IN THE COURT OF COMMON PLEAS, DELAWARE COUNTY, OHIO

STATE OF OHIO EX REL. DAVE YOST,	)	
Plaintiff,	)	No. 21 CV H 06 0274.
	)	Judge James P. Schuck
v.	)	
GOOGLE LLC,	)	
Defendant.	)	

BRIEF OF TECHFREEDOM AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

January 26, 2024

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SUMMARY OF ARGUMENT

The growth of the Internet has spurred fresh debate about what one might call the ontology of a common carrier: What are a common carrier's quintessential attributes? It's not a settled question. But there's arguably one truly necessary element. "What appears to be essential" to the "common carrier concept" is that "the carrier undertakes to carry for all people *indifferently*." *NARUC v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) (emphasis added) (cleaned up). A search engine does not, and cannot, cohere with this principle of non-discrimination. And that tells us two things. First, search engines aren't common carriers—not under any plausible definition of the term. Second, if Ohio tried simply to declare search engines to be common carriers anyway, the First Amendment would forbid it.

I. Throughout its history, common carrier law has involved the state requiring non-discrimination in the transportation of commodity material or information. Search engines do not passively carry undifferentiated widgets in this way. What they do is *organize* information, ranking it based on certain criteria of relevance. This takes search engines far outside of the concept of common carriage, both as traditionally understood and as understood in more recent times by the Federal Communications Commission. Fundamentally, in fact, search engines *simply can't* be common carriers. The *whole point* of a search engine is to

discriminate between relevant and irrelevant content. A search engine could not "rank" content indifferently if it tried; it would no longer be a *search* engine.

II. When they sort and rank content—by doing the *opposite*, in other words, of presenting content indiscriminately—search engines engage in the exercise of editorial control and judgment. Search engines therefore enjoy full First Amendment protection. An entity's First Amendment protection does not magically go away just because the state tries to label that entity a "common carrier." A state cannot use a common carrier law to force a newspaper to carry certain op-eds or a parade to include certain groups. Likewise, a state cannot use a common carrier law to force a search engine to produce certain search results.

ARGUMENT

I. A SEARCH ENGINE IS NOT—AND CANNOT BE—A COMMON CARRIER.

Lumber is lumber. Once it has arrived at a construction site, one two-by-four (of a certain grade) is generally as good as another. How the wood got to the site is, for purposes of the construction itself, irrelevant. Putting common carriage in its proper historical context begins with this fundamental point. The "business of common carriers" is, at its core, "the transportation of property." *German Alliance Ins. Co. v. Kansas*, 233 U.S. 389, 406 (1914). "Historically, common carriers have been those businesses providing physical means of transportation for goods or people." *Republican Nat'l Comm. v. Google Inc.*, No. 2:22-cv-1904, Dkt. 53 at 16

(E.D. Cal. Aug. 24, 2023). See Interstate Commerce Act, 24 Stat. 379, 379-80 (1887) (governing "transportation of passengers or property").

True, the "transmission of intelligence" has sometimes been treated as "of cognate character" to traditional common carriage. *German Alliance*, 233 U.S. at 406-07. But such carriage, in the fields of telephony and telegraphy, continued to bear a "direct relation to the business or facilities of *transportation*" itself. *Id*. at 426 (Lamar, J., dissenting) (emphasis added). Although it contains a message, a telegram is best thought of as a widget of private information, conveyed along "public ways," by a commodity carrier. *Id*.; see Mann-Elkins Act, 36 Stat. 539, 544-45 (1910).

Search engines are nothing like this. They do not passively "carry" information. Indeed, they don't "actually carry or transport" anything at all. *Republican Nat'l Comm*, No. 2:22-cv-1904, Dkt. 53 at 21. What they do is *organize* information, thereby enabling users to "sift through the ever-growing avalanche of desired content that appears on the Internet every day." Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 Geo. Wash. L. Rev. 697, 701 (2010). Google's great innovation, in this regard, was to use "the volume of links from other sites as a criterion for ranking search results." Eugene Volokh & Donald M. Falk, *First Amendment Protection for Search Engine Search Results*, UCLA School of Law Research

Paper No. 12-22, 11 (2012). Google is not an indiscriminate shipper of Internet widgets, treating websites like lumber—as though any website, for any given search query, were as good as any other. Google offers not a *transportation* service but a *ranking* service, one that's primarily "the result of [its] engineers' editorial judgment that inbound links provide[] a sound and quantifiable measure of a site's value." *Id.*

The FCC's approach to common carriage is consistent with (and bolsters) everything said to this point. Although the FCC has waffled over whether broadband is common carriage, for instance, what's clear is that if an Internet service provider explicitly "hold[s] itself out as providing something other than a neutral, indiscriminate pathway," it is not a common carrier. *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 389 (D.C. Cir. 2017) (Srinivasan, J., concurring in denial of rehearing en banc). So long as it's upfront about what it's doing, an ISP that would rather engage in "editorial intervention"—and, thus, not common carriage—is free to do so. *Id*. Yet such "editorial intervention," in the form of sorting and curating information, is the *central feature* of the service a search engine offers.

And even if broadband is common carriage, as the FCC (sometimes) believes, that tells us nothing about search engines. The FCC has long distinguished between "basic" (common carrier) services, which simply carry data along, and "enhanced" services, which process data in some way. See, e.g., FCC,

Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384, 420, ¶ 97 (1980). Any service that offers more than "pure transmission capability" is an "enhanced" service. *Id.* In FCC parlance, search engines are clearly "enhanced" services: they crawl the web, gather webpages, and rank those pages—using extraordinarily complex algorithmic functions—in response to specific queries. See, e.g., Google, *A Guide to Google Search Ranking Systems*, http://tinyurl.com/4axtyvj9 (last accessed Jan. 22, 2024). Nothing could be further from the kind of "conduits" or "dumb wires" that are the stuff of the telegraph, the telephone, or common carriage more broadly.

When common carriage is debated in the context of social media—as is occurring at the Supreme Court right now, in the "NetChoice" cases, see *Moody v. NetChoice*, No. 22-277 (U.S.); *NetChoice v. Paxton*, No. 22-555 (U.S.)—there is, looming in the background, at least the theoretical possibility that services could be required to provide a chronological feed (or no feed at all). No comparable possibility exists for a search engine. A so-called search engine that "ranked" content indifferently (whatever that might mean) would, in a quite literal sense, not be a *search* engine. It'd be a service that offers up the very data flood—the vast and bewildering wilderness of the worldwide web—that search engines were invented to sort, narrow, and control.

II. SIMPLY "DECLARING" A SEARCH ENGINE TO BE A COMMON CARRIER WOULD VIOLATE THE FIRST AMENDMENT.

"The First Amendment protects acts of expressive association." *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2312 (2023). It ensures that a speaker cannot be "force[d]" to "include other ideas," in his message, that "he would prefer not to include." *Id*. This is a right to "editorial control and judgment" over the speech one disseminates. *Miami Herald v. Tornillo*, 418 U.S. 241, 258 (1974).

This First Amendment right to editorial control protects search engines just as much as it protects newspapers, *Miami Herald*, 418 U.S. 241, or parades, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). "When search engines select and arrange others' materials, and add the all-important ordering that causes some materials to be displayed first and others last, they are engaging in fully protected First Amendment expression." Volokh & Falk, supra, at 15-16. See *id*. at 6-7 (collecting cases); *Zhang v. Baidu.com*, 10 F. Supp. 3d 433, 438, 443 (S.D.N.Y. 2014).

Ohio acts as though the "common carrier" label somehow evades or overcomes search engines' First Amendment protections. But it does not. Simply "labeling" a search engine a "common carrier" has "no real First Amendment consequences." *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 825 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part). The Eleventh Circuit understood as much, in the NetChoice cases, in regard to

social media. *NetChoice, LLC v. Att'y Gen. of Florida*, 34 F.4th 1196, 1221 (11th Cir. 2022) ("Neither law nor logic recognizes government authority to strip an entity of its First Amendment rights merely by labeling it a common carrier."). So did the dissent in the Fifth Circuit. *NetChoice, LLC v. Paxton*, 49 F.4th 439, 505 (5th Cir. 2022) (Southwick, J., dissenting) ("A common carrier designation, which I doubt is appropriate, would not likely change any of my preceding analysis."). And so did the Supreme Court when, just last term, in *303 Creative v. Elenis*, it distinguished between a law "requiring an ordinary, non-expressive business to serve all customers," on the one hand, and a law that compels speech in violation of the First Amendment, on the other. 143 S. Ct. at 2319 n.5. See also *id*. at 2315 ("When a state public accommodations law and the Constitution collide, there can be no question which must prevail."); *PG&E v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 17 n.14 (1986) ("Appellees also argue that appellant's status as a regulated utility company lessens its right to be free from state regulation that burdens its speech. We … reject[] this argument.").

The First Amendment law for common carriers is just regular old First Amendment law. "[W]hat is true for parades and newspaper op-ed pages is at least as true for search engine output." Volokh & Falk, supra, at 15-16. Search engines are, to repeat, "engaging in fully protected First Amendment expression." *Id*. Ohio cannot use its common carrier law to dictate the content of a search engine's search

results any more than it could use that law to dictate the content of a newspaper's op-eds or a parade's floats.

CONCLUSION

The motion should be granted.

Respectfully submitted,

January 26, 2024

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