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17 UNITED STATES DISTRICT COURT

18 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

19
20 U.S. WECHAT USERS ALLIANCE,
CHIHUO INC., BRENT COULTER,
21 FANGYI DUAN, JINNENG BAO, ELAINE
PENG, and XIAO ZHANG,

22 Plaintiffs,

23 v.

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

26 Defendants.
27

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

**REPLY IN SUPPORT OF PLAINTIFFS’
RENEWED MOTION FOR
PRELIMINARY INJUNCTION**

Judge: Hon. Laurel Beeler
Date: September 19, 2020
Time: 1:30 p.m.
Crtrm.: Remote

Trial Date: None Set

INTRODUCTION

1
2 Defendants’ continue to ignore major issues central to this Court’s decision and
3 have replied with a reformulation of prior arguments that changes nothing. Among the
4 major issues not rebutted, or in some instances even addressed, in Defendants’ Opposition
5 are the following:

6 1. The WeChat EO and the Secretary’s Identification are and must be
7 interpreted as a total ban on the use of the WeChat app by plaintiffs and all users in the
8 United States.

9 2. The WeChat Ban will effect and harm only the Chinese American
10 community and is motivated by President Trump’s continued efforts to blame China for
11 the pandemic and the recession rather than taking responsibility for his own failures.

12 3. WeChat is a unique super app that Chinese Americans are dependent on for
13 multiple communication and other functions, protected by the First Amendment, especially
14 in the pandemic. This is especially true for people with low literacy in English and for
15 communications with friends and family in China.

16 4. Defendants do not respond to plaintiffs’ demonstration that the Secretary’s
17 Identification did not cure the vagueness claim.

18 As to the arguments Defendants do address, their rhetoric cannot hide the fact that
19 they are largely rehashing points they have already made. Below we address a few of the
20 specific arguments Plaintiffs raise in their opposition. But the bottom line is that it remains
21 the case that the government will, effective Sunday, bar all use of WeChat in the United
22 States; that doing so will run roughshod over the First Amendment rights of U.S. users of
23 the app and is otherwise unlawful; and that the balance of harms here plainly favors
24 plaintiffs, who merely ask at this time that the Court preserve the status quo to allow for
25 full briefing on the validity of the government’s actions.

1 **I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR FIRST**
 2 **AMENDMENT CLAIMS AND HAVE PRESENTED SERIOUS QUESTIONS**
 3 **GOING TO MERITS**

4 Defendants cannot credibly argue that there are not at least serious questions that go
 5 to the merits of Plaintiffs’ First Amendment claims, which merely requires that Plaintiffs
 6 show “colorable First Amendment claim.” *Warsoldier v. Woodford*, 418 F.3d 989, 1001
 7 (9th Cir. 2005).¹ Indeed, the Government’s statements that the Executive Order will ban
 8 all use of WeChat effective on Sunday confirms Plaintiffs’ worst fears. *See* Dkt. 45 at 2.
 9 The Government does not dispute that, if permitted to take effect, the EO and
 10 *Identification* will prohibit an unprecedented amount of protected First Amendment
 11 activity and shut down an entire platform for speech. *See* Mot., Dkt. 17 at 21-25 (stating
 12 that “[n]early everything that happens on WeChat is protected First Amendment activity,”
 13 including but not limited to personal associations, worship, political speech, professional
 14 speech, and commercial speech). Even without “deciding what level of scrutiny should
 15 apply,” the Court can comfortably conclude that there are “serious First Amendment
 16 questions” and grant preliminary relief. *Viacom Int’l, Inc. v. FCC*, 828 F. Supp. 741, 743
 (N.D. Cal. 1993).

17 Defendants do not deny that they make distinctions based on national origin and
 18 instead acknowledge that the WeChat EO disproportionately burdens Chinese-Americans
 19 and their ability to speak. *See* Opp., Dkt. 22 at 36-37. This is precisely the type of
 20 prohibited content-based restriction that “[distinguishes] among different speakers,
 21 allowing speech by some but not others.” *Citizens United v. Fed. Election Comm’n*, 558
 22 U.S. 310, 340–41 (2010). The EO singles out WeChat users (i.e., predominantly Chinese-
 23 Americans) as the only group subject to speech restrictions, exactly as the law at issue in
 24 *Citizens United* prohibited corporations from engaging in political speech due to their
 25

26 ¹ Nor should the Court be persuaded by the Government’s argument that it is “prejudiced
 27 with its response due in three hours” by Plaintiffs’ use of the sliding-scale standard for
 28 preliminary injunctions when the standard was briefed in the original motion, *see* Mot.,
 Dkt. 17 at 23, and again in the reply, in responding to Defendants’ briefing, *see, e.g.*, Dkt.
 28 at 12-13.

1 corporate identify. *Id.* at 340. Further, Defendants still cannot rebut evidence that the EO
2 is based on racial animus and the need to garner political favor.

3 The Government fully recognizes the extent to which Plaintiffs rely on WeChat but
4 hopes that the Court will simply ignore the breadth of the EO and the amount of speech it
5 burdens. Other social media applications cannot connect Plaintiffs to the same networks or
6 communities. Further, courts that analyze *whether* ample alternative avenues exist do not
7 ask *why* there are so few alternatives. Defendants fail to establish that there are ample
8 alternative avenues, even if this Court conclusively decides that intermediate scrutiny is
9 the right standard to apply.

10 As previously argued, the other *Winters* factors also weigh in favor of Plaintiffs.
11 *See* Mot., Dkt. 17 at 35-40. It is indisputable that the potential loss of any First
12 Amendment freedoms is irreparable harm. *See Warsoldier*, 418 F.3d at 1001-02 (“[U]nder
13 the law of this circuit, a party seeking preliminary injunctive relief in a First Amendment
14 context can establish irreparable injury sufficient to merit the grant of relief by
15 demonstrating the existence of a colorable First Amendment claim.”) (quotation marks
16 omitted). And the balance of the hardships and the public interest weigh clearly in the
17 Plaintiffs’ favor after considering the imminent infringement of Plaintiffs’ First
18 Amendment rights in the face of ambiguous and unsubstantiated national security
19 concerns. *See Sammartano v. First Judicial Dist. Court, in & for Cty. of Carson City*, 303
20 F.3d 959, 974 (9th Cir. 2002), *abrogated on other grounds* (“Courts considering requests
21 for preliminary injunctions have consistently recognized the significant public interest in
22 upholding First Amendment principles.”). To preserve the status quo and Plaintiffs’ First
23 Amendment rights, this Court must issue an injunction. *See, e.g., Index Newspapers LLC*
24 *v. City of Portland*, No. 3:20-CV-1035-SI, 2020 WL 4220820, at *9 (D. Or. July 23, 2020)
25 (granting TRO because plaintiffs raised serious First Amendment questions).

26 Finally, after conceding that the EO will result in a complete ban of WeChat, the
27 Government’s insistence that its “actions do not burden substantially more speech than
28 necessary” (Opp. at 7) rings hollow. Never before has an administration banned an entire

1 social media platform – that is indisputably the primary platform of communications needs
2 for a minority community – with such discriminatory animus and haste.

3 **II. DEFENDANTS’ DEFINITIONS OF PROHIBITED TRANSACTIONS ARE**
4 **NOT COMMITTED TO AGENCY DISCRETION**

5 Having previously argued that Plaintiffs should have waited to challenge the EO
6 until the Secretary issued his definitions of prohibited transactions, Defendants now claim
7 that the question of whether these definitions comply with the clear statutory limits on
8 Defendants’ authority is beyond the scope of judicial review. It is not. Notably absent
9 from Defendants’ argument is any reference to statutory language suggesting that this
10 question is committed to agency discretion. As Plaintiffs demonstrated in their Reply
11 brief, the language Defendants previously cited for this argument in fact proves the
12 opposite. See Reply at 7:27 – 8:12. Defendants’ new cases in support of this argument are
13 simply inapposite, because Plaintiffs are not challenging the validity of a decision to
14 withhold enforcement, the allocation of a lump-sum budget appropriation, or an agency’s
15 refusal to reconsider a prior decision based on alleged material error. Rather, Plaintiffs
16 argue that Defendants exceeded the authority granted to them by a statutory provision that
17 explicitly states that “[t]he authority granted to the President by this section does not
18 include the authority to regulate or prohibit, directly or indirectly,” personal
19 communications or the exchange of information or informational materials. 50 U.S.C. §
20 1702(b)(1), (3). Courts have considered in the past whether Defendants exceeded the
21 authority delegated to them by the IEEPA, *see* Reply at 8:8-12, and Defendants have
22 offered no plausible reason why this Court should do otherwise.

23 **III. DEFENDANTS FAIL TO SUBSTANTIATE THEIR NATIONAL SECURITY**
24 **HARMS**

25 The government again stresses the purported national security implications of this
26 case—now calling them “of the highest importance,” Opp. at 5; *see also id.* at 3-4, 13. But
27 wishing does not make it so, and certainly does not substitute for an *actual* evidentiary
28

1 showing to demonstrate this to the Court.² As we explained in our earlier reply brief (Dkt.
2 28 at 8-9), almost none of the “evidence” to which the government cites—the same
3 evidence it cited in its prior opposition (Dkt. 22 at 4-13)—has anything specifically to do
4 with WeChat. *See* Dkt. 28 at 9 n.7.

5 The government also stresses the fact that Congress has not “invoked” its authority
6 to block the President’s action pursuant to the IEEPA. *Opp.* at 7. That is true, but besides
7 the point: It remains the case that Congress specifically limited that presidential authority
8 to bar personal communications by means of the invocation of a (purported) national
9 emergency. 50 U.S.C. § 1702(b)(1); *see also id.* at (b)(2)-(3). It is that statutory
10 prohibition on which plaintiffs rely.

11 Finally, the government repeatedly argues that this Court must simply defer blindly
12 to its invocation of national security interests. *See Opp.* at 3; *see also id.* at 13. But that is
13 simply not the law. As the Ninth Circuit has explained, courts “are free to review whether
14 the actions taken pursuant to a national emergency comport with the power delegated by
15 Congress.” *United States v. Spawr Optical Research, Inc.*, 685 F.2d 1076, 1080-81 (9th
16 Cir. 1982). Or as the Supreme Court has framed the point, “it is error to suppose that
17 every case r controversy which touches on foreign relations lies beyond judicial
18 cognizance.” *Japan Whaling Ass’n v. American Cetacean Soc.*, 478 U.S. 221, 230
19 (1986).³

20 Here, especially given the profound First Amendment issues raised by this case, the
21 Court reasonably can and should determine whether the government’s purported national
22 security interests have any factual basis, or instead are merely political cover for actions
23 taken for the President’s political advantage.

24
25 ² At the Court’s hearing earlier today (Dkt. 46), the government referred to a purported
26 classified threat assessment related to WeChat. Notably, there is no reference—even
27 redacted—to such classified material, or to a request to produce such material *in camera*,
28 in the government’s actual filing.

³ Nor should this Court feel bound otherwise by *Trump v. Hawaii*, *see Opp.* at 3, in which
the Court was bound by rational basis review—a more deferential standard than what is
applicable here. *See Hawaii*, 138 S. Ct. 2392, 2422 (2018).

1 **IV. PRELIMINARY INJUNCTIVE RELIEF IS NECESSARY TO AVOID**
2 **FURTHER HARMS**

3 Defendants suggest that Plaintiffs have shifted to now contending irreparable harm
4 from losing connection with friends, family, congregants, business partners, and political
5 contacts, but Plaintiffs' Motion adequately addresses these concerns. Defendants
6 incorrectly argue that "Plaintiffs' supplemental motion fails to even attempt to distinguish
7 cases" in Defendants Opposition. *See* Plaintiffs' Reply, Dkt. 28 at 18-19 (distinguishing
8 Defendants' cases). It is also incorrect that Plaintiff Peng's complaints "stem primarily
9 from fear about the effect of the Order" on her mental health service recipients. *Opp.* at
10 12. Those concerns are valid, but regardless Plaintiff Peng's concerns are also about
11 MHACC, the mental health organization that she founded and built to serve the mental
12 health needs of her community are sufficient harms in and of themselves.

13 **V. THE BALANCE OF HARDSHIPS AND THE PUBLIC INTEREST WEIGH**
14 **HEAVILY IN PLAINTIFFS' FAVOR**

15 Defendants rely on vague, conclusory, and unsupported assertions of "compelling
16 national and foreign policy concerns," and point to the same cases that they relied on in
17 their original Opposition brief (Dkt. 22). *Opp.* at 13. However, those cases are
18 distinguished in part by the fact that they relied on substantial evidence of a national
19 security or foreign policy threat. *See* Dkt. 28 at 19-20; page 5-6, *supra*. Defendants
20 additionally cite *Stagg P.C. v. U.S. Dep't of State*, 158 F. Supp. 3d 203, 207 (S.D.N.Y.),
21 but, that case is inapposite as it involved classified and unclassified technical data that was
22 not approved for public release. *Id.* at 210. Similarly, *Def. Distributed v. U.S. Dep't of*
23 *State*, 121 F. Supp. 3d 680, 689, 696 (W.D. Tex. 2015) involved restrictions of the export
24 of "defense articles," and there, the court concluded "Plaintiffs have not shown a
25 substantial likelihood of success on the merits of their claim under the First Amendment."
26 Here, there is simply no evidence that any of Plaintiffs' communications threaten the
27 United States' national security or foreign policy interests. On the other hand, Plaintiffs
28 have demonstrated irreparable harm through uncontested evidence.

1 **VI. A NATIONWIDE INJUNCTION IS APPROPRIATE**

2 Defendants cite *California v. Azar* for the proposition that a nationwide injunction
3 should not issue. However, “[u]nlike the plaintiffs in *California v. Azar*... the [Plaintiffs]
4 here ‘do not operate in a fashion’ that permits neat geographic boundaries.” *E. Bay*
5 *Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1282–83 (9th Cir. 2020) (affirming
6 nationwide injunction against new rule adopted by Department of Justice and Department
7 of Homeland Security, in combination with presidential proclamation). Here, the
8 Defendants ask that an injunction be limited to Plaintiffs, Dkt. 22. at 40, but that is not a
9 workable alternative form of injunction because—as Plaintiffs have demonstrated and
10 Defendants have not contested—Plaintiffs would be left to only use WeChat to
11 communicate with each other. Such a solution would not provide relief to remedy
12 Plaintiffs’ harms from a nationwide WeChat ban.

13 DATED: September 18, 2020

Respectfully submitted,

14 ROSEN BIEN GALVAN & GRUNFELD LLP

15 By: */s/ Michael W. Bien*

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Michael W. Bien

17 Attorneys for Plaintiffs

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