

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

U.S. WECHAT USERS ALLIANCE, et al.,
Plaintiffs,
v.
DONALD J. TRUMP, et al.,
Defendants.

Case No. 20-cv-05910-LB

**ORDER GRANTING MOTION FOR
PRELIMINARY INJUNCTION**

Re: ECF No. 17 and 48

INTRODUCTION

The plaintiffs are persons in the United States who use WeChat, a messaging, social-media, and mobile-payment app.¹ In this lawsuit, they challenge the constitutionality of Executive Order 13943, which prohibits (without defining) “transactions” relating to WeChat (to protect national security), effective September 20, 2020. The Executive Order directs the Secretary of Commerce to “identify” the “transactions” that are prohibited. On September 18, 2020, the Secretary issued an “Identification of Prohibited Transactions to Implement Executive Order 13943,” identifying the prohibited transactions.

¹ Compl. – ECF No. 1; First Am. Complaint (“FAC”) – ECF No. 49. The plaintiffs are U.S. WeChat Users Alliance, a nonprofit formed to challenge the WeChat Executive Order, and individual and business users. *Id.* at 7–9 (¶¶ 19–25). Citations refer to material in the Electronic Case File (“ECF”);

1 In relevant part, the Secretary’s Identification generally bans (1) app stores from distributing
 2 the WeChat app or updates to it, (2) internet-hosting, content-delivery, and other internet-transit
 3 services that enable the functioning or optimization of the WeChat app, (3) use of the app’s code,
 4 functions, or services in the functioning of software or services, and (4) services from allowing the
 5 transfer of funds via the app to or from parties in the United States. More colloquially, the result is
 6 that consumers in the U.S. cannot download or update the WeChat app, use it to send or receive
 7 money, and — because U.S. support for the app by data hosting and content caching will be
 8 eliminated — the app, while perhaps technically available to existing U.S. users, likely will be
 9 useless to them. In public comments on September 18th, the Secretary said that “[f]or all practical
 10 purposes, [WeChat] will be shut down in the U.S. . . . as of midnight Monday.”²

11 The plaintiffs claim that the ban (1) violates the First Amendment to the U.S. Constitution,
 12 (2) violates the Fifth Amendment, (3) violates the Religious Freedom Restoration Act, 42 U.S.C. §
 13 2000bb(1)(a), (4) was not a lawful exercise of the President’s and the Secretary’s authority under
 14 the International Economic Emergency Powers Act (“IEEPA”) — which allows the President to
 15 prohibit “transactions” in the interest of national security — because the IEEPA, 50 U.S.C. §
 16 1702(b)(1), does not allow them to regulate personal communications, and (5) violates the
 17 Administrative Procedures Act (“APA”) because the Secretary exceeded his authority under the
 18 IEEPA and should have promulgated the rule through the notice-and-comment rulemaking
 19 procedures in 5 U.S.C. § 553(b).³

20 The plaintiffs moved for a preliminary injunction and contend that they are likely to succeed,
 21 and have presented serious questions, on the merits of the First Amendment claim (and satisfied
 22 the other elements for preliminary-injunctive relief). First, they contend, effectively banning
 23 WeChat — which serves as a virtual public square for the Chinese-speaking and Chinese-

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 25 ² Ana Swanson & David McCabe, *Trump to Ban TikTok and WeChat from U.S. App. Stores*, N.Y.
 26 TIMES, Sept. 18, 2020, <https://www.nytimes.com/2020/09/18/business/trump-tik-tok-wechat-ban.html>
 27 (last visited Sept. 18, 2020), Ex. C to Bien Decl. – ECF No. 45-1 at 23. At the September 18 and 19,
 2020 hearings, the government did not contest that the court could consider — whether as a party
 admission or by judicial notice — the Secretary’s statement or other public officials’ statements.

28 ³ IAC, ECF No. 45-1 at 23.

1 American community in the United States and is (as a practical matter) their only means of
 2 communication — forecloses meaningful access to communication in their community and
 3 thereby operates as a prior restraint on their right to free speech that does not survive strict
 4 scrutiny. Second, even if the prohibited transactions are content-neutral time-place-or-manner
 5 restrictions, they do not survive intermediate scrutiny because the complete ban is not narrowly
 6 tailored to address the government’s significant interest in national security.⁴ The plaintiffs also
 7 contend that they are likely to succeed on the merits of their claims that, by effectively shutting
 8 down U.S. users’ access to the WeChat app, (1) the President and the Secretary exceeded their
 9 authority under IEEPA, (2) the Secretary violated the APA, and (3) the Executive Order is void for
 10 vagueness (in part) because the government asserts conflicting interpretations of the prohibition’s
 11 effect.⁵ The government counters that the plaintiffs are not likely to succeed on the merits of their
 12 claims and have not established irreparable harm or that the balance of equities tips in their favor.⁶

13 The court grants the motion on the ground that the plaintiffs have shown serious questions
 14 going to the merits of the First Amendment claim, the balance of hardships tips in the plaintiffs’
 15 favor, and the plaintiffs establish sufficiently the other elements for preliminary-injunctive relief.

17 STATEMENT

18 The next sections summarize (1) the plaintiffs’ (and the U.S. public’s) use of WeChat, (2) the
 19 relevant Executive Orders and agency action, and the plaintiffs’ contentions about the context of
 20 the action, (3) the government’s additional contentions about WeChat’s threat to national security,
 21 and (4) the case’s procedural history.⁷

22 _____
 23 ⁴ *Id.* at 27–29 (¶¶ 78–86); *see* Mot. – ECF No. 17 at 29–39; Reply – ECF No. 28 at 18–22; Renewed
 Mot. – ECF No. 48 at 3–5.

24 ⁵ Reply – ECF No. 28 at 17–23; *see id.* at 17–18 (narrowing the void-for-vagueness argument) (citing
 25 *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 534–35 (N.D. Cal. 2017)); Renewed Mot. – ECF
 No. 48 at 3–9; *see id.* at 8–9 (narrowing the void-for-vagueness argument further).

26 ⁶ Opp’n – ECF No. 22 at 28–50; Opp’n – ECF No. 51 at 4–14.

27 ⁷ Because this is a preliminary-injunction motion, the court overrules the government’s objections to
 28 the Alban and Chemerinsky declarations. Opp’n – ECF No. 22 at 51; *cf. Flynt Distrib. Co. v. Harvey*,
 734 F.2d 1389, 1394 (9th Cir. 1984) (“The trial court may give even inadmissible evidence some

1 **1. WeChat**

2 WeChat is a mobile app, developed by the Chinese company Tencent Holdings Ltd., with
3 more than 1.2 billion users worldwide (including more than 100 million users outside of China
4 and 19 million regular users in the U.S.).⁸ It allows its users to send messages, make video and
5 audio calls, and send and receive money, and it also functions as a social-media platform.⁹

6 The plaintiffs' declarations establish that in the U.S., Chinese-American and Chinese-speaking
7 WeChat users rely on the WeChat platforms to communicate, socialize, and engage in business,
8 charitable, religious, medical-related, and political activities with family, friends, and colleagues
9 (here in the U.S. and around the world).¹⁰ In the U.S., those in the Chinese-American, Chinese-
10 speaking, and other communities rely on WeChat — as opposed to other platforms — as their
11 “primary source of communication and commerce,” in part because western social-media
12 platforms such as Facebook, WhatsApp, and Twitter are blocked in China, and WeChat often is
13 the only way for its users to reach their networks in China.¹¹ In addition, WeChat provides content
14 (such as the news) in Chinese, which is critical for the many U.S. WeChat users with limited
15 proficiency in English.¹² WeChat also resonates culturally with its U.S.-based Chinese-speaking
16 users because it integrates Chinese traditions into electronic transactions, such as sending gifts of
17 money in “red envelopes.”¹³ Other platforms cannot practically replace WeChat because they lack
18 the cultural relevance and practical interface with China and do not provide the integral connection

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21 ⁸ Cohen Decl. – ECF No. 17-9 at 3 (¶ 6); Sun Decl. – ECF No. 17-11 at 10 (¶ 13), 11 (¶ 16); Maya
22 Tribbitt, *WeChat Users in the U.S. Fear Losing Family Links with Ban*, BLOOMBERG, Aug. 11, 2020,
23 [https://www.bloombergquint.com/technology/wechat-users-in-the-u-s-fear-losing-family-links-with-](https://www.bloombergquint.com/technology/wechat-users-in-the-u-s-fear-losing-family-links-with-ban)
24 [ban](https://www.bloombergquint.com/technology/wechat-users-in-the-u-s-fear-losing-family-links-with-ban), Ex. TT to Bien Decl. – ECF No. 17-12 at 351.

25 ⁹ Cohen Decl. – ECF No. 17-9 at 3 (¶ 6).

26 ¹⁰ Sun Decl. – ECF No. 17-11 at 11 (¶ 17); Cao Decl. – ECF No. 17-2 at 3–4 (¶¶ 11–20); Peng Decl. –
27 ECF No. 17-5 at 2–3 (¶¶ 1–4, 7–16); Duan Decl. – ECF No. 17-4 at 2 (¶¶ 6, 9), 3 (¶¶ 14, 16).

28 ¹¹ Cohen Decl. – ECF No. 17-9 at 4 (¶ 6); Sun Decl. – ECF No. 17-11 at 9 (¶ 12).

29 ¹² Sun Decl. – ECF No. 17-11 at 10–11 (¶¶ 15, 18); Jeung Decl. – ECF No. 17-10 at 8 (¶ 25) (“Four
out of ten Chinese in the United States — and six out of ten of Chinese who are foreign-born — are
limited English proficient. This high proportion of our community cannot access English social medial
platforms and require WeChat for their communications”).

30 ¹³ Cohen Decl. – ECF No. 17-9 at 3 (¶ 6); Sun Decl. – ECF No. 17-11 at 11 (¶ 16).

1 that WeChat provides to the Chinese community.¹⁴ In short, WeChat is irreplaceable for its users
2 in the U.S., particularly in the Chinese-speaking and Chinese-American community.¹⁵

3 Plaintiff Elaine Peng illustrates these points when she describes her WeChat use for personal,
4 political, and business communications, including running her nonprofit organization Mental
5 Health Association for Chinese Communities, which provides mental-health education and
6 services to the local Chinese community.¹⁶ WeChat is her primary tool for outreach and services.¹⁷
7 For example, she has two WeChat groups: one for internal communications with her 110
8 volunteers and one with 420 members (volunteers, recipients of services, and family members).¹⁸
9 Many of the Chinese community members are not fluent in English, and WeChat is the only
10 online tool that they rely on.¹⁹ Most of her 400-plus service recipients are elderly, deficient in
11 English, or both.²⁰ They suffer from mental-health issues that include depression, schizophrenia,
12 bipolar disorder, and post-traumatic stress disorder.²¹ When she founded the nonprofit in 2013, she
13 “went to great trouble” to teach the service recipients how to set up and use WeChat accounts, an
14 effort that involved volunteers who expended “time, energy, and effort” to address the needs of
15 clients who did not know how to use a smart phone.²² If her service recipients lose access to
16 WeChat — “the only channel for them to receive services, educational material, and treatment
17 resources” — it will be a “humanitarian crisis.”²³ In “the last month or so,” she has tried to shift
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21 ¹⁴ Cohen Decl. – ECF No. 17-9 at 7 (¶ 15); Sun Decl. – ECF No. 17-11 at 16–17 (¶¶ 32–33).

22 ¹⁵ Cohen Decl. – ECF No. 17-9 at 7 (¶ 15); Sun Decl. – ECF No. 17-11 at 16 (¶ 32).

23 ¹⁶ Peng Decl. – ECF No. 17-5 at 2–3 (¶¶ 1–4, 7–12); Peng Supp. Decl. – ECF No. 48-1 at 2 (¶ 3). The plaintiffs provide other examples too. *See supra* n.10 (collecting declarations).

24 ¹⁷ Peng Supp. Decl. – ECF No. 48-1 at 2 (¶ 4).

25 ¹⁸ *Id.*.

26 ¹⁹ *Id.* (¶ 5).

27 ²⁰ *Id.* (¶ 6).

28 ²¹ *Id.* (¶ 7).

29 ²² *Id.* (¶ 6).

30 ²³ *Id.* (¶ 5).

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