

No. 02-3010

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

INTERACTIVE DIGITAL SOFTWARE ASSOCIATION, et al.
Plaintiffs-Appellants

v.

ST. LOUIS COUNTY, MISSOURI, et al.,
Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Missouri

**BRIEF OF *AMICUS CURIAE* INTERNATIONAL GAME
DEVELOPERS ASSOCIATION IN SUPPORT OF APPELLANTS
AND IN SUPPORT OF REVERSAL**

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September 25, 2002

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, amicus states that it has no parent company and that no company owns 10% or more of amicus' stock.

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IDENTITY OF AMICUS

The International Game Developers Association (“IGDA”) is a non-profit association established by, and comprised of, video game¹ developers – the individuals who design, plan, create, and author video games – specifically to foster the creation of a worldwide game development community. The IGDA's mission is to build a community of game developers that leverages the expertise of its members for the betterment of the industry and the development of the art form.

STATEMENT OF INTEREST AND SOURCE OF AUTHORITY TO FILE

IGDA submits this amicus brief in support of appellants. Amicus asks this Court to reverse the district court’s decision upholding the constitutionality of St. Louis County Ordinance No. 20,193 (Oct. 26, 2000) (the “Ordinance”). This brief is submitted upon consent of counsel to all of the parties.

The Ordinance at issue in this case criminalizes the sale or distribution of certain violent or sexually explicit video games to persons under the age of seventeen. The District Court upheld the Ordinance against appellants’ constitutional challenge, finding alternatively that video games enjoyed no First

¹ The term “video game” is used throughout this brief to encompass all interactive electronic games played on video game consoles (e.g., PlayStation), personal computers, on the Internet, and handheld devices (e.g., GameBoy).

Amendment protection or that the Ordinance survived strict scrutiny. The IGDA has a significant interest in this litigation because it implicates an important constitutional question that directly affects IGDA's members' expressive interests: whether the video game medium is a "significant medium for the communication of ideas," *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952), and thus enjoys the full protection of the First Amendment. IGDA maintains that this medium is entitled to the same level of First Amendment protection that is afforded to other expressive media such as movies and the Internet. A contrary ruling would invite other jurisdictions to regulate the content of video games sold and rented for home use, depending upon the aesthetic, religious or moral predilections of any particular set of local legislators. IGDA thus has a vital interest in proper resolution of the important First Amendment issues raised here.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1952, the Supreme Court brought motion pictures squarely within the protection of the First Amendment, concluding that movies "are a significant medium for the communication of ideas." The Court explained that movies "may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which

characterizes all artistic expression.” *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. at 501.

This case presents the question whether the video game medium is, like movies, a “significant medium for the communication of ideas” entitled to full First Amendment protection. In the past decade, and in particular the past two years, a growing number of courts have recognized that video games, like movies, incorporate narrative, storyline, characters, sound effects, music and graphic design components that in combination “convey to the user a significant artistic message protected by the First Amendment.” *Rothner v. Chicago*, 929 F.2d 297, 303 (7th Cir. 1991). Indeed, with the exception of the court below, every federal court that has confronted a content-based regulation of video games has found that such games enjoy First Amendment protection. *See, e.g., American Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577-78 (7th Cir. 2001) (“AAMA”) (holding that children have a First Amendment right to receive information and ideas imparted through video games, and finding that “most of the video games in the record . . . are stories;” further describing the story told by several video games and finding that one game, “Ultimate Mortal Kombat 3” “has a message, even an ‘ideology,’ just as books and movies do”) *cert denied*, 122 S.Ct. 462 (2001); *James v. Meow Media*, 300 F.3d 683, (6th Cir. 2002) (“Because plaintiffs seek to attach tort

liability to communicative aspect of the video games produced by the defendants, we have little difficulty in holding that the First Amendment protects video games in the sense uniquely relevant to this lawsuit.”); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 181 (D. Conn. 2002) (“Video games . . . that are analytically indistinguishable from other protected media, such as motion pictures or books, which convey information or evoke emotions by imagery, are protected under the First Amendment.”); *Sanders v. Acclaim Entm’t, Inc.*, 188 F. Supp. 2d 1264, 1279 (D. Colo. 2002) (“video games deserve . . . full First Amendment protection”).

In sharp contrast to these courts’ well-reasoned conclusions that the thoughts and ideas conveyed in video games constitute expression or “speech” for purposes of the First Amendment, the District Court below woodenly analyzed video games as a homogenous and uniform “medium” that it likened to board games and sports rather than the multi-media conduit by which video game designers express and convey a broad variety of “ideas, impressions, feelings, or information.” *See Interactive Digital Software Ass’n v. St. Louis Cty., Mo.*, 200 F. Supp. 2d 1126, 1134 (E.D. Mo. 2002). In its initial ruling, denying the plaintiffs’ motion for summary judgment, the District Court faulted the plaintiffs for having presented the court only with scripts of certain video games but not the final product, forcing the court to rely only upon snippets of four video games presented by the defendants.

Id. at 1135. However, in granting summary judgment *sua sponte* for the defendants, and in denying the plaintiffs’ motion to set aside the judgment, the court ignored the additional evidence presented by the plaintiffs – including CD-ROMs of the complete games -- demonstrating the extensive plot and character development in modern video games. *See* J.A. 792 - 878.

Moreover, the district court’s finding that video games are not vehicles of communicating ideas and information, and are therefore not “speech,” threatens the development of new forms of expressive media. **Amicus asks this Court to recognize the tremendous communicative and expressive features of this medium and to afford it full First Amendment protection. There is no longer, were there ever, a justification for protecting movies and the Internet, *see Reno v. ACLU*, 521 U.S. 844, 868-70 (1997), but not video games.**²

The notion that video games are “completely devoid of artistic value” and thus unprotected expression is “totally at odds with reality.” *Rothner*, 929 F.2d at 303. That notion ignores the commonplace knowledge of a wide segment of the

² Any disparity between the constitutional protection available for the Internet medium and the video game medium would be particularly glaring as applied to video games created by IGDA’s members. Some of the video games created by amicus’ members can also be played on the Internet. It is simply illogical to suppose that the same game is expressive and protected by the First Amendment

American people that video games express ideas and meaning, and are intended to do so. It ignores the growing perception that video games possess a creative capacity that will surpass, if it has not already done so, that of more traditional entertainment media that are fully protected by the First Amendment. Indeed, the notion that the video game medium is not an expressive one appears to be a notion confined to the courts, where it is advanced to defend the constitutionality of laws (such as the Ordinance at issue here) that assume the very opposite: namely, that video games “affect public attitudes and behavior.” *Burstyn*, 343 U.S. at 501. This Court should join the growing number of courts across the country that have correctly put that notion to rest.

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

when played over the Internet, and yet unexpressive, and unprotected, when played otherwise.

ARGUMENT

I. The Video Game Medium is an Expressive Medium

“[P]rotected expression,” for First Amendment purposes, is expression that relates to the “market in ideas, . . . broadly understood as the public expression of ideas, narratives, concepts, imagery, opinions – scientific, political, or aesthetic – to an audience whom the speaker seeks to inform, edify, or entertain.” *Swank v. Smart*, 898 F.2d 1247, 1251 (7th Cir. 1990); *see also Miller v. Civil City of South Bend*, 904 F.2d, 1081, 1092 (7th Cir. 1990) (“[T]he expression that is relevant to freedom of speech . . . is the expression of a thought, sensation, or emotion to another person.”), *rev’d sub nom. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1994).

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

A. Expressive content

Video games cover a vast array of subject-matter categories, including, to name but a few, adventure games (“Ico”), character action-adventure games (“Super Mario Sunshine”), puzzle games (“Tetris” and “Bejeweled”), sports games (“Madden NFL 2003”), racing games (“Gran Turismo 3”), simulator games (“Flight Simulator 2002”), hunting games (“Big Game Hunter”), early educational games (“Elmo’s Number Journey”), teenage and adult educational programs (“Where in the World is Carmen Sandiego?”), family entertainment (“The Sims”), fighting games (“Virtua Fighter 4”), role-playing games (“EverQuest”), and shooting games (“Quake 3” and “Counter-Strike”). Just as there is a wide diversity of books – both fiction and non-fiction – available for purchase, there is also great diversity in the types and themes of video games. See Steven Poole, *Trigger Happy: Videogames and the Entertainment Revolution* 21-54 (2000) (surveying landscape of video game subject matter).

Like movies, video games tell stories and entertain audiences through the use of complex pictures and sounds, and through text as well. The thematic ideas for video games are at times drawn directly from successful works in other media. See *AAMA*, 244 F.3d at 578. Video games have been drawn from the book (and movie) of “The Lord of the Rings,” and such other movies as the James Bond

film “Goldeneye,” *see* Seth Stevenson, *Not Just a Game Anymore*, *Video*, Newsweek, Jan. 1, 2000, at 94 (noting that “Goldeneye 007” game was more profitable than the movie), and the 1999 hit movie “The Blair Witch Project,” *see* Peter Olafson, *A Blair Witch Video Game*, *New York Times*, Nov. 2, 2000, at G11. The game “Tom Clancy's Rainbow Six,” for example, was developed in conjunction with a novel by author Tom Clancy of the same name. *See* L. Wayne Hicks, *Books Find New Life as Computer Games*, *Denv. Bus. J.*, May 26, 2000, at 35A. Video games have also been produced based on the very successful “Harry Potter” series of books. *See id.* More often, the plots and characters for video games are developed in a process comparable to the movie script development process. *See* Poole, *supra*, at 73.

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

usually with the aim of reaching some “ultimate” objective – such as solving a riddle, rescuing a hostage, or defeating an invader. *See* J.A. 798-801 (Decl. of William D. Gardiner) (describing the plot and structure of the *Resident Evil* game); *see also* AAMA, 244 F.3d at 577-78 (describing the plot-line of “The House of the Dead” game).

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

To be sure, not all video games contain complex narratives.³ That a particular video game lacks a strong narrative theme, however, does not diminish

³ Indeed, as Professor Henry Jenkins, Director of the Program in Comparative Media Studies at MIT, has observed: “Some of the best games . . . have nothing to

the appropriate First Amendment protection. The First Amendment does not require that expression be in narrative form; still less does it require that narratives, where present, be complex. The graphic design and sound elements of a puzzle game constitute a form of aesthetic expression akin to music or abstract art that clearly qualifies as protected expression within the First Amendment. Music is also playing an increasingly sophisticated and central role in video games. This Court should not, as the district court did, *see* 200 F. Supp. 2d at 1134-35, mistakenly conclude that the “ideas, impressions, feelings, or information” that are conveyed by video games are “inconsequential,” and therefore unprotected, expression. That has never been the law with respect to First Amendment protection for artistic expression in other media. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995) (First Amendment is not limited to protection of “succinctly articulable” or “particularized” messages; to hold otherwise would leave unprotected the “unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll”). It should be no different for the video game medium.

do with storytelling. For all we know, the future art of games may look more like architecture or dance than cinema.” Henry Jenkins, *Art Form for the Digital Age*, Technology Review, Sept./Oct. 2000, *available at* <http://www.techreview.com>; *see also* Poole, *supra*, at 95-111 (discussing use of stories in video games).

B. Expressive intent

It is clear that video game developers and publishers “seek[] to inform, edify, [or] entertain” through their video game creations. *Swank*, 898 F.2d at 1251. The development of a video game epitomizes the creative process. Game developers brainstorm, collaborate, sketch scripts, and design “story boards.” *See generally* Olivia Crosby, *Working So Others Can Play: Jobs In Video Games Development*, Occupational Outlook Q., July 1, 2000, at 2 (describing game development).

Designers understand full well the creative aspects of their work, and think about how best to communicate their intended message to their audience. They appreciate the interactive aspects of their craft, and design their creations accordingly:

“Designers are storytellers, with a twist: they invent a plot, but they let the player control the story and decide the outcome. They create a web of possibilities, and the player chooses a path.” *Id.* They understand the role of fantasy and “play” in video games, and even advertise their games “as taking us places very different from where we live.” Henry Jenkins, “*Complete Freedom of Movement*”: *Video Games as Gendered Play Spaces*, in *FROM BARBIE TO MORTAL KOMBAT: GENDER AND COMPUTER GAMES* 262, 264-65 (Justine Cassell and Henry Jenkins, eds. 1998).

And they consciously seek to stir the emotions of their audience. Indeed, Sony nicknamed its PlayStation2 game console the “emotion engine” because “it has

enough computing power to deliver visuals capable of engaging the audience's feelings." Stevenson, *supra*, at 94; see also Dean Takahashi, *Video Games Become More Than Child's Play*, Wall Street Journal, May 12, 2000, at B6 (reporting on the promise of Sony's designers to create "games that will make you cry").

Further, game developers collaborate with a variety of individuals from the creative arts, including graphic and animation artists; novelists (*e.g.*, Tom Clancy and Michael Crichton); movie directors (*e.g.*, George Lucas); musicians (*e.g.*, David Bowie); composers (*e.g.*, John Williams); even architects, engineers, and physicists.⁴ Indeed, game developers consider themselves to be artists in their own right.⁵ Designers are passionate about their craft, and many consciously choose game design over related creative endeavors such as movie making. See Julie Flaherty, *It's a Video Game, Certainly, but is it Art?*, New York Times, Mar. 2,

⁴ See Poole, *supra*, at 9-12 (discussing recent collaborations between video game designers and other artists); Steve Klett, *Now Hear This*, Incite PC Gaming, June 2000, at 48 *supra*, at 49 ("Leading this sonic renaissance are rock stars and even classical composers who see computer games as a new medium to display their talents."); Carrie Bell, *Acts Score Big with Vid Games*, Billboard, Nov. 13, 1999, at 1 (describing cross-pollination of recording and game industry); Dean Takahashi, *Scientists Journey to the Next Frontier in Physics: Designing Computer Games*, Wall Street Journal Europe, May 4, 1999.

⁵ See Jack Kroll, *'Emotion Engine'? I Don't Think So*, Newsweek, Mar. 6, 2000, at 64; Edmund Lee, *Pure Play*, Village Voice, Nov. 17, 1999, available at <http://www.villagevoice.com/issues/9946/lee.shtml>.

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

Game developers have formed a community of critical thought about their craft, akin to those familiar in more traditional artistic and entertainment fields. In trade magazines, such as "Game Developer," designers explore innovations in the field, supply critical commentary and discussion, and provide peer review of new tools of their craft. *See* "Character Matters, Part 2: Getting Ahead of the Curve," (Oct. 2002), *available at* <http://www.gdmag.com>; *see* Game Studies, (a peer reviewed academic journal studying video games) (*available at* <http://www.gamestudies.org>). The Game Developers Choice Awards (presented by amicus) bestows annual awards to honor innovation and artistic achievement in video games. Awards are bestowed for such things as Excellence in Visual Arts, the Game Character of the Year and Game Innovation (to name a few).⁶ The creative

⁶ Game Developers Choice Awards *available at* <http://www.igda.org/awards/>. *See also* Academy of Interactive Arts and Sciences "Interactive Achievement Awards", *available at* <http://www.interactive.org>; Bell, *supra*, at 1 (noting that musical compositions for video games recently became eligible to be nominated for Grammy awards).

process of creating video games has prompted several academic conferences, a Digital Games Research Association, and even college degree programs.⁷

Moreover, video games – even quite violent ones – have received significant recognition from parts of our society wholly unrelated to the technology and new media segments. For example, the video game “Medal of Honor” graphically and vividly depicts the action and realities encountered by soldiers in World War II. Created by Steven Spielberg and his company, DreamWorks Interactive, the video game was intended by its designers to be “something with broad appeal that would ignite a player’s imagination about the soldiers who rose above and beyond the call of duty.”⁸ The Congressional Medal of Honor Society of the United States has

⁷ See, e.g., “Playing with the Future: Development and Directions in Computer Gaming” Conference in Manchester, England in April 2002, available at <http://www.cric.ac.uk/cric/gamerz/Default.htm>, and “Computer Games and Digital Cultures” Conference in Tampere, Finland in June 2002; these conferences spawned the establishment of a new international association for the research of video games, see <http://www.digra.org>; Jeff Gottlieb, *Video Games Make Leap Into College Curriculum*, Los Angeles Times, Feb. 27, 2000, at B11 (reporting that “[c]lasses in video games are taught at colleges throughout the country,” that two- and four- year degrees in the subject are offered at DigiPen, a small college in Redmond, Washington, and that there is a new Interdisciplinary Minor in Gaming Studies at the University of California Irvine School for the Arts, a program in which students study game design and its societal effects).

⁸ *Congressional Medal of Honor Society Officially Endorses Electronic Arts and Dreamworks Interactive's Medal of Honor*, Press Release, Dec. 9, 1999, available at

officially “endorsed” the video game; the Society has said that the video game sends the “message to upcoming generations that the medal itself represents ordinary people doing extraordinary things for their country.”⁹ The game designers clearly intended to express a message through this video game. Nonetheless, the content of the video game “Medal of Honor” might well fall within the Ordinance’s prohibition against “graphic violence.”

C. Expressive effects

The final essential component of protected expression is an audience that receives the intended expression. In the video game world, that audience is immense.¹⁰ And contrary to popular belief, that audience is made up of many adults and women. *See id.* (over 90% of all games are purchased by adults over the age of 18 and 43% of game players are women). The nature of this diverse audience’s response to games buttresses considerably the case for games’ expressive qualities.

<http://www.digitalgamedeveloper.com/Htm/Business/Dec99/09/CongressionalMedalofHonorSocietyOfficially.htm>.

⁹ *Id.*

¹⁰ *See Ten Facts About the Computer and Video Game Industry*, available at <http://www.idsa.com.pressroom.html> (noting that sixty percent of all Americans age six and older, or 145 million people, play computer and video games, and that Americans purchased more than 225 million video games in 2001).

The game-playing audience uses video games and responds to them in ways ordinarily associated with those entertained by works of creative expression. Indeed, surveys show that the video game audience is tremendously excited by the entertainment that game developers create. Thirty-four percent of consumers surveyed in 1999 ranked video games as the most enjoyable home entertainment medium, with television ranking a distant second at 18%. *See Ten Facts About the Computer and Video Game Industry, available at <http://www.idsa.com.pressroom.html>.* This excitement and enjoyment has made the video game industry the fastest growing segment of the U.S. entertainment industry, with more than \$6.35 billion in revenue in 2001 (rivaling movie box office sales).¹¹ The New York Times reports that “[t]he grip that video games and their characters have on their fans mirrors the way movies and their stars mesmerize their audiences.” Flaherty, *supra*. Some video game characters have become icons of popular culture and are regarded nearly as movie stars. *See id.* (discussing video game superstar “Lara Croft” of the game “Tomb Raider”); Stevenson, *supra* (reporting that Croft is “as recognizable as many a popular actor”).

¹¹ *See Essential Facts about the Computer and Video Game Industry*, IDSA Report, May 2002, available at <http://www.idsa.com/pressroom.html>; *Ten Facts, supra*.

The response to video game speech is often more cerebral than celebration of virtual superstars. Scholars focus on the way in which games engage the imagination and create fantasy and play space,¹² and have observed that games foster social bonds by bringing game-players together in new interactive environments. See Jenkins, *Art Form for the Digital Age*, *supra*; Flaherty, *supra*. An entire book is devoted to the topic of gender and video game culture, and explores such themes as the empowerment many women experience when playing certain violent video games. See “Voices from the Combat Zone: Game Grrlz Talk Back,” in FROM BARBIE TO MORTAL KOMBAT, *supra*, at 328.

The aesthetics of video games has also generated significant commentary. See Poole, *supra*, at 11 (“[T]he inner life of video games – how they work – is bound up with the inner life of the player. And the player’s response to a well-designed videogame is in part the same sort of response he or she has to a film, or to a painting: it is an aesthetic one.”). Indeed, a significant body of scholarly and

¹² See Jenkins, *Art Form for the Digital Age*, *supra* (“If anything, game designers have pushed beyond cinema in terms of developing expressive and fantastic environments that convey a powerful sense of mood, provoke our curiosity and amusement, and motivate us to explore.”); Jenkins, *Complete Freedom of Movement*, *supra*, at 264-66 (arguing that games are essential in a world in which real play space has become a scarce commodity); Murray, *supra*, at 97-184 (discussing the aesthetics of the digital medium); Poole, *supra*, at 63 (noting role of play).

popular opinion holds that the medium has developed sufficiently in technological sophistication and expressive capabilities to warrant the title “art.”¹³ But whether games inspire the imagination, ennoble the spirit, provide entertainment, or instead leave some viewers with the perception that games suffer from a “banality of vision and style,” Kroll, *supra*, they are expression received by an audience, and are equally worthy of full First Amendment protection. *See Winters v. New York*, 333 U.S. 507, 510 (1948) (“Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.”).

D. Asserted negative impact

There are some who believe that mere exposure to the content of video games causes anti-social behavior. That belief has given rise to a moral panic and public controversy about the proper place for video games -- especially video games depicting violence -- in our children’s lives. Indeed, it was that very belief

¹³ *See* Stevenson, *supra* (predicting that “[i]n the century to come, the medium producing the most dynamic, vital and exciting new art” will be video games); Jenkins, *Art Form for the Digital Age*, *supra* (“Computer games are art—a popular art, an emerging art, a largely unrecognized art, but art nonetheless. . . . The time has come to take games seriously as an important new popular art shaping the aesthetic sensibility of the 21st century.”); Flaherty, *supra* (describing video games at crossroads between entertainment and art); Takahashi, *Video Games Become More Than Child’s Play*, *supra*, at B6 (predicting that video games will become high art when game artists fully realize the unique features of interactivity).

that apparently led the County to enact the Ordinance. The preamble to the Ordinance speaks of the County’s “compelling interest” in protecting the physical and emotional health of children,” and of parents’ “power to control the types of games their children play and . . . their exposure to violent . . . materials.”¹⁴

Ordinance, Preamble. It also makes reference to studies purportedly documenting that “exposure to violence, such as in these video games, causes children to imitate violent behavior, glorify violent heroes, become desensitized to violence and learn that violence is rewarded.” *Id.*

Amicus flatly rejects this belief and the spurious social science upon which that belief rests. *See AAMA*, 244 F.3d at 578-79 (rejecting claim that scientific studies demonstrate that violent video game playing increases aggressive behavior or violence). But the very belief, and the ensuing public debate, speaks volumes about the communicative and expressive capabilities of the video game medium. Responding to that debate, **the City chose to restrict minors’ access to violent video games *because of the ideas communicated by such games, and because of***

¹⁴ Note that amicus is in full support of the Entertainment Software Ratings Board (ESRB) as a *self-regulated* initiative of the video game industry and its role in providing content based information that empowers parents to make age appropriate decisions for their family.

the supposed harm that flows from them. *See* Ordinance, Preamble.¹⁵ **Such regulations strike at the very core of what the First Amendment protects against.** *See United States v. Playboy Entm't Group, Inc.*, 120 S. Ct. 1878, 1893 (2000); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972); *see also American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 328-32 (7th Cir. 1985) (“Indianapolis seeks to prohibit [pornographic] speech because it believes this speech influences social relations and politics on a grand scale, that it controls attitudes at home and in the legislature. This precludes a characterization of the speech as low value.”), *aff'd*, 475 U.S. 1001 (1986).¹⁶ Indeed, if video games truly lack any expressive capacity, how could they “cause[] children to imitate violent behavior” as the Ordinance states that they do? And how else, if not through

¹⁵ Indeed, during consideration of the Ordinance, the County Counselor readily acknowledged that the Ordinance “is based on speech content.” J.A. 692.

¹⁶ While the County’s purpose for restricting violent video games might not, standing alone, be enough to bestow First Amendment protection on an otherwise non-expressive activity, *see Miller*, 904 F.2d at 1093 (Posner, J., concurring in opinion and judgment of the court) (observing that a ban on nude sunbathing in order to change the way people think about women and sex would not render sunbathing expressive), it is significant support for the notion that the video game medium is an expressive one. *See Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (holding that music is protected expression because “[f]rom Plato’s discourse in the Republic to the totalitarian state in our own times, rulers have known [music’s] capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state”).

receiving such visual communication from game developers and responding to them, could minors possibly be harmed, as the County believes, through “exposure” to video games? Further, if video games contained no meaningful expression, how would it be possible to identify those games deemed “harmful to minors”—*i.e.*, games that “predominately appeal[] to minors’ morbid interest in violence,” are “patently offensive,” and lack “serious literary, artistic, political or scientific value”?

Appellees’ argument that video games are not speech is thus belied by the very Ordinance at issue, which seeks to control a protected category of speech because of the purported audience’s response to the content of the expression. *See* Ordinance, Preamble. Indeed, the argument’s sole purpose is to divert attention from what the City has actually done: it has chosen sides in a controversial political debate. The job of the First Amendment is to ensure that the “marketplace of ideas,” and not the government, settles the controversy. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also Ashcroft v. Free Speech Coalition*, _____ U.S. _____, 122 S. Ct. 1389, 1403 (2002) (“First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end.”). For the reasons set out

above, the video game medium is – as a matter of descriptive fact – a fully expressive one and is entitled to full First Amendment protection.

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

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

Even though the Supreme Court said long ago that the “‘line between the informing and the entertaining is too elusive’” a line to draw for constitutional purposes, *Burstyn*, 343 U.S. at 501 (quoting *Winters*, 333 U.S. at 510), several courts rejected First Amendment protection for video games in the ’80s because a video game, in their view, “was pure entertainment with no informational element.” *America’s Best Family Showplace Corp. v. City of N.Y.*, 536 F. Supp. 170, 174 (E.D.N.Y. 1982). Thus, they thought it was “unnecessary to draw th[e] elusive line,” *id.*, and maintained that in order for entertainment to count as protected expression, “there must be some element of information or some idea being communicated.” *Id.* at 173.

But the Supreme Court’s decisions in this area demonstrate that the distinction between entertainment and information is too “elusive” to draw in the first place. In other words, “‘what is one man’s amusement, teaches another’s

doctrine.”” *Burstyn*, 343 U.S. at 510 (quoting *Winters*, 333 U.S. at 510). An information/idea requirement for entertainment as expression,¹⁷ moreover, is flatly inconsistent with the principle that artistic forms of expression need not be reducible to a particularized idea or concept to receive constitutional protection. Artistic expression, even abstract expression intended and received for pure entertainment, is fully protected expression. See *Hurley*, 515 U.S. at 569; *Miller*, 904 F.2d at 1096 (“If the only expression that the First Amendment protects is the expression of ideas and opinions, then most music and visual art, and much of literature, are unprotected.”). Nonetheless, as explained above, today’s video games do express ideas and information.

Some courts have reasoned that the interactive feature of video games somehow removes them from the realm of protected expression. See, e.g., *Caswell v. Licensing Comm’n of Brockton*, 444 N.E.2d 922, 925-26 (Mass. 1983) (pointing to the “activity” required by the game player). Other courts have correctly rejected this argument, and this Court should reject it as well. See *AAMA*, 244 F.3d at 577; *Wilson*, 198 F. Supp. 2d at 180. It is odd to think that the *additional* expression of

¹⁷ The court in *America’s Best* relied on *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556-58 (1975), for such a requirement. But the cited passage from *Conrad* says nothing of the kind; it simply explains that theater is no

the game player would somehow negate or detract from the expression that video game developers intend to communicate, and do communicate, through the game itself. Quite the contrary, the interactive dimension of the video game medium is widely believed to be one of its most expressive, and consequently entertaining, features. *See, e.g.,* Stevenson, *supra* (unlike movies, “videogames boast interactivity – an even better way to engage the emotions of the audience”). As with theater, the fact that speech is mixed with “live action or conduct” – in this case the live action or conduct of the video game player – is “no reason” to hold video games to a “different [constitutional] standard.” *Conrad*, 420 U.S. at 558. Indeed, when the Supreme Court afforded full protection to the Internet, it specifically described that new medium as a “dynamic, multifaceted category of communication [that] includes not only traditional print and news services, but also audio, video, and still images, as well as *interactive*, real-time dialogue.” *Reno v. ACLU*, 521 U.S. at 870 (emphasis added). Interactivity enhances expression; it does not prove its absence.

Appellees also argued below that, if video games contain protected expression, then all games, however basic, must be entitled to similar treatment.

less protected even though it “frequently mixes speech with live action or conduct.” *Id.* at 557-58.

They pointed to courts that have held games such as Bingo and skeet shooting to be unprotected by the First Amendment. *See Allendale Leasing, Inc. v. Stone*, 614 F. Supp. 1440, 1454 (D. R.I. 1985), *aff'd*, 788 F.2d 830 (1st Cir. 1986); *Town of Richmond v. Murdock*, 235 N.W.2d 497, 500 (Wis. 1975). Given the enormous expressive capacity of the video game medium as described above, the comparison between contemporary video games and games such as Bingo could not be more inapt.¹⁸ Moreover, amicus' argument is decidedly not that games, *because* they are games, qualify for First Amendment protection. Instead, the argument presented is that video games so qualify because of the expressive intent of their creators, the expressive content of the games themselves, and the expressive effects that these games produce when received by their intended audience. Amicus seeks protection for this distinctive medium of expression, and not for games as such.

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

Courts that previously have held video games to be insufficiently expressive for First Amendment purposes have done so in the context of content-neutral

¹⁸ Even some basic games, however, have received constitutional protection. *See, e.g., Hammerhead Enters., Inc. v. Brezenoff*, 707 F.2d 33, 33-34 (2d Cir. 1983) (game satirizing public assistance programs protected); *Watters v. TSR, Inc.*, 715 F. Supp. 819, 821 (W.D. Ky. 1989) (treating "Dungeons and Dragons" game as protected expression), *aff'd on other grounds*, 904 F.2d 378 (6th Cir. 1990).

licensing laws regulating video games. *See, e.g., Caswell*, 444 N.E.2d at 925-926; *America's Best*, 536 F. Supp. at 173-74; *Malden Amusement Co. v. City of Malden*, 582 F. Supp. 297, 299 (D. Mass. 1983); *Marshfield Family Skateland, Inc. v. Town of Marshfield*, 450 N.E.2d 605, 609-10 (Mass.), *appeal dismissed*, 464 U.S. 987 (1983). Amicus' principal argument is that, contrary to these decisions, the video game medium is an inherently expressive medium such that regulations of video games as a medium should trigger constitutional scrutiny. *See, e.g., Leathers v. Medlock*, 499 U.S. 439, 441-42 (1991) (cable television); *United States v. Grace*, 461 U.S. 171, 176 (1983) (leafleting); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (billboards); *Saia v. New York*, 334 U.S. 558, 561 (1948) (sound trucks and loudspeakers); *Burstyn*, 343 U.S. at 501 (movies).

Moreover, the First Amendment applies in full force to appellants' constitutional challenge to the Ordinance in this case because the challenged provisions of the Ordinance restrict children's access only to video games containing "graphic violence." And the Ordinance expressly defines "graphic violence" as a "*visual depiction or representation of realistic serious injury to a human or human-like being.*" Ordinance. It is beyond debate that visual depictions, no less than the written word, are protected First Amendment expression. *See Hurley*, 515 U.S. at 569; *Schad v. Borough of Mount Ephraim*, 452

U.S. 61, 65-66 (1981); *Kaplan v. California*, 413 U.S. 115, 119 (1973); *see also Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996) (“[P]aintings, photographs, prints, and sculptures . . . always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection”). Were the government to regulate similar visual depictions contained in more traditional media – such as books, movies, or television – there would be no question that the government was regulating “expression” covered by the First Amendment. *See, e.g., Video Software Dealers Ass’n v. Webster*, 968 F.2d 684, 687-88 (8th Cir. 1992) (violent videos). The use of a nontraditional medium for communicating *identical* visual depictions cannot alter the result. A jacket, for example, is not an inherently expressive “medium” for the expression of ideas, but when the government seeks to punish words printed on a jacket, the First Amendment is clearly implicated. *Cohen v. California*, 403 U.S. 15, 18 (1971); *see also Eclipse Enterprises, Inc. v. Gulotta*, 134 F.3d 63, 65-67 (2d Cir. 1997) (no question that First Amendment applied to regulation of pictures and descriptions of violence on trading cards).

Whatever the Court’s ultimate view of video games as an expressive medium, it must apply the First Amendment where, as here, the government regulates a category of visual depictions contained in that medium. To hold

otherwise would give the government *carte blanche* freedom to censor visual depictions contained in new and emerging media. As such, the position that appellees advance would severely jeopardize the constitutional freedoms of those, such as amicus' members, who utilize nontraditional media in order to communicate a range of protected expression, including visual depictions and representations. There is no authority or justification for such a departure from basic First Amendment principles.

CONCLUSION

This Court should reverse the district court's decision upholding the constitutionality of the Ordinance. In so doing, amicus urges the Court to acknowledge that the video game medium is a highly expressive medium – on par with movies, books and other popular media. It is thus entitled to full First Amendment protection.

Dated: September 25, 2002

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, John P. Borger, hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that the foregoing Brief is in compliance with Fed. R. App. P. 29, 32(a)(5), 32(a)(7)(B). The Brief uses proportionately spaced 14-point type and contains 6,659 words, as measured by Microsoft Word 97 SR-2 (including headings, footnotes and quotations, but excluding the cover page, corporate disclosure statement, table of contents, table of authorities, and counsel's certifications).

John P. Borger

Dated: September 25, 2002

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Fed. R. App. P. 31(b) and 8th Cir. R. 28(a) and 28(d), 2 true and accurate copies of the foregoing Brief, in addition to one computer disk containing the brief, were served this 25th day of September, 2002 by First-Class Mail upon the following:

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Also by Federal Express, this same day, 10 copies of amicus' Brief and one computer disk containing the Brief, were filed with this Court pursuant to Fed. R. App. P. 25(a)(2)(B), and 8th Cir. R. 28(a) and 28(d).

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