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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.

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

**PLAINTIFFS’ RESPONSE TO
DECLARATION OF JOHN COSTELLO**

Judge: Hon. Laurel Beeler

Trial Date: None Set

1 On October 19, 2020, Defendants filed a declaration of John Costello, ECF
2 No.93- 1, in support of their pending Motion to Stay the preliminary injunction issued by
3 this Court a month earlier. In his newly filed declaration, Mr. Costello purports to rebut
4 the expert declaration of Adam Roach, which analyzed Defendants’ September 18, 2020
5 Identification of Prohibited Transactions (“Identification”) and concluded that WeChat
6 would “effectively be shut down as soon as [the prohibitions] are fully implemented.”
7 ECF No. 84-1 at ¶ 13. But the Costello declaration further *confirms* that Defendants have
8 not met the standard for a stay.

9 First, the Costello declaration contradicts the government’s argument that the
10 prohibitions affect only “business-to-business transactions” and are not aimed at speech.
11 According to Mr. Costello, who personally drafted the Decision Memorandum on which
12 the Secretary of Commerce relied to issue the Identification, “[t]he intent of the
13 prohibitions is to substantially reduce the number of daily users of the WeChat mobile
14 application in the United States.” ECF No. 93-1 at ¶ 9. Reducing the number of WeChat
15 users, of course, means reducing the amount of protected speech that users publish through
16 the platform. Regulations that aim to stop protected speech before it occurs by targeting a
17 platform or other communications medium, or to limit the distribution of protected speech
18 through such a platform, are quintessential prior restraints. *See Grosjean v. American*
19 *Press Co.*, 297 U.S. 233, 244 (1936) (treating Huey Long’s newspaper tax as a “previous
20 restraint” because its “direct tendency is to restrict circulation”); *City of Ladue v. Gilleo*,
21 512 U.S. 43, 55 (1994).

22 Second, Costello does not take issue with Adam Roach’s expert opinion that “[k]ey
23 WeChat functions, such as voice and video calls, may be severely limited” by the second
24 and third prohibitions in the Identification. ECF No. 84-1 at ¶ 8. Nor could he—
25 Mr. Costello lacks the technical background to opine on the likely effects of the
26 prohibitions. Such a “severe” impact on WeChat users’ primary means of communicating
27 with family, friends, and political and religious associates clearly implicates the First
28 Amendment. *See Currier v. Potter*, 379 F.3d 716, 727 (9th Cir. 2004) (“It is axiomatic

1 that restrictions upon the mail system implicate the First Amendment.”).

2 Third, the Costello declaration further confirms that the prohibitions will not
3 address the government’s stated national security interests related to surveillance and
4 censorship during the pendency of this case. Mr. Costello states that it “would take 1-2
5 years [from the date of the prohibitions] for the functionality of the app to degrade to the
6 point of causing an otherwise dedicated WeChat user to stop using the app and delete it
7 from his or her device.” ECF No. 93-1 at ¶ 8. Mr. Costello then proceeds to assert that the
8 third prohibition in the Identification will have only a “limited” effect on the WeChat app’s
9 functionality and usability, and that he “do[es] not expect the impact of this
10 prohibition...to deter otherwise dedicated users of the WeChat application from continuing
11 that use.” *Id.* at ¶ 12. Without conceding the accuracy of Mr. Costello’s predictions or his
12 projected timeline for shutting down WeChat in the United States, Plaintiffs note that the
13 anticipated delay effectively undermines the government’s argument that it will suffer
14 irreparable harm if the Court’s injunction is not stayed pending appeal. A stay is an
15 extraordinary remedy, available only when the party seeking the stay demonstrates harm
16 that is *imminent*—or at least that the harm will occur before the Court of Appeals has an
17 opportunity to review the injunction. By their own admission, Defendants will not suffer
18 irreparable harm in the absence of a stay because even if the prohibitions were in effect,
19 use of the WeChat app in the United States would not significantly decline until months or
20 even years down the road.

21 Fourth, the Costello declaration attempts to reassure the Court that Defendants
22 “considered the risk of an unpatched security vulnerability” before issuing the
23 Identification. But Mr. Costello does not quantify or otherwise explain what the risk is
24 beyond conclusorily asserting that it is “vastly outweighed by the long-term security
25 benefits of the prohibition.” *Id.* at ¶ 7. Costello also summarily asserts that security
26 vulnerabilities requiring app updates are rare, but even a brief survey of recent technology
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1 reporting shows that such vulnerabilities are extremely common.¹ Mr. Costello's
 2 conclusory, post-hoc assertion that Defendants considered and rejected, for unspecified
 3 reasons, the likely possibility that a prohibition on app updates would actually *exacerbate*
 4 threats to Americans' data security, does not come close to showing the kind of well-
 5 reasoned, narrowly tailored policy design necessary to justify the WeChat Ban's
 6 extraordinary and unprecedented burden on protected speech.

7 Finally, by confirming that WeChat Pay "is not currently available in the United
 8 States," the Costello declaration contradicts Defendants' statement to the Court at the
 9 October 15 hearing that Defendant Ross was referring only to WeChat Pay when he stated,
 10 on national television on the morning of September 18, 2020, that the prohibited
 11 transactions would effectively "shut down" WeChat by the evening of Monday,
 12 September 21, 2020. *See* Hearing Transcript at 31:10-32:7 (Oct. 15, 2020). In fact, at the
 13 time of his comment Defendant Ross was well aware that WeChat Pay is not available to
 14 American users of the app, *see* ECF No. 93-2 at 4 (noting that WeChat Pay is "not
 15 currently available in the United States"), and it is simply implausible that he was referring

16 _____
 17 ¹ *See, e.g.*, Samuel Gibbs, "WhatsApp hack: have I been affected and what should I do?"
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1 to WeChat Pay being shut down rather than the app as a whole.

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Respectfully submitted,

ROSEN BIEN GALVAN & GRUNFELD LLP

By: /s/ Alexander Gourse

Alexander Gourse

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