No. 19-6236

In the Supreme Court of the United States

OCTOBER TERM 2020

CITY OF NEW TRURO, NEW TEJAS
Petitioner,

v.

KILL-A-BYTE SOFTWARE, INC.,
Respondent.

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

BRIEF FOR THE PETITIONER

NOVEMBER 16, 2020

Team 96
Counsel for Petitioner

QUESTIONS PRESENTED

I. Does a party to litigation forfeit its right to appeal a claim that was rejected in summary judgment when they fail to move for judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure?

II. Does due process preclude nuisance liability against a private company for the negative effects of its products?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Supreme Court Cases

U.S. Circuit Court of Appeals Cases

U.S. District Court Cases

State Supreme Court Cases

State Appellate Cases

Constitutional Provisions

United States Code

Rules

Other Authorities

OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Thirteenth Circuit is unreported, but it is available at No. 18-5971 and reprinted on pages 1a-18a of the Appendix to the Petition for Writ of Certiorari. The decision of the U.S. District Court for the Western District of New Tejas is unreported, but it is available at Civil Action No. 16-cv-5412 and reprinted on pages 19a-34a of the Appendix to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The Thirteenth Circuit entered its judgment in this case on March 21, 2020. Petitioners applied for writ of certiorari, which this Court granted on October 5, 2020. The jurisdiction of this Court is properly invoked under 28 U.S. Code § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the application of Federal Rule of Civil Procedure 50, which is reproduced in Appendix A, and the Due Process Clause of Section 1 of the Fourteenth Amendment, which is reproduced in Appendix B.

INTRODUCTION

In 1937, this Court first promulgated a set of rules meant to establish a clear and unified set of procedures "to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. In 2007, the Federal Rules of Civil Procedure were rewritten to improve clarity and comprehension. Fed. R. Civ. P. 1 committee's note to 2007 amendment. Today, Kill-a-Byte attempts to rewrite Rule 50 and create an exception where one does not currently exist. This is unnecessary. The Rule, as currently written, is clear and unambiguous; Kill-a-Byte simply failed to abide by it.

Even if this Court chooses to disregard Rule 50 to hear Kill-a-Byte's argument, it will ultimately find Kill-a-Byte liable for creating and distributing a public nuisance. Kill-a-Byte may have become accustomed to living in a lawless world, such as the one it created in Lightyear, but this is not an arena where they can play by their own rules. New Tejas's public nuisance law passes constitutional muster because it is neither arbitrary nor irrational. The laws of New Tejas and the Rules of this Court are clear. Therefore, this Court should reverse the decision of the Thirteenth Circuit and hold Kill-a-Byte accountable to the Rules of this Court and the laws of New Tejas.

STATEMENT OF THE CASE

I. FACTUAL HISTORY

Full-time killers. "Lightyear" is a first-person, multi-player "shooter simulation" online video game distributed by Kill-a-Byte Software Inc. ("Kill-a-Byte").

Pet. App. 20a. Shortly after Lightyear's release in 2003, the game became wildly popular due to its vivid gore and hyper-realistic death scenes. Pet. App. 2a, 21a. The ultimate goal: kill or be killed. Pet. App. 21a.

Lightyear offers players a myriad of weapon choices, from a basic rock to a futuristic "gravity gun." Pet. App. 21a. No matter what weapon a player chooses, Lightyear provides a death scene for every circumstance. Pet. App. 21a. After a few years of players only being able to kill each other directly, Kill-a-Byte upgraded the game to offer more extreme options, including "environmental deaths," which allow players to manipulate the environment and construct "elaborate traps" to kill others from positions of safety. Pet. App. 21a. Over the typical course of play, the average Lightyear player will be responsible for or bear witness to "thousands (perhaps even tens of thousands) of realistic deaths." Pet. App. 24a.

Many young men in the City of New Truro ("the City") devote a significant amount of time to playing Lightyear. In the City, fifty percent of adolescent men between the ages of fifteen and twenty-five play Lightyear for at least ten hours each week, while some play in excess of thirty-five hours per week. Pet. App. 22a. While the game is available online for free, Kill-a-Byte generates profits by selling additional downloadable content that aims to personalize the Lightyear experience, such as enhanced "'cosmetic' features (which might change the appearance of a player or weapons), additional taunts, [and] improved death animations." Pet. App. 22a n.1. Kill-a-Byte also offers "paid accounts" that provide an even more tailor-made user experience. Pet. App. 22a n.1. In the real world, Kill-a-Byte sells game-related

clothing and products and hosts e-sports tournaments. Pet. App. 22a n.1. These streams of revenue all rely on Lightyear remaining a significant part of its players lives. Pet. App. 23a.

Oversight without care. Internal documents from Kill-a-Byte reveal a business model almost entirely reliant on increasing the amount of time people played Lightyear. Pet. App. 23a. Kill-a-Byte "actively monitored" how long individuals played the game, tracked playtime data in an "electronic database," and computed statistics "for every player and account." Pet. App. 23a. Despite possessing vast amounts of user data, Kill-a-Byte did not create any safeguards to protect players from overexposure to the game's violent depictions of death. Pet. App. 23a. Additionally, it is unclear from the record if Kill-a-Byte instituted any measures to prevent young children from playing Lightyear. However, children as young as fifteen played Lightyear for ten, twenty, or thirty-plus hours a week. Pet. App. 22a. Kill-a-Byte failed to take any action to help players who were spending an unhealthy or unsafe amount of time playing the game. However, Kill-a-Byte was aware that its game had negative effects. In fact, the news published stories of "college students failing classes because they spent too much time playing Lightyear." Pet. App. 23a.

Despite the negative impact of Lightyear, Kill-a-Byte remained steadfast in its ultimate mission: to entice players to spend more and more time online in their virtual, murder-ridden world. Pet. App. 23a. Kill-a-Byte's profitability "almost directly [positively] correlated" with increased game time. Pet. App. 23a. Finding

ways to increase the amount of time players spent online was "the impetus for many of the changes made to Lightyear over the years." Pet. App. 23a.

A city destroyed. By 2016, the City was home to "an undereducated male population with diminished job skills and few employment prospects." Pet. App. 2a. These young men spent most of their time and energy trying to kill their way to the top of Lightyear's world, instead of "attending school, doing homework, working at a job, learning a foreign language or a musical instrument, playing sports, or a variety of other productive activities." Pet. App. 23a. Success for the men of Lightyear depended solely upon their ability to "shoot first" and think later. Pet. App. 22a.

Experts in the field of social science testified to the fact that playing Lightyear for excessive periods of time leads to "poor educational achievement, unemployment, and low earning potential and the likelihood that an individual will engage in criminal activity." Pet. App. 24a. One of the City's neurologists testified that "violence through video games can affect developing minds, desensitizing them to violence and making them more likely to engage in this behavior in real life." Pet. App. 24a.

The City's current crime rate "is nearly six times the national average" with "2,200 violent crimes per 100,000 residents." Pet. App. 25a. The rest of the country sleeps more soundly at night with only 381 violent crimes per 100,000 people. Pet. App. 25a. The City's crime problem is compounded by the fact that its police force is understaffed and underfunded. Pet. App. 3a n.1. Further, the poverty rate in the City is the highest of any city in the country at 45.3%, followed by Detroit, Michigan at 37.9%. Pet. App. 25a; *Poorest Cities in America*, WORLD. POP. REV.

https://worldpopulationreview.com/us-city-rankings/poorest-cities-in-america. The City's schools are also of poor quality. Pet. App. 3a n.1. Ultimately, the City is not immune to the plights of a poor economy; and now, with its young men captured by a virtual world, the future of the City looks dim.

II. PROCEDURAL HISTORY

In 2016, the City filed suit in state court against Kill-a-Byte "alleging that Kill-a-Byte's distribution and operation of its 'Lightyear' video game negatively affected the City's citizens and substantially interfered with public safety." Pet. App. 3a, 19a. The City sought to hold Kill-a-Byte liable for "'absolute public nuisance' under New Tejas common law." Pet. App. 2a. Kill-a-Byte removed the case to federal court based on diversity jurisdiction. Pet. App. 3a.

Once in federal court, Kill-a-Byte moved for summary judgment on multiple grounds, all of which were denied, including the argument that the tort liability provided for by New Tejas's public nuisance law violates due process. Pet. App. 20a. The City did not move for summary judgment, on the due process claim or on any of Kill-a-Byte's other arguments. Pet. App. 3a.

The case went before a jury, who heard from experts provided by both parties about the linkage "between violent video games and subsequent criminal behavior." Pet. App. 3a. The jury found that "(1) Kill-a-Byte intentionally distributed and operated Lightyear; (2) the increased crime rate constituted a substantial interference with a right to public safety; and (3) the widespread use of the Lightyear software was a substantial factor in the City's increased crime rate." Pet. App. 4a.

The district court held Kill-a-Byte liable for public nuisance and for abatements costs of $613.2 million. Pet. App. 33a.

Kill-a-Byte appealed to the Thirteenth Circuit, which reversed the decision of the district court. Pet. App. 1a. However, on certification to the New Tejas Supreme Court, the state supreme court ruled that the City's liability theory was valid, the City's evidence was sufficient, and that the abatement award was proper under state law. Pet. App. 5a. Despite these holdings, the Thirteenth Circuit found that the abatement award violated due process. Pet. App. 11a. Moreover, the circuit court held that Kill-a-Byte preserved their due process claims for appeal, despite not having filed any motions to do so. Pet. App. 5a. The City then filed a timely petition for a writ of certiorari, which this Court granted and limited to two issues.

SUMMARY OF THE ARGUMENT

Kill-a-Byte forfeited its right to appeal its due process argument because it failed to file any Rule 50 motions preserving the issue. Before trial, Kill-a-Byte moved for summary judgment alleging that the imposition of civil liability for the effects caused by the distribution of a video game violated due process. The City did not seek summary judgment on this issue. The district court rejected Kill-a-Byte's motion and the case went before a jury. Under Rule 50, Kill-a-Byte was required to move for a judgment as a matter of law either before the submission of the case or after the jury's verdict and the entry of judgment in order to preserve their due process argument for appeal. Kill-a-Byte failed to file motions at either juncture, leaving the Thirteenth Circuit without power to hear their due process claim.

The Federal Rules of Civil Procedure provide no exceptions or alternatives, so Kill-a-Byte now attempts to create a new avenue for relief in the form of a "purely legal" exception. However, no such exception is found in Rule 50 nor elsewhere in the Federal Rules. Creating a new, sweeping exception of this kind runs counter to the foundational notions of statutory interpretation used by this Court. Further, a purely legal exception is both impractical and unnecessary.

Even if this Court chose to create a new exception, it would not apply to Kill-a-Byte's due process argument. Kill-a-Byte's due process claim is not purely legal because it cannot be resolved without applying the facts of this specific case. As Judge Despard in the court below pointed out, it is likely that the Thirteenth Circuit's due process analysis was simply a prejudicial reaction to the substantial abatement award the City received, as well as the City's explanation of its theories and evidence presented at trial. Therefore, this Court should continue to apply Rule 50 strictly and require that all parties to litigation equally follow the rules.

However, even if this Court chooses to functionally abandon Rule 50 and allow Kill-a-Byte to continue with its due process argument, the argument will fail on the merits. Due process provides procedural and substantive rights. Kill-a-Byte failed to specify which due process rights were violated. This is because neither were.

Procedural due process requires that the government provide its constituents with notice and an opportunity to be heard. Kill-a-Byte was notified of its state law violation and then participated in a full and fair trial. Due process does not, as Kill-

a-Byte baselessly alleged, require a government to proactively inform its constituents of each and every law that might affect them and how.

Furthermore, the imposition of civil liability against Kill-a-Byte is a valid application of economic legislation under substantive due process. Economic legislation does not violate due process unless the law is both arbitrary and irrational, and the New Tejas public nuisance law is neither.

After establishing the constitutionality of the New Tejas public nuisance law, Kill-a-Byte's case quickly unravels. The marketing and design of Lightyear unreasonably and significantly interfered with public safety in the City, making it a public nuisance. The district court correctly found that the City's high crime rate amounts to a substantial interference with the public's right to safety and that rampant and excessive playing of Lightyear was a substantial factor behind the City's rise in crime. The City is also plagued by a high rate of unemployment that persists because a substantial percentage of employable young men devote hours to Lightyear, preventing them from obtaining full-time employment. Because Lightyear was a substantial factor in the deterioration of the City, New Tejas law allows liability to be assigned to Kill-a-Byte.

Kill-a-Byte need not have known that Lightyear would lead to exponential increases in the City's crime, poverty, and unemployment rates. Instead, Kill-a-Byte only needed to know or intend to cause the conditions underlying the nuisance. Here, Kill-a-Byte both knew and encouraged these conditions. Kill-a-Byte based its business model on increasing the overall number of Lightyear users, the amount of

time users spent playing the game, and the diversity of violence available. As the district court accurately noted, the natural consequences of a substantial portion of the population being entrapped in the violence of Lightyear included increased aggression, reduced free time, and low interest in securing gainful employment.

ARGUMENT

I. KILL-A-BYTE FORFEITED THEIR DUE PROCESS ARGUMENT THAT WAS REJECTED IN SUMMARY JUDGMENT BY FAILING TO MOVE FOR JUDGMENT AS A MATTER OF LAW.

The Supreme Court, the Constitution, the common law, and a plain meaning statutory interpretation of Federal Rule of Civil Procedure 50 all require preservation of issues for appeal. Rule 50 unambiguously sets forth two procedural pathways for challenging the sufficiency of the evidence in a civil jury trial. Fed. R. Civ. P. 50. First, a party may challenge the sufficiency of the evidence before the submission of the case to the jury. *Id.* Second, the party may renew their argument *after* the jury's verdict and the entry of judgment. *Id.* There are no alternatives or exceptions. *See id.*

This Rule grew out of the "well-established [common law] practice of reserving questions of law," which is reflected in the Seventh Amendment's Reexamination Clause. *Balt. & Carolina Line v. Redman*, 295 U.S. 654, 659 (1935) (explaining that the Seventh Amendment seeks to preserve the right of trial by jury from "indirect impairment through possible enlargements of the power of reexamination existing under the common law"); *see* U.S. CONST. amend. VII ("In suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules

of the common law."). In 2006, this Court reaffirmed the rule that appellate courts cannot direct a district court "to enter judgment contrary to the one it had permitted to stand" if a Rule 50 motion was not filed. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 401 (2006). Further, this Court has generally instructed lower courts to "not depart from the usual practice under the Federal Rules." *Jones v. Bock*, 549 U.S. 199, 212 (2007). If this Court allows Kill-a-Byte's argument to proceed on appeal, this Court would significantly "depart from the usual practice under the Federal Rules." *Id.* Instead, this Court should continue to uphold the straightforward requirements of Rule 50.

A. The Court Of Appeals Lacked Authority To Hear Kill-a-Byte's Due Process Claim Because Kill-a-Byte Failed To Submit A Rule 50 Motion.

Kill-a-Byte forfeited its right to appeal its due process argument, which the district court rejected when it denied Kill-a-Byte's motion for summary judgment, because it failed to file a Rule 50 motion preserving the issue. This Court has repeatedly held that "'[i]n the absence of such a motion' an 'appellate court [is] without power to direct the District Court to enter judgment contrary to the one it had permitted to stand.'" *Unitherm*, 546 U.S. at 401 (quoting *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 218 (1947)).

Rule 50 promulgates two procedural avenues that a party may use to challenge the sufficiency of the evidence in a civil jury trial. Fed. R. Civ. P. 50. First, subsection (a) allows a party to file a motion before the case is submitted to the jury. *Id.* At this stage, the district court can use its discretion to either grant or deny the motion. *Id.* Second, at the conclusion of trial, a party may file a motion to renew its evidentiary

sufficiency challenge once the jury has returned its verdict and the district court has entered its judgment pursuant to subsection (b). *Id.* These two paths are clearly defined, and this Court has held that an appellate court may not review a verdict for sufficiency of the evidence *unless* a party moved the district court for such relief. *Unitherm*, 546 U.S. at 400-01.

In *Unitherm*, this Court found that the plain language and practical application of Rule 50(a) does not allow a party to "challenge the sufficiency of the evidence on appeal on the basis of the District Court's denial of its Rule 50(a) motion." *Id.* at 405. Instead, this Court held that a party must file a Rule 50(b) motion for an appellate court to have authority to hear the issue. *Id.* Thus, an appellate court can only grant relief that has been requested from the trial court.

Here, Kill-a-Byte, like the defendant in *Unitherm*, failed to file a Rule 50 motion. *Id.* at 396; Pet. App. 3a. Only Kill-a-Byte moved for summary judgment on the claim that imposing civil liability for lawful distribution of a video game violates due process. Pet. App. 3a. The City did not seek summary judgment on this issue. Pet. App. 3a. The district court denied Kill-a-Byte's motion, and, following a three-week trial, the jury returned a verdict in favor of the City on the issue of liability. Pet. App. 4a. Next, the district court conducted a two-week bench trial limited to the issue of abatement, which is an equitable remedy governed by state law that must be decided by the court itself. Pet. App. 4a. The district court ultimately entered a judgment awarding the City $613.2 million in abatement costs. Pet. App. 4a.

At no point did Kill-a-Byte submit a Rule 50 motion. In fact, Kill-a-Byte both failed to submit a Rule 50(a) motion prior to the case being submitted to the jury after the court's denial of their motion for summary judgment *and* failed to file a Rule 50(b) motion following the district court's final judgment. Thus, according to this Court's longstanding precedent, the Thirteenth Circuit was "without power" to direct the district court to enter a different judgment. *See Unitherm*, 546 U.S. at 400-01 (quoting *Cone*, 330 U.S. at 218). Accordingly, this Court should find that Kill-a-Byte did not preserve its due process argument and the judgment of the district court should be affirmed.

B. Kill-a-Byte's Due Process Issue Was A Live Issue At Trial Because The City Did Not Request Nor Receive Summary Judgment On The Matter.

As explained above, only Kill-a-Byte moved for summary judgment on the due process issue, and the district court denied the motion. Pet. App. 3a. The City neither requested nor received summary judgment on the issue. Pet. App. 3a. The denial of a motion for summary judgment is *not* functionally equivalent to a final decision on an issue; instead, a denial decides only whether a case must proceed to trial. *See Switz. Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 25 (1966). Thus, after Kill-a-Byte's motion for summary judgment was denied, all of its claims remained live issues at trial, including the due process argument.

1. Issue preservation turns on a lower court's judgment, not its reasoning, so the district court's denial of Kill-a-Byte's summary judgment motion did not constitute a "judgment" on the due process issue.

The district court's denial of summary judgment in favor of Kill-a-Byte on the due process issue did not constitute a "judgment" on the issue. Therefore, the

Thirteenth Circuit lacked jurisdiction to hear an appeal of the due process claim. Appellate court jurisdiction is limited to the review of "final decisions." 28 U.S.C. § 1291; *Valverde ex rel. Padilla v. Dodge*, 967 F.3d 1049 (10th Cir. 2020). Final decisions are "decisions that end the litigation on the merits so that nothing remains for the court to do but to execute the judgment." *Attocknie v. Smith*, 798 F.3d 1252, 1256 (10th Cir. 2015).

A district court's denial of a summary judgment motion does not amount to a "final decision" under 28 U.S.C. § 1291 because it "leaves much, (often everything) to be decided." *Ortiz v. Jordan*, 562 U.S. 180, 188 (2011); *Allstate Sweeping, LLC v. Black*, 706 F.3d 1261, 1266 (10th Cir. 2013); *see Switz. Cheese Ass'n*, 385 U.S. at 25 (holding that "the denial of a motion for a summary judgment . . . does not settle or even tentatively decide anything about the merits of the claim"); *see also Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478, 482 (1978) (finding that "orders that have no direct or irreparable impact on the merits of the controversy" are not final judgments); *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981) (upholding "the general principle that only *final* decisions of the federal district courts would be reviewable on appeal"). Similarly, orders "where assessment of damages or awarding of other relief remains to be resolved have never been considered to be 'final.'" *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976). Finally, when deciding issues of claim preservation, this Court must "review[] [final] judgments not opinions." *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984).

The dissent in the court below correctly stated that "[a]n opinion rejecting Kill-a-Byte's arguments is no substitute for a judgment on those arguments." Pet. App. 17a. As this Court stated in *Ortiz*, "orders denying summary judgment do not qualify as 'final decisions.'" 562 U.S. at 188. Thus, the majority in the Thirteenth Circuit erred in its analysis when it afforded dispositive weight to the district court's *reasoning* rather than its final judgment. Pet. App. 17a. In fact, the Thirteenth Circuit's opinion wrongly conflated the denial of summary judgment against Kill-a-Byte as being functionally equivalent to a grant of partial summary judgment in favor of the City. Pet. App. 16-17a. This reasoning is incorrect because a denial and a grant of summary judgment have significant and opposite consequences: a denial of summary judgment sends a case to trial while a grant of summary judgment resolves a case *without* trial. *See Switz. Cheese Ass'n*, 385 U.S. at 25; *see generally* Joan Steinman, *The Puzzling Appeal of Summary Judgment Denials: When Are Such Denials Reviewable?*, 2014 MICH. ST. L. REV. 895.

Additionally, after the district court decided the merits of the due process argument, the issue of damages still remained unresolved. Under this Court's precedent in *Wetzel*, an order "where assessment of damages or awarding of other relief remains to be resolved ha[s] never been considered to be 'final.'" 424 U.S. at 744. Therefore, the district court's denial of Kill-a-Byte's summary judgment motion did not constitute a final judgment. As such, Kill-a-Byte was required to file a Rule 50 motion to preserve it for appeal. However, because Kill-a-Byte failed to file, this

Court should find that Kill-a-Byte forfeited its right to appeal this issue and the Thirteenth Circuit lacked jurisdiction to hear its claim.

2. The merger rule does not apply to a court's order denying summary judgment; therefore, Kill-a-Byte, at a minimum, needed to file a Rule 50(b) motion to preserve the due process issue.

The merger rule does not apply to the district court's denial of Kill-a-Byte's summary judgment motion. Under the merger rule, an interlocutory order "merge[s] with the final judgment in a case, and the interlocutory orders (to the extent that they affect the final judgment) may be reviewed on appeal from the final order." *Pineda v. Ford Motor Co.*, 520 F.3d 237, 243 (3d Cir. 2008). This Court has held that the merger rule does not apply to denials of summary judgment, which do not merge into a final judgment and cannot be appealed after a jury trial. *See Ortiz*, 562 U.S. at 183-84. Instead, the "jurisdiction of a Court of Appeals under 28 U.S.C. § 1291 extends only to appeals from . . . final decisions of the district courts." *Id.* at 188 (internal quotations omitted).

If the City *had* moved for summary judgment on Kill-a-Byte's due process challenge and the district court had granted the motion in favor of the City, then the interlocutory order would have merged with the final judgment under the "merger rule" and could have been reviewed on appeal. *Pineda*, 520 F.3d at 243; *see* Pet. App. 17a. However, that is not the situation before this Court. Instead, only Kill-a-Byte filed a motion for summary judgment, which the district court denied. Pet. App. 3a. Under this Court's precedent in *Ortiz*, the district court's denial of Kill-a-Byte's summary judgment motion was not a final judgment for purposes of appeal. 562 U.S.

at 183-84. Thus, because the merger rule is inapplicable to the district court's order regrading Kill-a-Byte's motion, Kill-a-Byte was required to file a Rule 50(b) motion in order to preserve its due process argument for appeal.

C. Rule 50 Does Not Provide A "Purely Legal" Exception To Its Requirements Nor Should This Court Create Such An Exception.

This Court has never held that there is a "purely legal" exception to Rule 50, and it should not expand the scope of the rule now. Rule 50 provides a clear, two-step process to preserve an issue on appeal. Fed. R. Civ. P. 50. First, "a motion for judgment as a matter of law may be made at any time before the case is submitted to the jury." Fed. R. Civ. P. 50(a). If the court does not grant the Rule 50(a) motion, "the movant may file a renewed motion for judgment as a matter of law" after the entry of the judgment. Fed. R. Civ. P. 50(b). There are *no* exceptions. *See* Fed. R. Civ. P. 50.

This Court should decline to create a "purely legal" exception to Rule 50, as doing so would be contrary to the foundational principles of statutory interpretation that require courts to interpret the Rules using their "plain meaning." *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 540 (1991). Moreover, creating such an exception is both impractical and unnecessary. Instead, this Court should apply Rule 50 strictly in order to provide clarity and certainty in future litigation. However, even if this Court were to recognize a purely legal exception to the Rule, such an exception would not apply to Kill-a-Byte's due process claim because it is incapable of resolution without reference to the facts of the case.

1. A purely legal exception to Rule 50 is unwarranted under foundational principles of statutory interpretation.

It is well established that courts must "give the Federal Rules of Civil Procedure their plain meaning." *Bus. Guides*, 498 U.S. at 540. Courts must also assume that the plain meaning of the rule "accurately expresses the legislative purpose." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 376 (2013). Thus, as with a statute, the "judicial inquiry is complete" when the text of the Rule is clear and unambiguous. *Bus. Guides*, 498 U.S. at 540-41; *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003).

This Court recognized in *Johnson* that the requirements of Rule 50 "as written and construed by us [are] not difficult to understand or to observe." *Johnson v. N.Y., New Haven & Hartford R.R.*, 344 U.S. 48, 53-54 (1952). This Court was previously asked to create an exception to the Rules to give "appellate courts the power to enter judgments for parties who . . . had made no timely motion for judgment notwithstanding the verdict." *Id.* at 53. This Court declined to adopt such an amendment, and there are "[n]o sufficiently persuasive reasons" why the Court "should do so now under the guise of interpretation." *Id.* at 54.

Instead, in *Unitherm*, this Court found that the plain language and practical application of Rule 50 does not allow a party to "challenge the sufficiency of the evidence on appeal on the basis of the District Court's denial of a Rule 50(a) motion." 546 U.S. at 405. This Court held that a party *must* file a Rule 50(b) motion for an appellate court to have authority to hear the issue. *Id.* Therefore, an appellate court is without power to grant relief that has not been requested from the trial court. *Id.*

As such, the procedure that Kill-a-Byte asks this Court to adopt can only "be obtained by the process of amending the Federal Rules, and *not* by judicial interpretation." *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U. S. 163, 168 (1993) (emphasis added).

Additionally, the Seventh Amendment's Reexamination Clause supports upholding the existing restrictions on appellate courts' ability to review final judgments. *See* U.S. CONST. amend. VII ("In suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."). The amendment seeks to preserve the right of trial by jury from "indirect impairment through possible enlargements of the power of reexamination existing under the common law." *Balt. & Carolina Line*, 295 U.S. at 657. Creating a new "purely legal" exception to Rule 50 is the type of "enlargement" that the Founders and this Court have sought to prevent. As the dissent in the Thirteenth Circuit correctly noted, "[t]he majority's cavalier treatment of Rule 50 fails to recognize its constitutional significance under the Seventh Amendment." Pet. App. 16a n.4.

Kill-a-Byte argues that this Court should adopt a "purely legal" exception to Rule 50. Pet. App. 7a. However, such an exception is contrary to both the "language and purpose" of Rule 50. *Bus. Guides*, 498 U.S. at 543. Because the requirements of Rule 50 are clear and unambiguous, this Court should interpret the Rule based only on its plain meaning, which does not include an exception for "purely legal" issues. *See Desert Palace*, 539 U.S. at 98. This Court should also decline to read new, broad

exceptions into the rule. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 93 (2012) (explaining that the "omitted-case canon" provides support for not adding theories or exceptions to the text of a statute when it is not there).

2. Creating a "purely legal" exception to Rule 50 is both impractical and unnecessary.

Generally, as is the case here, "a party may [not] appeal a denial of summary judgment after a district court has conducted a full trial on the merits." *Ortiz*, 562 U.S. at 187. This is because, after trial, the record before the court is more thoroughly developed and "supersedes the record existing at the time of the summary-judgment motion." *Id.* at 184. After the jury returns its verdict and the court enters judgment, a party must file a Rule 50(b) motion to renew its objection. *Ji v. Bose Corp.*, 626 F.3d 116, 128 (1st Cir. 2010); *see Feld Motor Sports, Inc. v. Traxxas, L.P.*, 861 F.3d 591, 596 (5th Cir. 2017); *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1235 (4th Cir. 1995).

The justification for this rule relies "on the procedural fact that a denial of a motion for summary judgment is merely a judge's determination that genuine issues of material fact exist. It is not a judgment, and does not foreclose trial on issues on which summary judgment was sought." *Ji*, 626 F.3d at 127 (quoting *E. Mountain Platform Tennis, Inc. v. Sherwin-Williams*, 40 F.3d 492, 500 (1st Cir. 1994)). Circuit courts have held that an appellate court has jurisdiction over "an appeal of the district court's legal conclusions in denying summary judgment . . . only if it is sufficiently preserved in a Rule 50 motion." *Feld Motor Sports*, 861 F.3d at 596; *see Ji*, 626 F.3d at 128; *Chesapeake Paper Prods. Co.*, 51 F.3d at 1235.

This Court, and numerous circuit courts, have refused to provide a "purely legal exception" to the requirements of Rule 50. *Johnson*, 344 U.S. at 53-54; *Ji*, 626 F.3d at 128; *Feld Motor Sports*, 861 F.3d at 596; *Chesapeake Paper Prods. Co.*, 51 F.3d at 1235. *But see Feld v. Feld*, 688 F.3d 779, 781-82 (D.C. Cir. 2012); *Houskins v. Sheahan*, 549 F.3d 480, 489 (7th Cir. 2008); *Banuelos v. Constr. Laborers' Tr. Funds for S. Cal.*, 382 F.3d 897, 902-03 (9th Cir. 2004); *Rothstein v. Carriere*, 373 F.3d 275, 284 (2d Cir. 2004); *United Techs. Corp. v. Chromalloy Gas Turbine Corp.*, 189 F.3d 1338, 1344 (Fed. Cir. 1999); *McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997); *Ruyle v. Cont'l Oil Co.*, 44 F.3d 837, 841-42 (10th Cir. 1994). These courts agree that "[r]eviewing a pretrial denial of summary judgment after a full trial is inappropriate because the denial was based on an undeveloped, incomplete record, which was superseded by evidence adduced at trial." *Chesapeake Paper Prod. Co.*, 51 F.3d at 1236. In addition, these courts have recognized the impracticality of applying a "purely legal" distinction in practice. *See id.* at 1235-36. First, the Fourth Circuit, in rejecting to recognize a "purely legal exception" to Rule 50, reasoned that the "dichotomy [between an error of law or an error of fact] is problematic because all summary judgment decisions are legal decisions in that they do not rest on disputed facts." *Id.* at 1235 (noting that the "legal nature of summary judgment decisions is evident from [the] traditional *de novo* standard for reviewing such decisions"). Moreover, requiring courts to determine whether summary judgment was denied on a purely legal or purely factual basis would be a "dubious undertaking." *Id.*

Rule 50 is a bright-line rule, and it should remain as such. Moreover, the Rule should continue to be applied strictly by this Court, as the burden on parties to comply with such a straightforward rule is low, and the rule's requirements are not, as the lower court stated, a "meaningless formality." Pet. App. 7a; *see* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2472 (2d ed. 1995) (explaining that the rule requiring issue preservation "is not a mere technical formality and is essential to the orderly administration of civil justice"). Rather, there is great value in procedural rules being applied clearly and consistently, to provide certainty to the parties, attorneys, and judges. Pet. App. 15a. In particular, Rule 50's requirements help ensure that the district court judge remains "fully apprised – and can fully consider – all of the reasons that a party might deserve judgment to be rendered in its favor." Pet. App. 15a; *see Cone*, 330 U.S. at 216 (explaining that a post-verdict motion is necessary because "[d]etermination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart").

Finally, creating a "purely legal" exception is not necessary given that adequate remedies at law already exist. *Id.* at 1236. For example, in limited circumstances, an aggrieved party who believes that the district court erred in denying their motion for summary judgment may move for an interlocutory appeal. *See* 28 U.S.C. § 1292(b). Alternatively, as Kill-a-Byte should have done here, an aggrieved party may file a Rule 50 motion for a judgment as a matter of law. Fed. R.

Civ. P. 50(b). This Court should not allow courts to treat Rule 50 as a "meaningless formality" by disregarding its clear requirements. Pet. App. 7a. Instead, because the text of Rule 50 does not contain any exceptions and creating a "purely legal" exception is both impractical and unnecessary, this Court should decline to recognize a purely legal exception to Rule 50.

3. Even if this Court recognized a purely legal exception to Rule 50, such an exception would not apply to Kill-a-Byte's due process claim.

Kill-a-Byte's due process claim is not a pure legal issue, so *even if* this Court were to recognize a new legal exception to Rule 50's requirements, it would not apply in this instance. Cases that would qualify as purely legal "involve contests not about what occurred, or why an action was taken or omitted, but disputes about the substance and clarity of pre-existing law." *Ortiz*, 562 U.S. at 190. In other words, "pure legal" questions are "abstract legal questions" that can be "answered without reference to the facts of the case." *Kay v. United of Omaha Life Ins. Co.*, 562 F. App'x 380, 385 (6th Cir. 2014) (noting that whether the doctrine of equitable estoppel requires reasonable or actual reliance would be considered a purely legal question of law).

For example, purely legal questions may include "determination[s] of whether speech is constitutionally protected," *Houskins*, 549 F.3d at 489, whether a court "could hear evidence outside the administrative record," *Banuelos*, 382 F.3d at 903, issues pertaining to collateral estoppel, *Ruyle*, 44 F.3d at 841-42, and state government immunity statutes, *McPherson*, 125 F.3d at 995. Additionally, some courts may choose to "review the defaulted claim only if such review is necessary to

prevent manifest injustice." *Rothstein*, 373 F.3d at 291 (internal quotations omitted). On the other hand, the question of whether a jury could reasonably find that a party believed she could mail in a check after a person's death in order to reinstate his life insurance policy would *not* be considered "purely legal," as its resolution requires reference to the facts of the particular case. *Kay*, 562 F. App'x at 385.

Kill-a-Byte's due process claim is not a purely legal claim because it is incapable of resolution without reference to the facts of the case. As the dissent in the court below pointed out, the majority's due process analysis was a reaction to the exuberant award the City received, as well as the City's explanation of its theories and evidence presented at trial. Pet. App. 18a. Therefore, even if the judgment involves a question of law, the facts utilized in the legal analysis will necessarily be case specific. Pet. App. 18a. Thus, even if this Court were to recognize a purely legal exception to Rule 50, such an exemption would be inapplicable to this case because Kill-a-Byte's due process claim is not purely legal, but rather fact-specific.

This Court should not allow Kill-a-Byte's due process argument to be heard on appeal. To do so would contravene this Court's precedent, the Founders intentions, and basic principles of statutory interpretation. Furthermore, to do so in this case would be fruitless because Kill-a-Byte's due process claim is not purely legal but driven by the facts of this case. This Court should reverse the decision of the Thirteenth Circuit and hold that Rule 50 harbors no implied exceptions.

II. THE DISTRICT COURT CORRECTLY HELD THAT KILL-A-BYTE CAN INCUR LIABILITY UNDER STATE LAW FOR THE PUBLIC NUISANCE CAUSED BY ITS VIDEO GAME, LIGHTYEAR.

Due process was not violated in this case. The Fourteenth Amendment mandates that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Due process provides two sets of rights: procedural and substantive. Though these rights are distinct, they work together to "guarantee more than process . . . [and] cover a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them." *Cnty. of Sacramento v. Lewis*, 23 U.S. 833, 840 (1998) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997); *Daniels v. Williams*, 474 U.S. 327, 331 (1986)) (internal quotations omitted).

Kill-a-Byte could not identify which aspect of due process was violated in this case because neither were. Regarding procedural due process, Kill-a-Byte received proper notice that the City sought to take action against it, and then Kill-a-Byte participated in a full and fair trial. *See* Pet. App. 2a-5a. Notice and an opportunity to be heard are the only rights proffered by procedural due process. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 272 (2010). Further, substantive due process was not violated because the New Tejas public nuisance law is a form of economic legislation, which is held to a rational basis standard. *Concrete Pipe & Prods. of Cal. Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 637 (1993). The law and the City's theory of liability was neither arbitrary nor irrational, so it satisfies the rational basis standard. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

Therefore, this Court should hold that neither procedural nor substantive due process was violated in this case.

A. The City's Application Of Public Nuisance Law Against Kill-a-Byte Did Not Violate Procedural Due Process Because Kill-a-Byte Had Proper Notice And An Opportunity To Be Heard, And The Law Is Not Unconstitutionally Retroactive.

Procedural due process requires that the government follow appropriate procedures when it decides to "deprive any person of life, liberty, or property." U.S. CONST. amend. XIV, § 1. The focus, therefore, is on the fairness of the procedural steps not on the fairness of the outcome. The procedure is simple and only involves two steps: notice and a hearing. *Espinosa*, 559 U.S. at 272 (2010); *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Kill-a-Byte suffered no procedural due process harms in this case. Before an abatement was handed down against Kill-a-Byte, Kill-a-Byte participated in both a jury and bench trial. Pet. App. 2a-5a. Kill-a-Byte was on notice and had every opportunity to be heard. *See* Pet. App. 2a-5a. Here, instead, Kill-a-Byte has attempted to manipulate due process to save itself because it simply did not "anticipate the liability" and because the City did not give Kill-a-Byte any "warning that it might face such an extraordinary liability." Pet. App. 11a, 13a.

Due process does not require the government to proactively inform its constituents of each and every law that may affect them. *See Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982) ("Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply."). Rather, it is an individual's responsibility to

abide by the law. *See ignorantia legis neminem excusat*, BLACK'S LAW DICTIONARY (11th ed. 2019) (ignorance of law excuses no one).

The Court of Appeals found that the "retroactivity" of the New Tejas law also violated due process. Pet. App. 11a. The Ex Post Facto Clause of the Constitution prohibits laws from being passed and enforced after the fact. *Weaver v. Graham*, 450 U.S. 24, 28 (1981); *United States v. Wass*, 954 F.3d 184, 189 (4th Cir. 2020). While every ex post facto law is retroactive, not every retroactive law is an unconstitutional ex post facto law. *Calder v. Bull*, 3 U.S. 386, 391 (1798). Furthermore, courts only take issue with retroactivity in the criminal law context. *Collins v. Youngblood*, 497 U.S. 37, 41 (1990) (finding that "it has long been recognized by this Court that the constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them"); *Johannessen v. United States*, 225 U.S. 227, 242 (1912) (holding that the retroactivity "prohibition is confined to laws respecting criminal punishments, and has no relation to retrospective legislation of any other description").

The classic example of an unconstitutional retroactive law is one that "makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action." *Calder*, 3 U.S. at 391 (finding a law that "aggravates a crime, or makes it greater than it was, when committed . . . changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed . . . that alters the legal rules of evidence, . . . in order to convict the offender" is also unconstitutionally retroactive). Limiting the issue of

retroactivity and ex post facto to criminal law was made explicit in *Johannessen*, and this Court has upheld that principle since. 225 U.S. at 242; *Collins*, 497 U.S. at 41.

When retroactivity is raised as an issue in a civil case, courts must determine "whether the statutory scheme is 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Smith v. Doe*, 538 U.S. 84, 92 (2003) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)). In doing so, courts must "defer to the legislature's stated intent." *Hendricks*, 521 U.S. at 361. This standard is incredibly difficult to overcome: a defendant must provide "the clearest proof . . . to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Smith*, 538 U.S. at 92.

Here, there are no ex post facto or retroactivity issues. Kill-a-Byte incurred liability under a civil statute, and courts generally only have due process retroactivity concerns in criminal cases. *Collins*, 497 U.S. at 41; *Johannessen*, 225 U.S. at 242; Pet. App. 1a-5a. Additionally, the abatement award is not "so punitive either in purpose or effect as to negate" the fact that it is an equitable, compensatory judgment imposed under tort law by the court. *Smith*, 538 U.S. at 92. Kill-a-Byte has not provided "the clearest proof" or any proof that the City, the State of New Tejas, or the district court intended the abatement be inflicted as a criminal penalty. *Id.*

Furthermore, the New Tejas law did not come into effect after Kill-a-Byte began distributing Lightyear. While the record does not provide a citation of the law, it is a common law rule, which implies that it existed before Kill-a-Byte began producing Lightyear in 2003. Moreover, all laws have some sort of retroactive

characteristic. *See Calder*, 3 U.S. at 391. A person cannot be charged with murder until after they have killed someone, a building cannot be demolished until after it has become decrepit, and an abatement cannot be incurred until a harm is discovered. In some cases, the time between an act and its harm is years. A temporal gap between a damaging act and the damage it causes simply does not make a law unconstitutionally retroactive. The New Tejas public nuisance law does not violate procedural due process and its enforcement against Kill-a-Byte in this case did not violate due process either.

B. The City's Imposition Of Civil Liability On Kill-a-Byte Did Not Violate Substantive Due Process Because It Is A Proper Application of Economic Legislation That Satisfies Rational Basis Scrutiny.

The cornerstone of substantive due process is to protect constituents from "'arbitrary action of government' or the exercise of power without any reasonable justification in the service of a legitimate government interest." *Lewis*, 523 U.S. at 845 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). Similar to retroactivity, substantive due process concerns are raised in cases where "punitive damages" have been awarded. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996). Here, Kill-a-Byte is only being held liable for abatement costs, which are compensatory damages. Pet. App. 31a.

Additionally, Kill-a-Byte incorrectly relied on the Court's takings analysis in *Eastern Enterprises v. Apfel* when proclaiming an alleged violation of due process. 524 U.S. 498, 540 (1998). Here, the case before the Court is not a taking under substantive due process because New Tejas's public nuisance liability does not affect

an identified property interest. *Id.* at 540 (Kennedy, J., concurring in the judgement and dissenting in part) (noting that takings must "operate upon or alter an identified property interest"). "[R]egulatory actions requiring the payment of money are not takings." *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339 (Fed. Cir. 2001). Further, property interests "are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). New Tejas state law does not provide Kill-a-Byte with a property interest against abatement costs.

Instead, this case requires the Court to assess the constitutionality of economic legislation, which is properly analyzed under *Concrete Pipe and Products of California Inc.* 508 U.S. at 637 (holding that a law need only survive rational basis review even when "the effect of the legislation is to impose a new duty or liability based on past acts"). "[T]he modern framework for substantive due process analysis concerning economic legislation requires only an inquiry into whether the legislation is reasonably related to a legitimate governmental purpose." *Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass'n*, 110 F.3d 547, 554 (8th Cir. 1997). Economic legislation satisfies rational basis scrutiny if it is neither "arbitrary [nor] irrational." *Usery*, 428 U.S. at 15. This standard also applies to retroactive economic legislation. *United States v. Carlton*, 512 U.S. 26 (1994) (holding that a retroactive law will be upheld if a party can "show[] that the retroactive application of the legislation is itself justified by a rational legislative purpose"); *Pension Ben. Guar.*

Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984) (holding that "the strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means"). While the City strongly contends that its public nuisance law is *not* retroactive, even if it were, it would still pass constitutional muster.

Here, the imposition of civil liability against Kill-a-Byte is a valid application of economic legislation that is neither arbitrary nor irrational and thus satisfies rational basis scrutiny. This Court has previously declared that it "do[es] not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). In particular, this Court has repeatedly "expressed concerns about using the Due Process Clause to invalidate economic legislation." *Apfel*, 524 U.S. at 537 (1998) (citing *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955)). Kill-a-Byte's claim will only add to the "endless" "string of unsuccessful challenges to economic legislation." *Templeton Coal Co. v. Shalala*, 882 F. Supp. 799, 813 (S.D. Ind. 1995), *aff'd sub nom. Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir. 1996).

1. The City's theory of liability under New Tejas state tort law does not violate substantive due process because it is neither arbitrary nor irrational.

Adhering to the nuisance law of New Tejas, the City adopted a theory of liability that comports with due process because it is neither arbitrary nor irrational. State nuisance laws do not violate substantive due process unless such laws are both

arbitrary and irrational. *See Usery*, 428 U.S. at 15; *see also R.A. Gray & Co.*, 467 U.S. at 730 (noting that even retroactive economic legislative need only be satisfied by a "rational purpose"). Black's Law Dictionary defines arbitrary as "a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures" and irrational as "[n]ot guided by reason or by a fair consideration of the facts." *Arbitrary*, BLACK'S LAW DICTIONARY (11th ed. 2019); *irrational*, BLACK'S LAW DICTIONARY (11th ed. 2019). Here, the law and its application against Kill-a-Byte is neither arbitrary nor irrational because the law requires consideration of the facts and the decision to hold Kill-a-Byte liable was based off of facts and the law's rational goal to ensure public safety in the City.

Further, this Court must extend deference to the City's theory of liability because New Tejas's public nuisance law stems from common law theories of nuisance. *See e.g., Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 622 (7th Cir. 2014) (citing the "deferential standard" for reviewing state legislation and that "even more deference is owed to judicial common-law developments"). While the City's theory of liability appears novel when compared to historic or traditional theories of public nuisance, the district court accurately characterized the City's theory as both "a natural outgrowth of existing precedent" and "not so irrational as to violate due process." Pet. App. 28a.

An application of the public nuisance doctrine to a consumer product generally is not irrational nor arbitrary and is in fact supported by the Second Restatement of Torts, which the New Tejas Supreme Court relies upon. *See* RESTATEMENT (SECOND)

OF TORTS § 821B, cmt. H; Pet. App. 26a. The Restatement provides a "broad definition [for] a public-nuisance action [that] can be maintained for injuries caused by a product if the facts establish that the design, manufacturing, marketing, or sale of the product unreasonably interferes with a right common to the general public." Pet. App. 29a.

Moreover, public nuisance cases related to consumer products are not novel and have indeed been litigated. For example, in *NAACP v. AcuSport*, the NAACP brought suit against the manufacturers, importers, distributors, and retailers of handguns. 271 F. Supp. 2d 435 (E.D.N.Y. 2003). The suit relied on a provision of New York state law which held that actions which "endanger the people of New York and interfere with their use of public space" are a public nuisance. *Id.* at 446. The court held that AcuSport – a handgun manufacturer – and other handgun industry defendants had "created a public nuisance." *Id.* The defendants had the ability to "substantially reduce the harm" "through easily implemented changes in marketing and more discriminating control of sales practices," and they failed to do so. *Id.* The court in *AcuSport* identified steps that the defendants could have taken to lessen or even eliminate the dangers associated with their consumer product. *Id.* at 447. The court noted that the defendants could have engaged in feasible "marketing steps," tracked handgun retail practices more closely, or "require[ed] retailers to avoid multiple or repeat sales to the same customers." *Id.* at 447, 450. Rather than pursue any of these ameliorative measures, the court found that the defendants engaged in

"[c]areless practices" and failed to take "appropriate precautions," resulting in the increased use of "handguns in connection with criminal activity." *Id.* at 450.

Similarly, in *In re National Prescription Opiate Litigation* the plaintiffs successfully brought a public nuisance action which alleged that various pharmaceutical company defendants created a public nuisance through their intentional distribution and marketing of prescription opioids. *See* No. 18-OP-45032, 2020 WL 4550400, at *14 (N.D. Ohio Aug. 6, 2020). The plaintiffs alleged that the defendants: (1) were aware that they had created an "oversupply of prescription opioids"; (2) knowingly "ignored red flags" indicating an oversupply; (3) demanded and incentivized "speed and volume" among their distributors; (4) relied on a business model which required increasing the distribution of opioids; (5) fostered the supply of "far more opioids than could have been justified to serve a legitimate market"; and (6) misled the public about the effects and dangers of opioids. *Id.* Evaluating these claims, the district court determined that the plaintiffs had indeed "fairly and sufficiently stated plausible claims for absolute public nuisance based on the Pharmacy Defendants' alleged intentional conduct involving their dispensing activities." *Id.*

Though *AcuSport* and *National Prescription* involved companies and products in unique commercial contexts, the underlying theories of public nuisance creation in both cases are applicable to Kill-a-Byte. Like handgun industry defendants in *AcuSport* and pharmaceutical industry defendants in *National Prescription*, Kill-a-Byte created a public nuisance through the manner in which it created, managed,

and distributed its product, Lightyear. *See AcuSport*, 271 F. Supp. 2d at 447; *In re Nat'l Prescription Opiate Litig.*, 2020 WL 4550400, at *14. Further, like the industry defendants in both cases, Kill-a-Byte was aware of the harm its product presented to the public yet choose to ignore numerous options available to reduce this harm. *See AcuSport*, 271 F. Supp. 2d at 446; *In re Nat'l Prescription Opiate Litig.*, 2020 WL 4550400, at *14; Pet. App. 23a. More than just awareness, Kill-a-Byte meticulously tracked and aggregated user data to reveal exactly how long each user engaged with Lightyear. Pet. App. 23a. Despite knowledge that some users were spending inordinate amounts of time with the company's product, Kill-a-Byte "never limited the amount of time" an individual user could devote to Lightyear and, more fundamentally, "never questioned whether" any Lightyear users were spending excessive time with the product. Pet. App. 23a. Notably, Kill-a-Byte's practical ability to easily introduce a "straightforward" time limit system related to Lightyear "is undisputed." Pet. App. 23a n.2.

Despite a keen two-fold awareness of harm and the availability of ameliorative action, Kill-a-Byte simply chose not to implement even the most basic of safeguards over its product. Pet. App. 23a & n.2. Instead, like pharmaceutical industry defendants in *National Prescription* and gun industry defendants in *AcuSport*, Kill-Byte adopted a business model which attempted to flatly maximize the presence of Lightyear within the video game industry and within the lives of its users. Pet. App. 23a. Again mirroring prescription drug defendants, Kill-a-Byte also ignored numerous "red flags," which signaled the observable and harmful impact of its

product, including reports of "college students failing classes because they spent too much time" with Lightyear. *In re Nat'l Prescription Opiate Litig.*, 2020 WL 4550400, at *14; Pet. App. 23a. In addition to refusing to introduce a monitoring system within Lightyear, Kill-a-Byte refrained from modifying its business model, echoing the harmful trade practices at issue in *National Prescription*. 2020 WL 4550400, at *14; Pet. App. 23a. By continuing to promote Lightyear without regard for its effects, Kill-a-Byte's "[c]areless practices and lack of appropriate precautions" led to the deterioration of public safety in the City, mirroring the court's findings in *AcuSport*. 271 F. Supp. 2d at 450; Pet. App. 23a-25a. Because Kill-a-Byte both created a product which presented a significant risk of harm and chose to ignore available remedial measures, holding Kill-a-Byte liable is neither arbitrary nor irrational.

2. The district court correctly held that Kill-a-Byte's Lightyear video game constituted a public nuisance because it significantly and continuously interfered with public safety in the City.

Under the City's rational theory of liability, Kill-a-Byte's Lightyear video game is a public nuisance because it caused the significant deterioration of public safety within the City. The Restatement of Torts defines a public nuisance as "an unreasonable interference with a right common to the general public." RESTATEMENT (SECOND) OF TORTS § 821B. Generally, a public nuisance claim arises in one of three circumstances: (1) when conduct "involves a significant interference with the public health, the public safety, the public peace," (2) when conduct is outlawed by statute, or (3) when "the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant

effect upon the public right." *Id.* Though the doctrine of public nuisance has traditionally connoted "interference[s] with use[s] and enjoyment of land," the doctrine has necessarily expanded to meet the needs of modern society. *Id.*; Pet. App. 9a. Recognizing the natural evolution of the public nuisance doctrine, this Court has held that that "public nuisance law, like common law generally, adapts to changing scientific and factual circumstances." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423 (2011).

Both state and federal courts have endorsed a conception of a flexible public nuisance doctrine and have extended it to both specific conduct and products. For example, in *Michigan State Chiropractic Association v. Kelley*, the Michigan Court of Appeals expanded the definition of a public nuisance to include the unlawful practice of medicine specifically because this activity was "harmful to public safety." 262 N.W.2d 676, 677 (Mich. App. 1977). Similarly, the Tennessee Supreme Court found that "the handling of snakes in crowded church sanctuary" was a public nuisance, chiefly because there were "virtually no safeguards." *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 113 (Tenn. 1975). Notably, in *Helton v. Hunt*, the Fourth Circuit authorized the explicit inclusion of video game machines in the state's public nuisance law. 330 F.3d 242, 249 (4th Cir. 2003) (Niemeyer, J., concurring) (upholding a state statute that declared certain video game "machines a public nuisance").

Here, both the marketing and internal design of Lightyear unreasonably and significantly interfered with public safety in the City. Though Kill-a-Byte has halted Lightyear's physical distribution, the product's current online component fits directly

within the Restatement's conception of public nuisance of a "continuing nature" that produces "a permanent or long-lasting effect." RESTATEMENT (SECOND) OF TORTS § 821B. Within the City, more than half of all adolescent males "played the game for a least 10 hours every week." Pet. App. 22a. Of this group of Lightyear users, ten percent engaged with Lightyear *in excess of thirty-five hours per week*. Pet. App. 22a. Importantly, however, the profound impact of Lightyear is not limited to heavy or even moderate users. Even mere "average" players may "observe thousands (and perhaps even tens of thousands) of realistic deaths," complete with amounts blood and gore so extreme that they border on "unrealistic." Pet. App. 21a, 24a.

As the City's neurologist expert testified, "exposure to (and, indeed, participation in) violence through video games can affect developing minds, desensitizing them to violence and making them more likely to engage in this behavior in real life." Pet. App. 24a. Moreover, research has shown that exposure to violent video games like Lightyear is linked to "aggressi[on]" and "decreases in socially desirable behaviors" including "empathy and moral engagement." *Resolution on Violent Video Games,* AM. PSYCH. ASS'N (2015) https://www.apa.org/about/policy/violent-video-games (summarizing scientific consensus on the harmful effects caused by violent video game exposure). The City's expert testimony also suggests that excessive play of Lightyear and subsequent exposure to "gruesom[e]" depictions of death leads to "poor educational achievement, unemployment, and low earning potential," which are all independent and indisputable contributors to criminal activity. Pet. App. 21a, 23-24a.

Currently, the violent crime rate in the City is "nearly six times the national average" and the poverty rate in the City is 45.3% – the highest rate in the nation and seven and half percent higher than in the next ranked city. Pet. App. 25a; *Poorest Cities in America*, WORLD. POP. REV. https://worldpopulationreview.com.us-city-rankings/poorest-cities-in-america (Detroit, Michigan is ranked second with a poverty rate of 37.9%). The district court correctly held that such an extreme increase in crime "constituted a substantial interference with a right to public safety" and that "the widespread use of the Lightyear software was a substantial factor" behind the spike in criminal activity within the City. Pet. App. 4a. The City's economic plight has been exacerbated by a high rate of unemployment that persists as a substantial percentage of employable young men devote hours to Lightyear that are commensurate with hours required for full-time employment. *See* Pet. App. 22a, 25a.

The conditions behind the City's social and economic harms were not unforeseen by Kill-a-Byte; they were an explicit, long-term goal held by the company. Pet. App. 23a. As internal company documents reveal, Kill-a-Byte's strategic mission "was to increase the amount of time (both in the aggregate and individually) players spent playing the game." Pet. App. 23a. More importantly, Kill-a-Byte possessed a strong internal incentive to encourage ever-increasing devotion to Lightyear: money. Pet. App. 23a. The amount of time users spent engaged with Lightyear "directly correlated with Kill-a-Byte's revenue." Pet. App. 23a. Thus, because Kill-a-Byte promoted constant commitment to Lightyear despite knowing of its long-lasting

detrimental effects, Kill-a-Byte created a public nuisance.

i. Kill-a-Byte intended to create and had knowledge of the underlying conditions in the City that caused a public nuisance, so it possessed the requisite intent required to incur liability.

Kill-a-Byte did not need to know or intend for Lightyear to cause exponential increases in the City's crime, poverty, and unemployment rates to incur public nuisance liability. Instead, to be liable for a public nuisance in this context, a party need only be aware of or possess the intent "to bring about [the] conditions which are in fact found to be nuisance." *In re Nat'l Prescription Opiate Litig.*, 2020 WL 4550400, at *14. Accordingly, the dispositive question to assess liability is straightforward: did the "defendant creat[e] or assist in the creation of the nuisance." *People v. ConAgra Grocery Prod. Co.*, 227 Cal. Rptr. 3d 499, 534 (Cal. App. 2017) (alteration in original).

Under this standard, actual knowledge of specific harms is not required for a defendant to be held liable under a public nuisance theory. For example, in *AcuSport*, the degree to which handgun industry defendants had "knowledge that a specific gun sold to a specific dealer [would] be diverted into the illegal market and cause harm to the public" was simply irrelevant. *AcuSport*, 271 F. Supp. 2d at 488. Instead, the court suggested that the proper inquiry is only whether the handgun defendants had created the conditions that fostered the alleged harm through their "imprudent" merchandising practices. *Id.* at 489. Similarly, in *National Prescription*, pharmaceutical industry defendants' financially motivated opioid oversupply "necessarily resulted in the devasting consequences . . . of the opioid epidemic." *In re Nat'l Prescription Opiate Litig.*, 2020 WL 4550400, at *14. Because the defendants

intended to maximize profit by maximizing the amount of opioids sold, conditions ripe for development of market saturation and ensuing addiction, the plaintiffs successfully argued that the defendants created a public nuisance. *Id.*

Here, while Kill-a-Byte may not have intended to inflict an array of social, criminal, and economic harms upon the City, Kill-a-Byte did intend to create the underlying conditions which allowed these harms to occur. Kill-a-Byte encouraged unlimited increases in the overall number of Lightyear users and in amount of time these users dedicated to Lightyear. Pet. App. 23a. Further, responding to the critical reception of Lightyear, Kill-a-Byte also sought to increase the diversity of violence present within its product, periodically introducing new weapons and modes of death. Pet. App. 20a, 21a. As the district court accurately observed, the natural consequences of a substantial portion of the population being exposed to violence for increasing intervals of time include reduced free time, increased aggression, and lessened interest in securing gainful employment. Pet. App. 23a.

Notably, however, Kill-a-Byte cannot assert that it was totally unaware of the severe social and economic harms caused by Lightyear. For example, Kill-a-Byte was aware that some college students failed classes "because they spent too much time" playing Lightyear. Pet. App. 23a. Kill-a-Byte was also aware of precisely how much time each Lightyear user spent within the world of Lightyear. Kill-a-Byte diligently recorded, tracked, and analyzed all user and account data. Pet. App. 23a. Like the defendants *National Prescription*, Kill-a-Byte was not only aware of the market saturation, incredible reach, and time commitment of its product, but it also relied on

these conditions as a critical component of its business model. *See In re Nat'l Prescription Opiate Litig.*, 2020 WL 4550400, at *14; Pet. App. 23a.

Finally, given the indisputably violent nature of Lightyear and the common-sense assumption that "aggression increases in teenagers" when exposed to graphic depictions of violence, Kill-a-Byte also knew that distributing and operating Lightyear was likely to create a public nuisance. Pet. App. 24a n.3. In short, Kill-a-Byte had both the knowledge and intent to create a product that reached far into the lives of its users, presenting graphic depictions of violence at an ever-increasing rate. Because these are the precise conditions which gave rise to the array of public nuisance-related harms suffered by the City, Kill-a-Byte possessed the requisite level of awareness for public nuisance liability.

ii. The abatement award, as a form of compensatory damages, was not unconstitutional as applied to Kill-a-Byte.

After being found liable under New Tejas state law for creating a public nuisance, Kill-a-Byte was required to pay compensatory damages, rendering the abatement award constitutional. This court has cautioned that due process concerns may well arise when a state seek to impose punitive damages on private individuals or corporations. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). When assessing a due process challenge related to damages, this Court has also relied on a simple but effective distinction between compensatory and punitive damages. Compensatory damages are "intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct," and therefore do not alone raise due process concerns. *Cooper Indus., Inc. v. Leatherman Tool Grp.,*

Inc., 532 U.S. 424, 432 (2001) (citing RESTATEMENT (SECOND) OF TORTS § 903). In sharp contrast, punitive damages are instead "aimed at *deterrence and retribution*" and, because they are not tied to a concrete harm, necessarily require a state to exercise discretion. *Id.* at 416 (emphasis added). State discretion inevitably implicates both "procedural and substantive" due process concerns. *Id.* Ultimately, assessments of punitive damages, as opposed to compensatory damages, are of particular concern because punitive damages may be administered in an imprecise or excessive manner due to poor state discretion, thereby violating due process. *Id.* at 417.

In *BMW of North America Inc. v. Gore*, this Court advised that awards of punitive damages pose a unique difficulty because they present a risk of "gro[ss] excessive[ness]," and they may cross over into a "zone of arbitrariness" barred by the Due Process Clause. 517 U.S. at 574-75, 568. In *Gore*, this Court reasoned that a punitive damages award of four million dollars following a disputed vehicle transaction did in fact violate the Due Process Clause, chiefly because the alleged harmful conduct was not "sufficiently reprehensible" to justify such a large award. *Id.* at 579. Notably, the state's justification for the inflated damage amount was based in part on the defendant's similar conduct in *other* states. *Id.* at 572. Rejecting this approach, this Court cautioned that due process commands that damages must be limited to harms suffered either by the state "or its residents." *Id.* at 573.

Here, as a threshold matter, the district court awarded an abatement in the form of compensatory damages. The deterrence and retribution interests which typically motivate punitive damages are not present in this case. *Campbell*, 538 U.S.

at 417. Kill-a-Byte's conduct cannot be deterred because it has largely ceased; Kill-a-Byte stopped physically distributing Lightyear in 2013, but the online component remains accessible. Pet. App. 22a. Similarly, there is no evidence that the district court imposed the abatement with the goal of retribution for Kill-a-Byte's conduct. Therefore, because it represents an award of compensatory damages, the abatement award did not violate due process.

In addition, the abatement awarded in this case is firmly linked to the tangible harms which currently plague the City. Unlike the State of Alabama in *Gore*, the City sought only to redress the concrete harms its residents suffered as a result of Kill-a-Byte's conduct related to Lightyear. *See Gore*, 517 U.S. at 572-73. Though the circuit court expressed the opinion that the abatement was unwarranted and unreasonable, there are ultimately no such standards in an analysis of compensatory damages. *See* Pet. App. 11a-13a. While the judges on the Thirteenth Circuit might disagree with New Tejas law, "the judge's job is to construe the statute – not to make it better." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947). Thus, the district court's imposition of a compensatory damages in the form of an abatement was proper under New Tejas state law and did not violate Kill-a-Byte's Due Process rights.

C. The City's Substantial Factor Test And Theory Of Civil Liability Do Not Violate Due Process Because It Is A Valid Scheme of Causation And Responsibility For The Creation of A Public Nuisance.

By assigning public nuisance liability to Kill-a-Byte under the substantial factor test, the City utilized a widely recognized approach to causation. Though Kill-

a-Byte may argue that this approach fails to allocate responsibility to other influences, this contention overlooks both historical support for the approach and the central role of Kill-a-Byte in causing the City's injuries. *See* Pet. App. 11a-13a; *Gibson*, 760 F.3d at 624. States are free to develop schemes of causation, including those which "permit recovery on a theory of culpable *contribution* to the risk of injury." *Gibson*, 760 F.3d at 624 (emphasis added). Conduct "is a cause of the event if it was a material element and a substantial factor in bringing it about." W. KEETON ET. AL, PROSSER AND KEETON ON LAW OF TORTS § 41 (5th ed. 1984).

This Court has also specifically acknowledged the possibility that when harm or injury is caused by multiple actors, the "conduct of each [may be] . . . the cause in fact of the event." *Burrage v. United States*, 571 U.S. 204, 215-16 (2014) (quoting W. KEETON ET. AL, PROSSER AND KEETON ON LAW OF TORTS § 41 (5th ed. 1984)). Here, Kill-a-Byte's creation and operation of a public nuisance in the form of Lightyear contributed to the harms suffered by the City. Though the City's approach to liability in this case is unique, it ultimately does not violate principles of fundamental fairness.

1. The substantial factor test is a valid tort theory applied against Kill-a-Byte.

New Tejas's adoption of the substantial factor test for assessing public nuisances does not represent a radical departure from traditional conceptions of tort liability. Instead, the substantial factor test is a pragmatic application of a theory which holds a party liable when the conduct of that party and at least one other party "is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would

absolve all of them, the conduct of each is a cause in fact of the event." W. KEETON ET. AL, PROSSER AND KEETON ON LAW OF TORTS § 41 (5th ed. 1984). Though the Thirteenth Circuit asserted that such a theory may expand the scope of civil liability, other federal courts have relied on a substantial factor approach to determine liability amid complex causal landscapes. *Stephens v. Union Pac. Ry. Co.*, 935 F.3d 852, 855 (9th Cir. 2019); *Bouriez v. Carnegie Mellon Univ.*, 585 F.3d 765, 773 (3d Cir. 2009); *Citizens Fed. Bank v. United States*, 474 F.3d 1314, 1319 (Fed. Cir. 2007); *Morales v. Am. Honda Motor Co.*, 71 F.3d 531, 537 (6th Cir. 1995); *Clement v. United States*, 980 F.2d 48, 53 (1st Cir. 1992).

In *Stephens*, the Ninth Circuit endorsed a state tort law construction that assigned liability based on substantial factor test in the context of asbestos exposure. 935 F.3d at 855. While recognizing that this test is "not without limit," the court also noted that the test is a "liberal standard." *Id.* at 856. Under this test, asbestos plaintiffs were only required to show that they suffered "high enough levels of exposure" to support the "inference" that the exposure was a substantial factor in their purported injuries. *Id.* (citing *McIndoe v. Huntington Ingalls, Inc.*, 817 F.3d 1170, 1176 (9th Cir. 2016)). Similarly, this year, in *Locust Valley Water District v. Dow Chemical Company*, a court approved a substantial factor approach in a water pollution case, noting that such a test requires the conduct to "ha[ve] such an effect in producing the injury that reasonable people would regard it as the cause of the injury." 465 F. Supp. 3d 235 (E.D.N.Y. 2020) (citing *In re Methyl Tertiary Butyl Ether Prod. Liab. Litig.*, 591 F. Supp. 2d 259, 266 (S.D.N.Y. 2008)). The *Locust* court

concluded that impossibility of tracing specific pollutants – the harm at issue – to specific defendants did not render the substantial factor test inappropriate or inapplicable. *Id.*

Here, Lightyear had a tight, destructive grasp on the lives of many young men in the City. As previously described "violence through video games can affect developing minds, desensitizing them to violence and making them more likely to engage in this behavior in real life." Pet. App. 24a. This would certainly support the inference that Lightyear contributed to the City's harms, which include high crime, high poverty, and high unemployment. *Stephens*, 935 F.3d at 855; Pet. App. 25a. While it may be difficult to parse out the specific causal elements of the City's injuries, the mere presence of other harms or causes of the City's injuries do not render substantial factor test in appropriate. Rather, harms like the City's, which may have several causal elements, are precisely the kinds of harms the substantial factor test is designed to address. More pragmatically, this case presents the exact scenario in which reliance on traditional "but for" causation would incorrectly absolve all actors who have contributed to the City's harms. W. KEETON ET. AL, PROSSER AND KEETON ON LAW OF TORTS § 41 (5th ed. 1984). Thus, holding Kill-a-Byte liable under a substantial factor test represents the application of a valid tort theory.

2. The innovative reach of the City's public nuisance suit does not violate fundamental fairness.

While this Court is rightfully wary of legislation which imposes retroactive liability, a law's implication of prior or even discontinued behavior does not necessarily mean it is impermissibly retroactive. Unfortunately, despite this subtlety,

the Thirteenth Circuit viewed the imposition of liability in this case through a lens of shock and aw, chiefly because it was uncomfortable with the dollar amount awarded to the City. *See* Pet. App. 11a-13a. The primary motivation for the court's discomfort is that it assumes that Kill-a-Byte could not have known it risked being held liable for its conduct related to Lightyear.[1] Pet. App. 13a. This is the only reason that the Court of Appeals provides to justify its holding that the New Tejas law violates fundamental fairness. Pet. App. 13a.

However, fundamental fairness is not a simple bright line standard, but is instead a nebulous "requirement whose meaning can be as opaque as its importance is lofty." *Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18, 24-25 (1981). Fundamental fairness requires that a court first "consider[] any relevant precedents and then by assessing the several interests that are at stake." *Id.* The Thirteenth Circuit did not provide "any relevant precedents" to support its holding. Instead, as demonstrated by the well-known lead paint public nuisance litigation in California, the requisite knowledge requirement is not knowledge of likely liability but knowledge of likely injury, which Kill-a-Byte surely meets. *See ConAgra Grocery Products Co.*, 227 Cal. Rptr. 3d at 529. Therefore, the City's theory of liability under New Tejas public nuisance law is fundamentally fair.

Although Kill-a-Byte did not expect to be held liable under New Tejas law, Kill-a-Byte was aware of the harms Lightyear could cause. Pet. App. 23a. Kill-a-Byte was

[1] Notably, there is no evidence in the record where Kill-a-Byte explicitly states that it was unaware of its potential liability or, more generally, that as a large technology company, it was unaware of the controlling law of a state in which it operated.

aware of the tremendous amounts of time players were spending playing the game and was aware of the real-life consequences of this time. Pet. App. 23a-25a. Kill-a-Byte "actively monitored" how long individuals played the game, tracked playtime data in an "electronic database" and computed statistics "for every player and account." Pet. App. 23a. Kill-a-Byte knew that a significant percentage of impressionable adolescent males in the City played Lightyear in excess every week. Additionally, the news published stories of "college students failing classes because they spent too much time playing Lightyear," Pet. App. 23a, and Kill-a-Byte likely would have been aware of the scientific consensus surrounding violent video games. Nonetheless, Kill-a-Byte chose to continue aggressively promoting Lightyear in pursuit of unlimited profit.

The facts before the Court today are closely analogous to those of California's lead paint litigation. In 2000, Santa Clara County sued former lead paint manufacturers for promoting lead paint despite knowing that the paint was toxic. *ConAgra Grocery Products Co.*, 227 Cal. Rptr. 3d at 514-24. The lead paint companies "argue[d] that they should be absolved of responsibility for the current hazard because their wrongful conduct was 'too remote' and 'attenuated' from the current hazard." *Id.* at 545. This argument failed, and the court found that the paint was a "substantial factor in creating the current hazard." *Id.* at 546. Ultimately, the lead paint companies were held liable for public nuisance and the trial court required them to pay $1.15 *billion* in abatement costs. *Id.* at 568. The abatement money was meant to cover the costs of inspecting and fixing affected homes, as well as providing

education and outreach on the dangers of lead-based paint. *Id.* at 525. The court held the lead paint companies liable even though "the actions of others in response to those promotions and the passive neglect of owners also played a causal role." *Id.* at 546.

Here, the City has incurred costs and continues to do so due to the detrimental effects Lightyear. Over the last decade, its violent crime rate has significantly exceeded the national average, its tax revenues have decreased by more than 50%, and the costs of funding its police department have more than doubled. Pet. App. 2a, 25a. The City identified concrete and ameliorative actions they wish to take, such as "finding job training programs, centers to assist with 'video game addiction,' increased police presence, security cameras in downtown, and other public safety measures," and the abatement award is properly tied to those remedies. Pet. App. 25a. The abatement award and the legal reasoning behind in this case are analogous to that of the California lead paint case.

Ultimately, these cases represent the modern application of public nuisance law. This Court has supported the idea that "public nuisance law, like common law generally, adapts to changing scientific and factual circumstances." *Am. Elec. Power Co.*, 564 U.S. at 423. The district court's abatement award is not disproportionate to Kill-a-Byte's actions or the role it played in contributing to the current situation in the City. This Court should not fear the logical and necessary growth of common law doctrines, such as public nuisance; instead, this Court should find that the district court's decision to find Kill-a-Byte liable and award abatement costs was constitutional.

CONCLUSION

For the reasons stated, Petitioner respectfully requests this Court reverse the decision of the United States Court of Appeals for the Thirteenth Circuit.

Dated November 16, 2020.

Respectfully submitted,
/s/ *Team 96*
Team 96
Counsel for Petitioners

CERTIFICATE OF COMPLIANCE

Pursuant to Competition Rule 2.5 and Supreme Court Rule 33.1(h), the undersigned hereby certifies that the Brief of Petitioners, City of New Truro, New Tejas, contains 13,866 words, beginning with the Statement of Jurisdiction through the Conclusion, including all headings and footnotes, but excluding the Certificate of Compliance, Certificate of Service, and the attached Appendix.

/s/ *Team #96*
Team #96
Counsel for Petitioners
November 16, 2020

CERTIFICATE OF SERVICE

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

/s/ *Team #96*
Team #96
Counsel for Petitioners
November 16, 2020

APPENDIX A

Section 1 of the Fourteenth Amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

The relevant portion of Rule 50 of the Federal Rules of Civil Procedure provides:

(a) Judgment as a Matter of Law.

(1) *In General.* If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) *Motion.* A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.