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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

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

Plaintiffs,

v.

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

Defendants.

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

**REPLY IN SUPPORT OF PLAINTIFFS'  
MOTION FOR PRELIMINARY  
INJUNCTION**

Judge: Hon. Laurel Beeler  
Date: September 17, 2020  
Time: 9:30 a.m.  
Crtrm.: Remote

Trial Date: None Set

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## INTRODUCTION

“A preliminary injunction is not a preliminary adjudication on the merits, but a device for preserving the status quo and preventing the irreparable loss of rights before judgment.” *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1234 (9th Cir. 1999), *supplemented*, 236 F.3d 1115 (9th Cir. 2001). It is telling that Defendants’ 40-page Opposition fails to even refer to the “status quo.” In deciding this motion, it is not necessary for the Court to adjudicate the merits of Plaintiffs’ constitutional and statutory claims raised, but instead to focus on the standards for granting preliminary injunctive relief: likelihood of success on the merits, irreparable harm in the absence of preliminary relief, the balance of the equities, and the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A preliminary injunction is appropriate here, where the Plaintiffs have demonstrated “that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff’s favor.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011). Defendants concede that the Executive Order (the “EO”) implicates the First Amendment, see Opp. at 24-32, and therefore Defendants have the burden of justifying the EO’s restriction on constitutionally-protected activities. *See* Mot. at 15:13-24 (citing cases). Defendants have failed to meet this burden and the preliminary injunction should be granted so the status quo can be preserved.

While Defendants provide argument, they fail to present any admissible evidence,<sup>1</sup> including in response to the declarations provided by each of the individual Plaintiffs and their experts. *See* Dkts. 17-1 through 17-11. Defendants do not dispute, for example, that millions of Chinese speakers in America—new immigrants, citizens, green card holders, students and other visitors—are not proficient in English, and therefore rely on WeChat, even more so during the pandemic, in their day-to-day activities. Nor do Defendants provide any evidence of available alternatives that can replace the functions, services, and

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<sup>1</sup> Civil Local Rule 7-5 requires that “[f]actual contentions made in support of or in opposition to any motion must be supported by an affidavit or declaration and by appropriate references to the record.”

1 communication that are currently threatened by the WeChat ban.

2 Defendants also do not dispute that WeChat users in the United States, including  
 3 Plaintiffs, are highly dependent on WeChat, and regularly use the app to communicate  
 4 with other users in this country. Nor do Defendants dispute that Plaintiffs and other U.S.-  
 5 based users rely on WeChat for multiple activities otherwise protected by the First  
 6 Amendment, including reading the news; sharing, publishing, and discussing social issues;  
 7 organizing and assembling for all purposes, including political activity; practicing religious  
 8 and cultural traditions;<sup>2</sup> engaging in business and charitable works; socializing with friends  
 9 and family; communicating with Chinese speakers in the United States, in China and  
 10 around the world, by text, voice and video; and interacting with state and local  
 11 governments in the United States about issues of public importance. *See* Mot. at 6-9.

12 Defendants’ attorneys, once again unsupported by any evidence, argue that  
 13 Plaintiffs and the numerous other WeChat users, journalists, lawyers, and commentators  
 14 who have read the EO, and have been unable to discern what “transactions” will be  
 15 prohibited on September 20, 2020 are all wrong in believing that they are at substantial  
 16 risk absent a preliminary injunction. According to Defendants, “[t]he Order is not self-  
 17 executing: it prohibits only those transactions that are ‘identified by the [Secretary] under  
 18 section 1(c) of this order.’” Opp. at 23:8-10. Thus, it is wrong for the Court to evaluate the  
 19 EO for clarity—even though the EO may be vague and overbroad—because any such  
 20 defects will be cured by the requirement (in the same vague and overbroad EO) that the  
 21 Secretary shall define “transactions” on September 20, 2020, the same day that the EO  
 22 becomes enforceable by criminal and civil penalties.

23 The absence of evidence, other than the EO itself, proves the point: there is no  
 24 statement by Secretary Ross assuring that he will act on September 20, 2020, or that he

25 \_\_\_\_\_  
 26 <sup>2</sup> While it is correct that Plaintiffs did not base this motion on their claim that the EO  
 27 violates RFRA, *see* Opp. at 35-36, Plaintiffs included extensive evidence and argument  
 28 that a WeChat ban would substantially burden a range of First Amendment protected  
 religious activities, including prayer, Bible study, and celebrations of religious and cultural  
 holidays and events. *See* Mot. at 8-9, 22-23. Defendants do not dispute that a WeChat ban  
 would burden the free exercise of religion.

1 will address the fears and concerns raised by Plaintiffs in this action by limiting the  
 2 definition of “transaction” so it does not run afoul of the constitutionally-protected  
 3 interests at issue in this action.<sup>3</sup> And Defendants’ argument is also inconsistent with the  
 4 EO itself; they fail to address Section 3 of the EO, which specifically allows the EO to be  
 5 enforced with “no prior notice of an identification pursuant to section 1(c)” of the EO—  
 6 that is, a definition of which transactions are prohibited.

7 Indeed, rather than alleviate any fears, Defendants double-down on the threat of a  
 8 total ban, exacerbating Plaintiffs’ fears. Yes, the Secretary may cut off the only way to  
 9 communicate with friends and family in China, but that is China’s fault and so is somehow  
 10 not appropriate for the Court’s consideration. Opp. at 32:4-13; *see also id.* at 33:21-25  
 11 (arguing that Plaintiffs’ “obstacles and burdens in arranging charitable activities or travel  
 12 plans” by a WeChat ban are actually caused by “the anticompetitive and restrictive policies  
 13 of the [People’s Republic of China],” not the EO). Yes, the Secretary may ban all uses of  
 14 WeChat by users in the United States, but there must be “numerous alternatives” (once  
 15 again, without evidence)—even if “less preferable due to cost or functionality.” Opp. at  
 16 31:11-19. As of September 11, 2020, more than five weeks after the EO was issued and  
 17 nine days before its effective date, Defendants have nothing to say to this Court other than  
 18 all options remain on the table, and get ready for a complete ban of any use of WeChat.

19 Defendants contend that the Court lacks the power to even address this motion and  
 20 that it is inappropriate to question the President’s actions or his motivations so long as they  
 21 somehow implicate national security. As demonstrated below, both contentions are wrong.  
 22 But given the conceded uniqueness of the functionality provided by the WeChat super-app,  
 23 its critical uses for Chinese speakers in the United States, and the vagueness of and  
 24 confusion caused by the EO, no cases are directly on point as to the merits. The  
 25 Government has never before threatened to ban a social media platform that addresses  
 26 such a range of communicative needs for a minority community. *See Chemerinsky Decl.*

27  
 28 <sup>3</sup> *See* Reply Declaration of Michael W. Bien (“Bien Reply Decl.”) ¶ 5.

(Dkt. 17-8) ¶ 5; Alben Decl. (Dkt. 17-7) ¶ 3.<sup>4</sup> Plaintiffs raise serious and complex questions under the First and Fifth Amendment, and *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), which concerned a much narrower restriction on speech, does control even if it is China’s “fault” that WeChat is “irreplaceable.” Opp. at 28:18-29:6.

Under these circumstances, the Court must act to preserve the status quo so that Plaintiffs and all other individuals and entities in the United States can continue using WeChat and avoid the irreparable harm caused by the loss of constitutionally-protected rights before final adjudication on the merits. After a self-imposed 45-day waiting period—itself unexplained and seemingly inconsistent with the purported national security implications to justify a ban on WeChat—Defendants have failed to offer any evidence or argument that explains how the public interest is served by allowing criminal and civil penalties under the EO to become effective on September 20, 2020, rather than 60 days after the Secretary defines the covered “transactions,” thus affording Plaintiffs and others time to come into compliance or to seek judicial review of any such definition. Plaintiffs’ uncontroverted evidence of real, cognizable harm that they have and are experiencing would be addressed by the proposed preliminary injunction and the status quo would be preserved, pending a final decision on the merits.

## **I. THE ISSUES IN THIS MOTION ARE JUSTICIABLE**

### **A. Plaintiffs’ Claims Are Ripe for Review**

Defendants concede that Plaintiffs’ claims are constitutionally ripe but nevertheless argue that this Court should deny this motion on “prudential” ripeness grounds. *See* Opp. at 17:17–18:4. To determine whether a claim is prudentially ripe, the Court must consider “both the fitness of the issues for judicial decision and the hardship to the parties of

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<sup>4</sup> The Alben and Chemerinsky declarations provide factual and historical perspectives about bans on protected First Amendment activities and do not “give an opinion as to [their] legal conclusion, *i.e.*, an opinion on an ultimate issue of law.” *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008). Even if an expert declaration includes some improper legal opinion or argument—which these do not—a court may choose to strike just the offending sections. *See, e.g., Lira v. Cate*, No. C00-0905, 2010 WL 727979, at \*4 n.4 (N.D. Cal. Feb. 26, 2010).

1 withholding court consideration.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).

2 Defendants contend that Plaintiffs’ claims are not ripe because they “are premised  
3 on speculation regarding the scope and impact of the Executive Order.” Opp. at 18:5-6.  
4 But the EO itself provides all the Court needs to decide whether it is likely that its  
5 prohibitions are unconstitutionally vague and overbroad and exceeds the scope of the  
6 President’s authority under 50 U.S.C. § 1702(b). As Plaintiffs demonstrated in their  
7 motion, Sections 1(a), 2(a), and 2(b) of the EO alter Plaintiffs’ legal rights and obligations  
8 on September 20, 2020, and will expose them to civil and criminal liability on that day,  
9 independent of any action by the Secretary of Commerce. *See* Mot. at 10-12:4. Nothing in  
10 the EO or in the IEEPA suggests that further action by the Secretary or anyone else is a  
11 necessary precondition for the sweeping prohibitions articulated in these sections of the  
12 EO to be legally binding on Plaintiffs. *See* 50 U.S.C. §§ 1702(a)(1), 1704 (authorizing the  
13 President himself to designate conduct as unlawful, without any further action by any other  
14 official); *United States v. Arch Trading Co.*, 987 F.2d 1087, 1094-95 (4th Cir. 1993)  
15 (affirming criminal sanctions for violation of an executive order issued pursuant to IEEPA,  
16 even though implementing regulations had not yet been issued at the time of the offense).

17 The existence of “speculation” about how the Government will enforce the Order is  
18 precisely why immediate review and preliminary relief is necessary. Absent immediate  
19 review, Plaintiffs’ First Amendment rights will continue to be chilled. While it may be  
20 appropriate to defer review of certain executive orders that contemplate further  
21 administrative action, immediate review is justified in circumstances like these, where the  
22 *informal* effects of a vague and overbroad executive order cause Plaintiffs immediate and  
23 irreparable harm. *See County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 529-30 (N.D.  
24 Cal. 2017) (rejecting the President’s argument that the constitutionality of an executive  
25 order was not ripe because other executive branch officials “must still determine what the  
26 terms of the Order mean”); *Chamber of Comm. v. Reich*, 57 F.3d 1099, 1100-01 (D.C. Cir.  
27 1995) (reversing district court’s decision that an *ultra vires* challenge to an executive order  
28 was not ripe until finalization of implementing regulations, where the order had informal

1 effects on the balance of negotiating power between employers and organized labor).

2 It would be futile to wait for the Secretary to construe the term “transaction,” *see*  
 3 *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1058 (9th Cir. 1995), as all  
 4 available evidence suggests that Defendants will simply repackage the same sweeping  
 5 prohibition contained in the EO. Doing so would be consistent with Defendants’ prior  
 6 actions. Executive Order 13873—on which the President’s purported authority to issue the  
 7 WeChat EO depends—defines “transaction” to include any “use” of designated  
 8 information and communications technologies or services “by any person.” *See* Bien Decl.  
 9 (Dkt. 17-12) ¶ 3 & Ex. B. And Defendants fail to provide assurances that they intend to  
 10 interpret the term more narrowly in the EO at issue. Indeed, Defendants’ Opposition  
 11 suggests that the Secretary’s definition of “transactions” will cover all uses of the app. *See*  
 12 *Opp.* at 33:3-9 (arguing that any communication through WeChat necessarily involves an  
 13 “exchange [of users’] personal data and content for the right to use WeChat services,” and  
 14 thus a “transfer of value”). Plaintiffs may well choose to challenge the Secretary’s  
 15 definition of “transaction” after September 20, 2020—via an amended complaint or  
 16 otherwise—but this in no way renders their challenge to the underlying EO unripe.<sup>5</sup>

### 17 **B. Plaintiffs’ Challenges Involving National Security Determinations Are** 18 **Justiciable**

19 Defendants cite numerous authorities for the proposition that “the President’s  
 20 discretionary judgment as to what is and is not an emergency” represents a non-justiciable  
 21 political question. *Opp.* at 19:20-24, 20 n.11. But Plaintiffs are not challenging the  
 22 validity of Executive Order 13873, the President’s May 15, 2019 declaration of a national  
 23 emergency that is a necessary legal basis for the President even to issue the WeChat EO;

24  
 25 <sup>5</sup> Defendants invite the Court to re-write the EO itself under the guise of applying the  
 26 savings clause in Section 1(b). *Opp.* at 19 n.10. The Court should decline this invitation  
 27 to take on a role that is properly left to the elected branches of government. *See City and*  
 28 *County of San Francisco v. Trump*, 897 F.3d 1225, 1239-40 (9th Cir. 2018) (rejecting the  
 President’s argument that a similar savings clause rescued a similarly vague and overbroad  
 executive order from unconstitutionality, despite a provision indicating that the order  
 would be clarified by future administrative action).

1 rather, Plaintiffs challenge the validity only of the *WeChat* EO. None of Defendants' cases  
 2 suggest that the President's *exercise* of emergency powers authorized by the IEEPA during  
 3 a declared national emergency are non-justiciable. To the contrary, questions about  
 4 whether the President validly exercised those powers clearly are *not* political questions.  
 5 There is no "textually demonstrable" commitment of such questions to a branch other than  
 6 the judiciary, and the IEEPA and the First and Fifth Amendments set out discernible limits  
 7 on the President's authority that courts can apply without engaging in subjective policy  
 8 judgments. *See generally Baker v. Carr*, 369 U.S. 186 (1962). Indeed, the justiciability of  
 9 the President's exercise of the emergency powers granted to him by IEEPA is clear from  
 10 the fact that courts do consider the merits of similar challenges to executive orders  
 11 involving national security issues and in doing so, evaluate the sufficiency of the evidence  
 12 provided by the Government to substantiate its national security arguments, rather than  
 13 dismiss on political question grounds. *See Al Haramain Islamic Found., Inc. v. U.S. Dep't*  
 14 *of Treasury*, 686 F.3d 965 (9th Cir. 2012); *see also Ralls Corp. v. Comm. on Foreign Inv.*  
 15 *in U.S.*, 758 F.3d 296, 318 (D.C. Cir. 2014) ("Both the Supreme Court and this Court have  
 16 recognized that the right to know the factual basis for the action and the opportunity to  
 17 rebut the evidence supporting that action are essential components of due process.").

### 18 C. Plaintiffs' *Ultra Vires* Claims Are Justiciable

19 Defendants argue that Plaintiffs lack a private right of action to enforce the  
 20 limitations on the President's authority in the IEEPA, Opp. at 20:6-22:6, but Plaintiffs'  
 21 *ultra vires* claims do not require a statutory cause of action. Courts have long "presume[d]  
 22 that Congress intends the executive to obey its statutory commands and, accordingly, that  
 23 it expects the courts to grant relief when [the President] violates such a command."  
 24 *Chamber of Comm v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996). None of Defendants'  
 25 cases suggest otherwise, and the Ninth Circuit reaffirmed the availability of *ultra vires*  
 26 claims earlier this year in *Sierra Club v. Trump*, 963 F.3d 874, 890-92 (9th Cir. 2020).

27 Defendants contend that Congress expressly precluded all judicial review of  
 28 executive actions taken pursuant to the IEEPA. *See* Opp. at 21:13-15. But the subsection

Defendants cite for this proposition—50 U.S.C. § 1702(c)—instead proves if anything the opposite; it acknowledges that there may be judicial review of IEEPA determinations under general principles of law, and merely specifies that any classified material relevant to that case may be submitted *in camera*. By noting that “*this subsection* does not confer or imply any right to judicial review,” *id.* (emphasis added), the provision acknowledges the presumption that “[w]hen an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority.” *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988). Defendants’ interpretation of Section 1702(c) is contradicted by a substantial body of case law deciding challenges to the scope of the President’s IEEPA authority on the merits, rather than on jurisdictional grounds. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Milena Ship Mgmt. Co. v. Newcomb*, 804 F. Supp. 846, 850 (E.D. La. 1992); *Veterans Peace Convoy, Inc. v. Schultz*, 722 F. Supp. 1425 (S.D. Tex. 1988).

## **II. DEFENDANTS’ OVERBROAD, CONCLUSORY, AND UNSUPPORTED NATIONAL SECURITY CLAIMS CANNOT BE RELIED ON TO JUSTIFY THE BAN ON WECHAT**

Defendants’ Opposition relies heavily on repeated assertions that the ban on WeChat must be allowed to take effect because of national security concerns. But notably absent from the papers is any support for their claim. Because Plaintiffs made “a colorable claim that its First Amendment rights have been infringed, or are threatened with infringement, [ ] the burden shifts to the government to justify the restriction.” *Doe v. Harris*, 772 F.3d 563, 570 (9th Cir. 2014); *see also* Mot. at 15:13-24 (citing cases). Defendants fail to do so, and provide no credible national security justification for a ban of WeChat in the United States. Nor do they explain why lesser, more targeted measures, would not address any legitimate issues without burdening speech.

According to Defendants, the “Government interests of paramount importance” that justify the WeChat Ban are “preventing the Chinese Government from using WeChat to surveil the American people, censor information, sow misinformation, and collect and use vast swaths of personal and proprietary information from American users to advance its

own interests.”<sup>6</sup> Opp. at 26:12-15. But Defendants’ 1,245-page submission of “evidence” provides little, if anything about WeChat, its parent company, Tencent, or their activities in the United States—let alone information about how they, as compared to other entities that undergird the telecommunications network or are integrated with our critical infrastructure, pose an actual national security threat.<sup>7</sup> None of the government reports or studies submitted by Defendants made findings or recommendations about how the civilian use of WeChat to communicate with friends and family threatens the United States, much less supports banning WeChat in this country.

Indeed, to substantiate WeChat’s “threat,” the Opposition relies almost exclusively on public information from a foreign entity, the Australian Strategic Policy Initiative (“ASPI”). See Opp. at 8-16-10:12, n.2-3; Dkts. 22-14 through 22-16, 22-19; *see also* Opp. at 29-30 (arguing that less restrictive measures are unworkable). Yet ASPI’s most recent and comprehensive analysis on WeChat, its September 8, 2020 report titled “TikTok and WeChat: Curating and Controlling Global Information Flows,” specifically recommends broadly applicable data privacy and data protection frameworks, not a total ban:

Thus far governments have tended to hold most major international social

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<sup>6</sup> Plaintiffs have *not* conceded that the Chinese government uses WeChat as a tool to engage in “all-pervasive dragnet surveillance of the American population.” Opp. at 14:12-14 (internal quotations omitted). Defendants quote sections of the Complaint out of context and misrepresent its substance. See *id.* at 14:10-22.

<sup>7</sup> See, e.g., Dkts. 22-1 and 22-2 (news and congressional reports discussing ZTE and Huawei; no mention of WeChat); Dkts. 22-3 and 22-4 (517 pages of congressional reports reviewing the Chinese telecommunications industry; no mention of WeChat); Dkt. 22-5 (Department of Defense report naming technology companies with military ties; no mention of WeChat); Dkt. 22 at 6 (sole mention of China states that “ongoing cyber activity from China [are now] **significantly lower** than before the bilateral US-China cyber commitments of September 2015.”); Dkt. 22-10 (intelligence report generally stating that the “Internet of Things” could bring new cyber threats; no mention of WeChat, which is not an IoT app.); Dkt. 22-13 (generally discussing an “increasingly complex security environment ... defined by rapid technological change,” with no mention of WeChat); Dkt. 22-17 (describing WeChat’s popularity within **Australia’s** Chinese diaspora, platform censorship, and fake news being spread on the platform, without any mention of national security implications for the U.S.); Dkt. 22-19 (news article speculating as to the potential for misinformation transmitted **through** WeChat and an “Orwellian future **in China**” but with no discussion at all about WeChat being a threat to U.S. national security); Dkt. 22-20 (discussing TikTok, but not WeChat); Dkts. 22-23 and 22-24 (discussing China’s party censorship of WeChat content and China’s great firewall, but not how that threatens U.S. national security); Dkt. 22-25 (WeChat’s terms of service).

1 media networks and Chinese social media networks to different standards.  
 2 **It's imperative that states move to a policy position where all social**  
 3 **media and internet companies are being held to the same set of**  
 4 **standards, regardless of their country of origin or ownership.** This  
 report recommends [ ] that governments implement transparent user data  
 privacy and user data protection frameworks that apply to all social media  
 networks.

5 Bien Reply Decl. ¶ 2 & Ex. A at 7. If the Government followed ASPI's recommendations,  
 6 it would be pushing a range of user-friendly data privacy and protection requirements,  
 7 including limits on how data is retained, accessed, and disseminated, rather than impose an  
 8 unprecedented ban on speech. *Id.* It is only at end of their brief (*see* Opp. at 35:21) that  
 9 Defendants raise what appears to be a credible national security concern—namely that  
 10 WeChat could be relied on to transmit “information relating to the national defense.” But  
 11 that concern could be dealt with by restrictions on its use by federal government  
 12 employees or on government-issued devices, for example, as it has already done with  
 13 TikTok. Bien Decl. (Dkt. 17-12) ¶ 4 & Ex. C. It does not, however, justify a total ban on  
 14 the app.

15 Finally, Defendants fail to rebut Plaintiffs' evidence—proven by the President's  
 16 own tweets, speeches, and public statements—that the true purpose and timing of the EO  
 17 was not to protect against national security threats but instead to further the President's  
 18 political campaign by inciting racial animus against China and Chinese Americans,  
 19 including blame for the pandemic for which he purposefully misled the country. Mot. at  
 20 13:13-14:19; *see also* Bien Reply Decl. ¶ 3 & Ex. B (New York Times article describing  
 21 the President's admission that he intentionally disseminated false information about  
 22 COVID-19 to the public earlier in the year). Notably, Defendants point to no new event or  
 23 discovery, report or recommendation relating to national security that explains or justifies  
 24 the President's decision to go after WeChat on August 6, 2020. That timing, however, is  
 25 consistent with a troubled campaign that opportunistically scapegoated China.

26 ///

27 ///

1 **III. A PRELIMINARY INJUNCTION IS WARRANTED IN THIS CASE**

2 **A. Plaintiffs Are Likely to Succeed on the Merits**

3 **1. Plaintiffs Are Likely to Succeed on Their Vagueness Claims<sup>8</sup>**

4 Defendants' argument that the Court cannot determine whether the EO is void for  
5 vagueness until the Secretary issues definitions of prohibited transactions ignores the text  
6 of the EO. Section 3 provides that "there need be no prior notice of an identification made  
7 pursuant to section 1(c) of this order" before initiation of an enforcement action. *See* Bien  
8 Decl. (Dkt. 17-12) ¶ 2 & Ex. A. Due process requires that laws "define the criminal  
9 offense with sufficient definiteness that ordinary people can understand what conduct is  
10 prohibited ..." and give "actual notice to citizens." *Kolender v. Lawson*, 461 U.S. 352,  
11 357-58 (1983); *see also F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012)  
12 ("[R]egulated parties should know what is required of them so they may act accordingly").

13 Defendants also ignore that the Secretary's definitions of prohibited transactions  
14 will be made without the notice typically provided by the legislative or rulemaking  
15 process. Instead, those definitions will be provided on the very same day that the EO  
16 authorizes enforcement—thus depriving Plaintiffs of actual and reasonable notice of what  
17 actions are prohibited before they can be prosecuted. Finally, Section 1(c) contemplates  
18 the Secretary identifying "transactions" subject to the EO by September 20, 2020; but the  
19 government gives no reassurance that the Secretary can, let alone will, address the  
20 vagueness of other key terms in the Executive Order before it takes effect.

21 This is not the first time that the President has argued that the prospect of future  
22 administrative clarification insulates his executive orders from vagueness challenges. In  
23 *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497 (N.D. Cal. 2017), the President  
24 raised the same argument against a preliminary injunction barring enforcement of

25 \_\_\_\_\_  
26 <sup>8</sup> Contrary to Defendants' arguments, Plaintiffs need not show that the EO is  
27 "unconstitutional in every conceivable application" for the Court to grant a preliminary  
28 injunction based on a facial challenge. *Opp.* at 22:18. A law may also be found facially  
unconstitutional if "it seeks to prohibit such a broad range of protected conduct that it is  
unconstitutionally overbroad." *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir.  
1998), *as amended on denial of reh'g* (July 29, 1998).

Executive Order 13768, which sought to bar so-called “sanctuary cities” from obtaining federal funds. A vagueness challenge to that order was unripe, the President argued, “because [the government] must still determine what the terms of the Order mean and how it will enforce it ....” *Id.* at 529-30. Judge Orrick rejected that excuse and enjoined enforcement of Executive Order 13768 on vagueness grounds because the order did not make clear what conduct might subject the plaintiff counties to a loss of federal funds, thus “making it impossible for jurisdictions to determine how to modify their conduct, if at all, to avoid the Order’s penalties.” *Id.* at 534-35. Similarly, this Court need not wait to relieve Plaintiffs from the unconstitutionally vague EO. Any forthcoming definitions will not remedy the unavoidable due process violations within the EO, which authorizes the Government to simultaneously notify Plaintiffs of what uses violate the law and immediately prosecute them for such uses.<sup>9</sup>

## 2. Plaintiffs Are Likely to Succeed on Their First Amendment Claims and Have Presented Serious Questions Going to Merits

At this juncture, the Court need not make concrete determinations of how exactly the EO violates the First Amendment, as it may grant a preliminary injunction when there are “serious questions going to the merits” and the balance of hardships tips sharply in Plaintiffs’ favor. *See All. for the Wild Rockies*, 632 F.3d at 1134-35. Indeed, courts in this district have granted preliminary relief without deciding what level of scrutiny should apply, because so long as the “suit raises serious First Amendment questions, the Court has little difficulty finding the potential for irreparable injury.” *Viacom Int’l, Inc. v. FCC*, 828 F. Supp. 741, 743 (N.D. Cal. 1993). Here, Defendants concede that the EO implicates the First Amendment, *see* Opp. at 24-32, and Defendants have failed to meet their burden of justifying the EO’s restriction on constitutionally-protected activities. Plaintiffs are likely

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<sup>9</sup> Defendants argue that IEEPA’s scienter requirement for criminal liability defeats the due process claim. Opp. at 34:22-24, n.13. But Plaintiffs are not required to wait and prove their scienter as an affirmative defense in a criminal trial, further increasing “the impermissible risk of discriminatory enforcement.” *Gentile v. State Bar of Nevada*, 501 US 1030, 1051 (1991). And IEEPA also provides for civil penalties of \$250,000 or more under 50 U.S.C. § 1705(b), for which there is no scienter requirement.

1 to succeed on the merits, and at the very least present “serious First Amendment questions  
2 [compelling] a finding that there exists the potential for irreparable injury.” *Sammartano*  
3 *v. First Judicial Dist. Court*, 303 F.3d 959, 973 (9th Cir. 2002).

4 **(a) The EO Is Not Content Neutral and Strict Scrutiny Should**  
5 **Apply**

6 Defendants claim that the EO is content-neutral,<sup>10</sup> but this is belied by the fact that  
7 the EO unnecessarily bans an entire social media platform primarily used by Chinese-  
8 Americans, thereby slowing the spread of certain types of discourse. In so doing, the EO  
9 “reflect[s] the Government’s preference for the substance of what the favored speakers  
10 have to say (or aversion to what the disfavored speakers have to say),” *Turner Broad. Sys.,*  
11 *Inc. v. FCC*, 512 U.S. 622, 658 (1994), and discriminates against specific “ideas [the  
12 President] disfavors,” *One World One Family Now v. City & Cty. of Honolulu*, 76 F.3d  
13 1009, 1012 n.5 (9th Cir. 1996).

14 Indeed, the EO is a prior restraint. Any governmental action that “makes the  
15 peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the  
16 uncontrolled will of an official ... is an unconstitutional censorship or prior restraint upon  
17 the enjoyment of those freedoms.” *Shuttlesworth v. City of Birmingham*, 394 U.S. 147,  
18 151 (1969); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990). Prior restraints  
19 constitute “the essence of censorship,” *Near v. Minnesota*, 283 U.S. 697, 713 (1931), and  
20 “the most serious and the least tolerable infringement on First Amendment rights.”  
21 *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). “[A]ny system of prior

22  
23 <sup>10</sup> Defendants’ argument that the EO appears neutral on its face (despite clearly having  
24 discriminatory intent and a disparate impact upon the Chinese community), *see* Opp. at  
25 24:5-26:2; Mot. at 21-22, should not prevent the Court from applying strict scrutiny. Other  
26 courts have invalidated laws with allegedly neutral purposes, finding that they actually  
27 made impermissible distinctions based on content: *Arkansas Writers’ Project v. Ragland*,  
28 481 U.S. 221, 231–232 (1987) (sales tax scheme violated First Amendment’s freedom of  
press guarantee by taxing general interest magazines but exempting other publications);  
*Carey v. Brown*, 447 U.S. 455 (1980) (invalidating a ban on residential picketing that  
exempted labor picketing under the Equal Protection Clause); *Police Dep’t of Chicago v.*  
*Mosley*, 408 U.S. 92, 100 (1972) (“Far from being tailored to a substantial governmental  
interest, the discrimination among pickets is based on the content of their expression.”).

1 restraints of expression ... bear[s] a heavy presumption against its constitutional validity.”  
 2 *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

3 **(b) The EO Cannot Survive Intermediate Scrutiny**

4 Even if the EO is analyzed as a time, place, or manner restriction under intermediate  
 5 scrutiny, it still cannot pass constitutional muster because it is not “narrowly tailored to  
 6 serve a significant governmental interest” and fails to “leave open ample alternative  
 7 channels for communication.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)  
 8 (citations and internal quotation marks omitted).

9 **(i) The EO Does Not Serve Important Government**  
 10 **Interests**

11 Defendants insist that that the EO implicates “critically important Government  
 12 interests” involving “national security and foreign affairs.” Opp. at 37:17-18. But generic  
 13 statements of national security concerns do not give the Government carte blanche to  
 14 infringe upon constitutional rights. *See, e.g., Ralls Corp.*, 758 F.3d at 318 (“These  
 15 procedural protections are required by the Due Process Clause ... notwithstanding the  
 16 Government’s ‘compelling’ interest in national security ....”). Defendants do not address  
 17 Plaintiffs’ showing that the EO is motivated by anti-Chinese animus and political  
 18 opportunism. *See* Mot., at 11, 21-22. The absence of support linking WeChat to a national  
 19 security threat, *see* Section II and note 7, *supra*, strongly suggests that the Government’s  
 20 explanation is a pretext.

21 *Trump v. Hawaii*, in which the majority upheld the President’s travel ban in light of  
 22 explanations “involving sensitive and weighty interests of national security and foreign  
 23 affairs.” 138 S. Ct. 2392, 2422 (2018) (internal quotations omitted) is easily  
 24 distinguishable as it applied rational basis review, inapplicable here, *id.* at 2423. *Hawaii*  
 25 does not mandate blanket deference to the Government in this case, where Defendants  
 26 have failed to meet their burden of justifying the restriction on First Amendment speech.  
 27 *See Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011); *Klein v. City of*  
 28 *San Clemente*, 584 F.3d 1196, 1201 (9th Cir. 2009) (“[w]hile [the Plaintiff] has the general

burden of establishing the elements necessary to obtain injunctive relief, [the Government] has the burden of justifying the restriction on speech.”)

**(ii) The EO’s Ban of WeChat, *a fortiori*, Burdens Substantially More Speech Than Necessary**

Defendants make the bizarre argument that a total ban of WeChat use in the United States is “narrowly tailored” to the “central purpose” of preventing WeChat “from collecting Americans’ personal and proprietary information so that such information will not flow to the Chinese Government.” Opp. at 27:20-28:6. By this logic, a complete ban on telephone calls and emails to and from China would also be “narrowly tailored.” Defendants’ superficial rejection of all alternatives—including those recommended by ASPI—demonstrates that the Government has not fulfilled its duty to seriously consider less speech-restrictive measures, such as barring WeChat from government-issued devices, and instead simply gravitated towards the most extreme step. Opp. at 29-30. However, “the prime objective of the First Amendment is not efficiency.” *McCullen v. Coakley*, 573 U.S. 464, 495 (2014) (invalidating Massachusetts law that took “the extreme step of closing a substantial portion of a traditional public forum to all speakers” without “seriously addressing the problem through alternatives that leave the forum open”). To demonstrate that the law is narrowly tailored, “the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government’s interests, not simply that the chosen route is easier.” *Id.*

**(iii) A WeChat Ban Would Leave No Avenues of Communication Available**

Defendants’ assertion that a WeChat ban satisfies the requirement that the Government must leave open ample alternatives channels for communication to the Chinese Americans who depend on it for so much of their lives, Opp. at 30:26-31:17, is belied by Defendants’ acknowledgement that Plaintiffs would have no other method to communicate with their friends and family in China. *See* Opp. at 32:4-13 (arguing that China is to blame, so the President cannot be held responsible for this substantial burden

on protected speech). Plaintiffs established that WeChat is deeply ingrained within the culture of the Chinese diaspora and is the only medium of communication within this particular community that spans continents and the Great Firewall, not only because most other apps are barred from China, but also because no other apps are usable or accessible to native Chinese speakers with limited English proficiency. *See, e.g.*, Sun Decl. (Dkt. 17-11) ¶32. Plaintiffs’ unsuccessful efforts to find even limited alternatives to WeChat, *see* Mot. at 38:20-23, are evidence of what an incalculable loss the WeChat ban would cause, not that there are adequate replacements. *Compare Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 690-91 (2010) (upholding bar on certain “specific methods of communication,” in part because “the advent of electronic media and social-networking sites reduces the importance of those [specific] channels”) *with City of Ladue v. Gilleo*, 512 U.S. 43, 54-57 (1994) (invalidating municipal ban on lawn signs because it “completely foreclosed a venerable means of communication that is both unique and important”).

### 3. Plaintiffs Are Likely to Succeed on Their *Ultra Vires* Claim

Defendants assert that 50 U.S.C. § 1702(b) does not prevent the President from regulating personal communications or the exchange of information or informational materials via WeChat. *See* Opp. at 32:14-35:22. This argument ignores clear statutory language to the contrary. 50 U.S.C. § 1702(b)(1), (3). Defendants speculate that adequate alternative means of personal communication are available to Plaintiffs, Opp. at 33:1-3, but there is no exception in Section 1702(b)(1) for personal communications that could conceivably be transmitted through an alternative medium. Section 1702(b)(1) specifies that the President’s authority “does not include the authority to regulate or prohibit, directly or indirectly— (1) *any* postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value.” (emphasis added). As a fallback, Defendants also suggest that *all* personal communications transmitted via WeChat “involve a transfer of value” because all WeChat users necessarily “exchange their personal data and content for the right to use WeChat services.” Opp. at 33:3-9. But this interpretation would render Section 1702(b)(1) meaningless, as it would

1 justify unilateral presidential regulation of virtually any personal communications (*e.g.*, a  
 2 telephone call). Nor is it what Congress intended when it enacted the limitations on  
 3 presidential power in Section 1702(b). *See* H.R. Rep. No. 95-459, at 16 (June 23, 1977)  
 4 (“The provisions of [Section 1702(b)(1)] are designed both to preserve First Amendment  
 5 freedoms of expression, and to preclude policies that would totally isolate the people of the  
 6 United States from the people of any other country.”) *Bien Reply Decl.* ¶ 4 & Ex. C.

7 According to Defendants, Section 1702(b)(3)’s express limitation on the President’s  
 8 authority to unilaterally control the international flow of news, culture, and ideas does not  
 9 apply to regulations of “a single service provider.” *Opp.* at 34:6-18. But regulations  
 10 singling out particular providers are *precisely* what Congress was worried about when it  
 11 enacted and then expanded the protections for information and informational materials in  
 12 Section 1702(b)(3). Such a targeted approach to controlling the flow of information  
 13 triggers core First Amendment concerns about content- and viewpoint-based  
 14 discrimination, and is squarely at odds with both the text and the intent of Section  
 15 1702(b)(3). *See Kalantari v. NITV, Inc.*, 352 F.3d 1202, 1205 (9th Cir. 2003).

#### 16 **B. Preliminary Injunctive Relief Is Necessary to Avoid Further Harms**

17 “The loss of First Amendment freedoms, for even minimal periods of time,  
 18 unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976).  
 19 “Irreparable injury need not be established with certainty or even high probability; the  
 20 distant possibility of such harm establishes a ‘serious threat of irreparable injury’ sufficient  
 21 to support preliminary injunctive relief.” *Napa Valley Publ’g Co. v. City of Calistoga*, 225  
 22 F. Supp. 2d 1176, 1182 (N.D. Cal. 2002). Plaintiffs’ uncontroverted evidence shows that  
 23 they have already lost First Amendment freedoms by changing their associational conduct  
 24 as a result of the enactment of the EO, and will continue to do so. *See, e.g.*, *Bao Decl.*  
 25 (Dkt. 17-1) ¶ 17 (using other apps but finding “very few of my WeChat contacts use” apps  
 26 not designed for Chinese-speaking users); *Duan Decl.* (Dkt. 17-4) ¶ 25 (explaining that  
 27 Chihuo Inc. has lost business relationships due to the EO); *Peng Decl.* (Dkt. 17-5) ¶ 28  
 28 (explaining that MHACC has begun using an alternative app but “only a small percentage

1 of [mental health services] recipients have switched [to the alternative app] so far”).  
 2 Plaintiffs’ evidence similarly demonstrates the burdens on their protected associational,  
 3 speech, and religious interests will continue to occur if relief is not granted. *See id.* ¶¶ 22-  
 4 23; Duan Decl. (Dkt. 17-4) ¶¶ 25-26, 28; Zhang Decl. (Dkt. 17-6) ¶¶ 7, 16, 18, 19; Coulter  
 5 Decl. (Dkt. 17-3) ¶¶ 9-12; Bao Decl. (Dkt 17-1) ¶ 16; Cao Decl. (Dkt. 17-2) ¶¶ 23-24.

6 Defendants’ Opposition fails to rebut this evidence, or to acknowledge that under  
 7 controlling law Plaintiffs have *a priori* established irreparable harm by raising colorable  
 8 First Amendment and Due Process claims. *See, e.g., Doe v. Harris*, 772 F.3d at 583 (“A  
 9 colorable First Amendment claim is irreparable injury sufficient to merit the grant of relief,  
 10 and [i]f the underlying constitutional question is close ... we should uphold the injunction  
 11 and remand for trial on the merits.”) (internal quotation marks and citations omitted);  
 12 *Warsoldier v. Woodford*, 418 F.3d 989, 1001-02 (9th Cir. 2005) (concluding that where a  
 13 plaintiff “raised a colorable claim that the exercise of his religious beliefs has been  
 14 infringed, he has sufficiently established that he will suffer an irreparable injury absent an  
 15 injunction.”); *Viacom*, 828 F. Supp. at 743-44 (finding irreparable injury without deciding  
 16 the applicable scrutiny level).

17 Defendants’ cases are not to the contrary. Defendants argue that Plaintiffs’ fear,  
 18 anxiety, and confusion “are entirely conjectural” and “not adequately concrete,” but no  
 19 executive order has previously sought to ban and criminalize the use of a single social  
 20 media platform used by tens of millions to communicate, and none of the cases Defendants  
 21 rely upon for this argument involve challenges to vague laws or otherwise implicate the  
 22 First Amendment in evaluating irreparable harm. *See Opp.* at 36:26-37:20; *cf. Napa Valley*  
 23 *Publ’g Co.*, 225 F. Supp. 2d at 1181 (finding irreparable harm where publisher “proffered  
 24 evidence it *would* lose significant readership *if* the challenged restrictions were  
 25 implemented pending trial.”) (emphasis added). A finding of irreparable injury is  
 26 appropriate where Plaintiffs’ fear of harm is caused by a law’s vague terms. *See, e.g.,*  
 27 *County of Santa Clara v. Trump*, 250 F. Supp. 3d at 537 (finding the “substantial  
 28 confusion and justified fear” that counties will lose all federal grant funding amounts to

1 irreparable harm where it was caused by an executive order’s “unclear terms and its broad  
 2 and undefined scope”). This is especially true where, as here, the government has failed to  
 3 assure that a law challenged for vagueness will not apply to Plaintiffs’ acts. *See Hedges v.*  
 4 *Obama*, No. 12 CIV. 331, 2012 WL 1721124, at \*27 (S.D.N.Y. May 16, 2012), *order*  
 5 *clarified*, 2012 WL 2044565 (S.D.N.Y. June 6, 2012) (“the indefinite—indeed, vague—  
 6 nature of [the statute], coupled with the Government’s inability to provide assurances that  
 7 the specific conduct at issue here (of which the Government had ample notice) would not  
 8 subject plaintiffs to prosecution and detention for their acts lays the foundation for  
 9 plaintiffs’ reasonable fear of irreparable harm.”).

10 Defendants cite to an antitrust case to argue that harms to business interests “are not  
 11 irreparable and thus are not a proper basis for a preliminary injunction.” Opp. at 38:3-7.  
 12 Yet, where the freedom to speak guaranteed by the First Amendment is at issue, “the  
 13 prevention of access to a public forum is, each day, an irreparable injury.” *Jacobsen v.*  
 14 *U.S. Postal Serv.*, 812 F.2d 1151, 1152, 1154 (9th Cir. 1987) (newspaper publisher’s  
 15 “fledgling business suffers irreparable harm if the administrators ban his papers” from post  
 16 office entrances).

### 17 **C. The Balance of Hardships and the Public Interest Weigh Heavily In** 18 **Plaintiffs’ Favor**

19 Defendants argue that an injunction “would frustrate and displace the President’s  
 20 determination of how best to address threats to national security,” Opp. at 39:10-14; but  
 21 vague, conclusory, and unsupported assertions of “significant national security and foreign  
 22 policy interests,” *id.* at 39:3-5, are insufficient to tip the balance in Defendants’ favor. *See,*  
 23 *e.g., Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017) (“Rather than present  
 24 evidence to explain the need for the Executive Order, the Government has taken the  
 25 position that we must not review its decision at all. We disagree[.]” Each of the cases  
 26 Defendants rely upon to support the interests they claim are “at stake” in this matter were  
 27 supported by evidence of an appreciable national security or foreign policy interest. *See*  
 28 *Winter*, 555 U.S. at 24 (“the record contains declarations from some of the Navy’s most

1 senior officers, all of whom underscored the threat posed by enemy submarines and the  
 2 need for extensive sonar training to counter this threat”); *United States v. South Carolina*,  
 3 840 F. Supp. 2d 898, 921 (D.S.C. 2011), *modified in part*, 906 F. Supp. 2d 463 (D.S.C.  
 4 2012), *aff’d*, 720 F.3d 518 (4th Cir. 2013) (referring to “a declaration submitted by Deputy  
 5 Secretary of State William Burns” stating the “harm [to] a wide range of delicate U.S.  
 6 foreign relations interests.”); *Escamilla v. M2 Tech., Inc.*, No. 4:12CV634, 2013 WL  
 7 4577538, at \*2 (E.D. Tex. Aug. 27, 2013) (“Both sides also offered evidence in support of  
 8 their respective positions.”). Defendants’ showing in this case is entirely dissimilar.

9 Defendants fail to explain the significance of September 20, 2020 or how  
 10 maintaining the status quo during a reasonable notice period following the delineation of  
 11 “transactions” will in any way harm the United States’ interests. In contrast, “[t]he fact  
 12 that [Plaintiffs] have raised serious First Amendment questions compels a finding that ...  
 13 the balance of hardships tips sharply in [Plaintiffs’] favor.” *Am. Beverage Ass’n v. City &*  
 14 *Cty. of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019). And “it is always in the public  
 15 interest to prevent the violation of a party’s constitutional rights.” *Padilla v.*  
 16 *Immigration & Customs Enf’t*, 953 F.3d 1134, 1147 (9th Cir. 2020).

#### 17 **D. A Nationwide Injunction Is Appropriate Here**

18 “Adequate equitable relief must remedy [Plaintiffs’] harms.” *E. Bay Sanctuary*  
 19 *Covenant v. Trump*, 950 F.3d 1242, 1282 (9th Cir. 2020). Defendants argue that any  
 20 preliminary relief should be limited, and that “staying the EO’s effective date as to  
 21 Plaintiffs until after the Secretary issues final regulations would achieve that goal.” Opp.  
 22 at 40:12-14. Plaintiffs include residents of four states and the USWUA is made up of  
 23 WeChat users throughout the United States. Complaint Dkt. 1, ¶¶ 19-25. Plaintiffs’ uses  
 24 of WeChat depends on the network effects of other users; limiting an injunction to only  
 25 Plaintiffs would be equivalent to not issuing any injunction at all, for Plaintiffs would be  
 26 left with no other U.S. users with whom to communicate.

#### 27 **CONCLUSION**

28 Plaintiffs respectfully ask the Court to enter the Proposed Order, Dkt. 17-13.

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Respectfully submitted,

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