

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, and XIAO ZHANG,

Plaintiffs–Appellees,

v .

DONALD J. TRUMP, in his official capacity as the President of the United
States, and 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
The Honorable Laurel Beeler (No. 3:20-cv-05910-LB)

**BRIEF OF *AMICUS CURIAE* UNITED CHINESE AMERICANS IN
SUPPORT OF PLAINTIFFS U.S. WECHAT USERS ALLIANCE, et al.**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, United Chinese Americans (“UCA”) states that it is a non-profit organization organized under Section 501(c) (3) of the Internal Revenue Code. UCA has no parent corporation and no publicly held corporation owns 10% or more of UCA’s stock.

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INTEREST OF *AMICUS CURIAE*

The United Chinese Americans (“UCA”) is a national 501(c)(3) non-profit organization dedicated to the enrichment and empowerment of the Chinese community in the United States. It promotes civic participation, political engagement, youth education, preservation of Chinese heritage and culture, and the understanding between peoples of the U.S. and China.

WeChat is a mobile application used by over one billion Chinese people around the world to communicate and exchange information, primarily in the Chinese language. It is an indispensable tool for the Chinese people to stay connected. UCA organizes events and maintains its online community largely via WeChat. UCA members connect with family and friends in the US, China around the world via WeChat. To attain a broader picture of the impact of WeChat, UCA conducted a nationwide survey among the Chinese American community. UCA believes that the Trump Administration’s WeChat Order and its implementation discriminate against Chinese Americans and threaten their fundamental rights protected by the U.S. Constitution¹.

¹ Pursuant to FRAP 29(4) (E), UCA affirms that no counsel for any party authored this brief in whole or in part; no party or party’s counsel contributed money to fund preparing or submitting of the brief; and no one other than UCA contributed money to fund preparing or submitting of this brief.

INTRODUCTION

Since the mid-19th century, Chinese Americans have repeatedly suffered from institutionalized racial discrimination in the U.S. Times have changed but some have not. Soon after inciting racial animus by words such as “China virus”, “China plague”, “Chinese virus” and “Kung Flu”², President Trump issued Executive Order 13943 (August 6, 2020) prohibiting any transaction related to WeChat (the “WeChat Order”). The implementation of that executive order would effectively shut down the primary communications platform that Chinese Americans use to connect with fellow Chinese people and their ancestral culture. To assess the importance of WeChat to Chinese Americans, UCA conducted an online survey. The survey confirms the findings of the District Court and provides additional insights. As we will show, the WeChat Order as to be implemented violates Equal Protection and infringes Chinese Americans’ fundamental rights under the Constitution. We therefore urge the Ninth Circuit to affirm the preliminary injunction of the WeChat Order issued by the District Court.

SUMMARY OF UCA’S SURVEY OF WECHAT USERS

² See Kimmy Yam, *Anti-Asian bias rose after media, officials used ‘China virus,’ report shows*, NBCNEWS, (Sept. 29, 2020, 2:25 PM), <https://nbcnews.to/36CAIXD> .

The questions for UCA’s WeChat User Survey (the “WeChat Survey”) were carefully designed to avoid bias and without disclosing the potential use of the survey results³. The following is a summary of the results⁴.

Among the more than 600 individuals that responded to the survey:

- 97% are ethnic Chinese who are either citizens or permanent residents of the US;
- they have used WeChat for an average of 7 years;
- 92% use Chinese as the primary language in WeChat;
- 94% of them use WeChat for personal communications with persons in China for non-commercial purposes;
- 80% of them use WeChat’s “Circle of Friends” to publish information;
- 21% of them use WeChat’s “public platform” to publish articles;
- 84% of them receive articles, publications, literature, videos, music, photographs, digital artworks, and other informational material from China via WeChat;
- 78% of them first heard of COVID-19 on WeChat;
- 58% of them considers WeChat the primary source of COVID-19

³ “Survey Gauges Impact of WeChat Ban on Chinese American Community”, <https://ucausa.org/uca-wechat-use-survey-report/>.

⁴ <https://bit.ly/33ru1jZ> .

related information;

- 82% say they cannot find a reasonably good alternative to WeChat if it is banned in the U.S.;
- The top reasons to use WeChat are its ease of use, its Chinese language features, and the need to stay connected with family and friends who are on the WeChat network⁵.

ARGUMENT

I. THE WECHAT ORDER VIOLATES EQUAL PROTECTION

1. Legal Standards

Although the Fifth Amendment to the U.S. Constitution does not have an equal protection clause, the U.S. Supreme Court had interpreted the due process clause as one which “prohibits the federal government from engaging in discrimination that is ‘so unjustifiable as to be violative of due process.’” *Schlesinger v. Ballard*, 419 U.S. 498, 500 n. 3, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975) (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954)). When applied to the federal government, “[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.” *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

⁵ <https://bit.ly/36i2enI>.

Laws that facially discriminate based on race and national origin trigger strict scrutiny. *Mitchell v. Washington*, 818 F.3d 436, 446 (9th Cir. 2016) (“When the government expressly classifies persons on the bases of race or national origin ... its action is ‘immediately suspect’.... A plaintiff in such a lawsuit need not make an extrinsic showing of discriminatory animus or a discriminatory effect to trigger strict scrutiny.” (citing *Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 204-05 (2d Cir.2006).) To establish a *prima facie* case of discrimination for facially neutral laws, in addition to demonstrating disparate impact, one must show that “‘the totality of the relevant facts gives rise to an inference of discriminatory purpose.’” *Johnson v. California*, 545 U.S. 162, 168 (2005).

2. The WeChat Order Has a Disparate Impact on Chinese Americans

WeChat is used by people of Chinese origin around the world to communicate with each other in the Chinese language⁶. UCA’s WeChat Survey confirms this: 97% of the surveyed users primarily use the Chinese language in WeChat, 92% of them use WeChat to communicate with people

⁶ “WeChat Now Has over 1.2 Billion Users Worldwide.” *South China Morning Post*, 14 May 2020, <https://bit.ly/36Cwmuo>; See also Naomi Xu Elegant, ‘Irreplaceable’: U.S. WeChat users struggle to imagine life without the app Trump wants to ban, *FORTUNE* (August 12, 2020 3:49 AM), <https://bit.ly/33CLCW4> .

in China. Moreover, 82% states that there are no reasonably good alternatives to WeChat. *See* Summary of WeChat Survey, *supra*. Since most Chinese people of the world are on WeChat, it's near impossible for them to switch to another application for the sole purpose of communicating with Chinese Americans⁷.

The WeChat Order will have a disparate impact on Chinese Americans for obvious reasons. While non-Chinese can use alternative applications to communicate with their family and friends, Chinese Americans depend on WeChat to connect with fellow Chinese in China and around the world in their ancestral language. Banning WeChat in the U.S. will severely restrict Chinese Americans' connection to their Chinese family members, friends, social contacts, and cultural roots⁸.

3. The WeChat Order Discriminates Against Chinese Americans on Its Face

⁷ *See* Catherine Thorbecke, *For Chinese Americans, WeChat ban threatens to upend business and community*, ABC NEWS (August 27, 2020, 4:12 AM), <https://abcn.ws/3g5UAQI> .

⁸ *See e.g.* Rita Wenxin Wang, *How Trump's Attempted WeChat Ban Would Devastate Chinese American Families Like Mine*, VOX (Oct 1, 2020, 1:00pm), <https://bit.ly/3mQ2wba> ; Trone Dowd, *Trump's WeChat Ban Could Cut Off Chinese Americans From Their Families*, VICE NEWS (Sep. 19, 2020, 10:54 AM), <https://bit.ly/3okMjLB> ; and Kari Paul, *'I will be cut off': Chinese Americans Feel Targeted by Trump's WeChat Order*, THE GUARDIAN (Sep. 22, 2020), <https://bit.ly/3mFEEab> .

The WeChat Order identifies “the spread in the United States of mobile applications developed and owned by companies in the People’s Republic of China (China)” as a “threat” to “the national security, foreign policy, and economy of the United States.” *Exec. Order No. 13,943*, 85 Fed. Reg. 48641 (Aug. 6, 2020). It labels “Chinese nationals visiting the United States” as people “who may be enjoying the benefits of a free society for the first time in their lives.” *Id.* It then prohibits “any transaction that is related to WeChat by any person, or with respect to any property, subject to the jurisdiction of the United States...” *Id.*

The rationale for the prohibition given in the WeChat Order was that the application “automatically captures vast swaths of information from its users.” *Id.* Yet requiring certain personal information is common among all chat applications, due to the necessity of user identification and authentication. Mobile chat applications such as Skype (Microsoft) and FaceTime (Apple) also capture their users’ personal information. Google and Facebook even *publish* vast amounts of sensitive information of Americans for the whole world to view⁹. Google Street View shows the front door of

⁹ See generally Erica Jaeger, *Facebook Messenger: Eroding User Privacy in Order to Collect, Analyze, and Sell Your Personal Information*, 31 J. MARSHALL J. INFO. TECH. & PRIVACY L. 393 (2014).

almost every U.S. resident¹⁰. Facebook publishes the daily activities and personal relationships of millions of Americans¹¹. The information exposed by Google and Facebook can be readily harvested by anyone with an internet connection. While the Government labels mobile applications created by Chinese developers in China as threat to the U.S., it treats applications developed by others as safe alternatives. Absent specific evidence, the distinction between the two groups lies solely in the race or national origin of their developer and owner, with the former being Chinese and the latter not.

Identifying mobile applications developed by Chinese in China as a threat to the U.S. is no different from the historical “Yellow Peril” mentality. See, *Oyama v. California*, 332 US 633, 651-59 (1948) (describing the historical anti-Chinese fervor due to fear of “economic competition”). In 2012, the U.S. House of Representatives recognized that the passage of laws that prohibited Chinese from entering the United States “adversely affected people of Chinese origin in the United States because of their ethnicity.”¹²

¹⁰ Roger C. Geissler, *Note – Private Eyes Watching You: Google Street View and the Right to an Inviolable Personality*, 63 *Hastings L.J.* 897, 901-03 (2012).

¹¹ Dylan Curran, *Are you ready? Here is all the data Facebook and Google have on you*, *THE GUARDIAN* (Mar. 30, 2018), <https://bit.ly/3ojNv1R>.

¹² H.Res. 683 (112th): *Expressing the regret of the House of Representatives for the passage of laws that adversely affected the Chinese in the United*

Barring the “spread” of Chinese mobile applications in the U.S. sends a signal similar to what the Chinese Exclusion Act did. Chinese Americans are immigrants from China. The automatic association of “Chinese” with “threat” in the WeChat Order subjects Chinese in the U.S. to racial discrimination as a result of such association.

The WeChat Order declares WeChat a threat on the ground that it collects user data that may be shared with the Communist Party of China. Most Chinese Americans users consented to the privacy policy of WeChat and willingly provided WeChat with their personal information by choosing to use the application. The WeChat Order thus implicitly taints Chinese Americans users by labeling their use of WeChat as an activity that threatens US national security. The stigmatization of Chinese Americans as willing collaborators in threatening US national security based on mere suspicion coupled with the prohibition of the use of WeChat constitutes a violation of equal protection and due process under the Fifth Amendment.

Since the WeChat Order facially discriminates against Chinese Americans based on their race or national origin, it is subject to the Court’s strict scrutiny. *Mitchell v. Washington*, 818 F.3d at 446.

4. The WeChat Order Has a Discriminatory Purpose

Even assuming, *arguendo*, that the WeChat Order is facially neutral, the

States, including the Chinese Exclusion Act. <https://bit.ly/2Jss7YX>.

evidence shows that the ban has a discriminatory purpose.

“A plaintiff does not have to prove that the discriminatory purpose was the sole purpose of the challenged action, but only that it was a ‘motivating factor.’” *Arce v. Douglas*, 793 F.3d 968, 977 (9th Cir. 2015). “The court analyzes whether a discriminatory purpose motivated the defendant by examining the events leading up to the challenged decision and the legislative history behind it, the defendant's departure from normal procedures or substantive conclusions, and the historical background of the decision and whether it creates a disparate impact.” *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 504 (9th Cir. 2016). “Actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose.” *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 465, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979).

WeChat has lawfully operated in the U.S. for many years without objections from the U.S. federal government. UCA members have used WeChat for an average of seven years. President Trump had been in office for over three years without raising any security issues with WeChat. The situation changed in the wake of the Covid-19 pandemic. Starting from March 2020, President Trump repeatedly used the term “Chinese virus” to refer to the novel coronavirus, despite the objections from the Chinese community and the World Health Organization against the term due to the

stigmatization it causes¹³. On May 12, 2020, when CBS News correspondent Weijia Jiang (a Chinese American) asked President Trump a novel coronavirus related question, President Trump told her to “ask China.”¹⁴ Knowing the backlash against Chinese Americans due to the association of the virus and the Chinese, Trump defended the term “Chinese virus” based on the belief that the virus originated in China¹⁵. However, in June 2020, Trump called COVID-19 the “Kung Flu”, a racist term without a geographical justification. These events immediately preceding the WeChat Order are indicative of President Trump’s discriminatory state of mind. President Trump’s animosity displayed towards CBS correspondent Weijia Jiang with explicit reference to China suggests that he has linked Chinese Americans to China and the virus. After all, a country does not carry and spread the virus, people do. The close temporal proximity between Trump’s racist remarks targeting Chinese and the WeChat Order that harms Chinese Americans allows for an inference that the WeChat ban was a retaliatory measure motivated in part by discrimination.

The WeChat Order considers “Chinese nationals visiting the United States” as people “who may be enjoying the benefits of a free society for the

¹³ <https://bit.ly/3mk0sYK>

¹⁴ <https://wapo.st/3nXykLE>

¹⁵ *Trump defends calling coronavirus ‘Chinese virus’— ‘it’s not racist at all’*. CNBC, Mar 18, 2020. <https://cnb.cx/2KOxS46>

first time in their lives.”¹⁶ Yet, it seeks to summarily deprive them one of the freedoms they have in China – the personal autonomy to communicate with each other using their favorite mobile chat application -- upon their arrival in the U.S., without specific evidence of wrongdoing. Such irrational inconsistency can only be explained by a discriminatory purpose.

The text of the WeChat Order recognized Chinese people’s reliance on WeChat. The Government thus foresaw the immensity of the disparate impact of the WeChat Order on Chinese Americans. Moreover, the Government has been fully informed of the disparate impact on Chinese Americans. UCA, in an open letter to the White House endorsed by 122 Chinese organizations across over 35 states, informed the U.S. Government that Chinese Americans rely on WeChat for communications with families in China, for civic participation and free political expression, for exchanging news and opinions. The UCA open letter warned that the WeChat Order “would severely disrupt and uproot the way of life for millions of Americans.”¹⁷ Yet, the implementation of the executive order by Secretary Ross calls for the total shutdown of the WeChat platform in the U.S.,

¹⁶ *See also*, Letter from Donald Trump, President of the United States, to Nancy Pelosi, Speaker of the United States House of Representatives, and Mike Pence, President of the Senate (Aug. 6, 2020), <https://bit.ly/2JGWk70> .

¹⁷ <https://bit.ly/3fMLS9U>

without any consideration of the harm to be inflicted upon the Chinese community. The arbitrariness and oppressiveness of the WeChat Order and its implementation exhibit a total disregard of the rights and liberties of the Chinese Americans, who are historically targets of racism in the U.S. The measure is harsh, yet the evidence is slim to non-existent. Discrimination may explain such laws that patently run counter to American values of personal rights and due process.

From being labeled as “Yellow Peril”, to the Chinese Exclusion Act, to McCarthyism, to Trump’s “Kung Flu”, and to the WeChat ban, Chinese Americans have been frequently singled out as the target of racial discrimination.

Time and again, it is the judiciary that upheld the Constitution and protected the fundamental rights of Chinese Americans from the abuses of state power. In Yick Wo v. Hopkins, 118 US 356 (1886), a San Francisco city ordinance required laundries be in brick or stone buildings unless a waiver was granted. The Supreme Court struck it down based on the finding of discriminatory implementation. In United States v. Wong Kim Ark, 169 US 649 (1898), the Supreme Court held that a Chinese child born in the United States becomes a citizen of the United States at the time of birth, by virtue of the first clause of the Fourteenth Amendment. Id at 653. Recently, in Trump v. Hawaii, 138 S. Ct. 2392 (2018), the Supreme Court took the opportunity

to expressly overrule Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), which justified the internment of Japanese Americans during World War II on the ill-founded grounds of national defense.

5. Strict Scrutiny Applies to the WeChat Order

Since the WeChat Order intentionally discriminates against Chinese Americans based on the suspect classifications of race and national origin, it is subject to strict scrutiny. It operates as a complete shutdown of WeChat in the U.S. without any sort of tailoring or provisions for legal exceptions. It unconstitutionally violates Equal Protection. The Ninth Circuit should affirm the District Court's order to preliminary enjoin the implementation of the WeChat Order.

II. THE WECHAT ORDER IS OVERBROAD AND VIOLATES UCA MEMBERS' FIRST AMENDMENT RIGHT OF ASSOCIATION

A law is overbroad when it impermissibly sweeps into its proscriptions conduct that is legitimate as well as conduct which may properly be regulated. United States v. Robel, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967). In Robel, Eugene Robel, a member of the Communist Party of the United States, was charged with violating the Subversive Activities Control Act for maintaining his employment at a "defense facility." The district court dismissed the indictment. The Ninth Circuit certified the case

for direct appeal to the U.S. Supreme Court. *Id.* at 261. The U.S. Government defended the statute on the ground that it was passed pursuant to Congress' war power. The teaching of the Supreme Court is instructive:

“[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.” *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 426 (1934). More specifically in this case, the Government asserts that § 5 (a) (1) (D) is an expression “of the growing concern shown by the executive and legislative branches of government over the risks of internal subversion in plants on which the national defense depend[s].” Yet, this concept of “national defense” cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term “national defense” is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. *It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.*

Robel, 389 US at 264 (emphasis added). Acknowledging that “[t]he Government's interest in such a prophylactic measure is not insubstantial”, the Supreme Court struck down part of the statute on the ground it “contains the fatal defect of overbreadth”, as it “quite literally establishes guilt by association alone, without any need to establish that an individual's

association poses the threat feared by the Government in proscribing it.” *Id.* at 265-66.

The law in *Robel* concerned the employment of communists in U.S. defense facilities. The WeChat Order concerns the use of a popular online chat application. The Government’s national security concerns in *Robel* were far more direct, concrete and realistic than the ones raised in the WeChat Order. Yet the WeChat Order is far more overbroad. It essentially prohibits access to WeChat by anyone in the United States regardless of their employment and purpose, based solely on suspicion of the Chinese.

UCA organizes events and maintains its community largely via its national and local WeChat groups. The indiscriminate shutdown of WeChat in the United States is overly broad because it sweeps legitimate use of WeChat into prohibited conduct. Such prohibitions will severely hamper UCA members’ ability to engage in activities relating to the association. The WeChat Order is therefore facially overbroad and unconstitutionally abridges UCA members’ First Amendment rights, including the freedom of association.

III. THE WECHAT USER SURVEY SUPPORT PLAINTIFFS’ POSITIONS ON FIRST AMENDMENT AND IEEPA

1. First Amendment

In addition to confirming the fact findings of the District Court that were

based on the evidence submitted by Plaintiffs, the WeChat Survey provides additional insight. The Survey reveals that 94% of the respondents use WeChat for personal communications with persons in China, 80% of them use WeChat's "Circle of Friends" to publish information (to their WeChat contacts). Therefore, at least 74% of the respondents have readers in China to their "Circle of Friends" posts. The survey further shows that 21% of the respondents use WeChat's "public platform" to publish articles to a wider audience.

Even if the Chinese American publishers on WeChat switch to other platforms, shutting down WeChat in the U.S. would remove their WeChat audience in China. The WeChat Order severely abridges the free speech and publication rights of Chinese Americans.

2. IEEPA

The WeChat Survey shows that 78% of the respondents first heard of COVID-19 on WeChat, 58% of them consider WeChat the primary source of COVID-19 related information, 84% of them receive articles, publications, literature, videos, music, photographs, digital artworks and other informational material from China via WeChat.

The WeChat Survey data shows that WeChat is not only a personal communications platform, it has also become a *de facto* news service and an important source of informational materials, at least for the Chinese

American community. These rights to personal communication and informational materials are exactly what the Congress sought to protect in passing the Berman Amendment of 1988 to the International Economic Emergency Powers Act (“IEEPA”) of 1977, which established the IEEPA exceptions, *i.e.*, 50 U.S.C. § 1702(b)(1) and (3)¹⁸.

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court’s grant of preliminary injunction.

Respectfully submitted.

Dated: December 4, 2020

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¹⁸ Even in more stringent U.S. economic sanctions prohibitions against more serious national security concerns of Iran or North Korea that were promulgated under IEEPA, the U.S. Government unlike in the WeChat Order has, in accordance with the Berman Amendment excepted personal communication and informational material to and from those countries. See North Korea Sanctions Regulations at 31 CFR § 510.516, 31 CFR §510.312; and Iran Transactions and Sanctions Regulations at 31 CFR §560.201.

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STATEMENT OF THE PARTIES' CONSENT

In accordance of Federal Rule of Appellate Procedure 29(a), counsel for UCA certifies that counsel to Appellants President Donald J. Trump and Secretary Wilbur Ross and counsel to Appellees U.S. WeChat Users Alliance, et al. have expressly consented to the timely filing of this amicus brief.

Dated: December 4, 2020

/s/ Dongxiao Yue

Dongxiao Yue

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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