

Chinese Immigrant Legal Mobilization in the United States: The 2020 Executive Ban on WeChat and Civil Rights in a Digital Age

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On August 6, 2020, then U.S. President Donald Trump issued an executive order banning WeChat, the most popular social messaging app in China and the fifth most popular in the world. The President evoked national security as the justification for the ban. In the context of the COVID-19 pandemic and rising U.S.-China tensions, the public perceived the President's targeting of WeChat—particularly by a politician known for his reliance on social media—as a racialized and politically motivated attack.

This Article examines the successful legal mobilization predominantly initiated by five otherwise obscure immigrant and transnational Chinese lawyers in the United States to oppose the WeChat ban. Asian Americans are commonly regarded as model minorities who overcome racial obstacles through hard work and strong families, not through political protest. The Chinese immigrant and transnational lawyers who mobilized against the WeChat ban espoused diverse political beliefs. Yet they developed a sophisticated and coordinated multi-level strategy to claim the protection of their rights. Through oral histories and the analysis of media and legal documents, we examine this unprecedented legal mobilization effort through three sets of issues. First, the WeChat defenders did not have access to the resources of an established civil rights organization. Instead, they relied on the social networks that WeChat fostered in the digital public sphere. Second, this set of actors can be characterized as being both “weak” and “strong” in their access and knowledge of legal political culture, particularly as they experienced political and gendered attacks from within their own ethnic community. Third, the WeChat defenders challenged the model minority representation of Asian Americans by taking on a legal fight against the U.S. President. In doing so, they nevertheless

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affirmed American exceptionalism by validating the belief that justice is possible within the existing system of political liberalism. The unprecedented efforts of the WeChat defenders reveal how it is possible to defend and claim civil rights for Chinese people in the United States while combating presumptions of being both alien threats and docile subjects.

INTRODUCTION	52
I. LEGAL MOBILIZATION AND THE DIGITAL PUBLIC SPHERE	57
II. THE WEAK AND THE STRONG	63
III. CHINESE IMMIGRANT LEGAL MOBILIZATION AND THE MYTH OF RIGHTS	69
CONCLUSION.....	74

INTRODUCTION

On August 6, 2020, then U.S. President Donald Trump issued two executive orders banning two popular social networking applications connected to companies in the People’s Republic of China: TikTok and WeChat.¹ Both are considered highly competitive Chinese companies with global footprints. In 2021, TikTok, a video-sharing platform majority-owned by Chinese investors, boasted 1.9 billion monthly active users in over 150 countries.² Meanwhile, WeChat is the most popular social messaging app in China, with 1.29 billion monthly active users, and the fifth-most popular social networking app in the world.³ Former President Trump evoked national security as the justification for these bans, claiming that “the spread in the United States of mobile applications developed and owned by companies in the People’s Republic of China . . . continues to threaten the national security, foreign policy, and economy of the United States.”⁴ In the context of the COVID-19 pandemic, which Trump characterized as the “China virus,” and the use of TikTok to mobilize opposition to Trump in an election year,⁵ the public perceived these Presidential bans—particularly by a politician known for his reliance on social media platforms to promote his agenda—as racialized and politically motivated attacks against China, Chinese companies, and Chinese peoples. In response, a group of five then

1. See Exec. Order No. 13942, 85 Fed. Reg. 48637 (Aug. 6, 2020); see Exec. Order 13873, 84 Fed. Reg. 22689 (Aug. 6, 2020).

2. Roger Chen & Rui Ma, *How ByteDance Became the World’s Most Valuable Startup*, HARV. BUS. REV. (Feb. 24, 2022), <https://hbr.org/2022/02/how-bytedance-became-the-worlds-most-valuable-startup> [https://perma.cc/XNU3-MY87].

3. Iris Deng, *China’s All-Purpose WeChat App Lets Users Register Two Accounts with One Phone Number in Pilot Test*, S. CHINA MORNING POST (July 6, 2022), <https://www.scmp.com/tech/big-tech/article/3184348/chinas-all-purpose-wechat-app-lets-users-register-two-accounts-one> [https://perma.cc/VFZ2-9EMH].

4. Exec. Orders Nos. 13942 & 13873, *supra* note 1.

5. Shelly Banjo & Misyrlena Egkolfopoulou, *TikTok Teens Are ‘Going to War’ Against the Trump Campaign After Republicans Call to Ban the App*, TIME (July 9, 2020), <https://time.com/5865261/tiktok-trump-campaign-app/> [https://perma.cc/7L9S-NKW4].

little-known Chinese immigrant and transnational lawyers in the United States filed a complaint for declaratory and injunctive relief against Trump, stating that, “[T]he Executive Order was . . . issued in the midst of the 2020 election cycle, during a time when President Trump has made numerous anti-Chinese statements that have contributed to and incited racial animus against persons of Chinese descent—all outside of the national security context.”⁶

This Article, a collaboration between a historian and a socio-legal scholar, examines the legal mobilization to oppose the WeChat ban. Their collective efforts of filing a court case within fifteen days, raising funds to pay for the legal costs, and mobilizing public opinion about the racial and civil liberties implications of the executive order banning WeChat (hereinafter the Executive Order) resulted in legal injunctions that halted the implementation of the presidential order.⁷

This remarkable response sheds light on a group of legal-political actors that has received relatively little academic or public attention. Asian Americans are commonly regarded as model minorities who overcome racial obstacles through hard work and strong families, not through political protest or legal advocacy.⁸ Those of immigrant and refugee backgrounds, in particular, are perceived as even less likely to challenge the existing political order given the tenuousness of their status in U.S. society and the dominant ideology that expects gratitude from newcomers.⁹ In the last several years, Chinese immigrants who have been vocal in political efforts have tended to align with conservative political leaders and agendas, as seen through their visible opposition against affirmative action, support for police officer Peter Liang who killed African American Brooklyn resident Akai Gurley, and mobilization against low-income housing and homeless shelters to protect the property values in their neighborhoods.¹⁰ Ironically, many of the Chinese American right, who were staunch Trump supporters before the ban, have relied heavily on WeChat to mobilize and spread disinformation among Chinese communities in the United States.¹¹

6. Compl. for Prelim. Inj. at 3, ECF 1, U.S. WeChat Users All. v. Trump, 488 F. Supp. 3d 912 (N.D. Cal. 2020) (No. 3:20-cv-05910) [hereinafter Compl. for Prelim. Inj.].

7. U.S. WeChat Users All., 488 F. Supp. 3d at 930.

8. See generally ELLEN D. WU, *THE COLOR OF SUCCESS: ASIAN AMERICANS AND THE ORIGINS OF THE MODEL MINORITY* (2013) (the book provides a historical analysis of the origins of the model minority representation).

9. See YEN LE ESPIRITU, *BODY COUNTS: THE VIETNAM WAR AND MILITARIZED REFUGEES* 13 (2014).

10. JAMES S. LAI, *ASIAN AMERICAN CONNECTIVE ACTION IN THE AGE OF SOCIAL MEDIA* 4, 32, 56 (2022); Janelle Wong & Sono Shah, *Convergence Across Difference: Understanding the Political Ties that Bind with the 2016 National Asian American Survey*, 7 *RSF: THE RUSSELL SAGE FOUND. J. OF THE SOC. SCI.*, Apr. 2021, at 70, 73–75.

11. See LAI, *supra* note 10; Alex T. Tom, *Understanding the Chinese American Right: Who are These New Chinese American Conservatives and How Can We Engage Them Today?*, LAUSAN COLLECTIVE (Oct. 27, 2020), <https://lausancollective.com/2020/understanding-the-chinese-american-right/> [https://perma.cc/U9AT-GBE9].

The Chinese immigrant and transnational lawyers who opposed the WeChat ban espoused diverse political beliefs. In their interviews with the authors, the lawyers did not express uniformity in terms of party affiliations, political ideologies, or analyses of racial politics.¹² Yet they developed a sophisticated and coordinated multi-level strategy to claim the protection of their rights against the most powerful political leader in the United States. Through oral histories, personal observations, and the analysis of media and legal documents, we examine this legal mobilization effort through three sets of questions.

First, how were the WeChat defenders able to create a legal campaign without an organizational base? They did not have access to the resources of an established civil rights or civil liberties organization, like the National Association for the Advancement of Colored People (NAACP) or the American Civil Liberties Union (ACLU). Instead, they relied primarily on the social networks that WeChat fostered in the digital public sphere. The concept of the public sphere, originally defined by philosopher Jurgen Habermas, identifies a space in which individuals might come together to exchange ideas and develop opinions about their collective society and government.¹³ The contemporary popularity of social media now serves as the foundation of a *digital* public sphere, in which ideas might be articulated, circulated, and coalesced in the virtual realm.¹⁴ The significance of the digital public sphere in the WeChat case resembles what James S. Lai has characterized as Asian American “connective action,” the utilization of social media to activate civic participation.¹⁵ As he argues, social media activism is particularly useful for those who face obstacles, such as lack of U.S. citizenship and limited English language facility, to traditional pathways of political participation.¹⁶

Second, we analyze how this set of actors could be characterized as both “weak” and “strong” in their access to and knowledge of legal political culture. Various studies have asked whether the legal system benefits those who already possess socioeconomic-political capital, and if those who are marginalized within the existing power structure can obtain justice through the courts.¹⁷ As lawyers, the WeChat defenders possessed the knowledge and

12. See Video Conference Interview with Ying Cao, Managing Partner, Ying Cao Law LLC (July 27, 2021); Video Conference Interview with Angus Ni, Litigation Attorney, AFN Law PLLC (July 20, 2021); John Shengyang Wu, Partner, Alpha Law LLC (Aug. 17, 2021); Video Conference Interview with Gang Yuan, Principal, Yuan Law Group (Aug. 26, 2021); Video Conference Interview with Clay Zhu, Partner, DeHeng Law Offices (July 20, 2020) (translation summary provided by co-author).

13. JURGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 4–7 (1962).

14. See Christian Fuchs, *The Digital Commons and the Digital Public Sphere: How to Advance Digital Democracy Today*, 16 WESTMINSTER PAPERS IN COMMUN & CULTURE 9, 13 (2021).

15. LAI, *supra* note 10, at 3–5.

16. *Id.* at 2.

17. See, e.g., Sophie Jacquot & Tommaso Vitale, *Law as Weapon of the Weak? A comparative analysis of legal mobilization by Roma and women’s groups at the European level*, 21 J. EUR. PUB. POL’Y 587 (2014); Mark Kessler, *Legal Mobilization for Social Reform: Power and the Politics of Agenda*

access to resources and social networks to mount a court challenge and develop the fundraising infrastructure to support the case. At the same time, they did not possess the specialized knowledge and skills needed for this particular case (i.e., a constitutional challenge against a presidential order¹⁸). In addition, they faced strong political and gendered opposition, particularly from fellow members of the Chinese immigrant community.

Finally, we examine how the WeChat defenders challenged the model minority representation of Asian Americans by taking on a fight against the U.S. President; but the focus on the civil rights of just one racial or ethnic group did not necessarily translate to a broader vision of social justice. The results of the court case affirmed the belief that justice is possible within the existing system of political liberalism. This narrative supports exceptionalism, a view of the United States as a unique nation founded upon meritocracy and democracy. This representation, though, has been increasingly challenged by scholars and activists who regard the existing system of (in)justice as foundational to sustaining inequalities in American society.¹⁹ In other words, the WeChat case could have challenged the representation of Asian Americans as model minorities whose lack of overt resistance affirms the fundamental soundness of American society. Instead, while the case did demonstrate Asian American activist agency, it still strengthened the narrative of U.S. exceptionalism as a nation of law.

This case advanced the study of legal mobilization and racial protest for social justice by illuminating the efforts of an understudied group in U.S. society and legal culture. Asian Americans are the fastest-growing group in the United States,²⁰ yet their significant roles in shaping the legal and political culture of the country of their residence has rarely been recognized. The WeChat mobilization could yield insight into how people of Asian ancestry in the United States have been regarded as both forever foreign and yet the ultimate proof of how the system works for racialized and immigrant groups. The subjects of our study reveal how they navigate these projections of being both alien threats and docile subjects through defending and claiming civil rights. But before proceeding to the analysis, a brief chronology of the lawsuit is in order.

Setting, 24 L. & SOC'Y REV. 121 (1990); Ann Southworth, *Lawyers and the "Myth of Rights" in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469 (1999).

18. *U.S. WeChat Users All.*, 488 F. Supp. 3d at 916.

19. For examples of this stream of scholarship, see Martha T. McCluskey, *Constitutional Economic Justice: Structural Power for "We the People"*, 35 YALE L. & POL'Y REV. 271 (2016); K. Sabeel Rahman, *From Economic Inequality to Economic Freedom: Constitutional Political Economy in the New Gilded Age*, 35 YALE L. & POL'Y REV. 321 (2016).

20. Abby Budiman & Neil G. Ruiz, *Asian Americans Are the Fastest-growing Racial or Ethnic Group in the U.S.*, PEW RSCH. CTR. (Apr. 9, 2021), <https://www.pewresearch.org/fact-tank/2021/04/09/asian-americans-are-the-fastest-growing-racial-or-ethnic-group-in-the-u-s/> [<https://perma.cc/VFZ2-9EMH>].

The Executive Order issued on August 6, 2020, banning “all transactions with WeChat in the U.S.” would take effect on September 20th, leaving millions of WeChat users and other stakeholders only forty-five days to mount an effective legal challenge.²¹ The next day, a Chinese immigrant lawyer in California circulated a “preliminary analysis of the WeChat ban” among a group of fellow Chinese lawyers practicing in the United States who had formed a casual community of professionals on WeChat.²² Five of the lawyers decided to take immediate action. They established the U.S. WeChat Users Alliance (hereinafter USWUA) on August 8th and issued a public call for donations to fund a legal challenge against the Executive Order.²³ In the following three weeks, they hired a seasoned civil rights litigator, identified five individuals and two entities to serve as plaintiffs and five expert witnesses, and drafted a complaint. During this period, they raised \$50,000, mostly from the other Chinese immigrant lawyers in the virtual WeChat community.²⁴ On August 21st, USWUA filed a complaint in the U.S. District Court for the Northern District of California challenging the Executive Order. They immediately filed a motion for preliminary injunction, claiming, among others, that the Order was without legal authority and “unconstitutionally vague and violated due process under the First and Fifth Amendments.”²⁵

On September 16th, the Department of Justice (DOJ) issued a notice assuring WeChat users that the Executive Order would not affect their personal use of the app.²⁶ The plaintiff lawyers, however, doubted the validity and credibility of the assurances and continued to prepare for the injunction while waiting for the Department of Commerce (DOC) to issue implementation rules.²⁷ Two days after the DOJ’s assurances, consistent with the lawyers’ expectations, the DOC issued implementation rules to take effect on September 20th that would result in a complete ban of the use of WeChat (personal or not) in the United States.

After two hearings on September 18th and 19th, the District Court granted USWUA’s motion for preliminary injunction and suspended the implementation of the Executive Order. The DOJ reacted by filing two separate motions to stay the preliminary injunction in both the District Court and the Ninth Circuit. The District Court denied the injunction on October

21. Exec. Orders Nos. 13942 & 13873, *supra* note 1.

22. Memorandum from Clay Zhu, Partner, DeHeng Law Offices, circulated to Chinese immigrant lawyers (Aug. 7, 2020) (on file with the authors).

23. U.S. WeChat Users Alliance, *An Open Letter to Call for Actions and Donations to Protect WeChat Users’ Rights in the U.S.* (Aug. 8, 2020), <https://uswua.org/home> [<https://perma.cc/4NEE-N62R>].

24. Interview with Ying Cao, *supra* note 12.

25. Notice of Mot. and Mot. for Prelim. Inj. at 16, ECF 17, U.S. WeChat Users All. v. Trump, 488 F. Supp. 3d 912, 912 (N.D. Cal. 2020) (No. 3:20-cv-05910).

26. Notice Regarding Implementation of Exec. Order 13943 at 2, Sept. 16, 2020, ECF 13-1, U.S. WeChat Users All. v. Trump, 488 F. Supp. 3d 912, 912 (N.D. Cal. 2020) (No. 3:20-cv-05910).

27. Comments made by the USWUA founders on the virtual WeChat lawyer community, Sept. 18, 2020 (on file with the authors).

23rd, and the Ninth Circuit denied on October 26th. The DOJ then filed a motion requesting the Ninth Circuit to overturn the lower court's preliminary injunction. The USWUA lawyers battled the Trump administration at every step. While the legal proceedings were ongoing, previously elected Vice President Joseph R. Biden won the presidential election. On June 9, 2021, President Biden revoked the WeChat ban. On August 9th, about a year after Trump issued the Executive Order, the DOJ notified the court of its withdrawal, marking an unprecedented and highly impactful legal victory of Chinese immigrants against a U.S. President who evoked his national security mandate.²⁸

How did these five obscure Chinese lawyers successfully defy a presidential order? What does this historical event reveal about the Chinese immigrant community in the United States, their strengths and vulnerabilities, and their oppression and resistance? What can we learn from this case about the future of Chinese Americans' legal and political rights as the community is caught in the crossfires of the U.S.-China rivalry? This Article attempts to answer these preliminary questions.

I. LEGAL MOBILIZATION AND THE DIGITAL PUBLIC SPHERE

Those who sought to ban WeChat and those who opposed the action held divergent views of the social media platform. While the White House labeled the app as a national security risk, those who used and defended WeChat regarded it as an essential social and commercial platform for their everyday lives. WeChat's wide use among Chinese mainlanders and diasporic Chinese simultaneously heightened the sense of endangerment for U.S. government officials and roused the suspicion among WeChat defenders that the ban was a racially and politically motivated attack. In the end, WeChat was both the target of Trump's ire and a prime mechanism by which its defenders organized their opposition to the Executive Order.

Launched in January 2011, WeChat has been characterized as a "super app" that "integrates the functionalities of iMessage, Facetime, Facebook, Twitter, Instagram, WhatsApp, and Skype."²⁹ WeChat offers private and group messaging, voice and video calling, article sharing or news circulation to groups, and commercial payment functions. The platform, offered by the Tencent company, has collaborated with Chinese state agencies to remain operational. Users have even practiced self-censorship to continue using WeChat.³⁰ The Executive Order cited the surveillance of WeChat content,

28. *Status Updates on the Case of USWUA v. Trump*, U.S. WECHAT USERS ALL., <https://uswua.org/civil-rights-litigation-1> [<https://perma.cc/DY9R-ZBCL>] (last visited Feb. 25, 2023).

29. Yan Su & Xizhu Xiao, *From WeChat to 'We Set': Exploring the Intermedia Agenda-setting Effects across WeChat Public Accounts, Party Newspaper and Metropolitan Newspapers in China*, 14 CHINESE J. COMM'N 278, 278 (2021).

30. Eric Harwit, *WeChat: Social and Political Development of China's Dominant Messaging App*, 10 CHINESE J. COMM'N 321, 321 (2017).

specifically the mining of social media data by the People's Republic of China, to justify banning the app. The Order proclaimed: "This data collection threatens to allow the Chinese Communist Party access to . . . personal and proprietary information" of both Americans and Chinese nationals living in the United States.³¹

Scholars of Chinese social media and WeChat in particular offer a more complex understanding of the relationship between the Chinese state and the Internet. Shaohua Guo highlighted the process of "bargaining and reciprocity" between the state and media conglomerates.³² Yan Su and Xishu Zio argued that the social media app shaped the topics and framing of issues in metropolitan newspapers.³³ According to their study, WeChat did not appear to influence party newspaper content, but there were indications that the two forms of media were independent of one another.³⁴ Even if WeChat did not exist in a "pure" digital public sphere, there is some space for private and public communication on the social media platform outside of the influence of the state.³⁵

In the motion challenging the Executive Order, the WeChat defenders noted that government surveillance is not unique to the People's Republic of China: "In the United States and across the world, national governments engage in dragnet surveillance of digital communications of ordinary people."³⁶ Yet "despite widespread knowledge of these practices, hundreds of millions of people in this country voluntarily use surveilled devices and apps to participate in all facets of social and economic life every day."³⁷ In other words, WeChat users are not unique in their use of a social media app that might be surveilled. As the motion against the WeChat ban stated, like other populations who use surveilled media, WeChat users "continue to use and rely on the app, knowing that Big Brother is watching."³⁸

Despite the surveillance, WeChat users continue to use the platform because of the way it has become an integral part of their lives. Advertised by Tencent as "WeChat, a lifestyle,"³⁹ the average user spends eighty-two minutes each day on the app, using a variety of functions.⁴⁰ The complaint cited that in the United States, "[A]pproximately 19 million users rely on the app . . . and it is the primary app Chinese-speakers in the U.S. use to participate in social life by connecting with loved ones, sharing special

31. Exec. Order 13873, 84 Fed. Reg. 22689 (Aug. 6, 2020).

32. SHAOHUA GUO, *THE EVOLUTION OF THE CHINESE INTERNET: CREATIVE VISIBILITY IN THE DIGITAL PUBLIC 2-3* (2021).

33. Su & Xiao, *supra* note 29, at 278, 282, 288, 290.

34. *Id.* at 278.

35. *Id.* at 278, 282, 290.

36. Compl. for Prelim. Inj. at 2.

37. *Id.*

38. *Id.*

39. GUO, *supra* note 32, at 54.

40. Mansor Iqbal, *WeChat Revenue and Usage Statistics (2021)*, BUS. OF APPS (June 21, 2021), <https://www.businessofapps.com/data/wechat-statistics/> [<https://perma.cc/76BH-N2SF>].

moments, arguing ideas, receiving up-to-the minute news, and participating in political discussions and advocacy.”⁴¹ The complaint also pointed out how WeChat serves commercial, religious, and public functions. Because of the app’s multifaceted functions and purposes, the legal team demanded that a proposed ban against the social media platform needed to meet the highest form of scrutiny for violating protected speech and the standards of due process. The defenders demanded that the government clearly identify which transactions on WeChat constituted a national security risk.

The WeChat defenders noted the racial and political context of the ban as well. President Trump regularly espoused anti-Chinese rhetoric in the context of U.S.-China tensions, which escalated during the COVID-19 pandemic. The defenders explained that the platform is the only “‘super-app’ with a natively Chinese interface designed for Chinese speakers” and as a result, prohibiting WeChat “singles out people of Chinese and Chinese-American ancestry and subjects them to disparate treatment on the basis of race, ethnicity, nationality, national origin, and alienage.”⁴²

The structure of a court case suggests the possibility of an equal airing of views between the U.S. government and the defenders of WeChat. However, the Executive Order carries the weight of the U.S. Presidency (even if it is tarnished by Trump’s reputation) and is supported by the federal resources of the government. Meanwhile, the critics of the ban consisted of a handful of lawyers who enlisted legal experts and named plaintiffs within fifteen days to mount a court challenge. The key leaders were Clay Zhu and Angus Ni, who participated extensively in drafting the complaint and contacted potential plaintiffs. The other defenders—Ying Cao, Gang Yuan, and Shengyang Wu—took the lead in establishing the non-profit U.S. WeChat Users Alliance (USWUA) to fundraise for and promote awareness about the court case. This group of five secured the services of Michael Bien, an expert in civil rights law, and his firm Rosen Bien Galvan & Grunfeld LLP. Bien, Zhu, and Ni represented the plaintiffs, which consisted of the USWUA, five individuals (one of them not of Chinese descent), and Chihuo Incorporated (an online retailer). This assembled team of plaintiffs, legal experts, and supporters came together quickly, primarily due to their WeChat usage. The platform allowed the key organizers to connect with one another and develop a plan to challenge the President of the United States.

The day after Trump announced the WeChat ban, Zhu authored a memo, predominantly in Chinese, and circulated it within a WeChat group that consisted of nearly 300 Chinese immigrant lawyers currently practicing in the United States.⁴³ In the memo, Zhu outlined what he believed to be at stake and the ways in which the ban violated legal protections. He

41. Compl. for Prelim. Inj. at 1.

42. *Id.* at 5.

43. Zhu, *supra* note 22; Interview with Clay Zhu, *supra* note 12.

emphasized the enormous discretion the International Emergency Economic Powers Act (“IEEPA”) grants to the President and asserted that the best way to challenge the legality of the ban was by making constitutional claims based on the First Amendment, Due Process, and the Takings Clause. Zhu noted that further investigation might unveil other bases for mounting a legal challenge to the Executive Order. Zhu called on his fellow Chinese immigrant lawyers to take immediate action. The memo also referred to Trump’s Muslim travel ban, the subsequent constitutional suits, and the temporary restraining orders issued by federal judges.⁴⁴

Moreover, Zhu’s memo outlined a rough legal strategy. He argued that first, the suit should be filed in federal court located in a relatively liberal state. Second, they must identify one to two WeChat users to serve as plaintiffs, preferably users who reside in the same liberal state they file the suit. The plaintiffs’ identities and backgrounds should also evoke sympathy. The memo listed examples such as plaintiffs who were women and those with good moral character. The memo emphasized that the plaintiffs would not bear any legal costs. Third, the memo stressed the importance of hiring a powerful legal team, including two to three experienced litigators, two to three more junior lawyers, and one to two paralegals. The memo noted that Zhu already was in touch with two seasoned U.S. litigators. Fourth, the memo suggested an approach to fund the cost of hiring excellent lawyers needed to meet the challenge of overturning a presidential order. It proposed establishing a website and organization to raise funds from Chinese Americans and other groups. It also suggested that, for legitimacy purposes, the organizers themselves refrain from taking any of the donated money. Fifth, the memo identified potential supportive groups (e.g., Apple where WeChat is one of its most downloaded apps, the ACLU, and other legal aid organizations that work to protect civil rights for Asian Americans). Sixth, the memo highlighted the importance of distancing themselves from the Chinese government and Tencent. Zhu sought to avoid sensitive U.S.-China politics in order to focus on the unconstitutionality of the WeChat ban for users in the United States. The memo stressed that “depoliticization is essential.”⁴⁵

Following the circulation of the memo, which incited detractors as well as supporters among the Chinese immigrant lawyers, Zhu was able to connect with the eventual group of five lawyers supportive of legally challenging the Executive Order. Cao, the organizer of the WeChat group for Chinese immigrant lawyers, read Zhu’s memo and observed how the other lawyers responded to it on the platform. She selected the most vocal supporters to further strategize the legal challenge to the Executive Order.

44. Zhu, *supra* note 22.

45. Interview with Clay Zhu, *supra* note 12.

They met via Zoom, and the very next day on August 8, 2020, they circulated another memo in Chinese announcing the formation of the USWUA.⁴⁶

The memo articulated the severe consequences of the WeChat ban, the importance of WeChat for millions of Chinese Americans, and the unconstitutionality of the Executive Order. The organizers emphasized that “the US is a rule of law country, where the constitution is supreme. We are a group of lawyers caring for the interests of Chinese Americans. We believe resorting to the court is the most effective measure. Our organization makes solely claims based on U.S. law, so we are unwilling to comment on US-China political disputes. We do not represent the interests of any political party, government, or the Tencent company. We only represent WeChat users residing in the U.S. territory.”⁴⁷ The memo then stressed the difficulty in the legal challenge and implored supporters in the United States to donate to the legal cause. The organizers promised to use all the donated funds on the lawsuit, and any balance left would be donated to charitable organizations in the United States. The memo ended with the following sentence, “[W]e understand that WeChat is an app with flaws. We may choose not to use it, but Mr. President does not have the power to make that choice for us.”⁴⁸

The speed of this group’s mobilization was remarkable. The group members did not necessarily know each other; several of them had never personally met before the WeChat case.⁴⁹ They were also geographically spread out: Zhu was based in the San Francisco Bay Area, Ni’s practice was in Seattle, Washington, and Cao, Yuan, and Wu all worked and resided in the greater New York City area. However, they were already united as members of a WeChat group with shared cultural and linguistic backgrounds and professional interests. As Angus Ni explained, as members of the same WeChat group of “practicing attorneys who are Chinese . . . [,] you have a sense of familiarity.”⁵⁰ The WeChat platform provided opportunities for the attorneys to form a digital public sphere devoted to challenging the Executive Order. Their shared use of WeChat allowed them to communicate about strategy, divide up responsibilities, recruit plaintiffs and additional supporters, and broadcast information about their efforts, despite being in different parts of the country.⁵¹ In addition, given the nature of social media, users were accustomed to communicating quickly with one another, helping the process move efficiently. While some of the activities opposing the executive ban necessarily transcended the digital realm, WeChat served as a one-stop shop for the team’s legal mobilization.

46. Interview with Ying Cao, *supra* note 12.

47. Statement by U.S. WeChat Users All., *supra* note 23.

48. *Id.*

49. Interview with Ying Cao, *supra* note 12.

50. Interview with Angus Ni, *supra* note 12.

51. Interview with Clay Zhu, *supra* note 12.

The virtual legal mobilization to stop the executive ban on WeChat exemplified a practice that James Lai characterized as Asian American connective action. The concept of connective action, as discussed by Bennett and Segerberg, captured the phenomenon of utilizing digital communication networks to engage in political activism.⁵² Lai's scholarship illuminated how Asian American communities utilized these approaches for collective civic engagement. He pointed out that Asian Americans had one of the lowest voter turnouts "due to its majority foreign-born population."⁵³ At the same time, they "are the most digitally connected racial group in the United States."⁵⁴ Given these characteristics, Asian American participation in digital communities facilitated two forms of engagement: diasporic and local/national. On the one hand, immigrant Asian communities maintain strong connections with "homeland" and "transnational" communities through social media, particularly among those with shared cultural and linguistic practices. On the other hand, these same platforms also enable traditionally marginalized members of the U.S. polity (non-citizens, those with limited English fluency, those less familiar with U.S. political culture, etc.) to collectively engage in activism at the local and national levels. As Lai pointed out, "[I]f connective action has the ability to provide an online means of communication and moderation, historically disenfranchised groups should be able to participate in ways never seen before in the civic arena."⁵⁵

The lawyers who came together to prevent the WeChat ban in some ways replicated and in other ways departed from these practices of Asian American connective action. As educated bilingual professionals, they did not need to rely on WeChat for civic engagement, but the platform facilitated their effectiveness in mobilizing other Chinese language users and WeChat advocates. In addition, the critics of the ban argued for the importance of cultural and transnational communication, particularly for Chinese immigrant communities. At the same time, they carefully distanced themselves from the People's Republic of China and Tencent. In other words, the WeChat defenders sought to engage in civic legal activism as residents of the United States by practicing their right to ethnic and transnational forms of communication while also disassociating themselves from dangerous allegations of Chinese state and corporate sponsorship. In making this argument, they challenged both the presumptions of Asian Americans as model minorities who do not engage in protest as well as the suspicions that people of Asian ancestry in the United States constitute alien threats. To protect their access to WeChat, the lawyers who initiated to stay

52. See W. LANCE BENNETT & ALEXANDRA SEGERBERG, *THE LOGIC OF CONNECTIVE ACTION: DIGITAL MEDIA AND THE PERSONALIZATION OF CONTENTIOUS POLITICS 2* (2013).

53. LAI, *supra* note 10, at x.

54. *Id.*

55. *Id.* at 5.

the Executive Order sought to channel their energies towards a particular political arena: the federal courts.

II. THE WEAK AND THE STRONG

Given the costs, expertise, and time required to bring a lawsuit, the legal system has commonly been the purview of those who already have socio-political-cultural capital. The “haves” systematically come out ahead.⁵⁶ But various scholars have also studied how marginalized groups, such as women and specific racial, ethnic, and religious groups, have utilized the court system to seek and protect minoritized political rights. In doing so, scholars and activists raise the question of whether the law can serve “as a weapon of the weak.”⁵⁷ In the WeChat case, the key organizers against the Executive Order straddled the status between the “strong” and the “weak.” As experienced lawyers, they had the wealth of knowledge, financial standing, status, and contacts in the legal community to marshal the necessary resources to take on the U.S. government. At the same time, the lawyers and plaintiffs who challenged the Executive Order were almost all of Chinese diasporic and immigrant background. As members of a racially targeted community, they were often subjected to politicized and gendered harassment by coethnics who disagreed with their actions. Thus, challenging presidential power exercised over alleged matters of national security and foreign affairs constituted a “stiff uphill struggle.”⁵⁸ The WeChat team mobilized their strengths and navigated their weaknesses to take on President Trump.

The key organizers of the WeChat case all possessed legal training, although not in the specialization that was needed for this case. All five lawyers who initiated the case immigrated from the People’s Republic of China. Other than Ni, who spent significant time in the United States and Canada as a youth, the rest initially came to the United States to pursue graduate and law degrees. They also developed legal specializations that capitalized upon their bilingual and bicultural backgrounds. Three of the five lawyers focused on commercial transactions, catering to Chinese clients or transacting with Chinese parties.⁵⁹ Two of the lawyers worked predominantly with Chinese American communities through their focus on personal injury and immigration law. Given their professional niche, a ban

56. See Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 149 (1974).

57. Sophie Jacquot & Tommaso Vitale, *Law as Weapon of the Weak? A Comparative Analysis of Legal Mobilization by Roma and Women’s Groups at the European Level*, 21 J. EUR. PUB. POL’Y 587, 588 (2014).

58. Craig R. Ducat & Robert L. Dudley, *Federal District Judges and Presidential Power During the Postwar Era*, 51 J. POL. 98, 115 (1989).

59. See Interview with Ying Cao, *supra* note 12; Interview with Angus Ni, *supra* note 12; Interview with Shengyang Wu, *supra* note 12; Interview with Gang Yuan, *supra* note 12; Interview with Clay Zhu, *supra* note 12.

on WeChat would significantly impact their law practices. As Ni explained, “90% of my clients are Chinese people, are Chinese companies. And, like, half my work is done, then [on] WeChat.”⁶⁰

As lawyers, they possessed the general knowledge to effectively evaluate mounting a legal challenge to the Executive Order. In other words, their legal knowledge and training, though general, enabled them to leap over the “naming” and “blaming” phase—perceiving injuries to their legal rights and interests—and reach directly to “claiming” strategies—seeking legal remedies.⁶¹ While most Chinese American users of WeChat were still unclear what the Executive Order would exactly entail, the lawyers immediately questioned its legality. For instance, John Shengyang Wu, drawing on his legal education on constitutional law, suspected that the Executive Order violated the First Amendment.⁶² Ni thought that they could challenge the Order on the basis of administrative law or regulation of government practices, based on his knowledge about these topics.⁶³

Apart from basic knowledge of relevant substantive law, the lawyers’ understanding of the adjudicatory system and familiarity with the legal profession was also crucial. Zhu, who played a central role in securing the services of Michael Bien, an experienced civil rights lawyer, had extensive contacts within the legal community in the Bay Area. Zhu and Ni, who spearheaded the legal team, were both litigators, which meant they knew how to navigate the process of bringing a case to court. The other three members of their group, Ying Cao, John Wu, and Gang Yuan, had experience establishing non-profit organizations and could quickly create the WeChat Users Alliance. Through their community advocacy and extensive contacts, they also had experience raising funds.

Securing financial resources was essential for the progress of the case. Bien was willing to accept the case based on the understanding that the legal advocacy team was in the process of fundraising. However, his law firm could not proceed with pro bono services given the enormous amount of legal labor needed to litigate against the Executive Order under extreme time pressure. In contrast, a number of the USWUA lawyers were far along in their careers, with most of them having their own practices, allowing them to devote numerous unpaid hours of their personal labor to the WeChat case. They also could allocate their legal staff to support the case. As educated legal professionals with the training, experience, and resources to mount a legal challenge, they could be characterized as members of the “strong” or the “elite” in terms of their class status.

At the same time, the WeChat lawyers were professionally “weak” in that most were solo practitioners in a niche market, and thus, the risk created

60. Interview with Angus Ni, *supra* note 12.

61. William L.F. Felstiner, et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC’Y REV. 631, 635–36 (1981).

62. See Interview with John Shengyang Wu, *supra* note 12.

63. See Interview with Angus Ni, *supra* note 12.

by the WeChat ban highly exposed their practices. As noted earlier, all five lawyers relied on clients in China or transacted with Chinese parties in the United States. And because most of them were de facto solo practitioners, meaning they either practiced alone or were nominally affiliated with a larger firm, they were financially independent. While the independence gave them the flexibility and freedom to devote much time to the lawsuit against the WeChat ban, it also deprived them of the security of belonging to a sizable law firm with diversified practices.

However, part of their strength as Chinese immigrant lawyers stemmed from their shared vulnerability. Based on a recent survey, 57% of the professional work done by average Chinese immigrant lawyers in 2021 was related to China.⁶⁴ 67.91% of the surveyed lawyers reported that WeChat played an important role in their work, with 36.57% considering WeChat very important. To put that into perspective, only 14.39% regarded LinkedIn as very important. More concretely, 30.85% of Chinese immigrant lawyers considered WeChat very important for “staying in touch with existing clients,” 23.7% for “client development,” and 16.67% for “providing service to clients.”⁶⁵ Their dependence on China-related businesses and on WeChat might have strengthened the determination of Chinese immigrant lawyers to overthrow the Executive Order.⁶⁶

Further, both the lawyers who opposed the Executive Order and the people they sought to advocate for could be characterized as being “weak” or racially and culturally marginalized. The anti-Chinese rhetoric espoused by the Trump administration prior to and during the COVID-19 pandemic corresponded with a rise in anti-Asian American violence and harassment. Stop AAPI Hate, an academic and community-led effort to track these incidents, indicated that Chinese Americans constituted the largest group (42.7%) of all Asian American ethnicities to report these acts of “hate, violence, harassment, discrimination, shunning, and child bullying.”⁶⁷

This anti-Chinese and anti-Asian movement of the twenty-first century builds upon a longer history of racism and exclusion in the United States.⁶⁸ The 1875 Page Act and 1882 Chinese Exclusion Act established a legal apparatus of immigration exclusion based on nationality, class, and gender

64. The survey defined the term broadly: legal work is related to China if it is for “Chinese clients, U.S. clients investing in China, U.S. clients transacting with a Chinese party, U.S. clients disputing with a Chinese party.” *Chinese American Lawyers Survey 2022* at Question 23 (Oct. 20, 2022) (on file with the authors).

65. *Id.* at Questions 19, 20.

66. By comparison, TikTok is much less relevant for the lawyers’ practice, so the idea of defending it against the Trump executive ban did not even appear in the community of Chinese immigrant lawyers.

67. *Stop AAPI Hate National Report*, STOP AAPI HATE (Nov. 18, 2021), <https://stopaapihate.org/national-report-through-september-2021/> [<https://perma.cc/6PHG-VEVC>] (last visited Feb. 26, 2023).

68. Cady Lang & Paulina Cachero, *How a Long History of Intertwined Racism and Misogyny Leaves Asian Women in America Vulnerable to Violence*, TIME MAG. (Apr. 7, 2021), <https://time.com/5952819/history-anti-asian-racism-misogyny/> [<https://perma.cc/Z3EN-BA2M>].

that subsequently applied to other Asian immigrants.⁶⁹ The 1790 Naturalization Act constituted the basis for designating Asian immigrants able to enter the United States as “aliens ineligible for citizenship.”⁷⁰ The forever foreigner status these laws invoked has remained within the popular imagination and cultural attitudes in the United States, even as the legal basis for immigration and citizenship exclusion have been removed.⁷¹ This latent hostility and suspicion towards Asian people manifests and easily mobilizes in times of political conflict, such as World War II, the Cold War, and the War on Terror. In the aftermath of the 9/11 attacks, Arab Americans and South Asian Americans, regardless of their religious affiliation, became targets of hate crimes.⁷² Economic competition also exacerbates these racialized tensions. For example, in 1982, two White autoworkers, who blamed Japanese imports for the downturn in the U.S. car industry, battered and killed Chinese American engineer Vincent Chin. They displaced their anger and anxieties over global economic competition onto an innocent Asian American man.⁷³

The opponents of the WeChat ban understood that they might be regarded as stooges of the People’s Republic of China and of Tencent. These allegations of Chinese people in the United States as government and corporate spies reveal the persistence of the Cold War, particularly in U.S.-Asia relations, and how periodic trade wars between the United States and China continue to fuel tensions. As Zhu’s initial memo emphasized, and as the WeChat defenders insisted, their case was to establish the rights of Chinese people in the United States to utilize the social media platform for a variety of purposes.⁷⁴ They explicitly distanced themselves from any perceived connections to the Chinese government and corporations to establish themselves as claimants of the U.S. state.

Interestingly, the lawyers were not all U.S. citizens. Cao was the only one at the time of the case. Zhu was not naturalized until 2022. Others held green cards and had ongoing family and commercial contacts in China which necessitated frequent travel back-and-forth between the two countries. Ni is a Canadian citizen and did not express intentions of becoming a U.S. citizen. However, the heterogeneity of immigration status did not stop them from staking a claim on the U.S. Constitution. They insisted on asserting their

69. ERIKA LEE, *THE MAKING OF ASIAN AMERICA: A HISTORY* 12, 118 (2015).

70. Naturalization Act of 1790, 1 Stat. 103 (1790).

71. ROBERT G. LEE, *ORIENTALS: ASIAN AMERICANS IN POPULAR CULTURE* ix, 3 (1999).

72. Cynthia Lee, *Hate Crimes and the War on Terror*, 1 G.W. L. FAC. PUBL’NS & OTHER WORKS 1 (2008).

https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1801&context=faculty_publications [<https://perma.cc/L9HD-WHQ4>] (last visited Jan. 24, 2023).

73. HELEN ZIA, *ASIAN AMERICAN DREAMS: THE EMERGENCE OF AN AMERICAN PEOPLE* 63–70 (2000).

74. See Zhu, *supra* note 22.

rights amid an intensely xenophobic political context that tended to portray all things Chinese as foreign and potentially a threat to national security.⁷⁵

To succeed in this effort, the WeChat team had to convince not only the courts but also members of their own community. Some Chinese immigrants in the United States were reluctant to support the case against the Executive Order because of their familiarity with authoritarian governments. They were uncertain about becoming plaintiffs, donating funds, or having their names publicly identified with the WeChat effort.⁷⁶ They could not believe that an effort to challenge the U.S. President would succeed.⁷⁷ They also anticipated backlash and political persecution. In addition, there was misinformation about the Executive Order's limited application, so some WeChat users did not take the ban seriously.⁷⁸ Some people eventually stepped forward to serve as plaintiffs and donate to support the legal case. Many others remained on the sidelines.

This group of non-supporters also expressed concern because members of the Chinese immigrant community actively targeted the WeChat advocates for political harassment. The WeChat defenders encountered avid Trump supporters, many of whom accepted his anti-China rhetoric because of their own opposition to the People's Republic of China. These vocal critics WeChat supported political and religious movements that are surveilled and targeted in China.⁷⁹ Some harassed and threatened the WeChat defenders because they perceived them as supporters of the Chinese government.⁸⁰ They sent emails and phone calls to both lawyers and plaintiffs who challenged the WeChat ban alleging their status as spies and threatening to harm them if they persisted in their opposition of the Executive Order.⁸¹ The harassers also publicly circulated personal information about the lawyers and plaintiffs to make it easier to target them. These were coordinated efforts that relied on the publicity and social network infrastructures of Trump supporters. In addition, the supporters of the Executive Order utilized alternative social media platforms to WeChat to

75. Even though this statement by the Federal Bureau of Investigation seeks to distinguish between the Chinese government and Chinese people, the anti-China rhetoric has escalated hate crimes in the United States against people of Chinese ancestry as well as other Asian ethnicities. *The China Threat*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/investigate/counterintelligence/the-china-threat> [<https://perma.cc/LEU3-YVNH>] (last visited Dec. 8, 2022); *The Blame Game: How Political Rhetoric Inflames Anti-Asian Scapegoating*, STOP AAPI HATE, (Oct. 2022), <https://stopaapihate.org/anti-asian-scapegoating/> [<https://perma.cc/XS8W-CKXU>] (last visited Dec. 8, 2022).

76. Video Conference Interview with Elaine Peng, President, Mental Health Association for Chinese Communities (Sept. 9, 2021).

77. See Interview with Ying Cao, *supra* note 12.

78. Yi Lu, *Te Lang Pu de Wei Xin "Jinling" Jiuqing You He Xiaoli? (特朗普的微信"禁令"究竟有何效力?)*, SINA TECH. (Aug. 8, 2020), <https://tech.sina.com.cn/i/2020-08-08/doc-iihvhuipn7577515.shtml> [<https://perma.cc/S4PN-XS2Z>].

79. Interview with Elaine Peng, *supra* note 76; Interview with Ying Cao, *supra* note 12.

80. *Id.*

81. *Id.*

organize their efforts. One of the opponents of the Executive Order asked not to be identified publicly or have his image recorded when conducting an interview not due to potential backlash by the U.S. government, but because of the hostility within the Chinese immigrant community.⁸²

The harassers not only racially and ethnically targeted the WeChat defenders, but they also disproportionately targeted the women on the team. Michael Bien, a non-Chinese WeChat defender, did not receive any negative treatment. In contrast, the Chinese members of the legal team either directly experienced or witnessed the harassment from other Chinese immigrants. The women on the legal team, Ying Cao and Elaine Peng, were both major targets of the attacks. Even some of the men on the team, who themselves were targeted, noted the extreme treatment that Cao received in comparison to her male counterparts.⁸³

Zhu characterized women as possibly more sympathetic plaintiffs, but the perception of women challenging existing hierarchies and social norms appeared to elicit more anger and threats.⁸⁴ Stop AAPI Hate has reported that “hate incidents reported by women make up 62% of all reports.”⁸⁵ These statistics presumably reflect interracial incidents of hate or that women are more likely to report these acts, or both. The intensity by which Cao and Peng recount their experiences of harassment from within the Chinese community suggests that gender dynamics also shape intra-community expressions of intimidation and threatened violence.

Despite the harassment, neither Cao nor Peng backed down from their efforts. Cao, an experienced lawyer and community leader, founded the U.S. WeChat User Alliance, managed the volunteers, and led the fundraising efforts. When asked about the harassment campaign, Cao expressed annoyance, but sought to understand the motivation and strategy of these critics, and persisted in her plans.⁸⁶ Peng, who founded the Mental Health Associations for Chinese Communities and frequently used WeChat for both personal and professional purposes, agreed to serve as a plaintiff for the WeChat case. Given the stigma and lack of understanding associated with mental health issues, particularly in the Chinese immigrant community, Peng was familiar with going against the grain. For the WeChat case, she expressed her desire to stand up for what she believes in, regardless of community threats.⁸⁷

Thus, the same WeChat proponents who were able to mobilize their “strengths” as trained professionals and as bilingual and bicultural brokers

82. Video Conference Interview with anonymous volunteer for WeChat Users Alliance (Sept. 9, 2021); Video Conference Interview with anonymous volunteer for WeChat Users Alliance (Sept. 24, 2021).

83. See Interview with Elaine Peng, *supra* note 76; Interview with Ying Cao, *supra* note 12.

84. Thuy Vo Dang et al., *Conflict and Care: Vietnamese American Women and the Dynamics of Social Justice*, 47 AMERASIA J. 120 (2021).

85. STOP AAPI HATE, *supra* note 67.

86. See Interview with Ying Cao, *supra* note 12.

87. Interview with Elaine Peng, *supra* note 76.

to challenge the ban also occupied a position of marginality and vulnerability. They are racialized immigrants subjected to a long legacy and escalating context of xenophobia. As diasporic subjects, the team tried to persuade other Chinese immigrants to claim legal rights in the United States. And the defenders, particularly the women, were being surveilled and harassed by members of their own ethnic community.

Strikingly, those engaged in targeting the WeChat team included both men and women.⁸⁸ These detractors were reacting to their experiences with or observations of the People's Republic of China. At the same time, they felt empowered by the Trump presidency and the divisive political culture in the United States. These harassers replicated a broader societal tendency to target women who are perceived as challenging social hierarchies. The legal mobilization against the Executive Order and the political responses it generated reflect the combination of strong and weak positions of Chinese transnational subjects, even for those who are highly educated and skilled.

III. CHINESE IMMIGRANT LEGAL MOBILIZATION AND THE MYTH OF RIGHTS

The WeChat challenge followed in a tradition of Chinese immigrant and transnational subjects utilizing the courts to secure political rights in the United States. It is important to recognize this ongoing legal legacy of civil rights activism, given the history of immigration and citizenship exclusion and the persistent perceptions of Asian peoples as model minorities or passive victims. Joseph and Mary Tape, for example, took a case to the California Supreme Court in 1885 to argue for the right of their daughter, who was of Chinese parentage but was born and had always resided in San Francisco, California to attend an integrated public school.⁸⁹ The 1898 U.S. Supreme Court case *U.S. v. Wong Kim Ark* established the rights of birth-right citizenship in the United States.⁹⁰ In *Wong Kim Ark*, a U.S. natural-born Chinese person challenged his detention upon return from a trip to China under the Chinese Exclusion Acts.⁹¹ Another U.S. Supreme Court case is *Lau v. Nichols*, where non-English speaking students of Chinese ancestry brought a class action against a San Francisco school district in 1975.⁹² *Lau* resulted in a legal mandate that U.S. public schools provide instructional support for students with limited English proficiency.⁹³

There are limitations, though, as to how Chinese American civil rights activism might transform fundamental structures of inequality. Legal scholar Stuart A. Scheingold coined the phrase “myth of rights” to characterize the

88. Interview with anonymous volunteer for WeChat Users Alliance, *supra* note 82.

89. *Tape v. Hurley*, 66 Cal. 473, 473 (1885).

90. *United States v. Wong Kim Ark*, 169 U.S. 649, 649 (1898).

91. *Id.*

92. *Lau v. Nichols*, 414 U.S. 563, 563 (1974).

93. *Id.*

collective investment in a legal belief in political rights, despite the impediments of what the courts can achieve.⁹⁴ This section explores the power and constraints of this legal approach to securing rights in the United States.

While the history of Chinese people in the United States can be told as a litany of what happened to the community in terms of legal, social, and cultural restrictions, there is also a counter-history of agency and political protest. These examples of resistance include organized efforts both in the United States and alongside nationalist movements in China. In 1905, for instance, China launched a wide-spread boycott against American goods to protest the treatment of Chinese people in the United States.⁹⁵ Chinese immigrants could not become naturalized citizens until the Chinese Exclusion Act was repealed in 1943 and hence could not vote to shape the political culture of their adopted land. As a result, the courts provided a powerful avenue to claim rights in the United States. For example, U.S. courts overturned a significant number of the immigration exclusion cases when individuals challenged their decisions.⁹⁶ Similar to the transnational lawyers in the WeChat case, these individuals tended to be both “strong” and “weak.” They had connections and access to financial and legal resources to question their exclusion from the United States. However, they were also a despised racialized group specifically barred from entry by the U.S. polity.⁹⁷ The loophole for immigration was primarily based on class, since merchants, diplomats, students, and tourists could enter the United States.⁹⁸ The “strength” of those migrants who had the resources to legally challenge their exclusion intertwined with the class privilege embedded in U.S. immigration policy.

In addition, these Chinese legal challenges strategically utilized Whiteness. Lucy Salyer and Tian Xu’s scholarship documented a community of White attorneys who worked on behalf of Chinese immigrants to challenge exclusion policies over the course of the late nineteenth and early twentieth centuries.⁹⁹ In fact, some of these lawyers had worked previously as federal employees who enforced immigration policies.¹⁰⁰ Their knowledge of the administration of law served as crucial assets when they shifted career paths and subsequently challenged exclusion on behalf of

94. STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 5 (1974).

95. YONG CHEN, *CHINESE SAN FRANCISCO, 1850–1943: A TRANS-PACIFIC COMMUNITY*, 148 (2000).

96. LUCY E. SALYER, *LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* xi, xvii (1995).

97. Kitty Calavita, *The Paradoxes of Race, Class, Identity, and “Passing”*: Enforcing the Chinese Exclusion Acts, 1882–1910, 25 *LAW & SOC. INQUIRY* 1, 4–5 (2000).

98. MADELINE Y. HSU, *THE GOOD IMMIGRANTS: HOW THE YELLOW PERIL BECAME THE MODEL MINORITY* 1–5 (WILLIAM CHAFE ET AL. EDS., 2015).

99. SALYER, *supra* note 96, at 70; Tian Atlas Xu, *Immigration Attorneys and Chinese Exclusion Law Enforcement: The Case of San Francisco, 1882–1930*, 41 *J. AM. ETHNIC HIST.* 50, 56 (2022).

100. Xu, *supra* note 99, at 58.

Chinese clients. Given the duality of class status and the legal vulnerabilities they faced, Chinese immigrants who had the resources to challenge exclusion enhanced their chances of success during an era of exclusion by securing the services of White lawyers, particularly those with experience with immigration procedures. Furthermore, given the racialized practice of disbelieving Chinese testimony in U.S. legal proceedings, Chinese immigrants needed White spokespersons to garner legitimacy in these settings.¹⁰¹

The twenty-first century injunction against the Executive Order reinforced a belief in the rule-of-law in the United States and replicated a practice of enlisting Whiteness to support their cause. The legal team filed a complaint focused primarily on First Amendment rights of free speech.¹⁰² In addition to choosing to work with Michel Bien, the WeChat legal team also obtained a declaration in support of their motion from Erwin Chemerinsky. Both Bien and Chemerinsky are White, Jewish-American, and respected figures in the field of civil rights and civil liberties law. Chemerinsky, a widely recognized expert and scholar in constitutional law, is also dean of the University of California, Berkeley, School of Law and the founding dean of the Law School of the University of California, Irvine. In his declaration, Chemerinsky highlighted two unprecedented aspects of the Executive Order. First, he wrote that “never has the government tried to shut down entirely a public forum used by millions of Americans. Such a broad restriction on speech . . . is unprecedented in the modern history of this country.”¹⁰³ Second, Chemerinsky emphasized that he was “deeply troubled by the fact that a violation of the Executive Order can result in civil and criminal penalties.” He was “unaware of any law in this country that criminalizes speech regardless of its content or the speakers’ intent. The chilling effect on the exercise of free speech caused by the Executive Order is profound and constitutionally unsupportable.”¹⁰⁴

To further bolster this free speech argument, Zhu secured plaintiffs who could testify how the WeChat ban would harm their ability to engage in commercial, professional, personal, religious, and political activities.¹⁰⁵ The legal team also emphasized the vagueness of the Executive Order and cited both the First and Fifth Amendments’ duties to “protect speakers ‘from arbitrary and discriminatory enforcement of vague standards’ in laws and regulations.”¹⁰⁶

101. See SALYER, *supra* note 96, at xvi.

102. Pl.’s Renewed Mot. for Prelim. Inj., ECF 48, U.S. WeChat Users All. v. Trump, 488 F. Supp. 3d 912, 912 (N.D. Cal. 2020) (No. 3:20-cv-05910) [hereinafter Pl.’s Renewed Mot. for Prelim. Inj.].

103. Video Conference Interview with Erwin Chemerinsky, Dean and Jesse H. Choper Distinguished Professor of Law, University of California, Berkeley, School of Law (Aug. 27, 2020).

104. *Id.*

105. Interview with Clay Zhu, *supra* note 12.

106. Pl.’s Renewed Mot. for Prelim. Inj. At 16.

To support this argument for free speech and arbitrary enforcement, the WeChat legal team also emphasized the equal protections argument by highlighting the anti-Chinese implications of the Executive Order. As their complaint argued, “Prohibiting the use of only WeChat but not any similar applications (ones not made in China and without Chinese interfaces), the Executive Order singles out people of Chinese and Chinese-American ancestry and subjects them to disparate treatment on the basis of race, ethnicity, nationality, national origin, and alienage.”¹⁰⁷ Bien and Zhu initially debated making this argument since it was a more difficult one to prove that the ban was discriminatory.¹⁰⁸ Nevertheless, Bien and Zhu decided that the Executive Order’s anti-Chinese framing had to be included to make sense of its timing and scope.¹⁰⁹ The judge ultimately did not support the claim.

The litigation team was most uncertain whether the government charge of national security might halt their case.¹¹⁰ One key turning point was when the DOJ provided the team with extensive pages of evidence to justify the U.S. government’s concerns about national security. All members of the legal team indicated that if there was actual evidence of national security threat, then they would have dropped the case. However, after reviewing the thousands of pages, the U.S. WeChat User Alliance team realized there was no substantial support for these allegations. The U.S. government included media sources highlighting Chinese government surveillance of WeChat but no evidence demonstrating actual incidents of national security violations. The DOJ also planned to show certain classified evidence to the judge without sharing it with the WeChat litigators.¹¹¹ However, based on the reviewed materials, the team was confident that there was no additional evidence to support the allegation of endangering national security.

Although discussions are ongoing regarding whether and how to set regulations on WeChat, the legal mobilization was considered successful. The U.S. WeChat User Alliance raised more than a million dollars from thousands of donors to support the litigation efforts, indicating that there was financial and grassroots support for their cause from within the Chinese American community, which contributed the bulk of the funds.¹¹² After winning the court battle to stop the WeChat ban, the USWUA again sued the federal government for compensation of the litigation cost under the Equal Access to Justice Act. The DOJ promptly settled the suit by agreeing to pay \$900,000 to cover the bulk of the legal expenses.¹¹³ Upon receiving the

107. *Id.*

108. Video Conference Interview with Michael Bien, Partner, Rosen Bien Galvan & Grunfeld LLP (Aug. 27, 2021).

109. *Id.*

110. Interview with Clay Zhu, *supra* note 12.

111. *See* 28 C.F.R. § 17.17(c) (2007).

112. *See* Interview with Ying Cao, *supra* note 12.

113. *Civil Rights Litigation over Freedom to Use WeChat Came to a Successful and Inspiring Conclusion*, U.S. WECHAT USER ALL. (2021) <https://img1.wsimg.com/blobby/go/99f042e6-97b7-444a->

payment for his portion of the legal expense totaling \$124,151.97, Clay Zhu donated the entire amount to the Chinese American Legal Defense Alliance, which claims to be “the first and only non-profit organization in the U.S. dedicated to providing free and direct legal representation to all Chinese Americans who have suffered racial discrimination and hatred.”¹¹⁴

Together, the WeChat defenders could point to their legal victory as a vindication of the United States as a nation of law. Their “victory” demonstrated to skeptical Chinese immigrants that justice could be possible in the United States. The team also refused to back down from those who harassed and sought to intimidate them. The WeChat defenders and their supporters attributed their success to the insight that the United States functioned as a nation of law. Their ability to obtain justice through the court system reinforces the myth of rights.

And yet how might Chinese immigrant and transnational subjects’ claiming of rights in the United States close off options for more transformative forms of justice? For example, one of the Chinese immigrant lawyers in the WeChat case had gained prior fundraising experience by supporting Peter Liang, the police officer who killed Akai Gurley, an unarmed Black man, in 2014. The lawyer who supported Liang, like other Chinese American supporters, argued that the death was a result of an accident; in their eyes, Liang was subjected to racial scapegoating, since other (overwhelmingly White) police officers are rarely convicted of similar deaths.¹¹⁵ In both the WeChat and Liang cases, the lawyer in question framed the harm in terms of racial discrimination against Chinese people in the United States. He spent time working closely with the New York Chinese American community, including the Chinese family associations, and he tapped into their anger and aggrievement to raise funds to support Liang. Other Asian American activists, including Chinese Americans, have critiqued these efforts for focusing on protecting Liang’s civil rights rather than understanding Gurley’s death as part of a long, ongoing practice of violence against Black lives by the police.¹¹⁶

The WeChat defenders were not necessarily synonymous with Peter Liang’s supporters. The legal advocate who fundraised for both causes indicated that Liang’s case tended to attract donations from Chinese people

8718-617637ced7b5/USWUA%20Announcement%20in%20English%2012.22.21(1).pdf [https://perma.cc/WSSR-FQXX] (last visited Feb. 25, 2023).

114. CALDA Mission, CHINESE AM. LEGAL DEF. ALL., <https://caldausa.org/our-mission> [https://perma.cc/EMW4-6R7W] (last visited Feb. 25, 2023).

115. Julia Carrie Wong, ‘Scapegoated?’ *The Police Killing that Left Asian American Angry - and Divided*, THE GUARDIAN (Apr. 18, 2016), <https://www.theguardian.com/world/2016/apr/18/peter-liang-akai-gurley-killing-asian-american-response> [https://perma.cc/HH67-XV2X].

116. Hansi Lo Wang, ‘Awoken’ by N.Y. Cop Shooting, *Asian-American Activists Chart Way Forward*, NAT’L PUB. RADIO (Apr. 23, 2016), <https://www.npr.org/sections/codeswitch/2016/04/23/475369524/awoken-by-n-y-cop-shooting-asian-american-activists-chart-way-forward> [https://perma.cc/RB23-4TE3].

in the New York City area, while the WeChat case secured funders across the country, particularly those on the West Coast. Also, other members of the legal team linked the WeChat case to the Trump administration's efforts to target other racialized groups, such as the attempt to ban "Muslims." And some members of the legal team expressed political commitment to justice that transcended their own ethnic or cultural group. Nevertheless, the cross-over between Liang and WeChat supporters, motivated by the desire to protect Chinese civil rights, suggests that a one-group focus, which encapsulates a spirit of ethnic nationalism, may not lead to more transformative forms of justice for all.

CONCLUSION

In the aftermath of the WeChat case, some of the lawyers involved are continuing their efforts to protect Asian American civil liberties. For example, Ying Cao, the only woman on the primary WeChat legal team, has been offering pro bono legal services in the wake of the March 16, 2021 Atlanta shooting that resulted in the deaths of six Asian American women.¹¹⁷ Others have pointed to the persecution of Chinese American scientists and engineers for being suspected spies for the People's Republic of China.¹¹⁸ This most recent set of political accusations follows a longer pattern that traces back to the Cold War and to the targeting of Wen Ho Lee in the 1990s and early 2000s.¹¹⁹ In other words, the legal advocates who opposed the Executive Order continue to use WeChat as a professional and organizing digital public sphere. In fact, the success of the case has in many ways sparked their commitment to political activism. The defenders are leveraging their strong status as legal experts in servicing the "weak," most notably, for Asian Americans targeted for violence and persecution. These efforts affirm the WeChat defenders' belief in the United States as a nation of law where the efforts to achieve justice are possible.

The WeChat defenders' legal mobilization efforts should be applauded for quickly and effectively challenging an overreaching Executive Order through a digital practice of connection action. The case had a disproportionate impact on Chinese immigrant and transnational subjects in the United States and also held long-term implications regarding government regulation of speech and transactions in the digital public sphere. The case was not possible without Chinese immigrant and transnational political activism. However, there remains a question whether these efforts will primarily be directed towards protecting this particular racialized immigrant community, or if the efforts will be channeled towards more transformative forms of justice for other racialized groups more broadly.

117. Interview with Ying Cao, *supra* note 12.

118. Interview with Clay Zhu, *supra* note 12.

119. HSU, *supra* note 98, at 243.

Furthermore, the complex politics within the Chinese immigrant community evident in the WeChat case sheds light on persistent, and perhaps growing, divisions. As with any political movement, there is rarely uniformity of support. And yet, the organized opposition from coethnics, motivated by both political conditions in China and the United States speaks to a transnational political formation that rejects the principles of political liberalism and instead embraces the politics of the mob. Using misinformation and intimidation, the opponents of the WeChat case deployed authoritarian practices that characterize aspects of political culture in the People's Republic of China and the United States.

The legal mobilization for access to WeChat reveals stark political pathways that are messy and complicated. The ban against WeChat, interpreted as an anti-Chinese effort, could represent White political rule in the United States. The Chinese immigrant efforts to shut down the WeChat case suggest that a multiracial or at least Asian-White political coalition is emerging through a collective commitment towards anti-communism and the political utilization of intimidation. The WeChat defenders embrace the principles of political liberalism and anti-discrimination through White allies' support but may not necessarily support a more transformative critique of race and justice that accounts for the persistence and legal institutionalization of anti-Blackness. As a window into our current political culture, the WeChat case reveals the agency of Chinese immigrants in championing their political rights and the complex legacies and implications of their efforts.