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**KIDS CAN GAMBLE TOO: LOOT BOXES AND PREDATORY  
VIDEO GAME PRACTICES**

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**INTRODUCTION**

Loot boxes are either gambling, or something so close that the difference is insignificant. A loot box is an in-video game purchase mechanic that awards the purchaser with a chance at a desirable in-game item such as an avatar skin, weapon, and in-game boost. The price per loot box can vary from a dollar or two, to over \$100. The chance of obtaining a desirable item from a loot box is often five

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percent or less. The video game industry is moving toward nearly all games containing loot boxes and it is currently a multi-billion-dollar business.

Paid loot boxes in video games can simulate slot machines with sounds, animations, and encouragement to play more. These loot boxes are being heavily marketed toward children, essentially fueling gambling addiction among minors, conjuring the mental image of a 12-year-old at a casino, pulling the lever on a slot machine.

Whether or not loot boxes fit the strict legal definition of gambling, they should be regulated as if they do. Several European countries have outlawed loot boxes, and more countries will soon follow suit. The United States government should implement restrictions on which games can contain loot boxes and, working with the Electronic Ratings Service Board (“ERSB”), update ratings on games to better inform parents of the dangers associated with children’s gambling.

## I. MICROTRANSACTIONS AND LOOT BOXES

In-game payments, or “microtransactions,” are becoming increasingly popular in video games.<sup>1</sup> Many games have had the ability to purchase items for in-game use with real money for years.<sup>2</sup> Loot boxes take the microtransaction idea to a new, more lucrative, and possibly more dangerous level.

What is a loot box and why does it matter? For the purposes of this article, all in-game purchase mechanisms with a random element can be whittled down into the moniker, “loot box.” These can include but are not limited to; loot boxes, loot crates, card packs, booster packs, battle packs, and lock boxes.<sup>3</sup> Loot box mechanics in video games started in Japanese gaming and made their way to US video game mainstream in the last ten to fifteen years.<sup>4</sup>

Loot box mechanics entail paying money to have a chance at earning an in-game item. Loot boxes can be found in most mobile

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<sup>1</sup> See *The Rise of Microtransactions*, WEPC, <https://www.wepc.com/statistics/microtransactions-survey-uk/> (last visited Apr. 7, 2022).

<sup>2</sup> Steven T. Wright, *The Evolution of Loot Boxes*, PCGAMER (Dec. 8, 2017), <https://www.pcgamer.com/the-evolution-of-loot-boxes/>; see also *Gacha Game*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Gacha\\_game](https://en.wikipedia.org/wiki/Gacha_game) (last visited Apr. 7, 2022).

<sup>3</sup> *Loot Box*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Loot\\_box](https://en.wikipedia.org/wiki/Loot_box) (last visited Apr. 7, 2022).

<sup>4</sup> Wright, *supra* note 2.

games today, with many on the top grossing games list.<sup>5</sup> Loot boxes also appear in most modern console and PC games.<sup>6</sup> These are not to be confused with all in-game purchase mechanics. Some games allow a player to purchase in-game items or cosmetics, with no random element involved.

#### A. THE EMERGENCE OF LOOT BOXES

The concept of loot boxes is not a new one. Trading cards have had a random element for over 150 years, initially being offered as cards in packs of cigarettes.<sup>7</sup> Consumers would receive a random card depicting a horse, politician, or other object.<sup>8</sup> The cigarette companies encouraged the collection of these cards, and some offered rewards for completing sets.<sup>9</sup> With the rising popularity of baseball, cigarette companies started making cards depicting baseball players.<sup>10</sup>

In the 1950's, Topps, a well-known trading card company, created its first baseball cards and included the cards in packs of bubblegum.<sup>11</sup> Recognizing that the cards were more popular than the gum, Topps started selling the packs of cards by themselves.<sup>12</sup> One could buy a single pack and be lucky enough to pull Pittsburgh Pirates pitcher Honus Wagner, or buy 30 packs and never lay eyes on him.<sup>13</sup> The trading card market boomed for a while, with other sports like Football and Hockey gaining player cards as well.<sup>14</sup> In the 1990's, Pokémon cards became extremely popular, with over 30

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<sup>5</sup> *Leader Board of Top Selling Mobile Games*, SIMILARWEB (Apr. 4, 2022), <https://www.similarweb.com/apps/top/google/store-rank/us/games/top-grossing/>.

<sup>6</sup> Wright, *supra* note 2.

<sup>7</sup> Ben Johnson, *Cigarette Cards and Cartophily*, HISTORIC UK <https://www.historic-uk.com/CultureUK/Cigarette-Cards-Cartophily/> (last visited Nov. 7, 2020).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *The Cardboard Connection*, WAYBACK MACH., <https://web.archive.org/web/20120901074445/http://www.cardboardconnection.com/baseball/baseball-card/> (last visited Nov. 7, 2020).

<sup>12</sup> *Id.*

<sup>13</sup> The Honus Wagner card last sold at auction for over \$3 million. Ryan Cracknell, *World Record \$3.12 Million for T206 Honus Wagner Baseball Card*, BECKETT, <https://www.beckett.com/news/world-record-price-for-t206-honus-wagner-baseball-card-3-million-and-counting/> (last visited Nov. 7, 2020).

<sup>14</sup> *Id.*

billion cards sold to-date.<sup>15</sup> While the idea is not new, integrating the concept of trading card packs into video games using virtual items is new enough that little regulation addresses it.<sup>16</sup>

## B. ENVISIONING THE LOOT BOX EFFECT

To paint the image of a loot box, step into the shoes of a twelve-year-old pre-teen. It is Saturday, his favorite day of the week, and a weather advisory limits weekend activity to the indoors. Booting up the Xbox, he settles in to play his favorite video game, the latest edition of Madden NFL. He navigates to his game-mode of choice, Madden Ultimate Team, which allows him to play with real professional football players in the form of virtual cards and create his own super team of his favorites. Each player has a rating—the higher the rating, the better the virtual player performs in-game.<sup>17</sup>

Players in Ultimate Team mode gain these player cards by advancing through the game and by obtaining card packs.<sup>18</sup> Card packs contain mostly lower-rated players, with a small chance at pulling a really good player.<sup>19</sup> Today, there are new, limited-time card packs in the in-game store.

This hypothetical pre-teen buys these packs for an increased chance of pulling his favorite player, legendary quarterback Brett Favre. He buys some of these card packs with his parent's credit card. Ten dollars are converted into Xbox Points which are then used to purchase one pack for 1,000 points. A colorful, flashy animation shows ten virtual cards flying out of the pack, each one turning over to reveal the players. Each card is a disappointment, showing either players he already possesses on his Ultimate Team, or players rated too low to be desirable. A social media post shows his best friend just pulled Brett Favre.

Jealous, but not wanting to spend more money on another pack, he plays a few friendly games against online opponents with his virtual Ultimate Team. After a streak of good strategy and luck, he wins enough games to get a free card pack. The same, colorful animation rolls and the cards are revealed. A highly rated Drew

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<sup>15</sup> *Pokémon in Figures*, POKÉMON CO., <https://corporate.pokemon.co.jp/en/aboutus/figures/> (last visited Apr. 11, 2022).

<sup>16</sup> *Loot Boxes*, MIRAHEZE: CRAPPY GAMES WIKI, [https://crappygames.miraheze.org/wiki/Loot\\_Boxes](https://crappygames.miraheze.org/wiki/Loot_Boxes) (last visited Apr. 11, 2022).

<sup>17</sup> *See Madden Ultimate Team Pack Probability*, MADDEN 21, <https://www.ea.com/games/madden-nfl/madden-nfl-21/news/madden-ultimate-team-21-pack-probability> (last visited Apr. 10, 2022) [hereinafter *Madden*].

<sup>18</sup> *Id.*

<sup>19</sup> *Madden*, *supra* note 17.

Brees card is included, a lucky draw to be sure, though it is not Brett Favre. Capitalizing on this new lucky streak, he buys more card packs. Several minutes and opened card packs later, no more highly rated players have been pulled. Brett Favre will not be joining his Ultimate Team today. Maybe next time, he will have more luck.

Meanwhile, this 12-year-old gamer's parents receive an alert that their credit card has been charged for \$120, and he is about to be grounded. He tries to explain that if he had pulled Brett Favre out of the card packs, it would have been worth it. He shows them his Ultimate Team and explains how he could better compete against online opponents and possibly win tournaments worth hundreds of thousands of dollars in prize money if only he had that one player.<sup>20</sup> He does not tell them that better player cards are released every week or that even with a better overall team, he really is not good enough at Madden NFL to compete in tournaments.

Now imagine a 27-year-old adult at a casino who spots a video slot machine modeled after his favorite movie, *The Fast and the Furious 12*. He decides to play one dollar, the reels spin with colorful animations of the characters from the movie and they settle on a losing line. He decides to play one more dollar. The reels spin and this time an animated explosion and flashing lights indicate he has won \$100! Capitalizing on his good fortune, he plays several more rounds, until he has lost not only the \$100 he won, but \$20 more. In both scenarios, the result was a \$120 loss playing a game. While there are several differences between the two hypothetical scenarios, the similarities are shocking and concerning.

One of these hypothetical activities is clearly labeled and regulated as gambling. The risks are known and assumed by an adult deemed to be of an age to assume those risks.<sup>21</sup> The activity undertaken by the twelve-year-old with the video game is similar to the adult in the casino, yet the activities are not governed by similar laws. Before traveling down the rabbit hole of gambling law and what may or may not govern, it is important to recognize why this could be a problem.

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<sup>20</sup> Christopher Yee, *This West Covina Man Is Known as the Greatest Madden Video Game Player of All Time*, SAN GABRIEL VALLEY TRIB. (Sept. 5, 2016), [https://www.sgvtribune.com/2016/09/05/this-west-covina-man-is-known-as-the-greatest-madden-video-game-player-of-all-time/?utm\\_source=dlvr.it&utm\\_medium=twitter](https://www.sgvtribune.com/2016/09/05/this-west-covina-man-is-known-as-the-greatest-madden-video-game-player-of-all-time/?utm_source=dlvr.it&utm_medium=twitter).

<sup>21</sup> See *Terms of Service*, CAESARS ENT., (Mar. 1, 2018), <https://www.caesars.com/corporate/terms-of-service>.

### C. DANGERS OF LOOT BOXES IN GAMING

To begin, some facts provide perspective on the issue. More than 240 million people in the United States play an hour or more of video games each week.<sup>22</sup> 70% of minors under the age of eighteen play video games, with 20% of all video game players falling into that same demographic.<sup>23</sup> In the three month span from April to June of 2020, Americans spent \$11.6 billion on video games.<sup>24</sup> While that number is greater than the year before, likely due to families spending more time at home during the COVID-19 pandemic, it is a staggering figure.

#### 1. GAMING BUSINESSES CAPITALIZING ON MICROTRANSACTIONS

One of the biggest players in that market, *Electronic Arts* (“EA”), reported in July of 2020 that their in-game revenue was over three times that of selling the games themselves.<sup>25</sup> EA is responsible for some of the most popular and highest grossing games today. Readers might recognize titles like Madden NFL, FIFA, UFC, and the Battlefield franchise, amongst others.<sup>26</sup> Out of the \$60.4 billion U.S. consumers spent on gaming in 2021, EA games are responsible for \$6.5 billion.<sup>27</sup> EA is not the only business profiting off in-game purchases. Owner of the wildly popular Fortnite, Epic Games offers Fortnite for free, with all revenue coming from in-game microtransactions. Epic launched Fortnite for

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<sup>22</sup> *2020 Essential Facts About the Video Game Industry*, ENT. SOFTWARE ASS’N, <https://www.theesa.com/esa-research/2020-essential-facts-about-the-video-game-industry/> (last visited Apr. 10, 2022).

<sup>23</sup> *Id.* (51.1 million total children).

<sup>24</sup> *Quarterly U.S. Consumer Spend on Video Game Products Reached the Highest Total in U.S. History in First Quarter of 2020*, NPDI GROUP (May 15, 2020), <https://www.npd.com/wps/portal/npd/us/news/press-releases/2020/quarterly-us-consumer-spend-on-video-game-products-reached-the-highest-total-in-us-history-in-first-quarter-of-2020/>.

<sup>25</sup> *Electronic Arts Reports Strong Q1 FY21 Financial Results*, ELEC. ARTS (July 30, 2020), [https://s22.q4cdn.com/894350492/files/doc\\_financials/2021/q1/Q1-FY21-Earnings-Release-Final.pdf](https://s22.q4cdn.com/894350492/files/doc_financials/2021/q1/Q1-FY21-Earnings-Release-Final.pdf) (\$359 million from game sales, \$1.1 billion from “live” services).

<sup>26</sup> ELEC. ARTS, <https://www.ea.com/games/library> (last visited Apr. 10, 2022).

<sup>27</sup> *Q3 FY22 Financial Results*, ELEC. ARTS REPS. (Feb. 1, 2022), <https://www.ea.com/news/electronic-arts-reports-q3-fy22-financial-results>; Leah J. Williams, *US Games Spending Hit a Record US \$60.4 Billion in 2021*, GAMES HUB (Jan. 21, 2022), <https://www.gameshub.com/news/news/us-games-spending-record-2021-11492/>.

Apple mobile devices in 2018 and raked in \$2 million a day for a time, solely from sales on that platform.<sup>28</sup>

While Fortnite itself is described as “free-to-play,” players are limited to a single game mode and few cosmetic options.<sup>29</sup> Players can purchase a “battle-pass” which allows access to other game modes and cosmetics.<sup>30</sup> Players can purchase the items outright, converting real money into “V-Bucks,” which are then used to make in-game purchases.<sup>31</sup> Fortnite will often have special limited-time events, partnering with big-name brands like Marvel and allowing players to make their character look like a famous superhero.<sup>32</sup> One of the more popular elements available for purchase are “dances,” which make the player’s in-game avatar move and groove.<sup>33</sup> This feature is so popular that a lawsuit was brought against Epic Games over the trademark of Alfonso Ribeiro’s dance, “The Carlton,” featured on “Fresh Prince of Bel-Air.”<sup>34</sup> Ribeiro later dropped the suit, along with a similar claim against the basketball game NBA2K for using the dance.<sup>35</sup>

Fortnite is not the only game that is free on its face but that costs to truly play. Like mentioned above, many of the top games in the mobile app stores contain loot box mechanics. These games, frequently called “freemium” or “pay-to-play,” cost nothing to download or to access.<sup>36</sup> Most freemium games allow the player to access a limited section of the game, or tease premium features that

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<sup>28</sup> Akhilesh Ganti, *How Does Fortnite Make Money?*, INVESTOPEDIA (Sept. 10, 2020), <https://www.investopedia.com/tech/how-does-fortnite-make-money/>.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*; see also Joseph Knoop, *Epic Games Settles Fortnite Loot Box Lawsuit with V-bucks*, PC GAMER (Feb. 22, 2021), <https://www.pcgamer.com/uk/fortnite-lawsuit-loot-llama/>.

<sup>32</sup> *Leader Board of Top Selling Mobile Games*, SIMILARWEB (Nov. 7, 2020), <https://www.similarweb.com/apps/top/google/store-rank/us/games/top-grossing/>.

<sup>33</sup> *Id.*

<sup>34</sup> *Ribiero v. Take-Two Interactive Software, Inc.*, No. 2:18-cv-10417 (C.D. Cal. dismissed Dec. 17, 2018).

<sup>35</sup> *Alfonso Ribeiro Drops 'Carlton Dance' Suit Against 'Fortnite' Video Game Creators*, ASSOCIATED PRESS (Mar. 7, 2019), <https://www.usatoday.com/story/life/people/2019/03/07/alfonso-ribeiro-drops-carlton-dance-suit-against-fortnite/3098433002/>.

<sup>36</sup> Vanshika Dhyani, *The Psychology of Freemium Games*, UX PLANET (Jun. 8, 2020), <https://uxplanet.org/the-psychology-of-freemium-games-69024d80273b>.



require the collection of random items contained in loot boxes or outright purchases.<sup>37</sup>

This business model has been successful for the developers, as evidenced by the correlation between top grossing games in the app stores and their “free” price tag. One such game, Clash of Clans, has earned over \$6.4 billion since its launch in 2014, despite being “free-to-play.”<sup>38</sup> Mobile game users have often complained about this business strategy, stating that it is misleading and predatory.<sup>39</sup>

A distinct difference between different types of loot boxes must be mentioned here. Some loot boxes can be earned through game play or progression, or after completing certain objectives.<sup>40</sup> These are gifted by the game with no strings attached, a free reward just for playing.<sup>41</sup> Paid loot boxes are another animal altogether. These can only be unlocked via payment of some kind, whether in real dollars, or in-game currency.<sup>42</sup> Often, video game developers will increase the odds of pulling something desirable out of the paid loot boxes.<sup>43</sup> The most damage that the free, earned loot boxes can wreak is to lure the gamer in with colorful animations and flashing lights, convincing them to open another loot box; a paid one this time. Paid loot boxes are the focus of this article, which explores the dangers associated with companies getting too greedy, and the lack of regulatory oversight for paid loot boxes in video games.

## 2. *WHEN LOOT BOXES GO TOO FAR*

At one point, a handful of game manufacturers crossed a line with their random loot mechanics and outraged the video game community. In particular, EA’s “Star Wars: Battlefront II” received criticism for its loot box system, a breaking point for many

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<sup>37</sup> *Id.*

<sup>38</sup> Sehaj Dhillon, *Clash of Clans Revenue and Usage Statistics (2022)*, BUS. APPS (Jan. 11, 2022), <https://www.businessofapps.com/data/clash-of-clans-statistics/>.

<sup>39</sup> See Harrison Jacobs, *Gaming Guru Explains Why 'Freemium' is Actually the Best Business Model for Multiplayer Video Games*, BUS. INSIDER (Mar. 19, 2015, 10:08 AM), <https://www.businessinsider.com>.

<sup>40</sup> See Andrew E. Freedman, *What Are Loot Boxes? Gaming's Big Controversy Explained*, TOM'S GUIDE (Aug. 9, 2019), <https://www.tomsguide.com/us/what-are-loot-boxes-microtransactions,news-26161.html>.

<sup>41</sup> See generally *id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

players.<sup>44</sup> *Battlefront II*'s loot box system allowed a player to either pay money for desired abilities, weapons, and avatars randomly assorted in its loot boxes, or required the player to put in several hours of grinding gameplay to earn the same items.<sup>45</sup> During a question and answer session on Reddit, an unsuspecting developer who had worked on the game was ambushed.<sup>46</sup> The developer was confronted with the math that in order to unlock all the content in the game, a player would either have to invest \$2,100 or 4,528 hours of gameplay.<sup>47</sup> One Reddit user asked, “[t]hat’s over twice the amount of working a full time, 40 hour-a-week job for a year, and very few people will play even a quarter of that. What are your plans to retain a player base with such a slow progression system?”<sup>48</sup> A representative of EA replied in another thread with, “[t]he intent is to provide players with a sense of pride and accomplishment for unlocking different heroes.”<sup>49</sup> That comment is currently the most “downvoted” in Reddit history, with more than 668,000 users reacting negatively and expressing their frustration.<sup>50</sup> EA eventually removed the mechanic from the game and made several changes that, when the game was reintroduced, did not receive the same negative reaction.<sup>51</sup> The damage had been done however, and with

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<sup>44</sup> Tyler Wilde, *Star Wars Battlefront 2 Microtransactions Have Been Temporarily Removed*, PC GAMER (Nov. 16, 2017), <https://www.pcgamer.com/star-wars-battlefront-2-microtransactions-have-been-temporarily-removed/>.

<sup>45</sup> See Soeren Kamper, *It Will Take 4,528 Hours of Gameplay (or \$2100) to Unlock All Base-Game Content in Star Wars: Battlefront 2*, STAR WARS GAMING (Nov. 14, 2017), <https://swtorstrategies.com/2017/11/it-will-take-4528-hours-of-gameplay-or-2100-to-unlock-all-base-game-content.html>.

<sup>46</sup> See u/thesomeot, Comment to *Star Wars Battlefront II DICE Developer AMA*, REDDIT (Nov. 15, 2017), [https://www.reddit.com/r/StarWarsBattlefront/comments/7d4qft/star\\_wars\\_battlefront\\_ii\\_dice\\_dev\\_eloper\\_ama](https://www.reddit.com/r/StarWarsBattlefront/comments/7d4qft/star_wars_battlefront_ii_dice_dev_eloper_ama).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> u/EACommunityTeam, Comment to *Seriously? I Paid 80\$ to Have Vader Locked?*, REDDIT (Nov. 12, 2017), [https://www.reddit.com/r/StarWarsBattlefront/comments/7cff0b/seriously\\_i\\_paid\\_80\\_to\\_have\\_vader\\_locked/dppum98/?st=JA00J743&sh=b95da37c](https://www.reddit.com/r/StarWarsBattlefront/comments/7cff0b/seriously_i_paid_80_to_have_vader_locked/dppum98/?st=JA00J743&sh=b95da37c).

<sup>50</sup> *Id.*

<sup>51</sup> Wilde, *supra* note 44; see also Knoop, *supra* note 31.

more consumers aware of this blatant showing of corporate greed, the public demanded more regulation.<sup>52</sup>

At what point would consumer outrage overpower the money printing capabilities of loot boxes and microtransactions? The popularity of these games has not been as affected as gamers, angry with loot box mechanics, may want. If anything, the popularity of these games is growing each year. ESPN has recognized competitive gaming as “E-Sports” and will show tournaments on cable TV.<sup>53</sup> These E-Sports teams not only consider themselves athletes, but also have sponsors and endorsement deals for products from energy drinks to keyboards and cars.<sup>54</sup> E-Sports tournaments can be enormous, with the Madden NFL 21 championship winner coming away with \$1.4 million in prize money.<sup>55</sup>

### 3. CURRENT REGULATIONS

There is a clear trend of video games moving away from simply being a “pay and play” commodity toward something much more complex. Once upon a time, a gamer could purchase a video game over the counter or from a digital storefront and have access to the entire game with no requests for further payment from the video game company. With the market shifting towards in-game purchases, so too must the regulations and laws shift to accommodate the new hurdles.

Before answering the questions of what should be done, it is essential to understand what is being done now. Video games released in the United States all have a rating attached.<sup>56</sup> Much like the rating system for films and television programming, games are rated according to a certain maturity level believed to be necessary for a user.<sup>57</sup>

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<sup>52</sup> Andy Chalk, *US Lawmaker Who Called out Star Wars Battlefront 2 Lays out Plans for Anti-Loot Box Law*, PC GAMER (Dec. 5, 2017), <https://www.pcgamer.com/us-lawmaker-who-called-out-star-wars-battlefront-2-lays-out-plans-for-anti-loot-box-law/>.

<sup>53</sup> See generally ESPN, <https://www.espn.com/esports/> (last visited Apr. 12, 2022).

<sup>54</sup> Jordan Ashley, *Top 10 Esports Sponsorships That Will Redefine the Industry*, ESPORTS.NET (Aug. 12, 2021), <https://www.esports.net/news/top-10-esports-sponsorships/>.

<sup>55</sup> Stacey Henley, *EA Announces Record Breaking Prize Pool for Madden 21 Championships*, LOADOUT (Aug. 26, 2020), <https://www.the.loadout.com/madden-nfl-21/madden-21-championships-prize-pool>.

<sup>56</sup> ESRB, <https://www.esrb.org> (last visited Apr. 8, 2022).

<sup>57</sup> *Id.*

The ESRB has a ratings system dedicated to helping parents determine if a game is appropriate for their child.<sup>58</sup> An “E” rating means it is approved for “Everyone,” which means the game has little or no objectionable material and should be suitable for even the youngest gamer.<sup>59</sup> An “E10+” rating indicates the game is suitable for children aged ten and older.<sup>60</sup> A “T” rating means the game is approved for teens, or minors under the age of seventeen, and may contain mild language and cartoon violence.<sup>61</sup> “M” is for “Mature,” the most common game rating.<sup>62</sup> “M” indicates the game may include “intense violence, blood and gore, sexual content and/or strong language.”<sup>63</sup> Popular games today like Call of Duty and Grand Theft Auto are rated M.<sup>64</sup> “AO 18+,” or “Adults Only 18+,” applies only to the rare game that may include, “prolonged scenes of intense violence, graphic sexual content and/or **gambling with real currency.**”<sup>65</sup>

In April of 2020, after push back from parents and consumers, the ESRB added a warning on “T” rated games that included a loot box mechanic that read, “in-game purchases with random items.”<sup>66</sup> Some users would say this is not enough. An “AO18+” rating on a game would mean less revenue and fewer overall sales, thus disincentivizing a studio to include gambling with real money. But if a game with loot boxes could be described as actual gambling, with real money, does it not deserve a rating higher than “T”? Should it not be truly regulated, like gambling is?

#### 4. *WHAT IS THE DANGER?*

Hawaii Representative Chris Lee has been one of the first U.S. politicians to lead the charge against the practices in Battlefront II,

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<sup>58</sup> *Ratings Guide*, ENT. SOFTWARE RATING BD., <https://www.esrb.org/ratings-guide/> (last visited Apr. 8, 2022).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Kyle Chivers, *2020 Video Game Ratings in Review, and What They Mean to Gamers*, NORTON (Jan. 14, 2021), <https://us.norton.com/internetsecurity-kids-safety-video-game-ratings.html>.

<sup>63</sup> *Id.*

<sup>64</sup> See *Grand Theft Auto V*, ENT. SOFTWARE RATING BD., <https://www.esrb.org/ratings/33073/Grand+Theft+Auto+V/> (last visited Apr. 14, 2022); see also *Call of Duty®: Vanguard*, ENT. SOFTWARE RATING BD., <https://www.esrb.org/ratings/38008/Call+of+Duty®%3A+Vanguard/> (last visited Apr. 14, 2022).

<sup>65</sup> *Ratings Guide*, *supra* note 58 (emphasis added).

<sup>66</sup> *Id.*

calling it “a *Star Wars*-themed online casino designed to lure kids into spending money.”<sup>67</sup> Rep. Lee stated he was in contact with legislators with the intent to change laws in several states regarding microtransactions and loot box-type mechanics in video games, especially those marketed toward children.<sup>68</sup> Video game manufacturers seem to be on a never-ending quest to include more and more loot box mechanics and microtransactions in their games—constantly pushing the envelope to see what consumers will allow and how much money they will spend. Why is this a problem? We live in a capitalist economy and people can make their own choices, right?

The problem, hinted at several times already and plainly stated by Rep. Lee, is that the target audience for many of these games is children. Children are highly susceptible to all activities known to cause addiction, and gambling is no exception.<sup>69</sup> Adolescent gambling addiction recovery programs are already providing assistance to minors who have struggled with the gamblers high that many have described experiencing while opening loot boxes.<sup>70</sup>

Gambling may not have the same stigma it has carried in times past, with images of a dirty room behind a bar, men shouting at a TV, cheering and cursing at a football game, and money being passed around and clenched in sweaty fists long-gone. There are easier and more legitimate ways to lose money now. The internet has made it extraordinarily simple to play poker, blackjack, or pull slots.<sup>71</sup> One can also bet the over on a basketball game, or place a

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<sup>67</sup> Chris Lee, *Highlights of the Predatory Gaming Announcement*, YOUTUBE, (Nov. 21, 2017), [https://www.youtube.com/watch?v=\\_akwfRuL4os&feature=emb\\_logo](https://www.youtube.com/watch?v=_akwfRuL4os&feature=emb_logo).

<sup>68</sup> *Id.* Rep. Lee has also been joined in this effort by Senator Hawley of Missouri, though Hawley wants to more aggressively ban social media and video game practices that target children. *Senator Hawley to Introduce Legislation Banning Manipulative Video Game Features Aimed at Children*, JOSH HAWLEY U.S. SENATOR FOR MO. (May 8, 2019), <https://www.hawley.senate.gov/senator-hawley-introduce-legislation-banning-manipulative-video-game-features-aimed-children>.

<sup>69</sup> Mark D. Griffiths, *Is the Buying of Loot Boxes in Video Games a Form of Gambling or Gaming?*, GAMING L. REV. (2018).

<sup>70</sup> Filipa Calado et al., *Prevalence of Adolescent Problem Gambling: A Systematic Review of Recent Research*, J. GAMBLING STUD. 397, 397-424 (2017); see also David Zendle et al., *Adolescents and Loot Boxes: Links with Problem Gambling and Motivations for Purchase*, 6 ROYAL SOC'Y PUBL'G 1 (June 19, 2019).

<sup>71</sup> *Our Overall Attitude Towards Gambling and Betting Has Changed*, EURO WEEKLY NEWS (Apr. 5, 2022, 10:36 AM), <https://euroweeklynews.com/2022/04/05/our-overall-attitude-towards-gambling-and-betting-has-changed/>.

bet on ferret bingo.<sup>72</sup> While modern technological advances have made it easier to bet on silly or childish things, gambling is not for minors. If paid loot boxes are really veiled gambling, they need to be kept away from children.

#### D. MODERN GAMBLING REGULATION

Gambling in the United States is a massive industry. According to one source the gambling industry in the U.S. is worth over \$240 billion, with online gambling worth \$102 billion.<sup>73</sup> Yearly revenues have exceeded \$158 billion.<sup>74</sup> Under U.S. law, gambling is legal, though several states have enacted statutes banning either certain gambling practices or kiboshing it all together.<sup>75</sup> Only two states, Hawaii and Utah, have banned all gambling, including a state lottery.<sup>76</sup> From commercial casinos, Native American casinos, lotteries, and online gambling, there are many ways to gamble and many gambling activities that are regulated and taxed.

In 2006, congress passed the Unlawful Internet Gambling Enforcement Act (“UIGEA”).<sup>77</sup> The UIGEA prohibits gambling businesses from “knowingly accepting payments in connection with the participation of another person in a bet or wager that involves the use of the Internet and that is unlawful under any federal or state law.”<sup>78</sup> The act itself does not illegalize online gambling, but disallows businesses from processing online gambling money.<sup>79</sup> Under the UIGEA, would a video game company be violating the law by accepting payment from players purchasing loot boxes? The transaction is taking place over the internet, but in the example of

<sup>72</sup> Samantha Beckett, *8 Bizarre Things You Can Actually Bet On*, CASINO.ORG (Mar. 17, 2017), <https://www.casino.org/blog/8-bizarre-things-you-can-actually-bet-on/>.

<sup>73</sup> *Online Gambling Market Worth \$102.97 Billion by 2025*, CISION (Aug. 27, 2019), <https://www.prnewswire.com/news-releases/online-gambling-market-worth-102-97-billion-by-2025--cagr-11-5-grand-view-research-inc-300907362.html>.

<sup>74</sup> S. Lock, *Total Revenue of the Gambling Market in the United States from 2004 to 2018*, STATISTA (May 29, 2020), <https://www.statista.com/statistics/271583/casino-gaming-market-in-the-us/#:~:text=In%202018%2C%20the%20U.S.%20gambling,stakes%20gaming%20and%20tribal%20gaming.>

<sup>75</sup> *State Gambling Laws*, FINDLAW, <https://statelaws.findlaw.com/gambling-and-lotteries-laws/gambling.html> (last visited Nov. 7, 2020).

<sup>76</sup> *Id.*

<sup>77</sup> Unlawful Internet Gambling Enforcement Act of 2006 Overview, 31 U.S.C. §§ 5361-5366 (2006).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

the twelve-year-old playing Madden NFL Ultimate Team, his money is transferred into Xbox points, which are then used to buy the card packs. In that case, would Xbox, EA, or the user be the one violating the UIGEA? The act does not specify that “payments” means “dollars.”<sup>80</sup> If paid loot boxes were determined to be gambling, certainly keeping them in-game would violate the UIGEA.

### 5. CURRENT GAMBLING LAWS

While the several states regulate gambling within their own borders, one common aspect is the minimum gambling age, usually 21, with no state lower than 18 years old.<sup>81</sup> In most states, it is illegal to enter a casino if one is under 21.<sup>82</sup> In New Jersey, an eighteen-year-old can purchase a lottery ticket but cannot set foot in a casino.<sup>83</sup> Some have pondered the reason for this seemingly arbitrary number.<sup>84</sup> Could it have something to do with the service of alcohol in casinos? Maybe the responsibility of assuming the risks associated with alcohol is seen as equivalent to the risks inherent in gambling? Perhaps studies about human brain development and the frontal lobe supposedly still growing until 21 have influenced this age bar.<sup>85</sup> Studies have linked adolescent gambling with anti-social behavior, depression, anxiety, future drug and alcohol abuse, and suicide.<sup>86</sup> Whatever the reason, no state has seen fit to lower the minimum gambling age, while the fact remains that many video game players and those who are able to purchase loot boxes are under that legal age.

### E. MARKETING GAMBLING TO CHILDREN

Today, minors are essentially constantly plugged in to the internet. Playing games with friends and strangers is a popular

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<sup>80</sup> *Id.*

<sup>81</sup> I. NELSON ROSE, *PATHOLOGICAL GAMBLING: A CRITICAL REVIEW* (1979).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *How Would Lowering the Legal Age of Gambling Impact the US?*, DAILY IOWAN, (Mar. 26, 2020) <https://dailyiowan.com/2020/03/26/how-would-lowering-the-legal-age-of-gambling-impact-the-us/>.

<sup>85</sup> Chris Foy, *RNGs and Loot Boxes: The Gambling Addiction of Gaming*, FHE HEALTH (Aug. 8, 2019), <https://therehab.com/learning/rng-lootboxes-gambling-in-gaming/>.

<sup>86</sup> Katie Hansen, *Too Much Too Soon: The Consequences of Underage Gambling*, LANCER FEED (Feb. 3, 2016), <https://lancerfeed.press/opinions/2016/02/03/too-much-too-soon-the-consequences-of-underage-gambling/>.

pastime, especially on mobile devices.<sup>87</sup> Over 238 million people play mobile games in the U.S. and Canada.<sup>88</sup> Not only is playing games popular, but watching other people play the games is popular as well.<sup>89</sup> “Streamers” are those who play video games and stream it live on the internet.<sup>90</sup> They share their screen for all to see and often have a camera facing themselves. For those unfamiliar with streamers and the industry, it may sound silly. Who would watch someone else play a video game?

Not only do millions of people spend hours watching streamers, they often pay for the privilege.<sup>91</sup> Twitch.tv, the most popular platform for streamers, brought in \$2.3 billion in revenue in 2020.<sup>92</sup> Most of that is believed to go to the streamers themselves, the most popular of which have endorsement deals and run advertisements on their Twitch channel.<sup>93</sup> The most popular streamer, “Ninja,” brings in around \$5 million a year from his more than 14.7 million followers.<sup>94</sup> The game that Ninja streams the most and the game that brought him fame and money is none other than the afore mentioned Fortnite.<sup>95</sup>

Why should we care that children are tuning in to watch other people play video games? Children are highly susceptible to media and advertising.<sup>96</sup> Video game companies will pay these streamers to play their games. Inevitably, those that stream games containing loot boxes will buy some and open them. Some viewers will even “donate” money to the streamer specifically for loot boxes. After opening, usually several, loot boxes, the streamer will pull a desirable item. This then convinces the viewers that they too can

<sup>87</sup> 65% of Americans and Canadians Play Mobile Games, NPD (Jan. 19, 2021), <https://www.npd.com/wps/portal/npd/us/news/press-releases/2021/65-of-americans-and-canadians-play-mobile-games/>.

<sup>88</sup> *Id.*

<sup>89</sup> Mansoor Iqbal, *Twitch Revenue and Usage Statistics (2022)*, BUS. APPS (Jan. 11, 2022), <https://www.businessofapps.com/data/twitch-statistics/>.

<sup>90</sup> *See id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*; see also, *How Much Do Twitch Streamers Make? 2022 Earning Statistics Revealed*, STREAM SCHEME, (Feb. 4, 2022), <https://www.streamscheme.com/twitch-payout/>.

<sup>94</sup> Iqbal, *supra* note 89.

<sup>95</sup> *Id.*

<sup>96</sup> Abraham Riesman & Jesse Singal, *This Is Your Brain on Advertising: Why Kids Are So Vulnerable to Marketing*, CUT (Nov. 3, 2015), <https://www.thecut.com/2015/11/why-kids-are-so-vulnerable-to-advertising.html>.



obtain these rare items. It is worth noting that several streamers have been accused of “streamer luck,” a tongue-in-cheek way of accusing them of having increased chances at rare items granted by the video game company, a claim that has been denied by several streamers.<sup>97</sup>

While these streamers can afford to open dozens of loot boxes all at once, a feat that would cost a typical gamer hundreds of dollars, and are incentivized by most video games containing loot boxes that offer deals (the more loot boxes one buys, the cheaper each one is), the odds are that the streamer will pull a desirable item from a loot box. A casual gamer would possibly buy a loot box or two, not gain a rare item, and simply move on. With the “testimonial” of the streamer offering credibility, however, the gamer may be enticed to purchase more and more, until the desired item is pulled. This type of advertising is especially dangerous to those who are young and more susceptible.<sup>98</sup>

It could be said that it is impossible to show direct evidence that a company like EA markets games like Madden NFL directly to children. After all, football is an adult sport played by adults and enjoyed by people of every age demographic. However, on January 7<sup>th</sup>, 2021, EA’s official Madden NFL Twitter account tweeted a teaser that said, “Are You Ready?” featuring the children’s cartoon Spongebob Squarepants.<sup>99</sup> A few days later, uniforms, animations, stadiums, and more in-game items featuring the world’s favorite sponge and his friends were added to the game.<sup>100</sup> If paid loot boxes are gambling, then advertising aimed at children for a game containing paid loot boxes would be wrong, right? What is the difference between cigarettes being marketed to children with Joe

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<sup>97</sup> See Gutfoxx, *My Best TOTW Packs All Year! Streamer Luck Was Activated!*, YOUTUBE (Jan. 12, 2021), <https://www.youtube.com/watch?v=DjyxpCBNWU>.

<sup>98</sup> See Committee on Communications, *Children, Adolescents, and Advertising*, PEDIATRICS: OFFICIAL J. AM. ACAD. PEDIATRICS, (Dec. 2006).

<sup>99</sup> @EAMaddenNFL, TWITTER (Jan. 5, 2021, 9:00AM), <https://twitter.com/EAMaddenNFL/status/1346486827897810945?s=20>.

<sup>100</sup> Richard Warren, *Madden NFL 21 SpongeBob Crossover Includes New Cosmetics, Challenges, and More*, GAMERANT (Jan. 8, 2021), <https://gamerant.com/madden-nfl-21-spongebob-crossover-cosmetics-challenges/>; see also *Nickelodeon X Madden NFL 21*, ELEC. ARTS, <https://www.ea.com/games/madden-nfl/madden-nfl-21/seasons/nickelodeon> (last visited Apr. 10, 2022).

Camel and gambling being marketed to children with Spongebob?<sup>101</sup>

## II. ARE PAID LOOT BOXES GAMBLING?

Most people can agree that playing slot machines, blackjack, or a similar activity is gambling. But if we are to determine if paid loot boxes should be lumped in with those activities, gambling should be defined. Common law and Black's Law Dictionary break gambling into three elements: (1) consideration; (2) prize, and; (3) chance.<sup>102</sup> It is debated whether loot boxes satisfy these elements.<sup>103</sup> While some loot boxes that can be earned through game play may not fall under the common law definition of gambling, the paid loot boxes purchased with money certainly do.<sup>104</sup>

### A. CONSIDERATION

Gaming in the gambling context requires players to give something of value to play the game, this consideration could be actual currency or some substitute like poker chips.<sup>105</sup> Real-world currency obviously satisfies this element, but in-game currency is a little less clear.<sup>106</sup> If we liken the exchange of Xbox Points to casino chips, there is a clear exchange of real currency for something that can also be exchanged for something of value. Chips at a casino can then be exchanged for currency or used as further consideration to continue gaming. The chips represent the value of the almighty dollar and are treated as such, though only in a limited context within the specific casino.

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<sup>101</sup> See John M. Broder, *FTC Charges Joe Camel Ad Illegally Takes Aim at Minors*, N.Y. TIMES (May 29, 1997), <https://www.nytimes.com/1997/05/29/us/ftc-charges-joe-camel-ad-illegally-takes-aim-at-minors.html>; *Joe Camel Advertising Campaign Violates Federal Law, FTC Says*, FTC (May 28, 1997), <https://www.ftc.gov/news-events/press-releases/1997/05/joe-camel-advertising-campaign-violates-federal-law-ftc-says>.

<sup>102</sup> *Gambling*, BLACK'S LAW DICTIONARY (9th ed. 2009). See also WALTER T. CHAMPION JR. & I. NELSON ROSE, GAMING LAW NUTSHELL 8 (1st ed. 2012).

<sup>103</sup> Alexandra M. Prati, *Video Games in the Twenty-First Century: Parallels Between Loot Boxes and Gambling Create an Urgent Need for Regulatory Action*, 22 VAND. J. ENT. & TECH. L. 215, 236-39 (2019).

<sup>104</sup> See *id.*

<sup>105</sup> *Id.*

<sup>106</sup> See *id.*

Xbox Points or other forms of in-game currency can only be exchanged back to real-world currency through some kind of grey market or a direct refund.<sup>107</sup> However, do the Xbox Points have any less value once converted from real-world currency? § 330.1(f) of the California Code (examined in greater detail later on) leads us to the idea that anything of value being exchanged for a chance at something else, like earning a free spin on a slot machine, meets the definition of proper consideration.<sup>108</sup>

Paid loot boxes should satisfy the consideration element. The loot boxes that are earned by in-game progression would not meet the requirements for the consideration prong unless one's time could be deemed proper consideration.<sup>109</sup> Perhaps in some cases, where the time invested clearly overshadows a potential prize's worth would meet the requirements<sup>110</sup>, but it is unlikely that any loot box not purchased with real-world currency would satisfy this element. The resolution of current litigation may provide a more concrete, legal answer to this question.<sup>111</sup>

## B. PRIZE

The hypothetical twelve-year-old from earlier loves the Ultimate Team mode in Madden NFL. Within this game-mode, there is an auction house feature that can be used to buy and sell cards to real people using an in-game currency called coins.<sup>112</sup> A card's worth is dependent on how rare they are and their overall rating. Cards can be posted in the auction house and other people can place coin bids, offering more and more coins until the auction expires and the person with the highest bid gets the card.<sup>113</sup> The player who put the card up for auction gets the coins, minus a 10%

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<sup>107</sup> See *Sell MUT Coins*, MR. MUT COIN, <https://www.mrmutcoin.com/> (last visited Apr. 10, 2022) (selling coins in the grey market); see also *ROCK BOTTOM*, <https://www.rockbottomcoins.com> (last visited Apr. 10, 2022) (selling coins in the grey market).

<sup>108</sup> See CAL. PENAL CODE § 330.1 (Deering 2022).

<sup>109</sup> See generally *CHAMPION & ROSE*, *supra* note 102, at 9.

<sup>110</sup> See *supra* Section I.C.2.

<sup>111</sup> *Ramirez v. Electronic Arts, Inc.*, 5:20cv5672, (N.D. Cal. filed Aug. 13, 2020)(This case has been moved to arbitration as of Mar. 5, 2021).

<sup>112</sup> *Madden Ultimate Team Grinder's Guide: Auction House*, EA SPORTS (Oct. 28, 2021, 4:40 PM), <https://www.easports.com/madden-nfl/news/2014/mut-auction-house>.

<sup>113</sup> See *id.*

auction tax.<sup>114</sup> Because of this, we can place approximate dollar values on card packs.<sup>115</sup>

For the prize element of common law gambling to be satisfied, the player must have an opportunity to obtain something of value.<sup>116</sup> Prizes include real currency, replays for games, or virtual items.<sup>117</sup> In *Kater v. Churchill Downs Inc.*, the court determined that virtual currency and in-game virtual items can satisfy the prize element of common law gambling.<sup>118</sup> However, in the same case, the court ruled that if an in-game currency could only be converted to real-world currency through a process that would violate the game's terms of service, it could not be considered a "prize". The ruling would seem to diminish the value of in-game currency that can only be exchanged into real-world currency via a black or grey market, which violates most, if not all game's terms of use.

This further clouds the waters around what may seem an easily satisfied element. The answer remains that while not everyone may see an in-game item or virtual currency as valuable, to some it can be just as valuable as real-world currency. To be sure, some courts would not consider the prize element met in money-exchange scenarios that violate a game's terms of service agreement.<sup>119</sup>

### C. CHANCE

Chance is, on first look, the most easily-met element for common-law gambling.<sup>120</sup> Chance requires that the outcome of the

<sup>114</sup> *Id.*

<sup>115</sup> How the auction house works: without getting complicated enough to require an economics degree, let us assume Brett Favre would be worth 1 million coins on the auction block. One could then risk up to just under the dollar equivalent of 1 million coins and "turn a profit." But "grey market" coin sellers have been popping up on the internet. See sources cited *supra* note 107. One can exchange real dollars for Madden coins, either through selling or buying. Let us assume 1 million coins are worth \$200 in actual currency. So, if someone pays under \$200 in card packs and pulls a Brett Favre, they would be able to turn a profit. Some online coin sellers will even sell you a particular card at the equivalent coin to dollar rate. With this information in hand, the argument could be made that one could put dollars in and get dollars out of loot boxes. See also *supra* note 112.

<sup>116</sup> *Gambling*, BLACK'S LAW DICTIONARY (9th ed. 2009).

<sup>117</sup> See *Kater v. Churchill Downs Inc.*, 886 F.3d 784, 787 (9th Cir. 2018).

<sup>118</sup> *Id.*

<sup>119</sup> See *Mason v. Mach. Zone, Inc.*, 140 F. Supp. 3d 457, 465 (D. Md. 2015).

<sup>120</sup> See *Chance*, BLACK'S LAW DICTIONARY (11th ed. 2019).

game or activity be determined by luck rather than skill.<sup>121</sup> Loot boxes operate on a random number generator (“RNG”) system and fit this element by definition.<sup>122</sup> One could open the same loot box 100 times and receive no rare or valuable items or receive 100 rare items.<sup>123</sup> Some gamers play this numbers game to attempt to turn a profit. Assuming a certain loot box has a five percent chance at a certain item, one should receive five of those items after opening 100 loot boxes. This is a fallacy however, as the player has a five percent chance at that item every time the loot box is opened.<sup>124</sup> The player could never see the rare item or obtain it in the first loot box.

While the loot boxes themselves are operated purely by chance and would satisfy this element handily, one court has seen fit to classify the game as a whole and not the mechanic itself.<sup>125</sup> In *Mason v. Mach. Zone, Inc.*, the Maryland District Court determined that despite a purely chance-based in-game mechanic, if the game as a whole could be called a game of skill and not chance, all things in the game are of the same.<sup>126</sup> The plaintiff in *Mason* brought an action against a mobile game manufacturer, suing for money she claims was lost in an illegal casino within defendant’s game.<sup>127</sup> The game in question contained an in-game casino feature in which the plaintiff stated they had lost over \$100.<sup>128</sup> The plaintiff claimed that the in-game mechanic is an illegal slot machine under California Penal Code § 330b.<sup>129</sup>

The court concluded that the in-game casino function generally satisfied the elements of common law gambling and fit into the requirements set forth in § 330b.<sup>130</sup> The court then took a unique position and analogized the game to a pinball machine.<sup>131</sup> Noting

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<sup>121</sup> *See id.*

<sup>122</sup> Chris Foy, *RNGs and Loot Boxes: The Gambling Addiction of Gaming*, FHEHEALTH (Aug 8, 2019), <https://therehab.com/learning/rng-lootboxes-gambling-in-gaming/>.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*; see also Daniel M. Oppenheimer & Benoit Monin, *The Retrospective Gambler’s Fallacy: Unlikely Events, Constructing the Past, and Multiple Universes*, 4 JUDGMENT & DECISION MAKING (2009), <http://journal.sjdm.org/9609/jdm9609.html>.

<sup>125</sup> *Mason v. Mach. Zone, Inc.*, 140 F. Supp. 3d 457, 463 (D. Md. 2015).

<sup>126</sup> *Id.* at 460.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*; see also Cal. Penal Code § 330b.

<sup>130</sup> *Mason*, 140 F. Supp. at 463. (explaining the court’s skepticism of the “machine or device” requirement of § 330b applied to a piece of software).

<sup>131</sup> *Id.*

that pinball machines, which are games of skill, sometimes award free replays to the player, an in-game random, chance-based mechanic therefore does not a game of chance make.<sup>132</sup> While this reasoning seems open to argument, the offending device at issue was not the game itself, but rather the casino mechanic within the game.<sup>133</sup>

The game developer-defendant in *Mason* argued that the game is one of skill and would be exempt from § 330b.<sup>134</sup> The Maryland court viewed the developer's argument with far greater weight than may have been warranted. The court refused to examine the gambling element of the game individually.<sup>135</sup> Instead, the court steadfastly looked at the game as a whole, not unlike viewing a casino as a den of random chance games rather than a den of skill-based games, like Texas Hold 'em Poker.<sup>136</sup> The court doubled down on its position with the proclamation, "[t]he game at issue here is not a 'Casino.'"<sup>137</sup> The *Mason* court's position is certainly debatable, to say the least. By not examining the individual element of chance within the game, the court ignored what could potentially be a predatory practice, harmful to many.

The court's decision in *Mason* undermines the strength of the argument that loot boxes satisfy the chance element. Post-*Mason*, any game with loot boxes could be defined as a skill-based game. Madden NFL would easily be classified as a game of skill, despite containing chance-based elements. If the courts choose not to examine the loot box mechanic by itself and instead choose to look at the game only as a whole, loot boxes will escape proper definition or regulation, whether they are determined to be a gambling mechanic or not.

What is the difference between the aforementioned trading card packs and loot boxes? On the surface, these appear similar. Both have a random element, both have rare and desirable items, and both have the chance at pulling common items more often than rare or valuable items. Purchasing baseball cards is not considered gambling and one would be hard-pressed to find someone who thinks they are. What is the difference? Could it be the aspect of having a physical card in your hand, versus a digital one? Could it

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*; see also *United States v. Hsieh*, No. 11-00082, 2013 WL 1499520 (D. Guam Apr. 12, 2013) (holding that while poker is mainly a skill-based game, its elements of chance make it a game of chance).

<sup>137</sup> *Mason*, 140 F. Supp. at 463.

be that loot boxes are part of a greater video game universe, rather than just a card pack from the drug store? This author submits that the material difference between the two is that paid loot boxes are a part of a game that has already been bought and paid for. Purchasing a \$60 video game and then immediately being faced with the prospect of spending more money for items in that game feels exploitative and devious, especially when game progression requires an item only acquirable through a loot box.

When purchasing a physical trading card pack, one purchases the pack and the chance at a desirable card. Other than collecting, or perhaps selling, rare cards, there is no other purpose, no endgame, no progression. It is a one-time sale; you buy a card pack, you get cards. You may be disappointed in the cards you receive, and you may want to buy another pack to test your luck. Perhaps the true difference between trading card packs and loot boxes is that the latter just feels wrong.

#### D. PENDING LEGAL ACTION

A recent class-action suit against EA ultimately should help answer some of the questions raised above. In a complaint filed in August of 2020, Kevin Ramirez claims EA's business practices are predatory by nature and violate California gambling statutes.<sup>138</sup> The assertion is that under § 330.1(f) of the California Code, the video game containing loot boxes is by law, a slot machine. The relevant part of the statute reads,

A slot machine . . . is one that is, or may be, used or operated in such a way that, as a result of the insertion of any piece of money or coin or other object the machine or device is caused to . . . , mechanically, electrically, automatically, or manually, and by reason of any element of hazard or chance, the user may receive or become entitled to receive anything of value or any check, slug, token, or memorandum, whether of value or otherwise.<sup>139</sup>

Under this definition, the “device” would be a video game console along with the game itself, the “money or coin” would be

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<sup>138</sup> Complaint at ¶ 1, Ramirez v. Elec. Arts, Inc., No. 20-cv-05672-BLF (N.D. Cal. Mar. 5, 2021), 2021 WL 843184 [hereinafter “Complaint”].

<sup>139</sup> See Cal. Penal Code § 330.1(f) (West 2012); see also Cal. Penal Code § 330(b)(d) (West 2011).

points or virtual coins, which electronically is then exchanged for a chance for something of value (relative to the gamer).<sup>140</sup> This would certainly seem to fall under the definition of the statute and could be considered gambling. The complaint also likens EA's practices to a casino, designed to create and encourage addiction to playing the game and spending money.<sup>141</sup>

Due to recent legal action in Europe, EA began listing the chances at a desirable outcome for their card packs.<sup>142</sup> Most top tier cards, the only ones that if pulled, make the cost of the pack worth it or would allow the player to "break even", have a less than 5% chance of being pulled.<sup>143</sup> Most slot machines have a 0.1% of winning enough to break even or more.<sup>144</sup> Both the slot machine and the loot box mechanic in the game want the player to buy and spin more. If a player does win something, they feel lucky, like winners, and they want to keep their serotonin flowing. They hit the button or pull the lever again. They might lose, "but it's alright," they say, "you can't win every time." The feeling that eventually the luck will outweigh the misfortune is the very real phenomena that has earned casinos and video game makers a lot of money. Chasing this winning feeling has been compared to disease and hard drug addiction.<sup>145</sup>

Some of the "freemium" games mentioned earlier could be compared to a casino as well, where a player enters and gambles. Continuing the analogy, EA's games mentioned in the Ramirez complaint are like paying a cover charge at the door of the casino before being allowed to gamble. If the suit is successful for the plaintiffs, video game manufacturers may be required to eliminate or change their loot box practices or be subject to harsher regulation. There are several other suits pending against other game makers for loot boxes and predatory practices.<sup>146</sup> Other countries have

<sup>140</sup> See Cal. Penal Code § 330.1(f) (West 2012); see also Cal. Penal Code § 330(b)(d) (West 2011).

<sup>141</sup> Complaint, *supra* note 138, at ¶ 68.

<sup>142</sup> *Id.* at ¶ 13.

<sup>143</sup> *Id.*

<sup>144</sup> Joey Richardson, *How to Beat Slot Machines*, GAMBLINGSITES.NET (Sep. 25, 2018), <https://www.gamblingsites.net/blog/how-to-beat-slot-machines/>.

<sup>145</sup> Bradley S. Fiorito, Comment, *Calling a Lemon a Lemon: Regulating Electronic Gambling Machines to Contain Pathological Gambling*, 100 NW. U. L. REV. 1325, 1336-37 (2006).

<sup>146</sup> Julie Steinberg, *Loot Box Lawsuits Liken Transactions to Slot Machine Gambling*, BLOOMBERG L. (Sept. 1, 2020),



addressed this issue. Belgian courts held that loot box mechanics are certainly gambling and are to be regulated as such. Canadian courts recently saw their own class action against EA for loot boxes in Madden NFL.<sup>147</sup> Scholars and Psychologists in the United Kingdom and Europe have proclaimed that loot boxes are gambling or “close enough not to matter.”<sup>148</sup> The UK Gambling Commission would not classify loot boxes as gambling because “the in-game items have no real-life value outside of the game.”<sup>149</sup> The Commission did relent that if the in-game items were exchanged for real-world currency, they would consider that particular loot box purchase to be gambling.<sup>150</sup>

### III. POSSIBLE SOLUTIONS

Paid loot boxes need to be regulated as gambling. Whether justified by child safety or mental illness prevention or preventing a tax opportunity from going to waste, arguing for proper regulation against loot boxes is supported by worthy motives. The logistics are complicated as to how this could be accomplished. There are several possible solutions that could solve the problem and not disrupt a multi-billion-dollar industry in the process.

#### A. SELF-REGULATION

Allowing the industry to regulate itself could be the easiest way to accomplish what needs to be done without shutting down loot boxes entirely. No interference by the government with the free-market economy would be necessary. Self-regulation is currently successfully implemented across several industries such as

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<https://news.bloomberglaw.com/product-liability-and-toxics-law/loot-box-lawsuits-likened-transactions-to-slot-machine-gambling>.

<sup>147</sup> James Batchelor, *EA Facing Canadian Class Action Lawsuit Over Loot Boxes*, GAMESINDUSTRY.BIZ (Oct. 21, 2020), <https://www.gamesindustry.biz/articles/2020-10-21-ea-facing-canadian-class-action-lawsuit-over-loot-boxes>.

<sup>148</sup> Griffiths, *supra* note 69.

<sup>149</sup> *Id.*; see also Joseph Macey & Juho Hamari, *ESports, Skins and Loot Boxes: Participants, Practices and Problematic Behaviour Associated With Emergent Forms of Gambling*, 21 NEW MEDIA & SOC’Y 20 (2018) (professors in Finland examining loot boxes and other video game-related gambling); Enrique Echeburúa & Javier Fernández-Montalvo, *Psychological Treatment of Slot-Machine Pathological Gambling: New Perspectives*, 21 J. GAMBLING STUD. 21 (2005) (professors in Spain analyzing the brain’s reaction to gambling, specifically with slot machines).

<sup>150</sup> Griffiths, *supra* note 69.

medicine, mining, fishing, and law.<sup>151</sup> Setting guidelines on loot box mechanics, like limiting who may be permitted to purchase them or how they are purchased, placing limitations on certain loot boxes, allowing parental controls, and providing marketing requirements are just some of the ways this can be accomplished.

Setting an age restriction on the purchase of each loot box would not stop minors from purchasing them entirely, but it could potentially deter children from gambling on loot boxes.<sup>152</sup> If nothing else, it would protect the video game companies. Changing how loot boxes are purchased could be as simple as requiring authorization on each purchase, or no longer converting dollars to in-game currency. More expensive loot boxes could have a purchase limit to stop the “gambler’s high” and discourage further purchases.<sup>153</sup>

Parental controls would also be effective, allowing the parents to know and control what their children are purchasing if they so desire. Another solution would be to lock the ability to purchase loot boxes in games that are rated “E”-“T.” Lastly, requiring marketing aimed at minors to have a disclaimer about the dangers of loot boxes and gambling or stop marketing to children altogether. These are just a few of the ways allowing the video game companies to self-regulate could work to minimize the exposure of children to dangerous gambling behaviors.

## B. GOVERNMENT REGULATION

In a few European countries, like the Netherlands and Belgium, loot boxes have been ruled as gambling and violating local gambling laws.<sup>154</sup> The Netherlands has begun fining EA €500,000 weekly for their loot boxes in FIFA, the worldwide bestselling

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<sup>151</sup> Daniel Castro, *Benefits and Limitations of Industry Self-Regulation for Online Behavioral Advertising*, THE INFO. TECH. & INNOVATION FOUND. (Dec. 2011), <https://itif.org/files/2011-self-regulation-online-behavioral-advertising.pdf>.

<sup>152</sup> Rob Williams, *The Problem Continues: A Lot of Parents Ignore or Don’t Care About ESRB Ratings*, TECHGAGE (Sept. 24, 2013, 8:30 AM), <https://techgauge.com/news/the-problem-continues-a-lot-of-parents-ignore-or-dont-care-about-esrb-ratings/>.

<sup>153</sup> See Griffiths, *supra* note 69.

<sup>154</sup> Josh Coulson, *The Netherlands Has Banned Loot Boxes With A Maximum Fine Of €5 Million For Non-Compliance With New Terms*, THEGAMER (Oct 29, 2020), <https://www.thegamer.com/netherlands-loot-box-ban/>; see also *Gaming Loot Boxes: What Happened When Belgium Banned Them?*, BBC (Sept. 12, 2019), <https://www.bbc.com/news/newsbeat-49674333>.

soccer game.<sup>155</sup> The paltry sum has not deterred EA and they continue to sell and market their games containing loot boxes in the country. If the U.S. government were to get involved in paid loot box regulation, there are several possible options.

The federal government could fine the video game companies. While this has not had much effect on EA, perhaps fining them a higher amount could produce a more substantial effect. The government could fine the video game manufacturers based on every game they sell, or on a rolling basis, or progressively increase the fines with each “violation,” fining a set amount for every loot box sold. This option seems very unlikely, especially with our current political climate in flux.

A government agency like the FTC or even the IRS could be handed the task of loot box regulation. After all, there is a lot of money involved and absolutely none of it is being taxed like gambling is.<sup>156</sup> The government could leap on this opportunity and tax each paid loot box dollar as gambling revenue. This could effectively kill two birds with one stone. The video game companies would either stop implementing paid loot boxes, or the government would have increased tax revenue. Again, considering the current political leanings of our various branches of government, this outcome is unlikely.

### C. ESRB RATINGS

So far, the ESRB has done little to regulate or address paid loot boxes. If they were required by law to regulate loot boxes, the ESRB could create another rating between “Teen” and “Mature.” A new rating would allow parents to make a proper, educated choice when allowing their children to play a game with paid gambling. Something like “‘G’ for Gambling” or “Teen Plus,” perhaps. This could be the easiest and most likely outcome if paid loot boxes were legally viewed as gambling. It requires a minimal amount of work while preventing liability for the video game companies and the ESRB.

A new rating is nevertheless unlikely to happen without government action, as the ESRB does not view loot boxes as gambling. The ESRB has stated that it does not believe loot boxes are gambling because players are always rewarded with something,

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<sup>155</sup> See Coulson, *supra* note 154.

<sup>156</sup> *Topic No. 419 Gambling Income and Losses*, I.R.S., <https://www.irs.gov/taxtopics/tc419> (last updated Jan. 21, 2022).

and there is no chance a player would pull zero virtual items.<sup>157</sup> This seems to be flawed logic as even some slot machines award the player with at least something for every pull and playing them is still indisputably gambling.<sup>158</sup>

If current litigation were to resolve in such a way that convinces the ESRB to change its view on paid loot boxes, this would be the ideal avenue toward loot box regulation. The ESRB is already an established organization, and parents already trust the ratings on the boxes for games appropriate for their children. While it is true that some parents may ignore the ratings altogether, regulations would seek to do the most they could for the greatest number of people. This option of regulation also disrupts the free-market economy the least, with the least amount of government oversight and interference. While some may argue this option does not go far enough to prevent children from gambling in video games, it is the most likely outcome, and surely something is better than nothing.

#### IV. CONCLUSION

Paid loot boxes in video games are either strictly gambling, or they come awfully close. Video games may not be inherently bad, and violent games do not necessarily lead to violent tendencies. Gambling may not be an unhealthy activity for mature adults with fully formed frontal lobes. When gambling becomes an addiction, however, it can turn dangerous. Even more dangerous is when the addiction afflicts a child. The mere existence of adolescent gambling addiction recovery programs indicates that minors are susceptible to the gamblers high that many have described experiencing while opening loot boxes.<sup>159</sup>

Paid loot box mechanics in modern games aimed at children are a predatory, greedy practice that demand heavy regulation, or should be stopped altogether. The fastest, most reasonably likely means of regulation requires the ESRB to step up and re-examine its stance on loot boxes, change its ratings, and give parents more information to make an educated decision on the games brought into their homes. Barring that, the government may need to get involved by fining the use of paid loot boxes, or eliminate paid loot boxes

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<sup>157</sup> Jason Schreier, *ESRB Says It Doesn't See 'Loot Boxes' As Gambling*, KOTAKU (Oct. 11, 2017), <https://kotaku.com/esrb-says-it-doesnt-see-loot-boxes-as-gambling-1819363091>.

<sup>158</sup> See Griffiths, *supra* note 69.

<sup>159</sup> See generally Calado et al., *supra* note 70; see also Zendle et al., *supra* note 70.

from video games altogether. Whatever does happen, regulatory change is coming soon and, like any good streamer's content, will be exciting to watch.