"pokémon" onto a birds-eye-view of the players' surroundings.[4] Pokémon randomly appear in-game based on the physical characteristics of the players' environments.[5] Pokémon GO players must constantly look at their phones to adequately prepare themselves to catch pokémon,[6] and Pokémon GO further encourages players to pay attention to their phones by showing the nearby pokémon within the "sightings" feature.[7] The high level of attention required to play Pokémon GO has resulted in players getting shot and killed,[8] falling off a cliff,[9] crashing cars,[10] and numerous other injuries[11] because they were not paying attention to their surroundings.[12] But holding Niantic, the creator of Pokémon GO, liable for these injuries is as absurd as holding the painter liable for injuries suffered by the viewers of her painting. Nonetheless, current case law leaves Niantic and the painter open to liability.[13]

The United States Supreme Court made clear in *Brandenburg v. Ohio* that a speaker may be criminally liable for her speech when she intends to cause "imminent lawless action," and that action is likely to occur.[14] This preliminary requirement for a speaker to be liable for her speech is known as

4. Robert Levine, *The Mapping Expert Behind Pokémon Go*, BLOOMBERG (July 21, 2016, 3:10 PM), http://www.bloomberg.com/news/articles/2016-07-21/the-mapping-expert-behind-pokmon-go.

5. *Finding and Catching Wild Pokémon*, POKÉMON GO, https://support.pokemongo.nianticlabs.com/hc/en-us/articles/221957648-Finding-and-Catching-wild-Pok%C3%A9mon (last visited Nov. 11, 2016).

6. Luke Kerr-Dineen, *Here s Why Everyone Is So Obsessed with the New Pokemon Go App*, USA TODAY SPORTS: FOR THE WIN (July 11, 2016, 12:55 PM), http://ftw.usatoday.com/2016/07/i-downloaded-the-pokemon-go-app-and-its-actually-really-fun.

7. Dave Thier, *How Sightings Works in Pokémon GO*, FORBES (Aug. 11, 2016, 12:03 PM), http://www.forbes.com/sites/davidthier/2016/08/11/nearby-tracker-tracking-how-sightings-works-in-pokemon-go/#61318b7c6ad3.

8. *Pokémon Go Player Killed in San Francisc0 612 2 reW*nBTF1 8.52 Tf1 0 0 1 17.148.8Tm0 g0 G[(2)0.0000092 0

"incitement."[15] Incitement can be reduced to three elements: (1) intent to

dangerous than a hitman manual, which was not held to incite imminent lawless action.[26] Nonetheless, Niantic's use of augmented reality technology, which requires players to interact with their environment through electronic devices, fulfills incitement's requirements without satisfying the policy underlying the incitement requirement.[27]

This note highlights three potential solutions to provide augmented reality companies with the First Amendment protections they were intended to retain. The first solution would be to deem imminence not satisfied when an augmented reality company uses "fixed" algorithms, which spawn the in-game incentives. The second solution necessitates legislative or judicial action eliminating or reinterpreting the intent element, within the meaning of incitement and as applied to augmented reality products, as proven only when the entertainment company *desired* the harm that resulted. The third solution requires legislative or judicial action reinterpreting incitement's intent element to be proven in the augmented reality context only when a reasonable augmented reality company is "virtually" certain, as opposed to "substantially" certain, that harm would result from its product. As will be discussed, the third solution is the best way of reinvigorating the First Amendment protections driving the incitement requirement in the augmented reality framework.

This note argues that incitement must be harder to prove against augmented reality companies. This change must occur because when incitement is applied to those companies, their artistic expression is likely to be silenced in a way unintended by the creators of the incitement requirement.[28] Part I explains the incitement requirement and the policy behind it. Part II illuminates how key elements of Pokémon GO, which are bound to be reanimated

I. WHAT IS INCITEMENT?

The First Amendment extends broad protection to artistic expression,[30] which includes video games.[31] This protection is so extensive that only the

calling for *imminent*

A. Imminence Element of Incitement

successfully catch.[80] Pokémon GO utilizes a birds-eye-view screen, similar to the Google Maps platform, to show the players' surroundings, super-imposed pokémon,[81] and a pokémon tracker showing how close pokémon are and their identities.[82] While a player could remain in one place in hopes that pokémon pop up on the player's screen,[83] players are encouraged to move around their surroundings and catch different pokémon.[84]

The in-game incentives, which encourage players to move around their surroundings, manifest in a few ways.[85] Two key incentives deal with where a player is and whether the player is moving.[86] More specifically, different pokémon can be found in different environments, like at a pier or in a desert.[87] Furthermore, playing the game while moving triggers more pokémon to spawn on a player's screen,[88] allowing those players to potentially fill their pokédex at a faster rate. The "sightings" feature, which shows players what pokémon are nearby, further incentivizes players to move because the pokémon displayed by this tracker may spawn on the players' screens if they take a few steps.

itself) from potential harms that simply cannot be avoided.[113] But even if these warnings indicate Niantic does not intend harm, these warnings are wholly ineffective in proving Niantic does not have the requisite intent for incitement.[114]

Pokémon GO's in-game warnings are not a valid defense against a showing of incitement. In-game warnings are relevant for showing a player assumed the risk of a game.[115] However, this is relevant under a tort analysis, which is addressed *after* a finding of incitement.[116] In other words, the warnings may help Niantic, and other companies using similarly problematic augmented reality technology, in avoiding tortious liability, but the warnings are not a defense to incitement.[117]

Learning from incitement's applicability, Niantic and other similarly situated augmented reality companies may tailor where in-game incentives spawn as to minimize liability risks. However, this curating is unlikely. The appeal of Pokémon GO, as well as games that will soon follow in its footsteps, is that it is truly an open-world experience.[118] Namely, players get to hunt down pokémon in-game while exploring new uncharted

spirit of incitement is not fulfilled because Pokémon GO hardily advocates violence, and does far less that actually incite.[126] First Amendment protections are distorted when incitement is not present when a Klansman says "we are going to . . . [b]ury the niggers,"[127] while incitement is present when a family-style video game using technology allows players to interact with their environments in new ways. This inconsistency demands for a change in the law.[128]

III. THE SOLUTIONS

The disconnect between the spirit backing the incitement requirement and its application against augmented reality companies using profitable features within Pokémon GO demands a change in the law.[129] Two potential ways of resolving this problem involve altering the imminence element of incitement and altering the intent element of incitement.[130] As will be seen, the intent element is the best element to alter or reinterpret to provide augmented reality companies the First Amendment protections they deserve. If this problem is addressed as this note suggests, companies using augmented reality technology will retain the same First Amendment protections incitement provides for other forms of expression.[131]

A. Imminence Solution

Augmented reality companies would seemingly have the same First Amendment protections as other entertainment companies if the algorithms spawning in-game incentives would be deemed "recorded" or "fixed." If the algorithms utilized in augmented reality games are deemed recorded in the

126. *See Brandenburg*, 395 U.S. at 447-49.

127. *See id.* at 446-48.

128. *See* Planned Parenthood v. Casey, 505 U.S. 833, 854-55 (1992).

129. One major factor for overruling a prior Supreme Court case is present in this scenario. *See id.*

same way lyrics were deemed recorded in *McCollum*,[132] imminence will not be automatically satisfied by the use of randomly spawning in-game incentives. This would require plaintiffs to prove that augmented reality companies are more active in how they entice players to move around their surroundings for imminence to be present. For example, if a plaintiff can show a Niantic employee manually inserted each pokémon in Pokémon GO for individual players, imminence would be satisfied.

While this first plausible solution is logical and is familiar to incitement jurisprudence,[133] it may provide an unintentional loophole for augmented reality companies to actually incite players while still avoiding liability. More specifically, if individual algorithms were set for individual players, those algorithms would be deemed sufficiently "fixed" because they are implemented in the augmented reality context, regardless of whether they are targeting players to harm them. For example, Niantic could set an algorithm, spawning pokémon for a single person, drawing her towards major freeways with the desire to harm her. Niantic would still not satisfy the imminence element in this context simply because it records its expression through the

Pokémon GO would find itself in a similar situation.[135] Abrogating the rule governing when intent is proven in this context heightens the level of protection augmented reality companies would receive, making it less likely for plaintiffs to prove those companies intended the harm their players endured.

But if incitement's intent can only be proven when an augmented reality company desired the harm, these pit falls in the current incitement standard are immaterial. As discussed earlier, the augmented reality technology used in Pokémon GO is problematic because it proves Niantic is substantially certain that harm will result from the content of its product.[136] Eliminating substantial certainty would require a plaintiff to demonstrate that Niantic, or another company using similarly problematic elements in its game, *desired* the harm that resulted thereby showing that it intended the harm.[137] The result of this change would be that "intent" could not be inferred from Pokémon GO's elements alone. While this approach is appealing in its simplicity and effectiveness, it is not perfect.

By eliminating substantial certainty as a way of proving augmented reality companies intend to incite imminent lawless action, augmented reality companies will have *more* protections than other entertainment companies. Namely, augmented reality companies will retain First Amendment protection when the content of their games demonstrate they are *more*

requirement.[140] Namely, law enforcement does not need a warrant to search electronic containers when it is *virtually certain* that the law enforcement will not learn facts outside what the private searcher learned.[141] Thus, when there is a *mere possibility* that new facts outside the private search can be discovered by the subsequent search, there is a Fourth Amendment violation.[142]

Applying virtual certainty to the augmented reality context, intent for incitement is fulfilled when a reasonable augmented reality company is virtually certain that its consumer will be injured by playing the game. Moreover, an augmented reality company does not intend the harm if there is a *mere possibility* that a player could play the game in the way that the particular plaintiff did without being injured. For example, there is a possibility that a player would not get hurt in searching for pokémon in an active electrical power plant, and thus, intent would not be present. However, there is no possibility for a Pokémon GO player to jump on an electrical coil at an active electrical power plant without injury, and thus intent would be fulfilled if the game advocated for that action.

The virtual certainty approach would make it much harder to prove that an augmented reality company intended to incite. This approach provides augmented reality companies their fundamental First Amendment protection