

**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.)

4:26-CV-04096-CCT

DEFENDANTS' MOTION FOR STAY OF
PRELIMINARY INJUNCTION PENDING
APPEAL

This Court entered an Order on Pending Motions, which granted a preliminary injunction in Plaintiffs' favor, on July 17, 2026. Doc. No. 51. Governor Larry Rhoden and Attorney General Marty Jackley, Defendants in the above-named case, respectfully move this Court for a stay of the preliminary injunction pending appeal. See FED. R. CIV. P. 62(d). The grounds supporting the request for stay are detailed in Defendants' Brief in Support of Motion for Stay of Preliminary Injunction Pending Appeal, which is filed under separate cover.

Dated this 3rd day of August, 2026, Pierre, South Dakota.

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CERTIFICATE OF SERVICE

I hereby certify I electronically filed the foregoing with the Clerk of Court for the United States District Court for the District of South Dakota, 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 Miiller
Amanda Miiller
Deputy Attorney General

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DEFENDANTS' BRIEF IN SUPPORT OF
MOTION FOR STAY OF PRELIMINARY
INJUNCTION PENDING APPEAL

INTRODUCTION

Defendants, Governor Larry R. Rhoden and Attorney General Marty J. Jackley, by and through their counsel, Amanda J. Miiller, Jacob R. Dempsey and Paul S. Swedlund, hereby file this brief in support of Defendants' motion to stay the preliminary injunction entered in this case. This Court has enjoined a duly enacted state criminal statute without performing a proper legal analysis of speech integral to criminal conduct and incitement, without considering relevant and highly probative evidence of intent, without the required common sense balancing of commercial speech, without proper interpretation and application of controlling precedent, without holding Mayday to its burden of proving a likelihood of success on the merits, and without determining the true applicability of the statute as to Nancy Turbak Berry.

As a result, the Court has legalized the solicitation and aiding and abetting of an illegal drug and erroneously broadened the scope of the term

advertising. The Court’s reasoning and ruling could just as easily protect the solicitation and aiding and abetting of online methamphetamine sales by groups who claim to simply “provide information” about methamphetamine and offer consumers the “choice” to commit an illegal act. “Providing information” by way of solicitation and aiding and abetting is conduct integral to the commission of a criminal act and supplying the means to carry that act out is incitement, which is not protected speech. Period. And the statute does not apply at all to Turbak Berry. Accordingly, Defendants respectfully request a stay of the Court’s preliminary injunction of SDCL 22-17-5.3 as applied to Mayday and Turbak Berry pending the State’s appeal.

BACKGROUND

In 2026, the South Dakota Legislature enacted House Bill 1274, which was signed into law and codified, as it pertains to this proceeding, in SDCL 22-17-5.3. H.B. 1274, 2026 Leg., 101st Sess. (S.D. 2026). The new law became effective on July 1, 2026. *Id.* The law is based on the Federal Comstock Act, which is entitled “Mailing Obscene or Crime-Inciting Matter.” Doc. 27, para. 30; *see also* 18 U.S.C.A. § 1461 (West). The Act prohibits the mailing of:

Every article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or

made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means abortion may be produced, whether sealed or unsealed; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing[.]

18 U.S.C.A. § 1461.

Recently, in the wake of *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022), General Counsel for the United States Postal Service issued an official advisory opinion regarding the applicability of the Act to the mailing and advertisement of abortion-inducing articles. Ex. 1, Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortions, Slip Opinion, (2022). While the opinion concludes that the Act does not prohibit the mailing, delivery, or receipt of abortion-inducing drugs, it does so only because “there are manifold ways in which recipients in every state may use these drugs, including to produce an abortion, without violating state law.” *Id.* at 2. However, this justification only applies “where the sender lacks the intent that the recipient of the drugs will use them unlawfully.” *Id.* at 1-2. The opinion goes on to note that the Act “could be constitutionally applied to the mailing of drugs *intended* to produce abortions.” *Id.* n.5 (emphasis added). The opinion further acknowledges “that state law, as well as federal, is relevant to the application of the [Act].” *Id.*

With the understanding that 100% of abortions¹ in the State of South Dakota are now accomplished through telemedicine² and the procurement of abortion drugs sent through the mail, and a further understanding that the application of the Act depends on 1) the requisite intent of the sender; and 2) the application of state law, the South Dakota Legislature enacted House Bill 1274 to stop the flow of illegal abortion drugs into the State. Ex. 2, p. 7;

<https://societyfp.org/research/wecount/wecount-december-2025-data/> (last accessed July 28, 2026). That law, which mirrors the Act, provides:

No person may knowingly dispense, distribute, sell, or advertise any of the following for purposes of an *unlawful* abortion pursuant to § 22-17-5.1:

- (1) An article or thing designed, adapted, or intended for producing an abortion; or
- (2) An article, instrument, substance, drug, medicine, or thing that is advertised or described in a manner calculated to lead another to use or apply it for producing an abortion.

A violation of this section is a Class 6 felony.

SDCL 22-17-5.3 (emphasis added). The present challenge followed.

LEGAL STANDARD

“A stay pending appeal . . . has functional overlap with an injunction, particularly a preliminary one.” *Kansas v. United States*, 124 F.4th 529, 532

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1. It is illegal to administer, prescribe, or procure “any medicine, drug, or substance” with the intent “to procure an abortion . . . unless there is appropriate and reasonable medical judgment that performance of an abortion is necessary to preserve the life of the pregnant female.” SDCL 22-17-5.1.
 2. It is illegal to administer abortion pills via telemedicine for the purpose of inducing an abortion. SDCL 36-4-8, -47, and -48.

(8th Cir. 2024) (quoting *Nken v. Holder*, 556 U.S. 418, 428, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009)). Accordingly, the same four-factor test for a stay pending appeal is applied to a request for stay of a preliminary injunction. *Id.* at 533. The four-factor test is:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Brakebill v. Jaeger, 905 F.3d 553, 557 (8th Cir. 2018) (quoting *Hilton v.*

Braunskill, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987)).

“The most important factor is likelihood of success on the merits, although a showing of irreparable injury without a stay is also required.” *Id.* (citing *Brady v. Nat’l Football League*, 640 F.3d 785, 789 (8th Cir. 2011)). In balancing these factors, “[c]lear evidence of irreparable injury should result in a less stringent requirement of certainty of victory; greater certainty of victory should result in a less stringent requirement of proof of irreparable injury.” *Brady v. Nat’l Football League*, 640 F.3d 785, 789 (8th Cir. 2011) (quoting *Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 388 (7th Cir.1984)). When the balance weighs in the applicant’s favor, a stay is appropriate. *Arkansas Peace Ctr. v. Arkansas Dep’t of Pollution Control*, 999 F.2d 145, 147 (8th Cir. 1993).

ARGUMENT

1. Success on the Merits

A. Illegal Speech

“What do you need?” This is the opening line of Mayday’s website. If the answer to that question were “methamphetamine” and Mayday then provided a link to a seller willing to ship methamphetamine into South Dakota where it is illegal, there is no principled argument that Mayday has not solicited,³ or aided and abetted⁴ an illegal drug transaction in South Dakota. But, according to this Court’s order, because the answer is “abortion pills,” Mayday gets to skirt the laws. On this basis alone, Defendants are likely to succeed on the merits of an appeal of the Court’s preliminary injunction. Defendants’ likelihood of success increases when the flaws in the Court’s reasoning and ruling are exposed.

As a preliminary matter, the Court conflated the standards it applied regarding the State’s illegal speech claims, that being speech integral to criminal conduct and incitement.⁵ Doc. 51 at 26-40. Speech integral to

3. Solicitation is accomplished when “[a]ny person who, with the intent to promote or facilitate the commission of a crime, commands, hires, requests, or solicits another person to engage in specific conduct which would constitute the commission of such offense or an attempt to commit such offense.” SDCL 22-4A-1.

4. Aiding, abetting, or advising is accomplished when “[a]ny person who, with the intent to promote or facilitate the commission of a crime, aids, abets, or advises another person in planning or committing the crime.” SDCL 22-3-3.

5. For example, in the legal standards portion of the Court’s analysis on speech integral to criminal conduct, after acknowledging that criminal speech is unprotected, it provided the following caveats:

Rather, for speech to exceed the bounds of protection, the speech must “intend to bring about a particular unlawful act[.]” *Hansen*, 599 U.S. at 783, or be “directed to inciting or producing imminent lawless action and is likely to incite or produce such action[.]” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

criminal conduct and incitement were both alleged by the State. These are two separate doctrines that require independent analysis before commercial speech should be evaluated.

Speech integral to a crime inquires whether the speech itself is a means of the crime—it focuses on the speaker’s own act, regardless of intent, and not the subsequent acts of others. *United States v. Arthur*, 160 F.4th 597, 609 (4th Cir. 2025). Accordingly, acts such as aiding and abetting, *Arthur*, 160 F.4th at 609, and solicitation, *United States v. White*, 610 F.3d 956, 960 (7th Cir. 2010), are unprotected because the act, itself, is criminal. Incitement, on the other hand, inquires whether speech is likely to cause imminent lawless action by others. It requires both intent and a probability of imminent harm. *Bible Believers v. Wayne Cnty., Mich.*, 805 F.3d 228, 246 (6th Cir. 2015). The erroneous application of these standards was an abuse of discretion, and it is likely Defendants will prevail on the merits when the standards are correctly applied on appeal.

I. Speech Integral to Criminal Conduct

The commingled standard used by the Court caused it to interpose a heightened intent element where it does not exist, focus on the subsequent acts of others, and then to treat Mayday’s conduct as protected speech while disregarding the well-established rule that the First Amendment does not

Doc. 51 at 33. Likewise, in the Court’s conclusions it states, “Defendants have not shown that Mayday advertises with the specific intent that another person engage in specific criminal conduct.” Doc. 51 at 38. However, these principles only apply to incitement.

shield speech “used as an integral part of conduct in violation of a valid criminal statute.” *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498, 69 S. Ct. 684, 688, 93 L. Ed. 834 (1949). Additionally, the Court failed to analyze the State’s claim that Mayday’s advertising violates the State’s Deceptive Trade Practices Act, as well as other criminal provisions. It is an abuse of discretion for a Court to decline to decide an issue. *Petrone v. Werner Enters., Inc.*, 42 F.4th 962, 969 (8th Cir. 2022).

The Court’s decision was primarily based on Mayday’s self-serving testimony that it “does not sell, handle, provide, or offer abortion pills for sale.” Doc. 51 at 2, 27, 33, 36. At no point have Defendants ever asserted that Mayday directly does any of those things; if it did, they would be charged as a principal, and not for soliciting or aiding and abetting. Nevertheless, the Court ultimately concluded that Mayday does not solicit or aid and abet because it does not “offer to provide unlawful material[,]” that being abortion pills. Doc. 51 at 38.

Solicitation and facilitation do not require that Mayday actually “sell, handle, or distribute abortion pills.” Doc. 51 at 27, 33. In *United States v. Jackson*, 482 F.2d 1264, 1267 (8th Cir. 1973), the court affirmed the defendant’s conviction for aiding and abetting a cocaine deal when the evidence established the defendant’s role in “bringing the buyer and seller together.” The Eighth Circuit has consistently held “that neither possession nor an actual sale by a [middleman] need be proved by the government on a charge of . . . aiding and abetting the distribution of drugs.” *United States v. Hernandez*, 986

F.2d 234, 238 (8th Cir. 1993). Thus, in *United States v. Anziano*, 606 F.2d 242, 245 (8th Cir. 1979), the court affirmed an aiding and abetting conviction of a middleman defendant to a methamphetamine transaction when the defendant introduced undercover law enforcement buyers to a seller and arranged for the buyers and seller to meet to consummate the transaction. The *Anziano* Court ruled that for aiding and abetting it was “not significant that [the defendant] did not personally have the drug in his possession at any time or that the sale was actually consummated by” the seller. *Anziano*, 606 F.2d at 245.

Importantly, as a factual matter, Mayday absolutely does “offer to provide” abortion pills. That is Mayday’s reason for being—to advertise abortion pills on behalf of merchants who cannot advertise for themselves. And when Mayday asks, “What do you need?” and provides the option to select abortion pills, that constitutes solicitation. It is Mayday’s offer that makes it a part of the supply chain in the sale of illegal abortion pills. There is no difference between Mayday’s solicitation of abortion pills than that of a street pusher who asks, “Wanna score some meth?” and then directs the individual to a stash house, or in Mayday’s case, the third-party merchants.

The same reasoning equally applies to Mayday’s aiding and abetting in the sale of abortion pills. In just two clicks of a mouse, a buyer is immediately connected with an abortion pill merchant willing to break the law. This is because Mayday’s website is inherently structured in a way that directly facilitates these sales. On immediate entry to the website, Mayday asks “What

do you need?” Hearing Ex. D. The term “abortion” is prominently displayed. *Id.* When a user clicks on the “abortion” link, they are instantly directed to Mayday’s page that reads “Order from” and then lists five abortion pill merchants willing to ship illegal abortion pills into the State of South Dakota. Hearing Ex. E. The Court concluded that “referring [Mayday site users] to a specific third-party that provides a product” is perfectly harmless and legal. Doc. 51 at 27. But that is only true if the “product” is legal, which it is not here. Referring buyers “to a specific third-party that provides a[n illegal] product” is the very definition of aiding and abetting an illegal drug transaction. *Jackson*, 482 F.2d 1267; *Hernandez*, 986 F.2d at 238; *Anziano*, 606 F.2d at 245.

Particularly when the evidence of Mayday’s intent, which the Court refused to consider, is factored into the analysis. Mayday’s lawsuit may be “forward looking” because it wants to conceal evidence of its intent, but the question of the intent behind “statements [Mayday] intend[s] to make in the future” is not limited to prospective evidence. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). Past statements illuminate Mayday’s present intent, particularly when, as described above, the plain intent of Mayday’s website is to connect buyers with sellers willing to conduct illegal transactions in only two clicks of a mouse. Removing the Mail Forwarding instructions and Chatbot Charley from its website hasn’t changed Mayday’s intent, it has only concealed overt expressions of it. Hearing Ex. D-Q and 29. Mayday’s intent is still facially evident from its own website.

Connecting users with third-party abortion pill merchants is the core function of Mayday's website. Mayday's testimony denying this fact, which the Court found "credible," is very obviously not an accurate description of what Mayday does:

- When Mayday says it targeted its advertising to South Dakota because of a "lack of access to information," it means a "lack" of "information" on how to illegally ship pills into the state;
- When Mayday says its "aim" is to provide "accurate information about abortion pills," it means "accurate information" on how to illegally ship pills into the state;
- When Mayday says its website just "makes it easier to learn that abortion pills exist," it actually goes beyond informing site users that abortion pills *exist* by informing users how to purchase the pills illegally;
- Though Mayday says its website does not recruit, influence, or recommend the commission of an illegal act, that is *exactly* what it does. By asking "What do you need?" and then filling that need by brokering the illegal sale of what the user "needs" recruits the buyer into a transaction. Soft-peddling the illegality of the transaction influences the buyer to proceed with it. Recommending pills as categorically safe and "trusted" partners who will supply them recommends an illegal transaction and influences users to proceed with it; and
- When Mayday says that referencing "trusted" pill providers is only countering information that is "not trustworthy," not "promoting abortion pills," Mayday glosses over the fact that representing itself as a source of "trustworthy" information intrinsically promotes the abortion pill transactions offered by its website.

In each of these statements, Mayday describes only *part* of what it does. These statements cannot be taken at face value. The Court fails to read between the lines and judge these statements in comparison to what Mayday *does* as opposed to what it *says*. Mayday's website provides no "information" about abortion pills in the two-click process other than who "ships [them] to all 50 states," and cost and delivery information. That is all Mayday *does*; it instantly connects buyers with sellers willing to conduct illegal transactions within South

Dakota’s borders. If, consistent with what Mayday’s website *does*, Mayday had testified honestly and completely that the aim of its advertising campaign is simply to provide “accurate information about [illegal mail-order purchases of] abortion pills” and to “make it easier to learn that [illegal mail-order] abortion pills exist [and who sells them],” then the conclusion that its speech is integral to illegal activity, and sufficiently transactional to be “conduct . . . that incidentally sweep[s] in speech,” is inescapable. *Nat’l Inst. Of Fam. And Life Advoc. v. Becerra*, 585 U.S. 755, 769 (2018). Mayday’s omissions of the full extent of its “aim[s]” from its testimony are intrinsically not credible or deserving of strict scrutiny, meaning that Defendants have a strong likelihood of prevailing on the merits of an appeal.

Despite this, the Court concluded that Mayday lacked the “the specific intent that another person engage in specific criminal conduct” and the “specific intent to promote or facilitate the commission of a crime.” Doc. 51 at 38. It is unclear whether it did so using a conflated legal standard, *see, e.g., supra* n.5, or under its statutory analysis of SDCL 22-3-3 and SDCL 22-4A-1. Doc. 51 at 35. Herein lies the rub. Regardless, the Court abused its discretion in the former by misapplying a legal standard, and in the latter by dismissing direct and overwhelming evidence of intent.

In sum, Mayday’s conduct falls squarely within *Giboney*. 336 U.S. at 498. The record shows Mayday does more than express views—they direct users to sources of abortion pills and facilitate acquisition. That is not “mere advocacy.” It is the functional equivalent of solicitation or aiding-and-abetting

conduct, which has never enjoyed constitutional protection. The Court effectively collapsed this distinction. By characterizing Mayday’s activity as “providing information,” it ignored SDCL 22-17-5.3’s purpose requirement and the conduct’s operative effect—connecting individuals to unlawful services. That analytical shift effectively nullifies *Giboney*. When speech is transactional, targeted, and designed to produce an unlawful result, it falls outside the First Amendment. SDCL 22-17-5.3 regulates precisely that category. As a result, Defendants have shown a likelihood of success on the merits on appeal.

In addition to the conflated legal analysis, the Court also failed to analyze and make a ruling on the remaining evidence presented regarding illegal conduct. At the hearing, the Court took judicial notice of the following state criminal laws, which Defendants asserted Mayday had violated:

- SDCL 22-17-5.1 - Procurement of abortion prohibited--Exception—Penalty
- SDCL 22-4A-1 - Criminal solicitation—Penalty
- SDCL 22-3-3 - Aiding, abetting or advising--Accountability as principal
- SDCL 37-24-6 - Deceptive act or practice--Penalty.
- SDCL 22-3-8 - Conspiracy to commit offense—Punishment
- SD HB 1318, from the 2022 Legislative Session and SDCL 36-4-8, 36-4-47, and chapter 34-23A – An Act to prohibit medical abortion by telemedicine and to increase the penalty for the unlicensed practice of medicine when performing a medical abortion
- SDCL 34-23A-7 - Forty-eight hour notice to parent or guardian for minor or incompetent female--Delivery of notice—Exceptions (criminalized via SDCL 34-23A-10.2)

Of this list, when the Court addressed whether Mayday’s speech was integral to criminal conduct, it only looked to whether Mayday engaged in the solicitation and aiding and abetting of abortion pill sales. Doc. 51, pgs. 29-40.

The Court failed to analyze whether Mayday's advertising constitutes a deceptive act or practice, the illegality of using telemedicine to procure abortion pills, whether there are sufficient safeguards to ensure that sales of pills of minors occur with the required parental notification, and whether Mayday was engaged in a criminal conspiracy with its self-professed "trusted partners," the abortion pill merchants.

The most glaring omission is the lack of analysis and decision on the Deceptive Trade Practices Act. In South Dakota, it is a crime to "[k]nowingly act, use, or employ any deceptive act or practice, fraud, false pretense, false promises, or misrepresentation or to conceal, suppress, or omit any material fact in connection with the sale or advertisement of any merchandise or the solicitation of contributions for charitable purposes[.]" SDCL 37-24-6. Indeed, this was the original basis for South Dakota's complaint for injunctive relief against Mayday in state court. Doc. 51 at 6. Mayday settled this matter, agreeing to remove its gas station advertisements in South Dakota, terminate its campaign, and refrain from posting further advertisements "that aid, abet, or solicit illegal conduct as established by law." Doc. 51 at 7.

Defendants produced significant evidence at the hearing regarding Mayday's deceptive acts and practices such as 1) advertising to consumers that abortion pills are "available in all 50 states" without advising them that the pills are illegal and that it is illegal to use telemedicine to procure them; 2) advertising websites that affirmatively assure consumers that the procurement and use of abortion pills is legal; 3) advertising to consumers that abortion pills

are FDA approved but then failing to abide by FDA guidelines on their use; and 4) advertising and soliciting abortions for minors without the required parental notification. *See also* Doc. 51 at 29-30.

These misrepresentations and omissions all fall within the purview of deceptive acts and practices. Defendants maintain that this analysis should have been done under its speech integral to criminal conduct claim. This is because SDCL 37-24-6 criminalizes the act of committing a deceptive act or practice; thus the act, itself, is criminal. *Arthur*, 160 F.4th 597, 609. Moreover, SDCL 37-24-6 contemplates both commercial and non-commercial transactions in that it prohibits deceptive acts and practices in connection with 1) the sale of any merchandise, 2) the advertisement of any merchandise, and 3) “the solicitation of contributions for charitable purposes[.]” Failing to analyze and decide the deceptive acts and practices claim, as well as other claims,⁶ is an abuse of discretion. *Petrone*, 42 F.4th at 969. Accordingly,

6. For instance, regarding conspiracy, Defendants introduced evidence that Mayday publicly holds out their abortion pill merchants as “trusted partners.” Conspiracy requires 1) two or more persons, 2) an agreement to commit any offense against the State, and 3) an overt act by one of the parties. SDCL 22-3-8. Mayday and the abortion pill merchants are two separate entities. Mayday publicly holds itself out as partners with the abortion pill merchants listed on its website. Mayday advertises for the abortion pill merchants and provides direct links to its website to facilitate the sale of abortion pills. It is a crime to sale abortion pills in the State of South Dakota. It is a crime to use telemedicine to procure abortion pills in the State of South Dakota. This is a partnership because the two do not succeed without each other. The abortion pill merchants cannot legally advertise without Mayday and Mayday’s website is currently designed to advertise and facilitate abortion pill sales.

Defendants have demonstrated a likelihood of success on the merits in this regard.

II. Incitement

In its legal standard, the Court correctly noted that “for speech to exceed the bounds of protection, the speech must ‘intend to bring about a particular unlawful act[,]’ or be ‘directed to inciting or producing imminent lawless action and is likely to incite or produce such action[.]’” Doc. 51 at 33 (citations omitted). The Court then summarily concluded that the evidence did not “establish that Mayday’s desired speech is intended to produce unlawful abortions or incite imminent lawless action.” Doc. 51 at 33. It did so without any analysis whatsoever. Other than mirroring the same conclusion later in its decision, Doc. 51 at 38, the Court made no other references to this claim. Because there is a complete lack of analysis as to the Court’s reasoning, Defendants are left in a position where they are unable to assess the Court’s basis for this conclusion and make an argument. Defendants contend this complete lack of analysis further demonstrates the error made by the Court when it conflated the standards of speech integral to criminal conduct and incitement. As a result, Defendants have demonstrated a likelihood of success on the merits regarding this issue on appeal.

B. Commercial Speech

Assuming, arguendo, that Mayday’s speech is protected, it is commercial speech that cannot survive when the proper framework is applied. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557,

564–65, 100 S. Ct. 2343, 2350, 65 L. Ed. 2d 341 (1980). The Supreme Court has long recognized “the ‘commonsense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.” *Id.* at 562. Commercial speech may be regulated because “of the greater potential for deception or confusion in the context of certain advertising messages.” *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65, 103 S. Ct. 2875, 2879, 77 L. Ed. 2d 469 (1983).

Throughout the proceeding, Defendants maintained that Mayday’s speech constitutes “mixed speech,” at best. Accordingly, the Court applied the necessary *Bolger* factors to categorize Mayday’s speech. But the Court’s rigid application showed no yield to the flexibility of the factors and vitiated the regulatory rationale meant to protect against deception and confusion. Based on the required ‘commonsense’ distinction that must be made, and in light of the protective rationale against deception and confusion, the Court’s conclusion that Mayday’s speech is fully protected non-commercial speech cannot stand. The advertisement, solicitation, and facilitation of illegal drug sales in contravention of state laws simply cannot stand.

While the Court applied the proper test, it failed to acknowledge that the *Bolger* factors are “just a general framework” that “no one factor is sufficient,” and that “*Bolger* strongly implied that all [factors] are not necessary.” *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 517 (7th Cir. 2014). The first factor of

whether Mayday’s speech is an advertisement is not in dispute. Doc. 51 at 27. This factor weighs in favor of Defendants.

However, the Court went on to conclude that Mayday’s advertisements do not refer to a specific product or service. Doc. 51 at 27. It did so on the previously mentioned faulty logic that “Mayday does not sell, handle, or distribute abortion pills.” *Id.* Again, this logic is unsound and leads to the same absurd result in the analysis for illegal speech—it could just as easily protect online methamphetamine sales by groups who claim to simply “provide information” about methamphetamine and offer consumers the “choice” to commit an illegal act. Such a conclusion simply defies “commonsense,” which should be the lodestar in making this determination. Further, as a factual matter, Mayday absolutely refers to a specific product, abortion pills, and then identifies five specific abortion pill merchants of its choosing. Hearing Ex. D and E.

The Court similarly lost its course by too narrowly construing the economic motivation factor. While the Court’s decision focuses on the alleged fact that Mayday does not receive payment from the abortion merchants it advertises for, this is not a prerequisite of commercial speech. Mayday can realize an economic benefit from its speech from sources other than advertising or drug sales revenues. Donations and fundraising are an economic benefit and a motivator. But in one conclusory sentence, the Court dismisses the economic motivation behind Mayday’s advertisements. *See* Doc. 51 at 27.

At the outset, the finding that “there is no evidence that Mayday holds an economic motivation for its advertisements” is hard to square with the evidence presented that Mayday, itself, touts that it is “entirely funded by donations and merchandise sales.” *Compare* Doc. 51 at 27 *with* Hearing Ex. AA. Moreover, according to *Nat’l Inst. of Fam. & Life Advocs. v. James*, 160 F.4th 360, 377 (2d Cir. 2025), evidence of “capital increase through fundraising” is evidence of “economic benefit” to Mayday from “engaging in this speech.” Mayday solicits and receives donations specifically off its message of delivering abortion pills to all 50 states. Those donations pay salaries at Mayday and for all the advertising on billboards, trucks, blimps, airplane banners and gas station placards. Donations that “directly relate to [Mayday's] ability to fundraise and, in turn, [allow it] to buy more advertisements” is an economic motivation that the Court simply ignores. *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1273 (9th Cir. 2017). And *New York Times* clearly does not support a lack of economic motivation here because Mayday is pushing an illegal product, not simply funding a *lawful* movement message, such as that abortion pills are legal in Minnesota and South Dakota women can legally buy and induce abortion with them there. *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964).

When Mayday’s speech is properly framed as commercial, it is then subject to intermediate scrutiny for commercial speech regulations. *Central Hudson*, 447 U.S. 557 (1980). This four-part test requires: (i) the speech concerns lawful activity and is not misleading; (ii) the governmental interest is

substantial; (iii) the regulation directly advances that interest; and (iv) the regulation is not more extensive than necessary. *Id.*

Mayday’s website easily fails this test: (i) the sale of abortion pills in South Dakota is illegal (this, alone, ends the analysis); (ii) the State’s interest in the life, health, and safety of pregnant women and their unborn children is well recognized by the United States Supreme Court and the State’s interest in enforcing its criminal laws, and preventing circumvention of its abortion regulations are unquestionably substantial; (iii) shutting down advertising for an illegal transaction and in furtherance of a scheme to supply abortion pills directly advances the State’s interest; and (iv) the statute is narrowly drawn because it does not ban discussion of abortion, advocacy, or general information and only targets purpose-driven advertising tied to illegal conduct, i.e., it “reaches no further than the purposeful solicitation and facilitation of specific acts known to violate [South Dakota] law.” *Hansen*, 599 U.S. at 781.

When the standards for commercial speech are applied in a “commonsense” manner and with due regard to the protective rationale against deception and confusion, Defendants have demonstrated a likelihood of success on the merits as to this issue.

C. The Court’s Attempts to Distinguish Persuasive Authority is Unavailing

The Court’s order does not give full force and weight to *Pittsburgh Press*, *Bigelow*, and *James* based on untenable distinctions that make no legal difference. The Court concluded that *Pittsburgh Press*’s categorical statement

about constitutionally permissible prohibitions on advertisements for illegal transactions like prostitution or controlled drugs is “not . . . particularly instructive” simply because the statement appears in the context of an equal opportunity decision about the lack of heightened protection due to gender-segregated employment ads. Doc. 51 at 34-35. This distinction is not a basis for disregarding *Pittsburgh Press* because its holding rested on the proposition that, because employment discrimination was illegal, the gender-segregated want ads in question were not entitled to non-commercial First Amendment protections because they facilitated illegal employment discrimination.

Pittsburgh Press, 413 U.S. at 389. For the same reason, Mayday’s speech is not entitled to heightened scrutiny because it openly and brazenly facilitates an illegal drug transaction, which *Pittsburgh Press* says is not entitled to any protection at all let alone heightened scrutiny. Per *Pittsburgh Press*, Mayday’s First Amendment interest “is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.” *Id.* Thus, *Pittsburgh Press* does not so readily permit Mayday’s speech to be classified as non-commercial and subjected to heightened scrutiny as this Court concluded.

Nor does the alleged greater specificity of the ordinance in question in *Pittsburgh Press* render that decision “not . . . particularly instructive” here. Doc. 51 at 34-35. The statute in question, SDCL 22-17-5.3, contains an explicit prohibition on “advertis[ing]” for any “article or thing . . . intended for producing an abortion,” or “drug, [or] medicine . . . for producing an abortion,”

that is sufficiently clear on “when a person is alleged to have aided in the doing of the act declared unlawful by the statute” that *Pittsburgh Press*’s relevance cannot be so lightly disregarded.

The Court also reads *Bigelow* too narrowly simply because it did not decide “the precise extent” that states may regulate or prohibit advertising of illegal activity, and because *Bigelow* found the speech commercial. Doc. 51 at 38-39. The fact that *Bigelow* does not decide “the extent to which constitutional protection is afforded commercial advertising under *all* circumstances” is not reason to dismiss the case entirely—particularly when Defendants have supplied so many other authorities (*Williams, Hansen, Al-Timimi, Conant, Arthur*) which help infill the “extent” of constitutional protections afforded advertisements of illegal activity possibly left unaddressed in *Bigelow*. *Bigelow*, 421 U.S. at 826 (italics added). *Bigelow* itself is abundantly clear that advertising that “further[s] a criminal scheme” in a state, as Mayday’s very obviously does in South Dakota, is not protected. *Bigelow*, 421 U.S. at 828. *Bigelow* is also clear that speech like Mayday’s is “commercial” in that “it relate[s] to a commodity or service” that is available from out-of-state suppliers. *Bigelow*, 421 U.S. at 828.

Per *Bigelow*, the “court cannot escape the task of assessing the First Amendment interest at stake and weighing it against the public interest served by the regulation” simply by labeling Mayday’s “speech” as non-commercial because there is arguably an incidental speech component to essentially transactional speech. *Bigelow*, 421 U.S. at 826; *Becerra*, 585 U.S. at 769. As

in *Bigelow*, “the task of balancing the interests at stake here was one that should have been undertaken” by the Court rather than simply labeling Mayday’s speech as “non-commercial” based on *dicta* that the “extent” of the decision does not purport to address “all circumstances.” The circumstances of *Bigelow* and this case are sufficiently similar—they both involve advertising abortion services—to be clear enough that advertising abortion services within a state where abortion is illegal, as Mayday does, falls within the police powers of that state that the Court should not have simply dismissed it out of hand.

Finally, the Court refuses to find *James* “instructive” in connection with whether “Mayday’s speech is integral to criminal conduct” because “[t]here is no language in *James* specifically addressing the legality of abortion reversal pills.” Doc. 51 at 39. First, the *James* Court certainly would have mentioned that the pills were illegal, and analyzed the case much differently, if they were. Second, giving Mayday the benefit of the doubt regarding the legal status of the pills in New York fails to hold Mayday to its burden of proving a likelihood of success on the merits. It was Mayday’s burden to prove that the abortion reversal pills were illegal if it wanted to contest that point of *James*, but it did not (and could not because, being based in New York, Mayday knows full well that the pills are legal there). To find Mayday’s speech *James*-protected when the pills in question in that case were not illegal, and the speech in question in that case was not even arguably integral to criminal conduct, reads *James* too favorably to Mayday’s benefit.

The Court does not give *Pittsburgh Press*, *Bigelow*, and *James* their due legal and factual force or weight based on distinctions that are without a difference as they relate to this case. Meanwhile, it takes no such pains to explain why Mayday’s other principal authorities—*Matsumoto* and *Welty* (not to mention *Williams*, *Hansen*, *Al-Timimi*, *Conant*, and *Arthur*)—do not fully support the State’s position. The Court glosses over these facts, as well as findings from Mayday’s own authorities that speech that “induces” a woman to obtain an illegal abortion is “speech integral to criminal conduct.” *Matsumoto v. Labrador*, 122 F.4th 787, 813 (9th Cir. 2024). Mayday’s website induces women to obtain illegal abortion pills and illegal abortions by connecting buyers with sellers in two clicks of a mouse. “What do you need?” is a flat-out inducement to click on “abortion” to buy abortion pills from one of Mayday’s “trusted” pill merchants . . . and testimony from Mayday saying it is not simply is not credible. Falsely telling women that it’s all OK, implying that the transaction is legal because of “shield laws” in other states, is another way of inducing them to consummate the transaction.

The Court also ignores a finding from Mayday’s own authorities that a “state may constitutionally punish speech made in direct furtherance of in-state abortions.” *Welty v. Dunaway*, 791 F.Supp.3d 818, 831 (M.D. Tenn. 2025). “What do you need?” is in direct furtherance of supplying women with abortion pills via Mayday’s links to merchants on its site. Neither *Welty* nor the speech integral exception require Mayday to sell, dispense, or distribute abortion drugs; it is enough for the speech integral exception to apply that

Mayday speaks “in direct furtherance of in-state abortions” – which it plainly does while also providing the means to consummate such transactions. The Court relies too much on what Mayday says rather than what it does. The facts speak for themselves here, and Defendants are likely to succeed on the merits.

D. HB 1274 is Inapplicable to Turbak Berry

Challenges to a statute on First Amendment grounds must be based on “realistic scenarios” that the law will suppress or deter protected expression. *Students for Life v. Jackley*, 746 F.Supp.3d 668, 688 (D.S.D. 2024) (quoting *Harrington v. Strong*, 363 F. Supp. 3d 984, 1004 (D. Neb. 2019)). Interpreting or applying SDCL 22-17-5.3 to criminalize Turbak Berry's simple “wearing [of her] Mayday Health sweatshirt” is facially unrealistic. The challenged statute, SDCL 22-17-5.3, is strictly limited to “advertis[ing]” in connection with providing “drug[s]” “for purposes of an unlawful abortion” or “for producing an abortion” in South Dakota.

In a perplexing turn of events, while the Court was dismayed with the State’s proffer of intent on the part of Mayday because it did not “not sell, handle, provide, or offer abortion pills for sale,” Doc. 51 at 27, 33, 36, it refused to apply the very same reasoning to Turbak Berry. Doc. 18-19. Instead, it found that because the messaging was “markedly similar to the message on Mayday’s gas station placards” that the statute was applicable to her. *Id.* at 18.

The Court's view ignores the fact that the two parties are not similarly situated. Turbak Berry testified that she has no place in the supply chain and agreed that she was simply expressing advocacy and support for Mayday. On the other hand, the State has shown that Mayday has inserted itself into the supply chain and that by doing so, it has crossed the line of mere advocacy into facilitation. The key factor here is intent—the same intent the Court refused to acknowledge on the part of Mayday but so freely affords to Turbak Berry.

Compounding this error, the Court also placed undue emphasis on the word “person,” in SDCL 22-17-5.3, a fact that was not in dispute, but failed to analyze the word “advertise” a fact that was in dispute as it relates to Turbak Berry.⁷ Doc. 51 at 19. The State submitted that the word “advertise” in the context of SDCL 22-17-5.3 means “to present (something or oneself) to the public in a way that is intended to attract customers.” Doc. 17-18. This definition went uncontested; yet the Court declined to apply or even analyze the issue. Defendants have demonstrated a likelihood of success on the merits regarding this issue on appeal.

2. Irreparable Injury to the State Absent a Stay

“In order to demonstrate irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief.” *Knutson v. AG Processing, Inc.*, 302 F. Supp.

7. As the Court acknowledged, there was no dispute as to Mayday whether their speech constituted an advertisement. Doc. 51 at 27.

2d 1023, 1036 (N.D. Iowa 2004) (quoting *Iowa Utilities Bd. v. F.C.C.*, 109 F.3d 418, 425 (8th Cir. 1996)). “Therefore, to constitute irreparable injury, the injury must be ‘both certain and great; it must be actual and not theoretical.’” *Id.* (quoting *Packard Elevator v. I.C.C.*, 782 F.2d 112, 115 (8th Cir.1986)).

It is the Defendants’ responsibility to protect South Dakotans and enforce the laws of the State of South Dakota. Mayday Health’s advertisements imply that abortion pills can be legally mailed into the State. Defendants cannot simply sit idle while an advertiser continues to promote illegal conduct within the state.

More importantly, South Dakotans face immediate and dire consequences resulting from the solicitation and facilitation of the sale of abortion pills that are flowing into the State. The injury, loss, or damages suffered include, but are not limited to, side effects, hemorrhaging, and infections from ingesting abortion pills that may result in serious injury or death (Hearing Ex. EE and FF); women taking abortion pills and being told by the abortion pill merchants that they should keep their abortions secret and not seek follow-up medical care relating to abortion procedures for fear they might “get in trouble,” thereby reducing the chances that women will seek medical care for adverse reactions, side effects, hemorrhaging, or infections (Hearing Ex. T); and loss of life or injury to teenaged children who are specifically instructed how to surreptitiously obtain medical abortions without their parents knowledge or consent, leaving the parents unable to monitor their teenage children for adverse reactions (Hearing Ex. Z).

3. Substantial Injury to Mayday

Initially, a stay causes no substantial injury to Mayday because it has already agreed to not advertise in South Dakota pursuant to the terms of the agreement settling the deceptive acts and practices claim. Doc. 51 at 20. Nor does a stay significantly infringe on Mayday's First Amendment right to advocate on behalf of abortion pills because Mayday "has the full panoply of protections available to its direct comments on public issues" even if a stay is entered. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 68 (1983). The only component of Mayday's "speech" affected by a stay is its advertising on behalf of commercial transactions, and, as observed in *Bolger*, "there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions." *Bolger*, 463 U.S. at 68.

4. Public Interest

Halting the advertisements and the flow of abortion pills into the State protects South Dakotans from any potential injury or death that may result. For example, a teenaged child could be saved who may have otherwise followed Mayday Health's instructions and surreptitiously performed an at-home medical abortion without informing their parents and then dies of septic shock because their parents were not aware of the abortion pills their child had ingested. The same goes for the woman encouraged not to seek follow-up medical care for fear of "getting in trouble" according to the advice given by Mayday Health's "trusted websites and partners." And finally, it benefits the

State to simply shut down bad actors who are knowingly advertising illegal services.

CONCLUSION

Coming full circle, the Federal Government may constitutionally regulate the advertisement of crime-inciting materials through the mail, particularly that which advertises information about “procuring or producing of abortion.” 18 U.S.C.A. § 1461; *see also Smith v. U.S.*, 97 S. Ct. 1756, 431 U.S. 291, 52 L. Ed. 2d 324; *U.S. v. Reidel*, 91 S. Ct. 1410, 402 U.S. 351, 28 L. Ed. 2d 813, *rehearing denied* 91 S. Ct. 2223, 403 U.S. 924, 29 L. Ed. 2d 703; *Roth v. U.S.*, 77 S. Ct. 1304, 354 U.S. 476, 1 L. Ed. 2d 1498, *rehearing denied* 78 S. Ct. 8, 355 U.S. 852, 2 L. Ed. 2d 60; *U.S. v. Extreme Associates, Inc.*, 431 F.3d 150 (3d Cir. 2005), *cert. denied* 126 S. Ct. 2048, 547 U.S. 1143, 164 L. Ed. 2d 806; *U.S. v. Gantzer*, 810 F.2d 349 (2d Cir. 1987); *U.S. v. Heyman*, 562 F.2d 316 (4th Cir. 1977); *U.S. v. Slepicoff*, 524 F.2d 1244 (5th Cir. 1975), *rehearing denied* 526 F.2d 1407, *cert. denied* 96 S. Ct. 2215, 425 U.S. 998, 48 L. Ed. 2d 824; *Schindler v. U.S.*, 221 F.2d 743 (9th Cir. 1955), *cert. denied* 76 S. Ct. 310, 350 U.S. 938, 100 L. Ed. 819. The Federal Government may do so even though it has no nationwide prohibition on abortion.

Yet when the Court reviewed the same concept as it applied to the State, which very much has a prohibition on both the advertisement and procurement of abortion pills to induce abortion within the State’s borders, it found inapposite. It did so by simply distinguishing that the Comstock Act applies to advertisements sent through the mail. Doc. 51 at 31 n. 5. The

Federal Government clearly has no greater interest in regulating advertisements sent by the mail, and which does not touch on an illegal activity, than South Dakota does in regulating any advertisement within its borders that very much do implicate illegal conduct. If the principle of federalism still exists, such a conclusion cannot stand. Defendants respectfully request the Court enter a stay in this matter pending appeal.

Dated this 3rd day of August, 2026, Pierre, South Dakota.

/s/ Amanda J. Müller
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CERTIFICATE OF SERVICE

I hereby certify I electronically filed the foregoing with the Clerk of Court for the United States District Court for the District of South Dakota, 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
Amanda Müller
Deputy Attorney General

**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

AFFIDAVIT OF AMANDA MIILLER

I, Amanda Miiller, Deputy Attorney General, having been duly sworn
upon oath, states as follows:

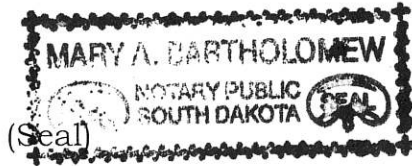
1. I am one of the attorneys representing Defendants in the above-entitled matter.
2. Attached as Exhibit 1 is the Official Advisory Opinion of General Counsel for the United States Postal Service regarding the application of the Comstock Act.
3. Attached as Exhibit 2 is the #WeCountReport issued by the Society of Family Planning for April 2022 to December 2025, which was published on June 10, 2026.

Dated this 3rd day of August, 2026.



Amanda Miiller
Deputy Attorney General

Subscribed and sworn to before me this 3rd day of August, 2026, at
Pierre, South Dakota.




Notary Public, State of South Dakota

My Commission expires: 9-5-2026

(Slip Opinion)

Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortions

Section 1461 of title 18 of the U.S. Code does not prohibit the mailing of certain drugs that can be used to perform abortions where the sender lacks the intent that the recipient of the drugs will use them unlawfully. Because there are manifold ways in which recipients in every state may lawfully use such drugs, including to produce an abortion, the mere mailing of such drugs to a particular jurisdiction is an insufficient basis for concluding that the sender intends them to be used unlawfully.

December 23, 2022

MEMORANDUM OPINION FOR THE GENERAL COUNSEL UNITED STATES POSTAL SERVICE

In the wake of the United States Supreme Court's recent decision overruling *Roe v. Wade*, 410 U.S. 113 (1973),¹ you have asked for this Office's view on whether section 1461 of title 18 of the United States Code prohibits the mailing of mifepristone and misoprostol, two prescription drugs that are commonly used to produce abortions,² among other purposes. Memorandum for Christopher Schroeder, Assistant Attorney General, Office of Legal Counsel, from Thomas J. Marshall, General Counsel, United States Postal Service, *Re: Request for an Interpretation of 18 U.S.C. § 1461*, at 1 (July 1, 2022) ("USPS Request"). Originally enacted as part of the Comstock Act of 1873, section 1461 currently declares "[e]very article or thing designed, adapted, or intended for producing abortion," as well as "[e]very article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion," to be "nonmailable matter" that the United States Postal Service ("USPS") may not lawfully deliver. 18 U.S.C. § 1461.

We conclude that section 1461 does not prohibit the mailing, or the delivery or receipt by mail, of mifepristone or misoprostol where the sender

¹ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

² See Ctrs. for Disease Control & Prevention, U.S. Dep't of Health & Hum. Servs., *Abortion Surveillance—United States, 2019*, 70 MMWR Surveillance Summaries, Nov. 26, 2019, at 8, <https://www.cdc.gov/mmwr/volumes/70/ss/ss7009a1.htm>.



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lacks the intent that the recipient of the drugs will use them unlawfully.³ This conclusion is based upon a longstanding judicial construction of the Comstock Act, which Congress ratified and USPS itself accepted. Federal law does not prohibit the use of mifepristone and misoprostol. Indeed, the U.S. Food and Drug Administration (“FDA”) has determined the use of mifepristone in a regimen with misoprostol to be safe and effective for the medical termination of early pregnancy.⁴ Moreover, there are manifold ways in which recipients in every state may use these drugs, including to produce an abortion, without violating state law. Therefore, the mere mailing of such drugs to a particular jurisdiction is an insufficient basis for concluding that the sender intends them to be used unlawfully.⁵

³ A cognate provision, 18 U.S.C. § 1462, imposes similar abortion-related prohibitions on using an express company or other common carrier for “carriage” of such items. Our analysis in this memorandum is applicable to that provision as well.

Sections 1461 and 1462 refer not only to persons who transmit such items by mail or by common carrier—the senders—but also to individuals who “knowingly cause[]” such items to be mailed, *id.* § 1461; “knowingly take[]” any such items from the mail for the purpose of circulating or disposing of them, *id.*; or “knowingly take[] or receive[]” such items from an express company or common carrier, *id.* § 1462. In the different contexts of obscenity and child pornography, courts of appeals have held that section 1461 applies to the act of the recipient who orders the nonmailable material and thereby “causes” it to be mailed. *See, e.g., United States v. Carmack*, 910 F.2d 748, 748 (11th Cir. 1990); *United States v. Johnson*, 855 F.2d 299, 305–06 (6th Cir. 1988). *But see Johnson*, 855 F.2d at 307–11 (Merritt, J., dissenting); *United States v. Sidelko*, 248 F. Supp. 813, 815 (M.D. Pa. 1965). As far as we know, however, these provisions have never been applied to prosecute the recipients of abortion- and contraception-related materials. Moreover, the court of appeals decisions we discuss below construed the relevant provisions of the Comstock Act to turn on the nature of the sender’s intent, not that of the recipient. Consistent with this practice, we focus on the sender throughout this memorandum. To the extent a recipient might be covered, however, our analysis herein would apply and therefore section 1461 would not prohibit that person from ordering or receiving the drugs if she does not intend that they be used unlawfully.

⁴ *See Mifeprex (Mifepristone) Tablets*, U.S. Food & Drug Admin. 2 (Mar. 2016), https://www.accessdata.fda.gov/drugsatfda_docs/label/2019/020687s022lbl.pdf (mifepristone label); *see also Mifeprex (Mifepristone) Information*, U.S. Food & Drug Admin., <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/mifeprex-mifepristone-information> (last updated Dec. 16, 2021).

⁵ For purposes of this opinion, we assume but do not decide that section 1461 could be constitutionally applied to the mailing of drugs intended to produce abortions. We also assume without deciding that state law, as well as federal, is relevant to the application of section 1461. In addition, we do not address here whether and under what circumstances the mailing of mifepristone or misoprostol might violate other federal laws. Finally, as

Application of the Comstock Act to Drugs That Can Be Used for Abortions

I.

The Comstock Act has a long and complex history. The original 1873 law was the handiwork of Anthony Comstock—“a prominent anti-vice crusader who believed that anything remotely touching upon sex was . . . obscene”—who successfully lobbied Congress and state legislatures in the nineteenth century to enact expansive laws “to prevent the mails from being used to corrupt the public morals.” *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 70 n.19 (1983) (omission in original) (quotation marks and citations omitted); *see also* Priscilla J. Smith, *Contraceptive Comstockery: Reasoning from Immorality to Illness in the Twenty-First Century*, 47 Conn. L. Rev. 971, 982–84 (2015). Originally entitled “An Act for the Suppression of Trade in, and Circulation of, obscene Literature and Articles of immoral Use,” Act of Mar. 3, 1873, ch. 258, 17 Stat. 598 (“1873 Act”), the Act is perhaps best known for having prohibited the distribution of a wide range of writings until courts and the Executive Branch determined that the Free Speech Clause of the First Amendment significantly limited the permissible reach of the law, *see, e.g., Bolger*, 463 U.S. at 69–75. In addition, the Act also included several restrictions on the conveyance of things designed to prevent conception or to produce abortion.⁶ Congress largely repealed the references to contraceptives in

you note, USPS Request at 3, some states have independently enacted laws to restrict the mailing of these drugs for abortion purposes within their jurisdiction. *See, e.g., Tex. Health & Safety Code* § 171.063(b-1). We do not here assess the possible effect of federal law on such state restrictions, other than to note our agreement with your view that the doctrine of intergovernmental immunity would preclude application of such state laws against USPS employees who are complying with their duties under federal law. *See Intergovernmental Immunity for the Department of Veterans Affairs and Its Employees When Providing Certain Abortion Services*, 46 Op. O.L.C. ___, at *1–5, *10 (Sept. 21, 2022).

⁶ The original 1873 Act consisted of five sections, three of which are relevant to this opinion. Section 1 of the Act prohibited, *inter alia*, the sale, distribution, or possession, in the District of Columbia and federal territories, of “any drug or medicine, or any article whatever, for the prevention of conception, or for causing *unlawful* abortion,” along with advertisements for contraceptives and abortion services and information about how to obtain them. 1873 Act § 1, 17 Stat. at 598–99 (emphasis added). Congress chose not to include that prohibition when it comprehensively enacted title 18 into positive law in 1948. *See Pub. L. No. 80-772*, § 21, 62 Stat. 683, 864 (1948) (repealing, *inter alia*, 18 U.S.C. § 512 (1946)).

Section 2 of the Act, which eventually became codified as section 1461, criminalized the mailing of, *inter alia*, “obscene, lewd, or lascivious” writings; “any article or thing

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1971. *See* Pub. L. No. 91-662, 84 Stat. 1973 (1971) (discussed *infra* Part I.C).

In its current form, section 1461, which is derived from section 2 of the 1873 Act, begins by declaring “[e]very obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance” to be “non-mailable matter” that “shall not be conveyed in the mails or delivered from any post office or by any letter carrier.” 18 U.S.C. § 1461. The next clauses declare nonmailable “[e]very article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; and [e]very article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion, or for any indecent or immoral purpose.” *Id.*; *see also* 39 U.S.C. § 3001(a) (likewise declaring such matter to be “nonmailable”). Section 1461 further makes it a felony to “knowingly use[] the mails for the mailing, carriage in the mails, or delivery” of any such things, or to “knowingly cause[]” them “to be delivered by mail according to the direction thereon.” 18 U.S.C. § 1461. In addition, 18 U.S.C. § 1462 imposes two other, related prohibitions: it makes it unlawful to bring those same things “into the United States, or any place subject to the jurisdiction thereof,” and it prohibits the knowing use of “any

intended or adapted for any indecent or immoral use or nature”; and “any article or thing designed or intended for the prevention of conception or procuring of abortion.” 1873 Act § 2, 17 Stat. at 599. Before Congress enacted title 18 into positive law in 1948, the provision that is now section 1461 was codified at 18 U.S.C. § 334 (1925–1926).

Section 3 of the 1873 Act prohibited all persons “from importing into the United States” any of the “hereinbefore-mentioned articles or things”—referring to the items prohibited by sections 1 and 2. 1873 Act § 3, 17 Stat. at 599. One year later, *see* Act of June 20, 1874, ch. 333, 18 Stat. pt. 3, at 113–14, Congress codified section 3 of the Comstock Act as section 2491 of the Revised Statutes and, in doing so, replaced the section’s reference to the “hereinbefore-mentioned articles or things” with a list of articles and things pulled from the other provisions of the Comstock Act, *see* Rev. Stat. § 2491 (1st ed. 1875), 18 Stat. pt. 1, at 460; *see also* Rev. Stat. § 2491 (2d ed. 1878), 18 Stat. pt. 1, at 457. In supplying content to these words, Congress prohibited the importation of articles or things “for causing unlawful abortion,” reflecting the language of section 1 of the original Comstock Act. Rev. Stat. § 2491 (1st ed. 1875), 18 Stat. pt. 1, at 460. Congress consistently retained the words “unlawful abortion” in follow-on versions of this restriction, including in subsequent Tariff Acts through 1930, after which the provision was codified at 19 U.S.C. § 1305.

Application of the Comstock Act to Drugs That Can Be Used for Abortions

express company or other common carrier or interactive computer service” for “carriage” of such items “in interstate or foreign commerce.”⁷

Over the course of the last century, the Judiciary, Congress, and USPS have all settled upon an understanding of the reach of section 1461 and the related provisions of the Comstock Act that is narrower than a literal reading might suggest. This construction occurred long before the Supreme Court’s decisions in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Roe* and thus was not dependent upon the Court’s recognition of constitutional rights regarding the prevention or termination of pregnancy. Beginning early in the twentieth century, federal courts construed the provisions not to prohibit all mailing or other conveyance of items that can be used to prevent or terminate pregnancy. By the middle of the century, the well-established, consensus interpretation was that none of the Comstock Act provisions, including section 1461, prohibits a sender from conveying such items where the sender does not intend that they be used unlawfully. USPS accepted that construction and informed Congress of it. On several occasions, Congress reenacted and amended the Comstock Act against the backdrop of the judicial precedent in a manner that ratified the federal courts’ narrowing construction.

A.

Since early in the twentieth century, federal courts have agreed that section 1461 and related Comstock Act provisions do not categorically prohibit the mailing or other conveyance of items designed, adapted, or intended for preventing or terminating pregnancy.

In 1915, in *Bours v. United States*, 229 F. 960 (7th Cir. 1915), the U.S. Court of Appeals for the Seventh Circuit reversed the conviction of a doctor who had mailed a letter addressing how a woman might procure an “operation” from him. The court noted that Congress enacted the provision that is now section 1461 pursuant to its “national power of controlling the mails” and held that, “[i]n applying the national statute to an alleged offensive use of the mails at a named place, it is immaterial what

⁷ The importation prohibition—along with 19 U.S.C. § 1305 (prohibiting the importation into the United States of “any drug or medicine or any article whatever for causing unlawful abortion”)—derives from section 3 of the original 1873 Act, *see* § 3, 17 Stat. at 599. The common-carrier prohibitions derive from an 1897 law extending the mailing prohibitions of the original Comstock Act to common carriers. *See* Act of Feb. 8, 1897, ch. 172, 29 Stat. 512.

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the local statutory definition of abortion is, what acts of abortion are included, or what excluded.” *Id.* at 964. The court further held that “[t]hough the letter of the statute would cover all acts of abortion,” under a “reasonable construction,” the statute should not be read to prohibit the mailing of advertisements for a procedure a doctor would perform in order “to save [the] life” of the woman. *Id.* Because the indictment had not drawn this distinction, the defendant had no opportunity to explain whether he had intended to perform the operation “only under such circumstances as would make it the duty of any reputable physician to perform the act.” *Id.* at 965. Therefore, the court reversed the judgment and remanded the case. *Id.* at 966.

Fifteen years later, in *Youngs Rubber Corp. v. C.I. Lee & Co.*, 45 F.2d 103 (2d Cir. 1930), the U.S. Court of Appeals for the Second Circuit also reasoned in dicta that the statute could not be construed as expansively as its language might suggest. *Youngs Rubber* was a trademark infringement suit in which the defendants argued that the plaintiff’s business was unlawful because it involved sending Trojan condoms to druggists for retail sale via the mail and common carriage, a practice that—according to the defendant—violated the Comstock Act. *Id.* at 108. “Taken literally,” the appeals court wrote, the Comstock Act’s “language would seem to forbid the transportation by mail or common carriage of anything ‘adapted,’ in the sense of being suitable or fitted, for preventing conception or for any indecent or immoral purpose, even though the article might also be capable of legitimate uses and the sender in good faith supposed that it would be used only legitimately.” *Id.* “Such a construction,” the court cautioned, “would prevent mailing to or by a physician of any drug or mechanical device ‘adapted’ for contraceptive or abortifacient uses, although the physician desired to use or to prescribe it for proper medical purposes.” *Id.* The court observed that New York law did not prohibit supplying such articles to physicians “or by their direction or prescription.” *Id.* at 109 (quotation marks omitted). Reasoning that “[t]he intention to prevent a proper medical use of drugs or other articles merely because they are capable of illegal uses is not lightly to be ascribed to Congress,” the court construed the statute’s contraception and abortion prohibitions to “requir[e] an intent on the part of the sender that the article mailed or shipped by common carrier be used for illegal contraception or abortion.” *Id.* at 108.

In 1933, the U.S. Court of Appeals for the Sixth Circuit embraced the same limiting construction of the Comstock Act. *Davis v. United States*,

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62 F.2d 473 (6th Cir. 1933), involved a defendant who was convicted of, among other things, the sale of “rubber sundries” to druggists that were delivered by common carrier. *Id.* at 474. Invoking the “rule of reasonable construction,” *id.* at 475, the *Davis* court reversed the conviction because the district court did not permit the admission of evidence that the defendant had sent the items intending that they be used for “treatment and prevention of disease” rather than to prevent conception, *id.* at 474. The court quoted with approval *Youngs Rubber*’s view that the statute should be read to “requir[e] an intent on the part of the sender that the article mailed or shipped by common carrier be used for illegal contraception or abortion or for indecent or immoral purposes,” *id.*, and noted that the “soundness of its reasoning commends itself to us,” *id.* at 475. The court accordingly rejected the district court’s conclusion that the statute “brings within the condemnation of each section articles or things that are capable of being used for the specified purposes without respect to their having a legitimate use, and without regard to the intent of the persons mailing [them],” *id.* at 474, holding instead that “intent that the articles . . . shipped in interstate commerce were to be used for condemned purposes is a prerequisite to conviction,” *id.* at 475.

Three years later, the Second Circuit revisited the issue and adopted *Youngs Rubber*’s dicta as a holding in *United States v. One Package*, 86 F.2d 737 (2d Cir. 1936). In that case, a New York gynecologist had imported vaginal pessaries from a Japanese sender who had asked the doctor to use them in her practice to assess whether they were useful for contraceptive purposes. *Id.* at 738. At the time, New York law prohibited the sale or provision of articles for the prevention of conception, but it included an exception for the provision of such things to physicians “who may in good faith prescribe their use for the cure or prevention of disease.” *Id.* (citing N.Y. Penal Law § 1145 (Consol. Laws, c. 40)). The doctor testified that she prescribed the items only where her patient had a health-related reason such that “it would not be desirable for a patient to undertake a pregnancy,” which the court of appeals apparently understood to fall within the exception under New York law that permitted physicians to provide patients with contraceptives for particular purposes. *Id.*⁸ The court quoted favorably, and at length, from the dicta in *Youngs Rubber*, and noted the accord of the Sixth Circuit in *Davis*. *Id.* at 738–39. It then

⁸ The court of appeals noted that the accuracy and good faith of the doctor’s testimony was “not questioned.” *One Package*, 86 F.2d at 738.

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dismissed the case because none of the relevant provisions should be read to prohibit the mailing or importation of items to prevent or terminate pregnancy with the intent that they be used for lawful purposes. *Id.* at 739–40. The court reasoned that it was appropriate to, in effect, imply the insertion of the adjective “unlawful,” which expressly modified the word “abortion” in some provisions of the Comstock Act, to modify the terms “prevention of conception” and “abortion” throughout the various provisions that derived from the Act. *Id.*⁹ The court elaborated:

[W]e are satisfied that this statute, as well as all the acts we have referred to, embraced only such articles as Congress would have denounced as immoral if it had understood all the conditions under which they were to be used. Its design, in our opinion, was not to prevent the importation, sale, or carriage by mail of things which might intelligently be employed by conscientious and competent physicians for the purpose of saving life or promoting the well being of their patients. The word “unlawful” would make this clear as to

⁹ The case involved the “prevention of conception” prong of the Tariff Act of 1930—a descendent provision of the original Comstock Act—which prohibited importing articles “for the prevention of conception or for causing *unlawful* abortion.” *One Package*, 86 F.2d at 738 (emphasis added) (quoting 19 U.S.C. § 1305(a) (1934)); *see also supra* note 6. The court noted that the original 1873 Comstock Act likewise used the adjective “unlawful” to modify “abortion” in one of its provisions (section 1—involving the sale and possession of abortifacients in federal territories) but not in others, and not as to articles for preventing conception. *One Package*, 86 F.2d at 739. The court reasoned that Congress could not reasonably have had the design to make the “unlawful” nature of the intended use an element of the offense under some of the abortion-related prohibitions but not others, or as to the importation of items used for abortion but not those used for contraception. *See id.* (“[I]n the Comstock Act, . . . the word ‘unlawful’ was sometimes inserted to qualify the word ‘abortion,’ and sometimes omitted. It seems hard to suppose that under the second and third sections articles intended for use in procuring abortions were prohibited in all cases while, under the first section, they were only prohibited when intended for use in an ‘unlawful abortion.’”). Instead, the court reasoned, the adjective “unlawful” must in effect be read to modify all of the prohibitions. *Id.*; *see also id.* at 740 (Learned Hand, J., concurring) (“[I]t is of considerable importance that the law as to importations should be the same as that as to the mails; we ought not impute differences of intention upon slight distinctions in expression.”). The *One Package* court’s analysis that the adjective “unlawful” should be read to modify all of the provisions of the Comstock Act is bolstered by the 1874 Congress’s understanding of the term “hereinbefore-mentioned articles” in section 3 of the Comstock Act to prohibit the import only of articles, drugs, or medicines “for causing unlawful abortion.” *See supra* note 6; Rev. Stat. § 2491 (1st ed. 1875), 18 Stat. pt. 1, at 460.

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articles for producing abortion, and the courts have read an exemption into the act covering such articles even where the word “unlawful” is not used. The same exception should apply to articles for preventing conception. . . . It seems unreasonable to suppose that the national scheme of legislation involves such inconsistencies and requires the complete suppression of articles, the use of which in many cases is advocated by such a weight of authority in the medical world.

Id.

The Second Circuit again reaffirmed this construction of the statute shortly thereafter in *United States v. Nicholas*, 97 F.2d 510 (2d Cir. 1938), which involved the Comstock Act’s prohibition on mailing information about contraception. Citing *Youngs Rubber* and *One Package*, the court in *Nicholas* noted: “We have twice decided that contraceptive articles may have lawful uses and that statutes prohibiting them should be read as forbidding them only when unlawfully employed.” *Id.* at 512.¹⁰ Applying this reading, the court held that USPS was required to deliver a magazine containing contraception-related information to a magazine editor who might then distribute it to persons such as physicians who could use the information lawfully. *Id.* The court further held that USPS should detain a book containing such information when it was addressed to an individual “about whom nothing” was known “except that he was not a physician,” *id.* at 511, but allowed for the recipient to “prove whether he is among the privileged classes” whose possession of the book “would be lawful,” *id.* at 512.

¹⁰ Although *Nicholas* described the relevant inquiry as being whether the articles were “unlawfully employed,” rather than whether the sender *intended* that they be used unlawfully—the touchstone the court had adopted in *Youngs Rubber* and *One Package*—this difference in phrasing does not reflect a departure relevant to our analysis. The court’s invocation of those two earlier decisions without qualification, as well as its further citation to *Davis*, indicates that it did not intend to deviate from the interpretation of the Act that the court had adopted in those decisions. Both the Historical and Revision Note to section 1461 and subsequent federal decisions understood *Nicholas* similarly. See 18 U.S.C. § 1461 (Historical and Revision Note) (observing that *Nicholas* followed “[t]he same rule” as *Davis*, which held that “the *intent* of the person” that a mailing “be used for condemned purposes was necessary for a conviction” (emphasis added)); *United States v. Gentile*, 211 F. Supp. 383, 385 n.5 (D. Md. 1962) (citing, *inter alia*, *Nicholas* for the proposition that “contraceptive devices [must be] shipped and received with intent that they be used for *illegal* contraception or abortion”).

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In 1944, the U.S. Court of Appeals for the D.C. Circuit also narrowly construed the statute in the context of a report about contraceptive materials that a consumer group had published and mailed to individuals who submitted a signed certificate attesting, “I am married and use prophylactic materials on the advice of a physician.” *Consumers Union of United States, Inc. v. Walker*, 145 F.2d 33, 33 (D.C. Cir. 1944). The appeals court explained that it was “inclined to follow the interpretation [of the Comstock Act] which has been adopted in other circuits,” citing to *Nicholas, Davis, Youngs Rubber*, and *One Package*. *Id.* at 35 & n.11. It therefore concluded that “Congress did not intend to exclude from the mails properly prepared information intended for properly qualified people,” and held that the report “was proper in character within the meaning of those decisions.” *Id.* at 35.

Subsequent judicial discussions of the relevant Comstock Act provisions recognized the narrowing construction upon which the courts of appeals had converged. *See, e.g., United States v. Gentile*, 211 F. Supp. 383, 385 n.5 (D. Md. 1962) (“It seems clear under the authorities that in order to make out an offense under this paragraph the Government should be required to allege and prove that contraceptive devices are shipped and received with intent that they be used for *illegal* contraception or abortion or for indecent or immoral purposes.” (citing *Youngs Rubber, Davis*, and *Nicholas*)); *United States v. H.L. Blake Co.*, 189 F. Supp. 930, 934–35 (W.D. Ark. 1960) (“It would seem reasonable to give the word ‘adapted’ a more limited meaning than that above suggested and to construe the whole phrase ‘designed, adapted or intended’ as requiring an intent on the part of the sender that the article mailed or shipped by common carrier be used for illegal contraception or abortion or for indecent or immoral purposes.” (quoting *Youngs Rubber*, 45 F.2d at 108)); *United States v. 31 Photographs*, 156 F. Supp. 350, 357 (S.D.N.Y. 1957) (characterizing the appellate court decisions as “upholding importation of contraceptives and books dealing with contraception when sought to be brought into the country for purposes of scientific and medical research,” such that “only contraceptives intended for ‘unlawful’ use were banned” (citing, *inter alia*, *One Package, Nicholas, Davis*, and *Walker*)); *see also Poe v. Ullman*, 367 U.S. 497, 546 n.12 (1961) (Harlan, J., dissenting) (“[B]y judicial interpretation . . . the absolute prohibitions of the [Comstock] law were qualified to exclude professional medical use.” (citing *Youngs Rubber, Davis*, and *One Package*)).

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As the court in one of those later cases noted, the analysis in *Youngs Rubber* “has been cited many times and has become the law to be applied to the facts where the question of a violation of the statute . . . is before the court.” *H.L. Blake Co.*, 189 F. Supp. at 934. Under that “law to be applied,” the court explained, “it is well established that the defendants should not be convicted unless it is established beyond a reasonable doubt that at the time they mailed the sample packages of prophylactics . . . they intended them to ‘be used for illegal contraception.’” *Id.* at 935 (quoting *Youngs Rubber*, 45 F.2d at 108).¹¹

B.

Congress has amended the Comstock Act’s provisions numerous times since the federal courts’ decisions in *Bours*, *Youngs Rubber*, *Davis*, *One Package*, *Nicholas*, and *Walker*, each time perpetuating the wording of the Act’s abortion-related provisions. Moreover, as we explain in greater detail below, USPS accepted the courts’ narrowing construction of the Act in administrative rulings, and it informed Congress of the agency’s acceptance of that construction in connection with Congress’s amendment of the contraception-related provisions of the Comstock Act.

We conclude that Congress’s repeated actions, taken “[a]gainst this background understanding in the legal and regulatory system,” *Texas Dep’t of Housing & Cmty. Affs. v. Inclusive Cmty. Project*, 576 U.S. 519, 536 (2015), ratified the Judiciary’s settled narrowing construction. *See id.* (“If a word or phrase has been . . . given a uniform interpretation by inferior courts . . . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation.” (omissions in original) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpre-*

¹¹ The leading cases that established this accepted construction—*Youngs Rubber*, *One Package*, and *Davis*—each involved items that could be used to prevent conception rather than to produce abortion. Nevertheless, the canonical passage from *Youngs Rubber*, repeated in each of the cases and in others thereafter, referred both to items designed to prevent conception and to those designed to induce abortions. Moreover, the court in *One Package* went to lengths to explain that all of the relevant Comstock Act prohibitions should be read consistently to require proof of a sender’s intent to facilitate unlawful downstream use. *See supra* note 9; *see also Bours*, 229 F. 960 (construing narrowly the prohibition on mailing of information about how to obtain abortions). We therefore agree with your assessment that “there is no apparent reason why the case-law principles applicable to contraceptive articles (formerly) under Section 1461 would not also apply to abortion-inducing articles under the same provision.” USPS Request at 3 n.3.

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tation of Legal Texts 322 (2012))); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change.”); *cf. Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (“When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.”); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 244 n.11 (2009) (holding that when Congress amended the Individuals with Disabilities Education Act without altering the text of a provision that the Supreme Court had previously interpreted, Congress “implicitly adopted [the Court’s] construction of the statute”).

The conclusion that Congress ratified the longstanding judicial view of the Comstock Act is strongly reinforced by the Historical and Revision Note that was included in the 1945 report of the House Committee on the Revision of the Laws¹² when Congress enacted title 18 of the U.S. Code into positive law.¹³ That Note subsequently was appended to the official U.S. Code entries for sections 1461 and 1462. *See* 18 U.S.C. § 1461 (Historical and Revision Note).¹⁴ It specifically “invited” the “attention of Congress” to the courts of appeals’ decisions in *Youngs Rubber, Davis, Nicholas*, and *One Package*, and quoted at length from *Youngs Rubber*, including its conclusion that the relevant provisions of the statute should be construed to require “an intent on the part of the sender that the article

¹² *See* H.R. Rep. No. 79-152, at A96–97 (1945).

¹³ *See* Pub. L. No. 80-772, 62 Stat. at 768.

¹⁴ The Historical and Revision Notes were written by a staff of experts hired by Congress to revise the U.S. Code in the 1940s, including the editorial staffs of the West and Thompson publishing companies, the former Chief of the Appellate Section of the Department of Justice Criminal Division, and other contributors from both inside and outside of government. *See* H.R. Rep. No. 79-152, at 1–7 (1945) (describing in detail this revision process and noting that “[t]he [House] Committee on Revision of the Laws has exercised close and constant supervision over this work through its general counsel . . . and its special counsel”). The Supreme Court has discussed or relied on Historical and Revision Notes numerous times, most frequently during the middle of the twentieth century. *See, e.g., Ex parte Collett*, 337 U.S. 55, 65–71 (1949) (discussing a revision note to 28 U.S.C. § 1404 and concluding that the revision note was highly significant in determining the meaning of section 1404(a)); *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 254–55 (1953); *Muniz v. Hoffman*, 422 U.S. 454, 471–73 (1975).

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mailed or shipped by common carrier be used for illegal contraception or abortion.” *Id.*¹⁵

Congress subsequently amended the Comstock Act four times (in 1955, 1958, 1971, and 1994) without changing the language in any respect that suggested disagreement with the well-established narrowing interpretation that the Historical and Revision Note had specifically brought to its attention. Congress made the third of these amendments in 1971—removing the Act’s references to contraceptives—after being informed by the Post-

¹⁵ The Note’s complete discussion of the court of appeals decisions is as follows:

The attention of Congress is invited to the following decisions of the Federal courts construing this section and section 1462 of this title.

In *Youngs Rubber Corporation, Inc. v. C. I. Lee & Co., Inc.*, C.C.A. 1930, 45 F. 2d 103, it was said that the word “adapted” as used in this section and in section 1462 of this title, the latter relating to importation and transportation of obscene matter, is not to be construed literally, the more reasonable interpretation being to construe the whole phrase “designed, adapted or intended” as requiring “an intent on the part of the sender that the article mailed or shipped by common carrier be used for illegal contraception or abortion or for indecent or immoral purposes.” The court pointed out that, taken literally, the language of these sections would seem to forbid the transportation by mail or common carrier of anything “adapted,” in the sense of being suitable or fitted, for preventing conception or for any indecent or immoral purpose, “even though the article might also be capable of legitimate uses and the sender in good faith supposed that it would be used only legitimately. Such a construction would prevent mailing to or by a physician of any drug or mechanical device ‘adapted’ for contraceptive or abortifacient uses, although the physician desired to use or to prescribe it for proper medical purposes. The intention to prevent a proper medical use of drugs or other articles merely because they are capable of illegal uses is not lightly to be ascribed to Congress. Section 334 [this section] forbids also the mailing of obscene books and writings; yet it has never been thought to bar from the mails medical writings sent to or by physicians for proper purposes, though of a character which would render them highly indecent if sent broadcast to all classes of persons.” In *United States v. Nicholas*, C.C.A. 1938, 97 F. 2d 510, ruling directly on this point, it was held that the importation or sending through the mails of contraceptive articles or publications is not forbidden absolutely, but only when such articles or publications are unlawfully employed. The same rule was followed in *Davis v. United States*, C.C.A. 1933, 62 F. 2d 473, quoting the obiter opinion from *Youngs Rubber Corporation v. C. I. Lee & Co.*, *supra*, and holding that the intent of the person mailing a circular conveying information for preventing conception that the article described therein should be used for condemned purposes was necessary for a conviction; also that this section must be given a reasonable construction. (See also *United States v. One Package*, C.C.A. 1936, 86 F. 2d 737.)

18 U.S.C. § 1461 (Historical and Revision Note).

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master General that both the federal courts and USPS had adopted this narrowing interpretation. *See* H.R. Rep. No. 91-1105, at 3–4 (1970).¹⁶ Moreover, we have found no evidence that Congress disapproved of the interpretation.¹⁷ Indeed, in 2007 Congress legislated regarding the FDA’s treatment of mifepristone in a manner consistent with the understanding that the Comstock Act does not categorically prohibit the covered modes of conveying abortion-inducing drugs.¹⁸

Congress’s several actions “perpetuating the wording” of the Comstock Act’s abortion provisions against the backdrop of a well-established, settled judicial construction that was brought to Congress’s attention

¹⁶ *See supra* note 11 (explaining that the courts of appeals’ rationales applied equally to conveyance of items to prevent conception and to produce abortion).

¹⁷ The House report stated at the outset of its discussion that “[e]xisting statutes completely prohibit the importation, interstate transportation, and mailing of contraceptive materials, or the mailing of advertisement or information concerning how or where such contraceptives may be obtained or how conception may be prevented.” H.R. Rep. No. 91-1105, at 2. That introductory remark, however, plainly was a reference to the literal text of the provisions, as opposed to their settled meaning. The report proceeded to convey the Postmaster General’s description of the settled judicial and administrative narrowing construction of the statute, noting that it was in tension with the text of the contraception provisions, and neither the report nor any evidence in the legislative record of which we are aware expresses the committee’s disagreement with that construction.

¹⁸ In approving a mifepristone product for certain abortions in 2000, the FDA imposed certain restrictions on distribution as a condition of approval, pursuant to its regulatory authority. *See* Letter for Sandra P. Arnold, Vice President, Population Council, from Ctr. for Drug Evaluation & Rsch., U.S. Food & Drug Admin., *Re: NDA 20-687* (Sept. 28, 2000). In the Food and Drug Administration Amendments Act of 2007 (“FDAAA”), Congress provided that any such restrictions, identified in the FDAAA as “elements to assure safe use,” were deemed to be a “Risk Evaluation and Mitigation Strategy” that would continue to be required under the new statutory regime unless and until the FDA determined that modifications were necessary. *See* Pub. L. No. 110-85, tit. IX, § 909(b), 121 Stat. 823, 950–51 (2007). In the debate preceding this amendment, critics of the FDA’s 2000 approval of mifepristone for abortion purposes acknowledged that the legislation would apply to that mifepristone approval. *See* 153 Cong. Rec. S5765 (daily ed. May 9, 2007) (statement of Sen. Coburn); 153 Cong. Rec. S5469–70 (daily ed. May 2, 2007) (statement of Sen. DeMint). Yet neither those critics nor anyone else in the congressional debate mentioned the Comstock Act, even though it would have been natural to assume that the FDA’s 2000 approval had resulted in the distribution of mifepristone to certified physicians through the mail or by common carrier. Congress’s decision to carry forward the FDA’s regulatory conditions for mifepristone without addressing such modes of distribution suggests that Congress did not understand the Comstock Act to invariably prohibit the conveyance by mail or common carrier of drugs intended to induce abortions.

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establishes Congress's acceptance of that narrowing construction. *Inclusive Cmty's. Project*, 576 U.S. at 536. That construction, as noted, does not prohibit the mailing of an item that is designed, adapted, or intended for producing abortion in the absence of an intent by the sender that the item will be used unlawfully.

C.

USPS has accepted the settled judicial construction of the Comstock Act—and reported as much to Congress.

In 1951, the Solicitor of the Post Office Department, Roy C. Frank, wrote to an Arizona postmaster concerning a Planned Parenthood clinic's mailing of diaphragms and vaginal jellies to its patients "for medicinal purposes." *Contraceptive Matter—Mailings—Physicians*, 9 Op. Sol. P.O.D. 47 (1951) (No. 40). Citing "the decisions of the Federal courts," Frank opined that a "mailing of contraceptives by a physician to a patient would not be regarded as a violation" of the Comstock Act. *Id.* Similarly, in 1963, when the St. Louis Postmaster detained 490 "contraceptive devices and substances," the USPS General Counsel informed him that he should "dispatch" those items because "there is no available evidence that the items in each of these parcels were being distributed for unlawful purposes." Letter for Harriet F. Pilpel, Greenbaum, Wolff & Ernst, from Louis J. Doyle, General Counsel, Post Office Department (Oct. 24, 1963) (on file with the Smith College Libraries). In a letter to the sender Emko Company's counsel, the USPS General Counsel added that "should we obtain evidence in the future that [Emko] is distributing contraceptive devices and substances for unlawful purposes we will again look into the matter." *Id.*

Of particular importance, when Congress was considering amendments to the Comstock Act in 1970, USPS brought to Congress's attention its acceptance of the Judiciary's narrowing construction. The Postmaster General submitted a statement to Congress about his agency's understanding that "the delivery by mail of contraceptive information or materials has by court decisions, and administrative rulings based on such decisions, been considered proper in cases where a lawful and permissive purpose is present." See H.R. Rep. No. 91-1105, at 3-4 (1970). As a result, "[t]he lawful mailing . . . of contraceptive articles . . . is dependent on the interpretation given to the intended purpose." *Id.* at 4. The Postmaster General noted that "[w]hat is a lawful purpose within the meaning

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of the interpretations given, though vaguely identifiable, has with the passage of time also been considerably broadened” and that “many States . . . have adopted positive legislation to authorize or encourage public family planning services.” *Id.* As a result, by the time the Postmaster General wrote to Congress in 1970—after the Court’s *Griswold* decision holding unconstitutional a state prohibition on the use of contraception—“it [was] quite clear that the cited law as presently written [was] unenforceable.” *Id.*

The House Ways and Means Committee included the Postmaster General’s statement in its report on the draft amendment and noted that “[i]n view of” that statement—along with statements supporting the draft amendment by the Departments of Labor and of Health, Education, and Welfare—the Committee on Ways and Means was “unanimous in recommending enactment of H.R. 4605.” *Id.* Congress then amended the Comstock Act to repeal most of the Act’s applications to contraceptives. *See* Pub. L. No. 91-662, 84 Stat. at 1973–74.¹⁹

* * * * *

Thus, before the Court’s recognition of a constitutional right to contraception in *Griswold* and to abortion in *Roe*, the Judiciary, Congress, and USPS itself all understood section 1461 and the related provisions of the Comstock Act not to prohibit the conveyance of articles intended for preventing conception or producing an abortion where the sender lacks the intent that those items should be used unlawfully. We further note that, shortly after Congress amended the Comstock Act in 1971 to eliminate the restrictions on contraceptives, the Supreme Court’s decision in *Roe* effectively rendered unenforceable the restrictions on articles “designed, adapted, or intended for producing abortion.” For the past half century, courts have not had the occasion to elaborate further on the meaning of the Comstock Act as it relates to abortion, including regarding

¹⁹ Although the 1971 Congress eliminated the preexisting broad prohibitions on sending contraception-related articles and information using the mails or common carriage, it added a narrower prohibition designed to prevent the mailing of unsolicited contraceptive items and advertising to private homes. *See* 39 U.S.C. § 3001(e); *see also* 18 U.S.C. § 1461 (making it a crime to knowingly use the mails to mail anything deemed “nonmailable” in section 3001(e)). In *Bolger*, the Supreme Court held that the ban on unsolicited advertisements of contraceptives violates the First Amendment. 463 U.S. at 61.

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the sources of law that inform whether an abortion would be “unlawful” for purposes of the established construction of the Act.

II.

In Part I we demonstrated that, in accord with the prevailing judicial construction Congress ratified, section 1461 does not prohibit the mailing of articles that can be used to produce abortion, including mifepristone and misoprostol, where the sender lacks the intent that those items should be used unlawfully.²⁰ We turn now to address the many circumstances in which a sender of these drugs typically will lack an intent that they be used unlawfully.

Federal law does not prohibit the use of mifepristone and misoprostol for producing abortions. Indeed, the FDA has determined the use of mifepristone in a regimen with misoprostol to be safe and effective for the medical termination of early pregnancy. And, to the extent relevant, these drugs can serve important medical purposes and recipients in every state can use them lawfully in some circumstances. This is true even when the drugs would be delivered to an address in a jurisdiction with restrictive abortion laws, because women who receive the drugs in all fifty states may, at least in some circumstances, lawfully use mifepristone and misoprostol to induce an abortion.

We note that those sending or delivering mifepristone and misoprostol typically will lack complete knowledge of how the recipients intend to use them and whether that use is unlawful under relevant law. Therefore, even when a sender or deliverer of mifepristone or misoprostol, including USPS, knows that a package contains such drugs—or indeed that they will be used to facilitate an abortion—such knowledge alone is not a sufficient basis for concluding that section 1461 has been violated. We also recognize that USPS may have reason to consider adopting uniform policies or practices regarding the mailing of mifepristone or misoprostol. *Cf. Smith v. United States*, 431 U.S. 291, 304 n.10 (1977) (“[T]he nationwide character of the postal system argues in favor of a nationally uniform construction of [section] 1461.”).

²⁰ See *supra* note 3 (noting that the same test would apply to section 1462 and to recipients of the drugs to the extent those persons might be amenable to prosecution).

46 Op. O.L.C. __ (Dec. 23, 2022)

We have not undertaken the challenging task of a detailed review of state abortion laws, but we can offer some illustrative uses for mifepristone and misoprostol that the law of a given state would not prohibit:

- First, in most states—where a majority of the U.S. population lives—abortion continues to be lawful until at least twenty weeks’ gestation. It is very unlikely that someone sending validly prescribed mifepristone or misoprostol into such states will intend for them to be used unlawfully.
- Second, even some states that in recent months have enacted or begun to enforce more restrictive abortion laws continue to allow abortion for at least some number of weeks of pregnancy. Use of mifepristone and misoprostol to terminate a pregnancy that falls within that period would be lawful.
- Third, thus far, no state that has enacted or newly begun to enforce restrictions on abortion in the wake of *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022), prohibits abortions that are necessary to preserve the life of the woman.²¹ Many medical conditions that make pregnancy potentially life-threatening—for instance, certain heart conditions, pulmonary hypertension, or Marfan Syndrome²²—are known in the first trimester, when women most commonly use mifepristone and misoprostol to induce an abortion. Such a use of these drugs to terminate a life-threatening pregnancy would be lawful.
- Fourth, some state abortion restrictions also include exceptions for cases of rape or incest, to protect the health of the woman, or where there are severe fetal anomalies. The use of mifepristone or miso-

²¹ See *Dobbs*, 142 S. Ct. at 2305 n.2 (Kavanaugh, J., concurring) (“Abortion statutes traditionally and currently provide for an exception when an abortion is necessary to protect the life of the mother.”); see also *Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting) (“[I]f [a state] statute were to prohibit an abortion even where the mother’s life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective . . .”).

²² See, e.g., Inst. of Med., Clinical Prevention Services for Women: Closing the Gaps 103–04 (2011); see also *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 737 (2014) (Kennedy, J., concurring) (noting that “[t]here are many medical conditions for which pregnancy is contraindicated”).

Application of the Comstock Act to Drugs That Can Be Used for Abortions

prostaglandin to produce an abortion in such cases would therefore be lawful.

- Fifth, some states that regulate the conduct of certain actors involved in abortions do not make it unlawful for the woman herself to abort her pregnancy. In those contexts, section 1461 might not prohibit the mailing of mifepristone and misoprostol to a woman in a state with restrictions on abortion, even if the sender does so with the intent that the woman use the drugs to produce an abortion.
- Sixth, even if a state prohibits a pregnant person from ingesting mifepristone or misoprostol for the purpose of inducing an abortion, such an individual has a constitutional right to travel to another state that has not prohibited that activity and to ingest the drugs there.²³ Someone sending a woman these drugs is unlikely to know where she will use them, which might be in a state in which such use is lawful.
- Seventh, federal agencies provide abortion services in some circumstances without regard to contrary state law.²⁴ Mailings of abortion

²³ See *Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, J., concurring) (“[M]ay a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel.”); *id.* (referring to the question as “not especially difficult”); see also *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) (explaining that Virginia could not “prevent its residents from traveling to New York to obtain [abortion] services or . . . prosecute them for going there” (citing *United States v. Guest*, 383 U.S. 745, 757–59 (1966))).

²⁴ The Department of Veterans Affairs (“VA”), for example, recently has begun providing abortions to veterans and certain other VA beneficiaries without regard to state law when the life or health of the woman would be endangered if the pregnancy were carried to term or the pregnancy is the result of an act of rape or incest. See Reproductive Health Services, 87 Fed. Reg. 55,287, 55,288 (Sept. 9, 2022). “[S]tates may not restrict VA and its employees acting within the scope of their federal authority from providing abortion services as authorized by federal law, including VA’s rule.” *Intergovernmental Immunity for the Department of Veterans Affairs and Its Employees When Providing Certain Abortion Services*, 46 Op. O.L.C. ___, at *10; see also 87 Fed. Reg. at 55,294 (noting that state and local laws, including criminal laws, that “restrict[], limit[], or otherwise impede[] a VA professional’s provision of care permitted by” this new rule “would be preempted” (citing 38 C.F.R. § 17.419(b))). Also, the Department of Defense (“DoD”) has for many years provided service members, dependents, and other beneficiaries of DoD health care services with abortion services when a pregnancy is the result of rape or incest or when continuing the pregnancy would endanger the woman’s life, and DoD has indicated it will continue to do so without regard to contrary state laws. See

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medications intended to be used pursuant to these federal authorities would be lawful under section 1461, because contrary state law could not constitutionally be applied.

- Finally, individuals use mifepristone and misoprostol for medical purposes other than to induce abortions and the legality of those uses would remain unaffected by state restrictions on abortion. For instance, the same dosages of mifepristone and misoprostol that are used for medication abortion can be used to treat a miscarriage,²⁵ and misoprostol is commonly prescribed for the prevention and treatment of gastric ulcers.²⁶

Thus, no matter where the drugs are delivered, a variety of uses of mifepristone and misoprostol serve important medical purposes and are lawful under federal and state law. Accordingly, USPS could not reasonably assume that the drugs are nonmailable simply because they are being sent into a jurisdiction that significantly restricts abortion. Nor would such an assumption based solely on the recipient's address be reasonable even if it is apparent that some women in a particular state are using the drugs in question in violation of state law. *Cf. Youngs Rubber*, 45 F.2d at 110 (although the volume of the plaintiff's sales nationwide justified an inference that the drug stores to which the condoms were being delivered must have been selling at least some of them for purposes that were prohibited under state law—"and that plaintiff must know this"—that was insufficient to conclude that the company intended such illegal conduct by the recipients).

In conclusion, section 1461 does not prohibit the mailing of mifepristone or misoprostol where the sender lacks the intent that the recipient will use them unlawfully. And in light of the many lawful uses of mifepristone and misoprostol, the fact that these drugs are being mailed to a

Memorandum for Senior Pentagon Leadership from Gilbert R. Cisneros, Jr., Under Secretary of Defense for Personnel and Readiness, Department of Defense, *Re: Ensuring Access to Essential Women's Health Care Services for Service Members, Dependents, Beneficiaries, and Department of Defense Civilian Employees* (June 28, 2022).

²⁵ See, e.g., Honor Macnaughton, Melissa Nothnagle & Jessica Early, *Mifepristone and Misoprostol for Early Pregnancy Loss and Medication Abortion*, 103 Am. Fam. Physician 473, 475 (Apr. 15, 2021).

²⁶ See *Cytotec Misoprostol Tablets*, U.S. Food & Drug Admin. 5–6 (Aug. 2016), https://www.accessdata.fda.gov/drugsatfda_docs/label/2018/019268s051lbl.pdf (misoprostol label).

Application of the Comstock Act to Drugs That Can Be Used for Abortions

jurisdiction that significantly restricts abortion is not a sufficient basis for concluding that the mailing violates section 1461.²⁷

CHRISTOPHER H. SCHROEDER

Assistant Attorney General

Office of Legal Counsel

²⁷ While this request was pending, we received a similar request from the Department of Health and Human Services (“HHS”) regarding the Comstock Act in connection with the Food and Drug Administration’s Risk Evaluation and Mitigation Strategy for mifepristone. We conveyed our conclusions by e-mail to HHS on December 19, 2022, and we noted there that this memorandum was forthcoming. E-mail for Samuel Bagenstos, General Counsel, HHS, from Christopher H. Schroeder, Assistant Attorney General, Office of Legal Counsel, *Re: Advice Regarding Comstock* (Dec. 19, 2022, 8:31 PM).



Menu

#WECOUNT**#WeCount Report, April 2022 to December 2025**

April 2022 to December 2025

PUBLISHED: JUNE 10, 2026

#WeCount is a reporting effort that captures monthly shifts in the volume of abortions provided within the formal US healthcare system, nationally and by state, following the *Dobbs v Jackson Women's Health Organization* Supreme Court decision to overturn *Roe v Wade*. This report includes data from April 2022 to December 2025.

#WeCount data explorer**Categories & States**

All US states

Date Range

Apr 2022

Start

Dec 2025

End

RESET

Plot

Table

**EXHIBIT****2**



Key findings

Across the US, **1.13 million abortions** were provided in the formal healthcare system in 2025.

The number of abortions **remains higher than before *Dobbs***.

The monthly average number of abortions was **slightly higher in 2025 than it was in 2024**.

Nationally, the majority of abortions occurred **in person**; the number of in-person abortions decreased slightly between 2024 and 2025.

The number of abortions provided via telehealth has increased; across 2025, over **300,000** abortions were provided via telehealth.

By December 2025, **29%** of US abortions were provided via telehealth.

Shield laws continue to facilitate abortion access, with nearly 15,000 abortions per month provided under shield laws by December 2025.

Download the data

The following resources are available for download:

[Report data tables](#) [.xlsx]

[Summary slides](#) with national and 51 state-level findings [.pptx]

[Report narrative](#) [.pdf]

[Press release](#) [.pdf]

Contact WeCount@SocietyFP.org if you would like to explore the data via additional formats.

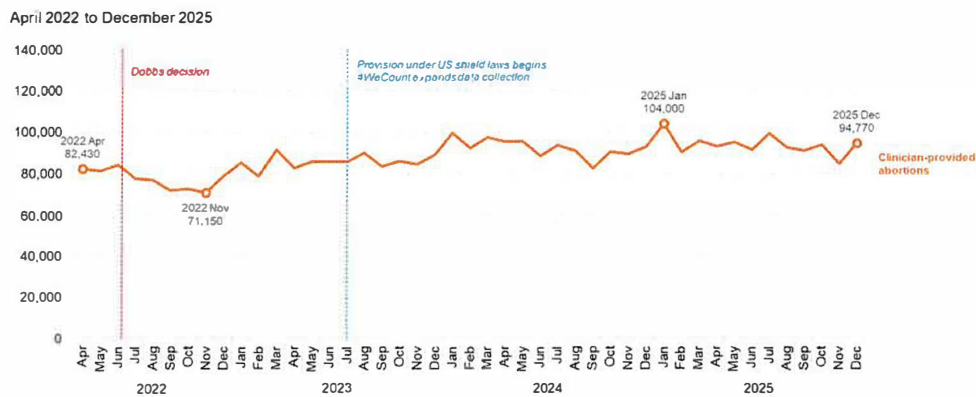
Please use the citation below to cite this #WeCount report.

National findings

Abortions in the US have increased since Dobbs

The monthly number of abortions increased gradually over time in the US since 2022. The monthly total peaked in January 2025, reaching 104,000 abortions in a single month.

Abortions in the US have increased since *Dobbs*



Source: [Society of Family Planning](#), June 2026

US abortions totaled 1.13 million in 2025

Across 2025, a total of 1,126,760 abortions were provided in the US healthcare system.

US abortions totaled 1.13 million in 2025

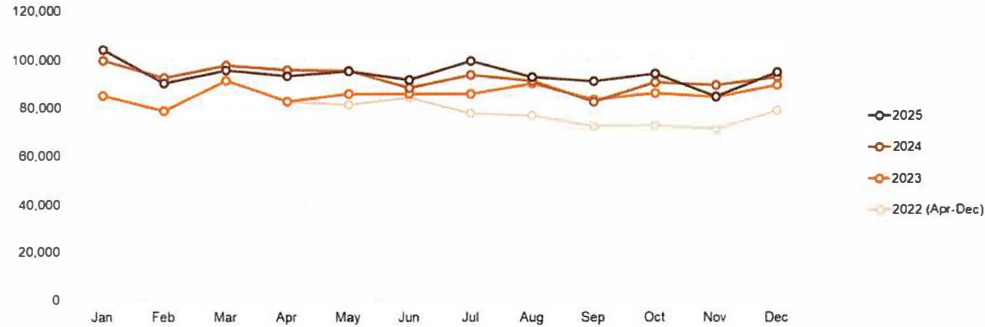


Source: [Society of Family Planning](#), June 2026

In addition to some monthly fluctuation, abortion volume has increased year over year. For most months, 2025 abortion counts were similar to 2024.

Abortion volume fluctuates from month to month, and has increased year over year

April 2022 to December 2025, year over year



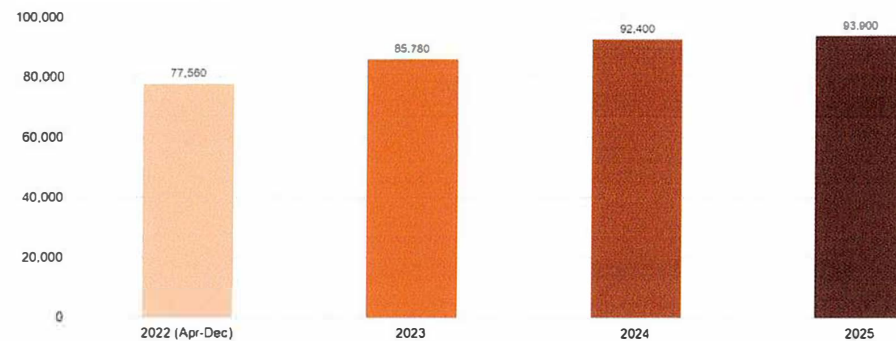
Source: [Society of Family Planning](#), June 2026

Growth in the monthly number of abortions has slowed

The monthly average number of abortions climbed from 77,560 in 2022, to 85,780 in 2023, to 92,400 in 2024, to 93,900 in 2025. Note that the 2022 monthly average reflects a partial year of data.

Growth in the monthly number of abortions has slowed

Average monthly number of abortions, 2022-2025



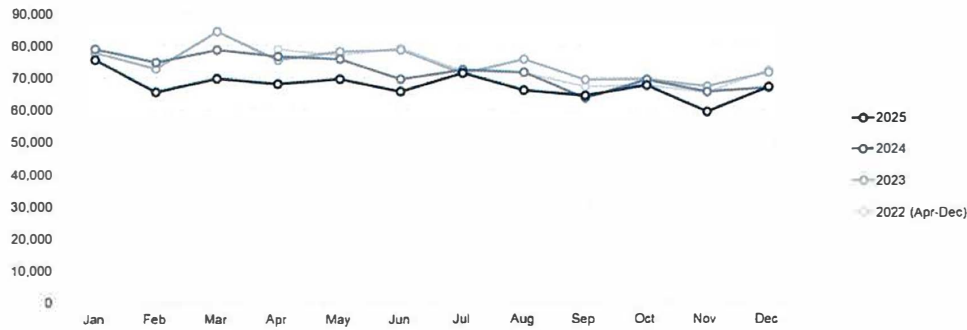
Source: [Society of Family Planning](#), June 2026

In-person abortion volume fluctuates from month to month, and was lower in 2025 than in 2024

In addition to some monthly fluctuation, in-person abortion volume has decreased slightly, with monthly numbers in 2025 lower than in 2024. Monthly abortion volume was typically higher in the first half of each year.

2025 than in 2024

April 2022 to December 2025, year over year



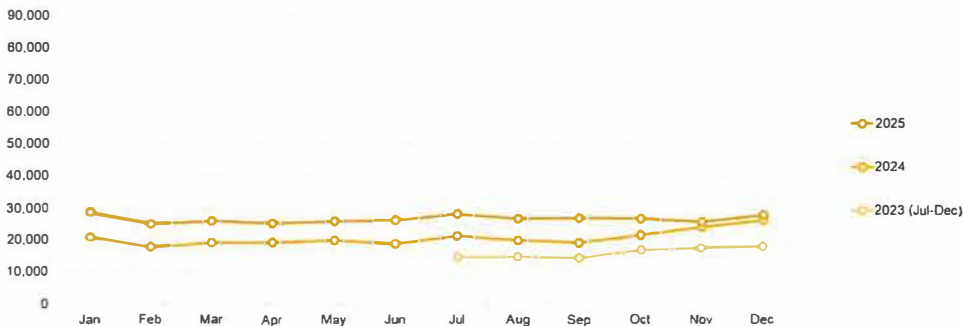
Source: [Society of Family Planning](#), June 2026

Telehealth abortion volume has increased year over year

Telehealth abortion volume does not fluctuate substantially from month to month and has increased year over year.

Telehealth abortion volume has increased year over year

July 2023 to December 2025, year over year



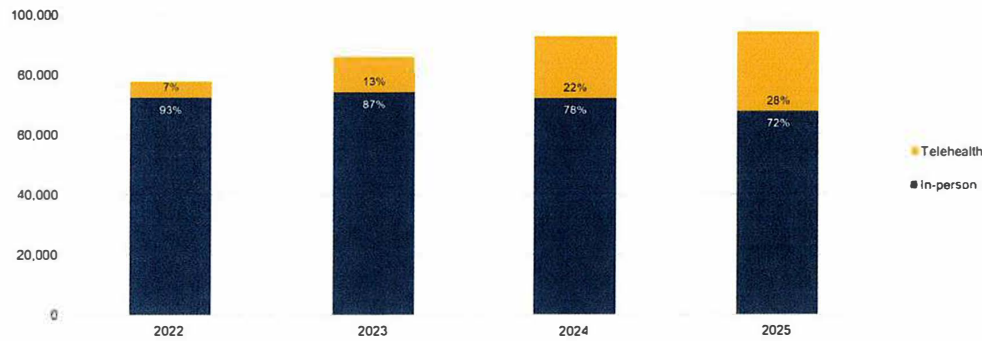
Source: [Society of Family Planning](#), June 2026

Telehealth findings

In 2025, 28% of abortions were provided via telehealth

The proportion of abortions provided via telehealth has increased each year between 2022 and 2025.

Proportion of annual abortions provided in-person vs telehealth, 2022-2025



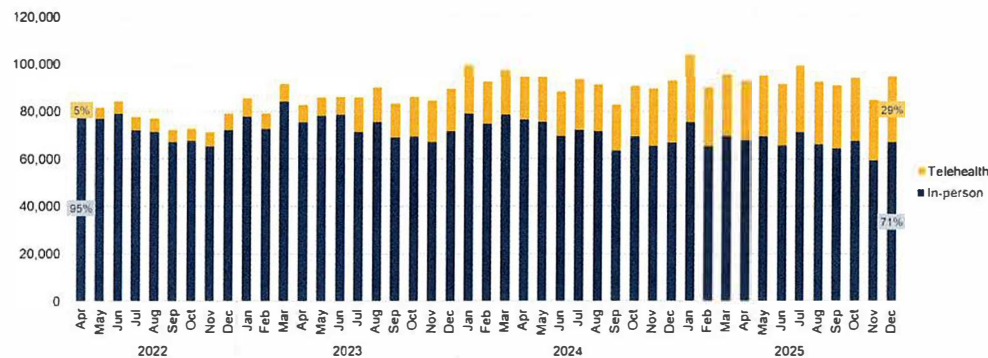
Source: [Society of Family Planning](#), June 2026

Telehealth abortion grew from 5% of all abortions in April 2022 to 29% in December 2025

The proportion of abortions provided via telehealth increased from 5% in April 2022 to 29% in December 2025.

Telehealth abortion grew from 5% of all abortions in April 2022 to 29% in December 2025

April 2022 to December 2025, proportion in-person versus telehealth



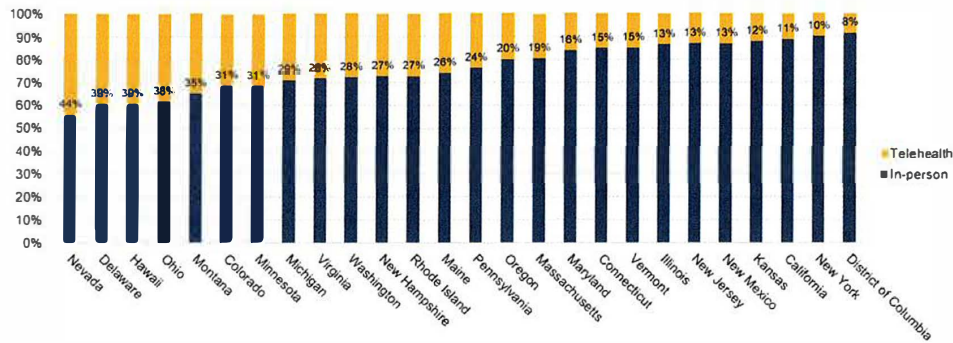
Source: [Society of Family Planning](#), June 2026

Where abortion and telehealth are permitted, the share of abortions provided via telehealth varied widely, 2025

Across the US, in states that permit abortion and telehealth provision of abortion, there was substantial variation in the proportion of abortions provided via telehealth, ranging from 8% to 44%. In several larger population states (eg, New York, California, Illinois, and New Jersey), telehealth represents a smaller share of abortions, at 10-13% of all abortions.

via telehealth varied widely, 2025

January to December 2025, proportion provided via telehealth in states where abortion and telehealth are permitted



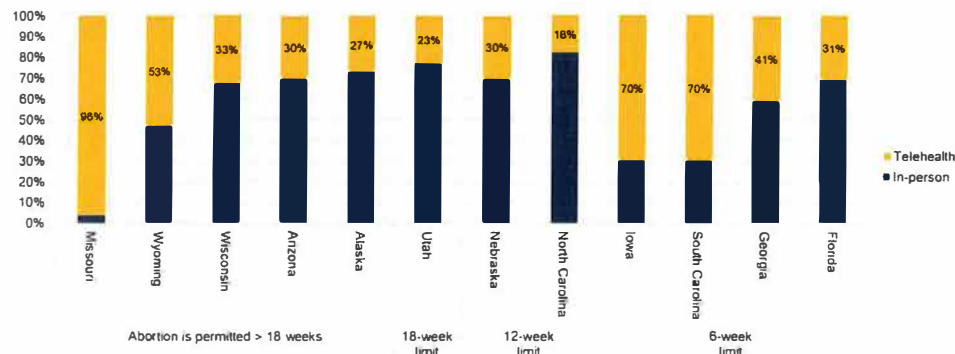
Source: [Society of Family Planning](#), June 2026

Where telehealth abortion is restricted, the share of abortions provided via telehealth under shield laws varied widely, 2025

In states without a total abortion ban but where telehealth is restricted, including states with 6, 12, and 18-week bans, the proportion of abortions provided by telehealth varies widely.

Where telehealth abortion is restricted, the share of abortions provided via telehealth under shield laws varied widely, 2025

January to December 2025, proportion provided via telehealth in states where telehealth is restricted



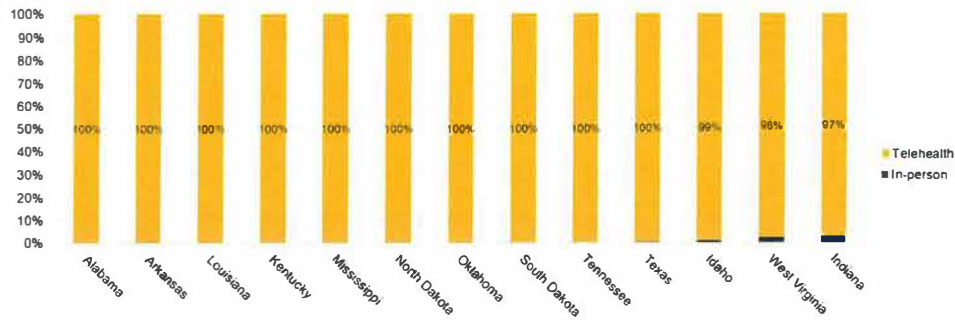
Source: [Society of Family Planning](#), June 2026

Where abortion is banned, nearly all abortions were provided via telehealth under shield laws, 2025

In states with total abortion bans, telehealth abortions provided under shield laws make up nearly all abortions occurring within those states. [Residents may travel to other states to obtain care](#). Abortions provided in person under [exceptions](#) are represented in dark blue, making up 3% of abortions in Indiana, 2% of abortions in West Virginia, and 1% of abortions in Idaho. In North Dakota, no abortion facilities were providing in-person care from January to November 2025, when the state implemented a total ban.

under shield laws, 2025

January to December 2025, proportion provided via telehealth in states where abortion is banned



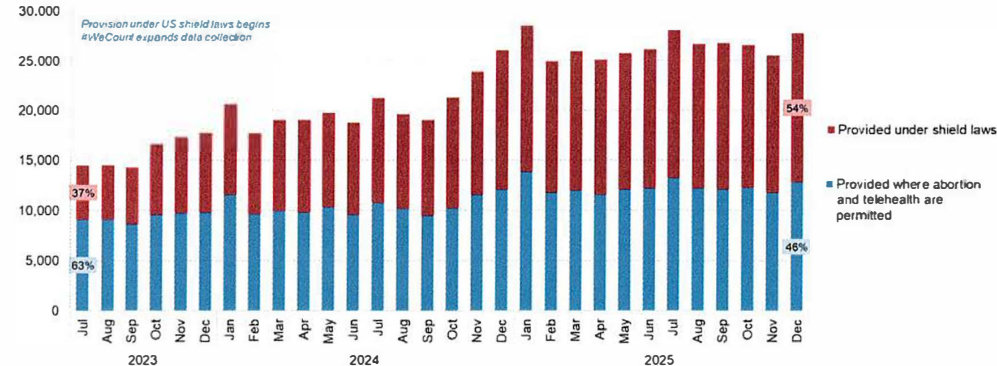
Source: [Society of Family Planning](#), June 2026

Over half of telehealth abortions are now provided under shield laws

The number and proportion of telehealth abortions provided under shield laws has increased over time. As of December 2025, more than half (54%) of telehealth abortions are provided under shield laws.

Over half of telehealth abortions are provided under shield laws

July 2023 to December 2025



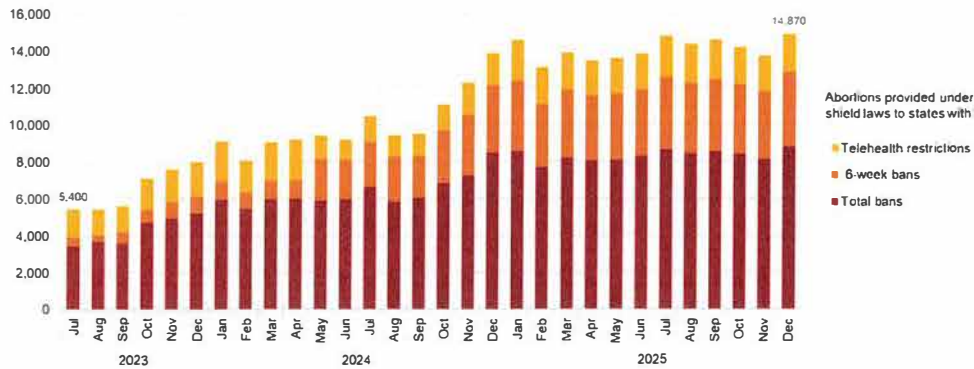
Source: [Society of Family Planning](#), June 2026

Number of abortions provided via shield laws in 2025 has increased over previous years

By December 2025, abortions provided under shield laws totaled 14,870 per month. Shield laws provide protections for clinicians to mail medication abortion pills to people in states with telehealth restrictions, 6-week bans, and total abortion bans. The number of abortions provided under shield laws into states with these restrictions has increased since clinicians began to offer abortion under shield laws in July 2023, with notable increases in provision to states after enactment of 6-week bans and total abortion bans. Some of the increase in states with 6-week bans is due to changes in state-level restrictions, such as states that transitioned from telehealth restrictions to 6-week bans during this period and thus switched categories.

previous years

July 2023 to December 2025



Source: [Society of Family Planning](#), June 2026

Background

#WeCount is a national effort that reports monthly numbers of abortions in the US, nationally and by state, beginning in April 2022. #WeCount data include abortions within the formal US healthcare system, defined as medication or procedural abortions provided by a licensed US clinician operating within their licensed scope of practice.

#WeCount data do not reflect self-managed abortions, defined as ending a pregnancy without the involvement of a licensed clinician operating within their licensed scope of practice, such as medications provided by community networks, clinicians providing care outside their licensed scope of practice, or websites that sell medications outside of the formal US healthcare system.

These data reflect the status of abortion provision within the formal US healthcare system and can help healthcare systems, public health practitioners, and policymakers make evidence-informed decisions. Monthly state totals were rounded to the nearest 10.

Terminology

State of occurrence

- In-person care: The state where the healthcare facility providing the abortion is located.
- Telehealth care: The state to which abortion medications are mailed.

Delivery settings

- Brick and mortar clinic: A physical clinic where a patient can go to receive care.

Delivery methods

- Brick-and-mortar telehealth: Telehealth abortions offered by a brick-and-mortar clinic.
- In-person care: Abortions in which a clinician meets with the patient face-to-face; can be procedural or medication abortions.
- Telehealth abortion: Medication abortion offered by a clinician through remote consultation with the patient, resulting in remote dispensing of medications by mail.
- Self-managed abortions: Note that #WeCount does not include self-managed abortions, defined as abortions using medications, herbs, or something else, or obtaining pills from friends or online without clinician assistance.

Types of care

- Medication abortion: Abortion performed with medications, including mifepristone, misoprostol, or misoprostol alone.
- Procedural abortion: Abortion performed with instrumentation, including uterine aspiration (manual or electric), dilation and curettage, dilation and evacuation, or dilation and extraction.

Legal context

- Shield laws: Shield laws provide protections for clinicians to mail medication abortion pills to people in states with telehealth restrictions, 6-week bans, and total abortion bans.

Methods

Provider database

In early 2022, #WeCount developed a database of all known US abortion facilities, including clinics, private medical offices, hospitals, and virtual clinic providers. We used the Abortion Facility Database from Advancing New Standards in Reproductive Health (ANSIRH) at University of California, San Francisco to establish a clinic database, and continue to update our list throughout the study period using annual updates to ANSIRH's abortion facility database, abortion directories ([AbortionFinder.org](https://abortionfinder.org) and [INeedanA.com](https://needanA.com)) and word-of-mouth referrals to unlisted abortion-providing facilities and clinicians.

Data collection

#WeCount collects monthly abortion volume data from participating facilities and offers remuneration for each monthly submission.

Missing data and imputation

The data in this report includes the monthly counts reported by providers for April 2022 through December 2025. From April 2022 to December 2024, 11% of abortions were imputed. From January to December 2025, 22% of abortions were imputed. The magnitude of imputation in each state is noted with symbols in the data tables.

- Partial reporting: For providers missing some months of data, we imputed values for missing months based on the average percent month-to-month change in in-person abortion volume in the state.
- Non-reporting: For providers that never reported, we estimated all months of data using contextual information, including news articles, contacts known to the non-reporting clinics, knowledge of the abortion volumes by state, and state-level medians from reporting facilities. To compute medians, we categorized reporters to #WeCount into five types of facilities: 1) small abortion clinics, 2) large abortion clinics, 3) primary care clinics, 4) low volume hospitals, and 5) high volume hospitals. Where available, we also used publicly available state administrative data to supplement our estimates.

Virtual clinics:

- Partial reporting: For virtual clinics missing some months of data, we imputed values for missing months based on the average percent month-to-month change in virtual clinic abortion volume in the state.
- Non-reporting: We developed separate imputations for virtual clinics that did not submit data to us, using the median number of abortions that were provided by other virtual clinics in the state.

State policy environment

We reported the number of abortions by state and by restrictiveness level using several categories. These categories were based on the abortion policy in each state on the 15th of each month as reported by the [New York Times](#). For a legal analysis of restrictions that explicitly ban telehealth or implicitly preclude telehealth abortion, we rely on the [RHITES](#) map.

- Total abortion bans: States that restrict abortion at all gestations, with or without exceptions.
- 6-week abortion bans: States that restrict abortion after detection of embryonic cardiac activity, referred to as a “6-week bans” because detection of such activity usually occurs around that point.
- 12- to 18-week abortion bans: States that restrict abortion beginning between 12 and 18 weeks of pregnancy.
- Permitted: States where abortion is permitted beyond the gestational categories above. Within permitted states, we disaggregated between states where telehealth abortion is permitted and states where telehealth abortion is restricted.

#WeCount was deemed exempt by Advarra IRB. This research was sponsored by the Society of Family Planning.

Limitations

#WeCount data does not reflect interstate travel for abortion care. As a result, observed changes in abortion volume in some states may reflect changes in interstate travel for abortion.

Counts are likely an underrepresentation of all abortions in the US. #WeCount has a comprehensive count of abortions provided in the formal US healthcare system, with more than 85% of all abortions reported. However, abortions provided by individual hospitals and private practice clinicians may be underreported. These counts also do not include abortions that take place in the US outside of the formal healthcare system.

#WeCount reports abortion service type by distinguishing telehealth from in-person abortion care. #WeCount does not report medication abortions separately from procedural abortions. Thus, the in-person abortion counts include both medication and procedural abortions that were provided in clinics, while all telehealth abortions are medication abortions.

Telehealth data represent the number of medications prescribed, dispensed or mailed by providers. #WeCount cannot estimate the proportion of people who did not take the medications sent to them, and therefore telehealth estimates may overestimate the number of abortions completed.

Use of shield laws to provide abortion via telehealth into states with total or 6-week abortion bans or with telehealth abortion restrictions started in July 2023, and #WeCount began to count abortions provided under shield laws at that time. Because of this transition in abortion provision, #WeCount does not have a comparator for previous months.

#WeCount cannot estimate unmet needs for abortion. Research has yet to accurately capture the underlying need for abortion.

Contributors

#WeCount is made possible by the many abortion providers who generously reported their data in support of this effort, as well as many members of the Society of Family Planning community. This report was prepared by the #WeCount Co-Chairs and Society of Family Planning staff.

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- Ushma Upadhyay, PhD, MPH; University of California, San Francisco

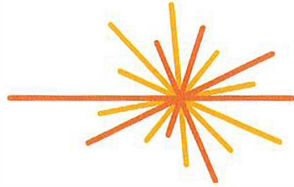
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For questions about #WeCount and information on how to enroll your practice, please contact WeCount@SocietyFP.org.



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