

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

THE AMERICAN HOSPITAL
ASSOCIATION, *et al.*,

Plaintiffs,

–v–

MELANIE FONTES RAINER, in her official
capacity as Director of Office for Civil Rights,
U.S. Department of Health & Human Services,
et al.,

Defendants.

Civil Action No. 4:23-cv-01110-P

BRIEF OF AMICI CURIAE STATE HOSPITAL ASSOCIATIONS

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Lila J. Finney Rutten *et al.*, *Online Health Information Seeking Among US Adults: Measuring Progress Toward a Healthy People 2020 Objective*, 134 Pub. Health Rep. 6, at 617 (Sep. 12, 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6832079/> 3, 5

Patrick Boyle, *Physicians learn to partner with Dr. Google*, American Association of Medical Colleges News (Mar. 2, 2023), <https://www.aamc.org/news/physicians-learn-partner-dr-google>..... 4

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Steve Alder, *HIPAA Compliance for Hospitals*, The HIPAA Journal (Dec. 4, 2023), <https://www.hipaaajournal.com/hipaa-compliance-for-hospitals/>..... 2

U.S. Dep’t of Health & Human Servs., Collection of Letters (July 20, 2023), <https://www.hhs.gov/sites/default/files/ocr-ftc-letters-re-use-online-tracking-technologies.pdf>. 3

U.S. Department of Health & Human Services, *Enforcement Highlights* (Oct. 31, 2023), <https://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/data/enforcement-highlights/index.html>..... 2

U.S. Dep’t of Health & Human Servs., *HHS Office for Civil Rights and the Federal Trade Commission Warn Hospital Systems and Telehealth Providers About Privacy and Security Risks from Online Tracking Technologies* (July 20, 2023), <https://www.hhs.gov/about/news/2023/07/20/hhs-office-civil-rights-federal-trade-commission-warn-hospital-systems-telehealth-providers-privacy-security-risks-online-tracking-technologies.html>. 3

U.S. Department of Health & Human Services, *Use of Tracking Technologies by HIPAA Covered Entities and Business Associates* (Dec. 1, 2022),

<https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/hipaa-online-tracking/index.html#:~:text=Regulated%20entities%20are%20not%20permitted,violations%20of%20the%20HIPAA%20Rules>..... 2

U.S. Dep’t of Health & Human Servs., Centers for Medicare & Medicaid Services, *Medicare Program; Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and the Long-Term Care Hospital Prospective Payment System and Policy Changes and Fiscal Year 2024 Rates*, 88 Fed. Reg. 58,640, 58,645 (Aug. 28, 2023)..... 5

Virginia Rural Health Plan, *Broadband Internet Supporting Rural Virginia* (Jan. 2022), https://www.vdh.virginia.gov/content/uploads/sites/76/2022/01/Virginia-Rural-Health-Plan_4-Broadband.pdf 4

CORPORATE DISCLOSURE STATEMENT

Amici curiae are non-profit organizations. They have no parent corporations and do not issue stock.

INTEREST OF AMICI CURIAE*

Amici curiae are 17 state hospital associations, which collectively represent thousands of hospitals and health systems that serve tens of millions of patients every year. Amici and their members share an interest in ensuring that healthcare providers have the tools to effectively disseminate accurate and well-tailored health information to the general public through their websites. Below are descriptions of each amicus:

- The **California Hospital Association (CHA)** is a nonprofit organization dedicated to representing the interests of California hospitals and the patients they serve. CHA represents more than 400 hospital and health system members and 97 percent of the patient beds in California, including general acute care hospitals, children’s hospitals, rural hospitals, psychiatric hospitals, academic medical centers, county hospitals, investor-owned hospitals, and multi-hospital health systems. These hospitals furnish vital health care services to millions of California’s citizens. CHA provides its members with state and federal representation in the legislative, judicial, and regulatory arenas, in an effort to improve health care quality, access and coverage; promote health care reform and integration; achieve adequate health care funding and contain costs; improve and update laws and regulations; and maintain public trust in health care.
- Founded in 1927, the **Florida Hospital Association** is the leading voice for health care in the State of Florida. Through representation and advocacy, education and informational services, the Florida Hospital Association supports the mission of over 200 hospitals and health care systems to provide the highest quality of care to the patients we serve. The Florida Hospital Association’s mission is to advocate proactively on behalf of hospitals at the state and federal levels on issues that will assist members in their mission of community service and care to patients.
- The **Georgia Hospital Association** is a non-profit trade association made up of member hospitals and individuals in administrative and decision-making positions within those institutions. Founded in 1929, the Association serves 145 hospitals in Georgia. Its purpose is to promote the health and welfare of the public through the development of better hospital care for all of Georgia’s citizens. The Association represents its members in legislative matters, as well as in filing *amicus curiae* briefs on matters of great gravity and importance to both the public and to health care providers serving Georgia citizens.
- The **Greater New York Hospital Association (GNYHA)** is a Section 501(c)(6) organization that represents the interests of approximately 220 hospitals and health systems primarily in New York State but also in New Jersey, Connecticut, Pennsylvania, and Rhode

* No party’s counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief.

Island. All of GNYHA's members are either not-for-profit, charitable organizations or publicly sponsored institutions that provide services ranging from state-of-the art, acute quaternary services to basic primary care needed by their communities. Many of GNYHA members and their affiliated medical schools also provide extensive medical education and training and undertake cutting-edge research that benefits patients all over the world. To assist its members, GNYHA engages in advocacy, policy analysis, education, research, and communication services at the local State, and Federal levels. GNYHA also undertakes extensive activities in the health care regulatory area, participating actively in issues pertaining to hospitals and other health care entities, health planning, and requirements for establishing and operating health care facilities. In this regard, GNYHA monitors and tracks proposed laws and regulations on behalf of its members, provides input into the development of new laws and regulations and provides education and training for member hospitals when new requirements go into effect. One of GNYHA's focus areas in the regulatory space is health care privacy and security.

- The **Healthcare Association of Hawaii (HAH)** has been the leading voice of healthcare in Hawaii since 1939. HAH represents, all of Hawaii's hospitals, all public and private nursing facilities, all Medicare-certified home health agencies, all hospices, and almost all type II residential care homes and assisted living facilities. Our 170 members also include case management, DME providers, home infusion agencies and pharmacies, air and ground ambulance providers, the blood bank, and dialysis providers. HAH's focus is on legislative advocacy, workforce development, quality and reimbursement improvement, and emergency preparedness.
- The **Healthcare Association of New York State, Inc. (HANYS)** is New York's statewide hospital and healthcare system association representing not-for profit and public hospitals, health systems, nursing homes, home health agencies, and other healthcare organizations. HANYS' members cross the spectrum of providers, including rural Critical Access Hospitals, community hospitals, large, urban Academic Medical Centers, and safety net providers. HANYS seeks to advance the health of individuals and communities by providing expertise, leadership, representation, and service to health providers and systems across the entire continuum of care.
- The **Illinois Health and Hospital Association (IHA)** represents over 200 hospitals and 40 health systems throughout the State of Illinois. Member hospitals include community hospitals, urban hospitals, safety net hospitals, specialty hospitals, rural and critical access hospitals, as well as teaching and academic medical centers. For over 100 years, IHA has served as an advocate for these members, addressing the social, economic, political, and legal issues affecting the delivery of high-quality health care in Illinois. IHA's purpose is, among other things, to support each person's quest for optimum health and to ensure that all individuals and communities have access to high-quality health care at the right time and in the right setting. In pursuing this purpose, IHA routinely advocates for rules that strengthen hospitals and improve the quality of care provided to their patients.
- The **Indiana Hospital Association (IHA)**, founded in 1921, provides leadership, representation, and support to Indiana hospitals to advance a health care delivery system

that improves the health and health care of all Hoosiers. IHA's membership includes over 160 hospitals across Indiana, and its leadership consists of current and former hospital executives and industry experts. Through its mission, IHA is dedicated to ensuring a health care system that improves quality of care and patient safety for Indiana citizens. IHA represents the collective interests of its members before policymakers, legislators, and regulators and serves as the central voice and advocate in matters of vital concern to its members.

- The **Iowa Hospital Association (IHA)** is a nonprofit trade association of 117 hospital and health system members. IHA was established in 1929 and provides advocacy, education and information to its members. It represents and advocates health policy issues benefiting Iowans before the state legislature, U.S. Congress and regulatory bodies. IHA is in Des Moines and is an allied member of the American Hospital Association (AHA).
- The **Kentucky Hospital Association (KHA)** is a non-profit state association of hospitals, related health care organizations, and integrated health care systems. Membership in KHA is voluntary, and its member entities include 120 hospitals in the Commonwealth of Kentucky. KHA engages in advocacy and representation efforts on behalf of their member hospitals that promote safety, quality, and efficiency in health care. The mission of KHA is to be the leading voice for Kentucky health systems in improving the health of our communities.
- The **Massachusetts Health & Hospital Association (MHA)** serves as the unified voice for Massachusetts hospitals and healthcare providers. Founded in 1936, MHA represents more than 100 hospitals, health systems, and allied care providers. Through advocacy, education, and collaboration, MHA's mission is to improve the overall health of the commonwealth and support providers' efforts to offer high-quality, affordable, and accessible care.
- The **Michigan Health & Hospital Association (MHA)** is the statewide leader representing all community hospitals in Michigan. Established in 1919, the MHA represents the interests of its member hospitals and health systems in both the legislative and regulatory arenas on key issues and supports their efforts to provide quality, cost-effective and accessible care. Through our leadership and support of hospitals, health systems and the full care continuum, we are committed to achieving better care for individuals, better health for populations and lower per-capita costs.
- Since its creation in 1922, the **Missouri Hospital Association (MHA)** has grown from 50 to more than 140 member hospitals. As a nonprofit membership association, MHA represents every acute care hospital in the state, as well as most of the federal and state hospitals and rehabilitation and psychiatric care facilities. MHA advocates for policies that improve health and health care in the state, and provides data, decision-support tools and operational resources to help hospitals and health systems deliver care. In addition to representation and advocacy on behalf of its members, the association seeks to educate its members, the public and the media, as well as legislative representatives, about health care issues.

- Established in 1915, the **Ohio Hospital Association (OHA)** was the nation's first state hospital association. It represents 248 hospitals and 15 health systems throughout Ohio. Ohio's hospitals employ 430,000 individuals, and contribute billions to the State's economy, including billions in net community benefit. OHA is recognized nationally for patient safety, healthcare-quality initiatives, and environmental-sustainability programs. Guided by a mission to collaborate with member hospitals and health systems to ensure a healthy Ohio, OHA centers its work on three strategic initiatives: advocacy, economic sustainability, and health outcomes for patients and communities
- The **Oklahoma Hospital Association (OHA)** is the voice of hospitals in Oklahoma. Established in 1919, the OHA represents more than 135 hospitals and health systems across the state. OHA's primary objective is to promote the health and welfare of all Oklahomans by leading and assisting its member organizations in providing high quality, safe and valued health care services to their communities. The OHA also believes hospitals play a vital role in helping to advance the overall state of health for their patients and the public at large. The OHA provides a variety of membership services including representation and advocacy at the state and federal national levels, educational programs, information and data analysis, patient quality and safety resources, and industry communication. Members can also avail themselves of various insurance and group-purchasing products.
- **Washington State Hospital Association** is a Washington not-for-profit corporation, with principal offices in Seattle, Washington. WSHA's membership includes 113 Washington hospitals and its purposes include advocacy for, and service to, its members on issues that affect the delivery, quality, accessibility, affordability, and continuity of health care.
- The **West Virginia Hospital Association (WVHA)** is a not-for-profit statewide organization representing hospitals and health systems across the continuum of care. The WVHA was founded in 1925 to serve as the collective voice of the state's hospital community. Today, the mission of the WVHA is to support its members in achieving a strong, healthy West Virginia. Members of the Association envision a strong healthcare system that supports optimizing the health status of West Virginians served by hospitals and improving the economic condition of the state. The values of quality, transparency, integrity, collaboration and innovation guide the actions of the Association so that member hospitals and health systems can provide high-quality, affordable, accessible healthcare for West Virginia families and communities.

INTRODUCTION

Amici curiae submit this brief to highlight for the Court the enormous, adverse, real-world effects of the policy being challenged in this lawsuit. That policy—set forth in a December 2022 Bulletin issued by the Office of Civil Rights, U.S. Department of Health and Human Services (“HHS Bulletin”)—dictates that a healthcare provider triggers the requirements of the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) whenever it uses a website technology that relies on the IP address of the visitor’s computer on a publicly accessible page of its website containing information about specific health conditions or providers. The HHS Bulletin threatens website features that are bedrock tools for effectively disseminating information online in an engaging way. Faced with the HHS Bulletin and resulting threats of enforcement action and class action lawsuits, many of amici curiae’s member hospitals have disabled features of their websites that they previously relied on as necessary to help bring reliable health information to the general public and to reach communities beyond their current patient population, including communities that have historically lacked adequate access to healthcare services.

In this brief, amici offer illustrations of the types of website features that are now threatened by the HHS Bulletin. Amici do not address the legal foundation for the HHS Bulletin. Rather, amici seek to inform the Court of what is at stake: namely, that the HHS Bulletin threatens essential avenues for effectively conveying health information to members of the public and empowering them to learn about and access needed healthcare services. Amici respectfully ask the Court to set the HHS Bulletin aside and grant summary judgment for Plaintiffs.

BACKGROUND

Hospitals are constantly vigilant to protect the confidentiality of their patients’ individually identifiable health information. HIPAA compliance is woven deep into hospital operations, with

implications for every way in which hospitals interact with patients or patients' medical information.¹ The proper scope of information protected under HIPAA has far-reaching implications for hospital policies, procedures, and operations. Hospitals must closely monitor and adapt to the HIPAA regulatory landscape, and the consequences of anything other than a conservative and scrupulous approach to HIPAA compliance can be severe.²

In December 2022, the Office of Civil Rights at the U.S. Department of Health & Human Services issued the HHS Bulletin online.³ Among other things, the HHS Bulletin provided that “an individual’s IP address” is protected health information under HIPAA whenever it is collected on a page of a HIPAA covered entity’s website containing information about specific health conditions or providers. According to the HHS Bulletin, “all such information [including IP addresses] collected on a regulated entity’s website or mobile app generally is [protected health information],” even if the user did not provide the hospital with any personal information and accessed a page of the website that did not require login credentials or other user authentication.⁴ Crucially, the HHS Bulletin stated that HIPAA applies to a website user’s IP address “even if the individual *does not have an existing relationship with the regulated entity.*” In other words, the HHS Bulletin does not just affect pages of a hospital’s website aimed at current patients; it also

¹ Steve Alder, *HIPAA Compliance for Hospitals*, The HIPAA Journal (Dec. 4, 2023), <https://www.hipaajournal.com/hipaa-compliance-for-hospitals/>.

² See, e.g., U.S. Department of Health & Human Servs., *Enforcement Highlights* (Oct. 31, 2023), <https://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/data/enforcement-highlights/index.html> (noting settlements and civil monetary penalties in 138 cases charging HIPAA violations totaling over \$137 million).

³ See U.S. Dep’t of Health & Human Servs., *Use of Tracking Technologies by HIPAA Covered Entities and Business Associates* (Dec. 1, 2022), <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/hipaa-online-tracking/index.html#:~:text=Regulated%20entities%20are%20not%20permitted,violations%20of%20the%20HIPAA%20Rules.>

⁴ *Id.*

applies to pages aimed primarily at members of the general public who have no existing patient relationship with the hospital. By deeming the IP address of a visitor to a hospital's website to be protected health information, the HHS Bulletin made it difficult or impossible for hospitals to use any website feature that entails a third-party vendor obtaining IP addresses.

After issuing the HHS Bulletin, the Office of Civil Rights announced in July 2023 that it had issued warning letters to approximately 130 healthcare providers regarding the use of online tracking technologies and raising the possibility of enforcement action.⁵ HHS has published the warning letters on its website, publicly identifying all of the recipients.⁶

DISCUSSION

Amici begin by highlighting the critical role that their members play in making reliable health information available to the general public and in helping to ensure that communities without adequate healthcare access have more opportunities to obtain health information and needed services. Amici then identify some of the website features that they have used in the past to disseminate information more effectively that are now threatened by the HHS Bulletin.

I. Hospital Websites Play a Critical Role in Disseminating Reliable Health Information to the General Public and in Reaching Underserved Communities.

Both extensive research and common experience demonstrate that people are increasingly likely to search for health information online.⁷ For that reason and others, it is increasingly

⁵ U.S. Dep't of Health & Human Servs., *HHS Office for Civil Rights and the Federal Trade Commission Warn Hospital Systems and Telehealth Providers About Privacy and Security Risks from Online Tracking Technologies* (July 20, 2023), <https://www.hhs.gov/about/news/2023/07/20/hhs-office-civil-rights-federal-trade-commission-warn-hospital-systems-telehealth-providers-privacy-security-risks-online-tracking-technologies.html>.

⁶ See U.S. Dep't of Health & Human Servs., *Collection of Letters* (July 20, 2023), <https://www.hhs.gov/sites/default/files/ocr-ftc-letters-re-use-online-tracking-technologies.pdf>.

⁷ See, e.g., Lila J. Finney Rutten *et al.*, *Online Health Information Seeking Among US Adults: Measuring Progress Toward a Healthy People 2020 Objective*, 134 *Pub. Health Rep.* 6, at 617 (Sep. 12, 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6832079/>; Patrick Boyle,

important that the health information available online be not only reliable and accessible but also well-tailored to the needs of the people who search for it. The better tailored the health information publicly available online, the more likely that online searches for health information will improve public health.

Hospital websites play a crucial role in the online health information ecosystem. Hospitals serve as reliable, recognizable voices, and they are able to provide broad-based information regarding a wide range of health topics. For many people, a hospital website may be the place that they are most likely to find—and trust—the health information that leads them to seek out the care they need (or to *not* seek out care that they do *not* need).

The need for accessible and reliable online health information is especially important for communities that have traditionally lacked adequate access to health care. For example, the Centers for Disease Control and Prevention has sought to promote telehealth to address the problem that individuals in rural communities, in large part because of inadequate access to health care, are more likely than urban residents to die from the five leading causes of death in the United States.⁸ And “increase[d] opportunities for obtaining health information and education” are frequently cited as a benefit of broadband internet access in rural areas.⁹ But online health information can be part of the solution only if it is accessible, reliable, and well-tailored, and

Physicians learn to partner with Dr. Google, American Association of Medical Colleges News (Mar. 2, 2023), <https://www.aamc.org/news/physicians-learn-partner-dr-google>.

⁸ CDC, *Telehealth in Rural Communities* (last updated Sept. 8, 2022), <https://www.cdc.gov/chronicdisease/resources/publications/factsheets/telehealth-in-rural-communities.htm>.

⁹ Virginia Rural Health Plan, *Broadband Internet Supporting Rural Virginia* (Jan. 2022), https://www.vdh.virginia.gov/content/uploads/sites/76/2022/01/Virginia-Rural-Health-Plan_4-Broadband.pdf

research has indicated that individuals from groups that have historically lacked adequate access to health care are also more likely to be frustrated when they search for health information online.¹⁰

HHS has consistently charged hospitals with better serving these communities, touting the goal of hospitals “advancing health equity for all, including members of historically underserved and under-resourced communities.”¹¹ But in order to serve as effective sources of reliable health information and to reach a broad audience outside of their existing patient base, hospitals must be empowered to use the best tools available to ensure that their websites are providing the right information to the right people, in a way that they can trust and act on.¹²

II. The HHS Bulletin Threatens Crucial Tools that Hospitals Have Used to More Effectively Disseminate Health Information.

Many of amici’s member hospitals have reported that, in the wake of the HHS Bulletin, they have either terminated or faced significant challenges in retaining website features that they previously relied on to disseminate information to the public more effectively. Hospitals are concerned that, in light of the HHS Bulletin, these website features may create HIPAA exposure because they involve third-party technologies that rely on the IP address of the visitor’s computer to function. Many hospitals have abandoned some or all of these technologies after encountering prohibitive challenges in attempting to salvage them—for example, because third-party vendors are unwilling to subject themselves to HIPAA’s requirements via a Business Associate Agreement

¹⁰ See Finney Rutten *et al.*, *supra*.

¹¹ U.S. Dep’t of Health & Human Servs., Centers for Medicare & Medicaid Services, *Medicare Program; Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and the Long-Term Care Hospital Prospective Payment System and Policy Changes and Fiscal Year 2024 Rates*, 88 Fed. Reg. 58,640, 58,645 (Aug. 28, 2023)

¹² See, e.g., Raynard S. Kington, *et al.*, *Identifying Credible Sources of Health Information in Social Media: Principles and Attributes* (July 16, 2021) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8486420> (“High quality health information must be understandable, engaging, and culturally competent to be influential. Health and medical organizations must work hard to gain the trust of people at the community level.”).

or because the technology available through HIPAA-compliant vendors is inferior or far more expensive. Below, amici set forth illustrative examples of some of the website functionalities that the HHS Bulletin threatens, and without which hospitals are severely hampered in their ability to fulfill their important role as reliable sources for health information online.

As an initial matter, amici emphasize that the HHS Bulletin affects not just pages of hospital websites aimed at current patients, but also pages aimed at the general public. Hospitals have long understood the need for robust protection of information provided by *patients* on web pages *aimed at patients*, such as patient portals. Amici understand that this lawsuit does not challenge the HHS Bulletin as it applies to patient portals or other password-protected pages of a hospital's website. Compl. ¶ 40. But many pages on hospitals' websites that contain information about specific health conditions or providers are aimed at the general public—not individuals who have an existing patient relationship with the hospital. Indeed, disseminating health information beyond just their current patient population is an important part of hospitals' role in the health information ecosystem. And the HHS Bulletin threatens many of the technology applications that hospitals have used to more effectively disseminate information on these pages of their websites.

Analytics. The HHS Bulletin affects analytics technologies that hospitals have used in the past to glean information about how their websites are used by the public. This information can be a crucial tool for hospitals to better understand what populations they are reaching, what populations they could be reaching more effectively, and how to tailor their online content accordingly. For example, one hospital system, as a result of analytics on its website, learned that a larger-than-expected number of residents of a nearby State were exploring certain pages of its website. The hospital system was able to tailor its website content to better address the perceived needs of that population, thus improving public access to health information. The same hospital,

with the help of analytics, used activity on its website to identify underrepresented medical specialties in the hospital's own geographic area, leading the hospital to recruit more physicians in those specialties to better serve regional community needs. In examples like these, the hospital does not need to know the identity of any individual visitor to its website, but it does need to employ website analytics technologies that rely on the IP addresses of website visitors.

Website analytics also allow hospitals to identify instances where users fail to follow through on pursuing information or seeking needed health care. Hospitals use analytics to identify website user experience issues that may be preventing website visitors from identifying physicians or scheduling appointments. For example, a hospital might learn that a large number of users visit a page of the hospital's website reflecting interest in booking an appointment with a particular type of specialist, but only a small percentage of those users end up clicking through to the page where they can actually make the appointment. These types of insights can be crucial to improving hospitals' ability to disseminate health information and connect people with needed health care. Armed with this type of information from third-party analytics technologies, a hospital might learn, for example, that a particular page of its website is too difficult to navigate or fails to address users' most common concerns—enabling the hospital to make needed improvements.

Because third-party analytics technologies typically rely on the IP address of the website visitor's computer, the HHS Bulletin, by deeming the disclosure to a third party of an individual's IP address as triggering HIPAA, threatens hospitals' ability to use website analytics to improve their online content and service offerings. Many hospitals have reduced or eliminated the analytics functionalities on their websites and have consequently lost insights regarding their dissemination of health information for the benefit of the public, including whether informational campaigns are reaching their intended audiences and how website visitors find and use health information.

Map and Location Technologies. As Plaintiffs allege in their complaint, many hospitals use third-party map and location technologies to provide better information about where healthcare services are available, including embedded applications that provide bus schedules or driving directions. *See* Pls.’ Mot. for Summ. J, ECF 25, at 9 & App’x at 25 & 42. Many of amici’s members have used these types of technologies on their websites to help patients and prospective patients find their way to a healthcare facility. Map and location technologies are a crucial tool in overcoming a significant impediment to healthcare access: physically getting to a healthcare facility. As many studies have shown, “transportation barriers are an important barrier to healthcare access, particularly for those with lower incomes.”¹³ In using map and location technologies, hospitals can broaden access to healthcare services to populations that otherwise would have difficulty getting them, resulting in better care and more adherence to courses of treatment over time. Hospitals need to be able to embed the standard Google Maps tool on their websites to ensure that visitors’ ability to navigate to a particular location is as seamless as possible.

But hospitals’ use of map and location technologies on their websites is in jeopardy because of the HHS Bulletin. The HHS Bulletin implicates third-party map and location applications because they typically entail collecting the user’s IP address, and the HHS Bulletin has thus made it difficult or impossible for hospitals to keep those technologies in place.

Embedded Video. Many of amici’s member hospitals have had to stop embedding YouTube videos on their websites as a result of the HHS Bulletin because YouTube collects an IP address when a user clicks on a video. Embedded video is a standard feature of building an

¹³ Samina T. Syed, *et al.*, *Traveling Towards Disease: Transportation Barriers to Health Care Access*, 38 J. Comm. Health 5, 976 (Oct. 2013), [_https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4265215/](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4265215/) (collecting and reviewing studies).

engaging, informational website, and hospitals have used embedded videos as an important tool to educate both patients and the general public about various medical procedures, symptoms of diseases, and physicians. Video content in a physician's profile, for example, can help personalize the physician for potential patients and lead to more fruitful physician-patient relationships.

By embedding video, the owner of a website can incorporate rich video content without having to either slow down the page load speed (by self-hosting the video) or risk losing a user's attention (by linking to a video hosted elsewhere, requiring the user to leave the website). If a hospital is forced to link to a video hosted elsewhere rather than embedding it on the hospital's own website, the hospital cannot avoid subjecting the user to misleading health advertisements and misinformation.

In any other context where disseminating information to the general public is important, embedded video is an obvious tool for doing so. But healthcare providers are now in a different boat; their hands are tied because of the HHS Bulletin, and many hospitals have taken down all embedded video content from their websites—including video content aimed at the general public, rather than current patients—to avoid running afoul of HIPAA as interpreted in the HHS Bulletin.

CONCLUSION

As the above examples illustrate, the HHS Bulletin prohibits hospitals from maintaining website features that are crucial to the effective dissemination of well-tailored health information to the general public. Amici respectfully ask that the Court consider the critical technologies for disseminating reliable health information that are under threat and sustain Plaintiffs' challenge to the HHS Bulletin.

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CERTIFICATE OF SERVICE

I hereby certify that, on January 12, 2024, the foregoing was served electronically on all counsel of record via the Court's CM/ECF system.

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