No. 20-0979

IN THE SUPREME COURT OF TEXAS

AMAZON.COM, INC.,
Defendant-Appellant,

V.

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

On Certified Question from the United States Court of Appeals,
Fifth Circuit, Case No. 20-20108

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

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To the Honorable Supreme Court of Texas:

Public Justice, P.C. and Texas Watch respectfully submit this amicus curiae brief in support of Appellee Morgan McMillan pursuant to Rule 11 of the Texas Rules of Appellate Procedure.

Attestation pursuant to Rule 11(c):

I am the principal attorney that drafted this attached amicus curiae brief. I hereby attest that I was not paid a fee by any party or organization to prepare this brief. I additionally attest I did not discuss the contents of this brief with any party or request assistance from any party in preparing this brief.

March 18, 2021

Respectfully submitted,

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Statements of Interest

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, which is a key element of Public Justice's mission.

Texas Watch is a non-partisan, non-profit, statewide citizen advocacy organization dedicated to safety, accountability, and justice. For over 20 years, the organization has advocated for the rights of consumers, policyholders, workers, and patients. Texas Watch believes free and functioning courts are vital to the framers' vision of our state and our nation. A strong and independent civil justice system with fidelity to the law ensures a truly competitive marketplace where

businesses rise and fall based on the quality of the goods and services they offer, not the corners they cut nor the power they wield.

This case is of specific interest to Texas Watch because it impacts the legal rights of consumers. Working families must have redress through our courts for equal justice to be an animating and unifying principle in our state.

Summary of Argument

Amazon.com, Inc. ("Amazon") is the world's most valuable retail company. It earns nearly 50% of all online retail dollars in the United States. But there is a hefty price: Amazon's success owes partly to its efforts to evade laws and regulations other retailers must follow—including strict liability—giving Amazon an unfair competitive advantage.

Amazon's primary vehicle for this evasion is its online "marketplace," a commission-based sales platform where product manufacturers and suppliers—often overseas and unreachable—list their products with Amazon and Amazon takes a cut of each sale. Amazon controls nearly every facet of transactions on its marketplace, from specifying how the listing will be formatted to taking payment and confirming the order from the customer. And in many cases, such as this one, Amazon warehouses and ships the product, directly inserting itself in the chain of distribution.

Despite this control, Amazon claims this "marketplace" model exempts Amazon from its responsibility to Texas citizens hurt or killed by products they buy from Amazon. Rather, Amazon argues, it should

enjoy a unique status among retailers, being able to savor the spoils while skirting the responsibilities.

Amazon justifies its desire for special treatment on two grounds. First, Amazon distorts this Court's product liability holdings and the pertinent code sections to argue it is not a "seller" under Texas law. Amazon is wrong. Here, Amazon was "engaged in the business of selling such a product…" If Amazon is not a "seller" under the facts of this case, then the test is insurmountable in the modern e-commerce economy, and Texas products-liability law is completely toothless.

Second, Amazon lobs at this Court several faulty policy-based arguments. For example, it claims holding it to the same standard as every other retailer would be detrimental to Texas businesses, would ensnare dissimilar companies like package delivery services, and would run afoul of the Texas Legislature's expressed policy preferences.

One could fairly assume that if Amazon is going to make such bold claims, it would support them with citations to the record or at least cogent argument. But it does not. Amazon simply states them as if they are obvious, immutable facts.

Yet, they are not obvious, nor even plausible. How would holding Amazon liable for selling a defective product impact UPS or FedEx? Unlike Amazon, they do not sell products. How liability for Amazon—a company that has done more to decimate traditional and small-business retail than any other entity on the planet—be bad for Texas businesses? Consider who Amazon believes *is* responsible for product defects on its marketplace—its suppliers; the very businesses whose interests Amazon claims to be advancing.

As to legislative policy, that begins and ends with the words of the statute. Amazon can argue all it wants about tort reform or the perceived evils of product liability in general, but those arguments are inapposite. The Texas Legislature has defined the contours of product liability law and Amazon fits squarely within them.

The district court was correct to find Amazon could be held strictly liable under Texas law because it was the key link in the chain of distribution of the defective remote. Amazon itself said it best, in publicly proclaiming its support for proposed legislation in California that would hold e-commerce companies like Amazon strictly liable for defective products: "Injured consumers should be able to seek

compensation regardless of how a particular online marketplace makes money."[1]

[1] Huseman, Brian, *Amazon Stands Ready to Support AB 3262 if all Stores are Held to the Same Standard*, THE AMAZON BLOG (August 21, 2020), https://blog.aboutAmazon.com/policy/Amazon-stands-ready-to-support-ab-3262-if-all-stores-are-held-to-the-same-standards (last visited February 3, 2021).

Argument

I. Amazon has purposefully upended the traditional retail model and supplanted it with one that creates a conduit for unsafe and counterfeit goods to enter the United States.

A. Amazon exercises total control over all transactions on its website.

Like most traditional retailers, part of Amazon's business is selling products. Unlike most traditional retailers, though, Amazon also acts as the marketplace, the distributor, and in some cases the manufacturer. Or, as succinctly put by one court, "Amazon … serves all the traditional functions of both retail seller and wholesale distributor." *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964, 973 (W.D. Wis. 2019).

Amazon's e-commerce marketplace model has been wildly successful for Amazon. According to Forbes, "Amazon has surpassed Walmart as the biggest retailer on the planet."[2] And its "marketplace" represents "a fast-growing part of Amazon's retail empire, and a

[2] Lauren Debter, *Amazon Surpasses Walmart As The World's Largest Retailer*, FORBES (May 15, 2019) https://www.forbes.com/sites/laurendebter/2019/05/15/worlds-largest-retailers-2019-amazon-walmart-alibaba/#65f43bfd4171.

lucrative one." *McMillan v. Amazon.com, Inc.*, 983 F.3d 194, 197 (5th Cir. 2020), certified question accepted (Jan. 8, 2021).

A product manufacturer or supplier wanting to list products on Amazon's marketplace must agree to Amazon's Business Solutions Agreement ("BSA"), an adhesion contract that gives Amazon total control over transactions on its marketplace. As one legal commentator observes, "the [BSA] exists primarily to serve Amazon's interest in shielding itself from as much liability stemming from its third-party vendors as possible." Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C.J.L. & Tech. On. 181, 216 (2019).

Under the BSA, any supplier using the Amazon.com website must agree to a litany of terms prescribed by Amazon that dictate nearly everything about the listing. Among other things, the BSA gives Amazon unfettered discretion to alter or remove listings or to altogether ban third parties at its election, gives Amazon the exclusive right to process payments and receive all sales proceeds, and largely bars any communication between the supplier and the buyer. The BSA also provides that Amazon gets paid for every sale through a commission,

which Amazon calls a "referral fee," determined by the type of product being sold, as well as various fees. *See*, ROA 258-305 (the BSA).

The BSA has some regrettable omissions as well. For example, Amazon does not require foreign suppliers to designate a U.S. agent for service of process or to identify the manufacturer of products sold through Amazon.

For an additional charge, Amazon will fulfill orders from its own warehouses, as was done here. Under the Fulfillment by Amazon ("FBA") program, Amazon receives the product directly from the supplier/manufacturer, stores it, selects it, and then ships it from one of its many warehouses receiving an order. Fulfilled products are also returned to Amazon and Amazon processes the return.

A supplier wanting to use Fulfillment by Amazon must register each product with Amazon, and Amazon may refuse registration of any product. When an Amazon customer places an order for a product that is Fulfilled by Amazon, Amazon picks the product from the shelf, packs it in an Amazon box, and ships it with, when eligible, Prime Shipping. Amazon can package Fulfilled products together, regardless of whether they come from different suppliers, so they all arrive together.

Buyers on Amazon.com can purchase multiple products from different suppliers (including Amazon) at the same time. Amazon's customers cannot make payments directly to suppliers; instead, the customer must pay Amazon. Amazon then periodically remits sales proceeds to the supplier, minus the commissions and fees charged by Amazon, meaning Amazon earns a commission on every sale made on its site.

B. Amazon dominates retail in an unhealthy way.

E-commerce has largely displaced brick and mortar storefronts. "The consumer goes to Amazon's website to look for a product in the same manner one would walk into a Lowes, Home Depot, or a neighborhood True Value, or order from one of those entities' website." *State Farm Fire & Cas. Co. v. Amazon.com Services, Inc.*, 70 Misc. 3d 697, 137 N.Y.S.3d 884, 889 (N.Y. Sup. Ct. 2020). Amazon's massive website, Amazon.com, "makes up at least 46 percent of the online retail marketplace, selling more than its next twelve online competitors combined." *McMillan*, 983 F.3d at 196.

This has real-world consequences. In certifying the question to this Court, Judge Willett remarked that "[t]he migration of consumer

spending online, further compounded by the COVID-19 pandemic, has enabled [Amazon,] the once modest online bookstore (initially dubbed 'Cadabra,' as in 'abracadabra') to make many traditional retailers disappear." *McMillan*, at p. 196. Indeed, Amazon—a company that saw a $100 billion *increase* in net sales for 2020[3]— is now so large and powerful that a bipartisan group of members of the U.S. House of Representatives is proposing rewriting the antitrust laws to account for its monopoly power.[4]

And it is easy to see why. Amazon is among "the kind of monopolies we last saw in the era of oil barons and railroad tycoons." *See* fn. 2, *infra*, at p. 6. Republican legislators have excoriated tech behemoths like Amazon for using "their monopoly power to act as gatekeepers to the marketplace, undermine potential competition, and pick winners and losers, all while simultaneously cozying up to

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[3] Kohan, Shelley, *Amazon's Net Profit Soars 84% With Sales Hitting $386 Billion*, FORBES (Feb. 2. 2021, 6:12 pm EST), https://www.forbes.com/sites/shelleykohan/2021/02/02/amazons-net-profit-soars-84-with-sales-hitting-386-billion/?sh=2eb0fdf11334.

[4] See, *Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee of the Judiciary* (October 2020), p. 6, https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf ("Majority Report").

unfriendly nations like China in order to further expand their global footprint."[5]

And while those are concerns specific to antitrust, they give context to the question here. For years, Amazon has reaped the benefits of being a retail behemoth, ruthlessly undercutting brick and mortar stores, large and small, who must factor the cost of defective products into their price structure, while leaving injured consumers like Morgan McMillan with nothing. If Amazon is successful in gerrymandering its way out of the responsibilities accepted by other legitimate retailers, that will only further its unfair competitive advantage and feed its belief that it is exempt from the rule of law. Indeed, "courts and enforcers have found the dominant [e-commerce] platforms" like Amazon to have "arbitrary and unaccountable power," which they use to "repeatedly violat[e] laws and court orders" in a way that "raises questions about whether these firms view themselves as above the law,

[5] Rep. Ken Buck. *The Third Way*, House Judiciary Committee, Subcommittee on antitrust, commercial, and administrative law (Oct. 6, 2020), https://buck.house.gov/sites/buck.house.gov/files/wysiwyg_uploaded/Buck%20Report.pdf ("Minority Report").

or whether they simply treat lawbreaking as a cost of business." Majority Report at p. 19.

This case is a perfect example of that. By attempting to exploit what it argues is a loophole in the chain of distribution of consumer goods and falsely labeling itself a mere "service provider" or sales "facilitator," Amazon demands this Court's imprimatur on a system where Amazon avoids all accountability and makes it nearly impossible to hold anyone else responsible as well.

Amazon's dominance also allows Amazon to position itself as the unquestioned gatekeeper to online sales. Manufacturers and suppliers, reputable or otherwise, quickly find out that it is Amazon's way or the highway. This allows Amazon to exploit its monopoly position by unfairly competing with its own third-party suppliers, engaging in favoritism and bidding wars, and otherwise acting capriciously. Indeed, news stories of small-business sellers being abused by Amazon are commonplace.[6]

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[6] *See, e.g.*, Spencer Soper, *After Going All-In on Amazon, a Merchant Says He Lost Everything*, BLOOMBERG (Oct. 27, 2020), https://www.bloomberg.com/news/articles/2020-10-27/amazon-reviews-alleging-counterfeit-products-can-get-sellers-kicked-off-platform ; *Amazon Merchant Kicked off Website Spent $200,000 to get Justice*, The

So while Amazon lectures this Court about giving consumers choice and protecting startups and small retail businesses, the truth is the only one who wins from this setup is Amazon. Amazon guarantees itself a profit from every sale while freely jettisoning injured consumers to a land of no recourse and undermining its own suppliers when it feels like it.

C. Amazon's business model encourages disreputable manufacturers and suppliers to sell unsafe products.

Amazon's "direct import" business model—whereby foreign suppliers send products to Amazon warehouses for FBA sales—encourages sketchy overseas operations like Hu Zi Jie (which operated on Amazon under the fake name "USA Shopping 7693"), to unload dangerous and illegal goods on unsuspecting Texas while maintaining zero accountability. "By design, Amazon's business model cuts out the middlemen between manufacturers and consumers, reducing the friction that might keep foreign (or otherwise judgment-proof) manufacturers from putting dangerous products on the market." *Erie*

SEATTLE TIMES (Mar. 3, 2021), https://www.seattletimes.com/business/amazon-merchant-kicked-off-website-spent-200000-to-get-justice/

Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 144 (4th Cir. 2019) (Motz, J., concurring). For many of these foreign manufacturers and suppliers, FBA is their only access point to the U.S. consumer market.

The judgment-proof nature of Amazon's foreign manufacturers isn't just speculation. A Mississippi federal court recently decided a case where the plaintiff seeking to recover damages for a house fire caused by a product bought from Amazon's site tried to serve the third-party supplier, but the address provided was "an empty field in China." *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 3:18CV166-M-P, 2021 WL 930697, at *1 (N.D. Miss. Mar. 11, 2021). Other cases recount similar scenarios. *See*, *e.g.*, *Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431, 267 Cal. Rptr. 3d 601 (2020) (finding Amazon strictly liable in sale of exploding battery partly because Chinese manufacturer and supplier either defaulted or could not be served); *Stiner v. Amazon.com, Inc.*, 2020-Ohio-4632 (plaintiff unable to complete service on Chinese company that manufactured caffeine powder bought on Amazon and that caused death of teenage boy); *Allstate New Jersey Insurance Company v. Amazon.com, Inc.* (D.N.J., July 24, 2018, No.

CV172738FLWLHG) 2018 WL 3546197, at *2 ("Neither Plaintiff nor [Amazon] is aware who manufactured the laptop battery[.]")

Yet, under Amazon's take on the law, it would have no accountability for any harm caused by its goods. That would leave the injured buyer, who is impeded partly by Amazon's own business model that prevents contact between the parties and allows suppliers to operate under a pseudonym on Amazon, to try to identify, locate, serve, and pursue a judgment against a foreign or fly-by-night manufacturer or supplier.

D. Amazon's marketplace is overflowing with dangerous, defective, and illegal goods.

The result of Amazon's business model, which allows many illegitimate suppliers to nevertheless list products and hide their identities by using a pseudonym, is unsurprising. Several investigative reports illustrate how Amazon has allowed overseas and disreputable manufacturers and suppliers to treat the United States as a dumping ground for shoddy, dangerous, and illegal merchandise. For example, in a now well-publicized piece, the Wall Street Journal 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."[7]

The Journal's investigation uncovered, among other things, a motorcycle helmet purchased on Amazon was listed as DOT compliant but wasn't. As a result, a man died when the helmet came off during a crash. *Id.* And, particularly troubling, many of the unsafe products the Journal uncovered were meant for infants and children—for example, many of the children's toys contained lead. *Id.*

The Wall Street Journal's findings aren't unique. CNN reported that many Amazon-branded products available on its website were fire hazards.[8] The Food and Drug Administration warned consumers not use nearly 50 male enhancement or weight loss products sold on Amazon and eBay after the agency found hidden, dangerous ingredients

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[7] 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, https://www.wsj.com/articles/amazon-has-ceded-control-of-its-site-the-result-thousands-of-banned-unsafe-or-mislabeled-products-11566564990.

[8] Blake Ellis, Melanie Hicken, *Senators demand recalls after CNN report finds Amazon's own products are being flagged as fire hazards,* CNN (Sept. 11, 2020), https://www.cnn.com/2020/09/11/business/amazonbasics-lawmakers-demand-recalls-dangerous-invs/index.html.

in them.[9] And last month, the Environmental Protection Agency (EPA) ordered Amazon to stop selling illegal pesticides on its marketplace, saying they pose "serious and immediate health risks to consumers, children, pets, and others exposed to the products."[10] This comes after the EPA charged that between 2013 and 2018, Amazon committed more than 4,000 violations of the Federal Insecticide, Fungicide, and Rodenticide Act by allowing third-parties to distribute from Amazon warehouses potentially dangerous pesticides and disinfectants. *Id.* Likewise, the Food and Drug Administration has accused Amazon-owned Whole Foods of engaging in "a pattern of receiving and offering for sale misbranded food products."[11]

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[9] Katherine Fung, *FDA Warns Consumers Against Buying Certain Products off Amazon Due to Dangerous Ingredients*, NEWSWEEK (Dec. 17, 2020), https://www.newsweek.com/fda-warns-consumers-against-buying-certain-products-off-amazon-due-dangerous-ingredients-1555749.

[10] Katherine Long, *EPA again orders Amazon to stop selling illegal pesticides*, THE SEATTLE TIMES (Feb. 9, 2021), https://www.seattletimes.com/business/amazon/epa-again-orders-amazon-to-stop-selling-illegal-pesticides.

[11] Genovese, *Whole Foods issues allergy recall after FDA's strict warning to improve food labels,* FOX BUSINESS (Mar. 15, 2021), https://www.foxbusiness.com/lifestyle/whole-foods-issues-allergy-recall-after-fda-issued-strict-warning-for-retailer-to-improve-food-labels.

The risks from Amazon's dangerous and illegal products are not simply academic. A small sampling of the litigation against Amazon gives a face to the risk of injury, death, or substantial property damage from a dangerous Amazon purchase. Among other things:

- a high school student died from taking pure caffeine powder (which the FDA advises is a dangerous substance) purchased from Amazon, *Stiner*, 2020-Ohio-4632;
- a defective glass coffeemaker purchased from Amazon shattered, causing the plaintiff nerve damage, *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 395 (S.D.N.Y. 2018);
- a woman was badly burned by a defective, exploding laptop battery purchased from Amazon, *Bolger*, 53 Cal. App. 5th 431;
- 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;
- 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 v. Amazon.com, Inc.*, 930 F.3d 415, 421 (6th Cir. 2019);
- a fire caused by a defective hoverboard purchased from Amazon burned down a family's home, killing the family dogs, *Carpenter v. Amazon.com, Inc.*, 17-CV-03221-JST, 2019 WL 1259158, at *1 (N.D. Cal. Mar. 19, 2019);
- a defective space heater purchased from Amazon burned a legal aid office to the ground, causing $783,000 in damage, *Legal Aid of Nebraska, Inc. v. Chaina Wholesale, Inc.*, 4:19-CV-3103, 2020 WL 42471, at *1 (D. Neb. Jan. 3, 2020); and
- a woman was blinded in one eye by a defective dog collar, *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 140 (3d Cir. 2019).

None of this is unforeseeable. Rather, this is a direct result of Amazon's business model allowing the direct importation and sale of any product without Amazon checking—even for goods Amazon holds in its own warehouses—that the goods are safe or legal and the suppliers are reputable. Amazon's refusal to do that is partly how Amazon is able to undercut and drive out law-abiding retailers from the marketplace. This is the reality of Amazon's business and what must be considered when Amazon argues about "consumer interest in a broad selection of products," insuring against "isolated personal injuries," and protecting "innocent sellers, their employees, and buyers." Appellant's Br. 34.

II. Under Texas law, Amazon is in the business of selling and distributing commercial products such as the remote.

The specific question presented in this case is whether Amazon can be considered a "seller" of the remote under Texas law. The answer is yes. Amazon did everything a traditional retailer would do with the possible exception of technically taking title to the remote, a factor that is not relevant under Texas law.

A. Amazon sold the remote to Mr. Gartner.

Appellee's husband, Mr. Gartner, went to Amazon's virtual storefront, put the remote in Amazon's "shopping cart," and paid

Amazon using its online checkout system. Since the product was "Fulfilled by Amazon," Amazon then retrieved the defective remote from its own warehouse, packed it, labeled it, and shipped it to Mr. Gartner. This is no different than if he had gone to a physical store, except Amazon shipped him the product rather than handing it to him after retrieving it from the warehouse. In other words, 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)[12].

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) (internal punctuation omitted); *see*

[12] In all of this, 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.

also Tex. Civ. Prac. & Rem. Code Ann. § 82.001(3) ("'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 set the criteria for the listing, took the money for the sale, confirmed the sale, 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 and Casualty Company*, 390 F. Supp. 3d at 972.

Citing New Texas Auto, Amazon repeatedly argues the Texas Legislature intended to restrict strict liability mainly to manufacturers. *See*, *e.g.*, Appellant's Br. 3, 15. But the language Amazon quotes in *New Texas Auto* refers to Tex. Civ. Prac. & Rem. Code Ann. § 82.003(a), which creates a right of indemnity for an innocent product seller. *That* is how the Legislature has chosen to hold manufacturers primarily liable. And, of course, it goes without saying that Amazon can avail

itself of that statutory indemnity any time it gets sued for selling a defective product that causes injury in Texas.

The problem, as Amazon well knows, is those indemnity actions are unlikely to be successful for the same reasons that consumers are unlikely to be successful at holding the suppliers liable. But that is a problem of Amazon's own making. It cannot foist the adverse consequences of its willful business decisions on innocent consumers who had no say in them.

Amazon also contends it is merely a "service provider" that "facilitates" sales. But even if we take that dubious claim at face value, it does not inform the analysis here. 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.")

In Texas, a service provider is exempt from strict liability only if "providing that product is incidental to selling services." *Centerpoint Builders GP, LLC*, 496 S.W.3d at 40 (general contractor at apartment construction project not a "seller" of wooden beams because any product sale was incidental to its contract to provide the service of building the apartment complex). And here, it was not. Amazon provided no service to Mr. Gartner—other than the "service" of taking his money and sending him a product in exchange; the same "service" any retailer could claim to provide.

Just because Amazon's business model is somewhat novel does not mean Amazon is not a seller or distributor under established law. 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" marketplace, arguing—as Amazon does here—that the third-party developer, not Apple, was the actual "seller." *Id.* at 1519–20.[13]

[13] 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 Inc.*, 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.*

But the Supreme Court disagreed, noting that Apple's proposed rule "would draw an arbitrary and unprincipled line among retailers based on retailers' financial arrangements with their manufacturers or suppliers." *Id.* at 1522. Writing for the court, Justice Kavanaugh 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 and then resells it at a markup or takes commission from acting as the storefront for the product, causing the supplier to factor the commission into the price, "everything turns out to be economically the same for the manufacturer, retailer, and consumer." *Id.*

Because of this economic reality, 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." "[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 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 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. Just like in Apple, Amazon is trying to convince this Court to adopt an arbitrary distinction based on who takes title to a product. But the reality is, whether Amazon chooses to charge a commission or take title and re-sell the product for a markup, "everything turns out to be economically the same for the manufacturer, retailer, and consumer." *Id.* at 1522.

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

Amazon defines a sale for product liability purposes as "the transfer of property or title for a price." Appellant's Br. 18. (citations omitted). But even that narrow definition—which is untethered to Texas law—encompasses Amazon's role. Mr. Gartner gave Amazon his

money (i.e., paid a "price"), and in exchange Amazon "transferred property" to him. That is, by Amazon's definition, a sale.

Discounting its own controlling role in the sale, Amazon repeatedly argues that it did not "source" the remote or set its price. Yet Amazon cites no Texas statute or case ascribing significance to who "sourced" a product or set its price. Indeed, Amazon's chosen definition of "sale" says nothing about those actions, nor does Section 82.001(3).

And, in any event, as a California court recently observed, Amazon *did* choose to offer the remote for sale. "Amazon is no mere bystander to the vast digital and physical apparatus it designed and controls." *Bolger*, 53 Cal. App. 5th at 457 (italics in original). Amazon "chose to set up its website in a certain way, it chose certain terms and conditions for third-party sellers and their products, it chose to create the FBA program, it chose to market third-party sellers' products in a certain manner, it chose to regulate third-party sellers' contact with its customers, it chose to extend certain benefits to its customers and members who purchase third-party sellers' products, and most importantly it chose to allow the sale at issue here to occur in the manner described above." *Id.*

Nothing aside from Amazon's own choices required it to allow Hu Xi Jie to list the remote, to store the remote at its warehouse, to accept Mr. Gartner's order, or to ship the product to him. "It made these choices for its own commercial purposes. It should share in the consequences." *Id.*

Amazon emphasizes that it never took title to the remote. But again, 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.*, 3:15-CV-2543-L, 2017 WL 661373, at *7 (N.D. Tex. Feb. 17, 2017).

Further, even if Amazon did not hold title to the remote, clearly it had the power to *transfer* title to an Amazon customer after that customer paid Amazon for the product. Indeed, Amazon does not claim Mr. Gartner had to contact Hi Xi Jie separately to obtain title to the remote he purchased. Rather, Amazon transferred title when it shipped the product from its warehouse. *See* ROA 309-310 ("title for items purchased on Amazon" will "pass to you upon our delivery to the

carrier"). 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. And if Amazon has the power to transfer title, then by its own definition, it is a seller.

C. Finding Amazon to be a seller here would not impact true "service providers" such as delivery services.

There is no merit to Amazon's supposed concern that the District Court's ruling would put at risk package-delivery services, advertisers, and others. None of those companies is "engaged in the business of selling products for use or consumption." *Firestone Steel Products 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 do not 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 Tex. Auto Auction Servs., 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).

Further, if there were any truth to Amazon's prediction that holding Amazon responsible for the dangerous junk it sells would lead to a deluge of product liability lawsuits against delivery services, why haven't we seen it? After all, *State Farm Fire and Casualty Company*, 390 F. Supp. 3d 964, a case holding Amazon strictly liable under Wisconsin law for a Fulfilled by Amazon product, was decided nearly two years ago. And *Bolger v. Amazon*, holding Amazon strictly liable under California law for an exploding laptop battery listed by a foreign, judgment-proof supplier, is more than seven months old and generated significant publicity when it was issued.[14]

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[14] *See, e.g.*, Palmer, *California court rules Amazon can be liable for defective goods sold on its marketplace*, CNBC (Aug, 13, 2020, 6:44 pm), https://www.cnbc.com/2020/08/13/amazon-can-be-held-liable-for-faulty-goods-court-rules.html; Graham, *Amazon liable for defective products from third-party sellers, California court says*, USA Today (Aug. 13, 2020, 5:43 pm), https://www.usatoday.com/story/tech/2020/08/13/amazon-retailer-liable-3rd-party-product-defects-california-court-rules/3369886001/; Barash, et al., *Amazon Can Be Liable in California for Defective Products*, Bloomberg (Aug. 13, 2020, 4:29 p.m.),

Thus, one would expect to see some evidence of this problem by now, were it true. But Amazon has nothing. Amazon has not pointed to a single product liability suit against a delivery service, much less the prophesized flood.

D. Abstract policy concerns cannot override the express terms of Texas statutory law.

Amazon argues at some length that liability would run contrary to the "Legislature's stated policy" and that strict liability is a flawed doctrine in general. *See* Appellant's Br. 27-51. But it is Amazon's analysis that is flawed. *See* Section III, Brief, *infra*. It is also unnecessary. The Texas Legislature has already defined what it means to be a "seller" for the purpose of product liability. Tex. Civ. Prac. & Rem. Code Ann. § 82.001(3). And while that definition is not intended to supplant Texas common law entirely, it is instructive.

"Where statutory text is clear, that text is determinative of legislative intent unless the plain meaning of the statute's words would produce an absurd result." *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d

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https://news.bloomberglaw.com/product-liability-and-toxics-law/amazon-can-be-liable-in-california-for-defective-products.

430, 452 (Tex. 2012). Thus, this Court presumes "the Legislature deliberately and purposefully selects words and phrases it enacts, as well as deliberately and purposefully omits words and phrases it does not enact." *Centerpoint Builders GP, LLC*, 496 S.W.3d at 36 (citation omitted).

Here, as discussed above, the definition of "seller," both in the common law and in section 82.001(3), is not so ambiguous as to require academic discussions of the philosophy of tort law or digressions into unrelated common law theories of liability. And while defining the outer boundaries of who is "engaged in the business of selling products for use or consumption" might, as in *Centerpoint Builders*, sometimes be difficult, this is not such a case.

By any reckoning, Amazon is in the business of selling products. Just look at who Amazon's competitors are: other retailers like Walmart, Best Buy, and Target. Not to mention the many former retailers Amazon helped usher into the grave like Borders, Kmart, Circuit City, and most recently, Fry's Electronics. These companies are not service providers, they are (or were) "engaged in the business of selling products for use or consumption."

Ignoring these obvious analogies, Amazon's detours into social host liability, *see Smith v. Merritt*, 940 S.W.2d 602 (Tex. 1997), and a psychiatrist's duty to warn, *see Thapar v. Zezulka*, 994 S.W.2d 635 (Tex. 1999), doctrines that are irrelevant here.[15] Those issues have nothing to do with the definition of "seller." Likewise, Amazon's lengthy foray into the scholarly debate over whether strict product liability effectively serves the goals for which it was created adds nothing to the analysis. This Court is not being called upon to make a pronouncement on the relative societal benefits and burdens of the doctrine of strict liability.

That is not to say context is entirely irrelevant to this Court's determination. But the appropriate context is Amazon's business operations and how it functions in the global retail economy, not whether strict liability is a worthy doctrine in general. The latter question is, as Amazon correctly notes, best left to the Texas Legislature.

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[15] In a particularly egregious misuse of words taken out of context, Amazon asserts on page 32 of its Brief that "[t]his Court has already determined that recognizing a new category of 'sellers' under Section 82.001(3) 'would be inconsistent with legislative intent. *Merritt*, 940 S.W.2d at 607." But, of course, *Merritt* was not a product liability case and had nothing to do with the definition of "seller."

E. Recent decisions are instructive on Amazon's status as a seller when a product is Fulfilled by Amazon.

While decisions from other states are not determinative here, they do illustrate how other courts have dealt with this question. And, they illustrate that the law is moving rapidly toward holding Amazon strictly liable for products that are Fulfilled by Amazon. *See, e.g.*, *Bolger*, 53 Cal. App. 5th 431 (finding Amazon strictly liable in sale of product using Fulfilled by Amazon); *State Farm Fire and Casualty Company*, 137 N.Y.S.3d at 889 (finding triable issue of fact as to whether Amazon is liable as seller of defective thermostat where product was Fulfilled by Amazon); *Legal Aid of Nebraska, Inc.*, 2020 WL 42471, at *5 (permitting strict-liability claims to proceed against Amazon); *State Farm Fire and Casualty Company*, 414 F. Supp. 3d at 873 (same); *State Farm*, 390 F. Supp. 3d at 972 (W.D. Wis.) (same).

Bolger deserves special emphasis because it mirrors this case in almost every way and that court was confronted with the same arguments Amazon makes here. In *Bolger*, the plaintiff purchased a laptop battery that was Fulfilled by Amazon and then she was badly burned when the battery exploded in her lap. *Bolger*, 53 Cal. App. 5th at 437. Amazon convinced the trial court to grant summary judgment,

arguing Amazon could not be held strictly liable under California law. *Id.* But in a detailed and thoughtful analysis, the Court of Appeal reversed, holding, "[u]nder established principles of strict liability, Amazon should be held liable if a product sold through its website turns out to be defective." *Id.* at 439.

The *Bolger* court also considered and persuasively rejected nearly all of the same arguments Amazon makes to this Court. For example:

Amazon argued: Amazon should be treated like an auctioneer, which is not generally strictly liable for the products it auctions.

The *Bolger* court responded: Auctioneers "play[] no more than a 'random and accidental role' in transferring the goods from the seller to the buyer. *Bolger* at 457 (citations omitted). They have "no continuing relationship with anyone in the original chain of distribution to the consumer and therefore could not exert any influence on product safety." *Id.* (citations omitted). "Here, Amazon was part of the original

chain of distribution, and its role was anything but random and accidental. The auctioneer precedents are inapposite." *Id.* at 458.

Amazon argued: Amazon does not have a direct relationship with the product manufacturers.

The *Bolger* court responded: "A conventional retailer, for example, is not shielded from liability merely because it has an ongoing relationship with a product's distributor rather than its manufacturer. Amazon, like a conventional retailer, can exert pressure on manufacturers indirectly through the parties with whom it does have ongoing relationships, i.e., third party sellers." *Bolger* at 460.

Amazon argued: Amazon may not be able to seek contribution or indemnity if it cannot identify the manufacturer.

The *Bolger* court responded: "The risk of nonpayment, in such a circumstance, should fall on an entity that benefited from the sale of the product rather than the injured plaintiff." *Bolger* at 461.

Amazon argued: Holding it strictly liable would force it to raise its commissions and fees on all third-party suppliers and raise prices.

The *Bolger* court responded: "Amazon can choose how to absorb that risk. Nothing in the record supports its assertions that it

would be forced to indiscriminately raise its fees on 'millions of faultless third-party sellers who have never sold a defective or dangerous product…' *Bolger* at 461-462.

Unable to engage with the *Bolger* decision, Amazon waives it off in a footnote, contending it was driven by a desire to expand strict liability that runs counter to this Court's precedents. Appellant's Br., 25, fn. 1. Hardly. Nowhere in *Bolger* does the court claim it is "expanding" strict liability based on policy. Rather, the court simply noted, as all courts confronting this issue do, that Amazon's purposeful disruption of the traditional retail system is just a new wrinkle on an old issue. *Bolger*, at 438.

It is true, as Amazon notes, there are also out-of-state cases finding Amazon not strictly liable. *See*, *e.g.*, *Erie Insurance Company*, 925 F.3d 135; *Fox*, 930 F.3d 415; *Stiner*, 2020 -Ohio- 4632, ---N.E.3d--- (2020); *Garber v. Amazon.com, Inc.*, 380 F. Supp. 3d 766 (N.D. Ill. 2019); and *Eberhart*, 325 F. Supp. 3d 393. But those cases are either inapposite or now questionable precedent.

Unlike this case, several of those cases did not involve the product being "Fulfilled by Amazon," meaning that the third-party, not Amazon,

stored and shipped the products. *See, e.g., Stiner*, 2020 -Ohio- 4632 ("Tenkoris, however, did not use the Fulfillment by Amazon program."); *Garber*, 380 F. Supp. 3d at 773; *Fox*, 930 F.3d at 425. Amazon's failure to take 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. *See*, *e.g*, *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 two other cases that resolved in Amazon's favor did involve Fulfillment by Amazon—*Erie Insurance Company* and *Eberhart*—their holdings are not applicable here.

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.*

But Texas law has no such requirement. So, while Amazon might win this argument in states in which the formal transfer of ownership is a prerequisite to strict liability, Texas is not one of those states.

The other Fulfilled by Amazon decision finding for Amazon, *Eberhart*, is arguably no longer viable precedent. In that case, a New

York federal district court read New York state law to find Amazon not strictly liable. *See id.* at 398. But recently, a New York state court refused to follow that decision, noting "it is clear that Defendant Amazon falls into th[e] category of 'retailers and distributors'" as defined by New York's highest court. *State Farm Fire and Casualty Company*, 137 N.Y.S.3d at 887. Given that the state courts are the ultimate arbiter of state law, *Eberhart* is of little or no value now.

III. Amazon's public policy arguments do not compel the result Amazon wants.

Amazon spills a lot of ink essentially threatening this Court that if it holds Amazon liable here, Amazon will have to take it out on innocent buyers and the business that are forced to rely on Amazon to survive. But if Amazon really cared about its customers, why is it fighting so hard to deny any remedy to Morgan McMillan here? And Amazon's professed "concern" for the vitality of Texas retail businesses is ironic considering Amazon has done more to destroy traditional retail and force migration to Amazon's online platform than any other company on earth.

Indeed, Amazon's Brief shows Amazon is more than happy to throw its "partners" under the bus when convenient. Absent from

Amazon's brief is any suggestion its third-party suppliers, including the "Texas businesses" it claims to empathize with, should be protected from strict liability for defective products sold on Amazon.com. On the contrary, it is clear Amazon sees them as the properly liable parties. The rule Amazon advocates for here protects *only* Amazon.

Amazon counters it would have to raise costs across the board to account for liability. But this is unsupported by anything in the record and also defies common sense. Amazon's contract with every third-party marketplace supplier already requires indemnification from the supplier and, in most cases, liability insurance that names Amazon as an additional insured. Amazon is amply protected. And if there is a risk the third-party will be judgment-proof or beyond the reach of our courts, that risk rightfully falls on Amazon. *Bolger* at 461 ("The risk of nonpayment, in such a circumstance, should fall on an entity that benefited from the sale of the product rather than the injured plaintiff."). Even if Amazon did have to raise its prices to account for strict liability concerns, that would merely put it on an equal footing with traditional retailers subject to strict liability and erase the undeserved commercial advantage it argues it should have.

Indeed, while Amazon's business model may be novel, it would be naïve to believe that Amazon's success is due entirely to whatever legitimate cost savings and convenience that 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. *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2088, 201 L. Ed. 2d 403 (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."[16] As a result, Amazon was able to avoid collecting sales tax on virtually all of its transactions,

[16] 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/.

thereby offering its customers tax-free sales that put "[s]mall brick and mortar retailers ... at a disadvantage."[17]

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:

[17] *Id.*

Absolute immunity from 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.

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 and illegal products whose many victims will be without any meaningful recourse for their injuries.

Finally, it is worth reiterating that while "the world's largest retailer" repeatedly suggests imposing liability on it would amount to a drastic expansion of liability, that is exactly backwards. It is Amazon that is asking for a categorical *exclusion* from the responsibility every other retail business must bear; a staggering reduction in the scope of liability that would come at the expense of the health and safety of Texas citizens.

Conclusion

Amazon easily meets the criteria for being a seller under Texas law, at least in this case. As such, it should be held strictly liable for the defective remote that injured Appellee's young child.

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Certificate of Service

I certify that on March 18, 2021, I served the foregoing Brief of Amicus Curiae Public Justice, P.C., and Texas Watch on counsel for all parties electronically via the court's electronic filing system.

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