No. 13-1124

In The
Supreme Court of the United States

MINORITY TELEVISION PROJECT, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Founded in 1991, the Institute for Justice is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. As part of its mission, the Institute routinely litigates cases that are judged under this Court's various articulations of intermediate scrutiny. The Institute has also frequently challenged laws on the grounds that changed factual circumstances have rendered those laws unconstitutional. Accordingly, the Institute has an interest in ensuring that lower federal courts have appropriate guidance in both of these areas of constitutional doctrine.

SUMMARY OF THE ARGUMENT

This Court has long recognized the importance of clear rules when First Amendment rights are at stake. When the boundaries between permissible and

[1] Pursuant to Supreme Court Rule 37.2(a), *amicus* states that all parties were notified ten days prior to the due date of this brief of the intention to file, and all parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

impermissible speech are murky, cautious speakers are likely to self-censor and the public as a whole loses out. But clear rules are important not only for speakers – judges, too, need clear rules by which to enforce the Constitution's command that "Congress shall make no law . . . abridging the freedom of speech."

This case is a good example of what happens when lower federal courts lack clear, administrable rules for resolving First Amendment cases. Despite the fact that there is essentially no evidence – beyond the bare assertions of people who oppose it – that advertising on public television channels would lower the quality of programming, the en banc Ninth Circuit upheld a sweeping content-based restriction on such advertising, including even political advertising. Moreover, it did so despite the fact that enormous economic and technological changes over the past 50 years have eradicated the original justification for treating broadcast communication as more susceptible to regulation than other methods of disseminating speech.

This holding would not have been possible but for two areas of profound doctrinal confusion that require clarification by this Court. First, the Ninth Circuit's ruling reflects the confusion caused by the proliferation of "intermediate" forms of First Amendment scrutiny, which offer little of the guidance that courts need or the protection that speakers deserve. Second, the Ninth Circuit's ruling demonstrates the need for more guidance from this Court on when and how

federal courts may take account of factual circumstances that have changed between the time of a law's enactment and the time it is being reviewed. This Court should grant certiorari to provide this guidance.

ARGUMENT

I. LOWER FEDERAL COURTS ARE CONFUSED BY THE MULTIPLICITY OF INTERMEDIATE FORMS OF FIRST AMENDMENT SCRUTINY, AND THAT CONFUSION ENDANGERS FIRST AMENDMENT RIGHTS.

Much of the dispute between the en banc majority and dissent in this case turns on a disagreement about the proper application of so-called "intermediate scrutiny." The majority viewed that standard as imposing almost no burden on the government to justify its speech restrictions, while the dissent viewed it as imposing meaningful limits that could be satisfied only with genuine evidence. *Compare* Pet'r's App. at 17a ("The dissent's insistence on 'evidence' in the technical sense is misplaced.") *with* Pet'r's App. at 60a (Kozinski, C.J., dissenting) (noting the absence of record evidence and observing that "if we're conducting some level of heightened scrutiny, . . . we should insist on something more than a bunch of talking heads bloviating about their angst.").

This disagreement is understandable, because intermediate-scrutiny jurisprudence is hardly a model

of clarity. Since the late 1940s, this Court has articulated over a half-dozen distinct areas of First Amendment doctrine that are subject to various forms of intermediate scrutiny. *See McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (campaign-contribution limits); *Citizens United v. FEC*, 558 U.S. 310 (2010) (campaign-finance disclosure);[2] *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (zoning adult-oriented businesses); *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994) (content-neutral injunctions); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (regulation of mass media); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980) (regulation of commercial speech); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (regulation of broadcast communication); *United States v. O'Brien*, 391 U.S. 367 (1968) (content-neutral regulations that impose an incidental burden on expressive conduct); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (time, place, and manner regulations).

This phenomenon began with this Court's time, place, and manner cases, which hold that certain regulations of the non-communicative elements of speech – such as its volume or the location in which it occurs – are subject to a more lenient standard of review than regulations that are aimed at (or

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[2] Although the Court in *Citizens United* applied intermediate scrutiny to campaign-finance disclosure, Petitioners correctly note that the Court applied strict scrutiny to the ban on corporate-funded electioneering communications. Pet. at 30-32.

triggered by) speech with a certain content. *See* Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. Ill. L. Rev. 783, 788-91 (2007) (describing time, place, and manner regulations as "[t]he first strand of free speech cases that eventually emerged as intermediate scrutiny"); *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 27-28 (2010) (discussing the distinction between laws aimed at non-communicative conduct, which receive intermediate scrutiny if they impose incidental burdens on speech, and laws that are "triggered" by speech, which receive strict scrutiny). Over time, however, the scope of intermediate scrutiny has grown to the point where it is increasingly seen as "some kind of default standard." *Madsen*, 512 U.S. at 791 (Scalia, J., concurring in the judgment in part and dissenting in part).

The result of this growth is an ad hoc, patchwork body of law that has no basis in the uncompromising text of the First Amendment itself. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 532 (2009) (Thomas, J., concurring) (observing that this Court's decisions in *Red Lion Broad. Co.*, 395 U.S. 367, and *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), adopted "a legal rule that lacks any textual basis in the Constitution"). But besides conflicting with the terms of the First Amendment, the growth of intermediate scrutiny has also harmed speakers and made matters unnecessarily difficult for the courts that are charged with enforcing those speakers' rights.

With regard to speakers, it is increasingly the case that speech of little social value is given the full protection of strict scrutiny, while speech of high social value is given only the protection of intermediate scrutiny. Thus, burdens on wholly unpersuasive speech like animal "crush" videos, lies about having received military honors, or the offensive rantings of the Westboro Baptist Church enjoy substantially higher protection than commercial or even political speech. *Compare United States v. Stevens*, 559 U.S. 460 (2010) (applying strict scrutiny to prosecution for distributing dog-fighting videos), *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (same, violating Stolen Valor Act), *and Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (rejecting civil liability for emotional distress caused by military-funeral protests), *with Cent. Hudson*, 447 U.S. 557 (1980) (applying intermediate scrutiny to restrictions on commercial speech), *and Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (same, restrictions on political contributions).

This approach turns the First Amendment on its head – it cannot be the case that speech with the greatest ability to inform or persuade the public should be entitled to the least protection. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2671 (2011) ("That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers."). Indeed, one would expect that the drafters of the First Amendment held precisely the opposite view: that speech that can change listeners' minds or move them to action is the sort of speech

that is most likely to be targeted for regulation, and therefore the most deserving of robust judicial protection.

To make matters worse, the multiplicity of intermediate scrutiny standards that this Court has devised provide little guidance to the lower courts whose job it is to provide that protection. These standards are often phrased in similar, but not identical terms, which makes it difficult to tell whether decisions under one form of intermediate scrutiny have any bearing on other areas of intermediate scrutiny. *Compare, e.g., Citizens United*, 558 U.S. at 366-67 (holding that campaign-finance disclosure laws must bear a "substantial relation" to a "sufficiently important" governmental interest), *with Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (holding that time, place, and manner restrictions must be "narrowly tailored to serve a significant governmental interest"), *Cent. Hudson*, 447 U.S. at 566 (holding that a restriction on commercial speech must not be "more extensive than is necessary to serve [a substantial governmental] interest"), *and O'Brien*, 391 U.S. at 377 (holding that the incidental burdens of content-neutral regulations of conduct must be "no greater than is essential to the furtherance of [an important or substantial government] interest."). The distinctions between these standards are, at times, so ill-defined that even members of this Court have expressed exasperation in trying to untangle them. *See Madsen*, 512 U.S. at 791 (Scalia, J., concurring in the judgment in part and dissenting in part) ("The

difference between [the standard used by the majority for evaluating content-neutral injunctions] and intermediate scrutiny [of the time, place, and manner variety] . . . is frankly too subtle for me to describe . . . .").

These conflicting standards have led, inevitably, to conflicting outcomes, most notably regarding the amount of evidence necessary to sustain a law under the various forms of intermediate scrutiny. *See* Pet. at 33-36. While this Court has repeatedly stated that evidence is a requirement in all First Amendment cases, there are certainly areas where this Court seems to take that requirement more or less seriously. *Compare, e.g., Edenfield v. Fane*, 507 U.S. 761, 771 (1993) (striking down prohibition on direct solicitation by CPAs because an affidavit that "contain[ed] nothing more than a series of conclusory statements" about the effect of direct solicitation was insufficient evidence under intermediate scrutiny) *with Shrink Mo. Gov't PAC*, 528 U.S. at 393 (upholding state campaign contribution limits and citing, as the principal evidence in support of those limits, an affidavit from a state senator containing the bare assertion that "large contributions have 'the real potential to buy votes' ").

As a result of both this confusion and the flexibility of the various intermediate-scrutiny standards, it is easy to find cases in which lower federal courts have reached opposite conclusions on essentially identical facts. *Compare, e.g., Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010) (striking down PAC requirements for grassroots ballot-issue advocates

under intermediate scrutiny) *with Worley v. Fla. Sec'y of State*, 717 F.3d 1238 (11th Cir. 2013) (upholding materially identical restrictions under materially identical facts); *compare also Green Party of Conn. v. Garfield*, 616 F.3d 189 (2d Cir. 2010) (striking down prohibition on political contributions from lobbyists) *with Preston v. Leake*, 660 F.3d 726 (4th Cir. 2011) (upholding materially identical prohibition). And this division exists not only between circuits, but within them; in one recent en banc ruling, the United States Court of Appeals for the Sixth Circuit split 8-7 over whether a conclusory affidavit and "common sense" were sufficient evidence to satisfy intermediate scrutiny under *Central Hudson*. *Compare Pagan v. Fruchey*, 492 F.3d 766, 778 (6th Cir. 2007) (en banc) (holding that municipality had an obligation "to provide *something* in support of its regulation," and that the court was not "free to hold that obligation has been discharged based on principles of *common sense* or *obviousness*"), *with id*. at 779 (Rogers, J., dissenting) (stating that "[t]o require a study, or testimony, or an affidavit, to demonstrate the obvious is to turn law into formalistic legalism").

These inconsistent outcomes would be bad enough if speakers could be guaranteed that they were merely the result of confusion about the proper application of this Court's intermediate-scrutiny jurisprudence. But as Chief Judge Kozinski noted in dissent below, the very indeterminacy of intermediate scrutiny provides ample room for lower courts to decide cases based on their own values, rather than a

genuine attempt to discern the meaning of this Court's precedent. Pet'r's App. at 51a (Kozinski, C.J., dissenting). The result is a "jurisprudence of doubt" that is particularly toxic "in the case of speech, which is especially vulnerable to uncertainties in the law." *Id*. at 78a-79a (citation omitted).

This is an ideal case in which this Court can begin to reverse this dangerous trend. The legal issues are clearly presented and the factual record is undisputed. Moreover, this case provides multiple avenues for clarifying this Court's intermediate-scrutiny jurisprudence, either by reversing this Court's earlier decisions holding that the regulation of broadcast communication is subject to only intermediate scrutiny or by clarifying the role that evidence plays under intermediate scrutiny. For these reasons, the petition for certiorari should be granted. *See* Sup. Ct. R. 10(c).

II. LOWER FEDERAL COURTS NEED GUIDANCE ABOUT THE ROLE OF CHANGED FACTUAL CIRCUMSTANCES IN CONSTITUTIONAL CASES.

In addition to providing an opportunity to clarify this Court's intermediate-scrutiny jurisprudence, this case is also an excellent opportunity for this Court to clarify another area of constitutional doctrine that has confused lower courts: the role of changed factual circumstances in constitutional adjudication.

As members of this Court, petitioners, and other *amici* have noted, the facts regarding broadcast communication and the role that it plays in the marketplace of ideas have changed dramatically over the past 50 years. *See Fox Television*, 556 U.S. at 533 (Thomas, J., concurring) ("[E]ven if this Court's disfavored treatment of broadcasters under the First Amendment could have been justified at the time of *Red Lion* and *Pacifica*, dramatic technological advances have eviscerated the factual assumptions underlying those decisions."); *see also* Pet. at 14-28. And as Chief Judge Kozinski noted in dissent below, these changes call into question the continuing vitality, not only of this Court's decisions in *Red Lion* and *Pacifica*, but of the many statutes and regulations that were enacted when the communications marketplace looked very different than it does today. Pet'r's App. 79a-80a.

Chief Judge Kozinski's observation is by no means radical; this Court has long held that changed circumstances can justify invalidating a law. *See, e.g., Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2630-31 (2013) (holding that changed circumstances over a period of 40 years rendered Voting Rights Act preclearance formula unconstitutional); *Leary v. United States*, 395 U.S. 6, 38 n.68 (1969) (stating that a statute is subject to constitutional attack if the factual premises of the law no longer exist); *Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U.S. 405, 415 (1935) ("A statute valid when enacted may become invalid by change in the conditions to which it is

applied."); *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547-48 (1924) ("A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed."). This Court reiterated that rule in its seminal decision in *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938); and, indeed, the statute at issue in *Carolene Products* was eventually invalidated in 1972 on changed-circumstances grounds. *Milnot Co. v. Richardson*, 350 F. Supp. 221, 225 (S.D. Ill. 1972).

Despite this long line of precedent, some lower courts, including the Ninth Circuit, have questioned or rejected the claim that changed circumstances can convert a once-constitutional exercise of government power into an unconstitutional restriction on individual liberty. *See, e.g., Burlington N. R.R. Co. v. Dep't of Pub. Serv. Regulation*, 763 F.2d 1106, 1111 (9th Cir. 1985) (reviewing this Court's case law and concluding that "[t]he Supreme Court has been ambivalent" on the issue); *Murillo v. Bambrick*, 681 F.2d 898, 912 n.27 (3d Cir. 1982) (stating that this Court "appears not to have determined definitively whether changed conditions are a relevant consideration in equal protection analysis"); *see also Heffner v. Murphy*, No. 12-3591, 2014 WL 627743, at *25 (3d Cir. Feb. 19, 2014) (holding that changed circumstances could not serve as a basis for striking down an "antiquated" restriction on serving food at funeral homes).

Other courts, however, have been more willing to consider changed circumstances, not only when

reviewing laws in the first instance, but even when reviewing laws that have previously been held constitutional. In *Dias v. City & County of Denver*, for example, the Tenth Circuit denied a motion to dismiss a constitutional challenge to Denver's ban on owning pit bulls – a law that had been upheld only 20 years earlier – and remanded the case to give the plaintiff an opportunity to demonstrate that "the state of science [at the time of the new lawsuit] [was] such that the bans [were] no longer rational." 567 F.3d 1169, 1183 (10th Cir. 2009); *see also Milnot Co. v. Ark. State Bd. of Health*, 388 F. Supp. 901, 903 (E.D. Ark. 1975) (striking down Arkansas prohibition on sale of filled milk, and concluding that changed circumstances had rendered previous federal decisions on the same issue "of little precedential value").

This disagreement on such a fundamental question regarding the judicial process – what evidence may judges consider in rendering constitutional decisions? – demands review by this court. *See* Sup. Ct. R. 10(c). It is a question of vital importance. Due to legislative inertia, laws whose constitutionality has been called into question by changed circumstances are rarely repealed. And, given the small number of cases that this Court can hear in any given term, this Court rarely has the opportunity to consider for itself whether changed factual circumstances merit the invalidation of a law that was constitutional when enacted. Thus, this question generally falls to lower courts. Without clear guidance on the type and amount of evidence they may consider in answering

that question, lower courts will continue to be confused, and citizens will not be afforded the full constitutional protection to which they are entitled.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Respectfully submitted,

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