a statute that says that when there's a
 5 nuisance, the State's Attorney or citizen may maintain
 6 an action to enjoin it. And it says three days'
 7 notice in writing shall be given the Defendant of the
 8 hearing in the application, exactly like the statute
 9 we have here.
 10 And so the State's Attorney decides to use
 11 this. He files his motion. He gives three days'
 12 notice in writing. The Defendants appear and they say
 13 well, Your Honor, there's no jurisdiction because
 14 there's no Summons and the Circuit Court disagrees,
 15 enters relief. The state court -- I'm sorry -- the
 16 Supreme Court grants the Writ of Certiorari because
 17 there's no Summons.
 18 Final paragraph, when the legislature stated
 19 the State's Attorney may maintain an action in equity,
 20 it meant a civil action. Civil actions shall be
 21 commenced by the service of a Summons. Because there
 22 was no Summons, no jurisdiction. Circuit Court
 23 reversed, annulled and vacated.
 24 The State's attempt to distinguish this case,
 25 their sole attempt as I read it is that Black was an

11

1 action in equity, whereas the statute here does not
 2 say it's in equity. But the fact that that was an
 3 action in equity makes no difference. It was a civil
 4 action. A civil action, you need a Summons, you need
 5 proper service.
 6 In addition, if it makes any difference, this
 7 is an equitable action. It's not an action at law.
 8 It's not an action for damages. It's an action in
 9 equity seeking an injunction so this is indeed an
 10 action in equity so Black, I believe, is
 11 indistinguishable.
 12 So bottom line, we have no Summons until
 13 February 18th. We have no service until perhaps at
 14 earliest, February 18th, and the Court's only option
 15 is to dismiss.
 16 As far as the new Summons that was issued and
 17 allegedly served and the new Complaint that was
 18 issued, we have the same rights we would have and we
 19 do have with any other Summons and Complaint. We have
 20 rights to challenge service. We have rights to bring
 21 appropriate motions. And we haven't had time to even
 22 begin to consider what we're going to do so that's why
 23 it doesn't cure anything because we haven't had our
 24 due process to address that Summons and Complaint in
 25 the same manner in which we addressed the original

12

1 attempt to commence a proceeding back when this was
 2 filed in late December.
 3 I do want to just address sort of the emotional
 4 hook that the State offered you at the end there where
 5 it says, well, we've got a public health emergency.
 6 Well, I have a thought on both fact and the law with
 7 respect to that. My thought with respect to the fact
 8 is it's been two and a half months since those notices
 9 went out. We haven't seen any actual evidence of any
 10 harm to anybody so the public health emergency I think
 11 is not supported by the record when we get the emotion
 12 out of it.
 13 And then finally, as far as the alleged
 14 emergency and its effect on due process, I'm reminded
 15 of what Sir Thomas More wrote -- I'm sorry -- what was
 16 written in the play that Sir Thomas More was a
 17 character and Sir Thomas More says at the end, he
 18 says, Well, when the last wall was down and the devil
 19 turned around on you, who would you look to then for
 20 help?
 21 And so all we're asking is that the law be
 22 enforced as it is as we all recognize that -- as I
 23 think we all recognize that it is and that we not --
 24 we not disregard the law solely for the purpose of
 25 achieving an end that the State considers appropriate.

13

1 Thank you.
 2 THE COURT: All right. Thank you.
 3 Mr. Dempsey, anything in response?
 4 MR. DEMPSEY: Yes, I do have several comments
 5 in response, Your Honor.
 6 So regarding the Black case, the action in
 7 equity language in the statute is very important to
 8 the Court. They said that this should have been
 9 commenced with a Summons and Complaint because it's an
 10 action in equity and then they likened that to
 11 meaning -- they said this means that it falls under
 12 the general civil procedure statutes. So it's
 13 entirely inapplicable because the court is saying
 14 because it's an action in equity, it is part of the
 15 general process. Here we have a special statutory
 16 process.
 17 And earlier I referenced a case I called D.K.
 18 It's actually N.K., In the Matter of N.K., just to
 19 correct and clarify. That case is an abuse and
 20 neglect that started with a Petition; however, the
 21 case is about a revocable trust. It started with a
 22 Petition. There is a Devitt v. Hayes case that we
 23 know that small claims cases aren't started with a
 24 Summons and Complaint.
 25 To accept the Defendant's argument would be to

14

1 ignore the language of the statute, the plain language
 2 of 37-24-23 and 16, and to ignore the reasoning in all
 3 of these cases that when statute permits it, a process
 4 that is due is the commencement of an action under
 5 that statute.
 6 Finally, in making its plain language argument
 7 defense counsel ignores that it says upon the giving
 8 of appropriate notice, the action is commenced upon
 9 giving appropriate notice. I did not hear him note
 10 that.
 11 And finally, the -- (inaudible) -- that the
 12 Complaint had been filed language in 16 explicitly
 13 contradicts that the Complaint -- and I would note
 14 there's been a lot of discussion about we didn't do
 15 anything until the 18th. Well, there was a federal
 16 lawsuit filed that there was a restraining order
 17 entered against the Attorney General and so the reason
 18 nothing was done until the 18th is because we were
 19 operating under that order.
 20 THE COURT: Do you have any case law that says
 21 that enforcement actions that are brought by the
 22 Attorney General don't follow the Rules of Civil
 23 Procedure?
 24 MR. DEMPSEY: I could not find a case that said
 25 that specifically.

15

1 THE COURT: Okay. Thank you.
 2 All right. Well, it's clear to me that the
 3 action wasn't started until February 18th,
 4 purportedly. I think that we still have or the
 5 defense still has all rights that they would have had
 6 at that point. I think any -- I didn't have
 7 jurisdiction until that it was served and obviously
 8 will determine --
 9 MR. LEACH: Your Honor?
 10 THE COURT: That's okay. Louder?
 11 MR. LEACH: I'm apologizing. My hearing is not
 12 what is used to be --
 13 THE COURT: That's okay.
 14 MR. LEACH: -- even with my hearing aids. I
 15 had you at the beginning but then I lost you for a
 16 moment. Thank you.
 17 THE COURT: All right. My ruling is that this
 18 action wasn't commenced, purportedly, until
 19 February 18th of this year. That is the date that the
 20 Court has jurisdiction and so I don't think we need to
 21 start a new file number, a new action.
 22 I think you've cured my concerns and so the
 23 next question is timing and scheduling. Do we want to
 24 schedule a trial on the permanent injunction or do the
 25 parties wish to have a hearing on preliminary and

16

1 permanent separately or is it too soon to make that
 2 decision?
 3 MR. LEACH: Well, Your Honor, I would like for
 4 a chance to address this with the State early next
 5 week, Monday, because there are a bunch of attorneys
 6 other than me who are handling everything other than
 7 jurisdiction. They're handling all the substantive
 8 issues and they've been good to work with and I think
 9 if we can have a chance to address this with the
 10 State, that's going to be the best way to proceed.
 11 What I know is that I'm not competent or
 12 qualified to tell you today how we want to proceed
 13 because all those issues are at their head, not my
 14 head.
 15 THE COURT: Mr. Dempsey, any response to that?
 16 MR. JACKLEY: May I respond to that, Your
 17 Honor?
 18 THE COURT: Go ahead, Mr. Jackley.
 19 MR. JACKLEY: This is a pretty straightforward
 20 process. It's a straightforward preliminary permanent
 21 injunction case. The State is asking for a trial.
 22 THE COURT: All right. So what I would like
 23 you to do is reach out to Ms. Lewis. We'll get a
 24 trial date on the calendar.
 25 I did already advise, I guess by e-mail, my

17

1 understanding is that when Mayday filed their brief it
 2 also talked about the substantive matters. I want a
 3 response from the State prior to any trial in response
 4 to that and then allow Mayday to reply so there is
 5 going to have to be some time frame so that I can get
 6 the appropriate briefing I need to be ready for the
 7 trial. I don't think that's going to be next week or
 8 the week after. It might be a little bit but I want
 9 to make sure you keep that in mind. I want to be
 10 prepared when it's time to hear this. Anything else?
 11 MR. LEACH: I don't think so, Your Honor.
 12 Thank you.
 13 THE COURT: All right. Thank you. We'll be in
 14 recess.
 15 (Proceedings concluded.)
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1 STATE OF SOUTH DAKOTA)
2 SS CERTIFICATE
3 COUNTY OF HUGHES)
4

5 I, Mona G. Weiger, court reporter, do hereby
6 certify that the Transcript of Hearing contained on the
7 foregoing pages was reduced to stenographic writing by
8 me from digital recording and thereafter transcribed to
9 the best of my ability, and that the foregoing is a
10 full, true and complete transcript of my shorthand notes
11 of the recorded proceedings had at the time and place
12 set forth above.

13 Dated this 27th day of February, 2026.

14
15 /s/ Mona G. Weiger
16 Mona G. Weiger
17 Court Reporter
18
19
20
21
22
23
24
25

<p style="text-align: center;">1</p> <p>1 [1] - 9:13 15-6-4(d) [1] - 9:11 15-6-81(a) [1] - 6:1 16 [2] - 14:2, 14:12 18th [10] - 3:8, 8:1, 8:2, 9:17, 11:13, 11:14, 14:15, 14:18, 15:3, 15:19 1990 [1] - 5:7</p>	<p>11:10, 13:6, 13:10, 13:14, 14:4, 14:8, 15:3, 15:18, 15:21 actions [3] - 6:1, 10:20, 14:21 actual [1] - 12:9 addition [1] - 11:6 address [5] - 2:19, 11:24, 12:3, 16:4, 16:9 addressed [2] - 7:20, 11:25 advertising [1] - 4:18 advise [1] - 16:25 afternoon [1] - 3:11 agent [1] - 9:16 ago [1] - 7:24 agreed [2] - 4:17, 7:18 ahead [2] - 2:3, 16:18 aids [1] - 15:14 alleged [1] - 12:13 allegedly [2] - 9:17, 11:17 Allover [1] - 2:7 allow [1] - 17:4 allows [1] - 5:3 annulled [1] - 10:23 apologizing [1] - 15:11 appear [2] - 3:20, 10:12 appearance [1] - 2:9 appearing [1] - 2:17 Appendix [1] - 6:3 application [1] - 10:8 appropriate [10] - 6:1, 6:13, 6:15, 8:20, 8:21, 11:21, 12:25, 14:8, 14:9, 17:6 argue [2] - 3:4, 3:5 argument [4] - 4:19, 4:22, 13:25, 14:6 Assistant [1] - 2:13 assume [1] - 6:23 attempt [3] - 10:24, 10:25, 12:1 attempted [1] - 3:12 Attorney [8] - 2:12, 2:13, 8:10, 10:5, 10:10, 10:19, 14:17, 14:22 attorneys [2] - 2:8, 16:5 availability [1] - 4:18</p>	<p style="text-align: center;">B</p> <p>begin [1] - 11:22 beginning [1] - 15:15 behalf [1] - 2:10 best [1] - 16:10 bit [1] - 17:8 Black [5] - 9:25, 10:3, 10:25, 11:10, 13:6 bottom [1] - 11:12 brief [3] - 4:20, 4:24, 17:1 briefing [2] - 4:14, 17:6 bring [3] - 8:11, 9:22, 11:20 brings [1] - 5:11 brought [4] - 5:10, 5:19, 8:7, 14:21 bunch [2] - 3:10, 16:5 business [3] - 2:6, 2:7, 9:14</p> <p style="text-align: center;">C</p> <p>calendar [1] - 16:24 capacity [1] - 3:20 Capital [1] - 5:6 Carver [3] - 4:25, 6:5, 6:19 case [20] - 3:11, 4:25, 5:7, 5:14, 5:19, 5:21, 6:19, 9:25, 10:2, 10:3, 10:24, 13:6, 13:17, 13:19, 13:21, 13:22, 14:20, 14:24, 16:21 cases [5] - 4:24, 5:10, 6:8, 13:23, 14:3 certainly [2] - 3:19, 4:8 Certiorari [1] - 10:16 challenge [1] - 11:20 chance [2] - 16:4, 16:9 character [1] - 12:17 Circuit [4] - 9:25, 10:1, 10:14, 10:22 cite [1] - 10:2 cited [1] - 5:8 citizen [1] - 10:5 civil [13] - 4:23, 5:12, 5:14, 5:23, 6:8, 6:17, 9:8, 10:20, 11:3, 11:4, 13:12</p>	<p>Civil [4] - 8:18, 9:6, 9:11, 14:22 civily [1] - 5:20 claims [1] - 13:23 clarify [1] - 13:19 clear [3] - 3:3, 7:17, 15:2 code [1] - 5:16 colleague [1] - 7:18 coming [1] - 9:19 commence [4] - 4:4, 6:12, 9:22, 12:1 commenced [15] - 3:14, 3:16, 3:18, 4:13, 5:2, 5:25, 6:2, 6:9, 7:22, 7:25, 8:13, 10:21, 13:9, 14:8, 15:18 commencement [2] - 6:20, 14:4 comments [1] - 13:4 competent [1] - 16:11 Complaint [20] - 2:22, 3:7, 3:8, 3:24, 5:2, 6:3, 6:10, 6:16, 6:24, 7:3, 7:11, 9:7, 11:17, 11:19, 11:24, 13:9, 13:24, 14:12, 14:13 completely [1] - 3:12 Compliant [1] - 8:18 complied [1] - 6:22 components [1] - 9:24 concerns [2] - 2:20, 15:22 concluded [1] - 17:15 conflicts [1] - 6:18 consider [1] - 11:22 considers [1] - 12:25 consumer [1] - 5:18 contact [1] - 4:17 contest [1] - 2:24 contested [1] - 4:16 continue [1] - 7:9 contradicts [1] - 14:13 copy [3] - 8:7, 8:9, 9:12 Corporation [1] - 5:6 corporation [1] - 9:5 correct [5] - 4:1, 5:21, 6:7, 10:2, 13:19 counsel [1] - 14:7 course [1] - 8:22 court [4] - 6:10, 9:23, 10:15, 13:13 Court [12] - 4:14,</p>	<p>4:19, 5:1, 5:9, 6:23, 7:9, 9:25, 10:14, 10:16, 10:22, 13:8, 15:20 Court's [3] - 2:20, 3:17, 11:14 creates [1] - 5:3 criminal [1] - 5:10 criminally [1] - 5:19 curable [1] - 4:3 cure [1] - 11:23 cured [4] - 3:24, 6:25, 7:11, 15:22</p> <p style="text-align: center;">D</p> <p>D.K. [2] - 6:19, 13:17 Dakota [1] - 2:5 damages [1] - 11:8 date [2] - 15:19, 16:24 days [1] - 8:25 days' [2] - 10:6, 10:11 December [1] - 12:2 decides [1] - 10:10 decision [1] - 16:2 defect [1] - 7:12 defects [1] - 6:25 Defendant [3] - 4:15, 9:23, 10:7 Defendant's [1] - 13:25 Defendants [1] - 10:12 defense [2] - 14:7, 15:5 delivering [1] - 9:12 DEMPSEY [9] - 2:11, 4:12, 5:18, 5:23, 6:8, 7:1, 7:9, 13:4, 14:24 Dempsey [4] - 2:11, 5:5, 13:3, 16:15 determine [1] - 15:8 devil [1] - 12:18 Devitt [1] - 13:22 difference [2] - 11:3, 11:6 digital [1] - 2:1 directly [1] - 5:13 director [1] - 9:15 disagrees [2] - 6:24, 10:14 discussion [1] - 14:14 dismiss [2] - 3:17, 11:15 disregard [1] - 12:24 distinguish [1] -</p>
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Exhibit 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----:

MAYDAY HEALTH, : Docket No.: 26-cv-00078

Plaintiff, :

v. :

MARTY J. JACKLEY, : New York, New York

: February 11, 2026

Defendant. :

-----:

PROCEEDINGS BEFORE
THE HONORABLE KATHERINE POLK FAILLA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiff: DAVIS WRIGHT TREMAINE, LLP
BY: ADAM SIEFF, ESQ.
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1 THE DEPUTY CLERK: Your Honor, this is in
2 the matter of Mayday Health vs. Jackley.

3 Counsel, please state your name for the
4 record, beginning with plaintiff.

5 MR. SIEFF: Good afternoon, Your Honor.
6 This is Adam Sieff of Davis Wright Tremaine for
7 plaintiff. I am joined on the line with Counsel
8 Chelsea Kelly and Ambika Kumar.

9 THE COURT: Good afternoon. This is
10 Judge Failla. And I'm just confirming, Mr. Sieff,
11 that you and your team are able to hear me.

12 MR. SIEFF: Confirmed, Your Honor. We can
13 hear you.

14 THE COURT: Much appreciated, thank you.
15 And then representing Mr. Jackley this
16 afternoon, which includes Mr. Jackley.

17 MR. JACKLEY: Good afternoon, Your Honor
18 and Counsel. South Dakota Attorney General Marty
19 Jackley, Civil Chief Amanda Miller, and Solicitor
20 General Paul Swedlund.

21 THE COURT: Thank you all very much. Happy
22 to have you all participating in this conference
23 this afternoon.

24 What I am going to do now is to read into
25 the record my oral decision. And I decided to give

1 an oral decision because I wanted to get information
2 to you as quickly as possible. So I'll give you an
3 opportunity to mute yourselves because there isn't
4 oral argument, and I'll begin momentarily. Thank
5 you.

6 Let me begin also by thanking you for your
7 written submissions and for your oral presentations
8 on January 16th and 29th of this year. I've
9 considered all of those. I've considered as well,
10 the post-hearing submission from Mr. Jackley. And I
11 will now issue my oral decision on plaintiff's
12 motion for a preliminary injunction.

13 As just a bit of procedural review, this
14 Court heard a telephonic oral argument on
15 plaintiff's motion for a temporary restraining order
16 on January 16th of 2026. It issued an oral decision
17 later that day granting the motion. And my oral
18 decision was by my standards, long for an oral
19 decision, it was nine pages. And I am incorporating
20 here its discussion about the background section,
21 the applicable law for a temporary restraining
22 order, and its analysis of personal jurisdiction
23 under New York's long-arm statute, which is founded
24 Civil Practice Law and Rule Section 302(a).

25 And so I won't be repeating those

1 discussions here, but I will simply add to the
2 injunctive relief discussion what the parties
3 already know to be the standard, which is that a
4 party seeking a preliminary injunction must show a
5 likelihood of success on the merits, the possibility
6 of irreparable harm if preliminary injunction is not
7 granted, a balance of hardships tipping in the
8 moving party's favor and the public's interest being
9 served, or at least not disserved by relief. One
10 case for that proposition is *Salinger v. Colting*,
11 607 F.3d 68, a Second Circuit decision from 2010.
12 Where a state or federal government is a party, then
13 factors three and four often merge. One case for
14 that is *Nken vs. Holder*, 556 U.S. 418 from 2009.

15 So those things that I've just mentioned
16 are what I'm not reconsidering. But what I have
17 reconsidered is my Younger abstention analysis, and
18 that is in light of the parties' submissions and my
19 own research. In particular, and for the reasons
20 that I'm about to describe, I do believe that the
21 law requires me to abstain from exercising federal
22 jurisdiction in this case, and as a result, I am
23 denying plaintiff's motion for a preliminary
24 injunction.

25 So I am focusing my discussion this

1 afternoon on Younger abstention law. I know that
2 the parties are aware of Younger abstentions, so
3 I'll discuss it in rather brief terms. It was
4 summarized by the Second Circuit in the case of
5 *Diamond "D" Construction Corporation vs. McGowan*,
6 282 F.3rd 191, in 2002. But rather than read all of
7 these cites into the record, I'm just going to
8 excerpt a couple of quotes that I think are
9 important.

10 The Circuit found that *Younger v. Harris*,
11 401 U.S. 37, from 1971, generally requires federal
12 courts to abstain from taking jurisdiction over
13 federal constitutional claims that involve or call
14 into question ongoing state proceedings. Although
15 the Younger abstention doctrine was born in the
16 context of state criminal proceedings, it now
17 applies with equal force to state administrative
18 proceedings. This doctrine of federal abstention
19 rests foursquare on the notion that in the ordinary
20 course, a state proceeding provides an adequate
21 forum for the vindication of federal constitutional
22 rights. Therefore, giving the respect to our
23 coequal sovereigns, the principles of our federalism
24 demand we generally prohibit federal courts from
25 intervening in such matters. That is the end of my

1 quotation from that case.

2 Younger abstention is mandatory when,
3 number one, there is an ongoing state proceeding;
4 number two, an important state interest is involved;
5 and number three, the plaintiff has an adequate
6 opportunity for judicial review of his
7 constitutional claims during or after the
8 proceeding. Cases for that proposition include
9 *Spargo v. New York State Commission on Judicial*
10 *Conduct*, 351 F3d 65, a Second Circuit decision from
11 2003. When Younger applies, abstention is mandatory
12 and its application deprives the federal court of
13 jurisdiction in the matter. And that is found in
14 cases including *Colorado Water Conservation District*
15 *versus United States*, 424 U.S. 800 from 1976.

16 There are two exceptions recognized for
17 Younger abstention. They're commonly referred to as
18 the bad faith and extraordinary circumstances
19 exceptions. In connection with the TRO hearing,
20 plaintiffs suggested that the bad faith exception
21 applied and as cited support the Second Circuit's
22 decision in *Cullen vs. Flagler*, 18 F.3rd 96 from
23 1994 and Judge Gershon's decision in *Brooklyn*
24 *Institute of Arts and Sciences v. City of New York*,
25 64 F. Supp. 2d 184, an Eastern District decision

1 from 1999.

2 After the TRO hearing and in connection
3 with the preliminary injunction hearing, I did a
4 deeper dive into Second Circuit case law in this
5 area, which made it clear that the bad faith
6 exception and the inquiry into it was more nuanced
7 than it originally appeared. The *Cullen* case that I
8 mentioned was one of the first in the Circuit to
9 articulate the exception.

10 And here again, rather than putting
11 citations into the record, I'm going to excerpt a
12 few quotes from the decision. "Intervention would
13 still be warranted upon a showing of bad faith,
14 harassment or any other exceptional circumstance
15 that would call for equitable relief. Generally,
16 for such a showing to be made, the party bringing
17 the state action must have no reasonable expectation
18 of obtaining a favorable outcome. But a refusal to
19 abstain is also justified where a prosecution or
20 proceeding has been brought to retaliate for or to
21 deter constitutionally protected conduct, or where a
22 prosecution or proceeding is otherwise brought in
23 bad faith or for the purpose to harass."

24 In that case, the Second Circuit found that
25 based on a past history of personal conflict between

1 the plaintiff and the local school board, the
2 strictly ad hominem manner in which the school board
3 had disciplined him, they found that the school
4 board disciplinary proceedings were retaliatory in
5 nature and calculated to chill First Amendment
6 expressive activity.

7 But later Second Circuit cases made clear
8 that the bad faith exception also has a subjective
9 component to it. One of those cases is *Schlagler v.*
10 *Phillips*, 166 F.3rd 439, from 1999. The plaintiff
11 in that case had posted pro-skinhead stickers in a
12 Cafe in Monroe, New York and was charged with
13 aggravated harassment under the New York penal law.
14 While the criminal case was pending, he brought a
15 Section 1983 action challenging the statute on First
16 Amendment grounds. The district court rejected the
17 state's Younger argument, concluding that although
18 there was no evidence of any prosecutorial animus
19 towards Schlagler, the statute itself was facially
20 unconstitutional and therefore any prosecution under
21 it could only be brought in bad faith. The Second
22 Circuit reversed, reasoning that because the
23 prosecution was not retaliatory or otherwise
24 illegitimate in its motivation and in fact was
25 nothing more than a straightforward enforcement of

1 the laws of New York, I found the case did not fall
2 within the bad faith exception. In particular,
3 the Court in *Schlagler* found that the district
4 court's focus on the First Amendment and the issues
5 related to the First Amendment, and I'm now going to
6 quote, "Undercuts the rationale set forth in
7 *Younger*, which was also a First Amendment challenge
8 to a state criminal prosecution. *Younger* narrowly
9 limited exceptions to cases involving retaliatory or
10 bad faith efforts to regulate speech. If the
11 district court's interpretation of the *Cullen*
12 exception were followed to its logical conclusion,
13 the exception would swallow the *Younger* rule."

14 Later on, the Court found that if the facts
15 show that the prosecution is in retaliation for past
16 speech or shows a pattern of prosecution to inhibit
17 speech beyond the acts being prosecuted, the
18 exception should apply and abstention may be
19 improper. It wasn't found there, and therefore, the
20 Court ruled as it did.

21 Later on in 2002, the Second Circuit tried
22 to harmonize its case law on the bad faith
23 exception. And that was in the *Diamond "D"*
24 *Construction Corporation* case I mentioned a few
25 moments ago. And that case detailed the history of

1 the exception in Second Circuit and Supreme Court
2 case law. But it concluded, and again here I'm
3 excerpting without giving the cites, "Our most
4 recent cases concerning the bad faith exception have
5 further emphasized that the subjective motivation of
6 the state authority in bringing the proceeding is
7 critical to, if not determinative of, this inquiry.
8 A state proceeding that is legitimate in its
9 purposes but unconstitutional in its execution, even
10 when the violations of constitutional rights are
11 egregious, will not warrant the application of the
12 bad faith exception. Later on, the Court finds that
13 we give states the first opportunity, but not the
14 only or last, to correct those errors of a federal
15 constitutional dimension that infect its
16 proceeding."

17 And then still later, the Court says,
18 "Federal interference with state proceedings,
19 because it necessarily presumes that the state court
20 review will be inadequate, affronts the dignity of
21 the state sovereign. However, as we recognized in
22 *Cullen*, a state has no interest in continuing
23 actions brought with malevolent intent. Thus, it is
24 only when the state proceeding is brought with no
25 legitimate purpose that the state interest in

1 correcting its own mistakes dissipates and along
2 with it, the compelling need for federal deference."
3 That's the end of that quote.

4 This court has reviewed all of these Second
5 Circuit decisions on the bad faith exception issued
6 after *Diamond "D"* -- actually, all of ones really
7 issued after *Cullen*. And I will tell you that there
8 are some instances in which there are short-hands to
9 that are used that I think arguably conflate the
10 requirements of the exception.

11 As one example of that, in the case of
12 *Wilson v. Emond*, 373 F.App'x98 in 2010, a Second
13 Circuit decision from 2010, the Court referred to
14 the bad faith exception as covering cases of proven
15 harassment or prosecutions undertaken by state
16 officials in bad faith without hope of obtaining a
17 valid conviction. And the Court there didn't really
18 get into the subjective element, although I suppose
19 the reference to bad faith may have made it
20 implicit. And so there are some other cases that
21 really don't speak at length about the subjective
22 element, and they include *Weiss v. New York*, 2024
23 Westlaw 283-7623, *Daniel vs. Doe 1 through Doe 10*,
24 2024 Westlaw 213-1446, *Lowell v. Vermont Department*
25 *of Children and Families* 835 F. App'x 637, and then

1 *Glatzer v. Barone* 394 F. App'x 763.

2 But there are other Second Circuit
3 decisions that have confirmed the continuing
4 importance of the subjective component of the bad
5 faith inquiry. They include the Second Circuit's
6 2020 decision as distinguished from its 2019
7 decision in *Trump vs. Vance* 977 F.3d 198, *Miller*
8 *vs. Sutton* 697 F. App'x 27 from 2017, *Schorr v.*
9 *DoPico* 686 F. App'x 34 also from 2017, *Jackson*
10 *Hewitt Tax Services Incorporated vs. Kirkland*, 455
11 F. App'x 16 Second Circuit decision from 2012.

12 And I'll note as well that in the case of
13 *Kern vs. Clark*, 331 F.3d 9, a Second Circuit
14 decision from 2003, they actually remanded to the
15 district court for a hearing on the subjective
16 element of the bad faith exception. And the quote
17 of import there is, "In the present case, the
18 factfinder could infer bad faith or improper motive
19 if it credited the evidence that Kern claims
20 demonstrates that the defendants aggressively
21 prosecuted him in a string of weak cases brought on
22 behalf of Kern's political enemies."

23 So turning now to my analysis, with that
24 case law out of the way, as suggested by my TRO
25 decision and my questioning two weeks ago, I find

1 that the pending civil enforcement action under
2 SDCL Section 37-24-23 meets all three of the Younger
3 criteria, and that for me the remaining question was
4 whether the bad faith exception applies. I find
5 that it does not.

6 Focusing first on the subjective analysis,
7 the Court cannot find on the record before it
8 subjective bad faith on the part of Mr. Jackley.
9 The South Dakota Attorney General's Office received
10 numerous complaints, formal and informal, regarding
11 Mayday's gas station placards. Mr. Jackley was
12 requested by the Governor of South Dakota to look
13 into the matter. And to be clear, I don't find that
14 to be an indication of pretext or bad faith, and I
15 don't think it is analogous to what happened in
16 Judge Gershon's decision. Mr. Jackley then sent a
17 cease and desist letter to Mayday. I understand him
18 to have considered proceeding under South Dakota
19 Criminal Statutes concerning solicitation and
20 facilitation, but to have instead chosen the less
21 drastic option of a civil enforcement action under
22 South Dakota's deceptive trade practices statute.
23 Mr. Jackley also cited the example of, all caps, JEN
24 as an abortion rights organization whose conduct he
25 believes balances First Amendment rights of free

1 expression with South Dakota laws restricting
2 abortion access. On the objective front, I cannot
3 say that Mr. Jackley has no reasonable expectation
4 of obtaining a favorable outcome in the civil
5 enforcement action.

6 Now, as I will elaborate in just a moment,
7 I do believe that the proper way to view Mayday's
8 website and the materials on it is noncommercial
9 speech subject to protection under the First
10 Amendment. But I understand that Mr. Jackley holds
11 a different view and believes that abortion pill
12 providers who cannot sell their products in
13 South Dakota are using Mayday as an end run around
14 the restrictive statutes of that state such that the
15 speech is commercial and potentially within the
16 ambit of the statute that I cited earlier, and I
17 think he should be permitted to pursue those
18 arguments in South Dakota court.

19 In light of the findings I've just made, I
20 am constrained to find that Younger abstention
21 applies and that I lack jurisdiction to consider
22 plaintiff's motion for a preliminary injunction.
23 Now, as suggested by my introductory comments to the
24 bad faith exception, federal courts have to trust
25 their state court analogs, and I trust that the

1 South Dakota court will get it right.

2 Let me just note on that point that I've
3 done my best here -- I suppose that goes without
4 saying. I've done my best to interpret Second
5 Circuit law on the Younger abstention doctrine and
6 its bad faith exception. If I've gone too far, if
7 I've misunderstood the law or where it is today, I
8 invite the Second Circuit to clarify my
9 jurisdictional obligations to clarify the bad faith
10 exception and, as appropriate, to reverse me. And I
11 say that not because I'm here tempting fate, but
12 because unless there be any doubt about this, I
13 absolutely agree that this case is the mirror image
14 of the factual situation presented in the Second
15 Circuit's late 2025 decision in *National Institute*
16 *of Family and Life Advocates v. James*, 160 F.4 360.
17 I think that the Second Circuit's analysis applies
18 equally here and that absent Younger abstention,
19 this Court would be granting plaintiff's motion for
20 injunctive relief. My read -- what the materials I
21 have before me suggest that Mayday's website
22 contains, under what I will call the NIFLA case,
23 noncommercial speech. It is speech that is based on
24 moral beliefs with no economic motivation. The
25 plaintiff does not charge the patrons of the website

1 or the service providers for referrals and the fact
2 that the website solicits donations does not
3 transform its contents into commercial speech, as
4 made clear by cases including *Connecticut Bar*
5 *Association vs. United States*, 620 F.3d 81, a Second
6 Circuit decision from 2010. That in turn focused on
7 the Supreme Court's 1988 case in *Riley v. National*
8 *Federation for the Blind*. The *NIFLA* case as well
9 made clear that if its holding were different than
10 it was, it could potentially inappropriately limit a
11 reproductive rights group in a state with abortion
12 restrictions that provides information about out of
13 state organizations that will help women obtain the
14 procedure for free. I also do not believe that the
15 website solicits or abets acts that are illegal
16 under South Dakota law. And here I'll just cite to
17 the parties *Ashcroft v. Free Speech Coalition*, 535
18 U.S. 234, and the section that I was focusing on is
19 found at pages 253 to 254.

20 And so as a result, I mean, I suspect -- or
21 let me say it this way, if I had jurisdiction, which
22 I don't believe I do, I think the South Dakota
23 statute would be subject to strict scrutiny analysis
24 and we would see whether it was narrowly tailored to
25 serve a compelling state interest under *NIFLA*, the

1 answer would probably be no. Indeed, if in fact a
2 court were to find that the statute was
3 noncommercial speech, not sure the statute cited to
4 me under South Dakota law would be applied at all.
5 But as it happens, I have to decide this issue on
6 jurisdictional grounds and given that I am deciding
7 the matter the way I am, I'm denying the motion. I
8 think the next steps for the parties would be -- and
9 I will issue an order to show cause to explain in
10 writing why I should not dismiss this matter for
11 lack of jurisdiction. I'm going to ask the parties
12 to file simultaneous letter briefs on or before
13 March 2nd, 2026. I'm going to direct the clerk of
14 court to terminate the motions that are currently
15 pending at docket entries 14 and 20. I will issue a
16 bottom line order later today that includes the
17 order to show cause language but also gives a
18 written document in case either side wishes to take
19 an appeal. And given the disposition of the motion
20 and my issuance of an order to show cause, I am
21 staying Mr. Jackley's obligation to answer, move, or
22 otherwise respond until after the order to show
23 cause is resolved.

24 Mr. Sieff, is there anything that is
25 unclear about the decision that I've just issued?

1 MR. SIEFF: No, Your Honor. I think that
2 that was an extremely helpful explanation of your
3 reasoning, and we appreciate all aspects of the
4 order, and we understand the next steps with respect
5 to responding to the order to show cause.

6 THE COURT: I appreciate that. Thank you.
7 And let me say this, Mr. Sieff, something I hadn't
8 considered, and I'll say this for both sides, is I
9 suppose if either side were to file an appeal from
10 this decision, you'd have to let me know your view
11 as to whether I had jurisdiction to do anything on
12 the order to show cause. But if you'll excuse my
13 grandmother's old expression, we'll burn that bridge
14 when we get to it.

15 Mr. Jackley, is there anything that is
16 unclear about my decision?

17 MR. JACKLEY: Your Honor, I want to be
18 completely respectful of what the Court has said and
19 noting the March 2, 2026 order to show cause filing
20 date. We have a state court hearing scheduled for
21 February 20th. Is it the Court's ruling that that
22 can proceed, or do I need to seek a continuance?

23 THE COURT: Very fair, sir. Right now, I
24 have denied the plaintiff's application for
25 injunctive relief. I don't even think I have

1 jurisdiction with this to proceed with the case that
2 is before me. I don't have the power to stop you or
3 to stop the state court from proceeding.

4 MR. JACKLEY: Thank you, Your Honor.

5 THE COURT: Of course, sir. Now, if
6 anybody were to tell me otherwise -- if the Second
7 Circuit disagrees, they'd let me know. But no one's
8 told me that yet, and I think the clock is ticking.
9 So I very much appreciate your inquiry so that I
10 could clarify my decision to the extent it was
11 unclear.

12 MR. JACKLEY: Thank you, Your Honor.

13 THE COURT: All right. I thank you all
14 very much. I know you've been working very hard on
15 very short time frames. I really do appreciate your
16 efforts. I will let you go because I know you have
17 other things to do. You have my thanks. We're
18 adjourned.

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C E R T I F I C A T E

I, Marissa Lewandowski, certify that the foregoing transcript of proceedings in the case of Mayday Health v. Jackley, Docket #1:26-cv-00078-KPF, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Marissa Lewandowski

Marissa Lewandowski

Date: February 12, 2026