SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, by Letitia James, Attorney General of the State of New York, Plaintiff, -against- VALVE CORPORATION, Defendant.	Index No.: 450952/2026 IAS Part 61 Hon. Nancy M. Bannon Mot. Seq. 001

DEFENDANT VALVE CORPORATION'S MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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PRELIMINARY STATEMENT

People enjoy surprises. Part of the appeal of many popular collectibles, from baseball cards to cereal box prizes, is the possibility of opening a sealed package and being surprised with a rare item. And while there is an element of randomness in opening a baseball card pack that includes a one-of-a-kind Aaron Judge rookie card, no legislature or court has ever deemed that act illegal gambling. The New York State Attorney General ("NYAG") now asks this court to do just that.

NYAG alleges that Valve Corporation ("Valve") is promoting gambling, in violation of the New York Penal Law and State Constitution, by selling the digital equivalent of baseball card packs—mystery boxes that, upon opening, reveal one random digital item from a set of options.[1] Like baseball cards, these digital items, called "skins," are designed for entertainment and have subjective and aesthetic value to users. They do not affect game play and simply alter a player's in-game appearance. As with baseball cards, collectors have established secondary markets for skins, with resale prices based on desirability. And like baseball card packs, mystery boxes are widely available. They are common features in countless videogames—not just Valve's—and are enjoyed by millions of people worldwide.

Despite the overwhelming similarities between mystery boxes and familiar collectibles like baseball cards, New York now asserts that offering mystery boxes facilitates gambling. Unsurprisingly, that assertion finds no support in the statutory text, case law, or common sense. NYAG's claims should be dismissed.

[1] NYAG refers to these as "loot boxes." As used here, "mystery boxes" is a catch-all term, including "cases" in Counter-Strike 2, "crates" in Team Fortress 2, and "treasures" in Dota 2. First Amended Complaint ("FAC") ¶¶ 49, 69, 72. We refer to the digital items in mystery boxes collectively as "skins."

To begin, the New York State Constitution's prohibition against illegal gambling does not provide a standalone cause of action because it is not self-executing. That is enough to dismiss Count One.

Counts Two and Three must be dismissed because the sale of mystery boxes is not gambling under the plain statutory language. "A person engages in gambling when he *stakes or risks* something of value upon the outcome of a contest of chance," "upon an *agreement or understanding* that he will receive *something of value* in the event of a certain outcome." N.Y. Penal Law § 225.00(2) (emphases added). NYAG's attempt to apply this plain text to mystery boxes fails at every turn: Because every player always receives exactly what he paid for—one skin per mystery box—there is no "stake" or "risk." While users enjoy and subjectively value skins, they are not money, property, tokens exchangeable for money or property, credits, or promises, so as a matter of law they are not "something of value" as that term is defined under New York gambling law in § 225.00(6). And because players pay Valve a flat fee to receive a random skin—rather than pooling their money in a game of chance, there is no wagering agreement with Valve.

NYAG also fails to plausibly allege that Valve *knowingly* violated the law (as the statute requires). Valve has openly offered mystery boxes—and paid New York state taxes on those purchases—for more than a decade without objection from NYAG or any other regulator. And no other state has ever criminalized mystery boxes. Valve had absolutely no reason to think its conduct was illegal.

Moreover, the fact that no one—until now—even suspected that New York's laws might criminalize Valve's conduct means NYAG's attempted application of those laws violates several constitutional protections. *First*, Valve lacked fair notice that its conduct could be subject to

criminal prosecution, in violation of the Due Process Clause. *Second*, NYAG's overbroad interpretation of the gambling laws violates the First Amendment by chilling protected videogame (and other) content. *Third*, NYAG has usurped the Legislature's role in violation of the New York Constitution's separation-of-powers doctrine by extending the reach of the gambling statutes to retroactively criminalize previously legal conduct. Courts have consistently held that, because only the legislature can define what a crime is, "ambiguity in a criminal statute" must be "resolved in favor of the defendant." *United States v. Bass*, 404 U.S. 336, 348 (1971). Even the slightest "doubt[]" requires dismissal. *Id.* Here, there is more than just "doubt." Indeed, the Legislature has repeatedly considered and *rejected* bills that would have regulated the monetization of mystery boxes.

Allowing this case to continue would inject uncertainty into hundreds of daily commercial transactions. Can parents purchase packs of baseball cards for their children? Can families go to Chuck E. Cheese to play games of chance and exchange winning tickets for prizes? Can a child reach into a cereal box and grab a surprise toy? All these actions and more could lead to chargeable *crimes* under NYAG's interpretation of gambling. This Court should not permit such a nonsensical outcome. It should dismiss this misguided lawsuit with prejudice.

SUMMARY OF ALLEGATIONS

A. Valve Created Games that Millions of Users Enjoy

Valve is a videogame developer whose games have attracted hundreds of millions of players over the past two and a half decades. FAC ¶¶ 2, 24, 35. The enduring success of its games has led to robust communities and ecosystems, including competitive e-sports tournaments, artist workshops to design virtual aesthetics, and online content creators. *Id.* ¶¶ 35-37, 46.

Valve also operates Steam, a popular online gaming platform where players can purchase games, hardware, and other virtual items. FAC ¶¶ 16-17, 26. Steam users do so with Steam Wallet

funds, a virtual currency solely for use on Steam that can be purchased with dollars, but is not redeemable for cash. *Id.* ¶¶ 29-30.

B. Players Can Purchase Virtual Items to Enhance Gameplay Experience

NYAG targets certain features of Valve's Counter-Strike 2, Team Fortress 2, and Dota 2 videogames that allow players to purchase skins. FAC ¶¶ 5, 49, 78. Skins are virtual "cosmetic overlays" that change a character's in-game appearance by, for example, adding gloves or changing the color of a weapon. FAC ¶¶ 49-50. Skins "provide no advantage or other impact on gameplay," *id.* ¶ 51, but they have intangible and subjective worth to gamers, *id.* ¶¶ 38, 93.

NYAG targets the process of purchasing a skin through a mystery box, which Valve and other videogame makers have openly offered for well over a decade. FAC ¶ 39. Players open mystery boxes using virtual keys that can be purchased for $2.49 through Steam. *Id.* ¶ 43. Every time players use a key, they receive exactly one skin. *Id.* ¶ 41. Before opening, the mystery box lists the skins that a player may receive by category of rarity, and Valve has publicly disclosed the odds of receiving an item in each category. *Id.* ¶¶ 54-55. Thus, players know the odds of receiving each item before even choosing to buy a key or opening the box.

More recently, Counter-Strike players have also been able to obtain skins through a feature known as the Armory. *Id.* ¶ 75. A player can purchase an Armory Pass using Steam Wallet funds, earn Armory Credits through gameplay, and then use Armory Credits to obtain a random virtual item. *Id.* ¶¶ 76-79. Just like a mystery box, the Armory gives a player one skin from a disclosed list. *Id.* Players cannot select the skin, but they know the various options and probabilities of receiving each one. *Id.* ¶ 79.

C. Players Cannot Redeem Virtual Items for Cash

NYAG does not allege that Valve redeems skins for cash like a casino redeems casino chips. Nor could it: Valve does not redeem skins for fiat currency, and skins have no objective,

set value like casino chips. Valve does allow users to sell skins to other users on the Steam Community Market ("Community Market") for virtual Steam Wallet funds, but those funds are not redeemable for cash either. *See* FAC ¶¶ 84, 90 & n.11, 96. Valve also caps the price for all virtual items on the Community Market, and imposes a seven-day waiting period before a skin received from a mystery box can be sold between users on the Community Market or traded to another user. *Id.* ¶¶ 90, 103 n.15.

Nevertheless, NYAG alleges it is possible to redeem skins for cash through multiple independent transactions with third parties. For example, the FAC alleges one of its investigators (i) sold a skin on the Community Market for Steam Wallet funds, (ii) used Steam Wallet funds to buy hardware, and finally (iii) sold the hardware for cash at a local brick-and-mortar store that trades in second-hand electronics. *Id.* ¶ 84.

NYAG alleges it is possible to obtain cash through "private sales" on third-party websites unaffiliated with Valve. *Id.* ¶ 90 & n.11. NYAG claims Valve has not done enough to stop those third-party sites (*id.* ¶ 98) but acknowledges that the Steam Subscriber Agreement ("SSA") "prohibits the sale of skins off platform" (*id.* ¶ 96). NYAG does not allege that Valve receives direct financial benefits from these third-party transactions.

D. NYAG's Claims

NYAG asserts three claims under Executive Law § 63(12). Count One alleges Valve violated the New York Constitution's prohibition on gambling. Counts Two and Three allege that Valve promoted gambling in the first and second degree in violation of Penal Law §§ 225.05 and 225.10. NYAG claims Valve "knowingly" promoted gambling because it created mystery boxes and the Armory and maintained Steam. FAC ¶ 170. But NYAG does not explain how those activities show Valve knew it was promoting unlawful gambling. And other allegations show that Valve believed it was acting lawfully. NYAG acknowledges that (unlike illegal casinos) Valve

has been openly offering mystery boxes for over a decade and has paid New York taxes on mystery-box sales since their inception. *See id.* ¶¶ 39, 43-44 & n.4, 61, 69, 72.

NYAG identifies no legislative act or court decision—anywhere in the country—that has criminalized mystery boxes. Nor does NYAG acknowledge that New York recently sought to regulate mystery boxes by amending the General Business Law—*not the Penal Law or Article 225*. Even that legislation simply would have required certain disclosures about mystery boxes; it would not have banned them. Assemb. B. 10075, 2017-2018 Reg. Sess. (N.Y. 2018). Currently, the Legislature is considering amending the Racing, Pari-Mutuel Wagering and Breeding Law to forbid boxes with repurchasable contents. Assemb. B. 9044A, 2025-2026 Reg. Sess. (N.Y. 2025). Neither bill would criminalize mystery boxes as "gambling" or suggest that the Legislature considers mystery boxes to currently be unlawful under Article 225.

Rather than allowing the legislative process to play out, NYAG brought this case. And it seeks to do far more than regulate mystery boxes. NYAG requests a permanent injunction, restitution, disgorgement, and a fine of three times Valve's profits from mystery boxes—a remedy that, if granted, would halt the operation in New York of a popular videogame feature enjoyed by millions of people worldwide. *See* FAC, Prayer for Relief.

ARGUMENT

I. THE NEW YORK CONSTITUTION'S PROHIBITION AGAINST GAMBLING DOES NOT CREATE A STANDALONE CAUSE OF ACTION

Because the New York Constitution's prohibition against gambling does not authorize NYAG to initiate enforcement actions, Count One must be dismissed. The New York Constitution provides that "no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling . . . shall hereafter be authorized or allowed within this state; and *the legislature shall pass appropriate laws* to prevent [those] offenses." N.Y. Const. art. 1, § 9(1) (emphasis added).

Since at least 1908, New York courts have recognized that the constitutional prohibition on gambling is "not self-executing," *People ex rel. Collins v. McLaughlin*, 128 A.D. 599, 611 (1st Dep't 1908), and "[e]nforcing acts by the Legislature are necessary," *Beach v. Queens Cnty. Jockey Club*, 164 Misc. 363, 367 (Sup. Ct. Queens Cnty. 1937). *See also People v. Mumford*, 171 Misc. 397, 399 (Magis. Ct. 1939); *People v. Wilkerson*, 73 Misc. 2d 895, 900 (Monroe Cnty. Ct. 1973).

It is black-letter law that a non-self-executing constitutional provision does not criminalize any conduct absent implementing legislation. *E.g.*, *Brown v. State*, 89 N.Y.2d 172, 186 (1996) ("A civil damage remedy cannot be implied for a violation of the State constitutional provision unless the provision is self-executing . . . without the necessity for supplementary or enabling legislation."). To our knowledge, no court has permitted NYAG to bring an enforcement action directly under section 9. Quite the opposite, New York courts have held that even if "gambling is unlawful" under section 9, it is "not punishable as a crime" until the Legislature sets the punishment, meaning that NYAG cannot use section 9 itself to punish Valve. *Beach*, 164 Misc. at 367; *see id.* at 366 ("[n]o person may be arrested" for violating section 9 if "the only penalty for violation" the Legislature prescribed was "forfeiture of the amount wagered in a civil action").

Nor does Executive Law § 63(12) supply the necessary cause of action. Section 63(12) does not substantively prohibit any conduct—it is a vehicle that authorizes NYAG to seek certain *remedies* for violations otherwise proscribed. *See* N.Y. Exec. Law § 63 (authorizing NYAG to request "an order enjoining the continuance of . . . fraudulent or illegal acts, directing restitution and damages and, in an appropriate case, cancelling any certificate filed under [§ 440] of the former penal law"). As the Court of Appeals has explained, "courts must 'look through' Executive Law § 63(12) and apply" substantive law to determine liability. *People ex rel. Schneiderman v. Credit Suisse Sec. (USA) LLC*, 31 N.Y.3d 622, 633-34 (2018); *see id.* at 634-35 (Feinman J.,

concurring). Because neither the New York Constitution nor § 63(12) provides the necessary predicate for a standalone cause of action, the Court should dismiss Count One.

II. MYSTERY BOXES ARE NOT "GAMBLING" UNDER NEW YORK CONSTITUTIONAL OR STATUTORY LAW

In any event, Valve's offering of mystery boxes does not promote gambling under the New York Constitution or any provision of New York law. Because New York's gambling laws are "criminal statute[s]," NYAG's claims against Valve can succeed only if these laws unambiguously cover Valve's mystery boxes. *Bass*, 404 U.S. at 348. They do not come close.

The New York Court of Appeals has interpreted "gambling" under section 9 of the New York Constitution to prohibit "the risking of money or something of value on games of chance, as well as bets and wagers by nonparticipants on competitions of skill." *White v. Cuomo*, 38 N.Y.3d 209, 220 (2022) (quotations omitted). This construction mirrors the Penal Law's definition:

> A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.

N.Y. Penal Law § 225.00(2); *see also White*, 38 N.Y.3d at 220 (finding § 225.00(2) a "helpful guidepost" in determining the meaning of "gambling" in section 9).

Valve's offering of mystery boxes does not "promot[e] gambling" under any plausible reading of these provisions because a player does not "stake[] or risk[]" anything when purchasing a mystery box, a skin is not "something of value," and there is no wager "agreement" between a player and Valve. On top of that, NYAG fails to plausibly allege that Valve "knowingly" violated any gambling laws, as required under §§ 225.05 and 225.10.

A. The Stake or Risk Element Is Absent Because Players Make a Simple Purchase

NYAG's theory fails right at the gate because Valve's offering of mystery boxes does not

entail any "stake or risk"—the defining element of gambling under Article 225. Under Article 225—like any other statute criminalizing gambling—spending money is not enough; NYAG must establish the possibility of forfeiture or loss. But there can be no loss where a person receives exactly what he or she bargained for. *Mai v. Supercell Oy*, No. 20-cv-05573, 2024 WL 2077500, at *1 (9th Cir. May 9, 2024); *see Muidallap Corp. v. State Liquor Auth.*, 143 A.D.2d 9, 12 (1st Dep't 1988) (payment of $250 for admission to a movie premiere, where attendees were given chips to play casino games for prizes, was not a stake or risk); *cf. Kohn v. Koehler*, 96 N.Y. 362, 367-68 (1884) (a person engages in gambling where he "may draw a prize, or may draw a blank, and he thus hazards what he has paid upon the chances, incident to a drawing by lot").

Applying those straightforward principles, NYAG's claims cannot succeed. Players do not stake or risk anything when they open a mystery box or use Armory Credits. Rather, they pay a fixed amount of virtual currency to get exactly one skin from a known set of options pursuant to publicly disclosed odds. *See, e.g.*, FAC ¶¶ 5, 41, 55, 64, 73. That is not gambling. *See Mai*, 2024 WL 2077500, at *1 (recognizing that plaintiffs did not suffer any economic injury because "for each [mystery] box they purchased, they received exactly what they expected: at least one mystery virtual item").

These transactions are directly analogous to the purchase of sports trading cards—and a host of other physical mystery boxes and monthly subscription services—all of which are of course perfectly legal. In *Chaset v. Fleer/Skybox International, LP*, 300 F.3d 1083 (9th Cir. 2002), the Ninth Circuit affirmed dismissal of RICO gambling claims against traders of card packs that randomly included valuable "chase" cards alongside an assortment of standard ones. The plaintiffs pressed the same theory NYAG advances here: a transaction is illegal gambling if purchasers pay for the chance to receive a valuable item they are statistically unlikely to get. *Chaset*, 300 F.3d at

1086.

The Ninth Circuit rejected that theory, holding that "purchasers of trading cards do not suffer an injury cognizable under RICO when they do not receive an insert card" because "[a]t the time the plaintiffs purchased the package of cards, which is the time the value of the package should be determined, they received value—eight or ten cards, one of which might be an insert card—for what they paid as a purchase price." *Id.* at 1087 (citation modified). Although the court decided the case on standing principles, the court's interpretation of "injury" fully applied to the merits: there was no injury precisely because there was no stake or risk. The Fifth Circuit reached the same conclusion in *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998). And the same is true here.

Moreover, players in Valve's games are "not wagering with *dollars*"; they use "*virtual*" funds to acquire virtual keys. *Mason v. Mach. Zone, Inc.*, 140 F. Supp. 3d 457, 465 (D. Md. 2015) (*Mason I*). The only time players use "real-world currency" is when they acquire "a nontransferable, revocable license to use virtual currency for entertainment purposes." *Id.* Players' loss (if any) therefore is "complete" at "the moment of that antecedent transaction" when players "swap[ ] something of value (real money) for something of whimsy (pretend 'gold')." *Id.*; *see also* FAC ¶ 30. Once that initial transaction is complete, players may spend their virtual Steam Wallet funds as they please. They can purchase games, hardware, or virtual items to enhance gameplay—or they can buy mystery boxes and keys. FAC ¶¶ 28, 30. And keys may be held for as long as players like—they need not be used immediately after purchase or even refunded if unused. Thus, even if mystery boxes "aesthetically resemble[ ] classic games of chance, the underlying transaction is more akin to purchasing cinema or amusement park tickets." *Mason I*, 140 F. Supp. 3d at 465. Players "pay for the pleasure of entertainment *per se,* not for the prospect

of economic gain." *Id.* NYAG has failed to plausibly allege that players stake or risk anything within the meaning of Article 225 when they purchase a mystery box key.

B. A Skin Is Not "Something of Value"

Users enjoy skins. But a skin does not qualify as "something of value" under New York's gambling laws, which define that phrase as:

> [1] any money or property, [2] any token, object or article exchangeable for money or property, or [3] any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge.

N.Y. Penal Law § 225.00(6) (numbering added). A skin does not qualify under any prong of this definition, as every other court to have considered this question has concluded. *E.g.*, *Coffee v. Google, LLC*, No. 20-cv-03901, 2022 WL 94986, at *12-13 (N.D. Cal. Jan. 10, 2022) (contents of mystery boxes are not things of value because a "virtual in-game item or feature designed or perceived to enhance gameplay" "can only be used within the games themselves" (citation modified)); *see also Soto v. SkyUnion, LLC*, 159 F. Supp. 3d 871, 880 (N.D. Ill. 2016); *Mai v. Supercell Oy*, 648 F. Supp. 3d 1130, 1137-38 (N.D. Cal. 2023), *vacated on other grounds*, 2024 WL 2077500 (9th Cir. May 9, 2024); *Taylor v. Apple, Inc.*, No. 20-cv-03906, 2021 WL 11559513, at *6 (N.D. Cal. Mar. 19, 2021). This court should do the same.

1. A Skin Is Not Money or Property (Prong 1)

A skin is not money, and NYAG has not alleged otherwise. A skin is not "property" either. Where the New York Legislature means to include virtual items in the definition of "property," it says so expressly. For example, the Legislature specifically amended § 155.00(1)—the larceny statute—to encompass "computer data" and "computer program." *See* 1986 N.Y. Laws ch. 514, at 2502. It did the same when defining "property" for computer-related theft offenses in § 156.00(2)-(3). *See* 1986 N.Y. Laws ch. 514, at 2501. Yet it has never amended the definition

of "property" in Article 225 to include virtual items. "[W]here a law expressly describes a particular . . . thing . . . to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded." *See* N.Y. Stat. Law § 240. Just so here.

2. A Skin Is Not a Token, Object or Article Exchangeable for Money or Property (Prong 2)

A skin is not a "token, object or article exchangeable for money or property." N.Y. Penal Law § 225.00(6); *see* FAC ¶¶ 157, 169. "Tokens" are physical objects: they are "nonmetal, metal or partly metal representatives of value." N.Y. Penal Law § 225.00(17). And while § 225.00(17) does not define "object" or "article," § 225.00(27)(b)—which deals with "unlawful gaming property"—describes "objects" and "articles" as physical "substitute[s]" for tokens. Under the usual statutory construction principles, "where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout." *People v. Bolden*, 81 N.Y.2d 146, 151 (1993) (quoting N.Y. Stat. Law § 236). Skins, then, plainly are not "tokens," "objects," or "articles" under § 225.00(6) because they are digital, not physical.

Nor are skins "exchangeable for money or property." N.Y. Penal Law § 225.00(6). NYAG claims players can sell skins on third-party websites, FAC ¶¶ 87-95, or convert them into cash through a series of independent transactions, including buying hardware on the Community Market and then selling that hardware at an electronics store, *id.* ¶¶ 82-84. Those multi-step transactions do not satisfy the statutory definitions.

First, simply alleging the existence of a third-party market cannot be enough. If "exchangeable for money or property" encompassed any item that can theoretically be resold, the definition would have no meaning or limiting principle. And courts have squarely rejected such arguments. *E.g.*, *George v. NCAA*, 945 N.E.2d 150 (Ind. 2011) (the NCAA's randomized ticket-

distribution system is not illegal lottery simply because tickets could be later resold at a greater price). Indeed, many other types of collectibles, like baseball cards, have robust secondary markets, where some fetch a higher price than others, but no one believes that makes them gambling. *See Chaset*, 300 F.3d at 1086-87 (rejecting just such a claim).

Moreover, Valve's SSA expressly prohibits the exchange of skins outside of Steam. *See* FAC ¶ 96; *see also* SSA ¶¶ 1.C, 2.G, 3.D.[2] Courts have appropriately held, under gambling statutes substantially similar to New York's, that virtual items are not things of value where third-party markets violate the terms of use. *E.g.*, *Kater v. Churchill Downs Inc.*, 886 F.3d 784, 787-88 & n.2 (9th Cir. 2018); *Mason v. Mach. Zone, Inc.*, 851 F.3d 315, 320 n.3 (4th Cir. 2017) (*Mason II*). That stands to reason: Valve, like any other private videogame developer, bears responsibility only for its own actions. NYAG cannot seriously suggest that Valve should be held criminally liable for third-party websites because it failed to shut them down (which it cannot do) or failed to enforce the SSA terms *outside* of Steam, *see* FAC ¶¶ 98-105.

Second, it also does not matter that a skin can be sold between users on the Community Market for virtual Steam Wallet funds. *See* FAC ¶¶ 82-83. Steam Wallet funds are not money as a matter of law because money must be authorized by the government, among other requirements. N.Y. U.C.C. Law § 1-201(b)(24); *see* SSA ¶ 3.C ("Steam Wallet funds have no cash value and are not exchangeable for cash."). Nor are Steam Wallet funds property for the reasons discussed above. *Supra* Section II.A.1; *see* SSA ¶ 3.C (clarifying that Steam Wallet funds "do not constitute a personal property right").

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[2] The SSA is incorporated by reference into the FAC and is documentary evidence that may be considered on a motion to dismiss. FAC ¶¶ 96, 151, 152; *see KSFB Mgmt., LLC v. Focus Fin. Partners, LLC*, No. 650688/2024, 2025 WL 287296, at *2 n.2 (N.Y. Sup. Ct. N.Y. Cnty. Jan. 22, 2025), *aff'd sub nom. KSFB Mgmt., LLC v. Goldman Sachs & Co., LLC*, 251 N.Y.S.3d 678 (1st Dep't 2026); *see also Caniglia v. Chi. Trib.-N.Y. News Syndicate Inc.*, 204 A.D. 2d 233, 233 (1st Dep't 1994). A copy of the SSA is attached to the Affirmation of Nola B. Heller as Exhibit B.

Finally, NYAG's hypothetical transaction, whereby a player buys Steam hardware and resells it for cash at an electronics store outside of Steam, does not solve the problem because the statute says nothing about indirect, multi-step transactions. Indeed, the very next clause (addressed below) defines "something of value" to include a "form of credit or promise directly *or indirectly* contemplating transfer of money or property," N.Y. Penal Law § 225.00(6) (emphasis added)—but the clause defining "token, object, or article" has no comparable language. The law presumes that omission was deliberate. Hypothetical, attenuated transactions do not qualify. Otherwise, every purchase that involves an element of randomness and can later be resold—even something as innocuous as buying a Happy Meal and reselling the toy it contains—would amount to gambling.

3. A Skin Is Not a Form of Credit or Promise (Prong 3)

A skin also is not "a form of credit or promise," much less one that contemplates transfer of money or property or involves the extension of a service or privilege of gameplay. *See* N.Y. Penal Law § 225.00(6). Very simply, a credit or promise to transfer money or property presupposes contractual power to call on the issuer to execute that transfer. *See Nissho Iwai Eur. PLC v. Korea First Bank*, 99 N.Y.2d 115, 121 (2002) (a "credit" is an "agreement embodying the issuer's commitment to 'honor drafts or other demands for payment'"). But Valve does not—and has never promised to—buy back the skins.

Skins also do not extend a service, entertainment, or privilege of gameplay like casino chips. Skins cannot be used to open mystery boxes, and they have no effect on gameplay. *See* FAC ¶ 3 (the games are "free to play"); *see also Soto*, 159 F. Supp. 3d at 880 (mystery-box prizes merely "*improve*" players' experience in the game; they do not "extend gameplay" (citation modified)).

C. Players Do Not Stake or Risk Anything "Upon an Agreement" with Valve

A person engages in illegal gambling only when he or she risks or stakes something of value "upon an agreement or understanding" that he or she might receive something of value in return. N.Y. Penal Law § 225.00(2). The defining characteristic of such a wagering agreement is that a participant pays to enter into a game of chance where only one party to the agreement can win; conversely, it is *not* gambling to pay a fixed fee to receive a surprise prize from a known set of options. The Court of Appeals recently reaffirmed that long-standing rule in *White*, 38 N.Y.3d at 225-27 ("Contests charging entry fees and awarding fixed prizes do not constitute gambling prohibited by article I, § 9 of the Constitution."); *see also Harris v. White*, 81 N.Y. 532, 539 (1880) (gambling requires "*gain and loss between the parties* by betting"); *Jordan v. Kent*, 44 How. Pr. 206, 207 (Sup. Ct. N.Y. Cnty. 1872) ("[T]o every wager there must be two or more contracting parties having mutual or reciprocal rights[.]").

Valve does not stand to lose or gain anything when a player opens a mystery box and receives a particular skin; Valve receives $2.49 when a user buys a key—never more or less—and the player receives one skin whenever they decide to use that key. Nor does the sum of purchase prices of mystery box keys comprise a pool that is winnable by any one user. The sale of a mystery box key is a simple commercial transaction, no wagering agreement is involved.

D. NYAG Fails to Allege that Valve Knowingly Promoted or Profited from Unlawful Gambling

Sections 225.05 and 225.10 expressly condition liability on a showing that the defendant acted "knowingly" with respect to "advanc[ing] or profit[ing] from unlawful gambling activity," but NYAG does not plausibly allege that element here. FAC ¶¶ 163, 176.

A defendant "acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such

circumstance exists." N.Y. Penal Law § 15.05(2). The requirement to establish a culpable mental state is "presumed to apply to every element of the offense unless an intent to limit its application clearly appears." N.Y. Penal Law § 15.15(1). Because no such limiting intent appears here, "knowingly" modifies both the prohibited conduct—"advanc[ing] or profit[ing]"—and the attendant circumstance that the activity constitutes "*unlawful* gambling activity." N.Y. Penal Law §§ 225.05, 225.10 (emphasis added).

NYAG claims Valve acted knowingly because it created mystery boxes, sold virtual keys, and maintained the Community Market. *See* FAC ¶¶ 170, 178. But those are ordinary-course-of-business activities no state has ever criminalized. NYAG cannot state a claim unless it adequately alleges that Valve knew those specific activities were illegal. *See Susskind v. Ipco Hosp. Supply Corp.*, 49 A.D.2d 915, 915 (2d Dep't 1975) (requiring particularized allegations that defendant "wrongfully, knowingly, intentionally, maliciously" interfered with negotiations); *VPF Invs. I LLC v. Foot Locker, Inc.*, No. 152153/15, 2015 WL 6499513, at *5 (N.Y. Sup. Ct. N.Y. Cnty. Oct. 22, 2015) (similar). If anything, NYAG's allegations prove the opposite.

First, Valve began offering mystery boxes over a decade ago and has openly featured them since. FAC ¶ 39; *see also People ex rel. Vacco v. Alamo Rent A Car, Inc.*, 174 Misc. 2d 501, 504-07 (Sup. Ct. N.Y. Cnty. 1997) (respondents did not "knowingly" violate the statute where their rental practices were continued over an "extended period of time" and "open to public scrutiny").

Second, since their introduction, Valve has paid New York state tax on mystery box and key purchases. FAC ¶¶ 43 & n.4, 61, 69, 72.

Third, no jurisdiction in the country has prohibited Valve from offering mystery boxes. *See De Ridder v. Roblox Corp.*, 811 F. Supp. 3d 1116, 1122-23 (N.D. Cal. 2025) ("cases that have addressed the legality of [mystery] boxes under the Penal Code have concluded that they do not

offer the chance to win a 'thing of value'" and are thus not gambling). Indeed, the Ninth Circuit has observed *in litigation involving Valve* that mystery boxes have not been found unlawful in Washington, *Galway v. Valve Corp.*, No. 22-35105, 2023 WL 334012, at *1 (9th Cir. Jan. 20, 2023). NYAG itself recognized that Washington has "identical statutory definitions of 'gambling'" to New York's, *see* First Amended Complaint ¶ 124, *People ex rel. Schneiderman v. FanDuel, Inc.*, No. 453056/2015 (N.Y. Sup. Ct. N.Y. Cnty. Dec. 31, 2015), Dkt. No. 117.

Fourth, mystery boxes are ubiquitous in the gaming industry and have been for years. NYAG has never before taken steps to regulate, challenge, or oppose that practice by any of the other game developers, sellers, and marketers. On the contrary, as discussed below, *infra* Section III.B.2, the New York Legislature has many times *rejected* proposals to regulate mystery boxes. Valve therefore had every reason to think its conduct was lawful.

In short, even if NYAG's novel theory extending the term "gambling" to mystery boxes is correct, there are no plausible allegations that Valve knew it was promoting unlawful gambling. Failure to allege this essential element separately requires dismissal.

III. NYAG'S READING OF ARTICLE 225 WOULD CRIMINALIZE VALVE'S CONDUCT WITHOUT FAIR NOTICE IN VIOLATION OF DUE PROCESS, THE FIRST AMENDMENT, AND SEPARATION OF POWERS

The FAC must be dismissed for an independent reason: NYAG's attempt to apply New York's gambling laws against Valve tramples several constitutional protections, including fair notice under the U.S. Constitution's Due Process Clause and the First Amendment, and the New York Constitution's separation-of-powers principles.

"[L]aws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). The U.S. Supreme Court has therefore held for over a century that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning

and differ as to its application, violates the first essential of due process of law." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926); *see also, e.g.*, *People v. Stuart*, 100 N.Y.2d 412, 420-21 (2003) (articulating the same standard in New York). Article 225 does not come close to providing fair notice that any purchase with an element of randomness constitutes illegal gambling if the item can later be resold on a secondary market. Accordingly, NYAG's reading would retroactively impose *criminal penalties* for conduct that has *never* been criminalized by *any* court or legislature. That is as unconstitutional as it gets.

NYAG's reading of Article 225 also would chill protected expression in violation of the First Amendment and "hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges" despite New York's strict separation-of-powers principles. *United States v. Davis*, 588 U.S. 445, 448 (2019). The New York Constitution squarely vests the power to make laws in the legislative branch—not with the executive. *Boreali v. Axelrod*, 71 N.Y.2d 1, 13 (1987). NYAG's brazen reinterpretation of Article 225 wrests that authority from the legislature. "[W]hen [a] choice has to be made between two readings of what conduct [the legislature] has made a crime, it is appropriate, before we choose the harsher alternative, to require that [the legislature] should have spoken in language that is clear and definite." *Bass*, 404 U.S. at 347-48 (citation omitted). Simply put, any tie goes to the defendant.

A. Article 225 Does Not Provide Fair Notice

Where, as here, a defendant brings an as-applied vagueness challenge, a court must "consider whether a statute can be constitutionally applied to the defendant under the facts of the case." *Stuart*, 100 N.Y.2d at 421. That means asking whether Valve was on fair notice that the inclusion of mystery boxes in its games violates New York gambling law. The only possible answer is "no." No one who has read New York's law could have imagined it would apply to mystery boxes. Article 225 has been in force for decades and yet there is no indication that New

York has ever attempted to apply it to the makers of collectible items like skins based on the value those items have acquired in a secondary market. NYAG's novel interpretation fails basic due process requirements.

1. NYAG Impermissibly Reinterprets § 225.00(2)'s Key Terms

As discussed in greater detail above, NYAG interprets three key terms in § 225.00(2)—"stakes or risks," "something of value," and "agreement"—in a way no court, anywhere, has ever endorsed. Because Valve could not have anticipated that NYAG would apply the statute in this way, Valve plainly lacked fair notice.

First, Valve lacked fair notice that NYAG would treat opening a mystery box as "stak[ing] or risk[ing]" something of value. As explained, the ordinary meaning of "stake or risk" that has been applied in gambling cases for a century and a half is that a "stake" or a "risk" requires a possibility of loss—that the player "may draw a prize, or may draw a blank." *Kohn*, 96 N.Y. at 367-68. But for each mystery box Valve's players purchased, "they received exactly what they expected: at least one mystery virtual item." *Mai*, 2024 WL 2077500, at *1. There is no risk. And again, players in Valve's games are not wagering real money when they open mystery boxes; they are using virtual keys purchased with virtual Steam Wallet funds—a practice courts have distinguished from gambling. *See supra* Section II.A; *Mason I*, 140 F. Supp. 3d at 465 (while "aesthetically resembl[ing] classic games of chance," game features like mystery boxes are "more akin to purchasing cinema or amusement park tickets"; consumers "pay for the pleasure of entertainment *per se*, not for the prospect of economic gain"). Valve had no way to anticipate that NYAG would flout this established understanding.

Second, the same goes for NYAG's attempts to extend the term "something of value" to cover skins. No court has endorsed that reading of the term "something of value." *See supra* Section II.B. That is powerful evidence that the term is "so vague that men of common

intelligence" would not be on notice that skins are covered. *Connally*, 269 U.S. at 391 (citations omitted). Indeed, a California court has recognized "a strong argument that [California's identical] provisions are unconstitutionally vague" if interpreted to cover such virtual items. *De Ridder*, 811 F. Supp. 3d at 1123. The court emphasized that, "given the growth in online games played using various forms of virtual tokens and currencies, it is important for game providers to be able to determine whether their games are considered gambling" and encouraged *the legislature* to "modernize" the Penal Code if necessary. *Id.* Until the legislature does so, however, the court cautioned *the judiciary* to "construe ambiguous phrases like 'thing of value' as narrowly as reasonably possible." *Id.* (citations omitted).

Moreover, no court has endorsed NYAG's suggestion (FAC ¶¶ 82-84, 87-89) that skins can be considered "something of value" because they can be exchanged for real cash *in a separate transaction* with someone *outside* of Steam at a *later point*. Far from it, courts have held that virtual tokens cannot be considered "thing[s] of value" where, as here, their sale "for cash on a secondary market violates the Terms of Use." *See, e.g.*, *Kater*, 886 F.3d at 788 n.2.

As NYAG also admits, the skins' resale prices fluctuate not only "according to items' rarity" but also according to "players' engagement in the game" and "other non-conventional economic indicators" like the players' subjective, aesthetic value of the skins. FAC ¶¶ 5, 85, 93. The hypothetical transactions NYAG relies on therefore look nothing like the traditional casino games, where *casinos themselves* "convert chips *back into cash*" and the chips have a fixed dollar value. *Mason I*, 140 F. Supp. 3d at 468; *accord Soto*, 159 F. Supp. 3d at 883-84 (distinguishing mystery-box items because "it is not possible to calculate their worth by looking to a constantly changing and unsanctioned secondary market"). NYAG's brand-new theory based on subsequent transactions therefore cannot remedy the severe notice concerns.

Third, NYAG creates a whole new definition of "agreement" that also has never before been applied in the gambling context. As explained *supra* Section II.C, an "agreement" for purposes of the gambling statutes has historically been understood to refer to a reciprocal transaction among the players. *Harris*, 81 N.Y. at 539; *see also White*, 38 N.Y.3d at 225-27; *Jordan*, 44 How. Pr. at 207. Because Valve receives the same purchase price regardless of the outcome, FAC ¶ 43, NYAG's reinterpretation of an "agreement" cannot be reconciled with more than a century of that precedent. *See, e.g.*, *Hochberg v. N.Y.C. Off-Track Betting Corp.*, 74 Misc. 2d 471, 476-77 (Sup. Ct. N.Y. Cnty. 1973) (racetrack not liable for plaintiff's wager because it did not gain or lose anything based on the outcome of the bet; it was "merely an agency" that handled "the money wagered by the participants who are the parties to the wagering transaction"); *see Mason II*, 851 F.3d at 319-20 (concluding the same under Maryland law).

Because no court anywhere in the country has ever endorsed NYAG's interpretation of "something of value," "stakes or risks," or "agreement," the statute plainly fails to "give fair notice of conduct that is forbidden." *FCC*, 567 U.S. at 253 (citations omitted).

2. NYAG's Ex Post Facto Application of Its Interpretation of Article 225 Is Unconstitutional

NYAG also impermissibly seeks to impose criminal penalties on Valve based on its own "retroactive" "expansion of statutory language." *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001) (citing *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964)). The executive's "unforeseeable" "enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law." *Bouie*, 378 U.S.at 353. Thus, if a state legislature would have been "barred by the Ex Post Facto Clause from passing . . . a law," the executive is similarly "barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Id.* at 353-54.

Applying those principles, courts have consistently prohibited new and unforeseen interpretations of criminal statutes that—like New York's gambling laws here—have been on the books for decades. For example, in *FCC*, the Federal Communications Commission sought to punish broadcasters for transmitting fleeting expletives under an obscenity statute, even though the statute historically was interpreted to punish only transmissions that "dwelled on or repeated" obscenities "at length." 567 U.S. at 254 (citation modified). The U.S. Supreme Court swiftly rejected that ex-post reinterpretation because the broadcasters had no "affirmative notice" at the time of the broadcasts that their seconds-long transmissions "would be considered actionably indecent." *Id.* at 255-57. The same result followed recently in *Davis*, where the government "abandoned its longstanding position" that 18 U.S.C. § 924(c)—which prohibits using a firearm in connection with certain federal crimes—requires a categorical analysis and instead urged the "lower courts to adopt a new case specific method that would look to the defendant's actual conduct in the predicate offense." 588 U.S. at 453, 464 (citation modified).

Numerous other New York and Supreme Court cases take the same tack. *See, e.g.*, *People v. Farone*, 308 N.Y. 305, 311 (1955) (declining to "construe [statute] in the manner here urged by the People," because "the inevitable consequence" of that approach "would be an unprecedented extension of the scope of our penal laws against gambling"); *People v. Golb*, 23 N.Y.3d 455, 467-68 (2014); *United States v. Lanier*, 520 U.S. 259, 266 (1997); *Skilling v. United States*, 561 U.S. 358, 408 (2010); *Van Buren v. United States*, 593 U.S. 374, 393-94 (2021).

NYAG's interpretation of § 225.00(2) similarly cannot stand, because no court anywhere has applied state gambling laws to criminalize commercial transactions within a videogame, even though Valve (and others) have been openly offering mystery boxes for over a decade. And NYAG's theory reaches further still. In its view, § 225.00(2) covers all commercial transactions

that involve an element of chance, if the initial purchase can later be converted to cash in a separate transaction with third parties. That is an extraordinarily broad theory that would allow NYAG to prosecute—today, with no additional notice—anyone who makes, distributes, or sells:

- Baseball card packs, Pokémon card packs, or *Magic: The Gathering* packs, all of which randomly include cards that can be sold at varying prices on secondary markets;
- Physical blind boxes, including Happy Meals, Cracker Jack boxes, cereal box toys, Labubus, and randomized LEGO minifigure packs;
- Grab bags at comic book stores;
- Fashion or book box subscriptions with randomized selections; and
- Arcade establishments like Chuck E. Cheese—where customers purchase tokens, use the tokens to play games of chance, win tickets based on the randomized outcome of those games, and exchange those tickets for real-world prizes.

Each of those transactions—and many more like them—involves a purchase of randomized items that can be resold for cash. No court has allowed the executive branch to criminalize overnight such "a breathtaking amount of commonplace" conduct not specifically proscribed by a statute. *Van Buren*, 593 U.S. at 393. This Court should not be the first.

B. NYAG's Reading of Article 225 Violates the First Amendment and Infringes on New York's Separation-of-Powers Doctrine

1. NYAG's Approach Unconstitutionally Chills Protected Speech

The government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. Am. C.L. Union*, 535 U.S. 564, 573 (2002) (citation modified). That principle applies fully to videogames. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011). The First Amendment therefore requires a close examination of legislative and executive action against videogame developers, especially in the criminal context. *See generally*

id. As the Supreme Court explained, "the severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful" content. *Reno v. Am. C.L. Union*, 521 U.S. 844, 872 (1997). The "government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963) (citation omitted).

a. Skins Are Constitutionally Protected Forms of Expression

There can be no question that NYAG's limitless reading of Article 225 would chill vast categories of protected expression. Most obviously, as even NYAG admits, skins themselves are purely aesthetic creations and are thus fully protected by the First Amendment. *See* FAC ¶ 46 ("Valve works closely with the community of players of the respective games, holding artist workshops" to design "virtual items" like skins); *see also Angelilli v. Activision Blizzard, Inc.*, 781 F. Supp. 3d 691, 701 (N.D. Ill. 2025) (skin designs are "protected by the First Amendment"). Criminalizing mystery boxes would unquestionably chill the development of skins, discouraging artists from creating particularly desirable or attractive designs.

More broadly, NYAG's interpretation of Article 225 would impermissibly stifle videogame development. Contrary to NYAG's suggestion, mystery boxes are an integral feature of numerous videogames, which both makes the game more engaging and creates revenue that funds game development and allows for free-to-play games. *See* FAC ¶¶ 39-40; *Angelilli*, 781 F. Supp. 3d at 701 ("skins" are part of the overall videogame protected "content" because they engage players by "making sure that the gaming experience is different for players each time they log in"). Indeed, it is not possible to "excise one particular aspect of an integrated strategy game and evaluate that aspect in isolation." *Mason I*, 140 F. Supp. 3d at 463. States therefore may not require Valve to "remove" or "alter" protected features, for doing so would alter the nature of the game itself. *Cf. Moody v. NetChoice, LLC*, 603 U.S. 707, 718 (2024) (applying First Amendment to social media platform developers' content regulation); *Courtright v. Epic Games, Inc.*, 795

F. Supp. 3d 1156, 1165-66 (W.D. Mo. 2025) (clarifying that even such monetization strategies like the "near miss," "chasing," "fear of missing out," "exclusivity," "entrapment," and "sunk cost effect"—which Valve does not use—are "properly considered video game content" protected under the First Amendment because they are integrated "elements and features of video games").

Applying Article 225 to criminalize mystery boxes would also "strongly stifle development" of all manner of *other* videogame features that incorporate similar monetization strategies based on randomized prizes. *Courtright*, 795 F. Supp. 3d at 1167. When developers "must guess" what features are illegal, they "necessarily will steer far wider of the unlawful zone." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (citation modified).

NYAG may argue that the First Amendment is not implicated because it seeks to regulate only gambling conduct, not speech. But whatever NYAG's intentions, the *result* of criminalizing mystery boxes based on a never-before-articulated theory will have an impermissible chilling effect on protected videogame design. Courts have appropriately rejected this run-around of the First Amendment. *See Angelilli*, 781 F. Supp. 3d at 701 (dismissing a similar challenge because "the First Amendment is not so feeble that it can be circumvented by framing acts of creation as 'conduct' rather than expression"); *Courtright*, 795 F. Supp. 3d at 1165 (First Amendment implicated when a government regulation would "require that defendants change how" a videogame is played or "what speech [the game] disseminate[s]").

In fact, NYAG's boundless interpretation would potentially impose *criminal liability* on influencers and content creators who post videos showing mystery-box openings—as well as designers, sellers, and distributors of baseball cards, Labubus, and scores of other products featuring protected expressive designs. After all, NYAG proposes no way to meaningfully

distinguish between mystery boxes and those activities. That is exactly the kind of chilling effect that the Supreme Court has warned against. *See Brown*, 564 U.S. at 793.

b. NYAG's Interpretation Cannot Pass Strict Scrutiny

Because NYAG's interpretation of Article 225 would chill wide swaths of protected speech, it is invalid unless NYAG can show it "is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown*, 564 U.S. at 799 (citation omitted). "That is a demanding standard" that NYAG cannot satisfy because its reading of Article 225 is fatally under- and overinclusive. *Id.*

"Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Id.* at 802 (collecting cases). NYAG claims an interest in ending gambling because it "can lead to addiction and result in real harm." FAC at 42; *see also id.* ¶¶ 128-49. According to the FAC, Valve's mystery boxes "use the same mechanics and psychological lures as traditional casino games." *Id.* at 39. But New York's Constitution *allows* casino and other forms of gambling, *see* N.Y. Const. art. 1, § 9—indeed, the Constitution has been repeatedly amended to *expand* legal gaming, *White*, 38 N.Y.3d at 219. While the government "need not address all aspects of a problem in one fell swoop," *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015), NYAG's approach "has singled out the purveyors of video games"—indeed, Valve specifically—"for disfavored treatment . . . and has given no persuasive reason why," *Brown*, 564 U.S. at 802. This sort of arbitrary enforcement is not permitted.

NYAG's reading of Article 225 is also overinclusive. Game features that NYAG identifies as addictive, such as "the innovative video game monetization inventions and ideas intended to lure and addict users, is a very broad category of content that may be addictive for some individuals but not others." *Courtright*, 795 F. Supp. 3d at 1167. NYAG itself recognizes as much, focusing

its discussion largely on "children and adolescents." FAC ¶¶ 141-52. But the government may not "suppress[ ] a large amount of speech that adults have a constitutional right to receive" "to deny minors access to potentially harmful speech." *Reno*, 521 U.S. at 874; *accord Courtright*, 795 F. Supp. 3d at 1167 (dismissing action against videogame developers because "the changes that are requested would apply to all users of the games and is therefore not narrowly tailored for children"); *Sanders v. Acclaim Ent., Inc.*, 188 F. Supp. 2d 1264, 1281 (D. Colo. 2002) (same). And it surely cannot do so where other less restrictive means to protect minors exist, such as parental controls that Valve already deploys. *See Brown*, 564 U.S. at 794.

Worse, NYAG's interpretation of Article 225 would chill all manner of protected expression, from baseball cards to subscription services to Labubus. Yet nowhere in the FAC does NYAG even attempt to show that those types of purchases lead to harmful addiction. That dooms NYAG's case. While its goals may be legitimate, "when they affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive." *Id.* at 805. NYAG has failed to properly tailor the means here.

2. NYAG's Interpretation of Article 225 Also Violates Foundational New York Separation-of-Powers Principles

"Only the people's elected representatives in the legislature are authorized to make an act a crime." *Davis*, 588 U.S. at 451 (citation modified). Where "it's impossible to say that [the legislature] surely intended that result," "a court may not, in order to save [the legislature] the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe." *Id.* at 464 (emphasis omitted). New York courts have regularly struck down executive actions where the Executive "take[s] it upon itself to fill the vacuum and impose a solution of its own" after "repeated failures by the Legislature" to proscribe certain conduct. *Boreali*, 71 N.Y.2d at 13 (finding that Public Health Council violated separation of powers by

promulgating certain smoking regulations); *accord Under 21 v. City of New York*, 65 N.Y.2d 344, 359 (1985).

The same result should follow here. New York's Constitution specifically delegates enforcement of the gambling provision to the Legislature. *See supra* Section II.C (discussing N.Y. Const. art. 1, § 9). The "measures to be adopted in furtherance of that end must" therefore "also rest in the legislative discretion." *Wilkerson*, 73 Misc. 2d at 901 (citation omitted). Here, the Legislature has considered and *rejected* bills that would have imposed liability on videogame developers for monetizing mystery boxes—even as mystery boxes have become a prominent feature in videogames over the last decade, *see* FAC ¶ 39. That should be the end of the matter.

In 2018, for example, the Legislature introduced A10075, which would have required developers to disclose probability rates for "randomized reward[s]" and "consumable virtual item[s] that can be redeemed." Assemb. B. 10075, 2017-2018 Reg. Sess. (N.Y. 2018). Not only was that bill rejected, it came nowhere close to the enforcement action NYAG brings here. For one thing, it would have amended the General Business Law—*not the Penal Law or Article 225*. Nor did it prohibit mystery boxes outright. Legislation currently under consideration is more of the same. A9044A proposes amending the Racing, Pari-Mutuel Wagering and Breeding Law to forbid offering mystery boxes where the contents are directly or indirectly repurchasable for cash or cash equivalents, cryptocurrency, or non-fungible tokens, among other things. *See* Assemb. B. 9044A, 2025-2026 Reg. Sess. (N.Y. 2025). These bills are miles apart from the kind of liability NYAG seeks to impose in this lawsuit. And neither even hints that mystery boxes are presently unlawful under Article 225.

At the same time, the Legislature has passed numerous laws related to gambling, but none concerned mystery boxes or any kind of in-game purchases. *See, e.g.*, N.Y. Rac. Pari-Mut. Wag.

& Breed. Law §§ 1400-12 (addressing interactive fantasy sports); *id.* § 1367-a (mobile sports betting); *id.* §§ 1321a–k (casino licenses); *id.* § 912 (sweepstakes). NYAG's efforts to criminalize mystery boxes where the New York Legislature has repeatedly declined to do so is an unconstitutional power grab to legislate by enforcement. The Court should reject it.

3. Potential Violations of the First Amendment and the Separation-Of-Powers Doctrine Also Require a Heightened Due Process Analysis that NYAG's Approach Cannot Survive

The profound First Amendment and separation-of-powers concerns also bear on the due process analysis. As the Supreme Court has explained, "the vice of unconstitutional vagueness is . . . aggravated where . . . the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution" or when it "undermines the Constitution's separation of powers and the democratic self-governance." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964); *see also Davis*, 588 U.S. at 451. Under those circumstances, the Supreme Court imposes "a heightened vagueness standard." *Brown*, 564 U.S. at 793. NYAG's unprecedented application of Article 225 cannot survive such exacting scrutiny.

Start with the First Amendment. The Supreme Court has explained that because the "threat of sanctions may deter [free] exercise almost as potently as the actual application of sanctions," *NAACP*, 371 U.S. at 433, the "danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform" speakers what is proscribed, *Keyishian*, 385 U.S. at 604. The government therefore may regulate activity that abuts protected expression "only with narrow specificity." *Id.* As explained, NYAG's approach to Article 225 unquestionably violates the First Amendment. But even *potential* First Amendment violations require the application of a heightened fair-notice standard that NYAG's interpretation plainly cannot survive. *See, e.g.*, *FCC*, 567 U.S. at 258 (considering the interplay between the

First Amendment and the Due Process Clause and opting to resolve the case "on fair notice grounds" alone, without "address[ing] the First Amendment" concerns).

The same principles apply to statutes that potentially violate separation of powers. Because "the power of punishment is vested in the legislative" branch, the Supreme Court has required courts to narrowly construe vague statutes where executive action threatens to usurp legislative authority to avoid "hand[ing] responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges" and "eroding the people's ability to oversee the creation of the laws they are expected to abide." *Davis*, 588 U.S. at 451, 464 (collecting cases); *accord Bass*, 404 U.S. at 348 (because "legislatures and not courts should define criminal activity," "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant").

Thus, even apart from the substantive First Amendment and separation-of-powers violations, NYAG's interpretation of Article 225 requires heightened scrutiny under the Due Process Clause. This Court should give full force to the doctrine and hold NYAG's brand-new interpretation of Article 225—which has never been applied by any court in any context, let alone to impose criminal liability—unconstitutional.

C. Alternatively, the Court Should Apply the Doctrines of Constitutional Avoidance and Lenity to Exclude Mystery Boxes from Article 225's Definition of Gambling

The Court need not definitively determine whether NYAG's interpretation of Article 225 is unconstitutional because Article 225 is, at the very least, reasonably susceptible to different interpretations. Accordingly, the Court can apply the twin doctrines of constitutional avoidance and lenity to exclude mystery boxes from the statute's reach.

The constitutional avoidance doctrine teaches that "a statute should be construed, whenever possible, in a way that avoids placing its constitutionality in doubt." *People v. Viviani*, 36 N.Y.3d 564, 579 (2021); *accord People v. Dietze*, 75 N.Y.2d 47, 52 (1989). Lenity principles similarly

dictate that "a criminal statute should be interpreted in defendant's favor where there are two plausible constructions." *People v. Andujar*, 30 N.Y.3d 160, 166 n.4 (2017); *accord Yates v. United States*, 574 U.S. 528, 547-48 (2015). As discussed, Article 225 can easily be read to exclude mystery boxes. That reading would still allow the statute to capture traditional gambling activity under the statute's plain meaning and allow the Legislature to address any concerns posed by mystery boxes as it deems necessary—all while avoiding serious notice concerns and protecting freedom of expression and separation of powers. The Court should opt for that narrow interpretation.

CONCLUSION

For these reasons, the FAC should be dismissed in its entirety.

Dated: May 18, 2026
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CERTIFICATE OF COMPLIANCE WITH COMMERCIAL DIVISION RULE 17

I certify that this Memorandum of Law in Support of Defendant's Motion to Dismiss complies with the word limit of Commercial Division Rule 17 (codified at N.Y. Comp. Codes, R. & Regs. tit. 22, § 202.70(g)) because it contains 9,998 words, inclusive of headings and exclusive of the caption, table of contents, table of authorities, table of defined terms, the signature block and this certificate, in compliance with Rule 17. In preparing this certification, I have relied on the word count of the word processing software used to prepare this Memorandum of Law.

Dated: May 18, 2026
New York, New York

Nola B. Heller

CERTIFICATE REGARDING USE OF GENERATIVE ARTIFICIAL INTELLIGENCE PROGRAMS

The undersigned attorney for Defendant Valve Corporation certifies pursuant to Part 61 Rules Paragraph 8 that there were no generative artificial intelligence programs used in drafting any document in this submission, including the notice of motion, memorandum of law, or affirmation.

Dated: May 18, 2026
New York, New York

Nola B. Heller