No. 25-

IN THE

Supreme Court of the United States

LEDA HEALTH CORPORATION,

Petitioner,

v.

JAY ROBERT INSLEE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF WASHINGTON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The State of Washington makes it unlawful to sell a lawful product "with which evidence of sexual assault is collected" if, and only if, the seller "markets or otherwise presents" it as usable "over-the-counter, at-home, or self-collected," or knows the person will use it for that purpose.

1. Does a law that bans the sale of otherwise lawful items based exclusively on the content of the seller's truthful marketing burden speech protected by the First Amendment?

2. Do content and viewpoint restrictions on speech avoid strict scrutiny review merely because the speech is commercial in nature?

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

Leda Health Corporation, which was the plaintiff in the district court and the appellant in the court of appeals.

Jay Robert Inslee, in his official capacity as Governor of Washington; and Robert W. Ferguson, in his official capacity as Attorney General of Washington. Respondents were the defendants in the district court and the appellees in the court of appeals.

Leda Health Corporation has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

RELATED PROCEEDINGS

Leda Health Corporation v. Jay Inslee and Robert Ferguson, No. 2:24-cv-00871-DGE (W.D. Wash.). Order denying preliminary injunction and granting motion to dismiss; judgment entered October 21, 2024.

Leda Health Corporation v. Jay Inslee and Robert Ferguson, No. 24-6659 (9th Cir.). Memorandum disposition affirming entered July 29, 2025.

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INTRODUCTION

This case asks a simple question with sweeping implications: May a State ban the sale of a lawful product solely because the seller truthfully tells consumers about a lawful way to use it? Washington answered yes. The statute challenged in this case makes it unlawful to sell any "product with which evidence of sexual assault is collected" if the seller either (a) markets or presents it for "at-home" or "self-collected" use, or (b) intends, knows, or should know it will be used outside hospitals or law enforcement. Wash. Rev. Code § 5.70.070(1)(d), (2)(a)–(b). The product never changes; only the words do. The law toggles legality based on content—what the speaker says about lawful use. Those speakers include the petitioner in this case, Leda Health Corporation, a company that sought to offer "at home" sexual assault kits in the State of Washington.

The Washington Legislature said the quiet part out loud: it enacted the statute to prevent sexual assault survivors from receiving "inaccurate information" and to ensure only "accurate information" about sexual-assault kits is shared, language that should set off First Amendment alarm bells for anyone reading it. *Id.* at § 5.70.070, Intent—2023 c 296. In other words, the State targeted a disfavored message—the "at-home" option for serving victims—and preferred the opposite message—"institutional only." That is content and viewpoint discrimination.

The decision below upheld the statute by letting subsection (2)(b) do all the work for subsection (2)(a). The lower court insulated section (2)(a) (restricting "marketing") from First Amendment review by declaring

that any marketing it forbids is "related to illegal activity" under *Central Hudson*, because section (2)(b) purportedly renders the underlying sale unlawful. But that collapses two distinct, disjunctive prohibitions into one and quietly turns the legislature's "or" into an "and." By its terms, (2)(a) is a freestanding ban on presenting an "at-home" use message when providing a kit. And that speech triggers liability *whether or not* the seller has the (2)(b) mental state or any knowledge about a particular buyer's intended use. Treating (2)(a)'s speech as unprotected simply because the State also made certain sales illegal under (2)(b) is classic bootstrapping: the government manufactures "illegality" by tying it to disfavored words, then invokes that contrived illegality to strip those words of protection. Nor does lower court's assertion that it is "hard to conceive" of marketing at-home use without also possessing the (2)(b) mental state justify rewriting the statute's disjunctive structure or skipping the threshold analysis of (2)(a) as a standalone, content-based speech restriction. Put simply, the lower court let (2)(b) do all the work for (2)(a). That was error.

The stakes are not confined to this product or this speaker. If allowed to stand, Washington's tactic becomes a template any government can copy: outlaw an otherwise lawful transaction whenever disfavored words are uttered, then rebrand the words as "speech about illegal activity." That approach chills speakers and listeners alike—here, survivors who have a right to receive truthful information about lawful options. In the critical hours after an assault, withholding basic, accurate guidance from survivors—an alarming 80% of whom do

not report their assault *at all*[1]—means lost choices and lost evidence. By the time institutional care is available (to the 20% who seek it), the opportunity to preserve perishable evidence may be gone. The statute disproportionately harms survivors who cannot or will not immediately go to a hospital or law enforcement—those in rural areas, those fearing retaliation or immigration consequences, or those for whom retraumatization is a serious risk—by making it perilous for anyone to answer their questions or include cautionary instructions. And it does so in a live policy debate where other States, like Texas, have recently moved in the opposite direction in allowing "at home" use of sexual assault kits—underscoring both the viewpoint-based nature of Washington's law and the national importance of the question.

The First Amendment does not permit governments to evade strict scrutiny by relabeling content discrimination as "commercial conduct." This Court's precedent makes clear that, when the government targets speech because of what it says or who says it, strict scrutiny applies; commercial speech is "no exception." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564, 567 (2011); *see also Reed v. Town of Gilbert*, 576 U.S. 155, 163–65 (2015); *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610 (2020).

At minimum, the decision below should be vacated because it short-circuited the inquiry—treating (2)(a)'s freestanding speech ban as unprotected only by importing (2)(b)'s conduct label. The Court should grant certiorari,

1. Vogt, Emily L., *Trends in US Emergency Department Use After Sexual Assault, 2006-2019*, https://tinyurl.com/ybxkx92v ("Unfortunately, survivors often receive inadequate or incomplete care.") (last accessed December 26, 2025).

make clear that content-based burdens on truthful speech trigger strict scrutiny, and remand for proper First Amendment review.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is an unpublished memorandum disposition, filed July 29, 2025. It is reproduced at Pet. App. 1a.

The opinion and order of the United States District Court for the Western District of Washington (denying a preliminary injunction, granting the motion to dismiss, and entering judgment on October 21, 2024) is unreported and reproduced at Pet. App. 5a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment on July 29, 2025. Pursuant to Supreme Court Rule 13.5, Petitioner sought an extension of time to file a petition for a writ of certiorari on October 16, 2025. The time to file was extended to December 26, 2025. This petition is timely under Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Wash. Rev. Code § 5.70.070. In relevant part:

(1) For purposes of this section:

. . .

(d) "Sexual assault kit" means a product with which evidence of sexual assault is collected.

(2) A person may not sell, offer for sale, or otherwise make available a sexual assault kit:

(a) That is marketed or otherwise presented as over-the-counter, at-home, or self-collected or in any manner that indicates that the sexual assault kit may be used for the collection of evidence of sexual assault other than by law enforcement or a health care provider; or

(b) If the person intends, knows, or reasonably should know that the sexual assault kit will be used for the collection of evidence of sexual assault other than by law enforcement or a health care provider.

The full text of statutory provisions is reproduced in the appendix at Pet. App. 48a.

STATEMENT OF THE CASE

A. The Speech and the Statute.

Leda Health Corporation ("Leda") is a small startup company that developed Early Evidence Kits ("EEK") to give sexual assault survivors an option to preserve potential evidence of their assault privately and lawfully for possible future use. In the United States, the sad, undisputed reality is that most sexual assault survivors do not go to a hospital or law enforcement after being assaulted.[2]

EEKs consist of commonplace, lawful items (sterile swabs, plastic bags, tamper-evident tape, a shipping sleeve, a ballpoint pen) along with instructions describing lawful self-collection methods designed to minimize contamination and preserve chain of custody. Survivors may ship the sealed kit to an accredited laboratory for testing and storage, keep it for later use, or choose to take it to law enforcement or a hospital. Leda's materials include chain-of-custody documentation and cautionary disclaimers; they do not guarantee admissibility, and nothing in Washington law makes self-collection illegal.

In 2023, Washington enacted House Bill 1564, codified at Wash. Rev. Code § 5.70.070. The statute defines "sexual assault kit" broadly as any "product with which evidence of sexual assault is collected." *Id.* at § 5.70.070(1)(d). It then makes it unlawful to "sell, offer for sale, or otherwise make available" such a product if, and only if, the seller either (a) "market[s] or otherwise present[s]"

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2. *See* RAINN, *Facts & Statistics: The Scope of the Problem*, https://tinyurl.com /6dxuf3yb (last visited December 26, 2025)

it as "over-the-counter, at-home, or self-collected," or otherwise indicates it may be used to collect evidence other than by law enforcement or a health care provider, § 5.70.070(2)(a), or (b) "intends, knows, or reasonably should know that the sexual assault kit will be used for the collection of evidence of sexual assault" in that lawful, non-institutional setting, § 5.70.070(2)(b). The same kit is legal to sell if it is presented "for use by nurses or police," but illegal to sell if it is presented with truthful instructions for at-home use by a survivor. The product does not change; the speech does.

B. Events Leading to the Statute.

In October 2022, the Washington Attorney General sent Leda a cease-and-desist letter claiming that Leda's online description of at-home use was "patently false" under state consumer law and threatening enforcement. Leda ceased sales and marketing in Washington. Several months later, legislators introduced HB 1564.

The Legislature's goal was clear: stifle the spread a disfavored message. Legislative materials described the measure as a way to prevent the spread of "misinformation" about at-home kits and to ensure survivors receive information aligned with the State's preference for institutional exams. Committee discussions identified companies offering at-home options and emphasized stopping the "at-home" message from reaching survivors. The final statute did not ban any item or self-collection itself; it banned the sale and marketing of kits when accompanied by the disfavored message. See Pet. App. 48a.

C. The Proceedings Below.

Leda filed suit under 42 U.S.C. § 1983, alleging that § 5.70.070 is a content- and viewpoint-based restriction on speech that violates the First Amendment. Leda sought a preliminary injunction, explaining that the statute suppresses truthful, non-misleading information about the lawful use of lawful products and chills both speakers and listeners, including survivors who have a right to receive information.

The district court denied a preliminary injunction, granted the State's motion to dismiss, and entered judgment. Pet. App. 45a. The court held that (2)(b) regulates conduct, not speech, because liability turns on a seller's intent, knowledge, or reason to know about a buyer's intended use. Pet. App. 49a. As to (2)(a), the court acknowledged it regulates marketing, but concluded any covered speech is unprotected because it is "related to illegal activity." Pet. App. 3a. In the court's view, once (2)(b) makes a sale unlawful, a seller's truthful marketing that a kit may be used at home necessarily proposes an illegal transaction and fails at the threshold step of *Central Hudson*.

The Ninth Circuit affirmed. Pet. App. 1a. The panel agreed that (2)(b) "regulates conduct, not speech." Pet. App. 2a. It further held that, to the extent (2)(a) regulates speech, it regulates only commercial speech that is unprotected because it is "related to" the "illegal activity" proscribed by (2)(b). Pet. App. 3a. The court reasoned it was "hard to conceive" of marketing that presents a product as usable at home that does not also satisfy (2)(b)'s

intent/knowledge element; on that basis, the court treated the marketing as proposing an illegal transaction and therefore outside the First Amendment under Central Hudson's threshold step. Pet. App. 3a.

D. The First Amendment Stakes.

The decision below blesses a strategy any state could adopt to punish the sale of lawful goods by making the legality of a transaction hinge on the content of truthful, non-misleading speech about lawful uses. It allows a state to relabel speech it could not ban directly as "speech related to illegal activity" by using the speech itself to render the underlying sale illegal. In operation, § 5.70.070 functions as a content- and viewpoint-based ban on information: sellers may speak in favor of institutional use but may not speak in favor of lawful at-home use. The statute thus disfavors a particular idea—self-collection by survivors—afraid to go to hospitals and police—and suppresses both the speaker's message and the public's right to receive it. That is the speech question presented here.

REASONS FOR GRANTING THE PETITION

I. The Statute Burdens Speech.

Section (2)(a) of Washington's statute prohibits the sale or offer for sale of any "product with which evidence of sexual assault is collected" if the seller "market[s] or otherwise present[s]" it as "over-the-counter, at-home, or self-collected," or otherwise indicates that the product may be used to collect evidence "other than by law enforcement or a health care provider." Wash. Rev. Code § 5.70.070(1)(d), (2)(a). On its face and in operation, Section (2)(a) targets

what a seller says about a product. It does not turn on any physical attribute of the product, and it does not prohibit self-collection itself. It makes the legality of an otherwise lawful sale hinge on the content of the seller's message. That is a regulation of speech.

Section (2)(a) expressly targets marketing and presentation, which are speech. This Court has made clear that marketing and advertising are protected communications, even when they involve a commercial transaction. *See Sorrell*, 564 U.S. at 564, 567 (pharmaceutical marketing is protected speech and commercial speech is no exception to the First Amendment's protection against content based burdens); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501, 504 (1996) (plurality opinion) (rejecting the argument that the government may keep consumers in ignorance by suppressing truthful commercial information). While commercial speech includes speech "proposing a commercial transaction," it also includes "the advertising and promotion of products and services, assembly or user instructions, information about the product." *Maryland Shall Issue, Inc. v. Anne Arundel Cnty. Maryland*, 91 F.4th 238, 248 (4th Cir. 2024).

Here, the statute uses communicative criteria to determine consumer protection liability. If the seller communicates a disfavored message, namely that a survivor can use the product at home, the sale is forbidden. If the seller communicates a favored message, namely that the product is to be used only by law enforcement or a health care provider, the sale is permitted. The product remains the same. The message changes. That is content based regulation.

A. Section (2)(a) bans speech based on its content and viewpoint.

A law is content based when it applies to particular speech because of the topic discussed or the idea expressed. Although the decision below recognized the statute as a marketing restriction adopted to stop the spread of what the Washington Legislature called "misinformation" about at-home use, this Court has cautioned that the government cannot disfavor truthful, non-misleading information in the name of consumer protection. *See Sorrell*, 564 U.S. at 566, 571 ("marketing" is just "speech with particular content").

Section (2)(a) singles out speech that communicates one idea about a lawful product, namely that survivors may lawfully self-collect evidence at home, and disfavors that idea relative to the contrary message that only institutional collection (like the kind performed at hospitals and police stations) is appropriate. Leda's viewpoint on this topic—that survivors can collect sexual assault evidence on their own with legal items—is overtly political. Look no further than the fact that on December 1, 2025, the Texas Legislature began implementing House Bill 1422.[3] Broadly, the law lets sexual-assault survivors get forensic exams and DNA testing without reporting to police. As one Texas legislator described it, "House Bill 1422 removes one of the biggest barriers sexual assault survivors face when deciding whether to seek help: the fear that getting a forensic exam means they must immediately involve

3. Tex. H.B. 1422, 89th Leg., R.S. (2025), https://tinyurl.com/6aftx683 (last accessed December 26, 2025).

law enforcement."[4] Washington simply finds itself on the opposite side of Texas this political debate. And all these legislative choices come on the heels of a chorus of vibrant public discussion on the topic of whether survivors receive adequate resources in the United States.[5]

Commercial speech that is inextricably "intertwined with informative and perhaps persuasive speech seeking support . . . for particular views on economic, political, or social issues" is treated as political speech that is fully protected by the First Amendment. *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). Regardless, speech receives the highest form of protection when "it can be fairly considered as relating to any matter of political, social, or other concern to the community." *Lane v. Franks*, 573 U.S. 228, 241 (2014). The burden imposed by the restriction is squarely "directed at [the] particular ideas" about the "at home" use of sexual assault kits and "presents the danger of suppressing" those ideas because of their disfavored viewpoint. *Leathers v. Medlock*, 499 U.S. 439, 453 (1991).

Common sense confirms the point: the statute here pins legality to *words*, not physical product features. An online listing that reads "sexual assault kit for clinical

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4. *Sex assault survivors in Texas can now get DNA tests without involving police*, Fox 7 Austin, https://tinyurl.com/y3px6y8n (last accessed December 26, 2025).

5. Nadolny, T. L., Penzenstadler, N., Fraser, J., & Barton, G. (2024, October 3). *America tested 100,000 forgotten rape kits. but Justice remains elusive*. USA Today. https://tinyurl.com/3a4srbpc (Last accessed December 26, 2025); Kennedy, Pagan. (2024, March 6). *Let's Reinvent the Rape Kit*. Harvard Public Health, https://tinyurl.com/57mzubub (Last accessed December 26, 2025).

use by nurses" may be posted and the product may be sold; change *nothing but the text* to "sexual assault kit with instructions for at-home self-collection" and both the listing and the sale become unlawful. A distributor can ship the identical kit to the same customer without incident so long as the shipping carton says "clinical use," but a sticker that says "self-collection instructions enclosed" makes the shipment unlawful because of how it was "presented" under (2)(a). These examples are not edge cases; they describe ordinary advertising, labeling, point-of-sale conversations, and informational materials. In each scenario the physical product and the underlying conduct remain identical; only the content of the message changes. A law whose punitive application turns on whether the speaker communicates a particular idea about a lawful commercial product is a law that burdens speech. *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975) ("[S]peech is not stripped of First Amendment protection merely because it appears" in a "commercial advertisement."); *Ginzburg v. United States*, 383 U.S. 463, 474 (1966) (The existence of "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.")

The statute's different treatment of messages about the same product is viewpoint discrimination as well as content discrimination. In *Sorrell*, this Court condemned a law that discriminated based on content and speaker identity, because it burdened a category of commercial speech due to *what* it communicated and *who* communicated it. *Id.* at 564, 571. Section (2)(a) likewise targets a category of marketing speech based on what it communicates, namely that at-home use is an option, and it disfavors that viewpoint relative to the State preferred alternative.

Washington's justification for the statute only underscores its speech-burdening nature. Communicating information—even if some believe it to be "misinformation"—is still speech that implicates the First Amendment. The Washington Legislature adopted the statute to suppress an idea about at-home kits that it considered inaccurate and to channel survivors toward institutional settings. Section (2)(a) therefore cannot be justified without reference to the content of the regulated speech. The law is not triggered by a product's features. It is triggered by words and ideas a seller conveys. That is the essence of a speech-based restriction, and it requires the statute to pass First Amendment scrutiny. *Sorrell*, 564 U.S. at 566, 571.

The lower courts treated Section (2)(a)'s speech restriction as unprotected on the theory that it concerns illegal activity—but *only* because the State has made the sale illegal whenever the speech occurs. But that's a circle. That reasoning uses the speech to ban the sale, then relies on the asserted illegality of the sale to declare the speech unprotected under *Central Hudson*'s threshold step. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 566 (1980). This approach improperly collapses the first step of the *Central Hudson* analysis.

Central Hudson asks at the threshold whether the speech concerns lawful activity and is not misleading. *Id.* at 566. Before Washington enacted Section 5.70.070, it was lawful to sell the items at issue accompanied by the message that it was lawful for survivors to self-collect evidence for personal preservation or possible future use (something that also is indisputably legal still, even after

the statute's passage). The statute does not make self-collection unlawful. Rather, splitting hairs, Washington declared that a sale is unlawful when *accompanied* by truthful marketing that discusses at-home use, then invoked that newly created unlawfulness to recast the truthful marketing as a proposal of illegal activity. If that tactic were permitted, any legislature could convert truthful commercial speech about lawful uses of lawful products into speech about illegal activity simply by outlawing the transaction whenever that speech occurs. That is precisely the kind of end run around the First Amendment that *Sorrell* forbids. 564 U.S. at 566, 571. The government may not burden disfavored speech and then defend that burden by pointing to the very burden it created.

Nor does the State's asserted interest in preventing what it labels misinformation justify recategorizing truthful speech as unprotected. Governments may not reduce the flow of truthful information because it worries that consumers will make choices it does not prefer. The "paternalistic assumption" that a survivor will use truthful information "unwisely" cannot justify a decision to suppress it. *44 Liquormart*, 517 U.S. at 507. The government may not engage in content-based suppression of speech as a shortcut to policy goals that could be pursued through less speech restrictive means, such as counter speech and targeted prohibitions of deception. *Id.* at 507, 510, 511; *see also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (core First Amendment protections prevent the government from restricting what the people may hear based on the opinions of the government).

Section (2)(a) nevertheless imposes a blanket ban on truthful marketing that discusses at-home use, even if the marketing includes robust disclaimers and avoids any guarantee of evidentiary admissibility.

B. Section (2)(b) Burdens Speech.

This Court should grant this petition, vacate the lower court's judgment, and remand based solely on the fact that (2)(a) burdens speech, not conduct. Because the statute is disjunctive, a sale is unlawful if *either* (2)(a) "or" (2)(b) is satisfied. Wash. Rev. Code § 5.70.070(2). Recognizing that (2)(a) regulates speech is therefore sufficient to warrant a grant, vacate, and remand so the court of appeals can apply the proper First Amendment framework to that provision, address any remedial and severability questions, and reconsider its analysis of the statute as a whole.

The Ninth Circuit's step-one *Central Hudson* rationale depended on using (2)(b) to render the transaction "illegal" and then treating (2)(a)'s marketing speech as a proposal of illegality. But the lower court never determined whether (2)(a) can stand on legs of its own. The Court should also make clear, as explained *infra*, that (2)(b) burdens speech as well.

Section (2)(b) tells you what it is by where it sits. Following immediately *after* (2)(a), and joined by the disjunctive "or," it functions as the belt to (2)(a)'s suspenders, the catch-net for the same disfavored "at home" message when that message surfaces in forms other than overt "marketing." If (2)(a) polices the headline, (2)(b) polices the fine print and the conversation at the counter. Its

placement and text show that the legislature designed a two-step scheme aimed at the same speech: (2)(a) bars saying the "at home" part out loud in marketing, and (2)(b) mops up everything that slips through by punishing the sale whenever the seller's words, materials, or even inferred assent indicate knowledge or intent that a lawful buyer will pursue a lawful at-home use.

In other words, Section (2)(b) targets expressive conduct. It makes a "sexual assault kit" illegal to sell if the seller "intends, knows, or reasonably should know" the product "will be used" to self-collect sexual assault evidence. Wash. Rev. Ann. at § 5.70.070(2)(b). This provision stifles the spread of the "at home" message by means more indirect than actual marketing and, even worse, punishes sellers based on their own silent aspirations for how someone will use their product. There is no precedent for a law that punishes a seller for silently hoping a customer will buy a legal good and use it in a legal way. In both design and effect, Section (2)(b) burdens speech.

Section (2)(b) cannot be applied without examining speech. Knowledge and intent are mental states. In commercial settings, the primary evidence of those mental states is what the seller says and receives in return. The State of Washington will prove a seller's "intent" or "knowledge" through the seller's marketing, labeling, instructions, point-of-sale conversations, emails, chats, FAQs, and other communications that convey or acknowledge at-home use. A clerk's answer to a customer's question, an email describing self-collection procedures, a website page that discusses how a survivor might preserve potential evidence at home, or packaging that includes

instructions for self-collection each become ready proof of intent or knowledge. The statute here, therefore, requires enforcement officials and courts to scrutinize what was said, written, displayed, or included in the packaging for the "sexual assault kit."

Put simply, (2)(b) bans the spread of the "at home" message in all the ways Section (2)(a) cannot reach. Consider again the first ad for a sexual assault kit touting use by police and hospitals. That marketing is not banned under Section (2)(a). But imagine that a seller offers this *exact kit* to survivors while verbally telling them that the kit also can legally be used at home just by following the instruction card. The seller will be punished under Section (2)(b). Imagine a purchaser asks how difficult it would be for her to follow the instructions herself. If the seller completes the sale after truthfully answering, the seller will again be punished. Finally, imagine a seller inserts easy-to-follow instructions inside the kit, places it on a shelf in blank packaging or lists it on a website, and merely offers it for sale while hoping that a survivor will purchase the kit and use it at home. If a seller does just that, it will yet again be punished. Section (2)(b) targets expressive conduct in these ways. It is "directed narrowly and specifically at expression or conduct commonly associated with expression"—the communications inherent in commercial dealings. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 751 (1988).

The only thing that changed in each of the abovementioned examples was the content of the speech—not the physical items being sold, and not the manner in which they were sold. Laws that cannot be "justified without reference to the content of the regulated speech"

are content based speech regulations that implicate the First Amendment. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Even *silence* versus speech matters: a seller who says nothing about at-home use may complete a transaction; a seller who provides a truthful, cautionary disclaimer about the limits and risks of at-home use (like Leda) violates the law because the disclaimer communicates the disfavored idea.

i. Offering an "at home" kit is expressive conduct.

The threshold question is whether conduct with a "significant expressive element" drew the legal remedy or the ordinance has the inevitable effect of "singling out those engaged in expressive activity." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-07 (1986). To determine whether conduct is sufficiently expressive, the Court asks whether it was "intended to be communicative" and "in context, would reasonably be understood by the viewer to be communicative." *Clark v. Community for Creative Non–Violence*, 468 U.S. 288, 294 (1984).

First, providing survivors "at home" sexual assault kits carries a significant expressive element. The very thing that makes a kit "at home" is the speech about its use, which is "nonspeech" that is "intimately related to expressive conduct protected under the First Amendment." *Arcara*, 478 U.S. at 706 n.3; *see also Grayned v. City of Rockford*, 408 U.S. 104 (1972) (demonstration results in prosecution under a city ordinance); *Marsh v. Alabama*, 326 U.S. 501 (1946) (trespass in order to distribute religious literature); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (breach of peace prosecution based upon distribution of religious

literature). Communicating a certain message leading up to or during a sale is the *only* way to sell an "at home" kit. Section (2)(b) punishes that expressive element. It makes the subsequent transaction unlawful because of the seller's communications or even the seller's silent agreement with the "at home" message supply intent or knowledge. The only way to avoid that punishment is to avoid any suggestion of the "at home" message at all. In practice, that poses "the hazard of self-censorship." *Mishkin v. New York*, 383 U.S. 502, 511 (1966).

The First Amendment permits no such thing. Its core tenant is the protection of "speaker[s] [who] may be unsure about the side of a line on which his speech falls" or if he "may worry that the legal system will err, and count speech that is permissible as instead not." *Counterman v. Colorado*, 600 U.S. 66, 75 (2023). The resulting self-censorship of the "at home" message—one Washington could not proscribe outright—can no less be accomplished by chilling sellers like Leda into silence. Section (2)(b) thus targets the "significant expressive element" of selling an "at home" kit. *Arcara*, 478 U.S. at 706-07.

This Court's precedents also have looked at whether the significantly expressive element "drew the legal remedy in the first place." *Arcara*, 478 U.S. at 706 (citing *United States v. O'Brien*, 391 U.S. 367 (1968)). That happened here. The Washington Legislature's own statement of "intent" affixed to the statute itself identifies the perceived harm as speech about at-home kits and declares the statute necessary to prevent survivors from receiving "[in]accurate information" and to ensure only "accurate information" is shared about sexual assault kits. Wash. Rev. Code Ann. § 5.70.070, Intent—2023 c

296. Viewpoints that disagree with this one (like Leda) are what legislators called "misinformation," which the statute was designed to halt.[6] *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 430-31 (1992) (Viewpoint restrictions are "particularly pernicious" types of laws that "require greater scrutiny" than mere "subject-matter-based restrictions."). The Legislature made clear that the desire to stifle what it believed was "[in]accurate information" drew the legal response. *See HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 685 (9th Cir. 2019) (*citation omitted*). (a statute's "stated purpose" informs the analysis of its inevitable effect on expression).

The "significant expressive element" involved in providing an "at home" sexual assault kit is not the only way to tell that the statute targets speech. This Court also looks at whether the "inevitable effect" of "singling out those engaged in" a particular type of speech. *Arcara*, 478 U.S. at 707; *see also Minneapolis Star & Trib. Co. v. Minnesota Com'r of Revenue*, 460 U.S. 575 (1983).

Here, the inevitable effect of Section (2)(b) is to single out kits sold with the "at home" message. To be sure, that is exactly what (2)(b) was designed to do. The statute's statement of intent explains that banning the "at home" message was necessary to ensure only what the State deemed "accurate information" was shared. Wash. Rev. Code Ann. § 5.70.070, Intent—2023 c 296. By stifling the message, the "at home" kit vanishes. The burden (2)(b) imposes is squarely "directed at [the] particular

6. *Prohibiting the Sale of Over-the-Counter Sexual Assault Kits: Hearing Before S. Law & Justice Comm.*, H.B. 1564, 68th Leg., Reg. Sess. (Wa. 2023) (statement of Alex Davidson), https://tinyurl.com/mtyax7w8 (41:10) (last accessed December 26, 2025).

ideas" about the "at home" use of sexual assault kits and "presents the danger of suppressing" those ideas because of their disfavored viewpoint. *Leathers*, 499 U.S. at 453; *see also Minneapolis Star & Trib.*, 460 U.S. at 592 (This Court has "long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.").

Even if this were a close call (which it is not), the lower court applied the wrong test. This Court has held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct," like selling a product that only *becomes* that product *because* of the speech about it, only "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedom." *O'Brien*, 391 U.S. at 376. At minimum, the lower court should have applied *O'Brien* to determine the speech versus nonspeech question. It erred in declining to do so.

ii. The Statute restricts the rights of sexual assault survivors to hear truthful speech.

Section (2)(b) not only targets sharing the disfavored message. It is squarely aimed at making sure survivors never hear it. This targeting unconstitutionally burdens a survivor's "right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). When governments try to restrict what the public can hear—even while touting its own good intentions—courts "should not examine the statute's constitutionality as if it raised no special First Amendment concern." *United States v.*

Am. Libr. Ass'n, Inc., 539 U.S. 194, 216 (2003) (Breyer, J., concurring). But the decision below did just that.

The State of Washington does not want survivors to learn what they can do with legal items. By making it perilous to answer questions, provide instructions, or include cautionary guidance, (2)(b) deters sellers from speaking at all to survivors who seek information about lawful at-home self-collection. Staff will be instructed not to answer questions, written materials will be stripped of content, and company websites will remove neutral information about self-collection.

Section (2)(b) bans sellers from intimating the "at home" use directly to survivors when providing the product to them. The "paternalistic assumption" that a survivor will use "truthful . . . information unwisely cannot justify a decision to suppress it." *44 Liquormart*, 517 U.S. at 497, 507. The Washington Legislature's own admission that the statute was passed to "prevent survivors from receiving [in]accurate information," Wash. Rev. Code Ann. § 5.70.070, Intent—2023 c 296, reveals little more than a "highly paternalistic" desire to restrict what the people may hear based on the government's view of what is best. *Virginia State Bd. of Pharmacy*, 425 U.S. at 770.

Where the public's right to hear truthful information is restricted, this court has applied heightened, but not "strict," scrutiny. *See, e.g., Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989); *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 740–747 (1996) (plurality opinion); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 227 (1997) (Breyer, J., concurring in part); *Red Lion Broadcasting Co.*

v. FCC, 395 U.S. 367, 389–390 (1969). The decision below never addressed whether the statute unconstitutionally burdens the public's right to hear truthful information about lawful products. This, too, was error.

II. The Court Should Instruct the Lower Court to Apply Strict Scrutiny on Remand.

The government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Content-based restrictions on speech are presumptively unconstitutional and may be justified only if the government proves that they are "narrowly tailored to serve compelling state interests." *R.A.V.*, 505 U.S. at 395. Because the sale and use of sexual-assault kits is lawful in Washington, speech proposing and accompanying those lawful transactions enjoys that presumption as well.

On remand, the Court should direct the court of appeals to apply strict scrutiny on remand. Content-based restrictions on speech are subject to strict scrutiny, and "[c]ommercial speech is no exception." *Sorrell*, 564 U.S. at 566. Since *Sorrell*, the Court has only reinforced the critical nature of that threshold inquiry: *before* invoking *Central Hudson*'s intermediate scrutiny, a court must determine whether the law is content based or speaker based. If it is, strict scrutiny governs, regardless of whether the speech happens to have commercial elements. *Reed*, 576 U.S. at 155; *Barr*, 591 U.S. at 610.

Sorrell applied heightened—indeed strict—scrutiny to a commercial speech restriction where the State disfavored a particular marketing message and the

speakers who conveyed it. 564 U.S. at 565–67 (citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418 (1993); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994)). To be sure, the *Sorrell* court knew it was dealing with commercial speech. But the *Sorrell* court explicitly rejected the argument that the statute was "a mere commercial regulation" warranting lesser review, holding that when the government restricts speech "because of disagreement with the message it conveys," the First Amendment requires heightened scrutiny and "[c]ommercial speech is *no exception*." *Id.* at 566 (quoting *Ward*, 491 U.S. at 791 (emphasis added)) (citations omitted).

Four years later, *Reed* confirmed the point. This Court affirmed that a law is content based if it "applies to particular speech because of the topic discussed or the idea or message expressed," and such laws are presumptively unconstitutional and subject to strict scrutiny. 576 U.S. at 155, 163–64, 171. In a concurrence, Justice Breyer emphasized that using "content discrimination to trigger strict scrutiny sometimes makes perfect sense." *Id.* at 176. The concurrence also specifically recognized that Sorrell had "applied the heightened 'strict scrutiny' standard even in cases where the less stringent 'commercial speech' was," in Justice Breyer's view, more "appropriate." *Reed*, at 178 (Breyer, J., concurring). But Justice Breyer emphasized the key point here: *Sorrell* applied a form of heightened scrutiny to commercial speech without mechanically defaulting to *Central Hudson*.

Fast forward five more years to 2020. In *Barr*, this Court reviewed a First Amendment challenge to the Telephone Consumer Protection Act's long-established

ban on robocalls to cell phones after Congress added a 2015 exception allowing robocalls to collect government-backed debt. *Barr*, 591 U.S. at 611. The Court held that the 2015 government-debt exception was a content-based preference (it permitted calls based on their subject matter) and failed constitutional scrutiny. *Id.* at 618. As a remedy, the Court severed the offending exception and left the broader robocall ban intact, emphasizing that when a discrete, content-based carveout renders a speech regime unconstitutional, the ordinary fix is to excise the exception rather than invalidate the entire statute. *Id.* at 636. But in declaring the exception unconstitutional, this Court once more applied strict scrutiny to a content-based speech carve-out, emphasizing that a statute that is "directed at certain content and . . . aimed at particular speakers" triggers the most exacting review. *Barr*, 591 U.S. at 611 (quoting *Sorrell*, 564 U.S. at 567). Justice Breyer, yet again flagging the path down which the Court continued to travel, wrote of the Court's decision that "to apply the strictest level of scrutiny to the economically based exemption here is thus remarkable." *Barr*, 591 U.S. at 642 (Breyer, J., concurring).

Seizing on *Sorrell*'s "no exception" point, lower courts have implemented this instruction by harmonizing *Sorrell*, *Reed*, and *Barr* with *Central Hudson*: intermediate scrutiny applies to content-neutral commercial regulations, but strict scrutiny still applies when the law is content or speaker based.

Take for example the Sixth Circuit's decision in *International Outdoor, Inc. v. City of Troy, Michigan*. The Court squarely addressed how *Sorrell*, *Reed*, and *Barr* impact how lower courts review content-based

restrictions of speech. The court ultimately concluded that this Court's precedent is clear about one thing: commercial speech is no second-class citizen when its content is targeted:

> It follows that the intermediate-scrutiny standard applicable to commercial speech under *Central Hudson* . . . applies only to a speech regulation that is content-neutral on its face. That is, a regulation of commercial speech that is not content-neutral is still subject to strict scrutiny under *Reed*.

International Outdoor, 974 F.3d at 703 (emphasis added). In other words, governmental speech restrictions cannot be justified under the intermediate-scrutiny "commercial speech" First Amendment analysis whenever the government resorted to content- or speaker-based criteria in enacting them. In those instances, strict scrutiny is always the appropriate test. The Statute here is content-based because it went farther than just targeting commercial speech as a whole (e.g., commercial kit retailers can still advertise and sell to hospitals and law enforcement).

With this petition, Leda does *not* ask this Court to overrule or even revisit *Central Hudson*—because it does not need to do so to grant, vacate, and remand. Leda simply asks the court to find that strict scrutiny applies in this instance because the statute targets speech based on content.

The statute at issue is content based on its face. It describes a disfavored message—"at-home,"

"do-it-yourself," or "self-collected" use of sexual-assault kits—and punishes sellers who convey it. *See Reed*, 576 U.S. at 163 ("Content-based laws [are] those that target speech based on its communicative content [and] are presumptively unconstitutional . . . "). Whether a sale is lawful turns on what the speaker says about the kit's use before giving it to someone, not on any physical attribute of the product. If a kit is provided without commentary to a survivor who later self-collects at home, nothing in the statute is violated. But the moment the provider truthfully tells the survivor that the same, lawful items may be used for self-collection, liability attaches. Because the statute "describes speech by content," it is content based. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring). In other words, (2)(a) and (2)(b) cannot be "justified without reference to the content of the regulated speech," making them content based. *Ward*, 491 U.S. at 791 (citation omitted).

The statute's operation is equally telling. If a company advertises a swab by saying it is "the preferred product of SANE nurses across the country," the statute does not apply. If the same company truthfully tells a survivor that the very same swab can be used for lawful self-collection at home, the statute imposes penalties. The only variable is the content of the speech. Targeting speech for its content triggers strict scrutiny "regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech." *Reed*, 576 U.S. at 156, 165. The State's asserted purpose—to funnel survivors to what it calls "accurate information"—does not change the analysis; it confirms it. The legislative statement of intent announces a goal of preventing survivors from receiving "inaccurate

information," thereby preferring one message about sexual-assault kits (institution-only) over another (lawful at-home use). *See* Wash. Rev. Code Ann. § 5.70.070, Intent—2023 c 296. That is the essence of content and viewpoint discrimination.

Strict scrutiny is also appropriate for another separate and independent reason. The speech at issue is intermingled with noncommercial expression and cannot be neatly severed. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) (where commercial and noncommercial elements are "inextricably intertwined," the whole is entitled to full strict scrutiny protection). Here, the "at-home" kit that companies like Leda offer is defined by its instructions, cautions, and context—strip away the words and you are left with an inert assortment of everyday items you can buy at a Walgreens. The message is not an accessory to the product; it is the blueprint that assembles it. The speech makes the product at issue here. But, again, the lower court glossed over this question entirely in finding that the statute had nothing to do with speech.

In sum, the statute is facially content based and speaker targeted, and it discriminates against a particular idea about a lawful product. Under *Sorrell*, *Reed*, and *Barr*, strict scrutiny applies. *Central Hudson* remains relevant for content-neutral regulation of commercial speech, but it does not dilute the standard when the government chooses to suppress speech because of what it says or who says it. The Court should therefore direct the court of appeals to apply strict scrutiny on remand.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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December 29, 2025

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JULY 29, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-6659
D.C. No. 2:24-cv-00871-DGE

LEDA HEALTH CORPORATION,
A DELAWARE CORPORATION,

Plaintiff-Appellant,

v.

JAY ROBERT INSLEE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF WASHINGTON; ROBERT W. FERGUSON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF WASHINGTON,

Defendants-Appellees.

Filed July 29, 2025

Appeal from the United States District Court
for the Western District of Washington
David G. Estudillo, District Judge, Presiding

Argued and Submitted May 21, 2025
San Francisco, California

Appendix A

MEMORANDUM*

Before: BERZON, FRIEDLAND, and MENDOZA, Circuit Judges.

Plaintiff-Appellant Leda Health Corporation appeals the district court's order granting Defendants-Appellees' ("Washington's") motion to dismiss and denying Leda Health's motion for a preliminary injunction. We review de novo the district court's judgment granting a motion to dismiss for failure to state a claim and may affirm the dismissal based on any ground supported by the record. *Kwan v. SanMedica Int'l*, 854 F.3d 1088, 1093 (9th Cir. 2017). We have jurisdiction under 28 U.S.C. §§ 1291 and 1292, and we affirm.[1]

1. Leda Health failed to state any First Amendment claims. Section (2)(b) of House Bill 1564 ("HB 1564") regulates conduct, not speech, so Leda Health's First Amendment challenge to this provision fails.

To the extent that Section (2)(a) regulates speech, it regulates commercial speech and so must satisfy the test articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). Under this test, "[t]he government may ban

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1. Because we affirm the dismissal of Leda Health's Complaint, Leda Health's challenge to the district court's denial of a preliminary injunction is moot. *See HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 687 (9th Cir. 2019).

. . . commercial speech related to illegal activity." *Id.* at 563-64. Because Section (2)(b) prohibits selling, offering, or otherwise making available sexual assault kits if the offeror "intends, knows, or reasonably should know that the sexual assault kit will be used for the collection of evidence of sexual assault other than by law enforcement or a health care provider," any speech covered by Section (2)(a) is "related to" the "illegal activity" of engaging in a transaction proscribed by Section (2)(b) and is therefore unprotected by the First Amendment. Wash. Rev. Code § 5.70.070; *Cent. Hudson*, 447 U.S. at 564. It is hard to conceive of a circumstance in which someone "market[s] or otherwise present[s]" a "product with which evidence of sexual assault is collected" "as over-the-counter, at-home, or self-collected or in any manner that indicates" that the product "may be used for the collection of evidence of sexual assault other than by law enforcement or a health care provider" but does not "intend[]" or "know[]" or should not "reasonably . . . know" that the product "will be used for the collection of evidence of sexual assault other than by law enforcement or a health care provider." Wash. Rev. Code § 5.70.070.

2. HB 1564 is not a bill of attainder. Bills of attainder single out individuals for punishment without a judicial trial. *SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 669 (9th Cir. 2002). HB 1564 does not single out Leda Health; it is a generally applicable law that applies to any party selling, offering for sale, or otherwise making available "sexual assault kits" marketed or otherwise presented for the collection of evidence by anyone other than law enforcement or a healthcare provider. Wash. Rev.

Code § 5.70.070. Nor does HB 1564 inflict punishment without a judicial trial; it regulates only future conduct to mitigate prospective risks. *See id.*; *SeaRiver*, 309 F.3d at 675-76 (holding that the legislature's focus on prospective risks, regardless of the target's past conduct, evinced that the law at issue was not punitive in nature).

3. Because we affirm dismissal of Leda Health's claims on the merits, we need not and do not decide whether Leda Health's claims against the Governor are barred by the Eleventh Amendment.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WASHINGTON AT TACOMA, FILED OCTOBER 21, 2024

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CASE NO. 2:24-cv-00871-DGE

LEDA HEALTH CORPORATION,

Plaintiff,

v.

JAY ROBERT INSLEE *et al.*,

Defendant.

ORDER ON MOTION FOR PRELIMINARY INJUNCTION (DKT. NO. 10), MOTION TO DISMISS (DKT. NO. 30), AND MOTION FOR EVIDENTIARY HEARING (DKT. NO. 34)

I INTRODUCTION

This matter comes before the Court on Plaintiff's motion for a preliminary injunction (Dkt. No. 10) and Defendants' motion to dismiss for failure to state a claim (Dkt. No. 30). Defendants filed a response to Plaintiff's motion for injunctive relief (Dkt. No. 18), to which Plaintiff replied (Dkt. No. 29). Plaintiff subsequently filed a motion for an evidentiary hearing (Dkt. No. 34), to which

Defendants responded (Dkt. No. 36), Plaintiff replied (Dkt. No. 39), and Defendant surreplied (Dkt. No. 40). Plaintiff then filed a response to Defendants' motion to dismiss (Dkt. No. 37), to which Defendant replied (Dkt. No. 41). Upon careful consideration of the briefing filed by both parties, the Court concludes this matter is suitable for disposition without oral argument. *See* LCR 7(b)(4); *United States v. State of Or.*, 913 F.2d 576, 582 (9th Cir. 1990) ("[W]e have rejected any presumption in favor of evidentiary hearings[.]").

The Court DENIES Plaintiff's motion for a preliminary injunction and GRANTS Defendants' motion to dismiss for the reasons set forth below. Accordingly, Plaintiff's motion for an evidentiary hearing is DENIED as moot, and Defendants' surreply is also moot.

II BACKGROUND

A. Factual Background

Leda Health is a company known for developing Early Evidence Kits ("EEKs")—products that allegedly enable sexual assault survivors to "self-collect and store evidence such as DNA" if they are unable or unwilling to seek a traditional forensic medical examination. (Dkt. No. 11 at 4.) Each EEK is branded with a unique barcode and contains an instruction manual on DNA self-collection, diagnostic swabs, sterile water for swabbing dry areas, a prepaid FedEx bag for shipping to an accredited partner lab, tamper-evident tape, plastic bags for storing clothing or other relevant items, and an intake form for

documenting the assault and chain of custody. (*Id.* at 6.) Leda sells its EEKs to companies or other entities with which it partners—including sorority chapters on college campuses. (*Id.* at 5.) In 2022, Leda attempted to partner with the University of Washington's Kappa Delta sorority. (*Id.* at 4.)

On October 31, 2022, the Washington State Attorney General's Office (AGO) issued Leda a cease-and-desist notification. The letter directed Leda to "immediately cease and desist from advertising, marketing, and sales to Washington consumers related to its 'Early Evidence Kits' on the basis that Leda's business practices related to these kits violated the Washington Consumer Protection Act." (Dkt. No 19-1 at 29.) The letter stated that "Leda's claims regarding the admissibility of its at-home kits have the capacity to deceive a Washington consumer into believing that its Early Evidence Kits have equivalent evidentiary value to a sexual assault evidence kit ("SAEK") administered by a medical professional." (*Id.* at 30). The notice went on to assert that the self-administered nature of Leda's EEKs would predictably result in "numerous barriers to admission as evidence, including on the basis of potential cross-contamination, spoilation, and validity." (*Id.*) It emphasized that, in Washington, exams by a trained Sexual Assault Nurse Examiner (SANE) are "both free and routinely admissible." (*Id.* at 31.) Thus, the letter concluded that "Leda charging consumers for Early Evidence Kits despite the fact they are unlikely to be admissible in a criminal court is an unfair and deceptive business practice" in violation of the Washington Consumer Protection Act. (*Id.*)

Appendix B

Washington was not the first state to raise concerns about the emergence of at-home sexual assault evidence collection kits. In 2019, Attorneys General from New York, Oklahoma, Connecticut, Michigan, North Carolina, Hawaii, and Florida sent cease and desist notifications to Leda's precursor company, MeToo Kits. (*See* Dkt. No. 19-1 at 35-67.) In 2020, New Hampshire's legislature passed a bill establishing that "[n]o person shall sell or offer for sale in the state of New Hampshire an over-the-counter rape test kit." N.H. Rev. Stat. § 359-R:1. Washington and Maryland [1] followed New Hampshire's lead.

On January 24, 2023, Washington's legislature first considered House Bill 1564: "An Act Relating to prohibiting the sale of over-the-counter sexual assault kits." (Dkt. No. 19-1 at 3.) After multiple hearings, the bill was passed and went into effect on July 23, 2023. (Dkt. No. 30 at 13.) Several representatives from Leda Health testified at the hearings, asserting that Leda's kits are not misleading but rather intended to be an additive option for the approximately 70% of sexual assault victims who do not go to the hospital, or for those who go but are not able to see a SANE nurse. (Dkt. No. 13 at 181.) Leda further stated that while the company did not guarantee evidence admissibility, it had procedures in place to establish chain of custody and believed that evidence from its kits should be admissible in court. (*Id.*) Nevertheless, the legislature found that "[a]t-home sexual assault test kits create false expectations and harm the potential

1. *See* Md. Code Ann. Com. Law § 14-4602 - Sale, offer for sale, or distribution of a self-administered sexual assault kit prohibited.

for successful investigations and prosecutions." 2023 Wash. Sess. Laws, ch. 296, § 1. Thus, it concluded "[t]he sale of over-the-counter sexual assault kits may prevent survivors from receiving accurate information about their options and reporting processes; from obtaining access to appropriate and timely medical treatment and follow up; and from connecting to their community and other vital resources." *Id.* Entitled "[o]ver-the-counter sexual assault kits" and codified at Washington Revised Code § 5.70.070, the act establishes that:

> (2) A person may not sell, offer for sale, or otherwise make available a sexual assault kit:
>
> a) That is marketed or otherwise presented as over-the-counter, at-home, or self-collected or in any manner that indicates that the sexual assault kit may be used for the collection of evidence of sexual assault other than by law enforcement or a health care provider; or
>
> b) If the person intends, knows, or reasonably should know that the sexual assault kit will be used for the collection of evidence of sexual assault other than by law enforcement or a health care provider.

Wash. Rev. Code § 5.70.070(2). The statute defines "sexual assault kit" as "a product with which evidence of sexual assault is collected." Wash. Rev. Code § 5.70.070(1). It further stipulates that a violation of the section constitutes "an unfair or deceptive act in trade or commerce and an unfair method of competition for the purpose of applying [Washington's] consumer protection act." Wash. Rev. Code § 5.70.070(3).

B. Procedural History

On June 17, 2024, Plaintiff filed a Complaint for declaratory and injunctive relief, asserting that Washington Revised Code § 5.70.070 (hereinafter referred to as the Statute) is unconstitutional on multiple counts in violation of 42 U.S.C. § 1983. (Dkt. No. 1.) The Complaint claims that the Statute impermissibly regulates protected speech in violation of the First and Fourteenth Amendments and is thus unconstitutional facially and as applied to Leda Health. (*Id.* at 13-16.) The complaint further alleges that the Statute is void for overbreadth and vagueness, both facially and as applied, and that it constitutes an unconstitutional bill of attainder. (*Id.* at 16-20.) Shorty after filing the Complaint, Plaintiff brought the instant motion for a preliminary injunction to prevent enforcement of the Statute on the same grounds. (Dkt. No. 10.) Defendant then filed a motion to dismiss. (Dkt. No. 30).

Appendix B

III MOTION FOR PRELIMINARY INJUNCTION

A. Legal Standard

Governed by Federal Rule of Civil Procedure 65(a), a "preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. NRDC*, 555 U.S. 7, 24, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). To obtain a preliminary injunction, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. "In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Id.* at 24 (quoting *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 542, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987)). In so doing, a court must "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 102 S. Ct. 1798, 72 L. Ed. 2d 91 (1982)). The Ninth Circuit has adopted a sliding scale test for preliminary injunctions in which "a stronger showing of one element may offset a weaker showing of another." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Thus, "serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Id.* at 1135 (internal quotations removed).

B. Likelihood of Success on the Merits and Irreparable Harm

"The loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976). Accordingly, "[w]hen a party seeks a preliminary injunction on the basis of a potential First Amendment violation, the likelihood of success on the merits will often be the determinative factor." *Joelner v. Vill. of Washington Park, Illinois*, 378 F.3d 613, 620 (7th Cir. 2004) (citing *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) ("[T]o the extent that [a plaintiff] can establish a substantial likelihood of success on the merits of its First Amendment claim, it also has established the possibility of irreparable harm as a result of the deprivation of the claimed free speech rights"); *see also Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) ("A colorable First Amendment claim is irreparable injury sufficient to merit the grant of relief") (internal quotations omitted).

1. Facial First Amendment Claim

To mount a facial First Amendment challenge, a plaintiff must establish "that no set of circumstances exists under which the Act would be valid"—in other words, that the law in question is unconstitutional in all its applications. *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). Facial challenges are generally disfavored; "the Supreme Court has entertained facial freedom-of-expression challenges only

against statutes that, by their terms, sought to regulate spoken words, or patently expressive or communicative conduct such as picketing or handbilling." *Roulette v. City of Seattle*, 97 F.3d 300, 303 (9th Cir. 1996) (internal citations omitted).

Focusing on subsection (2)(a) of the Statute, Plaintiff alleges that law "does not ban the sale of EEKs" but rather "regulates how and what companies like Leda Health can tell people about their own products." (Dkt. No. 10 at 9.) In this way, Plaintiff construes the Statute as a "marketing ban" that "aims to eliminate a specific substantive message—that sexual assault kits are available for use 'over-the-counter, at-home or for personal self-collection' without the involvement of law enforcement or a health care provider." (*Id.* at 12) (quoting Wash. Rev. Code § 5.70.070(2)(a)). The Statute thereby functions as a content-based regulation on how a sexual assault kit can be described and who can describe it, Plaintiff asserts. (*Id.* at 13) (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) ("[T]he First Amendment stands against attempts to disfavor certain subjects or viewpoints [as well as] restrictions distinguishing among different speakers, allowing speech by some but not others.")). Because a state cannot ban "the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information," the Statute is facially unconstitutional, Plaintiff concludes. (*Id.* at 14) (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 577, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011)).

Defendant responds that Plaintiff "fundamentally mischaracterizes H.B. 1564 as banning marketing or speech about over-the-counter sexual assault kits." (Dkt. No. 18 at 8.) The Statute, Defendant counters, does not implicate speech at all, but rather regulates the non-expressive conduct of selling, offering for sale, or otherwise making available over the counter sexual assault kits. (*Id.* at 16.) Defendant supports this argument by pointing out that there is nothing in the Statute that prevents Plaintiff from "telling people that they can self-collect evidence" or "promoting the supposed benefits of EEKs or instructing people on how to use EEKs" or "answering questions from people about EEKs." (*Id.* at 17.) Instead, the law is only triggered if a person sells, offers to sell, or otherwise distributes the products in question. (*Id.* at 17.) Defendant further asserts that the Statute's prohibition on offering to sell sexual assault kits does not implicate the First Amendment because "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection." *United States v. Williams*, 553 U.S. 285, 297, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008)).

The Supreme Court is clear that "restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct" and that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell*, 564 U.S. at 567. Thus, to determine whether the Statute operates as a restriction on "commerce or conduct" or whether it implicates protected speech, the Court must construe the

Statute. *See Williams*, 553 U.S. at 293 ("The first step . . . is to construe the challenged statute.").

"When interpreting state laws, a federal court is bound by the decision of the highest state court." *In re Kirkland*, 915 F.2d 1236, 1238 (9th Cir. 1990). "In the absence of such a decision, a federal court must predict how the highest state court would decide the issue." *Id.* at 1239. Washington courts begin statutory interpretation with the statute's "plain meaning," which "'is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.'" *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 243 P.3d 1283, 1288 (Wash. 2010) (quoting *State v. Engel*, 166 Wn.2d 572, 210 P.3d 1007, 1010 (2009)). "If the statute is unambiguous after a review of the plain meaning, the court's inquiry is at an end." *Id.* The court must "bear in mind that '[a] statute, of course, is to be construed, if such a construction is fairly possible, to avoid raising doubts of its constitutionality.'" *Ass'n of Nat. Advertisers, Inc. v. Lungren*, 44 F.3d 726, 729 (9th Cir. 1994) (citing *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780, 101 S. Ct. 2142, 68 L. Ed. 2d 612 (1981)).

Plaintiff's argument that the Statute primarily bans speech is undermined by the clear language of the regulation itself, which states that: "[a] person may not sell, offer for sale, or otherwise make available a sexual assault kit." Wash. Rev. Code § 5.70.070(2). The Statute's operative verbs—"sell," "offer for sale," and "make available"—contemplate transactional conduct, i.e. the

transfer of a sexual assault kit from one person to another, and not speech or expression. *C.f. Williams*, 533 U.S. at 294. The Statute goes on to specify that a person may not sell, offer for sale, or otherwise make available a sexual assault kit "[t]hat is marketed or otherwise presented as over-the-counter, at-home, or self-collected" or "[i]f the person intends, knows, or reasonably should know that the sexual assault kit will be used for the collection of evidence of sexual assault other than by law enforcement or a health care provider." Wash. Rev. Code § 5.70.070(2). The first subsection ("marketed or otherwise presented") identifies what kinds of sexual assault kits are banned for sale based on the kit's stated use (at-home evidence collection). Wash. Rev. Code § 5.70.070(2)(a). In this way, the Statute appears analogous to the FDA's "use of a product's marketing and labeling to discern to which regulatory regime a product is subject." *Nicopure Labs, LLC v. Food & Drug Admin.*, 944 F.3d 267, 282, 444 U.S. App. D.C. 357 (D.C. Cir. 2019) (citing *Whitaker v. Thompson*, 353 F.3d 947, 953, 359 U.S. App. D.C. 222 (D.C. Cir. 2004)).

The D.C. Circuit has held that "the FDA's reliance on a seller's claims about a product as evidence of that product's intended use, in order that the FDA may correctly classify the product and restrict it if misclassified, does not burden the seller's speech." *Id.* at 283. For example, in *Nicopure Labs*, an e-cigarette manufacturer and distributor challenged two provisions of the Tobacco Control Act (TCA) on First Amendment grounds—the premarket review pathway and the free sample ban. The premarket review pathway classified products for regulation and review based on "how the manufacturer describe[d] the

product's characteristics and intended use." *Nicopure*, 944 F.3d at 282. The plaintiff argued that this use of a manufacturer's claims—"such as the claim that the product is 'safer than cigarettes'"—to assign the product to a review pathway impermissibly burdened speech. *Id.* The court was "unpersuaded" by this argument. *Id.* As the panel explained, "[j]ust as the government may consider speech that markets a copper bracelet as an arthritis cure or a beach ball as a lifesaving flotation device in order to subject the item to appropriate regulation, so, too, the FDA may rely on e-cigarette labeling and other marketing claims in order to subject e-cigarettes to appropriate regulation." *Id.* at 283.

Here, the Statute similarly uses the marketing speech accompanying a sexual assault kit to subject the product to "appropriate regulation"—a ban on the sale or distribution of kits intended for use in the self-collection of evidence following sexual assault under Washington Revised Code § 5.70.070. *Id.* In both *Nicopure* and *Whitaker*, its predecessor case, the product in question—like the sexual assault kits at issue here—could be lawfully sold if the substance went "unaccompanied by the speech that characterized it." *Nicopure*, 944 F.3d at 284. Just as the "classification of a substance as a 'drug' turn[ed] on the nature of the claims advanced on its behalf" in *Whitaker*, so too does the classification of a sexual assault kit as banned for sale turn on whether it is "marketed or otherwise presented as over-the-counter." *Whitaker v. Thompson*, 353 F.3d 947, 953, 359 U.S. App. D.C. 222 (D.C. Cir. 2004). This use of speech to determine whether the conduct of selling the product as-labeled is unlawful

"does not run afoul of the First Amendment." *Nicopure*, 944 F.3d at 284; *see also Whitaker*, 353 F.3d at 953 (citing *Wisconsin v. Mitchell*, 508 U.S. 476, 489, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993)) ("the First Amendment allows 'the evidentiary use of speech to establish the elements of a crime or to prove motive or intent'").[2] The *Nicopure* court further concluded that any commercial speech related to the sale of the product as labeled did not implicate the First Amendment, as "[i]t is well established that 'commercial speech related to illegal activity' is not subject to constitutional protection." *Id.* (quoting *Central Hudson Gas & Electric Corp. v. Public Service Commission* 447 U.S. 557, 564, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980)).

Notably, the First Circuit independently reached the same conclusion when considering a similar First Amendment challenge to a local ordinance that restricted flavored tobacco products. *See Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence, R.I.*, 731 F.3d 71 (1st Cir. 2013). The City of Providence's so-called Flavor Ordinance established that it would be "unlawful for any person to sell or offer for sale any flavored tobacco product to a consumer" and provided that a "statement or claim made or disseminated by the manufacturer of a tobacco product . . . that such tobacco product has or produces a characterizing flavor shall constitute presumptive evidence that the tobacco product is a flavored tobacco product."

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2. Just as it is illegal for manufacturers to sell "saw palmetto" (an extract from the dwarf American palm) under the label that it treats benign prostatic hyperplasia, Leda and other manufacturers cannot sell a "kit" that is labeled for self-collection of evidence following a sexual assault. *See Whitaker*, 359 U.S. App. D.C. at 233.

Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence, No. CA 12-96-ML, 2012 U.S. Dist. LEXIS 176256, 2012 WL 6128707 at *19 (D.R.I. Dec. 10, 2012), *aff'd sub nom. City of Providence,* 731 F.3d. 71Much like Plaintiff argues here, the plaintiffs in *City of Providence* claimed that the Flavor Ordinance's "presumptively ban[ning] products based on what Plaintiffs say about them" violated their First Amendment rights. *City of Providence*, 2012 U.S. Dist. LEXIS 176256, 2012 WL 6128707 at *7. But as the district court explained, "[t]he inclusion of a 'public claim or statement made by the manufacturer' to determine whether the described product falls under the definition of a 'flavored tobacco product' . . . does not amount to a prohibition against speech." *2012 U.S. Dist. LEXIS 176256, [WL]* at *8. The definition of characterizing flavor "merely serve[d] to explain which tobacco products fall under the prohibition." *Id.* Likewise, subsection 2(a) of the Statute explains which sexual assault kits "fall under the prohibition": those that are "marketed or otherwise presented as over-the-counter, at-home, or self-collected or in any manner that indicates that the sexual assault kit may be used for the collection of evidence of sexual assault other than by law enforcement or a health care provider." Wash. Rev. Code § 5.70.070(2)(a). Thus, like the Flavor Ordinance, the Statute is an "an economic regulation of the sale of a particular product" and not a regulation of speech. *City of Providence*, 2012 U.S. Dist. LEXIS 176256, 2012 WL 6128707 at *7.

To the extent that the Statue may incidentally implicate speech, the speech is commercial in nature. "[T]he core notion of commercial speech [is] speech which

does no more than propose a commercial transaction." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983) (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 762) (internal quotations omitted). "Speech [can] properly be characterized as commercial when (1) the speech is admittedly advertising, (2) the speech references a specific product, and (3) the speaker has an economic motive for engaging in the speech." *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1106 (9th Cir. 2004) (citing *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66-67, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983)). The Ninth Circuit has declined to limit the scope of commercial speech to "circumstances where clients pay for services," emphasizing that advertisements or marketing that is "placed in a commercial context and directed at the providing of services rather than toward an exchange of ideas" qualifies as commercial speech even if the solicitation is of a non-paying client base. *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1273 (9th Cir. 2017). Likewise, commercial speech remains commercial even if it "contain[s] discussions of important public issues." *Bolger*, 463 U.S. at 67-68.

The Statute prohibits "offering" sexual assault kits "for sale"—speech that "does no more than propose a commercial transaction." *Bolger*, 463 U.S. at 66. Even a hypothetical "offer for sale" at no cost (free distribution of EEKs) would still explicitly "reference the product" itself and be directed at the "provision of services"—services that are typically provided so that the company can turn a profit. *Joseph*, 353 F.3d at 1106; *Herrera*, 860 F.3d, at 1263. This too meets the definition of commercial speech.

To the extent that the marketing language in subsection 2(a) burdens speech, it only does so if a person is selling a kit that is "marketed or otherwise presented as over-the-counter"; critically, it is the sale or distribution of a product meeting the description in 2(a) that triggers the statute. Thus, to the extent that the Statute implicates speech, the speech is "'linked inextricably' with the commercial arrangement that it proposes." *Edenfield v. Fane*, 507 U.S. 761, 767, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993) (quoting *Friedman v. Rogers*, 440 U.S. 1, 10, n. 9, 99 S. Ct. 887, 59 L. Ed. 2d 100 (1979)).

The Supreme Court has developed a four-part test regarding the permissible regulation of commercial speech. *Central Hudson*, 447 U.S. at 566. "At the outset" a court must determine whether the expression is protected at all; "[f]or commercial speech to come within that provision, it at least must concern lawful activity and not be misleading." *Id.* This initial inquiry is where the court in *City of Providence* ended its analysis, as the Ordinance itself "precluded [Plaintiff] from selling flavored tobacco products in Providence" and thus any offer to sell the product constituted an act proscribed by law. *City of Providence*, 2012 U.S. Dist. LEXIS 176256, 2012 WL 6128707 at *8. As the First Circuit panel emphasized in regard to a second Ordinance that was challenged in the *City of Providence* suit (the Price Ordinance) "[h]ere, the 'offers' and other forms of allegedly commercial speech restricted by the Price Ordinance are offers to engage in unlawful activity; that is, sales of tobacco products by way of coupons and multi-pack discounts, which are banned by the Price Ordinance itself." *City of Providence*, 731 F.3d at

78. Similarly, the *Nicopure* court concluded that because "speech proposing an illegal transaction is speech which a government may regulate or ban entirely . . . the FDA does not run afoul of the First Amendment when it relies on manufacturer statements." *Nicopure*, 944 F.3d at 284 (citing *Hoffman Estates*, 455 U.S. at 496).

Likewise, the Statute explicitly forbids the sale or distribution of sexual assault kits for use in the self-collection of evidence. Any "offer for sale" of an EEK thus constitutes an offer to engage in an illegal transaction, and such speech is "categorically excluded from First Amendment protection." *Williams*, 553 U.S. at 297; *Levi Strauss & Co. v. Shilon*, 121 F.3d 1309, 1312 (9th Cir. 1997).[3] In other words, the Statute lawfully prohibits offers to engage in the very conduct that the Statute forbids. Furthermore, any marketing represents "commercial speech related to illegal activity" if the company attempts to sell or otherwise make available the kits that meet the statutory description. *Central Hudson*, 447 U.S. at 564. Otherwise, the Statute does not restrict marketing or advertising of at-home sexual assault kits. Thus, the *Central Hudson* inquiry must end before it

3. In evaluating a First Amendment challenge to a City of New York statute that banned the sale of tobacco products below the listed price, a district court similarly concluded that "offers that are restricted by the ordinance are offers to engage in an unlawful activity—namely, the sale of cigarettes and tobacco products below the listed price. Thus, the ordinance lawfully prohibits retailers from offering what the ordinance explicitly forbids them to do." *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of New York*, 27 F. Supp. 3d 415, 423 (S.D.N.Y. 2014).

properly begins, as any speech implicated by the statute concerns illegal activity and is not protected. *See City of Providence*, 731 F.3d at 78.

The caselaw Plaintiff relies on to argue that the Statute bans speech only further serves to distinguish the Statute from laws that do implicate the First Amendment. (*See* Dkt. No. 29 at 6-7.) For example, Plaintiff analogizes this case to *In re R.M.J*, a matter that involved a restriction on the categories of information and forms of printed advertisement that lawyers in the State of Missouri could lawfully publish. *In re R. M. J.*, 455 U.S. 191, 193, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982). Missouri's regulation directly restricted a lawyer's freedom to publish "truthful advertising related to lawful activities"—speech "entitled to the protections of the First Amendment." *R.M.J.*, 455 U.S. at 203. Here, the Statute does not restrict advertising or disseminating information about lawfully sold products; as Defendants point out, it only regulates what people and businesses "must *do*[,] . . . not what they may or may not *say*." (Dkt. No. 18 at 17) (emphasis in original) (quoting *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 60, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006)). Plaintiffs may market EEKs in any way they choose so long as they do not *sell* them.[4]

4. For the same reasons, this Statute is readily distinguishable from notable advertising cases, such as *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996) (prohibition on advertising prices of legal alcoholic beverages violated First Amendment) and *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 750, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976) (prohibition on pharmacists advertising information about

Likewise, Plaintiff's comparison to *Sorrell* is inapposite, as *Sorrell* involved a Vermont statute that prohibited the sale of information for marketing purposes but allowed the same information to be sold for "educational communications." *Sorrell*, 564 U.S. at 564. Unlike a ban on the sale of sexual assault kits intended for at-home use, the product in question in *Sorrell* was information itself (which is "speech within the meaning of the First Amendment"). *Id.* at 570. Accordingly, the regulation not only restricted the creation, dissemination, and use of speech, but also favored certain speakers (academic institutions) over others (marketers). *Id.* at 571 ("So long as they do not engage in marketing, many speakers can obtain and use the information."). In this way, the law imposed a "speaker and content based burden on protected expression" and did not survive heightened scrutiny. *Id.* Contrastingly, Washington has not banned "all speech about 'sexual assault kits' that describes them as self-collected" as Plaintiffs assert; it has banned the *sale* of sexual assault kits intended for at-home use. (Dkt. No. 29 at 7.) Any person in Washington state remains free to disseminate as much accurate *or* misleading information about sexual assault kits as they would like to whomever they would like—so long as that individual does not sell or otherwise make available sexual assault kits that fall under the prohibition in the Statute.

Having concluded that the Statute regulates commercial conduct, the Court briefly considers whether

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legally prescribed prescription drugs violated First Amendment). The Statute does not regulate or restrict advertising—truthful or misleading—about at-home sexual assault kits, but rather bans selling or otherwise making such kits available.

the "particular conduct possesses sufficient communicative elements to bring the First Amendment into play." *Philip Morris USA v. City & Cnty. of San Francisco*, No. C 08-04482 CW, 2008 U.S. Dist. LEXIS 101933, 2008 WL 5130460, at *2 (N.D. Cal. Dec. 5, 2008), *aff'd sub nom. Philip Morris USA, Inc. v. City & Cnty. of San Francisco*, 345 F. App'x 276 (9th Cir. 2009) (unpublished). Since "[e]very civil and criminal [regulation] imposes some conceivable burden on First Amendment protected activities," conduct does not constitute protected speech whenever a person aims to communicate an idea. *Philip Morris*, 345 F. App'x at 276 (quoting *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706, 106 S. Ct. 3172, 92 L. Ed. 2d 568, (1986)). Instead, "a facial freedom of speech attack must fail unless, at a minimum, the challenged statute 'is directed narrowly and specifically at expression or conduct commonly associated with expression.'" *Roulette v. City of Seattle*, 97 F.3d 300, 305 (9th Cir. 1996) (citing *City of Lakewood*, 486 U.S. at 760). For example, the Supreme Court "has recognized the expressive nature of students' wearing of black armbands to protest American military involvement in Vietnam; of a sit-in by blacks in a 'whites only' area to protest segregation; of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam; and of picketing about a wide variety of causes." *Philip Morris*, 2008 U.S. Dist. LEXIS 101933, 2008 WL 5130460, at *2 (citations omitted).

Plaintiff asserts that subsection 2(b) of the Statute regulates expressive conduct because it "targets the intended message that accompanies the sale: that a common, otherwise-legal product can be used by a survivor

to-self collect evidence." (Dkt. No. 29 at 6 n.3.) However, the Ninth Circuit has found that consummating a business transaction and selling goods constitutes nonexpressive conduct unprotected by the First Amendment, and Plaintiff fails to distinguish this caselaw. *See, e.g., B & L Productions, Inc. v. Newsom*, 104 F.4th 108 (9th Cir. 2024); *Philip Morris*, 345 F. App'x at 276 ("[S]elling cigarettes isn't [protected expressive activity] because it doesn't involve conduct with a significant expressive element . . . . It doesn't even have an expressive component."). For example, *B&L* concerned a California statute that banned contracting for, authorizing, or allowing the sale of firearms or ammunition on Del Mar Fairgrounds property. *B & L Prods*, 104 F.4th at 111. The plaintiff asserted that the challenged statute specifically targeted and "jeopardized the pro-gun speech that occurs at gun shows," including information sharing and educational activities. *B&L Prods*, 104 F.4th at 114. However, the court pointed out that a "celebration of America's gun culture . . . can still take place on state property, as long as that celebration does not involve contracts for the sale of guns." *Id.* at 114-115 (internal quotations omitted). Thus, because "'the only inevitable effect, and the stated purpose' of [the] statute [was] to regulate nonexpressive conduct," the court concluded that "our inquiry is essentially complete." *Id.* at 116 (quoting *HomeAway.com, Inc.*, 918 F.3d at 685.) So too here. The only inevitable effect and the stated purpose of the Statute is to regulate nonexpressive conduct—the sale of sexual assault evidence collection kits for at home use. Leda can continue to "celebrate" its message that survivors can self-collect evidence of sexual assault using a certain product, so long as that celebration does not involve the sale of EEKs.

The *Nicopure* court's commentary is also instructive on this point. Much like Plaintiff asserts that an "intended message [] accompanies the sale" of an EEK (Dkt. No. 29 at 6 n.3), Nicopure argued that providing free samples was "'expressive' because they convey[] important information to smokers who want to switch to vapor products, including key consumer information[.]" *Nicopure*, 944 F.3d at 291 (internal quotations removed). The court noted that "[t]his extraordinary argument, if accepted, would extend First Amendment protection to every commercial transaction on the ground that it 'communicates' to the customer 'information' about a product or service." *Id.* However, as the *Nicopure* court emphasized, "the Supreme Court has long rejected the 'view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.'" *Id.* (citing *United States v. O'Brien*, 391 U.S. 367, 376, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968)). Thus, the court found that "the seller's intention that those experiences leave consumers with helpful information that encourages future purchases does not convert all regulation that affects access to products or services into speech restrictions subject to First Amendment scrutiny." *Id.* The same can be said for Plaintiff's stated intention that its sale or distribution of an EEK imparts information: that intent does not transform the transaction into expressive conduct that implicates the First Amendment. *Id.*

Accordingly, Plaintiff has failed to allege a facial First Amendment violation as a matter of law and this claim would not succeed on the merits. *See Winter*, 555 U.S. at 20. Thus, because Plaintiff's only argument on irreparable harm is premised on the likely success on

the merits of its constitutional claims, Plaintiff does not establish a likelihood of irreparable harm on this claim. (*See* Dkt. No. 10 at 26.)

2. As-Applied First Amendment Claim

Plaintiff asserts that the Statute "has been unconstitutionally applied to Leda Health because it was designed with it in mind" and "[t]he Legislature specifically targeted Leda Health through the Statute." (Dkt. No. 10 at 20.) To support this argument, Plaintiff states "it is telling that Representative Mosbrucker specifically referenced Leda Health" in email communications about House Bill 1564. (*Id.*)

Just as the facial impact of a statute may render it unconstitutional, if a statute's "stated purpose" is to suppress specific speech or ideas, a court may consider that purpose in determining the constitutionality of the regulation. *Sorrell*, 564 U.S. at 565-566. However, "[t]he Supreme Court has disclaimed the idea that 'legislative motive is a proper basis for declaring a statute unconstitutional' in the absence of a direct impact on protected speech." *B&L Prods., Inc.* 104 F.4th at 116 (citing *United States v. O'Brien*, 391 U.S. 367, 383-84, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968)). Thus, when "the only inevitable effect, and the stated purpose of a statute is to regulate nonexpressive conduct," a "court may not conduct an inquiry into legislative purpose or motive beyond what is stated within the statute itself." *Id.* at 116 (internal citations omitted); *see also HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 685 (9th

Cir. 2019). Because the stated purpose of the Statute is "prohibiting the sale of over-the-counter sexual assault kits" and the statute does not directly impact protected speech (*see supra* Section III.B.1), this Court may not further inquire into the legislature's motives. (Dkt. No. 19-1 at 3.) Thus, Plaintiff would not succeed on the merits of its as-applied First Amendment claim, as the Statute does not target Plaintiff's expression of ideas—rather, it prohibits specific non-expressive conduct exemplified by Plaintiff's business model.[5] And because Plaintiff's only argument on irreparable harm is likely success on the merits, Plaintiff likewise cannot establish a likelihood of irreparable harm on this claim. (*See* Dkt. No. 10 at 26).[6]

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5. As the Ninth Circuit commented in *Philip Morris*, "[t]he censorial motive plaintiff attributes to defendants is always present when the government restricts the sales of a product." *Philip Morris*, 345 F. App'x at 276. That alone "can't be sufficient" to raise First Amendment concerns, the court found. *Id.*

6. Additionally, Leda's claims about its EEKs would not be necessary for prosecution under the Statute because Leda separately meets the scienter requirement of subsection 2(b). *See* Wash. Rev. Code § 5.70.070(2) ("A person may not sell . . . a sexual assault kit if it is marketed . . . as over-the-counter . . . *or* [i]f the person intends, knows, or reasonably should know that the sexual assault kit will be used for the collection of evidence of sexual assault other than by law enforcement or a health care provider") (emphasis added). Leda asserts that the Statute "does not punish the sale of a 'sexual assault kit' unless the seller describes it as 'over-the-counter,' 'athome,' or 'self-collected.'" (Dkt. No. 29 at 5.) Yet this characterization conspicuously omits subsection 2(b), which establishes that regardless of how a kit is marketed, it cannot be legally sold if the manufacturer *intends* that it be used for at-home evidence collection. Wash. Rev. Code § 5.70.070(2). Thus, the Statute prohibits the sale of *Leda's* EEK's no matter how they are labeled or marketed, because

3. Overbreadth and Vagueness Claims

"According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech." *Williams*, 553 U.S. at 292. "Courts vigorously enforce[] the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Id.* (emphasis in original). Here, Plaintiff fails to make out an overbreadth claim as a matter of law because the Statute does not regulate protected speech, let alone prohibit "a substantial amount of protected speech." *Id.; see supra* Section III.B.1.[7] Moreover, "the overbreadth doctrine does not apply to

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Leda affirmatively states that its "EEKs *are* intended for at-home use [and] EEKs *are* for self-collection of evidence" (Dkt. No. 10 at 18) (emphasis in original). In this way, although a hypothetical retailer could perhaps sell sexual assault kits "in blank packaging," (Dkt. No. 29 at 3), Leda itself could not. Thus, even assuming arguendo that subsection 2(a) implicates some speech, Leda's speech about the EEKs is likely superfluous for the purposes of prosecution.

7. Plaintiff asserts that "banning any person from discussing self-collected sexual assault kits sweeps vast amounts of constitutionally protected speech within its reach" and in so doing causes companies like Leda to "to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." (Dkt. No. 10 at 21) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)). However, as discussed *supra*, the Statute does not ban the *discussion* of anything; it prohibits selling, offering to sell, or otherwise making available sexual assault kits intended for at-home use. Wash. Rev. Code § 5.70.070(2). Thus, the Statute regulates transactional conduct, not speech. And to the extent speech is implicated by the proscription on offers to sell, the speech in question is not protected, as it constitutes a "proposal to engage in illegal activity." *Williams*, 553 U.S. at 298.

commercial speech." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 497, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982). Therefore, even if the Statute incidentally burdens speech, the overbreadth doctrine would remain inapplicable. *See supra* Section III.B.1 (finding that to the extent that the Statue implicates speech, the speech is commercial in nature). Accordingly, Plaintiff's overbreadth claims would not succeed on the merits.

"A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process." *Vill. of Hoffman*, 455 U.S., at 497. "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Williams*, 533 U.S. at 304. In the First Amendment context, courts allow plaintiffs to argue that a statute is vague if it "is unclear whether [the statute] regulates a substantial amount of protected speech." *Id.* When considering a vagueness challenge, a court should first "examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications." *Vill. of Hoffman*, 455 U.S., at 495.[8] Thus, the Court must "examine the complainant's

8. "[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 95 S. Ct. 710, 42 L. Ed. 2d 706 (1975).

conduct before analyzing other hypothetical applications of the law" because "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Id.*

Plaintiff argues that "[i]t is unclear what behavior the Statute proscribes by barring speech that 'otherwise makes available' sexual assault kits." (Dkt. No. 10 at 21) (quoting Wash. Rev. Code § 5.70.070(2). The canon of construction *ejusdem generis* counsels that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384, 123 S. Ct. 1017, 154 L. Ed. 2d 972 (2003) (internal quotation marks omitted). Relatedly, "we rely on the principle of *noscitur a sociis*—a word is known by the company it keeps—to 'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words'" in construing the meaning of a term in a statute. *Yates v. United States*, 574 U.S. 528, 543, 135 S. Ct. 1074, 191 L. Ed. 2d 64 (2015) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995)). Here, the phase "otherwise make available" follows the more specific terms "sell" and "offer for sale." Wash. Rev. Code § 5.70.070(2). Read in conjunction with the verbs that precede it, "otherwise make available" encompasses actions related to selling and offering for sale—such as the distribution of free samples. It is not uncommon for statutes that proscribe conduct to include

a final, catch-all term with the word "otherwise," and courts consistently rely on these canons to determine what acts are covered by that statutory phrase. *See, e.g., Yates* 574 U.S. at 545 (quoting *Begay v. United States*, 553 U.S. 137, 142-143, 128 S. Ct. 1581, 170 L. Ed. 2d 490 (2008) ("[W]e relied on this principle to determine what crimes were covered by the statutory phrase 'any crime ... that ... is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another,' 18 U.S.C. § 924(e)(2)(B)(ii). The enumeration of specific crimes, we explained, indicates that the 'otherwise involves' provision covers 'only *similar* crimes, rather than *every* crime that 'presents a serious potential risk of physical injury to another.'"). Thus, read alongside the other operative verbs in the statute, the phrase "otherwise makes available" is sufficiently clear to guard against arbitrary or discriminatory enforcement.

Plaintiff further asserts that the phrase "in any manner that indicates" is unconstitutionally vague. (Dkt. No. 10 at 22) (quoting Wash. Rev. Code § 5.70.070(2)(a)). However, this term is similarly scrutable when read alongside the "neighboring words with which it is associated." *Williams*, 553 U.S. at 294. The Statute prohibits the sale of a sexual assault kit "[t]hat is marketed or otherwise presented as over-the-counter, at-home, or self-collected or in any manner that indicates that the sexual assault kit may be used for the collection of evidence of sexual assault other than by law enforcement or a health care provider." Wash. Rev. Code § 5.70.070(2). Taken in context, "in any manner" is a general term that we construe to "embrace

only objects similar in nature to those objects enumerated by the preceding specific words": "over-the-counter," "at-home," and "self-collected." *Keffeler*, 537 U.S. at 384. Accordingly, it is not a vague phrase but rather refers to ways in which a sexual assault kit might be described to connote the intended use of evidence collection outside a medical or law enforcement setting. As Defendants suggest, "a sexual assault kit presented as do-it-yourself or self-test would [predictably] fall within the bounds of [the Statute]." (Dkt. No. 30 at 27.) "It is not the case that the [Statute's] criteria lack any ascertainable standard for inclusion and exclusion, nor do they contain no guidelines, such that the authorities can arbitrarily prosecute one class of [persons] instead of another." *Kashem v. Barr*, 941 F.3d 358 at 370, 374 (9th Cir. 2019) (internal quotation and citations omitted).[9] A person of ordinary intelligence

9. Plaintiff also argues that the term "marketed or otherwise presented" is "unconstitutionally vague because it offers no means of differentiating truthful speech from false or misleading speech in that process." (Dkt. No. 29 at 10). However, as described *supra*, the term "marketed or otherwise presented" does not regulate speech but rather uses the marketing claims advanced on behalf of a sexual assault kit to identify whether it is subject to regulation under the Statute. *See Nicopure* 944 F.3d at 283 ("the FDA's reliance on a seller's claims about a product as evidence of that product's intended use, in order that the FDA may correctly classify the product and restrict it if misclassified, does not burden the seller's speech"); *City of Providence*, 2012 U.S. Dist. LEXIS 176256, 2012 WL 6128707 at *8 ("the inclusion of a 'public claim or statement made by the manufacturer' to determine whether the described product falls under the definition of a 'flavored tobacco product' . . . does not amount to a prohibition against speech."). The statute does not proscribe any marketing or promotion of sexual assault kits; it prohibits the sale of sexual assault kits intended for at home use. A person may freely

reading the Statute would glean fair notice of what conduct is prohibited.

Because "it is clear what the statute proscribes 'in the vast majority of its intended applications,'" Plaintiff's vagueness claim fails as a matter of law and would not succeed on the merits. *California Tchrs. Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1151 (9th Cir. 2001) (quoting *Hill v. Colorado*, 530 U.S. 703, 733, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000)). Likewise, any as-applied challenge must also fail, as the language of the Statute gives "*these plaintiffs* [] fair notice that *[their] conduct* would raise suspicion under the criteria" and does not "vest the government with unbridled enforcement discretion" as applied to Leda Health. *Kashem*, 941 F.3d at 370 (emphasis in original). And because Plaintiff's only argument on irreparable harm is likely success on the merits, Plaintiff fails to establish a likelihood of irreparable harm on its vagueness and overbreadth claims. (*See* Dkt. No. 10 at 26.)

4. Bill of Attainder Claim

The Constitution instructs: "No Bill of Attainder . . . shall be passed." U.S. Const. art. I, § 9, cl. 3. "[A] law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial" is a bill of attainder. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977). The Bill of Attainder Clause is "an important ingredient of

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promote the benefits of at home evidence collection kits; what they may not do is sell kits for at home evidence collection. *See Nicopure* 944 F.3d at 283; *Whitaker*, 353 F.3d at 953.

the doctrine of 'separation of powers,'" as it prevents legislatures from stepping into the judicial role, or "ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." *Id.* at 649. "Three key features brand a statute a bill of attainder: that the statute (1) specifies the affected persons, and (2) inflicts punishment (3) without a judicial trial." *SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 669 (9th Cir. 2002). This tripartite test is not disjunctive, meaning all three elements must be met. *Nixon*, 433 U.S. at 648 ("[T]he fact that [a statute] refers to [a plaintiff] by name [] does not automatically offend the Bill of Attainder Clause."). "Only the clearest proof suffices to establish the unconstitutionality of a statute as a bill of attainder." *SeaRiver*, 309 F.3d at 669. In examining the Statute's constitutionality, the Court "may only look to its terms, to the intent expressed by Members of Congress who voted its passage, and to the existence or nonexistence of legitimate explanations for its apparent effect." *Nixon*, 433 U.S. at 484.

The Supreme Court has established a set of "guideposts" for "determining whether legislation singles out a person or class within the meaning of the Bill of Attainder Clause." *SeaRiver*, 309 F.3d at 669. "First, we look to whether the statute or provision explicitly names the individual or class, or instead, describes the affected population in terms of general applicability." *Id.* Second, the court assesses "whether the identity of the individual or class was 'easily ascertainable' when the legislation was passed." *Id.* (quoting *Brown*, 381 U.S. at 448-49). Third, the court examines "whether the legislation defines the

individual or class by "past conduct [that] operates only as a designation of particular persons'" and evaluates whether the past conduct consists of "irrevocable acts committed by them." *Id.* (quoting *Selective Serv. Sys.*, 468 U.S. at 847-848); *see also Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 86 (1961). The guideposts are intended to be considered holistically. *SeaRiver*, 309 F.3d at 669.

Plaintiff asserts that Leda Health is the "easily ascertainable" target of the Statute because "Legislators openly discussed Leda Health when drafting and voting for the bill"; Leda was the only company to testify at the Bill hearing; Leda was the only company in Washington selling sexual assault kits at the time the Statute passed; and one sponsor of the Bill "posted online that her Bill was designed to stop Leda Health from operating in Washington." (Dkt. Nos. 10 at 24, 1 at 6.) For the purposes of the foregoing analysis, the Court accepts these factual allegations as true. Plaintiff further argues that the Statute "singled out" Leda Health for attainder based on past conduct (selling EEKs). *Id., see SeaRiver*, 309 F.3d at 669.

As an initial matter, the Statute does not reference Leda Health by name; instead, it is widely applicable to any person who engages in prohibited conduct. This cuts against a finding that Plaintiff was singled out. *SeaRiver*, 309 F.3d at 670. And although the hearing testimony and statements of certain legislators made it clear that the bill would apply to Leda Health, that application depended entirely on Leda's choosing to *continue* selling EEKs

after the Statute passed (which Leda did not). Thus, the Statute does not set forth a rule based on irreversible past conduct like the commission of a felony, rather, it attaches only if a person engages in generally prohibited activities. *United States v. Munsterman*, 177 F.3d 1139, 1142 (9th Cir. 1999); *see also Communist Party*, 367 U.S. at 86 (finding the law was not a bill of attainder because it "attache[d] not to specified organizations but to described activities in which an organization may or may not engage"). As in *Communist Party*, "[f]ar from attaching to the past and ineradicable actions of an organization, the application of the [Statute] is made to turn upon [] contemporaneous fact"—whether a company is selling, offering for sale, or otherwise making available sexual assault kits for at home use. *Communist Party*, 367 U.S. at 87. This "prospective and generalized effect" cuts against a finding that Leda Health has been "singled out" for attainder; unlike laws found to constitute bills of attainder, the Statute neither limits its application to Plaintiffs nor prevents them from conforming their conduct with law. *SeaRiver*, 309 F.3d at 671; *c.f. United States v. Lovett*, 328 U.S. 303, 314-316, 66 S. Ct. 1073, 90 L. Ed. 1252, 106 Ct. Cl. 856 (1946) (finding that an appropriations bill that prohibited the compensation of three named three federal employees based on what Congress believed to be their political beliefs constituted a bill of attainder).

Courts are clear that "[a]n otherwise valid law is not transformed into a bill of attainder merely because it regulates conduct on the part of designated individuals or classes of individuals." *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 727 (9th Cir. 1992).

As the Seventh Circuit once highlighted, the fact "[t]hat the plaintiffs were the target, and so far appears the *only target*" of legislation "does not establish that the [legislation] was not a bona fide legislative measure" because "[i]t is utterly commonplace for legislation to be incited by concern over one person or organization." *LC&S, Inc. v. Warren Cnty. Area Plan Comm'n*, 244 F.3d 601, 604 (7th Cir. 2001) (emphasis added). Here, it is not disputed that the Washington Statute "was incited by concern over one organization"—Leda Health. But the Statute "applies to a class of activity only." *Communist Party*, 367 U.S. at 88. As the Supreme Court warned in *Nixon*, the argument that "an individual or defined group is attainted whenever he or it is compelled to bear burdens which the individual or group dislikes . . . . would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain[.]" *Nixon*, 433 U.S. at 470. Ultimately, while Leda's business may have singularly inspired legislative action, it was not "singled out" within the meaning of the Bill of Attainder Clause.

Furthermore, even if Leda Health had been "singled out," the Statute is not a bill of attainder because it does not inflict legislative punishment but rather furthers a legitimate legislative purpose. "Three inquiries determine whether a statute inflicts punishment on the specified individual or group: "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and

(3) whether the legislative record 'evinces a congressional intent to punish.'" *SeaRiver*, 309 F.3d at 673 (quoting *Selective Serv. Sys. v. Minnesota Pub. Int. Rsch. Grp.*, 468 U.S. 841, 852, 104 S. Ct. 3348, 82 L. Ed. 2d 632 (1984)). A statute need not meet all three factors to constitute a bill of attainder; rather, courts weigh each inquiry. *Id.* However, "if [an Act] furthers a nonpunitive legislative purpose, it is not a bill of attainder." *Id.* at 674. Accordingly, the second factor is dispositive insofar as a finding of legitimate legislative purpose defeats a bill of attainder claim. *Id.; see also Nixon*, 433 U.S. at 475.

"Traditionally, bills of attainder sentenced the named individual to death, imprisonment, banishment, the punitive confiscation of property by the sovereign, or erected a bar to designated individuals or groups participating in specified employments or vocations." *SeaRiver*, 309 F.3d at 662. The Statute evinces none of these forms of punishment. Although Plaintiff argues that it was "banished" from Washington, the Statute's prohibition on selling sexual assault kits does not fall within the historical meaning of "banishment," which "has traditionally been associated with deprivation of citizenship, and does more than merely restrict one's freedom to go or remain where others have the right to be: it often works a destruction of one's social, cultural, and political existence." *SeaRiver*, 309 F.3d at 673 (internal quotations omitted). Moreover, as Defendants point out, "Leda also offers STI testing, toxicology screenings, educational workshops, and emergency contraceptives; passage of HB 1564 does not prevent Leda from offering these other services to Washingtonians." (Dkt. No. 18 at 29.)

Finally, the Statute "reasonably can be said to further nonpunitive legislative purposes." *Nixon*, 433 U.S. at 475. Indeed, as in *Fresno Rifle*, "[t]here is no indication that the Legislature's motivation was anything other than a legitimate desire to protect the safety and welfare of the citizens of [Washington]." *Fresno Rifle*, 965 F.2d at 728. The legislature's stated purpose was "to support survivors of sexual offenses through building victim centered, trauma-informed systems that promote successful investigations and prosecutions of sexual offenses" and protect survivors from the potentially harmful impact of "over-the-counter sexual assault kits." (Dkt. No. 19-1 at 3). And although Plaintiff disagrees with the legislature's way of achieving this aim, it offers no evidence that the legislature was motived by an improper desire to *punish* Leda Health rather than proscribe *conduct* brought to its attention by Leda's business model.[10] As Defendant points out, the public hearing testimony of prosecutors,

10. Plaintiff's reliance on *Lovett* is misplaced. The Statute in *Lovett* "clearly accomplishe[d] the punishment of named individuals without a judicial trial," as the act "specifically cut[] off the pay of certain named individuals found guilty of disloyalty" and prevented them from engaging in future government work "because of what Congress thought to be their political beliefs." *Lovett*, 328 U.S. at 316, 314. The Act was a consummate example of trial by the judiciary: "No one would think that Congress could have passed a valid law, stating that after investigation it had found Lovett, Dodd, and Watson 'guilty' of the crime of engaging in 'subversive activities,' defined that term for the first time, and sentenced them to perpetual exclusion from any government employment." *United States v. Brown*, 381 U.S. 437, 449, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965). Contrastingly, this Statute does not resemble a "special legislative act[] which take[s] away the life, liberty, or property of particular named persons, because the legislature thinks them guilty[.]" *Lovett*, 328 U.S. at 317.

healthcare workers, advocates for sexual assault victims was largely focused on what sexual assault evidence collection entails and the potential harm posed by products like EEKs—not on Leda Health. Moreover, exchanges made during the hearings suggested that one of the reasons that Legislature opted to pass a law rather than rely on the cease-and-desist letter to Leda Health was because of its concern with protecting survivors from *other* companies that sell at-home sexual assault evidence collection kits.[11] In this way, "the legislative record is probative of nonpunitive intentions." *SeaRiver*, 309 F.3d at 676. Ultimately, because the Statute "furthers a nonpunitive legislative purpose, it is not a bill of attainder." *SeaRiver*, 309 F.3d at 674.

Accordingly, Plaintiffs would not succeed on this claim; even construing all factual disputes in Plaintiff's favor, Plaintiff does cannot feasibly "establish the unconstitutionality of [the] [S]tatute as a bill of attainder." *SeaRiver*, 309 F.3d at 669. As Plaintiff's only argument on irreparable harm is based on likely success on the merits, Plaintiff fails to establish a likelihood of irreparable harm absent a preliminary injunction. (*See* Dkt. No. 10 at 26.)

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11. *See* Hr'g Before H. Comm. on Community Safety, Justice, & Reentry (Wash. Feb. 7, 2023), at 1:18:40-2:12:14, video recording by TVW, https://tvw.org/video/house-community-safety-justice-reentry-2023021199/?eventID=2023021199. The Court notes that both Plaintiff and Defendant cited video hyperlinks to this hearing in footnotes rather than following the proper procedure of admitting an official transcript or thumb drive of the video into evidence.

C. Remaining Factors

To obtain a preliminary injunction, a plaintiff "must establish that he is likely to succeed on the merits [and] that he is likely to suffer irreparable harm in the absence of preliminary relief[.]" *Winter*, 555 U.S. at 20. Because the Court has found that Plaintiff's constitutional arguments fail as a matter of law and there is no risk of irreparable harm to Plaintiff absent an injunction, Plaintiff's motion must be denied. The Court need not reach the remaining factors of public interest and balance of the equities.

IV MOTION TO DISMISS

A. Legal Standard

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "A claim has facial plausibility when the [complaint] pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). When considering a motion to dismiss for failure to state a claim, the Court must accept as true all well-pleaded factual allegations and construe the allegations in favor of the non-moving party. *See Wood v. City of San Diego*, 678 F.3d 1075, 1080 (9th Cir. 2012). The Court does not have to accept conclusory, legal assertions. *Iqbal*,

556 U.S. at 678. At the preliminary injunction stage, a plaintiff bears "a heavier burden than . . . in pleading the plausible claim necessary to avoid dismissal." *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 165 (2d Cir. 2020).

B. Discussion

The merits of Plaintiff's First Amendment claims fail as a matter of law and not based on the plausibility of Plaintiff's factual allegations. Even construing the facts in the light most favorable to Plaintiff, the Statute does not regulate protected speech for the reasons described *supra*. Instead, it burdens only non-expressive conduct. Thus, Plaintiff does not successfully plead a facial or as-applied First Amendment violation and the first two claims in its Complaint must fail. Similarly, as discussed *supra*, Plaintiff fails to plead cognizable overbreadth and vagueness claims. The Court's conclusions that these claims fail as a matter of law does not change when construing the factual allegations in Plaintiff's favor. Finally, the Court found *supra* that even construing all Plaintiff's factual allegations as true, the Statute did not plausibly constitute an unconstitutional bill of attainder. Plaintiff did not "carr[y] its burden, as the 'one who complains of being attainted,' of establishing 'that the legislature's action constituted punishment and not merely the legitimate regulation of conduct.'" *SeaRiver*, 309 F.3d 662 at 694 (quoting *Nixon*, 433 U.S. at 476 n. 40). Thus, this final claim likewise fails under the 12(b)(6) standard.[12]

12. The Court does not reach Defendants' argument that the Eleventh Amendment bars Plaintiff's claim against Governor Inslee, as the Court's finding that all of Plaintiff's claims fail as a matter of law effectively moots the immunity inquiry. (*See* Dkt. No. 30 at 15.)

Accordingly, Defendants' motion to dismiss Plaintiff's Complaint is GRANTED.

V CONCLUSION

For the reasons stated above, Plaintiff's motion for preliminary injunctive relief (Dkt. No. 10) is DENIED. Plaintiff's motion for an evidentiary hearing (Dkt. No. 34) is likewise DENIED as moot, and thus Defendants' surreply (Dkt. No. 40) is also moot. Defendants' motion to dismiss Plaintiff's claims (Dkt. No. 30) is GRANTED. Plaintiff's claims are dismissed with prejudice.

Dated this 21st day of October, 2024.

/s/ David G. Estudillo
David G. Estudillo
United States District Judge

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT OF WESTERN DISTRICT OF WASHINGTON, AT TACOMA, FILED OCTOBER 21, 2024

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CASE NUMBER. 2:24-cv-00871-DGE

LEDA HEALTH CORPORATION,

Plaintiff,

v.

JAY ROBERT INSLEE *et al.*,

Defendant.

Filed October 21, 2024

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court**. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

Appendix C

THE COURT HAS ORDERED THAT

Plaintiff's motion for a preliminary injunction is DENIED. Defendants' motion to dismiss for failure to state a claim is GRANTED. Plaintiff's claims are DISMISSED with prejudice. The case is closed.

Dated October 21, 2024.

Ravi Subramanian
Clerk of Court

s/Michael Williams
Deputy Clerk

APPENDIX D — RCW 5.70.070 OVER-THE-COUNTER SEXUAL ASSAULT KITS

RCW 5.70.070

Over-the-counter sexual assault kits.

(1) For purposes of this section:

(a) "Health care facility" means a hospital, clinic, nursing home, laboratory, office, or similar place situated in Washington state where a health care provider provides health care to patients.

(b) "Health care provider" means a person licensed, certified, or otherwise authorized or permitted by law, in Washington state, to provide health care in the ordinary course of business or practice of a profession, and includes a health care facility.

(c) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity. The term does not include a government or governmental subdivision, agency, or instrumentality.

(d) "Sexual assault kit" means a product with which evidence of sexual assault is collected.

(2) A person may not sell, offer for sale, or otherwise make available a sexual assault kit:

(a) That is marketed or otherwise presented as over-the-counter, at-home, or self-collected or in any manner that indicates that the sexual assault kit may be used for the collection of evidence of sexual assault other than by law enforcement or a health care provider; or

(b) If the person intends, knows, or reasonably should know that the sexual assault kit will be used for the collection of evidence of sexual assault other than by law enforcement or a health care provider.

(3) The legislature finds that the practices covered by this section are matters vitally affecting the public interest for the purpose of applying the consumer protection act, chapter 19.86 RCW. A violation of this section is not reasonable in relation to the development and preservation of business and is an unfair or deceptive act in trade or commerce and an unfair method of competition for the purpose of applying the consumer protection act, chapter 19.86 RCW.

[2023 c 296 s 2.]

NOTES:

Intent-2023 c 296: "It is the intent of the legislature to support survivors of sexual offenses through building victim-centered, trauma-informed systems that promote successful investigations and prosecutions of sexual offenses. Thorough and professional investigations, including preservation of forensic evidence, are imperative and a fundamental component in achieving these outcomes.

Appendix D

At-home sexual assault test kits create false expectations and harm the potential for successful investigations and prosecutions. The sale of over-the-counter sexual assault kits may prevent survivors from receiving accurate information about their options and reporting processes; from obtaining access to appropriate and timely medical treatment and follow up; and from connecting to their community and other vital resources." [2023 c 296 s 1.]