This case may be cited as 1 M.W. 1 (2nd. Ct. App.) (2020).

Heard by JUDGES COTE, FOXWORTH, and KIMES, Judges of the 2nd District Court of Appeals of the State of Lincoln.

COTE, J. delivered the opinion of the Court, in which KIMES, J. joined.
FOXWORTH, J. filed a dissenting opinion.

MUSEUM OF WASTE, LLC v. CITY OF PEORIA

The Museum of Waste, a not for profit experimental art exhibition, opened in Peoria, Illinois in November of 2017. Founded and curated by Mario Benzenelli, an internationally renowned, award winning artist, the Museum's website purports it to be "an exploration of the ways we as humans are self-destructive toward ourselves and our planet." The museum consists of several exhibits, each of which petitioner claims shows a fundamental way in which humans waste their and our planet's potential. For instance, when the museum opened, the "Wasted Planet" exhibit allowed patrons to walk through a room littered with the amount of garbage that an average American family of four produces in a month. The exhibit also contained information regarding how patrons could decrease their waste footprint.

Another exhibit, "Wasted Potential," contained sculptures of individuals using drugs constructed completely out of drug paraphernalia such as syringes.

In June of 2018, the museum expanded and added another exhibit, entitled "Wasted Money." In this exhibit, Benzenelli installed three dozen fully operating slot machines and three fully operational craps tables. Around the room, numerous signs and banners advertised how small of a chance patrons had to come out ahead. The employees managing the craps tables were actors who mocked players for wasting their money. A running counter was displayed on the wall showing how much money had been wasted at the slot machines, which were specifically set to be even more difficult to win than normal casino slots. These decreased odds were fully displayed on the many prominent signs.

Benzenelli testified that despite these warnings and reminders, he expected that patrons would gamble, given the lack of gambling nearby. His expectation was more than met, and after the Wasted Money exhibit opened, patrons to the museum

increased by 250%. The city alleges and Benzenelli does not deny that the primary cause of this increase was the interest in gambling. Patrons spent tens of thousands of dollars trying to win the $1,000,000 jackpot, which was guaranteed through an insurance policy taken out by Benzenelli. Benzenelli testified that the jackpot was functionally impossible to win. All proceeds from the casino portion of the museum were donated to Gambler's Anonymous, though the museum kept the increased revenue from ticket sales to fund museum operations.

In February of 2019, Benzenelli received a communication from the local government stating that he was in violation of Peoria City Code 345.21(a), which bans table games and slot machines within city limits. Both parties agree that the devices and games implicated fall within the scope of 345.21(a). The City claims that this is the end of the analysis, and that courts in this state and elsewhere have found that games like slot machines and blackjack tables are not protected by the First Amendment. Benzenelli argues that while there is substantial case law to that effect, the instant case can be distinguished because those cases rely on the lack of artistic or communicative message in those games, which is not the case in his situation, where he is making a statement on a matter of public concern, which implicates core First Amendment and Illinois Constitutional concerns. Petitioner does not claim that the law is unconstitutional, but rather that it is unconstitutional as applied to his unique circumstances.

The court below found for the city. We review this appeal de novo.

The First Amendment of the Constitution reads, in relevant part, "Congress shall make no law...abridging the freedom of speech…" U.S. Const. Amend. I. The First Amendment was incorporated to the states in *Gitlow v. New York*, 268 U.S. 652 (1925). Though the language of the amendment states that Congress shall make no law abridging speech, the United States Supreme Court has made clear that, as with all amendments, there are exceptions to this. For instance, incitement to imminent lawless action is not protected by the First Amendment. *See, i.e. Brandenburg v. Ohio,* 395 U.S. 444 (1969).

To be protected by the First Amendment, "speech" need not be spoken or written words. Conduct is also protected. *See, eg, Stromberg v. California,* 283 U.S. 359 (1931); *Tinker v. Des Moines*, 393 U.S. 503 (1969). In the instant case, the only verbal or written speech involved is by the table dealers and in the form of the running count of gambling losses at the venue. The state claims that the precedents of this state's Supreme Court require us to find that there is no speech or conduct

worthy of protection of the First Amendment, because that Court has found that slot machines are not protected by the First Amendment. See, *e.g., Serpico v. Vill. of Elmwood Park,* 344 Ill. App. 3d, 203 (2003. We disagree. While *Serpico* and cases like it did find that slot machines and simulated video gaming devices were not protected by the First Amendment, there is a key difference between those cases and the instant case. Those cases turned on the point that while games and entertainment may be protected by the First Amendment, "there must be some element of information or some idea being communicated." *Serpico*, at 210, quoting *Showplace Corp. v. City of New York*, 536 F. Supp. 170, 173 (E.D. N.Y. 1982).

While it is true that the machines themselves are not protected according to the precedent in this state and elsewhere, we can find no example of a case where machines and table games were used in a manner as in the instant case. Due to this anomaly, we are in some ways writing on a blank slate. We find that in the particular circumstances of the current case, the devices are clearly being used to communicate a message on a matter of public concern, and thus are worthy of First Amendment protections.

That threshold question being met, we turn to the merits.

Peoria City Code 345.21(a) reads "It shall be unlawful for any person, firm or corporation to keep, locate, maintain or operate any simulated video or mechanical gaming device, or any table game of chance, within the City. The definitions section clearly defines these terms and there is no claim of vagueness or overbreadth."

A key question in First Amendment inquiries is whether a law is content-based or content-neutral. "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972). In other words, the government may not regulate speech based on the ideology of the message or the topic of the speech. See, e.g. *Carey v. Brown,* 477 U.S. 455 (1980). We hold that the government is not doing so here. The law itself does not state that anti-gambling or anti-waste messages are not allowed, simply that slot machines and table games of chance are not allowed regardless of how they are used. While content-based restrictions are subject to strict scrutiny, content-neutral restrictions are subject only to intermediate scrutiny. *Turner Broadcasting System Inc. v. FCC,* 512 U.S. 622 (1994).

To withstand intermediate scrutiny, a law must 1. further an important government interest 2. by means that are substantially related to that interest. *Craig v. Boren*, 429 U.S. 190 (1976). Here, however, we are dealing with a mixture of speech and non-speech elements, and thus the test is slightly different.

In *United States v. O'Brien,* 391 U.S. 367 (1968), the Supreme Court held that when speech and nonspeech elements are combined in the same course of conduct, the appropriate test is to determine if 1. A government regulation is within the constitutional power of the government; 2. it furthers an important or substantial government interest; 3. the governmental interest is unrelated to the suppression of free expression; and 4. the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest.[1] *Id.*

We have discussed that our Supreme Court and other courts in this state have repeatedly held that the government can ban slot machines, and that it furthers an important interest. As we stated *supra*, we are convinced that the government interest here is unrelated to the suppression of free expression. That being said, we find that the restriction on the conduct in the instant case illustrates that the law in question goes further than is essential to the furtherance of that interest. Here, an internationally renowned artist's expression on a core First Amendment issue is being restricted by the law in question. The Museum is a non-profit operation and all proceeds from the gambling are being donated to charity. All proceeds from ticket sales go to the upkeep of the exhibit.

As such, we find that the specific conduct in question here is protected by the First Amendment, and that the government has gone too far in applying its law to this specific conduct. Even if the conduct was not protected by the First Amendment, it is worth noting that ""[t]he Constitution of [Lincoln] is even more far-reaching than that of the constitution of the United States in providing that every person may speak freely, write and publish on all subjects, being responsible for the abuse of that liberty." *Village of South Holland v. Stein*, 373 Ill. 472, 479 (1940). *See also Montgomery Ward and Company v. United Retail Wholesale and Department Store Employees*, 400 Ill. 38 (1948). If the conduct is not protected by the First Amendment, it is surely protected by our Constitution. Accordingly, while we do not

[1] Our dissenting brother claims that these two tests are functionally identical. See *infra*. We believe that if the Supreme Court intended for the two tests to be identical, they would have used the same language for the two tests. We believe that the test for conduct, especially when it involves core First Amendment speech, is more stringent.

strike the law in its entirety, we issue a permanent injunction against the closure or interference with the exhibit by the government.

The trial court is reversed.

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FOXWORTH, J. dissenting

My colleagues today fundamentally misunderstand the First Amendment jurisprudence of the Supreme Court of the United States, and find, without a shred of evidence beyond general statements from decades ago, that a local ordinance is unconstitutional as applied to the conduct in the case before us. Because they fundamentally misstate and misinterpret the law, and because I believe there is no precedent supporting their assertions, I respectfully dissent.

The majority comes close to getting it right. Indeed, the conduct here should be protected by the First Amendment. Indeed, strict scrutiny is not the appropriate standard for this case. Indeed, either intermediate scrutiny or the test laid out by the Supreme Court in *United States v. O'Brien,* 391 U.S. 367 (1968) is the test for us to follow. I would note that though the majority draws a distinction, the two tests have largely been considered functionally identical.

The majority proceeds to correctly analyze three of the four factors of the *O'Brien* test before erring in remarkable hand-wavey fashion on the fourth factor in order to reach a result. While we might want to allow fringe cases like this to be protected by the First Amendment, we are judges, not legislators, and the law is clear.

The majority first errs by not even acknowledging a fundamental principle of constitutional law: that laws and local ordinances are presumed to be constitutional. See *Chavda v. Wolak*, 188 Ill. 2d 394, 398 (1999); *Greyhound Lines, Inc. v. City of Chicago*, 24 Ill. App. 3d 718, 723 (1974); see also *People ex rel. Lumpkin v. Cassidy*, 184 Ill. 2d 117, 123 (1998) (constitutionality is to be presumed). In order to overcome this presumption, "the party challenging the ordinance, namely, plaintiffs here, must show by clear and affirmative evidence that the ordinance is "arbitrary, capricious, or unreasonable; that there is no permissible interpretation of the enactment that justifies its adoption; or that the enactment will not promote the safety and general welfare of the public." *Serpico v. Vill. of*

Elmwood Park, 344 Ill. App. 3d 203 (2003). The plaintiff in this case, contrary to the claims of the majority, has done no such thing. The fact that one fact pattern may exist that brings an ordinance into question does not make it unreasonable, and no one, even the majority, claims that there is no permissible interpretation of the enactment that justifies its adoption. While plaintiff claim that the law in general does not promote the safety and welfare of the public as applied to his conduct, this does not matter. What matters is that here we have a content-neutral restriction on gambling devices, and the test of intermediate scrutiny is easily passed. The interest, after all, is preventing gambling and gambling addiction, and all the ordinance does is restrict devices that encourage those things.

"Gambling has traditionally been closely regulated, and even forbidden, without the implication that such restrictions violate the First Amendment. *Serpico,* at 210, quoting *There To Care, Inc. v. Commissioner of the Indiana Department of Revenue*, 19 F.3d 1165, 1167 (7th Cir. 1994). Gambling machines like the ones involved in this case have been repeatedly and unanimously found to not merit full First Amendment protection. *See,* in addition to *Serpico, O'Donnell v. City of Chicago*, 363 Ill. App. 3d 98 (2005); *Candy Lab Inc v. Milwaukee Cty*., 266 F. Supp. 3d 1139 (2017).

The majority seems to be suggesting that what is occurring here is art, not gambling, but in the current circumstances, the two cannot be separated. It may well be art, but the Museum is taking money from patrons in games of chance and facilitating gambling. That the scale is small, that a point is being made, or that the money is being donated to charity are all immaterial to the question of law. Ample alternative avenues of communication exist. *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986), as can be displayed by the other rooms in the exhibit, or the idea of pretend gambling machines, for instance, as suggested by the city.

It is not questioned by many that the First Amendment has limitations. The majority acknowledges this, then acts as if the First Amendment protects all conduct, whether content based or content neutral, and regardless of whether there is a substantial government interest. That is a bridge too far for me.

In regards to the majority's argument about the Constitution of Illinois, I have little to say because the majority frankly does not say much either. A vague generality of how our Constitution's freedom of speech and expression is broader than that of the US Constitution (true) does not substitute for substantial analysis explaining why that matters in this case. The majority cites no case for their assertion that this

conduct is an example of conduct that is potentially protected by the Illinois Constitution if not the US Constitution, because there isn't one. I suspect this case will be heard by the Supreme Court of this state, and they are the proper body to weigh in on this question, about which there is little caselaw.