

CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION ONE

ANGELA BOLGER,

Plaintiff & Appellant,

v.

AMAZON.COM, LLC,

Defendant & Respondent.

Appeal from the Superior Court of San Diego County
Hon. Randa M. Trapp, No. 37-2017-00003009-CU-CR-CTL

**Application to File Amicus Curiae Brief;
Brief of Public Justice and Consumer Attorneys of
California as Amicus Curiae in Support of Plaintiff**

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CERTIFICATE OF INTERESTED PARTIES

This is the initial certificate of interested entities or persons submitted on behalf of Public Justice and Consumer Attorneys of California as amicus curiae in the case number listed above.

The undersigned certify that there are no interested entities or persons that must be listed in this Certificate under California Rules of Court, rule 8.208, for either Public Justice or Consumer Attorneys of California.

Dated: 3/4/20

By: /s/ Evan J. Ballan

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APPLICATION TO FILE AMICUS CURIAE BRIEF

Public Justice and Consumer Attorneys of California (collectively “Amici”) hereby request this Court to accept the attached amicus curiae brief in support of Plaintiff and Appellant Angela Bolger under Rule 8.520(f) of the California Rules of Court.

Counsel for Amici are familiar with all of the briefing filed in this case to date. Amici’s attached amicus brief argues that it would be both bad law and bad policy to grant Amazon absolute immunity from traditional strict products liability.

No party to this action has provided support in any form regarding the authorship, production, or filing of this brief. Amici’s stated interest in this action and motivation for filing this brief are described below.

A. Public Justice

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 involves the ability of injured consumers and their families to seek remedies through the civil justice system and ensuring the civil justice system serves the victims of corporate wrongdoing is a key element of Public Justice’s mission.

B. Consumer Attorneys of California

Founded in 1962, Consumer Attorneys of California (“CAOC”) is a voluntary membership organization representing over 6,000 associated consumer attorneys practicing throughout California. CAOC’s members frequently represent individuals injured by defective products. CAOC members also prosecute consumer-protection lawsuits with the intent of curbing unfair business practices that unduly stifle competition and harm California consumers. CAOC has taken a leading role in advancing and protecting the rights of California consumers in both the courts and the California Legislature.

As an organization dedicated to seeking redress for victims of defective products and consumer protection, CAOC is intensely interested in the issues presented by this appeal. From CAOC’s perspective, the Court’s resolution of this appeal will have fundamental ramifications on the retail marketplace that will dramatically affect consumers’ safety and their ability to seek compensation for injuries caused by defective products.

INTRODUCTION

Amazon asks this Court to grant it categorical immunity for injuries caused by third-party products that Amazon sells through its website. Amici submit that this immunity would be both bad law *and* bad policy.

Such a rule would be bad *law* because, although Amazon's products may be manufactured by a third party, Amazon nonetheless fulfills many of the traditional functions of both a distributor *and* retailer. As such, California's long-standing rule of strict products liability requires that Amazon bear liability for defective products it sells through its website even where, as is often the case in traditional retail, the products were initially supplied by a third party.

And granting Amazon the immunity it seeks would be bad *policy* because it would give Amazon—already a monolith—an unfair competitive advantage over traditional retail. If Amazon gets its way, it will be free to sell defective products with impunity, while traditional retailers will remain saddled with the increased costs that tort liability entails. Traditional retailers will thus be pressured to adopt Amazon's model or cede further market share to Amazon. Either way, the end result will be a worst-case scenario for California consumers: Dangerous products will proliferate on the market while consumers simultaneously lose the ability to seek compensation for resulting injuries.¹

¹ References to the Appellant's Opening Brief are abbreviated as: **(AOB, p. [page].)** References to the Respondent's Brief are abbreviated as: **(RB, p. [page].)**

ARGUMENT

- A. **The traditional policies behind California’s product-liability law militate in favor of holding Amazon liable for defective products purchased through its website.**
 - 1. **California law protects consumers by holding participants in the production and marketing enterprise strictly liable for defective products.**

California’s product liability law imposes strict liability upon those involved in providing consumers with dangerous and defective goods—and applies with full force to Amazon and the products sold on its site. California recognizes that retailers like Amazon play a critical function in the modern consumer marketplace: as intermediary between manufacturer and purchaser, the retailer has the ability to pressure those who make consumer goods to ensure that they are safe.

Nearly a century ago, Justice Traynor articulated why a changing consumer marketplace warranted the imposition of strict liability to protect individuals from harms caused by dangerous and defective products: “As handicrafts have been replaced by mass production with its great markets and transportation facilities,” he explained, “the close relationship between the producer and consumer of a product has been altered.” (*Escola v. Coca Cola Bottling Co. of Fresno* (1944) 24 Cal.2d 453, 467 (conc. opn. of Traynor, J.)) “The consumer no longer has means or skill enough to investigate for himself the soundness of a product . . . and his erstwhile vigilance has been lulled by the steady efforts of

manufacturers to build up confidence by advertising and marketing devices.” (*Ibid.*)²

Like all tort law, strict products liability was designed to serve two “social purposes.” (Cross, *Tort Law and the American Economy* (2011) 96 Minn. L. Rev. 28, 30.)

The first is to “deter[] behavior that presents risks that exceed their social value.” (*Ibid.*) In the products context, this means deterring the manufacture, distribution, and sale of unreasonably dangerous products. (*Escola v. Coca Cola Bottling Co. of Fresno* (1944) 24 Cal.2d 453, 464 (conc. opn. of Traynor, J) [“It is to the public interest to prevent injury to the public from any defective goods by the imposition of civil liability generally.”].)

The second social purpose behind tort law in general, and strict products liability in particular, is to promote “the compensation of innocent victims.” (Cross, *supra*, 96 Minn. L. Rev. at p. 30; see also *Greenman, supra*, 59 Cal.2d at pp. 63–64.)

The touchstone of California’s product-liability law is that it is the entities involved in creating the product and bringing it to the consumer who are best positioned to prevent against defective products entering the marketplace in the first instance, and also best positioned to internalize the costs of defects when they occur. (See *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.* (3d Cir. 1989) 626 F.2d 280, 288 & fn.19 [citing California cases].)

² Though Justice Traynor was writing for himself and not the Court, California has taken up his *Escola* concurrence as the guiding principle of modern product liability law. (See *Greenman v. Yuba Power Prods., Inc.* (1963) 59 Cal.2d 57, 63–64.)

For this reason, California courts have given the strict-liability rule a “broad application” to protect individuals harmed by defective products, including expanding liability to include retailers, bailors, and lessors of defective products. (*Price v. Shell Oil Co.* (1970) 2 Cal.3d 245, 250; see also Prosser, *Strict Liability to the Consumer in California* (1966) 18 Hastings L.J. 9, 27–28.) This broad application has been used promote “the paramount policy” of product liability law: “the protection of otherwise defenseless victims of manufacturing defects and the spreading throughout society of the cost of compensating them.” (*Shell Oil, supra*, 2 Cal.3d at p. 251.)³

Critically, California imposes strict liability along every link of the product supply chain that connects the product to the customer: California law holds not only manufacturers, but also retailers, dealers, and distributors liable for defective products they provide. “Retailers like manufacturers are engaged in the business of distributing goods to the public” and are “an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products.” (*Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256, 262.) After all, a retailer is sometimes “the only member of that enterprise

³ California courts have applied this concept in other areas of tort law. (See, e.g., *Haft v. Lone Palm Hotel* (1970) 3 Cal.3d 756, 775, fn. 20 [describing “emerging tort policy of assigning liability to a party who is in the best position to distribute losses over a group which should reasonably bear them”]; see generally Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts* (1961) 70 Yale L.J. 499.)

reasonably available to the injured plaintiff” and “the retailer himself may play a substantial role in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer’s strict liability therefore serves as an added incentive to safety.” (*Ibid.*)

2. Amazon has upended the consumer marketplace, exerting control over every aspect of its sales.

Amazon is now situated as one of the most prolific players in the global and domestic retail market, and connects hundreds of millions of customers with every type of product imaginable through its ubiquitous online store. And Amazon plays an essential role at every step of its customers’ purchasing experience.

Most consumers believe Amazon operates like other major retailers that obtain their inventory from suppliers who offer some assurances that their goods are suitable for public consumption and use.⁴

That is an understandable assumption: For many users, the Amazon experience involves searching for a product on the Amazon website, browsing through the results, adding a product to their Amazon virtual shopping cart (perhaps after considering reviews from other Amazon customers), checking out and providing payment to Amazon, and then receiving their product in

⁴ (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>> [as of Mar. 4, 2020].)

the mail days later in an Amazon box. The customer's credit card statement will show a charge from Amazon.com. If a customer likes, she can share her experience with the product by writing a review of it on Amazon's website. If she is dissatisfied with the product, she can return it by mailing it back to Amazon or by bringing it to a physical Amazon storefront.

Nevertheless, Amazon has attempted to evade liability by designating a large number of products offered on its website as what it calls "marketplace" transactions. This means that although they are listed on Amazon and are presented to customers who search for items on the Amazon site, the products in fact are technically "sold by" third-parties, many located offshore and immune from process service, and many with limited assets that effectively render them judgment-proof (and beyond the scope of American law enforcement).⁵ Although Amazon permits these sellers to list items for sale on Amazon's site, the items are subject to minimal scrutiny, regulation, and oversight.

Perhaps unsurprisingly, the products sold to unsuspecting buyers through these marketplace transactions are rampant with quality issues. Because Amazon refuses to accept legal responsibility for products sold through its marketplace transactions, Amazon's inventory is tainted with a proliferation of dangerous products that pose a threat to the safety of consumers,

⁵ (Shepard, *How Amazon's Wooing of Chinese Sellers Is Killing Small American Businesses*, Forbes (Feb. 14, 2017), <<https://www.forbes.com/sites/wadeshepard/2017/02/14/how-amazons-wooning-of-chinese-sellers-is-hurting-american-innovation>> [as of Mar. 4, 2020].)

and that are listed and sold by shadow entities that injured consumers cannot hold to account.

An investigation by the *Wall Street Journal* found scores of illegal, banned, or dangerous products listed for sale on Amazon, including more than 4,000 items “that have been declared unsafe by federal agencies, are deceptively labeled or are banned by federal regulators.”⁶ Products sold through Amazon’s marketplace have resulted in all manner of harm to consumers, from exploding batteries in laptops,⁷ hoverboards,⁸ and headlamps,⁹ to counterfeit eclipse-viewing glasses that purchasers allege resulted in permanent vision loss,¹⁰ to a malfunctioning space heater that

⁶ (Berzon, *supra*.)

⁷ This is what transpired in this case and is an issue that has occurred elsewhere as well. (Semuels, *When Your Amazon Purchase Explodes*, *The Atlantic* (Apr. 30, 2019), <<https://www.theatlantic.com/technology/archive/2019/04/lithium-ion-batteries-amazon-are-exploding/587005/>> [as of Mar. 4, 2020].)

⁸ (See, e.g., *Carpenter v. Amazon.com, Inc.* (N.D. Cal. Mar. 19, 2019, No. 17-cv-03221-JST) 2019 WL 1259158, at *1; *Fox v. Amazon.com, Inc.* (6th Cir. 2019) 930 F.3d 415.)

⁹ (See *Erie Insurance Co. v. Amazon.com, Inc.* (4th Cir. 2019) 925 F.3d 135.)

¹⁰ (Kravets, *Lawsuit: Amazon Sold Eclipse Glasses That Cause ‘Permanent Blindness,’* *Ars Technica* (Aug. 31, 2017), <<https://arstechnica.com/tech-policy/2017/08/lawsuit-amazon-sold-eclipse-glasses-that-cause-permanent-blindness/>> [as of Mar. 4, 2020].)

burned a Legal Aid office to the ground.¹¹ When injured plaintiffs have sued Amazon in an attempt to hold the company responsible for the dangerous and defective products sold on its site, the company has offered a consistent refrain: “it’s not our product, so it’s not our fault.” This is a peculiar (if unsurprising) response, given that in a marketplace transaction, Amazon is intimately involved in every step of uniting product and consumer. For example, in many marketplace transactions, Amazon is responsible for:

- providing the buyer and seller with accounts, and giving the seller permission to sell its product on Amazon;
- drafting the agreement that governs the third-party sellers’ use of the Amazon marketplace;
- listing the product on its website;
- showing the product to customers in search results and product suggestions;
- providing customers with images, descriptions, and customer reviews of the product;
- collecting payment for the product from the customer;
- storing the product in its warehouse;¹²

¹¹ (See *Legal Aid of Nebraska, Inc. v. Chaina Wholesale, Inc.* (D. Neb. Jan. 3, 2020, No. 4:19-cv-3103) 2020 WL 42471.)

¹² Amazon provides this service to sellers through its “Fulfillment by Amazon” program. Not every marketplace seller avails itself of this service, but many do—including the seller of the defective product at issue in this case.

- shipping the product to the customer (often in Amazon-branded packaging);¹³
- handling customer service for consumer inquiries;¹⁴ and
- managing any refunds or returns for the customer.¹⁵

And, of course, Amazon reaps massive profits by collecting a commission from the seller on each good sold, in an amount Amazon determines and controls.¹⁶

Indeed, Amazon also exerts total control over its relationship with the third-party “seller.” In so-called “Fulfilled by Amazon” transactions, Amazon takes title of the good, stores it in its warehouse, and ships it to customers. In all cases, Amazon requires sellers to agree to its “Amazon’s Services Business Solutions Agreement,” which “governs every step of the sales process.” (*Oberdorf v. Amazon.com Inc.* (3d Cir. 2019) 930 F.3d 136,

¹³ For “Fulfilled by Amazon” transactions.

¹⁴ For “Fulfilled by Amazon” transactions.

¹⁵ For “Fulfilled by Amazon” transactions.

¹⁶ (See Amazon, *Selling on Amazon*, <<https://services.amazon.com/selling/pricing.html>> [as of Mar. 4, 2020].) In 2018, in which third-party sales made up a majority of sales on Amazon.com, Amazon reported **\$42.75 billion** in revenue. (See Levy, *Amazon’s Third-Party Marketplace Is Worth Twice as Much as Its Own Retail Operations*, Motley Fool (Mar. 7, 2019), <<https://www.fool.com/investing/2019/03/07/amazons-third-party-marketplace-is-worth-twice-as.aspx>> [as of Mar. 4, 2020].)

141, rehearing en banc granted.) Under that agreement, Amazon “retains the right in its sole discretion to determine the content, appearance, design, functionality, and all other aspects of the Services, including by redesigning, modifying, removing, or restricting access to any of them.” (*Ibid.*) Amazon also retains the ability to order a third-party vendor to “cease providing any or all of the Services at its sole discretion and without notice, including suspending, prohibiting, or removing any listing,” to “stop or cancel orders of any product,” or to withhold payment from vendors. (*Ibid.*) Amazon also requires “that its vendors release it and agree to indemnify, defend, and hold it harmless against any claim, loss, damage, settlement, cost, expense, or other liability.” (*Ibid.*)

Amazon’s control over these transactions is plenary: Amazon exerts complete control over who can list products on its website, what those products are, and what safety standards it wants to require for those products. If Amazon does not want to incur liability for defective products, it can stop allowing the sale of risky products on its website at any time. Like a conventional retailer, Amazon is frequently “the only member of [the producing and marketing] enterprise reasonably available to the injured plaintiff” and Amazon, as a global titan of retail, has the ability “to play a substantial role in insuring that the product is safe . . . [or] to exert pressure on the manufacturer to that end.” (*Vandermark, supra*, 61 Cal.2d at p. 262.) It is well known that Amazon’s market dominance allows it to exert such pressure on its merchants to give Amazon low prices. If properly incentivized, Amazon could also use

its retail might to ensure the products offered on its website are reasonably safe for users.

Indeed, in a factually similar case, a federal court applying Texas law recently rejected Amazon’s argument that it should not be considered a seller of a defective project because “it has no relationship with the manufacturer, rendering it unable to directly pressure the manufacturer on safety or spread the cost of defects across units sold.” (*Gartner v. Amazon.com, Inc.* (S.D. Tex. Jan. 7, 2020, No. 4:18-cv-2242) at *14–15.)¹⁷ To the contrary, the Court concluded Amazon was a “seller” under state law because “Amazon sets fees that it would retain for the sale of a third-party product, protects itself by requiring third-party vendors to indemnify Amazon should any ‘claim, loss, damage, settlement, cost, expense or other liability’ occur, and reserves the right to refuse to provide [Fulfillment by Amazon] services for a product that does not comport with Amazon’s policies. With the rights retained, Amazon could halt the placement of defective products in the stream of commerce, deterring future injuries.” (*Ibid.*, citation omitted.)¹⁸

¹⁷ A copy of *Gartner* can be found at “Exhibit A” of “Appellant’s Second Motion for Judicial Notice.” (See AOB, p. 18.)

¹⁸ Amazon has made a virtually identical argument here, and it should fare no better under California law than it did under Texas’s. (Compare *Gartner, supra*, at *15 [“Amazon need not be able to directly pressure the manufacturer on safety in order to be considered a seller.”], with RB, p. 39 [“Amazon does not have a relationship with manufacturers for third-party products, so it cannot directly pressure the manufacturer on safety or spread the cost of defects across units sold.”].)

Amazon is hardly incidental to the connection between buyer and seller in such a transaction—it is the epicenter of their relationship. But when it comes to legal responsibility for dangerous and defective products, Amazon says it has nothing to do with it. Not only is this position harmful to injured consumers left with no recourse—it is also contrary to decades of California law. Indeed, Amazon’s position would render it immune to the incentives at the heart of California’s product liability law, because it would be free of any pressure or incentive to use its substantial market power to ensure product safety.

3. California law requires holding Amazon accountable for defective products sold on its site.

Amazon’s attempts to paint itself as operating in a novel space not governed by conventional law fall short: a straightforward application of California’s existing product liability law to the facts of Amazon’s marketplace requires holding Amazon strictly liable for defective goods.

When courts fashioned and developed California’s product liability law, companies like Amazon did not exist. The issue presented here may be different in shape from those that have come before, but it is identical in substance. California law operates to ensure that the societal costs of defective products are borne by those in the best position to (1) make dangerous products safer or else remove them from the marketplace, and (2) bear the costs imposed by defects (including by pursuing indemnification claims against those it allows to sell on its site). Those aims can

only be achieved by holding Amazon accountable for products sold through its site.

Similarly, California’s strict-liability system protects consumers and enforces accountability by requiring manufacturers, sellers, distributors, and others in the consumer enterprise to consider the risks of their goods in setting prices and participating in the marketplace. If a given product carries a risk of injury, and the seller will be held responsible for that risk, the seller must take that into account. If a product causes a substantial amount of harm, manufacturers, sellers, and others will make the item safer, increase the price, or, if necessary, remove the product from the stream of commerce.

As a Fourth Circuit judge recently explained, Amazon’s “marketplace” is a thinly veiled attempt to subvert those market forces so that it can reap profit without sensitivity to risk. (*Erie Insurance, supra*, 925 F.3d at p. 144 (conc. opn., Motz, J.).¹⁹ “In a traditional supply chain,” Judge Motz explained, “manufacturers transfer new goods to consumers through multiple links,” including manufacturers, distributors, and retailers. (*Ibid.*) “Because seller liability extends to manufacturers, distributors, and retailers alike, the consumer at the end of this supply chain almost always has some legal recourse in the event of an injury,

¹⁹ Judge Motz ultimately voted with the rest of the panel to conclude Amazon was not a seller. Judge Motz lamented that Maryland law, which relied primarily on title, compelled the result. The same is not true here.

for some entity in this linear supply chain is clearly a ‘seller’ and available for service of process within the United States.” (*Ibid.*)

But Amazon’s model “disrupts the traditional supply chain” by design, because it “cuts out the middleman between manufacturers and consumers, reducing the friction that might keep foreign (or otherwise judgment-proof) manufacturers from putting dangerous products on the market.” (*Ibid.*) As a result, “Amazon’s business model shields it from traditional product liability . . . in many cases forcing consumers to bear the cost of injuries caused by defective products (particularly where the formal ‘seller’ of a product fails even to provide a domestic address for service of process).” (*Ibid.*)

Pinning all of product liability law on technical property notions like title (as Amazon urges) ignores the reality of the modern consumer marketplace, elevates form over function, and turns California precedent inside out. As Amazon and similar entities continue to dominate the American retail marketplace, endorsing Amazon’s argument would mean that more and more consumers will be left without recourse for their harms. Additionally, absent any risk of liability, Amazon has no incentive to keep goods it knows to be dangerous away from unsuspecting consumers. The position Amazon urges would virtually shield it (and the impossible-to-serve, barely-solvent sellers on its site) from liability. Rather than applying the law to changing circumstances, Amazon’s proffered result would move the law backwards and remove vital protections for California consumers while shielding Amazon from responsibility.

As a practical matter, an injured consumer seeking compensation for an injury suffered from a product sold on Amazon’s marketplace has three options:

First, the consumer can do nothing, and absorb the full cost of the injury herself.

Second, the consumer can sue the manufacturer or “third-party” seller of the product on Amazon. Experience shows that these sellers are often located outside the United States and are often insolvent—meaning they are effectively judgment proof.²⁰ (See, e.g., *Stiner v. Amazon.com, Inc* (Ohio Com. Pl., Sept. 20, 2017, 15-cv-185837) 2017 WL 9751163, at *7 [manufacturer is “Chinese company and not subject to process of service” and third-party vendor “is insolvent”].)

Or, third, consumers can seek recourse from Amazon, an American company that is readily located, able to litigate in court, and was the central player in the series of events that brought the defective product to the injured consumer.

Only the third option provides any accountability for goods sold through one of the world’s largest retailers, and only that option is consistent with existing California law and policy.

²⁰ In many cases, the seller or manufacturer simply cannot be found at all. (*Oberdorf, supra*, 930 F.3d at p. 145, fn. 20 [collecting cases].)

B. Absolving Amazon of liability for defective products purchased through its website will give it an unfair advantage in the marketplace to the detriment of consumer safety.

This Court’s analysis of this case cannot be divorced from the wider context in which it arises: Driven by the “prevalence and power” of the Internet, “e-commerce” has fundamentally “changed the dynamics of the national economy.” (*Dakota v. Wayfair, Inc.* (2018) 138 S.Ct. 2080, 2097.) As a result, a substantial portion of America’s retail industry has shifted from the strip mall to the Internet: in the United States, online retail sales accounted for approximately \$445 billion in 2017, and experts anticipate that market will surpass \$1 trillion by 2027.²¹

Accelerated to dominance by increased globalization of supply networks and the rapid rise of technology, Amazon has emerged as a singular behemoth that has fundamentally changed how California consumers purchase goods. Amazon’s outsized market power has enabled it to strong-arm its competitors by offering deep price discounts,²² and the fact that Amazon operates as a “retailer . . . marketing platform, a delivery and logistics

²¹ (See *U.S. Online Retail Sales Likely to Surpass \$1 Trillion By 2027: FTI*, Reuters (Oct. 17, 2017), <<https://www.reuters.com/article/us-usa-retail-internet/u-s-online-retail-sales-likely-to-surpass-1-trillion-by-2027-fti-idUSKBN1CM1LW>> [as of Mar. 4, 2020].)

²² (See Rosenthal, *Walmart, Amazon in Online Price War*, Baltimore Sun (Oct. 16, 2009), <https://www.baltimoresun.com/bs-mtblog-2009-10-sarah_palin_stephen_king_books-story.html> [as of Mar. 4, 2020].)

network, a payment service, a credit lender, an auction house, a major book publisher, a producer of television and films, a fashion designer, a hardware manufacturer, and a leading host of cloud service space” has prompted concerns that the company runs afoul of antitrust laws designed to promote a fair and competitive marketplace. (See, e.g., Khan, *Amazon’s Antitrust Paradox* (2017) 126 Yale L.J. 710, 711.)

Undoubtedly, Amazon’s success is due, in large part, to its core business model. Eschewing costly “traditional brick-and-mortar retail locations” and instead “emphasizing shipping products from warehouses and distribution centers” has helped Amazon earned a “reputation for offering lower prices than its traditional competitors.” (*Fagerstrom v. Amazon.com, Inc.* (S.D. Cal. 2015) 141 F.Supp.3d 1051, 1057.)

But Amazon’s success is not entirely due to the cost savings its distribution model offers. Rather, as Plaintiffs suggest, “Amazon’s success owes partly to its dubious ability” to use its business model “to evade laws and regulations normal retailers must follow, giving Amazon an unfair competitive advantage.” (AOB, p. 11.)

For example, until recently, “larger online retailers like Amazon” used their business model to exploit loopholes in state sales-tax laws, allowing them to avoid collecting sales tax on many transactions.²³ Because these ostensibly “tax-free sales” gave

²³ (Bollag, *New California law requires Amazon to collect sales tax for small online retailers*, Sacramento Bee (Apr. 25, 2019),

Amazon an obvious “unfair advantage over in-state businesses who already had to tax California customers,” the California Legislature enacted laws to make clear “that platforms like Amazon must collect tax for products sold on their websites.”²⁴

This case tests whether California courts will grant Amazon yet *another* unfair competitive advantage over traditional retail: Absolute immunity from tort liability for selling defective products.

As discussed earlier, strict products liability in California was designed to promote two social objectives: (1) to encourage businesses to filter dangerous products out of the marketplace, and (2) to ensure that the costs of any product-related injuries are borne by the businesses who manufactured, distributed, and sold them. (*Escola, supra*, 24 Cal.2d at p. 463–465 (conc. opn. of Traynor, J.)

But while deterring dangerous products and compensating injured victims has significant social utility, it does come with a cost: To mitigate their tort liability, businesses subject to strict products liability must dedicate resources to screen out defective products. And, when defective products are nonetheless sold and cause injury, the business must bear the attendant litigation costs and compensation to the victim. Ultimately, paying these costs often “raises the costs of products” these businesses sell. (Cross,

<<https://www.sacbee.com/news/politics-government/capitol-alert/article229699444.html#storylink=cpy>> [as of Mar. 4, 2020.)

²⁴ (*Ibid.*)

supra, 96 Minn. L. Rev. at p. 28.) As a result, many retailers regard the costs associated with tort liability as a “tort tax.” (*Id.* at p. 41.)

Naturally, a “business would have less incentive to [offer] safe products if injured parties could not force [the] business to pay for their damages.” (*Ibid.*) Without the specter of tort liability, a profit-minded businesses could avoid the significant costs to screen-out defective products and compensate victims, and sell its products for lower prices or enjoy a higher profit margin (or both). Thus, all other things equal, a business that is *not* subject to strict products liability will hold a competitive advantage over a business that is.

Not coincidentally, Amazon urges this Court to grant it just such an advantage by holding that its business model should be categorically exempt from strict-products liability. 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 such a rule would be a disaster for public policy. Indeed, granting Amazon the immunity it seeks would foster an environment in which dangerous products proliferate in the marketplace and consumers lose the ability to obtain compensation for any resulting injuries.

For its part, Amazon would have little incentive to police its inventory without the threat of tort liability. This, of course, would only serve to increase in the number of unreasonably dangerous products that are already available on Amazon’s website.

This alone is no small concern given that Amazon is already “the biggest retailer on the planet” (AOB, p. 16), and shows no sign of slowing down: At a time when Internet retail is growing “at four times the rate of traditional retail” (*Wayfair, supra*, 138 S.Ct. at p. 2097), Amazon is already larger than the “next twelve online retailers *combined*.” (*Erie Insurance, supra*, 925 F.3d at p. 144, italics added.) As a result, *half* of the money spent at online retailers in the United States is spent on Amazon. (AOB, p. 11.)

But were this Court to grant Amazon immunity from tort liability for the products it sells, the effect would not be limited to Amazon. As it stands, Amazon’s competitors already feel pressured to adopt Amazon’s e-commerce business model simply for its logistical benefits. (E.g., AOB, pp. 16–17 [noting that “major retailers, including Walmart, Sears, Wayfair, Newgg, and others, have followed Amazon’s lead and opened their own e-commerce marketplaces”].) If, in addition to its logistical benefits, Amazon’s competitors saw that its business model *also* offered immunity from products liability, Amazon’s competitors would face *even more* pressure to adopt this same business model or else lose additional market share to Amazon.

Either way, the rule Amazon urges would cause the market to become increasingly dominated by retailers whose business models not only *allow* them to sell defective products with virtual impunity as a matter of law, but whose profit margins will be based, at least in part, *on that very assumption*.

Of course, as Amazon and its analogs use their immunity from tort liability to increasingly dominate the retail market,

consumers will have less and less recourse for injuries caused by defective products. Thus, Amazon’s rule would burn the candle at both ends: It would not only serve to ensure that the market becomes increasingly saturated with dangerous products, it would also serve to strip consumers of their ability to obtain compensation for their inevitable injuries.

In short, the rule Amazon seeks could not be more at odds with the policy objectives behind the tort rules that have defined commerce in California for over 50 years. Whereas those rules were designed to reduce the number of dangerous products on the market and facilitate compensation for those injured by them (*Escola, supra*, 24 Cal.2d at pp. 440–441 (conc. opn., of Taynor, J.)), Amazon’s rule would tend to *increase* the number of dangerous products on the market and *foreclose* compensation for those injured by them.

Amici anticipate Amazon will raise a number of arguments in response to the foregoing.

First, Amazon will inevitably attempt to dismiss the foregoing as fanciful and alarmist. But, again, Amazon is *already* the world’s largest retailer, and the most dominant force in the fastest-growing retail segment. And it is difficult to decide which is a more concerning prospect: That Amazon achieved that hegemonic status in part because “Amazon’s business model shields it from traditional products liability” (*Erie Insurance, supra*, 925 F.3d at p. 144), or that Amazon has not yet begun to realize the competitive advantage that such tort immunity will offer. Either way, it is hardly alarmist to suggest that consumers

will be less safe if a California appellate court grants the world's largest and fastest growing retailer immunity for virtually any defective product it sells.

Second, Amazon may suggest that, while Amazon and any analogs may not face tort liability for selling defective products, government regulations will still serve to police the marketplace. But even in the drug industry—which is characterized by a mere 11,000 products and which is policed by a dedicated federal agency—state tort suits are viewed as a necessary, “complementary form of drug regulation.” (*Wyeth v. Levine* (2009) 555 U.S. 555, 578.) If a dedicated federal agency must rely on private litigants to police products in the relatively small and highly regulated drug industry, state or federal entities stand no chance of effectively enforcing product standards among the *millions* of products available in the retail marketplace. Thus, any suggestion that government regulations will substitute for tort suits to keep businesses in check has it exactly backwards: It is tort suits that often give government regulations their teeth.

Third, Amazon may suggest that the free market will police itself and that, by choosing trustworthy retailers, consumers will prevent the “race to the bottom” that Amici envision. But although Justice Traynor acknowledged in *Escola* that “consumers rely[] on the reputation of the manufacturer or the trade mark” in choosing which products to buy, he nonetheless recognized that “the imposition of civil liability” is ultimately necessary “to prevent injury to the public from any defective goods.” (*Escola, supra*, 24 Cal.2d at p. 464 (conc. opn. of Traynor, J.)) That observation is

even more applicable here given that Amazon has unprecedented dominance of the retail marketplace. Thus, even if consumer choice were sufficient to police the marketplace *in theory*—and California’s product-liability law is rooted in the belief that it is *not*—it would be even less likely to have that effect in the modern marketplace.

Fourth, Amazon will perhaps suggest that, to the extent Amici’s fears have any legitimacy, they are concerns for the Legislature, not the courts. But as Amici discussed in Part A, although Amazon’s business model may differ from traditional retailers in *form*, the *substance*—at least in the respects relevant to the basis of products liability—remains the same. Thus, Amici do not urge this Court to assign liability to Amazon merely because it is good policy. Rather, Amici urge this Court to assign liability to Amazon because doing so is consistent with long-standing California tort law that is *itself* designed to promote good policy.

CONCLUSION

For the foregoing reasons, Amici urge this Court to reject Amazon's request for immunity from tort liability for the products it sells on its website.

Such a rule would be at odds with long standing California law which broadly imposes strict liability on entities who, like Amazon, are not only involved in the sale and distribution of defective products, but who are well positioned to filter those products out of the marketplace and to pay compensation for injuries that arise when they fail to do so.

Such a rule would also be bad public policy because it would foster a retail marketplace dominated by businesses that have no incentive to avoid selling dangerous products. The result would be a marketplace increasingly saturated with dangerous products, while consumers would simultaneously lose their ability to seek compensation for their inevitable injuries.

Dated: 3/4/20

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I certify that the foregoing document was produced on a computer in 13-point type.

I further certify that the brief is 5,915 words, as calculated by the word-processing program used to generate this document. This word count includes footnotes but excludes the material that may be omitted from the word count under rule 8.204(c)(3) of the California Rules of Court.

/s/Benjamin I. Siminou
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CERTIFICATE OF SERVICE

I, Benjamin I. Siminou, am employed in the County of San Diego, California. I am over the age of 18 years and not a party to this action. My business address is 2305 Historic Decatur Rd., Suite 100, San Diego, California 92106.

On March 4, 2020, I served the attached “Application to File Amicus Curiae Brief; Brief of Public Justice and Consumer Attorneys of California as Amicus Curiae in Support of Plaintiff” on all counsel of record via the Court’s electronic filing system, operated by TrueFiling.

On the same date, I served a copy of the “Application to File Amicus Curiae Brief; Brief of Public Justice and Consumer Attorneys of California as Amicus Curiae in Support of Plaintiff” by first class U.S. mail on the Hon. Randa Trapp, at the following address:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 4, 2020, at San Diego, California.

/s/Benjamin I. Siminou
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