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The Predatory Nature of Loot Boxes and the Need for Governmental Regulation, 53 UIC J. Marshall L. Rev. 1085 (2021)

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THE PREDATORY NATURE OF LOOT BOXES AND THE NEED FOR GOVERNMENTAL REGULATION

JERRY SHEN*

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I. INTRODUCTION

Traditional gambling is heavily regulated by the government, and for good reasons.¹ However, there is an unregulated form of gambling specifically targeting children. Children are being

*Juris Doctor Candidate, UIC John Marshall Law School, May 2021. I want to thank my mother, Shen Yuhua, for her love and support these past three years. I am also forever grateful to Professor Megan Kreminski, Professor Joanne Hodge, and Professor Hugh Mundy for giving me a second chance.

1. See *Responsible Gaming Regulations and Statutes*, AM. GAMING ASS'N (Sept. 2019), www.americangaming.org/wp-content/uploads/2019/09/AGA-Responsible-Gaming-Regs-Book_FINAL.pdf [perma.cc/38JA-Z962] (providing a “collection of the statutes and regulations addressing responsible gaming in the 28 states, plus the District of Columbia, that have commercial casinos or sports betting regulations as of August 31, 2019.”).

bombarded by advertisements promoting it, children are actively engaging in it, and companies are making millions as a result. It is called a loot box.

On November 16, 2017, a nineteen-year-old going by the screen name of Kensgold posted a cry for help on Reddit.² His heartfelt letter was addressed to one of the biggest companies in the gaming industry, Electronic Arts, as well as to other developers in the video game industry.³ His post was titled “I am 19 and addicted to gambling.”⁴ It detailed his addictions, not to roulette tables or online poker, but to loot boxes and other microtransactions in video games.⁵ He described how he spent \$13,500.25 over a period of three years on an addiction that started when he was only thirteen.⁶ His story, and the story of so many others with the same affliction, sounds eerily similar to real-life gambling addicts.⁷ Recent statistics estimate the video game industry will reach \$160 billion in sales by 2022, up from \$117 billion in 2018.⁸ In 2018, Activision Blizzard, one of the biggest names in the industry, revealed they made \$7.16 billion in revenue in the previous fiscal year.⁹ The main reason

2. Ethan Gach, *Meet the 19-Year-Old who Spent Over \$10,000 on Microtransactions*, KOTAKU (Nov. 29, 2017), kotaku.com/meet-the-19-year-old-who-spent-over-10-000-on-microtra-1820854953 [perma.cc/2A66-K562].

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. See Andrew V. Moshirnia, *Precious and Worthless: A Comparative Perspective on Loot Boxes and Gambling*, 20 MINN. J.L. SCI. & TECH. 77, 80-81 (2018) (stating how “[u]sers, usually below the age of eighteen, have described themselves as addicted to loot boxes, spending thousands of dollars in the pursuit of better items”); see also Heather Alexandra, *Loot Boxes Are Designed to Exploit Us*, KOTAKU (Oct. 13, 2017), www.kotaku.com/loot-boxes-are-designed-to-exploit-us-1819457592 [perma.cc/X9A8-5Q5U] (describing how the author found out she had a gambling problem, not from casinos, but from games, stating: “I don’t care to estimate how much I spent on *loot boxes*/but I will admit that it got to the point that I was actually spending cash on iTunes cards so that the payments wouldn’t show in my credit card history”); Ellen McGrody, *For Many Players, Loot Boxes are a Crisis That’s Already Here*, VICE (Jan. 30, 2018), www.vice.com/en_us/article/kznmwa/for-many-players-loot-boxes-are-a-crisis-thats-already-here [perma.cc/FP75-DHWU]. McGrody recounts the stories of several people who spent hundreds or thousands of dollars on loot boxes. *Id.* Of the people she interviewed, she did not notice a difference between “cosmetic economies,” and “economies that influence progression.” *Id.* The common theme among the players “was a similar set of behaviors and impacts” leading to behavior that they considered “impulsive, shameful, and stress-inducing.” *Id.* Some players admitted to feeling “physically sick” and wanting to throw up when logging into their game of choice after waking up, and then checking their bank account. *Id.*

8. Sam Smith, *Loot Boxes & In-Game Spend Drive Digital Games Market: Surpassing \$160 Billion by 2022*, JUNIPER RES. (May 1, 2018), www.juniperresearch.com/press/press-releases/loot-boxes-in-game-spend-drive-digital-games [perma.cc/5CBB-PK8M].

9. Rob Thubron, *Over Half of Activision Blizzard’s \$7.16 Billion Yearly Revenue Came from Microtransactions*, TECHSPOT (Feb. 12, 2018), www.techspot.com

behind such a huge increase in profits is the industry-wide implementation and integration of loot boxes in video games – essentially purchasable single use slot machines.¹⁰

This Comment will explain why loot boxes need governmental regulation by examining the similarities between loot boxes and real-world gambling. Part II of this Comment will explore the history of downloadable content (“DLC”) in video games, how DLC turned into microtransactions in the form of loot boxes and how it became an industry staple. This Comment will then compare and contrast real-life gambling disorders and internet gaming disorder (“IGD”) and follow up by examining how Illinois regulates gambling and how the Judiciary has responded to loot boxes. Finally, this Comment will look at how other countries have regulated loot boxes, focusing on the Netherlands, China, and South Korea. This section will conclude by examining how the United Kingdom, France, and the United States view loot boxes and the steps taken towards possible regulation in the future.

Next, in Part III, this Comment will establish that the reason loot boxes need regulation is that video game companies purposefully engineer them to be as addictive as possible, while also denying that loot boxes are a problem. Then, this Comment will explain the difficulties of categorically regulating loot boxes as gambling by examining case law from around the country.

Finally, Part IV will discuss possible solutions based upon Federal and International precedents in real-life gambling, as well as the possibility of self-regulation by the industry, driven by market forces.

II. BACKGROUND

The problem of loot boxes is very complex and has an extensive history. This section will start by exploring how one-time purchasable DLC turned into the problematic loot box. Then, this section will explain what Video Gaming Disorder is and note the similarities to gambling addiction. After that, this section will look at Illinois gambling law, following with a discussion on how other countries around the world have addressed the issue, such as the Netherlands, China, and South Korea. This section concludes by discussing three countries considering potential regulation of loot boxes: the United Kingdom, France, and the United States of America.

pot.com/news/73230-over-half-activision-blizzard-716-billion-yearly-revenue.html [perma.cc/H2GW-7F8N]. Almost half of the revenue, about four billion dollars, came from “in-game net bookings,” which includes all in-game purchases, such as loot boxes and downloadable content. *Id.*

10. Smith, *supra* note 8.

A. *Brief History of Downloadable Content, Microtransactions, and Loot Boxes*

1. *Downloadable Content*

Video games have become one of the biggest giants in the entertainment industry.¹¹ *Grand Theft Auto V*, released in September 2013, earned one billion dollars in sales within three days.¹² This was unheard of in any other sector of the entertainment industry, surpassing earning records in film, television, music, and books.¹³ Video games have also cornered the market on mobile apps, being the most popular and profitable type of mobile app.¹⁴ Almost one-third of all downloaded apps are video games, generating about seventy-five percent of Apple's App Store revenue.¹⁵ The average video game player ("gamer") in the United States spends over twelve hours a week playing video games.¹⁶

Ironically, loot boxes came about because video game companies were afraid of potentially negative consumer response.¹⁷ The price of an average console video game peaked at sixty dollars during the early stages of the video game industry because gaming companies were unwilling to raise prices any higher, fearing consumer backlash.¹⁸ In order to get around this hurdle, the concept of DLC was born, and it came into prominence in 2006.¹⁹ Bethesda, a well-known video game developer, released the infamous "Horse Armor Pack" as additional content for their game, *The Elder Scrolls IV: Oblivion*.²⁰ This DLC shocked fans of the game, mainly due to the price, approximately \$2.50 on the Xbox 360, or \$1.99 on PCs, just for the in-game horse to look slightly different.²¹ Even though the term "Horse Armor" became a derisive insult within the gaming community, fans of the game still bought the DLC.²² This DLC ranked ninth on the top ten most purchased downloads for *Oblivion*

11. Ferris Jabr, *Can You Really Be Addicted to Video Games?*, N.Y. TIMES MAG. (Oct. 22, 2019), www.nytimes.com/2019/10/22/magazine/can-you-really-be-addicted-to-video-games.html [perma.cc/E35J-NYZ6].

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. Dave Smith, *I miss the days when I only had to pay once for a video game*, BUS. INSIDER (Apr. 22, 2015), www.businessinsider.com/microtransactions-are-ruining-video-games-2015-4 [perma.cc/ZBY7-Y5DJ].

18. *Id.*

19. Mike Williams, *The Harsh History of Gaming Microtransactions: From Horse Armor to Loot Boxes*, USGAMER (Oct. 11, 2017), www.usgamer.net/articles/the-history-of-gaming-microtransactions-from-horse-armor-to-loot-boxes [perma.cc/Y9T8-N6FP].

20. *Id.*

21. *Id.*

22. *Id.*

on Xbox Live, allowing Bethesda to make even more money on top of the sixty dollars fans already paid for the basic version of the game.²³

Seeing success from these initial forays into opening consumer wallets long after the sale of the original game, gaming companies started to branch out into more devious ways of milking money out of the consumer.²⁴ Rockstar, creators of the famous Grand Theft Auto series, came up with the idea of a season pass and called it the “Rockstar Pass.”²⁵ It gave consumers the option of buying all of the planned DLC for a game, sometimes several weeks or even months before the game is released, at a discounted price.²⁶ Rockstar rationalized this as a way for the consumer to save money, compared to buying the DLC piecemeal.²⁷ This model evolved into “Deluxe Editions” – essentially the original game with a season pass included – and became the industry norm.²⁸ This still was not good enough for gaming companies – they needed a way to get even more money from the consumer, for as long as possible after the initial purchase.²⁹ They found the answer in microtransactions.³⁰

2. *Microtransactions and Loot Boxes*

Microtransactions are a “business model where virtual goods,

23. Michael McWhertor, *Top Oblivion DLC Revealed, Horse Armor Surprisingly Popular*, Kotaku (Jan. 30, 2009), www.kotaku.com/top-oblivion-dlc-revealed-horse-armor-surprisingly-pop-5143151 [perma.cc/VHL5-6MDJ].

24. Williams, *supra* note 19.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. See Kyle Langvardt, *Regulating Habit-Forming Technology*, 88 FORDHAM L. REV. 129, 138-39 (2019) (stating that most gaming companies, in an effort to earn more money, “moved to a hybrid monetization model that rests at least partially on in-app ‘micropayments’ from players—small fees that players spend over time to gain small in-game advantages . . .”). The article goes on to explain that “F2P games lean heavily on micropayments, and certain big-budget traditional games do as well. . .” and that “the video game industry has captured most of its overall revenue from these post-sale or post-download micropayments.” *Id.*

30. See Samuel Horti, *Revenue from PC Free-to-Play Microtransactions has Doubled Since 2012*, PC GAMER (Nov. 26, 2017), www.pcgamer.com/revenue-from-pc-free-to-play-microtransactions-has-doubled-since-2012 [perma.cc/D8ML-ZJ3Q] (explaining that in 2017, “PC gamers will spend a whopping \$22bn on microtransactions in free-to-play games this year, double the figure from 2012 and nearly three times the revenue generated from full game purchases on PC and consoles combined . . .”). To compare, “in 2017 full, paid game releases on PC and consoles will generate \$8bn.” *Id.* Of that twenty-two billion dollars, about five billion dollars will be from “[a]dditional content (including DLC) . . . [b]oth of those figures are on the rise, but they’re dwarfed by the money PC publishers and developers can make from microtransactions in free-to-play titles . . . PC microtransactions from free-to-play games will reach \$25bn by 2022.” *Id.*

such as characters, costumes, or weapons, can be purchased online for small sums of real currency.”³¹ Part of the reason video games have become such a commercial juggernaut is due to gaming companies using as “many psychological techniques to make their products as unquittable as possible.”³² One way to get people addicted is via intermittent reinforcement, “in which players are surprised with rewards at random intervals.”³³ In video games, players can repeatedly kill one enemy or perform a single task within the game “in the hope that they will stumble upon an upgraded weapon or piece of armor,” often referred to as “farming” or “grinding.”³⁴ However, many gamers do not have the time or patience for “farming” or “grinding,” and developers took advantage of that impatience by offering microtransactions.³⁵ By offering microtransactions, “developers have created shortcuts to avoid the tedium of grinding by allowing game players to purchase the best items with real money.”³⁶ Loot boxes, the most infamous kind of

31. Matt Fernandez, ‘Star Wars’ Video Game Microtransactions Ignite Controversy, VARIETY (Nov. 23, 2017), www.variety.com/2017/digital/news/star-wars-video-game-controversy-microtransaction-loot-box-1202621913 [web.archive.org/web/20210120164322/https://variety.com/2017/digital/news/star-wars-video-game-controversy-microtransaction-loot-box-1202621913/] (explaining that “[o]ne form of microtransactions are loot boxes, a type of unlockable in-game content that contains a randomized selection of items . . . [and] can either be earned through normal gameplay or can also often be purchased for real money”).

32. Jabr, *supra* note 11.

33. *Id.* (explaining how “[m]ost video games initially entice players with easy and predictable rewards . . . [s]ome video games punish players for leaving by refusing to suspend time; In their absence, the game goes on, and they fall behind”); see also Alex Wiltshire, *Behind the addictive psychology and seductive art of loot boxes*, PC GAMER (Sept. 28, 2017), www.pcgamer.com/behind-the-addictive-psychology-and-seductive-art-of-loot-boxes [perma.cc/QHC6-KREB] (clarifying that “[p]sychologists call the principle by which they work on the human mind ‘variable rate reinforcement’ . . . [t]he player is basically working for reward by making a series of responses, but the rewards are delivered unpredictably’ . . .”). The article notes how this is similar to drug addiction and the dopamine system, where “[d]opamine cells are most active when there is maximum uncertainty, and the dopamine system responds more to an uncertain reward than the same reward delivered on a predictable basis.” *Id.*

34. Moshirnia, *supra* note 7, at 79.

35. Williams, *supra* note 19.

36. Moshirnia, *supra* note 7; see also Wiltshire, *supra* note 33 (explaining how the loot box system in the Collectible Card Game Hearthstone implements several different ways to earn in-game currency, called gold). The most reliable way gold is earned is from winning games, every third game won rewards the player with ten gold, up to a maximum of 100 gold per day. Wiltshire, *supra* note 33. In addition, players will get a “daily quest” each day they log in, with different objectives to achieve, such as requiring the player to win games at a certain class. *Id.* Completion of these daily quests would reward the player about forty to sixty gold, depending on the difficulty of the quest. *Id.* One pack, consisting of five cards, costs 100 gold, so a dedicated player could buy about one pack a day, with gold left over for the next day. *Id.* The beauty of the system is how unobtrusive it is, as the daily quests “gently encourage you to try classes

microtransaction, can be bought with real money and then opened to unlock random in-game content, usually from a preset list of possible items.³⁷ Loot boxes that are earnable through normal game play, not purchasable with real dollars, are not an issue.³⁸ The problem occurs when loot boxes can be purchased with real money, as will be discussed further in Part III of this Comment.³⁹

B. Similarities Between Video Gaming Disorder and Gambling Addiction

In June of 2018, the World Health Organization updated the International Statistical Classification of Diseases and Related Health Problems (“ICD-11”).⁴⁰ This update was especially notable because it acknowledged the existence of video gaming disorder.⁴¹ The ICD-11 described the disorder as “a pattern of behavior characterized by impaired control over gaming, increasing priority given to gaming over other activities to the extent that gaming takes precedence over other interests and daily activities, and continuation or escalation of gaming despite the occurrence of negative consequences.”⁴² Under the *Diagnostic and Statistical Manual of Mental Disorders* (“DSM-5”), mental health professionals recognized the need for further research into gaming disorder, making it the only other behavioral addiction identified in DSM-5, alongside gambling disorder.⁴³

and playstyles you're not used to, while also rewarding you for simply playing the way you like . . . [but] you can just buy card packs with real money . . . [c]lassic card packs cost \$3 for two, \$10 for seven, and the scale goes up to \$70 for 60.” *Id.*

37. Fernandez, *supra* note 31.

38. *Id.*

39. *Id.*

40. Christopher Dring, *World Health Organization Makes Gaming Disorder a Recognized Illness*, GAMESINDUSTRY (May 25, 2019), www.gamesindustry.biz/articles/2019-05-25-world-health-organisation-makes-gaming-disorder-a-recognised-illness [perma.cc/6T3K-CADU].

41. *Id.*

42. *Id.*

43. *Internet Gaming*, AM. PSYCHIATRIC ASS'N, www.psychiatry.org/patients-families/internet-gaming [perma.cc/YXE6-HP4C] (last visited Nov. 11, 2019) (noting that the DSM-5 has many “substance-related addictive disorders, such as alcohol, tobacco, stimulants, marijuana and opioids,” but only has one other behavioral addiction, gambling disorder); *see also* Moshirnia, *supra* note 7 (explaining that the International Classification of Diseases will also have a related entry for hazardous gaming). According to ICD-11, “[h]azardous gaming refers to a pattern of gaming, either online or offline that appreciably increases the risk of harmful physical or mental health consequences to the individual or to others around this individual . . . [and] the increased risk may be from the frequency of gaming, from the amount of time spent on these activities, from the neglect of other activities and priorities, from risky behaviours associated with gaming or its context, from the adverse consequences of gaming, or from the combination of these . . . [and] [t]he pattern of gaming is often persists [sic]

An addiction to gambling is often exhibited by “a pattern of gambling activity which is so extreme that it causes an individual to have problems in their personal, family, and vocational life.”⁴⁴ The addiction occurs when the brain is conditioned by specific aspects of the gambling, such as intermittent reinforcement, causing the “need for the excitement of gambling [to become] harmful both to themselves and to others . . . [due to] uncontrollable and disordered spending on gambling activities.”⁴⁵ According to the National Council on Problem Gambling, gambling is viewed as “a spectrum of risk, intensity, and possible harms.”⁴⁶ Harm is determined by “whether or not someone can experience harm . . . emotional or financial, as a result of the gambling-like mechanics in a game.”⁴⁷ Experts in the field of gambling are taking closer looks into loot boxes because of “convergence.”⁴⁸ Convergence occurs in this context when addictive behaviors associated exclusively with one type of activity become mirrored to behaviors exclusive to a different kind of activity.⁴⁹ One example would be casinos making slot machines more like playing video games, by adding “some skill and some choice and controllers.”⁵⁰ Video game companies, on the other hand, “gamblify” their games “by making it a lot more like a slot machine,” adding features such as loot boxes, sometimes even appearing in the form of a slot machine.⁵¹

Gaming disorder is gaining more recognition, but the symptoms have been around for a long time without formal recognition.⁵² As technology improves, so do video games, offering

in spite of awareness of increased risk of harm to the individual or to others.” Moshirnia, *supra* note 7.

44. David Zendle & Paul Cairns, *Video Game Loot Boxes Are Linked to Problem Gambling: Results of a Large-Scale Survey*, PLOS ONE (Nov. 21, 2018), journals.plos.org/plosone/article?id=10.1371/journal.pone.0206767

[perma.cc/6CL9-VNZZ] (listing some of the possible issues, ranging from “domestic abuse and intimate partner violence to involvement in illegal activities, increased medical costs, and suicidality . . . typically described as being both excessive and involuntary”).

45. *Id.*

46. McGrody, *supra* note 7.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*; see also Ethan Gach, *I Feel Gross Just Watching NBA 2K20's Loot Box Trailer*, KOTAKU (Aug. 28, 2019), www.kotaku.com/i-feel-gross-just-watch-ing-nba-2k20-s-loot-box-trailer-1837674621 [perma.cc/5QAV-7FAL] (showing a screen capture of the in-game loot box that looks and acts like a slot machine, describing it as “a literal slot machine you can pull to match three gems”).

52. Caitlin Gibson, *The Next Level: Video Games are More Addictive than Ever*, WASH. POST (Dec. 7, 2016), www.washingtonpost.com/sf/style/2016/12/07/video-games-are-more-addictive-than-ever-this-is-what-happens-when-kids-cant-turn-them-off [perma.cc/XL7Q-9T6D] (explaining that “[e]xperts also see a correlation between obsessive video game use and traits associated with autism, attention deficit disorders, anxiety and depression, although the exact nature

more and more levels of immersion, as well as making it easier for players to detach from reality and base all of their social interactions through video games.⁵³ It is not a secret that developers engineer loot boxes “to capture attention with a mixture of spectacle and psychological trickery not unlike what you might find at a slot machine.”⁵⁴ A player puts money in a machine, either pushes a button or pulls a lever, and hopes for a jackpot.⁵⁵ This process describes how to operate a slot machine, but it also applies to opening a loot box.⁵⁶ In both situations, the player is staking “money

of the connection is not fully understood”).

53. *Id.*

[G]ames have been criticized as an escape from human interaction, but some offer a different sort of social connection: MMOs — or massively multiplayer online games — allow gamers to play together from any place at any time, and many describe a powerful sense of attachment to those who share this virtual realm . . . [and] [l]ogging off is that much harder for kids who feel a very real bond to their online friends and teammates.

Id.

54. See Alexandra, *supra* note 7 (quoting a developer for Overwatch on how they design loot boxes). The Overwatch developer admitted that “[w]hen you start opening a loot box, we want to build anticipation . . . [w]e do this in a lot of ways—animations, camera work, spinning plates, and sounds . . . [w]e even build a little anticipation with the glow that emits from a loot box’s cracks before you open it.” *Id.* The developer goes on to explain how it is “a system that preys on addiction, built upon mountains of research on how best to trick people into letting companies rob them.” *Id.* See also Wiltshire, *supra* note 33 (stating that it is easy to understand why opening loot boxes can be an addictive rush).

“[A] moment of anticipation followed by release . . . [the] animated flurry is often accompanied by disappointment, but is sometimes with the joy of getting exactly the item that you wanted . . . then you feel the gambler’s pull to open another, pushing you back into the game to grind or digging into your wallet to earn or buy your next one.”

Id.; Cecilia D’Anastasio, *Why Opening Loot Boxes Feels Like Christmas, According To Game Devs*, KOTAKU (Mar. 20, 2017), kotaku.com/why-opening-loot-boxes-feels-like-christmas-according-1793446800 [perma.cc/4YFK-B93V] (quoting *Halo 5* lead progression designer Christopher Bloom explaining that “the packs’ pulsating opening can feel a little like slot machines or a dealt poker hand . . . ‘It’s the possibility you might get extremely lucky. . . there’s value in everything you open. . . but there’s always something else you kind of want to get”).

55. See Zendle, *supra* note 44 (describing loot boxes). Loot boxes are virtual items that can be paid for with real world money, and the “similarities between loot boxes and gambling may lead to increases in problem gambling amongst gamers. *Id.* Another similarity between gambling and buying loot boxes is that “individuals stake money on the outcome of a future event, whose result is determined at least partially by chance in the hopes of receiving a valuable reward.” *Id.*

56. Moshirnia, *supra* note 7 (describing the many ways gaming developers try to “increase the allure of loot boxes . . . games use prize-wheel spinners, triggering near-miss reactions as the desired item was just out of reach . . . not unlike a gambler being triggered by a slot machine that almost hit the jackpot”).

on the outcome of a future event, whose result is determined at least partially by chance in the hopes of receiving a valuable reward.”⁵⁷ While studies are unclear “whether buying loot boxes acts as a gateway to problem gambling, or whether spending large amounts of money on loot boxes appeals more to problem gamblers,” it is clear the government needs to take a closer look.⁵⁸

C. Interpretation of the Illinois Loss Recovery Act by Federal Courts

Federal law does not have a defined meaning for gambling, so state courts have stepped in to address the issue.⁵⁹ In Illinois, the relevant part of the Illinois Loss Recovery Act states that a “person commits gambling when he or she . . . knowingly plays a game of chance or skill for money or other thing of value.”⁶⁰ Also, a person

57. *Id.*

58. *Id.*; see also Kyle Orland, *Meet the Legislator Trying to do Something About Video Game Loot Boxes*, ARSTECHNICA (Dec 16, 2017), www.arstechnica.com/gaming/2017/12/meet-the-legislator-trying-to-do-something-about-video-game-loot-boxes [perma.cc/HS4V-FNME]. The article quotes Congressman Chris Lee from Hawaii saying that having the option to spend money to buy the items a player wants is fine, but it “shouldn’t be through an exploitive, targeted gambling mechanism in which the player is being encouraged to spend money to win a chance at getting something, rather than getting that thing itself.” *Id.* Congressman Lee believes “modern loot boxes ‘employ predatory mechanisms designed to exploit human psychology to compel players to keep spending money in the same way that casino games are so designed’ . . . offer[ing] the same “psychological, addictive, and financial risks as gambling.” *Id.*

59. David J. Castillo, *Unpacking the Loot Box: How Gaming's Latest Monetization System Flirts with Traditional Gambling Methods*, 59 SANTA CLARA L. REV. 165, 180 (2019). Castillo states that “the criminalization and regulation of gambling activities has traditionally fallen within the police power of the states.” *Id.*

Black’s Law Dictionary does not define the term ‘gambling,’ but it does define ‘gambling device’ as: ‘anything such as cards, dice or an electronic or mechanical contrivance, that allows a person to play a game of chance in which money may be won or lost’ . . . [and] ‘game of chance’ is ‘a game whose outcome is determined by luck rather than skill.’

Id. at 179. He concludes that “clearly any form of gambling regulation will have to address value, consideration, and chance.” *Id.* at 184.

60. 720 ILL. COMP. STAT. 5/28-1(a) (2019). The relevant portion of the statute is as follows:

A person commits gambling when he or she: (1) knowingly plays a game of chance or skill for money or other thing of value, unless excepted in subsection (b) of this Section . . . (12) knowingly establishes, maintains, or operates an Internet site that permits a person to play a game of chance or skill for money or other thing of value by means of the Internet or to make a wager upon the result of any game, contest, political nomination, appointment, or election by means of the Internet.

is gambling when he or she “[s]ets up or promotes any lottery or sells, offers to sell or transfers any ticket or share for any lottery.”⁶¹ Illinois courts have stated that the controlling factor in whether something is a lottery or not is by looking at the reasons behind why the person is participating.⁶² The courts determined that if the reason behind participation in a specific event is due to the “lure of an uncertain prize,” then it is a lottery, and thus it is gambling under Illinois law.⁶³

The case of *Phillips v. Double Down Interactive LLC* exemplifies how federal courts have interpreted Illinois law on loot boxes and gambling by applying the Illinois Loss Recovery Act in its analysis.⁶⁴ This suit is a class action brought against Double Down Interactive LLC, alleging Double Down’s online casinos are unlawful gambling devices under the Illinois Loss Recovery Act.⁶⁵ The *Phillips* court granted Double Down’s motion to dismiss because, under the Illinois Loss Recovery Act, a plaintiff is only able to recover money lost from gambling in a civil action against the winner of that money.⁶⁶ The court explained that Double Down “never directly participated in the game” and only the player is actively doing something.⁶⁷ After the player pays money to Double

Id.

61. G.A. Carney, Ltd. v. Brzeczek, 117 Ill. App. 3d 478, 483 (1983) (explaining that “the essential elements of any lottery are chance, consideration, and a prize”).

62. *Id.* (elaborating that the issue of “whether a given scheme or business is a lottery is determined by the nature of the appeal which the business makes to secure the patronage of its customers”).

63. *Id.* (concluding that if “the controlling inducement is the lure of an uncertain prize, then the business is a lottery”).

64. See *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731, 740 (N.D. Ill. 2016) (holding the Defendant did not win anything of value, nor risk anything of value, and the Plaintiff did not lose any value from the chips bought, because she was able to continue playing the casino games offered).

65. *Id.* at 733.

66. *Id.* at 739; see also 720 ILL. COMP. STAT. 5/28-8(a) (2021). The relevant portion of the statute is as follows:

Any person who by gambling shall lose to any other person, any sum of money or thing of value, amounting to the sum of \$50 or more and shall pay or deliver the same or any part thereof, may sue for and recover the money or other thing of value, so lost and paid or delivered, in a civil action against the winner thereof, with costs, in the circuit court. No person who accepts from another person for transmission, and transmits, either in his own name or in the name of such other person, any order for any transaction to be made upon, or who executes any order given to him by another person, or who executes any transaction for his own account on, any regular board of trade or commercial, commodity or stock exchange, shall, under any circumstances, be deemed a ‘winner’ of any moneys lost by such other person in or through any such transactions.

Id.

67. *Phillips*, 173 F. Supp. 3d at 740.

Down in exchange for the virtual currency used in its online casinos, Double Down “keeps the money . . . no matter whether that player wins or loses in the games, that money is never put at risk.”⁶⁸ It also emphasized that “[b]ecause no amount of earned money ever hangs in the balance or depends on the outcome of a game, Double Down is not a ‘winner’ under the Illinois Loss Recovery Act.”⁶⁹ The court explained that “[e]ven if a player never wagers the chips he or she bought; Double Down still keeps the money paid to buy the chips . . . [t]here is no ‘winning’ money or anything of value for Double Down when the chips are used.”⁷⁰ Just as Double Down is not considered to have won anything, the court also declared that the Plaintiff did not “lose” anything of value because she was merely “buying the right to continue playing the games” when purchasing the virtual casino chips.⁷¹ Using this analysis, it would be hard to argue loot boxes should be regulated as gambling because a gaming developer would never be a participant and therefore never a winner; and the consumer would never be considered a loser, because they can continue to play the game and never lose anything of value.⁷²

D. Countries Regulating Loot Boxes

1. The Netherlands

In the Netherlands, the Dutch Gaming Authority (or Kansspelautoriteit) examined ten popular games of 2018 and found that all ten had loot boxes, with four in violation of the Betting and Gaming Act.⁷³ The Dutch Gaming Authority distinguished the ten games by looking at certain factors, such as the potential for

68. *Id.*

69. *Id.* However, the court did acknowledge that the virtual chips have monetary value when bought by the players, and “obviously Double Down has made money (indeed, millions of dollars) on chip sales over the past several years . . . however, the Court need not decide whether the chips are ‘things of value’ because the statute requires a clear winner and loser. *Id.* at 739.

70. *Id.*

71. *Id.* at 741.

72. See T.J. Hafer, *The Legal Status of Loot Boxes Around the World, and What’s Next in the Debate*, PC GAMER (Oct. 26, 2018), www.pcgamer.com/the-legal-status-of-loot-boxes-around-the-world-and-whats-next [perma.cc/Q3V2-N6CC] (stating virtual items from a loot box “only exist as strings of computer code . . . so does Bitcoin” and then asking how it can be considered worthless when certain games have items that sell for tens of thousands of dollars apiece, such as from the game *Counterstrike: Global Offensive*).

73. Matt Davidson, *The Netherlands Determines Some Loot Boxes Are Gambling*, IGN (Apr. 20, 2018), www.ign.com/articles/2018/04/20/the-netherlands-determines-some-loot-boxes-are-gambling [perma.cc/TV66-VMXC] (elaborating that the Dutch government went on to describe the other six games, and loot boxes in general “as potentially addictive and and [sic] describing them as ‘similar to slot machines and roulette in terms of design and mechanisms’”).

addiction or whether the game had any similarities to traditional methods of gambling.⁷⁴ One important factor used was whether the items from the loot boxes had resale value, or if the player could trade the items for real world money.⁷⁵ Article 1 of the Dutch Betting and Gaming Act requires companies to have a legal license to sell any game featuring “a combination of in-game goods that can be traded and the obtaining of these goods through loot boxes.”⁷⁶ In order for companies to use loot boxes in compliance with the Betting and Gaming Act, the companies will have to, among other requirements, “remove ‘addiction-sensitive’ elements, such as flashy effects to increase excitement upon opening a loot box, or the ability to open several loot boxes in quick succession.”⁷⁷

While not specifically named by the Dutch government, an example of “addiction-sensitive” elements can be seen in the game *Hearthstone*, developed by Blizzard.⁷⁸ *Hearthstone* has specifically designed loot boxes to elicit “a rush: a moment of anticipation followed by release.”⁷⁹ In *Hearthstone*, the loot boxes are referred to as card packs, and to open it, “you have to drag a pack over to what Blizzard calls the altar . . . blue magical power builds, and then . . . the cards suddenly burst out in a shower of glitter and gold.”⁸⁰ The animation changes depending on the expansion: “With Journey to Un’goro packs, they emerge in a crackle of lightning (which echoes its evolve mechanic), and a shattering of ice in the Knights of the Frozen Throne packs.”⁸¹ While sometimes the player will get what they want, it “is often accompanied by disappointment . . . then you feel the gambler’s pull to open another, pushing you back into the game to grind or digging into your wallet to earn or buy your next one.”⁸² Blizzard also keeps the animations short, around 2 seconds,

74. *Id.*

75. *Id.*

[P]otential for resale (for example, selling . . . players or teams from FIFA for real money) develops a real world value beyond the initial purchase . . . [and] [o]ffering items such as this for sale based on chance is restricted under Dutch law and requires a gambling license, which these games will need to apply for if they want to continue operating in the Netherlands.

Id.

76. NETHERLANDS GAMING AUTHORITY, STUDY INTO LOOT BOXES: A TREASURE OR A BURDEN? 4 (2018).

77. Davidson, *supra* note 73 (stating that the authority’s priority is “the protection of vulnerable groups, such as minors”). The Netherlands Gaming Authority had set a deadline of June 20, 2018 for companies in violation of the new law to comply, following which it will actively consider enforcement action up to and including fines or risk being banned from doing business in the country. *Id.*

78. Wiltshire, *supra* note 33.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

to deal with the possible tedium of opening multiple loot boxes in a row and seeing the same animations over and over.⁸³ While Hearthstone was not specifically targeted by the Dutch government, it is still a good example of what is considered “addiction-sensitive” elements in loot boxes.

2. China

Recently, China has taken drastic steps in regulating loot boxes in general, as well as the problems the country has with internet gaming disorder.⁸⁴ A new law bans children under eighteen from playing online games between 10:00 p.m. and 8:00 a.m.⁸⁵ This law also limits gameplay time to ninety minutes per day during the week, and three hours per day on weekends and holidays.⁸⁶ The part that is most relevant to this Comment is the law’s regulation on spending real money within the video games.⁸⁷ There is a twenty-eight to fifty-seven yuan (approximately \$4-\$9)⁸⁸ limit on spending per month, depending on the age of the child, for in-game purchases.⁸⁹ With this new law, China now has “one of the most heavily regulated video game markets in the world.”⁹⁰ Before this regulation was put in place, the Ministry of Culture required all game developers using loot boxes in their games to “reveal the odds of loot boxes in their game by May 1st [2017.]”⁹¹ The Ministry also required companies to “disclose all information on virtual items and services in order to improve transparency for players,” such as recent results of opened loot boxes by other players, either in-game or on an official website for the game.⁹² The Chinese government

83. *Id.* (stating “[t]he challenge was to design a sequence that would feel special to those opening a single pack while not wearying those opening 50 in a row . . . [t]he sweet spot, it turns out, is about two seconds”).

84. Javier C. Hernández & Albee Zhang, *90 Minutes a Day, Until 10 p.m.: China Sets Rules for Young Gamers*, N.Y. TIMES (Nov. 6, 2019), www.nytimes.com/2019/11/06/business/china-video-game-ban-young.html [perma.cc/FJ6P-5GZW] (explaining the law will require users to log in with their use real names and government identification numbers when playing online).

85. *Id.*

86. *Id.*

87. *Id.*

88. *USD to CNY Exchange Rate - Bloomberg Markets*, BLOOMBERG, <https://www.bloomberg.com/quote/USDCNY:CUR> [perma.cc/5UE3-L58T] (last visited Oct. 19, 2020).

89. Hernández, *supra* note 84.

90. *Id.* (stating “technology companies in the country and abroad would be forced to follow the government’s policy announcements more closely” and warning that “[p]ublishers and developers need to be very aware of the content of the games they are developing for the [Chinese] market”).

91. Steve Dent, *China Forces Game Producers to Reveal Loot Box Odds*, ENGADGET (Dec. 12, 2016), www.engadget.com/2016/12/12/china-forces-game-producers-to-reveal-loot-box-odds [perma.cc/2PSR-R9YC].

92. Lawrence Phillips, *Valve Forced to Disclose Item Drop Rates for TIT*

pointed to the “addictive animations and other psychological tricks” used to get players addicted, which in turn gets players to spend real money to get the same “rush” from opening more loot boxes.⁹³ The government believes that these steps are necessary to protect “the rights and interests of consumers . . . [while promoting] the healthy and orderly development of the online game industry.”⁹⁴

3. *South Korea*

The South Korean government takes a very serious tone towards gaming companies and the problems associated with gaming disorder.⁹⁵ In recognizing the seriousness of the issue, the government passed the Gaming Shutdown Law, also referred to as the Cinderella law, which went into effect in November 2011.⁹⁶ The law forces gaming companies to put measures in their games to prevent players under sixteen from playing between the hours of midnight and 6 a.m.⁹⁷ The reason that South Korea has taken more drastic steps in regulation, much earlier than other countries, is that Electronic Sports are a huge industry there.⁹⁸ In addition to combating gaming disorder, the South Korean government also keeps a close eye on the implementation of loot boxes within games to curb any deceptive advertising practices.⁹⁹ In 2018, the South Korean Fair Trade Commission fined three game developers, Nexon, Netmarble, and NextFloor, one billion South Korean won

Chests, JOIN DOTA (May 9, 2017), www.joindota.com/en/news/53321-valve-forced-to-disclose-item-drop-rates-for-ti7-chests [perma.cc/AAQ5-Z8V7].

93. Dent, *supra* note 91.

94. *Id.*

95. Carolyn Su, *South Korea's Video Game Addiction*, NEWSWEEK (Oct. 17, 2011), www.newsweek.com/south-koreas-video-game-addiction-68309 [perma.cc/K5EN-M3GD]. The South Korean government believes a lot of their problems are the result of gaming addiction. *Id.* This conclusion was partly the result of several incidents, ranging from 2005 where “a 28-year-old man collapsed and died from organ failure after playing for 50 hours straight” to 2009 when a married couple was so addicted to caring for their in-game child, that their real-life baby starved to death. *Id.* In response to those events, from 2009-2011, two different governmental agency investigations “found that more than one in 10 Korean adolescents are at high risk for Internet addiction and that one in 20 are already seriously addicted.” *Id.*

96. *Id.*

97. *Id.*

98. *Id.* In South Korea, the top players of certain games can “earn close to \$400,000 a year battling it out in professional StarCraft leagues (one of ten major gaming leagues in the country). *Id.* Major gaming competitions are broadcast “by two of Korea's major TV channels” and watched by millions of people and “sponsored by big corporations such as SK Telecom and Samsung . . . [creating] the World Cyber Games, the Olympics of the gaming world.” *Id.*

99. Sam Nordmark, *South Korean Game Developers Fined \$945,000 For Their Implementation of Loot Boxes*, DOTESPORTS (Apr. 9, 2018), dotesports.com/business/news/south-korean-game-fined-945-loot-boxes-22609 [perma.cc/LN8R-9SAY].

(₩) (\$946,000) for the way each company implemented loot boxes within their games.¹⁰⁰

E. Countries Considering Regulating Loot boxes

1. The United Kingdom

The United Kingdom currently does not have any statutory regulation of loot boxes, and in 2017, the UK Gaming Commission stated “that loot boxes are not gambling if the items you get through them cannot be exchange[d] for real money.”¹⁰¹ In 2018, the Gaming Commission released “The Young People & Gambling 2018” study that revealed “450,000 UK kids, aged between 11 and 16, bet regularly.”¹⁰² The study also found that “three in ten children, out of the 2,865 polled, had opened a loot box in a game,” but the Gaming Commission did not change its stance.¹⁰³ That stance might change in the future, however, because in 2019, the “UK’s Department of Digital, Culture, Media and Sport issued a report recommending that loot boxes in videogames be subject to the same regulations as gambling.”¹⁰⁴ The report came out following several

100. *Id.* The South Korean government stated that the companies “intentionally misled their customers after launching loot boxes that served as a tie-in for special in-game events.” *Id.* The companies hosted special in-game events requiring players to combine sixteen puzzle pieces in order to get special in-game items. *Id.* The pieces only appeared in loot boxes and had an estimated drop rate of approximately half a percent. *Id.* Each box cost \$0.85, so for players to get a single item, they would have to spend at least \$13.60 to complete one puzzle. *Id.* However, due to the low odds for a puzzle piece to show up in a loot box, “[o]ne player reportedly spent a total of \$432 to complete it.” *Id.*

101. GameCentral, *UK Government Responds to Loot Box Petition*, METRO (Oct. 26, 2017), metro.co.uk/2017/10/26/uk-government-responds-to-loot-box-petition-7029179 (adding that the Gaming Commission acknowledged “the risks that come from increasing convergence between gambling and video games” and will be “keeping this matter under review and will continue to monitor developments in the market”).

102. GameCentral, *Loot Boxes Part of Growing Child Gambling Problem Reveals UK Study*, METRO (Nov. 21, 2018), www.metro.co.uk/2018/11/21/loot-boxes-part-of-growing-child-gambling-problem-reveals-uk-study-8164308 (reporting “the study found that video game loot boxes have exposed close to a million young people to gambling”).

103. Fraser Brown, *The UK Gambling Commission has not Connected Loot Boxes with Gambling*, PC GAMER (Nov. 11, 2018), www.pcgamer.com/the-uk-gambling-commission-has-not-connected-loot-boxes-with-gambling [perma.cc/FE52-GG5P].

104. Andy Chalk, *The ESA ‘Strongly Disagrees’ with UK Commission’s Finding on Loot Boxes*, PC GAMER (Sept. 9, 2019), www.pcgamer.com/the-esa-strongly-disagrees-with-uk-commissions-finding-on-loot-boxes [perma.cc/GC4Z-M3AN].

[R]egulations on gambling . . . would include content labels on games with paid loot boxes and a ban on selling them to minors . . . the report also criticized the position that loot boxes are not a form of gambling, and said that if [the Gaming Commission] wants to maintain that

months of research, including speaking with “members of the industry, academia, and public.”¹⁰⁵ The report further recommend that companies either should stop selling loot boxes to children, or only allow the loot boxes to be bought with currency earned in-game from playing the game.¹⁰⁶ Brad Enright, the Gambling Commission program director, responded that his hands were tied by current laws, but he is cognizant of the issues, and would be willing to step in if the laws were ever changed.¹⁰⁷

2. *France*

France is another country that does not regulate loot boxes but might be changing its policies in the near future.¹⁰⁸ In 2018, the French regulatory authority for online games, referred to as the ARJEL, released their 2017-2018 activity report “address[ing] concerns about loot boxes . . . and stat[ing] that microtransactions in videogames ‘are undermining public policy goals for gambling.’”¹⁰⁹ In the report, ARJEL specifically pointed out how

position it should release a report explaining why.

Id.; see also Alice O'Connor, *Regulate Loot Boxes Under Gambling Law, Parliament Committee Recommends*, ROCKPAPERSHOTGUN (Sept. 12, 2019) (hereinafter O'Connor I), www.rockpapershotgun.com/2019/09/12/regulate-loot-boxes-under-gambling-law-parliament-committee-recommends [perma.cc/5JA2-JRNQ] (describing the recommendations of the Digital, Culture, Media and Sport Committee). The Committee concluded:

We consider loot boxes that can be bought with real-world money and do not reveal their contents in advance to be games of chance played for money's worth . . . [and] [t]he Government should bring forward regulations under section 6 of the Gambling Act 2005 in the next parliamentary session to specify that loot boxes are a game of chance.

Id.

105. O'Connor I, *supra* note 104.

106. HOUSE OF COMMONS DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, IMMERSIVE AND ADDICTIVE TECHNOLOGIES (2019) (stating that “[i]n the absence of research which proves that no harm is being done by exposing children to gambling through the purchasing of loot boxes, then we believe the precautionary principle should apply and they are not permitted in games played by children until the evidence proves otherwise”).

107. Rob Davies, *Video Game Firms Face Prosecution Over Gambling by Children*, THE GUARDIAN (July 22, 2019), www.theguardian.com/society/2019/jul/22/video-game-firms-face-prosecution-over-gambling-by-children [perma.cc/R95U-AJ2M] (quoting Enright, admitting the gaming companies “created this situation . . . and there's an onus and responsibility on them to address the byproduct of how they're operating . . . game companies could take action . . . [but] were waiting for the regulator to flag such instances, rather than acting of their own volition”).

108. Andy Chalk, *French Gambling Regulator Determines That Loot Boxes are not Legally Gambling*, PC GAMER (July 4, 2018), www.pcgamer.com/french-gambling-regulator-determines-that-loot-boxes-are-not-legally-gambling [perma.cc/L74A-RKTW].

109. *Id.* (acknowledging that loot boxes do not qualify as gambling under the

game developers implement loot boxes in a way that is very similar to slot machines.¹¹⁰ Using a “near-miss” gameplay mechanic, similar to what is used in slot machines, loot boxes trick the player into believing they almost won the jackpot, encouraging players to continue spending money excessively.¹¹¹ The ARJEL is currently supporting several different investigations on the issue, and pushing for other Europe gambling regulators to investigate as well.¹¹² The ARJEL is also supporting an “initiative by the legal department of the University of Bordeaux” with the aim of supporting more research on the issues “at the legal, economic and societal levels, and to address all the associated themes with a concrete and operational approach.”¹¹³

3. *United States of America*

In the U.S., there are currently no federal or state regulations concerning loot boxes, but several politicians have been trying to bring it to the public’s attention.¹¹⁴ In 2018, the Federal Trade Commission (“FTC”) chairman, Joseph Simmons, was confronted by New Hampshire Senator Maggie Hassan and asked if the FTC will investigate and address the issue of loot boxes.¹¹⁵ He gave a one-word response of “Yes”, but the only thing the FTC has done since

current law, because the items gained have no real-world value).

110. *Id.*

111. *Id.*

112. *AUTORITÉ DE REGULATION DES JEUX EN LIGNE*, ACTIVITY REPORT 2017-2018, 5 (2018). French law defines gambling as “an offer made to the public . . . leading to a financial sacrifice . . . motivated by the expectation of a gain.” *Id.* at 6. While microtransactions and loot boxes are not considered gambling under that definition, the ARJEL believes:

they form habits and reflexes that . . . make them privileged gateways to real gambling . . . spending money, sometimes repetitively, in the hope of obtaining a character or any other virtual object likely to facilitate the progression in the game constitutes . . . a habituation to wagering and to slot machines . . . the player does not know what he/she is buying and the result of his/her acquisition is governed by chance or more precisely by a random number generator . . . there is no guarantee the distribution of the prizes will not depend on the player's behaviour and on how his/her personal data are exploited - with the aim of inciting him/her to play more by manipulating the randomness of the distribution . . .

Id. at 4-5.

113. *Id.* at 7.

114. Chris Lee, *Highlights of the Predatory Gaming Announcement*, YOUTUBE (Nov. 21, 2017), www.youtube.com/watch?v=_akwfRuL4os [perma.cc/28M8-2MFA].

115. Ethan Gach, *FTC Says It Will Investigate Loot Boxes*, KOTAKU (Nov. 28, 2018), www.kotaku.com/the-ftp-says-it-will-investigate-loot-boxes-1830714932 [perma.cc/9K9E-UCS3] (explaining that Simons responded in the affirmative, “but declined to go into any more detail about the FTC’s current position on loot boxes and whether they constitute a form of gambling”).

then is host a public workshop on loot boxes.¹¹⁶

In addition to concerns raised to the FTC, in 2017, Chris Lee, a member of the Hawaii House of Representatives, described loot boxes as “predatory” and tried to pass legislation to regulate loot boxes as gambling.¹¹⁷ In 2019, U.S. Senator Josh Hawley, from Missouri, introduced to the Senate “a bill that will ban loot boxes and pay-to-win microtransactions,” called “The Protecting Children from Abusive Games Act.”¹¹⁸ The bill proposes to ban all “loot boxes and pay-to-win microtransactions in ‘games played by minors,’ a broad label that . . . will include both games designed for kids under 18 and games ‘whose developers knowingly allow minor players to engage in microtransactions.’”¹¹⁹ This bill is problematic for numerous reasons, mainly because the overbroad language would affect every video game being sold, not just games specifically made

116. Lesley Fair, *FTC Workshop Looks into Loot Boxes*, FED. TRADE COMMISSION (Apr. 8, 2019), www.ftc.gov/news-events/blogs/business-blog/2019/04/ftc-workshop-looks-loot-boxes [perma.cc/ZE2H-3YFA] (specifying the panel was set for August 7, 2019, and “will bring industry representatives, consumer advocates, academics, and others together to talk about the marketing of loot boxes and other in-game purchases, including a discussion of the potential behavioral impact on young consumers”).

117. See Orland, *supra* note 58. (describing Hawaii Congressman Lee’s thoughts on loot boxes). Congressman Lee states “predatory” is an “appropriate adjective for game makers who are knowingly exploiting addictive gambling mechanisms to manipulate players and increase their bottom line.” *Id.* Congressman Lee then warns about the fact that, during the development process for a lot of modern video games, “there are clear and deliberate decisions being made to employ these kinds of mechanisms with the full knowledge of the effects they can have . . . [t]hat’s made obvious by kinds of people who have been employed, including psychologists and other sorts of experts.” *Id.* He goes on to clarify that he is not advocating the regulation of content or speech. *Id.* His goals are to protect the public’s health, safety, and welfare because “there is unquestionably a significant impact, particularly on children and youth” and it is up to the people “to prevent an industry from exploiting people.” *Id.* He believes that any game with randomized in-game purchases, such as loot boxes, should be restricting to consumers twenty-one years of age or older. *Id.* His reason being that younger players are more “psychologically vulnerable” because they don’t have “the cognitive maturity at that point to make the appropriate decisions in that context.” *Id.* See also Edwin Hong, *Loot Boxes: Gambling for the Next Generation*, 46 W. ST. L. REV. 61, 77 (2019). Congressman Lee introduced Hawaii House Bill No. 2686 to prevent the sale of video games with loot boxes or randomized rewards to people under twenty-one years old. *Id.* He also introduced House Bill No. 2727, to require disclosure and transparency of the percentage chance of rewards in loot boxes. *Id.* Neither bill passed. *Id.*

118. Jason Schreier, *U.S. Senator Introduces Bill to Ban Loot Boxes and Pay-To-Win Microtransactions*, KOTAKU (May 5, 2019) (hereinafter Schreier I), www.kotaku.com/u-s-senator-introduces-bill-to-ban-loot-boxes-and-pay-1834612226 [perma.cc/YK76-SYW2]; see S. 1629, 116th Cong. (2019) (as introduced in the Senate, May 23, 2019).

119. Stephen Totilo, *You Can Now Read the Proposed Senate Bill That Would Ban Loot Boxes in Games Kids Like*, KOTAKU (May 23, 2019), www.kotaku.com/you-can-now-read-the-proposed-senate-bill-that-would-ba-1834983260 [perma.cc/UYZ6-KM6A].

for kids.¹²⁰ The language does not merely forbid selling games with microtransactions to kids but would be a total ban on developing, publishing, or selling any game with microtransactions if the gaming company either knows or suspects children will play the game – essentially every video game on the market.¹²¹ The overbroad language also has the implication that the ban would not just affect loot boxes, but all microtransactions across the board, including benign ones, such as expansions to video games.¹²²

III. ANALYSIS

There are many different issues concerning video games, addiction, and how it relates to gambling, but this Comment specifically looks at the issue of loot boxes.¹²³ There is a significant amount of concern by politicians around the country who have noticed the similarities between gambling and loot boxes.¹²⁴ One of

120. *Id.* (stating “not just games made for kids . . . would be impacted but games marketed to adults that kids also like . . . would be affected.”).

121. Robert N. Adams, *Discussing The Legal Issues of the Protecting Children from Abusive Games Act*, TECHRAPTOR (June 25, 2019), www.techraptor.net/gaming/guides/discussing-legal-issues-of-protecting-children-from-abusive-games-act [perma.cc/5R24-E4VN] (pointing out the strongest argument against this bill is that it “is an overbroad restriction on speech” and cites *Ashcroft v. ACLU*, 542 U.S. 656 (2004), where the Supreme Court “held that legislation is unconstitutionally broad when a less restrictive means would accomplish the same purpose”).

122. Giancarlo Valdes, *‘Zero’ Chance It Passes: Game Analysts Break Down Senator’s Anti-Loot Box Bill*, VENTURE BEAT (May 13, 2019), www.venturebeat.com/2019/05/13/zero-chance-it-passes-game-analysts-break-down-senators-anti-loot-box-bill [perma.cc/MTG4-Z4HF] (quoting Wedbush Securities analyst Michael Pachter saying “Congress simply cannot legislate against pay-to-win, where a game is competitive and people purchase better weapons, gear, etc . . . [t]hat’s like legislating against faster cars, nicer handbags, whatever”).

123. *See* Hong, *supra* note 117 (explaining how other “[c]oncerns in this area have manifested themselves in controversies relating to skin betting, loot boxes, social casino gaming and the use of gambling themed content within video games available to children”).

124. Kyle Orland, *The Legislative Fight Over Loot Boxes Expands to Washington State*, ARSTECHNICA (Jan. 25, 2018), www.arstechnica.com/gaming/2018/01/the-legislative-fight-over-loot-boxes-expands-to-washington-state (stating “a group of three Democratic state senators introduced a bill that would require the state gambling commission to examine loot boxes and determine ‘whether games and apps containing these mechanisms are considered gambling under Washington law’”); *see also* Schreier I, *supra* note 118 (detailing Senator Josh Hawley’s bill that would ban loot boxes and pay-to-win microtransactions in “games played by minors”); O’Connor I, *supra* note 104 (describing industry efforts at self-regulation after a FTC workshop on the issue of loot boxes); Orland, *supra* note 58 (explaining Hawaii state representative Chris Lee’s opinions on advocating for regulation); Cecilia D’Anastasio, *U.S. Senator Asks ESRB To Re-Examine Loot Boxes*, KOTAKU (Feb. 15, 2018), www.kotaku.com/u-s-senator-asks-esrb-to-re-examine-loot-boxes-1823049616 [perma.cc/N2B6-F2CK] (discussing New Hampshire Senator Maggie Hassan’s

the concerns is “the targeting of vulnerable populations, most notably young people, through ‘gambling-like’ experiences.”¹²⁵ There is also an increased penetration of gambling into socially accepted vehicles, in both sports and video games, resulting from an “increased ease of access and the continuous availability of formerly discontinuous gambling activities.”¹²⁶ Companies are consistently turning a blind eye to the issue and in open denial, but also employing psychologists and sociologists to actively engineer loot boxes to be as addictive as possible.¹²⁷

A. *Why Loot Boxes Need to be Regulated as Gambling*

As loot boxes become more prevalent in gaming and consumers become savvier, developers became sneakier in implementation.¹²⁸ To entice the player into buying more loot boxes, developers created different kinds of loot boxes.¹²⁹ For example, *Overwatch*, a very popular video game, offers rare costumes for limited periods of time that are unable to be obtained through other means, in order to tempt the player into spending more money in hopes of hitting the jackpot.¹³⁰ As discussed previously, Blizzard has taken numerous steps to design and implement loot boxes in *Hearthstone* to be as addictive as possible.¹³¹ The way loot boxes in *Overwatch* are animated have also been carefully designed to hook players into wanting more.¹³² While some purely cosmetic items might be

letter to the Entertainment Software Rating Board asking them to reconsider the issue of loot boxes and gambling).

125. Juho Hamari, *The Convergence of Gaming and Gambling?*, GAMIFICATION RES. NETWORK (Nov. 29, 2017), www.gamification-research.org/2017/11/the-convergence-of-gaming-and-gambling [perma.cc/P3YA-P2LH].

126. *Id.*

127. D’Anastasio, *supra* note 54 (explaining how *Overwatch* developers “Michael Heiberg and Jeremy Craig were deliberate in their [loot box] designs” to “maximize on anticipation”); *see also* Alexandra, *supra* note 7 (explaining how “designers from games like *Overwatch* and *Duelyst* “put considerable thought into designing loot boxes “to be a pleasurable experience. . . a temptation and a snare. . . a devious economic trap, designed to take players’ money” and stating that players are “not expected to resist them forever.”).

128. Williams, *supra* note 19.

129. *Id.*

130. *Id.* (stating that sometimes these rare items can be obtained in other ways, but are usually harder, more random, or significantly more tedious, while emphasizing the ease of buying and opening a loot box).

131. *See* Wiltshire, *supra* note 33.

132. *Id.* Wiltshire describes the loot boxes in *Overwatch* as a “masterpiece of audio-visual design.” *Id.* The process of the loot box’s animated opening in *Overwatch* starts by sending four disks into the sky, differentiated by streaks of different colors to build suspense, and “maximized excitement and anticipation.” *Id.* *See also* Will Fulton, *Do Players Really Like Loot Boxes, or Are Game Publishers Forcing Them On Us?*, DIGITAL TRENDS (Nov. 16, 2017), www.digitaltrends.com/gaming/do-players-like-loot-boxes [perma.cc/3CUJ-K9MZ] (describing “the satisfying tactility of opening them to the gameplay

benign, there are also many ways companies abuse the use of loot boxes, turning games into what is referred to as “Pay to Win.”¹³³ Those kinds of games target players “who would rather spend money than grind out levels” to gain a competitive advantage over other players – in other words, paying money to win the game.¹³⁴ One such game of this kind is a Chinese game called ZT Online, having gained notoriety after one of its most prominent players spoke out against the game’s deceptive practices.¹³⁵ In ZT Online, and many other online games, there are gamers who are willing to spend money to gain a competitive advantage over other players, meaning whoever spends the most money has the most fun.¹³⁶

Loot boxes purchasable with real money are essentially lotteries with a payout that only has value in a fantasy world, an illusion reinforced by the gaming companies, to sell more loot boxes.¹³⁷ The reason most people play the lottery is similar to the reason most players buy loot boxes: hoping to hit the jackpot and skip all the hard work and tedium required to progress, whether in real life, or in a video game.¹³⁸ For those players who do not have

systems in which they are couched, loot boxes are being carefully crafted to manipulate players into wanting them”); McGrody, *supra* note 7. One anonymous player admitted an addiction to opening Overwatch loot boxes, because it “had a feeling of a continuous rush . . . like opening a bunch of Christmas presents.” *Id.* Another player described being drawn to loot boxes because of “the slow reveal, the soft glow, the visuals of the loot exploding out of the top of the box, the couple of frames where the light turns gold . . .” *Id.* A different player recounted how their “spending on Counter Strike loot boxes evolved into a skin gambling habit” and admitted he had problems with “casino gambling in addition to online betting and loot box purchases” in the past. *Id.* The reason given by “a FIFA player, who spent upwards of £1000 in Ultimate Team, told me they were compelled by ‘the buzz of getting the player and . . . the need to have a good team to try and be competitive.’” *Id.*

133. Some cosmetic loot boxes are benign, but not always, as there is a very large industry of people using “skins” for weapons in the game Counter-Strike: Global Offensive as currency to gamble. See Joshua Brustein & Eben Novy-Williams, *Virtual Weapons Are Turning Teen Gamers Into Serious Gamblers*, BLOOMBERG (Apr. 20, 2016), www.bloomberg.com/features/2016-virtual-guns-counterstrike-gambling [perma.cc/J2VY-J88S] (explaining how consumers “buy skins for cash, then use the skins to place online bets on pro CS:GO matches” and then “convert each gun or knife back into cash” on various websites that facilitate the transactions).

134. Joel Martinsen, *Gamble Your Life Away in ZT Online*, DANWEI (Dec. 26, 2007), www.danwei.org/electronic_games/gambling_your_life_away_in_zt.php [perma.cc/48DP-8LJ5] (summarizing the process as whoever is the biggest spender, wins).

135. *Id.* Lu Yang, a twenty-seven-year-old sonogram technician at a hospital in Chengdu, spent tens of thousands of yuan in the game within a few months on microtransactions and loot boxes. *Id.*

136. *Id.*

137. Jabr, *supra* note 11.

138. Martinsen, *supra* note 134. Games can restrict the player by either requiring something is done within a certain time limit, limiting how often a player can do a certain action, or slowing down the game play by requiring the player to defeat a prohibitively excessive amount of enemies before they can get

the time, energy, or patience to progress in a video game, they can spend a little money, buy a loot box, and skip all the tedium, effort, and hassle.¹³⁹ For companies like EA, incorporating loot boxes essentially gives them free rein to print money, and some gaming companies take advantage of this by designing games to force players into buying loot boxes to progress.¹⁴⁰ With just one little click, the player is offered a variety of randomized rewards, often not the reward they wanted.¹⁴¹ This further incentivizes them into clicking again and again.¹⁴² Each click makes the next click easier, until it becomes an irresistible compulsion, and the player is none the wiser as to how much money was really spent.¹⁴³

In addition to designing systems to be as addictive as possible, developers, such as EA, have released public denials claiming loot box mechanics are not similar to gambling.¹⁴⁴ Kerry Hopkins, EA's Vice President of legal and government affairs made such a denial when confronted by the UK's Parliament Digital, Culture, Media, and Sport Committee.¹⁴⁵ She started by clarifying that EA refers to loot boxes as "surprise mechanics" similar to surprise toys like

stronger. *Id.*

139. *Id.*

140. Robert Purchase, "I've Seen People Literally Spend \$ 15,000 on Mass Effect Multiplayer Cards," *Former BioWare Speaks out Against EA's Monetisation of Games*, EUROGAMER (Oct. 23, 2017), www.eurogamer.net/articles/2017-10-23-manveer-heir-bioware-mass-effect-ea-monetisation [perma.cc/353P-SJSY]. Manveer Heir, a long time EA game designer describes how he watched EA's business model change over time to favor microtransactions. *Id.* He states that it is:

[D]efinitely a thing inside of EA . . . they are generally pushing for more open-world games . . . the reason is you can monetize them better . . . 'have them come back again and again' . . . EA and those big publishers in general only care about the highest return on investment . . . [and] don't actually care about what the players want, they care about what the players will pay for.

Id.

141. *Id.*

142. *Id.*

143. *Id.* Heir describes the reasoning behind EA's decision-making process as to why they keep making decisions that anger their fanbase. *Id.* He says the sheer magnitude of money made from microtransactions from Mass Effect 3 alone, "that's the reason other EA products started getting multiplayer that hadn't really had them before, because we nailed it and brought in a ton of money . . . repeatable income versus one-time income." *Id.* See also Moshirnia, *supra* note 7 (explaining that in "psychological terms, loot boxes can be thought of as "Skinner boxes" . . . that the doling out of rewards on a random schedule attendant to an action recruited repeated attempts of that action . . . [t]he uncertain but tantalizingly close reward enlists constant attempts").

144. Nathan Grayson, *EA: Our Loot Boxes Are Actually 'Surprise Mechanics' That Are 'Quite Ethical'*, KOTAKU (June 6, 2019), www.kotaku.com/ea-our-loot-boxes-are-actually-surprise-mechanics-that-1835662012 [perma.cc/56KH-JSU7].

145. *Id.*

“Kinder Eggs, or Hatchimals, or LOL Surprise.”¹⁴⁶ She also stated EA does not believe there is enough evidence to link “surprise mechanics” to gambling, and concluded the “surprise mechanics” implemented in EA games are “actually quite ethical and quite fun.”¹⁴⁷ Among the video game community, EA holds the record for being the worst gaming company in America, having “won” that award twice in a row within a five year time span.¹⁴⁸ EA won the award in 2012 and 2013, one reason being that EA “deliberately [held] back game content with the sole intent of charging a fee for it at a later date . . . [including] microtransactions in all its free-to-play games.”¹⁴⁹

EA also holds the Guinness World Record for having the most down-voted comment on the social news aggregation website Reddit.¹⁵⁰ Reddit is one of the most visited social news aggregation

146. *Id.*

147. *Id.*

148. Chris Morran, *EA Makes Worst Company in America History, Wins Title For Second Year In A Row!*, CONSUMERIST (Apr. 9, 2013), consumerist.com/2013/04/09/ea-makes-worst-company-in-america-history-wins-title-for-second-year-in-a-row [perma.cc/TPS6-WZZB] (stating EA needs to stop “treating your customers like human piggy banks, and don’t put out so many incomplete and/or broken games with the intent of getting your customers to pay extra for what they should have received in the first place”); see Jonathan Loh, *EA is Unsurprisingly one of America’s Most Hated Companies – Again*, BUS. INSIDER (Feb. 5, 2018), www.businessinsider.sg/ea-is-unsurprisingly-one-of-americas-most-hated-companies-again (stating the financial news publication 24/7 Wall St. ranked EA fifth in their 2017 edition of America’s Most Hated Companies, because of “negligence and deceptive business practices . . . marred with revelations of corporate scandals”); see also Ellis Hamburger, *EA Steers Angry Customers Away From Reviewing Games at Google Play*, VERGE (Feb. 9, 2014), www.theverge.com/2014/2/9/5395338/ea-dungeon-keeper-review-scam-google-play-store (describing how EA tricks users by prompting players to leave a review of their game, but only allowing five out of five reviews to be submitted to where the game is downloaded from, and redirects lower ratings to EA’s own email); Brad Reed, *EA’s Ability to Enrage Its Own Customers is a Rare Talent*, BGR (Feb. 7, 2014), bgr.com/2014/02/07/ea-sleazy-microtransactions-criticism [perma.cc/SG9P-FM2F] (detailing all the ways EA has exploited their consumers, such as releasing a Free To Play game that is unplayable without spending cash, requiring always-on digital rights management software in games which prevented consumers from playing the game at all or buying out smaller but more popular gaming developers and then running them into the ground).

149. Morran, *supra* note 148; see also Paul Tassi, *In 2017, EA has Turned into an Industry Punching Bag Once Again*, FORBES (Nov. 13, 2017), www.forbes.com/sites/insertcoin/2017/11/13/in-2017-ea-has-turned-into-an-industry-punching-bag-once-again [perma.cc/4Y2B-PML2] (stating many consumers see EA “as the pure manifestation of corporate greed and incompetence . . . synonymizing (sic) EA with greed and/or failure”).

150. Zack Zwiezen, *EA Received a Guinness World Record for Most Downvoted Comment in Reddit History*, KOTAKU (Sept. 7, 2019), www.kotaku.com/ea-received-a-guinness-world-record-for-most-downvoted-1837955807 [perma.cc/R647-YF45]. For a sense of scale, EA’s comment has 683,000 down votes while the second most down voted comment only has 88,906 down votes. *Id.*

websites in the world, allowing members to submit topics for discussion, which then gets voted up or down by other members.¹⁵¹ The comment was an “unknown community manager” responding to consumer complaints regarding a recently released EA game, *Star Wars Battlefront II*, and how it forced players to buy loot boxes to unlock iconic Star Wars characters, such as Luke Skywalker or Darth Vader.¹⁵² This record was the result of consumers finally taking a stand against EA’s practice of over-saturating every game they release with excessive amounts of microtransactions and their practice of nickel and diming consumers with loot boxes.¹⁵³ Due to increasing amounts of negative backlash against EA, the company promised to “act responsibly . . . and try to rectify those mistakes and learn from them.”¹⁵⁴ Within months of making that statement, CEO Andrew Wilson stated that EA will “push forward” with implementing loot boxes in their future games, but it would not be considered gambling because the loot boxes will disclose how many items are inside and what the odds are of acquiring each item.¹⁵⁵ These statements show that EA knows what the problems with loot boxes are, but choose to ignore them.¹⁵⁶ These actions by EA are only mere gestures of appeasement, hoping the public will be fooled into complacency.¹⁵⁷

151. REDDIT, www.redditinc.com (last visited Nov. 1, 2019).

152. Zwiezen, *supra* note 150.

153. Tassi, *supra* note 149 (discussing how EA tied loot boxes to progression in their latest game, *Star Wars Battlefront II*, with players unable to get stronger or advancing in the game without buying loot boxes, either with virtual currency or real money); see Robert Purchase, *Star Wars Battlefront 2 Has a Loot Crate Problem*, EUROGAMER (Oct. 10, 2017), www.eurogamer.net/articles/2017-10-09-star-wars-battlefront-2-has-a-loot-crate-problem [perma.cc/5DFF-4Q5X] (detailing all the problems with the game using loot boxes for progression in the game).

154. Alice O'Connor, *EA Exec Says They Won't Repeat Loot Box Mistakes*, ROCKPAPERSHOTGUN (Apr. 17, 2018) (hereinafter O'Connor II), www.rockpapershotgun.com/2018/04/17/ea-exec-says-they-wont-repeat-loot-box-mistakes [perma.cc/4YUJ-J5KW] (describing how “[y]ears of growing discontent over loot box monetization in games came to a head with 2017’s *Star Wars Battlefront II*’s lousy loot-based unlock progression system, raising such a stink that governments weighed in on arguments and EA disabled the microtransactions”).

155. Timothy J. Seppala, *EA is Going to Keep Putting Loot Boxes in its Games*, ENGADGET (May 9, 2018), www.engadget.com/2018/05/09/ea-loot-boxes-are-gambling-heres-more-loot-boxes [perma.cc/NDR6-GU6G] (stating that Wilson claimed that EA loot boxes are not gambling, “because you’re guaranteed a certain amount of items with each purchase . . . EA doesn’t facilitate a way to sell the items for real-world money (like you would cash out chips at a casino) or assign a currency value [to the items]”).

156. *Id.*

157. *Id.*

B. Why Loot Boxes Are Not Regulated Like Gambling

For an activity to be considered gambling, and thus subject to regulation, courts traditionally require that three elements must be met: chance, value, and consideration.¹⁵⁸ One of the biggest hurdles in loot box regulation is the element of value.¹⁵⁹ In the majority of cases, courts have held that virtual currency, which cannot be exchanged for real world value, does not satisfy the element of value.¹⁶⁰

1. Value

Of the three elements, value is the biggest hurdle to overcome.¹⁶¹ One of the common factors courts use to define value is whether the real money spent on loot boxes offer tradable items or items to be used as currency in betting.¹⁶² The distinction is that

158. See Castillo, *supra* note 59 at 184 (concluding that “any form of gambling regulation will have to address value, consideration, and chance”).

159. See Hafer, *supra* note 72 (discussing the argument that items in loot boxes have no real world value); Castillo, *supra* note 59 (stating “current case law would not support an assertion that loot boxes provide prizes of value”).

160. See *Mason v. Mach. Zone, Inc.*, 851 F.3d 315, 319 (4th Cir. 2017) (holding that Maryland law requires a person to lose money, and dismissed the case because the Plaintiff “could receive either virtual gold, which . . . does not amount to money, or . . . other virtual resources that likewise were not money or redeemable for money”); *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731, 740 (N.D. Ill. 2016) (holding that under Illinois law, the Defendant “keeps the money a player pays to buy additional chips no matter whether that player wins or loses in the games, that money is never put at risk” and the Plaintiff never lost the “value” of the chips because she was able to use those chips to keep playing the online casino games); *Ristic v. Mach. Zone, Inc.*, No. 15-cv-8996, 2016 U.S. Dist. LEXIS 127056, at *12-13 (N.D. Ill. Sep. 19, 2016) (stating that the Defendant was “only giving players something that has value in the game” and will not reward the Plaintiff for “remorse a buyer may feel when she realizes that she has wittingly swapped her hard-earned cash for simulated gold” and granted the motion to dismiss); *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871, 880-82 (N.D. Ill. 2016) (stating that under California and Illinois law, players are not winning “anything of measurable value” because the contents of the in-game loot box “are not exchangeable for real money or other goods, either within the game or in the real world”).

161. See *Mason*, 851 F.3d at 319 (holding that “virtual gold . . . does not amount to money . . . other virtual resources that likewise [are] not money or redeemable for money”); *Ristic*, No. 15-cv-8996, 2016 U.S. Dist. LEXIS 127056, at *12-13 (ruling that the “simulated gold” only has “value in the game” and not in real life); *Soto*, 159 F. Supp. 3d at 880-82 (stating that under California and Illinois law, players are not winning “anything of measurable value” because the contents of the in-game loot box “are not exchangeable for real money or other goods, either within the game or in the real world”).

162. Hafer, *supra* note 72 (explaining the distinction between games “where real money can be spent on transferable items and situations in which real money can be spent to bet on in-game items”); see also *Mason*, 851 F.3d at 319 (holding that “[v]irtual gold and virtual chips are not sold on the secondary market and, therefore, are not equivalent to money . . . [i]nstead, players sell in

if items cannot be traded without selling the whole account, then there is no value.¹⁶³ In *Mason v. Mach. Zone, Inc.*, the plaintiff alleged that the defendant's free-to-play mobile game was a form of gambling because players could "spin" a virtual wheel in the hopes of winning items to be used in the game.¹⁶⁴ The appellate court affirmed the lower court's dismissal because the plaintiff "did not 'lose money' when she 'spun' the virtual wheel . . . therefore, she had failed to state a claim under" Maryland's Loss Recovery statute.¹⁶⁵ The court clarified the statute only allows recovery if a person loses money to a winner, against whom the loser can recover against.¹⁶⁶ Additionally, there was nothing at stake because the gaming company kept the money the plaintiff spent, regardless of the outcome from spinning the virtual wheel.¹⁶⁷ The court also discussed how "based on the manner in which the Game of War casino operates, Mason could not have lost or won money as a result of her participation in that virtual activity" because she spent the money for virtual gold, and the game does not facilitate redemption of virtual items for real-life currency.¹⁶⁸ The appellate court then marginalized the argument that players can sell their accounts on a secondary market, because the virtual items themselves are not being sold, so it is not equivalent to money.¹⁶⁹ The court also noted that the accounts included "levels of advancement in the game."¹⁷⁰

In a similar class action case, *Soto v. Sky Union, LLC*, Soto alleged he lost money playing the "free-to-play" online game Castle Clash, owned by Sky Union, and that "Castle Clash is a game of . . . gambling . . . camouflaged as a game of skill."¹⁷¹ The court goes

the secondary market their entire accounts, which include their levels of advancement in the game"); *Soto*, 159 F. Supp. 3d at 880-82. When players win items from the loot box:

[T]hey do not turn to the secondary market to sell those [items] . . . [i]nstead, players sell their entire accounts, which plaintiffs contend increase in value when plaintiffs are awarded rare and powerful [items] . . . [t]he amount a player can get for selling his account to another player says little about the values of the individual items contained within that account.

Id.

163. *See Mason*, 851 F.3d at 320 (specifying that selling an account on the secondary market is not the same as selling the virtual gold or virtual chips, thus the Plaintiff did not lose any money); *see also Soto*, 159 F. Supp. 3d at 880 (stating the "amount a player can get for selling his account to another player says little about the values of the individual items . . . contained within that account").

164. *Mason*, 851 F.3d at 316-17.

165. *Id.*

166. *Id.* at 319.

167. *Id.*

168. *Id.*

169. *Id.* at 320.

170. *Id.*

171. *Soto*, 159 F. Supp. 3d at 874 (acknowledging that "these games are free

into detail about the mechanics of the game by explaining the various ways the game encourages players to spend real money.¹⁷² It granted Sky Union's motion to dismiss for failure to state a claim after analyzing the case under California, Illinois, and Michigan law.¹⁷³ The court dismissed Soto's argument because, under California law, the "[in game items] are worth the amount by which they increase the value of a Castle Clash account sold on the open market."¹⁷⁴ It held that, unlike a casino where the chips have predetermined value and are "cashed out" by the casino, Castle Clash does not allow players to "cash out" the items won.¹⁷⁵ Players can only cash out by selling their accounts on a secondary market, and the amount earned "says little about the values of the individual items (Heroes, Talents, etc.) contained within that account."¹⁷⁶ While the court said the virtual items had no value

only for those users who choose to keep them that way . . . these games . . . offer users the opportunity to spend money at various stages of gameplay").

172. *Id.* at 875-76. The court explains that "shards" is one type of virtual currency in the game, used to buy stronger heroes, and earned by players going into dungeons, but there is a daily limit to how many times a player can go into a dungeon, so the game offers players the option of paying real money to remove the limit. *Id.* at 875. There is also another kind of virtual currency called "gems," a small amount is given to players when starting, but players can only get more gems by paying real money for it, "ranging from 230 gems for \$1.99 to 16,800 gems for \$99.99." *Id.* The gems are used to play a game of chance, awarding "players new Heroes or "Talents," special attributes that modify a Hero's combat behavior." *Id.* There are also numerous in-game events "whereby players with large quantities of gems are awarded rare Heroes or Talents . . . the "Great Gems Bonanza," through which the twenty Castle Clash players owning the most gems at the end of one day were awarded a new highly skilled and valuable Hero." *Id.* To promote these events, the publisher would update players, informing "players how many gems they would need to buy to have a chance of winning, and some players spent as much as \$3,000 in one day to achieve a high enough rank to win the coveted Hero." *Id.* at 875-76.

173. *Id.* at 874. The Court uses similar reasoning for Illinois and Michigan law, as it did for California law, stating "like California, Illinois does not provide for liability where games of chance offer rewards with no value" and "it is not possible to calculate their worth by looking to a constantly changing and unsanctioned secondary market for Castle Clash accounts." *Id.* at 882-84.

174. *Id.* at 877-80. The Court states that under California Penal Code § 330b(d), "California courts have observed that the plain text of this statute sets forth three key elements: payment, chance, and prize." *Id.* at 878. The Courts decision turned on the concept of value and clarified that it does not matter the currency used is imaginary, but it does matter that the rewards are imaginary. *Id.* at 879. The Court agrees that the element of consideration is met:

[T]he Court is not prepared to say that gems are not capable of serving as consideration . . . players must purchase gems from Sky Union in order to participate . . . requiring players to convert their money into gems to enter contests does not render their cash payment too remote to serve as consideration.

Id. at 881.

175. *Id.* at 880.

176. *Id.*

because the individual items cannot be sold piecemeal, it did not address the fact that the accounts themselves would be relatively worthless without the items, only stating that the value of the individual items cannot be calculated.¹⁷⁷

However, in Washington, the courts have come to the opposite conclusion and determined that virtual currency has value.¹⁷⁸ In *Kater v. Churchill Downs Inc.*, the plaintiff, Kater, brought a class action against Big Fish Casino, a virtual online casino, after she lost over \$1,000 worth of virtual casino chips.¹⁷⁹ The case was dismissed by the district court, “because the virtual chips are not a ‘thing of value.’”¹⁸⁰ Big Fish Casino offers common casino games like blackjack, poker, and slots, but requires the player to first download the “Big Fish Casino” app for free and then receive a certain amount of free chips to start playing.¹⁸¹ Players can earn more chips by either winning games, or buy more chips, with “prices ranging from \$1.99 to nearly \$250.”¹⁸² While the casino’s mandatory terms of use state the chips have no monetary value, there is an option within the app that allows players to transfer chips to each other.¹⁸³ On appeal, the Court relied heavily on the wording of Washington state law defining what “value” is.¹⁸⁴ Specifically, the Court focused on the language defining value as “involving extension of . . . a privilege of playing at a game or scheme without charge.”¹⁸⁵ The Court clarified that “without virtual chips, a user is unable to play” and

177. *Id.* See also Hong, *supra* note 117, at 72-73 (challenging the notion of virtual items having no value because “with the trading and selling of accounts themselves becoming more prominent, in-game items provide value far beyond the video games themselves, as players with rare items sell their accounts for several hundreds of dollars”); Hafer, *supra* note 72 (arguing that gaming companies are “profiting indirectly from any aftermarket value of items found in loot boxes . . . if their crates have the potential to net you a five-figure payout on the open market, that certainly factors into the equation of how much people will be willing to pay for a key”).

178. *Kater v. Churchill Downs Inc.*, 886 F.3d 784, 788 (9th Cir. 2018) (stating that other Federal cases are unpersuasive because they used “the analysis of different state statutes, state definitions, and games”).

179. *Id.* at 786.

180. *Id.*

181. *Id.* at 785.

182. *Id.* at 785-86.

183. *Id.* at 786. In allowing players to transfer chips to each other, it gives the player a way to “cash out” their winnings, by selling the chips using a third-party website, and then transferring the chips to the player buying it. *Id.* Each transfer of chips has a “transaction fee, priced in virtual gold,” thus Big Fish Casino gets paid each time players transfer chips to each other. *Id.*

184. *Id.* at 787 (holding that under Washington law, the virtual chips have value because they “extend the privilege of playing . . . without charge”); see also WASH. REV. CODE ANN. § 9.46.0285 (2019) (defining “Thing of value” to mean “any money or property...exchangeable for money or property, or any form of credit or promise...contemplating transfer of money or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge”).

185. *Kater*, 886 F.3d at 787-88.

requires the user to buy more chips, but “if a user wins chips, the user wins the privilege of playing [more] without charge.”¹⁸⁶

Another issue with the element of value arises from case law on collectible card games.¹⁸⁷ Various courts have held there is no economic injury to consumers buying packs of cards because they received what they agreed to pay for: a pack of cards with only a chance, not a guarantee, of a rare card.¹⁸⁸ The gaming industry relies on this comparison heavily in their defense of loot boxes.¹⁸⁹ The main source of this argument from the industry is the Entertainment Software Rating Board (“ESRB”).¹⁹⁰ It is a self-regulatory organization for the video game industry, established by the Entertainment Software Association (“ESA”) in 1994, which assigns age and content ratings to video games sold to the general

186. *Id.* (deciding the value derives from extending the players ability to keep playing the game, the Court did not address the issue of Big Fish Casino benefitting from the secondary market sales of its virtual chips).

187. *See Chaset v. Fleer/Skybox Int'l*, 300 F.3d 1083, 1087 (9th Cir. 2002) (holding that “[p]urchasers of trading cards do not suffer an injury . . . when they do not receive an [rare] card” and further elaborated that the plaintiffs purchased a pack of cards, and the value is the cards in the pack); *see also Schwartz v. Upper Deck Co.*, 104 F. Supp. 2d 1228, 1230-31 (S.D. Cal. 2000) (holding that no economic injury was suffered because “Plaintiffs struck a bargain with Defendant and received the benefit of their bargain . . . [t]hey paid for a pack of cards which included a bona fide ‘chance to win’” and that is what the Plaintiff received); *Price v. Pinnacle Brands*, 138 F.3d 602, 607 (5th Cir. 1998) (dismissing the suit for lack of standing because “plaintiffs do not allege that they received something different than precisely what they bargained for: six to twenty cards in a pack with a chance that one of those cards may be of Ken Griffey, Jr.” and elaborating that “Injury to mere expectancy interests or to an ‘intangible property interest’ is not sufficient”).

188. *Chaset*, 300 F.3d at 1083; *Schwartz*, 104 F. Supp. 2d at 1228; *Price*, 138 F.3d at 602.

189. Jason Schreier, *ESRB Says it Doesn't see 'Loot Boxes' as Gambling*, KOTAKU (Oct. 11, 2017) (hereinafter Schreier II), www.kotaku.com/esrb-says-it-doesnt-see-loot-boxes-as-gambling-1819363091 [perma.cc/VBG6-Y65R]; *see also* Hafer, *supra* note 72 (noting arguments cited by gaming industry giants).

Another common argument for loot boxes, cited by EA among others, is that there is no such thing as an empty loot box . . . a slot machine, a blackjack dealer, or even a lottery can take your money and give you nothing in return if you lose, loot boxes always give you something for your money . . . [t]here is no “losing” in the sense of walking away completely empty-handed.

Id.

190. Chris Kohler, *July 29, 1994: Videogame Makers Propose Ratings Board to Congress*, WIRED (July 29, 2009), www.wired.com/2009/07/dayintech-0729 [perma.cc/JEV4-CSFQ]. The ESRB was established in response to national outcry about violence in video games following the release of *Mortal Kombat* and the fear that video games are training children to become killers. *Id.* *Mortal Kombat* is a fighting game which used “digitally captured actors and bloody, violent “fatality” moves” that was incredibly realistic and groundbreaking when it was released. *Id.*

public.¹⁹¹ The ESRB is resistant to acknowledge that players lose anything of value when opening a loot box and thus refuses to consider loot boxes akin to gambling.¹⁹² Their reasoning is that the player will always receive *something*, even if it is not something the player actually wants.¹⁹³ They base the reasoning on case law in regards to collectible card games, pointing to how opening a loot box will always give the player something, whether it is what they wanted or not.¹⁹⁴ This argument may come off as disingenuous for one big reason: the ESRB is run by the ESA, which is comprised of many big-name publishers and developers in the gaming industry.¹⁹⁵ The ESRB even readily admits that classifying loot boxes as gambling would hurt companies economically.¹⁹⁶ By admitting that loot boxes are akin to real gambling, they would have to give any game with loot boxes the “Adults Only” rating, “which would be poisonous for big publishers, as most big-box retailers will not sell A-O games in their stores.”¹⁹⁷ Currently, the ESRB is willing to put a warning label of “In-Game Purchases” on “*any* video game with an in-game option to purchase extra content.”¹⁹⁸ This applies to every game that lets a consumer pay real money for virtual items such as “bonus levels, skins, surprise items (such as item packs, loot boxes, mystery awards), music, virtual coins and other forms of in-game currency, subscriptions, season passes and upgrades.”¹⁹⁹ However, the reasoning for the labels are not to warn consumers of the dangers of loot boxes, instead, the labels are merely lip service to placate uninformed consumers and only sidestep addressing the real issue.²⁰⁰

2. Consideration

For the element of consideration, the majority opinion in most jurisdictions requires that the “party must have a chance to gain,

191. *Id.*

192. Jason Schreier, *After Months of Controversy, ESRB Will add 'In-Game Purchases' Label to Games*, KOTAKU (Feb. 27, 2018) (hereinafter Schreier III), www.kotaku.com/after-months-of-controversy-esrb-will-add-in-game-purc-1823356171 [perma.cc/8HCR-6EL7] (quoting ESRB president Patricia Vance, saying: “We certainly considered whether or not loot boxes would constitute as gambling . . . we don’t believe it does”).

193. Schreier II, *supra* note 189. Vance reasons that loot boxes are not gambling, because the player “is *always* guaranteed to receive in-game content (even if the player unfortunately receives something they don’t want.)” *Id.*

194. *Id.*

195. Kohler, *supra* note 190.

196. Schreier II, *supra* note 189.

197. *Id.*

198. Schreier III, *supra* note 192.

199. *Id.*

200. *Id.* The ESRB goes on to say it “can’t overwhelm [consumers] with a lot of detail . . . particularly among parents . . . a large majority of parents don’t know what a loot box is.” *Id.*

and stand a risk of loss” and that participation has to be “more than a minimum effort” to be deemed valid consideration.²⁰¹ A minority of jurisdictions view gambling consideration to be “more akin to consideration used in an ordinary contract . . . where consideration is any 'right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.'”²⁰²

In comparison, the minority opinions define consideration the same as a contract but also vary depending on the jurisdiction.²⁰³ In *State ex rel. Schillberg v. Safeway Stores*, the Washington Supreme Court proclaimed that “antigambling laws are designed not only to prevent loss but to preclude some kinds of gain to the promoter of a lottery from reaping an unearned harvest at the expense of the players.”²⁰⁴ The case arises from Safeway grocery stores heavily promoting an event called “Bonus Bingo” allowing players to obtain free of charge bingo booklets from any Safeway store for a chance to win a monetary prize.²⁰⁵ The court explained that the defendant gained “thousands of persons to its stores who would not otherwise go there” as well as “the time, thought, attention and energy of members of the public,” and “an actual increase in patronage from them.”²⁰⁶ The customers wagered their “time, attention, thought, energy, and money spent in transportation studying Safeway’s advertising and in journeying at least once per game to a Safeway store for a chance to win a prize.”²⁰⁷ Essentially, the element of consideration is satisfied because Safeway benefitted from the influx of potential customers, who would not have taken the time or effort to visit those stores if not for a chance to win at Bingo.²⁰⁸ It can be easily argued that under this form of analysis, there is ample consideration in loot boxes.²⁰⁹ In the case of loot boxes, gaming

201. Castillo, *supra* note 59, at 185 (citing *Yellow-Stone Kit v. State*, 88 Ala. 196 (1889), explaining the court’s holding that “[n]o consideration existed because the payment of money was not required for a chance to win.”).

202. *Id.* at 185-86 (citing *State ex rel. Schillberg v. Safeway Stores*, 75 Wash. 2d 339, 351 (1969), where the court held the effort expended by the customers in filling out the sweepstakes forms was consideration).

203. Castillo, *supra* note 59; *see also Schillberg*, 75 Wash. 2d at 350 (holding that consideration was present by customers visiting Safeway stores which “amount to a consideration moving from player to promoter”); *Gottlieb v. Tropicana Hotel & Casino*, 109 F. Supp. 2d 324, 328-30 (E.D. Pa. 2000) (ruling that “[c]onsideration is a bargained for exchange, and it may take the form of either a detriment to the promisee or a benefit to the promisor . . . present ‘both in the form of a detriment or inconvenience to the promisee at the request of the promisor and of a benefit to the promisor’”).

204. *Schillberg*, 75 Wash. 2d at 349, 351 (stating the court “will look most closely to see if any substantial consideration moves from player to promoter”).

205. *Id.* at 341-44.

206. *Id.* at 351.

207. *Id.* at 351-52.

208. *Id.*

209. Castillo, *supra* note 59, at 185.

companies make a significant amount of money from designing and implementing loot boxes in their various games, and the consumer spends a considerable amount of time and money on the loot boxes, often to the point of addiction.²¹⁰ The *Schillberg* Court's statement that gambling regulation is meant "to put a damper on the actions of those who receive from the device much more than they part with in prizes" is the exact reason why loot boxes need to be regulated.²¹¹

3. *Chance*

The element of chance is the easiest to satisfy, as numerous cases discussing gambling notes that "chance" is the least disputed element.²¹² Chance is satisfied when a participant receives a prize or award without having to use any skill or expend any effort, and wins based on random luck.²¹³ In the case of loot boxes, there is no effort nor skill involved for a player to open a loot box – all it takes is one little click, and the more clicks a player buys, the better the chances they get what they want.²¹⁴

IV. PROPOSAL: WHAT KIND OF REGULATION IS NEEDED

This section examines the possible steps that could be taken to address the issue of loot boxes. The extraordinary financial benefit that loot boxes provide to the gaming industry suggests a limited likelihood of independent industry-wide regulation of the practice. This section examines two possible solutions to the loot box issue. The first solution is removing the gambling aspect from the loot boxes by requiring publishers to not only disclose the odds of each loot box, but also reveal the contents of each box before purchasing.

210. *Id.* at 194.

211. *Schillberg*, 75 Wash. 2d at 351.

212. *See Kater*, 886 F.3d at 786 (noting only the element of value was at dispute); *see also* *People v. Eagle Food Ctrs., Inc.*, 31 Ill. 2d 535, 538 (1964) (noting both parties agree that "defendant's promotion embodies the elements of prize and chance"); *Iris Amusement Corp. v. Kelly*, 366 Ill. 256, 262 (1937) (holding the Plaintiff ran an illegal lottery, and noting the Plaintiff admitted the elements of chance and prize were present); *G.A. Carney, Ltd. v. Brzeczek*, 117 Ill. App. 3d 478, 483 (1983) (explaining "the essential elements of any lottery are chance, consideration, and a prize" and noting the Plaintiff does not dispute the elements of chance and prize when accused of gambling in the form of a lottery); *and* *Midwest Television, Inc. v. Waaler*, 44 Ill. App. 2d 401, 408 (1963) (defining lottery as something "where persons have 'paid or promised consideration' for a chance to win a prize, where the winner is determined by chance" and defining consideration, without seeing a need to define chance or prize).

213. Hong, *supra* note 117, at 67.

214. *See Carney*, 117 Ill. App. 3d at 484 (stating that a contestant who buys multiple entry forms, in addition to the single free entry given to all players, gives the contestant better chances to win a prize and is evidence the contest was an illegal lottery).

The second solution asks the judiciary to expand the definition of value in regard to loot boxes in video games.

Admittedly, the industry has taken some positive steps towards self-regulation, but it is not enough.²¹⁵ On the same day as the FTC workshop investigating loot boxes, the ESA stated a plan to disclose loot box odds in the future, starting in 2020.²¹⁶ There are some who feel this response is very similar to the events necessitating the formation of the ESRB and might not be enough to fix the problem.²¹⁷ There are others who want to continue letting the industry regulate itself, such as Hawaii State House of Representative Sean Quinlan.²¹⁸ However, even Quinlan advocates for some form of protection for children from the “gambling and addictive mechanics” of loot boxes.²¹⁹ Quinlan compares loot boxes to the cigarette mascot, Joe Camel: “We didn’t allow Joe Camel to encourage our kids to smoke cigarettes, and we shouldn’t allow Star Wars to influence your kids to gamble.”²²⁰ In light of all the political discourse, moral outrage, and negative press leveled against game developers world-wide, the minor positive step of odds disclosure seems more akin to an empty gesture, falling short of addressing the real problem.²²¹

215. Alice O’Connor, *Major Developers Will Disclose Odds on Loot Boxes in Effort to Avoid Government Regulation*, ROCKPAPERSHOTGUN (Aug. 8, 2019) (hereinafter O’Connor III), www.rockpapershotgun.com/2019/08/08/major-developers-will-disclose-odds-on-loot-boxes-in-effort-to-avoid-government-regulation [perma.cc/W9G5-3TYW]. O’Connor concludes that these preemptive measures are nothing more than appeasement to divert negative governmental attention: “The industry want governments to believe they can keep games in check themselves (despite this big announcement also being tantamount to admitting they now see their behaviour over the past few years as unethical?) to avoid legislation cutting into this valuable post-launch revenue stream.” *Id.*

216. *Id.* (explaining that some of the companies include “Activision Blizzard, Bandai Namco, Bethesda Softworks, Bungie, Electronic Arts, Microsoft, Nintendo, Sony, Take-Two, Ubisoft, Warner Bros, and Wizards of the Coast.”). See Fair, *supra* note 116 (setting the date of the panel on August 7, 2019).

217. O’Connor III, *supra* note 215 (stating that it would be much harder for gaming companies to convince the government that the industry is capable of self-regulation amid accusations of promoting underage gambling, especially if more politicians rally against loot boxes).

218. Haydn Taylor *Games Industry Must Self-Regulate on Loot Boxes, Says State Representative*, GAMESINDUSTRY.BIZ (Dec. 1, 2017), www.gamesindustry.biz/articles/2017-12-01-games-industry-must-self-regulate-on-loot-boxes-says-state-representative [perma.cc/X4R4-RPQX] (quoting Quinlan, stating that “the games industry must take responsibility for how it handles loot boxes and microtransactions”).

219. *Id.* Quinlan states loot boxes might not technically be gambling, but “the mechanism is so close to gambling, when we talk about psychology and the way addiction and reward works, I think whether or not it means the strict definition of gambling, it’s close enough and the impact is close enough.” *Id.*

220. Makena Kelly, *How Loot Boxes Hooked Gamers and Left Regulators Spinning*, THEVERGE (Feb. 19, 2019), www.theverge.com/2019/2/19/18226852/loot-boxes-gaming-regulation-gambling-free-to-play [perma.cc/9X3H-PDBG].

221. Cecilia D’Anastasio, *U.S. Senator Asks ESRB to Re-Examine Loot*

This Comment is not advocating for a ban on all loot boxes, nor is it proposing the United States take the same drastic steps as other countries such as China or South Korea.²²² The Supreme Court of the United States has ruled previously that video games are a protected means of expression under the First Amendment in *Brown v. Entertainment Merchants Association*.²²³ In *Brown*, the Supreme Court held the California law prohibiting renting or selling violent video games to minors under eighteen was both overinclusive and underinclusive.²²⁴ The under-inclusivity stemmed from the law restricting exposure to violence only in video gaming while other sources of violent media remained unregulated.²²⁵ The California law was also considered overinclusive because it usurped the decisional rights of parents to expose their children to violence as they saw fit.²²⁶ With *Brown* in mind, this Comment proposes two potential solutions to the problem of loot boxes: 1) requiring more transparency from video game companies, or 2) asking the courts to redefine the element of value in regards to loot boxes.

A. The First Option: Be More Transparent and Informative

The ESRB already plans to disclose the odds of loot boxes, but it is not enough to resolve the underlying issues of addiction and exposure to minors.²²⁷ Mere disclosure of odds makes no difference when the meaning of those odds is not understood. It is not a stretch to say most children under the age of eighteen would not

Boxes, KOTAKU (Feb. 15, 2018), www.kotaku.com/u-s-senator-asks-esrb-to-re-examine-loot-boxes-1823049616 [perma.cc/FNG4-6SGQ]. The Senator says loot boxes “raise[] several concerns surrounding the use of psychological principles and enticing mechanics that closely mirror those often found in casinos and games of chance. The potential for harm is real.” *Id.* See also Orland, *supra* note 58 (quoting Congressman Chris Lee recalling the “hundreds” of correspondence from his constituents: “Those messages are variants of ‘I know I have a problem; I spent thousands of dollars on games; I know it’s bad, but I can’t help myself now’”). Lee goes on to cite “medical experts and psychologists who focus on gambling to show the negative effects this kind of variable reward mechanism in games can have on people.” *Id.*

222. See Hernández, *supra* note 84 (explaining how China set restrictions for online gaming playtime); and Su, *supra* note 95 (explaining how South Korea required gaming companies to restrict players under sixteen from playing between the hours of midnight and 6 a.m.).

223. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011) (ruling that a California law prohibiting the rent or sale of violent video games to minors under eighteen was unconstitutional).

224. *Id.* at 800-05.

225. *Id.* at 800-04.

226. *Id.* at 804-05.

227. See Fair, *supra* note 116 (explaining the panel will discuss the marketing of loot boxes and other in-game purchases).

understand the significance of odds and probability in regard to randomized loot in a loot box. Also, to the people with addiction problems, the odds would not matter, similar to how odds do not matter to a compulsive gambler.²²⁸

To reach the root of the issue, the government should mandate video game developers change loot boxes that are purchasable with real world money into giving a preview of the contents of each box before the sale. Epic, a major gaming company, has already implemented this in their game Fortnite.²²⁹ In Fortnite, loot boxes are called “X-Ray Llamas” and each one costs fifty V-Bucks, the virtual currency within the game, purchasable by players with real world money.²³⁰ Players are given a free preview of the contents, allowing for an informed purchase and removing the gambling aspect, with no detriment to the company.²³¹ Note, this change only applies to the loot boxes that can be bought for real world money; as all other kinds of loot boxes within the game that are only purchasable with currency earned through gameplay do not reveal their contents.²³²

This option can also be expanded on. Gaming companies can follow the requirements of the Netherlands to “remove ‘addiction-sensitive’ elements, such as flashy effects to increase excitement upon opening a loot box, or the ability to open several loot boxes in quick succession” and implement it in all future loot boxes.²³³ The removal of these elements was also implemented in Fortnite as part of the “X-Ray Llama.”²³⁴ Previously, before the “X-Ray Llama” was implemented, when a player opens an in-game loot box, there is a small possibility the llama will change colors to drop better items; it can turn silver for slightly better items, which in turn can then turn gold for even better items.²³⁵ After the loot box is opened, there is a shower of confetti and each item within is prominently and

228. See Kelly, *supra* note 220 (quoting a loot box addict admitting “When your brain works like mine, you can’t stop . . . There is always the little voice of the back of your head that goes ‘Yeah no man, you should’ve quit like 30 boxes ago,’ but even when you’re telling yourself to stop, you’re still clicking buy, and you’re still opening boxes”).

229. Owen S. Good, *Fortnite Save the World Ends Blind-Draw Loot Boxes*, POLYGON (Jan. 26, 2019), www.polygon.com/2019/1/26/18198543/fortnite-save-the-world-upgrade-llamas-loot-boxes-x-ray [web.archive.org/web/20201217183748/https://www.polygon.com/2019/1/26/18198543/fortnite-save-the-world-upgrade-llamas-loot-boxes-x-ray] (explaining that Epic is “doing away with its blind-draw lootboxes” and implemented an “X-Ray” mechanic to their loot boxes, allowing a player to see exactly what is inside the box before opening).

230. *Id.*

231. *Id.*

232. *Id.*

233. Davidson, *supra* note 73.

234. Good *supra* note 229.

235. GlobalElites, *Fortnite 50 upgrade llama opening*, YOUTUBE (July 27, 2018), www.youtube.com/watch?v=k7Mrd5PLCIw [perma.cc/L9PQ-JT7T].

individually displayed with much fanfare.²³⁶ The player also had the option to queue up as many loot boxes as they wanted and could open them in quick succession.²³⁷ After the “X-Ray Llama” was added, the loot boxes offer a preview of its contents, with a list of icons displaying all the items on one page.²³⁸ The player is also sent back to the storefront after opening each loot box, removing the option to open numerous loot boxes in quick succession.²³⁹ As of August of 2019, there has been no other gaming company that has taken steps similar to Epic regarding loot boxes in the United States.²⁴⁰

B. The Second Option: Expand the Definition of Value in the Context of Gambling

The other potential solution asks the judiciary to expand the definition for the element of “value” in the context of gambling. Gaming companies are “gamblifying” video games more and more, exploiting the addictive elements of gambling while also skirting current gambling laws due to how courts are defining value in gambling and lotteries.²⁴¹ In previously discussed cases, the courts routinely ruled for the video game company because the plaintiff received nothing of value, thus failing to meet the required element of value.²⁴² In *Soto*, the Court agreed the virtual gems purchased by the Plaintiff has value, either as payment to a slot machine, or as consideration for a lottery.²⁴³ However, the Court held the virtual

236. *Id.*

237. *Id.*

238. Good, *supra* note 229 (stating the loot boxes cannot be opened in bulk, because the player has to see what is in each box before opening).

239. *Id.*

240. Rebekah Valentine, *Epic Games commits to loot box transparency across portfolio*, GAMESINDUSTRY (Aug. 8, 2019), www.gamesindustry.biz/articles/2019-08-09-epic-games-commits-to-loot-box-transparency-across-portfolio [perma.cc/8KKZ-Z9UA].

241. *See* Gach, *supra* note 51.

242. *See* *Mason*, 851 F.3d at 319-20 (dismissing the case for lacking the required element of value); *Soto*, 159 F. Supp. 3d at 880-81 (holding that players selling their entire gaming account does not give value to individual items within the account); *and Phillips*, 173 F. Supp. 3d at 739-41 (holding that the defendant neither won nor risked losing anything of value because the defendant “keeps the money a player pays to buy additional chips no matter whether that player wins or loses in the games” and the Plaintiff never lost the “value” of the chips because she was able to use those chips to keep playing the online casino games).

243. *Soto*, 159 F. Supp. 3d at 879, 881 (stating “[f]or the purpose of determining whether Castle Clash is functionally a slot machine when players engage in Rolls, it does not matter that gems are imaginary currency” and also stating “the Court is not prepared to say that gems are not capable of serving as consideration . . . requiring players to convert their money into gems to enter contests does not render their cash payment too remote to serve as consideration”).

items redeemed by the gems had no value because the players could not “cash out” the items like chips at a casino, along with the fact that the game does not allow trading of items between players.²⁴⁴ The Court explained that part of this rationale is because the Court was unable to determine how much each individual item was worth when selling the account as a whole.²⁴⁵ In *People v. Eagle Food Centers, Inc.*, the Illinois Supreme Court stated “the general purpose of lottery statutes is to prevent members of the public from being cheated and defrauded of their money in return for a mere chance to receive something which may or may not be of greater value than the sum which they have invested.”²⁴⁶ It seems contradictory for the judiciary to acknowledge that virtual currency has value enough to serve as consideration yet claim that what is paid for by the virtual currency has none.²⁴⁷

Gaming companies take advantage of this loophole by prohibiting the transfer of individual items between players in the terms of service, but then turning a blind eye to players selling entire accounts to each other. One site offering such a service explains that one of the common reasons behind account selling is because of the items contained in the account.²⁴⁸ While it might be true that allowing value to be assigned to these items merely because of the availability of a secondary market would render the element of value meaningless in the gambling context, the opposite should also be considered. Dismissing cases involving loot boxes for failing to meet the element of value solely because the items cannot be bought or sold directly gives gaming companies carte blanche to turn video games into casinos for kids, without being regulated as such. The courts should consider the ease of selling accounts on the

244. *Id.* at 879 (clarifying the contents of the loot boxes such as “Heroes and Talents are imaginary rewards . . . a device is a 'slot machine or device' only if it presents users with the possibility of winning a 'thing of value,' an 'additional chance or right to use the slot machine or device,' or a token that may be exchanged for a thing of value”).

245. *Id.* at 880 (explaining that the “amount a player can get for selling his account to another player says little about the values of the individual items (Heroes, Talents, etc.) contained within that account”).

246. *People v. Eagle Food Centers, Inc.*, 31 Ill. 2d 535, 540 (Ill. 1964) (quoting *Affiliated Enters., Inc. v. Rock-Ola Mfg. Corp.*, 23 F. Supp. 3 (N.D. Ill. 1937)). This case emphasized that consideration is one of the three elements needed for a lottery, along with chance and prize. *Id.* at 538.

247. *Soto*, 159 F. Supp. 3d at 881 (stating “the Court is not prepared to say that gems are not capable of serving as consideration” and clarifying that the cash paid by players to buy the gems used within the game is not “too remote to serve as consideration”).

248. GameCentral, *How Much Are Your Online Game Accounts Worth?*, METRO (Jan. 4, 2017), metro.co.uk/2017/01/04/how-much-are-your-online-game-accounts-worth-readers-feature-6352970 (explaining that “accounts aren’t just any ordinary accounts; they contain rare items, skins, titles, and other virtual goods . . . things that make an online game account valuable are the items and skins that they include . . . [the] rarer or harder to get, the more valuable the account is”).

secondary market as well as the impact on consumers in allowing gaming companies to continue their blatant exploitation of gambling addiction.

V. CONCLUSION

Car manufacturers advise their customers to always wear a seat belt. Alcohol distributors remind their customers to drink responsibly, and not to drink and drive. Casinos have numerous warnings, pamphlets, and other instructional material on gambling addiction and the ways to seek help. Yet, when it comes to loot boxes, there are no such warnings, nor is there any instructional or informative material on the dangers of loot boxes. Gaming companies are making unprecedented amounts of money by preying on the young, the addicts, and the uninformed. This not only harms the public from a policy standpoint, but also besmirches the image of the entire industry – an industry that has brought much joy, inspiration, and comfort to so many people. There are numerous studies done across the world on the issue, and other countries have taken significant steps to ensure the problem does not grow any bigger. As it stands, the United States government needs to step in and firmly address the issue. With all the public outrage, as well as numerous politicians rallying for something to be done, it is clearly past time for stricter governmental regulation or a judicial update defining value in regard to this new form of gambling.

