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Docket No. 19-6236

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In The  
**SUPREME COURT OF THE UNITED STATES**

October Term, 2020

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**The City of New Truro, New Tejas,**  
*Petitioner,*

v.

**Kill-A-Byte Software, Inc.,**  
*Respondent.*

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

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**BRIEF FOR RESPONDENT**

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**Team 46**  
**Attorneys for Respondent**

## **QUESTIONS PRESENTED**

- I. Whether a party properly preserves an issue for appeal when the trial court denies a motion for summary judgment as a matter of law.
- II. Whether retroactively applying civil liability and imposing a \$600 million judgment on a video game manufacturer for an alleged public nuisance violates the Due Process Clause.

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## **OPINIONS BELOW**

The opinion and order of the United States District Court for the Western District of New Texas regarding Respondent's motion for summary judgment is available at No. 16-cv-5412 and reprinted in the Record from 19a-32a. The final judgment of the United States District Court for the Western District of New Texas is available at No. 16-cv-5412 and reprinted in the Record from 33a-34a. The Thirteenth Circuit Court of Appeals' decision is available at No. 18-5971 and reprinted in the Record from 1a-18a.

## **STATEMENT OF JURISDICTION**

The United States District Court for the Western District of New Texas had diversity jurisdiction pursuant to 28 U.S.C. § 1332(a). The United States Court of Appeals for the Thirteenth Circuit had appellate jurisdiction over this case pursuant to 28 U.S.C. § 1291. The United States Court of Appeals for the Thirteenth Circuit entered its final judgment on March 21, 2020. R. at 1a. The City of New Truro, New Texas, timely filed a petition for writ of certiorari, which this Court granted pursuant to 28 U.S.C. § 1254 on October 5, 2020. R. at 1.

## **CONSTITUTIONAL PROVISION AND FEDERAL RULES INVOLVED**

The central constitutional provision is the Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1. This case also involves Rule 50 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 50. The pertinent texts of U.S. Const. amend. XIV and Rule 50 are set out in Appendix A.

## STATEMENT OF THE CASE

### **I. Factual Background**

Respondent Kill-A-Byte Software, Inc., (“KAB”) is a successful software company known for developing, producing, and distributing widely popular video games. R. at 20a. From 2003 to 2013, KAB distributed and operated the online video game Lightyear, a science-fiction game where 1,000 players battle one another on an alien planet until one remains. R. at 2a. During the ten-year span, Lightyear experienced commercial success with over 300 million individual accounts created. R. at 2a. Lightyear’s performance in the City of New Truro, New Tejas, (“New Truro” or “City”) was no different from the rest of the country with approximately 50% of young male New Truro residents playing the game for ten hours per week. R. at 2a. For the ten years it distributed and operated Lightyear, KAB operated within the bounds of all relevant state and federal regulations. R. at 2a.

Unfortunately, New Truro experienced an economic downfall over the last sixteen years. R. at 2a. The City has seen its fair share of education issues, such as a poorly funded school system and the teacher strike of 2004. R. at 3a n. 1. In 2005, the City suffered from an embezzlement scandal, which reduced the police budget. R. at 3a n. 1. Furthermore, in the last ten years, tax revenues in the City decreased by more than 50% and the cost of funding New Truro’s police department has more than doubled. R. at 2a. The severe hardships experienced by the people of New Truro ultimately culminated in significant budget short falls and an extraordinary increase in crime. R. at 2a. The people of New Truro suffer from a massive unemployment rate of 15% and over 45% of residents live in poverty. R. at 25a. In addition, the crime rate

in the City has escalated to unusually high levels compared to the national average. R. at 2a.

## **II. Procedural Background**

In 2016, thirteen years after KAB began distributing Lightyear, the City initiated this action seeking to abate the purported public nuisance contributed to by KAB. R. at 2a. The City argues Lightyear substantially interfered with public safety by encouraging the young male population to play video games. R. at 2a. The City sought to hold KAB entirely liable for the \$600 million cost to abate the public nuisance by funding job training programs, supporting an increase in police presence, creating centers to assist with “video game addiction,” installing security cameras in the City’s downtown, and other public safety measures. R. at 25a.

New Truro filed suit in New Tejas state court, and KAB removed the case to federal court based on diversity jurisdiction. R. at 3a. KAB 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. R. at 3a. The District Court for the Western District of New Tejas denied KAB’s motion for summary judgment. R. at 19a. The court held that the imposition of civil liability under state law cannot violate the Due Process Clause because: (1) the substantial factor theory of liability was a valid expansion of state law; (2) the retroactive application of the substantial factor test passed rational basis review; and (3) the estimated cost to abate is neither unprecedented nor radical. R. at 27a, 29a-30a.

The public nuisance case was eventually brought to trial. R. at 4a. At trial, the City's expert stated video game addiction is not a medical diagnosis and should not be treated as such. R. at 22a. More importantly, it was undisputed that KAB was not the sole cause of the City's crime rate. R. at 4a. Nevertheless, the City argued that as a matter of state law, KAB was liable for the full cost of abating the nuisance. R. at 4a. Under New Texas law, the City was only required to prove that: (1) the increased crime rate substantially interfered with a right to public safety; and (2) Lightyear was a "substantial factor" in the increased crime rate. The jury returned a verdict in favor of the City, and the court then held a two-week bench trial on the issue of abatement. R. at 4a. Judge Whitworth awarded the City more than \$600 million in abatement costs. R. at 4a.

KAB subsequently appealed to the Thirteenth Circuit. R. at 4a. The Thirteenth Circuit then certified questions to the Supreme Court of New Texas regarding the viability of the City's theory of liability due to the unprecedented nature of the issues under state law. R. at 4a. The Supreme Court of New Texas confirmed the viability and legal sufficiency of the City's claim and the recoverability of the amount awarded to abate the public nuisance under state law. R. at 4a-5a. The Thirteenth Circuit, in accordance with the answers to the certified questions, addressed two issues: (1) whether KAB preserved its due process argument for appeal; and (2) whether the imposition of civil liability, under these circumstances, violated due process. R. at 5a.

In its opinion, the Thirteenth Circuit reversed the district court and held that KAB preserved its due process argument because Rule 50 motions are not required

when purely legal issues are denied at the summary judgment stage of litigation. R. at 8a. The Thirteenth Circuit also held that the City's claim violated due process because the retroactive application of the erroneously expanded New Texas Substantial Factor Test and the grossly excessive abatement award exceeded constitutional bounds when viewed in the aggregate. R. at 9a. For these reasons, the Thirteenth Circuit reversed the district court's decision and rendered a take-nothing judgment for KAB. R. at 14a. New Truro timely filed a petition for writ of certiorari, which this Court granted pursuant to 28 U.S.C. § 1254 on October 5, 2020. R. at 1.

## SUMMARY OF THE ARGUMENT

The Court should affirm the Thirteenth Circuit and find that ruling on the due process violation was a purely legal issue that did not require a Rule 50 motion for preservation. In finding the issue was preserved for appeal, this Court should hold the imposition of a \$600 million judgment for civil liability violates due process.

A Court of Appeals has jurisdiction to review a denial of summary judgment on a pure question of law even if the party did not raise the issue on a Rule 50 motion. This Court should accept the majority view, followed by the D.C., Second, Sixth, Seventh, Ninth, Tenth, and Federal Circuits, that a Rule 50 motion is not required to preserve purely legal issues denied on summary judgment. The rationale of a Rule 50 motion only logically applies to questions of fact, not questions of law, because the purpose of a Rule 50 motion is to assess the sufficiency of the evidence. Requiring a Rule 50 motion for purely legal issues is also not consistent with the intent of the Federal Rules of Civil Procedure (“Federal Rules”) because it is inefficient to require two identical motions at summary judgment and following the trial.

Contrary to the minority view that it is too difficult for courts to identify pure questions of law, district courts are capable of discerning between questions of law and questions of fact. This Court’s past precedent has recognized this dichotomy; therefore, this Court should reject the minority position that this undertaking is unworkable. The Advisory Committee notes to the Federal Rules further support the majority view by directing district courts to provide an analysis of their decision-

making on motions for summary judgment, including whether the denial of summary judgment was based on an issue of law or an issue of fact.

KAB's due process argument qualifies as a purely legal issue because it does not hinge on any disputed facts or require a determination on the sufficiency of the evidence. Therefore, this Court should affirm the Thirteenth Circuit's decision that KAB properly preserved its purely legal issue on a motion for summary judgment.

In finding the due process argument was preserved for appeal, this Court should affirm the Thirteenth Circuit and hold the imposition of a \$600 million civil liability violates the Due Process Clause. The City brought a public nuisance action against KAB and intends to hold the company liable for interfering with public safety. The City alleges KAB, in producing the video game Lightyear, contributed to the increase in crime. The City believes, as a matter of law, KAB is responsible for the total cost to abate the nuisance despite the City admitting KAB is not the sole cause of the increase in crime. Imposing civil liability on KAB violates due process because the inappropriately expansive causation standard, the retroactive application of that standard, and the grossly excessive abatement award exceed constitutional limits.

The Supreme Court of New Texas expanded the substantial factor test beyond constitutional limits by certifying the City's theory of liability which only requires proof that KAB distributed a product that was a substantial factor in the increased crime rate. It is beyond reason to allow the City to hold KAB liable for simply distributing a video game in accordance with all state and federal regulations. Instead, this Court should adopt a substantial factor test that requires proof KAB



had actual knowledge the video game was harmful and concealed that harm. It would set a dangerous precedent to hold a lawful video game producer liable for \$600 million in abatement costs without requiring proof KAB had actual knowledge Lightyear was harmful and concealed that harm. Alternatively, this Court could adopt but-for causation, which is best fit to address cases with only one defendant because but-for KAB's conduct the crime rate would have still increased.

This Court should also find the retroactive application of the expanded public nuisance standard exceeds constitutional bounds. Lightyear was released in 2003, however it was not subject to extraordinary liability until the New Texas Substantial Factor Test was expanded in 2019. The Court has only verified laws which retroactively apply liability to short and confined periods of time, such as five months. Retroactively imposing liability on sixteen years of conduct is not a short and confined period of time.

Furthermore, the retroactive liability is severe and disproportionate to the harm, which offends due process. The City admits KAB is not the sole cause of the increase in crime, as several other factors have also played a role. It is beyond reason to hold KAB entirely liable for the cost to abate a nuisance. It is undisputed that KAB is not the sole cause for the increase in crime, yet the City intends to hold it entirely liable for the total cost to abate the nuisance. The City has experienced education issues, unemployment problems, a diminishing police force, an increased poverty rate, and increased crime for over a decade. Attributing all these issues to a video game is nonsensical and demonstrates the disparity between the harm Lightyear

caused and the \$600 million award. This Court should find the grossly excessive and disproportionate punishment inflicted on KAB violates due process.

### **ARGUMENT**

#### **I. KILL-A-BYTE PROPERLY PRESERVED THE DUE PROCESS ISSUE RAISED ON SUMMARY JUDGMENT BECAUSE IT WAS NOT REQUIRED TO RENEW THE PURELY LEGAL ARGUMENT IN A RULE 50 MOTION.**

This Court should affirm the Thirteenth Circuit's decision that KAB properly preserved its due process argument because Rule 50 motions are not required to preserve purely legal issues raised at summary judgment. This Court should adopt the position of the majority of circuit courts which have held that "[w]here a motion for summary judgment based on an issue of law is denied, appellate review of the motion is proper even if the case proceeds to trial and the moving party fails to make a subsequent Rule 50 motion." *Wilson v. Union Pacific R.R. Co.*, 56 F.3d 1226, 1229 (10th Cir. 1995). The majority of circuit courts are correct because the rationale of the Rule 50 motion does not apply to purely legal questions, as the purpose of a Rule 50 motion is to evaluate the sufficiency of the evidence. *See Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 718 (7th Cir. 2003). Requiring a Rule 50 motion to renew a purely legal argument contravenes the intent of the Federal Rules, as it is simply an inefficient and "meaningless formality." R. at 7a. *See Fed. R. Civ. P. 1.*

This Court should reject the opinions of the minority of circuit courts that hold that district courts cannot assess whether a summary judgment motion involves a purely legal or a fact-bound issue. *Contra Feld Motor Sports, Inc. v. Traxxas*, 861 F.3d 591, 596 (5th Cir. 2017). Certainly district courts can discern between issues of fact

and law, and do so routinely. *But c.f. id.* Indeed, both this Court and the Federal Rules encourage district courts to make determinations on summary judgment about whether the argument is an issue of law or fact. *See Ortiz v. Jordan*, 562 U.S. 180, 188 (2011); *see also* Fed. R. Civ. P. 56 advisory committee's note to 2010 amendments.

The basis of KAB's appeal is whether the City's imposition of its common law public nuisance claim violates due process. This is a purely legal issue because it does not hinge on any disputed fact. Despite KAB not making a Rule 50 motion, this Court should find that it has jurisdiction to review the due process argument and affirm the Thirteenth Circuit's decision. The court correctly held that KAB was not required to raise a Rule 50 motion in order to preserve the issue for appeal.

**A. This Court Should Adopt the Majority View that a Rule 50 Motion is Not Required to Preserve a Purely Legal Claim that a Trial Court Denies at Summary Judgment.**

This Court should hold that when a trial court denies summary judgment on a purely legal issue, a Rule 50(a) motion at trial and a Rule 50(b) motion post-judgment are not required to preserve the issue for appeal. The majority of circuit courts hold that a party preserves an issue for appeal when the trial court denies summary judgment on a purely legal issue rather than on the sufficiency of the evidence. *See Feld v. Feld*, 688 F.3d 779, 781-82 (D.C. Cir. 2012). *See also Houskins v. Sheahan*, 549 F.3d 480, 489 (7th Cir. 2008); *Banuelos v. Constr. Laborers' T. Funds*, 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).

In *Ortiz v. Jordan*, this Court did not resolve whether a Court of Appeals has jurisdiction to review a denial of summary judgment on a pure question of law if the party failed to make a Rule 50 motion, resulting in a circuit split. 562 U.S. at 188. *Ortiz* addressed whether a party may appeal a denial of summary judgment after a district court has conducted a full trial on the merits, and to that issue, this Court unequivocally answered “no.” *Id.* at 184. This Court stated, however, that it “need not address” the argument concerning the necessity of a Rule 50 motion because the summary judgment denial at issue in *Ortiz* “hardly present[ed] ‘purely legal’ issues.” *Id.* at 190.

This Court should accept the majority position because: (1) the rationale of requiring a Rule 50 motion does not apply to purely legal questions; (2) imposing an additional Rule 50 motion for a purely legal issue contravenes the intent of the Federal Rules because it is a waste of judicial resources; and (3) contrary to the minority of circuit courts’ opinion, federal courts are capable of discerning between legal issues and fact-bound issues in instances where the summary judgment denial is based on a pure question of law. The decision of the Thirteenth Circuit should therefore be affirmed.

**1. Rule 50 motions are unnecessary to preserve purely legal questions raised on summary judgment.**

The rationale for requiring a Rule 50 motion does not apply to legal questions raised on summary judgment because Rule 50 concerns the sufficiency of evidence. When a party moves for summary judgment, the district court must determine whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Rule 50(a) provides that a trial court may enter judgment for the moving party when there is no legally sufficient evidentiary basis for a reasonable jury to find for the opposing party. Fed. R. Civ. P. 50(a). If the court does not grant a Rule 50(a) motion, the moving party may file a Rule 50(b) renewed motion for judgment as a matter of law for the same reasoning. Fed. R. Civ. P. 50(b).

The rationale for requiring a Rule 50 motion in order to preserve an issue for appeal only applies to issues of fact. A Rule 50 motion is necessary when summary judgment is denied on an issue of fact because, “the full record developed in court supersedes the record existing at the time of the summary judgment motion.” *Ortiz*, 562 U.S. at 184. Stated differently, “on appeal, there would be no reason to ‘step back in time’ to determine whether the evidence was sufficient for summary judgment” because the question of the sufficiency of the evidence at summary judgment would have been superseded by the events at trial. *Feld*, 688 F.3d at 782 (quoting *Chemetall*, 320 F.3d at 718). “Procedural instruments are means for achieving the rational ends of law.” *Adams v. United States*, 317 U.S. 269, 273 (1942). The justification for

requiring a Rule 50 motion in order to preserve an issue is only rational when summary judgment is denied based upon the sufficiency of the evidence, rather than the law.

The D.C. Circuit, Second Circuit, Sixth Circuit, Seventh Circuit, Ninth Circuit, Tenth Circuit, and Federal Circuit all agree that a Rule 50 motion is unnecessary to preserve legal issues raised on summary judgment as they do not challenge the sufficiency of the evidence. *See Barber v. Louisville & Jefferson Cty. Metro. Sewer Distr.*, 295 Fed. Appx. 786, 789 (6th Cir. 2008) (“[w]here the denial of summary judgment was based on a question of law rather than the presence of material disputed facts, the interests underlying the rule are not implicated.”). For example, the Tenth Circuit did not require a Rule 50 motion to preserve the defendant’s issue for appeal because the denial of summary judgment was based on an issue of law and not on a disputed fact. *Wilson*, 56 F.3d at 1229. *Wilson* involved a former employee’s action against its employer, Union Pacific, for injuries sustained while walking near a train track. *Id.* at 1228. On its motion for summary judgment, Union Pacific argued that under the relevant statute, the employer’s conduct “could not, as a matter of law, have been the cause of any injury once the plaintiff left the site of the [injury].” *Id.* at 1229. The Tenth Circuit acknowledged that since this was not an issue of fact, but rather a question of law for the court to decide, a Rule 50 motion was not required to preserve the issue. *Id.*

The majority position is logical because the events at trial do not affect the issue of law raised on summary judgment. *Banuelos*, 382 F.3d at 902 (stating that

“this distinction is logical”). The argument and reasoning of a purely legal issue will be identical on a motion for summary judgment and on a motion for judgment as a matter of law after the trial. *Id.* at 903. The requirement of a Rule 50 motion in order to preserve a denial of summary judgment is only rational as applied to issues of fact that question the sufficiency of the evidence.

Holding that a party forfeits the ability to appeal an argument because the party failed to renew the exact same argument after a trial would also be unjust. The Honorable Judge Despard argued in the dissenting opinion of the Thirteenth Circuit’s decision that the majority view is unfair because it “disrupts the orderly” procedure of appeals and does not provide clarity to litigants. R. at 15a. However, Judge Despard’s opinion is incorrect because should the Court accept the majority position in its holding here, litigants will be on-notice at summary judgment that a purely legal issue will be preserved for appeal without a Rule 50 motion.

KAB’s motion for summary judgment involved a question of law: whether the City’s imposition of civil liability violates due process. R. at 19a. The district court only considered whether the causation standard was proper, whether the retroactive application was inappropriate, and whether the requested abatement award was excessive in light of due process. R. at 27a, 28a, 31a. Nowhere in the district court opinion did it address a disputed fact or proclaim the due process violation hinged on the sufficiency of the evidence. Because the ruling was based on a question of law as opposed to the sufficiency of the facts, a Rule 50 motion is not necessary to preserve the argument for appeal.

The due process argument raised in a motion for summary judgment by KAB was unaffected by the events at trial. R. at 8a. The Court should not require KAB to raise the identical argument in a Rule 50 motion for the sole purpose of preservation. KAB raised a purely legal argument on summary judgment regarding whether the imposition of civil liability violated due process and therefore properly preserved the issue for appeal.

**2. The requirement of a Rule 50 motion to renew a purely legal argument contravenes the intent of the Federal Rules of Civil Procedure.**

This Court should accept the majority view because foreclosing a party's ability to appeal a denial of summary judgment on an issue of law does not align with the intent of the Federal Rules. Rule 1's "paramount command" requires that courts construe the rules to further the just, speedy, and inexpensive resolution of disputes. *Dietz v. Bouldin*, 136 S. Ct. 1885, 1891 (2016). This Court should consider the effect of the requirement of a Rule 50 motion to renew a legal argument denied on summary judgment on the efficient allocation of judicial resources and the delay and costs to the parties. This Court should accept the majority view because it furthers Rule 1's command to interpret the rules fairly and efficiently.

It is both a waste of judicial resources and an inefficient use of the courts' and litigants' time to require the Rule 50 motion in order to preserve the issue of law for appeal. When a party moves for summary judgment on a purely legal issue and is denied by the court, the Rule 50(a) motion before trial and Rule 50(b) motion after trial would be identical concerning the issue of law. The Thirteenth Circuit correctly



labeled the minority of circuits' requirement of a Rule 50 motion for purely legal issues as a "meaningless formality." R. at 7a.

The minority's requirement of a Rule 50 motion for purely legal issues is a "meaningless formality" when the district court denies the issue of law on the motion for summary judgment because the district court is effectively granting summary judgment on the issue to the opposing party. In a case where the district court denied summary judgment on an argument regarding the construction of a patent claim, the Federal Circuit stated that "[w]hen the district court denied [the defendant's] motion for summary judgment, it did not conclude that issues of fact precluded judgment; it effectively entered judgment of validity to [the plaintiff]." *Lighting Ballast Control LLC v. Philips Elecs. N. Am. Corp.*, 790 F.3d 1329, 1337 (Fed. Cir. 2015). By effectively entering judgment of validity to the opposing party, the district court would be wasting time and resources by issuing another decision on the same question of law on a Rule 50 motion.

Here, the district court's decision discusses and rejects all of KAB's legal arguments on summary judgment. R. at 7a. The Thirteenth Circuit correctly found that although the district court did not expressly grant summary judgment in favor of the City, the district court's extensive decision "easily could have stated instead that partial summary judgment in favor of the City was granted." R. at 7a. By analyzing KAB's motion for summary judgment and denying the validity of the legal argument, the district court effectively found that the City's legal argument was valid. Therefore, it would be inefficient to require KAB to raise the exact same

argument on a Rule 50 motion in order to preserve the issue for appeal. Requiring KAB to make an additional Rule 50 motion, after the district court extensively addressed KAB's due process argument on summary judgment, does not reflect the intent of the Federal Rules because it is both inefficient and unjust.

**3. Contrary to the minority position, district courts routinely discern between purely legal issues and fact-bound issues.**

This Court should find that the minority position is without merit because district courts are trusted with the determination of whether their denial of summary judgment is based on a question of fact or a question of law. A minority of circuit courts hold that a party forfeits its ability to appeal an issue by failing to make a Rule 50(a) or Rule 50(b) motion after a denial of summary judgment. *See Feld Motor Sports, Inc.*, 861 F.3d at 596. *See also Ji v. Bose Corp.*, 626 F.3d 116, 128 (1st Cir. 2010); *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1235 (4th Cir. 1995). The minority also argues that a district court is faced with an unreasonable burden of distinguishing between legal and factual issues. *See Black v. J.I. Case Co.*, 22 F.3d 568, 571 n. 5 (5th Cir. 1994).

The minority's concern about "engaging in the dubious undertaking of determining the bases on which summary judgment is denied" is without merit because a district court can, and should, make this determination on summary judgment. *Contra Chesapeake*, 51 F.3d at 1235. District courts routinely decide whether an argument invokes an issue of law or an issue of fact during the course of litigation. For example, district courts decide when issues of fact must be resolved by

the trier of fact. *See Cobb v. Metro-North R.R.*, 41 F. Supp. 3d 145, 150 (D. Conn. 2014) (finding that whether the defendant complied with the applicable regulation was an issue of fact for the jury). On appeal, circuit courts often determine whether the basis of an appeal is an issue of law or an issue of fact in order to apply the appropriate standard of review. *See e.g., Daff v. United States*, 78 F.3d 1566, 1573 (Fed. Cir. 1996) (“contract interpretation is an issue of law that we review *de novo*”); *Folger Coffee Co. v. M/V Olivebank*, 201 F.3d 632, 636 (5th Cir. 2000) (“seaworthiness is an issue of fact reviewed for clear error”).

The dichotomy between issues of law and issues of fact is alive and well in this Court’s jurisprudence, but the minority of circuit courts fail to recognize its existence. In *Johnson v. Jones*, for example, this Court held that an interlocutory appeal of the denial of summary judgment is appropriate when the trial court concludes, given undisputed facts, that the defendant has immunity. 515 U.S. 304, 319-20 (1995). Conversely, this Court held an interlocutory appeal was inappropriate for a denial of summary judgment on the defendant’s immunity when the issue involved a genuine dispute of material fact. *Id.* at 313. While this Court recognized the difficulty in distinguishing the basis on which summary judgment was denied, this Court rejected the notion that this undertaking was “unworkable.” *Id.* at 318. This Court in *Johnson* trusted the Court of Appeals with categorizing questions of law, questions of fact, or mixed questions of law and fact. *Id.* This Court recognized that this distinction may require a “detailed evidence-based review of the record,” but that it is still manageable for the circuit courts. *Id.* at 319.

The minority's criticism of drawing a dichotomy between questions of law and fact is even further undermined by this Court's analysis in *Ortiz*. This Court in *Ortiz* reiterated the rule from *Johnson*, "that immediate appeal from the denial of summary judgment on a qualified immunity plea is available when the appeal presents a 'purely legal issue,'" rather than "when the district court determines that factual issues genuinely in dispute preclude summary adjudication." *Ortiz*, 562 U.S. at 188. This Court refused to grant an appeal on the defendants' qualified immunity claims because they did not present purely legal issues and involved disputed facts. *Id.* at 190. This Court recognized that denials of summary judgment, particularly those involving the immunity defense, require a determination between questions of pure law and questions of disputed facts.

The minority position undermines the ability of trial courts and ignores the mandate given by this Court. *See Ortiz*, 562 U.S. at 188. It is well within the district court's ability and responsibility to determine the legal or factual bases of its denial of summary judgment. Even if the district court denies summary judgment and does not explicitly state its reasoning, this Court in *Johnson* has trusted the Court of Appeals with making such a determination on appeal. Here, this Court should rely on the judgment of the Thirteenth Circuit in determining that the due process issue raised in KAB's motion for summary judgment was purely legal. R. at 8a. In denying the motion for summary judgment, the district court considered the outer bounds of state tort liability in concert with due process, thereby constituting a purely legal determination. R. at 27a. This Court should reject the minority position because

district courts are capable and successful in determining whether there are issues of fact or issues of law in their denials of summary judgment.

Furthermore, the Advisory Committee notes from the 2010 amendments to Rule 56 dictate that district courts should “state on the record the reasons for granting or denying a summary judgment motion” because “a statement of reasons can facilitate an appeal or subsequent trial-court proceedings.” Fed. R. Civ. P. 56 advisory committee’s notes to 2010 amendment. Should a district court deny summary judgment because a genuine issue of material fact exists or require a trial on the merits to determine the sufficiency of the evidence, then the district court must give reasons for its decision. *See Robbins v. Becker*, 715 F.3d 691, 695 (8th Cir. 2013) (remanding to the district court because of an insufficient explanation of its findings of fact and conclusions of law on its denial of the defendant’s motion for summary judgment).

This Court should accept the majority position because a district court has the ability to parse out whether the denial of summary judgment is based on a purely legal issue or a question of fact. Judge Despard contended in the dissenting opinion that the majority opinion of the Thirteenth Circuit was improperly influenced by the \$600 million abatement award. R. at 18a. However, the Thirteenth Circuit exemplified the ability to draw a dichotomy between questions of law and fact. The Thirteenth Circuit did not address whether the \$600 million award was justified based on factual conduct; it merely addressed whether it exceeded constitutional limitations, which is a purely legal issue. R. at 13a-14a. In following the instruction

of the Federal Rules, a district court can easily determine and give a statement for the reasons of its decision. The District Court for the Western District of New Texas wrote a thorough decision denying KAB's summary judgment motion, in which it addressed each one of KAB's legal arguments. R. at 26a-32a.

The minority of circuit courts also argue that "purely legal issues" do not exist on motions for summary judgment. The Fifth Circuit, which follows the minority position, stated that all summary judgment rulings are "rulings of law in the sense that they may not rest on the resolution of disputed facts." *Black*, 22 F.3d at 571 n. 5. This argument is misleading because while all grants of summary judgment invoke the legal standard that no genuine issue of material fact exists, most denials of summary judgment involve finding genuine issues of material fact. *See generally Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986). A denial of summary judgment involves the application of the facts to the legal standard, but the focus of the court is on whether reasonable fact finders could disagree. *See Fed. R. Civ. P.* 56. The application of the legal standard to material facts on a motion for summary judgment should not preclude this Court from ruling that there is a distinction between questions of law and questions of fact at summary judgment.

There were no genuine issues of material fact within KAB's motion for summary judgment. R. at 4a. The only material fact in the district court's determination was undisputed: that KAB contributed to the public nuisance but that KAB was not solely responsible for the City's crime rate. R. at 4a. The district court only addressed the question of law regarding where the outer bounds of state tort law

crossed due process limits. R. at 27a. Therefore, the district court's denial of KAB's motion of summary judgment does not require a Rule 50 motion to preserve the issue for appeal.

The minority position is incorrect in its concern about the challenge of discerning between fact-bound issues and issues of law because both this Court and the Federal Rules entrust federal courts with making this determination on summary judgment. The minority position also does not align with the intent of the Federal Rules to administer justice efficiently and fairly. The majority position is correct because the rationale of requiring a Rule 50 motion only applies to fact-bound issues and not purely legal issues. Therefore, this Court should affirm the Thirteenth Circuit's decision that KAB properly preserved its due process argument on summary judgment without an additional Rule 50 motion because it is a pure question of law.

**B. A Rule 50 Motion is Not Necessary Because the Violation of Kill-A-Byte's Due Process Rights is a Purely Legal Question.**

Should the Court accept the majority view that a Rule 50 motion is not required to preserve a purely legal issue denied on summary judgment, KAB's due process argument qualifies as a purely legal issue because it does not rest on disputed facts. In *Ortiz*, the Court stated that a purely legal issue must be "capable of resolution 'with reference only to undisputed facts.'" 562 U.S. at 190. The Court did not give detailed instructions on the definition of a purely legal claim, but the Court did mention that "cases 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.* The Sixth Circuit provides further explanation and defines purely legal issues as “abstract legal questions, which can be asked and answered without reference to the facts of the case.” *Kay v. United of Omaha Life Ins. Co.*, 562 Fed. Appx. 380, 385 (6th Cir. 2014).

The majority of circuit courts who apply the purely legal exception to the Rule 50 requirement provide insight on what type of issue qualifies. A pure question of law must be “divorced from any dispute over the facts.” *Feld*, 688 F.3d at 783. *See Lawson v. Sun Microsystems, Inc.*, 791 F.3d 754, 761-62 (7th Cir. 2015) (finding a purely legal issue for a question of contract interpretation because it had no bearing on the sufficiency of trial evidence). *Contra Frank C. Pollara Grp. v. Ocean View Inv. Holding*, 784 F.3d 177, 187 (3d Cir. 2015); (refusing to apply the “purely legal” exception to a denial of summary judgment based on a question of contractual privity because “certain predicate facts. . . were vigorously disputed). *See also T. Levy Assocs. v. Kaplan*, 755 Fed. Appx. 116, 119 (3d Cir. 2018) (finding that the defendants did not raise a purely legal issue in a summary judgment motion because they “disputed the alleged facts occurred over a sufficient period of time to meet RICO’s continuity requirement”). In *Feld*, the Third Circuit held that the question of “whether D.C. law permits a condominium owner to use force to exclude another individual from the building’s common area” qualified as a pure issue of law because it did not depend on the record or turn on any facts. 688 F.3d at 783.

Here, KAB’s motion for summary judgment argued that the City’s expansion of liability for common law nuisance violates the Due Process Clause. R. at 27a. KAB’s



argument involved a pure question of law because it challenged the validity of the New Tejas public nuisance law and did not hinge on any disputed facts. R. at 23a. The district court provided a thorough analysis of its denial of the motion by assessing whether the New Tejas public nuisance law violated the protections of the Due Process Clause. R. at 26a-32a. Each of KAB's arguments in support of its motion did not invoke questions of fact; the underlying facts of the claim, including whether KAB was aware of the effects of the distribution of Lightyear and the City's high crime rates, were not in dispute. R. at 7a. At summary judgment, the district court was not faced with the question of whether KAB was liable for public nuisance. R. at 27a. The district court's sole responsibility on KAB's motion for summary judgment was to determine the constitutionality of the City's theory of liability. R. at 27a. That question presents a pure issue of law.

The Thirteenth Circuit correctly found that KAB's due process argument presents a purely legal issue. KAB's argument on its motion for summary judgment is similar to the issue posed in *Feld* because it involves the boundaries of pre-existing law. KAB's due process argument also did not concern "what occurred, or why an action was taken or omitted," but rather focused on an argument about the "substance" of pre-existing law as this Court specified in *Ortiz*. KAB's argument is not contingent on any dispute of material fact; therefore, this Court should find that KAB's argument on its motion for summary judgment posed a pure question of law.

In sum, a Rule 50 motion should not be required to preserve pure questions of law denied on summary judgment because the rationale of requiring a Rule 50 motion

after a denial of summary judgment only applies to questions of fact. The majority position is better aligned with the intent of the Federal Rules because it promotes efficiency and fairness. Finally, contrary to the minority position, district courts have the ability to discern between issues of fact and issues of law. Should the Court accept the majority position, KAB's due process argument is a pure question of law because the constitutionality of the City's public nuisance claim does not hinge on any disputed facts. Therefore, this Court should affirm the Thirteenth Circuit's decision that KAB properly preserved its due process argument on its motion for summary judgment without a Rule 50 motion.

Should this Court find the issue was properly preserved because it is a pure question of law denied at summary judgment, then it must look to whether the imposition of civil liability on KAB violates due process. Because the motion for summary judgment preserved due process for appeal on the grounds that it is a legal – not factual – issue, the court need not address whether the district court's findings of fact were proper. Instead, this Court need only examine whether the expanded causation standard, retroactive application of the new standard, and excessive abatement award offends due process. And, as discussed below, due process has been violated, and the Thirteenth Circuit's decision must stand.

**II. THE IMPOSITION OF CIVIL LIABILITY ON KILL-A-BYTE VIOLATES DUE PROCESS BECAUSE THE IMPROPERLY EXPANDED CAUSATION STANDARD WAS RETROACTIVELY APPLIED AND THE ABATEMENT AWARD WAS DISPROPORTIONATE TO THE HARM.**

Retroactively applying the New Tejas Substantial Factor Test and imposing \$600 million civil liability on KAB to abate a public nuisance violates the Due Process Clause of the Fourteenth Amendment. The Due Process Clause forbids the states to “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV. Imposing civil liability on KAB violates due process because the unilateral expansion of the causation standard, the retroactive application of the broader standard, and the grossly excessive and disproportionate award exceeds constitutional bounds.

The City brought a public nuisance claim against KAB and argued that, as a matter of law, KAB is liable for the total cost to abate the nuisance because: “(1) the increased crime rate substantially interfered with the right to public safety; and (2) Lightyear was a ‘substantial factor’ in the increased crime rate.” R. at 4a. This theory of liability is much broader than the Restatement. While the Restatement acknowledges that interference with public safety is a public nuisance, it finds liability only when there has been significant harm. Restatement (Second) of Torts § 821B; 821F (Am. Law Inst. 1965). The City’s theory of liability does not require proof that a defendant caused significant harm but requires only proof the product interfered with public safety.

The district court improperly applied the City's theory of public nuisance liability using the expanded substantial factor test ("New Tejas Substantial Factor Test"). R. at 4a. The New Tejas Supreme Court certified the City's theory of liability, which required only a showing that Lightyear contributed to the crime rate in New Truro and retroactively applied the New Tejas Substantial Factor Test to the past sixteen years. R. at 5a. This retroactive application culminated in a \$600 million abatement award. The Thirteenth Circuit found the district court's holding and New Tejas Supreme Court's answer unprecedented and inconsistent with this Court's prior decisions. R. at 9a-10a. *See Burrage v. United States*, 571 U.S. 204, 215-216 (2014) (holding a defendant cannot be liable if the hazard would have occurred without the harmful conduct).

This Court should affirm the Thirteenth Circuit and find the City's theory of liability and resulting abatement award violates due process. This Court requires rational cost spreading to abate public issues when imposing civil liability. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19 (1976). The New Tejas Substantial Factor Test fails to cost spread rationally because it holds KAB entirely liable for all harm without regard to the proportion of crime it actually caused. It is undisputed KAB is not the sole cause of the increase in crime, yet the City argues as a matter of law that KAB is responsible for the total cost to abate the harm. This Court should reject the New Tejas Substantial Factor Test and adopt a test that requires proof the defendant had actual knowledge of the harm and acted to conceal it. Alternatively, this Court could adopt but-for causation because it is best suited to address cases with only one

defendant. In adopting either standard the City's claim fails as it is violative of the Due Process Clause.

In applying the New Texas Substantial Factor Test, the district court also imposed retroactive liability on KAB that spanned over a decade. This Court has held retroactive imposition of liability offends due process when it is not confined to a short and limited period of time and when it imposes severe and disproportionate liability. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 547-49 (1998); *Pension Benefit Guar. Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 731 (1984). KAB was not on-notice it would face extraordinary liability when it released Lightyear in 2003. Sixteen years later, the Supreme Court of New Texas certified the New Texas Substantial Factor Test. Retroactively applying this test to sixteen years of conduct violates due process because it is not confined to a short and limited period of time.

Lastly, this Court should find the \$600 million abatement award violates due process because it is grossly excessive and disproportionate to KAB's conduct. The Due Process Clause prohibits grossly excessive and arbitrary punishments inflicted on the tortfeasor. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (finding excessive damages are neither reasonable nor proportionate to the wrongful conduct). It is undisputed KAB is not the sole cause for the increase in crime, yet the City intends to hold them entirely liable for the cost to abate. R. at 4a. Attributing all the costs to repair the education, unemployment, and policing issues faced by the City to a video game producer allows the City to recover far beyond any

loss suffered by KAB's conduct. Imposing excessive civil liability on KAB by way of a retroactively applied and over-extended causation standard violates due process.

**A. The New Tejas Substantial Factor Test Exceeds Constitutional Limits Because it Fails to Proportion Responsibility for the Increase in Crime.**

The New Tejas Substantial Factor Test violates due process because it holds KAB entirely responsible for abatement without proportioning liability based on the contribution to the harm. The New Tejas Substantial Factor Test only requires that the City show Lightyear affected the crime rate. It is undisputed that KAB is not the sole cause for the increase in crime, yet under the New Tejas Substantial Factor Test, the City intends to hold KAB entirely liable for the total cost to abate. This Court has held the government must pursue a means of cost spreading that is rational. *Usery*, 428 U.S. at 19.

This Court should decline to apply the New Tejas Substantial Factor Test and instead adopt a substantial factor test that cost spreads more rationally by requiring proof defendant had actual knowledge of the harm and acted to conceal it. *See Cty. of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 325 (Cal. Ct. App. 2006) (requiring proof defendant had actual knowledge of the harm and concealed it); *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 550 (Cal. Ct. App. 2017) (same). Alternatively, this Court could apply but-for causation because it is more appropriate when there is only one defendant. Imposing civil liability on KAB for operating within the bounds of all state and federal laws conflicts with fundamental fairness and public policy because but-for KAB's conduct the harm would have still occurred.

**1. This Court should apply a substantial factor test that requires proof the defendant had actual knowledge of the harm and acted to conceal it.**

This Court should reject the New Tejas Substantial Factor Test because it creates a right of action that is too broad and undefined by only requiring proof the defendant distributed a product that inevitably caused harm. The substantial factor test in public nuisance cases must go beyond requiring distribution of a harmful product; it must require actual knowledge and concealment of the alleged harm. *See Santa Clara*, 40 Cal. Rptr. 3d at 325; *ConAgra*, 227 Cal. Rptr. 3d at 550. This Court should adopt such a standard.

Other jurisdictions, addressing substantial factor causation in light of public nuisance claims, require actual knowledge of harm and affirmative conduct. *Santa Clara*, 40 Cal. Rptr 3d at 328. California courts require more than proving the defendant knew they were distributing a product; they require proof that the defendant had actual knowledge the product was injurious to public health. *E.g.*, *ConAgra*, 227 Cal. Rptr. 3d at 529 (concerning lead-based paint); *Ileto v. Glock Inc.*, 349 F.3d 1191, 1206 (9th Cir. 2003) (concerning weapons). Without requiring affirmative conduct and proof the defendant knew the product was hazardous, a public nuisance claim cannot prevail. *ConAgra*, 227 Cal. Rptr. 3d at 529.

This Court should apply the substantial factor test developed in public nuisance cases in other jurisdictions because the New Tejas Substantial Factor Test is overly broad and improper. The district court found the New Tejas Substantial Factor Test did not violate due process; however, the case law it relied upon suggests

otherwise. R. at 30a. The district court relied on two California cases – *Santa Clara* and *ConAgra* – when assessing the abatement award on KAB’s motion for summary judgment but failed to appreciate that the California courts applied a vastly different substantial factor test than New Tejas. There is no evidence in the Record that KAB had actual knowledge Lightyear affected the crime rate nor evidence they concealed any harm. Furthermore, it is undisputed that KAB operated within the bounds of all state and federal laws. The district court relies on the common law developed in the California cases in its denial of summary judgment but fails to indicate KAB had actual knowledge of the harm and acted to conceal it. It is only under the overextended New Tejas Substantial Factor Test that the district court was able to hold KAB liable.

Unlike the district court, this Court should adopt the substantial factor test developed in *Santa Clara* and *ConAgra* and require proof that KAB had actual knowledge Lightyear would increase the crime rate in the City. Without actual knowledge, this Court should not find KAB’s conduct was a substantial factor in the harm. It is not enough that KAB knew they were distributing a video game; there must be evidence of affirmative conduct, such as concealment. Without maintaining a substantial factor test similar to those in other jurisdictions, a dangerous precedent would be set and the potential for liability would be endless. A substantial factor test like the one certified by the New Tejas Supreme Court inappropriately expands liability by not requiring proof of actual knowledge, and this expansion of liability under the New Tejas Substantial Factor Test violates due process.



**2. Alternatively, this Court should apply but-for causation.**

Substantial factor causation is inappropriate and fails to cost spread because the City seeks to only hold one party liable for the total cost to abate. The substantial factor test is favored in cases when two or more independent acts bring about an injury. *E.g.*, *Maryland v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 453 (D. Md. 2019) (finding the State failed to allege conduct sufficient to plead more than one defendant individually was a substantial cause of the injury and therefore there was no legal liability). Substantial factor causation is appropriate when two or more defendants' actions, if viewed separately, would not satisfy causation, but when viewed in the aggregate, give the plaintiff a right to recover.

In instances where multiple defendants are sued for one injury and it is impossible to tell what portion of the injury was caused by each defendant, the court will apply the substantial factor test to hold the defendants jointly and severally liable. *See Summers v. Tice*, 199 P.2d 1 (Cal. 1948); *Corey v. Havener*, 65 N.E. 69 (Mass. 1902) (involving two motorcyclists injuring a horse rider). In *Summers*, the court applied the substantial factor test because two hunters fired their weapons simultaneously and injured the third hunter. 199 P.2d at 3. The court found that an actor's conduct is not a substantial factor if the harm would have been sustained without the conduct. *Id.* *See also* Restatement (Second) of Torts § 432 (Am. Law Inst. 1965). This Court has acknowledged and accepted what the Restatement asserts: a defendant's conduct cannot be a substantial factor when the harm would have occurred without the act. *Burrage*, 571 U.S. 215–16. In holding such, this Court

effectively found if a hazard would have occurred without the defendant's conduct, then the defendant cannot be a substantial factor and therefore cannot be liable for the harm. *Id.* This test mirrors but-for causation when applied to this case.

The substantial factor test applied by the district court is improper because it failed to cost spread rationally in only holding one party accountable for the total harm. Because KAB is the only defendant, it would be inappropriate to apply the New Tejas Substantial Factor Test. If the City had introduced another source that was a substantial factor in the increased crime rate, a substantial factor test may be appropriate. However, that is not the case because the City intends to hold KAB solely responsible for the total cost to abate the public nuisance while simultaneously admitting KAB was not the sole cause of the nuisance. R. at 4a. The application of the New Tejas Substantial Factor Test is therefore inappropriate.

Instead, this Court should apply but-for causation. In applying the proper standard, this Court would find as the Thirteenth Circuit did: but-for KAB's conduct, the increase in crime would have still occurred. It is undisputed that KAB was not the sole cause of the City's crime rate, as indicated by the massive unemployment rate, large amount of New Truro residents in poverty, significant issues with police funding and tax revenue, and deep-rooted education issues. R. at 2a, 3a n. 1, 25a. Holding KAB liable for harm it did not cause violates due process.

### **3. The New Tejas Substantial Factor Test conflicts with fundamental fairness.**

It would set a dangerous precedent to hold KAB civilly liable because it was a substantial factor in the City's increased crime rate. This Court should not find that

a company operating within the bounds of all state and federal regulations is civilly liable for lawfully operating its company. Courts are reluctant to declare an activity a public nuisance when the activity is in compliance with all laws and regulations. *See e.g., City of Chi. v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1123 (Ill. 2004); *See also*, Restatement (Second) of Torts § 821B cmt. f (Am. Law Inst. 1965). Recognizing a public right that is overly broad and undefined in a public nuisance case is dangerous. *Beretta*, 821 N.E.2d at 1116. Some courts have also found that the extensive umbrella of federal and state regulations shield companies from public nuisance claims. *See e.g., City of Gary v. Smith & Wesson Corp.*, 776 N.E.2d 368, 376 (Ind. Ct. App. 2002).

KAB operated and distributed Lightyear from 2003 to 2013. R. at 2a. The video game was played by over 300 million individuals nationwide. R. at 2a. While the City seemingly experienced an extraordinary spike in crime during the same time period, the Record does not demonstrate whether the trend was similarly nationwide. The district court failed to consider the effect of the City's claim as a whole and instead acted "much like the blind men and the elephant [in considering] aspects of the City's claims in isolation." R. at 9a.

Several other elements of causation need to be addressed when considering fundamental fairness and due process, namely legal cause and intervening forces. Causation can be separated into cause-in-fact and legal cause. *Beretta*, 213 Ill. 2d at 395. Cause-in-fact is addressed in the substantial factor test, whereas legal cause is a policy question. *Id.* To establish legal cause, the defendant's conduct must be "so

closely tied to plaintiff's injury that he should be held legally responsible for it." *Id.* When analyzing a public nuisance claim the court must answer the question of whether the defendant's conduct extends a legal responsibility. *Id.*

There is an absence of legal cause in this case because KAB's conduct is too far removed from the harm to justify liability. KAB distributed a video game. R. at 2a. The City is claiming the video game was a substantial factor in increasing the crime rate. R. at 4a. While Lightyear does feature weapons and battles, it is nonsensical to find that a video game increased crime so much that it cost the City \$600 million. A video game, which individuals play in their home, is too far removed from violent crime that occurs outside in downtown New Truro.

Furthermore, if an intervening act is unforeseeable in a public nuisance case, it breaks the causal chain and relieves the defendant of liability. *Glock*, 349 F.3d at 1209. Courts place an emphasis on foreseeability of harm when determining causation in public nuisance cases. *City & Cty. of San Francisco, v. Purdue Pharma L.P.*, No. 3:18-cv-07591-CRB, 2020 U.S. Dist. LEXIS 181274 (N.D. Cal. Sept. 30, 2020). In this case, the individual chooses to play KAB's video game, which under a proximate cause analysis breaks the causal chain. The foreseeability of an increase in violent crime is too far disconnected from the sale of a video game – that inevitably encourages people to stay in their homes – and therefore the causal chain is broken.

Whether this Court utilizes the substantial factor test established in California or adopts but-for causation, the district court's use of the New Texas Substantial

Factor Test and resulting imposition of liability violates due process. The Thirteenth Circuit's opinion should therefore be affirmed.

**B. The Retroactive Application of the New Tejas Substantial Factor Test by the District Court Violates Due Process Because the Retroactivity Spans Sixteen Years and Imposes Severe and Disproportionate Liability.**

This Court should find the retroactive application of the New Tejas Substantial Factor Test violates due process because the retroactivity spans sixteen years and imposes liability severe and disproportionate to the alleged harm. Retroactive liability violates due process if it is not confined to a short and limited period of time. *See Pension Benefit Guar. Corp.*, 467 U.S. at 731; *United States v. Darusmont*, 449 U.S. 292, 296-97 (1981). The New Tejas Substantial Factor Test was erroneously expanded in 2019, sixteen years after KAB released Lightyear, when the Supreme Court of New Tejas certified the City's theory of liability. It would be unprecedented and irrational to apply the New Tejas Substantial Factor Test retroactively to over sixteen years of conduct. Furthermore, deprivation of fair warning – caused by judicial expansion or narrowing of statutory language – violates due process, especially when it results in severe and disproportionate punishment. *See Bouie v. Columbia*, 378 U.S. 347, 352 (1964).

**1. The retroactive application violates due process because it spans sixteen years and is not confined to a short and limited period of time.**

The retroactive liability imposed by the New Tejas Substantial Factor Test violates due process because it retroactively applies to sixteen years as opposed to a short and confined time period, such as five months. This Court only upholds

retroactive statutes that are confined to short and limited periods of time. *See Pension Benefit Guar. Corp.*, 467 U.S. at 731; *Darusmont*, 449 U.S. at 296-97.

When this Court allows retroactive application of laws, it does so in cases that generally concern employment benefits that retroactively apply to the few months preceding the law's enactment. *See e.g., Usery*, 428 U.S. 1 (concerning the Black Lung Benefits Act of 1972); *Pension Benefit Guar. Corp.*, 467 U.S. 717 (concerning the Multiemployer Pension Plan Amendments Act of 1980); *Concrete Pipe & Prods. v. Constr. Laborers Pension Tr.*, 508 U.S. 602 (1993) (same). For example, the Multiemployer Pension Plan Amendments Act of 1980 applied retroactively to the five months preceding enactment, and this Court held it did not violate due process. *Pension Benefit Guar. Corp.*, 467 U.S. at 719. This Court also found that the 1976 Tax Amendments, which retroactively applied to the previous calendar year, did not violate due process. *Darusmont*, 449 U.S. at 292.

While this Court has therefore upheld retroactive laws in light of due process, it confines the constitutionality to short and limited periods of time. The retroactive liability imposed on KAB was not limited to a short time period, such as five months or one calendar year. KAB began distributing Lightyear in 2003. R. at 2a. Sixteen years later, in 2019, the Supreme Court of New Texas unilaterally expanded the substantial factor test in public nuisance cases to encompass KAB's conduct. R. at 4a-5a. This Court must align with its prior precedent and find that this retroactive application violates due process.

**2. The retroactive application subjects Kill-A-Byte to severe and disproportionate liability, which violates due process.**

Retroactive application of the causation standard approved by the Supreme Court of New Tejas, by way of certified question, violates due process because KAB had no warning it would face extraordinary liability for Lightyear until after this case was initiated. Retroactive imposition of liability cuts against the Due Process Clause, especially when the liability is unanticipated and severe. *Eastern Enterprises*, 524 U.S. at 547-49 (holding the retroactive application of the Act exceeded constitutional bounds under the Takings Clause); *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 622 (7th Cir. 2014). (holding retroactive application of judicial decisions exceeds constitutional limits if it is unexpected and indefensible). Furthermore, deprivation of fair warning – caused by judicial expansion or narrowing of statutory language – violates due process. *Bouie*, 378 U.S. at 352 (finding the convictions violated due process because the judicial interpretation of the statute forbade the conduct).

This Court has determined retroactive application of laws violates due process when the legislature acts in an arbitrary and irrational manner. *Eastern Enterprises*, 524 U.S. at 547-49. In a plurality opinion, this Court held a risk-contribution theory of liability unconstitutional because it imposed severe, retroactive liability on a limited number of parties disproportionate to their conduct. *Eastern Enterprises*, 524 U.S. at 528-29. The Seventh Circuit also addressed the risk-contribution theory and found a retroactive law that revoked the plaintiff's right to pursue a risk-contribution theory for apportioning damages against the defendants violative of the Due Process

Clause because the plaintiff instituted the action before the law went into effect. *Gibson*, 760 F.3d at 608. Thus, the statute in *Gibson* retroactively prevented the plaintiff's ability to recover. *Id.* at 608-09. The Seventh Circuit ultimately found a fundamental right was abridged and applied rational basis review. *Id.* And finding no rational basis, the retroactive application of the statute violated due process. *Id.*

The District Court for the Western District of New Tejas declined to apply *Eastern Enterprises*, whereas the Thirteenth Circuit found the precedent controlling. R. at 12a-13a. Instead, the district court relied on *Gibson* and applied rational basis review finding the retroactive application was neither arbitrary nor irrational. R. at 27a. This Court should be disinclined to follow the district court and instead should find the imposition of severe civil liability on one party, disproportionate to their conduct, violates due process as held in *Eastern Enterprises*. And in fact, this case represents an imposed liability even more severe and disproportionate than that of *Eastern Enterprises*. New Truro, by way of a retroactively imposed public nuisance law, is inflicting disproportionate retroactive liability on KAB alone to abate the total increase in crime despite admitting they are not solely responsible for it.

The district court incorrectly relied on *Gibson* and applied a rational basis review in finding the retroactive imposition of civil liability was neither arbitrary nor irrational. R. at 27a-28a. The precedent set in *Gibson* is inapplicable to this case and should not be adopted. *Gibson* concerned a vested, or fundamental right, which is controlled by rational basis review under substantive due process analysis. This case concerns retroactively imposing civil liability on a defendant as opposed to



retroactively taking away a plaintiff's right to pursue civil liability as in *Gibson*. The Seventh Circuit standard cannot be applied to this case, and therefore this Court should not apply rational basis review.

Furthermore, common-law liability with retroactive effects should be analyzed with even more scrutiny than retroactive legislation because judicially developed law lacks the procedural protections found in the legislature. KAB was held civilly liable under a causation standard that was judicially developed as a result of a certified question to the Supreme Court of New Texas after the initiation of litigation. This Court should distrust the application of retroactive common law, especially when it charges a single party with the abatement cost of all damages. It is undisputed that KAB is not solely responsible for the increase in crime; however, the retroactive common law would deem KAB entirely responsible for the cost to abate. R. at 4a. This Court should find the severe, disproportionate, and retroactive imposition of civil liability on KAB violates due process.

Imposing liability that retroactively spans sixteen years is a violation of due process under this Court's past precedent. Furthermore, the severe and disproportionate nature of the retroactive liability exceeds constitutional limits. This Court should therefore affirm the Thirteenth Circuit and find the retroactive application of the New Texas Substantial Factor Test violates due process.

**C. The \$600 Million Abatement Award Fails to Cost Spread Rationally Because the City's Recovery Would Exceed the Loss it Suffered from Kill-A-Byte's Conduct.**

The \$600 million abatement award is an unconstitutional deprivation of property because it is grossly disproportionate to KAB's lawful conduct of developing and distributing a video game. The Due Process Clause prohibits grossly excessive and arbitrary punishments inflicted on the tortfeasor. *State Farm*, 538 U.S. at 416. Allowing the City to recover the total cost to abate from a single actor, that the City admits is not responsible for the total harm, violates due process. The district court declined to rely on *State Farm* because it concerns punitive damages rather than abatement. This Court has never addressed the issue of abatement; however, other jurisdictions have set forth several tests in determining the appropriateness of abatement awards: (1) the "creation of the nuisance" standard; (2) the instrumentality of control standard; and (3) the municipal services exception.

The "creation of the nuisance" standard does not rely on who is best fit to abate the nuisance, but rather finds abatement appropriate if defendant created or assisted in creating the nuisance. *Santa Clara*, 40 Cal. Rptr. 3d at 325. New Truro has a history of economic, education, and employment issues. R. at 25a. There is no indication KAB created or assisted in creating – with actual knowledge – the increasing crime rate. On the other hand, the control of the instrumentality standard does take into account who is best fit to abate the nuisance. *Tioga Pub. Sch. Dist. #15 v. United States Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993). Those courts applying the instrumentality of control standard will require defendant to abate a public

nuisance if the defendant was in control of the product that caused the nuisance. *Id.* KAB released Lightyear in 2003, and over 300 million individual accounts were created worldwide. R. at 22a. Once the user signs up, KAB was no longer in control of when and for how long individuals played the video game. R. at 23a.

Lastly, some courts have carved out a municipal services exception in public nuisance actions where the government cannot seek damages to abate the cost of municipal services used in response to a public nuisance. *E.g., City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322 (9th Cir. 1983). This Court should recognize the municipal services exception and find the City cannot hold KAB liable for the cost to abate municipal services. R. at 25a.

The \$600 million abatement award is wholly arbitrary and disproportionate because it seeks to hold KAB accountable for funding the police, installing security cameras, supporting job training programs, and creating a “video game addiction” center. The vast disconnect and disproportionate nature between the alleged harm caused by a video game and a \$600 million award violates due process.

**1. The grossly excessive and arbitrary nature of the \$600 million abatement award exceeds constitutional bounds.**

Allowing the City to recover the total cost to abate – \$600 million – from a sole actor that is not responsible for the total harm is unconstitutional. Excessive damages are those which are neither reasonable nor proportionate to the wrongful conduct. *State Farm*, 538 U.S. at 412. Compensatory damages are meant to redress the concrete loss the plaintiff suffered by way of the defendant’s wrongful conduct. *Id.*

Imposing a civil liability of \$600 million in abatement costs on KAB is neither reasonable nor proportionate to its conduct. It is undisputed that Lightyear is not solely responsible for the increase in the City's crime rate. R. at 4a. New Truro has faced police-funding issues since a 2005 embezzlement scandal. R. at 3a n. 1. In addition, New Truro suffers from a 15% unemployment rate and 45% of its residents live in poverty. R. at 25a. The City admits that its unusually high crime rate is not solely the result of Lightyear, but nonetheless insists KAB is responsible for the full and excessive cost of abating the nuisance. R. at 4a.

More importantly, the damages levied against KAB are arbitrary as the City did not even attempt to identify specific costs attributed to Lightyear. R. at 4a. Abatement is meant to correct the loss faced by the City as a result of KAB; however, requiring KAB to redress all harm – including that which the City admits KAB is not responsible for – violates due process.

While this Court has not addressed excessive abatement awards specifically, it set forth three factors to consider when determining if punitive damages are grossly excessive: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm and the punitive damages award; and (3) the difference between the remedy and penalties imposed in comparable cases. *BMW of N. Am. v. Gore*, 517 U.S. 559, 562 (1996). Applying the factors to this case, it is undisputed that KAB acted in accordance with all state and federal laws. R. at 2a. Therefore, in operating as a lawful business, KAB's conduct cannot be considered reprehensible less this Court wish to set a dangerous precedent of holding businesses liable for

abiding by the law. Next, the disparity between the harm and the award is substantial. An award of \$600 million in abatement costs to provide centers to assist with “video game addiction,” fund job training programs, sponsor educational opportunities, support an increase in police presence, install security cameras downtown, and other public safety measures, is too far removed from a video game to comply with due process. R. at 25a. Lightyear is a science-fiction video game that people all over the country play. R. at 2a. Only one of the several projects the City wishes to charge KAB to fund is directly related to video game use, and that is a purported “video game addiction” center. The City’s own expert states that video game addiction is not a medical diagnosis and should not be treated as such. R. at 22a. Attributing all of the City’s issues to a video game is simply nonsensical and demonstrates the disparity between the harm Lightyear actually caused and the \$600 million award.

Lastly, the disparity between the \$600 million abatement award and penalties imposed in comparable cases is vast. In fact, no court has imposed, let alone considered, close to a \$600 million award for alleged harm caused by a video game. While there exists no public nuisance claims against video game companies, courts have litigated cases involving a video game’s proclivity to incite violence. *E.g.*, *James v. Meow Media, Inc.*, 300 F.3d 683 (6th Cir. 2002) (dismissing the \$30 million suit against the video game manufacturer for failure to state a claim); *Bede v. Sony Comput. Ent.*, No. 15CC1-2003-CV-540 (Tenn. Cir. Ct. 2003) (dismissing the \$246 million suit in Cocke County against the video game manufacturer).

Thus, utilizing the test set forth in *BMW*, this Court should find the abatement award is grossly excessive and unconstitutional because KAB operated lawfully, the disparity between the harm Lightyear caused and the \$600 million award is immense, and no other court has even considered an award of this magnitude for alleged violence caused by video games. But it is the legislature, and not the judiciary, that should decide the appropriate causation standard to apportion damages. When a plaintiff has experienced a concrete loss, someone must pay to correct the problem. *State v. Schenectady Chems., Inc.*, 459 N.Y.S.2d 971, 977 (N.Y. Sup. Ct. 1983). The determination of who must pay is a question better suited for the legislature and beyond the ken of the judiciary. *Id.* This Court has declined to draw a mathematical line for what constitutes a grossly excessive award and instead requires strict reasonableness of an award to stay within constitutional bounds. *Txo Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 458 (1993).

The City has experienced a concrete loss but admits the loss is not entirely attributed to KAB's conduct. R. at 4a. It is beyond reason to hold a party fully accountable for a loss to which they did not cause. The abatement award in this case was the result of judicially developed common-law that dangerously broadened the standard of liability. The City only needed to demonstrate KAB's conduct was a substantial factor in the increased crime rate, without a showing of actual knowledge or affirmative conduct. In a case such as this, the New Tejas legislature would be best fit to apportion damages and make it less likely for an erroneous standard to prevail in light of the many procedural protections that exist in the legislature.

It is undisputed the City has experienced an extraordinary rise in crime, but this Court needs to analyze the rationale behind the abatement award when considering due process violations. A \$600 million award against a lawfully operated company for releasing a video game extends far beyond the bounds of reasonableness and violates due process.

**2. The \$600 million abatement award is improper under the creation of the nuisance standard, the instrumentality of control standard, and the municipal services exception.**

If this Court declines to apply the precedent developed in *BMW* and *State Farm*, it should look to the different standards developed in other jurisdictions: (1) the “creation of the nuisance” standard; (2) the instrumentality of control standard; and (3) the municipal services exception. Whether this Court adopts the creation of the nuisance standard, the instrumentality of control standard, or the municipal services exception, the \$600 million abatement award is improper. The “creation of the nuisance” standard hinges on whether the defendant created or assisted in creating the nuisance. *Santa Clara*, 40 Cal. Rptr. 3d at 325. Here, the district court adopted the “creation of the nuisance” standard from *Santa Clara* and rejected the control of instrumentality standard. R. at 30a. In *Santa Clara*, the public nuisance was related to the dangers of lead and lead paint. The defendant in that case created the nuisance by concealing the dangers of lead, campaigning against the regulation of lead, and promoting the use of lead-based paint while knowing it was dangerous to human health. *Id.* The California standard does not look at who is best fit to abate

the nuisance, but instead requires actual knowledge and concealment of the dangers that caused the nuisance. *Id.* at 328.

KAB neither created nor assisted in creating the increased crime rate. The undisputed facts put forth evidence of the economic, educational, and job-related issues that have existed in the City for over a decade. R. at 25a. The Record does not indicate, and it would be implausible to find, a video game initiated any of these issues. The district court improperly characterized the *Santa Clara* case without taking into account the California court's full analysis. The district court used the *Santa Clara* case to demonstrate liability should not hinge on who is best fit to abate the nuisance but failed to recognize the actual knowledge requirement. R. at 30a. Unlike the California case, the New Tejas standard does not require proof KAB actively concealed the hazard of its video game. There is no indication in the Record that KAB knew and concealed Lightyear's ability to increase crime. Should this Court adopt the *Santa Clara* approach like the district court, it must take into account the California court's full analysis and require proof of actual knowledge and concealment for a public nuisance claim to proceed.

In addition, courts have overwhelmingly held that a public nuisance claim cannot prevail where the defendant lacks control over the product when it causes harm because it is not best fit to abate the nuisance. *See e.g., Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646 (D.R.I. 1986); *Hooksett Sch. Dist. v. W.R. Grace & Co.*, 617 F. Supp. 126 (D.N.H. 1984); *Cty. of Johnson v. United States Gypsum Co.*, 580 F. Supp. 284 (E.D. Tenn. 1984). Liability under this standard must turn on whether the



defendant controls the instrumentality that allegedly caused the nuisance. *Manchester*, 637 F. Supp. at 656. In product-related public nuisance cases, once the product is sold to the plaintiff, the manufacturer no longer has control of it and can neither create nor abate a public nuisance. *Id.* Without control, a defendant cannot be required to abate the nuisance because a defendant cannot force an abatement strategy on a user. *Cty. of Johnson*, 580 F. Supp. at 294. After a product is sold, the purchaser becomes responsible for abating the nuisance. *Hooksett*, 617 F. Supp. at 133.

KAB was not in control of Lightyear when it affected the crime rate in New Truro and therefore cannot be liable for the cost to abate the increased crime. After the release of Lightyear, KAB was no longer in control of the individual player's use of the video game. KAB does not deny that some users spend large amounts of time playing Lightyear; however, KAB cannot force an abatement strategy on the user in the form of an imposed "time limit" per day or per week like the City suggests. Similar to *County of Johnson*, this Court should find KAB cannot be charged with the cost to abate simply because it could have prevented harm earlier by forcing a product-user to play Lightyear less. This would unreasonably restrict the individual user and require KAB to abate a nuisance out of its control.

Courts have also recognized an exception in public nuisance actions seeking to abate the cost of municipal services. *Flagstaff*, 719 F.2d at 322-23. The Ninth Circuit declined to hold the defendant liable for the fire and safety hazard services run by the municipality, claiming the cost must be borne by the public as a whole, and not

by the individual defendant. *Id.* at 323. The court found that spreading emergency service expenses to taxpayers was the fair and rational method of bearing the burden to protect the public. *Id.* In addition, the court provided examples of how the legislature is best fit to re-allocate the cost of emergency response, making judicial intervention inappropriate. *Id.* at 324.

The City attempts to collect \$600 million in abatement costs from KAB to remedy its education issues, unemployment problems, diminishing police force, increased poverty rate, and increased crime. R. at 25a. The City has been experiencing these issues for over a decade and as a matter of law are not entitled to collect the total cost of abatement from a singular actor, who they admit is not entirely responsible for the harm. R. at 2a. In addition, the costs which the City seeks to abate are municipal services, for which the courts have carved out an exception. It would be inappropriate for a court to allocate the entire cost of city-provided services onto a single defendant – KAB – as the legislature is best fit to re-allocate the cost of municipal services.

In sum, KAB initially raised its due process argument on its motion for summary judgment, which the district court subsequently denied. KAB's due process argument was a purely legal issue, and therefore did not require a Rule 50 motion to preserve it for appeal. In finding the due process argument preserved, the Thirteenth Circuit reversed the district court's decision. The imposition of civil liability on KAB violates due process because the state erroneously expanded and applied the New Texas Substantial Factor Test retroactively and levied a grossly excessive abatement

award that exceeds constitutional limits. Therefore, the Thirteenth Circuit's decision should be affirmed, and the Court should render a take-nothing judgment for Kill-A-Byte Software, Inc.

**CONCLUSION**

Respondent, Kill-A-Byte Software, Inc., respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Thirteenth Circuit.

Respectfully Submitted,

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Team 46

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Respondent,

Kill-A-Byte Software, Inc.

## APPENDIX A

### U.S. Const. amend. XIV.

Section 1 of the Fourteenth Amendment to the Constitution of the United States of America 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.

### Fed. R. Civ. P. 50.

Federal Rule of Civil Procedure 50 provides in pertinent part:

(a) Judgment as a Matter of Law.

(1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) Motion. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.