
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

No. 18-5971

BRIEF FOR RESPONDENT

TEAM 62
Attorneys for Respondent

ORAL ARGUMENT REQUESTED

QUESTIONS PRESENTED

- I. Does a Rule 50 motion become unnecessary and redundant to preserve an argument when both parties fully presented their purely legal due process arguments to the district court judge during summary judgment?

- II. Is a city's public nuisance claim against a video game distributor invalidated where the evidence shows an attenuated connection between the distributor's game and the increased crime rate given that other factors contributed to the city's criminal and financial difficulties?

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PARTIES TO THE PROCEEDING

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

Respondent Kill-a-Byte Software, Inc. is a video game distributor and operator.

DECISIONS BELOW

The United States District Court for the Western District of New Tejas opinion is unpublished but can be located at Civil Action No. 16-cv-5412 and is reprinted on page 19a of the Record. The United States Court of Appeals for the Thirteenth Circuit opinion is unpublished but can be located at No. 18-5971 and is reprinted on page 1a of the Record.

STATEMENT OF JURISDICTION

The judgment of the Thirteenth Circuit was entered on March 21, 2020. The petition for writ of certiorari was granted on October 5, 2020. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The appendix contains the text of the following constitutional provision and Federal Rule of Civil Procedure relevant to this case: U.S. Const. amend. XIV, § 1; Fed. R. Civ. P. 50(a).

STATEMENT OF THE CASE

Statement of Facts: A city alleged an increase in crime was solely attributable to a video game that ceased production far before the claim was even alleged. R. at 2a. In 2003, Respondent, Kill-a-Byte Software, Inc. (Kill-a-Byte), created Lightyear, a legally sold and operated video game that enjoyed international success after being distributed to 300 million individuals worldwide. *Id.* Kill-a-Byte continued its distribution of Lightyear for ten years without incident, and stopped operation of Lightyear “in 2013 with its grand finale.” R. at 22a. Around the time Lightyear was created, Petitioner, the City of New Truro (the City) suffered significant economic problems stemming from budget deficits. R. at 3a. Between 2004 and 2005, the City experienced a teacher strike and an embezzlement scandal, exacerbating the City’s existing financial problems. *Id.* After experiencing high unemployment rates, poor public education systems, and budgetary shortfalls, the City alleged that these expansive problems stemmed from a single cause: Lightyear. R. at 2a.

Over the past ten years, the City experienced a crime rate higher than the national average. *Id.* The City’s fifty percent reduction in tax revenue coupled with the high costs of funding its police department have significantly contributed to the crime rate. *Id.* Despite acknowledging that Lightyear was one of numerous factors allegedly contributing to the crime rate, the City still asserted that the video game distributor “was responsible for the full cost of abating the nuisance to which it contributed.” R. at 4a. Accordingly, the City asserted that Kill-a-Byte should be solely responsible for the City’s floundering economy and increased criminal activity. *Id.*

Procedural History: In 2016, the City sued Kill-a-Byte for allegedly creating an absolute public nuisance through the distribution of Lightyear. R. at 2a. The City argued that Lightyear transformed its residents into people who were “trained to kill” and created an uneducated, unemployable group of citizens, supposedly interfering with public safety and economic development. *Id.* The City sought \$613.2 million in abatement costs to address this public nuisance, and the City allocated the entire \$613.2 million cost to Kill-a-Byte. R. at 4a.

The abatement costs covered a vast array of expenses, including “funding job training programs, centers to assist with ‘video game addiction,’ increased police presence, security cameras in downtown, and other public safety measures.” R. at 25a. As such, the abatement costs extend beyond the expenses stemming from the City’s single allegation that Lightyear increased the crime rate. *Id.* Moreover, rather than arguing that Kill-a-Byte directly caused the increased crime rate, the City alleged that Kill-a-Byte intended for Lightyear to be successful, as determined by the amount of time a purchaser played the game. R. at 25a n.4.

Since the City sought abatement of the alleged public nuisance, the district court decided the equitable remedy as a matter of law. *Id.* On a motion for summary judgment, Kill-a-Byte argued that the City’s application of its nuisance claim was unconstitutional. R. at 27a. During the summary judgment hearing, the district court fully analyzed the constraints imposed on state tort liability by the Due Process Clause of the Fourteenth Amendment. *Id.* Recognizing that New Texas caselaw offered little guidance in this area, the district court turned to Seventh Circuit

precedent, which indicates that economic legislation is unconstitutional when the given law is arbitrary and irrational. *Id.* The district court found that the Due Process Clause did not inhibit the City from recovering the abatement costs, and denied Kill-a-Byte's motion for summary judgment on May 10, 2017. R. at 32a. Following trial, the district court entered a judgment on March 2, 2019, ordering Kill-a-Byte to pay the entire \$613.2 million in abatement costs to the City. R. at 33a.

Kill-a-Byte appealed the judgment to the Thirteenth Circuit, arguing that the City's nuisance claim was not viable under state law and that the City failed to provide sufficient evidence to prove this claim. R. at 8a. The Thirteenth Circuit certified these issues to the Supreme Court of New Texas, which returned vague answers indicating that the City's liability theory was viable in general and that the City's evidence was legally sufficient. R. at 5a. The Thirteenth Circuit deferred to the state court's answers pertaining to state law, but it held that the City's public nuisance claim violated due process. *Id.* Although Kill-a-Byte did not file a Rule 50 motion for the due process issue, the circuit court held that a Rule 50 motion served no purpose with purely legal issues, such as the due process question found in the case at hand. R. at 7a. The Thirteenth Circuit also pointed to the attenuated relationship between the City's crime rate and the distribution of Lightyear, holding that the crime rate would have increased even without Kill-a-Byte's involvement. R. at 9a. The Thirteenth Circuit found further constitutional problems with the retroactivity of the abatement costs, holding that Kill-a-Byte could not have anticipated responsibility for such a disproportionate economic liability. R. at 13a.

SUMMARY OF THE ARGUMENT

The Legal Exception to a Rule 50 Motion: Statutory law grants appellate courts jurisdiction over all final decisions. This concept of finality is given a practical meaning, whereby the analysis turns on the district court judge's intent. Since pure questions of law are decided by the judge, evidence presented to the jury does not impact a judge's decision on these legal issues. As such, when a judge rules on a purely legal issue during a summary judgment hearing, this ruling is final. The Federal Rules of Civil Procedure (FRCP) are designed to promote fairness and efficiency within proceedings. While some FRCP motions, such as a Rule 50 motion, are designed to build a complete record so as to fully inform the jury, such motions are useless in certain situations. A Rule 50 motion is unnecessary to preserve a legal issue for appellate review when a district court denies summary judgment on a question of law because the record pertaining to the legal issue is already fully developed by the time of the summary judgment hearing.

Since the judge was fully apprised of Kill-a-Byte's purely legal due process argument during the summary judgment hearing, this Court can still hear the due process argument even without the filing of a Rule 50 motion. A jury decides issues of fact, while a judge decides issues of law. During the summary judgment hearing, both Kill-a-Byte and the City had an opportunity to fully present their respective due process arguments. Since a Rule 50 motion is merely used to provide both parties an opportunity to add factual evidence to the record, such a motion would serve no purpose in the case at hand. As such, the due process issue is properly before the

Court, even without a Rule 50 motion.

Constitutional Constraints on Public Nuisance Claims: The deference afforded to judicial common law is not without limits. These limits ensure that common law claims are only valid in certain situations. The tort law concept of public nuisance can only be proven by showing a connection between the alleged harm and the actor's interference. As such, before state law can impose civil liability on a private party, certain requisite elements must be met. These requirements help promote a fair proceeding based on the merits of the case. Furthermore, the United States Constitution prohibits certain takings and infringements of speech to ensure that the government does not encroach on private rights.

The City's public nuisance claim violates the Due Process Clause by holding Kill-a-Byte responsible for the increase in crime because the City failed to show sufficient connection between the increased crime rate and Kill-a-Byte's distribution of Lightyear. Moreover, Kill-a-Byte was held responsible for the entire amount of the abatement costs six years after Kill-a-Byte stopped operating Lightyear. Such a retroactive and irrational economic liability is prohibited by the Constitution. Similarly, constitutional requirements cannot be avoided merely because of a strong public desire to improve a particular public condition. By holding Kill-a-Byte responsible for the entirety of the excessive abatement costs, the government is replacing the public's moral judgment with its own as an attempt to promote the common good through economic liabilities. Such economic liability violates the constitutional principle of fairness.

ARGUMENT

The Constitution demands fairness in legal proceedings. Numerous authoritative sources, including the FRCP, provide requirements that ensure all litigants are afforded a fair hearing. The FRCP includes a vast array of provisions because judicial proceedings require unique rules and guidance. By focusing on both fairness and efficiency, these rules recognize that provisions are only applicable in a limited number of situations. A Rule 50 motion is required to preserve arguments that have not been fully presented to the judge or jury, but this rule produces redundant processes when a purely legal issue is being argued. Moreover, the constitutional requirement of fairness ensures that common law claims are not abused. Even when the government seeks to promote public welfare, the Constitution still provides boundaries to ensure that the government action is appropriate under the circumstances. Both the FRCP and the Constitution mandate fairness and justice in all legal disputes, and these two principles have been foundational elements of the United States legal system since its inception.

Standard of Review

For the first issue on appeal, whether Kill-a-Byte was required to file a Rule 50 motion to preserve an argument that the district court rejected in denying summary judgment, R. at 5a, courts of appeal apply a *de novo* standard of review. *See Williams v. Taylor*, 529 U.S. 362, 384 (2000). When reviewing a lower court's decision to deny summary judgment on questions of law, courts of appeal again use a *de novo* standard. *See Plumhoff v. Rickard*, 572 U.S. 765, 768 (2012). The *de novo* standard

states that no deference is given to the lower court's decision. *See Buford v. United States*, 532 U.S. 59, 64 (2001).

I. A RULE 50 MOTION IS UNNECESSARY TO PRESERVE LEGAL ISSUES RAISED DURING SUMMARY JUDGMENT BECAUSE THE ISSUE HAS ALREADY BEEN FULLY DISCLOSED TO THE COURT, SO KILL-A-BYTE'S DUE PROCESS ARGUMENT WAS PROPERLY PRESERVED.

The FRCP aim to achieve “just, speedy, and inexpensive” proceedings. Fed. R. Civ. P. 1. At times, these goals can conflict with one another, so the rules contain provisions that ensure one goal is not sacrificed in favor of another. *See, e.g., Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966). Ultimately, the goal of civil proceedings is to achieve a just decision on the merits in an efficient manner. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). Civil proceedings follow procedures designed to filter out unnecessary information, making the merits of the case the court's primary focus. *See* Fed. R. Civ. P. 50, 56. For example, motions for summary judgment and judgment as a matter of law allow courts to take cases out of the jury's hands, primarily when evidence is “so one-sided that one party must prevail as a matter of law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986). Such motions recognize that purely legal questions will not benefit from jury deliberation, so these legal questions are resolved by the court. *See id.*

A. Kill-a-Byte's Purely Legal Issue Is Not Impacted by Jury Consideration Because Juries Are Solely Responsible for Determining Issues of Fact.

Summary judgment is proper if the evidence indicates that there is no genuine issue as to any material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). No genuine factual issues exist when the court decides that the record could not lead

a rational jury to find for the nonmoving party. *See Ricci v. DeStefano*, 557 U.S. 557, 586 (2009). This Court has stated that appealing a denial of summary judgment based on sufficiency of evidence is prohibited. *See Johnson v. Jones*, 515 U.S. 304, 313 (1995). However, an appeal pertaining to the denial of summary judgment may be available after a final judgment is entered if the appeal involves a purely legal issue. *See Ortiz v. Jordan*, 562 U.S. 180, 188 (2011). This Court has held on several occasions that “[t]he controlling distinction between the power of the court and that of the jury is that the former [has] the power to determine the law and the latter to determine the facts.” *See, e.g., Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). Accordingly, the FRCP contain provisions aimed at separating questions of law from questions of fact. *See Weisgram v. Marley Co.*, 528 U.S. 440, 447 (2000). For example, a Rule 50(a) motion removes questions of fact lacking sufficient evidence from the jury’s consideration, Fed. R. Civ. P. 50(a), but this motion is not always necessary.

1. ***Kill-a-Byte Was Not Required to File a Rule 50 Motion to Preserve Its Purely Legal Due Process Argument Because the Entirety of This Argument Was Presented During Summary Judgment.***

Absolute adherence to Rule 50 is unnecessary when the rule’s underlying purpose has already been achieved. *See Ericsson Inc. v. TCL Commc’n Tech. Holdings Ltd.*, 955 F.3d 1317, 1321 (Fed. Cir. 2020). Some courts rely on judicial precedent to prohibit the purely legal exception to a Rule 50 motion. *See, e.g., Varghese v. Honeywell Intern., Inc.*, 424 F.3d 411, 423 (4th Cir. 2005). However, a majority of the circuit courts have allowed this purely legal exception in order to discourage redundant motions that serve little to no purpose. *See, e.g., Houskins v. Sheahan*,

549 F.3d 480, 489 (7th Cir. 2008). In *Houskins*, the court held that a Rule 50 motion serves no purpose with summary judgment denials that are not based on adequacy of evidence. *Id.* Constitutional questions amount to issues of law that must be decided by the court. *Id.*

A Rule 50 motion grants the trial court an opportunity to reexamine the sufficiency of evidence and alert opposing counsel of the existence of insufficient evidence. *See Ericsson*, 955 F.3d at 1324. In *Ericsson*, the lower court's decision to deny summary judgment regarding a patent's eligibility under statutory law was appealed. *Id.* at 1320. On appeal, the plaintiff argued that TCL waived its right to appeal by failing to raise the issue of patent eligibility under a Rule 50 motion. *Id.* at 1321. The court held that because the legal issue had been fully litigated before the lower court's judge, Rule 50's underlying purpose had already been satisfied, so the absence of a Rule 50 motion was acceptable. *Id.* at 1324.

This Court has left room for a purely legal exception to a Rule 50 motion by making an explicit distinction between the treatment of legal and factual issues. *See In re AmTrust Fin. Corp.*, 694 F.3d 741, 751 (6th Cir. 2012). In *AmTrust*, the FDIC sought to collect payment from AmTrust after it declared bankruptcy, pursuant to the parties' contract. *Id.* at 745. The FDIC filed a motion for summary judgment pertaining to the contract dispute, but the district court denied this motion. *Id.* at 749. The FDIC appealed the decision to the circuit court, which ultimately agreed with the lower court's decision; however, AmTrust argued that the FDIC's claim could not be heard by the circuit court because the FDIC failed to file a Rule 50 motion

during or after the trial. *Id.* at 745, 750. The circuit court disagreed, stating that the lower court's decision can be appealed even without a Rule 50 motion. *Id.* at 751. The circuit court explained that this Court's holding in *Ortiz* was limited to cases where summary judgment was denied due to factual disputes. *Id.* at 750. As such, the circuit court found that the *Ortiz* decision maintained the opportunity to appeal purely legal claims despite the absence of a Rule 50 motion. *Id.*

In the case at hand, since both parties fully addressed their due process arguments during the summary judgment hearing, the purpose of a Rule 50 motion was already accomplished, and requiring this motion would be redundant. A Rule 50 motion can only be granted when the court finds that a reasonable jury would lack a sufficient evidentiary basis to find for the moving party on a particular issue. Fed. R. Civ. P. 50(a). As shown in *Ericsson*, where the plaintiff argued that the defendant's right to appeal a legal issue had been waived because a Rule 50 motion was not filed, 955 F.3d at 1321, the purpose behind a Rule 50 motion is irrelevant with purely legal issues. While some courts prohibit a denial of summary judgment from being appealed regardless of the issue at hand, *see, e.g., Varghese*, 424 F.3d at 423, a legal exception to a Rule 50 motion avoids redundant procedures. The FRCP's provisions designed to direct a court's attention to the merits of a case are only useful in limited circumstances. *See Ericsson*, 955 F.3d at 1321. In the present case, a Rule 50 motion would have done nothing to inform the judge's decision on Kill-a-Byte's due process argument because there was sufficient evidence to make a final ruling during summary judgment. *See id.* Rule 50 motions help correct evidentiary deficiencies, but

since both parties fully disclosed their respective arguments during summary judgment, no such deficiencies exist here. The judge made a ruling on a legal issue based on a complete record. R. at 32a. By allowing a purely legal exception to Rule 50, this Court would promote just, speedy, and inexpensive proceedings by ensuring that a Rule 50 motion only applies to relevant circumstances. *See Houskins*, 549 F.3d at 489 (explaining that “including an issue of law in a Rule 50 motion would defeat its purpose”).

The absence of a Rule 50 motion raising Kill-a-Byte’s due process argument has no impact on the jury’s decision in the case at hand because a jury’s verdict is unaffected by pure questions of law. In *AmTrust*, where an appeal was allowed without a Rule 50 motion following the denial of summary judgment, the court analyzed the Supreme Court’s *Ortiz* holding. 694 F.3d at 750. *AmTrust* held that the Supreme Court purposely used broad language when discussing the necessity of a Rule 50 motion in order to maintain the possibility of a purely legal exception. *Id.* In the present case, the Thirteenth Circuit found that Kill-a-Byte would not even be able to draft a Rule 50 motion based on a purely legal issue. R. at 8a. This finding is consistent with the reasoning in *Ortiz*, whereby the Supreme Court acknowledged that some denials of summary judgment can be considered final decisions. 562 U.S. at 188. Since a jury is not asked to decide questions of law, the record pertaining to the due process issue remained unchanged from summary judgment to post-trial. *See AmTrust*, 694 F.3d at 750. Requiring Kill-a-Byte to file a Rule 50 motion would have only created a redundant and unnecessary procedural hurdle. *See id.*

2. *The Denial of Kill-a-Byte's Due Process Argument During Summary Judgment Was a Final Order Because the Denial Dealt with a Purely Legal Issue.*

A denial of summary judgment on a question of law is considered an appealable final order. *See Banuelos v. Constr. Laborers' Tr. Funds for S. Cal.*, 382 F.3d 897, 902–03 (9th Cir. 2004). In *Banuelos*, the court acknowledged that while appellate courts are unable to review some summary judgment denials after a full trial on the merits, this is not always the case. *Id.* at 902. The court explained that the distinction between a denial of summary judgment on a question of law and a question of fact is logical, and it held that denials based on questions of law can be reviewed by appellate courts without a Rule 50 motion. *Id.* Since purely legal issues cannot be resolved by a jury, requiring a Rule 50 motion for a denial of summary judgment based on a question of law is a “pointless academic exercise.” *Id.* at 902–03.

Appellate courts have jurisdiction over all final decisions from district courts, but a court's final decision is not the equivalent of its last order. *See Rothstein v. Carriere*, 373 F.3d 275, 284 (2d Cir. 2004). The plaintiff in *Rothstein* alleged malicious prosecution after being found guilty of obscenity charges related to pornographic material. *Id.* at 281. Under a malicious prosecution claim, the plaintiff must show that the criminal charge is not supported by probable cause. *Id.* at 282. This can be accomplished by showing that the police committed fraud, perjury, or other acts of bad faith. *Id.* at 283. The lower court erred by not directly addressing the probable cause issue, which was also not preserved through a Rule 50 motion. *Id.* The defendant appealed, alleging that the probable cause presumption was not rebutted,

but the plaintiff argued this issue was not appealable because it had not been preserved in the lower court. *Id.* at 283. Since the probable cause issue was previously addressed in the defense’s denied motion for summary judgment, the court held that the lower court’s “ruling granted partial summary judgment to Rothstein on the effect of the indictment.” *Id.* at 284. Moreover, the *Rothstein* holding stated that when a motion for summary judgment pertaining to an issue of law is denied, this issue is still appealable even if the moving party fails to make a subsequent motion under Rule 50. *Id.* Denial of summary judgment on a legal issue is equivalent to a court’s final decision to grant partial summary judgment on this issue. *See id.*

This Court has held that denials of summary judgment can still be considered final decisions. *See Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152 (1964). Statutory law states that appellate courts have jurisdiction over all final decisions from district courts. 28 U.S.C. § 1291 (2018). However, in *Gillespie*, this Court held that the concept “final decision” must be given a practical, rather than a technical, meaning. 379 U.S. at 152. The finality of a decision must be analyzed with the fundamental concept of fairness in mind. *See id.*

In the present case, the judge’s denial of Kill-a-Byte’s motion for summary judgment on the due process issue was not an interlocutory order because the decision was made after both parties fully briefed the issue. When a district court rules on a legal issue fully presented during a summary judgment hearing, that decision transcends interlocutory status and becomes final. *See Ericsson*, 955 F.3d at 1323 (holding that an issue is appealable as long as the district court fully addressed the

issue based on a complete record). In the case at hand, the circuit court's dissenting opinion argues that the Supreme Court categorically denied the applicability of the merger rule, the concept that interlocutory orders merge with final judgments, to summary judgment denials. R. at 17a. However, the *Ortiz* opinion intentionally used broad language when discussing the finality of summary judgment denials. 562 U.S. at 188. Since *Ortiz* involved a denial of summary judgment on a factual issue, *id.* at 191, this Court's holding is not directly applicable to the case at hand. In *Ortiz*, the Supreme Court did not address the purely legal exception to a Rule 50 motion because this issue was not before the Court. *Id.* As such, the Thirteenth Circuit's dissenting opinion incorrectly conflates summary judgment denials on questions of law with denials on questions of fact.

The district court's denial of summary judgment on Kill-a-Byte's purely legal due process argument was a final decision based on a fully developed record. Since final decisions from a district court can be appealed, and both parties set forth their entire argument on the due process issue, the district judge's decision to deny summary judgment is a final decision in the case at hand. *See Gillespie*, 379 U.S. at 152 (holding that the finality of a decision is determined through practical reasoning). Also, the court, rather than the jury, is responsible for deciding Kill-a-Byte's due process issue, meaning that the district court's denial of summary judgment on this issue was a final decision that can be appealed without a Rule 50 motion. *See Banelos*, 382 F.3d at 902 (explaining that a denial of summary judgment on an issue of law is considered a final decision).

Denying summary judgment on a purely legal issue is equivalent to a partial grant of summary judgment in favor of the nonmoving party; therefore, the district court's decision on Kill-a-Byte's summary judgment motion was an appealable final decision. Evidentiary relevance is dictated by the distinction between summary judgment on issues of fact and issues of law. As the Second Circuit explained, "once a trial has occurred, the focus is on the evidence that was actually admitted at trial, not on the earlier summary judgment record." *Rothstein*, 373 F.3d at 284. Since judges decide issues of law, a judge's decision on these issues is not informed by a jury trial. *See id.* Whether a judge's decision is referred to as a denial of summary judgment in favor of the moving party or a partial grant of summary judgment in favor of the nonmoving party, the judge's decision is final and appealable. *See id.* Similar to *Rothstein*, which involved denial of summary judgment on a legal issue, *id.*, by denying Kill-a-Byte's motion for summary judgment on the due process claim, the district court effectively granted partial summary judgment for the City. A denial of summary judgment on a question of law, otherwise referred to as a partial grant of summary judgment, is an appealable, final order from the judge. *See, e.g., id.* Therefore, this Court has jurisdiction over Kill-a-Byte's due process argument.

B. The FRCP's Goal of Promoting Just, Speedy, and Inexpensive Proceedings Would Be Violated by Refusing to Consider Kill-a-Byte's Due Process Argument, and Consequently, Allowing a Technicality to Decide the Outcome of the Case.

The goal of civil proceedings is to achieve a proper decision based on the merits of the case. *See Maty v. Grasselli Chem. Co.*, 303 U.S. 197, 200 (1938). Similarly, courts are discouraged from allowing mere technicalities to interfere with a hearing

on relevant issues. *See, e.g., Schiavone v. Fortune*, 477 U.S. 21, 27 (1986). The FRCP are construed liberally to promote just, speedy, and inexpensive proceedings based on the merits of the respective case. *See Hickman v. Taylor*, 329 U.S. 495, 507 (1947). These rules are designed to simplify the procedural aspects of civil litigation so that litigants can have their day in court. *See Surowitz*, 383 U.S. at 373. Moreover, “[t]he federal judicial system has a strong interest in the correct resolution of [legal] questions, not only to spare litigants unnecessary costs but also to relieve courts of time-consuming pretrial motions.” *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring).

1. ***The FRCP’s Fundamental Goal of Fairness Mandates the Appealability of Kill-a-Byte’s Due Process Argument Because Deciding a Case Based on a Technicality is Unjust.***

The FRCP are meant to assist litigants with bringing their valid claims before a court. *See Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 337 (5th Cir. 2017). In *Kroger*, a store employee was cleaning an oily substance that leaked from the ventilation ducts after the store’s annual cleaning of its condenser units. *Id.* at 327. Kroger typically provided its employees with an absorbent cleaning supply to clean up the oily substance, but this supply was not provided to the employee in this case. *Id.* While cleaning the oily substance, the employee was severely injured after slipping and falling. *Id.* at 328. Before Kroger moved for summary judgment on the employee’s negligence claim, the employee provided Kroger with an expert report that allegedly established a material issue of fact pertaining to causation. *Id.* Shortly thereafter, the employee filed a motion asking the court to reconsider his previously denied motion

for leave to file a surreply containing this expert report. *Id.* The lower court ultimately granted Kroger's motion for summary judgment and denied the employee's motion to file a surreply, holding that the employee failed to provide adequate evidence to prove causation. *Id.* at 334. However, the appellate court remanded the denial of the employee's motion to file a surreply to the lower court, holding that the FRCP should be construed to avoid dismissals based on mere technicalities. *Id.* at 337. Moreover, the court held that the lower court must consider the interests of justice when deciding whether to allow the surreply, and also stated that such interests seem to weigh in favor of allowing the expert report to supplement the record. *Id.* at 338.

The FRCP are meant to be liberally construed to secure just proceedings. *See Rachel v. Troutt*, 820 F.3d 390, 394 (10th Cir. 2016). In *Rachel*, the deadline for a state prisoner to respond to a dispositive motion preceded the deadline for responses to the prisoner's discovery requests. *Id.* at 393. As such, the prisoner sought an extension of time to conduct discovery; however, the lower court granted summary judgment in favor of the opposing party before ruling on the prisoner's request for an extension of time. *Id.* The appellate court reversed the grant of summary judgment, holding that rules of civil procedure must be construed liberally to allow for a just proceeding based on the merits of the case. *Id.* at 394, 396. Accordingly, the spirit of these rules is violated by disregarding valid arguments based on mere formalities, and instead, the FRCP are applied on a case-by-case basis to ensure fair proceedings. *See Carrillo v. Las Vegas Metro. Police Dep't*, 670 F. App'x 602, 603 (9th Cir. 2016).

During summary judgment in the case at hand, both Kill-a-Byte and the City fully explained the reasoning behind their legal arguments to the district court judge, turning a Rule 50 motion into a meaningless formality. The district court recognized that the jury is responsible for evaluating evidence, but only the judge can make determinations on legal issues. R. at 32a. Similar to the reasoning in *Kroger*, where the appellate court refused the lower court’s denial of a surreply, 864 F.3d at 337, denying Kill-a-Byte’s chance to set forth its argument based on a mere technicality belies the purpose of the FRCP. These rules must be construed liberally to allow litigants to bring valid claims before a court. *See id.* The Thirteenth Circuit’s dissenting opinion argues that certain motions are required in civil proceedings to ensure an “orderly process.” R. at 15a. However, requiring a Rule 50 motion in the case at hand would create additional hurdles that serve no purpose. *See Kroger*, 864 F.3d at 337. To ensure a just civil proceeding, this Court should allow Kill-a-Byte’s legal argument to be appealed because both sides fully addressed their argument during summary judgment. *See id.*

By addressing Kill-a-Byte’s due process argument, this Court will promote fairness, a fundamental goal of the FRCP. The first provision of the FRCP states that the rules should be construed to secure just proceedings, but disregarding Kill-a-Byte’s entire due process argument is the antithesis of the rules’ purpose. In *Rachel*, the lower court excused a deadline imposed by the FRCP to ensure a just proceeding based on the merits. 820 F.3d at 394. The FRCP cannot be applied in a uniform manner, as every court applying the FRCP must consider the specific facts of the case.

See Carrillo, 670 F. App'x at 603 (asserting that the purpose of the FRCP is violated by disregarding arguments due to mere technicalities). Courts have ample discretion to interpret the rules in a manner that promotes fairness because these rules were not designed to apply on a uniform basis. *See id.* Therefore, this Court should consider Kill-a-Byte's legal argument fully raised during summary judgment to ensure a just proceeding and to prevent a procedural technicality from deciding this case. *See id.*

2. *Requiring Kill-a-Byte to File a Rule 50 Motion Would Create Repetitive Procedures That Contradict the FRCP's Goal of Promoting Speedy and Inexpensive Proceedings.*

The FRCP promotes speedy trials by discouraging redundant processes that lack purpose and create delays. *See Kerman v. City of New York*, 374 F.3d 93, 118 (2d Cir. 2004). In *Kerman*, a police officer responded to the home of a mentally ill man threatening suicide. *Id.* at 98. Upon arrival, the officer instructed local paramedics to take Kerman to the hospital for an overnight observation. *Id.* Kerman alleged false imprisonment, but the jury found a lack of evidence, ultimately dismissing this claim. *Id.* at 106. Kerman moved for a correction of the judgment and a new trial, but during the hearings on these motions, the police officer argued for the first time that the judgment should stand given his qualified immunity. *Id.* at 106–07. Kerman alleged that the qualified immunity defense should not be permitted because the factual issues material to the defense were not presented in a Rule 50 motion prior to the case being submitted to the jury, *id.* at 107, but the court disagreed. *Id.* at 118. The court held that the purpose of a Rule 50 motion had already been accomplished during the earlier motion for summary judgment and that requiring a Rule 50 motion would

impose unnecessary delays. *Id.* While in an earlier holding, the Second Circuit acknowledged that certain defenses can be waived when procedural rules are not followed, *McCardle v. Haddad*, 131 F.3d 43, 51 (2d Cir. 1997), *Kerman* held that procedural rules do not apply on a uniform basis. 374 F.3d at 118. Both fairness and speed must be considered within the balancing test aimed at ensuring a proper proceeding on the merits. *See Kerman*, 374 F.3d at 118.

Refusing to hear Kill-a-Byte's legal argument would be an inappropriate application of a Rule 50 motion because such a situation would impose pointless procedural hurdles that create unnecessary delays. The FRCP's goals of speed and fairness are not mutually exclusive. As detailed in *Kerman*, where the court accepted an appeal despite the absence of a Rule 50 motion, 374 F.3d at 119, requiring Kill-a-Byte to file this motion would have imposed a procedural hurdle without a purpose. The holding in *Kerman* stated that "the standard for judgment as a matter of law is the same as the standard for summary judgment." *Id.* at 118. Requiring a Rule 50 motion in the case at hand would create delays by forcing the court to hear the due process argument that was already fully presented during summary judgment, wasting the time of both the parties and the judge. *See id.*

The Thirteenth Circuit's dissenting opinion incorrectly argues that the prohibition of appealing facts tried by a jury categorically ensures order and efficiency. *See McCardle*, 131 F.3d at 51 (stating that a Rule 50 motion helps inform the jury in certain instances). This prohibition is irrelevant to the case at hand. In the present case, the Thirteenth Circuit was fully equipped to address the due process

issue based on the summary judgment proceedings in the district court. Requiring a Rule 50 motion, a tool designed to add relevant information to an incomplete record, for a legal issue would run counter to the FRCP's goal of attaining speedy proceedings by imposing procedural hurdles that provide no benefit. *See id.*

By filing a Rule 50 motion in the district court, Kill-a-Byte would have caused the court to undergo duplicative processes that would only serve to add time and expenses to the trial. *See Kerman*, 374 F.3d at 118. This Court has held that the FRCP aims to achieve just outcomes while conducting efficient and cost-effective proceedings. *See Stewart*, 487 U.S. at 33. Kill-a-Byte was not required to file a Rule 50 motion because this would have only led to further delays and unnecessary costs. *See id.* Hearings under a Rule 50 motion incur both time and money, and while such hearings serve a purpose in limited circumstances, a Rule 50 motion was not necessary in the present case because the court previously made a final decision during summary judgment. For these reasons, this Court should affirm the Thirteenth Circuit's ruling that Kill-a-Byte was not required to move for judgment as a matter of law to preserve an argument that the district court rejected when it denied summary judgment.

II. THE CITY'S PUBLIC NUISANCE CLAIM IS UNCONSTITUTIONAL BECAUSE IT UNFAIRLY BLAMES KILL-A-BYTE FOR A CRIME RATE IT HAD NOTHING TO DO WITH, AND BECAUSE THE PUNISHMENT ALLOWS FOR IMPROPER GOVERNMENT INTERFERENCE.

Nearly every tort claim requires some showing of causation in order to promote fairness. *See Paroline v. United States*, 572 U.S. 434, 449 (2014). A foundational concept of due process is that actors "should be made liable for the consequences and

gravity of their own conduct, not the conduct of others.” *Id.* at 462. This due process analysis requires showing that the defendant was a proximate cause of the harm. *See Burrage v. United States*, 571 U.S. 204, 215 (2014). Moreover, imposition of monetary liabilities is constrained because these liabilities must be rationally related to the government’s objective. *See Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974). This constraint helps ensure that monetary liabilities avoid a due process violation through a prohibition on arbitrary and irrational state behavior. *See Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 637 (1993). More specifically, economic due process abides by a rational basis test that requires a correlation between the actor’s alleged interference and the resulting harm. *See E. Enters. v. Apfel*, 524 U.S. 498, 550 (1998) (Kennedy, J., concurring).

Torts premised on imprecise definitions and ambiguous boundaries are often used by litigators seeking to blend their claims into an inapplicable area of law. *See, e.g.*, Restatement (Second) of Torts § 821B (Am. Law Inst. 1979) (defining public nuisance as “an unreasonable interference with a right common to the general public”). Torts lacking well-defined jurisprudence leave room for creative arguments, and claims imposing cumbersome requirements can be bypassed in favor of claims with less evidentiary hurdles. *See Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986, 993 (2019) (stating that while many torts require some showing of foreseeability, for example, the foreseeability threshold differs depending on the specific tort at issue). The Constitution sets constraints on nuisance claims to maintain boundaries on this

area of tort law. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011).

A. Kill-a-Byte’s Distribution of Lightyear Lacks Sufficient Connection to the Increased Crime Rate Alleged by the City, and Allowing Such an Attenuated Connection Violates Fundamental Principles Inherent in Both Tort Law and the Constitution.

A just public nuisance claim requires a sufficient connection between the actor’s conduct and the alleged harm. *See Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992). Such a connection is proven by showing that the actor was in control of the unreasonable interference that caused the resulting harm. *See* Restatement § 821B. When discussing nuisance per se, sometimes called absolute nuisance, the Restatement affirms that this claim results in liability under certain types of harmful conduct, *id.* § 821A, but such conduct must still be a legal cause of the harm. *See id.* § 822. Accordingly, causation “limit[s] a person’s responsibility [to] the consequences of that person’s own acts.” *Holmes*, 503 U.S. at 268. The fairness principle inherent in the Due Process Clause prohibits an actor from being charged with creating an absolute public nuisance when there is insufficient evidence proving the requisite connection. *See id.*

1. *Kill-a-Byte Sought Business Success Rather than Intentionally Interfering with Public Health and Safety.*

Public nuisance claims require a certain amount of intention by the actor. *See* Restatement § 821B. While case law is sparse on the requisite amount of intention in public nuisance claims, the Restatement asserts that an actor is liable for either public or private nuisance claims “if his interference with the public right was

intentional.” *Id.* Public and private nuisance claims are two separate types of tortious conduct, but the Restatement discusses the overlap between the two claims. Restatement § 822(a), 822(g). Under both claims, the intentionality element requires that the actor either “acts for the purpose of causing [the interference], or knows that [the interference] is resulting or is substantially certain to result from his conduct.” Restatement § 825. Thus, the Restatement declares that the actor must intend the consequences of the act rather than merely intending the act itself. *See Kawaauhau v. Geiger*, 523 U.S. 57, 61–62 (1998).

Proving an intent to act is not sufficient to establish a nuisance claim. *See N. Nat. Gas Co. v. L.D. Drilling, Inc.*, 697 F.3d 1259, 1269 (10th Cir. 2012). The plaintiff in *L.D. Drilling* used a field as an underground storage facility. *Id.* at 1264. The stored natural gas eventually migrated beyond the boundaries of the field due to destabilization within the land, which allowed other companies to extract some of this natural gas. *Id.* Moreover, the plaintiff alleged that this extraction by the other companies actually accelerated the natural gas’s migration, and the plaintiff sued these other companies under a nuisance claim. *Id.* at 1265. The court found that at a minimum, proving intent in a public nuisance claim requires that the actor created or continued the interference with knowledge that the alleged harm was substantially certain to follow. *Id.* at 1269. Not all courts agree on the requisite intent elements under a nuisance claim, and some state courts have even focused on the intent of the interference itself. *See, e.g., Angerman v. Burick*, No. 02CA0028, 2003 WL 1524505,

at *2 (Ohio App. 2003). However, under federal law, a public nuisance claim requires that the actor intended the resulting harm. *See L.D. Drilling*, 697 F.3d at 1269.

To support a valid public nuisance claim, the accused actor must knowingly or actively cause the injury. *See Redevelopment Agency of Stockton v. BNSF Ry. Co.*, 643 F.3d 668, 673 (9th Cir. 2011). In *Stockton*, railway companies were accused of creating a public nuisance when nearby spilled petroleum migrated through a water drain installed by the companies. *Id.* at 671. The railway companies eventually sold some of the land containing the migrated petroleum to the redevelopment agency, and while the petroleum migration was an unintended result of the drain, the agency still sought cost recovery for remediation of the contamination. *Id.* at 672. The court denied the agency cost recovery, holding that a public nuisance claim requires a certain degree of intentionality that is proven when the actor either created or assisted in the creation of the nuisance. *Id.* at 673. The court held that merely placing a substance or product into the stream of commerce does not satisfy the creation or assistance requirement. *Id.* at 674. Instead, the manufacturer's knowledge of the resulting dangers coupled with an intention to bring about those dangers must be demonstrated to prove public nuisance. *Id.*

In the present case, Kill-a-Byte did not intend to bring about the conditions that allegedly factored into the City's increased crime rate. The City offered testimony alleging that time spent playing video games leads to poor educational and employment performance. R. at 24a. The City then created an even more attenuated nuisance claim by alleging that low academic and employment achievement spurs

criminal behavior. *Id.* Even if these relationships are accepted at face value, the City failed to show that Kill-a-Byte intentionally created an environment that contributed to an increased crime rate. The City contends that time spent playing video games could be better spent on “a variety of other productive activities,” R. at 23a, but this logic is flawed because the mere existence of other productive activities does not make Lightyear liable for public nuisance. As shown in *L.D. Drilling*, where a company extracting oil was alleged to have caused a nuisance, 697 F.3d at 1265, the court held that proving intention within a nuisance claim requires that the actor have knowledge that the alleged harm was substantially certain to follow. *Id.* at 1269. The City has offered no proof that Kill-a-Byte intended or even had knowledge that Lightyear would increase crime. Instead, the City offers an attenuated relationship between a video game and a city’s crime rate that fails to meet the intention element in a nuisance claim. *See id.*

To prove its absolute public nuisance claim, the City needed to show that Kill-a-Byte intended to increase the crime rate. While the City relies on state law precedent to allege that a nuisance claim requires an intent to create the interference itself, *see Angerman*, 2003 WL 1524505, at *2, this allegation is misguided. For example, gun manufacturers certainly intend to put weapons into the stream of commerce, but these manufacturers are not held liable for absolute public nuisance by merely creating conditions that could increase crime. *See, e.g., City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611, 614 (7th Cir. 1989). Here, the City’s application of intention would unfairly punish Kill-a-Byte for seeking to increase

revenue through completely legal means. *See L.D. Drilling*, 697 F.3d at 1269. Moreover, while the City may contend that it raised a sufficient nuisance claim as indicated by the certified question answers provided by the Supreme Court of New Tejas, R. at 5a, these answers are narrow. Although the Supreme Court of New Tejas found that the City may have a valid nuisance claim in general, the court did not address the claim's validity as it relates to Kill-a-Byte. *Id.* Lightyear was produced to entertain rather than to encourage crime. Holding product distributors liable for excessive abatement costs opens the door for frivolous litigation and has the potential to stifle commerce, as distributors would cease production of products that could be misconstrued as creating a nuisance.

The City's nuisance claim is invalid because Kill-a-Byte did not knowingly or actively increase the City's crime rate through the production of Lightyear. As held in *Stockton*, where a public nuisance claim against a railroad company for migrated petroleum was denied, a producer simply placing a legal product into the stream of commerce is not enough to generate a nuisance claim. 643 F.3d at 674. The City offered no evidence to prove that Kill-a-Byte knew its production of a video game would increase the crime rate. Moreover, the City asserted that Lightyear trained a portion of its population to kill, but this argument ignores the content of the video game. By featuring humanoid aliens carrying fictional equipment, Lightyear falls squarely within the science fiction genre of video games. R. at 21a. Kill-a-Byte had no way of knowing that its futuristic and fictitious video game would be blamed for a

city's crime rate; therefore, Kill-a-Byte should not be punished for Lightyear's success. *See Stockton*, 643 F.3d at 674.

2. *The City's Absolute Public Nuisance Claim Violates Due Process Because Kill-a-Byte Lacks Control Over the Purchaser, and Lightyear's Distribution Was Not A Proximate Cause of the City's Increased Crime Rate.*

Under a nuisance claim, the Restatement acknowledges that “[i]n some cases the physical condition created is not of itself harmful, but becomes so upon the intervention of some other force—the act of another person or force of nature.” Restatement § 834. An intervening force breaks the causation chain in certain situations, meaning that such an intervention adds yet another constraint on a defendant's ability to demonstrate the requisite link between their injury and the actor's alleged interference. *See Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 532 (1983). Pursuant to due process, both proximate cause and intervening forces limit an actor's liability stemming from their alleged interference. *See Holmes*, 503 U.S. at 268. Whether a court uses the substantial factor or but-for test, causation always requires some involvement from the actor. *See Iieto v. Glock Inc.*, 349 F.3d 1191, 1206 (9th Cir. 2003). Furthermore, some circuit courts differentiate between qualified and absolute public nuisance claims. *See, e.g., City of Cincinnati v. Deutsche Bank Nat'l Tr. Co.*, 863 F.3d 474, 480 (6th Cir. 2017). Despite this distinction, the Supreme Court has held that both claims require a showing of proximate cause. *See Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1299 (2017).

When an actor lacks control over the intervening third party ultimately responsible for the interference, there is not a sufficient connection between the actor and the alleged harm. *See City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 422 (3d Cir. 2002). In *Beretta*, a city brought suit alleging that numerous gun manufacturers created a public nuisance through an increase in the city’s crime rate. *Id.* at 419. The court held that the manufacturers lacked sufficient control over the alleged interference because the increased crime rate ultimately resulted from third parties rather than from the gun manufacturers. *Id.* at 422. The court found that given the manufacturers’ lack of control, the connection between the manufacturers’ actions and the alleged harm was too attenuated under a public nuisance claim. *Id.* In claims involving a manufacturer and purchaser, courts often attribute responsibility for the nuisance creation to the purchaser given the manufacturer’s lack of control over the product possessed by the purchaser. *See, e.g., Westinghouse*, 891 F.2d at 614.

Due process invalidates absolute public nuisance claims lacking sufficient connection between the defendant’s conduct and the resulting injuries. *See Ashley Cnty. v. Pfizer, Inc.*, 552 F.3d 659, 671 (8th Cir. 2009). In *Ashley*, numerous counties brought a civil suit against the defendants seeking abatement stemming from the methamphetamine epidemic in the area. *Id.* at 662–63. The defendants manufactured over-the-counter cold medications containing a key ingredient in methamphetamine. *Id.* at 663. The counties alleged that the defendants failed to take action to reduce the availability of their products to methamphetamine cooks. *Id.* at 664. The defendants

disagreed, and they alleged numerous intervening acts that served to break the causal chain, including the conduct of the retailers selling the cold medication and the cooks using the medication for illegal purposes. *Id.* at 668. While intervening acts do not limit the original actor’s liability when the injuries are foreseeable and a “natural and probable consequence of the original act,” the court held that a methamphetamine epidemic is not a natural and probable consequence of the regulated sale of cold medicine. *Id.* at 671. The link between the defendants’ actions and the counties’ alleged injuries was too attenuated for the court to accept the nuisance claim. *Id.*

Conforming to the fairness requirements of the Due Process Clause, absolute public nuisance requires a showing that the resulting harm is directly attributable to the actor in question. *See Janki Bai Sahu v. Union Carbide Corp.*, 528 F. App’x 96, 101 (2d Cir. 2013). In *Sahu*, the plaintiff brought a tort suit against the owner of a pesticide plant, alleging that the plant contributed to the contamination of the local drinking water. *Id.* at 99. Sahu argued that by assisting with the development of the plant, the owner knowingly contributed to a process that was capable of producing harmful pollution. *Id.* While Sahu claimed that all those participating in the creation or maintenance of a nuisance are jointly and severally liable for the resulting harm, the court disagreed, holding that public nuisance requires that the actor play “a sufficiently direct role in causing” the harm. *Id.* at 101. The court reasoned that mere participation in the conduct that allegedly contributed to the harm is not sufficient to establish causation. *See id.*

In the present case, Kill-a-Byte is not required to control the manner in which its legal product is used by purchasers, meaning Kill-a-Byte had no direct impact on the City's increased crime rate. Moreover, while the City argued that Kill-a-Byte did not limit the number of hours that an individual could play Lightyear, R. at 23a, such a limitation could not be done in a reasonable manner. While some users only play Lightyear sparingly, others play the game more regularly to participate in events such as e-sports tournaments. R. at 22a n.1. Imposing a time restriction on the diverse array of players could only be done in an arbitrary manner. As such, the case at hand bares resemblance to *Beretta*, where the court held that a gun manufacturer lacked sufficient control over the gun owner to be held liable for a nuisance claim. 277 F.3d at 422. Kill-a-Byte is not responsible for determining the number of hours a given player can spend playing Lightyear, as Kill-a-Byte does not have control of the player. Furthermore, under a valid public nuisance claim, the actor must be directly involved in creating the alleged harm. *See Iletto*, 349 F.3d at 1206. This requirement is particularly important in situations involving a manufacturer and purchaser, because in such situations, the manufacturer often lacks sufficient control over the purchaser. *See, e.g., Westinghouse*, 891 F.2d at 614. Therefore, Kill-a-Byte was in no position to direct its users on specific ways Lightyear must be played.

The City's increased crime rate is not a natural and probable consequence of the distribution of Lightyear because the video game purchasers are an intervening cause between Kill-a-Byte and the City's crime rate. The City alleged an absolute public nuisance, and while there are some distinguishing features between an

absolute and qualified nuisance, *Deutsche*, 863 F.3d at 480, both claims require proof of legal cause. *See Bank of Am.*, 137 S. Ct. at 1299. New Texas interprets public nuisance claims in accordance with the Restatement (Second) of Torts, R. at 26a, meaning that all nuisance claims require a showing of legal cause. § 822. Since the City failed to offer direct proof that the increased crime rate was a foreseeable result of Lightyear's sales, Kill-a-Byte was not a proximate cause of the alleged harm. As shown in *Ashley*, where the court held that a drug epidemic was not a foreseeable result of the regulated sale of cold medication, 552 F.3d at 671, Kill-a-Byte could not have anticipated that the sale of a science fiction video game would allegedly impact a city's crime rate. Even if this Court finds some connection between Lightyear and the City's crime rate, Kill-a-Byte could not have foreseen this result, especially because its game had been in production for ten years without issue. R. at 2a. Furthermore, no other city in the world has claimed that Lightyear increased its crime rate. Absolute public nuisance claims fail when the actor's alleged interference is not a proximate cause of the resulting harm. *See Ashley*, 552 F.3d at 671. Therefore, the City's claim must fail as it has not shown that distributing Lightyear was a natural and probable cause of the increased crime rate.

The City's increased crime rate was not caused by Lightyear, and instead, is the result of budget problems, factory closings, and educational issues. The City's allegation that Kill-a-Byte was a substantial factor in the increased crime rate is not supported by the facts. Whether a court relies on the substantial factor or but-for test, causation always requires the actor's involvement in the alleged harm. *See Iloto*, 349

F.3d at 1206. The relationship between the City's economic troubles and the production of Lightyear is attenuated at most. Alternatively, the City's budgetary, employment, and education problems are the direct cause of the City's economic hardships. Even the City agrees that these hardships contributed to the increased crime rate, yet the City still relies on an insufficient connection between Kill-a-Byte's actions and the alleged harm as an attempt to hold Kill-a-Byte solely responsible for the alleged nuisance. As held in *Sahu*, where the court found that being a contributing factor is not enough to establish a sufficient connection between the actor and the alleged harm, 528 F. App'x at 101, the City did not prove that Kill-a-Byte was directly responsible for the increased crime rate. Mere participation in an action that plays a role in the alleged harm is not sufficient to establish legal cause. *See id.* The budgetary, employment, and educational problems were the root cause of the City's increased crime rate, not Lightyear.

B. Implementing Abatement Costs Against Kill-a-Byte Violates Due Process Because These Costs Were Arbitrarily Applied to a Single Video Game Manufacturer, and the Costs Lack a Rational Relationship to the City's Goal of Reducing its Crime Rate.

States and municipalities are granted the constitutional power to regulate the safety of its inhabitants, U.S. Const. amend. X, but these regulations are still confined by the Due Process Clause. *See W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398 (1937). The Due Process Clause protects against unwarranted governmental interference. U.S. Const. amend. XIV. Moreover, purely economic liability violates substantive due process if it lacks a rational relationship to a legitimate government purpose. *See Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 455 (1988). Under this

rational basis test, economic liability will be considered unconstitutional when there is enough evidence showing that the state acted in an arbitrary and irrational manner. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

A valid public nuisance claim requires a rational relationship between the abatement costs and the municipality's goal of preserving public welfare. *See Maher v. City of New Orleans*, 516 F.2d 1051, 1058 (5th Cir. 1975). In *Maher*, a municipal ordinance seeking to preserve historical buildings prohibited the plaintiff from razing his property to construct an apartment complex. *Id.* at 1054. The plaintiff alleged that the ordinance lacked a sufficient connection to the furtherance of public welfare and that the ordinance was enforced in an arbitrary manner. *Id.* at 1059. The court found that the means used to achieve the municipality's objectives "must be reasonable and of general application." *Id.* These boundaries ensure that municipalities base economic liability on specific guidelines designed to protect against arbitrary enforcement. *See Gibson*, 760 F.3d at 621. Moreover, courts impose a statute of limitations on nuisance claims to ensure that punishment is not implemented on an arbitrary or irrational basis. *See, e.g., Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1028–29 (10th Cir. 2007). While the statute of limitations may extend beyond the typical two year time frame when a continuing nuisance claim is involved, the time period for bringing a suit is still subject to limitations, even under this more lenient approach. *See id.*

The Due Process Clause requires that individuals receive fair notice of what constitutes punishable conduct and the degree of punishment a municipality can

impose as a result of this conduct. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). In *State Farm*, Campbell caused a car accident and was convicted of various tort actions stemming from this accident. *Id.* at 414. State Farm refused settlement offers from those injured in the accident, but after Campbell's conviction, State Farm was ordered to pay a monetary judgment exceeding the insurance policy's limits. *Id.* Despite State Farm paying the entire judgment, Campbell sued State Farm under various claims stemming from the unwillingness to settle, including bad faith and fraud. *Id.* State Farm was convicted of these charges, and Campbell was awarded \$2.6 million in compensatory damages along with \$145 million in punitive damages. *Id.* at 415. This Court broadly defined the purposes of punitive damages to include both deterrence and retribution. *Id.* at 416. State Farm alleged that the punitive damages were excessive, and this Court agreed, holding that the actor's reprehensibility is the most important factor when analyzing the reasonableness of punitive damages. *Id.* at 419. More specifically, these damages cannot be implemented to punish actors for past behavior that was lawful when it occurred. *Id.* at 420–21. Limitations on arbitrary and retroactive punishment promote due process by providing actors with fair notice of what constitutes reprehensible conduct. *See id.*; *see Apfel*, 524 U.S. at 539 (Thomas, J., concurring).

In the case at hand, the entire \$613.2 million in abatement costs were arbitrarily enforced against Kill-a-Byte despite Lightyear being a single video game within an entertainment industry that has amassed massive popularity. Lightyear is merely one of many video games that adopts the mentality of every man for himself,

and there are countless video games that depict violence. The City even acknowledged that the alleged harm resulted from multiple video games, R. at 2a, yet the abatement costs failed to account for these other sources. As held in *Maher*, where a city resident was forbidden from razing his property, the means used to abate the nuisance must be reasonable and generally applied. 516 F.2d at 1054, 1059. The City is prohibited from choosing video game producers to include in the nuisance suit based upon which producer has the deepest pockets. *See id.* Even if this Court finds that Kill-a-Byte played some role in the City's increased crime rate, the abatement costs are arbitrarily enforced given that Lightyear is just one product floating within a sea of graphic video games. Cities must base economic liability on defined boundaries in order to prevent arbitrary enforcement, but the City failed to abide by this principle in the present case. *See Gibson*, 760 F.3d at 621.

The abatement costs enforced against Kill-a-Byte include expenses that are unrelated to the City's alleged harm. Despite its attempt to use Kill-a-Byte as a scapegoat, the City's economic and educational problems are directly related to teacher strikes, an embezzlement scheme, and factory shutdowns. R. at 3a. In addition to these correlation problems, the City never even alleged in its complaint that video game addiction created a nuisance. The only relationship the City offers between video game usage and increased crime rate is that time spent playing video games could be better spent on other activities, but this relationship is still too attenuated to prove any direct correlation. *See Gibson*, 760 F.3d at 621.

Similarly, the imposition of economic liability faces constraints in order to

protect against arbitrariness. *See id.* While the City argues that their alleged existing absolute public nuisance claim is not constrained by a statute of limitations, R. at 25a n.5, this is not true for every element of the City’s nuisance claim. The abatement costs include a wide array of expenses, many of which lack a connection to the conceivable impact a video game can have on a city. *See Gibson*, 760 F.3d at 621. Moreover, the City contradicts itself by alleging an existing public nuisance against a video game that is no longer in production. *See id.* Abatement costs can only be imposed to correct the damages related to the actor’s alleged interference. *See Grant*, 505 F.3d at 1028–29. Kill-a-Byte ceased production of Lightyear in 2013 after ten years of production. R. at 2a. Thus, the alleged existing public nuisance is not fairly traceable to Lightyear because Kill-a-Byte stopped production of the game three years before a nuisance claim was even filed. *See Grant*, 505 F.3d at 1028–29. Lightyear celebrated its “grand finale” back in 2013, R. at 22a, demonstrating that the abatement costs were arbitrarily enforced against a video game that has not been played in seven years.

Holding Kill-a-Byte responsible for the entire \$613.2 million abatement amount violates the Due Process Clause because Kill-a-Byte is being arbitrarily punished for past legal behavior without adequate notice. Kill-a-Byte was distributing Lightyear for ten years without incident. R. at 2a. Once the City started experiencing the consequences stemming from a corrupt and underfunded government, the City sought to pin the blame on a single video game distributor. As held in *State Farm*, where the Court found that the damages imposed on an insurance

company were excessive, the most important factor for determining the reasonableness of punitive damages is reprehensibility. 538 U.S. at 419. The New Tejas district court opinion attempts to draw a distinction between abatement costs and punitive damages, R. at 31a, but these two terms have significant overlap. By implementing \$613.2 million in abatement costs against a single distributor, the City seeks to turn Kill-a-Byte into a scapegoat for the sake of retribution and deterrence. *See State Farm*, 538 U.S. at 419. Kill-a-Byte is not to blame for the City's hardships. Therefore, the lack of connection between Lightyear and the City's crime rate, as well as the excessive abatement costs, violate the Due Process Clause by punishing Kill-a-Byte for past legal behavior it had no reason to believe was reprehensible. *See id.*

C. The Judiciary Branch Should Avoid Expanding Public Nuisance Claims Beyond the Scope Intended by the Constitution and the New Tejas Legislature, as This Creates Blatant Overreach by the Government.

The constitutional constraints imposed on a nuisance claim help ensure that this claim does not extend to situations beyond the legislature's intent. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 366 (2011); *see Paroline*, 572 U.S. at 449. A nuisance claim requires that the actor's activity *causes* the interference. Restatement § 834. The public policy concerns embedded within nuisance law are often left to the state legislature to address. *See Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011). Even beyond due process, the Takings Clause and the First Amendment both constrain public nuisance claims by limiting government interference. *See Armstrong*, 364 U.S. at 49; *see Brown*, 564 U.S. at 790.

1. ***The City’s Nuisance Claim Is an Overextension of State Common Law Because the Claim Disregards Constitutional Constraints That Are Designed to Limit a Claim’s Application to Relevant Situations.***

Judges cannot disregard the causation requirement inherent in nuisance claims. *See Paroline*, 572 U.S. at 449. This requirement ensures that the tort claim is not extended beyond its intended purpose, and the requirement also helps promote predictability. *See Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987). State common law faces constitutional constraints so that companies distributing products throughout the United States have clear and identifiable standards to follow. *See id.* (stating that “[t]he application of numerous States’ laws would only exacerbate the vagueness and resulting uncertainty” inherent within nuisance standards).

Courts place constitutional limits on public nuisance claims to limit the application of this tort to specific situations. *See, e.g., Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993). In *Tioga*, the defendant used a product containing asbestos in the construction of a school building for the plaintiff. *Id.* at 916. Upon discovery of the asbestos in the building, the plaintiff took measures to mitigate the damage. *Id.* at 917. The plaintiff sued the defendant under numerous claims, including public nuisance, to recoup the costs incurred while attempting to contain the asbestos. *Id.* The court denied the plaintiff’s public nuisance claim, holding that public nuisance was not intended to extend to situations pertaining to the sale of goods. *Id.* at 920. The court reasoned that holding otherwise would cause the subject of public nuisance to “become a monster that would devour in one gulp the entire law of tort.” *Id.* at 921.

Courts provide a certain degree of deference to state common law, but this deference is still constrained by constitutional limits. *See North Carolina, ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 303 (4th Cir. 2010); *see Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 622 (7th Cir. 2014). In *Cooper*, the lower court found that emissions from the defendant's plants constituted a public nuisance. *Id.* at 296. As a result of the public nuisance finding, the lower court imposed emissions caps and control technology on the defendant's plants. *Id.* The *Cooper* holding reversed the lower court's injunction, citing the problems created by allowing the vague concept of public nuisance to serve as a catch-all for a wide range of claims. *Id.* at 301. Accordingly, public nuisance claims face constraints to ensure that this area of law does not turn into an all-encompassing matter that renders other areas of tort law obsolete. *Id.* at 301–02.

In the present matter, constitutional constraints invalidate the City's public nuisance claim against Kill-a-Byte. The City's attempt to blame a single video game for an increase in crime falls outside of the intended scope of public nuisance. As shown in *Tioga*, where the court held that states frequently attempt to use public nuisance as a catch-all tort claim, 984 F.3d at 921, the City violated the fundamental concept of fairness inherent within due process by blaming a video game distributor for its crime problems. By enforcing the requisite causation element in nuisance claims, Restatement § 834, courts inhibit actors with little involvement in the interference from being unfairly blamed. *See, e.g., Paroline*, 572 U.S. at 449; *see Wal-Mart*, 564 U.S. at 366. Moreover, the restrictions on government interference

contained within the First and Fifth Amendments help ensure that public nuisance claims only apply in limited situations. *See Brown*, 564 U.S. at 790; *see Apfel*, 524 U.S. at 522. Thus, the City’s public nuisance claim directly violates the fairness principle and intervention limitation established by tort law and the Constitution.

The degree of deference afforded to New Texas common-law developments is limited by the Constitution, as such limitations ensure that courts do not take on a legislative role by interpreting laws in unintended ways. As discussed in *Cooper*, where the court emphasized the importance of a consistent and predictable application of public nuisance claims, 615 F.3d at 301, the Constitution imposes constraints on the City’s nuisance claim to ensure that this claim is not asserted in inapplicable situations. While the district court relied on the *Gibson* opinion to argue that judicial common-law is entitled to significant deference, 760 F.3d at 622, this deference does not exist without limits. This Court should invalidate the City’s nuisance claim in order to acknowledge and enforce the constitutional constraints that serve to set boundaries on common-law claims.

2. *The First and Fifth Amendment Limit the Government’s Ability to Arbitrarily Intrude on Private Behavior in Order to Ensure Autonomy and Predictability.*

The First Amendment protects an individual’s right to form and express opinions on legal entertainment. *See United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 818 (2000) (“Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the [g]overnment is best positioned to make these choices for us.”). A fundamental principle of the First Amendment is that the

government lacks power to restrict expression based on ideas, subject matter, or content. *See Brown*, 564 U.S. at 790. Moreover, the Takings Clause promotes fairness and justice by prohibiting the government from arbitrarily imposing liability on a small group of private actors when such liability is really the responsibility of the public as a whole. *See Apfel*, 524 U.S. at 522.

Video games are entitled to First Amendment protection that does not allow the government to replace an individual's moral judgments with its own. *See Brown*, 564 U.S. at 790. In *Brown*, a state law prohibited the sale of violent video games to minors. *Id.* at 789. To justify the law, the state attempted to show a connection between violent video games and human aggression, but the Court found that the state's purported relationship lacked causation. *Id.* at 800. As such, the Court held that the law violated the Free Speech Clause because the state failed to offer persuasive evidence that such content restriction was constitutional. *Id.* at 792. Moreover, the Court held that the individual, rather than the government, is in the best position to make moral judgments based on content. *Id.* at 790.

The Takings Clause prohibits the government from arbitrarily imposing liability on an actor when such liability should be the responsibility of the public as a whole. *See Apfel*, 524 U.S. at 522. In *Apfel*, this Court reviewed the Coal Act, which charged coal companies premiums to help fund health benefits for employees who had retired from the respective company. *Id.* at 514. After the Commissioner of Social Security charged Eastern a premium to fund these benefits, Eastern sued the commissioner, arguing that the Coal Act violated the Takings Clause of the Fifth

Amendment. *Id.* at 517. The Court agreed, holding that governmental interference arising from a program designed to promote the common good through economic adjustments constitutes a taking. *Id.* at 522. Moreover, the Supreme Court has held that unconstitutional shortcuts are not justified by a strong public desire to improve a particular public condition. *See Horne v. Dep't of Agric.*, 576 U.S. 350, 362 (2015).

The abatement costs imposed on Kill-a-Byte restrict constitutionally protected video game content because the City is violating the First Amendment by imposing its own moral judgment on individuals. As held in *Brown*, where the state attempted to restrict the sale of video games to minors, so-called violent entertainment is still protected by the First Amendment. 564 U.S. at 790. This Court also acknowledged that any argument focused on the age of exposure is immaterial, as individuals are exposed to violent content at an early age. *See id.* at 795 (providing examples from popular Fairy Tales, including the evil stepsisters' eyes being removed in Cinderella, and Hansel and Gretel trapping their captor in an oven). In this case, the City's efforts were not even focused on impressionable young children, as was the case in *Brown*. *See id.* Instead, the City is concerned with college students and unemployed individuals, R. at 23a, a population with a much higher capacity to tolerate potentially provocative content. Through the abatement costs, the City is imposing its own moral judgments by attempting to deter production and enjoyment of so-called violent video games, meaning the City's behavior is a direct violation of the Constitution. *See Brown*, 564 U.S. at 790.

The \$613.2 million liability imposed on Kill-a-Byte constitutes a governmental taking because the City's excessive punishment deprives Kill-a-Byte of substantial assets in an unfair and unjust manner. As held in *Apfel*, where a company argued that the Coal Act's economic liability violated the Fifth Amendment, 524 U.S. at 517, the City failed to demonstrate that the excessive economic punishment imposed against Kill-a-Byte was fair under the circumstances. Since the entirety of the abatement costs were imposed on a single video game distributor, this economic liability is unconstitutional because it violates the Takings Clause. *Id.* at 523. The City's concern about increased crime does not mean that constitutional safeguards that promote fairness and predictability can be ignored. *See Horne*, 576 U.S. at 362. An additional safeguard involves the restriction on ex post facto law, and in *Apfel*, a concurring opinion described an openness to expanding this restriction on retroactive liability beyond criminal cases so as to also include civil cases. 524 U.S. at 539. The \$613.2 million liability imposed on Kill-a-Byte violates the fundamental concept of fairness found throughout the Constitution because it retroactively imposes an excessive liability on a single actor without considering the City's numerous other problems. As such, the excessive abatement costs imposed against Kill-a-Byte are unconstitutional because they violate the Due Process Clause, First Amendment, and Takings Clause. For these reasons, the City's public nuisance claim must fail, and this Court should affirm the Thirteenth Circuit's ruling denying the City's claim.

CONCLUSION

For the foregoing reasons, this Honorable Court should AFFIRM the Thirteenth Circuit's decision holding that a motion for judgment as a matter of law was unnecessary in the case at hand, and that the City's public nuisance claim violates the Constitution.

Respectfully submitted,
/s/ Team #62
Team #62
Attorneys for Respondent
November 16, 2020

CERTIFICATE OF SERVICE

The undersigned, counsel for Respondent, certifies 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 #62
Team #62
Attorneys for Respondent
November 16, 2020

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Respondent, hereby certifies that, in compliance with Competition Rule 2.5 and Supreme Court Rule 33.1, Respondent's brief contains 12,604 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 #62
Team #62
Attorneys for Respondent
November 16, 2020

APPENDIX A: CONSTITUTIONAL PROVISION

Amendment XIV of 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.

APPENDIX B: FEDERAL RULES OF CIVIL PROCEDURE

Rule 50(a) from the Federal Rules of Civil Procedure 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.