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No. 08-1448

IN THE
Supreme Court of the United States

ARNOLD SCHWARZENEGGER, Governor of the State of California, and EDMUND G. BROWN, Jr., Attorney General of the State of California,
Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION IN SUPPORT OF RESPONDENTS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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BRIEF *AMICUS CURIAE* OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE* [1]

Amicus Curiae the National Cable & Telecommunications Association ("NCTA") is the principal trade association representing the cable television industry

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[1] All parties have consented to the filing of this brief. The parties' blanket letters of consent are on file with the Clerk.

No counsel for a party has written this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief.

in the United States. Its members include cable operators serving more than 90 percent of the nation's cable television households as well as most widely viewed cable programmers.

This Court has recognized that "[c]able programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 636 (1994). In this case, petitioners seek to narrow prevailing First Amendment standards, arguing that this Court should allow government regulation of speech to minors "so long as it [is] not irrational for the . . . legislature to determine that exposure to the material regulated by the statute is harmful to minors." Petrs Br. 8, citing *Ginsberg v. New York,* 390 U.S. 629 (1968). It is NCTA's view that this deferential standard – which petitioners would apparently apply to all forms of speech to minors – provides inadequate protection for important First Amendment rights. NCTA thus has a direct and immediate interest in the proper resolution of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has long held that content-based restrictions on speech are presumptively unlawful. *See, e.g., R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). The Court has thus required governments to justify content-based laws by showing, not just that they have a compelling government interest in regulating the speech, but also that the speech poses a real threat to the specified interest and that no less restrictive way of dealing with the threat would be

effective. *See, e.g., United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 813 (2000). Applying those standards, the Ninth Circuit in this case determined that California's law prohibiting the sale of violent video games to minors violated the First Amendment. The court of appeals acknowledged that California had a compelling interest in protecting minors' well-being, *see* Pet. App. 25a, but it found that California had not shown either that the video games posed a genuine problem with respect to minors' well-being, or that other methods of addressing the purported problem were inadequate. *See* Pet. App. 25a-34a. That decision was correct, in both approach and conclusion, and should be affirmed.

1. Petitioners' primary argument – and the one that we primarily address – is that government regulation of speech to minors should be treated with a high degree of deference. Relying principally on *Ginsberg v. New York*, 390 U.S. 629 (1968) – an "obscenity for minors" case – they propose that even content-based laws should be upheld "so long as it [is] not irrational for the . . . legislature to determine that exposure to the material . . . is harmful to minors." Petrs Br. 8. But this unexacting standard would dispense with what, in practice, are the most critical elements of First Amendment analysis. Given that it is a relatively simple matter for governments to advance an interest that, judged only in the abstract, appears to be substantial, the real force of First Amendment protection almost always lies in the additional requirements that government establish "that the harms it recites are real . . . ," *Edenfield v. Fane,* 507 U.S. 761, 771 (1993), and "that speech is restricted no further than necessary to achieve the goal . . . ." *Ashcroft v. American Civil Liberties Union*,

542 U.S. 656, 666 (2004). Indeed, this Court has repeatedly struck down laws for failing to meet one or both of those latter requirements, even while expressly acknowledging that the speech-restricting government had put forward a facially sufficient interest. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 46 (1976); *Edenfield*, 507 U.S. at 769; *United States v. National Treasury Employees Union*, 513 U.S. 454, 472 (1995).

Much of this established First Amendment protection would be lost under petitioners' compelling-interest-plus-rational-belief test. Once it is accepted that government has a compelling interest in safeguarding "the physical and psychological well-being of minors," *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989), petitioners' test is really little more than a speech-specific application of the notoriously deferential rational-basis test. Under that test, courts would have little ability to undertake the critical task of distinguishing regulation of truly harmful speech from regulation of merely objectionable speech. This Court has emphasized that, under the rational-basis test, courts are not entitled to "judge the wisdom, fairness, or logic of legislative choices," *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993), and that legislative judgments "may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 315. Indeed, petitioners claim that States should have almost total latitude to ban speech to minors merely by "finding" that the speech would be potentially harmful to their "'ethical and moral development.'" Petrs Br. 30, quoting *Ginsberg,* 390 U.S. at 641. That standard would make government censorship of speech to minors presumptively lawful rather than the other way around.

Such government control over speech might be tolerable if it were obvious that governments rarely overreached in regulating speech to minors. But that is not the case. Indeed, some of this Court's best-known decisions involve unconstitutional state attempts to dictate what minors – often school children – say and hear. *See, e.g., West Virginia Bd. Of Educ. v. Barnette*, 319 U.S. 624 (1943) (law requiring students to recite Pledge of Allegiance); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (law barring teaching of evolutionary theory in public schools). Similarly, this Court has invalidated a number of federal laws aimed at suppressing the availability of indecent sexual material to minors on the ground that the restrictions were either unjustified on the record or overbroad. *See, e.g., Sable Communications,* 492 U.S. at 126-31; *Playboy Entertainment Group,* 529 U.S. at 819-27.

Petitioners stress that minors are generally less mature than adults, but that fact, while true, does not justify making government the presumptive gatekeeper of permissible speech. What petitioners fail to come to grips with is that government's legitimate interest in banning speech to minors is a carefully limited one: it lies only in protecting minors from the rare examples of speech that cause cognizable harm, not in shielding them from speech that is merely offensive or objectionable. *See Erznoznik v. City of Jacksonville,* 422 U.S. 205, 212-13 (1975) (government may limit speech to minors "only in relatively narrow and well-defined circumstances"). In order to assure that government is pursuing the former rather than the latter course, it is necessary to have a First Amendment standard that will assess whether the banned speech does, in fact, pose a threat to minors' well-being. Yet, the *Ginsberg* test would fore-

close any meaningful examination of just that issue. That alone is reason to reject it.

2. The decision in *Ginsberg* is also an especially precarious foundation on which to base a broad government power over speech to minors. To start with, *Ginsberg* was largely an exercise in *ipse dixit* lawmaking. Although the Court in *Ginsberg* announced that New York's "girlie magazine" statute should be upheld unless it was "irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors," 390 U.S. at 641, it neither cited specific authority for, nor provided any independent explanation of, that extremely lax standard. In fact, the Court carried its deference to state censorship of speech one step further, refusing to give any weight to record evidence indicating divided expert opinion about whether such magazines actually caused any harm to minors. *See id.* at 642.

Ginsberg did rely heavily on *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158 (1944), but that case involved very different circumstances. The law at issue in *Prince* was simply one subpart of a broad-based state law directed at the problem of child labor, having only an incidental effect on speech (*i.e.*, when the labor happened to involve distribution of speech). As a result, it is probable that such a law would now be subjected, not to the strict scrutiny given to laws directly regulating the content of speech, but to the intermediate level of scrutiny given to laws regulating a combination of conduct and speech. *See, e.g., Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997). Thus, *Prince* was hardly good authority even for the deferential review accorded in *Ginsberg* – which did involve a content-

based restriction on speech – let alone a proper basis on which to ground a present-day expansion of state power over all speech to minors.

Petitioners' other arguments are likewise unavailing. Although petitioners say that States should be able to support parents by restricting certain kinds of speech to minors, that argument raises serious questions of its own. In particular, petitioners do not account for the fact that different parents will commonly be of different minds about the kind of speech that their (and other) children should hear. As a result, a State's ban on particular speech will often be more likely to reflect officials' own opinions about the value of that speech than some universal "parental" view, just the sort of value-based government judgment that the First Amendment is meant to protect against. And any related interest in avoiding the impression of state approval of the speech should be addressed by means other than direct censorship. "[M]ore speech" is "[t]he preferred First Amendment remedy." *Brown v. Hartlage*, 456 U.S. 45, 61 (1982).

Finally, petitioners cannot shore up the *Ginsberg* standard by relying on government's greater power to restrict speech over the public airwaves and in public schools. *See, e.g., FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). This Court has recognized that the federal government has unique power over speech by broadcast licensees, *see Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), a power that includes authority to protect children from unwilling exposure to objectionable (not just harmful) material. It has likewise observed that the First Amendment "must be applied in light

of the special circumstances of the school environment." *Tinker*, 393 U.S. at 506; *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 266 (1988). But these distinct rules – created to deal with particular contexts in which unlimited speech would literally be impossible – cannot be carried forward to the world at large, simply because government regards certain speech to minors as unworthy of constitutional protection.

ARGUMENT

Petitioners argue that this Court should adopt a new constitutional doctrine allowing States to prohibit communication of speech to minors, based on its content, "so long as it [is] not irrational for the . . . legislature to determine that exposure to the material . . . is harmful to minors." Petrs Br. 8, citing *Ginsberg v. New York*, 390 U.S. 629 (1968).[2] But this borrowed, excessively forgiving standard has no place in general First Amendment law. To begin with, the proposed test has the fatal flaw of eliminating what, in practice, are the most critical elements of traditional First Amendment scrutiny: that a State demonstrate that it is addressing a genuine problem

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[2] Although petitioners would require States to demonstrate a compelling state interest in regulating speech to minors, that antecedent requirement would presumably be satisfied, at least on paper, by a State's claim that it is censoring speech to protect minors from purported harm. This Court has repeatedly recognized that there is a compelling government interest "in protecting the physical and psychological well-being of minors." *Sable Communications of California, Inc. v FCC*, 492 U.S. 115, 126 (1989); *see also New York v. Ferber,* 458 U.S. 747, 756-67 (1982); *Denver Area Educational Telecommunications Consortium, Inc. v. FCC,* 518 U.S. 727, 754-58 (1996); *Reno v. American Civil Liberties Union,* 521 U.S. 844, 869 (1997).

and doing so in a properly limited way. To replace this rigorous analysis with a mere rational-belief inquiry – especially when addressed to highly subjective matters like the effects of particular speech on minors' "ethical and moral development" – would effectively disable reviewing courts from performing the necessary function of distinguishing regulation of truly harmful speech (permissible under the First Amendment) from regulation of speech that government merely finds offensive (impermissible under the First Amendment). Moreover, petitioners' effort to rest this expansion of government power on the narrow decision in *Ginsberg* suffers from the fact that *Ginsberg* was a poorly grounded and casually reasoned decision, providing little solid foundation for sweeping government authority to decide what speech is suitable for minors to hear. Petitioners' attempt to redefine First Amendment law should thus be rejected.

I. THE STATE'S PROPOSED STANDARD WOULD ELIMINATE CRITICAL PARTS OF PROPER FIRST AMENDMENT SCRUTINY

A. The first problem with petitioners' proposed compelling-interest-plus-rational-belief standard is that the very reason for its existence – to allow government to regulate speech without meaningful oversight – is contrary to core First Amendment principles. This Court has made clear that, "[a]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens,* 130 S.Ct. 1577, 1584 (2010) (internal quotation marks omitted); *New York State Bd. of Elections v. Lopez Torres*, 552

U.S. 196, 208 (2008) ("First Amendment creates an open marketplace . . . without government interference"). Rather than having government be the final arbiter of permissible speech, "'[t]he constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely in the hands of each of us . . . .'" *Leathers v. Medlock*, 499 U.S. 439, 448-49 (1991), quoting *Cohen v. California*, 403 U.S. 15, 24 (1971). "[O]pinions and judgments, including esthetic and moral judgments about art and literature, . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of the majority." *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 818 (2000).

The fundamental rule, therefore, is that government attempts to control speech are inherently suspect. "When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed." *Playboy Entertainment Group,* 529 U.S. at 817. As a result, "[c]ontent-based regulations are presumptively invalid," *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972), and seldom upheld. *See Playboy Entertainment Group*, 529 U.S. at 818. Indeed, even when government is engaging in less intrusive regulation of speech – for example, restricting speech-related conduct or setting rules for commercial speech – "it bears the burden of proving the constitutionality of its actions." *Id.* at 816-17; *see also Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993).

The Court has given force to this presumption of illegality by applying several exacting tests, invali-

dating speech-restricting laws unless the government can make each of three interrelated showings. As a threshold matter, the government must establish that it has undertaken regulation of the speech in order to serve a compelling, or at least a substantial, government interest. *See, e.g., Playboy Entertainment Group,* 529 U.S. at 813 (compelling interest); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994) (important or substantial interest). Significantly for present purposes, however, the Court has also required the government to do more than simply advance an interest that is compelling or important in theory: rather, the government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 771. Finally, the government must always show that its restriction on speech is properly tailored to address the identified problem, without burdening too much speech. *See, e.g., Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997).

Petitioners' proposal would work a radical alteration of this traditional approach. Where speech to minors is concerned, they say that the Court should apply only the compelling-interest part of the established three-part test, with further review limited to asking whether the State had a rational basis for believing that the restricted speech would be harmful to minors. *See* Petrs Br. 8, 16-17, 28; *Ginsberg*, 390 U.S. at 639, 641. But that is not a sufficiently robust First Amendment standard. While petitioners' proposed test does require an important reason for regulating speech, the fact is that, as a practical matter, governments tend to have little difficulty in meeting that requirement in and of itself. Although a

government may sometimes rely on an interest that is *illegitimate*, *see, e.g., Buckley v. Valeo*, 424 U.S. 1, 56-67 (1976) ("interest in equalizing the financial resources of candidates"), it is the rare case in which the Court has prohibited government regulation of speech on the ground that the asserted government interest is *insufficient*. *But see City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994) (interest in preventing "visual clutter" does not justify broad ban on residential signs). In general, therefore, governments have almost always been able to put forth some government interest that – judged in the abstract – would be significant enough to support restrictions on speech, just as California has done here. *See* note 2 *supra.*

The Court has thus safeguarded central First Amendment values largely by finding that government has failed to meet one of the other parts of the recognized tests: that is, by determining that, even though the claimed interest is important or even compelling, the danger to that interest is largely conjectural or the means of regulation overbroad. In cases challenging restrictions on campaign expenditures, for example, this Court has continually given close scrutiny to whether unrestrained expenditures truly threaten the government's concededly important interest in preventing actual or apparent corruption. In *Buckley v. Valeo*, having found that "the Act's primary purpose to limit the actuality and appearance of corruption" provided "a constitutionally sufficient justification for the $1,000 contribution limitation," 424 U.S. at 26, the Court went on to conclude that the same interest nevertheless could not support limits on independent expenditures, observing, among other things, that "the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent

corruption comparable to those identified with large campaign contributions." *Id.* at 46. Similarly, in *Davis v. Federal Election Comm'n*, 128 S.Ct. 2759 (2008), the Court invalidated a penalty on personal expenditures by a candidate for the House of Representatives, observing that use of a candidate's own funds would tend to reduce, not increase, the possibility of corruption or the appearance of corruption. *See id.* at 2773. And, most recently, in *Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876 (2010), the Court held that Congress could not constitutionally ban independent expenditures by domestic corporations and unions, relying in part on the determination, previously set forth in *Buckley*, that "independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption." *Id.* at 910.

The Court has followed the same course in many other First Amendment cases as well. In *Edenfield*, it agreed that the State had identified substantial interests to justify its regulation of solicitation by public accountants – "ensuring the accuracy of commercial information in the marketplace" and "the protection of potential clients' privacy" (507 U.S. at 769) – but struck down the particular Florida law at issue because "[t]he Board has not demonstrated that, as applied in the business context, the ban on CPA solicitation advances its asserted interests in any direct and material way." *Id.* at 771. *See also Ibanez v. Florida Dept. of Bus. and Prof. Regulation, Bd. of Accountancy,* 512 U.S. 136 (1994). In *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), even though the Court acknowledged that the government had an "undeniably powerful" interest in preventing officials from abusing their offices by accepting honoraria, *id.* at 472, it nonetheless found that the sweeping honoraria ban violated

the First Amendment, citing the government's failure to present "evidence of misconduct related to honoraria in the vast rank and file of federal employees below grade GS-16." *Id.* In *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105 (1991), the Court accepted that "the State has a compelling interest in compensating victims from the fruits of the crime," *id.* at 120-21, but nullified the law in question as "significantly overinclusive." *Id. See also City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 416 (1993) (city failed to "establish a 'reasonable fit' between its legitimate interests in safety and esthetics and its choice of a limited and selective prohibition of newsracks as the means chosen to serve those interests"); *Rubin v. Coors Brewing Co.,* 514 U.S. 476, 485, 486-90 (1995) (finding that federal government had a "significant interest in protecting the health, safety, and welfare of its citizens by preventing brewers from competing on the basis of alcohol strength" but concluding that law did not advance that interest).

It thus would significantly lessen First Amendment protections if, once a significant government interest had been invoked, the Court were to dispense with careful scrutiny of laws limiting speech, employing little more than a rational-basis test applied to a subcategory of speech (speech to minors). This Court has emphasized that the rational-basis test "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). In keeping with that model of judicial restraint, it has further admonished that "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical

data." *Id.* at 315. *See also Heller v. Doe*, 509 U.S. 312, 319-321 (1993). Under petitioners' test, therefore, the presumption against government regulation of speech would be turned backwards, leaving reviewing courts hard pressed to question any but the most farfetched legislative conclusion that disfavored material might be harmful to children.

Petitioners try to stack the deck still further, maintaining that "the governmental interest served by restricting minors' access to certain expressive material is not limited to protecting them from physical or psychological harm," Petrs Br. 30, but goes beyond that to "preventing the impairment of minors' 'ethical and moral development.'" Petrs Br. 30, quoting *Ginsberg*, 390 U.S. at 641. According to petitioners, the inherent subjectivity of this inquiry is actually an additional reason to defer to state judgments, because "the First Amendment cannot be applied in a manner that would require empirical proof of how expressive material impacts such nebulous concepts as one's ethics or morals." Petrs Br. 30. But, even if one accepts that States may restrict speech to minors without any threat of harm to their "physical and psychological well-being" – a view that is in considerable tension with the Court's definition of the States' legitimate interest, *see* note 2 *supra*[3] –

[3] The quoted language in *Ginsberg* was from a "legislative finding" in the New York statute, not from any independent discussion of the State's interest in regulating the speech in question. *See* 390 U.S. at 641 ("Section 484-e of the law states a legislative finding that the material condemned by § 484-h is 'a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state'"). In the immediately following sentence, the Court noted: "It is very doubtful that this finding expresses an accepted scientific fact." *Id.*

the fact that ethics and morals are "nebulous concepts" provides all the more reason for courts to scrutinize whether, in purporting to protect them, a State is doing anything more than just enforcing its views about the value of particular speech. Otherwise, the category of speech regarded as potentially detrimental to minors' ethics and morals will inevitably become as nebulous and open-ended as those concepts themselves, varying from State to State, depending on differing subjective legislative opinions.[4]

This case provides a ready example of the potential problem. Although extremely violent video games may be offensive to many people, the fact that speech is offensive does not mean, by itself, that it has a harmful effect on those who hear it. Yet, when put to the test of demonstrating that violent video games actually cause cognizable harm to minors, petitioners were unable to show anything more than a general correlation between violent video games and some aggressive behavior. *See* Pet. App. 27a-32a. Noting that this evidence fell short of demonstrating a proper causal link between speech and harm, the

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[4] It also seems self-evident that minors' "ethical and moral development" will vary by age, further emphasizing the need for a close examination of the basis for restricting speech to minors as a class. Even with the recognition that minors are still developing maturity through "late adolescence," *Graham v. Florida*, 130 S.Ct. 2011, 2026 (2010), the fact remains that a seventeen year old – who is, after all, nearly old enough to vote and can drive in many States – has a greater capacity for judgment than a child many years younger. Just as government cannot "reduce the adult population . . . to reading only what is fit for children," *Butler v. Michigan*, 352 U.S. 380, 383 (1957), it should not be able to limit seventeen year olds to materials fit only for ten year olds.

Ninth Circuit held that the ban on selling video games to minors was invalid. *See* Pet. App. 32a.

Petitioners seem to believe that it should be enough for a State to show a *possibility* of harm to minors, rather than actual harm. But First Amendment scrutiny is designed to protect against regulation of speech based on possibilities alone. In *Playboy Enterprises,* for example, this Court struck down federal regulations addressed to sexually explicit cable channels, finding that the evidence regarding a threat to children "was at best a draw." 529 U.S. at 819. In that situation, the Court observed, "the tie goes to free expression." *Id.* The same principle should apply here.

B. The fundamental weakness in the *Ginsberg* standard is that it does not do – indeed, cannot do – what a meaningful First Amendment test should do: provide a useful way to distinguish between those rare instances in which regulation of speech is needed to prevent significant harm and those instances in which regulation of speech simply reflects official distaste for its nature. That might not matter if there were good reason to think that, for the particular subcategory of "speech to minors," the risks of government overreaching were slight, but no such confidence is warranted. To the contrary, numerous cases reveal that government officials have a natural tendency to seek influence over minors' psychological and moral development, and that, in taking those steps, officials have frequently crossed the line into constitutionally protected areas.

Many examples of this overreaching are well-known. For example, the Court has often overturned efforts by state and local school officials to decree what students should say and hear, even though, as

a general matter, government has *greater* power to regulate speech in public schools. *See, e.g., Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 266 (1988); page 30 *infra.* Thus, the Court held that the State of West Virginia could not, consistently with the First Amendment, attempt to instill feelings of patriotism by having students recite the Pledge of Allegiance in schools. *See West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *see also Bd. Of Educ., Island Trees Union Free Dist. No. 26 v. Pico*, 457 U.S. 853, 872 (1982) (plurality opinion) ("local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books"). Applying a different part of the First Amendment, the Court likewise has struck down repeated state attempts to encourage students' religious beliefs by providing for school prayer. *See Wallace v. Jaffree,* 472 U.S. 38 (1985); *School Dist. of Abington Township v. Schempp,* 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). And, the Court invalidated an Arkansas statute that "prohibit[ed] the teaching in its public schools and universities of the theory that man evolved from other species of life," *Epperson v. Arkansas*, 393 U.S. 97, 98 (1968), a law embodying one State's view that exposure to evolutionary theory would be harmful to its students' religious training. *See also Edwards v. Aguillard*, 482 U.S. 578 (1987).

The Court has similarly set aside laws addressing potential harm to minors from indecent sexual material, which petitioners treat as a close cousin to "offensively violent" material (s*ee* Petrs Br. 37-38). In *Sable Communications*, although the Court acknowledged the government's compelling interest in protecting minors, 492 U.S. at 126, it declined to approve a total ban on indecent telephone communications,

saying that the government had failed to show that a less restrictive alternative could not address its concerns. *See id.* at 126-31. Nearly a decade later, in *Playboy Entertainment Group*, the Court found "legitimate reasons" for regulating sexually explicit programming in order to protect minors, 529 U.S. at 811, but saw no persuasive evidence that the government had adopted the least restrictive means of doing so. *Id.* at 819-27. *See also Denver Area Educational Telecommunications Consortium,* 518 U.S. at 755 (government restriction on speech "considerably more extensive than necessary") (internal quotation marks omitted); *Butler*, 352 U.S. at 383 (state statute designed to protect minors was "not reasonably restricted to the evil with which it is said to deal"). In addition, the Court has held that certain restrictions on virtual child pornography violated the First Amendment, *see Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 253 (2002), stating that "[t]he Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse." *Id.*[5]

Petitioners claim that States have had a long history of prohibiting unsavory communications to minors, citing statutes that bar sale of publications involving, among other things, "blasphemy," "profanity," "immoral deeds," "crime," "bloodshed," "police reports," and "immorality." *See* Petrs Br. at 31-33, 34-36. But these kinds of broad-based prohibitions

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[5] The Court has also invalidated state regulations aimed at protecting minors from exposure to advertising of tobacco products. *See Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525 (2001). There, the Court observed that the State's regulatory attempts "do not demonstrate a careful calculation of the speech interests involved." *Id.* at 562.

raise their own First Amendment problems. *See Winters v. New York,* 333 U.S. 507 (1948) (striking down similar statute as unconstitutionally vague). Indeed, if such bans were taken literally, minors would likely be prevented from buying daily newspapers, as well as many commonly read books and magazines, making the restrictions appear to reach well beyond any true need to protect minors from foreseeable harm. Fifty years ago, in fact, the California Supreme Court struck down a comparable law – aimed at the distribution of "crime" comic books – for just that reason, finding that, even as limited to such material, it was far too broad. *See Katzev v. County of Los Angeles*, 341 P.2d 310 (1959). In doing so, the Court pointedly observed that, by its terms, "[t]he ordinance brings within its scope such publications as New Funnies (town attacked by bandits in Woody Woodpecker story); Bugs Bunny (Bugs steals diamonds); and Classic Comics (Treasure Island)." *Id* at 315.

Petitioners insist that States must have broad power to limit speech to minors because minors have "'[a] lack of maturity and an underdeveloped sense of responsibility . . . .'" Petrs Br. 25, quoting *Roper v. Simmons,* 543 U.S. 551, 569 (2005). But this argument misses an important point: a State's compelling interest in restricting speech to minors is strictly limited to protecting them from cognizable harm, *see Sable Communications,* 492 U.S. at 126, and does not entitle the State simply to block speech that it finds offensive. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975) ("minors are entitled to a significant measure of First Amendment protection . . . and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them") (citations

omitted). Thus, minors' diminished maturity is a legitimate reason for government censorship *only* in the unusual case where exposure to the speech in question would actually be detrimental to minors in some important way. Yet, petitioners' proposed analysis would prevent – indeed, is designed to prevent – reviewing courts from giving close scrutiny to that very question.

Petitioners' argument also proves too much. "The question of the extent of state power to regulate conduct of minors not constitutionally regulable when committed by adults is a vexing one, perhaps not susceptible of precise answer." *Carey v. Population Services, Int'l,* 431 U.S. 678, 692 (1977) (plurality opinion). For that reason, this Court has frequently struggled with the task of identifying the specific point at which minors' constitutional rights leave off and the regulatory power of the State takes hold. *See, e.g., Reno v. American Civil Liberties Union*; *Hodgson v. Minnesota,* 497 U.S. 417 (1990); *In re Gault,* 387 U.S. 1 (1967). Importantly, however, the Court has not chosen to resolve such cases simply by pointing to minors' lack of maturity and then accepting the lawmaking State's judgment about what is best for them. To the contrary, the Court itself has carefully examined whether the particular law was necessary to advance the State's claimed interest in assisting minors. *See, e.g., Hodgson,* 497 U.S. at 450-456 (invalidating State's two parent notification statute partly on ground that "it disserves the state interest in protecting and assisting the minor with respect to dysfunctional families"). There is no good reason to adopt a more deferential posture in the area of constitutionally protected speech.

Petitioners imply that States would use their new wide-ranging power over speech to minors with sensitivity, suggesting at one point that States might not (perhaps, could not) censor material that "has serious redeeming value for minors." Petrs Br. 28. But there are at least two problems with this notion. First, although the California video game law includes an exemption for games with redeeming value, nothing in the *Ginsberg* test itself limits its application to "valueless" speech. Under *Ginsberg*, the question is not whether the censored speech might offer some benefit to minors, but whether it could do them harm. Second, while the Court could rewrite the *Ginsberg* standard to import a "redeeming value" limitation, that amendment would effectively contradict the very assumption on which the *Ginsberg* standard supposedly rests: that States can be trusted to decide what speech might or might not be suitable for minors. Although we think that assumption to be insupportable anyway, *see* pages 17-20 *supra,* a test that needs an exception to its own basic premise is hardly worth adopting in the first place.

Petitioners' approach to speech regulation would be troubling enough even if it applied just to video games, and nothing more. But, while petitioners and their *amici* make a point of stressing the unique role playing of participants in such games (*see, e.g.,* Petrs Br. 55; Br. *Amicus Curiae* Eagle Forum Education & Legal Defense Fund, 2, 7; Br. *Amicus Curiae* California State Senator Leland Y. Yee, Ph.D *et al.*, 4, 16-17), their arguments seemingly apply to speech well beyond that particular context. In addition to their reliance on laws that prohibit distribution of printed materials about crime and blasphemy, *see* pages 19-20 *supra*, petitioners invoke concerns about "violent scenes in television and movies," Petrs Br. 44, as well

as "violent music lyrics." Petrs Br. 45. If petitioners were to have their way, therefore, it appears that States would be free to regulate *any* form of speech that they deemed potentially harmful to minors' emotional development, all without effective judicial supervision.

This is simply bad constitutional law. In the end, government restrictions on speech should remain the exception, not the rule, even where speech to minors is concerned. Despite petitioners' suggestions to the contrary, traditional First Amendment tests are not so rigid that States cannot satisfy them when speech presents a real threat to important interests. *See, e.g., Holder v. Humanitarian Law Project,* 130 S.Ct. 2705, 2722-30 (2010). But, given governments' enduring propensity to restrict speech that they dislike or find disturbing, and the fact that speech by itself is seldom truly harmful even to minors, it is appropriate for governments to bear the burden of identifying a genuine speech-caused problem that cannot be remedied by narrower regulation. For that reason alone, petitioners' request to dispense with those essential parts of First Amendment analysis should be denied.

II. THE DECISION IN GINSBERG IS ESPECIALLY WEAK AUTHORITY ON WHICH TO BASE A DRAMATIC REVISION OF FIRST AMENDMENT STANDARDS

A. Petitioners argue that the decision in *Ginsberg* provides ample support for according broad discretion to state legislatures over speech to minors. *See* Petrs Br. 16-18, 28. But, even leaving aside the fact that *Ginsberg* involved the sale of sexually explicit materials – an area of law that occupies its own idiosyn-

cratic corner of the First Amendment landscape – the decision is hardly a model of careful analysis. Most notably, the Court in *Ginsberg* never really explained why its lax rational-belief standard is the proper test for assessing government restrictions on speech to minors. Having begun with the uncontroversial proposition that "'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults,'" 390 U.S. at 638, quoting *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 170 (1944), the Court simply announced, without any relevant citations, that the State may justify regulation of indecent speech to minors by showing that it was rational to regard the speech as harmful. *See* 390 U.S. at 639 (stated government interests would "justify the limitations in [the statute] upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful"); *id.* at 641 ("[t]he only question remaining, therefore, is whether the New York Legislature might rationally conclude, as it has, that exposure to the materials proscribed by [the statute] constitutes such an 'abuse'"); *id.* ("[t]o sustain state power to exclude material defined as obscenity by [the statute] requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors"). The Court even acknowledged that studies about the effects of indecency on minors were far from conclusive, 390 U.S. at 642, but it quickly dismissed that lack of consensus by saying that "[w]e do not demand of legislatures 'scientifically certain criteria of legislation.'" *Id.* at 642-43, quoting *Noble State Bank v. Haskell*, 219 U.S. 104, 110 (1911) (a non-speech case). Thus, instead of requiring the

State to show that the indecent material actually would be harmful to minors in some way – as opposed to conceivably harmful – the Court essentially accepted the State's assertion to that effect, without more.[6]

The principal authority cited in *Ginsberg* – though not for the rationality standard itself – was the Court's earlier decision in *Prince*, where the Court had upheld a statute barring, among other things, distribution of literature by children on the public streets. *See* 321 U.S. at 165-71. But *Prince* was a very different case. The particular law at issue in *Prince* was not a stand-alone law aimed specifically at suppressing speech, but was part of a wide-ranging labor law that sought to limit the employment of minor children. As the Supreme Judicial Court of Massachusetts noted, the state law "contains many sections obviously intended to protect children against hazardous occupations, to insure that they shall not be permitted to work in particular trades or processes or at hours considered detrimental to the health or morals of minors of various ages, or to secure proper school attendance." *Commonwealth v. Prince*, 46 N.E.2d 755, 758 (1943). This Court, in

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[6] The Court may have seen little reason for extended First Amendment analysis of a law restricting sale of "obscenity for minors," given that the Court had held that obscenity itself falls wholly outside First Amendment boundaries. *See Roth v. United States*, 354 U.S. 476, 485 (1957). But, at least outside the specific context of sexually explicit material, the issue is more complicated than that. The vast majority of speech *is* constitutionally protected, in the sense that government cannot entirely forbid its sale, and the real question, therefore, is whether government has justified its censorship of that speech to minors on the ground that it would cause them (though presumably not adults) cognizable harm.

declining to invalidate the law as applied to a nine-year-old girl's distribution of religious pamphlets, emphasized that Massachusetts was addressing the general problem of child labor, remarking that "[t]he state's authority over children's *activities* is broader than over like actions of adults," 321 U.S. at 168 (emphasis added), and stressing that "[t]his is peculiarly true of public activities and in matters of employment." *Id.*

This statutory focus on the evils of child labor significantly alters the appropriate First Amendment analysis. Taking the Massachusetts law as a whole, it is apparent that the restrictions of the statute were really aimed at *conduct*, with only an incidental effect on speech (*i.e.,* when the labor happened to involve speech). *See* 321 U.S. at 160-61 (law prohibits, *inter alia,* employment of a minor in "the trade of bootblack or scavenger"). As a consequence, if the same case were to arise today, the law would likely not be subjected to the strict scrutiny typically applied to laws that are directed at the content of speech, but rather to the lesser scrutiny given to laws that have a more indirect impact on speech. *See United States v. O'Brien*, 391 U.S. 368 (1968); *Turner Broadcasting*, 520 U.S. at 189. The decision in *Prince* thus stands as poor authority for *Ginsberg* itself – which, like the California law in this case, did involve a content-based limitation on speech – and would provide an especially unstable cornerstone for a new, greatly expanded doctrine based upon the *Ginsberg* analysis.[7]

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[7] The *Prince* decision also offers another cautionary example of why undue deference to legislative opinions is incompatible with enforcement of important constitutional principles. *See* pages 17-19 *supra.* There, the Massachusetts law drew an

Petitioners also cite *Ginsberg* for the idea that States may use their lawmaking powers to reinforce parental authority, *see* Petrs Br. 38-39, 41, but, as an initial matter, neither *Ginsberg* (nor *Prince*, on which it relied for this point) offers much backing for that principle. In *Prince*, the State was actually bringing a criminal prosecution *against* the child's guardian, *see* 321 U.S. at 161, who had allowed her ward to distribute religious literature on the public streets. Massachusetts was thus overriding, not reinforcing, "parental" choice. And, in *Ginsberg*, the minor evidently came into possession of the prohibited material only because he was "enlisted by his mother to go to the [defendant's] luncheonette and buy some 'girlie' magazines so that [the defendant] could be prosecuted." 390 U.S. at 671-72 (Fortas, J., dissenting). Although the interests of the parent and State in *Ginsberg* were thus apparently aligned to some extent, it remains the fact that the obedient minor might never have obtained the forbidden magazines at all, absent the directive from his mother to purchase them.

In any event, petitioners' focus on state support for parental views masks a deeper question about this kind of justification for limiting speech. Except in the

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explicit distinction between the statutory protection offered to boys and girls, specifying that "[n]o boy under twelve and no girl under eighteen" could engage in the prohibited activities. Although no one challenged that differential treatment, the terms of the law might well have passed a rationality test at the time, given the then-prevailing tendency for society to be more protective of young females than males. *See, e.g., Goesaert v. Cleary*, 335 U.S. 464 (1948). Since then, of course, the Court has given more critical attention to statutory lines drawn on the basis of gender. *See, e.g., United States v. Virginia,* 518 U.S. 515 (1996).

most egregious cases, it may be expected that different parents will have different views about the desirability of censoring speech, and it is not the proper role of government to impose orthodoxy where none exists. *See Turner Broadcasting*, 512 U.S. at 641 ("[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence"). Indeed, given this predictable lack of parental unanimity, it is highly likely that state officials purporting to be backstopping parental views about particular speech will actually just be picking the side that accords with their own views about the speech's worth, precisely the kind of determination that the First Amendment makes suspect. If a State cannot censor speech on its own, it gains no greater power from a claim that some parents, or even a majority of parents, are in favor of its attempts to do so. *See Playboy Entertainment Group,* 529 U.S. at 818 (protected speech not subject to "mandate or approval of the majority").[8]

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[8] The fact that California allows parents to obtain video games for their children lessens, but does not eliminate, the First Amendment problem. The State has still chosen a default rule that bans speech and, unless the State can demonstrate that the speech actually causes harm to minors, its law must be deemed to rest on nothing more than official disapproval of the content of the speech. That is always a constitutionally suspect justification for censoring speech. *See Consolidated Edison Co. of New York, Inc. v. Public Service Comm'n of New York*, 447 U.S. 530, 536 (1980) ("when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited merely because public officials disapprove the speaker's views") (internal quotation marks omitted).

Petitioners are also off-base in contending that States should use censorship of speech "to remove any possible imprimatur of societal approval." Petrs Br. 41. Here, the question is one of means, not ends. Although a State may certainly take the public position that it objects to particular kinds of speech, the proper method for conveying that message is to say so directly, rather than to extinguish the offending speech. As this Court has repeatedly admonished, "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Texas v. Johnson,* 491 U.S. 397, 419 (1989), quoting *Whitney v. California,* 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); *Linmark Assoc., Inc. v. Township of Willingboro,* 431 U.S. 85, 97 (1977). Open discussion is thus "[t]he preferred First Amendment remedy." *Brown v. Hartlage,* 456 U.S. 45, 61 (1982).

B. Petitioners try to bolster *Ginsberg* by claiming that the decision is part of a wider body of precedent giving government expanded powers over speech to minors, *see* Petrs Br. 18-22, citing cases involving regulation of broadcasting and speech in public schools. *See, e.g., FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). But those cases cannot be isolated from their own particular contexts. This Court, of course, has long recognized that the federal government has unique power over speech delivered by means of the public airwaves. *See Turner Broadcasting,* 512 U.S. at 637 ("our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media"); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). That power naturally encompasses

the lesser-included power to ensure that broadcast licensees refrain from airing material to which children should not be inadvertently exposed, a point expressly made clear by *Pacifica*. *See* 438 U.S. at 748-50. There is no basis, however, for extending that rare power to situations that do not involve the use of scarce government spectrum.

The same is true for efforts to transfer the government's greater power over speech in public schools to other contexts. Although it is accepted that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker*, 393 U.S. at 506, the Court has often emphasized that school authorities must have considerable latitude to assure that schools are able to achieve their intended purpose. *See id.* (First Amendment must be applied "in light of the special characteristics of the school environment"); *Hazelwood School District,* 484 U.S. at 266 (same); *Morse v. Frederick,* 551 U.S. 393, 397 (2007) (same). This is hardly surprising, given the fact that it would be impossible to conduct a sensible educational program if every teacher and student were free to say anything at any time. *See Hazelwood School District*, 484 U.S. at 266 ("[a] school need not tolerate student speech that is inconsistent with the basic educational mission") (internal quotation marks omitted). "[T]he special characteristics of the school environment" are not present in society at large, however, and the First Amendment balance struck in the former cannot simply be exported to the latter.

All in all, therefore, there is little sound authority for permitting States to control speech to minors, based on nothing more than their rational belief that it would be best for minors if they did so. Although

Ginsberg may well have reached the correct result in the narrow context of limits on obscenity, it is hardly a decision on which to base a striking expansion of governmental power to limit speech to minors. Protection of minors is admittedly a compelling state interest, *see Sable Communications,* 492 U.S. at 126, but traditional First Amendment tests nevertheless require – and should continue to require – that States identify a real problem to be addressed, as well as a carefully tailored solution to that problem. The Ninth Circuit found that petitioners could not meet that test, and petitioners have offered no sufficient reason to second-guess that conclusion. Thus, the Ninth Circuit correctly held that the California video games law violates the First Amendment.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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