No. 20-16908

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U.S. WECHAT USERS ALLIANCE, CHIHUO INC., BRENT COULTER, FANGYI DUAN, JINNENG BAO, ELAINE PENG, XIAO ZHENG,

PLAINTIFFS–APPELLEES,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, WILBUR ROSS, in his official capacity as Secretary of Commerce,

DEFENDANTS–APPELLANTS.

On Appeal from the United States District Court
for the Northern District of California, San Francisco
3:20-cv-05910-LB

Laurel Beeler, Magistrate Judge

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA IN SUPPORT OF PLAINTIFFS–APPELLEES U.S. WECHAT USERS ALLIANCE, ET AL., AND AFFIRMANCE

Avram Frey
Ashley Gorski
Patrick Toomey
Vera Eidelman
Hina Shamsi
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004

Phone: (212) 549-2500
Fax: (212) 549-2654
nsp_af@aclu.org

Jennifer Stisa Granick
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
Tel.: (415) 343-0758
jgranick@aclu.org

Christopher J. Conley (SBN 290747)
Jacob A. Snow (SBN 270988)
ACLU FOUNDATION OF
NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111
Tel.: (415) 621-2493
cconley@aclunc.org
jsnow@aclunc.org

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amici curiae American Civil Liberties Union and American Civil Liberties Union of Northern California state that they do not have a parent corporation and that no publicly held corporation owns 10 percent or more of their stock.

Dated: December 4, 2020

/s/ Avram Frey
Avram Frey

Counsel for Amici Curiae

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STATEMENT OF INTEREST[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan, non-profit organization with approximately two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Northern California is a state affiliate of the national ACLU. The ACLU has appeared before federal courts in numerous cases in which the government's invocation of national security implicates First Amendment rights, including as counsel in *In re Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review*, No. FISCR 18-01, 2018 WL 2709456 (FISCR Mar. 16, 2018), and *Wikimedia Foundation v. NSA*, 857 F.3d 193 (4th Cir. 2017), and as amicus in *Twitter, Inc. v. Barr*, No. 20-16174 (9th Cir.) (appeal pending).

[1] Pursuant to Federal Rule of Appellate Procedure Rule 29(c), amici certify that no person or entity, other than amici curiae, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. The parties have consented to the filing of this brief.

INTRODUCTION

The government's attempt to ban WeChat is unprecedented. WeChat is a unique mobile app that approximately 19 million Americans, predominantly of Chinese heritage, use daily to communicate with family members, send messages to colleagues, and engage with friends. Yet President Donald J. Trump issued Executive Order 13943, declaring WeChat a threat to national security, and the Secretary of Commerce then issued an "Identification of Prohibited Transactions," which barred downloads of WeChat software and prohibited many of the operations necessary for the app to function.[2]

Although the government claims that the WeChat EO does not implicate the First Amendment rights of WeChat users at all, it plainly does. The government's actions deliberately single out a communications platform, imposing a set of prohibitions that will make it effectively impossible for WeChat users to speak and associate on this platform. Not only does the WeChat EO require First Amendment review, *see Minneapolis Star Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 591-92 (1983), it compels an especially exacting form of scrutiny.

Amici's brief sets out the First Amendment standards that apply to the government's effort to ban an entire medium of expression like WeChat.

[2] This brief refers to the executive order and accompanying prohibitions collectively as the "WeChat EO."

First, the government's actions constitute a prior restraint on WeChat users' speech, an especially disfavored means of restricting First Amendment rights. This is because the WeChat EO will shut down the app, blocking millions of users in the United States from engaging in protected expression "in advance of the time that [their] communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (cleaned up). As a result, this Court must apply an "extraordinarily exacting" form of strict scrutiny. *Columbia Broad. Sys., Inc. v. U.S. Dist. Ct.* ("*CBS*"), 729 F.2d 1174, 1178 (9th Cir. 1984); *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 102 (1979).

Second, even if the WeChat EO did not constitute a prior restraint, it would still have to satisfy a strict narrow tailoring requirement because it is, in effect, a total ban on a unique and important means of communication. WeChat is an irreplaceable platform and community for its users—especially members of the Chinese diaspora—and thus the government's actions "foreclose an entire medium of expression." *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994). In these circumstances, courts apply an exacting standard: a total ban fails unless it "curtails no more speech than is necessary to accomplish its purpose." *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984).

Finally, the degree of judicial scrutiny that applies to the WeChat EO is not diminished by the government's national security claims. As both the Supreme Court

and this Court have made clear, the government's burden to justify an infringement on First Amendment rights is the same in the national security context as any other. *See, e.g.*, *N.Y. Times Co. v. United States* ("*Pentagon Papers*"), 403 U.S. 713, 729-730 (1971). In fact, the judiciary has an especially critical role to play in ensuring that the government meets its burden when national security is invoked.

Ultimately, whether the WeChat EO is classified as a prior restraint or a total ban, the government cannot meet its burden. Indeed, as Plaintiffs explain, the government cannot satisfy even the lesser standard of intermediate scrutiny applicable to time, place, or manner restrictions—not least because the WeChat EO bans millions of Americans from using an irreplaceable app, leaving them without reasonable alternatives. *See* Pls. Br. 41-46. Of course, Plaintiffs are also correct that the WeChat EO is not merely a time, place, or manner restriction. *See id.* at 31-41.

Amici urge the Court to examine the WeChat EO for what it is: a sweeping limitation on free expression that requires exacting First Amendment scrutiny—and is unconstitutional. For these reasons, the Court should affirm the district court's decision.

ARGUMENT

I. The WeChat EO burdens the First Amendment rights of WeChat users.

The government's actions unquestionably burden the rights of WeChat users and require First Amendment scrutiny. Though the government argues that it has

"merely applie[d] general national-security laws and regulations to prohibit a variety of commercial transactions" that do not "implicate[] the First Amendment," Gov't Br. 29, the government is mistaken.

In *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983), the Supreme Court drew a clear line between "generally applicable economic regulations" that do not trigger First Amendment scrutiny, and "facially discriminatory" regulations that do trigger that scrutiny by "singling out" a particular means of expression. *Id.* at 581, 585, 591-92 (invalidating special tax directed at newspaper publishers); *see also Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994) (where a statute imposes "special burdens" on expressive industries, "First Amendment scrutiny is demanded"). This Court has elaborated that "[a] court may consider the inevitable effect of a statute on its face, as well as a statute's stated purpose" to determine whether it will have "the inevitable effect of singling out those engaged in expressive activity." *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 685 (9th Cir. 2019) (cleaned up).

Here, both the inevitable effect and admitted purpose of the government's actions is to shut down WeChat as an expressive medium. The WeChat EO singles out WeChat, prohibiting downloads and upgrades of its software and barring commercial transactions like internet hosting and content delivery that are essential to its operation. *See* ER 224-32, 262-64; Pls. Br. 8, 21-22. The government itself

concedes that "the purpose of the prohibitions is to degrade, impair, and . . . prohibit [] WeChat services[.]" ER 404. It is undeniable that WeChat is an expressive forum: 19 million Americans use it daily for text messaging, phone and video calls, and social-media services. ER 70. Indeed, as the primary method of communication for members of the Chinese diaspora and also others doing business in China, the app is "irreplaceable." ER 70-71; *see City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994) ("regulation of a medium [of expression] inevitably affects communication itself").

Yet the government argues that because the WeChat EO merely regulates "business-to-business" transactions, the First Amendment is irrelevant to this Court's analysis. Gov't Br. 30-31 (citing *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), and *Virginia v. Hicks*, 539 U.S. 113 (2003)). The government is wrong. The cases on which it relies, *Cloud Books* and *Hicks*, involved generally applicable regulations that did *not* target people engaged in expression—unlike the WeChat EO. *See Cloud Books*, 478 U.S. at 707 ("[T]he First Amendment is not implicated by the enforcement of a public health regulation of general application[.]"); *Hicks*, 539 U.S. at 123 (holding that a "rule subject[ing] to arrest those who reenter after trespassing" does not trigger First Amendment scrutiny). In fact, *Cloud Books* reinforced that the First Amendment applies "where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity, as in *Minneapolis Star*." 478 U.S. at 706-07.

The inevitable, intended effect of the WeChat EO is to "singl[e] out those engaged in expressive activity." The government cannot avoid First Amendment scrutiny simply by targeting WeChat through a set of "business-to-business" prohibitions. Thus, for example, this Court applied First Amendment scrutiny to a zoning ordinance banning tattoo parlors (a commercial business), though the law said nothing about banning tattooing (the expressive activity), because the regulation had the inevitable effect of burdening protected expression. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062-63, 1062 n.5 (9th Cir. 2010) ("[T]he fact that the City's ban relates to tattooing *businesses* rather than the tattooing process itself does not affect whether the activity regulated is protected by the First Amendment."). Likewise, in *Backpage.com, LLC v. Dart*, the Seventh Circuit applied First Amendment scrutiny to a sheriff's threat against credit card companies doing business with an online forum, because cutting off the companies on which the forum relied was analogous to "killing a person by cutting off his oxygen supply." 807 F.3d 229, 231 (7th Cir. 2015). For the same reasons, the government's actions here must satisfy First Amendment requirements.

II. The WeChat EO is a prior restraint subject to the most exacting scrutiny.

The government's actions impose a prior restraint on WeChat users. By prohibiting services that are essential for users to speak and associate on WeChat—ultimately shutting down the platform—the WeChat EO bars user expression before

it even occurs. Because prior restraints are "the most serious and the least tolerable infringement on First Amendment rights," *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), this Court must subject the government's actions to "the most exacting scrutiny." *Daily Mail Pub.*, 443 U.S. at 102.

A. The WeChat EO is a prior restraint on WeChat users.

"Prior restraints" are "orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (cleaned up). The "historical paradigm" of a prior restraint was the English system of licensing all presses and printers, which forbade printing without government permission. Stephen R. Barnett, *The Puzzle of Prior Restraint*, 29 Stan. L. Rev. 539, 544 (1977). But the Supreme Court has since recognized many kinds of prior restraints. *See*, *e.g.*, *Bantam Books*, *Inc. v. Sullivan*, 372 U.S. 58 (1963) (holding that an advisory board reviewing suitability of books for minors is a prior restraint); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (holding that a permanent injunction against publication of newspaper determined to be a "public nuisance" is a prior restraint).

In *Nebraska Press Association*, the Supreme Court highlighted the defining features of prior restraints by contrasting them with subsequent punishments. The Court explained: "[i]f it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." 427 U.S.

at 559. "Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 n.13 (1980). Thus, there are two elements common to prior restraints: they bar expression *before* it is uttered; and rather than merely chilling speech through risk of sanction, they prevent speech altogether. *See Cuviello v. City of Vallejo*, 944 F.3d 816, 831-32 (9th Cir. 2019) ("[A] prior restraint stifles speech before it can take place.").

The government's actions constitute a prior restraint on WeChat users because the WeChat EO will shut down the platform entirely, preventing users from speaking before they post or read a word. *Near*, 283 U.S. 697, is illustrative. In *Near*, a state court had permanently enjoined the publication of a newspaper on the grounds that it was a public nuisance. The Supreme Court vacated the order, holding that, as a prior restraint, it was "the essence of censorship." *Id.* at 713. Here, the prior restraint is even more sweeping than in *Near*, as it prohibits not only the publication of one news source, but a wide range of digital expression and communication, including social media. ER 70. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997) (digital mediums like WeChat allow "any person . . . [to] become a town crier with a voice that resonates farther than it could from any soapbox"). Indeed, the government concedes that the WeChat EO will render WeChat "fully obsolete." ER 400, 404.

The government protests that because it has not *directly* regulated WeChat users, the WeChat EO cannot be called a prior restraint. Gov't Br. 35. But the Supreme Court has recognized that indirect restrictions on expression can be prior restraints, instructing courts to "look through forms to the substance." *Bantam Books*, 372 U.S. at 67. In *Bantam Books*, the Court held that an administrative board that reviewed books for obscene material was a prior restraint on the speech of publishers even though it suppressed their speech only indirectly. First, and most importantly, the scheme constituted a prior restraint on book *publishers* despite the fact that the board targeted an intermediary—book *distributors*—in its effort to prevent the dissemination of particular books. *Id.* at 64 n.6. Second, the board did not formally "regulate or suppress" the distributors at all, but merely "exhort[ed] booksellers and advise[d] them of their legal rights." *Id.* at 66. Despite this doubly indirect approach, the Court struck down the system as a prior restraint, noting the "obviously intended result" of curtailing circulation. *Id.* at 64 n.6; *see also Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 688 (1968) (holding that prior restraints may be effected through regulations of expression other than "direct suppression"). In other words, when courts analyze whether the government has imposed a prior restraint, what matters is the *effect* of the government's actions in barring "communications . . . in advance of the time that such communications are to occur,"

not the precise method the government uses to achieve this end. *Alexander*, 509 U.S. at 550.

Indeed, the government's far-reaching actions here embody the particular dangers that the prior restraint doctrine was designed to prevent. When the government suppresses speech in advance, it invariably sweeps too broadly, because "[i]t is always difficult to know in advance what an individual will say." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975); *see also* Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 L. & Contemp. Probs. 648, 656 (1955) ("A system of prior restraint normally brings within the complex of government machinery a far greater amount of communication than a system of subsequent punishment."). The danger to liberty is particularly acute where the prior restraint is issued by the executive branch, as "[a]n administrative board . . . may well be less responsive than a court, an independent branch of government, to constitutionally protected interests in free expression." *Se. Promotions*, 420 U.S. at 560-61. Moreover, administrative restraints can be imposed based on the "whims or personal opinions" of administrators, facilitating discrimination against disfavored speakers, views, or mediums of expression. *See*, *e.g.*, *Niemotko v. Maryland*, 340 U.S. 268, 272-73 (1951) (administrator bias led to suppression rooted in "dislike for or disagreement with the [Jehovah's] Witnesses or their views"); *see Cox v. Louisiana*,

379 U.S. 536, 557 (1965) (noting "the obvious danger" of discrimination inherent in administrative prior restraints).

The WeChat EO reflects each of these dangers. It blocks far more speech than necessary to serve any legitimate purpose, *see* Pls. Br. 41-46 (detailing significant overbreadth of the government's actions), represents a claim of tremendous discretionary authority by executive branch officials, ECF 17 at 31-34 (arguing that the WeChat EO is *ultra vires*), and plainly raises the issue of discriminatory bias, *see id.* at 13-14, 20-21 (evidencing that perceived political benefit of exploiting anti-Chinese sentiment motivated WeChat EO). Courts' special distrust of prior restraints is particularly apt here.

The government makes two arguments against classifying the WeChat EO as a prior restraint, but both are unavailing. First, the government asserts that the WeChat EO does not restrain users because it does not bar them from expressing themselves via other mediums. *See* Gov't Br. 21, 35. But that is irrelevant to the prior restraint analysis. The government's actions "need not effect total suppression in order to create a prior restraint." *Se. Promotions*, 420 U.S. at 556 (denial of a permit to stage a musical production at municipal theater constituted a prior restraint even though production might have been staged elsewhere).

Second, the government argues that the WeChat EO is "content-neutral" and thus "outside of the prior-restraint framework." Gov't Br. 35 (citing *Thomas v.*

Chicago Park District, 534 U.S. 316 (2002)). But the government is wrong on two counts. As Plaintiffs explain, the WeChat EO discriminates on the basis of content. *See* Pls. Br. 37-41. Moreover, even if the WeChat EO were content-neutral, the Supreme Court has never held that content discrimination is a required element of a prior restraint—and for good reason, as this case shows. The government's actions here are even more sweeping than those in *Near* or *N.Y. Times Co. v. United States* ("*Pentagon Papers*"), 403 U.S. 713 (1971) (holding injunction against publication of the Pentagon Papers an unconstitutional prior restraint), as it has not merely forbidden particular communications on WeChat based on their content, but banned the entire platform. It is as though, in *Near*, the state court had enjoined *all* local newspapers from future publication, or in *Pentagon Papers*, the lower court had shut down the *New York Times* entirely. In other words, the WeChat EO suppresses *more* expression than in a typical prior restraint case because it takes the unprecedented action of foreclosing an entire medium of expression indiscriminately.

In sum, because the government's actions will effectively shut down WeChat, barring millions of Americans from using the medium for numerous kinds of expression, the WeChat EO constitutes a prior restraint.

B. Prior restraints are subject to extraordinarily exacting scrutiny.

Because the WeChat EO constitutes a prior restraint, this Court must subject it to "the most exacting scrutiny." *Daily Mail Pub.*, 443 U.S. at 102; *see also CBS*,

729 F.2d at 1178. Indeed, the purpose of the prior restraint doctrine is to apply "a heavy presumption" of constitutional invalidity to this especially harmful category of restrictions. *Bantam Books*, 372 U.S. at 63. Accordingly, both prongs of traditional "strict scrutiny"—the requirements that the challenged government action advance a compelling interest, and that it be narrowly tailored to achieve that interest—are heightened.[3]

First, to pass constitutional muster, a prior restraint must do more than merely further a compelling interest. It must instead be necessary to further an urgent governmental interest of the highest magnitude. *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 845 (1978). This standard requires the government to show that the harm it seeks to prevent is not only extremely serious but "direct, immediate, and irreparable." *Pentagon Papers*, 403 U.S. at 730 (Stewart, J., concurring); *see id.* at 726-27 (Brennan, J., concurring). The government must also show that the harm is not simply possible, or even probable, but rather that its "degree of imminence [is]

[3] In some prior restraint cases—including those concerning permitting or licensing schemes—the judicial inquiry focuses (in part or in sum) on procedural protections, namely that the restraint is of limited duration, subject to prompt judicial review, and places the burden on the government to justify the restraint. *See Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965). Because the government has here shut down an expressive platform outright, rather than creating an administrative system to screen out particular expressions, the procedural requirements of *Freedman* and its progeny are inapposite. Instead, this case is similar to *Near*, *Pentagon Papers*, and others, in which a particular publication or medium was flatly barred, requiring especially exacting, substantive review.

extremely high" as demonstrated by a "solidity of evidence." *Landmark Commc'ns*, 435 U.S. at 845; *accord Craig v. Harney*, 331 U.S. 367, 376 (1947) ("The danger must not be remote or even probable; it must immediately imperil."); *Levine v. U.S. Dist. Ct.*, 764 F.2d 590, 595 (9th Cir. 1985) (government must demonstrate "a clear and present danger or a serious and imminent threat").

Second, when analyzing prior restraints, the Supreme Court has imposed an especially demanding form of the narrow-tailoring requirement, explaining that prior restraints must be "couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order." *Carroll v. President & Com'rs of Princess Anne*, 393 U.S. 175, 183 (1968). The government must therefore show both that the prior restraint will serve its purpose, and that it is the only way to do so. *Neb. Press*, 427 U.S. at 562, 565, 569-70; *see also Rosen v. Port of Portland*, 641 F.2d 1243, 1250 (9th Cir. 1981) ("Any 'prior restraint,' therefore, must be held unconstitutional, unless no other choice exists."). Thus, the government "carr[ies] a heavy burden of showing justification for the imposition of [] a [prior] restraint." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

As a result, the Court should apply the most stringent constitutional scrutiny to the government's prior restraint of WeChat users. For the reasons discussed by

Plaintiffs, the government cannot meet its burden under this standard, *see* Pls. Br. 41-46, and the Court should affirm the district court's order.

III. The WeChat EO is a total ban on speech and subject to a heightened tailoring requirement.

Even if this Court does not classify the WeChat EO as a prior restraint, exacting scrutiny is still required under the Supreme Court's precedents because the government has imposed a "total ban." WeChat is a unique and important medium of expression, and because the WeChat EO will shut down the platform entirely, the Court must subject the government's actions to an especially stringent tailoring requirement.

In *City of Ladue*, which concerned an ordinance prohibiting yard signs, the Supreme Court recognized a category of restraints on speech that cause "particular concern" because they "foreclose an entire medium of expression"—and so, like prior restraints, "can suppress too much speech."[4] 512 U.S. at 55. These restrictions, often called "total ban[s]," *see*, *e.g.*, *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 762 (1988), consist of two elements: they completely "foreclose" speech,

[4] *City of Ladue* cited numerous prior decisions striking down total bans. *See* 512 U.S. at 55 (citing *Lovell v. City of Griffin,* 303 U.S. 444, 451-52 (1938); *Jamison v. Texas,* 318 U.S. 413, 416 (1943); *Martin v. City of Struthers,* 319 U.S. 141, 145-149 (1943); *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 164-65 (1939); and *Schad v. Mount Ephraim*, 452 U.S. 61, 75-76 (1981)).

and they do so with respect to "an entire medium of expression," *i.e.*, a "means of communication that is both unique and important." *City of Ladue*, 512 U.S. at 54.

The WeChat EO has both of these elements. As discussed above, the WeChat EO completely forecloses users' speech on the app.[5] And WeChat is a "unique and important" medium of expression. *Id*. It is free and highly popular, with 19 million daily users in the United States. ER 70; *see City of Ladue*, 512 U.S. at 57 (because "[r]esidential signs are [] unusually cheap[,] . . . for persons of modest means or limited mobility, a yard or window sign may have no practical substitute."); *Martin v. City of Struthers*, 319 U.S. 141, 145-46 (1943) ("The widespread use of this method of communication by many groups espousing various causes atests [sic] its major importance."). WeChat is uniquely important for Chinese Americans and individuals doing business in China: it provides content in Mandarin; it "integrates Chinese traditions" and culture into its offerings; and with over one billion users worldwide, it is host to an enormous community that could not readily be reached elsewhere. ER 70; *see City of Ladue*, 512 U.S. at 57 (discussing ease of use as factor in determining importance of medium of expression); *Schneider v. State (Town of*

[5] That the government's actions will shut down WeChat through indirect means is, again, inconsequential. *See Colacurcio v. City of Kent*, 163 F.3d 545, 557 (9th Cir. 1998) (law that "'effectively den[ies]' [an expressive] business 'a reasonable opportunity to open and operate'" thereby "foreclose[s] an entire medium of expression") (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986)).

Irvington), 308 U.S. 147, 164 (1939) (same). The sheer number of functions provided by WeChat also makes it uniquely valuable to its users. The app "allows its users to send messages, make video and audio calls, and send and receive money." ER 70. It also functions as a social-media platform and news source. *Id.* As the district court found, this litany of services makes WeChat the "primary source of communication" for many users. *Id.* (citation and quotation marks omitted).

In considering the uniqueness and importance of WeChat, the Supreme Court's analysis in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), is instructive. In *Packingham*, the Court addressed a prohibition on the use of social networking websites by people previously convicted of sex offenses. Calling "cyberspace" the "most important place[] . . . for the exchange of views," *id.* at 1735, and noting that social media in particular "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard," *id.* at 1737, the Court struck down the restriction as a "complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture," *id.* at 1738. The same is true for the multiple expressive services available on WeChat, which also offers "the most important place" for expression for countless users. Thus, the district court correctly found that "WeChat is irreplaceable for its users in the U.S., particularly in the Chinese-speaking and Chinese-American

community." ER 71. For the many Americans who rely on WeChat every day, the WeChat EO will completely close off this essential medium for expression.

Because it is a total ban, the WeChat EO receives more exacting judicial review than the intermediate scrutiny applicable to time, place, or manner restrictions. *See United States v. Grace,* 461 U.S. 171, 177 (1983).[6]

[6] As this Court has noted, "[t]he interplay between . . . total bans . . . and . . . 'time, place, or manner' [restrictions] . . . is not entirely clear." *Anderson*, 621 F.3d at 1064. Many cases suggest that total bans are a wholly distinct category of restraints. *See*, *e.g.*, *City of Ladue*, 512 U.S. at 56 (distinguishing "regulations that . . . foreclose an entire medium of expression" from those that "merely shift the time, place, or manner of its use"); *Lovell*, 303 U.S. at 451 ("The ordinance is comprehensive with respect to the method of distribution. . . . There is thus no restriction in its application with respect to time or place."). Others suggest that total bans are a subset of time, place, or manner restrictions that fails intermediate scrutiny by not "leav[ing] open ample alternative channels of communication." *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989); *see*, *e.g.*, *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736-37 (2017) (holding that, even assuming intermediate scrutiny applies to a ban on social media access, it is not satisfied because "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights"); *Schad*, 452 U.S. at 75-76 ("[T]he Borough totally excludes all live entertainment" and so fails to "leave open adequate alternative channels of communication"). Still others have simply struck down broad bans as too sweeping, without clarification. *See*, *e.g.*, *Bd. of Airport Com'rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987) (holding of "sweeping ban" on all First Amendment activity in airport, "[w]e think it obvious that . . . no conceivable governmental interest would justify such an absolute prohibition of speech"). Nonetheless, as this Court noted in *Anderson*, total bans "are almost *never* reasonable 'time, place, or manner' restrictions." 621 F.3d at 1064. That is, whether or not total bans are a distinct category of restraints, courts apply more exacting scrutiny, and invalidate them much more frequently, than in the case of ordinary time, place, or manner restrictions.

Specifically, while the tailoring requirement applicable to time, place, or manner restrictions does not require that they "be the least restrictive or least intrusive means" of achieving the government's objectives, *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989), a total ban must "curtail[] no more speech than is necessary to accomplish [the government's] purpose," *Vincent*, 466 U.S. at 810; *accord Frisby v. Schultz,* 487 U.S. 474, 485 (1988) ("A complete ban can be narrowly tailored" only "if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy") (citation omitted); *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 528 (1981) (Brennan, J., dissenting) (total ban is permissible only if "any more narrowly drawn restriction, *i.e.*, anything less than a total ban, would promote less well the achievement of [the government's] goal").

Because the WeChat EO is a total ban, this Court should require the government to establish that it has prohibited no more speech than necessary to accomplish its legitimate objectives. And because, as Plaintiffs show, *see* Pls. Br. 41-46, the government's actions are undeniably overbroad, the Court should affirm the decision below.

IV. Claims of national security do not lessen the government's burden.

The government argues that because its stated objective is to promote national security, this Court should defer to the executive branch's First Amendment analysis. *See* Gov't Br. 35-40; *id.* at 3, 22, 23, 38, 43 (criticizing the district court's

scrutiny as "second-guessing"). The government is wrong. Its invocation of national security does not dilute judicial review of constitutional claims generally, nor does it alter the Court's analysis of the WeChat EO as a prior restraint or total ban.

A. Judicial review of constitutional claims remains essential when the government invokes national security.

The mere incantation of "national security" does not alter judicial scrutiny of constitutional claims. *See Pentagon Papers*, 403 U.S. at 719 (Black, J., concurring) ("The word 'security' . . . should not be invoked to abrogate the fundamental law embodied in the First Amendment."). That is, "national-security concerns must not become a talisman used to ward off inconvenient claims—a label used to cover a multitude of sins." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017) (cleaned up); *see also Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) ("Simply saying 'military secret,' 'national security' or 'terrorist threat' . . . is insufficient to [carry the government's burden].").

To the contrary, in matters of national security as elsewhere, courts must fulfill their "time-honored and constitutionally mandated roles of reviewing and resolving claims" alleging violations of civil liberties. *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004). Thus, "[w]hatever power the United States Constitution envisions for the Executive . . . , it most assuredly envisions a role for all three branches when individual liberties are at stake." *Id.* at 536; *see also Whitney v. California,* 247 U.S. 357, 378-79 (1927) (Brandeis, J., concurring) (judicial review is essential

"[w]henever the fundamental rights of free speech and assembly are alleged to have been invaded").

Indeed, meaningful review of constitutional claims is *more* important where the government asserts a national security justification: "[g]iven the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent." *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985). Executive branch officials may "disregard constitutional rights in their zeal to protect the national security," *id.* at 523, particularly when they assert "pressing exigencies of crisis" that can create "the greatest temptation to dispense with fundamental constitutional guarantees[,]" *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165 (1963). As the Supreme Court has explained, "[i]t is during our most challenging and uncertain moments that our Nation's commitment to [constitutional liberties] is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." *Hamdi,* 542 U.S. at 532; *see also In re Wash. Post Co.*, 807 F.2d 383, 391-92 (4th Cir. 1986) ("History teaches us how easily the spectre of a threat to 'national security' may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts of the government's [rationale] . . . would impermissibly compromise the independence of the judiciary and open the door to possible abuse."); *see also* Martin Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*,

70 Va. L. Rev. 53, 86 (1984) (national security can "fluctuate with the contemporary political climate," making "the need for a forum with a long tradition of independence from the political branches [] overriding").

Courts serve our collective interest by defending this nation's values and ideals, "the most cherished of [which] . . . have found expression in the First Amendment." *United States v. Robel*, 389 U.S. 258, 264 (1967). "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile." *Id.*; *accord Boumediene v. Bush*, 553 U.S. 723, 797 (2008) ("Security subsists, too, in fidelity to freedom's first principles."). Thus, "[t]he Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial Governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged." *Pentagon Papers*, 403 U.S. at 719 (Black, J., concurring).

B. The First Amendment requires exacting scrutiny, not deference, here.

Whether the government's actions are classified as a prior restraint or a total ban, established precedent makes clear that the level of judicial scrutiny remains high, regardless of a national security context.

The Supreme Court's decision in *Pentagon Papers*, 403 U.S. 713, establishes the exacting burden the government must meet to justify a prior restraint. In

analyzing a prior restraint on publication of the Pentagon Papers during the Vietnam War, the Court applied the same "'heavy presumption against its constitutional validity,'" and held the government to the same "'heavy burden'" that applies in other contexts. *Id.* at 714 (quoting *Bantam Books*, 372 U.S. at 70; *Org. for a Better Austin*, 402 U.S. at 419). Similarly, this Court has recognized that "national security interests . . . are generally insufficient to overcome the First Amendment's 'heavy presumption' against the constitutionality of prior restraints." *Ground Zero Ctr. for Non-Violent Action v. Dep't of Navy*, 860 F.3d 1244, 1260 (9th Cir. 2017).

Likewise, the heightened tailoring requirement applicable to total bans—that the government "curtail[] no more speech than is necessary," *Vincent*, 466 U.S. at 810—also applies when the government invokes national security. As the Supreme Court has repeatedly held, even when national security concerns apply, "precision must be the touchstone of legislation […] affecting basic freedoms." *Aptheker v. Sec. of State*, 378 U.S. 500, 514 (1964) (citation omitted). For example, in *Robel*, the Court struck down a statute barring members of the Communist party from employment in a federal defense facility, despite the government's national security rationale, citing "the fatal defect of overbreadth because [the statute] . . . [sanctions] association which may not be proscribed consistently with First Amendment rights." 389 U.S. at 266. Similarly, in *De Jonge v. Oregon,* 299 U.S. 353 (1937), the Court struck down a statute criminalizing "syndicalism," *i.e.* advocacy to overthrow

government, because it was improperly tailored, holding: "the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed." *Id.* at 364-65.

An exacting application of the tailoring requirement is particularly important in this case because, as the Supreme Court has frequently noted, imprecise tailoring may signal that the government's proffered interest is, in fact, pretextual. *See Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 352-53 (2010) (under-inclusiveness of ban on corporate election expenditures was "all but an admission of the invalidity of the [government's stated] rationale"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992) (over-inclusiveness of bias-motivated crime law "cast[] considerable doubt on the government's protestations that the asserted justification is in fact an accurate description of the purpose and effect of the law[.]") (citation omitted) (cleaned up); *City of Ladue*, 512 U.S. at 52-53 ("[Under-inclusiveness of] otherwise legitimate regulation of a medium of speech . . . may diminish the credibility of the government's rationale for restricting speech in the first place."). Plaintiffs have credibly alleged that the government's proffered national security interest is ultimately a pretext for political motives, citing considerable record evidence. *See* ECF 17 at 13-14, 20-21.

The government relies heavily on *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) ("*HLP*") for the proposition that it is entitled to broad deference, but

that decision does not support the government's position. In *HLP*, the Court considered a First Amendment challenge to a statute criminalizing the provision of material support to two government-designated terrorist organizations, 18 U.S.C. § 2339B(a)(1). Before ultimately agreeing with the government, the Court reviewed significant evidence, 561 U.S. at 29-33, and made its own independent decision, *see id.* at 36 (finding "persuasive evidence" to support "the considered judgment of Congress and the Executive").

The government makes much of the Court's statement that it did not "rely exclusively on [its] own inferences drawn from the record evidence," but also applied a measure of deference to the executive branch's judgment. *Id.* at 33. But that deference was limited to a specific "empirical question" that Congress, too, had already considered in enacting specific legislation: "[w]hether foreign terrorist organizations meaningfully segregate support of their legitimate activities from support of terrorism." *Id.* at 29. By contrast, when it came to adjudication of the First Amendment question, the Court was careful to defend its independent role:

> Our precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role. We do not defer to the Government's reading of the First Amendment, even when such interests are at stake.

Id. at 34. In short, *HLP* supports the principle that the government must substantiate a national security justification with sufficient evidence to permit meaningful judicial review. Regardless of whether the government's actions in this case are

characterized as a prior restraint or a total ban, it cannot avoid exacting judicial scrutiny by invoking a national security justification. Because the government cannot meet its burden under the First Amendment, *see* Pls. Br. 41-46, the Court should affirm.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to apply exacting First Amendment scrutiny and affirm the decision of the district court.

Dated: December 4, 2020

/s/ Avram Frey
Avram Frey
Ashley Gorski
Patrick Toomey
Vera Eidelman
Hina Shamsi
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
Fax: (212) 549-2654
nsp_af@aclu.org

Jennifer Stisa Granick
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
Tel.: (415) 343-0758
jgranick@aclu.org

Christopher J. Conley (SBN 290747)
Jacob A. Snow (SBN 270988)

ACLU FOUNDATION OF
NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111
Tel.: (415) 621-2493
cconley@aclunc.org
jsnow@aclunc.org

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), I certify as follows:

1. This Brief of Amici Curiae in Support of Plaintiffs–Appellees U.S. WeChat Users Alliance, *et al.*, and Affirmance complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,499 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, the word processing system used to prepare the brief, in 14-point font in Times New Roman font.

Dated: December 4, 2020

/s/ Avram Frey
Avram Frey

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 4, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 4, 2020

/s/ Avram Frey
Avram Frey

Counsel for Amici Curiae