

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

Mayday Health and Nancy Turbak)	
Berry,)	
)	
Plaintiffs,)	No. 4:26-cv-04096-CCT
)	
v.)	
)	
Governor Larry Rhoden and)	
Attorney General Marty Jackley,)	
sued in their official capacities,)	
)	
Defendants.)	
_____)	

Plaintiffs' Motion in Limine

Plaintiffs move in limine to exclude from evidence:

1. The testimony of Patricia Giebink, M.D. and State's Exhibits DD, EE, and FF, because the alleged risks and dangers of abortion pills, and the truth or falsity of Mayday's speech, are irrelevant, so Dr. Giebink's testimony and these exhibits are barred by Rules 402 and 702.

2. State's Exhibits T, U, V, W, Y, and Z, and testimony from State witnesses about these and other websites that Mayday's website links to, because

all such testimony is irrelevant under the Communications Decency Act, 47 U.S.C. § 230.

3. Evidence about Mayday's supporters or donors, because the First Amendment bars the State from obtaining such information, and it is irrelevant.

Dated: June 21, 2026

Respectfully submitted,

/s/ James D. Leach

James D. Leach

Attorney at Law

1617 Sheridan Lake Rd.

Rapid City, SD 57702

Tel: (605) 341-4400

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Attorney for Plaintiffs

Certificate of Service

I certify that on June 21, 2026, I filed this document by CM/ECF, thereby causing automatic electronic service to be made on all other parties.

/s/ James D. Leach

James D. Leach

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Memorandum in Support of Plaintiffs' Motion in Limine

I. Evidence about the alleged risks and dangers of abortion pills is irrelevant

This case is about speech. It raises three issues: whether House Bill 1274 as applied to Mayday Health is unconstitutional and violates the Communications Decency Act (CDA); whether it is unconstitutional as applied to Nancy Turbak Berry; and whether its prohibition on “advertise” is unconstitutional on its face. Doc. 1 at 2. The legal questions involve Mayday and Turbak’s First Amendment right to speak about abortion pills, and Mayday’s right under the CDA not to be held responsible for others’ speech that Mayday links to on its website. These subjects are addressed in Mayday and Turbak’s Memorandum in Support of Motion for Preliminary Injunction, Doc. 4, and again in Mayday and Turbak’s Reply Memorandum in Support of Motion for Preliminary Injunction, filed herewith.

This case does *not* involve whether abortion pills should be legal in the United States; whether they should be legal in South Dakota; whether abortion pills are safe, unsafe, or dangerous; whether anyone should or should not take an abortion pill; and what consequences a person might or might not suffer, other than probable termination of pregnancy, from taking an abortion pill. These are political or medical questions, or they could arise in other lawsuits raising other issues. They

are irrelevant to whether South Dakota can punish Mayday and Turbak's speech about abortion pills.

The State's Brief re Nancy Turbak, Doc. 15, admits the distinction between speech and action. The State addresses First Amendment-protected speech about child pornography, explosives, bomb manufacture, and *jihad*. Doc. 15 at 2-4. In none of those cases were the merits of child pornography, explosives, bomb manufacture, or *jihad* relevant.

So too here, the merits or demerits of abortion pills are irrelevant. Thus the State's proposed testimony about the merits, safety, risks, and dangers of abortion pills is irrelevant. Whether anyone should take an abortion pill is as separate from whether Mayday and Turbak's speech about abortion pills is constitutionally protected, as whether speech about child pornography, explosives, bomb manufacturer, and *jihad* is separate from such conduct. At most, testimony about the merits of abortion pills goes to what the State's policy about them should be, not the First Amendment issues here.

Dr. Giebink intends to testify that abortion pills are dangerous. Doc. 16-2 (Affidavit of Dr. Giebink) ¶¶ 8-19 and 24-26. Through her testimony, the State intends to introduce Exhibits DD, EE, and FF. Exhibit DD is a U.S. Food and Drug

Administration web page with information about Mifepristone. Exhibit EE is the FDA Warning Label for Mifepristone. Exhibit FF is the FDA Warning Label for Misoprostol. (Doc. 26 includes internet addresses for these Exhibits in case the Court wishes to see them.) The purpose of these exhibits is to further Dr. Giebink's testimony that abortion pills are dangerous, and that they are being misprescribed. But "dangerous" is not a ground for banning speech. Nor is "false." *United States v. Alvarez*, 567 U.S. 709, 717 (2012) ("Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements.") And the State may not punish Mayday for failing to provide the information the State thinks it should provide. "[T]he First Amendment does not leave it open to public authorities to compel a person to utter a message with which he does not agree." *Henderson v. Springfield R-12 Sch. Dist.*, 163 F.4th 478, 494 (8th Cir. 2025) (en banc), quoting *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005).

Plaintiffs brief this subject in Section III of their Reply Memorandum in Support of Motion for Preliminary Injunction, filed herewith. Rather than synopsise that discussion here, plaintiffs respectfully refer the Court to it. The testimony of Dr.

Giebink and Exhibits DD, EE, and FF are irrelevant and should be excluded under Rule 402.

II. Dr. Giebink's testimony about abortion pills is barred by Rule 702

Expert testimony is not admissible unless it will help the trier of fact to understand the evidence or determine a fact in issue. F. R. Evid. 702(a). For all the reasons discussed above, Dr. Giebink's proposed testimony will not help the Court understand the evidence or determine a fact in issue. The risks and potential benefits of abortion pills are irrelevant. The only issue is whether plaintiffs can speak about them.

III. Evidence about other websites that Mayday's website links to is irrelevant

The State's Exhibits T, U, V, W, Y, and Z are from other companies' websites. Doc. 26 at 2-3. Exhibit T is from www.plancpills.org. Exhibits U, V, and W are from aidaccess.org, Exhibits Y and Z are from [inedana\[abortion\].com](http://inedana[abortion].com). Mayday's website links to these other websites. Mayday is not legally responsible for any of this information, so these exhibits are irrelevant and should be excluded under Rule 402.

"It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive

computer services, unfettered by Federal or State regulation.” Communications Decency Act, 47 U.S.C. § 230(b)(2) (1996). “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). The CDA preempts all state laws, causes of action, and claims that are inconsistent with it. 47 U.S.C. § 230(e)(3).

A plaintiff may not “hold[] ISPs [internet service providers] legally responsible for information that third parties created and developed.” *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010). The Act “immunizes providers of interactive computer services against liability arising from content created by third parties.” *East Coast Test Prep LLC v. Allnurses.com, Inc.*, 971 F.3d 747, 752 (8th Cir. 2020) quoting *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc).

Mayday “provides or enables computer access by multiple users to a computer server,” so it provides an “interactive computer service.” 47 U.S.C. § 230(f)(2). The CDA prohibits Mayday from being deemed the speaker of such information. So Exhibits T, U, V, W, Y, and Z are irrelevant.

IV. Evidence about Mayday's supporters or donors is privileged and irrelevant

The government may not compel disclosure of the identity of an advocacy group's supporters and financial contributors. Compelled disclosure violates the First Amendment because it "can 'constitute a[n] effective . . . restraint on freedom of association.'" *First Choice Women's Resource Centers, Inc. v. Davenport*, ___ U.S. ___ (April 29, 2026) (slip opn. at 7), quoting *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (alterations in original). This is "'particularly' likely to follow when the government seeks to intrude into the workings of groups that hold 'dissident beliefs' disfavored by those holding the reins of power." *Id.* (slip opn. at 8).

Indeed, "[s]ince *NAACP v. Alabama*, [the Supreme Court has] faced many cases along similar lines. In them, one state authority or another has demanded private donor or member information. And in one case after another we have subjected those demands to heightened First Amendment scrutiny. . . . We have acknowledged, too, that demands for private donor information 'inevitabl[y]' carry with them a 'deterrent effect on the exercise of First Amendment rights.'" *Id.* (slip opn. at 9), quoting *Buckley v. Valeo*, 424 U.S. 1, 65 (1976) (brackets in original).

Mayday is a prototypical “group[] that hold[s] ‘dissident beliefs’ disfavored” by those who hold the reins of power in South Dakota. The identities of Mayday’s supporters and contributors are protected by the First Amendment. In addition, all such information is irrelevant, so it should be excluded under the First Amendment and Rule 402.

Dated: June 21, 2026

Respectfully submitted,

/s/ James D. Leach

James D. Leach
Attorney at Law
1617 Sheridan Lake Rd.
Rapid City, SD 57702
Tel: (605) 341-4400
jim@southdakotajustice.com
Attorney for Plaintiffs

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/s/ James D. Leach

James D. Leach

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

MAYDAY HEALTH and NANCY TURBAK)
BERRY,)

Plaintiffs,)

v.)

LARRY R. RHODEN, Governor for the)
State of South Dakota, and MARTY J.)
JACKLEY, Attorney General for the)
State of South Dakota, in their)
official capacities,)

Defendants.)

4:24-CV-04096-CCT

ANSWER

COMES NOW, Governor Larry Rhoden and Attorney General Marty Jackley (hereinafter Defendants), by and through their undersigned counsel, Amanda Miiller, Deputy Attorney General, and for their Answer to Plaintiffs' Complaint state and allege as follows:

DEFENSES

First Affirmative Defense – Failure to State a Claim

The Complaint fails to state a claim upon which relief can be granted.

Second Affirmative Defense – Lack of Standing

Plaintiffs lack standing because they have not suffered an injury in fact, and any alleged injury is speculative and not traceable to Defendants' conduct.

More specifically, Mayday Health has already agreed not to advertise abortion pills in the State of South Dakota.

Third Affirmative Defense – No First Amendment Violation

House Bill 1274 permissibly regulates unprotected or unlawful commercial speech, including advertising that promotes illegal activity. The statute satisfies all applicable constitutional standards.

Fourth Affirmative Defense – Lawful Regulation of Conduct

The statute regulates conduct—not protected speech—and any incidental impact on expression is constitutionally permissible.

Fifth Affirmative Defense – Overbreadth and Vagueness Denied

The statute is neither overbroad nor vague and provides clear notice of prohibited conduct.

Sixth Affirmative Defense – Sovereign Immunity

To the extent applicable, Defendants are entitled to sovereign immunity.

Seventh Affirmative Defense – No Irreparable Harm

Plaintiffs cannot demonstrate irreparable harm, a prerequisite for injunctive relief.

Eighth Affirmative Defense – Adequate Remedy at Law

Plaintiffs have adequate remedies at law, precluding equitable relief.

Ninth Affirmative Defense – Plaintiff Outside Scope of Statute

Plaintiff Turbak Berry’s alleged conduct does not fall within the scope of House Bill 1274, and therefore she cannot establish any credible threat of enforcement.

Tenth Affirmative Defense – Good Faith Enforcement

Defendants act in good faith in enforcing duly enacted state law.

ANSWER

Defendants hereby deny each and every thing, matter, and allegation contained within Plaintiff's Complaint except that which is hereinafter specifically admitted.

The section entitled "Nature of the Case" does not plead a factual allegation that requires a response. To the extent a response is required: 1) Defendants deny that Plaintiffs are entitled to any relief whatsoever; and 2) Defendants admit only that Plaintiffs purport to bring a constitutional challenge and an affirmative claim under the Communications Decency Act but deny that any of Plaintiffs' constitutional rights or any laws have been violated.

1. Defendants admit paragraph 1.
2. Defendants admit paragraph 2.
3. Defendants admit in paragraph 3 they are the Governor and Attorney General responsible for enforcement of HB 1274 and deny any liability for the claims alleged in their official capacities.
4. Defendants admit in paragraph 4 that Plaintiffs bring this action and that this Court has jurisdiction.
5. Defendants lack knowledge or information sufficient to form a belief about the truth in paragraph 5 about the founding of Mayday and its website. Defendants deny the remaining allegations.
6. Defendants deny paragraph 6.
7. Defendants deny paragraph 7.
8. Defendants admit paragraph 8.

9. Defendants admit in paragraph 9 that Mayday placed advertisements in South Dakota but object to and deny the characterization of the remaining allegations
10. Defendants admit paragraph 10.
11. Defendants admit in paragraph 11 that Mayday responded but object to and deny the characterization of the remaining allegations.
12. Defendants admit paragraph 12.
13. Defendants admit paragraph 13.
14. Defendants admit paragraph 14.
15. Defendants admit paragraph 15.
16. Defendants admit paragraph 16.
17. Defendants admit paragraph 17.
18. Defendants admit paragraph 18.
19. Defendants admit paragraph 19 but object to and deny the characterization that the placards were the only basis for the conclusion that Mayday engages in criminal solicitation.
20. Defendants admit paragraph 20.
21. Defendants admit paragraph 21.
22. Defendants admit the statements made by Attorney General Jackley in paragraph 22 but object to and deny the context in which they are used.
23. Defendants admit paragraph 23.

24. Defendants admit paragraph 24.
25. Defendants admit in paragraph 25 that the federal court dismissed Mayday's case based on *Younger* abstention. Defendants admit that the judge commented on the merits of the case and object to this Court's consideration of these comments because the case was not properly before that court.
26. Defendants admit in paragraph 26 that the federal court lacked jurisdiction over the case. Defendants admit that the judge commented on the merits of the case and object to this Court's consideration of these comments because the case was not properly before that court.
27. Defendants admit the majority of paragraph 27 but deny that Mayday's speech is protected.
28. Defendants admit paragraph 28 but deny the characterization that the "Legislature strikes back."
29. Defendants admit paragraph 29.
30. Defendants deny paragraph 30. HB 1274 is based on language, and specifically quotes, from the Federal Comstock Act which was enacted long before Mayday's actions.
31. Defendants admit paragraph 31.
32. Defendants deny paragraph 32.
33. Defendants deny paragraph 33.
34. Defendants lack knowledge or information sufficient to form a belief about the truth the allegation contained in paragraph 34.
35. Defendants admit to paragraph 35 but object to and deny the characterization that they are the same.
36. Defendants deny paragraph 36.

37. Defendants deny paragraph 37.
38. Defendants deny paragraph 38.
39. Paragraph 39 requires no response.
40. Defendants deny paragraph 40.
41. Paragraph 41 requires no response.
42. Defendants admit in paragraph 42 that the advertisements placed within South Dakota's borders were advertisements. Defendants deny that Turbak's wearing of a sweatshirt is an "advertisement."
43. Defendants deny paragraph 43.
44. Paragraph 44 requires no response.
45. Defendants lack knowledge or information sufficient to form a belief about the truth the allegation contained in paragraph 45.
46. Defendants admit paragraph 46.
47. Defendants deny paragraph 47.
48. Defendants admit paragraph 48.
49. Defendants deny paragraph 49.
50. Defendants deny paragraph 50.

REQUEST FOR RELIEF

WHEREFORE, Defendants respectfully request that the Court:

1. Dismiss the Complaint with prejudice;
2. Deny all requested declaratory and injunctive relief;

3. Award Defendants their costs and attorneys' fees as permitted by law;
and
4. Grant such other and further relief as the Court deems just and proper.

Dated this 20th day of June, 2026.

/s/ Amanda Müller
Amanda Müller
Deputy Attorney General
Office of the Attorney General
1302 East SD Highway 1889, Suite 1
Pierre, South Dakota 57501-8501
Telephone: (605) 773-3215
Email: amanda.mueller@state.sd.us

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of June, 2026, I electronically filed the foregoing with the Clerk of the Court for the United States District Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Amanda Müller
By: Amanda Müller
Deputy Attorney General

UNITED STATES DISTRICT COURT
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NOTICE OF EXPERT WITNESS

COMES NOW, Governor Larry Rhoden and Attorney General Marty Jackley, Defendants, by and through their undersigned counsel, Amanda Miiller, Deputy Attorney General, and hereby notifies the Court and Plaintiffs that it anticipates calling the following individual as an expert witness in the above-entitled case:

1. **Dr. Patricia Giebink**

Witness Qualifications: Dr. Giebink’s Curriculum Vitae is attached and marked as Exhibit 1.

Anticipated Testimony: Dr. Giebink will testify to the FDA approved medical label for Mifepristone including contraindications, side effects, and recommended uses; the FDA approved medical label for Misoprostol including contraindications, side effects, and recommended uses; risks associated with unapproved and misbranded drugs; fetal size and the difference between last menstrual period, gestational age, and

ultrasound; statistical abortion data; experiences at the Alpha Center related to abortion pills; informed consent; and other information contained with her affidavit filed with this Court.

Exhibits: Dr. Giebink will testify to exhibits E, S, W, X, CC, DD, EE, FF, GG, and HH.

Publications: Unexpected Choice (2021) — Focus on the Family / Tyndale House Publishers

Compensation: Flat Fee for consultation, review, research, preparation, travel, and testimony - \$5,000

Dated this 20th day of June, 2026.

/s/ Amanda Müller
Amanda Müller
Deputy Attorney General
Office of the Attorney General
1302 East SD Highway 1889, Suite 1
Pierre, South Dakota 57501-8501
Telephone: (605) 773-3215
Email: amanda.muller@state.sd.us

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/s/Amanda Müller
By: Amanda Müller
Deputy Attorney General

CURRICULUM VITAE FOR LEGAL TESTIMONY

Patricia K. Giebink, M.D.

IDENTIFICATION

Name: Patricia K. Giebink, M.D.

Profession: Physician (Obstetrics and Gynecology – Retired)

State of Licensure: South Dakota (1991–2024)

Primary Residence: Chamberlain, South Dakota

PROFESSIONAL SUMMARY

Dr. Patricia K. Giebink is a retired, board-certified obstetrician-gynecologist with over 30 years of clinical experience in women’s healthcare. Her professional background includes private practice, hospital-based obstetrics, academic medicine, and service in both domestic and international medical settings. She held admitting privileges in nearly a dozen hospitals across South Dakota and served as an attending physician for the University of South Dakota School of Medicine.

Dr. Giebink also previously worked at Planned Parenthood, the only abortion clinic in South Dakota at the time, giving her direct professional experience relevant to matters involving abortion practice, standards of care, and medical ethics. She is the author of *Unexpected Choice* and frequently provides expert education on women’s health and obstetrical care.

EDUCATION AND TRAINING

Internship and Residency, Obstetrics and Gynecology

Indiana University Medical Center, Indianapolis, Indiana (1987–1991)

Doctor of Medicine (M.D.)

University of South Dakota School of Medicine, Vermillion and Sioux Falls, South Dakota (1982–1987)

Master of Science, Physical Education and Exercise Physiology

Montana State University, Bozeman, Montana (1975–1976)

Bachelor of Arts, cum laude, Physical Education and Health

Augustana College, Sioux Falls, South Dakota (1968–1972)

LICENSURE AND CERTIFICATION

Life Fellow, American College of Obstetricians and Gynecologists (2020–Present)

Board Certified, American Board of Obstetrics and Gynecology (1994–2020)

EXHIBIT

1

Medical License, State of South Dakota (1991–2024)
Medical License, State of Missouri (2011–2014)
National Board of Medical Examiners – Parts I, II, III, IV (1985–1990)

ACADEMIC APPOINTMENTS

Attending Physician, University of South Dakota School of Medicine
Sioux Falls, South Dakota (1992–1998)

CLINICAL EXPERIENCE

Private Practice, Obstetrics and Gynecology – Sioux Falls, South Dakota
Hospital-Based Obstetrics and Gynecology – Multiple South Dakota hospitals
Locum Tenens Obstetrics – Statewide South Dakota
International Medical Practice – Oasis Hospital, United Arab Emirates
Gynecology Practice – Planned Parenthood Clinic, Sioux Falls, South Dakota

HOSPITAL PRIVILEGES (HISTORICAL)

Sanford Chamberlain Medical Center; Madison Community Hospital; Brookings Health System; Prairie Lakes Hospital; Mid Dakota Hospital; Sioux Valley Hospital; McKennan Hospital; Oasis Hospital (UAE)

PROFESSIONAL SOCIETIES

American College of Obstetricians and Gynecologists (Fellow)
South Dakota State Medical Association
American Association of Pro-life Obstetricians and Gynecologists
Sixth District Medical Society
Former Member: Seventh District Medical Society; American Medical Women’s Association

HONORS, LEADERSHIP, AND APPOINTMENTS

Executive Board Member, Alpha Center, Sioux Falls, South Dakota
District Six Director and Executive Board Member, AAPLOG
South Dakota Section Chair and Vice-Chair, ACOG
Appointed Member, ACOG Committee on American Indian and Alaskan Native Affairs
South Dakota Representative to ACOG Legislative Workshops
Leadership in Women’s Health Policy Conference, UNC–Chapel Hill

PUBLICATIONS

Giebink, P.K. *Unexpected Choice: An Abortion Doctor’s Journey to Pro-Life.* Focus on the Family / Tyndale House Publishers.
Author of peer-reviewed medical journal articles.

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4:26-cv-04096-CCT

SUPPLEMENTAL RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION

Defendants Larry R. Rhoden and Marty J. Jackley, by and through their counsel Amanda J. Miiller, Grant M. Flynn, Jacob R. Dempsey and Paul S. Swedlund hereby file this supplemental response to plaintiffs’ motion for a preliminary injunction. This supplemental response brings to the court’s attention certain additional authorities regarding the likelihood of Mayday succeeding on its CDA230 defense.

1. CDA230 immunizes Service Providers from “liability based on content *posted* by third parties.” *Anderson v. TikTok*, 116 F.4th 180, 183 (3rd Cir. 2024)(emphasis added). CDA230 does not immunize Service Providers who decide what third-party content will be delivered to site users. *TikTok*, 116 F.4th at 184. The act of deciding what third-party content a Service Provider will deliver to a site user is the Service Provider’s *own* expression, which is not exempt from liability under CDA230. *TikTok*, 116 F.4th at 184. Mayday.Health is not an open platform which Aid Access or Abuzz can access unilaterally. Rather, Mayday.Health decides which third-party abortion pill merchant content to post and link itself to and even endorses the selected merchants as having “the best content for a certain

aspect of abortion care” and as being a “trusted” sources for information and drugs. Thus, the act of advertising for and posting links to content offering to ship pills to “all 50 states” is Mayday’s own expression which is not immunized by CDA230. *TikTok*, 116 F.4th at 184.

2. *Dyroff v. Ultimate Software Group*, 934 F.3d 1093 (9th Cir. 2019), suggests that a website that is more than a mere Service Provider can be liable for the consequences of drugs sold via its website. *Dyroff* found that Ultimate Software Group could not be liable for drugs sold by a third-party Content Provider accessed via its website because:

- Ultimate Software Group was only a Service Provider because it did not create or publish its own content.
- Ultimate Software Group was a mere publisher of third-party content because it used a content-neutral, “blank box” format in which users typed in the type of third-party content they wished to access, *i.e.* “where can i score heroin in jacksonville, fl.”
- Ultimate Software Group was not responsible for the third-party content in question because, unlike *TikTok*, it did not curate and deliver user-specific content via content-driven algorithms of its own creation.

Mayday.Health does not meet *Dyroff*’s criteria for CDA230 immunity because, unlike Ultimate Software Group, the Mayday.Health website contains a great deal of non-neutral, Mayday-created content which steers users toward “trusted” abortion pill merchants of Mayday’s choosing whose message Mayday endorses. *Dyroff*, 934 F.3d at 1097-1099.

3. CDA230 does not apply here because the state is not seeking to penalize Mayday solely on the basis of it being a publisher of third-party content. In *Doe v. Internet Brands*, 824 F.3d 846 (9th Cir. 2016), two individuals used the defendant’s website to message and lure the plaintiff to sham auditions where she was drugged and raped. *Doe*, 824 F.3d at 848. The

Doe court ruled that, when the Service Provider was alleged to have known of the scheme beforehand, it could be liable for failure to warn because it could have fulfilled its duty to warn “without changes to content posted by the website’s users.” *Doe*, 824 F.3d at 851. As in *Doe*, Mayday knows ahead of time that its advertisements will draw South Dakota women to its website and then to the abortion pill merchants it is linked to. Mayday can prevent illegal transactions involving South Dakota women via changes to its own website – by not advertising on its own website that abortion pill merchants will ship to states where abortion is illegal and informing women that mailing abortion drugs to South Dakota is illegal – without changing any third-party content on its website. So CDA230 immunity does not apply here because, as in *Doe*, Mayday is not being penalized for the third-party content it publishes, but for its own actions in advertising and operating a website designed to solicit and facilitate illegal transactions. *Doe*, 824 F.3d at 854.

4. CDA230 does not immunize Mayday’s facilitation of illegal transactions. In *Fair Housing Council of San Fernando Valley v. Roommates.Com*, 521 F.3d 1157, 1164 (9th Cir. 2008), the court found that a roommate-matching website was not CDA immune for engaging in discriminatory conduct through a series of questions to users about discriminatory gender, race or sexual orientation preferences that violated the Federal Housing Act. The court found that eliciting a series of “illegal preferences” from users “contribute[d] materially to the alleged illegality of [third-party] conduct” promoted by the website. *Roommates.Com*, 521 F.3d at 1165, 1168. In doing so, the website “became more than a passive transmitter of information provided by others.” *Roommates.Com*, 521 F.3d at 1166.

Mayday.Health is not a mere Service Provider. It is not an open platform that Aid Access and other abortion pill sellers access which acts as a mere medium for their communications with

buyers and *vice versa*. Mayday itself decides which abortion pill merchants it will post and link its website to and advertises on their behalf on its website. Mayday does not operate via content-neutral, “blank boxes” but rather pre-populated, content-driven prompts like “Abortion” or “FAQs” on which users click, which then steer them toward the abortion drug merchants Mayday advertises on its site. Along the way, Chatbot Charley delivers a classic sales pitch:

- He promises to solve a problem, *i.e.* “**PREGNANT? DON’T WANT TO BE?**”
- He offers a simple solution validated by success stories or statistics, *i.e.* telling women abortion pills are “very safe and effective for ending a pregnancy,” telling women “it’s safe to take pills without seeing a provider first.”
- He preempts and overcomes objections, *i.e.* telling women that “[a]bortion pills are available online in every state thanks to shield laws,” telling women that “[i]t’s not a crime in any state for people to get or use abortion pills for themselves before 24 weeks of pregnancy,” telling women that abortion is “medically safe no matter how far along someone is in their pregnancy,” offering to “help [her] choose which type of abortion . . . to get,” telling them not to “tell anyone that you took abortion pills, even if you need to visit a medical provider for follow-up care.”
- He closes the deal, *i.e.* telling women abortion pills can be “prescribed online and sent in the mail,” telling her she can “[g]et abortion pills mailed to your home from a telehealth provider, and take them on your own,” offering to “share a link to a website that serves people of all ages,” referring her specifically to “Aid Access[, who] ships pills to people in all 50 states for \$150 or less.”

This brazen hard sell on Mayday’s *own* website goes far beyond the non-immunized, algorithm-derived, user-specific content delivery of *TikTok*, far beyond the content-neutral, “blank box”

immunized sales transaction in *Dyroff*, far beyond the non-immunized, non-third-party-content-based breach of duty of *Doe*, and far beyond the immunized role of a “passive transmitter” to non-immunized eliciting of “illegal [user] preferences” as in *Roommates.Com*.

As the 9th Circuit has made clear, websites are not havens to do what a “brick-and-mortar counterpart” could not do. *Roommates.Com*, 521 F.3d at 1164. A brick-and-mortar pharmacy could not advertise abortion pills in its window but evade responsibility for soliciting and facilitating a violation of SDCL 22-17-5.3 by, instead of selling the pills themselves, referring a customer to a third-party to consummate the transaction. CDA230 does not “create a lawless no-man's-land on the internet.” *Roommates.Com*, 521 F.3d at 1164. Since, under South Dakota law, Chatbot Charley’s chipper proposition to procure abortion pills for women would be “unlawful [if] posed face-to-face or by telephone, [it] do[es]n’t magically become lawful when asked electronically online.” *Roommates.Com*, 521 F.3d at 1164. Because, as applied to Mayday.Health, SDCL 22-17-5.3 is not “inconsistent” with CDA230, it is not preempted by federal law. Accordingly, Mayday is not likely to succeed on its CDA230 defense so no preliminary injunction should be entered on that basis.

Dated this 21st day of June 2026.

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

Mayday Health and Nancy Turbak)	
Berry,)	
)	
Plaintiffs,)	No. 4:26-cv-04096-CCT
)	
v.)	
)	
Governor Larry Rhoden and)	
Attorney General Marty Jackley,)	
sued in their official capacities,)	
)	
Defendants.)	
_____)	

Nancy Turbak's Opposition to State's Motion to Dismiss

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I. Summary of Argument

Nancy Turbak wants to engage in the same First Amendment-protected speech that Mayday engages in. She wants to speak by wearing Mayday's sweatshirt, and thereby to convey the message as widely as possible:

"They don't want you to know this:

You can still get **ABORTION PILLS** in all 50 states"

—and that anyone can "**LEARN MORE AT MAYDAY.HEALTH.**" Doc. 6 at 2.

This is the identical—literally not figuratively identical—message that Mayday conveyed and wants to continue to convey, and that the State condemned and continues to condemn as criminal and unprotected by the First Amendment. Doc. 1 at 10-11 and ¶ 23 (State alleges the message on Mayday's sweatshirt supports its criminal allegations against Mayday, including that Mayday is "advertising and soliciting the sale [of] illegal abortion pills within the physical borders of the state of South Dakota.")

In addition, the message on Mayday's sweatshirt is similar to the message Mayday posted at gas stations in December 2025 that began this controversy, which read "Pregnant? Don't Want to Be? **LEARN MORE AT MAYDAY.HEALTH.**"

Doc. 1 ¶ 9. Both Mayday’s sweatshirt and its gas station signs convey the message that a pregnant woman has choices, and that information about them is available at Mayday Health’s website.

The State’s current argument that Turbak’s speech is not criminal does not protect her from prosecution by a future Attorney General, perhaps acting at the direction of a future Governor, or at the prodding of a future Legislature. Turbak has standing to bring her First Amendment pre-enforcement claim both because she “is chilled from exercising her right to free expression,” and because she “foregoes expression in order to avoid enforcement consequences.” *Henderson v. Springfield R-12 Sch. Dist.*, 163 F.4th 478, 492 (8th Cir. 2025) (en banc), quoting *Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (5th Cir. 2003).

II. Argument

A. Turbak has standing and states a claim upon which relief can be granted

The State brings its motion pursuant to F.R.Civ.P. 12(b)(1) (lack of subject matter jurisdiction) and 12(b)(6) (failure to state a claim upon which relief can be granted). The lack of subject matter jurisdiction claim is based on the State’s contention that Turbak lacks standing. Doc. 15 at 1 and 5.

Turbak's standing to seek a preliminary injunction is addressed in Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction. Doc. 4 at 7. The crux of the State's argument is that Turbak's belief that she could be charged criminally or civilly under House Bill 1274 is "unrealistic," "erroneous," and "fanciful." Doc. 15 at 2-3 and 5. The State alleges that Turbak's fear of prosecution is not credible. A credible threat of prosecution confers standing. Doc. 4 at 8-9.

The State has incessantly threatened Mayday with criminal action based on the same speech that Turbak wants to engage in. The State's theories include "delivery of abortion drugs," "a plethora of deceptive acts and practices," "concealment, suppression, or omission of material facts in connection with the advertisement of abortion-inducing pills and abortion services," "the sale of abortion related merchandise," "illegal" "advisements," "illegal advertising," "knowingly advertising illegal services," "solicitation" which "is a criminal act in South Dakota," that Mayday's gas station signs constitute criminal "solicitation," that Mayday's speech "proposes an illegal transaction or is in furtherance of a criminal scheme," "illegal pill transactions," "facilitating illegal transactions," "inducing and commencing criminal activity," "selling abortion pills," "soliciting, inducing, commencing the illegal trafficking of pills in the State of South Dakota,"

and “advertising and soliciting abortions for teenaged children without the required parental notification.” Doc. 1 ¶¶ 10, 13-16, and 18-23.

In addition, the State has alleged that Mayday “sells merchandise on its website” with “similar messaging” about availability of abortion pills “in all 50 states” *an allegation the State supports with a photograph of a Mayday’s sweatshirt that Turbak wants to wear.* Doc. 1 ¶ 24.

Mayday provides information about abortion pills. It does not sell abortion pills, distribute abortion pills, or receive any benefit if someone uses its website to obtain or access information about abortion pills. Doc. 5 ¶¶ 2-6. All the same is true of Turbak. She intends to exercise her First Amendment right to provide information about abortion pills, including how to get them. By wearing Mayday’s sweatshirt, she will provide the same information about abortion pills, and their availability in all 50 states, that Mayday provides. For Turbak to believe that she can never be prosecuted, criminally or civilly, for engaging in the same conduct that Mayday engages in, and that the State has repeatedly condemned as criminal, would be naive.

The State’s allegations of criminality were not casual claims that slipped out in an unguarded moment. Nor were they press conference assertions intended to

impress a credulous public. The State's allegations of criminality were made in federal and state lawsuits. Every one was made subject to Fed. R. Civ. P. 11(b) or S.D.C.L. § 15-6-11(b), which require, on pain of judicial sanctions, that the representations are made in good faith and supported by facts and law. Every representation was made by highly skilled and reputable attorneys who have the power to prosecute the crimes they allege are being committed. Turbak reasonably believes that Attorney General Jackley and the prosecutors who work under him did not repeatedly violate Rule 11. Turbak would disregard Attorney General Jackley's and his subordinate attorneys' threats at her peril. The State's well-considered threats make her fear credible. "[T]hreatened enforcement [that] implicates First Amendment rights" means that "the [standing] inquiry tilts dramatically toward a finding of standing." Doc. 4 at 8, quoting *Dakotans for Health v. Noem*, 52 F.4th 381, 386 (8th Cir. 2022).

The State does not say whether its standing challenge is a facial attack or a factual attack. If the challenge is facial, the court looks only to the pleadings. *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990). If it is factual, the court may consider evidence outside the pleadings. *Id.* Either way, the State's motion should be denied.

The State’s motion to dismiss for failure to state a claim may be granted only if the complaint does not allege facts that if true state a claim that is “plausible on its face.” *Hamilton v. Palm*, 621 F.3d 816, 817 (8th Cir. 2010), quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Turbak’s claims are plausible, because they are supported by the repeated on-the-record claims by Attorney General Jackley and his fellow prosecutors, all speaking and writing subject to Rule 11, that the same conduct by Mayday is criminal.

B. Turbak’s conduct and Mayday’s conduct are legally indistinguishable

The State argues that Turbak’s proposed conduct cannot be prosecuted because wearing her Mayday sweatshirt—the sweatshirt the State has alleged is criminal, Doc. 1 ¶ 24—“is not in connection with transactional activity,” and that Turbak “is not in the position to sell or supply abortion pills to anyone.” Doc. 15 at 3-4. For three fundamental reasons, the State’s arguments fail to distinguish Turbak’s proposed conduct from Mayday’s conduct.

First, the sweatshirt contains Mayday’s core message: that a woman can “still get **ABORTION PILLS** in all 50 states,” and that she can “**LEARN MORE AT MAYDAY.HEALTH.**” Turbak’s proposed speech is the same as Mayday’s speech.

The State has already condemned the sweatshirt as criminal speech. Doc. 1 ¶ 24. From the advertisement on Mayday’s sweatshirt, a woman can learn that abortion pills exist, and that more information is available at Mayday’s website. The State argues that Turbak is differently situated than Mayday because Turbak “is not in the position to sell or supply abortion pills to anyone.” Doc. 15 at 3. But neither is Mayday. Doc. 5 ¶¶ 2-6. So the State fails to distinguish Turbak from Mayday.

Second, the State’s argument contradicts the text of House Bill 1274. A law means what its plain language says. *Argus Leader v. Hagen*, 2007 S.D. 96, ¶ 13, 739 N.W.2d 475, 480 (“The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect.”) (citation omitted). The State admits that “advertise” “means to make the public aware of (something or someone) especially by means of a published or broadcast notice.” Doc. 15 at 1, citing <https://www.merriam-webster.com/dictionary/advertise> (last visited June 20, 2026). Mayday’s sweatshirt, which Turbak wants to wear, does exactly that. It makes the public aware of how a woman can obtain abortion pills, and how to get more information: at Mayday’s website.

Foley v. State ex rel. South Dakota Real Estate Comm'n, 1999 S.D. 101, ¶ 17, 598 N.W.2d 217, 221, adopts a similar definition, citing Black's Law Dictionary (6th Ed. 1990) ("defining 'advertise' as 'to announce, apprise, . . . give notice of, inform, make known[.]'" (ellipsis and bracket by Court)).

To try to evade this commonsense meaning and legal authority, the State attempts to import the definition of "advertisement" from S.D.C.L. § 37-24-1(1) into HB 1274. But that statute begins "Terms used *in this chapter* mean" (emphasis added), so it applies only to Chapter 37. HB 1274 is not part of Chapter 37. Even if Chapter 37 applied here, it does not contain the "transactional versus general" distinction the State argues.

None of the state's secondary authorities are part of House Bill 1274. The State argues that the statute uses "advertise" in a "transactional sense" not a "general" one, and that "advertise" "reflects a specialized as opposed to [a] general meaning." Doc. 15 at 2. South Dakota's plain meaning rule precludes both arguments. In determining whether Turbak's fear of prosecution is credible, the court looks to the plain text of the statute. *Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658, 667 (8th Cir. 2023) ("When a course of action is within the plain text of a policy, a 'credible threat' of enforcement exists.") *Alexis Bailey*

Vineyard, Inc. v. Harrington, 931 F.3d 774, 778 (8th Cir. 2019) (“when a course of action is within the plain text of a statute, a ‘credible threat of prosecution’ exists.”)

The State cites *United States v. Hansen*, 599 U.S. 762, 771-73 (2023), which read Congress’s use of “encourage” and “induce” as “terms of art” rather than as their plain meaning suggested. But *Hansen* shows why the State’s argument is wrong. *Hansen* is based on “longstanding criminal theories” that those words “target[] those who support the crimes of a principal wrongdoer,” and on the fact that “‘encourage’ and ‘induce’ are among the ‘most common’ verbs used to denote solicitation and facilitation.” The opposite is true here. “Advertise” is not part of any “longstanding criminal theories,” nor is it a common verb used to denote solicitation or facilitation. So it takes its plain meaning, not the limited technical meaning the State wants to confine it to in order to try to save it.

The State also cites *United States v. Williams*, 553 U.S. 285 (2008), but the statute there prohibited “advertis[ing] . . . any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported matter is, or contains” sexually explicit conduct of a minor. *Id.* at 289-90. This definition made clear that the “advertising” in question was a “step[] taken in the course of an actual or proposed transfer of a product[.]” *Id.* at

294. The statute “criminalizes only offers to provide or requests to obtain” child pornography. *Id.* at 297. HB 1274 contains no such limitation, which the State proves by asserting that it applies to Mayday, which provides only information—not anything tangible, and not abortion pills.

Third, the State’s attempt to limit the reach of House Bill 1274’s prohibition on “advertise” contradicts the bill’s legislative history, which shows that signs like Mayday’s sweatshirt are exactly what the law is aimed at. Doc. 5-17 at 3 (Prime House Sponsor John Hughes tells the House: “The bill says that you can’t advertise abortion drugs by signage on a gas pump or in a restroom or on a billboard”); Doc. 5-18 at 31 (Hughes tells the Senate State Affairs Committee “We’re talking about gas stations. We’re talking about advertising abortion pills on gas pumps. Is that what we want?”) A sweatshirt is no different legally as an advertising medium than a gas pump, a restroom, or a billboard: all fulfill the purpose of disseminating a message to everyone who sees it. Turbak’s sweatshirt, like Mayday’s gas station signs, direct any interested person to Mayday’s website, which contains further information about abortion pills and links to companies that provide them.

Finally, even if “advertise” were construed in the technical, limited way that the State asserts it should be, if Mayday’s speech violates HB 1274, Turbak’s

proposed speech also does so, because Turbak wants to convey the same message that the State condemns Mayday for conveying: that abortion pills exist and that more information about them is available at Mayday Health.

C. Dismissal would not protect Turbak from future state criminal and civil prosecution, in which *Younger* abstention would bar federal intervention; the standard in such prosecution would be whether the statute is unconstitutional beyond a reasonable doubt, not whether it is unconstitutional

This Court's order can protect Turbak from future state criminal proceedings for exercising her First Amendment rights. Dismissal furnishes zero protection. The present Attorney General's interpretation of House Bill 1274 does not bind a future Attorney General from proceeding as he or she deems fit. *Allegheny Corp. v. Richardson, Inc.*, 463 N.W.2d 678, 679 (S.D. 1990) (Attorney General reversed predecessors' interpretation of statute about licensing foreign corporations to own South Dakota farmland). Given the shifting winds of abortion politics, the present Attorney General's interpretation of House Bill 1274 could fall by the wayside in a moment.

If this Court were to dismiss and a future Attorney General were to charge Turbak civilly or criminally, the state proceedings would bar federal injunctive relief. Doc. 5-13 at 15 (Southern District of New York Judge Katherine Polk Failla's

ruling that based on *Younger v. Harris*, 401 U.S. 37 (1971), she had no jurisdiction over Mayday's 2026 action against Attorney General Jackley because of the State's pending civil enforcement proceeding against Mayday).

Furthermore, federal law protects Turbak against unconstitutional state action in a way that South Dakota law cannot. No South Dakota legal proceeding ever will determine whether a State civil or criminal prosecution against Turbak is unconstitutional. Under South Dakota law, the question is only whether a state law is being applied unconstitutionally *beyond a reasonable doubt*. *State v. Stark*, 2011 S.D. 46, ¶ 10, 802 N.W.2d 165, 169, quoting *State v. Martin*, 2003 S.D. 153, ¶ 13, 674 N.W.2d 291, 296 ("To be invalidated a statute must be proved a breach of legislative power beyond a reasonable doubt.") A vast gulf exists between a law being found unconstitutional, and it being found unconstitutional beyond a reasonable doubt. In this Court, the former standard applies; in South Dakota courts, the latter applies.

Federal law allows pre-enforcement review of a statute that abridges First Amendment rights. Doc. 4 at 8-9. Turbak has properly invoked her right to that review. Dismissal would preclude such review. She is entitled to pre-enforcement review, not to be naked in front of the State's criminal and civil prosecutorial power.

III. Conclusion

The Attorney General has alleged that conduct legally indistinguishable from Turbak's conduct is criminal, and that Mayday's sweatshirt, which Turbak wants to wear, is a crime. So Turbak has standing, because her fear of future prosecution is credible. She has standing to seek pre-enforcement review of a statute whose prohibition on "advertise" is unconstitutional on its face, and that is unconstitutional as applied to her. The complaint states a claim on which relief can be granted. The State's motion to dismiss should be denied.

Dated: June 21, 2026

Respectfully submitted,

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Certificate of Service

I certify that on June 21, 2026, I filed this document by CM/ECF, thereby causing automatic electronic service to be made on all other parties.

/s/ James D. Leach

James D. Leach