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 Argument Requested**
Defendant.	)	

MOTION OF DEFENDANT GOOGLE LLC FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Ohio Rules of Civil Procedure and Rule 32 of the Local Rules of Practice of the Delaware County Court of Common Pleas, Defendant Google LLC ("Google") respectfully moves this Court for summary judgment against Plaintiff State of Ohio. Google's Motion is supported by the concurrently filed Memorandum in Support of Its Motion for Summary Judgment and the accompanying exhibits.

Dated: January 26, 2024

Respectfully submitted,

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DEFENDANT GOOGLE LLC'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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Summary judgment is warranted in Google's favor on the sole issue relevant to this stage of this bifurcated case: whether Google Search should be declared a "common carrier" under Ohio common law. The common law doctrine of "common carriage" does not fit Google Search for many reasons, and such a designation would be contrary to federal law and constitutionally flawed. For the reasons explained below, the Court should categorically reject Plaintiff's latest meritless attempt to regulate Google's ability to determine how best to select and present search results to consumers.

The undisputed evidence confirms that Google Search is not a service involving transportation or carriage. It is instead a highly innovative series of connected technologies that answer online user queries. Using information that Google has selectively gathered from a variety of sources, Google creates a new and bespoke product—a Google search results webpage ("SRP")—with content of Google's own creation or selection. Neither users nor websites or other information sources found on Google's SRPs hire Google Search to "carry" or "transport" anything. And because the undisputed facts demonstrate that Google necessarily exercises discretion and judgment to create what it believes to be a useful SRP, there is nothing "indiscriminate" or "indifferent" about the process Google uses to create Google search results.

The conclusion that "common carriage" is simply not a fit for Google Search is further supported by the federal legislative and regulatory regime in the area of interstate communications. The federal government's extensive legal framework specifically excludes information services such as Google Search from its regulation of common carriers. Thus, what the State seeks to do here—have this Court apply the "common carrier" designation to Google Search—would be inconsistent with, and preempted by, that federal regulatory scheme. It would also run contrary to the decisions of numerous courts, which have consistently concluded that Google Search is not a

mere conduit or "dumb pipe," and that its use of information to create search results is transformative. Principles of separation of powers and judicial restraint provide further support for the position that this Court should decline to redefine common carriage law.

The State's allegations invoke antitrust principles, but the common law claim of common carriage is incongruous with those concerns. There are other laws designed to address antitrust issues. Indeed, the State separately pursued the very same self-preferencing claim under federal antitrust law and the court granted summary judgment in Google's favor on that meritless claim. *State of Colorado, et al. v. Google LLC*, 2023 WL 4999901, at *21-25 (D.D.C. Aug. 4, 2023). Having failed to demonstrate that the very statutes passed to address antitrust concerns have been violated, the State should not be allowed to contort wholly inapplicable common law principles of common carriage to address the same conduct.

Finally, designating Google Search as a common carrier would violate the First Amendment, which protects Google's editorial judgment, as the common law obligations on common carriers would interfere with Google's ability to choose content for its search results. Summary judgment should be awarded in Google's favor.

STATEMENT OF UNDISPUTED MATERIAL FACTS

How Google Search Works

1. Google's mission is to "organize the world's information and make it universally accessible and useful." Ex. 1, Affidavit of Pandu Nayak ¶ 6.

2. To fulfill that mission, Google Search aims to provide relevant, high quality information in response to user queries, in order to satisfy the user's information needs. Ex. 2, Pandu Nayak Dep. (Aug. 8, 2023) at 21:12-22:6 (Google Search "primarily . . . tr[ies] to serve" users, or "people coming to Search[] to use the service to find information.").

3. Google looks for information from a variety of sources, acquires information that it has determined is likely to be useful to answer its users' queries, creates indices to organize the information Google Search has acquired, and selects information from the indices to create a search results page (SRP) that provides useful information to users in response to their queries. *See* Ex. 2, Nayak Dep. at 14:5-15:1; Ex. 1, Nayak Aff. ¶ 7.

4. One way Google acquires content is by "crawling" certain webpages on the internet. Ex. 1-B, *Life of a Query: Web Data* (GOOG-OHAG-00005050) at -051 ("Crawling the web means visiting web pages to find new and updated content and creating a copy of that content."). The internet is vast, containing well over 100 trillion webpages. *See id.* at -050. Google purposefully does not endeavor to include all of those webpages in its index or its search results. Rather, Google's systems, via internet service providers ("ISPs"), "crawl" only webpages that, in its judgment, are likely to be useful to users. Ex. 2, Nayak Dep. at 48:10-49:5 ("The Web is very, very, very large. And so I think what we actually aspire to do is to try and crawl the portion of the Web that we think will be useful for our users."); Ex. 4, Elizabeth Reid Dep. (Aug. 23, 2023) at 142:20-143:8 (explaining that Google may choose not to crawl a webpage, because if there is low likelihood that a user will want to see it, "then us crawling and indexing it has a cost overrun, so it hits diminishing returns"); Ex. 10, Ohio Resps. to Google Reqs. Admis. (Aug. 18, 2023), Response to RFA No. 27 (admitting that Google "does not crawl every webpage on the internet"). For example, Google estimates that over 70% of the new documents it discovers are "spam," and does not endeavor to crawl these pages. Ex. 3, Chris Nelson Dep. (Aug. 15, 2023) at 70:16-71:1.

5. Google's systems then make a copy of *some* portion of the information that they discover, without disturbing or hosting the webpages themselves. *See* Ex. 7, Alessandro Bonatti Dep. (Jan. 9, 2024) at 96:21-23 (Ohio's expert agreeing that "Google doesn't take exclusive

possession" of third-party webpages); Ex. 1-C, *How Search Works* (GOOG-OHAG-00001010) at -014 ("Search is indexing the open Internet but isn't hosting content.").

6. That copied information is then processed by Google and stored in its web index—a database designed and maintained by Google, which contains entries for *fewer than 1%* of the internet's webpages. Ex. 1, Nayak Aff. ¶ 11; Ex. 1-B at -051; Ex. 7, Bonatti Dep. at 87:14-18 (the webpages represented in Google's index comprise roughly "half a percentage point" of those on the internet).

7. Google does not index the web "indiscriminately"; as Vice President of Search at Google Dr. Nayak explained, "indiscriminate indexing would not make sense." Ex. 2, Nayak Dep. at 16:22-18:5; Ex. 6, John Mueller Dep. (Sept. 1, 2023) at 81:24-82:2 ("Q. Okay. Does every site that is crawled get indexed? A. No.").

8. Google includes information about webpages in its web index at its sole discretion, and whether or not it does so is based on its judgment about what information is likely to be useful to users. Ex. 2, Nayak Dep. at 16:22-18:5 ("[W]e need to find a way to index the portion of the Web that we believe our users will find useful. And so there is a lot of care that goes on in which portion of the Web we index."); Ex. 7, Bonatti Dep. at 88:2-8 (Ohio's expert agreeing that the choices Google makes about what to include in its web index are "based on Google's own innovation and technical expertise about how best to try to find the webpages that will be mostly likely responsive to users' queries").

9. Google's judgment about what information to include in Google's index is guided by many factors such as the quality of the page and whether the webpage constitutes "spam." Ex. 2, Nayak Dep. at 16:22-18:5; 18:10-19:21 (describing spam); Ex. 6, Mueller Dep. at 82:3-17

(explaining the "large number of factors" used "to determine whether or not to continue from the crawling process to the indexing process," including factors that are "quality related").

10. Google does not promise or guarantee to website owners and other content providers that their webpages will be crawled, their information will be added to Google's indices, or their information will appear among any search results, as all of those decisions are within Google's discretion. Ex. 1-L, *In-depth guide to how Google Search works,* https://developers.google.com/search/docs/fundamentals/how-search-works ("Google doesn't guarantee that it will crawl, index, or serve your page, even if your page follows the Google Search Essentials."); Ex. 7, Bonatti Dep. at 111:18-22 (agreeing "there's no guarantee that Google will crawl or index any webpage" from a third party); Ex. 1, Nayak Aff. ¶ 13.

11. In the early days of Google Search, it exclusively showed "plain blue link" results derived from crawling web pages, but over time Google recognized that "this approach did not produce useful results for all types of queries." Ex. 1-C at -096.

12. In 2007, Google Search transitioned to "universal search," where it started surfacing different units, such as videos, images, and local results, on the same SRP alongside web results, in dynamic positions on the SRP. Ex. 4, Reid Dep. at 127:16-128:5 ("Universal Search was an effort to . . . more across the board rank all of the units and allow them to float across any position."); Ex. 1-D, *25 biggest moments in Search, from helpful images to AI*, The Keyword (Sept. 6, 2023), https://blog.google/products/search/25-biggest-google-search-updates/ ("Helpful search results should include relevant information across formats, like links, images, videos and local results. So we redesigned our systems to search all of the content types at once.").

13. To support these other units, which today include sports, weather, TV and movies, travel (hotels and flights), and local, among many others, Google has other indices in addition to

the web index, and it acquires content for these indices in a variety of ways in addition to its crawling of webpages. *See* Ex. 4, Reid Dep. at 19:4-20:2; *id.* at 66:12-67:6 (describing Google's acquisition of information including, among others, through "merchants giving us feeds[,]" "data that we license for certain features[,]" and "from users" directly); Ex. 7, Bonatti Dep. at 77:8-19 (agreeing that Google Search obtains information from sites on the internet, by developing the information itself, and by licensing it).

14. One of those indices is the Knowledge Graph, a database of billions of facts curated and maintained by Google from which it draws to provide users with search results. Ex. 1-E, *Life of a Query: Knowledge Data* (GOOG-OHAG-00003745) at -745-46 ("Knowledge features are features that serve or utilize Knowledge Graph data. Knowledge features present data in a structured UI that's appropriate for the type of data. Knowledge features may also include unstructured data like web results, images, and more.").

15. Like the content included in its web and other indices, Google selectively obtains structured data for the Knowledge Graph in a variety of ways, including through licensing agreements with third-party content providers. *Id.* at -749-50 (discussing methods of data ingestion, such as third-party feeds, crawling, "custom infrastructure pipelines" like Wikipedia, and manually entering data); Ex. 5, Fabrice Caillette Dep. (Aug. 30, 2023) at 61:10-65:4.

16. Hundreds of Google personnel maintain the information in the Knowledge Graph and ensure that the facts maintained therein are of high quality. *See, e.g.*, Ex. 5, Caillette Dep. at 111:3-11 (describing "human operators" who "typically curate and create new data . . . making sure that the data remains accurate and complete").

17. At a high level, in response to a user's query, Google creates a SRP that responds specifically to that query. *See* Ex. 7, Bonatti Dep. at 77:3-5 (Ohio's expert agreeing that the SRP

is "a webpage created by Google"); *id.* at 82:9-12 (the SRP "is a uniquely created Google product or service"); Ex. 1-F, *Search Platforms Overview* (GOOG-OHAG-00004027) at -027 ("We then choose various features that make up the SRP, such as web links, knowledge panels and more, that match what they want, gathering the necessary data from our various back-ends.").

18. To fulfill that query, Google begins by using its query understanding systems—advanced software designed by Google engineers—to interpret and understand the user's query and discern the user's information need. Ex. 1-F at -027 ("Query Understanding is the layer of search infrastructure that interprets a user's query by using techniques ranging from finding synonyms and spelling errors to running natural-language understanding models.").

19. After it has interpreted the user's query, Google uses a collection of sophisticated algorithms to identify responsive information in the databases that it maintains on its servers, including the web index and the Knowledge Graph, based on what it believes may satisfy the user's information need. *Id.* at -030-31 ("Fulfillment's goal is to take the output from Query Understanding, identify the right features to fulfill the query's meaning, gather the needed data from the various backends, and then figure out the right order to present those features."); Ex. 1-B at -052 ("Next, the search backend looks through our index to find web pages that seem to match the meaning of the query."); Ex. 7, Bonatti Dep. at 82:25-83:3 (agreeing that Google Search "select[s] the information that's most useful to respond to the consumer's query").

20. As there often are hundreds of millions of entries that relate to the user query, Google uses a "ranking" process to select and arrange a small number of search results to display on the SRP that it creates for the user. Ex. 1, Nayak Aff. ¶¶ 15-16; Ex. 1-C at -025-27; Ex. 1-G, *A guide to Google Search ranking systems*, https://developers.google.com/search/docs/appearance/ranking-systems-guide (Google uses "ranking systems that look at many factors and

signals about hundreds of billions of webpages and other content in our Search index to present the most relevant, useful results."); Ex. 1-B at -052 ("Once we have a set of web pages that possibly match the query's meaning, we then rank these pages by a variety of factors, ranging from things like how often the page is linked to by other pages to the trustworthiness of the content.").

21. As Google can display the information it selects in a variety of forms, Google evaluates before serving its results how the relevant information fits together and what the best format likely is to display that information. This includes whether and where to display certain units on the SRP, based on considerations of potential relevance, usefulness, and reliability to users. Ex. 1-C at -026-27 ("Useful responses can take a variety of forms"; Google "evaluate[s] how all the relevant information fits together" to try to "deliver the best result[s] for [a user] query."); Ex. 1-F at -030 ("Once Google Search has identified what the user wants, the next step is to figure out how to serve those wants," including by "[r]ank[ing] the features relative to one another based on how likely they are to satisfy the query's true meaning."); Ex. 10, Ohio Resp. to RFA No. 8 (admitting that "Google publicly states that, as part of its 'approach to Search,' it 'believe[s] Search should . . . [d]eliver the most relevant and reliable information available'").

22. Google ranks the retrieved search results based on many factors, including:

a. the relevance of the search result to the query's intent, Ex. 2, Nayak Dep. at 113:8-115:9 ("And [the algorithms] are using signals . . . some of which are about relevance.");

b. the quality of the search result, based on principles of "E-E-A-T"—Experience, Expertise, Authoritativeness, and Trustworthiness, Ex. 2, Nayak Dep. at 88:18-89:4 ("[Google Search] uses signals to estimate things like [ ] how authoritative the page is."), *id.* at 93:14-97:2 (explaining E-E-A-T); and

c. many other factors, including the user's location, language, and device type, Ex. 1-H, *How search works (just the basics)* (GOOG-OHAG-00005105) (stating that Google uses many factors to select and rank results, "including things such as the user's location, language, device (desktop or phone), and previous queries. For example, searching for 'bicycle repair shops' would show different answers to a user in Paris than it would to a user in Hong Kong").

23. For example, if a user submits a query for "ohio state football schedule 2023," Google will turn to its indices, where there are *hundreds of millions* of potential results that use those (or similar) words and may be relevant to the query. Of those, Google will exercise its judgment to select a small fraction of results to display on the SRP it creates in response to that query. Ex. 1, Nayak Aff. ¶¶ 15-16; Ex. 1-A.

24. In response to the "ohio state football schedule 2023" query, Google does not simply provide links to websites, but it may choose to include features such as, among other things, a feature that displays the Buckeyes' schedule and game results, and which further allows the user to toggle to other information about the team, including news, standings, and players. Google may also present a "People also ask" unit, showing related questions people commonly search on Google; a "Related searches" unit, showing related searches that other people have done; and a Videos unit. *Id.*

25. Google selects a maximum of approximately 400 search results in response to a query, so it is not possible for a user to see all of the many millions of search results that may relate to a particular query. Ex. 1, Nayak Aff. ¶ 16; Ex. 1-A.

26. The modern SRP is also designed to provide information to assist users with more complex information needs, including, for example, queries that could be interpreted in multiple ways or that do not have just one right answer. Ex. 4, Reid Dep. at 131:16-132:22 (describing the

query "what to watch" as "more an exploratory query," with "a lot of different dimensions to think about, a lot of information," and no single right answer).

27. In order to better respond to user queries, over the past twenty-five years, Google has added a number of different search features to its SRP. Ex. 1-C at -092-100 (providing a timeline of Google Search developments and explaining that "blue links" may not produce useful results for all types of queries, such as queries for local entities, which may benefit from presentation "in a useful format, such as with a map"); Ex. 1-I, *Search features overview* (GOOG-OHAG-00004412) at -412.

28. Knowledge Panels, which contain information from Google's Knowledge Graph, may appear on the SRP when a user searches for certain people, places, organizations, or things that are in the Knowledge Graph database, and are designed to organize useful information about the particular entity. Ex. 1-J, *About knowledge panels* (GOOG-OHAG-00000317) at -317 ("Knowledge panels are information boxes that appear on Google when you search for entities (people, places, organizations, things) that are in the Knowledge Graph."); Ex. 4, Reid Dep. at 113:10-13 ("The knowledge panel refers to a unit in which we try and organize information about a particular entity and display it.").

29. Answer Cards, which provide direct answers to user queries, are another feature which may appear on the SRP. Ex. 1-E at -746.

30. Google has also created several specialized units, such as Local and Travel, that are designed to improve user experience and satisfy user information needs. Ex. 4, Reid Dep. at 19:4-20:2. These units may pull information from a variety of sources, including crawled webpages, licensed data, Google Maps data, and user generated content. *Id.* at 53:22-54:10 (explaining Google obtains data about geographic places in "a wide range of ways," including from data feeds,

merchants, users, and even "driv[ing] cars around" to collect images); *id.* at 66:12-67:6 ("We have data that we license for certain features . . . and then there's, you know, some data similar to Google Maps that could come from users. . . . [I]t's a range of things.").

31. Google's SRP also may include "snippets" or "featured snippets." Snippets are designed to emphasize and preview the page content that best relates to a user's specific search, and Google displays featured snippets when it determines this format will help people more easily discover what they're seeking. Ex. 1-K, *A reintroduction to Google's featured snippets*, https://blog.google/products/search/reintroduction-googles-featured-snippets/.

32. Google regularly launches changes to the design of its SRP to ensure that it is organized with relevant, fresh information that is helpful to users. Ex. 1, Nayak Aff. ¶ 8; Ex. 4, Reid Dep. at 99:3-102:12. Google Search's "Search Quality" team—which numbers over a thousand engineers—has designed, and continually improves upon, the software systems that it uses to select and rank information that appear on the SRP. *See* Ex. 1, Nayak Aff. ¶ 5; Ex. 2, Nayak Dep. at 89:20-90:6 ("We have a fairly elaborate evaluation process where every addition to Search, every signal, every algorithm change, everything is put through that evaluation process to ask the question: Does this actually improve Search?").

33. A variety of user-specific factors affect the content and presentation of information that Google chooses to include on the SRP for a user, including the user's location, the time of day the user submits the query, the user's immediate prior queries, user settings such as SafeSearch, and the user's language. Ex. 1-H, at -105; Ex. 7, Bonatti Dep. at 93:21-24 (agreeing that "the same search query entered by different individuals can result in different search engine results pages").

How Google Search Reaches Users

34. A user can only access Google Search via an internet connection with an Internet Service Provider ("ISP"), which transmits the user's query over the internet to Google. Ex. 1-M, *Life of a Packet* (GOOG-OHAG-00000859) at -860-62 (describing how user "connects to the local WiFi" and reflecting that there is an "ISP" connection between the user's laptop and Google's systems); Ex. 3, Nelson Dep. at 19:8-15 ("For a user to access Google, they need to have an internet connection, an account with an ISP, and the ISP can make Google results available to users."); Ex. 7, Bonatti Dep. at 94:13-18 ("The user needs an internet connection. You can't use Google offline."). An ISP is a separate company such as a mobile carrier or cable provider that provides access to the internet by transmitting data through networks from one place to another. *See* Ex. 1, Nayak Aff. ¶¶ 18-19, Ex. 8, Opening Report of Pl. Expert Alessandro Bonatti ¶ 168 & n.237 (citing *What is an internet service provider (ISP)?*, Verizon, https://www.verizon.com/about/blog/isp-meaning).

35. The Google systems, on Google servers, then conduct a multi-step process to create the SRP. Ex. 1-F, at -027; Ex. 1-N, *Life of a Query* (GOOG-OHAG-00000784) at -801, -832-33; *see supra* ¶¶ 17-33.

36. Once Google creates the search result page for a user, the data necessary to render that SRP on the user's device is handed off by Google to an ISP for transmission to the user. Ex. 1, Nayak Aff. ¶ 17; Ex. 7, Bonatti Dep. at 96:1-3 ("Q. Could Google Search provide search results without internet service providers? A. No."); Ex. 4, Reid Dep. at 154:23-155:24 (explaining that Google's servers "pass[] [the SRP]" to the "network" and then "[i]nternet protocols dictate how the network sends it to the user").

37. The ISP transmits the data over networks (either its own or those of its affiliates) from Google Search to the user; Google Search does not own those networks or control how the ISPs carry information across the networks. Ex. 1, Nayak Aff. ¶ 19.

38. If the user clicks on a link in the Google SRP, the user's browser and ISP, *not* Google Search, connect the user to the website. Ex. 7, Bonatti Dep. at 75:6-8 (Ohio's expert testifying that it is not his opinion "that Google carries consumers to a destination"); *see also* Ex. 1-C, at -014 (noting that Google Search "isn't hosting content").

39. A web user can also navigate to a third-party website without starting from a Google SRP at all; for example, the user can enter a site's URL in a browser and go directly to that page. Ex. 7, Bonatti Dep. at 96:18-20 (agreeing users can get to third-party webpages "with or without Google"); Ex. 10, Ohio Resp. to RFA No. 6 ("Plaintiff admits that websites can be accessed by typing their URLs into various browsers.").

40. Google chooses not to respond to queries from automated sources, such as bots. Google blocks a large amount of automated Google Search query traffic on a daily basis—amounting to several hundreds of millions of queries per day. Ex. 1, Nayak Aff. ¶ 20.

How Google Search Generates Revenue

41. Google does not charge users for submitting a query on Google Search. Users cannot pay to receive any particular result or to receive a different mix or order of results than Google chooses to show. Ex. 7, Bonatti Dep. at 83:4-9 ("Google is free to users."); *id.* at 116:16-18 (users "do not pay Google for search results").

42. Websites cannot pay Google to crawl their webpage, index it, include it in any organic search results, or rank it highly on the SRP. Ex. 7, Bonatti Dep. at 86:25-87:2 (agreeing "a website can't pay Google to appear in [organic] search results"); *id.* at 116:19-117:1 (agreeing

"websites do not pay Google to crawl their websites"); Ex. 1-L ("Google doesn't accept payment to crawl a site more frequently, or rank it higher.").

43. Everything that Google presents to a user on the SRP is "organic"—*i.e.*, its selection and placement has not been paid for by anyone, and its inclusion has been determined by Google on the basis of its proprietary ranking criteria—unless it is denoted as an "Ad" or as "Sponsored." Ex. 1-O, *Showing ads related to your search*, https://www.google.com/search/howsearchworks/our-approach/ads-on-search/ ("When you use Google Search, ads may appear with your search results. We think it's important to be transparent about these, which is why ads are clearly labeled."); Ex. 1-P, *How We Make Money with Advertising,* https://howwemakemoney.withgoogle.com/.

44. Google Search is monetized through the sale of Google search advertisements, which may appear on the SRPs displayed to users. Ex. 1-P ("Google's main source of revenue is advertising. . . . By serving ads, we can keep Google services free for everyone."). However, Google does not show ads on most SRPs. *Id.* ("If there are no useful ads, we won't show any ads at all—which is actually the case for the large majority of searches.").

45. Whether or not Google Search shows a potential advertisement is based on a number of factors, including the amount of the potential advertiser's bid, and Google's determination of the ad quality and usefulness to users. Ex. 7, Bonatti Dep. at 87:3-8 (a website "can never guarantee" that it would be "displayed in sponsored results or advertising results"); Ex. 1-Q, *How the Google Ads auction works*, https://support.google.com/google-ads/answer/6366577?hl=en.

46. Thus, Google does not promise or guarantee to even the highest bidding advertiser that its advertisement will be displayed on Google's SRPs. *See id.*; Ex. 7, Bonatti Dep. at 102:4-

7 (agreeing that "there's no guarantee for any particular search advertising auction that Google will actually show an advertisement").

47. Google Search is not the only general search engine available to individuals in Ohio, nor is it the only place where users can seek to satisfy their information needs online. For example, Microsoft's Bing and DuckDuckGo are other general search engines available in Ohio that operate similarly to Google Search. *See, e.g.*, Ex. 11, R. Frederking Aff. & Ex. 11-A, *Bing Webmaster Guidelines* (MSFT-OHLIT_000000198), https://www.bing.com/webmasters/help/webmaster-guidelines-30fba23a. In addition to general search engines, individuals in Ohio can go to a wide number of other websites to search for information of different types—Amazon for products, Wikipedia for facts, Yelp for local information, Expedia for travel, the Columbus Dispatch for news. *See, e.g.*, Ex. 9, Ohio Resp. to Google's First Set of Interrogatories (Oct. 10, 2022), Interrogatory No. 6 (stating Google's "competitors" include "Yelp, Apple, Mapquest, Travelocity, Outlook, Microsoft Office, vertical search providers, Vimeo, news aggregators, and customer review platforms"); Ex. 4, Reid Dep. at 78:1-79:5; *see also* Bonatti Dep. at 140:17-23 ("Amazon compet[es] with Google over . . . [s]earches for products or information about products, so surely they compete.").

LEGAL STANDARD

A court must grant summary judgment when, as here, "(1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the non-moving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *State ex rel. Parsons v. Fleming*, 68 Ohio St.3d 509, 511 (1994) (per curiam); Ohio Civ.R. 56(C).

The moving party has the initial "burden of showing that no genuine issue of material fact exists," *Byrd v. Smith*, 110 Ohio St.3d 24, 26 (2006), after which the burden shifts to the nonmoving party to identify the "specific facts," if any, that create a genuine issue warranting trial, *id.* at 27. Facts that have no effect on the outcome of the suit, even if in dispute, cannot preclude the entry of summary judgment. *Id.*; *see also id.* ("Rule 56 must be construed with due regard . . . for the rights of persons opposing [a plaintiff's] claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986))).

ARGUMENT

This case raises what is fundamentally a legal question: is Google Search a common carrier under Ohio common law? There are no genuine disputes of material fact as to how Google Search functions for purposes of answering that question. The undisputed facts establish that Google Search is not a common carrier. It does not carry or transport anything for hire, and it does not hold itself out as acting "indifferently," as required by Ohio common law. To find otherwise would be out of step with Ohio common law and the federal statutory scheme. And it would also violate the First Amendment, as an impermissible interference by the government with Google's speech.

I. Google Search Is Not a Common Carrier Under Ohio Common Law.

In Ohio, a "'common carrier' is consistently defined as one who undertakes to transport persons or property from place to place, for hire, and holds itself out to the public as ready and willing to serve the public indifferently . . . to the limit of its capacity." *Kinder Morgan Cochin L.L.C. v. Simonson*, 66 N.E.3d 1176, 1182 (5th Dist. Ct. App. 2016) (citations omitted); *see also Columbus-Cincinnati Trucking Co. v. Pub. Utilities Comm'n*, 141 Ohio St. 228, 231-32 (1943) ("A common carrier is one who holds himself out to the public as engaged in the business of transporting persons or property from place to place, for compensation, offering his services to the

public generally . . . [and] he undertakes to carry for all people indifferently."); Mot. To Dismiss Op. ("MTD Op.") at 7. Google Search does not meet any of these elements. A determination that Google Search is a common carrier under Ohio common law would be a vast expansion of the reach of the common law, and would create inconsistency and confusion for businesses. Such an act—while still suffering Constitutional flaws, *see infra* Sections II, III—would be the province of the legislature, not the courts.

A. Google Search Does Not Transport or Carry Other Persons or Their Property for Hire.

To meet the "carrier" requirement under Ohio common law, a firm must be one that "undertakes to transport persons or property. . . for hire." 14 Ohio Jur. 3d *Carriers* § 1 (West 2023); *see, e.g.*, *Pennant Moldings, Inc. v. C & J Trucking Co.*, 11 Ohio App. 3d 248, 250 (12th Dist. 1983) (per curiam) ("A common carrier at common law includes any carrier which 'seeks the privilege of transporting for hire the goods of the public.'" (quoting *Morrisey v. S. S. A. & J. Faith*, 252 F. Supp. 54, 56 (N.D. Ohio 1965))).

Thus, judicial decisions interpreting the common law of this State reflect the application of the "common carrier" designation to entities that are actually hired by others to carry or transport persons or property of others. *E.g.*, *Kinder Morgan Cochin L.L.C.*, 66 N.E.3d at 1182 (pipeline transporting customers' petroleum products); *Morrisey*, 252 F. Supp. at 56-57 (ship owner transporting customers' goods); *Breuer v. Pub. Utilities Comm'n*, 118 Ohio St. 95, 96, 98 (1928) (trucking company transporting customers' goods).

Google Search does not satisfy this element for multiple reasons.

First, Google Search is not a service for "transport" or "carriage" whether evaluated under 18th century or 21st century principles. Instead, Google Search's business is to create its own product: in response to each individual user's query, it curates information and fashions a bespoke

search results page (SRP). To make its product available to a user nearly instantaneously, Google Search does a tremendous amount of work in advance. Well before any query is issued, using its judgment and discretion (*see* Section I.B., *infra*), Google has created multiple indices. SMF ¶¶ 3-10, 13-16. Some are the result of Google Search's decisions regarding what content from the world wide web to crawl and what to include in its web index. Some are the result of Google licensing information and some information Google generates itself. Some are the result of Google creating collections of knowledge (entries in the "Knowledge Graph"). When it then receives a query from a user, Google Search uses a collection of its own proprietary algorithms, reflecting its judgment and discretion (*see* Section I.B., *infra*), to retrieve and rank material in order to create a curated search results page that includes information that it believes will be most helpful to the user. SMF ¶¶ 17-33. Google Search thus creates and publishes *content*—a search results page.

Courts have repeatedly recognized the transformative nature of Google's use of information—a conclusion that is wholly inconsistent with viewing Google Search as a "carrier." For example, in *Perfect 10, Inc. v. Amazon.com, Inc.*, the Ninth Circuit analyzed Google's *use* of copyrighted information and concluded that it is protected by the "fair use" doctrine due to the "significantly transformative nature of Google's search engine." 508 F.3d 1146, 1165-66 (9th Cir. 2007). The court observed that "a search engine . . . incorporat[es] an original work into a new work, namely, an electronic reference tool." *Id.* at 1165. Similarly, in *Authors Guild v. Google, Inc.*, 804 F.3d 202, 216 (2d Cir. 2015), the Second Circuit concluded that Google Search's use of snippets from the contents of books was fair use, stating: "Google's making of a digital copy of Plaintiffs' books for the purpose of enabling a search for identification of books containing a term of interest to the searcher involves a highly transformative purpose." *Id.* at 216, 225. These

decisions refute any concept of Google Search as simply carrying or transporting someone else's property, and therefore engaging in common carriage.

Second, to the extent the journey from user to website (or vice versa) involves "carriage," that carriage is done by an ISP, not Google Search. The user's query arrives at Google Search via an ISP, and once Google Search creates a Google search results page, it hands the information to an ISP and relies on the ISP to deliver the product to the user. SMF ¶¶ 34-39. Should the user decide to click on one of the links chosen for the SRP, the website content will be transmitted to the user by an ISP. The process is similar for Google's gathering of information to have available to craft its SRP: Google crawls the web via an ISP.

Tellingly, in the federal regulatory scheme in this area, it is the ISP, not Google Search, that has been regulated as a common carrier. Thus, when the D.C. Circuit in 2016 upheld the Federal Communications Commission's ("FCC") classification of broadband ISPs as common carriers under the Communications Act, it was in part because the ISPs "provide[] the *capability to transmit data* to and receive data from all or substantially all Internet endpoints." *U.S. Telecom Ass'n v. FCC* (*USTA I*), 825 F.3d 674, 743 (D.C. Cir. 2016) (emphasis added) (quoting *In re Protecting & Promoting the Open Internet*, 30 FCC Rcd. 5601, 5745-46 ¶ 336 & n.879 (2015)). The Communications Act gives the FCC authority to classify ISPs as either "telecommunications services" or "information services"—two mutually exclusive categories, only the former of which is subject to common carrier regulation. *See* 47 U.S.C. § 153(24), (53); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005). With that authority, the FCC has reclassified ISPs several times; since the 2015 Open Internet Order reviewed in *USTA I*, the FCC reclassified ISPs as information services in 2018, *see In re Restoring Internet Freedom Order*, 33 FCC Rcd. 311 (2018), and, on October 19, 2023, the FCC adopted a Notice of Proposed

Rulemaking to revert back to classifying ISPs as telecommunications services subject to common carrier regulation, *see In re Safeguarding and Securing the Open Internet*, 23 FCC Rcd. 83 (2023).

As to Google, under that regulatory scheme, the D.C. Circuit distinguished it, drawing a sharp line between firms that "provide content . . . over the internet," and companies that simply "transmit[]" data from one point to another. 825 F.3d at 690 (citations omitted). Multiple D.C. Circuit judges, including then-Judge Kavanaugh, agreed that companies like "Google, . . . in contrast with broadband ISPs, are not considered common carriers that hold themselves out as affording neutral, indiscriminate access to their platform without any editorial filtering." *U.S. Telecom Ass'n v. FCC* (*USTA II*), 855 F.3d 381, 392 (D.C. Cir. 2017) (Srinivasan & Tatel, JJ., concurring); *id.* at 435 (Kavanaugh, J., dissenting) ("[T]he Government may not tell . . . Google what content to favor."). Likewise, when a federal district court considered the question of whether Google's email service ("Gmail") was a "common carrier" under California law, it concluded that it was not because Gmail does not transport messages from place to place. *Rep. Nat'l Comm. v. Google, Inc.*, 2023 WL 5487311, at *9 (E.D. Cal. Aug. 24, 2023) (observing that "[u]nlike a traditional mail service, email services, like Google's Gmail, do not 'carry' messages," as emails are "transform[ed] . . . into 'packets' that are sent through the internet via computers on the network, and periodically reassembled and repacketized by intermediate computers on the network").

Under Ohio common law, entities that have been found to be common carriers necessarily receive someone else's property (or person) and move that property (or person) "from place to place." *Kinder Morgan Cochin L.L.C.*, 66 N.E.3d at 1182. For instance, a pipeline moving petroleum products from Ohio to Canada was judged a common carrier because, among other things, it moved petroleum products from one place to another; it did not create anything. *Id.* at

1182. Similarly, the U.S. Supreme Court held that a railroad company was a common carrier in part because it "engaged in the business of transferring cars from the Santa Fe track to industries located at Stafford." *Missouri Pac. Ry. Co. v. Larabee Flour Mills Co.*, 211 U.S. 612, 619 (1909). Unlike Google Search, these common carriers did not create a new product—they moved someone else's product.

The difference between Google Search and a carrier is further revealed by the undisputed fact that Google Search does not *take possession* of the information that it may refer to on a SRP. To the extent Google chooses to include a copy of particular webpage information in its web index, such webpage information remains available on the third-party website, which is not hosted by Google and which users can access in numerous ways outside of Google Search. *See* SMF ¶¶ 4-6. This stands in sharp contrast to entities that have been found to be common carriers, which are entrusted with the care of the goods or persons they are transporting. *See Morrisey*, 252 F. Supp. at 58 (describing shipper as "entrusting cargo to the care" of a common carrier). When a customer entrusted its products to the pipeline in *Kinder Morgan Cochin* to move from Ohio to Canada, neither the customer nor anyone else could access or use the petroleum while it was in the pipeline. *See generally Kinder Morgan Cochin L.L.C.*, 66 N.E.3d at 1178. Here, by contrast, Google Search does not take possession of content away from other websites.

Third, websites do not "hire" Google Search (whether to transport their content or otherwise). It is undisputed that a website owner cannot pay Google to crawl its webpages, index its information, or include that information among the search results that Google Search chooses to display to its users. SMF ¶ 42. Nor does a website owner enter into a contract with Google at any point—Google has no contractual obligation to include crawled information in its index or on its SRP. SMF ¶ 10. *Cf. Conwell v. Voorhees*, 13 Ohio 523, 542 (1844) (en banc) ("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"). While Google sometimes includes ads alongside the search results, would-be advertisers also cannot guarantee that Google Search will display their ad. SMF ¶¶ 44-46.

To the extent that the State argues that a *user* might be said to "hire" Google Search, MTD Op. at 8-11, the user is not hiring Google to transport the user or any property of the user. As to the contention that Google Search "carries" user queries, Ex. 12, Ohio Suppl. Resps. to Google's Interrog. No. 18, the State's theory fails because, consistent with the description above, once the query is delivered to Google by the ISP, an entirely new thing, a SRP, is created by Google Search, and that SRP is transmitted to the user via an ISP. The value that the user receives from Google Search is the Google SRP—not the query. Regardless, in both directions, the ISP, not Google, transports information.

B. Google Does Not Hold Itself Out as Being "Indifferent" or "Indiscriminate" With Respect to Google's Search Results.

Google Search also does not meet the requirement that a common carrier "hold[] itself out to the public as ready and willing to serve the public indifferently." *Kinder Morgan Cochin L.L.C.*, 66 N.E.3d at 1182 (citation and internal quotation marks omitted); MTD Op. at 7. For an entity that is already a "carrier," this element is often described as the "controlling factor in determining the status of one as a common carrier." *Columbus-Cincinnati Trucking Co.*, 141 Ohio St. at 232. That is because "[t]he distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently"—it is what separates a common carrier from private carriers. *Id.* Google does not act "indifferently" with respect to how Google creates search results in response to user queries. Rather, Google engages in judgment, discretion, and differentiation at every stage

of its processes. And by design it treats users differently, including by showing them different results, depending on various factors, and refuses to serve search results to certain users.

Entities that have been found to be common carriers under Ohio law do not exercise anything resembling the discretion that Google does. For instance, a pipeline was held to be a common carrier because "anyone who wanted to reserve capacity" in the pipeline to transport their petroleum products could do so by signing an agreement. *Kinder Morgan Cochin L.L.C.*, 66 N.E.3d at 1183. A trucking company that would sign a contract with "any one who had merchandise to be transported" was a common carrier. *Breuer v. Pub. Utilities Comm'n of Ohio*, 118 Ohio St. 95, 98 (1928). These carriers are "common" because they do not exercise their own discretion to select the petroleum or merchandise they will deliver or the owners of these goods with whom they will contract.

By contrast, Google makes judgments about crawling, indexing, ranking, and feature design, based on what it thinks is most relevant and useful to its users. Google *selects* what information to include in its indices. For example, Google's search index includes information about *less than 1%* of the many trillions of webpages on the internet. SMF ¶ 6. To respond to each query, it chooses from its vast collection of information to select what will most help the user. For instance, if a user submits a query for "ohio state football schedule 2023," Google will turn to the *hundreds of millions* of potential results in its indices and select only a handful of results, based on its judgment of what results will best address the user's information need. SMF ¶¶ 20, 24-25. Another aspect of the differentiation performed by Google is that it may show different users who enter the same query different search results, based on factors including location, prior recent searches, and device type. SMF ¶ 33. Throughout its processes, Google makes innumerable judgments about what information to collect or show to a user. And Google's inherent

selectiveness is no secret—Google states publicly that it "doesn't guarantee that it will crawl, index, or serve your page, even if your page follows the Google Search Essentials." SMF ¶ 10.

As two D.C. Circuit judges have explained, Google Search, "in contrast with broadband ISPs, [is] not considered [a] common carrier[] that hold[s] [itself] out as affording neutral, indiscriminate access to their platform without any editorial filtering." *USTA II*, 855 F.3d at 392 (Srinivasan & Tatel, JJ., concurring). The Supreme Court of Ohio has similarly concluded that carriers that exercise editorial filtering and selectivity are not "common" carriers. In *Columbus-Cincinnati Trucking Co.*, the company made individualized agreements with particular theaters to transport film for them, and it sometimes exercised its own discretion to select the film to deliver. 141 Ohio St. at 232 ("[T]he record shows that [the company's owner], by reason of his knowledge, and experience . . . select[s] substitute films when those previously contracted for or selected are not available."). Other courts have similarly concluded that when entities exercise discretion and selectivity over who they carry, they do not fit the mold of a common carrier. *See Balloons Over the Rainbow, Inc. v. Dir. of Revenue*, 427 S.W.3d 815, 827 (Mo. 2014) (*en banc*) (hot air balloon company was not a common carrier where it "exercise[d] discretion as to whether it flies a customer," as inconsistent with Missouri common law "requiring a 'common carrier' to carry all people indifferently"); *Sewell v. Cap. One Fin. Corp.*, 401 F. Supp. 3d 1159, 1173-74 (D. Nev. 2019) (wilderness canoe tour company was not a common carrier where it exercised discretion over its passengers based on "mental or physical unpreparedness").

Here as in *Columbus-Cincinnati Trucking Co.*, the record is undisputed that Google exercises discretion in its selection of what information to provide to users. It thus fails to meet the "common" element of the inquiry, in addition to the "carrier" element.[1]

C. It Is Not the Judiciary's Role To Decide Whether To Radically Expand the Common Carrier Doctrine.

The policy debate about whether or not Google Search should be regulated as a common carrier (or otherwise) should not be resolved by this Court. This case threatens to drastically expand the concept of common carriage and implicates important national public policy questions that courts are not empowered to address. To stay faithful to the principles of separation of powers and judicial restraint, this Court must grant summary judgment in favor of Google. *Moore v. Dague*, 46 Ohio App.2d 75, 84-85 (10th Dist. 1975) ("[I]n the judiciary, judicial restraint is essential . . . [i]f ours is to remain a government of law rather than of men."); *cf. Rep. Nat. Comm.*, 2023 WL 5487311, at *8 ("[N]o court . . . has found an email service provider to be a common carrier. This Court declines to be the first.").

Controlling precedent makes clear that the judicial declaration the State seeks—that this Court determine that Google Search, as an information service, should be regulated under Ohio law as a common carrier—would violate the Ohio separation-of-powers doctrine that "is implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government." *State v. Gamble*, 173 N.E.3d 132, 145 (8th Dist. 2021). This precedent holds that a fundamental principle of the separation-of-powers doctrine is "that the legislative branch is 'the ultimate arbiter of public

[1] *See also* James Grimmelmann, *Some Skepticism About Search Neutrality*, Next Digit. Decade: Essays on the Future of the Internet 435, 442-43 (2011) https://james.grimmelmann.net/files/articles/search-neutrality.pdf (rejecting common carrier argument as "discrimination" is the whole "point" of a search engine).

policy'" and the judicial branch shall not encroach on that function. *State ex rel. Cook v. Seneca Cnty. Bd. of Comm'rs*, 175 Ohio App.3d 721, 731 (3d Dist. 2008); *see Williams v. Spritzer Autoworld Canton, LLC*, 122 Ohio St.3d 546, 552 (2009) ("[I]t is the role of the General Assembly, rather than the attorney general or this court, to declare the policy of the state of Ohio.").

In this case the State has emphasized Google's alleged "dominant market position," Compl. at 2-3, although such alleged "dominance" is unrelated to whether Google constitutes a common carrier under Ohio law. *See supra* Section I.A.-B. In both this case and the State's federal antitrust case, the State complains about Google Search's alleged "self-preferencing" of its own content over third party content through its inclusion of "oneboxes." But under the U.S. antitrust laws, the State's self-preferencing theory fails. *See State of Colorado, et al. v. Google LLC*, 2023 WL 4999901, at *21-25 (D.D.C. Aug. 4, 2023) (granting Google's motion for summary judgment on the States' claims relating to Google's treatment of third-party Specialized Vertical Providers).

The State's economic expert in this case, Dr. Alessandro Bonatti, has likened the State's request for this Court to impose common carrier duties and obligations on Google Search to the European Union's Digital Markets Act, an expansive regulatory scheme adopted by the European Parliament and implemented by the European Commission. *See* Ex. 7, Bonatti Dep. 38:20-40:7. Whatever the merits of that decision by European lawmakers and whether it is in fact similar to common carrier duties and obligations, the Ohio legislature has not chosen to regulate Google Search and has never extended common carrier regulations to a product like Google Search.[2] *Cf.* MTD Op. at 13 ("Ohio does not regulate search engines."). This Court should defer to that legislative regime and not encroach on the legislature's functions by making policy from the bench.

[2] Similarly, the federal government has expressly declined to treat information services as common carriers under the Communications Act of 1934, 47 U.S.C. § 151 et seq., as amended—a statute that addresses common carriage in the communications context. *See* Section I.A., *supra*.

See, e.g., *Grant v. Washington Twp.*, 1 Ohio App. 2d 84, 89 (2d Dist. 1963); *see also Moore*, 46 Ohio App.2d at 84 ("Courts are not super-legislatures, whose function it is to enact those laws which it feels the legislative bodies have unwisely failed to enact."); *State ex rel. Ebersole v. Hurst*, 111 Ohio App. 76, 77-78 (1st Dist. 1960) ("[I]t isn't for the Courts to change the statutes to conform to what the Courts consider a better rule. This would be judicial legislation.").[3]

It is particularly important that this Court abide by Ohio's separations-of-powers doctrine here, "where the input from the people as to their desires and the pros and cons of such [regulation] are not possible" to obtain in the context of this judicial proceeding, and where there are significant public interests at stake. *Moore*, 46 Ohio App.2d at 84. Because Google Search is a helpful, popular resource for Ohioans to find useful information in response to their queries, *see* SMF ¶¶ 2-3, 26, most Ohioans will have an interest in whether Google Search should be required to "carry information from all sources indiscriminately," Compl. ¶ 45.

That the State has sought to hold only one technology firm a common carrier is particularly troubling. A judgment declaring Google Search a common carrier under Ohio law would result in an inconsistent application of the laws in Ohio against Google as compared to other information services that operate in Ohio and are not the subject of this lawsuit. While such a judgment could

[3] Justice Thomas would seem to agree. In his concurring opinion in *Biden v. Knight First Amendment Institute*, 141 S. Ct. 1220 (2021) (mem.), Justice Thomas never suggested that a *court* could regulate digital information services like Google Search as an alleged common carrier under state common law. *Id.* (Thomas, J., concurring). Rather, he suggests that "legislators" may have an argument to do so. *See id.* at 1226. In this regard, it bears noting that the United States Supreme Court has granted certiorari in two cases in which state legislatures did enact statutes to regulate digital hosting platforms as common carriers, and a decision is imminent. *See NetChoice, LLC, et al. v. Paxton*, No. 22-555; *Moody v. NetChoice, LLC*, No. 22-277. The Court is considering whether the imposition by the Florida and Texas legislatures of content moderation rules on such social media companies comply with the First Amendment. *See Netchoice, LLC v. Paxton*, No. 22-555, 2023 WL 6319650, at *1 (U.S. Sept. 29, 2023). The Court's upcoming ruling may be informative in this matter.

impose certain duties on Google Search regarding the information and sources it displays on its search results page, it could not do the same to Microsoft's Bing or any other general search engine, or the myriad of specialized search providers like Amazon or Expedia or Yelp that compete with Google for user online queries. *See, e.g.*, SMF ¶ 47.

At the same time, it would result in risk and uncertainty for those and other businesses that do not fit the traditional common law model for common carriage but may fall within the State's expanded concept of carriage because they, like Google Search, collect, select, and make available information—or even physical goods—to their users or customers. The range of firms in jeopardy is wide and varied, spanning from other general search engines like Bing, Yahoo!, and DuckDuckGo; specialized search engines like Yelp!, Expedia, Airbnb, and Fandango; online retail platforms like Amazon, Target, and Etsy; newspapers like the Columbus Dispatch and the Delaware Gazette; and online reference sites like Wikipedia; to brick-and-mortar businesses and entities like supermarkets, retailers, travel agencies, and product distributors. Each is open to the public and provides consumers with information or goods, some of which may be sourced from third parties, just as Google Search does.

This Court should instead follow the principles of separation of powers and judicial restraint and decline to redefine common carriage law. *See Grant*, 1 Ohio App. 2d at 89; *Moore*, 46 Ohio App.2d at 84; *Ebersole*, 111 Ohio App. at 77-78.

II. Determining Google Search To Be a Common Carrier Would Be Inconsistent with and Preempted by Federal Law.

Summary judgment for Google is warranted for the additional reason that a state court designating Google Search as a common carrier would be wholly inconsistent with and preempted by the extensive federal legislative and regulatory regime in the area of interstate communications.

See U.S. Const., art. VI, cl. 2 (Supremacy Clause); 47 U.S.C. § 151 *et seq.* (Communications Act of 1934 and Telecommunications Act of 1996, collectively referred to as "Communications Act").

A. It Is Inconsistent with Federal Law To Treat Google Search as a Common Carrier.

A decision by the Court to deem Google Search a common carrier would be directly contrary to the federal regime governing interstate communications services. This regime—which has been developed through careful consideration and public debate—expressly declines to treat information services like Google Search as common carriers. *See also supra*, Section I.A.

Consider the Communications Act of 1934, as amended, discussed in Section I.A. above. This Act treats common carriers and information services as two distinct categories of communications services. The Act expressly states that a "telecommunications carrier" "shall be treated as a common carrier under [this Act] *only to the extent that it is engaged in providing telecommunications services*," 47 U.S.C. § 153(51) (emphasis added), and it defines telecommunications services and information services to be mutually exclusive, *id.* § 153(24), (53); *Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014) ("We think it obvious that the Commission would violate the Communications Act were it to regulate [information services] as common carriers."); *Cellco P'ship v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012) ("[T]he Commission has interpreted [the Act] to exclude providers of 'information services'" from "the Act's definition of 'common carrier.'" (citations omitted)). *See also* 47 U.S.C. § 223(e)(6) ("Nothing in this section shall be construed to treat interactive computer services"—which are defined to include information services—"as common carriers or telecommunications carriers.").

Federal courts are in accord. The D.C. Circuit in *USTA I* acknowledged the distinction between common carriers and information services in affirming the FCC's decision to classify broadband ISPs as common carriers. *USTA I*, 825 F.3d at 691; *see supra*, Section I.A. The court

explained that broadband providers could be classified as common carriers because they "act as mere conduits for the messages of others" and are "engaged in indiscriminate, neutral transmission" of those messages, which "is characteristic of common carriage." *USTA I*, 825 F.3d at 741-42; *see also Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1322 (D.C. Cir. 2010) (Kavanaugh, J. dissenting) (likening "common carriers" to "dumb pipes" in a case concerning cable operators).

Unlike the broadband ISPs in *USTA I*, Google Search is an information service under the Communications Act. The Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includ[ing] electronic publishing." 47 U.S.C. § 153(24). This Court, in its motion to dismiss decision, acknowledged that Google Search fell within that definition. *See* MTD Op. at 13 (noting, in the context of public utilities, "Ohio law expressly excludes providers of information services, like Google [Search], from regulation"). The undisputed facts in the record confirm that Google Search offers information via the internet. SMF ¶ 34; *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 994 (2005).

Federal courts also have recognized that Google Search is not a "mere conduit" or a "dumb pipe." *See supra* Section I.A (citing *USTA I*, 825 F.3d at 690; *USTA II*, 855 F.3d at 392 (Srinivasan, J., concurring); *id.* at 435 (Kavanaugh, J., dissenting)). It's quite the opposite. *Id.*; *see, e.g.*, *USTA II*, 855 F.3d at 392 (Srinivasan, J., concurring) (observing that Google and like companies engage in "editorial filtering").

Federal courts have repeatedly concluded that Google Search and similar information services are not common carriers. *See supra* Section I.A.; *see also, e.g.*, *NetChoice, LLC v. Att'y*

Gen., 34 F.4th 1196, 1220-21 (11th Cir. 2022), *cert. granted in part sub nom. Moody v. Netchoice, LLC*, 2023 WL 6319654 (U.S. Sept. 29, 2023), *and cert. denied sub nom. Netchoice, LLC v. Moody*, 144 S. Ct. 69 (2023); *D'Agostino v. Appliances Buy Phone, Inc.*, 2015 WL 10434721, at *18 (N.J. Super. Ct. App. Div. Mar. 8, 2016) (per curiam) (deciding that Google terms of service were valid under New Jersey law because, in part, "Google is not a . . . common carrier"). This Court should join the overwhelming weight of authority and do the same.

B. The Supremacy Clause and Federal Law Preempt State Regulation of Google Search as a Common Carrier.

The Communications Act, in conjunction with the Supremacy Clause, also preempts state regulation of Google Search as a common carrier. Under the Supremacy Clause, actions taken by Congress or by federal agencies acting within the scope of their congressionally delegated authority can preempt state regulation. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986). Preemptive actions include both affirmative decisions to regulate an area under federal law and "a federal decision to forgo regulation in a given area[, which] may imply an authoritative federal determination that the area is best left *un* regulated." *Ark. Elec. Co-op. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983). Here, the FCC has done the latter: To further federal interests in competition and deregulation, the FCC has enforced a "long-standing national policy of nonregulation of information services."[4] *Minn. Pub. Utilities Comm'n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007) ("[A]ny state regulation of an information service conflicts with the federal policy of nonregulation.") (citation omitted). That policy would be in conflict with and preempt

[4] As the FCC explained in the amicus brief it submitted in *Charter Advanced Services (MN), LLC v. Lange*, this federal policy of nonregulation "refers primarily to economic public utility-type regulation, as opposed to generally applicable commercial consumer protection statutes, or similar generally applicable state laws." Br. of the FCC as Amicus Curiae Supp. Pls.-Appellees, 2017 WL 4876900, at *10 n.1 (8th Cir. Oct. 26, 2017).

any regulation by this Court of Google Search as a common carrier.[5] *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015) ("[F]ederal law must prevail" over state law if "the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of [the federal government].'" (citation omitted)).

The FCC's policy of nonregulation stems from its authority under the Communications Act and the Act's careful balancing of federal and state interests. *See La. Pub. Serv. Comm'n*, 476 U.S. at 369-70 ("The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law."). In dividing power between state and federal governments, for instance, the Act reserved for the FCC exclusive authority over *interstate* communication services, which include information services like Google Search. 47 U.S.C. §§ 151 (creating the FCC to make interstate communications services available to all people "by centralizing authority"), 152 (granting states jurisdiction over only *intrastate* telecommunications services); *see also Brand X Internet Servs.*, 545 U.S. at 976 (Thomas, J.) ("[T]he Commission has jurisdiction to impose additional regulatory obligations [on information service providers] under its Title I ancillary jurisdiction to regulate interstate and foreign communications."); *N.Y. State Telecommuns. Ass'n, Inc. v. James*, 544 F. Supp. 3d 269, at 280-81 (E.D.N.Y. 2021).

In addition, the Act discloses Congress's desire for information services to remain free from federal and state economic regulation. First, information services cannot be regulated as common carriers under the Act. *See supra* Section II.A. Second, Section 230 of the Act—which

[5] This Court's regulation would similarly be preempted if Google Search were deemed a "common carrier" under the Communications Act, rather than an information service, because the Act expressly limits state jurisdiction over telecommunication services to those only operating *intrastate*. *See* 47 U.S.C. § 152. The federal government has exclusive jurisdiction over firms that, like Google Search, operate interstate and cannot practicably separate their intrastate and interstate components. *See La. Pub. Serv. Comm'n*, 476 U.S. at 368; *Minn. Pub. Utilities Comm'n*, 483 F.3d at 576.

was adopted against the backdrop of the FCC's policy of nonregulation—sets forth the federal policy "to preserve the vibrant and competitive free market that presently exists for the internet and other interactive computer services"—including "any information service"—"unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2), (f)(2); *see also* Pulver Ruling, 19 FCC Rcd. 3307, 3316-23 ¶¶ 15-25 (2004).

Under these circumstances, federal courts have upheld the FCC's power to preempt state economic regulation of information services through its policy of nonregulation. The U.S. Court of Appeals for the Eighth Circuit, for instance, unanimously held in *Minnesota Public Utilities Commission*, that because "[c]ompetition and deregulation are valid federal interests[,] the FCC may protect [them] through preemption of state regulation" of information services. 483 F.3d at 580; *see also Charter Advanced Servs. (MN), LLC v. Lange*, 903 F.3d 715, 720 (8th Cir. 2018) (confirming FCC's preemptive authority over state regulation of information services).[6]

The FCC's nonregulation policy regarding information services extends to Google Search. *See supra,* Section II.A. There can be but one conclusion that follows: Federal law precludes this Court from regulating Google Search as a common carrier. *See Computer & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982) ("Courts have consistently held that when state regulation . . . would interfere with achievement of a federal regulatory goal, the Commission's

[6] The U.S. Court of Appeals for the District of Columbia's opposite conclusion, in a split decision, is incorrect and unpersuasive. Its analysis of the FCC's Title I authority is internally inconsistent and contrary to controlling precedent. *See generally Mozilla Corp. v. FCC*, 940 F.3d 1, 95-107 (D.C. Cir. 2019) (Williams, J., concurring in part and dissenting in part); *see also N.Y. State Telecomms. Ass'n*, 544 F. Supp. 3d at 287-88 (noting the FCC's preemptive authority in the area of "interstate communications" and concluding "[t]he Communications Act does *not* 'specifically leave out certain types of interstate communications [*e.g.*, those transmitted by information services] from the FCC's jurisdiction'" (brackets in original) (citation omitted)).

jurisdiction is paramount and conflicting state regulations must necessarily yield . . . ." (footnote omitted)).

III. The First Amendment Bars Designating Google Search as a Common Carrier.

The undisputed facts demonstrate that Google engages in substantial editorial discretion in creating the search results it shows to its users. Designating Google Search as a common carrier would interfere with that discretion and thus violate Google's rights under the First Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, and Article I, Section 11 of the Ohio Constitution. *See* U.S. Const. amends. I & XIV; Ohio Const. Art. I, § 11.[7]

Although this Court has previously expressed the view that "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 also acknowledged that it "is the burdens and obligations accompanying that designation that implicate the First Amendment." MTD Op. at 16. A decision under state common law that Google Search constitutes a common carrier could have far-reaching consequences and could lead to any number of additional lawsuits in other venues arguing that Google has violated its common law common carrier duties. *See Motor Freight v. Pub. Utilities Comm'n*, 120 Ohio St. 1, 8 (1929) (noting the "duties" and "obligations" "imposed upon common carriers"); *Conver v. EKH Co.*, 2003-Ohio-5033, ¶¶ 32-33 (10th Dist. 2003) (explaining that a common carrier "must hold itself ready to serve the public impartially to the limit of its capacity" and "exercise the highest degree of care" (citation and internal quotation marks omitted)); *see also* Compl. ¶ 45 (alleging "Google, in its operation of Google Search, has a duty to carry information from all sources indiscriminately").

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[7] *See also Eastwood Mall, Inc. v. Slanco*, 68 Ohio St.3d 221, 222 1994) (explaining "the free speech guarantees" in both constitutions have the same scope and "the First Amendment is the proper basis for interpretation" of Ohio's guarantee).

A. A Common Carrier Designation Would Violate Google's Constitutional Right To Make Its Own Editorial Judgments.

Imposing common carrier obligations would invade Google's editorial judgment and be contrary to a long line of U.S. Supreme Court precedent making clear that editorial decisions are protected by the First Amendment. The undisputed facts demonstrate that Google's search results are Google's own speech, as each search results page is created by Google and is the result of Google's extensive efforts—and exercise of judgment—in the pursuit of providing users with what it believes to be the most useful information in response to their queries. Ohio cannot, consistent with the First Amendment, force Google to alter its editorial decision-making.

The First Amendment protects speakers' editorial judgment—that is, their right to decide for themselves what speech to include and what speech to exclude in their publications. For instance, when Florida passed a law requiring newspapers to provide political candidates with a right of reply to critical editorials about them, the Supreme Court found that it violated the newspapers' speech rights. *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). The Court explained that "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper . . . constitute the exercise of editorial control and judgment"—editorial discretion that is protected by the First Amendment. *Id.*

The Supreme Court's editorial independence case law originated in the context of newspapers, but the Court has repeatedly made clear that the same protections extend to other speakers. *See, e.g.*, *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 11, 20 (1986) (holding that public utility company could not be required by government to include messages the company did not choose in billing envelopes sent to rate payers); *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp.*, 515 U.S. 557, 573 (1995) (holding that parade organizers could not be required by government to alter the expressive content of their parade by being forced to include marchers they

did not choose). Whether the speaker is a newspaper, a website designer, a utility company, or anyone else, "the government may not compel a person to speak its own preferred messages." *303 Creative LLC v. Elenis*, 600 U.S. 570, 586-87 (2023) (invalidating state's regulation of website designer). It does not make a difference "whether the government seeks to compel a person to speak its message when he would prefer to remain silent or to force an individual to include other ideas with his own speech that he would prefer not to include. All that offends the First Amendment just the same." *Id.* (citations omitted). A speaker's right to editorial independence is not diminished if the speech includes elements or information drawn from others. "[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices . . . . Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication." *Hurley*, 515 U.S. at 569-70.

The First Amendment's protection for editorial independence extends to search engines, which use their own judgment to determine what results to show to users. *Cf. Tornillo*, 418 U.S. at 256 ("Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers."). Just as a newspaper editor must choose what information to include in the paper, what to put on the front page, and in what order, a search engine must decide what information to include in its search results, what to put on the first page of results, and in what order. Indeed, several courts have already decided that search engines such as Google Search make editorial decisions entitled to protection under the First Amendment. *See Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 435 (S.D.N.Y. 2014) (finding a search engine's decisions about what to include in search results are "in essence editorial judgments" and holding that "the First Amendment protects as speech the results produced by an Internet search engine"); *e-ventures Worldwide, LLC v. Google, Inc.*, 2017 WL 2210029, at *4

(M.D. Fla. Feb. 8, 2017) (holding, in case about Google Search, that a "search engine is akin to a publisher, whose judgments about what to publish and what not to publish are absolutely protected by the First Amendment"); *Search King, Inc. v. Google Tech., Inc.*, 2003 WL 21464568, at *3, *4 (W.D. Okla. May 27, 2003) (concluding Google Search's ranking choices were constitutionally protected opinions and entitled to "full constitutional protection"); *Langdon v. Google*, Inc., 474 F. Supp. 2d 622, 629-30 (D. Del. 2007) (dismissing, on First Amendment grounds, lawsuit seeking to compel Google Search to publish plaintiff's advertisements in prominent places); *Hopson v. Google, LLC*, 2023 WL 2733665, at *3 (W.D. Wis. Mar. 31, 2023) (dismissing website owner's claim because, inter alia, "the First Amendment bar to plaintiffs proceeding against Google for removing content offered by third parties").

The SRP that Google Search provides to a user constitutes Google's own speech. While the SRP may provide links, information, or snippets from third parties, the undisputed facts demonstrate that the SRP itself—including the particular selection and arrangement of information that it contains—is a product of Google's own design, reflecting its judgment about what is relevant, useful, and high-quality information in response to a user's query. *E.g.* SMF ¶¶ 2, 20-24. Just as "[a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising," *Tornillo*, 418 U.S. at 258, Google's SRP is more than just a passive receptacle for links and other content. As other courts have observed, Google's search systems "inherently incorporate the search engine company engineers' judgments about what material users are most likely to find responsive to their queries." *Baidu.com Inc.*, 10 F. Supp. 3d at 438-39 (citation omitted). Google's search algorithms, which are used to create its SRP, are the product of Google's constitutionally-protected "opinions of the significance of particular web sites as they correspond to a search query." *Search King, Inc.*, 2003 WL 21464568, at *4. Thus, any common

carrier designation would necessarily entail obligations that would interfere with Google's ability to make its own judgments about what content is most useful for users, and thus would impermissibly interfere with Google's right to independent editorial decision-making, in violation of the First Amendment. *Tornillo*, 418 U.S. at 258 (invalidating statute because it "fails to clear the barriers of the First Amendment because of its intrusion into the function of editors"). The invasion of Google's editorial judgment is fatal. *See id.*

B. A Common Carrier Designation Could Not Withstand Strict Scrutiny.

Because designating Google Search a common carrier would unconstitutionally "intru[de]" into its editorial functions, the designation would violate the First Amendment and further balancing, whether under strict or intermediate scrutiny, is not required. *See Tornillo*, 418 U.S. at 258. However, if a balancing test were applied, it should be done using strict scrutiny because the obligations would be content- and speaker-based. A law that requires a speaker to "alter[] the content of [their] speech" is necessarily "content-based," and a law that "distinguish[es] among different speakers" is "[s]peaker-based." *Nat'l Inst. of Fam. Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371, 2378 (2018) (cleaned up); *see also Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech."). Therefore, designating Google Search alone as a common carrier would be a speaker-based restriction, and subjecting it to the traditional obligations imposed on common carriers would constitute content-based restriction.

A content- or speaker-based regulation can survive only if it passes strict scrutiny. *Nat'l Inst. of Fam. Life Advocs.*, 138 S. Ct. at 2371. Regulations subject to strict scrutiny "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Even if Ohio could identify a compelling interest at stake here, which it cannot,

designating Google Search as a common carrier is not a narrowly tailored approach to advancing that interest, as the resulting obligations would be both under- and over-inclusive. The obligations would be overinclusive, because such a broad marker as "common carrier," with all the regulations it permits, *see, e.g.*, *Dietrich v. Cmty. Traction Co.*, 203 N.E.2d 344, 347 (Ohio 1964) (explaining common carriers are held to the "highest degree of care"), is far broader than necessary to achieve any legitimate interest Ohio may identify. It would also be underinclusive because it would apply only to Google Search, not the myriad other websites that offer search functionality—such as Microsoft Bing and Amazon.com. "Such underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Nat'l Inst. of Fam. Life Advocs.*, 138 S. Ct. at 2376 (cleaned up). Failing strict scrutiny is another reason the common-carrier designation is not permissible.

C. Even if Intermediate Scrutiny Applied, Ohio Could Not Satisfy It.

The undisputed factual record establishes that the lower, intermediate level of scrutiny that the Supreme Court applied in *Turner Broadcasting System, Inc. v. FCC*, which concerned regulations on cable operators, is inapplicable in this case. 512 U.S. 622 (1994).

In *Turner*, the Court addressed cable operators, which were mere "conduit[s] for the speech of others, transmitting it on a continuous and unedited basis to subscribers." *Turner Broad. Sys.*, 512 U.S. at 629. As discussed *supra*, Sections I.A & I.B, the undisputed facts show that Google Search is not a mere conduit for the speech of others, *see* SMF ¶¶ 1-46. Further, the *Turner* Court determined intermediate scrutiny applied largely because "the physical connection" between the cable subscriber's home and the cable operator's network meant that the "cable operator, unlike speakers in other media, can . . . silence the voice of competing speakers with a mere flick of the switch." *Turner Broad. Sys.*, 512 U.S. at 656. Such reasoning does not apply here. If Google Search does not include a link to a particular webpage on its SRP, that does not prevent users from

accessing that webpage through other services available to the public. A person can use one of many other search engines to find the site, can navigate to it by clicking a link on another page (*e.g.*, Facebook), or by going directly to the site's URL, among many other methods. SMF ¶ 47. Thus, unlike the cable operators in *Turner*, Google Search does "not possess the power to obstruct readers' access to other competing publications." *Turner Broad. Sys.*, 512 U.S. at 656; *Reno v. Am. C.L. Union*, 521 U.S. 844, 870 (1997) (explaining that "the Internet can hardly be considered a 'scarce' expressive commodity" and concluding there was "no basis" for applying *Turner*'s lower level of scrutiny to internet regulations).

Even if only subjected to intermediate scrutiny, any common carrier designation would fail. To pass intermediate scrutiny, the regulation must "further[] an important or substantial governmental interest" that "is unrelated to the suppression of free expression," and "the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest." *Turner Broad. Sys., Inc.*, 512 U.S. at 662 (citation omitted). Intermediate scrutiny requires "that the means chosen do not burden substantially more speech than is necessary to further the government's legitimate interests." *Id.*

Ohio has not identified an "important or substantial" interest that the common carrier designation would address. And even if it did, the designation would be greater than necessary in addressing that interest. As described above, the common carrier designation, with all of the obligations that it permits, is far broader than necessary. Moreover, the designation is not "unrelated to the suppression of free expression," as Ohio's entire purpose in this lawsuit is to change the speech Google expresses—or chooses not to express—via its SRP. Designating Google Search as a common carrier therefore cannot pass First Amendment scrutiny.

CONCLUSION

For the foregoing reasons, summary judgment in Google's favor should be granted.

Dated: January 26, 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 26, 2024

/s/ *Michael R. Gladman*
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