

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, XIAO ZHANG,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as the President of the United States,
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

**CIRCUIT RULE 27-3 EMERGENCY MOTION
FOR A STAY PENDING APPEAL**

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CIRCUIT RULE 27-3 CERTIFICATE

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(2) Facts showing the existence and nature of the emergency

As set forth in this motion, the district court on Saturday, September 19, 2020, issued a preliminary injunction, prohibiting the Secretary of Commerce from taking action to protect national security from efforts of the People's Republic of China to conduct espionage on and collect the sensitive personal data of Americans. The Secretary acted pursuant to Executive Orders that declared a national emergency with respect to information and communications technology and services provided by certain foreign entities and that directed the Secretary to identify economic transactions involving the WeChat mobile application that should be prohibited in the

United States no later than Sunday, September 20. The Secretary prohibited a targeted set of business-to-business transactions related to WeChat as necessary to protect the national security, foreign policy, and economy of the United States but did not prohibit current U.S. users of WeChat from continuing to use the app. Plaintiffs are current U.S. users of WeChat, and based on their challenge under the First Amendment, the district court enjoined the Secretary's actions, notwithstanding the President's and the Secretary's determinations that significant harms to national security would occur from the continued, unrestricted use of WeChat.

This Court's immediate correction is required. The preliminary injunction contravenes the Secretary's national-security judgments and should be stayed as soon as possible. The government respectfully requests that the Court act on this stay motion by October 23, 2020, or if the Court is not inclined to grant relief absent further briefing, that it consider this request with the merits.

(3) When and how counsel notified

Government counsel notified plaintiffs' counsel by e-mail on Thursday, September 1, 2020, of the government's intent to file this stay motion. Service will be effected by electronic service through the CM/ECF system and e-mail. Plaintiffs' counsel, Ernest Galvan, indicated that plaintiffs oppose the stay motion.

(4) Submissions to the district court

On August 21, 2020, plaintiffs filed their complaint, and they initially sought a preliminary injunction against the President's Executive Order identifying WeChat as

a national-security threat. Doc.1, 17. The Secretary identified prohibited transactions regarding WeChat on Thursday, September 17, and announced those prohibitions on Friday, September 18. Later on September 18, the district court directed plaintiffs to file an amended complaint addressing the Secretary's actions and ordered the parties to brief a renewed motion for a preliminary injunction, all during an hours-long period that same day. Doc.46 (Sept. 18 Minute Entry). On Saturday, September 19, the court issued a preliminary injunction against the Secretary's actions.

On September 24, 2020, the government moved in district court for a stay of the preliminary injunction pending appeal and requested relief no later than October 1. Doc.68. The district court has not granted a stay as of today, October 2, indicating that it would consider the motion at a hearing on October 15.

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INTRODUCTION

The government respectfully requests that this Court stay the district court's preliminary injunction of September 19, 2020, which blocks recent action taken by the President and the Secretary of Commerce to respond to an important threat to the Nation's security posed by the People's Republic of China (PRC). Based on the President's Executive Order and his declared national emergency, the Secretary determined that the WeChat mobile application permitted the PRC to "conduct espionage" and "build dossiers on millions of U.S. persons" for intelligence purposes. Add.48. WeChat's owner, Tencent Holdings Ltd. (Tencent), has access to vast amounts of American users' sensitive personal information. Tencent has cooperated extensively with the PRC and the Chinese Communist Party (CCP), which can also exercise control over the company, placing such data of millions of U.S. WeChat users potentially at the fingertips of PRC intelligence services. The Secretary thus prohibited certain business-to-business transactions relating to WeChat—those prohibitions were "necessary for the protection of U.S. national security" and were thus set to go into effect promptly, on September 20. Add.50. The injunction threatens irreparable harm to national security and should be stayed pending appeal.

The Secretary's Identification of Prohibited Transactions inhibits new U.S. users from downloading WeChat, prevents various commercial transactions related to optimizing and updating WeChat in the United States, and prohibits certain potential, future transactions that could support WeChat. It does not disable the app for existing

users. In enjoining those measures designed to safeguard the Nation’s security, the district court committed serious error, incorrectly second-guessing the Executive Branch’s sensitive national-security judgments as resting only on “modest” and “scant little evidence.” Add.18, 20; *see Trump v. Hawaii*, 138 S. Ct. 2392, 2419 (2018) (“[W]hen it comes to collecting evidence and drawing inferences on questions of national security, the lack of competence on the part of the courts is marked.”).

The preliminary injunction is instead based on fundamental misunderstandings of the First Amendment, which is not even applicable here, as it “does not prevent restrictions directed at commerce or conduct”—like those in the Secretary’s Identification—“from imposing incidental burdens on speech.” *NIFLA v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (quotation omitted). Nothing in the Identification prohibits plaintiffs, who are all current U.S. users, from continuing to use WeChat. And even if the First Amendment applied, the Secretary’s actions would easily pass review, given the government’s national-security interests and the comparatively minor burdens (if any) on plaintiffs’ speech. After all, plaintiffs are not parties to the business-to-business transactions identified by the Secretary, and unlike those businesses, they face no exposure to civil or criminal liability because of their continued interaction with WeChat. Yet plaintiffs argued, and the court accepted, that the mere downstream effect of the Secretary’s action would violate their First Amendment rights. In plaintiffs’ view, because the PRC has blocked other mobile apps such as Facebook and Twitter from reaching China, the First Amendment prevents the Executive

Branch from taking steps to protect national security from threats posed by a PRC-based app that they say remains one of only a few social-media conduits between the United States and China. The Constitution, however, does not disable the United States' national-security efforts in order to privilege the PRC's surveillance measures.

Because the district court's injunction contravenes the Executive Branch's national-security judgments, this Court's correction is required as soon as possible. Absent a stay, the harms that the Secretary identified will predictably continue for potentially months of litigation, to the detriment of the Nation's security. And at a minimum, the injunction is vastly overbroad. Plaintiffs are all current users, but the injunction—particularly in blocking the Secretary's first prohibited transaction—anomalously frees WeChat to continue recruiting and gathering extensive information on new users, aggravating the existing harms. The government requested that the district court issue a stay pending appeal no later than October 1, 2020, but the court stated that it will not conduct a hearing until October 15. The government has thus proceeded with this stay motion to allow this Court a timely opportunity to decide the motion and to avoid further delay in light of the district court's extended schedule.

This Court should stay the preliminary injunction pending appeal or at least stay its overbroad effect as to prospective users by staying the injunction as to the first prohibited transaction. The government respectfully requests that the Court act on this stay motion by October 23, 2020, if the district court has not granted relief by that date.

STATEMENT

A. PRESIDENT'S EXECUTIVE ORDERS

1. Over the past decade, the United States has increasingly confronted national-security threats posed by “large China-based, -owned, or -influenced companies—particularly those ‘national champions’ ... subject to government direction, to include support for PRC ... policies and political goals.” Doc.22-3, at 8 (2011 U.S.-China Econ. & Sec. Review Comm’n Report). China’s “major technology giants,” including Tencent, are among “China’s national champions in next generation areas.” Add.113.

“China’s leading mobile platforms like ... Tencent” are afforded “unparalleled access to consumer data,” while also funding other “core technologies” of “strategic importance” to the PRC, such as artificial intelligence and semiconductors. Add.113-15. Tencent’s most popular product is the WeChat application, which has 19 million active daily users in the United States and 1 billion users worldwide. Add.137-38. WeChat permits users to (among other things): communicate via text, voice, or video; post content such as media stories or photographs, and engage with others’ shared content; make and receive certain payments; and use other integrated services, such as games and health-and-fitness features. *Id.* Users permit WeChat extensive access to their activity and data. Meanwhile, PRC legal authorities require companies like Tencent “to comply with Chinese data localization measures that enable ... access to foreign data” and “to cooperate with Chinese security services, even when they do

business abroad.” Add.68. Through those efforts, “Beijing openly acknowledges” that its purpose is “to reshape the international system in its favor”—to the detriment of “vital American interests.” Add.62.

2. In May 2019, the President issued Executive Order 13873 , which declares a national emergency pursuant to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701 *et seq.*, and the National Emergencies Act (NEA), 50 U.S.C. § 1601 *et seq.*, based on a finding that “foreign adversaries are increasingly creating and exploiting vulnerabilities in information and communications technology and services, which store and communicate vast amounts of sensitive information, facilitate the digital economy, and support critical infrastructure and vital emergency services, in order to commit malicious cyber-enabled actions.” Add.120. The President found that such technology operated “by persons owned by, controlled by, or subject to the jurisdiction or direction of foreign adversaries augments” threatens national security. *Id.*¹

3. On August 6, 2020, the President issued Executive Order 13943 (WeChat Executive Order), also pursuant to IEEPA and NEA. Add.59. The President found

¹ IEEPA authorizes 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,” including through the power to “regulate, direct and compel, nullify, void, prevent or prohibit, any ... 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. §§ 1701(a), 1702(a)(1)(B).

that “additional steps must be taken to deal with the national emergency” declared in Executive Order 13873, because “the spread in the United States of mobile applications developed and owned by companies in the [PRC] continues to threaten the national security, foreign policy, and economy of the United States.” Add.59. The President declared that “WeChat automatically captures vast swaths of information from its users,” which “threatens to allow the [CCP] access to Americans’ personal and proprietary information” and provides the PRC “a mechanism for keeping tabs on Chinese citizens” in the United States. *Id.*

The President thus directed the Secretary of Commerce to “identify the transactions” in the United States relating to WeChat that should be prohibited and ordered that the identified transactions be prohibited in 45 days’ time (on September 20, 2020). Add.59-60.

B. SECRETARY’S IDENTIFICATION OF PROHIBITED TRANSACTIONS

1. Following the WeChat Executive Order, the Secretary consulted with the Office of the Director of National Intelligence (ODNI), which oversees the U.S. intelligence community, and the Department of Homeland Security (DHS). Add.37. Those agencies provided reports describing the risks that WeChat poses to national security. Add.37, 49-50; *see* Add.54.

A Department of Commerce memorandum supporting the Secretary’s decision also set forth the national-security risks related to WeChat. The memorandum explained that “the PRC is building massive databases of Americans’ personal

information,” heightening “the potential for PRC intelligence and security services ... to use Chinese information technology firms as routine and systemic espionage platforms against the United States.” Add.40-41. That “data can be used to glean details about key government personnel and potential spy recruits,” and the “bulk data collection” facilitated by WeChat “can reveal patterns and trends in human behavior, providing a ‘pattern of life’ that can be used to facilitate intelligence and surveillance targeting.” Add.41. PRC legal authorities require Chinese organizations and citizens to “support, assist in and cooperate in national intelligence work,” and to keep that cooperation confidential, and compel companies like Tencent “to store select data within China”—facilitating access by PRC intelligence services. Add.43.

The Secretary also described Tencent’s specific connections to the PRC government. Tencent houses a robust and “nationally recognized” internal CCP Party Committee, “a mechanism through which Beijing expands its authority and supervision” in the boardrooms of “nominally private” companies. Add.42. Tencent has also “been transparent regarding the company’s collaboration with the PRC” and its surveillance efforts. Add.44. Through WeChat, Tencent has assisted PRC efforts to identify dissidents for prosecution, maintain large-scale monitoring of entire Tibetan counties, and conduct “pervasive” surveillance of “non-China-registered accounts.” Add.44-45.

The Secretary thus identified serious risks to national security. WeChat collects geolocation data, chat histories, stored photos, health records, financial information,

and other “sensitive personal information” on U.S. users. Add.45-46. That collection can assist the PRC’s “foreign intelligence and surveillance.” Add.47. In particular, the Secretary determined that—considering Tencent’s “history of cooperation with PRC officials” and WeChat’s “extensive amount of sensitive personal data collected”—the PRC could “conduct espionage” and “build dossiers on millions of U.S. persons” for intelligence purposes. Add.48. And the Secretary expressed concern that the PRC could manipulate WeChat to “subversively influence the views of millions of” U.S. users, in a manner that “align[s] with Chinese government objectives.” Add.48-49.

2. On September 17, 2020, the Secretary identified six “business-to-business transactions” in the United States to be prohibited pursuant to the WeChat Executive Order based on “the objective of preventing collection, transmission, and aggregation of U.S. user data by the WeChat app, Tencent, and [PRC intelligence services].” Add.49. The economic prohibitions, which would enter into effect on September 20, were “necessary for the protection of U.S. national security.” Add.50. The Secretary’s Identification of Prohibited Transactions does not prohibit existing users’ “use of the WeChat app,” and is “not directly targeted at users of the WeChat app.” *Id.*

The Secretary’s Identification first precludes software application stores from maintaining WeChat for download or update, Add.33 (Transaction 1), although that does “not require the removal of the app from user devices ... where the app has been downloaded prior to the order,” Add.50. The Identification also prohibits transactions in the United States or involving U.S. persons between Tencent and

several types of third-party businesses—“content delivery services” or “internet transit or peering services”—from further “enabling the functioning or optimization” of WeChat. Add.33-34 (Transactions 3, 4); Add.50-51. The Identification last prohibits—“in the future,” Add.50-51—transactions providing WeChat with “internet hosting services” in the United States (WeChat is currently hosted abroad), a new, forthcoming mobile-payment function, and any reconstitution of WeChat to circumvent the prohibitions. Add.33-34 (Transactions 2, 5, 6).²

C. PROCEDURAL HISTORY

1. On August 21, 2020, following the WeChat Executive Order but before the Secretary’s Identification, plaintiffs filed suit. Plaintiffs are several individuals and a business in the United States who use WeChat, in addition to the U.S. WeChat Users Alliance, an organization recently “founded ... to respond to the Executive Order.” Add.170; *see* Add.134. On Friday, September 18, the government notified the district court of the Secretary’s Identification. Doc.38. Later that day, the court required plaintiffs to file an amended complaint and ordered the parties to fully brief a new preliminary-injunction motion on an hours-long schedule. *See* Doc.46 (Sept. 18 Minute Entry) (3:30 p.m. motion; 5 p.m. amended complaint; 6:30 p.m. opposition).

2. On September 19, the district court issued a preliminary injunction against the Secretary’s Identification. The court concluded that there were “serious questions”

² The Identification reserves the possible prohibition of other transactions “at a future date,” Add.34 (Transaction 7), but that reservation is not at issue here, Add.22.

going to the merits of plaintiffs' First Amendment challenge. Add.16, 18. The court viewed the Identification as an "effective ban of WeChat for all U.S. users," and concluded "that the Secretary's prohibited transactions effectively eliminate the plaintiffs' key platform for communication, slow or eliminate discourse, and are the equivalent of censorship of speech or a prior restraint on it." Add.16, 17-18.

Because of the district court's expedited timeframe, the court did not have the opportunity to review the Department's memorandum supporting the Secretary's Identification. The court nonetheless declared that the government had "scant little evidence" that WeChat "raise[s] significant national-security concerns" "on this record." Add.18. The court stated that, "while the general evidence about the threat to national security related to China (regarding technology and mobile technology) is considerable, the specific evidence about WeChat is modest." Add.20. The court thus held that a preliminary injunction was warranted to maintain "the status quo." *Id.*

3. On September 24, the government moved in district court for a stay pending appeal, requesting relief no later than October 1. The government also submitted the decision memorandum and other materials considered by the Secretary, including sensitive information that had not previously been cleared for release. Add.125. The court has not acted on that motion, and instead indicated that it will hold a hearing on October 15. Doc.74 (Sept. 25 Minute Order). The government is presenting this motion to the Court now to avoid further delay, if the district court fails to provide relief promptly.

ARGUMENT

The district court’s preliminary injunction threatens serious harm to the Nation’s security. Building on the President’s findings in the WeChat Executive Order, the Secretary of Commerce made clear that WeChat facilitates the PRC’s efforts to “conduct espionage” and “build dossiers on millions of U.S. persons” for intelligence purposes. Add.48. The Secretary prohibited a limited set of “business-to-business transactions” to protect national security prospectively, but did not prohibit *any* current U.S. users (including plaintiffs) from using the app. Add.49-50. The injunction against the Secretary’s Identification of Prohibited Transactions improperly disrupts those national-security efforts, is unsupported by plaintiffs’ minimal harms, and rests on an incorrect view of the First Amendment.

A stay is plainly warranted while this Court considers the government’s appeal, as the government has amply satisfied the familiar requirements, which are “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quotation omitted); *see Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012) (requiring “strong showing that success on the merits is likely” but not that the movant “is more likely than not [to] win on the merits”).

A. THE GOVERNMENT IS LIKELY TO PREVAIL ON THE MERITS

In determining whether a preliminary injunction is warranted, “the most important” factor is whether the plaintiffs have shown a likelihood of success on the merits, *California ex rel. Becerra v. Azar*, 950 F.3d 1067, 1083 (9th Cir. 2020) (en banc) (quotation omitted), but an injunction also “does not follow from success on the merits as a matter of course,” *Winter v. NRDC, Inc.*, 555 U.S. 7, 32 (2008). Neither the merits nor the equities support the district court’s injunction, where the President and the Secretary have reasonably acted pursuant to broad statutory authorities to protect national security. The injunction instead rests on erroneous understandings of the scope of the Secretary’s actions and the harms to national security, along with an incorrect conception of the First Amendment.

1. A preliminary injunction is “an extraordinary remedy” in any case, but the district court’s injunction in this case is all the more extraordinary in that it inhibits the Executive Branch’s efforts to address “new and serious threats to our Nation and its people.” *Winter*, 555 U.S. at 24 (quotation omitted). The President acted pursuant to “broad authority” under IEEPA “to act in times of national emergency with respect to property of a foreign country.” *Dames & Moore v. Regan*, 453 U.S. 654, 677 (1981). The President found that “foreign adversaries are increasingly creating and exploiting vulnerabilities in information and communications technology and services, which store and communicate vast amounts of sensitive information, ... in order to commit malicious cyber-enabled actions.” Add.120. In issuing the WeChat Executive Order,

the President further confirmed that “WeChat automatically captures vast swaths of information from its users,” and this “data collection threatens to allow the [CCP] access to” U.S. users’ “personal and proprietary information.” Add.59.

The Secretary in turn assessed that the risk to national security is “high,” Add.50, and explained that the PRC can misuse WeChat for “foreign intelligence and surveillance,” Add.47. WeChat collects an “extensive amount of sensitive personal data” on U.S. users, including geolocation data, chat histories, stored photos, health records, financial information, and other “sensitive personal information.” Add.45-46, 48. The app thus enables the PRC “to build dossiers on millions of U.S. persons” and “to identify espionage targets for intelligence collection purposes,” Add.48, and such “bulk data” permits the PRC “to glean details about key government personnel and potential spy recruits, or to gain information useful for intelligence targeting and surveillance,” Add.41. The Secretary found that Tencent indeed had a “history of cooperation with PRC officials,” and the PRC maintained the ability to “compel cooperation from Tencent.” Add.47-48.

The combined judgment of the Executive Branch was that WeChat’s operation in the United States presents novel threats, particularly given Beijing’s broader efforts “to reshape the international system in its favor” at the expense of “vital American interests.” Add.62. The Secretary’s Identification therefore includes targeted measures that he deemed “necessary for the protection of the national security.” Add.50. Those judgments should have been respected. Instead, the district court improperly held that

there was “scant little evidence” of national-security harms to support a “ban” of the WeChat app. Add.18. Not only was that assessment wrong, *see* Add.42-45 (detailing Tencent’s cooperation with the PRC), the court was wrong to engage in that inquiry. As the Supreme Court has admonished, “when it comes to collecting evidence and drawing inferences on questions of national security, the lack of competence on the part of the courts is marked.” *Trump v. Hawaii*, 138 S. Ct. 2392, 2419 (2018) (quotation omitted); *see Boumediene v. Bush*, 553 U.S. 723, 797 (2008) (cautioning that “federal judges” do not “begin the day with briefings that may describe new and serious threats to our Nation and its people”). The “evaluation of the facts by the Executive” regarding “sensitive and weighty interests of national security and foreign affairs” should have been accorded the utmost deference. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010).

The district court further erred in declaring that the government had failed to connect the general “threat to national security related to China” with “specific evidence about WeChat.” Add.20. When the Executive Branch takes “preventive measure[s],” those “conclusions must often be based on informed judgment rather than concrete evidence” of the type that the court seemingly demanded, and the government “is not required to conclusively link all the pieces in the puzzle before [the Judiciary] grant[s] weight to its empirical conclusions.” *Humanitarian Law Project*, 561 U.S. at 34-35. If the court needed reassurances about the substantial national-security risks identified by the Executive Branch, then it should have refrained from

entering extraordinary relief until it could review any further information, rather than issue a sweeping injunction following an hours-long briefing schedule, and without considering the Secretary's supporting rationales.

As explained below, the district court's assessment of plaintiffs' First Amendment claims was fundamentally mistaken. But even aside from those flaws, it was manifest error for the court to issue an injunction that precluded the Executive Branch from addressing serious national-security risks, solely to accommodate plaintiffs' preference for unbridled access to one particular mobile app. *See Winter*, 555 U.S. at 31 (vacating preliminary injunction without "address[ing] the underlying merits of plaintiffs' claims").

2. The district court also erred legally and factually in concluding that there were "serious questions" as to the merits of plaintiffs' First Amendment claims, Add.16-18.

The district court identified no reason why the Secretary's Identification—which does not prohibit any plaintiff or current U.S. user from using WeChat—is subject to any First Amendment scrutiny. It is well-established that "[t]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *NIFLA v. Becerra*, 138 S. Ct. 2361, 2373 (2018) (quotation omitted); *see 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (plurality opinion) (viewing "direct regulation" limiting purchases as "not involv[ing] any restriction on speech").

The Supreme Court has “subjected such restrictions [on conduct] to scrutiny only” in two scenarios. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986); *see HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 685 (9th Cir. 2019). First, a conduct regulation may be subject to First Amendment scrutiny when the regulated conduct itself contains a “significant expressive element,” *Cloud Books*, 478 U.S. at 705—as, for example, in the case of a prohibition on burning one’s draft card, *see United States v. O’Brien*, 391 U.S. 367 (1968). But here, the Secretary’s Identification only regulates business-to-business transactions that facilitate the collection and retention of sensitive data. None of the businesses that would engage in those transactions with WeChat are plaintiffs, and there would, in any event, be no substance to a claim that their purely economic dealings with Tencent constitute “significant” expressive activity.

Second, a regulation nominally of “nonexpressive activity” may be subject to scrutiny when it “has the inevitable effect of singling out those engaged in expressive activity”—as, for example, in the case of a “tax imposed on the sale of large quantities of newsprint and ink.” *Cloud Books*, 478 U.S. at 704, 706-07; *see Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575 (1983). But unlike situations where the “burden of [a] tax fell disproportionately—in fact, almost exclusively—upon the shoulders of newspapers exercising the constitutionally protected freedom of the press,” *Cloud Books*, 478 U.S. at 704, the Secretary’s Identification here does not “single out” those engaged in expression. Although WeChat can be used for

expressive activity, it also can be used for other purposes, such as for its health-and-fitness and e-commerce features. And the general application of national-security laws to an app that merely enables some expressive content is not itself enough to trigger First Amendment scrutiny, just as “the enforcement of a public health regulation of general application” did not trigger First Amendment scrutiny in *Cloud Books* simply because the government regulated a bookstore. *Id.* at 707.

Even were the First Amendment applicable, it would not support the injunction here. The PRC as a foreign state and Tencent (in cooperating with the PRC)—a “foreign organization[] operating abroad”—have “no First Amendment rights,” and “plaintiffs cannot export their own First Amendment rights to shield foreign organizations.” *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 140 S. Ct. 2082, 2088 (2020). Insofar as plaintiffs’ claims relate to U.S. users’ “right to receive information” from abroad, the Supreme Court has “limited [its] review” of such claims “to whether the Executive gave a ‘facially legitimate and bona fide’ reason for its action,” which is satisfied by the national-security concerns here. *Hawaii*, 138 S. Ct. at 2419 (emphasis added) (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972)).

At most, if any protected speech of U.S. persons is implicated, the Secretary’s Identification placed only a limited, content-neutral time, place, and manner restriction on that speech. The Secretary did not “target speech” of U.S. users “based on its communicative content,” *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015), as the prohibitions were explicitly designed with the content-neutral “objective of preventing

collection, transmission, and aggregation of U.S. user data.” Add.49. Accordingly, even if viewed as a restriction on the manner of plaintiffs’ speech, the Identification is permissible if it is “narrowly tailored to serve a significant governmental interest” and “leave[s] open ample alternative channels for communication” under intermediate scrutiny. *Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1197 (9th Cir. 2016) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

The Secretary’s Identification clears those hurdles with ease. The Executive Branch’s national-security interests are undoubtedly “significant.” *See Haig v. Agee*, 453 U.S. 280, 292 (1981) (finding it “‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation”). And the Secretary made a reasonable determination, supported by the Executive Branch’s collective judgment, that those interests “would be achieved less effectively absent the regulation,” which is all that narrow tailoring requires. *Lone Star*, 827 F.3d at 1200 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)); *see Humanitarian Law Project*, 561 U.S. at 34 (holding, even under First Amendment strict scrutiny, that “respect for the Government’s conclusions is appropriate” based on “national security and foreign policy concerns”).

The Secretary also left open ample alternative channels for communication. Permitting the continued use of WeChat in its current form by existing U.S. users is plainly adequate, and even if it were not, there remain numerous other mobile apps that permit the same activities. *See* Doc.68, at 14-15, 15 n.3 (collecting other

messaging, social-networking, and news platforms available to Chinese-language users). Although the court concluded that WeChat’s prevalence in the Chinese-American community makes it preferable for plaintiffs, this Court has made clear that a regulation need not ensure the availability of a “preferred method of communication” to satisfy judicial review. *Lone Star*, 827 F.3d at 1202; *see G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1074 (9th Cir. 2006) (“invalidating government regulations for failing to leave open ample alternative channels” only where “regulation forecloses an entire medium of public expression across the landscape of a particular community or setting” (cleaned up)). Even if plaintiffs were correct that some of those alternatives are prohibited from operating in China, plaintiffs cannot leverage the PRC’s repressive censorship policies to demand a First Amendment right to continue using this particular app—and, in so doing, prevent the government from addressing serious national-security risks.

In reaching a faulty view of the First Amendment, the district court also based its injunction on the incorrect factual premise that plaintiffs would personally suffer meaningful First Amendment harm. The court expressed its view that the Secretary’s Identification amounted to an “effective ban of WeChat for all U.S. users” and the “elimination of [plaintiffs’] platform for communication.” Add.18, 20. In the court’s view, the Secretary’s prohibition of the “transactions effectively eliminate[s] the plaintiffs’ key platform for communication” or amounts to “censorship.” Add.16. But as the Secretary made clear in discussing the first prohibition, his Identification does

not preclude the “use of the WeChat app” by existing U.S. users—such as plaintiffs— or require “the removal of the app from user devices.” Add.50.

Instead, the Secretary reasonably identified a number of “business-to-business transactions” for prohibition, based on “the objective of preventing collection, transmission, and aggregation of U.S. user data by the WeChat app, Tencent, and the [PRC intelligence services].” Add.49. For instance, the Secretary prohibited commercial transactions related to distributing or maintaining WeChat through app stores and related to third-party commercial services and other updates that improve the functioning of the app. Add.50-51. Other prohibitions operated solely as to hypothetical “future” developments relating to WeChat. Add.50-51. Rather than being a “ban,” Add.18, therefore, the Secretary’s balanced approach addressed the national-security harms going forward, by stemming the tide of new U.S. users for WeChat and hindering the capabilities of the app, while limiting the disruption to existing users.

Accordingly, even if the First Amendment were applicable, and even if the Secretary’s Identification were not a reasonable restriction in light of significant national-security concerns, plaintiffs—all of whom are current users of the app—still would not be entitled to injunctive relief because they would not personally suffer meaningful First Amendment harm. And ultimately, plaintiffs merely express a preference to use a foreign-owned mobile app, but that preference does not support a drastic injunction that threatens substantial harm to the Nation. Plaintiffs’ challenges, at best, reduce to the claim that their speech may one day become somewhat more

inconvenient, and the district court identified no precedent that endorses precluding the Executive Branch from addressing novel harms to national security on that basis.

B. THE REMAINING FACTORS FAVOR A STAY, AT LEAST OF THE INJUNCTIVE RELIEF AS TO NON-USERS OF WECHAT

1. In addition to the foregoing “strong showing” that the government is likely to succeed on the merits, a stay is also warranted based on consideration of (1) the government’s irreparable injury absent a stay, (2) the absence of any substantial injury to plaintiffs, and (3) the public interest. *Nken*, 556 U.S. at 426. The Supreme Court and this Court have repeatedly stayed preliminary injunctions that inhibit the Executive Branch’s national-security prerogatives. *See Trump v. Hawaii*, 138 S. Ct. 542 (2017); *Trump v. IRAP*, 137 S. Ct. 2080 (2017) (per curiam) (partial stay); *see also NRDC, Inc. v. Winter*, 518 F.3d 704 (9th Cir. 2008) (partial stay); *NRDC, Inc. v. Winter*, 502 F.3d 859 (9th Cir. 2007). The injunction here irreparably harms the government—as well as the public interest, which “merge[s]” with the government’s interest, *Nken*, 556 U.S. at 435—while plaintiffs can claim no meaningful harm.

The Executive Branch has determined that WeChat poses an unacceptable risk to national security, permitting intelligence collection on U.S. users. Absent a stay, WeChat will continue to gather extensive data on U.S. users, including additional individuals who will download the app, aiding the PRC’s efforts to “conduct espionage” and “build dossiers on millions of U.S. persons” for intelligence purposes. Add.48. That harm is plainly irreparable, exacerbated by the fact that there is no

present mechanism for the government to require new users to remove WeChat, even if it prevails on appeal.

Although the government will suffer irreparable injury from the district court's preliminary injunction, plaintiffs would not be substantially injured under a stay. As explained above, the Secretary's Identification does not prohibit *any* plaintiff, all of whom are *current* U.S. WeChat users, from continuing to use the platform. Though the app's performance may degrade over time without access to updates or the other business-to-business transactions specified in the Identification, any technical changes can be undone if plaintiffs prevail, and there is no suggestion that such degradation during the pendency of an appeal would be serious enough to outweigh the immediate harms to national security.

2. At a minimum, this Court should stay the preliminary injunction as to the first prohibited transaction under the Secretary's Identification, which involves the hosting of WeChat on mobile app stores for downloads and updates, because enjoining the first prohibition is not necessary to redress plaintiffs' claimed First Amendment harms.

Article III demands that a court's remedy must "be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis v. Casey*, 518 U.S. 343, 357 (1996). Equitable principles likewise require that an injunction "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (quotation

omitted). And that limit applies with special force to injunctions concerning national security. *See U.S. Dep't of Def. v. Meinhold*, 510 U.S. 939 (1993) (staying injunction against military policy that conferred relief on anyone other than plaintiff).

The Secretary's first prohibition is what specifically inhibits *new* U.S. users from downloading WeChat. But plaintiffs are *current* users of WeChat, and thus are not substantially injured by that prohibition. Insofar as plaintiffs' claimed injury is an inability to receive future updates to the WeChat app, the First Amendment does not entitle them to an injunction to permit a mobile app to continue evolving through code updates. Particularly given the government's national-security interest in limiting the pool of users who expose their data to the PRC, any minimal injury sustained by plaintiffs from the first prohibition is insufficient to support the full breadth of injunctive relief, and the injunction should at least be stayed as to that prohibition.

CONCLUSION

For the foregoing reasons, the Court should stay the district court's preliminary injunction pending appeal or, at a minimum, stay the injunction against the Secretary's first prohibited transaction. The Court should grant a stay by October 23, 2020, if the district court has not provided relief by that time.

Respectfully submitted,

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OCTOBER 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3 because it contains 5600 words. This motion complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Garamond typeface.

/s/ Dennis Fan
DENNIS FAN

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2020, I filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Dennis Fan
DENNIS FAN