SUPREME COURT OF THE UNITED STATES

No. 07–582

FEDERAL COMMUNICATIONS COMMISSION, ET AL., PETITIONERS *v.* FOX TELEVISION STATIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[April 28, 2009]

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 (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" mono-

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*The Second Circuit, presented with both constitutional and statutory challenges, vacated the remand order on APA grounds. The court therefore "refrain[ed] from deciding" the "constitutional questions." 489 F. 3d 444, 462 (2007) (quoting *Lyng* v. *Northwest Indian Cemetery Protective Assn.*, 485 U. S. 439, 445 (1988)). The majority, however, stated and explained why it was "skeptical" that the Commission's policy could "pass constitutional muster." 489 F. 3d, at 462.

logue. *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). In rejecting the First Amendment challenge, the Court "emphasize[d] the narrowness of [its] holding." *Pacifica,* 438 U. S., at 750. See also *ante*, at 1 (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 (Appendix). Justice Powell, concurring, described Carlin's speech as "verbal shock treatment." *Id.*, at 757 (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 (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 (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 6 (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. That comment, fitting in the 1970's, is even more potent today. If the reserved constitutional question reaches this Court, see *ante*, at 26 (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 (Brennan, J., dissenting).