FCC v. Fox Television Stations I

556 U.S. ___, 129 S.Ct. 1800
Supreme Court of the United States
April 28, 2009

FEDERAL COMMUNICATIONS COMMISSION, et al., Petitioners, v. FOX TELEVISION STATIONS, INC., et al. No. 07-582. Argued November 4, 2008. Decided April 28, 2009. SCALIA, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III-A through III-D, and IV, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined, and an opinion with respect to Part III-E, in which ROBERTS, C.J., and THOMAS and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment. STEVENS, J., and GINSBURG, J., filed dissenting opinions. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined. Gregory G. Garre, Washington, DC, for Petitioners. Carter Phillips, for Respondents. Richard Cotton, Susan Weiner, New York, NY, Miguel A. Estrada, Andrew S. Tulumello, Matthew D. McGill, Gibson, Dunn & Crutcher LLP, Washington, D.C., for Respondents NBC Universal, Inc. and NBC Telemundo License Company. Jonathan '. Anschell, Los Angeles, CA, Susanna M. Lowy, New York, NY, for Respondent CBS Broadcasting Inc. Robert Corn-Revere, Davis Wright Tremaine LLP, Washington, D.C., John '. Zucker, New York, NY, Seth P. Waxman, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C., for Respondent ABC, Inc. Ellen S. Agress, New York, NY, Maureen A. O'Connell, Washington, DC, Carter G. Phillips, R. Clark Wadlow, James P. Young, Jennifer Tatel, David S. Petron, Quin M. Sorenson, Sidley Austin LLP, Washington, D.C., for Respondent Fox Television Stations, Inc. Andrew Jay Schwartzman, Parul Desai, Jonathan Rintels, Washington, DC, for Center for Creative Voices in Media, Inc. Matthew B. Berry, General Counsel, Joseph R. Palmore, Deputy General Counsel, Jacob M. Lewis, Associate General Counsel, Nandan M. Joshi, Washington, D.C., Paul D. Clement, Solicitor General, Gregory G. Katsas, Acting Assistant Attorney General, Gregory G. Garre, Deputy Solicitor General, Eric D. Miller, Assistant to the Solicitor General, Thomas M. Bondy, Anne Murphy, Washington D.C., for Petitioner.

Justice SCALIA delivered the opinion of the Court, except as to Part III-E.

Federal law prohibits the broadcasting of "any ... indecent ... language," 18 U.S.C. § 1464, which includes expletives referring to sexual or excretory activity or organs, see *FCC v. Pacifica Foundation,* 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978). This case concerns the adequacy of the Federal Communications Commission's explanation of its decision that this sometimes forbids the broadcasting of indecent expletives even when the offensive words are not repeated.

I. Statutory and Regulatory Background

The Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. § 151 *et seq.* (2000 ed. and Supp. V), established a system of limited-term broadcast licenses subject to various "conditions" designed "to maintain the control of the United States over all the channels of radio transmission," § 301 (2000 ed.). Twenty-seven years ago we said that "[a] licensed broadcaster is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." *CBS, Inc. v. FCC,* 453 U.S. 367, 395, 101 S.Ct. 2813, 69 L.Ed.2d 706 (1981) (internal quotation marks omitted).

One of the burdens that licensees shoulder is the indecency ban – the statutory proscription against "utter[ing] any obscene, indecent, or profane language by means of radio communication," 18 U.S.C. § 1464 – which Congress has instructed the Commission to enforce between the hours of 6 a.m. and 10 p.m. Public Telecommunications Act of 1992, § 16(a), 106 Stat. 954, note following 47 U.S.C. § 303.[27] Congress has given the Commission various means of enforcing the indecency ban, including civil fines, see § 503(b)(1), and license revocations or the denial of license renewals, see §§ 309(k), 312(a)(6).

The Commission first invoked the statutory ban on indecent broadcasts in 1975, declaring a daytime broadcast of George Carlin's "Filthy Words" monologue actionably indecent. *Pacifica Foundation,* 56 F.C.C.2d 94, 1975 WL 29897. At that time, the Commission announced the definition of indecent speech that it uses to this day, prohibiting "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs, at times of the day when there is a reasonable risk that children may be in the audience." *Id.,* at 98.

In *FCC v. Pacifica Foundation, supra,* we upheld the Commission's order against statutory and constitutional challenge. We rejected the broadcasters' argument that the statutory proscription applied only to speech appealing to the prurient interest, noting that "the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality." *Id.,* at 740, 98 S.Ct. 3026. And we held that the First Amendment allowed Carlin's monologue to be banned in light of the "uniquely pervasive presence" of the medium and the fact that broadcast programming is "uniquely accessible to children." *Id.,* at 748-749, 98 S.Ct. 3026.

In the ensuing years, the Commission took a cautious, but gradually expanding, approach to enforcing the statutory prohibition against indecent broadcasts. Shortly after *Pacifica,* 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073, the Commission expressed its "inten[tion] strictly to observe the narrowness of the *Pacifica* holding," which "relied in part on the repetitive occurrence of the 'indecent' words" contained in Carlin's monologue. *In re Application of WGBH Educ. Foundation,* 69 F.C.C.2d 1250, 1254, ¶ 10, 1978 WL 36042 (1978). When the full Commission next considered its indecency standard, however, it repudiated the view that its enforcement power was limited to "deliberate, repetitive use of the seven words actually contained in the George Carlin monologue." *In re Pacifica Foundation, Inc.,* 2 FCC Rcd. 2698, 2699, ¶ 12, 1987 WL 345577 (1987). The Commission determined that such a "highly restricted

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[27] The statutory prohibition applicable to commercial radio and television stations extends by its terms from 6 a.m. to 12 midnight. The Court of Appeals for the District of Columbia Circuit held, however, that because "Congress and the Commission [had] backed away from the consequences of their own reasoning," by allowing some public broadcasters to air indecent speech after 10 p.m., the court was forced "to hold that the section is unconstitutional insofar as it bars the broadcasting of indecent speech between the hours of 10:00 p.m. and midnight." Action for Children's Television v. FCC, 58 F.3d 654, 669 (1995) (en banc), cert. denied, 516 U.S. 1043, 116 S.Ct. 701, 133 L.Ed.2d 658 (1996).

enforcement standard ... was unduly narrow as a matter of law and inconsistent with [the Commission's] enforcement responsibilities under Section 1464." *In re Infinity Broadcasting Corp. of Pa.,* 3 FCC Rcd. 930, ¶ 5, 1987 WL 345514 (1987). The Court of Appeals for the District of Columbia Circuit upheld this expanded enforcement standard against constitutional and Administrative Procedure Act challenge. See *Action for Children's Television v. FCC,* 852 F.2d 1332 (1988) (R. Ginsburg, J.), superseded in part by *Action for Children's Television v. FCC,* 58 F.3d 654 (1995) (en banc).

Although the Commission had expanded its enforcement beyond the "repetitive use of specific words or phrases," it preserved a distinction between literal and nonliteral (or "expletive") uses of evocative language. *In re Pacifica Foundation, Inc.,* 2 FCC Rcd., at 2699, ¶ 13. The Commission explained that each literal "description or depiction of sexual or excretory functions must be examined in context to determine whether it is patently offensive," but that "deliberate and repetitive use ... is a requisite to a finding of indecency" when a complaint focuses solely on the use of nonliteral expletives. *Ibid.*

Over a decade later, the Commission emphasized that the "full context" in which particular materials appear is "critically important," but that a few "principal" factors guide the inquiry, such as the "explicitness or graphic nature" of the material, the extent to which the material "dwells on or repeats" the offensive material, and the extent to which the material was presented to "pander," to "titillate," or to "shock." *In re Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency,* 16 FCC Rcd. 7999, 8002, ¶ 9, 8003, ¶ 10, 2001 WL 332787 (2001) (emphasis deleted). "No single factor," the Commission said, "generally provides the basis for an indecency finding," but "where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency." *Id.,* at 8003, ¶ 10, 8008, ¶ 17.

In 2004, the Commission took one step further by declaring for the first time that a nonliteral (expletive) use of the F- and S-Words could be actionably indecent, even when the word is used only once. The first order to this effect dealt with an NBC broadcast of the Golden Globe Awards, in which the performer Bono commented, "'This is really, really, f* * *ing brilliant.'" *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program,* 19 FCC Red. 4975, 4976, n. 4, 2004 WL 540339 (2004) *(Golden Globes Order).* Although the Commission had received numerous complaints directed at the broadcast, its enforcement bureau had concluded that the material was not indecent because "Bono did not describe, in context, sexual or excretory organs or activities and ... the utterance was fleeting and isolated." *Id.,* at 4975-4976, ¶ 3. The full Commission reviewed and reversed the staff ruling.

The Commission first declared that Bono's use of the F-Word fell within its indecency definition, even though the word was used as an intensifier rather than a literal descriptor. "[G]iven the core meaning of the 'F-Word,'" it said, "any use of that word ... inherently has a sexual connotation." *Id.,* at 4978, ¶ 8. The Commission determined, moreover, that the broadcast was "patently offensive" because the F-Word "is one of the most vulgar, graphic and explicit descriptions

of sexual activity in the English language," because "[i]ts use invariably invokes a coarse sexual image," and because Bono's use of the word was entirely "shocking and gratuitous." *Id.,* at 4979, ¶ 9.

The Commission observed that categorically exempting such language from enforcement actions would "likely lead to more widespread use." *Ibid.* Commission action was necessary to "safeguard the well-being of the nation's children from the most objectionable, most offensive language." *Ibid.* The order noted that technological advances have made it far easier to delete ("bleep out") a "single and gratuitous use of a vulgar expletive," without adulterating the content of a broadcast. *Id.,* at 4980, ¶ 11.

The order acknowledged that "prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' ... are not indecent or would not be acted upon." It explicitly ruled that "any such interpretation is no longer good law." *Ibid.,* ¶ 12. It "clarif[ied] ... that the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent." *Ibid.* Because, however, "existing precedent would have permitted this broadcast," the Commission determined that "NBC and its affiliates necessarily did not have the requisite notice to justify a penalty." *Id.,* at 4981-4982, ¶ 15.

II. The Present Case

This case concerns utterances in two live broadcasts aired by Fox Television Stations, Inc., and its affiliates prior to the Commission's *Golden Globes Order.* The first occurred during the 2002 Billboard Music Awards, when the singer Cher exclaimed, "I've also had critics for the last 40 years saying that I was on my way out every year. Right. So f* * * 'em." Brief for Petitioners 9. The second involved a segment of the 2003 Billboard Music Awards, during the presentation of an award by Nicole Richie and Paris Hilton, principals in a Fox television series called "The Simple Life." Ms. Hilton began their interchange by reminding Ms. Richie to "watch the bad language," but Ms. Richie proceeded to ask the audience, "Why do they even call it 'The Simple Life?' Have you ever tried to get cow s* * * out of a Prada purse? It's not so f* * *ing simple." *Id.,* at 9-10. Following each of these broadcasts, the Commission received numerous complaints from parents whose children were exposed to the language.

On March 15, 2006, the Commission released Notices of Apparent Liability for a number of broadcasts that the Commission deemed actionably indecent, including the two described above. *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005,* 21 FCC Rcd. 2664, 2006 WL 656783 (2006). Multiple parties petitioned the Court of Appeals for the Second Circuit for judicial review of the order, asserting a variety of constitutional and statutory challenges. Since the order had declined to impose sanctions, the Commission had not previously given the broadcasters an opportunity to respond to the indecency charges. It therefore requested and obtained from the Court of Appeals a voluntary remand so that the parties could air their objections. 489 F.3d 444, 453 (2007). The Commission's order on remand upheld the indecency findings for the broadcasts described above. See *In re Complaints Regarding Various Television Broadcasts Between February 2,*

2002, and March 8, 2005, 21 FCC Rcd. 13299, 2006 WL 3207085 (2006) *(Remand Order)*.

The order first explained that both broadcasts fell comfortably within the subject-matter scope of the Commission's indecency test because the 2003 broadcast involved a literal description of excrement and both broadcasts invoked the "F-Word," which inherently has a sexual connotation. *Id.,* at 13304, ¶ 16, 13323, ¶ 58. The order next determined that the broadcasts were patently offensive under community standards for the medium. Both broadcasts, it noted, involved entirely gratuitous uses of "one of the most vulgar, graphic, and explicit words for sexual activity in the English language." *Id.,* at 13305, ¶ 17, 13324, ¶ 59. It found Ms. Richie's use of the "F-Word" and her "explicit description of the handling of excrement" to be "vulgar and shocking," as well as to constitute "pandering," after Ms. Hilton had playfully warned her to "'watch the bad language.'" *Id.,* at 13305, ¶ 17. And it found Cher's statement patently offensive in part because she metaphorically suggested a sexual act as a means of expressing hostility to her critics. *Id.,* at 13324, ¶ 60. The order relied upon the "critically important" context of the utterances, *id.,* at 13304, ¶ 15, noting that they were aired during prime-time awards shows "designed to draw a large nationwide audience that could be expected to include many children interested in seeing their favorite music stars," *id.,* at 13305, ¶ 18, 13324, ¶ 59. Indeed, approximately 2.5 million minors witnessed each of the broadcasts. *Id.,* at 13306, ¶ 18, 13326, ¶ 65.

The order asserted that both broadcasts under review would have been actionably indecent under the staff rulings and Commission dicta in effect prior to the *Golden Globes Order* – the 2003 broadcast because it involved a literal description of excrement, rather than a mere expletive, because it used more than one offensive word, and because it was planned, 21 FCC Rcd., at 13307, ¶ 22; and the 2002 broadcast because Cher used the F-Word not as a mere intensifier, but as a description of the sexual act to express hostility to her critics, *id.,* at 13324, ¶ 60. The order stated, however, that the pre-*Golden Globes* regime of immunity for isolated indecent expletives rested only upon staff rulings and Commission dicta, and that the Commission itself had never held "that the isolated use of an expletive ... was not indecent or could not be indecent," 21 FCC Rcd., at 13307, ¶ 21. In any event, the order made clear, the *Golden Globes Order* eliminated any doubt that fleeting expletives could be actionably indecent, 21 FCC Rcd., at 13308, ¶ 23, 13325, ¶ 61, and the Commission disavowed the bureau-level decisions and its own dicta that had said otherwise, *id.,* at 13306-13307, ¶¶ 20, 21. Under the new policy, a lack of repetition "weigh[s] against a finding of indecency," *id.,* at 13325, ¶ 61, but is not a safe harbor.

The order explained that the Commission's prior "strict dichotomy between 'expletives' and 'descriptions or depictions of sexual or excretory functions' is artificial and does not make sense in light of the fact that an 'expletive's' power to offend derives from its sexual or excretory meaning." *Id.,* at 13308, ¶ 23. In the Commission's view, "granting an automatic exemption for 'isolated or fleeting' expletives unfairly forces viewers (including children)" to take "'the first blow'" and would allow broadcasters "to air expletives at all hours of a day so long as they did so one at a time." *Id.,* at 13309, ¶ 25. Although the Commission determined that Fox encouraged the offensive language by using

suggestive scripting in the 2003 broadcast, and unreasonably failed to take adequate precautions in both broadcasts, *id.,* at 13311-13314, ¶¶ 31-37, the order again declined to impose any forfeiture or other sanction for either of the broadcasts, *id.,* at 13321, ¶ 53, 13326, ¶ 66.

Fox returned to the Second Circuit for review of the *Remand Order,* and various intervenors including CBS, NBC, and ABC joined the action. The Court of Appeals reversed the agency's orders, finding the Commission's reasoning inadequate under the Administrative Procedure Act. 489 F.3d 444. The majority was "skeptical that the Commission [could] provide a reasoned explanation for its 'fleeting expletive' regime that would pass constitutional muster," but it declined to reach the constitutional question. *Id.,* at 462. Judge Leval dissented, *id.,* at 467. We granted certiorari, 552 U.S. ___, 128 S.Ct. 1647, 170 L.Ed.2d 352 (2008).

III. Analysis

A. Governing Principles

The Administrative Procedure Act, 5 U.S.C. § 551 *et seq.,* which sets forth the full extent of judicial authority to review executive agency action for procedural correctness, see *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 545-549, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978), permits (insofar as relevant here) the setting aside of agency action that is "arbitrary" or "capricious," 5 U.S.C. § 706(2)(A). Under what we have called this "narrow" standard of review, we insist that an agency "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). We have made clear, however, that "a court is not to substitute its judgment for that of the agency," *ibid.,* and should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 286, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974).

In overturning the Commission's judgment, the Court of Appeals here relied in part on Circuit precedent requiring a more substantial explanation for agency action that changes prior policy. The Second Circuit has interpreted the Administrative Procedure Act and our opinion in *State Farm* as requiring agencies to make clear "'why the original reasons for adopting the [displaced] rule or policy are no longer dispositive'" as well as "'why the new rule effectuates the statute as well as or better than the old rule.'" 489 F.3d, at 456-457 (quoting *New York Council, Assn. of Civilian Technicians v. FLRA,* 757 F.2d 502, 508 (C.A.2 1985); emphasis deleted). The Court of Appeals for the District of Columbia Circuit has similarly indicated that a court's standard of review is "heightened somewhat" when an agency reverses course. *NAACP v. FCC,* 682 F.2d 993, 998 (1982).

We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. The Act mentions no such heightened standard. And our opinion in *State Farm* neither held nor implied that every agency action representing a policy change

must be justified by reasons more substantial than those required to adopt a policy in the first instance. That case, which involved the rescission of a prior regulation, said only that such action requires "a reasoned analysis for the change beyond that which may be required when an agency *does not act* in the first instance." 463 U.S., at 42, 103 S.Ct. 2856 (emphasis added).~ Treating failures to act and rescissions of prior action differently for purposes of the standard of review makes good sense, and has basis in the text of the statute, which likewise treats the two separately. It instructs a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), and to "hold unlawful and set aside agency action, findings, and conclusions found to be [among other things] ... arbitrary [or] capricious," § 706(2)(A). The statute makes no distinction, however, between initial agency action and subsequent agency action undoing or revising that action.

To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. See *United States v. Nixon,* 418 U.S. 683, 696, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). And of course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must – when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. *Smiley v. Citibank (South Dakota), N. A.,* 517 U.S. 735, 742, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996). It would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.~

B. Application to This Case

Judged under the above described standards, the Commission's new enforcement policy and its order finding the broadcasts actionably indecent were neither arbitrary nor capricious. First, the Commission forthrightly acknowledged that its recent actions have broken new ground, taking account of inconsistent "prior Commission and staff action" and explicitly disavowing them as "no longer good law." *Golden Globes Order,* 19 FCC Rcd., at 4980, ¶ 12. To be sure, the (superfluous) explanation in its *Remand Order* of why the Cher broadcast would even have violated its earlier policy may not be entirely convincing. But that unnecessary detour is irrelevant. There is no doubt that the Commission knew it was making a change. That is why it declined to assess penalties; and it relied on the *Golden Globes Order* as removing any lingering doubt. *Remand Order,* 21 FCC Rcd., at 13308, ¶ 23, 13325, ¶ 61.

Moreover, the agency's reasons for expanding the scope of its enforcement activity were entirely rational. It was certainly reasonable to determine that it made no sense to distinguish between literal and nonliteral uses of offensive words, requiring repetitive use to render only the latter indecent. As the Commission said with regard to expletive use of the F-Word, "the word's power to insult and offend derives from its sexual meaning." *Id.,* at 13323, ¶ 58. And the Commission's decision to look at the patent offensiveness of even isolated uses of sexual and excretory words fits with the context-based approach we sanctioned in *Pacifica,* 438 U.S., at 750, 98 S.Ct. 3026. Even isolated utterances can be made in "pander[ing,] ... vulgar and shocking" manners, *Remand Order,* 21 FCC Rcd., at 13305, ¶ 17, and can constitute harmful "'first blow[s]'" to children, *id.,* at 13309, ¶ 25. It is surely rational (if not inescapable) to believe that a safe harbor for single words would "likely lead to more widespread use of the offensive language," *Golden Globes Order, supra,* at 4979, ¶ 9.

When confronting other requests for *per se* rules governing its enforcement of the indecency prohibition, the Commission has declined to create safe harbors for particular types of broadcasts. See *In re Pacifica Foundation, Inc.,* 2 FCC Rcd., at 2699, ¶ 12 (repudiating the view that the Commission's enforcement power was limited to "deliberate, repetitive use of the seven words actually contained in the George Carlin monologue"); *In re Infinity Broadcasting Corp. of Pa.,* 3 FCC Rcd., at 932, ¶ 17 ("reject[ing] an approach that would hold that if a work has merit, it is *per se* not indecent"). The Commission could rationally decide it needed to step away from its old regime where nonrepetitive use of an expletive was *per se* nonactionable because that was "at odds with the Commission's overall enforcement policy." *Remand Order, supra,* at 13308, ¶ 23.

The fact that technological advances have made it easier for broadcasters to bleep out offending words further supports the Commission's stepped-up enforcement policy. *Golden Globes Order, supra,* at 4980, ¶ 11. And the agency's decision not to impose any forfeiture or other sanction precludes any argument that it is arbitrarily punishing parties without notice of the potential consequences of their action.~

E. The Dissents' Arguments

Justice BREYER purports to "begin with applicable law," *post,* at 1829, but in fact begins by stacking the deck. He claims that the FCC's status as an "independent" agency sheltered from political oversight requires courts to be "all the more" vigilant in ensuring "that major policy decisions be based upon articulable reasons." *Post,* at 1829, 1829-1830. Not so. The independent agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction. See, *e.g., In re Sealed Case,* 838 F.2d 476, 507-508 (C.A.D.C.) (Silberman, J.), rev'd *sub nom. Morrison v. Olson,* 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988); Kagan, Presidential Administration, 114 Harv. L.Rev. 2245, 2271, n. 93 (2001); Calabresi & Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 583 (1994); Easterbrook, The State of Madison's Vision of the State: A Public Choice Perspective, 107 Harv. L.Rev. 1328, 1341 (1994). Indeed,

the precise policy change at issue here was spurred by significant political pressure from Congress.[28]

Justice STEVENS apparently recognizes this political control by Congress, and indeed sees it as the manifestation of a principal-agency relationship. In his judgment, the FCC is "better viewed as an agent of Congress" than as part of the Executive. *Post,* at 1825-1826 (dissenting opinion). He nonetheless argues that this is a good reason for requiring the FCC to explain "why its prior policy is no longer sound before allowing it to change course." *Post,* at 1826. Leaving aside the unconstitutionality of a scheme giving the power to enforce laws to agents of Congress, see *Bowsher v. Synar,* 478 U.S. 714, 726, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986), it seems to us that Justice STEVENS' conclusion does not follow from his premise. If the FCC is indeed an agent of Congress, it would seem an adequate explanation of its change of position that Congress made clear its

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[28] A Subcommittee of the FCC's House oversight Committee held hearings on the FCC's broadcast indecency enforcement on January 28, 2004. "Can You Say That on TV?": An Examination of the FCC's Enforcement with respect to Broadcast Indecency, Hearing before the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce, 108th Cong., 2d Sess. Members of the Subcommittee specifically "called on the full Commission to reverse [the staff ruling in the Golden Globes case]" because they perceived a "feeling amongst many Americans that some broadcasters are engaged in a race to the bottom, pushing the decency envelope to distinguish themselves in the increasingly crowded entertainment field." Id., at 2 (statement of Rep. Upton); see also, e.g., id., at 17 (statement of Rep. Terry), 19 (statement of Rep. Pitts). They repeatedly expressed disapproval of the FCC's enforcement policies, see, e.g., id., at 3 (statement of Rep. Upton) ("At some point we have to ask the FCC: How much is enough? When will it revoke a license?"); id., at 4 (statement of Rep. Markey) ("Today's hearing will allow us to explore the FCC's lackluster enforcement record with respect to these violations").

About two weeks later, on February 11, 2004, the same Subcommittee held hearings on a bill increasing the fines for indecency violations. Hearings on '. R 3717 before the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce, 108th Cong., 2d Sess. All five Commissioners were present and were grilled about enforcement shortcomings. See, e.g., id., at 124 (statement of Rep. Terry) ("Chairman Powell, ... it seems like common sense that if we had ... more frequent enforcement instead of a few examples of fines... that would be a deterrent in itself"); id., at 7 (statement of Rep. Dingell) ("I see that apparently ... there is no enforcement of regulations at the FCC"). Certain statements, moreover, indicate that the political pressure applied by Congress had its desired effect. See ibid. ("I think our committee's work has gotten the attention of FCC Chairman Powell and the Bush Administration. And I'm happy to see the FCC now being brought to a state of apparent alert on these matters"); see also id., at 124 (statement of Michael Copps, FCC Commissioner) (noting "positive" change in other Commissioners' willingness to step up enforcement in light of proposed congressional action). A version of the bill ultimately became law as the Broadcast Decency Enforcement Act of 2005, 120 Stat. 491.

The FCC adopted the change that is the subject of this litigation on March 3, 2004, about three weeks after this second hearing. See Golden Globes Order, 19 FCC Rcd. 4975

wishes for stricter enforcement, see n. 4, *supra.*~ The Administrative Procedure Act, after all, does not apply to Congress and its agencies.~

Regardless, it is assuredly not "applicable law" that rulemaking by independent regulatory agencies is subject to heightened scrutiny. The Administrative Procedure Act, which provides judicial review, makes no distinction between independent and other agencies, neither in its definition of agency, 5 U.S.C. § 701(b)(1), nor in the standards for reviewing agency action, § 706. Nor does any case of ours express or reflect the "heightened scrutiny" Justice BREYER and Justice STEVENS would impose. Indeed, it is hard to imagine any closer scrutiny than that we have given to the Environmental Protection Agency, which is not an independent agency. See *Massachusetts v. EPA,* 549 U.S. 497, 533-535, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007); *Whitman v. American Trucking Assns., Inc.,* 531 U.S. 457, 481-486, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). There is no reason to magnify the separation-of-powers dilemma posed by the Headless Fourth Branch, see *Freytag v. Commissioner,* 501 U.S. 868, 921, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991) (SCALIA, J., concurring in part and concurring in judgment), by letting Article III judges – like jackals stealing the lion's kill – expropriate some of the power that Congress has wrested from the unitary Executive.

Justice BREYER and Justice STEVENS rely upon two supposed omissions in the FCC's analysis that they believe preclude a finding that the agency did not act arbitrarily. Neither of these omissions could undermine the coherence of the rationale the agency gave, but the dissenters' evaluation of each is flawed in its own right.

First, both claim that the Commission failed adequately to explain its consideration of the constitutional issues inherent in its regulation, *post,* at 1832-1835 (opinion of BREYER, J.); *post,* at 1826-1828 (opinion of STEVENS, J.). We are unaware that we have ever before reversed an executive agency, not for violating our cases, but for failure to discuss them adequately. But leave that aside. According to Justice BREYER, the agency said "next to nothing about the relation between the change it made in its prior 'fleeting expletive' policy and the First-Amendment-related need to avoid 'censorship,'" *post,* at 1832-1833. The *Remand Order* does, however, devote four full pages of small-type, single-spaced text (over 1,300 words not counting the footnotes) to explaining why the Commission believes that its indecency-enforcement regime (which includes its change in policy) is consistent with the First Amendment – and therefore not censorship as the term is understood. More specifically, Justice BREYER faults the FCC for "not explain[ing] why the agency changed its mind about the line that *Pacifica* draws or its policy's relation to that line," *post,* at 1834. But in fact (and as the Commission explained) this Court's holding in *Pacifica,* 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073, drew no constitutional line; to the contrary, it expressly declined to express any view on the constitutionality of prohibiting isolated indecency. Justice BREYER and Justice STEVENS evidently believe that when an agency has obtained this Court's determination that a less restrictive rule is constitutional, its successors acquire some special burden to explain why a more restrictive rule is not *un* constitutional. We know of no such principle.~

Second, Justice BREYER looks over the vast field of particular factual scenarios unaddressed by the FCC's 35-page *Remand Order* and finds one that is

fatal: the plight of the small local broadcaster who cannot afford the new technology that enables the screening of live broadcasts for indecent utterances. Cf. *post,* at 1834-1838. The Commission has failed to address the fate of this unfortunate, who will, he believes, be subject to sanction.

We doubt, to begin with, that small-town broadcasters run a heightened risk of liability for indecent utterances. In programming that they originate, their down-home local guests probably employ vulgarity less than big-city folks; and small-town stations generally cannot afford or cannot attract foul-mouthed glitteratae from Hollywood. Their main exposure with regard to self-originated programming is live coverage of news and public affairs. But the *Remand Order* went out of its way to note that the case at hand did not involve "breaking news coverage," and that "it may be inequitable to hold a licensee responsible for airing offensive speech during live coverage of a public event," 21 FCC Rcd., at 13311, ¶ 33. As for the programming that small stations receive on a network "feed": This *will* be cleansed by the expensive technology small stations (by Justice BREYER's hypothesis) cannot afford.

But never mind the detail of whether small broadcasters are uniquely subject to a great risk of punishment for fleeting expletives. The fundamental fallacy of Justice BREYER's small-broadcaster gloomy scenario is its demonstrably false assumption that the *Remand Order* makes no provision for the avoidance of unfairness – that the single-utterance prohibition will be invoked uniformly, in all situations. The *Remand Order* made very clear that this is not the case. It said that in determining "what, if any, remedy is appropriate" the Commission would consider the facts of each individual case, such as the "possibility of human error in using delay equipment," *id.,* at 13313, ¶ 35. Thus, the fact that the agency believed that Fox (a large broadcaster that used suggestive scripting and a deficient delay system to air a prime-time awards show aimed at millions of children) "fail[ed] to exercise 'reasonable judgment, responsibility and sensitivity,'" *id.,* at 13311, ¶ 33, and n. 91 (quoting *Pacifica Foundation, Inc.,* 2 FCC Rcd., at 2700, ¶ 18), says little about how the Commission would treat smaller broadcasters who cannot afford screening equipment. Indeed, that they would not be punished for failing to purchase equipment they cannot afford is positively suggested by the *Remand Order*'s statement that "[h]olding Fox responsible for airing indecent material in this case does not ... impose undue burdens on broadcasters." 21 FCC Rcd., at 13313, ¶ 36.

There was, in sum, no need for the Commission to compose a special treatise on local broadcasters.~ And Justice BREYER can safely defer his concern for those yeomen of the airwaves until we have before us a case that involves one.

IV. Constitutionality

The Second Circuit did not definitively rule on the constitutionality of the Commission's orders, but respondents nonetheless ask us to decide their validity under the First Amendment. This Court, however, is one of final review, "not of first view." *Cutter v. Wilkinson,* 544 U.S. 709, 718, n. 7, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005). It is conceivable that the Commission's orders may cause some broadcasters to avoid certain language that is beyond the Commission's reach under the Constitution. Whether that is so, and, if so, whether it is

unconstitutional, will be determined soon enough, perhaps in this very case. Meanwhile, any chilled references to excretory and sexual material "surely lie at the periphery of First Amendment concern," *Pacifica,* 438 U.S., at 743, 98 S.Ct. 3026 (plurality opinion of STEVENS, J.). We see no reason to abandon our usual procedures in a rush to judgment without a lower court opinion. We decline to address the constitutional questions at this time.

* * *

The Second Circuit believed that children today "likely hear this language far more often from other sources than they did in the 1970's when the Commission first began sanctioning indecent speech," and that this cuts against more stringent regulation of broadcasts. 489 F.3d, at 461. Assuming the premise is true (for this point the Second Circuit did not demand empirical evidence) the conclusion does not necessarily follow. The Commission could reasonably conclude that the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children. In the end, the Second Circuit and the broadcasters quibble with the Commission's policy choices and not with the explanation it has given. We decline to "substitute [our] judgment for that of the agency," *State Farm,* 463 U.S., at 43, 103 S.Ct. 2856, and we find the Commission's orders neither arbitrary nor capricious.

The judgment of the United States Court of Appeals for the Second Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, concurring.

I join the Court's opinion, which, as a matter of administrative law, correctly upholds the Federal Communications Commission's (FCC) policy with respect to indecent broadcast speech under the Administrative Procedure Act. I write separately, however, to note the questionable viability of the two precedents that support the FCC's assertion of constitutional authority to regulate the programming at issue in this case. See *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969); *FCC v. Pacifica Foundation,* 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978). *Red Lion* and *Pacifica* were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity. "The text of the First Amendment makes no distinctions among print, broadcast, and cable media, but we have done so" in these cases.~

This deep intrusion into the First Amendment rights of broadcasters, which the Court has justified based only on the nature of the medium, is problematic on two levels. First, instead of looking to first principles to evaluate the constitutional question, the Court relied on a set of transitory facts, *e.g.,* the "scarcity of radio frequencies," *Red Lion, supra,* at 390, 89 S.Ct. 1794, to determine the applicable First Amendment standard. But the original meaning of the Constitution cannot turn on modern necessity: "Constitutional rights are

enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *District of Columbia v. Heller,* 554 U.S. ___, ___, 128 S.Ct. 2783, 2821, 171 L.Ed.2d 637 (2008). In breaching this principle, *Red Lion* adopted, and *Pacifica* reaffirmed, a legal rule that lacks any textual basis in the Constitution. *Denver Area, supra,* at 813, 116 S.Ct. 2374 (THOMAS, J., concurring in judgment in part and dissenting in part) ("First Amendment distinctions between media [have been] dubious from their infancy"). Indeed, the logical weakness of *Red Lion* and *Pacifica* has been apparent for some time: "It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media." *Telecommunications Research & Action Center v. FCC,* 801 F.2d 501, 508 (C.A.D.C.1986) (Bork, J.).

Highlighting the doctrinal incoherence of *Red Lion* and *Pacifica,* the Court has declined to apply the lesser standard of First Amendment scrutiny imposed on broadcast speech to federal regulation of telephone dial-in services, see *Sable Communications of Cal., Inc. v. FCC,* 492 U.S. 115, 127-128, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989), cable television programming, see *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 637, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994), and the Internet, see *Reno v. American Civil Liberties Union,* 521 U.S. 844, 867-868, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). "There is no justification for this apparent dichotomy in First Amendment jurisprudence. Whatever the merits of *Pacifica* when it was issued[,]... it makes no sense now." *Action for Children's Television v. FCC,* 58 F.3d 654, 673 (C.A.D.C.1995) (Edwards, C. J., dissenting). The justifications relied on by the Court in *Red Lion* and *Pacifica* – "spectrum scarcity, intrusiveness, and accessibility to children – neither distinguish broadcast from cable, nor explain the relaxed application of the principles of the First Amendment to broadcast." 58 F.3d, at 673; see also *In re Industry Guidance on Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency,* 16 FCC Rcd. 7999, 8021, n. 11, 2001 WL 332787 (2001) (statement of Commissioner Furchtgott-Roth) ("It is ironic that streaming video or audio content from a television or radio station would likely receive more constitutional protection, *see Reno* [*v. American Civil Liberties Union,* 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997)], than would the same exact content broadcast over-the-air").

Second, even 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. Broadcast spectrum is significantly less scarce than it was 40 years ago. See Brief for Respondents NBC Universal et al. 37-38 (hereinafter NBC Brief). As NBC notes, the number of over-the-air broadcast stations grew from 7,411 in 1969, when *Red Lion* was issued, to 15,273 by the end of 2004. See NBC Brief 38; see also FCC Media Bureau Staff Research Paper, J. Berresford, The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed 12-13 (Mar.2005) (No. 2005-2). And the trend should continue with broadcast television's imminent switch from analog to digital transmission, which will allow the FCC to "stack broadcast channels right beside one another along the spectrum, and ultimately utilize

significantly less than the 400 MHz of spectrum the analog system absorbs today." *Consumer Electronics Assn. v. FCC,* 347 F.3d 291, 294 (C.A.D.C.2003).

Moreover, traditional broadcast television and radio are no longer the "uniquely pervasive" media forms they once were. For most consumers, traditional broadcast media programming is now bundled with cable or satellite services. See App. to Pet. for Cert. 107a. Broadcast and other video programming is also widely available over the Internet. See Stelter, Serving Up Television Without the TV Set, N.'. Times, Mar. 10, 2008, p. C1. And like radio and television broadcasts, Internet access is now often freely available over the airwaves and can be accessed by portable computer, cell phones, and other wireless devices. See May, Charting a New Constitutional Jurisprudence for the Digital Age, 3 Charleston L.Rev. 373, 375 (2009). The extant facts that drove this Court to subject broadcasters to unique disfavor under the First Amendment simply do not exist today. See *In re Industry Guidance, supra,* at 8020 (statement of Commissioner Furchtgott-Roth) ("If rules regulating broadcast content were ever a justifiable infringement of speech, it was because of the relative dominance of that medium in the communications marketplace of the past. As the Commission has long recognized, the facts underlying this justification are no longer true" (footnote omitted)).[29]

These dramatic changes in factual circumstances might well support a departure from precedent under the prevailing approach to *stare decisis.*~ For all these reasons, I am open to reconsideration of *Red Lion* and *Pacifica* in the proper case.

Justice KENNEDY, concurring in part and concurring in the judgment.

I join Parts I, II, III-A through III-D, and IV of the opinion of the Court and agree that the judgment must be reversed. This separate writing is to underscore certain background principles for the conclusion that an agency's decision to change course may be arbitrary and capricious if the agency sets a new course that reverses an earlier determination but does not provide a reasoned explanation for doing so. In those circumstances I agree with the dissenting opinion of Justice BREYER that the agency must explain why "it now reject[s] the considerations that led it to adopt that initial policy." *Post,* at 1831.~

Justice STEVENS, dissenting.

While I join Justice BREYER's cogent dissent, I think it important to emphasize two flaws in the Court's reasoning. Apparently assuming that the Federal Communications Commission's (FCC or Commission) rulemaking

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[29] With respect to reliance by FCC v. Pacifica Foundation, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978), on the ease with which children could be exposed to indecent television programming, technology has provided innovative solutions to assist adults in screening their children from unsuitable programming – even when that programming appears on broadcast channels. See NBC Brief 43-47 (discussing V-chip technology, which allows targeted blocking of television programs based on content).

authority is a species of executive power, the Court espouses the novel proposition that the Commission need not explain its decision to discard a longstanding rule in favor of a dramatically different approach to regulation. See *ante,* at 1810-1811. Moreover, the Court incorrectly assumes that our decision in *FCC v. Pacifica Foundation,* 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978), decided that the word "indecent," as used in 18 U.S.C. § 1464,[30] permits the FCC to punish the broadcast of *any* expletive that has a sexual or excretory origin. *Pacifica* was not so sweeping, and the Commission's changed view of its statutory mandate certainly would have been rejected if presented to the Court at the time.

I

"The structure of our Government as conceived by the Framers of our Constitution disperses the federal power among the three branches – the Legislative, the Executive, and the Judicial – placing both substantive and procedural limitations on each." *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.,* 501 U.S. 252, 272, 111 S.Ct. 2298, 115 L.Ed.2d 236 (1991). The distinction among the branches is not always sharp, see *Bowsher v. Synar,* 478 U.S. 714, 749, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986) (STEVENS, J., concurring in judgment) (citing cases), a consequence of the fact that the "great ordinances of the Constitution do not establish and divide fields of black and white," *Springer v. Philippine Islands,* 277 U.S. 189, 209, 48 S.Ct. 480, 72 L.Ed. 845 (1928) (Holmes, J., dissenting). Strict lines of authority are particularly elusive when Congress and the President both exert a measure of control over an agency. As a landmark decision involving the Federal Trade Commission (FTC) made clear, however, when Congress grants rulemaking and adjudicative authority to an expert agency composed of commissioners selected through a bipartisan procedure and appointed for fixed terms, it substantially insulates the agency from executive control. See *Humphrey's Executor v. United States,* 295 U.S. 602, 623-628, 55 S.Ct. 869, 79 L.Ed. 1611 (1935).

With the view that broadcast regulation "should be as free from political influence or arbitrary control as possible," S.Rep. No. 772, 69th Cong., 1st Sess., 2 (1926), Congress established the FCC with the same measure of independence from the Executive that it had provided the FTC. Just as the FCC's commissioners do not serve at the will of the President, see 47 U.S.C. § 154(c) (2000 ed.), its regulations are not subject to change at the President's will. And when the Commission fashions rules that govern the airwaves, it exercises legislative power delegated to it by Congress. See *Whitman v. American Trucking Assns., Inc.,* 531 U.S. 457, 489-490, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) (STEVENS, J., concurring in part and concurring in judgment); *Bowsher,* 478 U.S., at 752, 106 S.Ct. 3181 (opinion of STEVENS, J.). Consequently, the

[30] Section 1464 provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."

FCC "cannot in any proper sense be characterized as an arm or an eye of the executive" and is better viewed as an agent of Congress established "to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative ... aid." *Humphrey's Executor,* 295 U.S., at 628, 55 S.Ct. 869.˜

The FCC, like all agencies, may revise its regulations from time to time, just as Congress amends its statutes as circumstances warrant. But the FCC is constrained by its congressional mandate. There should be a strong presumption that the FCC's initial views, reflecting the informed judgment of independent commissioners with expertise in the regulated area, also reflect the views of the Congress that delegated the Commission authority to flesh out details not fully defined in the enacting statute. The rules adopted after *Pacifica,* 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073, have been in effect for decades and have not proved unworkable in the intervening years. As Justice BREYER's opinion explains, broadcasters have a substantial interest in regulatory stability; the threat of crippling financial penalties looms large over these entities. See *post,* at 1834-1836. The FCC's shifting and impermissibly vague indecency policy only imperils these broadcasters and muddles the regulatory landscape. It therefore makes eminent sense to require the Commission to justify why its prior policy is no longer sound before allowing it to change course.˜ The FCC's congressional charter, 47 U.S.C. § 151 *et seq.,* the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006 ed.) (instructing courts to "hold unlawful and set aside ... arbitrary [or] capricious" agency action), and the rule of law all favor stability over administrative whim.

II

The Court commits a second critical error by assuming that *Pacifica* endorsed a construction of the term "indecent," as used in 18 U.S.C. § 1464, that would include any expletive that has a sexual or excretory origin. Neither the opinion of the Court, nor Justice Powell's concurring opinion, adopted such a far-reaching interpretation. Our holding was narrow in two critical respects. First, we concluded, over the dissent of four Justices, that the statutory term "indecent" was not limited to material that had prurient appeal and instead included material that was in "nonconformance with accepted standards of morality." *Pacifica,* 438 U.S., at 740, 98 S.Ct. 3026. Second, we upheld the FCC's adjudication that a 12-minute, expletive-filled monologue by satiric humorist George Carlin was indecent "as broadcast." *Id.,* at 735, 98 S.Ct. 3026. We did not decide whether an *isolated* expletive could qualify as indecent. *Id.,* at 750, 98 S.Ct. 3026; *id.,* at 760-761, 98 S.Ct. 3026 (Powell, J., concurring in part and concurring in judgment). And we certainly did not hold that any word with a sexual or scatological origin, however used, was indecent.

The narrow treatment of the term "indecent" in *Pacifica* defined the outer boundaries of the enforcement policies adopted by the FCC in the ensuing years. The Commission originally explained that "under the legal standards set forth in *Pacifica,* deliberate and repetitive use [of expletives] in a patently offensive manner is a requisite to a finding of indecency." *In re Pacifica Foundation,* 2 FCC Rcd. 2698, 2699, ¶ 13, 1987 WL 345577 (1987). While the "repetitive use"

issue has received the most attention in this case, it should not be forgotten that *Pacifica* permitted the Commission to regulate only those words that describe sex or excrement. See 438 U.S., at 743, 98 S.Ct. 3026 (plurality opinion) ("[T]he Commission's definition of indecency will deter only the broadcasting of patently offensive *references* to excretory and sexual organs and activities" (emphasis added)). The FCC minimizes the strength of this limitation by now claiming that any use of the words at issue in this case, in any context and in any form, *necessarily* describes sex or excrement. See *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005,* 21 FCC Rcd. 13299, 13308, ¶ 23, 2006 WL 3207085 (2006) *(Remand Order)* ("[A]ny strict dichotomy between expletives and descriptions or depictions of sexual or excretory functions is artificial and does not make sense in light of the fact that an expletive's power to offend derives from its sexual or excretory meaning" (internal quotation marks omitted)). The customs of speech refute this claim: There is a critical distinction between the use of an expletive to describe a sexual or excretory function and the use of such a word for an entirely different purpose, such as to express an emotion. One rests at the core of indecency; the other stands miles apart. As any golfer who has watched his partner shank a short approach knows, it would be absurd to accept the suggestion that the resultant four-letter word uttered on the golf course describes sex or excrement and is therefore indecent. But that is the absurdity the FCC has embraced in its new approach to indecency.[31] See *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program,* 19 FCC Rcd. 4975, 4978-4979, ¶¶ 8-9, 2004 WL 540339 (2004) (declaring that even the use of an expletive to emphasize happiness "invariably invokes a coarse sexual image").

Even if the words that concern the Court in this case *sometimes* retain their sexual or excretory meaning, there are surely countless instances in which they are used in a manner unrelated to their origin. These words may not be polite, but that does not mean they are necessarily "indecent" under § 1464. By improperly equating the two, the Commission has adopted an interpretation of "indecency" that bears no resemblance to what *Pacifica* contemplated.[32] Most distressingly, the Commission appears to be entirely unaware of this fact, see *Remand Order,* 21 FCC Rcd., at 13308 (erroneously referencing *Pacifica* in support of its new policy), and today's majority seems untroubled by this significant oversight, see

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[31] It is ironic, to say the least, that while the FCC patrols the airwaves for words that have a tenuous relationship with sex or excrement, commercials broadcast during prime-time hours frequently ask viewers whether they too are battling erectile dysfunction or are having trouble going to the bathroom.

[32] While Justice THOMAS and I disagree about the continued wisdom of Pacifica, see ante, pp. 1819-1820 (concurring opinion), the changes in technology and the availability of broadcast spectrum he identifies certainly counsel a restrained approach to indecency regulation, not the wildly expansive path the FCC has chosen

ante, at 1807-1808, 1812-1813. Because the FCC has failed to demonstrate an awareness that it has ventured far beyond *Pacifica*'s reading of § 1464, its policy choice must be declared arbitrary and set aside as unlawful. See *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

III

For these reasons and those stated in Justice BREYER's dissenting opinion, I would affirm the judgment of the Court of Appeals.

Justice GINSBURG, dissenting.

The mainspring of this case is a Government restriction on spoken words. This appeal, I recognize, arises under the Administrative Procedure Act.˜ Justice BREYER's dissenting opinion, which I join, cogently describes the infirmities of the Federal Communications Commission's (FCC or Commission) policy switch under that Act. The Commission's bold stride beyond the bounds of *FCC v. Pacifica Foundation,* 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978), I agree, exemplified "arbitrary" and "capricious" decisionmaking. I write separately only to note that there is no way to hide the long shadow the First Amendment casts over what the Commission has done. Today's decision does nothing to diminish that shadow.

More than 30 years ago, a sharply divided Court allowed the FCC to sanction a midafternoon radio broadcast of comedian George Carlin's 12-minute "Filthy Words" monologue. *Ibid.* Carlin satirized the "original" seven dirty words and repeated them relentlessly in a variety of colloquialisms. The monologue was aired as part of a program on contemporary attitudes toward the use of language. *In re Citizen's Complaint Against Pacifica Foundation Station WBAI (FM),* 56 F.C.C.2d 94, 95, 1975 WL 29897 (1975). In rejecting the First Amendment challenge, the Court "emphasize[d] the narrowness of [its] holding." *Pacifica,* 438 U.S., at 750, 98 S.Ct. 3026. See also *ante,* at 1824-1825 (STEVENS, J., dissenting). In this regard, the majority stressed that the Carlin monologue deliberately repeated the dirty words "over and over again." 438 U.S., at 729, 751-755, 98 S.Ct. 3026 (Appendix). Justice Powell, concurring, described Carlin's speech as "verbal shock treatment." *Id.,* at 757, 98 S.Ct. 3026 (concurring in part and concurring in judgment).

In contrast, the unscripted fleeting expletives at issue here are neither deliberate nor relentlessly repetitive. Nor does the Commission's policy home in on expressions used to describe sexual or excretory activities or organs. Spontaneous utterances used simply to convey an emotion or intensify a statement fall within the order's compass. Cf. *Cohen v. California,* 403 U.S. 15, 26, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971) ("[w]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated."); *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC,* 518 U.S. 727, 805, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996) (KENNEDY,

J., concurring in part, concurring in judgment in part, and dissenting in part) (a word categorized as indecent "often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power").

The *Pacifica* decision, however it might fare on reassessment, see *ante,* at 1822 (THOMAS, J., concurring), was tightly cabined, and for good reason. In dissent, Justice Brennan observed that the Government should take care before enjoining the broadcast of words or expressions spoken by many "in our land of cultural pluralism." 438 U.S., at 775, 98 S.Ct. 3026. That comment, fitting in the 1970's, is even more potent today. If the reserved constitutional question reaches this Court, see *ante,* at 1819 (majority opinion), we should be mindful that words unpalatable to some may be "commonplace" for others, "the stuff of everyday conversations." 438 U.S., at 776, 98 S.Ct. 3026 (Brennan, J., dissenting).

Justice BREYER, with whom Justice STEVENS, Justice SOUTER, and Justice GINSBURG join, dissenting.

In my view, the Federal Communications Commission failed adequately to explain *why* it *changed* its indecency policy from a policy permitting a single "fleeting use" of an expletive, to a policy that made no such exception. Its explanation fails to discuss two critical factors, at least one of which directly underlay its original policy decision. Its explanation instead discussed several factors well known to it the first time around, which by themselves provide no significant justification for a *change* of policy. Consequently, the FCC decision is "arbitrary, capricious, an abuse of discretion." 5 U.S.C. § 706(2)(A)˜ And I would affirm the Second Circuit's similar determination.