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17 UNITED STATES DISTRICT COURT

18 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

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.

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

**PLAINTIFFS' RESPONSE TO
 DEFENDANTS' SEPTEMBER 18, 2020
 NOTICE REGARDING
 IMPLEMENTATION OF EXECUTIVE
 ORDER**

Judge: Hon. Laurel Beeler

Trial Date: None Set

1 The government insists that no injunction is needed because the Secretary of Commerce
2 has issued his *Identification of Prohibited Transactions (Identification)*, which specifies what will
3 be prohibited by Executive Order 13943 as of Sunday, September 20, 2020. *See* Dkt. 38;
4 Declaration of Michael W. Bien in Support of Plaintiffs’ Response to Defendants’ September 18,
5 2020 Notice Regarding Implementation of Executive Order (“Bien Decl.”) ¶ 2 & Ex. A (copy of
6 *Identification*). The Secretary’s promulgation proves exactly the opposite: The scope of the
7 prohibition remains unclear, lost in qualifying phrases and caveats, and thus users are
8 appropriately fearful that their conduct will be banned. And in prominent media pronouncements
9 this morning, the Secretary has stated that under this *Identification* the Executive Order will ban
10 **all** use of WeChat effective Sunday, thus causing the harms we outlined in our earlier papers. The
11 media understands this to be a “ban” and is so reporting. Finally, the government’s earlier
12 assurances to Plaintiffs and to this Court are not entirely consistent with the Commerce
13 Department’s announced rules—further proof that the government’s rushed actions warrant
14 careful judicial review before they are allowed to take effect. In short, the vagueness concerns that
15 Plaintiffs have raised—and that this Court recognized during the preliminary injunction hearing—
16 have not been resolved. The Court should issue the preliminary injunction it outlined during
17 yesterday’s hearing.

18 1. According to the *Identification*, the Secretary’s prohibition “only apply to the
19 parties to business-to-business transactions” (*id.* at 6), so—the government stresses—individual
20 users should not “fear criminal prosecution or civil enforcement for personal use of the WeChat
21 app to communicate with friends and family, read the news, engage in political debate, or
22 participate in religious activities.” Dkt. 38 at 2-3. But it is in fact quite unclear from the terms of
23 the *Identification* whether any of these uses will still even be able to occur after Sunday: While the
24 prohibitions apparently apply only to business-to-business transactions, the prohibited b2b
25 transactions also seem to include all of the functions necessary to allow **any** use of the WeChat
26 app to occur in the United States: the Secretary has interpreted “transaction” to include the
27 provision to WeChat or Tencent of “internet hosting services” (*id.* at 5 ¶ 2), “content delivery
28

1 services” (*id.* at 5 ¶ 3), and “internet transit or peering services” (*id.* at 6 ¶ 4) “enabling the
2 functioning ... of the WeChat mobile application.” *Id.*

3 This is by no means the only ambiguity in the Secretary’s order. For example, the
4 *Identification* in one place says that the prohibition does not include “the exchange of ... business
5 information using the WeChat mobile application, to include the transferring and receiving of
6 funds.” *Id.* at 7. But elsewhere, the Secretary bans “[a]ny provision of services through the
7 WeChat mobile application for the purpose of transferring funds” (*id.* at 6 ¶ 5); does the ban,
8 therefore, include all of the backend services necessary to allow that individual (“business”)
9 transfer of funds? Users are left wondering including several of the plaintiffs who are or operate
10 businesses on WeChat.

11 Indeed, it is unclear if the government itself knows what the Secretary has banned. On the
12 one hand, there are news reports today quoting “a senior Commerce official” as saying that,
13 because of the *Identification*, “[w]hat immediately is going to happen is users are going to
14 experience a lag or lack of functionality’ ‘It may still be usable but it is not going to be as
15 functional as it was.’ There may be sporadic outages as well, the official said.” Bien Decl. ¶ 7 &
16 Ex. F (September 18, 2020 Reuters article). But Secretary Ross himself said earlier this morning
17 on the *Fox Business Network* that, “[f]or all practical purposes [WeChat] will be shut down in the
18 U.S. ... as of midnight Monday.” Bien Decl. ¶ 4 & Ex. C. The government has carefully focused
19 its Notice to this Court on the likelihood of civil or criminal penalties for individual users. *See*
20 Dkt. 38 at 2, 3. The government does not really address what the order will actually do, however,
21 let alone all the harms that flow from an absolute ban on WeChat. In addition, the ambiguity of
22 the Executive Order as to retroactive application is maintained in today’s Statement, which states
23 that the Secretary may continue to change the definition of “transaction” in the future, which
24 Section 3 of the EO allows to become effective without notice. Bien Decl. ¶ 2 & Ex. A
25 (*Identification* at paragraph 7).

26 2. It also remains similarly unclear what, if any, factual basis the Administration has
27 for its claims that ordinary uses of WeChat represent an urgent threat to national security. In a
28 televised interview on Friday morning, the Secretary of Commerce stated that it “is our *fear*” that

1 WeChat is “taking data from the American public and sending it to China.” Bien Decl. ¶ 11. But
2 the Secretary provided no examples of “data” being “sen[t] . . . to China” or how the mere
3 transmission of “data” to China constitutes a national security threat. A separate statement from
4 an anonymous “senior Commerce official” to a reporter for the technology publication CNET
5 appears to confirm that the Administration has no evidence whatsoever of private data being
6 harvested by WeChat in the United States. “Whether we have any evidence, domestically, of
7 these particular apps taking data is missing the point, according to this official, because the
8 Administration “know[s] what the Chinese government’s intent is here in the United States.” Bien
9 Decl. ¶ 10 & Ex. I. Serious questions thus continue to exist whether the interests identified by the
10 government really exist, let alone preclude being so urgent as to need rushed enforcement without
11 giving the court and the parties time to address them.

12 3. In the government’s Notice submitted to this Court on Wednesday, the government
13 stressed that “we can provide assurances that the Secretary does not intend to take actions that
14 would target persons or groups whose only connection with WeChat is their use or downloading
15 of the app to convey personal or business information between users.” Dkt. 31, at 2. Although it
16 may well be true that the government will not “take action[.]” against such uses, what the
17 government failed to say in that filing was that both use and downloading of the WeChat app
18 would be prohibited effective Sunday.¹ Counsel may not have known the true scope of the ban
19 (and they did note that “the Department of Commerce continue[d] to review a range of
20 transactions” then). And the government’s “assurance” was, perhaps carefully, framed only in
21 terms of enforcement actions against users—not directly addressing what conduct would be
22 banned. But this ambiguity, which certainly affected the presentation of plaintiffs’ preliminary
23 injunction motion before the Court yesterday, is yet more proof that the government’s rushed
24 process itself causes plaintiffs and others harm.

25

26

27 ¹ While there may be some question about whether use of the app will continue to be
28 allowed, there is no doubt that the Secretary has purported to preclude all downloading of
the app as of that day. *See Identification* at 5 ¶ 1.

[3617036.2]

