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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

**PLAINTIFFS’ RESPONSE TO
DEFENDANTS’ NOTICE REGARDING
IMPLEMENTATION OF EXECUTIVE
ORDER 13943**

Judge: Hon. Laurel Beeler
Date: September 17, 2020
Time: 9:30 a.m.
Crtrm.: Remote

Trial Date: None Set

1 On September 16, 2020, with only two full business days left before the civil and
2 criminal prohibitions of President Trump’s Executive Order banning WeChat (the “EO”)
3 become effective, on Sunday, September 20, Defendants remain unable or unwilling to
4 state publicly what “any transaction that is related to WeChat” means or what conduct
5 Defendants have deemed to be subject to criminal prosecution. Defendants’ “representa-
6 tions and assurances” in their Notice Regarding Implementation (“Notice,” Dkt. 31) fall far
7 short of what is needed to address the serious and substantial First and Fifth Amendment
8 issues raised by the EO. Instead, Defendants’ filing demonstrates that a preliminary
9 injunction is necessary and appropriate to preserve the status quo and prevent the
10 irreparable loss of rights pending full adjudication on the merits.

11 Plaintiffs’ Complaint, filed on August 21, set forth numerous reasons that the
12 WeChat Ban is constitutionally defective and must be enjoined. Without revealing the
13 substance of any settlement communications, Plaintiffs want this Court to know that:

- 14 • Plaintiffs attempted to resolve the preliminary injunction by agreement
15 beginning with a meet and confer letter dated August 24;
- 16 • A telephone call between the parties was held on August 25;
- 17 • More than two weeks later, Defendants sent their first written response on
18 September 10;
- 19 • Plaintiffs responded to Defendants in writing within hours, raising important
20 questions and concerns, and requesting a meeting; and
- 21 • Defendants declined to meet and, instead, waited six more days, until
22 September 16, to respond at all, making only one minor change which is
23 clearly insufficient.

24 Supplemental Declaration of Michael W. Bien in Support of Preliminary Injunction, *filed*
25 *herewith*, ¶¶ 2-6.

26 Exhibit 1 to Defendants’ Notice (Dkt. 31-1) at 2:7-8 references this correspondence,
27 implying that the questions and concerns raised by Plaintiffs have been adequately
28 addressed. Defendants’ September 16 letter does not, in fact, resolve the fundamental

1 constitutional defects of the EO and underscores the critical importance of the preliminary
 2 injunction to protect the rights of Plaintiffs and other WeChat users in the United States.

3 **I. DEFENDANTS’ “REPRESENTATIONS AND ASSURANCES” ARE**
 4 **INADEQUATE TO CURE THE EO; THE PRELIMINARY INJUNCTION**
 5 **SHOULD BE GRANTED**

6 **A. The EO Will Still Become Effective on Sunday, September 20**

7 Defendants have not delayed the effective date of the EO’s prohibitions despite the
 8 fact that the Secretary “continues to review a range of transactions, including those that
 9 could directly or indirectly impact use of the WeChat app.”¹ Notice, Dkt. 31 at ECF 2:1-2.
 10 Defendants thus continue to refuse to address one of the many fundamental flaws in the
 11 EO: it violates the Fifth Amendment Due Process Clause due to its failure to provide
 12 notice, its vagueness, and its overbreadth. The EO may be enforced against Plaintiffs in
 13 just four days even though a reasonable person still cannot understand what the EO means
 14 or what conduct it will prohibit. Defendants’ September 16 letter confirms Plaintiffs’
 15 understanding of the EO—it will go into effect on September 20 unless this Court enjoins
 16 it. *See United States v. Stevens*, 559 U.S. 460, 480 (2010) (“...the First Amendment
 17 protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We
 18 would not uphold an unconstitutional statute merely because the Government promised to
 19 use it responsibly...This prosecution is itself evidence of the danger in putting faith in
 20 government representations of prosecutorial restraint. When this legislation was enacted,
 21 the Executive Branch announced that it would interpret § 48 as covering only depictions
 22 ‘of wanton cruelty to animals designed to appeal to a prurient interest in sex.’ See
 23 Statement by President William J. Clinton upon Signing H. R. 1887, 34 Weekly Comp.
 24 Pres. Doc. 2557 (Dec. 9, 1999). No one suggests that the videos in this case fit that
 25 description. The Government’s assurance that it will apply §48 far more restrictively than
 26 its language provides is pertinent only as an implicit acknowledgment of the potential
 27 constitutional problems with a more natural reading.”).

28 ¹ This is despite the fact the IEEPA explicitly prohibits the President from “directly or
 indirectly” curtailing “personal communications.” *See* Mot. (Dkt. 17) at 32-33.

[3615616.1]

1 **B. The “Representations and Assurances” Provide No Clarity About What**
2 **the Secretary Will or Won’t Do on September 20**

3 Defendants have still provided no information whatsoever about what specific
4 “transactions” will be prohibited on September 20. Thus, the Secretary has not taken off
5 the table his ability to ban the *use* of WeChat by anyone, including Plaintiffs and all other
6 WeChat users in the United States. This could be done, for example, through a definition
7 of transaction and an enforcement order directed at Tencent itself, or entities that contract
8 with Tencent to provide products or services that allow WeChat to function in the United
9 States, like Apple or Google, who make available the WeChat app in their online stores for
10 use on their phones, and provide regular updates to the WeChat app through automatic
11 downloads to app users.

12 The first sentence of the “representations and assurances” paragraph (Dkt. 31 at
13 ECF 2:1) confuses rather than clarifies: “At present, activity involving the WeChat app is
14 not prohibited.” But on Sunday, September 20, there apparently *will* be activity involving
15 the WeChat app that is prohibited, the Secretary just has not decided what the activity may
16 be and sees no reason to inform Plaintiffs, the public, or this Court in advance of the
17 effective date.

18 The second sentence (*id.* at ECF 2:1-4) confirms that the Secretary reserves the
19 right to define transactions and to initiate an enforcement action on September 20, “that
20 could directly or indirectly impact the use of the WeChat app.” This expressly leaves open
21 the possibility of actions that could ban or limit *all* of the constitutionally-protected uses of
22 WeChat even if the “Secretary does not intend to take actions that would target persons or
23 groups whose only connection with WeChat is their use or downloading of the app to
24 convey personal or business information between users...or impose criminal or civil
25 liability on such users.” This is confirmed by the last sentence (*id.* at ECF 2:4-6): “the use
26 of the app for such communications could be directly or indirectly impaired through
27 measures targeted at other transactions, use and downloading of the app for this limited
28 purpose” will not be prohibited.

[3615616.1]

1 **C. There Are Numerous Other Activities and Uses of WeChat That May**
 2 **Still Be Prohibited and Subject to Criminal and Civil Sanctions That**
 3 **Are Not Addressed by Defendants’ “Representations and Assurances”**

4 Defendants have provided a very narrow and limited statement that is anything but
 5 a safe harbor that would provide reasonable notice to WeChat users of what conduct will
 6 be prohibited by the EO on Sunday, September 20: “the Secretary does not intend to take
 7 actions that would target persons or groups whose only connection with WeChat is their
 8 use or downloading of the app to convey personal or business information between users.”
 9 *Id.* at ECF 2:2-4. Plaintiffs’ evidence submitted in support of this motion illustrates uses
 10 of the app that are not addressed by this carefully couched statement. For example,
 11 WeChat has a payments function that is used to buy and sell goods and to transfer funds to
 12 other users. *See, e.g.*, Sun Decl. (Dkt. 17-11) ¶¶ 10; Zhang Decl. (Dkt. 17-6) ¶ 10. That
 13 may be prohibited. WeChat users also use the app to store and manage data and
 14 information about their WeChat contacts, customers, employees and patients, and
 15 generally to run their businesses. *See, e.g.*, Duan Decl. (Dkt. 17-4) ¶¶ 14, 16; Peng Decl.
 16 (Dkt. 17-5) ¶¶ 10-11; Coulter Decl. (Dkt. 17-3) ¶¶ 11-12. That may be prohibited.
 17 WeChat users also purchase services from WeChat or Tencent, such as subscriptions and
 18 advertisements, and receive payments from or through WeChat/Tencent for products and
 19 services that they sell through the app. *See, e.g.*, Sun Decl. (Dkt. 17-11) ¶¶ 19-23; Duan
 20 Decl. (Dkt. 17-4) ¶¶ 18-20. These all may be prohibited.

21 In addition, anyone who does anything on WeChat other than “the use and
 22 download of the app to convey personal or business information to another user” may lose
 23 the benefit of even this narrow assurance because they no longer have that as their “only
 24 connection with WeChat,” whatever that means. *See* Notice, Dkt. 31 at ECF 2:2-4.

25 **D. Defendants’ New Position Further Undermines the “National Security”**
 26 **Justification for the WeChat Ban**

27 Of course, Defendants’ newly articulated indifference to individual WeChat users
 28 who “convey personal or business information” with other users, flies in the face of their
 entire rationale for banning WeChat in the first place—the purported national security

1 implications of the public’s use of WeChat. Having first failed to articulate any actual
2 national security concern, the administration’s latest “assurances” that users can keep using
3 WeChat, and exchange their personal and business information, only further illustrates the
4 hollowness and pre-textual nature of Defendants’ “national security” rationales.

5 **II. THE RECENT TIKTOK DECISION IS NOT RELEVANT**

6 Defendants Notice of Recent Decision (Dkt. 32) concerns a lawsuit brought by an
7 individual employee of TikTok challenging the President’s August 6, 2020 executive order
8 concerning TikTok. Most importantly, that employees’ lawsuit does not present a First
9 Amendment claim. *See* Dkt. 32 at 3, n. 1. In the TikTok matter, the Government’s
10 assurance cured the specific concern raised by the plaintiff employee—that he would be
11 prosecuted for receiving a paycheck. *See* Dkt. 32 at 2. The above inadequacies make clear
12 that the Government’s assurances here do not resolve Plaintiffs’ injuries. Finally, many of
13 the Administrations’ concerns about TikTok have are presently being addressed through
14 the proposed spin-off of TikTok by ByteDance (TikTok’s parent company) and proposed
15 major investment/purchase in the new entity by U.S.-based Oracle.

16 **CONCLUSION**

17 For all of these reasons, Plaintiffs request that this Court enter a preliminary
18 injunction enjoining the EO.

19
20 DATED: September 16, 2020

Respectfully submitted,

21 ROSEN BIEN GALVAN & GRUNFELD LLP

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

23

Michael W. Bien

24 Attorneys for Plaintiffs

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

**DECLARATION OF MICHAEL W. BIEN
IN SUPPORT OF PLAINTIFFS’
RESPONSE TO DEFENDANTS’ NOTICE
REGARDING IMPLEMENTATION OF
EXECUTIVE ORDER 13943**

Judge: Hon. Laurel Beeler
Date: September 17, 2020
Time: 9:30 a.m.
Crtrm.: Remote

Trial Date: None Set

1 I, Michael W. Bien, declare:

2 1. I am an attorney duly admitted to practice before this Court. I am a partner
3 in the law firm of Rosen Bien Galvan & Grunfeld LLP, counsel of record for Plaintiffs. I
4 have personal knowledge of the facts set forth herein, and if called as a witness, I could
5 competently so testify. I make this Declaration in support of Plaintiffs' Response to
6 Defendants' Notice Regarding Implementation of Executive Order 13943 (Dkt. No. 31,
7 filed September 16, 2020).

8 2. Plaintiffs attempted to resolve this dispute by agreement beginning with a
9 meet-and-confer letter dated August 24, 2020, served along with the Summons and
10 Complaint.

11 3. A telephone call between the parties was held on August 25, 2020, where
12 settlement was discussed.

13 4. Defendants sent their first written response to Plaintiffs on September 10,
14 2020, more than a week after Plaintiffs' filed their Motion for Preliminary Injunction and
15 more than two weeks after the August 25 telephone call between the parties.

16 5. Within hours of receiving Defendants' letter on September 10, 2020,
17 Plaintiffs responded in writing raising important questions and concerns and requesting a
18 meeting. The following day, on September 11, Defendants declined Plaintiffs' request for
19 a prompt meeting and no further communications took place.

20 6. On September 16, 2020, six days after Plaintiffs raised their concerns with
21 Defendants and requested a meeting, Defendants provided their first substantive response.
22 This response made only one minor, plainly insufficient change in response to Plaintiffs'
23 concerns.

24 I declare under penalty of perjury under the laws of the United States of America
25 that the foregoing is true and correct, and that this declaration is executed at San Francisco,
26 California this 16th day of September, 2020.

27 /s/ Michael W. Bien
28 Michael W. Bien