

12-1-2020

The Hunt for Loot: Proposed Solutions to More Effectively Regulate Addictive Gambling Mechanics in Video Games

Andrew Brewer

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/jlp>



Part of the [Administrative Law Commons](#), [Consumer Protection Law Commons](#), [Entertainment, Arts, and Sports Law Commons](#), [Gaming Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

Andrew Brewer, *The Hunt for Loot: Proposed Solutions to More Effectively Regulate Addictive Gambling Mechanics in Video Games*, 29 J. L. & Pol'y 158 (2020).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol29/iss1/4>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized editor of BrooklynWorks.

THE HUNT FOR LOOT: PROPOSED SOLUTIONS TO MORE EFFECTIVELY REGULATE ADDICTIVE GAMBLING MECHANICS IN VIDEO GAMES

*Andrew Brewer**

“Play interests me very much,” said Hermann: “but I am not in the position to sacrifice the necessary in the hope of winning the superfluous.”¹

– Alexander Pushkin, *The Queen of Spades*

Over the past decade, more and more video game developers have embraced “loot boxes” as a lucrative source of revenue. But recent concerns over the potential harms of loot boxes, particularly to children, have raised questions about their use and prompted attempts to regulate them throughout the world. This Note explores recent attempts—both foreign and domestic—to regulate loot boxes and proposes new solutions based on those strategies’ shortcomings. By carefully and competently defining terms and exceptions, and providing for more aggressive oversight of agency regulatory efforts, federally-crafted loot box legislation can more effectively protect children from predatory gambling mechanics in video games.

* J.D. Candidate, Brooklyn Law School, 2021. B.A., University of Arizona, 2018. Thank you to Aaron Doyer and the whole Journal of Law and Policy staff for your help and guidance. This would not have been possible without the work each one of you did during this especially stressful time. Also, a special thanks to my biggest role model in life for all her love and support, my mother.

¹ ALEXANDER PUSHKIN, *THE QUEEN OF SPADES* 1 (1833).

INTRODUCTION

The video gaming industry has grown faster than any analyst could have predicted. In 2018, it was a \$139 billion industry, generating more revenue that year than movie box-office sales, music album sales, music streaming, and the annual revenues of the NFL, NBA, MLB, and NHL combined.² That number was predicted to fall by a top market analyst³ but instead grew another 9.6% in 2019.⁴ That same year, a sixteen-year-old won the “Fortnite World Cup Finals” in New York City and took home a \$3 million prize.⁵ Epic Games, the company that makes *Fortnite*, made a record breaking \$2.4 billion in 2018 off of the game alone.⁶ That is more than any video game in history.⁷ To illustrate the magnitude of its success, Netflix considers *Fortnite* a bigger competitor than HBO or Hulu.⁸ Millions of people tune in to watch players livestream themselves playing the game, including *Fortnite*’s most popular streamer, who calls himself “Ninja,” and who makes an estimated

² Patriot Act, *The Darkside of the Video Game Industry*, YOUTUBE (Aug. 5, 2019), https://www.youtube.com/watch?v=pLAI_cmly6Q (referencing a Bloomberg article from Jan. 23, 2019).

³ Yuji Nakamura, *Peak Video Game? Top Analyst Sees Industry Slumping in 2019*, BLOOMBERG (Jan. 23, 2019, 5:59 PM), <https://www.bloomberg.com/news/articles/2019-01-23/peak-video-game-top-analyst-sees-industry-slumping-in-2019>.

⁴ Eric Ananmalay, *US Teen Wins \$3 Million at Video Game Tournament Fortnite World Cup*, CNBC (Jul. 28, 2019), <https://www.cnbc.com/2019/07/29/fortnite-world-cup-us-teen-wins-3-million-at-video-game-tournament.html>.

⁵ *Id.* Fortnite is a video game in which up to a hundred online players compete in a “first-person shooter” to be the last one alive. Sarah LeBoeuf, *What Is ‘Fortnite’?: A Look at the Video Game that has Become a Phenomenon*, NBC NEWS (June 30, 2018, 11:27 AM), <https://www.nbcnews.com/tech/tech-news/what-fortnite-look-video-game-has-become-phenomenon-n887706>.

⁶ Tom Hoggins, *Fortnite Earned Record \$2.4bn in 2018, the ‘Most Annual Revenue of Any Game in History’*, TELEGRAPH (Jan. 17, 2019, 9:56 AM), <https://www.telegraph.co.uk/gaming/news/fortnite-earned-annual-revenue-game-history-2018/>.

⁷ *Id.*

⁸ Matt Patches, *Netflix Says Fortnite is Bigger Competition than HBO or Hulu*, POLYGON (Jan. 17, 2019, 5:20 PM), <https://www.polygon.com/2019/1/17/18187400/netflix-vs-fortnite-hbo-hulu-competition>.

\$500,000 a month.⁹ All of this revenue comes from a game that is free to download and play.¹⁰

Fortnite and other so-called “free to play” games¹¹ amass their staggering revenues not from game sales themselves, but from items that can be purchased from within the game, known as “loot boxes.”¹² Loot boxes are “items in video games that may be bought for real-world money, but which provide players with a randomi[z]ed reward of uncertain value.”¹³ They often appear within video games as animated chests, crates, or card packs.¹⁴ After purchasing a loot box within the game, a player “opens” it, thereby revealing its contents. In other words, loot boxes are monetized microtransactions¹⁵ in a video game, where a player pays real money to acquire a container filled with a random item, or assortment of

⁹ Kevin Webb, *This 28-Year-Old Makes \$500,000 Every Month Playing ‘Fortnite’—Here’s How He Does It*, BUS. INSIDER (Mar. 31, 2018), <https://www.businessinsider.com.au/ninja-tyler-blevins-twitch-subscribers-fortnite-drake-youtube-2018-3>.

¹⁰ LeBoeuf, *supra* note 5.

¹¹ Another massively popular game with a free-to-play business model is *Apex Legends*, published by Electronic Arts, Inc. *Apex Legends*, ELECTRONIC ARTS, INC., <https://www.ea.com/games/apex-legends/about> (last visited Sept. 13, 2020).

¹² See Tae Kim, *‘Loot Boxes’ Could Be Trouble for the Videogame Industry. Here’s What You Need to Know.*, BARRON’S (Apr. 15, 2019), <https://www.barrons.com/articles/videogame-publishers-face-scrutiny-over-the-use-of-lock-boxes-51555120828> (“Loot boxes are extremely lucrative for the game publishers, generating billions of dollars in high-margin profits.”).

¹³ John Woodhouse, *Loot Boxes in Video Games*, HOUSE OF COMMONS LIBR. 8498, at 4 (Dec. 19, 2019).

¹⁴ Andrew E. Freedmen, *What are Loot Boxes? Gaming’s Big Controversy Explained*, TOM’S GUIDE (Aug. 9, 2019), <https://www.tomsguide.com/us/what-are-loot-boxes-microtransactions,news-26161.html>.

¹⁵ Microtransactions can be defined as any purchase a consumer can make in a video game, after the “initial purchase” or free download of the game. In this way, players may continue to spend money on the same game after purchasing it for several years. Eddie Makuch, *Microtransactions, Explained: Here’s what You Need to Know*, GAMESPOT (Nov. 20, 2018, 8:31 PM), <https://www.gamespot.com/articles/microtransactions-explained-heres-what-you-need-to/1100-6456995/>.

items, in return.¹⁶ Some items are purely aesthetic,¹⁷ while others improve a player's chance of winning the game (often referred to as "pay-to-win" mechanics).¹⁸ In many cases, a player does not know exactly what item they will receive when purchasing a loot box, distinguishing it from other transactions within a game where a player knows precisely what item they will receive at the time of payment.¹⁹ The most recent development of their use has been in free-to-play games, such as *Fortnite*.²⁰

The recent trend toward a loot box revenue model in video games is big business. To illustrate, Electronic Arts ("EA"), the company that develops the popular *FIFA* and *Madden NFL* games, earns an estimated one-third of all its revenue from "loot-box-related-mechanisms."²¹ In 2015, that amount was \$587 million solely from one of EA's most popular multiplayer game "modes," Ultimate Team, which the company makes available in its popular sports titles such *FIFA*, *Madden*, and *NHL*.²² The Ultimate Team mode works by allowing a player to build a team of athletes to compete against other players online.²³ A player begins with a starting roster of athletes, but to acquire better players and be more competitive, a player must ultimately purchase digital "packs" containing random athletes that the player may then use to bolster their team.²⁴ These "player packs", or loot boxes, are "bought" with

¹⁶ Woodhouse, *supra* note 13.

¹⁷ See Jordan Baranowski, *The Rarest Skins in Overwatch*, SVG (Jan. 4, 2019), <https://www.svg.com/142085/the-rarest-skins-in-overwatch/>.

¹⁸ See Kellen Beck, *Youtuber Spends \$90 in 'Star Wars: Battlefront 2' and Proves That It's Still Basically Pay-To-Win*, MASHABLE (Nov. 9, 2017), <https://mashable.com/2017/11/09/star-wars-battlefront-2-pay-win/>.

¹⁹ Woodhouse, *supra* note 13.

²⁰ Digital, Culture, Media and Sport Committee, *Immersive and Addictive Technologies*, 15 HOUSE OF COMMONS 39, at 44–45 (Sept. 9, 2019), <https://publications.parliament.uk/pa/cm201719/cmselect/cmcmmeds/1846/1846.pdf>.

²¹ Kim, *supra* note 12.

²² Jack Kenmare, *The Mind-Blowing Figures Behind EA Sports' Net Revenue from Ultimate Team*, SPORTBIBLE (May 26, 2020), <https://www.sportbible.com/football/gaming-news-the-figures-behind-ea-sports-net-revenue-from-ultimate-team-20200521>.

²³ FIFA, *What is FUT?*, EA (2019), <https://www.ea.com/games/fifa/fifa-19/ultimate-team/beginners-guide-fut>.

²⁴ *Id.*

in-game currency that a player may obtain either by earning it through gameplay or by purchasing it using real-world currency.²⁵ Despite its propensity to endlessly sap players for money, Ultimate Team has become, and remains, a wildly popular game mode in sports video gaming. In just the first half of 2020, it earned EA \$1.49 billion²⁶—more than the company brought in from the sales of the *FIFA* game itself.²⁷

Yet, despite all this economic success, Epic Games recently announced it would be removing its usual loot boxes from *Fortnite*.²⁸ Perhaps unsurprisingly, the move comes at a time when more countries are starting to investigate and understand what loot boxes really are—a dangerous form of gambling.

Indeed, recent studies have shown a clear relationship between spending money on loot boxes and an increase in problem gambling.²⁹ There are also increasing stories of teenagers spending large amounts of cash—in some cases up to \$10,000—on loot

²⁵ FIFA, *How to Improve Your FIFA Ultimate Team Squad*, EA (Oct. 21, 2019), <https://www.easports.com/fifa/ultimate-team/news/2017/how-to-improve-your-fifa-ultimate-team-squad>.

²⁶ Kenmare, *supra* note 22.

²⁷ Md Armughanuddin, *FIFA Ultimate Team Net Revenue Up by 40%, FIFA Accounts for Majority of EA's Net Revenue*, SPIELTIMES (Nov. 6, 2019), <https://www.spieltimes.com/news/fifa-ultimate-team-net-revenue-up-by-40-fifa-accounts-for-majority-of-eas-net-revenue>.

²⁸ Kyle Orland, *Fortnite Puts an End to Random Loot Box Purchases*, ARS TECHNICA (Jan. 28, 2019), <https://arstechnica.com/gaming/2019/01/fortnite-puts-an-end-to-random-loot-boxes-purchases/>.

²⁹ See Wen Li et al., *The Relationship of Loot Box Purchases to Problem Video Gaming and Problem Gambling*, 97 ADDICTIVE BEHAVIORS 27 (Oct. 2019), <https://www.sciencedirect.com/science/article/abs/pii/S0306460319301091> (“Results from a series of path analyses revealed that loot box purchasing was directly related to problem video gaming and problem gambling severity as well as indirectly [related] through increased video gaming/online gambling engagement, which in turn is related to elevated psychological distress.”); see also David Zendle et al., *Video Game Loot Boxes are Linked to Problem Gambling: Results of a Large-Scale Survey*, PLOS (Nov. 21, 2018), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0206767#sec005> (noting that a large-scale survey found evidence for a link between the amount that gamers spent on loot boxes and the severity of their problem gambling and that the link was stronger than a link between problem gambling and buying other in-game items with real-world money).

boxes.³⁰ It is unsurprising then that some researchers have referred to loot boxes as “weaponised behavioural psychology, perfectly pitched to exploit all the cognitive weaknesses that make people so susceptible to addiction and compulsion.”³¹

With the evidence mounting that loot boxes present a new danger to the consuming public,³² regulation seems necessary and imminent.³³ But the question remains how such regulations will be promulgated and whether they will be effective. One possibility is self-regulation by the industry via the Entertainment Software Rating Board (“ESRB”).³⁴ However, despite its stellar track-record for self-regulation in areas like violence, the ESRB is unlikely to self-regulate this predatory practice if it does not believe that its inaction would prompt the government to impose its own regulations.³⁵ Remediation by way of private suit and case law is similarly unlikely, because (as will be discussed below) plaintiffs may lack standing to sue video game developers in consumer fraud cases.³⁶ Given these realities, this Note submits that formal regulation is the only practical way of addressing this issue.

³⁰ Ethan Gach, *Meet the 19-Year-Old Who Spent Over \$10,000 on Microtransactions*, KOTAKU (Nov. 29, 2017, 5:12 PM), https://kotaku.com/meet-the-19-year-old-who-spent-over-10-000-on-microtra-1820854953_.

³¹ Alex Hern, *Video Games are Unlocking Child Gambling. This Has to Be Reined In*, THE GUARDIAN (Dec. 28, 2017, 4:00 PM), https://www.theguardian.com/commentisfree/2017/dec/28/video-games-unlock-child-gambling-loot-box-addiction_.

³² See discussion *infra* Sections I & II.

³³ See discussion *infra* Section IV.A.

³⁴ See discussion *infra* Section IV.A.

³⁵ Ben Gilbert, *The Video Game Industry is Facing Government Scrutiny Over Loot Boxes, and the Most Powerful Leaders in Gaming are Divided Over What to Do*, BUS. INSIDER (June 23, 2019, 7:41 AM), <https://www.businessinsider.com/video-game-industry-loot-box-legislation-2019-6#regardless-of-the-gambling-debate-at-least-one-us-senator-is-proposing-legislation-to-regulate-loot-boxes-in-games-3>.

³⁶ Thomas Hansfield, *Loot Box Lottery: How the Backlash Against Video Game Loot Boxes is Affecting Game Developers, Retailers, and Consumers in the Legal Sphere*, Vol. 103 Minn. L. Rev. (Apr. 23, 2019), <https://minnesotalawreview.org/2019/04/23/loot-box-lottery-how-the-backlash-against-video-game-loot-boxes-is-affecting-game-developers-retailers-and-consumers-in-the-legal-sphere/>.

However, Congress, and not the states, should be responsible for authoring legislation that limits loot boxes, as leaving the states to regulate these devices would lead to uncertainty amongst the industry regarding which technologies game-makers could employ in certain jurisdictions.³⁷ In drafting such laws, Congress would do well to heed the lessons learned from past legislative efforts, such as those seen in the Netherlands, the UK, Hawaii, and New York. Particularly, it must define loot boxes in a way that encompasses all of their harmful qualities, while including carefully crafted exceptions for other legitimate, non-gambling devices. Once Congress clearly sets out the exceptions for its definition of loot boxes, it must then be unequivocal in banning, outright, all of them from video games sold in the United States. Assuming this proposed thoughtful and prudential approach to national loot box legislation is followed, the consuming public—particularly minor children—may continue to enjoy the pastime of video-gaming while avoiding the emerging harms of addictive gambling associated with loot boxes.

Part I of this Note outlines the different responses countries have had to these gambling mechanics, including the Netherland's faulty approach, Belgium's outright ban, and the United Kingdom's fumbled response. Part II examines the United States' reaction to loot boxes in the form of proposed legislation in Congress. Part III then analyzes the downfalls of each of these approaches thus far. Finally, Part IV looks at the results of litigative efforts opposing loot boxes, explains why regulation is necessary, and proposes language that lawmakers should strongly consider when crafting legislation around this issue.

I. THE GROWING TIDE OF COUNTRIES THAT REGULATE LOOT BOXES

In 2017, EA released *Star Wars Battlefront II*, a sequel to the 2015 bestselling game *Star Wars Battlefront*.³⁸ The release was met

³⁷ See discussion *infra* Section IV.C.

³⁸ *Star Wars Battlefront 2's Loot Box Controversy Explained*, GAMESPOT (Nov. 22, 2017, 12:37 PM), <https://www.gamespot.com/articles/star-wars-battlefront-2s-loot-box-controversy-expl/1100-6455155/>.

with a wave of criticism from fans due to EA's increased use of loot boxes.³⁹ The backlash the game received from consumers was so intense, it can be seen as the catalyst that kicked off loot box regulation.⁴⁰ EA's release of *Star Wars Battlefront II*, and its pervasive use of loot box mechanics, prompted the Belgian Gaming Commission ("BGC") to look into the game and those similar to it to determine whether loot boxes constitute gambling.⁴¹

A. The Netherlands' Ban on Loot Boxes

In 2018, the Netherlands became one of the first countries to enact a ban on loot boxes.⁴² In the wake of the release of *Battlefront II*, the Netherlands Gaming Authority ("NGA") examined ten popular videogames that contained loot boxes and found that four of them violated the Netherlands' Betting and Gambling Act.⁴³ Important to the NGA's decision was that these four games supported markets where virtual items could be traded for real world currency.⁴⁴ At the time, games like *Counter Strike* and *Dota 2* supported online trading markets where players could sell the unwanted items they received through loot boxes.⁴⁵ For instance, items received through loot boxes in the game *Counter Strike* have sold for as much as \$61,000.⁴⁶ Put in perspective, a virtual item in

³⁹ *Id.*

⁴⁰ Ivana Kottasová, *The New Star Wars Video Game is Under Attack*, CNN BUS. (Nov. 16, 2017, 1:11 PM), <https://money.cnn.com/2017/11/16/technology/battlefront-ii-star-wars-game-gambling/index.html>.

⁴¹ *Id.*

⁴² Matt Davidson, *The Netherlands Determines Some Loot Boxes Are Gambling*, IGN (Sept. 6, 2018), <https://www.ign.com/articles/2018/04/20/the-netherlands-determines-some-loot-boxes-are-gambling>.

⁴³ Wesley Yin-Poole, *The Netherlands Declares Some Loot Boxes Are Gambling*, EUROGAMER (Apr. 19, 2018), <https://www.eurogamer.net/articles/2018-04-19-the-netherlands-declares-some-loot-boxes-are-gambling>.

⁴⁴ *Id.*

⁴⁵ Wesley Yin-Poole, *Dutch Loot Box Threat Forces Valve to Pull CS:GO and Dota 2 Item Trading in the Netherlands*, EUROGAMER (June 20, 2018), <https://www.eurogamer.net/articles/2018-06-20-dutch-loot-box-threat-forces-valve-to-pull-cs-go-and-dota-2-item-trading-in-the-netherlands>.

⁴⁶ Eugene Bozhenko, *The Most Expensive CS:GO Skins on Steam Market*, SKINS.CASH (Mar. 20, 2018), <https://skins.cash/blog/expensive-csgo-skins/>.

Counter Strike could sell for more than a brand-new, high-end luxury car.⁴⁷

After announcing its findings, the NGA gave game developers until June 20, 2018 to remove loot boxes from their games, or face a fine of up to \$959,000.⁴⁸ In response to the statement, Valve, the developer behind *Counter Strike* and *Dota 2*, removed all item trading from those games.⁴⁹ In contrast, EA insisted that its loot box mechanics in “FIFA Ultimate Team” were not gambling and, therefore, were not subject to the Dutch ban⁵⁰—a move likely spurred by the language of the Dutch report, which focused so heavily on the fact that items from the loot boxes could be sold after being opened, that it carved out a massive exception for all those games in which the items could not be so easily exchanged.⁵¹ Accordingly, EA CEO Andrew Wilson was quick to point out that a player always receives some item from the purchase of a loot box, and that EA does not support a way for players to sell their items back for real money, or exchange them on a virtual market.⁵²

B. Belgium Subsequently Follows Suit

The next country to act on loot boxes after the Netherlands was Belgium.⁵³ After the release of *Battlefront II*, Deputy Prime Minister and Minister of Justice, Koen Geens, requested an investigation into

⁴⁷ See *2020 BMW M2*, EDMUNDS, <https://www.edmunds.com/bmw/m2/> (last visited Sept. 12, 2020) (stating that the standard price for a BMW M2 is \$58,900).

⁴⁸ Shabana Arif, *The Netherlands Starts Enforcing Its Loot Box Ban*, IGN (June 20, 2018, 6:07 AM), https://www.ign.com/articles/2018/06/20/the-netherlands-starts-enforcing-its-loot-box-ban_

⁴⁹ Yin-Poole, *supra* note 45.

⁵⁰ Shabana Arif, *EA Insists Its Loot Boxes are Not Gambling as Regulators Clamp Down*, IGN (May 9, 2018, 6:31 AM), https://uk.ign.com/articles/2018/05/09/ea-insists-its-loot-boxes-are-not-gambling-as-regulators-clamp-down_

⁵¹ *Loot Boxes & Netherlands Gaming Authority's Findings*, DUTCH GAMES ASS'N, <https://dutchgamesassociation.nl/news/loot-boxes-netherlands-gaming-authoritys-findings/> (last visited Nov. 11, 2020).

⁵² Arif, *supra* note 50.

⁵³ Luke Christou, *Lawmakers Are Turning on Loot Boxes but It's Business as Usual for Video Game Publishers*, VERDICT (May 10, 2018, 8:00 AM), <https://www.verdict.co.uk/belgium-loot-box-ban/>.

loot boxes by the Belgian Gaming Commission.⁵⁴ That investigation provided important information on the potential harms of loot boxes.⁵⁵ “The Gaming Commission investigated four video games: Star Wars Battlefront II, Overwatch, FIFA 18 and Counter Strike: Global Offensive,” and found that, although the games were independently rated for different ages based on their content, that gambling mechanics in the form of loot boxes were not one of the factors considered in those ratings.⁵⁶ Minister Geens called for the game’s publishers to remove the loot boxes or else “risk a prison sentence of up to five years and a fine of up to €800,000”⁵⁷

One noteworthy distinction exists between the report from the Belgian Gaming Commission and the Dutch report.⁵⁸ The Belgian report did not define loot boxes in terms of whether the items they contained could be sold on a secondary market.⁵⁹ That limiting

⁵⁴ Koen Geens, Deputy Prime Minister, Minister of Justice and Minister of European Affairs, *Loot boxen in drie videogames in strijd met kansspelwetgeving* [*Loot Boxes in Three Video Games in Violation of Gambling Legislation*], (Apr. 25, 2018), <https://www.koengeens.be/news/2018/04/25/loot-boxen-in-drie-videogames-in-strijd-met-kansspelwetgeving>.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Wesley Yin-Poole, *Now Belgium Declares Loot Boxes Gambling and Therefore Illegal*, EUROGAMER (Apr. 27, 2018), <https://www.eurogamer.net/articles/2018-04-25-now-belgium-declares-loot-boxes-gambling-and-therefore-illegal>.

⁵⁸ Compare Peter Naessens, *Onderzoeksrapport loot boxen* [*Research Report on Loot Boxes*], GAMING COMM’N 1, 5 (2018), https://www.gamingcommission.be/opencms/export/sites/default/jhksweb_nl/documenten/onderzoeksrapport-loot-boxen-Engels-publicatie.pdf (contending that loot boxes should be banned due to the social pressure vulnerable groups like minors may feel to purchase them), with *Loot Boxes & Netherlands Gaming Authority’s Findings*, DUTCH GAMES ASS’N, <https://dutchgamesassociation.nl/news/loot-boxes-netherlands-gaming-authoritys-findings/> (last visited Sept. 23, 2020) (finding that the ability to trade loot box items outside of the game constitutes gambling).

⁵⁹ See Naessens, *supra* note 58, at 8 (“[Gambling] is any game whereby a bet of any kind that is placed leads to the loss of this bet by at least one of the players, or a win of any kind for at least one of the players or organisers of the game, and whereby chance may even be a secondary element in the course of the game, indication of the winner or determination of the size of the winnings.”).

factor, imposed by the Dutch, was ignored by the Belgians.⁶⁰ Instead, the Belgian report focused on the factors that contributed to the pressure minors and vulnerable people might feel to purchase loot boxes.⁶¹ Those include “[social] behavioral monitoring,” the “illusion of a game of skill,” the “fusion of fiction and reality,” the “use of celebrities,” the “introduction of a personal currency system,” the “approachable payment methods,” the “vast” data collection, the “[d]ifferentiation in loot boxes without necessarily adding value,” and in general, the “lack of transparency” and randomness.⁶² Arguably the most dangerous of those factors are the introduction of personal currency systems and approachable payment methods.⁶³ The report found that “the use of points (coins) and especially their size are psychologically very sophisticated and aimed at creating a personal reality which is then disconnected from the real world.”⁶⁴ By making loot boxes purchasable with in-game points or coins that the player must buy with real money, or otherwise spend large amounts of time playing to obtain, the games hide the real world value of the boxes behind a confusing exchange rate.⁶⁵ With the addition of easy and accessible payment methods that let you buy in-game currency immediately through a game or app, a player can easily rack up a large bill.⁶⁶

By the time the Belgian Gaming Commission concluded its report, EA had removed loot boxes from *Star Wars Battlefront II*.⁶⁷ Its decision was motivated not only by the immense backlash from fans,⁶⁸ but the treatment of fellow publisher, Valve, by the NGA, which received formal letters stating they were in violation of the Dutch Betting and Gambling Act and that they could face fines up

⁶⁰ *Id.*

⁶¹ *Id.* at 5.

⁶² *Id.* at 6–8.

⁶³ *Id.* at 7.

⁶⁴ *Id.*

⁶⁵ Gabe Duverge, *Insert More Coins: The Psychology Behind Microtransactions*, TOURO UNIV. WORLDWIDE (Feb. 25, 2016), <https://www.tuw.edu/psychology/psychology-behind-microtransactions/>.

⁶⁶ *Id.*

⁶⁷ Yin-Poole, *supra* note 43.

⁶⁸ *Id.*

to €830,000 if the gambling mechanics were not removed.⁶⁹ The company decided it was easier to remove loot boxes from their games in Belgium and the Netherlands rather than fight European gambling authorities.⁷⁰ However, EA did not concede defeat with regard to *FIFA 18*.⁷¹ In response to the Belgian government's statements threatening legal action, a spokesperson from EA stated that the company did not agree with the conclusion that their games could be seen as any form of gambling.⁷² Specifically, EA's CEO, Andrew Wilson, stated that the company "forbid[s] the transfer of items or in-game currency outside [the games]" and that it "also actively seek[s] to eliminate [trading] where it's going on in an illegal environment."⁷³ According to Wilson, EA "work[s] with regulators in various jurisdictions to achieve that."⁷⁴ However, some reports have shown that players can, in fact, sell items acquired in *FIFA* on third-party markets for real currency.⁷⁵

Initially, it seemed EA was willing to go to court to dispute whether loot boxes in *FIFA 18* constituted gambling.⁷⁶ Meanwhile, EA was preparing to release its next game, *FIFA 19*, in Belgium with loot boxes intact.⁷⁷ At the same time, the BGC was recommending prosecution.⁷⁸ The BGC was even threatening to revise the Belgian Gaming Act, which sets regulations for gambling in the country, specifically to target EA if they lost the case.⁷⁹ Eventually, EA succumbed to pressure from the Belgian

⁶⁹ Yin-Poole, *supra* note 45.

⁷⁰ *Id.*

⁷¹ Yin-Poole, *supra* note 57.

⁷² Arif, *supra* note 50.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Wesley Yin-Poole, *When It Comes to FIFA 18, You Can Most Definitely Cash Out*, EUROGAMER (Oct. 23, 2017), <https://www.eurogamer.net/articles/2017-10-23-when-it-comes-to-fifa-18-you-can-most-definitely-cash-out>.

⁷⁶ Rebekah Valentine, *EA May Go to Court Over Loot Boxes in Belgium*, GAMEINDUSTRY (Sept. 10, 2018), <https://www.gamesindustry.biz/articles/2018-09-10-ea-may-go-to-court-over-loot-boxes-in-belgium>.

⁷⁷ See Anton Goegebeur, *Kansspelcommissie trekt ten strijde tegen FIFA 18 (en 19)* [*Gaming Commission to Fight Against FIFA 18 (and 19)*], NIEUWSBLAD (Sept. 9, 2018), https://www.nieuwsblad.be/cnt/dmf20180909_03725401.

⁷⁸ *Id.*

⁷⁹ *Id.*

government and agreed to stop selling the in-game currency used to buy the loot boxes in the country.⁸⁰ If the action on loot boxes had stopped there, with Belgium and the Netherlands, it arguably would not have been an issue for the largest publishers. As EA put it, “[t]he impact of this change to FIFA Ultimate Team in Belgium is not material to our financial performance.”⁸¹ As it happened, EA’s biggest battle was still to come.

C. *The United Kingdom’s Stumbled Response*

Loot box regulation in the United Kingdom began in late 2016, when the country’s Gambling Commission conducted research on video games and published its concerns about underage gambling.⁸² In the report, the Commission stated that where in-game items can be traded or exchanged for real world currency, the items acquire monetary value and thus fall under UK gambling laws.⁸³ Outside of those circumstances, however, the Commission did not feel that loot boxes met the legal definition of gambling set by UK’s parliament.⁸⁴ Following the report, the UK Gambling Commission successfully prosecuted two men for operating a website where *FIFA* Ultimate Team coins could be used to gamble.⁸⁵ The two men were ordered to pay £174,000 and £91,000 in fines and costs.⁸⁶ Neither the site’s operators nor the website itself had any affiliations with EA⁸⁷,

⁸⁰ Paul Tassi, *EA Surrenders in Belgian FIFA Ultimate Team Loot Box Fight, Raising Potential Red Flags*, FORBES (Jan. 29, 2019, 10:23 AM), <https://www.forbes.com/sites/insertcoin/2019/01/29/ea-surrenders-in-belgian-fifa-ultimate-team-loot-box-fight-raising-potential-red-flags/#57d1441c3675>.

⁸¹ *Id.*

⁸² *Virtual Currencies, eSports and Social Casino Gaming—Position Paper*, GAMBLING COMM’N (Mar. 2017), <https://www.gamblingcommission.gov.uk/PDF/Virtual-currencies-eSports-and-social-casino-gaming.pdf>.

⁸³ *Id.* at 5.

⁸⁴ *Id.* at 7.

⁸⁵ *Two Men Convicted After Offering Illegal Gambling Parasitic Upon Popular FIFA Computer Game*, GAMBLING COMM’N (Feb. 7, 2017), <https://www.gamblingcommission.gov.uk/news-action-and-statistics/News/two-men-convicted-after-offering-illegal-gambling-parasitic-upon-popular-fifa-computer-game>.

⁸⁶ *Id.*

⁸⁷ *Id.*

suggesting the Commission had no interest in going after developers of video games that facilitated such gambling.

In 2018, the United Kingdom's Gambling Commission still did not seem ready to conclude that loot boxes themselves constituted gambling.⁸⁸ In its report, *Young People & Gambling 2018*, the Commission mentioned loot boxes, but seemed more interested in the issue of whether children had used the items they had acquired in the loot boxes to place bets on the outcome of games.⁸⁹ The Commission's focus seemed misplaced, given the fact that the report showed that almost one-third of children had opened loot boxes in the past year, but only 3% had partaken in this so-called "skins' gambling."⁹⁰ Ultimately following its previous stance,⁹¹ the report reiterated the Commission's position that loot boxes themselves do not constitute gambling.⁹²

The following year, the UK Parliament began to show more interest in gambling mechanics in video games.⁹³ A House of

⁸⁸ See Alice O'Connor, *Gambling Commission Report Decries Skin Gambling, but Not Loot Boxes*, ROCK PAPER SHOTGUN (Nov. 22, 2018), <https://www.rockpapershotgun.com/2018/11/22/gambling-commission-says-skin-gambling-is-gambling/> (noting that the UK Gambling Commission's survey in 2018 included general questions about the use of loot boxes, laying the groundwork for future decisions, but did not specifically at the time call loot boxes gambling).

⁸⁹ See *Young People & Gambling 2018*, GAMBLING COMM'N 4 (Nov. 2018), <https://www.gamblingcommission.gov.uk/PDF/survey-data/Young-People-and-Gambling-2018-Report.pdf> (detailing how young people reportedly interacted with in-game items).

⁹⁰ *Id.* The "skins" referred to by the Gambling Commission are items found in loot boxes that "provide cosmetic alterations to a player's weapons, avatar or equipment used in the game." *Id.* at 28.

⁹¹ *Loot Boxes Within Video Games*, GAMBLING COMM'N (Nov. 27, 2017), <https://www.gamblingcommission.gov.uk/news-action-and-statistics/News/loot-boxes-within-video-games>.

⁹² GAMBLING COMM'N, *supra* note 82, at 9, 29 (suggesting that loot boxes are not gambling but that placing bets with items found within the loot box was gambling).

⁹³ See Digital, Culture, Media and Sport Comm., *DCMS Committee Launches New Inquiry into the Growth of 'Immersive and Addictive Technologies'*, PARLIAMENT (Dec. 10, 2018), <https://committees.parliament.uk/committee/378/digital-culture-media-and-sport-committee/news/103563/dcms-committee-launches-new-inquiry-into-the-growth-of-immersive-and-addictive->

Commons committee announced it would be hearing evidence from Epic Games and EA, the makers of the two most popular games with loot boxes, as part of its inquiry into “Immersive and Addictive Technologies.”⁹⁴ At a meeting on June 19, 2019, members of the committee asked EA’s representatives if they had any “ethical qualms” about loot boxes.⁹⁵ Kerry Hopkins, Vice President of Legal and Government Affairs for EA, responded colorfully that her company does not view them as loot boxes, but as “surprise mechanics,”⁹⁶ and that “people like surprises.”⁹⁷ Hopkins further commented, “[w]e do think the way that we have implemented these kinds of mechanics—and FIFA of course is our big one, our FIFA Ultimate Team and our packs—is actually quite ethical and quite fun, quite enjoyable to people.”⁹⁸ She went on to compare loot boxes to Kinder Eggs, and said that EA disagrees that there is evidence showing loot boxes lead to gambling,⁹⁹ despite strong evidence suggesting otherwise.¹⁰⁰

The committee’s questions were part of a broader inquiry into the video game industry as a whole.¹⁰¹ On the issue of loot boxes,

technologies/ (reporting on the DCMS’s investigation into the impact of immersive technology, including an inquiry into how addictive these technologies can be).

⁹⁴ *Id.*

⁹⁵ Digital, Culture, Media and Sport Comm., *Immersive and Addictive Technologies*, PARLIAMENTLIVE.TV (June 19, 2019), <https://parliamentlive.tv/event/index/0bf5f000-036e-4cee-be8e-c43c4a0879d4>.

⁹⁶ Dustin Bailey, *EA: They’re Not Loot Boxes, They’re “Surprise Mechanics,” and They’re “Quite Ethical”*, PCGAMESN (June 20, 2019), <https://www.pcgamesn.com/ea-loot-boxes>.

⁹⁷ Ana Diaz, *EA Calls Its Loot Boxes ‘Surprise Mechanics,’ Says They’re Used Ethically*, POLYGON (June 21, 2019, 9:10 AM), <https://www.polygon.com/2019/6/21/18691760/ea-vp-loot-boxes-surprise-mechanics-ethical-enjoyable>.

⁹⁸ Bailey, *supra* note 96.

⁹⁹ Diaz, *supra* note 97.

¹⁰⁰ See, e.g., Gabriel A. Brooks & Luke Clark, *Associations Between Loot Box Use, Problematic Gaming and Gambling, and Gambling-Related Cognitions*, 96 ADDICTIVE BEHAVIORS 26 (2019) (noting that two studies replicated results showing loot box engagement is correlated with problematic gambling in video game players).

¹⁰¹ Dustin Bailey, *The UK Government Wants You to Tell It Whether Gaming is Good or Bad for Society*, PCGAMESN (Jan. 23, 2019), <https://www.pcgamesn.com/uk-government-gaming>.

however, it seemed that EA's dubious characterizations swayed the UK Gambling Commission.¹⁰² In 2019, it stated again that it does not categorize loot boxes as gambling because "there is no official way to monetiz[e] what is inside them."¹⁰³ Ostensibly, the prize must be "either money or have monetary value in order for it to fall under gambling legislation."¹⁰⁴

However, the UK Parliament's Digital, Culture, Media and Sport ("DCMS") Committee also questioned EA and Epic Games, reaching a very different conclusion than the Gambling Commission. In its final report, the committee lambasted representatives from the video game industry, charging them with being "willfully obtuse" in their answers to its questions.¹⁰⁵ According to the committee, "[t]he wide-ranging report calls upon games companies to accept responsibility for addictive gaming disorders. . . ."¹⁰⁶ The report goes on to recommend that the sale of loot boxes to children should be outright banned, and that the government should regulate them under the country's Gambling Act.¹⁰⁷ The committee also suggested that Pan European Game Information ("PEGI"), the European board that rates games for age restrictions, should "apply the same rating it uses for gambling software to games with loot boxes."¹⁰⁸

The Association for UK Interactive Entertainment, or "UKIE," responded to the report, saying it would review the

¹⁰² Zoe Kleinman, *Fifa Packs and Loot Boxes 'Not Gambling' in UK*, BBC (July 22, 2019), <https://www.bbc.com/news/technology-49074003>.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Digital, Culture, Media and Sport Comm., *Immersive and Addictive Technologies*, 15 HOUSE OF COMMONS 39 (Sept. 9, 2019), <https://publications.parliament.uk/pa/cm201719/cmselect/cmcmds/1846/1846.pdf>.

¹⁰⁶ Digital, Culture, Media and Sport Comm., *Immersive and Addictive Technologies Report Published*, PARLIAMENT (Sept. 12, 2019), <https://committees.parliament.uk/committee/378/digital-culture-media-and-sport-committee/news/103598/immersive-and-addictive-technologies-report-published/>.

¹⁰⁷ *Id.*

¹⁰⁸ Sherif Saed, *UK DCMS Parliamentary Committee Recommends Ban on Loot Boxes, Higher Age Ratings for Games with Loot Boxes*, VG24/7 (Sept. 12, 2017), <https://www.vg247.com/2019/09/12/uk-dcms-parliamentary-committee-recommends-ban-on-loot-boxes-for-children/>.

“recommendations with utmost seriousness and consult with the industry on how we demonstrate further our commitment to player safety—especially concerning minors and vulnerable people.”¹⁰⁹ UKIE’s North American counterpart, the Entertainment Software Association (“ESA”), took a more combative approach, stating it “strongly disagree[d]” with the DCMS Committee’s findings.¹¹⁰ The ESA represents America’s largest video game publishers, such as EA and Microsoft.¹¹¹ Put into context, total revenue from video game sales in the UK in 2019 was 4.9 billion U.S. dollars.¹¹² In the US, that number was 35.4 billion dollars.¹¹³ The UK report came only days after one of the largest American publishers, 2K, released the game *NBA 2K20* with a loot box mode depicting actual virtual slot machines.¹¹⁴

The DCMS committee’s report was quickly followed up by another report from the United Kingdom’s Children Commissioner, Anne Longfield.¹¹⁵ Longfield’s job, independent of Parliament, is to gather evidence about children in the UK and propose changes in

¹⁰⁹ Rahul Ghandi & David Zeffman, *UK Parliamentary Committee Says ‘Loot Boxes’ Should Be Considered Gambling and Regulated Accordingly*, LEXOLOGY (Sept. 25, 2019), <https://www.lexology.com/library/detail.aspx?g=014eb73a-9e90-4526-bf0b-a9f484e3c78f>.

¹¹⁰ Andy Chalk, *The ESA ‘Strongly Disagrees’ with UK Parliamentary Inquiry’s Finding on Loot Boxes*, PC GAMER (Sept. 13, 2019), <https://www.pcgamer.com/uk/the-esa-strongly-disagrees-with-uk-commissions-finding-on-loot-boxes/>.

¹¹¹ *About ESA*, ENT. SOFTWARE ASS’N, <https://www.theesa.com/about-esa#tabs> (last visited Nov. 11, 2020).

¹¹² Joseph Johnson, *Video Game Software Retail Sales Revenue in the United Kingdom (UK) from 2011 to 2019*, STATISTA (Feb. 7, 2020), <https://www.statista.com/statistics/281895/video-game-software-retail-sales-in-the-united-kingdom-uk/>.

¹¹³ Entm’t Software Ass’n, *U.S. Video Game Content Generated \$35.4 Billion in Revenue for 2019* (Jan. 23, 2020), <https://www.theesa.com/press-releases/u-s-video-game-content-generated-35-4-billion-in-revenue-for-2019/>.

¹¹⁴ Julian Rogers, *Is Nba 2k20 a Virtual Casino Inside a Basketball Game?*, PLAY USA (Sept. 6, 2019), <https://www.playusa.com/nba-2k20-loot-boxes/>.

¹¹⁵ Sally Weale, *Clamp Down on Fifa ‘Loot Boxes’ Urges Children’s Commissioner*, GUARDIAN (Oct. 22, 2019), <https://www.theguardian.com/society/2019/oct/22/clamp-down-on-fortnite-loot-boxes-urges-childrens-commissioner>.

legislation based on her findings.¹¹⁶ In October of 2019, she released a report titled “Gaming the System” about the risks children face when playing video games.¹¹⁷ At the top of her policy recommendations was limiting the role of money in games and addressing the harm of loot boxes.¹¹⁸ Specifically, she called for the government to amend the definition of gambling in Section 6 of the Gambling Act of 2005 to regulate loot boxes as a form of gambling.¹¹⁹

UK General Acts defines “gambling” as “gaming,” “betting,” and “participating in a lottery.”¹²⁰ Section 6 of the Gambling Act of 2005 defines “gaming” as “playing a game of chance for a prize.”¹²¹ If a change to the statute is necessary to regulate loot boxes, as Longfield suggests,¹²² it seems likely it would come in the form of amending the definition of a prize. The UK Gambling Act defines a “prize” to mean money or “money’s worth,” meaning having a real-world monetary value.¹²³ The UK Gambling Commission’s current stance is that loot boxes are not gambling, because players do not win “prizes” under the law.¹²⁴ However, amending the UK Gambling Act may not be necessary to capture loot boxes within the definition of gambling, because the items players receive are valuable, even if they are not immediately transferrable for currency

¹¹⁶ *The Children’s Commissioner for England*, CHILD. COMM’R, <https://www.childrenscommissioner.gov.uk/about-us/the-childrens-commissioner-for-england/> (last visited Nov. 11, 2020).

¹¹⁷ *Gaming the System*, CHILD. COMM’R (2019), <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2019/10/CCO-Gaming-the-System-2019.pdf>.

¹¹⁸ *Id.* at 4.

¹¹⁹ *Id.*

¹²⁰ Gambling Act, 2005, c. 19, § 3 (U.K.), <https://www.legislation.gov.uk/ukpga/2005/19/part/1>.

¹²¹ *See id.* § 6(1).

¹²² CHILD. COMM’R, *supra* note 117, at 4.

¹²³ Gambling Act, 2005, c. 19, § 6(5)(b) (U.K.), <https://www.legislation.gov.uk/ukpga/2005/19/part/1>.

¹²⁴ Joseph Bradley and Francis Brown, *Game Over for Loot Boxes?*, WHITE & CASE (Nov. 11, 2019), <https://www.whitecase.com/publications/alert/game-over-loot-boxes>.

or exchangeable.¹²⁵ This argument is explored more thoroughly in Part IV.

Backing up her calls for reform, Longfield's report detailed interviews with children of different ages in the United Kingdom, and found that some children were worried about their inability to control their spending habits, while others saw loot boxes as an addictive form of gambling.¹²⁶ Particularly in the game *FIFA*, children saw "player packs"¹²⁷ as a potential way to waste a significant amount of money in trying to obtain loot boxes containing good players.¹²⁸ At least one independent report has substantiated claims that children can spend a considerable amount of their parents' money making in-game purchases in *FIFA* without realizing the consequences.¹²⁹ It is not yet clear the impact this report, along with the DCMS Committee, report will have on the UK Parliament, but the next steps will likely involve Parliament passing legislation to ban loot boxes, changing the way they are regulated under the Gambling Act, or releasing a report explaining its reasoning as to why it will not change its position.¹³⁰

¹²⁵ See Vox, *Why Spend Money in Video Games?*, YOUTUBE (Oct. 8, 2019), https://www.youtube.com/watch?v=ZBxvAE_ux9U&vl=en (explaining why some people put a high value on virtual items).

¹²⁶ CHILD. COMM'R, *supra* note 117, at 20.

¹²⁷ "Player packs" are much like virtual trading card packs; a customer buys a pack and receives a random assortment of soccer players. The customer can then add those players to their virtual team to compete with other teams online, or they may trade their players for other customers' players on the virtual market. Ronan Murphy, *FIFA 20 Ultimate Team Pack Odds: What are the Chances of Getting Ronaldo or Messi in a Pack?*, GOAL (May 18, 2020), <https://www.goal.com/en-gb/news/fifa-20-ultimate-team-pack-odds-what-are-the-chances-of/1a5vudndnxgca1w2r3norbnrd1>.

¹²⁸ CHILD. COMM'R, *supra* note 117, at 23.

¹²⁹ Zoe Kleinman, *'The Kids Emptied Our Bank Account Playing Fifa'*, BBC (July 9, 2019), <https://www.bbc.com/news/technology-48908766>.

¹³⁰ Kostya Lobov & Alan Moss, *The UK Games Industry Is at a Regulatory Crossroads*, GAMESINDUSTRY.BIZ (Oct. 7, 2019), <https://www.gamesindustry.biz/articles/2019-10-07-the-uk-games-industry-is-at-a-regulatory-crossroads-opinion>.

II. THE UNITED STATES' SLOW RESPONSE TO GAMBLING MECHANICS IN VIDEO GAMES

In November of 2017, leading up to the release of *Star Wars Battlefront II* by EA, the ESRB preemptively announced that it did not see loot boxes as a form of gambling.¹³¹ The ESRB is the self-regulatory organization in the United States that sets content and age restrictions for video games.¹³² Importantly, the ESRB is owned by the Entertainment Software Association (“ESA”), a trade organization made up of companies in the video game industry that advocates on behalf of the interests of its members.¹³³ The ESA set up the ESRB in the 1990s after Congress threatened to regulate violence in video games.¹³⁴ The organization has since made apparent its distaste for regulation that would impact the revenue model of its largest members.¹³⁵

Once *Battlefront II* was released in the United States, Chris Lee, a Hawaiian State Representative, publicly condemned the use of loot boxes in video games.¹³⁶ Representative Lee called the use of loot

¹³¹ Jason Schreier, *ESRB Says It Doesn't See 'Loot Boxes' as Gambling*, KOTAKU (Oct. 11, 2017 12:46 PM), <https://kotaku.com/esrb-says-it-doesnt-see-loot-boxes-as-gambling-1819363091>.

¹³² See *About*, ESRB, <https://www.esrb.org/about/> (last visited Sept. 24, 2020) (explaining the role of the ESRB as setting age restrictions for the purchase of video games through its own rating system).

¹³³ *About ESA*, ENTMT. SOFTWARE ASS'N, <https://www.theesa.com/about-esa> (last visited Nov. 11, 2020).

¹³⁴ Andy Chalk, *Inappropriate Content: A Brief History of Videogame Ratings and the ESRB*, THE ESCAPIST (July 20, 2007, 12:00 PM), <https://v1.escapistmagazine.com/articles/view/video-games/columns/the-needles/1300-Inappropriate-Content-A-Brief-History-of-Videogame-Ratings-and-t>.

¹³⁵ For example, the ESA has spent considerable resources arguing against “right to repair” laws that allow consumers to take their hardware to third party repair shops, rather than requiring repairs be made only by the product’s manufacturer. Critics argue that without “right to repair,” manufacturers monopolize the repairs of their products, thus harming consumers. *“Right to Repair” Legislation*, ENTMT. SOFTWARE ASS'N, <https://www.theesa.com/policy/right-to-repair-legislation/> (last visited Sept. 27, 2020).

¹³⁶ Chris Lee, *Highlights of the Predatory Gaming Announcement*, YOUTUBE (Nov. 21, 2017), https://www.youtube.com/watch?v=_akwfrUL4os.

boxes a “predatory practice” and “designed to lure kids into spending money.”¹³⁷ He also commented:

These kinds of loot boxes and microtransactions are explicitly designed to prey upon and exploit human psychology in the same way casino games are so designed. This is especially true for young adults who child psychologists and other experts explain are particularly vulnerable. These exploitive mechanisms and the deceptive marketing promoting them have no place in games being marketed to minors, and perhaps no place in games at all.¹³⁸

Lee warned that the state of Hawaii was considering adopting legislation to ban the sale of games containing loot boxes to consumers under the age of 21.¹³⁹ Two months later, state legislators “introduced four bills that would regulate the sale of video games that feature . . . loot boxes.”¹⁴⁰

The proposed House Bill 2686 and Senate Bill 3024 “would prohibit the sale of any video game featuring a system wherein players can purchase a randomized reward using real money to anyone younger than 21 years old.”¹⁴¹ Two other bills “would require video game publishers to prominently label video games containing [loot boxes], as well as disclose the probability rates of receiving each loot box reward.”¹⁴² Ultimately, the bills in Hawaii

¹³⁷ Tamoor Hussain, *US State Representative Says Star Wars Battlefront 2's Loot Boxes Are "Predatory"*, GAMESPOT (Nov. 22, 2017), <https://www.gamespot.com/articles/us-state-representative-says-star-wars-battlefront/1100-6455147/>.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Owen S. Good, *Hawaii Lawmakers Introduce Loot Crate Regulation Bills*, POLYGON (Feb. 13, 2018, 11:15 AM), <https://www.polygon.com/2018/2/13/17007830/hawaii-loot-crate-laws-ea-star-wars-battlefront-2>.

¹⁴¹ Michael Brestovansky, *Bills Target Video Games with Rewards for a Price*, HAW. TRIB.-HERALD (Feb. 12, 2018), <https://www.hawaiitribune-herald.com/2018/02/12/hawaii-news/bills-target-video-games-with-rewards-for-a-price/>.

¹⁴² *Id.*

stalled, and failed to pass.¹⁴³ However, the proposed legislation did start the momentum for other states to draft their own similar bills.¹⁴⁴ Representative Lee said he was “working with a number of legislators to draft similar proposals in about half the states of the US.”¹⁴⁵

The next states to introduce loot box legislation were Washington State and California.¹⁴⁶ Washington introduced a bill in early 2018 that “would require the Washington [S]tate [G]ambling [C]ommission to consult with the industry . . . and recommend how to regulate loot boxes.”¹⁴⁷ At the time, the Washington State Gambling Commission stated that it was “aware of loot boxes but [had] not yet formed a position on whether they are gambling.”¹⁴⁸ Similarly, California proposed a bill around the same time that would “require the manufacturer of a video game that is sold in California . . . to provide a clear disclosure that the video game includes the opportunity to engage in a microtransaction on the physical box the video game is sold in.”¹⁴⁹

These efforts were quickly followed by a bill proposed in Minnesota that “would prohibit the sale of video games with loot

¹⁴³ Michael Brestovansky, ‘Loot Box’ Bills Fail to Advance, HAW. TRIB.-HERALD (Mar. 24, 2018), <https://www.hawaiitribune-herald.com/2018/03/24/hawaii-news/loot-box-bills-fail-to-advance/>.

¹⁴⁴ Paul Tassi, *EA, Activision and Others Should Be Afraid of Hawaii’s New Loot Box Bills*, FORBES (Feb. 13, 2018), <https://www.forbes.com/sites/insertcoin/2018/02/13/ea-activision-and-others-should-be-afraid-of-hawaiis-new-loot-box-bills/#4af46a576b5f>.

¹⁴⁵ *Id.*

¹⁴⁶ David Lumb, *State Senators Want to Regulate Loot Boxes in Washington*, ENGADGET (Jan. 25, 2018), <https://www.engadget.com/2018/01/25/washington-state-senator-regulate-loot-boxes/>; Assemb. B. 2194, 2017–2018 Leg., Reg. Sess. (Ca. 2018).

¹⁴⁷ Lumb, *supra* note 146.

¹⁴⁸ Max Wasserman, *Are Video-Game Loot Boxes a Form of Gambling That Targets Children? Washington Aims to Find Out*, NEWS TRIB. (Jan. 23, 2018, 8:00 AM), <https://www.thenewstribune.com/news/politics-government/article196064729.html>.

¹⁴⁹ Assemb. B. 2194, 2017–2018 Leg., Reg. Sess. (Ca. 2018).

boxes to people younger than 18.”¹⁵⁰ Additionally, Minnesota’s bill would require video games to be sold, either physically or digitally, with a clear warning that reads: “Warning: This game contains a gambling-like mechanism that may promote the development of a gaming disorder that increases the risk of harmful mental or physical health effects, and may expose the user to significant financial risk.”¹⁵¹

Meanwhile, one Senator from New Hampshire sent a letter to the ESRB voicing concerns over loot boxes.¹⁵² In response to the ESRB’s announcement that it did not consider loot boxes a form of gambling, Senator Maggie Hassan wrote a letter to Patricia Vance, the President of the ESRB, asking her to reexamine how loot boxes were rated:¹⁵³

The prevalence of in-game micro-transactions, often referred to as ‘loot boxes,’ raises 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.¹⁵⁴

The letter goes on to urge that, at a minimum, a game should be required to disclose “when loot boxes are utilized in physical copies of electronic games.”¹⁵⁵ In response to Senator Hassan’s efforts, the ESRB announced that it would add an “in-game purchases” label on

¹⁵⁰ Jason M. Bailey, *A Video Game ‘Loot Box’ Offers Coveted Rewards, but Is It Gambling?*, N.Y. TIMES (Apr. 24, 2018), <https://www.nytimes.com/2018/04/24/business/loot-boxes-video-games.html>.

¹⁵¹ H. F. No. 4460, 90th Leg., Reg. Sess. (Minn. 2018).

¹⁵² Owen S. Good, *Senator Calls on Video Game Ratings Board to Examine Loot Box Practices*, POLYGON (Feb. 15, 2018, 9:35 AM), <https://www.polygon.com/2018/2/15/17015510/loot-crates-senator-maggie-hassan-esrb-letter>.

¹⁵³ *Id.*

¹⁵⁴ Paul Tassi, *US Senator Confronts the ESRB Over Loot Box Classification and Addiction*, FORBES (Feb. 15, 2018), <https://www.forbes.com/sites/insertcoin/2018/02/15/us-senator-confronts-the-esrb-over-loot-box-classification-and-addiction/#6d9af17d5a97>.

¹⁵⁵ *Id.*

physical games that are sold with loot boxes.¹⁵⁶ However, the label would not specifically mention any gambling mechanics.¹⁵⁷

In addition to her letter to the ESRB, Senator Hassan asked members of the FTC to investigate loot boxes.¹⁵⁸ The FTC responded to Senator Hassan's request, agreeing to do so.¹⁵⁹ As a result, the ESA released a statement, saying:

Loot boxes are one way that players can enhance the experience that video games offer. Contrary to assertions, loot boxes are not gambling. They have no real-world value, players always receive something that enhances their experience, and they are entirely optional to purchase. They can enhance the experience for those who choose to use them, but have no impact on those who do not.¹⁶⁰

The FTC chose to structure their investigation in the form of an in-person workshop, where industry representatives, consumer advocates, and academics could give talks and have discussions on the effect of loot boxes on consumers.¹⁶¹ Panelists at the workshop made arguments for and against regulating loot boxes.¹⁶² Those opposed to regulation argued that “loot boxes do not need to be purchased in order to play a game, and that loot boxes bear a striking resemblance—albeit a digital one—to noncontroversial products in the marketplace such as baseball cards.”¹⁶³

¹⁵⁶ Brendan Sinclair, *ESRB Responds to Loot Box Controversy with In-Game Purchase Label*, GAMESINDUSTRY.BIZ (Feb. 27, 2018), <https://www.gamesindustry.biz/articles/2018-02-27-esrb-responds-to-loot-box-controversy-with-in-game-purchase-label>.

¹⁵⁷ *Id.*

¹⁵⁸ Colin Campbell, *FTC Pledges Loot Crate Investigation*, POLYGON (Nov. 27, 2018, 7:41 PM), <https://www.polygon.com/2018/11/27/18115365/ftc-loot-crate-investigation-senator-hassan>.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Lesley Fair, *FTC Workshop Looks into Loot Boxes*, FED. TRADE COMM'N (Apr. 8, 2019, 11:14 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2019/04/ftc-workshop-looks-loot-boxes>.

¹⁶² Carolina Alonso, *FTC Takes a Peek at Loot Box Regulation*, BAKERHOSTETLER (Oct. 11, 2019), <https://www.jdsupra.com/legalnews/ftc-takes-a-peek-at-loot-box-regulation-88494/>.

¹⁶³ *Id.*

On the side for regulating loot boxes, researchers from Columbia University and Central Michigan University presented journal articles they had published showing a link between spending money on loot boxes and problem gambling.¹⁶⁴ The studies found a correlation, and possible causation, between consumer spending on loot boxes and problem gambling, including increased spending on more loot boxes.¹⁶⁵ The research also found this correlation to be “much stronger” in adolescents between the ages of sixteen and eighteen than in adults.¹⁶⁶ Dr. David Zendle, a computer science researcher from the University of York who has published a number of articles on the harms of loot boxes,¹⁶⁷ argued that the findings from his most recent research cut against the likening of loot boxes to baseball cards or Kinder Eggs, because his results suggest that these items, unlike loot boxes, do not lead to problem gambling.¹⁶⁸ Another researcher at the workshop found that companies that disclose to the buyer the odds of receiving a certain type of item from a loot box have a strong economic incentive to lie about those odds, and there is no current regulation requiring these disclosures to be accurate.¹⁶⁹

This last point is especially significant given that on the same day the workshop took place, a number of companies announced they would be disclosing the odds of receiving particular items in

¹⁶⁴ *Inside the Game: Unlocking the Consumer Issues Surrounding Loot Boxes*, FTC (Aug. 7, 2019), https://www.ftc.gov/system/files/documents/videos/inside-game-unlocking-consumer-issues-surrounding-loot-boxes-session-2/ftc_loot_boxes_workshop_transcript_segment_2.pdf.

¹⁶⁵ *Id.* at 2–3.

¹⁶⁶ *Id.* at 4.

¹⁶⁷ See Zendle & Cairns, *Video Game Loot Boxes are Linked to Problem Gambling: Results of a Large-Scale Survey*, 13 PLOS ONE (2018), <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0206767&type=printable>; see also David Zendle et al., *Adolescents and Loot Boxes: Links with Problem Gambling and Motivations for Purchase*, 6 ROYAL SOC’Y OPEN SCI. 190049 (2019) (explaining the results of a study showing a stronger link between loot boxes and problem gambling in 16 to 18-year-olds, compared to adults); David Zendle, *Beyond Loot Boxes: A Variety of Gambling-like Practices in Video Games are Linked to Both Problem Gambling and Disordered Gaming*, 8 PEERJ 9466 (2020).

¹⁶⁸ FTC, *supra* note 164, at 19.

¹⁶⁹ *Id.* at 14.

loot boxes.¹⁷⁰ The step clearly came as a way to avoid government regulation through self-regulation.¹⁷¹ The decision by some video game publishers to disclose odds of certain items in loot boxes may have also been a reaction to a proposed bill in the United States House of Representatives.¹⁷² In May of 2019, Republican Senator Josh Hawley announced he was working on “a bill to effectively ban loot boxes,”¹⁷³ and in that same month, introduced the Protecting Children from Abusive Games Act (“PCAGA”).¹⁷⁴ The bill would make it unlawful for a video game developer to develop, and a video game publisher to publish, a “minor-oriented game that includes pay-to-win microtransactions or loot boxes.”¹⁷⁵ A “minor-oriented game” is defined as “an interactive digital entertainment product for which the target audience is individuals under the age of 18.”¹⁷⁶ This definition may apply where certain factors are present.¹⁷⁷ According to a release from Senator Hawley, “[t]his category is defined using a framework inspired by the landmark Children’s Online Privacy Protection Act and the recent update to that Act proposed by [himself] and [Massachusetts Senator] Edward Markey.”¹⁷⁸

¹⁷⁰ Alice O’Connor, *Major Developers Will Disclose Odds on Loot Boxes in Effort to Avoid Government Regulation*, ROCK PAPER SHOTGUN (Aug. 8, 2019, 3:04 PM), <https://www.rockpapershotgun.com/2019/08/08/major-developers-will-disclose-odds-on-loot-boxes-in-effort-to-avoid-government-regulation/>.

¹⁷¹ *Id.*

¹⁷² Ben Gilbert, *The Video Game Industry Is Facing Government Scrutiny Over Loot Boxes, and the Most Powerful Leaders in Gaming Are Divided Over What to Do*, BUS. INSIDER (June 23, 2019, 7:41 AM), <https://www.businessinsider.com/video-game-industry-loot-box-legislation-2019-6#regardless-of-the-gambling-debate-at-least-one-us-senator-is-proposing-legislation-to-regulate-loot-boxes-in-games-3>.

¹⁷³ *Id.*

¹⁷⁴ Protecting Children from Abusive Games Act, S. 1629, 116th Cong. (2019).

¹⁷⁵ Sen. Josh Hawley, *Frequently Asked Questions Regarding Legislation on Pay-to-Win and Loot Boxes*, HAWLEY.SENATE.GOV, <https://odinlaw.com/wp-content/uploads/2019/05/Loot-Box-Bill-FAQ.pdf> (last visited Sept. 27, 2020).

¹⁷⁶ *Id.* at 4.

¹⁷⁷ *Id.* at 4–6 (noting factors such as, *inter alia*, the product’s subject matter, the visual content, the music or audio content, and the use of animated characters or activities that appeal to individuals under the age of 18).

¹⁷⁸ *Id.*

Senator Hawley's bill would also make it unlawful to publish or distribute a game with loot boxes that the publisher or distributor should know is played by users under the age of eighteen.¹⁷⁹ According to Senator Hawley, when a game is designed for kids, game developers should not be allowed to monetize addiction—and when kids play games designed for adults, they should be walled off from compulsive microtransactions.¹⁸⁰ Furthermore, “[g]ame developers who knowingly exploit children should face legal consequences.”¹⁸¹

The frequently-asked-questions sheet provided by Senator Hawley regarding his proposed legislation states that the prohibition would apply to games for general audiences if developers and distributors have “constructive knowledge” that *some* users are under the age of eighteen.¹⁸² As discussed below, this provision, amongst others, likely makes enforcement of this bill imprecise and impractical.¹⁸³

In addition to the proposed bill's aim at loot boxes, it may also effectively ban so-called “pay-to-win” microtransactions.¹⁸⁴ The bill defines pay-to-win in two separate settings. In progression-based games, pay-to-win is defined as “downloadable content that, from the perspective of an individual user, eases progression through such content, assists in accomplishing the game's goals, or permits a user to continue to access game content rendered inaccessible after the expiration of a timer or number of gameplay attempts.”¹⁸⁵ In the context of competitive games, pay-to-win is defined as “downloadable content that, from the perspective of a reasonable user, provides a competitive advantage.”¹⁸⁶ As discussed in Section IV below, this language in the bill takes unnecessary aim at what

¹⁷⁹ S. 1629 § 1(b).

¹⁸⁰ *Senator Hawley to Introduce Legislation Banning Manipulative Video Game Features Aimed at Children*, HAWLEY.SENATE.GOV (May 8, 2019), <https://www.hawley.senate.gov/senator-hawley-introduce-legislation-banning-manipulative-video-game-features-aimed-children>.

¹⁸¹ *Id.*

¹⁸² Hawley, *supra* note 175, at 1 (emphasis added).

¹⁸³ See discussion *infra* Section III.

¹⁸⁴ S. 1629, §§ 1(a), (b).

¹⁸⁵ *Id.* § 2(7)(A)(i).

¹⁸⁶ *Id.* § 2(7)(A)(ii).

could be seen as a legitimate and altogether different kind of transaction than loot boxes.

The bill leaves enforcement of its provisions to the FTC.¹⁸⁷ It proposes making each separate sale of a loot box or pay-to-win microtransaction a separate offense and holds the publisher and developer liable for penalties brought by the FTC in a civil action.¹⁸⁸ Furthermore, the bill allows enforcement of any of its provisions by a civil action brought on behalf of a state's citizens by the state attorney general, with a right to intervene in any suit provided to the FTC.¹⁸⁹ Lastly, Sections 4 and 5 of the PCAGA call for the FTC to submit to Congress, no later than two years after enactment, a report on compliance by the industry, and a study on the effects of pay-to-win microtransactions and loot boxes.¹⁹⁰

When Senator Hawley introduced the PCAGA, two democratic senators signed on to the bill, giving it bipartisan support.¹⁹¹ Senator Richard Blumenthal from Connecticut spoke about the bill, saying, "Congress must send a clear warning to app developers and tech companies: Children are not cash cows to exploit for profit."¹⁹² The CEO of the ESA, Stanley Pierre-Louis, spoke out against the bill, calling it "flawed and riddled with inaccuracies."¹⁹³ The "impact of this bill," he went on, "would be far-reaching and ultimately prove harmful to the player experience, not to mention the more than 220,000 Americans employed by the video game industry."¹⁹⁴ Opposing the regulations, he pledged instead to work with senators to raise awareness about the tools and information the industry already provides to put the control of video game play and in-game

¹⁸⁷ *Id.* § 3(a)(1).

¹⁸⁸ *Id.* §§ 3(a)(3)(A), (B).

¹⁸⁹ *Id.* § 3(b).

¹⁹⁰ *Id.* §§ 4, 5.

¹⁹¹ Ian Boudreau, *US Loot Box Ban Bill Gains Bipartisan Support in the Senate*, PC GAMER (May 24, 2019), <https://www.pcgamer.com/us-loot-box-ban-bill-gains-bipartisan-support-in-the-senate/>.

¹⁹² Stefanie Fogel, *Loot Box Bill Moves Forward with Bipartisan Support*, VARIETY (May 23, 2019), <https://variety.com/2019/gaming/news/loot-box-bill-moves-forward-1203224727/>.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

spending in parents' hands rather than in the government's.¹⁹⁵ The bill "has been referred to the Senate Committee on Commerce, Science, and Transportation," where both democratic senators that signed on to the bill hold seats.¹⁹⁶ Despite all of the concerns about loot boxes in the past year and the growing number of countries deciding to regulate them, loot boxes have actually become more prevalent in world's top video games.¹⁹⁷

III. PROBLEMS WITH CURRENT APPROACHES

Before illustrating what an effective loot box ban could look like, it is necessary to highlight some downfalls of the current strategies and outline their mistakes. As discussed below, the best course may be self-regulation. In its current form, however, self-regulation has been insufficient. As discussed above, the ESA, responding to the FTC's investigation of loot boxes, advocates heavily for the use of tools and information it argues the industry already provides to parents to control in-game spending.¹⁹⁸ The primary tool it is likely referring to is the "in-game purchases" label that appears on games containing microtransactions.¹⁹⁹ However, the vague "in-game purchases" label by the ESRB does not differentiate for parents between harmful gambling mechanics and

¹⁹⁵ Steve Watts, *US Senate Loot Box Bill "Riddled with Inaccuracies," Says ESA*, GAMESPOT (Jun. 4, 2019), <https://www.gamespot.com/articles/us-senate-loot-box-bill-riddled-with-inaccuracies-/1100-6467222/>; see *Introducing a New Interactive Element: In-Game Purchases (Includes Random Items)*, ENTMT SOFTWARE RATING BD. (Apr. 13, 2020), <https://www.esrb.org/blog/in-game-purchases-includes-random-items/> (noting that the label that appears on a video game's packaging is the "information" given to parents that Pierre-Louis referred to in his statement).

¹⁹⁶ Boudreau, *supra* note 191.

¹⁹⁷ Mattha Busby, *Loot Boxes Increasingly Common in Video Games Despite Addiction Concerns*, THE GUARDIAN (Nov. 22, 2019), <https://www.theguardian.com/games/2019/nov/22/loot-boxes-increasingly-common-in-video-games-despite-addiction-concerns>.

¹⁹⁸ Watts, *supra* note 195.

¹⁹⁹ Patricia E. Vance, *What Parents Need to Know About Loot Boxes (and Other In-Game Purchases)*, ENTMT SOFTWARE RATING BD. (July 24, 2019), <https://www.esrb.org/blog/what-parents-need-to-know-about-loot-boxes-and-other-in-game-purchases/>.

more straightforward transactions. Many parents do not understand what a loot box is,²⁰⁰ and the “in-game purchases” label sweeps up a wide range of possible transactions in its language.²⁰¹ For example, the label can refer to a simple transaction for a cosmetic item, or to a convoluted purchase for in-game currency that is then spent on a loot box.²⁰² Despite the ambiguity in this label, the ESRB continues to express an unwillingness to include a specific warning about loot boxes or gambling mechanisms out of fear of “overwhelm[ing] [parents] with a lot of information.”²⁰³ In April of 2020, it budged on that position only slightly when it took another half measure by adding to the “in-game purchases” label a parenthetical stating: “includes random items.”²⁰⁴ However, unlike the content descriptor “real gambling,” this new label does not affect the age rating for a video game,²⁰⁵ showing that the ESRB still has no plans to include loot boxes in their age ratings process.²⁰⁶

Government regulations, like self-regulatory efforts, have similarly been insufficient. As discussed above, the Netherlands was one of the first countries to enact a ban on loot boxes.²⁰⁷ Being among the first on the scene, it is understandable that the effort

²⁰⁰ Sebastian Schwidessen, *USA: New Loot Box Bill Introduced . . . Again*, LINKEDIN (Apr. 27, 2018), <https://www.linkedin.com/pulse/usa-new-loot-box-bill-introduced-again-sebastian-schwidessen-ll-m/>.

²⁰¹ Vance, *supra* note 199.

²⁰² *Id.*

²⁰³ Schwidessen, *supra* note 200.

²⁰⁴ Jay Peters, *ESRB Introduces a New Label to Indicate that a Game Has Loot Boxes*, THE VERGE (Apr. 13, 2020), <https://www.theverge.com/2020/4/13/21219192/esrb-new-label-loot-boxes-gacha-game>.

²⁰⁵ *Ratings Guide*, ENTM’T SOFTWARE RATING BD., <https://www.esrb.org/ratings-guide/> (last visited Nov. 12, 2020).

²⁰⁶ Another tool the ESA appears to suggest will assist parents trying to navigate in-game spending is the provision of information in the form of online guides. Although perhaps more meaningful than its vague labels, the practice itself seems to contradict its own concerns about “overwhelming” parents with information. *See, e.g., Parental Controls*, ENTM’T SOFTWARE RATING BD., <https://www.esrb.org/tools-for-parents/parental-controls/> (last visited Nov. 12, 2020) (explaining that the ESRB provides online guides for parents to learn how to block their children from accessing age restricted content, spending money, spending an excessive amount of time playing, or talking to strangers online).

²⁰⁷ Davidson, *supra* note 42.

would not necessarily be the most carefully crafted legislation. Under its regime, for example, only instances where content from loot boxes became transferrable on an in-game market after purchase could be considered gambling,²⁰⁸ leaving highly popular games with loot boxes untouched, so long as the developer does not support selling or trading items.²⁰⁹ Games like *FIFA*, where the trading of items is *possible*, but not sanctioned by EA,²¹⁰ remain exempt from the Dutch ban.²¹¹ This approach blinds itself to the real harms, in order to fit loot boxes into the narrow definition of gambling. In doing so, the Netherlands leaves out some important examples of virtual gambling. If U.S. lawmakers are going to propose legislation on loot boxes, it is imperative that those efforts accurately state what a loot box is. If they define them too narrowly, they run the risk of making the same mistake as the Netherlands, allowing large titles like *FIFA* to slip through the cracks.

Recent attempts at regulating loot boxes in the United States have similarly not been without their faults. The first effort in Hawaii exposed some of the concepts of loot boxes that lawmakers often get wrong.²¹² For example, Hawaii's bill contains language making it unlawful for a *retailer* to *sell* a game that contains loot boxes.²¹³ This restriction, although seeming to achieve the desired effect, rests on three assumptions that would ultimately produce an anemic bill. First, not all games that contain loot boxes are "sold."²¹⁴ Some of the most popular examples of loot boxes are contained within games like *Fortnite* that are free-to-play. Under this language, making those games available to minors for no charge would not be unlawful.²¹⁵ Thus, any effective loot box bill needs to include not only games that are sold, but those that are free to download and play.

²⁰⁸ DUTCH GAMES ASS'N, *supra* note 58.

²⁰⁹ Yin-Poole, *supra* note 45.

²¹⁰ Yin-Poole, *supra* note 75.

²¹¹ Yin-Poole, *supra* note 45.

²¹² Paul Meekin, *Hawaii's Loot Box Ban Might Have Major Loot Hole*, HEAVY (Feb. 14, 2018, 7:16 AM), <https://heavy.com/games/2018/02/loot-box-ban-hawaii-loop-hole/>.

²¹³ *Id.*

²¹⁴ Schwiddessen, *supra* note 200.

²¹⁵ Meekin, *supra* note 215.

The second problem with the language of the proposed Hawaii bill, and those like it, is that not all games contain loot box mechanics when they are released.²¹⁶ The Hawaiian bill acknowledges that some game developers might sell their game with no loot box in it, only to then add them later through an update to the game.²¹⁷ One notable example of this practice is *FIFA*'s popular Ultimate Team mechanic, which was introduced five months after its release in 2009 through a \$10 add-on.²¹⁸ Although EA continues to sell a new *FIFA* game each year with the Ultimate Team mode always included, another developer could avoid a loot box ban similar to the one drafted by the Hawaiian legislature by selling its games without loot box mechanics, and slipping them in later through an update.²¹⁹ Any future legislative efforts must recognize this wide exception and ensure developers do not skirt around the language of the bill.

The third shortcoming of the proposed Hawaiian bill is that it places the bulk of its enforcement on retailers.²²⁰ For any regulation of loot boxes to have a deterrent effect, the punishment needs to fall on the developers and publishers of the games, not the third-party retailers that pass games on to consumers.²²¹ Physical retailers do not receive direct financial benefit from microtransactions in video games. In fact, they only receive a percentage of profits per physical copy that is sold. On the other hand, online retailers, like the Apple App Store or Steam, receive a thirty percent cut of any microtransaction—an arrangement some developers are starting to push back against.²²² Lawmakers in this area should recognize that enforcement will be most effective when pursued against the

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Samit Sarkar, *EA Looks Back on Five Years of the FIFA Ultimate Team Juggernaut*, POLYGON (Mar. 19, 2014, 1:00 PM), <https://www.polygon.com/2014/3/19/5525710/fifa-ultimate-team-fifth-anniversary-ea-sports-interview>.

²¹⁹ Meekin, *supra* note 215.

²²⁰ *Id.*

²²¹ *Id.*

²²² Nick Statt, *Apple Just Kicked Fortnite Off the App Store*, THE VERGE (Aug. 13, 2020, 2:59 PM), <https://www.theverge.com/2020/8/13/21366438/apple-fortnite-ios-app-store-violations-epic-payments>.

developers and publishers that create and benefit from the predatory practices such legislation is designed to deter.

Following states' efforts to regulate loot boxes, the bill currently in the United States House of Representatives is far from perfect. The most obvious flaw of the PCAGA is its vague language describing what behavior would be unlawful.²²³ Instead of an outright ban on the sale of loot boxes, or even banning their sale to children, the legislation makes it unlawful to publish or distribute games with loot boxes in them if the game is "minor-oriented," or if the publisher or developer has constructive knowledge that *any* users are under the age of eighteen.²²⁴ The vague language of the bill ultimately leaves developers and publishers in the dark over whether their game will be covered, and gives wide discretion to the FTC on who they are going to enforce the prohibition against.

The bill borrows its definition of the term "minor-oriented" from the Children's Online Privacy Protection Act,²²⁵ which has itself recently inflicted anxiety on YouTube and its most popular content creators as both entities attempt to ascertain whether the videos on the popular website constitute "minor-oriented" content.²²⁶ With vague references to a number of factors that are supposed to be weighed together,²²⁷ and severe penalties for violating the law, content creators who post their videos to YouTube are left to wonder whether they are in violation and will lose their main source of revenue.²²⁸ In a similar fashion, video game developers, under these

²²³ Dell Cameron, *Why That Anti-Loot Box Bill Is Actually Kinda Shitty*, GIZMODO (May 23, 2019, 6:09 PM), <https://gizmodo.com/why-the-anti-loot-box-bill-is-actually-kinda-shitty-1834987260>.

²²⁴ Protecting Children from Abusive Games Act, S. 1629, 116th Cong. (2019).

²²⁵ Hawley, *supra* note 175.

²²⁶ Makena Kelly & Julia Alexander, *YouTube's New Kids' Content System Has Creators Scrambling*, THE VERGE (Nov. 13, 2019, 3:06 PM), <https://www.theverge.com/2019/11/13/20963459/youtube-google-coppa-ftc-fine-settlement-youtubers-new-rules>.

²²⁷ The factors in the Children's Online Privacy Protection Act and the Protecting Children from Abusive Games Act are almost identical. *See* S. 1629 (noting factors such as, *inter alia*, the product's subject matter, the visual content, the music or audio content, and the use of animated characters or activities that appeal to individuals under the age of 18).

²²⁸ Kelly & Alexander, *supra* note 226.

same amorphous factors, will not have a clear indication of whether their game with loot boxes will run afoul of the legislation until the FTC decides to enforce penalties against them.

In addition to its potentially overbroad application, the “pay-to-win” language of the House bill targets the wrong type of transaction and could eliminate the business model of a substantial number of “app” games.²²⁹ The PCAGA inexplicably takes aim at a type of microtransaction that no one argues is tied to gambling addiction.²³⁰ This unnecessary focus on “pay-to-win” mechanics would ultimately do more harm to the industry than any possible benefit it could produce.²³¹ Furthermore, the House’s proposed loot box legislation glaringly misses one of the most popular and most addictive loot box mechanics: those which contain cosmetic items that change the appearance of the player’s character.²³² The bill draws a perplexing line at these items, suggesting a fundamental misunderstanding of the problem.²³³

Despite its shortcomings, one of the few things the PCAGA does get right is its report on compliance and study on the psychological effects of microtransactions and loot boxes.²³⁴ The Act would require the FTC to conduct this study and report its findings to

²²⁹ The “pay-to-win” language could mean any number of things. It could swallow up straightforward microtransactions with no randomization included in the purchase, such as where a player buys a better weapon or item to improve their performance in the game. However, it could also apply to cell phone “app” games where you can simply pay to advance a timer that must expire before the player can continue progressing in the game. Neither of these transactions utilize any element of chance, and yet could be considered “paying to win.” Paul Tassi, *We Shouldn’t Trust the US Government to Know How to Ban Loot Boxes and Microtransactions*, FORBES (May 10, 2019), <https://www.forbes.com/sites/paultassi/2019/05/10/we-shouldnt-trust-the-us-government-to-know-how-to-ban-loot-boxes-and-microtransactions/#63aeaf2031c7>.

²³⁰ *Id.*

²³¹ Cameron, *supra* note 223.

²³² Tassi, *supra* note 229.

²³³ Jason Schrier, *U.S. Senator Says His Anti-Loot Box Bill Has the Video Game Industry Worried*, KOTAKU (May 21, 2019, 1:30 PM), <https://kotaku.com/u-s-senator-says-his-anti-loot-box-bill-has-the-video-1834905639> (noting that Senator Hawley admittedly does not play video games).

²³⁴ Protecting Children from Abusive Games Act, S. 1629, 116th Cong. §§ 4–5 (2019).

Congress every two years.²³⁵ If lawmakers hope for legislation to have a lasting effect, any proposal should require such a study to be conducted annually by the FTC.²³⁶ One would hope that, if the PCAGA succeeds in becoming law, that its final form takes into account many of these shortfalls and proposed solutions.

IV. PROPOSING A MORE SENSIBLE APPROACH TO REGULATING LOOT BOXES

A. Is Regulation Imminent?

First and foremost, it is worth addressing the arguments made against regulating loot boxes at all. Some argue that regulation is wholly unnecessary because the industry is perfectly capable of regulating itself.²³⁷ Indeed, regulation in the United States could be rendered unnecessary if, for example, the ESRB preemptively began to include a “gambling mechanic” or “loot box” warning on each game containing such a mechanic, and subsequently raised each game’s age rating to “Mature” or “M.” Such a rating signals to retailers not to sell the game to any person under the age of seventeen.²³⁸ Although selling an M-rated video game to someone under the age of seventeen does not carry any legal penalties, the ESRB rating system is widely regarded as the “gold standard for entertainment rating systems in terms of efficacy.”²³⁹

The question remains whether the ESRB would take such steps. Although the industry reacted to threats of government regulation in the past by self-regulating,²⁴⁰ the system of ratings employed by the ESRB as part of its own regulating procedures has not been explicitly tied to a monetization practice in the same way loot boxes should be.²⁴¹ Violence or nudity in a video game is not as directly

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Charlie Hall, *Anti-Loot Box Bill Could Radically Change How Video Games Are Sold*, POLYGON (May 23, 2019), <https://www.polygon.com/2019/5/23/18637556/anti-loot-box-bill-microtransaction-ban-legal-analysis-esa>.

²³⁸ ENTMT SOFTWARE RATING BD., *supra* note 205.

²³⁹ Gilbert *supra* note 35.

²⁴⁰ Chalk, *supra* note 110.

²⁴¹ Kim, *supra* note 12.

ted to a publisher's stream of revenue as compared to loot boxes.²⁴² The ESRB is further unlikely to self-regulate this predatory practice if it does not believe that government regulation is likely to occur.²⁴³ Given these realities, formal regulation seems like the more practical way of addressing the issue.

A second argument against regulating loot boxes attempts to frame their purchase as analogous to buying packs of baseball or Pokémon cards.²⁴⁴ However, loot boxes within video games are significantly distinct from real-life trading card packs.²⁴⁵ This is not only because the player experiences a much different psychological response from opening a loot box, but also because a loot box facilitates an easily accessible and immediate payment, uses in-game currency to mask the feeling of paying real-life money, and most importantly, has been linked by researchers to problem gambling.²⁴⁶ Although some try to dispute that final claim and argue there is no research showing such a connection,²⁴⁷ numerous independent reports seem to suggest otherwise.²⁴⁸

One final argument against regulating loot boxes is that they simply do not fit within the legal definition of gambling.²⁴⁹ Most

²⁴² See *id.* (showing that Electronic Arts derives one-third of all revenue from loot boxes); see also Ryan J. Black et. al, *Shocking U.S. "Loot Box" Bill Should Surprise No One: The Video Game Industry Under Attack*, MCMILLAN LLP (May 2019), <https://mcmillan.ca/insights/shocking-u-s-loot-box-bill-should-surprise-no-one-the-video-game-industry-under-attack/>.

²⁴³ Gilbert *supra* note 35.

²⁴⁴ Bailey, *supra* note 101.

²⁴⁵ See generally Naessens, *supra* note 59 (reporting that the purchasing of in-game currency to buy loot boxes is a deliberate choice by game developers to create a personal reality which is disconnected from the real world, coupled with easy and anonymous payment methods, to create a system that manipulates players into spending more money).

²⁴⁶ *Id.*

²⁴⁷ Sinclair, *supra* note 156.

²⁴⁸ FTC, *supra* note 164; Li et al., *supra* note 29; Zendle & Cairns, *supra* note 167, at 14; Peter Naessens, *supra* note 58.

²⁴⁹ James G. Gatto & Mark A. Patrick, *All Bets Are On! Gambling and Video Games*, SHEPPARD MULLIN (Sept. 2018), https://www.mygamecounsel.com/wp-content/uploads/sites/32/2018/09/All-Bets-Are-On_Gambling-and-Video-Games-Article-0918.pdf (explaining the Ninth Circuit decision rejecting the findings of other federal courts that certain games are not illegal gambling).

substantive American laws on gambling come from the states,²⁵⁰ and it is defined generally as a “[p]ayment of some consideration” for a “prize,” the receipt of which is “determined by chance and not skill.”²⁵¹ Those who make the claim that loot box mechanics are not gambling typically argue that a player either *never* receives something of value (because the item cannot be sold or monetized),²⁵² or that they “*always* receive something of value” (in other words, the purchaser cannot “lose”).²⁵³ These claims attempt to refute the seemingly indisputable and intuitive notion that various players attach differing values to all the items they receive.²⁵⁴ Put simply, a player knows when they have wasted their money on a worthless item, and conversely, when their “bet” was worth it because they received a very rare or valuable item.²⁵⁵ Indeed, at least one study has shown that virtual economic behaviors follow their real-world macroeconomic counterparts.²⁵⁶ Furthermore, these claims ignore those situations where players can buy and sell the items online for real-world currency,²⁵⁷ with or without the game developer’s consent.²⁵⁸

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² Tae Kim, *State Legislators Call EA’s Game a ‘Star Wars-Themed Online Casino’ Preying on Kids, Vow Action*, CNBC (Nov. 22, 2017, 8:57 AM), <https://www.cnbc.com/2017/11/22/state-legislators-call-eas-game-a-star-wars-themed-online-casino-preying-on-kids-vow-action.html> (“‘Gambling’ requires a wager to win something of tangible value. If the thing won can’t be sold or monetized, it isn’t gambling. Period.”).

²⁵³ Makena Kelly, *How Loot Boxes Hooked Gamers and Left Regulators Spinning*, VERGE (Feb. 19, 2019, 8:00 AM) (emphasis added), <https://www.theverge.com/2019/2/19/18226852/loot-boxes-gaming-regulation-gambling-free-to-play> (quoting the CEO of the Entertainment Software Association as stating, “loot boxes do not constitute gambling because players always receive something of value that enhances their experience.”).

²⁵⁴ See Vox, *Why Spend Money in Video Games?*, YOUTUBE (Oct. 8, 2019), https://www.youtube.com/watch?v=ZBxvAE_ux9U&vI=en (explaining why some people put a high value on virtual items).

²⁵⁵ Many games rate the rarity of items or assign statistical numbers to their value, like player ratings in FIFA Ultimate Team. Murphy, *supra* note 127.

²⁵⁶ Edward Castronova et al., *As Real as Real? Macroeconomic Behavior in a Large-Scale Virtual World*, 11 NEW MEDIA & SOC’Y 685, 704 (2009).

²⁵⁷ Yin-Poole, *supra* note 75; Bozhenko, *supra* note 46.

²⁵⁸ Yin-Poole, *supra* note 45.

B. Litigative Efforts

In the absence of meaningful self-regulation or government oversight, some of those who have suffered the harms related to loot-box mechanics have turned to the courts for relief.²⁵⁹ Most state gambling laws create a cause of action for a plaintiff to recover losses incurred by illegal gambling.²⁶⁰ While no states have created specific causes of action against publishers of video games containing loot boxes, consumers alleged to have been injured by them appear to have two options: (1) sue under the Racketeer Influenced and Corrupt Organizations Act (“RICO”); or (2) sue under state consumer protection laws.²⁶¹

In considering a potential RICO action, *Chaset v. Fleer/Skybox Int’l*, decided by the Ninth Circuit Court of Appeals, is instructive.²⁶² The plaintiffs in *Chaset* brought a class action against manufacturers and distributors of sports trading cards,²⁶³ arguing that the random inclusion of limited edition cards in packages of otherwise randomly assorted sports and entertainment trading cards constituted unlawful gambling.²⁶⁴ The Ninth Circuit disagreed, affirming the lower court’s dismissal on a lack of standing, because the plaintiffs could not show injury to their business or property.²⁶⁵ The court stated that the plaintiff’s not receiving the limited edition cards in the packs they bought was an injury to a mere expectancy interest or to an intangible property interest, and was not sufficient to confer RICO standing.²⁶⁶

The holding in *Chaset* demonstrates that a plaintiff alleging a similar injury caused by a publisher of a video game is on shaky ground at best. Although it is hard to predict whether a judge would follow the line of reasoning in *Chaset* or hold that loot box mechanics are a form of gambling, the possibility seems to exist.

²⁵⁹ Hansfield, *supra* note 36.

²⁶⁰ Gatto & Patrick, *supra* note 249.

²⁶¹ Hansfield, *supra* note 36.

²⁶² *Chaset v. Fleer/Skybox Int’l, LP*, 300 F.3d 1083 (9th Cir. 2002).

²⁶³ *Id.* at 1084.

²⁶⁴ *Id.* at 1086.

²⁶⁵ *Id.* at 1087.

²⁶⁶ *Id.*

However, a court considering whether loot boxes constitute gambling may also look to *Kater v. Churchill Downs*, where the Ninth Circuit held that the defendant's virtual "chips" in "Big Fish Casino" were a "thing of value" under Washington state law.²⁶⁷ In *Big Fish Casino*, a free app game, players could wager and win virtual chips on casino games like blackjack, poker, and slot machines.²⁶⁸ Players could also buy more virtual chips through in-app microtransactions.²⁶⁹ The Court held that whether or not players could redeem the virtual chips for real-world currency did *not* determine whether they were "things of value" under Washington's broad statute.²⁷⁰ Thus, the court's holding could perhaps be applicable to loot box rewards that similarly cannot be so readily traded for real world currency. In other words, a Ninth Circuit court looking at a similar consumer protection case against loot boxes, following *Kater's* reasoning, could find that the virtual items won through loot boxes are "things of value." However, it remains to be seen whether states' courts would reach a similar conclusion, or to what extent the Ninth Circuit's decision was based on the fact that *Big Fish Casino* was, as the name suggested, a game designed to emulate a classic casino.

More recently, Epic Games, the developer of *Fortnite*, has been sued in two separate lawsuits.²⁷¹ In March of 2019, aggrieved gamers brought suit against the company in a California federal court under the state's consumer fraud statute, alleging that the game maker, through material misrepresentations and omissions, overstated the odds of receiving rare loot in *Fortnite's* loot boxes.²⁷²

²⁶⁷ *Kater v. Churchill Downs Inc.*, 886 F.3d 784, 788 (9th Cir. 2018).

²⁶⁸ *Id.* at 785.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 787–88.

²⁷¹ Edward C. Baig, *Epic Games Sued for Not Warning Parents 'Fortnite' Is Allegedly as Addictive as Cocaine*, USA TODAY (Oct. 9, 2019), <https://www.usatoday.com/story/tech/talkingtech/2019/10/07/fortnite-producer-epic-games-lawsuit-says-addictive-as-cocaine/3900236002/>; Liz Lanier, *Lawsuit Targets Epic's 'Predatory' Loot Boxes in 'Fortnite'*, VARIETY (Mar. 1, 2019), <https://variety.com/2019/gaming/news/lawsuit-loot-boxes-fortnite-1203152894/>.

²⁷² *R.A. v. Epic Games, Inc.*, No. CV 19-1488-GW-EX, 2019 WL 6792801, at *1 (C.D. Cal. July 30, 2019).

That same year, Epic Games was sued in Canada, where plaintiffs alleged the company failed to warn consumers about the “addictive nature” of *Fortnite*.²⁷³ Both cases are pending, but in an interesting move perhaps spurred by the lawsuits, Epic Games recently announced it was changing the loot box mechanics in *Fortnite* in order to allow players to see the items inside them before purchasing them.²⁷⁴ Whether the plaintiffs in the California suit will be able to show standing is unclear, given the decision in *Chaset*.²⁷⁵ But given this and other uncertainties associated with litigation, it seems wise to take the decision of loot box legality out of the hands of the courts. Instead, Congress should clarify precisely which conduct in video games constitutes gambling and regulate loot boxes expressly. It is vital, however, that Congress acts with care regarding loot boxes, lest its regulations be ineffective or sweep up other legitimate transactions in its grasp.

C. A Carefully Crafted Loot Box Ban

The first consideration in crafting effective loot box legislation is to avoid the mistakes of previous attempts, including the exceptions carved out by the Dutch Gaming Authority,²⁷⁶ or those proposed in the PCAGA.²⁷⁷ The Dutch focus on only those loot boxes that contain items transferrable outside the video game is misplaced and ignores the underlying problems around gambling in an effort to fit loot boxes into current gambling legislation.²⁷⁸ For its part, the proposed bill by Senator Hawley unnecessarily focuses on items that accelerate the progression of the player’s journey through the game, and completely ignores cosmetic items that many players

²⁷³ Baig, *supra* note 271.

²⁷⁴ Craig Clough, ‘Fortnite’ Maker Nears Win in Bid to Move ‘Loot’ Suit to NC, LAW360 (Jul. 29, 2019), <https://www.law360.com/articles/1183198>.

²⁷⁵ See Hansfield, *supra* note 36 (arguing the likely outcome of the lawsuits will be dismissal for lack of standing given the failure to establish economic injury, although the paper does not consider the likely effect of *Kater*).

²⁷⁶ DUTCH GAMES ASS’N, *supra* note 57.

²⁷⁷ See generally Protecting Children from Abusive Games Act, S. 1629, 116th Cong. (2019).

²⁷⁸ DUTCH GAMES ASS’N, *supra* note 57.

find very valuable.²⁷⁹ Additionally, the definition of loot boxes must not allow an exclusion for games that disclose the odds of receiving a certain category of item from a loot box, because nothing stops developers from lying about the odds²⁸⁰ or changing them for promotional material when they have a clear incentive to do so.²⁸¹

The second consideration then, in forming clear and careful loot box legislation is that Congress, and not the states, should be responsible for authoring it. Leaving the states to regulate loot boxes would lead to uncertainty amongst the industry regarding which systems producers could implement in certain states. This in turn could raise the costs of creating video games that include monetization mechanics, as it would likely require a developer to seek legal advice to parse out which of their in-game transactions would be legal in each state. Smaller developers who cannot afford such legal advice would likely either forgo micro-transactions entirely, thus risking earning less revenue overall and stunting their growth, or make assumptions about their monetization practices, thereby exposing themselves to risks of fines or litigation in certain states. Additionally, consumers in one state may feel slighted in competitive online games where their peers in another state are free to spend as much money as they like to obtain items that put them at an advantage. Therefore, leaving regulation to the states would run the risk of upsetting consumers and harming the industry. Lastly, any recourse would likely not come from private actions because plaintiffs may lack standing to sue video game developers in consumer fraud cases.²⁸² For these reasons, it is imperative that action come in the form of legislation and at the federal level.

²⁷⁹ Hawley, *supra* note 175.

²⁸⁰ Brendan Sinclair, “*There Is a Benefit for Lying [About Loot Boxes]*”, US GAMER (Aug. 9, 2019), <https://www.usgamer.net/articles/ftc-loot-boxes-this-week-in-business>.

²⁸¹ Video game companies have been known to pay content creators on platforms like YouTube and Twitch to open loot boxes on video, in carefully controlled situations where those same game companies have changed the odds of opening more valuable items from the loot box for that specific promotional material, in order to misrepresent the odds of loot boxes to consumers. Charlie Hall, *FTC Panel Reveals Troubling Relationship Between Streamers and Loot Box Creators*, POLYGON (Aug. 7, 2019, 3:19 PM), <https://www.polygon.com/2019/8/7/20758974/ftc-loot-box-panel-streamer-publisher-sponsorships>.

²⁸² Hansfield, *supra* note 36.

Substantively, it is crucial for Congress to carefully define loot boxes and make clear the boundaries of that definition. Exceptions to the definition of loot boxes in any legislation should include (1) items that can be won through gameplay alone, regardless of whether the item is random, and (2) items of certain value that can be purchased directly with real-world currency or in-game currency, and whose obtainment is a certainty of purchase and not a product of random chance. These two crucial exceptions will make sure that items that are traditionally won through gameplay, which were the staple of video games for years prior to the introduction of loot boxes, and microtransactions lacking any form of chance, which have generated vital revenue for game developers,²⁸³ are not touched.

Once Congress clearly sets out the exceptions for its definition of loot boxes, it must then be unequivocal in banning, outright, all of them from video games sold in the United States. Similar to the Belgian approach, Congress should require developers to remove loot boxes from their games or face heavy fines.²⁸⁴ This strategy brings many benefits while avoiding nearly all the pitfalls and shortcomings of other methods. Consequently, this approach does away with the unnecessarily confusing and unpredictable “minor-oriented” factors²⁸⁵ adopted by the proposed bill currently in the Senate, and the possible cost of studies relating to the effects of loot boxes remaining the market.²⁸⁶

An outright ban also avoids limiting language like the “sale of video games that feature so-called loot boxes or loot crates as part of their gameplay.”²⁸⁷ Thus, games that are free to download would not be exempt, and developers cannot skirt the ban by simply adding loot boxes to their game through an update after its initial release. Additionally, it would abate the ESRB’s fears that parents will be overwhelmed by information on labels on a physical box, and accidentally end up buying a game for their child that has loot

²⁸³ See Kenmare, *supra* note 22 (reporting that EA’s Ultimate Team made \$1.37 billion in 2019 and had surpassed that number as of May of 2020).

²⁸⁴ Naessens, *supra* note 59.

²⁸⁵ Protecting Children from Abusive Games Act, S. 1629 § 2(5), 116th Cong. (2019).

²⁸⁶ *Id.*, § 4-5.

²⁸⁷ Good, *supra* note 152.

boxes.²⁸⁸ Finally, a ban on the existence of loot boxes centers enforcement penalties on developers instead of retailers. Because retailers have no say over whether a game includes loot boxes, the responsibility for compliance should fall on developers who have actual control over the gambling mechanics in their games and derive the monetary benefits of their existence.

Enforcement of a ban should be left to the FTC and states attorneys general, like the proposed bill in the Senate currently requires.²⁸⁹ Furthermore, the FTC should be required to publish a report on the industry's state of compliance and current gambling mechanics in video games as the current proposed bill requires,²⁹⁰ but annually rather than biennially. Since there would be no dividing line along age, the study on compliance would be much more straightforward than the currently proposed approach.

An outright ban with such burden-shifting of compliance and punishment, and which contains a thoughtfully constructed definition of loot boxes that distills all the lessons learned from previous approaches, could provide effective regulation of gambling in video games while avoiding the various shortcomings of its predecessors.²⁹¹

CONCLUSION

Few could have predicted the fervent backlash that would result from the release of a *Star Wars* video game in 2018,²⁹² or that foreign and domestic regulatory bodies would find it necessary to immediately (and perhaps brazenly) regulate one of the most lucrative practices in contemporary video gaming.²⁹³ In response to signs of impending regulation, the industry has taken preliminary steps to address loot box concerns.²⁹⁴ However, their attempts have not proven effective, prompting lawmakers to take matters into their

²⁸⁸ Schwiddessen, *supra* note 200.

²⁸⁹ S. 1629 § 3.

²⁹⁰ *Id.* § 4.

²⁹¹ See discussion *supra* Sections I–III.

²⁹² GAMESPOT, *supra* note 38.

²⁹³ Orland, *supra* note 28; Kenmare, *supra* note 22.

²⁹⁴ Sinclair, *supra* note 156.

own hands.²⁹⁵ Some lawmakers have attempted to draw distinguishing lines between legal and illegal loot boxes.²⁹⁶ Meanwhile, the industry's colorful characterization of loot boxes has likely persuaded some lawmakers that they do not constitute gambling.²⁹⁷ The result is that some states that have tried to pass bills have failed to do so.²⁹⁸

Loot box regulation is undoubtedly a new issue, and action on it is far from over. Incidentally, if Congress is serious about effectively regulating loot boxes, it must drastically change the bill currently moving through the House that purports to do so.²⁹⁹ Instead of a vague balancing act, Congress needs to speak clearly on the issue and let the video game industry know once and for all that exposing children to predatory gambling mechanics is not going to be tolerated in the United States.

²⁹⁵ See discussion *supra* Sections II–III.

²⁹⁶ See *DUTCH GAMES ASS'N*, *supra* note 57 (finding that loot boxes are only illegal when the items they contain are transferrable).

²⁹⁷ Bailey, *supra* note 101.

²⁹⁸ Brestovansky, *supra* note 143.

²⁹⁹ Cameron, *supra* note 223.