**C.A. No. 19-17149**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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Before the Honorable Richard Clifton, N. Randy Smith, and Ryan Nelson
(Opinion filed November 17, 2020)

STATE FARM FIRE AND CASUALTY CO.,
*Plaintiff-Appellant*,

v.

AMAZON.COM, INC.
*Defendant-Appellee*.

On Appeal from the United States District Court
for the District of Arizona
No. 2:17-cv-01994
Hon. James A. Teilborg

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# APPELLANT'S PETITION FOR REHEARING EN BANC

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Daniel W. Berglund, Esq.
GROTEFELD HOFFMANN LLP
150 South Fifth Street, Suite 3650
Minneapolis, MN 55402
Ph: (612) 564-4895
dberglund@ghlaw-llp.com

Timothy L. Moulton, Esq.
THE MOULTON LAW FIRM, P.C.
6401 E. Thomas Road, Suite 101
Scottsdale, AZ 85251
Phone: 480-355-5000
tmoulton@moultonlawoffice.com

*Attorneys for Appellant*
*State Farm Fire and Casualty Co.*

## CORPORATE DISCLOSURE STATEMENT

Appellant State Farm Fire and Casualty Company ("State Farm") is a wholly owned subsidiary of State Farm Mutual Automobile Insurance Company, a mutual company incorporated in the State of Illinois, with its principal place of business in Bloomington, Illinois. State Farm Mutual Automobile Insurance Company has no parent company. It is a mutual insurance company and as such does not have any shareholders. No publicly traded companies have any ownership interest in State Farm Mutual Automobile Insurance Company.

Date: December 1, 2020

/s/ Daniel W. Berglund
Daniel W. Berglund, Esq.
GROTEFELD HOFFMANN LLP
150 South Fifth Street, Suite 3650
Minneapolis, MN 55402
Ph: (612) 564-4895
dberglund@ghlaw-llp.com

Timothy L. Moulton, Esq.
THE MOULTON LAW FIRM, P.C.
6401 E. Thomas Road, Suite 101
Scottsdale, AZ 85251
Phone: 480-355-5000
tmoulton@moultonlawoffice.com

Attorneys for Appellant
State Farm Fire and Casualty Co.

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## STATEMENT OF THE REASONS FOR EN BANC REVIEW

Before the panel majority's unpublished decision, an increasing number of cases throughout this country, after a careful analysis, have found Amazon to be a "seller" of products, subjecting it to strict product liability. *See, e.g., Bolger v. Amazon.com*, LLC, 267 Cal. Rptr. 3d 601 (Cal. Ct. App. 2020), *review denied* (Nov. 18, 2020); *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964 (W.D. Wis. 2019); *McMillan v. Amazon.com, Inc.*, 433 F.Supp.3d 1034 (S.D. Tex. 2020), *appeal pending sub nomine Gartner v. Amazon.com* at No. 20-20108. Arizona, like the jurisdictions finding Amazon to be a "seller," follows the Restatement (Second) Torts § 402A to determine such liability. *E.g., O. S. Stapley Co. v. Miller*, 447 P.2d 248, 251 (Ariz. 1968). In fact, Arizona precedent expressly directs courts to "acknowledge the realities of the marketplace," *Torres v. Goodyear Tire & Rubber Co.*, 786 P.2d 939, 944 (Ariz. 1990), and to construe the term "seller…expansively when it serves the policies underlying strict liability." *Antone v. Greater Arizona Auto Auction*, 155 P.3d 1074, 1077 (Ariz. Ct. App. 2007). Notwithstanding this mandate, and over Judge Clifton's dissent, the majority's seven-page decision, after limited analysis, held that Amazon was *not* a "seller" under Arizona law. (Dkt#31-1 at p. 6 (attached as Exhibit A)). It made this determination despite State Farm's showing that Amazon took possession of and stored the product prior to sale, controlled the entire sales transaction, packaged and

delivered the product, and monitored product safety and conducted all returns—facts Amazon does not substantially dispute. In other words, State Farm showed that Amazon acted much in the same manner as any traditional retailer subject to strict liability as a "seller" under Arizona law. A.R.S. § 12-681 (defining "seller" as any "person or entity, including a wholesaler, distributor, retailer or lessor, that *is engaged in the business of*…selling any product for resale, use or consumption") (*emphasis added*).

With its decision, the majority effectively eviscerated the long-standing protections provided to consumers under Arizona law for those products purchased online that cause significant damage, where (as is often the case with Amazon) the consumer is unable to hale the upstream manufacturer into court. *See O. S. Stapley Co.*, 447 P.2d at 251 ("the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it") (*quoting* Restatement (Second) Torts §402A (cmt. c). Moreover, the majority's ruling was not grounded on clear and unmistakable precedent from any Arizona court. Rather, the majority adopted and repeated the same seven-factor test contrived and relied upon by the district court that improperly limits the circumstances in which a party can be deemed a "seller" to those exact circumstances that have occurred in the past. (Ex. A at p. 4). Such a myopic

approach runs contrary to Arizona's mandate to "abjure technical definitions in defining the categories of enterprise to which the doctrine of strict liability should apply" and to instead consider the defendant's role in the stream of commerce. *Torres*, 786 P.2d at 943.

Pursuant to Federal Rule of Appellate Procedure 35(b), undersigned counsel believes, based on a reasoned and studied professional judgment, that this proceeding involves questions of exceptional importance. Specifically, the panel's decision that Amazon is not a "seller" under Arizona law, even if unpublished, could have lasting ramifications for thousands of consumers who use Amazon and purchase defective products manufactured by a "fly by night" entity—not only in Arizona but in other jurisdictions that follow the Second Restatement. Moreover, in concluding an online retailer should be treated differently than any other retailer treated as a "seller" under Arizona law, the panel's decision is contrary to the decisions of the Supreme Court and this Court holding that federal courts sitting in diversity should not decide "a question of first impression under Arizona law without using the procedure available to certify the question to the Arizona Supreme Court." *Torres*, 786 P.2d at 940 (citing *Torres v. Goodyear Tire & Rubber Co.*, 857 F.2d 1293, 1299 (9th Cir.1988) (Noonan, J., concurring and dissenting). *See also City of Phila. v. Lead Indus. Ass'n*, 994 F.2d 112, 123 (3d Cir. 1993) (a federal court cannot

"act as … judicial pioneer[s]" by deciding "whether and to what extent they will expand state common law").

The majority's limited interpretation and ultimate rejection of "seller" liability under Arizona law conflicts with the state-court mandate to apply the term "expansively when it serves the policies underlying strict liability." *Antone*, 155 P.3d at 1077 (*citing Jordan v. Sunnyslope Appliance Propane & Plumbing Supplies Co.*, 660 P.2d 1236, 1242 (Ariz. Ct. App. 1983). It also conflicts with a growing trend of courts finding Amazon to be a seller under the Restatement (or similar law) and under nearly identical factual circumstances. *Bolger*, 267 Cal. Rptr. 3d at 612–25; *Oberdorf v. Amazon.com, Inc.*, 930 F.3d 136, 143-154 (3d Cir. 2019), *reh'g en banc granted, opinion vacated*, 936 F.3d 182 (3d Cir. 2019); *Papataros v. Amazon.com, Inc.*, 2019 WL 4011502 at *15 (D.N.J. Aug. 26, 2019); *State Farm*, 390 F. Supp. 3d at 969-973; *McMillan*, 433 F.Supp.3d at 1042-44.

Because the court's decision—made without clear guidance from the state's highest court—could have a substantial impact on the rights of consumers within the state and elsewhere, rehearing *en banc* is warranted.

## BACKGROUND

State Farm Fire and Casualty Co. ("State Farm") commenced this action after a counterfeit battery in a "hoverboard" sold by Amazon in its "marketplace" exploded, causing extensive damage to the residence of one of State Farm's insureds.

State Farm, asserting its subrogation rights, commenced an action and ultimately attempted to name as defendants not only Amazon but other entities involved in the stream of commerce, including the foreign manufacturer and "Super Engine," the foreign third-party seller that, through Amazon's Fulfillment by Amazon Program, provided the hoverboard to Amazon to store and subsequently sell.[1] State Farm, however, was unable to successfully serve any party other than Amazon, and the other entities were ultimately dismissed from the action.

State Farm asserted causes of action in strict liability and negligence against Amazon in the underlying action, contending that Amazon's conduct and significant participation in the stream of commerce made it a "seller" under Arizona law and under the Restatement (Second) of Torts § 402A. In support of its position, State Farm demonstrated that Amazon:

1) housed the hoverboard in its warehouse until the sale occurred;

2) packaged and prepared the hoverboard for delivery;

3) delivered the hoverboard to the purchaser;

4) controlled and set the fees that it retained for itself from the sale of the hoverboard;

[1] "Super Engine" is not the actual name of the third-party seller. According to internal Amazon records, the third-party seller's legal name, at least at the time of the sale, was Easycredit Trade HongKong Co. Limited. Amazon allowed Easycredit Trade HongKong to use the pseudonym "Super Engine" for the sales transaction. Neither State Farm nor its insured were aware of the true identity of "Super Engine" until after litigation commenced and Amazon disclosed its sales records.

5) controlled the process by which the consumer paid for the hoverboard, Super Engine received payment;

6) managed and controlled all returns of the product;

7) required all vendors to register its products with Amazon in order to use the FBA services and Amazon had the right to exclude registration of the hoverboard;

8) maintained the power to (and did) inspect and monitor product quality, and pull the product from the "marketplace" if necessary to do so;

8) was the sole channel of communication between the purchaser and Super Engine; and

9) mandated that vendors display "any specific disclosures, messaging, notices, and Policies" on vendor's media platforms as required by Amazon.

Despite the evidence presented, the district court granted summary judgment in favor of Amazon. In so doing, the district court found that Amazon did not "significantly participate in the stream of commerce that delivered these hoverboards to consumers," and imposed a seven-factor test not previously articulated by any Arizona court to assess whether Amazon "significantly participated" in the stream of commerce, weighing whether Amazon:

> (1) provide[d] a warranty for the product's quality; (2) [is] responsible for the product during transit; (3) exercise[s] enough control over the product to inspect or examine it; (4) take[s] title or ownership over the product; (5) derive[s] an economic benefit from the transaction; (6)

> ha[s] the capacity to influence a product's design and manufacture; or (7) foster[s] consumer reliance through their involvement.

(*See* Ex. A at p. 4).

The court, weighing the evidence presented, concluded that *none* of the factors weighed in favor of imposing strict liability. Declaring that Amazon was more akin to an auctioneer than to a retailer or other entity with complete control of the product and transaction, the district court then concluded that Amazon was not a "seller" under Arizona law. (*See id.*)

A divided panel of this Court affirmed. In a brief, unpublished opinion, the panel majority recognized that Arizona courts "avoid the 'technical limitations of the term seller or manufacturer as used in Restatement § 402A.'" and that they "must also acknowledge the realities of the marketplace." (*Id.* at p. 3). Nevertheless, the panel found that the seven-factor test "accurately summarized the law," and that the "factors weighed in favor of Amazon." (*Id*. at p. 4).

Judge Clifton, in a dissenting opinion, noted that the majority panel "tried to answer the questions based on prior Arizona court decisions, as did the district court" but that "[t]he role played by Amazon here was not contemplated in those decisions." (*Id*. at p. 8). Citing the recently published *Bolger*, 267 Cal. Rptr. 3d at 612–25, Judge Clifton stated that the majority's "answers are plausible, but different answers would also be plausible." (*Id.*) He further observed that "Amazon's responsibility for the

transaction before us is not, in my view, clearly covered by prior Arizona cases." (*Id.*) Correctly stating that "these questions are certain to reoccur, given the transformation Amazon has wrought on the marketplace," Judge Clifton concluded by stating that he "would certify the questions to the Supreme Court of Arizona, the ultimate authority for interpretation of Arizona law." (*Id.*) (*citing Oberdorf v. Amazon.com, Inc.*, 818 F. App'x 138, 143 (3d Cir. 2020)).

## ARGUMENT

### A. The Majority's Decision That Amazon, an Online Retailer, Is Not A "Seller" Warrants Rehearing *En Banc*

As Judge Clifton's dissent suggests, the issue of whether Amazon is a "seller" under the Second Restatement is not only "certain to reoccur" but *is* reoccurring on a regular basis not only in Arizona but throughout the country, where purchasers of dangerous and defective overseas products on Amazon.com are unable to recover for the damages those products have caused. *See Bolger*, 267 Cal. Rptr. 3d at 617 (noting that "the Amazon website, and especially the FBA program, enables manufacturers and sellers who have little presence in the United States to sell products to customers here…The dilemma for an injured plaintiff is illustrated by this litigation, where two defendants have been served and failed to appear, and a third defendant can only be served in China.") Amazon's role as an online retailer—one in which it assumes control of the product prior to sale, conducts the sales transaction, and packages and delivers the product to the consumer—is one not

previously contemplated by the courts currently faced with the issue. Arizona is no different, and in relying on prior cases that addressed the comparatively limited roles of auctioneers and brokers to determine Amazon was insufficiently involved in the stream of commerce, the district court (and, by failing to adequately analyze the district court's ruling, the panel) erred. Pursuant to Federal Rule of Appellate Procedure 35(b), the panel's decision warrants rehearing *en banc* because (1) this is an issue of exceptional importance "given the transformation Amazon has wrought on the marketplace," and (2) the opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court. (*See* Ex. A at p. 8).

### 1. The Panel's Decision Involves an Issue of Exceptional Importance.

The changes that Amazon have made to retail are no secret. As the world's largest retailer, Amazon sells more than $177.86 billion in retail goods worldwide annually, a number that continues to grow. To a consumer, a sale made on Amazon is no different than one made at any "brick and mortar" store. The latter, of course, is subject to the protections of Restatements (Second) Torts § 402(A) and its public policy considerations. *See, e.g., Torres*, 786 P.2d at 942 ("The underlying objective of the doctrine was to place the risk of loss on those in the chain of distribution of defective, unreasonably dangerous goods.") (*citing Tucson Indus. v. Schwartz*, 501 P.2d 936, 940 (Ariz. 1973)). *See also O. S. Stapley*, 447 P.2d at 251–52 (*quoting* Restatement (Second) Torts § 402A, cmt. c) ("the public has the right to and does

expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained"); *Caruth v. Mariani*, 463 P.2d 83, 86–87 (Ariz. Ct. App. 1970) ("those involved in the chain of marketing can distribute the risk between themselves by means of insurance and indemnity agreements"); *Antone*, 155 P.3d at 1076. ("the underlying justification for imposing strict liability is risk/cost spreading to those parties in the distribution chain that are best able to both bear the cost and protect the consumer from defective products"); *Winsor v. Glasswerks PHX*, 63 P.3d 1040, 1049 (Ariz. Ct. App. 2003) (strict liability is a "policy device to spread the risk from one to whom a defective product may be a catastrophe, to those who marketed the product, profit from its sale, and have the know-how to remove its defects before placing it in the chain of distribution").

The panel's decision strips the protections afforded to consumers by the Arizona Supreme Court against sellers of defective products simply because the consumer in this case purchased the product online[2], and the panel did so without

[2] Although the panel's decision is unpublished and limited to the evidence presented in this case, the evidence presented here is no different than the evidence presented in cases in which Amazon *was* found to be a "seller" under the Second Restatement. *See, e.g.*, *Bolger*, 267 Cal. Rptr. 3d at 615-625. In fact, Amazon's productions in the underlying case largely comprised material produced in other lawsuits.

specific direction from any Arizona court. Moreover, this panel's decision directly contradicts other jurisdictions addressing the same Second Restatement question and faced with substantially similar facts. *Bolger*, 267 Cal. Rptr. 3d at 612–25; *Oberdorf v. Amazon.com, Inc.*, 930 F.3d at 143-150; *Papataros v. Amazon.com, Inc.*, 2019 WL 4011502 at *15; *State Farm*, 390 F. Supp. 3d at 969; *McMillan*, 433 F.Supp.3d at 1042-44.

Considering Amazon's market presence and its substantial involvement in any sales transaction, *Bolger*, 267 Cal. Rptr. 3d at 604-605, depriving an injured plaintiff of any recourse when Amazon chooses to contract with overseas manufacturers and distributors not subject to this court's jurisdiction raises significant policy concerns under Arizona law that the majority panel simply failed to address.

**2. The Majority Contravened Supreme Court and Ninth Circuit Precedent Limiting the Role of Federal Courts In Interpreting State Law.**

A federal court cannot "act as a judicial pioneer" in interpreting state law because "[f]ederalism concerns require that [federal courts] permit state courts to decide whether and to what extent they will expand state common law." *Lead Indus. Ass'n*, 994 F.2d at 123. And although this Circuit gives its panels some discretion to predict how the state's highest court would decide a case, *see, e.g., Fiorito Bros., Inc. v. Fruehauf Corp.*, 747 F.2d 1309, 1314 (9th Cir. 1984), when a critical question of state law is not settled, this Court has held that "the appropriate course of action

is to certify this issue" to the state's highest court.[3] *T-Mobile USA Inc. v. Selective Ins. Co. of Am.*, 908 F.3d 581, 587–88 (9th Cir. 2018) (*citing Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974))[4]; *see also Oberdorf*, 818 F. App'x at 143 (noting same issue under Pennsylvania law was one of "first impression and substantial public importance.") Indeed, this very Court has previously noted its reluctance to analyze Arizona strict product liability absent clear guidance from the state's highest court:

> The answers to these questions do not come easily, a fact that reveals the difficulty in which we find ourselves at this point in the development of products liability law generally and with respect to this case. An additional complexity is that each state has an incentive to make available to its inhabitants all the possible benefits of section 402A's coverage. To do otherwise may be to incur the risk of depriving a potential insured of the coverage for which he or she has paid.

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[3] In fact, a district court in this Circuit has already predicted the issue of whether Amazon is a "seller" incorrectly. *Compare Carpenter v. Amazon.com, Inc.*, No. 17-CV-03221-JST, 2019 WL 1259158 (N.D. Cal. Mar. 19, 2019), *to Bolger*, 267 Cal. Rptr. 3d 601. The federal court matter was settled, however, before oral argument on the appeal took place. *Carpenter v. Amazon.com, Inc.*, No. 19-15695, 2020 WL 5914622 (9th Cir. Oct. 5, 2020).

[4] In deciding whether to seek certification, the court must consider: (1) whether the question presents "important public policy ramifications" yet unresolved by the state court; (2) whether the issue is new, substantial, and of broad application; (3) the state court's caseload; and (4) "the spirit of comity and federalism." *Kremen v. Cohen*, 325 F.3d 1035, 1037-38 (9th Cir. 2003). As the dissent notes, this issue is of significance due to "the transformation Amazon has wrought on the marketplace," and Amazon's role in the stream of commerce "was not contemplated in" prior Arizona decisions. (Ex. A at p.8). Although the undersigned cannot speak to the state court's case load, given the issue "the spirit of comity and federalism" would also weigh in favor of certification.

*Torres v. Goodyear Tire & Rubber Co.*, 867 F.2d 1234, 1239 (9th Cir. 1989), *certified question answered*, 786 P.2d 939 (Ariz. 1990).

The majority's decision departs from this more prudent approach to addressing novel, critical issues of state law. *See Lehman Bros.* 416 U.S. at 391 (noting that federal certification of state law questions "helps build a cooperative judicial federalism," and is "particularly appropriate" for novel or unsettled questions of state law). Its new exception to "seller" liability finds no support in Arizona law and will have dramatic implications for thousands of consumers who are unaware that they were not being protected in the same way for products they have purchased on Amazon.com than they would in their neighborhood store. *See T-Mobile USA Inc.*, 908 F.3d at 587–88 (certifying question where "an untold number of…citizens and businesses" faced with a similar issue could be affected, rendering it "a matter of important public policy"); *Oberdorf*, 818 F. App'x at 143.

As the dissent correctly indicates, because a different finding is at least plausible[5] based upon the case law in Arizona—not to mention the directly contradictory decisions elsewhere—the matter warrants *en banc* review.

[5] The fact that another outcome is "plausible" also demonstrates that summary judgment was improper. A "judge's function" at summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Summary judgment is only appropriate "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009) (*quoting Matsushita Elec. Indus. Co. v. Zenith Radio*

## CONCLUSION

The full Court's review is warranted to address the conflict between the panel decision and the growing body of case law finding Amazon to be a "seller," as well as to address the panel's failure to fully analyze the public policy issues supporting strict liability under Arizona law. For the foregoing reasons, this Court should grant rehearing *en banc*.

Dated: December 1, 2020

Respectfully submitted,

/s/ Daniel W. Berglund
DANIEL W. BERGLUND
GROTEFELD HOFFMANN LLP
150 South Fifth Street, Suite 3650
Minneapolis, MN 55402
Ph: (612) 564-4895
dberglund@ghlaw-llp.com

Attorney for Plaintiff-Appellant
State Farm Fire and Casualty Co.

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*Corp*., 475 U.S. 574, 587 (1986)). "Summary judgment is inappropriate when a jury could reasonably conclude that most of the factors weigh in a plaintiff's favor." *Wendt v. Host Int'l, Inc*., 125 F.3d 806, 812 (9th Cir. 1997).

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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**C.A. No. 19-17149**

**IN THE UNITED STATES COURT OF APPEALS**
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D.C. No. Cr. 17-cv-01994-JAT
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v.

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Defendant-Appellee.

I hereby certify that on December 1, 2020, I electronically filed the foregoing APPELLANT'S PETITION FOR REHEARING EN BANC with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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/s/ Daniel W. Berglund
DANIEL W. BERGLUND
GROTEFELD HOFFMANN LLP
150 South Fifth Street, Suite 3650
Minneapolis, MN 55402
Ph: (612) 564-4895
dberglund@ghlaw-llp.com