Filed: 8/23/2023 4:40 PM
Clerk
Allen County, Indiana
ED

IN THE SUPERIOR COURT OF ALLEN COUNTY

INDIANA, *Plaintiff*, v. TIKTOK INC., TIKTOK PTE. LTD, BYTEDANCE INC., BYTEDANCE LTD., *Defendants.*	Case No. 02D03-2212-PL-000401 **PUBLIC REDACTED**

BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Statutes and Codes

Other Authorities

INTRODUCTION

Defendants TikTok, Inc., TikTok Pte. Ltd., ByteDance Inc., and ByteDance Ltd. (collectively "TikTok") profit enormously from Indiana consumers who exchange their personal information for access to TikTok's social-media platform. To do so, TikTok deceives those consumers by concealing and outright misrepresenting the fact that using the platform exposes their information to the Chinese Government.

The operative complaint explains which of TikTok's statements are false, and how. These allegations more than suffice to state claims under the Deceptive Consumer Sales Act ("DCSA"). TikTok's numerous transactions with Indiana consumers subject it to specific personal jurisdiction in this case and to liability under the DCSA. And the State's run-of-the-mill consumer-protection claims offend neither the First Amendment nor the Supremacy Clause. TikTok first attempted to evade the Indiana courts' application of Indiana law to its business in Indiana by removing this case to federal court, which rejected TikTok's meritless arguments. TikTok's arguments have no more merit now. Its Motion To Dismiss should be denied.

BACKGROUND

TikTok is a social-media application made available for Indiana consumers to download through Apple's App Store, the Google Play Store, and the Microsoft Store. *See* First Am. Compl. ¶ 40 (June 9, 2023) ("Am. Compl."). By interacting with the TikTok platform, users reveal a vast amount of sensitive personal information—their locations, interests, and much else—that TikTok collects. TikTok tells users as much. *See id*. ¶¶ 42–50. What TikTok does not tell users is that all this data is available not only to TikTok, but also to the Chinese Government and Communist Party (which are effectively one and the same).

Through its website and other public statements, TikTok assures U.S. consumers, including Indiana consumers, that (among other things) their data is protected by robust protocols overseen by a U.S.-based team, that TikTok has never provided user data to the Chinese Government and never would, and that "[n]one of our data is subject to Chinese law." *Id*. ¶¶ 5, 54, 157. As detailed in the operative complaint, these statements are false, deceptive, and misleading.

TikTok is owned and actively controlled by Defendant ByteDance Ltd., a multinational company headquartered in Beijing. *See id*. ¶¶ 162–86.[1] As a Chinese entity, ByteDance is subject to Chinese law, including laws mandating cooperation with China's intelligence services, as well as to the influence of the Chinese Government and Communist Party. *See id*. ¶¶ 58–82, 152–61. Thus, TikTok's user data is available to persons and entities who can be required or pressured to make that data available to the Chinese Government.

Representatives of TikTok and ByteDance have confirmed that Chinese authorities do in fact obtain personal data about U.S. citizens from TikTok. One former ByteDance executive even claims that Chinese authorities have a "backdoor channel" to that data and that ByteDance permits this access out of fear that the Chinese Government will ban ByteDance apps in China. *Id*. ¶ 101;[2] *see also id*. ¶¶ 96–134. Yet TikTok endeavors to obscure what it calls "the China association," including through its U.S. privacy policy, which purports to inform users how TikTok collects and shares their information—but which omits any reference to China. *Id*. ¶¶ 9–11, 158–60.

[1] ByteDance Ltd. is also the parent of TikTok Pte. Ltd. and ByteDance Inc., the other Defendants in this action. *See* Am. Compl. ¶ 39.

[2] Apparently concerned about this statement, TikTok argues that it should be struck under Rule 12(f). *See* Mem. in Supp. of Defs.' Mot. to Dismiss at 37 n.9 (July 20, 2023) ("MTD"). TikTok's assertion that "[t]he State does not allege there is any such 'backdoor,' only that a third-party 'claims' there is one in his own litigation," *id*., amounts to faulting the State for failing to prove its case in its complaint. And an allegation based on a statement by TikTok's own executive in a court filing is far from "groundless." *Id*.

These misrepresentations violate the Deceptive Consumer Sales Act by misleading Indiana consumers about how their personal information may be shared and used. The Attorney General brings this suit against TikTok, its parent ByteDance, and affiliated entities on behalf of the State pursuant to his authority under IND. CODE ANN. §§ 4-6-3-2 and 24-5-0.5-4. The operative complaint asserts six claims under the DCSA based on TikTok's: misrepresentations about the security of its data on U.S. users (Count I); misrepresentations about the application of Chinese law to Indiana consumer data (Count II); deceptive and misleading privacy policy (Count III); failure to comply with the disclosure requirements of the App Store and Google Play Store, which users expect apps available on those stores to comply with (Count IV); false, deceptive, and misleading statements about the influence and control of the Chinese Government and Community Party (Count V); and false, deceptive, and misleading use of an in-app browser, whereby TikTok gathers user data that may be shared with the Chinese Government unbeknownst to the user (Count VI). The State seeks declaratory and injunction relief to prevent future deceptive conduct and civil penalties to remedy TikTok's past deceptions. *See* Am. Compl. at 54–55.

TikTok previously attempted to remove this case to the Northern District of Indiana, which rejected TikTok's arguments for federal jurisdiction and remanded the case to this Court. TikTok now moves to dismiss the complaint based in part on the same arguments it made for removal.

ARGUMENT

I. TikTok Is Subject to Specific Personal Jurisdiction.

TikTok has substantial contacts with Indiana and this action arises from and relates to those contacts. TikTok is therefore subject to specific personal jurisdiction in this case.

Indiana authorizes its courts to exercise personal jurisdiction to the maximum extent permitted under the Due Process Clause of the Fourteenth Amendment. *See LinkAmerica Corp. v.*

Cox, 857 N.E.2d 961, 967 (Ind. 2006); *Boyer v. Smith*, 42 N.E.3d 505, 507 (Ind. 2015); IND. R. TRIAL P. 4.4. Thus, Indiana courts may assert personal jurisdiction over any out-of-state defendant that 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." *Int'l Shoe Co. v. Wash. Off. of Unemployment Compensation & Placement*, 326 U.S. 310, 316 (1945) (cleaned up). TikTok does not seriously argue that the otherwise proper assertion of personal jurisdiction against TikTok—a multi-billion-dollar company with hundreds of thousands if not millions of Indiana users—would "offend traditional notions of fair play and substantial justice." *Id.* (cleaned up). TikTok instead focuses its argument on the extent of its contacts with Indiana.

Specific personal jurisdiction applies if the Court determines (1) that TikTok "purposefully avail[ed] itself of the privilege of conducting activities within" Indiana; (2) that this suit "arise[s] out of or relate[s] to [TikTok's] contacts" with Indiana; and (3) that "'the maintenance of the suit' is 'reasonable, in the context of our federal system of government.'" *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021) (quoting *Int'l Shoe Co.*, 326 U.S. at 316–17) (internal quotation marks omitted). Those factors are easily satisfied here.

First, TikTok has purposefully availed itself of the privilege of doing business in Indiana. As the U.S. Supreme Court explained in its most recent case on personal jurisdiction, if a company "serves a market for a product in a State and that product causes injury in the State to one of its residents, the State's courts may entertain the resulting suit." *Id.* at 1022. In such situations, the company can be said to have "purposely avail[ed] itself of the privilege of conducting activities within the forum State." *Id.* at 1019 (cleaned up).

TikTok has served the Indiana market through substantial contacts with the State. TikTok "is a global . . . company," and "its business is everywhere." *Id.* at 1022. TikTok "markets" and

provides its product "across the United States and overseas." *Id*. In Indiana alone, the TikTok app [redacted]. *See* Am. Compl. ¶ 30. TikTok actively targets content and advertisements to Indiana users based on their location. *See id*. ¶¶ 30–34. Based on location data collected from Indiana users, TikTok serves unique, location-specific content to those users—*e.g.*, videos about Indiana basketball or local restaurants and attractions. *See id*. ¶ 31. In doing so, TikTok effectively creates an Indiana-specific experience designed to encourage Indiana users to return to the app frequently and for long durations, thereby increasing TikTok's ability to earn advertising revenue. TikTok also compensates content creators within the State. *See id*. ¶ 33.

TikTok "initiated the[se] contacts" with Indiana and "expected," if not "encouraged," the contacts that give rise to this case. *Aquatherm GmbH v. Renaissance Assocs. I Ltd. P'ship*, 140 N.E.3d 349, 359 (Ind. Ct. App. 2020). "[W]hat matters" for specific personal jurisdiction "is [TikTok's] structuring of its own activities so as to target the [Indiana] market." *NBA Props., Inc. v. HANWJH*, 46 F.4th 614, 624 (7th Cir. 2022). TikTok has been serving the Indiana market and its "actions certainly can be characterized as purposeful." *Id*. TikTok has established an app and distributed it "using a third-party retailer" (*e.g.*, the App Store). *Id*. In so doing, TikTok "unequivocally asserted a willingness" to make that app available throughout the United States, including Indiana, and TikTok has "established the capacity to do so," as evident in the millions of TikTok downloads in Indiana and TikTok's undisputed revenue-generating activities in the State. *Id*. The fact that Hoosiers have downloaded TikTok's app is not the "result of random, fortuitous, or attenuated contacts." *LinkAmerica Corp.*, 857 N.E.2d at 967. It is the direct result of TikTok's business and of how it has "structured" its operations to "invite" downloads from Indiana. *NBA Props.*, 46 F.4th at 625.

Second, the claims in this lawsuit "arise out of" and "relate to" TikTok's contacts with Indiana, and either is sufficient for personal jurisdiction. *Ford Motor Co.*, 141 S. Ct. at 1025–26 (rejecting the notion "that only a strict causal relationship between the defendant's in-state activity and the litigation will do"). TikTok's collection of user data for purposes of targeted content and advertising is at the core of its business model and of its contacts with Indiana users. And the State's claims arise directly from those contacts, namely from TikTok's misrepresentations about the Chinese Government's access to the data TikTok collects. These misrepresentations occur at the point of transaction between TikTok and Hoosier users. When prospective Indiana users view the TikTok app in the App Store, Google Play Store, or Microsoft Store, they see TikTok's false representations—including in TikTok's privacy policy, which is linked on TikTok's page within these app stores and which omits that user data may be made available to the Chinese Government. *See* Am. Compl. ¶¶ 135–51. When users consider the security of the TikTok platform, they consider these false representations. TikTok knows and intends that these misrepresentations will reach Indiana consumers, and they do. The false representations at the basis of this suit thus relate to the way TikTok profitably engages in business in the State: by making its app available to millions of Indiana users, then gathering their personal data. *See uBID, Inc. v. GoDaddy Group, Inc.*, 623 F.3d 421, 428 (7th Cir. 2010) (personal jurisdiction exists where the defendant's marketing, even if not "specifically target[ed]" at a state, "created substantial business" there).

Third, given TikTok's substantial overall contacts with Indiana, it is clearly reasonable that TikTok could be haled into court here. [redacted] Thus, likely millions of Indiana users have downloaded the TikTok app; have authorized TikTok to collect and use their location data, and, in doing so, traded valuable consideration for their access to TikTok's platform; and

have been misled in the process by TikTok's false representations in its privacy policy and elsewhere. [redacted]—in large part from targeting Indiana users with location-specific content and advertisements based on their location data; and, as noted, TikTok also compensates some Indiana users for content they create and post on the platform. *See id*. ¶¶ 32–33. With such extensive contacts in Indiana, it is entirely "predictable" that TikTok would be called to answer in Indiana courts for disputes relating to its representations to Indiana users. *Ford Motor Co.*, 141 S. Ct. at 1030. Accordingly, TikTok is subject to Indiana courts' specific personal jurisdiction in this case.

TikTok's counterarguments are all unavailing. TikTok first notes that it promulgated its misrepresentations from outside Indiana. But it has long been established that personal jurisdiction is not limited to the geographic location where the defendant acted. *See NBA Props.*, 46 F.4th at 621. Specific personal jurisdiction can arise for "acts performed outside the forum state that have an effect within the forum." *Aquatherm GmbH*, 140 N.E.3d at 357–58. Thus, in *Ford*, the Supreme Court held that people injured in car crashes in Montana and Minnesota could bring products-liability suits against Ford in those States even though the vehicles were neither sold, designed, nor manufactured there. As seen above, the question is whether TikTok "*serves*" the Indiana market—something it can do from outside Indiana's borders. *Ford Motor Co.*, 141 S. Ct. at 1022 (emphasis added). Indiana courts may exercise personal jurisdiction because "*[t]heir* residents, while [using TikTok] within *their* borders, were" lied to. *Id*. at 1032 (Alito, J., concurring in the judgment).

In any event, TikTok's false representations are in fact served to Indiana users while they are deciding whether to download TikTok in Indiana. These representations concern the data that TikTok collects from Indiana users while they are in Indiana, including data about their precise

location in Indiana. And TikTok profits from its representations to Indiana users by targeting advertisements to them based on their location in Indiana. By "'thoroughly, deliberately, and successfully exploit[ing] the [Indiana] market,'" and thereby causing harm in Indiana, TikTok has made itself subject to the jurisdiction of Indiana courts. *NBA Props.*, 46 F.4th at 622 (quoting *uBID*, 623 F.3d at 427).

For similar reasons, the State's claims do not ask the Court to assert personal jurisdiction based on Indiana users' "unilateral" actions. Although Indiana users have accepted TikTok's service by downloading the app, they had nothing to do with TikTok's own choices in serving the Indiana market. TikTok has ensured that its app is available nationwide, including in Indiana; it has designed its app to profit specifically from users' presence in Indiana; and it has succeeded in doing so. As in *uBID*, where the Seventh Circuit rejected a similar argument from GoDaddy (an Arizona-based web hosting company), TikTok itself has "created substantial business" in the State, and it "cannot now point to its hundreds of thousands [if not millions] of customers in [Indiana] and tell us, 'It was all their idea.'" 623 F.3d at 428. When TikTok made "a conscious choice to conduct business with the residents [in Indiana], 'it ha[d] clear notice that it is subject to suit there.'" *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1126 (W.D. Penn. 1997).

TikTok's assertion that recognizing personal jurisdiction in cases like this would render "defendants in internet-related cases . . . subject to personal jurisdiction in every spot on the planet where that interactive website is accessible" is therefore unfounded. MTD at 20 (internal quotation marks omitted). TikTok is unlike any of the "interactive websites" over which courts have declined to exercise personal jurisdiction in TikTok's cited cases. In one such case, the Seventh Circuit held that operating an e-commerce website that could receive orders from Indiana was insufficient to establish personal jurisdiction in Indiana for a trademark infringement suit. *See Advanced Tactical*

Ordnance Sys., LLC v. Real Action Paintball, Inc., 751 F.3d 796, 798 (7th Cir. 2014). In contrast, TikTok is not merely *accessible* from Indiana—TikTok provides a unique, tailored version of its platform to Indiana users. The product that TikTok offers to an Indiana user will look different because of his location in Indiana than the product offered anywhere else in the world.

Apparently recognizing this distinction, TikTok cites *Johnson v. TheHuffingtonPost.com*, 21 F.4th 314 (5th Cir. 2021), for the proposition that "Indiana-focused content and advertisements on the TikTok platform" do not create personal jurisdiction. MTD at 21. That case simply held that geotargeted advertisements on a New York-based publication's website were insufficient to subject the publication to personal jurisdiction in Texas for a libel suit because the publication's contacts with Texas—the advertisements—"neither caused nor relate to the harm that the [allegedly libelous] story caused." *Johnson*, 21 F.4th at 320–21. As explained, the harm caused here by TikTok's misrepresentations about its data-gathering practices arises directly from those practices as employed against Indiana users in service of TikTok's advertising business. And whereas the publication in *Johnson* showed geotargeted advertisements only to Texans "*already visiting its site*," *id.*, TikTok's misrepresentations impact users' decision whether to agree to use the TikTok platform at all.

TikTok also cites this Court's decision at the preliminary-injunction stage in Order Denying Mot. for Prelim. Inj., *Indiana v. TikTok, Inc.*, No. 02D02-2212-PL-400, at 18–22 (Ind. Super. Ct. May 4, 2023) ("PI Order"), for the holding that "the court lacked specific jurisdiction because [TikTok's] 'allegedly deceptive conduct'"—in that case, misrepresentations made in order to obtain a desired age rating for the TikTok app on app stores—"was directed to Apple in California and 'no aspect of the age rating process takes place in Indiana,'" MTD at 19–20. "Findings and conclusions made at the preliminary injunction phase are not binding in subsequent

phases of litigation," because "a preliminary injunction proceeding is exactly that: preliminary." *Mercho-Roushdi-Shoemaker-Dilley Thoraco-Vascular Corp. v. Blatchford*, 900 N.E.2d 786, 795 (Ind. Ct. App. 2009). Accordingly, the Court has not dismissed the State's other case against TikTok for lack of personal jurisdiction. And respectfully, that preliminary decision also does not provide any basis to dismiss this suit, either. As explained, if a defendant "serves a market for a product in a State," the State's courts have personal jurisdiction in resulting suits regardless of whether the defendant serves the market from out-of-state. *Ford Motor Co.*, 141 S. Ct. at 1022. The Court's decision makes no reference to this binding precedent from the United States Supreme Court.

The Court also saw a "difficulty" in the State's jurisdictional arguments because they "relate[d] to contacts that would exist in any of the 50 states where TikTok is available via Apple's App Store." PI Order at 20. Yet a company can be subject to specific personal jurisdiction in all fifty states. Many are. The facts to which "specific personal jurisdiction" attaches under *Ford Motor Co.*—namely "when a company like Ford serves a market for a product in the forum State and the product malfunctions there"—can easily exist in all fifty states for a company like Ford, whose "business is everywhere," no less than for a company like TikTok. 141 S. Ct. at 1022, 1027, 1032. Accordingly, the complaint alleges facts sufficient to establish specific personal jurisdiction over TikTok in this case.

II. The State Has Adequately Pled DCSA Claims.

A. The DCSA applies to TikTok's false representations.

The Deceptive Consumer Sales Act "is a remedial statute and shall be liberally construed and applied to promote its purposes and policies of protecting consumers from deceptive or unconscionable sales practices." *Kesling v. Hubler Nissan, Inc.*, 997 N.E.2d 327, 332 (Ind. 2013)

(internal quotation marks omitted). The Act itself commands that it "shall be liberally construed and applied to promote its purposes and policies." IND. CODE ANN. § 24-5-0.5-1(a). Those purposes are to "(1) simplify, clarify, and modernize the law governing deceptive and unconscionable consumer sales practices; (2) protect consumers from suppliers who commit deceptive and unconscionable sales acts; and (3) encourage the development of fair consumer sales practices." *Id*. § 24-5-0.5-1(b); *see also Kluger v. J.J.P. Enters., Inc.*, 159 N.E.3d 82, 88 (Ind. Ct. App. 2020). As relevant here, the Act provides that "[a] supplier may not commit an unfair, abusive, or deceptive act, omission, or practice in connection with a consumer transaction." IND. CODE ANN. § 24-5-0.5-3(a). This prohibition applies to TikTok's misstatements to Indiana consumers about what happens with the data they give to TikTok.

1. Downloading and using TikTok is a consumer transaction.

TikTok argues that the DCSA narrowly applies only to when money is exchanged, but the statutory text refutes that reading. The DCSA defines "consumer transaction" to encompass "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). And it includes as "suppliers" for these transactions (1) those who merely advertise to consumers, (2) manufacturers, (3) wholesalers, (4) people who do not directly deal with the consumer, and (4) debt collectors. *Id*. § 24-5-0.5-2(a)(3)(A)–(B). TikTok qualifies as a supplier in a consumer transaction—downloading the TikTok app "to a person for purposes that are primarily personal," *id*. § 24-5-0.5-2(a)(1)—whether the transaction is understood as a "sale" or as the "disposition" of an "intangible."

"[T]he common definition of a sale" is "the trade-off of title to property for consideration." *Monarch Beverage Co. v. Ind. Dep't of State Revenue*, 589 N.E.2d 1209, 1213 (Ind. T.C. 1992)

(internal quotation marks omitted). Although the DCSA itself does not define "sale," the Indiana Code elsewhere defines the term consistently with the common definition of "transfers [of] property to another person for consideration." IND. CODE ANN. § 6-2.5-4-1(b)(2) (defining "selling at retail"). The consideration from a sale can take various forms and is not limited to a money payment. *See Ind. Dep't of State Revenue v. Belterra Resort Ind., LLC*, 935 N.E.2d 174, 179 (Ind. 2010), *modified on reh'g*, 942 N.E.2d 796 (Ind. 2011) (defining consideration as a "benefit" and holding that "'consideration—no matter what its form—consists of a bargained-for exchange'"). And TikTok receives valuable consideration for the download of its app in the form of its users' data. *See Terms of Service*, TIKTOK (last updated July 2023), http://bit.ly/3IWR0Iz. Thus, TikTok sells its app to Indiana consumers even though it does not solicit money from them.

Alternatively, the catchall term "other disposition" encompasses downloading the TikTok app. TikTok argues that the terms "sale," "lease," "assignment," and "award by chance" all encompass monetary exchanges and that the term "other disposition" should be read likewise. But as just seen, this argument starts from a flawed premise. A "sale" does not require that consideration be in monetary form, and none of the other terms inherently requires an exchange of money. The DCSA also defines as "suppliers" several categories of people and entities whose roles do not necessarily involve exchanging money with consumers, and indeed that do not involve consumer interaction at all. *See* IND. CODE ANN. § 24-5-0.5-2(a)(3)(A)–(B). TikTok's narrow reading would thus risk making a hash of various provisions of the Act, which cannot have been the Legislature's intent. *See N. Ind. Bank & Tr. Co. v. State Bd. of Fin. of Ind.*, 457 N.E.2d 527, 532 (Ind. 1983).

Whether considered a "sale" or "other disposition," TikTok's transaction with Indiana consumers is a "consumer transaction" for the same fundamental reason: even though

downloading the TikTok app does not cost money, the app is not "free" to those who download it. Users exchange valuable information, and indeed some of the most intimate information they have, in exchange for the privilege of using the platform. *See* Am. Compl. ¶¶ 42–51. The nature of this exchange—extensive surveillance for the right to post and view videos—distinguishes this case from those TikTok cites, *see* MTD at 26, all of which are from out-of-State courts, none of which construe the DCSA, and all of which considered the services at issue to have been gratuitously given.[3] It also reveals the error in the Court's contrary (and preliminary) interpretation in the State's related DCSA suit against TikTok, which failed to account for this exchange. *See* PI Order at 30–32. And, contra TikTok, applying the DCSA to such exchanges in no way risks rendering the statute void for vagueness. A person "of ordinary intelligence," and certainly an entity of TikTok's sophistication, can readily comprehend that collecting copious information from millions of Indiana consumers to great profit subjects it to Indiana's consumer-protection law. *Bd. of Trs. of Purdue Univ. v. Eisenstein*, 87 N.E.3d 481, 505 (Ind. Ct. App. 2017).

In any case, TikTok's argument would fail under TikTok's own misreading of the DCSA. Even if the DCSA did contain some hidden "exchange-for-money" requirement despite its plain

[3] These include three cases decided before TikTok was invented. Two cases were decided under a California statute requiring "lost money or property as a result of the unfair competition," *In re Facebook Priv. Litig.*, 791 F. Supp. 2d 705, 714 (N.D. Cal. 2011); *Claridge v. RockYou, Inc.*, 785 F. Supp. 2d 855, 862 (N.D. Cal. 2011), and one was decided under a Pennsylvania law that required the "purchasing or leasing of goods or services," *Dobson v. Milton Hershey Sch.*, 356 F. Supp. 3d 428, 435 (M.D. Pa. 2018) (cleaned up). Given these statutes' explicit references to monetary exchanges, courts in those states had interpreted them not to include the provision of personal information. In another case, a plaintiff sued a company under Vermont's consumer-protection statute simply because the company insured the other party to an auto accident, a transaction "having nothing to do with" him. *Messier v. Bushman*, 197 A.3d 882, 891 (Vt. 2018). And in the last case, a criminal defendant appears to have brought consumer-protection claims against his court-appointed lawyers, from whom he had not acquired anything as a consumer. *See Rayford v. Maselli*, 73 S.W.3d 410, 411 (Tex. Ct. App. 2002). None of these cases undermines the conclusion that a user engages in a transaction with TikTok under the DCSA when providing access to extensive personal information in exchange for access to TikTok's platform.

text to the contrary, TikTok *does* receive money in exchange for the use of its app. Make no mistake—TikTok profits from consumers who use its app. In TikTok's Terms of Service, it states to potential users:

> You acknowledge and agree that we may generate revenues, increase goodwill or otherwise increase our value from your use of the Services . . . through the sale of advertising, sponsorships, promotions, usage data and Gifts . . . [and] you will have no right to share in any such revenue, goodwill or value whatsoever.

Terms of Service, TIKTOK (last updated July 2023), http://bit.ly/3IWR0Iz; *see* IND. R. EVID. 201 ("The court may judicially notice . . . a fact that . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."). TikTok profits from the transaction; it just profits from the commercial use of its users' data rather than their direct monetary payments. TikTok's choice to accept payment in a different form does not insulate TikTok from consumer-protection law. *See, e.g.*, Ruling, *Arizona v. Google, LLC*, No. CV-2020-6219, at 17 (Ariz. Super. Ct. Jan. 21, 2022) (attached as Ex. A) ("Providing location data, in exchange for use of apps or other services, can certainly be considered valuable consideration[.]").

If any doubt remained, the Legislature's "express statutory mandate that [the DCSA] 'be liberally construed and applied to promote its purposes and policies'" would require resolving it in the State's favor here. *Consumer Att'y Servs., P.A. v. State*, 71 N.E.3d 362, 366 n.4 (Ind. 2017) (quoting *Kesling*, 997 N.E.2d at 332; IND. CODE ANN. § 24-5-0.5-1). The Legislature knew that businesses could devise new ways to deceive consumers, and so it charged Indiana courts to construe the Act to "encourage the development of fair consumer sales practices" as business practices evolved. IND. CODE ANN. § 24-5-0.5-1(b)(3). Offering a product in exchange for geolocation data might be a relatively new business practice, but misstatements and omissions are an old problem, and TikTok's false representations fall squarely within the broad coverage of the DCSA.

2. TikTok's misrepresentations were made in connection with consumer transactions.

It follows from the above that TikTok's misrepresentations were made "in connection with" consumer transactions. IND. CODE ANN. § 24-5-0.5-3(a). Although the DCSA does not define "connection," the term is commonly used to mean "[t]he condition of being related to something else." *Connection*, OXFORD ENGLISH DICTIONARY (2d ed. 1989). TikTok's misrepresentations about its data-sharing policies relate to a user's decision to download TikTok and hand over valuable personal data. *See* Am. Compl. ¶ 82. That TikTok has made these misrepresentations through various mediums at various times, *see* MTD at 29, is irrelevant: the Act covers misrepresentations that "occur[] before, during, or after the transaction." IND. CODE ANN. § 24-5-0.5-3(a).

TikTok also suggests that "in connection with" means "reliance." But that reading has no textual basis, and TikTok cites no case adopting it. Moreover, the Attorney General need not show consumer reliance in his actions under the Act. *See id.* § 24-5-0.5-4(c). And even if he did, it is more than plausible that consumers relied on TikTok's promises that their data would not be accessible to the Chinese Government when choosing to download or continue using the app. *See, e.g.*, Am. Compl. ¶ 84 ("None of our data is subject to Chinese law." (quoting TikTok's statement on content moderation and data security practices)). After all, that seems to have been the motivating reason for those false promises.

3. Issue preclusion does not apply.

TikTok also argues that the State is issue-precluded from arguing that the DCSA applies to TikTok's transactions with its users because the Court suggested otherwise in the preliminary-injunction decision discussed above. "Issue preclusion is less favored against a government agency responsible for administering a body of law that affects the general public," as the Attorney

General is tasked with enforcing the DCSA. *Miller Brewing Co. v. Ind. Dep't of State Revenue*, 903 N.E.2d 64, 68 (Ind. 2009). Indeed, as the Indiana Supreme Court noted in *Miller Brewing Co*., courts have tended to "require affirmative misconduct by the government for issue preclusion to apply," which TikTok does not and cannot allege. *Id*. at 69.

In any event, the Court's preliminary-injunction decision—addressing only the *likelihood* of success on the merits and resulting in no final judgment for the case—is not binding on the merits even in that separate litigation. *See Mercho-Roushdi-Shoemaker-Dilley Thoraco-Vascular Corp.*, 900 N.E.2d at 795. It therefore cannot be binding here.

Additionally, dicta lacks issue-preclusive effect. *See Yanping Chen v. F.B.I.*, 435 F. Supp. 3d 189, 195 (D.D.C. 2020) (explaining that "dicta" cannot "actually . . . determine[]" an issue, so the issue "may be relitigated"). And the interpretation of the DCSA suggested in the preliminary-injunction decision was dicta. The Court considered the DCSA's applicability to the claims in that suit after it had already "determined that it lack[ed] personal jurisdiction over TikTok." PI Order at 22. The construction of the DCSA was thus not "essential" to the decision. *Avitia v. Metro. Club of Chicago, Inc.*, 924 F.2d 689, 690 (7th Cir. 1991). Indeed, though the jurisdictional ruling was incorrect for the reasons above, it indicates that even the Court considered itself without power to resolve that question. And even if the Court's DCSA discussion were recast as an alternative holding, it would still lack preclusive effect. As TikTok notes, Indiana courts have followed federal issue-preclusion precedent. *See* MTD at 27. And the Seventh Circuit has explained that "holdings in the alternative, either of which would independently be sufficient to support a result, are not conclusive in subsequent litigation with respect to either issue standing alone." *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1008 (7th Cir. 1997). Thus, the Court may apply the DCSA to the

consumer transactions at issue here. And for the reasons above, the State has shown—and at the very least plausibly alleged—that the DCSA does in fact apply to those transactions.

B. The State's complaint satisfies Rule 9(B).

Indiana's Rule of Trial Procedure 9(B), which applies to DCSA claims seeking civil penalties, "is identical to Federal Rule 9(b)." *McKinney v. State*, 693 N.E.2d 65, 71–73 (Ind. 1998). Under the Federal Rule, a plaintiff must plead the "who, what, when, where, and how" of the fraud, *i.e.*, simply "the first paragraph of any newspaper story," to survive a motion to dismiss. *United States ex rel. Sibley v. Univ. of Chicago Med. Ctr.*, 44 F.4th 646, 655 (7th Cir. 2022) (internal quotation marks omitted). And as under the Federal Rule, Indiana's Rule 9(B) expressly provides that the knowledge element of the claim—"[m]alice, intent, knowledge, and other conditions of mind"—"may be averred generally." IND. R. TRIAL P. 9(B); *see Outzen v. Kapsch Trafficcom USA, Inc.*, No. 1:20-cv-1286, 2021 WL 914021, at *12 (S.D. Ind. Mar. 10, 2021) (same); *accord, e.g.*, *United States ex rel. Mamalakis v. Anesthetix Mgmt. LLC*, 20 F.4th 295, 301 (7th Cir. 2021) (citing Fed. R. Civ. P. 9(b)).

The State's complaint easily satisfies Rule 9(B). The complaint alleges that TikTok has made misrepresentations about the Chinese Government's access to TikTok user data, thoroughly detailing "what the statements were" and "in what respect they were false." *McKinney*, 693 N.E.2d at 73; *see* Am. Compl. ¶¶ 141–51. The complaint alleges that TikTok made these representations specifically to Indiana users. *See, e.g.*, *id.* ¶ 30. And the complaint alleges that TikTok made these representations in recent years, including, among other specific examples, misleading statements to Indiana users in 2023 about the extent to which Chinese entities may access TikTok's American users' personal data. *See, e.g.*, *id.* ¶¶ 86–89, 141–51. The State thus has specifically alleged "what

the representations were, who made them, [and] when [and] where they were made." *McKinney*, 639 N.E.2d at 73. That is all that is required.

TikTok takes a different standard—which would purportedly require pleading reliance, notwithstanding that the Attorney General does not need to show reliance under the DCSA, as well as scienter—from *common-law fraud*. *See* MTD at 31–32 (quoting, *e.g.*, *Rice v. Strunk*, 670 N.E.2d 1280, 1289 (Ind. 1996)). But the Indiana Supreme Court has made clear that, for DCSA claims like those at issue, the pleading standard derives from Rule 9(B) alone. *See McKinney*, 693 N.E.2d at 72–73. TikTok therefore errs in attempting to import other pleading requirements from common-law fraud. *Cf. In re Sears, Roebuck & Co. Tools Mktg. & Sales Pracs. Litig.*, No. 1:05-cv-4742, 2009 WL 937256, at *9 (N.D. Ill. Apr. 6, 2009) (defendants argued that claims under Pennsylvania law failed to state scienter and reliance but did not make the same argument as to the Indiana DCSA claim). The State need not plead the elements of common-law fraud to make out a DCSA claim. It must plead only "the circumstances of fraud," and it has done so. *McKinney*, 693 N.E.2d at 72.

In any event, the State has plausibly alleged that "TikTok knew that its acts were deceptive." Am. Compl. ¶ 20. And that is so even though the State "need not include as much detail" given that many of its claims rely in part "on omissions." *Himan v. Thor Indus., Inc.*, No. 3:21-cv-239, 2022 WL 683650, at *12 (N.D. Ind. Mar. 8, 2022).

C. TikTok's statements are deceptive as a matter of law.

Turning to the substance of the State's claims, TikTok mistakes the forest for the trees, taking aim at select allegations and arguing that they either are not misleading by themselves or are otherwise non-actionable. The State's claims are not founded on isolated statements but on TikTok's consistent pattern of concealing and misrepresenting the exposure of Indiana consumers'

TikTok data to the Chinese Government. TikTok's arguments therefore cannot defeat any of the State's claims, especially at the dismissal stage. And in any event, TikTok's arguments all fail.

1. TikTok has failed to disclosure that user data may be shared with individuals and entities subject to Chinese law.

TikTok first attempts to turn its own deceptive statements around on the State, arguing that the State's allegations regarding some of those statements are internally contradictory. According to TikTok, the State cannot allege that TikTok conceals the Chinese Government's access to user data while 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*." MTD at 35 (quoting Am. Compl. ¶ 7) (emphases added by TikTok). Yet that quotation—like quotations throughout this part of TikTok's brief—comes entirely *from the State's complaint*, not from TikTok's privacy policy or other statements. *See also, e.g.*, *id*. (quoting State's allegation at Am. Compl. ¶ 236). As TikTok does not dispute, its privacy policy nowhere discloses that its parent company, ByteDance, or other affiliates of its corporate group are located in China. *See* Am. Compl. ¶ 9. Meanwhile, TikTok has affirmatively told Indiana consumers that their data is protected by comprehensive company protocols and practices, including rigid access controls managed by a U.S.-based security team; that it has never given the Chinese Government access to their data and never would; that none of this data is subject to Chinese law; and that TikTok is independent of ByteDance's control, which evidence disproves. *See id*. ¶¶ 5, 13. As alleged, therefore, the statements at issue are either untrue or, at best, highly misleading half-truths.

TikTok cites caselaw for the general proposition that courts may discount a plaintiff's internally contradictory factual allegations. *See* MTD at 34 (citing *Morgan Asset Holding Corp. v. CoBank, ACB*, 736 N.E.2d 1268, 1271 (Ind. Ct. App. 2000); *Sims v. New Penn Fin. LLC*, No. 3:15-

cv-263, 2016 WL 6610835, at *5 (N.D. Ind. Nov. 8, 2016)). But there is nothing self-contradictory in pointing out how a *defendant's own statements* in one context show that it is lying in another. And TikTok is, unsurprisingly, unable to cite support for the proposition that a defendant may avoid DCSA liability by sometimes conveying part of the truth.

TikTok is accordingly not protected from liability by the coy disclosure in its privacy policy that "some of the entities with whom TikTok may share U.S. user data may be located outside of the United States." MTD at 38 (cleaned up). That disclosure does nothing to inform Indiana users of the fact that at least one of those entities—TikTok's parent ByteDance—is located in China or of the risk that the *Chinese Government* will view their personal data. TikTok might not understand why an Indiana consumer would consider that non-disclosure "unfair." *Id*. But that dispute is not one for the dismissal stage.

2. TikTok's misrepresentations about the application of Chinese law to user data are actionable.

TikTok next contends that certain of the State's allegations fall outside the two-year limitations period that applied when this suit was originally filed, pointing to two of the many misrepresentations listed in the complaint—from a 2019 press release and a 2020 interview—affirmatively asserting that none of TikTok's user data is subject to Chinese law. But these are not the only misstatements underlying any of the State's claims. For example, the complaint details how TikTok's *2023* privacy policy continues to mislead Indiana users about the extent to which their data is "accessible in or could be shared with individuals in China subject to Chinese law." Am. Compl. ¶ 141–45. That privacy policy is still linked in TikTok's page on the App Store and Google Play Store, and it still "makes *no mention* of TikTok's ability to share user data with individuals and entities in China or those individuals' and entities' access to that data, even though TikTok knows that the affiliates of its corporate group with which it says it may share data are

located in China and subject to Chinese law." *Id*. ¶¶ 145–51 (emphasis added). TikTok's DCSA violations have thus been "of a continuous nature," from the first misrepresentation cited in the complaint to today. *Anonymous Physician v. Rogers*, 20 N.E.3d 192, 198 (Ind. Ct. App. 2014) (cleaned up). The DCSA's prior limitations period does not bar liability on any of the State's claims or for any of the misrepresentations from which they arise.

TikTok also argues that these two particular statements "are statements of law, which are 'seldom actionable' under the DCSA." MTD at 40 (quoting *Rainbow Realty Grp. v. Carter*, 131 N.E.3d 168, 177–78 (Ind. 2019)). Here again, the premise is incorrect. The State DCSA claims are based on TikTok's misrepresentations regarding the *fact* that TikTok's user data is accessible to entities who are themselves subject to Chinese law. That much is clear from these two particular statements: first, that "[n]one of [TikTok's] data is subject to Chinese law," and second, that the Chinese Government "does not have jurisdiction over the platform." Am. Compl. ¶¶ 54, 84–85 (internal quotation marks omitted). The fact that Chinese law does apply to entities that allegedly can access TikTok user data must be taken as true at this stage. *See Lei Shi v. Cecilia Yi*, 921 N.E.2d 31, 37 (Ind. Ct. App. 2010). And TikTok does not even contest that fact. TikTok's effort to recharacterize the above statements as mere interpretations of Chinese law is therefore irrelevant. Those statements do not purport to provide a legal conclusion under Chinese law; they convey that Chinese law, however interpreted, could not touch TikTok user data.

In any event, the State alleges that TikTok has deceived Indiana users by "downplay[ing] the *risk* of the Chinese Government and Community Party accessing and exploiting Indiana consumers' data"—which, as seen throughout the complaint, TikTok has done in many more statements than just these two. Am. Compl. ¶ 4 (emphasis added). Any "uncertainty" about how Chinese law in fact applies to TikTok's user data, MTD at 40, does not remove that risk or the

deceptive nature of concealing it, and certainly not at the dismissal stage. To the contrary, TikTok's contentions succeed only in showing that the risk is plausible.

3. TikTok's representations about its corporate structure are false and misleading.

TikTok further argues that it cannot be held liable for misrepresentations about TikTok's relationship with its parent ByteDance, cherry-picking some TikTok statements about ByteDance that are cited in the complaint and that, TikTok asserts, are not untrue in and of themselves. *See* MTD at 42–43. Yet TikTok nowhere cites a statement informing Indiana users of the full extent of ByteDance's *control* over TikTok—which is well-documented in the complaint, must be taken as true at this stage, and is the source of the risk that ByteDance and consequently the Chinese Government will access Indiana TikTok users' data. *See* Am. Compl. ¶¶ 162–206.

Citing *Kesling*, TikTok also contends that its misleading statements about its relationship with ByteDance merely reflect its "opinion" about its relationship with ByteDance. MTD at 44. TikTok fails to explain how a subsidiary's misleading assertions about the facts of its relationship with its parent are anything like the puffery about "sporty" and "top quality" cars that *Kesling* held to be nonactionable. 997 N.E.2d at 332–33. TikTok also fails to note that the Indiana Legislature amended the DCSA in 2014 to repudiate *Kesling*'s reasoning. *See* James R. Strickland, *David's Sling: The Undetected Power of Indiana's Deceptive Consumer Sales Act*, 51 IND. L. REV. 211, 218–19 (2018). The *Kesling* Court had held that a defendant could not be liable for a consumer's "own inferences." 997 N.E.2d at 334–35. "Following *Kesling*, the Indiana General Assembly amended the DCSA to include a general prohibition against any 'unfair, abusive, or deceptive act, omission, or practice in connection with a consumer transaction[,] . . . whether it occurs before, during, or after the transaction[,] . . . [that is either] implicit [or] explicit[.]'" Strickland, 51 IND. L.

REV. at 219 (quoting IND. CODE ANN. § 24-5-0.5-3 (2014)). The DCSA now "explicitly prohibit[s] implied misrepresentations." *Id.*

Implied misrepresentations "involve indirect representations created through context." *Id.* at 237 (cleaned up); *see also id*. at 237 nn.215–19 (collecting sources). When taken in context, TikTok's statements distancing itself from ByteDance—included those highlighted in TikTok's brief, which suggest that ByteDance plays a relatively minimal role in TikTok's operations—paint "a picture for Indiana consumers that TikTok is an independent company and that the risk of consumers' data being accessed and exploited by the Chinese Government or the Chinese Communist Party is minimal to nonexistent." Am. Compl. ¶ 160. Even to the extent that TikTok's representations are only indirect, therefore, the complaint plausibly alleges that they are deceptive.

4. TikTok's statements and omissions about the in-app browser are deceptive under the DCSA.

TikTok does not dispute that its app uses an in-app browser rather than the default browser on the consumer's device. As the State alleges, this gives TikTok "the ability to collect copious amounts of information about users" that is at "risk of . . . being accessed and exploited by the Chinese Government and Community Party," yet "[w]hen a user clicks on a link from within the TikTok app, . . . it appears to the average user that he or she exit[s] the TikTok app to view the page." Am. Compl. ¶¶ 207–08, 215, 221. TikTok also does not dispute that deceiving users in this manner can constitute a violation of the DCSA. Rather, TikTok argues that the average user would not actually "believe she was using her normal, default browser." MTD at 45.

That argument is irrelevant at this stage, where the State's allegations must be taken as true and construed in the light most favorable to the State. *See Hoosier Contractors, LLC v. Gardner*,

212 N.E.3d 1234, 1239 (Ind. 2023).[4] And TikTok can contend that "the State's own allegations undermine its claim," MTD at 45, only by distorting those allegations and reading them in the light most favorable to TikTok. The State does not concede that "the user interface of the in-app browser . . . looks nothing like the regular browser." *Id*. As is clear from the paragraphs of the complaint that TikTok partially quotes, the State alleges that, "[w]hen the TikTok in-app browser is open, *no information* identifying its belonging to TikTok is visible. Instead, TikTok displays the generic phrase 'Web Browser' across the top of the screen." Am. Compl. ¶ 211 (emphasis added). That generic phrase indicates to users that they have left TikTok, especially given that TikTok does not otherwise disclose the existence of an in-app browser. TikTok contends, with careful language, that its privacy policy "expressly discloses the relevant facts regarding the in-app browser," MTD at 46, but TikTok then proceeds to quote portions of the policy that say nothing about the in-app browser. TikTok's merits arguments notwithstanding, the complaint adequately alleges that TikTok's use and failure to disclose its use of an in-app browser violate the DCSA.

III. The Requested Relief Would Not Violate the U.S. Constitution.

The State asks the Court to award civil penalties for TikTok's past violations of the DCSA and to enjoin TikTok from continuing to treat Indiana consumers unfairly and deceptively in the ways described above and at more length in the complaint. TikTok argues that this relief would violate its First Amendment rights to speak on matters of public concern and would violate the Supremacy Clause because federal law purportedly preempts the State's claims. Both arguments are meritless.

[4] For the same reason, TikTok's attempt to dispute that its in-app browser collects user information, *see* MTD at 46 n.15, is misplaced here.

A. TikTok has no First Amendment right to deceive Indiana consumers.

The First Amendment provides no right to make fraudulent misrepresentations to consumers, even if those misrepresentations might bear on matters of public concern. The First Amendment thus does not preclude the State's claims. *See Young v. N. Ill. Conf. of United Methodist Church*, 21 F.3d 184, 185 (7th Cir. 1994).

The First Amendment's protection does not reach "historic and traditional categories" of unprotected expression "long familiar to the bar." *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (quoting *United States v. Stevens*, 559 U.S. 460, 468 (2010)). Those categories include "false or misleading commercial speech," which "receives no [constitutional] protection at all." *United States v. Benson*, 561 F.3d 718, 725 (7th Cir. 2009) (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562–63 (1980)); *see also Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 638 (1985) ("The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading."); *United States v. Raymond*, 228 F.3d 804, 815 (7th Cir. 2000); *United States v. Kaun*, 827 F.2d 1144, 1152 (7th Cir. 1987); *Ind. Pro. Licensing Agency v. Atcha*, 49 N.E.3d 1054, 1058 (Ind. Ct. App. 2016); *Ad Craft, Inc. v. Bd. of Zoning Appeals of Evansville*, 693 N.E.2d 110, 116 (Ind. Ct. App. 1998). Since "forms of public deception" are "unprotected speech," actions "targeting misleading affirmative representations" fall outside the scope of the First Amendment. *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612, 619 (2003); *see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 579 (2011). And since false or misleading commercial speech is outside the First Amendment's scope, an injunction barring that speech is constitutional. *See People ex rel. Gascon v. HomeAdvisor, Inc*., 263 Cal. Rptr. 3d 438, 451 (Cal. Ct. App. 2020)

("Once specific expressional acts are properly determined to be unprotected by the First Amendment, there can be no objection to their subsequent suppression" by a preliminary injunction. (cleaned up)). After all, "the commercial marketplace . . . is appropriately limited to speech that is not deceptive." *Benson*, 561 F.3d at 726; *see also Raymond*, 228 F.3d at 814-5 (affirming injunction of misleading speech); *Kaun*, 827 F.2d at 1152 (same).

It makes no difference that some of TikTok's misleading statements were made in the context of a purported "debate," started by TikTok's own actions, over TikTok's surreptitious funneling of U.S. citizens' personal information to the Chinese Government. MTD at 49. TikTok cites no rule, and there is none, to the effect that misleading statements are insulated from state consumer-protection law as long as they are made in "letters and testimony to legislators" or "interviews with major news outlets," let alone in "statements on TikTok's website" or "discussions of TikTok's alleged public-relations strategy writ large." *Id.* Even without making any of these statements, TikTok would have violated the DCSA through the misrepresentations and omissions in its direct statements to consumers. But it intrudes on no First Amendment rights to hold TikTok liable for, and to enjoin it from, using these other venues to further its deception of Indiana consumers.

TikTok's invocation of the *Noerr-Pennington* doctrine does not change the analysis. *See E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965). That doctrine arose in the antitrust context to protect companies' ability to petition the government on matters of public concern in concert with one another. *See Citizens Nat'l Bank of Grant Cnty. v. First Nat'l Bank in Marion*, 331 N.E.2d 471, 484 (Ind. Ct. App. 1975). This case does not concern antitrust law. TikTok notes that some courts—but not the Indiana courts—have extended the doctrine to certain common-law torts like

malicious prosecution and abuse of process. *But see Akhmetshin v. Browder*, 993 F.3d 922, 966 (D.C. Cir. 2021), *certified question answered*, 275 A.3d 290 (D.C. Cir. 2022) ("[T]he *Noerr-Pennington* doctrine only applies to antitrust cases."). Nevertheless, the doctrine has never been applied against claims of fraudulent misrepresentation. *See In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Pracs. & Prods. Liab. Litig.*, 553 F. Supp. 3d 211, 224 n.6 (D.N.J. 2021). After all, the doctrine ensures that otherwise valid laws do not unduly infringe on protected speech, and fraud is not protected speech. Moreover, even if the doctrine applied, it would prevent liability only for "governmental activities," not for TikTok's entire public campaign to mislead Hoosier consumers. *Citizens Nat'l Bank of Grant Cnty.*, 331 N.E.2d at 484. And determining whether any of TikTok's statements constituted a protected government petition would require "a fact-intensive inquiry that can only be resolved at trial." *United States v. Philip Morris USA, Inc.*, 337 F. Supp. 2d 15, 27 (D.D.C. 2004), *as amended*, 2004 WL 5370172 (D.D.C. Aug. 10, 2004).

B. The State's Claims Are Not Preempted by Federal Law.

TikTok's preemption argument—and TikTok's argument for a stay, addressed below—are in substance simply a rehash of its arguments in support of its failed attempt to remove this case to federal court. In its removal notice and brief in opposition to remand, TikTok argued that the federal government's primary role in foreign relations created federal jurisdiction over the State's state-law claims and that exercising federal jurisdiction was somehow necessary to avoid conflict with Executive Branch efforts, including through the Committee on Foreign Investment in the United States ("CFIUS"), to address the threats posed by TikTok's collection of U.S. citizens' personal data. *See* Not. of Removal, *TikTok*, No. 1:23-cv-00013, Doc. 1 (N.D. Ind. Jan. 6, 2023); Opp'n to Mot. to Remand, *TikTok*, No. 1:23-cv-00013, Doc. 19 (N.D. Ind. Feb. 17, 2023).

The Northern District of Indiana thoroughly rejected those arguments, explaining, among other things, that "[a] judicial determination that [TikTok] failed to make a complete disclosure of [its] data handling practices . . . will be neither here nor there to CFIUS' evaluation of the privacy risks posed by the TikTok app." *Indiana v. TikTok, Inc.*, No. 1:23-cv-00013, 2023 WL 3596360, at *4 (N.D. Ind. May 23, 2023). Another federal district court likewise rejected TikTok's attempt to insert a federal issue into similar Arkansas consumer-protection claims, noting that TikTok had raised, "essentially, a complete preemption argument" yet had failed to "identify any area of federal law that covers the subject matter of the State's claims so completely" as to convert them "into federal causes of action." *Arkansas ex rel. Griffin v. TikTok Inc.*, No. 1:23-cv-1038, 2023 WL 4744903, at *7 (W.D. Ark. July 25, 2023) (internal quotation marks omitted).

TikTok now asserts those arguments as the preemption arguments they always were, but they fare no better. The federal government may occupy the field of foreign affairs, but, as TikTok itself notes, the enforcement of state law is not thereby preempted unless the state "has no serious claim to be addressing a traditional state responsibility" and the suit "intrudes on the federal government's foreign affairs power." MTD at 52 (cleaned up). And neither condition is present here. Consumer protection is not "ground that is held exclusively by the federal government." *Id.* at 55 (quoting *NLMK Pa., LLC v. U.S. Steel Corp.*, 592 F. Supp. 3d 432, 453 (W.D. Pa. 2022)). The states generally prohibit unfair and deceptive trade practices within their borders. *See* Carolyn Carter, *Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws*, NAT'L CONSUMER L. CTR. (2018), https://bit.ly/3YHoMb5. Enforcing these laws is a traditional state responsibility. Indeed, where a state's Attorney General brings a "*parens patriae* action in state court to enforce [the state's] own state consumer protection laws," federalism concerns—and consequently the presumption against federal preemption—are

especially acute. *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 676 (9th Cir. 2012); *see State v. Norfolk S. Ry. Co.*, 107 N.E.3d 468, 472 (Ind. 2018) ("As a concept central to the constitutional design, federalism requires that we not find preemption easily." (internal quotation marks omitted)).

Nor do the State's claims intrude on the federal government's power over foreign affairs. The question in this case is whether TikTok has deceived Indiana consumers in violation of Indiana consumer-protection law. TikTok cites no federal statute that "evince[s] an intent" by Congress "to have 'exclusive federal regulation of the area'" of consumer fraud. MTD at 53 (quoting *Basileh v. Alghusain*, 912 N.E.2d 814, 818 (Ind. 2009)). Sections 1701 to 1708 do not touch on consumer deception. *See* 50 U.S.C. §§ 1701–08.[5] Section 4565 empowers CFIUS to investigate and regulate certain transactions between foreign and domestic entities. *See Id.* § 4565(a)(4). But nowhere does federal law broadly empower CFIUS to fill a state's traditional role of preventing entities already operating in the state from deceiving its consumers. State law is not preempted just because a separate "scheme of federal regulation" might also apply to a defendant. MTD at 53 (cleaned up).

Moreover, even accepting all of TikTok's assertions about the incidental effects that this suit could theoretically have on the Executive Branch's efforts to address the threat presented by TikTok, those effects remain "incidental or indirect," and as such they are insufficient to implicate foreign-affairs preemption. *Zschernig v. Miller*, 389 U.S. 429, 434 (1968) (internal quotation marks omitted). This is not a case where the "state interest actually underlying" the State's law is of national scope. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 425–26 (2003). The DCSA protects Indiana consumers, and that is what the State seeks to do by enforcing the DCSA here. *Cf. Buquer*

[5] Under Section 1708, the President has the authority to identify and sanction persons engaged in certain types of "fraud, artifice, or deception," but only if they engage in such deception to "steal[] a trade secret or proprietary information." 50 U.S.C. § 1708(d)(3).

v. City of Indianapolis, 797 F. Supp. 2d 905, 923 (S.D. Ind. 2011) ("The problem with Defendants' argument [against preemption] here is that Section 18 is anything but a neutral law of general application that just happens to have a remote and indirect effect on foreign relations. Rather, it targets only one form of identification—CIDs [consular identification cards] issued by foreign governments.").

Regardless, as two federal courts have found, the State's claims would not have even the incidental effects that TikTok asserts. The State's claims are therefore not subject to conflict preemption, either. That the State's claims raise the factual question whether TikTok is "deceiving Indiana consumers about the risks of the Chinese Government's and/or Communist Party's access to their data" does not mean that the Court is asked to "intrude on"—*i.e.*, do anything about—TikTok's collection of that data or the Chinese Government's access to it. MTD at 53 (internal quotation marks omitted). The State has not asked for any such relief. The federal government remains free to use its own authority to regulate TikTok's data-collection practices after TikTok has been enjoined from deceiving Indiana consumers about those practices. So too can TikTok and the federal government continue "negotiat[ing] over how to mitigate national security concerns of the government related to TikTok's data security" and "working to implement a number of strategies to mitigate" after the State receives its requested relief. *Id.* at 55. But TikTok may not use these purported negotiations with the federal government to evade liability for its violations of state law; that is not how this country's federalist system works.

Nor does TikTok offer any reason to believe that "the State's requested injunction could interfere with the robust solution CFIUS and [TikTok] are negotiating." *Id.* at 56. Unless that "robust solution" requires TikTok to deceive Hoosier consumers, it will not be "incompatible" with an injunction prohibiting such deception under the DCSA. *Id.*

IV. The Doctrine of Primary Jurisdiction Does Not Apply.

TikTok's final argument, that this case should be dismissed or stayed under the doctrine of primary jurisdiction, is simply its preemption argument by yet another name, and it fails for the same reasons explained above. Despite TikTok's thrice-repeated misconstruction of a sentence from the State's remand motion in the Northern District of Indiana, the State's claims would not "require a reassessment of th[e] same *national security* questions" that CFIUS may be considering. MTD at 58 (emphasis added); *see also id*. at 53. Whether TikTok should be allowed to harvest U.S. citizens' private data and share it with the Chinese is a national-security question. Whether TikTok may deceive Indiana users about the risk that their data will be shared with the Chinese is not. And this case concerns only the latter question. *See* Mot. to Remand, *TikTok*, No. 1:23-cv-00013, Doc. 18 (N.D. Ind. Feb. 3, 2023) (further explaining that the State's requested relief does not conflict with federal efforts to regulate TikTok); Reply in Supp. of Mot. to Remand, *TikTok*, No. 1:23-cv-00013, Doc. 33 (N.D. Ind. Mar. 17, 2023) (same).

That CFIUS is "uniquely qualified" to address certain national-security issues is, therefore, irrelevant. MTD at 59 (internal quotation marks omitted). CFIUS is not uniquely qualified to address claims under Indiana's consumer-protection statute. This Court is. Thus, staying this case would not promote judicial economy. It would only delay the State's ability to protect its citizens from TikTok's deceptive conduct while CFIUS addresses an entirely separate issue, and it would enable TikTok to prolong that delay by resisting CFIUS's efforts.

CONCLUSION

For the foregoing reasons, TikTok's Motion To Dismiss should be denied.

Date: August 23, 2023

Respectfully submitted,

/s/ Scott L. Barnhart
Scott L. Barnhart (Attorney No. 25474-82)
Cory Voight (Attorney No. 23180-49)
Betsy M. DeNardi (Attorney No. 23856-71)
Office of Attorney General
Indiana Gov't Center South
302 West Washington St.
5th Floor
Indianapolis, IN 46204
Telephone: (317) 234-7132
Fax: (317) 233-7979

David H. Thompson*
Pete Patterson*
Brian W. Barnes*
Megan M. Wold*
Athanasia O. Livas*
DeLisa L. Ragsdale*
COOPER & KIRK, PLLC
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036
Tel: (202) 220-9600
Fax: (202) 220-9601

Counsel for Plaintiff, State of Indiana

*Admitted *pro hac vice*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 23rd day of August, 2023, a true and correct copy of the foregoing Brief in Opposition of Defendants' Motion to Dismiss was served to all counsel of record by the Indiana E-Filing System.

Respectfully submitted,

/s/ Scott L. Barnhart
Scott L. Barnhart (Attorney No. 25474-82)
Cory Voight (Attorney No. 23180-49)
Betsy M. DeNardi (Attorney No. 23856-71)
Office of Attorney General
Indiana Gov't Center South
302 West Washington St.
5th Floor
Indianapolis, IN 46204
Telephone: (317) 234-7132
Fax: (317) 233-7979

David H. Thompson*
Pete Patterson*
Brian W. Barnes*
Megan M. Wold*
DeLisa Ragsdale*
Athanasia O. Livas*
COOPER & KIRK, PLLC
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036
Tel: (202) 220-9600
Fax: (202) 220-9601

Counsel for Plaintiff, State of Indiana

*Admitted *pro hac vice*