No. 19-6236

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 2020 TERM

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 PETITIONER

Team 23
Counsel for Petitioner

QUESTIONS PRESENTED

I. Did the Thirteenth Circuit err as a matter of law when it permitted a party to appeal a due process claim that was rejected in summary judgment and not preserved for appeal through a judgment as a matter of law during the trial on the merits?

II. Did the Thirteenth Circuit err as a matter of law in ruling that state law may not impose civil liability on a private party for distributing a product that is later determined to be a public nuisance?

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The May 10, 2017, opinion and order denying summary judgment and the March 2, 2019, final judgment of the United States District Court for the Western District of New Tejas in *City of New Truro, New Tejas v. Kill-a-Byte Software, Inc.*, No. 16-cv-5412 are unreported and provided in the record. R. at 19a, 33a. The record also provides the unpublished opinion of the United States Court of Appeals for the Thirteenth Circuit in *Kill-a-Byte Software, Inc. v. City of New Truro, New Tejas*, No. 18-5971 (13th Cir. Mar. 21, 2020), *cert. granted*, No. 19-6236 (Oct. 2020). R. at 1.

STATEMENT OF JURISDICTION

The United States District Court for the Western District of New Tejas had diversity jurisdiction over this case under 28 U.S.C. § 1332 because the amount in controversy exceeds $75,000 and the citizens are of different states. R. at 1a, 3a. The jury rendered a verdict in favor of the Petitioner and the district court entered a final judgment on the issue of abatement. Respondent appealed this final judgment to the Thirteenth Circuit Court of Appeals. The Thirteenth Circuit had jurisdiction over this case under 28 U.S.C. § 1291. In a split decision issued on March 21, 2020, the Thirteenth Circuit reversed the district court's judgment. The Petitioner then filed a timely petition for writ of certiorari, which this Court granted. This Court has jurisdiction over this case under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the construction and application of Federal Rule of Civil Procedure 50, Fed. R. Civ. P. 50, which is reproduced in the Appendix along with the

relevant constitutional provision: the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV.

STATEMENT OF THE CASE

Statement of Facts

"In the end, there can only be one." Kill-a-Byte Software, Inc. ("Kill-a-Byte"), one of the largest and most successful software companies in the nation, operated under this mentality. R. at 20a. This was best reflected in its creation of Lightyear, a multiplayer video game designed to pit players against one another to fight until death. R. at 21a. In rounds of anywhere from 25 to 1,000 players, every person used a weapon of choice to achieve gruesome deaths of other players. R. at 21a. These deaths were portrayed by excessive amounts of blood and gore. R. at 21a.

Lightyear was one of the most successful video games from 2003 to 2013. R. at 2a, 20a. Lightyear owes its popularity to the realistic physics engine, gore, and death scenes embodied within the game. R. at 21a. If anything was unrealistic about the game, it may have been the excessive amounts of blood and gore displayed after a death. R. at 21a. The game further embodied its "every man for himself" ethos by promoting taunting of the victims who were killed. R. at 21a. Though Kill-a-Byte lawfully sold and distributed the game, the repercussions were felt heavily within communities like the City of New Truro, New Tejas ("The City"). R. at 2a.

Lightyear was immensely popular, particularly in the City, where over 50% of the male population "between the ages of 15 and 25 played the game for at least 10

hours every week." R. at 2a. Ten percent of these regular players were "Lightyear addicts"[1] who played the game over 35 hours every week.

Kill-a-Byte knew that people spent this much time playing Lightyear. R. at 23a. Its employees "actively monitored" the information Kill-a-Byte recorded from each user's account. R. at 23a. There are even published reports of "college students failing classes because they spent too much time playing Lightyear." R. at 23a. But Kill-a-Byte never limited how much time people played each day or week, even though it easily could have. R. at 23a and n.2. Kill-a-Byte was not concerned with whether people were spending too much time on Lightyear because Kill-a-Byte's "primary goal" was "to increase the amount of time . . . players spent playing the game, a figure that almost directly correlated with Kill-a-Byte's revenue." R. at 23a.

While Kill-a-Byte profited from the time people spent playing Lightyear, the community did not. The game kept people in New Truro from being productive members of society. R. at 23a. And once a player passed a minimum threshold of time per week, time spent playing Lightyear correlated with low educational achievement, unemployment, and low earning capacity, circumstances which increased criminal propensity. R. at 23a–24a. Thus, time spent playing Lightyear substantially correlated to an increased amount of criminal activity. R. at 24a. More fundamentally, experts contend that young people who are exposed to and engage in violent video games are desensitized to violence in real life. R. at 24a. Even the

[1] "Lightyear addicts" is a term of art used by an expert witness that testified on behalf of the City. R. at 22a. It is not to be construed as a formal medical diagnosis. R. at 22a.

American Psychological Association has noted that "aggression increases in teenagers when they play violent video games." R. at 24a and n.3. The average Lightyear player saw approximately thousands to tens of thousands of realistic deaths. R. at 24a. This exposure to life-like violence makes people more likely to be violent in real life, especially since the game rewarded violent responses. R. at 24a. Lightyear players can easily transfer these violent reactions into the real world—into New Truro society. R. at 24a–25a.

The propensity for real-world violence and other effects of Lightyear impact the City, where such a large number of people play the game. Tellingly, the crime rate in the City is unusually high, with a violent crime rate almost six times the national average. R. at 25a. Its unemployment rate is also strikingly high at 15%, and its poverty rate is 45.3%. R. at 25a. Though not solely a result of playing the game, the City has felt a devastating impact within its community as result of Kill-a-Byte's mentality: "In the end, there can only be one."

Nature of the Proceedings

In 2016, the City sued Kill-a-Byte in New Tejas state court for absolute public nuisance under New Tejas common law. R. at 2a. The case was removed to federal court based on diversity jurisdiction. R. at 2a–3a. After discovery, Kill-a-Byte moved for summary judgment on numerous grounds including standing, sufficiency of the evidence, statute of limitations, abatement liability under state law, and an alleged Fourteenth Amendment due process violation. R. at 3a, 20a. The district court denied all of Kill-a-Byte's motions for summary judgment. R. at 19a–20a. Specific to this

appeal, the district court denied the motion for summary judgment based on the Fourteenth Amendment due process claim on May 10, 2017. R. at 19a. However, the City did not move for summary judgement on the due process issue, so the case proceeded to trial. R. at 3a.

A three-week jury trial on the merits resulted in the jury returning a verdict in favor of the City, finding that Kill-a-Byte was liable for absolute public nuisance. R. at 4a, 33a. A two-week bench trial, limited to the issue of abatement, followed the jury verdict. R. at 4a, 33a. At the bench trial, the court determined that Kill-a-Byte was liable for $613.2 million to abate the public nuisance by funding job training programs, centers to assist with video game addiction, increased police presence, security cameras in downtown, and other public safety measures. R. at 33a. On March 2, 2019, the district court entered its final judgment on Kill-a-Byte's liability for public nuisance and abatement costs. R. at 33a–34a.

The United States Court of Appeals for the Thirteenth Circuit reversed the decision of the district court. R. at 14a. Kill-a-Byte appealed the district court's final judgment on both state and federal claims. R. at 4a. The court determined that the judgment was consistent with the state law of New Tejas after the Supreme Court of New Tejas confirmed "(1) the viability of the City's liability theory; (2) the legal sufficiency of the evidence presented by the City; and (3) that the money sought by the City and awarded by the district court constituted a recoverable amount of 'abatement' for purposes of state law." R. at 5a. Regarding the federal claims, the court held that Kill-a-Byte was not required to raise a Rule 50 motion to preserve its

due process claim that had been rejected in a denial of summary judgment before trial. R. at. 8a. The court also held that the district court's judgment violated the Due Process Clause of the Fourteenth Amendment because it failed to give adequate weight to retroactivity and when considered together, the permissible aspects of the state's public nuisance liability exceeded constitutional bounds. R. at 9a. This appeal followed. R. at 1a.

SUMMARY OF THE ARGUMENT

The structure of our legal system exists to hold wrongdoers liable for the harm they contribute to society. In determining that Kill-a-Byte was not required to renew its Rule 50 motion and reversing the judgment below on the basis of a due process violation, the Thirteenth Circuit erred as a matter of law for two reasons. First, the Thirteenth Circuit should not have reviewed the due process claim because it was not preserved through a judgment as a matter of law at trial. Second, the retroactive liability imposed on Kill-a-Byte did not violate due process.

First, the Thirteenth Circuit erred as a matter of law when it reviewed a legal argument that was rejected in a denial of summary judgment because the argument was not preserved for appeal through a motion for judgment as a matter of law at trial. In order to preserve the structure of civil and appellate procedure, an exception to Federal Rule of Civil Procedure 50 ("Rule 50") should not be created for questions of law.

Circuit courts are courts of limited jurisdiction. Governed by 28 U.S.C. § 1291 and 28 U.S.C. § 1295, a circuit court has jurisdiction to review a district court's final

judgment. A final judgment is one that ends litigation on the merits and leaves nothing for the court to do but execute judgment. Contrary to orders and decrees that resolve part of a claim, such as a grant of partial summary judgment, an order denying summary judgment does not merge with the final judgment because it did not resolve any portion of the claim. This distinction is critical because a denial of summary judgment does not preserve for appeal the arguments it rejected. Rather, the denial of summary judgment reserves the arguments for the district court's review at *trial*. A party must raise those factual and legal arguments through a Rule 50 motion during or after a trial. The rationale underlying Rule 50, its clear text, and this Court's precedent require a party to do so for a circuit court to have jurisdiction over those arguments.

Following Rule 50, even for legal arguments, is necessary and just. An exception to Rule 50 for legal arguments rejected in summary judgment would threaten the structure of appellate review. Circuit courts would be forced to review an opinion, rather than a final judgment, to determine if it had jurisdiction over a legal argument rejected within a denial of summary judgment. This would lead to inconsistent results because bifurcating the legal and factual arguments in a denial of summary judgment is an elusive and vexing task. The appellate structure of the federal judiciary was not intended to hinge upon such an unpredictable standard. Nor was the appellate structure designed to permit a party to act imprudently by ignoring procedural requirements. Rather, the appellate structure affords parties with the opportunity to seek an interlocutory appeal or raise the argument through a Rule 50

motion at trial to have their arguments heard and decided. Thus, an exception to Rule 50 is unnecessary and will do more harm than good by undermining the current appellate structure and rewarding imprudent parties.

Alternatively, even if this Court decides that Rule 50 motions do not need to be renewed after trial when based off of purely legal arguments, the City prevails because state law may impose civil liability on a private party for distributing a product that is later determined to create a public nuisance. This retroactive common law liability does not violate due process and does not fall under the purview of the Takings Clause.

Retroactive liability, similar to retroactive civil laws, is considered under substantive due process and will be found unconstitutional only if arbitrary and irrational. Both arbitrariness and irrationality are disproved by showing that a rational basis exists for imposing the retroactive liability. A rational basis for retroactivity exists if the liability is fundamentally fair, a natural outgrowth of existing precedent, or includes an appropriate spreading of cost.

Retroactive liability is fundamentally fair when the historical circumstances show that imposing liability would not unnecessarily frustrate a party's reasonably settled expectations of liability. This test is met if the extension of existing law could be foreseen as reasonably possible. Both this Court's historical treatment of retroactivity and state common law's historical treatment of imposing liability for a lawful product that is later determined to interfere with a public right show that

retroactive liability in this case was reasonably possible and therefore fundamentally fair.

The retroactive liability is rational because using the substantial factor test is a natural outgrowth of existing causation precedent. Substantial factor causation does not violate due process just because other courts have chosen to use but-for causation. Substantial factor causation is not an uncommon standard in tort law and is even viewed favorably in several states, such as Ohio and California. Because the New Tejas Supreme Court certified that the City's liability theory was viable and it has been recognized as an appropriate causation standard by other states, substantial factor causation is an outgrowth of existing causation precedent and therefore another reason why imposing retroactive liability on Kill-a-Byte is rational.

The retroactive liability is rational because it approaches the spreading of cost appropriately. By treating the economic judgment similar to economic legislation, the abatement comes to this Court with the presumption of constitutionality and is rational due to Kill-a-Byte being in the best position to remedy the harm to which it contributed. Alternatively, the abatement judgment meets the constitutional standards for both compensatory and punitive damages and is therefore further shows why imposing retroactive liability on Kill-a-Byte is rational.

Although retroactivity can exist in various legal contexts, liability should only be evaluated under the Due Process Clause, not the Takings Clause. The Takings Clause was never intended to be the all-purpose protector of property interests; its

purpose is only to secure compensation in the event of proper governmental interference, not to analyze obligations to pay money imposed by court judgment.

ARGUMENT

Accountability is the essence of the American judicial system. Without it, communities are harmed, rights are infringed, and the system is taken advantage of. The judiciary holds wrongdoers accountable to society in two ways—structure and liability. This system of accountability works through a structure of carefully crafted procedural rules that give predictability and consistency to litigation. This structure ensures that litigation is fair, and that appellate review maintains its purpose, which is to review issues that were properly preserved in the lower court. Liability functions as the ultimate protection for the vulnerable, from the powerful. Due to their wealth and manpower, large corporations are one of the most influential forces in a community, for better or for worse. Thus, they should not be permitted to benefit from distributing a product that is harmful to society without also being accountable to society for the product's negative consequences. Between structure and liability, communities are protected, and order is preserved. This benefits all of society.

This Court should reverse the judgment of the Thirteenth Circuit for two reasons. First, the Thirteenth Circuit erred as a matter of law when it reversed the district court on due process grounds because Kill-a-Byte failed to preserve its due process argument in a Rule 50 motion for judgment as a matter of law. Second, even if this Court finds that the due process issue is reviewable, state law may impose retroactive liability without violating the Due Process or Takings Clauses.

I. THE THIRTEENTH CIRCUIT ERRED AS A MATTER OF LAW WHEN IT REVIEWED KILL-A-BYTE'S DUE PROCESS CLAIM BECAUSE IT WAS NOT PRESERVED FOR APPEAL THROUGH A MOTION FOR JUDGMENT AS A MATTER OF LAW AT TRIAL.

The federal judiciary is premised on a "carefully calibrated structure of . . . rules of civil procedure and appellate procedure." *Barber v. Louisville & Jefferson Country Metro. Sewer Dist.*, 295 F. App'x 786, 789 n.3 (6th Cir. 2008). A hallmark of this structure is Rule 50, which provides certainty and predictability for what issues will be raised on appeal to challenge the final judgment of a district court after a jury trial. The certainty and predictability of Rule 50 creates structure and ensures that a party's opportunity for justice is not undermined through lackluster procedural methods conducted by counsel or the judiciary. Failure to adhere to the structure of Rule 50 threatens the ability of the federal judiciary to accomplish its task of ensuring that justice is served.

Rule 50 is clear and simple: a party must follow the two-step process of seeking judgment as a matter of law to preserve an issue for appeal once a case has proceeded to trial. Fed. R. Civ. P. 50. A party must first raise a Rule 50(a) motion before the case is submitted to the jury and, if denied, renew its motion through Rule 50(b). *Id.* Failure to follow this structure leaves an "appellate court without power to direct the [d]istrict [c]ourt to enter judgment contrary to the one it had permitted to stand." *Cone v. W. Va Pulp & Paper Co.*, 330 U.S. 212, 218 (1947).

This Court reaffirmed the basic premise of Rule 50 in *Ortiz v. Jordan*. 562 U.S. 180, 184, 188 (2011). There, this Court recognized that Rule 50 provides jurisdiction for appellate review of arguments denied in summary judgment under Federal Rule

of Civil Procedure 56 ("Rule 56"). *Id.* at 190. Although *Ortiz* was addressing an argument relating to sufficiency of the evidence, the rationale it relied upon also applies to legal arguments that were rejected in summary judgment.

Thus, this Court should require a Rule 50 motion to preserve a legal argument rejected in summary judgment and refuse to address Kill-a-Byte's due process claim for two reasons. First, a motion for judgment as a matter of law is required for an appellate court to have jurisdiction over a legal argument rejected in summary judgment. Second, permitting appellate review of a legal argument rejected in summary judgment and not raised in a Rule 50 motion during trial would undermine the structure of the federal judiciary.

A. *A Circuit Court Does Not Have Jurisdiction to Review a Due Process Claim that was Rejected in a Denial of Summary Judgment.*

"The centerpiece of the jurisdiction of the circuit courts of appeal is the final judgment rule." 19 James W. Moore et al., *Moore's Federal Practice* § 202.02 (3d ed. 2020). This rule, embodied in 28 U.S.C. § 1291 and 28 U.S.C § 1295, limits the jurisdiction of the circuit courts to reviewing the "final decisions" of civil litigation in district courts. Denials of summary judgment generally cannot be appealed after a full trial on the merits because they are not final decisions. *Ortiz*, 562 U.S. at 188. Thus, a party must renew the rejected arguments in a Rule 50 motion for judgment as a matter of law at trial to preserve the arguments for appeal.

It is undisputed that a Rule 50 motion is required before a circuit court can review a district court's denial of summary judgment when the motion deals with the

sufficiency of the evidence. *Id.* at 190. Despite the clear text of Rule 50(b), which states that the court will "decid[e] the legal questions raised by the motion," the circuit courts are divided on whether a party must make a Rule 50 motion to preserve for appeal a purely legal question that was denied in summary judgment. *Compare Ting Ji v. Bose Corp.*, 626 F.3d 116, 128 (1st Cir. 2010) (holding that a Rule 50 motion is required to review a legal error on appeal), *with Rothstein v. Carriere*, 373 F.3d 275, 284 (2d Cir. 2004) (holding that a Rule 50 motion is not required for questions of law because the rationale of the rule does not apply). Though the majority of circuits recognize an exception to Rule 50 for purely legal questions, the exception is generally limited to issues such as res judicata, collateral estoppel, governmental immunity, and contract interpretation. *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 719 (7th Cir. 2003).

This Court should refuse to create an exception to the Rule 50 requirement because a circuit court's jurisdiction is limited to reviewing the final judgments of district courts, and denials of summary judgment are not final decisions. Also, the rationale underlying Rule 50 makes it clear that a motion for judgment as a matter of law is required to preserve a legal argument that was rejected in summary judgment.

1. A circuit court's jurisdiction is limited to reviewing a district court's final judgments.

Circuit courts are courts of limited jurisdiction. The final judgment rule recognizes that the jurisdiction of an appellate court is limited to reviewing "a decree

and any order from which an appeal lies." Fed. R. Civ. P. 54(a). Though not statutorily defined, courts consistently recognize a final decision as "one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *See, e.g.*, *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs*, 571 U.S. 177, 183 (2014).

A final judgment, however, "does not issue until the court has resolved all of the claims in the case. Thus, any ruling that resolves fewer than all claims, or that resolves only parts of the claims, does not result in a 'final' judgment as that term is normally used." 11 Moore et al., *supra*, § 56.02(4). The jurisdiction of circuit courts, therefore, does not arise under the final judgment rule until a district court renders a final decision on all parts of a claim.

This rule is not a mere formality. An appellate court owes deference to the district court judge who serves "as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). Stemming from the common law, there has been "a well-established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions. . . ." *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 660 (1935). Authority to render a final decision on reserved questions of law belongs to a district court. *Unitherm Food Sys. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 400–01 (2006).

The final judgment rule limits the jurisdiction of the circuit courts in order to minimize interference with district court decisions. *Flanagan v. United States*, 465

U.S. 259, 263–64 (1984). Thus, it is not a mere formality but rather embodies substantive policy that legal issues should be initially developed and decided by district courts. *California v. Harvier*, 700 F.3d 1217, 1219 (9th Cir. 1983). To permit otherwise would undermine the discretion of a district court.

2. <u>A denial of summary judgment is not a final judgment.</u>

A final judgment is the culmination of all decrees and orders from which an appeal lies. Fed. R. Civ. P. 54(a). The federal judiciary is structured so that a district court may resolve some or all parts of a claim at different points in the proceedings to promote "the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. Key to this structure is Rule 56, which permits a court to grant summary judgment on some or all parts of a claim without conducting a trial. Fed. R. Civ. P. 56(a).

By granting summary judgment or partial summary judgment, a district court decides that a party is entitled to judgment as a matter of law without a trial on an issue because there is no genuine dispute as to any material fact and the law indicates that the party should receive a favorable judgment. Fed. R. Civ. P. 56(a). Though a grant of partial summary judgment is interlocutory and not subject to immediate appeal, it merges with the final judgment and then acts as a final decision because the district court had resolved part of a claim within it. *Pineda v. Ford Motor Co.*, 520 F.3d 237, 243 (3d Cir. 2008). This merger supports the long-standing principle that "a final judgment draws in question all prior non-final orders and rulings which

produced the judgment." *Elfman Motors, Inc. v. Chrysler Corp.*, 567 F.2d 1252, 1253 (3d Cir. 1977).

However, this Court made clear in *Ortiz* that the standard merger principles for interlocutory orders do not apply to denials of summary judgment. *Ortiz*, 562 U.S. at 183–84, 188–89. Unequivocally, this Court answered the question "May a party . . . appeal an order denying summary judgment after a full trial on the merits?" with the answer "no." *Id.* at 183–84, 188–89. This Court recognized that orders denying summary judgment are not final decisions subject to appeal under 28 U.S.C. § 1291, *id.* at 891, because "the district court does not settle or even tentatively decide anything about the merits of the claim" in a denial of summary judgment, *Switz. Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 25 (1966). Instead, its "denial decides only one thing—that the case should go to trial." *Id.*

Ortiz highlights the critical distinction that exists between grants of partial summary judgment and orders denying summary judgment: appealability. As a final decision, the grant of partial summary judgment becomes reviewable after a final judgment is entered. 11 Moore et al., *supra*, § 56.230(2)(a). On the contrary, "orders denying summary judgment do not qualify as 'final decisions' subject to appeal" because they are simply a step along the route to a final judgment. *Ortiz*, 562 U.S. at 188. This is proper because judgment as a matter of law under Rule 56 is only to be granted if "there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Otherwise, it is expected that the legal

and factual issues will be developed and decided by the district court through a trial. *Harvier*, 700 F.3d at 1219.

A court that denies summary judgment on an issue retains its discretion to later determine the rejected argument through a trial on the merits. *See* Fed. R. Civ. P. 50(b) (permitting a court to review motions for judgment as a matter of law regarding both factual *and* legal issues during and after a jury trial). A party is not precluded from raising legal or factual arguments that were rejected in a denial of summary judgment at trial. Rather, the rules governing the jurisdiction of circuit courts require that a party raise a legal argument rejected in summary judgment through an interlocutory appeal under 28 U.S.C. § 1292 or through a motion for judgment as a matter of law under Rule 50 in order to preserve the issue for appeal. This is because a district court reserves an argument rejected in summary judgment as a live and unresolved issue for trial. This principle furthers the purpose of the final judgment rule by preserving and respecting the authority of a district court to render a final decision on all questions of law or fact that arise throughout a trial. *Baltimore & Carolina Line*, 295 U.S. at 660.

The final judgment rule is best served by adhering to the structure that the rules governing the jurisdiction of circuit courts have created. Under that structure, a grant of partial summary judgment merges with a final judgment, giving a circuit court jurisdiction over the claims or issues it resolved; but the arguments rejected in a denial of summary judgment are resolved through interlocutory appeals in narrow circumstances or through a Rule 50 motion during a trial on the merits. *See* 28 U.S.C.

§ 1292 (granting a district court the discretion to determine if an immediate appeal from a purely legal issue is necessary). If a party fails to avail itself of an interlocutory appeal or a Rule 50 motion, the denial of summary judgment remains unreviewable on appeal because it was not a final decision by the district court on any of the arguments raised within it.

3. <u>The rationale underlying Rule 50 makes it clear that a motion for judgment as a matter of law must be made at trial to preserve a legal argument rejected in a denial of summary judgment.</u>

In 1991, the Advisory Committee for the Federal Rules of Civil Procedure amended Rule 50 to make it clear that a motion for judgment as a matter of law can be made on purely legal grounds. Fed. R. Civ. P. 50 advisory committee's note to 1991 amendment. Though subsection (a) seems to focus solely on the evidentiary basis for judgment as a matter of law, subsection (b) of Rule 50 states that if the court does not grant the motion 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*." Fed. R. Civ. P. 50(b) (emphasis added). The language "legal questions raised by the motion" in Rule 50(b) emphasizes that a Rule 50(a) motion can be made on both legal and factual grounds and that Rule 50 was intended to extend to both.

Further, the Advisory Committee's Notes indicated that it was abandoning the terminology "direction of verdict" to make clear that Rule 50 and Rule 56 regarding summary judgment were linked under the judgment as a matter of law standard. Fed. R. Civ. P. 50 advisory committee's note to 1991 amendment. Though the legal standard is the same for both rules, the only difference is that Rule 50 and Rule 56

operate at different times: once a trial begins, Rule 50 governs all arguments that were not resolved in summary judgment before trial.

Thus, the clear text and rationale underlying Rule 50 contemplate that a party will use Rule 50 to seek judgment as a matter of law on issues not resolved before trial. This standard protects the district court's authority to develop the legal and factual arguments it reserved for consideration at trial when it denied a motion for summary judgment.

B. *Adhering to the Rule 50 Requirements to Preserve for Appeal a Legal Argument Rejected in Summary Judgment is Necessary and Just.*

Permitting appellate review of a legal argument rejected in summary judgment and not raised during trial threatens the American adversarial system. Creating an exception to Rule 50 will undermine the structure of appellate review and excuse blatant ignorance of the systems already designed to review a legal argument rejected in a denial of summary judgment.

1. <u>Requiring a Rule 50 motion to preserve a legal argument rejected in summary judgment is necessary to protect the structure of appellate review.</u>

A denial of summary judgment only decides that a case should proceed to trial. *Switz. Cheese Ass'n*, 385 U.S. at 25. It does not "settle or even tentatively decide anything about the merits of the claim." *Id.* Thus, permitting appellate review of a legal argument rejected in summary judgment and not raised during trial through a Rule 50 motion will fundamentally alter the effect of a denial of summary judgment. This effect will undermine the structure of appellate review.

Courts “review[] judgments, not opinions.” *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984). An exception to Rule 50 for purely legal arguments will force a circuit court to review an opinion, rather than a judgment, to understand why a district court denied summary judgment. However, district courts rarely give detailed reasoning for denying motions for summary judgment because they are not obligated to do so. *Black v. J.I. Case Co.*, 22 F.3d 658, 571 n.5 (5th Cir. 1994). Making an exception to Rule 50 for legal arguments would “create a new jurisprudence in which district courts would be obliged to anticipate parties’ arguments on appeal by bifurcating the legal standards and factual conclusions supporting their decisions denying summary judgment.” *Chesapeake Paper Prods. Co. v. Stone & Webster Eng’g Corp.*, 51 F.3d 1229, 1235 (4th Cir. 1995). This would also require the appellate courts “to engage in the dubious undertaking of determining the bases on which summary judgment is denied and whether those are legal or factual” to determine whether it has jurisdiction to hear an argument. *Id.*; *see also Miller v. Fenton*, 474 U.S. 104, 113 (1985) (“[T]he appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive.”).

The appellate structure of the federal judiciary was not intended to hinge upon such an unpredictable standard. It is not surprising that the circuits that have created an exception for purely legal arguments have stated that “the exception can undo the carefully calibrated structure of the rules of civil and appellate procedure.” *Barber*, 295 F. App’x at 789 n.3. And further, circuits have warned that “prudent counsel would do well to preserve the [legal] issue in a rule 50 motion.” *Chemetall*,

320 F.3d at 720. The appellate structure clearly created motions for judgment as a matter of law at trial under Rule 50 as the means for preserving for appeal a legal argument denied in summary judgment. An exception to this rule would do nothing but create gray where there once was clarity.

2. Requiring a Rule 50 motion to preserve a legal argument rejected in summary judgment is just because a party is afforded multiple simple methods to appeal the rejected argument.

The federal system affords parties two primary methods of appealing a purely legal argument rejected in a denial of summary judgment. A party that fails to avail itself of these avenues for redress should be barred from bringing the issue on appeal.

First, after a party is denied summary judgment, it may seek an interlocutory appeal on purely legal issues under 28 U.S.C. § 1292(b). *Varghese v. Honeywell Int'l Inc.*, 424 F.3d 411, 422 (4th Cir. 2005). Interlocutory appeals are available when a controlling question of law is contestable, and its resolution would speed up litigation. *Ahrenholz v. Bd. of Trs. of Univ. of Ill.*, 219 F.3d 674, 676–77 (7th Cir. 2000). Although it falls within the discretion of the district court to grant or deny an interlocutory appeal, a district court should not hesitate to grant one if it involves "a new legal question or is of special consequence." *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 110–11 (2009). Here, Kill-a-Byte could have sought an interlocutory appeal for its due process claim but did not give the district court the opportunity to certify the question for appeal.

Also, Kill-a-Byte failed to utilize the second method of obtaining redress on the due process claim: a Rule 50 motion during trial. This rule is not difficult to abide by.

By failing to use Rule 50 and then arguing that its legal argument is preserved because the issue was denied in summary judgment, Kill-a-Byte seeks to usurp the authority of the district court to decide a legal question that was reserved for trial.

Creating an exception for a party like Kill-a-Byte would excuse blatant ignorance of the system that the United States Code and Federal Rules of Civil Procedure have created. This system was put in place to protect the authority of the district court and the rights of other parties, and a party should not be rewarded with an appeal when it failed to use the proper methods to challenge a denial of summary judgment.

Thus, an exception to Rule 50 for purely legal arguments threatens the structure of appellate review and merely benefits parties that fail to follow the proper procedures to preserve issues for appeal. In a system that already affords parties multiple opportunities to object to a denial of summary judgment, an exception to Rule 50 is unnecessary and will do more harm than good. Refusing to create an exception to Rule 50 will ensure that the clarity and predictability of the federal judiciary structure is maintained. Therefore, this Court should refuse to review Kill-a-Byte's due process claim because Kill-a-Byte failed to preserve the issue for appeal through a motion for judgment as a matter of law at trial. But even if this Court does review the due process claim, there was no due process violation.

II. State Law May Impose Civil Liability on a Private Party for Distributing a Product that is Later Determined to Create a Public Nuisance because It Does Not Violate the Due Process or Takings Clauses.

Retroactive laws are disfavored in our nation's concept of ordered liberty. 2 J. Story, *Commentaries on the Constitution* § 1398 (5th ed. 1981). These concerns are greatest in the criminal context, so retroactive criminal laws are prohibited by the Ex Post Facto Clause. *See Calder v. Bull*, 3 U.S. 386, 390 (1798) (explaining the contours of Ex Post Facto criminal laws). But this outright prohibition on retroactivity does not extend to civil liability because the due process concerns present in the criminal context are not as pervasive in the civil context. *Id.* at 398 (J. Iredell, concur in judgment). "[I]nstances of tyranny exercised under the pretext of penal dispensations" are only a concern in criminal cases. *Id.* at 399. Unlike criminal cases which affect personal liberty, civil cases only affect private property. *Id.* Although property rights are important, "some of the most necessary and important acts of the [government] are . . . founded upon the principle, that private rights must yield to public exigences." *Id.* at 400.

Retroactive civil laws fall under the purview of substantive due process and will be found unconstitutional only if they are arbitrary and irrational. *See Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 614 (7th Cir. 2014) (relying on *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, (1976)). "Arbitrary and irrational" is analyzed simultaneously by courts, and both are refuted by showing that the retroactivity is rational. *Id.* This same standard applies to retroactive common law liability.

Pension Benefit Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717, 729 (1984). Thus, retroactive common law liability also does not violate due process when rational. *Id.* Without this permissible retroactive liability, those who contribute substantial harm to their communities would have a safe harbor from righting their wrongs. This would be unjust. Although retroactive common law liability can apply to individuals, courts frequently apply it to corporations because of the large impact corporations have on their communities. Retroactive common law liability ensures that wealthy corporations are accountable to society for their actions, regardless of when their actions took place.

The retroactivity analysis of substantive due process sometimes overlaps with this Court's expanded Takings Clause jurisprudence. Eduardo M. Penalver & Lior Jacob Strahilevitz, *Judicial Takings or Due Process*, 97 Cornell L. Rev. 305, 305 (2012). But the Thirteenth Circuit correctly acknowledged that this case more naturally, and more appropriately, falls under a due process analysis. R. at 1a, 13a.

A state may impose civil liability on a private party for distributing a product that is later determined to be a public nuisance for two reasons. First, the retroactive liability imposed on Kill-a-Byte does not violate the Due Process Clause because it was not arbitrary or irrational. Second, the Takings Clause does not apply to retroactive liability.

A. *The Retroactive Liability Imposed on Kill-a-Byte Does Not Violate the Due Process Clause because It was not Arbitrary or Irrational.*

Principles of due process permit retroactive common law liability. The only condition is that the retroactive liability cannot be arbitrary and irrational. *Gray*, 467 U.S. at 729 (1984). Although there is a presumption against retroactive liability, this presumption is rebutted simply by showing that the retroactivity is rational as applied to a certain circumstance. *Id.* This means that retroactivity is permissible if the evidence in the record indicates it is reasonable. *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1341–42 (2001). Courts thus give considerable deference to a legislature's intent in creating retroactive laws. *Id.* at 1342. "Even more deference is owed to judicial common-law developments," which "by their nature" retroactively apply to the parties in the precedent-setting cases. *Gibson*, 760 F.3d at 622. State common law development is a fundamental feature of our legal system, but it would be hindered if strict constraints on retroactivity were applied to state court judgments. *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001).

The New Tejas common law liability imposed here is proper under the Due Process Clause for three reasons. First, the retroactive liability is rational because it does not violate the test of fundamental fairness. Second, the retroactive liability is rational because using the substantial factor test is a natural outgrowth of

existing causation precedent. Third, the retroactive liability is rational because it approaches the spreading of cost appropriately.[2]

1. The retroactive liability is rational because it does not violate the test of fundamental fairness.

Retroactive liability is rational and therefore proper under the Due Process Clause when it is fundamentally fair. *E. Enters. v. Apfel*, 524 U.S. 498, 559 (1998) (Breyer, J., dissenting) (relying on *Gray*, 467 U.S. at 728–30, with three other justices agreeing that due process is satisfied when retroactive liability is fundamentally fair). Retroactive liability is fundamentally fair when the historical circumstances show that imposing liability would not unnecessarily frustrate a party's reasonably settled expectations of liability. *Id.* at 559. This test is met if the "extension of existing law could be foreseen as reasonably possible." *Commonwealth Edison*, 271 F.3d at 1358. It does not matter that the current precedent would not impose liability or that "liability would be imposed only with minor changes in then-existing law." *Id.* Therefore, as more courts apply retroactive liability for products that are later determined to cause a public nuisance, a party's expectation that liability will be imposed in similar situations becomes more and more foreseeable. Although there is no record of the legal history in New Tejas, both this Court's

[2] While the Thirteenth Circuit did not look at these aspects of liability individually, each of them is rational under the Due Process Clause. In this context, it is inappropriate to aggregate these three aspects of liability to find a due process violation. The theory most similar to the Thirteenth Circuit's briefly alluded to aggregation doctrine is the Court's cumulative error doctrine which originated in *Taylor v. Kentucky*, 436 U.S. 478 (1978). However, cumulative error doctrine only applies to *procedural* due process in *criminal* cases.

treatment of retroactivity and state treatment of common-law public nuisance demonstrate that the historical circumstances support this type of liability.

i. This Court's historical treatment of retroactivity shows that imposing retroactive liability in this case is fundamentally fair.

This Court's preexisting treatment of retroactivity gives corporations a reasonable expectation that retroactive liability can be imposed on them. Retroactivity has been employed by the courts and Congress to protect individuals in the community, particularly from those who profited from the harm they contributed to society. *Usery*, 428 U.S. at 18. For example, this Court upheld a law that required coal mine operators to compensate disabled employees even though those employees had ceased working in the mines before the act was passed. *Id.* This Court reasoned that compensating previous employees who could no longer work as coal miners was a rational basis for imposing retroactive liability. *Id.* This Court has also compelled a corporation to pay pensions by retroactively holding the corporation liable despite its withdrawal from the pension trust fund five months prior to the relevant pension law being passed. The Court resolved that this was acceptable because Congress had rationally concluded that the law's objectives would be better accomplished if applied retroactively. *Gray*, 467 U.S. at 720, 726, 730.

Further, retroactive liability imposed five years or less from the time of the event in question has consistently been determined to be appropriate because it does not disrupt a corporation's reasonably settled expectations to be free from

liability. *Compare Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986) (upholding retroactive liability reaching back five years), *and Concrete Pipe & Prods. v. Constr. Laborers Pension Tr.*, 508 U.S. 602, 610 (1993) (affirming liability that reached back five years), *with E. Enters.*, 524 U.S. at 503 (determining that retroactive liability imposed thirty to fifty years later interfered with reasonable settled expectations). The less time that elapses, the more reasonable it is for corporations to expect to be held liable for their actions. *Connolly*, 475 U.S. at 227.

Because retroactive liability imposed on corporations is consistent with this Court's precedent, Kill-a-Byte's expectations of potential liability were not unnecessarily frustrated as it could reasonably have foreseen that retroactive liability could also be imposed upon it. The fundamental fairness of this retroactive liability is further emphasized by the short amount of time that has passed since Kill-a-Byte sold and distributed Lightyear. The City sued a mere three years after Kill-a-Byte stopped distributing the product. R. at 2a, 25a. This short amount of time does not upset Kill-a-Byte's reasonably settled expectations because this Court has consistently held corporations liable for events that occurred up to five years before. Retroactivity has a long history of being used as an accountability mechanism, especially when failure to employ this legal doctrine would result in fundamental *un*fairness.

ii. The historical treatment of state common law shows that imposing liability for a lawful product that is later determined to interfere with a public right is fundamentally fair.

Not only does the use of retroactivity in general contribute to the reasonable expectation of liability, the doctrine of common-law public nuisance specifically contributes to a corporation's reasonable expectation of liability for distributing and profiting from a harmful product. Public nuisance tort law creates liability for distributing products that are later found to interfere with public rights. *People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, 108 (Cal. App. 6th Dist. 2017). The Restatement of Torts defines a public nuisance as "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B (Am. Law Inst. 1975). Public nuisance liability is not limited to interferences "with use and enjoyment of land." *Id.* at cmt. h.

The New Tejas Supreme Court's certification that the state's public nuisance doctrine applies to the distribution of products is not a conclusion isolated to New Tejas. The Ohio Supreme Court determined that "[u]nder the Restatement's broad definition, a public-nuisance action can be maintained for injuries caused by a product if the facts establish that the design, manufacturing, marketing, or sale of the product unreasonably interferes with a right common to the general public." *Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1142 (Ohio 2002). Likewise, common law in California has recognized that companies are liable for abatement of public nuisance when the companies promoted a lawful product that was later

determined to interfere with a right common to the general public. *ConAgra*, 17 Cal. App. 5th at 112.

Ohio and California[3] common law show how public nuisance can apply to corporations for selling and even merely promoting legal products that are later found to be harmful. These states' treatment of public nuisance common law shows that imposing abatement liability does not unnecessarily frustrate Kill-a-Byte's reasonably settled expectations, and New Tejas has confirmed that this liability is proper under its common law. R. at 5a. Kill-a-Byte did much more than merely promote the use of Lightyear; Kill-a-Byte directly sold and distributed the product that was later determined to infringe on the public right of safety in New Truro. R. at 2a.

This Court's treatment of retroactive liability and state common law treatment of public nuisance demonstrate that applying retroactive liability on Kill-a-Byte does not unnecessarily infringe on any reasonable expectation to be free from liability that Kill-a-Byte may have had. It is not unusual for corporations to be held accountable for the harm they contribute to their communities. Thus, applying retroactive liability for public nuisance here is fundamentally fair.

[3] Although California common law requires actual knowledge of harm and New Tejas common law does not, this is not dispositive. ConAgra, 17 Cal. App. 5th at 83; R. at 11a. When deciding how to remediate the consequences of a public nuisance, California law does not require a "retroactive liability" analysis. Petitioner concedes that because New Tejas's knowledge standard is lower than California's, a retroactivity analysis in proper. ConAgra, 17 Cal. App. 5th at 120.

2. <u>The retroactive liability is rational because using the substantial factor test is a natural outgrowth of existing causation precedent.</u>

When discussing common law doctrines, it is appropriate to look to the applicable Restatement. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 538, 542, (1999) (looking to Restatement (Second) of Torts and Restatement (Second) of Agency for guidance in interpreting a federal statute). The New Tejas common law on public nuisance also follows the Restatement (Second) of Torts. R. at 26a. According to Restatement (Second) of Torts, substantial factor causation "is a legal cause of harm to another if . . . [one actor's] conduct is a substantial factor in bringing about the harm[.]" Restatement (Second) of Torts § 431. If the actor's conduct "had any effect in producing" the harm but there were also other causes, then the actor is liable if the actor's conduct "ha[d] a substantial as distinguished from a merely negligible effect in bringing about the plaintiff's harm." *Id.* at cmt. b.

Substantial factor causation does not violate due process just because other courts have chosen to use but-for causation. Many types of causation are permissible in tort law, and acceptable causation standards vary immensely. *See Menne v. Celotex Corp.*, 861 F.2d 1453, 1458 (10th Cir. 1988) (explaining that some states incorporate multiple methods of determining causation). Different states have different priorities and therefore different approaches. *Id.* The foreseeability test, the superseding or intervening cause test, the substantial factor test, the but-for test, and the proximity of distance and time test are all permissible methods of examining causation. *Dale v. E. R. Knapp & Sons, Inc.*, 433 S.W.2d 880, 883–84

(Ky. Ct. App. 1968) (discussing several formulae for determining causation); *Point Prods. A.G. v. Sony Music Ent., Inc.*, 215 F. Supp. 2d 336, 342 (S.D.N.Y. 2002) (showing that New York courts can use the substantial factor test instead of the but-for test). The diversity of causation tests exemplifies how the states' substantial factor test is a natural outgrowth of existing precedent.

Substantial factor causation is not an uncommon standard in tort law and is even viewed favorably in several states. *See, e.g., Mitchell v. Gonzales*, 819 P.2d 872, 887 (Cal. 1991) (explaining that the substantial factor test "has been comparatively free of criticism and has even received praise"); *Ct.y of Westchester v. Town of Greenwich*, 870 F. Supp. 496, 503 (S.D.N.Y. 1994) (heralding the substantial factor test as an intuitive inquiry important to all proximate cause questions). Imposing "overall liability is consistent with other common-law developments in tort schemes where causation-in-fact is not required for recovery and liability is instead premised in some way on the defendants' contribution to the risk of injury." *Gibson*, 760 F.3d at 624.

Substantial factor causation is even applied in public nuisance cases and to abatement liability. For example, in California, substantial factor causation was used to hold corporations liable for a $409,049,018 abatement remedy. *People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51 (Cal. App. 6th Dist. 2017), *on remand sub nom. People v. Atlantic Richfield Co.*, No. 1-00-CV-788657 (Cal. Super. Ct., Sept. 4, 2018) (Order Re: Recalculation of Abatement Fund). The corporations argued that substantial factor causation was not appropriate because it only looked

at whether their contribution to the harm was substantial and did not consider what proportion of the harm the corporations were responsible for. *Id.* at 108. However, the court explained that proportionality is not a causation issue at all because it can later be apportioned amongst contributors and where the harm is not capable of apportionment, each contributor is liable for the entire harm. *Id.* California is just one of many states that uses substantial factor causation. *See e.g., Mayhue v. Sparkman*, 653 N.E.2d 1384, 1388 (Ind. 1995) (discussing whether medical malpractice was a substantial factor in causing the harm suffered by plaintiff); *Hake v. Manchester Twp.*, 486 A.2d 836, 841 (N.J. 1985) (determining whether causation for failure to act is a substantial factor contributing to the loss); *Walsh v. Snyder*, 295 Pa. Super. Ct. 94, 97 (1981) (analyzing whether the conduct of the defendant was a substantial factor in bringing about the harm). Substantial factor causation is a frequently used common-law causation standard that is permissible under the Restatement; it does not violate due process.

Deference is owed to state-law liability schemes. Allowing states to formulate their own tort law and determine the best way to hold people responsible for their actions is crucial to the notion of comity. *Gibson*, 760 F.3d at 622. Comity requires that federal courts generally should not interfere with state courts, but should respect state functions and recognize "that the entire country is made up of a Union of separate state governments" and that "the National government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971). The preferred

causation standard in New Tejas is proper under the Restatement and should not be overruled by the federal judiciary.

The New Tejas Supreme Court certified that the City's liability theory was viable, that the City presented sufficient evidence to recover under this liability theory, and that "the money sought by the City and awarded by the district court constituted a recoverable amount of 'abatement' for purposes of state law." R. at 5a. Substantial factor causation is an appropriate causation standard and is proper because New Tejas did not create a new, arbitrary liability scheme that has never been applied before. Rather, substantial factor causation has consistently been recognized as an appropriate causation standard by other states. By recognizing the substantial factor test, New Tejas exercised its authority to craft its own common law. Kill-a-Byte caused harm to the City of Truro, and it should not escape liability because the Thirteenth Circuit disagrees with the New Tejas's common law causation standard.

3. <u>The retroactive liability is rational because it approaches the spreading of cost appropriately.</u>

The City's approach to spreading the cost of mitigating the harm through the abatement imposed on Kill-a-Byte is rational. The Thirteenth Circuit misapplied the legal standard by erroneously viewing abatement, an equitable remedy, as synonymous with punitive damages. But the retroactive economic judgment in the form of an abatement should be evaluated the same as retroactive economic

legislation. Alternatively, abatement is more similar to compensatory damages than punitive damages and even if treated as punitive damages, is not grossly excessive.

i. The retroactive economic judgment levied on Kill-a-Byte should be evaluated the same as retroactive economic legislation.

Retroactive liability has the same standard for constitutionality whether it is evaluated under a statute or common law. *E. Enters.*, 524 U.S. at 532–33 (analyzing retroactivity under precedent set forth in English common law). In order to avoid returning to the *Lochner* era of economic substantive due process, "legislative acts adjusting the burdens and benefits of economic life come to the court with a presumption of constitutionality." *Usery*, 428 U.S. at 15. Thus, the burden of showing a due process violation is on the complaining party. *Id.* Because the same standard applies to retroactive statutes and retroactive common law, economic judgments based off of retroactive common law should be treated synonymously with economic legislative acts. Therefore, it follows that the amount of an economic common law judgment also comes to the court with the presumption of constitutionality. The trial court is in the best position to determine economic judgments levied upon offending parties because liability is tied intimately to facts found at the trial level as is the amount necessary to remedy the situation. *See Firestone Tire,* 449 U.S. at 374 (emphasizing the deference appellate courts must give district courts).

Under this analysis, Kill-a-Byte would have the burden to prove that how the district court adjusted the economic burdens and benefits through the $613.2

million abatement was irrational. It does not matter if it was not the *best* way to spread the cost of the City's safety and societal improvements; it need only be *rational*. The mere fact that Kill-a-Byte's product was a substantial factor that contributed to the crime rate in New Truro is sufficient to show that the abatement to pay for security cameras and other protective measures is rational and therefore constitutional. Further, other courts have also imposed substantial abatement liability on corporations retroactively due to the interference with a right common to the general public. *People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, 83 (Cal. App. 6th Dist. 2017), *on remand sub nom. People v. Atlantic Richfield Co.*, No. 1-00-CV-788657 (Cal. Super. Ct., Sept. 4, 2018) (Order Re: Recalculation of Abatement Fund) (imposing retroactive liability in the amount of a $409,049,018 abatement). Shifting the cost of job training, educational opportunities, and additional public safety measures from taxpayers to the party that benefited from contributing to the harm is rational. See *Commonwealth Edison*, 271 F.3d at 1351 (explaining that shifting the cost of remedying the harm from the taxpayer to the party that contributed to and benefitted from the harm was a rational reason to impose retroactive liability). Because the abatement award weighs economic burdens and benefits in the City and is consistent with New Tejas state law, it should be treated as economic legislation, come to the Court with the presumption of constitutionality, and be determined rational.

ii. Alternatively, the retroactive liability levied on Kill-a-Byte is more similar to compensatory damages than punitive damages.

While the Due Process Clause does impose substantive limits on punitive damages through the Eighth Amendment's prohibition against excessive fines, *Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433–34 (2001), this prohibition only applies to damages "aimed at deterrence and retribution," *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). This is because the purpose of punitive damages is to "punish[] unlawful conduct and dissuad[e] repetition." *BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1996).

By contrast, no substantive limits are imposed on compensatory damages because they "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *State Farm*, 538 U.S. at 416 (quoting *Cooper Indus.*, 532 U.S. at 432). Just like compensatory damages, abatement seeks to redress a wrong; it does not seek to punish.

The Thirteenth Circuit correctly acknowledged that the City is attempting to remedy a concrete loss through abatement, yet erroneously assumed that the use of substantial factor causation precluded the categorization of compensatory damages. Further, the City did not seek abatement to punish Kill-a-Byte; the City sought abatement to redress the harm done to it and obtain a remedy for the concrete loss experienced by the community in New Truro. R. at 14a. The City sought abatement to pay for job training programs, centers to assist with video-game addiction, increased police presence, security cameras in downtown, and other public safety

measures. R. at 25a. Because abatement is more similar to compensatory damages, which have no limits, this Court should not review the amount of the abatement.

iii. Even if this Court determines that Kill-a-Byte's retroactive liability should be treated as punitive damages, the abatement is not grossly excessive.

Even if this Court applies the analysis used for punitive damages, the abatement judgment is not grossly excessive and therefore does not violate due process. This Court has not formulated a precise line for determining whether punitive damages are constitutional. Instead, it considers three factors: "(1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the defendant's actions; and (3) the sanctions imposed in other cases for comparable misconduct." *Cooper Indus.*, 532 U.S. at 426. Kill-a-Byte's retroactive abatement satisfies all of these factors.

First, Kill-a-Byte's blameworthiness was established by the jury. The jury rendered a factual finding, not considered on appeal, that "the widespread use of the Lightyear software was a substantial factor in the City's increased crime rate." R. at 4a. Second, the abatement is directly related to the harm caused by Kill-a-Byte's actions. It is money that will be used for job training, educational opportunities, and additional public safety measures to remedy the harm substantially caused by Kill-a-Byte. R. at 19a. Third, large judgments rectifying harm caused by offending corporations are not uncommon. Judgments ranging up to $20 *billion* dollars, distributed over the course of forty years, have been upheld

against corporations that benefited from processing and using products that harmed their communities. *Commonwealth Edison*, 271 F.3d at 1333. Because the abatement in this case satisfies all three factors, it is not grossly excessive and therefore permissible under the punitive damages analysis.

Retroactive liability combats a "win at all costs" mindset and ensures that corporations are held accountable for what they cost society. The retroactive liability imposed on Kill-a-Byte is not arbitrary or irrational because it passes the test of fundamental fairness, emerges from an outgrowth of existing causation precedent, and spreads the cost of remedying the harm appropriately. Retroactivity can be analyzed in many different legal contexts. However, liability—which typically includes an obligation to pay money—should only be analyzed under the Due Process Clause, not the Takings Clause.

B. *The Takings Clause Does Not Apply to Retroactive Liability.*

"[I]t is the Due Process Clause rather than [takings] doctrine that protects the property owner from improperly motivated, unfairly conducted, or unnecessarily protracted governmental decision making." *First Eng. Evangelical Lutheran Church v. Cnty. of L.A.*, 482 U.S. 304, 339 (1987) (Stevens, J., dissenting). Both substantive due process and the Takings Clause, U.S. Const. amend. V, play an important role in protecting citizens' property. But there is a fundamental difference between the two. Substantive due process protects against the wrongful *deprivation* of property rights; the Takings Clause protects against wrongful deprivation of *compensation* for property rights that are legitimately taken. These two clauses are distinct and

should not be merged into one single protection. Keeping the substantive due process and takings analysis discreet ensures the most effective safeguards for property rights. Analyzing this case under the Due Process Clause is proper and will not risk resurrecting the ghost of substantive economic due process because the purpose of the Clause is to ensure "the fair application of law" and not to "resurrect long-discredited substantive notions of 'freedom of contract.'" *E. Enters.*, 524 U.S. at 558 (Breyer, J., dissenting).

The original understanding of the Takings Clause, which was to compensate individuals for government expropriation of land for public use, has grown to also include regulatory and judicial takings. *See id.* at 529 (majority opinion) (applying a regulatory takings analysis); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 715 (2010) (discussing a judicial takings analysis). A regulatory taking occurs when a government regulation or statute deprives private property owners of the reasonable use of their property, thereby overstepping constitutional bounds. *Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *see Phillips v. Wash. Legal Found.*, 524 U.S. 156, 160 (1998) (explaining that finances are private property for purposes of the Takings Clause). A minority of the Court maintains that this extends to an *obligation* to pay money. *E. Enters.*, 524 U.S. at 537–38. However, a majority of the Court contends that a taking of specific fund of money is different than imposing an obligation to pay money which does not give rise to a claim under the Takings Clause of the Fifth Amendment. *United States v. Sperry*

Corp., 493 U.S. 52, 63 (1989) (holding that the government charging a party a fee does not implicate the Takings Clause).

Judicial takings are extremely rare and without clear guidelines, and this Court's discussion of judicial takings is limited and disjointed. *Compare Hughes v. Washington*, 389 U.S. 290, 294–98 (1967) (Stewart, J., concurring) (discussing that the Constitution prohibits taking of land by the legislature and by the courts), *with Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1212 (1994) (Scalia, J., dissenting from order denying certiorari) (discussing that judicial takings analysis may be appropriate when real property is involved). Supposedly, a judicial taking occurs when "what was once an established right of private property no longer exists" due to a court judgment. *Stop the Beach*, 560 U.S. at 715. However, the judicial takings doctrine has only received support from a minority of the Court, and even then, it is only applied to a taking of *real* property. *Id.* at 735.

Neither a regulatory takings nor judicial takings analysis is appropriate for retroactive liability. Just as in *Eastern Enterprises*, "there is no need to torture the Takings Clause to fit this case. The question involved—the potential unfairness of retroactive liability—finds a natural home in the Due Process Clause, a Fifth Amendment neighbor." *E. Enters.*, 524 U.S. at 556 (Breyer, J., dissenting). Although the doctrine of regulatory takings has evolved, extending it to apply to retroactive liability would be imprudent. If the doctrine of judicial takings covered retroactive court judgments, few court rulings that levy financial judgments against a litigant would be free from scrutiny under the Takings Clause. And "[i]f the Clause applies

when the government simply orders A to pay B, why [would] it not apply when the government simply orders A to pay the government, i.e., when it assesses a tax?" *Id.* at 556 (J. Breyer, dissenting). The Takings Clause was never intended to be the all-purpose protector of property interests; its purpose is only to secure compensation in the event of proper governmental interference. *First Eng. Evangelical Lutheran Church*, 482 U.S. at 314–15.

Because it applies to wrongful deprivation of *compensation*, not wrongful deprivation of property, the Takings Clause does not apply to retroactive common law liability. But even if the Takings Clause is considered, a taking has not occurred. There can be no regulatory taking because common law tort liability is not governed by statute or regulation. And there is no judicial taking because no real property has been taken.

CONCLUSION

Society relies on the clarity and predictability of the judicial system to hold transgressors accountable for their wrongs. Creating an exception to Rule 50 for legal arguments rejected in summary judgment and holding that rational retroactive liability is inapplicable will only lead to deterioration of the judicial system and society—particularly the City of New Truro. Unless this Court rules in favor of the City, uncertainty will permeate the structure of the legal system and the burden of abating the entire public nuisance will be shifted to the City's unoffending taxpayers. Therefore, this Court should reverse the Thirteenth Circuit's decision and reinstate the abatement set forth by the district court.

Dated November 16, 2020

Respectfully submitted,

/s/____________________
Counsel for Petitioner