

No. 19-6236

IN THE

Supreme Court of the United States

OCTOBER TERM 2020

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 THE PETITIONER

NOVEMBER 16, 2020

TEAM NUMBER 39

COUNSEL FOR THE PETITIONER

QUESTIONS PRESENTED

- I. Whether a party that fails to move for judgment as a matter of law at trial properly preserves an argument that the district court rejected in denying summary judgment?
- II. Whether the Due Process Clause permits a state to impose its own civil liability scheme on a private party for distributing a violent video game that is later determined to create a public nuisance?

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PARTIES TO THE PROCEEDING

Petitioner City of New Truro is a city in the State of New Tejas.

Respondent Kill-a-Byte Software, Inc. is one of the largest and most successful software companies in the country and is the manufacturer, distributor, and seller of the Lightyear video game.

DECISIONS BELOW

The Thirteenth Circuit Court of Appeals' decision is not reported but is available at No. 18-5971 and reprinted at R. 1. The district court's decision is not reported but is available at No. 16-cv-5412 and reprinted at R. 19.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on March 21, 2020. The petition was timely filed and granted. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Respondent brought this action under the Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV § 1, claiming its rights were violated by the imposition of civil liability under the City's theory. Respondent raised this argument in a motion for summary judgment, governed under Fed. R. Civ. P. 56, which the district court unequivocally rejected, and contends it was not required to renew its argument at trial in a Rule 50 motion, pursuant to Fed. R. Civ. P. 50. The relevant Federal Rules of Civil Procedure are reprinted in the Appendix, and Fed. R. Civ. P. 50 is additionally set forth at R. 35–36.

Section 1 of the Fourteenth Amendment provides in pertinent part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV § 1.

INTRODUCTION

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no State “shall deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV § 1. The Due Process Clause represents those laws that are fundamental to fairness and ensures that laws are created through processes that are neither arbitrary nor capricious. *Id.* Of these processes, the procedural aspects of civil law are governed by the Federal Rules of Civil Procedure, which exist to ensure that a district judge gives full and just consideration of the reasons to render judgment in a party’s favor. Fed. R. Civ. P. 1. In particular, this Court has repeatedly and explicitly addressed the significance of Rule 50, Fed. R. Civ. P. 50, in securing the “power” of an appellate court to direct the district court to enter a contrary judgment. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 400–01 (2006) (quoting *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 218 (1947)). By requiring parties to renew their claims during and after trial, Rule 50 preserves the record for the appellate court. Fed. R. Civ. P. 1. Rather than find a legal exception where there is none, this Court should continue to protect that power.

The Supreme Court of the United States should reverse the decision of the Thirteenth Circuit Court of Appeals and recognize that Federal Rule of Civil Procedure 50 requires a party to move for judgment as a matter of law at trial to preserve an argument rejected by the district court in denying summary judgment. Respondents failure to follow this procedural requirement means the Thirteenth

Circuit lacked the proper jurisdiction to hear its due process claim; but if this Court reaches the merits of the due process claim, it should find that the Due Process Clause permits New Tejas to impose civil tort liability on Kill-a-Byte, Inc. for public nuisance.

STATEMENT OF THE CASE

A. The inception of Lightyear’s murder simulation.

In 2003, one of the largest and most successful companies in the country, Kill-a-Byte, Inc., (“Kill-a-Byte”) released its most successful game yet: Lightyear. R. at 25. The massive multiplayer, murder simulation enabled more than 1,000 players to battle each other to the death. *Id.* While the core game play remained essentially unchanged during its period of operation, the game underwent numerous changes and upgrades to its weaponry and the variety of possible deaths, all while staying true to its realism. R. at 21. Lightyear’s realistic features, the effects of which were gruesomely displayed on the victim, drew praise from critics and players alike for its realism. *Id.*

Lightyear put players in a violent yet realistic world in which they had to embody the mentality of “every man for himself” and, consequently, develop the reflex to “shoot first” in order to be the victorious last man standing. R. at 21–22. The physical effects, gore, and death scenes of Lightyear were so realistic that, arguably, the only unrealistic aspect of the game was the excessive amounts of blood and gore. R. at 21. Instead of permitting alliances, or even the possibility of

negotiation, the game nurtured antagonism and aggression between players through in-game “taunt” features that players could use against their victims. *Id.*

B. The rise of Lightyear’s popularity and New Truro’s crime rate.

More than 300 million individuals created player accounts during the decade in which Lightyear was in operation and distributed (from 2003 to 2013). R. at 2. Given its “free to play model,” not all of the Lightyear accounts turned into regular users, but many did. R. at 22. It is estimated that between 2010 and 2013, more than 50% of New Truro’s male residents between the ages of 15 and 25 played the game for at least 10 hours every week. R. at 2. The 10% most active of those “regulars” played the game in excess of 35 hours every week. R. at 22. The amount of time players spent on Lightyear was actively tracked and monitored by Kill-a-Byte, whose internal documents indicated its primary goal was to increase the amount of time players spent on the game, which correlated with in-game purchases. R. at 23.

During the decade of Lightyear’s operation, the City of New Truro’s violent crime rate exceeded the national average six-fold, amounting to a rate of 2,200 violent crimes per 100,000 residents. R. at 25. The property crime rate, also above the national average, reached 4,403 property crimes per 100,000 residents. *Id.* The City acknowledges that several factors contributed to its crime rate, including Lightyear. R. at 4.

C. New Truro sued to protect its residents.

Out of concern for the public safety of its residents, the City of New Truro sued Kill-a-Byte in 2016 for “absolute public nuisance” under New Tejas common law. R. at 2. The complaint alleged that by distributing Lightyear, Kill-a-Byte intentionally created conditions that substantially interfered with public safety. *Id.* Although the City originally filed suit in New Tejas state court, Kill-a-Byte removed the case to federal court based on diversity jurisdiction. R. at 3.

Following discovery, Kill-a-Byte moved for summary judgment on numerous grounds, including that the imposition of civil liability for the lawful distribution of a video game violates the Due Process Clause of the Fourteenth Amendment. *Id.* Kill-a-Byte’s motion was unequivocally rejected by the district court, which held that the imposition of civil liability under state law cannot violate the Due Process Clause. *Id.* The City did not receive or seek summary judgment on the issue, nor did Kill-a-Byte ever make a Rule 50 motion during or after trial. R at 5.

D. The jury found for the City of New Truro on liability and the bench awarded abatement.

At trial, the link and causes of the City’s unusually high crime rate were highly contested issues with expert testimony presented on both sides. R. at 3. Following a three-week trial, a jury returned a verdict in favor of the City on liability, finding that: (1) Kill-a-Byte intentionally distributed and operated Lightyear; (2) the increased crime rate constituted a substantial interference with a right to public safety; and (3) the widespread use of the Lightyear software was a substantial factor in the City’s increased crime rate. R at 4. Although it is

undisputed that Lightyear was not solely responsible for the City's crime rate, New Tejas law only requires that the Lightyear be a "substantial factor" in an increased crime rate which substantially interferes with the right to public safety. *Id.*

Following a two-week bench trial, the district court entered a judgment awarding the city more than \$600 million in abatement costs. *Id.*

E. Kill-a-Byte appealed to the Thirteenth Circuit Court of Appeals.

On appeal, the Thirteenth Circuit addressed the procedural issue of whether Kill-a-Byte forfeited its argument made in summary judgment – that the imposition of civil liability under the City's theory would violate the Due Process Clause of the Fourteenth Amendment – because they failed to raise the issue at trial in a Rule 50(a) motion and renew its post-judgment in a Rule 50(b) motion. R. at 5 (citing Fed. R. Civ. P. 50). The court held that a party need only renew a motion for summary judgment in a Rule 50 motion when the denial is based on genuine issues of fact rather than purely legal reasons. R. at 8. Based on this holding, the Thirteenth Circuit concluded that Kill-a-Byte preserved its summary judgment arguments because the question of due process is a purely legal question. R. at 9. On the merits, the Thirteenth Circuit found that the judgment below violated the Due Process Clause of the Fourteenth Amendment. *Id.* The City appealed, and this Court granted certiorari.

SUMMARY OF THE ARGUMENT

This Court should overturn the Thirteenth Circuit's ruling because Kill-a-Byte did not properly preserve its right to appeal the due process issue; thus, the

Thirteenth Circuit lacked jurisdiction to hear the due process issue in the first place. The Thirteenth Circuit determined that even though Kill-a-Byte did not submit a Rule 50 motion, they could still hear the case because the denial of the summary judgment motion was over a “purely legal” issue that the jury would never hear, and therefore did not matter within the context of the trial record. Relying on a “purely legal” exception to this appeals process defies the purpose behind the bright line rules for preserving the right to appeal a denied summary judgment motion. A “purely legal” exception creates confusion, a lack of uniformity, and the potential to circumvent the Federal Rules of Civil Procedure as well as the statute outlining appellate jurisdiction. Based on this invalid jurisdiction, this Court should not reach the merits of the due process claim.

However, if this Court decides to reach the merits of this case, it should find that Kill-a-Byte’s due process claim is without weight. When examining a state economic law, courts must give great deference to the state’s desires and only overturn a law for violation of substantive due process if the law is arbitrary and irrational. Under this standard, the City’s claim of public nuisance against Kill-a-Byte does not violate the Due Process Clause of the Fourteenth Amendment because the City’s development of this tort with regard to the sale of a product is not unprecedented, and Kill-a-Byte displayed the requisite intent to create conditions that caused the public nuisance. Furthermore, it is not fundamentally unfair or arbitrary for the City to hold Kill-a-Byte liable under a substantial factor causation scheme as the scheme is consistent with common law tort development

and the Restatement. Finally, the trial court's award of approximately \$600 million in abatement costs is consistent with due process principles because the trial court properly weighed all evidence and found that this amount in judgment is necessary to actually abate the nuisance. As such, this Court should overturn the Thirteenth Circuit and reinstate Kill-a-Byte's liability and judgment in the form of abatement.

ARGUMENT

I. THE THIRTEENTH CIRCUIT LACKED PROPER JURISDICTION TO HEAR KILL-A-BYTE'S DUE PROCESS CLAIM AS KILL-A-BYTE DID NOT PROPERLY PRESERVE ITS RIGHT TO APPEAL THIS ISSUE AFTER THE SUMMARY JUDGMENT STAGE THROUGH A RULE 50 MOTION.

This Court should not reach the merits of Kill-a-Byte's claim at all since Kill-a-Byte did not properly reserve its right to appeal its due process claim after the district court denied its claim at the summary judgment stage. The Thirteenth Circuit, in allowing Kill-a-Byte's appeal based on its due process argument, improperly characterized the appeal preservation process through a Rule 50 motion as a "meaningless formality." *Kill-a-Byte Software, Inc. v. City of New Truro*, No. 18-5971 at *7 (13th Cir. Mar. 21, 2020). Kill-a-Byte raised its due process argument prior to trial in a motion for summary judgment, which the district court denied. *Id.*, at *19. However, during trial, Kill-a-Byte did not renew its judgment in a Rule 50(a) motion and, subsequently, did not renew through a 50(b) motion. Abandoning the fact that a denial of summary judgment is not a "final decision" which would have merged into the court's ultimate judgment, Kill-a-Byte erroneously brought its appeal of the denial of summary judgment to the Thirteenth Circuit after trial. *See*

Ortiz v. Jordan, 562 U.S. 180, 188 (2011) (“The jurisdiction of a Court of Appeals under 28 U.S.C. § 1291 extends only to ‘appeals from . . . final decisions of the district courts.’”).

In ruling on this decision, the Thirteenth Circuit not only dismissed the purposes behind the appeals preservation process through a Rule 50 motion, but also erroneously followed the majority side of a circuit split¹ which creates a rule not found in the *Ortiz* decision and not supported by the reasoning in the *Ortiz* decision or the purpose behind the appeals preservation process. This discussion will focus on: (A) the valid procedural requirements behind the appeals preservation process for a denial of summary judgment that are supported by policy goals; and (B) the incorrect side of a current circuit split, which carves out a “purely legal” exception,

¹ See *Feld Motor Sports, Inc. v. Traxxas, L.P.*, 861 F.3d 591, 596 (5th Cir. 2017) (finding that in order to preserve an appeal for denial of a summary judgment motion, appellant must renew their argument through a Rule 50 motion); *Ji v. Bose Corp.*, 626 F.3d 116, 127 (1st Cir. 2010) (finding that the appeals process for a denial of summary judgment does not carve out an exception where the issue at the summary judgment stage is legal instead of factual); *Chesapeake Paper Prods. Co. v. Stone & Webster Eng’g Corp.*, 51 F.3d 1229, 1235 (4th Cir. 1995) (declining to create a “legal/factual dichotomy” in order to carve out an exception for appeals of summary judgment motion denials). See generally *New York Marine & Gen. Ins. Co. v. Cont’l Cement Co., LLC*, 761 F.3d 830, 838 (8th Cir. 2014) (rejecting “any ‘dichotomy[] between a summary judgment denied on factual grounds and one denied on legal grounds [as] both problematic and without merit.’”) (quoting *Metropolitan Life Insurance Co. v. Golden Triangle*, 121 F.3d 351, 355 (8th Cir.1997)). But see *Feld v. Feld*, 688 F.3d 779, 781-82 (D.C. Cir. 2012) (finding that there is an exception for “purely” legal claims brought during summary judgment); see also *Houskins v. Sheahan*, 549 F.3d 480, 489 (7th Cir. 2008); *Banuelos v. Constr. Laborers’ Trust Funds for S. Cal.*, 382 F.3d 897, 902-03 (9th Cir. 2004); *Rothstein v. Carriere*, 373 F.3d 275, 284 (2d Cir. 2004); *United Techs. Corp. v. Chromalloy Gas Turbine Corp.*, 189 F.3d 1338, 1344 (Fed. Cir. 1999); *McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997); *Ruyle v. Cont’l Oil Co.*, 44 F.3d 837, 841–42 (10th Cir. 1994).

erroneously taken by the Thirteenth Circuit. This Court should reverse the Thirteenth Circuit and declare that there is no exception to the appeals preservation process for summary judgment denials based on “purely legal” reasons.

A. Parties Must Preserve Their Appeal of a Denial of Summary Judgment Through a Rule 50 Motion Because There Is a Bright-Line Process for This Type of Appeal Laid Out in The Federal Rules of Civil Procedure, With Important Policy Goals Supporting This Process.

Parties invoke a Rule 56 Motion for Summary Judgment prior to trial when they believe a certain claim or defense presents “no genuine dispute as to any material fact,” entitling them to a judgment as a matter of law. Fed. R. Civ. P. 56. Summary judgment operates as a procedural check before trial, assisting with goals of the judiciary, including efficiency and expediency. *See* Paul S. Morin, *The New Temporal Prime Directive: Ortiz & the Death of Post-Trial Appeals from Pre-Trial Summary Judgment Denials*, 24 Regent U. L. Rev. 205, 211 (2012). When courts deny a motion for summary judgment, they do not preclude the issue from being raised again during trial. A court’s denial of summary judgment simply means that at the time of the motion, prior to trial, there is not enough evidence to support the moving party’s position that there is “no genuine dispute as to any material fact” on the matter. Therefore, a denial of summary judgment is not considered to be a “final judgment,” does not merge with the final judgment at the conclusion of the trial, and is not preserved on appeal. *See Ortiz*, 562 U.S. at 184. The reasoning is based on the nature of a denied summary judgment motion: that it “is merely a judge’s determination that genuine issues of material fact exist. It is not a [final] judgment, and does not foreclose trial on issues on which summary judgment was sought.”

Glaros v. H.H. Robertson Co., 797 F.2d 1564, 1573 (Fed. Cir. 1986). The appeals process is more than a “meaningless formality,” and this Section will discuss: (i) the bright-line procedural requirements for appealing a denial of summary judgment; (ii) the meaningful policy goals behind these requirements; and (iii) the constitutional roots for these rules.

- i. There are bright-line procedural requirements for appealing a denial of a summary judgment motion that Kill-a-Byte did not follow.*

In order to preserve an issue for appeal that the court denied prior to trial in a summary judgment motion, the party must raise the issue again through a Rule 50 judgment as a matter of law motion. Fed. R. Civ. P. 50. By raising this motion, both through a 50(a) and through a 50(b) motion as a renewed judgment as a matter of law motion at the close of trial, the Rules create the opportunity for the party to raise the issue again, but this time in light of the actual trial and circumstances. *See Chesapeake Paper Prods. Co.*, 51 F.3d at 1236. (“Reviewing a Rule 50 determination is preferable to reviewing a summary judgment decision because the Rule 50 decision is based on the complete trial record and not the incomplete pretrial record available at summary judgment.”). Raising the issue again at trial affords the party the chance to renew their motion in light of the evidence presented by both parties at trial.

Here, Kill-a-Byte did not raise its due process claim – which the district court denied in their summary judgment motion – in a Rule 50 motion during and after trial; therefore, Kill-a-Byte did not properly preserve its right to appeal this matter

to the Thirteenth Circuit. *Kill-a-Byte Software, Inc.*, No. 18-5971 at *5. Kill-a-Byte failed to conform with the procedural requirements for appealing a denial of summary judgment and should not be allowed to circumvent rules rooted in important policy considerations and constitutional principles.

ii. There are important policy considerations behind the procedural requirements that Kill-a-Byte disrupted by not utilizing the proper appeals channel.

By requiring a Rule 50 motion, the Rules of Civil Procedure allow district court judges to fully hear the reasons why a party might deserve judgment in their favor. *See generally Chesapeake Paper Prods. Co.*, 51 F.3d at 1236. This gives district court judges the opportunity to examine the issue again, this time with more evidence and a fuller set of facts to determine whether there really should be a resolution of a claim or defense as a matter of law. *See Kill-a-Byte Software, Inc. v. City of New Truro*, No. 18-5971 at *15 (13th Cir. Mar. 21, 2020) (Despard, J., dissenting) (“[The Rule 50 process] ensures that a district judge is fully apprised—and can fully consider—all of the reasons that a party might deserve judgment to be rendered in its favor.”). Requiring a Rule 50 motion is not an arbitrary rule or an antiquated procedural notion. Rather, it serves several policy goals, including efficiency, uniformity, and legitimacy. In terms of efficiency, appellate courts should not waste time hearing and determining issues that the lower court never had the chance to render a final judgment on or fully consider. A full trial is a long and expensive process, and parties should not waste the time of the court.

Likewise, the procedural requirements for appeals processes serve the goal of uniformity in the court system. Parties and their lawyers should have notice of when and how to properly address all claims, and the Federal Rules of Civil Procedure provide this guidance. Additionally, the Rules promote the goals of uniformity, and to construe them in different ways in different jurisdictions pushes against both their legitimacy and unifying goals. Parties should follow the specific process for appealing claims, as explicitly stated in the Rules. Lastly, and perhaps most importantly, adhering to the appeals process preserves both the legitimacy of trial-level courts as well as appellate courts. Where appeals are not the product of a final judgment, the legitimacy of the trial court is inherently at question. If the court of first instance does not get a chance to fully address and decide on every issue, how can an appellate court rightly have jurisdiction to decide upon the issue? *See* 28 U.S.C. § 1291. This legitimacy also invokes questions of fair trial concerns, namely that the jury should hear the full case, not a half-case where the party attempts to preserve a claim the district court previously denied under summary judgment without addressing the claim at all during the trial.

The Rules are clear in this area, and the policy goals assist in providing support for the process. Dismissing the Rule 50 motion process as a “meaningless formality” is not only harmful to the goals of the Rules but also minimizes an entire structure that federal courts rely on in determining the appeals process.

iii. There are constitutional roots in the procedural mechanisms Kill-a-Byte ignored in their appeals process.

There are procedural requirements for raising an appeal of this nature and those requirements are heavily influenced by policy goals of efficiency, uniformity, and legitimacy; but, perhaps most importantly, these requirements are a product of the United States Constitution. The Seventh Amendment Reexamination Clause holds that “no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.” U.S. Const. amend. XVII. This clause heavily influences the purpose behind Rule 50: mainly, that without a Rule 50 motion, “an appellate court [is] without power to direct the District Court to enter judgment contrary to the one it had permitted to stand.” *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 400-01 (2006) (quoting *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 218 (1947)). It is the responsibility of the party to maintain these procedural requirements in order to preserve their right to appeal after trial. These long held appellate practices are not, as the Thirteenth Circuit suggested, a “meaningless formality.” For the above reasons the Thirteenth Circuit should never have ruled on the merits of the due process argument because: the denial of summary judgment is not a final ruling by the district court, the Federal Rules of Civil Procedure lay out procedure for preserving an appeal which Kill-a-Byte did not follow, and these requirements find roots in policy goals as well as the Seventh Amendment.

B. The Requirements for Preserving The Right to Appeal Through a Rule 50 Motion Are Independent of Whether a Lower Court Denies a Motion for Summary Judgment Based on “Factual” or “Legal” Issues, and, Therefore, Kill-A-Byte Did Not Properly Preserve Its Right to Appeal Its Due Process Argument.

There is a process for appealing a denial of a summary judgment motion that Kill-a-Byte did not properly follow, and this should be the end of the inquiry.

However, certain courts have carved out an exception to this principle by stating that this process can be circumvented where the original issue raised was “purely legal” in nature. *See Feld*, 688 F.3d at 781. The Thirteenth Circuit below found in favor of this exception and ultimately held that Kill-a-Byte properly preserved its argument for appeal. *Kill-a-Byte Software, Inc.* No. 18-5971 at *7. This “purely legal” exception improperly characterizes the holding in the *Ortiz* case and is erroneously followed by a majority of circuits. This Section will discuss: (i) the parameters of the *Ortiz* holding that did not create a “purely legal” exception; and (ii) why finding such an exception would be harmful by causing confusion, a lack of uniformity, and potential circumvention of the Federal Rules of Civil Procedure.

- i. The Ortiz holding does not create an exception for “purely legal” denied motions for summary judgment that are not later preserved in trial.*

The contention at the heart of the circuit split concerning a Rule 50 motion after denial of summary judgement is whether the *Ortiz* holding only pertained to summary judgment motions which were based on a “purely legal” issue. *See Feld*, 688 F.3d at 781-82 (“But the Supreme Court has left open the question whether the same rule applies to preserving ‘purely legal’ arguments that were rejected at

summary judgment.”). The reasoning in the *Ortiz* decision does not leave room for this legal issue exception to preserve the right to appeal through a Rule 50 motion. In *Ortiz*, the Court determined that the nature of summary judgment is an “interlocutory . . . step along the route to final judgment” and is not itself a final judgment. 562 U.S. at 184. The Court articulated that the basis of the motion for summary judgment does not go away after the court denies the motion, but instead can later be raised again during trial and “evaluated in light of the character and quality of the evidence received in court.” *Id.* The purpose of distinguishing between a final judgment and an interlocutory decision lies in the jurisdiction of the appellate courts as articulated under 28 U.S.C. § 1291, granting appellate jurisdiction from “final decisions of the district courts.” Therefore, the *Ortiz* holding² clarified that appealing from an order denying summary judgment requires a party to raise their claim again in a Rule 50 motion during trial.

The confusion on the part of the majority side of the circuit split relates not to the main holding, but instead to the particular set of facts the *Ortiz* court was facing – namely, a denial of summary judgment based on a qualified immunity defense where the Court previously carved out an exception for a qualified

² There are some factual differences between *Ortiz* and the instant case. In *Ortiz*, the party who brought the original summary judgment motion subsequently did raise a Rule 50(a) motion at the close of the opposing side’s evidence as well as their own but failed to raise a Rule 50(b) motion. 562 U.S. at 187. Another key difference between *Ortiz* and the instant case is that the basis of the summary judgment motion in *Ortiz* was for a qualified immunity defense where the Court has recognized an exception strictly for that defense. *Id.* at 189. Although the facts in *Ortiz* present some differences to the instant case, the *Ortiz* reasoning still applies here.

immunity claim. *Id.* at 189. Prior to *Ortiz*, the Court recognized that there was a limited exception to the appeals process for a summary judgment denial based on a qualified immunity defense. *See Mitchell v. Forsyth*, 472 U.S. 511, 525-26 (1985). The nature of a qualified immunity claim “finally and conclusively [disposes of] the defendant’s claim of right not to stand trial,” therefore, necessitating some type of immediate appeal from the denial of summary judgment. *Id.*, at 527. After *Mitchell*, the Court further clarified that the purpose of this immediate appeal for qualified immunity is available where there is a “purely legal issue,” not where the district court finds a factual issue genuinely in dispute. *Johnson v. Jones*, 515 U.S. 304, 313 (1995).

However, the Court in *Ortiz* determined that even though there was a claim for qualified immunity, there were still facts relating to the claim of qualified immunity which did not make it “purely legal,” therefore, necessitating some renewed motion as a matter of law on the issue in order to appeal the lower court’s decision. *Ortiz*, 562 U.S. at 190-191. Not only did the Court in *Ortiz* state the process for appeals from a denial of summary judgment, they also pointed out the exact issue with drawing lines between what is a “purely legal” issue and what invokes at least some question of fact for the jury to hear. While the Court in *Ortiz* did not firmly decide whether there should or should not be a “purely legal” exception, the Court did clarify the appeals process and find that even where there was an exception to the rule for qualified immunity, this particular claim still rested upon facts which should have been preserved for appeal in a Rule 50 motion.

The circuit courts that find the “purely legal” exception to the appeals process valid misread *Ortiz* and incorrectly apply a standard which neglects the purpose behind the Federal Rules of Civil Procedure. These courts read the reasoning behind *Johnson* as a blanket reasoning for allowing appeals where there was no claim preservation after the court denied the party’s summary judgment motion. The difficulty in finding something “purely legal” is demonstrated here where, even though the basis of the claim is a due process question, there were still factual issues in contention. The district court judge could have considered questions and pieces of evidence introduced at trial in making a more informed determination after the summary judgment stage, had Kill-a-Byte raised the due process issue again in a Rule 50 motion. *See Kill-a-Byte Software, Inc. v. City of New Truro*, No. 18-5971 at *18 (13th Cir. Mar. 21, 2020) (Despard, J., dissenting) (“Here, . . . it seems impossible that the majority’s due process analysis was uninfluenced by the extraordinary verdict in favor of the City and the City’s clarification of its legal theories through the evidence presented at trial.”). Creating this false dichotomy between “purely legal” and not would encourage a practice which could lead to confusion, a lack of uniformity, and a circumvention of the Federal Rules of Civil Procedure that could violate statutorily-mandated appellate court jurisdiction.

ii. This Court should not create a “purely legal” exception because doing so would sow confusion in lower and appellate courts and would lead to a lack of uniformity.

This Court should find that the issue raised at the summary judgment stage here was not “purely legal,” and that there is no “purely legal” exception generally

for this type of appeal. This Court should make this ruling because the question of whether an issue is denied on a purely factual or legal basis is not clear cut and would lead to confusion. Additionally, the lack of uniformity from this exception does not properly place parties on notice and leads to a circumvention of the purpose of the Federal Rules of Civil Procedure, as well as appellate court jurisdiction under 28 U.S.C. § 1291.

First, finding a “purely legal” exception would sow confusion amongst courts as to what types of claims are “purely legal” and what types of claims are at least partially factual. Creating this false dichotomy is problematic “because all summary judgment decisions are legal decisions in that they do not rest on disputed facts.” *Chesapeake Paper Prods. Co.*, 51 F.3d at 1235. Additionally, summary judgment decisions are all purely legal in the sense that they receive de novo review. *Id.* Federal Rule of Civil Procedure 56 does not create a dichotomy between “legal” and “factual” bases for summary judgment decisions and this Court should not attempt to draw this line, particularly since summary judgment decisions are not final judgments. Fed. R. Civ. P. 56; *see Ortiz*, 562 U.S. at 192. If this Court were to create such an exception, lower courts would need to provide a more thorough explanation in their orders denying summary judgment so that a party might be aware of whether they had a purely legal or purely factual claim. This would certainly lead to confusion and could result in appeals not being preserved during trial at all where a party falsely believes a claim to be “purely legal.” Furthermore, appellate courts would essentially be forced to review two records in assessing these

claims: the evidence and information present at the time of summary judgment; and the final record, which does not include a Rule 50 motion but contains the full trial evidence. Here, the due process claim is intrinsically tied to the facts, which must be considered for the legal analysis. To divorce the two is an incorrect dichotomy which could easily lead to confusion and interference with the appeals process, invoking questions of policy. *Supra* I(A)(ii). To begin to split hairs on what is legal and what is factual leads to a lack of uniformity and confusion.

Second, the lack of uniformity produced by this exception would not properly place parties on notice as to whether they needed to preserve a claim for appeal during trial through the Rule 50 process. The Federal Rules of Civil Procedure exist for many reasons, in particular, to give parties notice as to how to preserve their claims for appeal. To ensure parties are properly represented, this Court should dictate bright-line rules as reflected in the Federal Rules of Civil Procedure. In order to promote the ideas of a fair justice system, courts across jurisdictions should exude uniformity, and the best way to achieve this is through a bright-line rule like the one already articulated in *Ortiz*. Even the D.C. Circuit agreed in their decision finding for the purely legal exception that “prudent counsel will make sure to renew their arguments in a Rule 50 motion.” *Feld*, 688 F.3d at 783.

For the above reasons, that there are valid purposes behind the appeals preservation process for a denial of summary judgment and that the Thirteenth Circuit followed an incorrect side of a current circuit split, this Court should reverse

the Thirteenth Circuit and declare that there is no exception to the renewal process for summary judgment denials based on “purely legal” reasons.

II. THE THIRTEENTH CIRCUIT INCORRECTLY HELD THAT KILL-A-BYTE IS NOT LIABLE BECAUSE THE CITY’S CLAIMS AGAINST KILL-A-BYTE ARE VIABLE AS A MATTER OF STATE LAW AND DO NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Petitioner, the City of New Truro, properly claimed that Kill-a-Byte is civilly liable for public nuisance as a matter of state common law, and the Due Process Clause of the Fourteenth Amendment permits this claim. As such, this Court should reverse the Thirteenth Circuit and hold Kill-a-Byte liable for creating a public nuisance and require the abatement of the harm it caused. The Fourteenth Amendment of the United States Constitution states that “[no] State [shall] deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV. The Due Process Clause represents those laws that are fundamental to principles of justice and that “lie at the base of all our civil and political institutions.” *Hurtado v. California*, 110 U.S. 516, 535 (1884). Due process under the Fourteenth Amendment does not profess to secure all persons in the United States the same benefits of the same laws and remedies. *Holden v. Hardy*, 169 U.S. 366, 388 (1897). Rather, due process is construed to mean that governments and judicial bodies are forbidden from enacting and creating laws that arbitrarily deprive individuals of life, liberty, and property. *See Hodgson v. Vermont*, 168 U.S. 262, 272 (1897).

The Constitution gives much leniency to state and local governments to enact laws, including the common law development of laws, unless specifically barred by a

constitutional provision. *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 614 (7th Cir. 2014). Here, the Supreme Court of New Tejas recognized the City’s liability theory of holding a product manufacturer and seller liable for the public nuisance of interference with public health and safety. *See* R. at 4–5. There is little caselaw in the area of state tort liability compliance with due process. However, through analyzing other federal cases concerning state tort liability claims, the Seventh Circuit has developed a standard for analyzing due process challenges to these laws. The Seventh Circuit has held that economic laws do not violate substantive due process unless the law is arbitrary and irrational. *See Gibson*, 760 F.3d at 621. Laws are not unlawful solely because they are unwise or because they upset otherwise settled expectations – the test is only whether the law is arbitrary or irrational. *See Concrete Pipe and Prods. Of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 637 (1993). This deference is necessary because the Constitution contains more specific guarantees of rights, and the courts must use judicial restraint when invoking the generalized notion of substantive due process. *See Graham v. Connor*, 490 U.S. 386, 395 (1989). Therefore, laws that create economic burdens and benefits come to this Court with a presumption of constitutionality, and the burden is on the party complaining of a due process violation to establish that the law is arbitrary and irrational. *Concrete Pipe and Prods. of Cal., Inc.*, 508 U.S. at 637.

Consistency with these standards requires this Court to reverse the Thirteenth Circuit and allow the City to hold Kill-a-Byte liable for the public

nuisance it has caused to public health and safety, because the City's claims are consistent with the Due Process Clause of the Fourteenth Amendment. This discussion will focus on: (A) why the City can hold Kill-a-Byte liable for public nuisance and why it can do so retrospectively; (B) why causation of the public nuisance is satisfied by Lightyear being a substantial factor in causing the injury to public safety; and (C) why the form and amount of abatement imposed on Kill-a-Byte is proper to diminish the public nuisance.

A. The City's Claims Against Kill-A-Byte Do Not Violate the Due Process Clause of the Fourteenth Amendment Because the City's Claim of Product Public Nuisance Is Not Unprecedented and Kill-a-Byte Can Be Held Retrospectively Liable.

The City's claim of public nuisance against Kill-a-Byte does not violate the Due Process Clause of the Fourteenth Amendment because the City's claims are not unprecedented, Kill-a-Byte intended to bring about conditions that caused the nuisance, and the City can hold Kill-a-Byte retroactively liable. The City sued Kill-a-Byte for "absolute public nuisance" under New Texas common law following the rise in crime and unemployment stemming from Kill-a-Byte's distribution of Lightyear. The Restatement of Torts provides the definition of public nuisance: "A public nuisance is an unreasonable interference with a right common to the general public." Restatement (Second) of Torts §821B. "The defendant is held liable for public nuisance if his interference with the public right was intentional." *Id.*

Unlike private nuisance, which finds its history in property use, public nuisance need not involve interference with the enjoyment of land. *Id.*, cmt. h. Indeed, many courts have gradually recognized a public nuisance claim for injury to

the public welfare without any harm to real property. *See Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1142 (Ohio 2002) (holding that the City of Cincinnati had a valid claim of public nuisance against fifteen handgun manufacturers for the intentional fostering of criminal misuse of firearms and the subsequent endangering of public safety); *see also Ganim v. Smith and Wesson Corp.*, 780 A.2d 98, 132 (Conn. 2001); *Young v. Bryco Arms*, 765 N.E.2d 1, 10 (Ill. App. Ct. 2001). Over the past twenty or thirty years, courts have increasingly recognized claims of public nuisance stemming from product manufacturing, distribution, and sales. *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 552 (2006) (highlighting increased public nuisance lawsuits concerning asbestos, paint with lead pigment, firearms, and tobacco products). These claims represent the reality that even if lawfully manufactured, distributed, and sold, certain products will substantially interfere with the public's right to health and safety and that individual plaintiffs will sustain injuries from the consequences of the nuisance created. *See id.*

Although the City's claims may be a more aggressive form of public nuisance than typically seen in lawsuits, its liability theory is a natural outgrowth of the public nuisance precedent generated by the common law over many years. Under the standard articulated by the Seventh Circuit in *Gibson*, the City's liability theory is not arbitrary nor irrational and is grounded in rational basis. Therefore, the City's claim does not violate due process. This Section will discuss: (i) why Kill-a-

Byte's actions were intentional under public nuisance doctrine; and (ii) why the City's claims are not barred by the theory of retroactivity.

- i. Kill-a-Byte intentionally sold Lightyear to New Truro residents and intended for the videogame to become popular and widely played.*

The Restatement makes clear that a defendant can be held liable for public nuisance if his interference with the public right is intentional. Restatement (Second) of Torts §821B. In the context of product public nuisance, a defendant need not intend that a nuisance or an injury to public safety will result from the manufacturing and sale of a product. If this were the case, it would be nearly impossible for a court to ever find a defendant liable for public nuisance. Rather, the defendant must have intended to produce the conditions, which are the basis of the nuisance. *Angerman v. Burick*, No. 02CA0028, 2003 WL 1524505 at *2 (Ohio App. Mar. 26, 2003); *Beckwith v. Town of Stratford*, 29 A.2d 775, 777 (Conn. 1942).

In deciding whether there is intent, there are some courts that require a plaintiff to prove that a defendant knows that its product is injurious to public health and safety. *See People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 529 (Cal. Ct. App. 2017) (holding that the plaintiff was required to show that the defendant paint manufacturer knew that the lead paint was injurious to public health in order to be liable for public nuisance). However, other courts merely consider it a factor whether a defendant knew or should have known that their product would potentially lead to a nuisance and illegal activity. *See City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1109 (Ill. 2004) (recognizing the theory

that the defendants' conduct in designing, manufacturing, distributing, and selling certain models of handguns was done with the knowledge that a significant number of guns would find their way into a secondary illegal gun market).

Here, the New Tejas law of public nuisance comports with the Ohio and Connecticut definitions of intent in that it does not require that Kill-a-Byte had knowledge that Lightyear would produce negative consequences for public health and safety. All that is required is that Kill-a-Byte intended to manufacture, distribute, and sell its products to the citizens of New Truro. As a prominent software company wanting to promote its successful videogame, Kill-a-Byte intended for its game to be popular and regularly played. Kill-a-Byte had access to records stating that 50% of New Truro's young male residents played the game at least ten hours each week, with 10% of regular players in the city playing in excess of 35 hours a week. *See* R. at 2. Kill-a-Byte intended for its players to spend increased time playing Lightyear and, therefore, less time engaging in society and other responsibilities. R. at 23. Thus, Kill-a-Byte intentionally created the conditions in New Truro which produced a severely undereducated male population with few employment prospects who are "trained to kill." R. at 2.

However, to the extent that this Court considers whether Kill-a-Byte knew or should have known that Lightyear would create a public nuisance, there is evidence supporting this notion as well. First, Kill-a-Byte should have drawn logical conclusions regarding the negative consequences that would result from thousands of New Truro residents playing Lightyear in excess of 35 hours a week, namely that

these citizens would have decreased educational and employment prospects.

Moreover, Kill-a-Byte also should have known that its violent video game could lead to players committing violent acts and illegal conduct in their real lives.

Numerous studies have analyzed the effects of violent video games on the American population and particularly young people. In 2001, John L. Sherry of Purdue University released a study finding that violence in video games leads to higher aggression amongst regular players, especially when the content is graphic and related to both fantasy and human characterizations. John L. Sherry, *The Effects of Violent Video Games on Aggression*, 27 *Human Communication Research* 409, 424 (2001). A 2004 study through the Association for Professionals in Services for Adolescents found that teenagers who are exposed to greater amounts of video game violence are more hostile, engage in physical fights more often, and performed more poorly in school. Douglas A. Gentile, Paul J. Lynch, Jennifer Ruh Linder, & David A. Walsh, *The Effects of Violent Video Game Habits on Adolescent Hostility, Aggressive Behaviors, and School Performance*, 27 *J. Adolescence* 5, 12–16 (2004). Furthermore, a 2000 article in the American Psychological Association's *Journal of Personality and Social Psychology* found that violent video games may be even more harmful than violent television. Craig A. Anderson & Karen E. Dill, *Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and in Life*, 78 *J. Personality & Social Psychology* 772, 788 (2000).

These articles are three of the numerous published between 2001–2010 on the effects of video game violence, with multiple studies finding an increase in

aggressive behavior in people who regularly play violent video games. These articles exist in addition to the media and news recognition that the topic has received since the start of the twenty-first century. *See, e.g.,* Anahad O'Connor, *The Claim: Violent Video Games Make Young People Aggressive*, N.Y. Times, Aug. 30 2005. As a leading software and videogame developer, Kill-a-Byte should have been aware of the increasing trends in aggressive behavior that violent video games were continuing to produce. Kill-a-Byte had sufficient notice of the issue and problematic trends given that many of the articles were published before Kill-a-Byte released Lightyear, and many articles that were published after the release of Lightyear still came out while Kill-a-Byte was increasing its sales in New Truro. Given the scholarship and media publications dedicated to this topic, Kill-a-Byte should have known that the increased sales of Lightyear could lead to increased crime rates and threats to public safety, especially in a city with such a high level of people playing Lightyear on a regular basis.

The City's claim of public nuisance due to the sale of Lightyear is not arbitrary and irrational because Kill-a-Byte intended to sell and distribute Lightyear so that it was popular and regularly played. In addition, Kill-a-Byte should have known that the increased use and play of Lightyear would lead to an increase of violence and crime in a city like New Truro, in which large swaths of the young male population play the game on a regular basis. Nothing about these findings are arbitrary or unreasonable given Kill-a-Byte's desire to make profits off

a successful violent video game. Therefore, the City’s claims do not violate the Due Process Clause on the grounds of intent.

ii. *The City’s claims do not impose severe retroactive liability on a party that could not have anticipated liability.*

In holding that the City’s claims are unconstitutional, the Thirteenth Circuit, relying on the Supreme Court’s analysis in *Eastern Enterprises*, found that the City’s liability theory imposes severe retroactive liability on a party that could not have anticipated the liability. *See Kill-a-Byte Software, Inc. v. City of New Truro*, No. 18-5971 at *13 (13th Cir. Mar. 21, 2020). In the *Eastern Enterprises* plurality opinion, Justice O’Connor explained that a law 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 Enterprises v. Apfel*, 524 U.S. 498, 528–529 (1998). The Thirteenth Circuit found that the City’s claims fit this description and that they were therefore unconstitutional. *Kill-a-Byte Software, Inc. v. City of New Truro*, No. 18-5971 at *13 (13th Cir. Mar. 21, 2020).

The Thirteenth Circuit incorrectly relied on *Eastern Enterprises* as producing a principle against the general notion of severe retroactive liability. *Eastern Enterprises* did not produce a binding precedent, other than its specific result, because no controlling principle can be inferred from the plurality, concurrence, and dissenting opinions. *Gibson*, 760 F.3d at 615. *Eastern Enterprises* concerns a former coal operator that brought suit challenging the Coal Industry Retiree Health Benefit Act (Coal Act), which established a mechanism for funding health care

benefits for retirees from the coal industry for liabilities that had occurred thirty-five to fifty years ago. *Eastern Enterprises*, 524 U.S. at 504. The four-Justice plurality opinion held that the Coal Act was an unconstitutional taking of Eastern Enterprises' property in violation of the Fifth Amendment. *Id.* However, the plurality did not reach the issue of substantive due process and analyzed the case differently than the case at issue here.

In *Eastern Enterprises*, the plurality analogized the Coal Act to an economic regulation that amounted to a taking and found that a law could not impose severe retroactive liability in this context. *Id.* at 528–29. However, the plurality expressed hesitation about invalidating economic laws under the Due Process Clause, and thus, the Court expressly declined to address Eastern Enterprises' due process claim. *See id.* at 538.

In his concurrence, Justice Kennedy was the one who analyzed the Coal Act under substantive due process. Justice Kennedy acknowledged that hesitancy should be used when scrutinizing economic legislation under the Due Process Clause, *see id.* at 547 (Kennedy, J., concurring); thus, he recognized that an economic law violates the Due Process clause only if it is arbitrary and capricious. *Id.* at 548. With regards to the Coal Act, Justice Kennedy explained that this was one of the rare instances where an economic law had exceeded due process limits. *Id.* at 549. Kennedy reasoned that creating a liability for events that occurred approximately forty years ago has a retroactive effect of unprecedented scope, *see*

id., and that the expectations under the Act were created by agreements made long after Eastern Enterprises had left the coal business. *Id.* at 550.

Similar to Justice Kennedy, the dissent also examined Eastern Enterprises' claims under the Due Process Clause and articulated that a law is arbitrary and in violation of the Due Process Clause if it is fundamentally unfair. *Id.* at 557 (Stevens, J., dissenting). The dissent phrased the issue as "whether or not it is fundamentally unfair to require Eastern to make future payments for health care costs of retired miners and their families, on the basis of Eastern's past association with those miners." *Id.* at 558–59. The dissent reasoned that the Coal Act did not violate due process because Eastern Enterprises' assignments were for miners whom Eastern Enterprises had employed in the past and because Eastern Enterprises had continued to receive profits from the coal mining industry. *See id.* at 560, 565–66. Due to these circumstances, the dissent concluded that it was not fundamentally unfair to impose liability on Eastern Enterprises. *Id.* at 566.

Returning to the case at issue here, the Thirteenth Circuit concluded, as noted above, that the opinions in *Eastern Enterprises* established a due process right that invalidates a law when the law "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." *Kill-a-Byte Software, Inc. v. City of New Truro*, No. 18-5971 at *13 (13th Cir. Mar. 21, 2020) (quoting 524 U.S. at 528–29 (plurality op.)). As the Seventh Circuit explained in the *Gibson* case, the *Eastern Enterprises* case does not provide a narrow-grounds

decision that supports the rationale for a due process right based on severe retroactive liability. In *Eastern Enterprises*, the five justices who concurred in the judgment did not even agree on which constitutional provision applied to the Coal Act to render it invalid. *See Gibson*, 760 F.3d at 619. The four-justice plurality based its decision on the Takings Clause, whereas Justice Kennedy was the only Justice to conclude that the Coal Act violated substantive due process. *Id.* Since the plurality and concurrence did not interpret the same constitutional right, it cannot be said that either provide a narrow rule of binding precedent. *See id.* Of those justices that actually analyzed the Coal Act under due process, four out of five of those justice, representing the dissent, found that the Coal Act did not violate due process.

If Kill-a-Byte's claim was rooted in the Takings Clause, perhaps it could be argued that *Eastern Enterprises* should guide this Court in holding the City's liability theory unconstitutional. However, even that rationale is flawed since it is not a clear binding precedent from *Eastern Enterprises*. Should this Court still choose to rely on *Eastern Enterprises*, the City's claims do not impose severe retroactive liability. Unlike in *Eastern Enterprises* where the concurrence found that holding Eastern Enterprises liable for conduct from approximately forty years ago constituted severe retroactive liability, here, the City desires to hold Kill-a-Byte liable for conduct from as recently as seven years ago. The City is responding to recent trends in increased crime and unemployment rates based on Kill-a-Byte's actions from only a short while ago. This is not fundamentally unfair and does not

represent a pattern of the City waiting for a long period of time to impose liability. Therefore, the Court should find that the City's claims do not impose severe retroactive liability.

Furthermore, the City's claims do not represent severe retrospective liability because Kill-a-Byte could have foreseen its liability. As discussed above in Section A(i), Kill-a-Byte intended to sell large volumes of Lightyear and desired for individuals to play Lightyear regularly and in high frequencies. *See supra* p. 25. Furthermore, Kill-a-Byte could have foreseen that its product would create a public nuisance in the form of increased violence and crime rates following the multitude of scholarship produced on the subject of violent video games. *See supra* p. 27–28. Due to the intentional nature of Kill-a-Byte's actions in selling Lightyear, it is not fundamentally unfair to hold it liable for its sales.

Finally, the City's claims are not severely retroactive because the extent of the liability is not substantially disproportionate to the parties' experience. While this will be further discussed in Section C, the jury's decision to require judgment in the amount of approximately \$600 million is not fundamentally unfair given the expert testimony provided and the extent of the public nuisance. Although the Thirteenth Circuit held that "judgment in the amount of hundreds of millions of dollars for distribution of a lawful product is too great a disconnect," *Kill-a-Byte Software, Inc. v. City of New Truro*, No. 18-5971 at *12 (13th Cir. Mar. 21, 2020), the court did not provide any reasoning for reaching this conclusion in connection with *Eastern Enterprises*.

Overall, *Eastern Enterprises* does not create a binding precedent establishing a due process right that invalidates a law for imposing severe retroactive liability. Furthermore, even if this Court does choose to use *Eastern Enterprises* as precedent, there are significant differences between the Court's findings in that case in comparison with the claims that the City asserts against Kill-a-Byte. Moreover, Kill-a-Byte intended to create conditions that brought about a public nuisance and should have known about increasing trends in aggression amongst violent video game users. Finally, the City's claim of product public nuisance is not unprecedented because courts have overtime recognized the need for states, cities, and municipalities to impose liability to protect public health and safety. Therefore, the City's claim of product public nuisance against Kill-a-Byte due to the sale of Lightyear, in itself, does not violate the Due Process Clause of the Fourteenth Amendment, because it is not arbitrary or irrational.

B. The City's Claims Against Kill-A-Byte Do Not Violate the Due Process Clause of the Fourteenth Amendment Because it Is Proper to Hold Kill-a-Byte Liable for Lightyear Being a "Substantial Factor" in Causing the Injury to Public Safety.

The City's claim of public nuisance against Kill-a-Byte does not violate the Due Process Clause of the Fourteenth Amendment because Kill-a-Byte's intentional, expansive sale of Lightyear was a substantial factor in causing the injury to public health and safety. Over time, courts have created new liability schemes based on progressive theories of causation that are necessitated by the circumstances of a given case. Although a common law development may enact an unprecedented form of liability or state law claim, deference is owed to judicial

common law developments, which by their nature must operate retroactively on the parties present in the case. *See Gibson*, 760 F.3d at 622. Indeed, common law developments should be given more deference than state legislation since common law is the “incremental and reasoned development of precedent.” *Id.* (quoting *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001)).

As this Court has explained, common law doctrine provides the framework needed to address issues that often arise as new circumstances and fact patterns present themselves. *See Rogers*, 532 U.S. at 461. Common law decisions are often granted “substantial leeway” because of the need to address new cases, reevaluate and refine doctrines, and adopt standards based on logic and common sense. *See id.* To place strict limitations on common law development “would place an unworkable and unacceptable restraint on normal judicial processes and would be incompatible with the resolution of uncertainty that marks an evolving legal system. *Id.*

Under common law doctrines, the courts have fashioned new remedies and liability schemes for different circumstances surrounding state tort claims. *See Collins v. Eli Lilly Co.*, 342 N.W.2d 37, 49 (Wis. 1984) (developing the “risk contribution” liability theory after plaintiff filed suit against twelve drug companies that allegedly produced or marketed DES); *Thomas v. Mallett*, 701 N.W.2d 523, 558 (Wis. 2005) (extending Collins’s risk contribution theory of liability to white lead carbonate pigment cases); *Summers v. Tice*, 199 P.2d 1, 4–5 (Cal. 1948) (developing the “alternative liability theory” after plaintiff filed suit against two possible defendants after being injured while hunting); *Hall v. E.I. Du Pont De Nemours &*

Co., Inc., 345 F. Supp. 353, 382–83 (E.D.N.Y. 1972) (developing the “enterprise liability theory” after plaintiffs filed suit against explosives manufacturers for accidents in which children were injured by blasting caps).

Even though most states apply a strict causation-in-fact requirement for various claims, that does not mean that states that use other causation requirements have made an arbitrary or capricious choice. *See Gibson*, 760 F.3d at 624. Indeed, the Supreme Court has made clear that laws readjusting rights and burdens are not unlawful solely because they upset otherwise settled expectations and norms. *See Concrete Pipe and Prods. of Cal., Inc.*, 508 U.S. at 637. This is true even if the effect of a new law imposes a new liability scheme based on past acts. *See id.*

The Restatement has recognized the changing landscape of tort causation schemes and provides for substantial factor causation: one actor’s conduct “is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm.” Restatement (Second) of Torts §431. The Restatement explains that even if there are other causes in addition to the actor’s conduct, the actor is still liable if their conduct “ha[d] a substantial as distinguished from a merely negligible effect in bringing about the plaintiff’s harm.” *Id.*, cmt. b.

Defendant’s contribution to the risk of injury is one factor for determining liability for common law developments in tort schemes where causation-in-fact is not required for recovery. *See Gibson*, 760 F.3d at 624. However, a defendant can still be held strictly liable under a different scheme than but-for causation. For

instance, in *Thomas*, a case that extended the risk-contribution theory of liability to white lead carbonate pigments, the court found that a defendant could be held strictly liable under a risk-contribution theory by showing “[t]hat the pigment manufacturer engaged in the business of producing or marketing white lead carbonate, or put negatively, that this is not an isolated or infrequent transaction not related to the principal business of the pigment manufacturer.” *Thomas*, 701 N.W.2d at 564. The *Thomas* court concluded that, although a different pigment manufacturer or a different cause entirely may have created the plaintiff’s injury, the defendant manufacturer was still liable for the harm as long as the plaintiff could show that it was indeed white carbonate lead pigment that caused her injuries.

A second factor that courts use for determining liability for common law developments in tort schemes where causation-in-fact is not required for recovery is the foreseeability of the harm. *See Concrete Pipe and Prods. of Cal., Inc.*, 508 U.S. at 638–39 (holding that it did not violate due process for the withdrawal liability assessed against Concrete Pipe to amount to more than the share of a multiemployer pension plan strictly attributable to workers at Concrete Pipe).

Following this context, when examining the case between the City and Kill-a-Bite in the present, the City seeks to impose a causation framework that is perhaps rarely used for state tort claims or perhaps has never been used before. Here, New Tejas seeks to use an innovative scheme of causation, finding liability if a defendant’s conduct is a substantial factor in bringing about the public nuisance.

New Truro is faced with an unprecedented issue of increased crime and unemployment rates in correlation with a large proportion of its population playing a violent video game for at least 10 hours every week. Due to the issues in determining exact causation of the situation in New Truro, New Tejas has fashioned a new tort liability scheme that allows for the common law to evolve to meet the difficult circumstances present in this case. It cannot be said that the Due Process Clause precludes a state from adopting an innovative causation scheme to meet a pressing and unprecedented public nuisance as the City has done here.

At trial, both the City and Kill-a-Byte presented expert testimony discussing the causes of the public nuisance in New Truro. The City's experts presented testimony explaining that the decreased educational attainment, increased unemployment, and unusually high crime rates could all be attributed to Lightyear. The jury returned a verdict in favor of the City finding that the widespread use of Lightyear was a substantial factor in the City's increased crime rate. Thus, the City met its burden of showing that the public nuisance injury did result from Lightyear. A jury weighed the testimony of the two sides' experts and found in favor of the City. This is exactly the type of determination that a jury should make after listening to and weighing all evidence. Furthermore, given the huge amounts of New Truro residents playing Lightyear on a regular basis, Kill-a-Byte should have foreseen that the public nuisance would result, given the effects of violent video games and the amount of time players spent engaging with Lightyear, as opposed to other important activities.

Additionally, a private company like Kill-a-Byte is the type of party that courts generally recognize as being more suitable to carry the financial burden of a public nuisance. Defendants are generally in a better place to absorb the cost of injury because they can insure themselves against liability and pass the cost of the damage award along to the consuming public. *Thomas*, 701 N.W.2d at 558. A city like New Truro, with all of the burdens and liabilities of a governing body to protect its citizens and provide public services, should not have to be further burdened by a successful software company who benefits and profits off of doing business with the City's residents.

Based on these factors and the general deference given to common law developments, it is not arbitrary nor irrational for New Tejas to impose a tort civil liability scheme based on substantial factor causation as opposed to causation-in-fact. Kill-a-Byte could have foreseen that a public nuisance would arise from the expansive sale of Lightyear in New Truro, and a jury did indeed find that the sale of Lightyear was a substantial factor in bringing about the public nuisance. It is not fundamentally unfair for New Tejas to implement an innovative causation scheme in response to an unprecedented local issue. Thus, the City's use of substantial factor causation does not violate the Due Process Clause of the Fourteenth Amendment.

C. The City’s Claims Against Kill-A-Byte Do Not Violate the Due Process Clause of the Fourteenth Amendment Because it Is Proper for the City to Request Abatement in the Form of Money Necessary to Diminish the Public Nuisance of Increased Criminal Activity and Unemployment.

The City’s claim of public nuisance against Kill-a-Byte does not violate the Due Process Clause of the Fourteenth Amendment because the trial court properly found that abatement in the form of approximately \$600 million is necessary to diminish the public nuisance of increased criminal activity and unemployment. The remedies against a public nuisance are: (1) indictment or information; (2) a civil action; or (3) abatement. *County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 325 (Cal. Ct. App. 2006). Liability for a nuisance is not dependent on whether the defendant is in a position to abate the nuisance; instead, the critical question is “whether the defendant created or assisted in the creation of a nuisance.” *Id.* (allowing for an abatement remedy when plaintiffs alleged that defendant lead paint manufacturers had lobbied against the regulation of lead and promoted lead paint for interior use and were thus responsible for the increased used of lead paint in many buildings).

Once a trial court finds that public nuisance liability exists, it is irrelevant whether the costs of abating the nuisance are “reasonable.” *See ConAgra Grocery Products Co.*, 227 Cal. Rptr. 3d at 550 (rejecting defendants’ claims that abatement could not be achieved at a reasonable cost and by reasonable means in lead paint case and instead finding that the plaintiff presented substantial evidence that lead paint poses an imminent risk of harm and that abatement will reduce the number

of sick children). Furthermore, abatement is additionally supported if the injury will not disappear on its own. *See id.* (finding that the lead paint and its effects would continue to create an ongoing risk to the health of children without abatement). Finally, a trial court must be given deference in its awarding of abatement, especially when that decision was based on crediting and weighing testimony. *See id.*

Here, Kill-a-Byte created the nuisance, or at the very least assisted in the creation of the nuisance through intentionally promoting and encouraging time-intensive play of a violent and graphic video game. Because of its intent and actions, Kill-a-Byte was a substantial factor in bringing about an undereducated, underemployed, and crime-ridden community. As such, Kill-a-Byte has caused serious societal issues that an already cash-strapped city must now remedy. A lack of an educated workforce can pose major consequences for a local municipality; thus, it is reasonable to impose on Kill-a-Byte an abatement award that the trial court found would be sufficient for reducing the societal injury that Kill-a-Byte caused.

It is unlikely that the negative public health and safety effects present in New Truro will disappear on their own. Because of Lightyear, many individuals missed out on important educational opportunities and developed aggressive and violent tendencies that may never go away. As such, the abatement award from Kill-a-Byte is greatly needed to overcome these new societal issues. Even if this Court finds that the abatement amount is unreasonable, it should still give

deference to the trial court, which after hearing all evidence including expert testimony on the dire state of New Truro and the cause of the nuisance, properly acted in its role of weighing and crediting all evidence. Upon weighing these factors, the form and amount of abatement is not arbitrary nor irrational and was properly awarded by the trial court. As such, due process permits this remedy.

In conclusion, this Court should reverse the Thirteenth Circuit and hold that Kill-a-Byte's is civilly liable to the City for public nuisance because the City's claims are consistent with the Due Process Clause of the Fourteenth Amendment. Although a public nuisance claim rooted in videogame distribution and sale is dissimilar to typical public nuisance claims, it is not unprecedented, and Kill-a-Byte displayed the requisite intent for creating conditions that caused the nuisance. Furthermore, Lightyear was a substantial factor in causing the public nuisance, a causation scheme that is recognized under the Restatement and is necessary given the unique circumstances of this case. Finally, this Court should give deference to the trial court's award of abatement in the amount of \$600 million because this amount is necessary to abate the harm. This Court should reinstate Kill-a-Byte's liability and the abatement awards, as these judgments were neither arbitrary nor irrational.

CONCLUSION

For the aforementioned reasons, we ask that this Court overturn the Thirteenth Circuit's decision and reinstate the decision of the United States District court for the Western District of New Tejas.

Respectfully submitted,
/s/ Team #39
Team #39
Counsel for Petitioner
November 16, 2020

CERTIFICATE OF SERVICE

By our signature, we certify that a true and correct copy of Petitioner's brief on the merits was forwarded to Respondent, Kill-a-Byte Software, Inc., through the counsel of record by certified U.S. mail, return receipt requested, on this, 16th day of November, 2020.

/s/ Team #39
Team #39
Counsel for Petitioner
November 16, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Competition Rule 2.5 and Supreme Court Rule 33.1, the undersigned hereby certifies that the Brief of Petitioner City of New Truro, New Tejas contains 11,580 words, beginning with the Statement of Jurisdiction through the Conclusion, including all headings and footnotes, but excluding the Certificate of Service, Certificate of Compliance, and the attached Appendix.

/s/ Team #39
Team #39
Counsel for Petitioner
November 16, 2020

Appendix

Fed. R. Civ. P. 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.

Fed. R. Civ. P. 50(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 a 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 for 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.