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

REPLY BRIEF

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The First Amendment prevents government from proscribing speech because of its disapproval with the ideas conveyed. Content-based restrictions, therefore, are presumptively invalid and subject to the most rigorous judicial scrutiny. As a result, the Supreme Court declared only five months ago: "It is rare that a regulation restricting speech because of its content will ever be permissible." United States v. Playboy Entertainment Group, Inc., 120 S. Ct. 1878, 1889 (2000).

An exception to this constitutional protection exists for obscene material, which may be regulated with less judicial scrutiny. The instant case does not involve obscene material. Obscene material, for constitutional purposes, is limited to material that deals with sex. This express constitutional limitation was intentionally mandated by the Supreme Court to create a subset from material that might have traditionally been considered obscene. Miller v. California, 413 U.S. 15, 20 (1973). Only this

subset may be proscribed. Depictions of violence, unrelated to sex, are not within this subset and, therefore, are fully protected by the First Amendment.

In this case, the City of Indianapolis disregards this carefully crafted judicial definition of obscene material and seeks to overrule, sub silentio, nearly fifty years of First Amendment jurisprudence. The City treats all precedent involving obscenity as mere happenstance, and argues that because the issue of "violence" was not addressed directly in these cases, the door is open to the inclusion of depictions of violence in the definition of obscene material. The City rejects the limitations of Roth v. United States, Miller v. California, Cohen v. California, Reno v. ACLU and the precedents of this Court stating: "None of these decisions is even persuasive, much less controlling." Opp. Br. at 10. The City rejects the Second Circuit and Eighth Circuit's implementation of Supreme Court precedent as "unimpressive." Opp. Br. at 37. In point of fact, the Supreme Court decisions are controlling and Circuit Court recognition of that controlling authority is the proper judicial analysis. In Miller, the Supreme Court adopted a judicial definition of obscene material limited to material relating to sex, to the exclusion of all other material. That definition is controlling.

The Challenged Provisions of the Ordinance regulate non-obscene depictions of violence; thus, they are subject to a presumption of unconstitutionally and strict judicial scrutiny. Application of the proper standard of judicial review mandates the conclusion that the Challenged Provisions unconstitutionally invade protected expression and are invalid. Thus, the District Court's judgment must be overturned.

I. The Supreme Court Has Rejected The City's Historical And Etymological Approaches To The Definition Of Obscenity And Has Conclusively Precluded The Expansion Of The Judicial Meaning Of Obscene Materials Beyond Matters Relating To Sex.

The constitutional definition of obscene material is limited to material that deals with sex. This limitation has not occurred by happenstance. Rather, the Supreme Court has purposely crafted this outermost limit to this category of expression because of "the inherent dangers of undertaking to regulate any form of expression." Miller v. California, 413 U.S. at 23.

In Miller, which provides the judicial definition of obscene material that continues to this day, and controls the outcome of this appeal, the Supreme Court expressly rejected the definition of obscenity provided in the Oxford English Dictionary that the City now advocates, and explained that for constitutional purposes the Court has adopted a judicial definition. The Court, in crafting that definition, explained that the judicial definition of obscenity is not intended to mirror the traditional etymological definition of obscenity, stating:

> This Court has defined "obscene material" as "material which deals with sex in a manner appealing to prurient interest," Roth v. United States, supra, at 487, but the Roth definition does not reflect the precise meaning of "obscene" as traditionally used in the English language. Derived from the Latin obscaenus, ob, to, plus caenum, filth, "obscene" is defined in the Webster's Third New International Dictionary (Unabridged 1969) as: "la: disgusting to the senses ...." The Oxford English Definition (1933 ed.) gives a similar definition, "[o]ffensive to the senses ... disgusting, repulsive, filthy, foul ...."
>
> The material we are discussing in this case is more accurately defined as "pornography" or "pornographic material." "Pornography" ... now means "1: a description of prostitutes or prostitution 2: a depiction (as in writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement." Pornographic material which is obscene forms a sub-group of all "obscene" expression, but not the whole.... We note, therefore, that the words "obscene material," as used in this case, have a specific judicial meaning which derives from the Roth case, i.e., obscene material "which deals with sex."

Miller v. California, 413 U.S. at 18 n.2 (emphasis added) (citations omitted).

Leaving no room for doubt that the judicial definition of obscene material is not intended to be coextensive with the dictionary definition, the Court further explained that "the Court now undertakes to formulate standards more concrete than those in the past...." Id. at 20. "[W]e now confine the permissible scope of such regulation to works which depict or describe sexual conduct ." Id. at 24. "[N]o one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard-core' sexual conduct ...." Id. at 27.

The Supreme Court has drawn, and has consistently reaffirmed, this bright-line definition that limits obscene material to sex. See, e.g., Roth v. United States, 343 U.S. 476 (1957); Memoirs v. Massachusetts, 383 U.S. 413 (1966); Cohen v. California, 403 U.S. 15 (1971); Reno v. ACLU, 521 U.S. 844 (1997). The Circuit Courts have agreed. See, e.g., Eclipse Enters., Inc. v. Gulotta, 134 F.3d 63 (2d Cir. 1997); Video Software Dealers Ass'n v.

Webster, 968 F.2d 684 (8th Cir. 1992); United States v. Thoma, 726 F.2d 1191 (7th Cir.), cert. denied, 467 U.S. 1228 (1984); Cinecom Theatres Midwest States, Inc. v. City of Fort Wayne, 473 F.2d 1297 (7th Cir. 1973). Accordingly, "[m]aterial that contains violence but not depictions or descriptions of sexual conduct cannot be obscene. Thus, videos depicting only violence do not fall with the legal definition of obscenity for either minors or adults." Video Software Dealers Ass'n v. Webster, 968 F.2d at 688 (citation omitted). It is plain error for the District Court or the City to rewrite the judicial definition of obscene material based on views of Ancient Greeks, Ancient Romans, the Oxford English Dictionary, or any other such source.

Significantly, Kevin W. Saunders, author of Violence as Obscenity (1996), which the City and the District Court rely upon for their argument to expand the definition of obscene materials to include depictions of violence, concedes that inclusion of depictions of violence within the definition of obscenity is contrary to the Supreme Court's holdings:

> The inclusion of violence within the category of the obscene does run contrary to Supreme Court case law. The Court has insisted that material must focus on sexual or excretory activity to be obscene.

Id. at 59 (emphasis added). Indeed, with respect to the regulation of depictions of violence in video games, Saunders concedes that under First Amendment jurisprudence not only is strict scrutiny analysis mandated, but that "[t]he lack of research on the effects of violent video games would certainly make it difficult for regulation of such games to pass strict scrutiny." Id.

The Supreme Court, over the course of history, has permitted restrictions upon the content of expression "in a few limited areas," R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992). Obscenity is one such area. But neither the City nor the District Court is free to disregard the limitations on these categories and to redefine as unprotected expression the community's offensive speech du jour. Indeed, the categories of unprotected expression, including the category of expression deemed obscene, have been narrowed by recent Supreme Court decisions, not expanded. Id. at 383. Miller narrowed the judicial definition of obscenity. Id. And, most recently, Reno v. ACLU, 521 U.S. 844, suggested a further narrowing particularly relevant to the City's argument.

In particular, the City repeatedly seeks to justify an expansion of the definition of obscene material to include violence by reference to "excretory" matters, suggesting that the Supreme Court's inclusion of the word excretory in its definition of obscenity in Miller, demonstrates that obscenity is not limited to matters relating to sex. Opp. Br. at 34. Here, the City's analysis disregards the context in which the phrase "excretory functions" was raised in Miller. There, the Court referenced "excretory functions" as an example of possible patently offensive sexual conduct. Miller, 413 U.S. at 25. There was no suggestion that this example could be broader than sex, as sex was the outermost limit imposed by Miller. Moreover, since Miller, the Court in Reno has suggested that "excretory activities" may sweep too broadly and thus fall outside the judicial definition of obscenity, rejecting the Communications Decency Act in part because "the Miller definition is limited to 'sexual conduct,' whereas the CDA extends also to include (1) 'excretory activities' as well ...." Reno, 521 U.S. at 873. Regardless of the outcome of this debate, it is clear from all Supreme Court precedent that if excretory functions may be deemed obscene, it is only those excretory functions that appeal to a prurient interest in sex. Miller, 413 U.S. at 23.

The City also argues that violent video games can be deemed obscene, notwithstanding the judicial definition limiting obscenity to sex, because the Ordinance regulates only those videos deemed to be "without redeeming social importance." Opp. Br. at 31. The Supreme Court in Winters v. New York, 333 U.S. 507 (1948), rejected social value as a standard for declaring protected expression unprotected. In Winters, the Court was faced with New York's effort to restrict magazines made up of violent depictions "so massed ... 'as to become vehicles for inciting violent and depraved crimes against the person.'" Id. at 514.[1] The Court unambiguously declared that "[t]hough we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." Id. at 510. Chief Judge Posner, in Miller v. Civil City of South Bend, similarly explained the inappropriateness of condemning expressive works to lower forms of protection based on their perceived value to society, stating:

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[1]Significantly, in this case, the City does not contend that violent video games incite violent crime, nor is such an assertion supported by the social science.

> There are no objective standards of aesthetic quality, and while we allow obscene works to be "redeemed" by "evidence" of aesthetic quality, it hardly follows that we should allow works that are not obscene to be condemned on the basis of evidence suggesting a lack of aesthetic quality.

904 F.2d 1081, 1098 (7th Cir. 1990) (Posner, J., concurring), rev'd sub nom. Barnes v. Glen Theatre, Inc. 501 U.S. 560 (1991). Accord Playboy Entertainment, 120 S. Ct. at 1893. Thus, expression cannot be deemed obscene merely because some may view it to be without value.

Furthermore, notwithstanding the City's arguments to the contrary, the Supreme Court's decision in Ginsberg v. New York, 390 U.S. 629 (1968), did not expand the judicial definition of obscenity beyond sex. The question before the Court in Ginsberg was solely 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 and see." Id. at 636-37 (emphasis added). The issue of whether such material could be regulated because of its purported harm to minors was not of issue, as appellant conceded the material's harm and obscene nature. Id. at 636. Rather, appellant's attack was on the State's "power to adapt th[e] Memoirs formulation [of obscenity] to define the material's obscenity on the basis of its appeal to minors ." Id. (emphasis added). Thus, Ginsberg can be read for no more than that the States have the power to adjust the "definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests...' of such minors." Id. at 638 (quoting Mishkin v. New York, 383 U.S. 402, 409 (1966)).

In the end, therefore, the expression at issue, so-called violent video games, cannot be deemed obscene for minors or adults because the video games at issue contain no sexual content. As such, they are entitled, like the magazines in Winters, to the full protection of the First Amendment. The mere fact that the City's constituency may deem this expression offensive does not deprive it of full constitutional protection as "[t]he very fact that the [materials] are offensive to many viewers provides a justification for protecting, not penalizing" such material. Playboy Entertainment, 120 S. Ct. at 1894 (Stevens, J. concurring). Judgments about aesthetics and morals "are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." Id. at 1889.

II. The Challenged Provisions Regulate Protected Expression Directly And Unconstitutionally

The City's argument that the "Ordinance does not regulate speech ... [but] regulates the playing of games," Opp. Br. at 14, is belied by the Challenged Provisions themselves. Indeed, the Challenged Provisions regulate viewing the games, placement of the games and monitoring of access by third parties to the games -- all based on content. The District Court also correctly rejected this contention, as the evidence of the Challenged Provisions' purpose and effect on expressive content is overwhelming. R-11 to R-20.

On their face, the Challenged Provisions are content-based regulations on speech, not regulations on game playing. Specifically, they regulate access to and the display of video games that contain the specified "visual depiction[s]." R-77. The Challenged Provisions do not regulate the operation of joysticks, push buttons, or any other aspect of "playing" this medium. What they do regulate are computer animated pictures, presented in two dimensional, three dimensional and video form, if those pictures present certain types of violence. Similar pictures of trees and sunshine, and civility and happiness, are not restricted. This is the essence of unconstitutional censorship. It is no more the regulation of "game playing," than a content-based restriction on access to movies would be a regulation on sitting, or a content-based restriction on access to the Internet would be a regulation on scrolling and clicking with a mouse. In protected mediums of expression, both the speaker and the recipient are engaged in activity protected by the First Amendment.

The City's reliance on twelve zoning and licensing cases from 1982 through 1985 is similarly misplaced. In each case relied upon by the City, the court was reviewing a content neutral zoning issue. As recently explained by the Supreme Court, in United States v. Playboy Entertainment Group,

> Our zoning cases, on the other hand, are irrelevant to the question here. We have made clear that the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effects of protected speech. The statute now before us burdens speech because of its content; it must receive strict scrutiny.

120 S. Ct. at 1887 (citations omitted). In addition, those cases were based on a significantly different record, at a time when both computers and video games were still very much in their infancy.

Ultimately, the City concedes, as it must, "that it is possible to create video games that, when played, constitute protected expression." Opp. Br. at 16. In these video games then, content based restrictions of non-obscene material must surely be unconstitutional. But the City seeks to avoid that fate claiming that the Challenged Provisions are constitutional because they only restrict expression in video games that lack "serious, artistic, political or scientific value as a whole ...." Id. This argument misses the point of Winters and other First Amendment jurisprudence, which prevent government from making value judgments on protected expression. Only in the area of obscene material does the Court look to the material's value, in an attempt to resurrect constitutional protection. See Miller, 413 U.S. at 24. It is not the material's low value that renders it obscene.[2]

The City similarly seeks to denigrate this expression by arguing that the expressive elements of this medium are outweighed by its non-expressive elements, comparing video games to mechanical pinball games, social dancing and the design of cars and buildings. Opp. Br. at 17-19. This analogy fails because it is wholly inconsistent with the City's claimed harm, i.e. the effect of the ideas conveyed through this medium on youth. The District Court also correctly found the Challenged Provisions do not regulate any non-communicative aspect of the medium or any secondary effects. R-20-21. Rather, they seek to suppress the direct effects of this medium's expressive elements. Id.

The District Court also correctly concluded that, for constitutional purposes, there is no meaningful distinction between this medium's ability to communicate a storyline and that of a movie, television or book. R-16. Indeed, David Walsh, Ph. D., President of the National Institute on Media and the Family, in his testimony to Congress, and relied on by the City in the District Court, confirmed:

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[2]It is important to note that while the City argues that this expression is devoid of serious ideas and appeals only to the non-cognitive, Opp. Br. at 32, 41, the factual premise of the City's claim is that the ideas expressed in this medium are the harm it seeks to protect against. Specifically, Anderson and Dill maintain that "the danger in exposure to violent video games seems to be in the ideas they teach and not primarily in the emotions they incite in the player." A-45 (emphasis added). Even if video games are viewed as "mere entertainment," censorship of ideas within that medium of entertainment violates the First Amendment. "The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all." Stanley v. Georgia, 394 U.S. 557, 566 (1969). See also Schad v. Borough of Mount Ephram, 452 U.S. 61, 65 (1981); Winters v. New York, 333 U.S. 507, 511 (1948).

> Whoever tells the stories defines the culture. That isn't new. It's been true for thousands of years. What is new is that during the 20th century we have delegated more and more of the story telling function to mass media. Computer and video games have become influential storytellers for this generation. As I said earlier some game producers take the storytelling art to new heights.

See Appellees' App. Vol. II, § A, in Supp. of their Mem. In Opp. To Appellants' Mot. For Prelim. Inj. It is precisely the expressive element, i.e. the decision to include depictions of violence in the presentation, that the City seeks to suppress.

III. The Ordinance Fails To Pass Judicial Scrutiny

Content-based restrictions on non-obscene expression are subject to the most stringent judicial scrutiny, and the Challenged Provisions of the Ordinance fail to withstand that scrutiny. Indeed, the City fails to demonstrate the existence of a "real harm" to minors from exposure to video games depicting violence -- a failure that is fatal under the strict scrutiny analysis. Rather, the City points to conflicting social science research, which hardly demonstrates the existence of a real harm much less the existence of a harm so severe and pervasive as to require an incursion into a right as fundamental as the freedom of expression.

There is no dispute that promoting the health and well-being of minors, and assisting parents in pursuing these goals for their children, are worthy goals of government. These goals, however, are not the end point of a proper constitutional analysis. The City must still demonstrate the existence of a real harm from which it seeks to protect minor children. This it has not done.

At best the City has suggested that a correlation may exist between some children, of some unspecified age and demographics, who play some video games that depict some types of violence with some increases in aggression. The exposure apparently must be "prolonged," for "a period of years." Opp. Br. at 3. The City has provided no evidentiary support for a link to crime, juvenile delinquency, violent behavior or any other improper conduct. The City has failed to demonstrate that parents are incapable of protecting their children from this purported harm. And, even a passing reading of the social science materials upon which the City relies demonstrates its inconclusive and underdeveloped nature.

For example, in its Preamble, the Ordinance cites a recent study by Professors Anderson and Dill, which was published in April of this year. See A-1. This study is also featured prominently in the City's Brief. Opp. Br. at 3. This study surveyed existing research on the subject of violence in video games, and concluded that the research "is sparse and weak in a number of ways." A-12. More specifically, with respect to the previous correlational studies, Anderson and Dill concluded that "none test the hypothesis that violent video games are uniquely associated with increased aggression." A-16 to A-17. With respect to the prior experimental work, they similarly concluded that "there is little experimental evidence that the violent content of video games can increase aggression in the immediate situation." A-17. In sum, they concluded that "the few published studies to date have not adequately tested the video game hypotheses." A-18. And with respect to their own work, they suggested that it alone was not enough. A-42 to A-43. "As scientists, we should add new research to the currently small and imperfect literature on video game violence effects and clarify for society exactly what these risks entail." A-47.

Furthermore, Anderson and Dill do not analyze the effect, if any, of currency-operated machines (which are the subject of the Challenged Provisions), as opposed to video games generally. Indeed, in the self-reporting portion of their study, the authors provided their subjects with a list of "video games that were currently for sale at a local computer store" to help prompt their memories as to their favorite games. A-23. And, the most popular game listed by the study's participants was a home-based video game. In addition, the video games that they had their participants play, were neither currency-operated games or machines, but rather computer software played on an Apple Macintosh computer. A-34. Thus, any conclusions that Anderson and Dill may have reached have dubious utility with respect to currency-operated machines that are encountered outside the home for short periods of time. All must concede that minors have significantly less exposure to currency-operated machines as opposed to games played on home-based computing platforms.

In the end, even Anderson and Dill do not make a case for government censorship. Anderson and Dill's principal finding was only the existence of a correlation between playing violent video games (not specifically currency-operated machines) and some aggressive behavior in a laboratory setting. The authors recognized that numerous other

factors present in these games could cause the observed increase, such as "excitement, difficulty, or enjoyment...." A-17. Most tellingly, Anderson and Dill explained that such correlation "could be ... wholly due to the fact that highly aggressive individuals are especially attracted to violent video games," A-31 (emphasis added), and presented no evidence that minors of any particular age category experienced any different effects from such games as opposed to other minors or adults.

The Ordinance and the City's Brief also point to recent testimony before Congress as support for the Challenged Provisions, but that testimony similarly fails to prove the requisite harm needed to justify suppressing protected expression. A-1; Opp. Br. at 4. David Walsh, President of the National Institute of Media and the Family, testified to Congress that "the research literature is just beginning to accumulate.... Additional studies will need to be completed before we can claim that there is a demonstrated cause effect relationship between video game violence and real life aggression." Appellees' App. Vol. II, § A, in Supp. of their Mem. in Opp. to Appellants' Mot. for Prelim. Inj. In addition, Dr. Jeanne B. Funk, a Clinical Child Psychologist, Department of Psychology, University of Toledo, testified that "[t]he obvious question before us is whether exposure to interactive violence causes violent behavior. I would like to be able to answer that question for you, but the reality is that there is not yet a sufficient body of scientific research to make a definitive statement." Id. And Dr. Jeffrey Goldstein, Ph.D., Department of Social and Organizational Psychology, University of Utrecht, the Netherlands, also testified that "[n]either the quantity nor the quality of research on video games does much to inspire confidence in solid conclusions about their effects." Id.

Thus, even though the City repeatedly refers to the Challenged Provisions as regulating material "harmful to minors," the City has not and cannot demonstrate the existence of any harm - - physical, emotional or psychological - - caused by video games, much less the currency-operated video games targeted by the Challenged Provisions. This, however, is its burden, for "[w]hen the Government defends a regulation on speech as a means to ... prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural ...." Turner Broad. Sys., Inc.

v. FCC, 512 U.S. 622, 664 (1994) (citation omitted); accord Playboy Entertainment, 120 S. Ct. at 1891; Edenfield v. Fane, 507 U.S. 761, 770-71 (1993). It is insufficient for the City to summarily conclude that it "has valid reasons to be concerned" about "potentially harmful effects," Opp. Br. at 45, and have such an arbitrary determination withstand judicial scrutiny. As this Court explained: "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." American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986); accord Playboy Entertainment, 120 S. Ct. at 1888-89.

Moreover, absent proof of a specific, definable harm, there is no way for the City to meet its burden to prove the Ordinance is narrowly tailored to achieve its purported goals, or to test alternatives. Nor was the District Court permitted to presume that the Challenged Provisions will advance the City's stated interest. City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986) (citing City of Los Angeles v. Taxpayers For Vincent, 466 U.S. 789, 803 n.22 (1984)). The City must demonstrate that "the regulation will in fact alleviate these harms in a direct and material way." Turner Broad., 512 U.S. at 664; accord Edenfield, 507 U.S. at 770-71. The City, however, does not even address (much less meet) this obligation.

Indeed, the City offers no proof that restricting access to video games will reduce, materially or otherwise, any specific harm, including aggression in the unidentified group of susceptible individuals. Nor does the City show these individuals will not simply get their exposure to potentially "harmful" influences elsewhere, including home video games, computer games, the Internet, television, movies, newspapers, magazines, and much more immediate and more likely sources such as poor role models. As one set of commentators aptly observed with respect to similar efforts to restrict minors' access to movies and crime comic books, "'one does not get at the basic problems presented by the energetic, adventure-thirsty, mesomorphic lad by taking movies or comics away from him. If he has a need for such outlets he will somehow get to them....'" Comment, Exclusion of Children From Violent Movies, 67 Colum. L. Rev. 1149, 1155 (1967) (quoting S. Glueck & E. Glueck & E. Glueck, Delinquents in the

Making 191 (1952)). Thus, blaming video games and removing access to certain types of video games for all minors to protect others, "would simply leave the delinquent child to a new stimulus." Id. And lest we think the City intends to legislate to restrict minors' access to these other mediums to address the inherent ineffectiveness in its current legislation, it has already told us that it cannot. Opp. Br. at 43; see also R-58 to R-59, R-61 (District Court concluded that it would be "difficult to impose sweeping restrictions on children's access to violence in media other than video games"). Thus, the Challenged Provisions have not and cannot be shown to have a likely impact on alleviating the harms the City forecasts.

Finally, the City has also failed to explain why it cannot achieve its objectives with other less-intrusive measures. Significantly, the history surrounding the evolution of First Amendment jurisprudence demonstrates the belief that speech labeled offensive or unpleasant can be counteracted with more speech. The City simply holds up its hands and says that it cannot counteract whatever ill-effects it perceives from these games, because they "appeal[] to the non-cognitive...," Opp. Br. at 33, an argument rejected as a basis for restriction of First Amendment freedoms. See supra, at Section II. And the "court[s] should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act." Playboy Entertainment, 120 S. Ct. at 1892.

The Challenged Provisions do not, therefore, pass strict scrutiny.

IV. The Challenged Provisions Are Unconstitutionally Vague

Notwithstanding the City's arguments with regard to the appropriateness of using the Miller test to restrict violent expression, the City has provided no evidence that assists anyone subject to the Challenged Provisions in divining their reach. "'The line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn.' Error in marking that line exacts an extraordinary cost." Playboy Entertainment, 120 S. Ct. at 1888. It is because of this extraordinary cost, even in the face of what the City argues is "low-value" speech, that the Constitution demands precision when regulating in the area of the fundamental right of freedom of expression. See NAACP v. Button, 371 U.S. 415, 433, 438 (1963); Winters v. New York, 333 U.S. 507 (1948). We demand this precision in the area of free

speech, regardless of whether the regulation seeks civil or criminal penalties. Gresham v. Peterson, 225 F.3d 899, 908 (7th Cir. 2000). Otherwise, we risk incursions into those areas of protected speech just over the line of that which may be regulated legitimately. Grayned v. City of Rockford, 408 U.S. 104, 109 (1972).

In addition, the City's argument confirms the very real fear that it intends to mete out the meaning of the Challenged Provisions over time, through piecemeal litigation in violation of Supreme Court mandates to the contrary. Dombrowski v. Pfister, 380 U.S. 479, 491 (1965). Thus, the City utterly fails to provide those regulated by the Challenged Provisions with a reasonable opportunity to know what is covered until after they have been prosecuted for violating its provisions. See Grayned, 408 U.S. at 108. In short, the City has presented nothing to assuage the very real fears of self-censorship and arbitrary enforcement.

Rather, the City merely harkens back to the Supreme Court's opinions in Miller and Ginsberg, for its contention that the Challenged Provisions are not void for vagueness. As demonstrated supra and in Appellants' principal brief, Miller and Ginsberg concern the regulation of depictions of sexual conduct. Thus, to the extent the Challenged Provisions might have meaning with respect to material of a sexual nature, they do not have any meaning with respect to material of a violent nature. And, in fact, none of the language in the Challenged Provisions has ever survived a constitutional challenge for vagueness with respect to materials depicting violence. See, e.g., Webster, 968 F.2d at 689-690; Davis-Kidd, Booksellers, Inc. v. McWherter, 866 S.W. 2d 520, 532 (Tenn. 1993).

Indeed, one court which has expressly considered this question has squarely held that "vagueness is not cured by incorporating violence in the definition of obscenity as to minors ....

The obscenity definition is specifically designed for sexually explicit materials not violent materials." Davis-Kidd Booksellers, 866 S.W. 2d at 532 (citation omitted). Thus, while the City is correct that the Miller Court held that "god-like precision" is not required in regulating obscenity, Opp. Br. at 48, the Court was speaking with respect to "hard-core pornography," not constitutionally protected depictions of violence, 413 U.S. at 28. The Miller test simply provides no guidance as to the regulation of materials that fall outside the boundaries of what is obscene.

Finally, seeking to divert attention away from the fact that the City is unable to explain the terms defining its own Ordinance, it points to the fact that some similar terms are utilized in the video game industry's own voluntary advisory system. See Opp. Br. at 53. While this is a factually true statement, it is singularly unhelpful in determining whether the Challenged Provisions are vague or assisting in explicating their meaning.

Indeed, significant differences exist as well. First, the video game industry's system is a voluntary system. If a video game manufacturer ascribes the wrong rating to any given game, there is no penalty or fine and the operator of such game is not facing the loss of his or her license.

Second, the industry's system is a "Parental Advisory Disclosure." R-99. It advises parents of the general "content" of video games, such as "[c]ontains scenes of violence...," and "[c]ontains scenes of strong violence..." R-99. It does not require game manufacturers to make value judgments about the content or to act as social scientists, as the Challenged Provisions seek to do, e.g., "appeals to a minors' morbid interest," "is patently offensive," and "lacks serious ... value ...." R-77.

Third, it has long been held that industry developed ratings systems cannot be utilized to determine the constitutional status of expressive material. See, e.g., Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 688-89 (1968); Swope v. Lubbers, 560 F. Supp. 1328, 1334 (W.D. Mich. 1983).

The Industry's Parental Advisory Disclosure is simply a tool for parents to use "in deciding whether, or to what extent, their children are exposed to [violent video games]," the one goal that the City articulates in this case. Opp. Br. at 3. It assists parents by providing information toward further informed choices as the First Amendment favors, not by the censorship the City proposes. The Parental Advisory Disclosure should not be turned from its intended purpose of assisting parents, into a government regulation imposing fines and loss of license, or all such voluntary efforts to assist parents to guide their children surely will be chilled, furthering a cycle of censorship and chilling effect that so affronts our First Amendment freedoms.

CONCLUSION

For the reasons stated here and in Appellants' Brief, the Challenged Provisions of the Ordinance violate the First Amendment and must be declared invalid. The District Court's conclusion, therefore, that Appellants failed to demonstrate a likelihood of success on the merits of their challenge to the Ordinance is error. Indeed, Appellants are entitled to preliminary and permanent injunctive relief against enforcement of the Challenged Provisions of the Ordinance.

Respectfully submitted,

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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 table of contents, table of citations, and counsel's certifications), totals 5995 words as allowed by Rule 32(a)(7) of the Federal Rules of Appellate Procedure.

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David L. Kelleher

CIRCUIT RULE 31(e) DIGITAL MEDIA VERSION OF APPELLANTS' BRIEF

In accordance with Circuit Rule 31(e), Appellants attach hereto a complete copy of Reply Brief in WordPerfect 8.0 format. The undersigned counsel has caused the attached disk and copies for opposing counsel to be scanned with Network Associates McAfee VirusScan v4.50, and hereby certifies that all such disks were determined to be free of any viruses by said computer virus program.

_____
David L. Kelleher

CERTIFICATE OF SERVICE AND FILING

I hereby certify that 2 true and accurate copies of the foregoing Appellants' Reply Brief were served this 21st day of November 2000 by Federal Express upon the following

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In addition, a copy of Appellants' Reply Brief was served on Appellees' counsel, Mr. Gutwein, by facsimile.

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

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