CAUSE NO. 19-6236

IN THE

Supreme Court of the United States

CITY OF NEW TRURO, NEW TEJAS,
Petitioner,

—*v.*—

KILL-A-BYTE SOFTWARE, INC.,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR PETITONER

ORAL ARGUMENT REQUESTED

NOVEMBER 16, 2020

TEAM NUMBER 12

QUESTIONS PRESENTED

I. Whether, in accordance with Federal Rule of Civil Procedure 50, a party must move for judgment as a matter of law at trial to preserve an argument that the district court rejected—and therefore did not issue a final judgment for—in denying summary judgment?

II. Whether state law may impose civil liability on a private party for distributing a product that is later determined by a jury to create a public nuisance because the party was found to be a substantial factor in causing social and economic damage to the state and its innocent citizens?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases:
Page(s)

TABLE OF AUTHORITIES (cont'd)

United States Court of Appeals Cases:

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES (cont'd)

State Court Cases:

TABLE OF AUTHORITIES (cont'd)

Statutory Provisions and Rules:

Secondary Sources:
Page(s)

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES (cont'd)

OPINIONS BELOW

The United States Court of Appeals for the Thirteenth Circuit's opinion is unreported, but it can be found at No. 18–5971 and in the record at Pet. App. 1a–18a. The opinion and order from United States District Court for the District of New Tejas denying Kill-a-Byte's motion for summary judgment is available at Civil Action No. 16-cv-5412 and within the record at Pet. App. 19a–32a. The district court's final judgment is available at Civil Action No. 16-cv-5412 and within the record at Pet. App. 33a–34a.

STATEMENT OF JURISDICTION

The Thirteen Circuit entered its judgment on March 21, 2020. The order granting certiorari appears on page 1 of the Record. The Court has jurisdiction in accordance with 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

This case centers around the Due Process Clause of the Fourteenth Amendment, which provides in pertinent part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, cl. 1. Additionally, this case implicated the Seventh Amendment, which states: "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. This case also involves the Federal Rules of Civil Procedure 50. The Rule's text can be found in the Appendix.

STATEMENT OF THE CASE

I. Statement of Facts

A. Kill-a-Byte Software, Inc. creates excessively gory shooter simulation.

Defendant Kill-a-Byte Software, Inc. (Kill-a-Byte) is one of the largest software companies in the country. Pet. App. 20a. Kill-a-Byte is responsible for the development, production, and distribution of "Lightyear," a multi-player online arena shooter simulation with over 300 million individual accounts. Pet. App. 20a, 22a. This massively successful game centers around the concept of fighting other players to the death until only one player remains. Pet. App. 2a. There are no alliances or teams among the players and no room for negotiation. Lightyear embodies the ethos of "every man for himself." Pet. App. 21a.

In part, Lightyear's popularity initially stemmed from its realistic physics engine and portrayal of gore and death scenes. *Id.* Lightyear's only unrealistic characteristic was that it portrayed excessive amounts of blood and gore. *Id.* One's reflexes and hand-eye coordination were crucial to success, encouraging players to "shoot first." Pet. App. 22a. While not all of the 300 million created accounts became regular users, many of them did. *Id.*

Although free to download, Kill-a-Byte Byte profits from advertising revenue, the sale of downloadable content such as improved death animations, out-of-game products like clothing, and through sales of optional paid accounts. *Id.*

B. Kill-a-Byte disregards alarming reports.

Because increased playtime boosted Kill-a-Byte's revenue, the company's primary goal with Lightyear was to intentionally and strategically increase the amount of time users spent online. Pet. App. 23a. During the decade of Lightyear's operation, from 2003 to 2013, Kill-a-Byte's employees constantly monitored Lightyear users' playing time through its own database, tracking and recording statistics for every player and account. Pet. App. 23a. The acquired data served as the impetus for many changes Kill-a-Byte made to the game. *Id*. Knowing that 50% of New Truro's male residents played over ten hours a week and that 10% played over thirty-five hours a week, Kill-a-Byte refrained from limiting the amount of time users could spend online and never questioned whether users were spending excessive time playing the game—despite reports highlighting that users failed college classes due to their fixation with Lightyear. Pet. App. 22a–23a.

C. Distribution of Lightyear negatively impacts New Truro.

The City's experts posited at trial that time spent playing Lightyear correlates negatively with educational achievement, employment, and earnings. Pet. App. 23a. Poor educational achievement, unemployment, and low earning potential further result in a higher likelihood of engagement in criminal behavior. Pet. App. 24a. Similarly, the American Psychological Association (APA) notes that aggression increases in teenagers when they play violent video games like Lightyear due to their desensitizing effects, rendering users more likely to commit violent behavior in real life. *Id*. One expert claimed Lightyear has "trained a generation of killers,"

expounding upon the effect playing a murder simulation could have on developing brains. Pet. App. 3a.

These findings are reflected in the City of New Truro's (the City) current state of affairs. Over the last decade, the City's violent crime rate has significantly exceeded the national average, with a rate of 2,200 violent crimes per 100,000 residents—nearly six times the national average of 381 incidents per 100,000 residents. Pet. App. 2a, 25a. Even though the City's tax revenues have decreased by more than fifty percent, the City had to double its funding to the police department. Pet. App. 2a. The City also suffers from massive unemployment (15%) and epidemic poverty rates (45.3%). Pet. App. 25a.

II. Procedural History

In 2016, the City sued Kill-a-Byte for absolute public nuisance in New Tejas (the State) State Court under New Tejas Common Law. Pet. App. 3a. The City alleged Kill-a-Byte's distribution of Lightyear intentionally created conditions that constituted a substantial factor in the substantial interference with a right to public safety. Pet. App. 25a. Kill-a-Byte removed the case to federal court based on diversity jurisdiction. Pet. App. 3a. Following discovery, Kill-a-Byte moved for summary judgment on several grounds, one of which claimed that imposing civil liability for lawful distribution of a video game would violate due process. *Id.* The district court denied this motion and accepted the City's theory of liability as consistent with due process. *Id.* The City did not move for summary judgment on this issue and Kill-a-Byte subsequently failed to raise the issue again at trial. Pet. App. 5a.

Following a three-week trial, the jury returned a verdict in favor of the City on liability, finding: "(1) Kill-a-Byte intentionally distributed and operated Lightyear; (2) the increased crime rate constituted a substantial interference with a right to public safety; and (3) the widespread use of the Lightyear software was a substantial factor in the City's increased crime rate." Pet. App. 4a. The district court conducted a two-week bench trial on the limited issue of abatement of the public nuisance and ultimately awarded the city $600 million dollars in abatement costs. *Id.* Kill-a-Byte appealed. *Id.*

The Thirteenth Circuit certified questions of the City's theory and sufficiency of evidence to the Supreme Court of New Tejas. *Id.* The Supreme Court of New Tejas confirmed its support for the substantial factor test for liability and agreed the liable party should bear the entire cost for abating the concrete harms found by the jury, regardless of whether the tortfeasor was only responsible for a certain proportion of the increased crime rate. The State rejected the necessity for "but-for" causation. Pet. App. 11a. Nonetheless, the Thirteenth Circuit held—despite the substantial deference provided to states under the Due Process clause—the judgment in the case exceeded the bounds of permissible liability. Pet. App. 14a.

The City appealed the judgment of the Thirteenth Circuit and this Court granted certiorari. Pet. App. 1.

SUMMARY OF THE ARGUMENT

I.

A motion for judgment as a matter of law during trial, in accordance with Rule 50 of the Federal Rules of Civil Procedure, is a vital prerequisite for preserving a legal argument for appeal. Without a Rule 50 motion, appellate courts are powerless to enter a judgment contrary to that of the district court. Additionally, Kill-a-Byte's attempts to circumvent Rule 50 pose a threat to the Seventh Amendment; when a party like Kill-a-Byte fails to move for judgment as a matter of law during trial, the opposing litigant is ambushed with the legal challenge in the appellate court after being stripped of an opportunity to challenge it before the trial court. The Court should defend the role Rule 50 motions play in allowing parties to present counterarguments and cure evidentiary deficiencies before appeal. Further, the trial judge should be afforded the opportunity to rule on the matter for both factual and legal issues. There is no reason to doubt the trial judge's competence in Kill-a-Byte's preferred manner.

In *Ortiz v. Jordan*, this Court confirmed the necessity for Rule 50 motions and refused to adopt the purely legal exception proposed by Kill-a-Byte. *Ortiz* reminded litigants that the appellate court can only review final judgments, and here, the district court's denial of Kill-a-Byte's motion for summary judgment does not constitute a final judgment because it does not fall within the narrow exception involving the qualified immunity defense. Additionally, the City's abatement remedy is a legal question that depends on particular facts. Thus, as the Court recognized

in *Ortiz* with the similarly fact-dependent issue of qualified immunity, Kill-a-Byte cannot claim its challenge to the City's theory of liability is purely legal.

A Rule 50 motion is not unduly burdensome for movants. As recognized in circuit courts adopting the City's position, nothing more is required than a brief explanation of disagreement with the opposing party's legal interpretations. By requiring parties to preserve legal arguments at trial, the Court would rule consistent with long-appreciated principles of procedural uniformity, predictability, and fairness.

II.

States have broad authority—more so, a duty—to develop common law imposing civil liability on a private party for distributing a product determined to be a public nuisance because the law is neither arbitrary nor irrational. The theory's substantial-factor element of causation is endorsed by the Restatement (Second) of Torts and matches the traditional strict liability standard used in traditional public nuisance cases. Even if the Court required "actual knowledge," Kill-a-Byte satisfies the standard because it knowingly created conditions spawning the negative impact on players' personal lives and the City's economy and crime rates. Additionally, the causal connection between Kill-a-Byte's actions and the City's injuries is strong enough to establish liability even if the City experienced unrelated incidents in Lightyear's early years of operation.

Abatement is a prospective, equitable remedy, rendering Kill-a-Byte's reliance on punitive damage limitations inappropriate. For this reason, cases like *State Farm*

Mutual Auto Insurance Co. v. Campbell and *BMW of North America, Inc. v. Gore* bear no precedential authority here, unlike other public nuisance cases recognizing abatement as a proper, constitutional remedy. In that same vein, *Eastern Enterprises v. Apfel* is inapplicable because the plurality's precautionary words about retroactive laws are inapposite to the prospective character of abatement. In any event, the City's theory is rational and not arbitrary even if it has a retroactive effect because the City has a rational interest in protecting innocent plaintiffs from the harms caused by massive and successful corporations like Kill-a-Byte. Lastly, the necessary trial and procedures safeguard any risk of abuse from the states using public nuisance suits as a guise for obtaining punitive damages.

ARGUMENT

I. Kill-a-Byte was required to move its due process argument for judgment as a matter of law at trial to preserve the argument after the district court denied Kill-a-Byte's motion for summary judgment.

The appropriate mechanism for Kill-a-Byte to preserve its due process argument for appeal after the district court denied its motion for summary judgment was to move for judgment as a matter of law under Federal Rule of Civil Procedure Rule 50 (Rule 50). Rule 50 is the procedural device used to move for judgment as a matter of law, which is required for preserving arguments on appeal after a trial on the merits.[1] FED. R. CIV. P. 50. The Rule 50(a) motion, or motion for judgment as a matter of law, "alerts the court to the opportunity to simplify the trial by resolving some issues, or even all issues, without submission to the jury." *Id.*, advisory committee's note to 2006 amendment. Subsequently, a Rule 50(b) motion authorizes the court to "direct the entry of judgment as a matter of law" within twenty-eight days after the trial judgment if the court reserved an issue for the jury after hearing a Rule 50(a) motion.

As this Court has "repeatedly held," appellate courts are "without power to direct the District Court to enter judgment contrary to the one it had permitted to stand" without a Rule 50 motion. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 400–01 (2006) (quoting *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 218 (1947)). In *Ortiz v. Jordan*, this Court held that a party is prohibited from

[1] Rule 50 encompasses two motions previously used to preserve arguments: motions for directed verdict and judgment notwithstanding the verdict.

appealing an order denying summary judgment following a full trial on the merits. 562 U.S. 180, 183 (2011). Kill-a-Byte contends this Court should adopt the reasoning of the circuit courts that interpret *Ortiz* to allow purely legal questions to be reviewed without a Rule 50 motion.[2] Instead, this Court should adopt the reasoning of the several circuits that uphold Rule 50 motions during trial to sufficiently preserve legal arguments for appeal. *Feld Motor Sports, Inc. v. Traxxas, L.P.*, 861 F.3d 591, 596 (5th Cir. 2017); *Ji v. Bose Corp.*, 626 F.3d 116, 128 (1st Cir. 2010); *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1235 (4th Cir. 1995).

A. Parties must follow the appropriate established procedures for preserving arguments for appeal following a full trial on the merits; there is no "purely legal" exception to the Rule.

This Court should refuse to cure Kill-a-Byte's oversight reading in a "purely legal" exception to Rule 50 where one does not previously exist within the text of the Rule itself. *See* FED. R. CIV. P. 50. In addition to the total absence of an exception within the Rule itself, Kill-a-Byte's position flies in the face of the Rule's purpose. Rule 50 motions serve two purposes: (1) to "provide the party opposing the motion the opportunity to meet the point raised by the adversary," and; (2) to "allow the trial judge to reconsider the legal issues." Mitchell G. Stockwell, *Limiting Claim Construction Challenges After* Ortiz v. Jordan, 39 AIPLA Q. J. 225, 232 (2011). In

[2] The D.C., Second, Sixth, Seventh, Ninth, Tenth, and Federal Circuits follow this approach. *Feld v. Feld*, 688 F.3d 779, 781–82 (D.C. Cir. 2012); *Houskins v. Sheahan*, 549 F.3d 480, 489 (7th Cir. 2008); *Banuelos v. Constr. Laborers' Tr. Funds for S. Cal.*, 382 F.3d 897, 902–03 (9th Cir. 2004); *Rothstein v. Carriere*, 373 F.3d 275, 284 (2d Cir. 2004); *United Techs. Corp. v. Chromalloy Gas Turbine Corp.*, 189 F.3d 1338, 1344 (Fed. Cir. 1999); *McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997); *Ruyle v. Cont'l Oil Co.*, 44 F.3d 837, 841–42 (10th Cir. 1994).

accordance with these policies, the Court should maintain that Rule 50's applicability does not waver depending on whether an issue on appeal is based on an issue of fact or law. *See Blessey Marine Servs., Inc. v. Jeffboat, LLC*, 771 F.3d 894, 898 (5th Cir. 2014) (holding the court can only "hear an appeal of the district court's legal conclusions following a jury trial . . . only if the party restated its objection in a Rule 50 motion").

i. Kill-a-Byte's proposed "purely legal exception" is at odds with the purpose of moving for judgment as a matter of law because it circumvents the Seventh Amendment's protections against ambushing the adversary with unanticipated arguments post-verdict.

Kill-a-Byte's lax commitment to Rule 50 raises serious Seventh Amendment implications. The Seventh Amendment provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. Court precedents have expounded on the Seventh Amendment's role in civil proceedings. In *Slocum v. New York Life Ins. Co.*, the Court held the Seventh Amendment's reexamination clause precluded the trial court from entering judgment as a matter of law after the jury submitted its verdict. 228 U.S. 364 (1913). The Court's later decision in *Baltimore & Carolina Line, Inc. v. Redman* revisited *Slocum* and held the court of appeals may direct entry of judgment for the losing party after a trial as long as the trial court reserved its decision on the motion prior to the jury's verdict. 295 U.S. 654 (1935). Since the Court promulgated Rule 50, the Court has clarified that a Rule 50(a) motion is *how* the trial courts reserve their decisions. *See* FED. R. CIV. P. 50(b). A Rule 50(a)

motion is never technically denied—rather, the issue is submitted to the jury if the court does not grant the motion "subject to the court's later deciding the *legal questions* raised by the motion." *Id.* (emphasis added).

The Court, as promulgator of the Rules of Civil Procedure, has historically remained cognizant of Rule 50's relationship with the Seventh Amendment. *See* FED. R. CIV. P. 50 advisory committee's note to 1991 amendment (explaining how Rule 50(a) is harmonious with the Seventh Amendment because it does not interfere with "any responsibility for factual determinations," and how Rule 50(b) renews an earlier argument to "avoid any question arising under the Seventh Amendment"); *see also id.*, advisory committee's note to 2006 amendment (stating Rule 50(b) "satisfies the Seventh Amendment," consistent with the Court's judgment-as-a-matter-of-law jurisprudence). Because "Rule 50 was designed to protect [Seventh Amendment] right[s]", courts must "adhere to its procedural mandates." *Ross v. Rhodes Furniture, Inc.*, 146 F.3d 1286, 1289 (11th Cir. 1998).

This is where Kill-a-Byte's proffered interpretation of Rule 50 runs afoul of the Seventh Amendment. Unless the challenging party moves for judgment as a matter of law per Rule 50(a), the trial court is incapable of reserving an issue for the jury and the opposing party misses a potential opportunity to cure any evidentiary deficiencies to bolster its argument. *See Ross*, 146 F.3d at 1289. Without a Rule 50(a) motion, the complaining party essentially "ambushes" the opposing party's Seventh Amendment rights by appealing after the jury reaches its verdict. *Id.*

To this argument, Kill-a-Byte may again retort that the Seventh Amendment is not threatened by the absence of a Rule 50(a) motion because it only seeks to appeal a legal question, not insufficient evidence. *See* Pet. App. 8a (claiming the issue of due process "is one for the court, not for the jury" and not understanding how "Rule 50 could apply or how Kill-a-Byte could have drafted a coherent motion"). Aside from the fact that abatement does rely on factual issues, as will be discussed *infra*, Kill-a-Byte's argument disregards the prescribed contents of the motion: "The motion must specify the judgment sought and *the law* and facts that entitle the movant to the judgment." FED. R. CIV. P. 50(a) (emphasis added). Thus, by the Rule's own terms, Kill-a-Byte must have included its own legal argument to present a "coherent motion" regardless of whether the sufficiency of evidence is the primary concern.

ii. Rule 50 is not exclusively applicable to challenging the sufficiency of evidence; the Rule's purpose is equally applicable to legal arguments because the trial court judge is in the best position to make the initial determination.

Kill-a-Byte was required to move for judgment as a matter of law in accordance with Rule 50(a) at trial because the Rule applies to evidentiary and legal challenges with equal force.[3] After the 2006 amendments to Rule 50, the advisory committee clarified the Rule functions as an "[a]utomatic reservation of the *legal questions*

[3] As a preliminary matter, the Court should note that Kill-a-Byte did not only raise a legal question on appeal; the record explicitly states Kill-a-Byte challenged the City's theory of liability *and* "the sufficiency of its evidence." Pet. App. 4a. Kill-a-Byte did not explain itself on the record as to why it neglected to raise the evidentiary issue during or after trial via Rule 50. Therefore, it is perplexing that Kill-a-Byte nonetheless argues it was not required to follow the prescribed procedures for challenging evidence, which is the very purpose it claims the Rule exclusively serves. Pet. App. 8a.

raised by the motion"—it did not suggest the Rule serves only evidentiary-based complaints. See FED. R. CIV. P. 50 advisory committee's note to 1937 amendment (emphasis added). These comments evince that the Court did not contemplate the Thirteenth Circuit's unfair characterization of the Rule as a "meaningless formality" if a legal question was at stake. Rather, the amendments reflect a respect for the trial court's position to consider both legal and fact questions in light of the moving party's concerns.

Beyond the Rule itself, and its commentary, Rule 50 precedents such as *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.* recognize the district court's role getting the first opportunity to review legal and factual questions. 546 U.S. at 404. In *Unitherm*, the Court held that failure to move for judgment as a matter of law following trial precluded Swift-Eckrich from seeking a new trial based on insufficient evidence. *Id.* Swift-Eckrich challenged Unitherm's reliance on caselaw pertaining to the appellate court's authority to *enter judgment* absent a Rule 50 motion and not ordering a *new trial*, as was relevant to its particular case, but the Court stated the "distinction [was] immaterial." *Id.* at 401–02. "This Court's observations about the necessity of a post verdict motion under Rule 50(b), and the benefits of the district court's input at that stage, apply with equal force whether a party is seeking judgment as a matter of law or simply a new trial." *Id.* at 402.

Unitherm's holding is significant because it reinforced the district court's role in providing the first impression on the arguments presented at trial. Mitchell G. Stockwell, *supra*, at 242. Just as Kill-a-Byte's position unsettles

Seventh Amendment protections, it further divests the trial court judge of its authority to provide its "stated views on claims of error." *Id.*

B. This Court's decision in *Ortiz v. Jordan* compels parties to preserve issues of law at trial.

In addition to the plain absence of an exception to Rule 50 and the disregard for how an exception would harm Rule 50's objectives, this Court's decision in *Ortiz v. Jordan* demands preserving legal arguments at the trial level. 562 U.S. at 183. *Ortiz* reaffirmed the traditional methods for preserving arguments for appeal, including those of a primarily legal character. *Id.* at 183.

In *Ortiz v. Jordan*, Ortiz, a female prisoner sued the case manager at her living unit, Jordan, for alleged section 1983 violations. *Id.* In a motion for summary judgment, Jordan argued she and co-defendant Bright, a prison investigator, were shielded by qualified immunity because their "conduct 'did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id.* The district court denied the motion because "material facts genuinely in dispute" precluded summary judgment on the qualified immunity defense. *Id.* At trial, the jury found for Ortiz, and the defendants appealed to the Sixth Circuit. *Id.* The Sixth Circuit reversed the verdict, holding a denial of summary judgment based on qualified immunity was an exception to the general rule against reviewing a denial of summary judgment following a trial on the merits. *Id.* This Court disagreed and held the defendant could not appeal an order denying summary judgment after the trial record superseded the record built for summary

judgment, and the defendants further failed to preserve their argument for appeal when they neglected to renew their defense via Rule 50. *Id.* at 184.

Since *Ortiz*, some circuit courts have construed the opinion to distinguish between denials of summary judgment based on genuine issues of material fact and those based on legal determinations.[4] However, the numerous similarities between *Ortiz* and the instant case demands bolstering the necessity of a Rule 50 motion no matter the nature of the issue on appeal. Despite factual variations between the two cases, this Court should consider the plethora of considerations raised by the *Ortiz* Court and hold the same reasoning leads to a conclusion favoring the use of Rule 50 motions in the instant case. First, *Ortiz* affirmed that appellate courts may only review final judgments. Second, *Ortiz* emphasized certain legal questions may not be generously labeled as "purely legal" because their outcomes depend on the facts of a particular case.

i. As Ortiz *emphasized, a final judgment is necessary to preserve an argument on appeal, and an opinion rejecting an argument does not constitute a judgment on the argument.*

As demonstrated in *Ortiz*, Kill-a-Byte's due process argument cannot be revived on appeal because the district court never issued a final, reviewable order on the issue of due process. An appellate court only has jurisdiction over "final decisions of the district courts." *Ortiz*, 562 U.S. at 188 (quoting 28 U.S.C. § 1291). Although the district court provided a thoroughly written explanation for denying Kill-a-Byte's motion for summary judgment, the explanation nonetheless does not amount to a

[4] *See supra*, note 1.

final judgment. Consistent with this Court's policy that it "reviews judgments, not opinions," this Court should treat the district court's denial as a stepping-stone to trial—not as a formal legal conclusion. *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984).

The denial of a motion for summary judgment is not tantamount to a final judgment because it "is strictly a pretrial order that decides only one thing—that the case should go to trial."[5] *Switz. Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 25 (1996); *see also Ji v. Bose Corp.*, 626 F.3d 116, 127 (1st Cir. 2010) (describing a summary-judgment disposition as "merely a judge's determination that genuine issues of material fact exist") (quoting *E. Mountain Platform Tennis, Inc. v. Sherwin-Williams Co., Inc.*, 40 F.3d 492, 500 (1st Cir. 1994)). Allowing courts to only view final judgments is essential to preserve Congress's intentions to "disallow appeal from any decision which is tentative, informal or incomplete." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

As the Court asserted in *Ortiz*, a summary-judgment order "retains its interlocutory character as simply a step along the route to final judgment." *Id.* at 184. In *Ortiz*, the defendants' qualified immunity defense did not "vanish" after the district

[5] The only recognized exception from this Court pertaining to total denial of a motion for summary judgment applies to pleas of qualified immunity. *Ortiz*, 562 U.S. at 188 (excluding qualified immunity from the general rule because "qualified immunity can spare an official not only from liability but from trial"); *see also Behrens v. Pelletier*, 516 U.S. 299, 313 (1996) (discussing the immediate appealability under § 1291 of denials of qualified immunity issues raised in a motion for summary judgment). However, this exception is recognized for purposes of immediately appealing a denial of summary judgment prior to trial—not to be conflated with the issue in this case, which focuses on whether an issue has been properly preserved.

court denied summary judgment, but the Court nonetheless agreed that the defense had to be reevaluated "in light of the character and quality of the evidence received in court," which supersedes the record built for summary judgment. *Id.* at 184. Thus, the Sixth Circuit was "powerless" to review the denial of the defendants' motion for summary judgment that was not readdressed in a Rule 50(b) motion post-trial.

Here, Kill-a-Byte's due process argument is likewise not ripe for appeal because it has never been adjudicated on its merits; it is still a live issue. Kill-A-Byte essentially slept on its "purely legal" argument at trial and raised it again on appeal without seeking a final order on the merits. Kill-a-Byte had two bites at the apple under one straightforward Rule: (1) filing a Rule 50(a) motion during the three-week-long jury trial; and (2) filing a Rule 50(b) motion to renew its due process argument during the two-week long bench trial dedicated to the sole issue of abatement.[6] FED. R. CIV. P. 50; Pet. App. 4a. Judge Whitworth practically invited the motion by denying summary judgment with conditional language: "*If* the City's evidence is credited by the jury (*and if I am correct* that the City's liability theory is consistent with state law), then the Due Process Clause does not bar the City's recovery." Pet. App. 32a (emphasis added).

Applying a legal exception to Rule 50 would circumvent the exception to the merger rule, which excludes *denials* of summary judgment from the general rule that

[6] Kill-a-Byte could not immediately appeal the denial of summary judgment via 28 U.S.C. § 1292(b) because there were factual issues precluding summary judgment. *Ortiz*, 562 U.S. at 188 (stating "instant appeal is not available . . . when the district court determines that factual issues genuinely in dispute preclude summary adjudication."

interlocutory orders merge with a final judgment. *Pineda v. Ford Motor Co.*, 520 F.3d 237, 243 (3d Cir. 2008). Kill-a-Byte cannot enjoy the benefit of a partial grant of summary judgment merging with the final order resulting from trial because the record reflects the district court denied Kill-a-Byte's motion for summary judgment as a whole. *Id.*; *see also* Pet. App.3a (stating the district court denied summary judgment, not that the district court granted partial summary judgment). Because the trial judge denied Kill-a-Byte's motion, no part of the denial can be merged with the trial court's final order.

Kill-a-Byte may cite the language contained within the Thirteenth Circuit's opinion, which misleadingly stated the district court judge "held" that due process did not prevent the City from imposing liability. Pet. App. 3a. However, when analyzing whether a summary judgment decision is an appealable final order, courts focus on "the substance of the order rather than merely its language." *Devon Robotics, LLC v. DeViedma*, 798 F.3d 136, 146 (3d Cir. 2015). The district court's denial of the motion explicitly referred to factual disputes and used conditional language regarding the legal issue of abatement—exactly the type of "tentative" conclusion this Court has rebuked from being reviewed on appeal. *See Cohen*, 337 U.S. at 546; Pet. App. 32a (qualifying the opinion by using the word "if"). The actual substance of the decision demonstrates the malleable, live quality of the factual and legal issues, which renders appeal without proper Rule 50 preservation improper. *See Bultema v. Benzie Cnty.*, 146 Fed. App'x 28, 40 (6th Cir. 2005) (holding a denial of summary judgment for disputed facts without a definitive conclusion on the issue of qualified immunity was

"[p]lainly . . . not the language of a ruling upon an abstract issue of law"). Therefore, reliance on the circuit court's language would reduce the rules of procedure to a mere semantic exercise; whether or not the circuit court described the district court judge's decision by using the word "held" does not alter the "interlocutory nature" of a motion for summary judgment.

ii. Ortiz *did not endorse a "purely legal" exception—it distinguished qualified immunity on grounds that it may preclude a suit at the outset.*

Contrary to Kill-a-Byte's construction of *Ortiz*, the Supreme Court did not validate an exception to Rule 50 for pure legal questions. 562 U.S. at 190. In *Ortiz*, the defendants raised the same argument raised by Kill-a-Byte in this case: that because a qualified immunity plea was a "purely legal" question that could be resolved based on undisputed facts, the defendants did not need to preserve its defense in a Rule 50(b) motion following its rejected motion for summary judgment. *Id.* The *Ortiz* Court refused to embrace the defendant's proposed exception to Rule 50, but since then, some circuit courts and Kill-a-Byte have taken the Court's definitive stance as free license to disregard the rule for legal questions. *Id.* "That exception, however, was not justified on the ground that the issue was 'purely legal,' but rather was justified because 'qualified immunity shelters [a defendant] from suit' and involves 'the defendant's claim of right not to stand trial.'" Stockwell, *supra*, at 240. Thus, the unique implications of a qualified immunity defense inspired the Court's holding—not its characterization as a legal question. The Court in no manner

gave a pass to litigants to sidestep the procedures for preserving arguments at the trial.

iii. The "purely legal" exception is unworkable because, like the qualified immunity issue in Ortiz*, the issue of abatement is an equitable remedy dependent on facts, and the summary-judgment evidence has been superseded by the trial court evidence; thus, it cannot be reviewed absent a Rule 50 motion.*

Kill-a-Byte's argument fails for the same reason the respondents failed in *Ortiz*: the nonexistent "purely legal" exception to Rule 50 would not apply even if it was enforceable because the issue Kill-a-Byte seeks to review is not purely legal at all. *See Ortiz*, 562 U.S. at 191 (acknowledging that where there are "facts that could render [the moving party] answerable for crossing a constitutional line," there is a sufficiency-of-the-evidence issue that must be preserved in a Rule 50(b) motion). Kill-a-Byte poses the issue as "purely legal" by broadly characterizing its argument as one of general due process. *See* Pet. App. 8a (describing "due process" as a question for the court, not the jury). However, the issue involves more factual implications than Kill-a-Byte asserts before this Court. The Thirteenth Circuit's review of the City's theory of liability following the full trial on the merits necessarily involved the issue of abatement, which is an equitable remedy incumbent on the specific facts of a particular case—far from a "neat abstract issue[] of law." *Ortiz*, 562 U.S. at 191 (quoting *Johnson v. Jones*, 515 U.S. 304, 317 (1995)); see *also* Pet. App. 4a (recognizing the issue of abatement is fact-based).

In *Ortiz*, the Court stated it did not have to "address [Jordan's] argument" as to whether a purely legal exception existed primarily because qualified immunity

may have "shelter[ed] [the defendant] from suit," and in any event, qualified immunity was not a purely legal issue. *Id.* at 190. Disputed facts for the jury's consideration included: (1) whether Jordan received notice of the alleged assailant's identity and Ortiz's fear of future assault; (2) what actions Jordan could have performed to prevent a second assault; and (3) whether Jordan retaliated against Ortiz by placing her in solitary confinement or whether it was a necessary step to promote the "integrity of the investigation." *Id.* at 191.

Like qualified immunity, abatement is a fact-intensive inquiry, and it is thus necessary to rely on the trial record, which superseded the summary-judgment record. *See Cnty. of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 325 (Cal. App. 2006) ("An abatement of a nuisance is accomplished by a court of equity by means of an injunction proper and suitable *to the facts of each case*." (quoting *Sullivan v. Royer*, 72 Cal. 248, 249 (1887)). Thus, the question of abatement is not merely a "question of law that would have negated the need for a trial." *Banuelos v. Constr. Laborers' Tr. Funds for S. Cal.*, 382 F.3d 897, 902 (9th Cir. 2004).

Although abatement is a question of law for the court, the trial in this case was necessary to resolve disputed material facts that would help the court reach a legal decision as to the extent of equitable remedy the City was entitled to. Indeed, the district court's decision denying Kill-a-Byte's motion expressly states: "If the City's evidence is *credited by the jury* . . . , then the Due Process Clause does not bar the City's recovery." Pet. App. 32a (emphasis added). The use of the word "and" within the decision itself suggests the City's relief depends on both law and fact. Had Kill-

a-Byte renewed its argument during trial, the trial court judge could have considered the argument "with a fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by the [expert] witnesses." *Cone*, 330 U.S. at 216.

C. A bright line rule is necessary to effectuate consistency and the orderly administration of justice.

As recognized by the Fourth Circuit in *Chesapeake Paper Prods. Co.*, it would be absurd to apply a "purely legal" exception to Rule 50 considering the fact that summary-judgment decisions are solely legal in nature. 51 F.3d at 1235. "[S]uch a dichotomy," the court stated, "would require [the courts] to engage in the dubious undertaking of determining the bases on which summary judgment is denied and whether those bases are 'legal' or 'factual.'"[7] *Id.* (citing *Wells v. Hico Indep. Sch. Dist.*, 736 F.2d 243, 251 n.9 (5th Cir. 1984)). Kill-a-Byte may contend that abiding by the rules is a pointless formality, but this argument undermines the uniformity and predictability the Rules provide, which the Court has long valued.[8] Pet. App. 7a.

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[7] Some, however, deny the task would be difficult because now Rule 56 asks the district court to explain the basis for its summary-judgment denial. Joan Steinman, *The Puzzling Appeal of Summary Judgment Denials: When are Such Denials Reviewable?*, 2014 MICH. ST. L. REV. 895, 940 (2015) (citing the 2010 amendments to Rule 56). The commentary to Rule 56 suggests such explanations "can facilitate an appeal or subsequent trial-court proceedings." FED. R. CIV. P. 50 (2010 Amendment). This provides false hope for the "purely legal" exception because it does not change the fact that legal conclusions often depend on the particular facts of a case.

[8] It is notable that when Rules have been determined to be especially formalistic, the Court and Congress have promulgated amendments to allow for more flexibility within reason. For example, Rule 50(a) no longer requires "an express reservation of rights against waiver." *See* FED. R. CIV. P. 50(a) advisory committee's note to 1937 amendment.

However, adding exceptions to the general rule would contravene the predictability and uniformity that the Rules of Civil Procedure provide. *See Carroll v. United States*, 354 U.S. 394, 404–06 (1957) ("Appeal rights cannot depend on the facts of a particular case. The Congress necessarily has had to draw the jurisdictional statutes in terms of categories.").

Indeed, Congress has asserted that Rule 50 is intended to simplify the process of resolving disputes, not to create useless formalities as Kill-a-Byte erroneously alleges. The first motion under Rule 50(a) "alerts the court to the opportunity to simplify the trial by resolving some issues, or even all issues, without submission to the jury." Steven Alan Childress, *Revolving Trapdoors: Preserving Sufficiency Review of the Civil Jury After* Unitherm *and Amended Rule 50*, 26 REV. LITIG. 239, 257 n. 82 (2007) (citing FED. R. CIV. P. 50 advisory committee's note to 2006 amendment).

i. The Court has consistently enforced Rule 50, regardless of whether following the Rule would be inconvenient for the moving party.

This Court's Rule 50 jurisprudence has consistently recognized the need to follow procedural rules. For example, in *Cone*, the Court reinforced the importance of Rule 50(b) by holding a verdict loser was not entitled to judgment as a matter of law because the losing party did not renew its argument for judgment notwithstanding the verdict after the trial's conclusion. 330 U.S. 212. In its reasoning, the Court looked to the Rule itself: "Rule 50(b) contains no language which absolutely requires a trial court to enter judgment notwithstanding the verdict even though that court is persuaded that it erred . . . ." *Id.* at 215. The Court further

rejected alternative measures to reach the petitioner's desired outcome, warning that "circuitous method[s] . . . cannot be approved." *Id.* at 218. Because the Rule "specifically prescribe[d]" a time period for preserving a motion for judgment notwithstanding the verdict, the Court declined to afford the petitioner leeway where it was not provided for in the Rule. *Id.*

Although *Cone* pertained specifically to judgment notwithstanding the verdict (Rule 50(b)) and not whether a legal argument is preserved absent a motion for judgment as a matter of law, *Cone* demonstrates the Court's commitment to enforcing Rule 50 as it is written and its refusal to entertain ad hoc exceptions. Here, Rule 50(a) similarly provides plain instructions for moving for judgment as a matter of law with a single time constraint: the motion must be submitted any time before the case is submitted to the jury. FED. R. CIV. P. 50(a)(2). Following *Cone*'s reasoning, there is no reason to support another "circuitous method" to seeking review over an issue that should have been first adjudicated by the trial court through the Court's promulgated procedures. *Cone*, 330 U.S. at 218; *see also Unitherm*, 546 U.S. at 403 (rejecting the respondent's avoidance of filing a Rule(b) motion, citing the "straightforward language employed in *Cone*").

ii. Enforcing Rule 50 does not impose a new burden on litigants.

While Kill-a-Byte's interpretation of Rule 50 burdens appellate courts with deciding whether an issue is purely legal or not, it is far easier at the outset for the moving party to draft a simple motion asserting a legal argument during trial. Additionally, maintaining the Rule is consistent with appropriately treating trial as

the "'main event' rather than a 'tryout for the road' on a dispositive argument." *Harris Corp. v. Ericsson Inc.*, 417 F.3d 1241, 1265 (Fed. Cir. 2005) (Gajarsa, J., dissenting) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977)).

Preserving a legal argument through a Rule 50 motion is undemanding for movants to satisfy. Indeed, even appellate courts that do not allow the purely legal exception liberally construe Rule 50 motions in favor of preservation. *E.g.*, *Feld Motor Sports*, 861 F.3d at 596 (discussing how courts recognize preservation of an issue as long as it serves its purpose in "providing notice to the district court of the defendant's objections" (citing *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 288 (5th Cir. 2007)). For example, in *Feld Motor Sports v. Traxxas, L.P.*, the Fifth Circuit recognized an adequately preserved legal argument even where the movant primarily focused on challenging the sufficiency of evidence. *Id.* at 596. By simply asserting the trial court's interpretation of a license agreement was unreasonable "so that it 'required[d] judgment as a matter of law,'" Traxxas preserved a legal question for the court of appeals. *Id.* Here, Kill-a-Byte could have asserted a similar argument during trial by stating, at the bare minimum, that the City's theory of liability was incorrect or unreasonable. For these reasons, the Court should hold that a Rule 50(a) motion is necessary to preserve legal arguments. Rules should not be compromised to accommodate for one party's ineptitude.

II. The City has the authority to create a law imposing civil liability on a private party for distributing a product determined to be a public nuisance because the law is neither arbitrary nor irrational.

Even if the Court reaches the merits of Kill-a-Byte's complaint, the City still prevails because it has enforced a theory of civil liability confirmed to be lawful by the New Tejas Supreme Court. Because the City seeks abatement under a common-law theory of liability for the immense economic damage Kill-a-Byte's game "Lightyear" has caused, this Court can look to precedents focusing on states' authority to write economic legislation due to similarly controlling principles. When analyzing the validity of economic legislation, the proper standard of review is rational basis; as long as economic legislation is not "arbitrary or irrational," the law passes constitutional muster. *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 637 (1993); *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 621 (7th Cir. 2014). Similar to how this Court respects legislation, it also does not sit to question the wisdom of the City's law—it need only determine that the City acted rationally in using its authority to impose civil liability on Kill-a-Byte. *Gibson*, 760 F.3d at 621. In fact, the Court affords broader deference to the states' development of common-law. *See id.* 605 (upholding Wisconsin's risk-contribution theory in light of the deference afforded to state common law).

The Restatement (Second) of Torts (Restatement) defines a public nuisance as "an unreasonable interference with a right common to the general public." RESTATEMENT (SECOND) OF TORTS § 821B (AM. LAW INST. 1979). "[T]he absence of a regulation or statute declaring" the distribution and operation of a videogame as a

basis for claiming a public nuisance does not prohibit trial courts from making such a finding. *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 554 (2017). The common law tort is intended for "the protection and redress of community interests . . . which the courts have vindicated by equitable remedies since the beginning of the 16th century." *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 603 (Cal. 1996). The police power to abate nuisances "belonged to the States when the Federal Constitution was adopted." *Nw. Fertilizing Co. v. Vill. of Hyde Park*, 97 U.S. 659, 667 (1878). Consistent with this principle, the City prays this Court uphold its efforts to impose liability for the grand economic and social harms caused by Kill-a-Byte's game, Lightyear.

A. The City's theory of liability is consistent with decades of public nuisance precedent and is rationally related to its goal of protecting against future harms.

The City's theory of liability is rational because it is consistent with the generally accepted principle that "[t]he tort of public nuisance is purposefully broad to protect against harms that cannot be proscribed proactively." Steven Czak, Note, *Public Nuisance Claims After* Conagra, 88 FORDHAM L. REV. 1061, 1088 (2019). Governments are obligated to "maintain a decent society." *Acuna*, 929 P.2d at 603 (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964)). For centuries, public nuisance liability has been employed to preserve "tranquility, security and protection." *Id.* With the rise of technology and the increasing realism and addictiveness of videogames like Lightyear, states should be permitted to use "common law theories to combat modern injuries" where the industry itself has no incentive to eliminate

harm. Hilary Silvia & Nanci K. Carr, *When Worlds Collide: Protecting Physical World Interests Against Virtual World Malfeasance*, 26 MICH. TECH. L. REV. 279, 315 (2020); *see also* Pet. App. 23a (describing how Kill-a-Byte was aware of Lightyear's impact but took no action to mitigate its negative consequences).

i. Courts have consistently treated public nuisance liability as a strict liability issue without concern as to whether such liability violated due process.

The City had authority to impose liability for Kill-a-Byte's distribution and operation of Lightyear because its theory is consistent with decades-worth of public nuisance jurisprudence. Finding an activity to be a public nuisance has not traditionally depended on the actor's intent or expectations. Instead, "[t]he term 'nuisance,' in its strict and original meaning," triggers strict liability analysis. *Taylor v. City of Cincinnati*, 55 N.E.2d 724, 729 (Ohio 1944). Thus, "the critical question is whether the defendant *created or assisted in the creation of the nuisance*." *ConAgra*, 227 Cal. Rptr. 3d at 534 (quoting *Cnty. of Santa Clara*, 40 Cal. Rptr. 3d 313).

To illustrate the states' authority to hold parties liable for public nuisance, this Court can look to cases allowing states to sue gun manufacturers. For example, Indiana allowed a suit against Smith & Wesson for creating a public nuisance even "without an underlying independent tort" and where the company had been compliant with statutes and regulations. *See City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1234 (Ind. 2003) (acknowledging gun manufacturers, while compliant with manufacturing regulations, may still create a public nuisance). Although Smith & Wesson could not be charged with intent to support illegal

handgun sales and cause the harms following therefrom, it was enough that the manufacturers created the nuisance at all. *Id.* The Indiana Supreme Court framed the issue from a practical standpoint:

> This is the case whether the actor intends the adverse consequences or merely is charged with knowledge of the reasonably predictable harm to others. In either case, the law of public nuisance is best viewed as shifting the resulting cost from the general public to the party who creates it. If the marketplace values the product sufficiently to accept that cost, the manufacturer can price it into the product. If the manufacturers and users of the offending activity conclude that the activity is not worthwhile after absorbing these costs, that is their choice. In either case, there is *no injustice* in requiring the activity to tailor itself to accept the costs imposed on others or cease generating them.

Id. at 1234 (emphasis added). Thus, *Smith & Wesson* demonstrates why it is fair to allow states to recover abatement costs even if the defendant did not intend to harm the public. Similarly, Kill-a-Byte argues it did not intend for Lightyear to experience devastating harms to its economy and crime rate. Pet. App. 2a. Nor did Kill-a-Byte violate a particular statute or regulation. *Id.* However, regardless of its intent, Kill-a-Byte still created the conditions substantially contributing to the City's unsafe conditions. *Id.* Thus, under strict liability, Kill-a-Byte is liable. Additionally, the same practical justifications raised by the Indiana court apply here: just as Smith & Wesson was best suited to absorb the costs of the consequences of its lucrative endeavors, Kill-a-Byte—as one of the "largest and most successful software companies in the country"—is similarly best suited to "tailor itself to accept the costs imposed on others." *Id.* at 1234; Pet. App. 20a.

Kill-a-Byte may protest that it is not in a position to abate the nuisance it created because it stopped operating Lightyear in 2013. *See* Pet. App. 23a (noting Kill-a-Byte raised a statute of limitations issue in its motion for summary judgment). Although Judge Whitworth later clarified that no such statute of limitations barred the City's claims, Kill-a-Byte may nonetheless address this fact to contend it is no longer responsible for the damages the City incurred. Pet. App. 25a n.5. The fact that Kill-a-Byte ceased operations in 2013 does not erase its liability. Section 834, comment e of the Restatement states that "a person who participated to a substantial extent in [creating the nuisance] is subject to liability for a nuisance even if the activity has ceased and 'even though he is no longer in a position to abate the condition and stop the harm.'" Peter Tipps, Note, *Controlling the Lead Paint Debate: Why Control Is Not an Element of Public Nuisance*, 50 B.C.L. REV. 605, 627–28 (2009) (quoting RESTATEMENT (SECOND) OF TORTS § 821B, cmt. e (AM. LAW. INST. 1979)). Thus, even though Kill-a-Byte discontinued Lightyear in 2013, the City's crime rates and financial conditions continue to suffer and Kill-a-Byte should not escape liability based on this convenient fact. Pet. App. 20a.

Because courts analyze common-law public nuisance under a strict-liability theory, the City was rational in not requiring Kill-a-Byte to know the precise type of negative consequences Lightyear would create.

1. Even under Kill-a-Byte's preferred "actual knowledge" theory, the City is still entitled to relief because Kill-a-Byte did possess knowledge that Lightyear was harmful to the public.

Kill-a-Byte may cite to the California public nuisance lead paint litigation, which required the defendants' actual knowledge that lead paint was harmful to public health, to assert the City's theory is too strict in comparison—but the City's theory still prevails under this standard. Pet. App. 11a–12a. The lead paint litigation created a standard that defendants "affirmative[ly] promot[ed] [a nuisance] for a use defendants knew to be hazardous." *ConAgra*, 227 Cal. Rptr. 3d at 529. The State was not constitutionally required to adopt California's theory of liability, but even if the Court incorporates the "actual knowledge" standard into this controversy, the evidence supports a finding that Kill-a-Byte possessed actual knowledge that Lightyear was injurious to the City's residents.

In *ConAgra*, a California appellate court reviewed a public nuisance suit against various lead paint manufacturers, in which the defendant manufacturers argued joint and several liability would violate due process. *ConAgra*, 227 Cal. Rptr. 3d at 533–34. The government alleged lead paint, when used within a home's interior, posed serious health risks to the public and thus its distribution constituted a public nuisance. *Id.* Relying on the government's theory of liability, one similar to the City's theory here, the court reviewed the jury's finding of liability under the substantial evidence rule. *Id.* In doing so, the court emphasized the jury did not need to find the manufacturer knew "precisely how children could be harmed by interior residential lead paint so long as there [was] substantial evidence that [the

manufacturer] knew that interior residential lead paint posed a significant risk of harm to children." *Id.* The court found it sufficient that the paint company knew, at the time it painted home interiors, that lead paint posed a health risk to those exposed to it. *Id.* at 534. Even if the available data was specific to outdoor use of lead paint, the court stated the jury could have reasonably concluded the data also applied to interior lead paint. *Id.* Thus, the court upheld the jury's verdict and held no due process violation was at issue. *Id.*

Here, the jury's verdict is consistent with the standard recognized in *ConAgra*. Just as the lead paint manufacturers did not intend to directly harm children with their product, the City acknowledges that Kill-a-Byte did not intend to negatively influence the crime rate. Pet. App. 25a. However, Kill-a-Byte had actual knowledge of Lightyear's impact from two separate sources: (1) APA studies noting the psychological impact of violent videogames on teenage players;[9] and (2) Kill-a-Byte's own actively monitored databases, which revealed users played for excessive amounts of time—negatively impacting their personal lives as a result. *See* Pet. App. 23, 24a n.3. This is similar to how the lead paint defendants in *ConAgra* possessed actual knowledge of the negative effects of lead paint exposure based on scientific data but continued to promote lead paint for interior use. *ConAgra*, 227 Cal. Rptr. 3d at 534. Here, even after obtaining the alarming data spanning a decade, Kill-a-Byte

[9] Even if the APA study did not focus on Lightyear specifically, the jury could reasonably infer the conclusions could apply to Lightyear, a similarly violent videogame. *See ConAgra*, 227 Cal. Rptr. 3d at 534 (deferring to the jury's inference that a study about exterior lead paint would apply to interior lead paint).

continued developing Lightyear with the intention of increasing the amount of time players dedicated themselves to the game. Pet. App. 23a. These actions constitute Kill-a-Byte's affirmative promotion of Lightyear for excessive use, not its "mere manufacture and [operation] of [Lightyear] or [Kill-a-Byte's] failure to warn of its hazards." *ConAgra*, 227 Cal. Rptr. 3d at 529. Therefore, even under the heightened standard of knowledge used in the lead paint litigation, states are still permitted to impose civil liability on a private party for distributing a product that is later determined to create a public nuisance.

ii. States are not limited to relying on "but-for" causation; the "substantial-factor" test is consistent with the Restatement (Second) of Torts and other jurisdictions.

Public nuisance jurisprudence has not traditionally required "but-for" causation, but rather only requires that "[a] connecting element to the prohibited harm must be shown." *ConAgra*, 227 Cal. Rptr. 3d at 543 (quoting *In re Firearm Cases*, 24 Cal. Rptr. 3d 659, 680 (Cal. App. 4th 2005)). The State requires the defendant's conduct be a "substantial factor" of the nuisance's creation. Pet. App. 4a. In accordance with this standard, causation must still be more than theoretical. *ConAgra*, 227 Cal. Rptr. 3d at 543. The substantial factor test is a commonly used type of causation endorsed by several state courts and the Restatement. *Id.* at 594 (holding that one lead paint manufacturer was a substantial factor in the creation of a public nuisance even if it stopped painting houses with the harmful paint before the suit); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1111 (Ill. 2004); RESTATEMENT (SECOND) OF TORTS § 431 (AM. LAW. INST. 1979). State courts have

found consistency between the Restatement's definition of public nuisance and state law to be persuasive, demonstrating the State was indeed rational in adopting the standard itself. *E.g.*, *Beretta U.S.A. Corp.*, 821 N.E.2d at 1111 (upholding Illinois public nuisance law and recognizing its consistency with the Restatement).

In the record, the Thirteenth Circuit contends the substantial-factor test has not traditionally been adopted where the harms would have occurred even without the tortfeasor's conduct. Pet. App. 9a–10a (quoting *Burrage v. United States*, 571 U.S. 204, 215–16 (2014)). The court relied on this Court's decision in *Burrage v. United States*, which examined whether the Controlled Substances Act twenty-year sentencing minimum applied if the distributor "contribute[d] to, but [was] not the but-for cause of, the victim's death or injury." *Burrage*, 571 U.S. at 206. In *Burrage*, the decedent died after he purchased heroin from the defendant, but the medical examiner testified that the decedent had ingested multiple drugs before he died. *Id.* at 207. Therefore, the heroin purchased from the defendant contributed to his death, but it could not be determined to constitute the but-for cause of death. *Id.* at 208. Justice Scalia held for the Court that it was not enough to sentence the defendant to the maximum based on the substantial-factor standard alone. *Id.* at 215–16.

1. The Lightyear players themselves did not break the chain of causation because Kill-a-Byte created conditions encouraging them to play.

Aside from the stark differences in the facts of *Burrage* and this case,[10] there is one major distinction that renders *Burrage* inapposite here: *Burrage* did not posit an absolute bar against the substantial factor theory—it limited the prohibition to circumstances in which the harm "*would have occurred without* [the defendant's conduct]." *Burrage*, 571 U.S. at 215–16 (citing W. KEETON, ET AL., PROSSER AND KEETON ON LAW OF TORTS § 41 267 (5th ed. 1984)). Here, one expert for Kill-a-Byte posited other potential sources for the opportunity costs, exponential increase in crime rates, and increased expenditures necessary for the police to suppress the crime. Pet. App. 3a n.1 (suggesting a 2004 teacher strike, 2005 embezzlement scandal and subsequent reduced police force budget, and factory closures as potential causes for the City's plight).

These other events do not excuse Kill-a-Byte from liability. First, it should be noted that the "death results" element of the Controlled Substance Act was required to be determined by a jury beyond a reasonable doubt—a far higher burden of proof than the standard required for the City's burden in a civil public nuisance claim. *Burrage*, 571 U.S. at 210. Second, Kill-a-Byte's expert cited to events occurring

[10] First, *Burrage*'s holding pertained specifically to the Controlled Substance Act—a federal statute. *Id.*; *see also* Brief in Opposition at 30–31, *ConAgra Grocery Prods. Co. v. California*, 139 S. Ct. 377 (2018) (No. 18-84) (contesting the defendant's writ for certiorari and noting how the defendant cited to cases concerning causation in federal statutes, none of which spoke to due process). Second, the stakes in *Burrage* were criminal, not civil, introducing a stricter burden of proof.

shortly after Lightyear's debut, but no specific events after 2005—an entire eight years before Kill-a-Byte retired the game. Pet. App. 3a n.1. Kill-a-Byte still has not refuted why it continued to aggressively promote Lightyear in spite of the turbulence the City experienced in the early 2000s. Unlike *Burrage*, in which the decedent had ingested an assortment of potentially-lethal substances and soon after passed away—rendering it more uncertain what ultimately led to his death—there are eight years of unaccounted-for time in which Kill-a-Byte collected data on the City's residents and continued operating Lightyear despite having actual knowledge of the harm it was causing. Pet. App. 23a.

Kill-a-Byte may argue the Lightyear users themselves were an intervening cause breaking the chain of causation. Pet. App. 10a n.3. The Third Circuit examined a similar claim in *Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536 (3d Cir. 2001). Beretta claimed several intervening actors broke the chain of causation between itself, the manufacturer, and the public harmed by the illegal arms market: distributors, retailers, consumers, and criminals. Appellees' Response Brief, *Camden*, 273 F.3d 536 (No. 01–1051). The Third Circuit found this argument persuasive, though it acknowledged the New Jersey Supreme Court may someday expand its public nuisance jurisprudence to broaden public nuisance liability in spite of intervening actors. *Camden*, 273 F.3d at 541–42.

Here, it is enough that Kill-a-Byte was a substantial factor—a standard consistent with the Second Restatement and other state law theories. However, even if the Court considers the intervening-actor argument, the causal chain is far from

interrupted in the manner seen in *Camden*. Unlike Beretta, which relied on retailors and other distributors to sell its product, Kill-a-Byte both created and operated Lightyear, even directly monitoring user accounts. Pet. App. 2a. Additionally, the City presented evidence that violent videogames like Lightyear directly impact the temperament and desensitization of their players. *See* Pet. App. 24a (describing how Lightyear's skills influence players' real lives); Pet. App. 24a n.3 (citing a study by the APA). Although playing Lightyear was voluntary, Kill-a-Byte actively encouraged users to spend as much time as they could on the game and took no measures—however simple they would be to implement—to limit playing time. Pet. App. 23a; *see also* Silvia & Carr, *supra*, at 300 ("Arguably, creating a game that encourages players to . . . engage in active play creates a foreseeable risk of interference with the rights of others.").

These facts demonstrate the chain of causation is direct and unclouded by multiple intervenors, bolstering the fairness of the City's theory. Holding a party substantially responsible for the impact on its users' psyche and success liable under public nuisance can hardly be considered violative of due process.

iii. The State's theory of public nuisance liability is valid even if declaring a videogame like Lightyear a public nuisance is unprecedented because the State has broad authority to discover and abate new nuisances.

Even if a videogame like Lightyear has yet to be declared a public nuisance in another jurisdiction, this is not enough to declare the City's theory of liability unconstitutional. "As society evolve[s], so too [does] the scope of public nuisance." *See* Tipps, *supra*, at 606. Common law public nuisance is not limited to an exhaustive

list of activities predetermined to be public nuisances; the courts and the legislature have equitable jurisdiction to abate public nuisances.[11] *See Beretta U.S.A. Corp.*, 821 N.E.2d at 1120–21 (explaining that although the legislature has the authority to statutorily categorize an activity a public nuisance, the absence of legislation does not foreclose courts from declaring an activity a public nuisance at common law).

It is true the Restatement suggests higher scrutiny for certain considerations if the defendant's conduct has not been previously recognized as a public nuisance before, such as "the potentially widespread damage," whether "the defendant was not aware of the injurious character of his conduct," and whether the defendant had knowledge or should have known about the effects of its conduct. RESTATEMENT (SECOND) OF TORTS § 821B cmt. e (AM. LAW INST. 1979). It is notable, however, that the Restatement makes no mention of due process implications where courts recognize new public nuisances. *See Smith & Wesson Corp.*, 801 N.E.2d at 1233 (holding states are not limited to recognizing public nuisances only where unlawful activity or real property is involved). Indeed, courts have commented on the necessity of affording states and their cities broad latitude in abating public nuisances even where the activity did not violate other existing laws when it was performed:

> The fact that a building was constructed in accordance with all existing statutes does not immunize it from subsequent abatement as a public nuisance. . . . It would be an unreasonable limitation on the powers of the city to require that this [presently existing] danger be tolerated ad infinitum merely because the [building] did

[11] As the Thirteen Circuit conceded in its opinion, public nuisance claims are not limited to cases involving real property. *Beretta U.S.A. Corp.*, 821 N.E.2d at 1233; Pet. App. 9a.

> not violate the statutes in effect when it was constructed . . . .

ConAgra, 227 Cal. Rptr. 3d at 554 (citations omitted) (alterations in original). By allowing the State to recognize a new public nuisance, the Court would honor the long-held principle that "common law . . . [is] the incremental and reasoned development of precedent." *Gibson*, 760 F.3d at 622 (citing *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001)). Strictly limiting the State to only recognize public nuisances where real property is involved—even where a jury has determined concrete damages have been incurred and expert testimony has determined a party is substantially responsible—would impair further development of the common law. *Id.* Such a limitation would encroach on the State's police powers to protect citizen welfare. Thus, contrary to the Thirteenth Circuit's assertions, the district court properly considered the effects of its decision as a whole. Pet. App. 9a. For these reasons, the City's theory of liability is constitutionally sound, and Kill-a-Byte is liable for actively promoting its harmful game.

B. Because abatement is a prospective remedy, whether the City's theory of liability comports with due process should not be determined on inapplicable precedents concerning excessive punitive damages.

In addition to the City's theory of liability, the City's sought-after remedy is constitutionally sound even though Kill-a-Byte did not necessarily anticipate liability when it originally operated Lightyear. Although this Court has yet to speak on the issue at hand, state courts support the common law remedy of abatement. *Id.* at 549 ("declin[ing] to reconsider" the holding that plaintiffs need not demonstrate

abatability). For example, in *ConAgra*, a California appellate court held abatement was appropriate where the plaintiff presented expert testimony that abatement would alleviate the impact of the defendant's public nuisance.[12] *Id.* at 551. Similarly, this Court should uphold the City's theory of liability because it appropriately remedies the harms incurred by Kill-a-Byte's nuisance and comports with due process.

i. Kill-a-Byte's reliance on punitive damage jurisprudence is misplaced because abatement is remedial—not punitive—in nature.

Because the City does not seek punitive damages at all, Kill-a-Byte and the Thirteenth Circuit mistakenly focused on the constitutional limits to punitive damages. *See* Pet. App. 13a–14a (first citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003), then citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), and comparing the trial court's abatement verdict to "grossly excessive" punitive damages). In *BMW*, the Court held that punitive damages are proper if the State has a "legitimate interest[] in punishing unlawful conduct and deterring its repetition," but not if the damages are grossly excessive. *BMW*, 517 U.S. at 568. *State Farm* further stated that excessive or arbitrary punishments may violate due process. *State Farm*, 538 U.S. at 416–17. Neither of these cases invalidate the City's cause of action because the City does not seek punitive damages at all.

[12] If Kill-a-Byte wanted to challenge the sufficiency of the evidence, it should have preserved the argument in a Rule 50 motion during trial.

There is a distinction between abatement for nuisance and damages, the latter of which is not even an option for the City. *See* Czak, *supra*, at 1071 ("A sovereign may only seek an abatement of the nuisance and not damages.") (citing RESTATEMENT (SECOND) OF TORTS § 821C(2) (AM. LAW INST. 1979)). As the Restatement explains, "precedents for [damages and abatement] are by no means interchangeable." RESTATEMENT (SECOND) OF TORTS § 821B cmt. i (AM. LAW INST. 1979). While damages "are directed at compensating the plaintiff" for injuries, abatement is an equitable remedy intending to "eliminate the hazard that is causing prospective harm to the plaintiff." *ConAgra*, 227 Cal. Rptr. 3d at 569.

Further, while abatement is prospective in nature, damages are retroactive. RESTATEMENT (SECOND) OF TORTS § 821B, cmt. i (AM. LAW INST. 1979). The government has the authority to "impose retroactive liability to some degree," but the Court need not reach that analysis because the City does not seek to impose *retroactive* liability; it seeks equitable relief in the form of abatement. *E. Enters. v. Apfel*, 524 U.S. 498, 258–59 (1998). As the California Supreme Court explained, "[t]here is no 'hindsight' or 'retroactive liability' involved in requiring those who knowingly engage in hazardous conduct to remediate the consequences of their conduct." *ConAgra*, 227 Cal. Rptr. 3d at 559. Here, the City did not arbitrarily assert that creating and operating a videogame is tortious in and of itself. Rather, Kill-a-Byte's actions were found to create a public nuisance, and it is the City's duty to abate the nuisance. *Nw. Fertilizing Co.*, 97 U.S. at 667. Thus, by citing to *BMW* and *State Farm*, Kill-a-Byte confounds the issue with smoke and mirrors. This Court should

decline to entertain Kill-a-Byte's attempts to displace decades of public nuisance jurisprudence.

C. *Eastern Enterprises* is inapplicable because no discernable holding from the case is instructive here; thus, it does not lend precedential value to Kill-a-Byte's due process argument.

This Court should refuse to afford weight to Kill-a-Byte's reliance on *Eastern Enterprises v. Apfel* because neither the plurality, concurrence, nor dissent are immediately applicable to this case. In *Eastern Enterprises v. Apfel*, the Court struck down the Coal Industry Retiree Health Benefit Act (Coal Act) as applied to Eastern Enterprises, but the Court did not reach an agreement as to why the Act was unconstitutional. *E. Enters.*, 524 U.S. at 258–59. The Coal Act required former mine operators to fund health benefits for retired miners who worked under the operators prior to leaving the coal industry, thus imposing "new future liability on the basis of an old employment relationship." *Id.* at 559 (Breyer, J., dissenting). The law had a retroactive effect by imposing liability for acts occurring thirty-five years prior to its enactment, an effect Justice Kennedy called "of unprecedented scope." *Id.* at 548 (Kennedy, J., concurring).

A plurality held Eastern Enterprises could not be liable under the Coal Act. Four justices voted the Act violated the Takings Clause because it met the three-prong analysis for regulatory takings. *Id.* at 529 (plurality op.). Additionally, Justice O'Connor warned against legislation that "imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience."

Id. at 528–29 (plurality op.). Justice Kennedy agreed the Coal Act could not impose liability on Eastern Enterprises, but under due process grounds. *Id.* at 548 (Kennedy, J., concurring). Justice Breyer, joined by three justices, dissented and argued that although some laws may be unconstitutional if retroactive, the Coal Act was constitutional because it was not arbitrary or unfair. *Id.* 567–68 (Breyer, J., dissenting). Based on the plurality's reasoning, Kill-a-Byte argues the City's theory is unconstitutional because it is applied retroactively and fits within a limited class that could not anticipate liability. Pet. App. 13a.

Kill-a-Byte's reliance on the *Eastern Enterprises* plurality is misplaced because the plurality narrowly focused on whether the retroactive effect of the Coal Act constituted a taking under the Fifth Amendment—a wholly distinct issue from the public nuisance question in this case. *See E. Enters.*, 524 U.S. at 513 (discussing the Coal Act's legislative history, which included concerns "to fulfill the promises that began in the collective bargaining process nearly 50 years [prior]"). This Court held nearly a century ago that abatement is incomparable to a government taking: "In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner." *Samuels v. McCurdy*, 267 U.S. 188, 196 (1925). Since *Samuels*, state courts have continued to recognize this distinction in recent opinions. *City of Dallas v. Stewart*, 361 S.W.3d 562, 590 (Tex. 2012) ("Due process distinguishes proper abatement of a nuisance from the improper deprivation of property.") (Guzman, J., dissenting); *see also* Alex Cameron, Comment, *Due Process and Local Administrative Hearings Regulating Public Nuisances: Analysis and Reform*, 43 ST.

MARY'S L.J. 619, 670 (2012) (arguing that "applying procedural due process protections to public nuisance abatements by comparing them with constitutional takings is problematic").

Since *Eastern Enterprises*, the D.C. and Seventh Circuits, among others,[13] have rejected the notion that the decision could be used to claim the Coal Act is unconstitutional under the Due Process clause. *Ass'n of Bituminous Contractors v. Apfel*, 156 F.3d 1246, 1254–55 (D.C. Cir. 1998); *Gibson*, 760 F.3d at 619. The courts noted that although takings and due process analyses were "'correlated to some extent,' a correlation is not an equivalency," and Justice Kennedy's sole opinion in favor of invalidating the Coal Act on due process grounds is not binding. *Ass'n of Bituminous Contractors*, 156 F.3d at 1254–55. In *Association of Bituminous Contractors*, the D.C. Circuit clarified:

> Justice Kennedy's due process reasoning can in no sense be though a logical subset of the plurality's takings analysis. . . . [T]he government is correct in stating that the only binding aspect of *Eastern Enterprises* is its specific result—holding the Coal Act unconstitutional as applied to Eastern Enterprises.

Id. at 1254–55 (quoting *E. Enters.*, 524 U.S. at 538). Similarly, the Seventh Circuit in *Gibson* rejected the notion that "isolated references" between the plurality and the concurring opinions do not render the opinion homogenous.[14]

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[13] *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003); *A.T. Massey Coal Co. v. Massanari*, 305 F.3d 226, 240–41 (4th Cir. 2002); *Anker Energy Corp. v. Consolidation Coal Co.*, 177 F.3d 161, 172 (3d Cir. 1999).

[14] The D.C. Circuit went on to hold the Coal Act withstood due process because the legislature had a rational basis for retroactively applying the law, similar to the

760 F.3d at 619. Further, even if the four dissenting justices analyzed the issue under due process, the due process application is not binding because the dissenters did not concur with Justice Kennedy. *Id.* at 620. "Without a controlling test from *Eastern Enterprises*," the court stated, "we are back to where we started: economic legislation does not violate substantive due process unless the law is arbitrary and irrational." *Id.* at 621.

Kill-a-Byte may contend, as did the Thirteenth Circuit, that *Eastern Enterprises* is applicable because the plurality warned against the government creating new liabilities based on formerly legal conduct, and that is how Kill-a-Byte characterizes the issue at hand. *E. Enters.*, 524 U.S. at 533. This interpretation, however, is overbroad because, as five justices settled, "regulatory actions requiring the payment of money are not takings." *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339 (Fed. Cir. 2001). Accordingly, because the City seeks monetary payment to abate the economic harms caused by Lightyear, there is no takings conflict. *Id.* Similar to how the D.C. Circuit held in *Association of Bituminous Contractors*, this Court should formally recognize the distinction between the due process and takings discussions in *Eastern Enterprises* and thusly hold it to be inapposite to this case. *Ass'n of Bituminous Contractors*, 156 F.3d at 1254–55.

Kill-a-Byte may also argue the $600 million verdict is disproportionate to the City's harms—another concern raised by Justice O'Connor in her *Eastern Enterprises*

City's proposed standard of review here. *Ass'n of Bituminous Contractors*, 156 F.3d at 1255.

plurality opinion. *E. Enters.*, 524 U.S. at 528–29 (plurality op.). Even if the Court reaches this step in the *Eastern Enterprises* analysis after properly foregoing the retroactivity considerations, disproportionality is also a non-issue. In *Eastern Enterprises*, the thirty-five-year time lapse between the events giving rise to liability and the Coal Act's enactment was a significant factor in the Court's conclusion that the Coal Act was unfair. *Id.* at 548. Here, there is only a six-year gap between Kill-a-Byte ceasing its Lightyear operations and the trial court's verdict. Pet. App. 33a. This shorter time gap dissolves the fairness concerns present in *Eastern Enterprises*.

Further, states with similar liability theories have allowed courts to consider equitable factors when contemplating abatement. For example, in *New York v. Shore Realty Corp.*, the Second Circuit reviewed an appeal involving New York's theory of public nuisance liability and noted: "The injunctive remedy is an equitable one; that abatement expenses may become prohibitive and disproportionate therefore may be taken into consideration." 759 F.2d 1032 (2d Cir. 1985) (citing RESTATEMENT (SECOND) OF TORTS § 839 cmt. f (AM. LAW INST. 1979)). Although the trial court judge here was unpersuaded by equitable considerations—if Kill-a-Byte presented any—the option to consider equity further supports the conclusion that the City's theory of liability is far from draconian and comports with due process.

i. Even if the Court characterizes the City's theory of liability as "retroactive," it is still constitutional because the law is rational and not arbitrary.

Even generously assuming the City's theory is retroactive in nature, the law is still constitutional because it is rationally imposed. The retroactive impact of a law

does not sound the death knell. *Commonwealth Edison Co.*, 271 F.3d at 1345–46 ("Although such 'most egregious circumstances' do not exist *unless* the legislation is severely retroactive, they do not exist *merely because* the legislation is severely retroactive and costly . . . [.]"). Even if legislation imposes new liability based on past conduct, it is within the State's authority if it is rationally based. *Concrete Pipe & Prods. of Cali., Inc.*, 508 U.S. at 637. The same principles apply to common law: "If strict constraints on retroactivity applied to state-court common-law decisions, then the development of common law would be impaired." *Gibson*, 760 F.3d at 622. A judicial opinion is only irrational if it is "unexpected and indefensible" based on a previously expressed law to the contrary. *Id.* at 622.

In this case, Kill-a-Byte does not point to any preexisting legislation or common law promising against the finding of a public nuisance. Nor can Kill-a-Byte allege liability was completely unexpected. Common law nuisances have been expanding for decades prior to the events in this case, with suits ranging from lead paint companies to gun manufacturers. *See ConAgra*, 227 Cal. Rptr. 3d at 559; *Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002). Further, Kill-a-Byte possessed a decade's worth of data on the City's male players, which revealed users were failing college courses all the while the City's crime rates skyrocketed and tax revenues plummeted. Pet. App. 22a–23a. It was only a matter of time before the City acted pursuant to its duty to amend the threats to public health and safety. Thus, Kill-a-Byte cannot credibly assert liability is unfair or surprising.

In *Gibson*, the Seventh Circuit upheld Wisconsin's theory of liability which could hold pigment manufacturers liable in a mass torts suit if they either knew or should have known of the injuries they caused, decreasing the plaintiff's burden of proof. *Gibson*, 760 F.3d 623–24. The court found it persuasive that Wisconsin's theory was consistent with other common-law developments in tort with similar causation requirements, even if Wisconsin's particular "risk-contribution" theory was not the majority rule. *See id.* at 624 (clarifying that although most states do not adopt the risk-contribution rule, "that does not mean that those states that have chosen to develop their common law to permit recovery on a theory of culpable contribution to the risk injury have made an irrational or arbitrary choice"). The court concluded Wisconsin was absolutely rational in furthering common law to protect innocent plaintiffs from manufacturers who would otherwise escape liability for injuries they contributed to. *Id.*

Similar to Wisconsin, here, the State possesses a rational basis for developing its common law to hold massive, lucrative companies like Kill-a-Byte responsible for the harms to which they contribute. Additionally, the State and the City have a rational interest in protecting innocent plaintiffs—the citizens impacted by the high crime rate and unemployment epidemic. *See id.* at 625–26 (holding a low standard of causation did not violate due process because the standard was justified in light of protecting innocent plaintiffs). Accordingly, abating the crime rate and addressing the town's troubled economy can hardly be considered irrational.

D. There are several safeguards preventing states from crossing into unconstitutional territory under the City's theory.

Although states have broad authority to abate public nuisances, states do not have unbridled authority. First, the City, as a sovereign, is limited to seeking equitable abatement and not damages, protecting against potential abuse of the tort of public nuisance for frivolous claims. Czak, *supra*, at 1089. Here, the harms are factual and concrete, and the amount necessary to abate them was determined after a two-week bench trial dedicated to abatement alone. Pet. App. 4a. The City bore its burden in demonstrating the harms and arguing why it deserved abatement and Kill-a-Byte was afforded its day in court to contest the issues and to present favorable evidence. The duly provided trial proceedings present a safeguard against awarding punitive damages masked as abatement.

Further, the City's theory avoids unconstitutionality by limiting liability and abatement costs to those incurred within its own jurisdiction. In *BMW*, the Court agreed with the Alabama Supreme Court that damages should be limited to conduct implicating the interests of Alabama residents only. *BMW*, 517 U.S. at 573–74. The City emphasizes again that this case does not involve damages like *BMW*, but the Court's comments on the limitations to Alabama's interests illustrate how the City's theory is fair. Although the record reflects Kill-a-Byte operated Lightyear throughout the entire state of New Tejas, the injuries incurred throughout the state could not be considered in the City's case. The City acknowledges $600 million is a considerable amount, but it is the number determined through expert testimony and concrete data to effectively abate the harm Lightyear significantly contributed to. Thus, the City

"simply [asks Kill-a-Byte] to clean up the hazardous conditions that [it] assisted in creating." *ConAgra*, 227 Cal. Rptr. 3d at 559. "Requiring [Kill-a-Byte] to do so is not disproportional to [its] wrongdoing." *Id.*

CONCLUSION AND PRAYER

For the forgoing reasons, Petitioner respectfully request this Court reverse the judgment of the Thirteenth Circuit Court of Appeals on both issues.

Respectfully submitted this 16th day of November, 2020.

/s/ *Team # 12*

Team # 12
Counsel for Petitioner

APPENDIX

Federal Rule of Civil Procedure 50

(a) Judgment as a Matter of Law.

(1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) Motion. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.