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 GALLEGO, individually,
Petitioners,

v.

AMAZON.COM, INC.,
Respondent.

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

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I.   INTRODUCTION

Amazon's knowledge about and influence over its users and product offerings are relevant to the tort liability issues raised by this case. Amazon's success as a business depends on its ability to collect and analyze information about its users and product offerings. The company has developed a powerful consumer surveillance apparatus to understand its users, nudge their behaviors, and to control the products available on its Marketplace. Currently, Amazon primarily leverages these powers for profit. It could also use them to keep vulnerable users safe from foreseeable harms if only it had the incentive to do so. Tort liability could, and is meant to, provide such an incentive in the interest of public policy.

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 common law rules should align tech giants' incentives with the public interest. EPIC previously filed *amicus* briefs on internet liability and online harms in *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024), *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. Like many other jurisdictions, Washington's body of tort law often depends on elements of foreseeability and causation. *See, e.g.*, *Bernethy v. Walt Failor's, Inc.*, 97 Wn. 2d 929, 653 P.2d 280 (1982). Amazon's knowledge of user vulnerabilities and harmful products should be relevant for evaluating whether Amazon breached a duty owed to the decedents. Ultimately, Amazon should not be permitted to use its extensive consumer surveillance capabilities only for its own gain while disclaiming any responsibility to keep its users safe from egregious, predictable harms.

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 an intentional practice that fuels profit-maximizing systems. Amazon builds surveillance into its platform and products, traffics user information, and feeds data into tailored algorithms that produce insights about users to drive sales. Amazon's knowledge of its customers often dwarfs information a seller would have about a prospective customer in a face-to-face conversation.

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 special life occasions, what they

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

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 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. By collecting and combining all of this information, Amazon is able to track users across the web, determine where users were and what they are interested in before coming to its website, and make predictions about their behavior.

Amazon's collection of a type of data called clickstream data demonstrates the company's powerful information-collection capabilities. Clickstream data "refers to the collection

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

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 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.*

From the many data points it collects and purchases, Amazon infers information and builds profiles about its users

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[3] https://aws.amazon.com/blogs/industries/capture-clickstream-data-using-aws-serverless-services/.
[4] https://www.wired.com/story/amazon-tracking-how-to-stop-it/.

that far exceed just their online behavior. Profiling can reveal 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, 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.

As Plaintiffs-Petitioners allege, grieving parents, members of Congress, and other actors informed Amazon of the dangers of selling Sodium Nitrite through its marketplace. CP 214-15, 236, 281, 392, 414-15. As this section describes, even absent

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[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.

these instances of actual notice, Amazon has access to vast amounts of information about its users and how they interact with Amazon's services. When a user winds up on an Amazon listing page, Amazon often knows who they are, where they came from, and why they are likely there.

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

Amazon uses its knowledge about its users to influence their behavior across the Amazon Marketplace. Amazon relies on two main methods to influence behavior: (1) targeted recommendations and (2) web design choices that encourage user behaviors beneficial to Amazon.

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. Found. (March 25, 2020).[7] 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 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).[8]

Amazon further extends its influence over user behavior through its web design choices. These design features nudge users to buy certain products, to use shipping options that are

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[7] https://www.newamerica.org/oti/reports/why-am-i-seeing-this/.
[8] https://www.channel4.com/news/potentially-deadly-bomb-ingredients-on-amazon.

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);[9] 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)[10]; 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 . . .

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[9] https://medium.com/design-bootcamp/how-amazon-uses-dark-patterns-to-manipulate-user-behavior-5bb6e2c99b7.
[10] https://storage02.forbrukerradet.no/media/2021/01/2021-01-14-you-can-log-out-but-you-can-never-leave-final.pdf.

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 demonstrated its ability to influence user behavior. In this case, it allegedly nudged vulnerable minors to purchase various items that made their decision to kill 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 products to decide which products to offer under its own private label and, when warned, sometimes removes dangerous product listings. This is relevant

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because it strongly signals that Amazon understands the importance of controlling the products available on Marketplace for its own ends and for its users' safety.

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).[11] 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).[12] Much like Amazon's user surveillance activities, Amazon's product

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[11] https://www.nytimes.com/2018/06/23/business/amazon-the-brand-buster.html.
[12] https://www.propublica.org/article/amazons-new-competitive-advantage-putting-its-own-products-first.

oversight activities demonstrate that it has at least some power to identify important qualities of products on its platform.

Amazon has also demonstrated its ability 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 Products*, Amazon Seller Cent.;[13] *Other Restricted Products*, Amazon Seller Cent.[14] 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,

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[13] https://sellercentral.amazon.com/help/hub/reference/external/200164330 (last visited Dec. 12, 2023).
[14] https://sellercentral.amazon.com/help/hub/reference/external/G200685320.

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 convincing Amazon to remove some unsafe product listings. 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 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).[15] 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

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).[16] Amazon

removed the product listings when the Washington Post

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

https://www.washingtonpost.com/technology/2019/08/06/googl
e-amazon-prohibit-firearm-parts-listings-its-easy-find-them-
anyway/.

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).[17]

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, including 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 canisters, among other items. Oobah Butler, *Amazon Let My 4-Year-Old Niece Buy Deadly Weapons*, Vice (Oct. 27, 2023).[18] Butler's nieces received each item within days—all without needing to verify their age. *Id.* However, once Amazon was

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[17] https://www.cnn.com/2019/08/06/tech/google-amazon-gun-related-shopping-results/index.html.
[18] https://www.vice.com/en/article/dy353q/four-year-old-buying-weapons-amazon-age-verification.

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 highlights Amazon's own recognition that without careful management, its platform can cause harm to consumers.

V.   CONCLUSION

For the foregoing reasons, EPIC respectfully urges the Court to reverse Division I's rulings and affirm the trial court decisions.

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CERTIFICATE OF SERVICE

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