No. 103730-9

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., a Delaware Corporation,

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., a Delaware Corporation,

Respondent.

PETITIONERS' COMBINED RESPONSE TO THE MEMORANDA OF *AMICI CURIAE*

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A. INTRODUCTION

The memoranda of *amici curiae*—the Electronic Privacy Information Center ("EPIC"), the Public Health Advocacy Institute ("PHAI"), the 24 families of sodium nitrite victims ("24 Families"), and Professors of Pediatrics—collectively demonstrate that review is warranted. As these memoranda show, this case presents "an issue of substantial public interest." RAP 13.4(b)(4). If Division I's opinion remains unreviewed, it would control the legal issues in many other cases pending in the superior courts. Division I's published decision also would establish the liability rules for all online sellers of dangerous products under the Washington Product Liability Act, RCW 7.72 ("WPLA"), a cutting-edge problem with broad implications for public health. In short, the sweep of Division I's opinion reaches far beyond these parties' individual dispute.

The *amici* memoranda also point to why the issues presented "should be determined by the Supreme Court." RAP 13.4(b)(4). *Amici* have catalogued the contemporary dangers of

vulnerable people, especially children, gaining unfettered access to killer chemicals on online platforms that manipulate the known behaviors of their users. *Amici* also discuss the gains in scientific knowledge of suicidal behavior, and they argue that Washington law should account for those advances. But Division I's opinion—cheered on by Amazon—suggests that the WPLA and Washington common law remain frozen in time. This Court, as the state's ultimate arbiter of the common law, "should … determine[]," RAP 13.4(b)(4), whether that is correct—and should offer guidance on the broader question about how the WPLA and the common law interact. Otherwise, the WPLA and the common law, as interpreted by Division I, would stay blind to the hazards that *amici* have identified.

B. ARGUMENT

(1) *Amici* Demonstrate the Substantial Public Interests at Stake

An issue tends to involve a "continuing and substantial public interest" when "the issue is likely to recur" and involves

more than a dispute that is of a "private nature." *Westerman v. Cary*, 125 Wn.2d 277, 287, 892 P.2d 1067 (1994) (exception to mootness doctrine) (quotations omitted). *Amici* show how Division I's decision "will have sweeping implications," meeting the test for review under RAP 13.4(b)(4). *State v. Watson*, 155 Wn.2d 574, 578, 122 P.3d 903 (2005).

(a) Scale of Public Health Emergency

As the 24 Families memorandum demonstrates, the scale of the public health emergency linked to Amazon's sodium nitrite sales is enormous. The memorandum profiles 24 individuals who died after purchasing sodium nitrite from Amazon—teenagers, vulnerable people, and beloved family members whose lives ended prematurely. 24 Families Memo. at 7-15. These decedents' families are the plaintiffs in eight other lawsuits pending in state and federal trial courts. *Id.* at 4. While each of their lives were distinct and deserving of individual recognition, their deaths share a common thread: Amazon sold and delivered to them a chemical with no household use, and

Amazon knew the chemical was often purchased from Amazon for suicide. *Id.* at 1-15. The 24 Families' memorandum details each victim's story, from Ayden Wallin, a 16-year-old whose mother warned Amazon about sodium nitrite being glorified on suicide message boards, to Benjamin Grange, a 31-year-old Princeton-educated computer scientist who died in August 2024. *Id.* at 7, 15. Many of these victims expressed regret immediately after ingesting the sodium nitrite. Eshed Pinhas told paramedics he "wanted to live," and Terrance Anderson ran to his mother while crying out, "mom, I'm dying," before collapsing. *Id.* at 11, 13.

The fact that ten separate but similar lawsuits representing 28 decedents are now pending, with most of those cases stayed pending the final outcome of this case, provides compelling evidence of the substantial public interest in resolving the issues the petitioners here have presented for review.

(b) Youth Mental Health Crisis

The PHAI and Professors of Pediatrics memoranda

highlight the urgent youth mental health crisis that forms the backdrop of this case. As the Surgeon General has warned, this crisis predated the pandemic but has worsened significantly, with suicide rates among individuals aged 10-24 increasing 62% from 2007 to 2021. PHAI Memo. at 4; Professors Memo. at 5-7. In the decade before the pandemic made this crisis worse, the number of high school students who created a suicide plan increased by 44%. PHAI Memo. at 7. In Washington, the crisis is even more alarming. Rates of youth suicide and attempted suicide increased by more than 600 percent in our state between 2013 and 2021. Professors Memo. at 11.

Online platforms exacerbate this crisis by amplifying negative emotions and normalizing self-harm. A Surgeon General Advisory in 2023 warned that "discussing or showing [self-harm] content can normalize such behaviors, including through the formation of suicide pacts and posting of self-harm models for others to follow." PHAI Memo. at 9. For example, the Sanctioned Suicide website, which was named in the *Scott*

complaint, provides instructions on methods of suicide, with sodium nitrite. PHAI Memo. at 13-14; Professors Memo. at 9.

The Professors of Pediatrics emphasize that adolescents are all the more vulnerable because of their brain development. Professors Memo. at 6-7. The brain's pre-frontal cortex "is not fully developed in adolescents," limiting their ability to control negative impulses and make rational decisions. *Id.* This vulnerable stage of brain development, when coupled with the inescapability of online influence, creates a "heightened danger for teens and increases the likelihood that adolescents will contemplate and attempt suicide." *Id.* at 12.

Despite the confluence of these harmful trends, online product sellers have no legal responsibility to use reasonable care when dispensing and delivering a killer chemical to consumers who are at risk of using it for suicide. That is, if Division I's opinion stands unreviewed.

(c) Amazon's Knowledge and Control

Complementing the other *amici* memoranda, the EPIC

memorandum documents Amazon's extensive surveillance capabilities and algorithmic control over its marketplace. Amazon exploits its permissive privacy policy to gather "a near 360-degree view of a person's life." EPIC Memo. at 4. Amazon records "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." *Id.* This information gathering reaches far beyond users' activity on Amazon platforms, EPIC explains: "Amazon tracks users across the web, showing Amazon where users were and what they are interested in *before coming to its website*. *Id.* at 5-6 (emphasis added).

Amazon then uses this data to influence user behavior through targeted recommendations and "dark patterns" designed to maximize profits—but not user safety. EPIC Memo. at 7-10. Amazon nudges users with its tools such as its "Frequently Bought Together" and "Similar Items" recommendation lists on product pages. *Id.* at 8-9. Amazon has designed these features to

induce users to buy more products, even when those bundles increase risk of harm,[1] such as when Amazon recommended products that, when combined, could produce a bomb. *Id.*

Simultaneously, Amazon strictly controls which products appear on its marketplace and can swiftly remove dangerous listings when motivated to do so. Amazon prohibits the sale of "illegal, unsafe, or other restricted products," including "products intended to be used to produce an illegal product or undertake an illegal activity." EPIC Memo. at 12. When the *Wall Street Journal* reported on 4,152 Amazon listings for products that federal agencies had identified as unsafe, Amazon reworded or removed more than 2,300 of them. *Id.* at 14.

In short, an online seller like Amazon can manipulate its sales platform to induce or restrict user purchases. This broad control suggests a public interest in determining whether sales resulting in suicide are immune from product liability, as

[1] Amazon associated sodium nitrite with a suicide manual, anti-emetics, and scales in this case. CP 225-26, 394-95, 413.

Division I effectively holds.

(d) Means Restriction Saves Lives

The Professors of Pediatrics memorandum explains that restricting access to lethal methods is "[o]ne of the most effective" suicide prevention strategies. Professors Memo. at 4. The Professors identify research that has found "'when lethal means are made less available or less deadly, suicide rates by that method decline, and frequently suicide rates overall decline.'" *Id.* at 14 (quoting *Means Reduction Saves Lives*, Harvard Univ., https://www.hsph.harvard.edu/means-matter/meansmatter/saves-lives/). Most people who survive a suicide attempt never attempt suicide again, the Professors explain: "One meta-analysis of 90 longitudinal studies found that only seven percent of people who attempted suicide and required medical care later died as a result of another suicide attempt." *Id.* at 15.

Unlike other means, sodium nitrite is particularly lethal and irreversible—and deceptive. PHAI Memo. at 12-13. This

chemical compound is "odorless," "lightly colored," and "easily soluble in water," making it both lethal and concealable. *Id.* As little as 0.7 grams, or a teaspoon, can be lethal. PHAI Memo. at 13.

Why a chemical like this one should be sold without restrictions to the consuming public on an online platform, Amazon cannot say. PHAI underscores that this chemical has "no household uses." *Id.* at 12. But given Amazon's system of immediate ordering and rapid delivery, "making lethal chemicals available with the click of a button and rapid delivery ensures that a teenager's impulsive act in a moment of crisis will be irreversible." Professors Memo. at 16-17.

The public implications are manifest. RAP 13.4(b)(4).

(2) Supreme Court Review Is Necessary to Consider These Public Interests

The above public interests discussed in the *amici* memoranda should be weighed by our state's highest court. RAP 13.4(b)(4). As EPIC stresses, a misalignment between the public

interest and the common law "can exacerbate some of the most egregious forms of online harm." EPIC Memo. at 2. The development of the common law is a core function of this Court, and now that Division I has issued a published opinion shutting the door to addressing these problems under the WPLA and the common law, only this Court can decide whether Division I's reasoning comports with Washington law. As the 24 Families argue, the decision below "rests on … misapplications of distinguishable caselaw." 24 Families Memo. at 16.

This Court should grant review to clarify that the WPLA does not foreclose the evolution of the common law principles that undergird the WPLA. Under one theory, the terms "negligence" and "proximate[] caus[ation]" in RCW 7.72.040(1) can have the meaning only as the common law existed in 1981 when the Legislature enacted the WPLA's seller liability provisions. Laws of 1981, ch. 27, § 5. But the cases that support that theory—*Jongeward v. BNSF Ry. Co.*, 174 Wn.2d 586, 278 P.3d 157 (2012) and *Spokane Methodist Homes, Inc. v. Dep't of*

Lab. & Indus., 81 Wn.2d 283, 287, 501 P.2d 589 (1972)—do not consider the specific language of the WPLA, nor do they supersede the rich body of caselaw interpreting it.

As a general interpretive rule, when a statute employs a word with a common law meaning, such as the term "trespass" in the timber trespass statute, RCW 64.12.030, courts consider the common law meaning. *Jongeward*, 174 Wn.2d at 596. In *Jongeward*, this Court suggested that this interpretive exercise looks to the "historical view" of the common law at the time of the statute's enactment, not the "modern view." *Id.* Using that historical lens, *Jongeward* examined a dictionary, a treatise, and precedents on the common law concept of trespass, all from the era leading up to the timber trespass's enactment over a century ago. *Id.* at 596-97. That interpretive approach might lend support for consulting only pre-1981 sources for interpreting the common law meaning of negligence and proximate causation when construing the WPLA.

But the WPLA is different from most statutes. It contains

a saving clause that protects the role of the common law, rather than freezing it in time: "The previous existing applicable law of this state on product liability is modified only to the extent set forth in this chapter." RCW 7.72.020(1). Moreover, in the WPLA's extensive legislative history, the state senate committee that drafted the WPLA never mentions any intent to foreclose the common law evolution of those concepts. *Senate Journal*, S. Journal, 47th Leg., Reg. Sess. 616 (1981). The notion that deference to the courts on the development of the common law was envisioned in the WPLA is further supported by the treatment of damages. RCW 7.72.010(6) (definition of "harm").

Subsequent case law confirms that the WPLA has room for changes and clarifications in the common law. For example, in *Ruiz-Guzman v. Amvac Chem. Corp.*, 141 Wn.2d 493, 7 P.3d 795 (2000), this Court considered the available methods for a claimant to establish a design defect claim against a product manufacturer under the WPLA. Specifically, this Court decided "whether a plaintiff may rely upon an alternative *product*, under

the risk-utility test of the WPLA, to show that a challenged product's risks outweigh the adverse effects of using an alternative *design*." *Id.* at 498. To answer that question, this Court considered a common law authority that post-dated the WPLA. This Court referred to the *Restatement (Third) of Torts* § 2 cmt. *f*., at 24 (1998) as "[p]ersuasive authority." *Id.* at 504.

But even if the common law as it existed in 1981 governs how this Court may weigh the considerations discussed by *amici*, the common law does not foreclose seller liability under the WPLA in this case's circumstances. We know of no pre-WPLA applying the proximate causation rule for suicides from *Arsnow v. Red Top Cab Co.*, 159 Wash. 137, 292 P. 436 (1930) and *Orcutt v. Spokane County*, 58 Wn.2d 846, 364 P.2d 1102 (1961) to product liability claims. And pre-1981 precedent hardly establishes the *Arsnow–Orcutt* rule as one that applies to all negligence claims where the defendant's actual or constructive knowledge of the foreseeable risks of self-harm was the basis for the defendant's duty of care. The suicides in *Arsnow* and *Orcutt*

resulted long after commonplace car accidents. In another pre-1981 case, the *Arsnow–Orcutt* proximate causation rule applied to a suicide following a slip-and-fall on an icy parking lot in a premises liability case. *Baxter v. Safeway Stores, Inc.*, 13 Wn. App. 229, 586, 589-90, 534 P.2d 585 (1975).

But in a different pre-1981 case, *Hunt v. King Cnty.*, 4 Wn. App. 14, 481 P.2d 593 (1971), the Court of Appeals held that *Arsnow–Orcutt* do not govern the causation question in a negligence case where the foreseeable risk of the defendant's self-inflicted injury was within the scope of the plaintiff's duty in the first instance. *Id.* at 22-23. And here, the petitioners have argued that Amazon's duty of care is predicated on the Amazon's actions creating or increasing the foreseeable risk of self-harm. Pet. for Review at 21-28. In other words, as in *Hunt*, the scope of the defendant's duty included the danger of suicide, and thus the causation principles from *Arsnow–Orcutt* do not apply here even if a pre-1981 understanding of causation is ensconced in the WPLA.

Without this Court's guidance on how the WPLA accounts for the common law generally and *Arsnow–Orcutt* specifically, then the public, the bar, and the bench will face uncertainty. At the very least, precedent points in competing directions. This Court should therefore grant review to resolve this tension if it holds that the WPLA is limited to a "historical view" of proximate causation.

C. CONCLUSION

The several *amici* groups assist the Court in gauging whether the issues presented for review are "of substantial public interest" and "should be determined by the Supreme Court." RAP 13.4(b)(4).

This document contains 2,558 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 11th day of March 2025.

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DECLARATION OF SERVICE

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

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