No. 00-3643

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

AMERICAN AMUSEMENT MACHINE ASSOCIATION, et al.,
Plaintiffs-Appellants
v.
TERI KENDRICK, et al.,
Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division (IP00-1321-C-H/G)
The Honorable David F. Hamilton, Judge

BRIEF OF *AMICUS CURIAE* INTERACTIVE DIGITAL SOFTWARE ASSOCIATION
IN SUPPORT OF APPELLANTS AND IN SUPPORT OF REVERSAL

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No. 00-3643
American Amusement Machine Ass'n v. Kendrick

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):

Interactive Digital Software Association

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Jenner & Block

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

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TABLE OF CONTENTS

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT..i

TABLE OF AUTHORITIES iii

IDENTITY OF AMICUS 1

STATEMENT OF INTEREST AND SOURCE OF AUTHORITY TO FILE..................................1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT...5

I. The Interactive Video Game Medium is an Expressive Medium..5

A. Expressive content...6

B. Expressive intent...9

C. Expressive effects...13

D. Asserted negative impact..15

II. There is No Legal Basis for Denying First Amendment Protection.................................17

III. Because the Ordinance Directly Regulates Visual Depictions of Violence, the First Amendment Applies in Full Force 20

CONCLUSION...23

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CASES

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Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996)....................21

Caswell v. Licensing Commission of Brockton, 444 N.E.2d 922 (Mass. 1983)....................3, 18, 19, 20

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Eclipse Enterprises Inc. v. Gulotta, 134 F.3d 63 (2d Cir. 1997)....................22

Ginsberg v. New York, 390 U.S. 629 (1968)....................3

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ORDINANCES

City-County Gen. Ordinance No. 72-2000 ....1,15, 16, 21

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IDENTITY OF AMICUS

Interactive Digital Software Association (IDSA) is the only U.S. trade association exclusively dedicated to serving the business and public affairs interests of companies that publish video and computer games[1] for video game consoles (such as Nintendo 64, Sega Dreamcast, and Sony PlayStation), personal computers, and the Internet. Its members collectively account for more than 90 percent of the $6.1 billion in entertainment software revenue in the United States in 1999, and billions more in export sales of U.S.-made entertainment software.

STATEMENT OF INTEREST AND SOURCE OF AUTHORITY TO FILE

IDSA submits this amicus brief in support of appellants. Amicus asks this Court to reverse the district court's decision upholding the constitutionality of City-County General Ordinance 72-2000 (the "Ordinance"). This brief is submitted upon consent of counsel to all of the parties.

The Ordinance at issue in this case is limited to violent video games located in commercial arcades. It thus does not regulate the video games published by IDSA's members. Nonetheless, IDSA has a significant interest in this litigation because it implicates an important and undecided constitutional question that directly affects IDSA's members' expressive interests: whether the interactive video game medium is a "significant medium for the communication of ideas," *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952), and thus enjoys the full protection of the First Amendment. IDSA maintains that this medium is entitled to the full First Amendment protection afforded to media such as movies and the Internet. A contrary ruling would invite other jurisdictions, and perhaps the City of Indianapolis and Marion County, to reach beyond the commercial arcade setting and attempt to regulate the content of

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[1] For ease of reference, IDSA will refer to both video and computer games as "video games" in the brief.

video games sold and rented for home use. Indeed, the County of St. Louis recently passed such a law, *see* St. Louis County Ordinance 20,193 (adopted Oct. 26, 2000), and similar bills are currently pending in several other jurisdictions. IDSA thus has a vital interest in proper resolution of the important First Amendment issues raised here.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1952, the Supreme Court brought motion pictures squarely within the protection of the First Amendment, concluding that movies "are a significant medium for the communication of ideas." The Court explained that movies "may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

This case presents the question whether the interactive video game medium is, like movies, a "significant medium for the communication of ideas" entitled to full First Amendment protection. Some courts in the early 1980s – when video game technology was very much in its infancy – held it was not. These courts viewed the games at issue as little more than technologically advanced pinball machines, incapable of anything but "inconsequential," and therefore constitutionally unprotected, expression.[2] But as the district court below recognized, these courts "did not foreclose the possibility that further

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[2] *See, e.g., Malden Amusement Co. v. City of Malden*, 582 F. Supp. 297, 299 (D. Mass. 1983); *America's Best Family Showplace Corp. v. City of New York*, 536 F. Supp. 170, 173-74 (E.D.N.Y. 1982); *Marshfield Family Skateland, Inc. v. Town of Marshfield*, 450 N.E.2d 605, 609-10 (Mass. 1983), *appeal dismissed*, 464 U.S. 987 (1983); *Caswell v. Licensing Comm'n for Brockton*, 444 N.E.2d 922, 926-27 (Mass. 1983); *City of Warren v. Walker,* 354 N.W.2d 312, 316-17 (Mich. Ct. App.1984), *appeal dismissed*, 474 U.S. 801 (1985).

development of video games might transform them into a medium of protected expression." *American Amusement Mach. Assoc. v. Kendrick*, No. IP00-1321-C-H/G, ___ F. Supp. 2d ___, 2000 WL 1528687, at *7 (S.D. Ind. Oct. 12, 2000); *see also Rothner v. City of Chicago*, 929 F.2d 297, 303 (7th Cir. 1991) (leaving open question of First Amendment status of video games).

That day has come. The video games now widely available are, like movies, rich combinations of narrative, storyline, sound, and graphic design "that convey to the user a significant artistic message protected by the First Amendment." *Rothner*, 929 F.2d at 303. The district court recognized this fact, but quite reluctantly. It grudgingly concluded that "at least some contemporary video games include protected forms of expression." *American Amusement*, 2000 WL 1528687, at *10. It relegated them to the "outer fringes" of the First Amendment, said that they were entitled to protection only because of the "expansive reach of the First Amendment," likened video game speech to "low value" speech, and even concluded that "many, perhaps most, video games contain only the barest minimum of protected speech." *Id.* at *10, *17.

This marginalization of a significant and creative medium to the "outer fringes" of the First Amendment has far reaching implications. Because the court afforded only minimal protection to video games, it felt justified in applying the "obscenity as to minors" standard of *Ginsberg v. New York*, 390 U.S. 629 (1968) – in the face of controlling precedent to the contrary – to the very different context of violent speech. *See American Amusement*, 2000 WL 1528687, at *17. The court's unjustified expansion of the unprotected category of obscene speech to cover protected violent speech threatens to reduce drastically the constitutional liberties of minors and adults alike. Had the district court given

video game speech the full measure of constitutional protection, it may not have extended *Ginsberg* so far and so erroneously.

Moreover, the district court's notion that interactive video games are somehow less expressive than more traditional media forms, and therefore less protected, threatens the development of new forms of expressive media. Amicus asks this Court to recognize the tremendous communicative and expressive features of this medium and to afford it *full* First Amendment protection. There is no longer, were there ever, a justification for protecting movies and the Internet, *see Reno v. ACLU*, 521 U.S. 844, 868-70 (1997), but not video games.[3] As this Court has suggested, the notion that video games are "completely devoid of artistic value" and thus unprotected expression is "totally at odds with reality." *Rothner*, 929 F.2d at 303.

That notion, and the "outer fringes" conception to which it naturally leads, ignores the commonplace knowledge of a wide segment of the American people that video games express ideas and meaning, and are intended to do so. It ignores the growing perception that video games possess a creative capacity that will surpass, if it has not already done so, that of more traditional entertainment

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[3] Any disparity between the level of constitutional protection available for the Internet medium and the interactive video game medium would be particularly glaring as applied to IDSA's members' products. Some of the video and computer games published by amicus' members for home computers can also be played on the Internet. It is simply illogical to suppose that the same computer game is expressive and protected by the First Amendment when played over the Internet, and yet unexpressive, and unprotected, when played on a stand-alone PC.

media that are fully protected by the First Amendment. Indeed, the notion that the video game medium is not an expressive one appears to be a notion confined to the courts, where it is advanced to defend the constitutionality of laws (such as the Ordinance at issue here) that assume the very opposite: namely, that video games "affect public attitudes and behavior." *Burstyn,* 343 U.S. at 501. The Court should finally put that notion to rest.

Even if the Court declines to address the fully expressive nature of today's interactive video games, it should still recognize that the First Amendment applies in full force to this case because the Ordinance expressly regulates visual depictions of violence. Such visual depictions are protected expression regardless whether the medium through which they are displayed is an inherently expressive medium.

ARGUMENT

I. The Interactive Video Game Medium is an Expressive Medium

As this Court has explained, "protected expression" for First Amendment purposes is expression that relates to the "market in ideas, . . . broadly understood as the public expression of ideas, narratives, concepts, imagery, opinions – scientific, political, or aesthetic – to an audience whom the speaker seeks to inform, edify, or entertain." *Swank v. Smart*, 898 F.2d 1247, 1251 (7th Cir. 1990); *see also Miller v. Civil City of South Bend*, 904 F.2d, 1081, 1092 (1990) (Posner, J., concurring in opinion and judgment of the court) ("[T]he expression that is relevant to freedom of

speech . . . is the expression of a thought, sensation, or emotion to another person."), *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1994).[4]

To understand the full expressive and communicative content of the video game medium, it is useful to analyze the component parts of protected expression. First, do video games express "ideas, narratives, concepts, imagery, [or] opinions – scientific, political, or aesthetic"? *Swank*, 898 F.2d at 1251. Second, do the "speakers," *i.e.,* the video games makers and publishers, seek to "inform, edify, or entertain" through that expression? Third, is the expression aimed at an "audience" that receives the intended expression and comprehends or responds to it in some meaningful sense? Amicus addresses each of these three questions below.

A. Expressive content

Video games cover a vast array of subject-matter categories, including, to name but a few, adventure games ("Myst"), character action-adventure games ("Zelda: Ocarina of Time"), puzzle games ("Tetris"), sports games ("Madden NFL 2000"), racing games ("NASCAR '99"),simulator

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[4] *See also Texas v. Johnson*, 491 U.S. 397, 404 (1989) (test for deciding whether conduct is "'sufficiently imbued with elements of communication to fall within the scope'" of the First Amendment is whether "'[a]n intent to convey a particularized message [is] present, and [whether] the likelihood [is] great that the message [will] be understood by those who view[] it'") (quoting *Spence v. Washington*, 418 U.S. 405, 409-11 (1974)).

games ("Flight Simulator"), hunting games ("Big Game Hunter"), early educational games ("Elmo's Number Journey"), teenage and adult educational programs ("Where in the World is Carmen Sandiego?"), family entertainment ("Sim City 3000"), fighting games ("Street Fighter"), role-playing games ("Ultima Online"), and shooting games ("Half-Life" and "Doom"). Just as there is a wide diversity of books – both fiction and non-fiction – available for purchase, there is also great diversity in the types and themes of video games. *See* Steven Poole, *Trigger Happy: Videogames and the Entertainment Revolution* 21-54 (2000) (surveying landscape of video game subject matter).

Like movies, video games tell stories and entertain audiences through the use of complex pictures and sounds, and sometimes through text as well. The thematic ideas for video games are at times drawn directly from successful works in other media. The game "Rainbow 6," for example, was based on a novel by Tom Clancy of the same name. *See* L. Wayne Hicks, *Books Find New Life as Computer Games*, Denv. Bus. J., May 26, 2000, at 35A. Video games based on the very successful "Harry Potter" series of books are in development. *See id*. Similarly, video games have been drawn from movies such as "Jurassic Park," the James Bond film "Goldeneye," *see* Seth Stevenson, *Not Just a Game Anymore*, *Video*, Newsweek, Jan. 1, 2000, at 94 (noting that "Goldeneye 007" game was more profitable than the movie), and most recently the 1999 hit movie "The Blair Witch Project," *see* Peter Olafson, *A Blair Witch Video Game*, New York Times, Nov. 2, 2000, at G11.[5] More often,

[5] Movie makers, in turn, also look to video games for themes and ideas. *See* John Gaudiosi, *Videogames Fill Big Screen,* Video Bus., Oct. 16, 2000 (announcing upcoming film based on popular game "Tomb Raider"); Loren King, *Latest 'Pokemon' Caper Stokes the Franchise*, Boston Globe, July 21, 2000, at D6 (discussing "Pokemon the Movie 2000"); Marc Saltzman, *Missed a Video Game? Just Wait for the Movie Version*, USA Today, Oct. 30, 1998, at 5E (mentioning such films as "Wing Commander" and "Super Mario Brothers").

the plots and characters for games are developed specifically for the video games in a process comparable to the movie script development process. *See* Poole, *supra*, at 73.

Unlike traditional movies, however, video games add a distinctive, interactive feature that allows the game player to become an active participant in shaping the unfolding narrative. *See* Janet H. Murray, *Hamlet on the Holodeck* 140 (1997) (distinguishing stories from games, which permit agency); *Stern Electronics, Inc. v. Kaufman,* 523 F. Supp. 635, 639 (E.D.N.Y. 1981) (observing that a video game is basically "a movie in which the viewer participates in the action"), *aff'd*, 669 F.2d 852 (2d Cir. 1982). Players typically take on the role of a pre-defined character who must overcome various obstacles that the game-designers construct, usually with the aim of reaching some "ultimate" objective – such as solving a riddle, rescuing a hostage, or defeating an invader.

But that is just the tip of the technological iceberg in terms of the narrative potential of this emerging medium. There are games in which "players can switch sides and play through the same confrontation from opposing positions." Murray, *supra*, at 147. Other games utilize artificial intelligence technology that enables the computer to create and adapt the story in response to the player's actions ("Creatures" and "Sim City"), and still others allow players to create their own characters within the context of a pre-established narrative ("Everquest" and "Ultima Online"). The emergence of online computer games has opened up the additional possibility of a number of individual players collectively shaping the story and game experience. *See* Stevenson, *supra*, at 94.

To be sure, not all video games contain complex narratives.[6] That a particular video game lacks

a strong narrative theme, however, does not diminish the appropriate First Amendment protection. The First Amendment does not require that expression be in narrative form; still less does it require that narratives, where present, be complex. The graphic design and sound elements of a puzzle game constitute a form of aesthetic expression akin to music or abstract art that clearly qualifies as protected expression within the First Amendment. Music is also playing an increasingly sophisticated and central role in modern video games. "Once an afterthought, [music has] now become just as important to a game as its graphics and game play." Steve Klett, *Now Hear This*, Incite PC Gaming, June 2000, at 48. This Court should not, as the district court did, *see American Amusement*, 2000 WL 1528687, at *10, equate "minimal plot development" with "inconsequential," and therefore unprotected, expression. That has never been the law with respect to First Amendment protection for artistic expression in other media. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995) (First Amendment is not limited to protection of "succinctly articulable" or "particularized" messages; to hold otherwise would leave unprotected the "unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll"). It should be no different for the interactive video game medium.

B. Expressive intent

Turning to expressive intent, it is clear that video game developers and publishers "seek[] to inform, edify, [or] entertain" through their video game creations. *Swank*, 898 F.2d at 1251. The development of a video game epitomizes the creative process. Game developers brainstorm,

collaborate, sketch scripts, and design "story boards." *See generally* Olivia Crosby, *Working So Others Can Play: Jobs In Video Games Development*, Occupational Outlook Q., July 1, 2000, at 2 (describing game development). Designers understand full well the creative aspects of their work, and think about how best to communicate their intended message to their audience. They appreciate the interactive aspects of their craft, and design their creations accordingly: "Designers are storytellers, with a twist: they invent a plot, but they let the player control the story and decide the outcome. They create a web of possibilities, and the player chooses a path." *Id.* They understand the role of fantasy and "play" in video games, and even advertise their games "as taking us places very different from where we live." Henry Jenkins, *"Complete Freedom of Movement": Video Games as Gendered Play Spaces*, *in From Barbie to Mortal Kombat: Gender and Computer Games* 262, 264-65 (Justine Cassell and Henry Jenkins, eds. 1998). And they consciously seek to stir the emotions of their audience. Indeed, Sony nicknamed its new PlayStation2 the "emotion engine" because "it has enough computing power to deliver visuals capable of engaging the audience's feelings." Stevenson, *supra*, at 94; see also Dean Takahashi, *Video Games Become More Than Child's Play*, Wall Street Journal, May 12, 2000, at B6 (reporting that Sony's designers are promising "games that will make you cry").

Further, game developers collaborate with a variety of individuals from the creative arts, including graphic and animation artists; novelists (*e.g.,* Tom Clancy and Michael Crichton); movie directors (*e.g.,* George Lucas); musicians (*e.g.*, David Bowie); composers (*e.g.,* John Williams); even architects, engineers, and physicists.[7] Indeed, game developers consider themselves to be artists in their own right.[8] Designers are passionate about their craft, and many consciously choose game design over related creative endeavors such as movie making. *See* Julie Flaherty, *It's a Video Game, Certainly,*

but is it Art?, New York Times, Mar. 2, 2000, at D1 (quoting Henry Jenkins' observation that more of his current students want to be game designers than movie makers, and that "[t]hey discuss game strategy 'the way a decade ago students were talking about David Lynch or Peter Greenaway'").

Game developers have formed a community of critical thought about their craft, akin to those familiar in more traditional artistic and entertainment fields. In trade magazines, such as "Game Developer," designers explore innovations in the field, supply critical commentary and discussion, and provide peer review of new video game creations. *See* Game Developer: On the Front Line of Game Innovation, Oct. 13, 2000, *available at* http://www.gdmag.com. The Academy of Interactive Arts and Sciences bestows annual awards in 29 categories, including a "Game of the Year" award, and craft awards for "Outstanding Achievement" in art direction, animation, sound design, and character/story development (to name a few).[9] The creative process of creating video games has prompted several academic conferences and even college degree programs.[10]

Moreover, video games – even quite violent ones – have received significant recognition from parts of our society wholly unrelated to the technology and new media segments. For example, the video game "Medal of Honor" graphically and vividly depicts the action and realities encountered by soldiers in World War II. Created by Steven Spielberg and his company, DreamWorks Interactive, the video game was intended by its designers to be "something with broad appeal that would ignite a player's imagination about the soldiers who rose above and beyond the call of duty."[11] The Congressional Medal of Honor Society of the United States has officially "endorsed" the video game; the Society has said that the video game sends the "message to upcoming generations that the medal itself represents ordinary people doing extraordinary things for their country."[12] The game designers

clearly intended to express a message through this video game. Nonetheless, the content of the video game "Medal of Honor" might well fall within the Ordinance's prohibition against "graphic violence."

C. Expressive effects

The final essential component of protected expression is an audience that receives the intended expression. In the interactive video game world, that audience is immense.[13] And contrary to popular belief, that audience is made up of many adults and women. *See id.* (61% of gamers are 18 or older and 43% are women). The nature of this diverse audience's response to games buttresses considerably the case for games' expressive qualities.

The game playing audience uses video games and responds to them in ways ordinarily associated with those entertained by works of creative expression. Indeed, surveys show that the video game audience is tremendously excited by the entertainment that home video makers create. Thirty-four percent of consumers surveyed in 1999 ranked video games as the most enjoyable home entertainment medium, with television ranking a distant second at 18%. *See Ten Facts About the Computer and Video Game Industry*, *available at* http://idsa.com.pressroom. html. This excitement and enjoyment has made the video and computer game industry the fastest growing segment of the U.S. entertainment industry, with more than $6.1 billion in revenue in 1999 (rivaling movie box office sales).[14] The New York Times reports that "[t]he grip that video games and their characters have on their fans mirrors the way movies and their stars mesmerize their audiences." Flaherty, *supra*. Some video game characters have become icons of popular culture and are regarded nearly as movie stars. *See id.* (discussing video game superstar "Lara Croft" of the game "Tomb Raider"); Stevenson, *supra* (reporting that Croft is "as recognizable as many a popular actor").

The response to video game speech is often more cerebral than celebration of virtual superstars. Scholars focus on the way in which games engage the imagination and create fantasy and play space,[15] and have observed that games foster social bonds by bringing game-players together in new interactive environments. *See* Jenkins, *Art Form for the Digital Age*, *supra*; Flaherty, *supra.* An entire book is devoted to the topic of gender and video game culture, and explores such themes as the empowerment many women experience when playing certain violent video games. *See Voices from the Combat Zone: Game Grrlz Talk Back, in From Barbie to Mortal Kombat*, *supra*, at 328.

The aesthetics of video games has also generated significant commentary. *See* Poole, *supra,* at 11 ("[T]he inner life of video games – how they work – is bound up with the inner life of the player. And the player's response to a well-designed videogame is in part the same sort of response he or she has to a film, or to a painting: it is an aesthetic one."). Indeed, a significant body of scholarly and popular opinion holds that the medium has developed sufficiently in technological sophistication and expressive capabilities to warrant the title "art."[16] But whether games inspire the imagination, ennoble the spirit, provide entertainment, or instead leave some viewers with the perception that games suffer from a "banality of vision and style," Kroll, *supra*, they are expression received by an audience, and are equally worthy of full First Amendment protection. *See Winters v. New York,* 333 U.S. 507, 510 (1948) ("Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.").

D. Asserted negative impact

Of course, there are some who believe that mere exposure to the content of video games causes anti-social behavior. That belief has given rise to a public controversy about the proper place for video games, especially video games depicting violence, in our children's lives. Indeed, it was that very belief that apparently led the City to enact the Ordinance. The preamble to the Ordinance speaks of the City's compelling interests in "protecting parents' authority to shield their minor children from *influences" – i.e.,* video games' visual depiction of graphic violence – that the "parents find inappropriate or offensive." City-County Gen. Ordinance 72-2000 (emphasis added). It also makes reference to studies purportedly documenting that "violent video games *produce* psychological effects in minor children and that prolonged *exposure* to violent video games increases the likelihood of aggression in minor children." *Id.* (emphasis added).

Amicus, of course, flatly rejects this belief, and, as the brief for the *amici* social science scholars makes clear, the spurious social science upon which that belief rests. But the very belief, and the ensuing public debate, speaks volumes about the communicative and expressive capabilities of the interactive video game medium. Responding to that debate, the City chose to restrict minors' access to violent video games *because of* the ideas communicated by such games, and *because of* the supposed harm that flows from them. Such regulations strike at the very core of what the First Amendment protects against. *See United States v. Playboy Entm't Group, Inc.,* 120 S. Ct. 1878, 1893 (2000); *Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 95-96 (1972); *see also American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 328-32 (7th Cir. 1985) ("Indianapolis seeks to prohibit [pornographic] speech because it believes this speech influences social relations and politics on a grand scale, that it controls attitudes at home and in the legislature. This precludes a characterization of the

speech as low value."), *aff'd*, 475 U.S. 1001 (1986).[17] Indeed, if video games truly lack any expressive capacity, how could they "influence" minors in a way that parents "find inappropriate or offensive," as the Ordinance states that they do? And how else, if not through *receiving* such visual communication from game makers and responding to them, could minors possibly be harmed, as the City believes, through "exposure" to video games? Further, if video games contained no meaningful expression, how would it be possible to identify those games deemed "harmful to minors"– *i.e.,* games that "predominately appeal[] to minors' morbid interest in violence," are "patently offensive," and lack "serious literary, artistic, political or scientific value"?

Appellees' argument that video games are not speech is thus belied by the very Ordinance at issue, which seeks to control a protected category of speech because of its influence. Indeed, the argument's sole purpose is to divert attention from what the City has actually done: it has chosen sides in a controversial political debate. It is of course the job of the First Amendment to ensure that the "marketplace of ideas," and not the government, settles the controversy. *See Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). For the reasons set out above, the interactive video game medium is – as a matter of descriptive fact – a fully expressive one and is entitled to full, not marginal, First Amendment protection.

II. There is No Legal Basis for Denying First Amendment Protection

Offering arguments advanced by courts from the 1980s, appellees have argued that First Amendment protection for video games is inappropriate. None of those reasons is persuasive.

Even though the Supreme Court said long ago that the "'line between the informing and the entertaining is too elusive'" a line to draw for constitutional purposes, *Burstyn*, 343 U.S. at 501 (quoting *Winters*, 333 U.S. at 510), several courts rejected First Amendment protection for video games in the '80s because a video game, in their view, "was pure entertainment with no informational element." *America's Best,* 536 F. Supp. at 174. Thus, they thought it was "unnecessary to draw th[e] elusive line," *id.*, and maintained that in order for entertainment to count as protected expression, "there must be some element of information or some idea being communicated." *Id.* at 173; *see also Marshfield Family Skateland*, 450 N.E.2d at 609-10; *Caswell*, 444 N.E.2d at 925; *Walker,* 354 N.W.2d at 316-17.

But the Supreme Court's decisions in this area demonstrate that the distinction between entertainment and information is too "elusive" to draw in the first place. In other words, "'what is one man's amusement, teaches another's doctrine.'" *Burstyn*, 343 U.S. at 510 (quoting *Winters,* 333 U.S. at 510). An information/idea requirement for entertainment as expression,[18] moreover, is flatly inconsistent with the principle that artistic forms of expression need not be reducible to a particularized idea or concept to receive constitutional protection. Artistic expression, even abstract expression intended and received for pure entertainment, is fully protected expression. *See Hurley*, 515 U.S. at 569; *Miller,* 904 F.2d at 1096 (Posner, J., concurring in opinion and judgment) ("If the only expression that the First Amendment protects is the expression of ideas and opinions, then most music and visual art, and much of literature, are unprotected."). Nonetheless, as explained above, today's video games do express ideas and information.

Some courts have reasoned that the interactive feature of video games somehow removes them from the realm of protected expression. *See*, *e.g., Caswell*, 444 N.E.2d at 925-26 (pointing to the "activity" required by the game player). The district court was correct to reject this argument, and this Court should reject it as well. *See American Amusement*, 2000 WL 1528687, at *9. It is odd to think that the *additional* expression of the interactive game player would somehow negate or detract from the expression that video game makers intend to communicate, and do communicate, through the game itself. Quite the contrary, the interactive dimension of the video game medium is widely believed to be one of its most expressive, and consequently entertaining, features. *See, e.g.,* Stevenson, *supra* (unlike movies, "videogames boast interactivity – an even better way to engage the emotions of the audience"). As with theater, the fact that speech is mixed with "live action or conduct" – in this case the live action or conduct of the video game player – is "no reason" to hold video games to a "different [constitutional] standard." *Conrad,* 420 U.S. at 558. Indeed, when the Supreme Court afforded full protection to the Internet, it specifically described that new medium as a "dynamic, multifaceted category of communication [that] includes not only traditional print and news services, but also audio, video, and still images, as well as *interactive*, real-time dialogue." *Reno v. ACLU*, 521 U.S. at 870 (emphasis added). Interactivity enhances expression; it does not prove its absence.

Appellees also argued below that, if interactive video games contain protected expression, then all games, however basic, must be entitled to similar treatment. They pointed to courts that have held games such as Bingo and skeet shooting to be unprotected by the First Amendment. *See Allendale Leasing, Inc. v. Stone*, 614 F. Supp. 1440, 1454 (D. R.I. 1985), *aff'd*, 788 F.2d 830 (1st Cir. 1986); *Town of Richmond v. Murdock*, 235 N.W.2d 497, 500 (Wis. 1975). Given the enormous

expressive capacity of the interactive video game medium as described above, the comparison between contemporary video games and games such as Bingo could not be more inapt.[19] Moreover, amicus' argument is decidedly not that games, *because* they are games, qualify for First Amendment protection. Instead, the argument presented is that interactive video games so qualify because of the expressive intent of their creators, the expressive content of the games themselves, and the expressive effects that these games produce when received by their intended audience. Amicus seeks protection for this distinctive medium of expression, and not for games as such.

III. Because the Ordinance Directly Regulates Visual Depictions of Violence, the First Amendment Applies in Full Force

Courts that previously have held video games to be insufficiently expressive for First Amendment purposes have done so in the context of content-neutral licensing laws regulating video games. *See*, *e.g., Caswell*, 444 N.E.2d at 925-926; *America's Best*, 536 F. Supp. at 173-74; *Malden Amusement Co,* 582 F. Supp. at 299; *Marshfield Family Skateland,* 450 N.E.2d at 609-10. Amicus' principal argument is that, contrary to these decisions, the interactive video game medium is an inherently expressive medium such that regulations of video games as a medium should trigger constitutional scrutiny. *See, e.g., Leathers v. Medlock*, 499 U.S. 439, 441-42 (1991) (cable television); *United States v. Grace*, 461 U.S. 171, 176 (1983) (leafleting); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (billboards); *Saia v. New York*, 334 U.S. 558, 561 (1948) (sound trucks and loudspeakers); *Burstyn,* 343 U.S. at 501 (movies).

But even if the Court does not go as far as amicus advocates, the First Amendment applies in full force to appellants' constitutional challenge to the Ordinance in this case. That is because the challenged provisions of the Ordinance restrict children's access only to video games containing "graphic violence." And the Ordinance expressly defines "graphic violence" as an "amusement machine's [including a video game's] *visual depiction or representation* of realistic serious injury to a human or human-like being." City-County Gen. Ordinance 72-2000 (emphasis added). It is beyond debate that visual depictions, no less than the written word, are protected First Amendment expression. *See Hurley*, 516 U.S. at 569; *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981); *Kaplan v. California*, 413 U.S. 115, 119 (1973); *see also Berry v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996) ("[P]aintings, photographs, prints, and sculptures . . . always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection"). Were the government to regulate similar visual depictions contained in more traditional media – such as books, movies, or television – there would be no question that the government was regulating "expression" covered by the First Amendment. *See., e.g., Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 687-88 (8th Cir. 1992) (violent videos). The use of a nontraditional medium for communicating *identical* visual depictions cannot alter the result. A jacket, for example, is not an inherently expressive "medium" for the expression of ideas, but when the government seeks to punish words printed on a jacket, the First Amendment is clearly implicated. *Cohen v. California,* 403 U.S. 15, 18 (1971); *see also Eclipse Enterprises, Inc. v. Gulotta.* 134 F.3d 63, 65-67 (2d Cir. 1997) (no question that First Amendment applied to regulation of pictures and descriptions of violence on trading cards).

Whatever the Court's ultimate view of video games as an expressive medium, it must apply the First Amendment where, as here, the government regulates a category of visual depictions contained in that medium. To hold otherwise would give the government *carte blanche* freedom to censor visual depictions contained in new and emerging media. As such, the position that appellees advance would severely jeopardize the constitutional freedoms of those, such as amicus' members, who utilize nontraditional media in order to communicate a range of protected expression, including visual depictions and representations. There is no authority or justification for such a departure from basic First Amendment principles.

CONCLUSION

This Court should reverse the district court's decision upholding the constitutionality of the Ordinance. In so doing, amicus urges the Court to acknowledge that the interactive video game medium is a highly expressive medium – at least as much as, if not more than, movies. It is thus entitled to full First Amendment protection.

Dated: November 8, 2000

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Paul M. Smith, hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that the foregoing Brief is in compliance with Fed. R. App. P. 29, 32(a)(7)(B), and 7th Cir. R. 32. The Brief uses proportionately spaced type of 12 points and contains 6,687 words, as measured by WordPerfect version 9 (including headings, footnotes and quotations, but excluding the cover page, corporate disclosure statement, table of contents, table of authorities, and counsel's certifications).

Paul M. Smith

Dated: November 8, 2000

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Fed. R. App. P. 31(b) and 7th Cir. R. 31(e), 2 true and accurate copies of the foregoing Brief, in addition to one computer disk containing the brief, were served this 8th day of November 2000 by First-Class Mail upon the following:

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Also by Federal Express, this same day, 15 copies of amicus' Brief and one computer disk containing the Brief, were filed with this Court pursuant to Fed. R. App. P. 25(a)(2)(B), and 7th Cir. Rules 31(b) and 31(e).

Paul M. Smith