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18 Attorneys for Plaintiffs

19 UNITED STATES DISTRICT COURT

20 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

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

23 Plaintiffs,

24 v.

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

27 Defendants.

Case No. 3:20-cv-05910

**SECOND AMENDED COMPLAINT  
 FOR DECLARATORY AND  
 INJUNCTIVE RELIEF**

## INTRODUCTION

1  
2 1. Public space in the digital age is defined by platforms and users rather than  
3 physical places with geographic boundaries. Cyberspace, particularly social media, is one  
4 of “the most important places” to exchange views. *Packingham v. North Carolina*, 582  
5 U.S. —, 137 S. Ct. 1730, 1735 (2017). Few digital public squares are as large as that  
6 found on WeChat. Released in 2011, WeChat is now one of the world’s most popular  
7 mobile telephone and social media applications (“app”), with over 1 billion monthly active  
8 users.<sup>1</sup>

9 2. Approximately 19 million users rely on the app in the United States, and it is  
10 the primary app Chinese-speakers in the U.S. use to participate in social life by connecting  
11 with loved ones, sharing special moments, discussing ideas, receiving up-to-the minute  
12 news, and participating in political discussions and advocacy.<sup>2</sup> As a “super-app,” WeChat  
13 users also rely on the app to make telephone calls, hold video conferences, upload  
14 documents, share photos, and make payments.<sup>3</sup> It has become essential to the conduct of  
15 daily life for its users, many of whom regularly spend hours each day on the app.

16 3. WeChat is also used for numerous societally important purposes, including  
17 by public institutions. For example, as the coronavirus pandemic continues to separate  
18 people physically, WeChat has been used in the United States by police departments to  
19 inform the public about testing center locations, by volunteers to organize the delivery of

20  
21 <sup>1</sup> Rayna Hollander, *WeChat has hit 1 billion monthly active users*, BUSINESS INSIDER  
22 (Mar. 6, 2018, 11:59 a.m.), <https://www.businessinsider.com/wechat-has-hit-1-billion-monthly-active-users-2018-3>; Iris Deng and Celia Chen, *How WeChat became China’s everyday mobile app*, SOUTH CHINA MORNING POST (Aug. 16, 2018),  
23 <https://www.scmp.com/tech/article/2159831/how-wechat-became-chinas-everyday-mobile-app>.

24 <sup>2</sup> Rick Smith, *Crackdown on WeChat could hinder millions of US users who rely on social media tool*, WRAL TECHWIRE (Aug. 19, 2020),  
25 <https://www.wraltechwire.com/2020/08/19/crackdown-on-wechat-could-hinder-millions-of-us-users-who-rely-on-social-media-tool/>.

26 <sup>3</sup> Bani Sapra, *This Chinese super-app is Apple’s biggest threat in China and could be a blueprint for Facebook’s future. Here’s what it’s like to use WeChat, which helps a billion users order food and hail rides*, BUSINESS INSIDER (Dec. 21, 2019),  
27 <https://www.businessinsider.com/chinese-superapp-wechat-best-feature-walkthrough-2019-12>.  
28

1 medical supplies, and by families to stay in touch with isolated elderly relatives in nursing  
2 homes. WeChat is also used by individuals and groups—including churches—for  
3 religious and cultural purposes, including: group prayer, organizing for holidays and  
4 events, taking care of the poor, sick and infirm, and education.

5         4. On August 6, 2020, the President issued Executive Order 13943 entitled  
6 “Addressing the Threat Posed by WeChat, and Taking Additional Steps To Address the  
7 National Emergency With Respect to the Information and Communications Technology  
8 and Services Supply Chain,” 85 Fed. Reg. 48641 (“the Executive Order”). Citing national  
9 security concerns, the Executive Order bans what appears to be all uses of WeChat by  
10 anyone within the United States as well as “U.S. persons” outside the United States.  
11 Section 1(a) of the Executive Order prohibits people and property subject to U.S.  
12 jurisdiction from carrying out “transactions” with WeChat after 45 days of the Executive  
13 Order’s issuance. Section 2(a) prohibits any transaction “by a United States person or  
14 within the United States” that evades, avoids, or violates the uncertain prohibition in  
15 Section 1(a). Maddeningly, the Executive Order does not define what those transactions  
16 include, leaving individuals and companies at a loss as to whether they will risk civil  
17 and/or criminal prosecution and penalties if they do not fundamentally change the way  
18 they communicate or run their businesses. The vaguely worded Executive Order was  
19 issued without further explanation or a media briefing, and states that the Secretary of  
20 Commerce shall identify what transactions are prohibited after 45 days—in effect,  
21 delaying identification of what transactions are prohibited until after such transactions are  
22 already prohibited.<sup>4</sup>

23         5. On September 18, 2020, the Commerce Department released its  
24 “Identification of Prohibited Transactions to Implement Executive Order 13943” (the  
25 “Identification”). The Identification sets forth eleven defined terms and identifies seven  
26

27 <sup>4</sup> Ana Swanson, *Trump’s Orders on WeChat and TikTok Are Uncertain. That May Be the*  
28 *Point.*, N.Y. TIMES (Aug. 7, 2020),  
<https://www.nytimes.com/2020/08/07/business/economy/trump-executive-order-tiktok-wechat.html>.

1 “transactions” to be prohibited pursuant to the Executive Order. On the same day he  
 2 issued the Identification, the Secretary admitted on national television that it will “for all  
 3 practical purposes” result in WeChat being “shut down in the U.S.” as soon as the  
 4 prohibitions take effect.<sup>5</sup>

5 6. Neither the Executive Order nor the Identification provided concrete  
 6 evidence to support the contention that using WeChat in the United States compromises  
 7 national security. Notably, no other nation has implemented a comprehensive WeChat ban  
 8 on the basis of any like-finding that WeChat is a threat to national security.<sup>6</sup> Both the  
 9 Executive Order and the Identification, however, were issued in the midst of the 2020  
 10 election cycle, during a time when President Trump has made numerous anti-Chinese  
 11 statements that have contributed to and incited racial animus against persons of Chinese  
 12 descent<sup>7</sup>—for reasons that have nothing to do with national security.

13 7. In a stark violation of the First Amendment, the Executive Order and  
 14 Identification target and silence WeChat users, the overwhelming majority of whom are  
 15 members of the Chinese and Chinese-speaking communities. They regulate and prohibit  
 16 constitutionally protected speech, expression, and association; in doing so, they are not  
 17 narrowly tailored to restrict only that speech which presents national security risks to the  
 18 United States. Nor do they leave open ample alternative avenues of communication for  
 19

20 <sup>5</sup> Megan Henney, *Trump Administration to Ban Americans from Downloading TikTok, WeChat on Sunday*, FOX BUSINESS (Sept. 18, 2020),  
 21 <https://www.foxbusiness.com/politics/trump-administration-to-ban-americans-from-downloading-tiktok-wechat>.

22 <sup>6</sup> See Maria Abi-Habib, *India Bans Nearly 60 Chinese Apps, Including TikTok and WeChat*, N.Y. TIMES (June 29, 2020, updated on June 30, 2020),  
 23 <https://www.nytimes.com/2020/06/29/world/asia/tik-tok-banned-india-china.html> (stating  
 24 that India’s ban is “part of the tit-for-tat retaliation after the Indian and Chinese militaries  
 clashed earlier this month.”).

25 <sup>7</sup> See, e.g., Nadia Kim, *Asian Americans Suffer From Trump’s Racist Attacks Too*, PUBLIC  
 26 SEMINAR (July 23, 2020), <https://publicseminar.org/essays/asian-americans-suffer-from-trumps-racist-attacks-too/>; Li Zhou, *Trump’s racist references to the coronavirus are his latest effort to stoke xenophobia*, VOX (June 23, 2020),  
 27 <https://www.vox.com/2020/6/23/21300332/trump-coronavirus-racism-asian-americans>;  
 28 Matt Stevens, *How Asian-American Leaders Are Grappling With Xenophobia Amid Coronavirus*, N.Y. TIMES (Mar. 29, 2020, updated on April 10, 2020),  
<https://www.nytimes.com/2020/03/29/us/politics/coronavirus-asian-americans.html>.

1 WeChat users. Indeed, banning the use of WeChat in the United States has the effect of  
2 foreclosing all meaningful access to social media for members of the Chinese-speaking  
3 community, such as Plaintiffs, who rely on the app to communicate and interact with  
4 others like themselves. The ban on WeChat, because it substantially burdens the free  
5 exercise of religion, also violates the Religious Freedom Restoration Act.

6 8. The Executive Order and Identification also run afoul of the Fifth  
7 Amendment’s Due Process Clause by failing to provide notice of the specific conduct that  
8 may be identified at a future date by the Secretary. Because of this uncertainty, businesses  
9 that use WeChat in the United States are justifiably fearful of using WeChat in any way  
10 and for any purpose—and also of losing access to WeChat. Since the Executive Order and  
11 Identification were issued, numerous users, including Plaintiffs, have scrambled to seek  
12 alternatives without success.

13 9. WeChat is the only “super-app” with a natively Chinese interface designed  
14 for Chinese speakers. That is one reason why it is the dominant social media and e-  
15 commerce application amongst the global Chinese diaspora, which include Chinese  
16 communities in the United States.<sup>8</sup> These individuals, particularly those who do not speak  
17 English, are *completely reliant* on WeChat to communicate, socialize, and express  
18 themselves. As such, by prohibiting the use of only WeChat but not any similar  
19 applications (ones not made in China and without Chinese interfaces), the Executive Order  
20 and Identification single out people of Chinese and Chinese-American ancestry and subject  
21 them to disparate treatment on the basis of race, ethnicity, nationality, national origin, and  
22 alienage. In doing so, the Executive Order violates the Equal Protection Clause.

23 10. In issuing the Executive Order and Identification, Defendants acted beyond  
24 the authority provided by the International Emergency Economic Powers Act, which  
25 precludes Defendants from “*directly or indirectly*” regulating, among other things,  
26

27 <sup>8</sup> Thuy Ong, *Chinese social media platform WeChat reaches 1 billion accounts worldwide*,  
28 THE VERGE (Mar. 5, 2018), <https://www.theverge.com/2018/3/5/17080546/wechat-chinese-social-media-billion-users-china>.

1 personal communications, donations, and the international exchange of information.

2 11. Finally, the Secretary's Identification violates the Administrative Procedure  
3 Act ("APA") because it is in excess of statutory jurisdiction, authority, or limitations, or  
4 short of statutory right, within the meaning of 5 U.S.C. § 706(2)(B), and is arbitrary,  
5 capricious, an abuse of discretion, or otherwise not in accordance with law, within the  
6 meaning of 5 U.S.C. § 706(2)(A).

7 12. The U.S. WeChat Users Alliance ("USWUA"), Chihuo Inc., Brent Coulter,  
8 Fangyi Duan, Jinneng Bao, Elaine Peng, and Xiao Zhang (collectively, "Plaintiffs"), bring  
9 this suit to challenge the Executive Order and Identification, which eviscerate an  
10 irreplaceable cultural bridge that connects Plaintiffs to family members, friends, business  
11 partners, customers, religious community members, and other individuals with common  
12 interests within the Chinese diaspora, located both in and outside of the United States. The  
13 Executive Order and Identification have already harmed Plaintiffs, who fear for the loss of  
14 their beloved connections, whether it be with friends, family, community, customers, aid  
15 recipients of the charities they run, or even strangers whose ideas enrich their lives. They  
16 have been forced to divert time, energy, and money to seek alternative communication  
17 platforms, download and save irreplaceable digital histories, plan for business closures,  
18 find other sources of information, and try to obtain alternative contact information for  
19 those from whom they will soon be separated.

20 13. Even if they succeed to some extent in their mitigation efforts, Plaintiffs will  
21 never be able to replace the full spectrum of the social interactivity that WeChat offers, nor  
22 will they be able to find any social networking platform with anything close to the same  
23 level of participation by the global Chinese diaspora. This is because WeChat's network  
24 effects, generated by its 1 billion-plus daily users, are irreplaceable.

25 14. In short, the threatened displacement of these WeChat users from their public  
26 space is an irreparable harm that requires judicial intervention.

27 15. For these reasons, and those discussed below, the Court should (1) declare  
28 that the Executive Order and the Identification are unlawful and unconstitutional; and

1 (2) enjoin Defendants from enforcing the Executive Order or the Secretary’s Identification  
2 to regulate or prohibit the use of WeChat in the United States, directly or indirectly.

3 **JURISDICTION AND VENUE**

4 16. The claims asserted herein arise under and pursuant to the Constitution and  
5 laws of the United States. This Court has jurisdiction over the subject matter of this action  
6 pursuant to 28 U.S.C. § 1331.

7 17. An actual, present, and justiciable controversy exists between the parties  
8 within the meaning of 28 U.S.C. § 2201(a).

9 18. Plaintiffs’ claims for declaratory and injunctive relief are authorized by 28  
10 U.S.C. §§ 2201 and 2202, by Rules 57 and 65 of the Federal Rules of Civil Procedure, and  
11 by the general legal and equitable powers of this Court.

12 19. Venue is proper in this District pursuant to 28 U.S.C. §§ 2201 and 1391  
13 (e)(1) because Defendant are officers of the United States acting in their official capacities  
14 and (1) at least one plaintiff resides in this district; and (2) a substantial part of the events  
15 or omissions giving rise to the claim occurred in this district. For the same reason,  
16 intradistrict assignment is proper in the San Francisco Division. *See* N.D. Cal. L.R. 3-2.

17 **PARTIES**

18 20. Plaintiff U.S. WeChat Users Alliance (“USWUA”) is a New Jersey nonprofit  
19 organization that is in the process of being registered under Internal Revenue Code section  
20 501(c)(3), established by individuals in the United States for the purpose of opposing the  
21 Executive Order. Plaintiff USWUA is made up of WeChat users located throughout the  
22 United States who are not affiliated with WeChat, its parent company Tencent Holdings  
23 Ltd. (“Tencent”), nor any political party or foreign government. Plaintiff USWUA runs on  
24 public donations from WeChat users and organizes its efforts on WeChat. Plaintiff  
25 USWUA is made up of individuals who want to continue using WeChat within the United  
26 States and are currently suffering and will continue to suffer an injury based on the  
27 Defendants’ actions.

28 21. Plaintiff Elaine Peng is a United States citizen residing in Castro Valley,

1 California. Plaintiff Peng founded the Mental Health Association for Chinese  
2 Communities (“MHACC”) in 2013 to provide mental health education, suicide prevention,  
3 assistance, and other resources to her local Chinese community that is underserved by the  
4 mental health profession due to language and cultural barriers. As president of MHACC,  
5 Plaintiff Peng strives to make mental health programs available to those in need and has  
6 received multiple awards for her work. Like much of the Chinese population in the United  
7 States, Plaintiff Peng uses WeChat as her exclusive means to connect with her Chinese  
8 families and friends, domestic or abroad. As most of the population MHACC serves relies  
9 on WeChat to communicate, use of WeChat is also integral to MHACC’s mission to  
10 provide mental health services and support to its members.

11 22. Plaintiff Brent Coulter is a United States citizen and WeChat user. Plaintiff  
12 Coulter holds a Juris Doctor from the University of California, Hastings College of the  
13 Law (“Hastings”), and lives in San Francisco, California. Plaintiff Coulter previously  
14 lived in China for approximately five years, where he studied at Sichuan University and  
15 worked in marketing. While in China, Plaintiff Coulter used WeChat as his main method  
16 of communication to connect with friends and professional contacts. Now in the U.S., one  
17 of Plaintiff Coulter’s professional goals is to bridge the gap between China and the U.S.  
18 with regard to law and business. At Hastings, Plaintiff Coulter founded the Asian Law and  
19 Business Association, through which he formed a partnership with the American Chamber  
20 of Commerce (“AmCham”) in Southwest China. Each year, Plaintiff Coulter drafts two  
21 chapters of AmCham’s annual white paper on U.S. business in China with his colleagues  
22 in both countries. WeChat is central to Plaintiff Coulter’s annual collaboration and  
23 remains the only way for him to connect with many of his professional contacts and  
24 friends in China. Plaintiff Coulter relies on WeChat to build upon his professional career  
25 which straddles law and business in the U.S. and China. Without WeChat, Plaintiff  
26 Coulter would lose access to many of the relationships that he has built throughout his  
27 studies and career.

28 23. Plaintiff Xiao Zhang is a Chinese citizen with a valid visa residing in

1 Houston, Texas. She is employed as an engineer and founded a nonprofit organization  
2 known as Hita Education Foundation that supports underserved students at the high school  
3 in her hometown in China. Plaintiff Zhang uses WeChat to speak with administrators,  
4 teachers, parents of school children, and to help identify underserved Chinese students who  
5 would benefit from the program. Plaintiff Zhang’s nonprofit organization currently sends  
6 donations of 300 yuan (approximately \$43 dollars) to seven students per month to pay for  
7 meals and school supplies. Plaintiff Zhang also uses WeChat to transfer the funds to each  
8 individual student, and WeChat is her exclusive means to connect with her Chinese-  
9 speaking family members and friends, domestic or abroad.

10         24. Plaintiff Fangyi “Amy” Duan is a Chinese citizen with a valid visa, and  
11 resides in Santa Clara, California. Plaintiff Duan is employed as the chief executive  
12 officer of Plaintiff Chihuo Inc. (“Chihuo”), a corporation that is dually registered in both  
13 California and Delaware.

14         25. Plaintiff Chihuo is a media and online retailer that creates content regarding  
15 Chinese restaurants and cuisine for people residing in the United States. Plaintiff Chihuo  
16 provides U.S. based merchants an e-commerce platform for targeting Chinese-speaking  
17 consumers. Plaintiff Chihuo serves its customers by providing targeted marketing and  
18 advertising services online. Plaintiff Chihuo delivers its targeted advertising and  
19 marketing services primarily on several WeChat official accounts through the app’s  
20 various functions, including WeChat Moments. Plaintiff Chihuo employs or contracts  
21 with approximately thirty people as part of its business. Plaintiff Chihuo’s WeChat  
22 accounts cover 14 major metropolitan areas in the United States and are enjoyed by more  
23 than 640,000 readers.

24         26. Plaintiff Jinneng Bao is a United States permanent resident and lives in  
25 Nassau County, New York. He is self-employed and runs several businesses including a  
26 construction company primarily serving Chinese-speaking clients in New York. Plaintiff  
27 Bao actively attends a Chinese church in New York and participates in Bible studies  
28 regularly on WeChat. His Bible study group consists of mostly Chinese-speaking

1 members. Due to the pandemic, Plaintiff Bao’s Bible study group has stopped meeting in  
 2 person, and WeChat is the only way the group currently maintains communications with  
 3 one another.

4 27. Defendant Donald J. Trump (“President Trump”) is the President of the  
 5 United States. He is sued in his official capacity. In that capacity, he issued the Executive  
 6 Order challenged in this suit and authorized the issuance of the Identification challenged in  
 7 this suit.

8 28. Defendant Wilbur Ross (“Secretary Ross”) is the United States Secretary of  
 9 Commerce. He is sued in his official capacity. In the Executive Order, the Secretary is  
 10 authorized to take actions, including adopting rules and regulations, to implement the  
 11 Executive Order. The Secretary exercised this authority on September 18, 2020, when he  
 12 issued the Identification prohibiting various transactions related to WeChat.

### 13 **FACTUAL ALLEGATIONS**

#### 14 **A. WeChat Capabilities**

15 29. WeChat is one of the most popular messaging applications in the world, with  
 16 a monthly user base of more than 1 billion people.<sup>9</sup> Nearly every person in China with an  
 17 online presence has at least one WeChat account, and over one-third of them spend four  
 18 hours or more on the app every day—making WeChat an indispensable part of many  
 19 peoples’ lives and work.<sup>10</sup>

20 30. Though WeChat began as a messaging service, it is now a “super-app” that  
 21 serves a multitude of communicative needs, including making telephone calls, video  
 22 conferencing, sharing photos, commenting on other users’ posts, making payments, and  
 23 still other purposes.<sup>11</sup>

24  
 25 <sup>9</sup> Arjun Kharpal, Everything you need to know about WeChat—China’s billion-user  
 26 messaging app, CNBC (Feb. 3, 2019), <https://www.cnbc.com/2019/02/04/what-is-wechat-china-biggest-messaging-app.html>.

27 <sup>10</sup> Li Yuan, To Cover China, There’s No Substitute for WeChat, N.Y. TIMES (Jan. 9,  
 2019), <https://www.nytimes.com/2019/01/09/technology/personaltech/china-wechat.html>

28 <sup>11</sup> Bani Sapra, *This Chinese super-app is Apple’s biggest threat in China and could be a*

1           31. One of WeChat’s primary uses is the app’s messaging capabilities, which  
2 include both text and voice messaging. Messaging through WeChat is the preferred  
3 method of communication in China, even when doing business. Through the app’s  
4 messaging capabilities, users can have numerous ongoing conversations at one time, and  
5 can also set up group texts within a family, a business, or among friends, to communicate  
6 with the whole group simultaneously.

7           32. WeChat also has capabilities to make voice and video calls. WeChat users  
8 often choose to make voice calls within the app rather than through their cellular telephone  
9 provider because it is more convenient. Group voice conference calls and video chats—  
10 comparable to Zoom video group calls—can also be easily made on WeChat.

11           33. WeChat includes a feature called “Moments” through which users can  
12 upload photos, videos, share news articles, and compose text. WeChat users can comment  
13 on or like posts, similar to the capabilities of apps like Facebook or Instagram.

14           34. WeChat also supports many integrated services, such as banking and ride-  
15 sharing, so that users do not need to use a separate app to get those services. Some  
16 companies have launched “mini-programs” within WeChat instead of standalone apps,  
17 making it more convenient for WeChat users to use their services.

18           35. WeChat has increasingly been adopted by older age groups in China,  
19 including a significant percentage of those over 60.<sup>12</sup> Even older users in their 70s use  
20 WeChat at high levels for messaging, voice calls, reading articles, and making payments.<sup>13</sup>

21           **B. WeChat Usage in the United States**

22           36. There are approximately 19 million daily active WeChat users in the United  
23

24 *blueprint for Facebook’s future. Here’s what it’s like to use WeChat, which helps a billion*  
25 *users order food and hail rides*, BUSINESS INSIDER (Dec. 21, 2019),  
26 <https://www.businessinsider.com/chinese-superapp-wechat-best-feature-walkthrough-2019-12>.

27 <sup>12</sup> Clark Boyd, *The Silver Lining: WeChat and China’s Over-60s*, MEDIUM (Sept. 3, 2020),  
<https://medium.com/swlh/the-silver-lining-wechat-and-chinas-over-60s-168b193fb516>.

28 <sup>13</sup> Mansoor Iqbal, *WeChat Revenue and Usage Statistics*, BUSINESS OF APPS (updated  
July 30, 2020), <https://www.businessofapps.com/data/wechat-statistics/>.

1 States.<sup>14</sup> WeChat is very widely used among Chinese speakers in the United States, many  
 2 of whom do not own personal computers and rely on the WeChat mobile app to  
 3 communicate.<sup>15</sup> WeChat is the dominant method for anyone in the United States who  
 4 regularly communicates with people in China because it is free, is more convenient, and  
 5 has better reception than traditional telephone calls. WeChat is used in the United States  
 6 not only to keep in touch with friends and family, but also academics, professionals, and  
 7 business people to discuss matters of professional importance.

8 37. In the United States, the vast majority of the Chinese-speaking population  
 9 uses WeChat, creating network effects that encourage others to join and participate lest  
 10 they be cut off entirely from family, friends, and business circles.<sup>16</sup> Almost all Chinese-  
 11 speaking immigrants who have come to the United States since 2011 brought their WeChat  
 12 accounts with them from China, where they built extensive networks of contacts prior to  
 13 immigrating. In order to maintain their networks among the Chinese-speaking community,  
 14 these individuals need to continue using WeChat rather than mainstream Western social  
 15 media platforms such as Facebook, WhatsApp, or Twitter. This is because all of these  
 16 platforms—and many others used in the United States—are not available in China. This is  
 17 also true for Chinese-speaking immigrants who came to the United States before 2011 and  
 18 now depend on WeChat to maintain connections with contacts in both the United States  
 19 and in China. Simply put, WeChat is irreplaceable because no other app has anywhere  
 20 near the same number of users and engagement among the Chinese-speaking community,  
 21 both in the United States and abroad. If WeChat were banned in the United States,

22 \_\_\_\_\_  
 23 <sup>14</sup> Krystal Hu, *WeChat U.S. ban cuts off users link to families in China*, REUTERS (Aug. 7,  
 24 2020), <https://www.reuters.com/article/us-usa-tencent-holdings-wechat-ban/wechat-us-ban-cuts-off-users-link-to-families-in-china-idUSKCN253339#:~:text=In%20the%20past%20three%20months,according%20to%20analytics%20firms%20Apptopia>.

25 <sup>15</sup> Gustavo Lopez, Neil G. Ruiz, and Eileen Patten, *Key facts about Asian Americans, a diverse and growing population*, PEW RESEARCH CENTER (Sept. 8, 2017),  
 26 <https://www.pewresearch.org/fact-tank/2017/09/08/key-facts-about-asian-americans/>.

27 <sup>16</sup> Mohit Mittal, *WeChat—The One App That Rules Them All*, HARVARD BUSINESS  
 28 SCHOOL DIGITAL INITIATIVE (Aug. 25, 2017), <https://digital.hbs.edu/innovation-disruption/wechat%E2%80%8A-%E2%80%8Athe-one-app-rules/>.

1 Plaintiffs' WeChat networks would not simply migrate to another platform—they would  
2 evaporate.

3 38. The WeChat mobile app in particular has become an essential part of  
4 Chinese and Chinese-American life in the United States. The vast majority of WeChat  
5 users in the United States use the app through their mobile phones. Many WeChat users in  
6 the United States do not own personal computers, and rely exclusively on the WeChat  
7 mobile app to maintain contact with their personal, professional, political, and religious  
8 communities. Even those users who do own a personal computer depend on the  
9 availability of the WeChat mobile app, because so many of the people with whom they  
10 communicate—even those located in the United States—rely on their mobile phones to  
11 access and use WeChat.

12 39. WeChat users in the United States use the app to communicate within  
13 Chinese-American communities in the United States and with Chinese speakers throughout  
14 the world. Without access to WeChat, users in the United States will be cut off from their  
15 cultural community in the U.S. and will lose the main line of communication they have  
16 with family and friends thousands of miles away. Plaintiffs Peng, Zhang, Bao, and Fang  
17 all use WeChat regularly while living in the United States to communicate with their aging  
18 parents or other family members who reside in China.

19 40. The importance of WeChat to Chinese Americans cannot be overstated  
20 because a significant portion of these individuals speak little or no English. According to a  
21 study by the Pew Research Center, 41% of the Chinese population in the United States are  
22 not English proficient.<sup>17</sup> Accordingly, a blanket prohibition on WeChat means that  
23 millions of individuals in the United States will be unable to find a comparable substitute  
24 on apps such as Facebook, which are designed for English-speaking users and primarily  
25 have English-speaking user networks within the United States.

26  
27 <sup>17</sup> *English proficiency of Chinese population in the U.S.*, PEW RESEARCH CENTER (July 6,  
28 2017), <https://www.pewsocialtrends.org/chart/english-proficiency-of-chinese-population-in-the-u-s/>.

1           41. WeChat users in the United States use the app to engage in, organize, and  
 2 publicize religious and cultural practices. For instance, various churches with primarily  
 3 Chinese congregants have WeChat profiles and stream their services online.<sup>18</sup> The Church  
 4 of Jesus Christ of Latter-Day Saints uses WeChat to reach Chinese-American members  
 5 and potential congregants within China.<sup>19</sup> WeChat users in the United States attend and  
 6 participate in religious services or events, such as funerals, weddings, or other gatherings  
 7 through the app. Plaintiff Jinneng Bao relies on WeChat exclusively to attend regular  
 8 Bible studies hosted by his Chinese church in New York. WeChat users in the United  
 9 States organize and celebrate various religious and cultural holidays through their activity  
 10 in WeChat groups. They post Moments about holidays such as the Chinese New Year, the  
 11 Mid-Autumn Moon Festival, Ching Ming Festival (when Chinese people around the world  
 12 visit the tombs of their departed loved ones), and the Duan Wu Festival (popularly known  
 13 in the U.S. as the day when Chinese communities host dragon boat races). Because events,  
 14 educational or celebratory, are frequently discussed and transmitted through social  
 15 networks on WeChat, users rely on WeChat to learn about and celebrate religious and  
 16 cultural events with their community members online.

17           42. In the United States, WeChat users organize around political causes through  
 18 the app. For instance, many WeChat groups were used to organize, campaign, and raise  
 19 funds in the 2016 presidential election, and users in the United States have similarly used  
 20  
 21

22 <sup>18</sup> Feng Long, *Leveraging Tech for Chinese Evangelism*, SIERRAPACIFIC (May 15, 2020),  
 23 <https://www.undeniableblessing.org/blog/Leveraging-Tech-for-Chinese-Evangelism>  
 24 (Oakland pastor who uses WeChat); MID-HUDSON CHINESE CHRISTIAN CHURCH (NY),  
<https://www.mhccc.org/> (last visited Aug. 20, 2020); BRENTWOOD BAPTIST CHURCH (TN)  
<https://brentwoodbaptist.com/chinese/> (last visited Aug. 20, 2020).

25 <sup>19</sup> THE CHURCH OF JESUS CHRIST OF LATTER-DAY-SAINTS IN CHINA,  
 26 <https://www.churchofjesuschrist.org/China> (last visited Aug. 20, 2020) (*see* Frequently  
 27 Asked Questions by Church Leaders, Can Church leaders/members outside China keep in  
 28 touch with Chinese members baptized in their brand/ward after those Chinese members  
 return to China? Email? WeChat? Letters?); James Griffiths, *This US Church with  
 Expansion in its DNA Wants to Open a Temple in China*, CNN (Hong Kong) (Jun. 11,  
 2020, [https://www.cnn.com/2020/06/06/asia/mormon-church-latter-day-saints-china-intl-  
 hnk/index.html](https://www.cnn.com/2020/06/06/asia/mormon-church-latter-day-saints-china-intl-hnk/index.html)).

1 WeChat to support candidates in the 2020 presidential election cycle.<sup>20</sup> Plaintiff Peng is an  
2 active member of several WeChat groups that discuss issues pertaining to the U.S. 2020  
3 election and publish information on how to become a registered voter. Asian-Americans  
4 who organized to oppose a Democrat-backed ballot initiative in California, which would  
5 have reversed the state's ban on race-conscious admissions, did so primarily through  
6 WeChat.<sup>21</sup> Organizations and causes wanting to reach Chinese Americans use WeChat  
7 groups to raise awareness about demonstrations, spread voter education materials, and  
8 campaign for various candidates.

9 43. WeChat is integral for the spread of current events and news within Chinese  
10 communities. WeChat users rely on the app to read about current events and the news,  
11 including in media from the United States, China, and around the world. Plaintiffs Zhang  
12 and Peng frequently use WeChat to read, share, receive, and respond to news items that  
13 their WeChat contacts post to their Moments. Plaintiffs then comment, like, and share  
14 various news items that they receive from their WeChat contacts. Journalists who cover  
15 issues pertaining to China and Chinese communities rely on WeChat to investigate issues  
16 and communicate with people to interview. Large Chinese-language newspapers in the  
17 U.S., such as *Sing Tao Daily* and *World Journal*, publish news stories through their  
18 WeChat accounts.

19 44. Government entities in areas with significant numbers of Chinese  
20 immigrants or Chinese Americans use WeChat as a method of communicating with their  
21 constituents. For instance, the police department in Alhambra, California began using  
22 WeChat in 2015 to provide updates about local law enforcement efforts.<sup>22</sup> The cities of  
23

24 <sup>20</sup> See Wanning Sun, *Why Trump's WeChat ban does not make sense—and could actually*  
25 *cost him Chinese votes*, THE CONVERSATION (Aug. 10, 2020),  
<https://theconversation.com/why-trumps-wechat-ban-does-not-make-sense-and-could-actually-cost-him-chinese-votes-144207>.

26 <sup>21</sup> Alia Wong, *The App at the Heart of the Movement to End Affirmative Action*, THE  
27 ATLANTIC (Nov. 20, 2018), <https://www.theatlantic.com/education/archive/2018/11/asian-americans-wechat-war-affirmative-action/576328/>.

28 <sup>22</sup> Ashley Fan, *Some San Gabriel Valley Communities Could Be Seriously Affected by*

1 Arcadia, San Gabriel, and Monterey Park in California have official WeChat accounts,  
 2 which allow them to communicate with Chinese-speaking populations in their own  
 3 language.<sup>23</sup> Local governments have used WeChat messaging as a way to send emergency  
 4 notifications and provide public notice for local governance proposals.

5 45. During the COVID-19 pandemic, WeChat users have relied even more on  
 6 the app to communicate and organize within their communities. In February 2020,  
 7 volunteers in the Bay Area used WeChat to organize and send medical supplies to Wuhan,  
 8 China at the start of the worldwide pandemic.<sup>24</sup> As travel restrictions emerged in the  
 9 United States, WeChat users relied on the app in order to communicate with family  
 10 members that they cannot visit in person in their home towns, in other areas of the United  
 11 States, and around the world. People in the United States use the app to visit with elderly  
 12 loved ones in nursing homes and hospitals, as well as with COVID-19 patients who cannot  
 13 be visited in person due to pandemic-related restrictions. Information about the pandemic,  
 14 including regarding COVID-19 testing, prevention methods, and government responses to  
 15 the pandemic, are broadly shared and discussed in the United States through WeChat  
 16 groups and posts. For instance, a local police department in California posted information  
 17 about times and locations for drive-up and walk-up COVID-19 testing on its WeChat  
 18 profile. Similarly, doctors used WeChat extensively to spread information on the

19 \_\_\_\_\_  
 20 *Trump's WeChat Ban*, SAN GABRIEL VALLEY TRIB. (Aug. 10, 2020),  
 21 [https://www.sgvtribune.com/2020/08/10/how-trumps-wechat-ban-could-disrupt-life-in-](https://www.sgvtribune.com/2020/08/10/how-trumps-wechat-ban-could-disrupt-life-in-the-san-gabriel-valley/)  
 22 [the-san-gabriel-valley/](https://www.sgvtribune.com/2020/08/10/how-trumps-wechat-ban-could-disrupt-life-in-the-san-gabriel-valley/); Josie Huang, *Alhambra Police Use WeChat as Bridge to Chinese*  
 23 *Immigrants*, KPCC (Jan. 20, 2015),  
 24 [https://www.scpr.org/blogs/multiamerican/2015/01/20/17819/alhambra-police-join-](https://www.scpr.org/blogs/multiamerican/2015/01/20/17819/alhambra-police-join-wechat-to-chinese/)  
 25 [wechat-to-chinese/](https://www.scpr.org/blogs/multiamerican/2015/01/20/17819/alhambra-police-join-wechat-to-chinese/).

23 <sup>23</sup> Ashley Fan, *Some San Gabriel Valley Communities Could Be Seriously Affected by*  
 24 *Trump's WeChat Ban*, SAN GABRIEL VALLEY TRIB. (Aug. 10, 2020),  
 25 [https://www.sgvtribune.com/2020/08/10/how-trumps-wechat-ban-could-disrupt-life-in-](https://www.sgvtribune.com/2020/08/10/how-trumps-wechat-ban-could-disrupt-life-in-the-san-gabriel-valley/)  
 26 [the-san-gabriel-valley/](https://www.sgvtribune.com/2020/08/10/how-trumps-wechat-ban-could-disrupt-life-in-the-san-gabriel-valley/); Christopher Yee, *How this 32-year-old Interpreter Became*  
 27 *Alhambra's Weibo, WeChat Guru*, SAN GABRIEL VALLEY TRIB. (Jul. 14, 2016, updated  
 28 Aug. 30, 2017), [https://www.sgvtribune.com/2016/07/14/how-this-32-year-old-interpreter-](https://www.sgvtribune.com/2016/07/14/how-this-32-year-old-interpreter-became-alhambras-weibo-wechat-guru/)  
 29 [became-alhambras-weibo-wechat-guru/](https://www.sgvtribune.com/2016/07/14/how-this-32-year-old-interpreter-became-alhambras-weibo-wechat-guru/).

27 <sup>24</sup> Devin Katayama, Ericka Cruz Guevarra & Alan Montecillo, “‘*That’s Where I Grew*  
 28 *Up*’: *The Wuhan Natives Organizing Aid from the Bay*, KQED (Feb. 19, 2020),  
 29 [https://www.kqed.org/news/11802206/thats-where-i-grew-up-the-wuhan-natives-](https://www.kqed.org/news/11802206/thats-where-i-grew-up-the-wuhan-natives-organizing-aid-from-the-bay)  
 30 [organizing-aid-from-the-bay](https://www.kqed.org/news/11802206/thats-where-i-grew-up-the-wuhan-natives-organizing-aid-from-the-bay).

1 prevention of COVID-19 in the Chinese communities in Sacramento, California.<sup>25</sup>  
 2 Organizations, such as Plaintiff Peng’s MHACC, make vital mental health programs  
 3 available to their communities through WeChat, in a world where people are struggling  
 4 with the long-term isolation associated with the pandemic.

## 5 **DEFENDANTS’ EXECUTIVE ORDERS AND IMPLEMENTING REGULATIONS**

### 6 **A. Executive Order 13873**

7 46. Prior to the issuance of the Executive Order challenged by this lawsuit, on  
 8 May 15, 2019, President Trump issued Executive Order 13873, titled “Securing the  
 9 Information and Communications Technology Services Supply Chain.” 84 Fed. Reg.  
 10 22689 (May 15, 2019). Executive Order 13873 declares a national emergency with respect  
 11 to the threat posed by unidentified “vulnerabilities in information and communications  
 12 technology and services[.]”

13 47. According to this Order, these unidentified vulnerabilities constitute an  
 14 “unusual and extraordinary threat to the national security, foreign policy, and economy of  
 15 the United States,” due in part to the “unrestricted acquisition or use in the United States of  
 16 information and communications technology or services designed, developed,  
 17 manufactured, or supplied by persons owned by, controlled by, or subject to the  
 18 jurisdiction of foreign adversaries[.]” The threat, according to the May 15, 2019 Order,  
 19 “exists both in the case of individual acquisitions or uses of such technology or services,  
 20 and when acquisitions or uses of such technologies are considered as a class.” Executive  
 21 Order 13873 does not identify specific countries or companies that pose a national security  
 22 threat.

23 48. Under the National Emergencies Act, this national emergency would have  
 24 terminated automatically after one year unless the President renewed it before that  
 25 termination. *See* 50 U.S.C. § 1622(d). President Trump extended Executive Order 13873  
 26

27 <sup>25</sup> Theodora Yu, *To Combat Coronavirus, These Doctors Are Helping Sacramento’s*  
 28 *Chinese Community on WeChat*, SAC. BEE (Feb. 27, 2020), <https://www.sacbee.com/latest-news/article240662256.html>.

1 for another year on May 13, 2020. *See* 85 Fed. Reg. 29321 (May 13, 2020). In his notice  
2 of the extension, the President provided no explanation for why the national emergency  
3 “must continue” other than a conclusory assertion that the threat identified in his original  
4 emergency declaration “continues to pose an unusual and extraordinary threat to the  
5 national security, foreign policy, and economy of the United States.” *Id.*

6 **B. Executive Order 13943**

7 49. More than fourteen months after the President declared this national  
8 emergency, President Trump issued Executive Order 13943, titled “Addressing the Threat  
9 Posed by WeChat, and Taking Additional Steps to Address the National Emergency with  
10 Respect to the Information and Communications Technology and Services Supply Chain.”  
11 85 Fed. Reg. 48641 (Aug. 6, 2020). Executive Order 13943 states that WeChat  
12 “automatically captures vast swaths of information from its users,” and that the data  
13 collected by WeChat “threatens to allow the Chinese Communist Party access to  
14 Americans’ personal and proprietary information.” According to the Executive Order, the  
15 data collected by WeChat also “captures the personal and proprietary information of  
16 Chinese nationals visiting the United states, thereby allowing the Chinese Communist  
17 Party a mechanism for keeping tabs on Chinese citizens who may be enjoying the benefits  
18 of a free society for the first time in their lives.” The Executive Order also warns that  
19 WeChat “may also be used for disinformation campaigns that benefit the Chinese  
20 Communist Party.”

21 50. Executive Order 13943 does not declare a new national emergency. Rather,  
22 it asserts that the “threat” posed by WeChat is “similar to” the threat posed by other  
23 Chinese-owned technology companies, such as TikTok, which the President took action  
24 against pursuant to his purported emergency powers under the International Emergency  
25 Economic Powers Act (“IEEPA”). *See* Executive Order 13942, 85 Fed. Reg. 48637  
26 (Aug. 6, 2020). The Executive Orders regulating WeChat and TikTok—both issued on the  
27 same day—rely on powers purportedly made available by the national emergency declared  
28 in Executive Order 13873, issued over a year earlier on May 15, 2019.

1           51. Several sections of Executive Order 13943 purport to alter the legal rights  
2 and obligations of private parties. Section 1(a) states that “any transaction that is related to  
3 WeChat by any person” will be “prohibited beginning 45 days after the date of this  
4 order[.]” Section 1(a) further prohibits, beginning 45 days from the date of the Order,  
5 transactions with Tencent, WeChat’s parent company, and any subsidiaries of Tencent that  
6 are “identified by the Secretary of Commerce[.]” Section 2(a) states that “[a]ny  
7 transaction... that evades or avoids, has the purpose of evading or avoiding, causes a  
8 violation of, or attempts to violate the prohibition set forth in this order is prohibited.”  
9 Section 2(b) further prohibits “[a]ny conspiracy formed to violate any of the prohibitions  
10 set forth in this order.” Section 3 purports to strip persons subject to the prohibitions in  
11 Sections 1(a) and 2 of any right to notice of the specific conduct being prohibited.

12           52. Executive Order 13943, by its terms, applies not only to WeChat and its  
13 parent company Tencent, but also to the millions of American individuals, groups,  
14 businesses, organizations, churches and government agencies, that use WeChat every day  
15 to communicate, learn, speak, read, publish, organize, advertise, run a business, and meet  
16 friends and family in their personal, professional and business lives. While “transaction”  
17 is not defined in the Executive Order, it does make clear that it applies to “any United  
18 States citizen, permanent resident alien, entity organized under the laws of the United  
19 States or any jurisdiction within the United States (including foreign branches), or any  
20 person in the United States.” *Id.* § 4(c). And “entity” is further defined to mean a  
21 government or instrumentality of such government, partnership, association, trust, venture,  
22 corporation, group, subgroup, or other organization, including an international  
23 organization.” *Id.* § 4(b).

24           53. Two other sections of Executive Order 13943 direct the Secretary of  
25 Commerce to take additional action: Section 1(c) directs the Secretary, within 45 days of  
26 August 6, to “identify the transactions subject to subsection [1](a).” Section 5 authorizes  
27 the Secretary to “take such actions, including adopting rules and regulations, and to  
28 employ all powers granted to me by IEEPA as may be necessary to implement this order.”

1 The Executive Order specifically mentions the popular use of WeChat to pay for purchases  
 2 or to transfer money or to accept or make payments for their businesses from or to another  
 3 user, as the basis to relieve the Secretary of Commerce of any responsibility to give “prior  
 4 notice” to them “of measures to be taken” because advance notice “would render those  
 5 measures ineffectual.” *Id.* § 3. It is unclear whether this section permits the Secretary to  
 6 freeze or seize monies belonging to WeChat users in the U.S. without notice.

7 54. Under the Executive Order, WeChat users who engage in a prohibited  
 8 transaction may be prosecuted under the IEEPA, which provides for civil penalties of  
 9 \$250,000 or twice the amount of the transaction at issue, and criminal penalties of up to \$1  
 10 million plus 20 years in prison. *See* 50 U.S.C. § 1705(b)-(c).

11 **C. The Secretary of Commerce’s Identification of Prohibited Transactions,  
 12 and Intent to Ban WeChat**

13 55. On September 18, 2020, the Commerce Department released its  
 14 “Identification of Prohibited Transactions to Implement Executive Order 13943” (the  
 15 “Identification”).

16 56. The Identification sets forth eleven defined terms and identifies seven  
 17 “transactions” to be prohibited pursuant to the Executive Order.

18 57. For example, the Identification defines “person” as “an individual or entity.”

19 58. The Identification also defines “Transaction” to mean “any acquisition,  
 20 importation, transfer, installation, dealing in, or use of any information and  
 21 communications technology or service.”

22 59. The Identification states that the following transactions are prohibited by  
 23 Executive Order 13943:

24 a. “1. Any provision of services to distribute or maintain the WeChat  
 25 mobile application, constituent code, or mobile application updates through an online  
 26 mobile application store, or any online marketplace where mobile users within the land or  
 27 maritime borders of the United States and its territories may download or update  
 28 applications for use on their mobile devices;

1           b.       “2. Any provision of internet hosting services enabling the  
2 functioning or optimization of the WeChat mobile application, within the land and  
3 maritime borders of the United States and its territories;

4           c.       “3. Any provision of content delivery services enabling the  
5 functioning or optimization of the WeChat mobile application, within the land and  
6 maritime borders of the United States and its territories;

7           d.       “4. Any provision of directly contracted or arranged internet transit or  
8 peering services enabling the functioning or optimization of the WeChat mobile  
9 application, within the land and maritime borders of the United States and its territories;

10          e.       “5. Any provision of services through the WeChat mobile application  
11 for the purpose of transferring funds or processing payments to or from parties within the  
12 land or maritime borders of the United States and its territories;

13          f.       “6. Any utilization of the WeChat mobile application’s constituent  
14 code, functions, or services in the functioning of software or services developed and/or  
15 accessible within the land and maritime borders of the United States and its territories; or

16          g.       “7. Any other transaction that is related to WeChat by any person, or  
17 with respect to any property, subject to the jurisdiction of the United States, with Tencent  
18 Holdings Ltd., or any subsidiary of that entity, as may be identified at a future date under  
19 the authority delegated under Executive Order 13943.”

20          60.     In short, the Identification sets forth a de facto ban of WeChat in the United  
21 States.

22          61.     On September 18, 2020, multiple Administration officials confirmed the  
23 purpose and intent of the Identification as being the eventual, complete prohibition of any  
24 use of WeChat in the United States.

25          62.     For example, on September 18, 2020, Secretary of Commerce Wilbur Ross  
26 stated on Fox Business News that “For all practical purposes, [WeChat] will be shut down  
27 in the U.S., but only in the U.S. as of midnight on Monday by the Commerce Department  
28

1 rule.”<sup>26</sup>

2 63. Mr. Ross also stated that “WeChat is essentially a funds transfer and  
3 payment processing mechanism.” This is incorrect, as several of WeChat’s most important  
4 functions involve social networking and other communications, both in China and in the  
5 United States. The version of WeChat that is accessible in the United States does not  
6 allow users to transfer funds unless both parties to the transaction already have Chinese  
7 bank accounts.

8 64. The Secretary’s mischaracterization demonstrates the government’s lack of  
9 investigation and understanding of the software that it has now banned.

10 65. In a televised interview on Friday, September 18, 2020, the Secretary of  
11 Commerce stated that it “is our *fear*” that WeChat is “taking data from the American  
12 public and sending it to China.” But the Secretary provided no examples of “data” being  
13 “sen[t]... to China” or how the mere transmission of “data” to China constitutes a national  
14 security threat.<sup>27</sup>

15 66. Also on September 18, 2020, a separate statement from an anonymous  
16 “senior Commerce official” to a reporter for the technology publication CNET appears to  
17 confirm that the Administration has no evidence whatsoever of private data being  
18 harvested by WeChat in the United States. “Whether we have any evidence, domestically,  
19 of these particular apps taking data is missing the point,” according to this official, because  
20 the Administration “know[s] what the Chinese government’s intent is here in the United  
21 States.”<sup>28</sup>

22 67. On the same day, another senior Trump administration official told CNBC  
23

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24 <sup>26</sup> Megan Henney, *Trump Administration to Ban Americans from Downloading TikTok,*  
25 *WeChat on Sunday*, FOX BUSINESS (Sept. 18, 2020),  
26 <https://www.foxbusiness.com/politics/trump-administration-to-ban-americans-from-downloading-tiktok-wechat>.

27 <sup>27</sup> *Id.*

28 <sup>28</sup> September 18, 2020 CNET article titled “TikTok, WeChat downloads will be barred from US starting Sunday,” *Available at:* <https://www.cnet.com/news/tiktok-wechat-downloads-will-be-barred-from-us-starting-sunday>.

1 that, as a result of Executive Order 13943 and the Identification, WeChat is “dead in the  
2 United States.”<sup>29</sup>

3 68. In a September 17, 2020 Memorandum for the Secretary of Commerce from  
4 John K. Costello, Deputy Assistant Secretary for Intelligence and Security (“Decision  
5 Memo”), the Commerce Department acknowledged that the prohibitions in the  
6 Identification were drafted to prevent transmission of U.S. user data by the WeChat app.

7 69. In September 2020, after the President issued Executive Order 13943 but  
8 before the Secretary issued the Identification, the Department of Homeland Security’s  
9 Cybersecurity and Infrastructure Agency (“CISA”) recommended that Defendants issue a  
10 far narrower prohibition aimed at preventing the use of WeChat on the devices of State,  
11 Local, Tribal, and Territorial partners and critical infrastructure operators. Defendants  
12 rejected the advice of their own intelligence agency in favor of a sweeping ban that will  
13 effectively “shut down” WeChat in the United States.<sup>30</sup>

14 70. In August and September 2020, after the President issued Executive Order  
15 13943 but before the Secretary issued the Identification, representatives for Tencent  
16 attempted to negotiate an agreement with the Commerce Department that would obviate  
17 the purported need for Defendants’ WeChat ban. Among other mitigation measures,  
18 Tencent offered to create a new U.S. version of WeChat; to deploy specific security  
19 measures to protect the U.S. version’s source code; to partner with a U.S. cloud provider  
20 for user data storage; to manage the U.S. version through a U.S.-based entity with a  
21 governance structure approved by the U.S. government; and to provide the U.S.  
22 government with regular compliance audits and notifications, as well as authority to  
23

24 \_\_\_\_\_  
25 <sup>29</sup> Eamon Javers and Kevin Stankiewicz, *TikTok Deal Still Has a Chance but WeChat*  
26 *‘Dead’ in the U.S., says Senior Administration Official*, CNBC (Sept. 18, 2020),  
<https://www.cnbc.com/2020/09/18/tiktok-deal-still-has-a-chance-but-wechat-dead-in-the-us-says-senior-administration-official.html>

27 <sup>30</sup> Megan Henney, *Trump Administration to Ban Americans from Downloading TikTok,*  
28 *WeChat on Sunday*, FOX BUSINESS (Sept. 18, 2020),  
<https://www.foxbusiness.com/politics/trump-administration-to-ban-americans-from-downloading-tiktok-wechat>

1 approve management and personnel with access to user data.

2 71. Defendants rejected Tencent’s proposals to mitigate Defendants’ purported  
3 concerns about data privacy and national security, opting instead to impose the  
4 prohibitions in the Secretary’s Identification, which Defendant Ross himself has stated will  
5 “shut down” WeChat in the United States once implemented.<sup>31</sup>

6 72. At least one of Defendants’ rationales for rejecting Tencent’s mitigation  
7 proposals and the recommendations of CISA is rooted in Defendants’ disapproval of the  
8 supposed “propaganda” that WeChat users exchange on the platform, which Defendants  
9 believe benefits the Chinese Communist Party.

10 73. Journalists have likewise understood the Executive Order and Identification  
11 as a complete ban on the use of WeChat. On September 18, 2020, the New York Times  
12 reported: “Trump Administration to Ban TikTok and WeChat From U.S. App Stores.”<sup>32</sup>  
13 The Wall Street Journal reported: “U.S. Bans Chinese Apps TikTok and WeChat, Citing  
14 Security Concerns.” CNBC reported: “Trump to block downloads of TikTok, WeChat on  
15 Sunday,” and noted that “WeChat is considered dead in the U.S.”<sup>33</sup> And the Associated  
16 Press reported: “US bans WeChat, TikTok from app stores, threatens shutdowns,” saying  
17 that the move could “effectively wreck the operation of both ... services for U.S. users.”<sup>34</sup>

18 **D. Purported Authority for the Executive Order and Identification**

19 74. Both Executive Order 13873 and Executive Order 13943 cite the National  
20 Emergencies Act (“NEA”) and the IEEPA as providing the legal authority for the  
21

22 \_\_\_\_\_  
23 <sup>31</sup> *Id.*

24 <sup>32</sup> Ana Swanson, David McCabe, and Jack Nicas, *Trump Administration to Ban TikTok and WeChat from U.S. App Stores*, N.Y. TIMES (Sept. 18, 2020),  
<https://www.nytimes.com/2020/09/18/business/trump-tik-tok-wechat-ban.html>.

25 <sup>33</sup> Steve Kovach, *Trump to Block Downloads of TikTok, WeChat on Sunday*, CNBC (Sept.  
26 18, 2020), <https://www.cnbc.com/2020/09/18/trump-to-block-us-downloads-of-tiktok-wechat-on-sunday-officials-tell-reuters.html>.

27 <sup>34</sup> Tali Arbel, Matt O’Brien, and Matt Ott, *US Bans WeChat, TikTok from App Stores, Threatens Shut Downs*, U.S. NEWS & WORLD REPORT (Sept. 18, 2020),  
28 <https://www.usnews.com/news/business/articles/2020-09-18/us-banning-use-of-wechat-tiktok-for-national-security>.

1 President's and the Secretary's actions. The IEEPA and the NEA were both passed in  
2 order to *limit* the President's emergency powers.<sup>35</sup>

### 3 1. The National Emergencies Act

4 75. The NEA, Pub. L. No. 94-412, 90 Stat. 1255, codified at 50 U.S.C. §§ 1601-  
5 1651, was enacted by Congress in 1976 to rein in, rather than expand, the power of the  
6 president. The NEA was designed to "insure" that the president's "extraordinary"  
7 emergency powers would "be utilized only when emergencies actually exist, and then,  
8 only under safeguards of congressional review." S. Rep. No. 94-1168, at 2 (1976).

9 76. To this end, the NEA allows the President to utilize emergency powers  
10 authorized by Congress in other federal statutes only when there is a national emergency  
11 that has been declared in accordance with specific statutory requirements. 50 U.S.C.  
12 § 1621.

13 77. Among other actions required by the NEA, the President must specify the  
14 statutory powers he intends to invoke upon issuing a national emergency. 50 U.S.C.  
15 § 1631. He must also publish the declaration of a national emergency in the Federal  
16 Register and transmit it to Congress "immediately." 50 U.S.C. § 1621(a). Every six  
17 months thereafter, for as long as the emergency remains in effect, the President must  
18 transmit to Congress "a report on the total expenditures incurred by the United States  
19 Government during such six-month period which are directly attributable to the exercise of  
20 powers and authorities conferred by such declaration." 50 U.S.C. § 1641(c). Each House  
21 of Congress, in turn, must meet at least once every six months following the declaration  
22 "to consider a vote on a joint resolution to determine whether that emergency shall be  
23 terminated." 50 U.S.C. § 1622(b). Any national emergency declared by the President  
24

25 <sup>35</sup> See IEEPA, Pub. L. 95-223, tit. III (1977) (stating that IEEPA confers "upon the  
26 President a new set of authorities for use in time of national emergency which are both  
27 *more limited in scope* than [those previously allowed] and *subject to procedural*  
28 *limitations*" (emphasis added)); Jules Lobel, *Emergency Power and the Decline of*  
*Liberalism*, 98 Yale L.J. 1385, 1412 (1989) (the NEA responded to "the twin disasters of  
Vietnam and Watergate" and the sense that "the pendulum had swung too far" toward  
executive power).

1 automatically terminates after one year unless the President publishes in the Federal  
2 Register and transmits to Congress a notice that the emergency “is to continue in effect  
3 after such anniversary.” 50 U.S.C. § 1622(d).

## 4                   **2.       The International Emergency Economic Powers Act**

5           78.     The IEEPA grants the President limited emergency powers when the  
6 President has declared a national emergency, pursuant to the NEA, with regard to an  
7 “unusual and extraordinary threat, which has its source in whole or in substantial part  
8 outside the United States[.]” 50 U.S.C. § 1701(a). “Any exercise” of the powers granted  
9 by the IEEPA “to deal with any new threat shall be based on a new declaration of national  
10 emergency which must be with respect to such threat.” 50 U.S.C. § 1701(b).

11           79.     The IEEPA does not grant the President unlimited powers during national  
12 emergencies. Rather, the statute includes specific limits on the emergency powers it  
13 authorizes. Section 1702(b) of the IEEPA states that “[t]he authority granted to the  
14 President by [the IEEPA] does not include the authority to regulate or prohibit, directly or  
15 indirectly ... (1) any postal, telegraphic, telephonic, or other personal communication,  
16 which does not involve a transfer of anything of value; (2) donations, by persons subject to  
17 the jurisdiction of the United States, of articles, such as food, clothing, and medicine,  
18 intended to be used to relieve human suffering ...; (3) the importation from any country, or  
19 the exportation to any country, whether commercial or otherwise, regardless of format or  
20 medium of transmission, of any information or informational materials ...; [or] (4) any  
21 transactions ordinarily incident to travel to or from any country[.]” 50 U.S.C.  
22 § 1702(b)(1)-(4). The IEEPA also requires that the President “consult with Congress  
23 before exercising any of the authorities granted by this chapter,” and that the President  
24 “immediately transmit to Congress a report” containing certain additional information  
25 about the President’s reasons for exercising his emergency powers under the IEEPA and  
26 the specific actions he and his subordinates will take in exercising those powers. 50  
27 U.S.C. § 1703(a)-(b).

1           **E. The Executive Order’s Timing Suggests That It Was Issued Not for a**  
 2           **Bona Fide National Security Reason But Instead to Further the**  
 3           **President’s Political Campaign By Inciting Anti-Asian Sentiment**

4           80. In the months before the Executive Order and Identification were issued,  
 5 President Trump made numerous anti-Chinese statements outside the context of national  
 6 security that commentators have described as inciting racial animus against persons of  
 7 Chinese descent for political gain. Many of these inflammatory statements have been  
 8 made in the context of the President blaming the coronavirus pandemic on China. Instead  
 9 of using the official public health terms for the virus and the disease it causes, such as the  
 10 “novel coronavirus” and “COVID-19,” President Trump has repeatedly and intentionally  
 11 referred to the virus causing the current pandemic as the “China virus,” “the Wuhan virus,”  
 12 “China Flu,” and “Kung-Flu.”<sup>36</sup>

13           81. Facing criticism that these word choices were racist and unfairly subjected  
 14 Chinese people—including Chinese Americans—to anger and hatred, the White House

15 <sup>36</sup> See, e.g., Remarks by President Trump in Press Briefing (July 23, 2020),  
 16 <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-press-briefing-072320/> (“We’ve had a tremendous week uniting the country in our fight against the  
 17 **China virus**”); Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 2, 2020),  
 18 <https://twitter.com/realDonaldTrump/status/1289887533250351110> (“**Big China Virus**  
 19 breakouts all over the World, including nations which were thought to have done a great  
 20 job. The Fake News doesn’t report this. USA will be stronger than ever before, and  
 21 soon!”); Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 11, 2020),  
 22 <https://twitter.com/realDonaldTrump/status/1293163704188645385> (“More Testing, which  
 23 is a good thing (we have the most in the world), equals more Cases, which is Fake News  
 24 Gold. They use Cases to demean the incredible job being done by the great men & women  
 25 of the U.S. fighting the **China Plague!**”); Donald J. Trump (@realDonaldTrump),  
 26 TWITTER (July 26, 2020),  
 27 <https://twitter.com/realDonaldTrump/status/1287473812733341696> (“Because of my  
 28 strong focus on the **China Virus**, including scheduled meetings on Vaccines, our economy  
 and much else, I won’t be able to be in New York to throw out the opening pitch for the  
 @Yankees on August 15th. We will make it later in the season!”); Donald J. Trump  
 (@realDonaldTrump), TWITTER (Mar. 18, 2020),  
<https://twitter.com/realDonaldTrump/status/1240243188708839424> (“I always treated the  
**Chinese Virus** very seriously, and have done a very good job from the beginning,  
 including my very early decision to close the “borders” from China - against the wishes of  
 almost all. Many lives were saved. The Fake News new narrative is disgraceful & false!”);  
 Li Zhou, *Trump’s Racist References to the Coronavirus Are His Latest Effort to Stoke  
 Xenophobia*, VOX (June 23, 2020), [https://www.vox.com/2020/6/23/21300332/trump-  
 coronavirus-racism-asian-americans](https://www.vox.com/2020/6/23/21300332/trump-coronavirus-racism-asian-americans); Colby Itkowitz, *Trump Again Uses Racially  
 Insensitive Term to Describe Coronavirus*, WASH. POST (Jun. 23, 2020),  
[https://www.washingtonpost.com/politics/trump-again-uses-kung-flu-to-describe-  
 coronavirus/2020/06/23/0ab5a8d8-b5a9-11ea-aca5-ebb63d27e1ff\\_story.html](https://www.washingtonpost.com/politics/trump-again-uses-kung-flu-to-describe-coronavirus/2020/06/23/0ab5a8d8-b5a9-11ea-aca5-ebb63d27e1ff_story.html).

1 press secretary has defended Trump’s dangerous and incendiary language.<sup>37</sup> The Anti-  
 2 Defamation League has reported an increasing number of hate crimes, including racial  
 3 slurs, spitting on, and physical assaults against Asian-Americans in the United States  
 4 following the President’s use of these terms, and warned that “Statements by public  
 5 officials referring to COVID-19 as the ‘Chinese virus,’ ‘Kung Flu’ or ‘Wuhan Flu’ may be  
 6 exacerbating the scapegoating and targeting of the [Asian American and Pacific Islander]  
 7 community.”<sup>38</sup> The incitement following the President’s statements reminded many in the  
 8 Asian American community of the hatred and racial violence focused on persons of Asian  
 9 descent after the Japanese auto industry was blamed for major job losses in the American  
 10 Rust Belt.<sup>39</sup>

11 82. In addition to asserting that the United States’ incidence of COVID-19 is  
 12 China’s fault, the President has exploited anti-Chinese sentiment as a rallying cry for his  
 13 reelection campaign. For example, on August 11, 2020, President Trump stated that “[i]f I  
 14 don’t win the election, China will own the United States. You’re going to have to learn to  
 15 speak Chinese.”<sup>40</sup> President Trump has on numerous occasions mocked the accents of  
 16 Chinese and Asian-Americans, including those of prominent Asian leaders.<sup>41</sup>

17  
 18 <sup>37</sup> Andrew Restuccia, *White House Defends Trump Comments on ‘Kung Flu,’ Coronavirus*  
 19 *Testing*, WALL ST. J. (Jun. 22, 2020), [https://www.wsj.com/articles/white-house-defends-](https://www.wsj.com/articles/white-house-defends-trump-comments-on-kung-flu-coronavirus-testing-11592867688)  
[trump-comments-on-kung-flu-coronavirus-testing-11592867688](https://www.wsj.com/articles/white-house-defends-trump-comments-on-kung-flu-coronavirus-testing-11592867688).

20 <sup>38</sup> *Reports of Anti-Asian Assaults, Harassment and Hate Crimes Rise as Coronavirus*  
 21 *Spreads*, ADL BLOG (Jun. 18, 2020), [https://www.adl.org/blog/reports-of-anti-asian-](https://www.adl.org/blog/reports-of-anti-asian-assaults-harassment-and-hate-crimes-rise-as-coronavirus-spreads)  
[assaults-harassment-and-hate-crimes-rise-as-coronavirus-spreads](https://www.adl.org/blog/reports-of-anti-asian-assaults-harassment-and-hate-crimes-rise-as-coronavirus-spreads).

22 <sup>39</sup> Ali Rogin & Amna Nawaz, *‘We Have Been Through this Before.’ Why Anti-Asian Hate*  
 23 *Crimes Are Rising Amid Coronavirus*, PBS NEWS HOUR (Jun. 25, 2020),  
[https://www.pbs.org/newshour/nation/we-have-been-through-this-before-why-anti-asian-](https://www.pbs.org/newshour/nation/we-have-been-through-this-before-why-anti-asian-hate-crimes-are-rising-amid-coronavirus)  
[hate-crimes-are-rising-amid-coronavirus](https://www.pbs.org/newshour/nation/we-have-been-through-this-before-why-anti-asian-hate-crimes-are-rising-amid-coronavirus).

24 <sup>40</sup> Kevin Liptak, *Trump Says Americans Will Have to Learn Chinese if Biden Wins, but*  
 25 *Offers Little Condemnation of Beijing*, CNN (Aug. 11, 2020),  
<https://www.cnn.com/2020/08/11/politics/trump-china-biden-learn-chinese/index.html>

26 <sup>41</sup> See, e.g., Laura Ma, *‘We want deal!’: Trump fakes Asian accent to mock Chinese and*  
 27 *Japanese businessmen at US rally*, South China Morning Post (Aug. 26, 2015),  
[https://www.scmp.com/news/world/article/1852785/we-want-deal-trump-fakes-asian-](https://www.scmp.com/news/world/article/1852785/we-want-deal-trump-fakes-asian-accent-mock-chinese-japanese-businessmen)  
[accent-mock-chinese-japanese-businessmen](https://www.scmp.com/news/world/article/1852785/we-want-deal-trump-fakes-asian-accent-mock-chinese-japanese-businessmen); Jennifer Gould and Emily Smith, *Trump*  
 28 *cracks jokes about Equinox scandal, kamikaze pilots at Hamptons fundraiser*, N.Y. POST  
 (Aug. 9, 2019), <https://nypost.com/2019/08/09/trump-cracks-jokes-about-rent-control->

1           83. Defendants’ animus toward persons of Chinese and Chinese-American  
2 descent is a key reason they have chosen to ban WeChat. Defendants have not imposed  
3 comparable restrictions on software that is not owned and used primarily by persons of  
4 Chinese and Chinese-American descent, even when that software collects similar personal  
5 and private data from users in the United States and shares that data with the Chinese  
6 government. Defendants have not, for example, proposed a comparable ban on Airbnb,  
7 despite their knowledge that Airbnb collects a wide range of private information from  
8 American users and shares that information with the Chinese government.<sup>42</sup>

9           84. Defendants’ claim that WeChat presents a threat to national security rings  
10 hollow. President Trump waited fifteen months after declaring a national emergency  
11 related to foreign-owned technology before targeting WeChat. Then, in issuing the  
12 Executive Order, he provided an additional month and a half for the Secretary of  
13 Commerce to define the “transactions” banned by the Order. Nothing in the administrative  
14 record produced in connection with the Secretary’s Identification provided any evidence  
15 that WeChat has been used by China to surveil Americans—let alone in a manner that  
16 poses a national security threat. Instead, the generalized threats about China that are  
17 identified in the administrative record have been known for years. Moreover, the  
18 administrative record does not identify any significant event(s) in the intervening one and a  
19 half years between the national emergency identified in Executive Order 13873 and the  
20 Executive Order banning WeChat ban that would have prompted the need to ban this app  
21 in particular or that would justify immediate action. In a December 4, 2020 letter to  
22 Plaintiffs’ counsel, Defendants’ counsel indicated that no additional factual materials  
23 beyond those included in the administrative record were considered by Defendant Ross or  
24

25 \_\_\_\_\_  
26 [kamikaze-pilots-at-hamptons-fundraiser/](#) (reporting on Trump “mimicking Japanese and  
Korean accents”).

27 <sup>42</sup> See Dustin Volz and Kirsten Grind, *Airbnb Executive Resigned Last Year Over Chinese*  
*Request for More Data Sharing*, WALL ST. JOURNAL (Nov. 20, 2020),  
28 <https://www.wsj.com/articles/airbnb-executive-resigned-last-year-over-chinese-request-for-more-data-sharing-11605896753>.

1 his subordinates in issuing the Identification.

2 85. President Trump’s assertions of national security threats related to WeChat  
3 are pretextual. Indeed, this is not the only time that President Trump has invoked vague  
4 national security threats related to social media apps for his own political gain. For  
5 example, on December 1, 2020, after Facebook and Twitter engaged in a public awareness  
6 campaign notifying users that President Trump’s claims about the 2020 election include  
7 false claims and disinformation, President Trump stated that Section 230 of the 1996  
8 Communications Decency Act “is a serious threat to our National Security.... Our Country  
9 can never be safe & secure if we allow it to stand.”<sup>43</sup>

10 **THE EXECUTIVE ORDER AND IDENTIFICATION CAUSED MASS**  
11 **CONFUSION AND HAVE ALREADY HARMED AND WILL CONTINUE TO**  
12 **HARM PLAINTIFFS**

13 86. American law firms have been unable to advise their clients as to the scope  
14 of “transactions” that are banned under Executive Order 13943. Multiple prominent law  
15 firms in the United States have effectively conceded that they cannot provide guidance  
16 about the meaning of the Executive Order, and have speculated that all uses of WeChat  
17 could be prohibited. One law firm informed its clients that the “extraordinary breadth and  
18 ambiguity” of the Executive Order has “left US companies and many others looking to the  
19 Trump Administration for additional clarity[.]”<sup>44</sup> Another firm speculated that WeChat  
20 “could be pulled out of the app stores and off of American phones .... Companies could

21 \_\_\_\_\_  
22 <sup>43</sup> Jaelyn Diaz, Trump Vows To Veto Defense Bill Unless Shield For Big Tech Is  
23 Scrapped, NPR (Dec. 2, 2020), <https://www.npr.org/2020/12/02/941019533/trump-vows-to-veto-defense-bill-unless-shield-for-big-tech-is-scrapped>; see also Cat Zakrzewski, *The*  
24 *Technology 202: Trump's misleading claims about Section 230 could last beyond his*  
25 *showdown with Congress*, THE WASHINGTON POST (Dec. 3, 2020),  
26 <https://www.washingtonpost.com/politics/2020/12/03/technology-202-trump-misleading-claims-about-section-230-could-last-beyond-his-showdown-with-congress/> (This claim particularly was a real head-scratcher for many tech policy observers because there is not a clear link between Section 230 and national security, and Trump didn’t explain why he believed it put the country at risk.”).

27 <sup>44</sup> Ambassador Charlene Barshefsky, David S. Cohen, Ronald I. Meltzer, David M.  
28 Horn & Semira Nikou, *New Executive Orders Target Chinese Apps*, WILMER HALE, (Aug. 10, 2020), <https://www.wilmerhale.com/en/insights/client-alerts/20200810-new-executive-orders-target-chinese-apps>.

1 be banned from interacting with the extensive interactive payment network used by  
2 WeChat.”<sup>45</sup>

3 87. The general public understands the Executive Order itself as prohibiting the  
4 use of WeChat. The University of Kansas, for example, announced on September 15,  
5 2020—before the Secretary issued the Identification—that it would ban the use of WeChat  
6 on all KU-owned computers and the campus network, stating that “KU’s Office of Global  
7 Operations & Security, the Office of the General Counsel and KU Information Technology  
8 have determined that use of WeChat in KU’s business operations and on its networks will  
9 fall within the scope of the executive order’s ban.”<sup>46</sup>

10 88. Even after the Commerce Department issued the Identification, law firms  
11 remained confused as to what, exactly, was prohibited. For example, Wilson Sonsini  
12 issued a client alert stating that: “The Orders use broad terminology and not all terms are  
13 defined. As such, we believe further guidance from the Commerce Department regarding  
14 the precise scope of the restrictions set forth in the Orders is necessary.”<sup>47</sup> Steptoe &  
15 Johnson LLP advised its clients that the “fifth prohibition is particularly broad, and less  
16 clear than the others... this provision will likely be a focus of concern within industry and  
17 among other stakeholders and would benefit from clarification by the Commerce  
18 Department.”<sup>48</sup>

19 \_\_\_\_\_  
20 <sup>45</sup> David A. Kaufman, John Sandweg, David K. Cheng & Rachel S. Winkler,  
21 *Administration’s Attempt to Delete TikTok and WeChat: Latest Trade Tiff or New Battle*,  
22 NIXON PEABODY (Aug. 7, 2020), <https://www.nixonpeabody.com/en/ideas/articles/2020/08/07/administrations-attempt-to-delete-tiktok-and-wechat>.

23 <sup>46</sup> Blake Ullmann, *KU-Owned Computers, Campus Wi-Fi Will Ban Use of WeChat*, THE  
24 UNIVERSITY DAILY KANSAN (Sept. 15, 2020), [https://www.kansan.com/news/ku-owned-computers-campus-wi-fi-will-ban-use-of-wechat/article\\_0d3326b8-f76b-11ea-bd4c-dbb1fe3ba1be.html](https://www.kansan.com/news/ku-owned-computers-campus-wi-fi-will-ban-use-of-wechat/article_0d3326b8-f76b-11ea-bd4c-dbb1fe3ba1be.html).

25 <sup>47</sup> Anne E. Symour, Josephine I. Aiello LeBeau, Melissa B. Mannino, Joshua F.  
26 Gruenspecht, *U.S. Department of Commerce Publishes Transactions with ByteDance and  
27 Tencent That Are Prohibited Due to National Security Concerns Raised by TikTok and  
28 WeChat*, WILSON SONSINI (Sept. 18, 2020), <https://www.wsgr.com/en/insights/us-department-of-commerce-publishes-transactions-with-bytedance-and-tencent-that-are-prohibited-due-to-national-security-concerns-raised-by-tiktok-and-wechat.html>.

<sup>48</sup> Peter Jeydel, Martin Willner, Wendy Wysong, Ed Krauland, Jack Hayes, Meredith

1           89. Each plaintiff learned of the Executive Order and Identification at or near the  
2 time they were issued and have suffered harm as a result of the prohibitions. Plaintiff  
3 Duan, for example, experiences fear and worry that Chihuo—the business she founded and  
4 for which she continues to serve as CEO—will not survive if it cannot provide services to  
5 customers through WeChat. Plaintiff Peng fears that the non-profit organization she  
6 founded will not be able to continue providing services to Chinese speakers in the United  
7 States, and that she personally will be unable to maintain her social ties and communicate  
8 with other members of the Chinese community in the United States. Plaintiff Zhang  
9 worries that she will be unable to maintain social ties and communicate with other  
10 Chinese-speaking people—both in the United States and in China. She believes that the  
11 charity she founded—Hita Education Foundation—could not have been founded without  
12 WeChat and may not be able to survive without being able to connect with Chinese-  
13 speaking people through the app. Each individual plaintiff fears losing connection with  
14 close friends and family members.

15           90. All plaintiffs, moreover, have already been forced by the Executive Order  
16 and Identification to expend time and resources preserving their contacts and memories on  
17 WeChat and/or searching—without success—for an alternative platform that could sustain  
18 their businesses, charities, and/or social and family ties. Plaintiff Peng has received  
19 inquiries from Chinese families through MHACC, her mental health WeChat group, about  
20 where to go if WeChat is banned, but has been unable find a comparable substitute to  
21 replace WeChat. Plaintiff Chihuo has spent money attempting to redirect its business  
22 activities that currently depend on WeChat by establishing alternative social media  
23 channels on YouTube, Instagram and Facebook.

24           91. These efforts to find a substitute for WeChat have not been and are unlikely  
25 to be successful. A ban would be particularly harmful to Plaintiffs and other WeChat users

26 \_\_\_\_\_  
27 Rathbone & Brian Egan, US Commerce Department Identifies Prohibited Transactions  
28 <https://www.steptoecomplianceblog.com/2020/09/us-commerce-department-identifies-prohibited-transactions-involving-wechat-and-tiktok/>.

1 who are not literate in English and cannot turn to alternative options, many of which are  
2 not available in these users' native tongue, do not offer a useful Chinese-language interface  
3 or notifications, suffer from poor translation functions and inadequate customer service,  
4 and/or do not provide user or privacy policies in Chinese. Many WeChat users do not  
5 know how to use alternative interfaces. Other apps do not offer the features offered by  
6 WeChat, such as "official accounts" that enable users like Plaintiff Chihuo to easily and  
7 quickly publish articles embedded with pictures and videos and manage comments on the  
8 account to remove offensive comments and prioritize comments that the account-holder  
9 approves. Other features unique to WeChat include "mini-programs" that offer a wide  
10 range of formatting tools; group chats in which the host has the power to admit and remove  
11 participants so as to prevent the chats from being flooded with unwanted advertisements or  
12 disruptive messages; and high-quality voice and video calls. Other apps lack WeChat's  
13 language-specific development and features that make it culturally relevant to its Chinese  
14 (and Chinese-American) users.

15 92. Most importantly, alternative apps also do not provide access to WeChat's  
16 vast network of Chinese-speaking users. Plaintiffs' family members, friends, clients,  
17 contacts, news sources, and religious community are regularly on WeChat, not other apps.  
18 WeChat's enormous network effect is *irreplaceable*, and any other platform would not  
19 provide the community that WeChat does.

20 93. Implementation of the prohibitions in the Identification would further harm  
21 Plaintiffs. John K. Costello, Deputy Assistant Secretary for Intelligence and Security, has  
22 admitted that if the Identification is implemented, the WeChat app will become slower to  
23 respond, certain features will be impaired, and the app will become unusable to the point  
24 that users in the United States will not be able to use it to communicate or transmit data.  
25 Plaintiffs and other ordinary WeChat users will be harmed if and when WeChat service is  
26 slowed or degraded. For example, Chihuo's business model relies on speed and prompt  
27 results provided by WeChat, and it will lose clients and customers if service is slowed or  
28 degraded. Similarly, high-quality voice and video calls are a critical function of WeChat,

1 and Plaintiffs will be harmed if their call quality degrades to the point where such calls are  
2 interrupted or cannot be maintained.

3 94. Mr. Costello has also acknowledged that the first prohibition of the  
4 Identification will prevent Plaintiffs from being able to receive security updates to  
5 WeChat. Such updates and new downloads are necessary to fix security vulnerabilities in  
6 apps such as WeChat. By preventing users from downloading new versions of the app or  
7 updating the app, Executive Order 13943 and the Identification make it *more* likely that  
8 Plaintiffs' private data and information will be stolen by, or otherwise shared with, entities  
9 such as the Chinese government. This prohibition would ensure that Plaintiffs and other  
10 current users would become vulnerable to cyber-attacks as soon as un-addressed  
11 vulnerabilities become public. Vulnerabilities requiring updates are common among social  
12 media apps.<sup>49</sup>

### 13 **FIRST CLAIM FOR RELIEF**

#### 14 **(First Amendment – Speech and Association)**

15 95. Plaintiffs reallege and hereby incorporate by reference the allegations

16  
17 <sup>49</sup> See, e.g., Samuel Gibbs, "WhatsApp hack: have I been affected and what should I do?"  
18 *The Guardian* (May 14, 2019), <https://www.theguardian.com/technology/2019/may/14/whatsapp-hack-have-i-been-affected-and-what-should-i-do>; Adam Clark Estes, "Google's Fixing the Hangouts Hack  
19 With 'Biggest Software Update Ever,'" *Gizmodo* (Aug. 5, 2015),  
20 <https://gizmodo.com/googles-fixing-the-hangouts-hack-with-biggest-software-1722296396>; Mike Isaac and Sheera Frenkel, "Facebook Security Breach Exposes  
21 Accounts of 50 Million Users," *N.Y. Times* (Sept. 28, 2018),  
22 <https://www.nytimes.com/2018/09/28/technology/facebook-hack-data-breach.html>;  
23 Shannon Liao, "Facebook Messenger had a vulnerability that could let hackers see who  
24 you contact," *The Verge* (Mar. 7, 2019),  
25 <https://www.theverge.com/2019/3/7/18254788/facebook-messenger-vulnerability-attack-imperva-iframe-malicious>; Maya Shwayder, "Vulnerability in Signal messaging app could  
26 let hackers track your location," *Digital Trends* (May 20, 2020),  
27 <https://www.digitaltrends.com/news/signal-vulnerability-hack-location/>; Brian Fung, "A  
28 Snapchat security breach affects 4.6 million users. Did Snapchat drag its feet on a fix?"  
*Wash. Post* (Jan. 1, 2014), <https://www.washingtonpost.com/news/the-switch/wp/2014/01/01/a-snapchat-security-breach-affects-4-6-million-users-did-snapchat-drag-its-feet-on-a-fix/>; Lee Bell, "Skype security flaw 'ignored' by Microsoft could allow  
hackers to gain access to users' computers," *ITPro* (Feb. 14, 2018),  
<https://www.itpro.co.uk/security/30539/skype-security-flaw-ignored-by-microsoft-could-allow-hackers-to-gain-access-to-users>; Lily Hay Newman, "Hackers Can Break Into an  
iPhone Just by Sending a Text," *Wired* (Aug. 7, 2019),  
<https://www.wired.com/story/imessage-interactionless-hacks-google-project-zero/>.

1 contained in the preceding paragraphs of this Complaint.

2       96. The First Amendment guarantees freedoms concerning religion, expression,  
3 the press, assembly, and petitioning the government. Plaintiffs depend on WeChat to  
4 exercise each of these freedoms.

5       97. WeChat is broadly used by members of the Chinese diaspora throughout the  
6 world, serving as a virtual public square where people within the Chinese and Chinese-  
7 speaking communities can connect based on shared interests. Plaintiffs and other WeChat  
8 users rely on the app to express themselves and communicate by text, voice, and video  
9 messaging; attend religious services and cultural events; organize political groups and  
10 causes; and read, share, and receive news and other information, among other protected  
11 First Amendment activities.

12       98. Executive Order 13943 and the Identification effectively ban the use of  
13 WeChat in the United States. Banning the use of WeChat in the United States has the  
14 effect of limiting Plaintiffs' rights to send and receive information. Executive Order 13943  
15 and the Identification foreclose all meaningful access to social media for users, such as  
16 Plaintiffs, who wish to communicate and associate with members of the Chinese and  
17 Chinese-speaking communities. Indeed, the Executive Order is a prior restraint that  
18 suppresses Plaintiffs' constitutionally protected speech, associational, and religious  
19 activities before they occur.

20       99. The Executive Order singles out WeChat users because of the content of  
21 their speech and treats WeChat users' speech less favorably than that of users of other  
22 social media platforms. The Executive Order does so for the purpose of silencing the  
23 viewpoints of WeChat's primarily Chinese and Chinese-American users and suppressing  
24 viewpoints that Defendants believe are insufficiently critical of the Chinese government.  
25 The suppression of Chinese "propaganda" is one of the animating purposes of the  
26 Executive Order.

27       100. The Executive Order is substantially overbroad on its face. By prohibiting  
28 "any transaction that is related to WeChat," the Executive Order prohibits substantially

1 more speech, association, and religious activity than the Constitution allows. The  
2 deleterious effects of the Executive Order’s overbreadth are compounded by the fact that  
3 violators may be punished with severe civil and criminal penalties, including incarceration,  
4 under 50 U.S.C. § 1705. Such severe penalties will lead (and already have led) to broad  
5 self-censorship among WeChat users and Tencent’s business partners in the United  
6 States—including those whose speech, association, and religious activities on WeChat may  
7 not be constitutionally prohibited. Because of its substantial overbreadth, the Executive  
8 Order is unconstitutional in every conceivable application.

9       101. The transactions prohibited by the Identification are necessary for WeChat to  
10 function in the United States. Defendant Ross and at least one senior Trump  
11 administration official have publicly admitted that implementing the prohibitions in the  
12 Identification will result in WeChat being “shut down” and/or “dead” in the United States.  
13 Implementing these prohibitions will effectively ban WeChat in the United States.  
14 Eliminating the ability of WeChat to function in the United States will have the effect of  
15 foreclosing all meaningful access to social media for WeChat users such as Plaintiffs, who  
16 use WeChat to communicate and associate with members of the Chinese and Chinese-  
17 speaking communities. Whether the ban results in an immediate cessation of all activity  
18 on WeChat or chills an increasing number of people from using the app (while subjecting  
19 them to additional risk), the effect will be to curtail speech, which the First Amendment  
20 does not permit. Without question, disabling an essential mode of communication is a  
21 prior restraint, and so violates the Constitution. Additionally, implementation of the  
22 Identification’s prohibitions would decrease user privacy, over-block access to legal  
23 content, fuel Internet fragmentation, undermine Internet freedom, and interfere with or  
24 even end direct Internet traffic between the United States and China.

25       102. The Identification singles out WeChat users because of the content of their  
26 speech and treats WeChat users’ speech less favorably than that of users of other social  
27 media platforms. The Identification does so for the purpose of silencing the viewpoints of  
28 WeChat’s primarily Chinese and Chinese-American users and suppressing viewpoints that

1 Defendants believe benefit the Chinese Communist Party. The suppression of Chinese  
2 “propaganda” is one of the animating purposes of the Identification. The government  
3 claims to be protecting its citizens and residents from material that is supportive of the  
4 PRC, based on the Secretary’s concern that China could use WeChat to “subversively  
5 influence the views of millions of” U.S. users, in a manner that “align[s] with Chinese  
6 government objectives.” These justifications necessarily make the WeChat ban a content-  
7 based prohibition.

8 103. The Identification is overbroad on its face. By prohibiting transactions that  
9 are necessary for WeChat to function in the United States, the Identification suppresses  
10 substantially more speech than the Constitution allows. The deleterious effects of the  
11 Identification’s overbreadth are compounded by the fact that violators may be punished  
12 with severe civil and criminal penalties, including incarceration, under 50 U.S.C. § 1705.  
13 Such severe penalties will lead third-party service providers targeted by the Identification  
14 to cut off even more speech-enabling services to WeChat than the prohibitions may require  
15 of them, so as to eliminate even the remote possibility of incurring the substantial civil and  
16 criminal penalties authorized by Section 1705. Because of its substantial overbreadth, the  
17 Identification is unconstitutional in every conceivable application.

18 104. Defendants lack a sufficient interest to justify either the Executive Order’s or  
19 the Identification’s burden on constitutionally protected speech and associational and  
20 religious activities. Neither the Executive Order nor the Identification is narrowly tailored  
21 to achieve the governments’ purported interest in preventing WeChat from collecting and  
22 sharing Plaintiffs’ personal information. And neither the Executive Order nor the  
23 Identification leaves open ample alternative channels for the exercise of Plaintiffs’  
24 protected First Amendment activities.

25 105. Accordingly, the Executive Order and Identification violate Plaintiffs’ rights  
26 under the First Amendment and inflict ongoing harm upon Plaintiffs.

27  
28

**SECOND CLAIM FOR RELIEF**

**(First Amendment – Free Exercise Clause)**

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2  
3 106. Plaintiffs reallege and hereby incorporate by reference the allegations  
4 contained in the preceding paragraphs of this Complaint.

5 107. The First Amendment’s Free Exercise Clause provides that “Congress shall  
6 make no law respecting an establishment of religion, or prohibiting the free exercise  
7 thereof.”

8 108. WeChat users in the United States depend on WeChat to participate in  
9 religious worship and other practices in accordance with the tenets and practices of their  
10 religion. Plaintiff Bao, for example, is a member of New Life Chinese Alliance Church in  
11 New York. Due to the ongoing COVID-19 pandemic, he and his fellow congregants do  
12 not attend church or participate in other church activities in person. Instead, he and his  
13 fellow congregants rely on WeChat for religious activities—such as participating in Bible  
14 Study groups. Plaintiff Bao and his fellow congregants regularly participate in a Bible  
15 Study group on WeChat.

16 109. Executive Order 13943 and the Identification effectively ban WeChat in the  
17 United States. In doing so, the Executive Order and the Identification will prevent Plaintiff  
18 Bao and his fellow congregants at the New Life Chinese Alliance Church from  
19 participating in Bible Study groups and other religious activities. Executive Order 13943  
20 and the Identification place a substantial burden on Bao’s exercise of religion.

21 110. There is no rational connection between the government’s avowed interest in  
22 preventing WeChat from sharing U.S. users’ private data and information with the Chinese  
23 government and the means it has chosen to advance that interest.

24 111. By banning WeChat and preventing users from patching security  
25 vulnerabilities in the WeChat app without a rational basis for doing so, Defendants have  
26 deprived and will continue to deprive Plaintiff Bao of his rights under the Free Exercise  
27 Clause.

28

**THIRD CLAIM FOR RELIEF**

**(First and Fifth Amendments – Vagueness)**

112. Plaintiffs reallege and hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

113. Sections 1(a) and 2 of Executive Order 13943 alter the legal rights and obligations of private parties, including Plaintiffs. Section 1(a) prohibits “any transaction that is related to WeChat by any person, or with respect to any property, subject to the jurisdiction of the United States, with Tencent Holdings Ltd. (a.k.a. Ténɡxùn Kònɡǔ Yǒuxiàn Gōnɡsī), Shenzhen, China, Start Printed Page 48642 or any subsidiary of that entity, as identified by the Secretary of Commerce (Secretary) under section 1(c) of this order.” Section 1(c) provides that “45 days after the date of this order, the Secretary shall identify the transactions subject to subsection (a) of this section.” Violations of Sections 1(a) and 2 are punishable by incarceration and monetary penalties. 50 U.S.C. § 1705(b)-(c).

114. The Identification identifies certain transactions subject to section 1(a) of the Executive Order, but it provides vague and inadequate notice of the conduct it purports to prohibit. Although the Identification states that the prohibitions apply only “to the parties to business-to-business transactions,” the Identification does not define “business-to-business transactions.” Nor does the Identification define the terms in prohibition number six (prohibiting “any utilization of the WeChat mobile application’s constituent code, functions, or services in the functioning of software or services”). Plaintiff Chihuo, reasonably fears that any use of WeChat by the company may qualify as “any utilization of the WeChat mobile application’s constituent code,” and subject the company to the criminal and civil penalties authorized by 50 U.S.C. § 1705.

115. The Identification further prohibits “Any other transaction that is related to WeChat by any person, or with respect to any property, subject to the jurisdiction of the United States, with Tencent Holdings Ltd., or any subsidiary of that entity, as may be identified at a future date under the authority delegated under Executive Order 13943.” No

1 reasonable person could tell what conduct may be prohibited under this provision.

2 Because of this uncertainty, Plaintiff Chihuo reasonably fears that its continued use of  
3 WeChat may trigger the civil and criminal penalties authorized by 50 U.S.C. § 1705.

4 116. The Executive Order and the Identification are therefore void for vagueness  
5 under the First and Fifth Amendments to the U.S. Constitution.

6 **FOURTH CLAIM FOR RELIEF**

7 **(Fifth Amendment – Equal Protection)**

8 117. Plaintiffs reallege and hereby incorporate by reference the allegations  
9 contained in the preceding paragraphs of this Complaint.

10 118. The Due Process Clause of the Fifth Amendment prohibits the Federal  
11 Government from denying equal protection of the laws, including on the basis of race,  
12 ethnicity, nationality, national origin, and alienage.

13 119. WeChat is widely used and depended on by the Chinese community in the  
14 United States to communicate with friends, family, customers, and other persons of  
15 Chinese or Chinese American ancestry, including Chinese-language speakers.

16 120. Plaintiffs Peng, Duan, Zhang, and Bao are members of the Chinese  
17 community in the United States. Plaintiff Brent Coulter uses WeChat to communicate  
18 with people of Chinese and/or Chinese-American ancestry in the United States and abroad.  
19 Plaintiffs USWUA and Chihuo are organizations or businesses whose members or  
20 customers primarily consist of people of Chinese and/or Chinese American ancestry in the  
21 United States, who use WeChat to communicate with others similar to them both in the  
22 United States and abroad.

23 121. Defendants have not imposed comparable restrictions on software that  
24 collects similar personal and private data from users in the United States and shares that  
25 data with the Chinese government, but that is not owned and used primarily by persons of  
26 Chinese and Chinese-American descent. Defendants have not, for example, proposed a  
27 comparable ban on Airbnb, despite their knowledge that Airbnb collects a wide range of  
28 private information from American users and shares that information with the Chinese

1 government.<sup>50</sup>

2 122. By prohibiting the use of WeChat but not other apps that are owned and used  
3 primarily by people who are not of Chinese or Chinese-American ancestry, Executive  
4 Order 13943 and the Identification single out people of Chinese and Chinese-American  
5 ancestry and those who wish to communicate and associate with them, and subject them to  
6 disparate treatment on the basis of race, ethnicity, nationality, national origin, and alienage.

7 123. This disparate treatment is motivated by Defendants' animus towards people  
8 of Chinese and/or Chinese American ancestry, and has the purpose of discriminating  
9 against people of Chinese and/or Chinese-American ancestry.

10 124. Defendants' issuance of Executive Order 13943 and the Identification  
11 therefore violate Plaintiffs' rights to equal protection guaranteed by the Fifth Amendment  
12 to the United States Constitution. Defendants' violations inflict ongoing harm upon  
13 Plaintiffs.

14 **FIFTH CLAIM FOR RELIEF**

15 ***(Ultra Vires (50 U.S.C. § 1702(b)))***

16 125. Plaintiffs reallege and hereby incorporate by reference the allegations  
17 contained in the preceding paragraphs of this Complaint.

18 126. The IEEPA includes specific limits on Defendants' authority to prohibit  
19 transactions related to WeChat. Section 1702(b) of the IEEPA states in relevant part that  
20 "[t]he authority granted to the President by [the IEEPA] does not include the authority to  
21 regulate or prohibit, directly or indirectly... (1) any postal, telegraphic, telephonic, or other  
22 personal communication, which does not involve a transfer of anything of value;  
23 (2) donations, by persons subject to the jurisdiction of the United States, of articles, such as  
24 food, clothing, and medicine, intended to be used to relieve human suffering...; (3) the  
25 importation from any country, or the exportation to any country, whether commercial or

26 \_\_\_\_\_  
27 <sup>50</sup> See Dustin Volz and Kirsten Grind, *Airbnb Executive Resigned Last Year Over Chinese*  
28 *Request for More Data Sharing*, WALL ST. JOURNAL (Nov. 20, 2020),  
<https://www.wsj.com/articles/airbnb-executive-resigned-last-year-over-chinese-request-for-more-data-sharing-11605896753>.

1 otherwise, regardless of format or medium of transmission, of any information or  
2 informational materials...; [or] (4) any transactions ordinarily incident to travel to or from  
3 any country[.]” 50 U.S.C. § 1702(b)(1)-(4).

4 127. Plaintiffs rely on WeChat for “personal communication[s]” that “do[] not  
5 involve a transfer of anything of value,” within the meaning of 50 U.S.C. § 1702(b)(1).

6 128. Plaintiffs rely on WeChat to donate as well as to coordinate and arrange for  
7 donations of “articles... intended to be used to relieve human suffering,” within the  
8 meaning of 50 U.S.C. § 1702(b)(2). Neither the President nor the Secretary has issued any  
9 findings that the coordination and donation of such articles would seriously impair the  
10 President’s ability to deal with any national emergency, are in response to coercion against  
11 the proposed recipient or donor, or would endanger Armed Forces of the United States  
12 which are engaged in hostilities or are in a situation where imminent involvement in  
13 hostilities is clearly indicated by the circumstances.

14 129. Plaintiffs rely on WeChat to import and/or export “information or  
15 information materials,” within the meaning of 50 U.S.C. § 1702(b)(3).

16 130. Plaintiffs rely on WeChat to complete “transactions ordinarily incident to  
17 travel to or from any country,” within the meaning of 50 U.S.C. § 1702(b)(4).

18 131. Neither the President nor any other federal official can take an action that  
19 exceeds the scope of their constitutional and/or statutory authority. In Executive Order  
20 13943, however, the President has nonetheless “prohibited” Plaintiffs from using WeChat  
21 in any manner, thereby exceeding each of the four specific limits on his authority  
22 contained in 50 U.S.C. § 1702(b).

23 132. The Secretary’s Identification likewise seeks to effectuate an outright ban of  
24 the WeChat platform. Defendant Ross has admitted that the prohibitions in his  
25 Identification will “shut down” WeChat in the United States once those prohibitions are  
26 implemented. By shutting down WeChat in the United States, the Identification  
27 necessarily regulates or prohibits, directly or indirectly, personal communications that do  
28 not involve a transfer of value, the donation and coordination of donations of articles

1 intended to relieve human suffering, the importation and exportation of information or  
2 informational materials, and transactions ordinarily incident to travel to or from any  
3 country. By regulating or prohibiting these activities, directly or indirectly, the  
4 Identification exceeds each of the four specific limits on the Secretary’s authority  
5 contained in 50 U.S.C. § 1702(b).

### 6 **SIXTH CLAIM FOR RELIEF**

#### 7 **(Religious Freedom Restoration Act – 42 U.S.C. § 2000bb(1)(a))**

8 133. Plaintiffs reallege and hereby incorporate by reference the allegations  
9 contained in the preceding paragraphs of this Complaint.

10 134. In 1993, Congress enacted the Religious Freedom Restoration Act (“RFRA”),  
11 Pub. L. No. 103-31 (1993) (codified at 42 U.S.C. §§ 2000bb–2000bb-4).

12 135. RFRA prohibits the government from “substantially burden[ing] a person’s  
13 exercise of religion even if the burden results from a rule of general applicability” unless  
14 the government can demonstrate that the application of the burden to the person is: (1) in  
15 furtherance of a compelling governmental interest; and (2) the least restrictive means of  
16 furthering that compelling governmental interest. 42 U.S.C. § 2000bb-1.

17 136. WeChat users in the United States depend on WeChat to participate in  
18 religious worship and other practices in accordance with the tenets and practices of various  
19 religions. Plaintiff Bao, for example, is a member of New Life Chinese Alliance Church in  
20 New York. Due to the ongoing COVID-19 pandemic, he and his fellow congregants do  
21 not attend church or participate in other church activities in person. Instead, he and his  
22 fellow congregants rely on WeChat for religious activities —such as participating in Bible  
23 Study groups. Plaintiff Bao and his fellow congregants regularly participate in a Bible  
24 Study group on WeChat.

25 137. Executive Order 13943 and the Identification effectively ban WeChat in the  
26 United States. As a result, Plaintiff Bao and his fellow congregants at the New Life  
27 Chinese Alliance Church will no longer be able to participate in religious activities using  
28 WeChat.



1 connect the facts relating to the likely technological effects of each of the prohibitions to  
2 the conclusion recommending each prohibition. The technological effects of these  
3 prohibitions are important aspects of the problem the Identification was purportedly  
4 intended to address.

5 144. In issuing the Identification, Defendant Ross failed to consider a wealth of  
6 available evidence indicating that a prohibition on new downloads of the WeChat app  
7 would *exacerbate* rather than mitigate threats to the security of WeChat users' private data.  
8 Defendant Ross and his staff did not articulate satisfactory explanations that connect the  
9 facts relating to the risks associated with unpatched security vulnerabilities to the  
10 conclusion recommending the prohibition on app updates. The risk of exacerbating cyber  
11 threats to the security of users' private data represents an important aspect of the issue the  
12 Identification was purportedly intended to address.

13 145. In issuing the Identification, Defendant Ross failed to consider a wealth of  
14 available evidence demonstrating that WeChat users in the United States depend on  
15 WeChat to communicate and share information with family, friends, and professional,  
16 political, and religious contacts located both in the United States and abroad. Defendant  
17 Ross and his staff did not articulate satisfactory explanations that connect the facts relating  
18 to the widespread use of WeChat users' dependence on the app to the conclusion  
19 recommending the wholesale ban of the app. WeChat users' dependence on the app for  
20 personal communications and information represents an important aspect of the issue the  
21 Identification was purportedly intended to address.

22 146. In issuing the Identification, Defendant Ross failed to consider whether  
23 Tencent's three separate mitigation proposals, either individually or in concert, would  
24 eliminate or mitigate the purported need for regulations of or prohibitions on transactions  
25 related to WeChat.

26 147. On information and belief, the President and/or staff associated with the  
27 Executive Office of the President intervened in the Commerce Department's negotiations  
28 with Tencent in August and September 2020 for the purpose of preventing the parties to

1 these negotiations from reaching an agreement that would eliminate or mitigate the  
2 purported need for regulations of or prohibitions on transactions related to WeChat. The  
3 President and/or staff associated with the Executive Office of the President did so for  
4 reasons unrelated to the purported security threat posed by WeChat, including but not  
5 limited to: (a) their disapproval of the content of communications and information shared  
6 on WeChat, and (b) their expectation that prohibiting transactions related to WeChat  
7 would benefit the President's reelection campaign by further encouraging animus among  
8 the American electorate towards people of Chinese or Chinese-American ancestry.

9 148. Such reasons are not among the factors that Congress intended for executive-  
10 branch officials to consider when issuing regulations under the authority of the IEEPA.  
11 The President and/or staff associated with the Executive Office of the President  
12 communicated their reasons for disapproving Tencent's mitigation proposals to Defendant  
13 Ross and/or his subordinates, and Defendant Ross's consideration of these reasons played  
14 a substantial role in his decision to issue the Identification.

15 149. In issuing the Identification, Defendant Ross failed to consider CISA's  
16 recommendation that Defendants issue a far narrower prohibition aimed at preventing the  
17 use of WeChat on the devices of State, Local, Tribal, and Territorial partners and critical  
18 infrastructure operators.

19 150. In issuing the Identification, Defendant Ross has not adequately explained  
20 the rationales for the Identification's prohibitions, and has failed to consider regulatory  
21 alternatives. Defendant Ross has also failed to consider the prohibitions' collateral effects,  
22 including how the prohibitions will reconfigure affected Internet infrastructure in ways that  
23 will decrease user privacy, over-block access to legal content, fuel Internet fragmentation,  
24 undermine Internet freedom, and interfere with or even end direct Internet traffic between  
25 the United States and China.

26 151. The Identification is therefore arbitrary, capricious, an abuse of discretion, or  
27 otherwise not in accordance of law, within the meaning of 5 U.S.C. § 706(2)(A).

28 152. Furthermore, the Secretary's Identification directly contravenes 50 U.S.C.

1 § 1702(b) by directly or indirectly regulating or prohibiting “personal communication[s]”  
2 that “do[] not involve a transfer of anything of value,” as well as the donation and  
3 coordination of donations of “articles... intended to be used to relieve human suffering,”  
4 the importation and/or exportation of “information or information materials,” and  
5 “transactions ordinarily incident to travel to or from any country.”

6 153. The Identification is therefore in excess of statutory jurisdiction, authority, or  
7 limitations, or short of statutory right, within the meaning of 5 U.S.C. § 706(2)(B), and  
8 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,  
9 within the meaning of 5 U.S.C. § 706(2)(A).

10 **PRAYER FOR RELIEF**

11 WHEREFORE, Plaintiffs pray for relief and judgment as follows:

12 1. Declaring that Executive Order 13943 and the Identification are  
13 unconstitutional under the First Amendment;

14 2. Declaring that Executive Order 13943 and the Identification are  
15 unconstitutional under the Fifth Amendment;

16 3. Declaring that Executive Order 13943 and the Identification do not comply  
17 with the limitations on presidential power in the National Emergency Act and the  
18 International Emergency Economic Powers Act, and are thus *ultra vires*;

19 4. Declaring that Executive Order 13943 and the Identification violate the  
20 Religious Freedom Restoration Act;

21 5. Declaring that the Identification violates the APA;

22 6. Preliminarily and permanently enjoining Defendants from enforcing the  
23 Executive Order and the Identification;

24 7. Preliminarily and permanently staying the implementation date of any of the  
25 penalty provisions applicable to the Executive Order and the Identification; and

26 ///

27 ///

28 ///

1           8.       Granting such other and further relief as this Court may deem just and  
2 proper, including an award to Plaintiffs of the costs of this suit and reasonable attorneys'  
3 fees and litigation expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412(d).

4 DATED: December 7, 2020

Respectfully submitted,

ROSEN BIEN GALVAN & GRUNFELD LLP

By: /s/ Michael W. Bien

Michael W. Bien

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