IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00–3643

AMERICAN AMUSEMENT MACHINE ASSOCIATION, et. al,

Plaintiffs-Appellants,

v.

TERI KENDRICK, et. al,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Indiana, No. IP00-1321-C H/G
the Honorable David F. Hamilton, Judge

APPELLEES' PETITION FOR REHEARING AND FOR REHEARING EN BANC

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DISCLOSURE STATEMENT

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rules 26.1 and 35, Appellees disclose that, aside from the office of the Corporation Counsel for the City of Indianapolis, only one law firm has had partners or associates appear for Appellees in connection with this case:

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No other law firms are anticipated to appear on behalf of Appellees.

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I. Rehearing en banc is warranted because the proceeding involves a question of exceptional importance:

Whether the Ordinance, on its face, is constitutional given that (1) the Ordinance imposes a narrow parental consent requirement, but not a ban, on children's access in public places to the most hard-core violent video games; and (2) the Ordinance does not restrict adults' access to video games.

II. Panel rehearing is warranted because the Panel overlooks or misapprehends the following points of law and fact:

1. The Panel incorrectly holds that the Ordinance must satisfy strict scrutiny, contrary to Ginsberg v. New York, 390 U.S. 629 (1968).

2. The Panel overlooks the City's interests in enacting the Ordinance.

3. The Panel overlooks the narrow scope of the Ordinance.

4. The Panel misapprehends Supreme Court precedent that accords children significantly fewer First Amendment rights than adults.

5. The Panel misapprehends Seventh Circuit authority requiring that the Panel uphold the Ordinance against a facial challenge to allow a state court to provide a narrowing construction.

ARGUMENT

The issue raised by the Panel's decision is of exceptional importance because of the decision's context. Children in communities and schools across the country are being exposed to, and are committing, unprecedented acts of violence. At the same time, growing scientific evidence shows a link between children's anti-social behavior and their exposure to media violence, particularly violent video games. Rightfully,

governments at all levels –- federal, state and local –- are crafting responses to this pressing social problem.

Indianapolis crafted its response in a measured, carefully tailored manner. Indianapolis's Ordinance merely requires a parent's consent for a child to play the most offensively morbid and violent video games in public places -- the settings where parents have the least control over their children's actions. The Ordinance places no restrictions on adults' access to video games and is a minor regulation on children's access to a small fraction of video games.

But the Panel's decision abruptly halted Indianapolis's efforts. Regulations similar to the Indianapolis Ordinance also have been enacted or proposed in Chicago, St. Louis County, and Honolulu, and in Arkansas, Connecticut, Oregon, Pennsylvania, Indiana, New York, Florida, and Tennessee. This is the first appellate decision to address the legality of regulations restricting children's access to graphically violent video games. Unless reversed, the Panel's decision not only will condemn Indianapolis's Ordinance, but will be highly influential in discouraging other governmental efforts. The Panel acknowledges that regulation of minors' access to violent video games might survive constitutional scrutiny. American Amusement Mach. Ass'n v. Kendrick, No. 00-3643, slip op. at 14 (7th Cir. Mar. 23, 2001) ("Slip op."). Thus, it is of exceptional importance that the Court's analysis be correct and its reasoning be clear. The Panel's decision is neither.

Indeed, the Panel's decision is wrong on both the facts and the law. The Panel (i) misreads the Ordinance's limited scope, (ii) overlooks the Ordinance's purposes, (iii) misapprehends the most applicable Supreme Court authority –- Ginsberg v. New York, 390 U.S. 629 (1968), which allows the government to restrict children's access to non-obscene pornography -- and (iv) fails to acknowledge that children have fewer First Amendment rights than do adults. Moreover, the Panel accords not the slightest degree of deference to the City in evaluating the harm that the few regulated games pose to children. And notwithstanding that Appellants mounted a facial challenge to the Ordinance, the Panel declines to read the Ordinance narrowly, much less to give an Indiana court the chance to provide a narrowing construction.

Instead, the Panel erects an insurmountable barrier for any restriction on children's access to obscenely violent video games. The Panel does this by demanding that the Ordinance satisfy a version of strict scrutiny that is at odds with the Supreme Court's teachings. Where, as here, the government regulates speech that may be harmful to children and leaves adult access to the speech unaffected, the Supreme Court has never applied strict scrutiny. As the district court correctly explained in its thoughtful seventy-four page opinion, the Supreme Court has applied a deferential reasonableness standard to government restrictions of this sort. For the reasons the district court articulated, Indianapolis's Ordinance satisfies

that standard. "It would be an odd conception of the First Amendment and 'variable obscenity' that would allow a state to prevent a boy from purchasing a magazine containing pictures of topless women in provocative poses, as in Ginsberg, but give that same boy a constitutional right to train to become a sniper at the local arcade without his parent's permission." American Amusement Mach. Ass'n v. Kendrick, 115 F. Supp. 2d 943, 981 (S.D. Ind. 2000).

1. The Panel Misreads the Ordinance's Scope and Purpose.

The Panel begins and ends its flawed analysis by grossly misapprehending the Ordinance's scope and purpose. To read the Panel's decision, one would conclude, incorrectly, that the Ordinance regulates wholly innocuous, unrealistic and unoffensive video games that are equivalent to Grimm's fairy tales. See slip op. at 5, 9-10, 13. The Panel also suggests that the Ordinance's sweep is so great that for the City to deny children the opportunity to play the regulated games would be "deforming; it would leave [children] unequipped to cope with the world as we know it." Id. at 9. The Panel similarly ignores the Ordinance's expressed purposes; contrary to the Panel's statements, id. at 5, 6, the City enacted the Ordinance in part because it was concerned that the regulated games are patently offensive. City-County General Ordinance No. 72, 2000 ("Ordinance") (Preamble) (see Addendum).

The Ordinance bears no relation to the Panel's description of it. The undeniable fact is that the Ordinance

places an extremely narrow, reasonable limitation on children's access to a select few, morbidly violent and patently offensive video games that contain little or no expressive value. The Ordinance's most important limiting characteristic is that it does not ban anything, expressive or otherwise. It merely requires that minors receive parental consent in order to play a few games in public places, such as arcades, malls, and theaters. As the Ordinance's Preamble states, "parents are less able in public places than in the home to control the level of violence and sexual content to which their minor children are exposed." Ordinance (Preamble). By requiring parental consent in limited settings, the Ordinance furthers its purpose of "protecting parents' authority to shield their minor children from influences that the parents find inappropriate or offensive . . . ." Id.

Moreover, video games that contain a serious plot or political or literary ideas are not regulated; the Ordinance covers only those games that "lack[] serious literary, artistic, political or scientific value as a whole for persons under the age of eighteen (18) years." Id. at § 831-1. Games that contain unrealistic, cartoonish depictions of violence are not regulated; the Ordinance is limited to those games that depict "realistic serious injury to a human or human-like being." Id. And games that are neither morbid nor patently offensive are outside the Ordinance's scope; the Ordinance reaches only those games that appeal to "minors' morbid interest in violence" and are "patently offensive to prevailing standards in the adult community as a

whole with respect to what is suitable material for persons under the age of eighteen (18) years." Id.

In fact, every supposed defect that the Panel thinks it finds in the Ordinance's scope is actually cured by the Ordinance's language. By its terms, the Ordinance leaves untouched games that are as suitable for children as Grimm's fairy tales or that contain stories akin to The Odyssey, Frankenstein, or Dracula. Similarly, the Ordinance does not regulate any and all games that contain graphic violence, as the Panel implies. Rather, the Ordinance regulates games that contain nothing but graphic violence, and even then only the most morbid and patently offensive violence. By its plain terms, the Ordinance's scope is limited to video games that have little or no expressive value -- material far removed from the core of the First Amendment.

The Panel, therefore, sings painfully off key when it equates the City's purposes in enacting the Ordinance to the mentors of "the Hitler Jugend." Slip op. at 8. Nor can the Ordinance be reasonably construed as a "ban." Id. at 13. The Ordinance's scope is sufficiently narrow that its enforcement could not possibly result in Indianapolis's children being "raised in an intellectual bubble." Id. at 9. More to the point, under the Ordinance the City makes no decisions about which, if any, games children should play. Parents make those decisions, as they should. Nothing in the First Amendment prevents the City from aiding parents in their historic

responsibilities, as demonstrated by Ginsberg v. New York, 390 U.S. 629, 639 (1968). The Panel cites no authority for its opposite conclusion.

2. The Panel Creates an Unduly Strict Standard that Conflicts with Ginsberg v. New York.

The Panel misapprehends not only the facts, but also the law. The Panel's misreading of the Ordinance is bad for Indianapolis, but the Panel's misreading of existing law also affects communities across the country. The Panel creates a new standard so strict that, if taken seriously, it effectively ends other government's efforts to allow parents to decide whether their children should be exposed to obscenely violent media.

Admittedly, neither the Supreme Court nor any other court has ever squarely addressed the government's authority to regulate children's access to hard-core graphically violent video games. The most relevant authority, however, is Ginsberg v. New York, 390 U.S. 629 (1968). Ginsberg is the only Supreme Court case involving a governmental restriction on children's access to material that the government found to be harmful in which the restriction did not affect adult access to the material.

Ginsberg established that the government may restrict children's access to non-obscene "girlie" magazines because "[m]aterial which is protected for distribution to adults is not necessarily protected from restriction upon its dissemination to children." Id. at 636 (quotation omitted). The Supreme Court explained that "[b]ecause of the State's exigent interest in

preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution of books recognized to be suitable for adults." Id. (quotation omitted). Of particular importance, the Court stressed that the government's restriction on minors' access to the non-obscene material need not satisfy strict scrutiny. It was sufficient that the government's judgment that the material was harmful to children was "not irrational." Id. at 641.

As the district court found, Ginsberg's teachings neatly apply to the Ordinance here. As in Ginsberg, the City concluded that video games that display hard-core graphic violence and sexually explicit material are harmful to minors, that parents should decide whether their children should be exposed to these harmful games in public arcades, and that the government has an independent interest in "protecting the well-being of minors." Ordinance (Preamble). To achieve these interests, the City placed reasonable limits on children's access to harmful games by requiring a parent's consent to view these games. As in Ginsberg, the Ordinance is not a ban on children's access to the games; parents are free to allow their children to play regulated games. Further, the Ordinance does not restrict adult access to any video games. Lastly, as in Ginsberg, the City was not unreasonable in concluding that the regulated games are, in fact, harmful to minors. The City considered evidence from (i) scientists and academics, (ii) Indianapolis community

leaders, such as educators, parents, and elected officials, (iii) Congressional testimony directly addressing this subject, and (iv) those who opposed the Ordinance, including several of the Appellants here. The City fairly concluded that there are profoundly sound reasons to be concerned about children's unlimited access to graphically violent and sexually explicit video games. And as in Ginsberg, this well-supported conclusion need not rest on scientific certainty. Id. at 641-43; see also City of Erie v. Pap's A.M., 529 U.S. 277, 300 (2000) ("The invocation of academic studies said to indicate that the threatened harms are not real is insufficient to cast doubt on the experience of local government.") (quotation omitted). The Panel's decision, however, wholly ignores Ginsberg's teachings. Compare slip op. at 6-8, 13-14.

Indeed, the Panel slides over Ginsberg's reasonableness standard. In its place, the Panel holds that the City's grounds for concluding that the regulated games are harmful to minors "must be compelling." Slip op. at 8. The Panel imposes this requirement, notwithstanding that every Supreme Court decision to apply strict scrutiny to a governmental restriction of minors' access to speech also involved a material restriction on adult access to speech –- a restriction not present here. See, e.g., United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 812-17 (2000) (regulation of "signal bleed" of indecent speech invalid because the regulation prohibited adult access to protected speech); Reno v. ACLU, 521 U.S. 844, 874 (1997)

(restriction on minors' access to indecent speech on the Internet invalid because the regulation suppressed a "large amount" of adult access to protected speech); Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 127 (1989) (ban on "dial-a-porn" invalid because the ban prohibited adult-to-adult protected speech).

Moreover, the Panel's version of a compelling interest is inordinately strict. According to the Panel, the City must support its judgment that the regulated games are harmful to children with studies demonstrating that those games "caused [someone] to commit a violent act." Slip op. at 12. That standard is unobtainable for several reasons. First, the City surely does not need scientific proof of causation. Scientific proof does not exist that cigarette smoke causes cancer. Consistent with the limits of the scientific method, scientific evidence has established a strong correlation between cigarette smoke and cancer. Likewise, considerable scientific evidence has established a high correlation between children's exposure to violent video games and children's increased aggressive behavior. That evidence is in the record and is catalogued in the City's merits brief.

Nor does the City have to prove that game-playing children will commit "violent acts." Id. at 12. As in Ginsberg, it is enough that the City have a reasonable ground to conclude that children's exposure to the games is "objectionable" such that the restriction will "protect the health, safety, welfare

and morals of its community." Ginsberg, 390 U.S. at 636 (quotation omitted). As stated in the Ordinance's Preamble, the City has "compelling interests in protecting the well-being of minors [and] in protecting parent's authority to shield the minor children from influences that parents find inappropriate or offensive . . . ." Under Ginsberg, those interests are plainly sufficient. The Ordinance regulates only those games that are patently offensive, and the City can regulate them on those grounds. Nothing in Ginsberg supports the Panel's requirement that the City prove the regulated games will cause its children to become violent felons. As the district court correctly found, there is a "lack of any persuasive, principled basis for distinguishing between graphic violence and explicit sexual content in terms of potential harm to children." 115 F. Supp. 2d at 971.

3. The Panel Misapprehends the Limited Scope of Children's First Amendment Rights.

The Panel draws its flawed "compelling interest" standard from its half-correct, and unhelpful, statement that "Children have First Amendment rights." Slip op. at 8. Children do have First Amendment rights. But as Ginsberg and other Supreme Court decisions prove, children's rights are by no means equal to those of adults. Under the Panel's view, a seven-year-old child has a constitutional right to play graphically violent video games in public arcades without his parent's consent. That view is insupportable.

The Panel ignores that "the constitutional rights of children cannot be equated with those of adults." Bellotti v. Baird, 443 U.S. 622, 634 (1979); see also, e.g., New York v. Ferber, 458 U.S. 747, 757 (1982); Ginsberg, 390 U.S. at 639; Prince v. Massachusetts, 321 U.S. 158, 170 (1944). This is so for three sensible reasons: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." Bellotti, 443 U.S. at 634.

In a range of settings, the Supreme Court has authorized restrictions on expression by children that would be protected for adults. For example, children's rights of expression have been limited in children's homes, Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 744-45 (1996) (plurality) (upholding restrictions on indecent cable television programming); FCC v. Pacifica Found., 438 U.S. 726, 750-51 (1978) (upholding ban during certain hours of indecent speech broadcast over radio); in schools, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686-87 (1986) (upholding restriction on children's lewd speech at school); on public streets, Prince, 321 U.S. at 170 (upholding ban on children's ability to sell religious literature on public streets); and in commercial settings, Ginsberg, 390 U.S. at 639. Indeed, as Ginsberg teaches, the government's authority to restrict children's access to material is particularly strong where, as here, the material

is harmful to children, is unrestricted for adults, and is of little or no expressive value. Ginsberg, 390 U.S. at 634-39.

Nor can a child's supposed right to play violent video games in arcades without his parent's consent be found in the two cases the Panel cites -- Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969), and Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975). Slip op. at 8. Tinker recognized that high school students have the right to engage in pure political speech in school -- speech at the First Amendment's core -- and even then only to the extent the speech does not materially disrupt the classroom. Tinker, 393 U.S. at 513. Erznoznik found at most that children may have access to nudity that is neither indecent nor obscene as to minors. Erznoznik, 422 U.S. at 213. The First Amendment rights of children recognized by the Court in Tinker and Erznoznik are far more limited than the right created by the Panel -- a right to play graphically violent and patently offensive video games that are harmful to minors without a parent's consent.

4. The Panel Misapprehends Seventh Circuit Authority Requiring that the Panel Uphold the Ordinance Against a Facial Challenge to Allow a State Court to Provide a Narrowing Construction.

Finally, the Panel misapprehends the law by ordering that the Ordinance be preliminarily enjoined without giving an Indiana court the opportunity to provide a narrowing construction. Appellants brought a facial attack on the Ordinance. “It has long been a tenet of First Amendment law that

in determining a facial challenge to a statute, if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld." Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383, 397 (1988); see also, e.g., Gresham v. Peterson, 225 F.3d 899, 908 (7th Cir. 2000) (refusing to enjoin Indianapolis ordinance on First Amendment grounds because "the rule that federal courts should defer to state court interpretations of state laws . . . also discourages federal courts from enjoining statutes that could be easily narrowed by a state court to avoid constitutional problems"). This principle applies where, as here, the party challenging a regulation seeks a preliminary injunction. See Brownsburg Area Patrons Affecting Change v. Baldwin, 137 F.3d 503, 509 (7th Cir. 1998). "While it is not a certainty that the state courts would adopt constitutional interpretations of the statute, they are entitled to the opportunity to do so, and [a federal court] will not interfere with that right." Gresham, 225 F.3d at 909.

Even with its erroneously oversized view of the Ordinance's scope, the Panel expressly acknowledges that the City may be able to establish the constitutionality of the Ordinance. Slip op. at 14. That observation should have led the Panel to uphold the Ordinance while giving a state court the opportunity to offer a narrowing construction. Instead, the Panel reaches out to reverse the district court and enjoin the Ordinance. The Panel's holding is wrong.

CONCLUSION

The Panel should grant rehearing or the Court should grant rehearing en banc and affirm the trial court's denial of a preliminary injunction.

Respectfully submitted,

By_____

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of April, 2001, I caused two copies of the foregoing Appellees' Petition for Rehearing and for Rehearing En Banc and one copy of the enclosed 3.5" diskette bearing the electronic version of Appellees' Petition in PDF format to be served upon the following by Federal Express:

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In addition, a copy of the Appellees' Petition was served upon Appellants' counsel, Mr. Kelleher, by facsimile.

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