EXHIBIT A

IN THE COURT OF COMMON PLEAS DELAWARE COUNTY, OHIO

STATE OF OHIO *ex rel.* DAVE YOST, OHIO ATTORNEY GENERAL	)	
	)	Case No. 21 CV H 06 0274
Plaintiff,	)	Judge James P. Schuck
v.	)	**(ORAL HEARING REQUESTED)**
GOOGLE LLC,	)	
Defendant.	)	

AMICUS BRIEF OF SENATOR J.D. VANCE SUPPORTING THE STATE OF OHIO'S MOTION FOR SUMMARY JUDGMENT & OPPOSING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Respectfully Submitted,

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INTRODUCTION

This Court, carefully examining Ohio law, concluded that "the core of the common law concept of common carriage has remained intact as the holding out of oneself to serve the public indiscriminately to the extent of one's capacity." *Yost v. Google*, Case No. 21-CV-H-06-02748, Op. & Order Granting in Part & Den. in Part Def.'s Mot. to Dismiss at 6 ("Op. & Order") (May 24, 2022). A common carrier typically will "transport persons or property, and holds itself out to the public as ready and willing to serve the public indifferently and impartially to the limit of its capacity." *Id.* at 7 (citing *Celina & Mercer Cty. Tel. Co. v. Union Ctr. Mut. Tel. Assn*, 102 Ohio St. 487, 492 (1921).

Since the legal concept emerged in late medieval England, common carriers have carried many things, including letters and messages. Adam Candeub, *Common Carrier Law in the 21st Century*, 90 TENN. L. REV. 813, 827 (2023). As this Court concluded, Google carries messages or queries, connecting people to other people and their websites, similar to the telephone network. Op. & Order at 8. In this light, Google's claim that "Google Search is not a service involving . . . carriage" and is therefore not susceptible to common carrier regulation is perplexing. Google Mot. for Summ. J. at 1. Both the United States and Ohio Supreme Courts have easily classified new message-bearing technologies, such as telegraphs and telephones, as common carriers. Google naturally follows this rule.

Attempting to distinguish itself from its predecessor communications networks, Google argues that it offers "a highly innovative series of connected technologies that answer online user queries. . . . [and] creates a new and bespoke product—a Google search results webpage ("SRP")—with content of Google's own creation or selection." *Id.* Whether this is true or not—and it is not—Google is playing fast and loose with the facts. Google has claimed *the exact opposite* about its search service in other cases and before other courts. When seeking to limit its

liability for user content under Section 230 of the Communications Act, it has asserted that its search services are "neutral tools," Google Rep. Mem., 2017 WL 3188006, *Gonzalez v. Google*, 282 F.Supp.3d 1150 (N.D. Cal. 2017), that are solely "information provided by another." Google Br., 2018 WL 3496264, at *3, *Marshall's Locksmith Service, Inc. v. Google*, 925 F.3d 1263 (D.C. Cir. 2019).

Indeed, this hypocrisy has led at least one federal judge to conclude it is "a fair point" that Google is judicially estopped from claiming that "the blind operation of 'neutral tools'" [in its algorithms and other sorting techniques] is actually "editorial discretion." *NetChoice v. Paxton*, 49 F.4th 439, 467–68 (5th Cir. 2022), *cert. granted in part*, 144 S. Ct. 477 (2023). In short, Google cannot claim that there are no factual questions about whether its services are susceptible to common carrier regulation suitable for resolution at this stage of litigation—because at the very least, this Court must determine which version of the facts about search engines Google actually asserts.

But even accepting as true its representations to this Court about how its search functions, they do not undermine the finding that Google search simply carries other people's information, connecting people to websites. Instead of telephone numbers, Google may use a host of algorithmic indexing techniques to create a search results webpage ("SRP"). But its functions are essentially the same as any communications network: it connects people by transmitting their words and exchanging their messages. It functions just like an old telephone switchboard, but rather than connect people with cables and electromagnetic circuits, Google uses indices created through data analysis. As such, common carrier regulation is appropriate under Ohio law.

Federal law gives the States power to declare specific firms to be common carriers. In *Mozilla Corp. v. Federal Communications Commission*, 940 F.3d. 1 (D.C. Cir. 2019), the D.C.

Court of Appeals invalidated the FCC's effort to preempt state regulation of common carriers. And, "[t]o date, five states have adopted some form of network neutrality statute and the governors of five (including one, Vermont, that later adopted a statute) have issued executive orders implementing some kind of enforceable network neutrality requirements on broadband Internet service providers." Thomas B. Nachbar, *The Peculiar Case of State Network Neutrality Regulation*, 37 CARDOZO ARTS & ENT. L.J. 659, 667 (2019). Google's claim that "a designation [of an internet platform as a common carrier] would be contrary to federal law and constitutionally flawed" has no basis. Google Mot. for Summ. J. at 1.

I. Google holds itself out as providing a search service under a general contractual offering and therefore can be regulated as a common carrier.

Google's submissions in this case portray its search function as a subtle, complex communications device for connecting individuals with other individuals and their websites. True, it uses advanced computational techniques and syntactic and behavioral analysis to connect search terms with websites. But its services are *functionally* equivalent to the telephone or telegraph. All these technologies transmit messages and use information to connect people and carry their communications—and all can be regulated as common carriers.

Google attempts to avoid this conclusion. First, it argues that it is not a common carrier because its index for producing search engines is "bespoke." Google Mot. for Summ. J. at 1, 17. But here, Google misunderstands common carriers: they can provide individualized services or experiences but must make a general *contractual* offering. Google does so in its terms of service. Second, Google claims that "to the extent the journey from user to website (or vice versa) involves 'carriage,' that carriage is done by an ISP, not Google Search." Google Mot. for Summ. J. at 19. Google, however, owns an enormous amount of the backbone transport, but even if Google Search did not own one yard of optic fiber, it would still be a common carrier because common carriers

need only play one step in communications or transport—as with railroad terminals. Third, Google argues that its services are not for "hire." *Id.* at 22. But people pay for Google Search with their attention and data. Common carrier status does not turn on cash payment.

A. Google concedes it is a firm with the primary purpose of carrying others' messages.

Google argues that it is "not a service for 'transport' or 'carriage'" because "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)." Google Mot. for Summ. J. at 17–18. "Bespoke" means "custom made" and originally referred to custom-made clothes. *The Modern Goings-on of "Bespoke,"* Merriam-Webster, https://www.merriam-webster.com/wordplay/what-is-the-new-meaning-of-bespoke (last visited Mar 11, 2024). And when you order custom-made clothes, you generally converse with your tailor and make your preferences known, take unique personal measurements, and veto or overrule his or her efforts if they fail to meet expectations.

Google's submissions in this case do not portray such customization. Google instead portrays its search function as a subtle, complex communications device for connecting individuals with other individuals and their websites. As Google explains, "Google has created multiple indices. . . . 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." Google Mot. for Summ. J. at 18. These limited number of indices show likely connections between the words that are submitted to the Google search box and third-party websites. There is nothing "custom" about these indices as they are generally and neutrally applied to all users, as Google's submissions show. Google Mot. for Summ. J. at 11–18.

Google's indices function as an old-fashioned telephone circuit board that connects people who want to communicate. Instead of operators plugging cables into a circuit board to match

calling with called phone lines, Google uses algorithms and machine learning to match certain syntactic strings ("words") with websites and people using an index. Because legal concepts apply from one century to another to *functionally* similar technologies, Google is just as much a common carrier as telephone companies were.

B. Google transports messages, but, even if it did not, transport is not a necessary criterion for common carrier status.

Google claims that "to the extent the journey from user to website (or vice versa) involves 'carriage,' that carriage is done by an ISP, not Google Search." Google Mot. for Summ. J. at 19. This is false. Google is in the business of carrying and transmitting messages. It dominates vast portions of the internet backbone, the fiber that transmits messages around the internet. Through its content delivery networks, it carries its users' messages every second of every day. As Google itself explains, "Google Cloud operates on one of the best connected and fastest networks on the planet, reaching most of the Internet's users through a direct connection between Google and their ISP." Saurabh Gupta & Kapil Sharma, *Google Cloud Networking in Depth: Cloud CDN*, GOOGLE CLOUD (June 6, 2019), https://tinyurl.com/548m4vvy. In addition, Google owns many submarine cables that connect the internet globally. Tyler Cooper, *Google & Other Tech Giants are Quietly Buying up the Most Important Part of the Internet*, VENTUREBEAT (Apr. 6, 2019), https://tinyurl.com/ttn8ak2b.

In fact, transport is a major part of Google's business. Google recently announced a $9.5 billion investment in offices and data centers. Google Blog, *Our Plans to Invest $9.5 Billion in the U.S. in 2022* (Apr. 13, 2022), https://tinyurl.com/y76zfm4s, as well as its new "Media CDN," a content delivery network that transports and delivers Google search traffic. Google Product Blog, *Introducing Media CDN—the modern extensible platform for delivering immersive experiences*, (Apr. 25, 2022), https://cloud.google.com/blog/products/networking/introducing-media-cdn.

But even if Google did not own an inch of fiber optic backbone, it could still be regulated as a common carrier. That is because common carrier status includes entities that play vital but non-transporting roles in transport—that, for instance, facilitate or link networks. "A type of carrier that is invariably labeled a 'common carrier' is a linking carrier. . . . the linking entity has become a vital part of the common carrier system and, therefore, becomes a common carrier." *Kieronski v. Wyandotte Terminal R. Co.*, 806 F.2d 107, 109 (6th Cir. 1986). That is why the Supreme Court and state supreme courts classified terminal facilities, which provide railroad switching, loading, and unloading services but do not typically transport goods, as common carriers. *United States v. Brooklyn E. Dist. Terminal*, 249 U.S. 296, 304-05 (1919) (because "[t]he services rendered by the Terminal are public in their nature; and of a kind ordinarily performed by a common carrier," railroad terminals are common carriers); *Chicago & E.I. Ry. Co. v. Chicago Heights Terminal Transfer R. Co.*, 317 Ill. 65, 70 (1925) ("Terminal railway companies are . . . common carriers"). Similarly, docks and wharves linked to common carriers can be regulated as common carriers. *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 522, 31 S. Ct. 279, 286 (1911) (linked docks and common carrier railroads). And so can stockyards, which are simply large pens to store animals. *United States v. Union Stockyards & Transit Co. of Chicago*, 226 U.S. 286, 305, 33 S. Ct. 83, 88 (1912); *Union Stockyards Co. of Omaha v. United States*, 169 F. 404, 406 (8th Cir. 1909).

As the Supreme Court explains in reference to railroads, the status of "common carriers . . . is defined to include all switches, spurs, tracks, and terminal facilities of every kind, used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary . . . all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, or icing, storage, and handling

of property transported." *Union Stockyards & Transit Co. of Chicago*, 226 U.S. at 303–04 (quotations omitted).

Further, in the period of un-interconnected independent telephones in the early 20th century, telephones did not transmit calls from other competitor telephone companies but were still obligated to inform competitor companies that a call was being made under their common carrier obligations. *See* Adam Candeub, *Network Interconnection and Takings*, 54 SYRACUSE L. REV. 369, 386 (2004).

C. Google transmits messages for hire even though it does not receive cash payment.

Google is not a charitable organization. It only carries user queries and website traffic for hire and profit. Google carries user queries in exchange for their "eyeballs." People pay for Google Search with attention and data, while advertisers pay with cash. Surprisingly, Google rejects the claim that it even "'carries' user queries," arguing that "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." Google Mot. for Summ. J. at 22. This is sophistry. Rather than being "an entirely new thing," Google's indices and SRPs connect and transmit messages between users and the websites where communication is sought.

D. Google acts "indifferently" with respect to its search.

Google claims that Ohio law requires common carriers to serve users "indifferently," and that means that because "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," it cannot be a common carrier. Google Mot. for Summ. J. at 22-23. Google misunderstands "indifferently."

As Google concedes, "anyone with an internet connection" can access Google Search. Google Opp'n to Pl.'s Mot. for Summ. J. at 10. And because that access and account formation is

governed by a general contractual offering held out to all, that is enough for common carrier status. *See* Google Terms of Service, https://rb.gy/ataljg. While common carriers need not provide identical services to all, they offer their services under a general contract to all.

Google's offering fits what Blackstone described as the central feature of common carriers—they offer an "implied contract" to all. III William Blackstone, *Commentaries on the Law of England*, 163. This contract must have "nondiscriminatory . . . terms." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1000, 125 S. Ct. 2688. A common carrier does not "make individualized decisions, in particular cases, whether and on what terms to deal." *Am. Orient Exp. Ry. Co., v. Surface Transp. Bd.*, 484 F.3d 554, 557 (D.C. Cir. 2007) (citing *Nat'l Ass'n of Regul. Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976). That is what the "holding out" requirement for common carrier status means. *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1222 (2021) (Thomas, J., concurring).

Even though its contractual offering is "indifferent" and open to all, Google looks to certain features of its service that allegedly take it outside of common carrier status: it "exercise[s] discretion and selectivity over who they carry," Google Mot. for Summ. J. at 23–24, and Google claims that "courts have distinguished common carriers from companies that, like Google, make editorial decisions about the content they will include or exclude in their product." Google Opp'n to Pl.'s Mot. for Summ. J. at 19.

Google's claims ignore Supreme Court precedent, which has recognized common carriers may limit their offers to only "a restricted number of commodities." *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475, 483, 62 S. Ct. 722, 727, 86 L. Ed. 971 (1942). Though offered to all, their contracts may make reasonable distinctions among customers or classes of customers. As the Supreme Court has stated, "[n]o carrier serves all the public. His customers are

limited by place, requirements, ability to pay, and other facts. . . . The public does not mean everybody all the time." *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252, 255, 36 S. Ct. 583, 584 (1916). Common carriers may decline service to those individuals or persons who would degrade their service or hurt their uses. The "rule of the common law [is] that common carriers have the right to decline shipment of packages proffered in circumstances indicating contents of a suspicious, indeed of a possibly dangerous, nature." *United States v. Pryba*, 502 F.2d 391, 399 (D.C. Cir. 1974). Further, communications carriers could always exercise a degree of "editorial control" to ensure rules of service and decency were observed. *See* Allan L. Schwartz, *Right of Telephone or Telegraph Company to Refuse, or Discontinue, Service Because of Use of Improper Language*, 32 A.L.R.3d 1041 (1970).

Google points to no search function features that take it out of common carrier status. By its own description, it is an index or indices that connects search terms with websites. Google states that it uses the same limited and small set of search indices for all users. Google Mot. for Summ. J. at 23. It does not make a "bespoke" index for every user, nor do users bargain for "bespoke" indices.

Adopting Google's meaning of "indifferent," all common carriers are discriminatory. After all, railroads discriminate as to which towns and communities they serve; grain elevators discriminate by attaching themselves to certain areas of track, making service easier for some shippers but not others; and airlines have established roots that discriminate in favor of certain airports. All common carriers "by design" "trea[t] users differently." But that is not the meaning of "indifferently"; common carriers offer the same contract, but different services and experiences to different types of customers.

II. Judicial estoppel precludes Google from asserting that its search is anything but a neutral conduit for third-party speech.

The judicial estoppel doctrine combats "'cynical gamesmanship'" in litigation. *Greer-Burger v. Temesi*, 116 Ohio St. 3d 324, 2007-Ohio-6442, 879 N.E.2d 174, ¶ 25 (quoting *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 380 (6th Cir. 1998)). It applies when the party invoking it proves three things: that (1) their opponent took a contrary position in a prior action, (2) the opponent took the position under oath, and (3) the court accepted the position. *Id.*

Google argued to this Court that its search engine is not a common carrier because the SRPs are its own editorial creation and expression. The "choices Google makes about what to include in its web index" are "based on Google's own innovation and technical expertise." Google Mot. for Summ. J. at 4. Unlike common carriers, it is not a "mere conduit[] for the messages of others" that is "engaged in indiscriminate, neutral transmission" of those messages. *Id.* at 30 (quotations omitted). It asserts that Google Search creates its search results, "by *developing* the information itself, and by licensing it." *Id*. at 6 (emphasis added). Google's control and creation of its search page "refute any concept of Google Search as simply carrying or transporting someone else's property, and therefore engaging in common carriage." *Id.* at 19.

Google took a "contrary position" about its search function in several prior actions in submissions to other courts when seeking liability protection under Section 230 of the Communications Decency Act of 1996. To qualify for the exemption, Google represented that its search result must simply contain "information provided by another" entity, 47 U.S.C. § 230(c)(1). For instance, when seeking Section 230(c)(1) protection in *Marshall's Locksmith Service, Inc. v. Google LLC*, 925 F.3d 1263 (D.C. Cir. 2019), Google asserted that the Court could not "hold Defendants [Google] liable for search results generated from information provided by" third parties. Google Br., 2018 WL 3496264, at *3. Rather, "search results are information provided by

another information content provider." *Id.* (quotations omitted). But search results cannot be both information provided by another when Google seeks Section 230(c)(1) protection *and* reflect the "transformative nature of Google's use of information" when Google argues to this Court that "Google Search . . . [is not] a 'carrier.'" Google Mot. for Summ. J. at 18. Presumably, Google made these representations under oath, and Google certainly prevailed in *Marshall's Locksmith Service*. *See also* Google Br., 2016 WL 1243086, at *18–19, *O'Kroley v. Fastcase, Inc.*, 831 F.3d 352 (6th Cir. 2016) ("the CDA protected Google and other search engines for . . . search results, . . . [t]he Court explained that the snippets and search terms were all derived from information provided by third parties (both websites and Google users").

In addition, Section 230(c)(1)'s protections extend only to "interactive computer services" that transmit others' information, not those "responsible, in whole or in part, for the creation or development of information provided through the Internet." 47 U.S.C. § 230(f)(3). To qualify for Section 230 protection, Google has claimed that it is not responsible for the "development" of its search engine results.

When seeking Section 230 protection in a case it won, *Gonzalez v. Google LLC*, 598 U.S. 617, 619, 143 S. Ct. 1191 (2023), Google argues that search results simply "reproduce . . . third-party content" and "that content someone else created or developed 'in whole or part.'" Google Br., 2022 WL 18358194, at *28–29 (quoting 47 U.S.C. § 230(c)(1), (f)(3)). Similarly, in a suit it won, Google has argued that "arranging and displaying others' content . . . through such algorithms . . . is not enough to . . . [be] responsible as the 'develop[er]' or 'creat[or]' of that content." *Google & YouTube Br.*, 2022 WL 868987, at *31–33, *Prager Univ. v. Google LLC*, 85 Cal. App. 5th 1022 (2022).

Yet, before this Court, Google states that "[w]hen it then receives a query from a user, Google Search uses a collection of its own proprietary algorithms, reflecting its judgment and discretion, 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. . . . Google Search thus creates and publishes content—a search results page." Google Mot. for Summ. J. at 18. Google further asserts that its search function "obtains information from sites on the internet, by developing the information itself, and by licensing it." *Id.* at 6.

Either Google search involves developing information or it does not. Courts have noticed the internet platform's contradictory positions. For instance, examining a similar case where internet platforms—including Google—resisted common carrier status, the U.S. Court of Appeals for the Fifth Circuit commented on the platforms' about-face:

> The [p]latforms' position in this case is a marked shift from their past claims that they are simple conduits for user speech and that whatever might look like editorial control is in fact the blind operation of 'neutral tools.' Two amici argue that the Platforms are therefore judicially estopped from asserting that their censorship is First-Amendment-protected editorial discretion. . . . That's a fair point.

NetChoice, LLC v. Paxton, 49 F.4th 439, 467–68 (5th Cir. 2022), *cert. granted in part*; 144 S. Ct. 477, 216 L. Ed. 2d 1313 (2023). During the oral argument in that case, on appeal to the Supreme Court, the justices expressed similar concerns. For instance, Justice Gorsuch asked, "So it's speech for purposes of the First Amendment, your speech, your editorial control, but when we get to Section 230, your submission is that that isn't your speech?" Oral Arg. Tr. at 10, *NetChoice LLC v. Paxton*, 22-555, https://rb.gy/fbaeiq.

III. State designation of an internet firm as a common carrier is consistent with federal law.

Google claims that "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." Google Mot. for Summ. J. at 23. It supports this expansive claim with this argument: because the federal Communications Act treats common carriers and information services as two distinct legal categories, and Google is an information service, states cannot regulate it as a common carrier. *Id.* at 24-25. This argument is irrelevant because these federal statutory distinctions have no bearing on a state law designation.

The argument is also incorrect. Information services can be regulated as common carriers. Indeed, internet service providers, which are information services, have been regulated under the FCC's Title II "common carrier" authority of Sections 201 and 202 under its so-called network neutrality order. *In re. Protecting and Promoting the Open Internet*, 30 FCC R. 5601 (2015). These regulations were in effect until the FCC in 2018 repealed them.

Further, "[b]y reclassifying broadband services under Title I [in the 2018 FCC action that repealed network neutrality, *Restoring Internet Freedom Order*, 33 FCC Rcd. 311 (2018), https://www.fcc.gov/document/fcc-releases-restoring-internet-freedom-order], the FCC gave up its authority to regulate broadband services as common carriers and hence surrendered the authority it had to adopt federal net neutrality rules." *ACA Connects v. Bonta*, 24 F.4th 1233, 1241 (9th Cir. 2022). And, due to that surrender of authority, the states are free to regulate information service providers, like ISPs and Google, as common carriers. Indeed, five states already do. Nachbar, *supra*, 37 CARDOZO ARTS & ENT. L.J. at 667.

CONCLUSION

For these reasons, Google's Motion for Summary Judgment should be denied, and the State of Ohio's Motion for Summary Judgment should be granted.

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CERTIFICATE OF SERVICE

I certify that on March 15, 2024, the foregoing was electronically filed via the Court's e-filing System, which will send notice to counsel of record.

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