UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA
PITTSBURGH DIVISION

LEDA HEALTH CORPORATION, a Delaware corporation, and MADISON CAMPBELL,	)	No._____
Plaintiffs,	)	PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND MEMORANDUM IN SUPPORT
v.	)	
MICHELLE HENRY, in her official capacity as Attorney General of Pennsylvania, and LETITIA JAMES, in her official capacity as Attorney General of New York,	)	JURY TRIAL DEMANDED
Defendants.	)	

Plaintiffs, LEDA HEALTH CORPORATION, a Delaware corporation ("Leda Health"), and MADISON CAMPBELL, by and through undersigned counsel, sue Defendants, MICHELLE HENRY, in her official capacity as Attorney General of Pennsylvania ("Attorney General Henry"), and LETITIA JAMES, in her official capacity as Attorney General of New York ("Attorney General James" and collectively with Attorney General Henry, "Defendants"), and state as follows:

INTRODUCTION

The First Amendment protects individuals and businesses from the government's attempt to suppress disfavored speech. Here, two state governments have threatened to shut down a company that provides resources to sexual assault survivors because it disagrees with the company's protected speech.

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 and Ms. Campbell believe sexual assault survivors need resources beyond what the government offers. Defendants do not. So, to ensure Defendants' own view carries the day, they have coerced Leda Health and Ms. Campbell to stop spreading Leda Health's "overall message," as Defendant James called it. To be clear, Leda Health's "message" is that sexual assault testing kits can help survivors and protect communities. But Defendants would rather government alone wear that white hat, and so they claim that (i) survivors of sexual assault should not be allowed to self-collect evidence and (ii) government sources already offer sufficient resources to survivors. Leda Health and Ms. Campbell simply disagree. The First Amendment protects this disagreement.

Government officials cannot wield their offices to standardize their own views. But that is what Defendants here are trying to do. No matter how strong Defendants feel that survivors should rely only on the government to heal or get justice, they cannot simply ban the speech of companies that disagree to make it so. To be sure, as government officials, Defendants Henry and James may share their views freely and criticize particular beliefs, like those of Leda Health and Ms. Campbell. They can even persuade others to follow their lead, relying on the merits and force of their ideas. But as the Supreme Court made abundantly clear just weeks ago, "[w]hat [they] cannot do, however, is use the power of the State to punish or suppress disfavored expression." *NRA. v. Vullo*, 144 S. Ct. 1316, 1326 (2024). They have done exactly that here, which is why Plaintiffs move for a preliminary injunction to prevent the ongoing violation of their constitutional rights.

FACTUAL BACKGROUND

I. The Pennsylvania Attorney General Targeted Leda Health's Protected Speech.

On May 24, 2024, Defendant Henry's office wrote to Leda Health threatening to prosecute it for "unfair and deceptive acts" under the Pennsylvania Consumer Protection Act unless Leda Health agreed to "immediately cease and desist advertising, marketing, and sales of products and services relating to its [EEKs] to consumers." *See* Declaration of Madison Campbell ("Campbell Dec."), attached as Exhibit A, ¶ 3. The letter does not limit the demand to Leda Health's activity in just Pennsylvania and, instead, demands Leda Health cease business *everywhere*. *Id*.

The letter does not contend that Leda Health's EEKs are illegal in the State.

Rather, Defendant Henry contends in her letter that her demands of Leda Health are part of an effort to protect individuals' "right to a forensic exam," "right to collection and testing of crime evidence," and the "right to receive resources ... with no financial charge to the survivor." *Id*. The letter's difficult-to-swallow premise is that by offering the same service as the government, Leda Health has violated Pennsylvania law.

What law, exactly, is equally unclear. Defendant Henry's letter announces that their investigation "revealed" that EEKs "are not in compliance with provisions of the Pennsylvania Sexual Assault Testing and Evidence Collection Act and the UTPCPL." *Id*. To that end, Defendant Henry threatened to prosecute Leda Health for failing to include in its advertising and not "mak[ing] clear" that EEKs "[do] not meet Pennsylvania Sexual Assault Evidence Kit requirements"—a statute Defendant Henry believes governs Leda Health. *Id*. But the cited statute does not regulate private companies; it sets out "minimum standard requirements for all rape kits *used in hospitals and health care facilities*" in Pennsylvania. 35 Pa. Stat. Ann. § 10172.3(a)(1) (emphasis added); *see also* 53 Pa. B 6784 (October 28, 2023). Leda Health is neither of these. Moreover, even the term "sexual assault evidence" in the statute is defined as "[r]ape kit evidence collected by a *hospital or health care facility*." 35 Pa. Stat. Ann. § 10172.2 (emphasis added). By its own language, the law Defendant Henry cites does not set forth standards applicable to a private company like Leda Health.

Defendant Henry's letter even acknowledges that Leda Health makes a disclaimer that it "cannot guarantee that information collected through [EEKs] will

be offered, admitted or relied upon in a court of law." Campbell Dec., ¶ 3. Yet without any elaboration, Defendant Henry says she still feels the disclaimer "does not adequately inform" individuals that EEKs "do not meet the minimum standards for sexual assault evidence collection in Pennsylvania"—standards that, as explained, do not govern Leda Health. *Id.* Ironically, Defendant Henry faulting Leda Health for being unable to *guarantee* the admissibility of an EEK would suggest that Pennsylvania law enforcement and healthcare professionals *can* guarantee admissibility of the evidence they collect. Obviously, they cannot. And neither can Leda Health.

Defendant Henry's letter confoundingly suggests that commercially available rape kits, like Leda Health's EEKs, are categorically improper. But that position is at direct odds with the very statute Defendant Henry blames Leda Health for not complying with. *Id.* The statute requires the Pennsylvania Department of Health to "[t]est and approve *commercially available* rape kits for use in [the State]." 35 Pa. Stat. Ann. § 10172.3(a)(2) (emphasis added). Leda Health offers commercially available rape kits. Defendant Henry's letter is silent as to why this law would allow state officials to *decline* to test EEKs submitted to law enforcement by survivors in Pennsylvania.

Defendant Henry concludes her letter by demanding that Leda Health stop all its "advertising" and "marketing" activities *across the entire country*, beyond just the sale or marketing of EEKs, including laboratory testing, live support, and Care Team activities in Pennsylvania. Campbell Dec. at ¶ 3. Defendant Henry also mistakenly

believes that self-collected evidence has never been admitted in any proceeding across the country. This is gravely mistaken. *See, e.g., State of Wisconsin v. Heine*, 319 Wis. 2d 233 (Wis. Ct. App. Apr. 14, 2009) (sexual assault victim self-collected semen that was later admitted as evidence). Revealingly, Defendant Henry freely acknowledges she is concerned that individuals might become convinced that Leda Health's services are equivalent, or superior, to the services offered by the government. To protect that viewpoint, she has threatened to sanction Leda Health.

II. The New York Attorney General Targeted Leda Health and Madison Campbell's Protected Speech.

Defendant James first targeted Leda Health back in 2019, when it was operating under the name "MeToo Kits." On September 11, 2019, Attorney General James's office sent Leda Health a cease-and-desist letter threatening to prosecute it under New York consumer protection laws if it did not stop "advertising [their] product," referring to EEKs. *See* Campbell Dec. ¶ 3.

Defendant James's letter emphasized that New York offers sexual assault evidence testing at no charge to survivors, and that law enforcement and healthcare workers use certain procedures when collecting and handling sexual assault testing kit evidence. How all of this meant Leda Health was misleading individuals of New York was not made clear. Defendant James threatened to prosecute Leda Health if it did not include as part of its advertising that "evidence preservation and other services are available for free in New York."[1] *Id.* Failing to refer survivors to testing

[1] Ironically, this contention by Defendant James is highly misleading. *See* https://tinyurl.com/wdxa49kz (last accessed June 11, 2024) (discussing the hidden out

also performed by the government, according to Defendant James, constituted a "grave disservice to survivors." *Id*.

Defendant James further criticized Leda Health's "advertising representations" describing EEKs as "evidence collection." *Id*. She said the advertisements create the "misleading impression that the evidence collected will be admissible in court." *Id*. Defendant James declined to offer any examples of individuals who have actually been misled into thinking that. On the contrary, Defendant James admitted that Leda Health made clear on its website that "there is no guarantee that any [EEK] evidence ... will be admissible in court." Defendant James had no problem with the specific language, but she blamed Leda Health for featuring it under its "Frequently Asked Questions" section of the website. *Id*. She did not specify where it should have gone that would have sufficed. *Id*.

Defendant James revealed her true gripe in closing: nothing Leda Health could do would overcome what she believed to be a problem with its "overall message" that sexual assault survivors can use self-collected kits like EEKs as an equivalent to government tests. *Id*. She disapproved of Leda Health "advertising" that products like EEKs might even serve as a "deterrent for sexual assault." *Id*. The concern here, according to Defendant James, is that private companies like Leda Health who spread this message might cause individuals to think they are "somehow safer from sexual assault as a result of purchasing a kit" and lead to them being "less careful

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of pocket costs for rape kits and treatment for sexual assault survivors visiting the hospital).

with their personal safety." *Id*. This is the "message" Defendant James seeks to suppress. Because of the threat, Leda Health took its website down immediately.

In June 2021, Leda Health informed Defendant James and her office that it intended to begin marketing its EEKs on a new website that month. *Id*. Leda Health made multiple attempts to meet with Defendant James's office to discuss their website and services and ensure they addressed the concerns raised in the 2019 letter. *Id*. Defendant James ignored these outreaches. *Id*. Over the next several years, Defendant James and her office conducted yet another investigation of Leda Health. *Id*. at ¶ 62. In May 2024, Defendant James shared her office's findings and demanded Leda Health and Ms. Campbell sign an "Assurance of Discontinuance" ("AOD"), effectively banning it from business in New York. *See* Campbell Dec. at ¶ 3.

This time around, Defendant James went after Leda Health CEO Madison Campbell personally, condemning statements she made about her own company. Defendant James, in the findings of that investigation, once again belabored that Leda Health's marketing and advertising create a "misleading impression" in three ways: (1) the "admissibility" of EEKs in court, (2) the "level of treatment provided to survivors" who use EEKs, and (3) possession of EEKs "as a deterrent to sexual assault." *Id*. The evidence proffered for these "misleading impressions" is based on pure conjecture, most of which strains credulity.

First, Defendant James contends that by simply referencing the fact that it uses a partner lab, Leda Health gives the "impression" that its lab results "are comparable to the results a survivor would obtain if they had their sexual assault

exam performed at a hospital or clinic." *Id*. Leda Health's "overall message" gives the "impression" that EEKs provide comparable quality results as tests administered by professionals, a view with which Defendant James disagrees. *Id*. She also accuses Leda Health of giving the "impression" that it can perform the same role as healthcare workers. *Id*. She admits, however, that Leda Health states repeatedly online that it is not a "replacement for professional medical care." *Id*. But she dismisses that statement out of hand, without explanation, claiming it is not "sufficient," in her view. *Id*.

Even more incredible are Defendant James's accusations concerning Leda Health's generic statements about community safety. Defendant James scolds Leda Health for "advertising" with statements such as "Protect Your Community with Leda," because Defendant James worries this might cause individuals to believe that EEKs might "somehow make[] communities safer." *Id*. Defendant James makes clear she believes they will not. Defendant James also complains Ms. Campbell made misleading interview statements when referencing the "staggering statistic that 1 in 4 college women will be a victim of sexual violence" and stating "can we protect them? 100%." *Id*. Put simply, Defendant James disagrees with Ms. Campbell. So she has threatened to prosecute Ms. Campbell for expressing hope that her company might make an actual difference when it comes to sexual assault statistics.

Defendant James concludes by telling Leda Health it must stop sharing its advertising "message" and close its business. She alleges the advertising message is in violation of Executive Law § 63(12) and General Business Law § 349 and § 350. *Id*.

Specifically, Defendant James demands that Leda Health no longer offer EEKs that are "marketed or otherwise presented as over-the-counter, at-home, or self-collected or that in any manner 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." *Id.*

III. Leda Health Provides Sexual Assault Testing Kits with Clear Guidance.

Defendants' letters reveal that they do not understand what Leda Health does or how it operates. Leda Health was formed to offer comprehensive support services to sexual assault survivors. *See* Campbell Dec. at ¶ 8. Along with providing EEKs, Leda Health offers 24/7 live support, assistance in finding hospitals or other services, and holistic trauma healing. *Id.* Leda Health also partners with community service providers, workplaces, and educational organizations to aid in establishing trauma care and healing services. *Id.*

Leda Health developed EEKs with the help of nurses and survivor advocates to enable survivors to self-collect and store evidence such as DNA. *Id.* at ¶ 9. EEKs are a supplemental option to the existing system and are currently used in Australia and the United Kingdom. *Id.* Leda Health does not claim that EEKs are a medical substitute for seeking in-person care. *Id.* at ¶ 10. In fact, Leda Health encourages survivors to seek in-person care if possible, as stated within the EEK's instructions. *Id.*

Leda Health also provides around-the-clock access to a Care Team consisting of a group of trained forensic nurses who encourage survivors to access in-person care.

Id. at ¶ 11. The Care Team helps survivors find the in-person facility closest to them. *Id.* At times, the Care Team may provide access to emergency contraception, STI/STD testing, and/or toxicology screening. *Id.* Members of the Care Team can also testify in a court of law about the services provided by Leda Health and the collection of evidence using the EEKs. *Id.*

To be clear, Leda Health cautions users that the admissibility of self-collected evidence, such as that from EEKs, will depend on the discretion of the court, the specific circumstances of each case, and applicable laws. (*Id.* at ¶ 12.) That said, as long as a chain of custody can be established with sufficient completeness, neither Pennsylvania nor New York law generally prohibit the introduction of self-collected evidence in court proceedings.

Leda Health never sold an EEK directly to an individual consumer in either State. *Id.* at ¶ 13. The premise of the threats made by the Defendants fundamentally miscomprehend Leda Health's business. Leda Health does not sell products or services directly to private consumers. *Id.* Instead, Leda Health sells to the companies or entities with which it partners. *Id.* When Leda Health partners with a company or entity, its goal is to build connections with local care facilities to promote a "warm hand-off"—*i.e.*, a person-to-person delivery of an EEK and accompanying services, in part to assure it is properly administered. *Id.* at ¶ 13. For example, Leda Health partnered with the Kappa Delta sorority chapter located at the University of Washington. *Id.* at ¶ 14. For a cost of $15.00 per member quarterly, Leda Health provided up to 3 hours of educational workshops; 5 EEKs; 30 emergency

contraceptives (Plan B); access to its User Portal, and the 24/7 services of Leda Health's Care Team. *Id.*

Survivors are not left to their own devices to use an EEK. Each EEK contains (1) four sets of swabs; (2) an instruction manual; (3) an intake form for documenting the sexual assault; (4) sterile water for swabbing dry areas; (5) a pen for filling out the intake form and completing chain-of-custody documentation; (6) unique barcodes on each kit; (7) two plastic bags with unique barcodes for storing garments and other relevant items; (8) a prepaid FedEx shipping bag for shipping to the lab; and (9) a tamper-evident tape. Campbell Dec. at ¶ 15. Leda Health's Care Team guides survivors through the EEK's step-by-step process for DNA self-collection and documentation using each of these items. *Id.* at ¶ 16. Such guidance includes advice on actions to avoid after a sexual assault to best ensure the preservation of DNA evidence for collection, support in documenting the assault, assistance in determining areas for collection based on survivor-relayed information, and instructions for signing and sealing each EEK component with tamper-evident tape for purposes of chain of custody. *Id.*

The swabs, sterile water, pen, and plastic bags contained in each EEK are commonplace items that are individually available for purchase throughout Pennsylvania and New York. Any sexual assault survivor could obtain these items to self-collect evidence without using an EEK. But EEKs offer testing and chain-of-custody assurances that a survivor might not otherwise have when self-collecting evidence.

Once provided with an EEK, a survivor may proceed by either (1) participating in a video call with a Leda Health Care Team member; (2) accessing the Leda Health mobile app for guidance and documentation; or (3) using the physical instruction manual and intake form in the EEK. *Id.* at ¶ 17. From there, a survivor can either (1) send the EEK for testing using the prepaid FedEx shipping bag contained in the EEK; (2) store the kit at the institution, if the survivor received the EEK through Leda Health's partnership with a clinic or hospital; or (3) submit the kit to law enforcement. *Id.* If the survivor chooses to send the EEK for lab testing using the prepaid FedEx shipping bag, it will be processed by Leda Health's partner lab, which is ISO/IEC 17025 accredited. *Id.* at ¶ 18. The lab will provide a lab report summary describing the samples collected in the EEK and the lab's testing methods. *Id.* at ¶ 18. In addition to the summary, the lab is able to provide survivors a full chain-of-custody document and in-depth report. *Id.* at ¶ 19.

Leda Health offers a useful mobile app to survivors as well. The app supports creating a digital chain of custody using the unique barcodes on the EEK, blockchain technology, and cryptographic keys. *Id.* at ¶ 20. Every step taken by the user on the mobile app is timestamped and stored securely. *Id.* The app allows users to upload photos and videos, including photos and videos of the collection process, as well as invite witnesses to provide descriptions of what they witnessed. *Id.* All these actions and data are time-stamped and securely stored using encryption. *Id.*

IV. Defendants Are the Ones Who Are Wrong About the Admissibility of Self-Collected Evidence.

Numerous flawed assumptions pervade Defendant Henry and James's threats.

For starters, Leda Health does not guarantee EEKs will always be admissible. It cautions survivors that it can never fully guarantee that a survivor's EEKs will be admissible in court. *Id.* at ¶ 21. Leda Health's "Terms and Conditions" make this clear. *Id.* at ¶ 21 (collection of Leda Health's statements concerning potential admissibility of EEKs). This exact same information is also conspicuously displayed on the public portions of Leda Health's website discussing its EEKs. *Id.*

But beyond Leda Health's transparency, Defendants are misguided in their position that self-collected evidence is inadmissible in all jurisdictions. That is flat out wrong. Not only this, but Defendants have threatened to prosecute Leda Health for advertising EEKs, despite *still* allowing it to be admissible in their courts. Neither State's rules of evidence ban self-collected evidence at all. As long as evidence meets the standard requirements for admissibility, such as relevance and authenticity, a court may admit it—the same as for kits collected by law enforcement. In other words, there is no evidentiary preference for self-collected versus law enforcement administered kits under Pennsylvania or New York law.

While a government has not yet used a Leda Health EEK in a prosecution in the United States, self-collected evidence has been admitted at trial in circumstances that are less protective of chain of custody and authenticity than the circumstances for Leda Health's 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 has also happened in criminal proceedings in both

Pennsylvania and New York. *See, e.g., Commonwealth v. Williams*, 290 A.3d 704 (Pa. Super. Ct. 2022) (where admissible evidence in a rape case consisted of underwear supplied to law enforcement by the victim); *Com. v. Booher*, No. 1732 WDA 2012, 2014 WL 10980073, at *2 (Pa. Super. Ct. Feb. 25, 2014) (same); *People v. Bristol*, 300 A.D.2d 1059, 1060 (N.Y. App. Div. 2002) (sufficient chain of custody existed where the court admitted a victim's underwear provided to police by the family of the victim). It may be admitted in civil or domestic cases as well. *See, e.g.*, *Robinson v. Cameron*, No. CV2012124327, 2014 WL 7232205, at *3 (Ohio Ct. Com. Pl. Aug. 27, 2014) (declining to exclude expert testimony based on inspection and testing of samples self-collected by plaintiff, where expert stated that a proper chain of custody of all samples was maintained).

In some cases, efforts to obtain sexual assault evidence from the police or hospitals do not solve the problem at all. Take the case of *State v. Ruiter*, for example. There, a victim of prolonged, constant sexual abuse sought care from a healthcare professional at a hospital. But the nurse who examined the minor victim did not do rape kit testing "because it was out of the 72-hour timeframe for collection." *State v. Ruiter*, 231 N.E.3d 1172 (Ohio 2023). Faced with this reality, victims will sometimes collect DNA evidence on their own to turn over to law enforcement. *See Napier v. Rapelje*, No. 1:13-CV-660, 2015 WL 4726986, at *4 (W.D. Mich. Aug. 10, 2015) (mother "provided detectives with a towel from the bathroom as well as underwear that [the victim] may have been wearing" when assaulted).

Defendants also falsely imply that collection from a healthcare professional

using advanced medical equipment is the *only* way DNA evidence can be acquired or introduced in court. It is not. *State v. Burns*, 988 N.W.2d 352, 356 (Iowa 2023) (DNA evidence introduced from a "clear plastic 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) (DNA evidence was collected from an "abandoned cup" on the floor of an inmate's cell).

Worst of all, Defendants wrongly suggest that DNA evidence is somehow categorically inadmissible just because it was collected by a 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 "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, Pennsylvania and New York adhere to this rule for DNA evidence. *Commonwealth v. Nazeio*, 289 A.3d 68 (Pa. Super. Ct. 2022) (dispute that DNA evidence was improperly collected “was properly before the finder of fact and went to the weight, not the admissibility ....”); *People v. Wesley*, 633 N.E.2d 451, 462 (N.Y. 1994) (“[I]nfirmities in collection and analysis of the evidence not affecting its trustworthiness go to weight, to be assessed by the jury ....”).

A state’s collection of evidence in a traditional sexual assault kit does not ensure that such evidence will be handled properly. Nor does it guarantee a conviction. Rape kits administered by law enforcement must satisfy the authentication and chain of custody factors to be admissible.

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. *See id.* at 26 (analyzing the balance of equities and public interest factors together).

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

A. Defendants Have Targeted Plaintiffs' Protected Speech.

Defendants targeted the message of Leda Health and Madison Campbell. The Plaintiffs' message about the resources available to sexual assault survivors enjoys robust First Amendment protection. The First Amendment exists to "protect the free discussion of governmental affairs." *Mills v. State of Ala.*, 384 U.S. 214, 218 (1966). And the protection afforded to messages like this extends not only to its speaker, but to its recipients as well. *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

Defendants do not claim that anything Leda Health says is factually false. Rather, they target Leda Health's "message." That message consists of truthful facts about sexual assault statistics, the admissibility of EEKs, and a hope that sexual assaults will decrease. This is simply not something the government can censor. The First Amendment does not tolerate "governmental control over the content of *messages* expressed by private individuals." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994) (emphasis added). Even more, the First Amendment secures the "freedom of expression upon public questions" like whether the government is providing adequate resources to survivors. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). Speech about "public issues" such as this occupies the "highest rung of the hierarchy of First Amendment values" and is entitled to "special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983). This type of "core political speech" enjoys a heightened level of protection in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346 (1995). Speech meets this definition when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," or when it "is a subject of general interest and of value and concern to the public." *Snyder v. Phelps*, 562 U.S. 443, 447 (2011).

Here, Leda Health's message is core political speech. Leda Health's speech about EEKs is plainly aimed at bringing about "political and social change." Therefore, Leda Health's message that government services for sexual assault survivors might be inadequate or undesirable for some, and that alternatives, like EEKs, are an available option, enjoys "special protection." *See Graham v. City of Philadelphia*, 402 F.3d 139, 147 (3d Cir. 2005) (sexual assault is a matter of "heightened public concern"). At its core, Defendants seek to prohibit Leda Health and Ms. Campbell from speaking about deficiencies in the criminal justice system in the form of the need for additional resources being allocated for sexual assault survivors. And "the governance of our criminal justice system, and the methods that may be undertaken in the maintenance of that system, are plainly matters of broad public concern." *Burns v. Martuscello*, 890 F.3d 77, 90 (2d Cir. 2018). Leda Health's message to survivors about EEKs is constitutionally protected speech, even if Defendants' view it as controversial or unlikely to make a difference in overall safety. *See e.g.*, *McIntyre*, 514 U.S. at 347 (finding "handing out leaflets in the advocacy of a politically controversial viewpoint" to be the "essence of First Amendment expression").

The facts in *Bigelow v. Virginia* are directly analogous to this one. In that case, the Supreme Court illustrated the "special protection" afforded to speech about the public issue of abortion. The Supreme Court observed that advertising truthful factual matters that abortion had become legal in New York was speech that enjoyed First Amendment protections. 421 U.S. 809, 821 (1975). The Court noted that, in announcing the availability of legal abortions in New York, the advertisement "did more than simply propose a commercial transaction," instead containing "factual material of clear public interest." *Id*. at 822. Importantly, the Court noted that this was information related to activity with which, at least in some respects, the State could not interfere, as *Roe v. Wade* was the law of the land at the time. *Id*.

What makes Defendants' actions even more constitutionally fraught is their effort to restrict not just Leda Health from *engaging* in the speech but to keep survivors from *hearing* it at all. Leda Health's message to survivors—that there are viable alternatives to services offered by the government—is core political speech that directly implicates survivors' and the public's "right to receive information and ideas, regardless of their social worth," which the Supreme Court has described as "fundamental to our free society." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). Time and time again, the Court has recognized this right, even extending it to a company advertising its services. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) (collecting cases and stating "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising.").

Here, like in *Bigelow*, Leda Health seeks to tell a group of people true information that goes beyond proposing a commercial transaction: that survivors can use EEKs at home as an alternative to services offered by the government. This is factually true in Pennsylvania and New York. Leda Health advertises this because it believes sexual assault testing is a matter of core public concern, one about which Defendants do not believe survivors have a right to hear. The First Amendment prohibits this exact type of paternalistic decision by the government of what information the public gets to hear. Indeed, the government encroaches on First Amendment boundaries when it "substitutes [its] judgment ... for the judgment of the individual ...." *Id.* at 143-44. Defendants may not substitute their own judgment—even if they think it well-reasoned—about EEKs, instead of allowing survivors to receive truthful information and make their own decision about how to handle being sexually assaulted. *See e.g.*, *Chicago Joint Bd., Amalgamated Clothing Workers of Am., AFL-CIO v. Chicago Trib. Co.*, 435 F.2d 470, 475 (7th Cir. 1970) (holding that the First Amendment allowed a domestic producer to advertise his product as an alternative to imports, even if it tended to deprive American residents of their jobs).

Regardless of what Defendants think of this message, they cannot censor it because of disagreements with its overall message. The First Amendment's protections belong not only to speakers "whose motives the government finds worthy" but also to speakers "whose motives others may find misinformed or offensive." *303 Creative LLC v. Elenis*, 600 U.S. 570, 595 (2023). Defendants can ban the speech at issue here no more than they could ban a firearms seller from advertising that

customers could "protect their homes" by buying a firearm. Imagined concern that this might give the "impression" that it is always legal to shoot someone—which it is not—does not justify banning the speech. The First Amendment does not require "admissibility" for Leda Health to say EEKs can help "protect communities." As the Supreme Court explained, disputes about "public issues should be uninhibited, robust, and wide-open," and that means "it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964).

What is clear is that Plaintiffs and Defendants disagree about the efficacy and benefits of its EEKs. The First Amendment protects Leda Health's ability to spread its message that EEKs can collect "evidence" that can be submitted to law enforcement and that this process will, hopefully, protect communities by decreasing the number of sexual assaults. This is fundamental protected speech under the Constitution.

B. The Defendants Retaliated Against Leda Health Because of Protected Speech. (Count I)

The Defendants threatened, coerced, and intimidated Leda Health to stop its business in Pennsylvania and New York. They did so because they disapproved of Leda Health's message that sexual assault survivors require more options, like EEKs, than government currently makes available. The First Amendment protects businesses like Leda Health from engaging in this type of protected conduct without having to fear retaliation from public officials.

The First Amendment right to free speech includes not only the affirmative right to speak, but also the right to be free from retaliation by a public official for the exercise of that right. *See Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968) (noting that retaliatory acts are "a potent means of inhibiting speech"); *ACLU v. Wicomico County, Md.*, 999 F.2d 780, 785 (4th Cir. 1993) ("Retaliation, though it is not expressly referred to in the Constitution, is nonetheless actionable because retaliatory actions may tend to chill individuals' exercise of constitutional rights."). Thus, by engaging in retaliatory acts, public officials place informal restraints on speech that "allow the government to produce a result which [it] could not command directly." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). "In general, constitutional retaliation claims are analyzed under a three-part test. Plaintiff must prove (1) that [it] engaged in constitutionally-protected activity; (2) that the government responded with retaliation; and (3) that the protected activity caused the retaliation." *Mun. Revenue Servs., Inc. v. McBlain, 347 F. App'x* 817, 823 (3d Cir. 2009). As explained already, Plaintiffs engaged in protected speech.

Defendants' conduct was retaliatory. To be retaliatory, a defendant's conduct must be "sufficient to deter a person of ordinary firmness from exercising his First Amendment rights." *McKee v. Hart*, 436 F.3d 165, 170 (3d Cir. 2006). First Amendment retaliation occurs when the official's comments "can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request." *Hammerhead Enterprises, Inc. v. Brezenoff*, 707 F.2d 33, 39 (2d Cir. 1983). This element is easily satisfied by

Defendants banning Leda Health from doing any business in their states. No company or individual would reasonably continue speaking if it would lead to an effective business banishment.

And finally, the Court need not strain to find evidence that Defendants retaliated because of Leda Health's protected speech: Defendants told Leda Health that is what they were doing. While public officials are free to speak out against things without it being retaliation, they cannot resort to "threat[s], coercion, or intimidation intimating that punishment, sanction or adverse regulatory action will imminently follow ...." *Mun. Revenue Servs., Inc. v. McBlain*, 347 F. App'x at 825; *X-Men Sec., Inc. v. Pataki*, 196 F.3d 56, 72 (2d Cir. 1999) (public officials cannot respond to protected speech with "threats, intimidation, or coercion"). But that is exactly what Defendants did here. They demanded that Leda Health end its business everywhere—not because EEKs are illegal or harmful—but because Defendants disliked the "impressions" they worried individuals might get from Leda Health. That Leda Health sells EEKs alone is not what drove Defendants' threats. Rather, it is the "overall message" Leda Health spreads and Defendants concern this message might cause recipients to use an alternative to government services. Rather than outright tell Leda Health to stop its speech—in what would have been a constitutionally troubled course in and of itself—Defendants instead resorted to intimidating Leda Health into leaving the States.

For these reasons, Plaintiffs are also likely to succeed in demonstrating that Defendants retaliated against them because of their protected speech.

C. Defendants' Threats Are Unconstitutionally Coercive Under the First Amendment. (Count II)

The Supreme Court has long recognized that freedom of speech is "vulnerable to gravely damaging yet barely visible encroachments." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963). Here, the coercive threats of the Attorneys General of Pennsylvania and New York demonstrate the truth of that concern.

There can be no mistake—Defendants targeted Leda Health's protected speech. Government may not censor "disfavor[ed] marketing" based on its "particular content" or "particular speakers"—that is, the "entities engaged in marketing." *Greater Philadelphia Chamber of Com. v. City of Philadelphia*, 949 F.3d 116, 139 (3d Cir. 2020). Defendants disfavor Leda Health's "overall .... message," as Defendant James admitted in her letter. Campbell Dec. at ¶ 3. But *Bantam Books*, along with the Supreme Court's recent affirmation of that decision in *NRA v. Vullo*, illustrate that a government official cannot do indirectly what she is barred from doing directly: "A government official cannot coerce a private party to punish or suppress disfavored speech ...." *NRA*, at 1328. The Court should apply the well-established principle from those cases that the government may not threaten legal sanctions to silence disfavored speakers.

1. Bantam Books *and* NRA *govern here.*

The First Amendment has long prohibited government officials from relying on the "threat of invoking legal sanctions and other means of coercion ... to achieve the suppression" of disfavored speech. *Bantam Books*, 372 U.S. at 67. The facts of that case are instructive to this one.

There, a government commission sent official notices to a book distributor for blacklisted publications the commission declared "objectionable." *Id.* at 61-64. Though the commission had no power to bring a legal action itself, the list hinted at the commission's "duty to recommend to the Attorney General" and local police violations of the State's obscenity laws for prosecution. *Id.* at 62. In response, the distributor took "steps to stop further circulation of copies of the listed publications" out of fear of facing "a court action." *Id.* at 63. The notices were then "invariably followed up by police visitations." *Id.* at 68. The publishers of the blacklisted publications sued the commission, alleging that this scheme of informal censorship violated their First Amendment rights. *Id.*

These types of threats, the Court held, pose a particularly grave constitutional risk because they "eliminate the safeguards" associated with more formal and direct processes. *Id.* at 69. Rather than prosecuting an author under the obscenity laws in *Bantam Books*—which would allow the author to defend her work and would trigger a suite of procedural safeguards—government actors who pressure booksellers bypassed these protections altogether. Government coercion or inducement thus "creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law." *Id.* at 69-70.

The Court determined the commission violated the publishers' free-speech rights by "coercing the distributor to stop selling and displaying the listed publications" the commission disfavored. *NRA*, at 1327 (summarizing *Bantam Books*). The distributor's "compliance with the [c]ommission's directives was not

voluntary." *Bantam Books*, at 66–68. To reach this conclusion, the Court considered: (1) the authority of the government speaker over those she is addressing; (2) the content and purpose of the communications; and (3) the effect of the government's conduct on its target audience. *Id*. at 68. The Court found no one factor to be dispositive, and held that a plaintiff need not establish the presence of all three to state a claim. *Id*.

In the six decades since, lower courts applying *Bantam Books* continue to focus on those three considerations: essentially, who said it, what did they say, and what was the effect on the recipient of the message. *See, e.g.*, *Kennedy v. Warren*, 66 F.4th 1199, 1207 (9th Cir. 2023); *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230-32 (7th Cir. 2015); *Okwedy v. Molinari*, 333 F.3d 339, 342-43 (2d Cir. 2003); *R.C. Maxwell Co. v. Borough of New Hope*, 735 F.2d 85, 88 (3d Cir. 1984).

In just May of this year, the Supreme Court followed those same three considerations in "reaffirm[ing] what it said" in *Bantam Books* in *NRA v. Vullo*. In *NRA*, the state official's actions were even more coercive than the commission in *Bantam Books*. Vullo, a New York state official, sought to punish the NRA for its speech by threatening insurance companies with legal sanctions unless they ended their business dealings with the NRA. Unlike the commission in *Bantam Books*, Vullo had the actual "power to apply formal legal sanctions." *NRA*, at 1327. As the Court observed, "the greater and more direct the government official's authority, the less likely a person will feel free to disregard a directive from the official." *Id*. Vullo had

"direct regulatory and enforcement authority" over the NRA, which supported a finding of coercion. *Id*.

Guided by *Bantam Books*, the Court next considered the nature of the communications between Vullo and the insurance companies she threatened. Vullo made clear to insurance companies she would "focus" enforcement actions "solely" on them if they maintained ties to the NRA. *Id*. The Supreme Court said that this "threat" of legal action was "loud and clear." *Id*. This consideration too weighed in favor of unconstitutional coercion.

Finally, the Court looked at how the insurance companies reacted to the threats from Vullo, which "further confirm[ed] the communications' coercive nature." *Id*. at __. One of the insurance companies being threatened agreed to "cease underwriting firearm-related policies" and to "scale back" its NRA-related business. *Id*. With this final *Bantam Books* consideration also weighing in favor of unconstitutional coercion, the Court determined that the allegations that Vullo threatened to wield her power against those refusing to aid her campaign to punish the NRA's gun-promotion advocacy stated a viable First Amendment claim.

2. *A straightforward application of* Bantam Books *and* NRA *shows Defendants have coerced Plaintiffs' speech.*

The Court need not stray from this established line of cases to find that Leda Health is likely to succeed in this case. "Any system of prior restraints of expression ... bear[s] a heavy presumption against its constitutional validity." *Bantam Books*, at 70. The Defendants here have threatened overt government censorship and cannot overcome the weight of that heavy presumption. The Court should simply apply the

rule from *Bantam Books*, as reiterated in *NRA*: government officials cannot use the threat of legal sanctions to punish a disfavored speaker. *Bantam Books*, at 66-70, *NRA*, at 1327.

Here, Defendant Henry and James's action were even more coercive than the offenders in *Bantam Books* or *NRA*. For starters, Defendants here threatened their disfavored speakers *directly*, as opposed to an intermediary like the commission in *Bantam Books* or the insurance companies in *NRA*. Threatening businesses behind closed doors, like Defendants have done here, is an especially dangerous tool for suppressing speech. An informal threat, conveyed in private, prevents the public from using the normal check on government overreach: "the ballot box." *See Shurtleff v. City of Bos.*, 596 U.S. 243, 252 (2022). Here, Defendants' conduct is precisely the kind of "gravely damaging yet barely visible encroachment[]" on speech that violates the First Amendment. *See Bantam Books*, at 66.

Defendants start off on worse footing than the offenders in *Bantam Books* and *NRA*. Things fare no better for them when turning to the *Bantam Book* considerations.

First, Defendants have the "power to apply formal legal sanction." *Bantam Books*, at 66. The more power an official has over those she addresses, the more likely that message will be coercive. S*ee NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). Defendants Henry and James are the chief law enforcement officers of their respective states. Not only do Defendants have the capability to bring legal sanctions, but they *already* have threatened to do so. Courts agree that, at minimum, the First

Amendment prohibits the government from making explicit, sanctions-backed threats to silence disfavored speech. *See, e.g., Backpage*, at 229 (a sheriff sending a letter "using the power of his office to threaten legal sanctions against … credit card companies for facilitating future speech" was unconstitutional coercion); *R.C. Maxwell*, at 85 (3d Cir. 1984) (agreeing that sanctions-backed threats to remove "unsightly billboards" violated the First Amendment); *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1016 (D.C. Cir. 1991). If anything, this case is easier than *NRA*, *Bantam Books*, and *Backpage* because Defendants are in a clear position of authority to legally sanction Leda Health. Thus, the threat was even more coercive than in those cases.

This first consideration has a clear application here. The directness of Defendants' threats toward Leda Health is most akin to *Okwedy v. Molinari*. There, the Second Circuit concluded that a high-ranking local official engaged in unconstitutional coercion when he sent an official letter directly to a billboard company "[a]s Borough President" to urge the company to take down a religious billboard advertisement. 333 F.3d at 342. In addition to invoking the official's full title, the letter observed that the billboard company "derive[d] substantial economic benefit[]" from working on the official's home turf. *Id*. And, emphasizing the letter-writer's power to punish, it asked the recipient to contact his "legal counsel" to "discuss further." *Id*. at 342, 344. The Court determined that these blatantly coercive efforts violated the First Amendment. Defendants' letters squarely fit this description.

Second, the nature of Defendants' threats demonstrates their plainly coercive nature. Defendants did not make "thinly veiled threats" like in *Bantam Brooks*; they made *explicit* ones. And the Supreme Court has been clear that even threats well short of "explicit" ones can rise to the level of coercive. *NRA*, at 1329. Defendants' letters travel far beyond the coercive conduct standards set forth in *Bantam Books* and *NRA*. Defendants penned their threats to paper: cease advertising your message or face legal action. Letters threatening legal action—sent by a government official with the direct authority to bring it—are anything but "thinly veiled." *Bantam Books*, at 68. The letters were not "phrased *virtually* as orders." *Id*. They *were* orders. The orders came with explicit demands to cease all business in the State. Defendant James even demanded Leda Health pay half-a-million dollars in her proposed "Assurance of Discontinuance." It would strain credulity to suggest Defendants' letters could reasonably be understood as anything else than threats. As the Third Circuit recognized, "by threatening that legal sanctions will … be imposed unless there is compliance with his demands," a government official violates the First Amendment. *Backpage*, 807 F.3d at 231. This consideration also favors coercion.

Third, the reaction from Leda Health reaffirms the letters' coercive nature. Since receiving the official communications from Defendants Henry and James, Leda Health has refrained from marketing, advertising, and similar activities in Pennsylvania and New York out of fear that it will be prosecuted for this speech. *Cf*. *Bantam Books*, at 68 (noting that the distributor's "reaction on receipt of a notice was to take steps to stop further circulation of copies of the listed publications"). Given

the severity of their demands, Leda Health was in no position to demur. *Cf. Okwedy*, 333 F.3d at 339 (billboard company removed controversial advertisements the same day it received a threatening fax from a local government official).

In sum, (1) Defendants, as chief law enforcement officers of their States, exercise vast legal authority over Leda Health, (2) Defendants made direct and explicit written statements invoking that authority to coerce Leda Health to stop all of its marketing and advertising, and (3) Leda Health responded by doing exactly that: stopping marketing and advertising in those States. This was a plain-as-day abridgment of Leda Health's First Amendment rights. Defendants might disagree that EEKs and similar self-collected kits are effective and can help survivors, but they cannot quelch that message. If the Court doubts that is the underlying goal, look no further than Defendant James's letter threatening Leda Health's "overall message." Campbell Dec. ¶ 3.

Both Defendants acknowledge their motivations for targeting Leda Health. Defendant Henry says she is worried that EEKs will supplant the free services offered by the government; Defendant James disagrees with Leda Health's "message" about the efficacy of EEKs. Defendants cannot—as government officials—stifle messages like this based on disagreement. Rather than prioritize improving the services offered to survivors in their States, Defendants decided to try to silence a company saying it could help.

The bottom line: Defendants do not want a private company to advertise offering service that might achieve parity with a government equivalent. If

Defendants do not believe Leda Health can offer equivalent services, they are allowed to disagree. In fact, the Constitution invites that disagreement. A core "function of free speech under our system of government is to invite dispute." *Cox v. State of La.*, 379 U.S. 536, 551 (1965). The Court continued:

> Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. *That is why freedom of speech is protected against censorship or punishment.*

Id. at 551-52 (emphasis added). The Free Speech Clause reflects the Framers' understanding that "we may test and improve our own thinking both as individuals and as a Nation" "[b]y allowing all views to flourish," including private citizens', as well as the government's. *See 303 Creative*, 600 U.S. at 584.

Put simply, Defendants cannot micromanage speech out of concern for "impressions." Defendants can restrict these expressions no more than they could threaten a private security company advertising its services based on the defensive belief that police officers could do the job better. Nor could it ban a private school from touting the education it offers because it might give the "impression" that private schools are better than public ones. *See, e.g., Paladino v. Adelphi Univ.*, 454 N.Y.S.2d 868, 874 (1982) (private school could claim to offer a better education than public schools because claims about the "comparative quality of the education" are "not statements of fact capable of proof, but rather opinions ....").

Defendants have threatened to sue a company because of its views that it can offer a service that is equivalent to, and could even supplant, the government's performance of the same service. That is not public service but protecting a monopoly.

Defendants' brazen attempt to standardize their *own* views and ideas about sexual assault kits flouts fundamental First Amendment principles.

3. *There is no risk of chilling permissible government speech.*

There is no risk that deciding this case for Plaintiffs would chill permissible government speech because the government never has a First Amendment interest in using the threat of legal sanctions to silence speakers. The core principle of *NRA* and *Bantam Books*—that the government may not use sanctions-backed threats to silence speech—safeguards both private and legitimate government speech. To be sure, the government must have broad latitude to speak and "select the views that it wants to express." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009). But when government officials threaten legal sanctions to suppress a disfavored message, they impair the free exchange of ideas that the First Amendment is designed to protect. Defendants cannot point to pretextual excuses to permit its coercion of Leda Health's speech.

First, while Defendants have, through their letters, pointed to their consumer protection laws as reason for the targeting, contentions like this are a hardly new excuse raised to defend against First Amendment coercion claims. A legitimate law enforcement motive does not immunize the Defendants' conduct. Indeed, the commission in *Bantam Books* was targeting material it believed violated the State's obscenity laws. Nothing in that case turned on the distributor's compliance with state law though. On the contrary, *Bantam Books* held that the commission violated the First Amendment by threatening legal sanctions to suppress disfavored publications,

even though they *may or may not* contain protected speech (*e.g.*, nonobscene material). *Bantam Books*, at 67. And in *NRA*, although Vullo was empowered to pursue violations of state insurance law, she could not do so to punish or suppress the NRA's protected expression. *NRA*, at 1328. As the Supreme Court plainly stated, "the contention that the NRA and the insurers violated New York law does not excuse Vullo from allegedly employing coercive threats to stifle gun-promotion advocacy." *Id*.

Second, Defendants' targeting of business practices also does not remove the First Amendment concern. When the government censors "misleading" commercial speech, it is typically limited to doing so with "false factual statements made with knowledge of their falsity and with intent that they be taken as true." *United States v. Alvarez*, 567 U.S. 709 (2012). That is not the allegation from Defendants here. Leda Health *does* offer EEKs that can be used to self-collect evidence, it *does* have a partner lab, and it *does* caution that results may be inadmissible. Defendants Henry and James fail to point to a *single false statement* made by Leda Health.[2] Nor do they even portend to do so. Instead, they are concerned with the "impressions" their *truthful* statements give.

Government concern for conjectural "impressions" cannot justify censorship. As the Supreme Court said in *NRA*, the fact that Vullo was allowed to lawfully "regulate" business activities related to the NRA's relationships with insurers "[did]

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[2] The Supreme Court has further emphasized that "[c]ommercial speech that is *not* false or deceptive and does *not* concern unlawful activities, however, may be restricted *only* in the service of a *substantial governmental interest,* and only through means that *directly advance that interest*." *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 638 (1985) (emphasis added).

not change the allegations that her actions were aimed at punishing or suppressing speech." *NRA*, at 1331. Similarly, in *Bantam Books*, the commission interfered with the business practices of the distributor and the publishers to suppress the publishers' disfavored speech. *Bantam Books*, at 66–71. And in *Backpage*, the sheriff interfered with a website's business practices to eliminate the website's "adult section" (if not the website itself). *Backpage*, at 230–232, 235–236. There, the sheriff wanted to "suffocat[e]" the website, "depriving the company of ad revenues by scaring off its payments-service providers." *Id.*, at 231. "The analogy," the Seventh Circuit explained, "is to killing a person by cutting off his oxygen supply rather than by shooting him." *Id*. That is exactly what Defendants have done here: prevent Leda Health from spreading its "message" to starve its business practices and relationships.

Ultimately, Defendants can share their differing views on sexual assault testing kits and to provide advice and information to the public or any of those they regulate. But they cannot hide behind that privilege to stamp out viewpoints with which they disagree, no matter how controversial. Demanding Leda Health altogether quit marketing or advertising its message about EEKs crosses the line from permissible persuasion to impermissible coercion.

These considerations all weigh heavily in favor of finding that Plaintiffs are likely to succeed on their claim of unconstitutional coercion.

III. Plaintiffs Are Likely to Suffer Irreparable Harm Absent a Preliminary Injunction.

Every day since Defendants' threats were made, Plaintiffs suffer the unconstitutional deprivation of their constitutional rights. Because of Defendants' coercive threats, Leda Health continues to refrain from marketing, selling, offering, describing, or educating others about EEKs in Pennsylvania or New York for fear of reprisal by Defendants. "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). "[I]njunctions are especially appropriate in the context of [F]irst [A]mendment violations because of the inadequacy of money damages." *Nat'l People's Action v. Wilmette*, 914 F.2d 1008, 1013 (7th Cir. 1990).

The looming menace of Defendants' threats inflicts ongoing constitutional injuries to Plaintiffs that cannot be remedied at law, making it likely to suffer irreparable harm absent immediate injunctive relief.

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

The Third Circuit has determined that "[a]s a practical matter, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff." *AT & T v. Winback & Conserve Program*, 42 F.3d 1421, 1427 n. 8 (3d Cir. 1994). Still, Leda has also satisfied the combined third and fourth elements for a preliminary injunction.

"It is incontrovertible that [c]urtailing constitutionally protected speech will not advance the public interest." *Stilp v. Contino*, 743 F. Supp. 2d 460, 470 (M.D. Pa. 2010). Many courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles. *See Iowa Right to Life Comm'e, Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999) ("[T]he potential harm to independent expression and certainty in public discussion of issues is great and the public interest favors protecting core First Amendment freedoms."); *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 695 (9th Cir. 2023) (en banc) ("When a party 'raise[s] serious First Amendment questions,' that alone 'compels a finding that the balance of hardships tips sharply in [its] favor.").

Here, safeguarding Plaintiffs' First Amendment rights is in the public interest and tilts the balance of equities strongly in its favor.

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

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

CONCLUSION

Government coercion and retaliation over free speech offends the First Amendment—full stop. Defendants have unconstitutionally coerced Plaintiffs into abandoning business activity in the respective States. For all of these reasons, the

Court should enter a preliminary injunction declaring the Defendants' actions unconstitutional and prohibiting Defendants from coercing Plaintiffs' protected speech.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of June 2024, a true and correct copy of the foregoing has been served via the Court's CM/ECF system upon all counsel of record.

In addition, for Defendants who have not yet made an appearance, a true and correct copy of the foregoing has been served via email and U.S. mail to counsel either known or believed to represent each of them, including:

Letitia James
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New York, NY 10005

Letitia James
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Empire State Plaza
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Albany, NY 12224

Michelle Henry
Office of Attorney General
Torts Litigation Unit
15th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120

/s/ J. Alex Little

DECLARATION OF MADISON CAMPBELL

1. I, Madison Campbell, state that I am over the age of eighteen (18) and competent to make this sworn declaration.

2. I am the founder and Chief Executive Officer of Leda Health and have served in that capacity for approximately five years.

3. There is a widespread need for collection of sexual assault evidence in the United States. Leda Health seeks to help meet that need. As a result of our protected speech, we have been targeted by the Attorneys General for the States of Pennsylvania and New York. True and accurate copies of (1) the letter from the Pennsylvania Attorney General, (2) the letter from the New York Attorney General, and (3) the "Assurance of Discontinuance" drafted by the New York Attorney General, are attached to the Complaint as Exhibit A, Exhibit B, and Exhibit C, respectively.

4. Sexual assault rates in the United States are ever-growing. In 2022, 531,810 people were raped or sexually assaulted.[1] This equates to one sexual assault every minute. And not all sexual assaults are reported. Most are not. In Pennsylvania, for example, a state-administered study found that only 43.3% of all rapes or sexual assaults were reported to the police.[2] That figure dropped to 36.4% when the offender was a non-stranger. And only about 20% of victims of college

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[1] Alexandra Thompson & Susannah N. Tapp, *Criminal Victimization*, U.S. Dep't of Just., 6 (2022), https://bjs.ojp.gov/document/cv22.pdf (last accessed June 14, 2024).

[2] *Pennsylvania Statewide Strategic Plan Sexual Violence Prevention and Education*, https://www.health.pa.gov/topics/Documents/Programs/Violence%20and%20Injury%20Prevention/svppcreport_pdf[1].pdf (last accessed June 14, 2024).

sexual assaults report the assault. This is consistent with the Department of Justice's statistics, which reflect that only 21.4% of rapes or sexual assaults are reported to law enforcement.[3]

5. The volume of testing kits law enforcement collects from these assaults has caused logistical problems and negatively impacted survivors. If a reporting victim chooses a traditional sexual assault kit, testing consists of a doctor or nurse photographing, swabbing, and conducting an exhaustive and invasive exam of the victim's full body, which takes many grueling hours to complete. Once a sexual assault kit is complete, it is sent for laboratory processing, however, due to a severe backlog, processing may take months or even years to deliver results. In 2022, at least 25,000 untested rape kits sat in law enforcement agencies and crime labs across the country.[4] And this only accounts for data reported by 30 states and Washington, D.C. The true scale of the backlog is unknown.

6. In Pennsylvania and New York alone, there are examples of law enforcement mishandling or losing rape kits. *E.g.*, *Com. v. Williams*, No. 2388 EDA 2012, 2014 WL 10885747, at *3 (Pa. Super. Ct. Aug. 28, 2014) ("The results of the rape kit were not available since the kit was lost, and there was no other DNA testing conducted."); *Devine v. Cameron*, No. CV 09-0171, 2011 WL 12854196, at *13 (E.D. Pa. Nov. 30, 2011) (reviewing the state trial court's conclusion that "a rape kit

[3] Alexandra Thompson & Susannah N. Tapp, *Criminal Victimization*, U.S. Dep't of Just., 6 (2022), https://bjs.ojp.gov/document/cv22.pdf (last accessed June 14, 2024).

[4] *Id.*

had been prepared and submitted for testing but had been lost."); *Newton v. City of New York*, 681 F.Supp.2d 473, 476 (S.D.N.Y. 2010) (where what police "lost" was the paper on which the rape kit's storage location had been written); *People v. Miller*, 594 N.Y.S.2d 978, 978 (Sup. Ct. 1993) (rape kit was inadvertently lost by either police or hospital). Further, data from Pennsylvania shows countless kits waiting for more than a year to be tested, with the overall backlog virtually unchanged since 2018.[5]

7. Worse yet, statistics like these do not even account for kits that were never submitted for testing. Law enforcement agencies have significant discretion, "up to and including decisions [on] whether to conduct an investigation at all" and whether to submit DNA for testing.[6] Moreover, the uncertainty that a kit will even be submitted for testing by law enforcement, and the significant backlog in testing kits demonstrate the importance and need for victims to have access to self-collection options such as EEKs.[7]

8. Leda Health seeks to offer comprehensive support services to sexual assault survivors. Leda Health also partners with community service providers,

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[5] *See* https://tinyurl.com/mvxkwxkn (last accessed June 14, 2024).

[6] *See* Rebecca Campbell & Giannina Fehler-Cabral, *Why Police "Couldn't or Wouldn't" Submit Sexual Assault Kits for Forensic DNA Testing: A Focal Concerns Theory Analysis of Untested Rape Kits*, 52 Law & Soc'y Rev. 73, 76 (2018).

[7] *See* Steph Whiteside, *How Seeking Justice Retaumatizes Assault Survivors*, https://will.illinois.edu/news/story/how-seeking-justice-retraumatizes-assault-survivors (last accessed June 14, 2024).

workplaces, and educational organizations to aid in establishing trauma care and healing services.

9. Leda Health developed EEKs with the help of nurses and survivor advocates to enable survivors to self-collect and store evidence such as DNA. EEKs are an additive option to supplement the existing system. Currently, EEKs are used in Australia and United Kingdom.

10. EEKs are forensic devices, not medical ones. Leda Health encourages survivors to seek in-person care if possible, if they are willing and able, as stated within the EEK's instructions.

11. We have also developed a system for a Care Team for those who utilize our EEKs. This consists of a group of trained forensic nurses who encourage survivors to access in-person care, if they are willing and able. The Care Team helps survivors find the in-person facility closest to them. At times, the Care Team may provide access to emergency contraception, STI/STD testing, and/or toxicology screening. Members of the Care Team can also testify in a court of law about the services provided by Leda Health and the collection of evidence using the EEKs.

12. We caution users in many ways that the admissibility of self-collected evidence, such as that from EEKs, will depend on the discretion of the court, the specific circumstances of each case, and applicable laws.

13. Leda Health has never sold an EEK directly to an individual in Pennsylvania or New York. Leda Health does not sell products or services directly to private consumers. Instead, we sell to the companies or entities with which we

have partnered. Our goal is to build connections with local care facilities to promote a "warm hand-off" and deliver EEKs and accompanying services.

14. For example, we attempted to partner with the Kappa Delta sorority chapter located at the University of Washington. Leda Health offered up to 3 hours of educational workshops; 5 EEKs; 30 emergency contraceptives (Plan B); access to its User Portal, and the 24/7 services of Leda Health's Care Team.

15. Each EEK contains (1) four sets of swabs; (2) an instruction manual; (3) an intake form for documenting the sexual assault; (4) sterile water for swabbing dry areas; (5) a pen for filling out the intake form and completing chain-of-custody documentation; (6) unique barcodes on each kit; (7) two plastic bags with unique barcodes for storing garments and other relevant items; (8) a prepaid FedEx shipping bag for shipping to the lab; and (9) a tamper-evident tape.

16. Our Care Team guides survivors through the EEK's step-by-step process for DNA self-collection and documentation using each of these items. Such guidance includes advice on actions to avoid after a sexual assault to best ensure the preservation of DNA evidence for collection, support in documenting the assault, assistance in determining areas for collection based on survivor-relayed information, and instructions for signing and sealing each EEK component with tamper-evident tape for purposes of chain of custody and maintaining the integrity of the evidence.

17. Under the Kappa Delta partnership, for example, a survivor would be able proceed by either (1) participating in a video call with a Leda Health Care Team

member; (2) accessing the Leda Health mobile app for guidance and documentation; or (3) using the physical instruction manual and intake form in the EEK. From there, a survivor can either (1) send the EEK for testing using the prepaid FedEx shipping bag contained in the EEK; (2) store the kit at the institution, if the survivor received the EEK through Leda Health's partnership with a clinic or hospital; or (3) submit the kit to law enforcement.

18. If the survivor chose to send the EEK for lab testing using the prepaid FedEx shipping bag, it would be processed by Leda Health's partner lab, which is ISO/IEC 17025 accredited. The lab would then provide a lab report summary describing the samples collected in the EEK and the lab's testing methods, a true and correct anonymous example of which is attached to the Complaint as Exhibit D.

19. The lab report also provides detailed information regarding chain of custody tracking, a true and correct anonymous example of which is attached to the Complaint as Exhibit E.

20. We also have developed a mobile app for survivors as well, should they choose to use it. The app supports the creation of a digital chain of custody utilizing the unique barcodes on the EEK, blockchain technology, and cryptographic keys. Every step taken by the user on the mobile app is timestamped and stored securely. The app allows users to upload photos and videos, as well as invite witnesses to provide descriptions of what they witnessed and upload their own photos or videos of the collection. All of these actions and data are time-stamped and securely stored using encryption.

21. Despite all these security measures aimed at ensuring the most reliable evidence possible, Leda Health still cautions survivors that it can never fully guarantee that a survivor's EEKs will be admissible in court. Leda Health's "Terms and Conditions"[8] make this clear. A true and correct copy collecting these is attached to the Complaint as Exhibit G.

22. This exact same information is also conspicuously displayed on the public portions of Leda Health's website discussing its EEKs.[9]

23. We filed this lawsuit because we would like to continue partnering with companies and entities in the States of Pennsylvania and New York to provide sexual assault survivors with Leda Health's support and services, including EEKs. Leda Health would like to offer, through marketing, advertising, and other forms of protected speech, EEKs to companies and entities in Pennsylvania and New York for ultimate use by sexual assault survivors. Leda Health would like to contact Pennsylvania and New York companies and entities to educate them about EEKs, how EEKs are used, and the benefits provided by EEKs. However, we are afraid to engage in any of this conduct for fear that we will be prosecuted for violations of the law, as suggested in the letters from the Pennsylvania and New York Attorneys General.

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8 *See* https://www.leda.co/agreements (last accessed June 14, 2024).

9 *See* https://partnerships.leda.co/eek (last accessed June 14, 2024).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DocuSigned by:
Madison Campbell
F2E507044F70436...

Madison Campbell
June 17, 2024