

Daily Journal

MARCH 30, 2022



Lawyers defend social media platform's First Amendment rights

CIVIL RIGHTS

U.S. WeChat Users Alliance v. Trump

MICHAEL W. BIEN, VAN SWEARINGEN, ERNEST J. CALVAN, BEN BIEN-KHAN, AMY XU, ALEXANDER R. COURSE, ROSEN BIEN GALVAN & GRUNFELD; CLAY ZHU, DEHENG LAW OFFICES

On Aug. 6, 2020, then-President Donald Trump—as part of his trade war barrage against China and its business entities—issued an executive order that would ban within 45 days the Chinese social media app WeChat due to alleged security concerns. He announced that the app allows “the Chinese Communist party access to Americans’ personal and proprietary information” and that it could be used for disinformation campaigns. The ban was to be enforced with severe civil and criminal penalties.

A leading Chinese American lawyer, Keliang (Clay) Zhu, the managing partner of DeHeng Law Offices PC’s San Jose shop, helped clients facing sanctions for doing business on WeChat form a U.S. WeChat Users Alliance to confront the threat.

Zhu then enlisted Michael W. Bien of the prominent civil rights and commercial litigation firm Rosen Bien Galvan & Grunfeld LLP to develop an ultimately successful legal strategy to block the ban from taking effect.

One hitch: Bien had never heard of WeChat, though he soon came to understand its global reach and critical importance to over one billion monthly active

users. “I had to educate myself so we could educate the judge,” he said, emphasizing that while he organized and led the team from his office and other firms that would block the ban, he had a lot of help.

He also knew he had an uphill fight. “If the government came up with evidence that WeChat was used for spying, as claimed, it would be very difficult to counter that in court,” Bien said. But the government’s evidence, which at first it said could be revealed only in secret under national security litigation rules, proved to consist only of news articles and studies of how WeChat was regulated in China. “Facebook takes down controversial posts too,” Bien said.

On the plus side for the plaintiffs, Bien pointed out that the Trump campaign had a WeChat channel it used for fundraising.

Bien noted critical contributions from his law partners R. Van Swearingen and Ernest J. Galvan and from a Chinese-speaking associate, Amy Xu, a senior counsel, Benjamin J. Bien-Kahn, and another associate, Alexander R. Gourse. Angus F. Ni of AFN Law PLLC played a pivotal role in developing facts and expert witness support. Lawyers from Davis Wright Tremaine LLP, in-

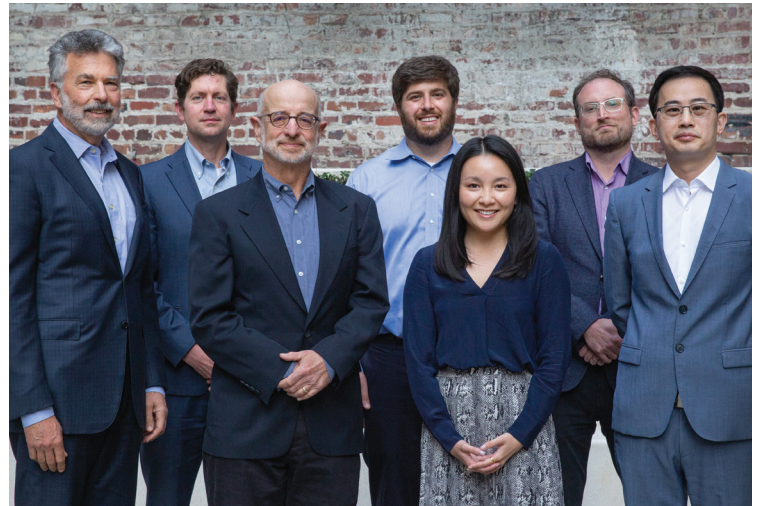


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FROM LEFT TO RIGHT: MICHAEL W. BIEN, VAN SWEARINGEN, ERNEST J. GALVAN, BEN BIEN-KAHN, AMY XU, ALEX R. COURSE AND CLAY ZHU

cluding Thomas R. Burke, David M. Gossett, John M. Browning and Courtney T. DeThomas, addressed issues regarding the legitimate scope of federal regulation of communications media. To prepare for a possible emergency appeal to the U.S. Supreme Court, Carter G. Phillips and Jeffrey T. Green of Sidley Austin LLP were on standby. “Carter Phillips wrote a brief that will never see the light of day,” Bien said, because the U.S. Solicitor General decided not to take the issue to the high court.

Speed was critical. By Aug. 21, 2020, Bien was able to file a suit over the ban. Following a series of hearings, U.S. Magistrate Judge Laurel Beeler of San Francisco issued a preliminary injunction on Sept. 20. The Trump administration appealed immediately, but failed to get a stay; the government eventually

dismissed its appeal. *U.S. WeChat Users Alliance v. Trump*, 3:20-cv-05910 (N.D. Cal., filed Aug. 21, 2020).

Beeler was ultimately swayed by the plaintiff team’s First Amendment arguments, Bien said, adding. “It came down to prior restraint. Turning off WeChat is like shutting down a newspaper. We don’t do that.”

All the lawyers worked at discounted rates or pro bono. The plaintiff alliance raised money to fund the case, some of which it got back from the government under the Equal Access to Justice Act.

“I’ve been in high-profile cases before, but nothing like this in terms of worldwide news interest from London to Hong Kong, and the many messages of appreciation and gratitude we got,” Bien said.

— JOHN ROEMER