No. 24-6659

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEDA HEALTH CORPORATION,
Plaintiff—Appellant,

v.

JAY INSLEE AND ROBERT FERGUSON,
in their Official Capacities for the State of Washington,
Defendants—Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
THE HONORABLE DAVID G. ESTUDILLO DISTRICT JUDGE
CASE NO. 2:24-cv-00871-DGE

APPELLANT'S OPENING BRIEF

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November 22, 2024

DISCLOSURE STATEMENT

Pursuant to FRAP 26.1(a), Leda Health Corporation reports that no publicly held company owns 10% or more of its stock nor does have any parent corporations.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Leda Health challenges a novel statute that restricts those who sell, advertise, or distribute certain unremarkable products from truthfully communicating legal ways those products can be used. To ensure that the Court is afforded a clear understanding of the challenged Statute and how it affects Appellant's business, Leda Health respectfully requests oral argument.

STATEMENT OF JURISDICTION

The district court denied Leda Health's Motion for Preliminary Injunction, dismissed all its claims, and entered a judgment against it on October 21, 2024. (Excerpt of the Record (hereinafter "ER")-3-35.)

The Notice of Appeal was filed on October 25, 2024, shortly after the judgment was entered, making it timely under Fed. R. App. P. 4(b)(1)(A)(i).

This Court's appellate jurisdiction arises from 28 U.S.C. §§ 1291 and 1292.

STATEMENT OF THE ISSUES

Nearly 80 percent of sexual assault survivors choose not to report their assault. Appellant Leda Health seeks to provide services to this population, allowing them to gather evidence of their sexual assault in a private, safe, and effective way. This effort includes providing survivors with common (and legal) items like plastic bags and sterile swabs, along with detailed instructions about how these items can be used in a manner that is most likely to maintain evidence of their assault.

It is unquestionably legal for a survivor in the State of Washington (represented by its Attorney General and Governor as the Appellees here) to collect evidence of their assault by themselves, and it happens often. But Washington does not like that Leda Health encourages the practice. In its view, survivors should *only* go to a hospital or law enforcement after a sexual assault.

To promote this view, Washington passed a statute that defines thousands of items (including cameras, plastic bags, and even ballpoint pens) as "sexual assault kits." And it then prohibits the sale, advertisement, or free distribution of these items if they are accompanied by speech that "indicates that the [item] may be used for the collection of

evidence of sexual assault other than by law enforcement or a health care provider" or otherwise are "presented as over-the-counter, at-home, or self-collected." The statute also bans such distribution if the person "intends, knows, or reasonably should know that the [item] will be used" in this legal manner. Thus, although a rape victim's mother can legally photograph her daughter's injuries with a camera, Wal-Mart in Seattle cannot legally sell the camera if the mother suggests to the cashier how she intends to use it. Nor can Walgreens sell a sterile cotton swab to a survivor who asks the pharmacist if she can use the swab to collect evidence of her rape without going to the police.

Leda Health sued to bar enforcement of the new law and sought a preliminary injunction. The district court denied the injunction and dismissed the case, raising the following issues on appeal:

1. Whether the district court erred when it denied the preliminary injunction and dismissed the case by holding that the Statute does not implicate the First Amendment.

2. Whether the Statute is a Bill of Attainder when the legislature's stated goal was to ban Leda Health from operating in Washington.

STATEMENT OF THE CASE

Leda Health Helps Sexual Assault Survivors

Leda Health is a start-up company that, among other goals, seeks to help the 80 percent of survivors who do not report their sexual assault.[1] Because many survivors do not wish to endure invasive forensic exams after being sexually assaulted, the company developed a less intrusive alternative for survivors to gather critical evidence in a private, safe, and effective way—the company calls this tool an Early Evidence Kit ("EEK"). (ER-145.) Leda Health's goal with EEKs is to supplement, not replace, what the government offers so that survivors have more options after being assaulted than they do now. (ER-5.)

EEKs empower survivors to collect evidence on their own, rather than submit themselves to an invasive examination at a hospital immediately after experiencing the trauma of a sexual assault. (ER-146.) Developed with the assistance of healthcare professionals and advocates, EEKs give survivors common (and legal) items they can use to self-collect DNA samples from their body, store those samples safely, ship them to a

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[1] Vogt, Emily L., *Trends in US Emergency Department Use After Sexual Assault, 2006-2019*, https://tinyurl.com/ybxkx92v (last accessed November 22, 2024).

laboratory for testing, and preserve them for whatever use the survivor desires down the road—whether it be to seek a criminal prosecution, file a civil lawsuit, or use as evidence in nonjudicial proceedings like Title IX complaints or workplace harassment claims.[2] (ER-145-147.)

Leda Health's EEKs contain things like swabs, sterile water, plastic storage bags, shipping labels, and a ballpoint pen that can easily be found (and legally bought) virtually anywhere in the United States. (ER-3-4.) These unremarkable items are not what makes EEKs unique. Similar packages have long been available on the internet.[3] A company called Sirchie, for example, offers a "Sexual Assault Victim Evidence Collection Kit" for sale online to the public for $25.[4]

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[2] Leda Health makes substantial efforts to explain to survivors that the company cannot guarantee that any evidence the survivor collects will be admissible for any particular purpose, and that such decisions depend on the circumstances and the rules and discretion of the adjudicatory body. (ER-86-87, 95-96.)

[3] *E.g.*, TriTech Forensics, https://tinyurl.com/2p4nuf4b (last accessed November 22, 2024); Arrowhead Forensics, https://tinyurl.com/yuxh6xmc last accessed November 22, 2024); Lynn Peavey Company, https://tinyurl.com/yv2m9mt6 (last accessed November 22, 2024).

[4] Sirchie, https://tinyurl.com/4h8rfbs5 (last accessed November 22, 2024).

What makes Leda Health's EEK unique is that the company packages such commonplace items with detailed instructions tailored to teach survivors how to use them to successfully collect a viable DNA sample from their body or any other relevant area. (ER-145.)[5] None of the items in an EEK is illegal to sell. Nor are any of the instructed uses of the items illegal.

After a survivor collects evidence with an EEK, they have three basic options: (1) they can send it to the accredited lab with whom Leda Health partners for testing using the prepaid FedEx shipping bag contained in the EEK; (2) they can choose to store the kit at that same lab if they remain unsure about what they want to do next; or (3) they can forgo shipping the sample to Leda Health's lab altogether and (now, later, or never) submit the sample directly to law enforcement or to a hospital. (ER-144-146.) To facilitate these options, EEKs have storage containers with unique barcodes, tamper-evident tape, plastic bags for

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[5] One additional distinction is that, unlike the Sirchie kit, Leda Health does not sell its EEKs online or market them to the general public. Rather, the company establishes relationships with companies or other entities—including sorority chapters on college campuses—who then make EEKs available to survivors who might need one. (ER-5.)

storing clothing or other relevant items, and an intake form for documenting the assault and the chain of custody of any items the survivor collects. (*Id.*) If the survivor chooses to submit a sample to Leda Health's partner lab, they will receive a report describing the samples collected in the EEK, the lab's testing methods, and a full chain-of-custody document and in-depth report of the DNA profiles detected. (ER-147, 164-167.)

Critics have attacked Leda Health's efforts to provide care to sexual assault since the company began. (ER-35-81.) As this lawsuit demonstrates, the mere suggestion that a survivor could self-collect evidence without the involvement of law enforcement officers has become a politically charged question.

Washington Targets Leda Health's Political Message

In October 2022, Leda Health partnered with a sorority at the University of Washington to provide EEKs to the sorority's members. (ER-4.) Sexual assault is particularly prevalent on college campuses, and students are often the least likely victims to report their assaults and receive care in the aftermath of them. (ER-83.)

Washington Attorney General Robert Ferguson did not like that Leda Health was making this effort. So, he joined a chorus of other elected state Attorneys General and tried to stop it. To do so, he sent a letter to Leda Health claiming that its sale of EEKs violated the state's consumer protection laws. (ER-102-106.) The letter threatened the company with prosecution for marketing allegedly "unfair and deceptive products." (*Id.*) The letter specifically argued that Leda Health's online message informing survivors how they could perform "self-administered DNA collection" was deceptive. (*Id.*) Attorney General Ferguson called the message an "advertising and marketing scheme[ ]" and said that the company's message about the "at home" use of EEKs was "patently false." (*Id.*) The letter even faulted Leda Health for not being able to *guarantee* that DNA evidence collected with an EEK would be admissible in a criminal prosecution.[6] The Attorney General never explained when or

[6] It is impossible, of course, to guarantee to any crime victim that a future court would admit a particular piece of evidence. But Washington courts routinely admit self-collected evidence in criminal cases, *see, e.g.*, *State v. Keen*,14 Wash. App. 2d 1068 (Wash. Ct. App. Oct. 27, 2020), and other forums like workplace disputes or Title IX adjudications permit greater leeway for admission of evidence than criminal courts.

how Leda Health had made such a guarantee. Nor did his letter explain what part of the message about "at home" use was "patently false."

Still, Leda Health heeded the Attorney General's threat. In response to the letter, it ceased all marketing and sales activity in Washington. (*Id.*)

Attorney General Ferguson ultimately chose not to sue Leda Health under the state's consumer protection laws. Instead, Washington took a different approach: a legislative effort to ban messages about the "at home" use of sexual assault kits.

Less than three months after Attorney General Ferguson's cease-and-desist letter, on January 24, 2023, House Bill 1564 (the "Bill") was introduced.[7] The original language of the Bill illustrated the legislature's effort to ban *only* those sexual assault kits that provided instructions about "at home" use. The Bill originally prohibited selling an "over-the-counter sexual assault kit," which it defined as a kit that: (1) "is marketed or presented as over-the-counter, at-home, or self-collected;" (2) "as

[7] H.B. 1564, 68th Leg., Reg. Sess. (Wa. 2023) (as presented by House, Jan. 24, 2023), https://tinyurl.com/2mrshna6 (last accessed November 22, 2024).

offered for sale or as a sample to members of the public;" and (3) "purports to allow an individual to independently collect evidence of a sexual assault outside of a collecting facility."[8] In other words, what made something an "over-the-counter sexual assault kit" would have *nothing* to do with its physical characteristics, per the Bill.

As the legislature grappled with how to ban the sale of some "kits" but not others, it opted to draw the distinction at how the seller communicated the kit could be used. The reason for this approach is easy to understand. The legislature understandably did not want to ban the physical items within sexual assault kits. Nor could it easily do so, given that swabs, plastic bags, tape, garment bags, sterile water, and cameras are ubiquitous. Rather, it wished to ban the sale of those items *only* in instances where a seller sold them while communicating that they could be used by the survivor to collect evidence of a sexual assault on his or her own. The legislature even touted that the Statute would prevent the spread of alleged "misinformation."[9] One witness testifying before the

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[8] *See* https://tinyurl.com/yftvdpmc (last accessed November 22, 2024).

[9] *See* https://tinyurl.com/4yeb39pv (last accessed November 22, 2024).

legislature put it bluntly: "let's be abundantly clear . . . this [Bill] aims to prevent the spread of misinformation."[10]

There was no ambiguity about what so-called "misinformation" the Bill targeted. One legislator said that it was "unconscionable that this company is *suggesting* sexual assault victims" could use common items to collect evidence of their sexual assault.[11] She told her colleagues that allowing Leda Health to share that message with survivors was "despicable" and "reprehensible."[12]

Some legislators wondered openly, though, why the Attorney General could not simply use existing laws to prosecute what the legislature called "misinformation." One confused legislator asked, "if

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[10] H.B. 1564, 68th Leg., Reg. Sess. (Wa. 2023) (as presented by House, Jan. 24, 2023), https://tinyurl.com/yzrpefz3 (last accessed November 22, 2024).

[11] *Id.*

[12] John Stattgast, *House Unanimously Approves Mosbrucker Bill to Ban Do-it-Yourself Rape Test Kits*, Wa. St. H. Republican Commc'ns (Feb. 28, 2023), https://tinyurl.com/y6zvp9p9 (last accessed November 22, 2024); Julie Calhoun, *Washington Lawmakers Propose Ban On 'At-Home' Rape Kits*, King5 (Feb. 3, 2023, 5:13 AM), https://tinyurl.com/446363j9 (last accessed November 22, 2024).

[Defendant Ferguson] has already sent [Leda Health] this [cease-and-desist] letter, why do we need this legislation?"[13] Another legislator replied that, "as much as I [want Attorney General] Ferguson to stay the Attorney General forever [,] . . . we have no guarantee that the future Attorney General" would agree that Leda Health's message about the at home use of EEKs was "patently false."[14] Rather than leave it up to the Attorney General or the courts, the legislature decided that it would have the final word over what Leda Health could say, and it passed the Bill.

On May 4, 2023, Governor Jay Inslee signed the Bill, codifying it as Wash. Rev. Code Ann. § 5.70.070 (hereinafter the "Statute"). The Statute reads, 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

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[13] *Prohibiting the Sale of Over-the-Counter Sexual Assault Kits: Hearing Before the Comm. on Community Safety, Justice, & Reentry*, H.B. 1564, 68th Leg., Reg. Sess. (Wa. 2023) (statement of Darya Farivar, State Rep. of Wa.), https://tinyurl.com/sxn7ybp6 (2:06:00) (last accessed November 22, 2024).

[14] *Id.*

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.

As noted above, the Statute's approach is remarkable. Consider how it operates in practice. The Statute does not restrict selling "a product with which evidence of sexual assault is collected." Nor does it prohibit someone from simply talking about how to collect sexual assault evidence "at home." Instead, it prohibits someone from doing both at the same time. A seller can offer a product that can be used to collect evidence of a sexual assault, but it cannot *truthfully tell* customers about that use. The Statute's exclusive target is truthful speech about the legal use of legal items.

There is no similar statute on the books in Washington or, it appears, anywhere else. A hypothetical example demonstrates why. Imagine a State passed a law to regulate "self-defense kits," which it defined as any product that can be used to deter a physical assault (such

as a baseball bat). Under this law, the sale of such a "kit" is prohibited if the seller markets the "kit" for self-defense, or knows the buyer would so use it, since the State wishes to encourage citizens to call the police for help rather than take matters into their own hands. In this hypothetical State, it is legal to buy a baseball bat, and a woman can lawfully use one to defend herself. Nonetheless, this imagined law prohibits an employee at a sporting goods store from selling a baseball bat to a customer if the customer tells the salesman that she intends to keep it by her bed in case an intruder enters her home. Such a law would not pass constitutional muster, of course, because prohibitions on what one can truthfully say about the legal use of legal items target the content of *speech*, not any type of conduct, and the First Amendment generally prohibits such censorship. So, too, here.

Leda Health Challenges the Washington Statute

On June 17, 2024, Leda Health filed a lawsuit in the Western District of Washington arguing that the Statute violated the First Amendment on its face, and as applied to Leda Health, and that it amounted to an unconstitutional Bill of Attainder. (ER-143.) The company moved for a preliminary injunction on June 26, 2024. (ER-113.)

Attorney General Ferguson and Governor Jay Inslee ("Washington") moved to dismiss the case on August 16, 2024. Leda Health responded to the motion on September 25, 2024. Washington filed its reply on Friday, October 18, 2024.

The next business day, on Monday, October 21, 2024, the district court denied Leda Health's motion for preliminary injunction and dismissed the case in a 32-page opinion. (ER-3-35.) The district court found that the Statute only banned conduct, not speech. (*Id.*) It found that the Statute banned the sale of kits, not based on their contents or physical traits, but based on their "stated use." A "sexual assault kit," in its view, only becomes an "at home sexual assault kit" if the kit's "stated use" is that it can be used for "at-home evidence collection." (ER-185.) Somehow, the district court concluded that truthfully "stating" how survivors can legally "use" legal products did not restrict speech. It also found that marketing the "at home" message was tantamount to marketing "illegal activity." (ER-190.) Finally, it dismissed the Bill of Attainder claim by holding that that the Statute did not identify Leda Health by name and that Leda Health could avoid the Statute's punishment by simply not violating it. (ER-27.) This appeal followed.

SUMMARY OF THE ARGUMENT

The Statute at issue restricts truthful speech about the legal use of a legal product. Specifically, it prohibits Leda Health from telling the survivors who it seeks to serve that they can collect evidence of sexual assault with the legal items in an EEK. There is no analogous law on the books where truthful speech about the legal use of legal items makes the marketing, sale, or charitable distribution of those same items illegal.

Washington's one-of-a-kind statute bans selling a kit if, and only if, the seller communicates a message during the sale that the government disfavors: a survivor can use the kit on their own and without the involvement of law enforcement or a nurse, that is, "at home." The "at home" message is core political speech protected by the First Amendment. It communicates to survivors that there are ways they can collect evidence after being assaulted, even if they are afraid to go (or simply choose not to go) to the hospital or police.

The Statute targets that truthful speech in two ways.

First, it makes it illegal to market or sell *anything* that can be used to collect evidence of a sexual assault if the seller communicates that the

items can be used for that purpose. This first way unconstitutionally punishes factually true statements about a legal use of legal items.

Second, if the seller truthfully intimates the "at home" message through any other means, or learns that the customer intends such use, the sale becomes illegal. This second way violates the First Amendment as well. An "at home" sexual assault kit, at its core and under the language of the Statute, is nothing more than a legal product sold with an illegal message. Nothing, apart from speech, makes something an "at home" kit. Selling one carries a significantly expressive element that enjoys First Amendment protection. This second way also unconstitutionally restricts the general public's right to hear truthful speech about a product that is legal for them to buy and use.

Restrictions of legal speech about legal products must survive strict scrutiny. They rarely do. The Statute in this case requires strict scrutiny for two reasons: (1) because it targets a specific message about how a kit can be used, making it content based, and (2) because it targets speech based on the speaker's viewpoint about the "at home" use of a kit. The fact that the "at home" message is communicated in a commercial setting does not change whether strict scrutiny applies. The Supreme Court and

circuits across the country have been clear in recent years that content- and viewpoint-based restrictions of speech are subject to strict scrutiny, and commercial speech is "no exception." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 618 (2020); *Reed v. Town of Gilbert*, 576 U.S. 155 (2015); *Sorell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011).

The Statute does not survive strict scrutiny. Washington has no interest, much less a compelling one, in preventing the nearly 80 percent of survivors who do not report their assaults from hearing about what they can legally do with legal items to preserve their options. Nor does it have an interest in censoring what the government believes to be misleading "misinformation." And even if it had a compelling interest in regulating false or deceptive advertising, the Statute has *nothing* to do with prohibiting that. It simply banned *all* speech, including true speech about how certain items can be used.

The Statute is still unconstitutional even if the lesser form of scrutiny from *Central Hudson* applies. It is legal to possess and use a "sexual assault kit" at home in Washington. It is not misleading to truthfully tell survivors about what they can legally do with a collection of legal items. And because the Statute has nothing to do with limiting

misleading advertising claims, it likewise fails to directly advance a government interest.

Finally, the Statute is an unconstitutional bill of attainder. The legislature repeatedly, without any attempt to hide it, singled out Leda Health by name when introducing, debating, and enacting the Statute. Legislators derided Leda Health for sharing the "at home" message when selling sexual assault kits. The Statute was designed to inflict legislative punishment after the Attorney General opted not to prosecute Leda Health in court. The bill of attainder provision exists to prevent such a legislative end-around where the legislature singles out those it deems deserving of punishment.

In sum, the Court should find that the Washington Statute bans protected speech, not conduct, and constitutes a bill of attainder. On this basis alone, it should reverse the district court's order granting Washington's Motion to Dismiss and remand. The Court's review of the district court's dismissal is *de novo*, which means it will "consider the matter anew without deference to the lower court's decision." *Election Integrity Project California, Inc. v. Weber*, 113 F.4th 1072, 1081 (9th Cir. 2024).

But the Court should not stop there. It can and should go further. Based on the record that already exists, the Court should also reverse the district court's order denying Leda Health's Motion for Preliminary Injunction. In doing so, the Court should reach the merits of that motion and find (1) that the Statute restricts speech and expressive conduct, (2) that the Statute fails strict scrutiny, (3) that the Statute is a bill of attainder, and (4) that Leda Health is likely to suffer irreparable harm absent injunctive relief.

In reversing the district court's order denying a preliminary injunction, the Court should remand for entry of a preliminary injunction consistent with its decision.

ARGUMENT

I. THE WASHINGTON STATUTE VIOLATES THE FIRST AMENDMENT.

The Washington Statute targets truthful speech about what survivors can legally do with a collection of legal items—use them "at home." Imagine a seller provides a kit to police or a hospital. The sale is legal. But imagine the seller offers that *same kit* to a survivor while sharing the truthful information that she can legally use it on her own, without the assistance of a nurse or police officer, to collect evidence. The seller will be punished under the Statute. Consider the following potential advertisement:

This advertisement displays a photo of a kit containing items for use in a sexual assault forensic exam, with text in red that states: "Buy Now!! Professional sexual assault kit. For use by police officers and nurses." Under the Washington Statute, the advertisement and sale of this kit is permissible, even if sold to a sexual assault survivor. And it is permissible because the message the seller conveys is one of which Washington approves. Now consider a slightly different advertisement:

This second advertisement displays the same photo of a kit containing items for use in a sexual assault forensic exam, but the text in red states: "Buy Now!! Sexual assault kit. Easy-to-follow instructions for use at

home!" This time, merely by displaying an advertisement (an "offer for sale") with a specific message, the seller has broken Washington law and could be punished. Plus, the kit cannot be sold to anyone, even a police officer or nurse, because the seller has marketed it with a banned message. Nothing about the advertisement changed other than what the seller *said* about the items. The physical items are the same.[15] The only difference is that the advertisement includes speech the state disfavors.

The "at home" message in the second advertisement is core political speech. The message is that survivors do not have to forfeit their ability to collect evidence of their assault just because they might be uncomfortable going to a hospital or police station immediately after their assault.

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 speech must involve "a subject of legitimate news interest; that is, a subject of

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[15] In these illustrative examples, the actual product depicted is the *same* "sexual assault kit" manufactured and sold by the same company, Sirchie, https://tinyurl.com/974h8m6y (last accessed November 22, 2024).

general interest and of value and concern to the public at the time of publication." *Adams v. Cnty. of Sacramento*, 116 F.4th 1004, 1011 (9th Cir. 2024). "[T]he content of the communication must be of broader societal concern," *id.*, and involve "issues about which information is needed or appropriate to enable the members of society to make informed decisions." *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983). And "[t]he inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Rankin v. McPherson*, 483 U.S. 378, 387 (1987).

The "at home" message fits within the established framework for protecting political speech. Whether survivors receive adequate care in the United States is no doubt the "subject of legitimate news interest." *Adams*, 116 F.4th at 1011. The way the government provides services to sexual assault survivors remains a matter of heated public debate across the country.[16] The "at home" message is of interest to a "significant number of persons" who are "likely to be truly interested in" knowing

[16] 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 November 22, 2024).

how to collect evidence on their own at home rather than at the hospital. *Adams*, 116 F.4th at 1011. The debate over the adequacy of government resources allocated for sexual assault survivors has caused many calls to "reinvent the rape kit" to better reach those who refuse to go to police or hospitals.[17] Naturally, survivors want to know if they can collect evidence without being invasively examined by a nurse or policeman. At its core, the "at home" message simply answers this question with a "yes."

The State of Washington, however, ended the debate with a "no" when it enacted the Statute. It picked sides in the public debate and pushed a message of its own. The Statute's language stands decidedly against the view "that [a] sexual assault kit may be used for the collection of evidence of sexual assault [by someone] other than by law enforcement or a health care provider." Wash. Rev. Code Ann. § 5.70.070(2)(b). *But it can*: a survivor collecting sexual assault evidence on his or her own is legal. And the common items used to do so are legal, too. Washington merely wishes that the survivor never *hears* the "at home" message from

[17] Kennedy, Pagan. (2024, March 6). *Let's Reinvent the Rape Kit*. Harvard Public Health, https://tinyurl.com/57mzubub (Last accessed November 22, 2024).

those who might sell them a kit. The "at home" message is speech in its most constitutionally protected form.

A. The Statute targets the disfavored message that survivors can self-collect evidence "at home."

The Statute targets the two ways the disfavored "at home" message reaches survivors: (1) a seller tells the survivor directly by marketing a kit with the message, or (2) the seller expresses the message (or hears it from the survivor) in some *other* way leading up to or during the transaction. Selling a kit is legal so long as the "at home" message is not conveyed in either manner. If it is, the Statute punishes the seller.

Section 2(a) targets speech directly. It uses the word "marketing" to describe what is banned. Under the Statute, "sexual assault kits that are *marketed* or otherwise presented as over the counter, at home, or do-it-yourself" become illegal to sell. Wash. Rev. Ann. at § 5.70.070(2)(a) (emphasis added).

Section 2(a) punishes marketing the "at home" message *alone*, restricting how companies like Leda Health can truthfully market the legal use of their otherwise EEKs. The sale of an EEK that is capable of "at home" use can be advertised, but only so long as Leda Health never says it can be used that way. If the company says anything about this

capability, Section 2(a) applies, and it is subject to a consumer protection lawsuit. Conversely, if Leda Health's marketing suggests that only "law enforcement or [a] healthcare provider" can use its EEKs, as in the first hypothetical advertisement above, Washington approves. *Id.* at § 5.70.070(2)(b). The only thing that changed in the two scenarios, and which flipped the sale from illegal to permissible, was the presence or absence of the "at home" message that accompanied the sale.

This is an unconstitutional restriction on truthful marketing. Marketing is speech that enjoys presumptive First Amendment protection. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011) ("marketing" is just "speech with particular content"). *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."). Indeed, the existence of "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." *Ginzburg v. United States*, 383 U.S. 463, 474 (1966). There is no precedent for a law that makes a legal product like an EEK illegal to sell *based on truthful speech about it*.

The legal items in an EEK also becomes illegal to sell if Leda Health were to intimate the "at home" message by means other than marketing. This violates the First Amendment in two ways: (1) it restricts expressive conduct, and (2) restricts the right of survivors to hear truthful speech about what they can legally do with legal items.

Section 2(b) 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—to broad effect. It punishes sellers if they harbor silent aspirations for how someone will use their product ("intends") or if they desire to discuss the legal ways their customers wish to use their products ("knows, or reasonably should know"). Again, there is no precedent for a law that punishes a seller for silently hoping a customer will buy a legal good from them and use it in a legal way or for providing truthful information about a legal product they sell when discussing the product with a consumer.

Section 2(b) bans the spread of the "at home" message in all the ways 2(a) cannot reach. Consider again the first ad *supra* at 21 for a

sexual assault kit touting the use by police and hospitals. The 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 be used by them on their own just by following the instruction card. The seller will be punished under Section 2(b). Imagine someone in the process of purchasing the same kit asks the seller how difficult it would be for her to follow the instructions herself. The seller will again be punished if it completes the sale. And, finally, imagine if a seller inserted easy-to-follow instructions inside the kit, placed it on a shelf in blank packaging, and merely offers it for sale, hoping that a survivor will purchase the kit and use it at home. If a seller does that, it will yet again be punished.

In each of these ways, Section 2(b) targets expressive conduct. That is, it 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). This is impermissible, as "conduct intending to express an idea is constitutionally protected." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1058 (9th Cir. 2010).

The First Amendment requires courts to ask the threshold question of (1) whether "conduct with a 'significant expressive element' drew the legal remedy" or (2) whether a law "has the inevitable effect of 'singling out those engaged in expressive activity.'" *Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389, 408 (9th Cir. 2015). Selling "at home" kits meets both of these elements.

First, providing survivors "at home" sexual assault kits carries a significant expressive element. The very thing that makes a kit "at home"—the speech about its use—is "intimately related to expressive conduct protected under the First Amendment." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 n.3 (1986). Communicating a certain message leading up to or during a sale of one is the *only way* to sell an "at home" kit. The only way to avoid that punishment is to avoid any suggestion (or even silent agreement with) the "at home" message. The only thing the seller can do to fall in line is self-censor their speech. Section 2(b) targets the "significantly expressive element" of selling an "at home" kit in this way. *City of Seattle*, 803 F.3d at 408.

Second, the inevitable effect of Section 2(b) is singling out kits sold with the "at home" message. That is *exactly* what Section 2(b) was

designed to do. *See* Wash. Rev. Code Ann. § 5.70.070 (explaining that banning the "at home" message was necessary to ensure only "accurate information" was shared); *see also HomeAway.com*, 918 F.3d at 685 (a court may consider a statute's "stated purpose" when analyzing its inevitable effect). Section 2(b) "uniquely impacts those engaged in" selling kits accompanied by the "at home" message. *Arcara*, 478 U.S. at 706 n.3. 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).

There is more. Section 2(b) not only targets sharing a disfavored message, but it also is 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).

Washington does not want survivors to learn what they can do with legal items, so it banned sellers (in Section 2(b)) from even intimating that use 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, Inc. v. Rhode*

Island, 517 U.S. 484, 507 (1996). The Washington Legislature's own admission that the Statute was passed to "prevent survivor's 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 opinions of the government. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

B. The district court erred when it read the Statute to prohibit conduct alone and not implicate speech.

To deny the preliminary injunction and dismiss the complaint, the district court read the Statute as a mere ban on "'offering' sexual assault kits 'for sale.'" (ER-128.) That is not true.

A "sexual assault kit" in Washington is any "product with which evidence of sexual assault is collected." Wash. Rev. Code § 5.70.070(1)(d). To be sure, this definition is incredibly broad, but it must be given full effect. *See Stenberg v. Carhart*, 530 U.S. 914 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning.").

"Evidence" of a sexual assault can be video, photographs, recordings, fibers, biological samples, hair, teeth marks, foreign objects

used in the assault, written or recorded statements, discarded clothing, bedsheets, tampons, and more. Thus, *any* "product" capable of collecting or capturing *any* of these things is caught in the sweeping dragnet of the Washington "sexual assault kit[]" definition. Smartphones can video and photograph injuries. Plastic bags can preserve fibers, biological samples, hair, tampons, and clothing. Swabs and distilled water can collect bodily fluids from the body or from surfaces. After all, they are each a "product with which evidence of a sexual assault can be collected." And, contrary to the district court's holding, ***none*** of these items are illegal to sell in the State of Washington.

There are three core problems with the district court's conclusion.

First, the district court invented the term "over the counter sexual assault kits." It is not a term found in the Statute. And worse, the district court never even defined it. It assumed, without explaining, that there was some physical quality that made a kit "over the counter." But the Statute supplies none. Still, the district court reasoned that selling a kit was only banned "[w]hen [it] meet[s] the description in 2(a)." (ER-10.) The problem: 2(a) does not describe a product; it only describes ways a product can be *marketed*, which is speech.

Second, the district court's own rationale directly undermined its conclusion that the Statute banned only conduct. It found that Section 2(a) banned the sale of kits, not based on their contents or physical traits, but based on their "stated use." A "sexual assault kit" only becomes an "at home sexual assault kit," according to the district court, if the kit's "stated use" is that it can be used for "at-home evidence collection." (ER-9.) Therefore, under the district court's own reasoning, the only difference between a legal "sexual assault kit" and an illegal "over the counter" one is how the seller "state[s]" it can be "use[d]." (*Id.*)

Third, the district court erroneously decided that marketing of "sexual assault kits" could be banned. (ER-11-12.) More specifically, it said that speech about "at home" of kits "concern[ed] illegal activity." (ER-16.) But the district court never explained what is illegal about either the items in a kit or a survivor using them at home—likely because none of it is illegal. Still, the district court relied on readily distinguishable cases where advertising restrictions were constitutional because the underlying product—items such as guns, tobacco, and cigarettes—was already restricted or heavily regulated. *See B&L Prods., Inc. v. Newsom*, 104 F.4th 108 (9th Cir. 2024) (where a law restricted

marketing guns at fairs because selling them was "already banned by other [State] statutes" that the plaintiff was not challenging); *Philip Morris USA, Inc. v. City & Cnty. of San Francisco*, 345 F. App'x 276 (9th Cir. 2009) (where a law restricting the geographic locations in which cigarettes could be sold did not implicate speech); *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence,* No. CA 12-96-ML, 2012 WL 6128707 (D.R.I. Dec. 10, 2012) (holding that a seller's description of its product is unquestionably speech).

C. The Statute Fails Strict Scrutiny.

Because the Statute implicates speech, not conduct, and directly regulates what sellers can say about the uses of "sexual assault kits," this Court should apply strict scrutiny. And there is neither a compelling governmental interest nor narrow tailoring here.

1.

Content- and viewpoint-based restrictions of speech are subject to strict scrutiny—full stop. The Supreme Court has been clear that commercial speech is "no exception." *Sorell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011); *see also Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 618 (2020); *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015).

The Court must first determine if a speech restriction is either content-based or speaker-focused before it applies the level of constitutional scrutiny set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

The Statute is subject to strict scrutiny for three reasons. First, it is a content-based regulation of commercial speech. Second, it is a viewpoint-based restriction based on how sexual assault kits can be used by survivors. And third, any commercial aspects of the speech that could conceivably warrant lesser scrutiny are inextricably intertwined with its core noncommercial nature, for which strict scrutiny applies.

First, the Statute allows the sale of kits accompanied by some messages but not others. The Statute "suppresses expression out of concern for its likely communicative impact"—that survivors will follow instructions and use the kit to collect sexual assault evidence at home. *United States v. Eichman,* 496 U.S. 310, 317 (1990).

To its credit, that is exactly how the legislature designed the Statute to function. The legislature acknowledged it passed the Statute to "prevent survivor's from receiving [in]accurate information." Wash. Rev. Code Ann. § 5.70.070, Intent—2023 c 296. Restrictions based on the

"impact that speech has on its listeners . . . is the essence of content-based regulation." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 811-12 (2000). Punishment under the Statute is entirely dependent on "the message the speaker seeks to convey" when selling a kit. *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1073 (9th Cir. 2020).

Consider the images *supra* at 21-22. One cannot determine if a sale will violate the Statute if the red text is removed. The only thing that changed was the content of the speech—not the physical items in the kit. Laws that cannot be "justified without reference to the content of the regulated speech" are content based. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Second, the Statute also restricts speech based on the viewpoint expressed by the seller. "At home" use is a viewpoint about how sexual assault kits can be used and deserves the most rigorous application of strict scrutiny. The Statute targets speech "*because of* not merely in spite of" its message. *Moss v. U.S. Secret Serv.,* 572 F.3d 962, 970 (9th Cir. 2009) (emphasis added). Strict scrutiny applies in such instances.

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995).

Punishing some viewpoints but not others is impermissible under the First Amendment. "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829. For example, in *Matal v. Tam*, 137 S. Ct. 1744 (2017), the Court's "finding of viewpoint bias ended the matter." *Iancu*, 139 S. Ct. at 2302 (citing *Tam*, 137 S. Ct. at 1761). Simply put, "if a [law] is viewpoint-based, it is unconstitutional." *Id*. at 2299.

Washington has adopted a viewpoint directly at odds with the "at home" message. It canonizes its own view that a "sexual assault kit [should not] 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)(b). In doing so, it elevates its own view while targeting opposing views for punishment. The opposing viewpoint—that the items in a sexual assault kit can legally sold to and used "at home" by survivors—is what the Legislature called "misinformation" the Statute

was designed to "stop."[18] Government restrictions of viewpoints it deems "misinformation" are a textbook example of the "particularly pernicious" types of laws that "require greater scrutiny" than mere "subject-matter-based restrictions." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 430-31 (1992).

The Statute explicitly restricts marketing, not of sexual assault kits in general, but specifically with the viewpoint that they can or should be used at home rather than exclusively in hospitals. Other speakers are allowed to market kits, so long as their marketing conforms to the state-sanctioned viewpoint. That makes the Statute viewpoint based.

Third, even if the content and viewpoints restricted by the Statute have commercial speech qualities, those qualities are so intertwined with the noncommercial "at home" message that strict scrutiny governs. The Statute bans noncommercial speech that cannot be separated from its commercial aspects. Strict scrutiny applies when commercial speech is intermingled with noncommercial speech in this way. *Riley*, at 796.

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[18] *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 November 22, 2024).

The fact that the "at home" message has some commercial characteristics does not alter its status as core political speech. The commercial aspect of selling an "at home" kit is inseparable from the "at home" message that made it so. 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).

If the "at home" message cannot accompany the sale of an "at home" kit, the product itself cannot exist. The "at home" message deserves full First Amendment protection because it "does more than propose a commercial transaction"; it tells survivors what they can do with it. *Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1017 (9th Cir. 2004). The message is what defines the kit and, naturally, cannot be "easily separated" its commercial aspects. *Hunt v. City of L.A.,* 638 F.3d 703, 715 (9th Cir. 2011). On the contrary, "the nature of ["at home" kits] *requires* their sales to be combined with a noncommercial message." *Id.* (emphasis added). Strict scrutiny applies for this separate reason as well.

2.

Because strict scrutiny applies, the Statute is "presumptively unconstitutional," and Washington bears the burden of proving that it is narrowly tailored to serve compelling state interests. *Reed*, 576 U.S. at 163. Washington did not meet that burden at the motion to dismiss stage.

First, the Statute's alleged need to censor so-called "misinformation" is not a legitimate government interest. It is little more than an effort "to achieve [the] policy objective" of forcing every survivor to go immediately to a hospital or police "through the indirect means of restraining certain speech by certain speakers." *Sorell*, 564 U.S. at 577.

Second, Washington failed to show that the "at home" message harms anyone. The Statute cites a broad concern about "false expectations" that survivors might develop about the evidence they collect at home. Wash. Rev. Code Ann. § 5.70.070, Intent—2023 c 296. This is no compelling interest at all. There is nothing "false" about telling survivors what they can legally do with legal items.

Micro-managing "expectations" reflects nothing but Washington's transparent desire to control what survivors do after a sexual assault. But the "paternalistic assumption" that a survivor will use truthful

information about collecting evidence at home "unwisely" cannot justify a decision to suppress it. *44 Liquormart*, 517 U.S. at 497. The First Amendment exists to "check raw paternalism." *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638, 649 (9th Cir. 2016). It prohibits the government from being able to "directly restrict speech in an attempt to *control conduct in response to that speech*." *Dana's R.R. Supply v. AG*, 807 F.3d 1235, 1251 (11th Cir. 2015) (emphasis added). Even if a survivor chooses an "at home" kit after hearing truthful information about it, Washington never explained what interest it has in robbing the survivor of that personal choice. On the contrary, survivors will "perceive their own best interests" if only they are "well enough informed." *Virginia State Bd. of Pharmacy*, 425 U.S. at 770.

The Statute does not make it to the narrowly tailored analysis. But even if it did, banning the "at home" message was not narrowly tailored to the modest objective of restricting false or deceptive marketing of "at home" kits. Washington had reasonable and practicable alternatives it could have implemented to prevent such a potential harm while leaving truthful speech untouched. It chose none of them.

To start, the Statute has *nothing* to do with prohibiting false or misleading marketing. Washington argued that advertising "at home" kits *could* be misleading *if* a company makes guarantees about the results always being "admissible as evidence." (ER-79.) But if it were concerned about misleading marketing, or what the Statute called "false expectations" created by promises about convictions and admissibility, Washington could have targeted these evils. Most obvious, it could have restricted advertising with misleading promises of admissibility or guaranteed convictions. If it were worried about "at home" kits' use in court, it could have amended the evidence rules to prohibit their admission into court. Again, it chose none of these.

Rather than pursue tailored restrictions, Washington banned truthful and deceptive speech alike. A statutory dragnet that punishes truthful and misleading speech alike fails the narrowly tailored prong of strict scrutiny. *See Riley*, 487 U.S. at 795. The Statute fails the second prong of strict scrutiny analysis as well.

D. The Statute also fails intermediate scrutiny.

Even if the Statute regulates exclusively commercial speech, and if the Court applies *Central Hudson* scrutiny, the Statute still cannot

survive. The Statute exclusively burdens commercial speech. 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). The "at home" message falls within that definition.

If speech is commercial, *Central Hudson* asks four questions to determine whether it can be restricted: (1) whether the speech concerns lawful activity and is not misleading; (2) whether the asserted government interest is substantial; (3) whether the regulation directly advances the asserted government interest; and (4) whether the regulation is no more extensive than necessary. 447 U.S. at 561. The Statute fails this test.

Possessing and using a sexual assault kit are legal activities. The first *Central Hudson* factor is based on the principle "that offers to give or receive what it is *unlawful to possess* have no social value and thus enjoy no First Amendment protection." *United States v. Williams*, 553 U.S. 285, 298 (2008) (emphasis added). That is not the case here. "Sexual

assault kits," as defined by the Statute, are legal to sell and possess. Washington has never argued differently. Advertising "at home" kits is nothing like commercial speech in the form of an "ad proposing a sale of narcotics or soliciting prostitutes." *Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations*, 413 U.S. 376, 387 (1973).

The "at home" message is truthful and not misleading. Nothing prevents survivors using kits on their own at home, and Washington produced *zero evidence* to suggest that at home use could not produce viable results.[19] In fact, it is precisely because the "at home" message is *true* that Washington *had* to target the speech, rather than restrict the use of kits at home or the purchasing of them by survivors.

Washington has no interest—compelling or substantial—in paternalistic censorship. The Statute is little more than a policy preference that survivors receive sexual assault care from police or hospitals exclusively. In restricting all marketing of the "at home" message to prevent deceptive marketing, it fails *Central Hudson*'s

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[19] Ample evidence exists that survivors can. "Self-collection post-rape is a viable option when instructions meet or exceed the current practices of the forensic nurse responding to rape victims today." Patricia M. Speck *et al.*, *Self-Collection Following Rape: An Integrative Literature Review*, 1 J. ACAD. FORENSIC NURSING, no. 1, 2023, at 18, 23.

tailoring requirement because it "burden[s] substantially more speech than is necessary" to further the purported government interest. *Turner Broad. Sys.*, 512 U.S. at 662. Even *Central Hudson* recognized that the government cannot "completely suppress information when narrower restrictions on expression would serve its interest as well." 447 U.S. at 565. Therefore, the Statute would fail *Central Hudson*, if it applied.

Ultimately, because the Statute restricts speech, rather than conduct, and it targets the content of speech to prohibit a message the government disfavors, it can only stand if it survives strict scrutiny. But this is something it cannot do. The district court's decision to deny the preliminary injunction and dismiss the case got these issues exactly wrong. This Court should reverse and remand with instructions to enter a preliminary injunction.

II. THE WASHINGTON STATUTE IS A BILL OF ATTAINDER.

The district court also dismissed Leda Health's claim that the Statute was not a bill of attainder. This was wrong. Washington used legislation to punish a single message and the only company who disseminated it: Leda Health. This violated the Constitution's prohibition on bills of attainder.

"No Bill of Attainder . . . shall be passed." U.S. Const. art. I, § 9, cl. 3. The Supreme Court noted in *United States v. Brown*, 381 U.S. 437, 442 (1965), that "the Bill of Attainder Clause was intended not as a narrow, technical . . . prohibition, but rather as an implementation of the separation of powers, a general safeguard against. . . trial by legislature." An unconstitutional bill of attainder (1) specifies the affected persons, and (2) inflicts punishment (3) without a judicial trial. *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group,* 468 U.S. 841, 847 (1984). A statute "need not fit all three factors to be considered a bill of attainder; rather, those factors are the evidence that is weighed together in resolving a bill of attainder claim." *Id.* at 350. All three factors weigh in Leda Health's favor in this case.

First, Leda Health was the clear target of the Statute. The legislature chose to codify that Leda Health was violating a separate and existing consumer protection law, right on the heels of the Attorney General declining to prosecute it under that *very same law*. The legislator who introduced the Bill announced on day one that the goal was to "to

make sure [Leda Health] leave[s] Washington state."[20] The "marketing" and "at home, do-it-yourself, or self-collected" language in the Statute was its best attempt to describe Leda Health's message as precisely as possible so that it could be banned. The legislature knew exactly who it was singling out with the Statute.

The district court ignored the legislative history altogether. Instead, it based its reasoning on the simple observation that the Statute "does not reference Leda Health by name" and that its "application depended entirely on Leda's choosing to *continue* selling EEKs." (ER-26.) (emphasis in original). The district never cited any authority for where it found these two bill of attainder principles. There is none.

To the first point, "singling out" does not require that a law identify its target by name, only that they be the "easily ascertainable" target of the law "when [it] was passed." *SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 668 (9th Cir. 2002). The district court never examined the legislative history relevant to this question. The district

[20] *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 Gina Mosbrucker, State Rep. of Wa.), https://tinyurl.com/mtyax7w8 (27:05) (last accessed November 22, 2024).

court was wrong not to examine the legislative record's overwhelming focus on targeting Leda Health. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 480 (1977) (examining "expressive sentiments" in the "legislative history" as part of the bill of attainder analysis); *see also, e.g., United States v. Lovett*, 328 U.S. 303, 308 (1946) (recounting extensive evidence of an intent to single out the target in the legislative record). Had it done so, it could have seen that the entire legislative record demonstrates a clear intent to prevent Leda Health from doing business in Washington. *See supra* at 10-11.

The district court's second point that Leda Health could avoid punishment simply by not acting in a way that violates the Statute in the future is unfounded. The fact that the target of the legislation retains some autonomy not to violate the law in the *future* plays no part in the bill of attainder analysis. Indeed, it would turn the analysis on its head if it did. Consider the seminal case of *United States v. Brown*, 381 U.S. 437 (1965), where the Supreme Court examined a law that forbid any member of the Communist Party from holding an executive office in a labor union. The Supreme Court found the law was a bill of attainder. It was no defense that the member could simply cease being a member of

the Communist Party and avoid the law altogether. Under the district court's reasoning, the law in *Brown* would have been constitutional because it turned on whether the individual "chose to continue" being part of the Communist Party. (ER-28.) That is not the law.

Second, the Statute punished Leda Health without the protection of a judicial proceeding. It "legislatively determine[d] guilt" after the Attorney General declined to prosecute Leda Health under existing law. *Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425, 468 (1977). It codified the Legislature's desired judicial outcome: that Leda Health was violating existing state law. This legislative end-around adjudicated that outcome "without provision of the protections of a judicial trial" in which Leda Health could have defended whether it was violating state law. *Id*.

The bill of attainder prohibition exists to prevent legislative adjudications of ethical and moral blameworthiness. It protects entities like Leda Health from legislators who "think them guilty of conduct which deserves punishment." *United States v. Lovett*, 328 U.S. 303, 315 (1946). That is because "the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific

persons." *Nixon*, 433 U.S. at 468. Here, the legislature assumed a judicial role to punish "ethics" of which it disapproved. Basic separation of powers principles confined that determination to the judiciary.

The district court wrongly concluded the Statute was not sufficiently punitive. It said punishment was that which "works a destruction of one's social, cultural, and political existence." *SeaRiver*, 309 F.3d at 673. Somehow, the district court found that a complete ban on the product Leda Health created, along with the message it shared in selling it, fell short of this standard.

Again, the district court erred by not examining the legislative record to ascertain whether the Statute was meant to be punitive. If it had, it would have seen an undisguised intention to destroy a company's cultural and political existence by suppressing its message. Legislators sharply criticized the "ethics of [Leda Health for] trying to profit off of trauma."[21] One even said that she thought that "[Leda Health] profit[ing] off of trauma" was "despicable" and "reprehensible."[22] Legislators even

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[21] *See* https://tinyurl.com/y6zvp9p9 (last accessed November 22, 2024).

[22] *See supra* at fn. 9.

argued that what Leda Health was doing was "unconscionable."[23] The sponsor of the Bill urged her fellow legislators to think of the "millions of dollars" in financial loss their legislation would cause Leda Health.[24] "Mak[ing] sure [Leda Health] leave[s] Washington State" was meant to punish ethics with which the legislature disagreed.[25] The Supreme Court has held that "formal legislative announcements of moral blameworthiness or punishment" like these are clear cut evidence of an intent to punish. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 480 (1977). The district court erred in ignoring them.

CONCLUSION

The Court should reverse the district court's order granting Washington's Motion to Dismiss. The Court also should reverse the district court's order denying Leda Health's Motion for Preliminary Injunction and remand for entry of a preliminary injunctive order consistent with its decision in this appeal.

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23 *Id.*

24 *See* https://tinyurl.com/yc8dyp3j (1:31:15) (last accessed November 22, 2024).

25 *See* https://tinyurl.com/mtyax7w8 (27:05) (last accessed November 22, 2024).

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CERTIFICATE OF SERVICE

I hereby certify that I served this brief on all counsel of record through the Court's CM/ECF system on November 22, 2024.

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