

No. 23-35584

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

NICOLAS MCCARTHY, ET AL.,  
*Plaintiffs-Appellants,*

v.

AMAZON.COM, INC.,  
*Defendant-Appellee.*

On Appeal from the United States District Court for the  
Western District of Washington  
No. 23-cv-0363-JLR  
The Honorable James Louis Robart, District Court Judge

**BRIEF OF THE ELECTRONIC PRIVACY INFORMATION  
CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-  
APPELLANT AND REVERSAL**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1, *amicus curiae* the Electronic Privacy Information Center states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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## INTEREST OF THE *AMICUS CURIAE*

The Electronic Privacy Information Center (“EPIC”) is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging privacy and civil liberties issues.<sup>1</sup>

EPIC regularly participates as *amicus* in this Court and other courts in cases concerning privacy rights and harmful data practices. EPIC also regularly advocates for meaningful government oversight of abusive, exploitative, invasive, and discriminatory data collection systems, algorithms, and platform design decisions.

EPIC is interested in this case because of the organization’s concern that, through unchecked commercial surveillance and manipulative design practices, e-commerce companies like Amazon can exacerbate some of the most egregious forms of online harm. EPIC previously filed *amicus* briefs on internet liability and online harms in *Moody v. NetChoice, LLC* (No. 22-277) (U.S.); *NetChoice, LLC, v. Paxton* (No. 22-555) (U.S.); *In re Casino-Style Games Litigation* (Nos. 22-16914,

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<sup>1</sup> Both parties consent to the filing of this brief. In accordance with Rule 29, the undersigned states that no party or party’s counsel authored this brief in whole or in part nor contributed money intended to fund the preparation of this brief. No outside person contributed money intended to fund the preparation of this brief.

22-16916, 22-16888, 22-16889, 22-16921, 22-16923) (9th Cir.); *Bride v. Yolo Technologies, Inc.* (No. 23-55134) (9th Cir.); *NetChoice v. Bonta* (No. 22-cv-08861) (N.D. Cal.); *Gonzalez et al. v. Google*, 598 U.S. 617 (2023); and *Herrick v. Grindr, LLC*, 765 F. App'x 586 (2d Cir. 2019).



## SUMMARY OF THE ARGUMENT

In the Ninth Circuit and beyond, product liability law has developed to identify the “cheapest cost avoider” of product harms, which may not always be the product manufacturer. *See Air & Liquid Systems Corp. v. DeVries*, 139 S. Ct. 986, 994 (2019) (citing Guido Calabresi, *The Costs of Accidents* 311–18 (1970)); *State Farm Fire & Casualty Co. v. Amazon.com, Inc.*, 407 F. Supp. 3d 848, 851 (D. Ariz. 2019) *aff’d* 835 F. App’x 213, 216 (9th Cir. 2020); Catherine M. Sharkey, *Products Liability in the Digital Age: Online Platforms as “Cheapest Cost Avoiders”*, 73 *Hastings L. J.* 1327, 1337–46 (2022) (surveying courts applying the cheapest cost avoider framework). To determine the cheapest cost avoider, courts identify the entity with sufficient knowledge of and control over relevant product risks to cost-effectively prevent product harms, either directly or by influencing others’ behavior. *Id.*; *see also* Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 *U. Chi. L. Rev.* 69, 84 (1975). Through its own data practices, design decisions, and product safety standards, Amazon is the cheapest cost avoider of Plaintiffs-Appellants’ deaths.

Amazon knows a lot about its users: who they are, where they are coming from, what they are interested in, and how to influence them. In fact, it collects and analyzes large swaths of consumer data every day to profile users, influence purchasing behavior, and recommend products. *Amazon.com Privacy Notice*, Amazon (Aug. 11, 2023).<sup>2</sup> These data points include users' age, location, purchasing history, and “clickstream data”—data tracing what websites a user has visited, what pages they viewed, and where they clicked next. *Id.* And while Amazon predominantly uses its invasive data practices to target advertisements and induce purchasing behavior, these practices also provide Amazon with uniquely granular knowledge of who purchases unsafe products like reagent-grade Sodium Nitrite on the Amazon Marketplace and from what sites they visit.

Amazon is adept at nudging user behavior in ways it desires. Amazon uses manipulative design techniques and targeted recommendations to induce user purchasing behavior. *See Spandana Singh, Why Am I Seeing This? Case Study: Amazon*, *New Am.* (Mar. 25,

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<sup>2</sup>

<https://www.amazon.com/gp/help/customer/display.html?nodeId=GX7NJQ4ZB8MHFRNJ>.

2020).<sup>3</sup> These nudging design practices are often called “dark patterns” by the Federal Trade Commission, Fed. Trade Comm’n, *Bringing Dark Patterns to Light* 3 (2022);<sup>4</sup> Darko Stankovic, *How Amazon Uses Dark Patterns to Manipulate User Behavior*, Medium (Feb. 15, 2023).<sup>5</sup> Amazon has often used such design practices to nudge users to purchase unsafe products or product combinations, but Amazon could use the same tools to induce safer user behaviors around unsafe products like Sodium Nitrite.

Amazon can control what products appear on its marketplace and how those products are presented to users. In fact, Amazon has regularly enforced its product safety standards to alter and remove thousands of product listings for weapons and other products containing dangerous chemicals. *See, e.g.,* Alexandra Berzon et al., *Amazon Has Ceded Control of Its Site. The Result: Thousands of Banned, Unsafe or*

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<sup>3</sup> <https://www.newamerica.org/oti/reports/why-am-i-seeing-this/case-study-amazon/>.

<sup>4</sup> <https://www.ftc.gov/reports/bringing-dark-patterns-light>.

<sup>5</sup> <https://bootcamp.uxdesign.cc/how-amazon-uses-dark-patterns-to-manipulate-user-behavior-5bb6e2c99b7>.

*Mislabeled Products*, Wall St. J. (Aug. 23, 2019).<sup>6</sup> Amazon’s ability to quickly remove thousands of potentially harmful product listings underscores its overarching control over the products it permits on its e-commerce store: because Amazon fully controls the means by which users purchase and receive unsafe products like reagent-grade Sodium Nitrite, it can—and has—cost-effectively prevented harm by altering or removing unsafe product listings from its marketplace.

Because Amazon (1) has unique and intimate knowledge of its users and which sites they visit, (2) employs extensive and manipulative design features to induce and modify user behavior, and (3) regularly controls the accessibility of dangerous products on its site by altering and removing product listings once it learns of product risks, Amazon serves as the cheapest cost avoider of Plaintiffs-Appellants injuries and the decision below should be reversed.

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<sup>6</sup> <https://www.wsj.com/articles/amazon-has-ceded-control-of-its-site-the-result-thousands-of-banned-unsafe-or-mislabeled-products-11566564990>.

## ARGUMENT

### I. **AMAZON HAS UNIQUE AND INTIMATE KNOWLEDGE OF ITS USERS, WHICH IT EMPLOYS TO INDUCE USER PURCHASING BEHAVIOR.**

Amazon has substantial knowledge of and control over nearly everything that happens on the Amazon Marketplace. Granular knowledge of user behavior and product details is the core of Amazon's business. Amazon collects information about its users as they use its marketplace to predict their behavior. One such type of information collected called "clickstream data" captures intimate user details, including which websites led users to certain Amazon product pages. Amazon uses this information to construct robust user profiles that illustrate the extent of Amazon's knowledge about its users. Amazon then exploits those user profiles to manipulate the products they see and to influence what they buy. Some companies achieved success by applying the internet's efficiency-enhancing properties to online marketplaces; Amazon has achieved *dominance* by ruthlessly exploiting the internet's surveillance capabilities.

## **A. Amazon Collects Granular and Revealing Personal Information about Its Users.**

Amazon collects vast amounts of data about users as they interact with its services and other services across the web. Amazon uses this information to construct user profiles that reveal characteristics about a user that Amazon can then exploit to induce product purchases.

Amazon's privacy policy demonstrates the staggering breadth of information the company collects about its users. Amazon uses multiple systems to record nearly every action its users take: what they search for, who their contacts are, what they watch, what their product reviews say, when they set a reminder about a special life occasion, and more. *Amazon.com Privacy Notice, supra.*<sup>7</sup> From these data points, Amazon derives insights about its users that far exceeds just their purchasing

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<https://www.amazon.com/gp/help/customer/display.html?nodeId=GX7NJQ4ZB8MHFRNJ> (last visited Dec. 12, 2023).

behaviors. *Id.* Amazon's Privacy Notice demonstrates this breadth:

You provide information to us when you:

- search or shop for products or services in our stores;
- add or remove an item from your cart, or place an order through or use Amazon Services;
- download, stream, view, or use content on a device or through a service or application on a device;
- provide information in [Your Account](#) (and you might have more than one if you have used more than one email address or mobile number when shopping with us) or [Your Profile](#) ;
- talk to or otherwise interact with our Alexa Voice service;
- upload your contacts;
- configure your settings on, provide data access permissions for, or interact with an Amazon device or service;
- provide information in your [Seller Account](#) , [Kindle Direct Publishing](#) account , [Developer](#) account , or any other account we make available that allows you to develop or offer software, goods, or services to Amazon customers;
- offer your products or services on or through Amazon Services;
- communicate with us by phone, email, or otherwise;
- complete a questionnaire, a support ticket, or a contest entry form;
- upload or stream images, videos or other files to Prime Photos, Amazon Drive, or other Amazon Services;
- use our services such as Prime Video;
- compile Playlists, Watchlists, [Wish Lists](#), or other gift registries;
- participate in Discussion Boards or other community features;
- provide and rate [Reviews](#);
- specify a Special Occasion Reminder; or
- employ [Product Availability Alerts](#), such as Available to Order Notifications.

As a result of those actions, you might supply us with such information as:

- identifying information such as your name, address, and phone numbers;
- payment information;
- your age;
- your location information;
- your IP address;
- people, addresses and phone numbers listed in your Addresses;
- email addresses of your friends and other people;
- content of reviews and emails to us;
- personal description and photograph in [Your Profile](#);
- voice recordings when you speak to Alexa;
- images and videos collected or stored in connection with Amazon Services;
- information and documents regarding identity, including Social Security and driver's license numbers;
- corporate and financial information;
- credit history information; and
- device log files and configurations, including Wi-Fi credentials, if you choose to automatically synchronize them with your other Amazon devices.

*Id.*

Amazon collects data through its many different services and devices. For example, Amazon collects users' names, addresses, recordings, and searches when they use Alexa, a virtual assistant. Kate O'Flaherty, *The Data Game: What Amazon Knows About You and How*

*to Stop It*, Guardian (Feb. 27, 2022).<sup>8</sup> Amazon collects information about users' contacts if uploaded to Alexa, the communications they have with Amazon via email, and the content they watch on Prime. *Id.* Amazon offers a photo-storage service where the facial recognition feature is turned on by default, resulting in Amazon collecting users' biometric face identifiers. *Id.* Photos may also contain information like geolocation tags and device information. *Id.* With Amazon's constant expansion into new business verticals such as healthcare provision, see Annie Palmer, *Amazon Closes Deal to Buy Primary Care Provider One Medical*, CNBC (Feb. 22, 2023),<sup>9</sup> the amount and variety of data it collects will continue to expand.

One specific type of information Amazon collects to feed its user profiles is real-time behavioral data called clickstream data.

Clickstream data “refers to the collection of digital interactions that occur between a user and a website or mobile application.” *Capture Clickstream Data Using AWS Serverless Services*, Amazon (July 17,

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<sup>8</sup> <https://www.theguardian.com/technology/2022/feb/27/the-data-game-what-amazon-knows-about-you-and-how-to-stop-it>.

<sup>9</sup> <https://www.cnbc.com/2023/02/22/amazon-closes-deal-to-buy-primary-care-provider-one-medical.html>.



2023).<sup>10</sup> Amazon collects user interactions such as “clicks on links or buttons, views of different pages, the duration of time spent on specific pages, submissions of forms, downloads of files, and many other activities that take place within the digital environment.” *Id.* Amazon logs each click users make, each time users scroll down to product reviews, and each time users’ cursors hover over the “add to cart” button. See Matt Burgess, *All the Ways Amazon Tracks You—and How to Stop It*, *Wired* (June 22, 2021).<sup>11</sup> All this data is available “at near real-time.” Amazon, *Capture Clickstream Data*, *supra*.

The information Amazon collects about a user is then used to construct a profile of the user which Amazon can then exploit to push certain products to the user. If a user’s profile indicates high blood pressure, for example, Amazon will likely recommend an at-home blood pressure monitor. Amazon might similarly infer that a person is expecting a baby and push baby products to the user if the user purchases a Kindle book about first-time motherhood or browses

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<sup>10</sup> <https://aws.amazon.com/blogs/industries/capture-clickstream-data-using-aws-serverless-services/>.

<sup>11</sup> <https://www.wired.com/story/amazon-tracking-how-to-stop-it/>.

webpages about what items are essential during a pregnancy before navigating to Amazon's storefront to purchase those items.

The data Amazon collects reveals more about users than simply their purchasing activity. Amazon has information that can reveal where someone lives, their place of work, who their family and friends are, and what they do in their free time. *See O'Flaherty, supra.*

Amazon's Prime Video and other Fire TV information can reveal a person's religious beliefs, politics, economic status, and culture. *Id.*

The idea that users wind up on an Amazon listing page without Amazon knowing who they are, where they came from, or why they are there is a fallacy. Amazon has access to vast amounts of information about its users and how they interact with Amazon's services. Amazon processes this information to maximize its profits instead of protecting user safety.

**B. Amazon designs its marketplace to manipulate what users see and influence what users buy.**

Amazon uses its intimate knowledge of its users to influence their behavior across the Amazon Marketplace. It induces behavior through two main methods: (1) targeted recommendations and (2) manipulative

design techniques known as “dark patterns.” *See* Fed. Trade Comm’n, *supra*, at 3.

Amazon’s recommendation engine is woven throughout its marketplace, nudging users to purchase more products at every step. For example, Amazon places a “Recommended for You” tab on the Amazon homepage, a “Frequently Bought Together” recommendation list on product pages designed to incentivize larger purchases, a “Similar Items” recommendation list for products like ones a user has viewed recently, and an “Items Recently Viewed” to encourage users to purchase products they previously viewed but did not purchase. *See* Singh, *supra*. These overlapping and ubiquitous recommendations direct users through the Amazon Marketplace, encouraging more and more frequent purchases even when recommended products or product bundles increase the risk of harm. *See, e.g.*, First Amended Complaint at 16; Siobhan Kennedy, *Potentially Deadly Bomb Ingredients are ‘Frequently Bought Together’ On Amazon*, Channel 4 News (Sept. 18,

2017) (describing bundled product recommendations that combine to produce a bomb).<sup>12</sup>

Amazon further extends its control over user behavior by incorporating deceptive design techniques known as “dark patterns” throughout its marketplace. *See* Fed. Trade Comm’n, *supra*, at 3; Stankovic, *supra*. These dark patterns include, *inter alia*, nudging users toward certain product choices, misdirecting users toward more profitable shipping options, showcasing positive user reviews, and automatically signing users up for an Amazon Prime subscription. *Id.*; *see also Fed. Trade Comm’n v. Amazon.com, Inc.*, 71 F. Supp. 3d 1158, 1164 (W.D. Wash. Dec. 1, 2014) (holding plausible claim of FTC Act violation when Amazon billed parents for purchases incurred by children with parents’ express consent). These dark patterns facilitate greater data extraction by Amazon and induce greater user purchasing behavior in ways that are difficult for users to detect or counteract. As the Federal Trade Commission recently explained, “[b]ecause dark patterns are covert or otherwise deceptive, many consumers don’t

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<sup>12</sup> <https://www.channel4.com/news/potentially-deadly-bomb-ingredients-on-amazon>.

realize they are being manipulated or misled.” Fed. Trade Comm’n, *supra*, at 3.

Amazon is a well-known abuser of manipulative design practices to control user purchasing behavior. *See, e.g., Fed. Trade Comm’n v. Amazon*, 71 F. Supp. 3d at 1164; Finn Lützow-Holm Myrstad, Forbrukerrådet, *You Can Log Out, but You Can Never Leave: How Amazon Manipulates Consumers to Keep Them Subscribed to Amazon Prime* (2021)<sup>13</sup>; Chiara Farronato et al., *Self-Preferencing at Amazon: Evidence from Search Rankings*, 113 Am. Econ. Rev. 239 (2023). For example, in June 2023, the Federal Trade Commission explained that Amazon “knowingly duped millions of consumers into unknowingly enrolling in . . . automatically renewing Prime subscriptions.” Complaint for Permanent Injunction, Civil Penalties, Monetary Relief, and Other Equitable Relief at 2, *Fed. Trade Comm’n v. Amazon.com, Inc.*, No. 23-0932 (W.D. Wash. June 21, 2023). With each dark pattern and targeted recommendation, Amazon further entrenches its

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<sup>13</sup> <https://storage02.forbrukerradet.no/media/2021/01/2021-01-14-you-can-log-out-but-you-can-never-leave-final.pdf>.

overwhelming control over users' decisions to purchase products on the Amazon Marketplace.

## **II. AMAZON CONTROLS WHAT PRODUCTS ARE ON ITS MARKETPLACE AND CAN COST-EFFECTIVELY ALTER OR REMOVE UNSAFE PRODUCT LISTINGS TO PREVENT HARM.**

Amazon is not a passive participant in its own marketplace. In fact, it exerts wide-ranging control over what products are allowed on the Amazon Marketplace. Through both proactive product safety standards and the retroactive removal of unsafe product listings, *see Restricted Products, Amazon Seller Cent.*,<sup>14</sup> Amazon decides which products are available on its marketplace and which products should be removed.

Amazon's control over the products on its marketplace begins with product safety standards it requires all product listings to meet. As part of these standards, Amazon strictly prohibits the sale of "illegal, unsafe, or other restricted products" on its marketplace. *Id.* These restricted products include, *inter alia*, (1) drugs and drug paraphernalia, (2)

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<https://sellercentral.amazon.com/help/hub/reference/external/200164330> (last visited Dec. 12, 2023).

explosives, weapons, and related items, (3) “hazardous and prohibited items,” and (4) “products intended to be used to produce an illegal product or undertake an illegal activity.” *Id.*; see also *Other Restricted Products*, Amazon Seller Cent.<sup>15</sup> Amazon further claims that, if a seller supplies a “product in violation of the law or any of Amazon’s policies . . . we will take corrective actions, as appropriate, including but not limited to immediately suspending or terminating selling privileges, destroying inventory in our fulfillment centers without reimbursement, returning inventory, terminating the business relationship, and permanent withholding of payments.” *Id.* Amazon ends its policy as follows: “Amazon encourages you to report listings that violate Amazon’s policies or applicable law by contacting us. We will investigate each report thoroughly and take appropriate action.” *Id.*

Many Amazon users have reported being recommended dangerous, unsafe, or otherwise troubling products. For example, a

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<sup>15</sup>

<https://sellercentral.amazon.com/help/hub/reference/external/G2006853>  
20.

2017 investigation by the United Kingdom’s Channel 4 News discovered that:

“when a user searched for a common chemical that was used in certain food products, the Amazon recommender system would suggest other items the user could buy, which collectively could be used to make black powder, a chemical explosive. The system also recommended other items, such as ball bearings, which could be used as shrapnel in homemade explosives. In response, Amazon said it was reviewing its website to ensure that all products were being ‘presented in an appropriate manner.’”

Singh, *supra*; see also Kennedy, *supra*.

In 2021, the Consumer Product Safety Commission sued Amazon for selling such unsafe products as (1) carbon monoxide detectors that failed to detect carbon monoxide, Complaint at 8, *In re Amazon.com, Inc.*, CPSC Docket No. 21-2 (July 14, 2021);<sup>16</sup> (2) children’s sleeping garments that don’t comply with flammability requirements, *id.* at 12; and (3) hair dryers that “present a significant electric shock and electrocution hazard to users,” *id.* at 14. And just last month, District Judge Chambers of the Southern District of West Virginia rebuffed Amazon’s efforts to disclaim

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<sup>16</sup> [https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/001-In-re-Amazon-com-Inc\\_.pdf?TvLLxHy1UMfiz3BpfXaKjQy1ibQbYAiU](https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/001-In-re-Amazon-com-Inc_.pdf?TvLLxHy1UMfiz3BpfXaKjQy1ibQbYAiU).



responsibility for inspecting, promoting, and selling a pinhole camera disguised as a towel hook that encouraged spying on individuals in the bathroom. *M.S. v. Amazon.com, Inc.*, No. 32-cv-0046, 2023 WL 8283642, at \*3, \*7 (S.D.W.V. Nov. 30, 2023).

Despite recent attempts to avoid responsibility and keep unsafe products on its marketplace, Amazon regularly enforced its product safety standards against unsafe products in the past. On August 23, 2019, only hours after the Wall Street Journal published an exposé identifying 4,152 Amazon product listings for items declared unsafe by federal agencies like the U.S. Food and Drug Administration (FDA), Amazon reworded or removed over 2,300 of the identified product listings from its marketplace. Alexandra Berzon et al., *supra*. These product listings included, *inter alia*, 80 listings for infant sleeping wedges that the FDA has warned could cause suffocation; 52 listings for dietary supplements that contain illegally imported prescription drugs; and 3,644 toy listings that lacked federally required choking-hazard warnings, including a xylophone with four times the legal limit of lead and children’s maracas containing 411 times the legal limit of lead. *Id.* Just a few weeks earlier—on the heels of two mass shootings—the

Washington Post reported that Amazon sold gun accessories despite the company's explicit policy banning firearm-related products. Greg Bensinger, *Google and Amazon List Gun Accessories for Sale, in Apparent Violation of Their Own Policies*, Wash. Post. (Aug. 6, 2019).<sup>17</sup> Amazon removed the product listings when the Washington Post contacted them. See Brian Fun, *Google and Amazon Say They Have Removed Gun-Related Shopping Results that Shouldn't Have Been There at All*, CNN Bus. (Aug. 6, 2019).<sup>18</sup>

Amazon has similarly removed product listings for explicitly life-threatening products after learning that minors had purchased the products. In October 2023, reporter and documentarian Oobah Butler asked his two nieces—ages 6 and 4—to purchase a variety of weapons and dangerous chemicals from Amazon: several carpenter knives, 15 angled scalpels, a pack of loose razor blades, 12 crossbow heads, a nine-inch pruning saw, spray paint containing toxic solvents, and extremely flammable butane gas cannisters, among other items. Oobah Butler,

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<sup>17</sup> <https://www.washingtonpost.com/technology/2019/08/06/google-amazon-prohibit-firearm-parts-listings-its-easy-find-them-anyway/>.

<sup>18</sup> <https://www.cnn.com/2019/08/06/tech/google-amazon-gun-related-shopping-results/index.html>.

*Amazon Let My 4-Year-Old Niece Buy Deadly Weapons*, Vice (Oct. 27, 2023).<sup>19</sup> Butler’s nieces received each item within days—all without needing to verify their age. *Id.* However, once Amazon was approached about the dangerous products it sold to children, it “speedily removed all the aforementioned products” from its marketplace. *Id.*

Amazon’s past and ongoing practice of rapidly removing dangerous products from its marketplace when informed of the danger—even when harm has not yet occurred—highlights the absurdity of Amazon refusing to remove Sodium Nitrite for years after knowing it was used by minors to commit suicide. *See* First Amended Complaint at 3.

### **III. AMAZON IS THE CHEAPEST COST AVOIDER OF PLAINTIFFS-APPELLANTS’ DEATHS.**

At its core, modern product liability law is a framework for preventing harm, not assigning wrongdoing. *See* Catherine M. Sharkey, *Modern Tort Law: Preventing Harms, Not Recognizing Wrongs*, 134 Harv. L. Rev. 1423, 1454 (2021) (reviewing John C. P. Goldberg & Benjamin C. Zipursky, *Recognizing Wrongs* (2020)). To minimize the

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<sup>19</sup> <https://www.vice.com/en/article/dy353q/four-year-old-buying-weapons-amazon-age-verification>.

total social costs of product defects, modern product liability law seeks to identify the “cheapest cost avoider” of harm, which may not always be the product manufacturer. *See* Sharkey, *Products Liability in the Digital Age*, *supra*, at 1337–46 (surveying courts applying cheapest cost avoider framework to buyers, third-party vendors, and online platforms); John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 *Geo. L. J.* 513, 514 (2003); Calabresi, *Costs of Accidents*, *supra*, at 155. Courts tend to assign product liability to the entity with the greatest knowledge of and control over relevant product risks to cost-effectively prevent product harms, either directly or by inducing others’ behavioral changes. *See Air & Liquid Systems Corp.*, 139 S. Ct. at 994 (citing Calabresi, *Costs of Accidents*, *supra*, at 311–318) (placing liability on entity in better position to warn of product danger rather than entity most at fault); *State Farm*, 407 F. Supp. 3d. at 851 (applying deterrence-based factors based on knowledge and control) *aff’d* 835 F. App’x at 216; *cf.* Sharkey, *Modern Tort Law*, *supra*, at 1435–1444 (tracing evolution of product liability as deterrence).

Through its own data practices, design decisions, and product safety standards, Amazon has more knowledge of and control over

factors that could cost-effectively mitigate the risk of suicide by Sodium Nitrite than any other entity. *See Air & Liquid Systems Corp.*, 139 S. Ct. at 997 n.3 (Gorsuch, J., dissenting) (“placing liability on a defendant who is not ‘in the best position to prevent a particular class of accidents’ may ‘dilute the incentives of other potential defendants’ who should be the first ‘line of defense.’”) (quoting *Edwards v. Honeywell, Inc.*, 50 F.3d 484, 490 (7th Cir. 1995)); *see generally* Catherine M. Sharkey,  *Holding Amazon Liable as a Seller of Defective Goods: A Convergence of Cultural and Economic Perspectives*, 115 Nw. U. L. Rev. Online 339 (2020).

Through its user profiles, user purchasing histories, clickstream data, and mouse tracking capabilities, Amazon collected all the data it needed to know that minors coming from an online suicide forum were purchasing reagent-grade Sodium Nitrite. Amazon still suggested acid-reducers, personal use scales, and a suicide manual as “Frequently Bought Together” recommendations. First Amended Complaint at 32.

Worse still, Amazon not only knew about users purchasing Sodium Nitrite on Amazon Marketplace for the purpose of committing suicide, but it also previously showcased a pattern of rapidly removing similarly unsafe products from its marketplace as soon as the harm was

identified. *See* Alexandra Berzon et al., *supra*; Butler, *supra*. *But see* First Amended Complaint at 3 (failing to remove Sodium Nitrite product listings for years after learning of the harm). Through design choices and enforcement of its own product safety standards, Amazon could cost-effectively remove unsafe products like Sodium Nitrite within hours of being notified. Additionally, Amazon plays a “substantial part in insuring that [a] product [on its marketplace] is safe or may be in a position to exert pressure on the manufacturer to that end.” *Bolger v. Amazon.com LLC*, 53 Cal. App. 5th 431, 448 (Cal. Ct. App. 2020) (quoting *Vandemark v. Ford Motor Co.*, 391 P.2d 168, 171–72 (Cal. 1964)). And because the precautions available to Amazon are baked into the design and controlling policies of the Amazon Marketplace, restricting harmful product sales and pressuring product manufacturers to adopt additional product safety mechanisms are all but costless for Amazon compared to the social costs of suicide.

Amazon has cost-effective ways to prevent the deaths of minors like Plaintiffs-Appellants, but it has routinely favored its own array of abusive, invasive, exploitative, and otherwise harmful commercial practices instead. Because Amazon has (1) has unique and intimate

knowledge of users on its marketplace and which sites they visit, (2) employs extensive and manipulative design features to induce and modify user behavior, and (3) regularly controls the accessibility of dangerous products on its marketplace by altering and removing product listings once it learns of product risks, Amazon is the cheapest cost avoider of Plaintiffs-Appellants' harms.

### CONCLUSION

For the foregoing reasons, EPIC respectfully urges the Court to reverse the district court's order granting Defendant's motion to dismiss.

**Date:** December 12, 2023     /s/ Megan Iorio  
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