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, INCORPORATED,
Defendant-Appellant.

On 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 APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

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The undersigned counsel of record certifies that, in addition to the persons and entities identified in the Appellant'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.

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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.[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*, its members, 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 2018 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. As this Court has said in a case examining strict liability under Texas law, "it is not for [federal courts sitting in diversity] to adopt innovative theories of recovery or defense for Texas law, but simply to apply that law as it currently exists." *Galindo v. Precision Am. Corp.*, 754 F.2d 1212, 1217 (5th Cir. 1985). The District Court violated that principle and expanded strict liability in a manner contrary to established Texas law and good policy.

This Court should join courts across the country that have considered similar questions by reversing the District Court's decision and confirming the limits that Texas has placed on strict products liability.

I. Texas law imposes strict products 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, which is not enough to trigger strict products liability under Texas law.

II. Texas has made the considered decision to limit strict products liability. The American tort system costs businesses and consumers billions of dollars annually. And Texas consumers already bear their share of those costs—which generate higher prices, stifle innovation, and result in less competition. The District Court's decision expanded the scope of strict products liability and, if affirmed, will impose more costs on Texas consumers and businesses nationwide than Texas has decided is prudent.

ARGUMENT

I. The District Court Erroneously Expanded Strict Liability Under Texas Law By Incorrectly Holding that, When Amazon.com Merely Operates an Online Marketplace for Others to Sell Products, Amazon.com Itself Is a "Seller" Subject to Strict Products Liability.

The District Court improperly extended strict liability under Texas law by holding that Amazon.com itself is a "seller" when it merely operates an online marketplace for *others* to sell their products.[2]

For these products sold by *others* through Amazon.com's online marketplace, Amazon.com does not "introduce" or "*place* products in the stream of commerce." *New Tex. Auto*, 249 S.W.3d at 402. Consequently, in its capacity merely providing an online marketplace, Amazon.com cannot be a "seller" for purposes of strict products liability. *Id.* at 405. Instead, it merely "*facilitates* the stream" by providing services to the actual third-party sellers. *Id.* at 402. Texas has long declined to extend strict products liability to such service providers and this Court should not undermine that decision.

[2] To be clear, Amazon.com does sell products itself on this online marketplace, but the issue before this Court does not concern those products. Rather, Amazon.com allows other third parties to sell their products using the online marketplace Amazon.com created. This case concerns those products sold by third parties.

The Supreme Court of Texas has adopted Section 402A of the Second Restatement of Torts, which "hold[s] those who sell defective products strictly liable for physical harm they cause to consumers." *Id.* at 403. And the Supreme Court has identified the Restatement's key requirement to determine who are "sellers": a 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)).[3]

To qualify as a "seller," an entity 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

[3] In *New Texas Auto*, the Supreme Court of Texas also relied in part on the Third Restatement, which similarly supports the argument that Amazon.com, as an online marketplace, is not a "seller." *See* 249 S.W.3d at 404. The Third Restatement expressly excludes those who merely "assist[] or provid[e] services to product distributors," even if they "indirectly facilitat[e] the commercial distribution of products." Restatement (Third) of Torts: Prod. Liab. § 20, cmt. 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 (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.

"concepts [] 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; *see also* Second Restatement § 402A, cmt. f (listing manufacturers, retailers, wholesalers, distributors, and the operators of restaurants as being "in the business of selling products").

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." *New Tex. Auto*, 249 S.W.3d at 403-04 (quoting *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 792 (Tex. 1967)). And, under Texas law, "every sale must transfer property, and where no transfer occurs, nothing is sold." *Hegar v. Am. Multi-Cinema, Inc.*, No. 17-0464, 2020 WL 1648043, at *5 (Tex. Apr. 3, 2020) (citation omitted); *see* Tex. Bus. & Com. Code § 2.106(a) (a sale "consists in the passing of title from the seller to the buyer for a price").

The District Court noted that Texas law does not necessarily require a "seller" to "*transfer* title" for purposes of strict products liability. ROA.1017 (emphasis added); *see, e.g.*, *New Tex. Auto*, 249 S.W.3d at 403

(noting *lessors* can be subject to strict products liability). But nothing in Texas law suggests that a party who *never held title* to a product can somehow be deemed a "seller" of that product when, as here, the product reaches the consumer through a sale. For a party to qualify as a "seller," that party must have held title to the product at some point.[4]

In all events, Texas has steadfastly declined to extend strict liability to those who merely facilitate sales made by others. So shipping companies, payment facilitators (like credit card processing services), warehouses, and advertisers are not "sellers" for purposes of strict products liability. *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). In fact, other courts have recognized that—under Section 402A of the Second Restatement—regardless of whether Amazon.com provides "extensive" services "in facilitating the sale," the

[4] 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").

combination of those services is "no more meaningful to the analysis" than the provision of individual services. *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 142 (4th Cir. 2019).

The District Court's contrary decision relies on Chapter 82 of the Texas Civil Practice and Remedies Code. *See* ROA.1015-17. 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.

More fundamentally, there is no basis in Texas law for the District Court's decision because the decision does not comport with the common-law policy justifications underlying strict products liability—which is

designed to ensure that those with control over the design and manufacture of products are responsive to consumer harms. *See id.* 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 over the product and level of responsibility contemplated by Texas's strict liability law. And it is not the role of this Court to expand the current scope of Texas products liability law. *See Meador v. Apple, Inc.*, 911 F.3d 260, 264 (5th Cir. 2018) ("If guidance from state cases is lacking, 'it is not for us to adopt innovative theories of recovery under state law.'") (quoting *Mayo v. Hyatt Corp.*, 898 F.2d 47, 49 (5th Cir. 1990)); *Galindo*, 754 F.2d at 1217.

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

Texas has made the wise 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.

This case is just one in a nationwide wave of litigation attempting to extend strict products liability beyond that limited scope. Facing similar questions, nearly all courts have concluded that Amazon.com as an online marketplace is not subject to strict liability tort law. *See, e.g.*, *Carpenter v. Amazon.com, Inc.*, No. 19-15695 (9th Cir.) (pending); *Stiner v. Amazon.com, Inc.*, No. 2019-0488 (Ohio) (pending); *see also Fox v. Amazon.com, Inc.*, 930 F.3d 415 (6th Cir. 2019); *Erie Ins.*, 925 F.3d 135; *Oberdorf v. Amazon.com*, 930 F.3d 136, *reh'g en banc granted and opinion vacated*, 936 F.3d 182 (3d Cir. 2019) (pending).

This Court should resist plaintiff's attempt to expand strict liability and impose greater costs on Texas consumers and American businesses. 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." 2018 Chamber Report at 4.

This inefficient allocation is especially acute in Texas. And as the second-most populous state in the country—full of consumers who

purchase products from third-party sellers on online marketplaces—extension of strict products liability will produce more of the same. 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* 2018 Chamber Report at 6.

At the same time the tort system fails to compensate plaintiffs, it also creates externalities. The most immediate burdens are shouldered by businesses, whose entire operations are affected by increased costs. For example, 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. Shepherd, *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 marketplaces and other facilitation 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* Shepherd, 66 Vand. L. Rev. at 287-88. Accordingly, the Court should reverse the district court's expansion of strict products liability and restore the limits that Texas has set.

CONCLUSION

This Court should reverse the district court's order denying summary judgment in part to Amazon.com.

May 11, 2020

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above document was filed and served on May 11, 2020, via ECF upon counsel of record for the parties.

/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.

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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 2778 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: May 11, 2020

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