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.	)	

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE OPEN MARKETS INSTITUTE IN SUPPORT OF PLAINTIFF STATE OF OHIO

The Open Markets Institute ("OMI") respectfully moves for leave to file a brief as *amicus curiae* in support of Plaintiff State of Ohio's Motion for Summary Judgment. Both parties were notified of OMI's intent to file an amicus brief. Plaintiff consented, but Defendant rejected OMI's request for consent to file a brief.

OMI is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine fair competition and threaten liberty, democracy, and prosperity. It regularly provides expertise on antitrust law, common carrier law, and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

OMI's proposed amicus brief would assist the Court by providing a historical context about common carrier law. The brief explains how common carrier law has evolved over time.

Instead of being rigid and stuck in the past, the doctrine remains flexible enough for governments to use to address new problems as they arise. The amicus brief also addresses Defendant's First Amendment arguments from a state and federal perspective. OMI explains that common carrier nondiscrimination and equal access obligations have been imposed on various industries over the years without raising First Amendment concerns. This information is relevant for the Court to properly determine Plaintiff's bid to have Google designated as a common carrier under Ohio law.

Therefore, OMI respectfully requests that this Court grant leave to file an *amicus curiae* brief in this case. The brief is attached as Exhibit A to this motion and is tendered herewith for filing.

Dated: March 15, 2024

Respectfully submitted,

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EXHIBIT A

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BRIEF OF *AMICUS CURIAE* OPEN MARKETS INSTITUTE IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF THE *AMICUS CURIAE*

The Open Markets Institute is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine fair competition and threaten liberty, democracy, and prosperity. Open Markets Institute regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

INTRODUCTION

Common carrier laws have existed for more than 500 years. Even though these laws date back to the Middle Ages, they remain vitally important in today's economy because they safeguard "access to systems and networks [that are] necessary for full involvement in civic society and economic life." Adam Candeub, *Common Carrier Law in the 21st Century*, __ Tenn. L. Rev. __, at 24 (forthcoming 2024), https://ssrn.com/abstract=4644936. Such laws are also vital because they ensure "that neither discriminatory animus nor economic power will unreasonably exclude people from" privately owned networks and systems that are "important for citizenship, democratic deliberation, and economic participation." *Id.*

The State of Ohio seeks to designate Google as a common carrier under state law. Google Search is the dominant player in the general online search market. It can wield its vast powers to harm users (including sellers and creators seeking to get to market), third-party websites, and real or perceived rivals in myriad ways. But if Google is designated as a common carrier, it would be subject to nondiscriminatory and equal access obligations that would prevent most of these abuses.

Under its well-established police powers, the State has authority to designate companies as common carriers. If a company holds itself out as "ready to serve the public indifferently to

the limit of [its] capacity" and dedicates its "property to public use" (i.e., makes its products or services "available to the public generally and indiscriminately"), it may be subject to common carrier obligations. *Hissem v. Guran*, 112 Ohio St. 59, 63-64 (1925). Because Google meets these elements, the State may impose common carrier obligations on it.

Google claims that it cannot be subject to common carrier regulations, no matter how narrowly tailored, because they would violate its First Amendment right to free expression. Despite Google's assertions, nondiscrimination and equal access obligations do not raise First Amendment concerns. In fact, courts "have long imposed [common carrier obligations] on telephone companies, railroads, and postal services, without raising any First Amendment issue." *US Telecom Ass'n v. FCC*, 825 F.3d 674, 740 (D.C. Cir. 2016). Thus, the court should reject Google's argument that its rights would necessarily be violated if it were subject to common carrier obligations.

ARGUMENT

I. States Have Longstanding Authority to Designate Firms as Common Carriers.

The State of Ohio is in "perfect harmony" with states throughout the Union, and with the U.S. Supreme Court, regarding what "constitute[s] a common carrier." *Hissem v. Guran*, 112 Ohio St. 59, 63 (1925). A firm can be designated a common carrier if it holds itself "out to serve the public indiscriminately." *US Telecom Ass'n,* 825 F.3d at 740. In concrete terms: "In the communications context, common carriers make a public offering to provide communications facilities whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing." *Id.* (cleaned up).

Ohio law is clear. The State can impose common carriage obligations on a firm that dedicates its "property to public use" and holds itself out as "ready to serve the public indifferently to the limit of [its] capacity." *Hissem*, 112 Ohio St., at 63-64. A firm dedicates its

property to public use if its products or services are made "available to the public generally and indiscriminately." *Id*. However, if a firm "is employed by one or a definite number of persons by a special contract, or for a special undertaking, he is only a private carrier" and the State cannot impose common carrier obligations on the business. *Id*. at 64.

Over the years, courts have applied the common carriage concept dynamically as new industries and technologies emerged. The Supreme Court recognized as much: "It would be a bold thing to say that the principle [regarding common carriers] is fixed, inelastic, in the precedents of the past, and cannot be applied though modern economic conditions may make necessary or beneficial its application." *German All. Ins. Co. v. Lewis*, 233 U.S. 389, 411 (1914).

In the modern era, the principles of common carriage have been applied to a range of industries. They are commonly associated with the transportation and communications industries. Candeub, *supra*, at 24; *see also Biden v. Knight First Amend. Inst. At Columbia Univ.*, 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring in denial of certiorari) ("[T]here is clear historical precedent for regulating transportation and communications networks in a similar manner as traditional common carriers."). Nevertheless, common carriage is not limited to these sectors. States have also applied these principles to various industries including grain elevators,[1] fire insurance,[2] and banking.[3]

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[1] *Munn v. Illinois*, 94 U.S. 113, 126–30 (1876).
[2] *German All. Ins. Co.*, 233 U.S. at 417.
[3] *Noble State Bank v. Haskell*, 219 U.S. 104, 110–13 (1911).

Public accommodations laws, including the Civil Rights Act of 1964, are also informed by common carriage norms. A.K. Sandoval-Strausz, *Travelers, Strangers, and Jim Crow: Law, Public Accommodations and Civil Rights in America*, 23 L. & Hist. Rev. 55, 85-89 (2005). Public accommodation laws prevent hotels, restaurants, and supermarkets from discriminating on grounds such as color, ethnicity, gender, race, and national origin.

The communications industry, in particular, has evolved drastically over time and courts updated common carriage doctrine accordingly. Ohio courts have recognized telegraph[4] and telephone[5] companies as common carriers. Courts have further held that cable[6] and broadband[7] companies may be subjected to common carriage obligations. As one state court aptly observed:

> The rules of law which govern the liability of telegraph companies are not new. They are old rules applied to new circumstances. Such companies hold themselves out to the public as engaged in a particular branch of business, in which the interests of the public are deeply concerned. They propose to do a certain service for a given price. There is no difference in the general nature of the legal obligation of the contract between carrying a message along a wire and carrying goods or packages along a route. The physical agency may be different, but the essential nature of the contract is the same.

Parks v. Alta. Cal. Tel. Co., 13 Cal. 423, 424–25 (1859).

Google incorrectly seeks to freeze common carriage doctrine in time. Given that courts, over the years, imposed common carriage obligations on a broad range of telecommunications firms, it is inconsistent with Ohio common carrier principles to draw a line in the sand at Google and declare that this is where we stop, this is where the State goes too far. Common carrier doctrine is not so rigid. On the contrary, one of its defining features is flexibility.

Google argues that it cannot be a common carrier because it does not "carry" physical goods or people. But the Ohio courts have never required physical transportation of a commodity

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[4] *W.U. Tel. Co. v. Griswold*, 37 Ohio St. 301, 310 (1881) ("[T]hat telegraph companies exercise a quasi-public employment with duties and obligations analogous to those of a common carrier, is a proposition clearly settled.").

[5] *Celina & Mercer Cnty. Tel. Co. v. Union-Ctr. Mut. Tel. Ass'n*, 102 Ohio St. 487, 492 (1921) (declaring that transmitting "telephonic messages" classified a telephone company as a common carrier).

[6] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 684 (1994) (O'Connor, J., concurring in part) ("[I]f Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies[.]").

[7] *US Telecom Ass'n*, 825 F.3d at 723 (holding that the FCC "acted permissibly in reclassifying mobile broadband as a commercial mobile service subject to common carrier regulation, rather than a private mobile service immune from such regulation.").

to apply common carriage principles. That is an invention of Google's counsel. Historically, public inns, blacksmiths, and farriers were common carriers, but these services never literally carried anything. *See Chudnovski v. Eckels*, 83 N.E. 846, 848 (Ill. 1908) ("[A]mong the instances of implied contracts are mentioned those of the common innkeeper to secure his guest's goods in his inn, of the common carrier to be answerable for the goods he carries, and of the common farrier that he shoes a horse well without laming him."). Like Google, they offered a service to the general public and that was sufficient. Accordingly, Google does not need to literally "carry" physical goods or people to be classified as a common carrier. *See Ganesh Sitaraman & Morgan Ricks, Tech Platforms and the Common Law of Carriers*, 73 Duke L. J. 1038, 1040 n.10 (2024) ("[C]ommon carriage did not merely apply to entities that "carry" or transport goods. In that sense, "common carrier" is something of a misnomer.") (cleaned up).

The State is acting well within its long-established authority in seeking to designate Google as a common carrier. It is using its police powers to apply common carriage principles to a company that holds itself out as open to the public on an indifferent basis. Ohio and federal legal precedent supports applying common carrier principles to Google Search.

II. First Amendment Considerations Do Not Preclude Common Carrier Regulations.

Common carrier obligations fit comfortably within the First Amendment. These obligations, including nondiscrimination and equal access, "have long been imposed on telephone companies, railroads, and postal services, without raising any First Amendment issue." *US Telecom Ass'n*, 825 F.3d at 740. Courts have consistently upheld the legislative power to identify and regulate telecommunications operators without running afoul of the First Amendment. *See S. Walter Jones, A Treatise on the Law of Telegraph and Telephone Companies, including Electric Law* § 251-53 (2d ed. 1916) (citing state law cases detailing state regulations imposing nondiscrimination requirements on telegraph and telephone corporations).

Likewise, courts have also upheld the government's authority to regulate broadband companies as common carriers without raising First Amendment concerns. *See US Telecom Ass'n*, 825 F.3d at 741. Courts and legislatures recognize that common carriers in communications are not speakers as such, but principally the facilitators of speech by others.

States can protect expressive activity beyond what the First Amendment and federal statutory law requires. While the Supreme Court ruled that the First Amendment does not require businesses to grant access to labor organizers, *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972), it also held that states can require businesses that are generally open to the public to permit petitioning activity on site. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980). In *PruneYard Shopping*, the U.S. Supreme Court affirmed the California Supreme Court's holding that the "California Constitution protects speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." *Id*. (citing *Robins v. PruneYard Shopping Ctr*, 23 Cal.3d 899, 910 (1979)) (cleaned up).

The Court offered multiple grounds for rejecting the shopping center owner's First Amendment arguments. First, it stressed that the First Amendment was not even implicated because "the shopping center by choice of its owner is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please." *Pruneyard*, 447 U.S. at 87. Thus, because the shopping center was open to all members of the public, any views expressed there by members of the public were unlikely to be attributed to the shopping center's owner. *Id*.

Second, the Court recognized that a member of the public's access for expressive activity did not require the shopping center itself to express any prescribed message. Rather, the shopping center owner was "free to publicly dissociate themselves from the views of the

speakers or handbillers." *Id*. at 88. *See also Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 65 (2006) (applying the same principles to a federal law that required law colleges to treat military and nonmilitary recruiters alike).

Given this body of precedent, the State may impose equal access and nondiscrimination obligations on Google without raising First Amendment concerns. Like the shopping center in *Pruneyard*, Google Search is open to all comers and the results in organic search cannot reasonably be interpreted as the views of Google itself. The Court should reject Google's new requirement for applying common carrier duties and apply the logic of *Pruneyard* because "[t]he physical agency may be different, but the essential nature of the contract is the same." *Parks*, 13 Cal. at 424.

III. Imposing Common Carrier Obligations on Google Would Not Violate its Rights.

Under Ohio law, a common carrier "must serve without discrimination, all who desire to be served and who conform to the reasonable rules of the company." *Celina*, 102 Ohio St. at 492 (1921). In other words, common carriage principles require a firm, in general, to serve all customers on the same terms and without preference. In Google's case, these laws could require it to rank websites in response to users' queries in a manner that is consistent, fair, and does not show favoritism (including self-preferencing).

While common carriage laws and obligations embedded in the common law do not establish an absolute right to access, they do provide a presumption of access. 3 William Blackstone, Commentaries on the Law of England 164 (7th ed., 1775) ("[I]f an inn-keeper, or other victualler, hangs out a sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way; and upon this universal assumpsit an action on the case will lie against him for damages, if he without good reason refuses to admit a traveler.") These laws limit the grounds for permissible discrimination. Sandoval-Strausz, *supra*, at 63-64.

Thus, a hotel cannot deny service to paying guests based on their race or ethnicity, but it can deny service if it has no vacancies or if a guest threatens the hotel's staff.

Google Search undoubtedly must engage in some discrimination to be effective. A search engine that provided users with disorganized clumps of information and failed to list relevant websites at the top of its results page would be of little use to users. As such, a search engine's decisions regarding how it ranks websites in response to users' queries do not necessarily conflict with common carriage obligations.

Google would still have the ability to rank, categorize, and organize websites on its search results page if it was subject to common carrier obligations. The State has not indicated that it intends to interfere with Google's ability to rank websites from most to least helpful. Nor has the State indicated that it intends to tell Google which websites must be included on its first results page and which links to push to lower pages.

The State instead seeks to impose common carriage obligations that would limit Google's ability to abuse its dominant position in search. While we do not know what the regulations would look like at this point, the State may seek to prohibit Google from preferencing the products and services of a third party that pays it over others in organic search results, or from preferencing its own products.

For example, if a user searched for restaurants, hotels, or other specialized services, Google may be proscribed from unfairly elevating the listing of a restaurant that is less relevant to the user than some other restaurant, in exchange for a payment by the less relevant restaurant. Similarly, Google could be proscribed from elevating its own travel services and restaurant reviews and pushing specialized search services like Expedia and Yelp to the bottom of the page—or to subsequent pages. Both of these types of discrimination are prohibited under

common carrier laws. *See Sitaraman & Ricks, supra*, 73 Duke L. J. at 1082 ("Whether it was a telephone company denying access to a messenger or transportation company, or a grain warehouse preferencing grain it was trading—the common law condemned platforms that self-preferenced integrated business lines."). But Google could relegate Expedia and Yelp to the second page or below if they did not provide useful information.

But according to Google, curating content on Google Search (i.e., organizing and ranking links to websites on Google Search in response to users' queries) means that nondiscrimination and equal access obligations would inevitably be unconstitutional because they would interfere with Google's editorial discretion. Under Google's interpretation, the State cannot impose common carriage obligations, no matter how narrowly tailored, without trampling its right to free speech. The U.S. Supreme Court, however, "has never accepted th[e] view [that] editorial discretion receives automatic First Amendment protection. Rather, editorial discretion can be protected speech if it results in a discrete and coherent message that is intended to convey a meaning." Candeub, *supra*, at 7.

To support its First Amendment arguments, Google claims its curation activities are similar to newspapers' editorial discretion. But Google Search's organization of webpages does not resemble a newspaper editor making careful and considered decisions based on human judgment—sometimes individual and sometimes collective—about what content to include or exclude in a publication. Instead, Google looks a lot more like the Yellow Pages.

The similarities between Google Search and the Yellow Pages are instructive. Like Google Search, the Yellow Pages lists the names and numbers of businesses in a community. And like Google Search, the Yellow Pages uses its discretion to group and organize these businesses in its publication (e.g., broad categories such as all restaurants versus more narrow

categories such as Chinese, Italian, and coffee shops). It is hard to believe that curatorial discretion would grant publishers of the Yellow Pages strong First Amendment rights because the company is not intending to convey a discrete and coherent message with its organizational scheme. If the Yellow Pages would not be entitled to strong First Amendment protections regarding its organizational scheme, neither should Google Search.

The court should reject Google's argument that the First Amendment is a shield against common carrier regulation. Even if curation is speech, it does not categorically protect Google from being designated as a common carrier under Ohio law. As of today, Google Search's ranking system is not based on what is best for users but is instead based on what is best for Google's bottom line. Common carriage rules would flip the switch and force Google to provide access to all users and to rank websites in a fair and nondiscriminatory manner.

CONCLUSION

For the reasons stated above, the Court should rule in favor of the State of Ohio's motion for summary judgment and hold that Google is a common carrier under Ohio law.

Dated: March 15, 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: March 15, 2024

/s/ Dale D. Cook
Dale D. Cook (0020707)