

No. 23-35584

IN THE
United States Court Of Appeals
FOR THE NINTH CIRCUIT

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Nicholas 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-00263-JLR
Honorable James L. Robart

**BRIEF OF *AMICI CURIAE* PROFESSORS OF PEDIATRICS
IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL**

KELLER ROHRBACK L.L.P.
Alison S. Gaffney
Chris Ryder
Dean Kawamoto
1201 THIRD AVENUE, SUITE 3200
SEATTLE, WA 98101-3052
TEL: (206) 623-1900

Counsel for Amici Curiae Professors of Pediatrics

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INTEREST OF AMICI CURIAE

Bonnie Halpern-Felsher, PhD, FSAHM, is the Marron and Mary Elizabeth Kendrick Professor of Pediatrics II and tenured professor of pediatrics at the Stanford School of Medicine. She also has a courtesy appointment in Psychiatry and Behavioral Sciences. She is also the President-elect of the Society for Adolescent Health and Medicine. She is a developmental psychologist with additional training in health psychology whose research focuses on cognitive and psychosocial factors involved in adolescents' and young adults' health-related decision-making, perceptions of risk and vulnerability, health communication, and risk behavior.

Jonathan P. Winickoff, MD, MPH, is a Professor of Pediatrics at Harvard Medical School and MassGeneral Hospital for Children. As a pediatrician, Dr. Winickoff is on the front line of screening and counseling youth for mental health conditions, substance use disorders, self-harm, and suicidal ideation and has been treating child and adolescent patients for over 25 years. As a researcher, Dr. Winickoff examines youth risk behavior, including tobacco use and nicotine addiction.

Amici have no personal interests in this case. Rather, Amici's sole interest is in public information and communication about reducing youth risk behavior, including self-harm and attempted suicide.

Amici submit this brief because they understand that youth risk behavior is a complex matter driven by various cognitive, emotional, and psychosocial factors unique to adolescence. Accordingly, it is critical that the Court understand the complexities that drive youth risk behavior as the Court considers whether warnings or other preventative measures have a deterrent effect on youth attempting suicide.

All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, no party's counsel contributed money intended to fund preparing or submitting the brief, and no person other than amici or their counsel contributed money intended to fund preparing or submitting the brief.

INTRODUCTION

The facts of this case, as the District Court recognized, are indisputably tragic. The opinion below, however, fails to appreciate both the reality facing adolescents today and the effectiveness of suicide-deterrent measures. First, the risks inherent in adolescence have been heightened by the growth of social media platforms and other digital media amplifying and promoting negative emotions and behaviors, including self-harm and suicide. Nationwide, young people are reporting alarming rates of anxiety, depression, and suicidal ideation, and the U.S. Surgeon General has declared that the country is facing a youth mental health crisis.¹

Second, one of the most effective tools of suicide prevention is restricting access to lethal means. Many more people attempt suicide and survive than die by suicide, and the majority of people who survive a suicide attempt never attempt suicide again. The District Court based its opinion in part on an assumption that a person who attempts suicide

¹ See *Protecting Youth Mental Health: The U.S. Surgeon General's Advisory*, U.S. Dep't of Health and Hum. Servs. Office of the U.S. Surgeon Gen. (2021), <https://www.hhs.gov/sites/default/files/surgeon-general-youth-mental-health-advisory.pdf>.

intends to die and that additional warnings or measures would not prevent death. But research indicates that the “intent” associated with a suicide attempt is often faltering, that suicide is an impulsive act, and that use of highly lethal methods is often a question of availability more than an unshakeable intent to die. These things are especially true with respect to teenagers with suicidal ideation.

The District Court did not take these considerations into account when concluding that, as a matter of law, decedents knew of the dangers associated with ingesting sodium nitrite and that their “deliberate disregard” broke the chain of proximate causation.² But additional warnings or other barriers to access can have a deterrent effect and save lives.

Amici submit this brief in order to bring to the Court’s attention research on the developing adolescent brain, the heightened dangers of digital media for youth today, and the effectiveness of suicide prevention measures.

² Order at 17, *Nicholas McCarthy, et al. v Amazon.com, Inc.*, No. C23-0263JLR (W.D. Wash. June 27, 2023), ECF No. 60.

ARGUMENT

I. Adolescents Are Particularly Vulnerable Due to Their Brain Development and the Prevalence of Digital Media Promoting Suicide

Rates of suicidal ideation, suicide attempts, and death by suicide among children and teens in the U.S. have risen alarmingly in recent years. These rates are rising in the context of what the U.S. Surgeon General has warned is a national youth mental health crisis.³ In issuing the advisory, the Surgeon General stated, “Mental health challenges in children, adolescents, and young adults are real and widespread. Even before the pandemic, an alarming number of young people struggled with feelings of helplessness, depression, and thoughts of suicide—and rates have increased over the past decade.”⁴

³ *Protecting Youth Mental Health: The U.S. Surgeon General’s Advisory*, U.S. Dep’t Health & Hum. Servs. (Dec. 7, 2021), <https://www.hhs.gov/sites/default/files/surgeon-general-youth-mental-health-advisory.pdf> [<https://perma.cc/SQZ7-NDFR>]. The American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, and the Children’s Hospital Association also declared a national emergency in child and adolescent mental health in 2021.

⁴ *U.S. Surgeon General Issues Advisory on Youth Mental Health Crisis Further Exposed by COVID-19 Pandemic*, U.S. Dep’t Health & Hum. Servs. (Dec. 7, 2021), <https://public3.pagefreezer.com/browse/HHS.gov/30-12-2021T15:27/https://www.hhs.gov/about/news/2021/12/07/us-surgeon-general-issues-advisory-on-youth-mental-health-crisis-further-exposed-by-covid-19-pandemic.html> [<https://perma.cc/G8AY-PCGA>].

Adolescence can be a dangerous time. For many, it is a period of great risk-taking behaviors. Critically, the pre-frontal cortex, which is key to impulse control, decision-making, and information processing, is not fully developed in adolescents. The pre-frontal cortex is one of the last areas of the brain to develop and generally does not fully mature until early adulthood. In contrast, regions in the brain's limbic system associated with emotional reactivity and impulsivity are fully developed by adolescence.⁵ As a result, "the adolescent brain is 'wired' to have strong emotional reactions, particularly to interpersonal interactions, at a time when their ability to plan and control impulses is less developed."⁶ As neuroscientist Dr. Frances Jensen explained in an NPR interview, there is "an increased risk of suicide in this window of development" because adolescents "have enough of [their] systems working in order to actually manifest a depression," while their frontal

⁵ Elizabeth Ballard & Maryland Pao, *Neurobiology of Suicide in Children and Adolescents: Implications for Assessment and Treatment* Springer Link, Youth Suicide Prevention and Intervention (Aug 23, 2022), https://link.springer.com/chapter/10.1007/978-3-031-06127-1_2.

⁶ *Id.*

lobes and impulse control are underdeveloped, and suicide is, in part, “an impulsive act.”⁷

In addition to the risks inherent in their “wiring,” today’s teens must navigate a new set of risks present in digital media. To start, social networking platforms can amplify common but powerful emotions such as sadness and hopelessness because of constant social comparison, compulsive use, and a lack of sleep. But social media platforms often go far beyond that, pushing an endless, algorithm-driven feed of “recommended content” displaying words and imagery related to suicide or suicidal ideation.^{8,9,10} In addition, as alleged in

⁷ *Why Teens Are Impulsive, Addiction-Prone And Should Protect Their Brains*, Fresh Air, NPR (Apr. 15, 2016), <https://www.npr.org/2016/04/15/474348291/why-teens-are-impulsive-addiction-prone-and-should-protect-their-brains>.

⁸ See Ali Pourmand et al., *Social Media and Suicide: A Review of Technology-Based Epidemiology and Risk Assessment*, Nat’l Libr. of Med. Telemedicine J. and e-Health, vol. 25, 10:880-888, (2019) <https://pubmed.ncbi.nlm.nih.gov/30362903/>.

⁹ Olivia Carville, *TikTok’s Algorithm Keeps Pushing Suicide to Vulnerable Kids*, Bloomberg (Apr. 19, 2023), <https://www.bloomberg.com/news/features/2023-04-20/tiktok-effects-on-mental-health-in-focus-after-teen-suicide>.

¹⁰ Queenie Wong, *Suicide and self-harm content is scarily easy to find on social media*, CNET (Oct. 1, 2021), <https://www.cnet.com/health/personal-care/suicide-and-self-harm-content-is-scarily-easy-to-find-on-social-media/>.

Appellants' complaint, certain websites, such as the "Sanctioned Suicide" site, normalize suicide and provide specific instructions on methods of suicide.¹¹ For decades, research on suicide "contagion" has suggested that suicidal behavior can be contagious based on media reporting on suicide and exposure to a suicidal peer.¹² And unlike traditional media such as newspapers, social media, for many of today's youth, is a constant presence.

This combination of factors creates an incredibly treacherous environment for today's adolescents and their families.¹³ As the Surgeon General noted, rates of suicidal ideation increased among young people nationwide even before the pandemic. From 2009 to 2019, the percentage of high school students who seriously considered suicide increased by 36 percent, and the percentage of those who created a

¹¹ ER-187.

¹² See Madelyn S. Gould and Alison M. Lake, *The Contagion of Suicidal Behavior*, Forum on Glob. Violence Prevention; Bd. on Glob. Health; Inst. of Med.; Nat'l Rsch. Council (Feb. 6, 2012), <https://www.ncbi.nlm.nih.gov/books/NBK207262/>.

¹³ Rates of suicidal ideation and suicide are increasing for children even younger than adolescence, as well. See, e.g., Tyler Kingkade & Elizabeth Chuck, *Suicidal thoughts are increasing in young kids, experts say. It began before the pandemic*, NBC News (Apr. 8, 2021 AM), <https://www.nbcnews.com/news/us-news/suicidal-thoughts-are-increasing-young-kids-experts-say-it-began-n1263347>.

suicide plan increased by 44 percent.¹⁴ From 2007 to 2019, suicide rates among youth ages 10 to 24 in the U.S. increased by 57 percent.¹⁵ By 2018, suicide was the second-leading cause of death for youth ages 10 to 24.¹⁶

These numbers show that young people like Kristine Jónsson and Ethan McCarthy are not outliers. Indeed, in Ohio, suicide is the leading cause of death for ages 10 to 14 and the second-leading cause for ages 14 to 24.¹⁷ In 2021, over 42 percent of Ohio high school students reported feeling sad or hopeless for more than two weeks in a row.¹⁸ And

¹⁴ *Protecting Youth Mental Health: The U.S. Surgeon General's Advisory* at 8, U.S. Dep't Health & Hum. Servs. (Dec. 7, 2021), <https://www.hhs.gov/sites/default/files/surgeon-general-youth-mental-health-advisory.pdf>.

¹⁵ *Id.*

¹⁶ *AAP-AACAP-CHA Declaration of a National Emergency in Child and Adolescent Mental Health*, Am. Acad. Pediatrics (Oct. 19, 2021), <https://www.aap.org/en/advocacy/child-and-adolescent-healthy-mental-development/aap-aacap-cha-declaration-of-a-national-emergency-in-child-and-adolescent-mental-health/>.

¹⁷ *Ohio Youth Suicide Prevention Collaborative*, Ohio Child.'s Hosp. Ass'n, <https://ohiochildrenshospitals.org/how-we-collaborate/zerosuicide/> (last visited Nov. 28, 2023).

¹⁸ *YRBS/YTS High School Mental Health, Suicide, and Self-Harm 2021*, Ohio Youth Surveys, <https://youthsurveys.ohio.gov/wps/wcm/connect/gov/093ec7b4-b292-4860-88ef-93e38625610e/YRBS%3AYTS+High+School+Mental+Health%2C+Suicide%2C+and+Self->

over twenty percent of Ohio high schoolers seriously considered attempting suicide.¹⁹ Fifteen percent made a plan about how they would attempt suicide, and nearly ten percent attempted suicide.²⁰

In West Virginia, the statistics are similarly alarming. In 2021, nearly 48 percent of high school students reported feeling sad or hopeless for more than two weeks in a row.²¹ Over 27 percent of high school students seriously considered attempting suicide, and twelve percent of students actually attempted suicide.²²

With approximately one in ten high school students attempting suicide, it cannot be that these students are intent on dying and that prevention measures would not make a difference. Instead, these statistics reflect the grim reality that youth nationwide are experiencing serious mental and emotional distress, while navigating

[Harm+2021.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_K9I401S01H7F40QBNJU3SO1F56-093ec7b4-b292-4860-88ef-93e38625610e-oxTNT.B](#) (last visited Nov. 28, 2023).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *West Virginia, High School Youth Risk Behavior Survey, 2021*, Ctr.'s for Disease Control and Prevention, <https://nccd.cdc.gov/youthonline/app/Results.aspx?LID=WV> (last visited Nov. 28, 2023).

²² *Id.*

an online environment that normalizes and amplifies pro-suicide messages. This reality, coupled with the inherent vulnerability and impulsivity that characterize adolescence, creates a heightened danger for teens and increases the likelihood that adolescents will contemplate and attempt suicide. But it does not mean that individual teenagers have fully formed an intent to die, or that they can weigh and appreciate the consequences of their actions. A suicide attempt is often “a cry for help,”—one that can only be heeded when the attempt is unsuccessful.

II. Restricting Access to Lethal Methods of Suicide Saves Lives.

The District Court’s ruling ignores a well-established principle of suicide prevention: restricting access to lethal means is one of the most effective strategies for preventing suicide. Research has demonstrated that restricting access to highly lethal means—such as sodium nitrite—can save lives. In many instances, the progression from suicidal ideation to a suicide attempt occurs during a short-term period of crisis and is, as discussed above, an impulsive act. “If highly lethal means are made less available to impulsive attempters and they substitute less

lethal means, or temporarily postpone their attempt, the odds are increased that they will survive.”²³

Furthermore, and perhaps counterintuitively, research has not established a correlation between the seriousness of an individual’s suicidal intent and the lethality of the method used in a suicide attempt. In other words, teens will find whatever means are around regardless of the seriousness of their suicidality. And ultimately, most suicide attempts are unsuccessful: According to the Harborview Injury Prevention & Research Center at the University of Washington, for every person who dies by suicide in the U.S., 60 people will survive a suicide attempt.²⁴ Studies of survivors of suicide attempts have not found a relationship between the resoluteness of intent to die and the medical severity of the attempt.²⁵ One reason for this may be that many people who attempt suicide have an inaccurate understanding of the

²³ *Means Matter Basics*, Harvard T.H. Chan Sch. of Pub. Health, <https://www.hsph.harvard.edu/means-matter/means-matter/> (last visited Dec. 12, 2023).

²⁴ *Pacific Northwest Suicide Prevention Resource Center*, Harborview Injury Prevention & Rsch. Ctr. at Univ. of Wash., <https://hiprc.org/outreach/suicide/> (last visited Dec. 12, 2023).

²⁵ *Method Choice and Intent*, Harvard T.H. Chan Sch. of Pub. Health, <https://www.hsph.harvard.edu/means-matter/means-matter/intent/> (last visited Dec. 12, 2023).

lethality or level of pain associated with a particular method.²⁶ But another reason may be that it is often availability, more than any other factor, that determines what method will be used.²⁷

While there is no established relationship between the resoluteness of an individual's intent to die and the lethality of the method chosen, there is, unsurprisingly, a relationship between the lethality of the method and survival of the attempt. Indeed, "[a] number of studies have indicated that when lethal means are made less available or less deadly, suicide rates by that method decline, and frequently suicide rates overall decline. This has been demonstrated in a number of areas: bridge barriers, detoxification of domestic gas, pesticides, medication packaging, and others."²⁸

Moreover, the data belie the District Court's assumption that if an individual attempts suicide, that individual is so intent on dying that suicide will be the ultimate outcome. On the contrary, the majority of

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Means Reduction Saves Lives*, Harvard T.H. Chan Sch. of Pub. Health, <https://www.hsph.harvard.edu/means-matter/means-matter/saves-lives/> (last visited Dec. 12, 2023).

people who survive a suicide attempt will not go on to die by suicide.²⁹ One meta-analysis of 90 longitudinal studies found that only 7% of people who attempted suicide and required medical care ultimately died by suicide.³⁰

These facts demonstrate that suicidal intent is not nearly as absolute as the District Court reasoned it to be. Instead, these facts point to an understanding of suicide as an impulsive act, often taken in a moment of acute, short-term crisis. For adolescents—at a stage in their development where the region of the brain responsible for impulse inhibition and executive function is, literally, not fully connected—any suicidal intent is even more tenuous.

In this context, any number of measures could avoid a tragic outcome—restricting access, slowing delivery, or increasing warnings about the certainty of death or the likelihood of pain and suffering. Conversely, making lethal chemicals available to adolescents with the

²⁹ *Attempters' Longterm Survival*, Harvard T.H. Chan Sch. of Pub. Health, <https://www.hsph.harvard.edu/means-matter/means-matter/survival/> (last visited Dec. 12, 2023).

³⁰ David Owens, Judith Horrocks, *et al.*, *Fatal and non-fatal repetition of self-harm: systematic review*, Nat'l Lib. of Med. British J. of Psychiatry, 181:193-199 (Sept. 2002), <https://pubmed.ncbi.nlm.nih.gov/12204922/>.

click of a button and rapid delivery ensures that a teenager's impulsive act in a moment of crisis will be irreversible.

RESPECTFULLY SUBMITTED this 13th day of December, 2023.

By: s/ Alison S. Gaffney

KELLER ROHRBACK L.L.P.

Alison S. Gaffney

Chris Ryder

Dean Kawamoto

1201 Third Avenue, Suite 3200

Seattle, WA 98101-3052

Tel: (206) 623-1900

Counsel for Amici Curiae Professors of Pediatrics

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