No. 19-6236

In The
Supreme Court of the United States

CITY OF NEW TRURO,
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 RESPONDENT

TEAM #90

Counsel for Respondent

QUESTIONS PRESENTED

I. Whether a party is required to repeatedly raise an argument through Rule 50 motions for judgment as a matter of law in order to preserve a challenge which the district court already rejected on purely legal grounds at summary judgment.

II. Whether the Due Process Clause forbids a state from imposing retroactive liability for public nuisance when its common law interpretations of public nuisance, causation, and abatement dramatically depart from precedent.

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STATEMENT OF JURISDICTION

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

STATEMENT OF THE CASE

I. BACKGROUND

Petitioner comes before this Court as a city in crisis. The City of New Truro, New Tejas suffers from unusually high unemployment, poverty rates, and crime. Pet. App. 25a. Over the past decade, its tax revenue has fallen by half. Pet. App. 2a. Its finances have suffered not only from the closing of multiple local factories but also the consequences of political corruption. Pet. App. 3a n.1. It now faces the challenges of an underperforming school system, an underfunded police force, and an underemployed populace. Pet. App. 3a n.1. In search of a creative solution to its many woes, the City landed upon the present case: it wishes to compel Kill-a-Byte, a video game company, to fill the gaps in its budget.

Respondent Kill-a-Byte Software, Inc. is one of the nation's most successful video game designers. From 2003 until 2013, it operated the wildly popular online game "Lightyear." Lightyear was an arena-style "first-person shooter" game in which players' characters battled each other on alien planets. Its gameplay and advanced graphics garnered critical acclaim. Over the ten years of its operation, over 300 million individuals – from casual players to elite e-sports competitors – created accounts worldwide. Pet. App. 2a. Records show that Lightyear attracted a particularly strong fanbase in New Truro. At the height of the game's popularity, from 2010 to 2013, over 50% of the City's male residents ages 15 to 25 played the game for at least 10 hours per week. Pet. App. 22a.

New Truro now claims that Lightyear was the only legal source of its struggles. The City recognizes that Respondent adhered to all applicable state and

federal law in its creation and operation of the game. Pet. App. 2a. Regardless, it alleges that, by making its game available to the people of New Truro, Respondent committed ”absolute public nuisance,” a common law tort. By the City’s telling, liability for public nuisance requires only that it show that Respondent intended for people to use its product, and that said product negatively impacted public safety. Pet. App. 25a. Petitioner’s experts have proposed both direct and indirect links between a video game and crime rates. Directly, New Truro reasons that, when Lightyear players were fighting each other as digital aliens and cyborgs, they were both becoming desensitized to actual bloodshed and being trained to “shoot first,” with the consequence that they became more violent in their daily lives. Pet. App. 24a. Indirectly, it traces the City’s high unemployment to the opportunity costs which dedicated players incurred; Lightyear fans allegedly sacrificed educational attainment and employment opportunities by spending so many hours online, and the resulting drop in their earnings potential led to a massive increase in crime. Pet. App. 23a–24a. The City recognizes its crime rate can be traced to many sources, and so cannot prove that Respondent’s product was the but-for cause. Accordingly, it has fallen back on a dramatic reinterpretation of the “substantial factor test” in its attempt to hold Kill-a-Byte liable for the entire cost of its crime abatement efforts. It hopes that Respondent will be ordered to fund measures to improve public safety, plus job training and other educational programs. These fixes will not come cheaply: the abatement costs of $613.2 million make up one of the largest judgments that has ever come before the Thirteenth Circuit. Pet. App. 1a, 33a.

II. Lower Court Proceedings

Petitioner initially filed suit in New Tejas state court, but Respondent removed the case to federal court under diversity jurisdiction. Following discovery, Respondent filed several motions for summary judgment under Rule 56(a) of the Federal Rules of Civil Procedure. These motions were on a variety of grounds, including challenges to the sufficiency of the City's evidence, the City's standing, and the City's legal theories. Pet. App. 20a. The last of these motions, the one at issue today, challenged the constitutionality of the City's public nuisance theory of liability, arguing it violated the Due Process Clause of the Fourteenth Amendment. Pet. App. 20a.

The district court denied summary judgment. After analyzing the constitutional standards governing the liability theory, the district court permitted the case to continue, explicitly concluding: "the Due Process Clause does not bar the City's recovery." Pet. App. 32a. The parties went to trial. A jury returned a verdict for the City, finding Respondent liable for public nuisance under New Tejas common law. Respondent did not raise its federal constitutional objection to the City's liability theory a second time before the close of evidence, or a third time following the jury verdict. Since the requested abatement costs were considered an equitable remedy under state law, the judge determined the size of the abatement, ultimately concluding that Respondent was liable for over $600 million. Respondent appealed the final judgment to the Thirteenth Circuit on the grounds that the district court erroneously found that the Due Process Clause did not bar the City's recovery.

Petitioner objected, alleging that regardless of whether the over $600 million dollar judgment was constitutional or not, Respondent failed to preserve that challenge by not raising the argument again in a Rule 50 motion for judgment as a matter of law at the conclusion of trial. The Thirteenth Circuit disagreed and found the challenge properly preserved because the question was a pure question of law. When the district court passed on it, it "expressly and unequivocally rejected Kill-a-Byte's legal arguments." Pet. App. 7a. The circuit noted that the majority of the circuit courts of appeals agreed with its conclusion and reasoned that "Rule 50 concerns the sufficiency of the evidence presented to the jury," while the issue the district court passed on was a legal question for a judge. Pet. App. 8a.

At the request of the Thirteenth Circuit, the Supreme Court of New Tejas certified 5-4 – over a "heated dissent" – that the district court's judgment was an acceptable interpretation of New Tejas state law. Pet. App. 4a–5a. Nevertheless, the Thirteenth Circuit held that the judgment constituted a Fourteenth Amendment violation for two reasons. First, the cumulative effect of the district court's many departures from common law tort principles strayed too far from the Due Process Clause's requirement of reasonable state action, so the liability arbitrarily deprived Respondent of property. Second, the district court had failed to consider how the retroactivity of the judgment raised due process concerns. Accordingly, the court reversed the prior decision and rendered a take nothing judgment for Respondent. Petitioner then appealed to this Court, which granted certiorari on the issues of motion preservation and due process.

SUMMARY OF THE ARGUMENT

To preserve a purely legal challenge to an opposing party's theory of liability following a jury trial, it is enough for a party to move for summary judgment on the issue. If the issue is not mooted at trial, the summary judgment order merges into the final judgment and is thus reviewable, just like all other interlocutory orders based purely in determinations of law.

Nevertheless, Petitioner asks this Court to shield its radical theory of liability and its $600 million judgment from *any* appellate review by reinterpreting the purpose and function of Rule 50. As Petitioner would have it, the only way an appellate court could review a district court's interpretation of law expressed in a summary judgment order would be if Respondent attempted to relitigate the exact same legal argument to the exact same judge who already fully considered the issue and rejected it. Petitioner contends that to allow preservation of such a challenge any other way would be unworkable and unmanageable.

But Petitioner is wrong. Rule 50 is not designed to serve as a vessel for parties to relitigate legal decisions the district court already passed on. Instead, Rule 50 is designed to allow parties to challenge the sufficiency of the evidence presented to the jury at trial. The general rule requiring such a motion when a denial of summary judgment is *based on disputed facts* is correct; the trial record essentially moots the record that existed at the time of summary judgment. Rule 50 allows parties to pose those challenges to the sufficiency of the evidence presented to the jury. But when a denial of summary judgment is based purely on law, that rationale no longer applies because a question of law is one for a court, not a jury.

A majority of the courts of appeals agree, and have been managing this task for years. Appellate courts are well-equipped to distinguish between summary judgment orders that are based in purely legal reasoning and those that are not. Interpreting the rules as petitioner urges would fly in the face of the purpose of the rules: securing "just, speedy, and inexpensive" determinations. It would be plainly unjust to permit Petitioner to walk away with a $600 million judgment that very well might be unconstitutional, all because a party did not relitigate an already-determined issue. This Court should reject such a "gotcha" rule and review the constitutionality of the district court's judgment.

The Due Process Clause of the Fourteenth Amendment protects against arbitrary government action: all laws must be reasonably related to a legitimate state aim. Large, retroactive judgments face elevated standards of reasonableness because they upset parties' reasonable expectations of how their government will treat them, and thereby threaten this standard of fundamental fairness. This is particularly true when a judicial decision significantly departs from common law precedents. While courts presume that economic legislation is justified by lawmakers' rational decisions about how to best allocate the burdens and benefits of modern society, judicial decision-making enjoys no such presumption.

By this standard, Petitioner's radical reformulations of the common law burst through the confines of acceptably incremental change on three fronts, thereby violating due process by imposing retroactive liability. *First*, Petitioner's embrace of an expansive theory of public nuisance is a dramatic departure from common law

because it expands formerly discrete public rights to encompass generalized harms, redefines the lawful sale of a product as an unreasonable interference with that right, and permits liability even when an actor had no knowledge of the harms their actions might cause. *Second*, it impermissibly departs from the requirement of but-for causation. While states may develop innovative schemes of causation in response to otherwise intractable causal puzzles, petitioner's abandonment of but-for causation is neither supported by precedent nor restrained by any discernable limiting principle. *Third*, the scope of the abatement relief requested is not rationally related to the consequences of Respondent's actions, and does not fall under any circumstance where courts have found it acceptable to hold a defendant liable for harms they did not cause. Individually and taken as a whole, these unexpected alterations to the common law cross the line of arbitrariness.

ARGUMENT

I. A REDUNDANT RULE 50 MOTION FOR JUDGMENT AS A MATTER OF LAW IS NOT REQUIRED TO PRESERVE A PURELY LEGAL ARGUMENT REJECTED AT SUMMARY JUDGMENT.

Petitioner asserts that Respondent waived its right to appellate review of the district court's pretrial summary judgment order rejecting Respondent's constitutional challenges to Petitioner's theory. Pet. App. at 32a ("[T]he Due Process Clause does not bar the City's recovery.").

Typically, after a full trial on the merits, the courts of appeals will not review a district court's earlier denial of an interlocutory motion for summary judgment. *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 718 (7th Cir. 2003) (collecting cases). This is because a denial of summary judgment is a "prediction" based on the record at that time that the evidence will be sufficient to go before a jury. *Id.* at 718–19; *see also Eastern Mt. Platform Tennis, Inc. v. Sherman-Williams Co.*, 40 F.3d 492, 500 (1st Cir. 1994) ("[A] denial of a motion for summary judgment is merely a judge's determination that genuine issues of material fact exist . . . . It does not foreclose trial on issues on which summary judgment was sought."). To challenge the sufficiency of the evidence at that point, the issue must be pressed with a Rule 50 motion for judgment as a matter of law.

But when a district court considers and passes on a pure question of law, like here, a Rule 50 motion at the close of trial should not be required. Such a requirement would be a meaningless formality that does not fit the text or purpose of the Federal Rules of Civil Procedure and ignore the otherwise typical function of the merger rule for interlocutory orders. Moreover, contrary to Petitioner's position,

asking courts to determine whether a summary judgment denial was based on law or fact is a manageable and workable standard which the majority of the courts of appeals already follow. Therefore, this Court should reach and review Respondent's constitutional challenge to this novel theory of liability.

A. The District Court in This Case Fully Considered and Passed on Respondent's Purely Legal Argument at Summary Judgment, and Did So Using Purely Legal Reasoning.

Whether Petitioner's theory of public nuisance liability in this case violates the U.S. Constitution is a purely legal question. *See Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 605 (7th Cir. 2014) (reviewing a grant of summary judgment on the basis that a theory of state tort liability violates the Due Process Clause and determining that "the genuinely disputed facts are not material to the legal question presented by the appeal"). The district court emphasized only legal standards and undisputed facts throughout its order, see Pet. App. 19a–32a, and so its reasoning is considered "purely legal."

B. The Plain Text and the Purpose of Rule 50 Make It a Poor Vehicle for Raising Purely Legal Arguments Already Passed on by the District Court at Summary Judgment.

Motions for judgment as a matter of law under Rule 50 consider whether a "legally sufficient evidentiary basis" exists for a "reasonable jury" to find for the non-moving party. Fed. R. Civ P. 50(a). "These motions thus challenge the sufficiency of the evidence rather than the correctness of questions of law." *Ruyle v. Cont'l Oil Co.*, 44 F.3d 837, 841 (10th Cir. 1994); *see also* Charles Alan Wright & Arthur R. Miller, 9B *Federal Practice and Procedure* § 2521 (3d ed. 2008) ("[Rule 50

is a] device to save the time and trouble involved in a lengthy jury determination when there is a clear *insufficiency of the evidence* on one side of the case or the other.") (emphasis added); James Wm. Moore, 9 *Moore's Federal Practice* § 50.06 (3d ed. 2014) ("[T]he fundamental purpose [of Rule 50 motions for judgment as a matter of law] is to determine whether . . . there is sufficient evidence for a reasonable jury to find for a nonmovant without the burden of production.").

Similarly, the Advisory Committee Notes to Rule 50 support this narrower interpretation of the use of Rule 50 by repeatedly emphasizing challenges to the legal sufficiency of the evidence. For example, in describing Rule 50(a)(2), the committee states the "purpose of [requiring a Rule 50(a) motion to be made prior to the close of evidence] is to assure the responding party an opportunity *to cure any deficiency in that party's proof*." Fed. R. Civ. P. 50 advisory committee's note to 1991 amendment (emphasis added). Similarly, in discussing Rule 50(b), the committee provides that "the court should disregard any jury determination for which *there is no legally sufficient evidentiary basis* . . . . The court may then decide *such* issues as a matter of law and enter judgment if all other material issues have been decided by the jury *on the basis of legally sufficient evidence*." *Id.* The committee does not, however, discuss how the parties should raise or how the court should handle pure questions of law under Rule 50.

i. A Majority of the Courts of Appeals Agree.

A clear majority – nine – of the circuits agree that neither the text nor the purpose of Rule 50 require a motion to be raised at the conclusion of trial to

preserve a purely legal argument raised at summary judgment. *See, e.g.*, *Schaefer v. State Ins. Fund*, 207 F.3d 139, 142 (2d Cir. 2000) (permitting review of a summary judgment denial that was based in purely legal reasoning after final judgment was entered despite no Rule 50 motion); *Pennbarr Corp. v. Ins. Co. of N. Am.*, 976 F.2d 145, 155 (3d Cir. 1992) (same); *McPherson v. Kelsey*, 125 F.3d 989, 992 (6th Cir. 1997) (same); *Houskins v. Sheahan*, 549 F.3d 480, 488–89 (7th Cir. 2008) (same); *Estate of Blume v. Marian Health Ctr.*, 516 F.3d 705, 707–08 (8th Cir. 2011) (same); *Banuelos v. Constr. Laborers' Tr. Funds for S. Cal.*, 382 F.3d 897, 902 (9th Cir. 2004) (same); *Copar Pumice Co. v. Morris*, 639 F.3d 1025, 1030–31 (10th Cir. 2011) (same); *Lighting Ballast Control LLC v. Philips Elecs. N. Am. Corp.*, 790 F.3d 1329, 1332 (Fed. Cir. 2015) (same); *Feld v. Feld*, 688 F.3d 779, 782 (D.C. Cir. 2012) (same).[1]

ii. The Justification for Requiring a Rule 50 Motion Does Not Apply When the Issue was Purely Legal.

The justification for requiring a Rule 50 motion to preserve a challenge to the sufficiency of the evidence does not apply to purely legal questions. Once a trial has taken place, the focus of the court of appeals properly shifts from the summary judgment record to the evidence actually admitted at trial. A Rule 50 motion is

[1] In addition to a majority of the federal circuit courts of appeals, many states whose state procedure rules map onto Rule 50 and Rule 56 have also held the same. *See, e.g.*, *Johnson v. Alaska State Dep't of Fish & Game*, 836 P.2d 896, 904 n.11 (Alaska 1991) (finding a denial of summary judgment based on a matter of law to be appealable and citing cases from Kentucky and Oregon for the same); *Ching v. Case*, 449 P.3d 1146, 1167 n.36 (Haw. 2019); *Normandeau v. Hanson Equip., Inc.*, 215 P.3d 152, 159–60 (Utah 2009).

necessary to preserve a challenge to the sufficiency of the evidence because "the full record developed in court supersedes the record existing at the time of the summary judgment motion." *Ortiz*, 131 S. Ct. at 889. On appeal, there is no reason to "step back in time" to determine whether the evidence was sufficient for summary judgment. "That question has been overtaken by events — the trial." *Feld*, 688 F.3d at 782. The courts of appeal all agree: if a court denied a motion for summary judgment based on a disputed issue of fact, and that issue of fact was decided at trial, courts "will not engage in the pointless academic exercise of deciding whether a factual issue was disputed after it has been decided" by the finders of fact. *Banuelos*, 382 F.3d at 903.

But this rationale does not exist for purely legal questions. That is because, when considering a pure question of law, a court can resolve the question "with reference only to undisputed facts." *Ortiz*, 131 S.Ct. at 889. In a purely legal question, no further factual development of the record – whether pretrial or during the trial – could possibly change the district court's ruling on the law. "It would be unfair to . . . penalize a party for failing to jump up and down or labor an objection that had already been preserved for appeal." *Bohler-Uddeholm Am., Inc. v. Ellwood Grp.*, 247 F.3d 79, 109 (3d Cir. 2001). This Court does not require parties to repeatedly raise points that they have already made, and that the court has ruled upon, earlier in a litigation. *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000) ("[P]reserving an argument for appeal requires that the lower court have been fairly put on notice of the substance of the issue."). After significant briefing and

deliberation of the legal issue in this case, the lower court flatly rejected Respondent's argument that this theory of liability, irrespective of the facts, violated the Constitution. The district court and the parties were put on notice of the substance of the issue at summary judgment. Therefore, the issue should be considered preserved.

iii. Interpreting the Rules to Require a Rule 50 Motion to Preserve a Purely Legal Dispute from Summary Judgment Would Result in Manifest Unjustness, Prolonged Litigation, and Increased Costs.

Rule 50, like the rest of the Federal Rules of Civil Procedure, "should be construed, administered, and employed by the court . . . to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. It would be manifestly unjust to read Rule 50 as requiring a district court's *error of law* to stand simply because a party did not re-raise the same legal point that the same judge already considered, already required briefing on, and already fully rejected. Consider the case at hand: would it be "just" to allow what may be an illegal, erroneous $600 million judgment against a private company to stand just because Respondent did not re-raise the already-considered-and-rejected legal issue in a Rule 50(a) or Rule 50(b) motion? As Justice Alito opined, "we might as well say that the lawyer has to stand on his head when the motion is made or jump up and down three times." Transcript of Oral Argument at 16–17, *Ortiz v. Jordan* (No. 09-737).

Nor would construing the rules the way Petitioner urges result in "speedy" or "inexpensive" determinations. To the contrary, it would prolong litigation and make it much more expensive. Preparing summary judgment motions and writing briefs

on either side of the motion is a complex, lengthy, and expensive process as is. *See* D. Brock Hornby, *Summary Judgment Without Illusions*, 13 Green Bag 2d 273, 274–75 (2010) (detailing the challenges to parties when making or opposing summary judgment motions). Importing that process to Rule 50(a) and Rule 50(b) following the close of evidence and a jury verdict would dramatically increase the cost of litigation. And it would do so unnecessarily: the parties already haggled over the exact same legal issues and received a ruling from the judge once. The motion was made. The parties argued. The judge ruled. This Court should not adopt a reading of these rules requiring parties to redo this effort when the district court already passed on a question of law, especially because such a reading would also permit potentially prohibitively expensive errors of law to needlessly stand.

C. When a District Court Denies Summary Judgment on Purely Legal Grounds, the Order Merges with the Final Judgment and Is Appealable.

Courts of appeals may hear appeals only from "final decisions of the district courts." 26 U.S.C. § 1291. "Final decisions" are typically those at the end of the case that "trigger the entry of judgment." *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 603 (2009). Denials of summary judgment, like other interlocutory orders that arise in litigation, are considered merged into the final judgment and then may be appealed so long as the issue has not become moot. *EEOC v Sears, Roebuck & Co.*, 839 F.2d 302, 353 n.55 (7th Cir. 1988).

In instances where the denial of summary judgment is based, in part, on genuine issues of disputed fact, the summary judgment motion is mooted when a

jury trial begins to receive the evidence. Because it has been mooted, a fact-based summary judgment order does not merge with the final judgment, and so a Rule 50 motion is required to challenge the sufficiency of the evidence (and thus "preserve" the challenge made at summary judgment). *See Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1573 (Fed. Cir. 1986) (finding that when summary judgment on the basis of disputed fact was denied and a trial on the merits was held, the summary judgment order did not merge in the final judgment and was not reviewable).

But when the court's denial of summary judgment is based not on the adequacy of the evidence at that stage, but the pure legal questions at issue, the same justification for requiring a Rule 50 motion does not apply. *See supra* at 12–13. In that instance, the denial of summary judgment is properly considered an interlocutory order that merges with the final judgment and is reviewable on appeal. *See, e.g.*, *Stilwell v. Am. Gen. Life. Ins. Co.*, 555 F.3d 572, 576 (7th Cir. 2009).

This result is not novel; rather, it is the exact treatment courts and scholars give to other interlocutory orders whose reasons are based in law. Consider, for example, a motion to dismiss for failure to state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(6). Some Rule 12(b)(6) motions are denied on the ground that the allegations in the complaint are sufficient (for example, because they are sufficiently specific or non-conclusory). If such a case proceeds to trial, the decisions on the pleadings are rendered unimportant and moot by the evidence produced at trial. *See, e.g.*, *Bennett v. Pippin*, 74 F.3d 578, 585 (5th Cir. 1996)

(refusing to review the district court's denial of a Rule 12(b)(6) motion following a full jury trial because, at that point, "plaintiff has proved, not merely alleged, facts sufficient to support relief," and so the denial of the motion to dismiss "became moot"). Instead, the losing party must appeal on the ground that there was insufficient evidence to support the verdict under Rule 50.

But other Rule 12(b)(6) motions argue the governing law does not recognize the cause of action that the claimant has pleaded. In that instance, if there is a full-dress trial and the defending party loses, the denial of the motion to dismiss *is* reviewable on appeal following the final judgment because the order has not been mooted by the facts proven at trial. Wright & Miller,15A *supra* § 3905.1 ("Failure to plead adequately a claim that in fact is proved at trial should not warrant reversal. [But] if the problem is not deficient pleading but reliance on . . . an erroneous legal theory . . . if the legal theory is rejected by a definitive ruling at the pleading stage, renewal should not be required."); s*ee also Marcoux v Shell Oil Prods. Co.*, 524 F.3d 33, 41 n.6 (1st Cir. 2008) (noting that when a question of law is the basis for a denial of a motion to dismiss, the normal rule that a Rule 12(b)(6) motion is not appealable after a full trial is "likely changed"). The Rule 12(b)(6) order based on the law of the case would be considered to have been merged in the final judgment and can be appealed. This logic applies with equal force to Rule 56 motions for summary judgment that are denied based on purely legal grounds.

D. The Remaining Arguments for Requiring a Redundant Rule 50 Motion for Preservation are Unpersuasive and Unavailing.

i. Though All Summary Judgment Decisions Are, by Definition, "Legal Decisions," the Reasoning Behind Them May Still Be Based in Evidentiary Sufficiency or Purely Legal Arguments.

The lower court's dissent argues that a distinction between factual and legal questions at summary judgment is "problematic because all summary judgment decisions are legal decisions in that they do not rest on disputed facts." Pet. App. 16a; *accord. Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1235 (4th Cir. 1995). Though it is true that a summary judgment determination is a legal decision, this argument is misleading. That is because when a court enters a summary judgment order on the basis of the presence or absence of disputed facts, a court is applying the law – the summary judgment standard – to the facts as they have been developed up to that stage of litigation. That is, indeed, a legal decision. But that "legal decision" is different from asking if the court was answering a pure question of law. *See Ahrenholz v. Bd. Of Trs.*, 219 F.3d 674, 677 (7th Cir. 2000) ("'Question of law' means an abstract legal issue rather than an issue of whether summary judgment should be granted.").

ii. It Is Not an "Unfair Surprise" to the Party that Prevailed at Summary Judgment if the Losing Party Appealed the Order Without a Rule 50 Motion Late in the Proceedings.

Some argue that it would be overly prejudicial and unfair to a party that succeeded in having a summary judgment motion denied to then see the issue revived on appeal "without notice" if a Rule 50 motion is not required at the close of trial. *See Holley v. Northrop Worldwide Aircraft Servs., Inc.*, 835 F.2d 1375, 1377

(11th Cir. 1988) ("Summary judgment was not intended to be a bomb planted within the litigation in its early stages and exploded on appeal."). But particularly when the summary judgment order being appealed is steeped in an alleged error of law, there is no "surprise." Both parties have briefed and argued the question of law. The district court ruled on the motion and decided it as an issue of law. Then the losing party appealed the error of law after the final judgment, when the interlocutory order merged with that judgment. This is *exactly* how appeals of other interlocutory orders happen throughout litigation. *See, e.g.*, *Davis v. TXO Prod. Corp.*, 929 F.2d 1515, 1517 (10th Cir. 1991) (deciding after a final judgment that "while the pleader who amends waives his objections to the ruling of the court on indefiniteness, incompleteness, or insufficiency, he does not waive his exception to the ruling which strikes a vital blow to a substantial part of his cause of action" (quoting *Blazer v. Black*, 196 F.2d 139, 143–44 (10th Cir. 1952))). For most interlocutory orders, the entry of final judgment is the earliest an aggrieved party could appeal the order, and even for those permitting immediate appeal, those appeals are typically not mandatory.[2]

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[2] In some instances, such as a denial for summary judgment regarding a defendant's qualified immunity, the denial of the interlocutory order is immediately appealable under the collateral order doctrine. *Behrens v. Pelletier*, 516 U.S. 299, 306–07 (1996) (holding that an officer could immediately appeal the denial of his summary judgment motion to the extent it turned on issues of law). *See generally* 28 U.S.C. § 1291. But these immediate appeals are *not* mandatory; adversely affected parties "can wait and challenge [the order] later, on appeal from the final judgment." *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 456 (7th Cir. 2010). Here, Respondent properly challenged the order in this appeal of the final judgment. Therefore, whether Respondent had an opportunity to appeal the interlocutory summary judgment order immediately makes no difference.

In that sense, a motion for summary judgment is no more a "bomb" set to blow up litigation than any other potentially erroneous interlocutory order that could occur early in the litigation and then be appealed after final judgment is entered. The latter is appealable. The former should be as well. This Court should not credit this objection to allowing an appellate court to review an erroneous summary judgment decision.

iii. The Holdings in *Ortiz* and *Unitherm* Do Not Control Because, in Those Cases, the Interlocutory Orders Did Not Present Purely Legal Issues.

Though Petitioner and the lower court's dissent rely on them, this Court's precedents do not speak directly to the question stemming from this case – whether a *purely legal* argument made at summary judgment is preserved absent a Rule 50 motion.

In *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, the Court clarified that "in the absence of . . . a [Rule 50(b)] motion, an appellate court [is] without power to direct the District Court to enter judgment contrary to the one it had permitted to stand." 546 U.S. 394, 400 (2006) (quoting *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 218 (1947)) (internal quotations omitted). But the explicit focus of the *Unitherm* Court throughout the opinion was on the insufficiency of the evidence, including in its statement of the holding. 546 U.S. at 406 ("Since respondent failed to renew its pre-verdict motion as specified in Rule 50(b), there was no basis for review of respondent's *sufficiency of the evidence* challenge in the Court of Appeals.") (emphasis added). Because the focus was on the power of the court of

appeals when no Rule 50(b) motion had been filed regarding an issue of the sufficiency of the evidence and not whether a court of appeals could hear a purely legal challenge, this case does not bear on the question before the Court now.

Similarly, in *Ortiz v. Jordan*, 131 S. Ct. 884 (2011), a case involving a denied summary judgment claim for qualified immunity, the Court was more explicit that its holding did not address whether purely legal summary judgment claims were preserved. Instead, the *Ortiz* Court punted the question because "the officials' claims of qualified immunity hardly present 'purely legal' issues capable of resolution 'with reference only to undisputed facts.'" *Id.* at 892.

Because of how further development of a record can affect mixed questions of fact and law or questions of fact, requiring a Rule 50(a) and Rule 50(b) motion to preserve the argument is sensible, as discussed earlier. But neither holding applies with any force here because Respondent's motion for summary judgment on the constitutionality of the Petitioner's theory of public nuisance is a purely legal question.

iv. Appellate Courts Are Well-Equipped to Determine Whether the District Court's Basis for Denying Summary Judgment Was "Legal" or "Factual."

Whether a court is dealing with a pure question of law, pure question of fact, or mixed question of fact and law is an issue with which district courts and appellate courts are well-versed. Nevertheless, the City relies on Fourth Circuit precedent reasoning that asking courts of appeals to peek into the reasoning of a

denial of summary judgment and examine the "law versus fact" dichotomy is a "dubious undertaking." *Chesapeake*, 51 F.3d at 1235.

This concern is overstated. First, this Court has already required courts of appeals to examine the reasoning of a district court's denial of summary judgment to decide if the denial is (a) reviewable because it was based on law, or (b) unreviewable because it was based on genuine issues of material fact. *See Johnson v. Jones*, 515 U.S. 304, 318–19 (1995). The *Johnson* Court plainly rejected the argument that deducing a district court's reasoning for denying summary judgment is "unworkable." Though the Court acknowledged the task of determining which reasons were reviewable and which were not could be difficult and might even lead to "a cumbersome review of the record," it is "not serious enough to lead us to a different conclusion."[3] *Id.*

Second, and tellingly, none of the nine circuits that permit a party to appeal a denial of summary judgment based on a pure question of law without a Rule 50 motion have shown any indication that they struggle to draw these distinctions. Neither the lower court's dissent nor Petitioner have pointed to any concrete examples demonstrating this task is unmanageable, unworkable, or, as the Fourth Circuit claimed, "dubious."

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[3] In declaring petitioner's concern "serious," this Court was also considering that "district judges may simply deny summary judgment motions without indicating their reasons for doing so." But since December 1, 2010, 15 years after *Johnson* was decided, Rule 56 has mooted that concern by requiring district courts to explain their summary judgment rulings. Fed. R. Civ. P. 56(a).

Third, if a court of appeals, after considering the briefing by the parties and the district court's reasoning for denying summary judgment, remains unsure whether the denial was based on issues of fact or law, there is a simple solution: remand and ask for clarification. *See, e.g.*, *Robbins v. Becker*, 715 F.3d 691, 694 n.2 (8th Cir. 2013) (exercising the court's "supervisory authority" to remand back to the district court to clarify its denial of summary judgment because the court was unable to affirm or reverse "based on the cursory commentary advanced by the district court").

Determining whether an issue in summary judgment was purely legal, purely factual, or some mix of the two is, certainly, not always simple. There will likely be close calls. "But it is equally true that there are cases in which it is clear the appellant has raised a pure issue of law, divorced from any dispute over the facts." *Feld*, 688 F.3d at 783. Indeed, in the qualified immunity context, the "law-fact divide" has provided a "workable rule for the mine run of qualified-immunity cases." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1947 (2009). This is a task the courts of appeals have the dexterity to handle and, particularly because these situations will arise when a district court may have made a serious error of law which may result in significant, erroneous, and unjust liability, this is a task this Court should require courts of appeals to handle.

II. Imposing Liability Under Petitioner's Theory of Public Nuisance Would Deprive Respondent of Due Process.

Due Process is a standard of fundamental fairness. It mandates that persons not be arbitrarily deprived of property, even when such deprivation would be in service of a noble cause. Retroactive judgments receive heightened protections against such arbitrariness, especially when the liability was not imposed by a reasoned legislative act. Accordingly, the district court's judgment violates Respondent's due process rights because first, the alleged conduct does not constitute a common law nuisance; second, the City's reinterpretation of the substantial factor test is without precedent or logical justification; and third, the size of the judgment exceeds Respondent's alleged contribution to the ultimate harm. Any one of these defects would be sufficient to void Respondent's liability, but together, they unquestionably deprive Respondent of property without due process of law. With this unconstitutional theories of liability, New Truro is attempting to force Respondent's consumers to subsidize the City's own failings in local governance – an attempt which, if successful, would have devastating consequences for courts, consumers, and businesses nationwide.

The Due Process Clause of the Fourteenth Amendment guarantees that no state "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. A law violates substantive due process if it is not reasonably related to a legitimate government aim.[4] *See, e.g.*, *Gen. Motors Corp. v.*

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[4] Of course, some "fundamental" rights contained within substantive due process are guaranteed by higher levels of judicial scrutiny, but no such specially protected

Romein, 503 U.S. 181, 191 (1992) (stating that both the retroactive and prospective aspects of economic legislation must have "a legitimate legislative purpose furthered by rational means"). This guarantee of reasonableness protects against "egregious or arbitrary government conduct." *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 198 (2003). Under this standard, Petitioner's definition of public nuisance, its reformulation of the substantial factor test, and the scope of the abatement it attributes to Respondent all individually and independently violate due process. Together, they even more plainly threaten to impose a judgment which is fundamentally unfair because it is retroactive, severe, and bears no rational relationship to Respondent's conduct.

A. Due Process Forbids the Fundamental Unfairness of a Severe, Unforeseeable, Retroactive Judgment

From its very earliest days, this Court has recognized that there are actions which the state simply cannot take. *See Calder v. Bull*, 3 U.S. 386, 388 (1798) ("There are certain vital principles in our free Republicans governments, which will determine and over-rule an apparant and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established."). The Due Process Clauses of the Fifth and Fourteenth Amendments enshrine a key tenet of this limitation: the state may not arbitrarily strip a person

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rights are implicated by this case. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 503–04 (1965) (applying strict scrutiny to laws which infringe on married couples' fundamental right to use birth control).

of property. Due process guarantees a "basic purpose: the *fair application of law.*" *E. Enters. v. Apfel*, 524 U.S. 498, 558 (1998) (Breyer, J., dissenting). This guarantee of fairness is infringed when unfairly retroactive judgments are imposed on unsuspecting parties, and judicial decisions are unfairly retroactive when they sharply depart from precedent.

i. Retroactive Judgments Trigger Heightened Review.

Concerns of fairness are particularly implicated when liability is applied retroactively, since an unfair retroactive judgment violates principles of fair notice, in violation of "fundamental principles of the social compact."[5] *E. Enters.*, 524 U.S. at 547–49 (Kennedy, J., concurring) (quoting J. Story, 2 *Commentaries on the Constitution* § 1398 (1833))*; see also Landgraf v. Usi Film Prods.*, 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."). These concerns trigger heightened review. The standard remains one of reasonableness, but a decisionmaker may need to present stronger reasons for imposing retroactive liability than would be required for a prospective rule. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) ("It does not follow, however, that what Congress

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[5] The test for when retroactive liability violates the Constitution is admittedly ill-defined. In *Eastern Enterprises*, the leading case on the issue, the Court overturned a statute which imposed retroactive obligations on a coal company. The plurality opinion, however, did so on takings grounds, with Justice Kennedy's concurring opinion arguing that the Takings Clause was inapplicable but overturning the statute as a due process violation. The four dissenters would have upheld it on due process grounds.

can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former."). In sum, "a liability that is severely retroactive, disruptive of settled expectations and wholly divorced from a party's experience may not constitutionally be imposed." *Me. Yankee Atomic Power Co. v. United States*, 44 Fed. Cl. 372, 378 (1999) (distilling the "central principle" of *Eastern Enterprises*).

The due process limits which this Court has placed on punitive damages shed light on when a compensatory judgment crosses the line of arbitrariness. This is particularly true in this case, since Petitioner's expansive theories of public nuisance and causation invite a level of judicial discretion akin to the jury discretion which this Court's punitive damages jurisprudence strives to cabin. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417–18 (2003) (holding that jury discretion demands clear constitutional limitations). The fair application of laws requires that actors can reasonably anticipate what kind of conduct will be subject to liability and to what extent. Unbounded discretion violates this principle. *See id.* at 417 (basing the importance of notice on "elementary notions of fairness enshrined in our constitution[]"). If the case law has focused on the special dangers of punitive damages, that is because compensatory awards do not normally stretch the accepted limits of causation and fair compensation and so do not implicate arbitrariness concerns. *But see* Paul DeCamp, *Beyond State Farm: Due Process Constraints on Noneconomic Compensatory Damages*, 27 Harv. J.L. & Pub. Pol'y

231, 290–92 (2003) (arguing that compensatory awards for noneconomic harms raise similar due process issues since they are likewise not grounded in objective fact). The judgment which the district court awarded violated fundamental tenets of fairness, reasonableness, and notice, and so may not be allowed to stand.

ii. Petitioner's Reinterpretations of Common Law Are Not Entitled to Deference.

Additionally, the district court's judgment is not entitled to any deference, first because a judge lacks a legislature's capacity for reasonable decisionmaking, and second because it departed too dramatically from common law precedent. Legislative decisions enjoy a presumption of rationality, and since the reasonableness of a judgment is the core question of this species of due process analysis, a reviewing court could more readily trust that a state public nuisance *statute* created a fair and considered allocation of burdens. *See Turner Elkhorn*, 428 U.S. at 28 (emphasizing that courts should be slow to question the rationality of economic regulations because legislatures are better positioned to gather and make inferences from facts). Common law courts, by contrast, have limited powers to gather facts and use them to craft legitimate public policies. As such, New Tejas' common law development must be carefully scrutinized for unconstitutional arbitrariness. But even if the district court was correct that judicial lawmaking merits more deference than legislative decisions, the state's newly announced common law is still not due any constitutional deference because it is not a logical consequence of existing precedent.

Retroactive judgments raise special due process concerns because a defendant is inherently deprived of the notice which a prospective rule provides. *See id.* at 16 (observing that retroactive legislation may require stronger justifications than prospective liability). The Court in *Turner Elkhorn* commented that courts should only overturn statutes for arbitrarily imposing liability under extreme circumstances since legislative bodies have fact-finding capacities which courts lack. *See id.* at 28 ("The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." (quoting *United States v. Gainey*, 380 U.S. 63, 67 (1965))). In this case, however, it was a single, generalist district court judge who determined that it was rational to subject Respondent to liability for all of the City's elevated public safety concerns. Public safety is not a matter of specialized judicial competence, nor of ordinary common knowledge. Determining the causes of and best solutions to a city's crime problem requires sensitive policy decisions which are best left to elected officials. As such, a purely judicial decision about how to spread the costs of social ills cannot be presumed rational. In direct contravention of this logic, the district court argued that "'even more deference is owed to *judicial* common-law developments' than is owed to state legislation." Pet. App. 28a (citing *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 622 (7th Cir. 2014)) (reasoning that common law developments must be allowed greater leeway for retroactivity because judicial decisions must almost

always act retrospectively). However, this is not a widely accepted proposition; the Seventh Circuit in *Gibson* did not cite a single case to directly support it. The rule of deference to legislation, by contrast, is fundamental to our judicial system, as well as to our separation of powers.

Even if the *Gibson* rule of deference to common law developments is correct, those developments must still be reviewed to determine if they are a "natural outgrowth of existing precedent" if they are to be retroactively applied to a litigant. Pet. App. 28a. It is true that, in order to develop, the common law must be applied to new circumstances and interpreted in new ways. *See Gibson*, 760 F.3d at 622 (arguing that significant deference is required to permit this evolution). Unsuccessful parties may be dismayed to unexpectedly find themselves on the losing side of previously unsettled questions. *See United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982) (commenting that judicial decisions must operate retrospectively). This evolution, however, must occur as a series of coherent steps, with decisions gradually building upon each other. *See Rogers v. Tennessee*, 532 U.S. 451, 461 (2001) ("[An] incremental and reasoned development of precedent . . . is the foundation of the common law system."). It is cause for concern when the law departs too suddenly from its historic foundations. Thus, retroactive reformulations of the common law violate due process when they are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue," but are acceptable when they are incremental, reasonable developments. *Id.* at 461–62. Taken alone or together, the novel doctrines announced in New Tejas' exceptional

rule of public nuisance are neither incremental nor reasoned. They do not, and cannot, merit any deference when their substantial and unanticipated effect deprives Respondent of property without due process of law.

B. Petitioner's Expansive Theory of Public Nuisance Violates Due Process

Public nuisance is a traditionally limited cause of action, under which a state actor may compel a private party to abate an unreasonable interference with a common right. Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance*, 45 Washburn L.J. 541, 543–44 (2006). It has historically been limited to discrete, clearly identifiable harms, often connected to the use of land. *See, e.g.*, *State v. Lead Indus. Ass'n*, 951 A.2d 428, 452 (R.I. 2008) ("A common feature of public nuisance is the occurrence of a dangerous condition at a specific location."). At these origins, it did not raise murky questions of causation; and it was easy to identify the harms which a person responsible for a nuisance needed to abate. Petitioner's radical reformulation of public nuisance as any contribution to a generalized public misfortune – here, unusually high levels of crime – upends all these limitations. First, it redefines a public nuisance as not a concrete problem which a single actor or obvious group of actors could remedy, but as a broad local concern. Then, finding that it cannot prove causation for such a poorly-bounded problem, it throws but-for causation out to window – not according to any logical apportionment of liability, but simply because the City finds it convenient to hold Respondent liable for its struggles. As such, it must fall back on a limitless new causal "test" in order to do so. Finally, even though the record is unambiguous that Respondent did not cause

the sum total of Petitioner's high crime levels, it claims that its remarkable rule of causation permits it to hold Respondent liable for subsidizing the entirety of its crime abatement. Any one of these defects would be enough to violate Respondent's due process rights. Cumulatively, liability based on these unprecedented legal theories would constitute a flagrant disregard for the principle that no state may deprive a person of property without due process of law.

i. Public Nuisances are, for Good Reason, Limited to Discrete Harms

A public nuisance claim requires that a plaintiff show that a defendant has unreasonably interfered with a right held in common by the public. Restatement (Second) of Torts § 821B (Am. Law Inst. 1965). At its origins, public nuisance permitted the state to seek criminal prosecution and/or injunctive relief when a party was encroaching on or enclosing common land – often, blocking a highway. *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 745–46 (2003) (describing the traditional remedies for public nuisance); Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 Mich. St. L. Rev. 941, 953 (describing the most common early public nuisances). Over time, the cause of action expanded to encompass uses of land which unreasonably encroached on less tangible common rights, such as the creation of unpleasant smells, disruptive noise, or even conduct deemed immoral. *See, e.g.*, *Dennis v. State*, 91 Ind. 291, 292–93 (1883) (classifying a slaughterhouse near a residential area as a public nuisance because it emitted odors "which rendered the air impure"); *State ex rel. Thompson v.*

Coler, 89 P. 693, 694 (Kan. 1907) (holding that a "bawdyhouse" was a public nuisance even though it was not explicitly defined as one in the state nuisance statute).

However, even as the definition of public nuisance expanded to these other harms, its scope remained restricted to "localized injuries to at most a small group of plaintiffs, [where] both the victim and perpetrator remain[ed] identifiable," prerequisites which kept "any issues of causation . . . readily susceptible to judicial resolution." Brief of Richard A. Epstein as Amicus Curiae Supporting Defendants-Appellees at 10, *City of New York v. BP P.L.C.*, No. 18-2188 (2d Cir. filed Feb. 14, 2019) [hereinafter Epstein Br.]. Public nuisances today do not need to be strictly limited to intrusions on public property, but they do need to be sufficiently discrete that a court can reasonably identify a nuisance's boundaries, its causes, and what it would take to abate it. Petitioner's definition of public nuisance as any interference with a generic right to public safety explodes the scope of this traditionally limited tort beyond issues which may be fairly resolved by the judiciary. *See id.* at 10–11 (arguing that courts are poorly positioned to manage issues of diffuse social harms and complex causation). This departure thus not only diverges from prior common law limitations, but also deprives Respondent of any assurance that a finding of liability will be rationally related to its conduct.

ii. Public Nuisance for Distribution of a Lawful Product Unconstitutionally Departs from Principles of Fair Notice.

Petitioner's theory of nuisance is additionally concerning given that the alleged "unreasonable interference" with the right to public safety was Respondent's

sale of a lawful product. The proposition that a lawful product could constitute a public nuisance has provoked much excitement from the plaintiffs' bar since it first surfaced in the tobacco litigation, but has thus far been largely rejected in contexts ranging from lead paint to opioids to fossil fuels.[6] *See* Luther J. Strange III, *A Prescription for Disaster: How Local Governments' Use of Public Nuisance Claims Wrongly Elevates Courts and Litigants Into a Policy-Making Role and Subverts the Equitable Administration of Justice*, 70 S.C. L. Rev. 517, 519–35 (2019) (surveying the history of these largely unsuccessful claims). Judgment against an entirely lawful product raises particularly acute due process concerns because of the total lack of notice afforded to manufacturers. *See BMW of N. Am. v. Gore*, 517 U.S. 559, 574 (1996) (stating that the Due Process Clause protects against civil judgments imposed without notice). When a manufacturer places a product on the market, it knows that it will be liable under the law of products liability for defectively designed or manufactured items. This notice permits manufacturers to make reasoned decisions about which risks they choose to face, in exchange for which rewards. It retroactively unsettles those expectations to later announce that a non-

[6] In one notable recent exception, an Oklahoma state judge found opioid manufacturers liable for public nuisance under Oklahoma state law – but that was based on the specific text of the state's public nuisance statute. *State ex rel. Hunter v. Purdue Pharma L.P.*, No. CJ-2017-616, 2019 Okla. Dist. LEXIS 3486, at *42 (Aug. 26, 2019). Even as an interpretation of a state statute, this unprecedented decision is now being challenged as a violation of the defendants' due process rights. Debra Cassens Weiss, *$572M Verdict Against Johnson & Johnson in Opioid Suit is Based on Oklahoma's Unusual Public Nuisance Law,* ABA J. (Aug. 27, 2019) https://www.abajournal.com/news/article/572m-verdict-against-jj-in-opioid-suit-is-based-on-oklahomas-unusual-public-nuisance-law.

defective product which was created with all due care and adhered to all relevant regulations was in fact "unreasonable" under state law. The well-established rules of products liability are thus swallowed up by this vast reconception of public nuisance. See *In re Lead Paint Litig.*, 924 A.2d 484, 505 (N.J. 2007) (warning that, if public nuisance law were loosed from its historic moorings, it "would become a monster that would devour in one gulp the entire law of tort." (quoting *Camden Cty. Bd. of Chosen Freeholders v. Beretta*, 273 F.3d 536, 540 (3rd Cir. 2001))); *see also* Schwartz & Goldberg, *supra*, at 552 (warning that an expanded definition of public nuisance would permit plaintiffs' attorneys to circumvent the "well-defined boundaries" of products liability).

Further departing from the common law, Petitioner posits a theory of "absolute public nuisance" which does not require a plaintiff to show that a manufacturer had any knowledge that its product would interfere with a public right. Public nuisance claims were once intertwined with criminal law; much conduct that qualified as an unreasonable interference with a public right could also be a basis for criminal prosecution. *See* Restatement (Second) of Torts § 821B cmt. b ("At common law public nuisance came to cover a large, miscellaneous and diversified group of minor criminal offenses . . . ."). Accordingly, some courts have held tight to an intent requirement as an important limitation on public nuisance claims. Most notably, in the sole successful case that has emerged from the long-fought lead paint litigation, a California court of appeals predicated liability on the fact that the defendants continued to promote their products for residential use

after they learned of the dangers of lead in homes. *See People v. ConAgra Grocery Prods.* 227 Cal. Rptr. 3d 499, 529 (Ct. App. 2017) (commenting that the "knowledge of the hazard" standard is a higher bar than the intent requirement in a products liability suit). Although criminal conduct is no longer a prerequisite for a public nuisance claim, the transformation of an essentially criminal rule into strict liability further uproots public nuisance from its historic grounding and bolsters concerns about the lack of notice accorded to Respondent. Not only was Respondent unaware that it might encounter a new form of liability – it also had no reason to suspect that its product might inflict the alleged harm. The City, relying on nothing but a highly contested new framing of a common law tort, claims that is sufficient justification for Respondent to be unexpectedly slapped with a bill for over $600 million.

C. Petitioner's Reinterpretation of the Substantial Factor Test Violates Due Process.

"It is a bedrock principle of tort law that for there to be a recovery for an injury, it must be established that defendant's act was a cause-in-fact of an injury." *Aegis Ins. Servs., Inc. v. 7 World Trade Co.*, 737 F.3d 166, 179 (2d Cir. 2013). It would therefore be a violation of due process to subject a party to liability for injuries which it did not cause. That is precisely what the City proposes to do with its radical expansion of the substantial factor test. This expansion has no logical grounding in the common law of tort, nor any rational relationship to a legitimate government aim. It is a standardless redistribution of wealth, arbitrarily taking from Respondent to fill the city's purse.

i. Petitioner's Formulation of the Test Dramatically Departs From Valid Understandings of "Substantial Factor."

The prevailing interpretation of the substantial factor test is only applicable when the entirety of a harm can be fairly attributed to multiple sufficient tortious causes. *See Burrage v. United States*, 571 U.S. 204, 215 (2014) (citing *Prosser & Keeton on Law of Torts* § 41, p. 268 (5th ed. 1984) (commenting that the substantial factor test is appropriate when "each of two causes is independently effective.")). In the classic example, it is used to solve the causal problem that arises when a pair of negligently set fires converge upon a plaintiff's property. See Joseph Sanders and Miachal D. Green, *The Insubstantiality of the Substantial Factor Test for Causation*, 73 Mo. L.R. 399, 416 (2008) (citing *Kingston v. Chi. & Nw. Ry. Co.*, 211 N.W. 913, 914 (Wis. 1927)). Under the traditional but-for test of causation, the defendant responsible for each fire could escape liability because the property would have burned regardless of that defendant's actions. The second defendant's negligence allows the first defendant to claim that their own negligence was harmless with respect to the plaintiff, and vice versa. But this would permit both admittedly negligent defendants to pay nothing, leaving an innocent plaintiff uncompensated. In such a situation, it is appropriate to modify the but-for test and hold both defendants liable for the injury because the conduct of each was a "substantial factor" in the ultimate harm. *See, e.g.*, Randy Lester, *The "Substantial Factor Test" for Causation:* Juedeman v. Montana Deaconess Medical Center, 48 Mont. L.R. 391, 399 (1987) ("A persuasive argument for the use of a substantial factor instruction

exists if the 'but for' test may unjustly allow a defendant relief from liability solely because some other tortfeasor or cause would have brought about the same result.").

The causal question behind New Truro's high crime rate is nothing like the archetypal two-fire problem. There is no suggestion that the popularity of Lightyear was independently sufficient for the sum of New Truro's woes. It is "undisputed" on the record that the City's crime rate was partially caused by a range of economic and political factors entirely unrelated to Respondent's product. Pet. App. 4a. There is no possibility that the City will be denied relief simply because the various entities behind its elevated crime rate can point fingers at each other, saying that some other is responsible for the totality of the harm. The issue of factual causation therefore falls within the scope of the traditional but-for test; the City is simply required to identify with more precision which problems in need of abatement can be fairly traced to whose conduct. While the Restatement (Second) of Torts Section 431 contains language that the district court plucked from its context to support a more expansive reading of the substantial factor test,[7] this Court has previously declined to expand this test to situations where a defendant made an uncertain contribution to an ultimate harm. *See Burrage*, 571 U.S. at 215–16 (refusing to find a heroin sale a "substantial factor" in a man's overdose death when he was found with multiple drugs in his system and it was unclear whether the heroin alone would have killed him).

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[7] As explained in note 8, *infra*, Section 431 describes a *limitation* on liability akin to proximate cause, so may not be used to explode longstanding principles of but-for causation.

This faulty reinterpretation of the substantial factor test is particularly dangerous because it does not contain any limiting principle for substantiality. The only potential guidance which the district court could offer was that a "substantial" factor is not one that has a "merely negligible effect." Pet. App. 31a (quoting Restatement (Second) of Torts § 431 cmt. b). This low bar for liability threatens to exponentially multiply the power of public nuisance suits: it implies that any time a product could be credibly alleged to have contributed to a broadly defined public nuisance, the affected locality could effectively demand of its manufacturer a blank check to round out the city budget. Budweiser might be required to fund police officers and public transportation to abate disorder and drunken driving. McDonalds might be sued to fund the public health care costs of obesity and high blood pressure. Bic could find itself on the hook for the budgets of fire departments on the reasonable assumption that its lighters cause at least some costly fires. This, in turn, would force consumers across the country to subsidize struggling municipalities. One prevailing justification for expanding public nuisance to the sale of non-defective products is that doing so will incentivize manufacturers to internalize the full costs of their products. *See* Brief of Catherine M. Sharkey as Amicus Curiae Supporting Plaintiff-Appellant at 14–15, *City of New York v. BP P.L.C.*, No. 18-2188 (2d Cir. filed Nov. 15, 2018) (arguing that nuisance suits are an economically efficient response to climate change). If this Court determines that this logic warrants expanding public nuisance beyond its historically limited origins, then it must not immediately undermine that justification for expanding

public nuisance by layering on top of it a new substantial factor doctrine which will internalize those costs incorrectly.

The Restatement (Second) of Torts suggests a second potential understanding of "substantial factor" in nuisance cases: when a group has collectively created a public nuisance, only those actors whose conduct was "substantial" will be subject to liability. *See* § 834 cmt. d ("When a person is only one of several persons participating in carrying on an activity, his participation must be substantial before he can be held liable for the harm resulting from it. This is true because to be a legal cause of harm a person's conduct must be a substantial factor in bringing it about."). However, this second meaning refers to which parties may be included in a causal group and how liability is apportioned among those multiple tortfeasors, and so offers no support for the City's aim to hold Respondent solely liable. New York courts, for instance, have held that a party whose conduct contributed to but did not independently create a nuisance may be subject to liability. *See, e.g.*, *N.A.A.C.P. v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 493 (E.D.N.Y. 2003) ("Where multiple actors contribute to a public nuisance, equity can reach actors whose conduct standing alone might not be actionable."). When a group collectively created a nuisance, it is appropriate to apportion liability among its members. Restatement (Second) of Torts § 840E cmt. b. In such cases, however, it is undisputed that a nuisance caused a harm; the causal question is simply which actors may be held responsible for that nuisance. As such, this alternate understanding of what it means for an action to be a "substantial factor" behind an injury cannot inform the instant case. Instead of

alleging that Respondent contributed to a nuisance which created an identifiable harm, as it would under this second meaning of "substantial factor," the City claims that the Respondent's alleged nuisance contributed in some unspecified amount to New Truro's crime rate.[8] This lack of specificity is no excuse for lowering the bar of but-for causation.

ii. Petitioner's Reformulation of the Substantial Factor Test Is Not a Legitimately Rational Departure from But-For Causation.

It is true that, as the district court observed, states may develop "innovative schemes of causation and responsibility" when faced with otherwise intractable causal questions. This is true not only of the traditional "two-fire problem" substantial factor test, but also of alternative liability, as in Summers v. Tice, and market-share liability in the toxic tort context. In each of these circumstances, it is acceptable for courts to relax the causal rule because but-for causation would make it not just difficult but *impossible* for an injured victim to recover from a group of tortious actors. *See Summers v. Tice*, 199 P.2d 1, 4 (Cal. 1948) ("The injured party

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[8] The Restatement (Second) contains a third possibility for the meaning of "substantial factor": a but-for cause may be too remote or trivial to establish a party's liability. *See* § 431 cmt. a (stating that causes will not be considered "substantial" if they only caused a harm in a "philosophic sense," such that no ordinary mind would consider them legally responsible for the outcome). This statement of a substantial factor test, which is reminiscent of proximate causation, is a limitation rather than an expansion of liability. Sanders and Green, *supra*, at 419; *see also Schneider v. Diallo*, 788 N.Y.S.2d 366, 367 (App. Div. 2005) (describing "substantial factor" as relevant to proximate causation). Under *this* articulation, a court might find that Respondent's sale of Lightyear was not a substantial factor in New Truro's crime rate, as the consequences were too remote from the conduct of operating a popular and entirely legal video game. *See* Pet. App. 10a n.3 (warning that the City's theory of liability may not satisfy ordinary conceptions of proximate causation).

has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless."). Moreover, in each of these circumstances, each defendant's liability is rationally "premised in some way on the defendants' contribution to the risk of injury." *Gibson*, 760 F.3d at 624. For instance, market share liability rests on the premise that a group of tortfeasors all placed a similarly harmful product on the market, but the injured victim cannot prove by a preponderance of the evidence that any one manufacturer created the exact product that caused their harm. Since the standard rule of causation would allow the victim uncompensated – and would allow a group of tortious actors to escape judgment – the bar for causation is lowered, and the victim only needs to show that the defendant manufacturers as a group likely caused the harm. *See Sindell v. Abbott Lab'ys*, 607 P.2d 924, 937 (Cal. 1980) (establishing the logic of market share liability). However, the scope of each defendant's liability is also lowered to reflect their contribution to the risk; a company that only created 20% of the product in question on the market would only be liable for 20% of the defendant's injury. *See Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1078 (N.Y. 1989) (declining to impose joint and several liability under market share liability because to do so would "increase a defendant's liability beyond its fair share of responsibility").

Despite these rationales and limitations, many courts have soundly rejected market share liability for both straying too far afield from common law causation and for infringing on legislative policymaking. *See, e.g.*, *Mulcahy v. Eli Lilly & Co.*,

386 N.W.2d 67, 76 (Iowa 1986) (concluding that market share liability "involves social engineering more appropriately within the legislative domain" and constitutes too "substantial [a] departure from our fundamental negligence requirement of proving causation" to be imposed on defendant manufacturers without prior notice); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 247 (Mo. 1984) (declining to recognize market share liability "[b]ecause the theory applicants urge has no support in precedent, [and so] the case presents a public policy choice"). The City's theory of liability runs into these same limiting concerns about the centrality of but-for causation and the proper role of the judiciary – but unlike market share liability, it presents no defensible rationale for adopting a different rule of causation. It starts with the conclusion that New Truro needs $613.2 million to change its fortunes, then arbitrarily works its way backward to the proposition that Respondent's video game must somehow be found responsible for that sum. An arguably acceptable alteration to but-for causation must respond to an otherwise impossible causal puzzle by rationally apportioning liability amongst a group of tortfeasors. Petitioner's substantial factor test, meanwhile, merely responds to the causal "problem" that the City has failed to identify with any precision how a video game worsened New Truro's local struggles. This arbitrary reframing of the causation requirement cannot become a reasoned innovation simply because Petitioner has cloaked it language from the Restatement (Second) of Torts.

D. The Excessive Scope of Respondent's Liability for Abatement Violates Due Process Because the Judgment is Not Rationally Related to Respondent's Conduct.

When public nuisances were limited to unreasonable interferences with public land, abatement was a purely injunctive form of relief. Today, it is hotly debated whether "abatement costs" cross the line from injunctive relief to damages – in which case the City would need to satisfy the "special injury" rule required of private plaintiffs seeking damages in a nuisance case (or else depart from yet another foundational element of public nuisance). *See, e.g.*, *In re Lead Paint Litig.*, 924 A.2d at 502 (concluding that the City of Newark's requested relief counted as damages, not abatement, under state law); Epstein Br. at 8 (arguing that New York City must show a special injury to recover the abatement costs of protecting against the effects of global warming). The Supreme Court of New Tejas may have concluded that Petitioner's requested relief as qualifies as injunctive abatement under state law, but even so, that relief not be arbitrary or unfair. As with all judgments, there must be a rational relationship between the consequences of a defendant's tortious action and the liability imposed.

i. The District Court's Judgment Was Not a Rational Means of Cost Spreading.

Even if the City's theory of public nuisance and its greatly expanded substantial factor test are constitutionally sound, it is a violation of due process to subject Respondent to liability for abating the entirety of the City's present struggles because the judgment is not a rational means of cost spreading. *See Turner Elkhorn*, 428 U.S. at 19 (upholding the retroactive statute in question

because it "approache[d] the problem of cost spreading rationally). The City's unprecedented interpretation of the substantial factor test would unquestionably force Respondent to pay for harms which it did not cause. It is uncontested that Respondent's product is not the sole cause of the City's numerous ills; New Truro has suffered from shifts in the industrial economy, an underfunded police system, struggling schools, and political corruption. Petitioner's theories of public nuisance and causation subject Respondent to liability for the full results of these many economic and social maladies. At the very most, Respondent should only be required to compensate the City for the abatement of whatever percentage of the crime level that a factfinder concludes may be fairly attributed to the popularity of its product. *See* Restatement (Second) of Torts § 840E cmt. b ("[L]iability may be apportioned among those who contribute [to the nuisance] . . . . [E]ach person is subject to liability only for his own contribution.").

ii. Petitioner's Theory Is Not Analogous to Joint and Several Liability.

This vast liability does not fall into any existing category of when a court may hold a single actor liable for an entire harm even though that actor played only a partial role. Joint and several liability, when permitted by state law, makes each defendant liable for the sum total of an injury if their co-defendants are insolvent. However, joint and several liability is a means of holding a group of tortfeasors responsible for a judgment, not for extending the liability of a single defendant. *See Staab v. Diocese of St. Cloud*, 780 N.W.2d 392, 395 (Minn. Ct. App. 2010) (declining to apply joint and several liability to make one actor fully liable for an injury when

a different actor who contributed to the injury was not a party to the action). And even that restricted context is limited to when multiple independently-acting tortfeasors have contributed to an indivisible injury, the responsibility for which cannot be meaningfully apportioned. *See United States v. Monsanto Co.*, 858 F.2d 160, 171–72 (4th Cir. 1988) (holding that joint and several liability does not violate due process when it is limited to indivisible harms). A city's crime rate is not an indivisible injury – and in any event, defendants in alleged indivisible injury cases may limit their liability to the consequences of their own actions if they can argue for a reasonable means of apportionment. *See Maddux v. Donaldson*, 108 N.W. 2d 33, 36–37 (Mich. 1961) (stating that joint and several liability is inappropriate when defendants have demonstrated how the consequences of their actions may be separated). The City's modified substantial factor test afforded Respondent no such opportunity. Since Respondent was a sole defendant, was not responsible for the entirety of the harm, and was not shown to have contributed to an indivisible injury nor given the chance to argue against an indivisible injury standard, no rationale for holding Respondent liable for the whole of the City's crime abatement applies. There is no reasonable relationship between the actions alleged and the scope of the liability imposed, and so the size of the judgment violates due process.

iii. Reasonableness Limits a Judgment That Is Not Factually Based on the Effects of a Party's Actions.

While this Court's jurisprudence on the due process limits of punitive damages provides broad guidance for when a compensatory award is unconstitutional, those precedents are especially illuminating with respect to the

blatant excessiveness of the district court's judgment. When the district court concluded that constitutional limits on punitive damages were irrelevant to compensatory damages, it did so by citing *State Farm*'s logic that the two kinds of damages are treated differently because punitive damages have the purposes of deterrence and retribution, whereas compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered *by reason of the defendant's wrongful conduct*" Pet. App. 31a (citing *State Farm*, 538 U.S. at 416 (emphasis added)). Courts have distinguished compensatory damages from punitive damages because punitive damages are not an objective measurement of a harm and so open the door to a factfinder's abuse of discretion. *See Cooper Indus. v Leatherman Tool Grp.*, 532 U.S. 424, 437 (2001) (distinguishing the factual nature of "actual damages" from the due process concerns associated with punitive damages); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) (warning that "punitive damages pose an acute danger of arbitrary deprivation of property" because of the jury's "wide discretion"). These same concerns apply to Respondent, as the "abatement" requested is not a factual determination of the harms inflicted by Lightyear's popularity. On the contrary, the judgment is an admittedly counterfactual measurement of the impact of Respondent's product. Under Petitioner's proposed definition of the substantial factor test, which decouples liability from conduct, discretion is implicated not as a matter of punishment but as a matter of which diffuse harms may be attributed to Respondent in a world of boundless nuisance and limitless causation.

The size of the judgment may rest on a reasonable assessment of what it will cost the City to "abate" its crime problem, but it is arbitrary to hold Respondent liable for the entirety of those costs. This excessive judgment has been defined not by the effect of Respondent's allegedly tortious conduct but by the depth of the City's need. Thus, *State Farm*'s cautions against arbitrarily excessive awards place constitutional boundaries around the abatement costs which the City may recover from Respondent, even if its underlying theories of liability are correct. The surplus liability deprives Respondent of due process. While the City's intent to improve public safety is commendable, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

CONCLUSION

This Court should, first, find Respondent's challenge to the district court's ruling of law in the denial for summary judgment reviewable without repeatedly raising the issue in a Rule 50 motion after a trial, and second, find that the district court erred when it permitted Petitioner's unprecedented theory of public nuisance liability to stand. Accordingly, we respectfully ask this Court to **affirm** the decision of the Thirteenth Circuit.

Respectfully submitted,
/s/ Team #90
Team #90
Counsel for Respondent
November 16, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 33.1 and Competition Rule 2.5, the undersigned hereby certifies that the Brief for Respondents, Kill-a-Byte Software, Inc., contains 13,078 words, beginning with the Statement of Jurisdiction through the Conclusion, including all headings and footnotes, but excluding the Certificate of Compliance.

/s/ Team #90
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