

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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No. 26-2705

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Mayday Health; Nancy Turbak Berry

Plaintiffs-Appellees

v.

Governor Larry Rhoden, in his official capacity; Attorney General Marty Jackley, in his official capacity

Defendants-Appellants

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Appeal from the United States District Court  
for the District of South Dakota, Southern Division,  
Hon. Camela C. Theeler, U.S. District Judge

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**Mayday Health and Nancy Turbak Berry's  
Opposition to  
State's Motion to Stay Preliminary Injunction**

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## **Table of Contents**

|      |                                                                                                     |    |
|------|-----------------------------------------------------------------------------------------------------|----|
| I.   | Statement of Facts                                                                                  | 1  |
| II.  | Standard of Review                                                                                  | 9  |
| III. | Argument                                                                                            | 10 |
| A.   | The State’s failure to cite the transcript precludes any challenge to the district court’s findings | 10 |
| B.   | Credibility determinations are uniquely for the district court                                      | 11 |
| C.   | The district court correctly applied the law to the facts                                           | 12 |
| 1.   | The First Amendment protects Mayday and Turbak’s speech                                             | 12 |
| 2.   | Mayday and Turbak’s speech is not “integral to criminal conduct,” nor is it otherwise criminal      | 13 |
| a.   | The “integral to criminal conduct” theory                                                           | 13 |
| b.   | Other criminal theories                                                                             | 19 |
| 3.   | Mayday’s speech is not “commercial”                                                                 | 24 |
| 4.   | The State’s “conduct not speech” argument fails                                                     | 26 |

|     |                                                                                                                                                                                                                                  |    |
|-----|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| D.  | The district court did not “legalize[] trafficking in illegal abortion pills”; to the contrary, Mayday and Turbak did not challenge the statute’s prohibitions on “dispens[ing],” “distribut[ing]” or “sell[ing]” abortion pills | 27 |
| E.  | The State has not met its burden for a stay                                                                                                                                                                                      | 28 |
| 1.  | Failure to make a “strong showing” of likely success on the merits                                                                                                                                                               | 28 |
| 2.  | Failure to show irreparable injury                                                                                                                                                                                               | 28 |
| 3.  | A stay would irreparably injure Mayday and upset the status quo                                                                                                                                                                  | 29 |
| 4.  | The public interest favors Mayday                                                                                                                                                                                                | 30 |
| IV. | Conclusion                                                                                                                                                                                                                       | 31 |

## **Table of Authorities**

### **Cases**

|                                                                           |          |
|---------------------------------------------------------------------------|----------|
| <i>ASARCO, LLC v. Union Pac. R.R. Co.</i> , 762 F.3d 744 (8th Cir. 2014)  | 10       |
| <i>Ashcroft v. Free Speech Coalition</i> , 535 U.S. 234 (2002)            | 13, 14   |
| <i>Bigelow v. Virginia</i> , 421 U.S. 809 (1975)                          | 22, 23   |
| <i>Brakebill v. Jaeger</i> , 905 F.3d 553 (8th Cir. 2018)                 | 9-10, 28 |
| <i>Brandenburg v. Ohio</i> , 395 U.S. 444 (1969)                          | 17, 18   |
| <i>Chiles v. Salazar</i> , 607 U.S. 627 (2026)                            | 12       |
| <i>Citizens United v. FEC</i> , 558 U.S. 310 (2010)                       | 26       |
| <i>Connick v. Myers</i> , 461 U.S. 138 (1983)                             | 13       |
| <i>Dobbs v. Jackson Women’s Health Organization</i> , 597 U.S. 215 (2022) | 13       |
| <i>E.T. v. Paxton</i> , 19 F.4th 760 (5th Cir. 2021)                      | 30       |
| <i>Elrod v. Burns</i> , 427 U.S. 347 (1976)                               | 29       |
| <i>First Resort, Inc. v. Herrera</i> , 860 F.3d 1263 (9th Cir. 2017)      | 25       |
| <i>Gatewood v. City of O’Fallon</i> , 70 F.4th 1076 (8th Cir. 2023)       | 11       |
| <i>Harris v. Quinn</i> , 573 U.S. 616 (2014)                              | 25       |
| <i>Hess v. Indiana</i> , 414 U.S. 105 (1973)                              | 14       |

|                                                                                                                                     |        |
|-------------------------------------------------------------------------------------------------------------------------------------|--------|
| <i>Jensen v. Minnesota</i> , ___ F.4th ___, 2026 U.S. App. Lexis 28160,<br>2026 WL 2716496 (8th Cir. Sept. 15, 2026)                | 30     |
| <i>Jones v. Kelley</i> , 854 F.3d 1009 (8th Cir. 2017)                                                                              | 10     |
| <i>Kansas v. United States</i> , 124 F.4th 529 (8th Cir. 2024)                                                                      | 29-30  |
| <i>Mayday Health v. Jackley</i> (citation to district court record)                                                                 | 14, 25 |
| <i>Matsumoto v. Labrador</i> , 122 F.4th 787 (9th Cir. 2024)                                                                        | 16     |
| <i>NIFLA v. James</i> , 160 F.4th 360 (2d Cir. 2025)                                                                                | 23     |
| <i>Nken v. Holder</i> , 556 U.S. 418 (2009)                                                                                         | 9      |
| <i>Pittsburgh Press v. Human Relations Comm’n</i> , 413 U.S. 376 (1973)                                                             | 22, 23 |
| <i>Planned Parenthood Great Northwest v. Comm’r</i> , ___ F.4th ___,<br>2026 U.S. App. Lexis 24930, 2026 WL 2409722 (Aug. 18, 2026) | 16-17  |
| <i>Roman Cath. Diocese of Brooklyn v. Cuomo</i> , 592 U.S. 14 (2020)                                                                | 30     |
| <i>Shamrock Hills, LLC v. Iowa</i> , ___ F.4th ___, 2026 U.S. App. Lexis<br>24278, 2026 WL 2330562 (8th Cir. Aug. 12, 2026)         | 27     |
| <i>Snyder v. Phelps</i> , 562 U.S. 443 (2011)                                                                                       | 13     |
| <i>TransUnion LLC v. Ramirez</i> , 594 U.S. 413 (2021)                                                                              | 30     |
| <i>United States v. Anziano</i> , 606 F.2d 242 (8th Cir. 1979)                                                                      | 20     |
| <i>United States v. Hansen</i> , 599 U.S. 762 (2023)                                                                                | 20     |

|                                                                   |              |
|-------------------------------------------------------------------|--------------|
| <i>United States v. Head</i> , 340 F.3d 628 (8th Cir. 2003)       | 11           |
| <i>United States v. Hernandez</i> , 986 F.2d 234 (8th Cir. 1993)  | 20           |
| <i>United States v. Jackson</i> , 482 F.2d 1264 (8th Cir. 1973)   | 20           |
| <i>United States v. Sryniawski</i> , 48 F.4th 583 (8th Cir. 2022) | 14, 15       |
| <i>United States v. United Foods, Inc.</i> , 533 U.S. 405 (2001)  | 25           |
| <i>United States v. Vivier</i> , 145 F.4th 892 (8th Cir. 2025)    | 11           |
| <i>Weber v. Block</i> , 784 F.2d 313 (8th Cir. 1986)              | 11           |
| <i>Younger v. Harris</i> , 401 U.S. 37 (1971)                     | 4            |
| <i>Zahn v. Nygaard</i> , 989 F.3d 1070 (8th Cir. 2021)            | 11           |
| <u>Statutes</u>                                                   |              |
| S.D.C.L. § 22-17-5.1                                              | 3            |
| S.D.C.L. § 22-17-5.2                                              | 22           |
| S.D.C.L. § 22-17-5.3                                              | 3, 5, 21, 27 |
| <u>Other authorities</u>                                          |              |
| H.B. 1274 (S.D. 2026)                                             | 5            |

## **I. Statement of Facts**

Mayday Health is a nonprofit 501(c)(3) corporation. R. Doc. 62, at 13. It was established because “the vast majority of the American people did not know that abortion pills even existed.” R. Doc. 62, at 13. Mayday seeks “to fill that gap,” and “to respond to widespread confusion, fear, and misinformation.” *Id.* and Court Order, R. Doc. 51, at 2, quoting R. Doc. 1, at 3. Mayday “does not sell, handle, provide, or offer abortion pills for sale.” R. Doc. 51, at 2. Instead, “Mayday provides information free of charge so that women can, if they choose, terminate pregnancies safely even though they live in places like South Dakota that limit or outlaw abortion.” R. Doc. 51, at 2-3, quoting R. Doc. 1, at 3.

Mayday “consult[s] with medical experts, OB/GYNs, who can provide us the most up-to-date, accurate medical info[rmation], so that can be reflected on [its] website.” R. Doc. 62, at 14. Mayday believes that “in states where there are restrictive [abortion] laws, there’s a lack of accurate

information about [abortion] pills.” R. Doc. 62, at 18. “[P]art of [Mayday’s] mission [is] to spread information in those states.” *Id.*

In December 2025, Mayday put placards at gas stations in South Dakota that read “Pregnant? Don’t want to be?” “Learn More at Mayday.Health”:



R. Doc. 51, at 3.

The State sued Mayday in state court, threatening it with “felony criminal consequences,” and accusing it of “illegal advertising.” R. Doc. 5, at

5-6. Mayday's felonious conduct, according to the State, included selling this sweatshirt:



R. Doc. 5, at 9. (In this appeal, the State continues to argue that the message on the sweatshirt—advising that people can “still get abortion pills in all 50 states”—is criminal. The State says this message “flagrantly flouts S.D.C.L. 22-17-5.1’s and -5.3’s prohibitions on advertising and procuring drugs for the purpose of producing an abortion in South Dakota.” Entry ID 5679447, at 5.)

Mayday responded by suing the State in federal court in New York, alleging that the State was violating its First Amendment rights. R. Doc. 5, at

6. The State accused Mayday of “solicitation of a crime,” R. Doc. 5-11, at 2, “inducing and commencing criminal activity,” R. Doc. 5-11, at 4, and “advertising and soliciting abortions for teenaged children without the required parental notification.” R. Doc. 5-12, at 3. Attorney General Jackley told the court: “In my mind as a chief law enforcement officer of the state, it is an absolute criminal violation.” R. Doc. 5-11, at 3. The federal court concluded that Mayday’s speech is protected by the First Amendment, but abstained and dismissed under *Younger v. Harris*, 401 U.S. 37 (1971), because of the pending state court case. R. Doc. 5-13, at 2 and 4.

The parties settled the state court case. Neither admitted wrongdoing. Mayday agreed to remove the gas station placards, and not to violate the law. R. Doc. 5-14, at 2. Mayday did *not* agree that it had *ever* violated *any* law, in South Dakota or anywhere else. *Id.*

While the case was being litigated in state court, the South Dakota Legislature condemned Mayday’s advertising. R. Docs. 5-16 to 5-19. Four days after the State signed the settlement agreement, the Legislature passed

a bill making it a felony to “knowingly dispense, distribute, sell, or *advertise*” anything “for purposes of an unlawful abortion[.]” House Bill 1274, codified as S.D.C.L. § 22-17-5.3. R. Doc. 5-15 (emphasis added).

In this lawsuit, Mayday and Nancy Turbak Berry—a lawyer who wears the Mayday sweatshirt—challenged *only* the “advertise” prohibition of the statute. They asserted that the “advertise” provision, as applied to their speech, would violate the First Amendment. R. Doc. 51, at 1.

At the preliminary injunction hearing, Leo Raisner, Mayday’s Executive Director, testified that Mayday does not sell, handle, provide, or distribute any pills, medicines, or anything else that could be used for an abortion. R. Doc. 62, at 14. Mayday does not offer to do any of those things. *Id.* Mayday does not induce or cause the transfer of abortion pills. *Id.* Mayday does not exhort anyone to take abortion pills, or to do anything. *Id.* It does not recruit anyone to do anything. *Id.* It does not advise or counsel anyone to do anything. *Id.* It does not propose any commercial transactions. *Id.*

Mayday's website links to other entities that provide abortion pills because it "want[s] people to know that they have choices. Whatever choice they make is up to them." *Id.* None of the websites to which Mayday links compensate Mayday in any way. *Id.* Mayday does not obtain any benefit of any kind if a woman chooses to purchase abortion pills from another website. *Id.* Mayday does not know, or have any way to find out, what a person does after leaving Mayday's website. *Id.* Mayday does not advocate that anyone take an abortion pill. *Id.* It does not advocate that anyone break the law. *Id.* It does not benefit in any way from the sale of abortion medications such as abortion pills. *Id.*

Raisner testified that "the latest data I've seen is that 60 percent of people have even heard of abortion pills. That means 40 percent of people in this country do not know that abortion pills are an option for them." R. Doc. 62, at 25. Raisner testified that there is "a lot of information out there that is not trustworthy," and that "what I really, really want pregnant women to

have is reliable, trustworthy information about abortion pills.” R. Doc. 62, at 25-26.

The State argued that Raisner was not credible. R. Doc. 62, at 60, 63, 65. The district court disagreed, finding him credible. R. Doc. 51, at 13, 36.

Turbak has practiced law in South Dakota for 45 years. R. Doc. 62, at 7. She taught a law school class on Sexuality, Reproduction, and the Law. R. Doc. 62, at 8. She believes that “women and girls with unwanted pregnancies should have access to abortion[.]” *Id.* She owns and wears Mayday’s sweatshirt that the State condemns as criminal:



R. Doc. 62, at 8-9.

Turbak bought it because she “was disgusted that the state is trying to keep information from South Dakota women about the fact that abortion pills are available,” and “so I personally could convey that to people that would see me and also in a small way support Mayday by purchasing something from them.” R. Doc. 62, at 9. By wearing it, she is “advertising two things. I’m advertising the information that abortion pills are available. And I’m advertising a website source where women can get more information about that.” *Id.*

The district court found: “Mayday is not an abortion pill merchant and it does not sell, dispense, or distribute abortion pills.” R. Doc. 51, at 33. It found: “While Mayday links abortion pill merchant websites on its own website—thereby referring to a specific third-party that provides a product—Mayday does not sell, handle, or distribute abortion pills for these third-party providers.” R. Doc. 51, at 27.

The court also found: “Mayday does not facilitate the transfer of or offer to transfer abortion pills into South Dakota. Nor does the evidence establish

that Mayday’s desired speech is intended to produce unlawful abortions or incite imminent lawless action.” R. Doc. 51, at 33-34 (footnote omitted). It found: “Mayday’s evidence at this juncture establishes that it spreads what it believes to be accurate information about abortion pills, including links to abortion pill merchants, with the intent of informing people that they have choices and to provide education about those choices.” R. Doc. 51, at 34.

## **II. Standard of Review**

This Court reviews a motion to stay based on four factors: “(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 proceedings; and (4) where the public interest lies.” *Kansas v. United States*, 124 F.4th 529, 533 (8th Cir. 2024), quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009). The first two factors are the “most critical.” *Id.* In addition to the requirement for a strong showing of success on the merits, “a showing of irreparable injury without a stay is also required.” *Brakebill v.*

*Jaeger*, 905 F.3d 553, 557 (8th Cir. 2018). This Court reviews the district court's findings of fact for clear error. *Jones v. Kelley*, 854 F.3d 1009, 1013 (8th Cir. 2017).

### **III. Argument**

#### **A. The State's failure to cite the transcript precludes any challenge to the district court's findings**

The transcript of the preliminary injunction hearing was filed before the State's motion, but the motion cites it only twice. Entry ID 5679447, at 17 and 23. The State does not cite it to challenge the district court's critical credibility finding in favor of Mayday (R. Doc. 51, at 36), nor to challenge the finding that Mayday does not sell, dispense, or distribute abortion pills (R. Doc. 51, at 33), nor to argue that *any* finding is clearly erroneous. Having failed to cite any testimony supporting its argument, the State cannot challenge those findings. *ASARCO, LLC v. Union Pac. R.R. Co.*, 762 F.3d 744, 753 (8th Cir. 2014) ("Judges are not like pigs, hunting for truffles buried in briefs or the record.") (cleaned up).

The State’s reply brief cannot remedy its failure, because a reply may not advance arguments for the first time. *Gatewood v. City of O’Fallon*, 70 F.4th 1076, 1080 (8th Cir. 2023). Allowing the State to do so would prejudice Mayday and Turbak because they would have no opportunity to respond. *United States v. Head*, 340 F.3d 628, 630 n.4 (8th Cir. 2003).

**B. Credibility determinations are uniquely for the district court**

“Credibility determinations are uniquely within the province of the trier of fact and may ‘virtually never’ be clearly erroneous.” *Zahn v. Nygaard*, 989 F.3d 1070, 1072 (8th Cir. 2021), quoting *Weber v. Block*, 784 F.2d 313, 316 (8th Cir. 1986). The State attacks the district court’s credibility determinations, but the district court saw and heard the witnesses. Its credibility determinations are entitled to “special deference.” *United States v. Vivier*, 145 F.4th 892, 895 (8th Cir. 2025).

**C. The district court correctly applied the law to the facts**

**1. The First Amendment protects Mayday and Turbak's speech**

"The First Amendment envisions the United States as a rich and complex place where all enjoy the freedom to think as you will and to speak as you think." *Chiles v. Salazar*, 607 U.S. 627, 640 (2026) (cleaned up).

In response to evidence of "a growing mental health crisis among Colorado teenagers," and evidence that "conversion therapy" was associated with "depression, anxiety, suicidal thoughts, and suicide attempts," Colorado prohibited conversion therapy, meaning attempting to change a person's sexual orientation or gender identity. Colorado prohibited counselors from talking with their clients about conversion therapy, although it allowed talk about its opposite: "acceptance" and "support" for "identity exploration and development." 607 U.S. at 635.

The law was unconstitutional. "[T]he First Amendment protects the inalienable right of every individual to decide for himself how best to speak. In this Nation, no official—high or petty—may command our tongues or

silence our voices.” 607 U.S. at 640 (cleaned up). Abortion is to South Dakota what conversion therapy is to Colorado. Both are illegal under state law; both states attempted to silence speech about them; and the First Amendment protects speech about both.

Abortion is “a profound moral question” of great public interest. *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215, 302 (2022). No other question divides this country so profoundly and has done so for so long. “[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” *Snyder v. Phelps*, 562 U.S. 443, 452 (2011), quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983).

**2. Mayday and Turbak’s speech is not “integral to criminal conduct,” nor is it otherwise criminal**

**a. The “integral to criminal conduct” theory**

The State’s argument that Mayday’s speech is criminal faces a high bar. “The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) (striking down Child Pornography Prevention Act of 1996 based on the

“vital distinctions between words and deeds, between ideas and conduct”). *Ashcroft* establishes that “[t]he government may not prohibit speech because it increases the chance an unlawful act will be committed ‘at some indefinite future time.’” *Id.*, quoting *Hess v. Indiana*, 414 U.S. 105, 108 (1973). In *Mayday Health v. Jackley*, the court cited *Ashcroft* in stating that Mayday’s website neither “solicits [n]or abets acts that are illegal under South Dakota law.” R. Doc. 5-13, at 4.

The district court rejected the State’s argument that Mayday’s speech is “integral to criminal conduct.” R. Doc. 51, at 29-39. The State “may not define speech as a crime, and then render the speech unprotected by the First Amendment merely because it is integral to speech that [it] has criminalized.” *United States v. Sryniawski*, 48 F.4th 583, 588 (8th Cir. 2022). Yet that is what the State has done here: it has defined “advertising” — which is speech — as a crime, then argues it is unprotected because it is integral to speech it has criminalized. The State’s argument is “circular and unpersuasive.” *Id.*

“To qualify as speech integral to criminal conduct, the speech must be integral to conduct that constitutes another offense that does not involve protected speech, such as antitrust conspiracy, extortion, or in-person harassment.” *Id.* (citations omitted). Here, Mayday and Turbak’s advertising is not integral to any other offense.

The State is likely to reply that Mayday’s speech indeed is integral to the offense of selling abortion pills. But the district court found that Mayday “does not sell, dispense, or distribute abortion pills.” R. Doc. 51, at 33. It found that Mayday “does not facilitate the transfer of or offer to transfer abortion pills into South Dakota.” *Id.*

The Seventh Circuit agrees with *United States v. Sryniewski*. Planned Parenthood challenged an Indiana law that restricted its ability to provide information about abortion to unemancipated pregnant minors. Indiana argued that Planned Parenthood’s speech was integral to criminal conduct. The court rejected this argument as “of course circular . . . the speech is illegal

because it is illegal.” *Planned Parenthood Great Northwest v. Comm’r*, \_\_\_ F.4th \_\_\_, 2026 U.S. App. Lexis 24930, at \*25-26, 2026 WL 2409722 (Aug. 18, 2026).

The “speech integral to criminal conduct” exception to First Amendment protection “demands more. It demands a separate underlying offense that is not the challenged restriction on speech itself. . . . A broader reading of the exception would undermine First Amendment rights by shielding any statute that criminalizes speech from strict scrutiny solely because the legislature made such speech criminal.” *Id.* at \*26.

The Ninth Circuit also agrees. “Labeling protected speech as criminal speech cannot, by itself, make that speech integral to criminal conduct.” *Matsumoto v. Labrador*, 122 F.4th 787, 814 (9th Cir. 2024). The court rejected Idaho’s argument that its abortion trafficking statute could be “both the ‘underlying offense’ and the exception to otherwise protected speech[.]” *Id.* The court held unconstitutional Idaho’s law that barred “recruiting” a pregnant minor to obtain an out-of-state abortion with intent to conceal it from the minor’s parents or guardian, which is a crime in Idaho. *Id.* at 815.

Mayday does not advocate, recommend, advise, or exhort anyone to do anything; it only provides information. The district court ruled: “[Mayday Executive Director Leo Raisner] testified that Mayday does not recruit anyone to do anything, does not attempt to influence anyone’s choice to have an abortion, and does not recommend anyone commit an illegal act. He also testified that . . . Mayday’s reference to trusted sources indicates that the information on its website can be trusted. The Court finds Raisner’s testimony on these matters credible.” R. Doc. 51, at 36. So Mayday’s speech is well within the protection of the First Amendment. *Planned Parenthood v. Comm’r*, \_\_\_ F.4th \_\_\_, 2026 U.S. App. Lexis 24930, at \*36 (“Planned Parenthood does not try to persuade anyone to have an abortion. Its lesser steps of providing information and referrals so clients can make their own decisions are similarly protected speech.”).

The State argues that the “integral to criminal conduct” First Amendment exception is the same as the *Brandenburg v. Ohio* “incitement” exception. It writes: “[g]enerally speaking, advertising loses First

Amendment protection under the speech integral exception when it crosses the line between ‘mere advocacy’ to ‘inciting or producing an imminent lawless [trans]action,” citing *Brandenburg*, 395 U.S. 444, 447-449 (1969). Entry ID 5679447, at 9-10 (second brackets by State).

The district court rejected the *Brandenburg* theory, explaining: “[n]or does the evidence establish that Mayday’s desired speech is intended to produce unlawful abortions or incite imminent lawless action.” R. Doc. 51, at 33-34 (footnote omitted). “The speech by Mayday and Turbak in this regard makes no offer to provide unlawful material and does not advocate to incite or promote imminent, unlawful action.” R. Doc. 51, at 38.

The district court was correct. Speech is unprotected only when it is “directed to inciting or producing imminent lawless action” and “likely to incite or produce such action.” *Brandenburg*, 395 U.S. at 447. And as the State conceded, “[i]ncitement . . . requires both intent and a probability of imminent harm.” R. Doc. 56, at 7. The State proved neither.

**b. Other criminal theories**

The State asserts that Mayday's speech is illegal because it "solicits and facilitates illegal drug transactions," and "aid[s] and abet[s] the distribution of drugs." Entry ID 5679447, at 9-13. The district court correctly rejected these theories. R. Doc. 51, at 35-40. The State's factual assertions are a series of bullet points. Entry ID 5679447, at 10-11. But every one of them lacks support in the record and the district court's findings.

The State misquotes the record, saying that "Mayday's complaint in this very case freely admits that the intent of its 'advertising' is to 'help' women 'terminate pregnancies safely even though they live in places like South Dakota that limit or outlaw abortion.'" Entry ID 5679447, at 11. But what Mayday's Complaint *actually* says is: "Mayday provides information free of charge so that women can, if they choose, terminate pregnancies safely even though they live in places like South Dakota that limit or outlaw abortion." R. Doc. 1, at 3 (emphasis added).

Criminal liability for speech that solicits, encourages, or facilitates unlawful conduct requires a criminal mens rea. *United States v. Hansen*, 599 U.S. 762, 771 (2023) (upholding prohibitions on “encourag[ing]” and “induc[ing]” certain acts because they “require an intent to bring about a particular unlawful act” and “are among the ‘most common’ verbs used to denote solicitation and facilitation”). Speech that merely provides information, as here, lacks both an unlawful act and an unlawful intent.

The cases the State relies on demonstrate this. *United States v. Jackson*, 482 F.2d 1264, 1264 (8th Cir. 1973) (defendant’s “activities clearly indicate affirmative action on his part in contacting the seller and in bringing the buyer and seller together”); *United States v. Anziano*, 606 F.2d 242, 245 (8th Cir. 1979) (“[t]o establish aiding and abetting the government is required to show that the defendant associated himself with the unlawful venture, that he participated in it as something he wished to bring about, and that he sought by his action to make it succeed”); *United States v. Hernandez*, 986 F.2d 234, 238

(8th Cir. 1993) (conspiracy requires proof of “[a]n agreement to commit an illegal act”).

The State argues that the district court should have inferred improper intent because Mayday removed two items from its website, one in 2023 and the other just before the hearing. Entry ID 5679447, at 17-18. But the district court rejected this argument. R. Doc. 51, at 12-15 and 30 n.4. The district court found Mayday’s testimony credible that it removed the second item because of its determination that it did not align with its mission. R. Doc. 51, at 13. The district court correctly ruled that “Plaintiffs’ lawsuit, seeking to enjoin the enforcement of S.D.C.L. § 22-17-5.3 against them, is forward looking and thus requires this Court to consider the Plaintiffs’ intended speech, not its past speech.” R. Doc. 51, at 14.

The State says abortion pills are legally indistinguishable from methamphetamine, and argues that the district court effectively “legalize[d] an illegal drug in the name of the First Amendment.” Entry ID 5679447, at 6. But as shown above, this case is about speech, not conduct; speech may not

be banned even if it encourages unlawful acts; Mayday's speech is not "integral to criminal conduct"; the State concedes that even speech that encourages crimes, or "exhorts" others to engage in them, is not criminal; Mayday does not recommend that anyone commit an unlawful act; Mayday does not incite imminent unlawful action; and the State proved neither unlawful act nor unlawful intent. Further, a woman who takes an abortion pill in South Dakota does not commit a crime. S.D.C.L. § 22-17-5.2.

Finally, the State asserts that "[i]nstead of faithfully following and applying [the State's] authorities, the district court took pains to draw meaningless distinctions between them in a way that seems determined to thwart their application to this case." Entry ID 5679447, at 14. The State is wrong to question the district court's motivation, and wrong on the merits. *Pittsburgh Press v. Human Relations Comm'n*, 413 U.S. 376, 386 (1973), unlike this case, involved a "purely commercial advertisement." *Bigelow v. Virginia*, 421 U.S. 809 (1975), expressly did "not decide . . . the precise extent to which the First Amendment permits regulation of advertising that is related to

activities the state may legitimately regulate or even prohibit.” (footnote omitted).

*NIFLA v. James*, 160 F.4th 360, 378 (2d Cir. 2025), the third case the State accuses the district court of being “determined to thwart,” held that speech about abortion pill reversal in New York, where abortion is legal, by an organization that spoke from moral motives, not economic ones, was noncommercial speech, so the New York Attorney General’s attempt to regulate it had to satisfy strict scrutiny. The district court here, rejecting Mayday’s argument, found *James* “instructive only insofar as it relates to the question whether Mayday’s speech is commercial and not on the question whether Mayday’s speech is integral to criminal conduct.” R. Doc. 51, at 39. So the State’s complaint about the district court’s reading of *NIFLA v. James*, like its complaints about the court’s reading of *Pittsburgh Press* and *Bigelow*, is erroneous.

### **3. Mayday's speech is not "commercial"**

Mayday, a nonprofit 501(c)(3) corporation, is funded by grants, small-dollar contributions made through its website, and merchandise sales, such as Nancy Turbak's sweatshirt, which it uses to spread its message. Last year it received \$2.3 million in grants, \$28,000 in website donations, and about \$2,600 in merchandise sales. R. Doc. 62, at 13. Everything that Mayday does expresses a moral belief. R. Doc. 62, at 17. Mayday does nothing for the purpose of monetary gain, apart from seeking money so it can communicate its message. *Id.*

The district court rejected the State's argument that Mayday's advertisements are commercial speech. R. Doc. 51, at 27. It found that "Mayday does not sell, handle, or distribute abortion pills for these third-party providers," which "weighs against finding the speech commercial." *Id.* It found "there is no evidence that Mayday holds an economic motivation for its advertisements," and "although Mayday fundraises and sells merchandise on its website to further its nonprofit mission, there is no evidence that

Mayday receives payment for linking the websites for abortion pill merchants on its own website.” *Id.* Likewise, the *Mayday Health v. Jackley* court agreed that Mayday’s speech is noncommercial, stating that the case “is the mirror image of the factual situation presented in . . . *National Institute of Family and Life Advocates v. James*[.]” R. Doc. 5-13, at 3.

“Commercial speech” is “speech that does no more than propose a commercial transaction.” *Harris v. Quinn*, 573 U.S. 616, 648 (2014), quoting *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). None of Mayday’s speech proposes a commercial transaction, let alone “merely” proposes it.

The State argues that the donations Mayday receives, and its fundraising, make its speech commercial. But no case says any such thing. The State relies on *First Resort, Inc. v Herrera*, 860 F.3d 1263 (9th Cir. 2017), but that case involved “advertising designed to attract a patient base in a competitive marketplace for commercially valuable services,” so it was a “classic example of commercial speech.” 860 F.3d at 1274 (internal quotation

omitted). Mayday has no “patient base” and sells no “services,” valuable or otherwise. R. Doc. 51, at 27.

Effective speech on matters of public concern requires money. “All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech[.]” *Citizens United v. FEC*, 558 U.S. 310, 351 (2010). The State’s theory makes virtually all speech commercial.

#### **4. The State’s “conduct not speech” argument fails**

The State argues that Mayday “brokers abortion pill sales,” which is “not speech but conduct in furtherance of illegal drug transactions.” Entry ID 5679447, at 24-25. But there was no evidence that Mayday “brokers abortion pill sales.” The district court rejected the State’s “Mayday engages in conduct not speech” argument, ruling that the statute “is directed at the dissemination of information based on its content—abortion—and therefore cannot be said to only incidentally burden speech. . . . the triggering conduct is the communicative message.” R. Doc. 51, at 28-29. States may not “shield their

statutes from review by calling speech conduct.” *Shamrock Hills, LLC v. Iowa*, \_\_\_ F.4th \_\_\_, 2026 U.S. App. Lexis 24278, at \*7, 2026 WL 2330562 (8th Cir. Aug. 12, 2026).

**D. The district court did not “legalize[] trafficking in illegal abortion pills”; to the contrary, Mayday and Turbak did not challenge the statute’s prohibitions on “dispens[ing],” “distribut[ing]” or “sell[ing]” abortion pills**

The State says that the district court “legalize[d] trafficking in illegal abortion pills in South Dakota[.]” Entry ID 5679447, at 1. But the injunction protects speech; it does not legalize “trafficking” in anything. The statute provides: “No person may knowingly *dispense, distribute, sell, or advertise*” anything “for purposes of an unlawful abortion[.]” S.D.C.L. § 22-17-5.3 (emphasis added). Mayday and Turbak challenged only the “advertise” prohibition of the statute. They did not challenge the “dispense,” “distribute,” and “sell” prohibitions, so they remain in full force and effect.

**E. The State has not met its burden for a stay**

**1. Failure to make a “strong showing” of likely success on the merits**

For all the reasons above, the State has not made a strong showing of likely success on the merits.

**2. Failure to show irreparable injury**

For the State to qualify for a stay, “a showing of irreparable injury without a stay is also required.” *Brakebill v. Jaeger*, 905 F.3d 553, 557 (8th Cir. 2018) (emphasis removed). The State’s attempt to make the required showing is eight lines. Entry ID 5679447, at 23. The State fails to show that *anything* that *Mayday* does could harm *anyone* in *any way*.

The testimony the State relies on was completely rebutted by Marvin Buehner, M.D., a board-certified obstetrician and gynecologist, R. Doc. 62, at 54-57; by Mayday’s rebuttal Exhibit 28, a New England Journal of Medicine article, “Sixteen Years of Overregulation: Time to Unburden Mifeprex”; and by Mayday’s rebuttal Exhibit 29, the FDA’s study of 24 years of extremely infrequent adverse events from Mifepristone.

The district court found: “Through rebuttal testimony by Dr. Marvin Buehner, the Plaintiffs presented evidence supporting the efficacy of the information on Mayday’s website, including that abortion pills are safe. Dr. Buehner also opined that the numbers are ‘astoundingly small’ for adverse events from taking abortion pills.” R. Doc. 51, at 31.

In this case, as in *Kansas v. United States*, 124 F.4th 529, 534 (8th Cir. 2024), the moving party relies on alleged irreparable harm to persons allegedly affected by a new law that has never gone into effect. (It would have gone into effect on July 1, 2026, but the Attorney General agreed not to enforce it until the court ruling, which came 17 days later. R. Doc. 62, at 66.) As in *Kansas v. United States*, the moving party fails to show how denial of a stay will irreparably damage itself or others.

**3. A stay would irreparably injure Mayday and upset the status quo**

“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020), quoting *Elrod v. Burns*, 427 U.S. 347,

373 (1976) (plurality). The State argues that a stay would not harm Mayday because it could still speak on other issues, but requiring Mayday to limit its speech is a “concrete” harm. *Jensen v. Minnesota*, \_\_\_ F.4th \_\_\_, 2026 U.S. App. Lexis 28160, at \*11, 2026 WL 2716496 (8th Cir. Sept. 15, 2026), quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021).

The status quo since 2022 is that Mayday has been able to speak. “[I]n considering whether the issuance of a stay pending appeal will substantially injure the other party, the maintenance of the status quo is an important consideration in granting [or denying] a stay.” *Kansas v. United States*, 124 F.4th at 534, quoting *E.T. v. Paxton*, 19 F.4th 760, 770 (5th Cir. 2021) (alterations by court). A stay would upset the status quo.

#### **4. The public interest favors Mayday**

As the district court ruled, “the public interest is served by issuing an injunction because the public has a compelling interest in protecting its First Amendment rights.” R. Doc. 51, at 42.

#### **IV. Conclusion**

The State failed to cite the hearing transcript except on two issues, so it cannot challenge the district court's credibility findings. The district court's credibility determinations are entitled to special deference. The State's criminal theories fail. Mayday's speech is about a matter of great public interest. It is not "commercial."

The district court found that Mayday "spreads what it believes to be accurate information about abortion pills, including links to abortion pill merchants, with the intent of informing people that they have choices and to provide education about those choices." R. Doc. 51, at 34.

The State fails to make a strong showing of success on the merits, and fails to show irreparable injury. Its motion to stay should be denied.

Dated: Sept. 24, 2026

Respectfully submitted,

/s/ James D. Leach

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Certificate of Compliance

Pursuant to F.R.A.P. 27(d)(2)(A) and 32(g)(1), I certify that this document contains 5,111 words. It has been scanned for viruses and is virus-free.

/s/ James D. Leach

James D. Leach

Certificate of Service

I certify that on September 24, 2026, I filed this document electronically, thereby causing automatic electronic service to be made on all parties.

/s/ James D. Leach

James D. Leach