IN THE COURT OF COMMON PLEAS
DELAWARE COUNTY, OHIO

STATE OF OHIO *ex rel.* DAVE YOST, OHIO ATTORNEY GENERAL	)	
Plaintiff,	)	**Case No. 21 CV H 06 0274**
vs.	)	**Judge James P. Schuck**
GOOGLE LLC,	)	**(ORAL HEARING REQUESTED)**
Defendant.	)	

MOTION OF DEFENDANT GOOGLE LLC TO DISMISS
PLAINTIFF THE STATE OF OHIO'S COMPLAINT

Defendant Google LLC ("Google"), pursuant to Ohio Civ. R. 12(B)(6), respectfully moves to dismiss Plaintiff's Complaint on the ground that it fails to state a claim upon which relief can be granted. The motion is supported by the accompanying memorandum. Pursuant to Local Rule 7.06, Google respectfully requests an oral hearing on the motion, which it anticipates would be approximately one hour in duration.

Dated: August 13, 2021

Respectfully submitted,

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PRELIMINARY STATEMENT

Ohio asks this Court to declare Google Search a common carrier or public utility simply because it alleges most Ohioans who seek information on the internet prefer to use Google rather than other internet search services. Google brings this Motion To Dismiss because, even assuming all the Attorney General's allegations are true as one must here, Ohio's request has no more validity under the law than a request to declare Fox News, the New York Times, or Walmart a "public utility" because most people in a particular town prefer to get their news or groceries from them instead of someone else.

Google Search is an information search service. Using an internet connection, a user submits a request for information (a "query"). Based on the characterizations in Ohio's complaint, Google Search in response displays a "Results Page," which provides (in addition to advertisements) two categories of information that Google has determined are likely to be responsive to the query. The first category is "organic search results," ranked in the order Google believes the user will find most useful, which the Complaint describes as a listing of links to other webpages "that appears because it's relevant to [the user's] search terms." The other category is "specialized search results," which the Complaint leaves undefined but appears to refer to when Google, at times, provides "relevant results for a particular type of information, such as news, local businesses, flights, shopping or product information" directly on the search results page derived from content collected from the internet and other sources. Examples of such "specialized search results" in the Complaint are Google Shopping and Google Flights.

Ohio wants this Court to regulate these "specialized search results," like Shopping and Google, which provide a direct response to a user's query, because Google Search is allegedly a "common carrier" or "public utility" under Ohio common law. Essentially, Ohio complains that Google does not give its competitors access to a Google Search Results Page so that they too can

place their own responses to a user's query directly on Google's service, such as in Google's so-called "specialized" results like Shopping and Flights, and it argues that Google's failure to do so violates its common law duties in operating Google Search as a common carrier or public utility.

Ohio's Complaint must be dismissed because it fails to state a claim upon which relief may be granted. Ohio is not clear for whom or what it believes Google Search ought to be deemed a common carrier. But it makes no difference. Google Search is not a common carrier of anything under Ohio law or otherwise. As to its users, Google Search carries nothing. It responds to users' queries itself with information and does not transport their queries anywhere. Google Search likewise is not a "carrier" of the information it publishes on a Results Page because it is not hired by others to display the links to their webpages in its search results. Nor is there anything "common" about the presentation of information on Google's Results Pages. That presentation inherently discriminates in favor of what Google believes will be helpful information for users—selecting among vast numbers of websites and pieces of information is the whole point of Google Search and the very source of its value to users.

It is equally clear that Google Search is not a public utility under Ohio law. Like its numerous competitors, Google exercises its editorial discretion in Google Search to provide users with information that Google believes will be responsive to the user's query. That service is not one that has ever been deemed the type of "essential service" that Ohio or anyone else has regulated as a public utility—such as electricity, gas, water, or garbage disposal. Neither Google Search nor any of its competitors have ever been subject to government regulations that control the relation between the business and the public as its customers, such as those that prevent unfair rates and denial of service. Under controlling Ohio Supreme Court precedent, the absence

of such government regulation prevents this Court from declaring Google Search to be a common law public utility.

Last, but certainly not least, the free speech guarantees in the Ohio and United States Constitutions bar Ohio courts from regulating the manner in which Google Search responds to user queries. Courts have consistently held that these constitutional protections apply to information provided by online services like Google and specifically safeguard Google's judgments about what information it chooses to present and how Google chooses to organize and display it. The State cannot interfere with this protected expression, let alone try to control what Google must or must not include on its Results Page.

OHIO'S FACT ALLEGATIONS IN THE COMPLAINT

The Complaint alleges that when a user submits a "query" to Google Search, Google sends back, via the user's chosen internet access provider, a "Results Page[]" that may contain, in addition to advertisements, two alleged categories of search results, which it refers to as "organic search results" and "specialized search results." Compl. ¶ 55.[1]

A. The "Organic Search Results"

Google uses web crawlers to collect information from hundreds of billions of webpages and analyzes and stores that information in the Google Search Index. The Complaint states when Google Search receives a query, its search engine uses "organic search algorithms" to generate a list of the webpages from this database that contain "any possible content" and "rank" those pages "to deliver the best search results." *Id.* ¶ 57; *id.* at 2. The Complaint refers to the list of

[1] The labels that Ohio has applied to Google's search results in the Complaint do not accurately reflect what they are, and Google does not refer to its search results in this manner in the operation of Google Search. All information displayed on a Results Page, other than advertisements, sponsored links, and static content like the Google logo, are referred to as "organic search results," including what the Complaint refers to as "specialized search results." The inaccuracy of the Complaint's labels, however, is not material to this motion, and Google thus refers to the Complaint's use of those terms for purposes of clarity without endorsing their validity.

webpages as the "organic search results." *Id.* ¶ 60; *id.* at 2. While there are many competing "internet search engines" that also help users find webpages in response to queries, *id.* at 9, the Complaint concedes that Google is popular with users because it provides the most relevant results. *Id.* at 2; *id.*¶ 15.

B. The "Specialized Search Results"

According to Ohio, in addition to "organic search results," Google Search presents what Ohio calls "specialized search results" in response to user queries. *Id.* ¶ 58; *id.* at 3. "Specialized search results" are not defined but are allegedly "optimized for identifying relevant results for a particular type of information, such as news, local businesses, flights, shopping or product information." *Id.* ¶ 58. The Complaint refers to different ways this additional information is displayed on a Results Page, such as "featured snippets," "knowledge panels," and "direct answers." *Id.* ¶¶ 65, 66, 73.

A "featured snippet," which is not described in the Complaint, refers to a link to a webpage that may appear with a snippet describing the page above the link. Google displays a featured snippet when it believes it will help a user more easily find the information that they are looking for. A "knowledge panel" is described in the Complaint as an "information box" that may appear "when you search for people, places, or things." *Id.* ¶ 65. The information comes from Google's Knowledge Graph, a database of over 500 billion facts about five billion entities that Google has collected from the web and other licensed sources. For example, a query for "Walt Disney" will return—in addition to other information—a box that provides basic information about the entertainment pioneer. A "direct answer" is also not clearly defined in the Complaint, but Ohio includes it with "knowledge boxes," and "featured snippets" as a "means for prioritizing the placement of information on the results page." *Id.* ¶ 73.

While information in these so-called "specialized search results" can be drawn from a multitude of sources, Ohio notes that information accessible through other Google services, such as Google Shopping and Google Flights, may appear in the results in response to a particular query. Compl. at 3.

C. Ohio's Claims Against Google

Ohio says Google Search "often features" "specialized search results" on the Results Page in "attractive formats," "in enhanced ways," and "above organic search results," Compl. at 3, so as to "maximize" their "exposure." *Id.* ¶ 64. The Complaint claims that when the "specialized search results" contain information derived from "other Google business lines," the display of that information is a "self-preference" that violates Google's supposed duty as a "common carrier" and a "public utility" under Ohio common law to "carry" content "from all sources indiscriminately as compared to Google's own information." *Id.* at 5; *id.* ¶¶ 45, 73.

LEGAL STANDARD

Dismissal is proper under Civ. R. 12(B)(6) when it appears "that the plaintiff can prove no set of facts entitling him to recovery." *Border City Sav. & Loan Ass'n v. Moan*, 15 Ohio St. 3d 65, 66, 472 N.E.2d 350, 351 (1984). Although a complaint's fact allegations "must be taken as true" and reasonable inferences made in a plaintiff's favor, *Byrd v. Faber*, 57 Ohio St. 3d 56, 60, 565 N.E.2d 584, 589 (1991), "[u]nsupported conclusions are not sufficient to withstand a motion to dismiss." *State ex rel. Hickman v. Capots*, 45 Ohio St. 3d 324, 324, 544 N.E.2d 639, 639 (1989); *see also Ettayem v. Land of Ararat Inv. Grp., Inc.*, 2017-Ohio-8835, 100 N.E.3d 1056, ¶ 20 (10th Dist.) (court "need not accept as true any unsupported and conclusory legal propositions advanced in the complaint").

ARGUMENT

I. GOOGLE SEARCH IS NOT A COMMON CARRIER UNDER OHIO LAW

Ohio common law defines a "common carrier" as "one who undertakes to transport persons or property from place to place, for hire, and holds itself out to the public as ready and willing to serve the public indifferently. The common carrier must hold itself ready to serve the public impartially to the limit of its capacity." *Kinder Morgan Cochin L.L.C. v. Simonson*, 2016-Ohio-4647, 66 N.E.3d 1176, ¶ 33 (5th Dist.) (internal quotation marks and citations omitted); *see also Celina & Mercer Cnty. Tel. Co. v. Union-Ctr. Mut. Tel. Ass'n*, 102 Ohio St. 487, 492, 133 N.E. 540, 542 (1921) ("'A common carrier is one that undertakes for hire or reward to carry, or cause to be carried, goods for all persons indifferently who may choose to employ him, from one place to another.'" (citation omitted)). In the telecommunications context, the "property" to be transported is a message: a common carrier is an entity that holds itself out as a "carrier of messages for hire from one person to another, over its wires." *Bradley v. W.U. Tel. Co.*, 1883 WL 5018, at *2 (Ohio Com. Pl. 1883); *see also Celina & Mercer*, 102 Ohio St. at 492.

The Complaint's allegations establish that, under Ohio law, Google Search is not a common carrier both because it is not "hired" to "carry" or "transport" a message from one person to another and because there is nothing "common," i.e., "indifferent" or "impartial," about the natural presentation of information by a search engine like Google on its Results Page of content obtained from other sources.

A. Google Search Is Not Hired To "Carry" Content From One Person To Another

A member of the public who submits a query to Google Search does not "hire" it to "carry" the query to another person. As recognized in the Complaint, the user simply asks Google Search to provide information in response to a query, and Google Search does so. *See*

Compl. ¶ 55 ("When a user enters a keyword or string of keywords (a 'query') in Google Search, Google Results Pages return different categories of search results[.]"); *see also Kinderstart.com LLC v. Google Inc.*, 2006 WL 3246596, at *10 (N.D. Cal. July 13, 2006) (dismissing claim Google Search is a common carrier under federal law: "while Kinderstart has alleged that Google invites the public to ***search*** using its search engine, it has not alleged facts that would show Google invites the public to ***speak*** using its search engine") (emphasis in original).

When a user then clicks on a link to another webpage on a Google Search Results Page, it is the user's chosen internet service provider or mobile carrier—not Google—that "carries" or "transmits" the messages between the user's computer and the computer server hosting the desired webpage. *See* Compl. ¶ 48 (Results Pages "reliably directed the consumer to the internet location that best met the search query"). In short, Google Search does not take users to some other destination. It is not a carriage service for the general public at all, let alone a common carriage service.

Because it does not and cannot allege that Google Search is a common carrier of a user's query, Ohio instead seems to allege that when Google Search provides links to other webpages in its search results, it is a "carrier" of the displayed content from the other webpages to users of Google Search. *See* Compl. ¶¶ 45, 48–51 (e.g., "common carrier of internet search results"). But Google's display of search results is likewise not "carriage" under the law. The Complaint does not allege (because it cannot) that Google Search is "hired" or paid by the owners of those webpages to display links to the pages to Google's users. *See Search King Inc. v. Google Tech., Inc.*, 2003 WL 21464568, at *1 (W.D. Okla. May 27, 2003) ("Google does not sell PageRanks, and the web sites that are ranked have no power to determine where they are ranked, or indeed whether they are included on Google's search engine at all.").

Indeed, the notion that Google Search transmits goods for hire is contradicted by Ohio's own Complaint, which alleges that what information gets displayed in its search results is determined by Google's proprietary algorithms, not by any contractual service-for-hire offered to anyone who owns a webpage. Compl. ¶¶ 56–60; *see also id.* ¶ 55 (noting paid-for advertisements are different from other search results). The Complaint quotes Google Search's mission "to organize the world's information and make it universally accessible and useful." *Id.* ¶ 13. That same mission statement makes it clear that its search results are not a service-for-hire offered to owners of webpages: "We don't charge anyone to appear in our search index. Whether a business, individual or organization buys ads is not a factor in our search algorithms. We never provide special treatment to advertisers in how our search algorithms rank their websites, and nobody can pay us to do so." *Our Approach to Search*, https://www.google.com/search/howsearchworks/mission/ (last visited Aug. 12, 2021).

B. There Is Nothing "Common" About The Presentation Of Information On Google Search

In addition to being unable to allege that Google Search is a service that is "hired" by owners of webpages to "carry" their content to Google's users, Ohio does not and cannot allege that Google Search holds itself out to those owners as a service that will display their content to users "indifferently" and "impartially to the limit of [Google's] capacity" as is required by Ohio law to establish Google as a common carrier. *Kinder Morgan*, 2016-Ohio-4647, ¶ 33. Indeed, it is simply not possible for Google Search, or any other internet search engine, to do so.

For every search query, there are typically thousands or millions of webpages with content that might be relevant. The only way search engines can make that content "accessible and useful," Compl. ¶ 13, is to "discriminate" among the possibly relevant sources of content that are displayed in response. *Id.* at 5. As Ohio alleges in its Complaint, Google Search is

designed to display and rank the most relevant results. *Id.* at 2; *id.* ¶¶ 57, 58. For Ohio to suggest that search engines like Google Search can display that content "impartially to the limit of its capacity," *Kinder Morgan*, 2016-Ohio-4647, ¶ 33, is nonsensical and absurd. James Grimmelmann, *Some Skepticism About Search Neutrality*, http://james.grimmelmann.net/essays/SearchNeutrality, at 4–5 (last visited Aug. 12, 2021) "Grimmelmann Essay") ("Of course Google differentiates among sites—that's why we use it. Systematically favoring certain types of content over others isn't a defect for a search engine—it's the point.").

Accordingly, it is not surprising that courts have promptly dismissed claims that Google Search is a common carrier or public utility that allegedly violated some common law duty not to "discriminate" among the content it displays. *See D'Agostino v. Appliances Buy Phone, Inc.*, 2015 WL 10434721, at *18 (N.J. Super. Ct. App. Div. Mar. 8, 2016) ("Google is not a public utility or common carrier."); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 634 (D. Del. 2007) (dismissing as "frivolous" claim that Google Search is engaged in a common law "public calling" to serve the public "without discrimination," such as "an innkeeper or common carrier"); *Kinderstart.com v. Google Inc.*, 2006 WL 3246596, at *10 (dismissing claim that Google Search is a common carrier under Communications Act, 47 U.S.C. §§ 201, et seq.). Consistent with Ohio's allegations that Google Search is designed to display the most relevant results (*see* Compl. at 2), search engines inherently do not display results "indiscriminately" to provide users with relevant results in a way that qualifies them as a common carrier under Ohio common law. Instead, Google Search must use its judgment to discriminate—to exclude many and to prefer and prioritize some sources of information over others when it displays information on a Results Page.

Ohio complains that when Google Search prioritizes the display on the Results Page of information derived from one of Google's own specialized search services, such as Google Travel or Google Shopping, it "unfairly discriminates" against competitors. Compl. ¶ 71 (emphasis added). But whether the selection that Google Search must do when it provides search results in response to a query is "fair" or "unfair" is not relevant to a determination of whether or not Google Search is a common carrier. Indeed, this is an issue being assessed under federal law in other lawsuits in other jurisdictions. *See id.* at 3 (Google's alleged dominance presents issues "left to be resolved elsewhere"). That is not an issue for this Court to consider in this lawsuit focused on whether Google meets the common law definition of common carrier, which it does not as described herein.

As Professor Grimmelmann has noted, "[s]ince search engines systematically discriminate by design, all of the heavy lifting" in Ohio's argument "is done by the word 'unfair.'" Grimmelmann Essay at 6. The FTC already examined this very complaint and disagreed,[2] though Ohio now appears to disagree with that conclusion. But the fact that Google Search, like all other search engines, must discriminate when it chooses what information to display in response to a query means that it cannot be declared a common carrier under Ohio law.

Under Ohio law, the "actual operation of a business determines its legal status" as to whether it is a common carrier. *Epic Aviation, L.L.C. v. Testa*, 149 Ohio St. 3d 203, 2016-Ohio-3392, 74 N.E.3d 358, ¶ 33 (citation omitted). Because search engines like Google Search are

[2] *See* Statement of the Federal Trade Commission Regarding Google's Search Practices, *In re Google Inc.*, FTC File No. 111-0163 (Jan. 3, 2013) (explaining FTC's unanimous decision to close investigation of "allegations that Google unfairly preferences its own content on the Google search results page," concluding "Google's display of its own content could plausibly be viewed as an improvement in the overall quality of Google's search product") (emphasis added), available at https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf.

not a service "for hire" to carry a person's message to someone else, and because they do not and cannot offer a service "for hire" to display everyone else's webpage information on a Results Page "indifferently" and "impartially to the limit of its capacity," Google is not a common carrier under Ohio law. *Celina & Mercer*, 102 Ohio St. at 492; *Kinder Morgan*, 2016-Ohio-4647, ¶ 33.

II. GOOGLE SEARCH IS NOT A PUBLIC UTILITY UNDER OHIO LAW

The Ohio Supreme Court has established a two-pronged test to determine whether a private entity that is not a common carrier is a public utility under Ohio law. The first prong requires that the entity be engaged in a public service through the "devotion of an essential good or service to the general public" of a type that the public "has a legal right to demand or receive." *Rumpke Sanitary Landfill, Inc. v. Colerain Twp.*, 134 Ohio St. 3d 93, 2012-Ohio-3914, 980 N.E.2d 952, ¶¶ 23-24; *Washington Twp. Trustees v. Davis*, 95 Ohio St. 3d 274, 2002-Ohio-2123, 767 N.E.2d 261, at ¶¶ 16-18; *A & B Refuse Disposers, Inc. v. Ravenna Twp. Bd. of Trustees*, 64 Ohio St. 3d 385, 387, 1992-Ohio-23, 596 N.E.2d 423. The second requires that the "enterprise conduct[] its operations in such a manner as to be a matter of public concern." *Id.* The Ohio Supreme Court has made clear, however, that neither prong can be established where, as here, there are no government regulations that "control the relation between the business and the public as its customers." *Castle Aviation, Inc. v. Wilkins*, 109 Ohio St. 3d 290, 2006-Ohio-2420, 847 N.E.2d 420, ¶ 29; *see also Rumpke*, 2012-Ohio-3914, ¶¶ 28, 36.

A. Google Search Is Not A Public Service

Google Search fails to meet the "public service" prong of the Ohio Supreme Court's test because it is not an "essential" service that "the general public . . . has a legal right to demand or receive." *Rumpke*, 2012-Ohio-3914, ¶ 23; *see also A & B Refuse Disposers*, 64 Ohio St. 3d at 387.

In *Rumpke*, the Court explained that to fall within the purview of "public service," there must be government regulation that affords the public a right to demand or receive an essential service. In that case, Rumpke, the operator of a private landfill, sued Colerain Township, challenging the township's denial of its rezoning application and seeking a declaration that it was a public utility exempt from the township's zoning authority. 2012 Ohio 3914, ¶¶ 3–6. The Court reviewed in depth its prior jurisprudence on common-law public utilities, reiterating the two characteristics, "public service" and "public concern," that must be established to qualify an entity as a public utility. *Id.* ¶ 20. With regard to the "public service" element, the Court stated: "we must look at whether there 'is a devotion of an essential good or service to the general public which has a legal right to demand or receive this good or service.'" *Id.* ¶ 23 (citations omitted). The Court held that the lack of government regulation affording the public a right to demand service from the landfill was dispositive on the public service question:

> [T]he lack of governmental regulation means that Rumpke determines to whom it provides its service and how or when that service is provided. The general public has no legal right to demand or receive Rumpke's services. Therefore, there is no assurance or guarantee that Rumpke will provide its services to the public indiscriminately and reasonably, nor is there anything preventing Rumpke from arbitrarily or unreasonably withdrawing its services. Rumpke could lawfully close its doors to the public. Furthermore, as a private company, Rumpke has the ability to set its own rates without any governmental oversight. Thus, Rumpke fails to meet the public-service factor of the public-utility test.

Id. ¶ 34.

Similar to *Rumpke*, in *Englewood v. Miami Valley Lighting LLC*, the Second District Court of Appeals relied upon the lack of government regulation over a streetlight provider to determine that it was not a public utility. 182 Ohio App. 3d 58, 2009-Ohio-1631, 911 N.E.2d 913, ¶ 93 (2d Dist.) (provision of streetlights not an essential service but rather "a policy choice"

that the provider was not legally obligated to offer). Although the streetlight provider was subject to regulation generally, it "was not regulated in the same manner as a public utility," as there existed no regulations that "control the relation between the business and the public as its customers," which meant that the provider could withdraw its services arbitrarily or unreasonably if it so chose. *Id.* ¶¶ 42-45 (quoting Castle Aviation, 2006-Ohio-2420, ¶ 29).[3]

These decisions stand for the straightforward proposition that, when goods or services are so "essential" that the public has a legal right to demand and receive them, governments regulate the provision of those goods and services. The absence of such regulation demonstrates: (1) that the good or service in question is non-essential; (2) that the entity in question is not devoted to the provision of that good or service to the public; and (3) that the public has no legal entitlement to receive the good or service. Because Google is a private entity that is not subject to regulation over the manner in which Google Search is offered to the public, or whether it is offered at all, the Complaint does not and cannot allege the necessary factual elements of the public service prong.

Ohio's allegations that Google chooses to provide Google Search indiscriminately to the public today, and that it is currently a "dominant" provider of "internet search" in Ohio, are insufficient to cure this fatal flaw. *See, e.g., A & B Refuse Disposers*, 1992-Ohio-23, at ¶ 8 ("[W]e reject appellant's assertion that … any business which simply claims that its services are

[3] The Ohio Supreme Court has affirmed repeatedly that only "special regulation and control by a governmental regulatory agency" that govern a provider's relationship to its customers will support a finding of public utility. *Castle Aviation*, 2006-Ohio-2420, ¶¶ 27, 29. Such regulations must "parallel [those] of businesses ordinarily accepted as public utilities." *Englewood*, 2009-Ohio-1631, ¶ 43 (quoting *Washington Twp.*, 2002-Ohio-2123, ¶ 21). Thus, for example, regulation of a radio station's programming by the Federal Communications Commission (*Washington Twp.*); safety regulations by the Federal Aviation Administration (*Castle Aviation*); and environmental regulations by the Ohio EPA (*Rumpke* and *A & B Refuse Disposers*), have all been rejected by the Ohio Supreme Court as regulation indicative of a public utility. *Washington Twp.*, 2002-Ohio-2123, ¶¶ 20–21; *Castle Aviation*, 2006-Ohio-2420, ¶ 29; *Rumpke*, 2012-Ohio-3914, ¶ 32; *A & B Refuse Disposers*, 64 Ohio St. 3d at 389.

'open to the public' can be categorized as a public utility. … Absent sufficient facts as to pertinent attributes [of the public service and public concern factors], that claim must fail."). As the Court held in *Rumpke*, a business is not a public utility merely because its services are open to the public; "[s]uch a holding would incorrectly encompass as public utilities 'traditional private business enterprises' such as 'dry cleaners, restaurants, and grocery stores.'" 2012-Ohio-3914, ¶ 25 (citation omitted).

Here, there is no law or licensing requirements that obligate Google to make Google Search available to the public indiscriminately and reasonably, which means that no member of the public has a legal right to demand that they be afforded access to Google Search. Many other entities in the business of collecting and publishing information over computer networks do so on a subscription-only basis, and some of those services, such as credit reporting agencies, do so on a highly selective basis. For all of them, as for Google, there is no law or regulation that prevents them from "arbitrarily or unreasonably" withdrawing their services from the public. *Rumpke*, 2012-Ohio-3914, ¶ 34 (since public had no right to demand or receive its service, landfill operator "could lawfully close its doors to the public").

Courts have "construed essential services to be akin to those services provided by traditional public utilities, such as electricity, gas, solid waste disposal, and telecommunication services." *Englewood*, 2009-Ohio-1631, ¶¶ 27, 29 (emphasis added). Indeed, the Ohio Constitution provides that such services are so essential to the public that "[a]ny municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the products or service of which is or is to be supplied to the municipality or its inhabitants." Ohio Const. Art. XVIII, § 4; *see Englewood*, 2009-Ohio-1631, ¶¶ 27-46 (Ohio Constitution did not permit municipality to acquire private entity's streetlight system covering

98% of city as a "public utility" given lack of regulation affording residents right to receive the private entity's streetlight service).

To claim, as Ohio does, that Google Search is a "public utility" is to declare it a business that Ohio could acquire, construct, own or operate. But that is absurd. The State could not possibly undertake such a burden for countless reasons, not the least of which is that it has no business dictating the online information it wants people to see. Given the First Amendment obstacles to such a regime, it is hardly a surprise that no Ohio court has ever deemed a business, like Google Search, that merely collects and publishes information to be an "essential service" that can be regulated as a "public utility." *See* Section III, *infra*; *see also Washington Twp.*, 2002-Ohio-2123, ¶ 22 ("One cannot equate the importance of this radio broadcasting service (which consists of a self-determined format intermixed with commercial advertising) with the essential nature of services provided by traditional public utilities."); *Directory Sales Mgt. Corp. v. Ohio Bell Tel. Co.*, 1986 WL 10897, at *4 (S.D. Ohio June 23, 1986) (observing that "if engaged in the business of selling, advertising or listings in classified business telephone directories, a telephone company is not a public utility").

B. Google Search Is Not A Service Of Public Concern

Google Search is not a service of "public concern" because of the presence of "competition in the marketplace" and, in any event, there is no relevant regulation by a government body on the factors required to make it a public utility. *Rumpke*, 2012-Ohio-3914, ¶¶ 24, 28; *Castle Aviation*, 2006-Ohio-2420, ¶ 29; *Englewood*, 2009-Ohio-1631, ¶¶ 21, 41–42.

While Ohio asserts that Google Search "is monopolistic," Compl. ¶ 32, it also alleges that other entities provide both general and specialized search services to the public, and it makes no

allegation that they are unable to choose to submit their search requests to those competitors instead of to Google Search.[4]

Indeed, the Complaint alleges that when people use Google Search instead of its competitors, it is because they choose to, not because they have to. Compl. at 2 ("Google Search is perceived to deliver the best search results"). That the public has a choice among competitors to search for information on the internet makes Google Search materially different from those entities providing a service that the Ohio Supreme Court has characterized as a "public concern." For example, in *St. Marys v. Auglaize Cty. Bd. of Commrs.*, , the entity found to be a public utility had "authority to levy fees on the generation of all solid waste created in the district, as well as for the disposal of all solid waste at a facility located in the district." 115 Ohio St. 3d 387, 2007-Ohio-5026, ¶ 66, 875 N.E.2d 561 ("These rates must be paid "by ***every*** person, municipal corporation, township, or other political subdivision that owns premises to which solid waste collection, storage, transfer, disposal, recycling, processing, or resource recovery service is provided.") (emphasis in original).

In any event, Ohio's conclusory allegation that Google Search is monopolistic is immaterial because Google Search cannot be deemed a "public concern" when "no government body regulates" it "on those factors that make an entity a public utility." *Rumpke*, 2012-Ohio-3914, ¶ 28. Here, Google Search is not subject to any regulation by any agency, let alone regulation that purports to control the relation of Google to the members of the public that use its

[4] The Complaint quotes and incorporates by reference statistics for "market share" of "internet searches," *id.* at ¶¶ 21-25, but they do not, in fact, measure all "internet searches." Instead, they measure all webpage views that are referred by a general search engine (*i.e.*, webpage views that occur when a user clicks on a link provided by a general search engine), such as Google, bing, Yahoo!, AOL, Ask Jeeves, and others. *See* Stat Counter Global Stats, *What methodology is used to calculate Statcounter Global Stats?*, https://gs.statcounter.com/faq#methodology (last visited Aug. 12, 2021). Thus, every query submitted to a competing "provider of a specialized search" service referenced in the Complaint, such as Orbitz, Travelocity, and Expedia, Compl. ¶¶ 74-75, is not included in the statistics cited in the Complaint. And those same statistics nevertheless establish that the public can and do choose among many different "general internet search" services that compete with Google Search. *Id.* ¶¶ 21–25.

service. In these circumstances, the absence of any such regulation is dispositive and establishes that Google Search is not a common law public utility as a matter of law.

In *Rumpke*, the Court found the private entity did provide an essential service and that it did "occupy a monopolistic position in the marketplace" because it collected most of the solid waste in the county. 2012-Ohio-3914, ¶ 35. The Court also agreed that Rumpke was subject to environmental regulations by two governmental agencies. *Id.* ¶ 30. But the Court held such regulations were "separate and distinct from the public concern involved in the regulation of public utilities," *id.* ¶ 32, and the lack of relevant government regulation was dispositive in determining that Rumpke did not meet the "public concern" prong. Without such regulation, the Court reasoned, "Rumpke may treat discriminately and arbitrarily the portion of the public to whom it provides its services. Because Rumpke dominates such a large portion of the market and provides an essential service but does so without any government oversight or regulation, it is not a public concern." *Id.* ¶ 35.

Accordingly, the Ohio Supreme Court unanimously held that Rumpke "cannot be a common-law public utility" because of the absence of such government regulation:

> The lack of governmental control over the public-service and public concern factors in A & B Refuse Disposers is critical in determining that Rumpke is not a public utility. Thus, we hold that a privately owned sanitary landfill cannot be a common-law public utility exempt from township zoning when there is no public regulation or oversight of its rates and charges, no statutory or regulatory requirement that all solid waste delivered to the landfill be accepted for disposal, and no right of the public to demand or receive its services.

2012-Ohio-3914, ¶ 36. The Court's holding in *Rumpke* is controlling and dispositive here.

It is also dispositive that, here, the Ohio Legislature has expressly excluded internet information services and Internet Protocol-enabled applications like Google Search from

regulation by the Public Utilities Commission of Ohio ("PUCO"). *See* O.R.C. §§ 4905.02(5)(c), (d). While the courts have stated an entity can be deemed a public utility for other purposes even if its business is not expressly included in the statutory definition of those regulated by PUCO, here, the legislature has expressly excluded the service from regulation by PUCO. Particularly where there is no other relevant government regulation of Google Search, the common law does not permit a court to substitute its judgment for that of the legislature. *See Moore v. Dague*, 46 Ohio App.2d 75, 85, 345 N.E.2d 449 (10th Dist. 1975) ("Courts are not super-legislatures, whose function it is to enact those laws which it feels the legislative bodies have unwisely failed to enact.").

III. THE GUARANTEES OF FREEDOM OF SPEECH IN THE OHIO AND UNITED STATES CONSTITUTIONS BAR OHIO FROM ATTEMPTING TO REGULATE HOW GOOGLE SEARCH RESPONDS TO USERS' QUERIES

Ohio's attempt to use common law doctrines about common carriers and public utilities as a pretense to regulate how Google Search responds to its users' queries is barred by the guarantees of freedom of speech in Article I, Section 11 of the Ohio Constitution and in the First Amendment, as incorporated by the Fourteenth Amendment, to the United States Constitution. *See Eastwood Mall, Inc. v. Slanco*, 1994-Ohio-433, 68 Ohio St. 3d 221, 222, 626 N.E.2d 59, 61 ("the free speech guarantees" in both constitutions have the same scope and "the First Amendment is the proper basis for interpretation of Section 11, Article I of the Ohio Constitution").

The law has long recognized that the First Amendment protects the editorial judgments of newspapers, magazines, guides, artists, and other businesses to gather information and assemble it as they see fit. That is exactly what Google Search does. When it receives a search query, it sifts through billions of webpages and a database of over 500 billion facts to figure out what information it believes will be most useful to the user and how to present it most effectively.

Where Google deems it appropriate, its responses include the "specialized search results" like Google Shopping and Flights that Ohio claims the power to regulate through invocation of common carrier and public utility law. Ohio alleges that Google prominently features information derived from its "other business lines" above "organic results" that provide links to other webpages, but that too is an editorial judgment no different than a newspaper's decision to feature its own opinion columnists. The First Amendment bars any effort by a governmental entity to prohibit Google from directly responding to a query with information it has collected and organized itself. Because Ohio's lawsuit calls upon this Court to regulate Google's speech and its editorial judgment, it is barred by the First Amendment.

A. The Information That Google Publishes In Response To A User's Query And The Manner In Which It Presents That Information Are Editorial Decisions Protected By The First Amendment

There is no more "fundamental rule of protection under the First Amendment" than that a "speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995). This principle does not "require a speaker to generate, as an original matter, each item featured in the communication." *Id.* at 570. The First Amendment protects a speaker's editorial judgments about the selection and arrangement of any content that it presents. "Since all speech inherently involves choices of what to say and what to leave unsaid," the First Amendment equally protects "the choice to speak" and also "the choice of what to say." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986). It thus protects a newspaper's daily judgments about which news stories to run, or which opinion, business, or lifestyle columnists to carry—and whether those stories should be highlighted "above the fold" or buried near the classifieds. *See* Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Search Results*, 8 J.L. Econ. & Pol'y 883, 884 (2012).

Two landmark Supreme Court cases elucidate this principle. In *Miami Herald Pub. Co. v. Tornillo*, the Court held that a statute requiring a newspaper to allow candidates a right to equal space to reply to criticism was unconstitutional. 418 U.S. 241 (1974). The Court stressed the newspaper is not "a passive receptacle": "choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." *Id.* Accordingly, it held the First Amendment bars government "compulsion" on the newspaper "to print that which it would not otherwise print." *Id.* at 256.

In *Hurley*, the Supreme Court confirmed that First Amendment protection for editorial control is "not restricted to the press" and instead is "enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression." 515 U.S. at 574. Relying on the "principle of autonomy to control one's own speech," the Court held that a Veterans Council's choice to exclude an organization from its parade was constitutionally protected. *Id.* at 572–574. "Rather like a composer, the Council selects the expressive units of the parade from potential participants," the Court explained. *Id.* And "though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day." *Id.* The Council "clearly made a decision to exclude a message it did not like from the communication it chose to make" and was fully entitled to "invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another." *Id.*

Applying these principles to Internet search engines, courts have recognized that the display of search results involve substantial editorial discretion that the First Amendment safeguards. In *Search King*, a company brought a tortious interference claim against Google,

alleging it "purposefully and maliciously" altered its search results to hurt the plaintiff's business. 2003 WL 21464568, at *2. The court emphasized that Google's search result rankings are "subjective opinions . . . of the significance of particular web sites as they correspond to a search query." *Id.* at *3–4 (citing *Jefferson Cnty. Sch. Dist. No. R-1 v. Moody's Investors Servs., Inc.*, 175 F.3d 848, 852–55 (10th Cir. 1999) (First Amendment protects financial rating service's unfavorable review of school district's bonds)). "Other search engines express different opinions, as each search engine's method of determining relative significance is unique." *Id.* Thus, Google's search rankings are "entitled to full constitutional protection." *Id.*

Likewise, in *Langdon*, a plaintiff sued Google for allegedly refusing to place ads for his website in prominent places on its Results Page and to "honestly" rank his webpages. 474 F. Supp. 2d at 629. Noting that free speech "necessarily compris[es] the decision of both what to say and what not to say," the court found "the injunctive relief sought by Plaintiff contravenes [Google's] First Amendment rights," citing *Tornillo*. *Id.* at 630.

In *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433 (S.D.N.Y. 2014), a group claimed that a Chinese search engine violated New York's public accommodation law when it excluded pro-democracy speech from its search results. The court dismissed the claim as barred by the First Amendment, explaining that "search engines inevitably make editorial judgments about what information (or kinds of information) to include in the results and how and where to display that information (for example, on the first page of the search results or later)." *Id.* at 438. Finding that a "search engine's editorial judgment is much like many other familiar editorial judgments," the court found merit in the argument "that the First Amendment fully immunizes search-engine results from most, if not all, kinds of civil liability and government regulation." *Id.*

So too, in *e-ventures Worldwide, LLC v. Google, Inc.*, 2017 WL 2210029, at *4 (M.D. Fla. Feb. 8, 2017), a search engine optimization firm sued Google for excluding the firm and its clients from Google's organic search results, claiming Google did so because the firm was "cutting into Google's revenues" by reducing the incentives to purchase relevant ads on Google. *Id.* at *1. The court held the claim was barred by the First Amendment: "Google's actions in formulating rankings" and "determining whether certain websites" should be removed "are the same decisions by a newspaper editor regarding which content to publish, which article belongs on the front page, and which article is unworthy of publication. The First Amendment protects these decisions, whether they are fair or unfair, or motivated by profit or altruism." *Id.* at *4.

In short, Google has autonomy over the content of its own speech: when users submit their queries to Google Search, they seek Google's editorial judgment as to what information is the most useful and how to display that information in the most useful manner. The resulting response constitutes Google's exercise of its constitutionally protected editorial judgment. While Google relies on sophisticated and proprietary computerized algorithms, the algorithms are written by humans in the first place and "inherently incorporate the search engine company engineers' judgments about what material users are most likely to find responsive to their queries." *Jian Zhang*, 10 F. Supp. 3d at 438-439 (internal quotation marks omitted).

In this lawsuit, Ohio alleges that Google Search displays information that Google has collected itself using its own specialized search services "in enhanced ways" and "above organic search results," Compl. at 3, so as to "maximize" its "exposure" and "to direct users to Google products and services." *Id.* ¶ 64. But, whatever the motive, the choice to prominently feature that information is an editorial choice no different than the Wall Street Journal's choice to

feature its own editorial board or ESPN's choice to promote other ESPN programming rather than its competitors' during its broadcast of a college bowl game.

Ohio also faults Google for the alleged growth of "captured-click searches," referring to searches in which a user does not choose to click on a non-Google link on the Results Page. *See* Compl. at 4; id. ¶¶ 52–54, 67–70. In other words, Ohio cries foul to Google simply answering too many user queries itself with sufficient information so that the user has no need to look elsewhere for more. Ohio may not penalize Google for answering questions itself because Google is exercising its First Amendment rights when it decides whether and how to do so. "The First Amendment protects these decisions, whether they are fair or unfair, or motivated by profit or altruism." *eventures Worldwide*, 2017 WL 2210029, at *4; *see also Pac. Gas & Elec.*, 475 U.S. at 8.

B. Ohio Is Constitutionally Barred From Using Public Utility Or Common Carrier Law To Regulate Speech Protected By The First Amendment

When Google uses its editorial judgment to respond to a user's query by displaying information it has collected and organized itself and not displaying information compiled by some third party, that response is speech protected by the First Amendment, which means any governmental entity is constitutionally barred from using a statute or common law to prohibit Google from doing so.

In *Associated Press v. United States*, the Supreme Court held that while the press may generally be covered by antitrust law, Sherman Act relief could not extend so far as to "compel AP or its members to permit publication of anything which their 'reason' tells them should not be published." 326 U.S. 1, 20 n.18 (1945). *Tornillo* applied that ruling to hold that Florida's right-to-reply statute "fail[ed] to clear the barriers of the First Amendment" and thus was void, even though the Herald had an effective monopoly. 418 U.S. at 258; *see also Jefferson Cnty.*,

175 F.3d at 860 ("[T]he First Amendment does not allow antitrust claims to be predicated solely on protected speech.").

This principle applies to search engines as well: *Search King* held that, because Google's search results were "constitutionally protected opinions," they were immune from state tort liability. 2003 WL 21464568, at *4; *accord e-ventures Worldwide*, 2017 WL 2210029, at *4. *Hurley* held a public accommodations law could not be used to "compel [a] speaker to alter [his message] by including one more acceptable to others," 515 U.S. at 581, and *Jian Zhang* applied that holding to bar such a claim against a search engine because "'once the expressive character' of Baidu's search results 'is understood, it becomes apparent' that allowing Plaintiffs to sue Baidu based on the content of those results would have 'the effect of declaring [Baidu's] speech itself to be the public accommodation.'" 10 F. Supp. 3d at 442 (quoting *Hurley*).

Ohio's lawsuit here is barred by this well-established First Amendment jurisprudence. Ohio asks this Court to brand Google a common carrier or public utility so that Ohio courts can prohibit Google from responding to user inquiries with information it has collected and organized itself and/or to compel it to include information from others that Google does not want to display in its response. The claim Ohio asserts and the relief Ohio seeks are barred by the First Amendment.

CONCLUSION

Ohio's Complaint mistakenly assumes Google Search is a common carrier or public utility because Ohioans choose to use Google Search. Under Ohio law, common carriers charge a fee to deliver a standardized service, and public utilities are regulated by a set of state regulations. Google has none of those attributes, and there is no basis in the law to conclude otherwise. The whole point of Google Search is to provide results tailored to a specific query. Google Search is not shipping a commodity product, but constantly working to provide useful

information in response to people's unique queries. For these reasons and those described in detail above, this Court should dismiss Plaintiff's claims against Google.

Dated: August 13, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing will be served to all parties through the electronic filing system of the Delaware County Court of Common Pleas.

Dated: August 13, 2021

/s/ Michael R. Gladman
Michael R. Gladman

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