IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO, FIFTH APPELLATE DISTRICT

STATE OF OHIO EX REL. DAVE YOST,	)	
Plaintiff-Appellant,	)	No. 25 CAE 08 0070
v.	)	
GOOGLE LLC,	)	
Defendant-Appelle.	)	

BRIEF OF *AMICUS CURIAE* TECHFREEDOM IN SUPPORT OF APPELLEE AND AFFIRMANCE

Pursuant to ORAP, Rule 17, all parties consented to the filing of this brief.

December 19, 2025

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INTEREST OF AMICUS CURIAE

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible.

TechFreedom has long been a leading voice in opposition to efforts to impose onerous common carrier rules on the Internet. See, e.g., FCC, *Restoring Internet Freedom Order*, 33 FCC Rcd 311 (2018) (citing TechFreedom's comments 29 times). TechFreedom has also long been a leading voice in opposition to government attempts to control online speech. See, e.g., *NetChoice v. Moody*, 34 F.4th 1196, 1219 n.17 (11th Cir. 2022) (quoting TechFreedom's amicus brief). This case involves both these issues. In this case, the urge to abuse the concept of common carriage, and the urge to control speech on the Internet, enter into unholy alliance.

TechFreedom has no parent corporation, it issues no stock, and no publicly held corporation owns an interest in it. No party's counsel authored any part of this brief. No one, apart from TechFreedom and its counsel, contributed money intended to fund the brief's preparation or submission.

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, as understood both historically and in modern telecommunications law. 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 social media platform to boost certain posts, 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), appealed, No. 24-5358 (9th Cir.). 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.*

Modern telecommunications law bolsters everything said to this point. 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 Dec. 12, 2025). 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.

The basic/enhanced distinction was codified, in the Telecommunications Act of 1996, as a distinction between "information" services and "telecommunications" services. Earlier this year, the U.S Court of Appeals for the Sixth Circuit ruled that broadband is, as a matter of law, an information service—in other words, *not* common carriage. *In Re: MCP No. 185*, 124 F.4th 993 (6th Cir. 2025). There is, quite simply, no reasonable argument under which an Internet service provider is *not* a common carrier, but a search engine *is* one. Broadband enables users to retrieve, store, and publish information via email, websites, social media, and more—but the process is highly self-directed by the user ("take me to *this* website," "send *this* email"). With a search engine, the user is in effect telling an agent to comb through information, assess it, and then present what is pertinent ("*find* pumpkin-pie recipes, *rank* them, and show me the *best* ones"). A search engine does vastly more discretionary sorting and arranging of data than does an ISP.

Before the Sixth Circuit's ruling, the FCC spent years waffling over broadband's status (information service or telecommunications service). But even when that status was unsettled, this much was clear: an ISP that *curated* content—that acted like something *closer* to a search engine—was *not* a common carrier. An

ISP was not a common carrier, in other words, if it explicitly "h[e]ld itself out as providing something other than a neutral, indiscriminate pathway." *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). As long as it was up front about what it was doing, an ISP that wanted to engage in "editorial intervention"—and, thus, *not* common carriage—was free to do so. *Id.* Such "editorial intervention," in the form of sorting and curating information, is the central feature of the service a search engine offers.

Social media is not common carriage. Cf. *Moody v. NetChoice*, 603 U.S. 707 (2024). But when people claim that it is, 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 would 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*, 600 U.S. 570, 586 (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. *Moody*, 603 U.S. at 708 (quoting *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 social media, *Moody*, 603 U.S. 707, or 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).

The "common carrier" label does not somehow evade or overcome search engines' First Amendment protections. 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 U.S. Court of Appeals for the Eleventh Circuit understood as much about 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."); see also *NetChoice, LLC v. Paxton*, 49 F.4th 439, 505 (5th Cir. 2022) (Southwick, J., dissenting). So did the U.S. Supreme Court when, 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. 600 U.S. 570 at 597 n.5; see also *id.* at 594 ("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"—and social media platforms, *Moody*, 603 U.S. 707—"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 social media platform's newsfeed, a newspaper's op-eds, or a parade's floats.

CONCLUSION

The Court should affirm.

Respectfully submitted,

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December 19, 2025

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 Court of Appeals for Delaware County, Fifth Appellate District.

Dated: December 19, 2025

/s/John C. Camillus
John C. Camillus