

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

AMERICAN HOSPITAL ASSOCIATION,
ET AL.,

Plaintiffs,

v.

BECERRA, ET AL.,

Defendants.

No. 4:23-cv-1110

Judge Mark T. Pittman

**BRIEF OF AMICI CURIAE THIRTY HOSPITALS AND HOSPITAL SYSTEMS
IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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CORPORATE DISCLOSURE STATEMENTS

Adventist Health System Sunbelt Healthcare Corporation (AdventHealth) is a nonprofit corporation organized under Florida law and, as such, has no stock. It also has no parent company.

Baylor Scott & White Health's parent company is Baylor Scott & White Holdings. Baylor Scott & White Holdings has no parent company. Both entities are nonprofits, and no publicly held corporation owns 10% or more of the stock of either.

Bon Secours Mercy Health, Inc., has no parent company, and no publicly held corporation owns 10% or more of its stock.

BJC Health System has no parent company, and no publicly held corporation owns 10% or more of its stock.

Care New England Health System is a nonprofit corporation. It has no parent company and has no shareholders, and, therefore, no publicly held corporation owns 10% or more of its stock.

Cedars-Sinai Medical Center is a California nonprofit public benefit corporation. It has no parent company, and as California nonprofit public benefit corporations cannot issue stock, no publicly held corporation owns 10% or more of its stock.

Christus Health is a Texas nonprofit. It has no parent company, and no publicly held corporation owns 10% or more of the membership interest in Christus Health.

El Camino Health is a California nonprofit public benefit corporation. It has no parent company, and no publicly held corporation owns 10% or more of its stock.

Florida Health Sciences Center, Inc., d/b/a Tampa General Hospital, has no parent company, and no publicly held corporation owns 10% or more of its stock.

H. Lee Moffitt Cancer Center and Research Institute, Inc., has no parent company, and no publicly held corporation owns 10% or more of its stock.

Heritage Valley Health System, Inc., is a nonprofit, tax-exempt entity and has no parent company. No publicly held corporation owns 10% or more of its stock.

Hoag Memorial Hospital Presbyterian is a California nonprofit public benefit corporation. It has no parent company, and no publicly held corporation owns 10% or more of its stock.

The Johns Hopkins Health System Corporation (JHHS) is a not-for-profit organization. It has no parent company, and no publicly held corporation owns 10% or more of its stock.

LifeBridge Health, Inc., has no parent company, and no publicly held corporation owns 10% or more of its stock.

Main Line Health System is a not-for-profit, federally tax-exempt corporation, with no shareholders or members, and, therefore, no publicly held corporation owns 10% or more of its stock.

Memorial Health Services, d/b/a MemorialCare, is a California nonprofit public benefit corporation. It has no parent company, and no publicly held corporation owns 10% or more of its stock.

Northwestern Memorial HealthCare is a private, nonprofit corporation. No publicly held corporation owns 10% or more of its stock.

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

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

The Regents of the University of California is a constitutional corporation. It has no parent company, and no publicly held corporation owns 10% or more of its stock.

Saint Francis Health System, Inc., is a nonpublic corporate entity. It has no parent company, is not publicly traded, and no publicly held corporation owns 10% or more of its stock.

Sarah Bush Lincoln Health System is a nonpublic corporate entity. It has no parent company, is not publicly traded, and no publicly held corporation owns 10% or more of its stock.

Sharp HealthCare is a California nonprofit public benefit corporation. It is the parent corporation of an integrated nonprofit healthcare delivery system that operates in San Diego, California. Sharp HealthCare has no members and, as such, no publicly held entity holds any membership or other interest in it.

SSM Health Care Corporation does not have a parent company, and no publicly held corporation owns 10% or more of its stock.

Thomas Jefferson University is a not-for-profit entity. It has no parent company, and no publicly held corporation owns 10% or more of its stock.

Torrance Memorial Medical Center is California nonprofit public benefit corporation. It has a parent corporation: Cedars-Sinai Health System, a nonprofit tax-exempt corporation. As California nonprofit public benefit corporations cannot issue stock, no publicly held corporation owns 10% or more of Torrance's stock.

UMass Memorial Health Care, Inc., ("UMass Memorial") is a nonprofit and has no parent company, and no publicly held corporation owns 10% or more of its stock.

University Health System Inc. d/b/a the University of Tennessee Medical Center is a Tennessee nonprofit corporation. It has no parent company, and no publicly held corporation owns 10% or more of its stock.

Valley Health System, Inc., is a nongovernmental corporate entity. No publicly held corporation owns 10% or more of its stock.

The Washington University is a corporation established by special act of the General Assembly of the State of Missouri approved February 22, 1853, and acts amendatory thereto. It has no parent company and has no shareholders and, therefore, no publicly held corporations own 10% or more of its stock.

* * * * *

Amici state that they are not aware of any persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent or subsidiary corporations, or other legal entities that are financially interested in the outcome of the above-captioned case.

Date: January 12, 2024

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INTEREST OF AMICI CURIAE

Amici are several of the nation’s leading hospitals, health systems, and healthcare providers.¹ They are directly and adversely affected by the new rule—promulgated by the United States Department of Health and Human Services’ Office for Civil Rights (HHS)—that prohibits the use of certain technologies on Amici’s websites. *See Use of Online Tracking Technologies by HIPAA Covered Entities and Business Associates*, U.S. Dep’t of Health & Hum. Servs. (Dec. 1, 2022), <https://perma.cc/BWN3-93BE> [hereinafter, the Bulletin].

The Bulletin’s impact on Amici, their patients, and the public is considerable. The Bulletin unnecessarily prohibits the use of certain technologies that hospitals and health systems like Amici have used to serve their communities.² As the federal government is well aware, one of the greatest challenges facing the country’s public health system is the prevalence of false or misleading health information available online. To combat such information, and to provide valuable services to the communities they serve, Amici operate websites with accurate and up-to-date health information. These websites are available to patients and the general public alike, whether a concerned parent or grandparent, an individual seeking to educate herself, or a high-school student conducting research for a term paper.

Amici submit this brief because hospitals and health systems need to ensure that they are able to reach their communities with effective healthcare information made available through websites, which in our digital age are the most common way that the public receives information

¹ No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission. All parties have consented in writing to the filing of this brief.

² Like plaintiffs, Amici do not challenge the Bulletin’s application to patient portals or other password-protected portions of hospitals’ websites.

about healthcare. HHS's Bulletin—and the resulting prohibitions on certain website technologies—are chilling Amici's efforts to reach the communities they serve. The Bulletin has also driven lawsuits brought by private plaintiffs' attorneys who seek to profit from the Bulletin by extorting settlements in civil class action litigation. Amici therefore support plaintiffs' motion for summary judgment and request that the Court set aside the Bulletin as requested by the plaintiffs as arbitrary, capricious, and contrary to law.

The signatories to the brief are:

AdventHealth is a Seventh-day Adventist non-profit health care system headquartered in Altamonte Springs, Florida, that owns and operates facilities in 9 states across the United States. It is the largest not-for-profit Protestant health care provider. AdventHealth's website is available at: <https://www.adventhealth.com/>.

Baylor Scott & White is the largest not-for-profit health system in the state of Texas. Founded as a Christian ministry of healing more than a century ago, Baylor Scott & White today serves more than three million Texans. Baylor Scott & White's website is available at: <https://www.BSWHealth.com>.

BJC Health System is one of the largest nonprofit healthcare integrated delivery organizations in the country with a mission of delivering services to residents in the greater St. Louis, Kansas City, southern Illinois, and eastern Kansas regions. BJC is committed to improving the health and well-being of the people and communities it serves through leadership, education, innovation, and excellence in medicine. BJC's website is available at: <https://www.bjc.org>.

Bon Secours Mercy Health, Inc., is a leading healthcare provider that works to improve the health and well-being of its communities and help those in need, especially people who are poor,

dying, and underserved. Long renowned for providing compassionate, high-value healthcare through its hospitals and clinical sites in the U.S. and Ireland, Bon Secours Mercy Health addresses the health and well-being of its patients, communities, and stakeholders by implementing programming, growing partnerships, providing services, and supporting community needs in impactful ways. Bon Secours Mercy Health's website is available at: <https://bsmhealth.org/>.

Care New England Health System is a trusted, integrated health care organization that fuels the latest advances in medical research, attracts the nation's top specialty-trained doctors, hones renowned services and innovative programs, and engages in the important discussions people need to have about their health and end-of-life wishes. Care New England Health System is helping to transform the future of health care, providing a leading voice in the ongoing effort to ensure the health of the individuals and communities it serves. Care New England Health System's website is available at: <https://www.carenewengland.org/>.

Cedars-Sinai Medical Center is one of the largest nonprofit academic medical centers in the country. Since its formation in 1902, Cedars-Sinai has evolved to meet the healthcare needs of one of the most diverse regions in the nation. Clinical programs cover a complete spectrum of medical services, ranging from primary care for preventing, diagnosing, and treating common conditions to specialized treatments for rare, complex, and advanced illnesses. Cedars-Sinai's website is available at: <https://www.cedars-sinai.org>.

Christus Health is a Catholic not-for-profit health system made up of more than 600 centers, including hospitals, clinics, and urgent cares in Texas. It includes more than 60 hospitals and long-term care facilities, 175 clinics and outpatient centers, and dozens of other health ministries and ventures. Christus Health's website is available at: <https://www.christushealth.org/>.

El Camino Health operates hospitals in Los Gatos and Mountain View, California, and have received numerous awards and honors for high-quality healthcare. Since its formation in 1956, El Camino Health's nationally recognized doctors and care teams have provided its patients and communities with high-quality, excellent care. El Camino Health's website is available at: <https://www.elcaminohealth.org/>.

Florida Health Sciences Center, Inc., d/b/a Tampa General Hospital, is a private not-for-profit hospital and one of the most comprehensive medical facilities in West Central Florida serving a dozen counties with a population in excess of 4 million. As one of the largest hospitals in Florida, Tampa General Hospital is licensed for 1,040 beds, and with more than 8,000 team members, is one of the region's largest employers. Tampa General Hospital's website is available at: <https://www.tgh.org/>.

H. Lee Moffitt Cancer Center and Research Institute, Inc., operates two hospitals and multiple outpatient centers in Florida to deliver cancer care to its patients and communities. Equipped with top research and care experts working side-by-side, H. Lee Moffitt Cancer Center and Research Institute is dedicated to revolutionizing cancer treatment and elevating cancer care. H. Lee Moffitt Cancer Center and Research Institute's website is available at: <https://www.moffitt.org/>.

Heritage Valley Health System is a community-based integrated delivery network providing comprehensive health care for residents of Allegheny, Beaver, Butler, and Lawrence counties in Pennsylvania; eastern Ohio; and the panhandle of West Virginia. In partnership with 3,600 employees and more than 600 physicians, Heritage Valley offers a broad range of medical, surgical, and diagnostic services at its three hospitals: Heritage Valley Beaver, Heritage Valley Sewickley, and Heritage Valley Sewickley, Kennedy Campus; Medical Neighborhoods;

community satellite facilities; and in physician offices. For more information about Heritage Valley Health System, visit: <https://www.heritagevalley.org>.

Hoag Memorial Hospital Presbyterian is a world-class healthcare system, which offers comprehensive care for its patients. Located in Newport Beach, California, Hoag Memorial Hospital Presbyterian operates institutes in cancer, heart and vascular care, neurosciences, and others. Hoag Memorial Hospital Presbyterian's website is available at: <https://www.hoag.org/>.

The Johns Hopkins Health System Corporation (JHHS) is a not-for-profit organization dedicated to providing the highest quality patient health care in the treatment and prevention of human illness. JHHS is an academically based health system and, in collaboration with The Johns Hopkins University School of Medicine, its mission is to improve the health of the community and the world by setting the standard of excellence in medical education, research, and clinical care. JHHS's website is available at: <https://www.hopkinsmedicine.org/>.

LifeBridge Health, Inc., is a non-profit organization that operates four acute care hospitals, one freestanding medical facility, and nearly 150 locations throughout Greater Baltimore and across the state of Maryland. With more than one million patient touchpoints each year, LifeBridge Health is recognized as one of the largest and most integrated providers of health-related services in the State of Maryland. LifeBridge Health's website is available at: <https://www.lifebridgehealth.org/>.

Main Line Health, founded in 1985, is a not-for-profit health system serving portions of Philadelphia and its western suburbs. Main Line Health consists of 5 hospitals, 6 health centers, 40+ offices, 2,000+ physicians, and over 11,500 employees. At its core are four of the region's most respected acute care hospitals—Lankenau Medical Center, Bryn Mawr Hospital, Paoli Hospital, and Riddle Hospital—as well as one of the nation's premier facilities for rehabilitative

medicine, Bryn Mawr Rehabilitation Hospital. Main Line Health's website is available at: <https://www.mainlinehealth.org/>.

Memorial Health Services d/b/a MemorialCare is a nonprofit health system serving the communities of Orange County and Los Angeles County, California. The system operates four acute care hospitals (including one of the eight children's hospitals in California) and a network of outpatient primary and specialty care clinics, as well as imaging and surgical centers. The MemorialCare network also includes a health care plan and two affiliated medical groups. MemorialCare's website is available at: <https://www.memorialcare.org/>.

Northwestern Memorial HealthCare ("NMHC") is an integrated academic healthcare system comprising 11 hospitals and two physician practice groups in Chicago and the surrounding suburbs. NMHC is an Illinois not-for-profit corporation dedicated to the missions of superior quality clinical care, academic excellence, and scientific discovery. NMHC's website is available at: <https://www.nm.org/>.

OhioHealth Corporation is a nationally recognized, not-for-profit, charitable, healthcare outreach of the United Methodist Church, including more than 35,000 associates, physicians, and volunteers, 15 hospitals, and more than 200 physician practice locations. OhioHealth serves patients throughout its 50-county footprint in Ohio. OhioHealth's website is available at: <https://www.ohiohealth.com/>.

Prisma Health is a private nonprofit health company and the largest healthcare organization in South Carolina. Prisma Health serves almost 1.5 million unique patients annually in its 21-county market area that covers 50% of South Carolina. Prisma Health's website is available at: <https://prismahealth.org/>.

The Regents of the University of California operates a system of public universities and academic health systems within those universities. UC's health system comprises six academic health centers, 20 health professional schools, a Global Health Institute, and systemwide services that improve the health of the University's students, faculty, and employees. UC academic health centers are ranked among the best in California, and its long-established health professional schools are nationally ranked in their respective areas. UC's websites include: <https://www.uclahealth.org/>; <https://www.ucsfhealth.org/>; <https://health.ucdavis.edu/>; and <https://health.ucsd.edu/>.

Saint Francis Health System, Inc., is a Catholic, not-for-profit health system wholly governed and operated in Tulsa, Oklahoma. The health system is anchored by Saint Francis Hospital, a 1,112-bed tertiary center, which includes the region's only children's hospital and level IV neonatal intensive care unit and a 168-bed heart hospital, as well as Tulsa's leading trauma and emergency center. Saint Francis Health System's website is available at: <https://www.saintfrancis.com/>.

Sarah Bush Lincoln Health System is a non-profit healthcare organization located in downstate Illinois. It operates a two-hospital system, consisting of Sarah Bush Lincoln Health Center in Mattoon, Illinois, and SBL Fayette County Hospital based in Vandalia, Illinois. Sarah Bush Lincoln's website is available at: <https://www.sarahbush.org/>.

Sharp HealthCare includes four acute care hospitals, three specialty hospitals, three affiliated medical groups, and a health plan. Sharp HealthCare's website is available at: <https://www.sharp.com/>.

SSM Health Care Corporation (SSM Health) is a Catholic, not-for-profit health system serving the comprehensive health needs of communities across the Midwest through a robust and

fully integrated healthcare delivery system. SSM Health includes 23 hospitals, more than 300 physician offices, and other outpatient and virtual care services. SSM Health's website is available at: <https://www.ssmhealth.com/>.

Thomas Jefferson University (TJU) is a non-profit research university in Philadelphia, Pennsylvania. TJU's clinical operations, referred to as Jefferson Health, is a non-profit health system serving the greater Philadelphia area and South Jersey. Jefferson Health is Philadelphia's second largest employer and includes 17 hospitals and over 50 outpatient and urgent care locations. Together with TJU, Jefferson Health's mission is to provide excellent clinical and compassionate care for patients, educate the health professionals of tomorrow in a variety of disciplines, and discover new treatments and therapies that will define the future of health care. Jefferson Health's website is available at: <https://www.jeffersonhealth.org/>.

Torrance Memorial Medical Center is a California nonprofit medical center established to provide quality healthcare services predominantly to the residents of the South Bay, Peninsula, and Harbor communities in California. A world-class regional medical center, Torrance Memorial includes an extensive integrated system of physicians and comprehensive medical services to provide coordinated communication and a continuum of care. Torrance Memorial's website is available at: <https://www.torrancememorial.org/>.

UMass Memorial Health Care, Inc., is the largest health care system in Central Massachusetts. It is the clinical partner of the UMass Chan Medical School, with access to the latest technology, research, and clinical trials. UMass Memorial Health Care's website is available at: <https://www.ummhealth.org/>.

University Health System Inc., d/b/a the University of Tennessee Medical Center, is the regional academic medical center for East Tennessee. The hospital serves as a referral center for

Eastern Tennessee, Southeastern Kentucky, and Western North Carolina. The University of Tennessee Medical Center's website is available at: <https://www.utmedicalcenter.org/>.

Valley Health System, Inc., is a regional healthcare system that serves residents in northern New Jersey and southern New York. Valley Health oversees an acute-care, 431-bed hospital in Ridgewood, New Jersey, and it operates comprehensive inpatient and outpatient programs; home-care services; and community-based medical practices and wellness programs. Valley Health's website is available at: <https://www.valleyhealth.com/>.

Washington University in St. Louis operates the Washington University School of Medicine. The mission of Washington University School of Medicine is to lead in advancing human health through the best clinical care, innovative research, and the education of tomorrow's leaders in biomedicine in a culture that supports diversity, inclusion, critical thinking, and creativity. Its outstanding faculty, including over 1800 clinical faculty members, are international leaders in patient care, research, and education who have contributed major discoveries and innovations to the fields of science and clinical medicine. Washington University in St. Louis's website is available at: <https://wustl.edu> and Washington University School of Medicine's website is available at: <https://medicine.wustl.edu>.

INTRODUCTION

Hospitals, health systems, and healthcare providers like Amici play critical roles in their communities. One of the main ways, of course, is the provision of accurate, up-to-date healthcare information for patients and the communities they serve through their websites, each of which is set forth in the statement of interest above. Amici also further the long-standing objective of the federal government to promote patient engagement with health information technology by maintaining and modernizing those websites to encourage engagement and promote ease of use. And increasingly, Amici are called on—including by the federal government—to deploy their websites to counter the spread of online health misinformation. Key to the success of all of these initiatives is the ability of hospitals and health systems to understand how patients, prospective patients, and the public use their websites and ensure that visitors can find and engage with the information they are looking for.

HHS's Bulletin, issued without any notice or comment, significantly sets those efforts back. The rule threatens to outlaw commonplace Internet technology used throughout the healthcare industry and by the federal government itself. The rule creates a chilling effect that threatens the ability of hospitals and health systems to reach and serve their patients and their communities. The practical effect of this rule is to undercut significant efforts Amici and other hospitals have made to maintain robust sources of online health information and counteract medical misinformation.

Amici submit this brief to urge this Court to set aside HHS's unlawful and uncounseled overstep, as requested by the plaintiffs, and to ensure that hospitals and health systems are not needlessly limited in the ways they effectively reach their patients and communities. The rule also incentivizes civil litigation against health systems, to the great advantage of certain lawyers, but with no meaningful benefit to the public or even the individuals they represent.

ARGUMENT

I. The Federal Government Leverages the Same Types of Tools the Bulletin Purports to Forbid.

A. Government Websites Emphasize the Usefulness of the Impacted Tools.

Third-party website technologies are central to the operation of the Internet as we know it. Although the Bulletin refers to the technologies as “tracking” technologies, that does not mean the technologies actually track the specific activities of individual users in a way that could ever be used to embarrass or otherwise harm them or subject them to potential criminal or civil exposure.

Google Analytics, one of the most widely used third-party technologies implicated by the challenged rulemaking, is regularly employed to engage in Internet analytics. Google Analytics is “a free web analytics tool that can help you analyze your website traffic and measure the effectiveness of your marketing efforts.” *Get the Insights Your Nonprofit Needs Using Google Analytics*, Google, <https://perma.cc/57NG-J4P6>. Of relevance to nonprofits like Amici, Google Analytics helps website operators analyze website traffic; understand how traffic navigates to and through the site; and understand the actions users take, all while maintaining the anonymity of individual users. *Id.*

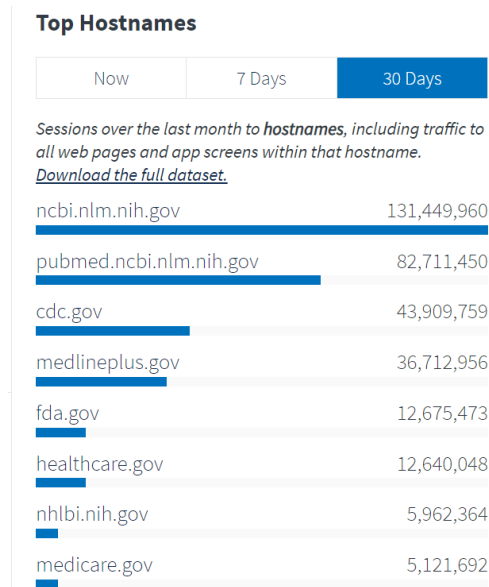
Tools like Google Analytics are not intended to spy on users or violate their privacy, nor are they used in that way. Instead, their purpose is to help website operators gain information about how website users, collectively in the aggregate and anonymously, are interacting with websites, which parts are working and which parts are not, in order to better communicate their information to the public.

What the challenged technologies have in common is that they maintain the anonymity of the users. Human beings do not view or analyze the browsing activities of a particular user, and

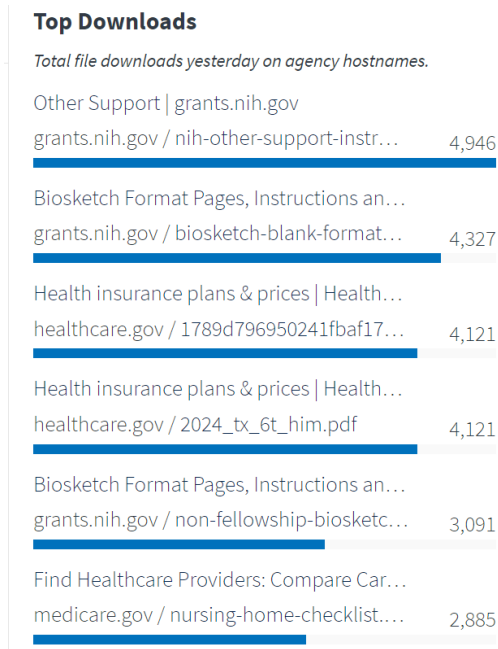
the data transmitted to companies like Google is not used to spy on or embarrass any particular user.

The usefulness of web analytics tools is reflected in the fact that the federal government capitalizes on them in its own website operation protocol. The federal government mandates that all federal agencies use Google Analytics on their websites. *See* Memo. from Exec. Off. of the President, Off. of Mgmt & Budget, to the Heads of Exec. Dep’ts & Agencies, at 4 (Nov. 8, 2016), <https://perma.cc/N42Z-83GU> (“All agencies must participate in the General Service Administration’s (GSA) Digital Analytics Program (DAP) and deploy the DAP tracking code on all public facing agency websites.”).

A visit to HHS’s website analytics page, <https://analytics.usa.gov/health-human-services>, reveals why website operators like both the federal government and Amici value analytics technologies like those implicated by the Bulletin. Analytics help HHS understand, among many other things, the number of unique visitors to HHS-operated websites:



Id. (last visited January 8, 2024). HHS also uses Google Analytics to analyze which specific webpages visitors navigate to; whether the visitors are using desktops, mobile phones, or tablets to access the websites; and the total file downloads for forms and files on HHS-related websites:



Id. As the government’s analytics website shows, third-party tools like these allow website operators to (1) direct users to their websites; (2) understand user activity on those sites; and (3) optimize their websites accordingly to encourage use and return visits. In addition, these tools let website operators know which online communications strategies are working effectively by identifying whether users arrived “from a Google search, an email campaign, or a social post,” among other pieces of information. *Get the Insights*, Google, *supra*. And for Amici, analytical tools like these provided, and, were it not for the Bulletin, would continue to provide, unique insight into how best to reach audiences who may be looking for information on health care, need health care themselves, or have a friend or family member who needs health care. Yet as plaintiffs’ complaint confirms, federal government websites *still* use analytics tools on HIPAA-covered webpages. *See* Dkt. 1 (Complaint), ¶¶ 11-12.

The Bulletin thus imposes unnecessary and legally unfounded limitations on Amici’s and other hospitals’ use of tools like Google Analytics. Absent the Bulletin’s restrictions, Amici would look to enjoy the capabilities offered by technologies like Google Analytics—technologies the federal government continues to deploy to its own benefit.

B. The Bulletin Needlessly Limits Hospitals’ Use of Analytics Tools on Their Websites.

The Bulletin effectively prohibits the use of tools like Google Analytics because of HHS’s misguided treatment of IP addresses as protected health information (PHI) under HIPAA, even in the context of browsing activity on a public website. *See* Bulletin.

Google Analytics requires the transmission of an IP address to function. This is true of any Internet technology: *any* transmission of information across the Internet requires a mutual sharing of IP addresses to allow two devices to communicate with each other in the first place. *Cf. United States v. Forrester*, 512 F.3d 500, 510 (9th Cir. 2008) (“Internet users ... rely on third-party equipment in order to engage in communication,” and “IP addresses,” much “[l]ike telephone numbers,” are inherently shared with third parties “for the specific purpose of directing the routing of information”); *Johnson v. Microsoft Corp.*, 2009 WL 1794400, at *4 (W.D. Wash. June 23, 2009) (“[A]n IP address identifies a computer, and can do that only after matching the IP address to a list of a particular Internet service provider’s subscribers.”). But unlike telephone numbers, an IP is often dynamic, changing at a regular interval (e.g. weekly) based on the terms of the Internet service provider. Google Analytics aggregates data showing users’ activity on webpages. Analysis of the aggregate data improves the ability for health systems to reach target audiences in the community and assess the effectiveness of community outreach of disease prevention and public health campaigns.

Google Analytics' current version, Google Analytics 4, anonymizes the IP address upon receiving it and does not store it. *Analytics Help*, Google, <https://perma.cc/TE38-FRZS> (“Google Analytics 4 does not log or store individual IP addresses.”). However, because HHS improperly treats IP addresses as PHI in the Bulletin, a covered entity must negotiate a business associate agreement with Google before using Google Analytics, on the theory that Google is being entrusted with PHI when it receives and then anonymizes the IP address. *See* Bulletin. Because Google will not undertake the risk and potential liabilities associated with serving as a business associate, health systems are now and immediately facing the risk of governmental sanction and penalty for attempting to use the same kind of valuable website analytical tools that the federal government is also using.

II. Outlawing the Use of Third-Party Technologies on Public Websites Undermines Hospitals' Missions to Serve the Public and Creates a Vacuum for Misinformation.

The Internet has revolutionized the way that people obtain medical information and make decisions about their healthcare. Perhaps the most profound change has been the empowerment of patients, proxies, and others with online access to healthcare information. *See* Briony Swire-Thompson & David Lazer, *Public Health and Online Misinformation: Challenges and Recommendations*, 41 *Ann. Rev. Pub. Health* 433, 439 (2020) (“No longer is a patient a passive recipient of health advice but they can have an active role in consuming and evaluating health information.”).

In late 2022 alone, most American adults—nearly 6 in 10—used the Internet to look up health or medical information. *See* Xun Wang & Robin A. Cohen, U.S. Ctrs. for Disease Control & Prevention, *Health Information Technology Use Among Adults: United States, July–December 2022*, U.S. Ctrs. for Disease Control & Prevention (October 2023), <https://perma.cc/96AP-AG9R>. And while hospital websites are valuable resources for their patients, the communities they serve,

and other members of the public at large, their reach extends far further. Amici's websites are a source of information for their communities and others seeking to understand medical innovations, public health trends, or treatment options being explored across hospital systems. For example, an individual with a loved one diagnosed with lymphoma could search out Cedars-Sinai's recent peer-reviewed study announcing advancements in predicting health outcomes for individuals diagnosed with immune-system cancers. *See Predicting Lymphoma Patients' Treatment Outcomes*, Cedars-Sinai (Dec. 20, 2023), <https://www.cedars-sinai.org/newsroom/predicting-lymphoma-patients-treatment-outcomes/>. Or a medical researcher seeking information on respiratory illnesses might access the University of Massachusetts Memorial Health's Health Library, available through UMass's website. *See Health Library*, UMass Memorial Health, <https://umassmemorial.staywellhealthlibrary.com/Library/DiseasesConditions/Adult/Respiratory/>.

With more people turning to the Internet for health information, the spread of medical misinformation has exploded through the Internet as well. The COVID-19 pandemic drew worldwide attention to the issue. *See, e.g.*, Israel Junior Borges do Nascimento et al., *Infodemics and Health Misinformation: A Systematic Review of Reviews*, 100 Bull. World Health Org. 544 (2022). But the problem is both older and broader than that. *See Swire-Thompson & Lazer, supra*, at 434 (describing fad cures for cancer and the claimed association between vaccines and autism). The growing capabilities of artificial intelligence further threaten the public with more medical misinformation. *See Bradley D. Menz et al., Health Disinformation Use Case Highlighting the Urgent Need for Artificial Intelligence Vigilance*, JAMA Internal Med. (published online Nov. 13, 2023), *abstract available at* <https://perma.cc/4BN2-Z92C>.

The need to combat health misinformation presents difficult questions, ranging from the truth of medical science in light of changing and developing technologies, *see Swire-Thompson*

& Lazer, *supra*, at 434 (“[W]hat is considered true and false is constantly changing as new evidence comes to light and as techniques and methods are advanced.”), to legal questions about censorship and the freedom of speech, *see generally Missouri v. Biden*, 83 F.4th 350 (5th Cir. 2023) (concluding that a federal campaign to combat misinformation constituted government censorship), *cert. granted sub nom., Murthy v. Missouri*, 144 S. Ct. 7, 7 (2023).

One of the most powerful tools available to combat harmful medical misinformation is the dissemination of accurate and trustworthy information by known and reliable sources like Amici in a manner that reaches those actively searching for it. *Cf. United States v. Alvarez*, 567 U.S. 709, 727 (2012) (“The remedy for speech that is false is speech that is true.”). Indeed, some published guidance for physicians recommends against engaging directly with misinformation; instead, “[t]he most effective solution to limit the reach of inaccurate online information is to expose internet users to more accurate than inaccurate information.” Asha Shajahan & Irene V. Pasquetto, *Countering Medical Misinformation Online and in the Clinic*, 106 Am. Fam. Physician 124, 125 (2022).

On the other hand, misinformation spreads most easily when there are “voids” of accessible, trustworthy sources. *See* Claire Wardle, *Tackling Misinformation: A Three-Pronged Approach*, Nat’l Insts. of Health (Sept. 6, 2023), <https://perma.cc/Z9BX-NVRA> (“Misinformation flourishes when people don’t have access to good information.”). The federal government has already identified health misinformation as “harmful to individual and public health” and called upon healthcare organizations to “[u]se technology and media platforms to share accurate health information with the public.” Vivek H. Murthy, Off. of the U.S. Surgeon Gen., *Confronting Health Misinformation* 6, 10 (2021).

Hospital systems across the country, including Amici, provide exactly that sort of reliable and digestible information through the Internet for the benefit of their patients and the general public. For example, amicus Cedars-Sinai Medical Center’s website features a comprehensive “health library” that provides accurate, comprehensible information on over 1,800 health disorders and treatments—not to mention a library of dozens of videos on conditions and procedures; guidelines for every age group on preventative healthcare; and a collection of health calculators and risk assessments. *See Health Library*, Cedars-Sinai, <https://www.cedars-sinai.org/health-library.html>. Cedars-Sinai also provides the public with trustworthy, up-to-date guidelines on pressing public health topics, such as COVID-19 and Mpox (formerly monkeypox). *See Public Health Topics*, Cedars-Sinai, <https://www.cedars-sinai.org/public-health-topics/covid-19.html> (COVID-19), & <https://www.cedars-sinai.org/public-health-topics/mpox.html> (Mpox). Other amici maintain similarly robust informational webpages. *See, e.g., Coronavirus (COVID-19) Information and Updates*, Johns Hopkins Medicine, <https://www.hopkinsmedicine.org/coronavirus/covid-19-vaccine>; *Alzheimers’ Disease*, *Baylor Scott & White Health*, <https://www.bswhealth.com/conditions/alzheimers-disease>.

Indeed, the United States Supreme Court has recognized that the Internet, and the websites that comprise it, are the public forum of our time: “While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the ‘vast democratic forums of the Internet’ in general, and social media in particular.” *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017) (citation omitted) (quoting *Reno v. Am. C.L. Union*, 521 U.S. 844, 868 (1997)); *see also id.* at 105 (“While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express

ourselves, and define who we want to be.”); *Sandvig v. Sessions*, 315 F. Supp. 3d 1, 11-12 (D.D.C. 2018) (recognizing enhanced First Amendment protection for Internet speech under *Packingham*; “With this special status comes special First Amendment protection.”).

The First Amendment protection is not in place only for Amici, but also extends to the public, who has a right to receive Amici’s speech without undue government interference. *See Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 8 (1986) (“The constitutional guarantee of free speech ‘serves significant societal interests’ wholly apart from the speaker’s interest in self-expression. By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public’s interest in receiving information.” (quotation omitted)); *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (same; “[t]he advertisement published in appellant’s newspaper did more than simply propose a commercial transaction. It contained factual material of clear ‘public interest.’”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (same; “So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.”); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 376-77 (1977) (holding First Amendment gave attorneys constitutionally protected right to engage in speech; “Advertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange.”).

If the Bulletin is left in place, hospitals like Amici will no longer be able to use the same third-party tools that many other websites use to optimize their ability to reach those looking for health information, because they are also covered entities under HIPAA, whereas other websites

providing this exact same information to the public, whether true or false, can utilize these same tools, and make these same disclosures of the same type of Internet information, because they are not covered entities under HIPAA—even though what is at issue is a query on a public website, not a patient interaction. That HHS would issue the Bulletin without full consideration of these concerns is troubling enough. But to do so without any notice and comment, and thus also without explanation or providing the opportunity to hear and receive contrary opinion, gives an advantage to parties who may be distributing inaccurate or misleading information. The Bulletin also frustrates Amici’s efforts to reach the public with accurate information, and it confounds the government’s own stated goal of enlisting hospitals and healthcare systems like Amici to combat misinformation.

At bottom, the Bulletin hobbles the ability of healthcare organizations to participate in the marketplace of ideas on an equal footing—thus necessarily privileging less reputable voices at a critical moment in the effort to promote accurate and trustworthy health information online.

III. Outlawing the Use of Third-Party Technology on Public Websites Undermines the Joint Efforts of Hospitals and the Government to Modernize Healthcare.

Americans today do not just learn about health and medicine through the Internet—they manage their medical records and communicate with their doctors online, too. Consistent with Internet usage for medical information overall, about 60% of people accessed an online medical record or patient portal in 2022. *Individuals’ Access and Use of Patient Portals and Smartphone Health Apps, 2022*, Off. of the Nat’l Coordinator for Health Info. Tech. (October 2023), <https://perma.cc/VNN9-EPVK>.

It has not always been this way. Just 15 years ago, only 20% of hospitals and physicians even used electronic health records—much less had online portals for patients to view their health information and communicate with their doctors. *National Trends in Hospital and Physician*

Adoption of Electronic Health Records, Off. of the Nat'l Coordinator for Health Info. Tech., <https://perma.cc/N396-G74T>. The growth in health information technology was not by chance. Rather, it is the product of a long-running collaboration between the federal government and private entities like Amici who worked to create a system of online health information that patients can easily find, navigate, and access.

Beginning first by executive order in 2004 and then by statute in 2009, the federal government initiated a concerted partnership with healthcare providers to encourage the adoption of health IT. *See* Exec. Order No. 13335; HITECH Act, Pub. L. No. 111-5, 123 Stat. 226 (2009) (codified at scattered sections of 42 U.S.C.). Congress tasked a new federal officer—the National Coordinator for Health Information Technology—with “the development of a nationwide health information technology infrastructure that allows for the electronic use and exchange of information.” 42 U.S.C. § 300jj-11(a), (b).

The federal government also created a program to encourage healthcare providers to adopt health IT—first through incentive payments, and later through Medicare reimbursement penalties. *See* Cong. Rsch. Serv., R40161, *The HITECH Act* 1-2 (2009). This initiative came to be known as the “Meaningful Use” program because participating providers were required to show not merely that they adopted health IT but that patients actually interacted with their online health record. *See, e.g.*, 42 C.F.R. § 495.24(c)(6)(ii) (requiring hospitals to attest that a minimum percentage of patients sent or received messages through their online health record).

Even in 2024, though, the federal government considers the mission far from complete. Just a few months ago, the National Coordinator continued to identify “opportunities for improvement” to increase the “rates of downloading and transmitting health information by individuals who access their online medical records”—especially the “need for further education”

of patients about online portals. *See Individuals' Access and Use*, Off. of the Nat'l Coordinator, *supra*; *see also* Off. of the Nat'l Coordinator for Health Info Tech., *2020-2025 Federal Health IT Strategic Plan* (2020). Indeed, the most recent guidance from the National Coordinator was for another five years of efforts aimed at creating a “fully connected healthcare system that empowers patients” to “access, exchange, and use electronic health information.” Off. of the Nat'l Coordinator, *2020–25 Strategic Plan*, *supra*, at 1.

Yet the HHS Bulletin threatens to jeopardize all of this progress by undermining the effectiveness of the hospital websites and efforts that continue to be so critical in driving patient engagement with their online health records. To be sure, Amici can host websites and patient portals without using any third-party analytics technologies, and neither Amici nor plaintiffs challenge the guidance as it relates to log-in sites like patient portals. But it serves nobody to have websites that patients do not know about and cannot navigate effectively. The federal government recognized a decade ago that it is not enough to maintain a superficial online presence if patients are not actively engaging hospital websites and putting them to the uses envisioned by the federal government. Instead, the goal is to foster the “*meaningful use*” of health IT. Hospitals cannot encourage patients to use online tools if the hospitals cannot effectively optimize their websites to compete with other sources of medical information.

Parts of the federal government—and even other offices of HHS—have long been aware that actual adoption of health IT requires both deliberate strategies and a constant eye towards website optimization. The National Coordinator’s Patient Engagement Playbook instructs hospitals and providers in best practices to “build an effective digital strategy for patient engagement.” *Patient Engagement Playbook*, Off. of the Nat'l Coordinator for Health Info. Tech., <https://perma.cc/8KGY-ZEYG> (May 31, 2019).

The Playbook also instructs hospitals to “[m]arket and educate effectively,” such as by “[using] Playbook language on your website or Facebook page.” *Id.*, Introduction & ch. 1.4. The Playbook suggests that patients are more likely to engage with their online health portal if invited by text message than by email, *id.*, ch. 1.3—precisely the sort of awareness that Amici rely upon third-party technology to provide. Indeed, website analytic tools provide insights into website effectiveness at a much finer level than crude recommendations to use email versus text message communications.

As for website optimization, the Playbook notes that “promising signs” suggest that “clear action steps presented using images, and in an appealing layout, may encourage patients to access the online patient portal.” *Id.*, ch. 1.4. Most tellingly, the Playbook encourages providers to “have ongoing conversations about what works and what can be improved.” *Id.*, introduction. But hospitals should not have to—and, 13 months ago, did not need to—look for “signs” or read tea leaves to try and guess “what works” and what might encourage patients to engage with their websites. Ubiquitous Internet technologies allowed hospitals to see how long users stayed on website pages, which buttons they were most likely to click, and which layouts and designs best drove engagement.

While one part of the federal government laments that patients still fail to engage with health IT and that “healthcare has just not quite caught up” with “today’s digital world,” Off. of the Nat’l Coordinator, *2020–2025 Strategic Plan, supra*, at 1, another part of the federal government has legislated sweeping new rules that would harm hospitals’ digital strategies for education and better engagement with the communities they serve. The resulting imbalance is a product of a hurried regulatory action without full consideration of the impact that undermines the

balance struck by federal health privacy law and that dispenses with the basic tenets of administrative law.

Amici ask this Court to set aside the HHS Bulletin—both in service of Amici’s own interests in public health and in service to the federal government’s stated goals of halting the spread of misinformation and promoting patient engagement.

CONCLUSION

This Court should grant plaintiffs’ motion for summary judgment.

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