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,	)	
Defendant.	)	

AMICUS MEMORANDUM OF
THE INTERNATIONAL CENTER FOR LAW AND ECONOMICS
IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTEREST OF *AMICUS*[1]

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ICLE has an interest in ensuring that First Amendment law promotes the public interest by remaining grounded in sensible rules informed by sound economic analysis. ICLE scholars have written extensively in the areas of free speech, telecommunications, antitrust, and competition policy. This includes white papers, law journal articles, and amicus briefs touching on issues related to the First Amendment and common carriage regulation, and competition policy issues related to alleged self-preferencing by Google in its search results.

INTRODUCTION

Google's mission is to "organize the world's information and make it universally accessible and useful." *See Our Approach to* Search, GOOGLE (last accessed Jan. 18, 2024), https://www.google.com/search/howsearchworks/our-approach/. Google does this at zero price, otherwise known as free, to its users. This generates billions of dollars of consumer surplus per year for U.S. consumers. *See* Avinash Collis, *Consumer Welfare in the Digital Economy*, *in* THE GLOBAL ANTITRUST INSTIT. REPORT ON THE DIGITAL ECONOMY (2020), *available at* https://gaidigitalreport.com/2020/08/25/digital-platforms-and-consumer-surplus/.

This incredible deal for users is possible because Google is what economists call a multisided platform. *See* DAVID S. EVANS & RICHARD SCHMALENSEE, MATCHMAKERS: THE NEW ECONOMICS OF MULTISIDED PLATFORMS 10 (2016) ("Many of the biggest companies in the world, including…

[1] *Amicus* state that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amicus* and its counsel made any monetary contribution toward the preparation and submission of this brief.

Google… are *matchmakers*… [M]atchmakers' raw materials are the different groups of customers that they help bring together. And part of the stuff they sell to members of each group is access to members of the other groups. All of them operate physical or virtual places where members of these different groups get together. For this reason, they are often called *multisided platforms*."). On one side of the platform, Google provides answers to queries of users. On the other side of the platform, advertisers, pay for access to Google's users, and, by extension, subsidize the user-side consumption of Google's free services.

In order to maximize the value of its platform, Google must curate the answers it provides in its search results to the benefit of its users, or it risks losing those users to other search engines. This includes both other general search engines and specialized search engines that focus on one segment of online content (like Yelp or Etsy or Amazon). Losing users would mean the platform becomes less valuable to advertisers.

If users don't find Google's answers useful, including answers that may preference other Google products, then they can easily leave and use alternative methods of search. Thus, there are real limitations on how much Google can self-preference before the incentives that allowed it to build a successful platform unravel as users and therefore advertisers leave. In fact, it is highly likely that users of Google search *want* the integration of direct answers and Google products, and Google provides these results to the benefit of its users. *See* Geoffrey A. Manne, *The Real Reason Foundem Foundered,* at 16 (ICLE White Paper 2018), https://laweconcenter.org/wp-content/uploads/2018/05/manne-the_real_reaon_foundem_foundered_2018-05-02-1.pdf ("[N]o one is better positioned than Google itself to ensure that its products are designed to benefit its users").

Here, as has been alleged without much success in antitrust cases, *see United States v. Google*, LLC, 2023 WL 4999901, at *20-24 (D. D.C. Aug. 4, 2023) (granting summary judgment in favor of Google on antitrust claims of self-preferencing in search results), the alleged concern is that Google preferences itself at the expense of competitors, and to the detriment of its users. *See* Complaint ("Google intentionally structures its Results Pages to prioritize Google products over organic search results."). Ohio asks the court to declare Google a common carrier and subject it to a nondiscrimination requirement that would prevent Google from prioritizing its own products in search results.

The problem, of course, is the First Amendment. Federal district courts have consistently found that the First Amendment protects how providers structure search results. *See, e.g.*, *e-ventures Worldwide, LLC v. Google, Inc*., 2017 WL 2210029 (M.D. Fla., Feb. 8, 2017); *Jian Zhang v. Baidu.com Inc*., 10 F. Supp. 3d 433 (S.D. N.Y., Mar. 28, 2014); *Langdon v. Google, Inc*., 474 F. Supp. 2d 622 (D. Del. 2007); *Search King, Inc. v. Google Tech., Inc.*, 2003 WL 21464568 (W.D. Okla., May 27, 2003).

While Ohio and their amici argue that Google should be considered a common carrier, and thus be subject to a lower standard of review for First Amendment purposes, there is no legal basis for such a conclusion.

First, common carriage is a poor fit for Google's search product. Courts have rejected monopoly power or being "affected with a public interest" as the proper prerequisites for common carrier status. Ohio, like other jurisdictions, has found that the "fundamental test of common carriage is whether there is a public profession or *holding out* to serve the public." *Girard v. Youngstown Belt Ry. Co.*, 134 Ohio St. 3d 79, 89 (2012) (emphasis added). *See also Loveless v. Ry. Switching Serv., Inc.*, 106 Ohio App. 3d 46, 51 (1995) ("The distinctive characteristic of a

common carrier is that he undertakes to carry for all people indifferently and hence is regarded in some respects as a public servant.") (internal quotations omitted). Google simply does *not* carry information in an undifferentiated way comparable to a railroad carrying passengers or freight. It is rather a service that explicitly differentiates and prioritizes answers to queries by providing individualized responses based upon location, search history, and other factors.

Second, as mentioned above, Google's search results are protected by the First Amendment, and simply "[l]abeling" Google "a common carrier… has no real First Amendment consequences." *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 825 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part). As this court stated, it is the nondiscrimination requirement sought by Ohio that is subject to First Amendment scrutiny, not the common carriage label itself. *See* Motion to Dismiss Opinion at 16. And any purported nondiscrimination requirement should be subject to strict scrutiny, as such a requirement would constrain Google's own speech in the form of its carefully tailored search results, and not simply the speech of others.

ARGUMENT

I. Common Carriage is a Poor Fit as Applied to Google's Search Product

There is a long history of common carriage regulation in this country. But there has not always been universal agreement on what constitutes the defining feature of a common carrier, with proposed justifications ranging from monopoly power (or natural monopoly) to being affected by the public interest. Over time, though, courts and commentators, including Ohio courts, have agreed that common carriage is primarily about holding oneself out to serve the public indiscriminately.

Simply put, Google Search does not hold itself out to, nor does it actually serve, the public indiscriminately by carrying information, either from users or from other digital service providers.

It provides individualized and tailored answers to users' queries, which may include Google products, direct answers, or general information its search crawlers have learned about other service providers on the Internet.

A. Common Carriage is *Not* About Monopoly Power or the Public Interest, It's About Holding Oneself Out to Serve the Public Indiscriminately

In its complaint, Ohio makes much of Google's market share in search. *See* Complaint para. 19-32. Amici also argue that the "immense market dominance" of Google makes it a common carrier analogous to telegraphs or telephones. *See* Claremont Amicus at 6. Similarly, both Ohio and amici argue that Google's search results are affected by a public interest. *See* Complaint at 40; Claremont Amicus at 3-4.

Whatever the market share of Google search, common law courts, including those of Ohio, do not find monopoly power to be a part of the definition of common carriage. For instance, the presence of competition for innkeepers did not mean they were not subject to requirements to serve. *See* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1319-20 (1996) ("On the monopoly rationale, it is important to note that none of the antebellum cases bases the duty to serve on the fact of monopoly. Indeed, the presence of competition was never a reason for denying the duty to serve in the antebellum era. In many towns, there were several innkeepers and cities like Boston had dozens of innkeepers. Yet, no lawyer, judge, or treatise writer ever suggested that innkeepers in cities like Boston should be exempt from the duty to serve the public."). Nor does the presence of monopoly necessarily lead to common carriage treatment under the law. *See* Blake Reid, *Uncommon Carriage*, at 25, 76 STAN. L. REV., *forthcoming* (2024) ("[F]irms holding effective monopolies or oligopolies in a wide range of sectors, including pharmacies and drug stores, managed healthcare providers, office supply stores, eyeglass sellers, airlines, alcohol distribution, and even candy are not widely

regarded or legally treated as common carriers."). Accordingly, Ohio does not define common carriage in relation to monopoly power. *Cf. Kinder Morgan Cochin LLC v. Simonson*, 66 N.E. 1176, 1182 (Ohio Ct. App. 5th Dist. Ashland County 2016) (failing to mention monopoly as part of the definition of common carrier).

Moreover, while older cases and commentators cite the "affected with a public interest" standard, courts have moved away from it because of its indeterminacy. *See Biden v. Knight First Amendment Inst*., 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring) (this definition is "hardly helpful, for most things can be described as 'of public interest.'"). *See also* Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. OF FREE SPEECH L. 463, 468-69 (2021).

Instead, the definition of common carriage under Ohio law is defined as holding itself "out to the public as ready and willing to serve the public indifferently." *See Kinder Morgan Cochin*, 66 N.E. at 1182; *Girard v. Youngstown Belt Ry. Co.*, 134 Ohio St. 3d 79, 89 (2012); *Loveless v. Ry. Switching Serv., Inc.*, 106 Ohio App. 3d 46, 51 (1995).

B. Google Does Not Offer an Undifferentiated Search Product to Its Users

With this definition in mind, Google is not a common carrier. Google does not offer an undifferentiated service to its users like a pipeline (like in *Kinder Morgan Cochin*) or railroad (like in *Girard* or *Loveless*), or even like a mall offering an escalator to customers (like in *May Department Stores Co. v. McBride*, 124 Ohio St. 264 (1931)). Nor does it offer to "communicate or transmit" information of "their own design and choosing" to users. *See FCC v. Midwest Video Corp*., 440 U.S. 689, 701 (1979) (defining common carrier services in the communications context). Instead, it offers a tailored search result to its users. *See* Complaint at paras. 17-18 (noting that search results depend on location); *How Search work with your activity*, GOOGLE (last

accessed Jan. 18, 2024), https://support.google.com/websearch/answer/10909618 ("When you search on Google, your past searches and other info are sometimes incorporated to help us give you a more useful experience."). This is *not* a common carrier in the communications context. *See Midwest Video*, 440 U.S. at 701 ("A common carrier does not make 'individualized decisions, in particular cases, whether on what terms to deal.'") (quoting *Nat'l Ass'n of Reg. Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976)).

For instance, if a user searches for restaurants, Google's algorithm may not only take into consideration the location of the user, but also whether the user previously clicked on particular options when running a similar query, or even if the user visited a particular restaurant's website. While the results are developed algorithmically, this is much more like answering a question than it is transporting a private communication between two individuals like a telephone or telegraph.

Importantly, users often receive a *different* result even for the same search. *See Why your Google Search results might differ from other people*, GOOGLE (last accessed Jan. 18, 2024), https://support.google.com/websearch/answer/12412910 ("You may get the same or similar results to someone else who searches on Google Search. But sometimes, Google may give you different results based on things like time, context, or personalized results."). Google is clearly making "'individualized' content- and viewpoint-based decisions" when it comes to search results. *Cf. Moody v. NetChoice,* 34 F.4th 1196, 1220 (11th Cir. 2022) (quoting *Midwest Video*, 440 U.S. at 701).

While the court emphasized at the motion to dismiss stage that a reasonable factfinder could find Google offers to hold itself out to the public in its mission "to organize the world's information and make it universally accessible and universal," *see* MTD Opinion at 7, this does not "change [its] status to common carrier[]… unless [it] undertake[s] to carry for all people indifferently."

Loveless, 106 Ohio App. 3d at 52. As the above facts demonstrate, there is no basis for finding that Google search offers an undifferentiated product to its users. The court should find Google is not a common carrier under Ohio law.

II. Google's Search Results are Protected by the First Amendment from Common Carriage Nondiscrimination Requirements

Ohio ultimately seeks to restrict the ability of Google to favor its own products in its search results. But this runs into a real constitutional problem: search results are protected by the First Amendment.

Moreover, as this court has previously found, the First Amendment scrutinizes not the label of common carriage, but the burdens which come with it. Here, the nondiscrimination requirement Ohio asks for is what is at issue.

This nondiscrimination requirement is inconsistent with the First Amendment. While this court thought it should be subject to intermediate scrutiny, the First Amendment requires strict scrutiny when speech is compelled. The cases cited by the court are inapposite when a speaker is delivering its own message, i.e. search results, rather than simply hosting speech of others.

A. Federal District Court Cases Establish Google Search Results are Protected by the First Amendment

While no appellate court has considered the issue, several federal district courts have recognized search engines have a First Amendment interest in their search results. Some decisions have framed the results themselves as speech. Others have considered the issue as one of editorial judgment. But under either approach, Google Search results are protected by the First Amendment.

For instance, in *Jian Zhang v. Baidu.com*, 10 F. Supp. 3d 433 (S.D. N.Y. Mar. 28, 2014), the court found that the application of a New York public accommodations law to a Chinese search engine that "censored" pro-democracy speech is inconsistent with the right to editorial discretion.

The court found that "there is a strong argument to be made that the First Amendment fully immunizes search-engine results from most, if not all, kinds of civil liability and government regulation." *Id.* at 438. The court noted that "the central purpose of a search engine is to retrieve relevant information from the vast universe of data on the Internet and to organize it in a way that would be most helpful to the searcher. In doing so, search engines inevitably make editorial judgments about what information (or kinds of information) to include in the results and how and where to display that information (for example, on the first page of the search results or later)." *Id.* Other courts have similarly found search engines have a right to editorial discretion over their results. *See also e-ventures Worldwide, LLC v. Google, Inc.*, 2017 WL 2210029, at *4 (M.D. Fla. Feb. 8, 2017); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-30 (D. Del. 2007).

In this sense, Google's search results are analogous to the decisions of what to print made by the newspaper in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), or the parade organizer in *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557 (1995).

At least one court has found that search results themselves are protected opinions. In *Search King Inc. v. Google Technology, Inc.*, 2003 WL 21464568, at *4 (WD. Okla. May 27, 2003), the court found that search results "are opinions—opinions of the significance of particular web sites as they correspond to a search query. Other search engines express different opinions, as each search engine's method of determining relative significance is unique."

Under this line of reasoning, Google's responses to queries are opinions directing users to what it thinks is the best answer given all the information it has on the user, her behavior, and her preferences. This is in itself protected speech. *Cf.* Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Results*, 8 J. L. ECON. & POL'Y 883, 884 (2012) ("[S]earch

engines are speakers… they convey information that the search engine has itself prepared or compiled [and] they direct users to material created by others… Such reporting about others' speech is itself constitutionally protected speech.").

In sum, the First Amendment protects Google's search results.

B. A Common Carriage Label Does Not Change First Amendment Analysis

Amici argued that because Google is a common carrier, the nondiscrimination requirement is merely an economic regulation that is not subject to heightened First Amendment scrutiny. *See* Claremont Amicus at 17. But the issue here is not simply the label of common carriage, it is the regulatory scheme sought by Ohio. *Cf.* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 825 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part) ("Labeling leased access a common carrier scheme has no real First Amendment consequences."); MTD Opinion at 16 ("As for the State's request for declaratory relief, merely declaring or designating Google Search to be a common carrier does not, of itself, violate the First Amendment or infringe on Google's constitutional speech rights…. It is the burdens and obligations accompanying that designation that implicate the First Amendment.").

In other words, when reviewing the nondiscrimination requirement sought by Ohio, the labeling of this as a common carriage obligation does not matter under the First Amendment.

C. The Nondiscrimination Requirement Should be Subject to Strict Scrutiny

Ohio and amici have characterized the nondiscrimination requirement that comes with common carriage as a content-neutral requirement to host the speech of others. *See* MTD Opinion at 16; Claremont Amicus at 15, 17. This court agreed that this was possible at the motion to dismiss stage. But the remedy sought is not content-neutral, nor is it dealing purely with the speech of others. As a result, it should be subject to strict scrutiny.

This court found that a "restriction of this type must satisfy intermediate scrutiny" as a "content-neutral restriction on speech." MTD Opinion at 16. The court compared the situation to *Turner Broadcasting System Inc. v. FCC*, 512 U.S. 622 (1994). But the nondiscrimination requirement is clearly content-based.

Ohio is asking this court to enjoin Google from prioritizing its own products in its search results. *See* Complaint at para. 77. The only way to know whether Google is doing that is to consider the content of its search results. *See, e.g.*, *Reed v. Town of Gilbert, Ariz*., 576 U.S. 155, 163 (2015) ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."). The idea or message expressed here is that Google's products would be a better answer to an inquiry than another. By definition, the nondiscrimination requirement is a content-based regulation of speech, and must therefore be subject to strict scrutiny.

Nor is this just an issue of the speech of others. This court stated that "infringing on a private actor's speech by requiring that actor to host another person's speech does not always violate the First Amendment." MTD Opinion at 17. The court cited *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), *Rumsfeld v. Forum for Academic and Institutional Rights, Inc*., 547 U.S. 47 (2007), and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). But none of these cases deals with a situation analogous to applying nondiscrimination requirements to Google's search results.

Here, as explained above, Google's search results are themselves protected speech. Collectively, each search result is Google's opinion of the best set of answers, in the optimal order, to questions provided by users to Google. Requiring Google to present different results, or results in a different order, or with different degrees of prioritization would impermissibly compel Google to speak, similar to requiring car owners to display license plates saying "Live Free or Die," *see*

Wooley v. Maynard, 430 U.S. 705 (1977), or forcing a student to stand for the Pledge of Allegiance, *see West Virginia State Bd. of Educ. V. Barnette*, 319 U.S. 624 (1943). It is, in short, impossible to require "Google [to] carr[y] all responsive search results on an equal basis," Complaint at 5, without compelling it to speak in ways it does not choose to speak.

Even if Google's interest in its search results is characterized as editorial discretion over others' speech rather its own speech (a dubious distinction), this would still be distinguishable from the above cases. Google is clearly identified with its results by users, unlike the shopping center with its customers in *PruneYard* or the law schools with military recruiters in *FAIR*. *See* Complaint at paras. 48-50 (alleging that Google was built on expectations from users that the search algorithm was in some way neutral). This is especially the case when Google is, as alleged, prioritizing its own products in search results. *See id.* at paras. 64-70. Google clearly believes, and its users appear to agree, that these products are what its users want to see. *See* Complaint at 2 ("Google Search is perceived to deliver the best search results…"). Otherwise, those users could just use another service. *Cf. Zhang*, 10 F. Supp. 3d at 441 (a user dissatisfied with search results can just use another search engine).

Notably, this stands in contrast to the court's characterization of the speech at issue. *See* MTD Opinion at 19-20 ("When a user searches a speech by former President Donald Trump on Google Search and that speech is retrieved by Google with a link to the speech on YouTube, no rational person would conclude that Google is associating with President Trump or endorsing what is seen in the video."). It is not the content of the links that users associate with Google, but the search results themselves, which includes the order in which each link is presented, the presentation of certain prioritized results in a different format, and the exclusion or deprioritization of certain results Google thinks the user will not find relevant. A search engine is more than a "passive

receptacle or conduit" for the speech of others; the "choice of material" and how it is presented in its search results "constitute the exercise of editorial control and judgment." *Tornillo*, 418 U.S. at 258.

In sum, the reasons for subjecting must-carry provisions in *Turner* to intermediate scrutiny do not apply here. First, the nondiscrimination requirement sought by Ohio is *not* content-neutral; indeed, it is precisely Ohio's dissatisfaction with the specific content Google provides that impels its proposed law. *Cf. Turner*, 512 U.S. at 653-55 (emphasizing the content-neutrality of the must-carry requirements). Second, Google *must* alter its message in its search results due to the regulation, as it is expressing a clear opinion that its own products are the best answer—an answer with which Google is identified and which distinguishes it from its search engine competitors. *Cf. id.* at 655-56 (finding the must-carry requirements would not force cable operators to alter their own messages or identify them with the speech they carry). Third, Google does *not* have the ability to prevent its users from accessing information, whether from other general search engines, specialized search engines, or just typing a website into the browser. *Cf. Turner*, 512 U.S. at 656 ("When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper control over most (if not all) of the television programming that is channeled into the subscriber's home… A cable operator, unlike other speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch."). Absent these countervailing justifications for intermediate scrutiny in *Turner*, Ohio's nondiscrimination requirement must be subject to strict scrutiny.

Finally, while it is true that economic regulation like antitrust law can be consistent with the First Amendment, *see* Claremont Amicus at 17 (citing *Associated Press v. United States*, 326 U.S. 1, 20), that does not mean every legal restriction on speech so characterized is

constitutional. For instance, in *Associated Press*, the Supreme Court found the organization in violation of antitrust law, but in footnote 18 disclaimed the power to "compel AP or its members to permit publication of anything which their 'reason' tells them should not be published." *Associated Press*, 316 U.S. at 20, n. 18. The Court echoed this in *Tornillo* to argue that the remedy sought by Florida's right-to-reply law was unconstitutional government compulsion of speech that would violate the newspaper's right to editorial discretion. *See Tornillo*, 418 U.S. at 254-58. Restricting Google's right to editorial discretion over its search results is similarly unconstitutional.

CONCLUSION

Ohio's attempted end-run of competition law and the First Amendment by declaring Google a common carrier must be rejected by this court. Google is not a common carrier. And the nondiscrimination requirement requested by Ohio is inconsistent with the First Amendment.

Dated: January 30, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

Dated: January 30, 2024

/s/ John C. Camillus
John C. Camillus