~~EXHIBIT B~~

**IN THE COURT OF COMMON PLEAS DELAWARE COUNTY, OHIO**

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



**AMENDED AMICUS BRIEF OPPOSING DEFENDANT'S MOTION TO DISMISS OF AMICI CLAREMONT INSTITUTE'S CENTER FOR CONSTITUTIONAL JURISPRUDENCE, J.D. VANCE, AND D.J. SWEARINGEN**

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## INTRODUCTION

No one doubts the essential role that Google plays in our society's political, economic, and social lives. It is the centralized communications mechanism that connects voters to politicians, consumers to businesses, and church and civil groups members to each other. The Supreme Court declared the internet is our "modern public square," and Google is the square's essential communications network, assuming the role that the telegraph and telephone played in earlier times. *Packingham v. North Carolina*, ___U.S.___, 137 S.Ct. 1730, 1736, 198 L.Ed.2d 273 (2017).

For centuries, courts have regulated common carriers and public utilities, which are both industries "affected with the public interest." Courts originally had the power to declare what constitutes a common carrier or an industry affected with public interest and impose regulatory remedies. In some states, courts have relinquished this authority to administrative agencies, usually public service commissions.

But, in Ohio, as in many other states, courts retain the power to declare industries to be common carriers and routinely do so. This power stems from Ohio courts' understanding that the legislature only has power to regulate industries as common carriers or public utilities if they first satisfy the judicially created test for such entities.

Following the approach accepted by courts nationwide, the Ohio Supreme Court states that "to constitute a common carrier there must be a dedication of property to public use of such a character that the product and service are available to the public generally and indiscriminately, that the carrier must hold himself ready to serve the public indifferently to the limit of his capacity." *Hissem v. Guran*, 112 Ohio St. 59, 64, 146 N.E. 808, 809 (1925). Under common carriage and public utility principles, courts have ruled many types of industries to be either common carriers,

public utilities or both, ranging from grain elevators and insurance and escalators to telegraphs and telephones.

Here, Google services are made available to all, generally and indiscriminately. Its essential role in our economy, political, and social life render it a matter of "public concern." Google meets the classifications as a common carrier of public utility under Ohio law. The Attorney General's Complaint asks Google to be subject to minimal standard of non-discrimination and non-preferential self-dealing is straightforward, non-controversial common carrier or public utility regulation. It is fully consistent with Ohio law.

Against this conclusion, Google asserts that it cannot be a common carrier because it "carries nothing." (Google LLC's Motion to Dismiss, "Google MTD," p. 2). Further, it is not a "carrier" of the information it publishes on its Results Page because it is not hired by others to display the links. (*Id.*). But, like a telephone or telegraph company, Google connects and transmits messages between users and the websites with which communication is sought. It owns massive amounts of the internet backbone—the physical network that delivers internet traffic. Similarly, Google advertisers certainly "hire" Google to transmit their messages to users. Google offers its services to its users in exchange for their attention, which it then "sells" to advertisers.

Google argues that because Ohio has never regulated it as a public utility, it can never be. But, the Ohio Supreme Court has long recognized that common carriage and public utility regulation adapts to technological development—after all, courts first applied the legal category to utilities for gas lights and telegraphs and eventually to telephones and jet airplanes. It is consistent with that development for these legal principles to apply to the internet. Further, in claiming that it is not a public utility, Google relies upon a small line of cases that the Ohio Supreme Court has rejected.

Last, common carriers have limited First Amendment rights. The telephone company's duty to serve all trumps its purported expressive right in discriminating against certain customers. And, even if Google has some First Amendment protections, it receives at most a reduced level of constitutional scrutiny appropriate for dominant communications systems or commercial speech.

Under Ohio Supreme Court precedent, Google is both a public utility and common carrier. *A & B Refuse Disposers, Inc. v. Ravenna Twp. Bd. of Trustees*, 1992-Ohio-23, 596 N.E.2d 423, 425 (1992) ("Determination of whether a particular entity is a public utility is a mixed question of law and fact."); *Coop. Legislative Comm. of R. R. Brotherhoods v. Pub. Utils. Comm'n*, 149 Ohio St. 511, 517, 80 N.E.2d 159, 163 (1948) ("Whether one charged with being a common carrier has by his conduct brought himself within that definition is a question of fact."). At the very least, Google's motion to dismiss is ill-timed given the current record before the Court.

## I. GOOGLE IS A COMMON CARRIER UNDER OHIO LAW

The term "common carrier" has deep historical roots. Ohio's definition, like the laws of most states, draws from these historical meanings. An examination of this term's history and its application in Ohio shows Google is a common carrier.

### A. The Common Law Precedent And Applicable Ohio Law

Lord Hale's 17th century treatise, *De Portibus Maris*, explains that even if privately owned, certain industries are "affected with a public interest" and have a duty to serve all in a non-discriminatory way. *See* Matthew Hale, *A Treatise in Three Parts*, *in* 1 COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 60–72 (F. Hargrave ed., 1787). The U.S. Supreme Court firmly established the United States "affected with public interest" legal category in *Munn v. Illinois*. 94 U.S. 113, 130 (1876). Relying upon *De Portibus*, the Court upheld an Illinois statute requiring a grain elevator to serve all customers in addition to other regulatory requirements. *See id.* at 126. The U.S. Supreme Court held that industries, which open themselves to serve all

customers, could be subject to the State of Illinois' non-discrimination obligations. *See id.* at 131–32.

The Ohio Supreme Court, in accordance with courts nationwide, has recognized that the "common carrier . . . [is] impressed with a public interest," *Marietta & V.R. Co. v. Pub. Utils. Comm'n*, 101 Ohio St. 29, 33, 126 N.E. 889, 890 (1920), as are those utilities, which are "so important to the public interest." *Inland Refuse Transfer Co. v. Limbach*, 53 Ohio St. 3d 10, 10, 558 N.E.2d 42, 43 (1990); *see also Ohio Power Co. v. Vill. of Attica*, 23 Ohio St. 2d 37, 43, 261 N.E.2d 123, 127 (1970) (a "business is 'affected with a public interest,' and therefore that the former membership requirement does not disqualify it from being regarded as a public utility").

Courts categorize firms as "common carriers" broadly, including industries that have nothing to do with carrying goods. These include fire insurance, *German Alliance Ins. Co. v. Kansas*, 233 U.S. 389, 414-15 (1914); grain elevators, *Brass v. North Dakota ex rel. Stoeser*, 153 U.S. 391, 405 (1894); railroad terminals that simply receive traffic, *Fort St. Union Depot Co. v. Hillen*, 119 F.2d 307, 312 (6th Cir. 1941); escalator operators, *Weiner v. May Dept. Stores Co.*, 35 F. Supp. 895, 896 (S.D. Cal. 1940); and express messenger companies, *Railway Express Agency v. Kessler*, 189 Va. 301, 305, 52 S.E.2d 102, 103 (1949).

And, of course, common carriage refers to communications firms such as Google. The Supreme Court of Ohio states:

> What is a common carrier? 'A common carrier is one that undertakes for hire or reward to carry, or cause to be carried, goods for all persons indifferently . . . The term 'common carrier,' applied to telephone companies . . . . The telephone company then must serve, without discrimination, all who desire to be served and who conform to the reasonable rules of the company.

*Melina & Mercer Cty. Tel. Co. v. Union-Ctr. Mut. Tel. Ass'n*, 102 Ohio St. 487, 492, 133 N.E. 540, 542 (1921); *see also Bradley v. W.U. Tel. Co.*, 1883 WL 5018, at *2 (Ohio Com. Pl. 1883) ("the

business of the defendant as a common carrier of messages for hire from one person to another, over its wires, and I cannot see that it differs in its nature from the business of any of our merchants who purchase goods and merchandise, in the east and elsewhere, and bring them here to dispose of to their customers.").

Ohio courts continue to recognize their own power to recognize common carriers and impose common law common carrier principles. The endurance this legal mechanism, despite extensive statutory and regulatory law, emerges from the fundamental principles on which all common carrier and public utility law rests in Ohio: the legislature only has the power to declare those firms to be common carriers which the courts would recognize as common carriers under common law. "This court is required to determine the limitations upon the power and authority of the General Assembly to declare certain persons and firms to be common carriers, when the business conducted by them is such as not to bring them within the common-law definition of common carriers." *Hissem v. Guran*, 112 Ohio St. 59, 62, 146 N.E. 808, 809 (1925). The Supreme Court of Ohio further explained, "If their business has not in fact been dedicated to public use and service, any regulation would amount to a taking of private property for public use, and therefore be beyond the power of the state." *Id.*

According to Ohio law, the "distinctive characteristic of a common carrier [is] that it undertook to carry for all people, indifferently, as opposed to private carriers, who were not obligated to carry unless the obligation was 'voluntarily assumed by virtue of a special contract.'" *Epic Aviation, L.L.C. v. Testa*, 149 Ohio St. 3d 203, 210, 2016-Ohio-3392, 74 N.E.3d 358, 364, at ¶ 23. In addition, there must be a "dedication of property to public use." *Hissem v. Guran*, 112 Ohio St. at 63–64, 146 N.E. at 809 (citing *Samms v. Stewart & McKibben*, 20 Ohio, 70, 55 Am. Dec. 445); *United States Express Co. v. Backman*, 28 Ohio St. 144 (1875); *Ohio Mining Co. v.*

*Pub. Utils. Comm'n*, 106 Ohio St. 138, 140 N. E. 143 (1922); *Korner v. Cosgrove*, 108 Ohio St. 484, 141 N. E. 267, 31 A. L. R. 1193 (1923); *S. Ohio Power Co. v. Pub. Utils. Comm'n*, 110 Ohio St. 246, 143 N. E. 700 (1924).

### B. Applying Ohio's Definition Of Common Carrier To Google

Google offers its services to all Ohioans indifferently and without a special contract. Just like public roads, ferries, or telephones, Google opens its services to all. Its public use is evident by the central role it plays in our economy. It fits squarely within Ohio precedent recognizing telegraphs, telephones, and paging systems as common carriers.

#### 1. Google's claim not to "carry"

Google claims that it is not a common carrier because "[a] member of the public who submits a query to Google Search does not 'hire' it to 'carry' the query to another person." According to Google, a common carrier must "carry" things. To support this unusual requirement, Google cites no precedent. (Google MTD, p. 7).

As noted above, there are plenty of common carriers that do not "carry messages"—ranging from insurance companies, grain elevators, wharves, or warehouses. Common carriers can often simply be hubs or bottlenecks for which it is appropriate to mandate access. Similarly, given its immense market dominance and reliance of Ohio commerce on its service, Google certainly has a "public use." Its role is analogous to the telegraph or telephone in prior years.

#### 2. Google's claim not to be "hired"

Second, Google claims Google Search cannot be a common carrier because it is not "'hired' or paid by the owners of webpages to display links to the pages to Google's users." (Google MTD, p. 7) But, Google does not cite any Ohio definition of common carrier that requires such hiring. (*Id.*). Further, Google is paid by advertisers to connect with certain users. Such transactions constitute being "hired" to transmit certain messages. The payment system may be

different than in a subscription service, such as traditional telephone, but Google is providing a communications for profit.

**3. Google's claim not to carry or transmit messages**

Third, Google claims that it "is not a carriage service for the general public at all, let alone a common carriage service" because "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." (Google MTD, p. 7).

But, again, that is not true. Google is in the business of carrying and transmitting messages. It dominates huge portions of the internet backbone, the fiber that transmits messages around the internet. Through its content delivery networks, it carries its users' messages every second of every day. As Google itself explains, "Google Cloud operates on one of the best connected and fastest networks on the planet, reaching most of the Internet's users through a direct connection between Google and their ISP." Saurabh Gupta & Kapil Sharma, *Google Cloud networking in depth: Cloud CDN*, GOOGLE CLOUD (June 6, 2019), https://tinyurl.com/548m4vvy, In addition, Google owns many of the submarine cables that connect the internet globally. Tyler Cooper, *Google and other tech giants are quietly buying up the most important part of the internet*, VENTUREBEAT (Apr. 6, 2019), https://tinyurl.com/ttn8ak2b. To use an analogy, the internet backbone is like a railroad track—and Google is the train engine and cars. Both the railroad track and railroad trains carry messages, and both can be, and have been, regulated as common carriers.

**4. Google's claim that nondiscrimination is impossible**

Fourth, Google claims that Ohio law requires common carriers to serve "indifferently" and "impartially to the limit of [Google's] capacity." (Google MTD, p. 8, citing *Kinder Morgan*, 2016-Ohio-4647, ¶ 33). Google asserts that it is "simply not possible" for Google to do so—and cites

academic papers to support its point. Google seems to argue that because its search engines select certain results as opposed to other results, Google is "inherently" discriminatory. (Google MTD, p. 9).

But, adopting Google's argument, all common carriers are discriminatory. After all, railroads discriminate as to which towns and communities they serve, grain elevators discriminate by attaching themselves to certain areas of track making service easier to some shippers but not others, and airlines have established roots that discriminate in favor of certain airports.

Many have pointed out, *e.g.*, Frank Pasquale, *Internet nondiscrimination principles: Commercial ethics for carriers and search engines*, 2008 U. CHI. LEGAL F. 263 (2008), that it is possible to develop search engines that are not discriminatory in undesirable ways while retaining Google's "discriminating" manner. And, that is precisely what the Ohio Attorney General's complaint asks. It asks this Court to require that Google refrain from (i) carrying content "from other sources without unfair discrimination as compared to comparable Google content"; (ii) prioritizing the placement of Google products, services, and websites on Results Pages from Google Searched in Ohio without providing equal opportunities for prioritization to non-Google entities; and (iii) and including features on Results Pages from Google Searches conducted in Ohio that promote captured-click searches, without providing access to similar features to non-Google entities. (Complaint, pp.14–15). There is no reason why Google cannot refrain from such types of discrimination while still providing the latest score on a basketball game or the best recipe for an Old Fashioned cocktail.

**5. Google's case law is off point**

The caselaw Google produces to support its arguments is off-point. *D'Agostino v. Appliances Buy Phone, Inc.*, No. A-2005-13T1, 2016 N.J. Super. Unpub. LEXIS 504 (Super. Ct.

App. Div. Mar. 8, 2016) involved a complex contract claim and certain exculpatory clauses that under New Jersey law are only applicable to common carriers. Whether Google was a common carrier was never argued by either party. *Id.* at *18. *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 634 (D. Del. 2007) presented a question of Delaware common law, and the Delaware Supreme Court narrowly construes public calling and common carrier obligations only to situations where there exists an innkeeper-guest relationship. *Kinderstart.com v. Google Inc.*, No. C06-2057 JF (RS), 2006 U.S. Dist. LEXIS 82481, at *10 (N.D. Cal July 13, 2006) involved the question of whether Google was a common carrier under Communications Act of 1934, 47 U.S.C. § 201 *et seq.*, a question controlled by Federal Communications Commission regulation, to which courts defer under *Chevron*. This statutory regime has no relevance to Ohio law which, as discussed above, continues to give courts a major role in determining the scope of common carrier law and, of course, regulatory authority over intrastate communications.

**6. Google's claim that "we've never done it that way before"**

Finally, Google claims that because it has never been regulated as a common carrier, it should never be. But Ohio common carrier law is not static; it evolves over time with new technologies. As the Ohio Supreme Court declared a century ago when deciding that the telephone is a common carrier, "And it has come to be settled, as civilization develops, and as new inventions and devices take their place in society, that wherever the public is concerned and the welfare of the people is in issue, technical constitutional invasions must give way." *Melina & Mercer Cty. Tel. Co. v. Union-Ctr. Mut. Tel. Ass'n*, 102 Ohio St. 487, 492, 133 N.E. 540, 542 (1921).

## II. GOOGLE IS A PUBLIC UTILITY

Google also qualifies as a public utility and, as such, courts may provide relief requested in the Attorney General's Complaint. The Ohio Supreme Court states, "The case law equates public-utility service with common carriage." *Epic Aviation, L.L.C. v. Testa*, 149 Ohio St. 3d 203,

209, 2016-Ohio-3392, 74 N.E.3d 358, 363, at ¶ 19. The "'public utility' class . . . includes . . . common carriers, telegraph and telephone companies, ferries, wharfage, etc." Gustavus H. Robinson, *The Public Utility Concept in American Law*, 41 HARV. L. REV. 277, 292 (1928). Just as Google satisfies the common law definition of common carrier, it satisfies the common law definition of public utility.

### A. The Public Utility Test Under Ohio Law

Given these terms' historical relatedness, it is not surprising that the test for common carrier and public utility are quite similar. Ohio's public utility test has two prongs: "public service" and "public concern":

- The public service prong states that "[t]he main and frequently most important attribute of a public utility 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." *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, 425. The Ohio Supreme Court interprets this requirement as meaning, "in order to qualify as a public utility, the entity must, in fact, provide its good or service to the public indiscriminately and reasonably." *Id.* (citing *Marano v. Gibbs*, 45 Ohio St. 3d 310, 311, 544 N.E.2d 635, 637 (1989)).

- The public concern prong states that a public utility must "conduc[t] its operations in such a manner as to be a matter of public concern." *Campanelli v. AT&T Wireless Serv.*, Inc., 85 Ohio St. 3d 103, 106, 1999-Ohio-437, 706 N.E.2d 1267, 1269. Normally, a public utility occupies a monopolistic or ogopolistic position in the marketplace. *A & B Refuse Disposers, Inc.*, 64 Ohio St. 3d at 388.

Relying on *Castle Aviation* and *Rumpke Sanitary Landfill, Inc. v. Colerain Twp.*, 134 Ohio St. 3d 93, 93, 2012-Ohio-3914, 980 N.E.2d 952, 953, at ¶ 1, Google erroneously submits that there is an additional prong, asserting that, "The Ohio Supreme Court has made clear . . . 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.'" (Google MTD, p. 11, quoting *Castle Aviation, Inc. v. Wilkins*, 109 Ohio St. 3d 290, 2006-Ohio-2420, 847 N.E.2d 420, at ¶ 29,

holding modified by *Epic Aviation, L.L.C. v. Testa*, 2016-Ohio-3392, 149 Ohio St. 3d 203, 74 N.E.3d 358, at ¶ 27).

Google's reliance on *Castle Aviation* is misplaced as it is neither applicable nor good law. First, the *Castle Aviation* decision, itself, makes clear that this special test only applies when determining public utility status under a particular statute, R.C. 5639.01(E)(2)—rather than the generally applicable common law test for a public utility. *Castle Aviation* states "one of the most important criteria, if not the most important, *for the application of R.C. 5739.01(E)(2)* to the rendition of a public utility service is special regulation and control by a governmental regulatory agency." *Castle Aviation* , 109 Ohio St. 3d 290, 295, 2006-Ohio-2420, 847 N.E.2d 420, 425, at ¶ 27 (holding modified by *Epic Aviation, L.L.C.*, at ¶ 27) (emphasis added).

Second, the Ohio Supreme Court explicitly modified this ruling in the later decided *Epic Aviation*, where it stated that the governmental regulation requirement is no longer determinative. The Ohio Supreme Court reasoned that, "In affirming the BTA's decision in *Castle Aviation*, we essentially narrowed the focus to a single criterion, which was 'special regulation and control by a governmental agency.'" *Id.* at ¶ 27. In doing so, we ignored the common-carrier standard that had previously been established." *Epic Aviation* at ¶ 24.

In *Epic Aviation,* the Ohio Supreme Court reaffirmed that the public utility test is closer to the common carrier test, focusing on "the distinctive characteristic of a common carrier [is] that it undertook to carry for all people, indifferently, as opposed to private carriers, who were not obligated to carry unless the obligation was 'voluntarily assumed by virtue of a special contract.'" *Id.* at ¶ 23 (quoting *Sundorph Aeronautical Corp. v. Lindley*, BTA No. 82–D–842, 1986 WL 28027, *5 (Jan. 10, 1986)).

Both *Castle Aviation* and Google rely upon the *Rumpke* case for the proposition that, "[T]he lack of governmental regulation means that Rumpke [or any other firm] 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" and therefore the public concern prong is not met. *Rumpke* at ¶ 34. *Rumpke* is neither applicable nor good law in light of *Epic Aviation.*

Like *Castle Aviation, Rumpke* does not purport to provide a general definition of "public utility" applicable in this case but carefully circumscribes its ruling "[t]o determine 'public utility' status for purposes of the R.C. 519.211(A) exemption." *Rumpke* at ¶ 10. As set forth above, "public utility" in Ohio has a common law meaning independent of statute—and it is under that legal category that the Ohio Attorney General asks this court to act.

Even more important, it appears that *Rumpke* is the first case which even states the rule that "[T]he lack of governmental regulation means that . . . general public has no legal right to demand or receive Rumpke's services." *Id.* at ¶ 34. And, that, therefore, a "common-law public utility" *cannot* exist "when there is no public regulation or oversight of its rates and charges." *Id.* at ¶ 36. In short *Rumpke* is the first case to make government regulation a *necessary condition* for public utility status.

In contrast, all prior cases simply viewed the existence of governmental regulation as one factor in the public concern test as the Ohio Supreme Court says in *Campanelli*:

> Although no one factor is controlling in determining whether an entity conducts its operation in such a manner as to be a matter of public concern, we must weigh several, including lack of competition in the local marketplace, the good or service provided, and the existence of regulation by government authority, in order to determine whether an entity conducts its business in such a way as to become a matter of public concern. *Campanelli v. AT&T Wireless Serv., Inc.*, 85 Ohio St. 3d 103, 106, 1999-Ohio-437, 706 N.E.2d 1267, 1269 (citing *A & B Refuse* at 388, 596 N.E.2d at 426).

And it is to the *Campanelli* approach that *Epic Aviation* returns Ohio law.

*Rumpke*, however, reaches its contrary conclusion only relying upon *A & B Refuse Disposers, Inc. v. Ravenna Twp. Bd. of Trustees*, 64 Ohio St. 3d 385, 389–90, 1992-Ohio-23, 596 N.E.2d 423, 427. *See Rumpke* at ¶¶ 29, 36. This reliance is not obvious. *A & B Refuse* expressly rejects the claim in *Rumpke* that a common-law public utility must have "public regulation or oversight of its rates and charges." It states explicitly that " the fact that a business is regulated by a governmental body, including a public utilities commission, is not dispositive of the question of whether that business is a "public utility". . . Rather, such a designation is simply evidence of that status." *A & B Refuse Disposers*, 64 Ohio St. 3d at 389–90, 596 N.E.2d at 427 (citing *McGinnis v. Quest Microwave*).

It is, therefore, not surprising nearly every other Ohio case determining public utility status does not make "public regulation or its oversight or rates" a necessary condition—but at most recognizes it as one, nondeterminative factor in multifactored analysis.[1] Nor is it surprising that Ohio Supreme Court in *Epic Aviation* rejected and reversed the *Rumpke-Castle Aviation* position.

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[1] *See,e.g., Consol. Elec. Co-op., Inc. v. Brown Twp.*, 2007-Ohio-3507, at ¶ 16 ("Courts must weigh several factors, no single one of which is controlling. The factors include lack of competition in the local marketplace, the goods or services provided, and the existence of regulation by government authority"); *St. Marys v. Auglaize Cty. Bd. of Commrs.*, 115 Ohio St. 3d 387, 396, 2007-Ohio-5026, 875 N.E.2d 561, 571, at ¶ 58 ("In determining whether an entity conducts itself in such a way as to become a matter of public concern, courts look to the good or service provided, competition in the local marketplace, and regulation by a governmental authority."); *Wash. Twp. Trustees v. Davis*, 95 Ohio St. 3d 274, 278, 2002-Ohio-2123, 767 N.E.2d 261, 265, at ¶ 18 ("Factors considered for this purpose are goods or services provided, competition in the local marketplace, and the existence and degree of regulation by governmental authority"); *Victor Varian Osnaburg Twp. Zoning Insp. v. Levy*, No. 1998CA00278, 1999 WL 668844, at *4 (Ohio Ct. App. 1999) ("'we must weigh several [factors], including lack of competition in the local marketplace, the good or service provided, and the existence of regulation by government authority, in order to determine whether an entity conducts its business in such a way as to become a matter of public concern.'") (quoting *Campanelli v. A & T Wireless Serv., Inc.* (1999), 85 Ohio St.3d 103, 106, 706 N.E.2d 1267, citing *A & B Refuse*, *supra.* at 388).

### B. Google Satisfies The Public Utility Test

Google is a public utility. First, as discussed in common carriage section *supra*, it offers its services to an indefinite public—all citizens of Ohio can use its services. It is indiscriminate in its offerings. All may use it without special contract or agreement, thereby satisfying the public service test.

Second, Google qualifies as a matter of public concern. Although "no one factor is controlling in determining whether an entity conducts its operation in such a manner as to be a matter of public concern," the Ohio Supreme Court states that several factors must be weighed, specifically the "lack of competition in the local marketplace, the good or service provided, and the existence of regulation by government authority, in order to determine whether an entity conducts its business in such a way as to become a matter of public concern." *Campanelli v. AT&T Wireless Serv., Inc.*, 85 Ohio St. 3d 103, 106, 1999-Ohio-437, 706 N.E.2d 1267, 1269 (citing *A & B Refuse*, 596 N.E.2d at 388, 426).

The Attorney General of Ohio has alleged facts that meet these tests. First, the monopolistic and anticompetitive behavior of Google has received extensive scrutiny in the United States and in Europe. There are numerous antitrust lawsuits currently pending against it.[2] Second, Google has become an essential facility in today's world relied upon for business, social, and political life.

Finally, accepting *arguendo* Google's claim that government regulation is necessary for the public concern test, the Federal Communications Commission has already stated that it has jurisdiction under section 230 to regulate legal obligations of Google and other information service providers on the internet. *See* Thomas M. Johnson Jr., *The FCC's Authority to Interpret Section*

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[2] Rachel Kraus, *A running list of American antitrust lawsuits against Google and Facebook*, MASHABLE, (Dec. 17, 2020), https://tinyurl.com/ku3z2bv6.

*230 of the Communications Act*, FCC (Oct. 21, 2020), https://www.fcc.gov/news-events/blog/2020/10/21/fccs-authority-interpret-section-230-communications-act ("Section 230 provides websites, including social media companies, that host or moderate content generated by others with immunity from liability. . . . the FCC has the authority to interpret all provisions of the Communications Act, including amendments such as Section 230"). It has an open proceeding contemplating direct regulation of Google and other internet platforms. *See Chairman Pai on Seeking Public Comment on NTIA's Sec. 230 Petition*, FCC (Aug. 3, 2020), https://www.fcc.gov/document/chairman-pai-seeking-public-comment-ntias-sec-230-petition.

## III. FIRST AMENDMENT

The Ohio AG lawsuit seeks to impose economic regulations to restrict Google's self-dealing and discriminatory behavior. Common carriers face these obligations as do other, garden-variety firms under antitrust and consumer protection laws. Courts have upheld these laws and regulatory regimes for centuries against First Amendment challenge. Second, it is well-established that common carriers enjoy only highly limited First Amendment rights, if at all. Third, if the First Amendment were to apply, the proper standard is not strict scrutiny but rather intermediate scrutiny appropriate for large communications platforms, as set forth in *Turner v. FCC,* or for commercial speech.

It is well established that common carriers have few if any First Amendment protection from mandated access. They have a duty to serve all. A "common carrier . . . must provide communications facilities to those who desire access for their own purpose." *All. for Cmty. Media v. F.C.C.*, 56 F.3d 105, 123 (D.C. Cir. 1995) (citing *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689, 699, 99 S. Ct. 1435, 1441, 59 L. Ed. 2d 692 (1979)).

This obligation places common carriers outside the protections offered other media and other corporations. Common carriers are not "entitled under the First Amendment to exercise 'the

widest journalistic freedom consistent with their public [duties].'" *F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 378 (1984). Rather, they must carry messages whether they agree with them or not, allowing all to access their services. "[E]qual access obligations of that kind have long been imposed on telephone companies, railroads, and postal services, without raising any First Amendment issue." *United States v. W. Elec. Co.*, 673 F. Supp. 525, 586 (D. D.C. 1987), *aff'd in part, rev'd in part sub nom. United States v. W. Elec. Co.*, 900 F.2d 283 (D.C. Cir. 1990). Given its regulatory status as a common carrier, Google cannot look to the First Amendment to shield it from the quite minimal duties of impartial access and non-discriminatory treatment of users that the Ohio Attorney General seeks to impose.

In addition to its common carrier status, Google, as a dominant communications network, has limited protection from obligations to carry messages as the Supreme Court made clear in *Turner Broadcasting v. F.C.C.* There, the Federal Communications Commission required cable systems to carry over-the-air broadcast stations' programming. Even though the cable systems were *not* common carriers, the Supreme Court upheld the access mandates under intermediate scrutiny.

The Supreme Court reasoned that Congress could subject the cable systems, consistent with the First Amendment, with these carriage obligations due to the "special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 661 (1994). This is the precise situation here. The Ohio Attorney General seeks to ensure that Google's market power is not used to unfairly advantage or preference its own business at the expense of consumers and a competitive, vibrant internet.

The remedies that the Ohio Attorney General seeks are simply economic regulations which the First Amendment does not limit. The Supreme Court has long held that economic regulation of communications firms do not implicate the First Amendment at all, particularly those aimed at increasing the options for free and open speech. Upholding an antitrust requirement prohibiting the Associated Press from discriminating against certain newspapers by refusing to license them stories, the Court reasoned "[i]t would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom" through antitrust and other economic regulations. *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

Similarly, the Supreme Court in *PruneYard Shopping Ctr. v. Robins* upheld a state law requiring businesses to host speech. 447 U.S. 74, 88 (1979). The Court has reaffirmed repeatedly that businesses do not have a First Amendment right to exclude individuals from using their services. *Rumsfeld v. F. for Acad. and Inst. Rts., Inc.*, 547 U.S. 47, 59–60 (2006). Google, therefore, cannot claim an absolute right—in the First Amendment at least—to control content on their search engine.

The remedies the Ohio Attorney General seeks are equivalent to the access requirements placed on AT&T under its break-up pursuant to the DOJ's antitrust suit—or the antitrust requirement that the Associated Press transmit its articles to all newspapers who seek them. It is "beyond dispute" that the government can subject firms to "generally applicable economic regulations without creating constitutional problems." *Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 581, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983).

## CONCLUSION

For the forgoing reasons, Google's Motion to Dismiss should be overruled.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I certify that on September 14, 2021, the foregoing was electronically filed via the Court's e-Filing System, which will send notice to counsel of record.

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4817-0055-5771.1