No. 20-16908

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California

REPLY IN SUPPORT OF EMERGENCY MOTION FOR A STAY PENDING APPEAL

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INTRODUCTION

Plaintiffs disparage the Secretary of Commerce's studied national-security judgment, implemented as part of the Executive Branch's efforts to constrain a mechanism through which the People's Republic of China (PRC) can collect intelligence on millions of persons in the United States, as "unthinkable." Resp. 1. But plaintiffs minimize the threat posed by the PRC, which has undertaken activities that were once unthinkable: PRC intelligence services have in recent years repeatedly conducted espionage on, and stolen the sensitive personal data of, hundreds of millions of Americans, *see* Add.41-42, and the WeChat mobile application enables the Chinese Communist Party (CCP) to "build dossiers on millions" more, Add.48.

In plaintiffs' view, before combating that threat, the Executive Branch should wait for Tencent to assist PRC intelligence services, permit the PRC to conduct espionage through WeChat, and then document that espionage in the form of "specific evidence." Resp. 19. The Supreme Court has squarely rejected plaintiffs' demand for such "'specific evidence'" as "a dangerous requirement" that would enfeeble the Executive Branch's ability to "confront evolving threats" through proper "preventive measure[s]." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34-35 (2010). And plaintiffs ignore the well-documented instances of Tencent's ongoing assistance to PRC intelligence services, as well as Tencent's ongoing surveillance of U.S. persons on WeChat. *See* Add.44-45. The district court's preliminary injunction prolongs those serious harms to national security by halting the Secretary's Identification.

Plaintiffs' arguments underscore the district court's misapprehension of both governing precedent and the rationale for, and effect of, the Secretary's Identification. Plaintiffs misconstrue the Secretary's actions as effecting an immediate shutdown of WeChat as to current U.S. users like them. Yet the Identification prohibits only economic transactions involving WeChat, and the Secretary made clear that he did not prohibit plaintiffs' "use of the WeChat app." Add.50. Plaintiffs are on no firmer ground in suggesting that the Identification implicates the First Amendment. This case no more concerns the First Amendment than if the government had shut down a bookstore in the United States that the PRC had been using as a physical base for espionage. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986) (holding closure of bookstore for public health reasons does not trigger First Amendment scrutiny).

In any case, the Secretary's Identification easily satisfies the First Amendment. Even if the Identification were viewed as implicating the First Amendment, plaintiffs have offered no persuasive reason why the Identification fails to satisfy intermediate scrutiny—the Identification is a narrowly targeted set of prohibitions that furthers the government's significant national-security interests, and that leaves myriad alternative means for plaintiffs' communications. Finally, plaintiffs are wrong to claim that the Identification is a content-based restriction subject to strict scrutiny: the Department's memorandum makes clear that the Identification is based on concerns about PRC data collection; and the Identification is content-neutral as to plaintiffs and other U.S.

users, as it simply recognizes that the PRC and Tencent in fact engage in surveillance and censorship on the WeChat platform.

This Court should stay the preliminary injunction, or at least stay it as to the first prohibited transaction.

ARGUMENT

A. THE GOVERNMENT IS LIKELY TO PREVAIL ON THE MERITS

1. Plaintiffs offer no precedent supporting a preliminary injunction that prevents the Executive Branch from addressing national-security threats that arise from a foreign adversary's intelligence collection against persons located in the United States, other than to pretend that there is no "*actual*" cause for concern. Resp. 18. Plaintiffs are wrong, and they are equally wrong that the district court "appropriately reviewed" the threat by deeming the evidence "scant." Resp. 10.

In arguing that the basis for the Secretary's Identification is "entirely conjectural," plaintiffs fail to grapple with the record. Resp. 20. The Secretary "assesse[d]" that the PRC in fact "would … use [WeChat] for foreign intelligence and surveillance" and that Tencent is "likely to respond to intelligence requests on U.S. users." Add.47. That assessment of a specific and identifiable risk to national security is entitled to deference. *See Humanitarian Law Project*, 561 U.S. at 33-34. The Secretary's conclusion is supported by ample evidence in the record, including information demonstrating that the PRC has repeatedly conducted espionage concerning the sensitive personal information of hundreds of millions of Americans. *See* Add.41-42

(78 million in Anthem hack; 145 million in Equifax hack; government officials in OPM hack). Tencent also has a "history of cooperation with PRC officials." Add.48; *see* Add.42-45. And WeChat is already being used to conduct "surveillance" of "communications conducted entirely among non-China-registered accounts," including accounts of "U.S. users." Add.44-45.

Plaintiffs offer no support for the district court's dismissal of the Secretary's exercise of national-security authorities as being based on "scant" evidence. Add.18. Plaintiffs would instead have this Court leave the sensitive personal data of vast numbers of Americans at the fingertips of PRC intelligence services until the Secretary presents "specific evidence" that "U.S. WeChat users' data has been provided to China" already, or even that the data has in fact been "used against Americans." Resp. 18.

Plaintiffs' argument (Resp. 18) was squarely rejected in *Humanitarian Law Project*, which called the demand for ""specific evidence"" "a dangerous requirement" that would inhibit "preventive measure[s]" based on the Executive Branch's "informed judgment." 561 U.S. at 34-35. The Supreme Court thus emphasized that national-security actions often "confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess," *id.* at 34—which only confirms the appropriateness of the Secretary's discussion of "potential" vectors in which the threat could occur, *contra* Resp. 19.

Plaintiffs attempt to distinguish *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), on the grounds that (1) the Supreme Court supposedly engaged in a searching review of the government's proffered national-security justifications, and (2) the case involved "the President's long-established authority over immigration." Resp. 9. Those assertions cannot be squared with *Hawaii*'s express rejection of "plaintiffs' request for a searching inquiry into the persuasiveness of the President's justifications," *id.* at 2409, or with the President's similarly longstanding authority over national security, *see Department of Navy v. Egan*, 484 U.S. 518, 530 (1988). And contrary to plaintiffs' suggestion (Resp. 8), this Court has confirmed that "deference to the political branches is particularly appropriate with respect to national security." *Washington v. Trump*, 847 F.3d 1151, 1163 (9th Cir. 2017) (per curiam).

2. Plaintiffs go farther than the district court in contending (Resp. 12-14) that the Identification should be subject to strict scrutiny because it imposes a prior restraint on speech and is content-based. That contention is incorrect. The Identification is not an impermissible prior restraint because it does not "prohibit the publication or broadcast of particular information or commentary." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556 (1976). Indeed, it does not prohibit plaintiffs from saying anything at all, let alone anything in particular.

Nor is the Identification content-based. The Secretary made clear that each of the prohibited transactions was identified "with the objective of preventing collection, transmission, and aggregation of U.S. user data by the WeChat app, Tencent, and

[PRC intelligence services]." Add.49. Those objectives are independent of the *content* of any WeChat user's speech—never mind *plaintiffs'* speech.

That the Executive Order and the Department's memorandum reference CCP disinformation and censorship is immaterial. *See* Resp. 13-14. The PRC and Tencent in cooperation have no First Amendment right to engage in that sordid activity, and regardless, the PRC's own repressive choices in conducting surveillance domestically and globally cannot possibly impose a heightened burden on the United States. What matters is that the PRC can use WeChat as a mechanism to advance its global agenda and in fact harm American interests. That the Secretary recognized that threat does not convert the Identification into a content-based restriction against plaintiffs.

3. Plaintiffs fare no better in defending First Amendment analysis that the district court actually conducted. As our motion explained (at 15-21), the Secretary's Identification does not implicate the First Amendment at all and, even if viewed as a time, place, and manner restriction subject to intermediate scrutiny, it easily passes constitutional muster.

Economic regulations are (with exceptions inapplicable here) not subject to First Amendment scrutiny—even where those regulations incidentally burden speech by, for example, shutting down a bookstore based on public-health reasons. *See Cloud Books*, 478 U.S. at 704-05. Plaintiffs apparently find the Supreme Court's precedents so inconvenient that the response relegates them to footnotes. *See* Resp. 11 nn.5-6. Indeed, the Identification presents an even simpler case of an economic regulation

than the one in *Cloud Books*, as the Secretary confirmed that "use of the WeChat app" is not prohibited. Add.50. Plaintiffs arguments to the contrary (Resp. 6-7) regarding the nature of the Identification simply confuse the shutting down of *business* transactions with barring plaintiffs from using the app. Nor does the First Amendment protect an app's technology—which is otherwise unaltered—against becoming less effective over time.

Plaintiffs claim (Resp. 11-12) that the government may not avoid review by restricting the communication medium rather than communications themselves. Of course, the government may not sidestep constitutional scrutiny by gerrymandering regulations of upstream economic activity. *See Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015) (holding local sheriff cannot restrict credit-card transactions for website advertisements because he disapproves of the website's content). But the Secretary's Identification does not single out the content that individual U.S. users like plaintiffs share on WeChat; nor is that the Secretary's purpose. Instead, the Identification is directed toward several nonexpressive commercial transactions, and was enacted to prevent Tencent—and, in turn, the PRC—from gaining access to vast troves of U.S. users' data. Those commercial restrictions, which accomplish purposes wholly divorced from plaintiffs' expressive activity and unrelated to the content of any speech, are not subject to First Amendment scrutiny even if they impose incidental burdens on plaintiffs.

Even if the First Amendment were triggered, the Identification at most places a limited time, place, and manner restriction on plaintiffs' speech and should be evaluated under intermediate scrutiny. *See* Mot. 17-20. Under that framework, the Identification is constitutional so long as it is narrowly tailored to serve a significant interest and leaves open ample alternative channels for communication. *See Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1197 (9th Cir. 2016).

Plaintiffs confusingly argue (Resp. 15) that the Identification is not narrowly tailored because it is not a complete ban on the use of WeChat. But it "is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging *too little* speech." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 448 (2015). Though the government could have chosen to ban WeChat in the United States, its determination that narrower commercial restrictions are warranted appropriately balances the national-security interests with other interests, including those of U.S. users. And of course, the government should not be punished for balancing the interests of U.S. users by identifying, and pursuing, a more measured approach.

Plaintiffs next contend (Resp. 15-16) that the Identification is not narrowly tailored because there were two narrower plans that the government could have adopted—Tencent's mitigation proposal and DHS's analyzed prohibition as to government employees. But narrow tailoring requires only that the Executive Branch's national-security interests "would be achieved less effectively absent the regulation," not that the regulation be the least restrictive means of furthering those

interests. *Lone Star*, 827 F.3d at 1200 (quotation omitted); *see Board of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). In this case, the Secretary's memorandum makes clear the national-security concerns at stake that Tencent's own proposal failed to address (including that mitigation would require trusting a company that cooperates with PRC intelligence services and that is forbidden from disclosing that cooperation). *See* Add.49 (concluding that the Tencent mitigation proposal would "not address our concerns"). And although DHS's assessment focuses on harm to government employees and "critical infrastructure," it does not indicate that such harm is the only relevant one. Add. 54. Those intricate factual determinations are instead precisely the types of conclusions based on "national security and foreign policy" concerns for which the courts' "respect" is "appropriate." *Humanitarian Law Project*, 561 U.S. at 34.

Finally, plaintiffs argue (Resp. 16) that the Identification does not leave open adequate alternative channels for communication. But the Secretary has not prohibited the continued use of WeChat by current users. Moreover, plaintiffs are unable to effectively demonstrate why the myriad other messaging, social-networking, and news platforms available to Chinese-language users are not adequate, *see* Mot. 18-19, only repeating that they prefer WeChat to other apps because of its "network effect" and "cultural relevance" and "practical interface with China," Resp. 16 (quotation omitted). Plaintiffs' own preferences are not determinative of whether other alternatives are inadequate.

4. Plaintiffs' claim that the Identification is ultra vires provides no better basis to deny a stay. That claim did not form the basis of the district court's preliminary injunction, and the equitable balance of this injunction rests solely on plaintiffs' assertomg First Amendment harms. *See* Add.20 (finding irreparable harm only because the "loss of First Amendment freedoms" is "irreparable injury" (quotation omitted)). Plaintiffs "briefly mention" their ultra vires claim but "do not substantiate the assertions with adequate briefing," *American Freedom Def. Initiative v. King County*, 904 F.3d 1126, 1129 n.2 (9th Cir. 2018), instead incorporating by reference a recent district court opinion in a different case involving the TikTok app in which the government has appealed, *see* Resp. 17-18.

In any event, plaintiffs' claim fails on the merits. Plaintiffs contend that the Identification exceeds the Executive's statutory authority under IEEPA because it regulates "personal communication[s]" and the importation and exportation of "information or informational materials." 50 U.S.C. § 1702(b). But as we explained, the Identification does no such thing. It regulates only commercial, business-to-business "transactions" involving WeChat, which fall into the heartland of IEEPA's regulatory scope. *Id.* § 1702(a)(1)(B). And any incidental effects of that economic regulation on plaintiffs' communications no more make the Identification ultra vires than they make it unconstitutional.

B. THE REMAINING FACTORS FAVOR A STAY, AT LEAST OF THE INJUNCTIVE RELIEF AS TO NON-USERS OF WECHAT

Aside from dismissing precedents that "sometimes stay preliminary injunctions that inhibit national security prerogatives," plaintiffs offer no reason why their preference for one mobile application among many overcomes the Secretary's protection of millions of Americans from PRC intelligence collection. Resp. 9 n.4.

Plaintiffs question the need for a stay because the Secretary has permitted *some* "continued use" of WeChat. Resp. 21. That the Secretary is taking a measured, incremental approach to address the national-security threat here does not justify a broad injunction against that first step. *See Williams-Yulee*, 575 U.S. at 449 (citing instances where Supreme Court has "upheld laws" based on principle that "the First Amendment imposes no freestanding 'underinclusiveness limitation'" (quotation omitted)). Even plaintiffs recognize that the Secretary is protecting "tens or hundreds of thousands of new users" from being subject to PRC surveillance through WeChat, Resp. 23, and the Secretary has maintained the hope that current users will find "other communications platforms [to] take its place," Add.50. Although plaintiffs assert that the technological result of the Identification would be akin to "us[ing] a cell phone in a rural area," Resp. 22, the personal inconvenience of not having full technological functionality as to one particular app cannot justify diminishing the Nation's security.

Plaintiffs also offer no serious response to staying the preliminary injunction as to the first prohibited transaction, which principally affects new users. *See* Resp. 24.

Unable to identify a direct harm to themselves as current users, plaintiffs principally rely on the tangential and amorphous benefit to current users of potentially interacting with new users. And the app updates barred under the first prohibition that plaintiffs demand are a marginal benefit at best: not having the most recent technology is not a viable basis for any injunction, let alone the one here.

Last, plaintiffs note (Resp. 20) that the Secretary established a different prohibition timeline for the TikTok app. *See* Add.25. Plaintiffs' speculation that the government failed to identify distinctions between these apps offers no basis to sustain a injunction, particularly where they do not demonstrate that TikTok is similarly situated to WeChat and where TikTok is subject to an additional set of requirements beyond an IEEPA Executive Order. *See* 85 Fed. Reg. 51,297 (Aug. 19, 2020) (Executive Order under the Defense Production Act). And in any case, plaintiffs' argument fails to recognize that an identical prohibited transaction for downloads and updates was set to take effect on September 20, 2020, underscoring the need for this Court's immediate correction at least as to the first prohibited transaction.

CONCLUSION

The Court should stay the district court's preliminary injunction pending appeal or, at a minimum, stay the injunction against the Secretary's first prohibited transaction.

Respectfully submitted,

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OCTOBER 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing reply complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3 because it contains 2,800 words. This reply complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 27 because this reply has been prepared in a proportionally spaced typeface using Word 14-point Garamond typeface.

/s/ Dennis Fan
DENNIS FAN

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2020, I filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Dennis Fan
DENNIS FAN