No. 20-20108

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MORGAN McMILLAN,
Individually and as Next Friend of E.G., a Minor Child,

Plaintiff–Appellee,

v.

AMAZON.COM, INC.,

Defendant–Appellant.

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

REPLY BRIEF FOR APPELLANT

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INTRODUCTION

The Texas Supreme Court bases "seller" liability on placing a product in the stream of commerce. *See New Texas Auto Auction Servs., L.P.* v. *Gomez de Hernandez*, 249 S.W.3d 400, 403–04 (Tex. 2008). Entities who provide services that facilitate sales, such as trucking companies, marketplaces, and advertisers, do not place the products in the stream of commerce and are not "sellers." *Id.* at 402–04. Hu Xi Jie, whom all agree was the "actual seller," ROA.1010, placed the remote in the stream of commerce by deciding what to sell, setting the price, describing the product, and offering it for sale.

Ms. McMillan and her *amicus*, Public Justice, offer no authority for extending "seller" liability beyond the "actual seller." Nor do they cite any record evidence establishing that Amazon actually placed the remote in the stream of commerce, as opposed to facilitating Hu Xi Jie's sale. The record evidence they rely upon describes the control that any number of service providers—such as the food-delivery providers that became consumer mainstays in the pandemic—regularly exercise over their ser-

vices. Basing liability on control over services would produce wildly unpredictable and far-reaching results, which explains why no court has adopted such a rule.

Ms. McMillan and Public Justice would replace Texas's "place in the stream of commerce" rule with a freewheeling policy inquiry whose lack of specificity would leave "seller" status in the eye of the beholder. Their policy arguments are based largely on speculation and hearsay, and are completely unmoored from Texas law. They are also directed to the wrong body. Under Texas law, the Legislature is the only proper body to consider a broad expansion of tort liability. And, under *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), and its progeny, the district court cannot create new tort liabilities for the State of Texas. The district court erred in doing so, and its order denying in part Amazon's motion for summary judgment should be reversed.

ARGUMENT

I. Amazon Is Not The "Seller" Of Products Offered And Sold By Third Parties.

Ms. McMillan mischaracterizes the issue on appeal as whether Amazon is "immune from Texas product liability claims when it places in the

stream of commerce a dangerous item via its Fulfillment by Amazon system." McMillan Br. 2. There is no question of immunity—let alone "[a]bsolute immunity," Public Justice *Amicus* Br. 18—in this case. An entity is properly considered a "seller" under Texas law when it "sell[s] for [its] own account" and thereby "place[s] products in the stream of commerce." *New Texas Auto*, 249 S.W.3d at 405–06; *see also*, *e.g.*, *Erie* v. *Amazon.com*, 925 F.3d 135, 142 (4th Cir. 2019) ("Amazon does in fact sell products that it owns on its website and thus would be considered a seller of *those* products"). But Amazon is not properly considered a "seller" for products listed and sold by third parties using its marketplace, and here Hu Xi Jie was the "actual seller of the Remote." ROA.1010.

When Amazon sells a product, Amazon is clearly identified as the seller on the product detail page, and Amazon selects, owns, and sets the price for the product. *See* ROA.250. This case, however, involves a product selected, described, priced, offered, and sold by a third party using Amazon's marketplace. And *New Texas Auto* squarely holds that a service provider's assistance to a product seller—"*facilitat*[*ing*] the stream" of commerce—does not equate to "*plac*[*ing*] products in the stream." 249 S.W.3d at 402. The fact that Amazon happens to sell products on its

marketplace does not make Amazon the "seller" of products sold by others using the marketplace. *See Firestone Steel Prods.* v. *Barajas*, 927 S.W.2d 608, 614 (Tex. 1996) ("It is not enough that the seller merely introduced products of similar design and manufacture into the stream of commerce.").

Amazon does not seek "a *vast expansion* of Texas law," McMillan Br. 2, but rather to uphold the "fundamental principle of traditional products liability law" that "the plaintiff must prove that the defendants supplied the product which caused the injury." *Gaulding* v. *Celotex Corp.*, 772 S.W.2d 66, 68 (Tex. 1989). The district court below failed to honor this principle.

A. Amazon Does Not Hold Or Transfer Title To Products Sold By Third Parties.

When a product is distributed through a sale, the "seller" under Texas tort law is the entity that holds the title and transfers it to the buyer. *See* Amazon Br. 25–27. Although Hu Xi Jie satisfies this definition, Amazon does not: It is undisputed that Amazon "never took title to the Remote." ROA.1017. Amazon therefore was not the remote's "seller." *See*, *e.g.*, *Erie*, 925 F.3d at 141.

This definition of "seller" explains the obvious differences between Hu Xi Jie's and Amazon's roles in the sale. Consistent with its rights as the remote's then-owner, Hu Xi Jie chose to sell the remote and made the offer, described the remote on the product detail page, selected the selling price, and decided whether to offer a warranty. *See* Amazon Br. 10 (citing ROA.250–51). Amazon did none of these things, and thus demonstrably was not "'in the same position as one who sells the product.'" *New Texas Auto*, 249 S.W.3d at 403–04 (quoting *McKisson* v. *Sales Affiliates, Inc.*, 416 S.W.2d 787, 792 (Tex. 1967)); *see also*, *e.g.*, *Fox* v. *Amazon.com*, 930 F.3d 415, 425 (6th Cir. 2019) (rejecting "seller" liability where Amazon "did not choose to offer the hoverboard for sale, did not set the price of the hoverboard, and did not make any representations about the safety or specifications of the hoverboard on its marketplace").

According to Ms. McMillan, "Amazon failed to provide *a single* Texas case or statute that requires title be held by a seller in order to bring a products liability case under Ch. 82." McMillan Br. 11. That is because Amazon has not made such an argument. As Amazon has acknowledged, the Texas courts have imposed "seller" liability on entities

that did not hold or transfer title where the product was distributed without a formal sale, such as a lease or "hand[ing] out free samples." *New Texas Auto*, 249 S.W.3d at 403. In those cases, transfer of title is irrelevant to the product's distribution and thus equally irrelevant to whether a particular entity is acting as a "seller" by distributing it. But a "sale" is expressly defined by Texas law as "the passing of title from the seller to the buyer for a price." Tex. Bus. & Com. Code § 2.106(a). Where the distribution at issue is a sale, therefore, an entity that does not "take title to the property during the course of [the] distribution" cannot be the "seller." *Erie*, 925 F.3d at 141.

The Fourth Circuit's decision in *Erie* is particularly instructive because Maryland—like Texas—applies Section 402A of the Restatement (Second) of Torts. *See Phipps* v. *Gen. Motors Corp.*, 363 A.2d 955, 963 (Md. 1976). Like the court below, Ms. McMillan attempts to distinguish *Erie* as relying not on Section 402A but Maryland statutory law, which she claims is different from Texas law in "requir[ing] a transfer of title." McMillan Br. 11; *see also* ROA.1017 ("liability under Maryland law focuses on title"). Ms. McMillan mischaracterizes *Erie*, and in any event

she ignores that Texas has adopted *the exact same statute*—Section 2-106 of the Uniform Commercial Code ("UCC")—that *Erie* relied on.

The Fourth Circuit concluded in *Erie* that "the term 'seller,' as used in Maryland products liability law," should be interpreted consistently with its "ordinary meaning." 925 F.3d at 141. "And the ordinary meaning of 'seller,'" the Fourth Circuit noted, "is 'one that offers [property] for sale,' with 'sale' defined as 'the transfer of ownership of and the title to property from one person to another for a price.'" *Ibid.* (quoting Merriam-Webster's Collegiate Dictionary 1129, 1097 (11th ed. 2007)). This interpretation is not specific to "Maryland products liability law," McMillan Br. 11, and instead applies to every state—including Texas—applying Section 402A's imposition of "seller" liability.

The Fourth Circuit found additional confirmation for this interpretation in Maryland's adoption of UCC Section 2-106, which "defin[es] a 'sale' as 'the passing of title from the seller to the buyer for a price." Md. Code, Com. L. 2-106(1), *quoted in Erie*, 925 F.3d at 141. Even if Texas had not adopted a similar definition, the ordinary meaning of "seller" would still focus on title. *See Erie*, 925 F.3d at 141 ("the Maryland Uni-

form Commercial Code adopts this [ordinary-meaning] definition precisely"). In fact, however, Texas has adopted Section 2-106, including the very same definition of "sale" that applies in Maryland. *See* Tex. Bus. & Com. Code § 2.106(a); *see also supra* at 6. Far from distinguishing Maryland law from Texas law, therefore, the Fourth Circuit's reliance on Section 2-106 confirms that both states apply the same definitions of "sale" and "seller."[1]

B. Amazon's Provision Of Services Does Not Transform It Into A "Seller."

Ms. McMillan concedes that "seller" liability is "limited to include those who actually placed a product in the stream of commerce," and that "persons assisting or providing services to product distributors … are not subject to liability." McMillan Br. 13–14. Amazon plainly "assist[ed]"

[1] Public Justice asserts that Amazon "had the power to *transfer* title" and "transferred title when it shipped the product from its warehouse" based on the UCC's entrustment provision. Public Justice *Amicus* Br. 11–12 (relying on § 2.403). This provision does not address who has title, nor does it confer title on Amazon. It simply "authorizes Amazon, as an entrustee—*i.e.*, as a bailee or consignee—to pass [the third-party seller's] *rights* to the buyer in the ordinary course of business." *Erie*, 925 F.3d at 143 (also explaining that the "purpose of this provision is to safeguard unsuspecting buyers who purchase goods from merchants in good faith, and it does not in any sense create products liability for Amazon as an entrustee" (citations omitted)).

and "provid[ed] services" to Hu Xi Jie. *See*, *e.g.*, ROA.1005 ("One of the services [provided by Amazon] is the Fulfillment by Amazon ('FBA') program, to which Hu Xi Jie subscribed."). But Ms. McMillan contends that Amazon *also* placed the remote in the stream of commerce because, in her view, the remote was briefly "out of the stream of commerce" after "Hu Xi Jie in China sent the Remote to sit on a shelf at Amazon." McMillan Br. 1.

1. Ms. McMillan's theory that Amazon "picked the Remote up off the shelf in its warehouse and placed it back into the stream" of commerce rests on inaccurately characterizing Amazon's services as "storing, packaging, and shipping" the remote. McMillan Br. 17, 24. These are common services used by product sellers, but Ms. McMillan is incorrect that the FBA program provides all of them. Rather, the undisputed evidence shows that "products are fully assembled and packaged before third-party sellers send them to [Amazon's] fulfillment centers for storage." ROA.252. And, "[w]hen an order is placed for the seller's product, the fulfillment center retrieves the product from the seller's inventory, places it in a shipping container or applies a shipping label to the package, and delivers it to a shipping carrier such as UPS." *Ibid.* Amazon

does store the product for the seller, *cf. Erie*, 925 F.3d at 141 ("warehousemen … are not sellers"), but it does not repackage or relabel the seller's products as Ms. McMillan incorrectly states.

Contrary to Ms. McMillan's belief, it is irrelevant that "a sale had not yet taken place" when Hu Xi Jie shipped the remote to Amazon for storage. Auctioneers also are generally involved before a sale takes place, but they nonetheless are not "sellers" because the *timing* of the service being provided has nothing to do with whether providing that service makes the service provider a "seller." *See Antone* v. *Greater Ariz. Auto Auction*, 155 P.3d 1074, 1079 (Ariz. App. 2007) (rejecting "seller" liability for auctioneer even though "sellers may leave vehicles at the auction lot before the day of the auction"), *cited with approval in New Texas Auto*, 249 S.W.3d at 405 n.34.

Nor does the fact that the remote "sat for a period of time" before the sale mean that Amazon must have "placed it back into the stream" of commerce. McMillan Br. 1, 17. The Texas Supreme Court rejected such a broad interpretation of "seller" liability in *New Texas Auto*. While the court had "sometimes referred to strictly liable defendants as 'introducing' products into the stream of commerce," which arguably is broader

than "'placing' them in that current," the court clarified that "both concepts were intended to describe producers" rather than an entity that "'introduces' a product to a crowd but has nothing to do with making it." *Id.* at 404–05. To say that Amazon "introduced"—let alone "placed"—a product into the stream of commerce because the product sat for a period of time on a warehouse shelf requires a tortured understanding of that term. And *New Texas Auto* makes clear that Amazon cannot be deemed the remote's "seller" even if its services could be described with a straight face as "introducing" Hu Xi Jie's products back into the stream of commerce.

Indeed, the FBA service would be a particularly poor proxy for "selling" because third-party sellers can use the service to sell their products through sales channels that are wholly independent of Amazon.com, including their own websites. ROA.253. Yet if Ms. McMillan's break-in-the-stream-of-commerce theory were correct, then Amazon would be deemed the "seller" of these products as well. No Texas court has applied "seller" liability in a manner that departs so wildly from the ordinary meaning of the word.

2. Ms. McMillan asserts that "Amazon had an extraordinary amount of control over the product, the vendor, and the communications with customers," and therefore was "far from a 'mere facilitator' of the stream of commerce." McMillan Br. 5; *see also* Public Justice *Amicus* Br. 15–16. But none of the points that she cites (*see* McMillan Br. 9) show control over the product in a way that could transform a service provider into a seller. Storing the remote (point 1) is no different from the "trucking business" that *New Texas Auto* recognized would not be a "seller." 249 S.W.3d at 403. Her assertions that Amazon packaged, prepared, and delivered the remote (points 2–3) are unsupported by the record. And the remaining points (points 4–8) describe any number of contemporary delivery services such as Grubhub and Postmates; those services set their fees, control their services, process transactions and payment, and channel communications between the seller and consumers.[2]

[2] Ms. McMillan and the district court cite a section of the *Business Solutions Agreement* that requires display of "disclosures, messaging, notices, and policies." ROA.294, *cited in* McMillan Br. 10 and ROA.1014. This section of the BSA addresses multi-channel fulfillment, which is where a seller sells its product through some other channel—such as its own website or eBay—and uses Amazon's FBA service to fulfill the order. That did not occur here.

Ms. McMillan also asserts that Amazon should qualify as a "seller" because it "[h]eld onto" the remote, "[e]arned an amount from each sale," and supposedly "[e]xercised control over the transaction." McMillan Br. 8. But the same is true for auctioneers who serve as intermediaries between the actual buyers and sellers, *see New Texas Auto*, 249 S.W.3d at 401 ("Auctioneers are usually neither buyers nor sellers, but agents for both."), as well as numerous other services—such as GrubHub, Caviar, and Postmates—that are not "sellers." And while Amazon collects a commission for third-party sales, *see* McMillan Br. 9; Public Justice *Amicus* Br. 8 n.2, that was also true of the auctioneer in *New Texas Auto*, 249 S.W.3d at 402, and numerous other service providers. In sum, every reason that Ms. McMillan provides for why Amazon is so "deeply involved in the sale" that it should be considered a "seller," McMillan Br. 14, is true of auctioneers and a host of others that are not "sellers" as a matter of Texas law.

3. A service provider cannot become a "seller" through "storing, packaging, and shipping" a product for the actual seller—or indeed through providing any other service or services. In *New Texas Auto*, the Texas Supreme Court specifically distinguished between entities that

"*place* products in the stream of commerce" and an entity that "*facilitates* the stream," 249 S.W.3d at 402, which means that sales-facilitating activities cannot themselves amount to placing a product in the stream of commerce. And the court illustrated its distinction by noting that "[a]n advertising agency that provides copy, a newspaper that distributes circulars, an internet provider that lists store locations, and a trucking business that makes deliveries" do not thereby become "sellers." *Id.* at 403. *New Texas Auto* is controlling here: Ms. McMillan relies on the services that Amazon provided to Hu Xi Jie, its intent in providing those services, and the "control" that she (incorrectly) imagines Amazon had over Hu Xi Jie's products, but none of those involves placing a product in the stream of commerce.

Like the district court, Ms. McMillan attempts to distinguish *New Texas Auto* out of existence. She notes that *New Texas Auto* involved an "unusual situation where an auctioneer was forced to take title to an automobile it later sold." McMillan Br. 12–13. That misses the point.

The only "atypical" aspect of the sale in *New Texas Auto* was that the same auctioneer sold the same car *twice*. Due to a clerical error that understated the car's mileage in the first sale, an arbitrator forced the

auctioneer to buy the car back before reselling it. 249 S.W.3d at 402. If anything, that made the case closer than this one: Even "[t]he Plaintiffs' counsel [in *New Texas Auto*] concede[d] that auctioneers are generally not sellers under section 402A," but attempted unsuccessfully to "distinguis[h] [the sale at issue] because [the auctioneer] actually held title to the [car] when it was finally sold at auction." *Id.* at 405; *see also Centerpoint Builders GP, Inc.* v. *Trussway, Ltd.*, 496 S.W.3d 33, 42 (Tex. 2016) (dismissing as "immaterial" the "fact that the defendant atypically held title to the allegedly defective vehicle when it was sold"). In this case, by contrast, Ms. McMillan does not have a "one-off" transfer of title to rely on.

New Texas Auto is directly controlling because it involved an auction marketplace identical in all material respects to an online marketplace. Auctioneers "are obviously engaged in sales," but—like other physical and virtual marketplaces—"the only thing they sell for their own account is their services; the items they auction are generally sold for others." 249 S.W.3d at 402. The Texas Supreme Court's conclusion that auctioneers are not "sellers" thus applies equally here.

Moreover, this Court's "caselaw makes plain" that dismissing *New Texas Auto* would be "error" even if it might be distinguished on its facts. *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 888 F.3d 753, 774–75 (5th Cir. 2018). *New Texas Auto* is the most "analogous cas[e]," *id.* at 765 n.5 (citations omitted), because it addresses a defendant whose "services" facilitate "sales" between actual "buyers" and "sellers," 249 S.W.3d at 401–02. Its holding therefore is the most relevant piece of data for this Court's *Erie* guess. *In re DePuy*, 888 F.3d at 765 n.5, 775. And even if Ms. McMillan and the district court were right about the scope of *New Texas Auto*'s holding, it would still be "error" to dismiss its "rationales and analyses," as well as its "dicta," because they are the second- and "third-best predictive *indic*[*ia*]" for this Court's *Erie* analysis. *Ibid.* (citations omitted).

4. Apart from quoting a pair of century-old livestock cases that have nothing to do with product liability, *see* McMillan Br. 16–17, Ms. McMillan offers no authority extending "seller" status to any logistics services. Even if the Texas Supreme Court had not spoken clearly on this subject, this Court could not adopt "innovative theories" that would redefine the chain of distribution and expand the scope of products liability.

Solomon v. *Walgreen Co.*, 975 F.2d 1086, 1089 (5th Cir. 1992) (citations omitted).

Like the district court, Ms. McMillan relies on *Fresh Coat* v. *K–2, Inc.*, 318 S.W.3d 893 (Tex. 2010), and *Centerpoint Builders*, but those cases cannot withstand the weight placed on them. McMillan Br. 14–16. Both cases involved defendants who actually sold the products at issue; the only question was whether the service elements of the transactions overshadowed the product sales.

The contractors in those cases purchased allegedly defective products, then "technically sold" and installed them in consumers' homes. *Centerpoint Builders*, 496 S.W.3d at 40; *see also Fresh Coat*, 318 S.W.3d at 899 (noting the contractor "provided" the product at issue). The contractor in *Fresh Coat* was a "seller" because its contract entailed providing labor and materials for stucco finish. 318 S.W.3d at 899. The court "conclude[d] that when a company contracts to provide a product that is alleged to be defective … the company's installation services do not preclude it from also being a seller." *Id.* at 899. By contrast, the general contractor in *Centerpoint Builders* was not the "seller" of roof trusses that it "purchased … directly from their manufacturer" because its sale of

trusses was "incidental to its contract to provide the services necessary to construct a building." *Id.* at 35, 38–41, 42.

Contrary to Ms. McMillan's claim, these precedents do not address "[w]hat constitute[s] a 'Seller' versus 'Service Provider'" under Texas law. McMillan Br. 14 (citations omitted). They certainly do not purport to impose "seller" liability on an entity that provided only services. And their holdings that a service provider *may* be considered a "seller" if it *actually sold the product* and the sale was not incidental to the services do not apply here, where the "actual seller" was Hu Xi Jie.

C. Ms. McMillan And Public Justice Have Not Identified Any Other Basis For Deeming Amazon A "Seller."

Ms. McMillan and Public Justice advance a host of additional arguments that attempt to reconcile their position with Texas law. None of these arguments supports "seller" liability here.

1. Ms. McMillan argues that Amazon can use its statutory and contractual indemnification rights to minimize its liability in cases like this one. McMillan Br. 18–20. Contractual indemnity is a common commercial arrangement employed in a variety of contexts, and statutory indemnity applies only to the actual "seller." *See Centerpoint Builders*, 496

S.W.3d at 35. Regardless, the availability of indemnity does not make one a "seller" in the first instance. Ms. McMillan provides no authority for the view that Texas law bases "seller" status on the ability to shift a loss to somebody else.

Relatedly, Ms. McMillan contends that Amazon failed to enforce its own insurance requirements for Hu Xi Jie. McMillan Br. 21–22. Insurance provisions are another common commercial arrangement. Basing "seller" status on a common contract term could affect countless service providers, and she cites no authority suggesting that Texas courts would adopt—let alone have adopted—such an approach.

2. Basing "seller" status on having a judgment-proof counterparty—which seems to be the thrust of Public Justice's argument—would be contrary to Texas law. Texas has adopted several liability in most instances, which puts the risk of non-collectible shares on the plaintiff rather than the defendant. *See* Tex. Civ. Prac. & Rem. Code § 33.013. That decision demonstrates that, in the Legislature's view, ensuring full compensation to injured plaintiffs does not trump other important tort

considerations, such as fairness, responsibility, and predictability. Under Texas law, the courts must respect the Legislature's policy decision. *See Thapar* v. *Zezulka*, 994 S.W.2d 635, 640 (Tex. 1999).

3. Public Justice suggests that the Supreme Court's antitrust standing decision in *Apple, Inc.* v. *Pepper*, 139 S. Ct. 1514 (2019), is somehow relevant to Texas products-liability law, *see* Amicus Br. 7–9. Under federal law, antitrust standing is limited to the direct purchaser from an alleged monopolistic retailer; the case was easily resolved by the absence of any "intermediary in the distribution chain between Apple and the consumer." 139 S. Ct. at 1521. The "iPhone owners pay the alleged overcharge directly to Apple," and the "absence of an intermediary" demonstrates that "the iPhone owners are direct purchasers from Apple and are proper plaintiffs to maintain this antitrust suit." *Ibid.*

This decision nowhere addressed state tort law. Nor did it suggest, as Public Justice implies, that Apple would be liable to a person who claimed injury from a mobile application sold by a third-party seller on the Apple App Store. The Supreme Court's decision on an issue of federal law, in a statutory context that has nothing to do with state product-liability law, says nothing relevant about Texas law.

4. Several other decisions that Public Justice cites similarly have no relevance to the proper interpretation of Texas law. Public Justice *Amicus* Br. 5, 12. The district court decisions from Nebraska and Mississippi involved motions to dismiss in which those courts, taking plaintiffs' allegations as true, ruled them sufficient to move beyond the pleading stage. The South Carolina tax decision involved an administrative law judge's interpretation of a sales tax statute that taxed "activities, with the object of gain, profit, benefit, or advantage, either direct or indirect" and defined "seller" broadly to include one "auctioning tangible personal property." If that statute's broad definition had anything to do with product liability, it would be foreclosed as a matter of Texas law by *New Texas Auto*'s holding that auctioneers and other sales facilitators are not "sellers."

The only case that actually involved a "seller" liability issue is the Wisconsin district court decision, *State Farm Fire & Casualty Co.* v. *Amazon.com*, 390 F. Supp. 3d 964 (W.D. Wisc. 2019). The court's decision turned on its interpretation of two Wisconsin statutes; the court held that the structure of the two statutes—both of which *restrict* liability—"suggests that, in the absence of the manufacturer, the entity responsible for

getting the defective product into Wisconsin is liable." *Id.* at 969–70 (relying on Wisc. Stat. Ann. §§ 895.046 and 895.047). The court also relied on a case that extended strict liability to lessors. *Id.* at 971–72. Like sellers, lessors source, own, and control the product at issue—all things that Amazon does not do in third-party sales. The court misinterpreted the Wisconsin statutes and misapplied the analysis of that state's lessor-liability precedent. In any event, one outlier decision applying another state's law cannot justify departing from Texas Supreme Court precedent that directly addresses sales facilitators.[3]

[3] Public Justice also attempts to distinguish several cases holding that Amazon is not a "seller" because the "laws in *those* states required a retailer to take physical possession of a product in order for liability to attach." Public Justice *Amicus* Br. 13–14. That is false. Tennessee, Illinois, California, and Ohio—the states whose laws were at issue in *Fox*, *Garber*, *Carpenter*, and *Stiner*—have no such requirement. California and Illinois, like Texas, follow Section 402A. And Tennessee and Ohio have product liability statutes—none of which bases "seller" on possession. In any event, this attempted distinction is irrelevant given *New Texas Auto*'s declaration that "a trucking business that makes deliveries"—which clearly involves possession—is not a "seller." 249 S.W.3d at 403.

II. Ms. McMillan's And Public Justice's Policy Arguments Cannot Justify Expanding "Seller" Liability.

The drafters of Section 402A deliberately based liability on "seller" status, not on policy considerations or—as plaintiffs commonly advocate—an entity's perceived ability to compensate an injured plaintiff. To be sure, policy considerations motivated adoption of strict liability, but its application depends on "seller" status, which in turn is based on specific actions an entity takes with respect to a product.

Ms. McMillan and Public Justice would replace this long-standing principle with a freewheeling policy inquiry. They do not propose any specific test. Nor do they analyze what liabilities and other consequences would flow from their amorphous policy analysis. That alone is reason to reject it. In any event, the only proper body to adopt policy-based expansions of tort liability is the Texas Legislature.

A. Texas Law Does Not Permit Judicial Expansion Of Tort Liability.

Ms. McMillan and Public Justice ignore the Texas Supreme Court's well-established policy against judicial expansions of tort liability where, as here, expansions would conflict with the Legislature's intended policy. *See* Amazon Br. 36–49. They also do not dispute that the Texas Supreme

Court has already determined that expanding "seller" liability would contradict the Legislature's intent in defining "seller" and restricting product liability. *Id.* at 39–40.

Ms. McMillan asks this Court to defer to the district court's "educated guess" about Texas law. McMillan Br. 5 & n.11. That request is based on a deference rule that the Supreme Court abolished 29 years ago. *See Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 231 (1991) ("a court of appeals should review *de novo* a district court's determination of state law"). The required deference in this arena is to the Texas Supreme Court, whose precedents make clear that the Legislature, not the courts, is the proper body to assess new tort liabilities. The Legislature can consider a broad array of facts and policies, investigate and hold hearings, weigh pros and cons, and, if it adopts an unwise rule, change it.

B. Ms. McMillan's And Public Justice's Policy Arguments Do Not Support Expanding Liability.

Appeals to public policy cannot justify extending strict liability to a business that is not a "seller." *See* McMillan Br. 20–22; Public Justice *Amicus* Br. 15–28. The Texas Supreme Court made clear that "the scope" of products liability cannot extend beyond "those who actually placed a product in the stream of commerce." *New Texas Auto*, 249 S.W.3d at 403.

In any event, the policy arguments that Ms. McMillan and Public Justice advance would not warrant expanding liability even if the courts were empowered to do so.

Ms. McMillan attempts to invoke the Second Restatement's rationale for product liability. *See* McMillan Br. 20. But the drafters of the Second Restatement explained that strict liability was based on actually marketing a product (§ 402A cmt. c) and gave as examples of "sellers" a "manufacturer of such a product," "any wholesale or retail dealer or distributor," and "the operator of a restaurant"—entities who select, own, and control the product (*id.* cmt. f). And the Third Restatement, which the Texas Supreme Court quoted in *New Texas Auto*, exempts product distribution facilitators from "seller" liability. Restatement (Third) of Torts § 20 cmt. g (1998) *quoted in New Texas Auto*, 249 S.W.3d at 404.

Public Justice makes its own policy arguments, asserting that the Amazon marketplace is filled with dangerous products and that imposing strict liability on online marketplaces would be good policy. Public Justice *Amicus* Br. 21–23. Its only evidence of the supposed dangerousness of the Amazon marketplace is one *Wall Street Journal* article and citations of a handful of cases. *Ibid.* But newspaper articles are "classic,

inadmissible hearsay," *Roberts* v. *City of Shreveport*, 397 F.3d 287, 295 (5th Cir. 2005), and the district court properly ruled them inadmissible shortly before certifying its summary-judgment ruling for interlocutory review, *see* ROA.1055–56, 1161. In any event, no record evidence supports the conclusion that online marketplaces are a less safe source of products than brick-and-mortar stores or the thousands of merchant websites that offer products to the public.

Public Justice offers no evidence that expanding strict liability will improve product safety. In fact, the available empirical evidence indicates that it will not. Studies of multiple industries across multiple decades have concluded "that product liability has had no noticeable impact on accident rates." A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 Harv. L. Rev. 1437, 1455 (2010) (collecting studies). For instance, a survey of accident data from the 1950s to the 1980s, involving a range of products, found no corresponding reduction in "the injury or death rate" from the "enormous expansion of products liability" during that time. George L. Priest, *Products Liability Law and the Accident Rate*, in Liability: Perspectives and Policy 184, 193–94 (Robert E. Litan & Clifford Winston eds., 1988); *see also, e.g.*, Paul H. Rubin

& Joanna M. Shepherd, *Tort Reform and Accidental Deaths*, 50 J.L. & Econ. 221, 233 (2007) (finding a decrease in accidental non-motor-vehicle death rates in states that adopted tort reforms that reduced manufacturers' liability). Expanding strict liability imposes very significant costs on state economies and small businesses. That is why legislatures in states with seller-liability statutes have uniformly opted to narrow, not expand, strict liability.

Companies such as Amazon, which deal in a "large volume" of transactions and seek to maintain customers for "long time horizons," already have a powerful economic incentive to take measures to maintain "their reputation for safety." Polinsky & Shavell, 123 Harv. L. Rev. at 1449. Yet Public Justice asserts, without support, that Amazon and other online marketplaces have "little incentive" to worry about safety without the threat of strict liability. Public Justice *Amicus* Br. 21. It ignores that Amazon voluntarily developed a product safety system—years before the cases it cites were filed—that monitors customer reviews and other data sources for potential product safety issues and removes products and sellers suspected to be unsafe. ROA.511–12.

Public Justice asks this Court to presume that reputable businesses have no economic incentive whatsoever to cultivate a reputation for safety with their customers. That is obviously nonsense. Decades of empirical evidence shows that, if customers believe that products are a safety risk, "they will either avoid buying the product or will not pay as much for it as they otherwise would." Polinsky & Shavell, 123 Harv. L. Rev. at 1443–45 (collecting examples). Relatedly, products with a reputation for safety can be sold for higher prices. *Id.* at 1445 (collecting examples). If customers begin to believe that a marketplace is not a source for finding safe, reliable products, then they will stop using it. There is no more customer-centric business in the world than Amazon, and it clearly values—and takes extensive measures to promote—customer safety.

Public Justice also makes the fanciful argument that imposing strict liability on online marketplaces is justified to prevent Amazon from having "an unfair advantage in the market place." Public Justice *Amicus* Br. 16–21. Again, Public Justice does not attempt to ground its argument in Texas law. The Texas Supreme Court does not formulate tort rules based on a single company, and vague notions of "unfair advantage" are

not a relevant policy under Texas's strict-liability doctrine. *See New Texas Auto*, 249 S.W.3d at 404. Moreover, Public Justice offers no evidence for its alarmist claim that holding Amazon strictly liable for third-party sales is the only thing preventing a doomsday scenario in which brick-and-mortar retailers are forced to move online and the market will be flooded with unsafe products. Public Justice *Amicus* Br. 18–21.

Despite the supposed decisive advantage that online marketplaces have, brick-and-mortar retailers account for more than 90% of retail transactions.[4] Ironically, then, Public Justice's argument fails to heed the larger lesson from *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080 (2018)—the dormant commerce clause opinion its brief cites. Public Justice *Amicus* Br. 17–18. As the Supreme Court noted, courts should hesitate to adopt "judicially created" policies—particularly those "premised on assumptions that are unfounded"—as they often produce undesirable results divorced from "economic reality." 138 S. Ct. at 2087, 2092, 2094

[4] Poonam Goyal & Morgan Tarrant, Why retail's brick-and-mortar still has good bones, Bloomberg Intelligence (Mar. 23, 2018), *available at* https://www.bloomberg.com/professional/blog/retails-brick-mortar-designstill-good-bones.

(citations omitted). Even if Public Justice prefers not to heed this warning, the Court should.

III. The District Court Overstepped Its Authority As A Federal Court Interpreting State Law.

As Ms. McMillan concedes, federal courts sitting in diversity must "'apply [state] law as it currently exists'" rather than "'adopt[ing] innovative theories of recovery or defense.'" McMillan Br. 5 (quoting *Galindo* v. *Precision Am. Corp.*, 754 F.2d 1212, 1217 (5th Cir. 1985)). But while she asserts that the district court did "not in any way creat[e] an expansion" of Texas law, *id.* at 25, she does not cite any Texas authority even suggesting—let alone "clear[ly]" indicating, *Mozingo* v. *Correct Mfg. Corp.*, 752 F.2d 168, 175 (5th Cir. 1985)—that "seller" liability would apply to a firm that provides services to the product's actual seller. This is hardly surprising given the Texas Supreme Court's recognition in *New Texas Auto* that its cases had applied "seller" liability only to "manufacturers, distributors, lessors, bailors, and dealers." 249 S.W.3d at 403. These categories represent the "presently existing boundaries" (*Rubinstein* v. *Collins*, 20 F.3d 160, 172 (5th Cir. 1994)) of "seller" liability under Texas

tort law, and the district court lacked any legally sufficient basis to exceed them. This Court is therefore "*Erie*-bound" to reverse. *Solomon*, 975 F.2d at 1089.

IV. The Court Should Reject A Non-Party's Request To Certify To The Texas Supreme Court.

Public Justice urges this Court to certify the "seller" question to the Texas Supreme Court "if this Court disagrees" with its position. Public Justice *Amicus* Br. 28. This request is not appropriate considering that no party to the lawsuit requested certification, and Ms. McMillan herself chose the federal forum. *See Jefferson* v. *Lead Indus. Ass'n, Inc.*, 106 F.3d 1245, 1248 & n.10 (5th Cir. 1997) ("The court should be slow to honor a request for certification from a party who chose to invoke federal jurisdiction." (quoting 17A Charles A. Wright *et al.*, Federal Practice and Procedure § 4248, at 176 (1988)). Further, Ms. McMillan expressed a preference for expeditious resolution in her *Statement Regarding Oral Argument*, and the possibility of "significant delay" weighs against certification. *Williamson* v. *Elf Aquitaine, Inc.*, 138 F.3d 546, 549 (5th Cir. 1998).

Even when a party requests it, this Court is "chary about certifying questions of law absent a compelling reason to do so; the availability of certification is such an important resource to this court that we will not

risk its continued availability by going to that well too often." *Jefferson*, 106 F.3d at 1247. The Court should be especially reluctant to certify when the request comes from a non-party who is transparently shopping for the forum it perceives to be most hospitable to its arguments.

In any event, the Court should not entertain certification because this case does not involve "determinative questions of Texas law having no controlling Supreme Court precedent." Texas R. App. P. 58.1. *New Texas Auto* sets forth the Texas rule on sales facilitators generally, not just auctions specifically, and that rule governs this case. Texas authorities "provide" a more-than-"adequate basis to decide this appeal," making certification inappropriate. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 208 n.11 (5th Cir. 2007).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2020, an electronic copy of the foregoing Reply Brief for Appellant was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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