No. _____

In the Supreme Court of the United States

PMCM TV, LLC,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(a) Should courts continue to follow the *Chevron* policy of deferring to administrative agency interpretations of federal statutes when the federal judiciary is not only uniquely qualified to undertake such interpretations but is also charged by the Constitution with the exclusive power to do so?

(b) Where a statute is plain on its face by every canon of statutory construction, should a court under *Chevron* nevertheless defer to an agency's contrary interpretation of the statute?

(c) The Cable Television Consumer Protection and Competition Act of 1992 provides that a television station entitled to must-carry status must be carried by cable systems on the channel on which it "broadcasts over the air." The D.C. Circuit below determined that Congress intended by this language to refer to a station's virtual channel – not the channel associated with the frequency on which it transmits its signal through the air but a different channel number incorporated into the broadcast channel stream. However, in order to qualify for must-carry status at all, a TV station must "operate" on the channel which it is assigned by the FCC's table of allotments for broadcast transmissions. If "broadcasting over the air on a channel" is the same as "operating on a channel," hundreds of television stations which have heretofore qualified for "must-carry" status on local cable television systems will now lose their cable carriage rights and protections. Could Congress have intended this result in a statute whose basic purpose was to ensure that TV stations are fairly carried by cable systems?

PARTIES TO THE PROCEEDING

The parties before the United States Court of Appeals for the District of Columbia Circuit were (i) Petitioner, PMCM TV, LLC, (ii) Respondent, the Federal Communications Commission, (iii) Respondent, United States of America, U.S. Department of Justice Antitrust Division, (iii) Intervenor below, ION Media License Company, LLC, (iv) Intervenor below, Meredith Corporation, (v) Intervenor below, Charter Communications, Inc., and (vi) Intervenor below, CBS Corporation.

RULE 29.6 DISCLOSURE STATEMENT

PMCM TV, LLC is a New Hampshire limited liability company. The company is not publicly traded, has no parent companies, and no publicly traded company holds 10% or more of its membership shares.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The orders of the FCC's Media Bureau were released on May 17, 2016 and are reported at *PMCM TV, LLC*, 31 FCC Rcd 5224 (MB 2016); *PMCM TV, LLC*, 31 FCC Rcd 5230 (MB 2016); and *PMCM TV, LLC*, 31 FCC Rcd 5236 (MB 2016). The FCC's decision on review of those orders was released on September 15, 2017 and is reported at *PMCM TV, LLC*, 32 FCC Rcd 7200 (2017). The opinion of the D.C. Circuit was entered on June 20, 2018 and is reported at *PMCM TV, LLC v. Federal Communications Commission*, No. 17-1209 (D.C. Cir. June 20, 2018). ("D.C. Circuit Order"). The D.C. Circuit denied PMCM TV, LLC's petition for rehearing *en banc* on September 5, 2018.

JURISDICTION

The D.C. Circuit's judgment was entered on June 20, 2018. PMCM TV, LLC filed a petition for rehearing *en banc* on August 6, 2018, which the D.C. Circuit denied on September 5, 2018. This case is therefore timely filed under Rule 13 of this Court's rules. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Appendix reproduces 47 U.S.C. §§ 534(b) and 534(h)(1).

STATEMENT OF THE CASE

The cable carriage issue raised in this case has been a time bomb waiting to explode since 2008 when the Federal Communications Commission ("FCC") began permitting cable systems to carry TV stations on their "virtual" channel number rather than on the channel over which they broadcast their signals. In connection with the complete conversion of the nation's broadcast television system from analog to digital in 2009, many stations which had been transmitting on analog channels associated with their radio frequency ("RF channels") were relocated to different digital RF channels. The FCC adopted a policy of letting stations identify themselves by a "virtual channel" which was the same as their former analog RF channel.[1] The idea was that viewers had grown accustomed to finding their shows on a particular channel and use of the virtual channel would simplify their ability to continue to watch their favorite channels. As an example, the NBC station in Washington historically operated on analog RF channel 4. After the digital conversion, it began operating on digital RF channel 48. The FCC's policy allowed it to continue to identify itself to over the air viewers as channel 4.

The virtual channel identifier (along with other information ancillary to the actual programing content, such as the call sign of the station) is included in the RF channel that is broadcast over the air by the station. Most TV sets are now configured to receive

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[1] *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Declaratory Order, 23 FCC Rcd 14254 (2008) ("*2008 Declaratory Ruling*").

and identify the signal transmitted through the air as the RF channel and then translate that channel to the viewer as part of the program stream as the virtual channel. There is nothing wrong with this process insofar as it applies to reception of channels by TV sets that receive their broadcasts over the air. This system goes seriously awry, however, when carriage on cable television systems comes into play.

As will be explained more fully below, the Cable Television Consumer Protection and Competition Act of 1992 (Cable Act)[2] requires that cable systems which are required to carry a television station's signal under the Cable Act must carry the station "on the cable channel number on which the local commercial television station is broadcast over the air," with certain exceptions not here pertinent. This provision was adopted to prevent TV stations from being assigned unfavorable channel numbers by cable systems whose own content effectively competes with TV stations for viewership.[3] For when cable TV became a larger player in the media landscape in the 1970's, cable operators could and did assign *any* channel position on their systems to the TV stations they carried regardless of the stations' over the air channel number. Congress expressed concern that, with that capability, cable operators would assign local TV stations "disadvantageous" channel positions and thus threaten "economic competition, and the Federal

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[2] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460.

[3] S. REP. NO. 102-92, at 61 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 1133, 1194.

television broadcast allocation structure in local markets across the country."[4] In 2008, the FCC issued a Declaratory Ruling[5] which declared that the statutory cable carriage requirement set forth above would continue to apply in the digital era. The Commission indicated at the same time, however, that cable systems "may" carry TV stations on their virtual channel rather than their over the air channel. Again, there was nothing wrong with that ruling as long as the mandatory right established by Congress to be carried on the channel number associated with their assigned RF frequency was not being disturbed.

In 2014, pursuant to the channel placement right established by the Cable Act, Petitioner PMCM demanded carriage by the cable systems in its New York television market on channel 3, the channel on which the FCC's rules require it to broadcast over the air. The cable systems refused to comply. Upon complaint to the FCC, the full Commission refused to enforce PMCM's right, declaring instead for the first time that a TV station broadcasts over the air not on its RF channel but instead on its virtual channel.[6] This "interpretation" of the law allowed the FCC to continue applying its own policy rather than the right accorded by Congress. PMCM appealed that decision to the D.C.

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[4] Conference Report accompanying the Cable Television Consumer Protection and Competition Act of 1992, H.R. REP. NO. 102-862, at 54 (1992) (Conf. Rep.).

[5] *2008 Declaratory Ruling, supra* note 1.

[6] *In re PMCM TV, LLC v. RCN Telecom Services, LLC*, Memorandum Opinion and Order, 32 FCC Rcd. 7200, 7207–08 ¶ 13 (2017).

Circuit Court of Appeals which cursorily reviewed the statutory language and then the affirmed the FCC's order, later denying a petition for rehearing *en banc*.[7] This petition followed.

REASONS FOR GRANTING CERTIORARI

I. The *Chevron* Precedent Calling for Deference to Administrative Agencies' Interpretations of Statutes Should be Overturned

This case illustrates the fundamental error in permitting administrative agencies rather than judges to interpret statutes. Here the FCC's interpretation was patently erroneous, as will be explained below. It was an interpretation made by lay persons of a statute under circumstances in which the FCC clearly desired an outcome that would support its own view – rather than Congress's – of how cable carriage rights should be applied. The Circuit Court rubberstamped the FCC's interpretation without serious independent consideration of the statutory language. Placing this degree of discretion in the hands of administrative agencies rather than courts conflicts with the Constitution, which vests judicial power exclusively in the judicial branch.

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[7] *PMCM TV, LLC v. Federal Communications Commission*, No. 17-1209 (D.C. Cir. June 20, 2018); Order Denying Petition for Rehearing *En Banc*, No. 17-1209 (D.C. Cir. Sep. 5, 2018).

There is a growing body of academic commentary on the need to change this policy.[8] These scholarly authorities argue that the accretion of power in administrative agencies – particularly the power to interpret statutes – gives them not only power to exercise a judicial function but also allows them to effectively revise a statute by "interpreting" it the way they think Congress would have, or even worse, should have, enacted it if it did so now – as the Commission did here.

The source of much of this problem is *Chevron*.[9] One can certainly see the sense in the initial *Chevron* principle – cases involving technical subject matters generally should be decided by the agencies which are charged with the expertise on those matters. The FCC, EPA, FDA, SEC and other federal agencies all are charged with administering regulatory fields that involve specialized knowledge of highly technical industries. There is nothing wrong with leaving them to decide most technical matters. But *Chevron,* perhaps inadvertently, has vested the agencies with powers and duties far beyond their areas of expertise.

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[8] *See, e.g.*, Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J. L. & PUB. POL'Y 103 (2018); Joseph Postell & Paul J. Larkin, Jr., *Not Above the Law: Ending the Misguided* Chevron-Auer *Deference Regime*, HERITAGE FOUNDATION, Sep. 7 2018; Joseph Postell, *The Framers Establish an Administrative Constitution*, FREE STATE FOUNDATION (Bd. of Acad. Advisors, Potomac, MD.), May 24, 2018; Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1 (2017).

[9] *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984).

Statutory interpretation is not the FCC's area of expertise, and it should not, from a policy perspective, and cannot, from a constitutional perspective, be left to the agency. Just as war is too important to be left to the generals, statutory interpretation is too important to be left to the agencies. This is how we end up with the flatly and patently erroneous decision in this case.

Petitioner recognizes that *Chevron* has been a part of the administrative landscape now for 35 years. It is high time that this Court take action to curb what has become a serious usurpation of the exclusive power of the judicial branch.

II. The Circuit Court's Decision has Grave Consequences for the Cable Carriage Rights of Hundreds of Television Stations Which Depend on Cable TV "Must Carry" Status for Viewership

There are several hundred commercial television stations around the United States that identify themselves by virtual channels rather than the RF channels on which they operate.[10] Until the FCC's decision in this case, those stations could safely qualify as local commercial television stations for purposes of the various protections afforded them under the Cable Act, including must-carry rights. The decision in this case radically undermines that qualification. As will be detailed below, Section 534(h)(1) of the Cable Act defines a "local commercial television station" as a

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[10] There are also some stations whose virtual channels are the same as their RF channels, so their qualification as a local television station is not impacted by the FCC's decision.

station which is "licensed and operating on a channel regularly assigned to its community by the Commission."[11] Virtual channels are not licensed and are not assigned to communities. The concept of virtual channels only arose in connection with the digital conversion in 2009 and therefore could not have been the channels intended by Congress for channel placement 17 years earlier. The channel referenced in Section 534(h)(1) must be the station's RF channel since that is the *only* channel on which a station is licensed and which is assigned to a particular community. Under the Circuit Court's ruling, however, all stations are deemed to be broadcasting over the air on, and therefore operating on, their virtual channel rather than their RF channel. And because they are therefore not "operating on" a channel licensed to and assigned to a community by the FCC, they cannot qualify under the statutory criteria as local commercial television stations. All of the rights and protections granted by the Cable Act to local commercial television stations whose virtual channels differ from their RF channels will have suddenly disappeared.

Cable systems which have every incentive to rid themselves of the obligation to carry local television stations at no charge will cite the instant case as clear authority that they have no obligation under the statute to do so. Having boxed itself into a corner, the Commission, whose interpretation of Section 534(b)(6) has been upheld by the Court of Appeals, will have to agree. And because the definition of a local television station is in the statute, the Commission cannot

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[11] 47 U.S.C. § 514(h)(1).

somehow "fix" the problem by changing that statutory definition.

The result will be the precise opposite of what Congress plainly intended -- instead of ensuring that stations are protected from anticompetitive behavior by cable systems, they will be at the cable systems' mercy. And instead of consumers being assured that they can watch these local stations on their cable systems, they will lose access to those stations entirely. The hundreds of stations who rely on must-carry rights for access to cable systems will suffer serious, perhaps fatal, financial consequences since cable viewers in today's world make up a large proportion of any TV station's viewing audience. The FCC adroitly sidestepped this necessary consequence of its interpretation of Section 534(b)(6), and the Circuit Court did not consider these consequences at all.

The adverse consequences of the Circuit Court's decision will dramatically upset the statutorily set regime of mandatory cable carriage that has worked well since 1992. Redress by this Court is necessary to prevent that disastrous result.

III. The Circuit Court Ignored its *Chevron* Obligation to Enforce a Statute that is Clear on its Face

Questions of statutory interpretation of laws subject to administrative agency oversight are now required by *Chevron* to follow a two-step analytic path. The now well-settled progression is as follows. "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as

well as the agency, must give effect to the unambiguously expressed intent of Congress." During this Step One analysis, the court determines on its own whether the statute is ambiguous, without regard to the FCC's reasoning. *SBC Commc'ns Inc. v. FCC*, 138 F.3d 410, 418 (D.C. Cir. 1998). Only if Congress has not directly spoken precisely to the matter in issue does a Court take the next step. It "does not simply impose its own construction on the statute…Rather if the statute is silent or ambiguous with respect to a specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842.

Here the statute is neither silent nor ambiguous. Yet the D.C. Circuit did not stop to consider the facial clarity of the statutory language at all. Had it not skipped over Step One, it would have found that there was no need for a Step Two "interpretation" because the statute could not reasonably be understood to mean anything other than what it says on its face. The statutory language at issue is as follows:

> Each signal carried in fulfillment of the carriage obligations of a cable operator under this section shall be carried on the cable system channel number on which the local commercial television station is broadcast over the air … at the election of the station, or on such other channel number as is mutually agreed upon by the station and the cable operator.

47 U.S.C. § 534(b)(6).

Six distinct factors strongly support the facial clarity of the statute.

1. A broadcast television station is allotted a particular frequency band to operate on which is specified in the FCC's Table of Allotments. That frequency band is identified as a "channel" and assigned a specific channel number by the Commission's rules. 47 C.F.R. §§ 73.622(i), 73.603. It is that channel that is generated as a wave by the broadcast transmitter at the transmitter site and from there emitted through the air to remote television receivers. In ordinary parlance, the channel on which a broadcast station is authorized to transmit its signal through the air, and the channel which appears on its license has always, understandably, been considered the channel on which the station "broadcasts over the air."

2. When Congress enacted the Cable Act in 1992, there was no such thing as a "virtual" channel. Congress can only have had in mind the RF channel number associated with the radio frequency over which a station broadcasts over the air. This Court has made clear that Congress's intent at the time of enacting a statute governs. *Perrin v. United States,* 444 U.S. 37, 42 (1979). "Unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning … *at the time Congress enacted the statute."* (emphasis added) Applying this canon, the "over the air" channel must be the RF channel.

3. When Congress enacted Section 534(b)(6) of the Cable Act, it expressly defined the terms that applied to the subjects regulated by the Act. In Section 534(h)(1), it expressly defined a "local commercial television station" as follows:

> [A]ny full power television broadcast station, other than a qualified noncommercial educational television station within the meaning of section 535(*l*)(1) of this title, *licensed and operating on a channel regularly assigned to its community by the Commission* that, with respect to a particular cable system, is within the same television market as the cable system. (emphasis added)

Congress expressly made the provisions of Section 534(b)(6) applicable to "local commercial television stations." In order to qualify as such a station and thus be eligible for the rights and protections accorded by the Cable Act, a station must be operating on the channel on which it is licensed and which is allocated to a specific community by the FCC. The *only* channel that meets that definition is a station's RF channel since that is the channel that appears both on its license and in the FCC's Table of Allotments where channels are allotted to communities. Virtual channels are (i) not part of a station's license, (ii) are not allotted to communities, and (iii) did not exist in 1992 when the Cable Act was passed. Congress can only have been referring to the same channel in Section 534(b)(6) as it was in Section 534(h)(1): the RF channel.

4. There is no logical or factual distinction between the channel on which a station "operates" and the channel on which it "broadcasts over the air." The operation of a television station on a channel consists of nothing more than broadcasting over the air. This results in a statutory quandary because if a station's "over the air" channel is its virtual channel rather than its RF channel, then the channel on which it "operates" must

also be the virtual channel. As noted above, hundreds of stations have different virtual channels than RF channels. Under the Circuit Court's interpretation of "channel," *none* of those stations would qualify as "local commercial television stations" because they are not "operating" on a channel licensed to a community but rather a virtual channel. This interpretation would nullify the rights which the Cable Act intended to grant local stations in order to ensure their carriage on cable systems. Since this runs directly contrary to the very purpose of the Act and the way it has been applied for some 25 years, that interpretation cannot be correct. To the contrary, the channel on which a station broadcasts over the air *must* be the same as the channel on which it operates, i.e., its RF channel.

5. In support of its affirmance of the FCC's conception that the virtual channel is the "over the air channel," the D.C. Circuit noted that "the virtual channel number is encoded in the signal that the station "broadcasts over the air." *D.C. Circuit Order*, at 4. This is true, but that perfectly rebuts the Court's conclusion that the virtual channel number is the over-the-air channel number. The "signal" that a station broadcasts over the air is <u>itself</u> the channel that is broadcast over the air; that's what a signal is. A part of the bit stream that is *contained in* a channel obviously cannot *be* the channel. The Circuit Court's observation actually supported identification of the RF channel as the channel referred to in Section 534(b)(6).

6. Finally, the Circuit Court misstated the Congressional purpose in enacting the channel placement sections of the Cable Act. The Court deemed the purpose of the must-carry provision of the Cable

Act is "to ensure that viewers have clear and easy access to local programming." *D.C. Circuit Court Order*, at 4. The legislative history of the Act makes it unequivocally clear that Congress was focused almost entirely in 1992 on (i) ensuring that television stations were carried on cable systems at all and (ii) protecting carried TV stations from anti-competitive channel placement by cable operators. Congress had seen the potential for abusive channel placement by cable operators who had been using channel placement to disadvantage the broadcast stations with which they compete. Congress went to some effort to articulate why the must-carry provisions of the Act were necessary:

> [T]he channel positioning requirement responds to the governmental interest in promoting strong competition between the local television stations and cable systems.

S. REP. 102-92, at 61 (1992), *as reprinted in* 1992 U.S.C.C.A.N. 1133, 1194.

> [Subsection (b)(4)(6)] permits stations whose channel positions have been wrongly manipulated by cable systems in the absence of cable carriage and channel positioning regulations to redress those wrongs.

Id. at 86

The Cable Act had nothing whatsoever to do with ensuring that viewers would have clear and easy access.

Under every possible means of determining facial clarity of the statutory intent (plain meaning of the words, necessary meaning at the time the statute was enacted, definition contained within the statute itself, harmonization of the use of the term within the same statute, result contrary to the purpose of the statute, and legislative history) the Circuit Court should have reversed the FCC for adopting an interpretation contrary to Congress's readily discernible intent. If *Chevron* Step One is to have any continuing vitality as part of the process of statutory construction, courts must actually look first to the statute itself rather than relying on administrative agencies to engage in interpretive exercises that distort the statutory purpose. If the FCC wanted to pursue a cable carriage policy that conflicts with the statutory command, it should have sought a change in the law from Congress rather than using a self-serving interpretation of the statute to accommodate its desired policy.

CONCLUSION

The FCC's decision, affirmed below, was plainly wrong, and not only was it wrong, but it will radically upset the national scheme of cable television carriage which Congress carefully constructed 25 years ago. Under the explicit terms of Section 534(h)(1) of the Cable Act and the Circuit Court's recent interpretation Section 534(b)(6), hundreds of television stations will lose their cable carriage rights – and hence their access to most American viewers. The Court should accept this case for review on that score alone, but the deeper issue raised by this case is whether the interpretation of federal statutes should be vested in the first instance in the branch of government uniquely qualified and

empowered under Article III of the Constitution to interpret such statutes. That is a question of even broader importance which merits review.

Respectfully submitted,

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