The Honorable David G. Estudillo

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LEDA HEALTH CORPORATION, a Delaware Corporation, Plaintiff, v. JAY ROBERT INSLEE, in his official capacity as Governor of Washington, and ROBERT WATSON FERGUSON, in his official capacity as Attorney General of Washington, Defendants.	No. 2:24-cv-00871-DGE PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION NOTE ON MOTION CALENDAR: July 24, 2024 **ORAL ARGUMENT REQUESTED**

Plaintiff, LEDA HEALTH CORPORATION, a Delaware corporation ("Leda Health"), by and through undersigned counsel and pursuant to Rule 65(a), Federal Rules of Civil Procedure, hereby moves for a preliminary injunction against Defendants, JAY ROBERT INSLEE, in his official capacity as Governor of Washington ("Governor Inslee"), and ROBERT WATSON FERGUSON, in his official capacity as Attorney General of Washington ("Attorney General Ferguson" and collectively with Governor Inslee, "Defendants"), and states:

INTRODUCTION

The First Amendment protects individuals and businesses from the government's attempt to suppress disfavored speech. Here, the State of Washington disagreed with Leda Health's

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protected speech, so it passed a law, Wash. Rev. Code § 5.70.070 ("Statute"), to ban it entirely. On its face, the Statute tells Leda Health what it can and cannot say about sexual assault evidence collection: banning it from "marketing or otherwise presenting" sexual assault kits as "over-the-counter, at-home, or self-collected" or indicating that the kit "may be used for the collection of evidence of sexual assault other than by law enforcement or a health care provider."

Leda Health was founded to provide resources to survivors of sexual assault beyond those provided by law enforcement and government. One such resource Leda Health provides are self-collected sexual assault testing kits. These kits are important because data shows that factors like lack of access, privacy concerns, personal safety, and distrust cause many sexual assault victims to avoid law enforcement and traditional methods of reporting and seeking help. Leda Health has never claimed that its resources are better or more effective than those offered by the government. But it does claim that survivors may require more (and different) resources than what governments currently offer them. And it advocates that its resources help survivors and protect communities. The First Amendment protects that opinion and the ability to express it without fear of governmental threats or retaliation.

This case is ultimately about a difference of opinion: Leda Health believes sexual assault survivors need resources beyond what the government offers. The State of Washington does not. So, Washington passed a law to suppress Leda Health's message that sexual assault testing kits can help survivors and protect communities. The Statute prevents Leda Health from telling survivors of sexual assault that they can self-collect evidence and that there are alternatives to government sources. The State of Washington, and Defendants, are allowed to disagree with this message. The First Amendment protects this disagreement. But they cannot constitutionally ban speech like they have done here.

The Statute targets the message that Leda Health conveys to the public, namely survivors, about the EEKs and is an unconstitutional content-based regulation both on its face and as applied

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to Leda Health. It is also unconstitutionally overbroad and vague. Accordingly, the Court should grant a preliminary injunction precluding Defendants from enforcing the Statute.

FACTUAL BACKGROUND

I. Washington Targeted Leda Health.

In October 2022, Attorney General Ferguson sent a cease-and-desist letter to Leda Health, in which it demanded that Leda Health "immediately cease and desist from advertising, marketing, and sales" of EEKs in Washington. *See* Campbell Dec. ¶ 21; Ex. 4.

Attorney General Ferguson specifically cited a portion of Leda Health's website, which touts its "holistic suite of services designed to meet the needs of survivors of sexual assault . . . From 24/7 live support from our Care Team, self-administered DNA collection, assistance in finding a hospital or other services and holistic trauma healing. . . ." *See* Campbell Dec. at Ex. 4. The letter characterized these descriptions of Leda Health's services and EEKs as "advertising and marketing schemes" with "claims regarding the admissibility" of EEKs that are "patently false." *Id.* The baseless contention leaves unsaid how it can be squared with Leda Health's transparent disclaimers. Campbell Dec. at Ex. 3. Still, in response to the demand, Leda Health ceased all marketing and sales activity in the State of Washington. *See* Campbell Dec. ¶ 22.

The Attorney General chose not to sue Leda Health, so instead the State of Washington took a different approach. On January 24, 2023, State Representatives Gina Mosbrucker, Tina Orwall, Kelly Chambers, Jenny Graham, Skyler Rude, and Alicia Rule presented House Bill 1564 (the "Bill").[1] The Bill originally prohibited the sale, offer, or provision of an "over-the-counter sexual assault kit," which was defined as a sexual assault or rape kit that: (1) is marketed or presented as over-the-counter, at-home, or self-collected; (2) is offered for sale or as a sample to

[1] *See* https://app.leg.wa.gov/billsummary?BillNumber=1564&Initiative=false&Year=2023 (last accessed June 14, 2024).

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members of the public; and (3) purports to allow an individual to independently collect evidence of a sexual assault outside of a collecting facility.[2]

The Bill plainly targeted Leda Health by name. An Individual State Agency Fiscal Note accompanying the Bill stated that the AGO's Consumer Protection Division "is only aware of one company engaged in the marketing and sale of over-the-counter sexual assault kits"—*i.e.*, Leda Health.[3]

The legislative record demonstrates that public officials in Washington grossly misunderstood what Leda Health offers with their EEKs. On February 2, 2023, Representative Mosbrucker sent an email to other members of the House of Representatives, noting that many of them "asked for meetings with Leda Health" regarding the Bill. *See* Campbell Dec. ¶ 24; Ex. 5. Representative Mosbrucker characterized Leda Health's EEKs as "over the counter" sexual assault kits and "do it yourself" rape kits. *Id*. at Ex. 5. Representative Mosbrucker also stated that she was asked to "provide a background and facts," but instead referred the email's recipients to an equally misguided local news clip where a layperson critic of Leda Health called Leda Health "predatory" and that it was "selling a Q-tip in a box." *See id.* (providing link to news clip). Also in the clip, Attorney General Ferguson claimed, without evidence, elaboration, or mention of the transparent information already discussed herein, that Leda Health misleads sexual assault survivors on the admissibility of EEK evidence. *See id.*

Despite these public mischaracterizations, members of the public expressed their support for providing survivors with the option of utilizing EEKs and urged their state representatives to vote against the Bill. Campbell Dec. ¶ 25, Ex. 6.

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[2] *See* https://lawfilesext.leg.wa.gov/biennium/2023-24/Pdf/Bills/House%20Bills/1564.pdf#pag e=1 (last accessed June 14, 2024).

[3] *See* https://app.leg.wa.gov/committeeschedules/Home/Documents/30661 (last accessed June 14, 2024).

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Unfortunately, public criticism of the Bill did not prevent its passage. On February 27, 2023, the Washington House of Representatives sent the Bill to the Senate, which amended the Bill, then passed it on April 7, 2023.[4] The House passed the amended Bill on April 13, 2023. *Id.* The Senate Bill Report directly called out Leda Health by name. On May 4, 2023, Governor Inslee signed the Bill. Wash. Rev. Code Ann. § 5.70.070(2).

II. The Statute's Targeting of Leda Health Is Misplaced.

Numerous flawed assumptions pervade the Statute.

Leda Health's EEKs does everything it can to supply admissible results. Campbell Dec. at ¶ 15. The lab can provide a summary describing the samples collected in the EEK and the lab's testing methods. *Id*. at Ex. 1. The lab can also provide a full chain-of-custody report. *Id*. at Ex. 2. But still, Leda Health cautions survivors that it can never fully guarantee that a survivor's EEKs will be admissible in court. *Id.* at ¶ 20. Leda Health's numerous disclaimers make this clear. *Id*. at Ex. 3. This exact same information is also conspicuously displayed on the public portions of Leda Health's website. *Id*.

Beyond Leda Health's transparency, the Statute faultily presumes that self-collected evidence is inherently inadmissible. Defendants have threatened to prosecute Leda Health for advertising EEKs, despite *still* allowing self-collected evidence to be admissible in their courts. Washington's rules of evidence do not bar self-collected evidence. As long as evidence meets the standard requirements for admissibility, a court may admit it—the same as for rape kits collected by law enforcement.

The Statute also wrongly implies that collection from a healthcare professional using sophisticated equipment is the *only* way DNA evidence can be acquired or admissible. *See e.g*., *State v. Burns*, 988 N.W.2d 352, 356 (Iowa) (DNA evidence introduced from a "clear plastic

[4] *See* https://app.leg.wa.gov/billsummary?BillNumber=1564&Initiative=false&Year=2023 (last accessed June 14, 2024).

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straw" that the defendant "discarded at a golf course clubhouse"); *State v. Hartman*, 27 Wash. App. 2d 952, 956 (2023) (DNA evidence collected from a "discarded napkin"); *Williamson v. State*, 413 Md. 521, 533 (2010) (evidence collected from an "abandoned cup" on the floor of an inmate's cell).

Self-collected evidence has been admissible in circumstances far less protective of chain of custody than with EEKs. *See e.g.*, *Thomas v. Commonwealth of Kentucky*, No. 2014-CA-000782-MR, 2016 WL 354318 (Ky. Ct. App. Jan. 29, 2016); *Moore v. Com.*, 357 S.W.3d 480, 497 (Ky. 2011); *State of Wisconsin v. Heine*, 319 Wis. 2d 233 (Wis. Ct. App. Apr. 14, 2009). This also has happened in Washington. *See e.g.*, *State of Washington v. Alvarez*, 11 Wash. App. 2d 1005 (Wash. Ct. App. Oct. 29, 2019); *State of Washington v. Earl*, 182 Wash. App. 1021 (Wash. Ct. App. July 14, 2014).

Nor does State-collection ensure the evidence will be handled properly, or that conviction is guaranteed. Often it is not. *See e.g.*, *State v. Keen*, 14 Wash. App. 2d 1068 (Wash. Ct. App. Oct. 27, 2020); *State v. Peebles*, 192 Wash. App. 1058 (Wash. Ct. App. Mar. 1, 2016); *State v. Benson*, 90 Wash. App. 1014 (Wash. Ct. App. Apr. 6, 1998).

Worst of all, the Statute is wrong to suggest that DNA evidence is somehow categorically inadmissible just because it was collected by the victim. Challenges that DNA evidence was improperly collected will generally go to the weight of the evidence, not admissibility. "The contamination of [ ] DNA evidence in the collection process and the weight to give it are questions for the jury to decide," *United States v. Goodrich*, 739 F.3d 1091, 1098 (8th Cir. 2014) (per curiam) (citations omitted), and thus "the great weight of legal precedent indicates that possible contamination issues go towards the weight—rather than the admissibility—of DNA evidence and should be brought out during cross-examination" before the jury, *see United States v. Morrow*, 374 F. Supp. 2d 42, 46 (D.D.C. 2005); *see also Redden v. Calbone*, 223 F. App'x 825, 830 (10th Cir. 2007); *United States v. McCluskey*, 954 F. Supp. 2d 1224, 1263 (D.N.M. 2013) (noting that

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"challenges based on the possibility of contamination [go] to the weight of the DNA evidence, not its admissibility"); *Khadera v. ABM Indus. Inc*., No. C08-0417RSM, 2011 WL 6813454, at *4 (W.D. Wash. Dec. 28, 2011) ("[A]n objection regarding the manner in which data was collected goes to the weight, and not the admissibility..."). No surprise, Washington adheres to this formula for admitting DNA evidence. *See e.g*., *State v. Hersh*, 170 Wash. App. 1049 (2012).

ARGUMENT AND INCORPORATED MEMORANDUM OF LAW

I. Legal Standard

The standard for issuing a preliminary injunction is well established:

> A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.

Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). The equities and public interest factors merge and favor an injunction when the government is enforcing an unconstitutional law. *Id.* at 26.

II. Leda Health is Likely to Prevail on the Merits.

A. The Governor and Attorney General Are Proper Parties.

While the Eleventh Amendment erects a general bar against federal lawsuits brought against a state, *Porter v. Jones,* 319 F.3d 483, 491 (9th Cir. 2003), it does not bar actions for prospective declaratory or injunctive relief against state officers in their official capacities for their alleged violations of federal law. *See Ex parte Young,* 209 U.S. 123, 155–56 (1908). The individual state official sued "must have some connection with the enforcement of the act." *Id*. at 157. That connection "must be fairly direct" and more than a "generalized duty." *L.A. Cnty. Bar Ass'n v. Eu,* 979 F.2d 697, 704 (9th Cir. 1992).

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Here, Attorney General Ferguson has a direct relationship with the challenged statute and has already threatened to enforce it against Leda Health. *See* Campbell Dec. at Ex. 4; *see also* Wash. Rev. Code Ann. § 5.70.070 (3) (providing that a violation of this subsection constitutes an "unfair or deceptive act" under Washington's consumer protection act); Wash. Rev. Code Ann. § 19.86.080(1) (empowering the Attorney General to file suit under the consumer protection act). Indeed, in similar cases, the Attorney General Ferguson has agreed it was an appropriate defendant in cases challenging statutes under which it can initiate prosecutions. *See e.g.*, *Jevons v. Inslee*, 561 F. Supp. 3d 1082, 1096 (E.D. Wash. 2021) ("Defendants do not appear to challenge whether Attorney General Ferguson is properly named in this suit, and the Court agrees sovereign immunity is not a jurisdictional bar...").

Governor Inslee is also a proper defendant. Violations of the Statute can be prosecuted by "[a]ny person who is injured" by an "unfair or deceptive act." Wash. Rev. Code Ann. § 19.86.090. The Sixth Circuit has observed that the "substantial public interest in enforcing the trade practices legislation … places a significant obligation upon the Governor to use his general authority to see that state laws are enforced." *Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656, 665 n.5 (6th Cir. 1982). This public interest is a sufficient connection to remove the Governor from the protections of sovereign immunity. Were this action unavailable to the Leda Health, it would be unable to vindicate the infringement of their First Amendment rights without first being sued by an unknown person or entity in Washington. The outright ban of certain speech has already required a significant changes to Leda Health's business. Such a result is clearly what the doctrine in *Ex parte Young* was in part designed to avoid.

Further, Governor Inslee is a proper defendant to Leda Health's unconstitutional bill of attainder claim. This independent basis is sufficient to sustain a cause of action against the Governor. *Consol. Edison Co. of New York v. Pataki*, 292 F.3d 338, 346 (2d Cir. 2002) (successful

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bill of attainder claim against the governor of New York); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 864 (8th Cir. 2006) (finding the governor was a proper defendant for a bill of attainder claim).

B. The Statute Is Facially Unconstitutional Under the First Amendment. (Counts I and II)

Leda Health brings both a facial and as-applied First Amendment challenge to the Statute. It is likely to prevail on both.

The Statute does not ban the sale of EEKs. But it regulates *how* and *what* companies like Leda Health can tell people about their own products. It does so by prohibiting Leda Health from representing that EEKs are "over-the-counter, at-home, or self-collected." It also prohibits Leda Health from "indicating" that EEKs could be used to collect evidence by anyone other than law enforcement or a health care provider. These restrictions apply not only to Leda Health's "marketing" of EEKs, but also to any other "presentation" of such descriptions of EEKs, including informational or instructional materials. Because these prohibitions are content-based, strict judicial scrutiny is warranted. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (observing that the First Amendment requires heightened scrutiny when the government creates "a regulation of speech because of disagreement with the message it conveys").

The Statute outright bans certain forms of commercial and non-commercial speech. And it does so explicitly based on content—namely, descriptions of the nature and purpose of sexual assault kits like Leda Health's EEKs. But even with commercial speech "the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *Ashcroft v. Am. Civ. Liberties Union*, 535 U.S. 564, 573 (2002)).

The Statute does not stop at just regulating the content of speech. It stretches farther into a brazen attempt to indoctrinate the viewpoint that someone other than law enforcement or health

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care providers should not and cannot use sexual assault kits to collect evidence of sexual assault. But the Supreme Court has cautioned that when the government targets not subject matter, "but *particular views taken by speakers* on a subject", the violation of the First Amendment is "all the more blatant" and constitutes "an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (emphasis added). The clear message of the Statute is that sexual assault kits administered by law enforcement or healthcare workers are better than those survivors might administer themselves. In addition to being demonstrably untrue, enshrining that viewpoint in law and banning commercial speech to the contrary runs afoul of fundamental First Amendment principles.

First, as explained further below, strict scrutiny applies regardless of the type of speech at issue. The protections afforded to commercial speech by the Supreme Court in recent cases confirms that strict scrutiny applies here.

Second, under that standard, the Statute's ban on "marketing" speech violates the First Amendment.

Third, the Statute's vague catch-all clause—"otherwise presented"—is an unconstitutional content and viewpoint based regulation of *non*-commercial speech, requiring strict-scrutiny on independent grounds.

And finally, even if the defunct level of scrutiny from *Central Hudson* still applied, the result would be the same.

1. Commercial Speech Enjoys the Same Protection Against Content and Viewpoint Based as Other Speech.

Marketing is generally considered commercial speech. *See Yim v. City of Seattle*, 63 F.4th 783, 801 (9th Cir. 2023). A statute restricts commercial speech when it identifies that the object of its regulation is "advertising." *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1106 (9th Cir. 2004).

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The Supreme Court afforded strict scrutiny protection to commercial speech in *Sorrell v. IMS Health, Inc.* The challenged law in that case prohibited pharmacies and health insurers from marketing or selling prescriber-identifying information or using such information for marketing without the prescriber's consent. *Sorrell*, 564 U.S. 552, 559 (2011). The State argued lesser scrutiny applied because its law was "a mere commercial regulation." *Id.* The Supreme Court rejected this, reasoning that, although "restrictions on economic activity" and "restrictions directed at commerce" that impose mere "incidental burdens on speech" are permissible, the law imposed more than an incidental burden. *Id.* at 567. The Court explained that free speech is implicated when an individual or entity is subjected to "restraints on the way in which [] information might be used or disseminated." *Id.* at 568 (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984)). That is why strict scrutiny was appropriate. *See id.*

The Court found that the "marketing" in *Sorrell* was commercial speech. The challenged law "disfavor[ed] specific speakers, namely pharmaceutical manufacturers" that wished to market prescriber-identifying information by outright barring them from doing so. *Id.* The Court concluded that "[t]he law on its face burdens disfavored speech by disfavored speakers." *Id.* Drawing on precedent, the Court held that because the law was "designed to impose a specific, content-based burden on protected expression," strict scrutiny applied. *Id.* at 565 (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418 (1993) and *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994)). The Court unambiguously stated that "[c]ommercial speech is no exception" to the rule that a regulation may not suppress speech and impose an unjustified burden on expression. *Id.* at 566 (citing *Discovery Network*, 507 U.S. at 429-30). Pharmaceutical marketing was a "form of expression protected by the Free Speech Clause of the First Amendment." *Id.*

The Supreme Court expounded upon *Sorrell* in *Barr v. American Ass'n of Political Consultants* and again applied strict scrutiny to a law restricting commercial speech. In *Barr*, the

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Supreme Court determined that a government debt collection exemption from the Telephone Consumer Protection Act's restriction on robocalls violated the First Amendment. 140 S.Ct. at 2347. The exception was unconstitutional because it impermissibly favored debt-collection speech over political and other speech. *See id.* The Court determined that the government-debt exception was subject to strict scrutiny because it was content-based. *See id.* The Court relied heavily on *Sorrell*, stating that the law at issue "does not simply have an *effect* on speech, but is *directed at certain content* and is *aimed at particular speakers*." *Id*. (quoting *Sorrell*, at 564 U.S. at 567) (emphasis added). Accordingly, the Court again applied strict scrutiny in the commercial speech context. *Id*. at 2346.

The Court should apply the *Barr-Sorrell* heightened level of scrutiny to the commercial speech here.

2. The Statute's "Marketing" Ban Violates the First Amendment on Its Face.

"Marketing or otherwise present[ing]" can be broken down into two parts. First, the "marketing" portion plainly targets commercial speech. The Statute's prohibition on "market[ing]" EEKs infringes Leda Health's constitutionally protected right to engage in commercial speech. Wash. Rev. Code Ann. § 5.70.070(2)(a). As demonstrated by *Sorrell* and *Barr*, the "commercial speech" moniker is, if anything, a distinction without a difference. The appropriate inquiry is whether the regulation in question (1) is content-based and (2) has more than in "incidental burden" on speech, regardless of the speaker. If so, strict scrutiny applies. Under that framework, the Statute is unconstitutional.

The Statute 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. If a sorority house kept a cabinet containing EEKs and posted a sign offering "FREE At-Home Sexual Assault Kits – Take One if Needed," it would be violating the Statute. Or if Leda Health placed an advertisement in a women's

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health magazine describing the benefits of EEKs and the method for using them at home, this would also violate the Statute. But if Leda Health provided EEKs with zero guidance on how they could be used, the Statute would permit this. The First Amendment does not allow for such selective restriction of speech.

This "marketing" ban is a content-based regulation in its proscription of how a sexual assault kit can "presented." Wash. Rev. Code Ann. § 5.70.070(2)(a). It allows some presentations and bans others. In other words, the Statute does not target the sale of EEKs; it targets what a company like Leda Health can say about EEKs. A speaker like Leda Health cannot market or even "present"—*i.e.*, describe—a sexual assault kit as "over-the-counter, at-home, or self-collected," under the Statute. Wash. Rev. Code Ann. § 5.70.070(2)(a). The Statute thus disfavors marketing, that is, "speech with a particular content." *Sorrell*, 564 U.S. at 564. A Statute whose target is *exclusively speech* imposes far more than an "incidental burden." *See Rosenberger*, 515 U.S. at 828 (the government may not regulate speech based on its substantive content).

By its plain language, the Statute also favors some speakers over others, just like the law in *Barr*. The Statute provides that a "person" may not sell, offer for sale, or otherwise make available sexual assault kits like EEKs, but it *excludes* "government or governmental subdivision, agency, or instrumentality." Wash. Rev. Code § 5.70.070(1)(c). A government speaker is free to describe sexual assault kits however he or she deems fit. A business, non-governmental organization, or private citizen is not. Therefore, "[t]he law on its face burdens disfavored speech by disfavored speakers." *Sorrell*, 564 U.S. at 564; *see also 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.").

The State of Washington has *no* legitimate interest in limiting speech about sexual assault evidence collection to government officials only. Nor can it have a legitimate interest in preventing

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survivors from using EEKs on the subjective belief that they might cause "false hope." A State can never have a compelling interest in "preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information." *Sorrell*, 564 U.S. at 573–79. Such a "highly paternalistic" approach is incongruent with the First Amendment. *Va. State Bd. of Pharm.*, 425 U.S. 748, at 769 (holding that the First Amendment allows people to "perceive their own best interests if only they are well enough informed, and the best means to that end is to open the channels of communication rather than to close them").

There is no compelling justification for banning Leda Health's "marketing" of EEKs. "To satisfy strict scrutiny, a restriction on speech is justified only if the government demonstrates that it is narrowly tailored to serve a compelling state interest." *Twitter, Inc. v. Garland*, 61 F.4th 686, 698 (9th Cir. 2023). "It is rare that a regulation restricting speech because of its content will ever be permissible." *Askins v. U.S. Dep't Homeland Sec.*, 899 F.3d 1035, 1045 (9th Cir. 2018). "[T]he fear that people would make bad decisions if given truthful information cannot justify content-based burdens on speech." *Sorrell*, at 577 (cleaned up).

Governments like Washington must pursue other courses before resorting to banning speech. To be narrowly drawn, a curtailment of free speech "must be *actually necessary* to the solution." *Twitter*, 61 F.4th at 698 (emphasis added). Put differently, "[i]f a less restrictive alternative would serve the Government's purpose, the [Government] must use that alternative." *Id.* (quoting *United States v. Playboy Ent. Grp., Inc*., 529 U.S. 803, 813 (2000); *see also IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1125 (9th Cir. 2020) ("Even if a state intends to advance a compelling government interest, we will not permit speech-restrictive measures when the state may remedy the problem by implementing or enforcing laws that do not infringe on speech.").

Even if Defendants could point to some *de minimis* interests, lesser means of accomplishing them exist short of banning speech. The concern that sexual assault survivors might

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be disappointed if their EEK is not admitted in court is not enough to justify the suppression of protected speech. In fact, even the "prospect of *crime* . . . by itself does not justify laws suppressing protected speech." *Ashcroft*, 535 U.S. at 245 (emphasis added). If the aim of the statute were to regulate the use of self-collected evidence in judicial proceedings, it could have amended the Washington Rules of Evidence. But it did not. If the legislature did not want sexual assault kits on the market at all, it could have tried to ban their purchase or possession. It did not. And if the legislature wanted to prevent survivors from being misled about the admissibility of sexual assault kits, it could have passed a law requiring that a disclaimer be made (one which Leda Health already makes). But again, it did not. The State also could *itself* inform survivors of the possibility that self-collected evidence would not be admitted in court. *See Nat'l Inst. Of Family & Life Advocates v. Becerra*, 585 U.S. 755, 775 (2018) (rather than burdening clinics with unwanted speech informing women of contraceptive services, state could "inform the women itself with a public-information campaign"). Any of these measures would have been a less restrictive means than banning speech altogether. *Reno v. Am. C.L. Union*, 521 U.S. 844, 874 (1997) (banning speech is always "unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve").

The bottom line: The Legislature could have accomplished the same objective without banning speech. In fact, the Statute makes clear that the State *already* has laws preventing deceptive or unfair trade practices directed to consumers—chapter 19.86 of the Revised Code of Washington. *See* Wash. Rev. Code § 5.70.070(3). If a consumer or Attorney General Ferguson believed that the description of EEKs as "over-the-counter, at-home, or self-collected" was deceptive or unfair, that consumer could bring an action under Washington's Consumer Protection Act. Indeed, Attorney General Ferguson could have here, demonstrating that alternatives short of banning speech certainly existed.

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3. The Statute Violates the First Amendment in Banning Speech "Otherwise Presenting" Sexual Assault Kits.

The Statute's "catch all" phrase bans non-commercial speech. Its ban on offering sexual assault kits that are "otherwise presented" as over-the-counter, at-home, or self-collected" also violates the First Amendment because it extends beyond commercial speech into *non*-commercial speech. Wash. Rev. Code Ann. § 5.70.070(2)(a). Commercial speech represents "expression related solely to the economic interests of the speaker and its audience," and "does no more than propose a commercial transaction." *Joseph*, 353 F.3d at 1106. A ban on "otherwise presenting" EEKs travels well beyond what is commercial.

The "otherwise presented" language, to the extent it has any understandable meaning at all, would plainly prohibit Leda Health from certain speech beyond just marketing. For example, if a survivor contacted a member of Leda's Care Team requesting an EEK or directions on its use, the statute bars that employee from even answering the survivor's questions. Answering these questions, or just even *discussing* EEKs with survivors trying to use one is not marketing, nor is it commercial at all. *See Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1980) ("Commercial speech" is "speech which does no more than propose a commercial transaction."). Such a boundless "catch-all" restriction aimed at more than just commercial speech carries no valid government interest, apart from the unconstitutional "suppression of free speech" itself. *Turner Broad. Sys,* 520 U.S. at 189.

The Statute fails constitutional muster on this separate and independent ground as well—because its residual phrase bans *non*-commercial speech. Facially content-based restrictions on this type of speech are unquestionably subject to traditional strict scrutiny. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 167 (2015).

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4. The Statute Would Still Be Unconstitutional Under *Central Hudson*.

Even under the constitutional framework that existed before *Barr* and *Sorrell*, the Statute would not pass constitutional muster. Five years after recognizing that the First Amendment protects commercial speech, the Supreme Court created a four-part test in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), for determining whether a governmental regulation on commercial speech is unconstitutional. The Court should not apply the *Central Hudson* test to this case, as explained *supra* (I)(B)(i). The speech targeted by the Statute is not purely commercial, and the Supreme Court effectively superseded *Central Hudson* with *Sorrell* and *Burr*. Strict scrutiny applies. But even if the Court uses the *Central Hudson* test, Leda Health is substantially likely to prevail on its claim that the Statute is unconstitutional on its face and as applied.

The *Central Hudson* test requires a court to consider whether: (1) the commercial speech is protected under the First Amendment because it concerns lawful activity and is not misleading; (2) the governmental interest in regulating the speech is substantial; (3) the regulation directly advances the government interest asserted; and (4) the regulation is more extensive than necessary to serve that interest. *Id.* at 564. If speech does not clearly fall within this definition, courts analyze factors such as whether the speech is informational but proposes a commercial transaction; whether the speech refers to a specific product; and whether the speaker has an economic motivation. *See, e.g.*, *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983). None of these factors alone would necessarily render speech "commercial" in nature, but a combination of factors may reflect that the speech is commercial. *See id.* at 67.

Under *Central Hudson*, commercial speech is protected under the First Amendment when it concerns lawful activity and is not misleading. 447 U.S. at 564. Prior to the enactment of the Statute, there was nothing unlawful about describing or marketing sexual assault kits as "over-the-counter, at-home, or self-collected" or selling kits intended for the purpose of allowing the self-

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collection of sexual assault evidence. And importantly, the language the Statute targets is not "misleading." EEKs can be provided without a prescription (*i.e.*, "over-the-counter"). EEKs *are* intended for at-home use. EEKs *are* for self-collection of evidence. Describing kits as such is not misleading. If the State was concerned that survivors might be "misled" into believing that self-collected evidence will always be admissible in court, the Statute could have targeted such representations. It does not.

As already explained, the State might have an interest in preventing survivors from being "misled" about the admissibility of self-collected evidence. However, for the same reasons that the Statute is not narrowly tailored to meet this interest, the Statute also does not directly advance such an interest.[5] The State did not consider any alternatives toward advancing its interest other than broadly banning protected speech. *Cf. Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2022) (where a statute that banned advertising for a particular drug failed *Central Hudson* test because there was "no hint that the Government even considered" alternatives to advertising prohibition). "If the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Id.* Here, the Statute is unconstitutional because banning speech was "the first strategy the Government sought to try." *Id*.

Accordingly, while the Court should apply heightened scrutiny to this case, the Statute fails on its face even under the *Central Hudson* test. The Court should therefore determine that Leda Health is substantially likely to prevail on the merits and enter a preliminary injunction precluding Defendants' enforcement of the Statute.

[5] The similarities between strict scrutiny and the *Central Hudson* test reflect why the Supreme Court has abandoned *Central Hudson* and focused simply on whether a regulation is content-based and imposes more than an incidental burden on speech.

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C. The Statute Violates the First Amendment As Applied to Leda Health's Speech. (Count II)

The Statute is unconstitutional on its face. It is also unconstitutional as applied to Leda Health's particular speech. To succeed on this separate claim, Leda Health must allege sufficient facts to demonstrate the Statute's "unconstitutionality as applied to [its] activities." *Microsoft Corp. v. United States Dep't of Just.*, 233 F. Supp. 3d 887, 911 (W.D. Wash. 2017) (quotations omitted). "[A]n as-applied challenge requires an allegation that a law is unconstitutional as applied to a particular plaintiff's speech activity, even though it may be valid as applied to others." *Id.*

Even though Defendants have not prosecuted Leda Health for violating the Statute yet, (1) there is a credible threat they will do so, and (2) the Statute has already unconstitutionally chilled Leda Health's free speech. Even in the First Amendment context, a plaintiff must show a credible threat of enforcement. *Lopez v. Candaele*, 630 F.3d 775, 786 (9th Cir. 2010). But "when the threatened enforcement effort implicates First Amendment rights, the [standing] inquiry tilts dramatically toward a finding of standing." *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1172 (9th Cir. 2018). Here, the AGO letter already sent to Leda Health constitutes a credible threat enforcement. *See e.g., Planned Parenthood Greater Nw. v. Labrador*, 684 F. Supp. 3d 1062, 1083 (D. Idaho 2023) (letter from Attorney General was a credible threat of prosecution). But even absent the letter, the relaxed standing requirement applies to this as-applied pre-enforcement challenge, as "a chilling of the exercise of First Amendment rights is, itself, a constitutionally sufficient injury." *Tingley v. Ferguson*, 47 F.4th 1055, 1066 (9th Cir. 2022).

Here, Defendants have applied the Statute to ban Leda Health's constitutionally protected speech. The AGO sent Leda Health a cease-and-desist letter in October 2022. Campbell Dec. at ¶ 21, Ex. 4. In response, Leda Health stopped engaging in constitutionally protected commercial and non-commercial speech in the State of Washington. *Id.* at ¶ 22.

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The Statute has been unconstitutionally applied to Leda Health because it was *designed* with it in mind.[6] The Legislature specifically targeted Leda Health through the Statute. The AGO's Consumer Protection Division reported it knew of only "one company" marketing and selling sexual assault kits: Leda Health.[7] And while email communications from Representative Gina Mosbrucker may not be part of the legislative history of the Statute, it is telling that Representative Mosbrucker specifically referenced Leda Health and provided a link to a one-sided and highly critical news story about Leda Health in an email to other legislators. (*See* Ex. 4.) *See e.g.*, *Sorrell*, 564 U.S. at 565 ("Just as the inevitable effect of a statute on its face may render it unconstitutional, a statute's stated purposes may also be considered.").

The Statute's legislative history shows that the State intentionally removed Leda Health's right to speech because it disagrees with Leda Health's message about EEKs' purpose. The Statute is, therefore, an unconstitutional content- and viewpoint-based restriction as applied against Leda Health.

D. The Statute Is Void for Overbreadth and Vagueness, Both Facially and As Applied. (Counts III and IV)

The Statute is unconstitutionally overbroad and vague. In the First Amendment context, a statute is facially overbroad "if it prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292 (2008). A speech regulation must provide "fair notice to those to whom [it] is directed." *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972)). And, like overbreadth, a First Amendment vagueness challenge seeks to strike restrictions that may chill protected speech. *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001). The analysis under either doctrine is applied "more strictly requiring statutes to provide a greater

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[6] *See* https://app.leg.wa.gov/committeeschedules/Home/Documents/31046 (last accessed June 14, 2024) (fiscal note explaining that Leda Health was the only entity the legislator was aware of whom the Statute would impact).

[7] *See* https://app.leg.wa.gov/committeeschedules/Home/Documents/30661 (last accessed June 14, 2024).

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degree of specificity and clarity than would be necessary under ordinary due process principles." *Id*. And with either claim, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 495 (1982).

Here, the Statute bans a substantial amount of constitutionally protected speech. *See supra* (II)(B)(1-2). It is not limited to representations or assurances that evidence collected using an EEK will be admissible in court, nor is it limited to "misleading" characterizations. *Id*. Instead, it bans *any* speech by a non-governmental speaker that in any way describes a sexual assault kit as "over-the-counter, at-home, or self-collected" or markets, offers, or makes available such kits if the speaker knows that they will be used for self-collection. As written, the Statute punishes a person for simply offering (even for free) a "product with which evidence of sexual assault is collected." Content-based regulations fail the "more stringent" vagueness and overbreadth tests because they fail to "regulate in the area" of First Amendment freedoms "with narrow specificity." *Vill. of Hoffman Ests.*, 455 U.S. at 499; *NAACP v. Button*, 371 U.S. 415, 432 (1963).

Even if preventing business representations to survivors that self-collected evidence would always be admissible in court, banning *any* person from *discussing* self-collected sexual assault kits sweeps vast amounts of constitutionally protected speech within its reach. In doing so, it has inevitably caused a company like Leda Health "to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked" by withdrawing all of its business from Washington. *Grayned*, 408 U.S. at 109. This is the type of vague and overbroad reach that the First Amendment plainly forbids.

The Statute's overbroad and vague definitions pose a risk that the State will arbitrarily enforce the Statute. It is unclear what behavior the Statute proscribes by barring speech that "otherwise makes available" sexual assault kits. Wash. Rev. Code Ann. § 5.70.070(2)(a). It is likewise unclear what the Statute references by speech that "in any manner" suggests it can be

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used for self-collection. *Id*. Worse, the definition of "sexual assault kit" is overbroad, encompassing any "product with which evidence of sexual assault is collected." *Id*. § 5.70.070(1)(d). "Person" includes any individual. *Id*. at § 5.70.070(1)(c). Does the State intend to punish a friend who offers to share an EEK from her bathroom cabinet with the victim of an assault? What about the classmate who offers a Q-tip or tissue with which the victim might collect evidence? The Statute is overbroad and vague on its face and cannot be upheld even if the State of Washington and Defendants "promised to use it responsibly." *Stevens*, 559 U.S. at 480.

The Statute is impermissibly broad and vague. It implicates a substantial amount of protected speech and fails to give fair notice to those to whom it is directed. It is also unconstitutional as applied to Leda Health's business practices and protected speech.

E. The Statute Is an Unconstitutional Bill of Attainder. (Count V)

The manner in which the Legislature singled out the Leda Health for banishment violates the Constitution's prohibition on bills of attainder.

"No Bill of Attainder ... shall be passed." U.S. Const. art. I, § 9, cl. 3. As the Supreme Court noted in *United States v. Brown*, 381 U.S. 437, 442 (1965), "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." Corporations, like individuals, enjoy constitutional protections of the Bill of Attainder clause. *SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 668 (9th Cir. 2002). 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.

A law is an unconstitutional bill of attainder if it "legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425, 468 (1977). The Bill of Attainder Clause was "found to reflect the Framers' belief that the Legislative Branch is not so well suited as politically

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independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." *Id. (cleaned up).* 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. *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group,* 468 U.S. 841, 847 (1984). Each is present here.

1. The Statute Was Designed to Target Leda Health.

A law does not have to identify an individual or entity by name to be an unconstitutional bill of attainder. Instead, the law can be unconstitutional if "the identity of the individual or class was 'easily ascertainable' when the legislation was passed." *SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 669 (9th Cir. 2002) (quoting *United States v. Brown,* 381 U.S. 437, 445 (1965)). The Supreme Court has long recognized that laws that are "*designed* to apply to particular individuals" are the hallmark of what makes an unconstitutional bill of attainder. *United States v. Lovett*, 328 U.S. 303, 316 (1946) (emphasis added).

Leda Health is the "easily ascertainable" target of the statute. Attorney General Ferguson informed the Legislature that it was "only aware of one company engaged in the marketing and sale of over-the-counter sexual assault kits"—*i.e.*, Leda Health.[8] Legislators openly discussed Leda Health when drafting and voting for the bill. One sent an email to other legislators, stating that many of them "asked for meetings with Leda Health" regarding the Bill. *See* Campbell Dec. ¶ 20; Ex. 4. The legislator specifically called Leda Health's EEKs "over the counter" sexual assault kits and "do it yourself" rape kits. *Id*. at Ex. 4. At the Bill hearing, the only company the Legislature heard testimony from was Leda Health.[9] Even local media plainly understood that the Bill was

[8] *See* https://app.leg.wa.gov/committeeschedules/Home/Documents/30661 (last accessed June 14, 2024).

[9] *See* https://lawfilesext.leg.wa.gov/biennium/202324/Pdf/Bill%20Reports/Senate/1564%20SBR%20LAW%20TA%2023.pdf (last accessed June 14, 2024).

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meant to ban Leda Health from operating in the State.[10] The two legislators who sponsored the bill openly discussed with the media ways in which the bill "targets Leda Health."[11] One sponsor posted online that her Bill was designed to stop Leda Health from operating in Washington.[12]

The Court also can look to whether a law singles out *past* conduct of a target in determining whether it is an unlawful attainder. The "singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons." *SeaRiver Mar. Fin. Holdings*, 309 F.3d at 670. Here, the Statute "singles out [Leda Health] on the basis of a past act that other [companies] operating in [Washington] had not committed as of the date the [Statute] was passed." *Id*. at 671.

Thus, the "easily ascertainable" guidepost favors concluding that the Statute singles out Leda Health. *See Nixon,* 433 U.S. at 473–78 (a statute need not even satisfy all of these factors to constitute a bill of attainder).

2. The Statute Inflicts Punishment on Leda Health.

Three inquiries determine whether a statute "inflicts punishment":

> (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."

[10] *See* https://www.seattletimes.com/seattle-news/politics/wa-legislature-considers-ban-on-at-home-sexual-assault-evidence-kits/ (last accessed June 14, 2024).

[11] *See* https://www.thecentersquare.com/washington/article_b138a862-bec1-11ed-bd7b-8b4be3521146.html (last accessed June 14, 2024).

[12] *See* https://ginamosbrucker.houserepublicans.wa.gov/2023/02/01/otc-sexual-assault-kits/ (last accessed June 14, 2024).

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Selective Serv. Sys. v. Minn. Pub. Interest Research Group, 468 U.S. 841, 852 (1984) (quoting *Nixon,* 433 U.S. at 473). Traditionally, bills of attainder inflict individuals with punishments such as death and imprisonment, other actions like "banishment" or "the punitive confiscation of property by the sovereign, or erected a bar to designated individuals or groups participating in specified employments or vocations." *SeaRiver Mar. Fin. Holdings*, 309 F.3d at 673.

Here, the Legislature brazenly chose to codify that Leda Health was violating a *separate* and *existing* law. The Statute is, at its bare core, a workaround to a prosecution under Washington's Consumer Protection Act. One does not have to look farther than the fact that Attorney General Ferguson's office threatened to prosecute Leda Health under the State's consumer protection act *before the Statute was even proposed*, but ultimately chose not to do so, relying instead on the punishment the statute inflicted legislatively. When Attorney General Ferguson declined to prosecute Leda Health for "unfair or deceptive acts," the legislature chose to enshrine that legal conclusion and "determine guilt" without judicial process. *Consol. Edison Co. of New York*, 292 F.3d at 346. This sort of prosecution by legislative act is exactly the type of punitive act the legislature cannot undertake.

The legislative punishment—a full business banishment—is undoubtedly punitive for purposes of the bill of attainder analysis. The complete prohibition from "marketing or otherwise present[ing]" inflicts "pains and penalties" that historically have been associated with bills of attainder. *Nixon*,433 U.S. at 474. The Statute transforms Leda Health into a "vilified class" by explicitly prohibiting their current and future operations in the State, without qualification or limitation. *Foretich v. United States*, 351 F.3d 1198, 1224 (D.C. Cir. 2003). But the gravamen of the bill of attainder prohibition is that a legislature may not target a company like Leda Health

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merely because it "thinks them guilty of conduct which deserves punishment." *United States v. Lovett*, 328 U.S. 303, 317 (1946). That is exactly what the Washington did here.

Finally, "[i]n determining whether a legislature sought to inflict punishment on an individual, it is often useful to inquire into the existence of less burdensome alternatives by which [the legislature] could have achieved its legitimate nonpunitive objectives." *Nixon*, 433 U.S. at 482. As explained *supra* (II)(B)(1-3), the Legislature ignored multiple less burdensome alternatives—ones that would not have banned any speech—before passing the Bill into law.

For all these reasons, Leda Health is likely to succeed in demonstrating that the Statute is an unconstitutional bill of attainder.

III. Leda Health is Likely to Suffer Irreparable Harm Absent a Preliminary Injunction.

Every day the Statute remains in effect, Leda Health suffers the unconstitutional deprivation of its constitutional rights. Because of Defendants threat of enforcement, Leda Health continues to refrain from marketing, selling, offering, describing, or educating others about EEKs in Washington State for fear of reprisal under the Statute.

"Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm." *Nelson v. NASA,* 530 F.3d 865, 882 (9th Cir. 2008). And if a plaintiff shows it is likely to prevail on the merits, that showing "usually demonstrates he is suffering irreparable harm no matter how brief the violation." *Baird v. Bonta*, 81 F.4th 1036, 1040 (9th Cir. 2023). 'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Roman Catholic Diocese v. Cuomo*, 592 U.S. 14, 19, (2020) (per curiam).

Defendants' enforcement of the same inflicts ongoing constitutional injuries to Leda Health that cannot be remedied at law, making it likely to suffer irreparable harm absent immediate injunctive relief.

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IV. The Balance of Equities and Public Interest Favor Entry of a Preliminary Injunction.

Leda Health also has satisfied the combined third and fourth elements for a preliminary injunction. The public interest and the balance of the equities always favor "prevent[ing] the violation of a party's constitutional rights." *Melendres v. Arpaio,* 695 F.3d 990, 1002 (9th Cir.2012). "When a party 'raise[s] serious First Amendment questions,' that alone 'compels a finding that the balance of hardships tips sharply in [its] favor." *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 695 (9th Cir. 2023) (en banc).

Defendants' ongoing enforcement of the Statute not only infringes on Leda Health's free speech rights, but also the rights of other non-governmental persons subjected to the Statute's restrictions.

V. The Court Should Waive Rule 65(c)'s Security Requirement.

The Court should not require Leda Health to post a bond because it has a high probability of success on the merits of its First Amendment claims. And defendants—government actors—will not suffer monetary damages from entry of a preliminary injunction.

CONCLUSION

The Court should enter a preliminary injunction declaring the Statute unconstitutional and prohibiting Defendants from enforcing it.

DATED this 26th day of June, 2024. I certify that this motion contains 8,384 words, in compliance with the Local Civil Rules.

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