

No. 103730-9

**IN THE SUPREME COURT OF THE STATE OF
WASHINGTON**

RUTH SCOTT, individually, and as personal representative of the
ESTATE OF MIKAEL SCOTT, a deceased individual; JEFF
MUHLEMAN, individually, and as personal representative of the
ESTATE OF TYLER MUHLEMAN, a deceased individual; and
CINDY CRUZ, individually,
Petitioners,

v.

AMAZON.COM, INC.,
Respondent.

MARY-ELLEN VIGLIS, individually, and as personal
representative of the ESTATE OF DEMETRIOS VIGLIS, a deceased
individual; JAMES PASSANNANTI, individually, and as personal
representative of the ESTATE OF AVA PASSANNANTI, a deceased
individual; and ANNETTE GALLEG0, individually,
Petitioners,

v.

AMAZON.COM, INC.,
Respondent.

**ELECTRONIC PRIVACY INFORMATION CENTER
AMICUS BRIEF IN SUPPORT OF PLAINTIFFS-
PETITIONERS AND REVIEW**

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I. INTRODUCTION

This Court should grant the petition for review to clarify urgently important questions of tort liability in Washington. The ruling below, if left in place, would represent an unjustified windfall for Amazon at the expense of Washington residents. In resolving the question of whether a company like Amazon has a duty to users and violates that duty when it ignores warning signs that they intend to use its products to kill themselves, the Court should understand the level of knowledge and influence Amazon has over its users and third-party product offerings. Currently, Amazon leverages this knowledge and power to remain one of the most profitable corporations in history: the only thing stopping it from using its resources to keep users safe from foreseeable harm is its own lack of desire or incentive to do so. Tort liability could, and is meant to, provide such an incentive.

II. IDENTITY 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. EPIC regularly participates as *amicus* in cases concerning corporate accountability for 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 a lack of common law rules to align tech giants' incentives with the public interest 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*, 603 U.S. 707 (2024), *NetChoice, LLC, v. Paxton* (No. 22-555) (U.S.), *Gonzalez et al. v. Google*, 598 U.S. 617 (2023), *McCarthy v. Amazon* (No. 23-35584) (9th Cir.), and *Bride v. Yolo Technologies, Inc.*, 112 F.4th 1168 (9th Cir., Aug. 22, 2024), among others.

III. STATEMENT OF THE CASE

EPIC adopts the Statement of the Case as set forth in Division I's published opinion, op. 2–9, and as refined in the Petitioner's petition for review, Pet. 4–6.

IV. ARGUMENT

A. Amazon Has Extensive Knowledge of Its Users, Which It Employs to Influence User Purchasing Behavior.

Amazon has substantial knowledge of and control over what happens on the Amazon Marketplace. Granular knowledge of users' identities, users' behavior, and third parties' product offerings is the core of Amazon's business. EPIC does not think Amazon's extensive consumer surveillance capabilities should exist, but while they do, Amazon should not be permitted to use them only for its own gain with no corresponding duties to its users.

i. 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's data collection is not passive or incidental, but an intentional choice meant to fuel systems that increase its profits. Amazon builds surveillance into its platform and products' design, purchases and sells information about users, and uses data to fuel tailored algorithms that drive sales.

Amazon's privacy policy demonstrates the staggering breadth of its information collection activities. *See Privacy Notice*, Amazon.com.¹ The information that Amazon collects includes, among other things, what users search for, who their contacts are, what they watch, what their product reviews say, when they set a reminder about a special life occasion, what they say to their smart devices, and more. *See id.* This information is gathered through a variety of sources that can provide Amazon with a near 360-degree view of a person's life depending on how many Amazon products they use: its websites, *see id.*, its variety

¹ <https://www.amazon.com/gp/help/customer/display.html?nodeId=GX7NJQ4ZB8MHFRNJ>

of “smart devices” such as Alexa, *see id.*, its numerous subsidiaries such as its health clinic OneMedical, *see* Geoffrey A. Fowler, *To Become an Amazon Clinic Patient, first You Sign Away Some Privacy*, Wash. Post (May 1, 2023),² and even through purchasing data from other companies.

Amazon’s collection of a type of data called clickstream data displays how closely the company watches its users. 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, 2023).³ 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

² <https://www.washingtonpost.com/technology/2024/06/15/amazon-one-medical-patient-safety/>

³ <https://aws.amazon.com/blogs/industries/capture-clickstream-data-using-aws-serverless-services/>.

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).⁴ All this data is available "at near real-time." Amazon, *Capture Clickstream Data*, *supra*. By collecting information itself or purchasing it from other companies, Amazon tracks users across the web, showing Amazon where users were and what they are interested in before coming to its website.

From these data points, Amazon infers information and builds profiles about its users that far exceed just their online behavior. Profiling potentially reveals to Amazon where users work, what their income level is, where they live, how they spend their leisure time, how old they are, and who their family and friends are. See Kate O'Flaherty, *the Data Game: What Amazon Knows About You and How to Stop It*, The Guardian (Feb. 27,

⁴ <https://www.wired.com/story/amazon-tracking-how-to-stop-it/>.

2022).⁵ 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),⁶ the amount and variety of data it collects and the intimacy of the resulting profiles will continue to expand.

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

ii. Amazon designs its algorithms and marketplace to influence what users see and purchase.

Amazon's technical know-how and intimate knowledge of its users helps it to influence their behavior across the Amazon Marketplace. It influences behavior through two main methods: (1) targeted recommendations and (2) manipulative design

⁵ <https://www.theguardian.com/technology/2022/feb/27/the-data-game-what-amazon-knows-about-you-and-how-to-stop-it>

⁶ <https://www.cnbc.com/2023/02/22/amazon-closes-deal-to-buy-primary-care-provider-one-medical.html>.

techniques known as “dark patterns.” *See* Fed. Trade Comm’n, Bringing Dark Patterns to Light 3 (2022).⁷ 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* Spandana Singh, *Why Am I Seeing This? Case Study: Amazon*, New Am. (March 25, 2020).⁸ 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* Siobhan

⁷ <https://www.ftc.gov/reports/bringing-dark-patterns-light>.

⁸ <https://www.newamerica.org/oti/reports/why-am-i-seeing-this/>

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).⁹

Amazon further extends its influence over user behavior through its web design choices. These design features include nudging users to buy certain products, to use shipping options that are more profitable for Amazon, to boost positive user reviews over negative ones, and to automatically sign users up for an Amazon Prime subscription. Some of the design features Amazon uses are manipulative or deceptive design techniques known as “dark patterns.” *See, e.g., Fed. Trade Comm’n v. Amazon*, 71 F. Supp. 3d 1158, 1164 (W.D. Wash. 2014); Darko Stankovic, *How Amazon Uses Dark Patterns to Manipulate User Behavior*, Medium (Feb. 15, 2023);¹⁰ Finn Lützow-Holm

⁹ <https://www.channel4.com/news/potentially-deadly-bomb-ingredients-on-amazon>.

¹⁰ <https://medium.com/design-bootcamp/how-amazon-uses-dark-patterns-to-manipulate-user-behavior-5bb6e2c99b7>.

Myrstad, Forbrukerrådet, *You Can Log Out, but You Can Never Leave: How Amazon Manipulates Consumers to Keep Them Subscribed to Amazon Prime* (2021)¹¹; 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).

Through its algorithm and platform design choices, Amazon has shown itself capable of nudging users to behave in ways that increase the company’s profits. In this case, that nudging allegedly included recommending that vulnerable minors purchase various items that made their decision to kill

¹¹ <https://storage02.forbrukerradet.no/media/2021/01/2021-01-14-you-can-log-out-but-you-can-never-leave-final.pdf>.

themselves more effective and less reversible. *See* Pet. 5. It is unclear why Amazon could not use the same systems to look after users' basic safety.

B. Amazon Controls Which Products Appear on Its Marketplace and Can Effectively Alter or Remove Unsafe Product Listings.

Besides nudging user behavior on its platform, Amazon also exerts wide-ranging control over what products appear on the Amazon Marketplace. For example, the company monitors the sales performance of third-party product in order to decide which products to offer under its own private label and removes dangerous product listings. This shows that the company is able to take the kinds of actions that a duty to keep users safe would require.

One way Amazon controls the products available on its marketplace is by monitoring third-party products' performance to decide which third-party sellers can be undercut by Amazon's own private label. After deciding which products to sell under its own label, Amazon uses "its powerful marketplace machine . . .

to steer shoppers towards its in-house brands and away from its competitors.” Julie Creswell, *How Amazon Steers Shoppers to Its Own Products*, N.Y. Times (June 23, 2018).¹² This practice has garnered the attention of antitrust enforcers. See Renee Dudley, *Amazon’s New Competitive Advantage: Putting Its Own Products First*, ProPublica (June 6, 2020).¹³

Amazon is able to identify and remove products that violate its product safety standards, especially when prompted by public outcry. Amazon strictly prohibits the sale of “illegal, unsafe, or other restricted products” on its marketplace, such as, *inter alia*, (1) drugs and drug paraphernalia, (2) 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.” See *Restricted*

¹² <https://www.nytimes.com/2018/06/23/business/amazon-the-brand-buster.html>

¹³ <https://www.propublica.org/article/amazons-new-competitive-advantage-putting-its-own-products-first>

Products, Amazon Seller Cent.¹⁴; *Other Restricted Products*, Amazon Seller Cent.¹⁵ Amazon claims that, if a seller supplies a non-compliant product, “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.*

Public pressure has succeeded in getting Amazon to remove some unsafe product listings. On August 23, 2019, only hours after the Wall Street Journal published an exposé

¹⁴ <https://sellercentral.amazon.com/help/hub/reference/external/200164330> (last visited Dec. 12, 2023).

¹⁵ <https://sellercentral.amazon.com/help/hub/reference/external/G200685320>.

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 more than 2,300 of the identified product listings from its marketplace. Alexandra Berzon et al., *Amazon Has Ceded Control of Its Site. The Result: Thousands of Banned, Unsafe or Mislabeled Products*, Wall St. J. (Aug. 23, 2019).¹⁶ These product listings included 80 listings for infant sleeping wedges that the FDA has warned could cause suffocation; 52 listings for dietary supplements that contained illegally imported prescription drugs; 3,644 toy listings that lacked federally required choking-hazard warnings; 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

¹⁶ <https://www.wsj.com/articles/amazon-has-ceded-control-of-its-site-the-result-thousands-of-banned-unsafe-or-mislabeled-products-11566564990>.

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).¹⁷ 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).¹⁸

Amazon has similarly removed 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

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

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

containing toxic solvents, and extremely flammable butane gas cannisters, among other items. Oobah Butler, *Amazon Let My 4-Year-Old Niece Buy Deadly Weapons*, Vice (Oct. 27, 2023).¹⁹ 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 practice of rapidly removing dangerous products from its marketplace when informed of the danger—even when harm has not yet occurred—highlights that the company is capable of doing exactly what its duty would require in this case if only it had the incentive to do so. This Court should grant the Petitioners’ petition for review to decide whether Washington law permits finding that Amazon had and violated a duty to its users to use its knowledge and control to prevent their

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

foreseeably harmful uses of products being sold on its platform.

V. CONCLUSION

For the foregoing reasons, EPIC respectfully urges the Court to grant the petition for review.

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