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.	)	

REPLY OF DEFENDANT GOOGLE LLC TO PLAINTIFF THE STATE OF OHIO'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS
FILED AUGUST 13, 2021

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Ohio asks this Court to declare Google—a private entity—to be a common carrier or public utility. Not only that, Ohio asks this Court to invent and impose upon Google corresponding obligations in its provision of search results. But as Google demonstrated in its Motion to Dismiss ("Motion"), Ohio's claims fail as a matter of law because Ohio's own allegations show that Google Search does not meet the definition of either a common carrier or public utility. Further, the First Amendment bars Ohio's efforts to regulate Google's speech.

In addition to a misguided procedural challenge, Ohio focuses its opposition on suggestions by certain commentators that ***legislatures*** should consider whether to enact ***statutory schemes*** to regulate social media platforms. But that merely highlights the impropriety of Ohio's request that ***this Court*** impose inapposite ***common-law*** duties on a service through which Google itself speaks. That relief is unavailable as a matter of law, and Ohio's case should be dismissed.

I. GOOGLE'S MOTION TO DISMISS IS PROCEDURALLY PROPER

Ohio's procedural challenge to the Motion should be quickly dispatched. Ohio contends that, since the Complaint seeks declaratory relief, the Motion is improper because it advances "merits" arguments rather than establishing the absence of a "live dispute." Opp. at 1. That is doubly wrong. ***First***, Ohio is not merely seeking declaratory relief—it ***also*** seeks injunctive relief. ***Second***, even as to the claim for declaratory relief, Ohio must do more than show a "live dispute." It must show a cognizable claim that Google is a common carrier or public utility and, as such, has violated its alleged "heightened duties." Compl. ¶¶ 43, 73. That it cannot do.

The mere existence of a dispute does not create a cognizable claim for declaratory relief if it is not "within the scope of the Declaratory Judgment Act," it is not "justiciable," or if "speedy relief is [not] necessary to preserve rights that may otherwise be impaired or lost." *Freedom Found. v. Ohio Dept. of Liquor Control*, 80 Ohio St. 3d 202, 204, 1997-Ohio-346, 685

N.E.2d 522, 524 (1997). *See also* O.R.C. § 2721.07 (court may dismiss declaratory action if it "would not terminate the uncertainty or controversy giving rise to the action"). All apply here.

First, Ohio's action is not within the scope of the Declaratory Judgment Act and is not justiciable because it seeks a declaration of rights that do not exist under Ohio law. *See Scott v. Houk*, 127 Ohio St. 3d 317, 322, 2010-Ohio-5805, ¶ 20, 939 N.E.2d 835, 839 (O'Connor, J., concurring) ("In the absence of demonstrating an established right, a declaratory judgment does not lie under R.C. 2721.02(A)."); *Baston v. Sears*, 15 Ohio St. 2d 166, 167, 239 N.E.2d 62, 63 (1968), *overruled in part on other grounds by Franklin v. Julian*, 30 Ohio St. 2d 228, 283 N.E.2d 813 (1972) ("[T]he fact that this action is brought under the declaratory judgment statutes does not serve to support the right claimed, since it is well recognized that declaratory judgment statutes do not establish substantive rights."); *Sessions v. Skelton*, 163 Ohio St. 409, 415, 127 N.E.2d 378, 382 (1955) ("A declaratory judgment action creates no new or substantive rights, it is purely a procedural remedy."); *Wurdlow v. Turvy*, 2012-Ohio-4378, ¶ 13, 977 N.E.2d 708, 712 (10th Dist.) (a "justiciable issue" requires the existence of a legal interest or right).

As detailed in Section III, *infra*, Ohio law does not afford either the Attorney General or any other party a "right" to have a court impose common-law duties on Google on the ground that it should be "classified" as a "public utility." Compl. ¶ 43. In the absence of an existing regulatory regime established by the legislature that regulates Google Search as a public utility, Ohio's attempt to use a declaratory judgment action to create such duties "must be considered legislative and therefore invalid." *Baston*, 15 Ohio St. 2d at 168. *See also* Motion at 18.[1]

[1] *See also, e.g., Carroll v. Lucas*, 39 Ohio Misc. 5, 9, 313 N.E.2d 864, 868 (Hamilton Cty. Com. Pl. 1974) (dismissing complaint seeking declaratory judgment that book constituted offensive material: "any judgment declaring what is harmful to juveniles or obscene would be a general statement in the nature of legislation, a field forbidden to the courts; [and . . .] would constitute a continuing interference with the administration of the school district; any declaratory judgment would be advisory in nature and not addressed to a specific controversy").

Second, declaratory relief is not available here because it is not "necessary to preserve rights that may otherwise be impaired or lost." *Freedom Found.*, 80 Ohio St. 3d at 204. When a dispute does not concern the construction of a written instrument or a constitutional or statutory provision and instead concerns whether one party has breached a common-law duty owed to another, the "speedy relief" of a declaratory judgment action is not necessary, and the action should be dismissed. This is because the allegedly aggrieved party has an "equally serviceable remedy": he can sue for damages or injunctive relief for breach of the alleged duty. *See Galloway v. Horkulic*, 2003-Ohio-5145, ¶ 24 (7th Dist.) ("[G]enerally, a declaratory action will not be entertained where another 'equally serviceable' remedy exists for the case.") (quoting *Sander Ditch Landowner's Ass'n v. Joint Bd. Of Huron & Seneca Cty. Cmmrs.*, 51 Ohio St. 3d 131, 135, 554 N.E.2d 1324, 1328 (1990)). Ohio has done exactly that here, seeking injunctive relief (albeit deficiently) to enforce the very same duties as to which it seeks declaratory relief.

Indeed, a plaintiff with a defective common-law tort claim cannot escape dismissal under Rule 12(B)(6) by simply recharacterizing the complaint as one for declaratory relief. The right to pursue the tort claim is an "equally serviceable" remedy, and, if the complaint's allegations show that a necessary element of the claim does not exist, the declaratory judgment action must be dismissed pursuant to Rule 12(B)(6)—which was the result in the very case on which Ohio relies. *See* Opp. at 4 (citing *White v. Croft*, 2005-Ohio-2417, ¶ 9 (5th Dist.)).[2]

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[2] In *White*, the court affirmed dismissal because declaratory judgment was "not the appropriate vehicle" and the inmate "failed to allege a valid habeas corpus claim, a recognizable right and a proper cause of action to force a parole hearing[.]" 2005-Ohio-2417, ¶¶ 15–19. *See also Hay v. Jefferson Indus. Corp.*, 62 Ohio Misc. 2d 472, 474, 601 N.E.2d 672, 674 (Madison Cty. Com. Pl. 1992) (dismissing personal injury plaintiff's declaratory judgment action because it was not "cognizable under R.C. Chapter 2721" and would not terminate controversy where "Plaintiff would still have the burden of proving those facts necessary to establish her right to recover").

Ohio also offers a list of what it calls "disputed facts" (derived from mischaracterizations of Google's arguments in the Motion) that it argues prevents dismissal. Opp. at 5–6. As detailed in Sections II and III, *infra*, the listed disputes are immaterial and/or are based on Ohio's conclusory legal allegations. Neither prevent dismissal. *See Ettayem v. Land of Ararat Inv. Grp., Inc.,* 2017-Ohio-8835, ¶ 20, 100 N.E.3d 1056, 1063 (10th Dist.).

II. OHIO'S ALLEGATIONS ESTABLISH THAT GOOGLE SEARCH IS NOT A COMMON CARRIER UNDER OHIO LAW

Ohio's Complaint fares no better as a substantive matter. The Complaint's allegations establish that Google Search is not a common carrier under Ohio law because (i) Google Search is not hired by another person to carry that person's message to someone else and (ii) Google Search does not (and cannot) offer to others to display their content on a Results Page "indifferently," "impartially," and "to the limit of its capacity." *Celina & Mercer Cty. Tel. Co. v. Union-Ctr. Mut. Tel. Ass'n*, 102 Ohio St. 487, 492, 133 N.E. 540, 542 (1921); *Kinder Morgan Cochin L.L.C. v. Simonson*, 2016-Ohio-4647, ¶ 33, 66 N.E.3d 1176, 1182 (5th Dist.); *Bradley v. W.U. Tel. Co.*, 1883 WL 5018, at *2 (Ohio Com. Pl. 1883).

First, Ohio suggests that any business that holds itself out "to serve the public" impartially is a common carrier. Opp. at 9 (quoting *Kinder Morgan*). Neither *Kinder Morgan* nor any other court has ever suggested that is a complete statement of Ohio law. If it were, it would render virtually every retail business in Ohio a common carrier. *Cf. Rumpke Sanitary Landfill, Inc. v. Colerain Twp.*, 134 Ohio St. 3d 93, 100, 2012-Ohio-3914, ¶ 25, 980 N.E.2d 952, 958 (rejecting claim that simply being "open to the public" makes an entity a public utility).

Second, Ohio suggests that courts have characterized as "common carriers" businesses that do not "carry" or "transport" a person or his property to another place or person. Opp. at 9–10; *see also* Amicus Br. at 4, 6. But this suggestion is not supported by the case law. Ohio mistakenly conflates cases that actually ***apply*** a common carrier's common-law duties to a specific business with cases that simply ***analogize*** a business's statutory duties to the common-law duties of a common carrier.[3] Further, Ohio argues that Google Search is described

[3] As to fire insurance (Amicus Br. at 4), see *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 425–426 (1914) (analogizing ***statutory*** regulation of insurance rates to government regulation of rates by public utilities and common carriers). As to grain elevators (Amicus Br. at 4), see *Brass v. North Dakota ex Rel. Stoeser*, 153 U.S. 391,

as "carrying" information to users. Opp. at 2–3 But that is beside the point. To meet the definition of a common carrier under Ohio law, an entity must carry the message ***of the person who hires it*** to someone else. *See Celina, & Mercer*, 102 Ohio St. at 492. Ohio's argument to the contrary—that common carriage does not necessarily require delivery-for-hire—would render every newspaper in Ohio a "common carrier" of information to its users.

Third, Ohio suggests Google Search is "hired" by users in a fashion because it collects data from them that it "monetizes" by selling advertising space. Opp. at 10–11. Amici do not credit that theory but instead suggest that such revenue means Google Search is "being 'hired' to transmit certain messages." Amicus Br. at 6–7. Both arguments have no merit. As to users, whether Google's alleged monetization of user data constitutes being "hired" by users is immaterial because it does not involve any agreement between a user and Google to carry the user's search query to someone else. *See* Motion at 6–7; *Kinderstart.com LLC v. Google Inc.*, 2006 WL 3246596, at *10 (N.D. Cal. July 13, 2006).[4]

As to owners of webpages links that are displayed in Google's "organic search results,"

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391 (1894) (sustaining duties imposed by state ***constitutional*** and ***statutory*** provisions on grain elevators). Moreover, Ohio erroneously asserts that various occupations, including bakers and innkeepers, were once called "common carriers" under English common law. Opp. at 10 & n.6. Ohio cites no case in support, and the textbook it cites states these occupations were called "common callings," ***not*** common carriers. *See* C. Phillips, Jr., THE REGULATION OF PUBLIC UTILITIES (2d ed.), p. 83 (1988). The "common calling" concept is the antecedent of the current "public accommodation" doctrine, which Ohio concedes is inapplicable to Google Search. Opp. at 13 ("[T]he State concedes that Google Search is not an innkeeper"). *See 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").

[4] Ohio notes that *Kinderstart.com LCC* "is not for citation." Opp. at 11. But that court's local rules do not prohibit its citation in an ***Ohio state*** court. *See, e.g.*, *State v. Strickland*, 2013-Ohio-2768, ¶ 16 n.5 (2d Dist.).

Amici argue that because Google owns some physical infrastructure, including Google Cloud computers and cables, its "content delivery networks" can be "regulated as common carriers." Amicus Br. at 7. But Ohio's Complaint does not seek to regulate Google's "delivery networks." It seeks declaratory and injunctive relief only as to Google Search, which is not a network and is not hired by users to carry their content to others. *See* Christopher Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463, 490–91 (2021) (available at https://www.journaloffreespeechlaw.org/yoo.pdf) ("Courts have made clear that common carriage regulation is determined on an activity-by-activity basis rather than an entity basis . . . The mere fact that Google initiated a residential broadband system in Kansas City should not convert all aspects of Google's operations into common carriage.").

the Complaint's allegations establish that they do not hire Google Search to transmit their messages to users. Google makes its own decisions as to what information is provided and how it is displayed, using its own proprietary algorithms. Webpage owners cannot and do not pay or "hire" Google for any of it. *See* Compl. ¶¶ 56–60; Motion at 7–8; *see also Conwell v. Voorhees*, 13 Ohio 523, 542 (1844) ("Common carriers . . . carry for hire; their obligation is only to the person with whom they have contracted to carry" and "they are liable only to persons in privity of contract"). That Google Search derives advertising revenue from providing information to users does not make it a common carrier for the same reason advertising revenue does not make a newspaper a common carrier—both make their own decisions as to what information to provide to their users.

Fourth, while it concedes that differentiation, discrimination, and prioritization among content is inherent in what any search engine does, *see* Opp. at 11 ("relevancy determinations" are at "the heart of internet search"), Ohio argues this fact does not prevent regulating Google Search as a common carrier because such services have "operational discretion." *Id.* at 11–12. This argument, for which Ohio cites ***no*** case law, lacks merit. What Ohio calls Google's "discretion" to decide (i) what potentially relevant information should be ***excluded*** from a Results Page and (ii) the ***priority*** of information included on a Results Page is precisely the sort of individual, source-specific decision making that is the antithesis of common carriage. In fact, if there were a contract to carry another's information to a user in response to a query, then under Ohio law that would be at most a so-called private carriage or charter service. *See Epic Aviation, L.L.C. v. Testa*, 149 Ohio St. 3d 203, 210, 2016-Ohio-3392, ¶¶ 23, 29–30, 74 N.E.3d 358, 364.[5]

[5] *See generally* Eugene Volokh, *Treating Social Media Platforms like Common Carriers?*, 1 J. FREE SPEECH L. 377, 382 n.12 (2021) (available at https://www.journaloffreespeechlaw.org/volokh.pdf) ("The key feature of common carriers appears to be that they do not routinely 'make individualized decisions, in particular cases, whether and on what terms to deal.' *Nat'l Assn' of Reg. Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir.

Fifth, Ohio—unable to cite ***any*** case applying common-law common carrier duties to a search engine—argues that certain "legal scholars" and Justice Thomas "agree that the question needs [to be] addressed." Opp. at 7. That argument, too, has no merit. As for the "legal scholars," ***none*** of the articles that Ohio cites even address whether Google Search falls within the scope of a common carrier under existing common law in any jurisdiction, let alone "favors" such a result. Opp. at 8. Instead, they address the different question of whether and how social media platforms that host users' speech, such as Facebook and Twitter, can or should be regulated as common carriers.[6]

Nor does Justice Thomas's concurrence in *Biden v. Knight First Amendment Inst. at Columbia Univ.* speak to this question. In assessing whether then-President Trump's Twitter account was a public forum, Justice Thomas merely speculated as to whether ***legislatures*** might consider whether "some digital platforms are sufficiently akin to common carriers or places of accommodation to be regulated[.]" 141 S. Ct. 1220, 1224, 1226 (2021). His concurrence, which no other Justice joined, did not address whether Google Search or any other search engine met ***any*** of the necessary elements for its service to actually be deemed common carriage under any existing law, much less under Ohio law, and much less by a court.

1976)."); *Nat'l Ass'n of Broad. v. FCC*, 740 F.2d 1190, 1203 (D.C. Cir. 1984) ("[T]he *sine qua non* of a common carrier is the obligation to accept applicants on a non-content oriented basis.").

[6] Ohio's reliance on Professor Langvardt's article, Opp. at 7 n.5, which focuses only on Facebook, is particularly unhelpful to Ohio: "The 'common carriage' concept is particularly unilluminating here. Congress seems to have recognized in drafting the Radio Act of 1927 that it could not impose a duty of 'common carriage' on radio broadcasters without making ordinary programming decisions impossible. And though a requirement of common carriage for *hosting* decisions may well be feasible and administrable, the concept seems at least as *inapplicable* to decisions about ***amplification*** and ***prioritization*** in the news feed as in the past it was to broadcast program scheduling." Kyle Langvardt, *Can the First Amendment Scale?*, 1 J. FREE SPEECH L. 273, 300–01 (2021) (available at https://www.journaloffreespeechlaw.org/langvardt.pdf) (bolded emphasis added). *See also* Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. FREE SPEECH L. 98, 124 (2021) (available at https://www.journaloffreespeechlaw.org/bhagwat.pdf) ("The most radical regulatory proposals regarding social media platforms . . . would treat platforms as common carriers[,] places of public accommodation, or sometimes as 'utilities.' . . . [A]ll these proposals are quite clearly unconstitutional.")

III. OHIO'S ALLEGATIONS ESTABLISH THAT GOOGLE SEARCH IS NOT A PUBLIC UTILITY UNDER OHIO LAW

Google Search is not a public utility under Ohio law because there are no government regulations that control the relation of the business with the public as its customers. This means that, under controlling Ohio Supreme Court precedent, Google Search is not a public utility because it does not provide an essential service that the public "has a legal right to demand or receive" and "it is not of public concern." *Rumpke*, 2012-Ohio-3914, ¶¶ 23, 34–35. Ohio's efforts to rebut this conclusion have no merit.

First, Ohio argues that regulation is not required for an entity to be a public utility. Opp. at 13 (citing *Marano v. Gibbs*, 45 Ohio St. 3d 310, 312, 544 N.E.2d 635, 637 (1989)). Ohio suggests it is sufficient if an entity simply makes its service "available to the public generally and indiscriminately." *Id.* (citing *S. Ohio Power Co. v. Pub. Util. Comm.*, 110 Ohio St. 246, 143 N.E. 700, at syllabus (1924)). The Court rejected both propositions in *Rumpke*, which clarified subsequent to *Marano* and *Southern Ohio Power* that existing government regulation is required for an entity to qualify as a public utility. *See Rumpke*, 2012-Ohio-3914, ¶ 25 ("[A] simple claim that a business's services are open to the public does not automatically categorize the business as a public utility" since that would encompass "'traditional private business enterprises'" that are "'regulated by diverse public authorities, *e.g.*, dry cleaners, restaurants and grocery stores.'") (citation omitted).

Second, Ohio asserts that "[j]ust as the landfill met the public concern factors in *Rumpke*, Google Search easily meets them here." Opp. at 15. But the landfill in *Rumpke* did ***not*** meet the public concern factors. *See Rumpke*, 2012-Ohio-3914, ¶ 35 ("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.") (emphasis added).

Third, Amici's assertion that *Rumpke* is not "good law in light of *Epic Aviation*" is erroneous. Amicus Br. at 12. In *Epic Aviation*, the Court did not even reference *Rumpke*, let alone "reject[] and reverse[]" it. *Id.* at 13. Rather, the Court considered whether an entity was a ***common carrier*** for purposes of a statutory exemption from sales tax for entities rendering what the statute called a "public utility ***service.***" *See Epic Aviation*, 2016-Ohio-3392, ¶ 1 (quoting O.R.C. § 5739.02(42)(a)) (emphasis added). An entity that qualifies for the exemption is deemed to provide a "public utility service" solely for purposes of that tax law. In *Epic Aviation*, the Court held that common carriers under Ohio law may be deemed to offer a "public utility service" for purposes of the statutory exemption. *Id.* at ¶ 28. The Court did not determine whether the entity was also a public utility.

Finally, Ohio argues that *Rumpke* applies only when an entity is "actively seeking public utility status" to obtain a benefit, such as exemption from local zoning board regulations. Opp. at 15. That argument has no merit. There is nothing in the Court's opinion that suggests such a limitation on its scope. In fact, the Court in *Rumpke* derived the two-factor public utility test from prior cases both in which an entity sought public utility status under a statutory provision ***and*** in which an entity sought to be ***excluded*** from such status under a statute. *See, e.g., Indus. Gas Co. v. Pub. Utils. Comm'n of Ohio*, 135 Ohio St. 408, 414, 21 N.E.2d 166, 168 (1939) (company sought declaration it was not subject to PUCO regulation); *S. Ohio Power Co.*, 110 Ohio St. at 252 (company claimed it was not subject to rate regulation by PUCO).

Indeed, there is ***no*** Ohio case law, and Ohio certainly cites no case, that purports to articulate what type of private entity can be regulated ***by a court***, applying judicially created "common-law" regulations, on the theory that the entity constitutes what the court deems to be a "public utility." *See* Opp. at 15 ("[T]he State is seeking to have Google Search declared a public

utility so that the State can impose heightened common law duties upon Google[.]"); *see also* Amicus Br. at 12. There is a reason no such case exists—there is no right under Ohio common law for any person, or for Ohio's Attorney General, to have a court impose common-law duties on an entity because it is a "public utility." Such regulation first must be established by the legislature, acting within the constraints imposed on it by the Ohio and United States Constitutions. Because the legislature has not imposed such regulation on the operation of Google Search and because Ohio law does not afford a private right of action to have a court create such regulations, Ohio's Complaint is an "invalid" attempt to have this Court legislate from the bench and must be dismissed. *Baston*, 15 Ohio St. 2d at 168.

IV. THE FIRST AMENDMENT BARS THE TYPE OF GOVERNMENT REGULATION OHIO SEEKS

When a user submits a query, Google Search decides what information to display in response and also the order in which it is displayed. Those decisions, under controlling U.S. Supreme Court precedent and cases applying that jurisprudence to internet search services, are editorial judgments protected by the First Amendment. Accordingly, the government may not regulate them as Ohio seeks to do through this case.

Ohio suggests that the First Amendment does not apply if Google Search is deemed to be a common carrier or public utility. Opp. at 17. But the U.S. Supreme Court has made clear that the First Amendment protects a public utility's "choice to speak" and its "choice of what to say." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986).[7]

Ohio also argues that certain entities may be required to "host the speech of others." Opp. at 18 (citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47

[7] Ohio relies on *F.C.C. v. League of Women Voters of California*, but in that case the Court ***invalidated*** a law that sought to forbid any educational broadcasting station that received federal funds from "engag[ing] in editorializing." 468 U.S. 364, 366 (1984). Just as Congress could not regulate "solely on the basis of the content of the suppressed speech" there, *id.* at 383, Ohio cannot regulate Google's use of "specialized search results" here.

(2006), and *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980)). But such duties can only arise when an entity allows its property to be used as a forum for others' speech. How Google Search decides to respond to a user query constitutes ***Google's own speech***, not the speech of others. Here, Ohio attempts to do exactly what both *Rumsfeld* and *PruneYard* explained was impermissible: regulate the content of that speech.[8]

Ohio argues that *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), do not apply because the relief it seeks is not "content based." Opp. at 21. But the permanent injunction Ohio requests ***is*** expressly content based—it seeks to prevent Google from "prioritizing the placement of Google products, services, and websites on Results pages." Compl. at 16.

Finally, Ohio's reliance on *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622 (1994), and *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969), is erroneous because those cases were expressly predicated on an entity's control of a physical resource. In *Turner*, the Court rested its holding on a cable provider's "ownership of the essential pathway for cable speech," which enabled it to physically "prevent its subscribers from obtaining access to programming it chooses to exclude." 512 U.S. at 656. And *Red Lion* is clear that its holding was a function of the physical "scarcity of radio frequencies." 395 U.S. at 390.

Nowhere does Ohio allege that Google physically prevents users from accessing websites as in *Turner*. Instead, Ohio alleges that Google "dominates internet search, globally and

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[8] Both cases underscored that the regulations at issue "neither limit[ed] what [the speaker] may say nor require[d] them to say anything" at all. *Rumsfeld*, 547 U.S. at 60; *PruneYard*, 447 U.S. at 76 ("[N]o specific message is dictated by the State."). Likewise, neither *Associated Press v. United States*, 326 U.S. 1 (1945), nor *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), permitted the government to dictate the content of the entity's speech. *Associated Press* found that the Associated Press violated the Sherman Act when it limited access to its news stories to member organizations. 326 U.S. at 19. It said nothing about the content of those news stories. And Ohio misstates the holding in *Lorain Journal*, Opp. at 18–19, which found a newspaper violated the Sherman Act by requiring advertisers to boycott a competing radio station. 342 U.S. at 152.

domestically." Compl. ¶ 2. But neither *Turner* nor *Red Lion* were predicated on "dominat[ion]" of a market. Indeed, *Turner* itself recognized that the regulation at issue could not be applied to newspapers, which, "no matter how secure [their] local monopoly, do[] not possess the power to obstruct readers' access to other competing publications." 512 U.S. at 656.[9]

CONCLUSION

Ohio claims that Google is violating its duties as a common carrier in the operation of Google Search when it prioritizes information from its own "specialized search services" in response to a user's query. That claim fails because Ohio's own allegations establish that Google Search is not a common carrier under Ohio law. Ohio's claim that this Court should impose common-law duties on Google Search because it is a public utility also fails because Ohio has no right under Ohio law to seek such relief. Moreover, the relief Ohio seeks—government regulation of Google's own speech in responding to user queries—is plainly barred by the First Amendment. For these reasons, the Motion should be granted, and the Complaint should be dismissed with prejudice pursuant to Rule 12(B)(6).

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[9] *See* Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Search Results*, 8 J. L. ECON. & POL'Y, 883, 884 (2012) ("Search engine operators, no matter what their alleged market shares may be, lack any such physical power because of how the Internet works. . . . [T]he *Turner* approach does not apply where the speaker is compiling and editing a speech product of its own—such as a single page that contains text selected and presented in a way that 'in the [speaker's] eyes comports with what merits' inclusion.") (quoting *Hurley*, 515 U.S. at 574).

Amici argue that Google's search results are commercial speech subject to intermediate scrutiny. But Google's search results are not commercial speech. They do not "simply propose[] a commercial transaction." *Broke Ass Phone v. Boardman Twp. Zoning Bd. of Appeals*, 2019-Ohio-4918, ¶ 21, 149 N.E.3d 966, 971. Instead, they provide requested information that, if it relates to a product or service, the user might use to find a proposed commercial transaction elsewhere on the Internet. *See Savannah Coll. of Art & Design, Inc. v. Houeix*, 369 F. Supp. 2d 929, 945 (S.D. Ohio 2004). In any event, because the injunction Ohio seeks is content based, strict scrutiny would govern even if the information displayed on a Results Page were deemed to be commercial speech. *See L.D. Mgmt. Co. v. Gray*, 988 F.3d 836, 839 (6th Cir. 2021).

Dated: September 30, 2021

Respectfully submitted,

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Counsel for Defendant Google LLC

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: September 30, 2021

/s/ Michael R. Gladman
Michael R. Gladman

Counsel for Defendant Google LLC