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.	)	

BRIEF *AMICUS CURIAE* OF THE CATO INSTITUTE IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTERERST OF *AMICUS CURIAE*

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual Cato Supreme Court Review.

This case interests Cato because it concerns the application of basic First Amendment principles to search engines, a critically important issue in the digital age. As explained in this brief, the First Amendment protects the right of Google Search to control what appears on a search results page. Ohio's lawsuit is grounded on a "communications collectivist" ideology that is at odds with foundational First Amendment principles.

ARGUMENT

I. Ohio's Lawsuit Recycles the Outdated Progressive Theory of Communications Collectivism

Providing that "Congress shall make no law . . . abridging the freedom of speech, or of the press," the First Amendment prohibits the government from censoring private speech and press. U.S. CONST. amend. I. Turning that guarantee on its head, scholars in the "communications collectivist" tradition convert the First Amendment from a shield to protect private actors from government abuse into a sword for the government to wield against privately-owned media platforms. In a seminal 1967 article, Jerome Barron attacked the "banality" of a First Amendment jurisprudence that only limits the government's interference with speech. Barron emphasized the need for the First Amendment to address "nongovernmental obstructions to the spread of political truth" in a capitalist system, where the private media's pecuniary interests would invariably obstruct that "truth." Jerome Barron, *Access to the Press: A New First Amendment Right*, 80 HARV. L. REV. 1641, 1643 (1967) (arguing that a new First Amendment right should be created for the public to access private, for-profit mass media on terms set by the government). To this end, Barron argued that "the interests of those who control the means of communication must be accommodated with the interests of those who seek a forum in which to express their point of view." *Id.* at 1656; *see generally*, Owen Fiss, THE IRONY OF FREE SPEECH (1998) (arguing the state must adopt a "democratic," rather than "libertarian," conception of the First Amendment so it can police the private speech arena for the public interest).

Then as now, communications collectivists advocated for "neutrality" requirements, right-of-reply mandates, and expansive applications of common carriage doctrine (using "public forum" or "public square" rhetoric). *See generally* Adam Thierer, *The Surprising Ideological Origins of Trump's Communications Collectivism*, THE TECHNOLOGY LIBERATION FRONT BLOG (May 20,

2020);[1] *see also* Jerome A. Barron, *Access Reconsidered*, 76 GEO. WASH. L. REV. 826 (2007) (describing the history of collectivist efforts to impose media access mandates since the 1960s). Borrowing directly, if unconsciously, from the communications collectivists' playbook, Ohio now seeks to apply common-carriage doctrine to Google's search results page. This would result in adopting the collectivists' position that the government should control the content shared over the mass media, forcing Google Search to host the speech that Ohio prefers.

Until lawsuits like this one attempted to resurrect it, communications collectivism had fallen sharply out of favor with courts and self-identified conservatives alike, and for good reasons. First, these efforts violate the First Amendment right to choose what speech to disseminate. *See, e.g.*, *Columbia Broad. System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) (finding that there is no constitutional right of access to broadcast outlets for political advertising); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (rejecting a right-of-reply for print media).

Second, in an effort to advance the "fundamental interest in protecting the free exchange of ideas and information values," communications collectivism chills speech. *Tornillo*, 418 U.S. at 256-58 (finding that newspaper editors were avoiding printing controversial stories under the "right of reply" mandate, thereby chilling speech). The Federal Communications Commission recognized this when it unanimously voted to repeal the Fairness Doctrine. *Syracuse Peace Council v. F.C.C.*, 867 F.2d 654, 659 (D.C. Cir. 1989) ("In sum, the fairness doctrine in operation disserves both the public's right to diverse sources of information and the broadcaster's interest in free expression. Its chilling effect thwarts its intended purpose, and it results in excessive and unnecessary government intervention into the editorial processes of broadcast journalists.").

[1] Available at https://bit.ly/36KwWsD.

Third, and critically, media access mandates violate property rights by forcing private websites to host speech they would otherwise exclude. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (holding that the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property"); 2 William Blackstone, Commentaries *2 (describing property as "that sole and despotic dominion which one man claims and exercises . . . in total exclusion of the right of any other individual in the universe."). Co-opting private property to favor certain viewpoints is not authorized by the First Amendment, and "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment," *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

Some scholars have relied on *PruneYard Shopping Center v. Robins* to argue that the government may seize websites like Google Search by fiat. 447 U.S. 74 (1980). First, *PruneYard* is inapposite because the shopping center at issue was not in the business of disseminating speech. Further, Google Search is distinguishable from the shopping center in *PruneYard* because Google Search exercises its editorial discretion when creating a search results page. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S 557, 580 (1995) (explaining that *PruneYard* "did not involve any concern that access to this area might affect the shopping center owner's exercise of his own right to speak" and that the owner in *PruneYard* "did not even allege that he objected to the content of the pamphlets") (internal citations omitted).

If a state were allowed to control what appears on a private search engine's search results page, that would amount to an unprecedent extension of *PruneYard*, applying it not only to compelled hosting on physical property but also compelled publishing of speech. When a case is itself on shaky constitutional footing, lower courts should refrain from dramatically expanding its

reach. And *PruneYard* is on such shaky footing. In fact, *PruneYard* was wrong when it was decided.

PruneYard's theory that the compelled physical hosting of speech raises no First Amendment concerns was impossible to reconcile with *Wooley v. Maynard*, which held that a state may not "require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." 430 U.S. 705, 713 (1977). And its suggestion that the First Amendment harm from the compelled support of speech can be cured by a non-endorsement disclaimer has been subsequently undermined by the Supreme Court many times over. *See Janus v. Am. Fed'n of State, Cty., & Mun. Employees*, 138 S. Ct. 2448 (2018) (forced subsidy of union speech violates the free speech rights of nonmembers, even though no one would assume funding constitutes endorsement); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (law requiring crisis pregnancy centers to notify patients of the availability of publicly funded abortion was compelled speech and violated the First Amendment, regardless of appearance of endorsement); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (compelled assessment for mushroom promotion violated the First Amendment); *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019) (right-of-access to privately operated cable television channel violated the First Amendment). This Court should therefore decline to rely on *PruneYard* in the novel and inapposite context of Google Search.

By adopting the tactics of communications collectivists, Ohio contravenes historically held conservative political values of limited government, constitutional fidelity, and strong property rights. *See generally* Robert McChesney & John Nichols, *Our Media, Not Theirs: The Democratic Struggle Against Corporate Media*, Open Media Series (2002) (arguing that collectivist efforts to

reform the media must begin with "the need to promote an understanding of the urgency to assert public control over the media"). Holding Google Search to be a common carrier would severely undermine rights of free speech and free press, arguably our most cherished civil liberties. To ensure these protections stay intact, this court should reject Ohio's claim as incompatible with the First Amendment.

II. Google Search Is Not a Common Carrier

To be a common carrier, a company must "serve the public indiscriminately and not 'make individualized decisions, in particular cases, whether and on what terms to deal.'" *Am. Orient Exp. Ry. v. STB*, 484 F.3d 554, 557 (D.C. Cir. 2007). In other words, it must provide "indifferent service" that accommodates all comers and "confers common carrier status." *NARUC v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976). A company "will not be a common carrier where its practice is to make individualized decisions in particular cases whether and on what terms to serve." *Id.* at 608–09. Under those long-settled principles, Google Search is not a common carrier because it makes individualized decisions when presenting each user with a unique search results page.

Ohio may not assume control over what content Google Search disseminates simply by calling it a "common carrier." As disseminators of unique speech products—the search results pages—Google Search has a First Amendment right to choose what appears on those pages. *Halleck*, 139 S. Ct. at 1932 (recognizing that "certain private entities . . . have rights to exercise editorial control over speech and speakers on their properties or platforms").

The Supreme Court has long recognized that "[t]he choice of material . . . the decisions made as to limitations on the size and content . . . and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." *Tornillo*, 418 U.S. at 258. And this editorial freedom extends far beyond newspapers and other print media. *See, e.g.*, *Hurley*, 515 U.S. at 567– 70 (finding that editorial privilege extends to

parade organizers); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (noting that the First Amendment protects an online bulletin board's decision "to publish, withdraw, postpone or alter content"); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (noting that First Amendment protections "do not vary when a new and different medium for communication appears"). *See also La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981 (S.D. Tex. 2017) (finding that the First Amendment extends to social media networks); *Zhang v. Baidu.com, Inc.*, 10 F. Supp. 3d 433, 437 (S.D.N.Y. 2013) (same regarding internet search engines); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629–30 (D. Del. 2007) (same).

Courts have rightly rejected lawsuits such as this, which attempted to impinge on websites' editorial freedom. *See, e.g.*, *Illoominate Media, Inc. v. Cair Fla., Inc.*, 841 Fed. Appx. 132 (11th Cir. 2020) (upholding the dismissal of a lawsuit by a political personality over her Twitter ban); *Domen v. Vimeo, Inc.*, 991 F.3d 66 (2d Cir. 2021) (upholding the dismissal of a Vimeo account termination); *Fyk v. Facebook, Inc.*, 808 Fed. Appx. 597 (9th Cir. 2020) (finding dismissal of a user's suit against Facebook for removing his content was proper). First Amendment protections "do not vary when a new and different medium for communication appears," and Google does not forfeit its constitutional rights by buying more servers. *Brown*, 564 U.S. at 790; *see also Reno v. ACLU*, 521 U.S. 844, 849 (1997) (finding the First Amendment applies with full force to internet media).

Some have argued that a website's editorial rights are contingent on its published content producing a "unified" or "coherent" speech product. *See, e.g.*, Ashutosh Bhagwat*, Do Platforms Have Editorial Rights?*, 1 J. FREE SPEECH L. 143 (2021); Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 4005 (2021). Proponents of the coherence-as-prerequisite theory argue that the Supreme Court has upheld infringements on the

First Amendment rights of editors when their "message" lacked unity or coherence. And they argue that the lack of a unified message made these infringements on editorial rights less grave.

But the Supreme Court's own explanation of the rights of editors is incompatible with that view. "A private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message." *Hurley*, 515 U.S. at 569–70*; see also Malik v. Brown*, 16 F.3d 330, 332 (9th Cir. 1994) (explaining that a person does not forfeit their First Amendment rights by not exercising them in a certain timeframe because "a 'use it or lose it' approach does not square with the Constitution"). The fact that a website chooses to host a wide range of views and topics is no basis for curtailing its First Amendment rights. That choice itself embodies a protected editorial judgment. The coherence-as-prerequisite theory rule would encourage online services to host less and moderate more to establish that they do present a coherent speech product.

Furthermore, First Amendment rights are not contingent on the closeness of a medium's similarity to a newspaper, and "we don't need to compare Google and Facebook to newspapers, grocery stores, malls, parade organizers, law school career fairs, doctors, or anything else" to conclude that Google engages in protected editorial activity. Eric Goldman, *Of Course the First Amendment Protects Google and Facebook (and It's Not a Close Question)*, SANTA CLARA DIGITAL COMMONS (2018).[2] What matters is not the *how* multivarious voices are combined. What matters is that a Google search results page indisputably does combine those voices into a unique page over which Google exercises editorial control. The First Amendment protects Google from lawsuits such as this one which attempt to override that control.

[2] Available at https://bit.ly/3J1qw5E.

III. Conclusion

Under long-settled principles, Google Search is not a common carrier because, among other reasons, it makes individualized decisions when presenting each user with a unique search results page. Regardless, Ohio may not assume control over what content Google Search disseminates simply by calling it a "common carrier," as Google Search has a First Amendment right to choose what appears on those pages. Google's Motion for Summary Judgment should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 12, 2024, a true and accurate copy of the foregoing was filed though and will be served to all parties by the electronic filing system of the Delaware County Court of Common Pleas.

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