

No. 23-15144

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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PETER MAI and DIEGO NIÑO, ET AL.,

*Plaintiff-Appellant,*

v.

SUPERCELL OY,

*Defendant-Respondent.*

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Appeal From the United States District Court  
for the Northern District of California, San Jose Division  
No. 5:20-cv-05573-EJD  
Honorable Edward J. Davila

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**AMICUS CURIAE BRIEF OF ENTERTAINMENT SOFTWARE  
ASSOCIATION IN SUPPORT OF DEFENDANT-RESPONDENT  
AND OF AFFIRMANCE**

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## **I. STATEMENT OF INTEREST OF AMICUS CURIAE**

Amicus Curiae Entertainment Software Association (“ESA”) is the U.S. trade association that serves as the voice and advocate for the U.S. video game industry. Its members are the innovators, creators, publishers, and business leaders that are reimagining entertainment and transforming how we interact, learn, connect, and play. The ESA works to expand and protect the dynamic marketplace for video games through innovative and engaging initiatives that showcase the positive impact of video games on people, culture, and the economy.

## **II. DISCLOSURE STATEMENTS**

The ESA is a non-profit, non-stock corporation. The ESA does not have a parent corporation and no publicly held corporation owns 10% or more of its stock. Fed. R. App. Proc. 26.1(a).

The ESA files this amicus brief without a motion for leave to file because all parties have consented to the filing of this amicus brief. Fed. R. App. Proc. 29(a)(2).

No party’s counsel authored this brief in whole or in part. No party or party’s counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than amicus curiae ESA, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. Proc. 29(a)(4)(E).

### **III. INTRODUCTION**

From the unknown contents of a pack of baseball cards to the roll of the dice in a boardgame, countless forms of entertainment incorporate some degree of chance. Video games are no different, and often rely on randomized outcomes to give users unique and unpredictable experiences.

Appellants target one feature of certain video games—virtual “loot boxes”—which they argue constitute illegal gambling under California law. But the fact that video game players may pay for loot boxes and not know exactly what they’re getting in advance does not transform the games into

illegal gambling. As explained below, Appellants stretch California law in unjustified and nonsensical ways in their attempt to criminalize a long-standing and mundane practice: the use of chance to make interactive entertainment more fun.

First, to constitute illegal gambling, California law requires that an action result in the acquisition of “a thing of value.” But whatever subjective in-game enjoyment a user may get from opening a loot box and using its contents in the game does not transform the transaction into gambling. The contents of loot boxes are useful only in a video game’s virtual world—the games do not offer any mechanism for converting loot box contents back into real-world cash. Without the ability to “cash out,” loot boxes do not satisfy the plain language of California’s gambling statutes.

Second, and independent from the question of “thing of value,” California’s relevant gambling laws do not regulate “games of skill.” Loot boxes are not games themselves, but rather features integrated with countless others to form a



complete video game. In those games, which are creative works, players use skill to deploy the items obtained from loot boxes during gameplay. The fact that the items in those loot boxes may depend to some degree on chance does not transform the character of the video game as a whole.

Appellants' interpretation of applicable law would isolate the loot box feature and consider it outside the context of the larger game, of which it is just one part. Such an approach, if adopted by the state, would lead to absurd results that would dramatically expand criminal liability for illegal gambling.

Finally, Appellants tacitly recognize the weakness of their legal claims and thus dedicate much of their brief to policy arguments against loot boxes. But, although the media often portrays video games as primarily children's entertainment, the average U.S. player is 32 years old.<sup>1</sup> And Appellants' policy arguments ignore the significant self-

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<sup>1</sup> ESA, "2023 Essential Facts," available at <https://www.theesa.com/2023-essential-facts/> (last visited Oct. 18, 2023).

regulation efforts of the video game community, which help to ensure informed and responsible use of loot box features. In particular, the video game industry has taken extra precautions to ensure that parents and children are aware of loot boxes, understand their costs and rewards, and avoid unwanted transactions.

For these reasons and as explained further below, the Court should affirm the lower court's decision.

#### **IV. BACKGROUND**

##### **A. Video games are a widespread and popular pastime among Americans.**

Video games are a popular pastime enjoyed by a diverse audience. The top reason people in the United States play video games is to have fun.<sup>2</sup> And players say that games help reduce stress, anxiety, and feelings of isolation.<sup>3</sup>

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<sup>2</sup> ESA, "Power of Play: Global Report 2023," at pp. 5-6, available at <https://www.theesa.com/power-of-play-2023/> (last visited Oct. 12., 2023).

<sup>3</sup> *Id.* at pp. 7-8.

More than 212 million (or 65%) of Americans play video games at least one hour per week.<sup>4</sup> The average U.S. player is 32 years old.<sup>5</sup> And for those players who are minors, a vast majority of parents (78%) report making all or most decisions about their children’s video game use.<sup>6</sup>

Many popular video games on the market today are highly sophisticated multimedia productions that feature complex narrative structures, immersive world building, and artistically rendered graphics. For example, many games follow specific characters through a series of challenges, punctuated by scripted narrative interludes (known within the industry as “cutscenes”) that advance the story and provide insight into the vast world of the game. Other games allow players to build their own characters and worlds, with countless combinations and creative options. It is no wonder that more than 80% of Americans reported that

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<sup>4</sup> ESA, “2023 Essential Facts,” *supra* note 1.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

video games brought them joy, provided cognitive skill building, and offered stress relief.<sup>7</sup> And given the interactive and live-action multi-player elements that many games feature, it is equally unsurprising that 71% reported that games helped them create a sense of community.<sup>8</sup>

**B. Video games use “loot boxes” to enhance the player experience.**

Video game publishers offer many ways for users to customize and enhance their gameplay experience. Players can personalize their play, such as by customizing their avatar’s appearance with special outfits or skins, updating their kit for a major battle, trading out their racing car for a new one, or utilizing other capabilities offered within a game. All of this helps to enhance players’ integration into the world of the game and to make it their own.

Loot boxes are one way players can enhance their gameplay experience. Loot boxes may be acquired either through in-game purchase using virtual currency or through

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<sup>7</sup> *Id.*

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

diligent gameplay (e.g., by achieving an important goal in game, such as taking an enemy's watchtower to capture its treasure). After obtaining a loot box, the player opens the box, crate, or other container to receive a surprise selection of virtual items. The type and number of items available differ from game to game, as does the importance of the items obtained for a game's narrative or objectives.

Sometimes these items have utility for a user's gameplay within the larger game; other times they are purely cosmetic and enhance the player's aesthetic experience of gameplay. But no matter what they contain, loot boxes are just one of many gameplay features that act in service to a game's broader creative structure.

Loot boxes are a more recent manifestation of a concept with which American consumers have had long familiarity: purchases that involve a surprise element, where the precise content is not revealed until after purchase. Surprise elements have been featured in entertainment products for decades. Popular examples include packs of trading cards,

gumball or toy vending machines, surprise toys such as “Hatchimals,”<sup>9</sup> Cracker Jack boxes, and Happy Meals. A loot box may be attractive to players because it can contain rare and hard to obtain in-game items, or simply because it offers a fun surprise.

## V. ARGUMENT

### A. The district court correctly held Supercell’s loot boxes are not “things of value” under the California Penal Code.

Appellants alleged that Supercell’s Clash Royale and Brawl Stars games involve unlawful gambling under California Penal Code §§ 330a, 330b, 330.1, and 337j because the games contain loot boxes. ER-14, 87–90. Sections 330a, 330b, and 330.1 generally prohibit engaging in certain activities related to slot machines and other gambling

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<sup>9</sup> Hatchimals toys contain a single egg, nestled inside of which was one of several different fantastical robotic creatures. Part of the delight of the toy is discovering which Hatchimal is inside, a mystery that revealed itself only after purchase. See Rachel Rabkin Peachman, “The Hunt for Hatchimals: The Elusive Toy of the Holiday Season,” *The New York Times* (Dec. 5, 2016), available at <https://www.nytimes.com/2016/12/05/well/family/the-hunt-for-hatchimals-the-elusive-toy-of-the-holiday-season.html>.

devices (such as possessing, leasing, or repairing them). Section 337j prohibits engaging in other activities related to “controlled games” without a license. But a necessary element of the definition of each prohibited or controlled game in these statutes is that the game is played for a “thing of value.” *See* OB 25.

The district court correctly found that Supercell’s games are not prohibited by California Penal Code §§ 330a, 330b, 330.1, or 337j because the digital “prizes” (or items) that users can obtain by opening in-game loot boxes are not “things of value” under the California Penal Code. ER-14–17.

- 1. Under the Penal Code, “things of value” are limited to specific items that can be exchanged for real money.**

Appellants contend that the contents of loot boxes are “things of value” because “loot . . . enhances and increases the amusement of Brawl Stars and Clash Royale” and “make[s] the games more fun.” OB 39–40. In other words,

Appellants argue that loot box contents are “things of value” because they have subjective or amusement value.

But no matter how much players enjoy or are amused by receiving loot box items, the relevant inquiry is whether the loot box items here are “things of value” as the term is used in the text of the California Penal Code. And the district court was correct that the contents of loot boxes do not satisfy the statutory language.

*First*, Appellants’ argument that amusement value is a “thing of value” under the California Penal Code has been squarely rejected by the California Court of Appeal.

In *Gayer v. Whelan*, 59 Cal. App. 2d 255 (1943), the district attorney of San Diego County seized fourteen pinball machines owned by the plaintiff under a statute that provided for the seizure and destruction of prohibited gaming devices. *Id.* at 256, 259. The owner sued to recover the pinball machines, and at issue was whether the pinball machines were prohibited under California Penal Code Section 330a (*id.* at 256, 260)—one of the statutes that



Appellants contends Supercell violated in this case. Section 330a prohibits certain devices that, “as a result of the operation of which any merchandise, money, representative or article{s} of value, checks, or tokens, redeemable in{,} or exchangeable for money or any other thing of value, is won or lost, or taken from or obtained from such machine.” *Id.* at 260 (quoting Cal. Pen. Code § 330a(a)).<sup>10</sup>

The only thing a player could win from the pinball machines was the chance to play additional pinball games on the same machine. *Id.* at 256–57. So, the court considered whether “amusement afforded by a free game, or games, awarded [to] the player for a high score amount[ed] to . . . [a] thing of value” under the statute. *Id.* at 260. The court rejected the defendant’s argument that the terms of Section 330a were “broad enough to include the amusement of a free game,” and held that under the terms of Section 330a there “must be some *material or tangible* thing of value, and that

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<sup>10</sup> The current statutory language differs from the *Gayer* court’s quotation of the statute in minor ways—immaterial to this argument—identified above in curly brackets.

securing the amusement of a free game or games on the machine, and nothing more, does not come within that definition and is not within the prohibition of the section.”

*Id.* at 261–63 (emphasis added).

Here too, the amusement value of loot box items, which Appellants alleged “enhances and increases the amusement of Brawl Stars and Clash Royale” and “make[s] the games more fun” (OB 39–40), is not a “material or tangible thing of value.” Thus, *Gayer* forecloses Appellants’ argument that the enhanced and increased amusement arising from loot box items is a “thing of value” under the Penal Code.

After *Gayer* was decided, the Legislature added Penal Code Sections 330b and 330.1. These statutes prohibit certain games played to receive either a “[t]hing of value **or** additional chance or right to use” the game (emphasis added). Appellant contends that the inclusion of the phrase “additional chance or right to use the slot machine or device” means that the Penal Code “expressly include[s] intangible, non-monetizable things” as “things of value.” See OB at 28.

Not so. As California courts have recognized, the Legislature employed “the use of the disjunctive OR,” thus prohibiting games played *either* for a thing of value *or* for extended play. *Merandette v. City & Cnty. of San Francisco*, 88 Cal. App. 3d 105, 113 (Ct. App. 1979) (holding that even if a machine does not provide a “thing of value” under Penal Code Section 330.2, the machine could still be prohibited if it “provides an additional right to the use of the machine”). By adding a new disjunct (i.e. additional play), instead of modifying its existing description of a “thing of value,” the Legislature confirmed the *Gayer* court’s holding that a “thing of value” must be “some *material or tangible* thing.” See *Gayer*, 59 Cal. App. 2d at 263.

*Second*, Appellants’ opening brief fails to disclose that the California Penal Code *defines* a “thing of value” at Section 330.2: “a ‘thing of value’ is defined to be any money, coin, currency, check, chip, allowance, token, credit, merchandise, property, or any representative of value.” Cal.

Pen. Code § 330.2.<sup>11</sup> Importantly, the definition in Section 330.2 lists specific items that can be exchanged for real money. Cal. Penal Code § 330.2.<sup>12</sup> But Defendants’ games do not permit users to exchange loot box items for real money. ER-16 & n.3; OB 44. Accordingly, loot box items do not meet the statutory definition.

Appellants argue that items obtained from loot boxes are nevertheless “things of value” because, allegedly, users can illicitly sell their accounts to other gamers for real money outside of the game through unauthorized, third-party exchanges in violation of the games’ terms of service. OB 44; ER-80 (Compl. ¶ 154). But the district court correctly found that this argument is foreclosed by this Court’s holding in *Kater v. Churchill*. See ER-15–16; *Kater*

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<sup>11</sup> See OB 26 (quoting a portion of Cal. Pen. Code § 330.2 but failing to disclose that § 330.2 offers a *definition* of the phrase “thing of value,” including for Cal. Pen. Code § 330.1).

<sup>12</sup> A “representative of value” is something that represents a monetary value according to law or commercial custom—like a coin or a bill—not just anything that has subjective or market value. See, e.g., *Ex parte Williams*, 87 P. 565, 568 (Cal. Ct. App. 1906) (McLaughlin, J., concurring).

*v. Churchill Downs Inc.*, 886 F.3d 784, 788 n.2 (9th Cir. 2018) (virtual casino “chips” “cannot constitute a ‘thing of value’” based on their alleged market value where the defendant’s terms of service prohibits their sale or transfer); *see also Coffee v. Google, LLC*, No. 20-CV-03901-BLF, 2022 WL 94986, at \*13 (N.D. Cal. Jan. 10, 2022) (Freeman, J.) (rejecting plaintiffs’ argument that loot boxes offering purely in-game items are “things of value” because allegedly they can be traded in “gray markets”); *Taylor v. Apple, Inc.*, No. 20-CV-03906-RS, 2021 WL 11559513, at \*5 (N.D. Cal. Mar. 19, 2021) (Seeborg, J.) (dismissing putative class action complaint alleging that Brawl Stars violates California anti-gambling statutes; applying *Kater* to reject plaintiffs’ argument that virtual currency is a thing of value because allegedly user accounts can be sold on gray markets). Furthermore, Appellants alleged that users can sell only entire “game accounts” (ER-80 (Compl. ¶ 154)), but Appellants have not alleged any way for a user to sell individual loot box items for real world currency and, again,

even if this were possible, such activity would be a violation of the games' terms of service.<sup>13</sup>

Thus, nothing in the statutory definition of “thing of value” suggests that it is intended to apply to the subjective or amusement value that a user of a video game places on receiving and using a virtual item during gameplay.

*Third*, the plain text of Cal. Pen. Codes §§ 330a, 330b, and 337j also forecloses appellants' broad interpretation of “thing of value.”<sup>14</sup> Under the principle of *ejusdem generis*, “[w]here general words follow specific words in a statutory

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<sup>13</sup> Supercells' Terms of Service provide that users “shall not sell, purchase, redeem or otherwise transfer Virtual Items to any person or entity or attempt any of the aforesaid, including but not limited to Supercell, another user or any third party.” Supercell Terms of Service at §4.1, available at <https://supercell.com/en/terms-of-service/#2.-Ownership> (last visited Sept. 27, 2023); *see also id.* at § 2.3 (“[Y]ou agree that you have no right or title in or to any content that appears in the Service, including without limitation the virtual items, content, features, goods, services or currency appearing or originating in any Supercell game, whether earned in a game or purchased from Supercell.”).

<sup>14</sup> This section focuses on Cal. Pen. Codes §§ 330a, 330b, and 337j, because the definition “thing of value” in Cal. Pen. Code § 330.2 (discussed above) expressly applies to Cal. Pen. Code § 330.1.

enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) (citation omitted); *Rizo v. Yovino*, 950 F.3d 1217, 1225 (9th Cir. 2020) (en banc).

Here, Cal. Pen. Codes §§ 330a, 330b, and 337j prohibit certain uses of a slot machine, other device, or “controlled game,” provided that a user can play the device for a chance to win one of certain listed valuable items. As shown in the table below, the last term in each list of valuable items is “other thing of value” or “other valuable thing”:

Penal Code Provision	“Thing of Value” Requirement
Section 330a(a)	<u>Slot or Card Machine, Contrivance, Appliance, or Mechanical Device</u> : “. . . upon the result of action of which <b>money or other valuable thing</b> is staked or hazarded [. . .] or as a result of the operation of which any merchandise, money, representative or articles of value, checks, or tokens, <b>redeemable in or exchangeable for money or any other thing of value</b> , is won or lost, or taken from or obtained . . . .”
Section 330b(d)	<u>Slot Machine or Device</u> : “. . . the user may receive or become entitled to receive any piece of <b>money, credit, allowance, or thing of value</b> , or additional chance or right to use the slot machine or device, or any check, slug, token, or memorandum, whether of value or otherwise, which may be exchanged for any <b>money, credit, allowance, or thing of value</b> , or which may be given in trade . . . .”
Section 337j(e)(1)	<u>Controlled Game</u> : “. . . played for <b>currency, check, credit, or any other thing of value</b> . . . .”

Under the principle of *ejusdem generis*, the general terms “other valuable thing” and “other thing of value” in Section 330a(a) must be “construed to embrace only objects similar in nature” to “money.” *Cir. City Stores, Inc. v. Adams*, 532 U.S. at 114–15. Similarly, the phrases “thing of



value” in Section 330b(d) embrace only objects similar in nature to “money, credit, allowance.” *Id.* And the phrase “other thing of value” in Section 337j(e)(1) embraces only objects similar in nature to “currency, check, [and] credit.” *Id.* But the subjective or amusement value of enhanced gameplay simply is not similar in nature to money, currency, credit, checks or allowances.

Other courts have rejected Appellants’ far-reaching interpretation of “thing of value” in similar contexts. In *Soto v. Sky Union, LLC*, 159 F.Supp.3d 871 (N.D. Ill. 2016), the court held that a video game called “Castle Clash” was not a slot machine under Section 330b because there was no “item of value.” Castle Clash allowed players to use real money to purchase virtual “gems,” which could then be used in the game to enter to win randomly selected in-game virtual items called “heroes” and “talents.” *Id.* at 878-81.

The court recognized that, under section 330b(d), “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. Cal. Penal Code 330b(d).” *Id.* at 879. Because the “heroes” and “talents” could not be redeemed for real money or sold under the Castle Clash terms of service, the randomized virtual items did not constitute a “thing of value” under the California penal code. *Id.*; *see also Mason v. Mach. Zone, Inc.*, 851 F.3d 315, 319 (4th Cir. 2017) (“[B]ased 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.”).

The same is true here. Appellants alleged that “prizes” contained in Supercell’s loot boxes are new or better characters, in-game coins, spells, and buildings, but do not claim that money can be withdrawn from Supercell’s games by obtaining these digital items. *See* ER-37–38, 40 (FAC ¶¶ 39–40, 50).

**2. Appellants’ statutory interpretation would impose criminal penalties on widely accepted activities.**

Appellants contend that Supercell’s games involve prohibited gambling because players stand a chance to win loot box items, which offer amusement value. OB 39–40. But Appellants’ expansive interpretation of the California Penal Code would turn any product ordered over the internet into an illegal “slot machine,” provided that the product contains an unpredictable amount of amusement value.

Take, for example, a traditional pack of baseball cards. Packs of baseball cards are commonly advertised as possibly containing rare or subjectively desirable cards such as autographed cards, cards printed with shiny foil, or rookie cards.<sup>15</sup> If that pack of cards is purchased by accessing a website, that website is a “device” under Appellants’ theory

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<sup>15</sup> For example, the 2023 Topps Series 2 baseball card packs currently include the following advertising: “Look for the Brand-New Golden Mirror Base Parallel Cards!” *E.g.*, <https://www.topps.com/2023-topps-baseball-series-2-value-box.html> (last visited Sept. 27, 2023).

(because it is software running on a phone or tablet or laptop). ER-73–74 (FAC ¶¶ 137, 139). And if the buyer alleges that she gains “subjective” or “amusement value” from one or more player cards that might turn up in the purchased pack, all the elements of Cal. Penal Code § 330b are met under Appellants’ interpretation—a device, something of value given to play, and the opportunity to receive subjective or amusement value by chance. ER-73–74 (FAC ¶¶ 138, 139); OB 25.<sup>16</sup>

If the Court accepted Appellants’ interpretation, it would also criminalize gumball machines and capsule toy vending machines commonly found outside of restaurants and malls. These machines accept money in exchange for a randomized chance to receive one of several flavors of

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<sup>16</sup> Long-time manufacturers of traditional trading cards have even begun to sell packs of cards in digital form that can be purchased and “opened” on a mobile phone app. *See, e.g.*, <https://play.toppapps.com/> (last visited Sept. 27, 2023); *see also* <https://www.sportsbusinessjournal.com/Daily/Issues/2014/05/27/Media/App-Review.aspx> (last visited Sept. 27, 2023) (describing how digital packs of cards can be “opened” on the app).

gumballs or one of a selection of toys. Regardless of the buyer's preference or even whether the buyer will consume it, a lemon gumball is worth a quarter, just like a grape gumball (and like all the various plastic toys in the toy vending machine). So no matter what flavor the consumer obtains, she gets what she paid for. But the consumer likely associates a greater subjective or amusement value with some flavors and toys than with others. Accordingly, under Appellants' interpretation of Cal. Pen. Code §§ 330a, 330b, 330.1, the operator of a gumball machine commits a misdemeanor and could be fined and imprisoned for up to six months (or even up to a year under § 337j).

Thus, Appellants' argument that a "thing of value" under the California Penal Code includes subjective and amusement value would lead to absurd results: if actually applied in the manner they seek, it could criminalize products and vending machines that Californians have enjoyed for generations.

**B. This Court can also affirm the lower court’s ruling because Clash Royale and Brawl Stars are games of skill.**

California Penal Code Section 330b(f) excludes from the definition of prohibited devices games that “are predominately games of skill,” such as pinball or other amusement devices. Similarly, Sections 330a(a) and 330.1(f) prohibit only those machines that are dependent upon “hazard or chance,” rather than the user’s skill.<sup>17</sup> “Whether a game is a game of skill or a game of chance depends upon which factor predominates.” *Cossack v. City of Los Angeles*, 11 Cal. 3d 726, 732 (1974). Clash Royale and Brawl Stars, the two Supercell games at issue here, are undoubtedly games of skill because skill predominates over chance in those games. *See G & G Closed Cir. Events, LLC v. Liu*, 45 F.4th 1113, 1117 (9th Cir. 2022) (“[A] court of appeals may affirm the district court on any grounds the record supports.”).

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<sup>17</sup> Likewise, Section 337j(e)(1) targets for regulation only (as relevant here) “game[s] of chance.” *Cf.* OB 25.

Clash Royale is somewhat like chess in that a player competes in set matches to eliminate an opponent's defenses and destroy the opponent's "tower" pieces. But while chess players take turns, Clash Royale opponents deploy their strategies simultaneously. And while a chess-player begins each battle with 16 chessmen, a Clash Royale player must build his or her own "decks" of "cards" for use in battle.

Clash Royale users build decks of cards by obtaining and opening different varieties of chests containing the cards by completing in-game tasks or purchasing them with in-game currency. *See* ER-25, 40–42 (Compl. ¶¶ 3, 50, 55). Players can only hold so many chests at once and choose when to open them. ER-41 (Compl. ¶ 55). Some chests can take several hours to open. ER-41 (Compl. ¶ 54). Thus, players apply their skill to determine how to acquire chests through gameplay, when to open chests, and—most importantly—how to deploy their "cards" in multi-player battles. *See* ER-40–2 (Compl. ¶ 50, 55). Given this complexity, Clash Royale

is undoubtedly a game of skill that involves a lot of the strategic elements of chess.<sup>18</sup>

Brawl Stars is a third-person shooter game, in which players move a character around the screen with a digital joystick and attempt to shoot their opponents on a multiplayer battle arena. If Clash Royale is like chess, Brawl Stars is more like a football or soccer video game, in that users must move their characters around a field in concert with other players to achieve certain objectives. “Brawlers”—the characters that users control in battle—each have unique abilities and characteristics. Brawl Stars players can get new Brawlers by, among other ways, opening Brawl Boxes. ER-38 (Compl. ¶ 40). Players obtain Brawl Boxes either through gameplay or purchase with real money. ER-38 (Compl. ¶ 42). Thus, as in Clash Royale, players can earn Brawl Boxes with the skill of gameplay, and—

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<sup>18</sup> In fact, Chess.com has published a guide to deploying chess-like strategies in Clash Royle. *E.g.*, <https://www.chess.com/article/view/chess-players-guide-to-clash-royale> (last visited Sept. 27, 2023).



importantly—use gameplay skill to control the Brawlers to battle other players.

To be sure, in both games users can access loot boxes that provide randomized contents. But the fact that one aspect of these games involves a random result does not preclude the games from being predominantly games of skill. After all, classic strategy games such as Risk and Monopoly involve chance elements, such as drawing cards and rolling dice.

A federal district court applying California law reached the same conclusion in *Mason v. Machine Zone, Inc.*, 140 F.Supp.3d 457 (D. Md. 2015). In that case, a class action complaint was filed against the producer of a mobile video game known as Game of War (“GoW”). When playing GoW, players “construct a simulated empire comprising resource plots, buildings, troops, and a ‘hero.’” *Id.* at 459. “Some players, impatient for conquest, exercise an option to purchase virtual ‘gold’ to ‘improve their virtual towns and hasten their advancement in the game.’” *Id.* at 460. The

players spent their virtual gold at an in-game “casino” to wager on a randomized “virtual spinning wheel” where, “[a]fter each spin, players receive a virtual prize [. . .] ranging from an in-game ‘resource’ such as ‘wood’ or ‘stone’ (useful elsewhere in the game) to additional chips or ‘gold.’”

*Id.* The plaintiff alleged “that players are more likely to win ‘basic items’ (e.g., ‘wood’) than valuable ones (e.g., ‘gold’).”

*Id.* The plaintiff singled out what he characterized as the in-game “casino” feature as an unlawful “slot machine or device” under California Penal Code § 330b.

In granting the defendant’s motion to dismiss, the court rejected the artificial approach to such games that Appellant adopts here in the Complaint:

The game at issue here is not “Casino”; the game is *GoW*. Plaintiff proffers no authority for the proposition that the Court may excise one particular aspect of an integrated strategy game and evaluate that aspect in isolation. On the contrary, applying Plaintiff’s logic, one could excise the free replay and similar chance-based functions of any number of skill-based games—including pinball—and, viewing those aspects in isolation, find the games to violate section 330b. In essence, Plaintiff invites the Court to read the

subsection (f) exclusion out of the statute. The Court declines Plaintiff's invitation.

*Mason*, 140 F.Supp.3d at 463. Thus, even if Clash Royale and Brawl Stars involve some randomized elements, that is not enough to make them prohibited games under the California Penal Code because the games are “predominantly” games of skill.

In sum, regardless of whether the content in loot boxes is a “thing of value,” this Court should affirm the district court’s dismissal of Appellants’ claims because Clash Royale and Brawl Stars are games of skill.

**C. The video game industry provides appropriate disclosures and control options to regulate loot boxes, which allow consumers to make informed choices.**

Because Appellants cannot substantiate their claims that loot boxes constitute illegal gambling under California law, they dedicate much of their brief to hyperbolic policy arguments attacking loot boxes. Appellants frame loot boxes and the game industry as predatory, and they argue that judicial intervention is necessary to protect young players

from the threats that loot boxes allegedly pose.

Notwithstanding the fact that the average video game player is over 30, as noted above, the game industry has developed a diverse and effective set of tools to allow users—and in the case of children, their parents—to regulate in-game purchases and make informed decisions. These tools are described below.

**1. ESRB Labeling.**

The Entertainment Software Rating Board is a non-profit, self-regulatory body that administers the industry's rating system for video games. The ESRB rating system is supported by parents, retailers, game publishers, console manufacturers, certain online and mobile storefronts, elected officials, and government agencies. That rating system consists of three components: (1) rating categories, which suggest age appropriateness; (2) content descriptors, which indicate content that may have triggered a particular rating and/or may be of interest or concern; and (3) interactive elements, which highlight interactive or online features of a

product.<sup>19</sup> The ESRB rating information appears on the packaging of games, online product detail pages, and advertising for the rated product.<sup>20</sup>

The ESRB interactive elements label includes an “In-Game Purchases” or “In-App Purchases” notice, which applies to games with in-game offers to purchase digital goods or premiums with real-world currency. This includes but is not limited to bonus levels, surprise items (such as item packs, loot boxes, and mystery awards), music, virtual coins, and other forms of in-game currency, subscriptions, season passes, and upgrades. Further, where there is a loot box or similar mechanic present in the game, ESRB includes the following enhancement to the label: “In-Game Purchases (Includes Random Items).”

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<sup>19</sup> See, e.g., the ESRB Ratings Guide, available at <https://www.esrb.org/ratings-guide/> (last visited Oct. 6, 2023). The “interactive elements” component of the ESRB label is not impacted by the “rating categories” or “content descriptors” assigned to a product, or vice versa.

<sup>20</sup> For further explanation, see <https://www.esrb.org/ratings/where-to-find-ratings/> (last visited Oct. 6, 2023).

These labels provide parents with information and allow them to make appropriate purchasing decisions for their family’s needs. In fact, 84% of parents say they are aware of ESRB ratings, while 74% say they check them before buying a game “every time” or “most of the time.”<sup>21</sup> The ESRB provides a robust set of resources for parents on its website to assist them in searching for rating information, setting up parental controls, providing information and tips for informed decision-making, and empowering parents with a Family Gaming Guide.<sup>22</sup>

## **2. Loot Box-Related Disclosures.**

In addition to the ESRB “In-Game Purchase” notice, video game publishers and console makers provide more specific loot box-related disclosures in a variety of formats to allow players and/or their parents to make informed choices.

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<sup>21</sup> ESRB, “Parents Press Start to Help Pick Appropriate Video Games,” available at <https://www.esrb.org/blog/parents-press-start-to-help-pick-appropriate-video-games/> (last visited Oct. 6, 2023).

<sup>22</sup> See, e.g., ESRB, “Tools for Parents,” available at <https://www.esrb.org/tools-for-parents/> (last visited Sept. 27, 2023).

All three major game platforms—Nintendo Switch, Microsoft Xbox, and Sony PlayStation—require that where publishers include paid loot boxes in their games available on their respective platforms, they must disclose information on the relative rarity or probability of obtaining randomized virtual items. Similarly, Apple and Google require that any mobile apps offering loot boxes on the App Store or on the Google Play store include drop-rate disclosures. These disclosures inform consumers of the odds of receiving in-game items prior to purchase.<sup>23</sup>

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<sup>23</sup> Apple, “App Store Review Guidelines,” <https://developer.apple.com/app-store/review/guidelines/> (last visited September 27, 2023) (“Apps offering ‘loot boxes’ or other mechanisms that provide randomized virtual items for purchase must disclose the odds of receiving each type of item to customers prior to purchase.”); Google, “Google Play Developer Policy Center,” <https://play.google.com/about/monetization-ads/payments/> (last visited September 27, 2023) (“Apps and games offering mechanisms to receive randomized virtual items from a purchase including, but not limited to, ‘loot boxes’ must clearly disclose the odds of receiving those items in advance of, and in close proximity to, that purchase.”); *see also* ESA Comment, “Inside the Game: Unlocking the Consumer Issues Surrounding Loot Boxes Workshop,” Federal Trade Commission (June 7, 2019) at 11.

### 3. Parental Controls.

Parental control systems work in conjunction with the ESRB ratings outlined above to enable parents to limit their children's gameplay to titles that fit a specified age threshold and/or to turn off or manage certain interactive features like in-game purchases. Several game consoles, including Nintendo Switch, Microsoft Xbox, and Sony PlayStation, include options to notify parents of any spending that occurs through the console, limit the amount of spending, or block it altogether. These consoles also allow parents to monitor and restrict their children's overall playing time. A large majority of parents (80%) say they use at least one parental control setting on one or more of their kids' game devices (including consoles, PCs, and mobile devices) in the home. For parents who use parental controls on a video game console, the highest proportion say they do so to limit or block purchases using real money.<sup>24</sup> Many game publishers

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<sup>24</sup> ESA, "Parents Press Start to Help Pick Appropriate Video Games," available at <https://www.esrb.org/blog/parents->



also enable parents to create and manage accounts for players under a certain age.<sup>25</sup>

Each of the tools listed above (ESRB ratings, drop rate disclosures, and parental controls) promote informed and responsible gameplay.

## VI. CONCLUSION

The Court should affirm the district court's dismissal of Appellants' claims.

Dated: October 20, 2023

Respectfully submitted,

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press-start-to-help-pick-appropriate-video-games/ (last visited Oct. 6, 2023).

<sup>25</sup> See, e.g., EA Help, "How to set up an underage EA account for your child," available at <https://help.ea.com/en/help/account/set-up-child-ea-account/> (last visited Oct. 18, 2023).

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FOR THE NINTH CIRCUIT

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