

1 MICHAEL W. BIEN – 096891
 ERNEST GALVAN – 196065
 2 VAN SWEARINGEN – 259809
 BENJAMIN BIEN-KAHN – 267933
 3 ALEXANDER GOURSE – 321631
 AMY XU – 330707
 4 ROSEN BIEN
 GALVAN & GRUNFELD LLP
 5 101 Mission Street, Sixth Floor
 San Francisco, California 94105-1738
 6 Telephone: (415) 433-6830
 Facsimile: (415) 433-7104
 7 Email: mbien@rbgg.com
 egalvan@rbgg.com
 8 vswearingen@rbgg.com
 bbien-kahn@rbgg.com
 9 agourse@rbgg.com
 axu@rbgg.com

THOMAS R. BURKE – 141930
 DAVIS WRIGHT TREMAINE LLP
 505 Montgomery Street, Suite 800
 San Francisco, California 94111-6533
 Telephone: (415) 276-6500
 Facsimile: (415) 276-6599
 Email: thomasburke@dwt.com

DAVID M. GOSSETT – Admitted *Pro Hac Vice*
 COURTNEY T. DETHOMAS – 294591
 DAVIS WRIGHT TREMAINE LLP
 1301 K Street N.W., Suite 500 East
 Washington, D.C. 20005-3366
 Telephone: (202) 973-4216
 Facsimile: (202) 973-4499
 Email: davidgossett@dwt.com
 courtneydethomas@dwt.com

10 KELIANG (CLAY) ZHU – 305509
 11 DEHENG LAW OFFICES PC
 7901 Stoneridge Drive #208
 12 Pleasanton, California 94588
 Telephone: (925) 399-5856
 13 Facsimile: (925) 397-1976
 Email: czhu@dehengsv.com
 14
 15 ANGUS F. NI – Admitted *Pro Hac Vice*
 AFN LAW PLLC
 502 Second Avenue, Suite 1400
 16 Seattle, Washington 98104
 Telephone: (773) 543-3223
 17 Email: angus@afnlegal.com

JOHN M. BROWNING – Admitted *Pro Hac*
Vice
 DAVIS WRIGHT TREMAINE LLP
 1251 Avenue of the Americas, 21st Floor
 New York, New York 10020-1104
 Telephone: (212) 603-6410
 Facsimile: (212) 483-8340
 Email: jackbrowning@dwt.com

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, and
 26 WILBUR ROSS, in his official capacity as
 Secretary of Commerce,

27 Defendants.

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

**JOINT CASE MANAGEMENT
 CONFERENCE STATEMENT AND
 REPORT OF RULE 26(F) CONFERENCE**

Judge: Hon. Laurel Beeler

Trial Date: None Set

1 Plaintiffs U.S. WeChat Users Alliance (“USWUA”), Chihuo, Inc., Brent Coulter,
2 Fangyi Duan, Jinneng Bao, Elaine Peng, and Xiao Zhang (“Plaintiffs”), and Defendants
3 President Donald Trump and Secretary Wilbur Ross (“Defendants”) (collectively, “the
4 parties”), through counsel, have met and conferred to the extent required by Rule 26(f) of
5 the Federal Rules of Civil Procedure¹ and jointly submit the following Case Management
6 Conference Statement, which includes the parties’ joint report pursuant to Rule 26(f)(2).

7 **1. JURISDICTION AND SERVICE**

8 **A. Plaintiffs’ Position**

9 This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C.
10 §§ 1331. No party contests venue. All parties have been served.

11 **B. Defendants’ Position**

12 Defendants dispute that the Court has jurisdiction over Plaintiffs’ claims against the
13 President and Executive Order 13943 (the “Executive Order”). Defendants do not contest
14 venue or service, and do not contest statutory subject matter jurisdiction under 28 U.S.C.
15 § 1331. However, Defendants may contest Plaintiffs’ standing to raise certain theories,
16 such as those asserting vagueness challenges under the Fifth Amendment, if those claims
17 survive Defendants’ pending motion to dismiss on other grounds, ECF No. 141.
18 Defendants may also contest whether there has been a valid waiver of sovereign immunity
19 as to certain of Plaintiffs’ theories regarding review under the Administrative Procedure
20 Act (“APA”).

21
22
23
24 ¹ Defendants dispute that Rule 26(f) applies to this proceeding. Plaintiffs seek judicial
25 review of final agency action, which is presumptively based upon an administrative record,
26 not civil discovery. *See, e.g., Friends of the Earth v. Hintz*, 800 F.2d 822, 828-29 (9th Cir.
27 1986) (“With a few exceptions, . . . judicial review of agency action is limited to a review
28 of the administrative record.”). Rule 26(f) thus appears to be inapplicable on its own
terms. *See* Fed. R. Civ. P. 26(a)(1)(B), (f)(1) (exempting from Rule 26(f)’s requirements
“action[s] for review on an administrative record”). Nevertheless, Defendants do not see
any benefit to motion practice on the issue, particularly on the current record, and
Defendants are therefore jointly submitting this report with Plaintiffs.

1 **2. FACTS**

2 **A. Plaintiffs' Position**

3 On August 6, 2020, President Trump issued the Executive Order, which prohibits
4 “transactions” with WeChat as identified by the Secretary of Commerce (“the Secretary”).
5 While framing the Executive Order as necessary to combat Chinese Communist Party
6 censorship and protect national security, the Executive Order was in service of garnering
7 pre-election publicity and inciting anti-Chinese animus. On September 17, 2020, the
8 Commerce Department released its “Identification of Prohibited Transactions to
9 Implement Executive Order 13943” (the “Identification”). The Identification sets forth
10 eleven defined terms and identifies seven “transactions” to be prohibited pursuant to the
11 Executive Order. Executive Order 13943 and the Identification effectively ban the use of
12 WeChat in the United States.

13 In a stark violation of the First Amendment, the Executive Order and Identification
14 target and silence WeChat users, the overwhelming majority of whom are members of the
15 Chinese and Chinese-speaking communities. They regulate and prohibit constitutionally
16 protected speech, expression, and association. Defendants’ ban on WeChat is not narrowly
17 tailored to restrict only that speech which presents national security risks to the United
18 States, nor does it leave open ample alternative avenues of communication for WeChat
19 users. Because of its substantial burdens on the free exercise of religion, the ban on
20 WeChat violates First Amendment and the Religious Freedom Restoration Act.

21 The Executive Order and the Identification fail to define key terms and do not
22 apprise reasonable persons of what conduct may be prohibited, and are therefore void for
23 vagueness under the First and Fifth Amendments to the U.S. Constitution.

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

1 The International Emergency Economic Powers Act (“IEEPA”) includes specific
2 limits on Defendants’ authority to prohibit transactions related to WeChat. The
3 prohibitions under the WeChat ban exceed each of the four specific limits on Defendants’
4 authority contained in 50 U.S.C. § 1702(b).

5 In issuing the Identification, the Secretary failed to consider relevant evidence, did
6 not adequately explain rationales for the Identification’s prohibitions, and failed to
7 consider alternatives. The Secretary’s actions are in excess of statutory authority and his
8 actions and omissions render the Identification arbitrary, capricious, an abuse of discretion,
9 and/or otherwise not in accordance of law.

10 **B. Defendants’ Position**

11 The U.S. Intelligence Community has determined that the routine and systemic cyber
12 espionage activities of the communist government of the People’s Republic of China
13 (“PRC”) represent not only a growing attack threat to our core military and critical
14 infrastructure systems, but the greatest long-term threat to our nation’s information and
15 intellectual property, and to our economic vitality. This growing threat is enhanced by the
16 PRC’s practice of pursuing hostile objectives through the purportedly private business
17 activities of Chinese companies, which—though nominally private, are in fact
18 instrumentalities of the Chinese state. Chinese technology companies in particular are
19 increasingly required by the PRC government to organize their business activities around
20 the demands of the Chinese state and its unrelenting efforts to achieve digital dominance
21 across the globe. These companies have been known to provide the PRC government with
22 access to massive amounts of online data, in what has been likened to a “massive
23 surveillance project.” Moreover, to ensure cooperation with this mass surveillance project,
24 the PRC government has enacted national intelligence laws that oblige Chinese individuals,
25 organizations, and institutions—even those outside of mainland China—to assist the PRC
26 in carrying out a wide array of intelligence work.

27 Congress has directed the Executive Branch to investigate and respond to the growing
28 national security threat from the PRC. *See, e.g.*, Pub. L. No. 115-232 §§ 1260(5), 1261. The

1 Executive Branch has done so through a multi-pronged set of efforts. As relevant here, on
2 May 15, 2019, the President declared a national emergency under the IEEPA and the
3 National Emergency Act, finding that “foreign adversaries are increasingly creating and
4 exploiting vulnerabilities in information and communications technology and services,
5 which store and communicate vast amounts of sensitive information, facilitate the digital
6 economy, and support critical infrastructure and vital emergency services, in order to
7 commit malicious cyber-enabled actions.” Securing the Information and Communications
8 Technology and Services Supply Chain, Exec. Order No. 13,873, 84 Fed. Reg. 22,689
9 (2019) (“ICTS Order”), pmb1. In the ICTS Order, the President found that those risks are
10 exacerbated by the unrestricted use in the United States of information and communications
11 technology or services supplied by persons subject to the jurisdiction or direction of foreign
12 adversaries. *Id.* The President has since renewed this national-emergency declaration. *See*
13 85 Fed. Reg. 29,321 (May 13, 2020).

14 Pursuant to the ICTS Order, on August 6, 2020, the President issued the Executive
15 Order at issue here, 85 Fed. Reg. 48,641, pertaining to WeChat, a mobile “superapp”
16 created and operated by the Chinese firm Tencent Holdings Ltd. (“Tencent”). Tencent is
17 one of the PRC’s largest technology companies that has officially been named by the PRC
18 as an artificial intelligence “national champion.” The President determined that WeChat’s
19 automatic and ongoing collection of vast swaths of information from United States users
20 threatens “to allow the [CCP] access to Americans’ personal and proprietary information,”
21 thereby creating an unacceptable national security threat. The Executive Order directed
22 the Secretary of Commerce (the “Secretary”) to prescribe a set of prohibited WeChat-
23 related transactions to mitigate the threat.

24 On September 18, 2020, the Secretary, after consultation with the U.S. Intelligence
25 Community and the Department of Homeland Security, issued a notice (the
26 “Identification”), identifying for prohibition six categories of technological services that
27 facilitate operation of the WeChat mobile app. Specifically, the Secretary restricted U.S.
28 app stores from continuing to offer the WeChat mobile application and accompanying

1 software updates for download by U.S. users; the provision of U.S.-based internet hosting
2 services to the WeChat mobile application; the provision of certain internet transmission
3 and cloud storage services to optimize the speed and functionality of the WeChat mobile
4 application in the United States; the provision of financial services to support WeChat’s
5 mobile payment functionalities; and use of the WeChat mobile application’s constituent
6 code or functions in other software within the United States. Importantly, these identified
7 restrictions regulate only the WeChat mobile application and services that support it, not
8 user activity or expression, which may continue to take place through a wide range of
9 alternative apps and communication technologies, including non-mobile versions of
10 WeChat itself.

11 The Department of Commerce has produced to counsel for Plaintiffs the
12 administrative record underlying the Identification (the “Administrative Record”), *see* ECF
13 No. 122, consisting of public and certain non-public information considered by the
14 Secretary in determining that these particular prohibitions were warranted under the
15 Executive Order. The relevant findings of the Secretary, and the materials he considered,
16 are contained within that record.

17 Because it is Defendants’ position that the only claims permitted to be asserted in
18 this action are those that challenge the Secretary’s action (rather than the President’s),
19 Defendants believe that the Court’s review in this action is properly limited to the
20 Administrative Record, even as to Plaintiffs’ constitutional claims. *See, e.g., Jiahao*
21 *Kuang v. DOD*, No. 18-CV-03698-JST, 2019 WL 293379, at *2–3 (N.D. Cal. Jan. 23,
22 2019) (concluding that that “Plaintiffs’ constitutional claims do not warrant extra-record
23 discovery” based on the nature of the claims); *Afianian v. Duke*, No.
24 CV1707643FMORAOX, 2018 WL 9619346, at *5-6 (C.D. Cal. Nov. 30, 2018) (similar);
25 *Bellion Spirits, LLC v. United States*, 335 F. Supp. 3d 32, 43 (D.D.C. 2018) (“district
26 courts have been hesitant to permit a plaintiff asserting a constitutional challenge to agency
27 action to avoid the APA’s bar on extra-record evidence.”). Defendants therefore do not
28 anticipate substantial, if any, factual issues for resolution. *See, e.g., Janjua v. Neufeld*, No.

1 15-CV-05475-EMC, 2017 WL 2876116, at *3 (N.D. Cal. July 6, 2017) (judicial review of
2 agency action generally does not involve “resolv[ing] factual questions” but instead is
3 directed at “the purely legal question of whether the agency could have reasonably reached
4 the decision that it did” on the basis of an administrative record). Moreover, even if
5 factual disputes exist, Defendants do not believe that it is necessary to resolve them to
6 dispose of Plaintiffs’ claims, each of which fails for legal reasons.

7 Nevertheless, if the Court disagrees, and depending on the claims that survive
8 Defendants’ pending Motion to Dismiss and the outcome of the pending review by the
9 Court of Appeals for the Ninth Circuit, Defendants anticipate potential factual disputes
10 regarding the impact of the prohibitions identified by the Secretary (both in general, and as
11 to Plaintiffs in particular) and the availability of alternative means of communication.

12 **3. LEGAL ISSUES**

13 **A. Plaintiffs’ Position**

- 14 1. Whether the Executive Order and Identification violate Plaintiffs’
15 rights to free speech and association under the First Amendment?
- 16 2. Whether the Executive Order and Identification violate Plaintiffs’
17 rights to free exercise of religion under the First Amendment?
- 18 3. Whether the Executive Order and the Identification are therefore void
19 for vagueness under the First and Fifth Amendments to the U.S. Constitution?
- 20 4. Whether the Executive Order and the Identification violate Plaintiffs’
21 rights to equal protection guaranteed by the Fifth Amendment to the United States
22 Constitution?
- 23 5. Whether the Executive Order and the Identification exceeds the limits
24 on Defendants’ authority under IEEPA?
- 25 6. Whether the Executive Order and the Identification violate Plaintiffs’
26 rights protected by the Religious Freedom Restoration Act?
- 27 7. Whether the Identification is in excess of statutory jurisdiction,
28 authority, or limitations, or short of statutory right, within the meaning of 5 U.S.C. §

1 706(2)(B), and whether it is arbitrary, capricious, an abuse of discretion, and/or otherwise
2 not in accordance with law, within the meaning of 5 U.S.C. § 706(2)(A).

3 **B. Defendants' Position**

4 1. Whether the Court possesses jurisdiction over Plaintiffs' claims
5 asserted against the Executive Order, notwithstanding the Supreme Court's long-
6 established recognition that courts have "no jurisdiction of a bill to enjoin the President in
7 the performance of his official duties." *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866);
8 *see also Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992).

9 2. Whether the Identification's prohibition of specific economic
10 transactions in order to reduce espionage risks flowing from the WeChat mobile app
11 implicates Plaintiffs' freedom of speech so as to require heightened scrutiny under the Free
12 Speech Clause of the First Amendment, and if so whether such scrutiny is satisfied.

13 3. Whether the Identification's prohibition of specific economic
14 transactions in order to reduce espionage risks flowing from the WeChat mobile app
15 implicates Plaintiffs' freedom of religion so as to require heightened scrutiny under the
16 Free Exercise Clause of the First Amendment, and if so whether such scrutiny is satisfied.

17 4. Whether the Identification is unconstitutionally vague under the Fifth
18 Amendment and whether Plaintiffs have standing to assert such a challenge in light of the
19 express provisions in the Identification clarifying that user activity of the sort Plaintiffs
20 allege is not subject to prohibition.

21 5. Whether the Identification satisfies the Equal Protection Clause.

22 6. Whether the Identification exceeds the limits of the authority
23 conferred under IEEPA, and if so, whether alternate authority exists.

24 7. Whether the Identification violates the Religious Freedom Restoration
25 Act, 42 U.S.C. § 2000bb *et seq.*

26 8. Whether the Secretary's selection of prohibited transactions to address
27 the national security threat posed by WeChat is committed to agency discretion and thus is
28 exempt from arbitrary and capricious review under 5 U.S.C. § 706(a), and if not, whether

1 the Identification satisfies the deferential standard of reasoned decisionmaking under the
2 APA, particularly in light of the broad deference due to the Executive Branch in areas of
3 national security and foreign policy.

4 9. Depending on resolution of the foregoing questions, what relief (if
5 any) is narrowly tailored to address any legal defects in the Identification, without unduly
6 infringing the Executive Branch’s authority to address the serious national security
7 concerns at issue.

8 **4. MOTIONS**

9 Plaintiffs filed a Motion for Preliminary Injunction on August 28, 2020. ECF No.
10 17. Plaintiffs also moved for expedited discovery on September 3, 2020, ECF No. 18,
11 which the Court denied on September 10, 2020. ECF No. 25. Following the issuance of
12 the Secretary’s Identification and at the Court’s request, Plaintiffs filed a Renewed Motion
13 for Preliminary Injunction on September 18, 2020. ECF No. 48. On September 19, 2020,
14 the Court granted “the plaintiffs’ motion for a nationwide injunction against the
15 implementation of Executive Order 13,943 (limited to the Secretary of Commerce’s
16 Identification of Prohibited Transactions 1 through 6).” ECF No. 59.

17 On September 24, 2020, Defendants filed a Motion to Stay Injunction Pending
18 Appeal (“Motion to Stay,” ECF No. 68) as well as a Motion to Shorten Time (ECF No. 69)
19 for briefing on their stay motion. The Court set an abbreviated briefing schedule for the
20 Motion to Stay (ECF No. 73) and denied the Motion to Stay on October 23, 2020 (ECF
21 No. 105).

22 The Court granted administrative motions brought by Plaintiffs (ECF No. 85) and
23 Defendants (ECF No. 94) asking the Court to seal business information and related
24 references that non-party Tencent Inc. designated as confidential business information
25 when it produced such information in response to an administrative subpoena served by
26 the Department of Commerce, and which was included in the Administrative Record and
27 produced to counsel for Plaintiffs subject to a stipulated protective order. *See* ECF Nos.
28 92, 103, 108. On November 3, 2020, non-party Tencent Inc. moved to intervene for the

1 limited purpose maintaining its mitigation proposal and related references under seal (ECF
2 No. 125), which the Court granted-in-part on November 24, 2020 (ECF No. 133).

3 Defendants moved to dismiss the First Amended Complaint on November 16, 2020
4 (ECF No. 130). On December 8, 2020, Plaintiffs filed a Second Amended Complaint
5 (ECF No. 136), thereby mooting the pending Motion to Dismiss. On December 23, 2020,
6 Defendants moved to dismiss the Second Amended Complaint in part. ECF No. 141.
7 Plaintiffs' Opposition is due by February 1, 2021, Defendants' Reply is due by February
8 15, 2021, and the hearing on that motion is set for March 4, 2021 at 9:30 a.m. Defendants
9 note, however, that on January 20, 2021, due to the change in administration, there was
10 new leadership at the Department of Commerce. In order to provide sufficient time for
11 new Department of Commerce officials to become familiar with the issues in this case,
12 Defendants may seek to extend the briefing and hearing schedule on their Motion to
13 Dismiss. If so, they will confer with Plaintiffs and seek such relief, as appropriate.

14 As explained in Section 21 below, Plaintiffs intend to bring a Motion to Compel
15 Completion of the Administrative Record.

16 The parties may bring other motions as developments warrant, including cross
17 motions for summary judgment. As necessary, the parties will update the Court
18 concerning additional motions that the parties intend to pursue.

19 **5. AMENDMENT OF PLEADINGS**

20 Plaintiffs do not anticipate amending the operative Second Amended Complaint at
21 this time but reserve the right to seek stipulation of counsel or leave from the Court to do
22 so upon the discovery of new facts of relevance. Defendants have not yet answered and
23 their time to respond to claims that are not subject to the pending Motion to Dismiss is
24 tolled pending resolution of that motion. *See* ECF No. 140 at 2.

25 **6. EVIDENCE PRESERVATION**

26 The parties have reviewed the Guidelines Relating to the Discovery of
27 Electronically Stored Information and taken adequate steps to ensure that evidence will be
28 preserved. In light of the January 7, 2021 resignation of Deputy Assistant Secretary for

1 Intelligence and Security John Costello (who presided over the drafting of the Decision
2 Memorandum and certified the administrative record) as well as the potential for change in
3 personnel due to the transition of presidential administrations, Plaintiffs have asked
4 Defendants to confirm that they have issued preservation notices to all personnel who may
5 have created or received relevant materials. Undersigned counsel for Defendants provided
6 that confirmation during their telephonic discussion on January 13, 2021. Prior to that
7 request, undersigned counsel also issued additional guidance to agency counsel on January
8 13, 2021, regarding the requirement to preserve relevant materials of departing employees.
9 Nevertheless, Defendants do not believe the departure of any agency employees is likely to
10 impact this litigation in light of the fact that the Administrative Record has already been
11 compiled.

12 The parties intend to further meet and confer regarding any additional issues
13 relating to evidence preservation, if applicable, after either (1) the Court rules on
14 Defendant's pending Partial Motion to Dismiss, or (2) the Ninth Circuit grants Defendants'
15 appeal (in the event that court so rules) — whichever occurs first.

16 **7. DISCLOSURES**

17 Although the parties disagree about whether any disclosure requirements under
18 Rule 26 apply to this proceeding (and, more broadly, whether discovery is otherwise
19 appropriate), they agree that resolution of the appeal currently pending before the Ninth
20 Circuit, the pending Motion to Dismiss, ECF No. 141, and disputes relating to the
21 Administrative Record will likely inform the proper scope of any discovery. Accordingly,
22 the parties have discussed and agreed to delay any exchange of initial disclosures, if
23 applicable, and to meet and confer regarding whether discovery is appropriate and, if so,
24 its scope, until after either (1) the Court rules on Defendant's pending Partial Motion to
25 Dismiss, or (2) the Ninth Circuit grants Defendants' appeal (in the event that court so
26 rules) — whichever occurs first.

27 **8. DISCOVERY**

28 See Section 7, above.

1 **9. CLASS ACTIONS**

2 This case is not a class action.

3 **10. RELATED CASES**

4 The parties are not currently aware of any related cases.

5 **11. RELIEF**

6 **A. Plaintiffs' Position**

7 Plaintiffs seek relief and judgment as follows:

- 8 1. An order declaring that Executive Order 13943 and the Identification
9 are unconstitutional under the First Amendment;
- 10 2. An order declaring that Executive Order 13943 and the Identification
11 are unconstitutional under the Fifth Amendment;
- 12 3. An order declaring Executive Order 13943 and the Identification do
13 not comply with the limitations on presidential power in the National Emergency Act and
14 the International Emergency Economic Powers Act, and are thus ultra vires;
- 15 4. An order declaring that Executive Order 13943 and the Identification
16 violate the Religious Freedom Restoration Act;
- 17 5. An order declaring that the Identification violates the APA;
- 18 6. An order preliminarily and permanently enjoining Defendants from
19 enforcing the Executive Order and the Identification;
- 20 7. An order preliminarily and permanently staying the implementation
21 date of any of the penalty provisions applicable to the Executive Order and the
22 Identification; and
- 23 8. Granting such other and further relief as this Court may deem just and
24 proper, including an award to Plaintiffs of the costs of this suit and reasonable attorneys'
25 fees and litigation expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412(d).

26 **B. Defendants' Position**

27 Defendants contest that Plaintiffs are entitled to the requested relief, or any relief
28 whatsoever. At a minimum, the Court lacks jurisdiction to award equitable relief relating

1 to the Executive Order itself. No monetary damages are sought or appropriate.

2 **12. SETTLEMENT AND ADR**

3 This action was assigned to the Alternative Dispute Resolution (ADR) Multi-Option
4 Program governed by ADR Local Rule 3. *See* ECF No. 4. Counsel for the parties have
5 discussed the selection of an ADR process. Plaintiffs are open to participating in Early
6 Neutral Evaluation. Defendants do not believe that participation in ADR will be a fruitful
7 use of the parties' resources, particularly in light of the national security sensitivities of
8 this case. As required by the Court's November 20, 2020 Order (ECF No. 132), the parties
9 are filing today their ADR certification forms.

10 **13. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES**

11 The parties have consented to Magistrate Judge Beeler conducting all proceedings
12 in this case.

13 **14. OTHER REFERENCES**

14 This case is not suitable for reference to binding arbitration, a special master, or the
15 Judicial Panel on Multidistrict Litigation.

16 **15. NARROWING OF ISSUES**

17 The parties may be willing to stipulate to certain facts, if appropriate and to be
18 determined after any issues relating to discovery have been resolved.

19 **16. EXPEDITED TRIAL PROCEDURE**

20 This case is not the kind of case that should be handled on an expedited basis with
21 streamlined procedures.

22 **17. SCHEDULING**

23 The scheduling of discovery cut off dates and hearing of any other dispositive
24 motions is premature at this time, particularly in light of the parties' threshold dispute as to
25 whether discovery is warranted. Plaintiffs seek to have the Court approve an expedited
26 briefing schedule for Plaintiffs' Motion to Compel Completion of the Administrative
27 Record, as discussed below in Section 21.

28

1 **18. TRIAL**

2 **A. Plaintiffs' Position**

3 The Plaintiffs anticipate that trial will last approximately seven to ten court days.

4 **B. Defendants' Position**

5 Defendants do not anticipate that a trial will be necessary to resolve this case. In
6 the event the Court disagrees, Defendants anticipate that any trial would take three to five
7 days. Plaintiffs have not made a jury demand.

8 **19. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS**

9 Plaintiffs filed a disclosure of interested entities or persons on January 19, 2021,
10 identifying no interested entities other than Plaintiffs themselves. Plaintiffs filed a
11 supplemental certification on January 20, 2021 stating that Tencent Holdings Ltd. is an
12 interested entity within the meaning of Civil L.R. 3-15 in that it (i) has a financial interest
13 in the subject matter in controversy or in a party to the proceeding, or (ii) has a non-
14 financial interest in that subject matter or in a party that could be substantially affected by
15 the outcome of this proceeding. No such disclosure is required of the Government. *See*
16 Local Rule 3-15.

17 **20. PROFESSIONAL CONDUCT**

18 All attorneys of record have reviewed the Guidelines for Professional Conduct for
19 the Northern District of California.

20 **21. OTHER MATTERS**

21 **A. Plaintiffs' Position**

22 1. Plaintiffs' Motion to Compel Completion of the Administrative
23 Record. Defendants produced a certified administrative record on November 2, 2020, but
24 did not include a privilege log. The Declaration of John Costello Certifying
25 Administrative Record suggests that privileged material has been withheld from the
26 administrative record. *See* ECF No. 122-1 at paragraph 3 (“This Administrative Record
27 contains all non-privileged materials directly or indirectly considered by Commerce in
28 making the above-cited decision.”). Plaintiffs and Defendants have traded multiple rounds

1 of letters concerning Plaintiffs' concern that the administrative record is not complete,
2 including because Defendants have not produced a privilege log. Counsel for the parties
3 have also met and conferred regarding these issues. Defendants assert that numerous
4 categories of information are privileged, including but not limited to: drafts of the
5 Identification and Decision Memo, internal working group documents (regarding setting
6 goals, plans, agendas), press strategy documents, subpoena drafts and related documents,
7 draft analyses including analyses relating to mitigation proposals, internal emails
8 concerning the recommended prohibitions, and external emails and communications with
9 other agencies including the Department of Justice, Department of the Treasury, and
10 certain inter-agency groups.

11 Defendants have taken the position that predecisional and deliberative documents
12 are not logged because the internal deliberations of the agency are never part of the
13 administrative record. Defendants are incorrect. As explained in *Institute for Fisheries*
14 *Resources v. Burwell*:

15 A complete administrative record includes "all documents and materials
16 directly or indirectly considered by agency decision-makers." It is obvious
17 that in many cases internal comments, draft reports, inter- or intra-agency
18 emails, revisions, memoranda, or meeting notes will inform an agency's final
19 decision. Therefore, the government is wrong to assert that these types of
20 materials, as a categorical matter, should be excluded from the universe of
21 materials "directly or indirectly considered by agency decision-makers." Of
22 course, these types of materials could be protected from disclosure by the
23 deliberative process privilege. But the scope of the privilege doesn't define
24 the scope of the material directly or indirectly considered. If a privilege
25 applies, the proper strategy isn't pretending the protected material wasn't
26 considered, but withholding or redacting the protected material and then
27 logging the privilege.

28 Case No. 16-CV-01574, 2017 WL 89003, at *1 (N.D. Cal. Jan. 10, 2017) (cleaned up).

Plaintiffs intend to bring a Motion to Compel Completion of the Administrative
Record. Counsel for the parties have discussed a briefing schedule for Plaintiffs'
anticipated motion, and have agreed—subject to the Court's approval—that Plaintiffs'
motion will be filed by February 19, Defendants' Opposition will be due by March 1, and
Plaintiffs' Reply will be due by March 5. Plaintiffs ask the Court to set the briefing
schedule accordingly, and to set a hearing at the Court's earliest opportunity.

1 2. Executive Order 13971 Prohibiting Transactions with WeChat Pay.
2 On January 5, 2021, President Trump issued Executive Order 13971, titled “Addressing
3 the Threat Posed by Applications and Other Software Developed or Controlled by Chinese
4 Companies.” *See* Exhibit A. This executive order prohibits “any transaction by any
5 person, or with respect to any property, subject to the jurisdiction of the United States, with
6 persons that develop or control the following Chinese connected software applications, or
7 with their subsidiaries, as those transactions and persons are identified by the Secretary of
8 Commerce (Secretary) under subsection (e) of this section: ... WeChat Pay....”.

9 Executive Order 13971 therefore serves to evade the Court’s preliminary injunction
10 entered September 20, 2020, which enjoins Defendants from implementing the
11 Identification’s fifth prohibited transaction, which prohibits “Any provision of services
12 through the WeChat mobile application for the purpose of transferring funds or processing
13 payments to or from parties within the land or maritime borders of the United States and its
14 territories.”

15 Plaintiffs have informed Defendants that Executive Order 13971 appears to evade
16 the Court’s preliminary injunction. Counsel for Defendants have incorrectly stated that
17 Executive Order 13971 does not evade the Court’s preliminary injunction because WeChat
18 Pay is a separate app and is unavailable in the United States. However, WeChat Pay is a
19 function *within* WeChat (not a separate app), and it *is* used by some WeChat users in the
20 United States. Plaintiffs’ raise this issue to the Court for discussion at the case
21 management conference, including as to whether a briefing schedule should be discussed
22 so as to avoid rushed briefing as the parties and court recall were required by the
23 Secretary’s issuance of the Identification one business day before the prohibitions related
24 to WeChat were set to go into effect.

25 **B. Defendants’ Position**

26 1. Plaintiffs’ Motion to Compel Completion of the Administrative
27 Record.

28 Defendants disagree with Plaintiffs’ characterization of the dispute above.

1 Defendants have not taken the position that a privilege log is never required with respect to
 2 an administrative record. Rather, Defendants’ position is that they have not withheld from
 3 the Administrative Record any materials that should otherwise have been included. In
 4 particular, Defendants disagree with the premise that agency materials that simply reflect
 5 the deliberative process, such as drafts of the Identification, drafts of administrative
 6 subpoenas issued to Tencent, and intra- or inter-agency emails reflecting agency
 7 deliberations, are properly part of the administrative record. *See Oceana, Inc. v. Ross*, 920
 8 F.3d 855, 865 (D.C. Cir. 2019) (“predecisional and deliberative documents ‘are not part of
 9 the administrative record to begin with,’ so they ‘do not need to be logged as withheld
 10 from the administrative record.’” (citation omitted)); *see also, e.g., Luis & Delta-Mendota*
 11 *Water Auth. v. Jewell*, No. 1:15-cv-01290-LJO-GSA, 2016 WL 3543203, at *19 (E.D. Cal.
 12 June 23, 2016) (“deliberative documents are not part of the administrative record”).
 13 Indeed, not only are such materials privileged, they are irrelevant: absent a showing of bad
 14 faith or improper behavior (not at issue here), the lawfulness of an “agency’s action is
 15 judged in accordance with its stated reasons. . . . [T]he actual subjective motivation of
 16 agency decisionmakers is irrelevant as a matter of law[.]” *In re Subpoena Duces Tecum*
 17 *Served on Office of the Comptroller of the Currency*, 156 F.3d 1279, 1279-80 (D.C. Cir.
 18 1998) (citations omitted)).²

19 Defendants recognize that certain judges in the Northern District of California have
 20 concluded otherwise, but the Government disagrees with those decisions and they are not
 21 binding on this Court. Nevertheless, Defendants believe that there would be value in
 22 conducting a further meet and confer on this issue to determine whether the parties can
 23 find a mutually acceptable middle ground. In the event further discussions between the

24 _____
 25 ² Plaintiffs correctly note that Mr. Costello’s certification includes language clarifying that
 26 the Administrative Record does not include privileged material. Defendants included that
 27 language in the interest of transparency and in light of their recognition that judges in this
 28 District have disagreed with the Government (and other courts) regarding whether
 deliberative materials are properly included in an administrative record as a matter of
 course. That language was not intended to suggest that Defendants believe that
 deliberative materials are properly included in an administrative record, which is contrary
 to the Government’s long-held position on this issue.

1 parties do not resolve this issue, Defendants consent to the expedited briefing schedule
2 requested by Plaintiffs.

3 2. Executive Order 13971

4 Defendants disagree that Executive Order 13971 evades the Court’s injunction and
5 believe that any possible dispute in this regard is premature. The Court did not enjoin the
6 Secretary from taking further action, even under the Executive Order at issue in this case,
7 to mitigate the threat posed by WeChat. *See* Prelim. Inj. Order, ECF No. 59 at 22
8 (“Nothing in this order prevents the Secretary . . . from identifying ‘any other transaction
9 that is related to WeChat . . . under the authority delegated by [the Executive Order].”).
10 Moreover, the Secretary has not yet identified any transactions for prohibition under
11 Executive Order 13971, and the Executive Order sets no particular deadline for him to do
12 so. Furthermore, the relationship between WeChat Pay, and the WeChat mobile
13 application is potentially disputed. Indeed, WeChat Pay appears to raise entirely different
14 issues than the speech-related claims that Plaintiffs have thus far pressed as a basis for
15 emergency, preliminary relief. In light of all of these considerations, Defendants
16 respectfully submit that it is premature to contemplate litigation regarding action that the
17 Secretary has not yet taken. If a dispute arises in the future regarding the consistency of
18 any action taken under Executive Order 13971 and the existing injunction, it can be
19 brought to the Court’s attention at that time.

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3. Remote Proceedings

In light of the ongoing pandemic, the parties propose that the parties and the Court continue their practice of using remote procedures to convene any necessary and appropriate proceedings in this case.

DATED: January 21, 2021

Respectfully submitted,

ROSEN BIEN GALVAN & GRUNFELD LLP

By: Van Swearingen

Van Swearingen

Attorneys for Plaintiffs

DATED: January 21, 2021

MICHAEL D. GRANSTON
Deputy Assistant Attorney General

ALEXANDER K. HAAS
Branch Director

DIANE KELLEHER
Assistant Branch Director

By: Serena M. Orloff

Serena M. Orloff

Amy Powell

U.S. Department of Justice, Civil Division
Federal Programs Branch

1100 L Street NW, Room 12512

Washington, DC 20005

(202) 305-0167 (office)

(202) 616-8470 (fax)

Serena.M.Orloff@usdoj.gov

Attorneys for Defendants