

No. 23-15144

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In the United States Court of Appeals  
for the Ninth Circuit

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PETER MAI and DIEGO NIÑO, on behalf of  
themselves and all others similarly situated,  
*Plaintiffs-Appellants,*

v.

SUPERCELL OY,  
*Defendant-Appellee.*

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On Appeal from the United States District Court for the  
Northern District of California, No. 5:20-cv-5573

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BRIEF OF AMICUS CURIAE TECHFREEDOM IN SUPPORT  
OF DEFENDANT-APPELLEE AND AFFIRMANCE

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## INTEREST OF AMICUS CURIAE\*

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible.

This case involves virtual chests and boxes—so-called loot boxes—in videogames. These items are a welcome innovation in the videogame industry. As we have explained to the Federal Trade Commission, Comments of TechFreedom, *In re Video Game Loot Boxes*, FTC Matter No. P194502 (Oct. 11, 2019), <https://tinyurl.com/ycyvwu5t>, and as we explain in this brief, there is nothing nefarious about them. On the contrary, they benefit videogame developers and videogame players alike.

## SUMMARY OF ARGUMENT

In recent years, the price of videogames has remained steady even as the cost of developing them has risen sharply. To what do consumers owe this welcome trend? A major factor has been the rise, throughout

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\* No party's counsel authored any part of this brief. No one, apart from TechFreedom and its counsel, contributed money intended to fund the brief's preparation or submission.

much of the videogame industry, of the “freemium” price model, under which players may either play a game without charge, or enhance the gaming experience through small in-game purchases.

The plaintiffs’ lawsuit attacks a pillar of the freemium price model. Many modern videogames use so-called loot boxes—virtual boxes and chests that contain randomized virtual rewards, such as weapons or keys—to facilitate in-game purchases (or “microtransactions”). The plaintiffs allege that these virtual boxes and chests violate California’s anti-gambling laws.

We address two key flaws in the plaintiffs’ case. First, the plaintiffs mistakenly treat as “gambling” what is in fact an innovative and beneficial price model. Under the once dominant “buy to play” model, a player had to make a full up-front purchase before even sampling a game. Now, under the freemium model, players can try a game before spending any money, make in-game purchases that enhance the gaming experience, or play the game indefinitely free of charge. Erroneously treating this price model as “gambling” would deprive players of these choices.

Second, the plaintiffs fail to grasp that any skill-based game contains elements of luck. Under California law, a predominately skill-based game is not a gambling device. Seeking to evade this rule, the

plaintiffs treat a random element *within* certain videogames as an activity unto itself. This makes no sense. It's like calling a tennis net a gambling device because tennis balls, when they hit the top of it, ricochet unpredictably. It is the *interplay* of skill and luck that makes games interesting and exciting. The plaintiffs' attempt to isolate one element of randomness in a game—to view it in a vacuum—is arbitrary and illusory.

## ARGUMENT

### **I. In the Videogame Market, Purchasable Virtual Items Are an Innovative Price Model, Not a Gambling Device.**

Videogames have come a long way since *Pong*. Many modern games combine “familiar literary devices (such as characters, dialogue, plot, and music),” along with a “distinctive” set of interactions between the player and “the virtual world,” to create an experience as immersive as any book, play, or movie. *Brown v. Ent'mnt Merchants Ass'n*, 564 U.S. 786, 790 (2011). In addition to advanced graphics, the most sophisticated games feature alternative plotlines, online multiplayer modes, and innumerable ways for a player to create content in, and modify aspects of, the game's virtual world.

As videogames have become more advanced, the cost of developing them has skyrocketed. Top titles now resemble major motion pictures,

with budgets of over \$100 million, and marketing campaigns to match. Matthew McCaffrey, *Video Game Loot Boxes: Anatomy of a Moral Panic* at 7, Reason Foundation (July 2023), <https://tinyurl.com/tx8yuwv2>; Mansoor Mithaiwala, *Video Games That Cost More to Make Than Hollywood Blockbuster Films*, SVG (Mar. 30, 2018), <https://tinyurl.com/3fbb4mnw>; Ben Fritz, *Video Game Borrows Page From Hollywood Playbook*, LA Times (Nov. 18, 2009), <https://tinyurl.com/uf8wx9ft> (discussing *Call of Duty: Modern Warfare 2*'s \$200 million launch budget).

Remarkably, the sharp rise in the cost of videogame development has not produced a concomitant rise in the price of the games themselves. Sean F. Kane, *Treasure or Trifle? A Macro Look at Microtransactions*, presented at FTC, *Inside the Game: Unlocking the Consumer Issues Surrounding Loot Boxes*, at 14 (Aug. 7, 2019), <https://tinyurl.com/4fva23fu>. One reason for this is that game makers have introduced innovative price models—in particular, microtransactions in the form of in-game purchases. Remarks of Sean F. Kane, FTC, *Inside the Game: Unlocking the Consumer Issues Surrounding Loot Boxes* at 9 (Aug. 7, 2019), <https://tinyurl.com/bdz74wbc>. “Since the mid-2000s microtransactions have become a crucial component of the business models of many game developers and publishers.” McCaffrey, *supra*, at

7. Although these in-game purchase options have been implemented across the industry, they've been especially important for smaller, independent game developers. See Alkson Studio, *Indie Games: The Money-Making Revolution*, Medium (Sept. 27, 2023), <https://tinyurl.com/ky3by6vr>. And while they've benefited game developers a lot, helping them navigate economic uncertainty, McCaffrey, *supra*, at 7, they've benefited consumers even more.

The “freemium” gaming model has been a boon for videogame players. The “buy to play” model that once dominated the market was all-or-nothing—a customer had to pay \$50 or \$100 simply to discover whether she liked a game. The freemium model, by contrast, allows her to play a game without paying anything. *Freemium Games*, Apple Developer, <https://tinyurl.com/mrx9jva3> (last visited Oct. 16, 2023). Under the old model, moreover, everyone—from light videogame players to hardcore gamers—paid the same price for a game. Now, under the freemium model, lighter players can play without *ever* having to make a purchase, while heavier players can make optional in-app purchases to enhance their experience. *Id.* The freemium model is also sensitive to players' needs as consumers. Usually, price-sensitive players can obtain virtual items, through in-game play, for free. Meanwhile, players willing to pay more can obtain those items more quickly, through in-game

purchases. Remarks of Mike Warnecke, FTC *Loot Boxes Workshop*, *supra*, at 16.

The videogame microtransaction market is a \$15 billion industry, McCaffrey, *supra*, at 7, and it continues to grow. This success has nothing to do with “gambling” (a point to which we return in a moment). It is a matter of consumer preference. The buy-to-play price model is the equivalent of an all-you-can-eat buffet. (Indeed, forcing game developers to charge a set price is like forcing restaurants to offer only an all-you-can-eat buffet purchase option.) That model privileges videogame enthusiasts and the affluent. The freemium price model—which operates for some as a “try before you buy” model, for others as a “pay as you go” model, and for yet others as a “play for free forever” model—brings flexibility to the videogame market. It serves the needs of everyone.

As the defendant notes (ARB 17), criminal laws are not to be given creative readings. Only with great leaps of imagination could one construe gambling laws aimed at physical slot machines to cover (and constrain) how videogame developers price their games. This Court should not head down that path. It should not “discourage[] developers from experimenting with innovative revenue models.” McCaffrey, *supra*, at 29.

## II. Randomness Is an Inherent—and Interesting—Part of Skill-Based Games.

The gambling statutes at issue in this case do not govern activities that are “predominantly games of skill.” Cal. Penal Code §§ 330b(f), 330.5. The defendant establishes two important points. First—as should be obvious—videogames are predominately games of skill. See, e.g., A.J. Willingham, *What is eSports? A look at an Explosive Billion-Dollar Industry*, CNN (Aug. 27, 2018), <https://tinyurl.com/3dvnkjb9> (discussing the rise of professional videogame-playing). And second, it is a mistake to look at videogames’ virtual chests and boxes in isolation. These objects are woven into the overall gaming experience. True enough, they introduce an element of randomness into the games—but an element of randomness is a key part of *all games of skill*.

No one would claim that tennis, for instance, is *not* a game of skill. Indeed, it is a very difficult and technically demanding sport. “It is billiards with balls that won’t hold still. It is chess on the run. ... [It] requires geometric thinking, the ability to calculate not merely your own angles but the angles of response to your angles.” David Foster Wallace, “Derivative Sport in Tornado Alley,” in *A Supposedly Fun Thing I’ll Never Do Again* at 7, 9 (1997). Meanwhile, no one would deny that tennis often involves an element of luck. “The man who said ‘I’d rather be lucky than good’ saw deeply into life. ... There are moments in a [tennis] match when

the ball hits the top of the net, and for a split second it can either go forward ... or fall back. With a little luck, it goes forward ... and you win. Or maybe it doesn't ... and you lose.” *MATCH POINT* (BBC Films 2005). Cf. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 686-87 (2001) (noting the role of “a lucky bounce” in golf).

Like tennis—or any other sport—videogame-playing features a mixture of skill and luck. In *Super Mario Bros.*, the player must dodge the Koopas’ randomly tossed hammers. In *Pac-Man*, the Ghost Gang pursues the player, moving up, down, left, and right randomly and out of sync. In *Tetris*, blocks of varying shapes fall in a random order, forcing the player to scramble to fit them together. *Tetris* “becomes challenging when the speed of dropping blocks increases, and constructed structures already occupy the game area. At that point, everyone hopes for *a bit of luck* and prays for the ‘T’ Tetrimino.” *Best Games That Require Good Luck*, G2A (June 16, 2023), <https://tinyurl.com/4ktp5xet> (emphasis added). Pinball has long been played in videogame format. California law declares pinball “predominately [a] game[] of skill.” Cal. Penal Code § 330b(f). Yet the game also involves lucky bounces. See Seth Porges, *End Game*, Chicago Reader (Sept. 2005), <https://tinyurl.com/8mr5ctpb> (discussing a 1976 hearing at which a pinball player convinced the New

York city council that pinball is “a game of skill, not chance,” by completing on command what “was, ironically, a lucky shot”).

“That’s why they play the game” is a famous sports cliché for a reason. It captures the notion that sports—like videogames—are exciting precisely because they are unpredictable. Virtual chests and boxes fit neatly within this sporting and gaming tradition. They are an interesting twist, akin to the net in tennis, the random shape-generator in *Tetris*, or a pop bumper in a pinball machine. They add “special drama” to videogames by introducing an element of randomness—and, thus, excitement and surprise. Cecilia D’Anastasio, *Why Opening Loot Boxes Feels Like Christmas, According to Game Devs*, Kotaku (Mar. 20, 2017), <https://tinyurl.com/2p95t27j>. “[The box] swells with potential.” *Id.* Players “might get extremely lucky,” *id.*—or they might not. In this regard, the chests and boxes are no different from *the rest of the game*—or from any sport—viewed as a whole. People play, or watch, not only to test or witness skill, but also because of the frisson that comes from knowing that anything might happen.

An attack on virtual chests and boxes is, at bottom, an attack on videogames themselves.

## CONCLUSION

The judgment should be affirmed.

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Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify:

This brief complies with the type-volume limits of Fed. R. App. P. 29(a)(5) because it contains 1,872 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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/s/ Corbin K. Barthold

## CERTIFICATE OF SERVICE

On October 20, 2023, a copy of this brief was filed and served on all registered counsel through the Court's CM/ECF system.

/s/ Corbin K. Barthold