No. 20-90010

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-Respondent,

v.

AMAZON.COM, INC.,
Defendant-Petitioner,

and

HU XI JIE,
Defendant.

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

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

Daryl Joseffer
Michael B. Schon
U.S. CHAMBER
LITIGATION CENTER
1615 H Street NW
Washington, D.C. 20062
(202) 463-5948

Scott A. Keller
BAKER BOTTS LLP
98 San Jacinto Blvd., Suite 1500
Austin, Texas 78701
(512) 322-2500
scott.keller@bakerbotts.com

Jeremy Evan Maltz
BAKER BOTTS LLP
700 K St. NW
Washington, D.C. 20001

Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS

Case No. 20-90010, *McMillan v. Amazon.com, Inc.*

The undersigned counsel of record certifies that, in addition to the persons and entities identified in the Petitioner's Certificate, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Amicus Curiae

The Chamber of Commerce of the United States of America

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.

Counsel for *Amicus Curiae*

Scott A. Keller
BAKER BOTTS LLP
98 San Jacinto Blvd., Suite 1500
Austin, Texas 78701

Jeremy Evan Maltz
BAKER BOTTS LLP
700 K St. NW
Washington, D.C. 20001

Daryl Joseffer
Michael B. Schon
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, D.C. 20062

Dated: February 14, 2020

/s/ Scott A. Keller
Scott A. Keller
Counsel of Record for
The Chamber of Commerce
of the United States of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation.[1] 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, customers (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

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus* and its counsel made a monetary contribution to fund the preparation or submission of this brief.

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* (2018) [hereinafter Chamber Report], https://www.instituteforlegalreform.com/uploads/sites/1/Tort_costs_paper_FINAL_WEB.pdf.

The Chamber is thus well situated to assist the Court in understanding the dangers of misreading Texas law to expand strict liability in this context. In so doing, the Chamber takes no position on the meaning of the term "seller" in other contexts. Further, the Chamber 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.

SUMMARY OF THE ARGUMENT

Strict products liability—which does not depend on proof of a defendant's negligence or intent to do harm—is the exception to general principles of tort liability. Accordingly, it has been carefully and deliberately cabined by Texas law. The District Court's decision here, however, expands strict liability in a manner contrary to established Texas law. This recurring question about strict liability and third-party sellers is arising in many different jurisdictions—with nearly all courts concluding that Amazon.com is not subject to strict liability tort law. This Court's guidance is needed now to reimpose the limits Texas law sets on strict liability.

I. Texas law imposes strict liability on a "seller" in certain situations, but a party does not become a "seller" subject to Texas's strict liability tort law by merely facilitating the sales of others. *New Tex. Auto Auction Servs., L.P. v. Gomez De Hernandez*, 249 S.W.3d 400, 403 (Tex. 2008). Texas's strict liability tort law requires those "who *place* products in the stream of commerce to stand behind them; it does not require everyone who *facilitates* the stream to do the same." *Id.* at 402. When Amazon.com acts merely as an online marketplace for a different party to sell

products, Amazon.com does not "place products in the stream of commerce" and is not "engaged in the business of selling" products. *See id.* It merely facilitates the sales of third-party sellers.

II. Allowing the District Court's decision to stand, even in the interim, blurs Texas's bright line between "sellers" and facilitators for the purposes of strict liability torts. This creates significant uncertainty for members of the business community nationwide in how to order their relationships with third-party sellers. Without resolution now by this Court, the question will recur—as it has in numerous jurisdictions across the country, most of which have concluded that Amazon.com is not subject to strict liability tort law. And in the meantime, the District Court has upset Texas's wise policy choice to limit strict liability and minimize its negative effects on businesses and consumers.

ARGUMENT

I. The District Court Erroneously Expanded Strict Liability Under Texas Law, By Incorrectly Holding that Amazon.com, as an Online Marketplace, is a "Seller" Subject to Strict Liability.

The District Court improperly extended strict liability under Texas law by holding that Amazon.com, as an online marketplace, is a "seller." But Amazon.com in this capacity does not "introduce" or "*place* products

in the stream of commerce." *New Tex. Auto*, 249 S.W.3d at 402, 405. Instead, it merely "*facilitates* the stream" by providing services to the actual third-party sellers. *Id.* at 402.

The Supreme Court of Texas has adopted § 402A of the Second Restatement of Torts, "holding those who sell defective products strictly liable for physical harm they cause to consumers." *Id.* at 403. And the Supreme Court has addressed the Restatement's key "seller" requirement: the party must be "*engaged in the business of selling*" a product to be strictly liable for its defects. *Id.* (emphasis in original) (quoting Restatement (Second) of Torts § 402A(1) (Am. Law Inst. 1965)).[2]

To qualify as a "seller," a party must "introduce" or "actually place[] a product in the stream of commerce." *Id.* at 403, 405. Both "introducing" and "placing" products in the stream of commerce are "concepts []

[2] *New Texas Auto* also relied on the Third Restatement, which also supports the argument that Amazon.com, as an online marketplace, is not a "seller." 249 S.W.3d at 404. Amazon.com in that capacity 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 (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]"). Restatement (Third) of Torts: Prod. Liab. § 20 (Am. Law Inst. 1998).

intended to describe *producers*"—not those who have "nothing to do with making" the product. *Id.* at 405 (emphasis added). From this core understanding, Texas courts have imposed strict products liability on "manufacturers, distributors, lessors, bailors, and dealers." *See id.* at 403. All of these recognized "sellers" share a common feature: If they do not actually sell a product, they are at least "in the same position as one who sells the product." *Id.* at 403-04 (quoting *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 792 (Tex. 1967)). And a sale "consists in the passing of title from the seller to the buyer for a price." Tex. Bus. & Com. Code § 2.106(a).

The District Court noted that Texas law does not necessarily require a "seller" to "*transfer* title." Dist. Ct. Op. at 14 (emphasis added); *see, e.g.*, *New Tex. Auto*, 249 S.W.3d at 403 (noting *lessors* can be subject to strict liability). But nothing in Texas law suggests that a party who *never had title* to a product can somehow be deemed a "seller" of that product. For a party to qualify as a "seller," that party must have held title to the product at some point.[3]

[3] But even acquiring and transferring title to a product may not make the party a "seller." *See New Tex. Auto*, 249 S.W.3d at 405 (auctioneer that *acquired and transferred title* to a product it auctioned was not a "seller").

In all events, Texas has steadfastly declined to extend strict liability to those who merely facilitate others' sales. So shipping companies, payment facilitators (like credit card processing services), warehouses, and advertisers are not "sellers." *See New Tex. Auto*, 249 S.W.3d at 403 (identifying non-"sellers"). Here, Amazon.com has just combined those facilitating functions into one service. There is no basis in Texas law for the proposition that, by combining facilitating functions, an entity somehow stands "in the same position as one who sells the product." *Id.* at 403-04 (quoting *McKisson*, 416 S.W.2d at 792).

The District Court's contrary decision relies on Chapter 82 of the Texas Civil Practice and Remedies Code. *See* Dist. Ct. Op. at 12-14. But the District Court ignored the Supreme Court of Texas's express directive that Chapter 82 "was not intended to replace section 402A [of the Restatement] or the common law except in limited circumstances." *New Tex. Auto*, 249 S.W.3d at 405 (citing Tex. Civ. Prac. & Rem. Code § 82.005(e)). Rather, Chapter 82's "broad definitions were drafted to provide indemnity for all retailers." *Id.* Consequently, "[t]o the extent Chapter 82 addresses product claims generally, it reflects a legislative intent to *restrict liability* for defective products *to those who manufacture them*." *Id.*

(emphases added). Chapter 82's definitions therefore cannot expand strict liability by supplanting the common law's distinction between sellers and facilitators.

Regardless, Chapter 82's definition of "seller" also confirms that Amazon.com's actions at issue in this case do not make it a seller subject to strict liability. Chapter 82 defines a "seller" as anyone "engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce" a product. Tex. Civ. Prac. & Rem. Code § 82.001(3). The Supreme Court of Texas has explained that the key language in Chapter 82, as in the Restatement, is that a seller must be "'*engaged in the business of*' selling or distributing" a product. *Centerpoint Builders GP, LLC v. Trussway, Ltd.*, 496 S.W.3d 33, 39 (Tex. 2016) (emphasis added). So when an entity is engaged in the business of providing a service, it is not also "'engaged in the business of' selling a product if providing that product is incidental to selling services." *Id.* at 40. Here, for instance, sales made by third-party sellers are incidental to the facilitation services that Amazon.com provides to those third-party sellers.

More fundamentally, there is no basis in Texas law for the District Court's decision 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. *New Tex. Auto*, 249 S.W.3d at 404 (collecting authorities). That does not describe Amazon.com, which, as relevant here, has simply created and run a marketplace for third-party sellers.

At bottom, for sales by third parties, while Amazon.com as an online marketplace is "obviously engaged in sales, the only thing they sell for their own account is their services; the items . . . are generally sold for others." *Id.* at 402. It simply lacks the degree of control and responsibility contemplated by Texas's strict liability law.

II. The District Court's Improper Expansion of Strict Liability is a Recurring Issue that Should Be Answered Definitively to Prevent Harms to American Businesses, Consumers, and the National Economy.

The District Court's reasoning and conclusion blurs the lines that Texas has carefully drawn to cabin strict liability.

Moreover, this case is just one in a nationwide wave of litigation. Facing similar questions, nearly all courts have disagreed with the District Court's approach here and have concluded that Amazon.com is not subject to strict liability tort law. Yet, the questions presented here about

Texas law will recur until decided conclusively within this Circuit. *See, e.g.*, *Stiner v. Amazon.com, Inc.*, No. 2019-0488 (Ohio) (pending); *Oberdorf v. Amazon.com*, 930 F.3d 136, *reh'g en banc granted*, *opinion vacated*, 936 F.3d 182 (3d Cir. 2019) (pending); *Carpenter v. Amazon.com, Inc.*, No. 19-15695 (9th Cir.) (pending); *see also Fox v. Amazon.com, Inc.*, 930 F.3d 415 (6th Cir. 2019); *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135 (4th Cir. 2019).

Texas is the second most populous State in the country, full of consumers who purchase products from third-party sellers on online marketplaces. Just as the District Court expressly looked to other district court decisions in light of the lack of guidance from this Court, *see* Dist. Ct. Op. at 12, other district courts may rely on the erroneous decision here until they have guidance from this Court.

That is particularly problematic here because the District Court's decision inverts Texas's wise public policy decision to cabin strict products liability. Generally, the tort system 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 at 4. This inefficient allocation is especially acute in Texas. 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* Joni Hersch & Kip Viscusi, *Tort Liability Litigation Costs for Commercial Claims*, 9 Am. L. & Econ. Rev. 330, 358-62 (2007). The U.S. Chamber's Institute for Legal Reform has come to similar conclusions. *See* Chamber Report at 6.

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.*, Thomas J. Campbell, Daniel P. Kessler & George B. Shepherd, *The Causes and Effects of Liability Reform: Some Empirical Evidence* 18-22, NBER Working Paper No. 4989 (1995). 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.*, Peter W. Huber & Robert E. Litan, *The Liability Maze: The Impact of Liability Law on Safety and Innovation* 16 (1991). 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* Jeremy A. Leonard, *How Structural Costs Imposed on U.S. Manufacturers Harm Workers and Threaten Competitiveness* 16 (2003) (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 price increases" that reach consumers. Joanna M. Sheperd, *Products Liability and Economic Activity: An Empirical Analysis of Tort Reform's Impact on Businesses, Employment, and Production*, 66 Vand. L. Rev. 257, 287 (2013). Completing the circle of harms between consumers and businesses, cost 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." A. Mitchell

Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 Harv. L. Rev. 1437, 1472 (2010).

The general costs imposed by the tort system disproportionately affect small businesses and entrepreneurs—exactly those who most benefit from 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 those sellers.

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* Sheperd, 66 Vand. L. Rev. at 287-88. Accordingly, the Court should grant the Petition and clarify the limits that Texas has placed on strict liability.

CONCLUSION

This Court should grant the Petition for Permission to Appeal.

February 14, 2020

Respectfully submitted,

/s/ Scott A. Keller

Scott A. Keller
BAKER BOTTS LLP
98 San Jacinto Blvd., Suite 1500
Austin, Texas 78701
(512) 322-2500
scott.keller@bakerbotts.com

Jeremy Evan Maltz
BAKER BOTTS LLP
700 K St. NW
Washington, D.C. 20001

Daryl Joseffer
Michael B. Schon
U.S. CHAMBER
LITIGATION CENTER
1615 H Street NW
Washington, D.C. 20062

Counsel for Amicus Curiae
The Chamber of Commerce of the United States of America

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above document was filed and served on February 14, 2020, via ECF upon counsel of record for the parties.

I further certify that, on February 14, 2020, the foregoing brief was served by first-class mail—with a courtesy copy provided by electronic mail—on the following counsel of record:

Jeff Meyerson
MEYERSON LAW FIRM
2224 Walsh Tarlton Lane, Suite 120
Austin, TX 78746
jeffm@meyersonfirm.com

Clifford L. Harrison
MUNSCH HARDT KOPF & HARR, P.C.
700 Milam, Suite 2700
Houston, TX 77002

/s/ Scott A. Keller
Scott A. Keller

CERTIFICATIONS UNDER ECF FILING STANDARDS

Pursuant to paragraph A(6) of this Court's ECF Filing Standards, I hereby certify that (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

/s/Scott A. Keller
Scott A. Keller

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 5(c)(1) and 29(a)(5) because this brief contains 2,586 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in 14-point Century Schoolbook font.

Dated: February 14, 2020

/s/ Scott A. Keller
Scott A. Keller