No. 19-6236

IN THE

SUPREME COURT OF THE UNITED STATES

CITY OF NEW TRURO, NEW TEJAS,

Petitioner,

v.

KILL-A-BYTE SOFTWARE, INC.,

Respondent.

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

BRIEF FOR RESPONDENT

Team No. 35
Counsel for Respondent

QUESTIONS PRESENTED

I. Whether a party must raise in a Rule 50 motion a purely legal question that the jury will not consider to preserve its challenge to the district court's resolution of the question at summary judgment.

II. Whether a public-nuisance law violates due process when it imposes liability on a party without requiring but-for causation and awards damages covering the full cost of abating the nuisance based only on a finding that the party was a substantial factor in causing it.

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The opinions issued by the U.S. Court of Appeals for the Thirteenth Circuit are unreported but available in the Record. *See* Pet. App. 1a–14a (majority opinion); Pet. App. 15a–18a (Despard, J., dissenting). The order issued by the U.S. District Court for the Western District of New Tejas denying Kill-a-Byte Software, Inc.'s motion for summary judgment is also unreported but available in the Record. *See* Pet. App. 19a–32a.

JURISDICTION

The U.S. District Court for the Western District of New Tejas had original jurisdiction of this diversity action under 28 U.S.C. § 1332 (2018). The U.S. Court of Appeals for the Thirteenth Circuit had jurisdiction of this appeal under 28 U.S.C. § 1291 (2018), and it entered judgment on March 21, 2020. Pet. App. 1a. This Court has jurisdiction of this appeal under 28 U.S.C. § 1254(1) (2018).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case concerns the proper scope of motions for judgment as a matter of law under Federal Rule of Civil Procedure 50. The pertinent provisions of Rule 50 are reproduced in Appendix A.

This case also involves the proper interpretation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. New Truro Struggling and Seeking Funds

In recent years, the City of New Truro ("the City") has faced misfortune after misfortune, grappling with a poor education system, a well-publicized embezzlement scandal, budgetary problems, unemployment, poverty, and crime. Pet. App. 2a, 3a, 25a. In 2004, for example, the City experienced a teachers' strike. Pet. App. 3a. Then, in 2005, its mayor was involved in a well-publicized embezzlement scandal for which he is now serving a felony sentence. *Id.* Stemming in part from this scandal and a decrease in tax revenues by more than fifty percent, the City is "fac[ing] a significant budget shortfall." Pet. App. 2a. The budget shortfall, in turn, has led to an underfunded and undermanned police force. Pet. App. 3a. The City now suffers from an unusually high crime rate that is nearly six times the national average. Pet. App. 25a. The City, moreover, suffers from "massive unemployment (15%) and high poverty rates (45.3%)," caused in part by numerous factory closings. Pet. App. 3a, 25a. Seeking the funds it needs to overcome these ills, the City has "blamed its injuries on a single purported cause: violent video games," distributed by the highly profitable Kill-a-Byte Software, Inc. Pet. App. 2a, 20a.

B. Kill-a-Byte Software, Inc.'s Distribution of "Lightyear"

Kill-a-Byte Software, Inc. ("Kill-a-Byte") is one of the largest and most profitable software companies in the United States. *See* Pet. App. 20a. Between 2003 and 2013, Kill-a-Byte developed, produced, and distributed a videogame called

"Lightyear." *Id.* Lightyear is a free-to-download, multiplayer, online game that allows each player to select a species (e.g., human, alien, cyborg) and a weapon (e.g., plasma rifle, gravity gun, laser sword), and then fight each other to the death in a computer-generated alien world. Pet. App. 21a. Its vivid graphics and realistic gore captivated players and critics alike. *Id.* More than 300 million individuals worldwide created Lightyear gaming accounts, though a much smaller number played regularly. Pet. App. 2a.

Both parties agree that Kill-a-Byte's distribution of Lightyear did not violate federal or state law. Pet. App. 2a. Though Lightyear was free to download, Kill-a-Byte generated revenue through the sale of additional downloadable content, optional paid accounts that provided preferable player ranking and improved matchmaking, and Lightyear-branded clothing. Pet. App. 22a. As would be expected from a software company marketing a videogame for over a decade, Kill-a-Byte routinely updated Lightyear's features and graphics to increase the amount of time that individuals spent playing it. *See* Pet. App. 23a. These consistent updates helped maintain active interest in Lightyear even near the end of its distribution: Between 2010 and 2013, more than fifty percent of fifteen to twenty-five-year-old men in the City played Lightyear for at least ten hours each week. Pet. App. 2a.

II. PROCEDURAL HISTORY

The City sued Kill-a-Byte for "absolute public nuisance" under New Tejas law, alleging that Kill-a-Byte, by distributing Lightyear, intentionally created conditions that substantially interfered with public safety. Pet. App. 2a. Kill-a-Byte's

distribution of Lightyear, the City asserted, created an "undereducated male population with diminished job skills" who are "trained to kill." *Id.* To abate these alleged harms, the City sought damages to fund job training programs, "centers to assist with 'video game addiction,'" an increased police presence, and security cameras downtown. Pet. App. 25a.

After the City filed this lawsuit in New Tejas state court, Kill-a-Byte removed it to federal court under diversity jurisdiction. Pet. App. 2a–3a. Following discovery, Kill-a-Byte moved for summary judgment. Pet. App. 3a. Kill-a-Byte argued, among other things, that holding it civilly liable for harms stemming from its lawful distribution of its videogame violates due process. *Id.* In denying Kill-a-Byte's motion, the district court held that, as a matter of law, "impos[ing] . . . civil liability under state law *cannot* violate the Due Process Clause." *Id.* (emphasis added).

At trial, the jury returned a verdict in favor of the City. Pet. App. 4a. The jury found that: (1) Kill-a-Byte intentionally distributed Lightyear, (2) the increased crime rate in New Truro substantially interfered with public safety, and (3) Lightyear was a "substantial factor" in the City's increased crime rate. Pet. App. 4a. At a subsequent bench trial limited to the issue of abatement, the City did not identify which harms were attributable to Lightyear and admitted that "numerous factors contributed" to the public nuisance. *Id.* The City, instead, argued that under New Tejas law Kill-a-Byte was responsible for the total cost of abating the nuisance to which it contributed. *Id.* The district court then awarded the City more than $600 million. *Id.*

Kill-a-Byte appealed the district court's judgment and abatement award to the U.S. Court of Appeals for the Thirteenth Circuit. *Id.* Skeptical of the City's "unprecedented" theory of liability, the court certified several questions to the Supreme Court of New Tejas. *Id.* In a 5-4 decision, the Supreme Court of New Tejas confirmed: (1) the validity under state law of the City's theory of liability, (2) the legal sufficiency of the trial evidence supporting Kill-a-Byte's liability under that theory, and (3) the appropriateness under state law of the district court's $600 million abatement award. Pet. App. 4a–5a.

Addressing first a threshold procedural issue, the U.S. Court of Appeals for the Thirteenth Circuit held that Kill-a-Byte had preserved its due-process argument because it was not required to renew this "purely legal" argument in a motion under Federal Rule of Civil Procedure 50. Pet. App. 5a, 8a. Moving to the merits, the court reversed the district court and held that New Tejas's public-nuisance law violates due process by failing to rationally allocate liability for covered nuisances. Pet. App. 11a. The court noted, in particular, that the law violates due process because it permits total recovery for a nuisance from an entity regardless of the amount of the nuisance the entity is responsible for and without proof that the entity was even a but-for cause of the nuisance. *Id.* The court was also troubled by the retroactive nature of the law. *Id.* The court further held that the district court's $600 million abatement award is "grossly excessive" and offends due process. Pet. App. 14a.

The City petitioned this Court for a writ of certiorari, which this Court granted on October 5, 2020. *See* Pet. App. 1.

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit correctly concluded that Kill-a-Byte did not need to raise its purely legal due-process argument in a Federal Rule of Civil Procedure 50 motion to preserve it for appellate review. The Thirteenth Circuit also correctly concluded that New Tejas's public-nuisance law violates the Due Process Clause by retroactively assigning full liability for a harm to a party without requiring but-for causation and regardless of the amount of the harm that the party actually caused. This Court should affirm the Thirteenth Circuit and hold that a purely legal question does not need to be raised in a Rule 50 motion to be preserved for appellate review and that both New Tejas's public-nuisance law and the district court's $600 million abatement award under the law violate due process.

As a threshold matter, after the district court rejected at summary judgment Kill-a-Byte's purely legal due-process challenge, Kill-a-Byte did not have to re-raise the challenge in a Rule 50 motion to preserve it for appellate review. Rule 50, by its plain text, makes clear that motions under the rule are appropriate only when challenging the sufficiency of the evidence. The Advisory Committee's Notes to the 1991 amendments, moreover, explain that the purpose of Rule 50 motions is to assure that the responding party has notice of and an opportunity to cure any deficiencies in its evidence. Because purely legal questions are neither affected by the evidence submitted at trial nor resolved by the jury, the plain text of Rule 50 cannot be interpreted as requiring a party to raise a purely legal argument in a motion under

the rule, which asks the judge to determine that no "reasonable jury" would have a "legally sufficient evidentiary basis" to find for the nonmoving party on the issue.

Despite the contentions of the dissenting opinion below, *Ortiz v. Jordan*, 562 U.S. 180 (2011), did not foreclose appellate review of all summary-judgment denials after a full trial on the merits. Foreclosing such review would have represented a sharp departure from general merger principles, which regard interlocutory orders that affect the final judgment as merged into that judgment for purposes of appellate review. *Ortiz* merely held that after trial a party may not appeal a denial of summary judgment based on the existence of genuine disputes of material fact. Because *Ortiz* expressly declined to consider whether its holding extends to summary-judgment denials based on purely legal conclusions, *Ortiz* does not foreclose appellate review of the district court's summary-judgment denial of Kill-a-Byte's purely legal due-process argument. This Court, therefore, should affirm the Thirteenth Circuit and hold that Kill-a-Byte was not required to raise its purely legal due-process argument in a Rule 50 motion to preserve it for appellate review.

This Court should also affirm the Thirteenth Circuit's holding that New Tejas's public-nuisance law violates due process. The Due Process Clause ensures that litigants are notified of prohibited conduct, their potential liability for such conduct, and that they are protected from excessive punishment. Here, the imposition of liability and the extent of that liability—i.e., $600 million of abatement—violate due process.

As an initial matter, Kill-a-Byte lacked notice that it could be subjected to tort liability under New Tejas's public-nuisance law even when it was not a but-for cause of the nuisance. Although a state may adopt novel approaches to tort liability, its power to do so is limited by the Due Process Clause. The due-process principle of fair warning ensures that a law is applied only prospectively when its approach to liability is so novel that no one could have anticipated it. Because New Tejas had no public-nuisance caselaw alerting parties that but-for causation was not required for the imposition of liability, and the Restatement (Second) of Torts, Restatement (Third) of Torts, and caselaw from other states require but-for causation, no party could have predicted that New Tejas might impose tort liability without but-for causation.

Kill-a-Byte similarly lacked notice of what punishment could be imposed for its conduct. Based on the Second and Third Restatements of Torts and also prior caselaw, Kill-a-Byte could not have anticipated having to pay the total cost of abating a nuisance that it caused only a fraction of. By requiring Kill-a-Byte to shoulder the full cost of abatement despite the fact that many parties contributed to the harm, the district court imposed an arbitrary, excessive, and punitive award. And regardless of whether the public nuisance was indivisible or divisible, the district court violated due process—either by permitting the City to recover from Kill-a-Byte for an indivisible harm the City itself had contributed to, or by requiring Kill-a-Byte to pay the full cost of a divisible harm that it did not fully cause.

Whether viewed individually or together, New Tejas's retroactive changes in state-tort-law liability and the district court's excessive abatement award under that

law violated due process. If the district court's judgment and $600 million abatement award are reinstated, every city in New Tejas could seek out parties who played a substantial role in creating public-health harms and force them to foot the entire bill for remedying those harms. And because New Tejas's law lacks a but-for causation requirement, this situation could occur regardless of how attenuated the party's conduct was from the alleged harms. The district court's judgment and abatement award give cities in New Tejas a license to go hunting for public-health funding through public-nuisance litigation. This Court should affirm the Thirteenth Circuit's ruling that New Tejas's public-nuisance law violates due process and that the district court's abatement award under the law is grossly excessive.

ARGUMENT AND AUTHORITIES

Both issues before this Court pose questions of law, which are reviewed de novo. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014).

I. A RULE 50 MOTION IS NOT REQUIRED TO PRESERVE FOR APPEAL A PURELY LEGAL ARGUMENT THAT THE DISTRICT COURT REJECTED AT SUMMARY JUDGMENT.

A party that is denied summary judgment on a purely legal question does not need to raise it again at trial in a Federal Rule of Civil Procedure 50 motion to preserve it for appellate review. The plain text of Rule 50 addresses only challenges to the sufficiency of the evidence at a jury trial. *See* FED. R. CIV. P. 50(a) (permitting the district court to grant judgment as a matter of law if it "finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue"). Purely legal questions do not turn on the evidence submitted at trial, nor are they submitted to the jury for resolution. The plain text of Rule 50, therefore, cannot be interpreted as requiring a party to raise in a Rule 50 motion a purely legal question.

Questions of fact, in contrast, turn on the evidence in the record. And once evidence has been submitted at trial, the trial record supersedes the summary-judgment record. *Ortiz v. Jordan*, 562 U.S. 180, 184 (2011). Because later events—i.e., the trial—have mooted whether the summary-judgment record presented genuine disputes of material fact, a party must renew in a Rule 50 motion its objections to the sufficiency of the evidence supporting the nonmoving party's case. A pure question of law, however, is not mooted by a later trial because it will present to

the district court precisely the same question after trial as it did at summary judgment. Thus, raising the pure question of law in a motion for summary judgment is sufficient to preserve it for appellate review.

Here, Kill-a-Byte was not required to raise again in a Rule 50 motion its purely legal due-process argument from summary judgment, which challenged the constitutionality of New Tejas's public-nuisance law. As a pure question of law, this constitutional challenge was not affected by the evidence submitted at trial. This challenge, indeed, was not even mentioned at trial. *See* Pet. App. 5a. And Kill-a-Byte's due-process argument would never be submitted to the jury for resolution. *See City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 753 (1999) ("[D]ue process claims are, of course, routinely reserved without question for the court."). Under these circumstances, Kill-a-Byte was not required to re-raise in a Rule 50 motion its due-process challenge from summary judgment to preserve it for appellate review.

A. RULE 50'S TEXT AND ADVISORY COMMITTEE NOTES DEMONSTRATE THAT RULE 50 MOTIONS ARE APPROPRIATE ONLY TO PRESERVE QUESTIONS ABOUT THE SUFFICIENCY OF THE TRIAL EVIDENCE.

The text of Federal Rule of Civil Procedure 50 makes clear that the purpose of a motion under the rule is to challenge the sufficiency of the evidence submitted to the jury at trial. Rule 50 allows the district court to grant the movant judgment as a matter of law only if it "finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." FED. R. CIV. P. 50(a)(1). The 1991 Advisory Committee Notes to Rule 50 explain that "the purpose of this requirement [i.e., moving at trial for judgment as a matter of law] is to assure the responding party

an opportunity to cure any deficiency in that party's proof." FED. R. CIV. P. 50 advisory committee's notes to 1991 amendments. The Advisory Committee Notes further explain that Rule 50 requires the moving party to specify the law and the facts that entitle it to judgment as a matter of law "so that the responding party may seek to correct any overlooked deficiencies in [its] proof." *Id.* Rule 50 motions, therefore, exist to draw attention to and challenge evidentiary insufficiencies at trial. *See United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002) (stating that "the Advisory Committee Notes provide a reliable source of insight into the meaning of a rule").

Because Rule 50 concerns only issues of evidentiary sufficiency, it cannot be interpreted to require a party to make a motion under it to preserve a purely legal question that was raised and decided at summary judgment. This Court has described purely legal questions as those "capable of resolution with reference only to undisputed facts," involving "contests not about what occurred, or why an action was taken or omitted, but . . . the substance and clarity of pre-existing law." *Ortiz v. Jordan*, 562 U.S. 180, 190 (2011); *see also Johnson v. Jones*, 515 U.S. 304, 317 (1995) (defining purely legal questions as those concerning "neat abstract issues of law"). Purely legal questions, in other words, cannot be impacted by the evidence submitted to the jury at trial. *Feld v. Feld*, 688 F.3d 779, 782 (D.C. Cir. 2012). Nor can they be resolved on the ground that "a reasonable jury" does not have a "legally sufficient evidentiary basis" to find for the nonmoving party, *see* FED. R. CIV. P. 50(a)(1), because questions of law are not submitted to the jury for resolution.

A jury is generally not asked to consider questions of law. *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 384 (1996) (explaining that questions of law are determined by the court and questions of fact are submitted to the jury). Here, for example, Kill-a-Byte's due-process argument presents a purely legal question, *see AT&T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1109 (9th Cir. 2013) (explaining that due process claims are questions of law), and there is no indication that the jury was asked to resolve it, *see* Pet. App. 5a. A jury, indeed, would never be asked to resolve a due-process claim. *See City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 753 (1999) ("[D]ue process claims are, of course, routinely reserved without question for the court."). Therefore, there would be no basis for Kill-a-Byte to file a motion asking the judge to remove the question from the jury's consideration on the ground that no reasonable jury could find for the City on it.

Because purely legal questions are not affected by the evidence submitted at trial and generally are not resolved by the jury, the plain text of Rule 50 cannot be interpreted as requiring a party to raise a purely legal argument in a motion under the rule, which asks the judge to determine that no "reasonable jury" would have a "legally sufficient evidentiary basis" to find for the nonmoving party on the issue. This Court, thus, should affirm the Thirteenth Circuit's conclusion that a Rule 50 motion is not required to preserve for appellate review a purely legal question that was rejected at summary judgment. *See Bus. Guides, Inc. v. Chromatic Commc'ns. Enters.*, 498 U.S. 533, 540–41 (1991) ("We give the Federal Rules of Civil Procedure

their plain meaning. As with a statute, our inquiry is complete if we find the text of the Rule to be clear and unambiguous.").

B. THE VAST MAJORITY OF COURTS OF APPEALS AGREE THAT RULE 50'S PURPOSE IS NOT SERVED WITH RESPECT TO PURELY LEGAL QUESTIONS AND, THUS, RULE 50 DOES NOT REQUIRE A MOTION TO PRESERVE THEM.

Eight U.S. Courts of Appeals have held that a party does not need to raise in a Rule 50 motion a purely legal question, which the district court resolved against the party at summary judgment, to preserve it for appellate review.[1] As these courts of appeals have explained, there are two critical distinctions between pure questions of law and questions of fact (or mixed questions of law and fact) that account for why Rule 50 treats them differently: Unlike questions of fact, questions of law (1) are not affected by the evidence submitted at trial and (2) are not resolved by the jury.

A purely legal question does not turn on the evidence submitted at trial, whereas a mixed or purely factual question does because the question will be analyzed and perhaps answered differently based on whether the summary-judgment record or the trial record is consulted. *See Feld*, 688 F.3d at 782; *accord Houskins v. Sheahan*, 549 F.3d 480, 488–89 (7th Cir. 2008). After evidence has been submitted at trial, a purely legal question will pose "precisely the same question" to the district court as it did at summary judgment, but a factual question will need to be

1. *See, e.g.*, *Frank C. Pollara Grp., LLC v. Ocean View Inv. Holding, LLC*, 784 F.3d 177, 186 (3d Cir. 2015); *Feld v. Feld*, 688 F.3d 779, 782 (D.C. Cir. 2012); *Houskins v. Sheahan*, 549 F.3d 480, 489 (7th Cir. 2008); *Rothstein v. Carriere*, 373 F.3d 275, 284 (2d Cir. 2004); *Banuelos v. Constr. Laborers' Trust Funds for S. Cal.*, 382 F.3d 897, 903 (9th Cir. 2004); *United Techs. Corp. v. Chromalloy Gas Turbine Corp.*, 189 F.3d 1338, 1344 (Fed. Cir. 1999); *McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997); *Ruyle v. Cont'l Oil Co*, 44 F.3d 837, 841 (10th Cir. 1994).

reevaluated using a completely different record: the trial record. *Feld*, 688 F.3d at 782; *see also Rothstein v. Carriere*, 373 F.3d 275, 284 (2d Cir. 2004) ("[O]nce a trial has occurred, the focus is on the evidence that was actually admitted at trial, not on the earlier summary judgment record."). It, therefore, makes sense to require a party wanting to raise on appeal an evidentiary challenge to its opponent's case to preserve it by filing a Rule 50 motion at trial because the relevant record will have changed at the trial. But if the issue is purely a question of law, the question and analysis before the judge will remain exactly the same, whether considered at summary judgment or at trial. Because the evidence admitted at trial does not affect pure questions of law, there is no need to file a motion testing the sufficiency of the trial evidence as it relates to those questions.

Juries, moreover, normally resolve questions of fact but rarely resolve questions of law. Rule 50 motions ask the judge to hold that no reasonable jury could find that the evidence is sufficient to find for the nonmoving party on a particular issue. One can only wonder what such a motion would say in the context of a purely legal question because the jury does not resolve pure questions of law. *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 384 (1996) (explaining that questions of law are determined by the court and questions of fact are submitted to the jury); *see also United States v. Gaudin*, 515 U.S. 506, 512–13 (1995) (explaining that in both the criminal and civil trials, juries generally resolve "mixed questions of law and fact" but not "pure questions of law"). Indeed, there would be no basis to argue in a Rule 50 motion that no reasonable jury could find for the nonmoving party when the

question is not one that would ever be resolved by the jury. The Fifth Circuit, though rejecting the proposition that Rule 50 does not apply to pure questions of law, noted that it did not require Rule 50 motions to preserve questions at bench trials because Rule 50 only concerns jury trials. *Feld Motor Sports, Inc. v. Traxxas, L.P.*, 861 F.3d 591, 595–96 (5th Cir. 2017). And, as with bench trials, if the question at issue will not be resolved by the jury, then there is no reason to make a Rule 50 motion arguing that no reasonable jury could find for the nonmoving party.

Here, for example, Kill-a-Byte is challenging the district court's rejection of its argument that New Tejas' public-nuisance law violates the Due Process Clause. No evidence admitted at trial could affect the constitutional analysis of the facial validity of New Tejas's public-nuisance law. This issue, moreover, would never be submitted to the jury to resolve. *See City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 753 (1999) ("[D]ue process claims are, of course, routinely reserved without question for the court."). Indeed, there is no indication that the jury here was even informed of this issue. *See* Pet. App. 5a. Under these circumstances, it does not make sense to require Kill-a-Byte to draft a motion arguing that no reasonable jury would have a legally sufficient evidentiary basis to find for the City.

C. THE COURTS OF APPEALS THAT REQUIRE A RULE 50 MOTION TO PRESERVE PURELY LEGAL QUESTIONS DO SO BASED ON THE ILLUSORY DIFFICULTY OF DISTINGUISHING QUESTIONS OF LAW FROM QUESTIONS OF FACT.

The Fourth and Eighth Circuits have determined that parties must move for judgment as a matter of law under Rule 50 to preserve for appellate review even purely legal questions which were decided against the party at summary judgment

because of the allegedly problematic nature of distinguishing between questions of law and fact. *See, e.g.*, *Metro. Life Ins. Co. v. Golden Triangle*, 121 F.3d 351, 355 (8th Cir. 1997) (concluding that such a distinction is "both problematic and without merit");[2] *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp*., 51 F.3d 1229, 1235 (4th Cir. 1994) ("[S]uch a dichotomy would require this Court to engage in the dubious undertaking of determining the bases on which summary judgment is denied and whether those bases are 'factual' or 'legal.'"). The Fifth and First Circuits have also adopted this view, and the Fifth Circuit cited the Fourth and Eighth Circuits' reasoning with approval. *See Feld Motor Sports, Inc. v. Traxxas, L.P.*, 861 F.3d 591, 596 (5th Cir. 2017); *Ji v. Bose Corp*., 626 F.3d 116, 128 (1st Cir. 2010).

At the district-court level, a distinction between questions of law and fact at summary judgment would not be problematic because Rule 56 currently obligates district courts to set out the factual findings and legal conclusions underlying their summary-judgment decisions. To be sure, the Fourth Circuit contended in 1995 that

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2. There has been some confusion concerning the Eighth Circuit's position. Although it clearly rejected a distinction between questions of law and fact in the Rule 50 context in *Metropolitan Life Insurance Co. v. Golden Triangle,* 121 F.3d 351, 355 (8th Cir. 1997), a later panel came to the opposite conclusion. *See White Consol. Indus., Inc. v. McGill Mfg. Co*., 165 F.3d 1185, 1990 (8th Cir. 1999) ("[W]hen the material facts are not in dispute and the denial of summary judgment is based on the interpretation of a purely legal question, such a decision is appealable after a final judgment."). Then, in *Lopez v. Tyson Foods, Inc*., 690 F.3d 869 (8th Cir. 2012), another panel clarified that, based on the prior panel rule, *Metropolitan Life* is the controlling decision—not *McGill*. *Id.* at 875. Finally, in *New York Marine & General Insurance Co. v. Continental Cement Co., LLC*, 761 F.3d 830 (8th Cir. 2014), the Eighth Circuit affirmed its rejection in *Lopez* of the law and fact distinction, but then carved out a special exception for preliminary issues such as the choice of law to be applied. *Id.* at 838 (concluding that a choice of law question raised at summary judgment but not preserved in a Rule 50 motion can be reviewed on appeal).

distinguishing between questions of law and fact in the context of whether a Rule 50 motion was required is problematic because the Federal Rules of Civil Procedure do not require district courts to set out their reasons for denying summary judgment. *Chesapeake*, 51 F.3d at 1235. The court, thus, declined to "create a new jurisprudence" in which district courts would be obligated to "bifurcate[e] the legal standards and factual conclusions supporting their decisions denying summary judgment." *Id.* This may have been a legitimate concern in 1995 when the Fourth Circuit decided *Chesapeake*. But the 2010 amendments to Rule 56 added a requirement that the district court "state on the record the reasons for granting or denying the [summary judgment] motion." FED. R. CIV. P. 56(a); *see also id.* advisory committee's note to 2010 amendments ("[A] statement of reasons can facilitate an appeal or subsequent trial-court proceedings."). District courts, therefore, are now obligated to specify the conclusions of law and findings of fact underlying their summary-judgment decisions. Because district courts are required already to set out the factual findings and legal conclusions embedded in their summary-judgment decisions, this Court would not add any burden to the district courts by requiring appellate courts to determine whether a Rule 50 motion was required to preserve a question for appeal.

At the appellate-court level, it is not arduous for courts of appeals to untangle questions of law from questions of fact. Courts of appeals do this already in every case when establishing the proper standard of review. *See, e.g.*, *United States v. Simmons*, 587 F.3d 348, 353 (6th Cir. 2009) ("[W]e first must determine what standard of review to apply to these claims."); *accord Chess v. Dovey*, 790 F.3d 961, 964 (9th Cir. 2015);

In re Wellcare Health Plans, Inc., 754 F.3d 1234, 1237 (11th Cir. 2014). It, thus, would not add any burden to the courts of appeals to require them to determine whether a Rule 50 motion was required to preserve the question before them—i.e., to analyze whether the question is one of law or fact—because the courts already conduct this analysis in determining the standard of review.

Requiring courts of appeals to distinguish between questions of law and those of fact in summary-judgment denials is nothing new. This Court, for example, requires courts of appeals to separate questions of law from fact when reviewing denials of summary judgment on qualified-immunity claims. When reviewing summary-judgment denials of qualified immunity, courts of appeals must determine whether the denial was based on the district court's finding that genuine issues of material fact required a trial or its legal conclusion that the moving party did not warrant judgment as a matter of law under the undisputed facts. *Johnson v. Jones*, 515 U.S. 304, 319 (1995). The latter is reviewable, whereas the former is not. *Id.* The petitioners in *Johnson* raised the same argument that the minority of courts of appeals employ to reject drawing a distinction between questions of law and those of fact: They argued that courts of appeals would have "great difficulty" separating the reviewable portions of the district court's denial of summary judgment from the nonreviewable portions. *Id.* This Court acknowledged that this could be a problem when the district court does not specify its reasons for denying summary judgment but concluded that this potential problem was "not serious enough to lead [the Court] to a different conclusion." *Id.*

Again, the 2010 amendments to Rule 56 added a requirement that the district court specify the reasons behind its summary-judgment decision. *See* FED. R. CIV. P. 56(a); *see also id.* advisory committee's note to 2010 amendments. Therefore, today, there is no longer any risk that the district court will "deny summary judgment motions without indicating their reasons for doing so," *Johnson*, 515 U.S. at 319, and even if that situation occurred, the court of appeals may remand the case, instructing the district court to give a more detailed explanation of its summary-judgment decision. *See, e.g.*, *Robbins v. Becker*, 715 F.3d 691, 695 (8th Cir. 2013) (remanding with instructions to provide a "more detailed consideration and explanation" concerning district court's denial of summary judgment). This Court concluded in *Johnson* that it is not overly difficult to require courts of appeals to distinguish between questions of law and fact in summary-judgment denials notwithstanding the problem that would exist if district courts failed to specify the reasons for their decisions. Now that the 2010 Amendments to Rule 56 have eliminated that problem, this is an easy case for this Court to affirm based on its holding in *Johnson* that it is not too arduous for courts of appeals to distinguish between questions of law and fact.

Summary-judgment rulings, moreover, are not all inherently decisions of law. The Fourth Circuit explained that it had also rejected a distinction between questions of law and fact because, it asserted, "all summary judgment decisions are legal decisions in that they do not rest on disputed facts." *Chesapeake*, 51 F.3d at 1235. But that is not correct. While summary judgment motions *that are granted* necessarily rest on undisputed facts, *see* FED. R. CIV. P. 56(a) ("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."), summary judgment motions *that are denied* often involve disputes over material facts, which is why summary judgment was improper in the first place. *See Ortiz v. Jordan*, 562 U.S. 180, 188 (2011) ("Summary judgment must be denied when the court of first instance determines that a 'genuine dispute as to [a] material fact' precludes immediate entry of judgment as a matter of law."). Summary-judgment decisions are all legal decisions only in the sense that they determine whether the moving party warrants judgment as a matter of law. Summary-judgment denials, however, often turn on whether a trial is required to resolve genuine disputes of material fact. It is, therefore, incorrect to regard all summary-judgment decisions as inherently "legal decisions."

In sum, the courts of appeals that have determined that a Rule 50 motion is required to preserve even purely legal questions have done so based on the notion that it is difficult to distinguish questions of law from those of fact. Not only are district courts already required by Rule 56 to specify the factual findings and legal conclusions underlying their summary-judgment decisions, but courts of appeals are also already required to untangle questions of law from fact when they determine the standard of review for the claims before them. It, therefore, burdens neither the district courts nor the appellate courts to require them to distinguish between questions of law and fact in the context of Rule 50 motions. This Court has made clear, moreover, that it is perfectly comfortable asking courts of appeals to distinguish between questions of law and fact in the context of summary-judgment denials

because it already requires them to do so in summary-judgment denials of qualified immunity. The burdens that the minority of courts of appeals have identified to rationalize requiring litigants to file Rule 50 motions to preserve even purely legal questions that were resolved at summary judgment are, therefore, illusory.

D. *ORTIZ V. JORDAN*, 562 U.S. 180 (2011), DID NOT ALTER THE GENERAL RULE THAT INTERLOCUTORY ORDERS AFFECTING THE FINAL JUDGMENT MERGE INTO THAT JUDGMENT AND THEREFORE ARE REVIEWABLE ON APPEAL.

Despite the contentions of the dissenting opinion below, this Court's holding in *Ortiz v. Jordan*, 562 U.S. 180 (2011), does not foreclose review of summary-judgment denials that are based on questions of law. *See* Pet. App. 17a (Despard, J., dissenting) (suggesting that *Ortiz* stands for the proposition that *no* summary-judgment denial may be appealed after a jury trial). *Ortiz*, to be sure, says that a party may not appeal an order denying summary judgment after a full trial on the merits. *Id.* at 184. But *Ortiz's* reasoning applies only to questions of fact, and the *Ortiz* Court expressly reserved the issue of whether its reasoning would apply to pure questions of law. *See id.* at 190 ("We need not address this argument, for the [respondents'] claims of qualified immunity hardly present 'purely legal' issues capable of resolution 'with reference only to undisputed facts.'").

In *Ortiz*, the court of appeals had reviewed the district court's summary-judgment order denying respondents' qualified-immunity defense based on the existence of genuine issues of material fact. *Id.* at 186–87. This Court explained that the court of appeals had erred by reviewing this summary-judgment denial because "once [the] case proceed[ed] to trial, the full record developed in court supersede[d]

the record existing at the time of the summary-judgment motion" and, thus, the qualified-immunity defense had to be "evaluated in the light of the character and quality of the evidence received in court." *Id.* at 184. Because the respondents had failed to renew in a post-trial Rule 50(b) motion their objections to the sufficiency of the evidence, this Court explained, the court of appeals had "no warrant to reject the appraisal of the evidence by 'the judge who saw and heard the witnesses and ha[d] the feel of the case which no appellate printed transcript can impart.'" *Id.* at 185 (quoting *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 216 (1947)); *see also id.* at 189 ("Absent [a Rule 50] motion, we have repeatedly held, an appellate court is 'powerless' to review the sufficiency of the evidence after trial." (quoting *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 405 (2006))).

Ortiz's rationale for why the court of appeals in that case erred is, therefore, limited to summary-judgment denials based on the existence of genuine issues of material fact. Pure questions of law, in contrast, are not affected by the evidence submitted at trial and will pose "precisely the same question" before, during, and after trial. *Feld v. Feld*, 688 F.3d 779, 782 (D.C. Cir. 2012). This Court, moreover, expressly declined to reach the respondents' argument that the district court's summary-judgment decision was reviewable because their qualified-immunity defense presented "purely legal" issues: As this Court observed, "[w]hat was controverted [at summary judgment], instead, were the facts that could render [respondents] answerable for crossing a constitutional line." *Id.* at 190–91. Because *Ortiz*'s reasoning applies only to questions of fact and this Court expressly declined

to extend its holding to pure questions of law, the Court's broad statement in *Ortiz* that denials of summary judgment are not reviewable after a full trial on the merits is limited to summary-judgment denials based on the existence of genuine disputes of material fact. *See Williams v. Gaye*, 895 U.S. 1106, 1122 (9th Cir. 2018) ("*Ortiz* does not foreclose reviews of denials of summary judgment after trial, so long as the issues presented are purely legal.").

To read *Ortiz* as standing for the proposition that *no* denial of summary judgment is appealable after a full trial on the merits would be a drastic departure from the general principle that interlocutory orders that affect the final judgment merge into that judgment and are therefore appealable. *See Pineda v. Ford Motor Co.*, 520 F.3d 237, 243 (3d Cir. 2008) ("Under the 'merger rule,' prior interlocutory orders . . . merge with the final judgment in a case, and the interlocutory orders (to the extent that they affect the final judgment) may be reviewed on appeal from the final order."). A summary-judgment denial based on a pure question of law that goes to the merits of the case merges into the final judgment and is appealable from that judgment. *See Santaella v. Metro. Life Ins. Co.*, 123 F.3d 456, 460–61 (7th Cir. 1997) ("The court's denial of summary judgment to the plaintiffs," in a case concerning the "interpretation of insurance contracts [which] is a matter of law," has "merged into the final judgment and is therefore appealable as well."); *see also United Fire & Cas. Co. v. Titan Contractors Serv., Inc.*, 751 F.3d 880, 886–87 (8th Cir. 2014) (observing that the "interpretation of an insurance policy is a question of law" and reviewing the district court's denial of summary judgment based on its interpretation of a policy

because the denial had "merge[d] into" the final judgment). A summary judgment denial based on a question of fact, in contrast, is mooted by the subsequent trial, which is why the court of appeals is "'powerless' to review the sufficiency of the evidence after trial" absent a Rule 50 motion. *See Ortiz*, 562 U.S. at 189 (quoting *Unitherm*, 546 U.S. at 405); *see also Feld*, 688 F.3d at 782 ("In other words, once evidence is presented at trial, any challenge to evidentiary sufficiency at summary judgment becomes moot."). Despite its broad language, *Ortiz* stands for the unremarkable proposition that denials of summary judgment based on the existence of genuine disputes of material fact are not appealable after a full trial on the merits. To read *Ortiz* otherwise would be a sharp departure from general merger principles.

In any event, as Justice Thomas's concurring opinion in *Ortiz* observed, this Court could have resolved the case by simply saying that the court of appeals had erred by reviewing the district court's order denying summary judgment in these circumstances. *Ortiz*, 562 U.S. at 193 (Thomas, J., concurring). According to Justice Thomas, who was joined by Justices Scalia and Kennedy, it was "unwise" for the Court to discuss Rule 50 because it was not addressed at any length until the respondents' response brief and the court of appeals did not address it. *Id.* at 194. Thus, because *Ortiz* could have been resolved without reference to Rule 50, any discussion concerning that rule is dicta and not binding on this Court today. *See Williams*, 895 F.3d at 1122 (referring to *Ortiz's* discussion of Rule 50 as "dicta").

In sum, if taken literally, the *Ortiz* Court's broad statement that summary-judgment denials are not reviewable after a full trial on the merits would be a sharp

departure from general merger principles. The *Ortiz* Court's reasoning, moreover, applies only to summary-judgment denials based on the existence of genuine disputes of material fact. And because the *Ortiz* Court expressly declined to consider whether its holding would extend to summary-judgment denials based on pure conclusions of law, its holding is limited to summary-judgement denials based on disputes of material fact. *Ortiz*, therefore, does not foreclose appellate review of the district court's summary-judgment denial of Kill-a-Byte's purely legal due-process argument. *See Williams*, 895 U.S. at 1122 ("*Ortiz* does not foreclose reviews of denials of summary judgment after trial, so long as the issues presented are purely legal."). This Court should affirm the Thirteenth Circuit's conclusion that Kill-a-Byte was not required to re-raise in a Rule 50 motion its purely legal due-process argument from summary judgment to preserve it for appellate review.

II. NEW TEJAS'S PUBLIC-NUISANCE LAW AND THE DISTRICT COURT'S $600 MILLION DAMAGES AWARD UNDER IT BOTH VIOLATE DUE PROCESS.

New Tejas's common law violates due process by imposing tort liability for a nuisance without requiring the defendant to have been its but-for cause and without requiring an apportionment of damages. The district court's $600 million award also violates due process because it allows the City—a contributing plaintiff—to recover from Kill-a-Byte the full value of abating an indivisible nuisance and, in the event the nuisance is divisible, the court did not consider how much of the nuisance Kill-a-Byte had actually caused, making the award excessively punitive.

The Due Process Clause of the Fourteenth Amendment protects individuals from the state depriving them of property without due process of law. *See* U.S. CONST.

amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law."). Due process embodies two distinct concepts: substantive due process and procedural due process. *United States v. Salerno*, 481 U.S. 739, 746 (1987). Substantive due process concerns the imposition of unfair laws and conduct that "shocks the conscience," *id.*, and it requires that a party have notice of which conduct is prohibited and which penalties may be imposed on it for engaging in such conduct, *F.C.C. v. Fox Television Stations, Inc.,* 567 U.S. 239, 253 (2012). Substantive due process also shields a party from arbitrary and excessive penalties. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). A party lacks notice of prohibited conduct and potential penalties when the laws proscribing them are the result of an unexpected change in the law which is then retroactively applied. *See Rogers v. Tennessee*, 532 U.S. 451, 457 (2001). And a penalty is excessive when it is greater than necessary to serve its purpose. *See State Farm*, 538 U.S. at 417. Procedural due process, by contrast, ensures that laws are imposed and enforced in a fair manner. *Id.*; *see also Rochin v. California*, 342 U.S. 165, 169 (1952). Procedural due process includes process-based protections such as receiving notice, a hearing, and the chance to present defenses. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993).

New Tejas's public-nuisance law and the district court's damages award under it violate both substantive and procedural due process. The law violates substantive due process by imposing tort liability on a defendant for a nuisance without requiring the defendant to be the but-for cause of the nuisance. The district court's $600 million

damages award under the law also violates substantive due process because it does not require damages to be apportioned and it is excessively punitive. And even if the substantive infirmities of the law alone do not violate due process, the law certainly violates due process when its procedural infirmities, such as its lack of advance notice of its scope of liability and its lack of a statute of limitations, are considered as well.

A. Retroactively applying New Tejas's public-nuisance law violates due process because the law unexpectedly deviates from prior law by holding parties liable for a nuisance even when they were not its but-for cause.

Retroactively applying New Tejas's public-nuisance law violates due process because the law's lack of a but-for causation requirement is an unexpected deviation from prior law. Retroactive application of a law contravenes due process when the law is "unexcepted and indefensible by reference to the law which had been expressed prior to the conduct [at] issue." *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001). While first recognized in criminal cases, *id.* at 459, this retroactivity protection also applies to civil cases, *Karem v. Trump*, 960 F.3d 656, 666 (D.C. Cir. 2020). Here, retroactive application of New Tejas's new common-law rule that a party may be held liable for a public nuisance—even when it was not a but-for cause of the nuisance—violates due process because the law's lack of a but-for-causation requirement is both unexpected and indefensible. Indeed, this new common-law rule directly contradicts the common-law requirements collected in the Restatement (Second) and Restatement (Third) of Torts and the tort law of other states. And there is no precedent in New Tejas, either, for assigning public-nuisance liability without but-for causation.

To impose liability on a party under a state-law rule that directly conflicts with the common law, the party must have been on notice of the upcoming change in the law. *See, e.g.*, *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 625 (7th Cir. 2014). Courts apply three steps to determine whether a party was on notice of such a change in the law: They (1) identify the law that the plaintiff is seeking to have applied, (2) identify the general state of the law in the relevant time period in which the defendant's conduct occurred, and then (3) compare the law the plaintiff is seeking to have applied to the general state of the law during the relevant time period. *See Karem*, 960 F.3d at 660, 666–67. If the new law identified at step one represents an unexpected and indefensible departure from prior law, imposing the new law retroactively on the defendant violates due process. *See id.* at 667.

In *Karem v. Trump*, for example, the D.C. Circuit applied this three-step retroactivity analysis in determining that a journalist, Karem, was likely to succeed on his claim that the White House had violated due process by suspending his press pass. *Id.* at 665–67. The court first identified the White House's reason for suspending Karem's pass: He violated a previously unarticulated "widely shared understanding" of professional conduct at a White House press event. *Id.* at 662. The court then considered what conduct had warranted suspending a White House press pass *prior to* Karem's unprofessional conduct. *Id.* 666–67. Prior to the incident involving Karem, journalists had engaged in similar conduct without any punishment at all. *Id.* at 667. Indeed, no journalist had ever had his White House press pass "revoked or even briefly suspended . . . based on [his] unprofessional conduct at a White House press

event." *Id.* at 659. Because similar conduct had never been punished previously, the court held that Karem had lacked advanced notice that his behavior opened him up to sanctions. *Id.* at 667. The D.C. Circuit observed that the White House is always free to promulgate a new rule, but when its new rule is unexpected, its retroactive enforcement violates due process. *Id.*

Here, the first step of the analysis is straightforward. The City is seeking to retroactively apply New Tejas's novel common-law tort rule against Kill-a-Byte, even though the new rule provides that Kill-a-Byte may be held liable for a public nuisance that it is not the but-for cause of. Pet. App. 9a. The second step of the analysis requires this Court to identify the state of New Tejas tort law between 2003 and 2013, which is when Kill-a-Byte's challenged conduct occurred—i.e., when Kill-a-Byte distributed Lightyear. Pet. App. 2a. And it is undisputed that there is no New Tejas precedent from those years assigning tort liability to a defendant in the absence of but-for causation. Pet. App. 26a. There is no such precedent, either, in the Restatement (Second) and Restatement (Third) of Torts and in the common law of other states.

For Kill-a-Byte to have received fair warning of this novel change in New Tejas's common law of public nuisance, due process requires the change to have been part of a trending development in the common law. *Rogers*, 532 U.S. at 464. But there is no trend abolishing the requirement of but-for causation for tort liability. Quite the opposite, in fact. The Restatement (Second) of Torts, for example, requires but-for causation to impose tort liability on a party. Although the district court below cherry-picked language from the Restatement to conclude that but-for causation is not

always required, *see* Pet. App. 30a–31a, the Restatement notes—explicitly—that a finding of but-for causation is "necessary" to impose tort liability for wrongful conduct. RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (AM. L. INST. 1965) (explaining that legal cause requires that the "harm would not have occurred" without the defendant's conduct). The district court's conclusion that but-for causation is not required stems from the substantial-factor language in section 431. There, the Restatement states that a defendant's conduct "must also be a substantial factor in bringing about the plaintiff's harm." *Id.* As the Restatement makes clear, it is "necessary" that the defendant be the but-for cause of the plaintiff's harm. *Id.* But that is not sufficient: The defendant "must *also* be a substantial factor in bringing about the plaintiff's harm." *Id.* (emphasis added). Taken in context, it is clear that the Restatement requires the defendant to be both a but-for cause of the plaintiff's harm and a substantial factor in bringing it about. The district court, thus, erroneously concluded that the Restatement (Second) of Torts does not require but-for causation for the imposition of tort liability.

This understanding of the Restatement (Second) of Torts is bolstered by the Restatement (Third) of Torts. The Restatement (Third) of Torts requires "tortious conduct" to be "a factual cause of harm" for liability to be imposed. RESTATEMENT (THIRD) OF TORTS § 26 (AM. L. INST. 2010). That is to say, liability can only be imposed "when the harm would not have occurred absent the [defendant's] conduct." *Id.* The Restatement (Third) of Torts, moreover, removed the substantial-factor language that led the district court here to conclude that but-for causation is not required to

impose tort liability—and it did so precisely because some courts had misread the Restatement (Second) of Torts as requiring only substantial-factor causation. *Id.* cmt. j ("The element that must be established . . . is the but-for or necessary condition standard of this Section," not the "substantial factor [language, which] has not . . . withstood the test of time, as it has proved confusing and been misused."). In light of this clarification in the Restatement (Third) of Torts, the common law was trending in the *opposite* direction, with jurisdictions correcting their previous misinterpretations of the Restatement (Second) of Torts. *See, e.g., June v. Union-Carbide Corp.*, 577 F.3d 1234, 1239 (10th Cir. 2009) (rejecting a formulation of the substantial-factor test that did not require but-for causation); *Reigel v. SavaSenior Care LLC*, 292 P.2d 977, 987 (Colo. Ct. App. 2011) (refusing to apply precedent premised on this incorrect reading of the Restatement (Second) of Torts). This trend, moreover, is supported by the law in a majority of jurisdictions. *See Gibson*, 760 F.3d at 625 ("[M]ost states for most types of claims continue to apply a strict causation-in-fact requirement . . . .").

Beyond the general trend of requiring but-for causation as set forth in the Restatement (Second) of Torts and the Restatement (Third) of Torts, major cases addressing but-for causation before and during the relevant time period here—from 2003 to 2013—also required but-for causation. In a major early tort case concerning asbestos exposure, for example, the trial court had required the plaintiffs to prove only substantial-factor causation because the case involved multiple defendants who had manufactured asbestos. *Borel v. Fireboard Paper Prods. Corp.*, 493 F.2d 1076,

1094 (5th Cir. 1973). But on review the Fifth Circuit held that no defendant could be held liable for the plaintiff's injuries unless the record showed that the defendant was the "cause in fact of some injury" to the plaintiff. *See id.* ("Having concluded that each defendant was the cause in fact of some injury to [plaintiff], we now come to the question of apportionment of damages.").

The Missouri Supreme Court similarly required but-for causation in the context of harms stemming from lead paint and, thus, rejected a nuisance theory of liability that did not require it. *See City of St. Louis v. Benjamin Moore & Co.,* 226 S.W.3d 110, 114 (Mo. 2007) ("Missouri public nuisance cases are in accord [with the Restatement (Second) of Torts] and require the plaintiff to show a causal link between the defendant and the alleged nuisance."); *see also Lee v. Chi. Transit Auth.*, 605 N.E.2d 493, 503 (Ill. 1992) (rejecting the plaintiff's theory of liability because the court could not conclude that plaintiff's injuries "would not have occurred without the defendant's failure" to warn of a danger). Another lead-paint case, *People v. ConAgra Grocery Products Co.,* noted as well that causation has two required elements for the imposition of tort liability, one of which is but-for causation. 227 Cal. Rptr. 3d 499, 545 (Cal. Ct. App. 2017).

Finally, even the lead-paint case relied on by the district court below, *Gibson v. American Cyanamid Co.*, concluded that "liability is far from automatic: the plaintiff still must prove that white carbonate lead pigment was the cause of the lead poisoning." 760 F.3d 600, 624 (7th Cir. 2014). In *Gibson*, the plaintiff advanced a theory of liability known as the "risk-contribution theory" where the plaintiff bears

the burden of making a prima facie showing that a manufacturer produced or marketed lead paint during his or her home's existence, and then the burden shifts to the manufacturer to prove that its paint was not used on the home. *Id.* at 606. The court in *Gibson* concluded that this theory of liability did not violate due process because the change in the causation requirement was foreseeable based on previous decisions applying this theory of liability. *Id.* at 609.

The district court below relied on *Gibson* to support its retroactive application of New Tejas's novel common-law public-nuisance rule, Pet. App. 28a, but this case is readily distinguishable from *Gibson*. In *Gibson*, the Seventh Circuit noted a changing body of products-liability law in the State of Wisconsin. 760 F.3d at 625. But here, there is no body of state law to rely on. Pet. App. 26a ("There is a dearth of New Tejas authority regarding the public nuisance cause of action . . . ."). With no state law to rely on, the only evidence for trends in common law are the Restatement (Second) of Torts, the Restatement (Third) of Torts, and caselaw from other states. And under the Restatements and caselaw, imposition of tort liability without a but-for causation requirement is wholly unexpected. Retroactive application of New Tejas's public-nuisance law, therefore, violates due process.

In light of the language contained in the Restatement (Second) of Torts, the clarification in the subsequent Restatement (Third) of Torts, and the widespread but-for causation requirement in other states, New Tejas's public-nuisance law's lack of a but-for causation requirement is wholly unexpected. Applying the third and final step of the analysis—i.e., comparing the state of the law during the relevant period

to the law the plaintiff is seeking to have applied—eliminating but-for causation is markedly different from the prior state of the common law, which overwhelmingly required but-for causation. Put differently, no one from 2003 to 2013 had fair warning that New Tejas's common law would be interpreted as allowing tort liability in the absence of but-for causation. Without fair warning, retroactively applying this change in the common law violates due process. *Rogers*, 532 U.S. at 457. Where, as here, there are no precedents applying a theory of public-nuisance liability without a but-for causation requirement, Kill-a-Byte could not have been on notice of this change in the law. Retroactive application of New Tejas's law, therefore, violates due process.

To be sure, New Tejas may be free to apply this change in its law prospectively. But due process forbids a retroactive application of unexpected developments in the common law. *Rogers*, 532 U.S. at 457. Because there was no authority putting Kill-a-Byte on notice that it could be subject to public-nuisance liability without being the but-for cause of the nuisance, this Court should affirm the Thirteenth Circuit's ruling that retroactive application of New Tejas's public-nuisance law violates due process.

B. THE DISTRICT COURT'S $600 MILLION DAMAGES AWARD AGAINST KILL-A-BYTE FOR THE FULL COST OF ABATING THE NUISANCE REPRESENTS A NOVEL AND UNFORESEEABLE SHIFT IN REMEDIAL LAW AND IS EXCESSIVELY PUNITIVE.

The district court's $600 million damages award violates due process by allowing the City—a contributing plaintiff—to recover the full value of abating the public nuisance in New Truro from Kill-a-Byte and, because no finding was ever made as to how much of the nuisance Kill-a-Byte caused, the award is excessively punitive. The Due Process Clause provides parties with two distinct protections from

judgments. First, the Due Process Clause requires notice of the severity of the punishment that the state may impose. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). Second, the Due Process Clause protects parties from arbitrary or excessive punishment. *Id.* A monetary judgment is excessive when it requires the defendant to pay for harms that he or she did not cause. *See Paroline v. United States*, 572 U.S. 434, 462 (2014) ("[D]efendants should be made liable for the consequences and gravity of their own conduct, not the conduct of others.").

The district court's $600 million abatement award violates both protections afforded by due process. First, requiring Kill-a-Byte to pay the full cost of abating the public nuisance in New Truro is yet another aggressive and unexpected deviation from the common-law principle of barring recovery for a nuisance where a plaintiff has contributed to it. Second, awarding the full costs of abatement where Kill-a-Byte is undisputedly only partially responsible for the nuisance constitutes an excessively punitive award. And regardless of whether the public nuisance was indivisible or divisible, the district court violated due process—either by permitting the City to recover from Kill-a-Byte for an indivisible harm the City itself had contributed to, or by requiring Kill-a-Byte to pay the full cost of a divisible harm that it did not fully cause.

1. *The City is barred from recovering from Kill-a-Byte because the City contributed to the public nuisance in New Truro.*

The City cannot recover from Kill-a-Byte for the public nuisance in New Truro because the City contributed to that nuisance. Under the Restatement (Second) of Torts, a plaintiff who contributed to the nuisance is barred from recovering from other

contributors. § 840E cmt. d ("[W]hen the plaintiff himself contributes to the nuisance . . . the plaintiff's own responsibility . . . will bar his recovery.") The general rule explained in the Restatement (Second) of Torts is that the harms resulting from a nuisance should be apportioned based on each party's contribution to the nuisance. § 840E cmt. b (explaining that "[w]hen the apportionment is made, each person contributing to the nuisance is subject to liability only for his own contribution"—"[h]e is not liable for that of others"). When a defendant has contributed to a nuisance, in other words, he is held liable "in proportion to [his] contribution." *Id.* This language reflects the maxim, "Only those losses proximately caused by unlawful conduct may be recovered." *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 918 (1982). There are some cases, however, where apportionment is impossible. Where multiple actors contribute to an indivisible harm, such as a public nuisance, then one of them may be held liable to the plaintiff for the entire harm. § 840E cmt. c. But where the plaintiff has contributed itself to a nuisance where apportionment is impossible, "his own responsibility" will bar his recovery. *Id.* cmt. d. The district court's $600 million damages award, therefore, unexpectedly deviates from common law by allowing a contributing plaintiff to recover the cost of abating a nuisance from a defendant. Here, because the City contributed to its own public nuisance, it is barred from recovering from Kill-a-Byte.

It is impossible to apportion responsibility for the public nuisance in the City of New Truro. The Restatement (Second) of Torts makes clear that apportionment is impossible where, as here, multiple actors contribute to an indivisible harm. *Id.* cmt.

c, d. A quintessential example of an indivisible harm, the Restatement notes, is when multiple actors pollute a stream, which poisons a farmer's cow. *Id.* cmt. c. There, as here, multiple actors contributed to a single problem resulting in a single harm, and there is thus no way to rationally apportion damages. The Restatement recognizes that in this situation, fairness requires each polluter to be held liable for the full value of their harm—i.e., the entire cost of the cow—so as not to insulate them from the effects of their contribution. *Id.* But when the plaintiff also contributes to the harm by polluting the stream, he cannot recover from any defendant. *Id.* cmt. d. Courts have long recognized this principle in the context of nuisances. *See, e.g.*, *C.W. Regan, Inc. v. Parsons*, 411 F.2d 1379, 1388 (4th Cir. 1969) (explaining in a case involving a collapsed tunnel that plaintiff can recover from defendant only "if plaintiff can show what part of the damage was caused by the actionable conduct of [defendant], in which [plaintiff] did not participate"); *see also Panther Coal Co. v. Looney*, 40 S.E.2d 298, 304 (Va. 1946) (explaining in a case involving a polluted stream that "[n]o person is entitled to recover from another for damages which have been occasioned by his own act or neglect").

Here, the City and Kill-a-Byte both contributed to the public nuisance in New Truro and, because the City contributed to the nuisance, it cannot recover from Kill-a-Byte. Assuming, for example, that Kill-a-Byte's distribution of Lightyear actually caused the undereducated male population in New Truro, the City also introduced undereducated males into the population by maintaining a low quality school system, Pet. App. 3a, and failing to mitigate additional education harms caused by a teachers'

strike in 2004, *id.* Similarly, assuming that Kill-a-Byte's distribution of Lightyear created a more violent male population and thus a higher crime rate, the City also contributed to a higher crime rate by cutting the budget of its police department and reducing the size of its police force. *See id.* And, finally, assuming that Kill-a-Byte's distribution of Lightyear created, as the City asserts, a male population with "diminished job skills and few employment prospects," Pet. App. 2a, the City contributed to this problem by maintaining a low quality school system and failing to keep and attract industry. See Pet. App. 3a (observing "numerous factory closings" in New Truro). The City and Kill-a-Byte, in other words, are at best two actors contributing to the same public nuisance. Thus, under the City's theory that Kill-a-Byte caused the public nuisance in New Truro, the City is barred from recovery because it contributed to the public nuisance as well. The district court's $600 million damages award violates due process because it allows the City—a contributing plaintiff—to recover the full value of abating the public nuisance from Kill-a-Byte, which is an unexpected deviation from the common law.

2. *Requiring Kill-a-Byte to pay the full cost of abatement where it is only partially responsible for the nuisance, and where the district court did not even try to apportion damages, constitutes an excessively punitive award.*

The district court's $600 million abatement award is excessively punitive because Kill-a-Byte is undisputedly only partially responsible for the public nuisance in New Truro and the district court did not even attempt to apportion damages. Regardless of whether this award is classified as legal or equitable, it violates due process. Abatement awards, like money damages, seek to rectify harms from a public

nuisance. *See Haynes v. Haas*, 463 P.3d 1109, 1118 (Haw. 2020) (explaining that abatement and money damages are both remedies available in a public-nuisance action, with the difference being that damages are retroactive in that they compensate plaintiffs for their harms, while abatement is prospective in that it seeks to lessen the current effects of the harms); *see also Forster v. Boss*, 97 F.3d 1127, 1130 (8th Cir. 1996) (treating an abatement-type award and money damages as both "ma[king] plaintiffs whole," and, thus, stating that allowing plaintiffs to "keep both . . . would be a double recovery"). And abatement awards, like damages awards, can be invalidated as excessive. *See New York v. Shore Realty Corp.*, 759 F.2d 1032, 1053 (2d Cir. 1985) ("[A]batement expenses may become prohibitive and disproportionate."). The abatement award here, moreover, is punitive—not compensatory—because it requires Kill-a-Byte to pay for something other than the concrete losses caused by its actions. *See Paroline*, 572 U.S. at 462. Finally, under the guideposts set out by this Court in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), the district court's $600 million abatement award is excessively punitive.

Though equitable in nature, an abatement award must stay within the confines governed by due process. Abatement should go no further than is required under the circumstances of each case. *See Donley v. Boettcher*, 255 N.W.2d 574, 579 (Wis. 1977) (explaining that "abatement is limited to the necessities of the case" and that this "general principle is equally applicable in prescribing that courts can go no further than is necessary"). Because abatement is limited by what the circumstances of the case require, it can be considered excessive—and, therefore, punitive—when it

goes further than necessary. *See Russland Enters., Inc. v. City of Gretna*, 727 So.2d 1223, 1228 (La. Ct. App. 1999) (classifying the abatement at issue as "punitive in nature"). Thus, contrary to the holding of the district court, Pet. App. 31a, this Court's punitive damages jurisprudence applies to this case because an abatement award, though equitable in nature, is still subject to due-process limitations.

The district court's $600 million damages award is punitive because it is unrelated to the harm that Kill-a-Byte actually caused. Compensatory damages are those meant to address the concrete losses which occur as a result of a party's culpable conduct. *State Farm*, 538 U.S. at 416. Punitive damages, in contrast, are "aimed at deterrence and retribution." *Id.* Damages awards become punitive rather than compensatory when they go beyond redressing the harm that the party actually caused. *See id.* And a punitive award violates due process when it is "grossly excessive or arbitrary." *Id.*; *see also Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 434 (2001) ("The Due Process Clause of its own force also prohibits the States from imposing grossly excessive punishments on tortfeasors.").

The district court's $600 million damages award is punitive rather than compensatory because the district court never made a finding as to how much of the public nuisance Kill-a-Byte actually caused. It is undisputed that Kill-a-Byte was not fully responsible for the public nuisance in New Truro: Kill-a-Byte, for example, did not provide the City with low-quality schools, underfund its police department, or fail to keep and attract industry—the City did those things. Pet. App. 3a–4a. But the district court nonetheless imposed the full cost of abating the nuisance of the City's

general malaise on Kill-a-Byte alone. Pet. App. 4a. By calling upon Kill-a-Byte to pay for losses it did not cause, the court's award is punitive rather than compensatory. *See State Farm*, 538 U.S. at 416.

Having established that the district court's $600 million abatement award is punitive, it must be evaluated under the test for determining whether a punitive-damages award violates due process. This Court has provided three guideposts for determining whether a punitive-damages award is excessive and thus violates due process: "(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 the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 418. Of these three guideposts, the first is considered the most important indication of a reasonable award, and it turns on whether the harm was physical or economic, intentional or accidental, and repeated or isolated in occurrence. *Id.* The second guidepost, though this Court has not adopted a specific formula, requires that the award not exceed a "single-digit ratio between punitive and compensatory damages." *See id.* at 425 (noting that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"); *see also BMW of N. Am. v. Gore*, 517 U.S. 559, 581 (1996) (observing that the Court has considered punitive damages of "more than four times the amount of compensatory damages" as close to the constitutional limit (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23–24 (1991))). Finally, the third guidepost is

inapplicable here due to the lack of any comparable cases applying New Tejas's common law of public nuisance. *See* Pet. App. 26a ("There is a dearth of New Tejas authority regarding the public nuisance cause of action . . . ."); *see also State Farm*, 538 U.S. at 428 (limiting a canvassing of "comparable cases" to the state where the case originated).

The first—and weightiest—guidepost weighs against the constitutionality of the district court's punitive award. There is no reprehensible conduct here warranting punishment. Kill-a-Byte violated no law, federal or state, in distributing Lightyear. Pet. App. 2a. Kill-a-Byte did not cause any physical harm. Kill-a-Byte did not intentionally create dangerous conditions in New Truro by distributing the game. Pet. App. 25a n.4 (explaining that the City does not argue that Kill-a-Byte intentionally created dangerous conditions in New Truro). Kill-a-Byte, therefore, committed no reprehensible conduct supporting an award of punitive damages. *See State Farm*, 538 U.S. at 425 (instructing courts to determine the reprehensibility of conduct by considering whether "the harm caused was physical as opposed to economic," "reckless," "intentional," or "involved repeated actions.").

The second guidepost also weighs against the constitutionality of the district court's punitive award. There are no compensatory damages here to create a ratio of punitive damages to compensatory damages. All of the costs sought by the city are prospective in nature, intending to repair harm rather than compensate for harm. Pet. App. 25a–26a ("The City seeks money from Kill-a-Byte 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."). To the extent that the $600 million damages award is intended to compensate for a concrete loss, this award is excessive under the second guidepost because the City made no attempt to identify the harms specifically attributable to Kill-a-Byte. Pet. App. 4a. Without knowing how much harm Kill-a-Byte *actually* caused, there is no way for this Court to formulate a ratio of punitive damages to compensatory damages. The award, therefore, is excessive because the ratio of punitive damages to compensatory damages is effectively $600 million to zero. This ratio of $600 million to zero grossly exceeds the permissible constitutional boundaries of a punitive-damages award. *See State Farm*, 538 U.S. at 425 (instructing that a punitive-damages award should not exceed a "single-digit ratio between punitive and compensatory damages"); *see also Gore*, 517 U.S. at 581 (observing that the Court has considered punitive-damages awards of "more than four times the amount of compensatory damages" as close to the constitutional limit (quoting *Haslip*, 499 U.S. at 23–24)).

The district court's $600 million abatement award is excessively punitive because it required Kill-a-Byte to pay for harms that it did not actually cause. According to this Court's guideposts in *State Farm*, this punitive award is excessive because Kill-a-Byte committed no reprehensible acts and the award is unrelated to any compensatory damages that Kill-a-Byte was responsible for. The district court's abatement award, accordingly, violates due process. This Court should affirm the

Thirteenth Circuit's holding that the district court's $600 million abatement award is "grossly excessive." *See* Pet. App. 13a–14a.

C. TAKEN TOGETHER, RETROACTIVELY IMPOSING TORT LIABILITY WITHOUT REQUIRING BUT-FOR CAUSATION AND WITHOUT APPORTIONING DAMAGES VIOLATES DUE PROCESS BECAUSE IT IS FUNDAMENTALLY UNFAIR.

Even if neither the unexpected lack of a but-for causation requirement nor the excessively punitive award on their own violate due process, the two considered together paint a picture of tort litigation that treated Kill-a-Byte in a fundamentally unfair manner. Courts have the power to review laws to assure fairness to parties. *Rochin v. California*, 342 U.S. 165, 169 (1952). Where a law is so fundamentally unfair that it "offends canons of decency and fairness" codified by the Due Process Clause, a court may intervene to prevent this unconstitutional action. *Id.; see also Hem v. Maurer*, 458 F.3d 1185, 1200 (10th Cir. 2006) (refusing to retroactively apply a statute due to "familiar considerations of fair notice, reasonable reliance, and settled expectations" (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994))). New Tejas's public-nuisance law's lack of a but-for causation requirement, lack of a statute of limitations, and lack of any requirement to apportion liability combine to create a system of public-nuisance law so fundamentally unfair that it violates due process.

Armed with no burden to prove but-for causation and the ability to receive full abatement awards from any defendant who played a substantial role in creating the public nuisance, the district court's judgment, if it stands, provides cities in New Tejas with a one-stop shop to fund their public-benefit programs through

fundamentally unfair litigation. If the district court's decision is allowed to stand, unfairness will manifest itself in three ways. First, any actor can be held liable for the full cost of major harms as long as a jury finds that it was a "substantial factor" in creating the public nuisance. Second, cities are effectively absolved of any personal responsibility they bear for creating or perpetuating their public-health crises. Third, no action—no matter how remote in time—is safe from retroactive nuisance liability. These three results together create a piggy bank for cities in search of funds.

If this decision is allowed to stand, no business or person in New Tejas is safe from retroactive litigation. As noted in the district court's opinion, there is no statute of limitations on claims concerning an existing public nuisance. Pet. App. 25a n.5. And all that is required to impose tort liability is a finding that the defendant was a "substantial factor" in causing plaintiff's harm. If this showing is made, then a city can recover the full cost of abatement—there is no requirement to apportion cost. *See* Pet. App. 4a (the district court did not even try to apportion costs); Pet. App. 5a (the full costs were deemed recoverable by the New Tejas Supreme Court). Any city in New Tejas, therefore, can use litigation to address a public nuisance with multiple causes as long as it can make a case that some actor, other than itself, substantially contributed to the nuisance.

And there is nothing a business or person can do to escape liability. As long as a public nuisance exists, and a business or person at some point substantially contributed to that nuisance, the business or person can be found liable for the entire cost of abating the nuisance. It does not matter when the business contributed to the

nuisance. It does not matter if the city made the nuisance worse. It does not matter if the city is responsible for the continuance of the nuisance. As long as the business or person at some point substantially contributed to it, the city can reach back in time and hold the business or person responsible for the entire cost of abatement.

While New Tejas's public-nuisance law's unexpected lack of a but-for causation requirement and the district court's excessively punitive abatement award alone each violate due process, taken together these issues certainly violate the notions of fundamental fairness enshrined in the Due Process Clause. This Court should, therefore, affirm the Thirteenth Circuit's conclusion that New Tejas's public-nuisance law and the district court's judgment under the law violate due process.

CONCLUSION

The Thirteenth Circuit correctly held that after the district court had rejected at summary judgment Kill-a-Byte's purely legal due-process challenge to New Tejas's public-nuisance law, Kill-a-Byte did not need to raise the challenge again in a Rule 50 motion at trial to preserve it for appellate review. The Thirteenth Circuit also correctly concluded that New Tejas's public-nuisance law violates due process by retroactively assigning to Kill-a-Byte full liability for the City's public nuisance without requiring Kill-a-Byte to have been its but-for cause and regardless of the amount of the nuisance that Kill-a-Byte actually caused. Finally, the Thirteenth Circuit correctly determined that the district court's $600 million abatement award is grossly excessive. This Court, accordingly, should affirm the judgment of the Thirteenth Circuit.

APPENDIX A

Federal Rule of Civil Procedure 50 provides, in pertinent part:

(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.