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19 UNITED STATES DISTRICT COURT

20 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

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 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.

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

**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

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## INTRODUCTION

1  
2 Defendants cannot satisfy their extraordinary burden of demonstrating that a stay of  
3 this Court’s Preliminary Injunction should be granted pending appeal, which would, as this  
4 Court has previously found, immediately result in irreparable harm to the Plaintiffs and all  
5 WeChat users in the United States. It remains undisputed—and the new evidence provides  
6 additional proof—that the Secretary’s September 18, 2020 *Identification* is a ban on  
7 WeChat in the United States, directly and indirectly interfering with First Amendment  
8 protected activities of millions of WeChat users during a global pandemic in which their  
9 app-based communications are essential to maintaining contact with one another. None of  
10 Defendants’ new evidence demonstrates an imminent and irreparable threat or harm to  
11 national security interests specific to WeChat that would satisfy their burden here.

12 “A stay is an ‘intrusion into the ordinary processes of administration and judicial  
13 review,’ and accordingly ‘is not a matter of right, even if irreparable injury might  
14 otherwise result ....’” *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal citations  
15 omitted). Defendants misstate the applicable legal standard, downplaying the heavy  
16 burden they must meet for this Court to issue such an extraordinary remedy. To issue a  
17 stay, the Court must consider “(1) whether the stay applicant has made a ***strong showing***  
18 that he is likely to succeed on the merits; (2) whether the applicant will be irreparably  
19 injured absent a stay; (3) whether issuance of the stay will substantially injure the other  
20 parties interested in the proceeding; and (4) where the public interest lies.” *Hilton v.*  
21 *Braunskill*, 481 U.S. 770, 776 (1987) (emphasis added).<sup>1</sup> Defendants have not  
22

23 <sup>1</sup> The two other cases Defendants cite for the legal standard each militate *against* a stay.  
24 See ECF No. 68 at 10. In *Mayweathers v. Newland*, 258 F.3d 930 (9th Cir. 2001), the  
25 Ninth Circuit held the district court had jurisdiction to grant a second preliminary  
26 injunction while an interlocutory appeal of the first preliminary injunction was pending, on  
27 the ground that “[t]he district court retains jurisdiction during the pendency of an appeal to  
28 act to preserve the status quo.” *Id.* at 935 (internal citation and quotation omitted). Here,  
by contrast, Defendants are asking this Court to *alter* the status quo by staying its  
preliminary injunction pending their (potential) appeal. And in *Apple, Inc. v. Samsung*  
*Elecs. Co.*, No. 11-cv-01846, 2012 WL 2527044 at \*8 (N.D. Cal. July 2, 2012), Judge Koh  
applied the stay factors to deny the defendants’ motion for a stay pending an appeal of the  
preliminary injunction order.

1 persuasively argued that they have made a strong showing of likelihood of success on the  
2 merits, and their new evidence fails to establish irreparable harm. Those first two factors  
3 are the “most critical,” and Defendants’ failure to satisfy them supports denial of the  
4 motion to stay, even without consideration of the remaining factors. *See Nken*, 556 U.S. at  
5 434-35; *see also Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017) (denying  
6 motion to stay preliminary injunction pending appeal because “the Government has failed  
7 to clear each of the first two critical steps” and also finding “the final two factors do not  
8 militate in favor of a stay”). In granting the motion for a preliminary injunction, this Court  
9 already found that each of the stay factors favor Plaintiffs. *See Order Granting Preliminary*  
10 *Injunction (“Order”)*, ECF No. 59 at 3, 16, 21; *see also Nken*, 556 U.S. at 434 (noting  
11 “substantial overlap” between stay and preliminary injunction factors).

12 Defendants’ far-fetched argument that “First Amendment scrutiny is ...  
13 inappropriate,” or “simply inapplicable to the Government’s challenged actions,” falls far  
14 short of the mark, as does their effort to suggest in the alternative that the First  
15 Amendment might have only “some bearing here” under intermediate scrutiny.  
16 Defendants’ Motion to Stay Injunction Pending Appeal (“Mot.”), ECF No. 68 at 17-18.  
17 Defendants’ new arguments provide no basis to change this Court’s well-supported  
18 findings that “plaintiffs have shown serious questions going to the merits of their First  
19 Amendment claim that the Secretary’s prohibited transactions effectively eliminate the  
20 plaintiffs’ key platform for communication, slow or eliminate discourse, and are the  
21 equivalent of censorship of speech or a prior restraint on it.” Order at 16. There simply  
22 are no viable substitutes for WeChat for the Chinese-American and Chinese speaking  
23 community, and Defendants’ argument to the contrary remains unsupported and is even  
24 contradicted by their new evidence. *See* ECF No. 76-1, Ex. A (“Decision Memo”) at 10  
25 (conceding “WeChat is one of the limited options available to those who want to  
26 communicate with Chinese citizens”). Nor does Defendants’ new evidence support any  
27 change to the Court’s findings that “there are obvious alternatives to a complete ban,”  
28 Order at 18, and that “the prohibited transactions burden substantially more speech than is



1 necessary to serve the Government’s significant interest in national security, especially  
2 given the lack of substitute channels for communication.” *Id.*

3 At bottom, Defendants are asking this Court to reconsider the same arguments that  
4 it has already considered and rejected, applying a substantially similar legal standard  
5 (except one with a heavy burden on Defendants), and to reverse itself. Defendants have  
6 provided no basis for doing so, and their stay motion should be denied.

## 7 ARGUMENT

### 8 **I. DEFENDANTS’ NEWLY SUBMITTED EVIDENCE DOES NOT 9 JUSTIFY GRANTING A STAY**

10 In seeking an expedited stay allowing Defendants to implement an unprecedented  
11 ban of an entire medium of communication, Defendants hang their hats on three pieces of  
12 newly submitted evidence, including classified information denied to Plaintiffs’ counsel.<sup>2</sup>

13 The Decision Memo, drafted after the President’s WeChat executive order was  
14 issued, is mostly a repackaging of old evidence and similarly fails to provide support for  
15 the claim that WeChat poses a national security threat of the kind that would pose an  
16 “irreparable harm” sufficient to stay the preliminary injunction. *See* ECF No. 28 at 14-16  
17 (rebutting earlier evidence presented by Defendants); Order at 20 (“specific evidence about  
18 WeChat is modest”). Most of the Decision Memo refers to general concerns about  
19

20 \_\_\_\_\_  
21 <sup>2</sup> Defendants argue that the compressed briefing schedule after issuance of the  
22 *Identification* did not allow for enough time for them “to submit the materials to the Court  
23 in the 36-hour period occurring after [Defendant Ross’s] decision.” Mot. at 8 n.1. But  
24 they ignore the fact that the rushed schedule was entirely their own choice. They chose  
25 when to issue the *Identification*, and given its issuance so soon before the effective date,  
26 both Plaintiffs and the Court offered them more time to oppose the preliminary injunction  
27 should they be willing to adjust their self-imposed deadline of implementing the WeChat  
28 ban on September 20, 2020. *See* 9/18 Hearing Transcript, ECF No. 66 at 9:14-25; 24:13-  
23; *see also* 9/17 Hearing Transcript, ECF No. 41 at 5:1-8:14. Additionally, Defendants  
fail to explain why they moved to have their motion resolved by October 1. *See* Mot. at 9;  
ECF No. 69. To expedite resolution, Defendants may waive Reply. On October 1,  
Defendants informed Plaintiffs’ counsel that they intend to file a notice of appeal from this  
Court’s preliminary injunction on October 2, but do not yet have the Solicitor General’s  
authorization. If so authorized, they “would also file in the Ninth Circuit an emergency  
motion to stay the preliminary injunction” on October 2, despite their present Motion still  
pending before this Court for hearing on shortened time. Plaintiffs oppose. Bien Decl. ¶

1 Chinese surveillance of Americans, which it then couples with speculation about the ways  
2 in which Tencent might support such efforts—without any evidence or examples involving  
3 Americans’ use of WeChat in support.<sup>3</sup> The Decision Memo also discloses, for the first  
4 time, that Tencent “has presented the Department of Commerce with a proposal to mitigate  
5 the concerns identified in EO 13943.” Decision Memo at 14. Specifically, it offered to  
6 “create a new U.S. version of the app, deploy specific security measures to protect the new  
7 app’s source code, partner with a U.S. cloud provider for user data storage, and manage the  
8 new app through a U.S.-based entity with USG approved governance structure.” *Id.* The  
9 Commerce Department also “considered additional mitigations to include escrow and  
10 review of WeChat’s source code, regular compliance audits and notifications, and stringent  
11 approvals over management and personnel with access to user data.” *Id.*<sup>4</sup> In rejecting  
12 these—and any other possible measure designed to address its concerns short of “a  
13 complete divestiture” of WeChat by Tencent—Defendants make conclusory claims about a  
14 lack of “trust” in Tencent as a Chinese-owned company and general evidence the Court  
15 has already considered about the plans and goals of the CCP for data gathering and  
16 surveillance. *Id.* The Decision Memo fails to offer up *any* examples in which WeChat  
17 was used to surveil Americans—let alone in a manner that poses a national security threat.

18         Indeed, most amazingly, one of the primary attachments to the Decision Memo—  
19 The Department of Homeland Security Cybersecurity and Infrastructure Security Agency’s  
20 Critical Infrastructure Security and Resilience Note (“CISA Note”) (ECF No. 68-1 at 23,  
21 Ex. B), which was “produced ... in response to a request for assistance from the  
22 Department of Commerce in implementing the [EO]” (*Id.* at 24)—recommends not a ban  
23 of WeChat but a far more narrow, tailored remedy to address the “threat” posed by  
24 WeChat: “CISA recommends the TikTok and WeChat applications not be permitted on  
25

26 <sup>3</sup> Appendix F to the Decision Memo, filed today at ECF No. 77, comprises reports of  
27 human rights violations *in China* and monitoring, surveillance and censorship *in China*.

28 <sup>4</sup> Defendants provided Tencent’s mitigation proposal to Plaintiffs’ counsel for attorneys’  
eyes’ only review at 6:43 p.m. on September 30. It will be filed under seal with the Court  
for its consideration upon entry of a protective order.

1 the devices of State, Local, Tribal, and Territorial (SLTT) partners and critical  
2 infrastructure operators as they may provide malicious actors with access to mobile  
3 devices and sensitive data.” CISA Note at 27. As this Court noted, this is the kind of  
4 “obvious alternative[] to a complete ban” that can avoid sweeping implications for free  
5 speech. Order at 18. If the Government sees fit to present this material—which is so  
6 inconsistent with its argument—to the Court, we can only speculate as to what else is in  
7 the evidentiary record. *See* ECF No. 68-1 at 2 (Costello Decl. ¶ 5) (“These materials are  
8 not a complete set of all materials considered by the Secretary.”). It is clear from the face  
9 of the Decision Memo, for example, that Defendants withheld at least some of the  
10 appendices to that document, including Tencent’s mitigation proposal. *See id.* at 18, n.85;  
11 *see also* n. 3, 4, *supra* (discussing recent filing and planned filing of two appendices).

12 To the extent the Court will consider this late evidence in this proceeding, Plaintiffs  
13 file herewith the Declaration of Joe Hildebrand, an expert in data security who explains  
14 best practices in mitigating data security risk and the targeted measures that were (and are)  
15 available to Defendants to address those issues as to Tencent and WeChat. The Court can  
16 compare Mr. Hildebrand’s suggestions to those contained in Tencent’s proposal (which  
17 Mr. Hildebrand has not seen). As disclosed in the Decision Memo at page 18, these  
18 suggestions are the very measures that Tencent offered, but Defendants rejected in favor of  
19 a total ban—apparently because Tencent would not agree to a “complete divestiture.”

20 The separate assessment of the Office of the Director of National Intelligence  
21 (“ODNI”) was lodged with the Court, but Plaintiffs have not seen this secret, classified  
22 document. *See* ECF No. 71. If the Court believes that the classified materials may justify  
23 the issuance of a stay, Plaintiffs’ counsel request an opportunity to rebut the substance of  
24 the Government’s classified evidence before any decision is rendered. When classified  
25 information is used as evidence in a civil action, “the Constitution does require that the  
26 government take reasonable measures to ensure basic fairness to the private party and that  
27 the government follow procedures reasonably designated to protect against erroneous  
28 deprivation of the private party’s interests.” *Al Haramain Islamic Found. Inc. v. United*

1 *States Dep't of the Treasury*, 686 F.3d 965, 980 (9th Cir. 2012); *see also United States v.*  
2 *New York Times Co.*, 328 F. Supp. 324, 326 (S.D.N.Y. 1971) (holding an *in camera*  
3 proceeding attended by attorneys for each side to discuss national security interests  
4 implicated in the Pentagon Papers), *aff'd sub nom. New York Times Co. v. United States*,  
5 403 U.S. 713, 714 (1971); *see also* Section II(B)(2), *infra*. While the Government may  
6 under appropriate circumstances rely on classified evidence *ex parte*, it cannot shroud its  
7 arguments with a cloak of absolute and impenetrable secrecy. Rather, due process requires  
8 that the Government provide its adversary with “constitutionally adequate notice and a  
9 meaningful opportunity to respond.” *Al Haramain Islamic Found., Inc.*, 686 F.3d at 1001.  
10 These due process rights are violated when the Government fails “to mitigate the use of  
11 classified information by, for example, preparing and disclosing an unclassified summary.”  
12 *Id.* Here, Plaintiffs’ counsel requested a non-classified summary of the classified evidence  
13 at issue, but have not received a response and therefore cannot address this information in  
14 its brief. *See* Declaration of Michael W. Bien In Support Of Opposition to Motion to Stay  
15 (“Bien Decl.”), *filed herewith*, ¶ 2 & Ex. A. Accordingly, Plaintiffs respectfully request—  
16 in the interests of fairness and consistent with their due process rights—an opportunity to  
17 review and respond to a non-classified summary of the classified evidence if the Court is  
18 inclined to grant the Government’s motion to a stay on the basis of that evidence.

## 19 **II. DEFENDANTS HAVE NOT MET THE STANDARD FOR A STAY**

### 20 **A. Defendants Have Not Made a Strong Showing of Likelihood of** 21 **Success on the Merits**

22 This Court found that Plaintiffs demonstrated serious questions about whether the  
23 WeChat ban “effectively eliminate[s] the plaintiffs’ key platform for communication,  
24 slow[s] or eliminate[s] discourse, and [is] the equivalent of censorship of speech or a prior  
25 restraint on it.” Order at 16. The Court also found that Defendants introduced “scant little  
26 evidence” that a complete ban of WeChat would address their stated national security  
27 concerns; that the ban burdens substantially more speech than necessary; and that “there  
28 are no viable substitute platforms or apps for the Chinese-speaking and Chinese-American

1 community.” *Id.* at 17-18. Defendants’ new evidence does not change these findings.

2 **1. The WeChat Ban Is A Prior Restraint and Is Not Content**  
 3 **Neutral**

4 Defendants’ attempt to preemptively and indiscriminately “foreclose an entire  
 5 medium of expression” raises “particular concern” under the First Amendment, *City of*  
 6 *Ladue v. Gilleo*, 512 U.S. 43, 55 (1994), and is subject to “a heavy presumption against its  
 7 constitutional validity,” *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975).

8 Although a prior restraint like the WeChat ban “[is] not unconstitutional per se,” *id.*,  
 9 Defendants must show that this is one of the rare and “exceptional cases” in which the  
 10 extraordinary burden on speech is justified—such as where the foreclosed speech would  
 11 reveal “the sailing dates of transports or the number and location of troops” during  
 12 wartime, *Near v. Minnesota*, 283 U.S. 697, 716 (1931). Claims that the foreclosed speech  
 13 “‘could,’ or ‘might,’ or ‘may’ prejudice the national interest” do not suffice; nor does any  
 14 other “surmise or conjecture that untoward consequences may result.” *New York Times*  
 15 *Co.*, 403 U.S. at 725-26 (Brennan, J., concurring). Defendants’ previous filings included  
 16 little more than “surmise and conjecture” about the harm that the public’s use of WeChat  
 17 might pose to national security, and the additional evidence they have now made publicly  
 18 available does not rebut the “heavy presumption” against the validity of their attempt to  
 19 completely shut down WeChat in the United States.

20 Defendants’ newly submitted evidence warns that WeChat and TikTok may be used  
 21 to disseminate “propaganda,” to facilitate “disinformation campaigns,” and to “promote  
 22 pro-Chinese government content[.]” CISA Note at 27. This focus on the *content* of  
 23 WeChat users’ speech echoes the text of EO 13943 itself—which warns that WeChat “may  
 24 also be used for disinformation campaigns that benefit the Chinese Communist Party,” 85  
 25 Fed. Reg. 48,641 (published Aug. 11, 2020)—and confirms Plaintiffs’ showing that the  
 26 ban is a content-based restriction that is subject to strict scrutiny on that basis as well. *See*  
 27 *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 166 (2015) (“[S]trict scrutiny applies either  
 28 when a law is content based on its face or when the purpose and justification for the law

1 are content based[.]”). Indeed, this is not the first time the Government has unlawfully  
 2 attempted to limit communications to and from China due to concerns about the influence  
 3 of Chinese “propaganda.” In *Lamont v. Postmaster Gen. of the United States*, the Supreme  
 4 Court squarely held—at the height of the Cold War, no less—that the Post Office may not  
 5 destroy incoming mail from China simply because the U.S. government deems it  
 6 “communist political propaganda.” 381 U.S. 301, 302 (1965). Such brazen censorship “is  
 7 at war with the uninhibited, robust, and wide-open debate and discussion that are  
 8 contemplated by the First Amendment,” *id.* at 307 (internal quotations omitted), and  
 9 cannot be “justified by the object of avoiding the subsidization of propaganda of foreign  
 10 governments which bar American propaganda,” *id.* at 310 (Brennan, J., concurring). “That  
 11 the governments which originate this propaganda themselves have no equivalent  
 12 guarantees only highlights the cherished values of our constitutional framework; it can  
 13 never justify emulating the practice of restrictive regimes in the name of expediency.” *Id.*

## 14                   2.       **The WeChat Ban Implicates the First Amendment**

15           Defendants do not address the substantial questions Plaintiffs have raised about  
 16 whether the WeChat ban represents a prior restraint and a content-based restriction on  
 17 speech. Incredibly, Defendants now contend, for the first time, that the WeChat ban is not  
 18 subject to First Amendment scrutiny at all because “the specific prohibited transactions  
 19 identified by the Secretary do not target expression” and “extend solely to economic  
 20 transactions between businesses.” Mot. at 17; *compare with id.* at 23 (requesting a “more  
 21 limited” ban “[b]arring new users of WeChat”). But this is preposterous—the ban  
 22 effectively shuts down an entire medium of communication because it is used to convey  
 23 messages the Government does not like. Courts have long recognized that regulations  
 24 aimed at mediums for speech necessarily regulate speech itself. *See, e.g., City of Ladue*,  
 25 512 U.S. at 48 (“[R]egulation of a medium inevitably affects communication itself[.]”);  
 26 *Currier v. Potter*, 379 F.3d 716, 727 (9th Cir. 2004) (“It is axiomatic that restrictions upon  
 27 the mail system implicate the First Amendment.”); *cf. Woodhull Freedom Found. v. United*  
 28 *States*, 948 F.3d 363, 374 (D.C. Cir. 2020) (plaintiff who used online forum to disseminate

1 speech had standing to challenge regulation that caused the forum to shut down). The fact  
 2 that Defendants seek to accomplish their impermissible ends by prohibiting third-party  
 3 services necessary for WeChat to function does not make the First Amendment  
 4 inapplicable. As the Seventh Circuit has explained, provocatively, “[t]he analogy is to  
 5 killing a person by cutting off his oxygen supply rather than by shooting him.”  
 6 *Backpage.com, LLC v. Dart*, 807 F.3d 229, 231 (7th Cir. 2015) (involving sheriff who  
 7 sought to shut down online forum for speech by pressuring Visa and MasterCard to  
 8 prohibit use of their credit cards for transactions with the forum). Similarly, Defendants  
 9 cannot escape First Amendment scrutiny by deliberately starving WeChat of the technical  
 10 support it needs to function rather than regulating WeChat or its users directly.<sup>5</sup>

11 None of Defendants’ new cases suggest otherwise. Defendants analogize this case  
 12 to *Arcara v. Cloud Books, Inc.*, in which the Supreme Court upheld a statute that  
 13 authorized local officials to temporarily close a bookstore they deemed “a place for  
 14 prostitution and lewdness.” 478 U.S. 697, 698 (1986). Neither *Arcara* nor Defendants’  
 15 other two new cases are apposite. For one thing, none of the laws at issue in these cases  
 16 purport to single out and shut down an entire medium of communication—let alone a  
 17 medium relied on by a distinct minority group singled out by the President for racist  
 18 demagoguery. Nor was there evidence in Defendants’ cases that any of the generally  
 19 applicable regulations would *inevitably* burden speech, or that the regulations were enacted  
 20 for specific purpose of burdening or eliminating speech. The WeChat ban is a blanket  
 21 prohibition on the services necessary for a social media platform to function and will have  
 22

23 <sup>5</sup> Defendants also suggest that Plaintiffs have “largely abandoned their ‘chill’ theory” as a  
 24 basis for First Amendment liability. Mot. at 17. Not so. *See, e.g.*, Amended Complaint,  
 25 ECF No. 49 at 29, ¶ 85; Pls’ Renewed Motion for Preliminary Injunction, ECF No. 48 at 2,  
 26 8-9; Pls’ Reply ISO Renewed PI, ECF No. 52 at 2. The vagueness and overbreadth of the  
 27 Secretary’s *Identification* will necessarily lead targeted third-party service providers to cut  
 28 off even more speech-enabling services than may be required of them, so as to eliminate  
 even the remote possibility of incurring the substantial civil and criminal penalties  
 authorized by 50 U.S.C. § 1705. *See Smith v. California*, 361 U.S. 147, 154 (1959)  
 (invalidating statute imposing strict criminal liability for possession of obscene materials  
 in bookstores, because the absence of a *mens rea* requirement would lead to broad self-  
 censorship on the part of booksellers and thereby “restrict the public’s access to forms of  
 the printed word which the state could not constitutionally suppress directly.”).

1 “the inevitable effect” of burdening users’ speech. *Doe v. Harris*, 772 F.3d 563, 574  
2 (2014). Indeed, limiting users’ ability to speak and share information through WeChat is  
3 the entire point of Defendants’ ban. *See* Decision Memo at 14 (“The below  
4 prohibitions ... deny access to and reduce the functionality of WeChat ... with the  
5 objective of preventing the ... transmission ... of user data[.]”). Finally, none of the  
6 regulations in Defendants’ cases were enacted for the express purpose of limiting the  
7 dissemination of particular messages that the Government did not like. Here, there is  
8 considerable evidence—both in the text of the WeChat ban and in the materials  
9 Defendants relied upon to justify it—that at least one of the ban’s core purposes is to limit  
10 the dissemination of “propaganda” and other information portraying the Chinese  
11 government in a positive light. *See* 85 Fed. Reg. 48,641; Decision Memo at 13-14; CISA  
12 Note at 27. As a result, not only is the ban subject to First Amendment scrutiny as a  
13 general matter, it is subject to *strict* scrutiny because it is both a prior restraint on speech  
14 and a content-based regulation of speech.

### 15 **3. The WeChat Ban Cannot Survive Intermediate Scrutiny**

16 Defendants maintain that the WeChat ban triggers “at most, intermediate scrutiny of  
17 the Secretary’s actions.” Mot. at 18. As this Court found, however, Plaintiffs have raised  
18 serious questions about whether the WeChat ban fails even intermediate scrutiny, because  
19 it burdens substantially more speech than necessary and does not leave open adequate  
20 alternative channels for communication. Order at 16-18.

21 Defendants maintain that anything less than a complete ban on WeChat would not  
22 advance Defendants’ avowed interests in limiting the Chinese government’s exploitation  
23 of Americans’ private data. Mot. at 19-20. But this concern does not appear to be shared  
24 by Defendants’ own Cybersecurity and Infrastructure Security Agency, whose Septem-  
25 ber 2, 2020 assessment of the risk posed by WeChat and TikTok recommends a *far*  
26 *narrower prohibition* that burdens far less speech than the one Defendants actually  
27 adopted. *See* CISA Note at 27 (recommending that “the Tiktok and WeChat applications  
28 not be permitted on the devices of State, Local, Tribal, and Territorial (SLTT) partners and



1 critical infrastructure operators”).<sup>6</sup>

2 Defendants offer no explanation whatsoever for why the Secretary rejected this far  
 3 more measured recommendation in favor of a complete ban that imposes an extraordinary  
 4 and unprecedented burden on protected First Amendment speech. Requiring Defendants  
 5 to justify this decision would not, as Defendants suggest, substitute the Court’s opinion  
 6 about what method is “most appropriate ... for promoting significant government  
 7 interests.” Mot. at 14 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).  
 8 Rather, it would preserve cherished constitutional values by ensuring that Defendants do  
 9 not run roughshod over Plaintiffs’ First Amendment rights for the sake of expediency.  
 10 There are obvious targeted measures based on industry best practices that would more  
 11 effectively address the issues of data security and surveillance without burdening speech.  
 12 See Hildebrand Decl. ¶¶ 8-13.

13 Defendants similarly fail (again) to establish that a complete ban of WeChat leaves  
 14 open ample alternative avenues of communication. This Court correctly found, based on  
 15 careful analysis of Plaintiffs’ declarations and other evidence submitted with their motion,  
 16 that “there are no viable substitute platforms or apps for the Chinese-speaking and  
 17 Chinese-American community.” Order at 17. As the Court recognized, this is because,  
 18 among other reasons, other social media platforms lack WeChat’s network effect within  
 19 the Chinese and Chinese-American communities. *Id.* at 2-6. Defendants’ suggestion that  
 20 other social media platforms can provide an adequate alternative to WeChat based on little  
 21 more than the availability of Google-like translation services for non-English speakers  
 22 betrays a profound lack of understanding about the central role of WeChat in  
 23 contemporary Chinese-American life. See Section II(C), *infra*.

24  
 25 \_\_\_\_\_  
 26 <sup>6</sup> Nor is it the case that the Government generally will not accept mitigation agreements to  
 27 address concerns about Chinese access to U.S. data. For example, the Government in 2018  
 28 approved the acquisition of a major U.S. insurance holding company by a Chinese  
 company after the Committee on Foreign Investment in the United States (CFIUS)  
 accepted a mitigation plan that in relevant part apparently required the company after its  
 acquisition “to use a U.S.-based, third-party service provider to manage and protect the  
 personal data of [its] U.S. policyholders.” See Bien Decl. ¶ 11 & Ex. J.

<sup>3620853.13]</sup>

1 Defendants’ cases on the subject of adequate alternative means of communication  
2 do not make their argument. In quoting the Ninth Circuit’s decision in *G.K. Ltd. Travel v.*  
3 *City of Lake Oswego*, Defendants omit critical language: in that case, the Court “cautioned  
4 against invalidating government regulations for failing to leave open ample alternative  
5 channels unless the regulation foreclose[s] ‘an entire medium of expression’ *across the*  
6 *landscape of a particular community setting.*” 436 F.3d 1064, 1074 (9th Cir. 2006)  
7 (emphasis added). Even if Defendants were correct that they have not foreclosed “an  
8 entire medium of expression”—they have—there would still be little doubt that their ban  
9 on WeChat forecloses an entire medium of expression *in the particular setting of the*  
10 *Chinese diaspora in the United States.*

11 Finally, Defendants’ attempt to cast doubt on the extraterritorial application of the  
12 First Amendment is misplaced. For one thing, the Ninth Circuit has “reject[ed] the  
13 suggestion that the First Amendment’s protection is lessened when the expression is  
14 directed abroad.” *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 511 (9th Cir. 1988).<sup>7</sup> And  
15 the Supreme Court has long held that the First Amendment protects the right to *receive*  
16 information—including from abroad. *See Lamont*, 381 U.S. at 308 (Brennan, J.,  
17 concurring). By shutting down Plaintiffs’ ability to send *or receive* communications from  
18 persons abroad, the WeChat ban would impose an extraordinary and unprecedented burden  
19 on their rights under the First Amendment. Because the ban burdens substantially more  
20 speech than necessary and does not leave open adequate alternative channels of  
21 communication, this Court rightly concluded that Plaintiffs raised serious questions going

22 \_\_\_\_\_  
23 <sup>7</sup> Citing an unpublished district court decision for authority, *Drummond Co., Inc. v.*  
24 *Collingsworth*, 2013 WL 6074157 (N.D. Cal. Nov. 18, 2013), Defendants suggest a more  
25 lenient standard applies when the Government invokes national security interests to justify  
26 limitations on the speech of persons abroad. But *Bullfrog Films* rejected the argument that  
27 the First Amendment’s protections are lessened in these circumstances. 847 F.2d at 512.  
28 And in any event, the reference to “competing considerations” in Defendants’ case does  
not imply that vague or speculative national security concerns would suffice. Indeed, the  
sentence immediately preceding the one Defendants cite refers to “*overriding*” national  
security interests and then repeats the holding from the district court in *Bullfrog Films* that  
“the First Amendment protects communications with foreign audiences to the same extent  
as communications within our borders.” *Id.* at \*14 (citing *Bullfrog Films v. Wick*, 646 F.  
Supp. 492, 502 (C.D. Cal. 1986), *aff’d* 847 F.2d 502 (9th Cir. 1988)).

1 to the merits of their claims under the First Amendment. Order at 16-18.

#### 2 **4. Plaintiffs’ *Ultra Vires* Claims Warrant Relief**

3 In addition to Plaintiffs’ First Amendment claims, Plaintiffs also sought a  
 4 preliminary injunction on the ground that the *Identification* (and underlying EO) are *ultra*  
 5 *vires* because the prohibitions exceed the bounds prescribed by the IEEPA. ECF No. 48 at  
 6 5-6. Having held that Plaintiffs had established a likelihood of success on their First  
 7 Amendment claims, the Court concluded that “the record and the arguments do not allow  
 8 the court to conclude at this juncture that the plaintiffs are likely to succeed on the merits”  
 9 of their *ultra vires* claims. Order at 19. To the extent the Court accepts Defendants’  
 10 invitation to revisit their views on the merits of Plaintiffs’ First Amendment claims, the  
 11 Court should similarly revisit this conclusion under Fed. R. Civ. P. 54(b).

12 As the Court is aware, there is parallel litigation ongoing addressing the  
 13 Government’s essentially identical prohibitions of TikTok. In *TikTok, Inc. v. Trump*, No.  
 14 1:20-CV-02658, 2020 WL 5763634, (D.D.C. Sept. 27, 2020), Judge Nichols over the  
 15 weekend granted TikTok’s motion for preliminary injunction on a similar record, finding  
 16 that “Plaintiffs have demonstrated that they are likely to succeed on their claim that the  
 17 prohibitions constitute indirect regulations of ‘personal communication[s]’ or the exchange  
 18 of ‘information or informational materials’” under 50 U.S.C. § 1702(b). *TikTok*, 2020 WL  
 19 5763634, at 14. The Court should adopt Judge Nichols’ well-reasoned opinion and  
 20 determine that Plaintiffs are likely to succeed as to their *ultra vires* claims.<sup>8</sup>

#### 21 **B. Defendants Have Not Shown Irreparable Harm Caused by the** 22 **Preliminary Injunction, Which Merely Preserves the Status Quo**

##### 23 **1. The Court Did Not Err in Stating the Standard or Balancing** 24 **the Equities**

25 Defendants assert that the Court erred in balancing the equities, and that a “proper  
 26 analysis” warrants a stay here. Mot. at 11. Not so. Defendants first claim that the Court

27 <sup>8</sup> Although Judge Nichols only enjoined the first prohibition (on downloads) with respect  
 28 to TikTok, this was because the remaining prohibitions for TikTok do not take effect until  
 November. *Id.* at 9. The court specifically noted that the IEEPA arguments “are equally  
 as applicable” to all of the prohibitions. *Id.*

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1 applied the wrong standard and “did not hold that the balance tips sharply in [Plaintiffs’]  
 2 favor.” This claim is unfounded. The Court set forth the “tips sharply” standard that  
 3 applies when the moving party raises serious questions going to the merits of the claim,  
 4 and eight lines later stated that the standard is met. Order at 15:20, 16:1.<sup>9</sup> Defendants’  
 5 assertion amounts to a complaint about the Court’s drafting of a rush order, not its  
 6 substance. Applying the proper standard, the Court correctly found that the balance of  
 7 hardships tipped sharply in favor of Plaintiffs who use WeChat to exercise their First  
 8 Amendment rights of speech, association, and the free exercise of religion.

9 Defendants repeat their argument that such First Amendment rights can never  
 10 outweigh any national security and foreign policy interests asserted by the Government,  
 11 Mot. at 13-14, citing *Holder v. Humanitarian Law Project (HLP)*, 561 U.S. 1 (2010).  
 12 *HLP*, however, specifically rejects Defendants’ contention, stating instead: “the Govern-  
 13 ment’s authority and expertise in [national security and foreign relations] matters do not  
 14 automatically trump the Court’s own obligation to secure the protection that the Constitu-  
 15 tion grants to individuals.” *Id.* at 34 (internal quotation marks omitted). Defendants mis-  
 16 cite *Defense Distributed v. U.S. Dep’t of State*, 838 F.3d 451 (5th Cir. 2016)) for their  
 17 proposition that “[e]ven if Plaintiffs have established a serious question about their First  
 18 Amendment claim ... that serious question does not outweigh the national security and  
 19 foreign policy interests at stake.” Mot. at 13. *Defense Distributed* stands for no such  
 20 proposition. There, the plaintiffs asserted a First Amendment right to distribute plans for  
 21 home production of untraceable firearms. The district court denied plaintiffs’ preliminary  
 22 injunction motion entirely on balance of harms grounds, and the Fifth Circuit affirmed on  
 23 those grounds, without reaching any of the First Amendment merits grounds. 838 F.3d  
 24 456-58. *Defense Distributed* therefore teaches nothing about a case like this one where the  
 25

26 <sup>9</sup> Defendants cite *Ramos v. Wolf*, No. 18-16981, 2020 WL 5509753, at \*10 (9th Cir.  
 27 Sept. 14, 2020) for the proposition that a preliminary injunction cannot stand where the  
 28 district court does not use the word “sharply” in its findings on the balance of hardships.  
*Ramos* includes no such holding, but instead turns entirely on the “serious questions” on  
 the prong. *Id.* at \*18.

1 Plaintiffs *have* raised serious questions going to the merits. Nor did *Stagg P.C. v. U.S.*  
 2 *Department of State*, 158 F. Supp. 3d 203, 210 (S.D.N.Y. 2016)) (another case about  
 3 disseminating technical information on weapons) reach a conclusion as to the likelihood of  
 4 success on the First Amendment merits. All three cases fail to support Defendants’  
 5 conclusory assertion that the “balance of equities therefore tips sharply in favor of the  
 6 United States.” Mot. at 14.

7 Here, the Court identified the appropriate standard, and two sentences later  
 8 concluded that “plaintiffs have shown serious questions going to the merits of the First  
 9 Amendment claim, the balance of hardships tips in the plaintiffs’ favor, and the plaintiffs  
 10 establish sufficiently the other elements for preliminary-injunctive relief.” Order at 15-16.  
 11 The Court’s decision is crystal clear in defining the (correct) standard it applied, and well  
 12 supported by the record showing that the balance of equities tipped sharply in favor of a  
 13 preliminary injunction to preserve the status quo.<sup>10</sup>

## 14 **2. The Court Properly Evaluated the Strength or Absence of** 15 **Evidence Supporting Defendants’ Assertions of National** 16 **Security and Foreign Policy Justifications**

17 Defendants decry “the Court’s stated need for ‘specific evidence,’” and argue that  
 18 the Court cannot evaluate the strength of Executive Branch officials’ assertions of national  
 19 security risks in connection with issuing a preliminary injunction. Mot. at 11. But the  
 20 cases Defendants cite make clear that courts can and do evaluate the strength of record  
 21 evidence in considering whether to issue an injunction. *See HLP*, 561 U.S. at 30-34  
 22 (referring to affidavits in according weight to government’s national security claims and  
 23 stating that “[o]ur precedents, old and new, make clear that concerns of national security  
 24 and foreign relations do not warrant abdication of the judicial role”); *Winter v. Nat. Res.*  
 25 *Def. Council, Inc.*, 555 U.S. 7, 24-25 (2008) (describing “declarations from some of the  
 26 Navy’s most senior officers” and “accept[ing] these officers’ assertions”); *Trump v.*

27 <sup>10</sup> At the very most, the only appropriate response to the Defendants’ motion would be a  
 28 scrivener’s edit to line 3 on page 16 and line 17 on page 21 of the order to add the word  
 “sharply,” so that the order properly memorializes what the Court actually found.

1 *Hawaii*, 138 S. Ct. 2392, 2409 (2018) (finding the level of detail in the process, agency  
 2 evaluations, and recommendations underlying the President’s chosen restrictions “is more  
 3 detailed than any prior order a President has issued” under the applicable Immigration and  
 4 Nationality Act provision, and thus granting “weight to [his] empirical conclusions.”).

5 While some deference is of course due to the Government as to national security  
 6 issues, courts nonetheless can and must independently assess the evidence and in so doing  
 7 may find the Government’s assertions weak or unsupported—especially where the First  
 8 Amendment is implicated. For example, in *Al Haramain Islamic Foundation, Inc. v. U.S.*  
 9 *Department of Treasury*, the Ninth Circuit relied upon *HLP*’s framework for evaluating a  
 10 challenge to the Government’s designation of plaintiff as a terrorist organization and found  
 11 that the national security evidence was not as persuasive as that submitted in *HLP*:

12 *HLP* involved wholly foreign organizations currently at war with a United  
 13 States ally, involved specific evidence concerning the continuing terrorist  
 14 activities of those organizations and the ability of those organizations to mis-  
 15 use the support offered by the plaintiffs, and involved proposed training that  
 16 had a “real, not remote” possibility of furthering terrorism. By contrast, we  
 17 address a domestic branch of an international organization with little  
 18 evidence that the pure-speech activities proposed by [Plaintiff–Appellant] on  
 19 behalf of the domestic branch will aid the larger international organization’s  
 20 sinister purposes. In these circumstances, we hold that [the government’s]  
 21 content-based prohibitions on speech violate the First Amendment.

22 686 F.3d 965, 1001 (9th Cir. 2012) (citation omitted). In *New York Times Co.*, *supra*, the  
 23 district court held an *in camera* proceeding attended by only attorneys for each side,  
 24 witnesses for the Government, and designated representatives of The New York Times to  
 25 “enable the Government to present its case forcefully and without restraint so that the  
 26 accommodation of the national security interest with the rights of a free press could be  
 27 determined with no holds barred.” Thereafter, the court concluded that:

28 the *in camera* proceedings at which representatives of the Department of  
 State, Department of Defense and the Joint Chiefs of Staff testified, did not  
 convince this Court that the publication of these historical documents would  
 seriously breach the national security .... Without revealing the content of  
 the testimony, suffice it to say that no cogent reasons were advanced as to  
 why these documents except in the general framework of embarrassment  
 previously mentioned, would vitally affect the security of the Nation. In the  
 light of such a finding the inquiry must end.

1 *New York Times Co.*, 328 F. Supp. at 330. As with national security justifications, courts  
 2 “can and do review foreign policy arguments that are offered to justify legislative or  
 3 executive action when constitutional rights are at stake.” *Am.-Arab Anti-Discrimination*  
 4 *Comm. v. Reno*, 70 F.3d 1045, 1056, 1070 (9th Cir. 1995) (noting that although the  
 5 government’s *in camera* submission to the district court “indicates that the [Popular Front  
 6 for the Liberation of Palestine] advocates prohibited doctrines and that the [Plaintiff–  
 7 Appellant] aliens are members, it does not indicate that either alien has personally  
 8 advocated those doctrines or has participated in terrorist activities”).

9 Other than summarily claiming that the Court erred and lacks authority to impose a  
 10 preliminary injunction whenever the Executive Branch asserts a national security threat,  
 11 Mot. at 11-12, Defendants provide no argument why the Court’s conclusion that the  
 12 Government’s “specific evidence about WeChat is modest” is incorrect.

### 13 3. Defendants Will Not Be Irreparably Injured Absent a Stay

14 Defendants attempt to relitigate the Court’s finding that the Government will not be  
 15 irreparably injured by a preliminary injunction, Mot. 14-16, but their new evidence is not  
 16 convincing and fails to demonstrate irreparable injury.

#### 17 (a) Defendants’ Evidence of Surveillance Is Speculative

18 After all the briefing this Court has reviewed, the key national security threat  
 19 identified by Defendants—surveillance—is based on a speculative concern about how U.S.  
 20 users’ data *might* be used in the future.

21 Defendants refer to the types of data identified in WeChat’s privacy policy to argue  
 22 that WeChat collects “sensitive information” that will be “will be inescapably and  
 23 perpetually available to the PRC.” Mot. 14; *see also* Bien Decl. ISO Preliminary  
 24 Injunction, ECF No. 17-12 ¶ 31 & Ex. DD (WeChat Privacy Policy). But the Decision  
 25 Memo and DHS CISA Assessment to which they cite for this argument only speculate  
 26 WeChat or Tencent *could* share the information it collects from U.S. users with the  
 27 Chinese government, and provide no *actual* evidence of such sharing—let alone in a  
 28 manner that causes irreparable harm to national security. In fact, the CISA recommends a

1 much more tailored action than the sweeping ban the Government is now pushing—one  
 2 focused only on precluding the use of WeChat by critical infrastructure operators and state,  
 3 local, tribal, and territorial partners. CISA Note at 27.

4 Notably, the Decision Memo’s discussion of Tencent’s compliance with and  
 5 assistance to the PRC’s surveillance efforts is focused on what happens inside China and to  
 6 Chinese nationals, not to U.S. persons. *See* ECF No. 76-1 at 8-9. To justify the sweeping  
 7 conclusion that “the WeChat or Weixin accounts of users in China are under constant  
 8 surveillance by PRC authorities,” the Decision Memo cites examples of (1) a Chinese  
 9 national prosecuted in Hubei’s Jingmen City for the content of her blogging and social  
 10 media posts, and (2) local authorities in Qinghai closing Weixin chat groups that spread  
 11 disinformation about the coronavirus.<sup>11</sup> *Id.* at 9. When it finally addresses U.S. users’  
 12 data, the Decision Memo never states that such information is or has been made available  
 13 to PRC authorities via WeChat, Tencent, or any other method. *Id.* at 12-13.

14 Instead, the Decision Memo repeatedly phrases the national security threat as about  
 15 the “potential” to facilitate surveillance using U.S. WeChat users’ data. *See, e.g., id.* at 12  
 16 (“One of the foremost national security risks presented by the WeChat mobile application  
 17 in the United States is **the possibility** that the PRC government **could** ... compel Tencent  
 18 to provide systemic access to U.S. user’s sensitive personal information.”); *id.* at 13 (“the  
 19 WeChat app **could** expand the PRC’s ability to conduct espionage on millions of U.S.  
 20 persons.”); *id.* at 12 (“intelligence operations **could ostensibly occur** without Tencent’s  
 21 express knowledge or awareness at a corporate level”); *id.* at 13 (“The PRC **could** combine  
 22 these various types of data, which they possess, and continue to collect, in order to build  
 23 dossiers on millions of U.S. persons.”); *id.* (“Funneling all these various types of  
 24 information into their AI apparatus **could potentially** create a platform to enhance the  
 25 PRC’s ability to identify espionage targets for intelligence collection purposes.”); *see also*

27 <sup>11</sup> U.S. social media posts, including ones posted by President Trump, have been removed  
 28 for spreading misinformation. *See* Bien Decl. ¶ 3 & Ex. B (*Washington Post* article titled  
 “Facebook, Twitter Penalize Trump For Posts Containing Coronavirus Misinformation”).

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1 CISA Note at 25 (WeChat “**could** be compelled to provide user and application data to the  
2 Chinese government.”). Defendants themselves explained the problem with this sort of  
3 evidence in opposing the injunction—these sorts of claims “are entirely conjectural” and  
4 “fall short of showing ‘immediate threatened injury.’” ECF No. 22 at 47-48.

5 **(b) The Claimed National Security Risks Are Neither**  
6 **Immediate Nor Irreparable**

7 The key fact to the Government in Defendants’ newly submitted evidence appears  
8 to be that “PRC law requires companies subject to PRC jurisdiction” to assist and comply  
9 with PRC intelligence and security services.<sup>12</sup> Decision Memo at 8-9. Defendants’  
10 articulation of their national security and foreign policy interests is that there exists a threat  
11 to the United States whenever *any* Chinese company has access to U.S. persons’ data  
12 because that Chinese company *could* be compelled by the PRC to hand over that data. *See,*  
13 *e.g.,* CISA Note at 25 (“**As Chinese companies,** they both [WeChat and TikTok] **may be**  
14 **compelled** under the 2017 China Internet Security Law to provide that information to the  
15 Chinese government.”); Decision Memo at 12 (“Given the bounty of information WeChat  
16 **could** offer on foreign users, as well as the aforementioned cyber tactics employed by the  
17 PRC, the Department of Commerce assesses the PRC and PRCISS would not limit their  
18 use of WeChat to domestic concerns and would instead use it for foreign intelligence and  
19 surveillance.”).

20 This is an incredibly broad assertion of irreparable harm that, if taken to its logical  
21 conclusion, would extend to *any* company with Chinese ownership that had access to  
22 Americans’ data: Any such company *might* be subject to surveillance authorities that  
23 *might* support Chinese espionage efforts in ways that would cause irreparable harm.  
24 Meanwhile, the speciousness of the claimed irreparable injury is belied by Defendants’  
25

26 <sup>12</sup> The United States’ intelligence services also make requests to social media companies  
27 for user data. *See, e.g.,* Bien Decl. ¶ 4 & Ex. C (“In recent months, the U.S. Justice  
28 Department has issued subpoenas against Facebook (FB) and web host DreamHost for  
records of thousands, perhaps millions, of citizens who expressed interest in protesting  
President Trump’s inauguration.”).

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1 argument that “Plaintiffs will be able to continue using WeChat in the short-term to some  
2 extent.” Mot. at 12. If, in fact, current WeChat access poses an immediate, irreparable  
3 threat, why would any such continued use be permitted?

4 Defendants fail to specifically articulate how allowing Plaintiffs and others in the  
5 U.S. to use WeChat immediately and irreparably harms the national interest when the  
6 United States continues to permit other Chinese companies to do business in the United  
7 States and to collect U.S. persons’ data. Defendants are even willing to allow TikTok to  
8 continue collecting similar data, even though the Secretary warned on September 18, 2020  
9 that both public platforms:

10 collect[] vast swaths of data from users, including network activity, location  
11 data, and browsing and search histories. Each is an active participant in  
12 China’s civil-military fusion and is subject to mandatory cooperation with  
the intelligence services of the CCP. This combination results in the use of  
WeChat and TikTok creating unacceptable risks to our national security.

13 Bien Decl. ¶ 5 & Ex. D. While both WeChat and TikTok present “unacceptable risks to  
14 our national security,” Secretary Ross stated that the prohibitions in Executive Order  
15 13943 would be applied to WeChat beginning September 20, 2020, but that the  
16 prohibitions (other than app-store updates) would not go into effect as to TikTok until  
17 November 12, 2020. *Id.* This is despite the fact that “over **100 million** Americans” use  
18 TikTok, far more than use WeChat. *See TikTok*, 2020 WL 5763634, at \*2 (emphasis  
19 added). As another example, Defendants’ evidence states that aside from WeChat,  
20 “Tencent’s most significant products are games that make up the biggest gaming franchise  
21 in the world.” Decision Memo at 3. Despite these games’ similar ability to collect user  
22 data from U.S. persons—reports state that Tencent games like League of Legends surveil  
23 U.S. minors—the United States continues to allow *that* data collection. Bien Decl. ¶ 6 &  
24 Ex. E. Nor does the United States Government even regulate the domestic data-broker  
25 industry that gathers the same types of “sensitive” personal information from everyone  
26 who uses the Internet and/or credit cards, and offers it for sale to political campaigns,  
27 targeted advertisers, and, presumably, the Chinese government or its agents. *See*  
28 Hildebrand Decl. ¶ 13; Bien Decl. ¶ 7 & Ex. F (*New York Times* article stating that

1 “[t]hese companies sell, use or analyze the data to cater to advertisers, retail outlets and  
 2 even hedge funds seeking insights into consumer behavior.”) Defendants fail to establish  
 3 that prohibitions specifically against WeChat are immediately necessary, when they allow  
 4 the same threats posed by TikTok and others to continue unabated.

5 **(c) Defendants’ Fail to Show How Censorship Is an**  
 6 **Irreparable Injury to National Security**

7 Defendants also allege that WeChat’s censorship will “subversively influence the  
 8 views of millions of U.S. WeChat users” and that “U.S. citizens are forced to self-censor  
 9 the content they share or jeopardize losing their preferred communication platform with  
 10 their contacts in China.” Mot. at 15. Censorship and stilted viewpoints may indeed be  
 11 “bad,” but Defendants fail to show how any of this is irreparable harm to the United  
 12 States’ national security. Specifically, defendants point to the ways in which China  
 13 censors critics of its regime and pushes a particularly beneficent narrative of the state—  
 14 pushing a pro-China view of the world. But there is no argument as to why that kind of  
 15 censorship and propaganda poses a national security threat—let alone the kind of national  
 16 security threat that poses irreparable injury. Cf. Bien Decl. ¶¶ 8-10 & Exs. G-I (reports  
 17 about Facebook and Twitter censoring political viewpoints including those of Roger Stone,  
 18 Infowars, and the Proud Boys). Finally, in our democracy and under our Constitution, the  
 19 cure for censorship is not more censorship. See *Lamont*, 381 U.S. at 310 (Brennan, J.,  
 20 concurring) (rejecting government’s attempt to justify censorship of incoming mail from  
 21 China as a response to China’s censorship of information from the United States, and  
 22 explaining that the absence of protections for free expression elsewhere in the world “can  
 23 never justify emulating the practice of restrictive regimes in the name of expediency.”).

24 **(d) Defendants Cannot Suffer Harm From an Injunction**  
 25 **That Merely Ends an Unlawful Practice**

26 Finally, it is well established that the Government “cannot suffer harm from an  
 27 injunction that merely ends an unlawful practice or reads a statute as required.” *Rodriguez*  
 28 *v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013); *TikTok*, 2020 WL 5763634, at \*9. While

1 the Court’s Order did not reach the merits of Plaintiffs’ *ultra vires* claims, Order at 19, as  
 2 noted above the *TikTok* court granted an injunction against Defendants on TikTok’s  
 3 identical claims that the Secretary’s prohibitions “constitute indirect regulations of  
 4 ‘personal communication[s]’ or the exchange of ‘information or informational materials.’”  
 5 *TikTok*, 2020 WL 5763634, at \*7-8. Because the Secretary’s prohibitions against WeChat  
 6 in this matter violate the First Amendment and are similarly *ultra vires*, Defendants cannot  
 7 as a matter of law show irreparable harm from failing to stay the injunction.

### 8 C. A Stay Would Irreparably Harm Plaintiffs

9 Defendants first contend that the Court’s finding that “[t]he immediate threat is the  
 10 elimination of their platform for communication” cannot constitute irreparable harm  
 11 because “even absent an injunction, Plaintiffs will be able to continue using WeChat in the  
 12 short-term to some extent, such that their ‘platform for communication’ will not in fact be  
 13 “eliminat[ed].” Mot. at 12. This argument is contradicted by the Secretary’s admission  
 14 that WeChat would be shut down for all practical purposes. *See* Order at 2 & n. 2.

15 Defendants next assert that the prohibitions at issue “do not impact First  
 16 Amendment rights”<sup>13</sup> because “they bar economic transactions” and the “impact on speech  
 17 is incidental.” Mot. at 12. As explained in Section II(A)(2) above, this argument is  
 18 meritless; courts have long recognized that regulating a platform for communication  
 19 necessarily regulates speech, and Defendants’ newly-submitted evidence shows that the  
 20 prohibitions were designed specifically to stop Plaintiffs and other WeChat users in the  
 21 U.S. from communicating on the app. Defendants’ reference to *CTIA - The Wireless Ass’n*  
 22 *v. City of Berkeley*, 928 F.3d 832, 851 (9th Cir. 2019) is inapposite, as that case pertains to  
 23 the regulation of commercial speech; but nevertheless, Defendants relied on the case for a  
 24 quote which only further proves Plaintiffs’ point: “[i]t is the ‘purposeful unconstitutional  
 25 suppression of speech [that] constitutes irreparable harm for preliminary injunction  
 26 purposes.’”

27  
 28 <sup>13</sup> Defendants concede at page 23 of their Motion that a WeChat ban does have an “impact  
 on Plaintiffs’ expressive activities.”

[3620853.13]

1 Finally, Defendants suggest that Plaintiffs will not be harmed by a stay because  
 2 “numerous other mobile applications and news sources *are* available in Chinese ... a point  
 3 the Government did not have the opportunity to develop.”<sup>14</sup> Mot. at 13. Defendants’  
 4 argument fails to acknowledge that these “alternatives” are not workable substitutes  
 5 because they lack the network effects of WeChat. *See* Declaration of Fangyi Duan (“Duan  
 6 Decl.”), *filed herewith*, ¶ 7; Declaration of Ying Cao (“Cao Decl.”), *filed herewith*, ¶ 13.  
 7 Defendants continue to make no effort to address the irreparable harm that Plaintiffs would  
 8 experience by being cut-off from their families, friends, and other contacts in China,  
 9 especially during the COVID-19 pandemic—nor can they. *See* Decision Memo at 10  
 10 (admitting the lack of alternatives to communicate with persons in China). Additionally,  
 11 some apps identified by Defendants lack the same functions as WeChat (Duan Decl. ¶¶ 5-  
 12 6; Cao Decl. ¶¶ 5-12); lack the ability to sign-up in Chinese (Duan Decl. ¶ 9; Cao Decl.  
 13 ¶ 5); lack Chinese interfaces and/or navigation menus (Cao Decl. ¶ 6; Duan Decl. ¶ 9); and  
 14 lack privacy and/or user policies in Chinese (Cao Decl. ¶¶ 5-6, 8-9). Plaintiffs will suffer  
 15 irreparable harm if the partial or “limited” stay requested by Defendants (Mot. at 23) is  
 16 granted, as that will result in the degraded and/or inoperable use of WeChat, ensuring that  
 17 “a majority of the [users] will simply exit.” Duan Decl. ¶ 8; Cao Decl. ¶ 14.

18 **D. The Court Correctly Concluded That the Public Interest Warrants**  
 19 **a Preliminary Injunction**

20 In explaining the applicable legal standard, Defendants confusingly write that the  
 21 third and fourth factors “for ‘assessing the harm to the opposing party and weighing the  
 22 public interest ... merge when the Government is the opposing party.’” Mot. at 10. While  
 23 true in principle, the Government is *not* the opposing party here, but rather the party  
 24 seeking the stay. The third and fourth factors thus do not merge, and the Court should  
 25 consider both the substantial harm to Plaintiffs and the harm to the public interest.

26 Defendants provide no reason to revisit the Court’s conclusion that “[t]he public  
 27

28 <sup>14</sup> Plaintiffs identified the lack of alternatives in their Complaint.

[3620853.13]

1 interest favors the protection of the plaintiffs’ constitutional rights.” Order at 20.

2 **III. NO PARTIAL STAY SHOULD BE GRANTED, NOR SHOULD THE**  
 3 **PRELIMINARY INJUNCTION BE MODIFIED**

4 Defendants ask the Court to modify or reconsider its preliminary injunction, see  
 5 Mot. at 8, 10, 22, but they have not so moved with a duly noticed motion and briefing  
 6 under the applicable Federal Rules of Procedure standard. *See* Fed. R. Civ. P. 7(b); N.D.  
 7 Cal. Civ. L. R. 7-2; *Alto v. Black*, 738 F.3d 1111, 1120 (9th Cir. 2013) (party seeking to  
 8 modify preliminary injunction “bears the burden of establishing that a significant change in  
 9 facts or law warrants revision or dissolution of the injunction”); *see also* Section II(B)(1),  
 10 *supra*. Regardless of the Court’s authority to do so, there is no basis for doing so here.<sup>15</sup>

11 Arguing that the “injunction must be narrowly tailored to remedy the specific harm  
 12 shown,” Defendants’ request that the Court “limit or stay the injunction at least insofar as  
 13 it applies to Paragraph 1 of the Identification of Prohibited Transactions,” thus “[b]arring  
 14 new users from WeChat.” Mot. at 23. (citing *E. Bay Sanctuary Covenant v. Barr*, 934  
 15 F.3d 1026, 1029 (9th Cir. 2019)). But they fail to show how blocking tens or hundreds of  
 16 thousands of new users from participating in WeChat discussions and frustrating WeChat  
 17 capabilities for its millions of current users meets this goal. Doing so would mean Plaintiff  
 18 Bao could not communicate with new church members, Plaintiff Chihou would be  
 19 deprived of new customers, and Plaintiff Peng could not carry out MHACC’s mission to  
 20 provide mental health services to new recipients of care. *See* EDF 17 (Pls’ Mot.) at 43-44;  
 21 *TikTok*, 2020 WL 5763634, at \*8 (finding such a bar on new users and updates to  
 22 constitute irreparable harm); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss

23 \_\_\_\_\_  
 24 <sup>15</sup> None of Defendants’ cases support the Court *sua sponte* “set[ting] aside all or any part  
 25 of its injunction,” Mot. at 16. *See Language Line Servs., Inc. v. Language Servs. Assocs.,*  
 26 *Inc.*, 500 F. App’x 678, 681 (9th Cir. 2012) (affirming district court’s refusal to modify  
 27 injunction); *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1096 (9th Cir. 2002)  
 28 (modification of preliminary injunction warranted because “[a]fter three months of moni-  
 toring, the district court determined that Napster was not in satisfactory compliance with  
 the [previously] modified preliminary injunction”); *City of Los Angeles, Harbor Div. v.*  
*Santa Monica Baykeeper*, 254 F.3d 882, 884, 886 (9th Cir. 2001) (holding that district  
 court’s rescission order was proper where district court issued a final order on Decem-  
 ber 28 “realizing the inconsistency between his October 28 and November 10 orders”).

1 of First Amendment freedoms, for even minimal periods of time, unquestionably  
 2 constitutes irreparable injury.”). Moreover, prohibiting updates would necessarily render  
 3 present WeChat users’ data *less* secure and prone to data breaches, a result at odds with the  
 4 U.S. interests Defendants assert are at stake. *See* Hildebrand Decl. ¶ 12.

5 Having determined that Plaintiffs demonstrated serious questions going to the  
 6 merits of their First Amendment claim that the Secretary’s prohibited transactions  
 7 “effectively eliminate the plaintiffs’ key platform for communication, slow or eliminate  
 8 discourse, and are the equivalent of censorship of speech or a prior restraint on it,” Order at  
 9 16, this Court should not summarily reverse course as Defendants’ insist.

10 **IV. DEFENDANTS OFFER NO RATIONALE TO NOW STAY THE**  
 11 **ORDER’S NATIONWIDE EFFECT**

12 Defendants make no new showing or argument to support their request to stay the  
 13 injunction’s nationwide effect. Mot. at 14, n. 2. Nor have they addressed the obvious  
 14 point that limiting the injunction to only Plaintiffs would fail to provide complete relief  
 15 and instead serve to dissolve the injunction. *See* ECF No. 28 at 20; ECF No. 52 at 8.

16 **V. DEFENDANTS’ REQUEST FOR BOND SHOULD BE DENIED**

17 Defendants waived any argument for a bond having never briefed a response to  
 18 Plaintiffs’ request that the Court waive bond. *See* ECF No. 17 at 48; 9/19 Transcript, ECF  
 19 No. 65 at 45:8-46:5. Defendants rely on *Connecticut General Life Insurance Co. v. New*  
 20 *Images of Beverley Hills*, but that case held that the district court did not err in declining to  
 21 set any bond where, as here, the party failed to request a bond or submit evidence that a  
 22 bond is needed. *Connecticut General Life Insurance Co. v. New Images of Beverly Hills*,  
 23 321 F.3d 878, 882 (9th Cir. 2003). A bond is inappropriate here because Plaintiffs “seek to  
 24 vindicate important interests, and there is no risk that Defendants will suffer monetary  
 25 harm.” *TikTok*, 2020 WL 5763634, at \*9 n.4.

26 **CONCLUSION**

27 Defendants failed to meet their burden and the injunction should remain in place.

1 DATED: October 1, 2020

Respectfully submitted,

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Michael W. Bien

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