

No. 26-1742

**United States Court of Appeals
for the Seventh Circuit**

ARNOLD STEIN and DIANE MILLER,
Plaintiffs-Appellees,

– v. –

EDWARD-ELMHURST HEALTH,
Defendant-Appellant.

Appeal from the U.S. District Court for the Northern District of
Illinois, No. 1:23-cv-14515, Judge Steven C. Seeger

**BRIEF OF *AMICI CURIAE* AMERICAN HOSPITAL ASSOCIATION
AND ILLINOIS HEALTH AND HOSPITAL ASSOCIATION IN
SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL**

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Appellate Court No: 26-1742

Short Caption: Stein et al. v. Edward-Elmhurst Health

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N/A

Attorney's Signature: /s/ Katherine E. Eayre Date: May 27, 2026

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INTEREST OF *AMICI CURIAE*

The American Hospital Association (“AHA”) represents nearly 5,000 hospitals, healthcare systems, and other healthcare organizations nationwide. Its members are committed to improving the health of the communities they serve, to safeguarding the privacy of their patients’ medical records, and to helping ensure that accurate and reliable health information is available to all Americans. The AHA educates its members on healthcare issues and advocates on their behalf, so that the perspectives of hospitals and health systems, along with the patients they serve, are considered in formulating health policy across the country.

Like the AHA, the Illinois Health and Hospital Association (“IHA”) is dedicated to advocating for more than 200 hospitals and nearly 40 health systems in Illinois. Along with its members—all located within the Seventh Circuit—the IHA works to ensure access to comprehensive, high-quality healthcare and information while protecting private health information.

The AHA, the IHA, and their members have a significant interest in this case. Hospitals and health systems take seriously their obligation to safeguard the privacy of their patients’ protected health information.

At the same time, the provision of accurate and reliable non-private health information is an essential component of promoting public health and wellness. To provide such information, *amici curiae*'s members rely on various online tools and technologies, including those analytics and communications tools at issue in this case. These common online tools—used by website operators of all types, including the federal government and even this Court—are now the target of thousands of groundless lawsuits against hospitals and other website operators nationwide, including more than 120 lawsuits within the Seventh Circuit alone. These claims, often pursued via barebones, copycat, or otherwise wholly inadequate allegations, threaten to impose crippling statutory damages against America's hospitals.

Amici curiae thus have a specific and significant interest in a decision from this Court reversing the District Court's holding with respect to the Electronic Communications Privacy Act. The U.S. Court of Appeals for the First Circuit recognized this interest in accepting an *amicus* brief from the AHA on these topics earlier this year. *See Order, Goulart, et al. v. Cape Cod Healthcare, Inc.*, No. 25-1672 (1st Cir. Jan. 20, 2026). The AHA and the IHA respectfully submit this brief to provide

important and relevant context about the purpose and use of these online tools by hospitals across the country in support of Defendant-Appellant Edward-Elmhurst Health (“Edward-Elmhurst”) and reversal. *See, e.g., Prairie Rivers Network v. Dynegy Midwest Gen., LLC*, 976 F.3d 761, 763 (7th Cir. 2020) (granting leave to file *amici curiae* briefs and describing ways in which friend-of-the-court briefs contribute to an appeal, including by offering a different analytical approach to the legal issues, highlighting factual or legal nuances, explaining broader regulatory or commercial context, and providing practical perspectives on consequences).¹

¹ Edward-Elmhurst is a member of the AHA and the IHA. No counsel for a party authored this brief in whole or in part, and no party or its counsel contributed money intended to fund the preparation or submission of this brief. Further, no person other than *amici curiae* or their counsel contributed money intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E). All parties consented to the filing of this brief. Fed. R. App. P. 29(a)(2).

INTRODUCTION

Hospitals and healthcare systems face widespread litigation challenging their use of common online tools. Across the country, plaintiffs are baselessly alleging violations of federal and state wiretap statutes and other privacy laws, apparently hoping that hospitals will simply pay up rather than defend their beneficial (and ordinary) uses of modern technology. Since 2022, nearly 300 such cases have been filed nationwide targeting the healthcare industry alone.²

These putative class actions pose a grave threat to America's hospitals. Despite the meritless nature of the claims, and even though many individual plaintiffs have suffered no actual damages, they seek statutory damages potentially amounting to hundreds of millions of dollars.³ Given this risk—along with mounting litigation and insurance

² See Digital Wiretapping Litigation Map, <https://www.fisherphillips.com/en/services/trending/us-privacy-hub/wiretapping-litigation-map.html> [<https://perma.cc/KYU5-7SYS>] (last accessed May 26, 2026); see also Defendant-Petitioner Edward-Elmhurst Health's Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b), at 1-2 (Mar. 13, 2026), in *In re Edward-Elmhurst Health*, No. 26-8004 (7th Cir.) (showing that “every major healthcare provider in Chicago has now been sued”).

³ See 18 U.S.C. § 2520(c)(2)(B) (providing for statutory damages of \$10,000 *per violation*).

costs and potential criminal penalties⁴—defendant hospitals and healthcare systems face significant pressure to settle. That pressure makes the certified question here especially important: whether the crime-tort exception under the Electronic Communications Privacy Act (“ECPA”) applies when a complaint alleges a lawful purpose, such as marketing or improving digital services, but does not plausibly allege that the defendant acted with a criminal or tortious purpose. This Court should hold that the crime-tort exception does not apply when a complaint alleges a lawful purpose.

To hold otherwise threatens to criminalize standard online tools used by nearly every industry. This includes healthcare providers across the country, federal government agencies, and even the United States Court of Appeals for the Seventh Circuit. As both the complaint and context make clear, the at-issue online technologies are widely used in the healthcare industry for critical, non-criminal and non-tortious objectives. These objectives include improving website functionality, disseminating accurate and reliable public health information, delivering

⁴ *See* 18 U.S.C. § 2511(4)(a) (providing for fines and imprisonment up to five years); 42 U.S.C. § 1320d-6(b) (providing for fines up to \$250,000 and imprisonment up to ten years).

high-quality and accessible health services, and ensuring community needs are met. Indeed, because the internet is a—if not the—primary source of healthcare information for many, the services these online tools deliver, including the effective operation of provider websites and an in-depth understanding of how provider sites are used, are critical to hospitals nationwide. Such aims benefit providers, patients, and the public at large; they are more-than apparent from the complaint and industry context; and they are certainly not criminal or tortious. Therefore, under the correct interpretation of the crime-tort exception, Plaintiffs have failed to plausibly allege that Edward-Elmhurst acted with the purpose of committing a crime or tort.

The District Court’s order should be reversed, and Plaintiffs’ ECPA claim should be dismissed.

ARGUMENT

I. Plaintiffs’ allegations reveal obvious alternative non-criminal, non-tortious explanations for Edward-Elmhurst’s use of the at-issue online technologies.

To state a claim based on the ECPA’s crime-tort exception, Plaintiffs must plausibly allege that Edward-Elmhurst intercepted a communication “for the purpose of committing any criminal or tortious

act in violation of the Constitution or laws of the United States or of any State.” 18 U.S.C. § 2511(2)(d). The District Court held that “the crime-tort exception applies” because “the complaint alleges that [Edward-Elmhurst] disclosed Plaintiffs’ health information to a third party in violation of 42 U.S.C. § 1320d-6(a)(3).” Short Appendix (“SA”) at 12. “That’s enough,” the District Court reasoned, because “the purpose must be to commit an act, and that act must be criminal or tortious.” SA 10-12. In so holding, the District Court considered and rejected “financial motivation” as a lawful purpose. SA 11-12. That holding is wrong as a matter of statutory interpretation, as Edward-Elmhurst has explained. *See* Appellant’s Opening Br. at 13-31. It also ignores that the complaint’s own allegations identify widespread and legitimate healthcare industry use of these same online technologies—uses that, as discussed below, serve critical non-criminal, non-tortious objectives benefitting providers, patients, and the public alike.

This Court has explained that, at the motion to dismiss stage, “[m]aking the plausibility determination is ‘a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.’” *McCauley v. City of Chi.*, 671 F.3d 611, 616 (7th Cir.

2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). If the allegations in a complaint raise no “more than a sheer possibility that a defendant has acted unlawfully,” the complaint “stops short of the line between possibility and plausibility of ‘entitlement to relief’” and must be dismissed. *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). That is true, for example, where there is an “obvious alternative explanation” for the defendant’s alleged conduct—*i.e.*, where the defendant’s actions are “entirely consistent with lawful conduct.” *McCauley*, 671 F.3d at 616, 619 (quoting *Twombly*, 550 U.S. at 567); *see also, e.g., id.* at 619 (affirming dismissal because plaintiff’s “factual allegations are entirely consistent with ... a lawful allocation of limited police resources”); *Wertymer v. Walmart, Inc.*, 142 F.4th 491, 503 (7th Cir. 2025) (affirming dismissal where the “complaint alleges that it is possible that Walmart sold honey labeled as ‘raw’ that was not, in fact, raw,” but “also readily supports a conclusion that Walmart’s honey was indeed raw and that [the plaintiff] received exactly what he paid for”).

Plaintiffs have not alleged—nor can they plausibly allege—that Edward-Elmhurst’s purpose in using tools like Meta Pixel, Facebook

CAPI, or Google Analytics on its website was to commit a crime or tort.⁵ Rather, obvious alternative explanations abound, as reflected by allegations in the complaint and confirmed by widespread industry use. Plaintiffs themselves repeatedly identify the explanations that matter for the certified question: Edward-Elmhurst allegedly used online tools “for marketing purposes” and “to increase its ability to market and retarget its Users.” Compl. ¶¶ 21, 29. Plaintiffs also allege that Facebook and Google “provide website owners analytics about the advertisements they have placed as well as tools to target people who have visited their web properties.” *Id.* ¶ 51. Those allegations describe a commercial or communications purpose, not a purpose to commit a separate crime or tort.

The District Court downplayed these allegations, reasoning that a financial motive cannot be a “get-out-of-liability-free card” because many crimes and torts are committed for money. SA 11-12. But that observation both ignores the pleadings and the statute. It is true that

⁵ Although the District Court focused on Meta Pixel and CAPI, the complaint broadly alleges that Edward-Elmhurst used “other tracking technologies,” including “the Google Analytics tools.” Appendix at 1-118 (Amended Class Action Complaint or “Compl.”) ¶¶ 76, 179.

some crimes and torts are financially motivated; it does not follow that every use of ordinary website tools plausibly has an “evil purpose[]” that is sufficient to invoke the ECPA’s crime-tort exception. *See By-Prod Corp. v. Armen-Berry Co.*, 668 F.2d 956, 960 (7th Cir. 1982). Plaintiffs have failed to plausibly plead the latter—*i.e.*, that Edward-Elmhurst used the challenged online tools for an unlawful purpose.

Nor does the complaint point to financial gain as Edward-Elmhurst’s sole non-criminal and non-tortious motivation. Other explanations are equally apparent on the face of the complaint, including: improving website functionality; disseminating accurate and reliable public health information; delivering high-quality and accessible health services; and ensuring community needs are met. In particular, as alleged in the complaint, online tools provide data on website traffic, allowing operators such as Edward-Elmhurst to “understand[] how Users utilize its Web Properties” and to respond accordingly with optimized web pages that are responsive to users’ needs. *See* Compl. ¶¶ 6, 13, 18, 51, 119, 137, 281; *see also id.*, Ex. A at 1 (“This information is used for system management and to improve the content and navigation of the site.”).

These objectives certainly are not criminal or tortious. Nor are they even wholly commercial, given the context. Remember, Edward-Elmhurst is a hospital system that “provides all manner of primary, specialty and multi-disciplinary care at over 64 locations throughout Illinois.” *Id.* ¶ 44. It also provides timely and credible health news to the public, including offering “approximately 220 links to pages with information on specific conditions, treatments, and services.” *Id.* ¶ 119. And it endeavors, above all, to “keep[] our community healthy” by delivering “community-connected care that meets the needs of every patient.” *See id.* ¶ 6 (incorporating Edward-Elmhurst’s website).⁶ Thus, as alleged on the face of the complaint, Edward-Elmhurst relies on the at-issue technologies to achieve important non-criminal and non-tortious objectives.

As such, under the correct interpretation of the crime-tort exception, Edward-Elmhurst’s actions are “entirely consistent with lawful conduct,” *McCauley*, 671 F.3d at 619, and Plaintiffs have failed to plead their way

⁶ Edward-Elmhurst Health, “Healthy Driven Community,” <https://web.archive.org/web/20230306142303/https://www.eehealth.org/community/> [<https://perma.cc/2Z37-G44E>] (archived on Mar. 6, 2023; last accessed May 22, 2026).

around the ECPA's one-party consent rule. The crime-tort exception should not apply to the use of online technologies that serve such important non-criminal, non-tortious purposes as alleged in the complaint.

II. Industry context confirms that the at-issue online tools serve critical non-criminal, non-tortious objectives.

The District Court's interpretation of the crime-tort exception to the ECPA threatens to criminalize widespread, beneficial use of the at-issue online technologies across all industries. *See supra* n.4; *Prairie Rivers Network*, 976 F.3d at 763 (noting *amicus* can assist the court by “[e]xplaining the broader regulatory or commercial context in which a question comes to the court” and “[p]roviding practical perspectives on the consequences of potential outcomes”); *see also FDIC v. Chi. Title Ins. Co.*, 12 F.4th 676, 684 (7th Cir. 2021) (explaining that courts “may also consider the ‘effects and consequence’ of the interpretation of the statute” (citation omitted)); *Bd. of Trade v. SEC*, 923 F.2d 1270, 1272-73 (7th Cir. 1991) (rejecting petitioners’ interpretation of a statute where the “consequence” of that reading “would be to destroy the system” being regulated).

A. Use of the at-issue online tools for non-criminal, non-tortious reasons is ubiquitous across industries with public-facing websites.

Edward-Elmhurst is far from alone in its use of online technologies, both in the healthcare industry and more broadly. The scale of related litigation underscores the point: similar lawsuits filed to date now total more than 4,600 overall, with nearly 300 in the healthcare industry in particular. *See supra* 4 & n.2; *see also* Compl. ¶ 50 (Edward-Elmhurst’s website is among the “many hospitals’, telehealth companies’ and other healthcare providers’ websites” that have used these technologies). Indeed, the use of online third-party technologies, in one form or another, is ubiquitous across every industry with public-facing websites.⁷ One recent report found that “[m]ore than nine-in-ten web pages include one or more third parties”—specifically, more than 90% of 16 million websites

⁷ Even Plaintiffs’ counsel acknowledges such use on their own website. *See* Almeida Law Group, “Privacy Policy,” <https://www.almeidalawgroup.com/privacy-policy-and-legal-notice/> [<https://perma.cc/N4TA-QVPA>] (last accessed May 22, 2026) (explaining that “[w]e use analytics and measurement tools to understand how visitors interact with the Website and to evaluate Website performance” and that “[a]nalytics services may be provided by third-party vendors including, but not limited to, Google, and may operate through cookies, tags, pixels or similar technologies”).

analyzed in July 2025.⁸ Many websites use third-party domains for analytics and communications, with google-analytics.com included on 50% of web pages, and Meta’s facebook.com included on 21%.⁹

This trend is not limited to private healthcare organizations, either. Throughout the relevant time period in this case, the federal government has used the same types of online technologies as Edward-Elmhurst across its many government websites, including on web pages operated by agencies that are themselves healthcare providers or other covered entities under the Health Insurance Portability and Accountability Act (“HIPAA”). *Amicus* AHA pointed out as much in its successful lawsuit against the U.S. Department of Health and Human Services (“HHS”),

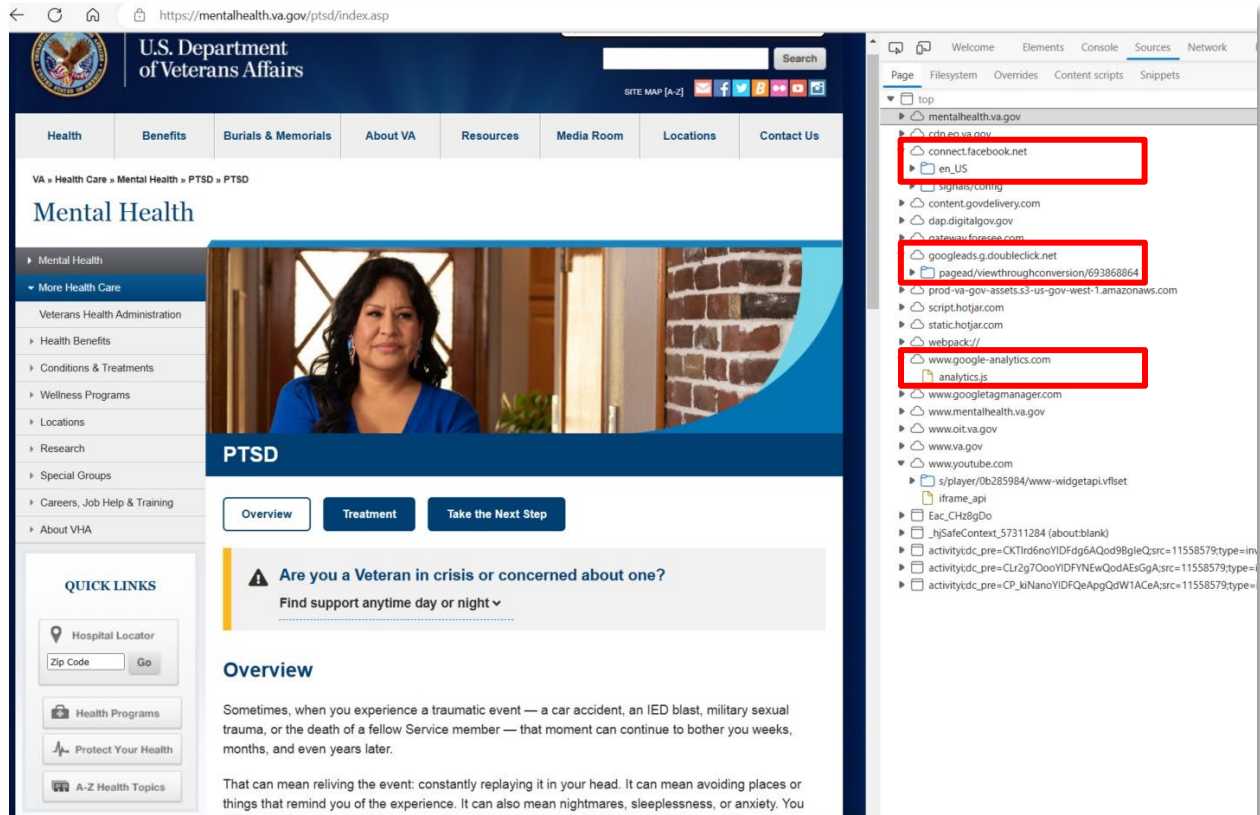
⁸ HTTP Archive, 2025 Web Almanac, “Third Parties” (Jan. 17, 2026), <https://almanac.httparchive.org/en/2025/third-parties> [<https://perma.cc/A6C4-JFAM>]; *id.*, “Methodology,” <https://almanac.httparchive.org/en/2025/methodology> [<https://perma.cc/FGC2-H8NJ>] (last accessed May 22, 2026).

⁹ 2025 Web Almanac, “Third Parties,” *supra* n.8; *see also* Office of Management and Budget Memorandum M-10-22, “Guidance for Online Use of Web Measurement and Customization Technologies” 1 (June 25, 2010), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/memoranda_2010/m10-22.pdf [<https://perma.cc/82VZ-ZUSP>] (“In the private sector, it has become standard for commercial websites to use web measurement and customization technologies to engage with members of the public.”).

which challenged and vacated HHS’s December 2022 guidance that improperly attempted to restrict the use of third-party technologies on healthcare provider websites.¹⁰ Web browser and inspection source tools revealed that the same types of third-party tools allegedly used by Edward-Elmhurst here were present on multiple federal covered entity websites, including on Veterans Health Administration (“VHA”) web pages describing specific health conditions or symptoms. One of many possible examples—excerpted below—is the VHA’s web page titled “Mental Health,” describing the symptoms of post-traumatic stress disorder and pointing veterans to treatment resources. That website used a Facebook pixel, a Google advertising cookie, and Google Analytics trackers:¹¹

¹⁰ *See Am. Hosp. Ass’n v. Becerra*, No. 4:23-cv-01110 (N.D. Tex.), ECF No. 1 (Complaint, dated Nov. 2, 2023), ¶¶ 9-11 (detailing various federal covered entity websites using Google Analytics and Meta Pixel, including the Veterans Health Administration, the Centers for Medicare and Medicaid Services’ Medicare.gov website, and the Department of Defense’s Military Health System web pages discussing specific health conditions and providers); *see also Am. Hosp. Ass’n v. Becerra*, 738 F. Supp. 3d 780 (N.D. Tex. 2024) (vacating HHS guidance).

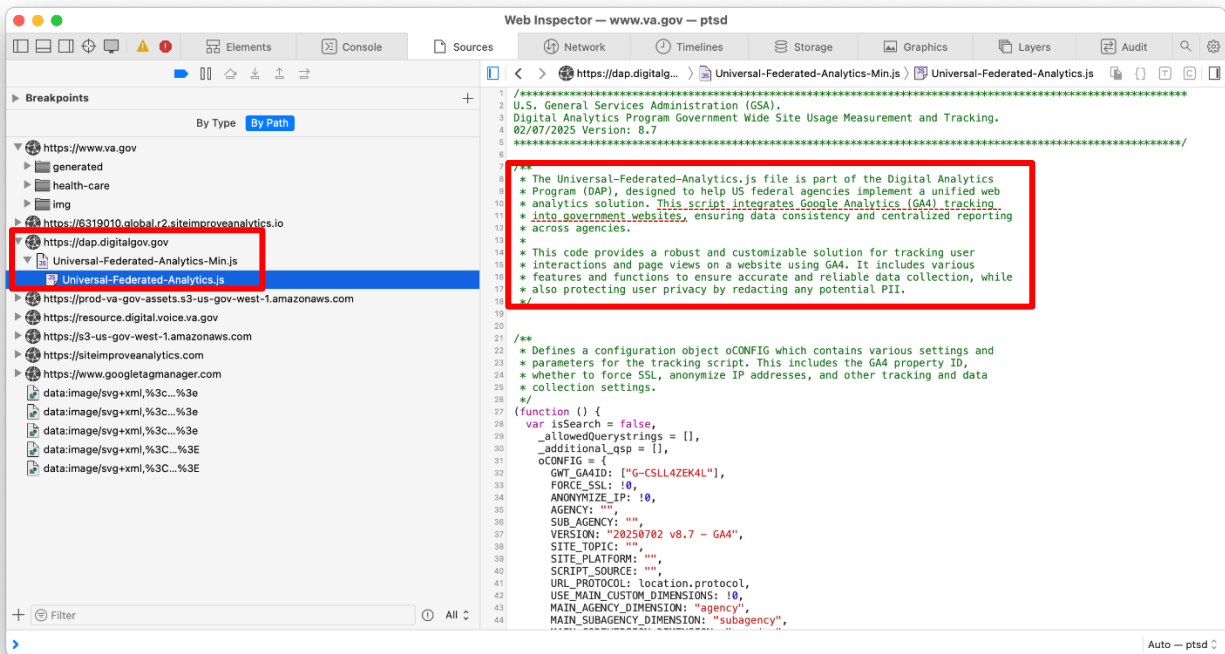
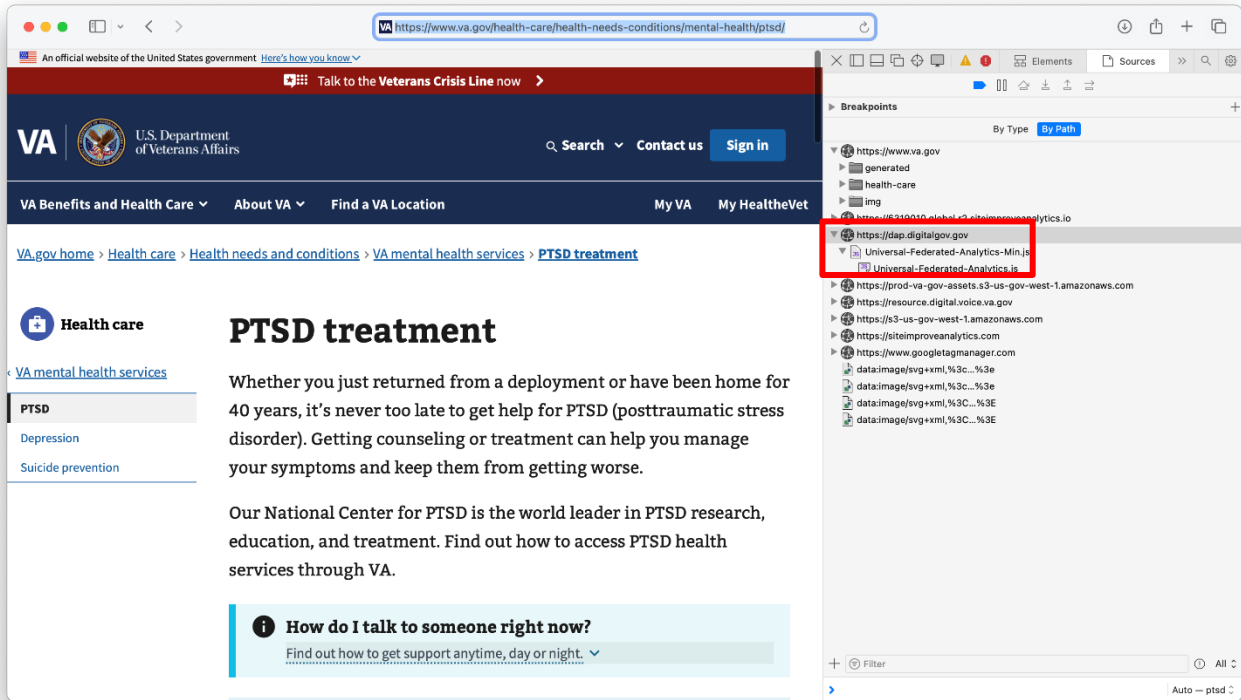
¹¹ AHA Complaint, *supra* n.10, ¶ 9 (screenshot of Department of Veterans Affairs, “Mental Health,” mentalhealth.va.gov/ptsd/index.asp (last visited Oct. 31, 2023) (red boxes added for emphasis)); *see also Cause*



VHA still uses these technologies on its website today, with upgrades to the web pages and tools used—including a script that expressly states that it “integrates Google Analytics (GA4) tracking into government websites”:¹²

of Action v. Chi. Transit Auth., 815 F.3d 267, 277 n.13 (7th Cir. 2016) (taking judicial notice of information on government website).

¹² Department of Veterans Affairs, “PTSD Treatment,” <https://www.va.gov/health-care/health-needs-conditions/mental-health/ptsd/> (last accessed May 13, 2026) (red boxes and underlining added for emphasis).



So, too, do many other federal HIPAA-covered entity web pages, such as: the National Institutes of Health Clinical Center page listing doctors and

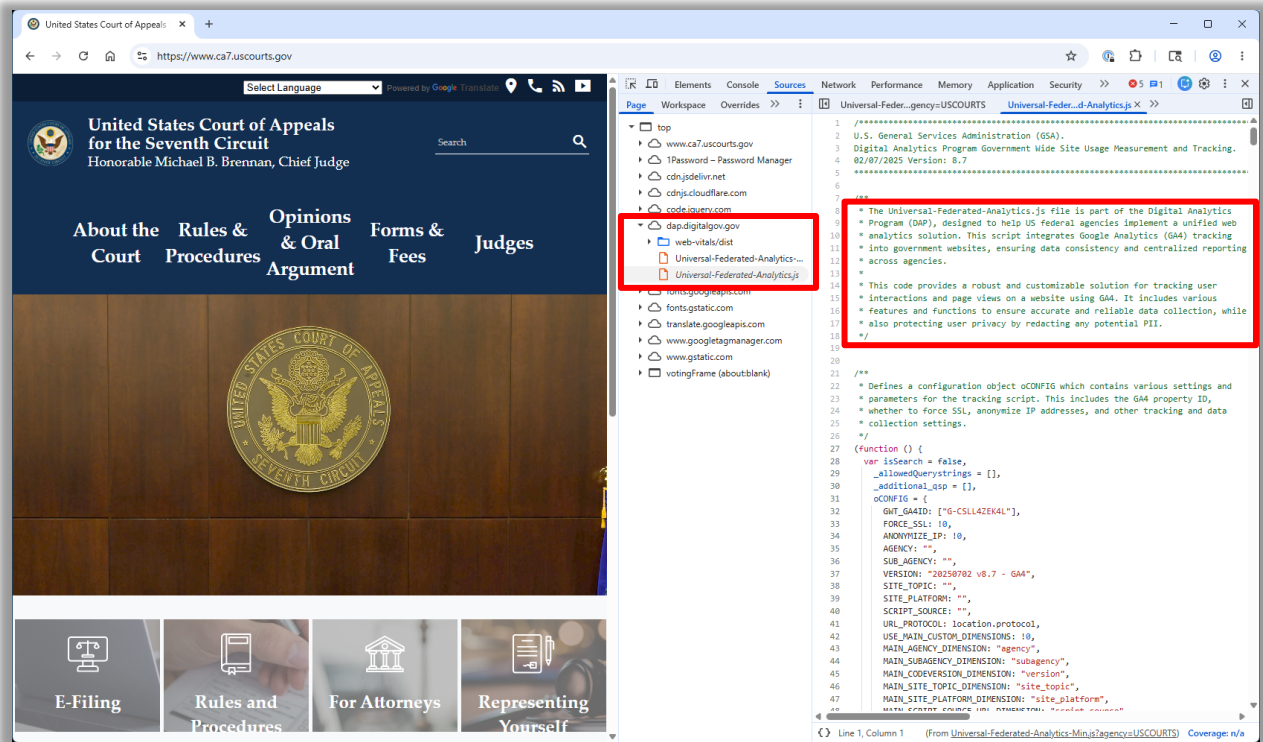
their specialties;¹³ the Office of Personnel Management’s Federal Employees Health Benefits Program page providing health plan information for each state;¹⁴ and the Centers for Medicare and Medicaid Services’ page concerning end-stage renal disease.¹⁵ The same is even true for this Court’s website, which likewise deploys Google Analytics online technologies “for tracking user interactions and page views”:¹⁶

¹³ National Institutes of Health Clinical Center, “Meet Our Doctors,” <https://www.cc.nih.gov/meet-our-doctors> (last accessed May 13, 2026) (using “Universal-Federated-Analytics.js” script integrating Google Analytics).

¹⁴ Office of Personnel Management, Federal Employees Health Benefits Program, “FEHB Plan Information for 2026,” <https://www.opm.gov/healthcare-insurance/healthcare/plan-information/plans/> (last accessed May 13, 2026) (using “Universal-Federated-Analytics.js” script integrating Google Analytics).

¹⁵ Centers for Medicare and Medicaid Services, “End-Stage Renal Disease,” <https://www.medicare.gov/basics/end-stage-renal-disease> (last accessed May 13, 2026) (using “Universal-Federated-Analytics.js” script integrating Google Analytics).

¹⁶ U.S. Court of Appeals for the Seventh Circuit, <https://www.ca7.uscourts.gov/> (last accessed May 20, 2026) (red boxes added for emphasis).



In fact, the federal government now *mandates* that analytics tracking technologies be deployed on *all* public-facing agency websites through the General Service Administration’s (“GSA”) Digital Analytics Program (“DAP”).¹⁷ This includes “sites that are primarily intended for

¹⁷ Office of Management and Budget Memorandum M-23-22, “Delivering a Digital-First Public Experience” 16 (Sept. 22, 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/09/M-23-22-Delivering-a-Digital-First-Public-Experience.pdf> [<https://perma.cc/M4RZ-VEPV>]; see also GSA, Understanding the Digital Analytics Program, “Overview,” <https://digital.gov/guides/dap#content-start> [<https://perma.cc/SUK4-PWRT>] (last accessed May 22, 2026) (“DAP uses Google Analytics 360 to measure traffic and engagement across thousands of federal government websites and apps, reporting analytics

public users,” as well as “sign-in pages that serve as the entry point to authenticated content.”¹⁸ The reasoning and non-criminal, non-tortious objectives of using the online tools are plain: Just like Edward-Elmhurst and healthcare providers across the country, “[a]ll federal agencies can use DAP to better understand user behavior and improve their public-facing websites and digital services, which will make it easier for the public to access the information and services that they count on each and every day.”¹⁹

Notably, the government uses the at-issue technologies to collect and analyze these data about website visits and use, making the data available to the public through a dashboard at analytics.usa.gov that shows “how the public interacts with federal websites.”²⁰ For example, the dashboard for the Department of Veterans Affairs website shows the

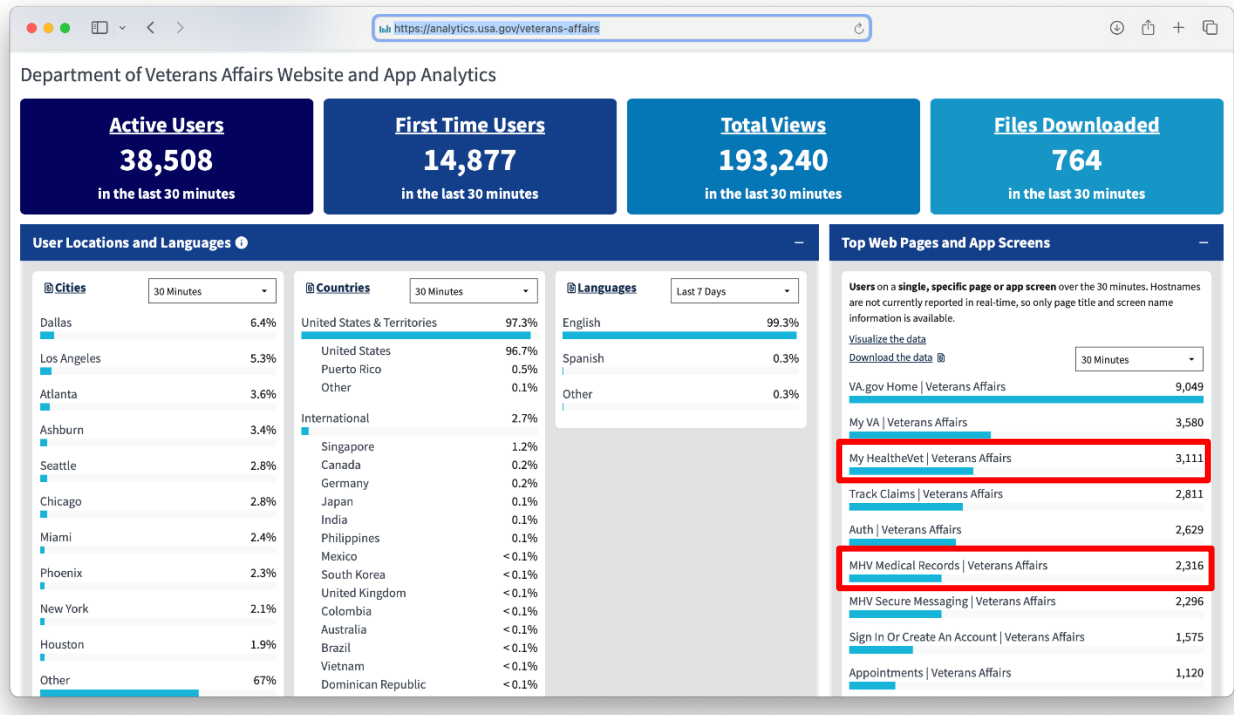
under a single federal-wide shared account. Google Analytics 360 is the paid, enterprise version of Google Analytics 4 (GA4).”).

¹⁸ GSA, Understanding the Digital Analytics Program, “Get Started with DAP,” <https://digital.gov/guides/dap/get-started-with-dap#content-start> [<https://perma.cc/R5ST-5QKH>] (last accessed May 22, 2026).

¹⁹ Understanding the Digital Analytics Program, “Overview,” *supra* n.17.

²⁰ Understanding the Digital Analytics Program, “Get Started with DAP,” *supra* n.18.

number of active users, their locations and languages, and the top pages visited and files downloaded for a given period:²¹



This dashboard reveals, as highlighted in the red boxes above, that the government is using the at-issue website analytics tools to capture the frequency with which users visited “My HealthVet”—VA.gov’s portal for veterans to “manage their health care”²²—as well as “MHV Medical

²¹ Department of Veterans Affairs Website and App Analytics, <https://analytics.usa.gov/veterans-affairs> (last accessed May 13, 2026) (red boxes added for emphasis); *see also id.*, [<https://perma.cc/F2BG-KGZ8>] (last accessed May 22, 2026).

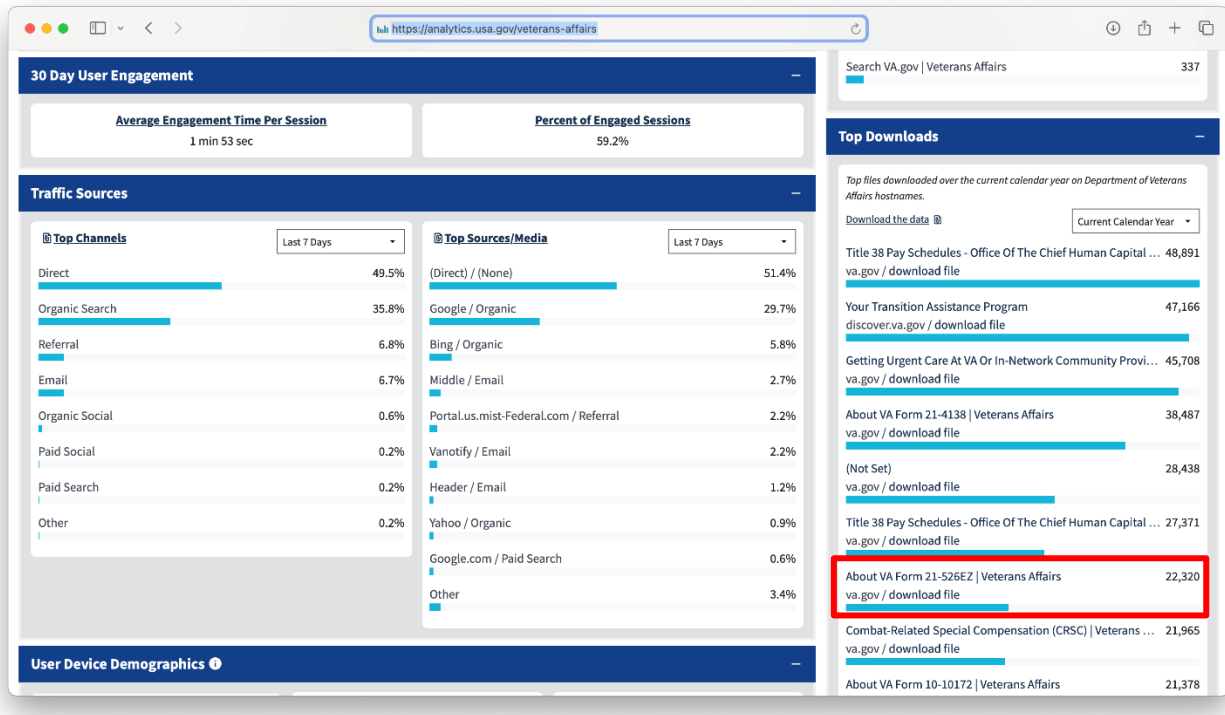
²² Department of Veterans Affairs, “My HealthVet on VA.gov: What to Know,” <https://www.va.gov/resources/my-healthvet-on-vagov->

Records”—a page within the My HealtheVet portal allowing users to “find, review, print, and download each part of your VA medical records.”²³ It also shows that the government is using these tools to capture one of the top downloads as “VA Form 21-526EZ”—the form “to apply for VA disability compensation (pay) and related benefits” for “an illness or injury that was caused by ... active military service”:²⁴

what-to-know/ [<https://perma.cc/CLP2-AAUH>] (last accessed May 22, 2026).

²³ Department of Veterans Affairs, “Review Medical Records Online,” <https://www.va.gov/health-care/review-medical-records/> [<https://perma.cc/DK4V-HMFA>] (last accessed May 22, 2026).

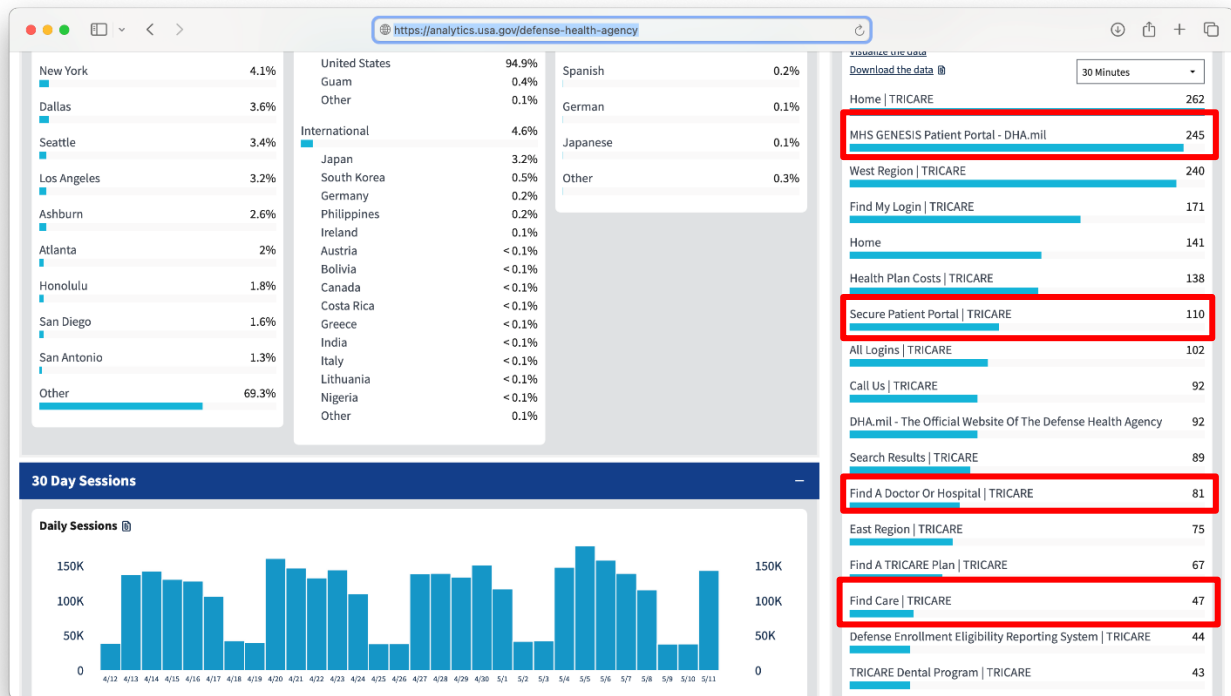
²⁴ Department of Veterans Affairs Website and App Analytics, *supra* n.21 (red box added for emphasis); Department of Veterans Affairs, “VA Form 21-526EZ,” <https://www.va.gov/forms/21-526ez/> [<https://perma.cc/BZ3Y-KSGV>] (last accessed May 22, 2026).



Through the government’s use of these digital analytics tools across more than 500 federal government domains, similar data are available for the U.S. Department of Defense’s Defense Health Agency—the entity that operates TRICARE, the uniformed services healthcare program for active duty service members and their families.²⁵ These tools record visitors to, among other healthcare provider websites, the government’s “MHS GENESIS Patient Portal – DHA.mil,” the “Secure Patient Portal

²⁵ Defense Health Agency, “About the Agency,” <https://dha.mil/About-DHA> [<https://perma.cc/L3B7-BAZ4>] (last accessed May 22, 2026); Defense Health Agency, TRICARE, “Plans,” <https://tricare.mil/Plans/New> [<https://perma.cc/QB2U-N2S2>] (last accessed May 22, 2026).

| TRICARE,” as well as TRICARE’s “Find A Doctor Or Hospital” and “Find Care” web pages, as indicated in the red boxes below:²⁶



Many other examples exist of the government’s deployment and use of the same types of online technologies across its websites.²⁷ These examples demonstrate not only the specific types of web pages deploying

²⁶ Defense Health Agency Website and App Analytics, <https://analytics.usa.gov/defense-health-agency> (last accessed May 13, 2026) (red boxes added for emphasis); *see also id.*, [<https://perma.cc/RV6Y-XXXT>] (last accessed May 22, 2026).

²⁷ U.S. Federal Government Website and App Analytics, <https://analytics.usa.gov> [<https://perma.cc/RNV9-K2NH>] (last accessed May 22, 2026) (identifying close to 100 federal agencies and subagencies using Google Analytics to monitor website use as part of the DAP).

the common online technologies at issue in this case—including many federal government healthcare provider sites and online provider portals—but also the non-criminal, non-tortious ways these website operators, including this Court, the federal government, and its providers or other HIPAA-covered entities, are using these tools and resulting data to “understand how people find, access, and use [] services online.”²⁸

B. Healthcare providers rely on online tools for the same non-criminal, non-tortious reasons as Edward-Elmhurst.

These tools are so commonly used, particularly in the healthcare space, for the same good reasons that Edward-Elmhurst, the federal government, this Court, and other website operators use the tools. Hospitals and health systems endeavor to provide their patients and the public with access to high-quality healthcare services, as well as reliable and accurate healthcare information.²⁹ Much of this good work now

²⁸ U.S. Federal Government Website and App Analytics, “About,” <https://analytics.usa.gov/about> [<https://perma.cc/WV73-QJV6>] (last accessed May 22, 2026) (“The data come from a unified Google Analytics account for U.S. federal government agencies known as the Digital Analytics Program. This program helps government agencies understand how people find, access, and use government services online.”).

²⁹ See Office for Civil Rights, “Understanding Some of HIPAA’s Permitted Uses and Disclosures” (Feb. 12, 2016), <https://www.hhs.gov/hipaa/for->

occurs online. In recent years, the most frequently used vehicle for obtaining healthcare information is the internet. According to a March 2023 report by the National Quality Forum, “[a]pproximately 74 percent of surveyed Americans use search engines to start their patient journey.”³⁰ But oftentimes online health information “can be disconcerting, confusing, and even misleading.”³¹ Since “[m]isinformation ... thrives in the absence of easily accessible, credible information,” the former U.S. Surgeon General has urged healthcare providers, as “highly trusted” sources, to “[u]se technology and media platforms to share accurate health information with the public.”³² In the

[professionals/privacy/guidance/permitted-uses/index.html](https://perma.cc/WA6S-LZW8) [<https://perma.cc/WA6S-LZW8>] (“Information is essential fuel for the engine of health care. ... The capability for relevant players in the health care system—including the patient—to be able to quickly and easily access needed information to make decisions, and to provide the right care at the right time, is fundamental to achieving the goals of health reform.”).

³⁰ National Quality Forum, Issue Brief, “Improving the Accessibility of High Quality Online Health Information” 1 (Mar. 14, 2023),

<https://digitalassets.jointcommission.org/api/public/content/3d1292b3b3274af2a30a37f9ed77d6c1?v=79f44b77> [<https://perma.cc/E5VY-6LND>].

³¹ *Id.*

³² Vivek H. Murthy, “Confronting Health Misinformation: The U.S. Surgeon General’s Advisory on Building A Healthy Information Environment” 5, 10 (2021),

same vein, the National Quality Forum has maintained that “[t]o improve health outcomes, health sources have a responsibility to ... actively shar[e] high quality health information in ways that build engagement and develop personal health literacy.”³³

Hospitals and health systems take this responsibility very seriously, and they rely on the at-issue online technologies to do so. Just like Edward-Elmhurst, healthcare providers use analytics and communications tools to disseminate accurate public health information—thereby combating misinformation—and to achieve related non-criminal, non-tortious objectives, including:

Improving website functionality. “If a website is not usable—if its features or design irritates, confuses, or frustrates users in their quest to perform desired operations—many users will simply access another site

<https://www.hhs.gov/sites/default/files/surgeon-general-misinformation-advisory.pdf> [<https://perma.cc/4S76-67AR>]; *see also id.* at 2 (“Health misinformation is a serious threat to public health. It can cause confusion, sow mistrust, harm people’s health, and undermine public health efforts.”).

³³ National Quality Forum, Issue Brief, *supra* n.30, at 10.

that better meets their needs.”³⁴ To avoid inadvertently turning away individuals seeking healthcare or health-related information, providers continuously aim to improve the functionality of their websites by using analytics tools.³⁵ Such tools convert users’ interactions with web pages into critical data, including showing how much time users spend on particular pages, their navigation flow paths between pages, and the bounce rates (*i.e.*, the ratio of users who exit without visiting a second page).³⁶ This information can reveal areas where users found the content clear and engaging, or conversely, where they found it difficult to navigate and confusing. Healthcare providers can then take necessary

³⁴ James J. Cappel & Zhenyu Huang, *Journal of Computer Information Systems*, “A Usability Analysis of Company Websites” 117 (Fall 2007).

³⁵ *See, e.g.*, National Institutes of Health Clinical Center, “Privacy and Disclaimer Policy,” <https://www.cc.nih.gov/disclaimers#Privacy> [<https://perma.cc/PC8Z-W6CE>] (last accessed May 22, 2026) (“The NIH Clinical Center uses certain information from visitors to its website to improve the online services we provide.”); *see also* Office of Management and Budget Memorandum M-23-22, *supra* n.17, at 16 (instructing agencies to “enhance the functionality of their websites and digital services through data-driven decision-making,” including “using web analytics to understand user flows and behavior” and “optimizing web pages and content for performance”).

³⁶ Patrick Cheong-Iao Pang et al., *Informatics*, “A Method for Analyzing Navigation Flows of Health Website Users Seeking Complex Health Information with Google Analytics” 2, 5, 11 (Oct. 20, 2023).

actions to improve the usability of their websites and optimize their online presence—all with the aim of providing accessible healthcare services and information.

Ensuring community needs are met. Analytics tools also provide key data about user demographics and the types and frequency of web pages visited.³⁷ This information can show the level and concentrations of public concern on specific health questions (*e.g.*, how many users in a particular geographic area viewed information about measles, or hypertension, or dementia, or addiction treatments, and so on). Using these data, hospitals and health systems can more effectively allocate their scarce resources to ensure community needs are met, both virtually and in person.³⁸ This includes, for example, providing additional online content to address users' questions, or providing additional staffing to

³⁷ *Id.* 2-3.

³⁸ *See, e.g.*, Department of Veterans Affairs, “Privacy, Policies, and Legal Information,” <https://www.va.gov/privacy-policy/> [<https://perma.cc/6M4U-TX7Q>] (last accessed May 22, 2026) (using data “to learn about how locations on our site are being used” and “what information is of most and least interest” in order to “make VA.gov sites more useful to visitors”).

deliver high-quality treatment and care in a particular geographic area or practice.

Delivering accessible health services. Relatedly, analytics and communications tools offer valuable insights into the effectiveness of outreach efforts to underserved members of the community, including through social media. Such data allow healthcare providers to understand the types of information sought by and demographics of individuals who engage with health information through various different channels.³⁹ In addition, these online tools can provide translation technologies that help non-English speakers access vital healthcare information on hospitals' web pages. Using these technologies, providers can tailor future communications with the goal of delivering accessible healthcare services and information to all community members.⁴⁰

³⁹ See Office of Management and Budget Memorandum M-23-22, *supra* n.17, at 24 (urging agencies to “determine the channels that are most appropriate for the intended customer or user group(s), considering the accessibility, language, and technology needs of that audience”).

⁴⁰ See, e.g., Endeavor Health, “Privacy Statement,” <https://www.endeavorhealth.org/privacy-statement> [<https://perma.cc/G35J-75QR>] (last accessed May 26, 2026) (explaining

In short, online technologies allow hospitals and health systems across the country, including federal government providers and Edward-Elmhurst, among others, to achieve numerous non-criminal, non-tortious objectives. This is readily apparent from the complaint, confirmed by industry context, and directly relevant to the certified question for appeal. The complaint's allegations of marketing, analytics, and financial benefit do not plausibly allege that Edward-Elmhurst acted with the purpose of committing a crime or tort. Rather, they allege the kind of ordinary website and public-outreach purposes that are "entirely consistent with lawful conduct." *McCauley*, 671 F.3d at 619. This Court should hold that the crime-tort exception does not apply when a complaint alleges such lawful purposes, and reverse the District Court's order denying Edward-Elmhurst's motion to dismiss Plaintiffs' ECPA claim.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully ask this Court to reverse the decision of the District Court and dismiss Plaintiffs' ECPA claim.

use of data to "identify popular features" and "share content specific to your use of the Endeavor Health Services").

Dated: May 27, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5); the type-style requirements of Fed. R. App. P. 32(a)(6); and the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7) because it is proportionally spaced, has a typeface of 14-point Century font, and contains 5,075 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

Dated: May 27, 2026

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document on the Court's CM/ECF system, which will send a notification of such filing to counsel of record for all parties in this case.

Dated: May 27, 2026

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