IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-3643

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

Appeal from the United States District Court
for the Southern District of Indianapolis,
The Honorable David F. Hamilton, Judge

BRIEF OF APPELLANTS

Timothy F. Brown
David L. Kelleher
Evan S. Stolove
Arent Fox Kintner Plotkin & Kahn PLLC
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5339
(202) 857-6000, (202) 857-6395 (FAX)

and

Wayne C. Turner
Jackie M. Bennett, Jr.
John F. McCauley
McTurnan & Turner
2400 Market Tower
10 West Market Street
Indianapolis, IN 46204

Of Counsel:

Elliott I. Portnoy
Arent Fox Kintner Plotkin & Kahn PLLC
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5339
(202) 857-6000, (202) 857-6395 (FAX)

(317) 464-8181, (317) 464-8131 (FAX)

DISCLOSURE STATEMENT

In accordance with Rules 26.1 and 28(a) of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Appellants disclose the following information:

(1) Only two law firms have had either their partners or associates appear for the Appellants before this Court or before the United States District Court for the Southern District of Indiana in connection with this case:

Arent Fox Kintner Plotkin & Kahn PLLC
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5339

McTurnan & Turner
2400 Market Tower
10 West Market Street
Indianapolis, IN 46204

No other law firm is anticipated to appear on behalf of Appellants.

(2) Appellant American Amusement Machine Association has no parent company and does not issue stock.

(3) Appellant Amusement and Music Operators Association has no parent company and does not issue stock.

(4) Appellant Indiana Amusement and Music Operators Association has no parent company and does not issue stock.

(5) Appellant Shaffer Distributing Company, Inc. has no parent company and no publicly traded company owns ten percent or more of its stock.

(6) Appellant Cleveland Coin Exchange, Inc. has no parent company and no publicly traded company owns ten percent or more of its stock.

(7) Appellant Namco Cybertainment, Inc., is a wholly-owned subsidiary of Namco Holding Corporation, which is itself a wholly-owned subsidiary of Namco Ltd. Namco Ltd. is a publicly traded company on the Japanese stock market and no other publicly traded company owns ten percent or more of its stock.

(8) Appellant B.J. Novelty, Inc. has no parent company and no publicly traded company owns ten percent or more of its stock.

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BRIEF OF APPELLANTS

JURISDICTIONAL STATEMENT

1. **Statement Concerning The District Court's Jurisdiction.**

(a) The jurisdiction of the District Court was based on federal question jurisdiction under 28 U.S.C. § 1331, pursuant to the First and Fourteenth Amendments to the Constitution of the United States, and the laws of the United States, namely, 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. §§ 2201 and 2202. Additionally, the District Court had supplemental jurisdiction over the claims arising

under the Constitution of the State of Indiana (Art. 1, §§ 9, 12 and 23, and Art. 4, § 30) pursuant to 28 U.S.C. § 1343(a)(3). The state law claims are so related to the federal question claims that they form part of the same case or controversy.

(b) Identification of each Appellants' state of incorporation and the state in which each has its principal place of business:

(i) American Amusement Machine Association is a non-profit trade organization organized under the laws of the State of Illinois with its principal place of business in the State of Illinois.

(ii) Amusement & Music Operators Association is a non-profit trade organization organized under the laws of the State of Illinois with its principal place of business in the State of Illinois.

(iii) Indiana Amusement & Music Operators Association is a non-profit trade organization organized under the laws of the State of Indiana with its principal place of business in the State of Indiana.

(iv) Shaffer Distributing Company is incorporated under the laws of the State of Ohio, and it maintains its principal place of business in the State of Ohio.

(v) Cleveland Coin Machine Exchange is incorporated under the laws of the State of Ohio, and it maintains its principal place of business in the State of Ohio.

(vi) Namco Cybertainment Inc. is incorporated under the laws of the State of Delaware, and it maintains its principal place of business in the State of Illinois.

(v) B.J. Novelty Inc. is incorporated under the laws of the State of Kentucky, and it maintains its principal place of business in the State of Kentucky.

2. **Statement Concerning Appellate Jurisdiction.** This Court has jurisdiction of this appeal under 28 U.S.C. § 1292(a)(1), because the District Court refused to grant an injunction. Appellants also provide the following information:

(i) Date of entry of judgment or order of the District Court denying preliminary injunctive relief, which is to be reviewed: October 11, 2000.

(ii) No motion for a new trial, or for alteration of the District Court's order, was filed.

(iii) The filing date of the Notice of Appeal: October 12, 2000.

3. **Jurisdictional Factors.** On August 21, 2000, Appellants' filed their Complaint with the District Court seeking: (1) a preliminary and permanent injunction prohibiting the enforcement of certain provisions of City-County General Ordinance No. 72, 2000, amending Sections 831-1, 831-5, 831-6 and 831-8, and adding new Section 831-7 to Chapter 831 of the Revised Code Of The Consolidated City And County for the City of Indianapolis and Marion County, Indiana, which was to take effect September 1, 2000 (the "Ordinance"), and (2) a judgment declaring these provisions void and of no force and effect. Appellants also filed and served on August 21, 2000 their Verified Application For Temporary Restraining Order, Verified Motion For Preliminary Injunction, and Memorandum In Support Of Plaintiffs' Application For Temporary Restraining Order And Preliminary Injunction. Appellants' application for a temporary restraining order and their motion for a preliminary injunction were based solely on their claims under the First and Fourteenth Amendments to the U.S. Constitution.

In lieu of a hearing on Appellants' application for a temporary restraining order, and to promote the prompt resolution of Appellants' motion for preliminary injunction, the parties on August 24, 2000,

filed a Joint Stipulation confirming Appellees' agreement not to enforce the Ordinance any earlier than 24 hours after the District Court entered an order granting or denying Appellants' motion for preliminary injunction.

On September 15, 2000, the District Court held a hearing on Appellants' motion for preliminary injunction, at which it received evidence and heard argument by counsel. The District Court on October 11, 2000, issued its 74-page Entry On Motion For Preliminary Injunction, including an extensive discussion of the District Court's evaluation of the likelihood of success of Appellants' claims under the First and Fourteenth Amendments to the U.S. Constitution, and denying Appellants' request for preliminary injunction. Appellants filed their Notice Of Appeal on October 12, 2000, to initiate this appeal. With its October 11, 2000 Entry, the District Court resolved in its entirety Appellants' motion for preliminary injunction, as to all issues and parties, and provided a basis for this appeal pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

In July 2000, the City of Indianapolis and Marion County, Indiana enacted City-County General Ordinance No. 72,2000 (the "Ordinance"), amending and adding certain Sections to the Revised Code for Indianapolis-Marion County (the "Challenged Provisions"). Appellants brought an action before the United Sates District Court or the Southern District of Indiana challenging the constitutionality of those provisions, because they regulate expression under the First Amendment. The District Court denied Appellants request for preliminary injunctive relief. Thus, Appellants submit that the issues presented on this appeal are as follows:

(1) Whether the District Court erred in concluding that depictions of violent expression that are neither erotic nor sexual, and which are protected by the First Amendment as to adults, may be deemed obscene as to minors under the age of eighteen years.

(2) Whether the District Court erred in refusing to apply the First Amendment's presumption of unconstitutionality to the Challenged Provisions of the Ordinance, which are content-based regulations of protected expressions.

(3) Whether the District Court erred in refusing to apply the First Amendment's strict judicial scrutiny to the Challenged Provisions of the Ordinance because their purported purpose is to protect minors.

(4) Whether the District Court erred in creating and applying a new standard of review of First Amendment restrictions, a standard requiring only that there be a reasonable basis for believing that restrictions on expressions would protect minors from unspecified and unproven harms.

(5) Whether the District Court erred in approving the Challenged Provisions, which restrict expression protected by the First Amendment, when the key terms of those provisions are undefined, the legislative history provides no guidance for a narrowing interpretation, and the standards for enforcement and voluntary compliance can only be defined by state court prosecutions of operators and distributors of the protected expression.

(6) Whether the District Court erred in concluding that the Ordinance, including the phrase "morbid interest in violence," provides constitutionally sufficient notice to the ordinary person to permit compliance and constitutionally sufficient criteria to limit subjective and arbitrary enforcement.

(7) Whether the District Court erred in refusing to grant Appellants preliminary injunctive relief because it held that Appellants had not shown that they were reasonably likely to succeed on the claims that the Challenged Provisions are unconstitutional.

STATEMENT OF THE CASE

This action was commenced against the City of Indianapolis and Marion County, Indiana, through their designated officials, in the United States District Court for the Southern District of Indiana, on August 21, 2000. R-88. Subject matter jurisdiction was predicated upon the presence of questions arising under the Constitution of the United States, the First and Fourteenth Amendments thereto, and the laws of the United States, 28 U.S.C. § 1331. The action challenged the constitutionality of provisions of City-County General Ordinance No. 72, 2000 (hereinafter the "Ordinance"), amending Sections 831-1, 831-5, 831-6 and 831-8, and adding Section 831-7 to Chapter 831 of the Revised Code for Indianapolis-Marion County, as those provisions relate to video games depicting violence (the "Challenged Provisions"), and sought declaratory and injunctive relief. Appellants contended there, as they do here, that the Challenged Provisions are an unconstitutional intrusion into protected speech, because they cannot survive strict scrutiny and are void for vagueness.

The action was commenced by the seven Appellants to protect their own interests as well as the interests of businesses affected by enforcement of the Challenged Provisions. Appellants Namco Cybertainment, Inc. and B. J. Novelty, Inc. own and operate currency-operated amusement machines ("video games") in Indianapolis. Appellants Shaffer Distributing Company and Cleveland Coin Machine Exchange, Inc. distribute video game machines in Indianapolis. Appellants American Amusement Machine Association, Amusement & Music Operators Association, and the Indiana

Amusement & Music Operators Associations are trade associations seeking to protect the interests of their members in Indianapolis. R-9. Named as defendants were Scott Newman, Marion County Prosecutor; Jack Cottey, Sheriff for Marion County; Bart Peterson, Mayor of Indianapolis; and, Jerry Barker, Chief of Police of Indianapolis (collectively referred to as "the City").[1] R-9.

At the time this action was commenced, Appellants sought a Temporary Restraining Order as well as a Preliminary Injunction. In lieu of a Temporary Restraining Order, the City stipulated that it would not enforce the Challenged Provisions for at least twenty-four hours following a ruling on the motion for preliminary injunction. R-6.

A Preliminary Injunction Hearing was conducted on September 15, 2000. R-89. Evidence was presented through one witness, a video game art director, and by submission. R-3-5, 7. The submissions were identified as Exhibits P1-22 and Exhibits P50-82. In addition, Exhibits 1-18, without letter designations, were admitted. All exhibits were admitted without objection except for Exhibits 17 and 18, which were admitted over the objections of Appellants. *See* September 15, 2000 Hearing Transcript ("Hearing Tr.") at 3-4, 39, 46, 99.

On October 11, 2000, the District Court filed a memorandum opinion entitled an Entry on Motion for Preliminary Injunction ("Entry") denying preliminary injunctive relief. R-1. The District Court found as follows:

Video games are a form of interactive entertainment. R-7. They may contain visual art, plot and character development, and as such are protected expression under the First Amendment. R-16-

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[1]Subsequently, by stipulation of all parties, Teri Kendrick (as the designated prosecutor) was substituted for Mr. Newman. R-88.

17. For First Amendment purposes, there is little or no distinction between the ability of some video games to communicate a storyline and that of a movie, television show or book. R-16. And, the fact that the video game medium is interactive does not deprive it of First Amendment protection. R-16.

The District Court further found that the Challenged Provisions single out for regulation certain video games based on their content and ideas, *i.e.*, violent content. R-19. In addition, the Court found that the Challenged Provisions neither regulate constitutionally recognized categories of "unprotected" expression as to adults, nor any "secondary effects" of the regulated speech. R-20. And, the Challenged Provisions are not content-neutral time, place or manner regulations. R-21.

Nonetheless, contrary to all precedent, the District Court concluded that the concept of "variable" obscenity announced in *Ginsberg v. New York*, 390 U.S. 629 (1968), which was limited to expression of a sexual nature, could be expanded by the City to regulate otherwise fully protected expression based on "a reasonable belief" of harmful effects by such speech to minors. R-21-22. As a result, the District Court concluded that while a violation of free speech rights ordinarily satisfies the requirements for irreparable harm and inadequacy of legal remedies sufficient to obtain a preliminary injunction, in light of the District Court's new definition of obscenity as to minors, Appellants were unlikely to succeed on their constitutional challenge; therefore, the District Court denied Appellants' request for preliminary injunctive relief. R-11, 73-74. It is this Entry that Appellants appeal here.

On October 12, 2000, on Appellants' motion, the District Court temporarily enjoined certain of the Challenged Provisions to allow this Court to consider a motion for injunctive relief during the pendency of this appeal. On October 16, 2000, this Court issued an Order staying enforcement of the Challenged Provisions until 5:00 p.m. on October 18, 2000. On October 18, 2000, this Court granted

a temporary injunction enjoining enforcement of the Challenged Provisions pending disposition of this appeal. At the same time, this Court issued an expedited schedule for this appeal.

STATEMENT OF FACTS

The currency-operated video games at issue here are an interactive form of entertainment. R-7. Each video game is usually a stand-alone, self-contained machine consisting of both hardware and software. R-7. They "are typically large machines, and are easily identifiable from their shape and design." R-97. To gain access to the video games content, a patron to an establishment housing such machines must pay a fee. R-97. The principal industry trade associations,[2] have developed a color-coded voluntary advisory system, which allows a video game manufacturer or operator to inform potential users of the general nature of the game's content by placement of a warning sticker or sign on the game's cabinet. R-97. This system is designed so that individuals can determine for themselves, in advance of coming into contact with a video game's content, whether to view the game. R-97.

As for the games' content, the typical video game reflects the creative concepts and artwork of its developers. R-7. In particular, a video game begins as a creative concept in the minds of the game developers and is brought to life by teams of artists. R-7. The artists draw sketches of characters and create storyboards. R-7. Storyboards are visual presentations of the action sequences and are used to form the movie presented through the video game. R-7-8. Storylines and themes guide the development of concept art, which is then transformed into digital art presenting the characters and backgrounds. R-8. The characters and scenes are then fully animated. R-8, R-149-50. Sound and

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[2]Appellants American Amusement Machine Association and Amusement & Music Operators Association. R-9.

music is added. R-8. The final product is fully three dimensional R-8, uses cameras to capture the sequences, R-8, contains extensive storylines and character development R-143-48, R-152; R-15, and can range in length from approximately five to thirteen hours, and can take years of man-hours to produce. R-8; *see also* Hearing Tr. at 25-26.

The Challenged Provisions of the Ordinance restrict access to and control the display of video games based solely on the visual expression that the artists choose to depict the storyline and theme.[3] The restrictions are based on a vague multi-prong test, which regulates games that are "harmful to minors." R-75. Video games are deemed "harmful to minors" and, therefore, subject to restriction, if the following definition is met:

1) the machine "predominantly appeals to minors' morbid interest in violence";

2) "is 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";

3) "lacks serious literary, artistic, political or scientific value as a whole for persons under the age of eighteen (18) years"; and

4) contains "graphic violence."

R-77; The full text of the Ordinance is set forth at R-75-83. The phrase "graphic violence" is further defined as follows:

> an amusement machine's visual depiction or representation of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfiguration. R-77.

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[3]The Challenged Provisions impose restrictions based on both sexual content and violent content. Appellants challenged the violent content restrictions only.

If a video game comes within the "harmful to minors" definition, then access to and display of the video game is restricted as to "minors." R-4, 81. For purposes of the Ordinance, a minor is any unemancipated person under the age of eighteen years. R-4. Violations of the Ordinance are punishable by a minimum fine of $200, and a video game operator may lose the right to make available to the public machines deemed "harmful to minors" by the Challenged Provisions upon even one violation. R-5, 82.

As of September 14, 2000, fourteen days after the scheduled effective date of the Ordinance, the City could not explain the operative portions of the Challenged Provisions, including the multiple prongs of the "harmful to minors" standard. The City's Assistant Deputy Mayor David Harris, a lawyer by training and public official who oversaw development of the Ordinance, was designated by the City to testify concerning the meaning and effect of the Ordinance. R-104. A key provision of the "harmful to minors" standard is the phrase "morbid interest in violence." R-77. As confirmed by Harris, the City, even after enactment of the Ordinance, could not "provide ... an articulable definition of morbid interest in violence ...." R- 118. Nor could the City provide the criteria by which law enforcement would enforce the Challenged Provisions. R-120-27. The City conceded that the Ordinance's meaning, enforcement criteria and application could only be ascertained through consultation with lawyers. *Id.*; *see also*, R-113-14, 116-18.

STANDARD OF REVIEW

In reviewing an order denying a request for preliminary injunctive relief, appellate review will generally depend on the nature of the District Court's determination. *In re L&S Indus. Inc.*, 989 F.2d

929, 932 (7th Cir. 1993). The decision as to whether to grant or deny a preliminary injunction is typically governed by an equitable weighing of several factors:

(1) whether the movant has some likelihood of success on the merits;

(2) whether the movant will suffer irreparable injury if immediate injunctive relief does not issue; and

(3) whether there is an adequate remedy available at law.

See id.; *see also Gateway E. Ry. Co. v. Terminal R.R. Ass'n*, 35 F.3d 1134, 1137-40 (7th Cir. 1994) (adding consideration of the public interest into the court's calculus).

The standards guiding a reviewing court's determination are, therefore, whether the District Court either abused its discretion in weighing those factors, made a clearly erroneous mistake of fact, or made a mistake as to the law. All legal conclusions, moreover, are reviewed *de novo*. *See In re L&S Indus.*, 989 F.2d at 932; *Atari, Inc. v. North Am. Philips Consumer Electronics Corp.*, 672 F.2d 607, 613, (7th Cir.), *cert denied*, 459 U.S. 880 (1982).

In the present appeal, the questions presented for review are all ones of law. Accordingly, this Court must review the applicable conclusions of the District Court *de novo*.

SUMMARY OF ARGUMENT

I. First Amendment jurisprudence has consistently held that depictions of violence are constitutionally protected expression. This principle was made clear more than fifty years ago in *Winters v. New York*, 333 U.S. 507 (1948), and was reaffirmed as recently as three years ago in *Eclipse Enters. Inc. v. Gulotta*, 134 F.3d 63 (2d Cir. 1997). During this time no court has held to the contrary.

First Amendment jurisprudence similarly has held that obscenity is not constitutionally protected expression. This principle was made clear nearly fifty years ago in *Roth v. United States*, 354 U.S. 476 (1957), and has been reaffirmed repeatedly. Throughout this period, the Supreme Court and this Court have made equally clear that expression may be deemed obscene only if the expression appeals in some significant way to erotic or sexual conduct.

In this case, contrary to all precedent, the District Court held depictions of violence were not protected expression at least as to persons under the age of eighteen years. To do so, the District Court held, also contrary to all precedent, that depictions of violence may be deemed obscene as to minors. In both of these conclusions the District Court erred. Obscenity, as to adults or minors, must in some significant way relate to erotic or sexual conduct. Moreover, it must appeal to a prurient interest. Depictions of violence which involve neither erotic material nor appeal to prurient interests, are protected expression under the First Amendment, for adults and non-adults alike.

Content-based regulations of protected expression are presumptively unconstitutional and are subject to strict judicial scrutiny, not the "reasonable basis" review applied by the District Court. *United States v. Playboy Enterprises Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878 (2000). Deference in the area of First Amendment restrictions is error. *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 129 (1989). Here, there is no evidence demonstrating that the Challenged Provisions are necessary, no evidence that the Challenged Provisions are the least restrictive means, no evidence that the Challenged Provisions will in fact alleviate the asserted harm, and no evidence that alternatives – including the alternatives of more speech and couterspeech – would not be effective. Therefore, the

Challenged Provisions cannot stand the constitutional scrutiny demanded of content-based restrictions and must be declared invalid.

II. The Constitution demands that laws regulating conduct be sufficiently definite in their terms so that ordinary people of ordinary intelligence can understand what is prohibited. The First Amendment demands that regulations on protected expression be precisely drawn to avoid the chilling effect caused by the uncertainties of vague laws. This mandate is necessary to avoid the twin dangers of self-censorship and arbitrary enforcement. The Challenged Provisions satisfy none of these concerns.

The Challenged Provisions employ phraseology such as "predominantly appeals to minors' morbid interest in violence," without any further definition and without any criteria by which the governed or the government can make a reasonable determination of the expression prohibited. This phrase has no generally accepted meaning to operators of video games or the City. Nor can the phrase be applied by operators or law enforcement officials to video games because it references some unknown and unknowable minor. Presumably, if the phrase has any meaning at all, it is only to future "expert" witnesses who will be asked to opine on a case-by-case basis whether a particular video game appeals to a morbid interest in violence, and even then "experts" are likely to differ. The First Amendment does not permit this type of trap for the authors and distributors of protected expression.

Video game manufacturers, distributors and operators are entitled to precision of regulation. First Amendment freedoms are delicate and vulnerable, and therefore need "breathing space to survive." *NAACP v. Button*, 371 U.S. 415 (1963). Absent meaningful definitions of terms like "morbid" and "suitable" and absent criteria for enforcement of these terms, the Challenged Provisions are a trap waiting to be sprung on any business involved with this protected expression that does not

steer a wide course through self censorship. The Challenged Provisions, therefore, violate the core principles of the First Amendment and cannot survive judicial scrutiny.

ARGUMENT

I. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT DEPICTIONS OF VIOLENCE MAY BE OBSCENE AS TO MINORS AND THAT LEGISLATION PURPORTING TO PROTECT MINORS FROM THE EFFECTS OF SPEECH PROTECTED BY THE FIRST AMENDMENT IS GIVEN THE LOWEST FORM OF JUDICIAL SCRUTINY.

At their core, the Challenged Provisions censor constitutionally protected expression because the City finds the ideas expressed therein offensive. Video games that present visual depictions of joy and happiness are protected, but video games that present visual depictions of violence are not. Indeed, two video games identical in all respects, except that one includes depictions of violence deemed "harmful to minors" by the Challenged Provisions, will be treated differently by this government regulation. This is precisely the type of censorship of ideas the Constitution prohibits.

The cornerstone of First Amendment jurisprudence is the principle that government may not proscribe speech because of disapproval of the ideas expressed. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). "Under the First Amendment the government must leave to the people the evaluation of ideas. Bold or subtle, an idea is as powerful as the audience allows it to be .... One of the things that separates our society from [totalitarian societies] is our absolute right to propagate opinions that the government finds wrong or even hateful." *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 327-28 (7th Cir.

1985), *aff'd*, 475 U.S. 1001 (1986). As most recently announced in *United States v. Playboy Enterprises*:

> When the purpose and design of a statute is to regulate speech by reason of its content, special consideration or latitude is not accorded to the Government .... We cannot be influenced, moreover, by the perception that the regulation in question is not a major one because the speech is not very important. The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly.

120 S. Ct. at 1893. These fundamental principles make clear that in the instant case the District Court erred and the Challenged Provisions cannot withstand scrutiny.

A. The Doctrine Of Variable Obscenity May Not Be Extended To Include Depictions Of Violence.

The District Court erred in its conclusion that the City may restrict access to video games containing depictions of violence under the doctrine of "variable" obscenity as set forth in *Ginsberg v. New York*, 390 U.S. at 641. Its conclusion is not only unprecedented, as the District Court concedes, but is contrary to the express limitation imposed on the doctrine by the Supreme Court and contrary to the teachings of this and every other circuit to address the issue. The concept of obscenity, including variable obscenity as to minors, has been strictly limited to matters of a sexual nature. Moreover, prior efforts to restrict access to depictions of violence have been repeatedly rejected, including as long ago as 1948 when the Supreme Court opined that depictions of violence, which have no independent value to society, are constitutionally on par with "the best of literature." *Winters v. New York*, 333 U.S. at 510.

Nearly 50 years ago in *Roth v. United States*, 354 U.S. 476, the Supreme Court directly addressed the constitutional question of the States' ability to restrict access to material deemed

“obscene.” In holding that obscenity is not protected speech, the Court specifically held that, “[o]bscene material is material which **deals with sex in a manner appealing to prurient interest**.” *Id.* at 487 (emphasis added). Even while creating this exception to First Amendment freedoms, the Court warned that this exception must be narrowly construed, declaring

> [t]he fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.

Id. at 488.

Following *Roth*, the Court has had ample occasion to address the question of obscenity and open the door to a broader scope of materials, but consistently has refused to do so. In *Memoirs v. Massachusetts*, the Supreme Court revisited the test for obscenity and again required that the material relate to sex, holding that "the dominant theme of the material .... [must] appeal to a **prurient interest in sex** ...." 383 U.S. 413, 418 (1966) (emphasis added). Several years later, in *Cohen v. California*, the Court declared that, “[w]hatever else may be necessary to give rise to the States’ broader power to prohibit obscene expression, such expression **must be, in some significant way, erotic**.” 403 U.S. 15, 20 (1971) (emphasis added). And then in *Miller v. California*, decided after the Court adopted the variable obscenity doctrine in *Ginsberg*, the Court again declared that "State statutes designed to regulate obscene materials must be carefully limited. As a result, **we now confine the permissible scope of such regulation to works which depict or describe sexual conduct**." 413 U.S. 15, 23-24 (1972) (emphasis added, citations omitted). Thus, nearly half a century of First Amendment

jurisprudence draws a bright line limiting obscenity to expressions of an erotic or sexual nature. Accordingly, depictions of violence that do not involve depictions of erotic or sexual conduct cannot be deemed obscene.

This Court, in *United States v. Thoma*, 726 F.2d 1191 (7th Cir.), *cert denied*, 467 U.S. 1228 (1984)), drew a similar bright-line separating obscenity, with its requisite prurient interest in sex, from depictions of violence. There, this Court explained: "Depictions of torture and deformation are not inherently sexual" and absent proof "how such violence appeals to the prurient interest ... there is no basis upon which ... [to] deem such material obscene." 726 F.2d at 1200; *see also Louisiana v. Johnson*, 343 So.2d 705, 710 (La. 1977) (Ordinance that "facially purports to proscribe patently offensive violent materials, exceeds the limits placed upon the regulation of obscene materials ...."). Thus, whatever else may be argued about obscenity, one fact is certain: the material must in some way relate to **a prurient interest in erotic or sexual conduct**.

The "variable" obscenity doctrine enunciated in *Ginsberg v. New York*, *supra*, does not deviate from this limitation. The magazines at issue in *Ginsberg* were "girlie" magazines. 390 U.S. at 631. The ordinance at issue banned the sale of "(a) any picture … which depicts **nudity** … and which is harmful to minors ...." *Id.* at 633 (quoting the New York Statute) (emphasis added). The "harmful to minors" standard was defined as: "that quality of any description or representation, in whatever form, of **nudity, sexual conduct, sexual excitement, or sado-masochistic abuse** ...." *Id.* at 646, (emphasis added). *Ginsberg* did not suggest in any way that non-sexual material could be restricted,

nor that the definition of obscenity could be expanded to subject matters beyond sex.[4] The *Ginsberg* analysis was specifically limited to the determination as to "whether it was constitutionally impermissible for New York ... to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what **sex material** they may read or see." *Id.* at 636-637. In upholding the New York statute, moreover, the Court observed that the statute "simply adjusts the definition of obscenity ... in terms of the **sexual interests**' ... of minors." *Id.* at 638 (quoting *Mishkin v. New York*, 383 U.S. 502, 509 (1966); emphasis added). In contrast to *Ginsberg*, the materials restricted by the Challenged Provisions need not contain depictions of erotic or sexual conduct, nor need they appeal to a sexual or prurient interest.

If after *Ginsberg* there was any doubt that the doctrine of variable obscenity was limited to matters relating to erotic or sexual conduct, these doubts were resolved unambiguously in *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). In *Erznoznik,* the Court reaffirmed minors' significant First Amendment rights, as declared in *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969), and in protecting those rights expressly closed the door on any expansion of the *Ginsberg* doctrine of variable obscenity.[5] *Erznoznik* specifically set forth the outer limitation of the

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[4]In fact, the Court in *Ginsberg* cited with approval a law review article that rejects the idea that violent material is "obscene." *See* 390 U.S. at 638-39 n.6 (citing with approval Comment, *Exclusion of Children From Violent Movies*, 67 Col. L. Rev. 1149 (1967)).

[5]*Tinker*, decided a mere ten months after *Ginsberg*, squarely addressed the issue of the rights of minors under the First Amendment, stating: "Studen
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Ginsberg doctrine, explaining:

> We have not had occasion to decide what effect *Miller* [*v. California*] will have on the *Ginsberg* formulation. It is clear, however, that under **any test of obscenity as to minors** not all nudity would be proscribed. Rather, **to be obscene "such expression must be, in some significant way, erotic**."

422 U.S. at 214 n.10 (citations omitted) (emphasis added). Plainly, if nudity absent eroticism is beyond the *Ginsberg* doctrine of obscenity as to minors, then depictions of violence, absent evidence of an erotic appeal, *see Thoma*, 726 F.2d at 1200, are beyond the outermost limits of the *Ginsberg* doctrine.

Indeed, the Circuit Courts agree that obscenity as to minors is (1) limited to material of a sexual nature, and (2) more specifically, that depictions of violence are not obscene and, thus, not proscribable. For example, in *Interstate Circuit, Inc. v. City of Dallas*, 366 F.2d 590 (5th Cir. 1966), *vacated on other grounds*, 391 U.S. 53 (1968), the Fifth Circuit demonstrated the bright line between impermissible restrictions on depictions of violence and permissible restrictions on depictions of sexual conduct. The City of Dallas had enacted an ordinance classifying motion pictures as "suitable" or "unsuitable" for minors based on sexual content as well as content "[d]escribing or portraying brutality, criminal violence or depravity ...." *Id.* at 592. The Fifth Circuit, emphasizing the distinction between obscenity and depictions of brutality and violence even when both were claimed "harmful to minors," held the ordinance unconstitutional in its reach beyond traditional obscenity to violence.

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nicate." 393 U.S. at 511.

Significantly, this Court in *Cinecom Theatres Midwest States, Inc. v. City of Fort Wayne*, 473 F.2d 1297 (7th Cir. 1973), decided after *Ginsberg* and before *Thoma*, expressly endorsed the analysis of the Fifth Circuit and the limitation on variable obscenity, explaining:

> Obscenity connotes some sort of **sexual or erotic presentation**.
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> * * *
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> We agree with the Fifth Circuit Court that a city may not, consonant with the First Amendment, go beyond the limitations inherent in the concept of variable obscenity in regulating the dissemination to juveniles of "objectionable" material. We observe first that children do not stand outside the protections of the *Constitution*. They are entitled, with some minimal limitations, to the guarantees which flow from our Constitution, including the freedoms of speech and expression .... **[W]e [agree] with the Court of Appeals for the Fifth Circuit that a child's freedom of speech is too important to be overridden by an ordinance expressing the community's view of what it considers as material harmful to its youth.**

Id. at 1301-02 (citations omitted) (emphasis added). The analyses of *Erznoznik*, *Cinecom* and *Thoma* are dispositive of this appeal, demonstrating beyond dispute that obscenity, including variable obscenity, is limited to **sexual or erotic presentations** and may not be extended to other subject matters that a community may view from time to time as harmful to its youth,[6] including depictions of violence. Any other result is not only contrary to these precedents but destroys the fundamental principles of First Amendment freedoms for minors described in *Tinker* and treats minors as the "closed circuit recipients of only that which the State chooses to communicate," which *Tinker* prohibits.

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[6]"Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said...." *Denver Area Educ. Telecom. Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J., concurring).

B. The District Court Ignores Established Precedent And Opens The Door To Unlimited Curtailment Of Minor's First Amendment Rights.

Contrary to all precedent, the District Court expands the *Ginsberg* variable obscenity doctrine to include depictions of violence as obscene to minors and opens the door to further expansion to any material or idea that the government has some basis to believe may harm minors in unspecified ways. To do so, the District Court goes to great length. The District Court acknowledges the limitation on obscenity and variable obscenity to matters involving the erotic as mandated by *Cohen* and *Erznoznik*, but then dismisses this limitation because the District Court is not "persuaded" that the Supreme Court meant what it said. R-46, 48. The District Court also acknowledges the Fifth Circuit's distinction between obscenity and violence in *Interstate Circuit*, and acknowledges this Court's approval of that analysis, but then dismisses both rulings arguing that the Dallas ordinance would be viewed invalid on other grounds in any event. R-48. Furthermore, the District Court dismisses this Court's express limitation on variable obscenity to the sexual or erotic as stated in *Cinecom* without explanation, except to state that this Court's pronouncement should not be viewed as a blanket rejection to a "better researched effort to protect children ...." *Id.* This justification for disregarding precedent is particularly curious in light of the District Court's subsequent refusal to apply any meaningful scrutiny to the City's true motivation and refusal to scrutinize the research offered in support of the Challenged Provisions. *See, infra* at p. 32-41.

Similarly, the District Court rejects the more recent views of this and other Circuits reaffirming the protection of expressions depicting violence. In 1992, the Eighth Circuit in *Video Software*

Dealers Ass'n v. Webster, 968 F.2d 684 (8th Cir. 1992), refused to expand the reach of obscenity, for adults or minors, beyond descriptions of sexual conduct, explaining:

> We agree with Missouri that the First Amendment does not protect obscenity. We also agree with Missouri that expression which is not obscene for adults may be obscene for children if the expression bears certain indicia of obscenity when examined from a minor's point of view. Obscenity, however, encompasses only expression that "depicts or describes sexual conduct." Material that contains violence, but not depictions or descriptions of sexual conduct cannot be obscene. Thus, videos depicting only violence do not fall within the legal definition of obscenity for either minors or adults.

968 F.2d at 688 (citations omitted).

In 1997, the Second Circuit added its voice to the, by then, unanimous view. In *Eclipse Enters., Inc. v. Gulotta*, 134 F.2d at 67, the court rejected a local ordinance seeking to restrict access by minors to trading cards containing depictions of violence, explaining:

> The Supreme Court historically has confined the categories of unprotected speech to defamation, fighting words, direct incitement of lawless action, and obscenity. We decline any invitation to expand these narrow categories of speech to include depictions of violence.
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> * * *
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> The Nassau County Board of Supervisors simply adapted the *Miller* standard to minors and to violence. However, this was not a sufficient measure to shield the Law from a successful constitutional challenge, because the standards that apply to obscenity are different from those that apply to violence.

This Circuit too has recognized depictions of violence are protected expression. In *American Booksellers Ass'n v. Hudnut*, this Court held "violence on television," a medium in which the Supreme

Court has historically permitted greater regulation,[7] is protected under the First Amendment no matter how "insidious." 771 F.2d at 330; *see also Thoma*, 726 F.2d at 1200.

Eclipse Enters., *Video Software Dealers Ass'n*, *Hudnut* and *Thoma* reaffirm the principle articulated by the Supreme Court more than fifty years ago in *Winters v. New York*, that: "[T]hough we can see nothing of any possible value to society in these magazines [containing depictions of bloodshed and violence], they are as much entitled to the protection of free speech as the best of literature." 333 U.S. at 510. Here, too, even if the City sees nothing of any possible value to society in these video games, they are as much entitled to the protection of free speech as the best of literature.

The District Court's refusal to recognize the limit on obscenity to matters that are "in some significant way, erotic," and the District Court's conclusion that *Ginsberg* establishes a "framework" for regulating speech that is labeled "harmful ... to minors," R-27, opens the door to a doctrine of variable obscenity without limit in scope or subject matter. This "framework," which the District Court concludes requires only that the legislature have "a reasonable basis for believing the Ordinance protects children from harm," subjects minors to the very type of unlimited censorship of ideas that the Constitution prohibits. This new doctrine, according to the District Court, requires no proof of harm and no proof of the absence of alternatives. Under this analysis, whenever government fears that new or old ideas may "harm" minors, government may act without further proof to censor those ideas and drive them from the marketplace. The ruling guts over forty years of well-established First Amendment

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[7] *Reno v. ACLU*, 521 U.S. 844, 868-69 (1997).

jurisprudence, which collectively guarantees minors First Amendment rights and limits proscription on those rights to matters dealing with sex.

As Judge Dalzell declared in *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997), the rationale of protecting children is

> as dangerous as it is compelling. Laws regulating speech for the protection of children have no limiting principle, and a well intentioned law restricting protected speech on the basis of its content is, nevertheless, state-sponsored censorship. Regulations that "drive certain ideas or viewpoints from the marketplace" for children's benefit risk destroying the very "political system and culture life" that they will inherit when they come of age.

929 F. Supp. at 882 (citations omitted).

Judge Dalzell's concern is reflected in the limitless application of the doctrine created by the District Court. Its ruling opens the door to restrictions on minors' ability to read, view or hear protected expression in any way offensive or unsuitable as to minors in the eyes of adults on a mere "reasonable basis." Such deference would permit legislative bans on access to depictions of anti-semitic material, anti-religious material, racist or biased material, and the like. Depictions and descriptions of all of the Seven Deadly Sins - - gluttony, sloth, greed, wrath, envy, pride and lust - - surely are at risk as inappropriate for minors. All of this speech is at risk precisely because such speech may be effective in shaping minors' opinions, their sensitivities and their perspectives.

In *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, this Court, rejecting another Indianapolis Ordinance, made it clear that such censorship is unconstitutional. In *Hudnut*, Indianapolis sought to restrict access to pornography, arguing: "Men who see women depicted as subordinate are more likely to treat them so. Pornography ... does not persuade people so much as change them. It works by socializing, by establishing the expected and the permissible." *Id.* at 328. Now, Indianapolis

makes the same claim with respect to depictions of violence contending that observing depictions of violence "produce psychological effects," R-75, that they do not contribute to the marketplace of ideas, and that such expression communicates "noncognitively ... not to the rationale, not to the intellectual, not to the reasonable, but to the instinctual and biological." Hearing Tr. at 111. In essence, Indianapolis argues for censorship because exposure to depictions of violence desensitizes the audience in the same way that Indianapolis claimed pornography desensitized its audience. Rejecting this argument this Court explained in *Hudnut* that:

> Racial bigotry, anti-semitism, violence on television, reporters' biases - - these and many more influence the culture and shape our socialization. None is directly answerable by more speech, unless that speech too finds its place in the popular culture. Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all the institutions of culture, the great censor and director of which thoughts are good for us.
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> * * *
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> People may be conditioned in subtle ways. If the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech.

771 F.2d at 330. This is no less true when the government seeks to censor these ideas from its youth. *See Cinecom*, 473 F.2d at 1301-02. Six months ago the Supreme Court reaffirmed that "where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities "simply by averting [our] eyes."' *Playboy Enters.*, 120 S. Ct. at 1886.

Youth have significant First Amendment protection, including access to depictions that include violence, and total deference to a community's censorship of ideas and subject matters that it labels "harmful to minors" would end that freedom of speech. *Cinecom*, 473 F.2d at 1301-02.

C. Restrictions On First Amendment Freedoms Are Subject To The Highest Judicial Scrutiny, Not The Lowest.

The District Court's deference to the City's Ordinance is based on the flawed premise that legislation restricting minors' access to protected expression that is "arguably 'harmful to minors'" is reviewed by courts "under a standard less strict." R-24. It is from this flawed premise that the District Court abandons the presumption of unconstitutionality applied to all content based regulation *see, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), and abandons the constitutional review of "strict scrutiny," *see, e.g., Playboy Enters.*, 120 S. Ct. at 1886, in favor of review for the existence of a mere "reasonable basis" by the legislature. R-36. This is clearly erroneous. For, as the Supreme Court has held, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake," even when the legislation purports to protect minors, *Sable Communications, Inc. v. FCC*, 492 U.S. at 129.

Rather, because the First Amendment protects all ideas, content-based restrictions on speech are presumptively unconstitutional. *R.A.V.*, 505 U.S. at 387. This presumption arises because "[t]he government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or view points from the marketplace." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). "This is a notion so

ingrained in our First Amendment jurisprudence that last Term we found it so 'obvious' as to not require [an] explanation." *Id.* at 115-16 (citations omitted).

In addition to the presumption of unconstitutionality, content-based restrictions are subject to strict judicial scrutiny. *R.A.V.*, 505 U.S. at 395. Thus, the burden is on the government to demonstrate that the restrictions are "necessary" to serve a compelling interest. *Id.; see also Simon & Schuster,* 502 U.S. at 118 ("the State must show that its regulation is **necessary** to serve a compelling state interest ...") (emphasis added); *Roth*, 354 U.S. at 488 ("The door barring federal and state intrusion into [First Amendment freedoms] ... must be kept tightly closed and opened only the slightest crack **necessary** to prevent encroachment upon more important interests") (emphasis added)).

The danger of censorship and the level of judicial scrutiny over content-based restrictions are no less when government acts to protect youth. In *United States v. Playboy Enterprises Group, Inc.*, the Supreme Court squarely addressed and applied strict judicial scrutiny to content-based restriction when the "overriding justification for the regulation is concern for the effect of the subject matter on young viewers." 120 S. Ct. at 1885. At issue was the constitutionality of provisions of the Telecommunications Act of 1996 with respect to sexually oriented programming, entering the home, unwanted - - three factors that traditionally afford government greater latitude and none of which are applicable in the instant case. Notwithstanding the presence of those three factors, the Court, in no uncertain terms, set and applied the standard of judicial scrutiny at the highest level, stating:

> Since [the challenged provision] is a content-based speech restriction, it can stand only if it satisfies strict scrutiny. If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that

> alternative. To do otherwise would be to restrict speech without an adequate justification, a course the First Amendment does not permit.
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> Our precedents teach these principles. Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists.

Id. at 1886 (citations omitted).

Similarly, three years ago, in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 867-868 (1997), which involved legislation to protect children from the primary effect of otherwise protected "indecent" and "patently offensive" expression, the Court specifically rejected any contention that *Ginsberg* mandates lesser scrutiny of protected expression, holding that precedent requires "the application of **the most stringent review**" of the legislative provisions at issue. *Id.* at 868 (emphasis added). *Accord Sable Communications,* 492 U.S. 115 (striking down legislation to protect children from the primary effects of otherwise protected expression for failure to employ "least restrictive means"); *Eclipse Enters.*, 134 F.3d at 67 (applying strict scrutiny to restrictions on depictions of violence as harmful to minors); *Video Software Dealers Ass'n,* 968 F.2d at 689 (applying strict scrutiny to restrictions on depictions of violence as harmful to minors).

Any lesser standard of review, merely because the legislation attaches the phrase "harmful to minors," would deprive minors of the significant First Amendment freedoms guaranteed to them by the Constitution, *Tinker v. Des Moines Indep. Community Sch. Dist.*, *supra*, and open the door to a broad array of government censorship. Significantly, in *Tinker* the Court did not employ a lesser standard of review declaring that the prohibition on expression, even when involving youth, could not withstand constitutional scrutiny without "evidence" that it is "necessary" to address a specified harm.

393 U.S. at 511. Examining the record, the Court found no such evidence and concluded that the true motivation was the constitutionally illegitimate end of suppression of the ideas conveyed. *Id.* at 513.

In *Erznoznik v. City of Jacksonville*, 422 U.S. 205, the Court reaffirmed the "significant measure of First Amendment protection" afforded to minors, and again stressed that censoring ideas from youth is not a legitimate purpose, stating:

> Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.

Id. at 213-14. Here, too, the Court demanded strict judicial scrutiny, explaining: "[w]here First Amendment Freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity of purpose are essential." *Id.* at 217-18.

Thus, the Challenged Provisions, as content-based restrictions, are presumed to be unconstitutional and subject to strict scrutiny. That is, the City must prove that the Challenged Provisions are "necessary" to serve a compelling state interest. *R.A.V.*, 505 U.S. at 395; *Simon & Schuster*, 502 U.S. at 118; *Eclipse Enters., Inc.*, 134 F.3d at 67. To establish necessity, the City must demonstrate: (1) the existence of an actual harm; (2) that the restrictions are narrowly tailored to remedy the harm; (3) that the restrictions will in fact alleviate the harm in a direct and material way; and (4) that no less restrictive means are available. *See Playboy Enterprises*, 120 S. Ct. at 1888; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994); *Eclipse Enters., Inc.*, 134 F.3d at 67. The failure to prove any one element is fatal to the constitutionality of the Challenged Provisions.

Proof of the existence of the harm to be addressed by the restrictions is essential. Legislatures "must do more than simply 'posit the existence of the disease sought to be cured.'" *Turner Broad. Sys.*,

512 U.S. at 664. Legislatures "must present more than anecdote and supposition. The question is whether an actual problem has been proven ...." *Playboy Enterprises*, 120 S. Ct. at 1891. The burden is on the legislature to prove that the harm is real. Even in the area of commercial speech, where regulation typically is subject to a lower form of scrutiny, the Supreme Court has declared that evidence of harm is critical. In *Rubin v. Coors Brewing Co.*, the Court explained:

> the Government carries the burden of showing that the challenged regulation advances the Government's interest "in a direct and material way." That burden "is not satisfied by mere speculation or conjecture; rather, a governmental body ... must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." We cautioned that this requirement was "critical ...."

514 U.S. 476, 487 (1995) (citations omitted). Thus, the demonstration of actual harm to be addressed by the legislation is the predicate for constitutional review.

In the instant case, the City concedes that there is no evidence that exposure to the proscribed content in videogames in fact causes harm to minors, September 15, 2000 Hearing Transcript at 99-100, and the District Court found no actual harm, R-36-42. Instead, the District Court points to social science research in other media - - such as television violence, the validity of which is hotly disputed within the social sciences.[8] From these studies, the District Court concludes it was "reasonable" for the City to conclude "some" violent video games are "likely" to be "harmful to minors." R-40. This showing hardly constitutes a demonstration of actual harm, failing to demonstrate even how they are

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[8]It is significant that the District Court uses television violence as its example of harmful expression, R-38, as this Circuit in *Hudnut* used television violence as an example of protected expression that could not be restricted because of its effect on its audience.

"likely" to be harmful. If there is a claim of actual harm the City must prove the harm.[9] If, as here, there in fact is no demonstrable harm, the legislation is unconstitutional censorship. *See, e.g.*, *AIDS Action Committee of Massachusetts v. Massachusetts Bay Transit Auth.*, 849 F. Supp. 79, 84 (D. Mass. 1993) (shielding children from advertisements that may be "patently offensive, vulgar and lewd" is a not sufficient state interest to restrict minors' access to protected expression), *aff'd*, 42 F.3d 1 (1st Cir. 1994)).

Moreover, if the City's proof does not show harm to all age groups under 18 years, then the legislation is unconstitutionally overbroad because it is not narrowly tailored to the harm and unnecessarily invades protected expression to those not harmed. If the proof does not show harm from currency-operated video games, but instead shows harm from television violence or depictions of violence in books, then the legislation is unconstitutionally overbroad because it is not narrowly tailored to the harm and unnecessarily invades the protected expression of the video game medium.[10] The District Court rejects the need for "survey" type research and proof, R-38-39, 41-42; but that is precisely what the Supreme Court required in *Playboy Enterprises*, explaining, "[w]ithout some sort of field survey, it is impossible to know how widespread the problem in fact is ...." 120 S. Ct. at 1891. Whether through surveys, studies or other proof, it is clear that the City must identify with specificity the

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[9]Significantly, the testimony of the City concedes that the primary purpose of the Challenged Provisions is not protecting minors from harm, but "[t]he real purpose is to empower parents .... The overriding purpose is to empower parents to make this decision for themselves...." R-133.

[10]And, alternatively, if harm can be demonstrated by comparison to other forms of media, the Challenged Provisions would also violate the Equal Protection Clause of the Fourteenth Amendment, because the Ordinance would then be fatally under-inclusive for singling out this one medium of expression.

real harm that the Challenged Provisions seek to cure and identify the category of people harmed, not simply restrict the access of all minors to an entire category of protected expression under a general theme of protecting minors.

Even if sufficient proof of harm could be shown, the Supreme Court has shown that censorship cannot be the first choice of government. Alternatives must be considered and, if available, used. For example, instead of suppressing expression, a public service educational campaign by the City informing parents, adults and minors would be a less restrictive alternative that would not invade First Amendment freedoms, but, rather, would enhance First Amendment values by increasing speech and increasing awareness. Such a public awareness campaign surely would advance the City's "real" or "overriding" purpose of empowering parents to make this decision for themselves...." R-133. Indeed, this is precisely the analysis employed by the Supreme Court, even under the less strict standards applicable to commercial speech. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507-08 (1996) (ban on advertisement of prices of alcohol to artificially inflate prices to reduce demand invalid because less restrictive alternatives, including public "educational campaign" and/or "counterspeech" may accomplish same objective) (J. Stevens' plurality opinion); *id.* at 530 (J. O'Connor's plurality opinion). If depictions of violence in fact are unwittingly desensitizing audiences, the sensitivity levels of parents and minors alike can be raised by counterspeech enhanced by educational campaigns.

Finally, even if there is an identifiable harm and no less restrictive alternative exists, a "tie goes to free expression." *Playboy Enterprises*, 120 S. Ct. at 1889. Therefore, the harm must not only be real, but must outweigh the very substantial interests of free expression. The instant case presents no such harm; rather, the Challenged Provisions seek to restrict access to a genre of expression in a visual

art medium merely because the City deems it offensive. As the Supreme Court recently explained, however:

> The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.

Playboy Enterprises, 120 S. Ct. at 1889. The same is true regardless of whether "the speech is not very important," or deemed "shabby, offensive or even ugly." *Id.* at 1893; *accord Hudnut*, 771 F.2d. at 330. This is true even in the face of a claim that the expression creates "a greater capacity for evil, particularly among the youth of a community." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952). As the Supreme Court explained in *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 157 (1945):

> Under our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another.

In the year 2000, video games are one of the more recent examples of a medium of expression that is both a visual art form and a storytelling device with special appeal to the younger generation. Just as the First Amendment protected non-obscene expression in magazines and movies, it protects non-obscene expression in video games from censorship by government merely because government finds the expression offensive.

II. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT THE CHALLENGED PROVISIONS ARE NOT UNCONSTITUTIONALLY VAGUE AND THAT AMBIGUITIES MAY BE RESOLVED BY CASE-BY-CASE PROSECUTION.

The District Court *also* erroneously determined that the definition of the term "harmful to minors," which is at the core of the Challenged Provisions, is not unconstitutionally vague. To reach this

result, the District Court committed several errors, including: 1) presuming the transferability of the *Miller* test for obscenity to materials depicting protected expression; 2) disregarding evidence demonstrating conclusively that even the City with all of its resources could not explain the criteria underlying the Challenged Provisions' most critical terms; and 3) condemning those regulated by these provisions to have the meaning of these terms determined through piecemeal prosecutions in the state courts.

A. Laws Regulating First Amendment Freedoms Must Be Carefully Tailored, With Exacting Standards, Such That They Can Be Easily Understood By Ordinary People Of Reasonable Intelligence, And So That Law Enforcement Has Objective Criteria To Apply In Enforcing The Law

The Constitution demands that statutes that seek to regulate conduct be set forth with "sufficient definiteness that ***ordinary people*** can understand what conduct is prohibited ...." *Kolender v. Lawson,* 461 U.S. 352, 357 (1983) (emphasis added); *accord Smith v. Goguen,* 415 U.S. 566, 572-73 & nn.7, 8 (1974); *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162, 168 (1972). This precision is essential "because we assume that man is free to steer between lawful and unlawful conduct, [thus] we insist that laws ***give the person of ordinary intelligence a reasonable opportunity*** to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972) (emphasis added).

While it has been said that legislation imposing only civil fines may require less exacting precision than criminal legislation, such is not the case where free speech rights are at issue. *Gresham v. Peterson,* 225 F.3d 899, 908 (7th Cir. 2000). This is so because when a vague statue "'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those]

freedoms.' Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked.'" *Grayned*, 408 U.S. at 109 (footnotes omitted). Thus, the courts must apply "a more stringent vagueness test" when the freedom of expression is implicated. *Gresham*, 225 F.3d at 908. "Precision of regulation must be the touchstone...." *NAACP v. Button*, 371 U.S. 415, 438 (1963). And the "government may regulate in the area [of speech] only with ***narrow specificity***." *Id.* at 433. This standard is not relaxed, moreover, simply because the regulation is intended to protect minors. *See Interstate Circuit,* 390 U.S. 676, 689 (1968).

In addition to providing guidance to the citizenry, the legislature must also establish minimal guidelines for law enforcement to follow to avoid the "unfettered discretion [a vague law] places in the hands of the ... police." *Papachristou,* 405 U.S. at 168; *accord Kolender,* 461 U.S. at 357, 358. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis ...." *Grayned,* 408 U.S. at 108-09. This the Constitution prohibits.

The Challenged Provisions of the Ordinance are inherently vague. They fail to provide fair notice and create a standardless enforcement mechanism. This vagueness, moreover, cannot be corrected by a narrowing interpretation. *Gresham,* 225 F.3d at 908. There is no legislative history to guide such interpretation. "[W]ithout legislative history revealing precisely what the [legislature] intended to regulate, a state court would have no basis for limiting the unconstitutionally vague provisions of the [Ordinance]." *Video Software Dealers Ass'n v. Webster,* 773 F. Supp. 1275, 1282

(W.D. Mo. 1991), *aff'd*, 968 F.2d 684, 688 (8th Cir. 1992). Here, the legislative history is devoid of any discussion of the specific criteria set forth by the Challenged Provisions.

B. The Term "Harmful To Minors" Is Unconstitutionally Vague

More specifically, Section 831-1 of the Ordinance defines the term "harmful to minors," which is utilized to determine whether a video game is subject to the proscriptive portions of the Challenged Provisions. A video game is "harmful to minors" if it, *inter alia*, "predominantly appeals to minors' morbid interest in violence." R-77. Simply put, there is no definition and no enforcement criteria explaining or limiting the term "minors' morbid interest in violence"

The City concedes, moreover, that it has no definition or limitation on this phrase, and that it has no criteria by which to even make such a determination. The testimony of David Harris, Assistant Deputy Mayor of Planning, confirmed that the City has no operating definition or criteria to give clarity to this term's meaning, and that will take a team of lawyers to discern the meaning of the phrase "predominantly appeals to minors' morbid interest in violence," testifying as follows:

> Q When you look at a machine, what criteria will you look at to determine whether that machine predominately appeals to a minors' morbid interest in violence.
>
> A That's something we will work with our lawyers to establish.
>
> Q As of today [September 14, 2000] the City doesn't know?
>
> A Because it has not gone into effect, our lawyers haven't given I think the final training sessions and things like that that are contemplated, but I think our lawyers - - I mean, I in my capacity as a lowly non-lawyer now cannot answer that question.

R-113-14.[11]

Q Mr. Harris, what is a morbid interest in violence?

A ... I cannot give you a specific definition, but we will consult our lawyers.

R-116-17.

Q As you sit here today as the official spokesman and designee of the Indianapolis, does the City have an articulable definition of the phrase "morbid interest in violence"?

A I can't provide you with an articulable definition of morbid interest in violence and we would again consult our lawyers on that question.

R-118. In sum, as the City cannot provide any guidance as to the meaning of this phrase without consultation with lawyers, it is clear that no "ordinary person" will be able to do so either.

The lack of defining criteria, and the difficulty of ascertaining the meaning of such a term, is fatal to regulations encroaching upon the First Amendment, and has led other courts considering similar terms in legislation proscribing speech to find them unconstitutionally vague. For example, in *Video Software Dealers Ass'n v. Webster*, the Court of Appeals for the Eighth Circuit struck down a nearly identically term as unconstitutionally vague, because its meaning was "elusive." 968 F.2d at 690. There, a Missouri regulation sought to restrict access to video cassettes with a "tendency to cater or appeal to ***morbid interests in violence*** for persons under the age of seventeen ...." *Id.* (emphasis added); *see also Davis-Kidd Booksellers, Inc. v. McWherter,* 866 S.W. 2d 520, 532 (Tenn. 1993) (definition for “excess violence” held "subjective" and unconstitutional, where it was defined as “the depiction of acts of violence in such a graphic and/or bloody manner as to exceed common limits of

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[11]Although Mr. Harris does not act as a lawyer for the City, he is a trained lawyer.

custom and candor, or in such a manner that it is apparent that the ***predominant appeal of the material is portrayal of violence for violence's sake***") (emphasis added).

In addition, the District Court's ruling provides no guidance. Rather, it merely describes the phrase as reaching "rough peace with the *Miller* standard as applied to sexual obscenity for adults" and therefore is "constitutionally serviceable." R-70. "Rough peace" and "constitutionally serviceable" hardly meet the Supreme Court's mandate for "precision of regulation." *NAACP v. Button*, 371 U.S. at 438.

And, expanding *Miller*'s obscenity test to include depictions of violence is inappropriate and unworkable. The *Miller* test, by definition, works only in the context of sexual material because it was developed to address obscenity. If depictions of violence are obscene, it is because they appeal to a prurient interest in sex as opposed to some other interest. As this Court explained in *United States v. Thoma,* "[d]epictions of torture and deformation are not inherently sexual and, absent some expert guidance as to how such violence appeals to the prurient interest ... there is no basis upon which a trier of fact could deem such material obscene." 726 F.2d at 1200.

Furthermore, at least in the area of obscenity, the term "prurient interest" was defined by the Supreme Court. In *Roth v. United States,* 354 U.S. at 488 n.20, the Court defined material that appeals to a prurient interest as "having a tendency to excite lustful thoughts ...." Later, in *Brockett v. Spokane Arcades, Inc.,* the Court elaborated further on that definition, and explained that material that provokes "only normal, healthy sexual desires" does not appeal to a prurient interest. 472 U.S. 491, 498 (1985).

In contrast, the term "minors' morbid interest in violence," is not defined and has no commonly understood meaning. The Supreme Court in *Winters v. New York*, determined that materials which had "so massed" criminal deeds of bloodshed and lust "as to become vehicles for inciting violent and depraved crimes against ... person[s]," and appealing to those who are "disposed to take vice for its own sake," were not proscribable. 333 U.S. at 513. If materials such as those are constitutionally protected from regulation, what different appeal must depictions have to appeal to a morbid interest in violence under this Ordinance? How can "ordinary people" of "ordinary intelligence" determine this "morbid interest" or differentiate it from another presumably "healthy" interest? In fact, the evidence before the District Court demonstrates that operators and distributors charged with complying with this Ordinance have no understanding as to the meaning of this term and are forced to engage in self-censorship in an effort to comply. (*See*, *e.g.*, R-98, ¶10, R-94, ¶ 7, R-91, ¶ 6.)

The District Court simply assumes that the vagueness inherent in this term will somehow be cured by the other prongs of the *Miller*-type test that are incorporated into the definition of "harmful to minors" in the Ordinance. R-70. This explanation, however, provides no answer and no guidance. Particularly in light of the fact that under the *Miller* test, "[a] work cannot be held obscene unless ***each element of the test has been evaluated independently and all three have been met***." *Luke Records, Inc. v. Navarro,* 960 F.2d 134, 136 (11th Cir.), *cert. denied*, 506 U.S. 1022 (1992).[12] If

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[12]In its effort to erect a saving construction of other unconstitutionally vague provisions of the Ordinance, the District Court held that a narrowing construction can be achieved by collapsing two of the Challenged Provisions' *Miller* prongs into one. *See* R-71, (lack of specific definition for "patently offensive" can be rectified by concluding that "graphic violence" definition also describes the term "patently offensive"). Thus, the District Court's own interpretation of the Challenged Provisions removes one of the prongs, thus re-injecting the vagueness which is supposed to be cured by the

one element of the test cannot be evaluated because it is without meaning, the entire definition fails for vagueness. And, the legislative history is devoid of any discussion as to meaning of the term "minors' morbid interest in violence" and there is no commonly understood meaning for this phrase, thus no narrowing construction could be offered.

In sum, there is no objective criteria for discerning the meaning of the phrase "morbid interest in violence." And, there is no basis upon which a video game operator or law enforcement official can determine that a video game "predominantly appeals" to such an interest, rather than a minor's interest in video games generally, an interest in computer-generated animation, in aliens, in science fiction, in fantasy or simply an interest in competition and winning. There is simply no means for ordinary persons of ordinary intelligence to ascertain this phrase's meaning or objective criteria for its application.

C. Other Provisions Of The "Harmful To Minors" Definition Are Equally Vague And Ambiguous.

The City's Deputy Mayor also testified to the lack of objective criteria and articulable definitions with respect to the other prongs of the definition of "harmful to minors," stating:

> Q The second prong of the ordinance refers to material that is suitable for minors. Has the City developed any criteria by which to determine what is and what is not material that's suitable for minors?
>
> A Again all of those determinations about all of the definitions in this ordinance are the same answers that I have given apply. I will consult our lawyers to make those judgments about whether all the many factors that are listed in the ordinance are met so that we can make a determination on a case by case about the individual games.

R-123.

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presence of independent prongs under the District Court's application of *Miller*.

Q How would you define bloodshed?

A Ask me every conceivable way in which bloodshed could possibly - - I can't articulate that, but on a case-by-case basis I think we could look and see whether or not it falls under a reasonable definition of bloodshed.

Q What is that reasonable definition of bloodshed?

A I can't give it to you right now.

R-128.

Ultimately, the City concedes that whether any particular video game would be covered by the Challenged Provisions is a decision that will be made with "everybody" involved, that is, "[t]he City as a whole including ... lawyers ...." R-129. The criteria the City must utilize to enforce these provisions "is all the case law and all the other stuff out here the lawyers rely on," therefore, "whatever it is that lawyers rely on, their advice is what we are going to rely on." R-131.

The City and the District Court, therefore, are satisfied that the meanings of these various vague terms can be explicated by the Indiana courts through prosecutions under the Ordinance. R-73. Such a result, however, is constitutionally forbidden. As the Supreme Court held in *Dombrowski v. Pfister*, "those affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal ...." 380 U.S. 479, 491 (1965).

D. The Challenged Provisions Are A Trap For The Innocent And Have An Immediate Chilling Effect.

The "harmful to minors" definition forms the core of the Challenged Provisions. Thus the vagueness inherent in this definition and its many prongs fails to provide the guidance necessary for

individuals to ascertain the limits of permissible conduct. Furthermore, although the City plans to develop criteria for the implementation and enforcement of these vague terms, it will not share that criteria with the public. R-131-32. The Challenged Provisions, therefore, will "trap the innocent by not providing fair warning," and invites "arbitrary and discriminatory law enforcement." *Grayned*, 408 U.S. at 108.

This chilling affect is real. As testified to by one of the video games distributors, Timothy Dwyer for Cleveland Coin Machine Exchange, his customers look to him to advise them as to whether a given game is covered by the Challenged Provisions of the Ordinance. R-139-40. As a result, he reviews Cleveland Coin's inventory and when he is unable to ascertain whether a game is covered or not, therefore, he plays it "on the conservative side, [and] eliminate[s] that inventory .... Anything with a question mark, be it, you know, good, be it bad, I would rather go with the bad side and just be safe ...." R-141-42. Another distributor, Scott Shaffer of Shaffer Distributing, explained that the decision to purchase a new video game often has to be made sight unseen and based on general verbal description of a game's content. R-102-03. Manufacturers typically only build video game machines for which there is an order, rather than build an inventory to sell. R-102-03. As a result of the enactment of the Challenged Provisions, he "will be very careful ... if in [his] opinion something might fall under this ordinance, [he] will order significantly less, if any, then [he] would have prior." R-103; *see also* R-1.

In fact, the vague nature of the Challenged Provisions, and their potential to be used for arbitrary and discriminatory enforcement is perhaps nowhere better demonstrated than by the District Court's conclusion that the Ordinance reaches video games that teach children to be snipers. R-73. The Court apparently is reading something into the vague terms of the Ordinance that is not obvious

from its face. Indeed, on their face, the Challenged Provisions do not reach a game simply because of its theme, or because of what it may or may not teach. Nor does the Ordinance ever use the term sniper, gun, shoot or kill. The District Court's conclusion and example demonstrate the very real dangers of case-by-case enforcement of the Challenged Provisions. No video game that contains what may be deemed offensive to law enforcement is safe and no operator with such a game is safe from arbitrary enforcement and loss of business licenses under these vague statutory provisions.

CONCLUSION

For the reasons set forth herein, the District Court's Entry on Motion for Preliminary Injunction should be reversed and an injunction issued pending final judgment as Appellants have amply demonstrated that they are likely to prevail on their constitutional claims.

Respectfully submitted,

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Timothy F. Brown
David L. Kelleher
Evan S. Stolove
Arent Fox Kintner Plotkin & Kahn PLLC
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5339
(202) 857-6000, (202) 857-6395 (FAX)

and

Wayne C. Turner
Jackie M. Bennett, Jr.
John F. McCauley
McTurnan & Turner
2400 Market Tower
10 West Market Street
Indianapolis, IN 46204

Of Counsel:

Elliott I. Portnoy
Arent Fox Kintner Plotkin & Kahn PLLC
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5339
(202) 857-6000, (202) 857-6395 (FAX)

(317) 464-8181, (317) 464-8131 (FAX)

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

Appellants' Brief was produced on a computer using WordPerfect 8.0. Appellants' counsel have used that word processor's word count function to verify that the number of words contained in the Brief, including headings, footnotes and quotations (but exclusive of the corporate disclosure statement, table of contents, table of citations, and counsel's certifications), totals 12,870 words as allowed by Rule 32(a)(7) of the Federal Rules of Appellate Procedure.

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Timothy F. Brown

CIRCUIT RULE 30(d) CERTIFICATE OF COMPLIANCE

All materials required by Circuit Rule 30(a) and (b) are included with the Appendix submitted by Appellants.

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Timothy F. Brown

CERTIFICATE OF SERVICE

I hereby certify that 2 true and accurate copies of the foregoing Appellants' Brief and 2 copies of the Appendix were served this 2nd day of November 2000 by Federal Express upon the following:

Matthew Gutwein, Esq.
Christopher G. Scanlon, Esq.
Baker & Daniels
300 North Meridian Street
Suite 2700
Indianapolis, IN 46204-1782

A. Scott Chinn
Corporation Counsel for the
City of Indianapolis
Anthony W. Overholt
Office of Corporation Counsel
Suite 1601, City-County Building
200 East Washington Street
Indianapolis, IN 46204

In addition, a copy of Appellants Brief, without the attached appendix, was served on Appellees' counsel, Mr. Gutwein, by facsimile.

Also by Federal Express, this same day, 15 copies of Appellants' Brief and 10 copies of the Appendix were filed with this Court pursuant to Circuit Rule 31(b) and Federal Rules of Appellate Procedure 25(a) and 30(a).

____
David L. Kelleher