No. 19-6236

In the Supreme Court of the United States

CITY OF NEW TRURO, NEW TEJAS,
PETITIONER

v.

KILL-A-BYTE SOFTWARE, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

TEAM #86
COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

1. Whether a party may appeal an argument denied on summary judgment when the argument was not preserved with Rule 50 motions after a full trial on the merits.

2. Whether it is rational for a state to hold a private party liable for intentionally distributing a product that was later determined to create a substantial interference with a public right?

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The decision of the United States District Court for the Western District of New Tejas is unreported, but the opinions of the court appear in the record at pages 19a–36a. The opinions of the United States Court of Appeals for the Thirteenth Circuit are also unreported, but appear on pages 1a–18a of the record.

STATEMENT OF JURISDICTION

The United States District Court for the Western District of New Tejas had diversity jurisdiction over this case pursuant to 28 U.S.C. section 1332 (2018). The district court entered its final judgment on March 21, 2020. Pet. App. 1a. Respondents appealed the decision of the district court to the United States Court of Appeals for the Thirteenth Circuit. Pet. App. 1a. The City of New Truro filed a timely petition for writ of certiorari, which this Court properly granted on October 5, 2020 pursuant to 28 U.S.C. section 1254(1) (2018). Order Granting Cert., Oct. 5, 2020, No. 19-6236.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves determining whether the imposition of civil liability on Kill-a-Byte violates the Due Process Clause of the Fourteenth Amendment. This case also involves an analysis of Rule 50 of the Federal Rules of Civil Procedure. The relevant sections of these constitutional and statutory provisions are reproduced in the attached Appendix.

STATEMENT OF THE CASE

I. Statement of the Facts

Between the years 2003 and 2013, Kill-a-Byte Software, Inc. ("Kill-a-Byte") operated and distributed the video game "Lightyear." Pet. App. 2a. The only mission

in the game is to use a variety of weaponry to battle other opponents "to the death." Pet. App. 2a. Lightyear became a quick success, accumulating more than 300 million accounts worldwide. Pet. App. 21a. Many attributed the popularity to the software's realistic graphics, which centered around excess amounts of blood and gore when a player was killed. Pet. App. 21a. As updates were made, Kill-a-Byte continued to add elaborate ways to bring about the demise of fellow players, even adding a feature where players can "taunt" their victims. Pet. App. 21a. Because of the game's "last man standing" approach to victory, Lightyear has been called the embodiment of the Hobbesian philosophy: "every man for himself." Pet. App. 21a.

New Truro was not immune to Lightyear's addictiveness; it was estimated that between the years 2010–13, more than half of the city's male residents between the ages of 15–25 played the game for at least 10 hours per week. Pet. App. 22a. Out of these regulars, 10% played the game for more than 35 hours per week. Pet. App. 22a. Kill-a-Byte never limited the game time of individual players, even after publication of accounts of college students spending so much time playing Lightyear that they failed their classes. Pet. App. 23a. In fact, Kill-a-Byte admitted to tracking individual players' game times with the intention to increase the amount of time spent on the game. Pet. App. 23a.

In the last decade, New Truro has faced a crime rate significantly exceeding the national average, which has doubled the cost of operating the police department. Pet. App. 2a. Currently, New Truro faces 2,200 violent crimes per 100,000 residents, almost six times the national average. Pet. App. 24a. Additionally, the property crime

rate is above average at 4,403 property crimes per 100,000 residents. Pet. App. 24a. Along with increased crime rate, the City suffers from a 15% unemployment rate and a 45.3% poverty rate. Pet. App. 24a. As a result of the increased unemployment rate, New Truro's tax revenues have decreased by more than 50%. Pet. App. 2a.

New Truro subsequently brought a public nuisance cause of action against Kill-a-Byte. Pet. App. 19a. The City sought cost of abatement from Kill-a-Byte which will be used to fund job training programs, centers to assist with "video game addiction," increased police presence, and security cameras. Pet. App. 25a.

II. Procedural History

United States District Court of the Western District of New Tejas

In 2016, the City of New Truro filed suit against Kill-a-Byte for absolute public nuisance in New Tejas state court. Pet. App. 2a. Kill-a-Byte removed to the United States District Court for the Western District of New Tejas. Pet. App. 3a. In its suit the City claimed that by creating and distributing Lightyear, Kill-a-Byte intentionally created conditions that were a substantial factor in interfering with public safety. Pet. App. 2a. New Truro sought approximately $600 million to abate the public nuisance. Pet. App. 26a.

Kill-a-Byte moved for summary judgement, arguing that it was a violation of due process to impose civil liability for the lawful distribution of a video game. Pet. App. 3a. On May 10, 2017, the district court filed its opinion denying Kill-a-Byte's motion. Pet. App. 19a. The case then proceeded to trial on the merits. Pet. App. 3a. After the conclusion of the trial, the district court filed final judgement on March 2, 2019. Pet. App. 33a. Notably, Kill-a-Byte did not raise a motion for judgment as a

matter of law pursuant to Federal Rules of Civil Procedure, Rule 50(a), nor renew the motion post-judgment pursuant to Rule 50(b), at any time during trial. Pet. App. 5a. The jury found: (1) the increased crime rate was a substantial interference to public safety; (2) Lightyear was a substantial factor in increasing the City's crime rate; and (3) by intentionally operating and distributing Lightyear, Kill-a-Byte was civilly liable. Pet. App. 33a–34a. In its discretion, the district court ordered abatement and awarded the City $613.2 million. Pet. App. 33a.

United States Court of Appeals for the Thirteenth Circuit

Kill-a-Byte subsequently filed for appeal with the United States Court of Appeals for the Thirteenth Circuit. Pet. App. 4a. Unsure of the application of New Tejas public nuisance law, the appellate court certified its questions to the Supreme Court of New Tejas. Pet. App. 4a. The Supreme Court of New Tejas held: (1) the City's civil liability argument is viable; (2) the evidence provided by the City could be sufficient to impose liability; and (3) the award for cost of abatement was a recoverable amount. Pet. App. 5a. Therefore, the only issues on appeal were whether Kill-a-Byte was required to renew its purely legal argument with Rule 50 motions, and, if the Rule 50 motion was not required, whether the imposition of civil liability on Kill-a-Byte violates due process. Pet. App. 5a.

The court of appeals reversed the district court's decision and abatement order. Pet. App. 1a. Determining that Kill-a-Byte did not need to raise any Rule 50 motions to preserve its arguments, the court held that imposition of civil liability reached outside the substantial deference provided to states and violated the Due Process

Clause. Pet. App. 14a. New Truro timely filed a petition for writ of certiorari, which this Court granted. Order Granting Cert., Oct. 5, 2020, No. 19-6236.

SUMMARY OF THE ARGUMENT

I.

This Court should reverse the lower court's decision that an argument denied on summary judgment, but not preserved by Rule 50 motions after a full trial on the merits, is reviewable by a court of appeals if the issue is purely legal. This Court should hold that Rule 50 motions are required to preserve such arguments because it is necessary for the appeals court to retain jurisdiction, and a bright-line rule is consistent with the Federal Rules of Civil Procedure and ensures fairness and judicial economy.

Failure to raise Rule 50 motions strips the appellate court of jurisdiction for failure to meet a Congressionally established jurisdictional requirement. Congress establishes the subject-matter jurisdiction of the appellate courts. Congress has generally limited appellate court's jurisdiction to review of final decisions or interlocutory orders when an appeal is filed within thirty days. Denial of summary judgment is generally not considered a final decision and is thus not reviewable by an appellate court without some further action. Rule 50 motions for judgment as a matter of law, at trial, will extend the deadline to appeal an interlocutory order. Therefore, because an order denying summary judgment is interlocutory, after thirty days from the date of the order, Rule 50 motions are necessary to preserve the argument after a full trial on the merits.

Additionally, a bright-line rule is consistent with the Federal Rules of Civil Procedure and ensures fairness and judicial economy. Rule 50 mirrors the standards for Rule 56, summary judgment; both Rules allow the court to resolve issues as a matter of law. The relevant question being whether there is only one reasonable conclusion as to the verdict. The courts have not carved out exceptions for the requirement for summary judgment and as such should not create a false dichotomy between questions of fact and questions of law necessitating Rule 50 motions.

Moreover, a bright-line rule ensures fairness by alerting the opposing party and the court to any improprieties in a case that may be resolved before a final decision. If the improprieties are not resolved, the opposing party is alerted to the possibility of appeal. Additionally, the bright-line rule protects parties who mistakenly believe their summary judgment argument was denied on a purely legal question if the appellate court determines otherwise. Similarly, creating a bright-line rule would promote judicial economy by eliminating unnecessary expenditure of courts' time and resources without risking inequitable application.

II.

This Court should also reverse the Thirteenth Circuit's opinion because states' laws need only be rational and non-arbitrary, but the lower court failed to address this standard.

The Thirteenth Circuit improperly followed this Court's plurality opinion in *Eastern Enterprises v. Apfel* as it relates to retroactivity. That decision stands only for the notion that the Coal Act was unconstitutional; it does not provide a narrow-grounds rationale for retroactivity that courts are required to implement. Rather,

states' laws need only be non-arbitrary and rational to survive due process scrutiny. Moreover, even if this Court found *Eastern Enterprises* persuasive, the law is not imposing retroactive liability. This action was brought to abate an existing nuisance substantially created by Kill-a-Byte.

Additionally, it is rational for a state's public nuisance law to have a causal standard that promotes the law's purpose. The substantial factor analysis—requiring an actor's conduct to be a substantial factor in bringing about harm—provides redress to injured parties that otherwise would not be able to prove generic but-for causation. Application of this standard is consistent with tort law's alternative and less demanding causal standards.

Moreover, the lower court conflated abatement and damages jurisprudence, two remedies that courts treat starkly different. Damages compensate a specific defendant for prior harm, and punish and deter wrongful conduct. Abatement, on the other hand, is an equitable remedy intended to eliminate a harmful condition. In turn, trial courts are given broad discretion to fashion abatement orders—discretion which was not abused here. Accordingly, this Court should reverse the decision of the Thirteenth Circuit.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE LOWER COURT'S DECISION BECAUSE RULE 50 MOTIONS ARE NECESSARY TO PRESERVE JURISDICTION, CONSISTENCY, FAIRNESS AND JUDICIAL ECONOMY.

This Court should draw a bright-line rule and hold that a party must move for judgment as a matter of law after a full trial on the merits to preserve any argument

denied in summary judgment. It is undeniable that a judgment as a matter of law, pursuant to Fed. R. Civ. P. 50(a)–(b), is required after a full trial on the merits to preserve any issue of fact or fact and law. *Ortiz v. Jordan*, 562 U.S. 180, 191–92 (2011). However, this Court has left open whether Rule 50 motions must be made on purely legal issues. *Id.* at 190. As such the lower courts are split on the issue.[1] A bright-line rule is necessary because an appellate court does not have jurisdiction to review an interlocutory order after the thirty-day appeal deadline without Rule 50 motions, and a bright-line rule creates consistency and ensures fairness and judicial economy.

A. Respondent's Failure to Timely Appeal or Properly Preserve Its Summary Judgment Argument Eliminates the Appellate Court's Jurisdiction to Re-Consider the Argument on Appeal.

This Court should reverse the lower court's decision affirming Respondent's motion for summary judgment because the appellate court did not have jurisdiction to reverse a denial of summary judgment when Rule 50 motions were not made after

[1] At five jurisdictions require Rule 50 motions to preserve arguments denied on summary judgment. *See Feld Motor Sports, Inc. v. Traxxas*, 861 F.3d 591, 596–97 (5th Cir. 2017); *Ihuken v. Jenkins*, 677 Fed. Appx. 840, 843–45 (4th Cir. 2017); *New York Marine & Gen. Ins. Co. v. Cont'l Cement Co., LLC*, 761 F.3d 830, 838 (8th Cir. 2014); *Ji v. Bose*, 626 F.3d 116, 127–28 (1st Cir. 2010); *Lind v. UPS*, 254 F.3d 1287 (11th Cir. 2001). While other jurisdictions have rejected the need for Rule 50 motions on purely legal questions. *See Frank C. Pollara Grp. v. Ocean View Inv. Holding*, 784 F.3d 177, 185 (3d Cir. 2015); *Stampf v. Long Island R.R. Co.*, 761 F.3d 192, 201 n. 2 (2d Cir. 2014); *Feld v. Feld*, 688 F.3d 779 (D.C. Cir. 2012); *Houskins v. Sheahan*, 549 F.3d 480, 488–89 (7th Cir. 2008); *Banuelos v. Constr. Laborers' Tr. Funds for S. Cal.*, 382 F.3d 897, 901 (9th Cir. 2004); *United Techs. Corp. v. Chromalloy Gas Turbine Corp.*, 189 F.3d 1338, 1344 (Fed. Cir. 1999) (applying Fifth Circuit precedent); *McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997); *Ruyle v. Cont'l Oil Co.*, 44 F.3d 837, 841 (10th Cir. 1994).

a full trial on the merits. Failure to move for judgment as a matter of law (or take some other action), to preserve arguments denied in summary judgment, strips jurisdiction to review appeals from the courts.

Congress alone establishes appellate courts' subject-matter jurisdiction. *Knotrick v. Ryan*, 540 U.S. 443, 452 (2004). Congress limited courts of appeals' jurisdiction to "appeals from . . . final decisions of the district courts." 28 U.S.C. § 1291 (2018); *see Ortiz*, 562 U.S. at 188. An order denying summary judgment is generally not appealable because it is an interlocutory order—not a final order under section 1291. *Plumhoff v. Richkard*, 572 U.S. 765, 771 (2014). Unlike a final order, an interlocutory order "reserves further questions or directions for future determination." L. S. Tellier, Annotation, *Reviewability, on Appeal From Final Judgment, of Interlocutory Order, as Affected by Fact That Order was Separately Appealable*, 79 A.L.R.2d 1352, § 1 (1961 & Supp. 2020). Even a grant of partial summary judgement is not a final decision appealable under section 1291 unless the district court has certified it as final order under Federal Rules of Civil Procedure Rule 54(b). *General Television Arts, Inc. v. Southern Ry. Co.*, 725 F.2d 1327, 1331 (11th Cir. 1984).

Congress created some exceptions for appeals of interlocutory decisions within mandatory time frames. 28 U.S.C. § 1292 (2018); *Lind v. UPS*, 254 F.3d 1281, 1285 (11th Cir 2001) (citing *Lum v. City of Honolulu*, 963 F.2d 1167, 1169–70 (9th Cir. 1992)). *See Chesapeake Paper Prods. Co. v. Stone and Webster Eng'g Corp.*, 51 F.3d 1229, 1237 (4th Cir. 1995) (stating "a party that believes the district court committed

error in denying summary judgment may move the court to certify the denial for interlocutory appeal pursuant to 28 U.S.C. § 1292(b)"); *Williamson v. Unum Life Ins. Co. of America*, 160 F.3d 1247, 1250 (9th Cir. 1998) (listing other limited exceptions to appeals of summary judgment). If a summary judgment is appealable, notice of appeal in a civil case *must* be filed within thirty days from the order. 28 U.S.C. § 2107(a) (2018); Fed. R. App. P. 4(a). However, if a party file Rule 50 motions within the time allowed the time to appeal runs from the entry of that motion. Fed. R. App. P. 4(a)(4)(A).

The Supreme Court "has long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'" *Bowles v. Russell*, 551 U.S. 205, 209 (2007) (quoting *Griggs v. Provident Consumer Disc. Co.,* 459 U.S. 56, 61, (1982)). Jurisdictional defects cannot be waived, and the Court must take notice of jurisdictional issues even if not raised by the parties. *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 (2017). Therefore, "[f]ailure to comply with a jurisdictional time prescription . . . deprives a court of adjudicatory authority over the case, necessitating dismissal." *Id.*

Additionally, the courts have recognized mandatory claim-processing rules, such as the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. The purpose of these rules is "to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Hamer*, 138 S. Ct. at 17 (citing *Henderson v. Shinseki,* 562 U.S. 428, 435 (2011)). While these rules are not jurisdictional, if "invoked, mandatory claim-processing

rules must be enforced." *Id.* (citing *Manrique v. United States*, 137 S. Ct. 1266, 1272 (2017)); s*ee Ortiz*, 562 U.S. at 187 (holding that the court of appeals had no basis to overturn a jury verdict when the defendant failed to renew their judgment as a matter of law with a Rule 50(b) motion after the jury's verdict).

In this case, the defendant had multiple opportunities to appeal or preserve arguments denied in motions for summary judgment. Respondent's failure to appeal or preserve its due process argument means that the Court of Appeals for the Thirteenth Circuit lacked jurisdiction to review the argument. Additionally, while not strictly a jurisdictional issue, failure to adhere to Rule 50, the mandatory claim-processing requirement as Petitioner has raised, necessitates reversal.

Respondent failed to take advantage of proper methods to appeal an interlocutory order. Respondent's motion for summary judgment was denied on May 10, 2017. Pet. App. 19a. The denial created an interlocutory order, which must be appealed within thirty days. 28 U.S.C. §§ 2192(b), 2107(a); Fed. R. App. P. 4(a). Respondent did not file an interlocutory appeal for any arguments denied on summary judgment. Therefore, Respondent failed to appeal an interlocutory order within the congressionally limited thirty-day period. Failure to meet the congressionally mandated deadline removes the court of appeals' jurisdiction to review Respondent's argument on appeal without something more.

In turn, after failing to appeal the denied motion for summary judgment, Respondent's only recourse to preserve its argument was to renew it with Rule 50 motions. Fed. R. App. P. 4(a)(4)(A). The denial of Respondent's summary judgment

motion created an interlocutory order which is not appealable as a final order. 28 U.S.C. § 1291; *see Ortiz*, 562 U.S. at 188. Respondent failed to raise both a Rule 50(a) motion and a post-judgment Rule 50(b) motion. Pet. App. 5a. Moreover, there is no indication that Respondent renewed its argument in the subsequent bench trial on the issue of abatement. Pet. App. 4a. Therefore, because Rule 50 motions are required to extend and preserve an argument denied on summary judgment, Respondent failed to preserve its argument for appeal. As such, the Court of Appeals for the Thirteenth Circuit was without jurisdiction to reconsider the denial of Respondent's Fourteenth Amendment argument after a full trial.

Congress establishes the appellate courts' jurisdiction and has created a process by which issues may be preserved for appeal. The courts have supplemented those jurisdictional requirements with mandatory claim-processing procedures. When the jurisdictional requirements and the mandatory claim-processing procedures have not been met, this Court has no option but to deny an appeal for lack of jurisdiction. Therefore, this Court should hold that failure to raise Rule 50 motions after a full trial on the merits essentially waives any right to appeal an argument denied on summary judgment.

B. A Bright-Line Rule is Consistent with the Federal Rules of Civil Procedure and is the Best Way to Ensure Fairness and Judicial Economy.

Even if this Court holds that Rule 50 motions are not required to sustain jurisdiction to appeal, this Court should hold that there is a bright-line rule requiring Rule 50 motions. This is consistent with the Federal Rules of Civil Procedure and it

is the best way to ensure fairness and judicial economy. Denials of summary judgment are interlocutory orders and therefore "remain subject to modification or adjustments prior to the entry of a final judgment." *Williams v. County of Westchester*, 171 F.3d 98, 102 (2nd Cir. 1999) (citing *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 107 (1987)). While some courts have made exceptions for purely legal issues, "it [is] always [] better practice for the parties to give the trial court an opportunity to correct its errors in the first instance by making either or both of the post-verdict motions." 9B Wright and Miller, *Federal Practice and Procedure* § 2540 (3d rev. ed. 2020). In this case the best practice should be the rule—a bright-line requirement is consistent with the Federal Rules of Civil Procedure and is the best way to ensure fairness and judicial economy.

i. <u>The Standard for Rule 50 and Summary Judgement are the Same; Therefore, There is No Reason to Create a False Dichotomy on Appeals.</u>

This Court should hold that, consistent with Federal Rule of Civil Procedure 56, there is no distinction on appeal between questions of law and fact. Instead, to preserve an argument denied at summary judgment, Rule 50 motions must be made after a full trial on the merits. There are two methods by which a court may remove a claim from the jury's determination—summary judgment under Rule 56 and judgement as a matter of law under Rule 50. Both require determining whether the issue must be resolved *as a matter of law*.

In denying a motion for summary judgment, courts are not required to express whether the denial is based on determinations of fact or law. *Chesapeake Paper Prods.*

Co., 51 F.3d at 1235 ("The Federal Rules of Civil Procedure do not require such a dichotomy in summary judgment denials.") (citing Fed. R. Civ. P. 56(c)). Summary judgment is a process by which the courts "weed out those cases so clearly meritorious or so clearly lacking in merit that the full trial process need not be activated to resolve them." *Holley v. Northrop Worldwide Aircraft Servs., Inc.*, 835 F.2d 1375, 1377 (11th Cir. 1988). Courts should grant summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits 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." *Sheridan v. Nationwide Ret. Sols., Inc.*, 313 F. App'x 615, 616 (4th Cir. 2009) (quoting Fed. R. Civ. P. 56(c); citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251–52 (1986)). However, the courts have recognized "even in the absence of a factual dispute, a district court has the power to 'deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.'" *Black v. J.I. Case Co.*, 22 F.3d 568, 572 (5th Cir. 1994) (quoting *Anderson,* 477 U.S. at 255). The relevant inquiry in a summary judgment analysis is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson,* 477 U.S. at 251–52.

Rule 50 motions mirror the standard for summary judgment. *Id.* at 250–51. Rule 50 motions preserve "a trial judge's power to determine questions of law." *Belk, Inc. v. Meyer Corp., U.S.*, 679 F.3d 146, 160 (4th Cir. 2012), *as amended* (May 9, 2012) (noting the most common legal question is "whether the evidence adduced at trial is

sufficient to establish a claim as a matter of law."). In other words, the questions raised in Rule 56 motions are the *same* as those raised in Rule 50 motions. *Ortiz*, 562 U.S. at 184 (noting that the full trial record supersedes the record existing at the time of summary judgment). The question is whether there is a legally sufficient basis for which a jury could find for the opposing party. *See Anderson*, 477 U.S. at 250–51 (stating in the contrapositive for a grant of either motion, whether "there can be but one reasonable conclusion as to the verdict").

Therefore, because Rule 50 motions should mirror the standard of a summary judgment motion, it would be consistent with the Federal Rules of Civil Procedure to create a bright-line requirement for Rule 50 motions to preserve an argument denied at summary judgment. In turn, this Court should hold that there is no exception to the requirement to make Rule 50 motions, after a full trial on the merits, for purely legal questions.

ii. A Bright-Line Rule is Necessary to Ensure Fairness for All Parties to a Claim.

A bright-line rule requiring Rule 50 motions after a full trial is the best way to ensure fairness in litigation. The legitimacy of our legal system hinges "on the willingness of parties to abide by the results, and that willingness will be undermined by procedures that are perceived as unfair." Patrick E. Longan, *Civil Trial Reform and the Appearance of Fairness*, 79 Marq. L. Rev. 295, 297 (1995). The Federal Rules of Civil Procedure are not meaningless formalities. The rules are a tool by which the federal courts ensure fairness in an adversarial legal system. While some rules are waivable, when "invoked, mandatory claim-processing rules must be enforced."

Hamer, 138 S. Ct. at 17 (citing *Manrique*, 137 S. Ct. at 1272). As such, this Court should hold that Rule 50 motions are required after a full trial to ensure fairness for all parties to a litigation. First, appealing a denial of summary judgement after a full trial without raising Rule 50 motions is unfair to the opposing party. *Holley,* 835 F.2d at 1377–78 (internal citations omitted). Second, a valid issue of law and fact may be dismissed for lack of jurisdiction because a party incorrectly believed the issue on appeal was a purely legal question and did not make the Rule 50 motions. *See Ortiz*, 562 U.S. at 184–191.

First, Rule 50 motions put the court and the opposing party on notice of any issues or improprieties. Rule 50(a)'s basic purpose is to "alert the opposing party to any insufficiency before the case is submitted to the factfinder, thereby affording the opposing party an opportunity to cure any defects in proof should the motion have merit." *Kelso v. Butler*, 899 F.3d 420, 424 (5th Cir. 2018) (internal quotations omitted). Additionally, Rule 50 motions also allow the court to correct any error as a matter of law before the case is given to the jury for determination. 9B Wright, § 2540 (stating it is always better for the "parties to give the trial court an opportunity to correct its errors in the first instance by making either or both of the post-verdict motions"); *see also Holley,* 835 F.2d at 1377–78 (stating: "We agree with the Eleventh Circuit that [s]ummary judgment was not intended to be a bomb planted within the litigation at its early stages and exploded on appeal.") (internal quotations omitted). Rule 50 therefore ensure fairness and increases the confidence in the parties to accept

results by alerting the opposing party to any deficiencies and allows the court to correct any errors of law prior to the case going to the jury.

Second, without a bright-line rule, a party may be prejudiced and unable to argue an appeal because they mistakenly believed their summary judgment was denied on a legal, as opposed to factual, basis. Many circuits have recognized the difficulty of determining whether a summary judgment was based on a question of law or a question of fact. *New York Marine & Gen. Ins. Co. v. Cont'l Cement Co., LLC*, 761 F.3d 830, 838 (8th Cir. 2014) (citing *Chesapeake Paper Prods. Co.,* 51 F.3d at 1235); *Ji v. Bose Corp.,* 626 F.3d 116, 127–28 (1st Cir. 2010)); *see Ortiz*, 562 U.S. at 187–92. In *Ortiz*, defendants in a qualified immunity case lost their motion for summary judgment. *Ortiz*, 562 U.S. at 187. After a full trial on the merits, the defendants filed a Rule 50(a) motion, however, they did not renew their argument with a Rule 50(b) motion. *Id.* On appeal, the defendants argued that they did not need to file a Rule 50(b) motion to appeal the denial of summary judgment because the issue was a purely legal issue. *Id.* at 188–89. However, this Court ultimately determined that the issue was not "purely legal," but instead, was dependent on the disputed facts of whether the defendants crossed "a constitutional line." *Id.* at 191. As such, the defendants lost their opportunity to argue their appeal because they mistakenly believed the denial of summary judgment was a question of law as opposed to a question of law and fact.

Moreover, a bright-line rule would not prejudice the parties because Rule 50 motions have very low requirements. *Belk, Inc.*, 679 F.3d at 156–57 ("[T]here is no

requirement that the Rule 50 motion be in writing and be filed with the court; oral motions, in which a party specifically invokes the rule, or perhaps even colloquy with the court, fulfill the requirements of Rule 50."). Further, courts have recognized the necessity of enforcing Rule 50 motions in similar cases. *Ortiz*, 562 U.S. at 190; *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 403 (2006). Therefore, because there is such a low threshold and courts require Rule 50 motions in similar cases, there is no unfair prejudice requiring Rule 50 motions after a full trial on the merits to preserve the arguments for appeal.

Here, the Court below incorrectly determined that it would be "fundamentally unjust" and a "meaningless formality" to require Rule 50 motions. Pet. App. 7a. If anything was "fundamentally unjust," it was the court's reversal of a denied summary judgment argument that was not preserved. This Court has routinely upheld the requirement to file Rule 50 motions to preserve arguments on appeal. Like *Ortiz*, there is nothing unfair about denying arguments which have not been properly preserved. Nor did the *Ortiz* Court consider the Federal Rules of Civil Procedure meaningless formalities. Instead, they are gentlemanly rules of engagement, designed to ensure fairness, in an adversarial legal system.

A bright-line rule, requiring Rule 50 motions to preserve any arguments denied at summary judgment after a full trial, ensures fairness for all parties to a lawsuit. As such, this Court should reverse the lower court's judgment and uphold the trial court's denial because respondent failed to follow the rules established by this Court in the Federal Rules of Civil Procedure. To ensure fairness for all parties in the future,

this Court should hold that Rule 50 motions are required to appeal any argument denied in summary judgment after a full trial on the merits.

iii. A Bright-Line Rule Promotes Judicial Economy by Streamlining the Procedure and Eliminating Confusion Without Risking Unfair Application.

Creating a bright-line rule requiring Rule 50 motions is the best use of limited judicial resources and limits the risk of creating arbitrary and inequitable results. The decision between creating a rule versus a more flexible standard or test is one that rests at the heart of every decision this Court makes. Michael Coenen, *Rules Against Rulification*, 124 Yale L.J. 644, 646 (2014). While these standards can offer courts nuance and flexibility, seemingly allowing for the ability to provide equitable instead of rigid results, this comes at the expense of time, variability, uncertainty, and high decision costs. *Id.* On the other hand, bright-line rules offer streamlined outcomes that further judicial economy and, when used in procedural matters, limit the risk of unjust outcomes. A bright-line rule preserves judicial resources by eliminating time-extensive analysis, and by allowing the court to address issues at the trial stage instead of waiting for a high-cost appeal.

Allowing appeals of "purely legal questions" without requiring Rule 50 motions puts courts in the tedious position of determining what constitutes a purely legal question. This is a time-consuming task which both parties and courts have struggled with because oftentimes facts are inextricably intertwined with the legal question. *See Ortiz*, 562 U.S. at 187–192. For example, an appellate court reviewing the legal question would have to determine first if there are any facts that arose during trial

that may inform the legal issue. If there are, is the appellate court then unable to answer the question of law? Or may the appellate court review the question of law based off facts that arose during trial in the absence of Rule 50 motions? This was the issue dealt with in *Ortiz*. *Id.* at 187. In *Ortiz*, this Court was faced with determining whether an appeal based on denial of qualified immunity was a purely legal question. *Id*. Ultimately, qualified immunity was determined to be a question of fact, *id.* at 191, but the answer was less than clear cut and has left many parties and courts divided.

Even the jurisdictions now, which do not require Rule 50 motions to appeal a denial of summary judgment, have varying standards to determine which issues may be appealed. *See Hanover Am. Ins. Co. v. Tattooed Millionaire Entm't, LLC*, 974 F.3d 767, 786 n.10 (6th Cir. 2020) (noting the Second, Third, and Seventh Circuits make distinctions based on the difference between "sufficiency-of-the-evidence challenges and all others," while the Sixth Circuit makes its determinations based on "factbound" compared to purely legal questions); s*ee also Ortiz*, 562 U.S. at 187. Additionally, the task of determining whether to require Rule 50 motions has proven difficult. For example, the Eight Circuit has conflicting case law which both requires and seemingly does not require Rule 50 motions to appeal pure questions of law. *Owatonna Clinic—Mayo Health Sys. v. Med. Protective Co. of Fort Wayne, Ind.*, 639 F.3d 806, 810 (8th Cir. 2011). In *Owatonna Clinic*, the court recognizes the circuit's inconsistency on the matter but refuses to resolve the issue at that time. *Id.* (an issue which was not resolved by the Eighth Circuit until 2014 in *New York Marine & Gen. Ins. Co. v. Cont'l Cement Co., LLC*. 761 F.3d at 838).

However, this Court can remove this step entirely and create a universal application, thus saving valuable time and eliminating variability and uncertain outcomes. By creating a bright-line rule, parties will no longer have to guess if they should raise Rule 50 motions, which has become an increasing issue in high-profile cases. *See Williams v. Gaye,* 895 F.3d 1106 (9th Cir. 2018) (where singers Robin Thicke and Pharrell Williams were found in violation of copyright law and they lost the ability to appeal when their attorneys failed to raise Rule 50 (a) and (b) motions falsely believing their questions were purely legal); *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831 (Fed. Cir. 2010), aff'd, 564 U.S. 91 (2011) (where Microsoft was unable to appeal a $200 million award for damages because its attorneys incorrectly believed a Rule 50(b) motion was unnecessary). More importantly, courts will no longer have to "engage in the dubious undertaking of determining the bases on which summary judgment is denied and whether those bases are legal or factual." *Chesapeake Paper Prods. Co.*, 51 F.3d at 1235.

Moreover, the risks associated with establishing bright-line rules are essentially eliminated in the context of federal civil procedure. The concern surrounding black-and-white analysis is no doubt heightened when dealing with criminal convictions and constitutional rights, and this Court should obviously lean towards a more fact-sensitive approach when determining those questions. But the Federal Rules of Civil Procedure are named "rules" for a reason—they are meant to aid, expedite, and simplify the Court's process with bright-line standards. The Federal Rules should not make things more complicated or add to the number of tests

this Court already must make in rendering an opinion. Additionally, being required to raise Rule 50 motions is not an excessive burden on parties. In practice, establishing this bright-line rule would actually alleviate confusion and prevent other attorneys from finding themselves in the predicament of *Gaye* and *i4i Limited Partnership*.

It necessarily follows that the "basic principles of judicial economy require a party to raise [Rule 50 motions]" and thus failure to do so is "tantamount to waiver." *Villara v. City of Yonkers Police Dept.*, No. 95 CIV. 10654 (JSR), 1997 WL 399660, at *1 (S.D.N.Y. July 15, 1997). Therefore, this Court should eliminate the unnecessary expenditure of judicial resources and variability and hold that a bright-line rule requiring Rule 50 motions is necessary to appeal any order denied on summary judgment to preserve judicial resources.

II. THIS COURT SHOULD REVERSE THE THIRTEENTH CIRCUIT'S DECISION BECAUSE IT IMPROPERLY FOLLOWS *EASTERN ENTERPRISES V. APFEL*, AND IT IS RATIONAL AND NON-ARBITRARY TO IMPOSE LIABILITY ON A PARTY THAT CREATES AN EXISTING NUISANCE.

The development of state common law is a fundamental feature of the American legal system. *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 622 (7th Cir. 2014). The Constitution provides significant deference to states for the "incremental and reasoned development" of common law unless it is prevented by a specific constitutional bar. *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001); *see Gibson*, 760 F.3d at 624. The Due Process Clause of the Fourteenth Amendment provides, in pertinent part, that no state shall "deprive any person of life, liberty, or property, without due

process of law." U.S. Const. amend. XIV. Historically, substantive due process protections have only been "accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright v. Oliver*, 510 U.S. 266, 272 (1994). In turn, this Court has always been "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). Therefore, state laws need *only* be rational and non-arbitrary to satisfy due process. *Gibson*, 760 F.3d at 614, 621 (explaining that the "question is not whether a law is wise or not; we test only whether the law is arbitrary or irrational").

The Restatement (Second) of Torts explains that "[a] public nuisance is an unreasonable interference with a right common to the general public."[2] § 821B (Am. Law Inst. 1979). An "unreasonable interference" includes acts that "significantly interfere with public health, safety, peace, comfort, or convenience." *Id.*; *Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1142 (Ohio 2002). Such an action can be brought by a public body or agency on behalf of the public. Restatement (Second) of Torts § 821C. Although public nuisance has typically been applied to actions connected to real property, it is *not* strictly limited to those situations. *Beretta U.S.A. Corp.*, 768 N.E.2d at 1142–44 (finding the city properly pled its public nuisance claim against a gun manufacturer for the manufacturing and distribution of firearms); *see also People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 556 (Cal. Ct. App.

[2] Petitioners have filed suit for "absolute public nuisance" under New Tejas common law. Pet. App. 2a. Unless specifically noted, reference to "public nuisance" is referring to "absolute public nuisance."

6th Dist. 2017) (upholding the trial court's ruling that three lead paint manufacturers were liable under public nuisance law for intentionally distributing lead-based paint).

Here, the Thirteenth Circuit failed to follow these well-established precedents in multiple respects. First, the lower court improperly relied on *Eastern Enterprises v. Apfel*'s plurality opinion and found that the law was impermissibly retroactive, rather than rational and non-arbitrary. Second, the court failed to give proper weight to a state's discretion in fashioning contemporary tort laws that redress substantial interferences with rights common to the public. Finally, the Thirteenth Circuit further erred by conflating damages with abatement—a stark distinction that the lower court recognized but failed to follow.

A. The Thirteenth Circuit Improperly Relied Upon Non-Binding Authority and Decided the Law Imposed Retroactive Liability Even Though the Action was Brought to Abate an Existing Nuisance.

The Constitution provides significant deference to states in developing their laws, and "even more deference is owed to judicial common law developments, which by their nature must operate retroactively on the parties in the case." *Gibson*, 760 F.3d at 622. If strict constraints on retroactivity applied to a state's common law, its development would be significantly impaired. *Id.* Despite this, the lower court held that New Tejas's public nuisance law imposed retroactive liability on Kill-a-Byte. Pet. App. 11a. In doing so, the Thirteenth Circuit improperly followed this Court's non-binding plurality reasoning in *Eastern Enterprises v. Apfel*. Pet. App. 12a–13a. The court's reliance is misplaced because that ruling *only* stands for the proposition that

the Coal Act is unconstitutional. Moreover, this action was not brought to impose retroactive liability, but to resolve a *current* nuisance.

This Court's judgment in *Eastern Enterprises v. Apfel* only stands for the notion that the Coal Act is unconstitutional. 524 U.S. 498 (1998); *see also Gibson*, 760 F.3d at 620. When the Supreme Court issues an opinion that does not have a single rationale garnering five votes, "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). The narrowest opinion must represent a "common denominator" of the Court's reasoning that represents a rationale approved by at least five Justices who support the judgment. *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc). When it is not possible to discern a single rationale that constitutes the narrowest ground for a decision, there is no binding ruling because it does not have a majority of the Supreme Court's support. *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003).

There is not a narrow-grounds rationale in *Eastern Enterprises* that has garnered the support of five Justices. *See*, *e.g.*, *Gibson*, 760 F.3d at 619; *A.T. Massey Coal Co., Inc. v. Massanari*, 305 F.3d 226, 236–37 (4th Cir. 2002); *Anker Energy Corp. v. Consolidation Coal Co.*, 177 F.3d 161, 172 (3d Cir. 1999). The four-justice plurality opinion held that the Coal Act violated the Takings Clause, whereas Justice Kennedy's concurrence specifically *rejected* the plurality's reliance on Takings Clause jurisprudence and determined that it violated due process. *Compare Eastern Enters.*, 524 U.S. at 537–38 ("Because we have determined that the [Coal Act] violates the

Takings Clause as applied to Eastern, we need not address Eastern's due process claim."), *with id.* at 539 (Kennedy, J., concurring in the judgment and dissenting in part) ("I concur in the judgment holding the Coal Act unconstitutional but disagree with the plurality's Takings Clause analysis, which, it is submitted, is incorrect."). Justice Kennedy's express rejection of the plurality's reasoning makes clear that there is no theoretical overlap between his due process analysis and the plurality's Takings Clause analysis. *A.T. Massey Coal Co., Inc.*, 305 F.3d at 237. Therefore, Justice Kennedy's substantive due process reasoning cannot be a "narrower ground" that would constitute a controlling holding. Rather, the Coal Act's unconstitutionality is the "only binding precedent that arises from the case." *Gibson*, 760 F.3d at 620.

Even if this Court finds *Eastern Enterprises*' opinions on retroactivity persuasive, it does not apply to the current case because this action was brought to abate a current nuisance. Pet. App. 2a–3a. Indeed, Justice Kennedy noted "[i]f retroactive laws change the legal consequences of transactions long *closed*, the change can destroy the reasonable certainty and security which are the very objects of property ownership." *Eastern Enters.*, 524 U.S. at 548 (emphasis added). Here, however, the conditions created by Kill-a-Byte are far from closed. Although the lawful distribution of Lightyear ceased in 2013, Pet. App. 22a, the appendix is silent to the fact that gameplay and the condition created has not ceased.

Similarly, in *ConAgra*, three defendant paint manufacturers argued that the trial court imposed retroactive liability "in hindsight," years after the distribution of lead paint stopped. *See ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d at 559. The

appeals court found that the defendants were only being required to remediate the condition they created. *Id.* Moreover, the fact that it was lawful to distribute residential lead paint did not bar the court from declaring it a public nuisance. *Id.* at 554 ("It would be an unreasonable limitation on the powers of the city to require that this [presently existing] danger be tolerated ad infinitum merely because the [building] did not violate the statutes in effect when it was constructed 36 years ago.") (quoting *City of Bakersfield v. Miller*, 410 P.2d 393, 399 (Cal. 1966)).

In this case, the City of New Truro brought suit against Kill-a-Byte to abate an *existing* nuisance. The City is not trying to impose retroactive liability on a transaction that is long closed. Rather, the City is resolving an ongoing nuisance, just like the counties that sued the paint manufacturers in *ConAgra*. Even though Lightyear was lawfully distributed, it is "an unreasonable limitation on the powers of" the City to require an existing nuisance to be tolerated simply because it did not violate a law at the time.

Lacking any controlling test from *Eastern Enterprises*, "we are back to where we started: economic [laws do] not violate substantive due process unless the law is arbitrary and irrational." *Gibson*, 760 F.3d at 621. This rational basis review applies even when the effect of the law imposes liability on past acts. *Id.* at 621–22. Imposing civil liability on a private party for distributing a product that is later determined to be a public nuisance is rational because it promotes the purpose of public nuisance law.

B. The Thirteenth Circuit Failed to Recognize That Substantial Factor Analysis is a Rational and Contemporary Causal Standard that States are Permitted to Fashion for Public Nuisance Law, and the Court's Opinion Focused on Conduct Rather Than Condition.

Courts have found an increasing number of instances where the "but-for" cause of proof is not required, though historically, tort liability was dependent on proof that the actor's conduct or activity was the actual—or "but-for"—cause of injury. John L. Diamond, et. al, *Understanding Torts*, 169 (6th ed. 2018). This has generally involved cases where requiring definite proof would "effectively immunize culpable defendants because of the difficulty of proving causation." *Id.* To resolve this issue, many states have replaced the "but-for" test with the alternative "substantial factor" test for causation. *Id.* "If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable." Restatement (Second) of Torts § 435(1). Under this test, an actor's conduct must be more than negligible or theoretical; it must materially contribute to the injury. *ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d at 543. Due process has never required tort causation to be stricter than the substantial factor analysis because it promotes the purpose of public nuisance. Moreover, the fact that an actor neither foresaw, or reasonably should have foreseen the extent of the harm is not arbitrary or irrational.

i. The Substantial Factor Analysis is a Rational Causal Standard that States are Permitted to Apply in Public Nuisance Law.

The substantial factor analysis allows courts to provide a remedy to injured parties that otherwise would not be available through but-for causation. The lower court was troubled that liability could be imposed on a party without evidence of but-for causation. Pet. App. 9a. However, this ignores the unique casual standard of torts:

> [T]ort law teaches that alternative and less demanding causal standards are necessary in certain circumstances to vindicate the law's purposes. It would be anomalous to turn away a person harmed by the combined acts of many wrongdoers simply because none of those wrongdoers alone caused the harm. And it would be nonsensical to adopt a rule whereby individuals hurt by the combined wrongful acts of many (and thus in many instances hurt more badly than otherwise) would have no redress, whereas individuals hurt by the acts of one person alone would have a remedy. Those are the principles that underlie the various aggregate causation tests . . . and they are sound principles.

Paroline v. United States, 572 U.S. 434, 452 (2014). Here, it is rational for New Tejas's public nuisance law to impose liability on a private party that was a substantial factor in creating the nuisance.

Paroline is particularly instructive because it shows that the but-for causation does not always promote a law's purpose. There, a victim of child pornography sought restitution from Paroline for emotional harm that resulted from the possession and widespread dissemination of an image depicting her abuse. *Id.* at 440–41. This Court found that a but-for showing of causation could not be made, and that it was impossible to identify "a discrete, readily definable incremental loss" caused by Paroline's possession of the image. *Id.* at 456–57. However, it was indisputable that his possession was part of an overall phenomenon that caused significant general losses. *Id.* This Court found that it undermined the purpose of the restitution statute

to turn away victims in cases where but-for causation could not be shown, "[j]ust as it undermines the purposes of tort law to turn away plaintiffs harmed by several wrongdoers." *Id.* at 457 (noting that one of the restitution statute's purposes was to "impress upon offenders that their conduct produces concrete and devastating harms").

That is precisely the situation here: the but-for causation standard would undermine New Tejas's nuisance law. Public nuisance actions are meant to redress unreasonable interferences with a right common to the general public. Restatement (Second) of Torts § 821B. This includes substantial interference with public safety. *Id.* Indeed, this is a broad cause of action, and as such it can be difficult to identify a discrete, readily definable cause. *See Beretta U.S.A. Corp.*, 768 N.E.2d at 1142. In turn, as this Court found in *Paroline*, tort law allows for less demanding casual standards to promote the law's purpose. The substantial factor analysis provides redress to the public when their right to public safety is interfered with by one of several actors who substantially caused the injury. Without this, there would be no redress to an injured public. The but-for analysis undermines the purpose of the law by turning away plaintiffs harmed by several wrongdoers. Such an approach is the antithesis of public nuisance, and it permits actors to harm the public without any liability for their harm. Due process does not restrict states from adopting contemporary casual standards to ensure injured parties have a remedy. *See, e.g.*, *Gibson*, 760 F.3d at 624; *Summers v. Tice*, 199 P.2d 1, 4–5 (Cal. 1948); *Thomas ex rel. Gramling v. Mallett*, 701 N.W.2d 523, 552 (Wis. 2005).

Additionally, the lower court distorted what is required in a substantial factor analysis by finding that the injuries still would have occurred in the absence of Kill-a-Byte's actions. Pet. App. 9a. Under the substantial factor analysis, a plaintiff does not need to prove that an injury would not have occurred without the defendant's action. *ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d at 543. Rather, the standard is satisfied when the conduct of the defendant is a substantial factor in bringing the result. *Id.* In *ConAgra*, for example, three defendants were sued under California's public nuisance law for the manufacture and distribution of lead paint used in private residents' homes. *Id.* at 515–19. While reviewing the causal element of the law, the court did not consider whether the injury would have occurred if the actions of the three named paint manufacturers did not occur. *Id.* at 543. The *only* inquiry was whether the conduct was a substantial factor in bringing the result. *Id.*

Moreover, this standard does not eliminate causation. The party alleging public nuisance still must show that the actor's conduct was a substantial factor in substantially interfering with the public's right to safety. *See* Restatement (Second) Torts §§ 821B, 435(1); *Gibson*, at 624. The actor's conduct still must materially contribute to the injury—a question that is left for the jury to decide. In this case, ample evidence was presented at trial that led the jury to find Kill-a-Byte was a substantial factor in interfering with the public's right to safety. Pet. App. 4a. For three years, *more than half* of males in New Truro aged 15–25 played Lightyear for at least 10 hours a week. Pet. App. 22a. The City's expert posited a direct connection that exposure to video game violence made players more likely to engage in this

behavior in real life. Pet. App. 24a. Regardless, the question which certiorari was granted is whether the standard is rational—which it undoubtedly is.

ii. Public Nuisance Focuses on the Condition Created, Not the Actor's Conduct.

The bedrock of absolute public nuisance law is that liability generally rests on cultivating a condition, *not* on any particular type of conduct. Thomas W. Merrill, *Is Public Nuisance a Tort*, 4 J. Tort L., 2011, at 1, 16. The Rhode Island Supreme Court has noted that the essential element of public nuisance is that "persons have suffered harm . . . that they ought not have to bear." *Wood v. Picillo*, 443 A.2d 1244, 1247 (R.I. 1982). Unlike negligence liability, nuisance liability is predicated upon unreasonable injury, rather than unreasonable conduct. *Id.* In other words, "plaintiffs may recover in [public] nuisance despite the otherwise nontortious nature of the conduct which creates the injury." *Id.*

Notwithstanding the above, absolute public nuisance[3] requires that the actor intended to bring about the conditions constituting a nuisance. *Dingwell v. Town of Litchfield*, 496 A.2d 213, 215 (Conn. App. Ct. 1985). This does not mean that the nuisance itself was intended. *Id.* Rather, it means that the creator "intended to bring about the conditions which are in fact found to be a nuisance." *Id.* at 215–16. This is recognized in the Restatement which states: "the fact that the actor neither foresaw

[3] Nuisance can generally be divided into two categories: absolute nuisance and qualified nuisance. *See Taylor v. City of Cincinnati*, 55 N.E.2d 724, 732 (Ohio 1944). Absolute nuisance is grounded in an intention to bring about certain conditions. *Id.* Qualified nuisance, on the other hand, depends upon the conduct of the defendant. *See id.* Specifically, qualified nuisance involves a lawful act "so negligently or carelessly done as to create a potential and unreasonable risk of harm, taywhich in due course results in injury to another." *Id.* Here, Petitioners allege only absolute public nuisance. Pet. App. 2a.

nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable." Restatement (Second) of Torts § 435(1). Thus, absolute liability applies where the harm and resulting damage are the consequences to the condition itself. *See Taylor v. City of Cincinnati*, 55 N.E.2d 724, 732 (Ohio 1944). Here, Kill-a-Byte intended to create a game that was addicting to players and maximized an individual's playing time. Pet. App. 23a. This condition, intended by Kill-a-Byte, was a substantial factor in substantially interfering with a public right. Pet. App. 4a.

Indeed, the California Court in *ConAgra* required proof that the defendants affirmatively promoted a product that they knew was hazardous, in other words, actual knowledge. 227 Cal. Rptr. 3d at 529. Although this is more restrictive than what is generally required to prove public nuisance, Kill-a-Byte still knew it was distributing an addictive game, and even more, intended to increase and maximize the amount of time people spent playing the violent game. Pet. App. 23a. Kill-a-Byte knew the hazards of the game's addictiveness because accounts of college students failing class from playing too much Lightyear were published. Pet. App. 23a. Despite this, Kill-a-Byte never limited the amount of game time—intending the addiction to continue. Pet. App. 23a.

Public nuisance laws redress an intended condition that substantially interfere with a public right. An essential element of public nuisance is that the public should not bear the cost of harm, even when the conduct is non-tortious. Therefore, it is rational to impose liability on a party that creates a condition causing a current public

nuisance. To rule otherwise would allow actors to create a condition that substantially interferes with a public right and yet, claim ignorance to avoid liability. Ruling so would require injured parties to bear the cost of harm and is an irrational concept contrary to absolute public nuisance law.

C. The Thirteenth Circuit Improperly Conflated Abatement and Damages Jurisprudence, and Failed to Respect the District Court's Proper Discretion.

Abatement, not damages, is the proper remedy for a public nuisance action. Public nuisance liability gives rise to an order requiring the defendant to "abate the condition deemed to be a public nuisance." Merrill, *supra* at 17. Throughout the long history of public nuisance law, there have only been *extremely rare* instances of public nuisance claims yielding an award for damages. *Id.* Rather, an abatement order requires the defendant to "clean up" the condition that they were a substantial factor in creating. *ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d at 559. Abating a nuisance is "accomplished by a court of equity by means of an injunction proper and suitable to the facts of each case." *Id.* at 568. "[T]he granting . . . [of an] injunction rests in the sound discretion of the trial court upon a consideration of all the particular circumstances of each individual case." *Id.* If no constitutional issue is raised, the order will not be modified or dissolved on appeal except for an abuse of discretion. *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433 (2001). The lower court, however, improperly relied on damages jurisprudence in determining the abatement order exceeded the limits of due process. Moreover, the abatement order was properly subject to the district court's discretion, which was not abused.

i. Abatement is the Proper Remedy for Public Nuisance and the Lower Court Incorrectly Relied Upon Damages Jurisprudence in Determining that the Amount Exceeded Due Process Limits.

There is a stark distinction between an abatement order and a damages award. *Id.* at 569. Our judicial system recognizes two forms of damages: compensatory and punitive. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). Compensatory damages are a legal remedy directed at compensating the injured party for *prior* accrued harm that resulted from the defendant's wrongful conduct. *Id.* at 416 ("Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.") (internal quotations omitted); *ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d at 569. By contrast, punitive damages are intended to punish unlawful conduct and deter its repetition. *Cooper Indus., Inc.*, 532 U.S. at 432. As such, courts in most states primarily award punitive damages against defendants who act with malice. Diamond, *supra*, at 210; s*ee, e.g.*, Cal. Civ. Code § 3294 (2019) (stating plaintiffs are allowed to recover "damages for the sake of example and by way of punishing the defendant," in addition to actual damages in cases where defendant acted with malice).

Abatement orders, on the other hand, are equitable remedies. *ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d at 569. "An equitable remedy's sole purpose is to eliminate the hazard" that is causing the harmful condition. *Id.* Notably, the remedy does not provide any compensation to the plaintiff for the harm. *Id.*

The difference between abatement and damages was recognized by the Third Circuit in *United States v. Price*. 688 F.2d 204, 212 (3d Cir. 1982). There, the Third Circuit reviewed an appeal from the district court's denial of a preliminary injunction where the defendants were alleged to have contaminated the city's water supply. *Id.* The injunction would have required the defendants to fund a diagnostic study of the threat to the city's water supply. *Id.* at 207. The court noted:

> Damages are awarded as a form of substitutional redress. They are intended to compensate a party for an injury suffered or other loss. A request for funds for a diagnostic study of the public health threat posed by the continuing contamination and its abatement *is not, in any sense, a traditional form of damages*. The funding of a diagnostic study in the present case, though it would require monetary payments, would be preventive rather than compensatory. The study is intended to be the first step in the remedial process of abating an existing but growing toxic hazard which, if left unchecked, will result in even graver future injury.

Id. at 212 (emphasis added). Notably, the Third Circuit found that funding for abatement was not compensatory but preventative of the existing harmful condition. *Id.* Therefore, the stark difference between the two renders reliance on damages jurisprudence improper when considering abatement. *See ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d at 559 ("Defendants' reliance on punitive damages and penalty cases is misplaced.").

The Thirteenth Circuit's reliance on this Court's analysis of due process constraints regarding punitive damages is entirely misplaced because damages and abatement are not analogous. The purpose of punitive damages is to punish and deter those that have acted with malice. That is far from the purpose of abatement—and even farther from public nuisance. Abatement seeks to eliminate a harmful condition and prevent it from causing further harm to the public. It does not act as a

punishment intended to deter future conduct. Further, public nuisance law does not even look at the conduct of the actor and whether they acted with malice. Rather, it looks only at whether the condition creating the nuisance was intended.

Indeed, compensatory damages are intended to redress a wrong caused by the defendant. However, compensatory damages resolve prior wrongful acts that injured a plaintiff, while abatement redresses a current nuisance causing harm to the public. Moreover, compensatory damages are directed at a specific plaintiff who has been injured, whereas abatement orders are not. Here, similar to *Price* and *ConAgra*, reliance on punitive and compensatory damage cases are misplaced. Kill-a-Byte is not being punished or required to pay damages to any individual. Instead, they are only required to clean up the harmful condition they were a substantial factor in creating by paying into a fund dedicated to public safety. Pet. App. 25a. Therefore, the Thirteenth Circuit's reliance on due process analyses for damages is misplaced, and the district court's abatement order must be reviewed under the abuse of discretion standard.

ii. The District Court's Abatement Order was Not an Abuse of Discretion Because the Court has Broad Authority to Fashion an Appropriate Abatement Injunction.

A trial court is granted broad discretion in fashioning an abatement order and may require the offending party to prefund remediation costs. In *ConAgra*, the trial court ordered the defendants to pay $1.15 billion in abatement. 227 Cal. Rptr. 3d at

514. Though the appellate court remanded for recalculation,[4] it found that "it was well within the court's discretion" to require defendants to prefund the remediation costs to protect children and families from lead paint hazards. *Id.* at 570. In fact, the fund was a reasonable method of prefunding the remediation that was required to abate the public nuisance created by defendants. *Id.* at 559, 570 ("[The defendants] are being required simply to clean up the hazardous conditions that they assisted in creating. Requiring them to do so is not disproportional to their wrongdoing.").

Similarly, here, the trial court ordered Kill-a-Byte to pay $613.2 million in abatement costs. Pet. App. 33a. The funds will be used to fund job training programs, centers to assist with "video game addiction," increased police presence, and security cameras in the city to abate the condition that Kill-a-Byte was a substantial factor in creating. Pet. App. 25a. It is well within the district court's discretion to fashion such an award.

Ultimately, the Thirteenth Circuit's opinion repeatedly relied on cases that bear no authority over this case. This Court's plurality decision in *Eastern Enterprises* does not provide controlling precedent regarding retroactivity that other courts must follow. In turn, a state's law needs to be only rational and non-arbitrary to survive

[4] The appeals court found the defendants liable for a shorter period of time than the trial court. *ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d at 598. Both the California Supreme Court and this Court subsequently denied the defendants' writs of certiorari, and the parties ultimately reached a post-judgment settlement where the defendants agreed to pay ten California counties a total of $305 million. Press Release, James R. Williams, Cty. Counsel, Office of Cty. Counsel, *California Counties and Cities Announce Groundbreaking $305 Million Settlement of Landmark Lead Paint Litigation* (July 17, 2019), https://www.sccgov.org/sites/cco/leadpaint/Documents/July%2017%2c%202019%20Press%2ORelease%20-%20Settlemento20ofo2oLandmark%20Lead%20Paint%20Litigation.pdf [https://perma.cc/N4FE-AWZV].

due process scrutiny. New Tejas's public nuisance law is rational because it promotes the purpose of public nuisance by utilizing a contemporary causal standard and focuses on the harmful condition created, rather than conduct. Moreover, it was within the district court's discretion to fashion an abatement order that seeks to stop the existing nuisance.

CONCLUSION

This Court has an obligation to respect Congressionally established jurisdictional limits. Moreover, the Federal Rules of Civil Procedure are not just meaningless formalities, but a system created by this Court that aids and expedites the judicial process and ensures notice and fairness in an adversarial system. Further, fairness and equity should not allow Kill-a-Byte an end-run around abatement simply because they are not the only cause. To do so would allow countless torts to go unremedied because more than one defendant aided the cause. For these and the foregoing reasons, the City of New Truro respectfully requests this Court to reverse the decision of the appellate court, and reinstate the judgement of the district court in granting costs of abatement to the City.

Dated November 16, 2020.

Respectfully submitted,

Team 86

Counsel for Petitioner

APPENDIX

U.S. Const. amend. XIV

No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

Fed. R. Civ. P. 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

(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.