

No. 18-5971

**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 RESPONDENT

TEAM 27
COUNSEL FOR RESPONDENT
DATED NOVEMBER 16, 2020

QUESTIONS PRESENTED

I. Why a party who moves for summary judgment on a purely legal basis is not required to move for judgment as a matter of law with regard to the same issue previously rejected by the court to preserve the issue for appeal?

II. Why a state law imposing civil liability on a private party for legal distribution of a product later determined to be a public nuisance violates the Due Process Clause of the United States Constitution?

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STATEMENT OF JURISDICTION

This Court has jurisdiction over the instant case because the first issue is a question regarding the Federal Rules of Civil Procedure, Rule 56, which has sustainability to be heard before this Court pursuant to 28 U.S.C. § 1331. The second issue before this Court involves the violation of fundamental constitutional rights, which may be heard by this Court pursuant to 42 U.S.C. § 1983. This case is on appeal from the United States Court of Appeals for the Thirteenth Circuit. It originated in the United States District Court for the District of New Tejas before its appeal to the Thirteenth Circuit.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments to the U.S. Constitution are printed in entirety in Appendix A. The Federal Rules of Civil Procedure, Rules 50 and 56(a)-(e), are printed in Appendix B.

STATEMENT OF THE CASE

Statement of Facts:

Respondent Kill-a-Byte (“Respondent”) is a software manufacturer and distributor who has operated throughout the nation since its founding in 2000. R. at 20a. Petitioner, the City of New Truro, New Tejas, (“the City”) was one of the many cities throughout the United States who welcomed the sale of Respondent’s video game in its stores. R. at 3a. Respondent began to distribute the software nationwide in 2003, including in its New Truro market. R. at 2a. Years later, Petitioner began to suffer a severe economic downturn. R. at 3a. Specifically, the Mayor of New Truro was convicted of felony embezzlement in 2005. R. at 3a. Various factories closed within the City resulting in an exacerbation in unemployment rates. R. at 3a. The “poor quality” school systems led to a teacher strike in 2004. R. at 3a. Notably, the former mayor’s embezzlement led to “numerous factory closings, the reduced police budget, and the consequently undersized police force.” R. at 3a.

Respondent’s production of the software ended nationwide in 2013. R. at 2a. Three years later, after unsuccessful attempts to identify the cause of the increasing crime rate, Petitioner filed suit against Respondent under the public nuisance doctrine and alleged that the distribution of Respondent’s software, a popular video game, was the cause of Respondent’s violence problem. The City contended that by distributing its software, Respondent “intentionally created conditions—namely, an undereducated male population with diminished job skills and few employment prospects,” which created a higher crime rate in the City. R. at 3a-4a. Prior to trial, Respondent moved for summary judgment on the grounds that, as a matter of constitutional law, imposing liability for the lawful sale of a video game to consenting adults violates its constitutional rights guaranteed under the Due Process Clause of the Fourteenth Amendment. R. at 5(a); *see also*

U.S. CONST. amend XIV. The district court denied this purely legal issue and allowed the case to proceed to trial notwithstanding the potential constitutional violations to be suffered by Respondent. R. at 5a. The City did not move for summary judgment as to any issue of law. R. at 3a. Because the district court denied Respondent’s summary judgment motion which precluded the claim as a violation of constitutional law, a trial was conducted, and a jury returned a verdict assessing the damages of City’s increased crime rate, poverty, and unemployment to Respondent. R. at 5a.

Respondent immediately appealed the legal issue to the Thirteenth Circuit. R. at 4a. The Thirteenth Circuit concurred with the district court that “[i]t is undisputed that [the software] was not solely responsible for the City’s crime rate—the City acknowledges that numerous factors contributed.” R. at 4a. However, the City contends that because Respondent did not ask the trial court to rehear the same issue in a motion pursuant to Federal Rules of Civil Procedure, Rule 50—whether assessing liability for an increased crime rate to a video-game manufacture is constitutionally permissible—it waived the issue for any appellate review and was required to accept the verdict. R. at 5a. The City argues before this Court that a purely legal error made by a trial court is only preserved for appeal if both parties repeatedly argue the same issue before that trial court. R. at 4a, 22a. Further, the City contends assessing liability against Respondent for the increase in crime in the City is constitutionally permissible. R. at 2a, 4a-5a.

Procedural History:

The City filed suit against Respondent in 2016 under the doctrine of “absolute public nuisance” in New Texas state court. R. at 3a. Because of the diversity of the parties, the action was removed to the District Court of New Truro. R. at 3a. Respondent moved for summary judgment based on the purely legal contention that the assessment of liability for increased crime due to the

legal sale of a video game violates the Due Process Clause of the United States Constitution. The trial court denied summary judgment and the jury entered judgment against Respondent. R. at 25a. The issue of abatement of the public nuisance was then submitted to a judge in a bench trial, who assessed a \$600 million judgment against Respondent because the sale of the videogame was a “substantial factor in the City’s increased crime rate.” R. at 4a.

Respondent immediately appealed the verdict to the Court of Appeals for the Thirteenth Circuit on the basis that an assessment of liability was unconstitutional under the Due Process Clause. R. at 2a. The Court of Appeals held: (1) requiring the same court to rehear an issue of law is both unnecessary and improper under the Federal Rules of Civil Procedure and procedural due process requires the rehearing of purely legal issues rejected at summary judgment; and (1) (KAT PLEASE ENTER). The City now seeks to overturn the holding of the Court of Appeals for the Thirteenth Circuit.

STANDARD OF REVIEW

Since the issue issues presented involve both constitutional law and questions of federal jurisdiction, this Court owes no deference to the decisions of the courts from which this case is on appeal and the Standard of Review is *de novo*.

SUMMARY OF THE ARGUMENT

When a party moves for summary judgment on the basis that controlling law precludes the claim or defense of the opposing party, the purely legal issue will remain the same throughout the trial regardless of any facts introduced. This is unlike a motion for summary judgment on the basis of evidentiary sufficiency, which presents a genuine issue of material fact which may be resolved during the trial, thus, a party which believes that summary judgment was denied erroneously because, after the close of evidence, the non-moving party has still not presented sufficient evidence, the moving party must then move for judgment as a matter of law. However, when summary judgment was denied because the trial court rejected a purely legal argument, forcing that court to rehear the same issue in a Rule 50 motion is not required. To require the court to rehear purely legal issue with which it did not agree without a change in circumstance is poor judicial economy, and to sever a party's access to appeal simply because they did not require a rehearing of purely legal issues would violate that party's constitutional right to procedural due process. This Court should affirm the lower court and hold that parties who raise a purely legal issue at summary judgment are not required to renew that issue in a Rule 50 motion.

Additionally, to impose retroactive liability of a product which is later determined to be a nuisance violates due process rights guaranteed under the Fifth and Fourteenth Amendments to the Constitution. To impose liability on a video game manufacture for increased crime rates which are, at best, deeply attenuated from the manufacture's own conduct and, at worst, completely unrelated is constitutionally impermissible. Further, to impose a \$600 million judgment on a party whose conduct was perfectly legal at the time the party was acting, and nearly three years after the party ceased sales of the product, would amount to severe injustice. Thus, this Court should agree with the decision of the lower court and vacate the judgment entered by the district court.

ARGUMENT

I. RESPONDENT DID NOT WAIVE ITS RIGHT TO APPEAL A VIOLATION OF DUE PROCESS BECAUSE RULE 50 MOTIONS ARE NOT REQUIRED WHEN THE ISSUE SOUGHT TO BE PRESERVED IS A MATTER OF LAW AND REQUIRING RULE 50 MOTIONS TO HEAR A PURELY LEGAL ISSUE WOULD CONTRAVENE CENTRAL TENETS OF AMERICAN JURISPRUDENCE.

Under the Federal Rules of Civil Procedure, Rule 56, a party may advance a motion for summary judgment if, as a matter of controlling law, proceeding to trial is unnecessary. These motions are predominantly filed because either the non-moving party has not presented enough evidence to prove a reasonable jury could find in its favor or, because the non-moving party has erroneously pled its case in a manner which is violates the law. If a party moves for summary judgment on the grounds that the non-moving party does not have sufficient evidence to allow a reasonable jury to find in its favor, the trial judge has the discretion to deny such motion. However, if the moving party wishes to preserve the evidentiary challenge for appellate review, the party must file a motion for judgment as a matter of law at the close of evidence (“Rule 50(a) motion”) as well as a renewed motion for judgment as a matter of law after the verdict (“Rule 50(b) motion”) restating the evidentiary challenge. Fed. R. Civ. P. 50(a)-(b). The Federal Rules of Civil Procedure do not require the party moving for summary judgment due to a violation of controlling law to file either of these motions. *Jurgens v. McKasy*, 927 F.2d 1552, 1557 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 902 (1991).

Further, to sever a party’s access to appeal a ruling on a matter of law simply because a party did not move the same court to rehear the issue various times would be fundamentally unjust. A deprivation of a meaningful opportunity to be heard by the courts violates one’s right to procedural due process. *See* U.S. CONST. amend. X, XIV. A bright-line rule requiring a party to preserve an issue of law for appeal by forcing the same court to rehear the unchanged issue multiple

times disrupts judicial economy. *See, e.g., Rosado v. Wyman*, 397 U.S. 397, 403 (1970). Because Rule 50(a) and Rule 50(b) motions are not required when motion for summary judgment relies on a purely legal argument, and because denying an appeal of a violation of fundamental rights would be fundamentally unjust, this Court should affirm the decision of the Thirteenth Circuit Court of Appeals.

A. Respondent did not waive its right to appeal a violation of Due Process because Rule 50 motions are not required when the issue sought to be preserved is a matter of law.

The Federal Rules of Civil Procedure prohibit an appellate court from reviewing a trial judge's denial of summary judgment when that motion rests on the sufficiency of evidence following a full trial on the merits if that party has not preserved the issue in both a Rule 50(a) and Rule 50(b) motion. *See, e.g., Ortiz v. Jordan*, 562 U.S. 180, 184 (2011). When a party moves for summary judgment prior to the trial, a judge may reject this motion if the evidence, when viewed in the light most favorable to the non-moving party, presents a genuine issue of material fact which may be resolved by a jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Similarly, Rule 50(a) and Rule 50(b) motions move the court to rule that after the close of evidence, a reasonable jury could not find in the favor of the non-moving party. *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 745 (1983). The fundamental distinction between a motion for summary judgment and Rule 50(a) and (b) motions is the amount of evidence presented to the court and the factual changes that have occurred throughout the trial. *Wilson v. Union Pac. R.R. Co.*, 56 F.3d 1226, 1229 (10th Cir. 1995).

Conversely, a party who moves for summary judgment purely on a legal basis presents an issue to be resolved notwithstanding any possible fact to be introduced by either party. *Feld v. Feld*, 688 F.3d 779, 782 (D.C. Cir. 2012) (holding that Rule 50 motions are unnecessary when the

basis for summary judgment is a purely legal argument because the court would again be faced with the same question raised before trial). A summary judgment motion filed on the basis of legal sufficiency will be judged upon the same merits both before and after the presentation of evidence. *Wilson*, 56 F.3d at 1229. Further, a legal argument must be adjudicated by the court. *Johnson v. Jones*, 515 U.S. 304, 314 (1995). Legal issues are distinguishable from factual issues, which may be reasonably interpreted and decided upon by the factfinder. *Celotex Corp. v. Catrett*, 477 U.S. 317, 334 (1986). Because the a purely legal issue presented at summary judgment would be unchanged following a trial on the merits of a case, a party need not, and should not, file a Rule 50 motion to renew the issue to the same court.

1. A party wishing to appeal a denial of summary judgment made on the basis of evidentiary sufficiency must renew the issue in a Rule 50(a) and Rule 50(b) motions because the facts available to the court have changed.

Under the Federal Rules of Civil Procedure, a party who believes that there is no genuine issue of material fact and it would prevail as a matter of law may move for summary judgment prior to trial. Fed. R. Civ. P. 56. If the trial judge finds that there may be a genuine issue of material fact which can be resolved at trial, the judge will deny summary judgment and hold that the parties will proceed to trial. Fed. R. Civ. P. 56(a). After the trial commences and the opposing party concludes presentation of evidence, the party who originally sought summary judgment may then move for judgment as a matter of law under Federal Rules of Civil Procedure 50(a). To move for judgment as a matter of law, the moving party must allege that under the facts presented by the opposing party, “a reasonable jury would not have a legally sufficient *evidentiary basis* to find for that party.” Fed. R. Civ. P. 50(a) (emphasis added). A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. Fed. R. Civ. P. 50(a)(2).

If the court denies a movant’s Rule 50(a) motion, the case will be submitted to the jury at

the close of evidence. Fed. R. Civ. P. 50(b); *see also Sampliner v. Motion Picture Patents Co.*, 254 U.S. 233 (1920). However, the movant may preserve the issue for appeal by renewing the motion for judgment as a matter of law after the return of the verdict. Fed. R. Civ. P. 50(b). A renewed motion for a judgment as a matter of law allows the movant to again petition the court to acknowledge that the jury did not have a legally sufficient evidentiary basis to enter a verdict against the movant. *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1913); *see also* Austin W. Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 685 (1918).¹ In order for the court to hear a Rule 50(b) motion, the movant is required to file a Rule 50(a) motion. *See, e.g., N. Ry. Co. v. Page*, 247 U.S. 65 (1927).

The fundamental rationale of requiring Rule 50 motions following a motion for summary judgment lies in the varying levels of evidence available to the fact finder. *N.Y. Marine Gen. Ins. Co. v. Cont'l Cement Co.*, 761 F.3d 830, 840 (8th Cir. 2014). In a trial by jury, the jury serves as the ultimate finder of fact. *See, e.g., Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 136 (2000). Thus, a motion for summary judgment which is filed on the basis of evidentiary sufficiency seeks to allow the court to enter judgment when the facts, as viewed in the light most favorable to the non-moving party, could not allow a reasonable jury to enter judgment in favor of that non-moving party. Fed. R. Civ. P. 56(c); *see also Matsushia Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (holding “[w]hen the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.” (internal quotations omitted)). However, should the judge determine any genuine issue of fact to be decided by a reasonable jury, summary judgment must be denied. *Anderson*, 477 U.S. at 247-48. Thus, if

¹ If a Rule 50(b) motion is granted, the jury is directed to enter a verdict for the moving party without discretion or the court may simply dismiss the jury and enter a verdict in accordance with the movant’s motion.

the motion for summary judgment is denied and the case proceeds to trial, all evidence will be presented to the fact finder and the factual questions which prohibited summary judgment will be argued. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

In *Scott*, the Court emphasized that the procedural posture (an appeal from a trial court's grant of summary judgment) greatly limited the amount of evidence available. *Id.* at 380. However, the Court recognized that because video evidence—which was disclosed and admitted into evidence prior to trial—directly discredited the description of events promulgated by the non-moving party, no reasonable jury could find in favor of the non-moving party even with the possibility of additional evidence admitted at trial. *Id.* at 380. The Court emphasized that trial courts have great latitude in denying summary judgment, and summary judgment should be granted on an evidentiary basis only when “no reasonable jury could believe . . . [the non-moving party's] version of the facts. . . .” *Id.* at 380.

Conversely, in *Ortiz*, the Supreme Court emphasized the importance of varying levels of evidence and affirmed the necessity of Rule 50 motions. 562 U.S. at 185. In *Ortiz*, the Supreme Court explained that failure to renew a motion for summary judgment on the basis of evidentiary sufficiency in a Rule 50 motion would deprive an appellate court of jurisdiction to rehear the evidentiary sufficiency of a jury verdict. *Id.* at 184. The plaintiff in *Ortiz* filed suit against supervisory prison officers who, as she contended, failed to take protective measures to ensure she was not assaulted by guards in the prison. *Id.* at 183. Two of the defendants filed a motion for summary judgment on the grounds that they were immune from suit under the defense of qualified immunity.² *Id.* The trial court denied summary judgment, acknowledging that a defense of

² The doctrine of qualified immunity protects a government official from suit so long as his or her conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

qualified immunity “turned on material facts genuinely in dispute.” *Id.* Following the completion of a trial on the merits, the jury returned a verdict against both defendants. *Id.* Rather than file a Rule 50 motion, the defendants appealed the denial of summary judgment. *Id.*

The Supreme Court evaluated the existing question of whether a party may or may not appeal a denial of summary judgment following a trial on the merits, answering in the negative. *Id.* at 184. A court must evaluate a qualified immunity defense “in light of the character and quality of the evidence received in the court.” *Id.* Thus, the defendants were required to file a Rule 50 motion to determine “whether the evidence favoring the party seeking relief is legally sufficient.” *Id.* The Court further explained that, ordinarily, a Rule 50 motion permits the court to enter a post-verdict judgment for the “verdict loser” if the court finds that the evidence was legally insufficient to sustain the verdict; absent such a verdict, “an appellate court is ‘powerless’ to review the sufficiency of the evidence after trial. *Id.* at 188 (citing to *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 405 (2006)).

Notably, the Court distinguished the bright-line rule that “questions going to the sufficiency of the evidence [in a motion for summary judgment] are not preserved for appellate review by summary judgment alone,” from the idea that a motion for summary judgment based upon an issue that is “purely legal in nature.” *Ortiz*, 562 U.S. at 189. Without ruling on the issue, the Supreme Court acknowledged the Seventh Circuit’s holding in *Rekhi v. Wildwood Indus., Inc.* that an issue of law is preserved for appeal by an unsuccessful motion for summary judgment without a Rule 50 motion as they do not “hinge on the facts adduced at trial.” 61 F.3d 1313, 1318 (7th Cir. 1995) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 530 n.10 (1985)). Because the issue of qualified immunity hinged on evidentiary sufficiency and the defendants failed to renew the factual issue in a Rule 50 motion, the Supreme Court held that the defendants waived the issue on appeal. *Ortiz*,

562 U.S. at 192.

Respondent here does not contest the requirement of Rule 50 motions when the grounds for summary judgment rest on evidentiary sufficiency. R. at 6a. Because the evidentiary record at the conclusion of evidence is more robust than the evidentiary record available at the summary judgment stage, a party must of course renew its evidentiary challenge should it wish to preserve the issue for appellate review. *See, e.g., Ortiz*, 592 U.S. at 184. Further, the justification behind requiring Rule 50 motions is uniquely applicable to a challenge of evidentiary sufficiency; allowing an appellate court to review a denial of summary judgment without reviewing evidence later explored at trial would allow that appellate court to deprive a successful party of a jury verdict without reviewing the evidence which supported that verdict. *See McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997) (acknowledging the procedural injustice that would occur if an appellate court were to reverse a jury verdict (1) if the grounds for summary judgment is evidentiary; and (2) the moving party has not filed a Rule 50 motion which allows the appellate court to review the entirety of the record rather than the record available at the summary judgment stage). If Respondent had moved for summary judgment on the basis that there was insufficient evidence to support a jury award, a Rule 50 motion would be required to preserve the issue for appeal; however, because Respondent moved for summary judgment on the ground that imposing civil liability under the existing state law violates the Due Process Clause, Respondent is not required to preserve the issue in Rule 50 motions. R. at 3a.

2. A party who moves for summary judgment on a purely legal basis need not preserve the issue in a Rule 50(a) or Rule 50(b) motion because the issue remains the same regardless of additional facts.

The majority of the circuits recognize the distinction primarily explored in *Ortiz* between summary judgment motions based upon evidentiary sufficiency, which require Rule 50 motions to

allow appellate review, and summary judgment motions containing purely legal arguments. 592 U.S. at 188; *Feld*, 688 F.3d at 782-83; *Rothstein v. Carriere*, 373 F.3d 275, 284 (2d Cir. 2004); *McPherson*, 125 F.3d at 995; *Houskins v. Sheahan*, 549 F.3d 480, 489 (7th Cir. 2008); *N.Y. Marine Gen. Ins. Co.*, 761 F.3d at 840; *Banuelos v. Constr. Laborers' Trust Funds for S. Cal.*, 382 F.3d 897, 903 (9th Cir. 2004); *Ruyle v. Cont'l Oil Co.*, 44 F.3d 837, 841 (10th Cir. 1994); *United Techs. Corp. v. Chromalloy Gas Turbine Corp.*, 189 F.3d 1338, 1344 (Fed. Cir. 1999). Only three circuits ignore this distinction and hold that parties who move for summary judgment on a solely legal issue must move the same court to examine the issue multiple times. *See 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); *Feld Motor Sports, Inc. v. Traxxas, L.P.*, 861 F.3d 591, 596 (5th Cir. 2017). However, both the rationale behind requiring Rule 50 motions and the nature of a motion for summary judgment as to a purely legal issue support the holding of the Thirteenth Circuit Court of Appeals. *See, e.g., Feld*, 688 F.3d at 782.

In *Feld*, the plaintiff moved for summary judgment after filing suit against her brother for forcibly removing her from the common areas of the condominium building he owned. *Id.* at 781. The plaintiff moved for summary judgment on the grounds that controlling law in the District of Columbia did not allow a condominium owner to use force to remove a visitor from the common areas of the building. *Id.* The district court denied summary judgment and the case proceeded to trial; after the close of evidence, the plaintiff did not renew her legal argument in a Rule 50(a) motion and the case was submitted to the jury, which returned a verdict rejecting the plaintiff's claims. *Id.* The plaintiff appealed to the D.C. Circuit Court of Appeals on the basis that the district court erred as a matter of law in denying summary judgment as to the interpretation of controlling law. *Id.*

Before addressing the merits of the plaintiff's legal argument, the court held that they properly had jurisdiction because Rule 50 motions are not required to preserve purely legal arguments. *Id.* at 782. According to the appellate court, the justification behind requiring Rule 50 motions (preserving the issue evidentiary sufficiency for appellate review) "does not apply when the district court rejects a purely legal argument at summary judgment." *Id.* After the district court rejected the plaintiff's motion for summary judgment on a legal basis, "[n]o changed facts or credibility determinations made at trial could alter whether D.C. law permits a condominium owner to use force to exclude another from the building's common areas." *Id.* Thus, had the plaintiff filed a Rule 50 motion, "the district court would have been faced with precisely the same question raised before trial." *Id.*

The Tenth Circuit discussed the precarious distinction in *Wilson v. Union Pacific Railroad Co.*, 56 F.3d 1226, 1229 (10th Cir. 1995) (exploring the propriety of a Rule 50 motion where an employer moved for summary judgment because, under controlling law, a company-mandated rule violation could not be the legal cause of employer's injuries). According to the Tenth Circuit, "[a] critical distinction exists between 'summary judgment motions raising the sufficiency of the evidence to create a fact question for the jury and those raising a question of law that the court must decide.'" *Id.* (citing *Ruyle*, 44 F.3d at 842). A legal issue brought in a motion for summary judgment is properly preserved for appeal "even if the case proceeds to trial and the moving party fails to make a subsequent Rule 50 motion." *Ruyle*, 44 F.3d at 842.

In *Ruyle*, the court held that that defendant, the lessee of mineral investment property, did not waive a legal issue brought on appeal by not filing a Rule 50 motion. *Id.* at 841. The plaintiffs, lessors of mineral interests, brought suit against the defendant for failure to prudently develop property. *Id.* at 840. The defendant moved for summary judgment prior to trial on the grounds that

controlling law collaterally estopped the action from proceeding. *Id.* at 840. The trial court denied summary judgment and the case proceeded to trial, where the jury returned a verdict against the defendant. *Id.* However, because a ruling on the legal issue of collateral estoppel would not vary based on any facts presented to the jury, the defendant was not required to file a Rule 50 motion and force the court to rehear the same issue. *Id.* at 844.

Similarly, the Second Circuit acknowledged in *Rothstein* that a ruling on a fundamental issue of law is always available for appeal; because a Rule 50 motion is made absent a sufficient evidentiary basis to support a verdict, it is inapplicable when the issue is purely legal in nature. 373 F.3d at 284. In *Rothstein*, the plaintiff filed suit against the defendant for malicious prosecution after the defendant allegedly made false statements to police which resulted in legal proceedings taken against the plaintiff. *Id.* at 283. The district court denied the defendant's motion for summary judgment which argued that the defendant was entitled to a rebuttable presumption that probable cause was established to arrest the plaintiff because a grand jury indicted the plaintiff. *Id.* Because the motion was denied on the basis that the presumption, under New York law, was inapplicable, a Rule 50 motion was not necessary to preserve the issue for appeal. *Id.* at 284. The court explained the distinction between when a Rule 50 is or is not required:

A motion pursuant to Rule 50 of the Federal Rules of Civil Procedure challenging the sufficiency of [plaintiff]'s evidence to rebut the presumption might have been required to preserve the error if the district court had allowed the issue to be tried. But the court's ruling that the grand jury proceedings were irrelevant took the presumption out of the case entirely . . . The district court did not deny [defendant]'s motion for summary judgment on the ground that a trial was necessary to determine whether [plaintiff] could rebut the presumption established by New York law. Rather, it ruled that the presumption had no role in the case at all. The disposition of the issue in that manner . . . preserved it for our review.

Id.

The Ninth circuit promulgated a three-part analysis which explored the error in requiring a

Rule 50 motion when the issue is a matter of law. *See generally Banuelos*, 382 F.3d. In *Banuelos*, the plaintiff moved the court to award a pension under a government-funded retirement plan which had been amended during his employment to require fewer years of service to receive benefits. *Id.* at 901-02. The plaintiff moved for summary judgment on the grounds that as a matter of controlling law, he was entitled to benefits under the amended pension plan. *Id.* at 901. The district court denied summary judgment based upon evidence “outside the administrative record.” *Id.* On appeal, the defendant, the trust plan, argued that court did not have jurisdiction due to the plaintiff’s failure to move for judgment as a matter of law under Rule 50. *Id.* at 902.

The Ninth Circuit acknowledged that generally, an appellate court “will not review a denial of a summary judgment motion after a full trial on the merits.” *Id.* (citing *Locriccio v. Legal Servs. Corp.* 833 F.2d 1352, 1359 (9th Cir. 1987)). However, such rule is not applicable to “denials of summary judgment where the district court made an error of law that, if not made, would have required the district court to grant the motion.” *Banuelos*, 382 F.3d at 902 (citing *Pavon v. Swift Transp. Co.*, 192 F.3d 902, 906 (9th Cir. 1999)). The court then promulgated a three-part analysis which justified disposing of the Rule 50 requirement when a motion for summary judgment is based on an error of law: (1) the district court resolved a separate legal issue, (2) failure to hear the appeal forces the district court to apply a potentially erroneous rule which may result in wasted proceedings, and (3) review of the error would be foreclosed if appeal was unavailable. *Banuelos*, 382 F.3d at 903.

The rationale which supports Rule 50 motions is simply not present when the basis for summary judgment is purely legal in nature. *Jurgens*, 927 F.2d at 1557; *see also Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, (7th Cir. 2003) (“when, as in this case, the court’s denial of summary judgment is not based on the adequacy of the evidence, the justification we just described

does not apply.”). Notwithstanding the fundamental distinction between summary judgment motions made based upon purely legal issues and those made based upon evidentiary sufficiency, three circuits have held that Rule 50 motions are necessary to preserve a purely legal issue for appeal. *See Ji*, 626 F.3d at 128; *Chesapeake Paper Prods. Co.*, 51 F.3d at 1235; *Feld Motor Sports, Inc.*, 861 F.3d at 596. However, the Fifth Circuit acknowledged that “Rule 50 motions are not required to be made following a bench trial, [thus] it is appropriate to review the court’s denial of summary judgment in [that] context.” *Feld Motor Sports, Inc.*, 861 F.3d at 595-96 (citing *Becker v. Tidewater, Inc.*, 586 F.3d 358, 365 (5th Cir. 2009)). In *Feld Motor Sports, Inc.*, the Fifth Circuit explored only the premise that a party successfully preserved an issue for appeal by filing both Rule 50(a) and Rule 50(b) motions. 861 F.3d at 596-97. The court did not discuss the preservation of a purely legal appeal without these motions. *Id.*

The First Circuit also acknowledged that “the rationale for this rule [that summary judgment is not reviewable after a trial and judgment] has been based on the procedural fact that a denial of a motion for summary judgment is ‘merely a judge’s determination that genuine issues of a material fact exist.’” *Ji*, 626 F.3d at 127 (citing *Easter Mt. Platform Tennis, Inc. v. Sherwin-Williams Co.*, 40 F.3d 492, 500 (1st Cir. 1994)). Thus, a denial of summary judgment “does not foreclose trial on issues which summary judgment was sought.” *Sherwin-Williams*, 40 F.3d at 500. However, while simultaneously acknowledging the distinction between summary judgment sought of evidentiary sufficiency and summary judgment sought on the basis of law, the First Circuit held “even legal errors cannot be reviewed unless the challenging party restates its objection in a motion for JMOL.” *Ji*, 626 F.3d at 128. Thus, the minority of circuits require that the court be confronted with the same legal issue in order to allow a party to preserve a legal error on appeal. *Id.*

In the instant case, Respondent raised a purely legal issue in its motion for summary

judgment. R. at 3a. Respondent moved the district court to recognize that as a matter of constitutional law, to impose liability for lawful distribution of a video game would violate the Due Process Clause. *Id.* The judge denied summary judgment and case proceeded to trial, where the jury returned a verdict in which it found the sale of the video game constituted a public nuisance. R. at 3a, 4a. Because a Rule 50 motion would have forced the same judge to rehear the legal basis for summary judgment after trial, Respondent promptly appealed the matter to the Court of Appeals for the Thirteenth Circuit. *Id.*

B. Respondent did not waive its right to appeal a violation of Due Process because requiring Rule 50 motions when the issue is a matter of law would contravene central tenants of American jurisprudence.

The Constitution of the United States guarantees that no party be deprived of life, liberty, or property without due process of the law. U.S. CONST. *amend.* V. The Constitution also protects citizens from such takings by state governments. U.S. CONST. *amend.* XIV. Thus, any law or proceeding which deprives a party of procedural due process is constitutionally impermissible. *Id.*, *see also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Procedural due process must be guaranteed even when the potential harm “may not involve the stigma and hardships of a criminal conviction,” because procedural due process is “a principal basic to our society.” *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). A party’s right to procedural due process is infringed when the party loses the opportunity to be heard “at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Further, procedural due process, as repeatedly explained by this Court, is flexible and requires “procedural protections as the situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1961); *see also Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961) (emphasizing “due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place

and circumstances.” (internal quotations omitted)).

This Court holds that courts should consider three factors in determining whether a procedure violates due process: first, the private interest impacted by government action; second, the risk of erroneous deprivation of that private interest through the current procedures and the value of additional procedural safeguards; and third, the government resources (including fiscal and/or administrative burdens) that additional procedural safeguards would entail. *Mathews*, 424 U.S. at 335 (citing *Goldberg v. Kelly*, 397 U.S. 254, 263-71 (1970)). In *Mathews*, the Court found that procedures for terminating disability benefits temporarily pending continuance hearings were constitutionally sufficient. *Id.* at 347. The Court noted that allowing ineligible recipients to continue to collect benefits pending the outcome of the hearings would be far too high a burden on the state, as all beneficiaries had the benefit to appeal the termination of their benefits and, if the findings were reversed and benefits were reinstated, the individual would receive automatic retroactive benefits. *Id.*

The availability of appeal is the distinguishing factor between the sufficient procedural due process outlined in *Mathews* and the constitutionally insufficient argument made by Petitioner in the instant case. *Id.* Here, Petitioner seeks to deprive Respondent of its right to appeal a violation of Constitutional law solely because Respondent did not undertake the unnecessary step of filing a Rule 50 motion (which would have required the district court to rehear a previously ruled-upon legal issue). R. at 5a. Thus, the private interest impacted by the act of the government foreclosing appeals on constitutional violation is an imperative interest which deserves the utmost procedural protection. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). Further, the risk of erroneous deprivation of the right to an appeal is high, as a ruling in favor of Petitioner here would foreclose the ability of the appellate courts to hear violations of constitutional law unless the trial

court had reheard the same legal issue multiple times. R. at 5a. By simply allowing appeals after a ruling on purely legal arguments at the summary judgment stage, such a risk would be eliminated. *See, e.g., Pavon*, 192 F.3d at 906. Whereas this Court in *Mathews* was faced with safeguards that would result in unforeseeable, yet likely immense, financial repercussions for the government, the instant case presents no such danger. 424 U.S. at 349.

The final *Mathews* factor, however, does not require analysis of only financial costs attributable to the proposed safeguards; rather, this Court examined burdens to administrative or judicial process. *Id.* at 335. The examination of promoting the most efficient use of judicial resources is often done in consideration of “judicial economy.” *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966). Most procedural due process problems analyzed under *Mathews* must weigh the fundamental fairness required by procedural due process against the negative effect of increasing procedural safeguards on judicial economy. *Id.* at 724 (weighing a rule which allowed federal courts to dismiss state law claims as well as federal law claims in the interest of judicial economy against the possible procedural due process concerns over permitting federal courts to dismiss state law actions).

However, the instant case presents no comparable balancing test. If this Court were to rule it favor of Petitioner and require parties to file Rule 50 motions and force the trial court to rehear purely legal arguments, judicial economy would be negatively impacted. *See, e.g., Feld*, 688 F.3d at 782. To require Rule 50 motions when the grounds for summary judgment are purely legal in nature would be to require an entirely unnecessary proceeding in the trial court where the parties would again make the same legal arguments in front of the same court. *Id.* After Respondent moved for summary judgment on the grounds that imposition of liability would violate the Due Process Clause, the trial court rejected it “unequivocally.” R. at 5a. Petitioner now argues that Respondent

was required to preserve the constitutional issue by moving the judge again after the verdict to reconsider the issue, yet nothing on the record reflects that the court would have taken a different position after the trial than it did before. R. at 5a-6a. Further, because Respondent's motion for summary judgment was based upon a purely legal argument, no facts introduced during the trial would have changed the resolution of the issue. R. at 7a; *see also Jurgens*, 972 F.2d at 1557. Thus, a motion under Rule 50 would have resulted in additional and unnecessary proceedings at the trial level. R. at 7a.

In the best interest of ensuring the procedural due process rights of Respondent are protected, this Court should not require additional proceedings with unchanged results to occur at the trial court level. The purpose of a motion under Rule 50 is to allow the court to determine whether the factual issues that precluded summary judgment prior to trial have been resolved, thus making a jury verdict unnecessary. *Ortiz*, 562 U.S. at 183. However, when summary judgment was moved for and denied on a purely legal basis, such motions are both unnecessary and improper. To ensure parties are guaranteed the right to be heard "at a meaningful time and in a meaningful way," *Armstrong*, 380 U.S. at 552, and to protect the concept of judicial economy, this Court should not foreclose the right to appeal a purely legal issue after denial of summary judgment.

II. TO IMPOSE LIABILITY ON RESPONDENT IN THE INSTANT CASE WOULD VIOLATE DUE PROCESS BECAUSE LIGHTYEAR IS NOT THE PROXIMATE CAUSE OF THE PUBLIC NUISANCE AND BECAUSE THE INJURIES CLAIMED ARE TOO ATTENUATED FROM RESPONDENT'S ACTIONS.

Deeply valued in our nation's history are the enumerated rights that the government may not "deprive any person of life, liberty, or property, without due process of law. . ." U.S. CONST. *amend.* V, XIV. To ensure a law does not violate due process, state laws need only be rational and non-arbitrary. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). A non-arbitrary law would normally require an exact and comprehensive definition; however, defining the public nuisance doctrine has proven elusive. W. Prosser & P. Keeton, *The Law of Torts*, §86 at 616 (5th ed. 1984) ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'. . . There is general agreement that it is incapable of any exact or comprehensive definition.") A rational and non-arbitrary state public nuisance³ law as described in the Restatement of Torts "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). Such liability does not depend on "whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance." *Cnty. of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 550 (2006).

If adhering to due process establishes liability, continuing adherence to due process further mandates that states cannot impose "grossly excessive" punishments on tortfeasors for liability

³ Petitioners have only alleged public nuisance liability against Respondent. A private nuisance liability claim would require the occurrence of a non-trespassory invasion of another's interest in the private use and enjoyment of land. (Restatement (Second) of Torts § 821D (1979)).

incurred. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996). While Congress and state legislatures possess broad powers to impose liability on individuals to prevent harm to others, “[i]t does not follow that what Congress can legislate prospectively it can legislate retrospectively.” *Usery*, 428 U.S. at 17. Such legislation might be unconstitutional if it “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.” *Eastern Enter. v. Apfel*, 524 U.S. 498, 528-29 (1998). Consequently, legislation that in effect imposes a new duty or liability based on past acts must survive rational-basis review. *Concrete Pipe and Prods. of Cal. Inc. v. Constr.*, 508 U.S. 602, 637 (1993). Petitioner’s irrational and arbitrary application of its state nuisance law to Respondent exemplifies an attempt to violate Respondent’s Due Process Clause protections.

A. Respondent did not create or assist in creating the alleged public nuisance because Lightyear does not fit under the common law definition of public nuisance and the \$600 million cost of abatement is unnecessary and unjust.

In order to honor enumerated due process rights, state laws need only be rational and non-arbitrary. *Usery*, 428 U.S. at 15. Accordingly, a successful action for public nuisance requires that the plaintiff prove a defendant knew it was distributing an allegedly harmful product and that it knew affirmative promotion for use of that product would be hazardous, thus creating an “actual knowledge standard.” *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 529 (2017). Traditionally, a public-nuisance claim can involve interference with use and enjoyment of an individual’s land; however, a public nuisance claim need not be limited to actions connected to real property. Rest. of Torts § 821B. After a court determines liability exists for a public nuisance and affirms that monetary damages are an appropriate remedy, the court will then determine the cost of abating the nuisance and “[if] such an award of punitive damages [] is grossly excessive .

. . [then it] furthers no legitimate purpose and constitutes an arbitrary deprivation of property.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). To consider Respondent’s software a public nuisance in this instance constitutes an effort by Petitioner to violate the Respondent’s rights under the Constitution as evidenced by its attempt to place the financial burden on Respondent for conditions which cannot be justly attributed it. R. at 6a. This is further evidenced by the \$600 million judgement awarded in the District Court. R. at 1a. Therefore, this Court should affirm the United States Court of Appeals for the Thirteenth Circuit finding a take-nothing judgement in favor of Respondent in order to prevent an unnecessary and unjust violation of Respondent’s right to due process.

1. Respondent’s software does not necessitate a public nuisance because Respondent could not foresee that its software would be injurious to public health and the software has not existed since 2013.

In order for Congressional legislation to allow liability retrospectively, the Due Process Clause requires that courts take into account the possibility that the tortfeasor knew of the danger, and even if they did know of the danger whether its actions “were taken on reliance upon the current state of the law, which imposed no liability upon them.” *Usery*, 428 U.S. at 17. Accordingly, imposition of nuisance liability does not only depend upon “whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance,” rather, the fundamental question is “whether the defendant created or assisted in the creation of the nuisance.” *Cnty. of Santa Clara*, 40 Cal. Rptr. 3d at 300. An absolute nuisance, or nuisance, consists of either: (1) a culpable and intentional act resulting in harm; (2) an act involving culpable and unlawful conduct causing intentional harm; or (3) a nonculpable act resulting in accidental harm, for which, because of the hazards involved, absolute liability attaches notwithstanding the absence of fault. *Angerman v. Burick*, 2003 WL 1524505 at *2 (Ohio App. 2003).

In *Usery*, the issue of foreseeability was applied to an action brought by twenty-two coal mine operators attacking the constitutionality of the black lung benefit provisions of the Coal Mine Health and Safety Act of 1969 (“the Act”) where operators challenged compensating former employees for death or disability benefits when the employee terminated its employment before the Act was passed. 428 U.S. at 5-7. Even though the operators had no qualms with accepting liability to compensate employees presently working in the industry and in the future from pneumoconiosis, they sought declaratory and injunctive relief from the Act which placed liability on them to compensate certain miners, former miners, and their survivors for death or total disability due to pneumoconiosis arising out of employment in coal mines. *Id.* at 5.

This Court explained that the imposition of liability for the effects of disabilities bred in the past is “justified as a rational measure to spread the costs of the employees’ disabilities to those who have profited from the fruits of their labor and the coal consumers.” *Id.* at 18. The aspects of the Act that imposed the burden of inactive miners’ disabilities on all operators was for Congress to choose, leaving this Court “unwilling to assess the wisdom of Congress’ chosen scheme to spread costs.” *Id.* at 19. Consequently, it was decided that the Due Process Clause would not bar the requirement of an operator to provide compensation for a former employee’s injuries arising out of employment in the mines, even if the former employee terminated his employment before the Act. *Id.* at 20.

The tort of public nuisance has been applied to numerous actions, including popular application to the promotion of lead-based paint in the late 1800’s and early 1900’s. *Cnty. of Santa Clara*, 40 Cal. Rptr. 3d at 300. In *County of Santa Clara*, the People of the State of California filed two separate class actions against a group of lead manufacturers for public nuisance pleading that the manufacturers be required to abate the public nuisance created by its unfair business practices

regarding lead paint. *Id.* at 298-99. Defendant's attempted to escape liability with a motion for summary judgement that was granted by the district court, however the actions taken by the defendant's to push sale of their product in despite its widely known and extensive harms, especially to children, were found by the court to be the cause of the lead paint nuisance. *Id.*

Facing the issue of an unclear definition of absolute nuisance, an Ohio appellate court determined that an absolute nuisance could take the form of one of three actions: (1) a culpable and intentional act resulting in harm; (2) an act involving culpable and unlawful conduct causing intentional harm; or (3) a nonculpable act resulting in accidental harm, for which, because of the hazards involved, absolute liability attaches notwithstanding the absence of fault. *Angerman*, 2003 WL at *2 (finding the commercial motocross track built by the defendants to be an absolute nuisance due to the small and medium motorcycle races that were taking place on the property primarily on the weekend, which disturbed neighbors, and preventing the defendants from continuing their operations).

In applying foreseeability to nuisance law to the present case, it is clear that even though Respondent created the software that Petitioner claims to be a nuisance, it had no notice that it could be held liable for its creation which gained worldwide popularity. R. at 19a. As distinguished from *Usery* above, Respondent is not facing a claim by its former employees for harm done to them, it is facing liability from the city of New Truro for the production and sale of a video game. *Usery*, 428 U.S. at 17. The defendants in *Usery* and *County of Santa Clara* both could have foreseen possible harm done to its coal workers (pneumoconiosis) and to residents (lead-based paint) whereas the type of liability alleged by Petitioner could not have been foreseen. Compare *Usery*, 428 U.S. at 17 and *Cnty. of Santa Clara*, 40 Cal. Rptr. 3d at 300 with R. at 4a. Accordingly, there were no complaints or warnings from neighbors like in *Angerman* giving Respondent notice

that its product may be an issue, 2003 WL at *2, and thus the damages were unforeseeable and violate due process.

2. The abatement costs of \$600 million awarded to Petitioner are grossly excessive and an arbitrary deprivation of Respondent's property.

As a civil remedy, compensatory damages and punitive damages are typically awarded at the same time by the decision maker and serve distinct purposes. Compensatory damages are “intended to redress the concrete loss that plaintiff has suffered by reason of the defendant’s wrongful conduct.” *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001). Conversely, punitive damages “are aimed at deterrence and retribution.” *Campbell*, 538 U.S. at 416. To ensure damages do not violate due process, “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive[s] fair notice not only of the conduct that subject him to the punishment, but also of the severity of the penalty that a State may impose.” *Gore*, 517 U.S. at 575.

While a state retains great discretion over the imposition of punitive damages, this Court has established three foundational due process guideposts in *Gore* which continues to instruct courts on properly reviewing punitive damages claims to consider necessary limitations on punitive damage awards in accordance with due process requirements. *Gore*, 517 U.S. at 559. (refusing to sustain a \$2 million punitive damages award paired with a comparatively trivial \$4,000 in compensatory damages for the defendant’s deliberate decision not to advise its dealers and customers of pre-delivery damage to cars that it sold as new when the cost of repair amounted to less than 3 percent of the car’s suggested retail price). This Court applied three guideposts to determine whether the defendant received fair notice “not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.” *Id.* at 575.

The predominantly applied *Gore* guideposts include review of (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Id.* at 575. The first guidepost analyzing an actor's degree of reprehensibility is "perhaps the most important indicium of the reasonableness of a punitive damages award. . ." *Id.* This Court was able to find the gravity of conduct exhibited by BMW as "sufficiently reprehensible to give rise to tort liability," but was not able to justify associating it with circumstances ordinarily giving rise to a substantial award of punitive damages such as bad-faith, intentional malice, or disregard for the health and safety of others. *Id.* at 575-76.

The second guidepost "and perhaps the most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." *Id.* at 580. Pointing to a previous decision, this Court detailed of where the line may be between reasonable and unreasonable damage awards: "even though a punitive damages award of 'more than 4 times the amount of compensatory damages' might be 'close to the line,' it did not 'cross the line into the area of constitutional impropriety.'" *Gore*, 517 U.S. at 581 (citing to *Pac. Mut. Life Ins. Co. v Haslip*, 499 U.S. 1 at 23-24 (1991)). With respect to the third guidepost, or the sanctions for comparable misconduct, this Court noted the maximum civil penalty authorized by the Alabama Legislature for violation of its Deceptive Trade Practices Act was \$2,000 in comparison with the \$145 million-dollar penalty reinstated by the Utah State Supreme Court against the defendant. *Gore*, 517 U.S. at 584. In consideration of this glaring gap, this Court determined that more modest sanctions could have served the same deterrent interest. *Id.* at 585.

These three *Gore* guideposts remain a foundation of due process jurisprudence facilitating courts in determining whether an award of damages is a grossly excessive monetary punishment in violation of the due process clause as evidenced by its extensive application in case law. *See TXO Prod. Corp. v. All. Res. Corp. Resources Corp.*, 509 U.S. 443 (1993); *see also Pac. Mut. Life Ins. Co.*, 499 U.S. at 1. In one of the many cases following *Gore*, this Court applied the guideposts in *State Farm v. Campbell*, reversing a reinstatement of a \$145 million punitive damages award. In *Campbell*, a jury initially awarded the award of \$2.6 million in compensatory damages and \$145 million in punitive damages for the defendant’s egregious conduct, which included fraud and intentional infliction of emotional distress. 538 U.S. 408, 410. In light of such an excessive amount, the trial court reduced the plaintiffs’ initial award to \$1 million in compensatory damages and \$25 million in punitive damages. *Id.* at 411. Both parties appealed to the Utah Supreme Court which reinstated the punitive damages award of \$145 million after applying the *Gore* guideposts; relying primarily on State Farm’s “massive wealth” and “clandestine” nature. *Id.*

The Utah Supreme Court found State Farm’s nationwide business practice reprehensible as evidenced by the extensive evidence concerning its performance and review policy. *Id.* It concluded further that the ratio between punitive and compensatory damages was not unwarranted, and not excessive when compared to the various civil and criminal penalties State Farm could have faced.⁴ *Id.* Writing for the Court, Justice Kennedy reaffirmed its determinations in *Gore* by further reiterating its instructions for determining the reprehensibility of a defendant’s conduct. *Id.* at 414.

Under *Gore*, courts must consider:

the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard to the health or safety of others; the target

⁴ The various civil and criminal penalties mentioned by the Utah Supreme Court include \$10,000 for each act of fraud, the suspension of its license to conduct business in Utah, the disgorgement of profits, and imprisonment. *Campbell*, 538 U.S. at 411.

of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

517 U.S., at 575.

Upon reviewing these instructions in comparison with the actions of the tortfeasor, this Court found reinstating the award of \$145 million in punitive damages to be excessive and a violation of the Due Process Clause of the Fourteenth Amendment. *Campbell*, 538 U.S. at 419. This Court made a point however to “acknowledge that State Farm’s handling of the claims against the [plaintiffs] merits no praise.”⁵ *Id.* Opining further that while it does not suggest the award of punitive damages was made in error, a more modest punishment could have satisfied the State’s legitimate objectives. *Id.* Accordingly, the punitive damages award of \$145 million was found to be “neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant.” *Id.* at 419.

While abatement and punitive damages are categorized as two differently applicable compensations, the precedent of punitive damages provides a reliable guide that this Court should consider when determining whether “one of the largest judgements ever to come before [the United States District Court of Appeals for the Thirteenth Circuit] Court,” is a violation of due process. R at 1a. In applying the *Gore* guideposts to the present case, the degree of reprehensibility that can be affixed to Respondent’s conduct is absent. The disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award is just as invisible. In the instant case, Respondent distributed a game which was used around the world; the harm now being claimed by

⁵ The trial court found that Defendant had instructed its employees to alter company records to make the *Campbell*’s appear less culpable; disregarding the “overwhelming likelihood of liability and the near-certain probability that, by taking the case to trial, a judgement in excess of the policy would be awarded;”

Petitioner has nothing to do with Respondent's product and is explained by other instances of criminality occurring in the city. R. at 3a. Moreover, Respondent has not distributed the software since 2013, greatly attenuating Respondent's actions from Petitioner's injury.

B. The injuries claimed by Petitioner are too attenuated from Respondent's actions because Respondent is not the but-for cause of Petitioner's injuries and this Court should not assess unforeseeable damages retroactively.

This Court has consistently been hesitant to expose economic legislation⁶ to due process scrutiny as a general matter which is supported by "this country's law [which] has harbored a singular distrust of retroactive statutes, and that distrust is reflected in this Court's due process jurisprudence." *Eastern Enter.*, 524 U.S. at 502 (1998). With respect to a complaint for liability founded upon nuisance law, such an action will also fail due to attenuation "if the harm alleged is the remote consequence of defendant's misconduct (causation) or is wholly derivative of the harm suffered by a third party (standing)." *Cincinnati*, 768 N.E.2d at 1147-48 (Ohio 2002). Respondent was not a cause of Petitioner's injury because the sale of a video game cannot be a major cause of the increased crime rates observed by Petitioner; at best, Respondent's actions are remotely connected to any alleged misconduct.

1. Respondent's software is not a but-for cause of Petitioner's nuisance.

In order to assess liability for public nuisance and abating the costs of such, Petitioner contends that the proper causation standard to be applied by this Court is the generous substantial factor rule. R at 4a. In order to determine whether an alleged tortfeasor is the actual cause of an alleged harm, the substantial factor rule applied in appropriate instances is described as:

⁶ Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties; that it may impose retroactive liability to some degree, particularly where it is "confined to short and limited periods required by the practicalities of producing national legislation." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 731 (1984).

[A] relatively broad [standard], requiring only that the contribution of the individual cause be more than negligible or theoretical. Thus, a force which plays only an infinitesimal or theoretical part in bringing about injury, damage, or loss is not a substantial factor, but a very minor force that does cause harm is a substantial factor.

ConAgra, 227 Cal. Rptr. 3d at 543 (citing *Bockrath v. Aldrich Chemical Co., Inc.*, 86 Cal. Rptr. 2d 846, 852 (Cal. 1999) (internal quotations and citations omitted)).

However, the proper standard for proximate causation is but-for causation, requiring proof that the harm would not have occurred in the absence of the defendant's conduct. *Burrage v. U.S.*, 571 U.S. 204, 210 (2014). Petitioner pleads for this Court to apply the broad substantial factor test, however with respect to the great liability Petitioner it is attempting to impose, a more precise test such as but-for causation would be in the best interest of justice in the present case.

The broad test of substantial factor causation in public nuisance actions permits a plaintiff in possession of constructive knowledge, sufficient to support a cause of action, a venue for recovery in situations where multiple defendants could have contributed to the alleged harm. *See ConAgra*, 227 Cal. Rptr. 3d at 499. In *ConAgra*, the plaintiff presented constructive evidence⁷ of each defendant's possible contribution and knowledge of the serious risk of harm its poisonous paint caused children living in a home with interior walls coated in the toxic substance. *Id.* Other evidence presented by plaintiff included a historical synopsis of the lead paint industries protection of its product along with marketing techniques resulting in the court finding a causal connection between defendants and the harm created due to the substantial factor test. *Id.* The court further found defendant manufacturers liable for the affirmative promotion of a product in over 10

⁷ Examples of evidence presented by the People include defendant memberships in trade associations for lead industries and information which ran in the U.S. Daily stating that lead poisoning could occur from chewing paint off cribs, toys, cradles, and woodwork. *Conagra*, 227 Cal. Rptr. 3d at 499.

California districts for a particular use that was hazardous; blatantly disguising the dangers of the product from California residents and going as far as creating campaigns to push its widespread use. *Id.*

In *Burrage*, this Court found but-for causation was the proper standard for proximate causation, requiring proof that the harm would not have occurred in the absence of the defendant's conduct. 571 U.S. at 210. This court examined a defendant who sold heroin to a customer who died from the use of multiple drugs. *Id.* Because the determination of which drugs caused the decedent's death could not be determined, an increase in his criminal sentence was unwarranted. *Id.*

Even if this Court were to accept Petitioner's causation standard, Respondent's reasonable actions as video game software creators, which were taken without actual or constructive knowledge of any foreseeable future liability, should not be considered the substantial factor in causing the harm. The evidence Petitioner relies on fails to show anything more than Respondent as an "infinitesimal" or "theoretical" part in bringing about such an injury. In fact, particular evidence preserved on the record establishes two other substantial factors under Petitioner's control that could also have contributed to the unproductivity of Petitioner's affected citizens. Moreover, the circumstantial evidence Petitioner rests its claims on could have only survived summary judgement on the merits if it included other circumstantial evidence of a decrease in productivity and increase of criminal activity in any population of any age group in the world in over the 13 years that the game was available to play and under Respondent's control. With respect to the popularity of the game played worldwide, Petitioner could have easily strengthened its claims with examples of these same issues the game had caused throughout the nation and

worldwide. In the absence of such evidence, this Court should affirm the decision of the Thirteenth Circuit Court of Appeals finding a take-nothing judgement in favor of Respondent.

2. At best, the consequences of using Respondent’s software are too remote and attenuated from Petitioner’s alleged misconduct.

Although this Court has been hesitant to subject economic legislation to due process scrutiny as a general matter, this nation has harbored a singular distrust of retroactive statutes; such distrust is reflected in this Court’s due process jurisprudence. *Eastern Enter.*, 524 U.S. at 502. As the Supreme Court held in *Apfel*, “retroactive legislation is generally disfavored. It presents problems of unfairness because it can deprive citizens of legitimate expectations and upset settled transactions.” *Id.* at 501. An action for public nuisance will fail on remoteness grounds if the harm alleged is the remote consequence of the defendant’s misconduct (causation) or is wholly derivative of the harm suffered by a third party (standing). *Cincinnati*, 768 N.E. 2d at 1147-48.

Legislation that reaches back in time to impose liability on parties that could not have possibly foreseen such liability at that time and the magnitude of the liability imposed upon them raise substantial fairness questions. *Eastern Enter.*, 524 U.S. at 501. Cautioning against retroactive legislation, this Court expounded that such backwards legislation presents problems of unfairness because it can deprive citizens of legitimate expectations and upset settled transactions. *Id.* (holding that the 1992 Coal Act substantially interfered with coal industry employer’s reasonable investment-backed expectations by operating retroactively 30-50 years to impose liability on one employer’s activities which took place between 1946 and 1965). In *Apfel*, this Court further recognized that Congress enjoys significant freedom to fashion economic legislation. *Id.* At 500. Typically recognized economic legislation includes the power to affect contractual commitments between private parties which may themselves impose retroactive liability in limited situations,

particularly where it is ““confined to short and limited periods required by the practicalities of producing national legislation,”” *Id.* at 500, *citing Pension Benefit Guar. Corp.*, 467 U.S. at 731.

The Ohio Supreme Court’s findings in *Cincinnati v. Beretta* essentially mirrored this Court’s warnings in *Apfel* with respect to causation, finding that conduct is barred from recovery for a public nuisance when the causal connection between such conduct or “alleged wrongdoing and the alleged harm is too tenuous and remote and because the claims asserted are indirect and wholly derivative of the claims of others.” 768 N.E. 2d at 1147. In essence, an action for public nuisance will fail on remoteness grounds if the alleged harm is found to be a remote and attenuated aftermath of the defendant’s alleged misconduct. *Id.* at 1147-1148. (finding that the manufacture, sale, and distribution of handguns by multiple handgun manufacturers was conduct that could not be considered too remote or too attenuated from the dangers correlating from those firearms; court focused on risks that are not open and obvious such as the failure to warn of risks attributed to “a semiautomatic gun which can hold a bullet even when the ammunition magazine is empty or removed.”)

Similar to the employers in *Apfel*, Respondent could not have foreseen any liability for a globally recognized and cherished video game that was on the market for a relatively short period of time beginning in 2003 and ending in 2013; three years prior to the initiation of this action by Petitioner attempting to apply liability retrospectively. R at 2. Unlike the employers in *Apfel* who faced legislation attempting to reach back thirty to fifty years, Petitioner’s attempt to reach back three years to impose liability on Respondent for actions that are too attenuated from Respondent’s alleged misconduct. Petitioner’s efforts have resulted in the waste of judicial resources by way of outlandishly attempting to use the adversarial system as a venue for violating Respondent’s due process rights for its own gain. R. at 2a. Petitioner’s public safety concerns creating the alleged

nuisance grounded in this action against Respondent places an unfounded blame on Respondent, alleging that it intentionally created the conditions of an undereducated male population with diminished job skills and few employment prospects. R. at 2a. However, Petitioner fails to provide specific examples of any violence attributed to users of Respondent's product throughout the world during the period of 2003-2013, who, according to Petitioner, have developed violent tendencies and created similar issues around the continent. R. at 3a. Because Petitioner's harm is too attenuated from any action by Respondent, and because Respondent is not the but-for cause of Petitioner's injuries, and because imposing liability on Respondent in the instant case violates due process, this Court should affirm the decision of the lower court.

CONCLUSION

The constitutional guarantee to both procedural and substantive due process protect individuals from deprivation of life, liberty, and property without due process of law. This guarantee also ensures parties can be heard in a meaningful way. Here, Respondent has not waived its right to appeal a violation of due process because a motion for judgment as a matter of law after summary judgment is denied on a purely legal basis is both unnecessary and improper. Further, to sever Respondent's access to be heard in a meaningful way would violate Respondent's right to procedural due process.

Further, to impose liability on Respondent for the lawful manufacture and sale of a video game, which ended in 2013, which is not the but-for cause of Petitioner's increased crime rate violates the Due Process clause. The harm suffered by Petitioner now was both unforeseeable to Respondent, as well as to Petitioner, but is not reasonably linked to the actions of Respondent.

WHEREFORE imposing liability to Respondent would violate controlling constitutional

and federal law, this Court should affirm the decision of the Court of Appeals for the Thirteenth Circuit and render a take-nothing judgment in favor of Respondent.

CERTIFICATE OF SERVICE

The Undersigned HEREBY CERTIFIES that a copy of the foregoing “Brief for Respondent” was served upon all appropriate parties via Electronic Mail to mcnboard@gmail.com on this 16th day of November, 2020.

s/Team 27
Counsel for Respondents

APPENDIX A

United States Constitution Amendment Five

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation. (Emphasis added).

Amendment Fourteen Section One

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. 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*; nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added).

APPENDIX B

Federal Rules of Civil Procedure

Rule 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.

(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.

(1) *In General.* If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) *Effect of a Conditional Ruling.* Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) Time for a Losing Party's New-Trial Motion.

Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment.

(e) Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal.

If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

Rule 56

(a) Motion for Summary Judgment or Partial Summary Judgment.

A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion.

Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) *Supporting Factual Positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant.

If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact.

If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials--including the facts considered undisputed--show that the movant is entitled to it; or

(4) issue any other appropriate order.