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

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

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March 26, 2020

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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

d. Cinnamon Rogers, Dileep Srihari, Savannah Schaefer, and Telecommunications Industry Association

e. Rural Wireless Broadband Coalition and Rural Broadband Alliance and their counsel, Russell D. Lukas and David A. LaFuria of Lukas, LaFuria, Gutierrez & Sachs, LLP

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

j. WTA – Advocates for Rural Broadband and its counsel, Gerald J. Duffy of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP

k. Jill Canfield, Jesse Ward, and NTCA – The Rural Broadband Association

l. Mark Twain Communications Co. and its counsel, Donald L. Herman, Jr., Carrie DeVier, and Clare Liedquist of Herman & Whiteaker, LLC

m. Brian Hendricks, Jeffrey Marks, and Nokia

n. Dr. J. Michel Guite, Vermont Telephone Co., Inc., and VTel Wireless, Inc.

o. Rick Chessen and NCTA – The Internet and Television Association

p. David S. Addington and National Federation for Independent Business, Inc.

q. Jeffry H. Smith and GVNW Consulting, Inc.

r. Jennifer A. Manner, Paul Kay, Echostar Satellite Operating Corp., and Hughes Network Systems, LLC

s. Gary Rawson, State E-Rate Coordinators' Alliance, and Mississippi Department for Information Technology Services

t. David Hartshorn and Global VSAT Forum

u. NE Colorado Cellular, Inc., and its counsel, David A. LaFuria of Lukas, LaFuria, Gutierrez & Sachs, LLP

v. Pine Belt Communications, Inc., and its counsel, Donald L. Herman, Jr., and Carrie L. DeVier of Herman & Whiteaker, LLC

w. Tom Stroup and Satellite Industry Association

x. Marijke Visser, Ellen Satterwhite, Alan S. Inouye, and American Library Association

y. AT&T Services, Inc., and its counsel, James J.R. Talbot, Gary L. Phillips, and David L. Lawson

z. Melanie K. Tiano, Thomas C. Power, Scott K. Bergmann, Thomas K. Sawanobori, and CTIA

aa. JAB Wireless, Inc., and their counsel, Stephen E. Coran and F. Scott Pippin of Lerman Senter PLLC

bb. Francisco J. Silva and Puerto Rico Telephone Co., Inc.

cc. Sagebrush Cellular, Inc., and its counsel, Michael R. Bennet of Womble Bond Dickinson (US) LLP

dd. Frank Korinek and Motorola Solutions, Inc.

ee. Rick Salzman, Mark Rubin, and TracFone Wireless, Inc.

ff. Todd Houseman, United Telephone Association, Inc., United Wireless Communications, Inc., and United Communications Association, Inc.

gg. Joseph Franell and Eastern Oregon Telecom

hh. Jane Kellogg and Deborah J. Sovereign of Kellogg & Sovereign Consulting, LLC

ii. Matthew M. Polka, Brian D. Hurley, and American Cable Association

jj. Ross J. Lieberman and ACA Connects – America's Communications Association

kk. Robert F. West and CoBank, ACB

ll. Geoff Feiss and Montana Telecommunications Association

mm. Union Telephone Company and its counsel, David A. LaFuria of Lukas, LaFuria, Gutierrez & Sachs, LLP

nn. Tracy S. Weeks and State Educational Technology Directors Association

oo. Aarti Holla and EMEA Satellite Operators Association

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Dated: March 26, 2020

Respectfully submitted,

/s/ Shay Dvoretzky

Counsel of Record for Huawei Technologies USA, Inc., and Huawei Technologies Co., Ltd.

REQUEST FOR ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a) and (f) and Fifth Circuit Rule 28.2.3, Petitioners Huawei Technologies USA, Inc., and Huawei Technologies Co., Ltd., respectfully request oral argument. This case involves novel and complex issues of constitutional and statutory interpretation and administrative law as well as a lengthy record. Oral argument would substantially aid the Court in its resolution of the case.

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JURISDICTIONAL STATEMENT

Huawei seeks review of a final order (Order) of the Federal Communications Commission (FCC or Commission). The Commission claims authority for the Order under various provisions in title 47 of the U.S. Code. This Court has jurisdiction under 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342–2344, and 5 U.S.C. § 706. The Order was released on November 26, 2019, and published in the *Federal Register* on January 3, 2020. 85 Fed. Reg. 230. Huawei petitioned for review on December 4, 2019, and January 6, 2020, within 60 days of both public release and publication. *See* 47 U.S.C. §§ 402(a), 405(a); 28 U.S.C. § 2344; 47 C.F.R. § 1.13(b).

STATEMENT OF ISSUES

1. Whether the FCC has statutory authority to bar universal service funds from being spent on equipment or services provided by companies the Commission perceives as national security threats.

2. Whether the FCC violated the Administrative Procedure Act (APA) or the Fifth Amendment Due Process Clause because the rule it promulgated (USF rule) (a) is not a logical outgrowth of the Notice of Proposed Rulemaking (NPRM); (b) did not result from reasoned decisionmaking; or (c) is vague and standardless.

3. Whether the USF rule's procedures for "initially designating" companies violate due process and the APA because they do not provide for any pre-deprivation protections.

4. Whether the Commission's "initial designation" of Huawei was unlawful and unconstitutional because it (a) constituted improper retroactive agency action; or (b) is arbitrary and capricious because it rests on an erroneous understanding of Chinese law, is not supported by substantial evidence, selectively blacklists Huawei, and can be explained only as the result of the FCC's pandering to the perceived wishes of certain members of Congress rather than consideration of the required statutory factors.

INTRODUCTION

This petition challenges an unlawful, standardless FCC rule, and a simultaneous "initial designation" under that rule, that resulted from a politically motivated campaign to blacklist Huawei and impugn its worldwide reputation. The rule bars use of universal service funds—a form of FCC-administered subsidies—to purchase equipment sold by companies the FCC determines are "national security threat[s]." Order p. 66. The accompanying "initial designation" identifies Huawei as such a company.

The rulemaking and "initial designation" rest on *the FCC's* national security judgments. But such judgments fall far afield of the FCC's statutory authority and competence. The Communications Act directs the FCC to promote universal service, not to tread upon the *President's* authority—conferred by both the Constitution and the Communications Act itself—to protect national security and conduct foreign affairs.

The USF rule, moreover, contravenes the APA and the Due Process Clause. For starters, the rule is incomprehensibly vague. It defines *no* key terms and provides *no* guidance about what makes a company fall within its purview. Moreover, in its rush to condemn Huawei, the Commission failed to acknowledge, let alone explain why it rejected, a wealth of evidence from commenters that the proposed rule would *undermine* the universal service fund (USF) statute's goal of expanding access to telecommunications. What's more, the FCC denied Huawei any due process protections before deeming it a national security threat. And the FCC's concurrent "initial designation" of Huawei rendered the rule unlawfully retroactive, in violation of the APA and the fair notice requirements of due process.

The Commission's decisions to exceed the scope of its expertise and authority, promulgate a rule that fails to meet the requirements of reasoned decisionmaking, and issue a retroactive "initial designation" without even waiting for the ink on the rule to dry can be explained only as politically expeditious pandering to Congress. The FCC issued the Order only after repeated congressional entreaties for it to blacklist Huawei, and only after the FCC Chairman and multiple Commissioners had publicly announced their conclusion that Huawei is a risk to national security, and promised Congress that they would act. The Order is nothing more than a pretextual attempt to blacklist Huawei under the guise of a general rulemaking. The Order promulgating the rule and "initial designation" is unlawful and should be vacated.

STATEMENT OF THE CASE

I. Statutory and regulatory background

A. The Communications Act of 1934

The Communications Act of 1934 consolidated regulatory authority over radio, telephone, and telegraph communications in one independent agency, the FCC. The Act gave the FCC authority to regulate specific, statutorily defined aspects of the telecommunications industry, like the

reasonableness of carrier charges and practices, *see Glob. Crossing Telecomms., Inc.* v. *Metrophones Telecomms., Inc.*, 550 U.S. 45, 48-49 (2007), and radio broadcast licensing, *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 137 (1940); *Nat'l Broad. Co.* v. *United States*, 319 U.S. 190, 210-15 (1943). It did so with the goal of "mak[ing] available, so far as possible, to all the people of the United States, … a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151; *Alenco Commc'ns, Inc.* v. *FCC*, 201 F.3d 608, 614 (5th Cir. 2000).

The Act did not empower the FCC to make national security or foreign affairs judgments. The Act gave that power exclusively to the President—and even then only in limited circumstances. For example, the President may authorize foreign governments to operate radio stations if "he determines it to be consistent with and in the interest of national security," 47 U.S.C. § 305(c); order "closing of any station for radio communication" during wartime "if he deems it necessary in the interest of national security or defense," *id.* § 606(c); and suspend certain rules "in the interest of the national security and defense," *id.* § 606(d). And the

FCC may suspend ordinary licensing procedures "during a national emergency proclaimed by the President." *Id.* § 308.

B. The Communications Act's universal service provision

This case centers on the Act's "universal service" provision, *id.* § 254, added by the Telecommunications Act of 1996 to promote affordable, nationwide telecommunications access. *Tex. Office of Pub. Util. Counsel (TOPUC)* v. *FCC*, 183 F.3d 393, 405-06 (5th Cir. 1999). Under § 254, the FCC disburses funds to USF recipients to, for example, provide "affordable telephone service to consumers in high-cost rural or isolated areas" and to "support[] programs for low-income customers, schools, libraries, and health care providers." *AT&T, Inc.* v. *United States*, 629 F.3d 505, 508 (5th Cir. 2011). "Support for the fund comes from [mandatory] assessments paid by interstate telecommunications service providers." *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1099 (D.C. Cir. 2009); *see* 47 U.S.C. § 254(b)(4).

Congress enacted § 254 with the "principal objective" of "open[ing] local telephone markets to competition." *TOPUC*, 183 F.3d at 406. The statute thus instructs the FCC to "base policies for the preservation and advancement of universal service" on six enumerated "principles," plus

such "other principles" that the Commission and the Federal-State Joint Board on universal service may together establish. 47 U.S.C. § 254(b); *see AT&T*, 629 F.3d at 514; *infra* pp. 27-28. The enumerated principles include ensuring "[a]ccess to advanced telecommunications and information services" at "just, reasonable, and affordable rates" in "all regions of the Nation." 47 U.S.C. § 254(b)(1), (2).

II. Factual and procedural background

A. Background on Huawei

Huawei is a global information and communications technology company serving more than 500 major telecommunications operators in more than 170 countries. A254. Huawei is, and always has been, a private company owned by its founder and employees. A255. The Chinese government holds no shares in Huawei. A1091.[1]

Since 2001, Huawei USA has brought advanced technology and much-needed competition to the United States. Its participation in the U.S. market has created many benefits. *First*, Huawei has driven down telecommunications equipment prices, which tend to be 20%-30% higher here than elsewhere because only two companies, Nokia and Ericsson,

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

dominate the U.S. market. A257. Small rural carriers, in particular, have chosen Huawei equipment for its reliability and cost-effectiveness. *See, e.g.*, A779-81; A791; A802; A807. Indeed, Huawei equipment is often two-to-three times less expensive than its competitors'. A780-81.

Second, Huawei's participation in the U.S. market has helped Huawei's carrier clients improve their service area coverage by 30%. A259.

Third, Huawei has provided its customers with "superior" technical solutions, A798, and "excellent customer service," "result[ing] in fewer and less severe coverage outages for [their] customers," A807. Excluding Huawei from the market, conversely, would hinder 5G deployment and may even put some rural carriers out of business. *E.g.*, A787; A796.

Huawei has advanced the Communications Act's goals in these ways while prioritizing cybersecurity. Huawei's end-to-end global cyber-security policies reflect international standards and guidelines; local laws and regulations; and feedback from vendors, employees, suppliers, and customers. A233-34. Huawei has a robust internal compliance program that includes routine processes for self-checks. A234-37. And

Huawei USA products and software have been subject to third-party testing. A588.

B. Congress investigates Huawei and the FCC responds

1. In October 2012, the U.S. House of Representatives Permanent Select Committee on Intelligence (HPSCI) published a report on the alleged "counterintelligence and security threat posed by Chinese telecommunications companies doing business in the United States." HPSCI, *Investigative Report on the U.S. National Security Issues Posed by Chinese Telecommunications Companies Huawei and ZTE* at iv (Oct. 8, 2012), https://tinyurl.com/yyp5muou (HPSCI Report). Rather than focus on "Chinese telecommunications companies" generally, though, HPSCI singled out just two companies, Huawei and ZTE. It said it did so because they were "indigenous Chinese firms, with histories that include connections to the Chinese government," "that also seek greater entry into the United States market." *Id.* at 8. The HPSCI Report stated that "Huawei and ZTE cannot be trusted to be free of foreign state influence and thus pose a security threat to the United States and to our systems." *Id.* at 45.

But the HPSCI Report acknowledged the *absence* of reliable evidence to support that concern. HPSCI conceded that it had not conducted

"a review of all technological vulnerabilities of particular ZTE and Huawei products or components." *Id.* at 11. In addition, while HPSCI faulted Huawei for not providing detailed responses to its questions, it recognized that its record "d[id] not prove wrongdoing." *Id.* at v-vi. And HPSCI relied heavily on confidential hearsay: Although it purported to interview "former Huawei employees" and "industry experts," HPSCI did not disclose their identities, the circumstances under which those interviews were conducted, or whether it kept any formal records. *Id.* at v, 8-11. HPSCI also cited its belief (with almost no legal analysis) that Chinese law obligated Huawei "to cooperate with any request by the Chinese government to use their systems or access them for malicious purposes." *Id.* at 3.

In the end, therefore, HPSCI made only tentative observations, not findings, that Huawei "*may* have connections and ties to Chinese leadership"; that "it [is] *possible* that Huawei receives substantial support from the Chinese government"; and that it had "serious *doubts* about whether Huawei can be trusted to operate in the United States in accordance with United States legal requirements and international codes of business conduct." *Id.* at 13, 24, 30 (emphases added).

2. Nonetheless, on December 20, 2017, based on the HPSCI Report, Senator Tom Cotton and 17 other members of Congress wrote to FCC Chairman Ajit Pai to express their "concerns regarding Huawei and Chinese espionage." https://tinyurl.com/yx6xp2l7; *see* Order ¶ 11. On March 20, 2018, Chairman Pai replied that he "share[d] [the members of Congress'] concerns" and promised to "take proactive steps" to address them. https://tinyurl.com/u2verd9. Less than a month later, the FCC issued an NPRM, in which the Commission proposed to rely on 47 U.S.C. § 254 to prohibit the use of USF funds "to purchase or obtain any equipment or services produced or provided by a company posing a national security threat to the integrity of communications networks or the communications supply chain." A6, 7 (NPRM ¶¶ 11, 13).[2]

Foreshadowing the vagueness of the final USF rule, the NPRM did not define what it means to "pos[e] a national security threat" or propose criteria to identify companies posing a threat. Instead, it "s[ought] comment broadly on possible approaches to defining the universe of companies covered by [the] proposed rule." A8-9 (NPRM ¶ 19). Although the

[2] The NPRM is also available at 33 FCC Rcd. 4058.

Commission identified three potential "approach[es]," none included any proposed standard, criteria, or procedures for implementation. Under the first, the Commission suggested possibly "establish[ing] the criteria for identifying a covered company," but did not identify any criteria other than whether a company had been previously prohibited from contracting with the government or participating in government programs. A9 (NPRM ¶ 20). Otherwise, the Commission proposed possibly to rely on (1) "existing statutes listing companies barred from providing certain equipment or services to federal agencies for national security" or (2) asking a different federal agency "to maintain a list of communications equipment or service providers that raise national security concerns." *Id.* (NPRM ¶¶ 21-22). The NPRM never indicated that the Commission would determine that specific companies were covered by the rule at the time it promulgated the rule itself. Nor did the NPRM propose or solicit comments on procedures for designating companies under any rule.

C. The vast majority of commenters join Huawei in opposing the adoption of the proposed rule

Huawei submitted written filings and documentary evidence opposing the proposed rule. Huawei explained that the Commission lacked

statutory authority for the rule and that the Commission's proposed approach was arbitrary and capricious under the APA; violated due process; lacked an evidentiary basis; and misunderstood Chinese law. Huawei Comments 11-18, 20-23, *In re Huawei Designation*, PS Docket No. 19-351 (Feb. 3, 2020), https://tinyurl.com/rf6prwq ("Designation Cmts.").

Many commenters also submitted evidence and arguments opposing the rule—which the FCC ignored. The Competitive Carriers Association (CCA) explained that the proposed rule undermines each of "the universal service principles set forth in Section 254(b)." A743. *First*, as the CCA explained, with supporting declarations from its members, the proposed rule would increase equipment prices for rural carriers serving millions of Americans; reduce coverage and degrade customer support; and deter adoption of new technologies while imposing interoperability costs. A733-41, A756-64. *Second*, commenters explained that even if the FCC could sustain the proposed rule based on its "dubious" statutory authority, A106, the rule's "prohibitive" costs would lack "any corresponding benefits." A58-61; *see* A757; A99-102. Indeed, the rule's costs would force rural carriers to reduce coverage, with "severe public safety implications." A58-60. One carrier explained, for example, that the proposed rule

threatened "911 service" and internet access for "more than 75 Border Patrol and U.S. Customs agents." A59-60. *Third*, commenters criticized the proposed rule for targeting "companies instead of products." A765.

D. Three Commissioners publicly express their preexisting views of Huawei

With the rulemaking pending, several Commissioners publicly illustrated their rush to brand Huawei a national security threat. During a May 2019 Senate hearing, Chairman Pai stated that he had already concluded that Huawei "present[s] a threat to the United States." John Eggerton, *FCC's Pai to Senate: Huawei is National Security Threat*, Broadcasting+Cable (May 8, 2019), https://tinyurl.com/skkjn4c. Also that month, Commissioner Starks announced his conclusion that "Huawei's equipment contains software vulnerabilities that could seriously compromise our network security," Geoffrey Starks, *The Huawei threat is already here*, The Hill (May 26, 2019), https://tinyurl.com/un67l9u, and that would be "very hard" for Huawei to "mitigate," Nilay Patel & Makena Kelly, *FCC Commissioner Geoffrey Starks talks Huawei and net neutrality on The Vergecast*, The Verge (May 21, 2019), https://tinyurl.com/y3w5g539. And in October 2019, Commissioner Carr tweeted a *Wall Street Journal* article by Chairman Pai entitled "FCC Answers

The Threat From Huawei," and added that he had "no doubt" "that China intends to spy on persons and businesses within our borders." @BrendanCarrFCC (Oct. 28, 2019, 3:34 pm EST), https://tinyurl.com/w5x234g.

E. The Commission releases its Order

On November 26, 2019, shortly after releasing a Draft Report and Order on October 29, 2019, https://tinyurl.com/rf75mg2, the Commission released its Order. The Order both formally adopted the USF rule and simultaneously "initially designate[d] [Huawei and ZTE] as covered companies for purposes of this rule," while "establish[ing] a process for designating additional covered companies in the future." Order ¶ 2.

1. The FCC first "adopt[ed] a rule that no universal service support may be used to purchase or obtain any equipment or services produced or provided by a covered company posing a national security threat to the integrity of communications networks or the communications supply chain." Order ¶ 26. The agency principally asserted that the universal service statute, 47 U.S.C. § 254, allows it "to place reasonable public-interest conditions on the use of USF funds," and the "public interest" includes national security. Order ¶¶ 29, 33. The agency further explained that "limiting the use of technology from certain vendors deemed to pose

a heightened national security risk is an appropriate element of providing a quality communications service" and "is especially consistent with public safety." Order ¶¶ 28, 31. The FCC noted, in passing, that the rule also "implements section 105 of the Communications Assistance for Law Enforcement Act (CALEA)." Order ¶ 35. It also asserted that the rule was consistent with "the goals underlying section 889 of the 2019 [National Defense Authorization Act]," Order ¶ 38, even though that law did not cover the USF program, Order ¶ 38 n.114.

2. The Commission next "establish[ed] a process for designating entities as national security threats for purposes of [the] rule." Order ¶ 39. The agency determined that the rule would cover "subsidiaries, parents and affiliates of covered companies." *Id.* It explained that it would "initially determine[], either *sua sponte* or in response to a petition from an outside party, that a company poses a national security threat," and then would "issue a public notice advising that such initial designation has been made, as well as the basis for such designation." Order ¶ 40. Then, "interested parties may file comments responding to the initial designation, including proffering an opposition to the initial designation," which will take effect after 31 days if unopposed or, if opposed, "if the

Commission determines that the affected entity should nevertheless be designated." *Id.* The Order delegated authority to the FCC's Public Safety and Homeland Security Bureau (Bureau or PSHSB) to "make both initial and final designations." Order ¶ 64. Although the Order contemplates review of a Bureau determination by the full Commission, *id.*, it provided no guidance or criteria for that review.

"In formulating its initial and final designations," the Commission continued, it "will use all available evidence to determine whether an entity poses a national security threat," including "determinations by the Commission, Congress or the President that an entity poses a national security threat; determinations by other executive agencies that an entity poses a national security threat; and, any other available evidence, whether open source or classified, that an entity poses a national security threat." Order ¶ 41. The FCC did not provide any criteria to guide its application of the rule.

3. Short-circuiting the process as to Huawei and ZTE, however, the Order immediately took "the step of initially designating [them] as covered companies for purposes of the prohibition" adopted "today." Order ¶ 43. Noting "the longstanding concerns about the threats posed by

Huawei and ZTE, including by other Executive Branch agencies and Congress," and relying on the HPSCI Report, the Commission asserted that "[t]hese two companies pose a great security risk" because of a hodgepodge of factors: "their size, their close ties to the Chinese government both as a function of Chinese law and as matter of fact, the security flaws in their equipment, and the unique end-to-end nature of Huawei's service agreements that allow it key access to exploit for malicious purposes." Order ¶ 45. The Order elaborated with considerations that, even if true, would apply equally to virtually any company doing business in China: that Chinese law purportedly "permits the government … to demand that private communications sector entities cooperate with any governmental requests, which could involve revealing customer information, including network traffic information," Order ¶ 46; *see* Order ¶ 56; and that "Chinese intelligence agencies have opportunities to tamper with their products in both the design and manufacturing processes." Order ¶¶ 43, 45; *see* Order ¶¶ 47-63.

4. The Commission rejected Huawei's due process arguments. *First*, it explained that, "[a]ssuming that a designation could result in a deprivation of a cognizable liberty or property interest," it had satisfied

due process requirements because "[t]his rulemaking proceeding has provided and will continue to provide Huawei and ZTE with notice and an opportunity to be heard on the issue of whether they should be designated under the rule adopted in this Report and Order." Order ¶¶ 94-95. The Order noted that "Huawei and ZTE will have a further chance to respond before PSHSB issues a final designation." Order ¶ 96.

Second, the FCC found "that designated suppliers … do not suffer a deprivation of life, liberty, or property sufficient to trigger due process protections" anyway. Order ¶ 99. It reasoned that "covered companies are not barred from a field of employment," and that "designation as a covered company does not create a deprivation by imposing a stigma sufficiently serious to alter a supplier's legal status." Order ¶¶ 100, 102-03.

5. The FCC's statement of basis and purpose and accompanying cost-benefit analysis focused exclusively on what the Commission perceived as "the economic costs" of excluding Huawei and ZTE, and those two companies alone, from the USF program. Order ¶¶ 108-21. The Commission concluded that "the dominant economic cost equals the necessary additional cost to carriers who choose to purchase more expensive equipment as a result of [its] action," and that "other costs" are "relatively

small." Order ¶ 108. And, critically, despite extensive evidence submitted by commenters, the Commission ignored the basic economic argument and expert evidence that even firms with small market shares can exert competitive pressure on prices; interoperability problems with pairing new, non-Huawei or -ZTE equipment with preexisting equipment; the possibility that some small carriers may not be able to afford increased costs and would go out of business entirely; and the likelihood that excluding Huawei and ZTE will result in lower quality of services, especially 5G, and depression of rural economies. *See supra* pp. 13-14; *infra* pp. 48-49.

The Commission's benefit calculations, concededly "difficult," worked backwards from its cost estimate and assumed that the rule would "reduce[] the incidence of data breach and identity theft" enough to justify its cost. Order ¶ 109. The Order did not explain why the FCC thought its rule would produce those benefits, or calculate the expected costs or benefits from any alternative approach.

Notably, Commissioner O'Rielly admitted that the Commission's cost-benefit analysis was supported by "no data" and that he was "disappointed in" it. Order p. 112.

6. On January 3, 2020, the FCC published a summary of the Order in the *Federal Register*, thereby initiating a 30-day period for Huawei to file comments in a "final designation" proceeding to be conducted by the Bureau. 85 Fed. Reg. 230. On February 3, 2020, Huawei submitted comments to the Bureau urging it not to enter a "final designation" order against Huawei. Designation Cmts., https://tinyurl.com/rf6prwq.

SUMMARY OF ARGUMENT

I. The Commission lacked authority for the USF rule and "initial designation." The rule rests on the Commission's inexpert, unauthorized judgments about national security and foreign affairs. But the USF statute, 47 U.S.C. § 254, tasks the Commission with ensuring affordable, nationwide access to telecommunications services in accordance with six enumerated principles—none of which mentions national security or foreign affairs. Indeed, the Communications Act elsewhere shows that Congress knew how to confer national security authority, and did so on *the President*, not the FCC. And if there were any doubt, principles of constitutional avoidance would bar the USF rule, because Congress cannot give an independent agency like the FCC authority in a domain like this—where the authority is constitutionally committed to the President.

II. Besides not having the authority to promulgate the USF rule, the way the Commission did so was unlawful.

A. The APA requires agencies to provide notice of the substance of proposed rules and a meaningful opportunity to participate in rulemakings. 5 U.S.C. § 553(b)–(c). But the NPRM contained *no* proposal relating to the designation procedures the Commission ultimately adopted.

B. The USF rule is also arbitrary and capricious. The FCC failed to address significant legal and factual arguments raised in the comments; relied on an irrational and unsupported cost-benefit analysis that even Commissioner O'Rielly found "disappoint[ing]," Order p. 112; did not tether its rule to a rational assessment of relevant factors; and failed to explain why it rejected proposed alternatives. Indeed, in its zeal to brand Huawei a national security threat, the FCC ignored compelling evidence that the USF rule would undermine the true goal of the universal service statute, *i.e.*, expanding access to telecommunications services.

C. The USF rule is also unlawfully vague, in violation of the APA and the Due Process Clause. It contains no criteria, definitions, or comprehensible standard to guide regulated parties, decisionmakers, or reviewing courts.

III. The rule is unlawful and must be vacated because the Commission erroneously determined that a company has no protected liberty interests justifying any due process protections before "initial designation" as a national security threat. But when the FCC enters an "initial designation," it implicates constitutionally protected interests because it

stigmatizes the company and tangibly affects its business. The Commission's failure to recognize that Huawei has constitutionally protected reputational interests is "arbitrary, capricious," and "otherwise not in accordance with law" under the APA, 5 U.S.C. § 706(2)(A). Moreover, because such interests are implicated, the Constitution requires, at minimum, pre-deprivation notice and an opportunity to be heard. Yet the rule provides no pre-deprivation protections at all, and Huawei received none.

IV. The Commission's "initial designation" of Huawei is likewise unlawful and unconstitutional.

A. By "initially designating" Huawei concurrent with announcing the rule enabling the designation, the Order constitutes impermissible retroactive agency action. The APA does not authorize agencies to promulgate retroactive rules, *i.e.*, rules imposing new disabilities based on past conduct alone. Nor does the APA or due process allow imposing legal requirements or disabilities without fair warning. Yet the Order simultaneously announced a new rule and, as part of the same integrated agency action, decreed on the basis of Huawei's alleged pre-promulgation conduct and associations that Huawei was a national security risk under

it. The Order therefore instituted a retroactive rule and imposed new legal disabilities about which Huawei did not have fair warning. Labeling the "initial designation" an "adjudication" does not cure these defects, because (a) the APA's text does not allow adjudications to be issued in rulemakings; and (b) when the "initial designation" was announced, there was no existing law under which Huawei could have been adjudicated, and Huawei was given no fair warning of the new rule or opportunity to comply.

B. The "initial designation" is also arbitrary and capricious. The FCC relied on its inexpert and erroneous understanding of Chinese law as authorizing the Chinese government to require companies like Huawei to spy for it. That legal error alone requires vacatur. But the "initial designation" is also unsupported by substantial evidence. The Commission ignored all contrary evidence and based its conclusions on non-evidence, or on evidence so unreliable that no impartial tribunal would consider it. And the Commission's selective blacklisting of Huawei—enabled by its standardless USF rule—treated indistinguishable parties differently without a reasoned justification.

C. How, then, did the Commission come to do such shoddy work—exceeding its expertise and authority, failing the requirements of the APA, and violating the Constitution? The only way to understand the Commission's Order is as pandering to members of Congress who wanted it to blacklist Huawei. The USF rule and concurrent "initial designation" are contrary to the rule of law and should be vacated.

ARGUMENT

I. The Commission lacked statutory authority for the USF rule

The universal service statute, 47 U.S.C. § 254, authorizes the FCC to allocate USF funds to expand access to telecommunications services. It does not authorize the FCC to make national security determinations, and where the Communications Act *does* confer that authority, it does so exclusively on the President. Indeed, conferring national security authority on the FCC, an independent agency, would raise serious separation-of-powers concerns by usurping and undermining the President's constitutional role. Because the FCC had no statutory authority to promulgate the USF rule, the rule must be set aside.

A. Neither the universal service statute nor the Communications Act more generally gives the FCC authority to make rules resting on national security or foreign affairs judgments

1. Section 254 directs the Commission to "base policies for the preservation and advancement of universal service" on six enumerated "principles" (plus others it might adopt under a procedure that the Commission has not invoked here, Order ¶ 31 n.89; *see infra* p. 33 n.3). 47 U.S.C. § 254(b); *see, e.g.*, *AT&T*, 629 F.3d at 514. Those principles work together to advance an overarching goal, ensuring affordable telecommunications services nationwide:

- "Quality services should be available at just, reasonable, and affordable rates";
- "Access to advanced telecommunications and information services should be provided in all regions of the Nation";
- "Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas";
- "All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service";

- "There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service"; and

- "Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h)."

47 U.S.C. § 254(b)(1)–(6).

These enumerated principles "impl[y] the exclusion of others." *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 844 (2018) (quoting A. Scalia & B. Garner, *Reading Law* 107 (2012)). The Commission "may not depart from them … to achieve some other goal." *Qwest Corp.* v. *FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001). Yet the FCC did just that in the USF rule, which rests on amateur guesswork about whether particular suppliers might endanger national security by facilitating malicious cyberactivity of certain foreign states. Order ¶ 27. None of the principles in § 254(b) even mentions national security or foreign affairs, let alone purports to give the FCC authority to make judgments in those areas.

2. Others parts of the Communications laws vest national security judgments exclusively in the President, confirming that the Commission has no such authority.

"[W]here Congress includes particular language in one section of a statute but omits it in another," courts "generally presume[] that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983). Courts "refus[e] to find implicit in ambiguous sections of [a statute] an authorization to consider [a factor] that has elsewhere … been expressly granted." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 467 (2001).

No law grants the Commission national security or foreign affairs authority, let alone in the universal service context. But other parts of the Communications Act grant *the President* limited authority to make foreign affairs or national security judgments. *Supra* pp. 5-6. Congress' deliberate choice to give national security authority to the President shows that it did not confer such authority on the FCC.

3. What's more, banning providers like Huawei based on national security concerns *undermines* the purposes set forth in the Communications Act, and in the enumerated principles of the USF provision. The enumerated USF principles confer on the Commission the bounded authority—and obligation—to "make available, so far as possible, to all the people of the United States, … a rapid, efficient, Nation-wide, and

world-wide wire and communication service with adequate facilities at reasonable charges." *Alenco Commc'ns*, 201 F.3d at 614 (quoting 47 U.S.C. § 151). By instead engaging in atextual guesswork in areas not entrusted to it, the Commission is denying USF recipients access to the very cost-effective and high-quality equipment and services that could fulfill the purposes of the Act. *See infra* pp. 45-51.

B. Congress did not and could not give the FCC authority to rest universal service rules on national security or foreign affairs judgments

It makes sense that Congress did not empower the FCC to allocate USF funds based on national security judgments. The Commission has no national security expertise. And Congress may not vest an independent agency with the authority to make national security or foreign affairs determinations anyway.

1. The Commission has no national security or foreign affairs function or expertise

"[P]olicymaking expertise account[s] in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency." *Gonzales* v. *Oregon*, 546 U.S. 243, 266 (2006); *see Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2417 (2019). But the FCC, by its own account, has no relevant expertise to make national security determinations. *See*

Order ¶ 19 ("other federal agencies have specific expertise" in national security); Order ¶ 33 ("We also have a long history of considering national security equities where other agencies have specific expertise and are positioned to make recommendations."); Order ¶ 52. The premise for delegation—expertise—is thus lacking.

2. Congress may not vest an independent agency like the Commission with national security or foreign affairs decisionmaking authority

Furthermore, while the Supreme Court has sometimes approved of statutes that confer authorities on officers who are not subject to presidential supervision and at-will removal, it has held that the Constitution prohibits laws that would "impede the President's ability to perform his constitutional duty," including laws that confer powers on independent agencies in such circumstances. *Morrison* v. *Olson*, 487 U.S. 654, 691 (1988); *see, e.g.*, *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000). In this regard, the Constitution vests the power to make national security decisions in Congress and the President—"those who are best positioned and most politically accountable for making them." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 531 (2004) (plurality opinion); *see Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1861 (2017) (citing U.S. Const. art. I, § 8, art. II,

§§ 1, 2); *Dep't of Navy* v. *Egan*, 484 U.S. 518, 527 (1988). And "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (quotation marks omitted).

Independent agencies are "structure[d] … to be more or less insulated from presidential control." *Collins* v. *Mnuchin*, 896 F.3d 640, 660 (5th Cir. 2018), *reinstated in relevant part on reh'g en banc*, 938 F.3d 553 (2019). Consequently, an independent agency like the FCC cannot be given authority to make independent judgments about national security and foreign affairs, because that would obstruct the President's ability to carry out responsibilities entrusted to him by the Constitution. At a minimum, constitutional avoidance principles require construing the Communications Act not to confer such authority on the FCC. *See, e.g.*, *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

The Order exemplifies this concern. The Commission asserts the authority to decide which companies and which foreign governments will collaborate to spy on the United States, and—only if the FCC chooses—to "seek to harmonize" those assessments with "the determinations of

other federal agencies in the Executive branch." Order ¶ 41. But the Commission cannot constitutionally wield authority to make decisions that might or might not "harmonize" with the national security or foreign affairs policies of the President, who "speak[s] for the Nation with one voice," *Crosby*, 530 U.S. at 381.[3]

C. The Commission's attempts to identify sources of national security authority fail

The FCC's contrary arguments only underscore the targeted scope of its authority under the Communications Act—which does not include making national security judgments.

1. The term "quality services" in § 254(b)(1) does not give the FCC any national security or foreign affairs authority. *But see* Order ¶ 29 & n.84. That phrase refers to services that transmit voice communications and data accurately, reliably, and quickly. *Cf.* 47 U.S.C. § 254(b)(3). Congress knew how to confer national security authority, *see supra* pp. 5-

[3] For these same reasons, the FCC may not add national security or foreign affairs as an "[a]dditional [USF] [p]rinciple" even if it follows the statutory process for doing so (which it did not do here). *See* 47 U.S.C. § 254(b)(7).

6, 27-29, and it did not do so through the modest words "quality services"—particularly given the FCC's conceded lack of relevant expertise. *See, e.g.*, *King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015); *Gonzales*, 546 U.S. at 266-67; *MCI Telecomms. Corp.* v. *AT&T Corp.*, 512 U.S. 218, 231 (1994); *Egan*, 484 U.S. at 529-32.[4]

2. The reference to "the public interest" in the USF statute, § 254(c)(1)(D), and in the agency's general rulemaking authority, § 201(b), does not give the Commission national security authority either. *But see* Order ¶¶ 28, 31, 34. The Supreme Court has "consistently held that the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, those words take meaning from the purposes of the regulatory legislation." *NAACP* v.

[4] *In re FCC-1161*, 753 F.3d 1015 (10th Cir. 2014), which did not even discuss the phrase "quality services," is not to the contrary. Order ¶ 29 & n.83. There, the Tenth Circuit concluded that the Commission had authority to require USF recipients to offer broadband services in part because such a requirement was "consistent with" the "six specific [universal service] principles outlined by Congress" in § 254(b). *FCC-1161*, 753 F.3d at 1047; *see id.* at 1044-48. *FCC 11-161* thus *undercuts* the Commission's argument: The FCC's actions must comport with the principles in § 254(b), and those principles provide no support for the Commission's asserted authority to make and impose independent national security or foreign affairs judgments.

Fed. Power Comm'n, 425 U.S. 662, 669 (1976). For example, "[t]he use of the words 'public interest' in the Gas and Power Acts is not a directive to the Commission to seek to eradicate discrimination, but, rather, is a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates." *Id.* The Supreme Court has even admonished *the FCC itself* that "public interest" "is not to be interpreted as setting up a standard so indefinite as to confer [on the FCC] an unlimited power," but rather "is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services." *Nat'l Broad. Co.*, 319 U.S. at 216. So, too, it cannot be interpreted to extend national security authority to the FCC, when that authority is statutorily and constitutionally committed to the President.[5]

[5] The Supreme Court's decisions, moreover, reflect the serious nondelegation concerns that would arise by construing the term "public interest" so broadly. *See Nat'l Cable Television Ass'n* v. *United States*, 415 U.S. 336, 342 (1974); *Indus. Union Dep't* v. *Am. Petroleum Inst.*, 448 U.S. 607, 646, 672-76 (1980) (plurality opinion and Rehnquist, J., concurring in the judgment).

3. The FCC's eleventh-hour invocation of the term "public safety" in § 254(c)(1)(A) is likewise unavailing. Order ¶ 31. The Communications Act and related laws elsewhere make clear that "public safety" refers to matters relating to domestic first responders, not to protection against alleged national security threats originating abroad. *See, e.g.*, 47 U.S.C. §§ 222(d)(4)(A), 222(h)(4), 275(e)(2), 615, 942(b)(1). Even the Commission's own regulations reflect this understanding. *See, e.g.*, 47 C.F.R. § 400.7(c). The Commission has not explained its change of course, *see Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 40-51 (1983), which in any event would be impermissible. Congress knew how to use the term "national security," but it used the phrase "public safety" instead.

4. Although the Communications Act's preamble lists "the purpose of the national defense" as one of Congress' reasons for creating the FCC, 47 U.S.C. § 151, that prefatory language does not confer authority for making national security judgments. *But see* Order ¶ 34 n.102. A statute's stated purpose and the authority it confers are distinct, because no statute pursues its purposes at all costs. *E.g.*, *Rodriguez* v. *United States*, 480 U.S. 522, 525-26 (1987) (per curiam). Moreover, the preamble's

"[g]eneral language" does not "apply to a matter specifically dealt with in another part of the same enactment." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 646 (2012). And the specific USF provision does not mention national security, whereas other provisions of the Communications Act do specifically confer national security authority *on the President*. *See supra* pp. 5-6, 27-29; *Bendix Aviation Corp.* v. *FCC*, 272 F.2d 533, 538, 542 (D.C. Cir. 1959) (holding that the FCC reasonably denied a request to use radio frequencies that *the President* had restricted for "national defense" in an "exercise … of *decisional prerogatives which had not been entrusted to the Commission by the Act*" (emphasis added; citing 47 U.S.C. § 305(a))).

5. Finally, the Commission's passing reference to CALEA cannot sustain the USF rule either. *See* Order ¶¶ 35-37.

As an initial matter, the Commission's reliance on CALEA is procedurally improper. The Commission may rely on authority only if it gave interested parties prior notice of it, *see* 5 U.S.C. § 553(b)(2); *infra* pp. 40-43. But the Commission did not propose resting the USF rule on CALEA in the NPRM.

In any event, CALEA and the USF statute deal with entirely different subject matters, so CALEA cannot confer on the Commission the authority to make national security judgments in allocating USF funds. CALEA preserves law enforcement's ability to intercept communications given "new and emerging telecommunications technologies." *U.S. Telecom Ass'n* v. *FCC*, 227 F.3d 450, 454 (D.C. Cir. 2000) (quoting H.R. Rep. No. 103-827, pt. 1 at 14-15 (1991)). CALEA requires all telecommunications carriers to maintain the capability to isolate certain communications and call-identifying information. 47 U.S.C. § 1002(a)(1)–(2). The statute also addresses certain risks presented by facilitating law enforcement interceptions:

> A telecommunications carrier shall ensure that any interception of communications or access to call-identifying information effected within its switching premises can be activated only in accordance with a court order or other lawful authorization and with the affirmative intervention of an individual officer or employee of the carrier.

Id. § 1004.

This statutory scheme is inapposite to the USF rule. *First*, § 1004 requires telecommunications carriers to prevent unauthorized interceptions only "within [their] switching premises," whereas the USF rule

aims to prevent foreign interference at *all points* within a network by covering all equipment of a designated company, regardless of its function or location. Even the Commission defines "switching premises" as "equipment that may provide addressing and intelligence functions … to manage and direct the communications along to their intended destinations." Order ¶ 35. But the USF rule sweeps more broadly, reaching *non-switching* equipment like batteries or inverters.[6]

Second, § 1004 addresses the privacy concerns created by CALEA's facilitation of interceptions only by U.S. law enforcement, not foreign governments. *See* 47 U.S.C. § 1002(a); *id.* § 1001(5) ("government" refers to domestic governments). So it gives the Commission no license to make national security judgments involving foreign states.

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[6] Interpreting § 1004 to reach all points in a carrier's network also disregards the preexisting legal framework regulating law enforcement interceptions, which CALEA "d[id] not alter." *U.S. Telecom Ass'n*, 227 F.3d at 455. If § 1004 covered all points in a carrier's network, then it would require carriers to "affirmative[ly] interven[e]" in *every* law enforcement interception, even those that may occur outside carrier offices. But another important wiretap law, 18 U.S.C. § 2518, allows court-authorized wiretaps "without limitation on the means necessary to [their] accomplishment"—*i.e.*, with or without carrier assistance. *Dalia* v. *United States*, 441 U.S. 238, 249 (1979); *see* H.R. Rep. No. 103-837, pt. 1, at 26 ("Activation of interception orders or authorizations originating in local loop wiring or cabling can be effected by government personnel.").

Finally, CALEA applies to *all* "telecommunications carrier[s]," not just USF recipients. *Id.* § 1004. The Commission cannot rationally justify imposing a requirement under CALEA on just a subset of carriers that share some attribute (like receipt of USF funding) entirely unrelated to CALEA, while leaving other carriers that are otherwise subject to CALEA free from that same requirement.

Thus, the Commission's last-ditch reliance on CALEA to sustain a rule involving the USF statute does not withstand scrutiny.

6. Congress did not intend, and the Constitution does not permit, five independent telecommunications commissioners to make national security and foreign affairs decisions. That should be the end of this case.

II. The Commission violated the Administrative Procedure Act and due process in adopting the USF rule

Even apart from the Commission's lack of statutory authority to adopt the USF rule, the rule must be set aside because it violates the APA and the Constitution.

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

An agency engaging in rulemaking must provide interested parties with notice of the legal authority for, and the substance of, the proposed

rule, 5 U.S.C. § 553(b)(2), (3), as well as "an opportunity to participate in the rule making," *id.* § 553(c). *See Nat'l Lifeline Ass'n* v. *FCC*, 921 F.3d 1102, 1115 (D.C. Cir. 2019). To satisfy this requirement, a final rule must be a "logical outgrowth" of its notice. *CSX Transp., Inc.* v. *STB*, 584 F.3d 1076, 1079-81 (D.C. Cir. 2009). A final rule is a logical outgrowth "where the NPRM expressly asked for comments on a particular issue or otherwise made clear that the agency was contemplating a particular" approach, and thus interested parties "reasonably should have filed their comments on the subject during the notice-and-comment period." *Id.* at 1080-81 (quotation marks omitted). But a final rule is not a logical outgrowth where interested parties would have had to "divine [the Agency's] unspoken thoughts." *Int'l Union, United Mine Workers of Am.* v. *Mine Safety & Health Admin.*, 407 F.3d 1250, 1260 (D.C. Cir. 2005) (quotation marks omitted). Thus, for example, the D.C. Circuit held that a final rule setting maximum air velocity at 500 feet per minute was not a logical outgrowth of a proposed rule requiring a minimum velocity of 300 feet per minute. *See id.* at 1259-60; *see also, e.g.*, *Nat'l Lifeline Ass'n*, 921 F.3d at 1116 (final rule not a logical outgrowth where particular definition of "rural" lands was not mentioned in NPRM); *Council Tree Commc'ns, Inc.*

v. *FCC*, 619 F.3d 235, 253 (3d Cir. 2010) (final rule not a logical outgrowth where NPRM did not say that spectrum capacity would be aggregated).

Here, interested parties had no notice of or opportunity to comment on the designation procedures for identifying companies subject to the rule, because the Commission did not propose *any* designation procedures in the NPRM. It simply sought comments on "possible approaches" for identifying covered companies. A8 (NPRM ¶ 19). Yet the final rule sets out—for the first time—a process (a) for making "initial designations" (without pre-deprivation process), Order ¶ 40; (b) permitting only written "comments responding to the initial designation" within 30 days (and no other process), absent which the initial designation will be deemed final, *id.*; (c) delegating authority "to make both initial and final designations" and "to reverse prior designations" to the Bureau, *id.* ¶ 64; (d) delegating authority "to revise this process" to the Bureau, *id.*; and (e) requiring separate Commission review before judicial review, *see id.*; 47 U.S.C. § 155(c)(7). The Commission's adoption of these designation procedures (which were not even among the approaches about which comments were requested) "does not even come close to complying with the

notice requirement of § 553," because "[s]omething is not a logical outgrowth of nothing." *Kooritzky* v. *Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994).

The Commission's failure to provide interested parties with notice of and a meaningful opportunity to respond to a proposed version of the designation procedures prejudiced Huawei and all other entities potentially subject to the USF rule. The required notice would have allowed Huawei an opportunity to better develop these issues so that the Commission could correct its course, rather than adopting an unlawful, irrational, and ineffective rule and "initial designation" that stigmatized Huawei and harmed its reputation. The lack of proper notice and opportunity to comment requires vacatur of the rule.

B. The USF rule is arbitrary and capricious

1. Agency action is arbitrary and capricious if it is not an exercise of reasoned decisionmaking

Agency actions must be set aside under the APA if they are arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Michigan* v. *EPA*, 135 S. Ct. 2699, 2706 (2015) (quoting *Allentown Mack Sales &*

Serv., Inc. v. *NLRB*, 522 U.S. 359, 374 (1998)). The agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (quotation marks omitted). Thus, agency action is arbitrary and capricious where the agency has "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* An agency also must "respond to relevant and significant public comments" "in a reasoned way." *Mozilla Corp.* v. *FCC*, 940 F.3d 1, 69-70 (D.C. Cir. 2019) (per curiam) (quotation marks omitted).

The FCC commonly fails these requirements, so courts have frequently vacated FCC actions—including several times last year alone. *See United Keetoowah Band of Cherokee Indians in Okla.* v. *FCC*, 933 F.3d 728, 740-43 (D.C. Cir. 2019); *Prometheus Radio Project* v. *FCC*, 939 F.3d 567, 584-88 (3d Cir. 2019); *Mozilla*, 940 F.3d at 60, 66-69.

2. The USF rule did not result from reasoned decisionmaking

The USF rule fails these standards. Far from engaging in reasoned decisionmaking tethered to the scope of its lawful authority, the Commission (a) ignored evidence that its rule would undermine the purposes of the USF statute; (b) engaged in a cost-benefit analysis so flawed that it cannot be taken seriously; and (c) failed even to rationally pursue the (illegitimate) national security objective that it set for itself.

a. The Commission failed to consider important aspects of the problem it purported to address by ignoring significant legal and factual arguments raised by commenters. Indeed, the Commission failed to meaningfully engage with numerous, evidence-based comments that the proposed rule would increase the prices and decrease the quality of telecommunications equipment and services, thus undermining the statutory goals of the USF program. The result is a rule not tethered to a rational assessment of relevant factors. *See State Farm*, 463 U.S. at 43-52.

For example, the Commission ignored or largely disregarded without explanation:

- Expert reports from economists contending that the proposed rule, by excluding Huawei from the USF program, would "harm" "communities that have historically been underserved

with respect to landline and wireless broadband service," A1026, because Huawei's presence increases competition and lowers prices, A399. One expert attributed a 15% reduction in some Ericsson and Nokia prices to Huawei's presence in the U.S. market. A1024.

- Eight declarations from rural-carrier members of the CCA, A733 n.5, warning that the proposed rule and exclusion of Huawei would "dramatically affect the market for core network equipment and services, resulting in substantially higher costs for rural carriers." A782. Because rural carriers "operate on extremely thin margins," A843, these higher costs would threaten rural carriers' "ability to survive." A796; A803; A807.

- Comments and declarations from rural carriers arguing that the rule would "devastat[e]" the availability of "quality communications" for rural communities. A813. Many carriers selected Huawei for its "reliable equipment" and "superior customer service." Designation Cmts. 11. The rule, and its potential exclusion of Huawei, would degrade customer support, prevent or delay the adoption of new technologies, and reduce coverage—by two-thirds in at least one carrier's case. A59; A795-96; A799; A802; A806-09.

- Arguments that company-based approaches would not improve national security because they ignore global supply-chain risks. A221; A1563-64; A1621-24. All major suppliers have operations in or incorporate components from China. Thus, if China wanted to introduce or exploit a vulnerability, it could do so through the equipment of many different suppliers. A217.

- Arguments and evidence that excluding *all* equipment of covered companies, especially "intrinsically secure" *non-switching* equipment like batteries or antennas, A1014, does not improve network security, so the rule should have "focus[ed] on

particular technologies and equipment," not "entire corporations." A100; *see also* A765-66; A88-91; A51-54.

The Commission also failed to meaningfully consider commenters' legal arguments that:

- The FCC lacks authority to make national security or foreign affairs determinations. A134-57.
- An agency that concededly lacks national security expertise should not attempt to formulate national security policy. A141-42.
- Permitting the Bureau to make designation decisions violates the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, because no one in the Bureau has been appointed by the whole Commission. *See Lucia* v. *SEC*, 138 S. Ct. 2044, 2050 (2018); *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 510-13 (2010); A2057.
- The Chinese laws the Commission invoked do not apply extraterritorially. *See* Designation Cmts. 102-04; *infra* pp. 71-72. The FCC did not explain its insistence on treating as equally threatening Chinese companies' subsidiaries operating outside China. *See* Order ¶ 39.

b. The Commission's cost-benefit analysis also ignored important aspects of the problem and is irrational. Even Commissioner O'Rielly found it supported by "no data" and was "disappointed in" it. Order p. 112. When "the FCC's analysis is so insubstantial that it would receive a failing grade in any introductory statistics class," it does not

supply the "reasoned explanation" that is required. *Prometheus Radio Project*, 939 F.3d at 586-87.

First, the FCC calculated the rule's costs on the unstated assumption that the rule applies to Huawei and ZTE alone. That approach is irrational given (a) the Commission's claim that it was formulating a generally applicable rule; (b) the Commission's inability to explain why other companies are not similarly situated to Huawei, *see infra* pp. 79-81; and (c) the Commission's conferral of authority on the Bureau to decide both whether to enter "final designations" of Huawei and whether to designate *other* companies, Order ¶ 64. Unless the Commission believed that only Huawei and ZTE, and no other companies, would be "finally designated," it had to consider other companies in its analysis.

Second, in calculating the rule's costs, the Commission ignored the many ways in which the rule *undermines* the statutory goals of the USF program; *see supra* pp. 45-51; *State Farm*, 463 U.S. at 43-52. The FCC failed to consider how Huawei's presence in the marketplace helps discipline prices and promote quality, and the broader economic costs of depriving Americans of access to Huawei's market-leading technology. A176-81. Among other things, the FCC ignored evidence about:

- the basic economics teaching that even firms with small market shares can exert competitive pressure on prices, *see* A399, A402, thus incorrectly assuming that the rule was "unlikely" to "materially increase U.S. radio access network equipment prices," Order ¶ 121, when in fact Huawei's absence from the U.S. market could increase the price of radio access network equipment by up to 16%, A1980;

- costs associated with "long-term interoperability" problems, A70, including complete network outages, *see* A736-37, likely occurring when carriers attempt to pair new, non-Huawei or -ZTE equipment with preexisting Huawei or ZTE equipment, A961-65; A736-38; A101, or with needing to rip and replace all equipment from targeted companies, A1061-62; A759-60;

- the likelihood that some carriers will be unable to absorb increased costs—estimated at more than $410 million for just one carrier, A792—without going out of business or raising prices for consumers, *see* Order ¶ 118 (estimating only "markup" costs); A737-38, A744;

- the facts that Huawei is the *only* provider of certain products and services for some rural carriers; that even where those carriers can find other suppliers, many are prohibitively expensive, *see, e.g.*, A58 (Ericsson and Lucent's prices are two-to-four times higher than Huawei's); and that those increased prices risk reducing access to and quality of services, depressing rural economies, A957-61, A970; A1060-62; A842-44; A88-92; and

- the disproportionate delays in 5G deployment in rural communities, "where the business case for deployment may be marginal," A1901, which will "widen the digital divide in rural areas" in which "adequate communications services are already scarce," A1902; A741, and decrease needed economic investment, *see* A741.

Third, the Commission's analysis of its rule's purported benefits is irrational. The agency worked backwards from its estimated cost of $960 million to arrive at the unsupported assertion that preventing "even" a 0.162% disruption of the U.S. economy's annual growth, a 0.072% disruption of the digital economy, a reduction in malicious cyberactivity of "even" 1.68%, or a reduction in the cost of data breaches by "just" 0.137% would justify the rule's costs. Order ¶ 109. But as Commissioner O'Rielly acknowledged, *see* Order pp. 112-13, the FCC made no effort to factually substantiate that preventing USF recipients from purchasing Huawei or ZTE (or any other) equipment would produce these benefits, much less to trace them to specific vulnerabilities in any particular types of products. Nor did the Commission factually substantiate how the operation of the rule in the USF context, as opposed to in communications networks at large, would produce such benefits. Instead, the FCC simply assumed without evidentiary support that, absent the rule, the U.S. economy would suffer reduced growth and costs associated with malicious cyberactivity and identity theft. Order ¶ 109. But as Huawei and other commenters explained, cybersecurity risks come from many sources, and all equipment manufacturers use components manufactured or sourced

from suppliers located in China. A177-78. The Commission did not consider how the risks created by this global supply chain would affect the expected benefits of a rule blacklisting only two companies.

c. Finally, the FCC never explained why it rejected proposed alternatives that would have served its putative national security objectives more effectively and at lower cost. The Commission failed to consider the recommendations of its own expert advisors, the Communications Security, Reliability, and Interoperability Council, echoed by Huawei and other commenters, to adopt a risk-based approach to supply-chain security focusing on design principles and processes rather than blacklisting certain companies. A171-72; A944-47. Indeed, the Commission made no findings and conducted no cost-benefit analysis to support rejecting that kind of risk-based approach. That cannot be the product of reasoned decisionmaking.

C. The USF rule violates the APA and due process because it is vague and standardless

1. A rule is arbitrary and capricious if it does not articulate a comprehensible standard

a. A rule is arbitrary and capricious if it is too indefinite for regulated parties to understand it and conform their conduct to it; to prevent

arbitrary enforcement among similar cases; and to enable meaningful judicial review. *See USPS* v. *Postal Regulatory Comm'n*, 785 F.3d 740, 750 (D.C. Cir. 2015). Thus, an agency may not "refuse to define the criteria it is applying," *Pearson* v. *Shalala*, 164 F.3d 650, 660 (D.C. Cir. 1999), or otherwise "'fail[] to articulate a comprehensible standard' for assessing the applicability of a [regulatory] category," *ACA Int'l* v. *FCC*, 885 F.3d 687, 700 (D.C. Cir. 2018) (citing *USPS*, 785 F.3d at 753-55); *see Diamond Roofing Co., Inc.* v. *Occupational Safety & Health Review Comm'n*, 528 F.2d 645, 649 (5th Cir. 1976) (reversing adjudication because standard failed to provide "fair warning of the conduct it prohibits or requires" and "reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority"). Relatedly, a rule is arbitrary where the agency fails to define key terms or to indicate "whether [a criterion] is a necessary condition, a sufficient condition, a relevant condition even if neither necessary nor sufficient, or something else." *ACA Int'l*, 885 F.3d at 703.

These requirements effectuate core values underlying the rule of law. Standardless rules make it impossible for regulated parties to understand and comply with the law. They also invite arbitrary enforcement; result in "differential treatment of seemingly like cases," *USPS*,

785 F.3d at 753 (citation omitted); and prevent agencies from "'satisfactorily explain[ing] why a challenged standard embraces one potential application but leaves out another, seemingly similar one,'" even though the agency's application of the rule to another, similar entity logically "should compel" the same conclusion. *ACA Int'l*, 885 F.3d at 700 (citing *USPS*, 705 F.3d at 754-55). And vague standards thwart judicial review by "provid[ing] virtually nothing to allow the court to determine whether [the agency's] judgment reflects reasoned decisionmaking." *Tripoli Rocketry Ass'n* v. *BATF*, 437 F.3d 75, 81 (D.C. Cir. 2006).

In *ACA International*, for example, the D.C. Circuit invalidated an FCC order addressing which types of equipment were "autodialers." 885 F.3d at 695. The FCC had stated that any equipment with the potential "capacity" to automatically dial random or sequential numbers qualified. *Id.* As the court explained, however, the FCC's "unreasonably, and impermissibly, expansive" definition would have covered "all smartphones," which could gain such "capacity" simply "by downloading an app." *Id.* at 700. And the court rejected the FCC's contention that the FCC had not resolved "whether smartphones qualify as autodialers," because the FCC's own "logic seemingly should compel concluding that smartphones"

are covered. *Id.* at 699-700. Further, to conclude that the question remained open "would have left affected parties without concrete guidance even though several of them specifically raised the issue with the agency, and even though the issue carries significant implications." *Id.* at 699. Either way, the FCC's action was arbitrary and capricious because it did not "articulate a comprehensible standard." *Id.* at 700 (quoting *USPS*, 785 F.3d at 753).

Similarly, in *Tripoli Rocketry*, the D.C. Circuit invalidated an agency's classification of propellant fuel used in hobby rockets as an "explosive" because it "deflagrate[s]," or rapidly burns. 437 F.3d at 76. The court explained that the agency had neither "provided a clear and coherent explanation of its classification" nor "articulated the standards that guided its analysis." *Id.* at 81. "The fatal shortcoming … is that [the agency] never reveals how it determines that a material deflagrates," and that "the agency never defines a range of velocities within which materials will be considered to deflagrate." *Id.* The court explained that it needed "*some* metric for classifying materials," and that the agency's "unbounded relational definition—*i.e.*, 'the deflagration reaction is *much faster* than the reaction achieved by what is more commonly associated

with burning'—[did] not suffice, because it says nothing about what kind of differential makes one burn velocity 'much faster' than another." *Id.*

b. The APA's arbitrary-and-capricious standard comports with the Due Process Clause, which likewise requires regulations to "give fair notice" of forbidden conduct and to establish intelligible standards to prevent "discriminatory enforcement." *FCC* v. *Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). "[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972).

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

The USF rule contravenes these principles.

First, none of the rule's key terms is defined. *See USPS*, 785 F.3d at 754; *Tripoli Rocketry*, 437 F.3d at 81. The rule calls for designation of companies "posing a national security threat to the integrity of communications networks or the communications supply chain." Order p. 66. But it does not define critical terms, like "threat," "national security," "integrity," "communications networks," and "communications supply chain."

Second, the rule is otherwise "indiscriminate and offers no meaningful guidance" for determining whether a company poses a national security threat, *see USPS*, 785 F.3d at 754, and no "metric … to allow the court to determine whether [the agency's] judgment" about a given company "reflects reasoned decisionmaking," *Tripoli Rocketry*, 437 F.3d at 81. For example, the rule fails to address whether designation should be based on a company's actions, its associations, or something else—or the mens rea applicable to any relevant conduct. Nor does the rule provide a metric for the kind or degree of conduct or associations that might make a company susceptible to designation. Instead, the FCC has simply declared that designations will be "base[d] … on the totality of evidence surrounding the affected entity." Order ¶ 41. But the Commission cannot satisfy the APA or due process by issuing a vague rule and then announcing ad hoc judgments about whether particular companies satisfy it.

The USF rule also leaves the Bureau, courts, and regulated parties guessing about the process for making, reversing, and reviewing designations. The rule does not disclose what quantum of proof is required for "initial designation"; what factors the Commission or the Bureau will consider sua sponte to make that designation; or how the Bureau will

scrutinize "petition[s for designation] from an outside party." 47 C.F.R. § 54.9(b)(1). Nor does the rule provide meaningful guidance for rendering a "final designation" or for reversing an "initial designation" or "final designation." And it does not indicate what a designated party must establish, and by what burden of proof, to convince the Bureau that it was wrongly designated. *See id*. Indeed, the FCC confessed that it simply "will base its determination on the totality of evidence surrounding the affected entity." Order ¶ 41.

The rule's "purported standard[s]" are thus "indiscriminate and offer[] no meaningful guidance to affected parties." *ACA Int'l*, 885 F.3d at 700 (quotation marks omitted). Such a vague rule is not lawful.

III. The USF rule's "initial designation" procedures violate designated companies' due process rights

The USF rule also must be vacated because it provides no pre-deprivation process by which companies potentially subject to an "initial designation" as a national security threat can protect their constitutional interests. The Commission erroneously determined that companies have *no* constitutionally protected interests and thus are not entitled to *any* pre-deprivation process. But the Constitution protects liberty interests in

reputation, and requires—at least—notice and an opportunity to be heard before any deprivation of such a liberty interest.

A. The FCC's failure to recognize that companies targeted for "initial designation" have constitutionally protected reputational interests renders the USF rule arbitrary, capricious, and unlawful

Under the "stigma-plus" test, government action implicates a person's protected liberty interests when it stigmatizes a person's reputation "in connection with the denial of some specific constitutional guarantee or some more tangible interest." *Marrero* v. *City of Hialeah*, 625 F.2d 499, 513 (5th Cir. 1980) (quoting *Paul* v. *Davis*, 424 U.S. 693, 700-02 (1976)); *see Wisconsin* v. *Constantineau*, 400 U.S. 433, 437 (1971). The government imposes such stigma when it labels an individual or entity a national security threat. *E.g.*, *Nat'l Council of Resistance of Iran* v. *Dep't of State*, 251 F.3d 192, 204 (D.C. Cir. 2010); *Latif* v. *Holder*, 28 F. Supp. 3d 1134, 1151 (D. Or. 2014). And tangible harm includes a change in status, such as loss of government employment, *Dennis* v. *S&S Consol. Rural High Sch. Dist.*, 577 F.2d 338, 343 (5th Cir. 1978); loss of "business goodwill" protected by law, *Marrero*, 625 F.2d at 514-15; and loss of opportunity to operate one's business, *Texas* v. *Thompson*, 70 F.3d 390, 393 (5th Cir. 1995); *Phillips* v. *Vandygriff*, 711 F.2d 1217, 1222 (5th Cir.

1983). Similarly, an entity has a "constitutionally cognizable interest in avoiding the loss of government contracting opportunities based on stigmatizing charges," even where the stigmatizing action does not amount to actual debarment from "virtually all government work for a fixed period of time." *Reeve Aleutian Airways, Inc.* v. *United States*, 982 F.2d 594, 598 (D.C. Cir. 1993) (quotation marks omitted).

Here, by "initially designating" companies as threats to national security, the USF rule will stigmatize them with "a badge of infamy." *Wieman* v. *Updegraff*, 344 U.S. 183, 190-91 (1952). Indeed, the Commission *concedes* that "designation by the Commission as a threat to national security is likely to impose some amount of stigma," Order ¶ 102 & n.277, and the rule tangibly alters both designated companies' ability to compete and their protected goodwill. Following publication of the NPRM, for example, Huawei customers "cancelled purchase orders, stopped paying for equipment and services already provided, and suspended projects and contract negotiations," causing "huge financial losses" and "reductions in its U.S. workforce." A260; *see also, e.g.*, A799 ("When the FCC released its proposed rule, United was in the process of ordering new Huawei equipment. … This project is now on hold."); A808 ("Union has in the past

and would continue to purchase Huawei equipment and services if the proposed rule is not adopted."); A791 ("Viaero has purchased equipment and services from Huawei and would continue to do so if the FCC does not finalize its proposed rule."); A794 ("JVT has and, absent the proposed rule, would continue to purchase equipment, services, and devices provided by the companies the FCC appears to be targeting with its proposed rule. JVT's network is made up largely of Huawei equipment.").

Because the FCC failed to recognize that "initial designation" implicates constitutionally protected interests, its Order rests on an error of law. It is therefore arbitrary and capricious under the APA, and should be vacated. *See SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943).

B. The USF rule does not afford bedrock due process protections

The Commission's error also requires vacatur on constitutional grounds, because the FCC erroneously concluded that "initially designated" companies are not entitled to pre-deprivation procedures. Because the USF rule deprives "initially designated" companies of constitutionally protected reputational interests, the FCC must provide adequate pre-deprivation procedural protections.

To determine what procedures are constitutionally due, courts assess (1) the "private interest that will be affected by the official action"; (2) the "risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) the "[g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

Applying this test, courts have held that, even if the government invokes national security, notice and an opportunity to be heard are the norm where private interests are important and the value of the procedures evident. In *Ralls Corp.* v. *CFIUS*, 758 F.3d 296, 318-20 (D.C. Cir. 2014), for example, the D.C. Circuit held that a company owned by two Chinese nationals must, "at the least, … be informed of the official action, be given access to the unclassified evidence … and be afforded an opportunity to rebut that evidence" "before [a] Presidential Order prohibits the transaction" on national security grounds. And even entities designated as foreign terrorist organizations are entitled to notice that a "designa-

tion is impending," notice of the "unclassified items upon which [the government] proposes to rely," and "the opportunity to be heard at a meaningful time and in a meaningful manner." *Nat'l Council of Resistance*, 251 F.3d at 208 (quotation marks omitted).

Here, persons or entities targeted as security threats have a significant "private interest" in their reputations and their corresponding ability to sell services or equipment. And without notice and an opportunity to be heard, there is a serious "risk of an erroneous deprivation" of those interests, because, as these FCC proceedings have shown, speculation and prejudgment may otherwise form the improper basis for designation decisions. Finally, these protections cost little. Any minimal administrative burden would be amply outweighed by the benefit to both the stigmatized entity and the rule of law. Indeed, government regulations in other debarment contexts workably require notice and an opportunity to respond. *See* A446; 2 C.F.R. § 180.805 (Office of Management and Budget); 48 C.F.R. § 9.406-3 (General Services Administration).

Rather than provide these constitutionally required *pre-deprivation* protections, the USF rule affords designated entities *only* the opportunity

to "file comments *responding to* the initial designation." Order ¶ 40 (emphasis added). That is not constitutionally sufficient. Vacatur is required.

IV. The Commission's "initial designation" of Huawei was unlawful and unconstitutional

A. By simultaneously promulgating the rule and entering the "initial designation," the Commission engaged in impermissible retroactive agency action

In the Order, the Commission not only issued the USF rule, but also "initially designated" Huawei as a supposed national security threat. This "initial designation" was necessarily based on Huawei's alleged conduct and associations before the promulgation of the rule. By making the "initial designation" simultaneously with the announcement of the USF rule, the Order violated a fundamental principle in the APA: that agencies cannot engage in retroactive rulemaking. It also violated the "fair notice" requirement of the Due Process Clause. The rule and "initial designation" must therefore be vacated for these reasons too.

Absent express statutory authorization, agencies cannot promulgate retroactive rules. *See* 5 U.S.C. § 551(4) (defining rule as an agency statement of "future effect"); *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 216 (1988) (Scalia, J., concurring). There is a presumption against retroactive lawmaking generally. *E.g.*, *Bowen*, 488 U.S. at 208; *De Niz*

Robles v. *Lynch*, 803 F.3d 1165, 1169-70 (10th Cir. 2015) (Gorsuch, J.). And under the APA, agency action can constitute a "rule" only if it has "legal consequences *only* for the future." *Bowen*, 488 U.S. at 216 (Scalia, J., concurring) (emphasis added); *see* 5 U.S.C. § 551(4); *Am. Airlines, Inc.* v. *Civil Aeronautics Bd.*, 359 F.2d 624, 629 (D.C. Cir. 1966) (en banc).

Thus, courts have invalidated purported rules that attached to pre-promulgation, rather than to exclusively post-promulgation, conduct. *Bowen*, 488 U.S. at 215-16; *Nat'l Mining Ass'n* v. *Dep't of Interior*, 177 F.3d 1, 8 (D.C. Cir. 1999); *Rock of Ages Corp.* v. *Sec'y of Labor*, 170 F.3d 148, 158-59 (2d Cir. 1999); *United States* v. *AMC Entm't, Inc.*, 549 F.3d 760, 770 (9th Cir. 2008). Even rules that impose only forward-looking or preventive measures are retroactive if those measures result from a determination that pre-promulgation conduct fails to meet the legal standards in a later-enacted rule. *See, e.g.*, *Nat'l Mining*, 177 F.3d at 8 (invalidating a rule insofar as it denied eligibility for new mining permits based on pre-rule acts); *Smith* v. *Doe*, 538 U.S. 84, 89-90 (2003) (law requiring sex offenders to place their names on a public registry based on pre-promulgation convictions was retroactive).

The Order engages in such unlawful retroactive rulemaking. As the FCC's statement of bases and purposes and cost-benefit analysis confirm, the USF rule and the "initial designation" resulted from a single agency rulemaking process and proceeding, culminating in a single integrated Order. That Order both announced a new rule and decreed that Huawei had been "initially designated" a security risk under it. Furthermore, because Huawei's "initial designation" was announced together with the rule, it could *only* have been based on Huawei's alleged pre-promulgation conduct and associations. The Order does not even pretend otherwise. The FCC's action therefore violates the law against retroactive rulemaking, because, under the Order, the USF rule does not have exclusively "future effect," but rather also "imposes … 'new disabilit[ies]' … based on transactions or considerations already past." *Nat'l Mining*, 177 F.3d at 8.

Furthermore, the rule and "initial designation" violate the "fair warning" requirement of due process. It is axiomatic that "agencies should provide regulated parties fair warning of the conduct a regulation prohibits or requires." *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (cleaned up); *see United States* v. *Chrysler Corp.*, 158 F.3d 1350, 1354-55 (D.C. Cir. 1998); *cf. PHH Corp.* v. *CFPB*, 839 F.3d 1,

47-48 (D.C. Cir. 2016) (Kavanaugh, J.), *vacated, and on reh'g en banc*, 881 F.3d 75 (2018). The Order violates this "fair warning" requirement. The rule and "initial designation" caused Huawei immediate and serious reputational harm. *Supra* pp. 59-60. And, ignoring basic rule-of-law principles, the Commission gave Huawei no prior notice that it could be "initially designated" in the USF rulemaking proceeding; no "opportunity … to conform [its] conduct" to the newly announced rule of which it had no prior notice, *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994); and no procedural protections that would have enabled it to confront the evidence against it in a fair and impartial process, *cf.* 5 U.S.C. § 554.

That the FCC labeled the "initial designation" an "adjudicatory decision" does not cure these legal flaws. Order ¶ 98 & n.267. It is doubtful that the APA allows adjudicatory orders to be issued as part of rulemaking proceedings: The APA defines "adjudication" as an "agency process for the formulation of an order" and an "order" as "the whole or a part of a final disposition … *in a matter other than rule making*." 5 U.S.C. § 551(6), (7) (emphasis added). Indeed, as Justice Scalia explained, the

entire APA is based on a dichotomy between, and a separation of, adjudication and rulemaking. *Bowen*, 488 U.S. at 216 (Scalia, J., concurring); *see Ass'n of Nat'l Advertisers* v. *FTC*, 627 F.2d 1151, 1160 (D.C. Cir. 1979).

In any event, agencies may not simply label rulemakings as adjudications to evade the APA's limitations—including the limitation that rules may have only "future effect." *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 763-64 (1969) (quoting 5 U.S.C. § 551(4)); *see also Azar* v. *Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019). Moreover, by definition, an adjudication involves application of *existing* law, not new law, to existing facts, thereby attaching current legal consequences to past conduct—the signature and substance of retroactive agency action. *Bowen*, 488 U.S. at 221 (Scalia, J. concurring); *see De Niz Robles*, 803 F.3d at 1170, 1172. And principles of "fair notice" apply even in adjudications. *Trinity Broad. of Fla.* v. *FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000). But in the case of Huawei's "initial designation," there was no existing law to apply, and Huawei was never given "fair warning" of the rules by which it would be judged. Rather, the Commission applied its new rule to alleged pre-promulgation conduct and associations—the signature and substance of retroactive rulemaking, not adjudication, and the signature and substance of

agency action taken without "fair warning." *See Nat'l Mining*, 177 F.3d at 8; *Chrysler Corp.*, 158 F.3d at 1354-55.

Qwest Services Corp. v. *FCC*, 509 F.3d 531 (D.C. Cir. 2007), which the FCC cites (Order ¶ 98 n.267) is not to the contrary. In that case, the Commission issued an NPRM seeking comment on the proper classification of certain types of calling cards. *Id.* at 535. In its final Order, "notwithstanding the proceeding['s] launch as a rulemaking," the Commission "split the proceeding into a dual one, half rulemaking and half adjudication," and classified the cards in an adjudicatory "declaratory ruling," which it explained could have retroactive effect. *Id.* at 535-36. One party, iBasis, challenged the Order, arguing that "such a split [was] inherently improper." *Id.* at 536. The D.C Circuit disagreed, noting that iBasis had pointed to "no case and to nothing in the [APA] … that bars such a bifurcation." *Id.* The court further noted that iBasis had not identified any right it had lost because of the FCC's switch from rulemaking to adjudication. *Id.* The court acknowledged that, in reply, iBasis argued that the switch deprived it of "notice that there was a risk of retroactive effect." *Id.* "Properly raised," the court agreed, "this would be an extremely serious claim against the Commission's curious way of doing business." *Id.*

But the court explained that it "ordinarily d[id] not consider claims raised for the first time in a reply brief," and that the iBasis brief did not point to "any fact or argument … beyond" what the Commission had already discussed in its Order. *Id.*

Qwest does not support the Commission's action here. *Qwest* did not address the APA language, cited above, that bars issuing adjudicatory orders in rulemaking proceedings. Nor did the court consider its own circuit precedent that disapproved of combined rulemakings and adjudications based on an extended analysis of the APA. *See Nat'l Advertisers*, 627 F.2d at 1160; *Am. Airlines*, 359 F.2d at 629-31; *Forsyth Mem'l Hosp., Inc.* v. *Sebelius*, 652 F.3d 42, 43 (D.C. Cir. 2011) (Brown, J., dissenting from denial of rehearing en banc) (criticizing "a hybrid proceeding in which adjudication served as a Trojan horse for retroactive rules"). Moreover, unlike iBasis in *Qwest*, Huawei has timely raised the "extremely serious claim" that the Commission's "curious way of doing business" in this case has adversely affected it in multiple ways, including by subjecting it to an unlawful retroactive rule, and by imposing stigmatic and other injury through new legal rules announced and imposed without fair notice or adequate procedures.

B. The "initial designation" is arbitrary and capricious

1. The "initial designation" rests on an erroneous understanding of Chinese law resulting from the FCC's disregard of Huawei's expert submissions

The Commission's "initial designation" is also invalid because it is arbitrary and capricious and rests on legal error. An agency order "may not stand if the agency has misconceived the law." *Chenery*, 318 U.S. at 94, 97-90; *see* 5 U.S.C. § 706(2)(A). And "[t]he content of foreign law is a question of law" on which the FCC has no expertise and which "is subject to de novo review." *Iracheta* v. *Holder*, 730 F.3d 419, 423 (5th Cir. 2013) (quoting *Access Telecom, Inc.* v. *MCI Telecomms. Corp.*, 197 F.3d 694, 713 (5th Cir. 1999)). Here, the Commission committed two legal errors with respect to Chinese law, each of which requires vacatur.

First, the Commission failed to meaningfully consider Huawei's expert submissions on the meaning of Chinese law and explain why it was rejecting them. *See State Farm*, 463 U.S. at 43-52. The Commission itself considered Chinese law to be a crucial consideration, *see* Order ¶¶ 27, 45-46, 48-49, 56, repeatedly stating that "Chinese laws obligating [Huawei] to cooperate with any request by the Chinese government to use or access [its] system, pose a threat to the security of communications networks

and the communications supply chain." Order ¶ 48; *see also* Order ¶ 27; Order p. 109.

But, contrary to the FCC's premises, Huawei's experts explained that:

- Chinese law does not authorize the Chinese government to compel companies to engage in malicious cyberactivity. Designation Cmts. 93-102. Article 13 of the Counterespionage Law permits certain activities "[a]s may be needed for counter-espionage work," but it "does not empower state security authorities to plant software backdoors, eavesdropping devices or spyware, or to compel third parties to do so." A360. Further, the provision generally does not apply to "telecommunication equipment manufacturer[s] such as Huawei, let alone an overseas subsidiary." *Id.*

- Article 18 of the Anti-Terrorism Law applies only to telecommunications and internet service providers, not equipment manufacturers like Huawei. A361. Further, it applies only when authorities are seeking to "prevent and investigate terrorist activities." *Id.*

- Article 28 of the Cyber Security Law applies only to network operators. A362.

- Any obligations that private companies might have under Articles 7, 14, or 17 of the National Intelligence Law are purely defensive and apply "only when acts that endanger China's national security are conducted." A1582, A1586. Those provisions do not provide the affirmative authorization that would be required for the Chinese government to compel a telecommunications equipment manufacturer to plant backdoors or spyware in its equipment. A389.

- None of the provisions of Chinese law relied upon by the Commission applies beyond Chinese territory. *See* A362-63; Designation Cmts. 102-04.

The Commission conducted only the most cursory examination of Huawei's expert submissions and Chinese law, and did not provide a reasoned response. For that reason alone, the "initial designation" is arbitrary and capricious and cannot stand.

Second, the FCC misunderstood Chinese law, which in fact does not authorize the Chinese government to compel Huawei to spy for it. The Order concedes that Chinese laws are subject to other readings. *See* Order ¶ 56. Moreover, as summarized above and in further detail in Huawei's Designation Comments (at 93-105), https://tinyurl.com/rf6prwq, Huawei's experts explained how Chinese law does not authorize the Chinese government to compel Huawei to engage in malicious cyberactivity and, in any event, does not apply extraterritorially. The FCC's misunderstanding of Chinese law was critical to its determination that Huawei poses a national security threat. Its "initial designation" of Huawei thus cannot stand.

2. The "initial designation" is not supported by substantial evidence

As discussed at length in Huawei's opposition in the separate "final designation" proceeding that the Bureau is conducting, the "initial designation" made by the Commission itself is not supported by substantial evidence. Designation Cmts. 36-90. It therefore must be vacated.

a. The Order completed the Commission's decisionmaking on the "initial designation" issue (with adverse legal, reputational, and economic consequences for Huawei). Under the APA, the factual findings that underlie it must be "supported by substantial evidence," *Allentown Mack*, 522 U.S. at 366; *Safe Extensions, Inc.* v. *FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007), or "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938)). The standard is objective. *Allentown Mack*, 522 U.S. at 377. The evidence must "hav[e] rational probative force," *Consol. Edison*, 305 U.S. at 230, and "must do more than create a suspicion of the existence of the fact to be established," *Universal Camera*, 340 U.S. at

477 (quotation marks omitted). Furthermore, "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Id.* at 488.

b. Huawei submitted extensive evidence showing that its products are safe and reliable and that it is not a national security threat. But the Commission wholly ignored this evidence—without reasoned explanation.

Huawei's extensive evidence showed that:

- Huawei is independent from the Chinese government and will not acquiesce to any demands to engage in malicious cyber-activity. Huawei is a private company owned by its employees and by its founder and governed by a Board of Directors comprising private citizens. The internal Communist Party Committee (which all companies operating in China, including foreign-owned companies, must have) does not make or exercise influence over business decisions. Designation Cmts. 83-87.

- Huawei adheres to leading cybersecurity practices. It has "an end-to-end global cybersecurity system through stringent security policies and processes in every facet of its global operations that reflect international standards and guidelines, local laws and regulations, and feedback from vendors, employees, suppliers, and customers [with] enterprise-wide governance of cybersecurity and privacy policies and procedures." A128-29; *see* A233-35; A453-595. Huawei "encourage[s] audits, reviews and inspections." A548. And Huawei USA has only limited, consent-based, and auditable access to customer networks for specific purposes through its mandatory Secure Network Access Solution. A236-38; A256-57.

- Huawei's products have been subjected to rigorous testing by multiple oversight entities. For example, the United Kingdom worked with Huawei to establish the independent Huawei Cyber Security Evaluation Centre. *See* A1491. Huawei USA also made its products available for "third-party testing" and "internal and external processes that can detect and protect against possible malicious acts by third parties or insiders." A236, A241-43.

- Huawei's customers have expressed satisfaction with the safety of its products. By the end of 2017, 197 Fortune Global 500 companies—45 of which are Fortune 100 companies—had chosen Huawei's offerings for their digital transformation. *See* A1527. And the governments and public entities of many countries, such as the United Kingdom, Canada, and Finland, continue to trust Huawei's equipment. *See* A980-81. Many countries in Europe, Africa, the Middle East, and the Americas plan for further deployment of Huawei's 5G equipment. *See* A2027.

- Huawei's presence improves competition and product diversity. Banning Huawei from the U.S. marketplace will delay domestic 5G deployment, hurting the economy and causing the loss of tens of thousands of jobs. *See, e.g.*, A1959-71. The decreased competition will drive up prices, reduce coverage, degrade customer support, and introduce uncertainty, to the particular detriment of rural carriers. *See* A1971-82; A734-40; Designation Cmts. 54-56 (summarizing relevant evidence).

c. Not only did the FCC ignore Huawei's affirmative evidence, but the FCC's determination was based on its own resort to materials that are not legally cognizable evidence and materials that, even if considered evidence, are so unreliable as to deserve no weight. That, too, calls for vacatur, because an agency may not make determinations based

on such speculation or unsubstantiated assertions. *See, e.g.*, *Safe Extensions*, 509 F.3d at 604-05; *McDonnell Douglas Corp.* v. *Dep't of Air Force*, 375 F.3d 1182, 1190 n.4 (D.C. Cir. 2004); *White ex rel. Smith* v. *Apfel*, 167 F.3d 369, 375 (7th Cir. 1999).

To justify "initially designating" Huawei, the Commission asserted that Huawei presents a "unique" threat because of (1) its size, (2) the security flaws in its equipment, (3) its design and manufacturing processes, (4) its close relationship with the Chinese government, (5) obligations imposed by Chinese law, and (6) the end-to-end nature of Huawei's service agreements. Order ¶ 45. But aside from the irrelevance of these considerations to the USF statute, *see State Farm*, 463 U.S. at 43-52, and their inability to distinguish like companies, *infra* pp. 79-81, the Commission violated basic evidentiary principles by relying on:

- **Statutes.** Order ¶¶ 12, 13, 45, 48. But "[s]tatutes are not evidence," *Porter* v. *Shineski*, 650 F. Supp. 2d 565, 568 (E.D. La. 2009), and adjudicative bodies "should not conflate legislative findings with 'evidence.'" *Pena* v. *Lindley*, 898 F.3d 969, 979 (9th Cir. 2018); *cf. INS* v. *Chadha*, 462 U.S. 919, 957-58 (1983); Designation Cmts. 57-58.

- **The HPSCI Report.** Order ¶¶ 7, 30, 45-46, 49, 50, 56. But courts have "consistently excluded congressional reports" as evidence "because of [their] inherently political nature." *Richmond Med. Ctr.* v. *Hicks*, 301 F. Supp. 2d 499, 512 (E.D. Va.

2004), *rev'd on other grounds*, 570 F.3d 165 (4th Cir. 2009); *see also Baker* v. *Firestone Tire & Rubber Co.*, 793 F.2d 1196, 1199 (11th Cir. 1986). Congressional proceedings lack the "substantive rules" and "procedural safeguards" applicable to adjudicative bodies. *Chadha*, 462 U.S. at 964-65 (Powell, J., concurring in the judgment). The HPSCI Report relies primarily on unsubstantiated hearsay (often of unidentified declarants), gathered in a politically motivated and procedurally infirm process, and does not even *purport* to make factual findings. Designation Cmts. 59-72; *supra* pp. 9-10.

- **Indictments alleging irrelevant conduct.** Order ¶¶ 28, 45-46, 48, 52, 62. But indictments are not evidence; they contain untested "accusation[s] only," *United States* v. *Fattah*, 914 F.3d 112, 174 (3d Cir. 2019), and thus are "quite consistent with innocence." *Hurst* v. *United States*, 337 F.2d 678, 681 (5th Cir. 1964); *see United States* v. *Anderson*, 174 F.3d 515, 524 (5th Cir. 1999); 5th Cir. Model Crim. Jury Instr. § 1.05 (2015); Designation Cmts. 72-74.

- **Unreliable hearsay.** The Commission relied on unreliable hearsay from multiple declarants—and much of it is itself simply unsubstantiated assertion, such as a statement by FBI Director Christopher Wray and three congressional letters "express[ing] concern" about Huawei. *See* Order ¶¶ 6, 11, 52. But hearsay lacking indicia of reliability should not be afforded evidentiary value. *E.g.*, *Queen* v. *Hepburn*, 11 U.S. 290, 296 (1813) (Marshall, C.J.); *Chambers* v. *Mississippi*, 410 U.S. 284, 298 (1973); Designation Cmts. 74-77.

- **Outside expert reports that the Commission has not thoroughly reviewed.** Agencies may sometimes rely on outside analyses, but only if they undertake their "own independent and thorough review." *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 907 n.17 (5th Cir. 1983); *see Sea Robin Pipeline Co.* v. *FERC*, 795 F.2d 182, 188 (D.C. Cir. 1986). And any reports must be reliable. *See, e.g.*, *Donahue* v. *Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002). The Commission did not

heed those principles here. Instead, it relied, without independent examination, on so-called expert reports that themselves consisted mostly of unsourced rumors and hearsay. *See* Order ¶¶ 50-51, 54, 57; Designation Cmts. 77-81.

- **Classified information as a critical basis for decision.** The FCC's reliance on non-evidence and unreliable evidence shows that the classified information on which it admittedly relied—both directly and by relying on sources that relied on classified information (Order ¶¶ 43 n.124; 44 & n.129; 45 & nn.130-31; 48 & n.144; 50 & nn.148-49, 151, 152; 56 & nn.174-75; 58 & n.186; Order p. 108)—was critical to the "initial designation." But an agency may rely on classified information only where "the unclassified material provided to [the affected party] is sufficient to justify the [decision]." *People's Mojahedin Org.* v. *U.S. Dep't of State*, 613 F.3d 220, 231 (D.C. Cir. 2010) (per curiam); Designation Cmts. 81-82.

When the FCC's non-evidence and unreliable evidence are set aside, there is insufficient evidence remaining in the record to support the factual premises underlying the "initial designation." Huawei's affirmative evidence remains unrebutted. Moreover, the Commission failed to support its assertions that the Chinese government or Communist Party exerts control or influence over Huawei, or that Huawei's equipment contains security flaws. *See* Designation Cmts. 83-89. And it failed to substantiate how any alleged flaws in Huawei's equipment make it a national security threat, or how Huawei's participation in the U.S. market threatens market diversity. *See id.* at 88-90. Nor did the Commission

draw a rational connection between evidence in the record and its conclusion that Huawei presents a national security threat to communications networks and the communications supply chain. No reasonable mind could find here an evidentiary basis for either the Commission's factual premises or its ultimate conclusion.

3. The Commission's selective blacklisting of Huawei is arbitrary and capricious

The FCC's "initial designation" of Huawei is also arbitrary and capricious because it irrationally treats Huawei differently from similarly situated companies. An agency "must give a reasoned analysis to justify the disparate treatment of regulated parties that seem similarly situated, and its reasoning cannot be internally inconsistent." *ANR Storage Co.* v. *FERC*, 904 F.3d 1020, 1024 (D.C. Cir. 2018) (cleaned up). Absent such a justification, the disparate treatment is arbitrary and capricious. *LePage's 2000, Inc.* v. *Postal Regulatory Comm'n*, 674 F.3d 862, 866 (D.C. Cir. 2012) (per curiam).

Here, the FCC arbitrarily and capriciously singled out Huawei, from among other, indistinguishable companies, for designation as a national security threat. The agency's stated considerations are not unique

to Huawei, and they provide no way to distinguish between Huawei and companies like Nokia, Ericsson, and Samsung. For example:

- Samsung's annual revenue in 2018 was twice Huawei's. A2000-04. And Huawei's 2018 revenue ($107 billion) was significantly larger than ZTE's ($12.7 billion). *Id.* The Commission nonetheless claimed that it relied on "size" to designate *Huawei*. Order ¶ 45.

- Nokia has a joint venture with, and that is supervised by, the Chinese government, Nokia Shanghai Bell Co. A604. Huawei is a private company that is not supervised by the Chinese government. The Commission nonetheless claimed that it relied on the supposed "close relationship" between *Huawei* and the Chinese government. Order ¶ 56. And although Huawei has an internal Communist Party committee, so does *every* company operating in China with three or more Party-member employees, including U.S.-based companies. Designation Cmts. 111.

- Nokia, Ericsson, and Samsung are all end-to-end providers. A1725-35. Yet the Commission claimed that it relied on *Huawei*'s desire to be an end-to-end provider. Order ¶ 56.

- The Commission did not contest Huawei's observation that *every* telecommunications company faces cybersecurity risks that are impossible to eliminate given the global supply chain. A992. Yet the Commission pointed to alleged security flaws in *Huawei*'s equipment, without demonstrating that Huawei's equipment contains security flaws greater than those in other companies' telecommunications equipment. Order ¶ 45.

- "[E]very major telecommunications equipment provider has a substantial base in China." A582. For instance, Nokia has "six Technology Centers, one regional Service Delivery Hub, and

more than 80 offices" in China. A1664. The Commission nonetheless relied on *Huawei's* "design and manufacturing processes" in China. Order ¶ 45.

- Finally, as third-party experts reported to Congress in April 2018, Huawei is not among the entities with "relation[s] to the Chinese government" that allegedly "present the *most* risk to the supply chain." A1854-55 (emphasis added) (naming three other companies but not Huawei). Yet the Commission's "primary focus" was on Huawei, Order ¶¶ 45-46, given Huawei's alleged "relationship with the Chinese government," Order ¶ 48—a relationship that is trivial compared to the relationships that numerous other entities have, A1854-55 (listing 14 other such companies).

The Commission did not address these points or explain why its ad hoc considerations justified singling out Huawei. Nor did the Commission explain how any of its considerations actually factored into its decision as "a necessary condition, a sufficient condition, a relevant condition even if neither necessary nor sufficient, or something else." *ACA Int'l*, 885 F.3d at 703. And the agency identified no metric for determining when ties are too "close"; what constitutes an unacceptable "flaw" or end-to-end agreement; when a company is too big; or when a company's range of products is "enormous" or its access to data too "vast." Order ¶ 56. The "initial designation" is arbitrary and capricious.

C. The "initial designation" can be explained only as the result of pandering to certain members of Congress rather than consideration of the relevant statutory factors

In sum, the only way to understand the Commission's course of conduct here is as pandering to the Commission's benefactors in Congress who wanted it to blacklist Huawei. In ignoring (at best) and undermining (at worst) the factors it was statutorily required to address, the FCC prejudged Huawei's case and provided only pretextual explanations for its actions. That is antithetical to the rule of law, and requires vacatur.

Again, in December 2017, eighteen members of Congress wrote to Chairman Pai expressing concerns about Huawei based on the 2012 HPSCI Report. *Supra* p. 11. In March 2018, Chairman Pai replied, promising to address their concerns with "proactive steps," and, less than a month after that, the Commission issued its NPRM. *Id.* And while the rulemaking was pending, the Commissioners' own public statements revealed that they had already made up their minds about Huawei. *Supra* pp. 14-15. Ultimately, the FCC's Order pointed to Congress' influence. The Commission cited congressional communications, including Senator Cotton's letter, as well as the HPSCI Report. *See, e.g.*, Order ¶¶ 6-7, 11,

30, 35, 44, 45. The FCC also cited the perceived wishes of Congress arising from "the goals underlying section 889 of the 2019 [National Defense Authorization Act]," Order ¶ 38, even though it conceded that that law did not apply because "the USF is neither a loan program nor a grant program," Order ¶ 38 n.114.

The Commission's disregard for the limits on its statutory authority, the requirements of the APA and the Constitution, and the very purposes of the USF statute can be explained only as a politicized response to congressional pressure. But prejudgment and desires to appease members of Congress are not permitted. Agency action is arbitrary and capricious where it is not "based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute." *State Farm*, 463 U.S. at 42; *see, e.g.*, *Carlson* v. *Postal Regulatory Comm'n*, 938 F.3d 337, 343-45 (D.C. Cir. 2019) (agency must consider statutory objectives and articulate how its action accounts for them). Prejudgment and desires to appease congressional benefactors are not among the factors Congress required the FCC to consider in § 254. *Cf. Latecoere Int'l* v. *U.S. Dep't of Navy*, 19 F.3d 1342, 1356 (11th Cir. 1994)

(prejudgment or bias is arbitrary and capricious). Indeed, they raise serious due process concerns in their own right. *See, e.g.*, *Koniag, Inc. Vill. of Uyak* v. *Andrus*, 580 F.2d 601, 610-11 (D.C. Cir. 1978); *Pillsbury Co.* v. *FTC*, 354 F.2d 952, 964 (5th Cir. 1966). And the Commissioners' statements "can only be interpreted as a prejudgment," *Antoniu* v. *SEC*, 877 F.2d 721, 723 (8th Cir. 1989), leaving "no room for a determination that there was a decision by a fair tribunal," *Staton* v. *Mayes*, 552 F.2d 908, 914-15 (10th Cir. 1977). *See also Cinderella Career & Finishing Schs.* v. *FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970); *Valley* v. *Rapides Par. Sch. Bd.*, 118 F.3d 1047, 1052 (5th Cir. 1997).

Finally, agencies must "offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public." *Dep't of Commerce* v. *New York*, 139 S. Ct. 2551, 2575-76 (2019). But at the end of the day, the Commission here has offered only "contrived reasons" to support the "initial designation." *Id.* at 2576. This Court is "not required to exhibit a naiveté from which ordinary citizens are free." *Id.* at 2575 (quoting *United States* v. *Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)).

This was an administrative process responding to politics rather than evidence, reason, and law. The Order should be vacated.

CONCLUSION

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

Dated: March 26, 2020

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CERTIFICATE OF SERVICE

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.

Dated: July 2, 2020

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Dated: July 2, 2020

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