SUPREME COURT OF THE UNITED STATES

No. 98–1682

UNITED STATES, ET AL., APPELLANTS *v.* PLAYBOY ENTERTAINMENT GROUP, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

[May 22, 2000]

JUSTICE STEVENS, concurring.

Because JUSTICE SCALIA has advanced an argument that the parties have not addressed, a brief response is in order. Relying on *Ginzburg* v. *United States*, 383 U. S. 463 (1966), JUSTICE SCALIA would treat programs whose content is, he assumes, protected by the First Amendment as though they were obscene because of the way they are advertised. The four separate dissenting opinions in *Ginzburg*, authored by Justices Black, Harlan, Douglas, and Stewart, amply demonstrated the untenable character of the *Ginzburg* decision when it was rendered. The *Ginzburg* theory of obscenity is a legal fiction premised upon a logical bait-and-switch; advertising a bareheaded dancer as "topless" might be deceptive, but it would not make her performance obscene.

As I explained in my dissent in *Splawn* v. *California*, 431 U. S. 595, 602 (1977), *Ginzburg* was decided before the Court extended First Amendment protection to commercial speech, *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976). JUSTICE SCALIA's proposal is thus not only anachronistic, it also overlooks a key premise upon which our commercial speech cases are based. The First Amendment assumes that, as a general matter, "information is not in itself harmful, that people will perceive their own best interests

if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Id*., at 770. The very fact that the programs marketed by Playboy are offensive to many viewers provides a justification for protecting, not penalizing, truthful statements about their content.