No. 20-20108

In the United States Court of Appeals
for the Fifth Circuit

MORGAN MCMILLAN, individually and as Next Friend of E.G., a Minor Child,
Plaintiff-Appellee

v.

AMAZON.COM, INC.,
Defendant-Appellant.

On Appeal from the United States District Court for the
Southern District of Texas, Civil Action No. 4:18-cv-02242

BRIEF OF AMICUS CURIAE PUBLIC JUSTICE, P.C., IN SUPPORT OF PLAINTIFF-APPELLEE

Leah M. Nicholls
PUBLIC JUSTICE, P.C.
1620 L St. NW, Ste. 630
Washington, DC 20036
(202) 797-8600
LNicholls@publicjustice.net

Jeremy Robinson (*Application Pending*)
CASEYGERRY, LLP
110 Laurel Street
San Diego, CA 92101
(619) 238-1811
jrobinson@cglaw.com

Benjamin I. Siminou (*Application Pending*)
SIMINOU APPEALS, INC.
2305 Historic Decatur Rd., Ste. 100
San Diego, CA 92106
(858) 877-4184
ben@siminouappeals.com

Jonathan D. Selbin
Evan J. Ballan
Lieff Cabraser Heimann & Bernstein LLP
275 Battery St., 29th Fl.
San Francisco, CA 94111
(415) 956-1000
eballan@lchb.com

Counsel for Amicus Curiae Public Justice, P.C.

SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, counsel for amicus curiae Public Justice, P.C., states that no person or entity beyond Public Justice, P.C., and its counsel has an interest in this amicus brief. Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), Public Justice, P.C., states that it has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

/s/ Leah M. Nicholls
Leah M. Nicholls
Counsel for Amicus Curiae Public Justice, P.C.

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Public Justice is a national public-interest advocacy organization dedicated to pursuing justice for the victims of corporate and governmental abuses. Public Justice specializes in precedent-setting and socially significant cases designed to advance consumers' and victims' rights, civil rights and civil liberties, occupational health and workers' rights, the preservation and improvement of the civil-justice system, and the protection of the poor and powerless.

This case is of particular interest to Public Justice because it affects the ability of injured consumers to seek remedies through the civil-justice system, and ensuring that the civil-justice system serves the victims of corporate wrongdoing is a key element of Public Justice's mission.[1]

[1] All parties have consented to the filing of this brief. No one other than Amicus and its counsel authored any part of this brief or monetarily funded its preparation. *See* Fed. R. Civ. P. 29(a).

INTRODUCTION

When, as here, a consumer buys a product from Amazon.com that is "Fulfilled by Amazon," Amazon dominates all facets of the transaction: Amazon (1) sets the product search parameters on its website; (2) presents the buyer with products chosen by Amazon based on how much Amazon stands to profit; (3) takes and processes the buyer's order; (4) takes and processes the payment; (5) sends the buyer a receipt; (6) retrieves the ordered product from its warehouse; (7) packs it; and (8) ships it to the buyer in Amazon-branded packaging.

Yet, Amazon tries to evade the liability every seller, distributor, or retailer would have for dangerous products under these same facts on technicalities. First, because Amazon does not hold title to the product, Amazon argues, it bears no responsibility for products it sells, stores, accepts payment for, and ships—even for products that injure, kill, or burn down someone's house or office. Second, Amazon claims, contrary to all appearances and common sense, it's not actually selling anything, it's merely providing a "service." That business model, which Amazon claims immunizes it from normal liability, is no accident.

Fortunately, Texas law does not condone Amazon's economic gerrymandering and would treat Amazon as a retailer. Good thing, too, as Amazon is a conduit for an enormous quantity of illegal, unsafe, and knock-off products that

would not enter the American consumer market but for Amazon. Particularly given the frequently foreign or fly-by-night nature of the "third-party" sellers that dominate Amazon's marketplace, Amazon is the only entity in a position to prevent injuries to the consumers that buy products on its website or to pay compensation when injuries occur.

Moreover, the immunity Amazon believes its business model bestows would give it an unfair competitive advantage over retailers with more traditional business models who *are* subject to strict liability.

Ultimately, both law and policy point to the same result: Amazon should be held strictly liable when products purchased on its site injure consumers or cause property damage, just like any other retailer.

ARGUMENT

I. Under Texas Law, Amazon Is Strictly Liable for Injuries the Remote Caused.

The district court correctly found Amazon could be held strictly liable under Texas law because it was the key link in the chain of distribution of the defective remote. Mr. Gartner, Plaintiff's husband, ordered the remote from Amazon, put it in Amazon's "shopping cart," and paid Amazon using its online checkout system. Amazon then retrieved the defective remote from its warehouse, packed it, labeled it, and shipped it to Mr. Gartner.

Mr. Gartner had no contact with "Hu Xi Jie," the third-party Amazon claims is the "seller." He did not visit Hu Xi Jie's website, did not pay Hu Xi Jie, and Hu Xi Jie did not ship him any products. Indeed, Mr. Gartner would have no way to know Hu Xi Jie was involved in the transaction since Amazon allowed Hu Xi Jie to use a fake name ("USA Shopping 7693") on its website.

Trying to distract from the unavoidable fact that Amazon is the main link in the chain of distribution here, Amazon contrives other disputes. It falsely analogizes itself to an occasional seller of second-hand goods, a provider of professional services, or a package-delivery service. It argues about holding title. It cites non-Texas cases applying dissimilar laws to often dissimilar facts.

These manufactured squabbles reflect Amazon's refusal to confront the main issue: Amazon directly sold and distributed the defective product that injured the Gartners. That is what the facts show, and that is why Texas law holds Amazon strictly liable.

A. Amazon is in the business of selling and distributing commercial products such as the remote.

There is no dispute the Gartners bought a defective remote in a retail sale. And there can be no legitimate dispute that Amazon was a crucial link in the chain of distribution of that remote. Amazon was the direct connection between Hu Xi Jie, the manufacturer or supplier, and the Gartners. After Hu Xi Jie manufactured or

acquired the defective remote in China, it sent the remote to Amazon's warehouse where Amazon stored it until Mr. Gartner purchased it on Amazon's website. The Gartners paid Amazon for the remote, and Amazon shipped the remote to them. The Gartners had no interaction with, or knowledge of Hu Xi Jie—particularly since Amazon permitted Hu Xi Jie to operate under a pseudonym on its website.

This transaction is nothing more than a slight variation of the standard retail model. Amazon's role here is both as a retailer and a distributor. Or, stated differently, Amazon "is the party present at the consummation of the sale who accepts money from the consumer in exchange for the product." *Amazon Servs., LLC v. S.C. Dep't of Revenue*, Dkt. No. 17-ALJ—17-0238-CC, at 29 (Sept. 10, 2019).

This makes Amazon a seller of the remote under Texas law, which defines a "seller" as a person "*engaged in the business of commercially distributing products.*" *Centerpoint Builders GP, LLC v. Trussway, Ltd.*, 496 S.W.3d 33, 42-43 (Tex. 2016) (emphasis added, internal punctuation omitted); *see also* Tex. Civ. Prac. & Rem. Code Ann. § 82.001 ("'Seller' means a person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof.").

There can be little doubt that, at least here, Amazon was "engaged in the business of commercially distributing products." Amazon warehoused the remote

and boxed and shipped it when someone ordered it from Amazon. "Amazon took on all the roles of a traditional—and very powerful—reseller/distributor." *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964, 972 (W.D. Wis. 2019).

As the district court correctly observed, under Texas law, it is irrelevant that Amazon is also a "service provider." Amazon can be both a seller and a service provider. The definition of "seller" under Texas law "does not exclude a seller who is also a service provider, nor does it require the seller to only sell the product." *Fresh Coat, Inc. v. K-2, Inc.*, 318 S.W.3d 893, 899 (Tex. 2010); *see also State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 414 F. Supp. 3d 870, 873 (N.D. Miss. 2019) ("Amazon in fact enjoys the benefits of a free market, with its attendant common law responsibilities, whether it is labeled a service provider or a marketplace.")

A service provider is exempt from strict liability only if "providing that product is incidental to selling services." *Centerpoint Builders*, 496 S.W.3d at 40. And here, it was not. Amazon provided no service to the Gartners—other than the "service" of taking their money and sending them a product. As Amazon itself admits, this was a product sale.

This approach is consistent with the Third Restatement of Torts, which recognizes that a product seller may also provide services. As the Restatement states, someone is a product seller when: (1) "in a commercial context, one transfers

ownership [of a product] either for use or consumption or for resale leading to ultimate use or consumption"; (2) "when, in a commercial transaction other than a sale, one provides the product to another either for use or consumption or as a preliminary step leading to ultimate use or consumption"; or (3) "when, in a commercial transaction, one provides a combination of products and services and either the transaction taken as a whole, or the product component thereof, satisfies the criteria in Subsection (a) or (b)." Restatement (Third) of Torts: Prod. Liab. § 20 (1998)

Again, that fits exactly with what Amazon did here. Even assuming Amazon provided some services to its upstream suppliers, it nonetheless also "provide[d] the product" to the Gartners "for use or consumption." *See*, *e.g.*, *Soto v. Tristar Prod., Inc.*, No. CV176406MWFMRWX, 2017 WL 5197399, at *3 (C.D. Cal. Nov. 9, 2017) ("Costco Membership is a prerequisite to gaining access to Costco Wholesale *stores*, which contain *products* that members are able to *purchase*." (emphasis in original)).

Just because Amazon's business model is somewhat unconventional does not mean Amazon is not a seller or distributor. A perfect example of this is the Supreme Court's recent decision in *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019). There, Apple urged the Court to dismiss an antitrust suit over iPhone apps sold through its "App

Store," arguing—as Amazon does here—that the third-party developer, and not Apple, was the seller. *Id.* at 1519-20.[2]

But the Supreme Court was not convinced: "Apple's proposed rule is not persuasive economically or legally[,]" and "would draw an arbitrary and unprincipled line among retailers based on retailers' financial arrangements with their manufacturers or suppliers." *Id.* at 1522. The Court pointed out that "agreements between manufacturer or supplier and retailer may take myriad forms, including for example a markup pricing model or a commission pricing model." *Id.* And regardless of whether a hypothetical retailer buys a product for $6 from a manufacturer and then sells it for $10 or takes a 40% commission so the manufacturer will list it with the retailer for $10 to net $6, "everything turns out to be economically the same for the manufacturer, retailer, and consumer." *Id.*

The Supreme Court declined to adopt a rule that "would allow a consumer to sue the … retailer in the former situation but not the latter." *Id.* "[W]e fail to see why the form of the upstream arrangement between the manufacturer or supplier and the retailer should determine whether a … retailer can be sued by a downstream

[2] Apple's App Store is an online "marketplace" much like Amazon.com. Third-party developers create the apps and then sell them through the App Store. *Apple*, 139 S. Ct. at 1519. Like Amazon, Apple profits from the sale by taking a percentage of the sales price as a fee or commission. *Id*.

consumer who has purchased a good or service directly from the retailer[.]" *Id.* at 1523.

A contrary holding, the Court noted, would elevate form (the precise arrangement between manufacturers or suppliers and retailers) over substance (whether the consumer is injured) and would "provide a roadmap" for retailers to evade responsibility by rigging the supply system. *Id.* That same logic applies here with equal force.

There is no merit to Amazon's supposed concern that the district court's holding here would also apply to package-delivery services, advertisers, financing companies, and others. None of those companies is "engaged in the business of selling products for use or consumption." *Firestone Steel Prod. Co. v. Barajas*, 927 S.W.2d 608, 613 (Tex. 1996). Consumers cannot buy a remote from a delivery service or a credit-card company. Internet search engines don't process payments for products and keep a commission. Simply put, those kinds of businesses do not sell products.

Indeed, this point was expressly made in *New Texas Auto Auction Services, L.P. v. Gomez de Hernandez*, 249 S.W.3d 400 (Tex. 2008): "An advertising agency that provides copy, a newspaper that distributes circulars, an internet provider that lists store locations, and a trucking business that makes deliveries all might be

'engaged' in product sales, *but they do not themselves sell the products*." *Id.* at 403-04 (emphasis added).

Nor is there merit to Amazon's claim that holding it liable here would mean that strict liability suddenly applies to informal sellers of second-hand goods, such as auction houses, swap-meets, or flea-markets. That's because Texas law is clear that strict liability only applies to entities "engaged in the business of" manufacturing, distributing, or selling consumer goods. *Id.* at 404. As a result, Texas law only imposes strict liability on "those whose *business* is selling, not everyone who makes an occasional sale," and expressly exempts entities like auctioneers from strict liability. *Id.* at 405-06 (emphasis in original). Texas courts will thus have little trouble distinguishing major e-commerce retailers like Amazon from informal sellers of second-hand goods.

B. Even under Amazon's definition, it was a seller of the remote.

Amazon chooses to define a sale as "transferring ownership" or "the passing of title from the seller to the buyer for a price." Appellant's Br. 25. But even that narrow definition encompasses Amazon's role here. The Gartners gave Amazon their money (i.e., paid a "price"), and in exchange Amazon "transferred property" to them. That was a sale.

Discounting its own controlling role in the sale, Amazon repeatedly argues that it did not "source" the remote, did not hold title to it, and did not set its price.

Yet Amazon cites no Texas case ascribing significance to who "sourced" a product or set its price. Indeed, Amazon's chosen definition of "sale" says nothing about those actions.

Amazon emphasizes that it never took title to the remote. But Amazon cannot point to any Texas authority suggesting ownership of title is a prerequisite to product liability. Indeed, the statutory definition of "seller" "does not require title to, or ownership interest in, the product, but only that a defendant 'distribute or place' the product in the stream of commerce." *Kirby v. Smith & Nephew, Inc.*, No. 3:15-CV-2543-L, 2017 WL 661373, at *7 n.2 (N.D. Tex. Feb. 17, 2017).

Further, even if Amazon did not hold title to the remote, there is no question it had the power to *transfer* title to an Amazon customer after that customer paid Amazon for the product. Indeed, Amazon does not claim the Gartners had to contact Hi Xi Jie separately to obtain title to the remote they purchased. Rather, Amazon transferred title when it shipped the product from its warehouse. Otherwise, no buyer of a "Fulfilled by Amazon" product would obtain valid title to it, because "[a] purchaser of goods acquires all title which his transferor had or had power to transfer." Tex. Bus. & Com. Code Ann. § 2.403.

Thus, either Amazon transfers title to any product stored in and shipped from its warehouses, or it is making millions of illegal sales by representing it can transfer

ownership of a purchased product when it cannot. And if it has the power to transfer title, then by its own definition, it is a seller.

C. The out-of-state decisions cited by Amazon are inapposite here.

Initially, Amazon was very successful in convincing courts it was not strictly liable for the products it sold, but that success has been short-lived. A recent decision sums up the current legal landscape: "While many courts that initially considered the issue found in Amazon's favor, some more recent cases have reached different results, with appeals on a few of these cases still pending. Indeed, this is a developing area of law[.]" *Phila. Indem. Ins. Co. v. Amazon.com, Inc.*, 425 F. Supp. 3d 158, at 163. (E.D.N.Y. 2019). *See Legal Aid of Nebraska, Inc. v. Chaina Wholesale, Inc.*, No. 4:19-cv-3103, 2020 WL 42471, at *5 (D. Neb. Jan. 3, 2020) (permitting strict-liability claims to proceed against Amazon); *State Farm*, 414 F. Supp. 3d at 873 (N.D. Miss.) (same); *State Farm*, 390 F. Supp. 3d at 972 (W.D. Wis.) (same).

Indeed, right now, there are several appeals pending in addition to this one. *See Carpenter v. Amazon.com, Inc.*, No. 19-15695 (9th Cir.) (fully briefed and awaiting argument); *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136 (3d Cir. 2019), *reheard en banc and certified to Pennsylvania Supreme Court*, No. 18-1041, 2020 WL 3023064 (3d Cir. June 2, 2020); *Stiner v. Amazon.com, Inc.*, 120 N.E.3d 885 (Ohio Ct. App. 2019), *review accepted at* 125 N.E.3d 911; *Bolger v. Amazon.com,*

Inc., No. D075738 (Cal. Ct. App.) (fully briefed and awaiting argument); *Loomis v. Forrinx Technology (USA), Inc.*, No. B297995 (Cal. Ct. App.).

Additionally, the early cases finding Amazon not strictly liable, *e.g.*, *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135 (4th Cir. 2019); *Fox v. Amazon.com, Inc.*, 930 F.3d 415 (6th Cir. 2019); *Stiner*, 120 N.E.3d 885, *Garber v. Amazon.com, Inc.*, 380 F. Supp. 3d 766 (N.D. Ill. 2019), *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393 (S.D.N.Y. 2018), *Allstate N.J. Ins. Co. v. Amazon.com, Inc.*, No. CV172738FLWLHG, 2018 WL 3546197 (D.N.J. July 24, 2018); and *Carpenter v. Amazon.com, Inc.*, No. 17-CV-03221-JST, 2019 WL 1259158 (N.D. Cal. Mar. 19, 2019), are inapposite.

Unlike this case, several of those cases did not involve the product being "Fulfilled by Amazon." *See Stiner*, 120 N.E.3d at 895; *Garber*, 380 F. Supp. 3d at 773; *Carpenter*, 2019 WL 1259158, at *1. The fact that Amazon never took physical possession of the products in those cases was deemed dispositive because, unlike Texas law, the laws in *those* states required a retailer to take physical possession of a product in order for liability to attach. *Fox*, 930 F.3d at 425 ("[W]e are not convinced, on the record before us, that [Amazon] exercised sufficient control over [the plaintiff's] hoverboard to be deemed a "seller" of the hoverboard under [Tennessee law.]"); *Garber*, 380 F. Supp. 3d at 780 ("[T]he Court predicts that the

Illinois Supreme Court would find that Amazon was not part of the hoverboard's distributive chain[.]"); *Stiner*, 120 N.E.3d at 894 (Amazon not strictly liable because the supplier "chose the product to offer for sale and then sourced, physically controlled, and fulfilled orders for that product"). By contrast, the sale here *was* "Fulfilled by Amazon," and thus Amazon *did* take physical possession of the product at issue.

While three other cases that resolved in Amazon's favor did involve fulfillment by Amazon, two of these decisions—*Erie Insurance Company* and *Eberhart*—are readily distinguishable.

Erie Insurance Company is distinguishable because that court was construing Maryland law, which, unlike Texas law, requires transfer of title for a sale: "[I]nsofar as liability in Maryland for defective products falls on 'sellers' and manufacturers … it is imposed on *owners* of personal property who transfer title to purchasers of that property for a price." *Erie Insurance Company*, 925 F.3d at 141 (emphasis added). Thus, under Maryland law, those parties "who own—i.e., have title to—the products during the chain of distribution are sellers, whereas [those] who do not take title to property during the course of a distribution but rather render services to facilitate that distribution or sale, are not sellers." *Id.*

Eberhart also involved state law (New York's) requiring transfer of title in order to fall within the chain of distribution. *Id.* at 398.

But Texas law has no such requirement. So, while "[i]n states in which the formal transfer of ownership is a prerequisite to strict liability, Amazon would prevail[,]" *State Farm*, 390 F. Supp. 3d at 972 (W.D. Wis.), Texas is not one of those states. And where, as here, formal transfer of title is not required, Amazon may be held liable for "putting the defective product into the stream of commerce," and because it "is well positioned to allocate among itself and its third-party sellers the risks that products sold on Amazon.com would be defective." *Id.* at 973.

II. Public Policy Weighs in Favor of Holding Amazon Strictly Liable.

A. Amazon exerts tremendous control over the products and transactions on its site.

Because this is a "Fulfilled by Amazon" case, this Court need not examine the level of control that Amazon has over sales made by third parties on its site. But the fact that Amazon does exert substantial control over its products and transactions is all the more reason why Amazon should be treated just like any other retailer for purposes of strict liability—and why it is in the best position to police the safety of the products on its site.

In all Amazon marketplace transactions, whether or not "Fulfilled by Amazon," Amazon exerts plenary control over the sale: Third-party vendors must

agree to "Amazon's Services Business Solutions Agreement," which "governs every step of the sales process." *Oberdorf*, 930 F.3d at 141 (3d Cir. 2019). Under that agreement, Amazon "retains the right in its sole discretion to determine the content, appearance, design, functionality, and all other aspects of the Services, including by redesigning, modifying, removing, or restricting access to any of them." *Id.* Amazon also retains the ability to order a third-party vendor to "cease providing any or all of the Services at its sole discretion and without notice, including suspending, prohibiting, or removing any listing," to "stop or cancel orders of any product," or to withhold payment from vendors. *Id.*

Amazon also requires "that its vendors release it and agree to indemnify, defend, and hold it harmless against any claim, loss, damage, settlement, cost, expense, or other liability." *Id.* Amazon argues that its third-party vendors are the real sellers, but it is Amazon that exerts complete control over who can list products on its website, what those products are, and what safety standards those products must meet. If Amazon does not want to incur liability for defective products, it can stop allowing the sale of risky products on its website at any time.

B. Absolving Amazon of liability for defective products will give it an unfair advantage in the marketplace to the detriment of consumer safety.

Undoubtedly, Amazon's success is due in large part to its business model. The increased globalization of supply networks and the rapid rise of technology has

allowed Amazon to eschew costly "traditional brick-and-mortar retail locations" in favor of an online marketplace, where products are shipped directly to consumers from Amazon's network of "warehouses and distribution centers." *Fagerstrom v. Amazon.com, Inc.*, 141 F.Supp.3d 1051, 1057 (S.D. Cal. 2015). The cost savings this business model affords has helped Amazon earn a "reputation for offering lower prices than its traditional competitors." *Id.*

But it would be naïve to believe that Amazon's success is due entirely to whatever legitimate cost savings and convenience its business model affords. Instead, history has shown that, whenever possible, Amazon has used its business model to gain an unfair competitive advantage over its brick-and-mortar retail competitors by leveraging its business model as a means to evade legal burdens imposed upon traditional retail.

For example, under long-standing federal law, states could "not require a business to collect its sales tax if the business lack[ed] a physical presence in the State. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2088 (2018). Because "the mere shipment of goods into the consumer's State . . . did not satisfy the physical presence requirement," *id.*, Amazon exploited this "online sales tax loophole" *Wayfair*, 138 S. Ct. at 2092, by "locat[ing] fulfillment centers in states with either

no sales tax or a small population."[3] As a result, Amazon was able to avoid collecting sales tax on virtually all of its transactions, thereby offering its customers tax-free sales that put "[s]mall brick and mortar retailers ... at a disadvantage."[4]

When it put an end to this "online sales tax loophole" in 2018, the Supreme Court specifically emphasized that it "prevented market participants from competing on an even playing field." *Wayfair*, 138 S. Ct. at 2092-93, 2096.

The Supreme Court also emphasized that "each year" the "physical presence rule" became "further removed from economic reality" given the retail industry's increasing shift to e-commerce. Here, the Supreme Court specifically referenced Amazon, noting that the Courts who first established the physical-presence rule "could not have envisioned a world in which the world's largest retailer would be a remote seller." *Wayfair*, 138 S. Ct. at 2097 (citing S. Li, *Amazon Overtakes Wal-Mart as Biggest Retailer*, L.A. TIMES, July 24, 2015, *available at* http://www.latimes.com/business/la-fi-amazon-walmart-20150724-story.html).

Having lost one loophole that gave Amazon an unfair competitive advantage over traditional retail, Amazon now seeks to create another: Absolute immunity from

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[3] Maria Halkias, *Texas Was Tougher Than Other States in Dealing with Amazon on Sales Taxes*, DALLAS MORNING NEWS, Mar. 29, 2018, *available at*, https://www.dallasnews.com/business/retail/2018/03/29/texas-was-tougher-than-other-states-in-dealing-with-amazon-on-sales-taxes/.

[4] *Id.*

liability for selling defective products—despite, as explained above, exerting substantial control over the products and transactions on its site.

Under Texas law, entities "engaged in the business of" selling consumer goods are subjected to strict products liability if, as a result of their design or manufacture, the goods prove to be unreasonably dangerous. *E.g.*, *New Texas Auto*, 249 S.W.3d at 404. This rule was designed to promote two objectives: (1) to encourage businesses to filter dangerous products out of the marketplace, and (2) to promote compensation of product-related injuries by the businesses that manufactured, distributed, and sold them. *Id.*

Of course, while deterring dangerous products and compensating injured victims has significant social utility, it does come with a cost: Businesses must dedicate resources to identify defective products, remove them from their inventories, and—where possible—stock safer alternatives. And, when defective products are nonetheless sold and cause injury, the business must bear the costs of compensating the victim.

Traditional retailers have come to regard these costs as a "tort tax." Frank B. Cross, *Tort Law and the American Economy*, 96 MINN. L. REV. 28, 41 (2011). Given that Amazon went to great lengths to preserve a sales-tax advantage over traditional brick-and-mortar retail, it is perhaps no surprise that Amazon is now engaged in a

nationwide litigation campaign to secure a "tort tax" advantage over traditional retail by seeking immunity for injuries caused by defective products it sells. In Amazon's view, only traditional retailers should be subject to strict products liability, while Amazon should be free to sell and distribute defective products with *impunity*.

But it is not hard to see why such a rule would be bad for public policy.

For one thing, the immunity Amazon seeks would give it significantly less incentive to police its inventory. This would only increase the number of unreasonably dangerous products available on Amazon's website. Even if the ramifications of Amazon's proposed ruled stopped there, this would be no small concern given that Amazon is already "the world's largest retailer." *Wayfair*, 138 S. Ct. at 2097. And it shows no sign of slowing down: At a time when Internet retail as a whole has "changed the dynamics of the national economy" and is growing "at four times the rate of traditional retail," *id*., Amazon is already larger than the "next twelve online retailers *combined*." *Erie Insurance Company*, 925 F.3d at 144 (Motz, J., concurring) (emphasis added).

Of course, it is difficult to decide which is a more alarming prospect: That Amazon achieved its hegemonic status in part due to the mistaken perception among some courts that "Amazon's business model shields it from traditional products

liability," *id.*, or that Amazon has not yet begun to realize the competitive advantage such tort immunity will offer.

But the adverse effects of the tort immunity Amazon seeks would not stop with the world's largest retailer. If, in addition to any legitimate benefits, competitors saw that Amazon's business model *also* offered immunity for unreasonably dangerous products—and, thus, relief from the "tort tax" burden—Amazon's competitors would face *even more* pressure to adopt this same business model or else lose additional market share to Amazon. The result will be a retail market increasingly saturated with unreasonably dangerous products whose many victims will be without any meaningful recourse for their injuries.

C. Amazon's business model has flooded the American consumer marketplace with unreasonably dangerous and illegal products.

And, at least for Amazon, this result has *already* come to pass. Unsurprisingly, the fact that Amazon disclaims responsibility for the products that can be purchased on its website means that the Amazon marketplace is home to a multitude of dangerous, defective, deceptive, and flatly illegal products. If no one is accountable, then there is no incentive to comply with safety and labeling requirements, and little incentive to ensure products are safe—the precise problem strict tort liability for retailers was designed to address.

The magnitude of the problem was illustrated by a recent *Wall Street Journal* investigation that found over 4,000 items on Amazon.com that "have been declared unsafe by federal agencies, are deceptively labeled or are banned by federal regulators—items that big box retailers' policies would bar from their shelves."[5]

For example, a motorcycle helmet purchased on Amazon was listed as DOT compliant, but it actually wasn't. As a result, a man died when the helmet came off during a crash. *Id.* Particularly troubling is that many of the unsafe products are meant for infants and children. Again, just as an example, certain musical toys for sale on Amazon had well in excess of the amount of lead allowed by the federal government in children's products while other items posed serious suffocation risks. *Id.*

The cases make even clearer the risk of injury, death, or substantial property damage from a dangerous Amazon purchase isn't hypothetical:

- a high school student died from taking caffeine powder purchased from Amazon, *Stiner*, 120 N.E.3d at 887;
- a glass coffeemaker purchased from Amazon shattered, causing the plaintiff nerve damage, *Eberhart*, 325 F. Supp. 3d at 395;

[5] Alexandra Berzon et al., *Amazon Has Ceded Control of Its Site. The Result: Thousands of Banned, Unsafe or Mislabeled Products*, WALL STREET J., Aug. 23, 2019, *available at* https://www.wsj.com/articles/amazon-has-ceded-control-of-its-site-the-result-thousands-of-banned-unsafe-or-mislabeled-products-11566564990.

- a woman was badly burned by a defective, exploding laptop battery purchased from Amazon, *Bolger*, No. D075738;

- a defective headlamp battery purchased from Amazon set a home on fire, causing over $300,000 in damage, *Erie Insurance Company*, 925 F.3d at 137;

- the plaintiff suffered burns and property damage from a defective hoverboard purchased from Amazon, *Loomis*, No. B297995;

- children had to jump from second story of their family home to avoid being killed in fire caused by a defective hoverboard purchased from Amazon, *Fox*, 930 F.3d at 421;

- a fire caused by a defective hoverboard purchased from Amazon burned down a family's home, killing the family dogs, *Carpenter*, 2019 WL 1259158;

- a defective space heater purchased from Amazon burned a legal aid office to the ground, causing $783,000 in damage, *Legal Aid of Nebraska*, 2020 WL 42471, at *1; and

- a woman was blinded in one eye by a defective dog collar, *Oberdorf*, 930 F.3d at 140.

In other cases, the products at issue are flat-out illegal because of the dangers they pose. For example, in *As You Sow v. Amazon.com, Inc.*, No. R919015279 (Alameda Cty., Cal. Super. Ct.) (complaint filed April 17, 2019), the plaintiff alleges that consumers continue to be able to purchase illegal mercury-filled skin lightening creams on Amazon even though Amazon was first sued about this issue in 2014. *See* 21 C.F.R. § 700.13(d) (largely prohibiting the use of mercury in cosmetics).

D. Tort liability is necessary because other forces that might keep unsafe products off the market are not adequate when it comes to Amazon's business model.

1. Consumer choice is an inadequate means to promote product safety, particularly in Amazon's case.

There at least three problems with the common argument that tort liability is unnecessary to ensure that retailers screen defective products from their inventories because modern consumers will avoid products known to be unreasonably dangerous, or will eventually abandon retailers that persistently trade in defective products.

First, a system in which product safety depends on consumers abandoning products or retailers in light of injuries to other consumers is really a system in which businesses like Amazon externalize the costs of policing their inventories.

Thus, rather than Amazon undertaking the effort to filter dangerous products out of its inventory, relying on consumer choice would shift that burden to already busy consumers by first expecting injured consumers to spend the time and effort to post reviews to warn future consumers, then expecting prospective customers to conduct pre-purchase research in order to ensure their safety. This is at odds with Texas law, which recognizes that, relative to consumers, those engaged in the businesses of selling defective products have the "better opportunity to avoid loss."

Gen. Tel. Co. of Sw. v. Bi-Co Pavers, Inc., 514 S.W.2d 168, 174 (Tex. Ct. App. 1974).

Moreover, replacing tort law with consumer choice would leave injured consumers (or their insurers) to fully absorb the costs of any injuries from defective products. This, too, is inconsistent with Texas law, which seeks to "compensat[e] injured consumers" and "spread[] potential losses." *See New Texas Auto*, 249 S.W.3d at 404.

Second, a system in which product safety depends on consumers abandoning products or retailers in response to consumer injuries from defective products is one in which some consumers will necessarily have to endure injury before others begin to adjust their purchasing decisions. Thus, while consumers may, in theory, eventually avoid known defective products (or retailers who persistently trade in them), that effect offers no solace to the consumers whose injuries served to notify the consuming public at large. This is inconsistent with Texas law, the "basic" theory of which is to "avoid loss" in the first instance. *Bi-Co Pavers, Inc.*, 514 S.W.2d at 173; *see also Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991) (explaining that the purpose of tort law "in general" is "to avoid injury to others," internal quotation marks omitted (quoting W. Keeton et al., *Prosser & Keeton on the Law of Torts*, § 92 at 655 (5th ed. 1984))).

Third, in Amazon's case, the notion that consumers can reliably avoid dangerous products simply by availing themselves of product reviews rings hollow: Indeed, for Amazon customers, the readiest source of product information are the reviews posted on *Amazon's own website*. Thus, the idea that reports of product-related injuries posted on Amazon's website will be sufficient to keep consumers safe from the dangerous products Amazon sells is not unlike trusting the fox to guard the henhouse.

Moreover, Amazon often frustrates its customers' ability to seek out reliable reviews or safety information by offering limited or obscured information regarding the products' origin or the manufacturer/supplier's identity, as was the case with the pseudonymous vendor involved in the transaction here.

2. Government regulations will not suffice to ensure product safety.

Government regulation, standing alone, is not sufficient to ensure that unsafe products do not reach the market. Even in the drug industry—which is characterized by a mere 11,000 products and actively monitored by a dedicated federal agency—state tort suits are viewed as a necessary, "complementary form of drug regulation." *Wyeth v. Levine,* 555 U.S. 555, 578 (2009). Of course, if a dedicated federal agency must rely on private litigants to help police a relatively small pool of highly regulated products, state and federal agencies stand no chance of effectively enforcing product

standards among the *millions* of products available in the retail marketplace. Thus, any suggestion that government regulations will substitute for tort suits to keep businesses in check has it exactly backwards: It is tort suits that often give government regulations their teeth.

3. Third-party Amazon "sellers" are frequently judgment-proof and not easily regulated.

Nor can tort suits against, or government regulation of, the third-party "sellers" on Amazon's website solve Amazon's dangerous-product problem. That's because they are foreign or fly-by-night operations. In multiple cases, including this one, the third-party sellers or manufacturers are based in China, meaning that they are virtually judgment-proof, either because they cannot be found or served, or because they never appear and no judgment can, as a practical matter, be enforced. *E.g.*, *Bolger*, No. No. D075738; *Legal Aid of Nebraska*, 2020 WL 42471, at *1. Moreover, the practical ability of U.S. regulators to police products coming from China via Amazon is virtually nonexistent.

Compounding that problem, Amazon permits sellers to sell products on its website under pseudonyms, obscuring the origin of the dangerous products and making the seller hard or impossible to find. In *Oberdorf*, for example, the dog collar was ostensibly sold by "The Furry Gang," and neither the plaintiffs nor Amazon

have been able to locate them—they've simply disappeared. *Oberdorf*, 930 F.3d at 142.

III. If This Court Disagrees that Amazon Is Clearly Liable Under Texas Law, It Should Certify the Question to the Supreme Court of Texas.

For the reasons explained above and in Appellee's briefing, under established Texas law, Amazon is strictly liable for the injuries caused by products purchased through Amazon. But if this Court disagrees, it should follow the example set by the *en banc* Third Circuit in *Oberdorf* and certify the question to the state supreme court.

This Court considers the following factors in determining whether to certify a question to a state supreme court: "(1) the closeness of the question and the existence of sufficient sources of state law; (2) the degree to which considerations of comity are relevant in light of the particular issue and case to be decided; and (3) practical limitations of the certification process," including "significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the state court." *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 332 (5th Cir. 2018) (quoting *Swindow v. Aurora Flight Scis. Corp.*, 805 F.3d 516, 522 (5th Cir. 2015)). Texas law permits the certification of "determinative questions of Texas law having no controlling Supreme Court [of Texas] Precedent." Tex. R. App. P. 58.1; *see also* Tex. Const., art. V, § 3-c(a).

Here, there is no doubt Amazon's liability is a pure question of state law (second factor). And as *Oberdorf* demonstrated, the issue can be framed to elicit a helpful response (third factor). Though, in Public Justice's view, Texas law clearly supports Amazon's liability, the online marketplace presents "fast-changing" and "cutting-edge" issues that a state court may be better positioned to decide in the first instance. *See Erie Insurance Company*, 925 F.3d at 144 (Motz, J., concurring). Moreover, Amazon's claim that the district court overstepped its constitutional bounds because the development of tort law is generally the domain of the state courts strongly suggests the proper remedy is to certify the issue to the Texas Supreme Court, not to decide that Ms. McMillan loses.

CONCLUSION

For these reasons, the district court's decision should be affirmed. If this Court disagrees that the clear result under Texas law is that Amazon is strictly liable, this Court should certify the question to the Supreme Court of Texas.

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Respectfully submitted,

/s/ Leah M Nicholls
Leah M. Nicholls
PUBLIC JUSTICE, P.C.
1620 L St. NW, Ste. 630
Washington, DC 20036
(202) 797-8600
LNicholls@publicjustice.net

Jeremy Robinson
CASEYGERRY, LLP
110 Laurel Street
San Diego, CA 92101
(619) 238-1811
jrobinson@cglaw.com

Benjamin I. Siminou
SIMINOU APPEALS, INC.
2305 Historic Decatur Rd., Ste. 100
San Diego, CA 92106
(858) 877-4184
ben@siminouappeals.com

Jonathan D. Selbin
Evan J. Ballan
LIEFF CABRASER HEIMANN &
BERNSTEIN LLP
275 Battery St., 29th Fl.
San Francisco, CA 94111
(415) 956-1000
eballan@lchb.com

Counsel for Amicus Curiae
Public Justice, P.C.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,435 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by Microsoft Word 2016. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a) because this brief has been prepared in proportionally spaced typeface using 14-point Times New Roman font.

/s/ Leah M. Nicholls
Leah M. Nicholls
Counsel for Amicus Curiae
Public Justice, P.C.

June 10, 2020

CERTIFICATE OF SERVICE

I certify that on June 10, 2020, I served the foregoing Brief of Amicus Curiae Public Justice, P.C., on counsel for all parties electronically via the CM/ECF system.

/s/ Leah M. Nicholls
Leah M. Nicholls