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17 UNITED STATES DISTRICT COURT

18 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

19
20 U.S. WECHAT USERS ALLIANCE,
CHIHUO INC., BRENT COULTER,
21 FANGYI DUAN, JINNENG BAO,
ELAINE PENG, and XIAO ZHANG,

22 Plaintiffs,

23 v.

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

26 Defendants.
27

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

**PLAINTIFFS' RENEWED MOTION
FOR PRELIMINARY INJUNCTION**

Judge: Hon. Laurel Beeler

Trial Date: None Set

1 **INTRODUCTION**

2 Today the Secretary of Commerce brought some clarity to one of the issues before
3 this Court by finally confirming that WeChat will be banned—shut down—for the millions
4 of Chinese speaking Americans that rely on it to communicate, speak, read, pray, organize
5 and operate their businesses. In so doing, the Secretary also cut off communications not
6 only between millions of people in the United States with each other but also
7 communications with friends, families, and businesses in China and the rest of the Chinese
8 diaspora that rely on WeChat.

9 This is nothing more than an unprecedented prior restraint on protected speech, on
10 the press, on the right to assemble and petition the government and the free exercise of
11 religion. It is anything but “narrowly tailored;” it is a sledge hammer. The burden is on
12 Defendants to justify the restrictions on speech—but they have failed to do so. The
13 evidence today that these “interests” of the government are, in fact, a pretext are even
14 stronger today. For example, the use of TikTok may continue unabated even though the
15 weak evidence defendants previously presented focused almost exclusively on TikTok, not
16 WeChat, as the danger.

17 The prohibitions of the Executive Order, including the imposition of criminal and
18 civil penalties, without additional notice, are effective on Sunday, but what acts are
19 prohibited and by whom, remain vague and unclear.

20 The dispute is ripe, the harm is irreparable and the First Amendment questions are
21 serious and crystalized. The balance of hardships tips sharply in favor of Plaintiffs and the
22 preliminary injunction must issue to preserve the status quo.

23 This renewed motion incorporates by reference all materials in the record, including
24 Plaintiffs’ original Motion (Dkt. 17-1), Reply (Dkt. 28), Notices to the Court (Dkts. 33 and
25 45), and the declarations and exhibits supporting those filings (no arguments are waived).
26 An Amended Complaint will be filed today.

1 **I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS, AND HAVE,**
 2 **AT THE VERY LEAST, SHOWN SERIOUS QUESTIONS AS TO MERITS**

3 **A. Plaintiffs Are Likely to Succeed on Their First Amendment Claims and**
 4 **Have Presented Serious Questions Going to Merits**

5 As we understand it from the Secretary’s public statements and the government’s
 6 representations to this Court, the Secretary’s *Interpretation* is a complete ban on the use of
 7 WeChat. Such a complete ban on WeChat is an unprecedented is a clear First Amendment
 8 violation—but at the very least, meets the standard for a preliminary injunction to preserve
 9 the status quo because “serious questions going to the merits were raised [with] the balance
 10 of hardships [tipping] sharply in the plaintiff’s favor.” *All. for the Wild Rockies v. Cottrell*,
 11 632 F.3d 1127, 1134–35 (9th Cir. 2011).

12 There are a litany of reasons why the WeChat ban is unconstitutional (or poses, at
 13 the very least, “serious questions going to the merits” as to whether Defendants’ actions
 14 violate the First Amendment). *First*, the EO and the *Interpretation* function as a prior
 15 restraint in that they prevent Plaintiffs and other WeChat users from speaking without the
 16 government’s approval and “make[] the peaceful enjoyment of freedoms which the
 17 Constitution guarantees contingent upon the uncontrolled will of an official.”
 18 *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969); *FW/PBS, Inc. v. City of*
 19 *Dallas*, 493 U.S. 215, 226 (1990); *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230 (7th
 20 Cir. 2015) (holding operator was entitled to preliminary injunction based on government’s
 21 campaign to starve an online forum for sex-related classified ads of its business).

22 *Second*, there are serious questions as to whether the EO and *Interpretation*, in
 23 closing off WeChat to its users, are a content-based restriction that singles out content on
 24 WeChat, created and distributed by people in the Chinese community, for differential
 25 treatment. Defendants’ arguments that the restrictions are content-neutral is belied by the
 26 differential treatment announced by the Government toward Tik-Tok, which does not
 27 primarily have a Chinese-user base. *See Berger v. City of Seattle*, 569 F.3d 1029, 1051
 28 (9th Cir. 2009) (rules purportedly regulating time, place, manner of speech actually found

1 to be “content-based by its very terms” by restricting people “from communicating a
2 particular set of messages”). Despite allegedly similar concerns with respect to both
3 WeChat and Tik Tok, Tik Tok users are not being immediately silenced, but Plaintiffs will
4 be shut off from the domestic Chinese-American community and their overseas networks
5 effective Sunday. Plaintiffs have submitted unrebutted evidence that there is no *bona fide*
6 national security concern regarding WeChat, but instead that the directive is motivated by
7 a desire to silence Chinese-American voices and incite anti-Chinese animus in exchange
8 for political points. Therefore, serious questions are presented whether the EO can meet
9 strict scrutiny as “the least restrictive or least intrusive means” of promoting a
10 governmental interest, *see Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), when
11 the government has not even seriously considered the possible alternatives to a complete
12 ban. *See Opp.*, Dkt. 22 at 38-39. At the very least, the Court needs to preserve the status
13 quo so that the “burden [can] shift to the government to justify the restriction.”
14 *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011).

15 *Even if* the Court applies intermediate scrutiny (and it should not given the speech
16 of millions involved) there are also serious questions as to whether the EO and the
17 Secretary’s definitions satisfy those restrictions. The Government’s arguments on
18 national security are overbroad, conclusory, and unsupported. *See Reply*, Dkt. 28 at 8-10.
19 Even after clarifying that the WeChat ban is effective on Sunday, the Government still
20 cannot identify the source of their “fear” that use of WeChat poses a threat to national
21 security. *See Pls’ Response*, Dkt. 45 at 3-4. The Court does not need to take the
22 Government’s word just because they invoke unsubstantiated concerns about “national
23 security” as a talisman—especially when it is their burden to “justify the restriction” on
24 speech. *Thalheimer*, 645 F.3d at 1116; *S.O.C. v. County of Clark*, 152 F.3d 1136, 1146
25 (9th Cir. 1998) (plaintiffs demonstrated probable success on the merits because county did
26 not meet its burden of demonstrating that its content-based ordinance was the least
27 restrictive means to further a compelling interest).

28 Finally, it is beyond serious dispute that there are no substitutes to WeChat for

1 Plaintiffs. The constraints of the pandemic have forced the majority of communications
2 and associations to occur virtually. Plaintiffs have no viable alternative to WeChat to
3 access the vast network of Chinese communities found online. For numerous reasons,
4 apps like Line, Telegraph, and WhatsApp are not broadly used within the Chinese and
5 Chinese diaspora communities in which Plaintiffs wish to engage. Now that we know that
6 the EO will be interpreted to ban fully WeChat, the practical effects of the WeChat ban are
7 truly as broad as Plaintiffs hypothesized: Defendants have closed “an entire medium” of
8 communication for Plaintiffs. *See* Mot., Dkt. 17 at 34-36.

9 **B. Executive Order 13943, as Interpreted by the Secretary’s Identification**
10 **of Prohibited Transactions, Remains *Ultra Vires***

11 As we previously argued, Executive Order 13943 is *ultra vires* under the IEEPA.
12 That remains the case even after the Secretary’s *Identification*. The EO itself establishes
13 the prohibition that the Secretary’s *Identification* interprets, and that prohibition remains
14 unlawful if the Secretary’s *Identification* does not define it narrowly enough so as to avoid
15 running afoul of the express limitations on the President’s authority in 50 U.S.C. §
16 1702(b). The Secretary’s *Identification* does not come close to doing so.

17 Subsection 1702(b) forbids Defendants from “regulat[ing] or prohibit[ing], directly
18 *or indirectly*,” personal communications not involving transfers of value as well as the
19 importation or exportation of information or informational materials. 50 U.S.C. §
20 1702(b)(1), (3) (emphasis added). Congress included the phrase “directly or indirectly” in
21 Section 1702(b) to ensure that the IEEPA’s protections for the personal communications
22 and for exchange of information or informational materials has “a broad scope” that
23 “facilitates transactions and activities incident to the flow of information and informational
24 materials.” *Kalantari v. NITV, Inc.*, 352 F.3d 1202, 1205 (9th Cir. 2003) (quoting H.R.
25 Conf. Rep. No. 102-482 at 239 (1994)).

26 As we previously argued, the Executive Order by its terms bars “any transaction”
27 with WeChat, regardless whether it falls within the scope of the IEEPA’s limitation.
28 Indeed, the *Identification* simply demonstrates that the prohibition in the EO is unlawful.

1 Under the Secretary’s interpretation, the Executive Order prohibits “*Any* provision of
2 services to distribute or maintain the WeChat mobile application, constituent code, or
3 mobile application updates”; “*Any* provision of internet hosting services enabling the
4 functioning or hosting of the WeChat mobile application” and “*Any* utilization of the
5 WeChat mobile application’s constituent code, functions, or services in the functioning of
6 software or services developed and/or accessible within . . . the United States and its
7 territories.” Identification at ¶¶ 1-2, 6. As the Secretary himself admitted this morning, on
8 national television, WeChat will “for all practical purposes . . . be shut down in the U.S.”
9 as soon as the President’s prohibition takes effect on September 20. By “shut[ting] down”
10 an entire medium of communication, through which Plaintiffs and millions of other
11 Chinese Americans exchange ideas about news, culture, religion, politics, and myriad
12 other topics, Defendants have acted *ultra vires* by “indirectly” prohibiting Plaintiffs’
13 personal communications and importation and exportation of information or informational
14 materials.

15 **C. Plaintiffs are Likely to Succeed on their Challenges to the *Identification***
16 **Based on the Administrative Procedures Act.**

17 As the Court is well aware, Plaintiffs’ prior preliminary-injunction pleadings
18 focused only on the Executive Order, which is itself unlawful for all the reasons we have
19 given. But the Secretary’s *Identification*, which purports to implement the Executive
20 Order, is also itself unlawful under the Administrative Procedures Act. The APA directs
21 courts to “hold unlawful and set aside agency action” that is “arbitrary, capricious, an
22 abuse of discretion, or otherwise not in accordance with law”; “contrary to constitutional
23 right, power, privilege or immunity”; or “in excess of statutory jurisdiction, authority, or
24 limitations, or short of statutory right.” 5 U.S.C. § 706. The *Identification* violates the APA
25 for at least two reasons.

26 First, the government conceded at oral argument today that the Secretary has
27 implemented the Executive Order so as to ban all use of WeChat by plaintiffs and other
28 domestic users. But Section 1702(b) of the International Emergency Economic Powers Act

1 (“IEEPA”) states in relevant part that “[t]he authority granted to the President by [the
 2 IEEPA] does not include the authority to regulate or prohibit, directly or indirectly ...
 3 (1) any postal, telegraphic, telephonic, or *other personal communication*, which does not
 4 involve a transfer of anything of value.” 50 U.S.C. § 1702(b)(1).¹ The Secretary has now
 5 interpreted and implemented the Executive Order, however, precisely to bar such personal
 6 communications using WeChat.

7 The Court previously expressed skepticism about the ripeness of our argument that
 8 the Executive Order was *ultra vires* under the IEEPA, on the ground that the Secretary
 9 might have interpreted the Executive Order to be consistent with the IEEPA. But now that
 10 the Secretary has acted, the same underlying problem of the government running
 11 roughshod over the limitations contained in the IEEPA demonstrates that the *Identification*
 12 violates Section 706. The Secretary *could* perhaps have interpreted the Executive Order in
 13 a limited fashion consistent with the IEEPA—the Court’s point. But he chose not to do so,
 14 and thus his actual implementation of the Executive Order can and must be reviewed in
 15 light of the IEEPA. It is plainly inconsistent with that controlling statute.²

16 Second, the *Identification* is also invalid on procedural grounds under the APA.
 17 Because the Secretary’s determination of which transactions are covered by the Executive
 18 Order is purported to have binding legal effect, it constitutes a final rule that should have
 19 been promulgated via notice-and-comment rulemaking procedures under 5 U.S.C.
 20 § 553(b). The government will surely argue that the *Identification* falls within the foreign
 21 affairs exception in Section 553(a)(1). But that provision must be “narrowly construed and
 22

23 _____
 24 ¹ It also provides that the president may not regulate or prohibit “(2) donations, by persons
 25 subject to the jurisdiction of the United States, of articles, such as food, clothing, and
 26 medicine, intended to be used to relieve human suffering...[or] (3) the importation from
 any country, or the exportation to any country, whether commercial or otherwise,
 regardless of format or medium of transmission, of any information or informational
 materials[.]” *Id.* (b)(2)-(3).

27 ² To the extent the government argues for a narrower interpretation of the *Identification*,
 28 that would be inconsistent with the government’s representations both in the media and in
 this Court. It would also serve to illustrate plaintiffs’ argument that both the Executive
 Order and the *Identification* are unconstitutional on vagueness grounds.

1 only reluctantly countenanced.” *Zhang v. Slattery*, 55 F.3d 732, 744 (2d Cir. 1995); *see*
2 *also* H.R. Rep. No. 79-1980, at 257 (1946) (limited to “only those ‘affairs’ which so affect
3 the relations of the United States with other governments that, for example, public
4 rulemaking provisions would provoke definitely undesirable consequences.” The Ninth
5 Circuit has repeatedly explained that this exception must be construed narrowly. *E.g.*, *E.*
6 *Bay. Sanctuary Covenant v. Trump*, 932 D.3d 742, 775 (9th Cir. 2018). The government is
7 regulating (and banning) the use by U.S. citizens and residents of a specific business’s app.
8 Any underlying relation to the foreign affairs of the country is at best highly attenuated.

9 Indeed, the Secretary of Commerce himself apparently recognizes that the National
10 Emergency declared by the President in May 2019, underlying the WeChat Executive
11 Order, is not a sufficient reason to skip over the APA’s notice-and-comment requirement.
12 In November 2019 the Secretary issued a notice of proposed rulemaking to implement
13 Executive Order 13873 (“Securing the Information and Communications Technology and
14 Service Supply Chain”)—the very Executive Order declaring the national emergency on
15 which the later WeChat Executive Order (E.O. 13943) was based. *See* Proposed Rule;
16 Request for Comments; *Securing the Information and Communications Technology and*
17 *Services Supply Chain*, 84 Fed. Reg. 65316 (Nov. 27, 2019).

18 And the concern about the lack of notice-and-comment procedures here is not
19 purely hypothetical. In such proceedings, for example, plaintiffs and others could have
20 argued that an alternative to an outright ban would have been strict data privacy or other
21 restrictions on WeChat in the United States, rather than an outright ban.

22 Plaintiffs thus are likely to succeed on the merits of their APA claims.

23 **D. Plaintiffs are likely to succeed on their Vagueness Claims**

24 Plaintiffs have previously argued that the EO is void for vagueness because it was
25 entirely unclear what transactions would be barred. *See* Dkt. 17, at 16-21; Dkt. 28 at 11-
26 12. The issuance of the Secretary’s *Identification* of course changes this argument; but it
27 does not in the end eliminate the argument: As plaintiffs explained this morning (Dkt. 45
28 at 2-3), it remains unclear what the Executive Order, as implemented by the *Interpretation*,

1 bans. Indeed, different government officials have provided different interpretations of it to
 2 the media today. *See id.* And as we also noted, the Secretary specifically retains the
 3 authority to change what transactions are banned (*Identification* at ¶ 7). Coupled with the
 4 provision in the Executive Order allowing for enforcement of the prohibitions without any
 5 notice (E.O. 13943 at 2 § 3), our prior argument that the Executive Order is void for
 6 vagueness remains likely to succeed on the merits even after the Secretary’s promulgation
 7 of his *Interpretation*.

8 **II. PRELIMINARY INJUNCTIVE RELIEF IS NECESSARY TO AVOID**
 9 **FURTHER HARMS**

10 The uncontested evidence shows Plaintiffs fear being disconnected from families
 11 and friends in the United States and China as well as of being cut off from political
 12 discussions, campaign participation, religious events, and other social and cultural events.
 13 Mot. (Dkt. 17-1) at 35-36. The unrebutted evidence also shows a WeChat ban effectively
 14 cuts off Plaintiffs’ primary means of communication with business and non-profit contacts.
 15 *Id.* at 36.

16 There are no effective substitutes or available alternatives to WeChat because no
 17 other app with the same or similar set of functions is designed for and used by Chinese-
 18 speaking users, and none have the network effects of WeChat. *See* Duan Decl. ¶¶ 29-30;
 19 Peng Decl. ¶¶ 24-26, 28; Zhang Decl. ¶¶ 19-20, 22-23; Coulter Decl. ¶ 11; Bao Decl. ¶ 17;
 20 *see also* Sun ¶¶ 12-34. After learning today of Defendants’ WeChat ban, Plaintiff Peng is
 21 “shocked and frightened, as my service recipients who are suffering mental health
 22 problems – including depression, schizophrenia, bipolar disorder, and post-traumatic stress
 23 disorder – will lose access to WeChat, the only channel for the them to receive services,
 24 educational materials, and treatment resources. This is a humanitarian crisis.” *See* Suppl.
 25 Peng Decl.” ¶ 7. Plaintiff Peng has tried to move the MHACC provider group to
 26 alternative apps but the majority of her service recipients cannot be shifted to other apps
 27 because WeChat is the only app with the functions MHACC needs that is also in the
 28 Chinese language. *Id.* ¶¶ 8-9. This includes WeChat’s ability to: “store all service

1 recipients' names, addresses, contact information, medical history, and other vital
 2 information;" "send out questionnaires;" allow for staff to "conduct one-on-one
 3 counselling;" evaluate case histories; and design and delivery treatment. *Id.* ¶ 9. MHACC
 4 has used " the real-time location sharing function on WeChat to prevent a suicide attempt."
 5 *Id.* Plaintiff Peng is "not aware of any method to transfer this information outside of
 6 WeChat." *Id.* Banning WeChat will mean that Plaintiff Peng and MHACC will lose "all
 7 these this valuable patient-specific information and destroy[] the fundamental foundation
 8 that MHACC has strived for years to build." *Id.* Plaintiff Peng will also lose "a critical
 9 and irreplaceable forum to reach" other Chinese Americans with whom she engages in
 10 political organizing. *Id.* ¶ 10.

11 **III. THE BALANCE OF HARDSHIPS AND THE PUBLIC INTEREST WEIGH**
 12 **HEAVILY IN PLAINTIFFS' FAVOR**

13 For the reasons already identified, the balance of hardships and public interest
 14 weigh heavily in Plaintiffs' favor. The government's invocation of national security
 15 concerns remains entirely speculative and conclusory.

16 **CONCLUSION**

17 For the reasons already in the record as well as those set forth above, Plaintiffs
 18 request that the Court enter a preliminary injunction as follows: Defendants President
 19 Donald J. Trump, in his official capacity, and Secretary of Commerce, Wilbur Ross, in his
 20 official capacity, as well as their agents, servants, employees, and all persons acting under
 21 their direction, are enjoined, pending final judgment, from enforcing Sections 1(a) and
 22 2(a)-(b) of Executive Order 13943 to directly or indirectly prohibit or limit any use of the
 23 WeChat application in the United States or by "United States persons" abroad.
 24 Defendants President Donald J. Trump, in his official capacity, and Secretary of
 25 Commerce, Wilbur Ross, in his official capacity, as well as their agents, servants,
 26 employees, and all persons acting under their direction, are enjoined, pending final
 27 judgment, from implementing Section 5 of Executive Order 13943 to directly or indirectly
 28 prohibit or limit any use of the WeChat application in the United States or by "United

1 States persons” abroad.
2

3 DATED: September 18, 2020

Respectfully submitted,

4 ROSEN BIEN GALVAN & GRUNFELD LLP

5 By: /s/ Michael W. Bien

6 Michael W. Bien

7 Attorneys for Plaintiffs
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