No. 19-6236

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

CITY OF NEW TRURO,
Petitioner,

v.

KILL-A-BYTE SOFTWARE, INC.
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit

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BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

I. Does a party forfeit a purely legal argument that the district court unequivocally rejected at summary judgment merely because they did not re-raise it in a Rule 50 motion at trial?

II. Does the Constitution allow a state to impose retroactive and disproportionate "public nuisance" liability for lawful activity without requiring proof of but-for causation?

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The opinion of the United States Court of Appeals for the Thirteenth Circuit is unreported but appears in the record in Appendix A of the petition for writ of certiorari at pages 1-18. The unreported opinion of the United States District Court for the Western District of New Tejas appears in the record in Appendix B of the petition at pages 19-32.

STATEMENT OF JURISDICTION

This civil case was initiated in New Tejas state court and removed to the United States District Court for the Western District of New Tejas based on diversity jurisdiction under 28 U.S.C. § 1332. Judgment of the district court was entered on March 2, 2019. The United States Court of Appeals for the Thirteenth Circuit had jurisdiction under 28 U.S.C. § 1291 to hear the appeal of the final decision of the district court. The Thirteenth Circuit entered judgement on March 21, 2020. This Court granted the petition for writ of certiorari on October 5, 2020; this Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States of America, which is provided in pertinent part in the Appendix to this brief on the merits. This case also involves Federal Rule of Civil Procedure 50, which is provided in pertinent part in the Appendix.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Kill-a-Byte Software, Inc., (hereinafter "Kill-a-Byte") a video game company with both commercial success and critical acclaim, lawfully created "an online, massively multiplayer, science-fiction video game" called Lightyear in 2003. R. at 2, 20. Since this video game only required players to create an account and install the game in order to play, both of which were free, it became highly popular worldwide. R. at 21-22. Kill-a-Bye regularly updated Lightyear's content and in-game features during the decade of its activity. R. at 22. At Lightyear's end in 2013, despite there being over 300 million accounts created across the world, just "a far smaller number played regularly." R. at 2, 22.

Features of the Video Game. Lightyear's gameplay involved matching up to 1,000 players together as humans, cyborgs, androids, or aliens on a shared alien world. R. at 21. The game-world contained environmental hazards, weapons, and computer-controlled aliens with varying degrees of rationality. *Id.* A player's objective was to survive as long as possible, by eliminating others or simply outlasting them, until only one player remained. *Id.* Players with faster reflexes and better hand-eye coordination inevitably lasted longer than others. R. at 22.

Lightyear Playership in New Truro. One such area where Lightyear was played was in the City of New Truro, New Tejas (hereinafter "the City") *Id.* Although Lightyear was particularly popular among the men in the City between the ages of fifteen and twenty-five, even the most active players could not be considered addicted

in any medical sense. *Id.* The average young male in the City played Lightyear less than two hours per day. *Id.*

Conditions in New Truro. The City has "fac[ed] a significant budget shortfall"; "tax revenues have decreased by more than 50%." R. at 2. Despite the "undersized police force" having a reduced budget, the cost of funding the department has "more than doubled." R. at 2-3. The crime rates in the City are "unusually high," with violent crime rates roughly "six times the national average." R. at 25. The City further "suffers from massive unemployment (15%) and high poverty rates (45.3%)," in part caused by a number of factory closings. R. at 3, 25. Additionally, the City has a poor educational system, which was exacerbated by a teacher strike in 2004. R. at 3.

II. NATURE OF THE PROCEEDINGS

The District Court. More than two years after Kill-a-Byte ceased distributing Lightyear, the City filed suit against Kill-a-Byte in New Tejas state court under the state's common law rule of absolute public nuisance, and sought full abatement for the nuisance. R. at 25-26. Particularly, the City sought money to fund "job training, educational opportunities, and additional public safety measures." R. at 19. Kill-a-Byte filed for removal to the United States District Court for the Western District of New Tejas on the basis of diversity jurisdiction. R. at 3.

Upon the end of discovery, Kill-a-Byte filed several motions for summary based on various grounds, including the City's standing, the statute of limitations, and whether the remedy sought by the City qualified as abatement. R. at 3, 20. Kill-a-

Byte brought separate motions challenging the sufficiency of the evidence to prove both necessary elements of intent and causation. R. at 20. And, in its final motion for summary judgment, Kill-a-Byte argued that imposing liability under the City's theory of New Tejas public nuisance law violated the Due Process Clause of the Fourteenth Amendment. *Id.* The district court rejected and denied all six motions. R. at 20, 32. Regarding its Due Process argument, the district court determined that the City's theory of liability was a "natural outgrowth of precedent" which survived rational basis review. R at 28.

Following trial, a jury returned a verdict in favor of the City, holding Kill-a-Byte liable for the public nuisance. R. at 33. After a subsequent bench trial, the district court found that the cost of abatement totaled $612.2 million and ordered Kill-a-Byte to pay. *Id.* Kill-a-Byte did not re-raise its Due Process argument during or after trial in a motion for judgement as a matter of law under Rule 50 of the Federal Rules of Civil Procedure ("Rule 50"). R. at 5.

The Court of Appeals. Kill-a-Byte appealed the district court's decision to the United States Court of Appeals for the Thirteenth Circuit based upon the Due Process Clause of the Fourteenth Amendment. R. at 1, 5. Because the theory of liability "appeared to be unprecedented under New Tejas law," the Thirteenth Circuit certified three questions to the Supreme Court of New Tejas: (1) whether the City's theory of public nuisance liability was viable; (2) whether the evidence at trial was legally sufficient to support the verdict; and (3) whether the amount awarded by the district court "constituted a recoverable amount of 'abatement' for purposes of state law." R.

at 4-5. The New Tejas Supreme Court answered affirmatively to all three questions. R. at 4.

The Thirteenth Circuit reversed the district court's judgment and granted a take-nothing judgment in favor of Kill-a-Byte. *Id.* First, the Thirteenth Circuit held that although Kill-a-Byte did not re-raise its Due Process argument in a Rule 50 motion at trial, it was "fully preserved" through its motion for summary judgement on that issue because it raised purely legal issues which need not be re-raised at trial. R. at 8. The Thirteenth Circuit also concluded that the imposition of civil liability against Kill-a-Byte was in fact unconstitutional because Kill-a-Byte had no notice it could be held liable until the New Tejas Supreme Court certified the Thirteenth Circuit's questions and because the liability for public nuisance was conditioned only upon a substantial factor test, not a but-for causation requirement. R. at 9-12.

The City of New Truro petitioned this Court for writ of certiorari. R. at 1. That writ was granted on October 5, 2020. *Id.*

SUMMARY OF THE ARGUMENT

I.

Federal Rule of Civil Procedure 50 ("Rule 50") permits a party to challenge the sufficiency of the opposing party's evidence in a civil jury trial. While a party's decision to do so is discretionary, whether or not they choose to do so may have implications in the context of argument preservation. Though it is well-settled that a party must make a Rule 50 motion in order to preserve for appeal challenges to the sufficiency of the evidence to support the jury's verdict, this Court declined to

definitively answer whether a party must *also* do so to avoid forfeiting legal arguments raised pre-trial in unsuccessful motions for summary judgement. The circuits are split on that question.

This Court should side with the majority of circuits–as well as the court below–who have reasonably held that a party who raises a purely legal argument in an unsuccessful motion for summary judgement does not have to re-raise it in a Rule 50 motion in order to preserve it for appeal. Rather, purely legal arguments rejected at summary judgement are preserved by that motion itself. For one, Rule 50 is not the proper vehicle for raising legal arguments. In fact, given the criteria set forth in Rule 50(a)(2), it would be impossible for a party to draft a coherent motion raising purely legal issues. Additionally, the logic behind requiring parties to re-raise their sufficiency of the evidence arguments at trial does not apply to those raising purely legal issues because nothing that happens at trial would be relevant to their resolution. Furthermore, requiring a party to renew an identical argument before the same court that rejected it would be redundant waste of judicial resources, and would violate the "law of the case principle." Lastly, though it admittedly can be challenging, this Court should not impose this unnecessary obligation on litigants merely because it may be difficult for appellate courts to discern whether or not an argument is purely legal. Circuit courts routinely do so in other contexts, such as selecting the proper standard of review.

Applying this rule to the present case, Kill-a-Byte preserved for appeal its argument that subjecting it to the City's unprecedented public nuisance theory

violates its due process rights because that argument raises purely legal issues, as defined by this Court and other federal courts of appeals. It raises purely legal issues because it can be resolved without reference to disputed facts and presents a dispute about the substance of pre-existing law, which this Court has described as relevant to the inquiry. The conclusion is bolstered by the district court's treatment of the issue at summary judgement, and the fact that Kill-a-Byte raised separate motions for summary judgment alleging that the City lacked sufficient evidence to prove the intent and causation elements of its public nuisance claim.

II.

As the district court noted, this case "requires this Court to consider the outer bounds of state tort liability permitted by due process." R. at 27. New Tejas manipulates public nuisance law to penalize Kill-A-Byte for the lawful distribution of a video game, arguing that because it was a "substantial factor" in the City's increased crime rate, which substantially interfered with public safety, Kill-A-Byte is responsible for the entirety of the theoretical "abatement" of the public nuisance, to the tune of over $600 million. This is an arbitrary and irrational use of public nuisance doctrine.

New Tejas's theory of liability disregards the traditional contours of public nuisance, discarding the standard causation element and the typical remedy of abatement, which is to cease the offending action. In doing so, New Tejas violates the Due Process Clause. The State's construction of public nuisance unfairly arbitrarily exposes parties to retroactive liability, and due process prohibits this imposition of

this type of liability without proof of causation. Moreover, the State's "abatement" remedy violates principles of fundamental fairness by allowing for an award of what are excessive, and essentially, punitive damages. Due process does not allow this imposition of severe liability on a party who could not have anticipated it and to an extent that is far disproportionate of the parties' responsibility.

ARGUMENT AND AUTHORITIES

I. KILL-A-BYTE WAS NOT REQUIRED TO MAKE A RULE 50 MOTION TO PRESERVE ITS DUE PROCESS ARGUMENT FOR APPEAL

Rule 50 enables litigants to challenge the sufficiency of the evidence presented by the opposing party in civil jury trials through motions for judgement as a matter of law ("JMOL"). Rule 50 operates in two stages. First, a litigant may make a "motion for judgement as a matter of law . . . at any point before the case is submitted to the jury." FED. R. CIV. P. 50(a). If the court rejects that motion, they "may file a renewed motion for judgement as a matter of law" after the case is submitted to the jury. *Id.* at 50(b). While not self-evident from the rule's plain language, Rule 50 plays a role in preserving certain arguments for appeal. For example, it is well settled that a litigant cannot argue on appeal that there was insufficient evidence to support the jury's verdict unless they filed a Rule 50(a) motion at trial and renewed it post-trial under Rule 50(b). *See Cone v. W. Va. Pulp & Paper Co.,* 330 U.S. 212, 218 (1947) (holding that, absent a Rule 50(b) motion, a federal appellate court is "without power to direct the District Court to enter judgement contrary to the one it permitted to stand"); *see also McCarty v. Pheasant Run, Inc.,* 826 F.2d 1554, 1555 (7th Cir. 1987) (clarifying that a litigant must *also* have filed Rule 50(a) motion in order to preserve insufficiency arguments because a Rule 50(a) motion is a "prerequisite" for a renewed motion under Rule 50(b)).

Notably, this rule extends to arguments challenging the sufficiency of the evidence initially raised–and then rejected–at summary judgement. *See Feld v. Feld*,

688 F.3d 779, 781 (D.C. Cir. 2012) ("It is true that [federal courts of appeals] are powerless to review a challenge to the legal sufficiency of evidence that was rejected at summary judgment and not brought again in a Rule 50 motion."). However, in *Ortiz v. Jordan* 562 U.S. 180, 190 (2011), this Court declined to decide whether a party must renew "purely legal" arguments rejected at summary judgement in a Rule 50 motion to preserve them for appeal. (stating, "We need not address" the argument that "issue[s] of a purely legal nature . . . are preserved for appeal by an unsuccessful motion for summary judgement, and need not be brought up again under Rule 50(b)"). In doing so, this Court left open the possibility that a party preserves purely legal claims for appeal by raising them in a motion for summary judgment, even though they did not renew those claims at trial in a Rule 50 motion.

With that issue squarely before this Court, Kill-a-Byte respectfully asks it to hold that a party need not file a Rule 50 motion in order to preserve purely legal claims rejected at summary judgement. In doing so, this Court will remain true to the spirit and purpose of Rule 50–to facilitate challenges to the legal sufficiency of the evidence raised at trial–and will refuse to sanction a rule which obliges parties to re-raise arguments at trial which are identical to the ones rejected by that very court at summary judgement.

A. A Party Does Not Have to Re-raise Purely Legal Arguments Rejected at Summary Judgment in a Rule 50 Motion in Order to Preserve Them for Appeal

In the wake of *Ortiz v. Jordan*, a few circuits declined to differentiate between purely legal arguments and those challenging the sufficiency of the evidence in the

context of argument preservation, maintaining that a party waives both unless they re-raise them in a Rule 50 motion at trial. *See e.g. Feld Motor Sports v. Traxxas, L.P.,* 861 F.3d 591, 596 (5th Cir. 2017) ("Following a jury trial on the merits, this court has jurisdiction to hear an appeal of the district court's legal conclusions in denying summary judgment, but only if it is sufficiently preserved in a Rule 50 motion."); *see also Ward v. Soo Line R.R.*, 901 F.3d 868, 882 (7th Cir. 2018), reh'g denied (Sept. 21, 2018). However, the majority of circuits have taken (or maintained) the position that "a Rule 50 motion is not required to preserve for appeal purely legal claims rejected at summary judgement." *Feld,* 688 F.3d at 783; *see e.g, Brown v. Smith*, 827 F.3d 609 (7th Cir. 2016); *Frank C. Pollara Grp. v. Ocean View Inv. Holding,* 784 F.3d 177 (3d Cir. 2015); *Nolfi v. Ohio Ky. Oil Corp.,* 675 F.3d 538 (6th Cir. 2012).

These circuits were correct in doing so for three reasons. First, Rule 50 is not an appropriate means of raising legal claims in light of its purpose and the criteria it establishes for drafting a coherent motion. Second, the logic of mandating a party to renew their insufficiency of the evidence arguments at trial in a Rule 50 motion does not hold up when applied to legal arguments raised at summary judgement. Lastly, this Court should not be persuaded by the concern, raised by some courts, that circuit courts will struggle to determine whether or not an argument only raises questions of law.

1. Rule 50 deals with challenges to the sufficiency of the evidence and is an inappropriate vehicle for raising purely legal claims

The purpose of Rule 50 is to empower litigants to seek judgement as a matter of law ("JMOL") when the opposing party cannot produce sufficient evidence to support a favorable jury verdict. *See Unitherm Food Sys., v. Swift-Eckrich*, 546 U.S. 394 (2006) ("Rule 50 sets forth the requirements . . . for*challenging the sufficiency of the evidence* in a civil jury trial.") (emphasis added). It is not meant to be an avenue for asserting legal arguments. The plain text of the rule supports this distinction. Rule 50(a) provides that, once a party has been fully heard on the merits, a judge may grant a motion for judgement as a matter of law when "a reasonable jury would not have a *legally sufficient evidentiary basis* to find for the non-moving party on the issue." FED. R. CIV. P. 50(a) (emphasis added). The 1991 Advisory Committee Notes to a revision of Rule 50 further demonstrate the evidentiary focus of the rule. *See* FED R. CIV. P. 50 advisory committee's note to 1991 amendment (explaining that the court's duty is "to enter judgment as a matter of law at any time during the trial, as soon as it is apparent that either party is unable to carry *a burden of proof* that is essential to that party's case") (emphasis added).

In addition to being inconsistent with the purpose of Rule 50, it would be impermissible for a court to grant a Rule 50(a) motion which solely contained legal arguments because it would be defective under Rule 50(a)(2). This rule provides that a Rule 50(a) motion must "specify the law *and* facts that entitle the movant to the judgement." FED. R. CIV. P. 50(a)(2). Thus, a party who solely wished to raise legal

arguments in a Rule 50 motion would be incapable of meeting this criterion because they could not–nor would they have a reason to–identify specific facts which "entitle [it] to the judgement." *Id*; *see* R. at 51. In fact, the court below cited this predicament when it held that Kill-a-Byte was not required to re-raise its Due Process argument in a Rule 50 motion to preserve it for appeal. R. at 8 (stating, "by its own terms, we do not see how Rule 50 could apply or how Kill-a-Byte could have drafted a coherent motion" for this very reason).

2. The rationales for requiring a Rule 50 motion to preserve insufficiency of the evidence arguments are inapplicable to legal claims rejected at summary judgment

A motion under Rule 50(a) is necessary to preserve arguments challenging the sufficiency of the evidence raised at summary judgment because, "once evidence is presented at trial, any challenge to evidentiary sufficiency raised at summary judgement becomes moot." *Feld*, 688 F.3d at 782. This is true for two reasons. First, a denial of summary judgement operates only as "a prediction that the evidence will be sufficient to support a verdict in favor of the [non-moving party]." *Feld*, 688 F.3d at 782 (citing *Chemetall GMBH v. ZR Energy,* 320 F.3d 714, 718 (7th Cir. 2003)). That prediction becomes "irrelevant once the trial has occurred because 'the full record developed at trial supersedes the pre-trial summary judgement record.'" *Id.* (citing *Ortiz*, 562 U.S. at 182). Second, because a Rule 50 motion "calls for the judgement in the first instance [by] the judge who saw and heard the witnesses and has the feel of the case," an appellate court, absent that ruling before it, has "no warrant" to

substitute its own appraisal of the evidence for that of the presiding judge." *Ortiz*, 562 U.S. at 185 (citing *Cone,* 330 U.S. at 216).

These rationales do not hold up when applied to purely legal issues raised at summary judgement. Unlike sufficiency of the evidence arguments which depend on the facts adduced at trial, pure questions of law can be resolved "with reference only to undisputed facts." *See Ortiz*, 562 U.S. at 190 (recognizing that disputes about the "substance and clarity of pre-existing law" can be resolved without the need for factual findings at trial). Put differently, nothing that takes place at trial would "require[] the district court to revisit its analysis" of a purely legal argument that it rejected when denying summary judgment. *Feld*, 688 F.3d at 783. Consequently, it would be redundant to require a party to renew unsuccessful legal arguments in a Rule 50 motion because the district court would be faced with "precisely the same question" it answered at summary judgement. *Id.*

This sort of redundancy not only wastes judicial time and resources, but violates the general rule, derived from the "law of the case" principle, against "the re-litigation of legal issues within the context of a single case, once they have been decided. *See* Joan E. Steinman, *The Puzzling Appeal of Summary Judgment Denials: When Are Such Denials Reviewable?*, 2014 MICH. ST. L. REV. 895, 958 (citing *Cobell v Salazar* , 679 F.3d 909, 916-17 (D.C. Cir. 2012) ("Under the law-of-the-case doctrine, the same issue presented a second time in the same case in the same court should lead to the same result.") (internal citations omitted). Thus, just as appellate courts avoid the "pointless academic exercise" of reviewing denials of summary judgement

motions based on the presence of disputed facts, *see Banuelos v. Constr. Laborers' Trust Funds for S. Cal.,* 382 F.3d 897, 902-03 (9th Cir. 2004), this Court should not require a party to renew their purely legal arguments in a Rule 50 motion before the same court that explicitly rejected them pre-trial.

3. Courts of appeals are well-suited to determine whether an argument raises purely legal issues.

An argument frequently employed in favor of requiring litigants to file a Rule 50 motion to preserve *all* arguments initially raised in an unsuccessfully motion for summary judgment is that courts of appeals should not have to determine whether or not an argument is "purely legal." *See Chesapeake Paper Prods. v. Stone & Webster Eng'g,* 51 F.3d 1229, 1235 (4th Cir. 1995) (opposing a rule which "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 'legal' or 'factual'). This Court should not be persuaded by that concern.

Although distinguishing between questions of law and fact can admittedly be "vexing," *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982), this Court has said that requiring appellate courts to do so is not "unworkable." *Johnson v. Jones*, 515 U.S. 304, 318 (1995). For one, in many cases it is clear that a party "has raised a pure issue of law, divorced from any dispute over the facts." *Feld*, 688 F.3d at 783; *see Gramercy Mills v. Wolens,* 63 F.3d 569, 571–72 (7th Cir. 1995) (easily determining that choice of law issue solely raised questions of law). Secondly, courts of appeals "routinely categorize issues as questions of law, questions of fact, or mixed questions of fact and law for [the] purposes of determining the appropriate standard of review."

Steinman, 2014 MICH. ST. L. REV. at 94; *see Anderson v. Comm'r,* 62 F.3d 1266, 1270 (10th Cir. 1995) (noting that if a mixed question of fact and law exists, the court additionally must discern "whether the mixed question is primarily factual or legal" so that it knows whether to apply the *de novo* or "clearly erroneous" standard of review). Lastly, in *Ortiz v. Jordan*, this Court articulated a test for evaluating whether an issue raises purely legal issues and readily applied it. 562 U.S. at 190 (declaring that cases raising purely legal questions present "neat abstract issues of law" related to the "substance and clarity of pre-existing law."). With this standard at their disposal, appellate courts–which, to reiterate, are already well-versed in distinguishing between law and facts in the context of selecting the proper standard of review–are well-suited to conduct this analysis in the Rule 50 preservation realm.

B. Kill-a-Byte's Due Process Argument Was Preserved through Its Motion for Summary Judgment Because It Raises Purely Legal Issues Which Can be Resolved With Reference Only to Undisputed Facts

Having set forth the irrationality of requiring a party to raise a Rule 50 motion at trial to preserve for appeal purely legal arguments rejected at summary judgement, an evaluation of whether or not Kill-a-Byte's Due Process argument presents purely legal issues is in order. If it does, Kill-a-Byte preserved it for appeal even though it did not re-raise it at trial in a Rule 50 motion.[1]

[1] Kill-a-Byte does not dispute that it could not have challenged the legal sufficiency of the evidence supporting the jury's unfavorable verdict before the Thirteenth Circuit because it did not raise the requisite Rule 50 motions.

In its motion for summary judgement, Kill-a-Byte argued that imposing liability under the City's theory would violate its constitutional right to due process because it "imposes severe retroactive liability on a limited class of parties that could not have anticipated that liability." R. at 27. Kill-a-Byte specifically took issue with the following aspects of the City's theory: (i) it did not have to prove that Kill-a-Byte distributed Lightyear with intent or knowledge to harm public safety; (ii) it only needed to prove that Lightyear was a "substantial factor" in the injury to public safety rather than the more exacting "but-for" standard of causation; and (iii) it could hold Kill-a-Byte responsible for "the full amount of abatement, regardless of any causes or responsible individuals or entities," so long as it could prove Kill-a-Byte was a substantial factor in "the interference with the right to public safety." R. at 26-27. This Court should find that this argument raises purely legal issues–and is therefore preserved–because it satisfies this Court's definition of a purely legal claim and is comparable to other claims which have been held to raise pure questions of law.

In *Ortiz v. Jordan*, this Court defined a purely legal argument as one which is "capable of resolution with reference only to undisputed facts." 562 U.S. at 892 (internal citations omitted). It then observed that arguments "fitting that bill typically involve[] contests not about what occurred, or why an action was taken or omitted, but disputes about the substance and clarity of pre-existing law." *Id.* There, this Court determined that the respondent's argument at summary judgement–that he was entitled, as a prison official, to the defense of qualified immunity against the respondent's §1983 action–"hardly presented purely legal issues." *Id.* This was so

because there were numerous disputed facts relevant to the disposition of that question; namely, whether the respondent could have taken actions to prevent or mitigate the alleged unconstitutional misconduct which gave rise to the petitioner's § 1983 claim. *Id.* at 892-93. ("Was [respondent] adequately informed, after the first assault of the identity of the assailant, and of [the petitioner's] fear of a further assault? What, if anything, could [respondent] have done to distance [petitioner] from the assailant, thereby insulating her against a second assault?) (internal citations omitted). Furthermore, this Court observed that "the pre-existing law was not in controversy," for it was well settled that a prison official who knew that an inmate faced a "substantial risk of serious harm and disregard[ed] that risk" by failing to take reasonable preventative measures was not entitled to qualified immunity. *Id.*

Kill-a-Byte's Due Process argument is "purely legal" because it exclusively raises questions about the "substance" of pre-existing law which are divorced from factual disputes over "what occurred" or "why an action was taken." Kill-a-Byte challenged whether the Due Process clause protected it from retroactively being held liable for the *entire* costs of abating a public nuisance even if its distribution of Lightyear was only a "substantial factor" of that nuisance rather than a "but-for" cause. R. at 26. Unlike in *Ortiz*, where it had already been established that a prison official is not entitled to qualified immunity if they were deliberately indifferent to an inmate's risk of harm, it was unclear whether the City's theory could constitutionally be applied outside the context of real property." R at 4. (noting that theory "appeared to be unprecedented"). In this case, the answer to that question did not depend on the

resolution of disputed facts; rather, it required a detailed analysis of precedent and common law doctrine–both of which are hallmarks of arguments raising purely legal issues. *See Brown v. Smith*, 827 F.3d 609, 613 (7th Cir. 2016) (internal citations omitted) ("Question[s] of law typically concern[] the meaning of a statutory or constitutional provision . . . or common law doctrine"). In fact, this is exactly the sort of analysis that the district court conducted when ruling on Kill-a-Byte's motion for summary judgement. R. at 28-31 (referencing, *inter alia*, the Restatement (2nd) of Torts, state supreme court decisions, and this Court's precedent to conclude that the City's liability theories were "a natural outgrowth of existing precedent"). And, in case there are any doubts about the relevance of considering how the district court may have categorized the issue, the Federal Circuit did exactly that when it held that the question of whether Washington D.C. law permitted a landowner to use force to remove another from a building's common area was purely legal. *See Feld*, 688 F.3d at 783 (citing the district court's exclusive reliance on statutes and case law when ruling on the appellant's motion for summary judgement).

Additionally, it is informative that Kill-a-Byte filed *separate* motions for summary judgement arguing that the City lacked sufficient evidence to prove causation and intent–arguments which *do* depend on the resolution of disputed facts. R. at 10-20; *see Chemetall*, 320 F.3d at 721 ("The intent of the parties is a question of fact to be derived . . . from the surrounding circumstances.") (internal citations omitted). Kill-a-Byte's decision to do so is inconsistent with a conclusion that it moved for summary judgement on its constitutional claim because it thought there was not

a genuine issue of material fact. *See Wilson v. Union Pac. R.R.,* 56 F.3d 1226, 1229 (10th Cir.1995) (differentiating between summary judgment motions raising the sufficiency of the evidence to create a fact question for the jury and those raising a question of law that the court must decide). Thus, given the analysis necessary to resolve its Due Process argument and the fact that the constitutional questions it raises are divorced from any dispute over the facts, Kill-a-Byte's motion for summary judgement on that issue raised purely legal issues. It follows that Kill-a-Byte properly preserved that argument for appeal without having to renew them in a Rule 50 motion.

II. DUE PROCESS PROHIBITS A STATE FROM RETROACTIVELY AND DISPROPORTIONATELY IMPOSING "PUBLIC NUISANCE" LIABILITY FOR LAWFUL CONDUCT WITHOUT PROOF OF BUT-FOR CAUSATION.

While states may draft their tort laws as they please, their discretion is limited by the Constitution. The Constitution does not provide states a free license with boundless tort liability. Rather, states must govern in accordance with "fundamental principles of fairness" and in avoidance of the "arbitrary deprivation of property." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 537 (1998); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994). In violation of these constitutional limits, New Tejas presents a novel legal theory: If a business lawfully distributes a lawful product, and a court later determines that the product helped create a public nuisance, the state retroactively may hold the business liable for the entire amount necessary to abate the public nuisance, regardless of any other causes or responsible parties, without

showing that the product was a but-for cause of the public nuisance.[2] Thus, for lawfully distributing a video game that the state later alleged was a "substantial factor in a substantial interference with a right to public safety," Kill-A-Byte faces $600-million-plus liability in "abatement" costs. R. at 1, 25. As such, the state's liability theory and its application to Kill-a-Byte exceed the constitutional limits of the Due Process Clause.

A. In Violation of the Due Process Clause, New Tejas's Liability Theory Significantly Departs from Traditional "Public Nuisance" Law, which Has Required a Showing of But-for Causation.

As it exists, New Tejas's common law public nuisance doctrine has three standard essential elements: (1) an intentional act; (2) a substantial interference with a right to public safety; and (3) that the act was a substantial factor in the interference.[3] R. at 4; *accord State v. Lead Indus., Ass'n, Inc.,* 951 A.2d 428, 446 (R.I. 2008) (holding that the "three principal elements" are "(1) an unreasonable interference; (2) with a right common to the general public; (3) by a person with control over" what created the nuisance). What is not required under the State's public nuisance doctrine, however, is any proof that the actor intended or even knew

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[2] This theory was first posited by the City of New Truro and was recently found viable as a matter of state law by the Supreme Court of New Tejas. R. at 4-5. Notably, the City's liability theory barely survived the court's review, scraping by in a 5-4 opinion "with a heated dissent." R. at 4. Given this ruling, and for simplicity's sake, this brief will refer to the City's theory as the *State*'s theory.

[3] In the instant case, the City alleged that Kill-a-Byte intentionally distributed Lightyear, that the increased crime rate in New Truro substantially interfered with a right to public safety, and that the widespread use of Lightyear was a substantial factor in the increased crime rate. R. at 4.

that an injury to public safety would occur as a result. R. at 26. There is also no requirement of a but-for causal link between the action and any of the alleged interferences of public safety. *Id.*

State common law doctrines, like public nuisance, are not immunized from constitutional review and must still comport with the Due Process Clause of the Fourteenth Amendment. *See, e.g. Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Albright v. Oliver*, 510 U.S. 266 (1994). Further, courts are hesitant to allow wide-ranging public nuisance doctrines, with "many courts [refusing] to expand public nuisance law to the manufacturing, marketing, and distribution of products." *City of Phila. v. Barretta U.S.A., Corp.,* 126 F. Supp. 2d 882 (E.D. Pa. 2000), aff'd 277 F.3d 415 (3d Cir. 2002). Cases like this, where a state is arbitrarily imposing over $600 million in liability on a company with no proof that it caused any harm or can abate it any discernible way, threaten to undermine the constitutional imperative for non-arbitrary and rational laws. Accordingly, this Court should not allow New Tejas to violate the Constitution's fundamental fairness principles.

1. The judicial imposition of retroactive "public nuisance" liability for the lawful distribution of a video game offends due process.

The Due Process Clause of the Fourteenth Amendment prohibits states from depriving any person of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Due process "dictate[s] that a person receive fair notice" that particular activities "will subject him" to monetary liability. *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 574 (1996). As Justice Kennedy emphasized in his *Eastern*

Enterprises concurrence, "due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity." 524 U.S. at 549. This matters because "[b]oth stability of investment and confidence in the constitutional system, then, are secured by due process restrictions against severe retroactive legislation." *Id.; see also* 2 J. Story, Commentaries on the Constitution § 1398 (5th ed. 1891) (noting that "[r]etrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact").

The same reasoning and principles apply to the development of common-law liability with retroactive effects. Like this Court held in *Bouie v. City of Columbia*, 378 U.S. 347, 352-53 (1964), due process bars arbitrary "judicial" retroactivity given that "unforeseeable and retroactive judicial [decisions] . . . operate[] precisely like an ex post facto law." *See also Marks v. United States*, 430 U.S. 188, 191-92 (1977) ("[T]he notion that persons have a right to fair warning of that conduct which will give rise [to liability] … is protected against judicial action by the Due Process Clause[.]"). Due process commands compliance with the traditional limits on common law liability especially when courts are exercising vague theories of equitable relief instead of upholding legislatively crafted remedies, like New Tejas public nuisance law dictates.

The retroactivity of the State's "public nuisance" theory of liability raises due process concerns because the State gave no warning that lawful and common activities would give rise to the essentially unlimited liability allowed under the State's interpretation of public nuisance. Before the Supreme Court of New Tejas

approved the State's theory in the midst of this litigation's appeal to the Thirteenth Circuit, Kill-a-Byte could not possibly have received fair notice that the lawful distribution of a lawful video game would expose the company to such a deprivation of property. Moreover, the State's public nuisance cause of action does not require that Kill-a-Byte intended or knew that an injury to public safety would occur as a result of its distribution of the video game.

Even though it is undisputed that Kill-a-Byte's distribution of the video game did not violate any federal or state statute or regulation, and even though the State does not allege that Kill-a-Byte knew its actions were allegedly injurious to public health, Kill-a-Byte is responsible for abating the entire cost of abating the City's public nuisance of an increased crime rate. This distinctly departs from "well-established common-law protection[s] against arbitrary deprivations of property," *Honda Motor Co., Ltd. v. Oberg,* 512 U.S. 415, 430 (1994), and it is an unprecedented contortion of public nuisance doctrine. *See City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882 (E.D. Pa. 2000), aff'd, 277 F.3d 415 (3d Cir. 2002) (dismissing plaintiffs' claim that gun manufacturers should be liable for public nuisance for distribution practices of their legal, non-defective products); *District of Columbia v. Beretta U.S.A. Corp.*, 2002 WL 31811717 (D.C. Super. Dec. 16, 2002) (holding that public nuisance suit was not feasible as a matter of law because it was not based upon conduct of defendants that violated any law or regulation).

This retroactive application of New Tejas's public nuisance scheme "compromises" the interests in "fair notice and repose" protected by due process and

"raise[s] particular concerns" of "arbitrary and vindictive" liability used "against unpopular groups or individuals." *Landgraf v. USI Film Prods.,* 511 U.S. 244, 266 (1994). Justice Kennedy's due process analysis in *Eastern Enterprise*s focused on the fact that the statute at issue imposed upon the defendant a retroactive obligation "of unprecedented scope." 524 U.S. at 549. When the Eleventh Circuit disposed of a cigar manufacturer's due process challenge of a statute's "quarterly assessments levied on tobacco manufacturers," it relied upon the *lack* of retroactivity of the law. *Swisher Int'l, Inc. v. Schafer*, 550 F.3d 1046, 1049 (11th Cir. 2008). The court determined that "[t]he crucial difference between the instant case and *Eastern Enterprises* is that the obligation imposed upon Swisher in the instant case is not retroactive." *Id.* at 1058. (finding that statute based its assessments on "current participation in the market" and not the "past conduct of tobacco manufacturers or importers"). Unlike the obligation imposed upon the company in *Swisher*, the public nuisance liability assessed against Kill-a-Byte is for past conduct that Kill-a-Byte stopped over seven years ago.[4] Like the statute in *Eastern Enterprises*, which Justice Kennedy deemed "arbitrary and beyond the legitimate authority of the Government," New Tejas's public nuisance law unfairly upset Kill-a-Byte's expectations that its lawful conduct would remain free of liability and constitutes an arbitrary deprivation of property.

[4] Kill-a-Byte ceased distribution of its lawful video game in 2013. R. at 2. The City did not file its present suit until more than two years after that. R. at 25. But no statute of limitations applies to claims seeking equitable relief under a public nuisance claim. *Id.*

In sum, New Tejas has twisted public nuisance law into "a monster that . . . devour[s] in one gulp the entire law of tort." *Tioga Public Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir.1993) Due process "safeguard[s] defendants against unjustified and unpredictable breaks with prior law," such as this, particularly when made through the "judicial alteration of a common law doctrine." *Rogers v. Tennessee,* 532 U.S. 451, 462 (2001). New Tejas's mutilation of public nuisance doctrine to deprive defendants of well-settled notice protections and to retroactively impose liability for the lawful distribution of a product (that is no longer distributed and has not been for over seven years) is an archetypal due process violation. *See Rogers,* 532 U.S. at 462; *Gore,* 517 U.S. at 574; *Landgraf,* 511 U.S. at 266; *Oberg,* 512 U.S. at 430; *William Danzer & Co. v. Gulf & S.I.R. Co.,* 268 U.S. 633, 637 (1925).

2. States cannot rationally impose "public nuisance" liability in the absence of but-for causation.

Equally as arbitrary as the state law's retroactive effect is the state's "substantial factor" test for causation in this context. Exemplifying the arbitrariness of this standard, the most recent Restatement has discarded "substantial factor" language, finding that it creates confusion and hurts more than it helps. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 26 cmt. j. (2010).[5] The causal connection traditionally required by public nuisance law

[5] Additionally, the Restatement excluded tort suits seeking to recover for public nuisance for products because it deemed "the common law of public nuisance is an inapt vehicle for addressing the conduct at issue." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 8 (2020). The Restatement also noted that "[l]iability on such theories has been rejected by most courts. *Id.*

mandates that defendants were the "cause in fact" of the nuisance. Matthew R. Watson, Comment, V*enturing into the "Impenetrable Jungle": How California's Expansive Public Nuisance Doctrine May Result in an Unprecedented Judgment Against the Lead Paint Industry in the Case of* County of Santa Clara v. Atlantic Richfield Company, 15 Roger Williams U.L. Rev. 612 (2010). Instead, New Tejas is wielding the public nuisance cause of action as a weapon against a myriad of issues in the city, including the unusually high crime rate, massive unemployment, and high poverty rights, regardless of whether Kill-a-Byte meaningfully caused the nuisance. The "substantial factor" test is simply too attenuated to support a public nuisance claim. See *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 94 (N.Y. App. Div 2003) ("All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born.")

The City argues that Kill-a-Byte created an interference with public safety, an increased crime rate, by distributing its video game. R. at 2. But it is undisputed that the video game was not solely responsible for the City's crime rate— the public nuisance. R. at 4. To hold Kill-a-Byte liable for distributing a lawful video game that was a "substantial factor" in the increased crime rate is to say that the nuisance is the distribution practice itself. Doing so would run contrary to notions of fair play. *See* 14 N.Y.Prac., New York Law of Torts § 8:2 ("[I]t would not seem fair to allocate

losses onto those who have committed no wrongdoing."). Numerous courts have rejected such theories for the lack of a causal connection as traditionally required by public nuisance law. *See, e.g.*, *Camden County Board of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536 (3d Cir. 2001) (finding that the causal chain was too attenuated to support a public nuisance claim); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007) (rejecting the City's nuisance suit against lead paint manufacturers because the City could not show that the particular defendant actually caused the problem"); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1116 (Ill. 2004) (holding that "the alleged public nuisance [wa]s not so foreseeable to the dealer defendants that their conduct can be deemed a legal cause of a nuisance that is the result of the aggregate" of many different acts over which they had no control). The City's injuries would still have occurred in the absence of Kill-a-Byte's video game distribution and using a "substantial factor" causation test to hold Kill-A-Byte liable for the entirety of the public nuisance runs afoul of due process.

B. New Tejas's Disproportionate "Abatement" Remedy Constitutes an Arbitrary Deprivation of Property, Regardless of Whether It Is Characterized as an Abatement or Punitive Damages

The City is seeking an "abatement" remedy under its public nuisance doctrine. The plain meaning of an abatement is "the act of eliminating or nullifying" something. *Abatement*, BLACK'S LAW DICTIONARY (11th ed. 2019). Therefore, to abate the intentional act that it is responsible for, which was a substantial factor to the increase

in crime rate that substantially interfered with the right to public safety, Kill-a-Byte should simply be required to end Lightyear.

However, despite Kill-a-Byte in fact ending Lightyear over seven years ago, the City sought over $600 million in damages to pay for new public safety measures to reduce crime. R. at 25. The City is not just asking Kill-a-Byte to abate its own acts. Instead, despite Kill-a-Byte only contributing a substantial factor, it is disproportionately required to abate the City's nuisance in the entirety, regardless of any other causes. Further, the City is "seek[ing] money . . . to 'abate' the *public nuisance*," not simply Kill-a-Byte's offending video game. *Id.* (emphasis added).

1. New Tejas's "public nuisance" law unconstitutionally allocates liability without regard to the proportion of harm caused by the alleged tortfeasor.

In light of New Tejas's public nuisance law's retroactive effect and insufficient causation test, the State's "abatement" remedy, which holds any entity that was a substantial factor in creating the public nuisance liable for the entire cost of abatement regardless of the proportion of the nuisance for which the defendant was responsible, is constitutionally irrational and unfair. *See Eastern Enterprises,* 524 U.S. at 528-29, 534 (plurality op.) (holding the statute unconstitutional because the statute's "severe retroactive liability on a limited class of parties that could not have anticipated the liability," in conjunction with the substantial disproportionality of the damages to the parties' experience, raised "substantial questions of fairness"); Gore, 517 U.S. at 575 (finding that the Due Process Clause prohibits liability that is "wholly disproportioned to the offense").

The idea that the City can recover the full amount of the estimated abatement costs from Kill-a-Byte, without regard to any other causes or responsible individuals or entities, transgresses both common sense and constitutional principles protecting parties from such an unfair result. If this Court found that the government cannot impose punitive damages disproportionate to a defendant's conduct, it must be the case that the government cannot impose liability, in the form of abatement, that lacks any proportionality or meaningful causality. *See Eastern Enterprises*, 524 U.S. at 528-529, 534. (Kennedy, J., concurring) (holding that the statute "violate[d] the proper bounds of settled due process principles" because the "remedy created by the [statute] b[ore] no legitimate relation to the interest which the Government asserts in support of the statute"); *Gore*, 517 U.S. 559 (holding that the Due Process Clause prohibits states from imposing grossly excessive punishments on tortfeasors).

2. New Tejas's "abatement" remedy violates principles of fundamental fairness by providing for an award of disproportionate damages, rather than ordering an end to the offending condition.

Although technically classified as an "abatement," New Tejas's public nuisance remedy blurs the line between compensatory damages and punitive ones. "Compensatory damages 'are intended to redress the concrete loss that the plaintiff has suffered *by reason of the defendant's wrongful conduct*.'" *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (quoting *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424 (2001)) (emphasis added). "[P]unitive damages serve a broader function." *Id.* Public nuisance liability is not conditioned upon unreasonable conduct on behalf of a tortfeasor, but instead "predicated 'upon

unreasonable injury.'" Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4(2) J. TORT L. ii, 16 (2011) (quoting *Wood v. Picillo*, 443 A.2d 1244 (R.I. 1982)).

Calculating public nuisance injuries proves to be a monumental task that leads to possibly unconstitutional, disproportionate outcomes since "[c]ertainly there is no known method of calculating damages" of the public bad that resulted in the public nuisance. *Id* at 17. Since "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the severity of penalty that a State may impose," public nuisance abatement can be unconstitutionally unforeseeable. *Gore*, 517 U.S. at 574. Further, "the magnitude of that liability raise[s] substantial fairness questions." *Eastern Enterprises*, 524 U.S. at 534. When a "solution singles out certain employers to bear a burden that is substantial in amount . . . and unrelated . . . to any injury they caused, the governmental action implicated fundamental principles of fairness." *Id.* at 537 (noting that these sorts of schemes are "quite unusual").

Here, the City has determined over $600 million in damages and that, despite contributing only a substantial factor to that injury, Kill-a-Byte must pay the entire amount. This large amount is not strictly limited to foreseeable damages; the damage award also funds new public safeguards and initiatives wholly unrelated to video games.

CONCLUSION

Without warning that its lawful distribution of video game placed it at risk of liability, Kill-a-Byte was slapped with more than $600 million dollars of "abatement" costs under an unprecedented theory of public nuisance. Before the district court, Kill-a-Byte moved for summary judgement, arguing that it would violate its due process rights to retroactively subject it to liability for the entire costs of abating a public nuisance under a dramatically reduced standard of causation. Though the district court rejected that argument at summary judgment, the Thirteenth Circuit sided with Kill-a-Byte on its appeal, sensibly ruling that New Tejas's public nuisance doctrine was unconstitutional, properly placing reasonable constitutional limits on states' discretion to decide for themselves when, and under what circumstances, it can subject an entity to liability for lawfully distributing a product. Crucially, the Thirteenth Circuit also rejected the City's contention that Kill-a-Byte had forfeited its Due Process argument because it had not re-raised it in a Rule 50 motion at trial, preserving the integrity of trials as a fact-finding forum.

This Court should affirm the Thirteenth Circuit on both counts.

Respectfully submitted,

Team 43

ATTORNEYS FOR RESPONDENT

No. 19-6236

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

CITY OF NEW TRURO,
Petitioner,

v.

KILL-A-BYTE SOFTWARE, INC.
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Thirteenth Circuit

APPENDIX

Team 43
Attorneys for Respondents

APPENDIX

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV § 1:

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.

FEDERAL RULES OF CIVIL PROCEDURE

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.

(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.