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 14 **IN THE UNITED STATES DISTRICT COURT**
 15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

16	_____)	
17	U.S. WECHAT USERS ALLIANCE, <i>et al.</i> ,)	Case No. 3:20-cv-05910-LB
18	Plaintiffs,)	DEFENDANTS’ REPLY IN
19	v.)	SUPPORT OF THEIR MOTION
20	DONALD J. TRUMP, President of the United)	TO STAY PRELIMINARY
21	States, and WILBUR ROSS, Secretary of)	INJUNCTION PENDING
22	Commerce,)	APPEAL
23	Defendants.)	Date: Oct. 15, 2020
24	_____)	Time: 9:30am
25		Judge: Hon. Laurel Beeler
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INTRODUCTION

1
2 Plaintiffs' opposition to Defendants' motion to stay is long on rhetoric but short on legal
3 analysis or substantiated harm. As set forth in Defendants' motion, and as further elaborated
4 below, the national security and foreign policy rationale for the Government's WeChat
5 restrictions amply satisfy any applicable First Amendment scrutiny. Those same national
6 security threats also strongly outweigh any temporary inconvenience that Plaintiffs may
7 encounter in switching to one or more of the many non-WeChat platforms for speech while this
8 case is being litigated. The Government has not restricted Plaintiffs' right to express any idea
9 that they please, nor has it limited their ability to do so through any platform that is not directly
10 monitored by the government of the People's Republic of China ("PRC"). Moreover, the
11 national security harms resulting from continued, unabated flow of information to Beijing and
12 censorship of American speech while this case is litigated cannot be repaired, whereas WeChat is
13 a global application with more than one billion users that will surely continue to be available in
14 the event Plaintiffs prevail on the merits. The Court should stay its preliminary injunction and
15 permit implementation of the Secretary's prohibitions, or at least Prohibition number 1, pending
16 Defendants' appeal to the Ninth Circuit.¹

DISCUSSION

I. Defendants Have A Strong Likelihood Of Success On The Merits.

A. The WeChat Restrictions Do Not Raise First Amendment Concerns

19
20 Just as application of the criminal laws in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697
21 (1986), did not implicate the First Amendment, neither do the WeChat restrictions, which are
22 grounded in national security. Defs.' Mot. to Stay ("Mot.") at 17, ECF No. 68. The PRC has
23 conducted widespread, surreptitious, and hostile informational attacks against the United States,
24 *see* Mot. at 9, and uses WeChat to amass data, monitor users, and control discourse. *Id.* These

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26 ¹ On October 2, 2020, Defendants appealed the Court's preliminary injunction order to the Court
27 of Appeals for the Ninth Circuit. ECF No. 79. Defendants also requested a stay of the Court's
28 preliminary injunction order from the Ninth Circuit, but pursuant to a time frame that would still
permit this Court to resolve Defendants' motion to stay. *See* ECF No. 81.

1 acts are not protected by the First Amendment.² Were Tencent to sell electricity to U.S.
2 consumers and, in so doing, systematically collect and send payment and electrical consumption
3 data back to the PRC for potentially adverse uses, there is little question that the President could
4 invoke his emergency powers to shut such an effort down. The outcome is no different because
5 WeChat trades in the transmission of speech, rather than electricity. *See Assoc. Press v. Nat'l*
6 *Labor Relations Bd.*, 301 U.S. 103, 132-33 (1937) (First Amendment does not supply a
7 “privilege to invade the rights and liberties of others”). The restrictions thus do not regulate any
8 “medium[] for speech,” Opp. at 8, ECF No. 78; they merely apply established national
9 emergency powers against a single firm functioning as an arm of the PRC.

10 Nor is the analysis different because Plaintiffs are users of WeChat, rather than Tencent
11 itself. Although the First Amendment protects the right to speak out and to publish, it does not
12 guarantee the right to use a medium for communication that poses harms to national security.
13 And it certainly does not preserve the PRC’s ability to use WeChat to “strangle individual
14 thoughts” of United States users, “invade personal privacy,” or use the data from millions of
15 Americans for hostile purposes. *Am. Commc’ns Ass’n, C.I.O., v. Douds*, 339 U.S. 382, 443-44
16 (1950) (Jackson, J., concurring); *see also id.* at 391. The WeChat restrictions appropriately stem
17 from the combination of the hostile practices of the PRC aligned with WeChat’s “position of
18 great power” over the lives and data of millions of people in the United States. *Id.* at 403-04; *cf.*
19 *also Herndon v. Georgia*, 295 U.S. 441, 445 (1935).³

20 None of Plaintiffs’ case law grapples with these unique circumstances. *Lamont v.*
21 *Postmaster General*, 381 U.S. 301 (1965), is inapposite. It involved a statute requiring the postal

22 ² In fact, for nearly ninety years, this country has restricted foreign entities from holding certain
23 types of licenses related to the transmission of speech. *See* 47 U.S.C. § 310. Yet under
24 Plaintiffs’ view of the law, those prohibitions are now constitutionally suspect.

25 ³ Many other factors that led the Supreme Court to reject a First Amendment challenge in *Douds*
26 are equally present here: the injury to national interests “would be an accomplished fact before
27 any sanctions could be applied”; the powers enabled by WeChat—such as development of
28 artificial intelligence regarding the movement and activities of United States users—could later
be exercised “at a time of external or internal crisis” against the United States; and in light of the
secrecy of Tencent’s activities, it would be difficult to “detect[] illegal activities of this kind[.]”
339 U.S. at 406.

1 service to detain and destroy unsealed “communist political propaganda” sent from abroad,
2 unless the addressee returned a reply card indicating a desire to receive such items. This
3 established a content-based scheme to censor information flowing through the U.S. mail,
4 “set[ting] administrative officials astride the flow of mail to inspect it, appraise it, write the
5 addressee about it, and await a response before dispatching the mail.” *Id.* at 306. The Court
6 concluded this framework would deter persons who “might think they would invite disaster if
7 they read what the Federal Government says contains the seeds of treason.” *Id.* at 307. Indeed,
8 in that respect, the law in *Lamont* created a censorship regime similar to the authority the PRC
9 wields with respect to WeChat. *See* Decision Mem. App. F, A.R. 1165, ECF No. 77-1 (WeChat
10 communications intercepted by PRC, followed by arrests). The economic prohibitions at issue
11 here bear no resemblance to that law. The WeChat restrictions do not empower the Government
12 to monitor the mail or decide whether communications may be confiscated as “propaganda.”
13 *Lamont*, 381 U.S. at 302. Nor do they restrict speech or discourse based on content. *Compare*
14 *id.* at 307. Instead, they prohibit business-to-business transactions for the provision of certain
15 technological services because the PRC exploits those services to amass personal data on
16 millions of U.S. persons, and to surveil and censor the content of their communications.⁴

17 Plaintiffs’ other cases are also inapposite. *See Currier v. Potter*, 379 F.3d 716 (9th Cir.
18 2004) (addressing restrictions on public mail system and rejecting First Amendment challenge);
19 *Backpage.com, LLC v. Dart*, 807 F.3d 229, 233 (7th Cir. 2015) (addressing “government
20 coercion aimed at shutting up or shutting down Backpage’s adult section” based on content);
21 *Woodhull Freedom Foundation v. United States*, 948 F.3d 363, 374 (D.C. Cir. 2020) (analyzing
22 Article III standing). The WeChat restrictions are content-neutral and properly applied to the
23 threat as identified by the President and the Secretary.

24
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26 ⁴ Moreover, the Court in *Lamont* did not reach whether the content-based law could be justified
27 by any compelling interest because the Government “expressly disavow[ed]” that the law was
28 justified by any “large public interests.” 381 U.S. at 309. Here, the Government has
demonstrated such large public interests.

1 **B. Any First Amendment Scrutiny Is Limited to Intermediate, Not Strict,
2 Scrutiny**

3 Even if the First Amendment were implicated, it would impose only intermediate
4 scrutiny, as this Court has concluded. Order at 16. Plaintiffs advance three contrary arguments;
5 none has merit.

6 First, they suggest that the challenged restrictions are content-based, and thus subject to
7 strict scrutiny, because the Secretary noted that the PRC uses WeChat to promote propaganda
8 and disinformation. Opp. at 13. This argument misrepresents the foundation for the WeChat
9 restrictions. The Government’s concerns are not about any particular pro-China content or even
10 about pro-China content or propaganda as a category. Instead, the Government is concerned
11 about a concerted effort by the PRC to concentrate all communication reaching the Chinese
12 diaspora onto the WeChat platform and then to exploit that monopoly to surveil individuals,
13 control discourse, and collect massive amounts of U.S. person data, including geolocation data
14 and other intelligence, for adverse use against U.S. interests. Such repressive activities are
15 anathema to the First Amendment. *Cf. Douds*, 339 U.S. at 433-34 (Jackson, J., concurring).

16 Second, Plaintiffs’ characterization of the WeChat restrictions as a “prior restraint” is
17 wrong. A prior restraint involves “administrative preclearance requirements for” or “preliminary
18 injunctions against” speech based on its content. *Universal City Studios, Inc. v. Reimerdes*, 111
19 F. Supp. 2d 294, 333-34 (S.D.N.Y. 2000); *see also Marland v. Trump*, No. 20-4597, 2020 WL
20 5749928, at *8 (E.D. Pa. Sept. 26, 2020). Neither type of restriction is at issue here. Plaintiffs
21 need not obtain administrative preclearance for any speech they wish to undertake, nor are they
22 enjoined from speaking on any topic whatsoever. Any practical difficulty using WeChat does
23 not prevent Plaintiffs from taking their speech to alternative platforms, and it does not amount to
24 “censorship” of their message. *See Marland*, 2020 5749928 at *8 (rejecting “prior restraint”
25 theory in part because the restrictions “make no distinction between favored and disfavored
26 content”). Nor are the WeChat restrictions anything like the criminalization of “malicious,
27 scandalous and defamatory” speech in *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697,
28 701 (1931); the rejection of a license to perform *Hair in Se. Promotions, Ltd. v. Conrad*, 420

1 U.S. 546 (1975); or the publication of the Pentagon Papers in *New York Times v. United States*,
2 403 U.S. 713 (1971)—which all involved prior restraints on speech based on its content.

3 Third, Plaintiffs intimate that the WeChat restrictions “single out . . . a medium relied on
4 by a distinct minority group,” which in turn was also “singled out by the President for racist
5 demagoguery.” Opp. at 9. These claims are groundless. WeChat was “single[d] out” because of
6 its documented history assisting the PRC with censorship, surveillance, and repression, and the
7 risk that those activities would also be wielded to the detriment of the United States. *See*
8 Decision Mem. at 5-14, ECF No. 76-1. Plaintiffs cite no evidence indicating otherwise.⁵

9 **C. Intermediate Scrutiny Is Satisfied**

10 Because it “is common ground that governments may regulate” mediums of
11 communication absent censorial purpose, *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994), the
12 Court’s Order, ECF No. 59, correctly recognized that strict scrutiny was not the appropriate
13 standard. *Id.* at 16. While Defendants believe they should prevail even under a more demanding
14 standard, at a minimum, under intermediate scrutiny, the WeChat restrictions should be upheld.

15 **1. The Restrictions Do Not Burden Substantially More Speech than** 16 **Necessary**

17 In support of their claim of undue burden, Plaintiffs cite the assessment performed by the
18 Critical and Infrastructure Security Agency (“CISA”) which recommended that the WeChat app
19 “not be permitted on the devices of State, Local, Tribal, and Territorial (SLTT) partners and
20 critical infrastructure operators as they may provide malicious actors with access to mobile
21 devices and sensitive data.” *See* Decision Mem. App. B at 1 (“CISA Assessment”), ECF No. 68-
22 1, Ex. B. But CISA, unlike the Secretary, did not purport to assess the entirety of the threat to
23 national security and the measures necessary to mitigate it. CISA’s assessment was grounded in
24

25 ⁵ Plaintiffs’ note only that the President has sometimes blamed the PRC for the spread of the
26 novel coronavirus, Compl. ¶¶ 57-58, comments that do not suggest animosity toward the Chinese
27 people and appear irrelevant to the WeChat restrictions. Indeed, on the same day the WeChat
28 executive order was issued, the President issued a similar order affecting TikTok, whose use is
certainly not limited to a “distinct minority group.”

1 its mission, which is to “build [a] more secure and resilient *infrastructure* for the future.”⁶ The
2 assessment thus appropriately focused on threats to digital infrastructure. *See, e.g.*, CISA
3 Assessment at 1 (discussing threats to “mobile devices, connected systems and networks” and
4 “system integrity”). The measures that CISA recommended would not have addressed other,
5 similarly important national security threats documented in the Secretary’s decision, such as the
6 PRC’s ability to induce self-censorship among U.S. users or the vast amounts of data collected
7 through WeChat, including medical and financial records, which could be used, among other
8 things, to “build dossiers on millions of U.S. persons,” enhance the PRC’s artificial intelligence,
9 and identify espionage targets. Decision Mem. at 13-14. CISA’s mission-focused assessment
10 therefore does not undercut the Secretary’s reasonable determination that broader action was
11 required.⁷ Moreover, even if Defendants “could have adopted a less drastic solution,” their
12 decision is not invalid under the First Amendment. *Globe Newspaper Co. v. Beacon Hill*
13 *Architectural Comm’n*, 100 F.3d 175, 190 (1st Cir. 1996) (affirming restrictions because
14 “eliminating the newsracks altogether [] is the most effective solution”); *see also, e.g., United*
15 *States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1132 (N.D. Cal. 2002) (similar).

16 Plaintiffs also suggest that the WeChat restrictions are invalid because they do not
17 regulate enough speech. Opp. at 20. A decision not to shut down every PRC-affiliated company
18 does not mean that the threats posed by WeChat are not real; the Government is entitled to
19 address problems sequentially and as it sees fit, particularly where it must balance issues of
20 foreign policy, trade, and national security. *See, e.g., City of Renton v. Playtime Theatres, Inc.*,
21 475 U.S. 41, 52-53 (1986) (city could “cho[o]se first to address the potential problems created by
22
23

24 ⁶ <https://www.cisa.gov/about-cisa>

25 ⁷ Moreover, even as to those national security threats, CISA did not suggest that such measures
26 directed at SLTT and infrastructure partner would eliminate the threat; it says they would simply
27 “reduce” them. CISA Assessment at 1 (emphasis added). And Plaintiffs fail to explain how a
28 prohibition against SLTT partners and critical infrastructure partners could feasibly be enforced
through IEEPA without also affecting users outside of this industry.

1 one particular kind of” business).⁸ Moreover, as Plaintiffs themselves acknowledge, WeChat is
2 uniquely situated in terms of its global reach and multi-functionality.

3 Finally, Plaintiffs claim that the Secretary should have adopted less-restrictive measures
4 to protect the national security interests, citing both Tencent’s mitigation proposal and a
5 Declaration of Joe Hildebrand, an engineer for a third-party web-browsing company, who offers
6 his opinion on “best practices in mitigating data security risk and the targeted measures . . .
7 available to Defendants to address those issues as to Tencent and WeChat.” Opp. at 5. These
8 materials do not undermine the Secretary’s reasonable determination, or the case for a stay. Mr.
9 Hildebrand has no background in national security, and even if he did, his opinion would be
10 entitled to no weight. *See, e.g., Trump v. Hawaii*, 138 S. Ct. 2392, 2421-22 (2018) (rejecting
11 plaintiffs’ submission of declaration by former national security officials, and cautioning that
12 even based on those opinions, courts could not “substitute [their] own assessment for the
13 Executive’s predictive judgments”). Further, even if the Court could consider an outside opinion
14 on national security matters, which it may not, Mr. Hildebrand is not a qualified expert in the
15 area of cybersecurity, national security, the PRC, or even data security, nor does he appear to
16 know specifics about WeChat or whether his suggestions for improved security are technically,
17 legally, or practically viable for Tencent. *See* Fed. R. Evid. 702; *Kumho Tire Co., Ltd. v.*
18 *Carmichael*, 526 U.S. 137, 149 (1999); *cf. Lucido v. Nestle Purina Petcare Co.*, 217 F. Supp. 3d
19 1098, 1103 (N.D. Cal. 2016) (expert in one field not qualified to provide opinions about a
20 different field). Moreover, his suggestions would require a “baseline level of trust” with the
21 PRC that the Secretary determined was lacking. Decision Mem. at 14-15. And even if the
22 Secretary “could have approached the problem” differently, he was not required to do so. *Elcom*,
23 203 F. Supp. 2d at 1132.

24
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26 ⁸ To the extent Plaintiffs are suggesting that the Administration is addressing threats posed by
27 China through speech alone, they are mistaken. *See, e.g.,* Cong. Research Service, “Made in
28 China 2025,” Industrial Policies: Issues for Congress (Aug. 11, 2020) (describing multiple
actions to address threatening Chinese policies and growing “technological and military
capabilities”).

U.S. WeChat Users Alliance, et al. v. Trump, et al., Case No. 3:20-cv-05910-LB
Defendants’ Reply in Support of their Motion to Stay Preliminary Injunction Pending Appeal

1 **2. The Restrictions Leave Open Ample Alternatives.**

2 Plaintiffs also argue that the WeChat restrictions do not leave open sufficient channels of
3 communication. They rely on *City of Ladue*, where the Supreme Court invalidated an ordinance
4 because it “foreclose[d] *an entire medium* of expression.” 512 U.S. at 55 (emphasis added). The
5 Court concluded that no meaningful alternatives existed because signs on a person’s private
6 property carried “a message quite distinct from placing the same sign someplace else” and were
7 “an unusually cheap and convenient form of communication” with “no practical substitute” for
8 persons of modest means or limited mobility. *Id.* at 43-44, 57. In contrast, the actions here
9 affect only business-to-business transactions on a single application with numerous practical
10 substitutes, Mot. at 14-15, a point that Plaintiffs do not, and could not, contest.

11 Plaintiffs maintain that the substitutes are inferior in their present form, but their claims
12 on this point are self-serving and legally irrelevant. For example, the founder of Plaintiff Chihuo
13 Inc. prefers WeChat to Telegram and Facebook Messenger because WeChat provides “[t]he host
14 of a chat group . . . the power to admit people in and remove people,” whereas “Telegram,
15 Facebook Messenger, and other apps . . . do not offer such features[.]” Decl. of Fangyi Duan ¶ 6,
16 ECF No. 78-2. But this assertion is inconsistent with guidance provided by Facebook and
17 Telegram themselves, which specifically instruct hosts how to admit and remove people from
18 chat groups.⁹ Ms. Duan also dislikes Facebook because it does not allow “the author . . . [to]
19 manage comments, such as removing offensive comments[.]” *Id.* ¶ 5. This is incorrect, as
20 Facebook provides instructions for deleting offensive content.¹⁰ Ying Cao, one of the founders
21 of the U.S. WeChat Users Alliance, states that the Telegram app “has about a dozen language
22 choices, but does not include Chinese.” Decl. of Ying Cao ¶ 5, ECF No. 78-1. He fails to
23

24 ⁹ See <https://telegram.org/faq#q-how-do-i-create-a-group>; <https://telegram.org/blog/supergroups>
25 (“Admins . . . have the power to remove other members from the group”);
26 <https://www.facebook.com/help/messenger-app/207233286525869> (instructions to “remove
someone from a group conversation in Messenger”).

27 ¹⁰ <https://smallbusiness.chron.com/delete-offensive-content-facebook-31737.html> (“How to
28 delete offensive content on Facebook”).

1 mention that Telegram offers a Chinese language pack.¹¹ Moreover, while Mr. Cao states that
2 other apps, like Line and Signal, do not have “in-app” translation, *id.* ¶¶ 6, 8, those apps are
3 available in a Chinese interface and thus do not need an “in-app” translation feature for Chinese
4 speakers.¹² His critiques about the functioning of Line in Chinese appear to be based on an
5 English version of the app translated by the operating system of his phone, not the Chinese
6 interface version. *Id.* ¶ 6. And while Mr. Cao expresses “doubt that Chinese speaking users”
7 could use Telegram, *id.* ¶ 5, others report that Telegram has a “newfound popularity” in China,
8 where it has become “a refuge for people seeking information outside official channels.”¹³

9 In any event, the First Amendment does not require the Government to ensure that
10 Plaintiffs can communicate through a mobile platform with specific features. It “requires only
11 that [the Government] refrain from effectively denying [them] a reasonable opportunity to” use
12 social media generally. *City of Renton*, 475 U.S. at 54. Nothing in the WeChat restrictions does
13 so, and even crediting Plaintiffs’ views about the relative functionalities of WeChat versus its
14 competitors simply proves the point that alternatives exist. The Government has not restricted
15 all social media applications—not even close—and the Supreme Court never suggested in *City of*
16 *Ladue* that courts reviewing alternatives must engage in the kind of subjective, granular
17 comparison of available alternatives that Plaintiffs posit. The Supreme Court and the Ninth
18 Circuit have repeatedly refused to invalidate restrictions simply because alternatives were
19 different, less preferable, or impracticable. *See U.S. Postal Serv. v. Council of Greenburgh Civic*
20 *Ass’n*, 453 U.S. 114, 124 (1981); *City of Renton*, 475 U.S. at 53-54; *G.K., Ltd. Travel v. City of*
21 *Lake Oswego*, 436 F.3d 1064, 1075 (9th Cir. 2006). Moreover, although Plaintiffs repeatedly
22 assert that the ubiquitous alternatives currently lack the “network effects” of WeChat, they cite
23 no reason those network effects cannot be changed. The WeChat restrictions satisfy the final
24

25 ¹¹ See <https://t.me/setlanguage/zh-hans-beta>

26 ¹² See <https://line.me/en/> (change language on homepage); <https://signal.org/en/> (same).

27 ¹³ [https://www.scmp.com/abacus/tech/article/3075804/how-telegram-became-refuge-wechat-](https://www.scmp.com/abacus/tech/article/3075804/how-telegram-became-refuge-wechat-users-during-coronavirus-outbreak)
28 [users-during-coronavirus-outbreak](https://www.scmp.com/abacus/tech/article/3075804/how-telegram-became-refuge-wechat-users-during-coronavirus-outbreak)

1 element of intermediate scrutiny, and for all of the above reasons, Defendants make a strong
2 showing of likely success on the merits.¹⁴

3 **II. The Remaining Factors Weigh Strongly in Favor of a Stay.**

4 Plaintiffs also fail to detract from Defendants’ showing that the equitable factors—which
5 “merge” when the Government is a party, *Nken v. Holder*, 556 U.S. 418, 433-35 (2009)—
6 strongly favor a stay of the preliminary injunction pending appeal.

7 **A. The Government’s National Security and Foreign Policy Interests Are** 8 **Compelling**

9 Plaintiffs do not dispute that the Government has a compelling interest in promoting U.S.
10 national security and foreign policy. *See Opp.* at 13-22. Instead, they claim that the evidence
11 relied on by the Government is “speculative” or otherwise insufficiently immediate to justify a
12 stay. *See id.* at 17-21. This argument, however, finds no basis in fact, law, or logic. Contrary to
13 Plaintiffs’ assertions, the record amply establishes that the PRC utilizes WeChat to surveil users.
14 *See, e.g.,* Decision Mem. App. F, A.R. 1165-66. And while Plaintiffs attempt to minimize the
15 PRC’s insidious operations as occurring solely within China, *Opp.* at 18, the record confirms that
16 “anyone using WeChat, even if they have lived their whole lives outside China, is ‘subject to
17 pervasive content surveillance[.]’” *Id.*, A.R. 1169; *see also id.*, A.R. 1167, 1173.

18 Supreme Court precedent also forecloses Plaintiffs’ argument that the Government’s
19 actions can only be justified by “*actual* evidence” of WeChat sharing U.S. user data with the
20 PRC. *See Opp.* at 17 (emphasis in original). In the context of national security and foreign
21 policy, “[c]onclusions must often be based on informed judgment rather than concrete evidence,
22 and that reality affects what [the Judiciary] may reasonably insist on from the Government.”
23 *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34-35 (2010). Nor should the Court take

24 ¹⁴ Plaintiffs cite another district court case in the District of Columbia involving the TikTok
25 application to suggest that even if their First Amendment claim is not likely to succeed, they are
26 likely to prevail on their statutory claims. *Opp.* at 13. The Government vigorously disagrees
27 with the decision in *TikTok*, which in any event is not necessarily on all fours with the issues
28 posed by WeChat. The Court thus far has based its preliminary injunction solely on the First
Amendment, and if the Court is inclined to consider a different basis, the Government
respectfully requests an adequate opportunity (outside of a 15-page reply brief devoted to other
issues and prior briefing on an unripe claim) to more fully address that issue.

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1 seriously Plaintiffs’ suggestion that the Government must wait for widespread harm to
2 materialize before taking action. *See* Opp. at 18. Again, as the Supreme Court has explained,
3 “[t]he Government, when seeking to prevent imminent harms in the context of international
4 affairs and national security, is not required to conclusively link all the pieces in the puzzle
5 before [courts] grant weight to its empirical conclusions.” *Holder*, 561 U.S. at 35.

6 Plaintiffs compound their error by asserting that the Court may evaluate the “strength” of
7 the Government’s national security and foreign policy determinations and, if it disagrees with the
8 Government’s assessments, substitute its views for those of the Government. *See* Opp. at 15-17.
9 “[W]hen it comes to collecting evidence and drawing inferences on questions of national
10 security, the lack of competence on the part of the courts is marked.” *Trump v. Hawaii*, 138 S.
11 Ct. at 2419 (quotation omitted); *see Boumediene v. Bush*, 553 U.S. 723, 797 (2008) (cautioning
12 that “federal judges” do not “begin the day with briefings that may describe new and serious
13 threats to our Nation and its people”). The same is true of foreign policy determinations. *See*,
14 *e.g.*, *OKKO Bus. PE v. Lew*, 133 F. Supp. 3d 17, 28 (D.D.C. 2015) (“Matters of strategy and
15 tactics relating to the conduct of foreign policy ‘are so exclusively entrusted to the political
16 branches of government as to be largely immune from judicial inquiry or interference.” (quoting
17 *Regan v. Wald*, 468 U.S. 222, 242 (1984)).¹⁵

18 The cases cited by Plaintiffs do not indicate otherwise. For instance, in *Winter v. NRDC*,
19 555 U.S. 7, 27 (2008), cited in Opp. at 15, the Supreme Court criticized the lower courts for their
20 “fail[ure] properly to defer to senior Navy officers’ specific, predictive judgments[.]” And in
21 *Hawaii*, 138 S. Ct. at 2422, cited in Opp. at 15-16, the Supreme Court explained that “[w]hile we
22 of course ‘do not defer to the Government’s *reading of the First Amendment*,’ the Executive’s
23 evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of
24 . . . ‘sensitive and weighty interests of national security and foreign affairs’” (emphasis added).
25 In *Al Haramain Islamic Foundation, Inc. v. U.S. Department of Treasury*, 686 F.3d 965 (9th Cir.

26 ¹⁵ Although the Ninth Circuit has indicated that courts can “review foreign policy arguments,” it
27 made that observation in the context of “clear precedent for judicial recognition of selective
28 enforcement [immigration] claims,” which are not at issue here. *See Am.-Arab Anti-*
Discrimination Comm. v. Reno, 70 F.3d 1045, 1056 (9th Cir. 1995).
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1 2012), cited in Opp. at 16, the Ninth Circuit “acknowledge[d] that the unclassified record
2 evidence is not overwhelming, but . . . reiterate[d] that [its] review—in an area at the intersection
3 of national security, foreign policy, and administrative law—is extremely deferential.” *Id.* at
4 979. And as to *New York Times Co. v. United States*, 328 F. Supp. 324, 330 (S.D.N.Y. 1971),
5 Plaintiffs are correct that, almost 50 years ago, a district court held *in camera* proceedings to
6 allow the parties to argue over the effect of publication of historical documents on U.S. national
7 security. *See* Opp. at 16-17. But considering a newspaper’s publication of Government-created
8 historical documents is quite unlike evaluating the threat posed by a foreign adversary’s ability to
9 surveil U.S. persons. And IEEPA expressly permits the Government to submit classified
10 information that the opposing party never sees. 5 U.S.C. § 1702(c).

11 Plaintiffs’ remaining arguments are equally unavailing. First, they contend that
12 Defendants’ “assertion of irreparable harm . . . , if taken to its logical conclusion, would extend
13 to any company with Chinese ownership that had access to Americans’ data[.]” Opp. at 19. But
14 not every company with Chinese ownership has the global reach of WeChat and presents the
15 same risks, particularly given Tencent’s close ties to the PRC, including a Tencent “Party
16 Committee” that “boast[s] nine general branches, 89 party branches and 3,386 members” as of
17 2017. Decision Mem. at 7-8; *see also* Costello Decl. at 2; *ASPI, Mapping China’s Technology*
18 *Giants*, Issue Paper, Report No. 15 at 3 (April 2019), Ex. 14 to ECF No. 22. And contrary to
19 Plaintiffs’ assertion, Opp. at 20, the Government is reasonably addressing the different threats
20 posed by TikTok on a different timeline and through different means.

21 Second, Plaintiffs argue that the Government should have responded to the threat posed
22 by WeChat by prohibiting more transactions related to Tencent, and on a faster schedule. *See id.*
23 But such IEEPA-based decisions “are complex and involve significant political ramifications”
24 not subject to second-guessing by Plaintiffs or the Court, *Holy Land Found. for Relief & Dev. v.*
25 *Ashcroft*, 219 F. Supp. 2d 57, 74 n.28 (D.D.C. 2002), and if anything, the Government’s decision
26
27
28

1 demonstrates an appropriate tailoring to the problem at hand.¹⁶

2 Third, Plaintiffs dispute the Government’s conclusion that the PRC’s censorship of
3 WeChat users poses a threat to U.S. national security and foreign policy. Opp. at 21. It should
4 be self-evident, however, that curtailing a foreign adversary’s control of what information U.S.
5 persons receive promotes the national interest. And as the Secretary explained:

6 The CCP is dictating how millions of WeChat users in the U.S. handle politically
7 sensitive information through the suspension and closure of U.S. citizens’ accounts.
8 Users outside of China, including millions of U.S. users, who share controversial material
9 may initially receive warnings about the content they are sharing. There are many
10 examples of U.S. citizens who continued to send material deemed to be offensive or
11 disloyal to the CCP, resulting in their accounts being suspended. In order to continue
12 using WeChat, U.S. citizens are forced to self-censor the content they share or jeopardize
13 losing their preferred communication platform with their contacts in China.

14 Decision Mem. at 14; *see also id.* at 10. Thus, far from engaging in “more censorship,” Opp. at
15 21, the Government is seeking to address the PRC’s pernicious stifling of speech occurring
16 within the United States. Plaintiffs’ willingness to tolerate the threat posed by the PRC’s actions
17 is not a basis to overturn the Government’s determination.

18 Finally, Plaintiffs contend that no harm can befall the Government because the Court’s
19 injunction has “merely end[ed] an unlawful practice.” *Id.* This argument lacks any force, as the
20 Government has detailed the harms that the injunction has caused and will continue to cause, and
21 because the Government’s actions are consistent with the First Amendment and IEEPA.

22 **B. Any Harm to Plaintiffs Is Minimal**

23 By contrast, a stay of the injunction pending appeal would not significantly or irreparably
24 harm Plaintiffs. Their argument that they face a “ban” on their use of WeChat or an

25 ¹⁶ Plaintiffs also suggest that the Government regulate “the domestic data-broker industry” based
26 on their “presum[ption]” that personal data is sold by the industry to “the Chinese government or
27 its agents.” Opp. at 20. Among the many problems with this assertion is that IEEPA is meant to
28 deal with a threat that “has its source in whole or substantial part outside the United States.” 50
U.S.C. § 1701(a). Looking for other arguments, Plaintiffs cite to the existence of a confidential
data mitigation agreement involving a Chinese acquirer agreed to by the Committee on Foreign
Investment in the United States, Opp. at 11, n. 6.; but an agreement in one case does not indicate
that a mitigation agreement would be similarly effective to resolve national security concerns
arising from a transaction involving WeChat.

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1 infringement of their First Amendment rights, Opp. at 22-23, fails for the reasons previously
2 described by Defendants, Mot. at 6-7 and *supra* at 1-9.

3 C. The Balance Tips Strongly in Favor of Defendants

4 Rather than engage with Defendants' arguments regarding the balance of the equities,
5 Plaintiffs advance a strawman, claiming that "Defendants repeat their argument that such First
6 Amendment rights can never outweigh any national security and foreign policy interests asserted
7 by the Government[.]" Opp. at 14. But Defendants have never made such a sweeping assertion;
8 and instead have argued that "[e]ven if Plaintiffs have established a serious question about their
9 First Amendment claim—which they have not—that serious question does not outweigh the
10 national security and foreign policy interests at stake." Mot. at 7.

11 Plaintiffs similarly offer (at best) incomplete descriptions of the case law relied upon by
12 Defendants, which also involved allegations of First Amendment harm. For instance, Plaintiffs
13 claim that "[t]he district court [in *Defense Distributed v. U.S. Dep't of State*, 121 F. Supp. 3d
14 680, 696 (W.D. Tex. 2015)] denied plaintiffs' preliminary injunction motion entirely on balance
15 of harms grounds[.]" Opp. at 14. But the district court in that case considered the plaintiffs'
16 First Amendment challenge at length before concluding that they had "not shown a substantial
17 likelihood of success on the merits" of that claim, *Def. Distributed*, 121 F. Supp. 3d at 691-96—
18 the same conclusion the Court should draw here. Likewise, Plaintiffs attempt to distinguish
19 *Stagg P.C. v. U.S. Department of State*, 158 F. Supp. 3d 203, 209-10 (S.D.N.Y. 2016), because
20 the court did not "reach a conclusion as to the likelihood of success on the First Amendment
21 merits." Opp. at 15. Plaintiffs fail to mention, however, that the court found the balance of
22 equities favored the Government "[e]ven assuming for the purposes of this motion that Stagg
23 P.C. has shown a substantial likelihood of success on the merits of its First and Fifth Amendment
24 and APA claims[.]" *Stagg P.C.*, 158 F. Supp. 3d at 210.

25 Try as they might, *see* Opp. at 14 n.9, Plaintiffs cannot dispute that the Court can issue a
26 preliminary injunction on the basis of a serious question only if it also finds that "the balance of
27 hardships tips *sharply* in the plaintiff's favor' and the other two factors are satisfied." *Ramos v.*
28 *Wolf*, No. 18-16981, 2020 WL 5509753, at *10 (9th Cir. Sept. 14, 2020) (citation omitted). If
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1 Plaintiffs are correct that the Court did not make the requisite finding due to “the Court’s drafting
2 of a rush order,” Opp. at 14, Defendants respectfully request that the Court amend its opinion
3 and explain its finding to aid appellate review.

4 **III. Alternatively, The Court Should Stay at Least Part of Its Preliminary Injunction.**

5 At a minimum, the Court should stay or modify the injunction insofar as it relates to
6 Paragraph 1 of the Identification of the Prohibited Transactions, which prevents the download
7 and update of WeChat from an online application store. *See* Mot. at 16-18; Decision Mem. at
8 15. This would effectively preserve the status quo while preventing the PRC from expanding the
9 pool of Americans it can surveil and target through WeChat. Plaintiffs, who are all existing
10 WeChat users, would retain access to the app and could communicate with existing users.

11 Plaintiffs speculate that Prohibition 1 will “block[] tens or hundreds of thousands of new
12 users” and that particular Plaintiffs may not be able to reach additional audiences. *Id.* But they
13 have submitted no evidence about the extent, if any, to which they communicate with such new
14 WeChat users, or that these theoretical new users are unreachable on other platforms.¹⁷ Plaintiffs
15 also suggest in a single sentence that “prohibiting updates” might decrease their data security or
16 expose them to a data breach. *See* Opp. at 25. But the U.S. interests at stake derive from the
17 PRC’s authorized access to the data; there is no reason to believe that prompt application updates
18 will address that problem. Nor have Plaintiffs submitted evidence that access to updates is
19 otherwise essential to their use of WeChat during the duration of this case.

20 **CONCLUSION**

21 The Court should grant Defendants’ motion.¹⁸

22
23 ¹⁷ This seems at odds with Plaintiffs’ conjecture that “the vast majority of Chinese-speaking
24 people are on WeChat and not any other apps.” *See, e.g.,* Decl. of Fangyi Duan ¶ 7.

25 ¹⁸ Plaintiffs suggest that Defendants have “withheld” some of the appendices to the Decision
26 Memorandum, “including Tencent’s mitigation proposal.” Opp. at 5. This is incorrect.
27 Defendants offered to provide the mitigation proposal to Plaintiffs’ counsel on condition of
28 Tencent’s consent, and then provided it on September 30. *See* Ex. A (emails among counsel);
ECF No. 77. As to Plaintiffs’ request for a proffer regarding the classified assessment, Opp. at 6,
Defendants responded on October 2, explaining that the Secretary’s 16-page decision
memorandum is itself an unclassified explanation. *See* Ex. B.

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