

Case No. 20-16908

**United States Court of Appeals
for the Ninth Circuit**

DONALD J. TRUMP, in his official capacity as President of the United States, and
WILBUR ROSS, in his official capacity as Secretary of Commerce

Defendants and Appellants,

v.

U.S. WECHAT USERS ALLIANCE, CHIHUO INC., BRENT COULTER,
FANGYI DUAN, JINNENG BAO, ELAINE PENG, and XIAO ZHANG

Plaintiffs and Appellees.

From The United States District Court,
Northern District of California,
Case No. 3:20-cv-05910-LB,
Honorable Laurel Beeler, United States Magistrate Judge

**PLAINTIFFS-APPELLEES' RESPONSE TO EMERGENCY MOTION FOR STAY
PENDING APPEAL**

DEHENG LAW OFFICES PC
Keliang (Clay) Zhu
7901 Stoneridge Drive #208
Pleasanton, California 94588
Telephone: (925) 399-5856
Email: czhu@dehengsv.com

ROSEN BIEN
GALVAN & GRUNFELD LLP
Michael W. Bien
Ernest Galvan
Benjamin Bien-Kahn
Van Swearingen
Alexander Gourse
Amy Xu
101 Mission Street, Sixth Floor
San Francisco, California 94105-1738
Telephone: (415) 433-6830
Email: mbien@rbgg.com

Attorneys for Plaintiffs-Appellees

Additional counsel on following page

AFN LAW PLLC

Angus F. Ni

502 Second Avenue, Suite 1400

Seattle, Washington 98104

Telephone: (773) 543-3223

Email: angus@afnlegal.com

DAVIS WRIGHT TREMAINE LLP

David M. Gossett

1301 K Street N.W., Suite 500 East

Washington, D.C. 20005-3366

Telephone: (202) 973-4216

Email: davidgossett@dwt.com

DAVIS WRIGHT TREMAINE LLP

Thomas R. Burke

505 Montgomery Street, Suite 800

San Francisco, California 94111-6533

Telephone: (415) 276-6500

Email: thomasburke@dwt.com

DAVIS WRIGHT TREMAINE LLP

John M. Browning

1251 Avenue of the Americas, 21st Floor

New York, New York 10020-1104

Telephone: (212) 603-6410

Email: jackbrowning@dwt.com

Attorneys for Plaintiffs-Appellees

TABLE OF CONTENTS

	Page
INTRODUCTION	1
BACKGROUND	1
ARGUMENT.....	5
I. DEFENDANTS CANNOT MEET THE STANDARD FOR A STAY	5
A. The Government Is Not Likely to Succeed On the Merits.....	6
1. The District Court Properly Treated the Government’s Action as a Complete Ban on WeChat.	6
2. The District Court Appropriately Reviewed the Government’s National Security Showing	8
3. The District Court Correctly Held That Plaintiffs Showed Serious Questions On Their First Amendment Claims.	10
(a) The First Amendment Applies.	10
(b) The District Court Properly Held That Plaintiffs Have Raised Serious Questions Under Strict Scrutiny Theories.....	12
(c) The District Court Properly Held That Plaintiffs Have Raised Serious Questions Under an Intermediate Scrutiny Theory.....	14
4. Plaintiffs Are Likely to Succeed on the Merits of Their <i>Ultra Vires</i> Claims.....	17
B. Defendants Cannot Show They Will Suffer Irreparable Injury if the Preliminary Injunction is Not Stayed.....	18
C. A Stay Would Irreparably Harm Plaintiffs	21
D. A Stay Would Be Against the Public Interest.....	23
II. NO PARTIAL STAY SHOULD BE GRANTED	24

CONCLUSION25

TABLE OF AUTHORITIES

	Page
 <u>CASES</u>	
<i>44 Liquormart, Inc. v. Rhode Island</i> , 517 U.S. 484 (1996).....	11
<i>Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treas.</i> , 686 F.3d 965 (9th Cir. 2012).....	10
<i>Am.-Arab Anti-Discrimination Comm. v. Reno</i> , 70 F.3d 1045 (9th Cir. 1995).....	8
<i>Arcara v. Cloud Books, Inc.</i> , 478 U.S. 697 (1986).....	12
<i>Backpage.com, LLC v. Dart</i> , 807 F.3d 229 (7th Cir. 2015).....	11
<i>Boumediene v. Bush</i> , 553 U.S. 723 (2008).....	8
<i>Bullfrog Films, Inc. v. Wick</i> , 847 F.2d 502 (9th Cir. 1988).....	12
<i>City of Ladue v. Gilleo</i> , 512 U.S. 43 (1994).....	11, 12
<i>Currier v. Potter</i> , 379 F.3d 716 (9th Cir. 2004).....	11
<i>Doe #1 v. Trump</i> , 957 F.3d 1050 (9th Cir. 2020).....	6
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976).....	21
<i>G.K. Ltd. Travel v City of Lake Oswego</i> , 436 F.3d 1064 (9th Cir. 2006).....	17

<i>Grosjean v. Am. Press Co.</i> , 297 U.S. 233 (1936).....	11
<i>Holder v. Humanitarian Law Project</i> , 561 U.S. 1 (2010).....	8
<i>HomeAway.com, Inc. v. City of Santa Monica</i> , 918 F.3d 676 (9th Cir. 2019).....	11
<i>Lamont v. Postmaster General</i> , 381 U.S. 301 (1965).....	14
<i>Meinhold v. U.S. Dep’t of Def.</i> , 34 F.3d 1469 (9th Cir. 1994).....	24
<i>Melendres v. Arpaio</i> , 695 F.3d 990 (9th Cir. 2012).....	24
<i>Near v. Minnesota</i> , 283 U.S. 697 (1931).....	13
<i>New York Times Co. v. United States</i> , 403 U.S. 713 (1971)	13
<i>NIFLA v. Becerra</i> , 138 S. Ct. 2361 (2018).....	11
<i>Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n</i> , 475 U.S. 1 (1986).....	23
<i>Packingham v. North Carolina</i> , 137 S. Ct. 1730 (2017).....	11
<i>Reed v. Town of Gilbert, Ariz.</i> , 576 U.S. 155 (2015).....	13
<i>Rodriguez v. Robbins</i> , 715 F.3d 1127 (9th Cir. 2013).....	18
<i>Southeastern Promotions, Ltd. v. Conrad</i> , 420 U.S. 546 (1975).....	13

<i>TikTok Inc. v. Trump</i> , No. 1:20-cv-02658(CJN), 2020 WL 5763634 (D.D.C. Sept. 27, 2020), <i>appeal docketed</i> , No. 20-5302 (D.C. Cir. Oct. 8, 2020).....	17, 18, 20
<i>Trump v. Hawaii</i> , 138 S. Ct. 2392 (2018).....	9
<i>Trump v. IRAP</i> , 137 S. Ct. 2080 (2017) (<i>per curiam</i>)	9
<i>U.S. Dep’t of Def. v. Meinhold</i> , 510 U.S. 939 (1993).....	24
<i>United States v. New York Times Co.</i> , 328 F. Supp. 324 (S.D.N.Y. 1971), <i>aff’d sub nom. New York Times</i> <i>Co. v. United States</i> , 403 U.S. 713 (1971).....	10
<i>Ward v. Rock Against Racism</i> , 491 U.S. 781 (1989).....	15
<i>Washington v. Trump</i> , 847 F.3d 1151 (9th Cir. 2017).....	8
<i>Winter v. NRDC</i> , 555 U.S. 7 (2008).....	8

STATUTES

International Emergency Economic Powers Act (“IEEPA”), 50 U.S.C. §§ 1701-1707	2, 9, 17
--	----------

INTRODUCTION

Defendants seek this Court’s assistance to do something previously considered unthinkable—ban an entire communication platform, WeChat, which is the ““primary source of communication and commerce”” for the Chinese diaspora in the United States and is “irreplaceable for its users[.]” ADD-4-5. The district court correctly ruled that this ban raises serious questions under the First Amendment, which must be resolved before the ban is allowed to take effect. ADD-16-21.

Defendants argue that a stay is necessary to protect national security. But their claims of harm—let alone *imminent* harm—ring hollow. The district court was correct in holding that Plaintiffs have at minimum raised “serious questions” on the constitutionality of the ban. A stay would immediately cause irreparable harm to Plaintiffs and to the ability of millions of Chinese-Americans to communicate during the global pandemic, and should be denied.

BACKGROUND

1. WeChat is a multipurpose “super-app” developed by the Chinese company Tencent Holdings Ltd. It has more than 1.2 billion users worldwide, including 19 million regular users in the United States. It “allows its users to send messages, make audio and video calls, and send and receive money, and it also functions as a social-media platform”; and in the U.S. serves as the ““primary

source of communication and commerce” of “those in the Chinese-American [and] Chinese-speaking ... communities[.]” ADD-4.

2. On May 15, 2019, the President issued Executive Order (EO) 13873, declaring a national emergency and prohibiting transactions with foreign countries or foreign nationals that pose undue risks to “information and communications technologies and services supply chain” in the United States. ADD-6, ADD-120-123.

Although EO 13873 was focused on infrastructure, *id.*, on August 6, 2020, the President relied on it to issue two further executive orders, banning “transactions” with two mobile apps created by Chinese companies, WeChat and TikTok. ADD-8-9, ADD-59-61; SUPP-ADD-88-90. The WeChat EO started a 45-day clock (to September 20, 2020), after which “any transaction that is related to WeChat by any person,” to be further defined by the Secretary of Commerce, would be prohibited. *Id.* The TikTok EO was almost identical. *Id.*

3. Plaintiffs, individual and commercial users of WeChat, commenced this action on August 21, 2020, arguing that the WeChat EO violated the Constitution and the International Emergency Economic Powers Act (“IEEPA”), 50 U.S.C. §§ 1701-1707. Dkt.1. The district court heard argument on their preliminary injunction motion on September 17—three days before the ban was to take effect. Dkt.36.

The next day, on September 18, 2020, the Secretary of Commerce issued the *Identification of Prohibited Transactions to Implement Executive Order 13943* (*Identification*), ADD-29, purporting to define the scope of the WeChat EO. It set forth seven categories of prohibited transactions, including barring app stores from allowing downloads and updates of WeChat and barring companies from providing various services (internet hosting, content delivery, internet transit or peering, etc.) to allow WeChat to function. ADD-10, ADD-33-34. The same day, the Secretary publicly stated that the prohibitions would “effectively shut down WeChat for U.S. users” as of September 20. ADD-11.

The district court held an emergency hearing to address the impact of the *Identification* on the pending preliminary injunction motion. Dkt.46. Defendants insisted that the September 20 deadline could not be delayed, and the court accommodated them by setting a schedule for the Plaintiffs to amend the complaint to address the *Identification* and file a renewed preliminary injunction motion that same day, with a hearing scheduled the following day.¹ At 5:50 a.m. on September 20, the district court issued her decision granting the preliminary injunction.

¹ See SUPP-ADD-51:14-52:13, SUPP-ADD-66:9-67:22. Defendants suggest they were somehow prejudiced by the schedule, Mot. 9-10, but at the court’s suggestion the new briefing largely incorporated prior briefing; the only new claim raised APA problems with the *Identification*, on which the court did not rely. ADD-19.

Despite their asserted urgency, Defendants waited nearly five days before filing a motion to stay in the district court, Dkt.68, which was accompanied by a motion requesting a stay by October 1 (without any explanation why that date mattered), Dkt.69. The district court set an expedited briefing schedule, requiring Plaintiffs to file their opposition by October 1 and Defendants their reply by October 6, and set a hearing for October 15 (noting that the court would advance the hearing if possible). SUPP-ADD-38.

4. With their stay motion Defendants submitted additional evidence to the district court, upon which the Secretary purportedly relied in making his *Identification*—in particular, a September 17, 2020, memorandum: “Proposed Prohibited Transactions Related to WeChat Pursuant to Executive Order 13943” (Decision Memo). ADD-37. The Decision Memo repackages evidence—mostly news articles focused on general concerns about Chinese espionage. ADD-37-53. It also disclosed that Tencent “presented the Department of Commerce with a proposal to mitigate the concerns identified in EO 13943,” by offering to “create a new U.S. version of the app, deploy specific security measures to protect the new apps[’] source code, partner with a U.S. cloud provider for user data storage, and manage the new app through a U.S.-based entity with a USG approved governance structure.” ADD-49; *see* SEALED-SUPP-ADD-1-7. The Department also “considered additional mitigations to include escrow and review of WeChat’s

source code, regular compliance audits and notifications, and stringent approvals over management and personnel with access to user data.” ADD-49. The *sole* reason for rejecting these—and any other possible measure designed to address its concerns short of “a complete divestiture” of WeChat by Tencent—was that Commerce did not “trust” Tencent due to its Chinese ownership. *Id.* Yet the purpose of these rejected measures is to provide objective indicia of security that mitigates subjective distrust. Critically, the Decision Memo fails to offer up *any* examples where WeChat was used to surveil Americans—let alone in a manner that poses a national security threat.

Plaintiffs rebutted the newly-submitted evidence in their opposition, to which they attached the declaration of data security expert Joe Hildebrand. SUPP-ADD-19-28. Mr. Hildebrand explains best practices in mitigating data security risk and the targeted measures that are available to Defendants to address those issues as to Tencent and WeChat. Plaintiffs demonstrated to the district court that those mitigating strategies are the very measures that Tencent offered but Defendants rejected in favor of a total ban—apparently because Tencent would not agree to a “complete divestiture.” ADD-49.

ARGUMENT

I. DEFENDANTS CANNOT MEET THE STANDARD FOR A STAY

Defendants ask this Court to stay the preliminary injunction, but do not

come close to meeting their burden: They cannot show that the district court’s decision to grant a preliminary injunction was an abuse of discretion or that irreparable injury will flow from staying the WeChat ban while this litigation proceeds; nor can they successfully dispute the substantial injury to Plaintiffs if the injunction is lifted. *See Doe #1 v. Trump*, 957 F.3d 1050, 1058 (9th Cir. 2020) (burden is on government; first two factors, likelihood of success and irreparable injury, are most critical; and in assessing likelihood of success this Court reviews the preliminary injunction only for abuse of discretion).

A. The Government Is Not Likely to Succeed On the Merits.

To meet the first factor, Defendants must make a “strong showing” that the district court abused its discretion in issuing the preliminary injunction. *Doe #1*, 957 F.3d at 1058, 1062. Defendants’ attacks on the preliminary injunction all fail. Indeed, most involve extraordinary attempts to wish away problematic facts or avoid appropriate judicial review.

1. The District Court Properly Treated the Government’s Action as a Complete Ban on WeChat.

Defendants repeatedly try to sweep problematic facts under the rug. Most egregiously, the district court found that “[t]he government does not meaningfully contest through evidence that the effect of the prohibited transactions will be to shut down WeChat[.]” ADD-16. The court relied on the fact that the same day that Secretary Ross issued the *Identification* he stated on live television that “[f]or

all practical purposes, [WeChat] will be shut down in the U.S. ... as of midnight Monday [Sept. 21, 2020].” ADD-2. Defendants now backpedal, however, and assert that even if a stay is granted, existing users will continue to be able to use WeChat; only new users will be banned. Without any evidence, they claim the ban on business-to-business transactions that support WeChat will not shut it down. Mot. 19-20. But as another senior Commerce Department official made clear the day the *Identification* issued, the government expected the prohibition on updates would degrade WeChat’s usability over time—leading to its inevitable demise. SUPP-ADD-84-87.

The district court was right to accept Secretary Ross at his word. In their recent stay motion in the district court, the government argued that nothing short of a complete ban will advance in the government’s interest in data privacy. Dkt.68 at 13-14. They cannot have it both ways. And as a technical matter, the only practical way to implement the so-called “business-to-business” prohibitions is to cut off all U.S. access to WeChat. SUPP-ADD-4-6 (Roach Decl. ¶¶ 8-13).

Even if the ban would not completely shut down WeChat, the district court appropriately granted a preliminary injunction. But the government’s attempts to wish away problematic facts should not be countenanced—and colors their entire attack on the injunction.

2. The District Court Appropriately Reviewed the Government's National Security Showing

Defendants criticize the district court for conducting *any* inquiry into their assertions of national security risks, disparaging its careful review of the record and arguing that courts must simply accept the government's assertions about national security wholesale. *See* Mot. 2, 13-14. This argument “runs contrary to the fundamental structure of our constitutional democracy.” *Washington v. Trump*, 847 F.3d 1151, 1161 (9th Cir. 2017). “[F]ederal courts routinely review the constitutionality of—and even invalidate—actions taken by the executive to promote national security, and have done so even in times of conflict.” *Id.* at 1163.²

Indeed, the very cases Defendants cite show that courts routinely evaluate national security evidence. In *Holder v. Humanitarian Law Project*, for example, the Court referred to affidavits and explained that “[o]ur precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role.” 561 U.S. 1, 30-34 (2010); *see also, e.g., Winter v. NRDC*, 555 U.S. 7, 24-25 (2008) (reviewing “declarations from some of the Navy’s most senior officers”);³ *Boumediene v. Bush*, 553 U.S. 723, 795-98 (2008)

² Courts also “can and do review foreign policy arguments that are offered to justify legislative or executive action when constitutional rights are at stake.” *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1056 (9th Cir. 1995).

³ Defendants cite two decisions granting stays in the *Winter* matter, Mot. 21, but

(holding unconstitutional statute depriving federal courts of jurisdiction over habeas petitions filed by Guantanamo Bay detainees, notwithstanding deference accorded to national security determinations of political branches).⁴

Defendants rely heavily on the Supreme Court's decision in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), for the proposition that this Court must accept their national security concerns at face value. Mot. 2, 14, 17, 21. The case stands for no such thing: The *Hawaii* Court evaluated the proffered national security justifications; it just found them well-documented and closely related to the prohibitions at issue. *Hawaii*, 138 S. Ct. at 2409. *Hawaii*, moreover, concerned the President's long-established authority over immigration. There is no similar tradition of Presidential authority over channels of communication like the Internet. Indeed, such assertion of authority is limited by settled First Amendment law and by IEEPA, the very law on which the President based the EO. *See* 50 U.S.C. § 1702(b)(1)-(4); Section I.A.4 *below* Review is especially critical when the government seeks to regulate a medium of communications. *See Al Haramain*

neither involved deferring to asserted national security interests without assessing evidence.

⁴ Defendants cite *Trump v. IRAP*, 137 S. Ct. 2080 (2017) (*per curiam*), for the unremarkable proposition that courts sometimes stay preliminary injunctions that inhibit national security prerogatives. Mot. 21. In *IRAP*, however, the Court only partially stayed orders enjoining President Trump's Muslim ban. *IRAP*, 137 S. Ct. at 2088-89.

Islamic Found., Inc. v. U.S. Dep't of Treas., 686 F.3d 965, 995-1001 (9th Cir. 2012) (evaluating national security reasons for banning activities of advocacy organization allegedly linked to terrorists); *United States v. New York Times Co.*, 328 F. Supp. 324, 330 (S.D.N.Y. 1971) (evaluating national security reasons advanced to block Pentagon Papers), *aff'd sub nom. New York Times Co. v. United States*, 403 U.S. 713 (1971).

Here, the district court appropriately reviewed Defendants' national security evidence, giving the government due deference. As discussed below, the conclusion that the national security evidence was scant was not an abuse of discretion. *See* Section I.B, *infra*.

3. The District Court Correctly Held That Plaintiffs Showed Serious Questions On Their First Amendment Claims.

The district court held that Plaintiffs demonstrated serious questions as to the constitutionality of the WeChat ban under the First Amendment, ruling that Plaintiffs had done so both under the strict scrutiny test for prior restraints and censorship, ADD-16, and under the intermediate scrutiny test for content-neutral time, place and manner restrictions, ADD-17. Defendants' counterarguments are meritless.

(a) The First Amendment Applies.

Attempting to avoid judicial review altogether, Defendants make the remarkable assertion that the First Amendment does not apply at all to the WeChat

ban—arguing they are only regulating “business-to-business” transactions to which WeChat users are not parties. Mot. 15-17. This is nonsense: Courts have repeatedly rejected attempts to avoid First Amendment review by restricting communication channels instead of actual communications. As the Seventh Circuit explained in a case where the government sought to shut down an online forum by restricting credit card transactions: “[t]he analogy is to killing a person by cutting off his oxygen supply rather than by shooting him.” *Backpage.com, LLC v. Dart*, 807 F.3d 229, 231 (7th Cir. 2015).⁵ Defendants’ attempt to shut down WeChat—a quintessential “modern public square,” *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017)—is clearly subject to First Amendment scrutiny.⁶

⁵ See also *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) (describing Huey Long’s newspaper tax as “a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled”); *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994) (“[R]egulation of a medium inevitably affects communication itself[.]”); *Currier v. Potter*, 379 F.3d 716, 727 (9th Cir. 2004) (“It is axiomatic that restrictions upon the mail system implicate the First Amendment.”).

⁶ Defendants’ reliance on cases involving incidental impacts on speech is misplaced. Mot. 15-17. In *NIFLA v. Becerra*, the Court considered the proper *level* of First Amendment scrutiny to apply to laws that directly regulated “professional conduct” at crisis pregnancy centers, *not* whether such laws were exempt from First Amendment scrutiny. 138 S. Ct. 2361, 2371-76 (2018). In *44 Liquormart, Inc. v. Rhode Island*, the Court struck down a liquor advertising regulation on First Amendment grounds. 517 U.S. 484, 489 (1996). *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 685 (9th Cir. 2019), addressed a land-use ordinance and *Arcara v. Cloud Books, Inc.*, 478 U.S. 697,

Defendants’ effort to avoid First Amendment scrutiny because Tencent is a foreign company and many users of WeChat are outside the United States, Mot. 17, is similarly absurd. Plaintiffs are located in the U.S. and use WeChat here—beyond which, the First Amendment protects their right to communicate with those located outside U.S. borders. *See Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 511 (9th Cir. 1988) (rejecting “suggestion that the First Amendment’s protection is lessened when the expression is directed abroad”).

(b) The District Court Properly Held That Plaintiffs Have Raised Serious Questions Under Strict Scrutiny Theories.

The district court concluded Plaintiffs raised serious questions going to their strict scrutiny claims that the “prohibited transactions effectively eliminate the plaintiffs’ key platform for communication, slow or eliminate discourse, and are the equivalent of censorship of speech or a prior restraint on it.” ADD-16. Defendants have essentially no response. This holding was plainly not an abuse of discretion.

The WeChat ban is a prior restraint because it shuts down an entire communication platform used by tens of millions of people in the United States. ADD-17; *Ladue*, 512 U.S. at 55. It is therefore subject to “a heavy presumption

698-99 (1986), was about shutting down a house of prostitution, not the coterminous bookstore.

against its constitutional validity,” *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975), and the government must show that this is one of the “exceptional cases” in which the extraordinary burden on speech is justified—such as where the foreclosed speech would reveal “the sailing dates of transports or the number and location of troops” during wartime, *Near v. Minnesota*, 283 U.S. 697, 716 (1931). Claims that foreclosed speech “‘could,’ or ‘might,’ or ‘may’ prejudice the national interest” do not suffice; nor does any other “surmise or conjecture that untoward consequences may result.” *New York Times Co. v. United States*, 403 U.S. 713, 725-26 (1971) (Brennan, J., concurring). Defendants have presented no such justification here—only a series of conjectures about what Tencent or the Chinese government “could” or “might” do with user data. *See* Section I.B, *infra*.

Strict scrutiny also applies to content-based censorship. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 166 (2015). The EO warns that WeChat “may ... be used for disinformation campaigns that benefit the Chinese Communist Party,” ADD-59, and thus targets specific content. And if there were any doubt, the new evidence Defendants submitted resolves it, justifying the ban on the grounds that WeChat may be used to disseminate “propaganda,” to facilitate “disinformation campaigns,” and to “promote pro-Chinese government content[.]” ADD-48, ADD-57. Strict scrutiny thus applies, and is fatal. Indeed, this is not the first time the government has unlawfully attempted to limit communications to and from

China due to concerns about the influence of Chinese “propaganda.” In *Lamont v. Postmaster General*, the Supreme Court held that the Post Office may not destroy incoming mail from China simply because the government deems it “communist political propaganda.” 381 U.S. 301, 302 (1965). Such brazen censorship “is at war with the ‘uninhibited, robust, and wide-open’ debate and discussion that are contemplated by the First Amendment,” *id.* at 307, and cannot be “justified by the object of avoiding the subsidization of propaganda of foreign governments which bar American propaganda,” *id.* at 310 (Brennan, J., concurring).⁷

(c) The District Court Properly Held That Plaintiffs Have Raised Serious Questions Under an Intermediate Scrutiny Theory.

The district court was also correct to find serious questions even if the WeChat ban is a content-neutral time, place and manner restriction viewed under intermediate scrutiny. ADD-17. To survive intermediate scrutiny, a regulation must be (1) narrowly tailored (not burdening substantially more speech than is necessary), (2) serve a significant government interest unrelated to the content of the speech, and (3) leave open adequate channels for communication. *Ward v.*

⁷ In their stay reply below, Defendants further demonstrate the ban is content-based by asserting they are trying to protect Americans from communications that “strangle individual thoughts.” Dkt.83 at 2:10-19. Neither case on which they rely is applicable here, as in neither did the government seek to shut down any communications media. But Defendants’ resort to such cases shows the real target of the WeChat ban is content the government finds objectionable.

Rock Against Racism, 491 U.S. 781, 791, 799 (1989). Defendants fail on all three prongs.

In the district court, Defendants made no attempt to show narrow tailoring, trying instead to justify a complete ban. ADD-17-18. Defendants have now shifted 180 degrees, arguing to this Court that the ban will not result in *any* of the 19 million U.S. users of WeChat losing access to the platform. Mot. 19-20. Defendants point to no evidence, which is unsurprising because even if the ban would not immediately have shut the app down (*contra* Secretary Ross’s admission), the clear effect would have been to shut it down in the near future. SUPP-ADD-4-6, SUPP-ADD-84-87. And this new explanation for the effect of the ban is inconsistent with the government’s asserted reasons for the EO, such as foreign surveillance—so the ban cannot be narrowly tailored to advance those goals. Nor can it be narrowly tailored when the government rejected Tencent’s mitigation plan, which would have specifically addressed the asserted concerns. *See pp. 4-5, supra*. Tellingly, the Cybersecurity and Infrastructure Security Agency’s (CISA) September 2, 2020 “TikTok and WeChat Assessment” recommended a much more tailored remedy to address the “threat” posed by WeChat—limited to precluding the use of WeChat on devices of critical infrastructure operators and state, local and territorial partners. ADD-57.⁸

⁸ Contrary to Defendants’ assertions in the district court stay briefing, Dkt.83 at 5-

Defendants cannot meet the second prong, as to which the district court properly found “scant little evidence” of a national security threat that would be remedied by a WeChat ban. *See* Section I.B, *infra*. Indeed, Defendants’ new evidence makes their position worse because it shows that the asserted government interest is in fact related to the content of the speech. *See* Section I.A.3.(b), *supra*.

Defendants plainly cannot meet the third prong. They argue WeChat users could cobble together some combination of translation services and other applications to replace WeChat. Mot. 18-19. But the court correctly found, based on careful analysis of the evidentiary record, that “there are no viable substitute platforms or apps for the Chinese-speaking and Chinese-American community.” ADD-17. Among other reasons, other social media platforms lack WeChat’s network effect within the Chinese and Chinese-American communities and lack “the cultural relevance and practical interface with China[.]” ADD-4-5. Indeed, Defendants’ Decision Memo admits the lack of alternatives to communicate with people in China. ADD-45.

6, CISA’s risk assessment was not focused only on threats to digital infrastructure, but rather considered the same national security issues asserted in the Decision Memo. *See* ADD-55 (concern “that China would use Chinese technology firms ‘as routine and systemic espionage platforms against the United States’”); ADD-56 (concern that WeChat “could allow the Chinese government ... to exploit sensitive data, and spread misinformation”); ADD-57 (concern that “Chinese government could use WeChat ... to censor unfavorable content and promote pro-Chinese government content in an attempt to sway public opinion and sow discord”).

Defendants’ cases on adequate alternatives do not save their argument. Indeed, in *G.K. Ltd. Travel v City of Lake Oswego*, the Court “cautioned against invalidating government regulations for failing to leave open ample alternative channels unless the regulation foreclose[s] ‘an entire medium of expression *across the landscape of a particular community or setting*.’” 436 F.3d 1064, 1074 (9th Cir. 2006) (emphasis added). Even if Defendants were correct that they have not foreclosed “an entire medium of expression”—they have—there would still be little doubt that their ban on WeChat forecloses an entire medium of expression *in the particular setting of the Chinese diaspora in the United States*.

4. Plaintiffs Are Likely to Succeed on the Merits of Their *Ultra Vires* Claims.

Plaintiffs also sought a preliminary injunction because the WeChat ban exceeds the bounds prescribed by the IEEPA. Under the plain statutory language, the President may not directly or indirectly regulate “personal communication[s]” or the exchange of “information or informational materials[.]” 50 U.S.C. § 1702(b). The district court passed over this claim, ADD-18-19, but since then Judge Nichols enjoined Defendants’ essentially identical prohibitions of TikTok, tentatively concluding that TikTok is a medium for personal communications and information exchange and thus cannot be regulated under IEEPA. *TikTok Inc. v. Trump*, No. 1:20-cv-02658(CJN), 2020 WL 5763634, at *4-*7 (D.D.C. Sept. 27, 2020), *appeal docketed*, No. 20-5302 (D.C. Cir. Oct. 8, 2020). The same analysis

applies to WeChat. Accordingly, Plaintiffs have asked the district court to revisit the *ultra vires* claim. Dkt.78 at 13. This Court, too, can rely on it as an independent basis for denying a stay.

B. Defendants Cannot Show They Will Suffer Irreparable Injury if the Preliminary Injunction is Not Stayed.

Defendants assert irreparable harm absent a stay because the WeChat ban is “‘necessary for the protection of U.S. national security’ and [was] thus set to go in effect promptly, on September 20.” Mot. 1. But their claim of irreparable injury runs afoul of the principle that the government “cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required[.]” *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013); *TikTok*, 2020 WL 5763634, at *9. Because the prohibitions against WeChat violate the First Amendment and are *ultra vires*, Defendants cannot as a matter of law show irreparable harm from failing to stay the injunction.

Beyond that, Defendants fail to point to any specific national security threat, let alone one with temporal urgency. Their entire national security argument is based on general distrust of the Chinese government and Chinese corporations, but Defendants provide no *actual* evidence that U.S. WeChat users’ data has been provided to China, let alone used against Americans.

The key national security threats identified by Defendants—the gathering of information and surveillance—are based entirely on concerns about how U.S.

users' data *might* be acquired or used in the future. Defendants refer to the types of data identified in WeChat's privacy policy to argue WeChat collects "'sensitive personal information' on U.S. users" that "could" be shared with the PRC, Mot. 7-8, and that this "enables the PRC 'to build dossiers on millions of U.S. persons' and 'to identify espionage targets for intelligence collection purposes'" and "'glean details about key government personnel and potential spy recruits, or to gain information useful for intelligence targeting and surveillance,'" Mot. 13.

But the record fails to identify *any* instance where such data sharing has taken place or was used or attempted to be used in these ways. Indeed, the only specific evidence of Tencent's assistance to the PRC in the Decision Memo is about conduct inside China, not in the U.S. *See* ADD-43-45. The Decision Memo never states that any information from U.S. use has been made available to PRC authorities. ADD-47-48. Instead, the Decision Memo repeatedly phrases the national security threat as about the "potential" to facilitate surveillance using U.S. WeChat users' data.⁹

⁹ *See, e.g.*, ADD-47 ("One of the foremost national security risks presented by the WeChat mobile application in the United States is **the possibility** that the PRC government **could** ... compel Tencent to provide systemic access to U.S. user's sensitive personal information."); ADD-47 ("intelligence operations **could ostensibly occur** without Tencent's express knowledge or awareness at a corporate level"); ADD-48 ("the WeChat app **could** expand the PRC's ability to conduct espionage on millions of U.S. persons.) (emphasis added).

The key fact to Defendants appears to be that “PRC law requires that companies subject to PRC jurisdiction” assist and comply with PRC intelligence and security services. ADD-43-44. Defendants’ articulation of their national security interests is that there exists a threat to the United States whenever *any* Chinese company has access to U.S. persons’ data because that Chinese company *could* be compelled by the PRC to hand over that data.¹⁰

This assertion is entirely conjectural, and thus falls far short of showing immediate threatened injury and, beyond that, is incredibly broad. Any such company *might* be subject to surveillance that *might* support Chinese espionage efforts in ways that would, by Defendants’ logic, cause immediate and irreparable harm. Yet the government continues to permit other Chinese companies to do business in the U.S. and collect U.S. persons’ data. Before the TikTok ban was enjoined, Defendants were willing to allow TikTok to continue collecting similar data through November 12, even though the government’s analysis of the risk of each was essentially identical and “over 100 million Americans” use TikTok—five times more than use WeChat. *See TikTok*, 2020 WL 5763634, at *2.

¹⁰ *See, e.g.*, ADD-55 (“**As Chinese companies**, [WeChat and TikTok] **may be compelled** under the 2017 China Internet Security Law to provide that information to the Chinese government[.]”); ADD-47 (“Given the bounty of information WeChat **could** offer on foreign users ... the Department of Commerce assesses the PRC and PRCISS would not limit their use of WeChat to domestic concerns and would instead use it for foreign intelligence and surveillance.”) (emphasis added).

Meanwhile, the speciousness of the claimed irreparable injury is demonstrated by Defendants' new argument that "the Secretary's Identification does not prohibit *any* plaintiff, all of whom are *current* U.S. WeChat users, from continuing to use the platform." Mot. 22. If, in fact, current WeChat access poses an immediate, irreparable threat, why would any such continued use be permitted?

The government seeks to hide the weakness of its national security justification behind extravagant language and extraordinary claims. But let there be no doubt: this is merely an attempt to justify the unjustifiable by invoking the concept of "national security."

C. A Stay Would Irreparably Harm Plaintiffs

Unlike the government, Plaintiffs *will* suffer irreparable harm if the preliminary injunction is stayed. First, as the Supreme Court has held, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). No matter how broad or narrow the ban actually is, restricting Plaintiffs' speech via WeChat constitutes irreparable harm.

Beyond that, the district court correctly held that "there are no viable substitute platforms or apps for the Chinese-speaking and Chinese American community." ADD-17. Eliminating that platform, even temporarily, is obviously irreparable injury.

Defendants’ primary counterargument is to again assert that the ban would not actually prevent Plaintiffs from using WeChat. Mot. 20-22. As explained above, *see* Section I.A.1., *supra*, the Court should not abide Defendants’ efforts to avoid Secretary Ross’s admission that the ban would have shut down WeChat on September 20 absent the injunction. *See* ADD-11; SUPP-ADD-16-18 (on September 18, “senior Trump administration official” told CNBC that WeChat is “dead in the United States”). Secretary Ross was in any event correct. As Plaintiffs’ expert Adam Roach testifies, the combined effect of the prohibited transactions make it “highly likely that WeChat will suffer serious degradation of services and effectively be shut down as soon as they are fully implemented.” SUPP-ADD-4-6 (Roach Decl. ¶¶ 8-13).

But even if the ban did merely cause a substantial degradation of service—in addition to precluding new downloads of and security updates to WeChat—that too would qualify as irreparable injury. As anyone who has ever tried to use a cell phone in a rural area understands, issues affecting the underlying functionality of a device can have extreme effects on its usability. The ban on services supporting WeChat would thus have a significant, irreparable, effect on Plaintiffs. SUPP-ADD-31 (corporate Plaintiff Chihuo faces loss of customers if WeChat service slows or degrades); SUPP-ADD-36 (WeChat’s video-calling service will be unusable if slowed or degraded).

Because WeChat is a network, its utility to its users depends on others—including newcomers—also being part of that network. The ban on downloads would block tens or hundreds of thousands of new users from participating in WeChat discussions and frustrate WeChat capabilities for its millions of current U.S. users. This would clearly cause substantial injury to Plaintiffs by infringing on their First Amendment rights to communicate with and receive communications from others. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 8 (1986) (“By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public’s interest in receiving information.”). Plaintiff Bao could not communicate with new church members, Plaintiff Chihou would be deprived of new customers, and Plaintiff Peng could not carry out MHACC’s mission to provide mental health services to new recipients of care. *Cf.* ADD-166-168, ADD-180-185, ADD-187-191; *see TikTok*, 2020 WL 5763634 at *8 (finding bar on new users and updates constitutes irreparable harm).

Finally, prohibiting updates would necessarily render present WeChat users’ data *less* secure and prone to data breaches, undermining the national security interests Defendants assert are at stake. SUPP-ADD-23 (Hildebrand Decl. ¶ 12); SUPP-ADD-3-4 (Roach Decl. ¶¶ 5-7).

D. A Stay Would Be Against the Public Interest.

Defendants provide no reason to revisit the district court’s conclusion that

“[t]he public interest favors the protection of the plaintiffs’ constitutional rights.”

ADD-20; *see Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (“[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.”).

II. NO PARTIAL STAY SHOULD BE GRANTED

Defendants ask the Court in the alternative to grant a partial stay of the injunction as applied to the first prohibition, thus barring new U.S. users from downloading WeChat and barring Plaintiffs and other existing users from receiving updates to the app. Mot. 22-23.¹¹ Defendants’ proposed partial stay would harm not only Plaintiffs’ ability to communicate with new users, however; it would also cause a degradation of WeChat’s performance for Plaintiffs and other existing U.S. users because of the network effects of a platform of social media and because of the importance of security updates. *See* Section I.C., *supra*.

///

///

///

¹¹ Defendants miscite *U.S. Dep’t of Def. v. Meinhold*, 510 U.S. 939 (1993), a partial stay order, for the proposition that Article III limitations on an injunction’s scope “appl[y] with special force to injunctions concerning national security.” Mot. 23. In *Meinhold*, an individual injunction provided all the relief Mr. Meinhold was entitled to, voiding of his military discharge. *Meinhold v. U.S. Dep’t of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994). Here, by contrast, there is no narrower injunction that could protect Plaintiffs’ First Amendment rights.

CONCLUSION

Defendants' motion to stay should be denied.

DATED: October 9, 2020

Respectfully submitted,

ROSEN BIEN GALVAN & GRUNFELD LLP

By: */s/ Ernest Galvan*

Ernest Galvan

Attorneys for Plaintiffs-Appellees

STATEMENT OF RELATED CASES

Appellees are not aware of any related cases pending before the Court.

DATED: October 9, 2020

Respectfully submitted,

ROSEN BIEN GALVAN & GRUNFELD LLP

By: */s/ Ernest Galvan*

Ernest Galvan

Attorneys for Plaintiffs-Appellees

**CERTIFICATE OF COMPLIANCE PURSUANT TO
FED. R. APP. 27(D)(2)(a) AND CIRCUIT RULE 32-3(2)**

Pursuant to Fed. R. App. P. 27(D)(2)(a) and Ninth Circuit Rule 32-3(2), I
certify that the attached brief is proportionally spaced, has a typeface of 14 points
and contains 5,594 words.

DATED: October 9, 2020

/s/ Ernest Galvan

Ernest Galvan

Case No. 20-16908

**United States Court of Appeals
for the Ninth Circuit**

DONALD J. TRUMP, in his official capacity as President of the United States, and
WILBUR ROSS, in his official capacity as Secretary of Commerce

Defendants and Appellants,

v.

U.S. WECHAT USERS ALLIANCE, CHIHUO INC., BRENT COULTER,
FANGYI DUAN, JINNENG BAO, ELAINE PENG, and XIAO ZHANG

Plaintiffs and Appellees.

From The United States District Court,
Northern District of California,
Case No. 3:20-cv-05910-LB,
Honorable Laurel Beeler, United States Magistrate Judge

**SUPPLEMENTAL ADDENDUM IN SUPPORT OF PLAINTIFFS-APPELLEES' RESPONSE
TO EMERGENCY MOTION FOR STAY PENDING APPEAL**

DEHENG LAW OFFICES PC
Keliang (Clay) Zhu
7901 Stoneridge Drive #208
Pleasanton, California 94588
Telephone: (925) 399-5856
Email: czhu@dehengsv.com

ROSEN BIEN
GALVAN & GRUNFELD LLP
Michael W. Bien
Ernest Galvan
Benjamin Bien-Kahn
Van Swearingen
Alexander Gourse
Amy Xu
101 Mission Street, Sixth Floor
San Francisco, California 94105-1738
Telephone: (415) 433-6830
Email: mbien@rbgg.com

Attorneys for Plaintiffs-Appellees

Additional counsel on following page

AFN LAW PLLC

Angus F. Ni

502 Second Avenue, Suite 1400

Seattle, Washington 98104

Telephone: (773) 543-3223

Email: angus@afnlegal.com

DAVIS WRIGHT TREMAINE LLP

David M. Gossett

1301 K Street N.W., Suite 500 East

Washington, D.C. 20005-3366

Telephone: (202) 973-4216

Email: davidgossett@dwt.com

DAVIS WRIGHT TREMAINE LLP

Thomas R. Burke

505 Montgomery Street, Suite 800

San Francisco, California 94111-6533

Telephone: (415) 276-6500

Email: thomasburke@dwt.com

DAVIS WRIGHT TREMAINE LLP

John M. Browning

1251 Avenue of the Americas, 21st Floor

New York, New York 10020-1104

Telephone: (212) 603-6410

Email: jackbrowning@dwt.com

Attorneys for Plaintiffs-Appellees

INDEX TO SUPPLEMENTAL ADDENDUM IN SUPPORT OF APPELLEES'
RESPONSE TO EMERGENCY MOTION FOR A STAY PENDING APPEAL

Date Filed	[Docket] Description	Supp. Add. Page
10/08/2020	[DOC #84-1] DECLARATION OF ADAM ROACH	001
10/01/2020	[DOC #78-3] DECLARATION OF JOE HILDEBRAND IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STAY PENDING APPEAL OF ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION	019
10/01/2020	[DOC #78-2] DECLARATION OF FANGYI DUAN IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STAY PENDING APPEAL OF ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION	029
10/01/2020	[DOC #78-1] DECLARATION OF YING CAO IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STAY PENDING APPEAL OF ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION	033
09/25/2020	[DOC #73] ORDER re briefing schedule for Motion to Stay	038
09/18/2020	[DOC #48-1] DECLARATION OF ELAINE PENG	040
09/18/2020	REPORTER'S TRANSCRIPT OF PROCEEDINGS – HEARING ON MOTION FOR PRELIMINARY INJUNCTION	043
09/18/2020	REUTERS ARTICLE “Trump to Block U.S. Downloads of TikTok, WeChat on Sunday”	084

INDEX TO SUPPLEMENTAL ADDENDUM IN SUPPORT OF APPELLEES'
OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR A STAY PENDING
APPEAL

Date Filed	[Docket] Description	Supp. Add. Page
08/28/2020	[DOC #17-12 – EXCERPT AT ECF pp. 22-24] EXHIBIT C TO THE DECLARATION OF MICHAEL W. BIEN IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION: Executive Order 13942, titled "Addressing the Threat Posed by TikTok, and Taking Additional Steps To Address the National Emergency with Respect to the Information and Communications Technology and Services Supply Chain," 85 Fed. Reg. 48637 (Aug. 6, 2020)	088
08/28/2020	[DOC #17-11] DECLARATION OF WANNING SUN IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION	091
08/28/2020	[DOC #17-10] DECLARATION OF RUSSELL M. JEUNG IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION	112
08/28/2020	[DOC #17-09] DECLARATION OF SPENCER COHEN IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION	128
08/28/2020	[DOC #17-08] DECLARATION OF ERWIN CHEMERINSKY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION	141
08/28/2020	[DOC #17-07] DECLARATION OF ALEX ALBEN IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION	144

Case 3:20-cv-05910-LB Document 84-1 Filed 10/08/20 Page 1 of 18

1 MICHAEL W. BIEN – 096891
 ERNEST GALVAN – 196065
 2 VAN SWEARINGEN – 259809
 BENJAMIN BIEN-KAHN – 267933
 3 ALEXANDER GOURSE – 321631
 AMY XU – 330707
 4 ROSEN BIEN
 GALVAN & GRUNFELD LLP
 5 101 Mission Street, Sixth Floor
 San Francisco, California 94105-1738
 6 Telephone: (415) 433-6830
 Facsimile: (415) 433-7104
 7 Email: mbien@rbgg.com
 egalvan@rbgg.com
 8 vswearingen@rbgg.com
 bbien-kahn@rbgg.com
 9 agourse@rbgg.com
 axu@rbgg.com

10 KELIANG (CLAY) ZHU – 305509
 11 DEHENG LAW OFFICES PC
 7901 Stoneridge Drive #208
 12 Pleasanton, California 94588
 Telephone: (925) 399-5856
 13 Facsimile: (925) 397-1976
 Email: czhu@dehengsv.com

14 ANGUS F. NI – Admitted *Pro Hac Vice*
 15 AFN LAW PLLC
 502 Second Avenue, Suite 1400
 16 Seattle, Washington 98104
 Telephone: (773) 543-3223
 17 Email: angus@afnlegal.com

18 Attorneys for Plaintiffs

19 UNITED STATES DISTRICT COURT

20 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

21 U.S. WECHAT USERS ALLIANCE,
 CHIHUO INC., BRENT COULTER,
 22 FANGYI DUAN, JINNENG BAO, ELAINE
 PENG, and XIAO ZHANG,

23 Plaintiffs,

24 v.

25 DONALD J. TRUMP, in his official capacity
 as President of the United States, and
 26 WILBUR ROSS, in his official capacity as
 Secretary of Commerce,

27 Defendants.

THOMAS R. BURKE – 141930
 DAVIS WRIGHT TREMAINE LLP
 505 Montgomery Street, Suite 800
 San Francisco, California 94111-6533
 Telephone: (415) 276-6500
 Facsimile: (415) 276-6599
 Email: thomasburke@dwt.com

DAVID M. GOSSETT – Admitted *Pro Hac Vice*
 DAVIS WRIGHT TREMAINE LLP
 1301 K Street N.W., Suite 500 East
 Washington, D.C. 20005-3366
 Telephone: (202) 973-4216
 Facsimile: (202) 973-4499
 Email: davidgossett@dwt.com

JOHN M. BROWNING – *Pro Hac Vice*
 forthcoming

DAVIS WRIGHT TREMAINE LLP
 1251 Avenue of the Americas, 21st Floor
 New York, New York 10020-1104
 Telephone: (212) 603-6410
 Facsimile: (212) 483-8340
 Email: jackbrowning@dwt.com

Case No. 3:20-cv-05910-LB

DECLARATION OF ADAM ROACH

Date: October 15, 2020
 Time: 9:30 a.m.
 Crtrm.: Remote
 Judge: Hon. Laurel Beeler

Case No. 3:20-cv-05910-LB

DECLARATION OF ADAM ROACH

SUPP.ADD. 001

1 DECLARATION OF ADAM ROACH

2 I, Adam Roach, declare:

3 1. I am an expert in Internet communication technologies with 25 years of
4 experience in networking technology. I have personal knowledge of the matters
5 stated herein and if called as a witness I would and could testify competently to
6 them. I have worked in the Internet Engineering Task Force (IETF) – the
7 international standards body that develops technical specifications for the Internet –
8 for the past 23 years. During that time, I have focused on the area of Real Time
9 Communications, which includes technologies such as instant messaging and voice
10 and video communications. Over the same period, I have worked at several
11 companies to design and implement both the client and network portions of large-
12 scale Internet-based applications that employ these technologies while accounting
13 for key factors such as privacy and security. Most recently, I worked for the past
14 eight years at the Mozilla Corporation on the Firefox Browser, which is actively
15 used by hundreds of millions of users on the Internet every day. I have attached as
16 Exhibit A a true and complete copy of my curriculum vitae to this declaration.

17 2. In the course of my work on these technologies, I have been issued 18
18 related patents, and published 20 IETF specifications defining the behavior of real-
19 time communications on the Internet. I served for three years on the technical
20 leadership body of the IETF, the Internet Engineering Steering Group (IESG). My
21 duties in this position included the review of approximately 1,000 pages of technical
22 specifications each month, which required developing expertise across a broad
23 spectrum of Internet technologies, including routing, transport, security, and
24 operations.

25 3. I am providing the following testimony for the plaintiffs in this case.
26 The following testimony is my analysis of the prohibited transactions identified in
27 the Department of Commerce's Identification of Prohibited Transactions to
28 Implement Executive Order 13943 and Address the Threat Posed by WeChat and

[3627694.1]

1 the National Emergency with Respect to the Information and Communications
2 Technology and Services Supply Chain, published on September 17, 2020.

3 4. The first class of prohibited transactions bars entities subject to the
4 jurisdiction of the United States from allowing the distribution or maintenance of the
5 WeChat application through downloads from Apple and Google. Given that the
6 combination of Android and iOS effectively constitute 100% of the global
7 smartphone market¹, and that their application distribution occurs primarily through
8 stores run by US-based Google and Apple, respectively, this action effectively
9 prevents existing users from receiving updates of already-installed versions of
10 WeChat and also prohibits new users from downloading the WeChat app. According
11 to the analytics firm Apptopia, WeChat has approximately 19 million daily active
12 users in the United States, implying at least that many currently installed versions of
13 the WeChat app.

14 5. With modern Internet-based applications, application updates serve a
15 number of purposes, such as deploying new features and fixing bugs. One critical
16 role that these updates play is patching security vulnerabilities in software
17 applications. It is common practice for security researchers all over the globe to
18 analyze popular applications for the purpose of finding security vulnerabilities and
19 working with vendors to fix them. The established industry process for this practice
20 is known by the term of art “Responsible Disclosure.” The core tenets of
21 Responsible Disclosure are that (1) a vulnerability, once discovered, is shared
22 confidentially with the software developer as soon as practically possible, and (2)
23 once disclosed to the developer, a future date is selected, after which the details of
24 the vulnerability are made available to the general public. These public disclosure
25 dates typically range from 90 to 180 days after the software developer is informed,

26
27
28 ¹ See <https://www.statista.com/statistics/272307/market-share-forecast-for-smartphone-operating-systems/>

1 and are designed to give the software developer sufficient time to develop and
2 deploy a fix for the discovered vulnerability. The public disclosures are generally
3 detailed enough that reasonably experienced practitioners skilled in the art of
4 software development can create malware to exploit the security vulnerabilities.

5 6. Users who have applications installed with publicly disclosed security
6 vulnerabilities are subject to a variety of attacks from malicious actors on the
7 Internet. These attacks may allow for a broad variety of malicious behavior,
8 including but certainly not limited to identity theft, password exfiltration,
9 performing financial transactions on the users' behalf, encrypting users' data and
10 charging a ransom to restore it, stealing private information from users' phones, and
11 persistently monitoring users' location, microphone, camera, and screen contents.

12 7. Taken together, these facts point to the net result of the first class of
13 prohibited transactions exposing approximately 19 million United States citizens to
14 potentially devastating results: by preventing Tencent from updating the already-
15 installed WeChat software when security researchers identify vulnerabilities, the
16 prohibition ensures that these current users become vulnerable to such attacks as
17 soon as vulnerability information becomes public.

18 8. The second and third classes of prohibited transactions are directed at
19 internet hosting services and content delivery services, to the extent they are
20 "enabling the functioning or optimization" of WeChat in the United States. These
21 prohibitions will likely make WeChat less functional, slower, and less responsive to
22 users in the United States, but do not limit the availability of WeChat's users'
23 information to Tencent or the government of the People's Republic of China, and
24 instead only serve to eliminate US visibility into Tencent's behavior. Key WeChat
25 functions, such as voice and video calls, may be severely limited. These prohibitions
26 will force all WeChat servers to operate outside of US jurisdiction, and the US
27 government completely loses all ability to monitor WeChat's operations to
28 determine whether collection of private user data is occurring. Consequently, the net

1 effect of these classes of prohibited transactions will be to exacerbate, rather than
2 address, the data security concerns expressed in the preface of the Executive Order.

3 9. The fourth class of prohibited transaction indicates that no provision of
4 transit or peering services may occur that enables or optimizes WeChat. This
5 prohibition represents an unprecedented and overbroad interference of the operation
6 of the global internet by the U.S. government, as it fundamentally misconstrues the
7 nature of Internet routing, peering, and transit. In general, providers of Internet-
8 based applications, such as WeChat, contract with Internet Service Providers (ISP)
9 to connect them to the global Internet. These ISPs then connect to what are
10 colloquially known as “Internet Backbone Providers”, who are responsible with
11 forming peering arrangements for global routing of traffic. Notably, these peering
12 arrangements are made on behalf of all of the customers of the backbone providers,
13 including their customers’ customers.

14 10. In China, the Backbone Providers consist primarily of China Unicom
15 and China Telecom². To implement this prohibition to its full extent, it prevents US
16 backbone providers from peering with these two companies altogether, effectively
17 ending all direct Internet traffic between the United States and China. Technically,
18 Tencent or WeChat may choose peering with other backbone providers (e.g., those
19 in Europe) and transitively using their networks to route traffic to and from China.
20 However, such a maneuver can be considered as “evading or avoiding” the
21 prohibition, which is not permitted according to Section 2(a) of the Executive Order.
22 Therefore, a reasonable interpretation would be that WeChat will be shut down
23 under this prohibition.

24 11. The fifth class of prohibition in the proposed order may limit the
25 financial information exposed to WeChat but does not address the concerns
26 specifically expressed in the Executive Order, such as the collection of the contents

27
28 ² <https://www.sciencedirect.com/science/article/pii/S1877050918305738>

1 of users' messages.

2 12. The sixth class of prohibition, as written, is over-reaching. Modern
3 software, with extremely rare exception, is created by using existing software
4 components – known as “libraries” – as part of the application’s constituent code
5 and functions. If put into effect as proposed, this prohibition will disallow the use of
6 these libraries for software developed in the United States. The scope of the damage
7 to the US software industry would be difficult to quantify; but it is my educated
8 estimate that it would be sufficient to cause substantial portions of the US software
9 development industry to move their development operations off shore.

10 13. Taking the prohibitions as a whole, it is highly likely that WeChat will
11 suffer serious degradation of services and effectively be shut down as soon as they
12 are fully implemented.³ Moreover, the broad scope of these prohibitions and the
13 Executive Order will create a chilling effect, forcing companies in the U.S. to ban or
14 block WeChat on their computers and Wi-Fi networks. In summary, of the six
15 prohibited transactions, none of the feasible prohibitions limit WeChat’s ability to
16 collect information about users (other than the fifth class, which may limit exposure
17 of users’ financial information). This means that these prohibitions do not address
18 the U.S. government’s concern for WeChat’s data security concern. Instead, they are
19 aimed at shutting down the WeChat service for U.S. users.

20 //

21 //

22 //

23 //

24

25 ³ See Attachment B, a true and correct copy of a September 18, 2020 CNBC article
26 by Eamon Javers and Kevin Stankiewicz titled “TikTok deal still has a chance but
27 WeChat ‘dead’ in the U.S., says senior administration official, *available at:* ”
28 [https://www.cnbc.com/2020/09/18/tiktok-deal-still-has-a-chance-but-wechat-dead-](https://www.cnbc.com/2020/09/18/tiktok-deal-still-has-a-chance-but-wechat-dead-in-the-us-says-senior-administration-official.html)
[in-the-us-says-senior-administration-official.html](https://www.cnbc.com/2020/09/18/tiktok-deal-still-has-a-chance-but-wechat-dead-in-the-us-says-senior-administration-official.html) (quoting “a senior Trump
administration official” stating that the Commerce Department’s announcement of a
ban on transactions means that WeChat is “dead in the United States.”)

1 I declare under penalty of perjury under the laws of the United States of
2 America that the foregoing is true and correct to the best of my knowledge, and that
3 this declaration is executed at Dallas, Texas this 7th day of October, 2020.

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



Adam Roach

EXHIBIT A

Adam Roach

Summary

Network engineer with 25 years' experience architecting, designing, and implementing highly available, performant, and scalable systems. I've been involved in foundational work in real-time voice, video, instant messaging, and presence technologies, and have eight years of experience working on webtech. Looking for a position to help solve your hard problems and explore your new opportunities.

Experience

Technical Advisor, Caffeine

September 2016 – Present

- Provide periodic WebRTC and general network engineering input for the team at Caffeine.

Principal Engineer, Mozilla Corporation

November 2012 – August 2020

- Part of the small initial team that designed, implemented, and tested Firefox's WebRTC implementation, including working heavily in the IETF and W3C to develop the specifications that allow web browsers to provide interoperable WebRTC implementations.
- Feature architect for the WebRTC-based Firefox Hello feature, including both network and software architecture. Interfaced extensively with Tokbox/Telefonica, who partnered with Mozilla to operate part of the network infrastructure. This feature allowed Mozilla to collect critical data about the quality of its underlying WebRTC implementation, while offering users a free browser-based calling service before other companies had filled that niche.
- Represented Mozilla in the W3C for the Web Payments specification, including spending time authoring the PaymentHandler specification. This work was strategically important for ensuring that the standardized APIs for making payments on the web leave room for newcomers, rather than being locked to the currently incumbent payment processors.
- Performed various smaller tasks to improve Firefox. Examples include an architectural audit of several Firefox features; research into Firefox's IPC performance, resulting in an ~80% improvement in latency for the top percentile of IPC message transmission; and finalizing an implementation of a feature that automatically fills out credit card forms in Firefox.

Area Director, Applications and Realtime, IETF

March 2017 – March 2020

Mozilla sponsored me for a three-year term serving on the managing body for the Internet Engineering Task Force (IETF), known as the Internet Engineering Steering Group (IESG). Members of the IESG are responsible for specific technology areas within the IETF and serve as Area Directors for those areas.

- Responsible for the top-level management of 14 working groups, most of which were developing standards for real-time technologies. Given the volunteer nature of working group chairs and their authors, this task required skills for significant soft influence.
- Responsible for shepherding a significant portion of the 75 inter-related documents that form the WebRTC specification and its prerequisites through the final steps of their processing.
- As a member of the IESG, responsible for ensuring that the documents published by the IETF during my term were fit for purpose and would not cause harm to the proper functioning of the Internet. This required reading on the order of 500 pages of technical specification every two weeks and providing detailed feedback on their contents. In addition to improving the output of the IETF, this exercised the ability to learn about new technology areas very quickly.
- As part of the IESG, I was also jointly responsible for making decisions about the tri-annual in-person IETF meetings, and the general running of the IETF.

Principal Engineer, Office of the CTO, Tekelec

January 2008 – November 2012

- Served as a member of CTO team to provide strategic input to corporate product direction, including customer interaction to gather requirements and prototyping of potential solutions.
- Designed the network architecture and software architecture for Tekelec's IP Front-End (IPFE) product and implemented a prototype solution that provided the basis for the product. The IPFE is the high-availability, load-balancing, and overload-handling solution used for Tekelec's (now Oracle's) Diameter server products.
- Provided support for the Sales Engineering team and interfaced directly with customers for the Diameter and SIP products in Tekelec's portfolio.

Core Contributor, ReSIProcate Opensource Project

October 2003 – August 2014

The ReSIProcate project was started as a commercial-grade SIP library intended to prove out protocol elements while they were under standardization in the IETF. It eventually grew to encompass other related protocols, such as MSRP (instant messaging) and ICE (media NAT traversal).

- As a member of the core project team, participated in project governance.
- Contributed design and code to the core SIP and MSRP components, and was one of the key designers of the SIP proxy implementation.
- Served as liaison to upstream patches from Firefox to the ReSIProcate ICE implementation (nICEr).

CTO and Partner, Estacado Systems

July 2004 – January 2008

- One of the managing partners who grew Estacado Systems, a bootstrapped startup company working in the real-time communications equipment, from four people to a team of 21, and executed a successful exit by selling the company to Tekelec. In addition to LLC governance, I was responsible for contract review and significant portions of customer contact.
- Worked with the engineering team to design an architecture for a SIP presence and SIP proxy system based on the ReSIPProcate codebase.
- Designed and prototyped a system for interoperating SIP/IMS networks directly with the cellular eNodeB “Interoperability Specification” (IOS) interface, suitable for embedding in cellular femtocells. This system allowed the deployment of high-density cellular access over standard IP networks.
- Designed, implemented, tested, and supported the OpenSigComp library, an open-source implementation of RFC 3320 “Signaling Compression” used by IMS networks to reduce signaling message size on radio links. This was one of Estacado System’s licensed products that provided revenue for subsequent product development.
- Designed and implemented a high-volume component for a call center quality monitoring system to expand it from working with circuit-switched PBXes to a variety of packet-switched VoIP systems, including those from Cisco, Alcatel, and Nortel. This involved both reverse engineering the signaling protocols as well as integrating with an existing call monitoring system.

Principal Engineer, dynamicsoft

February 2002 – July 2004

- Designed the network architecture and prototype for a push-to-talk system that operated over the 1xRTT CDMA network for a major US wireless carrier.
- Designed, implemented, and tested a SigComp component for integration into dynamicsoft’s product line. This implementation significantly informed the IETF’s specification of the SigComp standard.
- Conceptualized, designed, and implemented a component, internally called “LiveBus,” that allows for cluster state management, failure detection, and state replication among a set of IM and Presence servers. This remains a key component of Cisco’s Presence and IM service offering.
- Performed an architectural review of dynamicsoft’s Presence Engine and re-worked presence document handling from opaque static documents to a semantic model that could have per-subscriber policy applied. Brought the Presence Engine to multiple SIP Interoperability Test (SIPit) events, serving to improve both the product and the protocol specifications under development in the IETF.

Senior Engineer, Ericsson, Inc.

December 1994 – February 2002

- Software architect for Ericsson’s CSCF (Call Session Control Function) set of 3GPP/IMS servers, including a design for scaling and state replication.
- Member of a cross-organizational council to design the network architecture of Ericsson’s “Next Generation Network,” which strongly informed the standardized 3GPP IMS network.
- Part of a small team of SIP technology researchers inside Ericsson who worked on various SIP-related projects, including the development of a SIP stack, mobile VoIP client, SIP infrastructure, and interworking between SIP and various legacy protocols, including ISUP.

Organizations

Internet Engineering Task Force (IETF)

1998 - Present

In addition to the IESG role described above, I have been active in the IETF for over 22 years, predominantly in real-time communications, instant messaging, and presence.

- Chaired the XCON, SIPCORE, and NETVC working groups, responsible for centralized conferencing, the SIP core protocol, and video codec technology, respectively.
- Active author on documents in over 13 working groups, including DIME, MARTINI, MMUSIC, PERC, ROHC, RTCWEB, SIGCOMP, SIMPLE, SIP, SIPCORE, SIPPING, XCON, and XMPP.
- Member of the RFC Series Oversight Committee (RSOC), which is the governance structure for the entity that publishes RFCs.

World Wide Web Consortium (W3C)

2012 - 2017

- One of Mozilla's representatives to, and actively involved in, the WebRTC working group, which defined the web browser APIs for sending and receiving voice, video, and real-time data over the network.
- One of Mozilla's representatives to, and an author in, the Web Payments working group, which developed APIs to enable semantic collection of payment information in web browsers (e.g., the mobile experience of Apple Pay and Google Pay.)

Third Generation Partnership Project (3GPP)

2000 - 2001

- One of Ericsson's representatives to the CN1 and SA2 working groups, which designed requirements and implementation specifications for the 3GPP IMS network (which forms the basis for all commercial telecom VoIP systems today). In particular, I was the author of the contribution S2-000751, which formed the basis for the overall network architecture that forms the IMS core.

Patents and Publications

US Patents

- US 9,584,959 Systems, methods, and computer readable media for location-sensitive called-party number translation in a telecommunications network
- US 9,319,431 Methods, systems, and computer readable media for providing sedation service in a telecommunications network
- US 9,001,664 Methods, systems, and computer readable media for providing sedation service in a telecommunications network
- US 8,893,248 Methods, systems, and computer readable media for media session policy compliance auditing and enforcement using a media relay and session initiation protocol (SIP) signaling
- US 8,661,077 Methods, systems and computer readable media for providing a failover measure using watcher information (WINFO) architecture
- US 8,645,565 Methods, systems, and computer readable media for throttling traffic to an internet protocol (IP) network server using alias hostname identifiers assigned to the IP network server with a domain name system (DNS)
- US 8,499,082 Methods, systems, and computer readable media for providing services in a telecommunications network using interoperability specification/session initiation protocol (IOS/SIP) adapter
- US 8,499,035 Methods, systems and computer readable media for providing session initiation protocol (SIP) event watcher entity information in a communications network
- US 8,321,592 Methods, systems, and computer readable media for generating and using statelessly reversible representations of session initiation protocol (SIP) information by SIP cluster entities
- US 8,090,850 Methods, systems, and computer readable media for regulating network address translator (NAT) and firewall pinhole preservation traffic in a session initiation protocol (SIP) network
- US 8,046,626 System and method for maintaining resiliency of subscriptions to an event server
- US 7,760,639 System and method for handling network overload
- US 7,756,034 System and method for handling network overload
- US 7,607,138 System and method for optimizing inter-domain event services
- US 7,123,707 Methods of controlling communications with at least two calling party devices by a user of a called party device
- US 7,028,311 Communications node architecture and method for providing control functions in a telecommunications network
- US 6,343,292 System and method for providing text descriptions to electronic databases

IETF Specifications

- RFC 3265 Session Initiation Protocol (SIP)-Specific Event Notification
- RFC 3266 Support for IPv6 in Session Description Protocol (SDP)

Case 3:20-cv-05910-LB Document 84-1 Filed 10/08/20 Page 14 of 18

- RFC 3398 Integrated Services Digital Network (ISDN) User Part (ISUP) to Session Initiation Protocol (SIP) Mapping
- RFC 3485 The Session Initiation Protocol (SIP) and Session Description Protocol (SDP) Static Dictionary for Signaling Compression (SigComp)
- RFC 3578 Mapping of Integrated Services Digital Network (ISDN) User Part (ISUP) Overlap Signalling to the Session Initiation Protocol (SIP)
- RFC 4077 A Negative Acknowledgement Mechanism for Signaling Compression
- RFC 4662 A Session Initiation Protocol (SIP) Event Notification Extension for Resource Lists
- RFC 4896 Signaling Compression (SigComp) Corrections and Clarifications
- RFC 4976 Relay Extensions for the Message Sessions Relay Protocol (MSRP)
- RFC 5363 Framework and Security Considerations for Session Initiation Protocol (SIP) URI-List Services
- RFC 5367 Subscriptions to Request-Contained Resource Lists in the Session Initiation Protocol (SIP)
- RFC 5989 A SIP Event Package for Subscribing to Changes to an HTTP Resource
- RFC 6140 Registration for Multiple Phone Numbers in the Session Initiation Protocol (SIP)
- RFC 6544 TCP Candidates with Interactive Connectivity Establishment (ICE)
- RFC 6665 SIP-Specific Event Notification
- RFC 6873 Format for the Session Initiation Protocol (SIP) Common Log Format (CLF)
- RFC 6878 IANA Registry for the Session Initiation Protocol (SIP) "Priority" Header Field
- RFC 7621 A Clarification on the Use of Globally Routable User Agent URIs (GRUUs) in the SIP Event Notification Framework
- RFC 7647 Clarifications for the Use of REFER with RFC 6665
- RFC 7742 WebRTC Video Processing and Codec Requirements
- RFC 8723 Double Encryption Procedures for the Secure Real-Time Transport Protocol (SRTP)
- W3C Specification
<https://www.w3.org/TR/payment-handler/>
 Payment Handler API

Education

Bachelor of Science, Computer Engineering, Texas A&M University

1990 – 1994

EXHIBIT B

Case 3:20-cv-05910-LB Document 84-1 Filed 10/08/20 Page 16 of 18

10/7/2020

TikTok deal still has chance but WeChat 'dead' in U.S.: Trump official



WEEKEND UPDATE 7P ET

WATCH



POLITICS

TikTok deal still has a chance but WeChat 'dead' in the U.S., says senior administration official

PUBLISHED FRI, SEP 18 2020-12:38 PM EDT UPDATED FRI, SEP 18 2020-2:54 PM EDT

Eamon Javers
@EAMONJAVERS

Kevin Stankiewicz
@KEVIN_STANK

SHARE

KEY POINTS

There is still a chance for a deal that would allow TikTok to remain operating in the U.S., a senior Trump administration official told CNBC.

However, the official said WeChat, the social messaging app owned by Chinese tech giant Tencent, is "dead in the United States."

The developments come after the Commerce Department announced it was banning U.S. business transactions involving the TikTok and WeChat as of Sunday.

the insights you need to **INVEST LIKE A PRO**

START FREE TRIAL

PRO



10/7/2020

TikTok deal still has chance but WeChat 'dead' in U.S.: Trump official



UNRECORDED TO ET

WATCH



VIDEO 00:25

WeChat is dead in the United States, senior Trump administration official tells CNBC

Despite a Commerce Department announcement of a ban on transactions, a deal that would allow TikTok to remain operating in the U.S. could still happen, a senior Trump administration official told CNBC on Friday.

Stream live CNBC TV
from around the world.

START FREE TRIAL

PRO

Invest Like A Pro

However, the official said WeChat, the social messaging app owned by Chinese tech giant Tencent, is “dead in the United States.”

Earlier Friday, the Commerce Department announced it was banning U.S. business transactions involving the TikTok and WeChat. Beginning Sunday, American companies will no longer be able to distribute WeChat and TikTok, taking away their availability in U.S. app store libraries.

WeChat will be able to continue operating for people who have it installed on their devices, according to department officials who spoke with reporters on the condition of anonymity. But issues may arise because WeChat uses services run by U.S. firms to deliver data in the app.

More stringent restrictions on TikTok, which is owned by Beijing-based ByteDance, in the U.S. are set to go into effect Nov. 12, based on the Commerce moves Friday. The actions are the latest developments in weeks of uncertainty stemming from President Donald Trump’s claims that the Chinese-owned apps present national security risks to American users.

It is still possible a deal involving Oracle and Walmart to take stakes in TikTok can happen. Oracle said earlier in the week it had a deal in place with TikTok, but Trump said days later he was not

the insights
you need to

INVEST LIKE A PRO

START FREE TRIAL

PRO

10/7/2020

TikTok deal still has chance but WeChat 'dead' in U.S.: Trump official



TikTok deal still has chance but WeChat 'dead' in U.S.: Trump official

WATCH



There is no appetite in the Trump administration for a separate deal involving WeChat, which is a vital app for people in the U.S. to communicate with friends and family in China.

In a statement Friday, a Tencent spokesperson said it “has always incorporated the highest standards of user privacy and data security” and called the Commerce Department’s restrictions “unfortunate.”

“But given our desire to provide ongoing services to our users in the U.S. — for whom WeChat is an important communication tool — we will continue to discuss with the government and other stakeholders in the U.S. ways to achieve a long-term solution,” the spokesperson said.

—CNBC’s Steve Kovach contributed to this article.

The insights you need to **INVEST LIKE A PRO**

START FREE TRIAL

PRO

INVESTMENT

INVESTMENT

INVESTMENT

INVESTMENT

Case 3:20-cv-05910-LB Document 78-3 Filed 10/01/20 Page 1 of 10

1 MICHAEL W. BIEN – 096891
 ERNEST GALVAN – 196065
 2 VAN SWEARINGEN – 259809
 BENJAMIN BIEN-KAHN – 267933
 3 ALEXANDER GOURSE – 321631
 AMY XU – 330707
 4 ROSEN BIEN
 GALVAN & GRUNFELD LLP
 5 101 Mission Street, Sixth Floor
 San Francisco, California 94105-1738
 6 Telephone: (415) 433-6830
 Facsimile: (415) 433-7104
 7 Email: mbien@rbgg.com
 egalvan@rbgg.com
 8 vswearingen@rbgg.com
 bbien-kahn@rbgg.com
 9 agourse@rbgg.com
 axu@rbgg.com

10 KELIANG (CLAY) ZHU – 305509
 11 DEHENG LAW OFFICES PC
 7901 Stoneridge Drive #208
 12 Pleasanton, California 94588
 Telephone: (925) 399-5856
 13 Facsimile: (925) 397-1976
 Email: czhu@dehengsv.com

14 ANGUS F. NI – Admitted *Pro Hac Vice*
 15 AFN LAW PLLC
 502 Second Avenue, Suite 1400
 16 Seattle, Washington 98104
 Telephone: (773) 543-3223
 17 Email: angus@afnlegal.com

18 Attorneys for Plaintiffs

19 UNITED STATES DISTRICT COURT

20 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

21 U.S. WECHAT USERS ALLIANCE,
 CHIHUO INC., BRENT COULTER,
 22 FANGYI DUAN, JINNENG BAO, ELAINE
 PENG, and XIAO ZHANG,

23 Plaintiffs,

24 v.

25 DONALD J. TRUMP, in his official capacity
 as President of the United States, and
 26 WILBUR ROSS, in his official capacity as
 Secretary of Commerce,

27 Defendants.

THOMAS R. BURKE – 141930
 DAVIS WRIGHT TREMAINE LLP
 505 Montgomery Street, Suite 800
 San Francisco, California 94111-6533
 Telephone: (415) 276-6500
 Facsimile: (415) 276-6599
 Email: thomasburke@dwt.com

DAVID M. GOSSETT – Admitted *Pro Hac Vice*
 DAVIS WRIGHT TREMAINE LLP
 1301 K Street N.W., Suite 500 East
 Washington, D.C. 20005-3366
 Telephone: (202) 973-4216
 Facsimile: (202) 973-4499
 Email: davidgossett@dwt.com

JOHN M. BROWNING – *Pro Hac Vice*
 forthcoming
 DAVIS WRIGHT TREMAINE LLP
 1251 Avenue of the Americas, 21st Floor
 New York, New York 10020-1104
 Telephone: (212) 603-6410
 Facsimile: (212) 483-8340
 Email: jackbrowning@dwt.com

Case No. 3:20-cv-05910-LB

**DECLARATION OF JOE HILDEBRAND
 IN SUPPORT OF PLAINTIFFS'
 OPPOSITION TO DEFENDANTS'
 MOTION TO STAY PENDING APPEAL
 OF ORDER GRANTING MOTION FOR
 PRELIMINARY INJUNCTION**

Date: October 15, 2020

Time: 9:30 a.m.

Crtrm.: Remote

Judge: Hon. Laurel Beeler

Trial Date: None Set

[3622020.1]

Case No. 3:20-cv-05910-LB

DECLARATION OF JOE HILDEBRAND ISO PLF.' OPPOSITION TO DFS.' MOTION TO STAY PENDING
 APPEAL OF ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

1 I, Joe Hildebrand, declare as follows:

2 1. I am an expert with 30-years' experience in soft development, data security,
3 and related fields. I have been asked by plaintiffs' counsel to provide my expert opinion in this
4 case concerning the Government's effort to ban or restrict WeChat in the United States. I worked
5 for Cisco for 8 years (2008 to 2016), reaching the rank of Distinguished Engineer. Cisco is the
6 worldwide leader in IT, networking, and cybersecurity solutions. As part of the management
7 team of Cisco, I was responsible for the technical direction of a highly-scalable multi-protocol
8 instant messaging software product with various storage back-ends, developed prototypes and
9 production code in C, C++, C#, Java, Perl, Python, and Delphi on Linux, Solaris, Mac, and
10 Windows, provided final escalation point for all technical problems in Development, Professional
11 Services, and Support, participated in the formation of corporate-wide and Internet-wide
12 technology strategy, served as the chief architect for Cisco's cloud collaboration applications
13 group, including WebEx Meetings, Messenger, and related products, and provided technical
14 liaison for industry analysts and reporters through briefings, whitepapers, and industry
15 conferences.
16

17
18 2. In addition to my tenure with Cisco, I served various senior technical
19 positions for companies including Jabber (an Instant Messaging company acquired by Cisco),
20 Time Warner and Interlink. Most recently, I worked for Mozilla from October 2016 to August
21 2020, responsible for the entire engineering team – 700 people spread all over the world – for a
22 major web browser, Firefox.
23

24 3. I served on the board of directors of the Internet Security Research Group
25 (ISRG) in 2016. ISRG is the non-profit organization behind Let's Encrypt, one of the largest
26 Certificate Authorities in the world. I remain on their Technical Advisory Board.
27
28

1 4. I served on the Internet Architecture Board (IAB) for 4 years (2014-
2 2018). The IAB is a non-governmental agency that provides long-range technical direction for
3 Internet development, and a management function for the standards processes pursued by the
4 Internet Engineering Task Force (IETF). As a part of my IETF participation, I managed the
5 eXtensible Messaging and Presence Protocol (XMPP) working group, the HyBi working group
6 (which produced WebSockets), and the WebPush working group. I have contributed to
7 numerous standards documents there.
8

9 5. Of all my previous experiences, cyber security and data privacy are an
10 important and constant topic, and I have accumulated extensive expertise. My recent CV is
11 attached.
12

13 6. I have personal knowledge of the matters stated herein and if called as a
14 witness I could and would testify truthfully to them.
15

16 7. In general, data security is achieved through tradeoffs among three core
17 objectives: confidentiality, integrity, and availability of data.¹ It is an exercise in risk
18 management, including the identification, assessment, and mitigation of risks to acceptable levels
19 at an appropriate cost. In addition, when it comes to data security threats, it is virtually
20 impossible to prove the negative and that there are no risks to a particular network or software.²
21 Technology is always evolving, and will reveal existing or new vulnerabilities. Even the best
22 companies in the world cannot claim that no data risks exist for their networks or systems.
23
24
25

26 ¹ The three security objectives are discussed by the National Institute of Standards and
27 Technology, FIPS PUB 199, "Standards for Security Categorization of Federal Information and
28 Information Systems", at <https://nvlpubs.nist.gov/nistpubs/FIPS/NIST.FIPS.199.pdf>.

² Shuman Ghosemajumder, You Can't Secure 100% of Your Data 100% of The Time, Harvard
Business Review (Dec. 4, 2017), at <https://hbr.org/2017/12/you-cant-secure-100-of-your-data-100-of-the-time>.

[3622020.1]

8. Accordingly, the industry has developed a set of best practices for mitigating data security risk.³ Some of the core measures include segmenting and tightly controlling access to a company's sensitive data, maintaining and auditing access logs to detect and address any deviations from expected behaviors including unauthorized access, and encrypting user data in storage and during transmission in such a way that access to data transiting a system would be extremely difficult ("end-to-end encryption").

9. These best practices have not been fully adopted among major companies in the U.S. These companies have made the different tradeoffs among the three core objectives – confidentiality, integrity, and availability of data – and have achieved different levels of security while paying attention to cost, user experience, and other factors. Moreover, the U.S. government is fighting against end-to-end encryption, and has undermined the industry's effort to achieve better security.⁴ As a result, the American companies themselves do not have a good track record of protecting user data, as incidents of large-scale data leaks and breaches are recurring in the news.

10. I have read the Executive Order issued on August 6, 2020 that bans the use of WeChat in the U.S. If the Executive Order is truly concerned about the threat that the Chinese government may access the data of the WeChat users in the U.S., there are targeted measures based on industry best practices that can effectively address such a concern. First of all,

³ See Federal Trade Commission, Start with Security (June 2015); Thomas B. Pahl, Stick with Security: Segment your network and monitor who's trying to get in and out (Aug. 25, 2017), at <https://www.ftc.gov/news-events/blogs/business-blog/2017/08/stick-security-segment-your-network-monitor-whos-trying-get>; National Institute of Standards and Technology, Framework for Improving Critical Infrastructure Cybersecurity (April 16, 2018).

⁴ DOJ has been trying to force Facebook to give up end-to-end encryption, and Congress is considering bills to cripple end-to-end encryption with the support of DOJ. See <https://www.pcmag.com/news/gop-senators-try-to-cripple-end-to-end-encryption-with-new-bill> and <https://nakedsecurity.sophos.com/2019/12/12/facebook-refuses-to-break-end-to-end-encryption/>.

[3622020.1]

1 partnering with a U.S. cloud provider for user data storage. This will provide a relatively secure
2 place for user data and also allow easy audit and oversight to detect unauthorized data access.
3 Secondly, regular compliance audits and notifications, which should be a part of almost any set
4 of mitigations. Thirdly, stringent corporate or even external oversight over management and
5 personnel with access to user data, which is industry best practice. Finally, the use of standards-
6 based end-to-end encryption for WeChat. These measures do not eliminate all the potential risks
7 of data leaks to the Chinese government, but will at least meet the industry's current standard.

9 11. In addition, according to the 08/06/2020 Executive Order, the U.S.
10 government appears to be concerned about the likelihood that WeChat contains some secret or
11 hidden features that can unknowingly surveil and collect data from user devices (such as a
12 smartphone). One of the solutions is a review and audit of WeChat's source codes by an
13 independent third party. The third party would need to be technologically sophisticated to be able
14 to catch any illicit activity that WeChat might be engaged in, and measures would need to be
15 taken to ensure that the code that is reviewed is the code that is actually deployed.

17 12. Banning downloads of the WeChat app updates from the app stores is a
18 very dangerous move for persons in the US who already have the app. That approach will
19 increase, not decrease, security risks to those users. Because software at this scale is complex
20 enough that even the engineers that build it cannot predict every way it will be used, software like
21 the WeChat app needs constant updates to fix bugs. Without those updates, WeChat users'
22 devices and personal data will be susceptible to attacks as bugs are discovered but remain unfixed
23 in that last version that they have.

25 13. Finally, if the government is worried about its employees and agents being
26 overheard or surveilled, it should consider banning the use of WeChat or other apps for that
27 smaller group of people that the government wants to protect. However, if the government is
28

[3622020.1]

1 interested in protecting all Americans, finding ways to get the entire industry to move towards the
 2 best practices is necessary. Those ways include mandating strong end-to-end encryption,
 3 protecting consumer data and meta-data in the manner of Europe's General Data Protection
 4 Regulation (GDPR) or the California Consumer Privacy Act (CCPA), and supporting research
 5 into making traffic analysis more difficult. The big picture is that all Americans are under
 6 constant surveillance from big tech companies such as Facebook and Google. These companies
 7 collect a vast amount of sensitive and private data on everyone accessing the internet or using a
 8 credit card. The data is routinely packaged and sold by so-called "data brokers" for different
 9 purposes, such as to political campaign organizations or advertisement-targeting firms.⁵ If the
 10 Chinese government is really interested in obtaining information on American citizens, it can just
 11 go to the data brokers and pay for it. Banning one app will not keep Americans safe and their data
 12 private from criminals, monetized and weaponized data, or overreaching governments.
 13
 14

15
 16 I declare under penalty of perjury under the laws of the United States of America that the
 17 foregoing is true and correct to the best of my knowledge.
 18

19 Executed on September 28, 2020 at Denver, Colorado.
 20

21 
 22

23 Joe Hildebrand
 24
 25

26 ⁵ See Charlie Warzel, Chinese Hacking is Alarming. So Are Data Brokers, New York
 27 Times (Feb. 10, 2020), at [https://www.nytimes.com/2020/02/10/opinion/equifax-breach-](https://www.nytimes.com/2020/02/10/opinion/equifax-breach-china-hacking.html)
 28 [china-hacking.html](https://www.nytimes.com/2020/02/10/opinion/equifax-breach-china-hacking.html); Data Brokers: Regulators Try to Rein in the "Privacy Deathstars",
 Financial Times (Jan. 7, 2019), at [https://www.ft.com/content/f1590694-fe68-11e8-aebf-](https://www.ft.com/content/f1590694-fe68-11e8-aebf-99e208d3e521)
[99e208d3e521](https://www.ft.com/content/f1590694-fe68-11e8-aebf-99e208d3e521).

Joe Hildebrand

SUMMARY

Thirty years experience using a passion for communication to focus on executive level technology leadership, standards, and real-world interoperability.

WORK EXPERIENCE

Mozilla Corporation *Firefox*

Vice President of Engineering

October 2016 - September 2020

Led a team of 700 people worldwide to build and maintain the [Firefox](#) web browser used by hundreds of millions of people. Established guidelines for career paths, worked with the Diversity&Inclusion Team to find ways to increase the representation of Firefox's potential user base (i.e., every person in the world) on Mozilla's staff, and built a culture of openness, excellence, and repeatability. Responsible for all engineering, product management, and partnerships for Gecko, the Web Platform inside of Firefox.

Cisco Systems *Cloud Collaboration Applications*

Distinguished Engineer

October 2008 - September 2016

As a part of the Corporate Technology Group in the Office of the CTO, participated in the formation of corporate-wide technology strategy. Member of the Internet Architecture Board ([IAB](#)).

Overall architecture lead for [WebEx](#). As a member of the executive team, managed priorities and funding for over one thousand staff spread across multiple continents producing over \$1 billion in revenue.

Established an architecture governance model that serves as a template for how Cisco can write software.

Built an approach for internal software development using mechanisms from open source to motivate code sharing between disparate parts of a large business. Mentored senior technical talent from multiple business units. Directed standards activities at the [IETF](#) and [XSF](#) tied to business objectives.

Jabber, Inc.

CTO

July 2001- October 2008

As part of the executive management team, responsible for the technical direction of a highly-scalable multi-protocol instant messaging software product with various storage back-ends. Supported global sales team with training, collateral, and customer visits. Provided high-level support for the Sales Engineering and Professional Services department, including developing and presenting customer training, architecting customer solutions, and incorporating customer requirements into product direction.

Developed prototypes and production code in C, C++, C#, Java, Perl, Python, and Delphi on Linux, Solaris, and Windows. Provided final escalation point for all technical problems in Development, Professional Services, and Support. Directed standards activities with the [IETF](#) and [XSF](#). Provided

technical liaison for industry analysts and reporters through briefings, whitepapers, and industry conferences. Instrumental in the sale of Jabber, Inc. to Cisco Systems.

Interlink Group

Chief Architect

August 1996 - July 2001

As part of the senior management team, responsible for keeping a growing consulting company on the forefront of technology. Created, staffed, and managed a national architecture practice. Introduced and enforced software development practices, including configuration management, code inspection, and testing. Developed reusable architectures for Delphi, Visual Basic, Java, and C#. Supported national sales team in role of technical closer. Developed service offerings, including reusable sales collateral. Mapped client business needs onto technology platforms and directions. Mentored architects, developers and administrators in industry best practices. Developed internal line-of-business solutions. Provided final escalation point for all technical problems.

Time-Warner Communications *American Technical Resources*

Consultant

May 1995- August 1996

Designed and developed web site and API to accept telephone number updates for local number portability.

Fuentez Systems Concepts, Inc.

Lead Software Engineer

June 1992 - May 1995

Built systems for USMTF battlefield messaging, including distributed queuing, user interfaces, APIs, and systems management. Created data-driven web applications for message format management and source code control. Led teams to deliver military-grade solutions.

Virginia Tech *Mechanical Engineering Department*

Research Assistant

1990 - 1992

Built a graphical user experience to control COBRA, a robotic arm used in nuclear power applications.

Babcock and Wilcox Nuclear Services

Engineering Co-op

1988 - 1991

Designed robotic manipulators for high-radiation environments. Deployed designs in the field, including acting as robot operator and tooling engineer on the critical path for scheduled reactor maintenance. Used operational knowledge to design user experiences for next-generation robotic systems.

NASA STX Systems

Summer Intern

1988

Provided quick-response programming support for the Meteorology component of the ABLE-3A field research team in Alaska as a part of the Global Tropospheric Experiment. Performed graphical analysis of meteorological data for review by scientists studying changes to polar ozone concentrations.

Center for Excellence in Education

Summer Intern

1987

Devised and maintained a database management system to track donations to the Research Science Institute (RSI), a summer enrichment program established by Admiral Rickover for gifted high school students from the US and abroad.

Grumman-CTEC Research Science Institute

Summer Intern

1986

Built graphical systems for natural language and AI applications as a part of an internship sponsored by [RSI](#).

EDUCATION

Virginia Tech

BS, Mechanical Engineering, Cum Laude

1992 - 1987

Interdisciplinary interest in robotics including control software, kinematics, and mechanical design.

INDUSTRY & STANDARDS

Let's Encrypt

Technical Advisory Board Member, Board Member

Present2015

As a member of the Internet Security Research Group ([ISRG](#)) Technical Advisory Board, provided technical advice and review for one of the world's largest Certificate Authorities. For the year 2016, served as a member of the board of directors, providing fiduciary oversight.

IAB

Member

PresentMarch 2014

Responsible for the overall architecture of the Internet. Focus on documentation standards and new transport protocol approaches. Program committee member for the [SEMI workshop](#), the [CARIS workshop](#), and the [MaRNEW workshop](#).

IETF

Working Group Co-Chair, Author, Participant

20182001

Co-chaired the working groups [webpush](#), [XMPP](#), [HyBi](#), and [WebDAV](#). Helped build and judge consensus across multiple competing world views to create standards that allow people and systems to communicate.

RSOC IAB

Member

2016August 2013

Under the direction of the [IAB](#), provided oversight for the [RFC](#) Series and RFC Series Editor.

XSF

Member, Author, Council Member

20142001

Founding member of the XMPP Standards Foundation. Member of the [XSF Council](#) 2002-2003. Published several [XMPP Extensions](#).

PUBLICATIONS

2015

Kuehlewind, M. and Trammell, B. and Gubser, E., and Hildebrand, J. "[A New Transport Encapsulation for Middlebox Cooperation](#)", in Proc. IEEE Conference on Standards for Communications and Networking (CSCN), Tokyo, Japan, October 2015.

2014

Trammell, B. and Hildebrand, J., "[Evolving Transport in the Internet](#)", in IEEE Internet Computing, vol. 18, no. 5, September 2014.

2004

Hildebrand, J. "[Nine IM Accounts and Counting](#)", in ACM Queue, vol. 1, no. 8, January 2004.

PATENTS

Scalable fine-grained multi-service authorization 8,925,043

December 30, 2014

A scalable cross-protocol mechanism is provided for describing, transmitting and checking large lists of authorizations for operations on network resources.

System and method for allocating resources based on events in a network environment 8,788,654

July 22, 2014

Increasing network and compute resources just-in-time as predicted by various events.

Case 3:20-cv-05910-LB Document 78-2 Filed 10/01/20 Page 1 of 4

MICHAEL W. BIEN – 096891
 ERNEST GALVAN – 196065
 VAN SWEARINGEN – 259809
 BENJAMIN BIEN-KAHN – 267933
 ALEXANDER GOURSE – 321631
 AMY XU – 330707
 ROSEN BIEN
 GALVAN & GRUNFELD LLP
 101 Mission Street, Sixth Floor
 San Francisco, California 94105-1738
 Telephone: (415) 433-6830
 Facsimile: (415) 433-7104
 Email: mbien@rbgg.com
 egalvan@rbgg.com
 vswearingen@rbgg.com
 bbien-kahn@rbgg.com
 agourse@rbgg.com
 axu@rbgg.com

KELIANG (CLAY) ZHU – 305509
 DEHENG LAW OFFICES PC
 7901 Stoneridge Drive #208
 Pleasanton, California 94588
 Telephone: (925) 399-5856
 Facsimile: (925) 397-1976
 Email: czhu@dehengsv.com

ANGUS F. NI – Admitted *Pro Hac Vice*
 AFN LAW PLLC
 502 Second Avenue, Suite 1400
 Seattle, Washington 98104
 Telephone: (773) 543-3223
 Email: angus@afnlegal.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

U.S. WECHAT USERS ALLIANCE,
 CHIHUO INC., BRENT COULTER,
 FANGYI DUAN, JINNENG BAO, ELAINE
 PENG, and XIAO ZHANG,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity
 as President of the United States, and
 WILBUR ROSS, in his official capacity as
 Secretary of Commerce,

Defendants.

THOMAS R. BURKE – 141930
 DAVIS WRIGHT TREMAINE LLP
 505 Montgomery Street, Suite 800
 San Francisco, California 94111-6533
 Telephone: (415) 276-6500
 Facsimile: (415) 276-6599
 Email: thomasburke@dwt.com

DAVID M. GOSSETT – Admitted *Pro Hac Vice*
 DAVIS WRIGHT TREMAINE LLP
 1301 K Street N.W., Suite 500 East
 Washington, D.C. 20005-3366
 Telephone: (202) 973-4216
 Facsimile: (202) 973-4499
 Email: davidgossett@dwt.com

JOHN M. BROWNING – *Pro Hac Vice*
 forthcoming
 DAVIS WRIGHT TREMAINE LLP
 1251 Avenue of the Americas, 21st Floor
 New York, New York 10020-1104
 Telephone: (212) 603-6410
 Facsimile: (212) 483-8340
 Email: jackbrowning@dwt.com

Case No. 3:20-cv-05910-LB

**DECLARATION OF FANGYI DUAN IN
 SUPPORT OF PLAINTIFFS'
 OPPOSITION TO DEFENDANTS'
 MOTION TO STAY PENDING APPEAL
 OF ORDER GRANTING MOTION FOR
 PRELIMINARY INJUNCTION**

Date: October 15, 2020

Time: 9:30 a.m.

Crtrm.: Remote

Judge: Hon. Laurel Beeler

Trial Date: None Set

1 I, Fangyi “Amy” Duan, declare as follows:

2 1. I am a plaintiff in this case. I also operate a company called Chihuo Inc, another
3 plaintiff of the case. I have personal knowledge of the matters stated herein and if called as a
4 witness I could and would testify truthfully to them.

5 2. Chihuo Inc is an online platform to promote dining, food products, and restaurants
6 mostly for Chinese-speaking people in the U.S. The company has about thirty employees.

7 3. The business’s success is built upon WeChat’s large user base within the Chinese
8 communities, and it has more than 700,000 active followers on WeChat. Approximately 70% of
9 our content subscribers/viewers originate from WeChat.

10 4. When the Executive Order banning the use of WeChat came out in early August,
11 my company tried other alternative apps with little success.

12 5. Chihuo, Inc. relies on a special WeChat function called “official accounts” that
13 can easily and quickly publish short or long articles embedded with pictures and videos.
14 Followers of an official account will automatically see the article in his or her Moments (like
15 Facebook Wall). With a click of a button, a viewer can repost, share, comment, and like the
16 article. Unlike Facebook, the author on WeChat can manage comments, such as removing
17 offensive comments, and rearranging the order of comments so that good comments are listed on
18 top. Moreover, WeChat and its associated mini-programs offer a wide range of formatting tools,
19 such as adding customized fonts and infographics, manipulating the positions of headings and
20 subheadings, and so on. This is why the articles published by my company’s official accounts on
21 WeChat can be read tens of thousands of times within several hours of publication. No other apps
22 come close. Telegram and Skype simply don’t not have such a function. Line, Instagram, and
23 Facebook are vastly inferior because they are good only for short blogs and do not offer many of
24 the above-mentioned publishing functions for the author to format content and manage
25 comments. The power of story-telling and going viral through WeChat’s official accounts is
26 unparalleled.

27 6. The chat and messaging functions of WeChat are also unique. Another way for my
28

1 company to reach a large number of people is through chat groups on WeChat. The host of a chat
2 group has the power to admit people in and remove people. This is critical to control the content
3 of the group chat, reduce spam messages, and to maintain quality of the group. I and my company
4 have tried Telegram, Facebook Messenger, and other apps, but they do not offer such features to
5 the group host. As a result, the chat groups on Telegram and Facebook Messenger are flooded
6 with unwanted advertisements or messages, and members of the group have decided to ignore all
7 messages of the group chat or even to quit.

8 7. Importantly, the vast majority of Chinese-speaking people are on WeChat and not
9 any other apps. For example, my company maintains about a dozen chat groups on WeChat with
10 more than 5,000 members in the Bay Area alone. In anticipation of the WeChat ban, my company
11 set up Telegram chat groups for the Bay Area, but only about 300 members joined and their
12 participation levels are barely active on that app.

13 8. Chihuo Inc's business model relies on speed and prompt results provided by
14 WeChat, and it will be harmed if service is slowed or degraded. The blogs and articles published
15 by Chihuo Inc's official accounts contain a lot of videos and pictures. If the WeChat service is
16 slowed down, it could take several or more than ten seconds for the blogs to load instead of
17 appearing instantly. If that happens, a majority of the viewers will simply exit. This is the twenty
18 first century, and people do not like to wait. Another critical function of WeChat is its high-
19 quality voice and video calls. If WeChat service speed is slowed down, these calls will
20 experience lags and even break down, rendering it unusable.

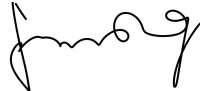
21 9. Finally, my abilities to access the outside world, to maintain my own personal
22 social ties, and to communicate with my family members and friends in China and in the United
23 States depend on WeChat. For example, I message my parents on WeChat every few days, and
24 they do not have the English or technical skills to install and operate apps that are designed for
25 English speakers. The language settings of some of the apps can be switched to Chinese, but
26 many function keys are still in English, and the initial sign-up page for the apps are still in
27 English (the language settings can be changed only after account registration is done). I have also
28 subscribed to hundreds of WeChat official accounts and rely on them for information and news

Case 3:20-cv-05910-LB Document 78-2 Filed 10/01/20 Page 4 of 4

1 updates, and the vast majority of them are not on any other apps.

2 I declare under penalty of perjury under the laws of the United States of America that the
3 foregoing is true and correct to the best of my knowledge.
4

5 Executed on September 29, 2020 at Santa Clara, California.

6 
7

8 Fangyi "Amy" Duan
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Case 3:20-cv-05910-LB Document 78-1 Filed 10/01/20 Page 1 of 5

MICHAEL W. BIEN – 096891
 ERNEST GALVAN – 196065
 VAN SWEARINGEN – 259809
 BENJAMIN BIEN-KAHN – 267933
 ALEXANDER GOURSE – 321631
 AMY XU – 330707
 ROSEN BIEN
 GALVAN & GRUNFELD LLP
 101 Mission Street, Sixth Floor
 San Francisco, California 94105-1738
 Telephone: (415) 433-6830
 Facsimile: (415) 433-7104
 Email: mbien@rbgg.com
 egalvan@rbgg.com
 vswearingen@rbgg.com
 bbien-kahn@rbgg.com
 agourse@rbgg.com
 axu@rbgg.com

KELIANG (CLAY) ZHU – 305509
 DEHENG LAW OFFICES PC
 7901 Stoneridge Drive #208
 Pleasanton, California 94588
 Telephone: (925) 399-5856
 Facsimile: (925) 397-1976
 Email: czhu@dehengsv.com

ANGUS F. NI – Admitted *Pro Hac Vice*
 AFN LAW PLLC
 502 Second Avenue, Suite 1400
 Seattle, Washington 98104
 Telephone: (773) 543-3223
 Email: angus@afnlegal.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

U.S. WECHAT USERS ALLIANCE,
 CHIHUO INC., BRENT COULTER,
 FANGYI DUAN, JINNENG BAO, ELAINE
 PENG, and XIAO ZHANG,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity
 as President of the United States, and
 WILBUR ROSS, in his official capacity as
 Secretary of Commerce,

Defendants.

THOMAS R. BURKE – 141930
 DAVIS WRIGHT TREMAINE LLP
 505 Montgomery Street, Suite 800
 San Francisco, California 94111-6533
 Telephone: (415) 276-6500
 Facsimile: (415) 276-6599
 Email: thomasburke@dwt.com

DAVID M. GOSSETT – Admitted *Pro Hac Vice*
 DAVIS WRIGHT TREMAINE LLP
 1301 K Street N.W., Suite 500 East
 Washington, D.C. 20005-3366
 Telephone: (202) 973-4216
 Facsimile: (202) 973-4499
 Email: davidgossett@dwt.com

JOHN M. BROWNING – *Pro Hac Vice*
 forthcoming
 DAVIS WRIGHT TREMAINE LLP
 1251 Avenue of the Americas, 21st Floor
 New York, New York 10020-1104
 Telephone: (212) 603-6410
 Facsimile: (212) 483-8340
 Email: jackbrowning@dwt.com

Case No. 3:20-cv-05910-LB

**DECLARATION OF YING CAO IN
 SUPPORT OF PLAINTIFFS'
 OPPOSITION TO DEFENDANTS'
 MOTION TO STAY PENDING APPEAL
 OF ORDER GRANTING MOTION FOR
 PRELIMINARY INJUNCTION**

Date: October 15, 2020

Time: 9:30 a.m.

Crtrm.: Remote

Judge: Hon. Laurel Beeler

Trial Date: None Set

1 I, Ying Cao, declare as follows:

2 1. I am one of the founders and trustees of U.S. WeChat Users Alliance, a plaintiff in
3 this case. I have personal knowledge of the matters stated herein and if called as a witness I could
4 and would testify truthfully to them.

5 2. I am an immigration lawyer in New Jersey, primarily serving Chinese-speaking
6 clients for their visa and immigration matters.

7 3. I have used WeChat for about eight years, and it has become a critical part of my
8 personal life and work. I currently have 4,100 contacts on my personal WeChat account. In
9 addition, my law office operates many WeChat chat groups where I and my staff can respond to
10 clients' needs, share legal updates and information instantly. There are more than 9,600 members
11 in these WeChat groups. My law office also has an official WeChat account to publish articles
12 about immigration law changes and common visa issues, which is a great way to attract new clients.

13 4. After the President issued the Executive Order that would ban the use of WeChat, I
14 have started downloading and experimenting with other apps. None of them has come close to be
15 a reasonable substitute for WeChat.

16 5. I have downloaded and used Telegram, an app advertised as a popular alternative
17 for WeChat. I doubt that Chinese speaking users with limited English proficiency could do so, as
18 the sign-up materials are only in English. Telegram is good for one-on-one messaging, but not for
19 group chats. Any member of the group can invite his or her friends in without the group host's
20 permission, which makes it hard to control the quality of the group and group discussion. The app
21 has about a dozen language choices, but does not include Chinese, and there is no user information
22 or privacy policy in Chinese. Telegram does not have in-app translation or voice-to-text functions
23 like WeChat does. My law office last month started a Telegram group for clients but the people
24 who have joined have generally been inactive compared to our firm's WeChat contacts.

25 6. I have downloaded and used Line. Its shortcomings are similar to Telegram in terms
26 of the ability to control group chats and group chat hosts themselves can even be kicked out of the
27 group. Line's interface is designed for English speakers. Even if the entire operating system of my
28

1 phone's language is changed to Chinese, many menu function keys/buttons are still displayed in
2 English, such as Line Webtoon, People Nearby, Line Play, Line Services, Line Game, Line
3 Camera, Foodie, and descriptions of the stickers, making it difficult for Chinese-speaking people
4 to operate the app. Line does not have in-app translation and voice-to-text functions like WeChat
5 does. It does not have a privacy policy in Chinese.

6
7 7. I have downloaded and used Skype. It is similar to Telegram because it is only a
8 messaging app, not a social media app. It does not have Moments-like feature to write posts. The
9 group chat function is limited compared to WeChat, as the maximum number of people in a group
10 is 50, while WeChat is 500. It does not have a translation or voice-to-text function.

11 8. I have downloaded and used Signal. It is another messaging app like Telegram with
12 similar flaws. It does not have Moments-like function to write posts. The group chat function is
13 limited compared to WeChat, such as the maximum number of people in a group is 10, while
14 WeChat is 500, making it difficult to reach to a large audience. Signal does not have an in-app
15 translation function like WeChat does. It has a basic voice-to-text function but does not work well
16 if the spoken language is Chinese. It also does not have a privacy policy written in Chinese.
17 Moreover, a phone number is needed to register for a Signal account. Unlike WeChat, the phone
18 number is displayed to every Signal contact which is a privacy concern when dealing with new
19 contact.
20

21 9. I have downloaded and used Snapchat. It has a special feature that all messages
22 disappear after viewing or expiration. It is widely recognized that the purpose of sharing snap shots
23 and videos on Snapchat is to "keep things light and spontaneous among friends, without having to
24 think about it later." It is not meant to help build your long-time online presence, but rather for
25 "being silly and enjoying the moment." Accordingly, the primary users are youngsters, and its
26 interface is not suitable for adults or business clients. The automatic disappearance feature can be
27
28

1 disabled if equipped with technical skills. It also does not have a voice-to-text function. It cannot
2 send or forward a Word or PDF document like WeChat does. It is not friendly to Chinese-speaking
3 users because it does not have language options. Even if the device (iPhone or android phone)'s
4 language changes to Chinese, most of its interface still display in English. I could not locate a
5 Chinese version of Snapchat's privacy or user policies.

6
7 10. I have downloaded and used Instagram. It is a great app for pictures or short video,
8 but not for text. Its group chat functions are limited, as the maximum number of people in a group
9 is 32, while WeChat is 500. It also does not have a voice-to-text function.

10 11. I have downloaded and used Facebook. Its Wall is similar to WeChat's Moments,
11 but the format of Facebook blog posts is primitive. WeChat Moments allows many different ways
12 to format and manage content (including picture, video, stickers, and infographic) to make the blog
13 more useful for publishing. Facebook has a basic voice-to-text function but does not work for
14 Chinese.

15
16 12. I have also used LinkedIn in the past. It is an app for business professionals who
17 look for career opportunities, and is inappropriate for interactions with family, friends, and clients.
18 Its messaging function is primitive compared to WeChat because it does not allow audio or video
19 calls.

20 13. A universal and glaring flaw for all these alternative apps is that most of Chinese-
21 speaking people are not on them. Even if the alternative apps offer some of the functions of
22 WeChat, they are useless to me because my relatives, friends, and clients are not on them. In this
23 sense, WeChat is irreplaceable.

24
25 14. I regularly use WeChat's audio and video calls, and its quality is comparable to the
26 best in business such as Zoom. If WeChat's service speed is slowed down, the calls will become
27 unbearable. Reading blogs with interactive media will also be slow to load. The messages in a large
28

1 chat group will likely experiences lags, further degrading and even destroying user experience.

2
3 I declare under penalty of perjury under the laws of the United States of America that the
4 foregoing is true and correct to the best of my knowledge.

5 Executed on September 29, 2020 at Short Hills, New Jersey.

6
7 

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Ying Cao

From: ECF-CAND@cand.uscourts.gov
To: efiling@cand.uscourts.gov
Subject: Activity in Case 3:20-cv-05910-LB U.S. WeChat Users Alliance et al Order on Motion to Shorten Time
Date: Friday, September 25, 2020 3:38:16 PM

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

*****NOTE TO PUBLIC ACCESS USERS***** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court

California Northern District

Notice of Electronic Filing

The following transaction was entered on 9/25/2020 at 3:37 PM and filed on 9/25/2020

Case Name: U.S. WeChat Users Alliance et al

Case Number: [3:20-cv-05910-LB](#)

Filer:

Document Number: 73(No document attached)

Docket Text:

Order by Magistrate Judge Laurel Beeler. Given the parties' representations and the disputed scheduling, the court sets the following briefing schedule for the pending motion to stay at ECF 68: Plaintiffs' opposition due Thursday 10/1/2020; Defendants' optional reply no later than Tuesday 10/6/2020; hearing set for 10/15/2020 at 9:30 a.m. If the court can do it on a tighter time period, it will let the parties know. The parties must submit chambers copies of their filings. The court terminates the motion to shorten time at ECF No. 69. *(This is a text-only entry generated by the court. There is no document associated with this entry.)* (lblc5S, COURT STAFF) (Filed on 9/25/2020)

3:20-cv-05910-LB Notice has been electronically mailed to:

Alexander Ross Gourse agourse@rbgg.com, glapurja@rbgg.com

Amy Powell amy.powell@usdoj.gov

Amy Xu axu@rbgg.com, glapurja@rbgg.com

Angus Fei Ni angus@afnlegal.com

David Morris Gossett davidgossett@dwt.com, dgossett@gmail.com

Dirk Langer langer@dirklanger.com

Keliang Zhu jfazio@dehengsv.com, ameehan@dehengsv.com, czhu@dehengsv.com, yyao@dehengsv.com

Michael Drezner Michael.L.Drezner@usdoj.gov

Michael William Bien mbien@rbgg.com, agourse@rbgg.com, axu@rbgg.com, glapurja@rbgg.com, kstilber@rbgg.com, vswearingen@rbgg.com

Serena M Orloff serena.m.orloff@usdoj.gov

Stuart Justin Robinson stuart.j.robinson@usdoj.gov, fedprog.ecf@usdoj.gov

Thomas R. Burke thomasburke@dwt.com, ayshalewis@dwt.com, esperanzamartinez@dwt.com, sfodocket@dwt.com

Van Swearingen vswearingen@rbgg.com, ezheng@rbgg.com, glapurja@rbgg.com, lwoo@rbgg.com

3:20-cv-05910-LB Please see [Local Rule 5-5](#); Notice has NOT been electronically mailed to:

David M. Gossett
Davis Wright Tremaine LLP
1301 K Street NW, Suite 500 East
Washington, DC 20005

MICHAEL W. BIEN – 096891
 VAN SWEARINGEN – 259809
 ALEXANDER GOURSE – 321631
 AMY XU – 330707
 ROSEN BIEN
 GALVAN & GRUNFELD LLP
 101 Mission Street, Sixth Floor
 San Francisco, California 94105-1738
 Telephone: (415) 433-6830
 Facsimile: (415) 433-7104
 Email: mbien@rbgg.com
 vswearingen@rbgg.com
 agourse@rbgg.com
 axu@rbgg.com

KELIANG (CLAY) ZHU – 305509
 DEHENG LAW OFFICES PC
 7901 Stoneridge Drive #208
 Pleasanton, California 94588
 Telephone: (925) 399-5856
 Facsimile: (925) 397-1976
 Email: czhu@dehengsv.com

ANGUS F. NI – Admitted *Pro Hac Vice*
 AFN LAW PLLC
 502 Second Avenue, Suite 1400
 Seattle, Washington 98104
 Telephone: (773) 543-3223
 Email: angus@afnlegal.com

THOMAS R. BURKE – 141930
 DAVIS WRIGHT TREMAINE LLP
 505 Montgomery Street, Suite 800
 San Francisco, California 94111-6533
 Telephone: (415) 276-6500
 Facsimile: (415) 276-6599
 Email: thomasburke@dwt.com

DAVID M. GOSSETT – Admitted *Pro Hac Vice*
 DAVIS WRIGHT TREMAINE LLP
 1301 K Street N.W., Suite 500 East
 Washington, D.C. 20005-3366
 Telephone: (202) 973-4216
 Facsimile: (202) 973-4499
 Email: davidgossett@dwt.com

Counsel for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

U.S. WECHAT USERS ALLIANCE,
 CHIHUO INC., BRENT COULTER,
 FANGYI DUAN, JINNENG BAO,
 ELAINE PENG, and XIAO ZHANG,

Plaintiffs,

v.

DONALD J. TRUMP, in his official
 capacity as President of the United States,
 and WILBUR ROSS, in his official
 capacity as Secretary of Commerce,

Defendants.

Case No. 3:20-cv-05910-LB

**DECLARATION OF
 ELAINE PENG**

Judge: Hon. Beeler
 Date: 09/19/2020
 Time: 1:30pm

Trial Date: None Set

1 I, Elaine Peng, declare as follows:

2 1. I am a Plaintiff in the above-captioned action (the “Action”). I have personal
3 knowledge of the matters stated herein and if called as a witness I could and would testify
4 truthfully to them.

5 2. I am a United States citizen residing in Castro Valley, California.

6 3. As I previously stated in my Declaration dated August 26, 2020, I operate the
7 Mental Health Association for Chinese Communities (“MHACC”), a nonprofit organization to
8 provide mental health education and services to the local Chinese community.

9 4. The primary tool for MHACC to reach out and provide services to the Chinese
10 Americans is WeChat. One WeChat group consists of approximately 110 MHACC volunteers
11 for our use for internal communications. The second WeChat group has approximately 420
12 members, made up of both volunteers, service recipients and their family members.

13 5. Since many of the Chinese community members we serve are not fluent in
14 English, WeChat is the only online tool that they rely on.

15 6. The majority of our four hundred plus service recipients are either of elderly, or
16 deficient in English, or both. When I first founded MHACC in 2013, we went to great trouble
17 just to teach them on how to set up WeChat accounts, how to use WeChat to message and share,
18 as many of them do not know how to use a smart phone. In some cases we have MHACC staff
19 driving hours to service recipients’ homes or recipients driving hours to our office, just to have
20 WeChat set up to access our services. The process took much time, energy and effort.

21 7. This morning I learned that the U.S. government is shutting down WeChat on
22 this Sunday. I am shocked and frightened, as my service recipients who are suffering mental
23 health problems – including depression, schizophrenia, bipolar disorder, and post-traumatic
24 stress disorder – will lose access to WeChat, the only channel for the them to receive services,
25 educational materials, and treatment resources. This is a humanitarian crisis.

26 8. In the last month or also, I have tried to shift the MHACC groups to alternative
27 apps. But these apps are in English. Because of the language barrier and lack of technical skills
28 to operate smartphones, the majority of my service recipients cannot be shifted to other apps.

CASE NO. 3:30-CV-05910-LB
DECLARATION OF ELAINE PENG

1 9. Additionally, almost all of MHACC's data are stored on WeChat. I store all
2 service recipients' names, addresses, contact information, medical history and other vital
3 information on WeChat. I send out questionnaires on WeChat for them to complete. Our staff
4 conduct one-on-one counselling with them on WeChat. We rely on the chat history to evaluate
5 their cases and design their treatment, and then deliver it to them on WeChat. In one case we
6 even used the real-time location sharing function on WeChat to *prevent a suicide attempt*. Since
7 WeChat is its own system, I am not aware of any method to transfer this information outside of
8 WeChat. Banning WeChat will mean erasing all such valuable information and destroying the
9 fundamental foundation that MHACC has strived for years to build.

10 10. I am also politically active. Right now I am using WeChat to organize teams to
11 spread Chinese-language materials to teach Chinese Americans – most of whom do not speak
12 English – on how to become registered voters, as well as to send messages to potential Chinese
13 American voters on the upcoming election. A majority of these Chinese American voters use
14 WeChat as their only messaging and social media app. Without WeChat, I lose a critical and
15 irreplaceable forum to reach them.

16 I declare under penalty of perjury under the laws of the United States of America that
17 the foregoing is true and correct to the best of my knowledge.

18
19 Executed on September 18, 2020 at Castro Valley, California.

20
21 

22 Elaine Peng
23
24
25
26
27
28

Pages 1 - 41

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Laurel Beeler, Judge

U.S. WECHAT USERS ALLIANCE,)
 CHIHUO INC., BRENT COULTER,)
 FANGYI DUAN, JINNENG BAO,)
 ELAINE PENG, and XIAO ZHANG,)

Plaintiffs,)
)

VS.)
)

No. C 20-5910 LB

DONALD J. TRUMP, in his)
 official capacity as President)
 of the United States, and)
 WILBUR ROSS, in his official)
 capacity as Secretary of)
 Commerce,)

Defendants.)
)

San Francisco, California
 Friday, September 18, 2020

TRANSCRIPT OF REMOTE VIDEO PROCEEDINGSAPPEARANCES:

For Plaintiffs: ROSEN BIEN GALVAN & GRUNFELD LLP
 101 Mission Street, Sixth Floor
 San Francisco, California 94105-1738
 BY: MICHAEL W. BIEN, ESQ.
 VAN SWEARINGEN, ESQ.

DEHENG LAW OFFICES PC
 7901 Stoneridge Drive, #208
 Pleasanton, California 94588
 BY: KELIANG (CLAY) ZHU, ESQ.

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

Reported By: Ruth Levine Ekhaus, RDR, FCRR
 Official Reporter, CSR No. 12219

APPEARANCES: (CONTINUED)

For Plaintiffs DAVIS WRIGHT TREMAINE LLP
505 Montgomery Street, Suite 800
San Francisco, California 94111-6533
BY: THOMAS R. BURKE, ESQ.

DAVIS WRIGHT TREMAINE LLP
1301 K Street NW, Suite 500 East
Washington, DC 20005
BY: DAVID M. GOSSETT, ESQ.

For Defendants: UNITED STATES DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
Ben Franklin Station, P.O. Box No. 883
Washington, DC 20044
BY: MICHAEL DREZNER, ESQ.
SERENA M. ORLOFF, ESQ.

PROCEEDINGS

Friday - September 18, 2020

11:45 a.m.

P R O C E E D I N G S

---o0o---

THE CLERK: Calling Civil Action 20-5910, US WeChat Users Alliance, et al.

Counsel, if you could, please state your appearances for the record.

MR. BIEN: Good morning, Your Honor. Michael Bien and Van Swearingen from Rosen, Bien, Galvan & Grunfeld on behalf of plaintiffs; along with Clay Zhu, Angus Ni, Thomas Burke, Dave Gossett. Thank you.

THE COURT: Good morning.

MS. ORLOFF: Good morning, Your Honor, and afternoon here on the east coast. Serena Orloff from the Department of Justice Civil Division; and with me is Michael Drezner, my colleague, for the Government.

THE COURT: Great. Okay. So let me -- thank you all for being available on short notice. I'm looking at my computer screen just to double-check that there has been nothing else filed since 10:45 -- which is fine.

Let me tell you my concern, the genesis of my comment about mootness, and then maybe we can hear what the Government has to say about it.

And this wasn't meant to foreclose an avenue for directing -- for addressing the issues that now are more

PROCEEDINGS

1 concrete. I mean, it's not moot in the sense that, of course,
2 the harm is concrete now.

3 I will tell you this just by preliminarily -- and I don't
4 know whether it was entirely obvious at the end of the hearing,
5 but after all I was convinced by the prudential ripeness
6 argument that the Government advanced.

7 So the order that I was going to issue this morning, until
8 I had the ping on my notifications that -- about the
9 secretary's issuance of the definition of "per transaction," I
10 was going to say it wasn't ripe and sort of offer -- I would
11 say I was basically available any time to address it, when the
12 Secretary did define "transaction."

13 So that was what the order was going to be after
14 yesterday's hearing. And then, of course, I didn't do it this
15 morning because I didn't have to.

16 And my concern is not that -- and the situation that we
17 have now -- and I have feedback from somebody. I don't know if
18 someone is on two devices, which will give feedback.

19 The situation that I have now is that the main argument
20 that I was considering yesterday, is a ground for the -- are
21 you all hearing feedback too? I'm not sure why that is.

22 Okay. Let's try that. Good. That took care of it.

23 Can you all still hear me? Good. So I think that was it.

24 The perils of having court hearings at home with all the
25 noise that attends the background, so I'm glad -- the whole

PROCEEDINGS

1 point of using a headset is so I avoid it on my end.

2 Yesterday, the ground that I was considering -- and the
3 only ground I was considering -- to grant the preliminary
4 injunction was the void for vagueness ground. And that -- and
5 as refined in the reply brief, that was very much a notice
6 Fifth Amendment issue. And, in fact, you defined the issue by
7 reference to Judge Orrick's opinion.

8 That, for example, is now off the table because it no
9 longer exists because of the nature of the ban of WeChat. It's
10 not -- it does not have civil or criminal penalties for the
11 individuals, as the Government said in its notice that it gave
12 last Wednesday.

13 But, in any event, as I said, I was going to say the rest
14 of it was not ripe because how, for the reasons we said
15 yesterday, can I decide the burdens on speech, for example,
16 without knowing what the burdens are? And so now we do know
17 what the burdens are; right? We do. But if I were to look at
18 the case in the vacuum of the executive order, I became
19 convinced that, given the national security -- the President's
20 ability to issue executive orders in an interest of national
21 security, the issue was not ripe -- and this is
22 the Government's argument all along -- until the Secretary
23 issued his guidance.

24 So now we have a concrete issue; we have a real issue.
25 And so I am interested in hearing the Government's perspective

PROCEEDINGS

1 on whether the motion is moot.

2 The reason I brought it up -- and it is not to say that I
3 can't address the issue, ultimately, today; but here was my
4 thought process about how does one tee this up. And I don't
5 mean for it to create enormous burdens, but as the Government
6 said, I think, in its notice this morning, but certainly we
7 contemplated this through the briefing, the appropriate way to
8 challenge the secretary's action is a complaint and then a TRO;
9 right?

10 And then so -- then I recognize the burdens this places on
11 a plaintiff. I can imagine a shortcut process that would
12 enable us to address the issues realtime, before the -- before
13 anything goes into effect. So I'm not saying I'm not here to
14 address the First Amendment issues -- because now this case
15 really is -- well, I will say this about the ultra vires
16 argument -- I said this yesterday, I think, but it was hard,
17 again, to decide on the record that was only the executive
18 order, whether the implementation of that order, through the
19 definition of "transaction" by the Secretary of Commerce, in
20 fact, exceeded the President's authority under the statute as a
21 communication that he couldn't regulate. So that wasn't ripe
22 either.

23 And so now we have a situation where those issues are
24 ready to be addressed. My procedural concern is: Are they
25 able to be addressed in the context of this complaint and this

PROCEEDINGS

1 motion? Because the fact landscape or the procedural landscape
2 is different. As to what does that mean concretely for our
3 ability to address the issue, I could imagine a shortcut
4 process where there is a placeholder complaint that essentially
5 cross-references the factual allegations of the underlying
6 complaint and an accompanying TRO, that could be queued up --
7 and things could be cleaned up -- this was something that I
8 thought about -- next week even.

9 And then we would -- depending upon what happened --
10 assuming I granted the TRO, then we would set a briefing
11 schedule to address the preliminary injunction motion.

12 So that was why I sort of -- I rattled this morning about
13 the issue. And thank you, Mr. Bien, for then filing something.

14 So I just wanted to describe, one, where we were as of
15 yesterday; two, my concerns about how to best address the
16 issues that absolutely are now ripe, and are now concrete. And
17 so that was -- that was my concern.

18 So we can now proceed in one of two ways. Mr. -- we could
19 hear first from the Government about what its position is on
20 the issue of whether the existing motion is moot and what the
21 correct procedural way to address it is; and then we can hear
22 from Mr. Bien; and then we can decide what to do.

23 **MS. ORLOFF:** Thank you, Your Honor. And I think --

24 **THE COURT:** I'll put myself on mute.

25 **MS. ORLOFF:** I think I can be fairly brief because

PROCEEDINGS

1 Your Honor, in many ways, took the words right out of my mouth
2 in terms of some of the points I was going to make.

3 We agree with the Court that the issues that we have spent
4 the last three weeks litigating are mooted, and it's not to say
5 that we don't think that plaintiffs still have a claim; we
6 recognize that they do. But the fact is that the plaintiffs
7 noticed as of this morning now reads like an argument for why
8 the Court should enjoin the Secretary's decision issued this
9 morning, whereas during the last three weeks we were focused on
10 the state of the executive order, you know, where we disagree
11 with the arguments that are presented in the notice. But we
12 can't have an adversarial process where the complaint and the
13 motions that we have filed have now really been overtaken by
14 events and the landscape has fundamentally changed.

15 So, you know, I don't -- I think we would be amenable to,
16 say, an approach that is something like what Your Honor has
17 laid out.

18 We don't think Your Honor should grant a TRO. But what we
19 would request is some time to sit and meet and confer with
20 plaintiffs. We can do it today; get a schedule together for
21 any motion that they may wish to file -- an amended complaint.
22 If we can't agree, we can lay out our positions in a filing
23 with the Court.

24 The one procedural issue I would note is that there is a
25 reference to a classified threat assessment in I think it's --

PROCEEDINGS

1 I believe it is in the rule itself. If it's not, there is such
2 a classified threat assessment. And we are conferring with our
3 clients as to whether or not we want to bring that to the
4 Court's attention in connection with any expedited briefing,
5 and what the protocols would be for that.

6 So we are trying to drill down on that right now. But our
7 proposal is that we confer with the plaintiffs and we submit
8 either jointly or, you know, a contested schedule sometime
9 later today.

10 **THE COURT:** Okay. So one question I have, of course,
11 is the -- and, again, I am still processing -- if you could
12 mute yourself again, Ms. Orloff, I think that will take care of
13 our feedback issue.

14 All right. So one concern that I have is the timing.
15 And, obviously, if the Government were to agree -- which I
16 doubt that it would given Mr. Drezner's representations -- to
17 defer the implementation of the Secretary -- of the executive
18 order pending a tidy briefing schedule -- absent that
19 agreement, which I am guessing is not going to happen, there is
20 the issue of the ban going into effect as of -- as of the 20th.
21 And the representations that have been made by the Government
22 in the public arena, in press conferences, about the effect of
23 the regulation on the users who, while are not subject to civil
24 or criminal penalties themselves, nonetheless, are essentially
25 cut off from the app as of Sunday night.

PROCEEDINGS

1 So that is in the record; we know that. It is an
2 admission or definitely something I can notice and so I'm not
3 concerned about that.

4 And so to maintain the status quo and I -- you know, I'm
5 all fine with an orderly briefing schedule to address,
6 ultimately, the landscape of a preliminary injunction. That's
7 fine.

8 A lot of the existing papers can be re-purposed without a
9 lot of effort to address adding the Secretary as a defendant,
10 however that. So what I had imagined -- I imagine that it is
11 going to be an issue for the plaintiffs not having a prompt
12 decision on the TRO -- which is how I'm thinking of the case
13 now -- before the implementation on September 30th.

14 One thought that I had is something to the effect of
15 amending the complaint with a cover sheet, essentially, to add
16 a defendant. That would require the Government's consent as a
17 new defendant -- and I don't know how that would work with
18 the -- I have to think about the capacities and the consent,
19 but I think for a clean record we would do that.

20 And then we would have a TRO motion that would be
21 addressed today or tomorrow, where -- we have two whole days.
22 I'm kind of exaggerating for literary effect. I prefer to do
23 it today or tomorrow morning, because no matter what the
24 outcome -- and it may be amenable, the motion itself, to being
25 heard on the papers.

PROCEEDINGS

1 And -- because in the end, now we do have, as you said, we
2 have a First Amendment claim that's ready to decide; and we
3 have a pronouncement in the press that it is what the
4 plaintiffs feared it would be.

5 And I have been working on my order, my ultimate order,
6 all morning anyway, because I am able to do that; but to really
7 write a robust order that is ultimately a preliminary junction
8 order, not a TRO but a preliminary injunction order, that
9 necessarily would have to come on the heels of full briefing.

10 So those are my thoughts to respond to Ms. Orloff's
11 argument. I mean, one, you can respond first and I want to
12 hear from Mr. Bien why he thinks, nonetheless, I should be able
13 to address this.

14 My concern is not substantive; it's procedural, as you
15 know. But let's hear from Ms. Orloff first.

16 **MS. ORLOFF:** Thank you, Your Honor.

17 I do want to say it feels a little concerning -- and maybe
18 I just misunderstood the Court, but it sounded like the Court
19 perhaps had already made up its mind on the relief that would
20 be issued and was writing the opinion now, so --

21 **THE COURT:** No. I'm writing the facts now. I don't
22 mean to interrupt you, but just to kind of reassure you, to the
23 contrary, I like oral argument; I care about your views. I
24 changed my mind based on your colleague's able arguments
25 yesterday, having thought it through more concretely.

PROCEEDINGS

1 And I'm just really plowing ahead writing the facts,
2 which -- which I had written a more -- I had a long set of
3 facts for the preliminary injunction. I then cut it way down.
4 And now I need to add in -- I can add in, for example, right
5 now what the Secretary has done.

6 I can queue up the arguments that the general -- you know,
7 these are the -- I can get out of my order, I believe, the
8 Fifth Amendment issues that I wrote about before, that I know
9 longer need to include.

10 And so that's what I'm just -- I'm preparing. I have
11 not -- I'm just telling everybody that I am prepared to
12 address, realtime, any revamped motion within a time period --

13 **MS. ORLOFF:** Okay.

14 **THE COURT:** -- that gets an order before the effective
15 date.

16 **MS. ORLOFF:** Understood. And thank you for the
17 clarification, Your Honor.

18 I do -- you know, we will comply with whatever briefing
19 schedule Your Honor sets with respect to a TRO and,
20 subsequently, a preliminary injunction.

21 I do think, though, that the plaintiffs -- and I do not
22 want to minimize their strong preference to use the WeChat app.
23 But that -- the declarations they have submitted in support of
24 their preliminary injunction motion, in my mind, show that, you
25 know, they have been preparing for this day for the last

PROCEEDINGS

1 45 days; and that there are substitutes for WeChat, even if the
2 plaintiffs do not prefer them.

3 And I just to note a few, Jinneng Bao noted in his
4 declaration that he has been looking into alternatives such as
5 Line, Facebook, and Telegram; Brent Coulter discussed iMessage
6 and FaceTime, and talked about efforts that he has already put
7 into making alternative arrangements; Chihuo stated in its
8 declaration that it has redesigned its website; Elaine Peng
9 said she is switching to Line; and Xiao Zhang said she built a
10 new website for her foundation to receive donations.

11 And in light of the fact that this is not a prior
12 restraint on speech, the plaintiffs remain free to use a
13 plethora of other applications to communicate, to get their
14 news, to speak with family at home, to engage in any religious
15 activities they wish to.

16 This is a limitation on a single app. We understand there
17 are challenges, but this has been coming for 45 days. And
18 there are serious national security issues at play. And so,
19 you know, we will comply with whatever schedule Your Honor
20 sets. But I would just urge the Court not to rush this
21 process; these are extremely important issues, I think,
22 sensitive issues of national security. And I believe we should
23 take the time to litigate them properly.

24 **THE COURT:** I agree with all of that, and I'm happy to
25 do whatever expedited schedule we need to do to address the

PROCEEDINGS

1 issues fully. But the fact record is different.

2 First -- and then we'll hear from Mr. Bien. But the fact
3 record is different because, one, the focus of yesterday's
4 argument was on the void for vagueness, and while the issues of
5 the first -- I'm sorry. If you don't mind muting yourself, I
6 think it is your room that's giving us feedback.

7 The focus was on the void for vagueness. And I do
8 appreciate that the First Amendment was implicated on the sort
9 of -- on the classic *Winters* elements, you know, we were
10 talking about the void for vagueness arguments.

11 And now -- but a big part of the plaintiffs' argument in
12 the opening brief -- and it was retained, but not emphasized as
13 much in the reply brief -- was that we sort of didn't really
14 need to get there fully; partly, for, I think, the reasons that
15 you advanced in your opposition brief.

16 So I hear the arguments that you're making. We didn't
17 know what the effect was going to be, which is why the issues
18 weren't ripe. I appreciate that you're pointing to facts in
19 some of the declarations for these plaintiffs.

20 And it is also true that it's now a matter of public
21 record that it's essentially shutting off the app for everybody
22 as of the effective date. That's what the Government has said
23 publicly.

24 So it does need to be queued up for consideration. I
25 absolutely agree. But there is the sort of -- and I have your

PROCEEDINGS

1 briefs. It's not as if I don't have the arguments you've made.
2 So it puts me in a better position than I would be without any
3 briefing at all. And then the issue is: What supplemental
4 briefing do we need to address the issues and how do we do
5 that?

6 And so, let's ask Mr. Bien what his thoughts are now.

7 **MR. BIEN:** Thank you, Your Honor.

8 First, I want to indicate that we feel that the briefing
9 that you have in front of you is appropriate for you to issue a
10 preliminary injunction to -- now. We, of course, can
11 supplement with anything else you want us to address and we'll
12 just go through.

13 First of all, Secretary Ross is a defendant; I want to
14 point that out. And what we want to do is prohibit the
15 implementation of the power -- his powers to take action on
16 Sunday.

17 So everything is here to maintain the status quo; to
18 preserve people's rights. As the Court has noted, those rights
19 have already been harmed and they are going to continued to be
20 harmed because, as Ms. Orloff just admitted, this is a ban;
21 this is nothing else than a ban.

22 Who exactly is going to be prosecuted doesn't really
23 matter. What matters is our clients' rights to use the app
24 will end on Sunday. That's the position the Government is
25 taking publicly; they just said it again today.

PROCEEDINGS

1 That is a deprivation of their fundamental rights. It's a
2 prior restraint, and we are prepared to make that argument.

3 What has happened today is the Government is speaking,
4 once again, out of three or four mouths. What the US Attorneys
5 are saying here; what the Secretary said in his, quote,
6 official statement; what he said to the press. And then
7 what -- I would take a look at Exhibit I attached to my
8 declaration what his secret people are saying, commerce people
9 are saying off-the-record to reporters, which is, again,
10 complete ban.

11 As to the national security concerns, they remain very
12 curious and unsupported, despite this vague reference here
13 today to some secret stuff.

14 What's interesting is TikTok has all the problems. That's
15 what was in the defendants' evidence that they submitted, yet
16 the Government has chosen not to stop TikTok from working
17 whatsoever. Okay? So if this is really that kind of national
18 security problem, about gathering information, monitoring, why
19 are they allowing one to go forward, one not?

20 It's been speculated that it has to do with who has better
21 connections in the White House, but that's not the point. The
22 point is, if this was a true national security concern, there
23 is no justification for allowing TikTok to function completely
24 on Sunday, while shutting down WeChat.

25 I would also point out, again, the sliding scale. We just

PROCEEDINGS

1 want to preserve people's rights now; prohibit the Government
2 from moving forward. We have established harm. We have
3 established that -- I agree with you, it's certainly ripe now.
4 We know what they are doing; they said what they are going to
5 do; and they did it; and it's a shut-down.

6 So we are also receiving communications to our clients'
7 website about, you know, can I communicate; can I do this; can
8 I use the app? Our clients don't know what they can do.

9 And, one, whether or not the Government is going to come
10 after them, I'll accept counsel's representations. But they
11 are going to go after everyone else who is necessary to use the
12 app. So communications could be turned off. I think we
13 disagree, obviously, as to what our evidence proved. Our
14 clients all said they could find no alternatives; there is no
15 other alternatives for Chinese-speaking people in America.

16 We know that institutions are going to interpret this as
17 University of Kansas did. By the way, we put that article in
18 the record for Your Honor today.

19 And I think that procedurally there is no problem. You
20 could address it through an appropriate preliminary injunction
21 issued today.

22 And then let's have a test on the merits. Let's look at
23 what's going on. If the Government actually has -- I don't
24 know. I'm not sure how they can put on -- there are many
25 more -- if they are going to go to -- if they are going to do a

PROCEEDINGS

1 ban, then it's teed up now. I'm not sure what else they could
2 do. But they can come back with something else down the road.
3 Injunctions can always be modified, if they choose to change
4 and more narrowly tailor what they plan to do to actually
5 address true national security interests.

6 But I think that's not their choice; their choice was a
7 ban. And so we think it is teed up now. Again, we would be
8 glad to address any kind of procedural issues.

9 Again, we think that the power of the Secretary is limited
10 to the power of the executive order. And the executive order
11 remains unconstitutional on its face, and I think we have
12 established that.

13 **THE COURT:** So -- and please help me with this point,
14 because this is the trouble I have.

15 If your complaint had been filed after the -- however you
16 articulated your claims, had been filed after the Secretary
17 issued the definition -- and whatever tweaks that would be
18 reflected in your complaint would have that, then I would be
19 entirely comfortable relying -- absent the Government's, for
20 example, telling me that there should be different briefing, or
21 the parties agreeing that there should be different briefing,
22 because the issues are different now.

23 And so the reason I raise that is because I just issued an
24 order last week which was the Paycheck Protection -- the SBA's
25 Paycheck Protection Plan. And this idea of whether the

PROCEEDINGS

1 Government has to fund speech -- or you think about the
2 *National Endowment of the Arts* case versus *Finley*, whether it
3 has to, when acting as a patron, fund it -- versus -- and so I
4 can imagine that some of the Government's First Amendment
5 arguments might be different now than they were in the brief,
6 which was -- which led with ripeness, addressed some of First
7 Amendment issues on the *Winters* factors, irreparable harm.

8 And so I, one, am concerned that the existing brief
9 doesn't fully capture the fact landscape of what's at issue;
10 two, I have already mentioned that, on its own, I have decided
11 and I was about to issue an order saying that the attack just
12 on the President's order was not ripe until defined.

13 Now it is, so the -- and now I'm concerned -- and
14 Ms. Orloff identified this too, that the First Amendment issues
15 have changed. You have said that they haven't, and I can
16 absolutely accept that.

17 And then the procedural issues that attend -- and so what
18 you're telling me is, I can just take the complaint as it is,
19 issue a preliminary injunction without the Government's
20 weighing in any more on what the First Amendment issue --
21 landscape.

22 Essentially, I would be issuing, then, a First Amendment
23 preliminary injunction -- because you have to tell me if you
24 really think the Fifth Amendment argument works anymore, given
25 that -- how it was defined in your reply brief.

PROCEEDINGS

1 You also told me at the hearing yesterday that as a lawyer
2 you learned, if you don't address things you've conceded them.
3 You may wish to revisit how you want to maintain your arguments
4 in the context of what the Secretary's definition actually
5 says. But, at least as of the reply brief, it was full-out
6 Fifth Amendment due process, and it was not as it was in your
7 opening motion.

8 And so what I -- when I worked my way through -- again,
9 working on it today was to prepare me to understand what was
10 left in the litigation so I could best address it. I cannot
11 imagine that the complaint, as it stands, is necessarily your
12 full theory of prosecution. Which is very different than the
13 issue of -- let's say, this came out of nowhere; right?

14 Let's say, today, Groundhog Day, you had no notice of what
15 happened. Today the President and the Secretary
16 simultaneously -- or the President issued an executive order
17 that contained the Secretary's definition. So you would be
18 left -- that's the -- because I, from my view, that's the
19 position that you find yourself in today.

20 We have the luxury of having the good work that you put in
21 before the implementation date which enables us to have a
22 pretty good preliminary assessment of the landscape. But I'm
23 concerned -- which is why I raised this possibility of -- isn't
24 it -- I'm not sure of this, it may be that you would merely say
25 something like I have a -- the complaint, to the extent it's

PROCEEDINGS

1 amended to include this additional language, period; that we
2 move for -- we stand on our motion as grounds for injunctive
3 relief to prevent the implementation of the order as of Sunday.
4 Right?

5 And then the Government might tell me -- I don't know what
6 you'll tell me. Is that briefing sufficient? It depends on
7 what Mr. Bien says; when do you want to tell me whether it is
8 or isn't sufficient?

9 And then, if there are substantial questions -- and this
10 was the argument in the reply brief on the First Amendment,
11 when the argument was made as of yesterday that there are at
12 least substantial questions raised under the *Winters* sliding
13 scale, that gives us you enough, you know, for now to sort of
14 avoid the robust analysis.

15 You may think differently. You know, rely -- or you may
16 say you know, we think you should deny it, we rely on our
17 previous arguments, we also wish to supplement them on this
18 issue.

19 I don't know because -- and that's why I raise these
20 issues for your consideration today.

21 **MR. BIEN:** Your Honor, we would be pleased to respond
22 to your concerns by preparing new papers that reflect what
23 you've done and we can get them on file. I don't think we
24 can -- I can't say we can do it today. We can try.

25 What do you think, team? You can signal me.

PROCEEDINGS

1 But, I think we can do it by tomorrow morning. It doesn't
2 give us a whole lot of time before the effective date, but we
3 can -- we can listen to what you said, go back, and come back;
4 and then, obviously, the Court needs to hear from
5 the Government too, once we've done that.

6 You know, it -- it may be possible -- and I am looking
7 around at my team, whether we can do something, you know,
8 before the end of the day, but -- I'm getting some yesses.
9 Maybe we can try for that.

10 And then maybe we give -- and then, if the Government can
11 respond by tomorrow, it gives us a chance to have, if the Court
12 is willing to have a hearing sometime on Saturday, I will waive
13 my Rosh Hashannah privilege.

14 **THE COURT:** Oh, I'm so sorry. I know it's
15 Rosh Hashannah. And that's, obviously, a problem. I'm really
16 sorry about that.

17 **MR. BIEN:** That's okay.

18 **THE COURT:** And it's the first night tonight too.
19 It's amazing how everything just --

20 **MR. BIEN:** This is not a year where anything is
21 normal, so --

22 **THE COURT:** I know. I know. I know. I know.

23 One issue -- one suggestion is, I don't know whether the
24 team can rely on the existing declaration -- the existing
25 supporting materials without having to -- that makes it easier.

PROCEEDINGS

1 I don't want to make people photocopy all night to deliver me
2 chambers copies. I can certainly press "print." But if there
3 are -- if it becomes necessary to submit supporting papers --
4 it's 12:15 now.

5 I imagine a complaint might be fairly easy to file. I
6 don't know whether if -- I mean, I know this is a terrible --
7 well, in any event, I don't know whether, then, you get tonight
8 off, and then file something in the morning.

9 **MR. BIEN:** We have a big team; don't worry about that.

10 **THE COURT:** Okay.

11 **MR. BIEN:** So we will get our -- we will get a
12 complaint, amended complaint, and some -- a new brief on file.
13 We'll refer to the existing evidence. If we need something
14 new, we'll add that. And I'm not sure I'll be able to get you
15 a chambers copy or not --

16 **THE COURT:** If there are no attachments and it's just
17 printing, I have no problem with that.

18 When I have -- I'm not going to make you look at your own
19 binders, but when I have this much stuff, it just becomes --
20 it's hard to do it electronically; it's actually impossible. I
21 appreciate that people have been giving me chambers copies.

22 But we do have tight a timeline. And so then, from a team
23 perspective, what's your best guess about what time you can get
24 something -- sounds like you can probably file the complaint
25 today; so at least the Government will have that.

PROCEEDINGS

1 And it sounds like the briefing, obviously, you briefed
2 some of the issues, and there may be things that you can
3 incorporate by reference, which is fine.

4 **MR. BIEN:** We'll represent that we'll get the brief
5 filed also before midnight tonight so the Government can -- and
6 then if they give us a deadline, you should set a deadline with
7 them when they should respond tomorrow. And we can have a
8 hearing tomorrow.

9 **THE COURT:** Okay. That sounds fine.

10 From the Government's perspective -- again, I apologize
11 for -- the briefing schedule is just too tight, and the order
12 was to, you know -- you may or may not find this --

13 **MR. BIEN:** There is another option, Your Honor.

14 And I'll just say, as you suggested many times,
15 the Government could agree to postpone implementation for a
16 week, and we could do this in an orderly and appropriate way.
17 And we don't have to -- you don't have to issue an order.

18 We, you know, we would accept the Government's
19 representation. It would have to be public. But that is the
20 option here, given the circumstances.

21 Again, the Government had an opportunity to act. Our
22 complaint has been on file for a long time, as has our motion.
23 They chose to wait.

24 **THE COURT:** I know the Government has said before
25 that -- I appreciate your argument that the plaintiffs have had

PROCEEDINGS

1 45 days and the opportunities and all of that. So I appreciate
2 those arguments.

3 And I am sorry to put you to the burdens of filing
4 something tomorrow, but we're going to have to have a hearing
5 tomorrow. And what I suggest -- we do have fairly robust
6 briefing -- and, again, I have really digested your briefs, as
7 you know from yesterday.

8 I do think there is an ability to say in your briefs to
9 make arguments to say, "This is how we think it should go," by
10 reference to your earlier arguments. You don't necessarily
11 have to reiterate them. You can incorporate them by reference.
12 I am very comfortable with that approach because that allows me
13 to continue to excite the existing documents that are in my,
14 now, four versions of the order that I was writing, because it
15 changed along the way. It changed on Wednesday. And then it
16 changed again yesterday. It's changed against this morning.
17 Now, it will change again based on your filings.

18 So I strongly recommend that everybody incorporate by
19 reference as much as they can and then supplement their
20 arguments. I think it will make it easier on you. It will
21 make it easier for you to get something to the Government
22 earlier, rather than later.

23 I think the Government can rely on those issues. And
24 then, recognizing that you may feel that your arguments
25 persuade for the reasons that they did in your earlier brief

PROCEEDINGS

1 and those are sufficient. And you may also want to put a
2 marker in for issues that you think might require further
3 illumination. And that's what the Government suggested, that
4 you may not have a full amount of time to address sufficiently
5 tomorrow. And then we will just talk about what we'll do.

6 I think we have to have a hearing tomorrow at about 1:00,
7 because I may need time between -- I will do my very best
8 between now and then to get as organized as I can, so when your
9 motions come in -- I'm not going to start working on something
10 at midnight tonight, just so you know.

11 I will work until my day is finished, whatever time that
12 is, and then leave and start again tomorrow. And then,
13 recognizing that the Government will file something at X-time
14 and you should tell me, and I propose a hearing at 1:00 or
15 possibly 2:00 tomorrow.

16 **MS. ORLOFF:** So thank you, Your Honor, for those
17 thoughts.

18 Just to share a couple of thoughts from the Government's
19 perspective, I have been trying to communicate with my
20 colleagues; we do also have Rosh Hashanah observance, many on
21 our team. And so I think there is a feeling that this is a
22 little bit of a hardship. But, that being said, we're ready to
23 meet it.

24 We would like as much time as possible, as the Court can
25 give us. We would request a meeting at 2:00, if the Court is

PROCEEDINGS

1 willing to put it then.

2 And also we thought it might be helpful to propose some
3 page limits. And the Court does have some sense of briefing on
4 this and certainly as to background and things like that. We
5 would suggest 15 or 20 pages at tops, which would, I think,
6 keep things focused on just the most important issues.

7 That way we wouldn't be, you know, you think of weighting
8 arguments that we may have, and that we may wish to make, and
9 points that we may oppose but don't think are centrally
10 relevant to the case. So that's the one ask that we would make
11 is we could, maybe, put some page limits on it.

12 We, you know, I guess I would -- if the plaintiffs file at
13 midnight tonight, you know, that is 3:00 a.m. eastern time, we
14 will try and start to work now and put together our arguments
15 but we will need some time to respond, and just ask for as much
16 time as the Court can give us. I guess I would propose, maybe
17 11:00 a.m., but I don't know if that gives the Court enough
18 time to prepare.

19 **THE COURT:** So one issue that -- do you mind muting
20 yourself, again, feedback.

21 **MS. ORLOFF:** I'm sorry.

22 **THE COURT:** A headset might help with that, but I am
23 not -- this is overly tech problem-solving for people.

24 I, in thinking about this this morning, I was trying to
25 think, what can I do -- and Rosh Hashanah went straight out of

PROCEEDINGS

1 my head this morning as I was making my coffee.

2 I was thinking what could I do to shortcut this process.
3 One thing I thought is that the plaintiffs filed an amended
4 complaint and a renewed motion for a TRO/preliminary
5 injunction, and we had a hearing today at, let's say, before
6 sunset, and then we could decide then, and where the Government
7 would have an opportunity to be heard, but not necessarily file
8 stuff. And then, at that point, I might have an idea.

9 I do want to fully have the Government consider the
10 issues. And I don't know what the answer is because we need --
11 I need to think about it. I literally am in the business of,
12 right now, I'm adding to my fact section; what I call my
13 statement. I am literally typing in what happened, you know,
14 excerpting and putting into the facts and refining some of
15 my -- synopsisizing things that I think don't need to be
16 emphasized so much.

17 So I haven't got -- and as I've told you already, I
18 100 percent was focusing on the void for vagueness arguments,
19 and I'm now shifting because there is where I think it's going
20 to go to revisiting some of my earlier thoughts on the First
21 Amendment. But I, obviously, need the briefing.

22 But let's say this were a TRO today, we would have a
23 hearing today. If the plaintiff filed a complaint at noon or
24 1:00 or 2:00 and simultaneously, I would set a hearing today,
25 recognizing that the East Coast has some issues with timing.

PROCEEDINGS

1 I'm open to that process. I don't want anyone to get up
2 at 3:00 in the morning and start working on a brief to sort
3 of -- on a holiday. And I'm willing to work with you to try to
4 at least have a preliminary hearing on the issues today, if
5 that's at all possible.

6 I can't imagine the amended complaint is that hard to do.
7 And if you decided next week that there are refinements that
8 you want to make to it because of the rushed nature of this,
9 because assume it was unexpected that you would have that
10 opportunity -- Rule 15(a) exists for a reason -- and I would be
11 very amenable for prettying things up later. So I once amended
12 an indictment myself by slapping something on top of it and
13 cleaned it up later.

14 So it seems to me that we could have a proper hearing even
15 today, if that would be helpful for you. I am willing to do it
16 tomorrow, but I feel enormous guilt -- I think that's the
17 appropriate emotion to express -- by doing it on Rosh Hashanah.

18 And so I want to -- my job sometimes is to save you from
19 yourselves. And I know that you have clients that -- and I am
20 extremely supportive of your diligence in representing your
21 clients' interests on the Government's side.

22 And I'll make one other observation and then you can tell
23 me if you want a preliminary hearing this afternoon at, say,
24 3:00. I don't know whether that's possible. I will work as
25 hard as I can -- or even 4:00 or 5:00. 4:00.

PROCEEDINGS

1 Maybe that's a good approach for everybody. When lawyers
2 file motions that are necessarily heard during the holiday
3 season, I think of the poor associates who are going to ruin
4 their New Years; and I always move those hearings and adjust
5 the believing schedules sua sponte. I am a judge, and not just
6 one who plays one on Zoom, and I have the ability to make it
7 all work.

8 And so, I wonder from the Government's -- I wonder what
9 everybody thinks about at least making a stab at trying to get
10 through it preliminarily this afternoon, during daylight hours.

11 **MS. ORLOFF:** I can address that, Your Honor, from
12 the Government's perspective. We don't have associates here,
13 unfortunately --

14 **THE COURT:** I know that.

15 **MS. ORLOFF:** -- but we would like -- I'm sure you do.
16 I'm sure Your Honor knows that.

17 We would like the time to, I think, compile some legal
18 authority and to put together our thoughts in a more coherent
19 fashion. So I have not heard any feedback from my colleagues
20 that they would prefer a hearing this afternoon. And I think
21 we would probably strongly prefer a hearing tomorrow, as
22 compared to today.

23 **THE COURT:** Okay. So, Mr. Drezner, looks like you
24 want to say something. Then we'll go back to Mr. Bien.

25 **MR. DREZNER:** Not to interrupt my colleague, but one

PROCEEDINGS

1 suggestion might be, given that plaintiffs believe that their
2 papers adequately represent what they are seeking and that
3 essentially not much has changed in their view, one proposal
4 would be to have their brief filed somewhat earlier than
5 midnight West Coast time, perhaps, I don't know, 8:00 p.m. or
6 6:00 p.m. West Coast time. And that would give us a bit more
7 ability to, then, respond to their arguments and have, I think
8 what, Your Honor is looking for is a systematic and thoughtful
9 hearing tomorrow.

10 **THE COURT:** Yeah. I think I, obviously, I think that
11 that's -- I wish it were Monday; then this would not be an
12 issue. But -- but the implementation is on Sunday and so we
13 have to address the issue between now and sometime tomorrow
14 afternoon because I will need the time to hear you and then
15 decide, after the hearing, what the outcome is.

16 Mr. Bien -- and I do think page limits are a good idea. I
17 honestly -- I think 15 pages should be enough for everybody
18 under the circumstances. And I really do think people's can
19 incorporate by reference earlier arguments that -- and that
20 will help me enormously too, so we are doing us all favors by
21 that approach.

22 Mr. Bien. You're still on mute.

23 **MR. BIEN:** Sorry.

24 You know, the Government's has had an opportunity to brief
25 this. They filed a brief today with argument, not just a

PROCEEDINGS

1 representation, about what was going on. You know, we can do
2 it by TRO, if that's what the Court would prefer.

3 **THE COURT:** I don't have a preference; whatever you
4 want to do is okay with me. And if I decide I need more
5 briefing, then I decide I need more briefing.

6 **MR. BIEN:** Right.

7 And I do think that it's at least possible that we can sit
8 down and just write something.

9 The Court has expressed a preference for an amended
10 complaint that addresses this; and we would, obviously, that
11 do. And we could do a short -- short brief allowing a hearing
12 today. But I don't think -- there is not going to be a lot of
13 time for the Government -- it would be us responding to them.
14 And, you know, I just don't know how that would work. I guess,
15 it would be the equivalent of a TRO; they don't get to file a
16 brief. And --

17 **THE COURT:** They can, if they want to. I allow that
18 opportunity. I always invite the Government to respond. And
19 often they can.

20 By the way, I don't mean to interrupt you. We have
21 somebody on the phone named Hong Gao, who raised a hand. And I
22 don't know if that's somebody --

23 **MR. BIEN:** He is not counsel, no.

24 **THE COURT:** Okay. All right. So that's good. So
25 only lawyers are speaking here. So thank you. If -- okay.

PROCEEDINGS

1 Sorry about that.

2 So -- no. I appreciate that and -- so there is somebody
3 named Gang Chen -- so I'm assuming everybody -- I'm going to
4 ignore the people raising their hands in the audience.

5 So, Mr. Bien, I apologize.

6 **MR. BIEN:** I guess we could -- I mean, I'm looking at
7 my team -- but if we can -- we could try to proceed today, you
8 know, file an amended complaint and do a short brief and get it
9 on file. And if you could do it at 4:00 or 5:00, we can get
10 something on, you know, on file, you know, at 3:00 or 4:00, an
11 hour or so before.

12 I think the Government has had an opportunity to brief
13 this. They did a brief that we tried to respond to already
14 today. I don't know why they get another chance. But it's --
15 it isn't -- you know, and the TRO, if we do a TRO -- or, again,
16 any injunction can be modified, as the Court has pointed out.

17 But I think the key is to maintain the status quo, to stop
18 the ban from going into effect. And we have been making that
19 same argument from day one.

20 Obviously, the Government's actions do shift the facts,
21 and we can -- recognize that. But they don't change the
22 fundamental essence of what we were afraid they were going to
23 do is what they actually did, and are going to do.

24 So that's why I said that we thought the preliminary
25 injunction is still a valid, appropriate motion. We would be

PROCEEDINGS

1 glad to amend, to make it procedurally appropriate, and to
2 point out how it's going on. I think that's a good idea.

3 And we can -- I suggest that we decide what's going on so
4 we can all hit the --

5 **THE COURT:** I think that's right. So let's do this --
6 Ms. Orloff, you wanted to say something?

7 **MS. ORLOFF:** Your Honor, yes, please. I'm sorry. I
8 just want to respond briefly.

9 I mean, I think surely the notice we filed earlier today
10 was really directed at the plaintiffs' prior arguments and was
11 not directed to new arguments that they may want to make.

12 But I am getting requests from my team, and since the
13 plaintiffs feel like they can respond sometime earlier today
14 than midnight, we would request -- and, you know, we would like
15 the time to put together our legal arguments in response to the
16 plaintiffs', rather than doing this on the fly.

17 So we would request that the plaintiffs file earlier than
18 midnight tonight, if possible, to give us some nighttime hours
19 that's not in the middle of the night on Rosh Hashanah, working
20 on this, then we would be prepared to file a response tomorrow.

21 And, you know, I don't know how critical an amended
22 complaint is at this juncture. You know, if the Court wants
23 it, we fully understand. But I think from our perspective it
24 would be more helpful to see whatever arguments are in their
25 brief so that we can respond.

PROCEEDINGS

1 **THE COURT:** Okay.

2 So my concern was the procedural appropriateness, because
3 you raise the issue too of my issuing a preliminary injunction
4 on a complaint that no longer fully reflects the fact
5 landscape. It seemed problematic because the attack was on the
6 executive order. And so that was my concern.

7 I think that -- and if the Government will stipulate that
8 I don't have to do that, that we can deem the complaint amended
9 to fully embrace the plaintiffs' arguments in the context of
10 the Secretary too. Because now the plaintiffs have the ability
11 to say: Hey, this definition doesn't change anything. It's
12 the -- and I do think that the plaintiffs want to accuse,
13 essentially, the definition, not just in the context of the
14 executive order, but the executive order as implemented.

15 And that gets us over the ripeness argument. Because
16 other than that, it's not ripe just based on the executive
17 order, even though it is ripe now.

18 So you guys if you want to concede that they can defer the
19 filing of their amended complaint until some other time, and,
20 but then sort of deem it amended, I'm fine with that; although
21 I don't know how much work it is to amend the complaint. It
22 doesn't strike me as it's all that much work.

23 But, Mr. Bien, what do you think?

24 **MR. BIEN:** I have one other suggestion that might cure
25 some of this problem. We think we should proceed today with a

PROCEEDINGS

1 hearing. We would -- we suggest simultaneous briefing. We
2 both know what's going on. There is no surprises.

3 **THE COURT:** Okay.

4 **MR. BIEN:** Then we can argue it. And everyone gets
5 their fair chance. They know much more than we did and had
6 advance notice what was happening, because they wrote a brief
7 about it already.

8 **THE COURT:** I really would prefer, if you can, to
9 simultaneously file a complaint. I do think procedurally
10 that's the correct way to do it. If you disagree and stipulate
11 that it's okay, I'm fine with that; but it feels weird to me
12 because I don't think -- I'm not issuing an order just on the
13 executive order. I'm doing it as defined by the Secretary of
14 Commerce.

15 **MR. BIEN:** We will file. We can do both today by the
16 deadline.

17 **THE COURT:** I think it's fine to submit simultaneous
18 briefs. I think that's an excellent suggestion. If we need
19 more briefing -- we know this case. Let's do that.

20 I don't want more than 15 pages. I would prefer 10. My
21 ability to digest -- you know, the one person who ends up
22 working then tonight and tomorrow is me. That's okay. I'll
23 take the hit for the team. But I do think the fewer pages the
24 better. What can you live with?

25 **MR. BIEN:** We can live with 15, Your Honor.

PROCEEDINGS

1 **THE COURT:** Okay. 15. Ms. Orloff? Mr. Drezner? You
2 suggested 15, so 15.

3 **MS. ORLOFF:** We're fine with 15 too. But we, I think,
4 vigorously oppose the idea of simultaneous briefing.

5 The plaintiffs' prior assertions of harm was very much
6 focused on this idea that they could be prosecuted for criminal
7 and civil violations. And, you know, we -- it is -- they will
8 now, I think, have to have a revised theory of harm in some
9 respects. It is, you know, like punching a pillow or just --
10 it's very difficult to know what they are going to say and to
11 know where we should be leveraging our response.

12 If the plaintiffs can file today, we can get our response
13 in by 11:00 a.m. tomorrow and we can have a hearing. But doing
14 this in realtime is like ships crossing in the night, I think,
15 really doesn't make much sense, and isn't the way to make
16 decisions in this very sensitive area of national security.

17 **THE COURT:** I have to think that the plaintiffs'
18 arguments are going to be focused on First Amendment. Am I
19 wrong on that?

20 I mean, one of issues is: Do you stand on your previous
21 arguments to preserve them, without reiterating them? Do you
22 have small -- and do you have sections where you say, you know
23 here is this claim, in addition to the reasons one, two, three,
24 four?

25 I really imagine staccato addressing of the issues. I

PROCEEDINGS

1 don't disagree with you, Ms. Orloff. I do think it's better --
2 obviously, you don't want to waste time responding to
3 unnecessary arguments. The problem is that the reply brief
4 mechanism is also useful because the plaintiffs refined their
5 arguments the last time based on the arguments that you raised.
6 And -- I don't know.

7 I don't know if you guys -- well, so I sort of reached the
8 limit. I think you guys need to get to work.

9 If -- I think simultaneous briefing would work fine. I
10 think it's a great suggestion, but I don't know that I want to
11 order it over your objection because I don't want to deny you
12 the opportunity to respond to the arguments fully. And so I'm
13 prepared -- so given that the pages are limited to 15,
14 Mr. Bien, what's a reasonable time, given that it's now 12:40,
15 what's a reasonable time to get things on file?

16 **MR. BIEN:** 3:30.

17 **THE COURT:** See? That's great.

18 So that's the -- they are asking for three hours. I think
19 if things are filed at 3:30, you can file something three hours
20 after that at 6:30. That's what we're going to do. That's
21 what we're going to do, because these issues have been fully
22 briefed. And if we need more time, we need more time.

23 And then I don't -- then that's at 6:30 and so then at --
24 by 6:45, I would like plaintiffs to say whether they think it's
25 useful to file a reply. And if so, to propose a time.

PROCEEDINGS

1 You know, you'll get essentially, if everybody is getting
2 three hours to do their opening briefs, then you can have an
3 hour and a half -- I'm not saying you have to file it tonight;
4 you can file it tomorrow morning. But you can file it tomorrow
5 morning and then we'll have -- then we'll set a hearing for
6 tomorrow. That's what we're going to do.

7 And that's -- I, personally, don't think I can handle more
8 paper than that under this tight timeline. It's not as if we
9 are operating in a vacuum of briefing. And that's how I think
10 we'll proceed then.

11 We'll set a further hearing if you file something, I would
12 like you to file something by 8:30 a.m. tomorrow morning. The
13 optional reply will be due by 8:30 tomorrow morning.

14 If you're not going to file one you should -- actually
15 6:30, 7:30, 8:00. 8:00 tonight. If want to file something you
16 go do it by 8:00 tonight. If not, then you can file something
17 earlier saying you're not going to file a reply and that you
18 think the existing -- that's just to be polite to me. Then
19 by -- that way, we'll have full briefing tonight at 8:00.
20 Everyone will have a good night sleep; not perfect, but not
21 bad. Then we will have a hearing tomorrow.

22 Let me just ask my staff what they think I'm going to put
23 myself on mute for a second.

24 (Pause in proceedings.)

25 **THE COURT:** Okay. The hearing will be at 1:30

PROCEEDINGS

1 tomorrow. Let's try to get everybody finished by -- because I
2 know it's on the East Coast for the Government. That's five so
3 I'm cutting it a half-hour earlier to 1:30. I'm hopeful that
4 given the substantial briefing that we have had already and the
5 incoming briefs that we'll get this afternoon, that we'll be
6 able to deal with things reasonably.

7 **MR. BIEN:** Judge Beeler? Excuse me one second, if I
8 might. Could we have a little more time to file the amended
9 complaint? Because, I think, I was anticipating everything
10 would happen today, but given -- and it will simply address
11 just the procedural issue and make sure that we have something
12 in there addressing the new events.

13 **THE COURT:** Yes. So you can still file your opening
14 brief at 3:30.

15 **MR. BIEN:** Yes.

16 **THE COURT:** When would you like to file your
17 complaint?

18 **MR. BIEN:** Can we have until 5:00 p.m. for that?

19 **THE COURT:** Yes.

20 **MR. BIEN:** Give us a little more time.

21 **THE COURT:** Will you file a black-lined version of
22 your complaint too? So file a clean copy, but also a
23 black-lined version as an exhibit, so I can see the changes.

24 **MR. BIEN:** Yes.

25 **THE COURT:** Okay. All right. All right.

PROCEEDINGS

Thanks everybody. I think that's a wrap.

Elaine, sorry about that. If you don't mind popping on the call for the 12:30.

I'll see everybody tomorrow at 1:30.

MR. BIEN: Thank you, Your Honor.

MS. ORLOFF: Thank you.

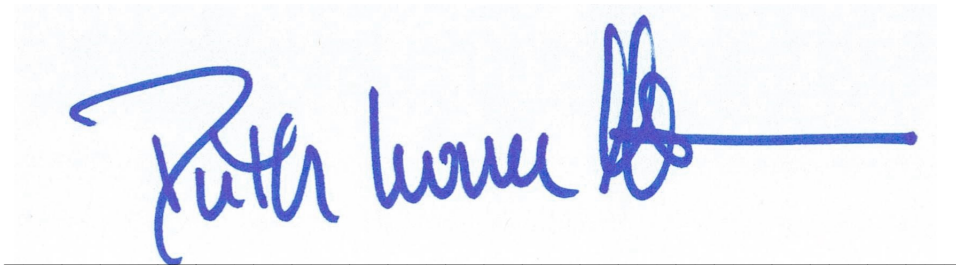
(Proceedings adjourned at 12:44 p.m.)

---o0o---

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Monday, September 21, 2020



Ruth Levine Ekhaus, RDR, FCRR, CSR No. 12219
Official Reporter, U.S. District Court

10/8/2020

EXCLUSIVE-Trump to block U.S. downloads of TikTok, WeChat on Sunday- officials | Reuters

**REUTERS**

Manchetes

Mundo

Negócios

Mercados

Brasil

More



HEALTHCARE

18 DE SETEMBRO DE 2020 / 4:31 AM / UPDATED HÁ 21 DIAS

EXCLUSIVE-Trump to block U.S. downloads of TikTok, WeChat on Sunday- officials

By David Shepardson



WASHINGTON, Sept 18 (Reuters) - The U.S. Commerce Department plans to issue an order Friday that will bar people in the United States from downloading Chinese-owned messaging app WeChat and video-sharing app TikTok starting on September 20, three officials told Reuters.

The officials said the ban on new U.S. downloads of TikTok could be still rescinded by President Donald Trump before it takes effect late Sunday as TikTok owner ByteDance races to clinch an agreement over the fate of its U.S. operations.

ByteDance has been talks with Oracle Corp and others to create a new company, TikTok Global, that aims to address U.S. concerns about the security of its users' data. ByteDance still needs Trump's approval to stave off a U.S. ban.

The Commerce Department order will "deplatform" the two apps in the United States and bar Apple Inc's app store, Alphabet Inc's Google Play and others from offering the apps on any platform "that can be reached from within the United States," a senior Commerce official told Reuters.

The officials spoke on condition of anonymity because the announcement had not yet been made public.

10/8/2020

EXCLUSIVE-Trump to block U.S. downloads of TikTok, WeChat on Sunday- officials | Reuters

The order will not ban U.S. companies from doing businesses on WeChat outside the United States, which will be welcome news to U.S. firms like Walmart and Starbucks that use WeChat's embedded 'mini-app' programs to facilitate transactions and engage consumers in China.

ADVERTISEMENT

Ad

**Get a \$300 Credit at Sign up - Dor**

Get back to business with a \$300 credit, then we'll m

GETSTARTED.TIKTOK.COM

The order will not bar transactions with WeChat-owner Tencent Holdings' other businesses, including its online gaming operations and will not prohibit Apple, Google or others from offering TikTok or WeChat apps anywhere outside the United States.

The bans are in response to a pair of executive orders issued by Trump on Aug. 6 that gave the Commerce Department 45 days to determine what transactions to block from the apps he deemed pose a national security threat. That deadline expires on Sunday.

Commerce Department officials said they were taking the extraordinary step because of the risks the apps' data collection poses. China and the companies have denied U.S. user data is collected for spying.

In a statement to Reuters, Commerce Secretary Wilbur Ross said "we have taken significant action to combat China's malicious collection of American citizens' personal data, while promoting our national values, democratic rules-based norms, and aggressive enforcement of U.S. laws and regulations."

The order is set to be published at 8:45 a.m. EDT (1245 GMT) on Friday, the officials said.

ADVERTISEMENT

10/8/2020

EXCLUSIVE-Trump to block U.S. downloads of TikTok, WeChat on Sunday- officials | Reuters

Ad

**Get a \$300 Credit at Sign up - Don**

Get back to business with a \$300 credit, then we'll m:

GETSTARTED.TIKTOK.COM

POPULAR APPS

The Trump administration has ramped up efforts to purge “untrusted” Chinese apps from U.S. digital networks and has called TikTok and WeChat “significant threats.”

TikTok has 100 million users in the United States and is especially popular among younger Americans.

WeChat has had an average of 19 million daily active users in the United States, analytics firms Apptopia said in early August. It is popular among Chinese students, ex-pats and some Americans who have personal or business relationships in China.

WeChat is an all-in-one mobile app that combines services similar to Facebook, WhatsApp, Instagram and Venmo. The app is an essential part of daily life for many in China and boasts more than 1 billion users.

The Commerce Department will not seek to compel people in the United States to remove the apps or stop using them but will not allow updates or new downloads. “We are aiming at a top corporate level. We’re not going to go out after the individual users,” one Commerce official said.

Over time, officials said, the lack of updates will degrade the apps usability.

ADVERTISEMENT

Ad

**Get a \$300 Credit at Sign up - Don**

Get back to business with a \$300 credit, then we'll m:

GETSTARTED.TIKTOK.COM

10/8/2020

EXCLUSIVE-Trump to block U.S. downloads of TikTok, WeChat on Sunday- officials | Reuters

“The expectation is that people will find alternative ways to do these actions,” a senior official said. “We expect the market to act and there will be more secure apps that will fill in these gaps that Americans can trust and that the United States government won’t have to take similar actions against.”

Commerce is also barring additional technical transactions with WeChat starting Sunday that will significantly reduce the usability and functionality of the app in the United States.

The order bars data hosting within the United States for WeChat, content delivery services and networks that can increase functionality and internet transit or peering services.

“What immediately is going to happen is users are going to experience a lag or lack of functionality,” a senior Commerce official said of WeChat users. “It may still be usable but it is not going to be as functional as it was.” There may be sporadic outages as well, the official said.

Commerce will bar the same set of technical transactions for TikTok, but that will not take effect until Nov. 12 to give the company additional time to see if ByteDance can reach a deal for its U.S. operations. The official said TikTok U.S. users would not see “a major difference” in the app’s performance until Nov 12.

Commerce will not penalize people who use TikTok or WeChat in the United States. The order does not bar data storage within the United States for WeChat or TikTok.

Some Americans may find workarounds. There is nothing that would bar an American from traveling to a foreign country and downloading either app, or potentially using a virtual private network and a desktop client, officials conceded. (Reporting by David Shepardson; editing by Chris Sanders and Lincoln Feast.)

Our Standards: The Thomson Reuters Trust Principles.

MORE STORIES

<https://br.reuters.com/article/idUSL1N2GF039>

4/11



Federal Register

Vol. 85, No. 155

Tuesday, August 11, 2020

Presidential Documents

Title 3—

Executive Order 13942 of August 6, 2020

The President

Addressing the Threat Posed by TikTok, and Taking Additional Steps To Address the National Emergency With Respect to the Information and Communications Technology and Services Supply Chain

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), and section 301 of title 3, United States Code,

I, DONALD J. TRUMP, President of the United States of America, find that additional steps must be taken to deal with the national emergency with respect to the information and communications technology and services supply chain declared in Executive Order 13873 of May 15, 2019 (Securing the Information and Communications Technology and Services Supply Chain). Specifically, the spread in the United States of mobile applications developed and owned by companies in the People's Republic of China (China) continues to threaten the national security, foreign policy, and economy of the United States. At this time, action must be taken to address the threat posed by one mobile application in particular, TikTok.

TikTok, a video-sharing mobile application owned by the Chinese company ByteDance Ltd., has reportedly been downloaded over 175 million times in the United States and over one billion times globally. TikTok automatically captures vast swaths of information from its users, including internet and other network activity information such as location data and browsing and search histories. This data collection threatens to allow the Chinese Communist Party access to Americans' personal and proprietary information—potentially allowing China to track the locations of Federal employees and contractors, build dossiers of personal information for blackmail, and conduct corporate espionage.

TikTok also reportedly censors content that the Chinese Communist Party deems politically sensitive, such as content concerning protests in Hong Kong and China's treatment of Uyghurs and other Muslim minorities. This mobile application may also be used for disinformation campaigns that benefit the Chinese Communist Party, such as when TikTok videos spread debunked conspiracy theories about the origins of the 2019 Novel Coronavirus.

These risks are real. The Department of Homeland Security, Transportation Security Administration, and the United States Armed Forces have already banned the use of TikTok on Federal Government phones. The Government of India recently banned the use of TikTok and other Chinese mobile applications throughout the country; in a statement, India's Ministry of Electronics and Information Technology asserted that they were "stealing and surreptitiously transmitting users' data in an unauthorized manner to servers which have locations outside India." American companies and organizations have begun banning TikTok on their devices. The United States must take aggressive action against the owners of TikTok to protect our national security.

Accordingly, I hereby order:

Section 1. (a) The following actions shall be prohibited beginning 45 days after the date of this order, to the extent permitted under applicable law:

any transaction by any person, or with respect to any property, subject to the jurisdiction of the United States, with ByteDance Ltd. (a.k.a. Zìjié Tiàodòng), Beijing, China, or its subsidiaries, in which any such company has any interest, as identified by the Secretary of Commerce (Secretary) under section 1(c) of this order.

(b) The prohibition in subsection (a) of this section applies except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted before the date of this order.

(c) 45 days after the date of this order, the Secretary shall identify the transactions subject to subsection (a) of this section.

Sec. 2. (a) Any transaction by a United States person or within the United States that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate the prohibition set forth in this order is prohibited.

(b) Any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.

Sec. 3. For the purposes of this order:

(a) the term “person” means an individual or entity;

(b) the term “entity” means a government or instrumentality of such government, partnership, association, trust, joint venture, corporation, group, subgroup, or other organization, including an international organization; and

(c) the term “United States person” means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States.

Sec. 4. The Secretary is hereby authorized to take such actions, including adopting rules and regulations, and to employ all powers granted to me by IEEPA as may be necessary to implement this order. The Secretary may, consistent with applicable law, redelegate any of these functions within the Department of Commerce. All departments and agencies of the United States shall take all appropriate measures within their authority to implement this order.

Sec. 5. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
August 6, 2020.

[FR Doc. 2020-17699
Filed 8-10-20; 11:15 am]
Billing code 3295-F0-P

Case 3:20-cv-05910-LB Document 17-11 Filed 08/28/20 Page 1 of 21

1 MICHAEL W. BIEN – Cal. Bar No. 096891
 VAN SWEARINGEN – Cal. Bar No. 259809
 2 ALEXANDER GOURSE – Cal. Bar No. 321631
 AMY XU – Cal. Bar No. 330707
 3 ROSEN BIEN GALVAN & GRUNFELD LLP
 101 Mission Street, Sixth Floor
 4 San Francisco, California 94105-1738
 Telephone: (415) 433-6830
 5 Facsimile: (415) 433-7104
 Email: mbien@rbgg.com
 6 vswearingen@rbgg.com
 agourse@rbgg.com
 7 axu@rbgg.com

8 KELIANG (CLAY) ZHU – Cal. Bar No. 305509
 DEHENG LAW OFFICES PC
 9 7901 Stoneridge Drive #208
 Pleasanton, California 94588
 10 Telephone: (925) 399-5856
 Facsimile: (925) 397-1976
 11 Email: czhu@dehengsv.com

12 ANGUS F. NI – Wash. Bar No. 53828*
 AFN LAW PLLC
 13 502 Second Avenue, Suite 1400
 Seattle, Washington 98104
 14 Telephone: (773) 543-3223
 Email: angus@afnlegal.com
 15 * *Pro Hac Vice* application forthcoming

16 Attorneys for Plaintiffs

18 UNITED STATES DISTRICT COURT

19 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

20 U.S. WECHAT USERS ALLIANCE,
 CHIHUO INC., BRENT COULTER,
 21 FANGYI DUAN, JINNENG BAO,
 ELAINE PENG, and XIAO ZHANG,

22 Plaintiffs,

23 v.

24 DONALD J. TRUMP, in his official
 capacity as President of the United States,
 25 and WILBUR ROSS, in his official
 capacity as Secretary of Commerce,

26 Defendants.

Case No. 3:20-cv-05910-LB

**DECLARATION OF WANNING SUN
 IN SUPPORT OF PLAINTIFFS'
 MOTION FOR PRELIMINARY
 INJUNCTION**

Judge: Hon. Laurel Beeler
 Date: September 17, 2020
 Time: 9:30 a.m.
 Crtrm.: Remote

Trial Date: None Set

1 I, Wanning Sun, declare:

2 1. I am a Professor of Media and Communication at the University of
3 Technology Sydney (UTS), Australia. My curriculum vitae is attached hereto as **Exhibit**
4 **A**. I have personal knowledge of the matters stated herein, and if called as a witness I
5 could and would testify competently to them. I make this declaration in support of
6 Plaintiffs' Motion for a Preliminary Injunction.

7 2. I am a Fellow of the Australian Academy of Humanities, and a member of
8 the College of Experts of the Australian Research Council (2020–22). My research is at the
9 intersection of anthropology and media studies, and I have a long-standing track record of
10 research on the changing nature and development of the everyday media and cultural
11 consumption practices of Chinese immigrants across the globe, having written and edited
12 three books on this topic since 2000. Over the past decade or so, I have conducted
13 investigations into how Mandarin-speaking, first generation immigrants from the People's
14 Republic of China use social media in their everyday lives. I am currently contracted with
15 the international academic publisher Routledge to edit a scholarly manuscript on the topic
16 of WeChat and the Chinese diaspora. My other areas of research expertise include soft
17 power and public diplomacy. The following is a list of academically refereed books and
18 journal articles, policy papers, and other publications by me that testify to my standing as
19 an expert on WeChat:

- 20 • Sun, W. (2016). *Chinese-language media in Australia: Developments,*
21 *challenges and opportunities* (Research Report), September 8. Ultimo,
22 NSW: Australia–China Relations Institute.
- 23 • Sun, W. (2019). China's Vessel on the Voyage of Globalization: The soft
24 power agenda and diasporic media responses. In J. Retis & R.
25 Tsagarousianou (Eds.), *The handbook of diasporas, media, and culture* (pp.
26 165–178). Hoboken, NJ: Wiley-Blackwell.
- 27 • Sun, W. (2019). Chinese-language digital/social media in Australia: double-
28 edged sword in Australia's public diplomacy agenda. *Media International*
Australia, 173(1), 22–35.

- 1 • Sun, W. (2019). Is there a problem with WeChat? *China Matters Explores*
2 [Policy Brief], April. Retrieved from [http://chinamatters.org.au/policy-](http://chinamatters.org.au/policy-brief/policy-brief-april-edition/)
3 [brief/policy-brief-april-edition/](http://chinamatters.org.au/policy-brief/policy-brief-april-edition/)
 - 4 • Sun, W. (2019). New research shows Chinese migrants don't always side
5 with China and are happy to promote Australia. *The Conversation*,
6 November 14. Retrieved from [https://theconversation.com/new-research-](https://theconversation.com/new-research-shows-chinese-migrants-dont-always-side-with-china-and-are-happy-to-promote-australia-126677)
7 [shows-chinese-migrants-dont-always-side-with-china-and-are-happy-to-](https://theconversation.com/new-research-shows-chinese-migrants-dont-always-side-with-china-and-are-happy-to-promote-australia-126677)
8 [promote-australia-126677](https://theconversation.com/new-research-shows-chinese-migrants-dont-always-side-with-china-and-are-happy-to-promote-australia-126677)
 - 9 • Sun, W., & Sinclair, J. (Eds.). (2016). Media and communication in the
10 Chinese diaspora: Rethinking transnationalism. Oxford, UK: Routledge.
 - 11 • Sun, W., & Yu, H. (2020). WeChatting the Australian election: Mandarin-
12 speaking migrants and the teaching of new citizenship practices. *Social*
13 *Media + Society*, 6(1). doi: 10.1177/2056305120903441
 - 14 • [https://theconversation.com/why-trumps-wechat-ban-does-not-make-sense-](https://theconversation.com/why-trumps-wechat-ban-does-not-make-sense-and-could-actually-cost-him-chinese-votes-144207)
15 [and-could-actually-cost-him-chinese-votes-144207](https://theconversation.com/why-trumps-wechat-ban-does-not-make-sense-and-could-actually-cost-him-chinese-votes-144207)
 - 16 • [https://theconversation.com/who-do-chinese-australian-voters-trust-for-their-](https://theconversation.com/who-do-chinese-australian-voters-trust-for-their-political-news-on-wechat-113927)
17 [political-news-on-wechat-113927](https://theconversation.com/who-do-chinese-australian-voters-trust-for-their-political-news-on-wechat-113927)
 - 18 • [https://theconversation.com/chinese-social-media-platform-wechat-could-be-](https://theconversation.com/chinese-social-media-platform-wechat-could-be-a-key-battleground-in-the-federal-election-113925)
19 [a-key-battleground-in-the-federal-election-113925](https://theconversation.com/chinese-social-media-platform-wechat-could-be-a-key-battleground-in-the-federal-election-113925)
 - 20 • [https://theconversation.com/how-australias-mandarin-speakers-get-their-](https://theconversation.com/how-australias-mandarin-speakers-get-their-news-106917)
21 [news-106917](https://theconversation.com/how-australias-mandarin-speakers-get-their-news-106917)
 - 22 • [https://www.scmp.com/podcasts/inside-china/3097760/explaining-wechat-](https://www.scmp.com/podcasts/inside-china/3097760/explaining-wechat-chinas-super-app-donald-trump-wants-banned)
23 [chinas-super-app-donald-trump-wants-banned](https://www.scmp.com/podcasts/inside-china/3097760/explaining-wechat-chinas-super-app-donald-trump-wants-banned)
- 24 3. I have been asked to provide my expert opinion regarding the importance of
25 WeChat to the Chinese-American community, and the lack of viable substitutes if WeChat
26 is banned.
- 27 4. In order to prepare this declaration, I have reviewed the following materials:
- 28 • Alonso, A., & Oriarzabal, P. (Eds.). (2010). *Diasporas in the new media age: Identity, politics and community*. Reno, NV: University of Nevada Press.
 - Borak, M. (2018). WeChat is suspending one of its popular features because people are using it to sell porn. *Tech in Asia*, December 6. Retrieved from [https://www.techinasia.com/wechat-suspending-favorite-features-people-](https://www.techinasia.com/wechat-suspending-favorite-features-people-sell-porn)
[sell-porn](https://www.techinasia.com/wechat-suspending-favorite-features-people-sell-porn)

- 1 • Chao, E. (2017). How WeChat became China's app for everything. *Fast*
2 *Company*, February 1. Retrieved from
3 [https://www.fastcompany.com/3065255/china-wechat-tencent-red-](https://www.fastcompany.com/3065255/china-wechat-tencent-red-envelopes-and-social-money)
4 [envelopes-and-social-money](https://www.fastcompany.com/3065255/china-wechat-tencent-red-envelopes-and-social-money)
- 5 • Chen, Y., Mao, Z., & Qiu, J. L. (2018). *Super-sticky WeChat and Chinese*
6 *society*. Melbourne, Australia: Emerald Publishing.
- 7 • Culpan, T. (2018). The world's most powerful app is squandering its lead:
8 WeChat is leaving money on the table. *Bloomberg Opinion*, July 23.
9 Retrieved from [https://www.bloomberg.com/opinion/articles/2018-07-](https://www.bloomberg.com/opinion/articles/2018-07-22/world-s-most-powerful-app-is-squandering-its-lead)
10 [22/world-s-most-powerful-app-is-squandering-its-lead](https://www.bloomberg.com/opinion/articles/2018-07-22/world-s-most-powerful-app-is-squandering-its-lead)
- 11 • Dragon Social. (2019). The ultimate beginner's guide to WeChat Official
12 Accounts for business (2019). Retrieved from
13 <https://www.dragonsocial.net/blog/beginner-guide-wechat-for-business/>
- 14 • Feng, Z. (2020). Meiguo Huaren ji bian "heiren de ming ye shi ming" beihou
15 de dai ji chongtu [Inter-generational conflict among Chinese Americans in
16 the "Black Lives Matter" debate]. BBC News (Chinese edition), July 4.
17 Retrieved from <https://www.bbc.com/zhongwen/simp/world-53259676>
- 18 • Huang, E. (2020). A letter from a Yale student to the Chinese American
19 community. *Chinese American*, May 31. Retrieved from
20 <https://chineseamerican.org/p/31571>
- 21 • Huang, E., & Lahiri, T. (2019). Right-wing "fake news" circulates on
22 China's WeChat app as Australia's election nears. *Quartz*, May 9. Retrieved
23 from [https://qz.com/1614329/fake-news-on-wechat-focuses-on-the-left-in-](https://qz.com/1614329/fake-news-on-wechat-focuses-on-the-left-in-australia-election/)
24 [australia-election/](https://qz.com/1614329/fake-news-on-wechat-focuses-on-the-left-in-australia-election/)
- 25 • Knockel, J., Parsons, C., Ruan, L., Xiong, R., Crandall, J., & Deibert, R.
26 (2020). *We chat, they watch: How international users unwittingly build up*
27 *WeChat's Chinese censorship apparatus* (Citizen Lab Research Report No.
28 127), May 7. Toronto, Canada: University of Toronto. Retrieved from
<https://citizenlab.ca/2020/05/we-chat-they-watch/>
- Knockel J., & Xiong, R. (2019). *(Can't) picture this 2: An analysis of*
WeChat's realtime image filtering in chats (Citizen Lab Report No. 122),
July 15. Toronto, Canada: University of Toronto. Retrieved from
[https://citizenlab.ca/2019/07/cant-picture-this-2-an-analysis-of-wechats-](https://citizenlab.ca/2019/07/cant-picture-this-2-an-analysis-of-wechats-realtime-image-filtering-in-chats/)
[realtime-image-filtering-in-chats/](https://citizenlab.ca/2019/07/cant-picture-this-2-an-analysis-of-wechats-realtime-image-filtering-in-chats/)
- Koreshkova, Y. O. (2018). WeChat as a lifestyle: Social network tool of the
Chinese migrants in Russia. *Journal of Siberian Federal University*:

1 *Humanities & Social Sciences*, 11(11), 1816–1823. doi: 10.17516/1997-
2 1370-0342

- 3 • Lu, Y. (2019). China's Internet is flowering. And it might be our future. *The*
4 *New York Times Magazine*, November 13. Retrieved from
5 [https://www.nytimes.com/interactive/2019/11/13/magazine/internet-china-
wechat.html](https://www.nytimes.com/interactive/2019/11/13/magazine/internet-china-wechat.html)
- 6 • Martin, F. (2017). Trading in the grey zone: Chinese students find innovative
7 ways to make a living in Australia. *PopAnth*, March 30. Retrieved from
8 [https://popanth.com/article/trading-in-the-grey-zone-chinese-students-find-
innovative-ways-to-make-a-living-in-australia](https://popanth.com/article/trading-in-the-grey-zone-chinese-students-find-innovative-ways-to-make-a-living-in-australia)
- 9 • Martin, F. (2018). Iphones and “African gangs”: Everyday racism and ethno-
10 transnational media in Melbourne's Chinese student world. *Ethnic and*
11 *Racial Studies* 43(5), 892–910. Retrieved from
12 [https://www.tandfonline.com/doi/full/10.1080/01419870.2018.1560110?scro
ll=top&needAccess=true](https://www.tandfonline.com/doi/full/10.1080/01419870.2018.1560110?scroll=top&needAccess=true)
- 13 • Niu, I. (2019). Is WeChat a problem for democracies? *Quartz*, November 6.
14 Retrieved from [https://qz.com/1742568/is-chinas-messaging-app-wechat-a-
problem-for-democracies/](https://qz.com/1742568/is-chinas-messaging-app-wechat-a-problem-for-democracies/)
- 15 • Phoebe by Ineat. (2019). WeChat Official Account: Local vs overseas,
16 March 8. Retrieved from
17 https://mp.weixin.qq.com/s/f76_S4hYmmb_l6Ayv6znDA
- 18 • Pink, S., Horst, H., Postill, J., Hjorth, L., Lewis, T., & Tacchi, J. (2016).
19 *Digital ethnography: Principles and practice*. Los Angeles, CA: Sage.
- 20 • Schwedel, H. (2018). A Guide to TikTok for anyone who isn't a teen. *Slate*,
21 September 4. Retrieved from [https://slate.com/technology/2018/09/tiktok-
app-musically-guide.html](https://slate.com/technology/2018/09/tiktok-app-musically-guide.html)
- 22 • Sosnovskikh, S. (2020). A new form of parallel trading within economics
23 relations between Russia and China. *Post-Communist Economies*.
doi: 10.1080/14631377.2020.1745562
- 24 • Srnicek, N. (2017). *Platform capitalism*. Cambridge, UK: Polity Press.
- 25 • Statista (2020). Number of monthly active WeChat users from 3rd quarter
26 2011 to 3rd quarter 2018 (in millions), May 20. Retrieved from
27 [https://www.statista.com/statistics/255778/number-of-active-wechat-
messenger-accounts/](https://www.statista.com/statistics/255778/number-of-active-wechat-messenger-accounts/)

- 1 • Sun, W. [Wanning]. (2016). *Chinese-language media in Australia: Developments, challenges and opportunities* (Research Report), September 8. Ultimo, NSW: Australia–China Relations Institute.
- 2
- 3 • Sun, W. [Wanning]. (2019a). China’s Vessel on the Voyage of Globalization: The soft power agenda and diasporic media responses. In J. Retis & R. Tsagarousianou (Eds.), *The handbook of diasporas, media, and culture* (pp. 165–178). Hoboken, NJ: Wiley-Blackwell.
- 4
- 5
- 6 • Sun, W. [Wanning]. (2019b). Chinese-language digital/social media in Australia: double-edged sword in Australia’s public diplomacy agenda. *Media International Australia*, 173(1), 22–35.
- 7
- 8
- 9 • Sun, W. [Wanning]. (2019c). Is there a problem with... WeChat? *China Matters Explores* [Policy Brief], April. Retrieved from <http://chinamatters.org.au/policy-brief/policy-brief-april-edition/>
- 10
- 11 • Sun, W. [Wanning]. (2019d). New research shows Chinese migrants don’t always side with China and are happy to promote Australia. *The Conversation*, November 14. Retrieved from <https://theconversation.com/new-research-shows-chinese-migrants-dont-always-side-with-china-and-are-happy-to-promote-australia-126677>
- 12
- 13
- 14 • Sun, W. [Wanning], & Sinclair, J. (Eds.). (2016). *Media and communication in the Chinese diaspora: Rethinking transnationalism*. Oxford, UK: Routledge.
- 15
- 16
- 17 • Sun, W. [Wanning], & Yu, H. (2020). WeChatting the Australian election: Mandarin-speaking migrants and the teaching of new citizenship practices. *Social Media + Society*, 6(1). doi: 10.1177/2056305120903441
- 18
- 19
- 20 • Sun W. [Wei]. (2015). Weixin: Zhongguoren de zaishi cunyou [WeChat: Chinese people’s Dasein]. *Xueshu yuekan* [Academic monthly], 47(12), 5–18.
- 21
- 22 • Tan, C.-B. (2013). Introduction. In C.-B. Tan (Ed.), *Routledge Handbook of the Chinese Diaspora* (pp. 1–12). London: Routledge.
- 23
- 24 • Walsh, M., & Xiao, B. (2019). “Uncharted territory”: WeChat’s new role in Australian public life raises difficult questions. *ABC News*, April 19. Retrieved from <https://www.abc.net.au/news/2019-04-19/wechats-new-role-in-australian-politics-raises-questions/11031878>
- 25
- 26
- 27 • Yu, H., & Sun, W. [Wanning]. (2020). WeChat subscription accounts (WSAs) in Australia: A political economy account of Chinese-language
- 28

digital/social media. *Media International Australia*, June 19. Retrieved from <https://journals.sagepub.com/doi/abs/10.1177/1329878X20932356>

- Xue, M., Yuan, X., Lee, H., & Ross, K. (2019). Sensing the Chinese diaspora: How mobile apps can provide insights into global migration flows. In P. Papapetrou, X. Cheng, & Q. He (Eds.), *Proceedings—19th IEEE International Conference on Data Mining Workshops (ICDMW) 2019* (pp. 603–608). Beijing: 2019.
- Zeng, M. J. (2018). Thinking of taking up WeChat? Here’s what you need to know. *The Conversation*, 17 December 2018. Retrieved from <https://theconversation.com/thinking-of-taking-up-wechat-heres-what-you-need-to-know-88787>
- Zhang, C. (2018a). Study: Chinese-American immigrants fall prey to WeChat’s misinformation problem. *Columbia Journalism Review*, April 19. Retrieved from https://www.cjr.org/tow_center/wechat-misinformation.php
- Zhang, C. (2018b). WeChatting American politics: Misinformation, polarization, and immigrant Chinese media. *Columbia Journalism Review*, April 19. Retrieved from https://www.cjr.org/tow_center_reports/wechatting-american-politics-misinformation-polarization-and-immigrant-chinese-media.php
- Zhang, G., & Wang, W. Y. (2019). “Property talk” among Chinese Australians: WeChat and the production of diasporic space. *Media International Australia*, 173(1): 53–65.

5. My opinions set forth below are based upon the documents and other evidence listed above, and on my professional knowledge and experience working, inter alia, as a scholarly researcher and writer on global Chinese immigrants’ use of WeChat and other social media platforms. In particular, my most recent research draws on three empirical sources: (1) two large-scale online surveys of WeChat users; (2) sustained digital ethnographic observation of and interaction with numerous WeChat groups and individuals; and (3) in-depth one-on-one interviews with regular WeChat users. The surveys were used to contextualize my research, providing a useful sense of the general patterns of digital practices within both WeChat and other digital social media ecosystems.

6. Building on my findings in relation to these general patterns, I adopted participatory digital ethnographic methods over five months in 2019, which allowed me

1 and my research team to make a sustained collection of digital data from various chat
2 groups, to ascertain significant trends and topics within those discussions, and to identify
3 their key opinion leaders. The semi-structured one-on-one interviews enabled us to zoom
4 in close and engage in a more in-depth analysis of the online behavior and discourses
5 engaged in by selected figures in WeChat groups and, where relevant, other non-Chinese
6 social media platforms.

7 7. The first of our two surveys was conducted in September 2018 among
8 Mandarin-speaking migrants from the People's Republic of China, investigating their
9 media access and usage patterns. It was conducted using a *convenience sample*
10 (participants were recruited largely from the social media platforms WeChat and
11 Facebook) of 646 individuals, of whom 528 completed all key questions. The majority of
12 our respondents were Australian permanent residents or naturalized Australian citizens
13 (over 90%), with an undergraduate degree or higher (85%), and employed (over 70%).

14 8. The second survey, which was conducted in February 2019 using the same
15 methodology, recruited 927 Mandarin-speaking migrants, with 786 respondents
16 completing all key questions. The main focus of this survey was on participants' media
17 and news access and consumption habits and preferred platforms or sources. The majority
18 of respondents again were either Australian citizens (over 36%) or Australian permanent
19 residents (over 31%), under 55 years old (89%), with an undergraduate degree or higher
20 (87%), having adequate English proficiency (93%), employed (71%, full-time and part-
21 time combined), and female (60%).

22 9. In addition to these surveys, over the past three years I have adopted the
23 methodology of *digital ethnography* to undertake participant observation in more than 40
24 WeChat groups, most of which have members from all over the world, including the
25 United States.

26 10. Finally, using my own methodology of *time-lapse ethnography*, I have
27 conducted repeated in-depth, one-on-one interviews with more than 10 individuals in the
28 United States, Australia, and other parts of the world. These interviews each lasted up to

1 one hour, with a focus on patterns and changes in participants' media habits, their views on
2 the roles they play in chat groups, and the roles WeChat plays in their everyday lives.

3 11. Based upon the documents and information I have reviewed, I am able to
4 offer the following opinion:

5 **STATEMENT OF OPINION**

6 **It is not only culturally difficult but also practically unviable for Chinese Americans**
7 **to switch to other social media platforms, should WeChat be banned.**

8 12. Like Chinese-speaking immigrants all over the world, the Chinese-American
9 community has changed dramatically in terms of its size and demographic composition.
10 This is mainly due to two factors: (1) large-scale outbound permanent migration from the
11 People's Republic of China (PRC) to the United States; and (2) the exponential growth of
12 mainland Chinese people now living in or visiting the United States due to its growing
13 interface with China across a wide range of domains, including trade, business, resources,
14 property investment, education, and tourism. The informational needs of these various
15 mobile cohorts – international students, tourists, permanent residents, and naturalized
16 American citizens – are diverse and often location-specific. But they are united by two
17 commonalities: (1) they desire to stay connected with family and friends in China, with
18 Mandarin-speaking immigrant communities within the United States, and with other
19 Chinese immigrant communities across the globe; and (2) they overwhelmingly prefer
20 WeChat over other social media platforms to conduct business, maintain everyday
21 connections, and access the Chinese-language news, information, and shared wisdom of
22 fellow Chinese Americans that is crucial to their practical and cultural well-being in their
23 adopted country.

24 13. WeChat was developed by the Chinese super-tech company Tencent, and
25 launched in January 2011. Tencent is the same company that developed and owns QQ, a
26 Chinese social media platform that predates WeChat. While QQ is still used by some
27 segments of the Chinese population in China, it has largely been superseded by WeChat,
28 especially among Chinese immigrant communities outside China, because of WeChat's

1 vastly enhanced usability and range of functions. By 2018 WeChat had garnered over a
2 billion active monthly users, more than 100 million of whom were outside China. As of
3 August 2020, there are more than 1.2 billion active WeChat messenger accounts
4 worldwide. WeChat is thus central to the interpersonal and public communication practices
5 of Chinese migrants, both in the United States and across the globe, so much so that it is
6 very difficult to imagine what their everyday communication would be like without the
7 platform. Some users compare WeChat to the ‘air’ they breathe; others use the metaphor of
8 ‘losing a limb’ if WeChat were no longer to be available.

9 14. Two decisive points are noteworthy in order to understand why banning
10 WeChat would be likely to pose significant difficulties and obstacles in the business
11 viability and everyday lives of Chinese Americans and Chinese visitors to the United
12 States. First, almost all new Chinese immigrants who have come to the United States since
13 2011 are WeChat users who brought their accounts with them from China. This means
14 that, in order to maintain the networks they had built prior to immigration, these
15 individuals need to continue using WeChat rather than mainstream Western social media
16 platforms such as Facebook, WhatsApp, and Twitter, because all of these platforms – and
17 several others – are banned in China. Switching to such platforms is not an option, given
18 that maintaining close connections with family and friends back in China has become an
19 essential part of their identity as Chinese-American citizens. Although they may be free to
20 take up Western social media platforms in addition to WeChat, the former can by no
21 means substitute for WeChat.

22 15. Second, those Chinese immigrants who migrated to the United States prior to
23 the launch of WeChat in 2011 also favor WeChat over other globally adopted social media
24 platforms such as Facebook and Twitter. This is for a number of reasons, including
25 language proficiency, cultural resonance, and networking considerations – the need to
26 maintain an interface with China by adopting a platform that is also legally available to
27 and used by their family and friends in China. As a predominantly Chinese-language users’
28 platform, WeChat gives Chinese-American citizens and other users access to Chinese-

1 language news and information that is otherwise unavailable. My research also suggests
2 that Chinese immigrants are more likely to access the content of English-language
3 mainstream media if it is posted on WeChat, either in its original form, translated, or
4 summarized.

5 16. Also, WeChat combines many of the functions of Facebook, Twitter,
6 WhatsApp, Instagram, and PayPal, with additional e-payment, e-commerce, and e-lifestyle
7 features. It has been called a ‘super-sticky’ all-in-one app and mega platform, and a digital
8 ‘Swiss army knife’ for modern life. A platform that is extremely agile, versatile, and
9 resourceful, WeChat comes with many features that resonate with traditional Chinese
10 practices, such as sending monetary gifts (‘red envelopes’) to friends electronically.

11 17. The arrival of WeChat revolutionized the ways in which Chinese people
12 socialize, conduct business and work, and partake in consumption. Not only is WeChat
13 important to individual users in their everyday communication with families, relatives, and
14 friends, but it also enables them to connect personally and professionally with other
15 members of Chinese communities back in China and around the world. WeChat users can
16 join myriad WeChat discussion groups, with each such group allowed no more than 500
17 people. These semi-private forums allow Chinese-American users to both maintain and
18 grow their existing networks in relation to their line of business, professional activities,
19 political interests, and place of origin. As a result, the networks that have been established
20 and grown within WeChat, as well as the business platforms that are either provided by
21 WeChat or allowed to operate within its ecosystem, are thus essential underpinnings to the
22 survival and success of Chinese-American businesses.

23 18. WeChat is pivotal to the everyday media and cultural lives of Chinese-
24 American citizens. Given that a significant proportion of the PRC migrants now living in
25 the United States do not have adequate English language proficiency, accessing news and
26 information provided by Chinese-language community media in the United States is vital
27 to their identity and well-being in their host country.

1 19. As WeChat has emerged as the omnipresent and omnipotent platform in
2 Chinese lives, WeChat Subscription Accounts (WSAs) have become critical sources of
3 news and information, primarily because the majority of digital Chinese-language media
4 and content providers in the United States adopt WSAs as their primary platform for
5 delivering content to WeChat users. This is because WSAs are easy to set up and operate,
6 and they have been widely adopted by content providers' target audiences.

7 20. WSAs have changed how Chinese make, circulate, and access news and
8 information since their introduction in 2013. WeChat offers three kinds of official
9 accounts, of which the WSA (*dingyuehao* 订阅号) is the best-known among everyday
10 users. WSAs are favored mostly by individuals, companies, institutions, and media
11 organizations that want a news-pushing or content-sharing platform to connect with and
12 post news items to their subscribers frequently – they are permitted to push between one
13 and eight articles per day, provided they post all articles simultaneously on that day.

14 21. WSA posts are nested inside a folder, and hence have lower visibility than
15 the second kind of official account – WeChat Service Accounts (*fuwuhao* 服务号) – whose
16 posts appear in the same way as posts by one's friends or friends' groups. Service
17 Accounts are used primarily by corporates and organizations as a service platform for
18 connecting with customers and enabling e-commerce-related functions, with only four
19 messages per month being allowed on each account.

20 22. The third kind of official account, WeChat Enterprise Accounts (*qiyehao* 企
21 业号), are mainly used for corporate internal communication and management, like
22 Facebook's Workplace.

23 23. Individuals can apply for a basic WSA with a Chinese ID card, free of
24 charge. In order to enjoy advanced functions, such as e-payment, geo-location, and
25 advertisement banners, a WSA needs to be verified by WeChat administrators, with an
26 account verification fee of RMB300 per year for a Chinese domestic account, or US\$99
27 per year for an overseas account.

24. There are several ways to make money through WSAs, and account owners use a combination of revenue generating mechanisms to attract as many readers and clicks as possible. The first strategy is to become a ‘traffic master’: any WSA with a minimum of 500 followers can apply to be a traffic master, and get paid based on a per-view and per-complete-view basis, as well as per-click on the advertisements that are automatically added by WeChat below each article. The second way of earning money is through advertisements embedded within the WSA feed. The fees are negotiated between advertisers and WSA owners, with each advertisement costing from several hundred to several thousand RMB (US\$ 1 \approx RMB 7). The ads are inserted multiple times into an article or run as a banner within the subscription account, and they are rewarded through a cost-per-read/click arrangement, generating RMB 0.3–0.6 per read or click. The third method is through soft-sell advertising or infomercials, often in the form of news and information, with a clickbait title and a good storyline selling a product, service, or event, negotiated between WSA owners and advertisers or sponsors with a higher price tag, ranging from RMB 500–500,000 per piece, depending on the popularity of the WSA (based on its number of followers and average reads per article). The fourth money-making possibility is by offering loyal followers members-only subscriptions to premium content or training programs, at a cost of RMB 50–1,599 per course or annual subscription. Fifth, through the ‘Thank Writer’ function, readers can pay/tip directly into the writer’s WeChat Wallet to express their appreciation of the writer’s content. Sixth, the WSA can be linked through WeChat Pay to sell products or services directly to subscribers. Seventh, money can be made by hosting artistic, cultural, and integrated marketing events. Finally, there is the option of attracting investment from venture capitalists.

25. A WeChat user who subscribes to a WSA receives notifications automatically, and can subsequently re-post WSA articles to everyone in their WeChat Groups, and on Moments. The user-friendly nature of the WeChat app and the capacity for infinite reproduction of content through reposting ensures that, if they are smart in their use of the platform, such online media outlets can maximize their reach, profit, and impact.

1 Among the most popular US-based websites that use WSAs are Literature City
2 (<https://www.wenxuecity.com/>), Creaders (<https://www.creaders.net/>), and *College Daily*
3 (<http://www.collegedaily.cn/>). China-registered WSAs can reach as many readers as
4 possible, irrespective of the nature of their accounts, either as Chinese users on ‘Weixin’
5 (the Chinese version of WeChat) or as non-Chinese users on the international version.

6 26. WSAs thus offer a viable and dynamic business opportunity to a new
7 generation of independent bloggers and digital entrepreneurs to make a profit through
8 content production. Most US-focused WSAs have created a (so far) sustainable business
9 model through content/information production and circulation, and have become a vibrant
10 and essential part of the business ecosystem of their owners.

11 27. As a part of the WeChat infrastructure, WSAs have become a platform of
12 their own, influencing the ways people connect, obtain their news, share information, and
13 market products and services. They are part of Tencent’s ‘platform bundling’ and global
14 expansion strategy, highlighting how digital entrepreneurs of Chinese background in the
15 United States capitalize on the WeChat ecosystem to better serve the information needs of
16 Chinese-American communities. As a platform within the wider architecture of WeChat,
17 WSAs serve as a new kind of ‘firm’ – an intermediary that brings together customers,
18 advertisers, service providers, producers, suppliers, and physical objects. Importantly, the
19 different users brought together by US-focused WSAs are not only Chinese speakers and
20 businesses, but also local US businesses, corporate entities, and public bodies.

21 28. The indispensable role played by WeChat in enabling Chinese immigrants in
22 the United States to stay connected with their families ‘back home’ becomes particularly
23 important at a time when national borders are mostly closed, and transnational mobility is
24 significantly reduced between the United States and China. Additionally, daily private
25 communication via WeChat’s ‘Chat’ function with like-minded friends who share the
26 experience of being a PRC migrant helps shape these users’ sense of belonging to a unique
27 sub-class of US citizens – Chinese Americans – and assists individuals in coping with the
28 challenges of being new or different in their adopted country. Often wedged between

1 China and the United States because of high-level political differences that have little if
2 anything to do with their own lives, Chinese immigrants regularly take to sharing their
3 concerns and difficulties by posting via WeChat's 'Moments' function. And within
4 WeChat 'Groups', individuals frequently share information and debate on topics and issues
5 of particular concern to their lives as immigrants.

6 29. Significantly, WeChat plays an increasingly important role in Chinese
7 immigrants' political integration within their host country. Research has shown that
8 WeChat became a major political platform for debating political issues and advocating for
9 specific agendas during the current and previous presidential election campaigns. In
10 particular, it was effectively used to garner support for President Trump among
11 conservative and far-right Chinese-American voters during the 2016 presidential
12 campaign. WeChat enabled conservative voices to amplify their volume and reach,
13 especially on a range of hot-button issues such as that of undocumented immigration. In
14 fact, some researchers argue that WeChat has played a significant role in the overall rise of
15 conservatism and political polarization in the Chinese-American community.

16 30. There are a number of influential conservative WSAs in the US, including
17 Voice of North American Chinese (VNAC), Civil Rights, Voice of Chinese Americans
18 (VCA), and recently North American Conservative. By contrast, there are several less
19 popular left-leaning accounts that include the NoMelonGroup, Anti-Rumor, and an
20 account called simply Chinese Americans. Collectively, conservative content is 'leading
21 the scoreboard in volume and reach, as well as [being] narrower and more aggressive in its
22 ideological expression' (Zhang, 2018b). In short, President Trump has a lot be thankful for
23 when it comes to WeChat. It is quite possible the ban has the potential to alienate some of
24 his strongest supporters – an outcome that Mr. Trump may not have anticipated when he
25 announced the ban.

26 31. In recent years, WeChat has also presented itself as an increasingly vital
27 space for broad civic engagement and civic dialogue within Chinese-American
28 communities. During the Black Lives Matter (BLM) protests, for instance, Yale student

1 Eileen Huang published an open letter on WeChat, addressed to Chinese Americans of her
2 parents' generation. Huang noted how Chinese-Americans have long-held and deep-seated
3 prejudices against African Americans and other people of color, and she called on them to
4 pledge their solidarity with BLM to fight racism. Huang's letter drew widespread criticism,
5 including, most prominently, from someone who identified himself as Ling Fei, who wrote
6 another open letter addressing Huang as a 'child' who had been 'brainwashed by the
7 lefties', implying that Huang was simply toeing a 'politically correct' line in suggesting
8 that African Americans would side with the views of Asian minorities. Within a week, the
9 two letters were shared widely on WeChat, precipitating more open letters between
10 younger Chinese students at Ivy League universities and older Chinese Americans. These
11 debates within Chinese-American communities that were enabled by WeChat are of high
12 significance culturally and socially. Banning WeChat would spell the end of a platform
13 that has begun to flourish as a forum for healthy public debate and useful civic education
14 and engagement in the United States, as well as among the rest of the Chinese diaspora. As
15 a result, WeChat has the potential to facilitate dialogue and debate within the Chinese-
16 American community, given its demonstrated usefulness as a platform for different
17 generations of Chinese Americans to engage in civic dialogue and debate on issues of race,
18 gender, religion, and politics.

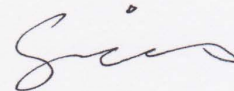
19 32. WeChat's exceptionally high level of convenience as a defining consequence
20 of its technical affordances has ensured that most, if not all, Chinese immigrants with a
21 PRC background now living in the United States prefer this social media platform. Other
22 social media cannot replace WeChat, because (1) they do not offer the much-needed
23 cultural and practical interface with China; (2) they require a very different set of cultural
24 practices, digital skills, language competence, and user habits; and (3) they are more likely
25 to be culturally alienating than culturally enabling.

26 33. WeChat has become such an integral part of Chinese immigrants' lifestyle
27 that Chinese-American communities and Chinese students studying in the United States
28 have responded to news of the ban with a mixture of confusion, anxiety, fear, and even

1 panic. There has been much speculation about exactly how the ban will affect their use of
2 WeChat, particularly in relation to whether users can retain their existing WeChat
3 discussion groups and continue making and receiving payments via the platform. Some
4 believe that Apple and Google will be forced to remove the WeChat app from their stores,
5 that new users will not be able to download it, and that existing users will not be able to
6 update it. Their greatest fear is that this would gradually lead to dwindling user numbers,
7 as a result of which WeChat would become incrementally unviable. Some commentators
8 advise users not to upgrade to a new mobile device or try to restore a backup of the app,
9 and simply to turn off the update function in case the app is terminated.

10 34. The biggest worry for most users is their possible loss of connection with
11 families and friends in China, and with people in the networks they have established on
12 WeChat. In anticipation of not being able to rely on WeChat for communication in the
13 imminent future, many have registered with QQ, an earlier Tencent platform, as well as
14 with Line, Telegraph, and WhatsApp, even though to date these social media platforms
15 have not been extensively taken up by PRC immigrants. Some speculate that when
16 immigrants visit China, they may be able to download or update the app safely. WeChat
17 users have also been sharing strategies for dealing with the possible consequences of the
18 ban. Some suggest that they may be able to use a Virtual Private Network to access the
19 China-based app store, as long as they ensure that they also have a China-registered Apple
20 ID. As a result of all these concerns, there has been widespread sharing of tips and advice
21 about how to retain one's WeChat data (e.g., from Chat and Moments histories).

22 I declare under penalty of perjury under the laws of the United States of America
23 that the foregoing is true and correct, and that this declaration is executed at Sydney,
24 Australia this twenty-sixth day of August, 2020.

25 

26
27 Wanning Sun

EXHIBIT A

Wanning Sun – Curriculum Vitae (brief) 2020

Personal Details

Address: 69 Thornley Street, Marrickville, NSW, 2204, Australia

Email: wanning.sun@uts.edu.au

Mobile: +61 408157851

Summary

Professor Wanning Sun is a Fellow of Australian Academy of Humanities (FAHA). She is a member of the College of Experts, Australian Research Council (2020-2022). From 2005-2006, Wanning Sun was the Freeman Foundation Visiting Professor at the State University of New York, Binghamton. Professor Sun is a leading international scholar on soft power, public diplomacy, and Chinese immigrant media. She is on the advisory boards of two China-related think-tanks in Australia: China Matters and the Australia-China Relations Institute.

Professor Sun has spearheaded diasporic Chinese media as a field of scholarly research, and she is also known for her work on rural to urban migration and social change in contemporary China. Wanning is the author of a major report, *Chinese-Language Media in Australia: Developments, Challenges and Opportunities* (2016). She is currently leading an Australian Research Council Discovery Project, 'Chinese-Language Digital/Social Media in Australia: Rethinking Soft Power' (2018-2020).

Current Position

Professor of Media and Communication, School of Communication, Faculty of Arts and Social Sciences, University of Technology Sydney (UTS).

Professional Experience

More than two decades' experience in teaching and academic research in the areas of media, communication, and China studies in the university sector in China, the United States, and Australia.

Qualifications

PhD in Media and Cultural Studies, University of Western Sydney, Nepean, 1997

Editorial Boards

- Member of Editorial Board, *Continuum: Journal of Media and Cultural Studies* (current)
- Member of Editorial Board, *Communication, Culture & Critique* (current)
- Member of Editorial Board, *Communication and the Public* (current)
- Member of Editorial Board, *The China Journal* (current)

Wanning Sun – Curriculum Vitae (brief) 2020

Research Grants

- ARC Discovery Grant: 'Chinese-language digital/social media in Australia: Rethinking soft power' (with H. Yu) (2018–2020)
- ARC Discovery Grant: 'Inequality in love: Romance and intimacy among China's young rural migrant workers' (2015–2017)
- ARC Discovery Grant: 'China's rural migrant workers: Social transition and cultural practices' (2010–2012)
- ARC Discovery Grant: 'The role of lifestyle television in transforming culture, citizenship and selfhood: Australia, China, Taiwan, Singapore and India' (with F. Martin, T. Lewis, R. Harindranath, and J. G. Sinclair) (2010–2013)
- Contracted research for industry partners: 'Methods of listening to radio among Chinese youth'
- ARC Cultural Research Network Project (I was one of 50 network participants) (2004–2009)
- ARC Discovery Grant: 'Maid in China: Internal migration and translocal imagination' (2004–2007)

Selection of Relevant Books

- *Love Stories in Contemporary China: The Cultural Politics of Intimacy*, with Ling Yang, London: Routledge, 2019. (edited volume)
- *Telemodernities: Lifestyle television and Transforming Lives in Asia*, with Tania Lewis and Fran Martin, Durham, NC: Duke University Press, 2016. (co-authored book)
- *Media and Communication in the Chinese Diaspora: Rethinking Transnationalism*, with John Sinclair, London: Routledge, 2016. (edited volume)
- *Unequal China: The Political Economy and Cultural Politics of Inequality*, with Yingjie Guo, London: Routledge, 2013. (edited volume)
- *Mapping Media in China: Region, Province, Locality*, with Jenny Chio, London, Routledge, 2013. (edited volume)
- *Subaltern China: Rural Migrants, Media and Cultural Practices*, Lanham, MD: Rowman and Littlefield, 2014. (single-authored book)
- *Media in China: Key Concepts and Critical Analyses* (four volumes), with Michael Keane, London: Routledge, 2013. (edited volume)
- *Media and the Chinese Diaspora: Community, Communication, and Commerce*, London: Routledge, 2006. (edited volume)
- *Leaving China: Media, Migration and Transnational Imagination*, Lanham, MD: Rowman & Littlefield, 2002. (single-authored book)

Wanning Sun – Curriculum Vitae (brief) 2020

Selection of Academically Refereed Research Papers on WeChat

- Sun, W & Yu, H 2020, 'WeChatting the Australian Election: Mandarin-Speaking Migrants and the Teaching of New Citizenship Practices', *Social Media + Society*, vol. 6, no. 1.
- Yu, H & Sun, W 2020, 'WeChat Subscription Accounts (WSAs) in Australia: A Political Economy Account of Chinese-language Digital/Social Media', *Media International Australia*, .
- Sun, W 2019, 'Chinese-language Digital/Social Media in Australia: Double-edged Sword in Australia's Public Diplomacy Agenda', *Media International Australia*, vol. 173, no. 1.

Recent Media Appearances Speaking about WeChat and Chinese Americans

- Is There a Problem with WeChat? (Policy Brief) <http://chinamatters.org.au/policy-brief/policy-brief-april-edition/>
- <https://theconversation.com/why-trumps-wechat-ban-does-not-make-sense-and-could-actually-cost-him-chinese-votes-144207>
- <https://www.scmp.com/podcasts/inside-china/3097760/explaining-wechat-chinas-super-app-donald-trump-wants-banned>

Case 3:20-cv-05910-LB Document 17-10 Filed 08/28/20 Page 1 of 16

1 MICHAEL W. BIEN – Cal. Bar No. 096891
 VAN SWEARINGEN – Cal. Bar No. 259809
 2 ALEXANDER GOURSE – Cal. Bar No. 321631
 AMY XU – Cal. Bar No. 330707
 3 ROSEN BIEN GALVAN & GRUNFELD LLP
 101 Mission Street, Sixth Floor
 4 San Francisco, California 94105-1738
 Telephone: (415) 433-6830
 5 Facsimile: (415) 433-7104
 Email: mbien@rbgg.com
 6 vswearingen@rbgg.com
 agourse@rbgg.com
 7 axu@rbgg.com

8 KELIANG (CLAY) ZHU – Cal. Bar No. 305509
 DEHENG LAW OFFICES PC
 9 7901 Stoneridge Drive #208
 Pleasanton, California 94588
 10 Telephone: (925) 399-5856
 Facsimile: (925) 397-1976
 11 Email: czhu@dehengsv.com

12 ANGUS F. NI – Wash. Bar No. 53828*
 AFN LAW PLLC
 13 502 Second Avenue, Suite 1400
 Seattle, Washington 98104
 14 Telephone: (773) 543-3223
 Email: angus@afnlegal.com
 15 * *Pro Hac Vice* application forthcoming

16 Attorneys for Plaintiffs

18 UNITED STATES DISTRICT COURT

19 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

20 U.S. WECHAT USERS ALLIANCE,
 CHIHUO INC., BRENT COULTER,
 21 FANGYI DUAN, JINNENG BAO,
 ELAINE PENG, and XIAO ZHANG,

22 Plaintiffs,

23 v.

24 DONALD J. TRUMP, in his official
 capacity as President of the United States,
 25 and WILBUR ROSS, in his official
 capacity as Secretary of Commerce,

26 Defendants.

Case No. 3:20-cv-05910-LB

**DECLARATION OF RUSSELL M.
 JEUNG IN SUPPORT OF
 PLAINTIFFS' MOTION FOR
 PRELIMINARY INJUNCTION**

Judge: Hon. Laurel Beeler
 Date: September 17, 2020
 Time: 9:30 a.m.
 Crtrm.: Remote

Trial Date: None Set

1 I, Russell M. Jeung, declare:

2 **QUALIFICATIONS AS AN EXPERT**

3 1. I am a Professor of Asian American Studies at San Francisco State
4 University. I have personal knowledge of the matters stated herein and if called as a
5 witness I could and would testify competently to them. I have been retained by plaintiffs'
6 counsel as an expert witness. I make this declaration in support of Plaintiffs' Motion for a
7 Preliminary Injunction.

8 2. After teaching a year in China and working for the Mayor of San Francisco, I
9 obtained my doctorate in Sociology at the University of California, Berkeley in 2000. I am
10 the author of five books on Chinese Americans, race and religion, including *Family*
11 *Sacrifices: The Worldviews and Ethics of Chinese Americans* (Oxford University Press,
12 2019); *Mountain Movers: Student Activism and the Emergence of Asian American Studies*
13 (UCLA Asian American Studies Center, 2019); and *At Home in Exile: Finding Jesus*
14 *Among My Ancestors and Refugee Neighbors* (Zondervan, 2016). Attached as Exhibit A is
15 a copy of my Curriculum Vitae.

16 3. In Ethnic Studies, we pride ourselves on being grounded within the
17 communities we study. The national Association of Asian American Studies awarded me
18 as "Community Engaged Scholar" for my community-based research in San Francisco's
19 Chinese neighborhoods, as well as my work with refugee populations. I have served on the
20 board of directors of the Chinese Historical Society of America, and have conducted
21 research on behalf of organizations such as the Chinese Community Development Center,
22 the Chinese Progressive Association, and the NICOS Chinese Health Coalition.

23 4. Recognizing that COVID-19 would be blamed on Asians just as SARS was
24 in 2003, I established Stop AAPI Hate, a project of Chinese for Affirmative Action, the
25 Asian Pacific Policy and Planning Council, and SF State Asian American Studies. We
26 developed a reporting center to collect first-hand incidents of COVID-19 discrimination, to
27 provide resources for our respondents, to track trends in racism, and to develop evidence-
28 based policy interventions to racism. From mid-March through the start of August, Stop

1 AAPI Hate has received over 2,500 reports of racism. Due to our analyses, our work has
2 been featured both nationally and internationally, including the New York Times,
3 Washington Post, Los Angeles Times, USA Today, Time magazine, and NPR.

4 5. Because of my publications and research record, my twenty years of teaching
5 Asian American Studies, and my strong community ties, I am one of the leading experts on
6 the racism experienced by Asian Americans at the current moment. Indeed, the
7 Congressional Asian Pacific Caucus, California Asian Pacific Islander Legislative Caucus,
8 and other government agencies have consulted with Stop AAPI Hate and me regarding the
9 discrimination faced by Chinese Americans today.

10 6. My opinions set forth below are based upon my professional knowledge and
11 my experiences working in the field of Asian American Studies, and I am able to offer the
12 following opinions.

13 **HISTORY OF RACISM AGAINST CHINESE AMERICANS**

14 7. The current surge of racism against Asian Americans fits a pattern that has
15 been repeated in American history. In times of 1) epidemic; 2) economic downturn; and 3)
16 war, Asian Americans have been cast as the Yellow Peril, that is, threats from the East to
17 come and dominate the West. Subsequently, we are “perpetual foreigners,” met with both
18 interpersonal violence and racist policies. Knowing this history, we established Stop AAPI
19 Hate in order to document the scapegoating of Chinese and Asian Americans that we knew
20 would inevitably occur. In fact, now in the summer of 2020, we are facing all three of
21 these factors fomenting racism: a global pandemic, the worst economic downturn since the
22 Great Depression, and an emerging Cold War with the People’s Republic of China. A
23 review of Chinese and Asian American history demonstrates how the fear of the Yellow
24 Peril leads to both individual and institutional discrimination.

25 8. Once Chinese came to the United States in large numbers during the Gold
26 Rush, they were immediately met with hostility and legalized discrimination. White miners
27 drove out the Chinese from the minefields and the new State of California instituted the
28 Foreign Miners Tax in 1850. Revenue from Chinese constituted 50% of the state

1 government's income through 1870. In the case of *People v. Hall*, 4 Cal. 399, 404-405, in
2 1854, the California Supreme Court ruled that the testimony of Chinese against whites was
3 inadmissible as the former were categorized, like Blacks and Indians, as "a race of people
4 whom nature has marked as inferior, and who are incapable of progress or intellectual
5 development beyond a certain point"

6 9. During the American recession from 1873-1878, the white Workingman's
7 Party rose to power by getting elected with the slogan, "The Chinese Must Go!" Early on,
8 the San Francisco Chronicle newspaper incited the fear of the Yellow Peril with headlines
9 that read, "The Chinese Invasion! They Are Coming, 900,000 Strong." As whites
10 complained that cheap Chinese labor stole jobs from white union men, they supported
11 national legislation such as the Page Act of 1875, which effectively barred Chinese women
12 from migrating to the United States.

13 10. During this period, health officials blamed Chinese for the epidemics of
14 malaria, smallpox and leprosy. One cover of *The WASP*, a weekly magazine founded and
15 published in San Francisco in 1876, depicted the specters of these three diseases emanating
16 from Chinatown. A report of the State Board of Health in 1871 deemed the Chinese as
17 "inferior in organic structure, in vital force, and in the constitutional conditions of full
18 development."

19 11. Anti-Chinese hostility rose to such a level that over 300 Chinese settlements
20 along the West Coast were driven out in the late 18th and early 19th century, including
21 those in Oakland, San Jose, and Tacoma. My own family's fishing village of over 200
22 residents, which had been established for over fifty years in Monterey, was burned down in
23 1906 and the Chinese were not allowed to resettle there.

24 12. Ethnic economic competition, fear of epidemics, and the racialization of
25 Chinese as unassimilable pagans culminated in the Chinese Exclusion Act of 1882, the
26 first piece of legislation that excluded a racial group from the United States. This act would
27 be re-enacted with the Geary Act of 1892 and remain until its repeal in 1943, when China
28 became a wartime ally with the United States against Japan.

1 13. Health concerns have thus led not only to violence, but also to racist policies
2 that excluded, quarantined, detained, and deported Chinese. When the bubonic plague was
3 found in San Francisco's Chinatown in 1900, health officials cordoned off and quarantined
4 the neighborhood, allowing white people to leave but segregating Chinese. That same year,
5 the Chinatowns of Honolulu and Santa Ana were burnt down due fears of infested
6 buildings. The Angel Island Immigration Station was established in 1910, and arrivals
7 from China had to pass medical inspections and interrogations designed to keep out the
8 medically unfit and illegal immigrants.

9 14. Like fear of epidemics, wartime hysteria spurred racism against Japanese
10 Americans during World War II. Racialized as perpetual foreigners and enemies who were
11 not to be trusted, over 110,000 Japanese, most of them American citizens, were
12 incarcerated in ten concentration camps across the nation.

13 15. Similarly, the Cold War against Communism and the Red Scare of the 1950s
14 resurrected the Yellow Peril fear once again and led to the persecution of Chinese
15 Americans. As Senator McCarthy hosted hearings in Washington DC and J. Edgar Hoover
16 investigated leftist groups, the Chinese Confession Program ostensibly aimed to allow
17 Chinese illegal immigrants to confess their migration violations and gain legal status.
18 However, this program simply sowed fear and mistrust within the Chinese American
19 community, as an individual's confession could implicate dozens of others and lead to
20 their deportation.

21 16. Other instances where the Yellow Peril threat was invoked and anti-Asian
22 racism spiked include Vincent Chin's murder, the SARS epidemic and the racialization of
23 Muslims after 9/11. During a recession in 1982 when the Japan auto industry became a
24 major economic threat, laid-off white auto-workers encountered Vincent Chin at a bar.
25 Mistaking him for being Japanese, they beat him to death yet only served three years'
26 probation. At the outbreak of SARS in 2003, "coughing while Asian" became a common
27 phrase among Asian Americans, as we were subject to racial profiling and harassment for
28 this disease from Asia. The Centers for Disease Control quickly assessed the

1 stigmatization of Asian Americans and took steps to remedy the fear. Finally, since 9/11,
2 Muslims –and those racially profiled as terrorists—have been targets of racism and anti-
3 Asian violence as the US entered its War on Terrorism. Most tragically, in 2012 a gunman
4 killed seven people and wounded four others at a Sikh gurdwara in Wisconsin.

5 17. In sum, the current surge in anti-Asian racism reflects a clear pattern of
6 America’s history of discrimination. In times of epidemic, economic downturn, and war,
7 the fear of the Yellow Peril heightens and Asians become targets of interpersonal violence
8 and racist policies.

9 THE CURRENT PANDEMIC AND THE WECHAT BAN

10 18. While pandemics might instill fear among people, inflammatory political
11 rhetoric clearly can scapegoat a marginalized group and stoke anger and racism directed at
12 them. Stop AAPI Hate has reported on the clear correlation of President Donald Trump’s
13 statements and tweets and the rise in anti-Asian racism during COVID-19. Indeed, the
14 week when he insisted on using the term, “Chinese virus,” reports to our tracking center
15 reached their apex and we received one hundred reports daily from across the nation.

16 19. In our analysis of news accounts about COVID-19 discrimination, we
17 detected a chronological pattern of racist political discourse leading to acts of
18 discrimination. Media would first cover xenophobic policies or statements by elected
19 officials, such as the Republic party officials suggesting conspiracy theories about
20 COVID-19’s origins or Trump’s travel ban. Following these stories, the next types of
21 media accounts would be about economic boycotts of Chinese businesses and later, acts of
22 discrimination against individual Asian Americans.

23 20. This relationship between political rhetoric, hate speech, and acts of anti-
24 Asian racism could also be seen in our analysis of incidents submitted to Stop AAPI Hate.
25 In over one out of four hate incidents (27%), assailants specifically mentioned the terms
26 “China” or “Chinese.” In these cases, they mimicked President Trump’s language by 1)
27 blaming China as the source of the disease (32%); 2) invoking anti-immigrant nationalism
28 by telling individuals to “go back to China” (20%); 3) or parroting the term, “Chinese

1 virus” (18%). Furthermore, 38% of the cases included virulent profanity against Chinese.

2 Some examples include:

- 3 • Middle-aged Caucasian man loitering in front of Chinese restaurant and
4 bakery, openly (theatrically) coughing and spitting and exclaiming that “It
5 smells like dog shit here!” He then exclaimed “God bless Trump!” before
6 pretending to call the immigration authorities.
- 7 • I was taking a brief walk for fresh air and exercise, a random person on the
8 opposite side of the street screamed at me "Go fucking die, you chink! All
9 you Chinks brought us the Chinese virus!"
- 10 • Yelled “Chinese, go back to your country!” then threw their soda at me from
11 a moving vehicle in my neighborhood.
- 12 • A woman sitting at a bus stop was screaming at myself and other Asians that
13 she saw walking. She said that we were "dirty Chinese", that we were trying
14 to take over the US, and that we "should go back to our f**king country"
15 among other things.
- 16 • While I was trying to pick a bike at the dock station, an employee who was
17 changing the batteries on e-bikes yelled at me and said "Spray that s*t".
18 This employee went on and said, "the Chinese invented the virus and Donald
19 Trump knows it."

20 21. Likewise, another very recent study shows that President Trump’s viral hate
21 speech results in racial animus. “From Fear to Hate: How the COVID-19 Pandemic Sparks
22 Racial Animus in the United States,” July 20, 2020, by Runjing Lu and Yanying Sheng,
23 reveals that the rise in the animosity directed at Asians “is stronger on days when the
24 connection between the disease and Asians is more salient, as proxied by President
25 Trump's tweets mentioning China and COVID-19 at the same time.”

26 https://acsweb.ucsd.edu/~rul053/pdfs/Draft_covid19_racial_animus_Salience.pdf (under
27 submission for publication).

28 22. When confronted about his inflammatory language, President Trump denies

1 that his choice of terms for COVID-19, such as “plague from China” or “kung flu” are
2 racist or stigmatizing. Yet even his denial of his racism reveals an insider/outsider binary
3 described as Orientalism. He tweeted, “the spreading of the Virus is not their fault in any
4 way, shape or form. They are working closely with us.” Clearly, he distinguishes between
5 the Asian perpetual foreigner (they) from “real” Americans (us).

6 23. The Trump administration has used the COVID-19 pandemic as a rationale
7 to implement the anti-immigrant agenda which already included the Muslim Ban and the
8 detention of families at the border. Since the pandemic hit the United States, he has
9 implemented a wholesale Immigration Ban, blocking the issuance of permanent visas,
10 suspended the entry of Chinese STEM graduate students, proposed banning international
11 students who are only taking online courses, and now, has ordered the ban of transactions
12 on TikTok and WeChat.

13 24. Unfortunately, the latter ban disproportionately impacts the Chinese
14 American immigrant community, which numbers roughly 2.5 million. Beyond utilizing the
15 app to maintain family communications with those overseas, Chinese Americans employ
16 WeChat to conduct their business, to gain needed and accessible public information for
17 health and safety, and to engage religiously and politically.

18 25. Four out of ten Chinese in the United States—and six out of ten of Chinese
19 who are foreign-born—are limited English proficient. This high proportion of our
20 community cannot access English social media platforms and require WeChat for their
21 communications.

22
23 I declare under penalty of perjury under the laws of the United States and the State
24 of California that the foregoing is true and correct, and that this declaration is executed
25 at Oakland, California this 25th day of August, 2020.

26
27
28

DocuSigned by:
Russell Jeung
7F7F7A9589184DA...

Russell M. Jeung

Exhibit A

RUSSELL JEUNG

2440 East 16th Street
Oakland, California 94601
(510) 882-5674
rjeung@sfsu.edu

PROFESSIONAL EXPERIENCE

San Francisco State University, College of Ethnic Studies, 2002 - present
Chair and Professor

Tamkang University, Graduate School of American Studies, 2009
Fulbright Scholar

Foothill College, Sociology Department, 2000-2002
Assistant Professor

Assistant to Mayor Art Agnos, 1987-1990
San Francisco, CA

EDUCATION

Ph.D. **University of California, Berkeley**
Sociology, 2000

MA **University of California, Berkeley**
Sociology, 1994

MA **Stanford University**
Education, 1984

BA **Stanford University**
Human Biology/Child Development, 1984

BOOK PUBLICATIONS

Family Sacrifices: The Worldviews and Ethics of Chinese Americans
New York: Oxford University Press, 2019.

Mountain Movers: Student Activism and the Emergence of Asian American Studies
Edited with K. Umemoto, H. Dong, E. Mar, L.H. Tsuchitani, and A. Pan, Los Angeles: UCLA
Asian American Studies Center, 2019

At Home in Exile: Finding Jesus among My Ancestors and Refugee Neighbors
Grand Rapids, MI: Zondervan, 2016.

*Sustaining Faith Traditions: Religion, Race, and Ethnicity among the Latino and Asian American
Second Generation*
Edited with Carolyn Chen, New York: New York University Press, 2012.

Faithful Generations: Race and New Asian American Churches.
2004. New Brunswick, NY: Rutgers University Press

FILM DOCUMENTARY

The Oak Park Story

Produced with Valerie Soe, San Francisco, CA 2010

FORTHCOMING ACCEPTED ARTICLE PUBLICATIONS

“Bridging A/Moral Divide: Asian American Studies 101 for Activists and a Community-Responsive Research Agenda for Scholars”

Journal of Asian American Studies, February 2020, 23:1.

“The Roots of Chinese American Religious Nones: Continuities with the Liyi Tradition” (with Seanan Fong)

In *Envisioning Religion, Race, and Asian Americans*, David Yoo and Khyati Joshi, eds., University of Hawaii Press.

“Creation Care by Grandma Shue”

Inheritance Magazine, Summer 2020 Vol. 66.

‘Employing Kwok’s Postcolonial Imagination: On Writing about Chinese American Religious “Nones”

In *Festschrift for Kwok Pui-Lan*, Benny Liew and Rita Nakashima Brock, eds.

“Chinese American Emerging Adults” (with Mike Karim)

In *Emerging Adults: Formation for Mission*. Mary Lederleitner, ed.

ARTICLE PUBLICATIONS

“Mobilizing the Asian American Electorate: The Racialization and Religious Minoritization of Immigrants” (with John Jimenez, and Eric Mar)

In *Religion is Raced*, Grace Yukich and Penny Edgell, eds. New York University Press, 2020..

“A Group Effort: Our Personal Responsibility Amid Bitter Inequalities”

Reflections: Yale Divinity School, Spring 2020.

“Introduction: Mountain Movers and the Emergence of Asian American Studies”

In *Mountain Movers: Student Activism and the Emergence of Asian American Studies*

Edited with K. Umemoto, H. Dong, E. Mar, L.H. Tsuchitani, and A. Pan, Los Angeles: UCLA Asian American Studies Center, 2019, 1-23.

“Familism, Racialization, and Other Key Factors Shaping Chinese American Perspectives”

In T.H. *Handbook of Asian American Biblical Hermeneutics*, Uriah Kim and Seung Ai Yeung, eds. New York: Bloomsbury, 2019.

“An Exile’s Dream for Justice”

Inheritance Magazine, Summer 2019, Volume 64.

“Serve the People! Asian American Studies at Fifty: Empowerment and Critical Community Service Learning at San Francisco State University” (with Eric Mar, Isabelle Pelaud, Philip Nguyen, Jensine Carreon and Wei Ming Dariotis)

AAPI Nexus Journal, , 2018, Vol. 16:1, 111-136

- “Intersections of Immigration, Ethnicity, Race and Religion”*** (with Jonathan Calvillo)
Oxford Research Encyclopedia of Religion in America, Dylan White, ed., January 2017.
- “Chinese American Millennials: The Worldview of the Non-Religious and their Relationship to the Christian Church”***
ChristianityNext, Winter 2017, 19-44.
- “Dancing with a Ghost: A Cambodian Exorcism in California”***
Boom: Journal of California, Vol. 5 No. 4, Winter 2015; (pp. 64-71)
- “Redefining Religious Nones: Lessons from Chinese and Japanese American Young Adults”*** (with Brett Esaki and Alice Liu)
Religions 2015, 6 (3), 891-911.
- “The Globalization and Racialization of Asian American Churches”***
Common Ground Journal. 2015, 12 (1), 31-38.
- “Secularization and Asian Americans”***
 In *Asian American Religious Cultures*, edited by Jonathan Lee, Jane Iwamura, Fumitaka Matsuoka, Edmond Yee, and Ron Nakasone, Santa Barbara, CA: ABC Clio Press, 2015, 136-144.
- “Chinese American Religions”*** (With Lisa Mar)
 In *Asian American Religious Cultures*, edited by Jonathan Lee, Jane Iwamura, Fumitaka Matsuoka, Edmond Yee, and Ron Nakasone, Santa Barbara, CA: ABC Clio Press, 2015, 290-295.
- “Hakka Diasporic Tales: Exilic Understandings of Shalom in California”***
Cultural Encounters, 2014, 10 (2), 106-114.
- “Keeping the Traditions: a Comparison of Cantonese and Mandarin-Speaking Chinese American Immigrants”***
 In *Yinxin and the Wuyi Qiaoxiang Society*. Edited by Zhang Guoxiong, Zhao Hongying, Zeng Luling, and Lorraine Dong, Beijing: Overseas Chinese Press of China, 2014.
- “Nonreligious Second-Generation Chinese Americans: How Gender Shapes Their Worldviews”*** (with Helen Kim)
Chinese America: History and Perspectives. 2013.
- “Asian Americans in Multiracial Church Ministry”*** (with Kathleen Garces-Foley)
Religions. 2013. 4(2), 190-208
- “Introduction: Racial, and Ethnic Identities of the New Second Generation”***
“Second-Generation Chinese Americans and the Familism of the Nonreligious”
 In *Sustaining Faith Traditions: Religion, Race, and Ethnicity among the Latino and Asian American Second Generation*. Edited with Carolyn Chen, New York: New York University Press, 2012.
- “Asian Americans, Religion and the 2008 Election”*** (with Soyoung Kim)
 In *Religion, Race, and Barack Obama’s New Democratic Pluralism*. Gaston Espinosa. Routledge Press. 2012.
- “Faith-Based Multiethnic Tenant Organizing: The Oak Park Story”*** (reprint)

In *Readings of Diversity and Justice*, Maurianne Adams, Warren Blumenfeld, Carmelita Castaneda, Heather W Hackman, Madeline L Peters, Ximena Zuniga, eds., New York: Routledge Press, 2012.

“Asian American Religions and Identity”

In *The Greenwood Encyclopedia of Asian American Issues*, edited by Edith Chen and Grace Yoo, Westport, CT: Greenwood Publishing, 2010.

“The Use of Religious Repertoires in Asian America”

“To Serve the Community: The Fourth Decade of Community Service Learning at Asian American Studies, San Francisco State University”

“Asian American Studies Tours as Pilgrimages of Memory”

In *At 40: AAS @ SF State*, San Francisco: Asian American Studies, San Francisco State University, April 2009.

“Response--Transforming the Ethnic: The Emergence of Covenant Values at New Hope Covenant Church, Oakland CA”

In *Covenant Quarterly*, February 2009.

“Chinese American Demographic Change in the San Francisco Bay Area: 1990-2000”

In *The 2008 Report: The Bay Area Chinese Churches Project*, co-written with Dean Adachi, Castro Valley, CA: Institute for the Study of Asian American Christianity, 2008.

Asian American Bible Believers: An Ethnological Report

Co-written with Brett Esaki, Russell Jeung, Helen Kim, Lalruatkima, James Kyung-Jin Lee, Tat-siong Benny Liew (Director), Quynhhoa Nguyen, and Sharon Suh, Institute for Signifying Scriptures, Claremont Graduate University, 2008.

“Introduction,” “The Only Thing I Could Do Was Sew.” and “The Loss of the Garment Industry is Part of a Cycle”

Oral histories for special edition, “San Francisco’s Sewing Industry,” *Chinese America: History and Perspectives*, Vol. 21, 2008.

“The Oak Park Story: Organizing a Faith-based, Multi-ethnic Community”

In *Religion and Social Justice for Immigrants*. Pierrette Hondagneu-Sotelo, New Brunswick, NJ: Rutgers University Press, 2006.

Asian American Religious Leadership Today: A Preliminary Inquiry

Co-written report for the Pulpit and Pew Project, Duke University. July 2005.

“Creating an Asian American Christian Subculture: Grace Community Covenant Church”

In *Asian American Religions: the Making and Unmaking of Borders and Boundaries*. Tony Carnes and Fenggang Yang, eds. 2004. New York: NYU Press.

“Gung Ho: Community Building and Asian American Christians”

In *The Cresset: A Review of Literature, the Arts, and Public Affairs* 2003. Valparaiso, IN: Valparaiso University Press.

“New Asian American Churches and Symbolic Racial Identity”

In *Revealing the Sacred in Asia America: Writings on Religion*. Jane Iwamura and Paul Spickard, eds. 2003. New York: Routledge Press.

“Comparing Evangelical and Mainline Asian American Pan-Ethnic Congregations”

In *Religions in Asian America: Building Faith Communities*. Pyong Gap Min and Jung Ha Kim, eds. 2002. Walnut Creek, CA: Altamira Press.

“Southeast Asians In the House: Multiple Layers of Identity”

In *Intersections and Divergences: Contemporary Asian Pacific American Communities*, Linda Vo and Rick Bonus, eds. 2002. Philadelphia, PA: Temple University Press.

COMMUNITY-BASED PARTICIPATORY RESEARCH

“LEJ’s Positive Impact on its Participants’ Health, Well-Being, and Community Attachment”
For Literacy for Environmental Justice, San Francisco, 2019

“Bayview Survey 2012: Top Issues and Racial Perceptions”
For Community Youth Center, San Francisco, 2012-2015

“Community Wellness Survey: Himalayan Women in the San Francisco Bay Area” (co-written with Alice Liu)
For the Sisterhood of Wellness Project, July 2014

“SRO Workers and Wage Theft” (co-written with Yiting Deng)
For Chinese Progressive Association, San Francisco, CA, July 2012

“Bayview Youth Survey 2012: Neighborhood Concerns and Youth Competencies”
For Community Youth Center, San Francisco, May 2012

“Barriers v. Bridges: Needs Assessment of Refugees from Bhutan”
For Bhutanese Community of California, September 2012

“From Crisis to Community Development: Needs and Aspirations of Refugees from Burma”
For Burma Refugee Family Network and Bhutanese Community of California, December 2011

“Chinese Community Health Fair 2011”
For NICOS Health Coalition, June 2012

“Chinese American Displaced Manufacturing Workers”
For Chinese Progressive Association and San Francisco Labor Council, San Francisco, CA, September 2011.

“Impact of Education Budget Cuts and Early Start”
For California Faculty Association, San Francisco, CA, March 2011

“API Connections Wellness Survey”
For API Connections, Oakland, CA, Dec. 2010

“English Center Survey” (co-written with Danilo Gecale)
For English Center, Oakland, CA, January 2010.

HONORS and AWARDS

Association of Asian American Studies Engaged Scholar Award, 2017
San Francisco State University Sabbatical Award, 2014
Virginia Seminar in Lived Theology Writing Fellowship, University of Virginia, 2012.
San Francisco State University CUE Grant, “Burmese Refugee Policy Report,” 2011
San Francisco State University Community-based Participatory Research Award, “Health Screenings in Low-income Asian American Communities,” 2010
Center for Asian American Media Post-Production Award, “Oak Park Story,” 2010

Bay Area Video Coalition Media Maker Award, "Oak Park Story," 2010
 Fulbright Scholar Award, Tamkang University, Taiwan, 2008
 Super Urban Areas Security Initiative grant, "Disaster Preparedness in Vulnerable Populations," 2007
 National Poverty Center fellowship, "*The Impact of Religion and Faith-Based Organizations on the Lives of Low Income Families*" conference, June 2007
 Creative Works Fund Grant for video documentary, "*The Oak Park Story*," 2006
 Minority Research Infrastructure Program Fellowship, 2006
 Engaged Scholars Fellowship, Congregational Studies Team, 2005
 Institute for the Study of American Evangelicals Luce Grant, 2004
 Award of Excellence First Prize (Gung Ho To Shave Ray's Hair), Associated Church Press, 2004
 Cesar Chavez Institute Research Fellowship, 2004
 San Francisco State University Presidential Award, 2003
 San Francisco State University Affirmative Action Award, 2003
 Outstanding Graduate Student Instructor, U.C. Berkeley Dept. of Sociology, 2000
 Robert McNamara Student Paper Award, Association for the Sociology of Religion, 1999
 Dean's Dissertation Year Fellowship, U.C. Berkeley, 1998; 1999
 Doreen Townsend Center for the Humanities Program Grant, U.C. Berkeley, 1996 - 1999
 Department of Sociology Research Fellowship, U.C. Berkeley, 1995
 Graduate Opportunities Fellowship, U.C. Berkeley, 1991 - 1992
 Okura Mental Health Fellowship, Washington D.C., 1991

COMMUNITY SERVICE

Board Chair	New Hope Covenant Church, 2001- 04; 2008 – 2009, 2012- Present
Editorial Board	Chinese America: History and Perspectives Journal, 2006 – 2012
Cmte Member	Alameda County Social Services Refugee Strategic Plan, 2012- 2013
Funding Committee	Asian Pacific Fund, 2003
Strategy Committee	Stop Chinatown Evictions, 2003
Community Volunteer	APA Coalition for an Informed California, 2003
Secretary and Board Member	Chinese Historical Society of America, 2003 – 05
Planning Committee	Association for Asian American Studies Conference, 2003
Task Force Appointee	City of Oakland Decent Housing Task Force, 2000
Commission Appointee	City of Oakland Fund for Children and Youth, 1997

CAMPUS SERVICE- UNIVERSITY

Advisory Committee	Institute for Civic and Community Engagement, 2017 -- Present
Member	Academic Program Review Committee, 2016 – Present
Ambassador	Academic Technology Open Educational Resources, 2017-18
Participant	All University Sneak Preview, 2011-2015; 2018-2019
Member	Campus Advisory Committee for Selection of New President, 2012
Co-Author	Professional Development Report for Dean of Faculty Affairs, 2012
Senator	Academic Senate, 2010-2011
Member	Academic Program Review Committee, 2011
Member	Curriculum Review and Approval Committee, 2010

CAMPUS SERVICE- COLLEGE AND DEPARTMENT

Chair	BA Curriculum Committee, 2013- 2014
Chair	Hiring Committee, 2012
Member	RTP Committee, 2011-2015
Member	Academic Review Committee of Dean, 2011

Chair
Member

Hiring Committee for Cesar Chavez Institute, 2007
Scholarship Committee, 2009-2015

Case 3:20-cv-05910-LB Document 17-9 Filed 08/28/20 Page 1 of 13

1 MICHAEL W. BIEN – Cal. Bar No. 096891
 VAN SWEARINGEN – Cal. Bar No. 259809
 2 ALEXANDER GOURSE – Cal. Bar No. 321631
 AMY XU – Cal. Bar No. 330707
 3 ROSEN BIEN GALVAN & GRUNFELD LLP
 101 Mission Street, Sixth Floor
 4 San Francisco, California 94105-1738
 Telephone: (415) 433-6830
 5 Facsimile: (415) 433-7104
 Email: mbien@rbgg.com
 6 vswearingen@rbgg.com
 agourse@rbgg.com
 7 axu@rbgg.com

8 KELIANG (CLAY) ZHU – Cal. Bar No. 305509
 DEHENG LAW OFFICES PC
 9 7901 Stoneridge Drive #208
 Pleasanton, California 94588
 10 Telephone: (925) 399-5856
 Facsimile: (925) 397-1976
 11 Email: czhu@dehengsv.com

12 ANGUS F. NI – Wash. Bar No. 53828*
 AFN LAW PLLC
 13 502 Second Avenue, Suite 1400
 Seattle, Washington 98104
 14 Telephone: (773) 543-3223
 Email: angus@afnlegal.com
 15 * *Pro Hac Vice* application forthcoming

16 Attorneys for Plaintiffs

18 UNITED STATES DISTRICT COURT

19 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

20 U.S. WECHAT USERS ALLIANCE,
 CHIHUO INC., BRENT COULTER,
 21 FANGYI DUAN, JINNENG BAO,
 ELAINE PENG, and XIAO ZHANG,

22 Plaintiffs,

23 v.

24 DONALD J. TRUMP, in his official
 capacity as President of the United States,
 25 and WILBUR ROSS, in his official
 capacity as Secretary of Commerce,

26 Defendants.

Case No. 3:20-cv-05910-LB

**DECLARATION OF SPENCER
 COHEN IN SUPPORT OF
 PLAINTIFFS' MOTION FOR
 PRELIMINARY INJUNCTION**

Judge: Hon. Laurel Beeler

Date: September 17, 2020

Time: 9:30 a.m.

Crtrm.: Remote

Trial Date: None Set

Case No. 3:20-cv-05910-LB

DECLARATION OF SPENCER COHEN

SUPP.ADD. 128

1 I, Spencer Cohen, declare:

2 1. I am an economist. I have a PhD in Geography from the University of
3 Washington, a MA in China Studies (also from the University of Washington), and a BA
4 in Mathematics and History from the University of Connecticut. My PhD was in the
5 subfield of economic geography and local political economy in China. I serve as senior
6 economist with a Seattle-based research and data analytics consulting firm, Community
7 Attributes Inc. My CV is attached as **Exhibit A**. I have personal knowledge of the matters
8 set forth herein, and if called as a witness, I could and would competently so testify. I
9 make this declaration in support of Plaintiffs' Motion For Preliminary Injunction.

10 2. For nearly my entire professional and academic career, I have researched and
11 been engaged with issues relating to China. I have advanced fluency in Mandarin,
12 including reading, writing, and spoken, and have spent significant time in China for
13 language study and doctoral research. My doctoral dissertation examined the China
14 economic growth model through the lens of local government finance and land leasehold
15 markets. I am also a leading authority on economic impact and industry cluster analysis,
16 and the importance of international trade and exports for a subnational regional economy.
17 In my current role, which I have held for more than seven years, I supervise and lead
18 projects on international trade policy, economic impact analysis, and regional economic
19 forecasting. My work includes studies on the wine industry, maritime sector, port logistics
20 and shipping, international trade, agriculture and food processing, aerospace, construction,
21 and the tech industry. I am a frequent public speaker on the U.S.-China trade war, the
22 Pacific Northwest economy, and economic impacts of Covid-19, and have written opinion
23 pieces and been interviewed by news media on these topics. I am often sought after for my
24 views and perspective on the U.S.-China trade relationship and its impact and importance
25 to the Pacific Northwest.

26 3. Previously, I served as senior policy advisor for the Washington Economic
27 Development Commission, and as research manager for the Washington State Department
28

1 of Commerce, where he regularly wrote about and presented on Washington's leading
2 export markets and sources of inbound foreign direct investment.

3 4. In these capacities, I have developed a deep understanding of the importance
4 of WeChat in the building and maintaining business networks and relationships between
5 U.S. companies and Chinese counterparts. Many businesses or organizations I engage
6 with in the Pacific Northwest who do business in China find having a WeChat account
7 critical and invaluable for managing contacts in China. Not having one puts one at a
8 significant disadvantage.

9 5. WeChat is economically important to the United States for at least the
10 following two reasons: (1) as a dynamic and intensively used networking platform
11 facilitating business communication and exchange amongst and between Chinese
12 Americans and Chinese citizens living in the United States; and (2) as an essential tool for
13 U.S. companies doing business in China. This essential role is further accentuated by the
14 push among United States policymakers to expand United States exports to China and
15 meet the targets established in the January 2020 Phase I Trade Deal. Thirdly, there is a
16 strong network effect that makes WeChat an irreplaceable platform for virtual social
17 interactions and communication.

18 **Business Platform in the United States**

19 6. WeChat is the largest mobile texting app in the world, with more than 1
20 billion users. The WeChat platform is multipurpose, with messaging, audio and video
21 calls, social media, and mobile payments functionality. The majority of WeChat users are
22 in China, though a growing share of users reside outside the U.S. and rely on WeChat as a
23 critical platform for communicating with relatives and friends in China. According to the
24 Migration Policy Institute, in 2018 there were 2.5 million Chinese immigrants living in the
25 U.S., a seven-fold increase since 1980, representing 5.5% of the entire foreign-born

26 ///

27 ///

28 ///

1 population in the U.S.¹ Chinese residents and Chinese Americans depend on WeChat as a
2 primary source of communication and commerce. The social networking functionality of
3 WeChat is irreplaceable; prohibition on its use in the U.S. would result in monetary and
4 non-monetary costs borne by both American citizens and legal residents of the U.S.

5 7. Nearly all Chinese businesses in the U.S., including those owned and
6 operated by Chinese Americans, rely on WeChat as a core platform for marketing, client
7 and customer communications, and online orders. Chinese Americans use WeChat to
8 build and foster relationships with potential business partners and customers, while many
9 consumer-facing businesses such as restaurants rely on WeChat as their primary medium
10 for posting deals, menu updates, and events, and in general terms maintaining relationships
11 with their clientele. Within the Chinese community, including both American citizens and
12 legal residents, WeChat is the most common and intensively used platform for managing
13 client relations and business networking. Within the Chinese ethnic community, it is
14 commonly the exclusive platform for businesses and social groups.

15 8. There is also the factor of inertia, or network effect arising from WeChat's
16 size and prominence—WeChat has evolved and grown to be the primary virtual space for
17 online networking and communication, and because of this robust network is the preferred
18 app for Chinese language social networking. Moreover, Americans studying the Chinese
19 language rely on WeChat as a means of staying informed on events in China, practicing
20 their reading and writing skills, and connecting with and developing friendships with both
21 U.S.-based and China based native Chinese language partners.

22 9. There is currently no available substitute to the dynamic functionality offered
23 through the WeChat platform. Businesses and individuals can create and post content,
24

25 ¹ Carlos Echeverria-Estrada and Jeanne Batalova, "Chinese Immigrants in the United
26 States," Migration Policy Institute, January 15, 2020.
27 <https://www.migrationpolicy.org/article/chinese-immigrants-united-states-2018> (accessed
28 August 26, 2020).

1 share and comment on posts, engage in voice and video conversation, and leverage the
2 WeChat platform for marketing and commerce. Prohibiting or strongly curtailing access
3 to this tool would incur costs borne primarily by Chinese Americans and Chinese legal
4 residents, due to both the existing investments made in this platform and the lack of a
5 comparable near-peer substitute.

6 **Helping United States Companies Export to China**

7 10. No U.S. company can succeed in China without an active WeChat account.
8 At a minimum level, WeChat is an essential tool among those staff and company officers
9 directly engaged in the China market and supply chains. U.S. supply chain managers, for
10 instance, will use WeChat to maintain frequent dialogue with China-based contract
11 suppliers or in-country staff.

12 11. Indeed, nearly all business dealings in China involve some interactions on
13 WeChat. This is just as important for U.S. company personnel based in the U.S., where
14 WeChat is essential to maintaining contacts with Chinese counterparts and clients
15 overseas. Many Chinese businesses have nearly or completely dispensed with email
16 exchanges in favor of shorter WeChat messaging. The importance of WeChat has become
17 further accentuated by the ongoing coronavirus pandemic. Entry into China for U.S.
18 citizens is highly restricted, due to 14-day quarantine requirements and testing. In many
19 cases, U.S.-based frequent business travelers to China have elected to not travel to China at
20 this time, further increasing their reliance on WeChat to manage contracts and supply
21 chain relationships.

22 12. China is also an important source of foreign direct investment (FDI) into the
23 U.S. and was quickly expanding in the U.S. until an erosion in U.S.-China relations and
24 passage of new rules placing Chinese FDI under much greater scrutiny and restrictions.
25 Despite these setbacks, Chinese FDI will continue to expand globally, and is expected to
26 resume expansion in the U.S. in the future. Many of these investments are facilitated by a
27 network of organizations and stakeholders, all of whom rely on WeChat to foster and
28 maintain these trans-Pacific relationships. Companies, site selectors, economic

1 development practitioners, city and state government officials, and various community
2 development organizations have used WeChat to market their respective regions for
3 inbound investment, build and maintain relationships with Chinese counterparts, and
4 coordinate inbound investment delegations. There is no viable alternative to the WeChat
5 platform for engaging in these activities.

6 13. The U.S.-China Phase I Trade Deal, signed on January 15, 2020, establishes
7 a set of ambitious export targets over the next two years, including a net increase of \$200
8 billion in U.S. exports to China of goods and services compared with 2017 levels. In order
9 to achieve these targets, U.S. companies will need to rapidly expand and build out their
10 marketing and commercial channels in China, including intensive utilization of WeChat to
11 connect with Chinese buyers and maintain client relations. WeChat's role in business in
12 China cannot be overstated. If U.S. companies are not able to maintain WeChat accounts
13 while in the U.S., they will be at a significant disadvantage trying to market and sell their
14 goods and services in China. Again, this is due to the network effects of WeChat, since it
15 has gained sufficient critical mass to be the only viable platform for digital interaction and
16 messaging between U.S. and Chinese companies in many cases.

17 14. Even setting aside the goals of the Phase I trade deal, China's economy will
18 continue to expand, albeit at slower annual rates than those experienced over the last two
19 decades. Concomitant with this overall economic growth will be the continued emergence
20 of a robust, consumer-oriented middle class made of urban households that exhibit a strong
21 preference for foreign products and services. Moreover, China's population is ageing; in
22 2019, the ratio of individuals 65 and over to the working age population reached 16.2%, up
23 from 10% in 2001. As the Chinese population gets older, there will be growing demand
24 for various high-end medical devices and equipment produced in the U.S. Again, if U.S.
25 companies are prevented from using WeChat while based in the U.S., these companies will
26 be at a competitive disadvantage vis-à-vis other nations that have not enacted a similar ban
27 on WeChat access. For example, a recent (August 24-24) survey by the American
28 Chamber of Commerce in Shanghai found that, among 142 respondents, 88% indicated

1 they use WeChat primarily as a communication tool with employees and 76.8% with local
 2 government, while 77.5% use the platform as a marketing tool. According to the survey
 3 findings, if the executive order is limited only to transactions inside the U.S.,
 4 approximately three quarters still expected a negative impact to their operations, with 9.2%
 5 indicating a “substantial impact that included a loss of revenue greater than 10% and loss
 6 of competitiveness.”²

7 **Irreplaceability of WeChat**

8 15. Social networks are sticky and create deep, resilient network effects. Once
 9 enough users become engaged in a platform, and once each individual develops a robust
 10 and growing audience on such a platform, it becomes increasingly difficult to stop using
 11 the tool and/or find a near-peer replacement. There is no viable alternative for Chinese
 12 language correspondence, especially for communications between the U.S. and China.
 13 WeChat will also continue to be the dominant platform for multipurpose social networking
 14 in China, meaning a ban on use in the U.S. will simply lock out U.S.-based users from
 15 these interactions. This network effect of WeChat means that, if this tool was banned, it
 16 would be place significant monetary and nonmonetary costs on its user base, many of
 17 whom would lose access to the deep web of connections they’ve developed through the
 18 platform—relationships deeply entwined with the infrastructure of the platform and often
 19 developed over multiple years of use—with no viable replacement.

20 ///

21 ///

22 ///

23 ///

24
 25 ² American Chamber in China, “AmCham Shanghai Flash Survey on Impact of WeChat
 26 Executive Order,” August 26, 2020. [https://www.amcham-](https://www.amcham-shanghai.org/en/article/amcham-shanghai-flash-survey-impact-wechat-executive-order)
 27 [shanghai.org/en/article/amcham-shanghai-flash-survey-impact-wechat-executive-order](https://www.amcham-shanghai.org/en/article/amcham-shanghai-flash-survey-impact-wechat-executive-order)
 28 (accessed August 26, 2020).

1 I declare under penalty of perjury under the laws of the United States of America
2 that the foregoing is true and correct, and that this declaration is executed at Seattle,
3 Washington this 28th day of August, 2020.



Spencer Cohen

Case 3:20-cv-05910-LB Document 17-9 Filed 08/28/20 Page 9 of 13

EXHIBIT A

Spencer Cohen, PhD

Economics Consultant, Regional Economist, and Expert in Chinese Economics and Politics

Greater Seattle

Mobile: 206 295 0980

Email: scohenke@gmail.com

Chief economist for research and data analytics consulting practice in Seattle. Expertise on China's domestic economy, U.S.-China trade relations, regional economics in the U.S., input-output modeling, forecasting, and economics research. Frequent panelist and public speaker. Advanced fluency (spoken, reading, writing) in Mandarin Chinese language.

PROFESSIONAL ACCOMPLISHMENTS

Expertise on China—advanced fluency in Mandarin Chinese (spoken, reading, writing) and doctoral research on China's urban economy and land leasehold markets.

Public speaker—frequent presenter on the U.S.-China relationship, regional economic trends, and economic impacts, including effects of U.S.-China trade war and Covid-19.

Leadership—recruited and managed a team of economics and data analysts. Serves as principal-level chief economist and public facing member of consulting practice.

PROFESSIONAL EXPERIENCE

SENIOR ECONOMIST, 2013-present

Community Attributes, Inc., Seattle, WA

An economics and data analytics consulting firm.

Chief economist leading economic and fiscal analyses, regional industry reports,

- Subject-matter leadership on: communication technology, maritime, aerospace, agriculture, information & communication technology, and wine industries; input-output modeling; forecasting; international trade; seaport and airport operations; and workforce supply-demand analytics.
- Notable clients: Washington State Joint Transportation Committee, Port of Seattle, Washington State Department of Commerce, Washington Aerospace Partnership, Washington State Wine Commission.

SENIOR POLICY ADVISOR, 2011-2013

Washington Economic Development Commission, Seattle, WA

Mini state agency responsible for statewide economic development strategy. Supported development of economic development strategy for Washington state and evaluating economic development programs receiving state funding.

RESEARCH MANAGER, 2008-2011

Washington State Department of Commerce, Seattle, WA

Served as lead economist for Business Services division, including public outreach, international analysis, publications and public presentations on state's economic performance.

- As Mandarin speaker, served as translator for high profile delegations from China and presentations (in Chinese) to inbound Chinese delegations.
- Served as Washington State Governor Gregoire's personal translator for meeting with Commercial Aircraft Corporation of China in executives in 2011.

CONTRACT RESEARCHER, 2007

Washington State Department of Community, Trade, and Economic Development, Seattle, WA

Prepared Washington State Investment Competitiveness Report used by the state officials for more than five years to strategize and promote FDI opportunities in Washington. FDI?

SPECIAL PROJECTS MANAGER, 2006

Washington State Department of Community, Trade, and Economic Development, Seattle, WA

- Planned and organized Washington State Trade Week, an annual event promoting the importance of international trade to the state economy.
- Directly supported Governor Chris Gregoire's trade mission to Australia and New Zealand and served as delegate on mission on behalf of the Washington Technology Center.

EDUCATIONAL BACKGROUND, MEMBERSHIPS, AND AFFILIATIONS

PhD, Economic Geography, University of Washington 2016.

Dissertation: *Local States, Markets, and the Geography of Political Economy and Land in China*.

- Examined the intersection of local government finance, land leasehold markets, and local state-owned enterprise restructuring and recapitalization process.
- Time series cross-sectional data analysis of land-revenue dependency at the prefectural level
- Interviews and doctoral fieldwork in Chongqing and Guangzhou.

MA, China Studies, University of Washington, 2005

BA, Mathematics and History (double major), University of Connecticut, 2001

LANGUAGE SKILLS AND TRAINING

Mandarin Chinese—Advance fluency (spoken, reading, writing, scientific)

Overseas Language Training:

- Beijing Language Training Center, 2007, Beijing, China
- Inter-University Program (IUP) for Chinese Language Training, 2004, *Beijing, China*
- Northeastern University (东北大学) Chinese Language Program, 2003, Shenyang, China

TECHNICAL SKILLS

MS Excel, MS Word, R statistics programming, economic input-output modeling, econometrics methods.

PROJECTS LED OR MANAGED

Select list of projects I have either served as chief author, project manager, and/or lead analyst.

Global Trade and Port Operations

Washington Council on International Trade (2018-2020). *Bi-Monthly Trade Briefings*. On-going set of periodic trade policy briefings on topics including U.S.-China Trade War, U.S.-Mexico-Canada Agreement (USMCA), United Kingdom-U.S. Free Trade Negotiations, and digital trade trends.

Highline College Center of Excellence in Global Trade & Supply Chain Management Center of Excellence (2018, 2020). *Global Trade and Supply Chain Management Sector Economic*

Analysis. Economic assessment of the Global Trade and Supply Chain Management sector in Washington state, including activities ranging from rail freight, air cargo, freight forwarding, trucking, and procurement and supply chain management within manufacturing and e-commerce operations in the state.

City of Kent (2018). *Global Trade and Supply Chain Analysis*. An economic assessment of the global trade and supply chain management sector within the Kent Valley region.

Washington State Joint Transportation Committee (2017-2018). *Washington State Marine Pilotage Study*. Analysis of best practices and recommendations for state maritime pilotage recruitment, tariff and fee rate setting process, and administrative oversight.

Washington State Department of Commerce (2015, 2017, 2020). *Washington State Military and Defense Economic Modeling and Forecasting Tool*. Led model development of interactive analytic tool for evaluating defense contracting activities in Washington state. Project funded by the U.S. Department of Defense Office of Economic Adjustment.

Port of Seattle (2017-2018). *Economic Impacts of Sea-Tac International Airport*. Analyzed the direct and secondary jobs and fiscal revenues across several categories of airport operations and off-site visitor spending activities.

Washington Council on International Trade (2015). *Economic Impact of Port Congestion*. Assessed the impact of port slowdowns during labor negotiations between the International Longshore and Warehouse Union and the Pacific Maritime Association began in May of 2014 and continued into the beginning of 2015.

Cluster and Industry Studies

Washington Maritime Federation (2013, 2017). *Washington State Maritime Sector Economic Impact Study*. Detailed analysis of the maritime industry in Washington state, including direct and total economic impacts.

Washington Aerospace Partners (2013, 2016-2018). *Washington State Aerospace Economic & Fiscal Impact Study* (with 2016, 2017, and 2018 updates for Aerospace Works for Washington and Aerospace Futures Alliance).

Washington State Department of Commerce (2016). *Defense Market Export Reports*. Produced reports for defense activities across five major industry clusters (maritime, aerospace, clean tech, information communication technology, and life science and global health); work used by state government to design strategies to help contractors diversify away from defense-only work.

Washington State Department of Agriculture (2016). *Economic Impact of Invasive Species*. Analysis quantified the effects of more than 15 invasive species on the Washington state economy.

Washington State Farm Bureau (2015). *Agriculture Industry Economic Impact Analysis*. Analysis of the economic and fiscal benefits associated with agriculture and the food & beverage processing supply chain and return on investment of Washington state.

Washington State Wine Commission (2015, 2020). *Wine Industry Economic Impact Analysis*. Created a data-rich analysis of the wine and grape industries in Washington, and provided an estimate of the industry's total economic contribution to the state.

Washington Technology Industry Alliance (2015). *Information and Communications Technology Industry Cluster Study*. Produced a quantitative and qualitative assessment of the ICT sector.

Washington Beer Commission (2018). *Economic Impact Analysis*. Analyzed the economic impacts of craft beer production in Washington state, including: direct and multiplier effects of the industry statewide; sales and distribution channels; industry growth, opportunities, and challenges; the beer production business model; the importance and impact of tourism and festival-related spending; tax revenues supported by the industry; and an outlook for further growth and expansion.

Workforce and Government Policy Analysis

Sound Transit (2016, 2020). *Construction Workforce Analysis*. Comprehensive construction workforce gap analysis for Sound Transit high demand occupations.

Coastal Villages Region Fund (2017). *Economic Needs Assessment*. Evaluated the socioeconomic conditions across the 65 communities in Western Alaska that participate in the Community Development Quota program, a federal program that sets aside 10% of fisheries quotas in Western Alaska for impoverished communities to support economic development.

Port of Seattle (2016). *Potential Economic Impacts of Proposed SoDo Arena*. Evaluation of potential economic costs borne by industrial district tenants in the SoDo district from proposed sports arena.

PUBLICATIONS, ARTICLES, AND SPEAKING ENGAGEMENTS

Op-ed Articles

Cohen, Spencer, "Opinion: Subsidies in China impact Washington state businesses," Puget Sound Business Journal, May 13, 2019.

Cohen, Spencer, "The Tariff Threat Is Real," Seattle Business Magazine, August 2019.

Presentations and Panels (2019-2020)

Cohen, Spencer, "Economic Impacts of Covid-19." Rainier Club. May 21, 2020. Seattle, WA.

Cohen, Spencer, "Unpacking the U.S.-China Phase I Trade Deal." Washington State China Relations Council. February 6, 2020. Seattle, WA.

Cohen, Spencer, "U.S.-China Trade War and Impacts to Washington State." Presentations to Pacific Northwest Waterways Association (October 10, 2019); Washington State Governor's Council of Economic Advisors (October 2, 2019); Washington State China Relations Council (August 22, 2019; Seattle, WA); Economic Alliance Snohomish County (August 13, 2019; Everett, WA); Washington Public Ports Association (May 15, 2019; Spokane, WA).

Cohen, Spencer, "Unpacking the Belt and Road Initiative." Presentation to Pangea Giving, September 5, 2019. Seattle, WA.

Panelist on Impacts of Trade War, Washington Council on International Trade Annual Trade Summit. April 23, 2019, Seattle, WA.

Cohen, Spencer, "Annual Snohomish County Economic Forecast." Presentation to Economic Alliance Snohomish County Annual Forecast Conference, February 21, 2019. Lynwood, WA.

Case 3:20-cv-05910-LB Document 17-8 Filed 08/28/20 Page 1 of 3

1 MICHAEL W. BIEN – Cal. Bar No. 096891
 VAN SWEARINGEN – Cal. Bar No. 259809
 2 ALEXANDER GOURSE – Cal. Bar No. 321631
 AMY XU – Cal. Bar No. 330707
 3 ROSEN BIEN GALVAN & GRUNFELD LLP
 101 Mission Street, Sixth Floor
 4 San Francisco, California 94105-1738
 Telephone: (415) 433-6830
 5 Facsimile: (415) 433-7104
 Email: mbien@rbgg.com
 6 vswearingen@rbgg.com
 agourse@rbgg.com
 7 axu@rbgg.com

8 KELIANG (CLAY) ZHU – Cal. Bar No. 305509
 DEHENG LAW OFFICES PC
 9 7901 Stoneridge Drive #208
 Pleasanton, California 94588
 10 Telephone: (925) 399-5856
 Facsimile: (925) 397-1976
 11 Email: czhu@dehengsv.com

12 ANGUS F. NI – Wash. Bar No. 53828*
 AFN LAW PLLC
 13 502 Second Avenue, Suite 1400
 Seattle, Washington 98104
 14 Telephone: (773) 543-3223
 Email: angus@afnlegal.com
 15 * *Pro Hac Vice* application forthcoming

16 Attorneys for Plaintiffs

18 UNITED STATES DISTRICT COURT

19 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

20 U.S. WECHAT USERS ALLIANCE,
 CHIHUO INC., BRENT COULTER,
 21 FANGYI DUAN, JINNENG BAO,
 ELAINE PENG, and XIAO ZHANG,

22 Plaintiffs,

23 v.

24 DONALD J. TRUMP, in his official
 capacity as President of the United States,
 25 and WILBUR ROSS, in his official
 capacity as Secretary of Commerce,

26 Defendants.

Case No. 3:20-cv-05910-LB

**DECLARATION OF ERWIN
 CHEMERINSKY IN SUPPORT OF
 PLAINTIFFS' MOTION FOR
 PRELIMINARY INJUNCTION**

Judge: Hon. Laurel Beeler

Date: September 17, 2020

Time: 9:30 a.m.

Place: Remote

Trial Date: None Set

Case No. 3:20-cv-05910-LB

DECLARATION OF ERWIN CHEMERINSKY

SUPP.ADD. 141

1 I, Erwin Chemerinsky, declare:

2 1. I have personal knowledge of the matters set forth herein, and if called as a witness,
3 I could and would competently so testify. I make this declaration in support of Plaintiffs' Motion
4 For Preliminary Injunction.

5 2. I am Dean of the University of California Berkeley School of Law, where I am also
6 the Jesse H. Choper Distinguished Professor of Law. Before assuming this position in 2017, I was
7 the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First
8 Amendment Law, at the University of California, Irvine School of Law, with a joint appointment
9 in Political Science. I previously taught at Duke Law School, the University of Southern
10 California School of Law (where I served for four years as director of the Center for
11 Communications Law and Policy), UCLA School of Law, and DePaul University College of Law.
12

13 3. My areas of expertise are constitutional law including the First Amendment, federal
14 practice, civil rights and civil liberties, and appellate litigation. I am the author of eleven books,
15 including leading treatises about constitutional law, criminal procedure, and federal jurisdiction,
16 and more than 200 law review articles. In 2016, I was named a fellow of the American Academy
17 of Arts and Sciences. I frequently argue appellate cases, including 7 in the U.S. Supreme Court, ,
18 and also serve as a commentator on legal issues for national and local media.
19

20 4. I have reviewed the "Executive Order on Addressing the Threat Posed by
21 WeChat," E.O. No. 13943, issued on August 6, 2020. The Executive Order prohibits any
22 "transaction" that is related to a messaging and social-media platform called WeChat, which is
23 widely used by Chinese Americans and others. Yet there is no definition of the term "transaction."
24 The Executive Order also prohibits any transaction that evades or avoids the prohibition on
25 transactions related to WeChat. The President purported to issue the Executive Order pursuant to
26 the International Emergency Economic Powers Act (IEEPA) and the National Emergencies Act
27
28

1 (NEA). The IEEPA authorizes civil and criminal penalties for the violation of the Executive
2 Order. *See* 50 U.S.C. § 1705.

3 5. The Executive Order's prohibition on the use of WeChat is the equivalent of a
4 complete ban of a newspaper, a TV channel, or a website used by the tens of millions of U.S.
5 citizens who regularly use the WeChat platform to communicate ideas and to conduct business
6 every day in the United States. Historically, the government has repeatedly attempted to censor or
7 suppress certain "offensive" content on newspapers or other media. But never has the government
8 tried to shut down entirely a public forum used by millions of Americans. Such a broad restriction
9 on speech, as is done by this Executive Order, is unprecedented in the modern history of this
10 country.

11 6. The public evidence gathered in the Complaint also strongly suggests that the
12 Executive Order is motivated by anti-Chinese animus, which suggests that the Executive Order
13 violates the Equal Protection Clause of the Fifth Amendment.

14 7. I am also deeply troubled by the fact that a violation of the Executive Order can
15 result in civil and criminal penalties. I am unaware of any law in this country that criminalizes
16 speech regardless of its content or the speakers' intent. The chilling effect on the exercise of free
17 speech caused by the Executive Order is profound and constitutionally unsupportable.

18
19 I declare under penalty of perjury under the laws of the United States of America that the
20 foregoing is true and correct, and that this declaration is executed at 4:22, this 27th day of
21 August, 2020.

22
23 
24 _____
25 Dean Erwin Chemerinsky
26
27
28

Case 3:20-cv-05910-LB Document 17-7 Filed 08/28/20 Page 1 of 9

1 MICHAEL W. BIEN – Cal. Bar No. 096891
 2 VAN SWEARINGEN – Cal. Bar No. 259809
 3 ALEXANDER GOURSE – Cal. Bar No. 321631
 4 AMY XU – Cal. Bar No. 330707
 5 ROSEN BIEN GALVAN & GRUNFELD LLP
 6 101 Mission Street, Sixth Floor
 7 San Francisco, California 94105-1738
 Telephone: (415) 433-6830
 Facsimile: (415) 433-7104
 Email: mbien@rbgg.com
 vsweARINGEN@rbgg.com
 agourse@rbgg.com
 axu@rbgg.com

8 KELIANG (CLAY) ZHU – Cal. Bar No. 305509
 9 DEHENG LAW OFFICES PC
 10 7901 Stoneridge Drive #208
 Pleasanton, California 94588
 Telephone: (925) 399-5856
 Facsimile: (925) 397-1976
 11 Email: czhu@dehengsv.com

12 ANGUS F. NI – Wash. Bar No. 53828*
 13 AFN LAW PLLC
 14 502 Second Avenue, Suite 1400
 Seattle, Washington 98104
 Telephone: (773) 543-3223
 Email: angus@afnlegal.com
 15 * *Pro Hac Vice* application forthcoming

16 Attorneys for Plaintiffs

17
 18 UNITED STATES DISTRICT COURT

19 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

20 U.S. WECHAT USERS ALLIANCE,
 21 CHIHUO INC., BRENT COULTER,
 22 FANGYI DUAN, JINNENG BAO,
 ELAINE PENG, and XIAO ZHANG,

Plaintiffs,

23 v.

24 DONALD J. TRUMP, in his official
 capacity as President of the United States,
 25 and WILBUR ROSS, in his official
 capacity as Secretary of Commerce,

26 Defendants.

Case No. 3:20-cv-05910-LB

**DECLARATION OF ALEX ALBEN IN
 SUPPORT OF PLAINTIFFS' MOTION
 FOR PRELIMINARY INJUNCTION**

Judge: Hon. Laurel Beeler

Date: September 17, 2020

Time: 9:30 a.m.

Crtrm.: Remote

Trial Date: None Set

Case No. 3:20-cv-05910-LB

[3602865.3]

DECLARATION OF ALEX ALBEN

1 I, Alex Alben, declare:

2 1. I am a Lecturer of Law at the UCLA School of Law, where I teach *Internet*
3 *Law, Media & Society*. I served as Washington State's first Chief Privacy Officer from
4 2015 to 2019 and also was the first chief privacy officer at RealNetworks, Inc., a Seattle-
5 based Internet company. I have testified before the U.S. House, Senate, and Copyright
6 Office on media issues resulting from the growth of the Internet and online networks. My
7 curriculum vitae is attached hereto as **Exhibit A**. I have personal knowledge of the matters
8 stated herein, and if called as a witness I could and would testify competently to them. I
9 make this declaration in support of Plaintiffs' Motion for a Preliminary Injunction.

10 2. Since serving as a lawyer and privacy officer for pioneering Internet
11 companies, I have observed the growth of networks that are powered by popular user
12 applications. In both the private and public sectors, I have developed applications that
13 allow users to research privacy issues and to manage their personal collections of audio
14 and video content. I represented the technology industry both in the Digital Media
15 Association and in the Secure Digital Music Initiative, a group of technology and content
16 companies seeking to develop secure Digital Rights Management Standards. I am the
17 author of "Analog Days: How Technology Rewrote our Future," Zeppo Press (2012) and
18 over the past three years have authored three law review articles relevant to the subject
19 matter of this case: "Privacy, Freedom, and Technology—Or How did we Get Into This
20 Mess?" in Seattle University Law Review, Volume 42, Spring 2019 Number 3;
21 "Reasonable Zones of Privacy—The Supreme Court's Struggle to Find Clarity in the
22 American Landscape Regarding Fourth Amendment Rights," in University of Washington
23 Law Tech Policy Law Journal, fall quarter, 2017; and "Privacy and the Press— An
24 Examination of how the Supreme Court Confused Press Freedom and False Light Privacy
25 in Critical Cases," in Stanford Law & Policy Review, March, 2017.

26 3. Banning a popular technology must be done with deliberation and caution,
27 especially where the technology is used for communication that transmits protected
28 speech. The Trump Administration's August 6, 2020 Executive Order 13943 prohibiting

1 “transactions” relating to the popular application WeChat falls into this category. The
2 plaintiffs’ lawsuit and media reports indicate that WeChat is used for communication
3 inside the United States, between the U.S. and foreign countries, such as China, and within
4 China. First Amendment concerns arise when the Federal government bans speech by
5 U.S. persons or burdens the rights to freely communicate and associate.

6 4. I have no information related to the national security concerns cited by the
7 administration in Executive Order 13943 and would agree that there are circumstances
8 where such concerns warrant curbs or a prohibition of specific speech that gives rise to a
9 national security threat. However, Executive Order 13943 is so broadly and vaguely
10 drawn that its scope is unclear and the behavior that the administration seeks to ban is
11 unknown. The operative section of Executive Order 13943 is Section 1:

12 Section 1. (a) The following actions shall be prohibited beginning 45 days
13 after the date of this order, to the extent permitted under applicable law: any
14 transaction that is related to WeChat by any person, or with respect to any
15 property, subject to the jurisdiction of the United States, with Tencent
Holdings Ltd. (a.k.a. Tēngxùn Kònggǔ Yǒuxiàn Gōngsī), Shenzhen, China,
or any subsidiary of that entity, as identified by the Secretary of Commerce
(Secretary) under section 1(c) of this order.

16 5. The word “transaction” is not defined, making this Executive Order
17 extremely vague. Further, the phrase “related to WeChat by any person” is neither defined
18 nor explained. Is the Executive Order aimed at personal communication by WeChat users
19 or other scenarios involving the transfer of WeChat data between certain entities? Is the
20 order intended to affect speech by people using the application within the U.S. or is it
21 intended to have extraterritorial effect? The Executive Order does not say. The
22 Administration indicates that the Commerce Department will retroactively determine what
23 it means by a “transaction” subject to the Executive Order, creating confusion and
24 uncertainty as to how it might be applied.

25 6. We are left to interpret an overly broad and extremely vague directive. As
26 noted in Congressional Research Service, *“Modern Tests and Standards: Vagueness,*
27
28

1 *Overbreadth, Strict Scrutiny, Intermediate Scrutiny, and Effectiveness of Speech*
 2 *Restrictions,”* in U.S. Constitution Annotated¹:

3 Vagueness is a concern of due process, but it has an increased significance
 4 when applied to the government’s restrictions on speech; the fear that a
 5 vague restriction may apply to one’s speech may chill constitutionally
 6 protected speech. The void-for-vagueness doctrine is often analyzed in
 7 connection with the overbreadth doctrine, which focuses on the need for
 8 precision in drafting laws that may affect First Amendment rights; an
 9 overbroad law that covers both protected and unprotected speech and/or
 10 conduct will normally be struck down as facially invalid.

11 As American law has firmly established, government directives affecting permissible
 12 speech must be clearly and narrowly drawn. Laws cannot be unclear as to what type of
 13 speech is under scrutiny or what actions threaten a national interest. Banning the use of an
 14 application used by tens of millions of individuals, both inside and outside the United
 15 States, without identifying the potential harm of speech would violate well-established
 16 Constitutional principles.

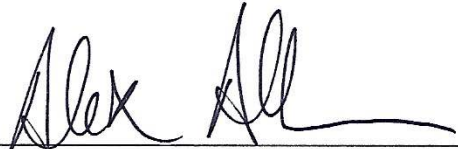
17 7. As a former state government official, I am familiar with the principles of
 18 drafting orders relating to government action. In such cases, best practices call for tightly
 19 defined laws relating to the persons and activities affected. In the case of Executive Order
 20 13943, one cannot tell whether the government intends to regulate the speech of the user
 21 base of WeChat or whether the government is primarily concerned with a privacy violation
 22 and transfer of personally identifiable information between companies or countries. If the
 23 government was concerned with a potential privacy violation or data breach, the Executive
 24 Order should have plainly and specifically identified the harm that is feared and the
 25 activity that is banned. Executive Order 13943 could have been much more narrowly
 26 drawn by defining what is meant by “transaction” and clarifying whether it was meant to
 27 ban the use of the application for personal and business communications by users of the
 28 application. The administration vaguely suggests in its directive that users of WeChat

¹ Available at: <https://www.law.cornell.edu/constitution-conan/amendment-1/modern-tests-and-standards-vagueness-overbreadth-strict-scrutiny-intermediate-scrutiny-and-effectiveness-of-speech-restrictions>.

1 might be harmed if their personal data was collected by the Chinese Communist Party, yet
2 it does not address the scenarios under which such “collection” would occur, nor does it
3 prohibit specific activities, such as unauthorized data transfers or surveillance, which
4 would lead to such result.

5 8. In conclusion, a more precisely worded Executive Order, specifying the
6 prohibited behavior regarding unauthorized data transfers might have accomplished the
7 administration’s goals and not run afoul of First Amendment principles, but that is not the
8 situation here.

9 I declare under penalty of perjury under the laws of the United States of America
10 that the foregoing is true and correct, and that this declaration is executed at Los Angeles
11 California, this 28th day of August, 2020.

12 
13 _____
14 Alex Alben

Case 3:20-cv-05910-LB Document 17-7 Filed 08/28/20 Page 6 of 9

EXHIBIT A

Alex Alben C.V.

Alex Alben has played a leadership role in high tech companies that pioneered the field of electronic media. As an executive at RealNetworks and Starwave, he executed business strategies by supervising product development and building new departments within growing companies. He served as Washington State's first Chief Privacy Officer from 2015-19.

Alex has represented the high tech industry in national and global policy groups and testified before the U.S. House, Senate and Copyright Office on copyright and media issues resulting from the growth of the Internet and online networks.

His teaching career has focused on privacy and Internet Law, with an emphasis on public policy and protecting personal data. After three years at the Tech Policy Law Clinic at the University of Washington, Alex currently is a Lecturer at Law at the UCLA School of Law, where he teaches "Internet Law, Media & Society."

Government Experience

Chief Privacy Officer—State of Washington—2015 to 2019

Named Washington State's first Chief Privacy Officer in April of 2015 and created the Office of Privacy and Data Protection. Consulted to the Governor and Legislature on technology and policy issues relating to privacy and security issues. Named one of 25 top "Doers, Dreamers & Drivers" in state government by Gov. Tech Magazine in March of 2017.

Responsible for training over 50 state agencies on data protection and best practices. Testified before legislature on biometrics, drones and Internet privacy issues. Tasked with broadband policy study relating to digital divide and coverage of rural areas.

Business and Product Experience

Alben Ventures, Seattle—2005 to 2014

From 2005-07, investor and management team member for Internet and social media start up companies, including Wetpaint, Inc., a social media platform, and Delve Networks, a video and search technology company.

From 2008-11, business strategy and policy consultant to Intellectual Ventures and TerraPower LLC venture focused on developing next generation nuclear energy technology, founded by Bill Gates and Nathan Myhrvold.

From 2011-12, special assistant to Vice Provost for Center for Commercialization at University of Washington with a focus on economic development and financing the W Fund, an early-stage venture fund.

2013—Consultant to City of Seattle, Office of Economic Development and University of Washington Office of Planning and Budget. Responsible for authoring "Incubator

Study” with a focus on the University District. Coordinated with policy makers and University District Livability Partnership.

2014-- Consultant to State of Washington, Department of Commerce. Focus on economic development and outreach to emerging companies.

RealNetworks, Inc., Seattle—1997-2004

Held senior executive positions as Vice President of Media Publishing, Music Products and Public Policy/Government Affairs. Primary accomplishments:

- Started the company's government affairs department and served as its first Chief Privacy Officer.
- Developed communications and marketing strategies for Real Network music and entertainment products and services.
- Negotiated major agreements for patents, IP rights and company partnerships.
- Represented the company in international entertainment and music industry negotiations for development of new digital products and standards setting initiatives relating to online security and privacy.
- Testified before U.S. Senate, U.S. House and Copyright Office on digital media distribution issues.

Starwave Corporation, Bellevue, WA—1993-1997

Member of senior management team of this Paul Allen venture:

- Vice President of Business Affairs and General Counsel responsible for creating the company's legal department, IP policies and licensing procedures.
- Negotiated key deals for creating, distributing and operating ESPN.com, ABCNews.com, NASCAR Online, Mr. Showbiz and other entertainment web sites and CD-Rom products.
- Led business development efforts on Eastwood CD-Rom and NASCAR products.
- Responsible for industry and public policy outreach in the emerging Internet sector relating to digital rights management and IP protection issues.

Motion Picture Attorney, Los Angeles, CA—1985-1993

Warner Bros. Studio and Orion Pictures Corporation:

- Handled all legal aspects of motion picture production for over 20 films, including financing, talent contracts and acquisition of literary rights.
- Wrote strategic plan for electronic media distribution of film products for Warner Bros. studio.
- Practiced entertainment law as an associate with Rosenfeld, Meyer & Susman. Member of Los Angeles Copyright Law Society. (1985 to 1993)

CBS News, New York—1980-1981

Broadcast researcher and writer for CBS News:

- Researcher for Walter Cronkite for CBS Special Events unit covering the 1980 presidential primaries, election and inauguration.
- Reporter for CBS News internal wire service at national conventions.
- Researcher for "The Uncounted Enemy" CBS Reports documentary with Mike Wallace, which became the subject of the *Westmoreland v. CBS* libel suit. (1980 to 1981)

Education

Stanford University, A.B. with distinction, 1980

Activities: *Stanford Daily* editorial page editor, co-founder of Stanford Committee on Political Education, Stanford Student Senate.

Stanford Law School, J.D., 1984

Activities: Graduate student teaching assistant in Arms Control & Disarmament Program. Externship with National Association of Broadcasters. Wrote three student "law review" musicals.

Community Leadership and Activities

Alben For Congress—2003-2004-- Democratic Candidate for the U.S. Congress from Washington's 8th Congressional District. Endorsed by *Seattle Times*, *Seattle Post-Intelligencer*, *King County Journal* and leading trade and professional organizations.

Co-chair of Stanford Law School's Seattle Law Society for 16 years. Stanford Associates Outstanding Achievement award (2003). Stanford Law School Board of Visitors (two terms).

Executive Board Member, Cornish College of the Arts. Responsible for developing the Cornish 5-year strategic plan. Served on Cornish Board from 2009 to 2015.

Served on boards of Washington Council for International Trade, ACT Theatre, Temple De Hirsch Sinai and Youth Theatre NorthWest.

Member of Stanford Law School "Law, Science and Technology" Advisory Board.

Humanities Washington—On speaker roster for this non-profit organization, promoting cultural dialog in Washington State from 2010-16. Topics: "Analog Days—How Technology Rewrote Our Culture," and "Privacy in the Digital Age."

Wikipedia Profile:

http://en.wikipedia.org/wiki/Alex_Alben