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' BRIEF

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, Indiana 46204

Christopher G. Scanlon
Matthew R. Gutwein
Catherine A. Meeker
Daniel R. Roy
BAKER & DANIELS
300 North Meridian Street, #2700
Indianapolis, Indiana 46204
(317) 237-0300

Counsel for Defendants-Appellees

DISCLOSURE STATEMENT

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, 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:

BAKER & DANIELS
300 N. Meridian St., Suite 2700
Indianapolis, IN 46204

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes and Ordinances **Page**

Books and Articles

Other

JURISDICTIONAL STATEMENT

Appellants' jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUES

1. Does the Ordinance regulate speech when it regulates the playing of graphically violent video games that lack serious literary, artistic, scientific or political value as a whole to minors?

2. Did the district court properly conclude that the Ordinance's regulation of minors' access to graphically violent video games is a permissible regulation of matters that are obscene as to minors?

3. Given the documented risk of harm to children posed by their playing graphically violent video games, the city's compelling interest in protecting its children from that harm, and the narrow tailoring of the Ordinance, is the Ordinance constitutional?

4. Did the district court properly conclude that the Ordinance is not unconstitutionally vague?

STATEMENT OF FACTS

1. The Ordinance's Enactment and Basis. Ordinance No. 72, 2000[1] ("Ordinance") limits children's access, absent a parent's consent, to certain video games that are graphically violent or sexually explicit. The Ordinance was proposed by the Mayor of Indianapolis on March 30, 2000, enacted unanimously by the City-County Council of the City of Indianapolis and Marion County ("Council") on July 10, 2000, and signed into law by the Mayor on July 17, 2000. Ex. P-62 at 388-94; R-82-83. Before enacting the Ordinance, the Councillors and Mayor considered at public meetings extensive comment from the video-game industry, educators, academics, community leaders, citizens and parents. Ex. P-51 at 1-8; Ex. P-52 at 1-5. The Councillors and Mayor also considered voluminous academic literature, congressional testimony and other materials on the subject of video games, media violence and children. *See* Ex. P-64.[2]

The Ordinance's primary basis was the Council's and Mayor's conclusion that the clear weight of evidence shows that children may be harmed by exposure to certain violent video games. Accordingly, the Ordinance was appropriate to assist

---

[1] The Ordinance's full text is Exhibit A to the district court's October 12, 2000, Entry at R-75-83; a signed copy, Exhibit P-53 to the record, is at A-1 in Appellees' Supplemental Appendix.

[2] The Mayor's office reviewed twenty-three academic articles in considering the Ordinance. A list of those articles, an exhibit to the deposition of Deputy Mayor David Harris, is at A-8.

parents in deciding whether, or to what extent, their children are exposed to graphically violent or sexually explicit video games offered in arcades and other public places.

The Councillors and Mayor considered, for example, an April 2000 study by Drs. Craig Anderson and Karen E. Dill that combined the authors' independent research with a comprehensive review of prior relevant research on children's exposure to video games and to media violence. R-6. The authors' research "corroborates the finding of earlier studies that violent video games produce psychological effects in minor children and that prolonged exposure to violent video games increases the likelihood of aggression in minor children." R-75. The authors found that the "dangers [of violent video games] may well be greater than the dangers of violent television or violent movies," that violent video game play is "positively related to increases in aggressive behavior," and that "repeated exposure to graphic scenes of violence is likely to be desensitizing." A-45; A-42; A-15-16.

The authors conducted both correlational and experimental studies, and found both that students who reported playing more violent video games over a period of years engaged in more aggressive behavior in their own lives, and that students who played a violent game in the laboratory responded more aggressively toward opponents than those who had played a nonviolent game. A-42. As the authors point out, "the convergence of findings across such disparate methods," particularly when coupled with prior research into the effects of television violence, "lends considerable strength to the

main hypothesis that exposure to violent video games can increase aggressive behavior." *Id.*

The Councillors and Mayor also considered testimony from the March 21, 2000, Hearing on the Impact of Interactive Violence on Children held by the United States Senate Committee on Commerce, Science, and Transportation. In that hearing, Dr. Anderson addressed the suggestion that "the TV/movie violence literature is inconclusive":

> Any scientist in any field of science knows that no single study can definitively answer the complex questions encompassed by a given phenomenon. Even the best of studies have limitations. It's a ridiculously easy task to nitpick at any individual study, which frequently happens whenever scientific studies seem to contradict a personal belief or might have implications about the safety of one's products. The history of the smoking/lung cancer debate is a wonderful example of where such nitpicking successfully delayed widespread dissemination and acceptance of the fact that the product (mainly cigarettes) caused injury and death. The myth that the TV/movie violence literature is inconclusive has been similarly perpetuated by self-serving nitpicking.
>
> Scientific answers to complex questions take years of careful research by numerous scientists interested in the same question. We have to examine the questions from multiple perspectives, using multiple methodologies. . . . When one looks at the whole body [of] research in the TV/movie violence domain, clear answers do emerge. In this domain, it is now quite clear that exposure to violent media significantly increases aggression and violence in both the immediate situation and over time.

A-60.

Shortly after the Ordinance was passed, a Joint Statement of the American Academy of Pediatrics, American Psychological Association, American Academy of Child and Adolescent Psychiatry, and American Medical Association concluded that:

> There are some in the entertainment industry who maintain that 1) violent programming is harmless because no studies exist that prove a connection between violent entertainment and aggressive behavior in children, and 2) young people know that television, movies, and video games are simply fantasy. Unfortunately, they are wrong on both counts.
>
> At this time, well over 1000 studies – including reports from the Surgeon General's office, the National Institute of Mental Heath, and numerous studies conducted by leading figures within our medical and public health organizations – our own members – point overwhelmingly to a causal connection between media violence and aggressive behavior in some children. The conclusion of the public health community, based on over 30 years of research, is that viewing entertainment violence can lead to increases in aggressive attitudes, values and behavior, particularly in children.

R-84. The Federal Trade Commission (and the district court, R-41 n.10) concluded similarly that "[a] majority of the investigations into the impact of media violence on children find that there is a high *correlation* between exposure to media violence and aggressive and at times violent behavior." Ex. P-13 at 1 (emphasis in original).

2. The Ordinance's Scope and Operation. The Ordinance applies only to currency-operated video games that a commercial business offers to the public. Sec. 831-1. The Ordinance does not regulate video games that are played at home and

does not apply to locations where minors are prohibited, such as bars. Sec. 831-1 (definitions of "Amusement location"and "Exhibitor").

The Ordinance regulates video games that are "harmful to minors," which the Ordinance defines as:

> *Harmful to minors* means an amusement machine that predominantly appeals to minors' morbid interest in violence or minors' prurient interest in sex, 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, lacks serious literary, artistic, political or scientific value as a whole for persons under the age of eighteen (18) years, and:
>
> (1) contains graphic violence; or
>
> (2) contains strong sexual content.

Sec. 831-1. The Ordinance defines "Graphic violence" as:

> *Graphic violence* means 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.

Sec. 831-1.

The Ordinance provides that an operator must not knowingly allow a minor to play a regulated game absent a parent's or guardian's consent. Sec. 831-5(h); Sec. 831-6(f). The Ordinance allows a parent or guardian ("parent") to grant his or her consent in two ways. Sec. 831-1 (definition of "Accompanied by"). First, the parent may accompany the minor to the business that offers the video games and tell an

employee that the minor is permitted throughout the day to play video games that are harmful to minors. *Id.* The employee would then stamp the minor's hand or use some other non-transferable designation to indicate parental consent. *Id.* Secondly, the parent may stay within five feet of a minor while the minor plays a video game that is harmful to minors. *Id.* To reinforce this consent requirement, the Ordinance also includes signage and game spacing and location requirements. Sec. 831-5(i) & (j); Sec. 831-6(g) & (h).

The Ordinance's provisions are similar in effect to the amusement machine industry's voluntary efforts to limit children's access to graphically violent and sexually explicit games. A-67; A-75. Among the testimony considered by the Council was the representation that the industry's voluntary Code of Conduct "requires location owners and operators of coin-operated video games to encourage parents to accompany young children into locations where coin-operated video games are available and, to the extent feasible, requires location owners and operators to encourage staff to discourage children who are unaccompanied by parents from playing coin-op games that carry a 'Strong' (i.e., red color) Disclosure Message."[3] A-67.

---

[3] Recognizing that "some coin-operated video games contain scenes of violence that some parents may not wish their young children to play," A-90, the amusement machine industry has created color-coded disclosure messages that, when displayed, describe the contents of a game. A green disclosure message indicates that the game is "Suitable for All Ages." Yellow disclosure messages indicate "mild" violent or sexual content. Red disclosure messages indicate scenes of "strong violence" involving "cartoon-like" or "human-like" characters "which result in bloodshed, serious injury and/or death to the depicted character(s)" or that a game contains "graphic depictions of sexual behavior and/or the human body." A-75.

3. The Regulated Games. At the hearing, the City introduced a video tape of footage from six games containing "graphic violence" as defined by the Ordinance, Ex. 17, and presented an in-court demonstration (which was taped for the record) of a player operating both a "fighting" and a "shooting" game, Ex. 18. In fighting games, two figures conduct multiple bouts, complete with spurting blood, until one figure is killed. The shooting games involve a player operating a handheld simulated gun or rifle to shoot figures on the display screen. R. 17-18. The Industry presented testimony about the storyline and plot of certain action/adventure games (the "Gauntlet games"). There is no evidence in the record demonstrating that the Gauntlet games contain the kind of graphic violence regulated by the statute or how these games compare with the shooting and fighting games sampled in Exhibits 17 and 18. The district court's Entry describes these games. R-17-19.

SUMMARY OF ARGUMENT

I. The Industry's constitutional challenge to the Ordinance fails for three reasons. First, the few graphically violent or sexually explicit games the Ordinance regulates are not speech. When played, the regulated games are nothing more than technologically advanced versions of pinball or a shooting gallery game. By definition, the Ordinance steers clear of any video game that contains as a whole serious literary, artistic, scientific or political value to minors. Moreover, the functional elements of the regulated video games overwhelm any peripheral expressive elements

within them. That artists contributed to the creation of regulated video games cannot dictate that the games, when played, are automatically protected expression. Artists also contribute to the creation of pinball and shooting gallery games or, for that matter, to cars and buildings, none of which is speech. When played, the regulated video games come down to a player shooting at targets -- an act that is not speech.

II. Even if video games are speech, the Ordinance is still constitutional because the hard-core graphic violence in the regulated games is unprotected obscenity as to minors. *Ginsberg v. New York*, 390 U.S. 629 (1968), recognizes that the definition of obscenity for minors is broader than that for adults. Under *Ginsberg*'s reasoning, the expanded definition of obscenity for minors is broad enough to include the hard-core, and harmful, graphic violence the Ordinance regulates.

Etymologically, historically, and legally, the definition of obscenity encompasses both sex and violence as to children. From its Greek derivation, to the Framers' understanding of the term, to the Supreme Court's development of the modern obscenity doctrine for adults, the concept of obscenity, particularly for children, has not been limited to sex. For example, in 1895, Indiana (like many other states) enacted a statute that proscribed access to both sexual and violent material.

Moreover, under the modern legal standards for obscenity found in *Miller v. California*, 413 U.S. 15, 24 (1973), there is no principled distinction with respect to children between unprotected sexual material and the hard-core graphic violence the

Ordinance regulates. As much if not more so than sexual material, the regulated games' violence is "a basic factor in impairing the ethical and moral development of our youth." *Ginsberg*, 390 U.S. at 641 (quotation omitted). Nor is there a constitutionally meaningful difference between a minor's "prurient interest in sex" and a minor's "morbid interest in violence," or between "sexual conduct" that the community views as "patently offensive" for minors and "graphic violence" that the community views as "patently offensive" for minors. *See Miller*, 413 U.S. at 24. That the Supreme Court has included "excretory" matters within the definition of obscenity as to adults lends further support for including graphic violence within the definition of obscenity as to minors. Even more so than with sexual matters, depictions of excretory matters are patently offensive and morbid in the same way as are depictions of graphic violence.

The Industry incorrectly claims that the Supreme Court, this Court and sister courts have held that obscenity as to minors is strictly limited to sexually explicit material. Neither the Supreme Court nor this Court has ever addressed the issue. And the courts from other jurisdictions have struck down on vagueness grounds statutes that are decidedly different from the Ordinance. None of these decisions is even persuasive, much less controlling.

The Industry is also wrong when it claims, sheepishly, that a seven-year old boy has a constitutional right to play graphically violent video games in public arcades without his parents' consent. As *Ginsberg* demonstrates, the First Amendment

rights of a child are not equivalent to those of an adult. In a variety of contexts, the Supreme Court has authorized restrictions on a child's access to speech that is protected for adults, including in a child's home, in school, on public streets and in commercial businesses. In light of children's immaturity, increased vulnerability and need for parental guidance, the Ordinance comports with children's diminished First Amendment rights. *Ginsberg* teaches that 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.

The Industry cries wolf when it claims that the district court's opinion opens the door to broad new forms of censorship. First, if regulated video games are speech, they are only barely so; when played, the regulated games contain the most minimal elements of expression. Secondly, any expressive elements of regulated games are far removed from the First Amendments's core. Thirdly, the Ordinance does not engage in viewpoint discrimination. Fourthly, the Ordinance's *Miller*-like standards sharply limit its scope. And fifthly, the Ordinance does not limit adults' access to regulated games, and is not a complete ban on children's access. No floodgates are opened.

III. The Ordinance is not vague. Each term the Industry challenges either has been upheld in the indecency context or is used in the Industry's own rating system for these games. The Industry offers no sound reason why the Supreme Court's well-developed teaching in the indecency context should be disregarded here. Purveyors of sexually explicit material are required to comply with essentially identical regulations. Those who offer video games harmful to minors can do so as well.

ARGUMENT

Standard of Review. The Industry's claims are a facial challenge to the constitutionality of the Ordinance. As such, the Industry bears "a heavy burden" to invalidate the Ordinance on its face. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (internal quotations omitted). "Facial invalidation is, manifestly, strong medicine that has been employed by the Court sparingly and only as a last resort." *Id.* (internal quotations omitted). The Court is "reluctant . . . to invalidate legislation 'on the basis of its hypothetical application to situations not before the Court.'" *Id.* at 584 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 743 (1978)). The Industry must demonstrate a "realistic danger" that enforcement of the Ordinance's provisions will necessarily "significantly compromise recognized First Amendment protections." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). The Industry can demonstrate no such danger.

The district court's denial of the Industry's request for injunctive relief is entitled to "substantial deference" and can be reversed only for an abuse of discretion. *Teamsters Local Unions Nos. 75 and 200 v. Barry Trucking, Inc.,* 176 F.3d 1004, 1011-12 (7th Cir. 1999). Because the district court's denial of a preliminary injunction is "based on a subjective evaluation of the import of the various factors and a personal intuitive sense about the nature of the case," *Roth v. Lutheran General Hosp.*, 57 F.3d 1446, 1453 (7th Cir. 1995) (internal quotations omitted), this Court "must consider . . . not what this Court would have done in the first instance, but whether this Court has a strong conviction that the district court exceeded the permissible bounds of judgment," *Barry Trucking,* 176 F.3d at 1011. The district court's findings of fact regarding the content of the regulated video games are reviewed under the clearly erroneous standard; to reverse under this standard, the Court "must be 'left with the definite and firm conviction that a mistake has been committed.'" *Id.* at 1010-11, 1008 (quoting *United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948)). The court's conclusions of law that the regulated games are obscene as to minors and that the Ordinance is not unconstitutionally vague are reviewed de novo. *Barry Trucking,* 176 F.3d at 1011.

I. A CHILD'S PLAYING OF REGULATED VIDEO GAMES IS NOT SPEECH.

The Ordinance does not regulate speech. The Ordinance regulates the playing of games. In the context in which the Ordinance regulates them, the regulated video games are like pinball, poker, or a shooting gallery at a local fair. When played in arcades, any elements of expression embedded in a regulated video game become inconsequential. Accordingly, playing a regulated video game is not a sufficiently expressive activity to warrant First Amendment protection. Moreover, under its terms, the Ordinance is careful not to regulate any video game that contains serious literary, artistic, scientific, or political value to minors. *See* Sec. 831-1. The Ordinance, therefore, does not engage in the censorship that the Industry claims.

As a threshold matter, it bears emphasis that neither this Court nor any other has held that a minor's playing of a graphically violent or sexually explicit video game that lacks serious literary, artistic, scientific or political value to minors is protected expression. In fact, prior to the district court's ruling here, every court that has squarely addressed the issue has concluded that video games are not speech. *See Malden Amusement Co., Inc. v. City of Malden*, 582 F. Supp. 297, 299 (D. Mass. 1983) (finding video games are not protected speech in upholding city ordinance restricting amusement licenses to businesses other than arcades); *America's Best Family Showplace Corp. v. City of New York*, 536 F. Supp. 170, 174 (E.D.N.Y. 1982) (finding that video games, like pinball, chess, and baseball, are "pure entertainment with no informational

element," with "so little in the way of particularized form of expression" that they "cannot be fairly characterized as a form of speech protected by the First Amendment"); *City of Warren v. Walker*, 354 N.W.2d 312, 316-17 & n.3 (Mich. Ct. App. 1984) (upholding ordinance prohibiting minors from playing video games and rejecting argument "that video games are within the genre of entertainment forms protected by the First Amendment"), *appeal dismissed for want of a substantial federal question*, 474 U.S. 801 (1985); *Kaye v. Planning and Zoning Comm'n*, 472 A.2d 809, 812 (Conn. Super. Ct. 1983) (before entertainment is protected speech there must be "some element of information or some idea communicated," and video games are "clearly lacking" that element); *Marshfield Family Skateland, Inc. v. Town of Marshfield*, 450 N.E.2d 605, 610 (Mass. 1983) (concluding that "technologically advanced pinball machines" are not entitled to first amendment protection), *appeal dismissed for want of a substantial federal question*, 464 U.S. 987 (1983); *Caswell v. Licensing Comm'n*, 444 N.E.2d 922, 926-27 (Mass. 1983) (rejecting contention that video games are similar to television and motion pictures and concluding that "any communication or expression of ideas that occurs during the playing of a video game is purely inconsequential"); *Wen & Liz Realty Corp. v. Board of Zoning Appeals*, 463 N.Y.S.2d 493, 497 (N.Y. App. Div. 1983) (affirming decision holding that video games are not protected speech); *Tommy and Tina, Inc. v. Department of Consumer Affairs*, 459 N.Y.S.2d 220, 226-27 (N.Y. Sup. Ct. 1983) ("[n]o information is imparted to the user nor is any idea being

communicated" by video games), *aff'd* 464 N.Y.S.2d 132 (N.Y. App. Div. 1983), *aff'd* 464 N.E.2d 988 (N.Y. 1984); *City of St. Louis v. Kiely*, 652 S.W.2d 694, 697 (Mo. Ct. App. 1983) (following *America's Best* decision in finding video games are not protected expression); *but see Aladdin's Castle, Inc. v. City of Mesquite*, 630 F.2d 1029, 1038-39 (5th Cir. 1980) (finding ordinance prohibiting playing of video games by those under seventeen to violate due process and equal protection clauses), *rev'd* 455 U.S. 283 (1982), *on remand* 713 F.2d 137 (5th Cir. 1983). This Court in *Rothner v. City of Chicago*, 929 F.2d 297, 302-03 (7th Cir. 1991) declined to decide whether all video games are protected by the First Amendment. And Chief Judge Posner has suggested that video games are outside the boundaries of First Amendment protection. *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1098-99 (7th Cir. 1990) (Posner, J., concurring), *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

In any event, the Court need not decide whether all video games in all contexts are outside the First Amendment's reach; the Ordinance regulates only certain games and in a specific context. We recognize that it is possible to create video games that, when played, constitute protected expression. But games of that sort are not covered by the Ordinance for three reasons.

First, by definition, the Ordinance is confined to games that "lack[] serious literary, artistic, political or scientific value as a whole for persons under the age of eighteen (18) years." Sec. 831-1. On its face, the Ordinance leaves untouched video

games that contain as a whole any serious expression. This provision puts to rest the Industry's claim that the Ordinance "censor[s] constitutionally protected expression because the City finds the ideas expressed therein offensive." Brief at 15. If a video game actually expresses serious ideas, the game is not regulated.

Secondly, as the Supreme Court has long recognized, not all activity that contains elements of expression is protected speech. "It is possible to find some kernel of expression in almost every activity a person undertakes -- for example, walking down the street or meeting one's friends at a shopping mall -- but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). *Cf. United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."). Whether an activity, such as a minor's playing of a video game, is protected expression turns on the activity's context and circumstances. *See Spence v. Washington*, 418 U.S. 405, 409-10 (1974) ("[T]he context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol."). To constitute protected speech, expressive activity must "convey a particularized message . . . and in the surrounding circumstances the likelihood [must be] great that the message would be understood by those who viewed it." *Id.* at 411.

For example, social dancing is not protected expression; ballet is. *See Dallas*, 490 U.S. at 24-25. "Casual chit-chat" is not protected expression; political speech is. *Swank v. Smart*, 898 F.2d 1247, 1250-51 (7th Cir. 1990). Sleeping in a tent in one's back yard is not protected expression; sleeping in a tent in Lafayette Park to protest against homelessness is. *Cf. Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Burning a flag to commit arson is not protected expression; burning a flag to protest against the government is. *See Texas v. Johnson*, 491 U.S. 397, 406 (1989). The display of a urinal in a men's restroom is not protected expression; the display of a urinal by Marcel Duchamp at the Exhibition of Independent Painters in New York in 1917 is. *See* Robert Post, *Recuperating First Amendment Doctrine*, 47 Stan. L. Rev. 1249, 1253-54 (1995). And so on. In each case, the context of an activity determines whether it is protected expression.

Here too, when played as games, the regulated video games' functional aspects overwhelm the artistic input. The regulated games are merely technologically advanced versions of a shooting gallery game, pinball, or any number of other games. That artists and musicians contribute to the creation of the regulated video games -- a fact on which the Industry hangs its hat -- does not invariably convert the playing of the games into protected speech.

It is certainly true that artistic talent went into some of the graphics and themes that make up the regulated video games. But the same is true of cars and

buildings. The design of cars and buildings begins with artists' drawings. Cars and buildings are often intended to evoke specific themes, emotions or ideas. And like the creation of video games, the creation of cars and buildings requires a combination of artistry, engineering, technology and hardware. Cars and buildings, however, are not speech. Ford cannot stop putting bumpers on its cars by claiming a First Amendment right for its artists to design cars as they see fit. In the context that they are used, the functional aspects of cars and buildings drown out their artistic or expressive elements.

Similarly, shooting gallery games at a local fair feature distinct themes, music, artistically created backgrounds and stylized targets of many stripes and colors, such as humans, aliens, animals or objects. But shooting galleries are not speech. Under the Industry's logic, even poker would be protected expression. Poker uses playing cards that are created by artists. Many poker games have themes. Poker requires verbal communication. Yet it cannot seriously be suggested that poker is speech.

Thus, considerable artistry may well have been needed to create "Silent Scope 2" (one of the regulated games the City demonstrated in court at the hearing below). But ultimately, it is a game in which a player shoots a simulated gun at human images on the screen. If the player hits the human targets, he scores points. If the player hits the human targets in the head, he scores more points. As the district court found, "[t]he game amounts to electronic target practice on images of people." R-18. Artistic or not, the targets are just targets. Shooting -- not expression -- is the point of

the game. "[T]he presence of expression in some broader mosaic does not result in the entire mosaic being treated as 'speech.'" *Universal City Studios, Inc. v. Reimerdes,* 111 F. Supp. 2d 294, 328 n.192 (S.D.N.Y. 2000).

That the regulated video games are presented electronically and viewed on a monitor cannot dictate that all games are necessarily protected expression. "Normally, although not always, the medium in which experience is encoded is irrelevant to its expressive character and social consequences. The pitter-patter of raindrops does not become expressive activity by being recorded, and a recording of Beethoven's Ninth Symphony is not entitled to more constitutional protection than the live performance from which the recording was made." *Miller v. Civil City of South Bend*, 904 F.2d at 1099 (Posner, J., concurring). Indeed, video game versions of pinball and poker exist, but these games are not transformed into protected expression merely because they are offered in a different medium. A video-game becomes speech only if it is sufficiently expressive, not because it is comprised of computer code.

The third reason the regulated video games are not protected expression is that a depiction of graphic violence itself is not expression; it is a means of expression. *See New York v. Ferber*, 458 U.S. 747, 763-63 (1982). The Ordinance does not regulate any particular message about violence. The Ordinance regulates a minor's playing of a game that depicts discrete acts of violence, namely certain acts of "amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or

disfiguration." Sec. 831-1 (definition of "Graphic violence"). As Justice O'Connor recently explained: "Being 'in a state of nudity' is not an inherently expressive condition." *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382, 1391 (2000) (plurality). Like nudity, dismemberment is not inherently expressive. Dismemberment may be used to express a message. But "limiting one particular means of expressing the kind of . . . message being disseminated" does not create "a complete ban on expression." *Id.* at 1393. "[T]o define what is being banned as the 'message' is to assume the conclusion. . . . Although there may be cases in which banning the means of expression so interferes with the message that it essentially bans the message, that is not the case here." *Id.* at 1393. Nor does the regulation of realistic *depictions* transform a mere means of expression into expression. In upholding a ban on non-obscene depictions of children performing sex acts, the Supreme Court explained there was not "any question here of censoring a particular literary theme or portrayal of sexual activity." *Ferber*, 458 U.S. at 763.[4] The same is true for the Ordinance; the limited regulation of depictions of

[4] The majority of circuits to address the question have found that *Ferber*'s rationale extends to "regulation of sexual materials that appear to be of children but did not, in fact, involve the use of live children in their production" because such depictions also have "little, if any, social value." *United States v. Hilton*, 167 F.3d 61, 73 (1st Cir. 1999), *cert. denied*,120 S. Ct. 115 (1999). *See also United States v. Mento*, 99-4813, 2000 WL 1648878, at *4 (4th Cir. Nov. 3, 2000) (included at A-129); *United States v. Acheson*, 195 F.3d 645, 650-52 (11th Cir. 1999); *but see Free Speech Coalition v. Reno*, 198 F.3d 1083, 1092 (9th Cir. 1999).

"graphic violence" is not a ban on any message that the games may attempt to express, merely a regulation of the means of expression. *See Ferber*, 458 U.S. at 763.

Nor is it relevant that the Ordinance restricts unaccompanied minors not only from playing a regulated video game but also from watching others play it. If a regulated game is not protected speech to the person playing it, the game is also not speech to a minor watching others play it.

Finally, the district court's opinion and the evidence on this issue merit comment. The court found that "at least some video games are expression entitled to First Amendment protection." R-2. The district court did not find, however, that any of the video games regulated by the Ordinance are protected speech. If anything, the district court strongly suggested that the regulated games the City demonstrated to the court were not expressive. The court explained that it "has no difficulty determining that any speech elements of 'Silent Scope 2,' 'The House of the Dead 2,' and several of the other games described in the record are relatively inconsequential -- perhaps even so inconsequential as to remove the game from the protection of the First Amendment." R-18-19. Moreover, the Industry did not attempt to rebut the City's evidence regarding regulated games. Instead, the Industry focused on describing the "Gauntlet" games. Tr. at 8-26. But apart from any issue of whether these games are expressive when played, there is nothing in the record to indicate that these games contain depictions of "realistic

serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfiguration," Sec. 831-1 (definition of "Graphic violence"), such that the games would fall within the Ordinance's threshold requirements. The only record is to the contrary. According to the industry ratings, Gauntlet Legends is rated "Animated Violence Mild." A-77. The raters determined the games not to include realistic serious violence to human-like figures. *Id.* at 1. Therefore, there is nothing in the opinion or the record below that supports a finding that there are any regulated video games that are sufficiently expressive to warrant First Amendment protection. The Industry's First Amendment challenge to the Ordinance fails.

II. EVEN IF SPEECH, THE REGULATED GAMES ARE UNPROTECTED OBSCENITY AS TO MINORS.

Even if video games are speech, the Industry's challenge still fails because the graphically violent and sexually explicit games the Ordinance regulates are unprotected obscenity as to minors. The district court correctly found that the City may regulate the games -- even if they are protected speech -- without the need to satisfy strict scrutiny. *See Ginsberg v. New York*, 390 U.S. 629, 635 (1968). As the district court explained, "[i]t 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." R-73.

A. Under the Doctrine of Variable Obscenity, the Graphically Violent and Sexually Explicit Games Regulated by the Ordinance Are Obscene for Minors.

1. *Ginsberg* Controls the Constitutionality of the Ordinance.

Ginsberg recognized that materials that are not obscene for adults may nevertheless be obscene for minors. *Ginsberg*, 390 U.S. at 637. Under *Ginsberg*'s principle of variable obscenity, the definition of obscenity for minors is far broader than the definition of obscenity for adults. Observing this principle, the Supreme Court in *Ginsberg* upheld a New York statute that banned distribution to minors of "girlie" picture magazines that were not obscene for adults. *Id.* at 634. As Justice Brennan, writing for the Court, explained,

> (M)aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because 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 to children of books recognized to be suitable for adults.

Id. at 636 (alteration in original) (citation omitted).

The Court stressed that because the legislature had found the material to be harmful to minors, the legislature's decision to restrict minors' access to the material was justified by two interests. First, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their child is basic in the structure of our society. . . . The legislature could properly conclude that parents are entitled to the support of laws designed to aid the discharge of that responsibility." *Id.* at 639. Secondly, the Court found that the "State also has an independent interest in the well-being of its youth." *Id.* at 640. *Ginsberg* observed that the Court's precedents had "recognized that the State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuse' which might prevent their 'growth into free and independent well-developed men and citizens.'" *Id.* at 640-41 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944)).

The Court then turned to whether the legislature was rational in concluding that children's exposure to the material was, as the legislature put it, "'a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state.'" *Id.* at 641 (quoting Sec. 484-e of the New York Penal Law). The Court found that the legislature need not verify its conclusion scientifically. Rather, because the material was defined as obscene for minors, it was sufficient that the legislature's judgment that the material was harmful to children was "not irrational." *Id.*

> It is very doubtful that this finding expresses an accepted scientific fact. But obscenity is not protected expression and may be suppressed without a showing of the circumstances which lie behind the phrase "clear and present danger" in its application to protected speech. To sustain state power to exclude material defined as obscenity by [sec.] 484-h requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors . . . . [T]he growing consensus of commentators is that "while these studies all agree that a causal link has not been demonstrated, they are equally agreed that a causal link has not been disproved either." We do not demand of legislatures "scientifically certain criteria of legislation." We therefore cannot say that sec. 484-h, in defining the obscenity of material on the basis of its appeal to minors under 17, has no rational relation to the objective of safeguarding such minors from harm.

Id. at 641-43 (citations omitted). Finally, the Court found as additional support for its holding that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children." *Id*. at 639.

As the district court found, *Ginsberg*'s teachings neatly apply to the Ordinance here. First, as in *Ginsberg*, the City-County Council 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 Council 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 total ban on children's access to the games; parents are free to allow their children to play regulated games. Further, the Ordinance does not deny adults access to any video games. Lastly, the Council was not unreasonable in concluding that the regulated games are, in fact, harmful to minors. The Council 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 Council fairly concluded that the body of evidence points decidedly one way: parents and public officials have profoundly sound reasons to be concerned about children's unlimited access to graphically violent and sexually explicit video games. 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.*, 120 S. Ct. 1382, 1397 (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.").

2. As a Matter of Precedent, History and Policy, the Regulated Games Are Obscene as to Minors.

Nothing in *Ginsberg*'s analysis is peculiar to sexual content to the exclusion of graphic violence. As a matter of precedent, history, and policy, *Ginsberg's*

expanded definition of obscenity as to minors is broad enough to cover the hard-core graphic violence the Ordinance regulates as to minors.

Ginsberg relied on *Roth v. United States*, 354 U.S. 476 (1957), and its progeny for the principle, now well established, that "[o]bscenity is not within the area of protected speech or press." *Ginsberg*, 390 U.S. at 635. *Roth* explained, first, that historically obscenity was never intended to be protected by the First Amendment. 354 U.S. at 482-83. In light of *Roth*'s emphasis on history to locate the boundaries of obscenity, the hard-core graphic violence regulated by the Ordinance plainly falls within the broader definition of obscenity for minors.

a. Based on History, The Regulated Games Are Obscenity As to Minors.

Etymologically and historically, the definition of obscenity has always encompassed more than sexual activity. "Obscene," according to scholars, has three possible derivations. One is from the Greek "ob caenum," which means "on account of filth" or just "filth." The second and third derivations flow from the Greek "ab scaena," meaning "off the stage." "Ab scaena" may refer either to "not to be openly shown on the stage of life" or, alternatively, "off the theatrical stage." Kevin W. Saunders, *Violence as Obscenity* 67 (1996). As Professor Saunders explains, each of these derivations encompasses the notion that both sex and violence could be obscene. *Id.* at 68-75. In

fact, the ancient Greeks in their theater were more tolerant of explicit sex than of depictions of violence. *Id.* at 72-75.

In 1773, contemporaneous with the Framers' adoption of the First Amendment, Samuel Johnson defined obscenity as "Immodest; not agreeable, to chastity of mind; causing lewd ideas[;] Offensive; disgusting[;] Inauspicious, ill omened." Samuel Johnson, *A Dictionary of the English Language* (4th ed. 1773). Similarly, the *Oxford English Dictionary* defines "obscene" as: "Offensive to the senses, or to taste or refinement; disgusting, repulsive, filthy, foul, abominable, loathsome." X *Oxford English Dictionary* 656 (2d ed. 1989). These definitions easily encompass the hard-core violence covered by the Ordinance.

Legally, too, the definition of obscenity often has encompassed violence. For instance, in 1884, New York enacted a statute that regulated as "obscene" materials depicting "pictures and stories of deeds of bloodshed, lust or crime;" many other states, including Indiana, soon passed similarly worded statutes. Saunders, *supra* at 113-14 (citing 1884 N.Y. Laws 464-65); *id.* at 114-18. Indiana's statute, enacted in 1895, classified violent and sexual material unprotected in the same breath; it banned the distribution of "any paper, book, or periodical, the chief feature or characteristic of which is the record of commission of crime, or to display by cut or illustration of crimes committed, or the acts or pictures of criminals, desperadoes, or of men or women in

lewd and unbecoming positions or improper dress." *Id.* at 117 (citing 1895 Ind. Acts 230). Many states also enacted obscenity statutes that banned the distribution of sexual and violent materials only to minors. *Id.* at 114-17. Admittedly, many of these statutes would not survive modern First Amendment scrutiny with respect to adults or children. But in light of *Roth*'s eye toward history in crafting the obscenity doctrine for adults, these earlier proscriptions on speech show that, at least as to children, sex can stake no superior claim over hard-core graphic violence for inclusion within the definition of obscenity.

b. Based On Modern Obscenity Standards, The Regulated Games Are Obscene As To Minors.

The Supreme Court's modern standards for obscenity as to adults also reinforce the conclusion that the regulated video games are obscene as to minors. *Roth* found that obscenity is unprotected because it is "without redeeming social importance." *Roth*, 354 U.S. at 484. As Justice Brennan explained, "'[i]t has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Id.* at 485 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)). Animated by these principles, the Court in *Miller v. California*, 413 U.S. 15 (1973), refined the definition of obscenity for adults. That test is:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (quotations and citations omitted).

Consistent with *Roth* and *Miller*, the Ordinance regulates only games that are "without redeeming social importance." *Roth*, 354 U.S. at 484. The Ordinance regulates only graphically violent games that "lack[] serious literary, artistic, political or scientific value as a whole to persons under the age of eighteen (18) years." Sec. 831-1.

Nor is there a constitutionally meaningful difference between a minor's "prurient interest in sex" and a minor's "morbid interest in violence," or between "sexual conduct" that the community views as "patently offensive" for minors and "graphic violence" that the community views as "patently offensive" for minors. *See Miller*, 413 U.S. at 24; Sec. 831-1. Underlying *Ginsberg*'s conclusion that the sexual material was obscene for minors (and thus prurient and patently offensive) was that the material was believed to be "a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state." *Ginsberg*, 390 U.S. at 641 (quotation omitted). The Court acknowledged, however, that there was little scientific proof to back up this concern -- a fact that remains true today. *Id.* *See also*

Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 Vand. L. Rev. 427, 505, 518 (2000). By contrast, there is considerable credible scientific evidence that the playing of violent video games is in fact harmful to children. Ross, *supra* at 505. ("In contrast to the dearth of support for the notion that sexually explicit speech is harmful, substantial social science research conducted over several decades lends support to the allegation that violent speech may lead some children to violent attitudes or actions."). On this prong of *Roth*'s and *Miller*'s analysis, graphic violence presents a stronger case than sex for being obscene as to minors.

In addition, the community considers hard-core graphic violence to be morbid and offensive to minors in the same way that sexual obscenity is considered prurient and offensive to minors. Neither sexual obscenity nor violent obscenity appeals predominately to a minor's mental or cognitive processes. Instead, sexual obscenity and violent obscenity create a physical or instinctual response. *See* Frederick Schauer, *Speech and "Speech" -- Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 Geo. L.J. 899, 925 (1979) ("The essence of the exclusion of hardcore pornography from the First Amendment is not that it has a physical effect, *but that it has nothing else*.") (emphasis in original); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 Duke L.J. 589, 602-608 (1986). And like

sexual obscenity, violent obscenity works to dehumanize the objects of the violence. "[O]bscene literature is that literature which invites and stimulates the reader to adopt the obscene posture toward human existence -- to engage in the reduction of man's values, functions and ends to the animal or sub-human level." Harry M. Clor, *Obscenity and Public Morality: Censorship in a Liberal Society* 230 (1969). For that reason, violent obscenity, like sexual obscenity, has no First Amendment value to minors. When directed toward minors, hard-core graphic violence is paradigmatic "low value speech." *See* Cass R. Sunstein, *Democracy and the Problem of Free Speech* 8-11 (1993); s*ee also* Kevin W. Saunders, *Media Violence and the Obscenity Exception to the First Amendment,* 3 Wm. & Mary Bill Rts. J. 107, 165-66 (1994). Because it appeals to the non-cognitive, graphic violence cannot be countered by more speech. Consequently, its harmful effects on children cannot be corrected by the marketplace of ideas. It is one thing to protect adults' access to speech that appeals to the non-cognitive. *See American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). But it is quite another to permit children unrestricted access to harmful, non-cognitive speech that cannot easily be countered. As Justice Stewart explained, "I think a State may permissibly determine that, at least in some precisely delineated areas, a child -- like someone in a captive audience -- is not possessed of that full capacity for individual choice which is the presupposition of the First Amendment guarantees. It is

only upon such a premise, I should suppose, that a State may deprive children of other rights -- the right to marry, for example, or the right to vote -- deprivations that would be constitutionally intolerable for adults." *Ginsberg*, 390 U.S. at 649-50 (Stewart, J., concurring).

That the Supreme Court has included "excretory" matters within the definition of obscenity as to adults lends further support for including graphic violence within the definition of obscenity as to minors. *See Miller*, 413 U.S. at 25; *Pope v. Illinois*, 481 U.S. 497, 501 n.4 (1987). Even more than sexual matters, depictions of excretory matters are patently offensive and morbid in the same way as are depictions of graphic violence. Both are "[o]ffensive to the senses, or to taste or refinement; disgusting, repulsive, filthy, foul, abominable, loathsome." X *Oxford English Dictionary* 656 (2d ed. 1989). Both involve matters that are unquestionably "objectionable" to public display. *Ginsberg*, 390 U.S. at 636 (citation omitted). Indeed, graphic violence is closely related to excretory matters because realistic depictions of graphic violence often result in excretory depictions: the disemboweled, decapitated or dismembered victim will release bodily fluids. He will "spill his guts."

If excretory and sexual matters are obscene for minors, then graphic violence must be obscene for minors as well. There is no principled way to distinguish between the government's recognized interest in restricting minors' access to sexual and

excretory material and the government's equally compelling interest in restricting minor's access to graphically violent video games. Thus, based on Indianapolis's community standards, the variable definition of obscenity for minors is broad enough to include the graphic violence regulated by the Ordinance.

B. No Court Has Held that the Government Is Prohibited from Restricting Minors' Access to Graphic Violence that Is Harmful to Minors.

The Industry asserts that the Supreme Court, this Court and other courts have held that obscenity is strictly limited to sexual conduct and cannot include violent obscenity as to minors. Brief at 16-24. Not so.

Putting aside for the moment that the definition of obscenity for minors is different than that for adults, the Industry's description of obscenity for adults is itself materially inaccurate. Adult obscenity includes not only sexual matters, but also excretory matters that do not necessarily have anything to do with sex. *See Miller*, 413 U.S. at 25; *see also Pope*, 481 U.S. at 501 n.4.

More importantly, the Supreme Court has not held that obscenity for minors is limited to sexual matters. *Winters v. New York*, 333 U.S. 507 (1948), involved a complete ban -- to adults and minors -- on materials "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime." *Id.* at 508. The Court invalidated the statute on vagueness grounds. *Id.* at 519-20. The Court did not hold, or even hint, that graphic

violence cannot be obscene as to minors. The other Supreme Court cases the Industry cites did not involve regulations of violence of any sort, much less the regulation of minors' access to violence. *See* Brief at 17-20, citing *Roth*, 354 U.S. 476; *Memoirs v. Massachusetts*, 383 U.S 413, 418 (1966); *Cohen v. California*, 403 U.S. 15, 20 (1971); *Miller*, 413 U.S. 15; *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 n.10 (1975). These cases lend no support to the Industry's theory. "It is of course contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad language in cases where the issue was not presented or even envisioned." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386-87 n.5 (1992).

For much the same reason, the Industry is equally incorrect when it asserts that this Court's opinions in *United States v. Thoma*, 726 F.2d 1191 (7th Cir. 1984), *cert. denied*, 467 U.S. 1228 (1984), and *Cinecom Theaters Midwest States, Inc. v. City of Fort Wayne*, 473 F.2d 1297 (7th Cir. 1973) are "dispositive of this appeal." Brief at 21. *Thoma* did not address whether graphic violence may be obscene as to minors. *Thoma* involved an adult criminal defendant's appeal of his conviction for producing and selling sexually obscene materials. The Industry quotes raw dictum from *Thoma* and then selectively edits the sentence to alter its basic point. The sentence from *Thoma* that the Industry has spliced merely states that expert testimony is necessary in certain obscenity prosecutions involving materials aimed at "bizarre deviant groups" -- a point of no

relevance here. *See Thoma*, 726 F.2d at 1200. Nor did *Cinecom* remotely involve any issue whether graphic violence may be obscene as to minors. *Cinecom* unremarkably struck down a complete ban -- for adults and children -- on drive-in movie theaters' showing nudity that was not obscene for either adults or children. *Cinecom*, 473 F.2d at 1301. *Cinecom* did not address, much less adopt, the proposition the Industry advocates.

The decisions from sister circuits that the Industry cites are likewise unimpressive. *Eclipse Enterprises, Inc. v. Gulotta*, 134 F.3d 63 (2nd Cir. 1997), did not find that obscenity as to minors is strictly limited to sexual matters. *Eclipse* involved a statute that completely banned to minors the distribution of trading cards that presented stories and pictures about famous crimes, such as the assassination of President John F. Kennedy and crimes associated with Prohibition. *Id.* at 64. The court correctly found that the statute, in stark contrast to the Ordinance here, completely banned core protected expression. *Id.* at 66. Notably, while striking down the statute as not narrowly tailored, the court stressed it did "not find it necessary to determine whether carefully delimited and properly tailored restrictions on distribution of non-obscene but otherwise harmful speech to minors, especially younger minors, can ever pass the strict scrutiny test." *Id.* at 67. *Eclipse* hardly supports the notion that the regulated video games are not obscenity as to minors.

Equally off the mark is *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992). There, the court struck down on vagueness grounds a statute prohibiting minors' rental of violent movies on video. As in *Eclipse*, *Video Software* declined to decide "whether states can legitimately proscribe dissemination of material depicting violence to minors." *Id.* at 689. And *Interstate Circuit, Inc. v. City of Dallas*, 366 F.2d 590 (5th Cir. 1966), *vacated*, 391 U.S. 53 (1968), is not even good law, having been vacated by the Supreme Court. Moreover, unlike here, that case involved a hopelessly broad and vague ban on minors' access to movies "[d]escribing or portraying brutality, criminal violence or depravity in such manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons." *Id.* at 592; *see Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 682 (1968) (finding ordinance vague). None of these cases supports the Industry's theory that the regulated games are not obscene as to minors. The City may regulate this material without the need to satisfy strict scrutiny.

C. A Child Does Not Have A Constitutional Right to View Graphically Violent Video Games without His or Her Parent's Consent.

Ultimately, the Industry is in the uncomfortable -- and indefensible -- position of having to claim that a seventeen-year-old child, or indeed a seven-year-old child, has a First Amendment right to play graphically violent video games in public arcades without his parent's consent. The Supreme Court has often recognized, in a

variety of contexts, 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*, 321 U.S. at 170. 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 children's expression 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. If a child does not have a constitutional right to sell religious literature in public *with his parent's consent*, surely he does not have a right to play violent video games in public *without his parent's consent*. *See Prince*, 321 U.S. at 170. 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 636.

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 Industry 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). Brief at 19. *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 this right extends only so long as 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. Taken together, *Tinker* and *Erznoznik* allow minors to engage in political speech and to view pictures of a baby's nude buttock and bare-chested women in *National Geographic* magazine. But those rights fall far short of the asserted limitless right of a child to access video games that are harmful to minors.

D. The Industry's Slippery-Slope Argument Is Unpersuasive.

The Industry contends that the district court's reasoning "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." Brief at 21-22. This allegation is unfounded.

Six factors present here serve to tightly cabin the district court's holding and to underscore the Ordinance's constitutionality.

First, the Ordinance places no restrictions on adults' access to regulated games. Consequently, the Ordinance raises none of the concerns of other regulatory efforts (such as the Communications Decency Act) that are aimed at preventing harm to minors, but that end up restricting adults' access to protected expression. This is not a case where, in the name of protecting children, adults' First Amendment rights are infringed.

Secondly, though we assume for purposes of this argument that the games are speech, the granite fact remains that the regulated games contain, at most, only the slightest elements of expression. The functional, non-speech elements of the regulated games overwhelm any expressive elements that might exist under the surface. *Cf. United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech elements can justify incidental limitations on First Amendment freedoms.").

Thirdly, any expressive elements of the regulated games are far removed from core speech protected by the First Amendment. The regulated games, by definition, communicate no serious ideas, information or definable message. As with

nude dancing, the regulated games at best are at "the outer perimeters of the First Amendment, though . . . only marginally so." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991).

Fourthly, the Ordinance does not engage in viewpoint discrimination, nor does it prefer one particular message or ideology over another. *Cf. R.A.V.*, 505 U.S. at 391-92. Although the Ordinance's triggering mechanism, as a technical matter, may be content-based, the actual regulatory provisions are more closely akin to time, place and manner restrictions. The Ordinance allows all video games, regardless of content, to be played in Indianapolis; the Ordinance merely regulates the manner (i.e., with the consent of a parent) and the place (i.e., separated by 10 feet and partitioned from other games) in which minors may be exposed to graphically violent and sexually explicit games. *Cf. City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46 (1986); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63 (1976).

Fifthly, the Ordinance's *Miller*-like standards also sharply diminish its scope. Contrary to the Industry's assertions, it is not sufficient that the government conclude that material may be harmful to minors. The material also must be patently offensive, appeal to a child's morbid interest in violence and lack serious literary, artistic, scientific or political value. These standards erect a high barrier for the government to regulate speech.

Finally, the Ordinance merely imposes civil fines for violations. State law prohibits the City-County Council from enacting criminal penalties. Ind. Code Ann. § 36-1-3-8(8), (9), (10)(B) (West 1997).

These six factors show that the City is not moving down the path of broadly censoring unpopular ideas or expression based on nothing more than an unsupported judgment that the material is harmful to minors. It would be perhaps impossible to draft a statute embodying these six factors that would regulate the Internet, books, art, or movies that are otherwise protected. For one, it would be exceedingly difficult for such a regulation not to restrict adults' access. Also, books, art, or movies, by their nature, possess expressive content that is absent from the regulated games. Any effort to regulate anti-religious, anti-Semitic speech or other forms of offensive speech (examples posed by the Industry) also would not be viewpoint neutral. *See R.A.V.*, 505 U.S. at 385-89. Nor would any such effort likely withstand the scrutiny of the *Miller*-like standards. Moreover, the existence here of a substantial body of scientific evidence supporting the Ordinance acts as an additional limitation. In short, the Ordinance does not justify the cries of censorship voiced by the Industry and amici. The district court correctly rejected the Industry's slippery-slope argument.

III. THE ORDINANCE SATISFIES STRICT SCRUTINY.

Even assuming the regulated video games contain protected speech, the Ordinance is still constitutional: the City's interests in passing the Ordinance are compelling and the Ordinance is carefully calibrated to further those interests. *See Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality) (government's content-based restriction on protected speech upheld because government interests are compelling and its means were narrowly tailored).

A. The City Has a Compelling Interest in Ensuring that Parents Decide Whether Their Children Are Exposed to Harmful Video Games.

The City's predominant purpose in passing the Ordinance was to ensure that a parent decides whether, or to what extent, his or her child is exposed to graphically violent or sexually explicit video games that are harmful to minors located in arcades. *See* Ordinance (Preamble). This interest is uniquely compelling. "It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling." *Ferber*, 458 U.S. at 756-57 (internal citation omitted). Of particular relevance here, the Supreme Court has consistently recognized that the government has a compelling interest in "protecting children from material that is harmful to them, even if not obscene by adult standards." *ACLU v. Reno*, 217 F.3d 162, 173 (3d Cir. 2000) (citing *Ginsberg*, 390 U.S. at 639-40). As *Ginsberg* emphasized, "constitutional interpretation has consistently recognized that

the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. . . . The legislature could properly conclude that parents . . . who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." 390 U.S. at 639.

The City has valid reasons to be concerned about children's exposure to the regulated games. As we explained earlier, *infra* pp. 1-4, the Mayor and the City-County Council considered substantial evidence on the potentially harmful effects to children from exposure to graphically violent video games. Further validating the City's concerns, the nation's leading medical organizations, within days of the Mayor's signing the Ordinance into law, issued a joint statement alerting that "well over 1000 studies . . . point overwhelmingly to a causal connection between media violence and aggressive behavior" and suggesting that the negative impact of violent interactive media "may be significantly more severe than that wrought by television, movies, or music."[5] The video game industry's own formal policy urges parents to accompany their children to arcades and instructs employees to discourage unaccompanied children from playing these games. Ex. P-57 at 8. The Industry and the City agree: adults may be capable of

[5] R-84-85, Joint Statement on the Impact of Entertainment Violence on Children, Congressional Public Health Summit, July 26, 2000.

evaluating for themselves the risk of harm posed by the regulated games, but children are not.

B. The Ordinance Uses the Least Restrictive Means to Ensure that Only Those Children Who Have a Parent's Consent Are Exposed to the Regulated Games.

The Ordinance is narrowly tailored to further the City's interest in ensuring that parents decide whether, or to what extent, their children should be exposed to harmful video games that are located in public businesses. First, the Ordinance's scope is extremely narrow. The Ordinance does not regulate all video games, but only those games that contain hard-core graphic violence and sexually explicit material. Thus, the Ordinance carefully targets harmful games.

Secondly, the Ordinance does not limit adults' access to any video games. The Ordinance therefore poses none of the problems the Court found with the government's efforts to regulate indecent speech in *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878, 1886-88 (2000) (regulation of "signal bleed" of indecent speech invalid because the regulation prohibited adults' 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 adults' access to protected speech), and *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). The only effect on adults' access is that the regulated games will be a few feet away from other games and in a different room or behind a partition -- an effect that is of no constitutional moment. *See Matney v. County of Kenosha*, 86 F.3d 692, 697 (7th Cir. 1996) (upholding open booth requirement for individual "adult entertainment" viewing rooms, noting that nothing in the regulation "limits the availability of individual booths as an avenue for watching adult entertainment"); *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389, 1394-96 (8th Cir. 1986). *Cf. Burson*, 504 U.S. at 210.

Thirdly, the Ordinance is not a complete ban even as to minors. Rather, the Ordinance sensibly requires a parent to grant consent before a minor has unfettered access to the harmful games. The Ordinance therefore precisely hits its target of ensuring that parents decide whether these games are appropriate for their children.

IV. THE ORDINANCE IS NOT UNCONSTITUTIONALLY VAGUE.

The Ordinance is not vague. Each term the Industry attacks either has been upheld in the indecency context or is employed in the Industry's own rating system for these games. There is no reason that long-used terms such as "morbid interest," "predominantly appeals," and "patently offensive" should have any less meaning in the context of video-game violence than in the context of sexual obscenity. Brief at 36-42. Moreover, because the Ordinance merely imposes civil fines, rather than criminal

penalties, the City has greater constitutional leeway in pursuing its regulatory goals. *See Levas and Levas v. Village of Antioch,* 684 F.2d 446, 452 (7th Cir. 1982); *see also Gresham v. Peterson,* 225 F.3d 899, 908 (7th Cir. 2000).

The Supreme Court has repeatedly held that "the inability to define regulated materials with ultimate, god-like precision" is not sufficient to invalidate all regulation. *Miller v. California*, 413 U.S. 15, 28 (1973). The Ordinance is closely modeled on Indiana's indecency statute, Ind. Code Ann. § 35-49-2-2 (West 1998), which courts have been applying for decades. As the Court explained in *Roth v. United States,* 354 U.S. 476, 491-92 (1957), and reiterated in *Miller,* 413 U.S. at 27 n.10 (1973), the terms historically used in obscenity statutes are not, and need not be, precise:

> (T)he Constitution does not require impossible standards; all that is required is that the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . . . [and provides] boundaries sufficiently distinct for judges and juries to fairly administer the law . . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense.

Roth, 354 U.S. at 491-92 (alteration in original) (internal citations omitted). Not only have purveyors of sexually explicit material proven fully equipped to interpret the terms "morbid," "patently offensive," and "suitable material for minors," but the Industry has itself interpreted "human-like" and "bloodshed" in order to apply warning labels to its

games. A-75. These terms can be easily understood by ordinary people of reasonable intelligence.

The Industry's declarants provide no credible support for their contention that the Ordinance is vague. Indeed, the declarants' deposition testimony dramatically undercuts the assertion that operators "have no understanding" of the meaning of terms contained in definition of "harmful to minors" and are thus "forced to engage in self-censorship." Brief at 40. The declarants themselves displayed confidence in their ability to determine which games were covered. *See* A-95; A-96; A-98. They also testified either that they had not discussed the Ordinance with any operators, or more often, that operators were quite certain about which games were within the Ordinance's scope and had asked to have those games removed. *See* A-102-114; A-116-128. Not one of the declarants testified that an operator subject to the Ordinance was unable to determine its scope. On the contrary, the declarants' testimony demonstrates that Marion County operators, ordinary people of reasonable intelligence, easily understand the terms of the Ordinance.

A. The *Miller* Standards Provide Equal Guidance in the Contexts of Graphic Violence That Is Obscene as to Minors and of Sexually Explicit Material That Is Obscene as to Minors.

The Industry's vagueness argument primarily attacks terms in the Ordinance's definition of "harmful to minors" that (i) courts have upheld against vagueness challenges, (ii) are included in Indiana's indecency statute, Ind. Code § 35-49-2-2, and (iii) the Supreme Court explicitly prescribed in *Miller, Ginsberg,* and *Roth.* The Industry seeks to avoid this line of precedent with the unsupported contention that the *Miller* test, "by definition, works only in the context of sexual material because it was developed to address obscenity." Brief at 39. Granted, sexually explicit material was at issue in each of these cases. The Court has not, however, stated that *Miller's* teachings -- particularly for purposes of a vagueness analysis -- are applicable only in the context of sexual conduct.

Indeed, this argument is immediately undermined by the Court's use of the *Miller* standards outside the sexual context. If the Industry is correct, the *Miller* test must not provide sufficient guidance to avoid unconstitutional vagueness in the context of excretory material (which presumably does not "excite lustful thoughts" either healthy or unhealthy). But the *Miller, Roth,* and *Ginsberg* decisions explicitly prescribe *Miller*-like standards for the evaluation of excretory materials. *Miller,* 413 U.S. at 25; *Ginsberg v. New York,* 390 U.S. 629, 646 (1968); *Roth,* 354 U.S. 488 n.20 (1957). The

Court intended the *Miller* test to identify depictions that are obscene because they go "substantially beyond customary limits of candor." *Roth*, 354 U.S. at 488 n.20. For purposes of a vagueness analysis, there can be no plausible reason to disregard the Court's guidance.

1. "Predominantly Appeals to a Minor's Morbid Interest in Violence."

The Industry contends that "there is no objective criteria for discerning the meaning of the phrase 'morbid interest in violence,'" as opposed to the phrase "prurient interest." Brief at 39-40. To make this argument, they ignore that to even reach the *Miller*-like prongs, a game must first satisfy the Ordinance's threshold definition of "graphic violence" -- a requirement that immediately narrows the Ordinance's reach. More importantly, the term "morbid interest" has historically been a part of both the definition of obscenity and of the definition of "harmful to minors" in the variable obscenity context, chiefly as a way to clarify the term "prurient." In fact, the *Roth* footnote the Industry cites uses the term "morbid interest" to clarify and define the more obscure "prurient interest." Prurient interest, the Court explained, is "a shameful *or morbid interest* . . . [that] goes substantially beyond customary limits of candor in description or representation of such matters." *Roth,* 354 U.S. at 488 n.20 (emphasis added). *See also Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 498 (1985) (quoting *Roth*'s "shameful or morbid interest" in excluding material appealing to "normal, healthy sexual desires"); *Miller,* 413 U.S. at 16 n.1 (defining obscenity as material appealing to the "prurient interest, i.e. a shameful or morbid interest in nudity, sex, or excretion"); *Ginsberg,* 390 U.S. at 646 (upholding against a vagueness challenge a criminal statute defining as "harmful to minors" material that "predominantly appeals to the prurient,

shameful, or morbid interest of minors"). The Industry concedes that "prurient interest" would provide sufficient "objective criteria" to determine the scope of the Ordinance. Brief at 39-40. Precedent demonstrates that "morbid interest in violence" provides the Industry as much if not more guidance in this civil law as the Supreme Court has given distributors of sexual material in a criminal context.

Nor are the Industry's citations to the contrary persuasive. *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992) found the statute vague not because of the term "morbid interest in violence," but because the statute contained no definition whatsoever of violence. *Id.* at 689. The Ordinance, by contrast, includes an elaborate, definite and objective definition of graphic violence. *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 531-33 (Tenn. 1993), is inapplicable for the same reason; the court's decision rested solely on the vagueness of the circular definition of "excess violence." Brief at 38. Indeed, the plaintiffs did not even challenge the statute's definition of prurient interest, "a shameful or morbid interest in sex." *Davis-Kidd Booksellers,* 866 S.W.2d at 534.

2. "Patently Offensive with Respect to What Is Suitable Material for Minors."

The Industry apparently makes the same argument with regard to the Ordinance's regulation of graphic violence that is "patently offensive to prevailing standards in the adult community as a whole with respect to what is *suitable material* for

minors." Brief at 41. But like the term "morbid interest," distributors of sexual material have successfully interpreted this language for decades in the face of criminal penalties. *See Ginsberg*, 390 U.S. at 646; *see also* Ind. Code § 35-49-2-2.[6]

3. "Graphic Violence." The Industry also contends that, because Deputy Mayor Harris was unwilling to articulate a definition of bloodshed, it must be impossible for "ordinary persons of ordinary intelligence" to discern the meaning of the term. Brief at 41. The Industry made similar assertions regarding other elements of the definition of "graphic violence" in the district court. *See* R-72-73. As the district court noted, however, the terms used to define graphic violence are "reasonably precise" and objective. *Id.* Indeed, the Industry uses both "bloodshed" and "human-like" in its own categorizations of video games. A-75. And while one might "quibble at the margins" about "whether a human-like alien's green ooze counts as 'bloodshed,'" those are decisions best left to the Indiana courts. R-72-73. This is, after all, a facial challenge to the Ordinance. *See Gresham*, 225 F.3d at 908.

---

[6] The Industry also faults the Ordinance for separating the "patently offensive" prong from the definition of graphic violence. Brief at 40 n.12. The Indiana statute governing sexual material that is "harmful to minors," Ind. Code § 35-49-2-2, similarly separates the "patently offensive" prong from the regulated content. R-71-72. As the district court noted, the Indiana Supreme Court would construe the Ordinance to narrow this prong to reflect that the regulated depictions rather than the game as a whole are to be patently offensive. R-71-72.

B. The Appellants Misunderstand the Purpose of the *Miller*-Like Provisions.

The Industry's vagueness attack is rooted in a fundamental misunderstanding of the purpose and practical application of the *Miller* test. Before a game is even subject to the Ordinance's substantive provisions, the game must first fall within the Ordinance's threshhold definition of "graphic violence." The Ordinance concretely defines that term as "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." Sec. 831-1. This definition provides more than sufficient notice of the Ordinance's scope, and meets the *Miller* requirement that the regulated depictions of conduct "be specifically defined by the applicable state law, as written or authoritatively construed." *Miller*, 413 U.S. at 24.

The additional three prongs of the *Miller*-like test -- that the depictions be patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; that the game predominantly appeal to minors' morbid interest in violence, and that the game lack serious literary, artistic, political or scientific value as whole for minors -- were not intended to be independent factual criteria, as the Industry seems to understand them, but were designed to provide additional layers of protection to the purveyors of games containing depictions of

graphic violence. *See* R-69-71; *see also Reno v. ACLU,* 521 U.S. 844, 873 (1997) (characterizing *Miller* test as a "definition including three limitations"). These *Miller*-like standards give purveyors of graphically violent video games three opportunities to convince a fact finder or a judge that an individual game, despite its graphic violence, should be available to unaccompanied children. First, they may convince a fact finder either that the game does not predominantly appeal to minors' morbid interest in violence or that the graphic violence is not depicted in a way that is patently offensive to prevailing community standards with respect to what is suitable material for minors. Secondly, they may convince a judge that the game has serious literary, artistic, political or scientific value for minors. Finally, game purveyors are afforded a third layer of protection in appellate review of the determination below.

The standards provide a safety valve -- three separate safe harbors -- guarding against too broad a reach by the concrete definition of "graphic violence." Together they function to "limit the uncertain sweep of the obscenity definition," *Reno,* 521 U.S. at 873, and afford the Industry the same protection afforded to those who would furnish sexually explicit (but protected) materials to minors in Indiana. Through a judge or fact finder's careful evaluation of individual games that contain graphic violence, the *Miller* prongs that the Industry contests in fact afford sanctuary from the Ordinance's restrictions for some graphically violent games. Deputy Mayor Harris was

correct in refusing to prematurely circumscribe these individual legal and factual judgments by providing a definition of "morbid interest in violence" or "suitable for minors." Brief at 37, 41.

C. Any Provisions of the Ordinance that this Court Might Deem Vague Are Easily Susceptible to a Narrowing Interpretation.

In a very similar First Amendment facial challenge, this Court recently reemphasized that it will not hold even "a vague statute unconstitutional if a reasonable interpretation by a state court could render it constitutional in some application." *Gresham,* 225 F.3d at 908. The Court affirmed the denial of a preliminary injunction and dismissal of the complaint, noting that "[w]hile it is not a certainty that the state courts would adopt constitutional interpretations of the panhandling provisions, they are entitled to the opportunity to do so, and we will not interfere with that right." 225 F.3d at 909; *see also Erznoznik v. City of Jacksonville,* 422 U.S. 205, 216 (1975) (noting that a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts). Given the number of precedents interpreting the Ordinance's *Miller*-like prongs, and the precision of the definition of graphic violence, even assuming any provision of the Ordinance does not provide "a reasonable degree of clarity" to the Industry, *Gresham,* 225 F.3d at 907, that provision would be readily subject to a state court's narrowing construction.

CONCLUSION

The district court's Entry should be affirmed.

Respectfully submitted,

By _____

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, Indiana 46204

Christopher G. Scanlon
Matthew R. Gutwein
Catherine A. Meeker
Daniel R. Roy
BAKER & DANIELS
300 North Meridian Street
Suite 2700
Indianapolis, Indiana 46204
(317) 237-0300, (317) 237-1000 (Fax)

Counsel for Defendants-Appellees

CERTIFICATE OF TYPE-VOLUME LIMITATION

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and (C), I hereby certify that, based on the word count function of Corel® WordPerfect® version 8.0, the foregoing Brief of Appellees contains 13,763 words, excluding the Corporate Disclosure Statement, the Table of Contents, the Table of Authorities, this Certificate, the Certificate of Filing by Digital Media, and the Certificate of Service.

_____

CERTIFICATE OF FILING BY DIGITAL MEDIA

Pursuant to Circuit Rule 31(e), I hereby certify that a digital media copy of the foregoing Brief of Appellees is included herein on a 3 ½" diskette free from viruses. The electronic version of Appellees' brief is in PDF format.

_____

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2000, I caused two copies of the foregoing Brief of Appellees, two copies of Appellees' Supplemental Appendix, and one copy of the enclosed 3 ½" diskette bearing the electronic version of Appellees' brief in PDF format to be served upon the following by Federal Express:

Timothy F. Brown
David L. Kelleher
Evan S. Stolove
Arent Fox Kitner Plotkin & Kahn, PLLC
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339

and upon the following by hand delivery:

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

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

_____