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

SUPPLEMENTAL BRIEF FOR PLAINTIFFS-APPELLEES

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INTRODUCTION

As explained in Plaintiffs' opening brief (USWUA Br.), the district court appropriately enjoined the WeChat ban because it violates the First Amendment; the connection between the ban and the government's national-security interests is "modest," I-ER-86; and the injury to Plaintiffs absent an injunction would be irreparable. As noted in that brief (at 25 & n.2), the WeChat ban also violates the International Emergency Economic Powers Act (IEEPA); we submit this supplemental brief addressing that claim.

The President's power under IEEPA is expressly limited: It "does not include the authority to regulate or prohibit, directly or indirectly," "any postal, telegraphic, telephonic, or other personal communication," or "the importation … or … exportation … of any information or informational materials" "regardless of format or medium of transmission." 50 U.S.C. § 1702(b)(1), (b)(3).

The WeChat ban plainly exceeds the President's power under this statute. It will "shut down" an app that is designed specifically for "personal communication," *id.* § (b)(1), and which "serves a multitude of communicative needs." II-ER-411, 446, 456. WeChat is also routinely used for the international transmission of "information or informational materials," *id.* § (b)(3), including "content … such as the news," I-ER-70, "photos," II-ER-446, and "lectures," II-ER-503. The WeChat ban is therefore *ultra vires* because it will "effectively

eliminate" American users' ability to send and receive communications, as well as prohibit or inhibit other means of international information exchange. I-ER-82.

That conclusion is buttressed by no fewer than three recent decisions concluding that the government's substantially identical ban on TikTok, a video sharing app, violates IEEPA. As Judge Nichols explained, "[t]he President's TikTok Order and the Secretary's prohibitions aim to stop U.S. users from communicating and thus sharing data on TikTok. The ultimate purpose (or intended object) of those prohibitions is to prevent China from accessing those data and spreading disinformation on TikTok." *TikTok Inc. v. Trump* (*TikTok II*), __ F. Supp. 3d __, 2020 WL 7233557, at *15 (D.D.C. Dec. 7, 2020). Accordingly, "while the government's actions may not constitute *direct* regulations or prohibitions of activities identified in 50 U.S.C. § 1702(b), they likely constitute *indirect* regulations of 'personal communication[s]' or the exchange of 'information or informational materials.'" *Id.*; *see also Marland v. Trump*, __ F. Supp. 3d __, 2020 WL 6381397, at *8 (E.D. Pa. Oct. 30, 2020), *appeal docketed*, 20-3332 (3d Cir.); *TikTok Inc. v. Trump* (*TikTok I*), 2020 WL 5763634, at *7 (D.D.C. Sept. 27, 2020), *appeal docketed*, 20-5302 (D.C. Cir.) (*TikTok* appeal).

The government's arguments to limit the scope of IEEPA are in direct conflict with the statutory text, structure, background, and purpose.

STATUTORY BACKGROUND

Enacted in 1977 in the aftermath of Vietnam and Watergate, "IEEPA was passed by Congress to counter the perceived abuse of emergency controls by presidents." *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 776 (9th Cir. 2006) (citing S. Rep. No. 95–466, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4540, 4541). IEEPA thus granted "the President a new set of authorities for use in time of national emergency which are both more limited in scope than those of [the earlier Trading With the Enemy Act] and subject to various procedural limitations." H.R. Rep. No. 95-459, at 2 (1977).

IEEPA allows the President to "deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." 50 U.S.C. § 1701(a). This limited grant of authority is subject to a number of explicit constraints.

As a threshold matter, the President must first "declare[] a national emergency with respect to [the specific] threat." *Id.* The President must also, "in every possible instance, … consult with the Congress before exercising [IEEPA] authorities," *id.* § 1703(a), and may only exercise those authorities with respect to the specific threat, "not … for any other purpose," *id.* § 1701(b).

Only when those conditions are met does IEEPA authorize the President to "regulate … or prohibit … transactions involving[] any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States." 50 U.S.C. § 1702(a)(1)(B).

Congress substantively limited the president's power under Section 1702. First, the authority granted under IEEPA explicitly "does not include the authority to regulate or prohibit, *directly or indirectly*," "any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value." 50 U.S.C. § 1702(b)(1) (emphasis added); Pub. L. No. 95–223, title II, § 203(b), 91 Stat. 1625, 1626-27 (1977). The legislative history explained that this limitation was "designed both to preserve First Amendment freedoms of expression, and to preclude policies that would totally isolate the people of the United States from the people of any other country." H.R. Rep. No. 95-459, at 16.

Second, the 1988 "Berman Amendment" added Section 1703(b)(3), "to prevent the executive branch from restricting the international flow of materials protected by the First Amendment." *Kalantari v. NITV, Inc.*, 352 F.3d 1202, 1205 (9th Cir. 2003).[1] Section 1702(b)(3) specified that the President's IEEPA authority

[1] Congress had in 1978 considered a similar provision that IEEPA "does not include the authority to regulate or prohibit the collection and dissemination of news by the news media," but did not include it because "[t]he news media have

"does not include the authority to regulate or prohibit, directly or indirectly," the importation or exportation, "whether commercial or otherwise," "of any information or informational materials." Pub. L. No. 100-418, title II, § 2502(b)(1), 102 Stat. 1371 (1988). The amendment's legislative history emphasized the importance of promoting the free exchange of ideas and information across borders and ensuring that IEEPA not be used to target information protected by the First Amendment. *See* H.R. Rep. No. 100-40, at 113 (1987).

In 1994, Congress "expanded [this] exemption's nonexclusive list of informational materials to include new media, such as compact discs and CD-ROMs, and it clarified that the exemption applied to importation and exportation in any 'format or medium of transmission.'" *Kalantari*, 352 F.3d at 1205; Pub. L. No. 103-236, title V, § 525(c)(1), 108 Stat. 474 (1994). "[N]ews wire feeds" were also added to the list of exempt materials. *Id*. The amendment was intended to reverse instances in which "the Treasury Department ha[d] narrowly and restrictively interpreted" the Berman Amendment. H.R. Conf. Rep. No. 103-482, at 239 (1994), *reprinted in* 1994 U.S.C.C.A.N. 398, 483. *See United States v. Amirnazmi*, 645 F.3d 564, 585 (3d Cir. 2011) (describing amendment as response

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long maintained that the First Amendment … provides adequate and complete protection of freedom of the press." H.R. Rep. No. 95-459, at 15-16.

in part to Treasury's exclusion of "intangible materials" from the definition of "informational materials").

ARGUMENT

THE WECHAT BAN EXCEEDS THE PRESIDENT'S IEEPA AUTHORITY.

The WeChat ban violates the explicit textual limits of IEEPA: It is, at a minimum, an "indirect"[2] "regulat[ion]"[3] of "any … personal communication," or "the importation … or … exportation … of … any information or informational materials," and thus is outside "[t]he authority granted to the President," 50 U.S.C. § 1702(b)(3).[4] Statutory interpretation "begins with the language of the statute itself" and, where the statute's language is plain, "that is also where the inquiry should end." *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (quotation omitted). Here, the statutory language is plain; the WeChat ban falls firmly within these exemptions.

"The verb 'regulate' means 'to control' or 'to govern.' The adverb 'indirectly' means … 'not directly,' or 'mediately.'" *Marland*, 2020 WL 6381397,

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[2] (if not "direct").

[3] (if not "prohibit[ion]").

[4] Because appellate courts may "affirm the district court's holding on any ground raised below and fairly supported by the record," *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208, 1226 (9th Cir. 2009), there is no merit to the claim in the government's supplemental brief that this Court cannot affirm the injunction on IEEPA grounds.

at *8. Courts have repeatedly recognized that Congress "explicitly intended, by including the words 'directly and indirectly,'" that the limitations in Section 1702(b) have "broad scope." *Amirnazmi*, 645 F.3d at 585; *see also Kalantari*, 352 F.3d at 1205 (quoting H.R. Conf. Rep. No. 103-482, at 239).

Thus, under IEEPA, the President lacks the authority to control or severely hinder any of Plaintiffs' personal communications or the international flow of any information or informational materials, whatever the medium. But this is precisely what the WeChat ban is intended to do, and does. There is no dispute that the ban would immediately bar new downloads and would soon "shut down" the app. II-ER-411, 456. Indeed, the government's own declarant concedes that the purpose of the WeChat ban is to regulate the platform out of existence. *See* II-ER-404-405 ("the purpose of the prohibitions is to degrade [and] impair" the app "to the extent that it would no longer function"). By preventing the personal communications and flow of information and informational materials between app users, the WeChat ban violates the explicit textual limits of IEEPA. *TikTok II*, 2020 WL 7233557, at *7-13; *Marland*, 2020 WL 6381397, at *8-12.

A. The fact that the WeChat ban purports to regulate commercial activity is irrelevant.

In the *TikTok* appeal, the government argues that the statutory limitations on IEEPA do not apply to the substantially identical TikTok ban because the "prohibitions … are a regulation of … commercial transactions, and have only an

incidental effect on … user communications." Gov't *TikTok* Br. 31; *see also* Gov't *TikTok* Reply Br. 8-9. This echoes the government's spurious argument here that the WeChat ban, by purporting to regulate commercial activity rather than speech, raises ***no*** First Amendment concerns. Just as the argument should be rejected in the First Amendment context, *see* USWUA Br. 20-25, so too must it be rejected under IEEPA—as every court to consider it has done. *See TikTok II*, 2020 WL 7233557, at *10 ("[A]s the government has emphasized, the TikTok prohibitions directly prohibit certain business-to-business transactions…. But the two goals of those prohibitions are to halt U.S. user data from flowing to China and to stop CCP propaganda from spreading in the United States, and the Secretary seeks to achieve those goals indirectly … by shutting down the TikTok app."); *Marland*, 2020 WL 6381397, at *12; *TikTok I*, 2020 WL 5763634, at *4.

The government cannot circumvent the limits on IEEPA simply by claiming that the objective of the WeChat ban is to regulate commerce, because the effect indisputably would preclude speech. Courts have long recognized that even "regulations that have only incidental effects" can constitute an "indirect regulation" that exceeds the limits of government power. *See, e.g.*, *Oregon Waste Sys. v. Dep't of Env't Quality*, 511 U.S. 93, 99 (1994). The WeChat ban will "shut down" a unique communications network and effectively prevent Americans from communicating and from importing and exporting informational materials—

precisely the type of "indirect" prohibition that the IEEPA exemption was designed to protect against. *See, e.g.*, *Kalantari*, 352 F.3d at 1207 (IEEPA exemption "plainly allows" importation of an Iranian movie despite government embargo on non-expressive goods).

The government relies heavily on a case involving a statute banning travel to Cuba, *Walsh v. Brady*, 927 F.2d 1229 (D.C. Cir. 1991). In that case, an importer of Cuban posters argued that he should be permitted to travel to Cuba under an equivalent exemption allowing for the importation of informational materials. *Id*. at 1231-32. The D.C. Circuit rejected this argument because the travel ban was a "generic travel regulation[]." *Id*. at 1233. Although the operative statute empowered the importer to undertake the transactions necessary to import posters, physical travel to Cuba was "considered too tangential" to that process and thus did not necessitate an exemption to the travel ban. *Id*. at 1231. The WeChat ban is not "generic," nor are its effects "tangential": The proposed prohibitions are specifically intended to "shut down" the communications medium WeChat, and thus to make it impossible for American users to import and export information to China. *See TikTok II*, 2020 WL 7233557, at *9-10 (distinguishing *Walsh*).[5]

[5] The government also suggested (Gov't *TikTok* Br. 52-53) that a later statute, 50 U.S.C. § 1708—which targets industrial espionage—allows it to regulate commercial transactions irrespective of the limits in § 1702(b). But § 1708(c) specifically provides that "[n]othing in this section shall be construed to affect … the exercise of any authority provided for under any other provision of law." Thus,

B. The WeChat ban impermissibly regulates or prohibits "personal communications."

There can be no real dispute that content exchanged on WeChat constitutes "personal communication," 50 U.S.C. § 1702(b)(1). There are approximately 19 million WeChat users in the United States (and more than 1 billion worldwide), who use the app to "communicate" "with family, friends, and colleagues (here in the U.S. and around the world)." I-ER-70; II-ER-446-447. The app "serves a multitude of communicative needs," including telephone calls, text messaging, video conferencing, sharing photos, and engaging with other users' content. II-ER-446-447; USWUA Br. 4-5. Indeed, "WeChat is effectively the only means of communication for many in the [Chinese-American] community." I-ER-83.

In the *TikTok* litigation, the government argues that the TikTok ban does not run afoul of Section 1702(b)(1) because all personal communications over digital communications platforms "involve a transfer of anything of value," 50 U.S.C. § 1702(b)(1)—specifically, data to the company that could be monetized, and in certain instances personal benefit to users through "brand and sponsorship deals." Gov't *TikTok* Br. 39-48; Gov't *TikTok* Reply Br. 16-20. But as Judge Nichols concluded, "the phrase 'anything of value' [in Section 1702(b)(1)] must refer to the transfer of value *between participants* in a personal communication itself," *TikTok*

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this argument has been roundly rejected. *See TikTok II*, 2020 WL 7233557, at *13; *Marland*, 2020 WL 6381397, at *10.

II, 2020 WL 7233557, at *11 (emphasis added)—a wire transfer, for example. The government's broad interpretation of the word "value" would swallow the entire statutory exemption.

The fallacy of the government's argument is confirmed by a textual reading of the full sub-paragraph of the exemption. Section 1702(b)(1) also exempts traditional "postal, telegraphic, [and] telephonic" modes of communication. 50 U.S.C. § 1702(b)(1). The postal service and phone company get paid for their services—a "transfer of anything of value," *id.* The government's reading thus would nullify the exemption entirely. *See TikTok II*, 2020 WL 7233557, at *11; *see also Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("[S]tatute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.").

C. The WeChat ban impermissibly regulates or prohibits Plaintiffs' importation and exportation of "information or informational materials."

Content on WeChat also undoubtedly constitutes "information or informational materials" under Section 1702(b)(3), and much of that content is "import[ed] or "export[ed]" to China and other countries. *Id.* WeChat users "rely on the [app] to communicate, socialize, and engage in business, charitable, religious, medical-related, and political activities with family, friends, and colleagues … *around the world*." I-ER-70 (emphasis added). In so doing, they

exchange a wide array of information or informational materials. *See* page 1, *supra*; *see also* II-ER-438-439, 446, 478, 488-489, 495, 499, 505, I-SER-043-45 ("critical" news source). It also has features akin to the "news wire feeds" explicitly referenced in the statute. I-SER-045 (WeChat Subscription Accounts provide a "news-pushing … platform").

The government suggests that this IEEPA exemption is no barrier to regulating TikTok (and presumably WeChat) "as a 'medium of transmission,'" irrespective of any effect on the international transfer of information *over* that medium. Gov't *TikTok* Br. 48; Gov't *TikTok* Reply Br. 21. The statute provides no support for this reading, which is essentially another version of the government's argument that it can ban commercial transactions with Tencent (the Chinese company that owns WeChat) despite the intended effect being to ban WeChat. *See* pages 7-8, *supra*. A regulation shutting down an entire communications medium—like the WeChat ban—is (at the very least) an indirect regulation of the "importation … of … information" on that medium.

Indeed, the government ignores that the very purpose of the WeChat ban was to stop the international transmission of data: The WeChat Executive Order justified the ban because WeChat allegedly "captures vast swaths of *information* from its [United States] users" that the CCP in China may access, and "may be used for dis*information* campaigns that benefit the [CCP]." II-ER-262 (emphasis

added). Judge Nichols correctly rejected this argument because "the government's stated goals … include stopping the exportation of data … to China and stopping the importation of propaganda into the United States." *TikTok II*, 2020 WL 7233557, at *12.

CONCLUSION

The WeChat ban exceeds the government's authority under IEEPA, which provides another reason to affirm the district court.

Dated: December 14, 2020

Respectfully submitted,

/s/ David M. Gossett

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UNITED STATES COURT OF APPEALS
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