STATE OF INDIANA	)	IN THE ALLEN SUPERIOR COURT
	) SS:	
COUNTY OF ALLEN	)	CAUSE NO. 02D03-2212-PL-401

STATE OF INDIANA,	)
	)
Plaintiff,	)
	)
v.	)
	)
TIKTOK INC., TIKTOK PTE. LTD., BYTEDANCE INC., AND BYTEDANCE LTD.,	)
	)
Defendants.	)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

FAEGRE DRINKER BIDDLE & REATH LLP

Andrea Roberts Pierson, #18435-49
Daniel E. Pulliam, #29439-49
Nicholas B. Alford, #31867-49
300 North Meridian Street, Suite 2500
Indianapolis, IN 46204
Tel. (317) 237-0300
Andrea.Pierson@faegredrinker.com
Daniel.Pulliam@faegredrinker.com
Nicholas.Alford@faegredrinker.com

COVINGTON & BURLING LLP

John E. Hall (8707-95-TA)
Alexander A. Berengaut (8705-95-TA)
Megan A. Crowley (8914-95-TA)
850 Tenth Street, NW
Washington, DC 20001
Tel. (202) 662-6000
jhall@cov.com
aberengaut@cov.com
mcrowley@cov.com

Counsel for Defendants TikTok Inc., TikTok Pte. Ltd., ByteDance Inc., and ByteDance Ltd.

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The State's Amended Complaint ("Complaint"), just like its original complaint, is a tangle of internally inconsistent and insufficiently pleaded allegations, packed with hundreds of paragraphs of "irrelevant . . . political posturing." *State of Indiana v. TikTok Inc.*, 2023 WL 3596360, at *1, *4 (N.D. Ind. May 23, 2023). At its core, however, is the claim that Defendants violated the Indiana Deceptive Consumer Sales Act ("DCSA") by allegedly deceiving TikTok users about the risk that the Chinese government may access their data. Yet nowhere in the Complaint's 259 paragraphs does the State allege that any Indiana consumers detrimentally relied on Defendants' representations, or that Defendants made any representations with the intent to deceive, as required to state a claim for an incurable deceptive act under the DCSA. To the contrary, the Complaint makes clear that Defendants disclosed all material facts—concessions that, like the jurisdictional and other flaws described below, doom its claims. No amount of re-pleading can cure the inherent defects in this lawsuit. The Court should dismiss the Complaint.

First, the Court lacks personal jurisdiction over Defendants because the Complaint does not allege that Defendants "targeted Indiana regarding the matter alleged to be false or deceptive." *State v. TikTok Inc.*, 2023 WL 4305656, at *10 (Ind. Super. May 4, 2023). Because there is no connection between Defendants' in-state conduct and their allegedly deceptive statements—let alone the *substantial* connection necessary for personal jurisdiction—the Complaint must be dismissed.

Second, even if the Court had jurisdiction over Defendants, the State's DCSA claims would not be actionable. As Judge Bobay recently held, the DCSA does not apply to free apps like TikTok—an issue the State is estopped from re-litigating here. The State also does not allege that Defendants' statements were made "in connection with a consumer transaction," as the statute requires. Ind. Code § 24-5-0.5-3(a).

Third, the Court should dismiss the Complaint for failure to state a claim. Because the State alleges Defendants committed incurable deceptive acts, it must satisfy the heightened pleading standard of Trial Rule 9(B). But the Complaint does not allege—much less with particularity—that Defendants made misrepresentations or omissions on which Indiana consumers detrimentally relied, or that Defendants procured *anything* through their alleged conduct. Even if Rule 9(B) did not apply, the Complaint still would fail because it does not allege conduct evincing an intent to deceive. Rather, the Complaint concedes that Defendants disclosed to TikTok users the ways in which their data may be accessed and with whom it may be shared.

Fourth, the Complaint should be dismissed or stayed on constitutional grounds. The State seeks to hold Defendants liable for First Amendment-protected speech and petitioning activity. The Complaint also implicates the federal government's national security authority, which the federal government is using to evaluate any risk posed by Chinese access to TikTok user data, and thus is preempted by federal law and subject to the primary jurisdiction of the federal government.

BACKGROUND

A. The State's Complaint

As the State alleges, TikTok[1] is an online platform that enables users to create, share, and view videos. Compl. ¶ 40. TikTok can be downloaded through the Apple App Store, the Google Play Store, and the Microsoft Store. *Id*. It is undisputed that TikTok is free. TikTok is provided in the United States by a U.S. company, Defendant TikTok Inc. ("TikTok Inc."). *Id*. ¶ 36. The State alleges that Defendant ByteDance Ltd. ("ByteDance") is a multinational holding company and is the parent company of TikTok Inc.[2] *Id*. ¶ 39.

TikTok users in the United States are subject to TikTok Inc.'s U.S. user privacy policy, which is available on TikTok's website ("privacy policy"). *Id*. ¶¶ 42–45 (citing privacy policy dated May 22, 2023, https://bit.ly/3kHRedg). The privacy policy discloses that TikTok Inc. is "a global company" and "the Platform is supported by certain entities within our corporate group, which are given limited remote access to Information We Collect," *id*. ¶ 137, and that "entities with whom

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[1] References in this Memorandum to "TikTok" are to the TikTok platform and business, as opposed to any particular corporate entity.

[2] ByteDance Ltd. is the ultimate parent company of TikTok Inc. *See* Corporate Structure, ByteDance, https://www.bytedance.com/en/ (last accessed July 19, 2023) (showing corporate parents of TikTok Inc.). Defendants disagree that ByteDance Ltd. is headquartered in China, as the State alleges, *see* Compl. ¶ 39; as a holding company, it has no principal place of business. The Court need not resolve this issue at this time, however, because it does not affect the Court's jurisdiction.

TikTok may share [user] data . . . may be located outside of the United States," *id.* ¶ 138. TikTok Inc. has publicly stated that it has "not shared information with the Chinese government and would not do so if asked." *Id*. ¶ 88 & n.48.

The State filed this action on December 7, 2022, and amended its complaint on June 13, 2023. Like the original complaint, the amended complaint alleges that Defendants misled Indiana consumers about the risk that the Chinese Government may access and exploit their data from TikTok, *see, e.g.*, Compl. ¶¶ 4, 16, 222–26. Specifically, the State alleges that Defendants mislead Indiana consumers by failing to "alert [them] to the ability of TikTok to share their data with individuals or entities located in China, or for individuals or entities located in China to access that data," *id.* ¶¶ 141, 232–41; making "claims that U.S. user data, which includes Indiana consumers' data, is not subject to Chinese law," *id*. ¶¶ 83, 227–31; "downplay[ing] the influence and control exercised over [TikTok Inc.] by its parent company, ByteDance," which the State alleges "cooperates closely with [] the Chinese Communist Party and Government," *id.* ¶¶ 55, 242–51; and using "an in-app browser," *id*. ¶¶ 221, 252–59.

On the basis of these allegations, the State asserts six claims for incurable deceptive acts under the DCSA, Ind. Code § 24-5-0.5 *et seq.*, and seeks as relief a declaration that "TikTok's actions are unfair, abusive, and deceptive to Indiana consumers," Prayer for Relief ("Prayer") at A; a permanent injunction "to compel

TikTok to cease its deceptive and misleading statements about the risk of access to and exploitation of consumers' data by the Chinese Government and/or Chinese Communist Party," Compl. ¶ 21, Prayer at B; and civil penalties, Compl. ¶ 22, Prayer at C–D. The Complaint does not allege that Defendants committed any uncured deceptive act or other specific deceptive act specifically enumerated in the DCSA. *See* Ind. Code § 24-5-0.5-2(a)(7) & 3(b).

B. Procedural History and Related Litigation

On January 6, 2023, Defendants removed this case from Allen County Superior Court to the U.S. District Court for the Northern District of Indiana on the basis that the State's complaint raises federal questions and implicates federal interests governed by federal common law. *State of Indiana v. TikTok Inc.*, Cause No. 1:23-cv-13-HAB, ECF No. 1. The State moved to remand the case to state court. *Id.*, ECF No. 18. After briefing and argument, the district court granted the State's motion to remand, concluding that there was no federal issue upon which to base federal jurisdiction. *State of Indiana v. TikTok Inc.*, 2023 WL 3596360, at *4–5. The court noted, however, that it "does not fault Defendants for their jurisdictional maneuvering" because the State chose "to plead matters well-beyond its legal claim." *Id.* at *4. As the court further explained, the State's complaint was full of "political posturing," "hyperbolic allegations," and "federal intrigue . . . irrelevant to the determination of this case." *Id*. at *1, *4. On June 13, 2023, the State filed

an amended complaint in this case. The amended complaint adds ByteDance Inc. and TikTok Pte. Ltd. as defendants, but makes no particularized allegations against those entities other than to allege their places of incorporation and headquarters. *See* Compl. ¶¶ 37–38.

The same day that the State commenced this action, it filed another complaint against Defendants, alleging that Defendants violated the DCSA by misrepresenting on third-party app stores the age appropriateness and frequency and intensity of certain content on the TikTok platform (the "content case"). *State v. TikTok Inc.*, 2023 WL 4305656, at *1 (hereinafter, "Content Case Op."). The two cases were consolidated on December 28, 2022 for purposes of case management, discovery, and mediation before Judge Bobay. *See id*. The State moved for a preliminary injunction in the content case, seeking to enjoin Defendants from making certain alleged representations on the Apple App Store. *Id*. After full briefing and an evidentiary hearing, Judge Bobay denied the State's preliminary injunction motion, concluding that the court did not have personal jurisdiction over Defendants, and that the State was unlikely to succeed on the merits of its DCSA claim because, among other reasons, the DCSA does not apply to the download of a free app like TikTok. *See id*. The State did not appeal Judge Bobay's order denying the preliminary injunction in the content case.

Instead, on May 31, 2023, the State filed motions for change of judge under Indiana Trial Rule 76(B) in this case and the content case. Judge Bobay granted the motions for change of judge in the content case and returned case management of this case to Judge DeGroote on June 21, 2023, and the parties agreed to the assignment of Judge DeGroote as a special judge in the content case. *See* Order Granting Motion for Change of Judge, *State v. TikTok Inc.*, No. 02D03-2212-PL-000401.

ARGUMENT

I. THE COURT LACKS PERSONAL JURISDICTION OVER DEFENDANTS.

The Due Process Clause of the Fourteenth Amendment prohibits an Indiana court from asserting personal jurisdiction over a defendant unless the defendant has "certain minimum contacts with the state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Boyer v. Smith*, 42 N.E.3d 505, 509 (Ind. 2015) (citations omitted) (Indiana's personal jurisdiction jurisprudence mirrors federal law). Minimum contacts "include acts defendants themselves initiate within or without the forum state that create a substantial connection with the forum state itself." *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). This requirement allows "potential out-of-state defendants . . . to predict what conduct might make them liable in [Indiana] courts." *Boyer*, 42 N.E.3d at 509 (citation omitted). Courts must "scrutinize those contacts

closely so out-of-state defendants will not be unfairly called into [Indiana] to defend themselves." *Id.* at 507.

Courts "recognize[] two types of personal jurisdiction: 'general' (sometimes called 'all-purpose') jurisdiction and 'specific' (sometimes called 'case-linked') jurisdiction." *Bristol-Myers Squibb Co. v. Super. Ct. of Calif., S.F. Cnty.*, 582 U.S. 255, 262 (2017). Here, the State has not alleged sufficient facts to establish general or specific jurisdiction over Defendants.[3] *See Wolf's Marine, Inc. v. Brar*, 3 N.E.3d 12, 15 (Ind. Ct. App. 2014) (holding that the defendant bears the burden of proving lack of personal jurisdiction "unless such lack is apparent on the face of the complaint").

There can be no dispute that Defendants are not subject to general jurisdiction in Indiana. A foreign corporation is not subject to general jurisdiction unless its affiliations with the state are "so 'continuous and systematic' as to render [the defendant] essentially at home in the forum State." *Daimler AG v. Bauman*, 571

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[3] The Supreme Court recently rejected a challenge to the constitutionality of a Pennsylvania law that subjects out-of-state companies that are registered to do business in the Commonwealth to general jurisdiction. *See Mallory v. Norfolk S. R.R. Co.*, 2023 WL 4187749, at *7 (U.S. June 27, 2023). But unlike the Pennsylvania law at issue in that case, Indiana's foreign business registration requirements do not contain a "consent by registration" provision, *see* Ind. Code § 23-0.5-5-1 *et seq.*, and Indiana's jurisdictional statute does not include "registration" as grounds for conferring jurisdiction on the state's courts, *see* Ind. R. Trial P. 4.4(A). As a result, *Mallory* does not alter the longstanding state and federal precedents governing this Court's jurisdiction in this matter.

U.S. 117, 139 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). For a corporate defendant, there are generally only two places where this requirement will be met: the state of its principal place of business and the state of its incorporation. *See Kipp v. Ski Enter. Corp.*, 783 F.3d 695, 698 (7th Cir. 2015). Here, Indiana is neither the state of incorporation nor the principal place of business of any of the Defendant entities, as the State acknowledges. *See* Compl. ¶¶ 36–39. Therefore, the Court does not have general jurisdiction over Defendants. *See* Content Case Op. at *8–*9.

Nor do the State's allegations establish specific jurisdiction, which arises when "the suit-related conduct is related to or arises out of the defendant's conduct within or directed to Indiana." *Aquatherm GmbH v. Renaissance Assoc. I Ltd. P'ship*, 140 N.E.3d 349, 358–59 (Ind. Ct. App. 2020). What matters for this analysis are the "contacts that the defendant [itself] creates with the forum state, not the defendant's contacts with persons who reside there." *Ysursa v. Frontier Pro. Baseball, Inc.*, 151 N.E.3d 275, 279–80 (Ind. Ct. App. 2020) (citing *Walden v. Fiore*, 571 U.S. 277, 284 (2014)).

Here, the State does not allege that any Defendant took *any* unlawful action in Indiana. Defendants did not make any of their allegedly deceptive statements and omissions in Indiana, nor were those alleged statements and omissions directed at Indiana. *See* Content Case Op. at *10 (holding that the court lacked specific

jurisdiction because Defendants' "allegedly deceptive conduct" was directed to Apple in California and "no aspect of the age rating process takes place in Indiana"). And while the Complaint alleges that TikTok is available to Indiana consumers through third-party app stores, Compl. ¶¶ 11, 37, 40, this is insufficient to establish personal jurisdiction, particularly because the State does not allege any ways in which TikTok specifically targeted Indiana. *See AirFx, LLC v. Braun*, 2011 WL 5523521, at *3 (S.D. Ind. Nov. 14, 2011) ("[A]bsent some concrete showing that the Defendants directed their websites to Indiana residents, the existence of these websites alone cannot support the exercise of personal jurisdiction over the Defendants."). Indeed, if "defendant merely operates a website, even a 'highly interactive' website, that is accessible from, but does not target, the forum state, then the defendant may not be haled into court in that state without offending the Constitution." *Wolf's Marine, Inc.*, 3 N.E.3d at 17 (quoting *be2 LLC v. Ivanov*, 642 F.3d 555, 559 (7th Cir. 2011)).

Similarly, it is well-established that the unilateral activity of a third party—such as an Indiana resident downloading and using TikTok or the third-party app stores offering TikTok in Indiana—cannot establish specific jurisdiction. *See, e.g.*, *Walden*, 571 U.S. at 285. Otherwise, defendants in internet-related cases would be subject to personal jurisdiction in "every spot on the planet where that interactive website is accessible"—an unjust and absurd result, which courts have roundly

rejected. *Adv. Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 803 (7th Cir. 2014); *see also Johnson v. TheHuffingtonPost.com, Inc.*, 21 F.4th 314, 320–21 (5th Cir. 2021) (noting that "[t]he place from which a person visits [a website] is entirely beyond [the website's] control," and if website accessibility alone could sustain a court's jurisdiction, "lack of personal jurisdiction would be no defense at all"); *accord* Content Case Op. at *12.

The State's allegation that Defendants provide Indiana-based users with Indiana-focused content and advertisements on the TikTok platform does not change this conclusion. *See* Compl. ¶¶ 30–31, 33. In *Johnson v. TheHuffingtonPost.com*, for example, the court rejected plaintiff's argument that geographically-targeted advertisements were sufficient to support specific jurisdiction over a defendant to a libel claim. 21 F.4th at 321. As the Fifth Circuit explained, the defendant's sale of advertisements neither "produced nor relate[d] to" plaintiff's libel claim, and thus there was no "suit-related tie[]" to support personal jurisdiction. *Id.* at 320–21. The same is true here: Indiana-focused content and advertisements have nothing to do with the State's claims, which relate to Defendants' alleged misstatements and omissions about Chinese government access to TikTok user data.

The State further alleges that Defendants pay certain content creators in Indiana "for content that those users . . . post to TikTok." Compl. ¶ 33. This conduct does not subject Defendants to personal jurisdiction in the State, particularly because

this conduct did not "contribute to the controversy at hand," which relates to Defendants' alleged misstatements about the risk of Chinese government access to TikTok user data. *Boyer*, 42 N.E.3d at 511. In any event, even if there were some connection between Defendants' alleged misrepresentations and the alleged payments to certain content creators (there is not), courts have long held that "sending payments to a forum-based recipient is insufficient to establish personal jurisdiction over the sender." *Physicians' Med. Ctr., LLC v. CareSource*, 2020 WL 1139424, *6 (S.D. Ind. Mar. 6, 2020); *see also, e.g.*, *Federated Rural Elec. Ins. Corp. v. Inland Power & Light Co.*, 18 F.3d 389, 395 (7th Cir. 1994) ("Several courts have held . . . mailing payments into the forum state" to be an "insufficient bas[i]s for jurisdiction."); *cf. Wolf's Marine, Inc.*, 3 N.E.3d at 17 ("[M]aking payment to an out-of-state defendant . . . generally is insufficient to permit the exercise of personal jurisdiction over the defendant.").

Nor is the State's allegation that TikTok Inc. filed a tax return in Indiana sufficient to support specific jurisdiction. That TikTok Inc. derives some income from its advertising activities in Indiana does not mean the State's lawsuit—founded on purported misstatements not targeted at Indiana users—arises from those activities. *See, e.g.*, Content Case Op. at *10 (rejecting income tax return filed in Indiana as a basis for personal jurisdiction); *Boyer*, 42 N.E.3d at 510. Indeed, if filing a tax return were enough to establish specific jurisdiction over a corporation,

then conducting *any* business in a state could establish specific jurisdiction over the entity for all suits, in direct violation of the Indiana Supreme Court's command that for specific jurisdiction to exist, a "defendant's *suit-related conduct* must create a *substantial connection* with the forum State." *Boyer*, 42 N.E.3d at 511 (quoting *Walden*, 571 U.S. at 284) (emphasis added and in original); *see also Wolf's Marine*, 3 N.E.3d at 15.

II. THE COMPLAINT SHOULD BE DISMISSED BECAUSE IT FAILS TO STATE A CLAIM.

The Complaint also should be dismissed under Indiana Trial Rule 12(B)(6) for failure to state a claim. To survive a motion to dismiss under Rule 12(B)(6), "the allegations in the complaint" must establish a "set of circumstances under which a plaintiff would be entitled to relief." *Trail v. Boys & Girls Clubs*, 845 N.E.2d 130, 134 (Ind. 2006) (citations omitted). While the Court must consider all allegations as true for purposes of a motion to dismiss, it "should not accept as true allegations that are contradicted by other allegations or exhibits attached to or incorporated in the pleading." *Morgan Asset Holding Corp. v. CoBank, ACB*, 736 N.E.2d 1268, 1271 (Ind. Ct. App. 2000); *see also Trail*, 845 N.E.2d at 134.

Moreover, because the State alleges that Defendants "committed incurable deceptive acts" in violation of the DCSA, Compl. ¶ 19, the State's Complaint must satisfy the heightened pleading requirements of Indiana Trial Rule 9(B). *See State ex rel. Harmeyer v. Kroger Co.*, 114 N.E.3d 488, 492–93 (Ind. Ct. App. 2018) (citing

Cont'l Basketball Ass'n, Inc. v. Ellenstein Enters., Inc., 669 N.E.2d 134, 138 (Ind. 1996)); *McKinney v. State*, 693 N.E.2d 65, 71 (Ind. 1998).[4]

These requirements are not satisfied.

A. The DCSA Does Not Apply to Defendants' Alleged Conduct.

The State's claims fail at the outset for two reasons: (1) because the DCSA does not apply to the download of a free app, and (2) because Defendants' allegedly deceptive statements and omissions were not made "in connection with a consumer transaction" within the meaning of the DCSA.

The DCSA does not apply to the download of a free app. The State's claims should be dismissed because, as Judge Bobay correctly concluded, the DCSA does not apply to the download of a free app like TikTok. Content Case Op. at *14. Instead, the DCSA applies only to statements made in connection with a "consumer transaction"—a term that "does not stretch so far as to include the download of a free app." *Id.*

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[4] While the State also seeks injunctive relief on the basis that "[a]t the very least, TikTok knew that its acts were deceptive," Compl. ¶ 20, the Complaint does not allege that Defendants committed any uncured deceptive act or other specific deceptive act enumerated in the DCSA, *see* Ind. Code § 24-5-0.5-3(b), nor does the State "distinguish between the allegations of 'deceptive acts' and 'incurable deceptive acts,'" *McKinney*, 693 N.E.2d at 73. Under such circumstances, "the entire complaint must be judged by Rule 9(B) standards." *Id*.

As Judge Bobay explained, the DCSA "has historically been used for consumer transactions involving exchanges for money." *Id.* The DCSA defines a "consumer transaction," as a "sale, lease, assignment, award by chance, or other disposition of an item of personal property, real property, a service, or an intangible." Ind. Code Ann. § 24-5-0.5-2(a)(1). The enumerated items "sale, lease, assignment, [or an] award by chance" each require an exchange for money, and under the doctrine of *ejusdem generis*, the catch-all phrase "other disposition" must be construed similarly. *See O'Bryant v. Adams*, 123 N.E.3d 689, 693–94 (Ind. 2019) ("The meaning of the catch-all phrase turns on the nature of the items within the enumerated list."). Because the State does not—and could not—allege that users paid any money to download TikTok, the Complaint should be dismissed.[5]

[5] Defendants' alleged payments to "creators" on TikTok, Compl. ¶¶ 33, 127–28, also do not constitute "consumer transactions" because those payments were not made by "consumers," and were "for primarily commercial purposes—not 'purposes that are primarily personal, familial, charitable, agricultural, or household,'" as the statute requires. *Galveston, LLC v. Morris Invest, LLC*, 2020 WL 5798160, at *7 (S.D. Ind. Sept. 29, 2020) (quoting Ind. Code § 24-5-0.5-2(a)(1)). Courts have consistently concluded that the DCSA does not apply to this sort of commercial transaction. *See, e.g.*, *Gordon v. Finch*, 2023 WL 3496427, at *8 (N.D. Ind. May 17, 2023) ("[plaintiff's] purposes in purchasing [products] from [defendant] were commercial, placing the transaction outside the scope of the IDCSA"); *McLeskey v. Morris Invest*, 2020 WL 3315996, at *6 (S.D. Ind. June 18, 2020) (concluding that plaintiffs who bought property to generate income engaged in a commercial, not consumer, transaction); *Galveston*, 2020 WL 5798160, at *7 (similar and collecting cases).

This conclusion is consistent with courts' interpretations of other states' consumer protection laws. *See, e.g.*, *In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705, 715–18 (N.D. Cal. 2011) (dismissing claim under California consumer protection statute because plaintiffs "received Defendant's services for free"); *Claridge v. RockYou, Inc.*, 785 F. Supp. 2d 855, 862–64 (N.D. Cal. 2011) (same); *Dobson v. Milton Hershey Sch.*, 356 F. Supp. 3d 428, 435 (M.D. Pa. 2018) (holding Pennsylvania consumer protection statute does not apply to benefits obtained "free of charge"); *Messier v. Bushman*, 197 A.3d 882, 891 (Vt. 2018) (dismissing claim under Vermont consumer protection statute against the defendant from whom the plaintiff "did not purchase anything"); *Rayford v. Maselli*, 73 S.W.3d 410, 411 (Tex. Ct. App. 2002) (dismissing claim under Texas consumer protection statute because plaintiff was "receiving legal services provided gratuitously").

It also makes sense: interpreting the DCSA to cover free apps like TikTok would dramatically increase the scope of the statute to cover countless interactions on the internet, and would raise constitutional vagueness concerns. *See Bd. of Trs. of Purdue Univ. v. Eisenstein*, 87 N.E.3d 481, 505 (Ind. Ct. App. 2017) ("A provision 'is not void for vagueness if individuals of ordinary intelligence could comprehend it to the extent that it would fairly inform them of the generally proscribed conduct.'") (quoting *Pittman v. State*, 45 N.E.3d 805, 816 (Ind. Ct. App. 2015)). Rather, as Judge Bobay observed, "[i]f the Indiana legislature wants the DCSA to

apply to such a common activity as downloading free apps," it could amend the statute accordingly. Content Case Op. at *14.

Moreover, the State is precluded from re-litigating this issue in this case. "Issue preclusion, or collateral estoppel, bars subsequent relitigation of the same fact or issue where that fact or issue was necessarily adjudicated in a former lawsuit and that same fact or issue is presented in a subsequent suit." *Marion Cnty. Cir. Ct. v. King*, 150 N.E.3d 666, 674 (Ind. Ct. App. 2020) (citations omitted). When evaluating whether issue preclusion applies, courts engage in a two-part analysis, asking "(1) whether the party in the prior action had a full and fair opportunity to litigate the issue, and (2) whether it is otherwise unfair to apply issue preclusion given the facts of the particular case." *Id.* Indiana courts "have followed federal precedent in applying issue preclusion," *Miller Brewing Co. v. Ind. Dep't of State Revenue*, 903 N.E.2d 64, 68 (Ind. 2009), under which "[f]indings and conclusions of law made at the preliminary injunction stage can have preclusive effects," so long as the circumstances suggest the findings are "accurate and reliable," *AM Gen. Corp. v. DaimlerChrysler Corp.*, 246 F. Supp. 2d 1030, 1034 (N.D. Ind. 2003) (citations omitted).

Here, Judge Bobay's conclusion that the DCSA does not apply to free apps satisfies both requirements for the application of issue preclusion. There can be no reasonable dispute that the State had a full and fair opportunity to litigate this issue

in the content case. Indeed, Judge Bobay issued his decision after months of deliberation, extensive briefing from the parties, and a full-day preliminary injunction hearing. *See* Content Case Op. at *1–*2. The State also had the opportunity to appeal Judge Bobay's order, *see* Ind. R. App. P. 14(A)(5), but chose not to do so.

These circumstances not only establish that the State had a full and fair opportunity to litigate the issue, but they also provide more than sufficient evidence of the accuracy and reliability of Judge Bobay's conclusion that the DCSA does not reach free apps. *See AM Gen. Corp.*, 246 F. Supp. 2d at 1034–36 (giving preclusive effect to preliminary injunction decision where parties had extensive discovery and preliminary injunction hearing, the court took two weeks to decide the issue, and it was subject to appeal); *see also CFTC v. Bd. of Trade,* 701 F.2d 653, 657–58 (7th Cir. 1983) (observing that preliminary injunction decisions can have preclusive effect and noting that "the findings on which they are based often receive considerable . . . judicial scrutiny" on appeal). Nor are there any reasons to conclude that the application of issue preclusion in this case would be unfair. *See Plaza Grp. Props., LLC v. Spencer Cnty. Plan Comm'n*, 911 N.E.2d 1264, 1269 (Ind. Ct. App. 2009) (citation omitted). On this basis alone, the Court should dismiss the Complaint.

Defendants' alleged statements and omissions were not made in connection with a consumer transaction. Even if the download of a free app qualified as a "consumer transaction," and Defendants' allegedly deceptive statements and omissions were deceptive as a matter of law (they are not, as discussed below, *see infra* Section II.B.2), those statements regarding the risk of the Chinese Government accessing U.S. user data still were not made "in connection with a consumer transaction" within the meaning of the DCSA. Instead, Defendants' alleged statements consist of (i) letters and testimony to legislators, *see, e.g.*, Compl. ¶¶ 86–88, 99, 104, 106, 120, 129–30, 155, 163; (ii) interviews with news outlets, *see, e.g.*, *id.* ¶¶ 85–87, 95, 111, 129, 155; (iii) statements on TikTok's website, *see, e.g.*, *id.* ¶ 84 & n.42; (iv) generalized allegations regarding TikTok's alleged public-relations strategy, *see, e.g.*, *id.* ¶¶ 153–54; and (v) court filings, *see, e.g.*, *id*. ¶¶ 113–14, 116.

The State does not allege that any of these statements were made to Indiana consumers *in connection with a consumer transaction*—indeed, the Complaint does not allege that a single Indiana consumer even heard these allegedly deceptive statements, let alone heard and relied on them when deciding whether to download TikTok. Therefore, none are actionable under the DCSA. *See N. Miami Educ. Ass'n v. N. Miami Cmty. Schs.*, 746 N.E.2d 380, 382 (Ind. Ct. App. 2001) ("An unambiguous statute must be held to mean what it plainly expresses, and a statute's plain and obvious meaning may not be expanded or restricted."); *see also, e.g.*, *New*

Mexico ex rel. Balderas v. Tiny Lab Prods., 457 F. Supp. 3d 1103, 1127 (D.N.M. 2020) (dismissing state's complaint because it did not allege "any representations . . . in connection with [the plaintiff's] provision of a platform for [consumers] to download those apps"); *Salehi v. Wells Fargo Bank, N.A.*, 2012 WL 2119333, at *6 (E.D. Va. June 11, 2012) (dismissing complaint where the plaintiff "fail[ed] to allege the false statements to Plaintiff were made in connection with a consumer transaction," *i.e.*, "allege [the defendant's] false statements to Plaintiff [were] related to specific transactions where [the defendant] advertises, sells, leases, licenses or offers for sale . . . its goods"); *Dagley v. Haag Eng'g Co.*, 18 S.W.3d 787, 792 (Tex. App. 2000) (shielding the defendant from Texas Deceptive Trade Practices Act liability because "none of [his] alleged misrepresentations were directly communicated to" the plaintiffs).

B. **The Complaint Fails to State a Claim for Relief.**

Even setting aside these threshold failures, the Complaint should be dismissed because the State does not allege—much less with the particularity required by Rule 9(B)—that Defendants intentionally made any deceptive statements or omissions, as required to state a claim under the DCSA.

1. The Complaint does not satisfy Rule 9(B).

As the Indiana Supreme Court has held, the pleading requirements of Trial Rule 9(B) are "equally applicable to common law and statutory fraud claims,"

including claims for incurable deceptive acts under the DCSA. *See Cont'l Basketball Ass'n*, 669 N.E.2d at 137–38; *see also McKinney*, 693 N.E.2d at 71 (noting that incurable deceptive acts under the DCSA "sufficiently sound in fraud to trigger Rule 9(B)"). Rule 9(B) instructs that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be specifically averred." In Indiana, the elements of fraud include: "(i) material misrepresentation of past or existing facts by the party to be charged; (ii) which was false; (iii) which was made with knowledge or reckless ignorance of the falseness; (iv) was relied upon by the complaining party; and (v) proximately caused the complaining party injury." *Rice v. Strunk*, 670 N.E.2d 1280, 1289 (Ind. 1996).[6]

Further, to satisfy Rule 9(B), the Complaint must state the time, the place, the substance of the false representations, the facts misrepresented, and "the identity of what was procured by fraud." *Kapoor v. Dybwad*, 49 N.E.3d 108, 132 (Ind. Ct. App. 2015) (quoting *Cont'l Basketball Ass'n*, 669 N.E.2d at 138); *see also, e.g.*, *State ex rel. Harmeyer v. Kroger Co.*, 114 N.E.3d 488, 493 (Ind. Ct. App. 2018); *Conseco,*

[6] Materiality and reliance are also necessary to state a claim of fraud by omission. *See Shea v. Gen. Motors LLC*, 567 F. Supp. 3d 1011, 1022 (N.D. Ind. 2021). Absent such requirements, *any* fact not disclosed to a consumer would provide a basis for liability.

Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 2002 WL 31961447, at *23 (Ind. Cir. Ct. Dec. 31, 2002).

Here, the State's Complaint contains no allegations—much less specific ones—that Defendants made any material misrepresentations or omissions on which any Indiana consumer relied. *See, e.g.*, *Loomis v. Ameritech Corp.*, 764 N.E.2d 658, 667 (Ind. Ct. App. 2002) (dismissing fraud claim under Rule 9(B) for failure to allege reasonable reliance and materiality); *Avon Hardware Co. v. Ace Hardware Corp.*, 998 N.E.2d 1281, 1290 (Ill. App. 1st Dist. 2013) (similar with respect to fraud claim brought under Indiana statute); *Enservco, Inc. v. Ind. Sec. Div.*, 623 N.E.2d 416, 423 (Ind. 1993) ("The central consideration in determining materiality is whether a reasonable [consumer] would attach importance to the information when deciding on his course of action." (quotations omitted)). In particular, the State does not allege that any statement or omission "led [consumers] to" download TikTok, "which [they] would not have otherwise done if [they] had been fully informed." *Himan v. Thor Indus., Inc.*, 2022 WL 683650, at *14 (N.D. Ind. Mar. 8, 2022); *cf. Chadbourne & Parke LLP v. Troice*, 571 U.S. 377, 387 (2014) ("[A] fraudulent misrepresentation or omission is not made 'in connection with' such a 'purchase or sale of a covered security' unless it is material to a decision . . . to buy or to sell a 'covered security.' . . . The phrase 'material fact in connection with the purchase or sale' suggests a connection that matters.").

The State also does not contend that Defendants' alleged statements and omissions caused harm to any Indiana consumer. *See Carrel v. George Weston Bakeries Distrib., Inc.*, 2006 WL 1005041, at *1 (S.D. Ind. Apr. 13, 2006) (dismissing statutory fraud claim on this basis). Nor has the State alleged—much less in any particularized fashion—what Defendants "procured" through their alleged fraud. *Kapoor*, 49 N.E.3d at 132. Under these circumstances, the State's Complaint does not satisfy Rule 9(B) and must be dismissed. *See State ex rel. Harmeyer*, 114 N.E.3d at 493 (dismissing complaint on similar grounds).

2. Defendants' alleged statements are not deceptive as a matter of law.

Even putting aside the requirements of Rule 9(B), the Complaint should be dismissed because it fails to allege that Defendants' alleged statements and omissions were deceptive—much less that Defendants acted with an intent to deceive, as required to state a claim for incurable deceptive acts. *See, e.g.*, *McKinney*, 693 N.E.2d at 68 ("Intent to defraud or mislead is thus clearly an element of an incurable deceptive act.").

The Complaint alleges that Defendants deceived Indiana consumers "about the risk of the Chinese Government, or Chinese Communist Party which controls the Government, accessing and exploiting their data." Compl. ¶ 53; *see also id.* ¶¶ 222–51, 259. According to the Complaint, Defendants carried out this "deception" in four ways: (1) by failing to disclose that individuals and entities in

China can access U.S. user data, *see* Counts I–VI; (2) by representing that TikTok U.S. user data is not subject to Chinese law, *see* Counts II–IV; (3) by downplaying the influence and control exercised over TikTok by its ultimate parent company, ByteDance Ltd., *see* Count V, Compl. ¶ 152; and (4) by failing to disclose that TikTok uses an in-app browser and the "data collection capabilities and practices" of that browser, *see* Count VI. These assertions cannot be squared with the State's own allegations and are insufficient as a matter of law. *See Morgan Asset Holding Corp.*, 736 N.E.2d at 1271 (holding that the court "should not accept as true allegations that are contradicted by other allegations or exhibits attached to or incorporated in the pleading"); *Sims v. New Penn Fin. LLC*, 2016 WL 6610835, at *5 (N.D. Ind. Nov. 8, 2016) (dismissing DCSA claim because complaint alleged that defendant disclosed relevant facts).

a) The allegation that Defendants failed to disclose that TikTok user data may be shared with individuals in China is insufficient to state a claim.

The State first alleges that Defendants misled consumers by failing to disclose that their data "is accessible by and may be shared with individuals and entities who

are subject to Chinese law," "including those working for ByteDance."[7] Compl. ¶¶ 230, 96; *see also, e.g.*, *id.* ¶ 143. Yet the State also alleges that individuals "with whom the data may be shared *according to TikTok's privacy policy*, are subject to Chinese laws." Compl. ¶ 110 (emphasis added); *see also id.* ¶ 7 (alleging that "current and recent versions of TikTok's privacy policy state that it *may share data it collects with its parent company ByteDance or other affiliates*, or certain entities, within its corporate group, *many of whom are subject to Chinese law*" (emphasis added)). According to the State's own allegations, Defendants have not intentionally omitted—and in fact have affirmatively disclosed to U.S. TikTok users—"that their data may be shared with individuals and entities subject to Chinese laws." *Id.* ¶ 236.

Indeed, TikTok's privacy policy—as the State alleges in the Complaint—explains that "certain entities within [TikTok's] corporate group" may access U.S. data. *Id.* ¶ 102 (quoting privacy policy dated May 22, 2023). "Similarly, prior to March 21, 2023, TikTok's privacy policy stated it may share U.S. data with ByteDance or another affiliate." *Id.*; *see also id.* ¶ 7 (alleging that "current and recent versions of TikTok's privacy policy state that it *may share data it collects with its*

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[7] The State does not specify which ByteDance corporate entity it is referencing. As noted above, ByteDance Ltd. is the ultimate parent company of TikTok Inc., and is a holding company with no employees. ByteDance Inc. is, as the State alleges, a U.S. corporation, *see* Compl. ¶ 38, and the State does not allege that it has any employees in China (nor could it). The Court need not resolve this discrepancy for purposes of this motion.

parent company ByteDance or other affiliates, or certain entities, within its corporate group" (emphasis added)). Moreover, the current privacy policy explains that "[a]s a global company, the Platform is supported by certain entities within our corporate group, which are given limited remote access to Information We Collect," and that entities "with whom TikTok may share your data as described herein may be located outside of the United States." *Id.* ¶¶ 137–38 (quoting privacy policy dated May 22, 2023).[8] The privacy policy further states that "TikTok may transmit your data to its servers or data centers outside of the United States for storage and/or processing." *Id.* ¶ 138.

Moreover, the Complaint alleges that "TikTok's former Global Chief Security Officer declared, 'TikTok relies on *China-based ByteDance personnel* for certain engineering functions that *require them to access encrypted TikTok user data* . . . these China-based employees may access these encrypted data elements in decrypted form based on demonstrated need and only if they receive permission from our U.S.-based team.'" Compl. ¶ 97 (emphasis added). And it further alleges that in "a June

[8] As the State notes, an earlier version of TikTok's privacy policy stated that TikTok "may share all of the information we collect with a parent, subsidiary, or other affiliate of our corporate group," Compl. ¶ 136, and that some of the entities "with whom TikTok may share your data as described herein may be located outside of the United States," *id*. ¶ 138; *see also* Original Compl. ¶¶ 130–31 (alleging that "a reasonable Indiana consumer would understand 'affiliate of our corporate group' to include" entities located in China).

2022 letter to multiple U.S. senators, TikTok acknowledged that '[e]mployees outside the U.S., including China-based employees, can have access to TikTok U.S. user data subject to a series of robust cybersecurity controls and authorization approval protocols overseen by our U.S.-based security team.'" *Id.* ¶ 99 (quoting June 2022 Letter to U.S. Senators at 3) (alteration in original).

These disclosures fatally undermine any allegation that Defendants made deceptive statements or omissions with the intent to deceive Indiana consumers about whether ByteDance Ltd. or individuals based in China may access TikTok user data. *See, e.g.*, *McKinney*, 693 N.E.2d at 68 ("Intent to defraud or mislead is thus clearly an element of an incurable deceptive act."); *McQueen v. Yamaha Motor Corp., U.S.A.*, 488 F. Supp. 3d 848, 859 (D. Minn. 2020) (dismissing DCSA claim because complaint alleged that defendant disclosed relevant facts).[9]

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[9] Although the State alleges that consumer data has been shared over Defendants' proprietary software, Lark, "including in groups accessed by employees based in China," Compl. ¶¶ 123–24, and that TikTok creators' "personal and financial information has been and is stored in China," *id.* ¶ 128, these allegations, even if true, do not state a claim under the DCSA in light of the disclosures described above. Similarly, the State's reference to an alleged "backdoor channel" through which Chinese authorities can access user data also does not provide a basis for a DCSA claim. *Id.* ¶ 101. The State does not allege there is any such "backdoor," only that a third-party "claims" there is one in his own litigation. *Id.* If the entire Complaint is not dismissed, this "groundless" reference should be struck under Rule 12(f). *See Smith v. Beasley*, 504 N.E.2d 1028, 1030 (Ind. Ct. App. 1987) (finding complaint alleging rights at issue were contractual, without any allegation there was a contract, (continued…)

Nor does Defendants' failure to specifically reference "China"—or any other country—in its privacy policy give rise to a claim under the DCSA, particularly in light of the disclosures described above. Indeed, Defendants *have* disclosed that some of the entities "with whom TikTok may share [U.S. user] data . . . may be located outside of the United States." Compl. ¶ 138. As one court explained, the DCSA "isn't a blanket prohibition on non-disclosure of information; the non-disclosure must be unfair in some sense." *Sims*, 2016 WL 6610835, at *5. In that case, the court dismissed a DCSA claim that homeowners brought against a mortgage servicer for failing to disclose a specific lending condition. The court explained that "[n]one of [the] likely numerous lending requirements . . . were disclosed" to the homeowners and the mortgage servicer "made no representation whatsoever about the likelihood that the [plaintiffs' application] would be approved." *Id.* "Under these circumstances," the court concluded, the servicer's

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was properly struck and dismissed). Courts routinely hold that "preliminary steps in litigations . . . that did not result in an adjudication on the merits or legal or permissible findings of fact are, as a matter of law, immaterial" and can therefore be struck under Rule 12(f). *See, e.g.*, *In re Merrill Lynch, Inc. Rsch. Reps. Sec. Litig.*, 218 F.R.D. 76, 78 (S.D.N.Y. 2003); *Scognamillo v. Credit Suisse*, 2005 WL 8162733, at *6 (N.D. Cal. Feb. 1, 2005); *see also Davis ex rel. Davis v. Ford Motor Co.*, 747 N.E.2d 1146, 1149 n.1 (Ind. Ct. App. 2001) (because "Indiana's T.R. 12 is based on and nearly identical to its federal counterpart" Indiana courts "look to the construction" of the federal rule "for guidance on interpreting [Indiana's] provision").

"*failure to mention one requirement of approval cannot reasonably be viewed as unfair, abusive, or deceptive*." *Id.* (emphasis added).

Just so here: The fact that TikTok's privacy policy states that data may be shared with corporate affiliates outside the United States but that does not specifically reference China (or any other country) "cannot reasonably be viewed as unfair, abusive, or deceptive," particularly in light of TikTok's other data access disclosures. *See id.; see also, e.g.*, *McQueen*, 488 F. Supp. 3d at 859 (dismissing a DCSA claim on similar grounds).[10]

b) Defendants' allegedly deceptive statements about the application of Chinese law are time barred and not actionable under the DCSA.

The State further alleges that Defendants misled consumers by stating that TikTok U.S. user data is not subject to Chinese law. Compl. ¶¶ 54, 230–31. The Complaint identifies only two such statements: a 2019 press release, and a comment by a former employee during an interview in 2020. *Id.* ¶¶ 54 n.22, 84–85. Both are outside the DCSA's two-year statute of limitations applicable at the time the case

[10] For the same reasons, the Court should dismiss Count IV, which alleges that Defendants violated the "minimal requirements" of the third-party app stores by failing to "alert Indiana consumers to the fact that it may share their data with entities and individuals in China, who are subject to Chinese laws that expose their data to the Chinese government and Communist Party." Compl. ¶ 240. As discussed, TikTok's privacy policy and other data access disclosures explain who can access U.S. user data and with whom user data may be shared.

was filed. *See* Ind. Code § 24-5-0.5-5; *A.J.'s Auto. Sales, Inc. v. Freet*, 725 N.E.2d 955, 964–65 (Ind. Ct. App. 2000); *Connell v. Welty*, 725 N.E.2d 502, 506 (Ind. Ct. App. 2000) ("'[T]he period of limitation in effect at the time the suit is brought governs in an action . . . .'") (citing *State v. Hensley*, 661 N.E.2d 1246, 1249 (Ind. Ct. App. 1996)).[11] Even if these statements were not time barred, they are statements of law, which are "seldom actionable" under the DCSA, "especially on matters for which the legal question is unsettled or unresolved." *Rainbow Realty Group, Inc. v. Carter*, 131 N.E.3d 168, 177–78 (Ind. 2019); *see also, e.g.*, *Shi v. Yi*, 921 N.E.2d 31, 37 (Ind. Ct. App. 2010) ("Courts also need not accept as true conclusory, nonfactual assertions or legal conclusions.").

The State's own allegations reflect significant uncertainty regarding whether and how Chinese law would apply to TikTok user data.[12] *See, e.g.*, Compl. ¶ 72

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[11] The DCSA was amended effective July 1, 2023 to lengthen the applicable statute of limitations from two to five years. Ind. Code § 24-5-0.5-5, *amended by* 2023 In. Legis. Serv. P.L. 152-2023 (H.E.A. 1504). But it is well established that "a new statute of limitations cannot revive a claim which was foregone under the prior statute of limitations before passage of the new one." *Connell*, 725 N.E.2d at 506 (citing *Ind. Dep't. of State Revenue, Inheritance Tax Div. v. Puett's Estate*, 435 N.E.2d 298, 301 (Ind. Ct. App. 1982) ("[I]f the plaintiff's suit was barred by the running of a statute of limitations prior to the extension of the limitations period, the subsequent statute cannot revive the defendant's liability.")). Accordingly, the amended statute of limitations does not change the analysis above.

[12] Although the State alleges that the Chinese Data Security Law applies to U.S. user data, Compl. ¶ 73, that law was not even in effect at the time Defendants made their allegedly deceptive statements, *see id.* ¶ 75 n.39. *See* Data Security Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Jun. 10, 2021, effective Sept. 1, 2021) art. 55, P.R.C. Laws (China).

("The type of organization [that] may be designated a 'critical information infrastructure operator' *is not always clear*. However, authorities' use of the applicable procedures indicates that tech companies and platforms *could be subject* to an invasive cybersecurity review." (emphasis added)). It is therefore no surprise that the State does not point to any provision of law that subjects foreign user data to Chinese law. *See id.* ¶¶ 59–76. Instead, it baldly asserts, without support or citation, that Chinese law enforcement and intelligence agencies "*interpret* Chinese laws as applying to any data, wherever it is stored," *id*. ¶¶ 80, 92 (emphasis added)—a conclusory assertion that, if true, would mean all data anywhere in the world would be subject to Chinese law, *see id.* ¶ 103 n.60 ("ByteDance, *like all technology companies doing business in China*, is subject to Chinese laws that require companies operating in the country to turn over user data when asked by the government." (emphasis added)).

In any event, given the ambiguities in Chinese law alleged in the State's Complaint, good-faith disagreements over the application of Chinese law cannot reasonably evince an intent to deceive. *See McKinney*, 693 N.E.2d at 68. This conclusion is particularly warranted where, as here, Defendants disclosed that "China-based employees, can have access to TikTok U.S. user data subject to a series of robust cybersecurity controls and authorization approval protocols." Compl. ¶ 99 (quoting June 2022 Letter to U.S. Senators at 3). Thus, the State's own

allegations, taken as true, fatally undermine its claim that Defendants deceived Indiana consumers about the application of Chinese law to their data. *See Sims*, 2016 WL 6610835, at *5 (dismissing DCSA claim because complaint alleged that defendant disclosed relevant facts); *Morgan Asset Holding Corp.*, 736 N.E.2d at 1271 (similar).

c) According to the State's own allegations, Defendants' alleged statements about TikTok's corporate structure were not false or misleading.

The State further alleges that Defendants are misleading consumers by "downplay[ing] the significant influence and control that its parent company ByteDance has over TikTok." Compl. ¶ 152. Specifically, the State alleges that TikTok's "public statements . . . stress the independence of the company's leadership from ByteDance" and "its independence from ByteDance control in its content moderation and data security practices." *Id.* ¶¶ 155–56. But the Complaint does not allege that any of TikTok's statements about its relationship with any ByteDance entity are false or omit any relevant information. *See Heller Bros. Bedding, Inc. v. Leggett & Platt, Inc.*, 2001 WL 740514, at *3 (N.D. Ill. June 28, 2001) ("To respond properly to a charge of fraud, defendants need to be appraised of the specific comments that are claimed to constitute falsehoods.") (citation omitted).

For example, the Complaint alleges that in a public hearing before Congress, the former TikTok executive "admitted that 'ByteDance is founded in China,' but

claimed 'we do not have an official headquarters as a global company.'" Compl. ¶ 154. The State nowhere alleges that this statement about TikTok's corporate headquarters is false, let alone deceptive. Similarly, although the Complaint quotes numerous statements TikTok representatives have made about the company's structure and security practices, *see id.* ¶¶ 155, 157, the Complaint nowhere alleges that these statements are not true. And, in fact, the Complaint alleges Defendants publicly disclosed that ByteDance Ltd. is TikTok's ultimate parent company, *id*. ¶¶ 167–68, owns the TikTok algorithm, *id*. ¶ 2, "plays a role in the hiring of key personnel at TikTok," *id*. ¶ 165, and that "[h]igh-level ByteDance employees have served in dual roles for ByteDance and for TikTok Inc., at least as recently as 2021," *id*. ¶ 166.[13]

Moreover, Defendants cannot be held liable for "paint[ing] a . . . picture for Indiana consumers that there is minimal risk of" the Chinese Government accessing their data, *id.* ¶ 18, as such allegations are "too general" and subjective to support a claim under the DCSA. *See, e.g.*, *Castagna v. Newmar Corp.*, 340 F. Supp. 3d 728,

[13] In these final two allegations (regarding TikTok hiring practices and employees), the State once again does not explicitly state which ByteDance corporate entity it is referencing, but other portions of its Complaint make clear that these allegations relate to TikTok Inc.'s ultimate parent company, ByteDance Ltd. *See, e.g.*, Compl. ¶ 12 (alleging that TikTok Inc. "misleads Indiana consumers about the level of influence and control exercised by its parent company, ByteDance, over TikTok and its operations"). As noted above, ByteDance Ltd. is a holding company with no employees. The Court need not resolve this discrepancy for purposes of this motion.

741 (N.D. Ind. 2018); *Kesling v. Hubler Nissan, Inc.*, 997 N.E.2d 327, 332–33 (Ind. 2013). Indeed, in *Kesling*, the Indiana Supreme Court held that a defendant could not be liable under the DCSA for describing a car as "sporty" and "top quality" because such statements are "subjective assertion[s] of opinion, not fact." 997 N.E.2d at 332–33. Likewise here, Defendants cannot be liable for allegedly "downplay[ing] ByteDance's control and influence over TikTok" and "claim[ing] that TikTok is independent from ByteDance." Compl. ¶¶ 245–46.[14]

d) Defendants' alleged statements and omissions about the in-app browser were not deceptive as a matter of law.

Finally, the State alleges that Defendants violated the DCSA by failing to disclose TikTok's use of an in-app browser. *See* Compl. ¶¶ 207–21. Specifically, the State alleges that Defendants deceived consumers by not telling them that when they click a website link on TikTok, the website will open on TikTok's in-app browser (rather than the default web browser on their phone), which has the capability to collect data regarding their web browsing. *Id.* These allegations do not satisfy Rule 9(B) as discussed above, *see supra*, and also fail to state a claim under Rule 12(B)(6).

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[14] These allegations likewise appear to relate to TikTok Inc.'s ultimate parent company, ByteDance Ltd., rather than ByteDance Inc. *See, e.g.*, Compl. ¶ 204 ("TikTok paints the picture of an independent U.S.-based company, with little to no risk of interference by its Chinese parent company . . . . These efforts to downplay ByteDance's control and influence over TikTok . . . are deceptive and misleading.").

First, the State's own allegations undermine its claim that when using the in-app browser, it "appears to the average user that he or she exited the TikTok app to view the page." Compl. ¶ 208. As the State concedes, the user interface of the in-app browser is not the "consumer's default browser on their phone," and looks nothing like a regular browser, as it "displays the generic phrase 'Web Browser' across the top of the screen." *Id*. ¶¶ 210–11. Moreover, the State alleges that TikTok "does not offer the user the option to open that link in their default browser." *Id*. ¶ 212. These allegations make clear that an "average user" would not believe she was using her normal, default browser to view the external website.

Similarly, the State's allegations that TikTok "does not alert users to its capabilities to collect sensitive information through the user's use of the in-app browser," *id.* ¶ 217, is insufficient to state a claim. The State nowhere alleges that TikTok actually uses the in-app browser to collect "sensitive information" from Indiana consumers, only that it has the "capabilities" to do so. *Id.* ¶ 217. Defendants' alleged failure to disclose this capability is not deceptive under the

DCSA and certainly does not suggest that Defendants were acting with an intent to deceive.[15] *See Sims*, 2016 WL 6610835, at *5.

In any event, TikTok's privacy policy—which applies to "TikTok services (the 'Platform'), [including] *TikTok apps*, websites, *softwar*e and *related services* accessed via any platform or device that link to this Privacy Policy," *see* Exhibit A to Defendants' Motion for Judicial Notice (privacy policy dated May 22, 2023) at 1 (emphasis added)—expressly discloses the relevant facts regarding the in-app browser.[16] The policy states that TikTok "automatically collect[s] certain

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[15] The State relies on various public sources to assert claims regarding TikTok's in-app browser. The Court need not consider these sources to dismiss the State's Complaint, but those sources make clear that (1) in-app browsers are a standard feature that users encounter on a wide range of similar apps, *see* Compl. ¶ 215 n.141 (citing Felix Krause, *iOS Privacy* (Aug. 18, 2022), https://bit.ly/3Uve3wJ (stating that Instagram, FB Messenger, Facebook, Amazon, Snapchat, and Robinhood "have their own in-app browser[s]")); and (2) Defendants do not use the in-app browser to collect sensitive information from users, but instead use "the Javascript code in question . . . for debugging, troubleshooting and performance monitoring of [the user] experience—like checking how quickly a page loads or whether it crashes." *Id.* (quoting TikTok spokesperson and stating, "[t]he above statement confirms my findings"); *see also id.* ("Do the apps above [including TikTok] actually steal my passwords, address and credit card numbers? No!"). Indeed, mere months after Krause published his research claiming TikTok has the ability to collect keystroke data, Forbes reported that "there is no evidence [that] TikTok is actually doing so." *See* Richard Nieva & Thomas Brewster, *Lawmakers Press Apple and Google Over TikTok's Keystroke Tracking Ability*, Forbes (Nov. 4, 2022), https://www.forbes.com/sites/richardnieva/2022/11/04/lawmakers-letter-apple-google-tiktok-keystroke-tracking/?sh=5e94fd2441a6.

[16] Even if the Court declines to take judicial notice of the privacy policy, it may still consider the document as part of the record in this case, pursuant to Indiana Trial Rule 9.2(A) because the State's Complaint is, in part, founded on the content of the (continued…)

information from you when you use the Platform, including internet or other network activity information," such as "browsing and search history" and "information regarding your use of the Platform." *Id.*; *see also* Compl. ¶ 218 n.144 (citing privacy policy dated May 22, 2023). These disclosures fatally undermine any claim that TikTok's use of an in-app browser violates the DCSA. *See In re TikTok Inc. Consumer Privacy Litig.*, No. 1:20-cv-04699, ECF No. 261 at 50–51 & n.26 (N.D. Ill. Jul. 28, 2022) (approving a class action settlement in case alleging that TikTok "surreptitiously harvest[s] and profit[s] from collecting the private information of users" and explaining that "[a]ll of [the plaintiffs'] claims could be undermined by the App's terms of service and privacy policy, which disclose the ways in which Defendants collect, use, and share data and information submitted by App users," such as "browsing and search history").

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policy. *See* Ind. R. Trial P. 9.2(A) ("When any pleading allowed by these rules is founded on a written instrument, the original, or a copy thereof, shall be included in or filed with the pleading. Such instrument, whether copied in the pleadings or not, shall be taken as part of the record."); *see generally Gregory & Appel, Inc. v. Duck*, 459 N.E.2d 46, 50 (Ind. Ct. App. 1984) (where complaint "clearly and unmistakably allege[s]" a written instrument upon which the lawsuit is premised, such instrument is "part of the complaint" and not "extraneous to the pleadings") (quotations omitted); *188 LLC v. Trinity Indus., Inc.*, 300 F.3d 730, 735 (7th Cir. 2002) ("It is also well-settled in this circuit 'documents attached to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to his claim. Such documents may be considered by a district court in ruling on the motion to dismiss.'") (quoting *Wright v. Assocs. Ins. Cos. Inc.*, 29 F.3d. 1244, 1248 (7th Cir. 1994)).

Because the State's own allegations make clear that TikTok did not communicate any falsehoods or fail to disclose any material facts to Indiana consumers, its Complaint should be dismissed.

III. THE RELIEF SOUGHT BY THE STATE, IF IMPOSED BY THE COURT, WOULD VIOLATE THE U.S. CONSTITUTION.

The grounds described above are more than sufficient to dismiss the Complaint, and the Court need not reach the arguments below. *See Bookwalter v. Ind. Election Comm'n*, 2023 WL 3000789, at *3 (Ind. Ct. App. Apr. 19, 2023) ("[I]t is a cardinal principle of the judicial function that we will pass upon the constitutionality of a coordinate branch's action only when it is absolutely necessary[.]"). However, if the Court were to reach them, the following constitutional infirmities with the State's Complaint offer additional grounds to dismiss the case.

A. The State's DCSA claim is Barred by the First Amendment.

The State seeks to hold Defendants liable for speech protected by the First Amendment. U.S. Const., amend. I. Accordingly, its Complaint should be dismissed.

The First Amendment protects the right of companies like TikTok Inc. to speak on matters of public concern. *See Citizens United v. FEC*, 558 U.S. 310, 365 (2010) ("[T]he Government may not suppress political speech on the basis of the speaker's corporate identity."); *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 597 (7th

Cir. 2012) (the First Amendment protects the liberty to discuss "all matters of public concern") (internal quotation marks omitted). That protection extends even to statements the government labels false. *See, e.g.*, *United States v. Alvarez*, 567 U.S. 709, 721–23 (2012) (plurality op.) ("This opinion . . . rejects the notion that false speech should be in a general category that is presumptively unprotected."); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth . . . and especially one that puts the burden of proving truth on the speaker.").

Here, the vast majority of Defendants' statements that the State cites in support of its claim were public advocacy and government petitioning activity on matters of public concern. *See, e.g.*, Compl. ¶ 93 (describing the ongoing public debate and governmental scrutiny of alleged Chinese access to TikTok U.S. user data). The State alleges that Defendants made these statements in the context of that ongoing debate, including through letters and testimony to legislators, *id.* ¶¶ 86–88, 99, 104, 106, 120, 129–30, 155, 163, 165; interviews with major news outlets, *id.* ¶¶ 85 & n.43, 87 & n.46, 89 & n.49; statements on TikTok's website, *id.* ¶ 86 & n.44; and discussions of TikTok's alleged public-relations strategy writ large, *id.* ¶¶ 153–54. No civil liability can arise from Defendants' alleged engagement in such constitutionally-protected activities. *See Alvarez*, 679 F.3d at 597.

For similar reasons, the State's claim is barred by the *Noerr-Pennington* doctrine, which precludes liability based on a defendant's "publicity campaign[s] directed at the general public, seeking legislation or executive action." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499–500 (1988). *See generally E. R. R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). The doctrine's protections apply not only to statements made directly to government officials, but also to public-relations efforts intended to influence public policy. *See, e.g.*, *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 849–50 (7th Cir. 2011); *see also New W., L.P. v. City of Joliet*, 491 F.3d 717, 722 (7th Cir. 2007) ("*Noerr–Pennington* has been extended beyond the antitrust laws, where it originated, and is today understood as an application of the first amendment's speech and petitioning clauses."). Here, the Complaint acknowledges the ongoing executive and legislative scrutiny of TikTok's data practices. The First Amendment fully protects Defendants' petitioning activities in the context of these inquiries, whether directed to government officials (as most of the challenged statements were) or the public at large. *See Mercatus Grp., LLC*, 641 F.3d at 841.

B. The State's Claims Are Preempted by Federal Law.

Indiana's claims also are preempted by federal law because Indiana lacks the power to regulate foreign affairs and matters relating to national security. The

Constitution's text and structure make clear that foreign affairs and national security are the exclusive prerogative of the Congress and President. *Ziglar v. Abbasi*, 582 U.S. 120, 142 (2017); *Thayer v. Hedges*, 22 Ind. 282, 289–91 (Ind. 1864) (recounting the federal government's power over foreign affairs since the Articles of Confederation); *Perpich v. Dep't of Def.*, 496 U.S. 334, 351 (1990).

"Foreign affairs preemption" embraces two related, but discrete, doctrines: conflict preemption and field preemption. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 418–20 (2003). Under "field preemption," state laws that intrude on "exclusive" areas of "federal regulation"—such as national security—are preempted, even in the absence of any express federal policy. *See Basileh v. Alghusain*, 912 N.E.2d 814, 818 (Ind. 2009); *see also Garamendi*, 539 U.S. at 418. "Conflict preemption," meanwhile, "voids a state law . . . when the state law does 'major damage' to the federal law's purpose." *Kennedy Tank & Mfg. Co., Inc. v. Emmert Indus. Corp.*, 67 N.E.3d 1025, 1029 (Ind. 2017) (citations omitted); *accord Garamendi*, 539 U.S. at 419. This occurs when the State regulates "areas of intense federal concern"—like "foreign relations"—because the State's actions are

"disruptive to Congress's system." *Kennedy Tank*, 67 N.E.3d at 1030–31. Here, the State's claims are preempted under both doctrines.[17]

1. Federal law occupies the national security field.

"[U]nder a field preemption analysis, when a state law (1) has no serious claim to be addressing a traditional state responsibility and (2) intrudes on the federal government's foreign affairs power, the Supremacy Clause prevents the statute from taking effect." *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1074 (9th Cir. 2012) (citing *Garamendi*, 539 U.S. at 426). Thus, "even in the absence of any treaty, federal statute, or executive order, a state law may be unconstitutional if it 'disturb[s] foreign relations' or 'establish[es] its own foreign policy.'" *Movsesian*, 670 F.3d at 1072 (quoting *Zchernig v. Miller*, 389 U.S. 429, 440–41 (1968)).

Here, the State's Complaint is preempted because it concerns national security and foreign policy *vis-à-vis* China and thus "intrudes on the field of foreign affairs entrusted exclusively to the federal government." *Movsesian*, 670 F.3d at 1077. Specifically, the State seeks to hold Defendants liable for making allegedly

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[17] "Preemption is typically a federal defense to a plaintiff's substantive state-law claim." *FMS Nephrology Partners N. Cent. Ind. Dialysis Ctrs, LLC v. Meritain Health, Inc.*, 144 N.E.3d 692, 698 (Ind. 2020). As such, it "operates to dismiss state claims on the merits," regardless of whether it can "serve as the basis for federal question jurisdiction." *Micronet, Inc. v. Ind. Util. Regul. Comm'n*, 866 N.E.2d 278, 291 n.12 (Ind. Ct. App. 2007) (cleaned up). For that reason, the federal district court's remand order in this case has no bearing on the defenses asserted here.

"deceptive and misleading statements about the risk of access to and exploitation of consumers' data by the Chinese Government and/or Chinese Communist Party." Compl. ¶ 21. *See also, e.g.*, *id.* ¶¶ 1, 9, 18, 21, 53, 56, 82, 91, 110, 134, 145, 146, 151, 152, 161, 221. And the State has conceded that "to adjudicate [its] claim, the court would need to evaluate whether Defendants are deceiving Indiana consumers 'about the risks of the Chinese Government's and/or Communist Party's access to their data.'" Br. in Supp. of Mot. to Remand, Cause No. 1:23-cv-13-HAB, ECF No. 18.1 at 6 ("Mot. to Remand"). Thus, the Complaint seeks to intrude on an area that is plainly entrusted exclusively to the federal government, and therefore is preempted. *See Garamendi*, 539 U.S. at 420.

This conclusion is particularly warranted here, where Congress evinced an intent to have "exclusive federal regulation of the area." *Basileh*, 912 N.E.2d at 818. Indeed, Section 721 of the Defense Production Act ("Section 721"), 50 U.S.C. § 4565, and the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701–08, together create a "scheme of federal regulation" to address national security concerns posed by foreign economic activity that is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also Basileh*, 912 N.E.2d at 818.

Specifically, Section 721 authorizes the Committee on Foreign Investment in the United States ("CFIUS"), an interagency committee of the Executive Branch, to review foreign acquisitions of U.S. businesses to determine their impact on national security. 50 U.S.C. § 4565. If CFIUS determines that a "covered transaction" would adversely affect "the national security of the United States," *id.* § 4565(b)(2)(A), CFIUS is empowered to mitigate those risks by "negotiat[ing], enter[ing] into or impos[ing]" conditions on the parties to the transaction, *id.* § 4565(l)(3)(A)(i). IEEPA further empowers the President to address threats to national security. 50 U.S.C. § 1701(a). Once the President has declared a national emergency, the President may, among other things, "regulate," "nullify," or "prohibit" any "acquisition" or "transfer" of "any property in which any foreign country or a national" has an interest, "subject to the jurisdiction of the United States." *See id.* § 1702(a)(1)(B).

The executive branch has increasingly used these authorities to address perceived threats to U.S. data like the ones the State alleges here, *see, e.g.*, Compl. ¶ 247—and in fact has used these authorities to attempt to regulate Defendants for similar data security concerns at issue here. *See* Status Report, *TikTok Inc. v. CFIUS*, No. 20-1444 (D.C. Cir. June 26, 2023); *TikTok Inc. v. Trump*, 490 F. Supp. 3d 73, 76 (D.D.C. 2020); *TikTok Inc. v. Trump*, 507 F. Supp. 3d 92, 114 (D.D.C. 2020). *See also, e.g.*, Exec. Order 14034, 86 Fed. Reg. 31423 (June 9, 2021) (directing

agencies to adopt processes to protect "sensitive data"); Exec. Order 13694, 80 Fed. Reg. 18077 (Apr. 1, 2015) (withholding property from foreign actors engaging in "malicious cyber-enabled activities"). Under these circumstances, there is no room for Indiana to regulate in this space.

Because the State's claims would "tread[] on ground that is held exclusively by the federal government," they are preempted. *NLMK Pa., LLC v. U.S. Steel Corp.*, 592 F. Supp. 3d 432, 453 (W.D. Pa. 2022).

2. The State's claims conflict with federal law.

The State's claim is also preempted because it stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Basileh*, 912 N.E.2d at 818 (citing *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000)).

As referenced above, under the CFIUS framework, TikTok and the federal government are currently engaged in negotiations over how to mitigate national security concerns of the government related to TikTok's data security. *See* Status Report, *TikTok Inc. v. CFIUS*, No. 20-1444 (D.C. Cir. June 26, 2023). As the State alleges, Defendants are already working to implement a number of strategies to mitigate any purported national security risks around TikTok's U.S. user data. *See, e.g.*, Compl. ¶ 86. Defendants remain in discussions with the U.S. government regarding this implementation and other safeguards. *See* Status Report, *TikTok Inc.*

v. CFIUS, No. 20-1444 (D.C. Cir. June 26, 2023) (explaining that the U.S. government and Defendants "continue to be involved in ongoing negotiations to determine" whether any national security concerns related to Defendants' data management practices "may be resolved by mutual agreement").

If successful, the State's Complaint would disrupt and potentially constrain CFIUS's ability to explore the full range of mitigation options to address any purported risks. *See Arellano v. Clark Cnty. Collection Serv., LLC*, 875 F.3d 1213, 1216 (9th Cir. 2017) (quoting *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987)). For example, the State's requested injunction could interfere with the robust solution CFIUS and Defendants are negotiating by mandating disclosures that are factually incompatible with this mitigation structure. *See also, e.g.*, Compl. ¶¶ 129–30 (alleging that the arrangement with Oracle would not "resolve all security concerns"). Such a state court injunction would violate the Supreme Court's admonition that federal power in the field affecting foreign affairs and national security "be left entirely free from local interference." *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941).

IV. THE COURT SHOULD DISMISS OR STAY THIS CASE UNDER THE DOCTRINE OF PRIMARY JURISDICTION.

Even if federal law did not preempt the State's claim, the Court should dismiss or stay this action under the doctrine of primary jurisdiction.

"The doctrine of primary jurisdiction is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *Ryan v. Chemlawn Corp.*, 935 F.2d 129, 131 (7th Cir. 1991). This prudential doctrine applies "when a claim is cognizable in a court but adjudication of the claim 'requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of [an] administrative body.'" *Austin Lakes Joint Venture v. Avon Utils., Inc.*, 648 N.E.2d 641, 645 (Ind. 1995) (quoting *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956)). In such circumstances, Indiana courts routinely grant requests for stays. *See, e.g.*, *Moran Elec. Serv., Inc. v. Comm'r, Ind. Dep't of Env't Mgmt.*, 8 N.E.3d 698, 708 (Ind. Ct. App.), *aff'd on reh'g*, 13 N.E.3d 906 (Ind. Ct. App. 2014) (concluding "under the doctrine of primary jurisdiction, this action should be stayed until the administrative action is final").

Although "[n]o fixed formula exists for applying" the doctrine, courts consider whether (1) its application would "promote[] consistency and uniformity, particularly where the development of the law is dependent to some degree upon administrative policy," (2) "an administrative agency is uniquely qualified to resolve the complexities of [issues] which are outside the conventional experience of the courts," and (3) judicial economy would be served "because the dispute may be decided within the agency." *Ryan*, 935 F.2d at 131; *see also Austin Lakes*, 648

N.E.2d at 645 (similar). All of these factors heavily favor invoking the doctrine here.

First, staying state court proceedings pending resolution of CFIUS's federal agency investigation and review, including any related litigation in the D.C. Circuit, will promote legal and factual uniformity and avoid conflicting dispositions of the same issues. *See Ryan*, 935 F.2d at 131; *see also* 50 U.S.C. § 4565(e)(2) (granting the D.C. Circuit original and exclusive jurisdiction to review challenges to CFIUS proceedings and orders). The State has conceded that "to adjudicate [its] claim, the court would need to evaluate whether Defendants are deceiving Indiana consumers 'about the risks of the Chinese Government's and/or Communist Party's access to their data.'" Mot. to Remand at 6. Yet Defendants and the federal government, through CFIUS, have been and continue to be engaged in negotiations to address any perceived national security concerns related to Chinese Government access to U.S. user data. *See supra* Section III.B.2.; Status Report, *TikTok Inc. v. CFIUS*, No. 20-1444 (D.C. Cir. June 26, 2023). Adjudicating the State's claim would require a reassessment of those same national security questions, as the State has conceded. Mot. to Remand at 6 (conceding that "to adjudicate [the State's] claim, the court would need to evaluate whether Defendants are deceiving Indiana consumers 'about the risks of the Chinese Government's and/or Communist Party's access to their data") (internal quotations omitted).

Second, CFIUS is "uniquely qualified" to address the national security and foreign affairs issues implicated by the State's Complaint. *Ryan*, 935 F.2d at 131. Congress specifically empowered CFIUS to balance the nation's interests in foreign investment and national security. *See id*. CFIUS is comprised of designees from expert federal agencies, including nine full-time voting member agencies, other federal government agencies that are included on an as-needed basis, and the Director of National Intelligence. *See* Exec. Order 13456, 73. Fed. Reg. 4677 (Jan. 23, 2008). The heads of the Office of Management and Budget, the Council of Economic Advisers, and the National Economic Council, as well as staff of the National Security Council and Homeland Security Council are also included to observe and participate in Committee deliberations, and report to the President. *See id.* Collectively, the CFIUS member agencies and participants have national security responsibilities and a wide-range of technical expertise directly relevant to the matters raised by the State's claim. *Id.*

Third, staying the matter would promote judicial economy because engagement with the Committee will resolve these issues without the need for lengthy, protracted litigation. *See Ryan*, 935 F.2d at 131. If, after the resolution with CFIUS, the State still wishes to press its claims, the Committee's determinations—and any related decisions from the D.C. Circuit—will help clarify and streamline any further litigation on these subjects.

CONCLUSION

For the forgoing reasons, Defendants respectfully request that the Court dismiss the Complaint.

Dated: July 19, 2023

Respectfully Submitted,

FAEGRE DRINKER BIDDLE & REATH LLP

By: */s/ Daniel E. Pulliam*
Andrea Roberts Pierson, #18435-49
Daniel E. Pulliam, #29439-49
Nicholas B. Alford, #31867-49
300 North Meridian Street, Suite 2500
Indianapolis, IN 46204
Tel. (317) 237-0300
Andrea.Pierson@faegredrinker.com
Daniel.Pulliam@faegredrinker.com
Nicholas.Alford@faegredrinker.com

COVINGTON & BURLING LLP

John E. Hall (8707-95-TA)
Alexander A. Berengaut (8705-95-TA)
Megan A. Crowley (8914-95-TA)
850 Tenth Street, NW
Washington, DC 20001
Tel. (202) 662-6000
jhall@cov.com
aberengaut@cov.com
mcrowley@cov.com

Counsel for Defendants TikTok Inc., TikTok Pte. Ltd., ByteDance Inc., and ByteDance Ltd.

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2023 a copy of the foregoing was filed electronically. Notice of this filing will be sent to the parties by operation of the Court's electronic filing system.

/s/ *Daniel E. Pulliam*