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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

STATE OF IOWA, ex rel. ATTORNEY GENERAL BRENNA BIRD,	)	Case No. EQCE089810
Plaintiff,	)	
v.	)	**PUBLIC REDACTED**
TIKTOK INC., TIKTOK LTD., TIKTOK PTE. LTD., BYTEDANCE LTD., and BYTEDANCE INC.,	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY INJUNCTION

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SUMMARY OF ARGUMENT

The State asks this Court to exercise one of its most extraordinary powers—the issuance of an injunction in advance of trial—to forbid Defendants from answering Apple's App Store age-rating questionnaire by indicating that certain categories of content on the TikTok platform are "infrequent/mild" rather than "frequent/intense," and from stating in the platform's guidelines that it "does not allow the promotion of alcohol, tobacco, or drug use." Pl.'s Mem. In Support Mot. Temp. Inj. ("Mot.") at 7. Because there is no Iowa-specific version of the TikTok platform, such an injunction would coerce Defendants into stating opinions with which they strongly disagree—not just to Iowans, but to users throughout the United States and nearly 50 countries, causing irreparable damage. The State's Motion subverts the purpose of a temporary injunction by seeking to disrupt the status quo—the questionnaire responses have been in place *since 2018*—on the basis of a statute that has never been applied under similar facts, concerning activity over which the Court has no jurisdiction. The Motion must be denied.[1]

To begin, the claims fail at the threshold because the Court has no personal jurisdiction over Defendants, whose alleged connections to Iowa neither rise to the level of purposeful availment nor relate to the State's claims—each of which is required for the exercise of jurisdiction to satisfy the Due Process clause of the U.S. Constitution. But even if the Court had jurisdiction to enter a temporary injunction, the State cannot establish any of the four requirements necessary to justify one.

[1] Defendants filed their Motion to Restrict Access on April 29, 2024. Defendants' Opposition to Plaintiff's Motion for a Temporary Injunction was due on May 1, 2024. As of this filing, the Court has not yet ruled on Defendants' Motion to Restrict Access. In the interest of protecting their confidential information, Defendants are filing the redacted versions of their Opposition and supporting documents, and serving the unredacted versions on the State. Defendants will file the unredacted versions of their filings once the Motion to Restrict Access is ruled on.

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First, the State has not established a reasonable likelihood of success on its novel claims under the Iowa Consumer Fraud Act ("CFA"), for multiple independent reasons:

The State has failed to plead, and cannot prove, a violation of the CFA. The plain language and legislative history of the CFA make clear that it has no application to freely available online platforms like the TikTok platform; indeed, the State's strained and unprecedented interpretation of the CFA would have the effect of converting an almost limitless number of interactions on the internet into causes of action in Iowa courts. In addition, the State has not shown that its alleged misstatements are misleading as to a material fact, or that they cause the "substantial unavoidable injury" or "unanticipated situation" required to establish an unfair practice.

Next, the State's CFA claims are also barred by Section 230 of the Communications Decency Act, which immunizes Defendants from liability for content moderation decisions.

Finally, the State's requested injunction would be unconstitutional. It would violate the First Amendment, which protects Defendants from being compelled to express opinion speech with which they disagree and that is not narrowly tailored to the State's purported goal of protecting minors. And it would violate the Dormant Commerce Clause, which prevents the State from obtaining an injunction that regulates conduct outside of Iowa.

More than a year ago, represented by the same outside counsel representing the State here, the State of Indiana sought to enjoin the same age-rating responses to Apple's questionnaire, based on the same documents and facts cited in the Motion, under Indiana's analogous Deceptive Consumer Sales Act. After discovery and an evidentiary hearing, the Indiana court denied the motion, finding that these facts could not support personal jurisdiction or a consumer-deception claim. *Indiana v. TikTok, Inc.* ("*Indiana I*"), No. 02D02-2212-PL-400,

2023 WL 4305656 (Ind. Super. May 4, 2023) (Bobay, J.). The State of Indiana did not appeal that ruling. Instead, it asked to change judges, and filed an amended complaint adding allegations relating to the evidence heard in *Indiana I*. Months later, a *second* Indiana judge dismissed the entire complaint—finding that these facts did not establish personal jurisdiction or state a consumer-deception claim. *State v. TikTok, Inc.* ("*Indiana II*"), No. 02D02-2212-PL-400, 2023 WL 8481303 (Ind. Super. Nov. 29, 2023) (Degroote, J.). No different result is warranted here.

Second, the State has not established that Iowa consumers will suffer irreparable harm if the motion is denied, particularly in light of the State's years-long delay in seeking injunctive relief: the questionnaire responses at issue have been in place *since 2018*; the State began its investigation at least eight months ago; and the State filed its Petition nearly three months ago. The State offers no proof, only argument, that there has been any harm suffered by an Iowa citizen—let alone "certain and irreparable" harm that would occur in the absence of a temporary injunction for the duration of this lawsuit.

Third, the State has not established that the balance of equities tips in its favor. A preliminary injunction would be profoundly disruptive, causing Defendants irreparable harm to their business, reputation, and brand in all 50 states and in foreign countries.

Fourth, an injunction also would harm the public interest by requiring Defendants to describe the TikTok platform in an incorrect manner that discourages participation in a vibrant online forum for First Amendment protected speech.

BACKGROUND

I. The TikTok Platform

The TikTok platform is an online entertainment platform whose mission "is to inspire creativity and bring joy," where more than a billion users around the world can view and interact

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with video content created by other users.[2] *See* Declaration of Jennifer Brandenburger ("Brandenburger Decl.") ¶ 8. Users 13 and older can interact with video content in several ways on the TikTok platform, which was first launched globally in 2017 and re-launched in the United States in 2018. *See id.* Most commonly, this occurs on the user's "For You" page, which presents videos based on a personalized recommendation algorithm. *Id.* ¶ 15. The personalization algorithm is based on a number of factors, including user interactions (such as the videos a user has liked or shared, trending topics and hashtags a user has explored, and accounts a user has followed), video information (such as sounds, effects, and hashtags), and device and account settings (such as language preference and country setting). *Id.*[3]

There is a staggeringly large quantity of video content available on the TikTok platform.

[REDACTED] —

encompassing a range of content as vast and diverse as the human experience. *See id.* ¶ 9. Filed with this brief is the declaration of Jennifer Brandenburger, the Head of Product Policy at TikTok U.S. Data Security Inc. (a wholly-owned subsidiary of Defendant TikTok Inc.). *See id.* ¶ 1. As Ms. Brandenburger explains, there are TikTok videos from animal lovers,[4] from persons

[2] References to "TikTok" herein, absent additional specification, denote the TikTok platform.

[3] In addition to the "For You" feed, there is also the STEM feed, the Following feed, and a "Discover" page, which allows users to search and explore videos on particular topics. [REDACTED] *See id.* ¶ 15. TikTok also includes a feature called TikTok LIVE, which allows viewers to see and interact with real-time content from creators on the platform. *See id.*

[4] Brandenburger Decl. Ex. 2 (video of a kangaroo emerging from a pouch with 102.5 million views).

describing all manner of jobs,[5] from hobbyists,[6] and from sports enthusiasts.[7] *See id.* ¶ 10. There are videos that become popular because they are heartwarming, such as a video of a father helping his son transfer into his wheelchair.[8] *See id.* There are also videos that become popular just because they are funny—such as a video of a husband laughing when his wife reveals that she is cutting onions while using a glass pan lid as a mask to prevent her eyes from watering[9]—or surprising—such as a video of a woman revealing the massive size of her nine-month old kitten.[10] And for a teen interested in Harry Potter, there is video content from prominent TikTok magician Zach King pretending to fly on a broomstick with 2.2 billion views.[11]

There is also a wide range of academically enriching content on the TikTok platform made by educators,[12] as well as videos of students working on their school projects.[13] In addition, there are videos that appeal to users' particular hobbies or athletic pursuits. For a teen user interested in baseball, for example, there are video clips shared by the MLB,[14] and videos

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[5] Brandenburger Decl. Ex. 3 (video of chef making a giant chocolate-covered strawberry with 125.1 million views); Ex. 4 (video of street artist with 27.3 million views); Ex. 5 (video of school cafeteria chef with 10.8 million views).

[6] Brandenburger Decl. Ex. 6 (video of a person creating a leather phone case with 156.2 million views); Ex. 7 (video of roller-skaters viewed 34.2M times)

[7] Brandenburger Decl. Ex. 13 (video of Caitlin Clark viewed 9.9 million times).

[8] Brandenburger Decl. Ex. 8 (video of a father helping his son into a wheelchair with 31.7M views).

[9] Brandenburger Decl. Ex. 9 (178.7M views).

[10] Brandenburger Decl. Ex. 10 (394.8M views).

[11] Brandenburger Decl. Ex. 1.

[12] Brandenburger Decl. Exs. 15–17 (account profiles for @tutorzed, @justsimple_english, and @naturalhistorymuseum).

[13] Brandenburger Decl. Ex. 18 (art student finishing painting with 24.6 million views).

[14] Brandenburger Decl. Ex. 11 (84.4 million views).

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showing kids play Little League.[15] The TikTok platform has also evolved as a community where users share their experiences and connect with each other based on different aspects of their identities, such as members of the Nigerian diaspora who are able to connect on TikTok from locations all around the world.[16] Many creators focus on the promotion of kindness and empathy for others, as illustrated by a recent New York Times story about "carefluencers," the supportive TikTok community of caregivers to aging relatives.[17]

II. Content Moderation Policies

Although the vast majority of content on the TikTok platform is suitable for all users, as Ms. Brandenburger explains, the reality of the modern internet is that some users of any online platform for user-generated content will seek to share content that is inconsistent with the values of the platform. *See* Brandenburger Decl. ¶ 17. The TikTok platform maintains several product features, policies, and procedures to help protect its users against this industry-wide challenge.

One protection is the TikTok platform's Community Guidelines ("Guidelines"), which set forth policies regarding the scope of permissible content on the platform. The Guidelines prohibit certain categories of videos, including nudity or allusions to sexual activity by young people, as well as videos that are dangerous or otherwise inappropriate. *See id.* ¶ 19. The TikTok platform uses both technology and human moderators to remove content that violates the Guidelines. Between October and December 2023, for example, 176,461,963 videos were removed from TikTok for violating the Guidelines. Of these videos, 77.1% were removed

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[15] Brandenburger Decl. Ex. 7 (12 million views).

[16] *See, e.g.*, Brandenburger Decl. ¶ 14 n.17 (#nigeriantiktok[flag] has 6.3m posts).

[17] Brandenburger Decl. Ex. 19 (Frank Rojas, *'Carefluencers' Are Helping Older Loved Ones, and Posting About It*, The New York Times (Apr. 3, 2024), *available at* https://www.nytimes.com/2024/04/03/style/carefluencer-social-media.html).

before the video received any views, 89.9% were removed within 24 hours of posting, and 96.7% were removed proactively (*i.e.*, without a user report). *See id.* ¶ 29. Of the videos that users flagged as violating the Guidelines, 92.4% were removed within two hours of the user's report. *See id*. If a user enters a search term associated with violative content, the TikTok platform will block the search, and, depending on the search term, may redirect the user to resources that may help them (such as resources for dealing with eating disorders). *See id.* ¶ 30. The Guidelines, however, also make clear to users of the platform that, "***[a]lthough we work hard to enforce our rules, we cannot guarantee that all content shared on TikTok complies with our Terms of Service or Community Guidelines***." *See id.* ¶ 27 n.25 (emphasis added).

In conjunction with its Guidelines, TikTok is moderated pursuant to a detailed set of internal policies and procedures that help enforce the Guidelines in a consistent way. These internal policies and procedures (referred to as a content moderation "playbook") provide additional detail and context to content moderators responsible for enforcing the Guidelines. *See id.* ¶ 20. For example, although content relating to the abuse of minors is prohibited on TikTok, content in which an individual speaks out *against* abuse is allowed. *See id.*

TikTok's Guidelines are periodically updated to reflect changes in the approach to content moderation, including ongoing efforts to balance two goals for the Guidelines: precision and specificity on one hand, and accurate interpretation and user clarity on the other. *See id.* ¶¶ 22, 24. The most recent update was announced on April 17, 2024. *See id.* ¶ 23. Among other revisions, relevant to the State's Motion here, the language "We do not allow showing or promoting recreational drug use, or the trade of alcohol, tobacco products, and drugs" no longer appears in the Guidelines. Instead, the updated Guidelines provide that TikTok does not allow "showing, possessing or using drugs," nor does it allow "the trade of alcohol, tobacco products,

or drugs." *Id.* ¶ 25.

Video content that is acceptable under the Guidelines but which might not be suitable for all audiences may also be restricted on TikTok. *Id.* ¶ 42. For example, even though it may not violate the Guidelines, content depicting the use of tobacco products by adults or consumption of excessive amounts of alcohol by adults is not eligible for recommendation in the For You feed. *Id.* ¶ 40. As Ms. Brandenburger explains, users of all ages and parents of users can also themselves proactively take a variety of steps to restrict their own access to content that does not violate the Guidelines but that they do not want to see on the TikTok platform. *Id.* ¶¶ 37–43.

III. The Apple Age-Rating Questionnaire

To make an app available for download on Apple's App Store, Apple requires app developers to complete its age rating questionnaire. Apple's standard-form, multiple-choice questionnaire asks app developers to "select the level of frequency for each content description that best describes your app." *See id.* ¶ 45. Apple provides app developers with three possible responses: None, Infrequent/Mild, and Frequent/Intense. *Id.* Based on a developer's responses, Apple will assign one of four age ratings for the app: 4+, 9+, 12+, or 17+. *Id.*

For TikTok, these questionnaire responses state that the following categories of content are "Infrequent/Mild"; "Profanity or Crude Humor"; "Mature/Suggestive Themes"; "Alcohol, Tobacco, or Drug Use or Reference"; and "Sexual Content and Nudity." *See id.* ¶ 46. Based on these responses, Apple assigned the TikTok platform a 12+ age rating. *Id.* Although developers have an option to select that the platform should be restricted to 17+, notwithstanding Apple's age rating of 12+, here that would not have been appropriate, given the content on the platform and the 12+ rating for other apps like Snapchat and Pandora. *See id.* ¶¶ 46 n.39, 60.

In addition, Apple offers a "Parent's Guide to TikTok," on its "App Store Preview" page. Brandenburger Decl. Ex. 25. Among other things, that Parent's Guide discusses the types of

content available on TikTok, noting that "while the content is generally PG-13, there's always a chance of bumping into profanity, violence, and sexually suggestive content (both visually and musically)." *Id*.

IV. Procedural Background

Following months of investigation covering a wide range of topics, on January 17, 2024, the State of Iowa filed a Petition alleging, among other things, that Defendants violated the CFA by misrepresenting the mildness and frequency of certain categories of content relevant to the age rating assigned to TikTok on the Apple App Store, Google Play Store, and Microsoft Store, as well as by making certain alleged misstatements in the Guidelines and about the function of a TikTok feature called Restricted Mode. The State did not move for a temporary injunction.

Two months later, however, on March 18, 2024, the State filed the present motion for a temporary injunction only as to its claims regarding the Apple App Store questionnaire and the Guidelines. The State's Motion asks the Court to enjoin Defendants from representing that (1) the platform contains "infrequent/mild" "profanity or crude humor," "sexual content and nudity," "alcohol, tobacco, or drug use or references," and "mature/suggestive themes" on the Apple App Store, and the associated "12+" age rating that results therefrom, and (2) the TikTok platform does not allow the promotion of alcohol, tobacco, or drug use in the Guidelines. On April 29, Defendants filed a Motion to Dismiss the State's Petition based on the defects detailed in Sections I and II.A-B, *infra*.[18] The Court has scheduled a hearing on the State's and

[18] As a result, the Court will note that certain sections of this Opposition are very similar to sections of Defendants' Motion to Dismiss, but for differences owing to the applicable legal standard, the State's reliance on evidence from outside the Petition in the Motion, and differences between the claims the State attempts to rely upon (for example, the State relies in the Motion on an "omission" claim that it failed to plead in the Petition, and its Motion does not rely on all of the statements alleged in the Petition). To aid the Court's review, Defendants identify these sections here. *Compare infra* Section I *with* Motion to Dismiss Section I (lack of

Defendants' motions for June 24, 2024.

LEGAL STANDARD FOR OBTAINING A TEMPORARY INJUNCTION

A temporary injunction is an "extraordinary" form of relief that "invokes the equitable powers of the court" and that should not be issued unless the "traditional equitable requirements" are satisfied. *Max 100 L.C. v. Iowa Realty Co*., 621 N.W.2d 178, 181 (Iowa 2001). The State is required to establish: (1) a likelihood of success on the merits, (2) irreparable harm, (3) that the balance of the harms weighs in its favor, and (4) that the public interest would not be disserved by granting the requested relief. *See LS Power Midcontinent, LLC v. State*, 988 N.W.2d 316, 334-40 (Iowa 2023); *see also* Iowa R. Civ. P. 1.1502(1).

"There is no power the exercise of which is more delicate, which requires greater caution, [] or [is] more dangerous in a doubtful case, than the issuing of an injunction," a principle "applied more frequently in cases of temporary injunctions." *Iowa State Dep't of Health v. Hertko*, 282 N.W.2d 744, 751 (Iowa 1979). Nor may a temporary injunction issue where it "depends upon a disputed question of law about which there may be doubt, which has not been settled by the law of this state." *Id*. Further, "[t]o exercise its discretion, []the district court must have before it some evidence—an affidavit or sworn testimony or their equivalent—on which it may ascertain the circumstances confronting the parties and balance the harm that a temporary injunction may prevent against the harm that may result from its issuance." *Kleman v. Charles City Police Dep't*, 373 N.W.2d 90, 96 (Iowa 1985). If the movant has not "met [its] burden to

personal jurisdiction); *infra* Section II.A.1 *with* Motion to Dismiss Section II.A (the CFA does not apply because there is no "advertisement of merchandise"); *infra* Section II.A.2.a *with* Motion to Dismiss Section II.B.1 (statements are non-actionable opinions); *infra* Section II.A.2.b *with* Motion to Dismiss Section II.B.2 (statements are not materially misleading); *infra* Section II.B *with* Motion to Dismiss Section III (State's claims are barred by Section 230 of the Communications Decency Act).

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present evidence supporting [] drastic injunctive relief," a temporary injunction should not be granted. *Id.*[19]

The State argues that Rule 1.1502(3) of the Iowa Rules of Civil Procedure, which provides that "a temporary injunction may be allowed . . . in any case specially authorized by statute," allows it to bypass the traditional equitable requirements. Mot. at 16–17. But the CFA does not "specially authorize[]" a temporary injunction.

If—and only if—"the legislature . . . impose[s] a duty to grant an injunction by specifying conditions in a statute[,] . . . the conditions specified in the statute supersede the traditional equitable requirements." *Max 100*, 621 N.W.2d at 181; *see also Worthington v. Kenkel*, 684 N.W.2d 228, 233 (Iowa 2004) ("[L]legislative intent to displace the traditional equitable requirements for the issuance of injunctions is not automatically expressed because a statute authorizes injunctive relief."). As relevant here, the CFA provides:

> A civil action pursuant to this section shall be by equitable proceedings. If it appears to the attorney general that a person has engaged in, is engaging in, or is about to engage in a practice declared to be unlawful by this section, the attorney general may seek and

[19] The State cites a number of internal and third-party documents in support of its Motion, many of which are improperly characterized as described herein, and several of which have no bearing or relevance to the issues in this case. *See, e.g.*, *also infra* pp. 46–47 (discussing some of this evidence). Consistent with the evidentiary posture of this temporary injunction proceeding, Defendants do not seek to strike these materials from the record as inadmissible. At the same time, they do not concede the materials comply with the rules of evidence and request that the Court not afford them probative weight for the reasons described above. *See RPB SA v. Hyla, Inc.*, No. LA CV20-04105, 2020 WL 6723491, at *11 (C.D. Cal. July 27, 2020) ("Although otherwise inadmissible evidence may be considered for the purposes of a preliminary injunction, inadmissible evidence is entitled to less weight."); *Biomin Am., Inc. v. Lesaffre Yeast Corp.*, No. 2:20-CV-02109-HLT, 2020 WL 1503475, at *7 (D. Kan. Mar. 30, 2020) (same); *Flynt Distrib. Co. v. Harvey,* 734 F.2d 1389, 1394 (9th Cir. 1984) ("The trial court may give . . . inadmissible evidence *some weight* [in a preliminary injunction proceeding], when to do so *serves the purpose of preventing irreparable harm before trial.*" (emphases added)); *see also Schmitz v. Iowa Dep't of Hum. Servs.*, 461 N.W.2d 603, 607–08 (Iowa Ct. App. 1990) (looking to federal case law for guidance on how to weigh otherwise inadmissible evidence in an Iowa Administrative Procedure Act proceeding with similarly relaxed evidentiary rules).

> obtain in an action in a district court a temporary restraining order, preliminary injunction, or permanent injunction prohibiting the person from continuing the practice or engaging in the practice or doing an act in furtherance of the practice.

Iowa Code § 714.16(7). Nothing in the CFA specifies any conditions that supersede the traditional equitable requirements.[20] To the contrary, it makes clear that the civil action "shall be by equitable proceedings." § 714.16. It cannot be the case that the only condition for a temporary injunction under the CFA is that "*it appears to the attorney general*" that a violation has been committed, *id*. (emphasis added); such a regime would make the Attorney General the judge in her own case and violate basic norms of due process.

The Iowa Supreme Court considered a similar question in *Max 100 L.C. v. Iowa Realty Co.* and found that the equitable factors must apply. There, the plaintiffs similarly argued that because the statute at issue (Iowa's competition law) authorized injunctive relief, they did not need to show irreparable harm or the other equitable factors. *Max 100*, 621 N.W.2d at 181–82. The Court held that merely authorizing an injunction—as the competition statute does, and which is all that Section 714.16 does—does not abrogate the traditional equitable factors:

> If our legislature had wanted to specially authorize the district court under section 553.12(1) to issue a temporary injunction independent of a balancing of the equitable considerations, it would have articulated some standard for the court to apply, considering the extraordinary nature of temporary injunctions. The absence of a standard or directive in section 553.12(1) indicates our legislature intended injunctive relief to be granted or denied within the discretion of the court under the applicable equitable principles.

Id. at 181. *Max 100* additionally provides several examples of statutes that *do* expressly abrogate equitable requirements, *unlike* Section 714.16. *Id.* at 182; Iowa Code § 20.12 (to obtain a

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[20] While the State cites *State ex rel. Miller v. Hydro Mag, Ltd.*, 436 N.W.2d 617 (Iowa 1989), Mot. at 17, the issue in that case was limited to whether ultimate relief under the CFA requires that the State show the "common-law fraud elements of reliance and damages," not whether the statute affected the traditional equitable principles on motions for temporary injunctive relief. 436 N.W.2d at 621.

temporary injunction, the "plaintiff need not show that the violation or threatened violation would greatly or irreparably injure the plaintiff"); *id*. § 499.9 (injunction available "despite the adequacy of any legal or other remedy"). Under the precedent of *Max 100*, there is no basis to apply Rule 1.1502(3) to the CFA. The State must accordingly meet the traditional requirements of Rule 1.1502(1), including demonstrating irreparable harm, a balance of harms weighing in the State's favor, and no disservice to the public interest.[21]

THE STATE IS NOT ENTITLED TO A TEMPORARY INJUNCTION.

The State seeks to disrupt the status quo by prohibiting questionnaire responses that have been in place for over five years, on the basis of a statute that has never been applied under similar facts, concerning activity over which the Court has no jurisdiction—and which, if granted, would severely disrupt Defendants' business internationally, and coerce speech in violation of the First Amendment. The Court need not reach the merits of the Motion because it lacks personal jurisdiction; in all events, the Motion fails all four equitable requirements and must be denied.

I. The Court Lacks Personal Jurisdiction Over Defendants and Therefore Lacks Authority to Enter a Temporary Injunction.

"Before delving into the issue of whether a preliminary injunction is appropriate in this instance, the court must first determine whether it has personal jurisdiction over [Defendants]."

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[21] While Iowa courts have found that a *permanent* injunction can be entered absent analysis of the equitable factors given particular statutory authorization, *see State ex rel. Miller v. Grady*, 698 N.W.2d 336, 2005 WL 839409 (Iowa Ct. App. 2005), *Worthington,* 684 N.W.2d 228, *Max 100* expressly cited the "extraordinary nature of *temporary injunctions*" in holding that the legislature would need to articulate a specific standard to apply—beyond merely "allow[ing] for injunctive relief"—in order to authorize issuance of a "temporary injunction independent of a balancing of the equitable considerations." 621 N.W.2d at 181 (emphasis added). Entry of a *permanent* injunction following proof of a CFA violation on the merits presents an entirely different circumstance than entering an injunction prior to trial. *See Hertko*, 282 N.W.2d at 753.

Pro Edge, L.P. v. Gue, 374 F. Supp. 2d 711, 724 (N.D. Iowa 2005), *modified*, 411 F. Supp. 2d 1080 (N.D. Iowa 2006). Here, that threshold predicate for the Court's equitable discretion is lacking; there is no personal jurisdiction over Defendants. For the same reasons detailed herein, the Court should dismiss the State's Petition. *See* Motion to Dismiss at 6–16.

Iowa courts have personal jurisdiction to the extent allowed by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and, accordingly, they "focus on the federal constitutional requirements for exercising personal jurisdiction." *Harding v. Sasso*, 2 N.W.3d 260, 264 (Iowa 2023). The State argues that Defendants are subject to only specific jurisdiction, which extends only to claims that "aris[e] out of or relat[e] to the defendant's contacts with the *forum*." *Bristol-Myers Squibb Co. v. Super. Ct. of Calif., San Francisco Cnty.*, 582 U.S. 255, 262 (2017) (emphasis added).[22] To establish specific jurisdiction: (1) the defendant must "purposefully avail[] [itself] of the privilege of conducting activities within the forum State"; (2) the plaintiff's claims must "arise out of or relate to the defendant's contacts with the forum"; and (3) the exercise of personal jurisdiction over the defendant must "comport with fair play and substantial justice." *Harding*, 2 N.W.3d at 264–65 (cleaned up). The State has failed to demonstrate that these requirements are met.

In evaluating whether a defendant purposefully availed itself of the forum, courts must look to (i) contacts that the *defendant itself* made, *not* the "unilateral activity of another party, and (ii) "the defendant's contacts *with the forum State itself*, *not* the defendant's contacts with

[22] The Supreme Court also recognizes general jurisdiction, which extends to all claims but exists only when a defendant's "affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State," *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014) (cleaned up), and, in particular instances, jurisdiction by registration, *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122 (2023). The State does not argue that Defendants are subject to either general jurisdiction or jurisdiction by registration. Mot. at 18.

persons who reside there." *Walden v. Fiore*, 571 U.S. 277, 284–85 (2014) (emphasis added). For the plaintiff's claims to arise out of those contacts, such that the defendant is subject to specific jurisdiction, "there must be an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State." *Bristol-Myers Squibb*, 582 U.S. at 262 (internal quotation marks omitted). "When no such connection exists, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Id.* at 256.

Here, the entire "underlying controversy" is whether the following statements constitute deception or unfair practices under the CFA: (1) questionnaire responses provided to Apple regarding the TikTok platform and the associated 12+ age rating in Apple's App Store; (2) the "T for Teen" age ratings in the Google Play Store and Microsoft Store; (3) certain statements in the Guidelines; and (4) statements concerning the platform's "Restricted Mode."[23] Mot. at 7; Pet. ¶¶ 127–78. It is undisputed that none of these statements "t[ook] place in [Iowa]" or otherwise has any specific "affiliation" with Iowa. *Bristol-Myers Squibb*, 582 U.S. at 262. Because "all the conduct giving rise to the [State's] claims occurred elsewhere[,] [i]t follows that [Iowa] courts cannot claim specific jurisdiction." *Id.* at 265.

Indeed, two separate judges in Indiana reached precisely this conclusion when presented with analogous claims and the same jurisdictional allegations. *Indiana I*, 2023 WL 4305656, at *10 (Indiana lacked specific jurisdiction where the "allegedly deceptive conduct is directed to Apple, a California corporation, and no aspect of the age rating process takes place in Indiana"); *Indiana II*, 2023 WL 8481303, at *4–6 (Indiana lacked specific jurisdiction where the plaintiff

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[23] The State's "Restricted Mode" claim is not part of this Motion, nor is the claim relating to the age ratings in the Google Play Store and Microsoft Store. *Compare* Pet. ¶¶ 158–62, 167–70, *with* Mot. generally.

did "not allege that Defendants made any of their allegedly deceptive statements or omissions in Indiana" and "[t]o the extent that any of the statements were targeted anywhere, it was at Apple, Google, or Microsoft, none of which are located in Indiana").

Unable to connect its claims to its alleged jurisdictional contacts, the State instead spends the bulk of its jurisdictional argument arguing that various actions *other than* the alleged misstatements support the exercise of specific jurisdiction in this matter. Specifically, the State argues that "TikTok has purposefully directed activities at Iowa in three independent ways," including (1) "advertis[ing] and mak[ing] its social media application available to Iowans in the App Store," (2) "enter[ing] Terms of Service contracts with many thousands of Iowans to use the TikTok app," and (3) "continually shar[ing] data with and harvest[ing] location data from these Iowa users." Mot. at 19. As discussed below, none of these contacts constitutes purposeful availment of Iowa, and none of the State's claims arise from these contacts.

A. National Availability of the TikTok Platform on the Apple App Store

The TikTok platform's availability in the Apple App Store does not establish sufficient contact with Iowa for purposes of specific jurisdiction, regardless of Iowans' decisions to download and use the platform. Here, the State alleges that Defendants (i) "actively market and advertise their product in Iowa on the Apple App Store, Google Play and Microsoft stores," and (ii) operate a national platform that Iowa residents can access from within the State. Pet. ¶¶ 10, 14. But these allegations reflect nothing more than the nationwide operation of the TikTok platform.

Because these same alleged contacts would exist for any location in the United States, the State cannot show, as it must, that Defendants' alleged actions were "*purposefully directed*" at Iowa. *See, e.g.*, *Cap. Promotions, L.L.C. v. Don King Prods., Inc.*, 756 N.W.2d 828, 834 (Iowa 2008) (emphasis added); *see also Lindgren v. GDT, LLC*, 312 F. Supp. 2d 1125, 1131 (S.D. Iowa

2004) (shipping website that "could be accessed anywhere, including Iowa . . . does not demonstrate an intent to purposefully target Iowa"); *see also Doshier v. Twitter, Inc.*, 417 F. Supp. 3d 1171, 1178 (E.D. Ark. 2019) (holding that Twitter users and advertisers could not assert specific jurisdiction over Twitter despite their use of the platform in Arkansas) (citing *Walden*, 571 U.S. at 285); *Neumann v. Red Rock 4-Wheelers, Inc.*, No. 19-cv-02160, 2022 WL 3370170, at *4 (D. Nev. Aug. 15, 2022) ("[M]aintaining a universally accessible website, even one that advertises third-party businesses in the forum state, fails to establish purposeful availment.").[24]

As the Ninth Circuit recently explained, to establish "purposeful availment," "[w]hat is needed . . . is some prioritization of the forum state, some differentiation of the forum state from other locations, or some focused dedication to the forum" that is "something substantial beyond the baseline connection that the defendant's internet presence already creates with every jurisdiction through its universally accessible platform." *Briskin v. Shopify, Inc.*, 87 F.4th 404, 420 (9th Cir. 2023). The State identifies no such prioritization or differentiation of Iowa from other locations in the pertinent alleged facts here. It was for this very reason that two judges in Indiana rejected analogous claims and jurisdictional allegations there. *See Indiana I*, 2023 WL 4305656, at *10 (Ind. Super. May 4, 2023) ("[O]perating an online service that is available in

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[24] Whether Defendants earn revenue from these purported "Iowa activities," [REDACTED], Mot. at 22, does not change the analysis. *See Indiana II*, 2023 WL 8481303, at *5 (finding "allegation that TikTok Inc. filed an Indiana income tax return, is insufficient to support specific jurisdiction"); *see also Knieper v. Forest Grp. USA, Inc.*, No. 4:15-CV-0222-HLM, 2016 WL 9450454, at *7 (N.D. Ga. Mar. 3, 2016) (same). [REDACTED] were enough to create jurisdiction, a corporation would be subject to jurisdiction in any state in which it conducts business—a rule flatly rejected by the U.S. Supreme Court. *See Bristol-Myers Squibb*, 582 U.S. at 264. Regardless, the State's claims about Defendants' representations plainly do not arise out of or relate [REDACTED]

Indiana and all other states is not sufficient to establish specific jurisdiction, when [Defendants are] being sued over responses made to the App Store's questionnaire."); *Indiana II*, 2023 WL 8481303, at *5–6.

Although the State seeks to tie the operation of this national platform to Iowa through the downloading activities of Iowa residents, that too is not enough, as "[t]he unilateral activities of a plaintiff or some other entity cannot satisfy the minimum contacts requirement." *Ostrem v. Prideco Secure Loan Fund, LP*, 841 N.W.2d 882, 892 (Iowa 2014); *see also Fastpath, Inc. v. Arbela Techs. Corp.*, 760 F.3d 816, 823 (8th Cir. 2014) ("[T]he plaintiff cannot be the only link between the defendant and the forum.") (cleaned up).[25] The choice of Iowa residents to download the TikTok platform is an activity of those residents—not of Defendants.

The TikTok platform's nationwide operations also fail to support specific jurisdiction in Iowa because the State's claims do not arise out of or relate to that alleged conduct—again, a conclusion that the Indiana courts reached with respect to similar claims asserted there. *See Indiana I*, 2023 WL 4305656, at *10 ("responses made to the App Store's questionnaire" are "not related to and do[] not arise out of [Defendants'] conduct within or directed to Indiana"); *see also id.* at *14 ("there is no allegation or evidence that TikTok has targeted Indiana regarding the matter alleged to be false or deceptive, which is TikTok's 'Infrequent/Mild' responses to the

[25] The State also argues that Defendants [redacted] Mot. at 22. However, each of the cited documents only underscores the TikTok platform's *national* presence and operations, rather than providing evidence of any purposeful targeting of Iowa. [redacted] Nor do the State's claims arise out of or relate to the mentions of Iowa in [redacted]; indeed, the State does not even incorporate these allegations into its substantive claims.

App Store's questionnaire."); *see also Indiana II*, 2023 WL 8481301, at *5.

B. Entering Terms of Service

The State also alleges that the Court has personal jurisdiction over Defendants because Defendants enter into TikTok's Terms of Service contract with users, including Iowa users. Pet. ¶¶ 13–14. But "a contract alone cannot automatically establish sufficient contacts." *Hager v. Doubletree*, 440 N.W.2d 603, 607 (Iowa 1989) (emphasis removed); *see also Int'l Adm'rs, Inc. v. Pettigrew*, 430 F. Supp. 2d 890, 896 (S.D. Iowa 2006) ("[T]he mere fact that a non-resident enters into a contract with a resident of the forum state is not sufficient to give the courts therein personal jurisdiction over the non-resident.").

Indeed, the Supreme Court has "emphasized the need for a 'highly realistic' approach that recognizes that a 'contract' is 'ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479 (1985). As such, "[i]t is these factors—prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing—that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum," not the mere existence of a contract. *See id.* Here, however, the State fails to allege, let alone establish a likelihood of proving, any of these factors. The only future consequence the State mentions is the collection and use of geographic information. Pet. ¶ 14. However, as discussed below, it is well-established that geo-targeting is not sufficient to establish purposeful availment. *See infra* § I.C.

Even if contractual relationships with Iowans were sufficient to constitute minimum contacts, the State's claims plainly do not "arise out of or relate to" the Terms of Service. The State does not assert a breach of contract claim related to the Terms of Service. And far from

availing itself of Iowa and the Iowa court system in the Terms of Service, the TikTok platform's U.S. Terms of Service require any disputes to be adjudicated in California pursuant to California law. *See* Ex. State Ex. 15, Terms of Service.[26] Accordingly, these contacts do not, and cannot, serve as a basis for establishing jurisdiction over Defendants.

C. Location-Based Advertising

The State also alleges that Defendants collect and use "location-based data" to "serve content to . . . users in Iowa," including "location-specific advertisements." *See* Mot. at 25; Pet. ¶¶ 11–12. "Geo-targeting" is not sufficient to establish that an online platform has purposefully availed itself of a given jurisdiction—a conclusion multiple courts across the nation have independently reached. *See, e.g.*, *Johnson v. TheHuffingtonPost.com, Inc.*, 21 F.4th 314, 321 (5th Cir. 2021); *see also Briskin*, 87 F.4th at 419 (explaining the "use of geo-located advertisements did not constitute express aiming when users in every forum . . . would receive ads targeted to their locations"); *Neumann*, 2022 WL 3370170, at *4 ("[M]aintaining a universally accessible website, even one that advertises third-party businesses in the forum state, fails to establish purposeful availment."); *Indiana I*, 2023 WL 4305656, at *10; *Indiana II*, 2023 WL 8481303, at *5; *AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1211–12 (9th Cir. 2020) (finding no "purposeful[] direct[ion]," based on "geo-located advertisements").

Further, the State's claims plainly do not "arise out of" or "relate to" this alleged "geo-targeting," which is not even mentioned in the Petition outside of the jurisdictional allegations. *See* Pet. ¶¶ 11–12, 14; *see also Johnson*, 21 F.4th at 321 ("Selling ads is no different from hawking tees and mugs. Those sales neither produced nor relate to Johnson's libel claim. That relatedness problem remains even if HuffPost used location data to tailor ads to each visitor.");

[26] Further, under the Terms of Service, TikTok Inc. is the entity that provides the TikTok platform in the U.S. *See* State Ex. 15, Terms of Service at 2.

Hepp v. Facebook, 14 F.4th 204, 208 (3d Cir. 2021) (no specific jurisdiction despite allegations that defendants "targeted their advertising business to Pennsylvania" and had "an online community organized around Philadelphia" because "none of these contacts forms a strong connection to the" claims alleged). The State does not allege that Defendants incorporated their purported misstatements regarding the content on the platform in any geo-targeted advertising or content, nor does it contend that Defendants' alleged misrepresentations arise out of or relate to the use of location data collected from Iowa users. Accordingly, the State's allegations regarding location data collection and use are "immaterial in determining whether there is specific jurisdiction." *Indiana II*, 2023 WL 8481303, at *4 (citing *Bristol-Myers Squibb*, 582 U.S. at 264).[27]

The cases the State cites are not to the contrary. For example, the State argues that *Sioux Pharm, Inc. v. Summit Nutritionals Int'l Inc.*, 959 N.W. 2d 182 (Iowa 2015), an unfair competition case, supports the exercise of specific jurisdiction because the corporate defendant in *Sioux Pharm* had fewer Iowa customers than there are Iowa TikTok users here. *See* Mot. at 22–23. But the Court in *Sioux Pharm* expressly noted that having an Iowa customer or customers in an unfair competition action was merely a factor among many supporting the exercise of specific jurisdiction, and the Court did not hold that it would be sufficient on its own.

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[27] The State urges the Court to disregard *Indiana II* because it "fails to cite—much less distinguish—the U.S. Supreme Court's decisions in *Ford Motor Co.* and *Burger King*." Mot. at 28. To begin, *Indiana I* cites *Burger King* several times, *Indiana I* at *9, 10, and *Burger King* does not help the State's position, *see* p. 19*, supra*. Nor does *Ford Motor Co.*, where the defendant *conceded* purposeful availment (including by marketing the vehicle models at issue "by every means imaginable" in the forum state) and the Court expressly declined to extend its reasoning to "internet transactions." 592 U.S. 351, 364-65 366 n.4. For its part, the State fails to confront *Indiana I* and *Indiana II*, relying only on conclusory assertions that the decisions are not consistent with other cases. Mot. at 27–28. As discussed on pages 22–24 below, that assertion is wrong.

See Sioux Pharm, 859 N.W.2d at 196. Rather, the Court relied primarily on facts that specifically and uniquely tied the defendant and the claim to Iowa *as distinct from other states*: the allegedly defective and mislabeled product was manufactured in Iowa by an Iowa supplier; one of the defendant's unfairly competitive actions was to "falsely tout[] Iowa roots to enhance its sales" by stating that it operated *its own* Iowa manufacturing facility; and the unfairly competitive behavior was "uniquely or expressly" aimed at Iowa because the defendant's only domestic competitor was located here.[28] *See id.* at 196–97. By contrast, the State's claims in this case are that Defendants allegedly make false representations to the Apple App Store and in nationally accessible Guidelines. Mot. at 7. None of Defendants' alleged Iowa contacts has anything to do with those claims, nor do those representations themselves relate to Iowa in any way. *See supra* §§ I.A–C.

The State also argues that recent cases in the social media context support the exercise of jurisdiction. Mot. at 24–27. The State is mistaken; none of the cited cases is analogous or persuasive:

- *State of Tennessee v. Meta Platforms, Inc.*, No. 23-1364-IV, Order on Defs' Mot. to Dismiss (Tenn. Ch. March 13, 2024) ("*Tennessee*"). *Tennessee* concerns claims that the social media platform Instagram is unfairly and deceptively addictive and harmful. In finding that those claims were sufficiently related to the defendant Meta's Tennessee contacts to support jurisdiction, the *Tennessee* court specifically relied upon the following contacts, which have no analog here: (1) "Meta used its research to develop sophisticated tools that hook consumers to Instagram [and] *conducted some of that research in Memphis, Tennessee*" (*i.e.*, some of the allegedly "addictive" features were developed *in Tennessee*); and (2) "Meta engaged *The Tennessean's* editorial board to provide a positive, forward-looking message related to Meta's impact in Tennessee" (*i.e.*, some of the alleged "deception" was specifically targeted to Tennesseans through a Tennessee-specific medium). *Tennessee* at 13 (emphasis added). Both of those contacts actually *occurred in Tennessee*; here, the

[28] The State does not argue that the *Calder* effects test applies and does not attempt to meet its requirements. Even if it did, Iowa courts apply that test "narrowly 'as an additional factor to consider when evaluating a defendant's relevant contacts with the forum state.'" *Sioux Pharm*, 859 N.W.2d at 196–97. Here, the State fails to establish any relevant contacts with Iowa.

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State alleges *no* contacts unique to Iowa, let alone any that relate to its claims.

The *Tennessee* court also suggested that specific jurisdiction may be premised on the operation of Meta's ad-supported "business model" in Tennessee. But the U.S. Supreme Court has squarely rejected this "loose and spurious form of general jurisdiction," explaining that such a "danger[ous] approach" to jurisdiction cannot be squared with due process and the limits of interstate federalism. *Bristol-Myers Squibb*, 582 U.S. at 264. In particular, the *Tennessee* court's decision relies almost exclusively on cases that pre-date the U.S. Supreme Court's decision in *Bristol-Myers Squibb*, 582 U.S. 255.[29] And, insofar as the *Tennessee* court did hold that Meta's use of geographically-targeted ads subjected it to jurisdiction in Tennessee, it did so with respect to claims that Meta designed its product to increase the time that its users spent on the platform in order to have them view more advertising. *See Tennessee* at 12–13. That rationale, which purportedly links the claims and ad-related conduct, has no application to the claims in this litigation.

- *Dzananovic v. Bumble, Inc.*, No. 21-cv-06925, 2023 WL 4405833 (N.D. Ill. July 7, 2023). The State cites *Dzananovic* for the proposition that a social media platform purposely availed itself of a forum state by collecting data from users for targeted marketing purposes. Mot. at 26–27. But in *Dzananovic*, the defendants "***conced[ed]*** that [their] purported marketing activities in Illinois constitute purposeful direction or purposeful availment." 2023 WL 4405833, at *3 (emphasis added). Moreover, as in *Tennessee*, those activities included numerous contacts *occurring in the state of Illinois*, including: taking out physical billboards in Chicago advertising defendants' Bumble dating platform; launching "BumbleSpot" locations in Chicago where users could meet their "matches" from the platform; offering "DiningOut Passbooks" to users in Chicago; hosting happy hours in Chicago; conducting prize drawings for free dates with Chicago users; sponsoring booths at a Chicago music festival; and employing campus ambassadors at Chicago universities. *Id.* at *4. There are no such contacts here, nor do Defendants concede purposeful availment as the *Dzananovic* defendants did.

- *Doffing v. Meta Platforms, Inc.*, No. 22-cv-00100-CL, 2022 WL 3357698 (D. Or. July 20, 2022) and *Chien v. Bumble Inc.*, 641 F. Supp. 3d 913, 928–30 (S.D. Cal. 2022). The State cites these two district court decisions from within the Ninth Circuit for the proposition that specific personal jurisdiction exists in a forum when app developers collect information from forum residents for marketing purposes. Mot. at 26–27. The holdings of these cases are not nearly so broad—in *Doffing*, the defendant also "sent thousands of text messages and emails" to the plaintiff in Oregon, *Doffing*, 2022 WL 3357698, at * 4, and in *Chien*, the defendant had "California-specific sections within its privacy policy," *Chien*, 641 F. Supp. 3d at 929–30—but, more fundamentally, these district-level cases do not reflect the state of the law in the Ninth Circuit. They precede the Ninth Circuit's 2023 opinion in

[29] The only personal jurisdiction case cited by the *Tennessee* court post-dating *Bristol-Myers Squibb* is *AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201 (9th Cir. 2020), for which the court cites the *dissent*. *See* State Ex. 19A at 11.

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> *Briskin v. Shopify, Inc.*, which clarified that "the fact that a broadly accessible web platform knowingly profits from consumers in the forum state is not sufficient to show that the defendant is expressly aiming its conduct there"—a principle that expressly includes "geo-located advertisements"—and that the plaintiff must establish some "prioritization" or "differentiation" of the forum state, which is notably absent here. 87 F.4th at 419–20.[30]

Exercising jurisdiction over Defendants under the circumstances advanced by the State would extend Iowa's jurisdictional reach to every modern corporation with a nationwide internet presence, as well as subject Defendants to specific jurisdiction in every state. Such an outcome would improperly conflate specific and general jurisdiction and undermine the predictability the Due Process Clause is intended to safeguard. *See generally Burger King Corp.*, 471 U.S. at 472. The State's overreach is especially salient considering the relief it requests here, which is not specific to Iowa but would affect the availability of the TikTok platform in all fifty states, whether or not they share the State's views. *See infra* §§ III–V.[31]

II. The State Cannot Demonstrate a Reasonable Likelihood of Success.

Even if the Court had jurisdiction over Defendants, the State's Motion is clearly meritless, as the State cannot establish a likelihood of succeeding on its CFA claims. First, it has failed to establish either that Defendants have engaged in any "advertisement of merchandise," as required to fall within the scope of the CFA (*infra* § II.A.1), or any deception, unfair practice,

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[30] The State also cites *North Carolina v. TikTok Inc.*, No. 23CV030646, Application for Enf't of CID (Wake Cnty. Super. Ct. October 25, 2023). This decision by a North Carolina trial court addresses jurisdiction over the subject of an investigative demand, not a filed lawsuit, and therefore cannot be extrapolated to the State's case here. Furthermore, given that the court provided no analysis whatsoever, its decision can carry no persuasive weight. *See* State Ex. 25.

[31] Compounding the deficiency of the State's jurisdictional allegations and arguments, the State purports to define "TikTok" to refer collectively to all Defendants, and consistently refers in general terms to the alleged conduct of "Defendants" or "TikTok." Pet. ¶ 1 n.1. The State cannot rely on this sort of group pleading to meet its jurisdictional burden because "[e]ach defendant's contacts with the forum State must be assessed individually." *See Calder v. Jones*, 465 U.S. 783, 790 (1984).

or omission under the CFA (*infra* § II.A.2–3). Second, the State's claims are barred by Section 230(c)(1) of the Communications Decency Act (*infra* § II.B). Third, the State's requested injunction would violate the First Amendment and the Dormant Commerce Clause of the U.S. Constitution, and therefore cannot constitute a proper remedy for any alleged CFA violation (*infra* § II.C).

A. The State Fails to Plead or Prove Multiple Essential Elements Necessary to Establish a CFA Claim.

To demonstrate a likelihood of success on its claims under § 714.16(2)(a) of the CFA, the State must establish that the alleged statements (1) constitute an "unfair practice, deception, . . . or . . . omission of material fact with intent that others rely upon the . . . omission"; ***and*** (2) were made "in connection with the lease, sale, or advertisement of merchandise." Iowa Code § 714.16(2)(a). The State must show it is likely to succeed in proving these elements "by a preponderance of clear, convincing, and satisfactory evidence." *State ex rel. Miller v. Cutty's Des Moines Camping Club, Inc.*, 694 N.W.2d 518, 524 (Iowa 2005). It fails on three fronts. First, making an online platform available for *free download* in third-party app stores is not, as a matter of law, "the lease, sale, or advertisement of merchandise"; rather, the CFA regulates transactions involving exchanges for money. Second, the State has not identified any "deceptions" because the alleged misstatements are non-actionable opinions. Third, the State has not established those alleged misstatements were materially misleading. These same defects bar the State's "unfair practice" and "omission" claims, and as explained in Defendants' Motion to Dismiss, they warrant dismissal of the Petition in its entirety. Mot. to Dismiss at II.

1. The State Cannot Establish any Act "in Connection with the Lease, Sale, or Advertisement of any Merchandise."

The State argues that the CFA applies because the Apple questionnaire responses and the platform's Guidelines are "advertisements of merchandise" within the meaning of the CFA. The

plain language and clear purpose of the CFA make clear, however, that the TikTok platform is not "merchandise" within the meaning of the CFA, nor are any of the challenged statements an "advertisement." § 714.16(2)(a).

a) The freely available TikTok platform is not "merchandise" under the CFA.

The CFA defines "merchandise" as "any objects, wares, goods, commodities, intangibles, securities, bonds, debentures, stocks, real estate or services." § 714.16(1)(e). The State argues that "[t]he TikTok app satisfies this definition, whether viewed as a 'good,' a 'service,' or an 'intangible.'" Mot. at 52–53. But the State ignores the fundamental requirement that "merchandise" for purposes of the CFA is something exchanged for money.

Because the terms "goods," "services," and "intangible" are not themselves defined by the statute, the Court should look to the common understanding and treatment of those terms in prior court decisions. *See Gardin v. Long Beach Mortg. Co*., 661 N.W.2d 193, 197 (Iowa 2003) (where term is undefined, court will review prior court decisions, similar statutes, dictionary definitions, and common usage). Applying that basic canon of construction here, the TikTok platform is plainly not "merchandise" because it is free to download and use.

The Iowa Court of Appeals, interpreting "merchandise" under § 714.16, adopted the following definition of "service": "[t]he act of doing something useful for a person or company *for a fee*." *Scenic Builders, L.L.C. v. Peiffer*, No. 10-0794, 2011 WL 2078225, at *2 (Iowa Ct. App. 2011) (emphasis added) (quoting Black Law's Dictionary 1399 (8th ed. 2004)). The State's only argument that the TikTok platform constitutes a "service" is that "service" appears in the title of the "Terms of Service" agreement. Mot. at 53. That is beside the point; courts do not allow parties' use of a term to supplant their own legal determinations[32]—a principle

[32] *Cf. Rohlin Const. Co., Inc. v. City of Hinton*, 476 N.W.2d 78, 79 (Iowa 1991) (explaining that,

particularly salient here given the many definitions of "service." The parties' use of "service" in the title of that agreement is thus irrelevant: what matters is whether the platform qualifies as a "service" under the CFA, which it plainly does not, since it is not offered "for a fee." *Scenic Builders*, 2011 WL 2078225 at * 2.

Similarly, "goods" are commonly understood as "things that are produced *to be sold*." *Goods*, Oxford Dictionary, https://www.oxfordlearnersdictionaries.com/definition/english/goods; *see also Goods,* Black's Law Dictionary (11th ed. 2019) ("Tangible or movable personal property other than money; esp., articles of trade or items of merchandise") The State makes no attempt to demonstrate that a "good" has been "advertised" in connection with any of its claims.

Finally, Illinois courts—interpreting the Illinois Consumer Fraud Act, on which the Iowa CFA "was patterned," *see State ex rel. Miller v. Hydro Mag, Ltd.*, 436 N.W.2d 617, 621 (Iowa 1989) (citation omitted)—define "intangible" for purposes of that statute to mean "property which has no intrinsic value but which is representative or evidence of value, such as certificates of stocks, bonds, promissory notes and franchises," *People ex rel. Scott v. Cardet Int'l, Inc.*, 321 N.E.2d 386, 390 (Ill. Ct. App. 1974). The State offers no reasoning for its conclusion that the TikTok platform is an "intangible" for purposes of the CFA.[33]

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regardless of whether a contract employs the term "penalty" or "liquidated damages," it is a general rule that the determination is a question of law for the court dependent on the court's construction of the contract); *Cheatem v. Landmark Realty of Missouri, LLC*, No. 20-00958, 2021 WL 5541957, at *4 (W.D. Mo. July 29, 2021) (noting that "[t]he label attached . . . by the parties [in a contract] does not matter" and "if the funds meet the statute's definition of 'security deposit,' the parties cannot change that legal characterization simply by agreeing that the 'Security Deposit . . . does not constitute a security deposit as that term is defined by Missouri or Kansas law'"); *Hartford Fire Ins. Co. v. Thermos L.L.C.*, 146 F. Supp. 3d 1005, 1017 (N.D. Ill. 2015) (under the New Jersey Consumer Fraud Act, the term "ascertainable loss" is a "term of art" and, thus, the plaintiff's use of that term in its response brief did not affect the court's analysis of whether the facts satisfied the statutory definition).

[33] Interpreting "intangible" any other way would broaden the scope of the CFA without any limitation and swallow the other textual limitations of the statute. Under the State's construction,

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The conclusion that the CFA's definition of "merchandise" does not include freely available online platforms like TikTok is reinforced by the ordinary definition of the word "merchandise," which encompasses things that are bought or sold. *See Merchandise*, Black's Law Dictionary (11th ed. 2019) ("In general, a movable object involved in trade or traffic; that which is passed from one person to another by purchase and sale."); *Merchandise*, Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/merchandise ("goods that are bought or sold"); *Merchandise*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/merchandise ("the commodities or goods that are bought and sold in business"). The State's interpretation of the CFA's definition of "merchandise" would, by contrast, force the Court to construe the term at odds with its common meaning.

b) The questionnaire responses, age ratings, and Guidelines are not "advertisements" under the CFA.

An "advertisement" under the CFA is defined as any "attempt by publication, dissemination, solicitation, or circulation to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in any merchandise." § 714.16(1)(a). In an attempt to satisfy this definition, the State argues that the "age-rating representations" and the platform's Guidelines qualify as "advertisements" under the CFA because both are published "directly or indirectly to Iowa consumers" and intended "to induce . . . [consumers] to incur" an obligation by agreeing to the platform's Terms of Service. Mot. at 51, 65–66 (internal quotations omitted). The State further argues that the Apple age-rating questionnaire responses induce users into

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the statute would cover not only the mere download of a free platform, as alleged here, but would expand liability to any free website (*e.g.*, a user subscribing to a weekly blogpost or newsletter). Even an alleged deceptive statement pertaining to a potential *idea* would theoretically be subject to CFA liability under the State's interpretation of the statute.

obtaining an "interest" in the TikTok platform simply by using the platform. *Id*. at 51.

Consistent with the definition of "merchandise," the questionnaire responses, age-ratings, and statements in the Guidelines fail to qualify as "advertisements" because they are not asking Iowans to purchase anything. *See State v. Cusick*, 248 Iowa 1168, 1172 (1957) ("[A]dvertising is a method, in a broad sense, of *soliciting the public to purchase* the wares advertised."). As such, the State has failed to establish that these statements "attempt to induce" any "obligation" or "interest."

"Attempt to induce." To make apps available to iPhone users, all app developers are required to answer Apple's age-rating questionnaire. This mandatory action is not an "advertisement" under the plain definition of the word. The State has not alleged, nor could it, that any of the statements at issue appeared in any billboard, TV ad, or other similarly promotional messaging that actually "attempt[s] . . . to induce." § 714.16(1)(a). "Induce" means "to move by persuasion or influence." *Induce*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/induce. Answering mandatory questions in the Apple app store, along with every other market participant, is not an attempt to "move by persuasion or influence." This is especially true where, as here, the answers are reviewed and assessed by a third party, who ultimately assigns and publishes the app rating. Nor do the Guidelines attempt to "induce" people to download the TikTok platform; as the State acknowledges, they are directed to *existing* TikTok users, not to prospective users. Pet. ¶¶ 33, 116, 118–19.

"Obligation or . . . interest." These terms, as used in the statutory definition of "advertisement" and relied on by the State, are commonly understood to refer to things of value obtained in consumer transactions, in exchange for money. "[O]bligation" means "a

commitment . . . to pay a particular sum of money." *See Obligation*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/obligation. And "interest" is defined as "[a] legal share in something; all or part of a legal or equitable claim to or right in property." *See Interest*, Black's Law Dictionary (11th ed. 2019); *see also* n.32, *infra*. Users incur no such obligation or obtain any interest when they download the free TikTok platform.

The State argues that the TikTok platform's Terms of Service qualifies as an "obligation." But the Terms of Service do not require users to make any payment or incur any financial obligation. The portions of the Terms of Service cited by the State are merely statements about how the platform operates, which users acknowledge they understand; these provisions do not require the user to do anything. *See* Mot. at 51–52; State Ex. 15 (under Terms of Service, user "acknowledge[s] . . . that [the TikTok platform and/or TikTok Inc.] may generate revenues, increase goodwill, or otherwise increase our value from [their] use" of the platform); State Ex. 17 (Privacy Policy stating that TikTok Inc. "*automatically collect[s]* certain information from you when you use the Platform" (emphasis added)). Indeed, if making something available for free in this manner, subject to terms governing the use of that free thing, constitutes an "advertisement" under the CFA—as the State asserts here—then so would the mere offering of any number of free services that impose conditions on their use, from public parks to Wikipedia.

The State similarly argues that users are induced into obtaining an "interest" because the Terms of Service "grant a user the right to use the TikTok app's social-media services." Mot. at 52. But the Terms of Service explicitly state that the "right to use" the platform may be revoked "at any time and without prior notice" and "for any reason or no reason." State Ex. 15 at §§ 4, 5.

That is not a legally cognizable "interest."[34]

That the word "advertisement" means an attempt to induce an exchange of money for something is reinforced by the CFA's use of that term within the cumulative phrase "lease, sale, or advertisement of any merchandise." § 714.16(2)(a). "Sale" is defined by the statute as "any sale, offer for sale, or attempt to sell any merchandise for cash or on credit." § 714.16(1)(g). Although "lease" is not specifically defined by the statute, it is also commonly understood to require an exchange of money. *See Lease*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/lease ("A contract by which one conveys real estate, equipment, or facilities for a specified term and for a specified rent); *Lease*, Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/-english/lease ("[A] legal agreement by which money is paid in order to use land, a building, a vehicle, or a piece of equipment for an agreed period of time"). Both "sale" and "lease" thus contemplate *consummated transactions* involving an exchange of money. "Advertisement" should be interpreted consistently, *i.e.*, an *attempt to induce* an *exchange of money*. *See Cusick*, 248 Iowa at 1172 ("[A]dvertising is a method, in a broad sense, of soliciting the public to purchase the wares advertised.").

To interpret "advertisement" in a manner inconsistent with the other two terms in this clause would lead to absurd results, violating a basic rule of statutory construction. *See Iowa Ins. Inst. v. Core Grp. of Iowa Ass'n for Just.*, 867 N.W.2d 58, 75 (Iowa 2015) (Iowa courts have

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[34] *See, e.g.*, *Jones v. Stover*, 108 N.W. 112, 113 (Iowa 1906) (license to use land did not confer a legal interest because it was a "personal privilege" that was "revocable at the pleasure of the licensor"); *Snyder & Assocs. Acquisitions LLC v. United States*, 133 Fed. Cl. 120, 125 (2017) ("ability to participate in the IRS e-filing program" did not qualify as a "property interest" because "filers participate in the e-filing program only with the IRS's permission," which "[t]he IRS can revoke . . . at any time"); *LaSalle Nat'l Bank & Trust Co. v. City of Chicago*, 470 N.E.2d 1239 (Ill. Ct. App. 1984) (holding that a company had no property interest in the retention of a sewage permit when that permit could be revoked "at any time").

"long recognized that statutes should not be interpreted in a manner that leads to absurd results."). Under the State's interpretation, the CFA would cover two kinds of accepted offers requiring the exchange of money—sales and leases—and a third category of non-accepted offers—advertisements—in which there need not be *even the potential* for any exchange of money. The State's interpretation, as applied here, would thus mean that, even though the *actual download* of the TikTok platform would *not* qualify because it is neither a sale nor a lease, the *offer to download*—alleged advertising of the same freely available TikTok platform—*would* qualify. This is precisely the sort of nonsensical outcome that, under Iowa law, counsels against such an interpretation.

c) The purpose and history of the CFA confirm it does not apply to the freely available TikTok platform.

The purpose of the CFA—embodied in its title, the "*Consumer Fraud* Act"—confirms that its plain language should be read to apply only to transactions or attempted transactions involving an exchange of money. While the terms "consumer" and "consumer fraud" are not defined for purposes of subsection § 714.16(2)(a),[35] the ordinary understanding of those terms is consistent with the interpretation of the statute as contemplating some monetary exchange. *See Consumer*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/consumer (consumer is "a person who buys goods or services for their own use");

[35] The term "consumer" *is* defined separately for purposes of subsection § 714.16(2)(o)—which applies only to free offers and is not a provision under which the State seeks relief (*see infra* p. 34)—as an "individual who seeks to accept or accepts a free offer." This definition underscores that for purposes of the remainder of the statute, a "consumer" is someone that engages in a *monetary*, *i.e.* not free, transaction. *See, e.g.*, *Kucera v. Baldazo*, 745 N.W.2d 481, 487 (Iowa 2008) (applying the rule of "expressio unius est exclusio [alterius]" and concluding that "the legislature's reference in the [statute's] amendment . . . only to [the chapter] dealing with remedies available to city employees suggests the legislature did not intend to expand the choice of remedies available [to other types of employees]").

Consumer Fraud, Black's Law Dictionary (11th ed. 2019) ("Any intentional deception, deceptive act or practice, false pretense, false promise, or misrepresentation made by a seller or advertiser of goods or services *to induce a person or people in general to buy*.") (emphasis added). Indeed, the State's own website describes the CFA as a "law[] that protects the ***buying public*** from false or misleading advertisements or sales practices." *For Consumers — Consumer Protection Division*, https://www.iowaattorneygeneral.gov/for-consumers (last visited May 1, 2024) (emphasis added).

The CFA's legislative history further supports this reading, to the extent any lingering ambiguity remains. *See Sallee v. Stewart*, 827 N.W.2d 128, 148 (Iowa 2013) (court may consider legislative history to construe ambiguous statute); Iowa Code § 4.6 (same). Examining the statute's purpose, the Iowa Supreme Court has concluded that the CFA was enacted to protect "*buyers* from fraudulent practices" based on "the historical development of consumer law." *Hydro Mag, Ltd.*, 436 N.W.2d at 620, 621 (cleaned up).

Consistent with its history and purpose, Defendants are not aware of any case in which the CFA has been applied to an exchange, like the one at issue here, for which a consumer could *never expect* to suffer *any* financial harm.[36] *See, e.g.*, *State ex rel. Miller v. Vertrue, Inc.*, 834 N.W.2d 12, 34 (Iowa 2013) (membership service involving payment of monthly premiums); *Cutty's*, 694 N.W.2d at 526 (sale of land and club dues); *State ex rel. Miller v. Rahmani*, 472

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[36] The Illinois Consumer Fraud Act, on which the Iowa CFA "was patterned," *see Hydro Mag, Ltd.*, 436 N.W.2d at 621 (citation omitted), similarly extends only to commercial transactions involving money. *See* 815 Ill. Comp. Stat. § 505/2 (prohibiting "unfair or deceptive acts or practices . . . in the conduct of any trade or commerce"); *Robinson v. Toyota Motor Credit Corp.*, 775 N.E.2d 951, 960 (Ill. 2002) ("The Consumer Fraud Act is . . . intended to protect consumers, borrowers, and business persons."); 815 Ill. Comp. Stat.§ 505/1 ("'[C]onsumer' means any person who purchases or contracts for the purchase of merchandise.").

N.W.2d 254, 257 (Iowa 1991) (brochure advertising vacation package for purchase).[37]

Other provisions of the CFA further underscore that § 714.16(2)(a) requires an exchange of money as a prerequisite to liability. *First*, in the section providing for the disgorgement remedy the State seeks, the CFA *presumes* that if a "person has acquired moneys or property by any means declared to be unlawful by this section," there will be consumers entitled to "*reimbursement*" of that money—*i.e.*, that the challenged action caused the consumers to pay for something. *See* § 714.16(7) (emphasis added). *Second*, Section 714.16(2)(o) of the CFA makes it an "unlawful practice for a person to make a *free* offer to a consumer . . . unless the person provides the consumer with clear and conspicuous information regarding the terms of the free offer before the consumer agrees to accept." *Id*. (emphasis added). Notably, even in this section of the statute which expressly addresses "free offers," the legislature made clear that it was intended to protect consumers from financial detriment, defining "free offer" as "an offer of goods and services without cost . . . to a consumer that, if accepted, causes the consumer to incur a *financial obligation*," § 714.16(2)(o)(6)(e)(i) (emphasis added)—*e.g.*, like a free preview or offer that automatically rolls into a paid subscription.[38]

[37] Courts in several other states have construed their consumer protection statutes as not applicable to free products or services. *See, e.g.*, *Indiana I*, 2023 WL 4305656, at *14; *Indiana II*, 2023 WL 8481303, at *6-7; *In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705, 715–18 (N.D. Cal. 2011) (dismissing claim under California consumer protection statutes 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 School*, 356 F. Supp. 3d 428, 435 (M.D. Pa. 2018) (dismissing claim under Pennsylvania consumer protection statute because the plaintiff received benefits from the defendant "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").

[38] This definition of "free offer" also makes plain that the CFA treats "goods" and "services" as things to be exchanged for money—otherwise, it would be unnecessary to specify that the

Accordingly, because the TikTok platform is not "merchandise" and the platform's age ratings and Guidelines do not qualify as "advertisement[s]," as these terms should be interpreted consistent with their plain language and the CFA's purpose, the State's claims must be dismissed. *See* Motion to Dismiss at 18–26. In all events, because the State's CFA claims depend upon an unprecedented extension of the statute, the State's request for a temporary injunction should be denied. *Hertko*, 282 N.W.2d at 751–52 (observing that "an injunction will not issue" when it "depends upon a disputed question of law about which there may be doubt, which has not been settled by the law of this state" and approving denial of temporary injunction where certain statutory terms had not been interpreted in the context of the case).

2. The State Has Not Established Deception Under the CFA.

The State identifies three statements that purportedly constitute deception under the CFA: (1) answering Apple's App Store Questionnaire by indicating that the platform as a whole contains "infrequent/mild"—as opposed to "frequent/intense"—"profanity or crude humor," "sexual content and nudity," "alcohol, tobacco, or drug use or references," and "mature/suggestive themes"; (2) stating that TikTok qualifies for a "12+" age rating on the Apple App Store; and (3) stating that TikTok does not allow the promotion of alcohol, tobacco, or drug use in the Guidelines. Mot. at 7. But the State has failed to establish a likelihood that it will succeed on its deception claim for any of these three statements.

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original offer is "without cost." The "free offer" subsection also refers to "goods" and "services" elsewhere in ways that further confirm that "goods" or "services" contemplate a monetary exchange under the CFA. *E.g.*, § 714.16(o)(1)(a) (free-offeror must identify all "goods or services . . . that the consumer will *receive or incur a financial obligation for* as a result of accepting the free offer"); § 714.16(o)(1)(d) (free-offeror must state, if applicable, that "consumer will become *obligated for* additional goods or services" (emphasis added)); § 714.16(o)(1)(g) (free-offeror must state, if applicable, the "consumer's right to receive a *credit on* goods or services" (emphasis added)).

a) Two of Defendants' alleged misstatements are not actionable representations of fact.

The questionnaire responses and associated age ratings are subjective opinions, not verifiable facts, making them not actionable under the CFA.

Deception is defined by the CFA as "an act or practice which has the tendency or capacity to mislead a substantial number of consumers as to a material *fact or facts*." § 714.16(1)(c) (emphasis added). Subjective opinions are plainly excluded because they are, quite literally, the opposite of a "fact"—*i.e.*, "something that is known to have happened or to exist, especially something for which proof exists, or about which there is information." *Fact*, Cambridge Dictionary, https://dictionary.cambridge. org/dictionary/english/fact; *compare with Opinion*, Oxford Learner's Dictionary, https://oxfordlearnersdictionaries.com/us/definition/english/opinion ("feelings or thoughts about somebody/something, *rather than a fact*") (emphasis added); *see also Opinion*, Merriam-Webster Thesaurus, https://www.merriam-webster.com/thesaurus/opinion (listing "fact" as antonym).

While Iowa courts have not had occasion to set forth the common-sense conclusion that a subjective opinion is not a "material fact" for purposes of the CFA, opinions have been deemed non-actionable in a range of analogous contexts: by Iowa courts addressing common-law fraud[39] and defamation[40] claims; by Illinois courts interpreting that state's analogous consumer

[39] *See, e.g.*, *Hoefer v. Wis. Educ. Ass'n Ins. Tr.*, 470 N.W.2d 336, 340 (Iowa 1991) ("A mere statement of an honest opinion, as distinguished from an assertion of fact will not amount to fraud, even though such opinion be incorrect."); *see also Rowe Mfg. Co. v. Curtis-Straub Co.*, 273 N.W. 895, 897 (Iowa 1937) (statement describing a product as having the "best design on the market" not actionable because "[e]xpressions of opinion, though extravagant, are not false representations of fact").

[40] *See, e.g.*, *Andrew v. Hamilton Cnty. Pub. Hosp.*, 960 N.W.2d 481, 491 (Iowa 2021) (citation omitted) (noting that "statements of opinion can be actionable [only] if they imply a provably

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protection statute;[41] and by other states construing materially similar consumer protection statutes,[42] including the Indiana court confronted with a nearly-identical complaint.[43]

(1) The Apple Age-Rating Questionnaire Responses

Apple's age-rating questionnaire, and the corresponding age rating, requires no fewer than three subjective assessments: (1) how to define the scope and outer limits of the content categories themselves (*e.g.*, what constitutes "mature" or "suggestive themes"); (2) where to draw the line between "mild" versus "intense" instances of such content; and (3) for content that is considered "intense," whether it is "infrequent" or "frequent" on the platform as a whole.

To be clear, Apple's questionnaire does not define these terms or allow developers to

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false fact, or rely upon stated facts that are provably false") (cleaned up); *see id*. (holding that statements describing a doctor's "prescription practices as excessive and his level of care as incompetent" were non-actionable opinions); *Yates v. Iowa West Racing Ass'n*, 721 N.W.2d 762, 773 (Iowa 2006) (statements like "substandard" and "poor performer" were non-actionable opinions, in part, because they "do not have a precise and verifiable meaning").

[41] *See, e.g.*, *Barbara's Sales, Inc. v. Intel Corp.*, 879 N.E.2d 910, 926 (Ill. 2007) (citation omitted) (non-actionable puffery denotes an exaggeration of the seller as to the "degree of quality of his or product, the truth or falsity of which cannot precisely be determined"); *Bozek v. Bank of Am., N.A.*, 191 N.E.3d 709, 729 (Ill. Ct. App. 2021) (noting that the Bank of America's "assertion of a legal opinion" was not a misrepresentation of fact); *Muhammad v. Adams Family Trucking*, No. 1-22-1251, 2023 WL 7548056, at *10 (Ill. Ct. App. Nov. 14, 2023) (unpublished) (citation omitted) ("[t]elling an insured that its coverage is 'adequate'" is a non-actionable opinion because "[w]hat is adequate" is in the "eye of the beholder" and is "impossible to characterize it as 'false' in the first place"); *Spiegel v. Sharp Elecs. Corp.*, 466 N.E.2d 1040, 1044 (Ill. Ct. App. 1984) (alleged misrepresentations that a photocopier would make "picture perfect copies" and "reduce error and paper waste" were non-actionable opinions); *see also Hydro Mag, Ltd.*, 436 N.W. 2d at 621 (Iowa CFA patterned on Illinois Consumer Fraud Act).

[42] *See, e.g.*, *Lambert v. Downtown Garage, Inc.*, 553 S.E.2d 714, 712–13 (Va. 2001) (citation omitted) (holding that, under Virginia's consumer protection statute, the alleged misrepresentation cannot be based on the "mere expression of an opinion"); *Winton v. Johnson & Dix Fuel Corp.*, 515 A.2d 371, 374 (Vt. 1986) (holding the same under Vermont's consumer protection statute).

[43] *See Indiana I*, 2023 WL 4305656, at *12 (citation omitted) (holding that "subjective assertions of 'opinion' are not actionable under [Indiana's consumer protection statute]"); *Indiana II*, 2023 WL 8481303, at *7 (same).

describe the content on their app using their own words; instead, it simply asks them to choose the category that "best describes" the "frequency" of the content categories on their app—a formulation that presupposes that there could be multiple reasonable ways to respond. Pet. ¶ 35.[44] Because the questionnaire requires use of "relative term[s]," *i.e.*, "word[s] meaning different things to different people," the responses necessarily express opinions—not facts—which "cannot be literally true or false." *W.L. Gore & Assocs., Inc. v. Totes Inc.*, 788 F. Supp. 800, 808 (D. Del. 1992). As such, the responses are not actionable under the CFA. And, indeed, courts have held that each of these three assessments is subjective and not actionable in analogous contexts.

Content categories. The content categories at issue—"Sexual Content and Nudity," "Mature/Suggestive Themes," "Profanity or Crude Humor," and "Alcohol, Tobacco, and Drug References"—are inherently subjective. *See* Brandenburger Decl. ¶ 50. Whether content qualifies for these labels is "an individual judgment that rests solely in the eye of the beholder and, as such, is not an objectively verifiable statement of fact." *Palestine Herald-Press Co. v. Zimmer*, 257 S.W.3d 504, 512 (Tex. Ct. App. 2008) ("The answer to the question of whether something is 'obscene' varies from state to state, from community to community, and from person to person."); *see also Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006) ("Even if one assumes that the State's definition of 'sexually explicit' is precise, it is the State's definition—the video game manufacturer or retailer may have an entirely different

[44] The guidance that Apple *does* provide regarding the age ratings reinforces the subjectivity of the standards involved. According to this guidance, the types of "sexual content, nudity, alcohol, tobacco, and drugs" for which "17+" rather than "12+" is the appropriate category, for example, are content "which may not be suitable for children under the age of 17"—a definition that will vary person to person, depending on their subjective view of what is "suitable" for children under 17. *See* State Ex. 6.

definition of this term."); *Jewell v. Gonzales*, 420 F. Supp. 2d 406, 434 (W.D. Pa. 2006) ("[I]t is difficult to quantify concepts like violence [and] sexuality.").

For example, "opinions may differ" as to whether a video captioned "How I spend my days with that pit in my stomach that I just can't get rid of," State Ex. 7, Perales Decl., Attachment 2.37, qualifies as "mature/suggestive themes," and representations about that content are thus not statements of fact, *see Curtis-Straub Co.*, 273 N.W. at 897.

Mild versus Intense. As with the statement that a product is "adequate," *see Adams Family Trucking*, 2023 WL 7548056, at *10, or "high-quality," *see Barbara's Sales, Inc.*, 879 N.E.2d at 926, individuals may have differing opinions as to what constitutes a "mild" or "intense" instance of a video depicting a "mature theme" or "tobacco content." *See also Adams Family Trucking*, 2023 WL 7548056, at *10 (holding that whether an insurance policy is "adequate" is in the "eye of the beholder"); *see also cf. Reynolds v. Colvin*, No. 3:13-cv-396 (GLS/ESH), 2014 WL 4184729, at *4 (N.D.N.Y. Aug. 21, 2014) ("Terms like 'mild,' . . . are inherently vague.").[45] As another example from among the videos cherry-picked by Mr. Perales,

[45] The State also claims that "TikTok itself has acknowledged under oath that 'mild' or 'intense' are industry-standard terms with industry-standard meanings." Mot. at 58. The State mischaracterizes the applicable testimony and is wrong that an industry's use of a term makes it verifiable and not subjective. To begin, what the witness, Dr. Tracy Elizabeth, actually testified to was how the industry "typically [] would describe intense sexual content" (and other categories). State Ex. 19 at 275:20-276:4; *id*. 276:5-279:18. Those "typical[]" descriptions—like "sexualized nudity," *id*. at 275:20-276:4—are themselves subjective, *see supra* pp. 37–38. And the existence of typical industry descriptions does not change the fact that, as Dr. Elizabeth testified, the "language can be understood in more than one way." *Id*. at 274:14-17. Indeed, as explained below, courts across the country have repeatedly held that content ratings, even "industry-standard" ratings—like the movie industry's standard MPAA rating system—cannot be proven true or false, and therefore cannot form the basis for a deception claim. *See* § II.A.2.a.2, *infra*.

Indeed, in that same *Indiana* proceeding, *three different witnesses called by Indiana* admitted to the subjectivity of "mild" and "intense." *Indiana I*, 2023 WL 4305656, at * 13 ("TikTok's Dr. Elizabeth testified that she viewed the terms 'mild' and 'intense' as subjective. The State's witnesses did not disagree. Dr. O'Bryan testified that most everyone would have their own

whether a video demonstrating a cocktail recipe for a "blueberry muffin shot" constitutes an "intense" or "mild" alcohol reference is likewise in the eye of the beholder and not verifiable. *See* Perales Decl., Sate Ex. 7, Attachment 1.20.

Frequency. Whether content is "frequent" or "infrequent" is yet a third layer of subjective assessments. *See Indiana I*, 2023 WL 4305656, at *13 ("The[] varying understandings of the terms 'frequent' and 'infrequent' [offered by the state, its witnesses, and TikTok's witnesses] underscore the inherent subjectivity of the terms. Thus, these complained-of subjective responses, again, are not 'representations of fact,' and are therefore, not actionable under the DCSA."); *Williams v. Tran*, No. 19-6221, 2021 WL 219263, at *3 (Vet. App. Jan. 22, 2021) ("'frequent' or 'very frequent'" are "relative terms with no inherent meaning" (cleaned up)). Indeed, the State never attempts its own definition.

Given these multiple layers of subjectivity, it is not surprising that when the State of Indiana brought virtually identical claims against Defendants, two different Indiana judges found them to be fatally flawed for the same reason: "The [Apple] App Store's questionnaire and TikTok's responses thereto involve subjective opinion-based terminology, which mean different things to different people." *Indiana I*, 2023 WL 4305656, at *13. Therefore, "TikTok's representation that content on the app was 'Infrequent/Mild' is a subjective assertion of opinion, which is not actionable." *Id*. As the second Indiana court to consider the claims explained:

> When considering the meaning of the App Store relevant content categories and TikTok's corresponding selection of 'Infrequent/Mild' responses to those categories, the determination made by TikTok is clearly subjective. One can see how easily the responses to those questions could vary from person to person. Considering the subjectivity of the App Store's content categories, the App Store

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definition of the difference between a 'mild' and 'intense' depiction of alcohol content. Dr. Allem testified that it would be difficult to categorize tobacco or alcohol use as 'mild' or 'intense' without additional definitions. Mr. Byorni also testified that there could be differences of opinion on whether content is 'mild' or 'intense.'").

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> questionnaire inherently solicits non-actionable statements of opinion, not objectively verifiable 'representations of fact.'

Indiana II, 2023 WL 8481303, at *7. Just so here.

(2) App Store 12+ Age Rating

The State further argues that the TikTok platform's 12+ age rating in the App Store is itself independently deceptive. Mot. at 47–48. For the same reasons set forth in § II.A.2.a.1 *supra*, the 12+ age rating is a non-actionable subjective opinion.

Courts have repeatedly held that content-appropriateness ratings, like app-store age ratings, are "not sufficiently factual to be susceptible of being proved true or false" and therefore cannot form the basis of a deception claim. *See Castle Rock Remodeling, LLC v. Better Bus. Bureau of Greater St. Louis, Inc.*, 354 S.W.3d 234, 242–43 (Mo. Ct. App. 2011) (explaining that BBB's rating is not sufficiently factual to be susceptible of being proved true or false"); *Aviation Charter, Inc. v. Aviation Res. Grp./US*, 416 F.3d 864, 870 (8th Cir. 2005) (rating of air charters based on safety and other data, including incident ratings "on a scale of 1 [to] 10," was "ultimately a subjective assessment, not an objectively verifiable fact"), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 131–32 (2014); *see also, e.g.*, *Blagojevich*, 469 F.3d at 652 (state's mandate that video games that met certain criteria carry an age "18" sticker was "a subjective and highly controversial message"); *id.* (the application of ESRB ratings—those used by the Microsoft and Google Play stores—to video games is "neither purely factual nor uncontroversial"); *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 953, 966–67 (9th Cir. 2009) ("18" age sticker did "not convey factual information"); *Forsyth v. Motion Picture Ass'n of Am., Inc.*, No. 16-cv-00935-RS, 2016 WL 6650059, at *4 (N.D. Cal. Nov. 10, 2016) (holding movie age ratings are "opinion" that cannot constitute misrepresentation). Accordingly, statements pertaining to whether content is

appropriate for a "12+" age group rather than "17+" are matters of opinion that cannot be subject to CFA liability.

b) Defendants' alleged misrepresentations do not have the tendency to mislead in a material way.

The responses to the Apple questionnaire, the App Store's 12+ age rating, and statements in the Guidelines cannot be enjoined for another reason: the State has failed to establish a likelihood of proving they are misleading in any material way. Section 714.16(1)(c) defines deception as "an act or practice which has the *tendency or capacity to mislead a substantial number of consumers* as to a *material* fact or facts." *Id*. (emphases added). To succeed on its CFA claim, the State thus must prove that (a) the alleged misstatements have the "tendency or capacity to mislead a substantial number of consumers" and that (b) the alleged statements were "material."

(1) The State fails to show that Defendants' alleged statements are misleading.

"To ascertain whether a practice is likely to mislead in the consumer protection context, courts typically evaluate the overall or 'net impression' created by the representation." *Vertrue, Inc.*, 834 N.W.2d at 34 (citations omitted). The State's attempts to establish that the Apple age-rating questionnaire responses, age rating, and statements in the Guidelines have a "tendency or capacity to mislead" are insufficient under this standard.

(a) The Apple Age-Rating Questionnaire Responses and the App Store 12+ Age Rating

With respect to the Apple App Store age-rating questionnaire, the allegedly misleading statements are the selection of "infrequent/mild" instead of "frequent/intense" for particular categories of content and the App Store's corresponding 12+ age rating. As explained above (§ II.A.2.a.1, *supra*), Apple does not define the content categories, or "mild," "intense,"

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"infrequent," or "frequent."

But there are two important clarifying principles for evaluating the responses to Apple's questionnaire. *First*, Apple uses the terms "infrequent" or "mild" in the disjunctive: on its "Age Ratings" page, Apple expressly notes that for apps rated 12+, "mature or suggestive themes" are "mild ***or*** infrequent," rather than "frequent ***and*** intense," as for 17+ apps. State Ex. 16 (emphasis added). The only other options available on the questionnaire are (i) none and (ii) frequent/intense. *Id*. As a result, for any one of the responses at issue to be inaccurate, the content type must be "frequent ***and*** intense." *Id*.

Second, Apple's questionnaire asks developers to select the "level of frequency for each content description that best describes *your app*." State Ex. 3 (emphasis added). "Frequency" is thus directed to the app as a whole; as the court in Indiana recognized, it "asks about the relative share of the content among all of the videos on TikTok." *Indiana I*, 2023 WL 4305656, at *13 ("The term 'frequency' is defined to mean 'the number, proportion, or percentage of items in a particular category in a set of data.'" (quoting *Frequency*, Webster's Dictionary, https://tinyurl.co/45kx6a84)); *see also Liberty Ammunition, Inc. v. United States*, 835 F.3d 1388, 1395 (Fed. Cir. 2016) (a term of degree "necessarily calls for a comparison against some baseline"); *Obremski v. Off. of Pers. Mgmt.*, 699 F.2d 1263, 1271 (D.C. Cir. 1983) (noting that frequency is "inherently a relative term").

As a result, to establish a likelihood of success on the merits, the State must show—"by a preponderance of clear, convincing, and satisfactory evidence," *Cutty's*, 694 N.W.2d at 524—that the content categories are "frequent and intense" on the TikTok platform, using all of the content on the platform as a baseline. The State has utterly failed to do so.

As to each content category, the State offers two categories of evidence: (1) a declaration

from its investigator; and (2) internal documents. Neither comes close to meeting the State's burden.

Investigator Declaration. For each content category, the State cites a handful of videos that its investigator, Alberto Perales, purportedly found when he was signed into the platform using a profile of a fictional 13 year-old user. The State admits that Mr. Perales specifically searched for videos falling in the content categories. Mot. at 30–31, 34, 40, 44, 55 (acknowledging that for all content categories, Mr. Perales found videos "using the TikTok app's search function"). Indeed, at least 70% of the videos that Mr. Perales compiled were accessed via the search function or the Following feed, rather than the For You feed—the predominant way by which users access content on TikTok. *See generally* State Ex. 7, Attachments 1–5; *see also* Brandenburger Decl. ¶ 15 n.19. Mr. Perales does not describe how or when he chose to follow particular creators, although the videos depict him methodically liking, and following the creators of, a significant majority of the videos he highlights. *See* Brandenburger Decl. ¶ 55. More generally, he offers no explanation for his methodology, other than that he "used the TikTok app as [he] thought a 13-year-old user might do if that user were curious about profanity, crude humor, sexual content, nudity, alcohol, tobacco, drug use, suicide, depression, self-harm, eating disorders, and other mature themes." State Ex. 7, Perales Decl. ¶ 7. Significantly, Mr. Perales makes no attempt to demonstrate the frequency of any of the content types on the TikTok platform, *or even within his own search*. For example, he does not say how many total videos he viewed, or how much time he spent on the platform. According to the history of the account that Mr. Perales used to access the videos, the 204 videos in the compilation were drawn from more than *16,600* videos viewed during his investigation. *See* Brandenburger Decl. ¶ 55.

In sum, the evidence proffered by the State is that an adult man, who has no stated

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training or basis of knowledge as to what a "13-year-old user might do"[46] on the TikTok platform beyond his own conjecture, spent a week actively searching for videos he deemed to fall within the Apple content categories and managed to find some among over 16,600 videos viewed. This is patently insufficient. His work obviously says nothing about the relative share of this content among all of the videos on the TikTok platform— —the very same failure of proof that doomed the virtually identical case brought in Indiana.

Indeed, that Mr. Perales identified *some examples* of videos purportedly falling into the Apple content categories is actually *consistent* with the representations in the Guidelines. Specifically, the Guidelines make clear that "[a]lthough we work hard to enforce our rules, we cannot guarantee that all content shared on TikTok complies with our Terms of Service or Community Guidelines." Brandenburger Decl. Ex. 20, Guidelines at 2 (modified Mar. 2023). This eliminates any possibility that a TikTok user would be left with the "net impression" that certain content types are *entirely unavailable* on the TikTok platform—and the Court should consider the Guidelines in evaluating that net impression. *See Huston v. Conagra Brands, Inc.*, No. 21-cv-04147-SLD-JEH, 2022 WL 4647251, at *4 (C.D. Ill. Sept. 30, 2022) (Under the Iowa CFA, "courts considering deceptive advertising claims should take into account all the information available to consumers and the context in which that information is provided and used.") (cleaned up).[47]

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[46] *See Rearden LLC v. Walt Disney Co.*, Nos. 17-cv-04006, 17-cv-04191, 2021 WL 6882227, at *7 (N.D. Cal. July 12, 2021) (excluding testimony where expert "selected movies that she believed supported the conclusion she wanted to reach").

[47] If anything, the questionnaire responses indicating that certain content will be "infrequent" or "mild" creates the "net impression" that *some* amount of content *will* be visible on the platform. *See Rahmani*, 472 N.W.2d at 257 (statement "that an effort to comply with the law" was not misleading because it "alerted consumers to the fact that there were potential legal problems

Internal Documents. Likewise, not a single one of the documents cited by the State remotely supports that videos falling within the Apple content categories are "frequent and intense" on the TikTok platform. More often than not, they [redacted] :

- *Profanity*. The State cites (1) [redacted] (*see* Mot. at 32, State Ex. 27); and (2) a policy that profane song lyrics are allowed on TikTok, which again says nothing about severity or frequency (let alone both). And again, here, the fact that videos with profane song lyrics may be found on the platform is fully consistent with the Guidelines, as they do not prohibit profanity in song lyrics and make the policy to permit "sexually explicit" lyrics clear. Brandenburger Decl. ¶ 60; *Id*., Ex. 20, Guidelines at 24.[48]

- *Sexual content and nudity*. The State cites (1) [redacted] (Mot. at 37, State Ex. 29 (emphasis added))— [redacted]); and (2) [redacted] (Mot. at 37–38, State Ex. 30), which [redacted] .[49] The State also takes issue with [redacted] Mot. at 39, which is probative of nothing relevant to this lawsuit.[50]

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involved with the program").

[48] The State also incorrectly states that a TikTok representative testified that a certain video with profane lyrics could "be recommended to 13-year-old users." *See* Mot. at 33. Although the representative testified that, in line with the Guidelines, the video would not be removed from the platform for the song's lyrical content, the representative was not asked whether it would be recommended on a 13 year-old's For You feed, and did not testify that it would be. *See* State Ex. 19, Indiana PI Tr., Tracy Elizabeth, 145:21-146:13.

[49] That TikTok's Guidelines are enforced of course does not render Apple's content categories any less subjective. The Guidelines provide significantly more detail (including examples) than Apple's content categories, and what qualifies as prohibited by the Guidelines is still often subjective. *See* Brandenburger Decl. ¶¶ 50–52. TikTok uses its best efforts to exclude only what is prohibited.

[50] The State also cites [redacted] . Mot. at 11–14, 36–37. [redacted]

- *Alcohol, tobacco, and drug use*. The State cites (1) (Mot. at 42–43, State Exs. 30, 33, 34) which says nothing about severity or overall frequency and also *see also* Brandenburger Decl. ¶ 28; and (2) (Mot. at 43, State Ex. 14), which also says nothing about severity or frequency.

- *Mature and suggestive themes*. The State again offers no evidence relating to the frequency of such content on the TikTok platform. The only document it cites *See* State Ex. 35; *More ways for our community to enjoy what they love*, TIKTOK (July 13, 2022), https://newsroom.tiktok.com/en-us/more-ways-for-our-community-to-enjoy-what-they-love. The State refers Mot. at 46–47 (State Ex. 35). The State makes no attempt to

The State also points to an internal document Mot. at 56 (State Ex. 38). The State makes no attempt, either here or in its discussion Even if it had, Finally, the

Here, again, the Indiana decisions reveal the flaws in the State's reliance on this purported evidence. Considering essentially the same documents and facts cited by the State, the Indiana court found that such statistics did not support an assertion that drug-related content, in particular, was "frequent":

The State argues that 15 million videos per quarter should have been removed by

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and say nothing about the frequency of intense "sexual content and nudity" on the TikTok platform as a whole.

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> TikTok for violation of TikTok's Community Guidelines, but were not. . . . But, the State's evidence does not establish the level of frequency for any particular content category. . . . The most favorable view of the State's evidence is that only 2.6% of the 8 billion videos uploaded during this two year period violated TikTok's Community Guidelines. . . . The State has not carried its burden to show the falsity of TikTok's representation that the content categories appear infrequently, especially when comparing the relatively small amount of allegedly suspect content to all of the content appearing on TikTok.

Indiana I, 2023 WL 4305656, at *14.

Indeed, the State effectively *concedes* that it cannot show the relative share across the platform of videos falling within the Apple content categories by straining to argue that it need not offer such proof. *First*, the State argues that "if an app has *either* frequent *or* intense mature content, then the appropriate age-rating representation is 'Frequent/Intense' for that category." Mot. at 53. As noted above, this is precisely the opposite of what Apple says on its "Age Ratings" page, where Apple expressly notes that for apps rated 12+, "mature or suggestive themes" are "infrequent ***or*** mild," and that such content is "frequent ***and*** intense" on 17+ apps. State Ex. 6. The State's argument to the contrary is not consistent with its own Motion, which quotes Apple's language, Mot. at 9, and then proceeds to repeatedly argue that the questionnaire responses are not accurate because the content categories are "frequent and intense," *id*. at 10, 11, 30, 34, 37, 40, 44, 48. And the State provides no principle to justify its interpretation of "Infrequent/Mild" to mean "infrequent **and** mild" but "Frequent/Intense" to mean "frequent **or** intense."

Second, the State claims that "even if [it] needed to show that mature content on TikTok frequently occurs," and "[e]ven if types of mature content do not appear frequently across the entire TikTok app, they appear frequently for *some users* in [REDACTED] or when a user seeks out mature content through searching or following other users." Mot. at 55. The State thus admits it has adduced no evidence that what it labels mature content "appear[s] frequently across

the entire TikTok app," which is what Apple's questionnaire asks. As for

id. at 54—the State offers no evidence supporting its claims whatsoever: no evidence as to how often such occur or how many users they might affect; whether they include content falling in Apple's categories, and if so, how often; or whether that content is ever intense, and if so, how frequently the intense content appears in Indeed, the most the State musters is its own argument that such occur for "some users." Mot. at 55.

Accordingly, even setting aside the inherent subjectivity of the Apple categories, the State has failed completely to satisfy its burden of proving that the Apple age-rating questionnaire responses (or the platform's corresponding 12+ age rating) create a misleading net impression regarding the frequency or severity of videos falling within these content categories.

(b) The Guidelines

The State further argues that the TikTok platform's Guidelines violate the CFA because they Mot. at 63. The State's argument concerns the following statements in the Guidelines: (1) "We do not allow showing or promoting recreational drug use, or the trade of alcohol, tobacco products, and drugs," *id*. at 63 (citing State Ex. 13, Guidelines), and (2) "[s]howing or promoting adults consuming drugs or other regulated substances for a recreational purpose" is "NOT allowed." *Id*. at 64 (citing State Ex. 13, Guidelines). According to the State,

But the Guidelines cited by the State are accurate: "showing or promoting" drug use is not permitted on TikTok. The plain meaning of "promote" is "to present (merchandise) for buyer acceptance through advertising, publicity, or discounting." *See Promote*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/promote. Other content-moderation documents relied on by the State also make clear that .

In addition, as part of an ongoing commitment to guiding community principles, TikTok's Guidelines are regularly updated. *See* Brandenburger Decl. ¶ 22. Since the filing of the State's Motion, TikTok's Guidelines have been amended. *See id.* ¶ 23. Among other changes, the current version of the Guidelines no longer contains either of the statements with which the State takes issue. Instead, the new Guidelines state: "We do not allow the trade of alcohol, tobacco products, and[/]or drugs. We also do not allow showing, possessing, or using drugs." *See id.* ¶ 25. These statements are likewise

Accordingly, the State has failed to establish that the identified statements in the

Guidelines are false.[51]

(2) The State fails to show that Defendants' alleged statements are material.

The State's deception claims also fail because it has not shown that the purported misstatements were "material." *See* § 714.16(1)(c) (defining deception as "an act or practice which has the tendency or capacity to mislead a substantial number of consumers as to a *material* fact or facts") (emphasis added). "A misleading impression . . . is *material* if it involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *Vertrue, Inc.*, 834 N.W.2d at 34 (cleaned up).

The State has not demonstrated that the alleged misstatements concerning the Apple age-rating questionnaire responses (and the age rating itself) or statements in the Guidelines are likely to affect a consumer's "choice of, or conduct regarding" the TikTok platform. Indeed, the State does not cite *any* evidence of *any* Iowa teens or parents actually relying on the purported misstatements to decide whether or not to download (or to permit the download of) the platform—let alone a "substantial number" of them. § 714.16(1)(c). The State cites only testimony from Defendants' witness in the Indiana litigation to the effect that "it would be reasonable to—to *assume* that *some* parents are taking the age rating into account when they

[51] The State also incorrectly asserts that the statement in the Guidelines pertaining to the "showing or promoting of adults consuming drugs or other regulated substances for a recreational purpose" applies to "'regulated substances' *like alcohol and tobacco*." Mot. at 64 (emphasis added). First, the Guidelines' publicly stated definition of "regulated substances" does not include alcohol and tobacco. Brandenburger Decl Ex. 20, Guidelines at 38 (defining "regulated substances" as "prescription drugs, over-the-counter drugs, compressed air canisters (whippets), and nitrite poppers"). Second, the statement relevant to moderation of alcohol and tobacco content in the Guidelines governs only "the trade of alcohol, tobacco products, and drugs." *Id.* at 37. Consistent with the Guidelines,

decide" whether to let their teens use the platform. Mot. at 50. That is plainly insufficient to meet the State's burden of establishing a likelihood that the questionnaire responses or Guidelines had the ability to cause a "*substantial number*" of Iowans to make a download decision they otherwise would not have.

3. The State's Claims of Omission and Unfair Practice Likewise Fail.

The Motion also argues that Defendants' alleged misstatements constitute an "unfair practice" under the CFA and that Defendants' alleged "fail[ure] to correct the … misstatements" constitutes an unlawful "omission of a material fact with intent that others rely upon the . . . omission" under the CFA. Both the "omission" and "unfair practice" claims depend entirely on the State establishing materially misleading misstatements in the first place. As discussed above, the State has not made that showing, and so its unfair practice and omission claims likewise fail.

Omission. The State argues that, "[w]hen TikTok allows Iowans to register for accounts without correcting the misimpressions created by its misleading descriptions of its service in the App Store, it violates the Act by omission." Mot. at 48–49. Because the State has failed to establish that the age-rating questionnaire responses and corresponding rating are misleading, *see* § II.A.2.b.1.a *supra,* this argument fails. Even more fundamentally, the State did not plead an omission claim in its Petition, *see* Pet., which prevents it from seeking injunctive relief for that claim. *See, e.g.*, *Quang Minh Lien v. Sessions*, No. 18-CV-2146-WJM-SKC, 2018 WL 4853339, at *4 (D. Colo. Oct. 5, 2018) ("It is axiomatic that a person has no likelihood of success on the merits for a theory of relief not pled."); *BGC, Inc. v. Bryant*, No. 22-CV-04801-JSC, 2022 WL 6250945, at *1 (N.D. Cal. Aug. 31, 2022) (holding that the plaintiff failed to show "a likelihood of success on the merits of its currently pled legal claims" and disregarding new arguments that were "untethered to Plaintiff's legal claims" in the complaint).

Even if the State had alleged such a claim, it would require proof of the additional

elements of "reliance, damages, intent to deceive, [and] . . . knowledge of the falsity of the claim or ignorance of the proof." *See Vertrue, Inc.*, 834 N.W.2d at 30. Yet the State offers no evidence to satisfy any of those required elements in its Motion. The State argues, in conclusory fashion, that "[p]arents care about whether their children will be exposed to inappropriate content online," and that "TikTok knows this and intends to reassure parents about the safety of their children on the TikTok app." Mot. at 49. But the State cites no evidence of specific complaints from Iowa parents, nor any surveys, affidavits, or other similar proof that Iowa parents relied on those misrepresentations or that Defendants' purported misstatements and omissions affected any *Iowa* parent's decision to allow their child to download the platform. This is insufficient to establish "reliance" as required for an omission claim.[52]

Unfair Practice. The State's failure to establish a materially misleading misstatement likewise prevents it from establishing multiple required elements of an unfair-practice claim. *First*, to prove such a claim, the State must demonstrate an "act or practice which causes substantial, unavoidable injury," "not outweighed by any consumer or competitive benefits." *See* § 714.16(1)(i). Here, the State's sole allegation of injury or harm is that the alleged misstatements caused Iowans to see content that they cannot now "unsee." Mot. at 60. Because the State's entire theory of harm depends on the existence of deceptive statements (or omissions of corrected statements), to the extent those alleged statements are not deceptive, they cannot, "as a matter of law, give rise to substantial unavoidable injury to consumers." *See Bass v. J.C.*

[52] The State appears to argue that the TikTok platform's "Guardian's Guide," supports its omission claims because it "reassure[s] parents about the safety of the TikTok app." Mot. at 49–50. This changes nothing about the State's failure to establish materially misleading statements in the first place. Further, as the State acknowledges, "[t]he Guide also encourages caregivers to 'review . . . our Community Guidelines with their teens,'" *id.* at 50, which contextualizes the age-rating questionnaire responses by informing users of content categories they will likely see while using the platform.

Penney Co., Inc., 880 N.W.2d 751, 764 (Iowa 2016) (cleaned up) (because department store's shipping and handling disclosures "were not complicated or confusing, and did not involve tricky or clever stratagems or fine print designed to mislead attentive customers," there was no substantial, unavoidable injury for purposes of CFA "unfair practice" claim).

Second, to establish a likelihood of success on its unfair practice claim, the State must also show that Defendants' purported misstatements created a "course of conduct contrary to what an ordinary consumer would anticipate." *Vertrue, Inc.*, 834 N.W.2d at 37. Here, because the alleged misstatements on which the State relies are not misleading as a matter of law, *see supra* § II.A., they likewise do not have the effect of creating a "situation unanticipated" by the ordinary TikTok user. *Id.*[53] And, again, the State cites no evidence of specific complaints from Iowa parents about confronting a "situation unanticipated" on Apple's App Store or in the Guidelines.

B. Section 230 of the Communications Decency Act Bars the State's Claims.

The State's claims also are unlikely to succeed because they seek to hold Defendants liable for conduct arising from their alleged failure to remove third-party content posted on the TikTok platform. Under well-established precedent, Section 230(c)(1) of the Communications Decency Act ("CDA") bars these claims.

Section 230(c)(1) of the CDA protects from liability: "(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action,

[53] In *Vertrue*, for example, a telemarketing script offering a $25 gift card "to encourage future patronage" was an unfair practice because it failed to "promptly disclose the purpose of the interaction" and created "the impression that the business [consumers] had just knowingly patronized was offering a $25 gift card to encourage future patronage" at that same business. *Id.* at 35. However, the actual purpose of the $25 gift card "was to lure unwitting customers into enrolling into membership programs" with a *different* business entirely. *Id.* That is the sort of "situation unanticipated by consumers" required by the CFA—again, absent here.

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as a publisher or speaker (3) of information provided by another information content provider." *Dyroff v. Ultimate Software Grp.*, 934 F.3d 1093, 1097 (9th Cir. 2019) (cleaned up); *see* 47 U.S.C. § 230(c)(1) (providing that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider").

All three prongs necessary for Section 230 immunity are satisfied here. First, the TikTok platform is an interactive computer service. Pet. ¶ 29 ("The TikTok app is a social media platform that centers on short videos created and uploaded by users[.]"). As courts have explained, "[t]he prototypical service qualifying for [CDA] immunity is an online messaging board (or bulletin board) on which Internet subscribers post comments and respond to comments posted by others." *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016) (quoting *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1195 (10th Cir. 2009)). This aptly describes the TikTok platform, an online platform where account holders post content and engage with the content of other account holders. *See* Pet. ¶¶ 29–32; *see also Winter v. Facebook*, *Inc.*, No. 4:21-CV-01046, 2021 WL 5446733, at *4 (E.D. Mo. Nov. 22, 2021) (concluding that TikTok is an "interactive computer service" under Section 230).

With regard to Section 230(c)(1)'s second and third prongs, the State's claims all stem from actions Defendants allegedly took, as publishers of content created by others, in determining what content is allowed to remain on the TikTok platform. Specifically, the State seeks to treat Defendants as publishers making decisions about "whether to publish, withdraw, postpone, or alter content." *See Winter*, 2021 WL 5446733, at *4. In *Winter*, the court held that Section 230 barred a claim that "TikTok refused to remove" content, including by "failing to follow their own Community Guidelines and tak[e] down content that violates those standards."

Id. The State's Petition cites exactly these kinds of "refusals to remove" and other moderation decisions to explain why each of the statements they rely upon are allegedly deceptive or misleading. For example:

- Counts A.4, A.7: The State claims that the questionnaire responses concerning the frequency and intensity of profanity and crude humor are misleading or deceptive because "TikTok's internal *content moderation policies do not attempt to make profanity infrequent* or mild on the TikTok app." Pet. ¶ 53.
- Counts A.1, A.7: The State claims that the questionnaire responses concerning the frequency and intensity of alcohol, tobacco, or drug content are misleading or deceptive because "mentioning or referencing drugs *does not result in removal* of the video from the platform." *Id.* ¶ 66.
- Count A.9: And the State claims that the Guidelines are misleading and deceptive because "TikTok *moderates its Community Guidelines* by choosing to leave some violative content on the platform rather than remove it." *Id.* ¶ 172.

See also, e.g., *id.*. ¶¶ 33, 44 (Counts A.5-6), 45, 47, 51, 53, 69, 70–75, 86–87 (Counts A.2, A.7), 97 (Counts A.3, A.7).

Courts have repeatedly held that claims such as these, which are premised on "activity that can be boiled down to deciding whether to exclude material that third parties seek to post online," are barred by Section 230. *Johnson v. Arden*, 614 F.3d 785, 792 (8th Cir. 2010) (Under § 230, a lawsuit "seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content—are barred."); *Fair Hous. Council of San Fernando Valley v. Roommates.com LLC*, 521 F.3d 1157, 1170–71, 1174 (9th Cir. 2008) ("[C]lose cases . . . must be resolved in favor of immunity, lest [courts] cut the heart out of section 230. . . ."); *In re Zoom Video Commc'n Inc. Priv. Litig.*, 525 F. Supp. 3d 1017, 1030 (N.D. Cal. 2021) ("[T]he text of § 230(c) immunizes the 'blocking and screening of offensive material,' . . . also known as 'content moderation.'"); *In re: Social Media Adolescent Addiction/Pers. Injury Prods. Liab. Litig.*, No. 4:22-md-03047-YGR, 2023 WL 7524912, at *34 n.58 (N.D. Cal. Nov. 14, 2023) (noting that "plaintiffs are barred from

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holding defendants liable for their content moderation activities" and that their claims "must not take issue with defendants' choices as to what content to take down or censor"); *Social Media Cases*, No. JCCP 5255, 2023 WL 6847378 (Cal. Super. Ct. Oct. 13, 2023) ("Liability for failure to warn about specific third-party content could be interpreted as premised on Meta's role as publisher in violation of both Section 230 and the First Amendment.").[54]

Indeed, it is settled law that a social media company is not subject to liability for failing to enforce its community guidelines with perfect accuracy or failing to find and remove every post that violates the service provider's community guidelines. *See Zeran*, 129 F.3d at 331 (noting, in the Section 230 context, that "[i]t would be impossible for service providers to screen each of their million postings for possible problems"). As one federal court noted, even when "a service provider, such as Google, adopts definitive prohibitions regarding the content of third party user material, and does not enforce them," no additional liability is created, and Section 230 immunity still applies. *Bennett v. Google, Inc.*, No. 1:16-cv-02283, 2017 WL 2692607, at *2 (D.D.C. June 21, 2017). "[H]olding [an online service provider] liable for establishing standards and guidelines would ultimately create a powerful disincentive for service providers to establish any standards or ever decide to remove objectionable content, which the CDA was enacted to prevent." *Id.*

[54] The State has not asserted any claims alleging harm to Iowans from their use of TikTok separate and apart from harms caused by third-party content. Indeed, all of the alleged harms suffered by Iowa residents are purportedly as a result of viewing the allegedly inappropriate third-party content itself. To the extent that case law is mixed on the application of Section 230 to claims about platform features—*compare, e.g.*, *In re Soc. Media Adolescent Addiction/Pers. Inj. Prod. Liab. Litig.*, No. 4:22-MD-03047-YGR, 2023 WL 7524912, at *16 (N.D. Cal. Nov. 14, 2023), *motion to certify appeal denied*, No. 4:22-MD-03047-YGR, 2024 WL 1205486 (N.D. Cal. Feb. 2, 2024) (Section 230 bars claims based on recommendation algorithm), *with Meta,* No. 23-1364-IV, Order on Defendants' Motion to Dismiss (Tenn. Ch. March 13, 2024) at *20–21 (Section 230 did not bar claims "based on conduct other than the publishing of third party content")—that issue is irrelevant here.

C. The Relief Sought by the State Is Unconstitutional.

The State's requested injunctive relief would affect Defendants' speech and would have nationwide impact. For both of those reasons, it would be an unconstitutional remedy.

1. A Temporary Injunction Would Violate the First Amendment by Compelling Defendants to Convey a Message With Which They Disagree.

The State is also not likely to succeed on its claims because the relief it seeks violates the First Amendment of the U.S. Constitution and Article I, Section 7 of the Iowa Constitution. Both the U.S. Constitution and the Iowa Constitution prohibit the government from telling people (or businesses) what they must say. *See Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 585 U.S. 878, 892 (2018); U.S. Const. Amend. 1; Iowa Const. Art. 1, § 7. "For corporations as for individuals, the choice to speak includes within it the choice of *what not to say*." *PG&E Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986) (plurality opinion) (emphasis added). Thus, subject to a narrow exception for disclosures of "purely factual and uncontroversial information," *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985),[55] compelled speech may be justified only if the government proves (1) that it is narrowly tailored to serve a compelling state interest and (2) that no less speech-restrictive alternative exists, *see State v. Musser*, 721 N.W.2d 734, 744 (Iowa 2006) ("Laws that compel speakers to utter or distribute speech bearing a particular message are subject to [strict] scrutiny.").

Here, the State's injunction would compel Defendants to convey an opinion with which

[55] Although the Iowa Supreme Court concluded in 1985 that *Zauderer* "has no impact on electronic media advertisements" and was limited to "*printed* advertising," *Comm. on Pro. Ethics & Conduct of Iowa State Bar Ass'n v. Humphrey*, 377 N.W.2d 643, 645–46 (Iowa 1985), last year, the U.S. Supreme Court applied *Zauderer's* reasoning in the context of wedding website messages, *303 Creative LLC v. Elenis*, 600 U.S. 570, 596 (2023) ("[T]he government may sometimes 'requir[e] the dissemination of purely factual and uncontroversial information,' particularly in the context of 'commercial advertising.'").

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they strongly disagree: that the platform is not appropriate for users under 17 and that videos falling within the specified categories of content are "frequent and intense."[56] *See* Brandenburger Decl. ¶¶ 61–63. Accordingly, the injunction can be sustained only if the State establishes that it is narrowly tailored to achieve the State's professed goal of protecting minors.

The State has not—and cannot—carry this burden. Even if the State could establish that an App Store rating places minors at risk (it cannot), *see infra* § III; *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993) (government cannot rely on "speculation or conjecture"), the State cannot establish that the injunction is the least speech-restrictive option; indeed, courts routinely conclude that public information campaigns and similar measures provide the government with alternatives to compelling private speech. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988) (compelled disclosure unconstitutional where government could "itself publish the . . . disclosure"); *Nat'l Inst. of Fam. & Life Advocates v. Becerra*, 585 U.S. 755, 774 (2018) (similar).[57] Less restrictive options here might include, for example, adding *additional* contextual language to the TikTok platform's app store page.

Nor can the State rely on the lower level of scrutiny that applies to compelled disclosures of "purely factual and uncontroversial information" designed to dissipate consumer confusion. *Zauderer*, 471 U.S. at 651. Most obviously, the speech at issue in this case cannot be characterized as "purely factual and uncontroversial"; instead, it "communicates a subjective and

[56] This speech is "still compelled" even though Defendants could avoid the speech by "simply exit[ing] the [App Store]." *Chelsey Nelson Photo., LLC v. Louisville/Jefferson Cnty Metro Gov't*, 624 F. Supp. 3d 761, 788 (W.D. Ky. 2022) (collecting cases), (vacated and remanded for further proceedings on other grounds).

[57] The requested injunction would also be "wildly underinclusive," as it applies only to the App Store and not the Google Play Store or Microsoft Store. *See infra* § III; *see also Becerra*, 585 U.S. at 774 (finding state action unconstitutional on this basis); *Brown v. Ent. Merchs. Ass'n.*, 564 U.S. 786, 802 (2011) (same).

highly controversial message" regarding video content's suitability for minors—a topic of public debate for decades that necessarily turns on subjective judgments informed by worldview, religious belief, parenting philosophies, and countless other subjective factors. *See supra* § II.A.2.a. Thus, the requested injunction is categorically different from the types of compelled speech courts have upheld under *Zauderer*. *See* 471 U.S. at 650–51 (disclosure of contingent-fee clients' liability for costs); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 107 (2d Cir. 2001) (disclosure that mercury was present in product).

The Seventh Circuit reached this exact conclusion in *Entertainment Software Association v. Blagojevich* when it enjoined Illinois's efforts to compel video game manufacturers to label "sexually explicit" games with an "18" label. 469 F.3d. at 652. The state argued that such a label constituted a "purely factual and uncontroversial" disclosure, but the court rejected that argument, explaining that "[e]ven if one assumes that the State's definition of 'sexually explicit' is precise, it is the State's definition—the video game manufacturer or retailer may have an entirely different definition of this term." *Id.*; *see also Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d at 962. Just so here.

2. <u>The Relief Sought by the State, If Granted, Would Violate the Dormant Commerce Clause.</u>

The requested injunction also violates the Dormant Commerce Clause, which "prohibit[s] States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval."[58] *Comptroller of the Treasury of Md. v. Wynne*, 575 U.S. 542,

[58] The fact that the TikTok platform is a free online platform does not remove it from "interstate commerce" for purposes of the Dormant Commerce Clause. "As both the means to engage in commerce and the method by which transactions occur, 'the Internet is an instrumentality and channel of interstate commerce.'" *United States v. Trotter*, 478 F.3d 918, 921 (8th Cir. 2007) (citation omitted). "Thus, 'regulation of the Internet impels traditional Commerce Clause considerations.'" *Publius v. Boyer-Vine*, 237 F. Supp. 3d 997, 1022 (E.D. Cal. 2017) (citation omitted) (finding plaintiff likely to succeed on claim that statute prohibiting posting home

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549 (2015). Even when a state regulates within its own borders, the state cannot impose undue burdens on interstate commerce by forcing interstate businesses to comply with "varying standards in [different] states." *S. Pac. Co. v. State of Ariz. ex rel. Sullivan*, 325 U.S. 761, 773 (1945). When assessing whether a state has unlawfully burdened interstate commerce, a court must "consider[] how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989).

There is no Iowa-specific version of the App Store, so granting the State's requested injunction would necessarily dictate how the TikTok platform is made available in all fifty states. *See* Brandenburger Decl. ¶ 69. If another State were to have a different interpretation of the App Store's terminology, TikTok would be exposed to a patchwork of inconsistent and burdensome regulation, where each state could decide the appropriate age rating for the TikTok platform, and what types of content on the platform are "frequent" or "mild." The "confusion and difficulty" of trying to comply with this "varied system of state regulation" in areas where there is an inherent "need for uniformity" is exactly the sort of burden on interstate commerce the Dormant Commerce Clause prohibits. *S. Pac.*, 325 U.S. at 774; *see also Am. Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d Cir. 2003) ("Because the internet does not recognize geographic boundaries, it is difficult, if not impossible, for a state to regulate internet activities without 'project[ing] its [policies] into other States.'").

III. The State Fails To Establish Irreparable Harm.

In addition to failing to establish a likelihood of success on the merits, the State has not carried its burden to establish that it is likely to suffer irreparable injury if its Motion is denied.

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addresses and telephone numbers of government officials violated dormant commerce clause).

To begin, the State's unexplained delay in seeking relief defeats any claim of irreparable harm. A party's "delay in bringing suit" is a factor courts have considered in decided the "appropriateness of [an] injunction." *See Helmkamp v. Clark Ready Mix Co.*, 214 N.W.2d 126, 130 (Iowa 1974).

TikTok has been available in Iowa via the App Store with the same age ratings *for over five years*. The State began its investigation of the platform at least by August 2023 (*five months* before it filed suit),[59] conducted by the same law firm that, by that point, had already conducted a similar investigation, taken discovery in the Indiana proceedings, and litigated and lost its request for a similar injunction in *Indiana I*. During all of this time, the TikTok platform's App Store page reflected that the relevant content categories were "Infrequent/Mild" on the app—giving the State essentially all it needed to know to press the claims at issue here. Yet the State waited *until January 2024* to file its complaint, and then *waited another two months* to move for a temporary injunction. Such a substantial and unexplained delay in pursuing this action fatally undermines the assertion that Iowa users of the TikTok platform will suffer irreparable harm in the absence of injunctive relief. *See, e.g.*, *Wildhawk Invs., LLC v. Brava I.P., LLC*, 27 F.4th 587, 597 (8th Cir. 2022) (addressing a contract breach claim arising under Iowa law and holding that delay of more than one year to bring suit undermined an assertion of irreparable injury); *Ng v. Bd. of Regents of Univ. of Minn.*, 64 F.4th 992, 998 (8th Cir. 2023) (13-month delay in seeking injunctive relief was unreasonable, which consequently defeated the movant's goal of preventing irreparable harm); *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (delay "vitiates much of the force of . . . allegations of irreparable harm"); *see also Milwaukee W. Bank v.*

[59] O. Kay Henderson, *Iowa Officials Hire DC Firm to Investigate TikTok*, RADIO IOWA (Aug. 8 2023), https://www.radioiowa.com/2023/08/08/iowa-officials-hire-dc-firm-to-investigate-tiktok/.

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Cedars of Cedar Rapids, Inc., 170 N.W.2d 670, 673 (Iowa 1969) (noting that a party, by failing to raise an issue for six months, could not now raise the issue "as an equitable reason for extension of time"); *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1331 (8th Cir. 1995) (three-month delay in filing an EEOC charge weighs against a request for "equitable modification of the limitations period").

In any event, the State has not established any substantial harm that will occur during the pendency of this case. Although the State asserts that the TikTok platform's 12+ age rating is causing harm to young Iowans because they cannot "unsee" content, the State has not substantiated this allegation. The State does not cite record evidence one would expect following an almost nine-month investigation, such as interview data, surveys, or affidavits from, for example, Iowa parents articulating the harms experienced by their children. Indeed, in its entire Motion, the State does not cite a single instance of harm suffered by an Iowa citizen—let alone the substantial harm necessary to justify temporary injunctive relief. *See Sear v. Clayton Cnty. Zoning Bd. of Adjustment*, 590 N.W.2d 512, 517 (Iowa 1999) (requiring that the movant must establish "*substantial* injury or damages" to obtain injunctive relief) (emphasis added); *see also In re Langholz*, 887 N.W.2d 770, 781 (Iowa 2016) (explaining that the movant "must be able to show that there is a *real* and immediate threat the injury will either continue or be repeated") (emphasis added) (internal quotations omitted).

The State's decision to seek a temporary injunction only as to the TikTok platform's representations on the App Store—and not its "T" for "Teen" ratings in the Google Play store and the Microsoft Store, which the Complaint alleges are equally misleading—further undercuts its claim of irreparable harm. *See Apple, Inc. v. Samsung Electrs. Co., Ltd.*, No. 11-CV-01846-LHK, 2011 WL 7036077, at *22 (N.D. Cal. Dec. 2, 2011), *aff'd in part, vacated in part on other*

grounds, remanded, 678 F.3d 1314 (Fed. Cir. 2012) ("Apple's decision to seek a preliminary injunction only as to a few select products undercut Apple's claim of urgency" for purposes of establishing irreparable harm). Indeed, the State makes no attempt to explain why Iowans downloading the TikTok platform from Apple's App Store face immediate irreparable harm that requires a temporary injunction, while those downloading it from the Google or Microsoft app stores do not. The same content is available on the TikTok platform regardless of the app store used to download it. *See* Brandenburger Decl. ¶ 68. Thus, the State's proposed injunction would lead to an outcome that further underscores the lack of irreparable harm.

Finally, the State's requested relief as to the Guidelines—that the Court enjoin the statement that TikTok "does not allow the promotion of alcohol, tobacco, or drug use," Mot. at 7—is moot. As described above and in Ms. Brandenburger's declaration, the Guidelines are periodically updated, and in the most recent update the disputed statement was removed. *See id.* ¶ 25 (stating instead that "We do not allow the trade of alcohol, tobacco products, and[/]or drugs. We also do not allow showing, possessing, or using drugs").

IV. The Balance of the Harms Weighs Against Granting the Motion.

Because the State has not made the threshold showings of irreparable harm and a likelihood of success on the merits, there is no need for the Court to proceed to the balancing phase of the temporary injunction analysis. However, if the Court were to consider the balance of the equities, it should deny the State's Motion because this factor tips sharply in Defendants' favor. If the injunction issues, TikTok will either (1) have to be removed from the Apple App Store or (2) remain on the App Store with a public statement that content depicting "Profanity or Crude Humor," "Mature/Suggestive Themes," "Alcohol, Tobacco, or Drug Use or Reference," and "Sexual Content or Nudity" are "Frequent/Intense" on the platform—opinions with which Defendants strongly disagree. As a result, TikTok would be re-categorized as a 17+ app on the

App Store, not only in the State of Iowa, *but in all 50 states and a number of other countries*, including significant markets like Indonesia and Mexico. *See id.* ¶ 69.

That change would cause significant reputational harm to Defendants' business and brand, impeding their ability to form and maintain commercial partnerships. *See id*. ¶¶ 64–68; *see also LS Power*, 988 N.W.2d at 338 (holding that loss of "opportunity to do business in Iowa" constituted irreparable harm); *Mutual of Omaha Ins. Co. v. Novak*, 775 F.2d 247, 249 (8th Cir. 1985) (holding that injury to "valuable business reputation and goodwill . . . constitutes harm that is irreparable"). It would also cause a significant number of users and potential users between the ages of 13 and 16 to migrate to competing platforms such as Snap, Instagram, or YouTube—all of which are rated as 12+ on the App Store. *Id.* ¶ 66. Even if the injunction is later lifted, many of these users would not return to the TikTok platform, causing Defendants irreparable harm. *Id.*; *see Metalcraft of Mayville, Inc. v. The Toro Co.*, 848 F.3d 1358, 1368 (Fed. Cir. 2017) (explaining that "it is impossible to quantify the damages caused by the loss of a potentially lifelong customer," and finding irreparable harm on this basis). These irreversible harms to Defendants' reputation, brand image, and user base weigh heavily against a temporary injunction. *TikTok Inc. v. Trump*, 490 F. Supp. 3d. 73, 84 (D.D.C. 2020) (concluding that these same factors would "inflict irreparable economic and reputational harm" on TikTok Inc. were the TikTok platform to be banned from the United States). As the court in *Indiana I* concluded:

> the threatened injury to the State does not outweigh the potential harm to the non-movant, TikTok. The threatened injury to the State is that Indiana teenagers will continue to have the same access to TikTok that all other American teenagers enjoy/suffer. However, the evidence demonstrates the disruptive and harmful financial impact that a preliminary injunction would cause TikTok; a preliminary injunction would cause significant harm to TikTok's business reputation, and no Indiana specific version of TikTok exists, which means such an injunction would disrupt TikTok's business operations in all 50 states. Therefore, the balance of harm component further weighs against issuing a preliminary injunction.

Indiana I, 2023 WL 4305656, at *15.

As established above, an injunction would also inflict First Amendment injury, which is *per se* harm. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Powell v. Noble*, 798 F.3d 690, 702 (8th Cir. 2015) (same).

V. An Injunction Would Disserve The Public Interest.

Finally, an injunction would harm the public interest. *See LS Power*, 988 N.W.2d at 399 (weighing potential harms to the public implicated by the requested injunction). The injunctive relief requested by the State here would upend the status quo and reach far beyond the State of Iowa, regulating the availability of the TikTok platform in other states and countries and imposing Iowa's policy preferences on these other jurisdictions. As detailed above, such an approach—if widely adopted—would be confusing to consumers and unworkable for TikTok, a platform that provides a forum for First Amendment protected speech for hundreds of millions of Americans. *See S. Pac.*, 325 U.S. at 774. The requested injunction also would harm the public interest by impinging on the Defendants' First Amendment rights, as well as the First Amendment rights of teens who wish to use the platform. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (recognizing a First Amendment right to access social media which "for many are the principal sources of knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast human realms of thought and knowledge"); Brandenburger Decl. Ex. 20 (Guidelines stating, "[On the TikTok platform,] [w]e welcome people from around the world, as they come to TikTok to discover a diversity of ideas, creators, and products, and to connect with others in our community.").

CONCLUSION

For the foregoing reasons, the State's motion for temporary injunction should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2024, I electronically filed the foregoing document through the Court's electronic filing system, which will send notification of such filing to the following attorneys of record:

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