CASE NO. 18-102

IN THE

SUPREME COURT OF THE UNITED STATES

CITY OF NEW TOURO, 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

Attorneys for Petitioner
Team 81

QUESTIONS PRESENTED

I. Whether the Thirteenth Circuit erred in ruling that Kill-a-Byte preserved its Due Process argument when Kill-a-Byte failed to follow the Federal Rules of Civil Procedure, cannot avail any exceptions, and policy weighs in favor of forfeiture.

II. Whether the Thirteenth Circuit erred in ruling that New Truro violated Kill-a-Byte's Due Process rights when the company intentionally promoted and distributed a violent video game that deteriorated its players' lives and caused a massive increase in crime that has substantially interfered with the citizens of New Truro's right to public safety.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Federal Appellate Court Cases

Federal District Court Cases

State Court Cases

Constitutional Provisions and Statutes

Rules

Other Authorities

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Thirteenth Circuit appears on pages 1a–18a (Appendix A) to the Petition for Writ of Certiorari. The opinion of the United States District Court for the Western District of New Tejas appears on pages 19a–33a (Appendix B).

STATEMENT OF JURISDICTION

The Thirteenth Circuit's judgment was entered on March 21, 2020. The Petitioner timely filed an appeal, and this Court granted writ of certiorari on October 5, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves discussion of Federal Rule 50 of Civil Procedure located at Appendix A of this brief. The central constitutional provision is the Due Process Clause of the Fourteenth Amendment to the United States Constitution located in Appendix B of this brief.

STATEMENT OF THE CASE

The City of New Truro, New Tejas (hereinafter the "City" or "New Truro") faces an epidemic of crime that has developed over the last decade. Pet. App. 2a. The violent and property crime rates are more than six times the national average. Pet. App. 25a. Contributing to this epidemic is widespread unemployment, a lack of education, and poverty. Pet. App. 25a. Currently, over 45% of residents live in poverty and over 15% are unemployed. Pet. App. 25a. The proliferation of these problems within New Tejas has led to significant budget shortfalls, including a

reduction of tax revenue by 50% and a severely underfunded police department. Pet. App. 2a.

The Social Impact of Lightyear

In assessing these issues, the City of New Truro identified one company as a substantial contributor to the wave of violence and devastation – Kill-a-Byte Software, Inc. (hereinafter "Kill-a-Byte"). Pet. App. 2a. Kill-a-Byte is a video game manufacturer that produced an incredibly popular online video game called "Lightyear." Pet. App. 2a. Lightyear is a free, online game where thousands of players fight to the death in the hopes of being the last person alive. Pet. App. 2a. Players utilize various weapons and traps to kill the other players in realistic and gory detail. Pet. App. 21a. This game was so popular that, during its production and distribution from 2003-2013, over 50% of New Truro men between the ages of 15 and 25 played the game for at least 10 hours per week. Pet. App. 2a. "Lightyear Addicts," as the most zealous players were known, played for over 36 hours each week and accounted for 10% of players. Pet. App. 22a. At its peak, the game had over 300 million users worldwide. Pet. App. 22a.

Kill-a-Byte knew how popular the game was as it tracked individual user data and stated that its goal was to maximize the amount of time players spent playing the game. Pet. App. 23a. The goal of increasing gameplay was behind many of the changes and updates made to the game, including significant increases in violence and gore. Pet. App. 23a. Kill-a-Byte never limited gameplay for its users or warned of the potential negative consequences for playing too much. Pet.

App. 23a. Even after reports of students failing classes due to the amount of time playing Lightyear, the company remained committed to its goal of increasing gameplay as much as possible. Pet. App. 23a.

The Role of Kill-a-Byte in Creating a Public Nuisance in New Truro

In response to the practices of Kill-a-Byte, the City of New Truro sued the company for its role in the creation of a public nuisance that infringes upon the right to public safety, and sought money to help abate the nuisance. Pet. App. 25a. In so doing, the City alleged that the production and distribution of Lightyear necessarily caused the conditions that allowed for the nuisance to proliferate. Pet. App. 31a. Specifically, the City alleges that the company intentionally marketed the game to young people with the goal of making them play as long as possible. Pet. App. 2a. The amount of time playing the game led to a population of young males who spent far less time working and getting an education, which then caused higher crime in the community. Pet. App. 23a.

More directly, the City alleged that Lightyear trained players to cultivate a "shoot first" mentality and increase their hand-eye coordination to compete with other players. Pet. App. 22a. These increased reflexes, coupled with the desensitization that occurs by showing thousands of graphic depictions of violence, trained players to be aggressive and kill as quickly as possible. Pet. App. 24a. In so doing, the game created an undereducated, unemployed population with a proclivity for violence. Pet. App. 24a. The City seeks to hold the company financially liable

for the creation of programs and funding aimed at combating the public safety crisis in New Truro. Pet. App. 25a.

Procedural History

The City originally filed its complaint in New Tejas state court alleging that Respondent's distribution and operation of its Lightyear video game negatively affected the City's citizens and substantially interfered with public safety. Pet. App. 19a. Respondents removed the case to the United States District Court for the Western District of New Tejas on May 10, 2017 based on diversity of the parties pursuant to 28 U.S.C.A.§ 1332. Respondents filed their Motion for Summary Judgment under FED. R. CIV. P. 56 asserting that even if the City's claims are viable as a matter of state law, this expansion of liability violates the Due Process Clause of the Fourteenth Amendment. Pet. App. 20a. On May 10, 2017, the District Court denied Kill-a-Byte's Motion for Summary Judgment. Pet. App. 32a. The District Court then presided over a jury trial, which following the conclusion thereof, entered final judgment in favor of the City on March 2, 2019. Pet. App. 33a.

On March 21, 2020, Kill-a-Byte Software, Inc. appealed the New Tejas District Court decision to the United States Court of Appeals for the Thirteenth Circuit. Pet. App. 1a. The Court of Appeals reversed, holding that procedurally, Kill-a-Byte was not required to renew its purely legal arguments in a Rule 50 motion and on the merits, the District Court's judgment violates the Due Process Clause of the Fourteenth Amendment. Pet. App. 5a, 8a. The City of New Truro then appealed to the United States Supreme Court, which granted the petition for

writ of certiorari on October 5, 2020 limited to the questions of 1) whether a party must move for judgment as a matter of law at trial to preserve an argument that the district court rejected in denying summary judgment and; 2) whether state law may impose civil liability on a private party for distributing a product that is later determined to create a public nuisance. Pet. App. 1.

SUMMARY OF THE ARGUMENT

This Court should reverse the Thirteenth Circuit's decision for two reasons. First, the Thirteenth Circuit erred in finding that a party need not preserve its purely legal argument for appeal. Second, it erred in ruling that a state may not impose civil liability on a company for its violation of the state's public nuisance law.

Kill-a-Byte was Required to Move for Judgment as a Matter of Law at Trial

In order to preserve an argument for appeal, Federal Rule 50 of Civil Procedure requires a party to seek judgment as a matter of law. When summary judgment is denied, a party may still contend that it is entitled to judgment as a matter of law. However, federal precedent recognizes that when both Rule 50(a) and Rule 50(b) motions are not made, a party fails to preserve its argument for review on appeal.

Under 28 U.S.C. § 1291, a court of appeals has jurisdiction over lower court decisions limited only to final judgments. A denial of summary judgment is an interlocutory order and by its terms, not final. In addition, Kill-a-Byte's due process argument cannot avail the merger rule because denials of summary judgment do

not merge with the final judgment. Further, allowing the merger rule to apply would not only inundate appellate courts, but undermine the decisions of district courts well beyond the bounds of appellate jurisdiction.

Finally, the Court of Appeals errs in carving out an exception to the rule that a denial of summary judgment is not appealable where the party failed to raise a Rule 50 motion for a question of law. This Court's well-established precedent makes no distinction of questions of law and fact but also reaffirms that a party's only avenues to appeal a denial of summary judgment are under 28 U.S.C §1291 and preservation through Rule 50. Allowing this exception to Rule 50 would overburden federal courts in deciphering legal versus factual bases of denials, undermine district court decisions, and encourage parties to forum shop.

The Federal Rules of Civil Procedure were created to provide clear cut rules and create efficiencies in the federal judicial system. Allowing Kill-a-Byte to preserve its argument for appeal after it failed to raise motions under the low burden of Rule 50 would render judicial processes and the Federal Rules meaningless.

New Truro May Impose Civil Liability on Kill-a-Byte for Violating the State's Public Nuisance Law

The City of New Truro properly utilized its public nuisance laws to hold Kill-a-Byte liable for its creation of a public nuisance through its promotion and distribution of Lightyear. Under New Tejas law of absolute public nuisance, the city must show that (1) the increased crime rate substantially interfered with the right to public safety; and (2) Lightyear was a "substantial factor" in the increased

crime rate. At six times the national average, the crime rate in the city is so high that it has substantially interfered with all citizens right to public safety through actual violence and through severe budget shortfalls.

Kill-a-Byte, in its reckless promotion and distribution of Lightyear, substantially contributed to this nuisance. The company marketed a free game to a vulnerable population while ignoring clear warning signs in their blind pursuit of profits. The use of substantial factor causation to hold a company liable is consistent with the Restatement (Second) of Torts and the public nuisance statutes of other jurisdictions. It is not necessary that Kill-a-Byte had control over every crime that occurred in New Truro, only that they substantially contributed to the conditions that allowed crime to flourish.

In cases of diversity jurisdiction and matters of state common law, federal courts must defer to the laws of the state instead of acting as a legislative body by creating far-reaching policies. Accordingly, this Court must find that the imposition of abatement damages against Kill-a-Byte is not retroactive liability, but a reasonable remedy for a public nuisance consistent with other jurisdictions. Kill-a-Byte profited off of the proliferation of this nuisance at the expense of the citizens of New Truro, and it is their responsibility now to help make the city whole again.

ARGUMENT

I. THE COURT OF APPEALS INCORRECTLY HELD THAT KILL-A-BYTE WAS NOT REQUIRED TO RENEW ITS ARGUMENTS WHERE KILL-A-BYTE FAILED TO FOLLOW PROPER PROCEDURAL REQUIREMENTS AND POLICY WEIGHS IN FAVOR OF FORFEITURE.

Civil Procedure is often viewed as a confusing mass of seemingly unrelated technical rules. It is quite the opposite. Civil Procedure provides clear cut rules to aid in streamlining and creating efficiencies to what often becomes complex litigation. In fact, Federal Rule of Civil Procedure ("Federal Rules") 1 explains that "the rules . . . should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1.

"To deny review seems to be unjust . . . but to grant it . . . would be [more] unjust to the party that was victorious . . . after the evidence was more completely presented," where witnesses were cross-examined and the trier of fact could assess live witnesses' credibility. *Morgan v. Am. Univ.*, 534 A.2d 323, 326 (D.C. Cir. 1987). Allowing a party to preserve an argument for appeal without first observing a Rule 50 motion under the theory of a legal question exception, would render the federal rule meaningless. Additionally, allowing Kill-A-Byte to proceed on this basis undermines the intent behind Rule 50(a) and 50(b) as well as 28 U.S.C. § 1291. If a party no longer needs to follow Rule 50, all denials of summary judgment would effectively be allowed on appeal.

Permitting review of the denial of summary judgment could lead to the "absurd result that one who has sustained his position after a full trial . . . might nevertheless be reversed on appeal." *Morgan*, 534 A.2d at 325.

> Holding that denial of summary judgment is unreviewable in no way prejudices the substantive rights of the party that was denied summary judgment. In a properly litigated case, when it appears during the course of trial that factual issues are indeed not in dispute and are not jury questions, the party denied summary judgment can move for a directed verdict.

Id. Coupled with the low burden of complying with Federal Rule 50 of Civil Procedure and the availability of alternative vehicles to obtain review, the Petitioner urges this Court to find that a party must move for judgment as a matter of law to preserve an argument that was denied summary judgment. Holding that the City of New Truro be subjected to a waived argument would be fundamentally unjust.

A. Preservation of an Argument for Appeal Requires a Party to Present its Argument for Judgment as a Matter of Law Under Rule 50 of The Federal Rules of Civil Procedure.

In order to preserve an argument for appeal, Federal Rule 50 of Civil Procedure requires a party to seek judgment as a matter of law. Under the Federal Rules, a trial judge may remove a case from a jury as a matter of law in one of two ways: first, by a motion for summary judgment under Rule 56 and second, through motions for a judgment as a matter of law under Rule 50(a) and Rule 50(b). FED. R. CIV. P. 50, 56. Under Rule 56, summary judgment should be provided if the relevant pleadings and documents "show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). If the movant does not meet this standard, the district court must deny the summary judgment motion and the case will proceed to trial. *See generally Celotex Corp v. Catrett*, 477 U.S. 317 (explaining FED. R. CIV. P. 56). It is a

well-known principle of the American legal system that the jury is the factfinder, and the judge instructs the jury on the applicable legal principles.

Therefore, when summary judgment is denied, a party may still contend that it is entitled to judgment as a matter of law after the evidence is presented at trial by raising a Rule 50(a) motion. Rule 50(a) allows a party to argue for judgment as a matter of law before the case is submitted to the jury and authorizes the district court to grant such motions at its discretion if "a party has been fully heard on an issue…and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue. . . ." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 135 (2000). A Rule 50(a) motion informs the opposing party of the challenge to the sufficiency of the evidence and gives the party an opportunity to provide additional evidence. FED. R. CIV. P. 50, adv. comm. notes, 2006 amend. This ensures that both parties are aware of the issues earlier in the proceeding rather than later and makes certain the district court can resolve the issues correctly and without delay. *Williams v. Runyon*, 130 F.3d 568, 572 (3d Cir. 1997). Rule 50(a) also allows the court the opportunity to streamline and simplify the trial by resolving issues without submission to the jury. *Id.*

Rule 50(b) sets forth the procedural requirements for renewing this challenge after the verdict and entry of judgment and states: "[I]f 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. . . ." FED. R. CIV. P. 50(b). A party that makes an argument in a Rule 50(a) motion but fails to renew the argument in a Rule 50(b) motion not only prevents the district court the opportunity to assess the sufficiency of the evidence after a full trial on the merits, but fails to give fair and adequate notice to the opposing party. Thus, renewing the motion under both Rule 50(a) and Rule 50(b) is necessary to preserve a party's argument for judgment as a matter of law.

The language of Rule 50(a) and Rule 50(b) states respectively, "a party *may* move for summary judgment . . ." and "a party *may* file a motion . . ." FED. R. CIV. P. 50. Read textually, the "raise or waive" character of Rule 50 is not obvious. While it can be argued that the relevant language is permissive rather than mandatory, courts have historically and repeatedly recognized that forfeiture results when a party fails to properly raise Rule 50 motions. *Runyon*, F.3d at 572, *Orlando v. Billcon Int'l Inc.*, 822 F.2d 1294, 1297–98 (3d Cir.1987); *Perdoni Bros., Inc. v. Concrete Sys., Inc.*, 35 F.3d 1, 3 (1st Cir.1994). This Court has confirmed this position in its' decisions, concluding that failure to raise both a Rule 50(a) and 50(b) motion leaves an appellate court without power to enter judgment to the contrary. *See generally Ortiz v. Jordan*, 562 U.S. 180 (2011), *Unitherm Food Sys. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006) (further explained below).

In *Unitherm*, this Court held that "in the absence of [a Rule 50(a)] motion, an appellate court is without power to direct the district court to enter judgment contrary to the one it had permitted to stand". *Unitherm*, 546 U.S. at 400. This Court further expressed the view that a Rule 50(b) motion is necessary due to "the

benefit of post-verdict input from the district court." *Id*. at 401. Additionally, the Court noted that absent a Rule 50(b) motion, the district court was without the power to grant relief and that consequently the court of appeals was similarly powerless. *Id*. at 405.

More recently, in *Ortiz*, a party sought to appeal a district court order denying summary judgment on the basis of qualified immunity following a full trial on the merits. *Ortiz*, 562 U.S. at 182–83. There, the defendants did, in fact, seek judgment as a matter of law pursuant to Rule 50(a), although they acknowledged they did not renew that motion under Rule 50(b). *Id*. at 185. This Court held, however, that the defendants' "failure to renew their motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b)" left the appellate court without authority to reconsider the summary judgment motion and rejected the district court's verdict. *Id*.

These Supreme Court decisions interpreting Rule 50 distill the principle that a party must preserve an argument for judgment as a matter of law through both a Rule 50(a) and 50(b) motion when summary judgment is denied under Rule 56. Without the renewed motion both at trial and after the verdict, an argument cannot be considered on appeal. In the case at hand, the District Court entered an order denying Kill-a-Byte's request for summary judgment under Rule 56. Pet. App. 32a. Kill-a-byte then heard and presented extensive testimony at a 3-week trial. Pet. App. 3a. The company is large enough to have a sufficiently competent legal team to file motions, yet they did not make this last-ditch effort until they found out they

lost. Because Kill-a-Byte blatantly failed to raise either motion, the Federal Rules through this Court's rulings in *Unitherm* and *Ortiz* establish that Kill-A-Byte failed to preserve its argument for appellate review.

1. *In failing to abide by Federal Rule 50 and forfeiting alternative means for preservation, Kill-a-Byte waived its argument and the Court of Appeals lacked jurisdiction to review.*

In our federal system, the jurisdiction of the U.S. Courts of Appeal is limited by the final judgment rule, which is codified under 28 U.S.C. § 1291. The District Court's final decision did not include Kill-a-Byte's due process argument, nor did Kill-a-Byte request immediate appeal. Therefore, the Court of Appeals did not have jurisdiction to review the appeal.

"The Court of Appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545 (1949) (citing 28 U.S.C. § 1291). The effect of the statute is to "disallow appeal from any decision that is tentative, informal or incomplete". *Id.* at 546. "Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal." *Id.* When a court denies a motion for summary judgment, the denial ordinarily does not qualify as a "final decision" subject to appeal. *Ortiz*, 562 U.S. at 188. These denials are instead interlocutory, meaning that the judgment is not final until the judge decides other matters in the case. *Id.* (citing *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976)). The denial simply results in the case proceeding forward. *Id.*

Alternatively, 28 U.S.C. § 1292 provides another avenue for appeal and permits interlocutory appeals if the trial court certifies that "the order involves a controlling question of law", "there is substantial ground for difference of opinion," and "an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Swint v. Chambers Count Com'n*, 514 U.S. 35, 46 (1995). However, in both cases, the party seeking appeal must do so within ten days. 28 U.S.C. § 1292(b).

A narrow exception to the final judgment rule under §1291, which normally forces a party to await final judgment before appealing, is the collateral order doctrine emerging from this Court's opinion in *Cohen v. Beneficial Industrial Loan Corp.* 337 U.S. 541, 546 (1949). In *Cohen*, this Court specified that an exception to the final judgment rule, and which then permits appeal, are those orders which "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* If a claim falls within this description, the collateral order doctrine permits a party to appeal an interlocutory order (such as a denial of summary judgment) without waiting for a final determination of the underlying case. Kill-a-Byte's due process argument falls squarely within this description. This is furthered by the Court of Appeals' assertion that the question of whether the City's claims violate due process is a question for the court. Pet. App.. 8a. This question, answered in the affirmative, would effectively render this litigation moot.

While the Court of Appeals contends that bringing a due process argument under a Rule 50 motion seems incomprehensible (Pet. App. 8a), Kill-a-Byte still could have requested appeal under §1291 through the collateral order exception or through permittance of interlocutory review under §1292(b). The consequence of Kill-a-Byte's constant failure to understand the legal procedures in place for reviewability on appeal must now result in waiver.

2. A denial of summary judgment is not akin to a partial grant of summary judgment that can avail the merger rule.

Under the 'federal merger rule', prior interlocutory orders (such as partial grant of summary judgment) merge with the final judgment in a case, and the interlocutory order may be reviewed on appeal from the final order. *Pineda v. Ford Motor Co.*, 520 F.3d 237, 243 (3d Cir. 2008). The Court of Appeals incorrectly states that in denying Kill-a-Byte's due process challenge, the district court impliedly entered partial summary judgment for the City. Pet. App. 8a. The court further incorrectly holds that in this situation, under the "merger rule", the interlocutory order of summary judgment denial merges with the final judgment and is therefore reviewable on appeal. Pet. App. 17a (citing *Pineda*, 520 F.3d at 243). The court is mistaken for two reasons.

First, the court cannot view a denial of summary judgment as an implied partial grant of summary judgment because the consequences and implications of each are quite distinct. Generally, interlocutory orders are not reviewable until there is a "final decision," at which point once-interlocutory orders "merge" with the final judgment. *John's Insulation, Inc. v. L. Addison & Assocs. Inc.*, 136 F.3d 101,

105 (1st Cir. 1998). An order of pretrial summary judgment is a "final decision" whereas a denial of summary judgment results in keeping the issue live for trial. Furthermore, this Court in *Ortiz* stated that orders denying summary judgment do not qualify as "final decisions" subject to appeal. *Ortiz*, 562 U.S. at 188. Consequently, the effect of creating an "implied" label means that all denials of summary judgment would be always reviewable on appeal.

Second, even if this Court considered the denial of summary judgment equivalent to an implied partial summary judgment grant for the City, Petitioners urge this court to invoke the known exception to the merger rule. This exception states that the merger rule should be disregarded if its implementation undermines the policy against piecemeal appeals. *See generally Sere v. Board of Trustee of Univ. of Illinois,* 852 F.2d 285, 288 (7th Cir. 1988). More specifically, the merger rule is inapplicable where "adherence would reward a party for dilatory and bad faith tactics." *Id*. To review the district court's order for summary judgment "is to invite the inundation of appellate dockets with requests for review of interlocutory orders and to undermine the ability of trial judges to achieve the orderly and expeditious disposition of cases." *Ash v. Cvetkov*, 739 F.2d 493, 497 (9th Cir.1984) (quoting *Huey v. Teledyne, Inc.*, 608 F.2d 1234, 1240 (9th Cir.1979)). Circumventing Kill-a-Byte's failure to preserve its due process argument to be reviewed on appeal through a theory of implication, and in so doing using the "merger rule", significantly undercuts the objectives of appellate jurisdiction under 28 U.S.C. § 1291 and the procedural requirements established in the Federal Rules. It would

allow arguments to be brought up at numerous instances post trial and without regard to procedure causing disjointed decisions.

In other words, preservation of an argument denied at the summary judgment stage requires a party to raise its' argument properly under Federal Rule 50 of Civil Procedure. If a party contends that it was not possible due to the lack of factual bases, the party should have used alternative avenues for immediate appeal. Failing to take any of these paths should result in waiver of the argument.

B. The Court of Appeals Incorrectly Carved Out an Exception To the Rule that a Denial of Summary Judgment is Not Appealable Where the Party Failed to Raise a Rule 50 Motion.

The Court of Appeals incorrectly carves out an exception to the rule that a denial of summary judgment is not appealable where the party failed to raise a Rule 50 motion and sides with the wrong side of the circuit split. Pet. App. 7a. The circuit split creates a question as to whether a Rule 50 motion is required to preserve for appeal a "purely legal claim" or "questions of law" as opposed to factual insufficiencies rejected at summary judgment. The Court of Appeals, along with some federal circuits will review a denial of summary judgment that was based on a "purely legal" argument even if that argument was not renewed under Rule 50. *See* Pet. App. 7a, *Feld v. Feld*, 688 F.3d 779, 781-82 (D.C. Cir. 2012); *Revolution Eyewear Inc. v. Aspex Eyewear Inc.*, 563 F.3d 1358, 1366 n.2 (Fed. Cir. 2009); *Houskins v. Sheahan*, 549 F.3d 480, 489 (7th Cir. 2008); *Barber v. Louisville & Jefferson Co. Metro. Sewer Dist.*, 295 F. App'x 786, 789 (6th Cir. 2008); *Rothstein v. Carriere*, 373 F.3d 275, 284 (2d Cir. 2004); *Banuelos v. Construction Laborers' Trust Funds for So. Calif.*, 382 F.3d 897, 902 (9th Cir. 2004); *Wolfgang v. Mid-America*

Motorsports, 111 F.3d 1515, 1521 (10th Cir. 1997). Examples of such arguments these circuit courts have found to be "purely legal" for this purpose, and therefore reviewable, include res judicata, collateral estoppel and government immunity. *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 719 (2003). The circuit courts' rationale for foregoing a Rule 50 motion for purely legal questions is that those questions do not challenge the sufficiency of the evidence and since additional fact finding during trial would not change the outcome of pure questions of law, there is no reason to require a party to raise the question again under Rule 50. *Feld*, 688 F.3d at 782. Petitioners urge this Court to instead follow the line of reasoning supported by the First, Fourth, Fifth and Eighth Circuit Courts and forego a purely legal exception for the following two reasons. *Feld Motor Sports, Inc. v. Traxxas, L.P.*, 861 F.3d 591, 596 (5th Cir. 2017); *Ji v. Bose Corp.*, 626 F.3d 116, 128 (1st Cir. 2010); *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1235 (4th Cir. 1995).

First, this court in its decisions in *Unitherm* and *Ortiz*, made no distinctions on reviews of denials of summary judgment based on questions of law or fact but rather created, and then further emphasized, a categorical rule for the sake of resolving the circuit split. *See generally Ortiz v. Jordan*, 562 U.S. 180 (2011), *Unitherm Food Sys. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006). In *Ortiz*, this Court specified the issue presented and explicitly stated its answer: "We granted review to decide a threshold question on which the Circuits are split: May a party appeal an order denying summary judgment after a full trial on the merits? Our answer is no."

Ortiz, 562 U.S. at 183–84. At no point did the Court distinguish between issues of fact or "purely legal" questions even though it was raised in the briefs. The Court's authoritative answer overshadows any alleged dicta in which the exception is argued to stem. Further, the decision only provides two avenues in which a party can appeal a denial of summary judgment: when a party has an immediate right to appeal under 28 U.S.C. § 1291 and preservation through Rule 50 motions. *Id.* at 189–90. Absent these actions, the Court concludes that an appellate court is "powerless" to review the sufficiency of the evidence after the trial. *Id.* at 189 (citing *Unitherm*, 546 U.S. at 405).

Second, even if this Court were to find that the opinion in *Ortiz* left open the question of whether Rule 50 applies to preserving "purely legal" arguments that were rejected at summary judgment, this Court should refuse to allow that exception as it would result in varied federal judgments and judicial inefficiencies. Allowing this exception would necessarily require federal courts to engage in additional measures to determine the basis on which summary judgment is denied and whether those bases are legal or factual. This dichotomy is "problematic because all summary judgment decisions are legal decisions in that they do not rest on disputed facts." *Chesapeake*, 51 F.3d at 1235. The Fourth Circuit in *Chesapeake* duly noted the burden this would impose, calling it a "dubious undertaking of determining the bases on which summary judgment is denied…" *Id.* "Such an effort—added to the tasks of already overburdened courts of appeal—would benefit only those summary judgment movants who failed to properly move for judgment as

a matter of law at the trial on the merits." *Black v. J.I. Case Co.*, 22 F.3d 568, 571 (5th Cir. 1994).

Further, the Federal Rules of Civil Procedure do not require such a dichotomy in summary judgment denials. *Chesapeake*, 51 F.3d at 1235. "Courts should not create new jurisprudence in which district courts would be obliged to anticipate parties' arguments on appeal by bifurcating the legal standard and factual conclusion supporting their decisions." *Id.* The First Circuit describes that the rationale is "based on the procedural fact that a denial of a motion for summary judgment is merely a judge's determination that genuine issues of material fact exist." *Ji*, 626 F.3d at 127. "Even legal errors cannot be reviewed unless the challenging party restates its objection in a [Rule 50] motion for judgment as a matter of law. *Id.* at 128. This is furthered by the fact that the Court of Appeals in the case at bar relied on evidence presented at trial in arriving at its due process analysis: "We are also troubled by the conclusion of the New Tejas Supreme Court that the evidence presented by the City at trial was sufficient to establish proximate causation under state law". Pet. App. 10a. By relying on these facts, the Court of Appeals necessarily implies that this issue is no longer a purely legal question.

Allowing this exception would encourage parties to forum shop and seek to remove cases to federal court. By rejecting this exception, this Court can reaffirm the notion "not [to] reward litigants who fail, whether inadvertently or intentionally, to exercise their rights under the Federal Rules of Civil Procedure." *Eaddy v. Yancey*, 317 F.3d 914, 916 (8th. Cir. 2003). Kill-a-Byte, a multi-million

dollar corporation, had at its disposal the means and time necessary to appeal the denial of summary judgment and follow the procedures in place for doing so. Petitioners urge this Court not to reward Kill-a-Byte for its careless conduct and find that a party is required to preserve its argument for appeal at trial.

II. THE COURT OF APPEALS INCORRECTLY HELD THAT ABSOLUTE PUBLIC NUISANCE LIABILITY AGAINST KILL-A-BYTE VIOLATES THE DUE PROCESS CLAUSE WHEN THE COMPANY'S INTENTIONAL ACTIONS SUBSTANTIALLY CONTRIBUTED TO AN INTERFERENCE WITH THE RIGHT TO PUBLIC SAFETY IN NEW TRURO.

The Thirteenth Circuit incorrectly held that the State of New Tejas' public nuisance laws violate the due process rights of the Respondent. Due process is an umbrella term which contains two sub-categories: procedural and substantive due process. Procedural due process protects a litigant's right to a fair proceeding when deprivation of that person's fundamental liberties are at risk. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Substantive due process, on the other hand, involves the protection of a litigant's fundamental liberties conferred in the Constitution as well as prohibits "the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005). In this case, Kill-a-Byte alleges that New Tejas state public nuisance law violates substantive due process by imposing liability for the creation of a public nuisance in New Truro. Pet. App. 19a.

When a dispute is before a federal court exercising diversity jurisdiction, the court must defer to the state substantive law unless the law is explicitly displaced by a federal statute. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). In this case,

the Supreme Court of New Tejas certified that the laws of New Tejas are consistent with the Restatement (Second) of Torts ("Restatement"). Pet. App. 26a. Under the Restatement, the law of public nuisance is broadly interpreted, with significant deference afforded to states in their application of the law. *See* RESTATEMENT (SECOND) OF TORTS § 821B (Am. Law Inst. 1979); *City of Cincinnati v. Beretta, U.S.A. Corp.*, 768 N.E.2d 1136, 1142 (Ohio 2002). Accordingly, the City's lawsuit against Kill-a-Byte is an appropriate use of the state's police powers and its public nuisance statute. The factual and legal inquiries are also consistent with other state public nuisance statutes and with the Restatement of Torts. Moreover, state common law comes before the court with a presumption of legality and must only be subject to rational basis review. *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 15 (1976) ("It is by now well-established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality. . ."). It is not the role of a federal court to determine the wisdom of a law, only whether the law is rationally related to a legitimate government interest.

Contrary to these presumptions, the Thirteenth Circuit incorrectly held that the New Tejas public nuisance law violates the Due Process Clause of the Fourteenth Amendment. While not specifically identifying what part of the law violates due process, the court held that the law violates the principles of fundamental fairness by holding a company liable for otherwise legal actions. Pet. App. 13a. It is incumbent upon this Court to correct these errors and recognize that

the City acted constitutionally in addressing a public nuisance that has plagued their citizens.

A. Kill-a-Byte is Liable Under the Absolute Public Nuisance Law of New Tejas for Intentionally Creating the Conditions that Substantially Interfered with Citizens' Right to Public Safety.

A public nuisance is defined by the Restatement as an "unreasonable interference with a right common to the general public." RESTATEMENT (SECOND) OF TORTS § 821B(1) (Am. Law Inst. 1979). In holding a defendant liable, states generally utilize two types of common law public nuisance claims – absolute public nuisance and qualified public nuisance. *Taylor v. City of Cincinnati*, 55 N.E.2d 724, 724–25 (Ohio 1944). The State of New Tejas utilizes an absolute public nuisance standard. Pet. App. 2a. An absolute public nuisance, as distinguished from a qualified public nuisance, traditionally requires a finding that a defendant acted with intentionality in the creation of a public nuisance. *Taylor,* 55 N.E.2d at 725. When a city seeks to hold a product manufacturer liable for the creation of a public nuisance, an action can be maintained for injuries caused by a product if the facts establish that the design, manufacturing, marketing, or sale of the product unreasonably interferes with a right common to the general public. *City of Cincinnati,* 768 N.E.2d at 1142.

Consistent with the Restatement, the City properly pled a cause of action against Kill-a-Byte for their role in creating a public nuisance that has severely impacted the residents' shared right to public health and safety. After a lengthy trial with significant expert testimony, the jury in federal district court found Kill-a-Byte liable under New Tejas' absolute public nuisance law finding that: (1) Kill-a-

Byte intentionally distributed and operated Lightyear; (2) the increased crime rate constituted a substantial interference with public safety and; (3) the widespread use of Lightyear was a substantial factor in the increased crime rate. Pet. App. 4a. The District Court determined that Kill-a-Byte must pay the cost of abating the public nuisance Kill-a-Byte caused in their unreasonable operation and distribution of Lightyear. This Court must reverse the Thirteenth Circuit decision and find that the New Tejas public nuisance law does not violate the Due Process Clause and reinstate the order for Kill-a-Byte to abate the nuisance that they helped to create.

1. Kill-a-Byte's intentional actions constitute an unreasonable interference with New Truro's right to public safety.

The City, in this case, properly presented evidence determining that there has been an unreasonable interference in the right to public safety. Under the Restatement, the drafters created a broad definition of a public nuisance as "an unreasonable interference with a right common to the general public" in order to account for the many ways in which a public nuisance can be created. RESTATEMENT (SECOND) OF TORTS § 821B (Am. Law Inst. 1979). The Restatement identifies safety as a right common to the public. *Id.* To determine whether an interference is unreasonable, a factfinder must determine whether the gravity of the interference with a public right outweighs the social benefit of the conduct. RESTATEMENT (SECOND) OF TORTS § 821F (Am. Law Inst. 1979); *People ex rel. Gallo v. Acuna,* 929 P.2d 596, 605 (Cal. 1997) ("The unreasonableness of a given interference represents a judgment reached by comparing the social utility of an activity against the gravity of the harm it inflicts…"). In this case, there is no doubt

that the severity of the interference in the City of New Tejas drastically outweighs the social utility of a violent video game.

It is unambiguous that crime in New Truro has been strikingly high over the last decade. New Truro suffers from violent crime rates and property crime rates that are almost six times higher than the national average. Pet. App. 25a. Moreover, the City's unemployment rate is 15% and over 45% of residents now live in poverty. Pet. App. 25a. These problems have overwhelmed the town and have forced them into significant budget shortfalls. The City has lost nearly 50% in tax revenue due to high unemployment and poverty. Pet. App. 2a. Due to the increase in crime, the cost of running the police department has also doubled. Pet. App. 2a.

As properly recognized by the Thirteenth Circuit, these conditions substantially interfere with the public health and safety of New Truro and the use of public nuisance laws to address these issues are not unprecedented. Pet. App. 9a. Other state supreme courts, when faced with similar threats to public safety caused by a product manufacturer, have found that the use of absolute public nuisance is proper. *See City of Cincinnati,* 768 N.E.2d at 1143; *James v. Arms Tech., Inc.,* 820 A.2d 27 (N.J. Super. App. Div. 2003).

The independent factfinders in this case determined that the advertisement, production, and distribution of Lightyear caused a substantial interference in the right to public to safety by intentionally creating the conditions that allowed for the nuisance to flourish. These conditions include "an undereducated male population with diminished job skills and few employment prospects" who are "trained to kill."

Pet. App. 2a. As the Thirteenth Circuit notes, the popularity of Lightyear is "difficult to overstate." Pet. App. 2a. More than half of all New Truro residents between the age of 15 and 25 played the game for at least ten hours per week. Pet. App. 2a. Amassing about 10% of those players are "Lightyear Addicts," who played the game for over 36 hours each week. Pet. App. 22a. Importantly, the age of the population with the highest exposure to Lightyear is significant as criminologists have found that people between the ages of 15 and 24 commit the largest proportion of crimes. JEFFRY T. ULMER & DARREL STEFFENSMEIER, THE AGE AND CRIME RELATIONSHIP, 377–78 (2017).

Kill-a-Byte promoted and distributed this free videogame to an already vulnerable age group and encouraged them to spend as much time as possible playing. Pet. App. 22a. During extensive hours of gameplay, players are exposed, over and over again, to graphic depictions of violence and gore. Pet. App. 21a. Lightyear is a product that not only desensitizes players to the thousands of violent killings they witness, but rewards players for the speed in which they are able to kill. Pet. App. 22a. The amount of time people played the game, coupled with the graphic violence in which players engaged, certainly substantially contributed to criminogenic conditions that now plague New Truro.

2. Kill-A-Byte acted intentionally, satisfying a cause of action for absolute public nuisance.

As discussed, New Tejas employs an absolute public nuisance standard. Absolute public nuisance, as distinguished from qualified public nuisance, requires a finding of intentional actions on behalf of the defendant. *Taylor*, 55 N.E.2d at

725. This is distinguished from a qualified public nuisance where a finding of knowledge of the alleged consequences is required. *Id.* Absolute nuisance, or nuisance per se, requires only a finding that the defendant acted in an intentional way that results in harm. *Id.* at 727–32.

In this case, the negative impacts on public safety in New Tejas are traceable to the intentional acts of Kill-a-Byte through its promotion and distribution of Lightyear. The City does not argue that Kill-a-Byte intended to increase the crime rate in New Truro. "Intentional", in the context of an absolute public nuisance, means not that the creation of a nuisance was intended, but that the defendant intended to create the conditions that necessarily led to the proliferation of a public nuisance. *In re National Prescription Opiate Litigation,* 2020 WL 4550400, at *15 (N.D.Ohio, 2020); *Angerman v. Burick*, 2003 WL 1524505 (Ohio App. 2003); *County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 325 (Cal. App. 2006).

The conditions that have caused a public nuisance in New Truro are unemployment, a lack of education, and the promotion of violent behavior. Pet. App. 24a. Indeed, the World Health Organization lists each of these conditions as having a significant impact on community health. *Violence–A Global Health Problem,* WORLD HEALTH ORGANIZATION (2002), https://www.who.int/violence_injury_prevention/violence/world_report/en/chap1.pdf. Kill-a-Byte financially benefits from a population that is so addicted to their game that they neglect their education and career. This is likely why, despite being "fully aware" of the amount of time users

spent playing the game, Kill-a-Byte did nothing to stop this addiction. Pet. App. 23a. In fact, Kill-a-Byte tracked the statistics of all its players and stated that its primary goal was to *increase* the amount of time that individual players spent playing the game. Pet. App. 23a. Individual gameplay, the company admits, is their primary source of revenue. Pet. App. 23a. This is likely why the company continued to promote even more gameplay despite publication of stories of many college students failing classes due to their lightyear habits. Pet. App. 23a. Lightyear also knew that violence and gore were popular amongst players, so they continually updated the methods to kill and graphics to make the killing as gruesome as possible. Pet. App. 21a. As the district court notes, "if anything was unrealistic about the game, it would have been the excessive amounts of blood and gore." Pet. App. 21a.

Though Respondent's may contend that they were merely attempting to market their videogames in a way that maximizes profits, public nuisance statutes ensure that companies cannot wash their hands of the widespread damage their product does to public. While the facts of the case do not conclude that Kill-a-Byte wanted to incite the violence and cause economic devastation now seen in New Truro, they most certainly prove that the company intended to inundate as many players as possible, for as long as possible, with graphic depictions of violence. The goal of the company was to maximize profits by maximizing gameplay, meaning the company necessarily competed for the time where players could otherwise have been working or going to school. In their blind pursuit of that goal, Kill-a-Byte

created those conditions that led to the proliferation of a public nuisance in New Truro.

B. The Court of Appeals Committed Judicial Overreach by Holding that Traditional Causation is Necessary for a Public Nuisance Claim.

Respondents contend that, despite evidence that Kill-a-Byte intentionally and unreasonably created the nuisance, the company should still not be held liable unless "but-for" causation can be established. This narrow interpretation of causation conflates public and private nuisance law and is inconsistent with the Restatement. Steven Sarno, *In Search of a Cause: Addressing the Confusion in Proving Causation of a Public Nuisance,* 26 PACE ENVT'L L. L. REV. 225 (2009). Consistent with the Restatement and other jurisdictions, New Tejas utilizes "substantial factor" causation which requires that a defendant play a substantial role in the creation of a nuisance. *Id.* at 253. It is well-established that courts should refrain from overreaching on issues of state police powers and common law. F. William Brownell, *State Common Law of Public Nuisance in the Modern Administrative State,* 24 NATURAL RESOURCES AND ENVIRONMENT 34 (2010).

1. *Substantial factor causation is a proper standard for public nuisance, and it is within the power of the state to utilize it.*

The Thirteenth Circuit, in holding that traditional, "but-for" causation is necessary to hold a party liable for abatement of a public nuisance, conflates private and public nuisance law and infringes on the ability of states to address issues that harm their citizens. Sarno *supra,* at 238–39. Private nuisance claims address harm caused to the use and enjoyment of individuals' real property and land. *Id.* It is

clear in the Restatement that private nuisance should be dealt with in the same way as traditional torts and "but-for" causation should apply. RESTATEMENT (SECOND) OF TORTS § 821D. Public nuisances, on the other hand, address harm to a right shared by the general public which are far more difficult, if not impossible in most cases, to attribute to one individual party. Sarno *supra,* at 238–39. This is why courts and the Restatement have explicitly approved the use of substantial factor causation as the proper analysis for determining public nuisance liability. *City of Milwaukee v. NL Indus. Ass'n, Inc.*, 691 N.W.2d 888, 893 (Wis. Ct. App. 2004); *County of Santa Clara*, 40 Cal. Rptr. 3d at 325.

The Thirteenth Circuit, in its reasoning, relied on *Burrage v. United States* to discredit the theory of substantial factor causation in this case. Pet. App. 9–10a. *Burrage* was not a public nuisance case. Rather, it was a criminal case questioning whether a heroin dealer could be liable for the death of a user if the user had also ingested a myriad of other drugs. *See generally Burrage v. United States*, 571 U.S. 204 (2014). Of course, in holding an individual liable for a criminal act against another individual, but-for causation is proper. However, when the harm is to a public right, this burden is often an impossible standard.

This is why the Restatement of Torts recognizes that "[A] person who carried on the activity which [sic] created the condition *or who participated to a substantial extent in such activity* is subject to liability [for a nuisance], for the continuing harm." RESTATEMENT (SECOND) OF TORTS § 834, cmt. F (Am. Law Inst. 1979). This latitude is based on the understanding that public nuisances operate differently

than a tort that is committed between two individuals. For example, *People v. Con Agra Grocery Products, Co.* held a lead paint company liable under California's absolute public nuisance law due to the significant health complications that lead paint inflicted upon citizens. *People v. Con Agra Grocery Products, Co.,* 227 Cal. Rptr. 3d 499, 549 (Cal. App. 6th Dist. 2017). In so ruling, the court clarified that it cannot be proven that each health complication is directly correlated to the lead paint or that the specific lead paint company caused a person's specific complications. *Id.* at 545–46. Instead, there must only be proof that the company substantially contributed to the problem through their distribution and promotion of the product. *Id.*

Similarly, the Supreme Court of Ohio, in *City of Cincinnati v. Beretta,* held that a gun manufacturer may be held liable for the substantial interference in a right to public safety that was caused by their sale and promotion of firearms. 768 N.E.2d at 1142. In these instances, the complex injuries to public health and safety do not lend themselves well to traditional negligence causation. Importantly, it is true that other states have addressed the same or similar issues under different causation standards and come to opposite results. *See City of Chicago v. Beretta U.S.A. Corp.,* 821 N.E.2d 1099, 1136 (Ill. 2004) (holding that a gun manufacturer cannot be held liable due to a lack of proximate cause.); *State v. Lead Industries, Ass'n, Inc.*, 951 A.2d 428, 438 (R.I. 2008) (holding that lead paint manufacturer did not have sufficient control over the lead paint at the time it harmed the defendants).

This is the critical point – it is well within the police power of individual states to address public health and safety concerns in the manner they see fit for their citizens. Brownell, *supra,* at 835 ("From its inception, this cause of action was grounded in the sovereign's police powers, for "[t]o regulate and abate nuisances is one of" a state's "ordinary functions" under its police powers."). Further, as courts of limited jurisdiction, it is fundamentally not the role of the federal courts to create or expand state law. *Id. at* 34–5. Instead, the court must apply the state law to the facts of the case and reserve the right to regulate state power to either Congress or state legislatures. *Erie R.R. Co.,* 304 U.S. at 78.

Accordingly, this Court, in *American Electric Power Co., Inc. v. Connecticut*, reaffirmed that it is the role of the legislature, not the courts, to displace common law. 564 U.S. 410, 429 (2011). In ruling, this Court held that even if an issue is in need of governance, it does not mean that the courts should act unilaterally to create the controlling law. *Id.* at 422. It is the role of legislatures, not courts, to adapt their laws as they see proper, recognizing that "public nuisance law, like common law generally, adapts to changing scientific and factual circumstances." *Id.* Here, the Thirteenth Circuit attempts to redefine the power of states by imposing a but-for causation standard on all public nuisance claims. In doing so, the Thirteenth Circuit neglects the principles of federalism and state sovereignty. Affirming the opinion of the Thirteenth Circuit would not only improperly curtail state police power, but also burden every state with a new and often unmanageable standard to protect their citizens. This Court has traditionally refused to address

issues of public nuisance causation because of this very concern. Steven Czak, *Public Nuisance Claims after ConAgra*, 88 FORDHAM L. REV. 1061 (2019). This Court must continue this well-founded tradition and defer to the state laws of New Tejas in this matter.

2. Under New Tejas Law, Lightyear was properly found to be a substantial factor in causing the public nuisance in New Truro.

In applying state law, Lightyear was a substantial factor in the creation of the public nuisance in New Truro. The question of whether a defendant's actions rise to the level of being a substantial factor is a flexible determination for the fact-finder. *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1214 (Cal. 1997). While being a necessary, or "but-for," cause of a nuisance is *per se* a substantial factor, the test was specifically created to deal with situations with complex causation factors. *Id*. Similarly, a question that often arises is whether a defendant had sufficient control over the nuisance to be held liable. *In re National Prescription Opiate Litigation,* 2020 WL 4550400, at *15 (N.D.Ohio, 2020). In this case, both of these questions are satisfied by the actions of Kill-a-Byte.

As discussed by the Thirteenth Circuit, the popularity of Lightyear "is difficult to overstate," and numerous experts testified to the damage that Lightyear could do to its players. Pet. App. 2a. In lieu of these concerns, Kill-a-Byte promoted this free video game to the most vulnerable population of citizens in New Truro – young people between the ages of 15 and 25. Pet. App. 22a. While tracking the incredible amount of time that residents spent playing the game, Kill-a-Byte continued to make updates to increase gameplay amongst users. Pet. App. 23a.

Relying on their data of individual users, the company increased the graphics and violent depictions of killings, increased the amount of ways a player can kill, and challenged players to kill even faster. Pet. App. 23a. Experts at the trial testified that exposure to this violence increases aggression in players. Pet. App. 22–23a.

This testimony is consistent with the research of psychologists across the country. According to the American Psychological Association, the link between aggressive behavior and exposure to violent video games is one of the most studied in the field and has been proven, time and again, to exist. *APA Resolution on Violent Video Games*, AMERICAN PSYCHOLOGICAL ASSOCIATION (Feb. 2020). Moreover, the report explains that there is also a causal link between violent video games and a "decrease in . . . prosocial behavior, empathy, and moral engagement." *Id.* Despite evidence that the Columbine High School shooters were influenced by a violent video game, the American Psychological Association does clarify that there has not been a proven link between video games and mass violence such as school shootings. *Id.*; David C. Kiernan, *Shall the Sins of the Son be Visited upon the Father--Video Game Manufacturer Liability for Violent Video Games*, 52 HASTINGS L.J. 207, 207–09 (2000). The City of New Truro is not suffering from an epidemic of mass shootings, however. The City is suffering from an epidemic of the type of widespread crime that is exacerbated by exposure to violent video games. In recognition of this fact, after a three-week trial with extensive testimony, the jury concluded that the effects seen in New Truro were substantially caused by Kill-a-Byte.

Another issue that exists within substantial factor causation is the issue of whether a defendant had control over the instrumentality at the time of the harm. Here, the question is whether Kill-a-Byte had control over the creation the nuisance as it was no longer producing the game at the time of the lawsuit and it cannot be in control of every person committing a criminal act in New Truro. These issues in the public nuisance context are unfounded. Under the Restatement, a party may be held liable so long as they are found to have "…produced a permanent or long-lasting effect upon the public right." RESTATEMENT (SECOND) OF TORTS § 821 B(2)(c) (Am. Law Inst. 1979). Liability may be imposed even if the defendant is no longer engaging in the action and regardless of whether the defendant is still in a position to abate the nuisance. RESTATEMENT (SECOND) OF TORTS § 834, cmt. F (Am. Law Inst. 1979). In this case, the injury alleged is to the public safety of the City of New Truro. It is not necessary, therefore, to prove that each act is traceable to Kill-a-Byte, only that they substantially contributed to the problem in the aggregate.

Courts, following the Restatement, have explained that the idea of control over individuals misunderstands the true injury being alleged. California courts have held that "[L]iability for nuisance does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance." *County of Santa Clara*, 40 Cal. Rptr. 3d at 325. Other state courts have held gun manufacturers liable for the substantial interference in public safety, rejecting the arguments that the criminal acts of a third party break

the chain of causation between the manufacturer and the injury to public safety. *City of Cincinnati,* 768 N.E.2d at 1142; *James*, 820 A.2d at 27. In *City of Cincinnati v. Beretta*, the court also explained how the gun manufacturer's liability for abatement was not contingent on the City proving that they were the only factor in creating the nuisance, only that their "creation and control" in contributing to the nuisance was substantial. 768 N.E.2d at 1143. Thus, in this case, it is neither alleged that Kill-a-Byte was the only factor in creating the nuisance nor that they had control over every individual. They are liable for creating injurious conditions to the public health that manifested in detrimental social outcomes that now plague the entire city. It is therefore their duty to help rectify the harm caused by their reckless pursuit of profit.

C. The Imposition of Abatement as an Equitable Remedy for a Public Nuisance Does Not Violate Kill-a-Byte's Substantive Due Process Rights.

The Thirteenth Circuit incorrectly held that that the imposition of abatement damages violates the substantive due process rights of Kill-a-Byte. In reaching their desired outcome in this case, the court conflated the reasoning of the Takings Clause of the Fifth Amendment with the reasoning of the Due Process Clause of the Fourteenth Amendment. Pet. App. 13a. This reasoning further muddles a complicated area of jurisprudence, and this Court must correct this error to ensure that abatement remains a vital tool for states to remedy public harms.

1. The Court of Appeals' concerns about retroactivity are inconsistent with public nuisance liability.

It is true that this Court has been clear that any legislation with retroactive consequences will be viewed skeptically. *E. Enterprises v. Apfel*, 524 U.S. 498, 500 (1998). However, despite the Thirteenth Circuit's assertions, abatement as a remedy for public nuisance liability is not equivalent to a state passing legislation with retroactive effect. The Thirteenth Circuit relies heavily on *Eastern Enterprises* in making this determination, specifically pointing to Justice Kennedy's concurrence that denotes a "distrust" in legislation with retroactive effects. Pet. App. 12–13a (citing *Id.* at 547). In their analysis, the Thirteenth Circuit incorrectly expanded that "distrust" to encapsulate more than acts of the legislature, but evolutions in judicial common law as well.

This Court has previously held that, "the development of state common law is a fundamental feature of our legal system. And, in turn, 'the foundation of the common law system' is 'the incremental and reasoned development of precedent'." *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 623 (7th Cir. 2014) (quoting *Rogers v. Tennessee,* 532 U.S. 451, 461 (2001)). In its development, common law is "flexible" and adaptive to many different circumstances. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Retroactive liability refers to legislation that imposes liability on an act that was not legal but was later deemed illegal while abatement is a remedy that seeks to mitigate future harm and is fashioned by a judge, not a legislature. *Gibson,* 760 F.3d at 623.

Indeed, abatement is not about imposing retroactive punishment, which is why the Thirteenth Circuit's reliance on the reasoning of punitive damages is also

misplaced. Pet. App. 13a. As discussed, liability for a public nuisance does not even hinge on whether an action was legal or not. *James,* 820 A.2d at 52. Abatement is an equitable remedy that public entities may seek not to punish past actions, but to prospectively address continuing future harm caused by the defendant's actions. Czak, *supra,* at 1082. In this case, the City is not simply getting money from Kill-a-Byte to do with as they please. The City is not using this abatement judgment to give employees pay raises or to remodel City Hall. The City is, at the direction of a judge and experts, allocating the money to address the public safety injury in the city through targeted programs and investments. Pet. App. 33a. This is the core of public nuisance liability and must be protected as a rational and legitimate remedy. Michael J. Purcell, *Settling High: A Common Law Public Nuisance Response to the Opioid Epidemic*, 52 COLUM. J.L. & SOC. PROBS. 135, 161 (2018) ("The standard prayer for relief in a public nuisance cause of action . . . is abatement").

2. The Court of Appeals erred in conflating the reasoning of the Takings Clause and the Due Process Clause.

In reliance on the plurality opinion in *Eastern Enterprises,* the Thirteenth Circuit applied the reasoning of the Takings Clause of the Fifth Amendment into its due process analysis. Pet. App. 13a. This is not only unsound reasoning, but will create even more confusion in an already convoluted area of jurisprudence. Ronald J. Krotoszynski Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713, 715–16 (2002).

The plain language of the Takings Clause of the Fifth Amendment protects citizens from having their private property taken for public use without just compensation. U.S. CONST. AMEND. V. It is true that, while all takings are subject to the constraints of substantive due process, not all deprivations of property are subject to the Takings Clause. Mark Tunick, *Constitutional Protections of Private Property: Decoupling the Takings and Due Process Clauses,* 3U. Pa. J. Const. L. 885, 892 (2001). The Takings Clause goes beyond due process to state that, even if the government action of taking land is consistent with due process, the government may not take the land without just compensation to the party. *Id.* Substantive due process, on the other hand, prevents an arbitrary government infringement on the rights of citizens entirely. *Usery,* 428 U.S. at 14–20. This reasoning in and of itself suggests the necessity of delineation between these two concepts. It would have been patently redundant of the Framers to incorporate a Takings Clause unless they intended it to apply to the specific circumstance covered in the plain meaning of the text. Tunick, *supra,* at 886 ("[T]he Court has never shown that the framers . . . understood "do not take property" in any way other than the plain meaning.").

The question of when a regulation or action becomes a "taking" has been litigated heavily and is often subject to significant *ad hoc* reasoning by courts. *Id.* This convoluted reasoning was deeply evident in the plurality decision in *Eastern Enterprises*. In striking down the legislation with retroactive effects, the plurality relied heavily on questions of fundamental fairness, retroactivity, and arbitrariness. *E. Enterprises,* 524 U.S. at 501. These are all principles more aptly addressed by a

due process analysis. Tunick, *supra,* at 886 ("The only textual provisions that logically support a declaration that an unfair regulation is unconstitutional are the Due Process Clauses"). Most notably, the plurality does not even consider what "just compensation" would be for the taking of property, which is the heart of a Takings Clause remedy. Understanding this delineation is critical to sound jurisprudence in this area of law.

This is why Justice Kennedy, in his concurrence in *Eastern Enterprises,* writes at length about the confusion in this area of law and the importance of keeping these two bodies of laws separate. *E. Enterprises*, 524 U.S. at 545. Importantly, a majority of justices in *Eastern Enterprises* agreed with Justice Kennedy that the Takings Clause does not apply to financial obligations that "do not operate upon or alter an identified property interest." *Id.* at 540.

The reasoning of the plurality in *Eastern Enterprises*, as critics note, shrouds arguments for economic substantive due process, reminiscent of the *Lochner* era, in a broad conception of the Takings Clause. Tunick, *supra,* at 889–90; Krotoszynski, *supra,* at 717. The Takings Clause is not about preventing government intrusions, as Justice Kennedy notes, but instead places conditions on the government's ability to take property. *E. Enterprises*, 524 U.S. at 545. Substantive due process, on the other hand, is a complete bar on a government's ability to act because it is a *per se* violation of a person's rights.

This Court, prior to *Eastern Enterprises*, expressed concern about the plurality's reasoning by questioning the continued relevance of *Lochner* era

reasoning in modern challenges to statutes with retroactive effects. *United State v. Carlton,* 512 U.S. 26, 34 (1994) (holding that the *Lochner* era was "[A]n era characterized by exacting review of economic legislation under an approach that has long since been discarded."). Returning to the *Lochner* era would drastically impair a state's ability to properly address issues affecting the health, welfare, and safety of their residents. *Id.* This Court must clarify this issue by overturning the Court of Appeals' decision and reaffirming the principle that the legislature is the proper body to address issues affecting the police powers of the states.

3. Abatement is a rational and traditional cost-spreading mechanism for public nuisance claims.

Similar to their reasoning on Kill-a-Byte's preservation of its due process argument, the Thirteenth Circuit utilized piecemeal reasoning to achieve their desired result in denying an abatement remedy for the City. Relying on "fundamental fairness," the Court of Appeals struck down the abatement remedy (Pet. App. 13a), instead of recognizing it as a proper use of public nuisance to spread costs that neither the City nor its residents should have to bear alone. Purcell, *supra,* at 148. Neither the imposition of this liability nor the determination that Kill-a-Byte should bear the full cost of the abatement is a violation of substantive due process.

Courts have frequently relied on cost-spreading as a means to address public harms. Recently, manufacturers of opioids entered into a settlement based on their participation in the creation of the opioid epidemic that plagues so many cities across America. *See* Natalie Sherman, *Purdue Pharma to Plead Guilty in $8bn*

Opioid Settlement, BBC News, https://www.bbc.com/news/business-54636002 (Oct. 21, 2020). This is exactly the role that public nuisance is meant to serve in our society. When an otherwise lawful product causes severe harm to a public right, the public should not have to bear that cost alone. Instead, those who profited off of the proliferation of the nuisance must rectify the problem.

As our economy and our understanding of environmental impacts continue to evolve, this power will be all the more critical for states. Comparable to violent videogames, E-cigarettes are another example of a relatively new technology whose complete harm to the public are not yet known. Recently, a Federal District Court in California held that the state had a meritorious claim against JUUL Labs, the makers of the popular e-cigarette devices. *In re JUUL Labs, Inc., Mktg., Sales Practices, and Products Liab. Litig.*, 2020 WL 6271173 at *66 (N.D. Cal. 2020). The primary complaint in the lawsuit, similar to the one before this court, is that JUUL Labs marketed their product to addict younger and more susceptible groups. *In re JUUL Labs, Inc.*, 2020 WL 6271173, at *2.

The police powers of the state are critical in protecting citizens from harm caused by the actions of private companies in various foreseeable and unforeseeable ways. States must be able to continue to balance the costs and benefits of actions, follow expert opinions, and protect the liberty of all of its citizens. Public nuisances are indeed complex and require complex solutions to devastating problems. The answers to these impending questions, as well as the questions before this Court, are far better suited for the states and the legislature to address. This Court must

not begin down the dangerous path of imposing federal constraints on lawful exercises of state power. Accordingly, this court must grant the citizens of New Truro the relief they deserve by reversing the Thirteenth Circuit's decision and reinstating the judgment of the District Court.

CONCLUSION

For the forgoing reasons, Petitioner respectfully requests that this court 1) reverse the decision of Thirteenth Circuit Court of Appeals and find that Kill-A-Byte did not preserve its argument for appeal and 2) the City of New Truro may impose civil liability on Kill-a-Byte under New Tejas' public nuisance law.

Respectfully Submitted,

Team 81
Attorneys for Petitioner

APPENDIX A

Federal Rule of Civil Procedure 50 provides:

> (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.

APPENDIX B

Section 1. Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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 C

28 U.S.C. §§ 1291, 1292 in relevant part provides:

(a)Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

> (1)Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
>
> (2)Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;
>
> (3)Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b)When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.