

Docket 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

Brief for Petitioner

Team 76

Questions Presented

1. Whether a party that fails to follow the procedure in Rule 50 of the Federal Rules of Civil Procedure can nevertheless preserve an argument that the district court rejected at the summary judgment stage for review by an appellate court?
2. Whether state law may hold a private party civilly liable under public nuisance doctrine when the party produced and sold a product to the State's residents which was a substantial factor in producing significant harm to the community?

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BRIEF FOR THE PETITIONER

Opinions Below

The decision of the Thirteenth Circuit Court, reversing the district court, can be found on page 14a of the Petitioner’s Appendix. The decision of the Federal District Court for the Western District of New Tejas denying Kill-a-Byte’s motion for summary judgment can be found on page 32a of the Petitioner’s Appendix. The district court’s entry of final judgment can be found on pages 33a–34a.

Jurisdiction

The judgment of the Thirteenth Circuit Court of Appeals was entered on March 21, 2020. This Court granted Writ of Certiorari on October 5, 2020. This Court has jurisdiction to review the questions presented under 28 U.S.C. §1254(1).

Constitutional Provision Involved

The pertinent part of the Fourteenth Amendment to the United States Constitution provides: “[n]o State . . . shall deprive any person of life, liberty, or property, without due process of law.”

Standard of Review

The Thirteenth Circuit erred when it reversed the trial court’s decision. This Court accepts the trial court’s findings of fact unless clearly erroneous, but decides questions of law *de novo*. See *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). When the Court reviews conclusions of law *de novo*, it makes an independent review, and is free to arrive at its own holding. See *First Options of Chicago v. Kaplan*, 514 U.S. 938, 947 (1995).

Statement of the Case

I. Factual History

Beginning in 2003, Respondent Kill-a-Byte Software, Inc. (“Kill-a-Byte”) began distributing and operating an online multiplayer video game known as “Lightyear.” (Pet. App. 2a.) Lightyear was a science-fiction game in which more than 1,000 online players battled to the death with computer avatars using various “primitive and futuristic weapons,” including everything from rocks to plasma rifles. (Pet. App. 2a, 21a.) The game design included realistic physical movements with graphic scenes of gore and death. (Pet. App. 21a.) This violent game encouraged players to develop an “every man for himself” mentality and allowed in-game taunting among competitors. (*Id.*) Kill-a-Byte upgraded the game periodically to include features that allowed for more gruesome deaths and sophisticated taunts, including the addition of environmental deaths that enabled players to use complex traps to kill competitors. (*Id.*) The game soared in popularity, with over 300 million accounts created during its ten years of operation. (Pet. App. 2a.) In the City of New Truro, New Tejas (hereinafter “New Truro” or “the City”), Lightyear was particularly popular, with more than 50% of male residents of the City aged 15–25 playing the game for at least ten hours per week between 2010 and 2013. (*Id.*) Of these male residents, the most active 10% played the game for more than 35 hours per week. (Pet. App. 22a.) Kill-a-Byte ceased operation of Lightyear in 2013. (Pet. App. 20a.)

New Truro suffers from an exceptionally high crime rate. The crime rate skyrocketed over the last decade and now significantly exceeds the national average. (Pet. App. 2a.) During this time, the cost of funding the City’s police department

doubled while the tax revenues were cut in half. (*Id.*) New Truro currently experiences 2,200 violent crimes per 100,000 residents—almost six times the national average. (Pet. App. 25a.) For property crime, the rate is also well above the national average at 4,403 property crimes per 100,000 residents. (*Id.*) The City also suffers from an unemployment rate of 15% and a poverty rate of 45.3%. (*Id.*)

II. Procedural History

In 2016, New Truro sued Kill-a-Byte for absolute public nuisance, seeking costs for abating the public nuisance of the City's high crime rate. (Pet. App. 25a.) The case was filed in New Texas state court, then removed to the United States District Court for the Western District of New Texas based on diversity jurisdiction. (Pet. App. 2a–3a.) The district court accepted the City's theory of liability that Kill-a-Byte's sale and operation of the Lightyear video game was a substantial factor in causing the increase in crime, interfering with the right to public safety. (Pet. App. 25a.) After the court denied Kill-a-Byte's motion for summary judgment, the case proceeded to a jury trial. (Pet. App. 4a.) At trial, the City's experts testified that playing Kill-a-Byte's video game correlated negatively with educational achievement, employment, and earnings. (Pet. App. 23a–24a.) Neurologists came before the court and warned that prolonged exposure to violent video games desensitized developing minds to violence, making the individuals more likely to engage in violent behavior in real life. (Pet. App. 24a.) Some experts even testified that Lightyear itself could be directly linked to violent behavior, as the game encouraged and incentivized quick, violent responses that would help a player win the game. (*Id.*) After a three-week trial, the jury returned a verdict for the City, finding that (1) Kill-a-Byte intentionally sold and

operated Lightyear, (2) that the increased crime rate substantially interfered with public safety, and (3) that the widespread use of lightyear was a substantial factor in the increasing crime rate. (Pet. App. 4a.) The court then ordered a bench trial on the issue of abatement. (*Id.*) Following two-weeks of arguments, the district court awarded the City \$613.2 million for the costs of abating the public nuisance posed by the increased crime rate. (Pet. App. 33a.)

Kill-a-Byte appealed to the Thirteenth Circuit Court of Appeals, which reversed the district court's decision. (Pet. App. 14a.) The court first dispensed with the City's procedural argument under Fed. R. Civ. P. 50, finding that Kill-a-Byte was not required in its Rule 50 motion at trial to renew a purely legal claim that was rejected at summary judgment. (Pet. App. 6a–7a.) The court explained that when denial of summary judgment is based on facts rather than a purely legal claim, a party need not renew a legal claim under a Rule 50 motion to preserve the issue for appeal. (Pet. App. 8a.)

Furthermore, the court ruled that the imposition of liability against Kill-a-Byte violated the Due Process Clause of the Fourteenth Amendment. (Pet. App. 8a.) Skeptical of the City's liability theory, the court certified several questions to the New Texas Supreme Court. The Supreme Court confirmed (1) the viability of the City's liability theory; (2) the legal sufficiency of the evidence presented by the City; and (3) that the money sought by the City and awarded by the district court constituted a recoverable amount of 'abatement' for purposes of state law. (Pet. App. 4a–5a.) Despite the New Texas Supreme Court's confirmation that the outcome was

consistent with state tort law, the Thirteenth Circuit found that various aspects of the state claims violated due process when considered “in the aggregate.” (Pet. App. 11a.) It declined to rule on the validity of the substantial factor test, used to impose liability under New Texas public nuisance law, but found that the causation standard considered in conjunction with the allocation of the abatement exclusively to Kill-a-Byte violated due process. (Pet. App. 9a.) Further, the court found that the retroactivity of the change in the common law from the response of the New Texas Supreme Court also violated due process. (Pet. App. 9a.) Finally, the court explained that the district court’s abatement award to the City violated due process by violating the restrictions applied to punitive damages. (Pet. App. 11a, 13a.)

This Court granted the City’s petition for writ of certiorari on October 5, 2020.

Summary of the Argument

Kill-a-Byte lost the right to appeal its due process claim by failing to comply with the requirement to make timely motions under Rule 50. Kill-a-Byte now seeks to bypass procedural requirements and appeal its due process claim to avoid civil liability for selling a product that proliferated crime in New Truro. Since the Thirteenth Circuit should have denied review of Kill-a-Byte’s due process claim for failure to comply with Rule 50, this Court should vacate the decision of the Thirteenth Circuit and reinstate the decision of the district court.

This Court should find that: (1) Kill-a-Byte failed to preserve its due process claim by failing to make timely Rule 50 motions; (2) even if Kill-a-Byte preserved its due process claim, that claim would fail on the merits because New Truro’s public

nuisance law passes rational basis review; and (3) the district court's judgment on abatement was rational.

Kill-a-Byte's due process claim was not preserved for appeal because Kill-a-Byte failed to make timely Rule 50 motions. The text of Rule 50 does not contain a "purely legal" exception to the requirement to make Rule 50 motions; thus, applying the text as written requires this Court to find that no such exception exists. This Court should apply the plain meaning of the text because parties to litigation have a reliance interest in the text of the Federal Rules of Civil Procedure (the Rules) being applied as written. Although the Rules are developed by the Supreme Court, and not Congress, Congress has laid out a specific process for amending the Rules, including a requirement that all Rule additions and amendments be approved by Congress before going into effect. Thus, to amend Rule 50 by adding a "purely legal exception" through judicial opinion would deprive Congress of a power that Congress clearly intended to preserve for itself.

Beyond the value of applying the plain text of Rule 50 as written, there are other policy reasons for declining to allow claims—even "purely legal" claims—to be preserved without timely Rule 50 motions. One important limitation of appealing a legal claim dismissed at the summary judgment stage, is that the appellate court would have to review the issue based on an incomplete pretrial record; whereas, review of Rule 50 motions is based on a complete trial record. Reviewing a pretrial record disregards important information in the trial record that could affect a court's analysis of a legal issue—including any evidence presented by a party to clarify its

legal theories. Additionally, distinguishing between factual and legal issues would consume significant court time, due to the lack of an established rule or principle for unerringly distinguishing between questions of law and fact. Thus, applying a bifurcated rule, which distinguishes between factual and legal issues in determining whether Rule 50 motions are necessary, would lead to large efficiency costs for courts. For these reasons, this Court should apply the plain meaning of Rule 50(a)–(b), and hold that timely Rule 50 motions are always required to preserve claims for appeal that were dismissed by a district court in the summary judgment stage.

If, in the alternative, this Court adopts the approach that Rule 50 motions are only required for “factual” claims, and not for “purely legal” claims, then this Court should still vacate the decision below because Kill-a-Byte’s due process claim is not “purely legal.” The Thirteenth Circuit’s analysis of the due process issue involved the weighing of specific facts presented by the City at trial. For example, the City presented evidence to clarify its legal theories, such as facts supporting its “legitimate government interest” for implementing the public nuisance law. For that reason, even if this Court applies a “purely legal” exception, it should still hold that Kill-a-Byte’s due process claim was not preserved for review by the Thirteenth Circuit because it was not “purely legal.”

Even if this Court finds that Kill-a-Byte’s due process claim was preserved for appeal, the decision of the Thirteenth Circuit should be reversed because Kill-a-Byte’s due process claim fails on the merits. The City’s viability theory, sufficiency of the evidence, and abatement award are each within the bounds of due process; Kill-a-

Byte cannot argue that New Truro's public nuisance law violates due process when considered in the aggregate. First, states are granted considerable leeway in the development of common law, and several states have adopted substantial or contributing factor tests to assign liability. Thus, the New Tejas substantial factor test does not impermissibly expand the scope of liability, and the jury properly used this test to find that Kill-a-Byte's sale of the Lightyear video game was a substantial factor in the City's increased crime rate.

In addition, New Truro's public nuisance law passes this Court's test of rational basis review for economic laws. Economic laws do not violate due process unless they are arbitrary and irrational. Such laws are upheld under rational basis review if there is a reasonably conceivable state of facts that could provide a rational basis for the classification, giving these laws a strong presumption of validity. The City had a rational basis in using the public nuisance law to protect the public safety; therefore, the law is not arbitrary and irrational under rational basis review.

Further, the imposition of liability against Kill-a-Byte does not violate due process based on the retroactivity of the New Tejas Supreme Court's response to the certified questions. Developments in the common law, by their very nature, must apply retroactively to the parties involved. Economic law that applies retroactively must be justified by a rational purpose. The rational purpose behind New Tejas's public nuisance law is the promotion of public safety, meeting the standard for rational basis review. Furthermore, the decision does not violate principles of

fundamental fairness, as the harm is recent in time and the City was able to prove causation under the applicable state standard.

Finally, the abatement ordered by the Western District of New Texas does not violate the restrictions on punitive damages, and the cost was rationally allocated to Kill-a-Byte. The judgment against Kill-a-Byte did not violate restrictions on punitive damages, as the damage award was not a punitive damages award but was instead equitable relief for the cost of abating a public nuisance. The abatement, like all awards of this type, was equitable in nature and provided a prospective remedy that compensated New Truro for the costs of rectifying the nuisance; it was not designed to punish past harms or to deter future conduct. These costs were also rationally allocated to Kill-a-Byte. The district court duly considered the abatement amount and how it could be allocated during a two-week bench trial focused on the abatement issue. This illustrates rational consideration in allocating the cost to Kill-a-Byte.

For these reasons, this Court should vacate the decision of the Thirteenth Circuit and reinstate the decision of the district court.

Argument

I. Parties should always be required to make timely Rule 50 motions to preserve claims made in a motion for summary judgment that was denied by the district court.

To preserve its due process claim rejected by the district court at the summary judgment stage, Kill-a-Byte was required to move for judgment as a matter of law at trial under Rule 50(a), and to renew that motion following the jury verdict under Rule 50(b). This Court should so hold for four main reasons. First, the plain text of Rule 50 does not contain a “purely legal” exception, and the parties to litigation have a

reliance interest in the text being applied as written. Second, only timely Rule 50 motions can allow an appellate court to review issues based off of the full trial record, rather than the pretrial record, and information from trial is often relevant to courts' determinations of both factual and legal issues. Third, Respondent's competing argument that a bifurcated rule would increase "just" results is not persuasive. Fourth, if in the alternative, this Court adopts the approach that Rule 50 motions are only required for "factual" claims, and not for "purely legal" claims, then it should still vacate the decision below because Kill-a-Byte's due process claim is not "purely legal."

A. It would be unfair to create an exception to Rule 50 that is not in the text of the Rule due to the reliance interest in the text being applied as written.

The plain text of Rule 50 does not contain an exception for "purely legal" issues. Fed. R. Civ. P. 50. Amending Rule 50 through judicial interpretation to provide for a "purely legal" exception would be unfair due to the reliance interest that parties have in the text of the Rules being applied as written. Additionally, amending the rules through judicial interpretation would contradict Congress's intent for the Rules to be amended through a carefully constructed procedure laid out in the Rules Enabling Act (REA).

1. The plain text of Rule 50 does not contain a "purely legal" exception to the requirement to make Rule 50 motions.

The plain text of Rule 50 does not provide any language that suggests there is an exception to the Rule for "purely legal" issues. Fed. R. Civ. P. 50. Rather the text of Rule 50, in pertinent part, provides:

(a) Judgment as a Matter of Law.

(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 sum, the text provides that a party may move for judgment as a matter of law during trial under 50(a), and if the court does not grant that motion, may renew its motion for judgment as a matter of law, no later than 28 days after the jury verdict, under Rule 50(b). Fed. R. Civ. P. 50(a)–(b).

This Court has embraced a textualist interpretation of Rule 50(b). *Unitherm Food Systems, Inc. v. Swift-Eckrich Inc.*, 546 U.S. 394, 400–01 (2006). In *Unitherm Food Systems*, this Court held that the absence of a Rule 50(b) motion leaves the “appellate court without power to direct the District Court to enter judgment contrary to the one it had permitted to stand.” *Unitherm Food Systems*, 546 U.S. at 400–01. This Court reasoned that the requirement for a Rule 50(b) motion post-verdict is “an essential part of the rule, firmly grounded in principles of fairness.” *Unitherm Food Systems*, 546 U.S. at 401.

When this Court first promulgated Rule 50, it was designed to end confusion and uncertainty that existed regarding directed verdicts and motions for judgments notwithstanding verdicts. *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48, 52 –

53 (1952). To reinterpret the rule to fit what the parties desire in a particular case would “reintroduce the same type of confusion and uncertainty that the rule was adopted to end.” *Id.* at 53. In 1946, this Court was asked to amend Rule 50 to allow appellate courts to enter judgments for parties who failed to make a timely Rule 50(b) motion for judgment notwithstanding the verdict; this Court did not adopt that amendment because it found no sufficiently persuasive reason for doing so. *Id.* Although Rule 50(b) was subsequently amended in 2009 to allow 28 days after the verdict for a Rule 50(b) motion to be made (rather than 10 days, as previously required), this Court has not done away with the requirement that the motion must always be made to preserve appellate court jurisdiction to review issues that the district court rejected at the summary judgment stage. Fed. R. Civ. P. 50(a)–(b); Committee Notes on Rules—2009 Amendment.

Respondent and some circuit courts have interpreted *Ortiz v. Jordan* as creating an exception to Rule 50 for “purely legal” issues; that is not a proper interpretation of the case. *Ortiz v. Jordan*, 562 U.S. 180 (2011). The Court, however, clearly stated that it need not address the argument of whether a Rule 50(b) motion is necessary for an appellate court to address “purely legal issues” because the qualified immunity defenses involved did not present “purely legal” issues capable of resolution “with reference only to undisputed facts.” *Id.* at 190. Thus, this Court did not create a “purely legal” exception in that case and ought not do so here.

Rather, this Court should follow the interpretation advanced by the First, Fourth, and Fifth Circuits that an appellate court “has jurisdiction to hear an appeal

of the district court’s legal conclusions in denying summary judgment. . . only if it is sufficiently preserved in a Rule 50 Motion.” (Pet. App. 6a (quoting *Feld Motor Sports, Inc. v. Traxxas, L.P.*, 861 F.3d 591, 596 (5th Cir. 2017).) This interpretation is superior because it holds true to the plain meaning of Rule 50, as interpreted by this Court in its prior decisions regarding the Rule.

2. Parties to litigation have a reliance interest in the text of Rule 50 being applied as written.

Although the Federal Rules of Civil Procedure are developed by the Supreme Court, and not by the legislative branch, they should still be interpreted according to textualist principles because parties have a reliance interest in the text being applied as written. The Rules control every aspect of procedure in the federal courts, affecting every part of the litigation process. For this reason, parties to litigation have a strong reliance interest in the Rules being applied according to the plain meaning of the text.

Recognizing the significance of changes to the Rules for litigating parties, Congress designed a careful procedure for drafting and amending the Rules in the Rules Enabling Act (REA). 28 U.S.C. §§ 2073–74. The rulemaking process, as laid out in the REA: (1) requires meetings of the committees appointed to promulgate rules, to be open the public; (2) allows public input from various, diverse constituencies regarding proposed changes to the Rules; and (3) requires approval of Congress of each proposed rule change before it can become effective. *Id.* To amend the Rules through judicial interpretation would circumvent this carefully constructed procedure set forth by Congress in the REA. This would be contrary to Congress’s expressed intent to have the public involved in discussions to amend the Rules, as

shown by the REA's requirement to have committee meetings be open to the public, and to allow public input regarding proposed changes.

Additionally, amending the Rules through judicial interpretation would allow a proposed change to go into effect without the approval of Congress; thus, Congress's preserved check on the system of promulgating and amending the rules would be circumvented. Since Congress has the "ultimate authority over the Federal Rules of Civil Procedure," this Court may not lawfully deprive Congress of this reserved power. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 400 (2010). It is ultimately within Congress's power to create exceptions to a rule by "amending the rule or by enacting a separate statute overriding it." *Id.* Thus, for this Court to unilaterally amend a rule without going through the proper procedures, including getting Congress's approval, would be an exercise of a power that Congress did not intend to delegate to the Court through the REA. Parties to litigation have a reliance interest in this Court applying the Rules as written, and in the Rules not being changed except through the proper procedure. For that reason, this Court should interpret Rule 50 according to its plain meaning, and should not create a "purely legal" exception without going through the proper procedure to amend Rule 50.

B. It is inappropriate for an appellate court to review a pretrial denial of summary judgment after a full trial.

Review of a pretrial denial of summary judgment is inappropriate because it is based on an incomplete pretrial record. *Chesapeake Paper Prods. Co. v. Webster Eng'g Corp.*, 51 F.3d 1229, 1236 (4th Cir. 1995). Review of a Rule 50 motion, on the

other hand, is based on the complete trial record. *Id.* The underlying facts affect courts' analysis of all issues—even “purely legal” ones; thus, it is always best to have a record as developed as possible on those facts. For example, information from the record that could affect a court's analysis of a legal issue includes any evidence presented by a party to clarify its legal theories. (Pet. App. 18a.)

For example, in the typical case involving a due process issue, the government will present evidence of the rational basis underlying the law or practice at issue, and the opposing party will present evidence to attempt to discredit that proffered rational basis. The court will then determine whether the proffered rational basis is credible. Such credibility determinations are reflected in the trial record but cannot be shown through a pretrial paper record alone. *Chesapeake Paper*, 51 F.3d at 1236. Thus, it is preferable for appellate courts to base their review of both factual and legal issues on the complete trial record. Review of a Rule 50 Motion allows this, while review of a pretrial denial of summary judgment does not. For this reason, this Court should hold that Rule 50 motions are always required to preserve claims for review by an appellate court, that were denied by a district court at the summary judgment stage.

C. The Thirteenth Circuit's and Respondent's competing argument that a bifurcated rule is necessary to achieve “just” results is not persuasive.

The competing argument that a Rule 50 motion should not be required to preserve “purely legal” issues for appeal is not persuasive because it fails to consider the practical consequences of that interpretation, such as lost efficiency. In making this competing argument, the Thirteenth Circuit relied on Fed. R. Civ. P. 1 (Rule 1)

which requires the Rules to be “construed, administered, and employed. . . to secure the just, speedy and inexpensive determination of every action and proceeding.” (Pet. App. 7a); Fed. R. Civ. P. 1. The Thirteenth Circuit relied heavily upon the word “just” in Rule 1, arguing that requiring a Rule 50 motion would be unjust in the present case because it would prevent Kill-a-Byte from raising its due process argument before the appellate court. (Pet. App. 7a.) This argument ignores Rule 1’s interest in “speedy and inexpensive” determinations, and also ignores the availability of an alternative solution for parties to prevent injustice and preserve claims denied at the summary judgment stage—making timely Rule 50 motions.

This Court has not established a rule or principle for unerringly distinguishing between questions of law and questions of fact; thus, a lot of courts’ time would be unnecessarily consumed by attempts to distinguish between the two if this Court were to adopt a bifurcated rule for when Rule 50 motions are required. *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). Additionally, such a bifurcated rule would require the appellate court to review both the evidence presented at trial as well as the evidence before the district court when it denied the summary judgment motion. *Black v. J.I. Case Co., Inc.*, 22 F.3d 568, 572 (1994). This is contrary to summary judgment’s purpose, which is to save time and expense. *Id.* These additional inquiries, which would be required of courts under a bifurcated rule, are also contrary to the goals of Rule 1—for actions to be resolved in a speedy and inexpensive way. Fed. R. Civ. P. 1.

Additionally, creating a bifurcated rule is unnecessary to preserve justice because “a party that believes the district court committed legal or factual error in denying summary judgment has adequate remedies other than seeking review of the denial after trial.” *Chesapeake Paper*, 51 F.3d at 1236. Specifically, such a party can move for judgment as a matter of law under Rule 50(a) and renew its motion after the jury verdict under Rule 50(b). *Id.* Thus, justice can be achieved under Rule 50 as currently written as long as parties exercise their right to make timely Rule 50 motions. For that reason, it is not worth sacrificing the goals of “speedy and inexpensive” determinations of actions to create a bifurcated rule, when justice can be preserved in another, simple way—by properly moving under Rule 50.

Thus, in order to advance the goals of the Rules, and to preserve the purpose of summary judgment motions, this Court should resolve the current circuit split by rejecting the “purely legal” exception to Rule 50.

D. If, in the alternative, this Court holds that there is an exception to Rule 50 for “purely legal” claims, then this Court should still vacate the decision below because Kill-a-Byte’s due process claim is not “purely legal.”

Even if this Court adopts the approach that Rule 50 motions are only required for “factual” claims, and not for “purely legal” claims, it should still vacate the decision below because Kill-a-Byte’s due process claim is not “purely legal.” Kill-a-Byte’s due process claim was not “purely legal” because certain factual evidence presented at trial was relevant for determining whether New Truro’s public nuisance law was supported by a “legitimate governmental interest” under rational basis review. Thus, even if this Court were to adopt the Thirteenth Circuit’s interpretation of Rule 50, Kill-a-Byte’s due process claim would not fit within the “purely legal” exception.

Additionally, the policy reasons for allowing certain legal issues to be reviewed before a full adjudication of a case, such as qualified immunity claims, do not apply to due process claims. Qualified immunity affects whether a defendant will have to bear the burden of discovery or not; a due process claim, on the other hand, does not protect the government against the burdens of litigation. For that reason, the policy justification for allowing qualified immunity claims to be reviewed before a full adjudication of the case does not apply to due process claims.

1. There are factual issues involved in determining whether economic legislation is “arbitrary and irrational” under the Due Process Clause; thus, due process claims are not “purely legal.”

In any case involving a due process claim regarding economic legislation, evidence of a “rational legislative purpose” will be relevant in showing that the government’s action was not “arbitrary and irrational.” *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). In the present case, the evidence of New Truro’s “rational legislative purpose” or “legitimate government interest” behind its public nuisance law was its interest in preserving public safety. The facts of the case are crucial to demonstrate the validity of this rational legislative purpose. For example, New Truro presented evidence at trial that Kill-a-Byte’s product threatened public safety, including expert testimony that the game had “trained a generation of killers.” (Pet. App. 3a, 21a.) This shows that the evidence at trial and the specific facts of the case are critical to a determination of the due process claim involved here. Judge Despard of the Thirteenth Circuit agreed that the facts played a role in the majority’s analysis of the due process issue, in his dissent. (Pet. App. 18a.) In particular, he found that “it seems

impossible that the majority's due process analysis was uninfluenced by the extraordinary verdict in favor of the City and the City's clarification of its legal theories through evidence presented at trial." (*Id.*) For these reasons, this Court should hold that Kill-a-Byte's due process claim is not "purely legal;" thus, even if this Court adopts the Thirteenth Circuit's interpretation of Rule 50, it should still hold that Kill-a-Byte failed to properly preserve its due process claim for the Thirteenth Circuit's review.

2. The policy reasons for allowing some "legal" issues to be reviewed through interlocutory appeal do not apply to due process claims.

Respondent may argue that if legal issues, such as qualified immunity, can be reviewed through interlocutory appeal, before a full adjudication of the case, then they certainly should always be suitable for review by an appellate court after a jury verdict has been reached. This Court should not be persuaded by this argument, because the policy reasons for allowing interlocutory appeal of certain legal issues such as qualified immunity, are not applicable to due process issues.

This Court has allowed interlocutory appeals on qualified immunity claims because qualified immunity is "both a defense to liability and a limited entitlement to not stand trial or face the other burdens of litigation." *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009). Thus, it is an issue that must be decided before trial to determine if the defendant will have to bear the burdens of discovery or not. *Id.* A due process claim, on the other hand, does not protect the government against the burdens of litigation; therefore, the policy reason for allowing qualified immunity claims to be reviewed through interlocutory appeal does not apply to due process claims.

For these reasons, this Court should hold that a due process claim can only be reserved for review by making timely Rule 50 motions. Since Kill-a-Byte failed to do so, its due process claim was not preserved for the Thirteenth Circuit's review in this case; thus, the Thirteenth Circuit's decision regarding that issue should be vacated.

II. Even if this Court finds that Kill-a-Byte preserved its due process claim, New Truro should succeed on the merits because imposition of civil liability on Kill-a-Byte is consistent with due process.

Even if this Court finds in favor of Kill-a-Byte on the procedural issue, New Truro should succeed on the merits. New Truro can impose civil liability on Kill-a-Byte pursuant to its public nuisance law because neither the City's liability theory nor the district court's abatement judgment were so unfair as to violate the constitutional guarantee of due process. This Court should overrule the Thirteenth Circuit Court of Appeals and find that the City's public nuisance law does not violate due process for three reasons. First, the substantial factor test, under which New Truro finds Kill-a-Byte liable for public nuisance, is a well-accepted theory within the bounds of due process. Second, the public nuisance law is an economic regulation that passes rational basis review, the standard under which the Court evaluates such legislation for violations of substantive due process. Under the same rational basis review, the imposition of liability against Kill-a-Byte does not violate due process based on retroactivity. Finally, the Full Faith and Credit Act requires this Court to give preclusive effect to the New Texas Supreme Court's judgment of state law. When each aspect of New Texas's claim satisfies due process, it should not be invalidated.

A. New Tejas’s substantial factor test, used to assign liability under its public nuisance law, does not violate due process.

New Tejas’s substantial factor test, used to assign liability under its public nuisance law, is an accepted tort theory for determining causation and allocating responsibility. Due process jurisprudence does not put the validity of this theory into question.

1. Use of the substantial factor test and its liability framework is not unique to New Truro.

While innovative, New Truro’s use of the substantial factor liability test in this context is well-precedented. Many states have adopted the substantial factor test, under which an act or omission is considered a cause-in-fact if it was a “substantial” or “contributing” factor in producing a given result. *See, e.g., Daniels v. John Crane, Inc.*, 46 N.E.3d 655, 668 (Ill. App. Ct. 2019); *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1047 (Pa. 2016); *Greathouse v. Amcord, Inc.*, 41 Cal. Rptr. 2d 561, 563 (Cal. Ct. App. 1995); *Kyriss v. State*, 707 P.2d 5, 8 (Mont. 1985). As the Western District of New Tejas pointed out, states are given leeway to adopt “innovative schemes of causation and responsibility.” (Pet. App. 31a.) *See Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 624 (7th Cir. 2014) (noting the existence of “common-law developments in tort schemes where causation-in-fact is not required for recovery and liability is instead premised in some way on the defendants’ contribution to the risk of injury”).

Further, findings of nuisance have been upheld under standards more lenient than the substantial factor test. *See San Diego Gas & Elec. Co. v. San Diego Reg’l Water Quality Control Bd.*, 36 Cal. App. 5th 427, 436, 248 Cal. Rptr. 3d 496, 502 (2019). In *San Diego Gas & Electric*, a water quality control board found that a utility

company had “caused or permitted waste to be discharged into the bay, and thereby created, or threatened to create, pollution and nuisance conditions.” *Id.* at 431. The utility company contested the subsequent cleanup and abatement order, arguing that the board was required to find that it had been a substantial factor in the creation of pollution to make a finding of nuisance. *Id.* The Fourth District Court of Appeals rejected this argument, determining that the company could be held liable based solely on the fact that the waste discharged by the company created, or threatened to create, a condition of pollution or nuisance. *Id.* at 443. The court explained that nuisance jurisprudence did not require proof that the defendant’s act was a “substantial factor” or “but for” cause of the resulting nuisance. *Id.* at 439. Thus, the cleanup and abatement order could be issued without a finding that the named responsible person was a substantial factor in creating the nuisance. *Id.* at 442.

The aforementioned cases demonstrate the settled nature of substantial factor liability and illustrate how creative development of state tort law is widely accepted. Accordingly, New Truro’s application of the substantial factor scheme in this case reflects an appropriate use of state tort law innovation within the bounds of due process.

2. Kill-a-Byte’s product was a substantial factor in New Truro’s increased crime rate, and it interfered with the City’s public safety.

The jury correctly determined that Kill-a-Byte’s product was a substantial factor in causing harm to New Truro’s public safety. “Substantial factor” causation is a legal cause of harm to another if “his conduct is a substantial factor in bringing about the harm[.]” Restatement (Second) of Torts § 431; *see also id.*, cmt. b (if the

actor's conduct "had any effect in producing" the harm but there were other causes in addition, then the actor is liable if the actors' conduct "ha[d] a substantial as distinguished from a merely negligible effect in bringing about the plaintiff's harm").

The City presented the jury with ample evidence tying Kill-a-Byte's conduct to the harm the City suffered. At trial, the jury weighed the City's evidence with that presented by Kill-a-Byte in its defense and properly issued the verdict that Kill-a-Byte was a substantial factor contributing to New Truro's increasing crime rate. While it is undisputed that other factors may have played a role, Kill-a-Byte intentionally took action that endangered New Truro's public safety without attempting to prevent or mitigate the harm; as a result, New Truro's crime rose steeply.

Kill-a-Byte created a highly graphic, violent, and addictive video game without taking any measures to mitigate its harm to users and their communities. Kill-a-Byte designed its videogame to be widely accessible and highly addictive, and then the corporation worked to keep as many users as possible in the game for great amounts of time. (Pet. App. 23a.) This fact is evidenced by the "free to play model," the database Kill-a-Byte maintained with its user's statistics, and the upgrades it used to increase the player pool and time of engagement. (Pet. App. 20a—23a.)

Unfortunately, Kill-a-Byte's efforts were successful. Over 50% of New Truro's male residents between the ages of 15 and 25 played the game for at least 10 hours every week. (Pet. App. 22a.) The most active users logged over 35 hours a week. (Pet. App. 22a.) Poor educational achievement, unemployment, low earning potential, and

the likelihood that an individual would engage in criminal activity rose in correlation to time spent playing Kill-a-Byte's videogame. (Pet. App. 23a—24a.) At trial, neurologists testified that exposure to, and participation in, violence through video games can affect developing minds, desensitizing them to violence and making them more likely to engage in this behavior in real life. (Pet. App. 24a.) One expert stated that Kill-a-Byte's game had "trained a generation of killers." (Pet. App. 3a.) Other experts noted that gameplay was likely to encourage real-world violence by rewarding fast, unthinking, and violent reflexes. (Pet. App. 24a.) New Truro saw the effects of the game manifest in its rising crime rate—a crime rate six times the national average. (Pet. App. 25a.)

Although Kill-a-Byte's proliferation of the game substantially interfered with New Truro's public safety, the corporation did not take any action to mitigate the negative effects of extensive violent videogame play. It is undisputed that daily or weekly time limits would have been simple for Kill-a-Byte to implement. (Pet. App. 23a, fn. 2.) Yet, the company chose to ignore the negative effects of its product to increase its profits.

In light of these facts, the jury properly concluded that Kill-a-Byte's product was a substantial factor in New Truro's increased crime rate, and this finding was not in violation of due process. Kill-a-Byte profited from its interference with public safety, and the lower court rightly held it accountable for abating the City's harm.

B. New Truro’s public nuisance law, as economic legislation, passes rational basis review; thus, it does not violate due process based on retroactivity.

Imposition of civil liability against Kill-a-Byte does not violate due process because it is an economic regulation that passes rational basis review, despite the retroactivity of the New Tejas Supreme Court’s decision. This Court has explained that “legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality.” *Usery*, 428 U.S. at 15. In challenging an economic law on due process grounds, the burden rests with the challenging party “to establish that the legislature has acted in an arbitrary and irrational way.” *Id.* While “retroactive legislation does have to meet a burden not faced by legislation that has only future effects . . . that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.” *Pension Ben. Guar. Corp.*, 467 U.S. at 730. Courts have also recognized that while these tests are normally applied to state legislative action, “even more deference is owed to *judicial* common-law developments.” *Gibson*, 760 F.3d at 622.

New Truro’s public nuisance law, as economic legislation, passes rational basis review; thus, it does not violate due process based on retroactivity. First, New Truro had a rational government interest in preserving public safety; therefore, its regulation of Kill-a-Byte passes rational basis review. Second, imposition of liability against Kill-a-Byte does not violate due process based on retroactivity because the law was not arbitrary and irrational and did not violate the principles of fundamental fairness.

1. New Truro's public nuisance law is an economic regulation that passes rational basis review.

New Truro's public nuisance law is economic in nature; thus, it should be upheld under rational basis review. The law "adjust[s] the burdens and benefits of economic life" in New Truro by regulating the economic relationship between the community and Kill-a-Byte. *See Usery*, 428 U.S. at 15. New Truro implemented the regulation to reduce the burden of Kill-a-Byte's product on violence and crime in the City. Thus, analysis must begin with the recognition that the Constitution affords significant deference to state (and local) laws, including common law development of tort liability. (Pet. App. 1a, 8a–9a.) *See also Gibson*, 760 F.3d at 614.

Economic laws are accorded a strong presumption of validity. *Heller v. Doe*, 509 U.S. 312, 319 (1993). Under rational basis review, state economic law does not violate substantive due process unless the law is arbitrary and irrational. *Gibson* 760 F.3d, at 621 (citing *Usery*, 428 U.S. at 15). This Court should uphold the law if there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." *See Heller*, 509 U.S. at 320. Courts have also recognized that rational basis review can apply where a local government uses the common law to adjust the burdens and benefits of economic life. *See Rogers v. Tennessee*, 532 U.S. 451, 461 (2001) (stating that the common law is "the incremental and reasoned development of precedent"); *see also Gibson*, 760 F.3d at 622 ("while we have been setting out the deferential standard for reviewing state legislation, even more deference is owed to *judicial* common-law developments").

Applying these principles, New Truro’s use of public nuisance law was a rational way to promote public safety. New Truro has a legitimate government interest in keeping its citizens safe; public safety is one of the predominant goals of state and local government pursuant to their police power. After all, the violence of Kill-a-Byte’s product “trained a generation of killers.” (Pet. App. 3a, 21a.) In response to this threat, New Truro enforced its public nuisance law to collect abatement from Kill-a-Byte that will further the City’s goal of increasing public safety. Such means are rational in response to Kill-a-Byte’s harm, and the City must be afforded a strong presumption of validity in reaching its ends.

New Truro’s economic use of public nuisance law to protect public safety was neither arbitrary nor irrational; therefore, its imposition of civil liability does not violate due process.

2. Imposition of liability against Kill-a-Byte does not violate due process based on retroactivity.

The judgment of liability against Kill-a-Byte does not violate due process on the grounds of the retroactivity of the New Texas Supreme Court’s decision. While the questions certified by the Thirteenth Circuit to the New Texas Supreme Court confirmed for the first time that the substantial factor test was a valid theory of liability in New Texas, this common law development affects economic expectations and should be extended the presumption of constitutionality explained in *Usery*. 428 U.S. at 15. The decision of the New Texas Supreme Court, furthering the common law development of New Texas, was neither arbitrary nor irrational. (Pet. App. 4a–5a.)

Furthermore, the decision was justified by a rational purpose and did not violate the principles of fundamental fairness.

a. The decision of the New Tejas Supreme Court was neither arbitrary nor irrational in applying the substantial factor test retroactively.

The response of the New Tejas Supreme Court to the certified questions from the Thirteenth Circuit was neither arbitrary nor irrational. Regarding the arbitrary and irrational standard for due process review, “rational-basis review applies ‘even though the effect of the legislation is to impose a new duty or liability based on past acts.’” *Gibson*, 760 F.3d at 621–22, (quoting *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 637 (1993)). In general, courts express a “distrust of retroactive statutes.” *E. Enters. v. Apfel*, 524 U.S. 498, 547 (1998) (Kennedy, J. concurring). However, a retroactive application that “readjust[s] rights and burdens is not unlawful solely because it upsets otherwise settled expectations.” *Concrete Pipe*, 508 U.S. at 637.

There is no clear precedent that can be gleaned from the *Apfel* decision that acts as binding precedent in this case. *See Gibson*, 760 F.3d at 620. In support of its decision that the retroactivity of the New Tejas Supreme Court’s response violated due process, the Thirteenth Circuit relied heavily on *Apfel*. (Pet. App. 12a–13a.) In *Apfel*, the Court considered the case of the retroactive application of the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act). *Apfel*, 524 U.S. at 504–520. Eastern Enterprises operated in the coal industry prior to the transfer of its coal operations to a subsidiary at the end of 1965. *Id.* at 516. However, after the enactment of the Coal Act, Eastern was obligated to pay certain premiums to over 1,000 former

employees who worked for the company prior to 1966. *Id.* With the Court split between a plurality and several concurrences and dissents, it determined that the retroactive application of the Coal Act was unconstitutional. *Id.* at 538. The plurality reached this determination under the Takings Clause of the Fifth Amendment. *Id.* at 532. In his concurrence, which is the focus of the Thirteenth Circuit’s discussion of the case, Justice Kennedy instead analyzed the law “under general due process principles rather than under the Takings Clause.” *Id.* at 545. Justice Kennedy explained that by “creating liability for events which occurred 35 years ago[,] the Coal Act has a retroactive effect of unprecedented scope.” *Id.* at 549. This scope made the Coal Act one of the “rare instances” where a law failed to meet the arbitrary and irrational standard. *Id.* In dissent, Justice Stevens supported Justice Kennedy’s analysis under due process, but reached the conclusion that the law was not unconstitutional because it applied only to specific employees of the company before 1966. *Id.* at 559–61.

Relying on *Apfel*, the Thirteenth Circuit found “no difference between legislation with retroactive effects and the development of common-law liability with retroactive effects.” (Pet. App. 12a.) The Thirteenth Circuit seems to have adopted a position explained in *Gibson*:

[T]he opinions in [*Apfel*] established a substantive due process right that invalidates state law when the law “imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties’ experience.”

Gibson, 760 F.3d at 618–19 (quoting *Apfel*, 524 U.S. at 528–29). However, circuit courts have recognized that there is “difficulty in combining a concurring opinion and a dissenting opinion to arrive at binding precedent.” *Gibson*, 760 F.3d at 620. According to this principle, *Apfel*’s holding on constitutionality of the Coal Act “is the only binding precedent that arises from the case.” *Id.* at 620. In cases of split opinions from the Court, “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” *Marks v. United States*, 430 U.S. 188, 193 (1977). However, the narrowest grounds analysis does not fit with *Apfel*, as “[t]he five Justices who concurred in the judgments . . . did not even agree on which constitutional provision applied to the Coal Act to render it invalid.” *Gibson*, 760 F.3d at 619 (citation omitted). Several “[c]ircuits agree that no governing holding emerged from [*Apfel*].” *Id.* at 620; *see also United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003); *A.T. Massey Coal Co. v. Massanari*, 305 F.3d 226, 240–41 (4th Cir. 2002); *Anker Energy Corp. v. Consol. Coal Co.*, 177 F.3d 161, 172 (3d Cir. 1999); *Ass’n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1256 (D.C. Cir. 1998). Without binding precedent from *Apfel*, “we are back to where we started: economic legislation does not violate substantive due process unless the law is arbitrary and irrational.” *Gibson*, 760 F.3d at 621. Economic law that “readjust[s] rights and burdens is not unlawful solely because it upsets otherwise settled expectations.” *Concrete Pipe*, 508 U.S. at 637.

The New Texas Supreme Court’s validation of the substantial factor theory of liability is not unconstitutional based on the decision’s retroactivity, as *New Truro*’s

nuisance law and theory of liability are not arbitrary and irrational. As discussed above, New Truro had a legitimate government interest in promoting public safety pursuant to the State’s police power. Evidence presented to the district court by the City was sufficient to show that Kill-a-Byte’s actions in promoting and selling its video game jeopardized public safety and interfered with the government’s interest in public safety. The New Texas Supreme Court found the evidence from the game itself, combined with the expert testimony, sufficient to establish liability under state law. (Pet. App. 4a–5a.) As further established above, the substantial factor test is a valid standard for determining liability in nuisance cases. This decision and the underlying public nuisance law are rationally related to the City’s interest in promoting public safety, and the decision is not arbitrary and irrational.

b. The retroactive application of New Texas’s public nuisance law was justified by a rational purpose and did not violate the principles of fundamental fairness.

The retroactive application of New Texas’s public nuisance law was justified by a rational purpose and did not violate the principles of fundamental fairness. Again, relying on the *Apfel* decision, the Thirteenth Circuit determined that the imposition of liability on Kill-a-Byte implicated fairness and was “equally unfair whether the judgment [was] analyzed based on due process or as a taking.” (Pet. App. 13a.) In *Apfel*, the plurality explained that “[t]he distance into the past that the Coal Act reaches back to impose liability on Eastern and the magnitude of that liability raise substantial fairness questions.” *Apfel*, 524 U.S. at 534. The plurality further stated “legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of

that liability is substantially disproportionate to the parties' experience." *Id.* at 528–29.

Courts in similar cases imposed liability against product manufacturers through retroactive application of changes in economic law. *See Gibson*, 760 F.3d at 627. Courts have recognized that there is “substantial leeway’ given to state courts to develop the common law.” *Id.* at 625 (quoting *Rogers*, 532 U.S. at 461). Indeed, “even more deference is owed to *judicial* common-law developments, which by their nature must operate retroactively on the parties in the case.” *Id.* at 622. In *Gibson*, a homeowner sued several paint manufacturers alleging harm based on their use of white lead carbonate pigment. *Id.* at 604. In 1978, lead was banned from being added to residential paint. *Id.* at 605. Although the plaintiff moved into the home in 1997, the paint in his house contained lead that had been applied some time prior to the ban when lead paint was still lawful. *Id.* at 604–05. While the plaintiff was not able to identify which of the six defendant paint manufacturers produced the paint used in the home, a 2005 decision from the Wisconsin Supreme Court applied retroactively specifically to lead paint cases. *Id.* at 606. This decision provided that so long as a plaintiff made a prima facie showing that the manufacturer produced or marketed lead paint sometime during the house’s existence, then the burden was on each manufacturer to prove that it did not produce or market lead paint either during the house’s existence or in the geographical market where the house was located. *Id.* This “risk-attribution” theory of liability allowed a plaintiff to sue the industry as a whole in absence of the ability to show that any one manufacturer was independently

responsible for the harm. *Id.* at 604. After a grant of summary judgment for defendants, plaintiff appealed, and the Seventh Circuit considered the retroactivity of the Wisconsin Supreme Court decision under the Due Process Clause. *Id.* at 605.

In deciding *Gibson*, the Seventh Circuit explained that “[t]he development of state common law is a fundamental feature of our legal system.” *Id.* at 622. The common law system depends on “the incremental and reasoned development of precedent.” *Id.* The court noted that “[i]f strict constraints on retroactivity applied to state-court common-law decisions, then the development of common law would be impaired.” *Id.* In finding that the risk-attribution theory was not unconstitutional, the court noted that due process limits judicial common law decisions, but “only if the judicial decision ‘is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.’” *Id.* (quoting *Rogers*, 532 U.S. at 457, 462). This leeway for state courts to develop the common law in ways that may affect settled expectations is justified by “[t]he need to adjust the common law as new cases are presented.” *Id.* at 623. The court noted that in formulating the risk-contribution theory, the Wisconsin Supreme Court “did not entirely eliminate causation,” still requiring plaintiffs to prove that defendants engaged in specific conduct during the relevant time period. *Id.* at 624. However, the court still found that where this causation was shown, the risk-attribution theory could constitutionally be used to impose liability because “[t]he manufacturers either knew or should have known of the harm that they were causing.” *Id.* at 623.

In this case, the New Texas Supreme Court's acceptance of public nuisance liability through the substantial factor test was related to a rational purpose and did not violate principles of fundamental fairness. As explained above, the substantial factor test was necessary for the City to prove liability through a combination of substantial factors that worked to cause the harm of the increased crime rate. This public nuisance law and theory of substantial factor liability, itself an economic regulation, serves the rational purpose of allowing the City to use its police power to promote public safety. Furthermore, like the risk-attribution theory of liability discussed in *Gibson*, the decision of the New Texas Supreme Court does not violate due process or the principles of fundamental fairness. The decision to accept this theory of liability was within the scope of the leeway granted to state courts in their development of common law. As mentioned in *Gibson*, the development of the common law is fundamental to a state's legal system, and any decision affecting the common law will have retroactive effect. Indeed, to preclude any common law judgment from having retroactive effect would be to impede the judicial process. Deference is due to developments in the common law, especially in the area of economic regulation.

While the Thirteenth Circuit stated that this retroactive application would even be unfair "as a taking," the court provided no explanation for this conclusion. (Pet. App. 13a.) This case is similar to *Gibson*, as the New Texas decision still requires a plaintiff to prove causation. Furthermore, the harm alleged and proven to the district court in this case is even more recent in time than the application of the lead

paint in *Gibson*. This case does not require the court to reach far back in time to find the harm. Instead, the harm in this case is recent and ongoing, and the City was able to prove causality under the theory and evidence standard required by the New Tejas Supreme Court. The retroactive imposition of liability against Kill-a-Byte does not violate the principles of fundamental fairness. Therefore, the retroactive application of the New Tejas Supreme Court's response to the Thirteenth Circuit's certified questions does not violate due process.

C. Federal courts interpreting state law must give preclusive effect to state court judgment.

Finding that New Tejas's statute survives rational basis review and does not violate due process, this Court must interpret state law to give preclusive effect to state court judgment. In its power to develop state tort law, liability for public nuisance falls well within the State's historic powers to protect the health, safety, and property rights of its citizens. *See In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F.3d 65, 96 (2d Cir. 2013).

The Full Faith and Credit Act, 28 U.S.C. § 1738, requires federal courts to "give preclusive effect to a state court judgment to the same extent as would courts of the state in which the judgment was entered." *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1181 (11th Cir. 2017). Under this Act, "federal courts generally should respect state court judgments, even where erroneous." *Id.* at 1185. *See also Hickerson v. City of New York*, 146 F.3d 99, 107 (2d Cir. 1998) ("[T]o second-guess [the state] court's determination of this issue would violate the full faith and credit statute.")). As long as state proceedings "satisfied the minimum procedural requirements" of due

process, the relevant doctrine should stand. *Id.* at 1184 (citing *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481 (1982)).

According to the statute, this Court should decide only whether applying New Tejas law in this case violates due process. As established above, New Truro's use of public nuisance in its claims against Kill-a-Byte was valid and constitutional. Therefore, the decision of the New Tejas Supreme Court confirming that the City's liability theory was viable, the City's evidence was sufficient, and the abatement award was recoverable, is entitled to full faith and credit.

The decision of the New Tejas Supreme Court did not violate due process. Thus, the Thirteenth Circuit should be vacated, and the New Tejas Supreme Court's holding should be affirmed.

III. The abatement ordered by the Western District of New Tejas does not violate the restrictions on punitive damages, and the cost was rationally allocated to Kill-a-Byte.

The abatement ordered by the Western District of New Tejas does not violate the restrictions on punitive damages, and the cost was rationally allocated to Kill-a-Byte. The judgment against Kill-a-Byte did not violate restrictions on punitive damages, as the damage award was not a punitive damages award but was instead equitable relief for the cost of abating a public nuisance. The abatement, like all awards of this type, was equitable in nature and provided a prospective remedy that compensated New Truro for the costs of rectifying the nuisance; it was not designed to punish past harms or to deter future conduct. The cost was also rationally allocated to Kill-a-Byte because the district court was not arbitrary in its judgment. The district court duly considered the abatement amount and how it could be allocated during a

two-week bench trial dedicated to the abatement issue alone. This illustrates rational consideration in allocating the cost to Kill-a-Byte; the allocation did not have to be the wisest, fairest, or most practical to be within the bounds of due process.

A. The abatement award to New Truro did not violate the restrictions on punitive damages, as the damage award consisted of an equitable remedy for abatement costs rather than punitive damages.

The district court’s damage award to New Truro did not violate restrictions on punitive damages, as the damage award was not a punitive damages award but was instead equitable relief for the cost of abating a public nuisance. This Court has noted that “[w]hile States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 438 U.S. 408, 416 (2003). Due process “prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.” *Id.* at 416. When evaluating whether an award of punitive damages is excessive or arbitrary, courts will consider: (1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Id.* at 418, (citing *BMW of N. Am. v. Gore*, 517 U.S. 559, 575 (1996)). Subject to these principles, “[s]tates enjoy considerable discretion in deducing when punitive damages are warranted.” *Id.* at 427. The purpose of punitive damages is “to punish [a party] for [its] outrageous conduct and to deter [the party] and others . . . from similar conduct in the future.” Restatement (Second) of Torts § 908(1).

However, while there are due process restrictions on punitive damages, the Thirteenth Circuit noted that “the City technically seeks ‘abatement’ rather than damages, and the City seeks to ‘abate’ a concrete injury that it has suffered.” (Pet. App. 13a.) The City’s abatement claim is more analogous to compensatory damages, which “are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrongful conduct.” *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). Even still, “the fact that ‘nuisance’ is sometimes characterized as a variety of ‘tort’ does not change the fact that an equitable claim to abate a nuisance is not a tort claim seeking compensatory damages.” *In re Nat’l Prescription Opiate Litig.* 2019 U.S. Dist. LEXIS 150567, *67 (N.D. Ohio 2019); *see also* Louise A. Halper, *Public Nuisance and Public Plaintiffs: Rediscovering the Common Law (Part I)*, 16 E.L.R. 10292, 10292 (1986) (“[T]he sovereign’s suit against a nuisance is not a tort action, but an exercise of the police power . . .”). While tort damages are often designed to remedy or punish past harms or deter future conduct, “abatement is equitable in nature and provides a prospective remedy that compensates a plaintiff for the costs of rectifying the nuisance.” *Opiate Litig.*, 2019 U.S. Dist. LEXIS 150567 at *67.

Equitable abatement in public nuisance claims involving the sale of products is not a novel legal concept. *See People v. Atl. Richfield Co.*, 2014 Cal. Super. LEXIS 1426 (Cal. Super. Ct. Jan. 7, 2014). In *Atl. Richfield Co.*, numerous County Counsels for the State of California sued several paint manufacturers for public nuisance, among other claims. *Id.* at *12–14. The public nuisance claim centered on the

defendants' knowing production of lead-based paint products that proved hazardous when used. *Id.* at *15. The court noted that because the plaintiffs sought abatement costs rather than damages, the plaintiffs could "obtain relief before the hazard causes any physical injury or physical damage to property." *Id.* Furthermore, the court explained that public nuisance claims are "not premised on a defect in a product or a failure to warn but on affirmative conduct that assisted in the creation of a hazardous condition." *Id.* The court also explained that liability for public nuisance does not depend on whether a defendant "is in a position to abate the nuisance; the critical question is whether the defendant *created or assisted in the creation of the nuisance.*" *Id.* at *16, (citing *Cty. of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 325–26 (Cal. Ct. App. 2006)). After finding causation under California law, the court entered a judgment for the plaintiffs, ordering several defendants to pay over \$1.1 billion to an abatement fund to be used by the plaintiffs for "lead detection, removal, and prevention." *Id.* at *189.

In the present case, the district court's judgment ordering abatement costs to the plaintiff is not barred by the restrictions on punitive damages. Rather than punitive damages seeking to deter future conduct, abatement costs sought by the City are requested specifically to abate and remedy the nuisance of an increased crime rate for which Kill-a-Byte was a substantial factor. The district court's order specifically states that the \$613.2 million to the City was "the cost of abatement of the public nuisance." (Pet. App. 33a.) The language in this order and in the court's opinion beginning at page 19a of the Petitioner's Appendix contains no indication that

the judge was granting this remedy for the purpose of deterring future conduct or any other punitive purpose. The court specifically stated that the remedy sought by the City “is focused on redressing the concrete loss . . . it has suffered by reason of Kill-a-Byte’s conduct.” (Pet. App. 31a.) This language indicates that the judgment against Kill-a-Byte does not constitute punitive damages, and the restrictions placed on punitive damages by *Gore* and *State Farm* are inapplicable to the present case.

Even if the factors outlined in *Gore* and *State Farm* applied to the remedy in this case, the amount awarded to the City is not affected by these restrictions. First, as to the degree of reprehensibility, it is true that the sale of the video games by Kill-a-Byte was not itself illegal. However, the violent video game sold by Kill-a-Byte involved battles to the death with other players using “both primitive and futuristic weapons.” (Pet. App. 2a.) Furthermore, experts at trial estimated that over half of the male residents of the City aged 15–25 played the game at least ten hours each week. (*Id.*) By the time the district court reached the question of damages, a jury had already found Kill-a-Byte liable for its conduct being a substantial factor in the increase in the City’s crime rate. As to the second *Gore* factor, the abatement amount ordered by the court is not disproportionate to the harm suffered by the City. The cost of the City’s abatement of its increased crime rate could involve a range of funding increases for police, schools, street lighting, and other programming designed to decrease the City’s crime rate. Finally, as to the third factor, *Atl. Richfield Co.* shows that abatement awards of this magnitude are not unprecedented, even in cases where product sales that were legal at the time are ultimately a cause of a public nuisance.

In addition, rather than punitive damages awarded by a jury, this abatement amount was ordered by a judge after a bench trial for damage calculation. The trial judge heard all of the evidence presented to the jury in the liability phase and presented directly to the bench in the damages phase, and the amount awarded to the City was based on the reasonable cost of abating the nuisance for which Kill-a-Byte was a substantial factor. The abatement costs awarded to the City in this case are not restricted by the limitations on punitive damages.

B. The district court rationally allocated the abatement cost to Kill-a-Byte.

The district court’s judgment rationally allocated the abatement cost to Kill-a-Byte. This Court has held that it is enough if the problem of cost-spreading is approached rationally; the Court should not “weigh whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances.” *Usery*, 428 U.S. at 18. Further, the cost of abating a nuisance does not have to be “reasonable,” and the allocation scheme does not have to be the “fairest.” (Pet. App. 30a.) (citing *People v. ConAgra Grocery Products Co.*, 227 Cal. Rptr. 3d 499, 550 (Cal. App. 2017)); *Nat’l R. Passenger Corp. v. Atchison, T. & S. F. R. Co.*, 470 U.S. 451, 477–78 (1985).

Costs cannot be struck down simply because they are sizable; meritorious public nuisance actions often lead to large judgments and abatement costs that mirror the great harm done. For example, in the Second Circuit a \$104.69 million judgment was entered in favor of the City of New York against Exxon Mobil Corporation after a jury found Exxon liable under New York tort law for contaminating city-owned wells with chemicals. *In re MTBE*, 725 F.3d at 78–79.

Similarly, the 6th District Court of Appeals in California held that manufacturers promoting lead paint for interior residential use caused a public nuisance that supported an abatement order of \$1.15 billion. *ConAgra Grocery*, 17 Cal. App. 5th at 79. In each case, the courts affirmed the constitutional validity of the large judgments against challenges that the costs exceeded the tortfeasors' responsibility for the nuisance. *See ConAgra Grocery*, 17 Cal. App. 5th at 120; *In re MTBE*, 725 F.3d at 117.

The Thirteenth Circuit's conclusion that the lower court had to spread the cost among other, unidentified, factors to New Truro's harm is incompatible with the principles of tort liability and damage allocation. New Truro, as the harmed party, deserves to be made whole by those responsible for contributing to its harm. Analogously, according to joint and severable liability principles outlined in the Restatement (Second) of Torts, when a court determines that apportionment of liability cannot be accomplished, each defendant who contributed is liable for the entire harm. *See Restatement (Second) of Torts*, § 840E, cmt. c. The reason for imposing liability on each for the entire consequence is that there exists no basis for dividing damages, and the law is "loath to permit an innocent plaintiff to suffer as against a wrongdoing defendant." *ConAgra Grocery*, 17 Cal. App. 5th at 117–18. Further, if defendants are independent tortfeasors liable for the damage they caused, then where apportionment of liability is incapable of proof the innocent wronged party should not be deprived of its right to redress. *Id.* The same principles apply here in favor of New Truro. While Kill-a-Byte may be correct that other factors contributed

to New Truro's harm, it would be impossible to accurately apportion the liability, and therefore cost, among other externalities that possibly contributed to an increase in crime. According to the policy laid out by the Restatement, it is more rational for the court to hold Kill-a-Byte liable for the harm than to leave the innocent wronged party, New Truro, without relief or redress.

Further, the district court found that Kill-a-Byte distributed and operated a graphically violent videogame that was a substantial factor in the City's increased crime rate, creating the existing public nuisance that requires remediation. Since Kill-a-Byte's conduct contributed to the existing public nuisance that it was ordered to abate, the burden of that remediation is not disproportionate to its individual responsibilities for assisting in the nuisance's creation. As established above, Kill-a-Byte was not being penalized or required to pay punitive damages of any kind. It was simply required to remedy the dangerous conditions that it assisted in creating. Requiring the corporation to do so is not disproportionate to its wrongdoing.

Finally, there were rational reasons for the district court to allocate the cost to Kill-a-Byte. The court presided over a two-week bench trial limited only to the issue of abatement to ensure its judgment was rational. (Pet. App. 4a.) Although the Petitioner's Appendix does not reflect the details of the evidence presented during the bench trial, it does reveal that experts testified at the jury trial that the total cost of abating the public nuisance would "exceed \$600 million." (Pet. App. 25a-26a.) Considering the lengthy trial on the issue of the abatement, it is likely the court was presented with various abatement schemes and remedial cost determinations. These

facts suggest that the court made a rational decision. Even if the parties offered the court cost-spreading schemes that would have been wiser, more practical, more reasonable, or even more fair—the only requirement is that the court weighed the evidence presented and entered a proper judgment. The Western District of New Tejas met this requirement, and rationally allocated the cost of abatement to Kill-a-Byte.

Conclusion

For the reasons stated above, this Court should vacate the Thirteenth Circuit’s decision and reinstate the decision of the District Court for the Western District of New Tejas, affirming its judgment that Kill-a-Byte is liable to the City for public nuisance and must pay the cost of abatement to the City.

Respectfully Submitted,

_____/s/
Team 76
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