No. D075738

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT,
DIVISION ONE

ANGELA BOLGER,
Plaintiff and Appellant,
vs.
AMAZON.COM LLC,
Defendant and Respondent.

On Appeal from The Superior Court of the State of California
San Diego County, Case No. 37-2017-00003009
Hon. Randa M. Trapp

PROPOSED *AMICUS CURIAE* BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

In accordance with Rule 8.208 of the California Rules of Court, the Chamber of Commerce of the United States of America has no parent corporation. No publicly held company has any ownership interest in the Chamber of Commerce of the United States of America.

Dated: March 3, 2020

By: /s/ Christopher J. Carr

Christopher J. Carr
Attorney for *Amicus Curiae* The Chamber of Commerce of the United States of America

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community. Specifically, the Chamber routinely files *amicus curiae* briefs addressing state tort and products-liability law, especially in cases involving the potential for strict liability.

The Chamber and its members have an interest in cabining strict liability. The expansion of strict liability under tort law is harmful to American businesses, consumers (due to higher prices and reduced availability of goods), and the national economy. The Chamber's Institute for Legal Reform has published a number of reports that detail the harmful consequences of such expansion of tort law. (See, e.g., U.S. Chamber Institute for Legal Reform, *Costs and Compensation of the U.S. Tort System* (October 2018), https://www.instituteforlegalreform.com/uploads/sites/1/Tort_costs_paper_FINAL_WEB.pdf ("Chamber Report").)

The Chamber is thus well situated to assist the Court in understanding the dangers of misreading California law to expand strict liability in this context. In so doing, the Chamber takes no position beyond the limited scope of the applicability of strict products liability and expresses no view on the proper treatment of counterfeit or infringing goods sold through online—platforms—matters governed by other laws not addressed in this brief.

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The matters addressed in the proposed brief are relevant to the disposition of the appeal in this case because the brief provides additional context regarding these issues. The issues raised by this appeal are significant not just to the parties in this case, but to all businesses that are affected by the costs of tort liability.

No counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, and its counsel made a monetary contribution to fund the preparation or submission of this brief. (See Cal. Rules of Court, rule 8.200(c)(3)(A)-(B).)

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INTRODUCTION

Strict products liability—which does not depend on proof of a defendant's negligence—is an exception to general principles of tort liability. Accordingly, the Supreme Court of California has carefully and deliberately cabined the circumstances in which strict liability may apply. Plaintiff asks this court to extend strict products liability beyond its current scope and contrary to its underlying policy justifications. (See *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 342 ("*O'Neil*") ["Recognizing plaintiff['s] claims would represent an unprecedented expansion of strict products liability."].) This Court should decline plaintiff's invitation and affirm.

I. The trial court correctly concluded that when Amazon.com acts merely as an online marketplace that facilitates a different party's sale of products, Amazon.com does not "place" the products at issue "into the stream of commerce" for the purposes of strict products liability. (*Id.* at p. 353.)

The Supreme Court of California has limited the scope of strict products liability to ensure that liability is tethered to the "bedrock principle" that "'the plaintiff's injury must have been caused by a "defect" *in the [defendant's] product.*'" (*Id.* at pp. 347-348 [emphasis added; alteration in original] [quoting *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 733 ("*Daly*")].) A product is "the defendant's product" for the purposes of strict products liability when that defendant is responsible for placing the item in

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the stream of commerce. And as the Courts of Appeal have recognized, those who simply provide services to facilitate third-party sales do not place items in commerce. (See, e.g., *Hernandezcueva v. E.F. Brady Co., Inc.* (2015) 243 Cal.App.4th 249, 259, as modified (Jan. 15, 2016) ("*Hernandezcueva*").)

II. The Supreme Court of California has made the considered decision to limit strict products liability. The American tort system costs businesses and consumers billions of dollars annually. And California consumers already bear a disproportionate share of those costs—which generate higher prices, stifle innovation, and result in less competition. This Court should not expand the scope of strict products liability and impose more costs on California consumers and businesses nationwide.

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DISCUSSION

I. The Trial Court Correctly Concluded that Amazon.com, as an Online Marketplace, Is Not Subject to Strict Liability in Tort for the Defects of Products Sold by Third Parties.

The trial court correctly concluded that Amazon.com, as an online marketplace, is not liable in tort for strict products liability because it does not "place" products that *third parties sell* "into the stream of commerce." (See *O'Neil*, *supra*, 53 Cal.4th at p. 353.) Rather, Amazon.com in this capacity merely provides a marketplace for, and services to, third-party sellers who use Amazon.com to market and sell their own products. Amazon.com never holds title to, sets the prices for, or makes any representations about the goods sold by third parties. In other words, Amazon.com as an online marketplace falls outside the chain of distribution and merely provides services to others who *do* place products into the stream of commerce.

Strict products liability is an exception to the general rule that tort liability arises only from negligence—and it is a limited exception. The Supreme Court of California has anchored strict liability to the "bedrock principle" that "'the plaintiff's injury must have been caused by a "defect" *in the [defendant's] product.*'" (*Id.* at pp. 347-348 [emphasis added; alteration in original] [quoting *Daly*, *supra*, 20 Cal.3d at p. 733].) This way, strict liability still adheres to the "fundamental" rule that a plaintiff's injuries must result from "an act of the defendant or an *instrumentality under the*

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defendant's control." (*Id.* at p. 349 [citing *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588, 597].) As a result, the Supreme Court has applied limited strict products liability to manufacturers, retailers, bailors, lessors, wholesalers, and distributors. (See *Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 130 [listing entities held strictly liable in tort].)

All of those entities share a common feature critical to imposing strict liability: they are all "responsible for placing a defective product into the stream of commerce." (*O'Neil*, *supra*, 53 Cal.4th at p. 349 [citing *Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1198-1199 ("*Peterson*")].) Otherwise, entities who merely facilitate the sales of others are not held strictly liable. So, as the Courts of Appeal have recognized, strict liability does not apply to services. (See *Hernandezcueva*, *supra*, 243 Cal.App.4th at p. 259 ["These principles also are reflected in . . . the Restatement Third of Torts, which provides that '[s]ervices, even when provided commercially, are not products.'"] [alteration in original].)

Amazon.com, as an online marketplace, does not "place products into the stream of commerce" for the purpose of strict products liability and thus cannot be held strictly liable in tort for any defective products sold by third parties on its platform. (See *O'Neil*, *supra*, 53 Cal.4th at p. 353.) Amazon.com never holds title to the goods in question. Instead, all Amazon.com has done is combine sales-facilitating functions into one service that it provides to third-party sellers—and *those* sellers are the proper

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parties for strict products liability.[1] Sales require many facilitators: delivery services, storage services, payment processing services, and the like. And there is no basis in California law for the proposition that, by combining those facilitating functions, an entity somehow "plac[es] a defective product into the stream of commerce." (*Id.* at p. 349 [citing *Peterson, supra*, 10 Cal.4th at pp. 1198-1199]; see also *Erie Ins. Co. v. Amazon.com, Inc.* (4th Cir. 2019) 925 F.3d 135, 142 ("*Erie Ins.*") [recognizing that while Amazon.com may provide "extensive" services to sellers, the combination of those services is "no more meaningful to the analysis" than the provision of individual services].)

Nor can Amazon.com be subject to strict liability here because it does not comport with the common-law policy justifications underlying strict liability. Strict liability is designed to ensure that those with control over the design and manufacture of products are responsive to consumer harms. (See *O'Neil, supra*, 53 Cal.4th at p. 349 [citing *Peterson, supra*, 10 Cal.4th at p. 1199]; *Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256, 262-263.) Without such a relationship, Amazon.com does not have sufficient control to be held strictly liable in tort, as the federal courts have overwhelmingly

[1] By establishing a marketplace for the sales of third parties, Amazon.com is unlike service providers who simultaneously sell products to the same consumers they also provide services. (See, e.g., *Hernandezcueva, supra*, 243 Cal. App. 4th at p. 258 ["Our inquiry concerns the propriety of imposing strict liability on a subcontractor that bought and installed defective products in fulfilling its contract."].)

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recognized. (See, e.g., *Fox v. Amazon.com, Inc.* (6th Cir. 2019) 930 F.3d 415, 425 ("*Fox*") [holding Amazon.com as an online marketplace did not exercise control over product because it "did not choose to offer the [product] for sale, did not set the price of the [product], and did not make any representations about the safety or specifications of the [product] on its marketplace"]; *Allstate N.J. Ins. Co. v. Amazon.com, Inc.* (D.N.J. July 24, 2018, No. 17-2738) 2018 WL 3546197, at *7, *8 ["Amazon . . . never exercised control over the product sufficient to make it a 'product seller' " under a New Jersey law requiring entities to "plac[e] the product in the stream of commerce."].)

Plaintiff's attempt to rely on the "market enterprise doctrine" is misplaced. The market enterprise doctrine itself is limited to situations that would "satisf[y]" the "policies underlying the strict liability doctrine[.]" (*Bay Summit Cmty. Ass'n v. Shell Oil Co.* (1996) 51 Cal.App.4th 762, 776.) It recognizes the same fundamental limitations that run throughout strict products liability—namely, that those who merely facilitate others' commercial transactions cannot be held strictly liable in tort. (See *id.* at pp. 775-776 ["[T]he mere fact an entity 'promotes' or 'endorses' or 'advertises' a product does not automatically render that entity strictly liable for a defect in the product."].) Such actors lack a "sufficient causative relationship or connection" with the products sold by third parties to justify holding them strictly liable. (*Id.* at p. 776)

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To the extent there is any gap in the Supreme Court's precedent, that gap must be filled by general products liability principles from the Restatements—and neither the Second nor the Third Restatement lends support to plaintiff's theory. (See, e.g., *Hernandezcueva*, *supra*, 243 Cal. App. 4th at p. 259 [relying in part on the Restatements].)

The Second Restatement provides that anyone "who sells any product" is strictly liable in tort for defective products if, among other things, "the seller is engaged in the business of selling such a product." (Rest. 2d Torts, § 402A(1) (Am. Law Inst. 1965).) Amazon.com, as an online marketplace, is neither a "seller" of the products sold by third parties in its marketplace, as that term is used in the context of strict liability law, nor is it "in the business of selling" the product. (See *id.* com. f [listing manufacturers, retailers, wholesalers, distributors, and the operators of restaurants as being "in the business of selling" products].) To the contrary, it is in the business of providing a service to the actual (third-party) sellers.

Likewise, the Third Restatement expressly excludes those who "assist[] or provid[e] services to product distributors," even if they "indirectly facilitat[e] the commercial distribution of products[.]" (Rest. 3d Torts, Prod. Liab., § 20 com. g (Am. Law Inst. 1998).) Moreover, Amazon.com, as an online marketplace, neither (1) "transfers ownership" of a product, because it never holds title to the products sold by third-party sellers (describing manufacturers, wholesalers, and retailers), nor does it

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(2) "otherwise distribute[] a product . . . to another either for use or consumption or as a preliminary step leading to ultimate use or consumption" (describing "lessors, bailors, and those who provide products to others as a means of promot[ion]"). (*Id.*, § 20.)

II. The Extension of Strict Liability in Tort Harms American Businesses, Consumers, and the National Economy.

California has made the correct policy decision to cabin strict products liability and exclude those entities who merely provide facilitating services that third parties use to place products in the stream of commerce. Strict liability is not a "broad, flexible doctrine" as Appellants suggest—nor should it be. (Appellant's Opening Br. at p. 32.) Rather, it is an exceptional doctrine that has correctly been limited to narrow circumstances.

This case is just one in a nationwide wave of litigation attempting to extend strict products liability beyond its currently defined scope. Facing similar questions, nearly all courts have concluded that Amazon.com is not subject to strict liability tort law. (See, e.g., *Stiner v. Amazon.com, Inc.* (Ohio) No. 2019-0488 [pending]; *Oberdorf v. Amazon.com* (3d Cir. 2009) 930 F.3d 136, *reh'g en banc granted, opinion vacated*, (3d Cir. August 23, 2019) 936 F.3d 182 [pending]; *Carpenter v. Amazon.com, Inc.* (9th Cir.) No. 19-15695 [pending]; see also *Fox, supra*, 930 F.3d 415; *Erie Ins., supra*, 925 F.3d 135.)

This Court should resist plaintiff's attempt to expand strict liability and impose greater costs on California consumers and American businesses.

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The tort system already costs billions of dollars annually and fails to provide commensurate benefits to consumers. For instance, in 2016, it imposed $429 billion in costs (accounting for 2.3% of gross domestic product), but only 57% was compensation for plaintiffs—the remaining 43% "covered the cost of litigation of both sides, operating costs for the insurers, and profits to effectuate risk transfer." (Chamber Report, *supra*, at p. 4.) And one study of personal injury claims in Texas concluded that for every $1.00 received by a claimant, on average $0.75 went to legal and administrative costs, which increased to $0.83 when the claimant retained legal counsel and filed a lawsuit. (See Hersch & Viscusi, *Tort Liability Litigation Costs for Commercial Claims* (2007) 9 Am. L. & Econ. Rev. 330, 358-362.) The U.S. Chamber's Institute for Legal Reform has come to similar conclusions. (See Chamber Report, *supra*, at p. 6.)

These tort costs are especially acute in California, which accounted for $56 billion of the $429 billion nationwide total costs from tort liability in 2016—and where the yearly tort costs per household are more than $4,000. (See *id.* at pp. 4, 21.) This per household cost is twice as high as States like Maine, North Carolina, and South Dakota. (See *id.* at p. 4.) And these costs would only increase if this Court expanded strict products liability to online marketplaces. After all, California is the most populous State in the country, full of consumers who purchase products from third-party sellers on such marketplaces.

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At the same time the tort system fails to compensate plaintiffs, it also creates externalities. The most immediate costs are shouldered by businesses, whose entire operations are affected by increased costs. For instance, excessive tort liability has been linked to lower worker productivity and employment. (See, e.g., Campbell et al., *The Causes and Effects of Liability Reform: Some Empirical Evidence*, NBER Working Paper No. 4989 (Jan. 1995), pp. 18-22.) More broadly, the threat and costs of litigation can hinder the development of new products, halting innovation within firms and stifling competition among them. (See, e.g., Huber & Litan, *The Liability Maze: The Impact of Liability Law on Safety and Innovation* (1991) p. 16.) And any domestic harms to businesses are magnified by losses to their competitiveness in international markets. One study found that domestic liability costs decrease manufacturing cost competitiveness by at least 3.2%. (See Leonard, *How Structural Costs Imposed on U.S. Manufacturers Harm Workers and Threaten Competitiveness* (2003) p. 16 [report prepared for the Manufacturing Institute of the National Association of Manufacturers].)

Any harms to businesses eventually make their way to consumers, because litigation and administrative costs "constitute the majority of the price increases" that reach consumers. (Shepherd, *Products Liability and Economic Activity: An Empirical Analysis of Tort Reform's Impact on Businesses, Employment, and Production* (2013) 66 Vand. L. Rev. 257, 287.) Completing the circle of harms between consumers and businesses, cost

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increases can "discourage most consumers from purchasing the product and consequently cause the manufacturer to withdraw the product from the marketplace or to go out of business." (Polinsky & Shavell, *The Uneasy Case for Product Liability* (2010) 123 Harv. L. Rev. 1437, 1472.)

The general costs imposed by the tort system disproportionately affect small businesses and entrepreneurs—exactly those who most rely upon and need the facilitator services that Amazon.com provides. Those small businesses and entrepreneurs use Amazon.com, and similar services, to gain access to a nationwide market that would otherwise be unattainable. But if those marketplaces are subject to strict liability for the sales of third parties, the marketplaces would become more expensive. The higher costs will either be passed along to consumers—decreasing sales—or simply make the marketplaces cost-prohibitive for many sellers, especially those most dependent on them.

Therefore, precisely at a time in our history when innovation is essential to America's economic competitiveness, strict liability reduces the incentives for innovation, competition, and entrepreneurial activity. (See Shepherd, *supra*, 66 Vand. L. Rev. at pp. 287-288.) Accordingly, this Court should reject plaintiff's theory and reaffirm the well-considered limits of strict products liability.

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CONCLUSION

The judgment of the trial court should be affirmed.

Respectfully submitted,

Dated: March 3, 2020

BAKER BOTTS L.L.P.

By: /s/ Christopher J. Carr

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204, subdivision (c)(1) of the Rules of Court and in reliance on the word count of the computer program used to prepare this *Amicus Curiae* Brief, counsel certifies that this brief was produced using 13-point type and contains 2890 words, excluding the cover, tables, certificate of interested entities or persons, signature blocks, this certificate, and the proof of service.

Dated: March 3, 2020 By: /s/ Christopher J. Carr

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PROOF OF SERVICE

The undersigned declares under penalty of perjury that he served an electronic copy of the forgoing *Amicus Curiae* Brief on March 3, 2020 via TrueFiling on all registered parties.

On March 3, 2020, the undersigned sent as required by Rule 8.212, subdivision (c)(1) copies of the above, via overnight mail to the following:

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Dated: March 3, 2020 By: /s/ Christopher J. Carr

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