No. 19-6236

IN THE

Supreme Court of the United States

OCTOBER TERM 2020

CITY OF NEW TRURO, NEW TEJAS,

Petitioner,

v.

KILL-A-BYTE SOFTWARE, INC.

Respondent.

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

BRIEF FOR THE RESPONDENT

TEAM NUMBER 57
COUNSEL FOR RESPONDENT

NOVEMBER 16, 2020

QUESTIONS PRESENTED

I. Whether Kill-a-Byte needed to raise a Rule 50 motion, challenging the sufficiency of factual evidence presented at trial, in order to preserve for appeal its purely-legal due-process argument that the district court rejected at summary judgment.

II. Whether New Tejas public nuisance law violates the Due Process Clause of the Fourteenth Amendment by permitting the City's use of the substantial-factor test alone to retroactively impose absolute liability for $613.2 million in civil abatement costs on Kill-a-Byte, a private party, for the legal distribution of a video game.

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BRIEF FOR THE RESPONDENT

TO THE SUPREME COURT OF THE UNITED STATES:

Respondent, Kill-a-Byte Software, Inc., appellant in Docket No. 18-5971 before the United States Court of Appeals for the Thirteenth Circuit, respectfully submits this brief on the merits, and asks this Court to affirm the United States Court of Appeals for the Thirteenth Circuit.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Thirteenth Circuit entered its judgment on March 21, 2020. The petition for writ of certiorari was timely filed, and this Court granted certiorari on October 5, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

DECISIONS BELOW

The opinion of the United States Court of Appeals for the Thirteenth Circuit is unreported, but it is available at No. 18-5971 and reprinted on page 1a of the record. That court reversed the decision of the United States District Court for the Western District of New Tejas, which is unreported, but it is available at Civil Action No. 16-cv-5412 and reprinted on page 33a of the Record.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action implicates the protections provided by the Fourteenth and Seventh Amendments, as well as Article 1 Section 10 of the Constitution of the United States. The jurisdiction of this Court is invoked under section 1254 of title 28 of the United States Code. The following are also restated in the Appendix.

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.

The Seventh Amendment to the Constitution of the United States of America provides in pertinent part:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Article 1 Section 10 of the Constitution of the United States of America provides in pertinent part:

> No state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts . . .

The applicable portion of 28 U.S.C. § 1254 provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

STATEMENT OF THE CASE

I. Factual Background

The City. In 2005, the former Mayor of New Truro, New Tejas, was imprisoned for a well-published embezzlement scandal. Record at 3a. As a result, Petitioner, the City of New Truro, New Tejas, suffered a litany of economic issues, including a high unemployment rate, numerous factory closings, a reduced police budget, and a consequently undersized police force. R. at 3a. All of this occurred in the face of an already struggling school system exacerbated by a teacher strike in 2004. R. at 3a. Over the last decade, the City's violent crime rate has significantly exceeded the national average, its tax revenues have decreased more than 50%, and the cost of funding its dwindling police department has more than doubled. R. at 2a. According to the City, the source solely responsible for remedying these numerous misfortunes was, simply, a video game. R. at 25a.

Lightyear. In accordance with federal and state law, Respondent Kill-a-Byte Software, Inc. distributed and operated “Lightyear”, an online, multiplayer, science-

fiction video game, until 2013, over two years before the City filed suit. R. at 2a. More than 300 million individuals, including New Truro residents, have created accounts during the decade that the game was in operation. R. at 2a. The game connects a player to the game's online servers, which group the player with others that may select a fictional species to fight each other in a procedurally-generated alien world. R. at 21a.

II. Procedural History

The City alleged that, in distributing Lightyear, Kill-a-Byte intentionally created conditions that were a substantial factor in a substantial interference with a right to public safety. R. at 25a. It is undisputed, however, that Lightyear was not solely responsible for the City's crime rate. R. at 4a. The City acknowledges that numerous factors contributed to their injury. R. at 4a. Yet, the City argued that Kell-a-Byte was solely responsible for abating the nuisance. R. at 4a. The City sought money from Kill-a-Byte to "abate" the public nuisance by funding job training programs, centers to assist with video game addiction, increased police presence, security cameras downtown, and other public safety measures. R. at 25a.

While the relevant facts were undisputed, Kill-a-Byte moved for summary judgment on numerous legal grounds, including that imposition of civil liability for lawful distribution of a video game would violate due process. R. at 3a. The district court denied this motion, holding that imposition of civil liability under state law cannot violate the Due Process Clause. R. at 3a. The case then proceeded to trial resulting in a favorable jury liability verdict for the City. R. at 4a. However, because

the remedy sought by the City was abatement, an equitable remedy under state law, it was an issue to be decided by the court. R. at 4a. The district court entered a judgment awarding the City $613.2 million to be paid solely by Kill-a-Byte. R. at 4a.

Kill-a-Byte appealed the judgment to the United States Court of Appeals for the Thirteenth Circuit, raising numerous issues related to the viability of the City's theory and the sufficiency of its evidence. R. at 4a. Skeptical and uncertain of the City's liability theory, the court of appeals certified several questions to the Supreme Court of New Tejas, seeking clarity, which returned to the court of appeals by way of a 5-4 opinion with a heated dissent. R. at 4a. After finding the issue properly preserved for appeal and Kill-a-Byte's due process argument persuasive, the court of appeals reversed the district court decision. R. at 14a. Following this, the City petitioned this Supreme Court of the United States for writ of certiorari, which this Court granted on October 5, 2020.

SUMMARY OF THE ARGUMENT

Citizens of these United States, including those of the State of New Tejas, appreciate the value that innovation in the commercial market brings to consumers and the economy. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-66 (1994). However, companies do not innovate when they are bound by the fear of what they do not know and the potential exposure they have to infinite liability. *Id.* In a free, dynamic society, creativity in commercial endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions." *Id.* This case presents several issues, all of which surround this guiding principle: An innovative

company like Kill-a-Byte is entitled to a degree of predictability, based on existing law, to know exactly how to conduct their business. *Id.* Rather than afford that predictability, New Tejas law has assigned a single video-game software company over $600 million in liability for doing exactly what the average citizen would expect the company to do: distribute a video game. R. at 33a. By affirming the court of appeals, this Court can continue to provide people with confidence in the legal consequences of their actions. *Landgraf*, 511 U.S. at 265-66.

This confidence is not merely a slogan used by this Court; rather, this confidence is the very protection offered by the United States Constitution. U.S. Const. amend. XIV, § 1. To determine whether these constitutional protections apply in the first place, courts look to the nature of the interest at stake to see if the interest is within the Fourteenth Amendment's protection of liberty and property. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 570-71 (1972). The order for Kill-a-Byte to $613.2 million certainly invokes these protections. *Id.* Upon reaching this conclusion, the interest at stake is then weighed with the state interest. *Id.* Here, the state interest in Kill-a-Byte's constitutionally protected property is to fund its municipal efforts, of which it already owes its citizens. *District of Columbia v. Air Fla., Inc.,* 750 F.2d 1077 (D.C. Cir. 1984). The means by which this end is achieved is by requiring Kill-a-Byte to fund $613.2 million into its programs without a showing of cause, without allocating responsibility, and without prospective notice of this potential liability. R. at 33a. The scales of this balancing test weigh

dramatically in favor of Kill-a-Byte's constitutionally protected interest. *Roth*, 408 U.S. at 570-71.

Notably, this balancing test is never performed by a jury, as it is a pure-legal analysis, a duty that has been entrusted to the courts. *Id.* The determinations made in this balancing test do not turn on any factual dispute or evidence presented at trial but solely on the constitutionality of New Tejas law. Because this was a purely legal argument raised by Kill-a-Byte in a motion for summary judgment, it was not required to be repeated in a Rule 50 motion to retain the right to appeal. This Court has never required as much, and the plain language of Rule 50 supports this conclusion. Thus, Kill-a-Byte properly preserved its constitutional due-process argument, and the court of appeals applied it with the proper force to reverse the district court judgment.

ARGUMENT

II. Kill-a-Byte Was Not Required to Renew Its Purely-Legal Argument in a Rule 50 Motion to Retain the Right to Appeal.

There is no utility offered or benefit gained by requiring a party to repeat an identical legal argument in a Rule 50 motion to preserve appeal. *Feld v. Feld*, 688 F.3d 779, 781-82 (D.C. Cir. 2012). Such a burden, as the court of appeals described, is but a "meaningless formality." R. at 7a. By its own terms, Rule 50 concerns the sufficiency of the evidence presented to the jury at trial. Fed. R. Civ. P. 50(a)(1). Here, the jury was not asked, nor would a jury ever conceivably be asked, whether the City's claims violated due process. R. at 8a. The district court did not deny Kill-a-Byte's motion for summary judgment because of genuine issues of disputed fact;

rather, it expressly and unequivocally rejected Kill-a-Byte's pure-legal argument. R. at 7a. It is hard to imagine a meaningful and coherent Rule 50 motion here that would properly challenge the irrelevant sufficiency of evidence pertaining to nonexistent fact issues that are entirely divorced from the purely-legal argument to be heard. R. at 8a.

Precisely due to circumstances such as these, and absent explicit instruction from this Court, an overwhelming majority of circuit courts agree that a pure question of law raised at summary judgment, such as Kill-a-Byte's, need not reappear in a Rule 50 motion in order to preserve appeal. *Feld*, 688 F.3d at 781-82. The remaining minority's lingering concern is not with the majority's logic but with the every-so-often "vexing" task of distinguishing issues of law from issues of fact. *Id.* at 783. On the contrary, this Court, as well as the plain language of Rule 50, have put more faith in the judiciary and suggest that the characterization between these two issues is both common and expected. *See Ortiz v. Jordan*, 562 U.S. 180, 188 (2011); Fed. R. Civ. P. 50(b). Nevertheless, the purely-legal status of Kill-a-Byte's argument here is not in dispute. R. at 32a. Thus, this scenario does not trigger the minority's hesitation. R. at 7a; *Feld*, 688 F.3d at 781-82. Because purely-legal questions are not within the scope of Rule 50 and Kill-a-Byte's due-process argument was indeed a purely-legal question, this case fits squarely within the blank space intentionally left empty by this Court in *Ortiz*, to later be properly filled with a case such as this. *See Ortiz*, 562 U.S. at 190.

A. A Rule 50 motion is not required to preserve for appeal a "purely-legal" claim previously rejected at summary judgment.

In *Ortiz*, this Court narrowly held that courts are powerless to review a challenge to the sufficiency of evidence rejected at summary judgment and not raised again in a Rule 50 motion. *Ortiz*, 562 U.S. at 892. However, this Court has left open the question of whether this same rule applies to preserving "purely-legal" arguments rejected at summary judgment, as opposed to those based on the sufficiency of evidence. *Feld*, 688 F.3d at 781-82. At least seven circuits have explicitly held that it does not. *Id.* at 782. This large majority of circuit courts have reasoned that the rationale for requiring preservation by way of a Rule 50 motion in no way applies to purely-legal questions. *Id.* at 781. Thus, when it is clear that the movant has raised a pure question of law, divorced from any dispute over the facts, these courts will not require the useless exercise of an inapplicable Rule 50 motion simply to preserve appeal. *Id.* at 783. This well-reasoned rule is best suited to give full effect to both Rule 50 and this Court's procedural jurisprudence. *Id.*

1. The rationale for requiring a Rule 50 motion to preserve appeal does not apply to purely-legal issues.

Requiring a Rule 50 motion to preserve a purely-legal argument is analogous to requiring a seatbelt at the dinner table. Like a seatbelt, a Rule 50 motion is unquestionably appropriate under applicable circumstances; however, like a seat at the dinner table, a purely-legal argument does not call for its function or application. When facts are in dispute, a Rule 50 motion unquestionably offers a movant great utility because, in such an instance, a previous denial of summary

judgment remains subject to change over the course of the trial. *Feld*, 688 F.3d at 782. In contrast, when facts are undisputed, a purely-legal argument experiences no alteration in the light of additional facts or credibility determinations made over the course of the trial. *Id.* at 783. Thus, if an unsuccessful summary-judgment movant repeats its purely-legal argument in a Rule 50 motion, the district court is faced with precisely the same question it denied at summary judgment. *Id.* Lacking purpose and effect, it offers no utility to demand the preservation of appeal through this meaningless formality.

This is not to say that a Rule 50 motion should never be required to preserve appeal. A Rule 50 motion preserves for appeal a challenge to the sufficiency of the evidence presented "because a previous denial of summary judgment is not the final word on that question but merely a prediction that the evidence could potentially support the nonmovant." *Feld*, 688 F.3d at 782. The accuracy of that prediction becomes irrelevant once the trial has occurred 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. On appeal, there would be no reason to reflect on whether the evidence was sufficient for summary judgment as that question has been overtaken by new events, the trial. *Feld*, 688 F.3d at 782.

But this justification does not apply when the district court rejects a purely-legal argument at summary judgment. *Id.* Any new events at trial do not overtake the purely-legal question. *Id.* In contrast, the previous denial of summary judgment is indeed the final word on that question, rather than a prediction, because the

same district court that denied the summary judgment would once again rule on the identical issue presented in a Rule 50 motion. *Id.* All that has changed to the argument is the paper that the movant has printed it on. It would be both illogical and paradoxical to anticipate any different outcome.

Further, this Court has explained that Rule 50 was designed to allow district court judges, as the individuals closest to the evidence adduced at trial, to determine whether that evidence permitted judgment as a matter of law. *See Ortiz*, 562 U.S. at 185 (reasoning that, absent a Rule 50 renewal, an appellate court could not reject the appraisal of the evidence by "the judge who saw and heard the witnesses and had the feel of the case which no appellate printed transcript can impart."). However, this proximity to the evidence at trial becomes completely irrelevant as to questions of law. *See id.* When appellate courts conduct a review of a purely-legal ruling, they apply the traditional *de novo* standard for review, affording the lower court no level of deference. *Whatley v. CNA Ins. Comps.*, 499 U.S. 225, 226 (1991). Absent determinations by the jury as the fact-finder, appellate courts have nothing to glean from the district court, and likewise no disadvantage in acting as a subsequent appraiser. *See id.* In other words, Rule 50's design, as established by this Court, to afford deference to the district court is frustrated once the purely-legal question is under *de novo* review, as they always are.

Dissenting in the court of appeals, Judge Despard rebuked the majority's "cavalier treatment of Rule 50" for failing to recognize its "constitutional significance under the Seventh Amendment." R. at 16a. This significance is

premised on Rule 50's "roots in the Reexamination Clause of the Seventh Amendment." R. at 15a. The Seventh Amendment's Reexamination Clause indeed protects certain findings of fact that are tried by a jury from being reexamined by courts. U.S. Const. amend. VII. This premise necessarily calls upon the very language of Rule 50(b), which clearly governs only issues of fact while setting aside purely-legal issues as incidental excess. *See* Fed. R. Civ. P. 50(b) (instructing that if the court does not grant an initial Rule 50 motion, "it is considered to have submitted the action to the jury," but reminding that there will also be "the court's later deciding of legal questions raised by the motion."). It is, in fact, these roots in the Seventh Amendment jury guarantee that illustrate the fact-intensive nature of the Rule 50 motion. *See* Fed. R. Civ. P. 50(b). The constitutional significance of Rule 50 is protected when courts give its language its full effect.

Much like the seatbelt at the dinner table, the otherwise warranted requirement for a Rule 50 motion to purely-legal arguments offers adjudications no utility. An unsuccessful summary-judgment movant need not, and certainly should not, expect any different outcome on a purely-legal issue, regardless of the point in time of the trial. The rationale behind the Rule 50 motion does not, and was never intended to, govern purely-legal issues.

2. Courts routinely identify pure questions of law.

The dichotomy of legal and factual issues is not a novel concept in the jurisprudence of dispositive judgments. *See, e.g., Ortiz*, 562 U.S. at 190 (rejecting the purely-legal classification of an issue in the presence of disputed facts).

However, two circuit courts have suggested otherwise in their approach post-*Ortiz*, requiring a Rule 50 motion to preserve for appeal any issue first raised in a motion for summary judgment. *See Ji v. Bose Corp.*, 626 F.3d 116, 128 (1st Cir. 2010); *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1235 (4th Cir. 1995). The Fourth Circuit has explained that the distinction would require courts to engage "in the dubious undertaking of determining the bases on which summary judgment is denied and whether those bases are 'legal' or 'factual.'" *Chesapeake Paper Prods. Co.*, 51 F.3d at 1235. But it is equally true that there are cases in which it is patently clear that the movant has raised a pure question of law, divorced from any dispute over the facts, that does not require this "dubious undertaking." *Feld*, 688 F.3d at 783. Fortunately, it is only these straightforward questions of law that are relevant here.

The only arguments protected by the majority approach are those that are "purely legal." *Id.* These purely-legal issues are such that courts can come to a legal conclusion that does not depend on the record and turns on no facts. *Id.* For example, in *Feld*, the circuit court identified a purely-legal argument that was rejected at summary judgment. *Id.* The court reasoned that the question of "whether D.C. law permitted a condominium owner to use force to exclude another individual from the building's common areas" did not depend on the record and turned on no facts. *Id.* No "dubious undertaking" was necessary. *Id.* The movant presented the issue as a question of law and the district court treated it as such. *Id.* After denying summary judgment, of course, nothing took place at trial that would

have required the district court to revisit its analysis and nothing from that record would be relevant to that specific issue. *Id.* Thus, the circuit court concluded that they had jurisdiction to hear the legal argument because a Rule 50 motion was not required to preserve for an appeal a purely-legal claim rejected at summary judgment. *Id.*

This application is consistent with the language of Rule 50(b). *See* Fed. R. Civ. P. 50(b). Rule 50(b) provides, in pertinent part: "if the court does not grant a motion of 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." Fed. R. Civ. P. 50(b). In other words, the plain language of Rule 50 indicates that the dichotomy not only exists, but that the characterization between fact and law is common judicial practice. *See* Fed. R. Civ. P. 50(b). Likewise, this same language from Rule 50 illustrates that an appropriate Rule 50(a) motion will always contain, at the very least, some factual issue, but never a purely-legal question. Fed. R. Civ. P. 50(b) (showing that there are always actions submitted to the jury, but the presence of a legal question to be later decided is not always necessary, only consequential). By subjecting any remaining legal questions raised by the motion to a later determination, the Rule implicitly provides that an appropriate Rule 50(a) motion will always contain some factual dispute proper for the remaining trial; otherwise, there would be no reason to delay the court's awaiting "later deciding [of] the legal questions raised by the motion." Fed. R. Civ. P. 50(b).

Like the court in *Feld*, courts are routinely required to determine whether an issue is a question of law or a question of fact. *Feld*, 688 F.3d at 783. Undoubtedly, there are more complex issues that contain some combination of law and fact; however, even this undertaking fits the judicial job-description. *Id*. Even so, all that is required here is the determination of whether an issue is a pure question of law. *Id*. If it is a question of fact or a combination of the two, it necessarily cannot be a pure question of law. Thus, the inherent burden, if any, of this task on judges is far outweighed by the legal clarity it provides to litigants and courts alike.

B. Kill-a-Byte's due-process argument was a pure question of law.

According to this Court's definition set in *Ortiz*, the due-process argument raised by Kill-a-Byte in its motion for summary judgment was a purely-legal argument. *See Ortiz*, 562 U.S. at 190. In analyzing the defendant's claim of a purely-legal argument in *Ortiz*, this Court reasoned that the claim "hardly present[ed] a purely-legal issue." *Id.* This court went on to instruct that cases "fitting that bill" typically involve contests not about what occurred or why an action was taken, but "disputes about the substance and clarity of pre-existing law." *Id*. Fitting that bill, Kill-a-Byte's due-process argument was a "purely-legal" argument because it did not contest what occurred or why actions were taken, but rather the substance and clarity of New Tejas' pre-existing public nuisance law. *Id.* Thus, as this Court has defined it, Kill-a-Byte's due-process argument is purely legal. *Id.*

It follows that the rationale for requiring a Rule 50 motion to preserve the right to appeal does not apply to Kill-a-Byte's argument here. *Feld*, 688 F.3d at 783. By its very language, a Rule 50(a) motion is appropriate when "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R Civ. P. 50(a)(1). However, the adjudication of a due-process argument rests solely within the purview of the courts. *Roth*, 408 U.S. at 570-71. The jury was not asked, nor would a jury ever conceivably be asked, whether the City's claims violated due process. *See id*; R. at 8a. A Rule 50 motion here would be meaningless and uneventful. Under these circumstances, as Judge Enys wrote, "we do not see how Rule 50 could apply or how Kill-a-Byte could have drafted a coherent motion." R. at 8a.

Had Kill-a-Byte raised its purely-legal due-process argument again in a Rule 50 motion, the district court would have been faced with precisely the same question it faced at summary judgment. *Feld*, 688 F.3d at 783. No changed facts or credibility determinations made at trial could alter whether or not New Tejas state law violates due process. *See id.* Under the well-reasoned standard established by a majority of circuit courts, Kill-a-Byte's purely-legal argument remained appealable, notwithstanding the absence of a Rule 50 motion. *Id.* at 782.

C. This Court implicitly approved this analysis in *Ortiz*.

This Court was confined to the question it granted certiorari in *Ortiz*, as the Supreme Court is "a court of final review and not first view." *Ortiz*, 562 U.S. at 895 (Scalia, J., concurring). As such, this Court necessarily avoided the direct issue of

whether a "purely-legal" issue was burdened with the same Rule 50 preservation requirement as that of a fact issue. *Id.* at 892. However, it is hard to mistake the direction that this Court suggested, especially as an overwhelming majority of circuit courts have chosen to follow that guidance. *Feld*, 688 F.3d at 783. This case presents an opportunity for this Court to answer that question squarely.

This Court intentionally excluded purely-legal arguments from the rule established in *Ortiz*. *Ortiz,* 562 U.S at 892. The unmistakable language in *Ortiz* cannot possibly suggest otherwise. *Id.* This Court, when faced with the specific issues, plainly isolated it, stating, "we need not address this argument". *Id.* Circuit courts have rightfully interpreted this as expressly declining to consider whether purely-legal issues are appealable after a full trial on the merits. *Fireman's Fund Ins. Co. v. N. Pac. Ins. Co.*, 446 F. App'x 909, 911 (9th Cir. 2011).

With its exclusion, courts and litigants were left with only general guidance to predict how this Court might eventually decide the issue. In *Ortiz*, the summary judgment was denied after the District Judge determined that the qualified immunity defense turned on material facts genuinely in dispute. *Ortiz,* 562 U.S at 183. Thus, the argument was not appealable absent proper Rule 50 procedure. *Id.* While inapplicable to *Ortiz*, this Court expounded on the exception ordinarily extended to purely-legal qualified-immunity pleas at summary judgment that make appeal available absent Rule 50 procedures. *Id.* at 188. In other words, without expanding the scope of the question presented, this Court implicitly acknowledged the useless impact of a Rule 50 motion on purely-legal determinations.

Perhaps even more telling than this Court's silence in *Ortiz* was this Court's expression in *Behrens v. Pelletier*, 516 U.S. 299, 312-13 (1996). In *Behrens*, the respondent attempted to argue that the appeal of a denial of summary judgment was not available based on the Courts holding in *Johnson v. Jones*, 515 U.S. 304 (1995). *Behrens*, 516 U.S. at 312-13. To this argument, this Court responded, "That is a misreading of the case . . . *Johnson* surely does not mean that *every* such denial of summary judgment is nonappealable." *Id.* (emphasis in original). Rather, "*Johnson* reaffirmed that summary judgment determinations are appealable when they resolve a dispute concerning an abstract issue of law . . ." *Id.* Again, while this Court has yet to provide a bright-line rule, its consistent treatment and distinction of purely-legal motions for summary judgment and their subsequent appealability cannot be mistaken. *Id; Ortiz,* 562 U.S at 183.

The question presented here offers this Court the opportunity sought for, but cautiously avoided, in *Ortiz*. *Ortiz*, 562 U.S. at 895 (Scalia, J., concurring). By ruling here that Kill-a-Byte was not required to preserve its purely-legal summary-judgment argument in a Rule 50 motion, this Court can ease the tension among the circuit courts and offer the sought after bright-line rule. Namely, requiring a Rule 50 motion to preserve appeal does not apply to purely-legal issues rejected at summary judgment.

III. New Tejas State Public Nuisance Law Permitting the City's Recovery of $613.2 Million in Civil Liability from Kill-a-Byte Violates Due Process.

The Constitution of the United States affords significant deference to the States in the development of their laws, including common-law development of tort liability. *See Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 621 (7th Cir. 2014). However, this deference, although substantial, is not limitless. *See, e.g.*, *id*; U.S. Const. amend. XIV, § 1. In fact, those limits are unquestionably exceeded here by New Tejas law for three independent reasons. First, New Tejas state law permits the imposition of absolute liability without showing the well-established prerequisite of causation. Second, by way of its causeless liability theory, New Tejas law permits the demand of a $613.2 million judgment to fund a variety of the City's proposed programs, all of which are unrelated to Kill-a-Byte's alleged misconduct. While these two issues already violate Kill-a-Byte's due-process protections, they remain exacerbated by a third issue: the retroactive nature by which they are applied. The retroactive application of this liability theory offends the "elementary considerations of fairness" protected by the Fourteenth Amendment. *Landgraf*, 511 U.S. at 265. While each of these factors violates due process standing alone, they need not be independently sufficient. When viewed in the aggregate, the City's ill-founded liability theory undoubtedly fails to satisfy its constitutional due-process requirements. *See id.*

A. New Tejas tort liability violates due process.

New Tejas law, that which dispenses of the causation requirement, offends principles of due process in two regards. New Tejas law permits (1) the finding of liability absent a showing of cause, and (2) the imposition of absolute liability on a single contributor, without allocating fault or apportioning costs. R. at 5a. If left unaddressed, these theories under New Tejas law will continue to dramatically expand the scope of civil liability far beyond its constitutional parameters. R. at 10a.

1. The Substantial Factor test is insufficient to prove that Kill-a-Byte was the cause of the City's injury.

The law has long considered causation a hybrid concept, consisting of two constituent parts: actual cause and legal cause. *Burrage v. U.S.*, 571 U.S. 204, 210 (2014). These two parts operate harmoniously to guarantee that no defendant is required to remedy an injury that they are not responsible for. *Id.* New Tejas law has permitted the City to overlook this well-established safeguard. R. at 5a. New Tejas law authorizes the use of the "substantial factor test," which is ordinarily applied to show legal cause alone, to show actual cause as well. R. at 5a. The use of this test in the absence of but-for causation ignores the well-established hybrid concept providing that the two forms of causation are intended to function cooperatively, not interchangeably. *Burrage*, 571 U.S. at 210. Even used appropriately to attempt to show legal causation, due to a break in the causal chain the substantial factor test is insufficient to show legal cause here. R. at 10a. Thus, the substantial factor test is incapable of showing actual cause and is insufficient to show legal cause under these circumstances.

a. Use of the substantial factor test as a substitute for actual, but-for causation is irrational.

Actual causation requires that, but-for the actions of one, there would have be no harm done. *Burrage*, 571 U.S. at 210. Here, that would have required evidence that, but-for the legal distribution of Lightyear, the City's injuries would not have occurred. *Id.* Under this ordinary analysis, the City would face the reality that their injuries would have nevertheless occurred absent Kill-a-Byte's actions. R. at 4a. In fact, the alternative causes are even more condemning to the City's argument. R. at 3a. More specifically, Kill-a-Byte is not a but-for cause of the City's harm because the actions of the City itself were substantial factors in bringing about its own injuries. R. at 3a. It is precisely instances such as this, where an accountable party can shift the blame for its own mistakes and still recover from another, that the need for a showing of but-for causation is evident.

The causation standard under New Tejas law is distinguishable from the "relaxing of the traditional standard of causation" that was permitted by the Seventh Circuit. *Gibson v. American Cyanamid Co.*, 760 F.3d 600, 623 (7th Cir. 2014). In *Gibson*, the court elaborated on the Wisconsin Supreme Court's rationale in adopting a "risk-contribution theory" that allowed plaintiffs to recover from lead paint manufactures by proving only that they produced the injurious paint during the time that the injury occurred. *Id.* at 624. However, as the court noted "even under the relaxed causation-in-fact standard or risk-contribution theory, liability is far from automatic: the plaintiff still must prove that white carbonate lead pigment was the cause of lead poisoning." *Id.* In other words, the plaintiffs must still prove

that the product was the cause of the injury, even if they cannot prove that the defendant was the specific manufacturer that supplied the harm-causing paint. *Id.* In contrast, under New Tejas law, liability is automatic. R. at 5a. The City was not required to prove that Lightyear, like the paint, was the cause of the injury. R. at 5a. All that the City was required to do was to point to Kill-a-Byte as a possible factor, and liability was automatic. R. at 5a. Even the permissive interpretation applied by the Seventh Circuit would not work to save the deficient New Tejas causation requirement. *Gibson*, 760 F.3d at 624.

This Court has already heard and rejected an argument indistinguishable from the City's argument here. *Burrage*, 571 U.S. at 216. In *Burrage*, the government argued that "when the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event." *Id.* In other words, even if two factors are not a but-for cause individually, but the two factors functioned contemporaneously to cause the injury, then, suddenly, they both become but-for causes individually. *Id.* This Court, without hesitation, declined "to adopt this permissive interpretation." *Id.* at 216.

The imposition of liability without a showing of but-for causation historically required by the common law will significantly expand the scope of civil liability beyond that which is constitutionally permissible by the Fourteenth Amendment. U.S. Const. amend. XIV, § 1; *See Philip Morris USA v. Williams*, 549 U.S. 346, 353

(2007) (finding that the basic guarantee of due process in a civil trial is that a defendant will not be held liable for damages without a meaningful opportunity to present every available defense to liability, including a defense based upon lack of causation). There is no reason why this Court should not reject the City's claim for the same reason it rejected the government's claim in *Burrage*. *Burrage*, 571 U.S. at 216.

b. The substantial factor test is insufficient to show legal cause when a superseding event breaks the chain of causation.

The court of appeals reasoned that, along with no showing of but-for causation, any proximate or legal causation argument was likewise lacking due to an intervening event. R. at 10a. In denying summary judgment, Judge Whitworth correctly noted that substantial factor causation is reflected in the Restatement: One actor's conduct "is a legal cause of harm to another if his conduct is a substantial factor in bringing about the harm." R. at 30a. Restatement (Second) of Torts § 431. Undeniably, the substantial factor test is widely used among the states to show legal causation and the validity of this practice is not in dispute. However, in its orthodox application, the substantial factor test comes with its own terms, one of which demands the absence of a superseding cause. R. at 10a. Indeed, even if a plaintiff shows but-for causation, and shows that the defendant was a substantial factor, a superseding cause will nevertheless break the chain of legal causation and absolve the defendant of liability. *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 835 (1996).

A superseding cause has been defined as a third party's intervening act (occurring after the defendant's misconduct) that was not foreseeable from the defendant's standpoint. *Id.* Here, even if the distribution of Lightyear was a substantial factor in causing the City's injuries, Kill-a-Byte could not have foreseen that the various injuries that the City is alleging would have occurred as a result of their lawful selling of a video game. *See* R. at 24a. The series of intervening events here are so unforeseeable that even under the broad New Tejas tort liability law, proximate cause is lacking. R. at 10a.

The most unforeseeable event is the decision of game-players to resort to criminal conduct because they have played the video game. Game manufacturers, like Kill-a-Byte, have no reason to foresee an individual committing criminal conduct because they have spent too much time playing their fantastical video game. *See* R. at 24a. The City has alleged that the time spent playing Lightyear correlates with educational achievement, employment, and earnings. R. at 24a. Additionally, the City then attempts to find correlations between poor educational achievement, unemployment, low earning potential, and the likelihood that an individual will engage in criminal activity and dubiously attempts to tie these circumstances back to Lightyear. R. at 24a. To illustrate, the City is claiming that because the game takes time away from someone's day, that they are then going to fall behind on their responsibilities, and that if they fall behind on their responsibilities then they will lose earning potential, and if they lose earning potential then they will eventually become so desperate that they will ultimately

make the choice to commit crimes. *See* R. at 24a. This same logic, piling inference on top of inference, would attribute liability to any time-wasting hobby that takes one's attention away from their schoolwork or office tasks. In that case, one could claim that reading novels, something increasingly seen as a beneficial activity, could be attributed to crime due to the author's ability to write such page-turners that an individual cannot put the book down and thus, neglects their other responsibilities because they are so eager to read the next chapter or series. One cannot reasonably say that anything taking our attention away from productive responsibilities will necessarily lead to criminal conduct. Because this chain of events leading to increased criminal activity is so unforeseeable, there is a break in the causal chain that absolves Kill-a-Byte of legal causation. *Exxon*, 517 U.S. at 835.

While the substantial-factor test is an appropriate measure for legal causation, it is likewise governed by its own rules. *Id.* Even if the distribution of Lightyear played a substantial role in criminal development, the numerous intervening actions of others were so unforeseeable and unpredictable that they negate the application of the substantial factor test to show legal cause.

2. Absolute liability without allocating responsibility to other actors violates the Due Process Clause.

It is undisputed that Lightyear was not solely responsible, if at all, for the City's crime rate and other alleged injuries. R. at 4a. In fact, the City has acknowledged that numerous factors contributed to their injuries. R. at 4a. However, under the City's theory, civil liability was recoverable against any substantial factor in the causal chain for the entire amount without allocating

appropriate responsibility. R. at 4a. This includes substantial factors such as the city's high unemployment rate, numerous factory closings, the reduced police budget, and the consequently undersized police force. R. at 3a. Notably, these other factors directly result from an embezzlement scandal for which the former Mayor now serves a felony sentence. R. at 3a. The City even acknowledges these numerous contributing factors for which they are responsible. R. at 4a. Despite the City's acknowledgement of these factors, the City still believes that it is appropriate for Kill-a-Byte to endure a $613.2 million judgment without considering these other causes. R. at 4a. Thus, it is undisputed that the City, under their public nuisance theory, is likewise liable for their own injuries; however, even with unclean hands, the City contends it is nevertheless able to recover.

Reviewing the constitutionality of state tort liability is not a novel or unexplored concept. *Int'l Brotherhood of Teamsters, Local 734 Health and Welfare Fund v. Phillip Morris Inc.*, 196 F.3d 818, 823 (7th Cir. 2000). Courts consistently apply the principle that "no rule of law requires persons whose acts cause harm to cover all of the costs, unless these acts were legal wrongs." *Id.* Not only has the City not shown actual cause, but the distribution of Lightyear did not violate any State or Federal laws. R. at 2a. Kill-a-Byte's only conduct was the legal distribution of an entertainment commodity. R. at 2a. The Seventh Circuit presented this identical concept in an analogy to the food industry where companies put "refined sugar in many products, making them tastier; as a result, some people eat too much (or eat the wrong things) and suffer health problems and early death. No one supposes,

however, that sweet foods are defective products on this account; chocoholics can't recover in tort from Godiva Chocolatier . . ." *Phillip Morris*, 196 F.3d at 823. Just like Godiva Chocolatier, Kill-a-Byte conducted its business according to the consumer's demand; yet, this does not mean Kill-a-Byte is responsible for the subsequent actions of its consumers. *Id.*

The City's liability theory narrowly parallels that which is known as "market share liability." *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 379 F.Supp.2d 348, 374 (S.D.N.Y 2005). While the two theories share similarities in analysis, their conclusions are dramatically different. *See id.* Market share liability permits allocation of fault to be made to a class of manufacturers, without showing but-for causation, but by proving their percentage of the market share and calculating liability according to the likelihood that they caused the injury. *Id.* For example, if a drug manufacture controls ten-percent of a drug market, and that drug causes an injury, the injured party may bring an action without showing but-for causation as long as she: (1) joins a substantial share of the potential causes; and (2) that liability is distributed according to market share. *Id.* Thus, this hypothetical plaintiff, if she joined a substantial share of the market, could recover up to ten-percent, but not all, of damages from that manufacture. *Id.*

Market share liability is one of the most permissible and broad liability theories established in tort; yet, the illustration of its safeguards and procedures show the dramatic departure the City's liability makes from it. *See id*. The City did not attempt to identify costs specifically attributed to Lightyear but still argued, as

a matter of state law, that Kill-a-Byte was responsible for the full cost of abating the nuisance to which it allegedly contributed. R. at 4a. In the absence of any other liability theory that comes close to the broad scope of liability as there is here, it is unquestionable that New Tejas state law, permitting such an arbitrary deprivation of property, frustrates the "elementary considerations of fairness" that the Due Process Clause seeks to protect. *Landgraf*, 511 U.S. at 265.

B. New Tejas law permitting the excessive and arbitrary abatement order violates the Due Process Clause.

The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). This protection emphasizes the elementary notions of fairness enshrined in our constitutional jurisprudence that dictate that a person receives fair notice not only of the conduct that will subject him to punishment, but also the severity of the penalty that a State may impose. *Id.* at 417. The punishment here is both arbitrary and grossly excessive. The City seeks funding for a broad category of vague rehabilitation efforts from a private party, without any legal authority to do so. *See* R. at 26a. Demanding $613.2 million in abatement costs is a penalty far more severe than Kill-a-Byte could have anticipated, if liability could have been anticipated at all.

1. The order requiring Kill-a-Byte to fund the City's relief efforts constitutes an arbitrary deprivation of property.

Absent legislative authority, a requirement to fund a municipality's efforts to improve the general wellbeing of its citizens violates due process. *City of Flagstaff v.*

Atchison, Topeka and Santa Fe Ry. Co., 719 F.2d 322 (9th Cir. 1983). The city seeks money from Kill-a-Byte to fund job training programs, centers to assist with addiction, increased police presence, security cameras downtown, and other public safety measures. R. at 25a. Rather than requiring Kill-a-Byte to abate the injury by suspending Lightyear's distribution, which Kill-a-Byte has already done, the City instead contends that it can recover abatement costs in the amount of any money necessary to reduce the crime rate to the national average. R. at 26a. In other words, the City demands that Kill-a-Byte fund its general safety and employment programs that would otherwise be paid for by tax revenue, because Kill-a-Byte distributed a video game years ago that several of the City's residents had played.

It is undisputed that the City can bring a claim for public nuisance against a private company; however, the remedy available is far more limited than the City's prayer for relief demands. Restatement (Second) of Torts § 821C(2)(b). Due to the "dearth of New Tejas authority" regarding the public nuisance cause of action, the New Tejas Supreme Court has directed us to the Restatement (Second) of Torts. R. at 26a. "[U]nder the Restatement's broad definition, a public-nuisance action can be maintained for injuries caused by a product if the facts establish that the design, manufacturing, marketing, or sale of the product unreasonably interferes with a right common to the general public." *Cincinnati v. Beretta U.S.A.*, 768 N.E.2d 1136, 1142 (Ohio 2002). While the City claims its increased crime rate as the nuisance here, these claims have generally been brought against corporations such as gun and lead-paint manufacturers for the potential risks they impose on society. *See,*

e.g., id (gun manufacture); *People v. ConAgra Grocery Prods. Co.,* 227 Cal. Rptr. 3d 499, 529 (Cal. App. 2017) (lead-paint manufacturer). Nevertheless, courts have been "reluctant to recognize a public right so broad and undefined that the presence of any potentially dangerous instrumentality in the community could be deemed to threaten it," and have ruled that there was no public right to be free from a general threat of crime. *City of Chicago v. Beretta U.S.A. Corp.,* 821 N.E.2d 1099, 1116 (Ill. 2004). Recognition of such a broad and undefined right would allow for irrational and arbitrary liability. *Id.*

The status of the then district-court-plaintiff as a municipality makes this arbitrary liability all the more concerning. The Ninth Circuit considered comparable circumstances when a city filed suit against a railroad to recover expenditures incurred following a derailed tank car. *City of Flagstaff*, 719 F.2d 322 (9th Cir. 1983). The court reasoned that the cost of public services for protection and safety are to be borne by the public as a whole, not assessed against the tortfeasor whose actions creates the need for the services. *Id.* at 323. Where such services are provided by the government, and the costs are spread by taxes, the tortfeasor does not expect a demand for reimbursement. *Id.* The court added that a fair and sensible system for spreading the costs of an accident is already in place; the city spreads the expense of services to its taxpayers, "an allocation which is neither irrational nor unfair." *Id.* A number of circuit courts have accepted this general rule that public expenditures made in the performance of governmental functions are not recoverable. *E.g., County of Erie, New York v. Colgan Air, Inc.*, 711 F.3d 147,

150 (2nd Cir. 2013). To permit such recovery would enable the extreme governmental overreach that the Fourteenth Amendment aims to protect. U.S. Const. amend. XIV, § 1.

This is not to say that a governmental entity may never recover the cost of its services; however, recovery is only permitted where it is authorized by statute or regulation. *City of Flagstaff*, 719 F.2d at 322. At the district court, Judge Whitworth noted the lack of New Tejas authority regarding the public nuisance cause of action, including any permissible legislation. *See* R. at 26a. In his denial of summary judgment, Judge Whitworth relied on the Seventh Circuit to correctly establish that "economic legislation does not violate substantive due process unless the law is arbitrary and irrational." R. at 27a; *Gibson*, 760 F.3d at 621. While this is undoubtedly true, it does not provide the shelter that the City requires here for two reasons: First, there is no economic, legislative action that has been made to permit this type of recovery. *See* R. at 26a. Second, even if there were legislative action, the shift of the City's pre-existing fiscal responsibility onto Kill-a-Byte, a private party, exceeds even the broad scope of rational basis review. *Gibson*, 760 F.3d at 621.

The traditional purpose of a public nuisance suit has been to stop the harmful conduct and remove the offensive condition. Restatement (Second) of Torts § 821C(2)(b). Indeed, "abatement," by its definition, is "the act of eliminating or nullifying." *Abatement*, Black's Law Dictionary (10th ed. 2014). Thus, the proper abatement of Lightyear would be its elimination or nullification, which occurred in 2013. R. at 2a. Yet, instead of abatement, the City now seeks reimbursement for

municipal services. R. at 25a. Many courts have denied these claims by applying the "free public services" doctrine, which holds that those whose actions cause government to provide services are not liable for the cost of those services (absent specific legislative authorization). *E.g., Air Fla., Inc.*, 750 F.2d at 1077.; *Koch v. Consol. Edison Co. of N.Y., Inc.*, 468 N.E.2d (N.Y. 1984), cert. denied, 469 U.S. 1210 (1985). Making these types of expenditures is what the City is already obligated to do, and the method by which those services are properly financed is taxation or fees, not tort liability imposed on a few, select private parties such as Kill-a-Byte.

Absent any authority to do so, it would be arbitrary and irrational to place the burden of general governance on a private party because they legally distributed a video game. *City of Flagstaff*, 719 F.2d at 322. This remedy, notwithstanding the unprecedented manner by which it is imposed, "constitutes an arbitrary deprivation of property" in violation of due process. *Id.*

2. The $613.2 million abatement award is grossly excessive.

To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property. *State Farm*, 538 U.S. at 417. The City contends that it can recover "any amount of money necessary to abate the public nuisance of reducing the crime rate to the national average." R. at 26a. This broad and unfounded request for relief furthers no legitimate purpose as it seeks to deprive Kill-a-Byte of its property without any reliable calculation. *State Farm*, 538 U.S. at 417. Rather, the City seeks to punish Kill-a-Byte in an effort to shift blame for the various problems the City faces. R. at 25a. While the City has characterized

this remedy as an abatement, it clearly imposes a liability for damages upon Kill-a-Byte, thus reaching beyond the authorized liability the City may demand from a private party. Restatement (Second) of Torts § 821C(2)(b). Thus, not only has this award for damages been improperly requested, but it has come in the egregious sum of $613.2 million. Under these circumstances, the judgment below far exceeds the parameters set by this Court. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

a. This abatement award is governed by the constitutional parameters set on damage awards.

While the City indeed sought equitable "abatement" costs, this classification appears to have been made out of necessity rather than equity. Restatement (Second) of Torts § 821C(2)(b). More specifically, under applicable public nuisance law, the City, in its official capacity, could only seek abatement and not damages from Kill-a-Byte, a private party. Restatement (Second) of Torts § 821C(2)(b). As a result, the City operated its true claim for damages under the guise of an abatement. *See* R. at 4a. However, well-established standards for awarding the equitable remedy of abatement, as illustrated by the court of appeals, demonstrate the stark contrast between true abatement awards and what was ordered here. R. at 11a; R. at 30a; *People*, 227 Cal.Rptr.3d at 570; *In re Peabody Energy Corp.*, 958 F.3d 717, 724-25 (8th Cir. 2020). Upon further examination, it becomes clear that this judgment shares no similarities to proper abatement awards.

These circumstances necessitate revisiting the authority under which the City seeks this fund. *See* Restatement (Second) of Torts § 821C(2)(b). As Professor Prosser has stated: "The state can never sue in tort in its political or governmental

capacity." W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 2, p. 7 (5th ed. 1984). This remains true unless, of course, there is specific statutory authority permitting the City to recover for public expenditures. *Id.* According to the New Tejas Supreme Court, the City is acting under the guidance of the Restatement (Second) of Torts § 821C(2)(b), which authorizes a public official to bring a civil action to abate a public nuisance. R. at 26a. Abatement, however, is the sole relief that the Restatement authorizes the official to seek. *Id.*

Of course, the City does indeed claim to seek abatement; however, classifying an award as an abatement is not conclusive. *See In re Peabody,* 958 F.3d at 724. Upon further examination, the purported abatement relief that the City seeks clearly fits the description of damages more accurately. *See* R. at 25a. In fact, in entering final judgment, Judge Whitworth suggested as much in saying that "[the district] court then conducted a bench trial on the issue of damages" and "enter[ed] judgment on the damages issue for the reasons stated by this court." R. at 33a. Judge Whitworth did not refer to the award as an abatement or a fund but referred to them as what they truly are: damages. R. at 33a.

Federal courts generally look to the California public nuisance lead-paint litigation for its breadth of guidance on the issue, just as the court of appeals here did below. R. at 11a; R. at 30a; *People*, 227 Cal.Rptr.3d at 570; *In re Peabody*, 958 F.3d at 724-25. An abatement order is an equitable remedy, while damages are a legal remedy. *Id.* This equitable remedy of abatement aims to fund the removal or cessation of an ongoing nuisance. *Id.* Here, that would mean the abatement's

purpose is to fund whatever lasting effect, if any, Lightyear has on the City. *Id.* More specifically, none of the alleged damage or injury done prior to this action's commencement, which was after Lightyear ended, are to be considered in the calculation, only prospective remediation costs to stop or remedy any public nuisance. *Id*. For this reason, courts have ordered these abatements by way of prospective and tentative funds rather than judgments. *Id.*

Unlike the award in *People*, the abatement award here is indeed a "thinly-disguised damages award." *People*, 227 Cal.Rptr.3d at 569. In *People*, the court ordered the defendants to pay into a fund that was drawn from solely to pay for the prospective removal of the hazards that the defendants had created. *Id.* Any funds that had not been utilized for that sole purpose by the end of the four-year abatement period were to be returned to the defendants. *Id*. Additionally, the court expressly provided that it would retain jurisdiction over the plan and its implementation as a safeguard. *Id.* at 570. In contrast, the district court here simply ordered Kill-a-Byte to hand over $613.2 million with no clarity or oversight into how the money was to be spent, or if Kill-a-Byte would receive any surplus if the City's crime rate reached the national average. R. at 33a. Instead, this alleged abatement award operates solely as an award for damages would.

These damages awarded to the City could be classified as both compensatory and punitive. *State Farm*, 583 U.S. at 416. Compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *Id.* Unlike an abatement award that is used to fund prospective

expenditures, compensatory damages seek to compensate an injured party for a concrete and identifiable loss, which is exactly what the City is attempting to do here. R. at 14a. None of the evidence presented by the City suggests that Kill-a-Byte has subjected the City to ongoing or recurring harm; rather, only that Kill-a-Byte caused harm several years ago and that the City wants compensation for that alleged injury. R. at 25a. The amount calculated under this theory is not an abatement fund but a prayer for compensatory damages.

Further, absent a showing of causation, the speculative nature of the damages awarded serve a punitive function. Punitive damages are aimed at retribution and punishment on the tortfeasor. *State Farm*, 583 U.S. at 416. By naming Kill-a-Byte as a single possible "substantial factor" in bringing about the litany of the City's injuries, the City seeks to place the entire burden of remediation solely on the company. R. at 4a. Further, these are completely speculative damages that are based solely on the City's estimate that the relief program's total cost would exceed $600 million. R. at 26a. Rather than seeking to apportion and distribute the burden of this cost accordingly, the City convinced the district court to order Kill-a-Byte to pay the bill. R. at 33a. These damages, at the very least, are punitive in nature if not wholly unconstitutional.

b. This Court has placed clear due-process limits on damages that are punitive in nature.

This Court has expressed its aversion to excessive and arbitrary damage awards that "transcend the constitutional limit." *Gore*, 517 U.S. at 585-86. In an effort to protect defendants in tort, such as Kill-a-Byte, from excessive judgments,

this Court has provided three guideposts in determining whether an award is grossly excessive: (1) the degree of reprehensibility of the conduct to be punished, (2) the disparity between the harm or potential harm suffered and the damages awarded, and (3) the difference between the remedy awarded and those awarded in comparable cases. *Id.* at 575-85.

This Court noted that the most important indicium of reasonableness is the first guidepost which weighs the degree of reprehensibility of the defendant's misconduct. *Id.* at 575. In *State Farm*, this Court expounded on this guidepost by instructing courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the conduct involved repeated actions or was an isolated incident; the harm was the result of intentional malice, trickery, or deceit, or mere accident. *State Farm*, 538 U.S. at 409. Simply put, this guidepost's objective is to determine whether punitive damages were truly appropriate given the circumstances and, if so, whether they were reasonable in light of those circumstances. *Id.* Similarly, if a defendant has inadvertently entangled itself in a scheme that causes some general injury, the degree of reprehensibility will likely not be high. *Id.* Thus, this guidepost protects tortfeasors who were otherwise acting unintentionally to cause any harm. *Id.*

In refusing to adopt a bright-line ratio between harm suffered and damages awarded, this Court clarified that "the precise award in any case, of course, must be based upon the facts and circumstance of the defendant's conduct and the harm to the plaintiffs." *Id.* at 425. This guidepost underscores the importance of the

particularity and specification that must accompany an award of damages. *Id.* More specifically, that an award is not speculative, but that there is a logical balance between the damages sought to compensate the injury, and those that are intended to reprimand the tortfeasor. *Id.* It is the absence of this specificity and balance that will frustrate the second guidepost. *Id.*

The third and final guidepost in *Gore* calls for a comparison between the award in question and those awards entered in cases similar. *Gore*, 517 U.S. at 559. This guidepost is a relatively simple analysis. *State Farm*, 538 U.S. at 428. For example, in *State Farm*, this Court simply compared the defendant's fraudulent behavior to the $10,000 fine for an act of fraud, which was an amount "dwarfed by the $145 million punitive damage award." *Id.* While every case may not present such an obvious discrepancy, cases that do will almost certainly satisfy this guidepost. *See id.*

This Court concluded in *State Farm* holding that "an application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages." *Id.* at 429. It necessarily followed that the punitive award of $145 million was an "irrational and arbitrary deprivation of the property of the defendant." *Id.* Thus, upon examination under these guideposts, an award can constitute a violation of a defendant's right to due process. *Id.*

c. The order for Kill-a-Byte to pay $613.2 million exceeds the due-process limitations set by this Court.

This Court undeniably ruled with great clarity that the reasoning used in *State Farm* and *Gore* intended to govern punitive damage awards. *State Farm*, 538 U.S. at 412. Because it is clear upon closer examination that this abatement order is in fact "a thinly-disguised damages award," it becomes appropriate to examine it as such; thus, placing it within the scope of this Court's comprehensive jurisprudence. *Id*. With an extremely low degree of reprehensibility, Kill-a-Byte legally distributed a video game, and, as a result, was ordered to pay $613.2 million in what appears to be a combination of compensatory and punitive damages. R. at 33a. Applying the factors established by this Court in *Gore*, the constitutional appraisal of this $613.2 million judgment, as this Court found in *State Farm*, "is neither close nor difficult." *State Farm*, 538 U.S. at 418.

Turning to the first *Gore* guidepost, the inquiry begins with the reprehensibility of Kill-a-Byte's alleged misconduct: the legal distribution of a video game. *Id.* at 419. Following this Court's instruction, the factors to consider here are: whether this misconduct caused physical or economic harm, involved repeated or isolated actions, or whether the harm was seemingly incidental. *Id.* Each of these factors weighs in favor of Kill-a-Byte. First, the City does not specifically allege any physical personal or property damage due to Lightyear, only that it played a role in the City's increased crime rate. R. at 3a. Thus, this injury is merely economic harm. Likewise, Kill-a-Byte's conduct cannot be said to be repeated actions, especially

because Lightyear has been out of operation for over six-years now and over two-years from when the City originally filed this claim. R. at 20a. Even then, Kill-a-Byte still was acting with no reason to know or believe that they could be liable for any detached liability. This resolves the final inquiry of whether the harm was incidental or intentional. Kill-a-Byte does not dispute that it intentionally distributed the video game, but what is in dispute is whether Kill-a-Byte intended to, or even had reason to know it could, impact a struggling city like New Truro. The harm caused by the lawful distribution of Lightyear, if any, is so far incidental to any injury to give merit to the City's claim for these punitive damages.

The second *Gore* guidepost weighs the balance between compensatory and punitive damages under all facts and circumstances. *Id.* at 425. In *State Farm*, this Court noted a similar circumstance in which the damage award did not clearly separate the compensatory from the punitive. *See id*. at 429 (noting the compensatory damages awarded contained punitive elements). Here, the disguised abatement award failed to specify exactly what the function of the lump sum award would be. R. at 33a. Instead, the City seemingly has the discretion to pocket the amount and spend it as it sees fit, much like a punitive damage award and nothing like an orthodox abatement fund. R. at 33a; *People*, 227 Cal.Rptr.3d at 569. It is this lack of clarity in the damages awarded that weighs this factor heavily in favor of Kill-a-Byte.

Gore's concluding guidepost looks into the disparity between the punitive damages awarded and the civil penalties authorized or imposed in comparable

cases. *State Farm*, 538 U.S. at 428. Analysis under this guidepost underscores the arbitrary and excessive nature of this particular damage award because of the lack of civil penalties authorized or imposed in comparable cases to what has been asserted against Kill-a-Byte. *Id.* Instead, the civil penalty authorized is not a penalty at all, but an abatement. Restatement (Second) of Torts § 821C(2)(b). The Restatement classifies this specific abatement as an injunction rather than any funding or damage amount. Restatement (Second) of Torts § 821C(2)(b). Thus, to plainly compare the disparity between the civil penalty authorized by the Restatement and the damages awarded, the ratio is $0 to $613,200,000.

In applying the *Gore* factors, this $613.2 million judgment makes the determination in this case "neither close nor difficult." *State Farm*, 538 U.S. at 418. The well-established principles governing the protection against unconstitutional damage awards are evidently present here. *Id.* Thus, the $613.2 million judgment against Kill-a-Byte violates due process. *Id.*

C. The Due Process Clause protects against the retroactive imposition of liability on Kill-a-Byte.

Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly. *Landgraf*, 511 U.S. at 265. This essential principle of due process is that a deprivation of property will be preceded by notice. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). More specifically, this Court has described "the root requirement" of the Due Process Clause being that an individual be given notice "*before* he is deprived of any significant property interest." *Id.* (emphasis in

original). Here, Kill-a-Byte acted under no notice that it would be subject to such a significant deprivation of property for distributing a video game. This retroactive judgment for hundreds of millions of dollars to punish the lawful distribution of a product frustrates these principles. *See id.* "In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions." *Landgraf*, 511 U.S. at 265-66. Without proper notice, the $613.2 million abatement order infringes on Kill-a-Byte's confidence in this due-process protection. *Id.*

Due-process restrictions secure confidence in the constitutional system against severe retroactive legislation. *Eastern Enters. v. Apfel*, 524 U.S. 498, 547 (1998) (Kennedy, J., concurring). Groups targeted by retroactive laws, were they to be denied all protection, would have a justified fear that a government once formed to protect expectations now can destroy them. *Id.* It is this very fear that allowed the court of appeals here to reason that there is "no difference between legislation with retroactive effects and the development of common-law liability with retroactive effects." R. at 12a. Whether the retroactive effects are imposed legislatively or judicially becomes immaterial as due process seeks to protect against that same evil. *See Landgraf*, 511 U.S. at 266 ("it is therefore not surprising that the antiretroactivity principle finds expression in several provisions of our constitution."). Thus, it remains appropriate to analyze this common-law liability theory with the same skepticism brought to retroactive legislation. *Id.*

This Court has agreed that the retroactivity of judicial decisions presents a threat to due process. *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964). In *Bouie*, this Court held that if a judicial decision is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, it must not be given retroactive effect." *Id.* This Court reasoned that these decisions "operate precisely like an ex post facto law" which are forbidden by the Constitution. *Id*; U.S. Const. art. 1, § 10. This Court reasoned that "if a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Bouie*, 378 U.S. at 353-54. This argument is not that the New Tejas tort liability violates the Ex Post Facto Clause, as that argument is foreclosed by current precedent. *Eastern*, 524 U.S. at 538-39 (Thomas, J., concurring). Rather, it is the Due Process Clause that gives this argument is force and effect. *Bouie*, 378 U.S. at 353-54. In *Bouie*, this Court simply drew an analogy to the Ex Post Facto Clause to give way for this judicial philosophy to operate through the Due Process Clause, as they share a common goal. *Id.* Consequently, while the Ex Post Facto Clause applies in criminal law, courts have not hesitated to apply this corresponding judicial philosophy from *Bouie* in the civil arena under a due-process analysis. *See Gibson*, 760 F.3d at 622.

The "expectations" and certainties demanding protection from retroactive liability are clearly under attack here. *Landgraf*, 511 U.S. at 266; *Bouie*, 378 U.S. at 354. Before the Supreme Court of New Tejas answered the court of appeals certified

questions, the law of New Tejas gave Kill-a-Byte no warning that it might face such extraordinary liability. R. at 11a. Not only did the questions require certification, but they returned to the court of appeals as a "5-4 opinion with a heated dissent." R. at 4a. In other words, even the sitting Justices of the Supreme Court of New Tejas could not reach a consensus as to the true effect of their own common law. *See* R. at 4a. It necessarily follows that four of the nine New Tejas Supreme Court Justices would not have predicted the liability Kill-a-Byte was faced with themselves. *See* R. at 4a. Similarly, in his denial of summary judgment, Judge Whitworth qualified his own judgment by adding, "if I am correct that the City's liability theory is consistent with state law" implying perhaps that he lacked confidence in the proper effect and application of the New Tejas state law. R. at 32a. There is a facial unfairness that presents itself in holding a party such as Kill-a-Byte liable for such an egregious amount under a theory that welcomed so much uncertainty in the courts deciding the very issue.

In application, the great distance that this retroactive law reaches back to impose liability on Kill-a-Byte raises substantial questions of fairness. *Landgraf*, 511 U.S. at 265; *Eastern*, 524 U.S. at 534. In *Eastern*, this Court noted that even in very limited areas in which retroactivity is tolerated, such as tax legislation, limits have been imposed to confine application to "short and limited periods." *Eastern*, 524 U.S. at 534. Kill-a-Byte operated Lightyear from 2003 until 2013. R. at 2a. During this decade of operation, the City raised no qualms with Lightyear. It was not until 2016, three years after its cessation, that the City sued Kill-a-Byte. R. at

2a. Just as the retroactive law in *Eastern* divested the defendant of its property long after the company believed its liability was settled, Kill-a-Byte's liability under Lightyear was likewise settled. *Eastern*, 524 U.S. at 534; *Landgraf*, 511 U.S. at 265.

The fundamental evil that brings abhorrence to retroactive liability is ever-present here. *Landgraf*, 511 U.S. at 265. In no way was Kill-a-Byte afforded the "opportunity to know what the law is and to conform their conduct accordingly," because their conduct had already occurred prior to its notice of such liability. *Id.* Kill-a-Byte has been guaranteed that no State will deprive it of its property without due process of law. U.S. Const. amend. XIV, § 1. An unpredictable demand for an excessive and arbitrary $613.2 million award, and without a showing of causation, strips Kill-a-Byte of that guarantee. *Landgraf*, 511 U.S. at 265.

CONCLUSION

The court of appeals did not err in deciding that Kill-a-Byte properly preserved the right to appeal its purely-legal due-process argument, and that under that argument, New Tejas law exceeded the outer bounds of permissible liability afforded by the Due Process Clause. Therefore, we respectfully ask that this Court affirm the Thirteenth Court of Appeals.

Respectfully submitted,
/s/ Team #57
Team 57
Counsel for Respondent
November 16, 2020

CERTIFICATE OF SERVICE

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

/s/ Team #57
Team 57
Counsel for Respondents
November 16, 2020

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for the Respondent, hereby certifies that, in compliance with Competition Rule 2.5 and Supreme Court Rule 33.1, the Brief of the Respondent contains 12,161 words beginning with the Statement of Jurisdiction through the Conclusion including all headings and footnotes, but excluding the Certificate of Service, Certificate of Compliance, and the attached Appendix.

/s/ Team #57
Team 57
Counsel for Respondent
November 16, 2020

APPENDIX

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Constitutional and Statutory Provisions Involved

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.

The Seventh Amendment to the Constitution of the United States of America provides in pertinent part:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Article 1 Section 10 of the Constitution of the United State of America provides in pertinent part:

> No state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts . . .

The applicable portion of 28 U.S.C. § 1254 provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (2) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Restatement (Second) of Torts Sections Involved

Restatement (Second) of Torts § 821B provides in pertinent part:

(1) A public nuisance is an unreasonable interference with a right common to the general public.

(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Restatement (Second) of Torts § 821C provides in pertinent part:

(1) In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.

(2) In order to maintain a proceeding to enjoin to abate a public nuisance, one must

(a) have the right to recover damages, as indicated in Subsection (1), or

(b) have authority as a public official or public agency to represent the state or a political subdivision in the matter, or

(c) have standing to sue as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action.

Rules

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.
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(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

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