No. 19-6236

In the Supreme Court of the United States

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

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BRIEF FOR THE PETITIONER

Team No. 64

QUESTIONS PRESENTED

I. Does the Thirteenth Circuit have jurisdiction over changing the application of the Federal Rules of Civil Procedure, and if so, did the Thirteenth Circuit err in holding that a Federal Rule of Civil Procedure 50(b) Motion was not necessary to renew and preserve a "purely legal" argument on appeal?

II. Under principles of constitutional due process and federalism, did the Thirteenth Circuit err in holding the Respondent's civil liability, pursuant to the state's lawfully adopted public nuisance law, violated due process when the Respondent's violent video game dominated the gaming market, the Respondent's game consumed a significant portion of the City's population, and the City suffers high rates of violent crime and community strife?

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The opinion of the Court of Appeals for the Thirteenth Circuit is unpublished but is available at *Kill-a-Byte Software, Inc., v. City of New Truro, New Tejas*, No. 18-5971 (13th Cir. filed March 21, 2020). The opinion of the District Court for the Western District of New Tejas is unpublished but is available at *City of New Truro, New Tejas v. Kill-a-Byte Software, Inc.*, No. 16-cv-5412 (W.D. New Tejas filed May 10, 2017).

JURISDICTION

The judgment of the United States Court of Appeals for the Thirteenth Circuit was entered on March 21, 2020. The petition for writ of certiorari was timely filed and granted on October 5, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix contains the pertinent text of the following constitutional and statutory provisions relevant to this case: U.S. Const. amend. VII; U.S. Const. amend. X; U.S. Const. amend. XIV, § 1; 28 U.S.C. § 1254(1); and Fed. R. Civ. P. 50.

STATEMENT OF THE CASE

I. Factual Background

A. Kill-a-Byte's Lightyear Game

Kill-a-Byte Software, Inc. ("Kill-a-Byte" or the "Respondent") is one of the most influential software companies in the country. Pet. App. 20a. Kill-a-Byte's most successful game was "Lightyear," an online gaming world were players shoot to kill in an every-player-for-themselves setting. Pet. App. 20a–21a. Lightyear operated as a connected online game from 2003 through 2013, acquiring over 300 million worldwide player accounts by the time it ended. Pet. App. 20a, 22a.

The barrier to entry for potential Lightyear players was low. *See* Pet. App. 21a. Players only needed a computer or video game console to create a free Lightyear account. Pet. App. 21a–22a. After installing the software and creating an account, Lightyear players selected their settings, including equipment and weapons, and fought to kill other players until only one player remained. Pet. App. 21a. A player's success in the game depended on her reflexes—specifically his learned ability to shoot first—to kill other players. Pet. App. 22a. Although the sophistication of its deadly weapons advanced over the game's years, Lightyear always included vivid death scenes. Pet. App. 21a. When players selected their preferred weapon and aimed it at another player, Lightyear displayed the anticipated kill and the gruesome effects on the target. *Id.*

Once players began gameplay, Kill-a-Byte profited off them in several ways, many of which increased the players' brand loyalty and dedication to playing

Lightyear. Pet. App. 22a n.1. Kill-a-Byte was paid through in-game purchases of downloadable content—improved death animations, cosmetic features, additional taunts—and out-of-game purchases of Lightyear-branded clothing and other products. *Id.* Kill-a-Byte also offered players paid accounts, which improved the player's in-game experience. *Id.* Last, Kill-a-Byte's profits grew through a stream of advertising revenue during Lightyear e-sport tournaments. *Id.*

B. Kill-a-Byte's Intent to Maximize Playing Time

Maximizing the time players spent playing Lightyear was fundamental to the Respondent's business model and profits. *See* Pet. App. 22a n.1, 23a. Further, Kill-a-Byte acknowledges its primary goal as a corporation was to continuously increase the amount of time players spent playing Lightyear. Pet. App. 23a.

Kill-a-Byte intentionally tracked, recorded, and monitored playing statistics for every Lightyear player and account. *Id.* Kill-a-Byte improved the game and its features for the sole purpose of increasing the amount of time individual players and the Lightyear community spent playing Lightyear, which directly impacted Kill-a-Byte's bottom line. *Id.* With its vast database, Kill-a-Byte closely followed its success in consuming increasing hours of players' days. *Id.*

Despite its intimate knowledge of the time players were spending on Lightyear and the harmful effects the considerable playing time had on populations, Kill-a-Byte never limited individual's time in the game or questioned the staggering data points. *Id.* Kill-a-Byte recognizes it could have easily implemented a time limit for players. Pet. App. 23a n.2.

C. Experts Link Lightyear to Negative Real-World Consequences

Experts with experience in social science and video games have linked the time an individual spends playing Lightyear to negative individual and social effects. Pet. App. 23a–24a. As the amount of time an individual spends playing Lightyear increases, experts have found the individual's educational achievement, employment, and earnings decreases. *Id.* These negative effects in turn create a greater likelihood the individual will engage in criminal activity. Pet. App. 24a. In sum, the more time an individual spent playing Lightyear, the more likely he is to become involved in crime. *Id.*

Lightyear is linked to not only criminal behavior, but violent criminal behavior. *Id.* Through the thousands of gruesome killings players witness in their gameplay, individuals become desensitized to violent behavior. *Id.* Further, Lightyear sharpened players' reflexes to respond quickly and with violence. *Id.* Blurring the lines between game play and real life, in real-world situations, players became reliant on their Lightyear training and regularly defaulted to violence in the real world. *Id.*

D. Lightyear's Effect on New Truro Residents

The City of New Truro, New Tejas (the "City" or "New Truro") is a ground zero for Lightyear's devastating effects on communities and societies. *See* Pet. App. 25a. By the end of Lightyear's decade-long run, 50% of New Truro's male residents between the ages of fifteen and twenty-five played Lightyear at least ten hours a week. Pet. App. 22a. The most dependent New Truro residents, the top 10% of the

City's players, spent over thirty-five hours per week playing the game—nearly equivalent to a full-time job. *Id.*

New Truro is experiencing above-average rates of violent crime, property crime, unemployment, and poverty. Pet. App. 25a. The City's violent crime rate is nearly six-times greater than the national average. *Id.* New Truro suffers a staggering 2,200 violent crimes per 100,000 residents. *Id.* Additionally, the City's property crime rate is twice as high as its violent crime rate: 4,403 property crimes per 100,000 residents. *Id.* Beyond high crime rates, 15% of City residents are unemployed and 45.3% of City residents are in poverty. *Id.*

II. Nature of the Proceedings

The City has argued that Kill-a-Byte, through Lightyear's violent nature and tremendous success, created an undereducated, unemployed population trained in violence that substantially interfered with New Truro's citizens' right to public safety. *Id.* New Truro pursued abatement for the absolute public nuisance pursuant to New Tejas (the "State") common law and the City sued Kill-a-Byte in state court in 2016. Pet. App. 2a–3a. Kill-a-Byte removed the case to federal court and moved for summary judgment. Pet. App. 3a.

After discovery, the United States District Court for the Western District of New Tejas denied Kill-a-Byte's motion for summary judgment, finding that imposition of civil liability under state law cannot violate the Due Process Clause. *Id.* New Truro did not seek summary judgment on the issue. *Id.* The case proceeded to trial, and the jury found the Respondent liable for the City's public nuisance. Pet.

App. 3a–4a. Following the jury's liability verdict, the district court awarded New Truro more than $600 million in abatement costs. Pet. App. 4a. The Respondent did not file any Rule 50 ("Rule 50" or the "Rule") motions to renew the arguments it presented in its summary judgment motion. *See* Pet. App. 3a.

Kill-a-Byte appealed the decision to the United States Court of Appeals for the Thirteenth Circuit, claiming the district court's verdict violates the Due Process Clause. *Id.* Before the Thirteenth Circuit reviewed the case, the Thirteenth Circuit certified questions of state law to the Supreme Court of New Tejas. Pet. App. 4a–5a. The State's Supreme Court verified the viability of the City's liability theory, the legal sufficiency of the City's evidence, and that the money the City sought and was awarded was a recoverable abatement amount pursuant to state law. *Id.*

Next, the Thirteenth Circuit certified two questions: whether Kill-a-Byte was required to renew its purely legal arguments in a Rule 50 motion; and whether "a state's imposition of civil liability in these circumstances offends the Due Process Clause of the Fourteenth Amendment." Pet. App. 5a. In the opinion penned by Judge Enys, the court held that Kill-a-Byte did not need to renew its argument through a Rule 50 motion, reasoning in part that Rule 50 motions are not necessary to preserve an appeal of a purely legal claim rejected at summary judgment. Pet. App. 7a. Judge Enys goes on to state that, in the circumstances present in this case, "requiring a Rule 50 motion would be a meaningless formality." *Id.*

When the court turned to the merits, they overturned the finding of the district court. Pet. App. 8a. In the opinion the court posits that the judgment of the

district court exceeded constitutional limits and that the relationship between Kill-a-Byte's actions and the City's injuries were too tenuous. Pet. App. 9a. Ultimately, the court determined that "the various aspects of the state claims violate due process when considered in the aggregate." Pet. App. 11a. Judge Despard wrote a dissenting opinion countering the majority's opinion on the Rule 50 motion, noting that Rule 50 of the Federal Rules of Civil Procedure is a bright-line rule, and a practical one at that. Pet. App. 15a.

The City appeals to this Court to reverse the decision of the court below and hold the district court's findings on liability and abatement costs do not violate due process.

SUMMARY OF THE ARGUMENT

Pursuant to New Tejas state law, the Respondent was held liable for creating the unsafe condition in New Truro, a community marked by a violent crime rate exponentially greater than the national average. The jury found the Respondent liable and the trial court imposed the appropriate remedy. Further, the District Court for the Western District of New Tejas held both the liability and the remedy comport with constitutional due process. The New Tejas Supreme Court verified the legality of the legal action. This Court should reverse the decision of the Thirteenth Circuit and affirm the finding of the district court.

Federal Rule of Civil Procedure 50 has utility and provides clarity to all parties. Kill-a-Byte was required to make a Rule 50 motion to renew its due process argument at the conclusion of the district court proceedings. Several reasons,

including fairness and notice, underscore the need to renew a motion under Rule 50 and demonstrate that the Rule is not a mere formality. As noted by this Court, Rule 50 has roots in the Seventh Amendment. Absent any issue of fairness, it is still not within the ability of the appellate courts to determine whether Rule 50 is entirely unnecessary. There is no statute giving the appellate courts that power. In fact, the United States Constitution gives that power to the Supreme Court with review by Congress.

Even if the Thirteenth Circuit were able to determine the fate of Rule 50, it committed error in finding that the question at hand was purely legal in nature. Legal questions can be questions of "pure law" as noted in the decision below. However, legal questions can also be mixed, as is the case here, and Rule 50 applies to all mixed legal questions. As such, Rule 50(b) should be read and applied as written.

Turning to the merits of this case, liability under the State's common law public nuisance cause of action includes a causation element, as required in all civil tort claims. Substantial-factor causation comports with due process and the trial court did not abuse its discretion in applying this standard to the City's claim. This causation standard is more protective of due process rights than alternative causation standards, including but-for causation. The Respondent cannot advocate for a different, albeit less protective, causation standard now that it has been held liable under the causation standard proscribed by the cause of action. Additionally, any claim that intervening actors relieve the Respondent of the harm it created is

wrong. In public nuisance cases, courts have upheld liability even when individuals must independently act in the time between the tortfeasor's action and when the substantial interference with the public's right is created.

Public nuisance law focuses on remedying the harm created, not the act that caused the harm. This distinction is critical in understanding why the Respondent's retroactivity argument, and thus due process argument, fails. Courts have considered retroactivity of public nuisance laws and held the ongoing nature of the harm forecloses attempts to shirk liability, even when the conduct creating the harm occurred in the past. Further, even though public nuisance law is a recent development in New Tejas, the trial court did not violate the Respondent's due process rights when it applied the law to the Respondent. Developments in liability through the courts is overwhelming the norm and the Respondent failed to demonstrate it relied on overturned precedent in regulating its nuisance-creating conduct. Without such, the Respondent's due process argument again fails.

Last, abatement is an equitable remedy that is appropriate and required to remedy the harmful condition. Rather than seeking to punish the party creating the public nuisance, this remedy is awarded to cure the harm. The cost to abate the nuisance, as determined by the trial court, is imposed on the party liable for creating that nuisance—here, the Respondent. Additionally, the nature of the abatement remedy is distinct from traditional tort damages. The objective of abatement costs is to stop and cure the ongoing harm to the public, not to compensate for incurred costs, not to punish a party for unlawful conduct, and not

to deter future conduct similar to that which caused the harm. Therefore, this Court's due process restrictions on punitive damages awards do not apply.

This Court should reverse the below court's decision and hold that the Respondent's liability and the City's abatement award do not violate due process.

ARGUMENT

I. Rule 50 requires that a party must renew its motion for judgment as a matter of law at trial to preserve an argument that the district court denied at summary judgment.

Rule 50 is not a mere formality and provides value in several ways, not the least of which is clarity for the opposing party and the judge. Rule 50 motions maximize fairness. As such, Rule 50(b) should be read and applied as written.

Absent any issues of fairness, it is not within the jurisdiction of the Thirteenth Circuit to determine that Rule 50(b) is antiquated or unnecessary. The appellate court is not empowered to change the Federal Rules of Civil Procedure. It is the domain of the appellate court to review the final order of a court below, which only incorporates matters raised at trial.

Finally, Rule 50(b) motions are required to preserve arguments that are denied at summary judgment, as Kill-a-Byte's claim was here. *Feld Motor Sports, Inc. v. Traxxas, L.P.*, 861 F.3d 591, 596 (5th Cir. 2017); *see also Ji v. Bose Corp.*, 626 F.3d 116, 128 (1st Cir. 2010) (finding "that even legal errors cannot be reviewed unless the challenging party restates its objection in a [Rule 50] motion"); *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1235 (4th Cir. 1995). This Rule has its roots in the Seventh Amendment and provides

clarity not only for the parties but also to the judges as to which issues will be preserved. Pet. App. 16a.

The Thirteenth Circuit erred both in determining its authority to decide the question and its assessment of Rule 50's applicability. This Court should uphold its precedent regarding Rule 50, thus eliminating the need to hear the merits of Kill-a-Byte's due process claim.

A. Federal Rule of Civil Procedure 50 provides clarity and order and is not a mere formality.

Several reasons underscore the need to renew a motion under Rule 50(b) and demonstrate that the Rule is not a mere formality. In the first instance, the Rule ensures clarity for both the judge presiding over the appeal and the opposing party. It is in that way that Rule 50(b) motions maximize fairness. As such, Rule 50(b) should be read and applied as written.

Even if there were not issues of fairness at play, it is not within the jurisdiction of the Thirteenth Circuit to determine that Rule 50(b) ought not and does not apply. It is not the domain of the appellate court to change the Federal Rules of Civil Procedure, but to review the final order of a court below, which only incorporates matters raised at trial.

i. Appellate Jurisdiction is limited to final orders and certain interlocutory orders, with few exceptions.

Starting with the Judiciary Act and continuing today, the jurisdiction of circuit courts is necessarily limited in scope. *See* 28 U.S.C. §§ 1291, 1292. *See generally* Judiciary Act of 1789, ch. 20, 1 Stat. 73.

Appellate courts have jurisdiction of "appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. This Court held that this means circuit courts cannot hear an appeal of any decision that is informal or incomplete. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

There are a select few prejudgment orders that are reviewable by circuit courts. Prejudgment orders included in this small exception are those that involve a claim of rights separable from, and collateral to, rights asserted in the action. *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) (referencing the *Cohen* collateral order doctrine).

Another exception to the limit on circuit court jurisdiction to final orders is found in § 1292, and that exception is for interlocutory decisions. 28 U.S.C. § 1292. There are three categories of immediately appealable interlocutory decisions. *Id.* Summary judgment is not within one of those three categories. *See Price v. Kramer*, 200 F.3d 1237, 1243 (9th Cir. 2000) (noting that this is the "prevailing view among the federal circuits"). Thus, Kill-a-Byte could not submit arguments denied at summary judgment for appeal without Rule 50 motions.

ii. Statutory construction and interpretation require a literal reading of Rule 50 as the plain language is clear and unambiguous.

When construing a statute or rule, the starting point is the language of the statute or rule itself. Commonly referred to as the "plain meaning rule," this tenet of statutory construction ensures that plain and unambiguous language is applied as written. *See e.g.*, *Sebelius v. Cloer*, 569 U.S. 369 (2013); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("[W]hen [a] statute's

language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.") (internal quotation marks omitted). Federal Rule of Civil Procedure 50 provides in relevant portion that a motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. Fed. R. Civ. P. 50(a)(2). If the court does not grant a motion for judgment as a matter of law, the court is considered to have submitted the action to the jury subject to the court later deciding the legal questions raised by the motion. Fed. R. Civ. P. 50(b). On its face, Rule 50 is clear. If a party would like to ask for judgment as a matter of law in a court of appeals, that party must submit a Rule 50(a) motion including that argument during trial and must renew said argument with a Rule 50(b) motion. Fed. R. Civ. P. 50. As is clear in the statute, and as noted by Judge Despard who dissented in the lower court, no exceptions are written into Rule 50. Pet. App. 15a.

Alongside this principle of plain language interpretation is the idea that the rule should be read in coordination with the entire scheme. However, to the extent that incorporating the entire scheme, and as a result of Congressional intent, marginalizes the plain text of the statute or rule then that insight into the entire scheme is less compelling. James J. Brudney & Corey Distlear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 Duke L.J. 1231, 1258 (2009). If a rule is clear on its face, then there is no need for incorporation of the entire scheme as there is no lack of clarity. As noted by Justice Scalia, the appropriate time to incorporate other portions of the

statutory scheme is in the face of ambiguity. *United Savings Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme"). Because the whole of the scheme is only drawn upon to the extent necessary to clarify the provision in question, unambiguous rules such as Rule 50 stand on their own. Courts should avoid "any construction which implies that the legislature was ignorant of the meaning of the language it employed." *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). Indeed, statutes should be construed "so as to avoid rendering superfluous" any of the included language. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004). Here, any assertion that Rule 50 presents only meaningless formalities conflicts with precedent set by this Court.

Federal Rule of Civil Procedure 1 states that the rules should be "construed, administered, and employed . . . to secure the just, speedy, and inexpensive determination of every action and proceeding," but not to the exclusion of the other rules. Fed. R. Civ. P. 1. Speediness and lack of expense are not paramount. The Thirteenth Circuit conflates those two rationales with justice and wrongly claims that it would be unjust to ask Kill-a-Byte to follow the rules that apply equally to everyone. Even if Rule 50 were unclear or ambiguous, Rule 1 does not automatically supersede it.

iii. Federal Rules of Civil Procedure may only be changed by the Supreme Court with review by Congress.

Title 26 of the United States Code assigns the authority for promulgation of rules. 26 U.S.C. § 2072. Section 2072 states that the "Supreme Court shall have the

power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals." 26 U.S.C. § 2072(a). That same section goes on to require that a rule not conflict with, be it by abridging, enlarging, or modifying, any substantive right. § 2072(b). So, absent a proactive change prescribed by the Supreme Court, a rule is only outright invalid if it interferes or modifies a substantive right. Rule 50 does not abridge, enlarge, or modify any substantive right, so it must be read as written. It is inappropriate for Kill-a-Byte, and indeed the Thirteenth Circuit, to assume this Court did not intend to have Rule 50 apply consistently and that it is a needless formality.

Title 26 further states in § 2074 that the Supreme Court shall transmit to Congress a copy of the proposed rule. 26 U.S.C. § 2074(a). Any rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress. § 2074(b). In this instance, modification of Rule 50 is the domain of the Supreme Court, albeit through a specific process governed by Title 26 of the United States Code. This Court is free to prescribe a new rule and transmit a copy of that rule to Congress by May 2021, for implementation on December 1, 2021. Until such occurrence, Rule 50 applies to this matter and all others as it is written.

iv. The Thirteenth Circuit made an improper distinction between questions of "pure law" and mixed questions of law and fact.

Though the Thirteenth Circuit is not empowered to alter the scope of Rule 50, it also committed error by stating Kill-a-Byte's due process claim was one of "pure

law." Legal questions can be questions of "pure law" as noted in the decision below. However, legal questions also can be mixed, as is the case here, and Rule 50 applies to all mixed legal questions. *Ramadan v. Gonzales*, 479 F.3d 646, 648 (9th Cir. 2007) ("By implying a fixed dichotomy between fact and law, our brief initial opinion inadvertently failed to consider an important category of cases—those that raise mixed questions of law and fact.").

A "purely legal" question is not one where the facts are simply undisputed, but where the facts do not matter at all: they are immaterial. *York v. Bailey*, 976 P.2d 1181, 1184 (Or. Ct. App. 1999) ("[T]hose as to which the facts are not merely undisputed *but immaterial*, such as a facial challenge to the constitutionality of a statute.") (emphasis added). Indeed, the Thirteenth Circuit noted in its opinion that "in these circumstances" it feels Rule 50 to be a mere formality. Pet. App. 7a. The implication in that statement being that in other circumstances Rule 50 is not a formality. In this case, because the facts and circumstances are not immaterial this is not a purely legal question.

In contrast a mixed question of law contemplates how the law applies to a particular set of circumstances. *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982) (defining mixed questions as those "in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated"); *see also Ramadan*, 479 F.3d at 648 (stating that "questions of law" include not only "pure" issues such as statutory

interpretation, but also "application of law to undisputed facts, sometimes referred to as mixed questions of law and fact"). When a question is not assessing something objective, such as the application of the constitution to a statute, it is likely a mixed question.

Kill-a-Byte's motion for summary judgment was a mixed question of law and fact. They argued that "civil liability for lawful *distribution of a video game* would violate due process" in this and similar instances. Pt. App. 3a (emphasis added). This necessarily entangles the facts and circumstances surrounding the claim at hand. The district court was asked to review whether this imposition of civil liability is a violation of due process. The facts matter for this question, so it is not purely legal.

It was further error for the Thirteenth Circuit to hold that Kill-a-Byte's claim was one of "pure law." This is indeed a question of mixed law and fact, as the circumstances are not immaterial by the Thirteenth Circuit's own admission. As such, Rule 50 applies as written.

B. In the absence of a Rule 50 Motion an appellate court is without power to direct the district court to enter judgment contrary to the one it had ordered.

Rule 50(b) motions are required to preserve arguments that are denied at summary judgment, as Kill-a-Byte's claim was here. *Feld Motor Sports*, 861 F.3d at 596; *see also Ji*, 626 F.3d at 128 (finding "that even legal errors cannot be reviewed unless the challenging party restates its objection in a [Rule 50] motion"); *Chesapeake Paper Prods.*, 51 F.3d at 1235. Without such a motion, the court of

appeals is without jurisdiction to hear the issue. This Rule has its roots in the Seventh Amendment and provides clarity not only for the parties as to which issues will be preserved but also to the judges. Pet. App. 15a.

In *Unitherm Food System, Inc. v. Swift-Ekrich, Inc.*, 546 U.S. 394 (2006), this Court explained that a Rule 50 motion is necessary for an appellate court to have "power to direct the District Court to enter judgment contrary to the one it had permitted to stand." 546 U.S. at 400–01. In deciding this, the Court relied in part on *Cone v. W.V. Pulp & Paper Co.*, 330 U.S. 212 (1947) and brought attention to Rule 50's roots in the Seventh Amendment of the United States Constitution. 330 U.S. at 218. The Reexamination Clause of the Seventh Amendment ensures that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. Certainly, this protection is no mere formality—the protection provided in the Reexamination Clause is a fundamental and oft-referenced piece of the justice system in this country. And while the Reexamination Clause extends beyond the bounds of Rule 50, controlling in many instances what a federal appeals judge may overturn, it is an important foundation for the Rule. Indeed, without Rule 50, courts of appeals would be without power to direct district courts to enter different judgments in many matters. *Balt. & Carolina Line v. Redman*, 295 U.S. 654, 660 (1935); *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 399 (1913).

After denying the motion for summary judgment, the lower court expressly reserved judgment of that issue. And so, leaving the question to the jury, it was the

responsibility of Kill-a-Byte to request judgment under Rule 50(a) and to preserve that motion with a Rule 50(b) motion, thereby empowering the court of appeals to direct a contrary judgment on the issue. As noted in Judge Despard's dissent, the constitutional importance of Rule 50 cannot be ignored, and doing so today would set a potentially dangerous precedent. Pet. App. 16a. The majority insists that the "merger rule" would combine the interlocutory order with the final judgment, and that the court of appeals can then review that decision. However, this Court made clear in *Ortiz v. Jordan*, 562 U.S. 180 (2011) that the "merger rule" does not apply to denials of summary judgment, as we have in the instant case. Denials of summary judgment do not merge into a final judgment. Therefore, for Kill-a-Byte to appeal the issue they necessarily must have filed Rule 50 motions.

The majority relies on the opinion of the district court and notes that the district court could "just as easily" have granted Kill-a-Byte partial summary judgment instead of denying the motion entirely. However, the fact remains that the district court did not deny the motion in part. The district court denied the motion for summary judgment entirely. Pet. App. 3a. Any assertion by the circuit court to the contrary is not only false but offends legal procedure—there is no rule providing for the "effective" granting of partial summary judgment, when the official decision is a denial of summary judgment. *See* Pet. App. 8a (the circuit court incorrectly and improperly asserts that, because the district court's opinion allegedly contained facts that may have supported a partial grant of summary judgment, the outright denial of summary judgment is in effect a partial summary

judgment). Subsequently, the Thirteenth Circuit claims that the district court presented favorable facts in its opinion. But as the court of appeals is aware, the district court's opinion is not the district court's judgment.

Despite the decision of this court in *Unitherm*, which held that a Rule 50(a) motion is insufficient to preserve for post-trial appeal questions that were raised at summary judgment, some circuits have attempted to nullify Rule 50. 546 U.S. at 404. The generally accepted rule from these circuits, which the Thirteenth Circuit joins, is that Rule 50 motions are not required to preserve for appeal a "purely legal" claim rejected at summary judgment. *Feld v. Feld*, 688 F.3d 779, 781–82 (D.C. Cir. 2012); *see also Houskins v. Sheahan*, 549 F.3d 480, 489 (7th Cir. 2008); *Banuelos v. Constr. Laborers' Tr. Funds for S. Cal.*, 382 F.3d 897, 902–03 (9th Cir. 2004); *Rothstein v. Carriere*, 373 F.3d 275, 284 (2d Cir. 2004); *United Techs. Corp. v. Chromalloy Gas Turbine Corp.*, 189 F.3d 1338, 1344 (Fed. Cir. 1999); *McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997); *Ruyle v. Cont'l Oil Co.*, 44 F.3d 837, 841–42 (10th Cir. 1994). Even if this Court agrees with the Thirteenth Circuit and finds that Rule 50 is a mere formality and finds that Rule 50 does not apply to purely legal questions, the question here does not fit within the definition of a purely legal claim. *See infra* I.A.iii.

The Thirteenth Circuit erred in its assessment of the validity of Rule 50 Motions. Rule 50 remains valid for reasons of fairness and notice, and so the Rule should be interpreted literally. Because the Thirteenth Circuit does not have the ability to change or eliminate Rule 50, it does not have jurisdiction to hear an

argument that was not renewed by a Rule 50 motion. Even assuming the Thirteenth Circuit's assessment of Rule 50's necessity was in line with precedent set by this Court, the question at hand is not a purely legal question.

II. A state may lawfully impose civil liability on a private party for creating a public nuisance.

States have the constitutional power, and responsibility, to protect the health, safety, and rights of their citizens. U.S. Const. amend. X; *Munn v. Illinois*, 94 U.S. 113, 145 (1876). Pursuant to this longstanding tenant of federalism, states are empowered to adopt and enforce laws in their jurisdiction. U.S. Const. amend. X; *Chi. & Alton R.R. Co. v. Tranbarger*, 238 U.S. 67, 76–77 (1915). Abatement of public nuisances is a basic function of New Tejas's and the City's police power. *Garcia v. Gray*, 507 F.2d 539, 544 (10th Cir. 1974).

The Respondent seeks to contravene these principles and abridge New Tejas's constitutional right to develop its own laws. The Respondent, by prodding at elements of the State's public nuisance action in isolation, hopes to paint a picture that the fundamental tenets of common law violate its due process. Simply put, that is not plausible. Many states, including New Tejas, have adopted public nuisance laws as the Restatement (Second) of Torts prescribes. *See In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 725 F.3d 65, 96 (2d Cir. 2013); *Gail v. New Eng. Gas Co.*, 460 F. Supp. 2d 314, 324 (D.R.I. 2006); *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 646 (D.C. 2005); Restatement (Second) of Torts § 821B (Am. L. Inst. 1979); Pet. App. 4a–5a. Further, as a question of state law, the New Tejas

Supreme Court upheld the State's public nuisance law as a valid, legal cause of action. Pet. App. 5a.

Great deference is owed to judicial developments of the common law. *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 622 (7th Cir. 2014). The party alleging a due process violation carries the burden of proving the law is arbitrary and irrational, even when the law imposes liability pursuant to past actions. *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 637 (1993); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

In this case, New Truro sought to hold Kill-a-Byte responsible for its unreasonable interference with public safety, the trial court found Kill-a-Byte liable, and the New Tejas Supreme Court certified the validity of the law underlying Kill-a-Byte's liability. Neither the State's public nuisance law nor the remedy awarded violates the corporation's due process rights. The Thirteenth Circuit erred in holding otherwise. To prevail before this Court, Kill-a-Byte must demonstrate that the State's public nuisance law is arbitrary and irrational.

A. Substantial-factor causation in a civil cause of action does not violate due process.

State law determines the elements required to impose liability under a specific cause of action, including the requisite causation standard for tort liability. *Citizens Fed. Bank v. United States*, 474 F.3d 1314, 1318 (Fed. Cir. 2007). Courts continuously have upheld the legal sufficiency of substantial-factor causation and its accordance with principles of fundamental fairness and constitutional due process. *See Moeller v. Garlock Sealing Techs., LLC*, 660 F.3d 950 (6th Cir. 2011)

(recognizing Kentucky's substantial-factor causation standard for a negligence claim); *Ileto v. Glock Inc.*, 349 F.3d 1191, 1206 (9th Cir. 2003) (applying California's substantial-factor causation standard to public nuisance claim against gun manufacturers); *Parks Hiway Enters. v. Cem Leasing*, 995 P.2d 657, 666 (Alaska 2000) (requiring substantial-factor causation under Alaska private nuisance law); *see also Citizens Fed. Bank*, 474 F.3d at 1320 (upholding the substantial-factor causation sufficient for breach of contract claim). Upon a trier of fact's finding that all elements of a claim, including causation, are met, a defendant is liable.

The causation standard selected by a trial court in accordance with state law can only be reviewed for abuse of discretion. *Citizens Fed. Bank*, 474 F.3d at 1318. Further, when a reasonable doubt exists as to whether the defendant was a substantial factor in bringing about the harm, the question of causation should be left to the trier of fact. *Fischer v. Ganju*, 485 N.W.2d 10, 20 (Wis. 1992). Here, the trier of fact decided, after reviewing all the evidence, that the Respondent was a substantial factor in creating the City's public nuisance.

To uphold the Thirteenth Circuit's decision would rewrite the State's laws and usurp the trial court's role in the judicial system. This Court, in accordance with principles of federalism, should permit New Tejas to develop its own laws and give deference to the courts administering those laws. Such a system affords, and did afford, more than adequate opportunity for the Respondent to dispute the underlying claim and does not run afoul of due process.

i. Substantial-factor causation sufficiently establishes actual causation of a public nuisance tort.

Pursuant to the New Tejas Supreme Court and the commonly adopted Restatement (Second) of Torts, substantial-factor causation satisfies the causation element of a public nuisance cause of action. Restatement (Second) of Torts § 431; Pet. App. 9a; *see also Maryland v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 453 (D. Md. 2019) (applying the Restatement to a Maryland public nuisance claim). The Thirteenth Circuit expressed due process concern over the State's adopted and proven causation standard. Pet. App. 9a. Yet this Court has never usurped state law and imposed a variant causation standard for a cause of action when evaluated under the Due Process Clause.

Substantial-factor causation is a more stringent causation standard than but-for causation. *Shyface v. Sec'y of HHS*, 165 F.3d 1344, 1352 (Fed. Cir. 1999) (using the Restatement's public nuisance definition). This more stringent test subsumes but-for causation—but-for causation is necessary but not sufficient to establish substantial-factor causation. *Ileto*, 349 F.3d at 1206; *Shyface*, 165 F.3d at 1352 (applying substantial factor as the legal causation standard for a vaccine injury under the National Childhood Injury Vaccine Act). Additionally, tort liability established through but-for causation does not violate due process. *See, e.g.*, *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346 (2013) (modeling Title VII liability after traditional tort law, including but-for causation as the legal causation requirement). Therefore, it strains credulity to find substantial-factor causation unconstitutional.

In this case, the Respondent claims its due process rights were violated by applying a more stringent causation standard. The Respondent's claim is incongruous to the realities of this case. Substantial-factor causation, which was applied, provides even greater due process protection than the lesser-included but-for causation standard. Again, Kill-a-Byte advocates for a less demanding causation standard while simultaneously claiming its due process rights were violated. Pet. App. 5a. Even if this Court decided to rewrite state law and apply but-for causation, the Respondent would still be liable for abating the nuisance. In finding the Respondent liable under substantial-factor causation, the trial court necessarily found Kill-a-Byte was a but-for cause of the nuisance.

Even if this Court considers the sufficiency of evidence proving causation, which the trial court and the New Tejas Supreme Court found legally sufficient, the findings of this proceeding comport with due process because the evidence linked the Respondent's conduct to the City's ongoing harm. Pet. App. 4a–5a. Circumstantial evidence can sufficiently establish that a defendant's conduct was a substantial factor in bringing about the harm. *Locust Valley Water Dist. v. Dow Chem. Co.*, No. 18-CV-7266, 2020 WL 3163006, at *4 (E.D.N.Y. June 4, 2020). In *Locust Valley Water*, the court ruled the public nuisance claim sufficiently pleaded substantial-factor causation, evidence of which included the defendant's dominating market share within the chemical industry. 2020 WL 3163006, at *1, *4 (denying defendant's motion to dismiss the public nuisance claim for polluted public water). Additionally, relying on precedent, the court held causation needs only enough

evidence for a jury to find the defendant was a substantial cause in bringing about the harm, rather than evidence identifying the exact manufacturer of the polluting product. *Id.* at *5.

The City demonstrated several ways in which Kill-a-Byte substantially caused the public nuisance. Like the plaintiff in *Locus Valley Water*, the City presented significant evidence that the Respondent substantially caused the high violent crime rate in New Truro, including the Respondent's efforts to create a significant population of individuals trained in quick-response shooting, a sensitivity to and familiarization with violence, and a massive following of devoted gamers that positioned the Respondent as a market leader. Pet. App. 22a–23a. The more dependent upon Lightyear the population became, the more the Respondent profited. Pet. App. 22a n.1. Not only could a jury find the Respondent substantially caused the harm, as required at the pleadings stage in *Locust Valley Water*, here, a reasonable jury did find the evidence sufficiently established the Respondent substantially caused the harm. Pet. App. 4a.

The trial court did not abuse its discretion when it ruled, based on the jury's findings, that the Respondent is liable for the City's public nuisance. *Id.* It relied on the state law's constitutional causation standard and deferred to the jury, as required, to determine the sufficiency of the evidence establishing causation. *Id.* Therefore, the trial court's decision upheld due process and should stand. The Respondent has no grounds to claim its due process rights were violated.

ii. Intervening events do not relieve an actor who proximately caused a public nuisance from liability.

Proximate cause is established through "some direct relation" between the injury and the alleged injurious conduct. *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992). The direct relation between the conduct and the injury is not interrupted merely because an intervening act occurs. *Ashley Cnty. v. Pfizer, Inc.*, 552 F.3d 659, 667 (8th Cir. 2009); *City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256, 282 (E.D.N.Y. 2004). Further, when the safety and welfare of an entire community is compromised, the state's interest in abating the nuisance diminishes limitations on liability that are relevant in individual negligence claims. *Beretta*, 315 F. Supp. 2d at 282; *NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 496 (E.D.N.Y. 2003).

In the context of a public nuisance claim, the foreseeability of harm is a determinative factor in establishing proximate cause. *AcuSport, Inc.*, 271 F. Supp. 2d at 496; *City & Cnty. of San Francisco v. Purdue Pharma L.P.*, No. 3:18-cv-07591-CRB, 2020 U.S. Dist. LEXIS 181274, at *132 (N.D. Cal. Sept. 30, 2020). An intervening act does not relieve the original actor of liability "if the injury is the natural and probable consequence of the original act and the injury 'might reasonably have been foreseen as probable.'" *Pfizer*, 552 F.3d at 667 (emphasis removed) (quoting *Shannon v. Wilson*, 947 S.W.2d 349, 356 (Ark. 1997)).

In *Beretta*, the court held the handgun manufacturers' distribution and marketing of guns was sufficiently connected to proximately cause the public harm suffered from illegal gun use. 315 F. Supp. 2d at 284. Although between distribution

and marketing of guns, distributers, retailers, and individuals purchased and controlled the product, the manufacturers were a direct link in the causal chain. *Id.* In contrast, the court in *Pfizer* found a cold medicine manufacturer's sale of medicine to independent retailers did not proximately cause the county's methamphetamine epidemic. 552 F.3d at 670–71 (applying Arkansas's public nuisance law). Importantly, the highly regulated nature of the pharmaceutical industry and intervening actors who transformed the legal product into an illegal drug were instrumental in the court's analysis. *Id.*

In this case, the Respondent proximately caused the public nuisance in the City. The Respondent attempts to avoid responsibility for its substantial interference with the City's public safety. Pet. App. 3a. Regardless of its deflection techniques, the Respondent foresaw, if not already knew, that its intent to hook young men on a massive, competitive shooter simulation would lead to increased violent crimes in communities concentrated in addicted gamers. Pet. App. 23a. Specifically, Respondent knew gamers were demanding more violent killings and in-game interactions. Pet. App. 21a. Additionally, Respondent knew that gamers were failing out of educational programs because of Lightyear; an occurrence known to lead to an increased likelihood of criminal activity. Pet. App. 23a–24a. Kill-a-Byte caused City residents to spend an exorbitant about of time playing Lightyear, the effects of which created a high violent crime rate that unreasonably interfered with public safety. Pet. App. 25a.

Further, any intervening acts on behalf of the video game consumers do not break the chain of causation. The Respondent's claim that intervening actors relieve it of liability is inaccurate. Similar to the manufacturers in *Beretta*, the individual gamers' decision to repeatedly play Lightyear does not break the causal chain between Respondent's its intent to create a widely, extensively used violent video game and the City's injury. Unlike the manufactures of cold medicine in *Pfizer*, who produced a lawful product sold through distribution channels and later cooked into an illegal drug, the Respondent's product and conduct was directly consumed by the City's gamers—the City's injury directly followed. Pet. App. 21a. The Respondent tapped into a direct-to-consumer market. Kill-a-Byte itself turned the dials, ramping up addiction to Lightyear all for a profit. Pet. App. 23a. The gamers' decision to play Lightyear, although clearly not independent and of free will, as evidenced by the game's addicts, do not relieve the Respondent of liability.

The Respondent is liable for the City's harm. The Respondent was held the actual and legal cause of the City's injury. Therefore, the Respondent cannot claim its due process rights were violated when it faced a trial by jury, which found it liable pursuant to the law of the State.

B. Civil liability for an ongoing public nuisance holds a party responsible for current harm and does not punish the nuisance-creating past act.

This case does not involve retroactive liability. The Respondent claims it is being punished for lawful conduct that occurred years ago. The Respondent is mistaken. The City's public nuisance claim seeks to remedy an ongoing interference

with public safety that the Respondent's conduct created. This is the distinction between this public nuisance claim and a tort claim pursuing the conduct itself.

Although New Tejas recently adopted its public nuisance law, the law is not retroactive and its enforcement poses no due process concerns. If a newly adopted public nuisance law could not be enforced until only conduct occurring after its adoption rose to the level of a substantial interference with public safety, the law would be rendered futile for years to come, leaving the public to suffer indefinitely.

The Respondent seeks this Court's help to avoid responsibility for the public crisis in New Truro that it caused and that a trier of fact held it liable for creating. This Court should reverse the below court and hold that the Respondent's proven liability not unconstitutionally deprive the Respondent of due process.

i. Public nuisance claims seek to abate a current and significant interference with the public's rights, not impose liability for prior conduct.

Public nuisance claims focus on the "harm caused rather than on the act creating the harm." *Town of Superior v. Asarco, Inc.*, 874 F. Supp. 2d 937, 947 (D. Mont. 2004); *United States v. Hooker Chems. & Plastics Corp.*, 722 F. Supp. 960, 968 (W.D.N.Y. 1989). The "primary objective of an abatement action" is to "insure that the nuisance is abated, not to punish for past acts." *People ex rel. Van De Kamp v. Am. Art Enters.*, 656 P.2d 1170, 1173 (Cal. 1983). Because a public nuisance claim is premised on the condition created, not the past conduct, whether the past conduct was lawful or illegal at the time bears no consideration. *See People v. ConAgra Grocery Products Co.*, 227 Cal. Rptr. 3d 499, 597 (Ct. App. 2017) (enforcing abatement for damages created by previously legal lead paint); *O'Hagen*

v. Bd. of Zoning Adjustment, 96 Cal. Rptr. 484, 493 (Ct. App. 1971) (holding noise and odor can affect a public nuisance). The sole question is whether the conduct created the current interference with the public's rights—a question focused on the present, not the past.

Inherently, a public nuisance cause of action must point to past conduct to establish causation of the condition, but the claim focuses on the effects that follow the conduct. *ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d at 534–35. That does not transform a law seeking to remedy a harmful current condition into a law seeking to reach into time and punish without notice. *See Am. Art Enters.*, 656 P.2d at 1173.

Further, this Court stated that a law is not retrospective "merely because it is applied in a case arising from conduct" predating the law's enactment. *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 269 (1994). In *Usery*, a newly passed federal law imposed liability on coal mine operators for the benefits of employees who suffered certain disease or death during employment. 428 U.S. at 9. The operators argued their liability for benefits of miners who stopped working for them before the act was passed violated due process. *Id.* at 15. Additionally, the operators argued the miners' employment was legal and the operators had no knowledge that the conditions were dangerous at the time of their employment. *Id.* This Court held that imposing liability on the operators for the "effects of disabilities bred in the past" is a rational and justified. *Id.* at 18. Importantly, this Court reasoned that imposing this financial responsibility on operators rationally imposes the cost of the

harmful effects to "those who have profited from the fruits of [the miners'] labor." *Id.*

In the context of environmental cleanup, courts have readily held that liability for cleaning the environmental harm under the federal statute, even though the polluting conduct pre-dated the statute's enactment, does not violate due process. *See United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1072–73 (D. Colo. 1985) (collecting cases considering pre-enactment liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980). The *Shell Oil Co.* court expressly addressed fairness concerns, including notice, and found no due process concern. *Id.* at 1073.

In this case, like in *Usery*, holding the Respondent liable for the effects of the harm bread in the past is rational and justified. Not only did Kill-a-Byte financially prosper from the City's gamers' addiction to Lightyear, it sought to maximize this addiction. Pet. App. 23a. Further, Kill-a-Byte did not mitigate any of the foreseeable harmful effects, even though it recognized it would be simple to implement warnings and safeguards. *Id.* In line with the many courts, including *Shell Oil Co.* considering liability for costs of remedying environmental harm that arose from pre-enactment conduct, holding the Respondent liable for remedying the harmful effects of its conduct does not violate due process.

The City does not seek to impose civil liability on the Respondent for developing or promoting Lightyear. The City seeks to impose civil liability on the Respondent for effecting a community inflicted with a staggeringly high violent

crime rate and deprived of public safety. Thus, the City's public nuisance claim is not retroactive in punishing past conduct and does not violate due process.

ii. Developments in common law are not due process violations.

A state's new law that upsets a party's expectation—that it will be free from liability for the dangers it created—is not unlawful. *Pension Benefit Guar. Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 729 (1984). This Court held that a law is "not unlawful solely because it upsets otherwise settled expectations." *Id.* As laws develop, so does a party's potential liability. *See Samuels v. McCurdy*, 267 U.S. 188, 198 (1925) (holding liability for manufacturing alcohol under states' prohibition laws was lawful despite alcohol being legally produced and enjoyed for years).

When courts adopt a change in the law, including new theories of civil liability, applying the new law to the parties before the court is "overwhelmingly the norm." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991). Additionally, tremendous deference is owed to judicial common law developments when challenged on due process grounds. *Gibson*, 760 F.3d at 622. A due process challenge must demonstrate that liability pursuant to the new law overrules legal precedent which a party previously relied upon to regulate its conduct and which, if applied, would change the outcome of the case. *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001) (holding liability must be "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue"); *James B. Beam Distilling.*, 501 U.S. at 534; *Gibson*, 760 F.3d at 622. In their very nature, courts refine law over time based on reason. *Rogers*, 532 U.S. at 462. Such developments

allow governing laws to comport with "reason and common sense," and do not violate due process. *Id.* at 462, 467.

In this case, New Tejas adopted a public nuisance law and in doing so, upset the Respondent's settled expectation that it would not be responsible for the violence and crime in the City that it created. The State's developments in law, and therefore the Respondent's increased exposure to civil liability, poses no due process violations.

The decision of the New Tejas Supreme Court, in upholding the State's new public nuisance law and its application to the Respondent, should be respected as a constitutional development in the State's civil law. The trial court applied the public nuisance law to the party before the court, the Respondent. The Respondent has not pointed to any New Tejas precedent upset by this development and upon which it relied on in regulating its conduct. Instead, Kill-a-Byte only relied upon its own bottom line to regulate its conduct. The Respondent developed its product to maximize its own popularity and profits. Pet. App. 23 n.1. The Respondent intimately tracked gamers' play time, using this data to tweak the game to attract new users and to keep players coming back. Pet. App. 23a. Through these efforts, the Respondent enjoyed substantial profits. Pet. App. 23 n.1.

Kill-a-Byte has not met the burden of demonstrating the State's public nuisance law is unexpected and indefensible as compared to the state laws that existed before the City's crime rates skyrocketed. Further, the trial court's adoption of public nuisance liability is a common-sense development of civil liability. Due

process cannot limit the natural evolution of common law. A contrary conclusion would stifle the very existence of the judicial system.

C. The abatement remedy awarded comports with principles of fundamental fairness.

Abatement is an equitable remedy that courts grant to stop an ongoing public nuisance, *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 781 (7th Cir. 2011), and abating a nuisance is "one of the basic functions of the [state's] police powers." *Garcia*, 507 F.2d at 544. The actual cost to abate the nuisance determines the appropriate abatement amount. *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1147 (Ill. 2004). The appropriate equitable remedy is determined at the trial court's discretion and the award is reviewed for an abuse of discretion. *See Kitsap Cty. v. Kitsap Rifle & Revolver Club*, 337 P.3d 328, 349 (Wash. Ct. App. 2014). As the below court noted in its opinion, abatement is an equitable remedy in New Tejas, and the award and amount of the abatement is for the trial court to determine. Pet. App. 4a. The trial court did not abuse its discretion or violate the Respondent's due process rights when it awarded the City the actual cost of abating the nuisance.

i. The cost to remedy the unreasonable interference with public safety determines the appropriate abatement amount.

Often, equitable remedies, including abatement, demand a payment of money. *United States v. Apex Oil Co.*, 579 F.3d 734, 736 (7th Cir. 2009). The cost of remedying the dangerous condition created determines the appropriate abatement amount. *Beretta*, 821 N.E.2d at 1147; *ConAgra Grocery Products Co.*, 227 Cal. Rptr.

3d at 550. Simply, the party whose actions were a substantial factor in creating the interference with public safety is responsible for the full cost of remedying the public nuisance. *See ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d at 569; *State v. Seigel*, 472 N.W.2d 584, 593 (Wis. Ct. App. 1991) ("[T]he trial court was free to fashion methods and remedies sufficient to curb the [public nuisance].").

The Due Process Clause does not shield the Respondent from the full cost of abating the nuisance that it is liable for creating. Any suggestion that proportionality is required between Respondent's conduct and the abatement costs misunderstands the law and the proceedings in this case. The Restatement, which New Tejas adopted, provides that the fact that other actors contributed to creating the harm does not relieve the Respondent from liability for its conduct. *ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d at 549; Restatement (Second) Torts § 840E, com. b. When the harm is "not capable of apportionment, each contributor is liable for the entire harm." *ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d at 549 (quoting Restatement (Second) Torts, § 840E, com. b.)).

In this case, Kill-a-Byte was found to have substantially caused the interference with New Truro's citizens' right to public safety. Pet. App. 4a. The City intends to remedy this interference through job training, rehabilitation of video game addicts, and increased security measures throughout the town. Pet. App. 25a. After finding the Respondent, the sole contributor before the court, liable for the public nuisance, the Respondent is responsible for the entire harm and thus the entire cost of abatement.

It is unreasonable for the citizens of New Truro to live in a community with a violent crime rate exponentially higher than the rest of the nation. Pet. App. 25a. It is unreasonable for citizens to stand by and watch violent criminals, trained in reflexive fighting by Kill-a-Byte, run rampant through their city. Pet. App. 22a. Therefore, Kill-a-Byte must contribute in full to the City's recovery, which does not implicate the Respondent's due process protections.

ii. This Court has not imposed any constitutional limits on the equitable remedy of abatement.

The Respondent's and the Thirteenth Circuit's reliance on *BMW v. Gore* and *State Farm* is misplaced. Pet. App. 14a. The purpose of punitive damages is to punish those who engage in unlawful conduct and to deter them from repeating such conduct. *BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1996). Constitutional due process limits a punitive damages award so grossly excessive it "furthers no legitimate purpose." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). In contrast, an abatement remedy it is exclusively focused on remediating the harm incurred from a public nuisance. *Am. Art Enters.*, 656 P.2d at 1173; *In re Englebrecht*, 79 Cal. Rptr. 2d 89, 93 (Ct. App. 1998). The purpose of an abatement remedy is not to punish the actor who created the harm. *Asarco, Inc.*, 874 F. Supp. 2d at 947.

Because a monetary abatement award is founded on the cost of remedying the public-nuisance harm, not punishing the actor for its conduct, this Court's due process limitation on punitive damages is inapplicable. The City does not seek to punish the Respondent or deter its future video game ventures. Instead, the City

seeks the costs required to remedy the City's public safety crisis. The total cost to abate the nuisance wholly serves a legitimate purpose. The abatement cost awarded to the City does not contravene this Court's due process jurisprudence. This Court should reverse the decision of the Thirteenth Circuit and uphold the decision of the district court.

CONCLUSION

This Court should reverse the decision of the Thirteenth Circuit and hold that Rule 50 requires the filing of motions to preserve arguments denied at summary judgment. Should this Court reach the merits of this case, this Court should reverse the decision of the Thirteenth Circuit and hold the Respondent's civil liability for the public nuisance in New Truro does not violate due process.

CERTIFICATE OF SERVICE

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

/s/ Team #64
Team #64
Counsel for Petitioner
November 16, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Competition Rule 2.5 and Supreme Court Rule 33, the undersigned hereby certifies that the Brief of Petitioner, City of New Truro, New Tejas, contains 9,996 words, beginning with the Statement of Jurisdiction through the end of the brief, including all headings and footnotes, but excluding the Certificate of Service, Certificate of Compliance, and the Appendices.

/s/ Team #64
Team #64
Counsel for Petitioner
November 16, 2020

APPENDIX A: CONSTITUTIONAL PROVISIONS

Seventh Amendment to the Constitution of the United States of America provides:

> 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.

U.S. Const. amend. VII.

The Tenth Amendment to the Constitution of the United States of America provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X.

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.

U.S. Const. amend. XIV, § 1.

APPENDIX B: STATUTORY PROVISIONS

Federal Rule of Civil Procedure 50 provides in pertinent part:

> (a) Judgment as a Matter of Law.
>
> (1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:
>
> (A) resolve the issue against the party; and
>
> (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.
>
> (2) Motion. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.
>
> (b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:
>
> (1) allow judgment on the verdict, if the jury returned a verdict;
>
> (2) order a new trial; or
>
> (3) direct the entry of judgment as a matter of law.

Fed. R. Civ. P. 50.

28 U.S.C. § 1254(1) provides in pertinent part:

> 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.

28 U.S.C. § 1254(1).