No. 19-60896

In the
United States Court of Appeals
for the Fifth Circuit

**HUAWEI TECHNOLOGIES USA, INC., AND
HUAWEI TECHNOLOGIES CO., LTD.,**

Petitioners,

v.

**FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,**

Respondents.

On Petition for Review of an Order of the
Federal Communications Commission

REPLY BRIEF FOR PETITIONERS HUAWEI TECHNOLOGIES USA, INC., AND HUAWEI TECHNOLOGIES CO., LTD.

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CERTIFICATE OF INTERESTED PERSONS

No. 19-60896, *Huawei Technologies USA, Inc., and Huawei Technologies Co., Ltd.* v. *Federal Communications Commission and United States of America*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Petitioner Huawei Technologies USA, Inc., is a wholly owned, indirect subsidiary of Huawei Investment & Holding Co., Ltd. Specifically, Huawei Technologies USA, Inc., is wholly owned by Huawei Technologies Coöperatief U.A. (Netherlands). Huawei Technologies Coöperatief U.A.'s parent corporation is Huawei Technologies Co., Ltd. (China). Huawei Technologies Co., Ltd., is 100% owned by Huawei Investment & Holding Co., Ltd.

2. Petitioner Huawei Technologies Co., Ltd., is a wholly owned, direct subsidiary of Huawei Investment & Holding Co., Ltd.

3. Huawei Investment & Holding Co., Ltd., has no parent corporation, and no publicly held corporation owns 10% or more of its stock. Of

Huawei Investment's shares, (a) just over 1% are owned by the founder of Huawei, Mr. Ren Zhengfei, and (b) the remainder are owned by the Union of Huawei Investment & Holding Co., Ltd., which administers an employee stock ownership plan in which nearly 97,000 employees participate.

4. The Federal Communications Commission is a federal agency.

5. The United States of America is a respondent by statute. *See* 28 U.S.C. § 2344; 47 U.S.C. § 402(a).

6. The order on review potentially impacts the financial interests of the telecommunications industry as a whole, including manufacturers, end users, and service providers in a broad range of industries, such as internet, cellular and landline telephone, and similar telecommunications applications. Such entities may include, among others, the parties that participated in the proceedings before the Federal Communications Commission and that therefore received service of the petitions for review in this case. *See* Pet. for Review 11-16 (filed Dec. 4, 2019; docketed Dec. 5, 2019); Pet. for Review 12-17 (Jan. 7, 2020). Those persons or entities are:

a. Caressa D. Bennet, Erin P. Fitzgerald, and Rural Wireless Association, Inc.

b. Wireless Internet Service Providers Association and its counsel, Stephen E. Coran and David S. Keir of Lerman Senter PLLC

c. Hytera Communications Corp. Ltd. and its counsel, William K. Keane and Patrick McPherson of Duane Morris LLP

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f. Michael Saperstein and USTelecom Association

g. Competitive Carriers Association and its counsel, Theodore B. Olson, Thomas H. Dupree Jr., and Andrew G.I. Kilberg of Gibson, Dunn & Crutcher LLP

h. Genevieve Morelli, Michael J. Jacobs, and ITTA

i. John A Howes, Jr., and Computer & Communications Industry Association

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INTRODUCTION

The Commission lacked statutory—and constitutional—authority for its universal service fund (USF) rule. The rule prohibits use of USF funds on equipment and services provided by companies supposedly posing national security threats, and contains procedures for designating those companies. It rests on the agency's independent national security judgments about the strategic intentions of a foreign sovereign and its relationship with private companies like Huawei. But the USF statute and Communications Act direct the Commission to promote universal service through FCC-administered subsidies, without referring to national security. Meanwhile, the Communications Act elsewhere expressly delegates national security authority to the executive branch, not the FCC. And delegating such authority to the Commission, an independent agency unanswerable to the President, would raise serious constitutional problems.

The Commission's brief, rather than defending these errors, largely repeats them. The Commission points to statutory phrases like "quality services" and "public interest," claiming *Chevron* deference. But those

terms do not give the FCC the powers of the Defense or State Departments. Thus, lacking statutory authorization, the Commission alternates between reimagining the Order as a modest technical measure and contending that it needs no statutory authorization anyway, as long as the statute does not explicitly prohibit the USF rule. That is not how administrative law works. And if there were lingering doubt, Congress eliminated it with the Secure Networks Act, which specifically addresses use of Commission subsidies to purchase putatively risky equipment, and relegates the FCC to implementing *other entities'* national security determinations.

In any event, even if the FCC had authority for the rule, it violated the Administrative Procedure Act (APA) and due process in promulgating it. Targeting Huawei, it ignored record evidence that the rule would undermine the purposes of the USF statute. It relied on a cost-benefit analysis supported by no data and resting on the assumption that the rule would cover only Huawei and ZTE (the sole, prejudged objective from the outset). It failed to meaningfully respond to alternatives that its own advisors endorsed. It provided no guidance on the meaning of its standardless terms, and no pre-deprivation due process in the USF rule before

designating companies as national security threats. And it engaged in impermissible retroactive rulemaking by simultaneously promulgating a new rule and "initially designating" Huawei based on past conduct.

The Commission responds by stringing together quotes from unreasoned passages of the Order and claiming that it can "flesh out" the rule's content through advisory opinions and adjudications. But repetition does not cure irrationality. The APA and Constitution demand reasoned decisionmaking, intelligible standards, and fair notice.

The FCC's politically motivated desire to target Huawei does not authorize it to make sweeping national security judgments about foreign sovereigns and companies, flouting the APA and due process under the guise of implementing a program designed to ensure comparable services at comparable rates nationwide. The Order should be vacated.

ARGUMENT

I. Huawei's challenge to the USF rule is ripe

Judicial review of recently adopted rules is routinely recognized as ripe. *See, e.g.*, *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 149-54 (1967). This case is no exception: (1) the issues are fit for review and (2) Huawei will suffer significant hardship absent review, *see Texas* v. *United States*, 497 F.3d 491, 498 (5th Cir. 2007); *John Corp.* v. *City of Houston*, 214 F.3d 573, 581-86 (5th Cir. 2000) (assessing ripeness claim by claim). The FCC does not dispute fitness. *See Texas*, 497 F.3d at 498-99; Order 66 (rule is "[f]inal"). And the rule has caused Huawei both legal and practical hardship, which will increase absent review. *See Texas*, 497 F.3d at 499.

The rule is "concrete action" that "threatens to impair" Huawei's interests, *Renewable Fuels Ass'n* v. *EPA*, 948 F.3d 1206, 1241 (10th Cir. 2020), targeting Huawei for exclusion from the USF program. And it has caused significant stigmatic and economic injury, "reducing the value of products [Huawei] market[s] and sell[s]." *Id.* at 1242; *see infra* pp. 34-36, 43. Carriers will not purchase telecommunications equipment—long-term capital investments—from a company destined for exclusion from

the market. Customers have thus canceled business with Huawei, causing "huge financial losses" and workforce reductions. A260; *see* Huawei Br. 59-60; Northern Michigan University Cmts. 5-6, FCC Dkt. No 18-89 (May 18, 2020).[1]

These harms will worsen absent review. And rural carriers and communities will lose access to Huawei's high-quality, affordable equipment and services, undermining the USF statute's purpose, *see* 47 U.S.C. § 254; A69-71; A733-41, A777-816; A874-81.

The Court has an "unflagging" obligation to "decide cases within its jurisdiction." *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 167 (2014). This is such a case.

II. The Commission lacks authority for the USF rule

Huawei's Opening Brief showed (at 26-37) that the USF statute, 47 U.S.C. § 254, directs the FCC to use USF funds to expand access to telecommunications services in rural and underserved communities. It does not authorize the FCC to make national security determinations. It lists

[1] A____ citations refer to the Fifth Circuit Rule 30.2 Appendix.

six exclusive guiding principles, *id.* § 254(b)(1)–(6), none of which mentions national security, even as the Communications Act confers independent national security authority on the executive branch *in other provisions*. That makes sense, because the FCC, an independent agency, cannot wield independent national security authority. Principles of constitutional avoidance and multiple tools of statutory construction compel that conclusion.

A. Traditional tools of statutory construction demonstrate that the FCC lacks authority to limit the use of USF funds based on national security judgments

No law, including the USF statute, authorized the USF rule.

1. "National security" appears nowhere in the USF statute or 47 U.S.C. § 1004, the provision of the Communications Assistance for Law Enforcement Act (CALEA) the Commission invokes. Moreover, the USF statute enumerates exclusive "principles" for USF regulation having nothing to do with national security. 47 U.S.C. § 254(b)(1)–(6). The Commission "may not depart from" them "to achieve some other goal." *Qwest Corp.* v. *FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001); Huawei Br. 27-37.

2. Other interpretive principles preclude reading § 254 or § 1004 to confer national security decisionmaking authority.

First, Congress expressly conferred national security authority *elsewhere* in the communications laws on *the President*, *e.g.*, 47 U.S.C. §§ 305(c), 308, 606, confirming that *the Commission* lacks that authority. *See Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Second, Congress would not have delegated such significant authority through modest, general terms like "quality services," let alone to an inexpert agency. *See King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015); *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147-48 (2000).

Third, constitutional avoidance precludes the Commission's reading, because delegating national security authority to an independent agency would raise serious separation-of-powers concerns. Huawei Br. 31-33, 35 & n.5; *infra* pp. 19-21.

3. The recently enacted Secure and Trusted Communications Networks Act of 2019 (SNA), Pub. L. No. 116-124, 134 Stat. 158 (2020), 47 U.S.C. §§ 1601–1609, confirms that the FCC lacks authority for the USF rule. Even if a statute has "a range of plausible meanings," "subsequent acts can shape or focus those meanings," especially "where the scope of the earlier statute is broad but the subsequent statute[] more

specifically address[es] the topic at hand." *Brown & Williamson*, 529 U.S. at 143.

The SNA does just that. It prohibits the use of USF funds to purchase certain equipment "pos[ing] an unacceptable risk to … national security." 47 U.S.C. §§ 1601(b)(1), 1602(a). But it assigns those national security determinations "exclusively" to *other* entities. *Id.* §§ 1601(c), 1608(2). The FCC must merely maintain a list of technically defined equipment based on *those entities'* national security determinations. *Id.* § 1601(b).

The SNA thus establishes a more specific regime addressing the same subject in a manner inconsistent with the Order. The Order targets *companies*—Huawei and ZTE—based on the *FCC's* independent national security determinations. The SNA authorizes prohibitions directed to *specific equipment*, based on *other entities'* determinations. Reading § 254 in light of the SNA shows that the Commission lacked authority for the Order.

B. The FCC's counterarguments fail

1. The Commission may not recharacterize its national security and foreign affairs judgments on appeal as modest technical assessments

To overcome its lack of statutory authority, the FCC attempts on appeal to recast the USF rule as involving modest "technical" measures concerning "networks and supply chains." Br. 3; *see* Br. 38. But an agency may not rely on "*post hoc* rationalizations" to justify its actions; only its "contemporaneous explanations" matter. *DHS* v. *Regents of Univ. of Cal.*, No. 18-587, 2020 WL 3271746, at *10 (U.S. June 18, 2020).

The Order's centerpiece is the FCC's independent judgment that China seeks to engage in malicious cyberactivity using complicit private companies. *See* Order ¶ 41. The FCC reasoned that China has engaged in "extensive and damaging cyberespionage efforts in the United States"; Huawei has "ties to the Chinese government and military apparatus"; "Chinese laws obligat[e] [Huawei] to cooperate with any request by the Chinese government"; and China will pressure Huawei to engage in misconduct. Order ¶¶ 44-48, 56. That assessment reflects core national security and foreign affairs judgments about the strategic intentions of a

foreign sovereign and its proclivity for working through private companies. These are not technical judgments about telecommunications equipment vulnerabilities within the Commission's competence.

2. The provisions of the USF statute that the FCC cites do not support the rule

The Commission claims authority in three phrases in the USF statute: "quality services," 47 U.S.C. § 254(b)(1); "public interest," *id.* § 254(c)(1)(D); and "intended" use, *id.* § 254(e). None supports the rule, particularly considering the interpretive principles discussed above.

a. Section 254(b)(1) provides that "[q]uality services should be available at just, reasonable, and affordable rates." "[T]echnical terms of art should be interpreted by reference to the trade or industry to which they apply." *La. Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 372 (1986). "Quality services" is an industry term relating exclusively to technical characteristics of data transmission. *See, e.g.*, Microsoft Computer Dictionary 432 (5th ed. 2002) ("quality of service" means, "[g]enerally, the handling capacity of a system or service; the time interval between request and delivery of a product or service," or, "[i]n computer technology, the guaranteed throughput (data transfer rate) level"). Indeed, the communications laws elsewhere define "quality of service" (for broadband) to

mean "download and upload speeds." 47 U.S.C. § 641(12). That "technical terminology" presumptively carries a similar meaning here. *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 571 (2012). And the interpretive principles above confirm that, whatever its precise meaning, "quality services" does not authorize national security decisionmaking.

b. So too for the phrase "public interest" in §§ 201(b) and 254(c)(1)(D). Section 201 permits the Commission to regulate "in the public interest" only to the extent authorized by other "provisions of this chapter." It adds no independent regulatory authority. And § 254(c)(1)(D) requires Joint Board participation, which did not occur here. In any event, its reference to "public interest" relates to the "evolving level of telecommunications" services, and does not authorize any national security judgments—especially given the interpretive principles discussed above.

(i) The Commission insists (at 37-38 & n.6) that the prefatory phrases "national defense" and "promoting safety" in 47 U.S.C. § 151 suggest that the "public interest" language in §§ 201 and 254 confers national security authority. But the Communications Act confers authority

through its substantive provisions, not § 151, which identifies why Congress created the FCC, not the agency's powers. Huawei Br. 36-37.

Indeed, *Comcast Corp.* v. *FCC*, 600 F.3d 642, 655 (D.C. Cir. 2010), which the FCC cites, rejected the argument that § 151 "creates 'statutorily mandated responsibilities,'" instead explaining that only "express delegations of regulatory authority" can do that. The Commission's other case, *NRA* v. *BATF,* 700 F.3d 185, 199-200 (5th Cir. 2012), examined preambular language to determine *why* Congress enacted certain firearms laws; it did not hold that prefatory language confers statutory authority.

(ii) The Commission also argues (at 35-38, 42-45) that courts have interpreted "public interest" in *other* provisions of the Communications Act, 47 U.S.C. §§ 214 and 310, to give the Commission national security authority.

First, even if §§ 214 and 310 did give the FCC national security authority, that shows that Congress did *not* confer such authority in § 201 or § 254. *See Russello*, 464 U.S. at 23.

Second, §§ 214 and 310 confer no independent national security authority on the FCC anyway. Those provisions involve *other* governmental

entities' national security judgments in contexts where Congress overtly recognized that national security considerations might be relevant.

Section 214(a) authorizes the Commission to license new telecommunications lines when "public convenience and necessity require." Anticipating possible national security or foreign affairs implications, § 214(b) gives *the Secretaries of Defense and State* the right to comment on license applications. As the FCC acknowledges, it has long deferred to "the expertise of the relevant Executive Branch agencies" on national security– and foreign affairs–related questions arising from license applications. Br. 47.

The Commission's § 214 case, *Hawaiian Telephone Co.* v. *FCC*, 589 F.2d 647, 649-54, 657-58 (D.C. Cir. 1978), merely upheld Commission action responding to Defense Department and NASA requests to grant their contractors licenses to build new communications facilities. The court noted that the FCC credited *those other agencies'* national security judgments. *Id.* at 657. The authority to consider expert executive-branch national security judgments when granting licenses does not imply any authority to base an entire rule on *the Commission's* national security judgments.

Section 310(b) reflects a *congressional* judgment about when certain licenses may be granted to companies with specified levels of foreign ownership. Under § 310(b)(4), the FCC must deny a license if denial will serve "the public interest," but only after a *statutory* foreign ownership threshold has been met. Indeed, the Commission's § 310 case, *Moving Phones Partnership L.P.* v. *FCC*, 998 F.2d 1051, 1055, 1057 (D.C. Cir. 1993) (emphasis added), noted "the national security policy *underlying the statute*" and observed that § 310(b)(4) merely gave "the Commission discretion" within the confines of § 310(b).

(iii) The Commission also cites 47 U.S.C. §§ 1008 and 1507. Br. 43 n.7. But both those provisions are similarly circumscribed. They at most authorize the Commission to consider "national security" as one factor in making narrow, statutorily specified decisions subject to executive branch involvement. Section 1507 requires the Commission to consider "the future needs of homeland security, national security, and other spectrum users" when allocating certain spectrum. That requires executive-branch input—indeed, *the President* has authority to assign frequencies for government use. 47 U.S.C. § 305(a). And § 1008(b)(1) lists "national

security" as one of numerous factors to consider, "after notice to the Attorney General," in determining the achievability of certain CALEA requirements. Any authority in these contexts is unlike the free-ranging authority to make independent national security judgments that the FCC claims here. Moreover, Congress' express references to "national security" in §§ 1008 and 1507 reaffirm that it does not confer such authority through silence. *See Russello*, 464 U.S. at 23.

c. The FCC also cites § 254(e), which obligates "carrier[s]" to use USF support only for purposes "for which the support is intended." The provision is a directive to carriers, not a grant of authority to the FCC. And the FCC concedes that it at most contemplates regulations designed to "achieve the principles set forth in section 254(b)." Br. 39 (quoting *In re FCC 11-161*, 753 F.3d 1015, 1046 (10th Cir. 2014)). Indeed, *FCC 11-161* upheld a requirement imposed under § 254(e) principally because it was "consistent with" those principles. 753 F.3d at 1047; Huawei Br. 34 n.4. Neither § 254(e) nor § 254(b) even mentions national security or foreign affairs. *Supra* pp. 5-7.

3. CALEA cannot support the USF rule

The Commission wrongly claims (at 39-42) that CALEA authorizes the rule.

It first contends (at 40) that the NPRM provided adequate notice of potential reliance on CALEA. But that "notice" was a footnote quoting § 1004, with no explanation of how CALEA supported the contemplated rule. *See* A17 (proposed rule not claiming § 1004 as authority).

Regardless, the Commission *still* has not explained CALEA's relevance. It does not dispute that the rule applies far beyond CALEA's scope. CALEA applies only to "switching premises," 47 U.S.C. § 1004, while the rule extends to *all* equipment; CALEA reaches only "carriers," *id.* §§ 1001(8), 1004, while the rule reaches schools, libraries, and rural hospitals, Order ¶ 22; and CALEA addresses only "interception of communications or access to call-identifying information," 47 U.S.C. § 1004, while the rule covers a wide range of foreign interference with U.S. networks, Order ¶¶ 5, 46, 67-68, 109. The FCC asserts that disregarding statutory limits is "safer and more administrable." Br. 41. But administrative con-

venience does not confer authority. The Commission must "remain tethered" to the distinctions Congress drew. *Sea Robin Pipeline Co.* v. *FERC*, 127 F.3d 365, 371 (5th Cir. 1997).

The rule is also irrationally *too narrow*, applying only to USF recipients, whereas CALEA applies to all carriers. The FCC claims it may incrementally target the "most acute" problem. Br. 41-42. But it never explains why it is rational to respond to a putative threat to the "nation's communications networks," Order ¶ 67, by addressing only systems used by USF recipients—who principally serve rural and underserved areas. *See* Order 116-18 (statement of Commissioner Rosenworcel).

4. The FCC is not entitled to *Chevron* deference

Lacking any valid statutory basis for the Order, the Commission claims *Chevron* deference for its interpretations of the foregoing provisions. *See Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council,* 467 U.S. 837 (1984). Deference is unavailable for two reasons.

First, *Chevron* deference applies only if "traditional tools of statutory construction" leave "an unresolved ambiguity." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1630 (2018). Even if a statute is ambiguous, an agency is not entitled to deference when its "interpretation goes beyond

the limits of what is ambiguous." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 481 (2001). As explained above, the statutory text does not even arguably give the Commission national security authority, particularly in light of the principles in Part II.A.

Second, *Chevron* would not apply even if there were ambiguity. Deference "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *Brown & Williamson*, 529 U.S. at 159. But sometimes "there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *Id.* This is such a case. The Commission's construction would expand its authority far beyond its institutional telecommunications expertise to reach core matters of executive policy. These circumstances present paradigmatic grounds for withholding *Chevron* deference. *See id.* at 159-60 (deference for matters of "economic and political significance" not conferred "in so cryptic a fashion"); Huawei Br. 30-31, 33-34.

5. The USF rule requires affirmative statutory authority

Finally, the FCC claims it needs *no* statutory authority "so long as [it] does not violate an express statutory command." Br. 48.

But agencies "ha[ve] no power to act" beyond the authority "Congress confers." *Collins* v. *Mnuchin*, 938 F.3d 553, 562 (5th Cir. 2019) (en banc). The Commission needs affirmative statutory authority, because courts "will not presume a delegation of power based solely on the fact that there is not an express withholding of such power." *Michigan* v. *EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001). The Commission's cases do not say otherwise. In *Alenco Communications, Inc.* v. *FCC*, 201 F.3d 608, 614-15, 621 (5th Cir. 2000), this Court observed that Congress gave the Commission discretion to balance the § 254(b) principles and a competition "directive" in §§ 251–253. In *Texas Office of Public Utility Counsel* v. *FCC*, 183 F.3d 393, 412, 437 (5th Cir. 1999), it held that the Commission may determine "what will constitute 'sufficient' [USF] support" during a transition period under § 254(e). Neither case empowers the FCC to assume statutory authority without an affirmative statutory basis.

C. Congress did not (and could not) give the FCC authority to rest USF rules on national security or foreign affairs judgments

Huawei explained (at 30-33) that constitutional avoidance principles preclude reading the communications laws to give the Commission, an independent agency, authority to make independent national security

or foreign affairs determinations. The Constitution entrusts those functions to the President and Congress.

The Commission says its Order is "consistent with" the President's views. Br. 45. But what if it were not? On the FCC's view, if the President wanted to change his approach to foreign affairs, he would have to seek permission before departing from the Commission's national security judgments. Such concerns are not hypothetical: the Commission recently issued Ligado Networks a 5G license over national security objections from the Defense Department and the National Telecommunications Information Administration, and the executive branch has sought reconsideration. *See* NTIA Recons. Pet., IB Dkt. Nos. 11-109, 12-340 (FCC May 22, 2020).

The separation of powers is designed to prevent this type of showdown. The Constitution centralizes in *the President* "foreign policy and national security" authority, *Am. Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 429 (2003), enabling the nation to speak with "one voice," *Zivotofsky* v. *Kerry*, 576 U.S. 1, 14-15, 28 (2015). Huawei Br. 30-33. "[M]ultimember expert agencies" may not "wield substantial executive power," *Seila Law LLC* v. *CFPB*, No. 19-7, 2020 WL 3492641, at *11 (U.S. June 29, 2020),

including national security or foreign relations powers, *see id.* at *14, *17 n.11. And the Constitution's "*structural safeguard[s]*" receive "categorical treatment" regardless of whether any "specific harm, or risk of specific harm, can be identified." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 239-40 (1995). The separation-of-powers inquiry does not "turn on judicial assessment of whether an officer exercising executive power is on good terms" with other branches. *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 500 (2010). It turns on whether the constitutionally assigned branch is exercising its authority without impediment. The Communications Act should be construed to avoid this constitutional concern.

III. The Commission violated the APA and due process in adopting the USF rule

A. The USF rule is not a logical outgrowth of the NPRM

Huawei explained (at 40-43) that the NPRM did not discuss, much less propose, any procedural protections for designated companies. The procedures adopted in the rule thus are not the logical outgrowth of the NPRM. That violates the APA, 5 U.S.C. § 553, because it deprived interested parties of the opportunity to comment meaningfully on the adopted approach.

The FCC responds that the NPRM "devoted" "an entire section" to the designation process. Br. 57. But that "section" proposed *identifying* "companies that pose a national security threat," A8-10 (¶¶ 19-22); it said nothing about *how* companies would be identified or what procedural protections they would receive. None of the open-ended "approach[es]" in the NPRM suggested any process or procedures, much less anything resembling the "designations" ultimately entrusted to the Bureau. And the NPRM provided no warning that the Commission might "designate" Huawei when promulgating the rule. *See also* A17.

Conversely, the final rule's designation procedures are nothing like what the NPRM *did* say. The final rule does not specify "criteria for identifying a covered company"; explain how any criteria will be implemented; rely primarily on National Defense Authorization Acts; or establish a "trusted vendor" program. Order ¶ 20 & n.37.

The "designation" procedures were not a logical outgrowth of the NPRM, and interested parties like Huawei had *no* opportunity to comment on them.

B. The USF rule is arbitrary and capricious

Huawei explained (at 43-51) that the rule is arbitrary and capricious because the FCC (1) ignored evidence that it would undermine the USF statute's purposes; (2) engaged in a cost-benefit analysis so irrational that Commissioner O'Rielly said it "underestimat[ed] the costs" based on "no data," Order 112; and (3) failed to meaningfully respond to proposed alternatives, including a risk-based approach that the agency's own advisors recommended.

1. In response, the Commission parrots (at 59) the Order's conclusory statements about facts and arguments in the record. But the FCC needed to "confront the problem[s] in a reasoned manner," *Mozilla Corp.* v. *FCC*, 940 F.3d 1, 67 (D.C. Cir. 2019) (per curiam), and "articulate a satisfactory explanation for its action," *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

For example, Huawei's experts showed that Huawei's market presence increases competition and lowers prices. Huawei Br. 45-46; *see* A394-424, A1016-29. The Commission responded (at 55) with the non-sequitur that "many companies" offer "quality services" using other sup-

pliers, and speculated that excluding Huawei "should unleash competition … in the long run." Order ¶ 30. The first response ignores actual evidence about excluding Huawei, *see* A782, A778-85, A794-97, A801-03, A806-10; the second does not explain why *eliminating* a competitor will "unleash competition."

2. Similarly, the Commission summarizes, without defending, its cost-benefit analysis. Br. 53-57. It waves away (at 55) Huawei's detailed explanation (at 49) of costs it ignored, instead alluding to the putative security risks of Huawei's equipment. As Commissioner O'Rielly observed, "no data" supports the FCC's analysis. Order 112.

The Commission also defends calculating the rule's costs by assuming it applies only to Huawei and ZTE, stating that it "reasonably worked with the information it had." Br. 56. But a cost assessment must estimate the effect of excluding *all* covered entities, not just those named at promulgation. Those costs may include increased equipment costs and insolvency for rural carriers. *See, e.g.*, Huawei Br. 19-20, 45-49. The Commission protests that it had "no basis on which to estimate" such costs. Br. 56. But Huawei submitted detailed evidence about similarly situated companies, and extensive economic analysis, Huawei Br. 48-49, 80-81,

which the Commission "entirely failed to consider," *State Farm*, 463 U.S. at 43. If the FCC cannot determine whether its rule might apply to other companies, that only confirms that the rule lacks intelligible standards. *See infra* pp. 26-28.

The FCC's defense of its benefits analysis is even worse. Huawei explained (at 50-51) that the Commission relied on no data or analysis when it assumed, with comical precision, that the USF rule would prevent at least a 0.162% disruption of annual economic growth, a 0.072% disruption of the digital economy, a 1.68% reduction in malicious cyber-activity, or a 0.137% reduction in the cost of data breaches. Order ¶ 109. The Commission nowhere explained how it knows the rule would produce benefits precisely offsetting its costs.

3. Finally, the FCC's claim (at 56-57) that non-"flagship equipment" can contain vulnerabilities does not support a complete ban on designated companies' equipment. The rule could cover *all* dangerous equipment ("flagship" or otherwise), regardless of supplier, without banning safe products. The Commission's own advisors recommended such an approach. Huawei Br. 51. There is no evidence the FCC considered it.

C. The USF rule is standardless and therefore arbitrary and capricious

Huawei explained (at 51-57) that the USF rule is standardless, and therefore arbitrary and capricious under the APA. Agencies must define a rule's criteria and articulate comprehensible standards to allow parties to conform their conduct to the rule; prevent arbitrary enforcement; and facilitate judicial review. *See, e.g.*, *USPS* v. *Postal Regulatory Comm'n*, 785 F.3d 740, 750 (D.C. Cir. 2015); *ACA Int'l* v. *FCC*, 885 F.3d 687, 700 (D.C. Cir. 2018). But the USF rule defines no key terms and provides no standard or meaningful guidance about what it means to "pos[e] a national security threat." Order 66. Nor does it provide crucial information about the designation process or the quantum or burden of proof.

The Commission all but ignores Huawei's APA arguments, focusing almost exclusively on constitutional due process cases. Only one of the FCC's seven cases (*Council for Urological Interests* v. *Burwell*, 790 F.3d 212 (D.C. Cir. 2015)) is an APA case, and it doesn't apply here anyway.

1. The FCC argues that it need not specify the "precise contours of the term 'national security threat.'" Br. 52. But the USF rule provides *no contours*. That is fatal under the APA, which requires an agency to

"articulate a comprehensible standard" in its rules. *ACA Int'l*, 885 F.3d at 700; Huawei Br. 51-57.

2. The Commission claims it may "flesh out its rules through adjudications and advisory opinions." Br. 51-52 (quoting *Urological Interests*, 790 F.3d at 226). But a regulation violates the APA if it "offers no meaningful guidance." *ACA Int'l*, 885 F.3d at 700. The FCC cites no authority allowing it to promulgate a vague rule, hold parties to it immediately, and rely on as-yet-unpromulgated adjudications and advisory opinions to specify the rule's most *basic* contours. To the contrary, the APA requires agencies to explain the relevant criteria for applying a rule, and why the rule embraces some potential applications but not others. Huawei Br. 52-53. The FCC's cases suggest that agencies may use adjudications and advisory opinions to resolve "the precise contours of [a] definition," *Urological Interests*, 790 F.3d at 216-17, 226, not to manufacture the content of a rule from whole cloth.

The FCC is wrong to suggest that the Commission's "initial designation" of Huawei could remedy the USF rule's irrational standardlessness, because the "initial designation" also articulates no standard. In-

stead it relies on a hodge-podge of ad hoc considerations that fail to distinguish similarly situated parties. *See infra* p. 28; Huawei Br. 79-81. The Commission also claims that the "initial designation" was merely a non-final suggestion to investigate Huawei. The Commission cannot have it both ways: Final agency action must have "legal effect." *Ciba-Geigy Corp.* v. *EPA*, 801 F.2d 430, 437 (D.C. Cir. 1986). If the "initial designation" is not even final agency action, then it has no legal effect and cannot supply the necessary content for the USF rule.

3. The Commission claims (at 52-53) that, because Huawei allegedly poses a clear "national security threat," it cannot challenge the vagueness of the USF rule as applied to other companies. For starters, the rule's lack of standards prevents *Huawei* from determining why it has been designated or conforming to the rule's requirements. In any event, the question is whether a rule is standardless on its face. *See, e.g.*, *ACA Int'l*, 885 F.3d at 700-01. Thus, in *Tripoli Rocketry Ass'n, Inc.* v. *BATF*, 437 F.3d 75, 83-84 (D.C. Cir. 2006), the court rejected the agency's case-specific evidence, offered to show that the substance at issue "deflagrate[d]," because it could not "remed[y]" the "complete absence of standards" for determining when material "deflagrates."

D. The Commission's simultaneous issuance of the USF rule and Huawei's "initial designation" was impermissibly retroactive and violated fair notice

As Huawei explained (at 63-69), the FCC's simultaneous promulgation of the USF rule and "initial designation" of Huawei constituted impermissible retroactive agency action that violated the APA and the "fair notice" requirements of the Due Process Clause. The Commission created a new legal standard and, without prior notice or opportunity to comply, imposed disabilities on Huawei based solely on Huawei's pre-promulgation conduct and associations.

In the Order, the Commission did not disclaim acting retroactively. Rather, relying on *Qwest Services Corp.* v. *FCC*, 509 F.3d 531 (D.C. Cir. 2007), it claimed that a rulemaking-adjudication hybrid was permissible under the APA—thereby necessarily acknowledging the retroactivity in the Order, because adjudications are retroactive. Order ¶ 98 & n.267; *see, e.g.*, *De Niz Robles* v. *Lynch*, 803 F.3d 1165, 1170 (10th Cir. 2015) (Gorsuch, J.). Huawei explained (at 65-69) that the APA does not permit adjudications as part of rulemaking proceedings, that the Commission's reliance on *Qwest* was misplaced, and that the Order was retroactive rulemaking rather than adjudication because there was no preexisting law to

apply. Now, the FCC abandons its reliance on *Qwest* and defense of its hybrid procedure under the APA, and instead argues that its Order was not retroactive at all. But an agency must defend its actions based on its *contemporaneous* rationale. *See Regents of Univ. of Cal.*, 2020 WL 3271746, at *10; *SEC* v. *Chenery*, 318 U.S. 80, 87-88 (1943). No defense remains; vacatur is required.

In any event, the Commission's new arguments are meritless. The Commission does not dispute that it needs statutory authorization to promulgate retroactive rules; that "designation[s]" under the rule use "past behavior" and "past facts," Br. 73-74; that Huawei's "initial designation" could only have been based on its pre-promulgation conduct; or that a rule is retroactive if it "attaches a new disability" to past conduct, Br. 74 (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 269 (1994)). Yet the Commission insists that it acted permissibly. Not so.

First, the Commission asserts that Huawei's "initial designation" "d[id] not impose any disability." Br. 71. But Huawei challenged the Order as retroactive insofar as it combined a rule and an "initial designation," and both components of the Order impose legal and practical harms. *Supra* pp. 4-5; *infra* pp. 41-43.

Second, the Commission argues (at 72-74) that because the rule bars only future USF purchases, and addresses future risk, it is not retroactive. But as the Commission acknowledges, retroactivity turns on "whether the *conduct* that … triggers" an agency's action "occurs before or after the law's effective date," Br. 72 (quoting *McAndrews* v. *Fleet Bank of Mass.*, 989 F.2d 13, 16 (1st Cir. 1993))—not whether the rule's remedies and purposes are forward-looking. *See also Landgraf*, 511 U.S. at 291 (Scalia, J., concurring). Courts have thus repeatedly recognized that rules or laws that impose burdens based on pre-promulgation conduct are retroactive, even if they do so to address future conduct or mitigate future risk.

In *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), for example, the Court concluded that "even though [a new law] mandate[d] only" that companies pay "future health benefits" to former employees to address a public health crisis, it "nonetheless attache[d] new legal consequences to [an employment relationship] completed before its enactment," and was therefore retroactive. *Id.* at 532, 537 (plurality op.); *see id.* at 547 (Kennedy, J., concurring in the judgment). Similarly, in *Smith* v. *Doe*, 538 U.S. 84, 90, 93, 105-06 (2003), the Court recognized that a law requiring sex-

offender registration based on pre-enactment convictions was "retroactive," although the law's purpose was to "protect the public" from the "high risk of reoffen[se]," not impose additional punishment.[2]

Third, the Commission argues (at 73-74) that using antecedent facts for subsequent decisionmaking is not retroactive. But the Order did not merely draw upon discrete, objective, antecedent facts to make a decision. It assessed Huawei's past acts and associations, determined that Huawei was a national security threat, and imposed a disability based solely on that assessment. Huawei's past conduct thus "trigger[ed] the

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[2] *See also, e.g.*, *United States* v. *Lovett*, 328 U.S. 303, 311-12, 315 (1946) (statute seeking to prevent future "subversive activity" constituted (retroactive) punishment for past acts); *United States* v. *Brown*, 381 U.S. 437, 438-39, 461-62 (1965) (similar). Contrary to the Commission (at 74-75), the additional cases Huawei cited also involved retroactive rules aimed at future risks. *See, e.g.*, *Nat'l Mining Ass'n* v. *Dep't of Interior*, 177 F.3d 1, 3, 8 (D.C. Cir. 1999) (rule encouraged "correct[ion]" of existing violations); *Rock of Ages Corp.* v. *Sec'y of Labor*, 170 F.3d 148, 158-59 (2d Cir. 1999) (inspection requirement addressed risk of future "misfires"); *United States* v. *AMC Entm't, Inc.*, 549 F.3d 760, 762-63, 768-69 (9th Cir. 2008) (theater retrofitting requirement benefitted future handicapped viewers). The Commission's insistence that the Court upheld the registration requirement in *Smith* v. *Doe* despite its retroactivity is irrelevant: Congress can legislate retroactively, but agencies without express statutory authorization cannot make retroactive rules. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988).

[rule's] application," *McAndrews*, 989 F.2d at 16, making the Order impermissibly retroactive.[3]

Finally, the Commission's only direct response to Huawei's fair notice argument—that parties "know what the law is and [can] conform their conduct accordingly," Br. 73—is false as to Huawei, which had no notice of the USF rule until after it was promulgated and imposed on Huawei through the "initial designation."

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[3] The Commission's cases do not suggest otherwise. In *Regions Hospital* v. *Shalala*, 522 U.S. 448, 456 (1998), there was no issue of *rule* retroactivity: an unchallenged statute directed an agency to use a prior year's costs to set a baseline for future reimbursements, and the challenged rule merely reaudited the statutory baseline year to ensure accurate reimbursements. *Bell Atlantic Telephone Cos.* v. *FCC*, 79 F.3d 1195, 1207 (D.C. Cir. 1996), upheld a regulation changing the method for calculating pre-promulgation earnings to set future price caps. The case is inconsistent with Supreme Court and subsequent circuit precedent. *See supra* p. 31-32 & n.2; *Nat'l Mining*, 177 F.3d at 8. And it involved use of discrete, objective past facts to set a future rate limitation—not a scheme imposing burdens based on the failure of pre-promulgation conduct to satisfy new standards. And *Association of Accredited Cosmetology Schools* v. *Alexander*, 979 F.2d 859, 865 (D.C. Cir. 1992), and *Administrators of Tulane Educational Fund* v. *Shalala*, 987 F.2d 790, 798 (D.C. Cir. 1993), predated *Landgraf*, relied heavily on a "vested rights" analysis that is incomplete after that case, and involved contexts where retroactivity was imposed largely by statute, not rule.

IV. The USF rule's "initial designation" procedures violate due process

A. The USF rule unlawfully fails to provide pre-deprivation process

As Huawei explained (at 57-63), the rule must be vacated because it provides *no* process before an "initial designation." The Commission mistakenly concluded that "initially designated" companies like Huawei have no constitutionally protected interests. On appeal, the Commission does not contest that the USF rule fails to provide pre-deprivation due process. The rule must be vacated for that reason alone.

B. The Commission's counterarguments are meritless

Rather than defending the rule's failure to provide pre-deprivation due process, the Commission contends that no process was due before Huawei's particular "initial designation" and that, alternatively, Huawei received the process it was due from the NPRM. But the *rule itself* (which produced Huawei's "initial designation") unlawfully withholds pre-deprivation due process. *All* "initially designated" companies will suffer reputational harm triggering due process protections, so the rule must contain pre-deprivation protections. And the Commission's Huawei-specific arguments are meritless. All the FCC needed to do to avoid defaming and

stigmatizing Huawei was to send Huawei a private communication about its intentions and reasons in advance. But it did not.

1. The FCC contends (at 66-68) that Huawei's "initial designation" did not deprive it of constitutionally protected interests because it was merely nonfinal notice before "final designation." Although the "initial designation" *is* final, *see Mathews* v. *Eldridge*, 424 U.S. 319, 330-31 & n.11 (1976), its finality is irrelevant to whether the USF rule provides pre-deprivation due process. It does not, and it must, because as Huawei's experience shows, "initial designation" injures due process–protected reputational interests. Huawei Br. 58-60.

2. The Commission erroneously contends (at 68-70) that Huawei cannot satisfy the stigma-plus test.

a. The Order concedes that Huawei's "initial designation" will likely "impose some amount of stigma." Order ¶ 102 & n.277; *see* Huawei Br. 58-60. But the Commission claims that such stigma resulted from the underlying evidence, not the designation itself.

The government causes injury *each time* it stigmatizes Huawei. *See Foretich* v. *United States*, 351 F.3d 1198, 1216 (D.C. Cir. 2003). Huawei's "initial designation" caused Huawei independent reputational harm,

prompting carriers to refuse to purchase Huawei equipment (as discussed next), and fear associational stigma from possessing Huawei equipment, USTelecom – The Broadband Ass'n Cmts. 2 n.5, FCC Dkt. No. 18-89 (May 20, 2020). Moreover, the Commission's failure to give Huawei due process before its "initial designation" deprived Huawei of the opportunity to fully substantiate its reputational injuries. The Commission cannot complain of insufficient evidence when the lack of process itself prevented its development.

b. The Commission does not dispute that lost business is a stigma-plus "plus" factor. FCC Br. 69; *see, e.g.*, *Texas* v. *Thompson*, 70 F.3d 390, 393 (5th Cir. 1995) (per curiam). And Huawei's "initial designation"—not the NPRM—caused the losses. Before Huawei's "initial designation," customers said they "would continue" doing business with Huawei if the Commission abandoned the proposed rule. *See, e.g.*, A791, A794, A807. Afterwards, former customers said they would have kept doing business with Huawei *but for* the designation decision. *See, e.g.*, Northern Michigan University Cmts. 5-6.

3. The Commission wrongly contends (at 70-71) that it gave Huawei the necessary process.

Due process ordinarily requires "some kind of hearing *prior* to the deprivation of a liberty interest." *Velez* v. *Levy*, 401 F.3d 75, 91 (2d Cir. 2005). Before "initially designating" Huawei, the FCC had to afford Huawei procedural protections, including notice of the Commission's evidence and reasons and a meaningful opportunity to respond. *See, e.g.*, *Ralls Corp.* v. *CFIUS*, 758 F.3d 296, 318-20 (D.C. Cir. 2014). But the FCC gave Huawei no prior notice (through the NPRM or otherwise) of the impending "initial designation," the evidence against it, or the pendency or existence of any regulation enabling an "initial designation," nor any opportunity to respond. *See supra* pp. 26-28.

The Commission contends (at 71) that Huawei will receive full process during "final designation" proceedings. But Huawei's "initial designation" represents the full Commission's defamatory assertion that Huawei is a "national security threat," *infra* pp. 39-42, and thus itself imposes reputational injury, *supra* pp. 35-36. Without pre-deprivation notice, Huawei's post-deprivation opportunity to comment on its initial designation was "barren." *Morgan* v. *United States*, 304 U.S. 1, 18 (1938); *see, e.g.*, *Bowlby* v. *City of Aberdeen*, 681 F.3d 215, 221-22 (5th Cir. 2012).

4. The Commission claims (at 68) that Huawei wants an infinite series of prior notices. But the Commission could simply have sent Huawei a private letter offering an opportunity to respond to factual and legal allegations. *See, e.g.*, 16 C.F.R. § 2.6 (entity "under [FTC] investigation" "shall be advised" of investigation in "generally nonpublic" manner). The Commission's failure to do so offends "fundamental requirements of fairness which are of the essence of due process." *Morgan*, 304 U.S. at 19.

5. Finally, the Commission contends that it could not provide more process because it needed to "mov[e] swiftly." Br. 71. That post-hoc rationalization is irrelevant. *See Regents of Univ. of Cal.*, 2020 WL 3271746, at *10. It is also incompatible with the Commission's own delay. The Commission relied on a *2012* report, engaged in 18 months of rule-making, spent a month converting a draft into the final Order, and delayed *Federal Register* publication another 42 days. Surely it could have found 30 days to provide notice and an opportunity to be heard. Indeed, the Order does not require removal of Huawei equipment or prevent USF recipients from purchasing Huawei equipment using non-USF funds. So the Commission's actions do not seriously address any supposed emergency anyway.

V. The FCC's "initial designation" of Huawei was unlawful

A. This Court has jurisdiction to review the "initial designation"

1. The "initial designation" of Huawei is final

The Commission wrongly contends (at 61-66) that the "initial designation" is not final under the Hobbs Act, 28 U.S.C. § 2342. Finality turns on "substance," not self-serving characterizations. *Mais* v. *Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1121 (11th Cir. 2014). An order is final if it (a) "mark[s] the 'consummation' of the agency's decisionmaking process"; and (b) produces "legal consequences" or determines "rights or obligations." *Bennett* v. *Spear*, 520 U.S. 154, 177-78 (1997). Both requirements are met here.[4]

a. The Commission has completed the decisionmaking process that produced the "initial designation." The "initial designation" was the final product of a now-completed rulemaking proceeding, and the agency will not reconsider it. The existence of a *separate* "final designation" proceeding is irrelevant. *See, e.g.*, *S.F. Herring Ass'n* v. *Dep't of Interior*, 946

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[4] Contrary to the Commission's claim (at 62), the Hobbs Act imposes no third requirement, *i.e.*, that Huawei lack another adequate judicial remedy. That requirement appears in "[t]he APA's judicial review provision." *Sackett* v. *EPA*, 566 U.S. 120, 127 (2012) (quoting 5 U.S.C. § 704).

F.3d 564, 579 (9th Cir. 2019) ("when there was already final agency action," regulated entities are "not required to engineer a *further* final agency action in a different form in order to bring suit"). Moreover, the separate "final designation" determination is made by a different decisionmaker (the Bureau), on a different record, and possibly under different standards. *See, e.g.*, *Del. Riverkeeper Network* v. *Sec'y Pa. Dep't of Env'tl Prot.*, 903 F.3d 65, 73-74 (3d Cir. 2018) (review by different decisionmakers under different rules constitutes "a separate proceeding"). Finality looks to "whether the *initial decisionmaker* has arrived at a definitive position." *Id.* at 74.

The Commission analogizes (at 63-64) this case to *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980). But the complaint there merely "averr[ed] … 'reason to believe'" a possible violation had occurred; it was just "a prerequisite to a definitive agency position on the question whether Socal violated the Act." *Id.* at 234, 241, 246.

A "realistic assessment" confirms finality. *Fidelity Television, Inc.* v. *FCC*, 502 F.2d 443, 448 (D.C. Cir. 1974) (per curiam). The full Commission (rather than the Bureau, as specified in the rule) "initially designated" Huawei. Order ¶ 64. It made determinative "find[ings]," Order

¶ 48, expressed with "confiden[ce]," Order ¶ 54. It provided that an "initial designation" automatically becomes final absent objection, Order ¶ 40, and assumed in its cost-benefit analysis that Huawei *would* be finally designated. Huawei Br. 19-20, 48, 65.

b. The second finality prong is also satisfied. First, "the agency action imposes [legal] obligations on the agency." *Sierra Club* v. *Trump*, 929 F.3d 670, 698 n.23 (9th Cir. 2019); *see Bennett*, 520 U.S. at 177. The Commission itself contends that its "initial designation" developed standards governing the agency's "designation" process, Br. 51-52, and "substantially implement[ed]" a Commission obligation under the SNA, Draft Declaratory Ruling ¶ 22, WC Dkt. 18-89 (June 25, 2020), https://tinyurl.com/y76p4q5n. While the "initial designation" cannot overcome the rule's intrinsic vagueness, *supra* pp. 26-28, or implement the SNA (with which it is inconsistent, *supra* pp. 7-8), the Commission's concessions end the finality inquiry. *See, e.g.*, *Ciba-Geigy*, 801 F.2d at 437 (development of rule through interpretation constitutes "legal effect").

The "initial designation" also has the same legal effects the Court found sufficient in *Bennett*. There, petitioners challenged an agency's en-

vironmental determination, even though it would impose no direct obligations on them absent a second agency's later action. 520 U.S. at 177-78. The Court found the "legal effects" prong satisfied because the challenged determination "alter[ed] the legal regime to which the [subsequent] action agency [wa]s subject." *Id.* at 178. Similarly, the Commission here claims (at 51-52) that the "initial designation" altered the legal landscape by filling in standards under the rule. And even though (like in *Bennett*) the "initial designation" does not trigger the same legal impediments imposed by a "final designation," it still binds the FCC, Huawei, and USF participants, requiring action to determine whether USF funds may be used to purchase Huawei equipment. *See id.* It also harmed Huawei by depriving it of due process, *supra* pp. 34-38, stigmatizing it, and impairing its ability to do business. *See CSI Aviation Servs., Inc.* v. *DOT*, 637 F.3d 408, 412-13 (D.C. Cir. 2011) ("cloud of uncertainty over … ongoing business" supports finality). These circumstances are unlike those in *Standard Oil* (FCC Br. 63-65), where the complaint had little "legal or practical effect" beyond imposing "expense and annoyance" in "responding to the charges." 449 U.S. at 242, 244.

2. Huawei's challenge to the "initial designation" is ripe

Huawei's challenge to its "initial designation" is also ripe. *See also supra* pp. 4-5. Huawei's challenges present the kinds of legal issues courts routinely find fit. *See, e.g.*, *Nat'l Ass'n of Home Builders* v. *U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1282 (D.C. Cir. 2005) (arbitrary and capricious claims). The "initial designation" also imposes reputational and economic hardship. *Supra* pp. 4-5. It caused lost sales and opportunities, "reducing the value of [Huawei's] products." *Renewable Fuels*, 948 F.3d at 1242; *supra* pp. 34-37, 39-42. And those reputational harms are not just practical (though that is enough)—they qualify as "legal harm[]" (*Texas*, 497 F.3d at 499) to Huawei's due process–protected interests.

B. Huawei's "initial designation" is arbitrary and capricious

Huawei demonstrated (at 70-81) that its "initial designation" is arbitrary and capricious because it (1) misunderstands Chinese law; (2) is not supported by substantial evidence; and (3) irrationally singles out Huawei. The Commission mostly ignores Huawei's arguments, instead summarizing the Order's inadequate explanations.

1. Huawei already showed (at 70-72) that the Commission is wrong that Chinese law authorizes the Chinese government to force organizations to spy for it. So the Commission suggests (at 78 n.14) the Chinese government may *ignore* the law. But the Order rests on an erroneous view of Chinese law, not a finding that it will be disregarded. Order ¶¶ 27, 45-46, 48-49, 56.

2. Huawei explained (at 73-79) that the "initial designation" was unsupported by substantial evidence. The Commission responds merely by summarizing (at 75-81) its conclusions. Two reasons warrant vacatur.

First, the FCC did not address Huawei's extensive evidence that it is *not* a national security threat. The FCC "must take [this evidence] into account." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951).

Second, the Commission does not justify its reliance on non-evidence, like statutes and indictments, or on unreliable materials (like the HPSCI Report, other unreliable hearsay, and other reports it has not carefully reviewed). Huawei Br. 75-79. The Commission says "it need not adhere" to judicial standards of evidence. Br. 75 n.13. But *substantial evidence decisions* require agencies to rely *on actual (and reliable) evidence*—not mere assertion. Huawei Br. 75-76.

3. Huawei argued (at 79-81) that the Commission irrationally singled out Huawei. The Commission neither defends its failure to respond meaningfully to Huawei's submissions in the rulemaking record, *see State Farm*, 463 U.S. at 43, nor explains how singling out Huawei was rational. *Supra* p. 28.

4. The Commission argues the record "showed a serious risk that supports further investigation." Br. 78 n.14. But the Commission did more than investigate. It deemed Huawei a "national security threat." *Supra* pp. 28, 32-33, 40-41. That determination requires "more than … a suspicion of the existence of the fact to be established." *Universal Camera*, 340 U.S. at 477. Vacatur is required.

* * *

In its eagerness to pander to members of Congress hostile to Huawei, the Commission issued an unauthorized rule and "initial designation"—and, compounding the problem, violated the APA and due process. The Commissioners' own extraordinary communications and statements leave little doubt that they prejudged Huawei and were unreceptive to reason and evidence. Huawei Br. 11, 14-15, 82-83. The FCC's brief does no better: it either parrots or fails to defend the substantively and

procedurally flawed arguments the Commission advanced in the Order. The USF rule and "initial designation" cannot stand.

CONCLUSION

The Court should vacate the USF rule and "initial designation."

Dated: July 2, 2020

Respectfully submitted,

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I certify that on July 2, 2020, the foregoing brief was electronically filed with the United States Court of Appeals for the Fifth Circuit using the CM/ECF system, which will accomplish service on all parties.

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