MALIGN MANIPULATIONS: CAN GOOGLE'S SHAREHOLDERS SAVE DEMOCRACY?

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Research shows that by manipulating Google Search—or more precisely, the order of the search results—a malign actor can shift public opinion regarding a candidate for political office or public policy issue. One double-blind study conservatively estimated the shift at twenty percent of undecided voters.[1]

However, it is not clear the extent to which Google Search has, to date, been manipulated for political purposes. The answer to that question is a carefully guarded secret at Google (or the subject of willful blindness). Some light was shed on the matter during the December 11, 2018, House Judiciary Committee Hearing on Transparency and Accountability: Examining Google and its Data Collection, Use and Filtering. At that hearing, Google CEO, Sundar Pichai, testified on the issue for several hours. However, his testimony left many questions unanswered (and raised many more).

For that reason—to provide answers—this Article argues that Google's shareholders must compel the company to disclose the extent to which Google Search has, to date, been manipulated by bad actors. This Article explains how Google's shareholders can compel such disclosure using Rule 14a-8 under the Securities Exchange Act of 1934.

Unfortunately, search engine manipulation has been loosely defined by authors. Many authors use search engine manipulation as a catch-all term for any reordering of search results (other than by relevance). This Article precisely defines search engine manipulation as: (1) malign third parties gaming the search algorithm for political ends, or (2)

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1. *See* Robert Epstein & Ronald Robertson, *The Search Engine Manipulation Effect*, 112 PNAS E4512 (2015).

malign insiders tweaking the search algorithm for political ends.

Finally, while this Article focuses on Google Search, the concerns regarding manipulation apply to any other search engine (e.g., Bing or Yahoo) or other platforms that use algorithms to find information for users (e.g., Facebook, Twitter, and even Amazon).

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I. INTRODUCTION

Google Search[2] is an amazingly powerful tool. It is Godlike.[3] Omniscient.[4] The user just enters a person, place, thing, or idea into the search box, and *voilà*, Google Search scours the *billions* of webpages on the internet and returns links to the tens, hundreds, even thousands, that are relevant.[5]

Even following that culling, however, the user still faces the prospect of reviewing more information than she could ever possibly absorb.[6]

The user's inability to absorb large amounts of information (a failing common to all mere mortals) is what makes Google Search so incredibly powerful.[7] Using its proprietary algorithm, Google Search sorts the information so that the most relevant morsels appear first.[8] (And that ordering is important, because numerous studies show that

2. Google Search is an internet search engine developed by, and the primary product of, Google, Inc. For ease of discussion, this Article will refer to the search engine as "Google Search," and the corporation as "Google." In 2015, Google, Inc. became a wholly owned subsidiary of Alphabet, Inc. as part of a restructuring. *See* ALPHABET, INC., FORM 10-K ANNUAL REPORT 3 (2018).

3. Charles Ferguson, *What's Next for Google*, MIT TECH. REV.(Jan. 1, 2005) http://www.technologyreview.com/web/14065/ ("The perfect search engine would be like the mind of God." (quoting Sergey Brin, co-founder of Google)). *But see* James Grimmelmann, *Some Skepticism About Search Neutrality*, *in* THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET, 435, 443 (Berin Szoka & Adam Marcus, eds., 2010) ("Not even Google is—or ever could be—omniscient.").

4. The traditional view of God is an entity who is omniscient (all knowing), omnipotent (all powerful), and omnibenevolent (all good). David Hume, *Evil and the God of Religion*, *in* THE PROBLEM OF EVIL 39, 46 (Michael L. Peterson, ed., 1992).

5. *See* ALEXANDER HALAVAIS, SEARCH ENGINE SOCIETY 47 (2018) (estimating that the web contains several billion English language pages alone).

6. Frank Pasquale, *Internet Nondiscrimination Principles: Commercial Ethics for Carriers and Search Engines*, 2008 U. CHI. LEGAL F. 263, 278 (2008) (discussing the "mental congestion" occasioned by information overload).

7. HALAVAIS, *supra* note 5, at 23, 110 (discussing the advent and importance of the PageRank algorithm).

8. *Id.* at 23.

users predominantly click on the links that appear at the top of the first page of results.)[9]

But what if the search algorithm—the order of the results—can be manipulated? One double-blind study found that by manipulating the order of the results, a malign actor can shift public opinion about that person, place, thing, or idea.[10] The study *conservatively* estimated the shift at twenty percent.[11]

Often voters turn to Google Search for information about a candidate for public office.[12] In those circumstances, a twenty percent shift in late undecided voters for or against a candidate could change the outcome of an election.[13] Some politicians[14] and scholars[15] believe

9. Jennifer Shkabatur, *The Global Commons of Data*, 22 STAN. L. TECH. REV. (forthcoming 2019) (ninety-two percent of clicks are on the first page of search results, and 32.5% of clicks are on the first result); *see also* HALAVAIS, *supra* note 5, at 42 ("Eye-tracking studies have shown that we are drawn to the top of the first page of results, and may ignore results that are lower on the page, let alone buried on subsequent results pages." (citing Z. Guan & E. Cutrell, *An Eye Tracking Study of the Effect of Target Rank on Web Search*, *in* PROCEEDINGS OF THE SIGCHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 417–20 (ACM Press, 2007))).

10. Robert Epstein & Ronald Robertson, *The Search Engine Manipulation Effect*, 112 PROC. NAT'L ACAD. SCI. E4512, E4520 (2015).

11. *Id.*

12. Searching for political topics on Google is so common that Google had a dedicated page for the 2018 Midterm Elections. *See Midterm Elections 2018*, GOOGLE TRENDS, https://trends.google.com/trends/story/US_cu_S_kK8WQBAAAliM_en (last visited Sept. 19, 2019).

13. Epstein & Robertson, *supra* note 10, at E4518 (noting that fifty percent of US presidential elections were won by vote margins under 7.6%). For a mathematical recitation of how the outcome of a presidential election could be changed, see *infra* Subpart III.B.

14. *See Transparency and Accountability: Examining Google and its Data Collection, Use and Filtering Practices: Hearing Before the H. Judiciary Comm.*, 115th Cong. 27–28 (2018) [hereinafter *Google Hearings*], https://search-proquest-com.go.libproxy.wakehealth.edu/docview/2154375437/94B4ED19D2D4A76PQ/1?accountid=14868 (detailing an exchange between Congresswoman Karen Bass and Google CEO Sundar Pichai regarding Russian manipulation of the search algorithm during the 2016 Presidential Election).

15. SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM 183 (2018) (suggesting that search engine manipulation cost Hillary Clinton the 2016 Presidential Election). Metaxa-Kakavouli and Torres-Echeverry write:

> While we do not yet—and may never fully—know precisely how the spread of fake news and misinformation across these platforms affected political views and outcomes, the events of the recent election, compounded by elections in France and perhaps the U.K. and Colombia, reveal the importance of the platforms on democratic institutions. Although Google did not attract as much attention as did social media platforms on the topic of false information, it remains a crucial actor in this landscape.

Danae Metaxa-Kakavouli & Nicolas Torres-Echeverry, *Google's Role in Spreading Fake News and Misinformation*, *in* FAKE NEWS AND MISINFORMATION: THE ROLES OF THE NATION'S DIGITAL NEWSSTANDS, FACEBOOK, GOOGLE, TWITTER

that manipulation of Google Search played a role in the defeat of Hillary Clinton in 2016 in key states.[16]

Unfortunately—despite dire implications for our democracy[17]—very little is known about the extent to which Google Search is, or has been, manipulated by malign actors for political ends. Google's management is incredibly secretive.[18] Some light was shed on the question during the December 11, 2018, House Judiciary Committee Hearing on Transparency and Accountability: Examining Google and its Data Collection, Use and Filtering Practices ("Google Hearings").[19] Google CEO Sundar Pichai testified on the issue for several hours.[20] However, the testimony left many questions unanswered (and raised many more).[21] For that reason, *Google's shareholders must compel the company to disclose whether Google Search has been manipulated by bad actors, together with the extent of such manipulations.* This Article explains how they can do that.

The legal tool available to shareholders is Rule 14a-8 under the Securities Exchange Act of 1934.[22] Rule 14a-8 provides that a company must include a shareholder proposal in its annual proxy, unless grounds exist to exclude it.[23] A shareholder proposal asking the board of directors to form an independent special committee to examine and report[24] on a significant public policy matter as it relates to the company's business—here, the potential manipulation of Google Search—is an appropriate use of the Rule.[25]

AND REDDIT 71 (2017), https://www-cdn.law.stanford.edu/wp-content/uploads/2017/10/Fake-News-Misinformation-FINAL-PDF.pdf.

16. Hillary Clinton received more votes overall, but Donald Trump won more votes in key states, securing a majority of the electoral college. *See Election Landscape*, WALL STREET J., Nov. 10, 2016, at A13. ("Mrs. Clinton appears headed for a popular-vote win but an electoral college loss."). The winner of the electoral college becomes President of the United States. *See* U.S. CONST. art. II, § 1, cl. 3; U.S. CONST. amend. XII.

17. Search engine manipulation has serious implications for the future of democracy in the United States. Informed voters are a necessary prerequisite to a properly functioning democracy. *See* Letter from Thomas Jefferson to Richard Prince (Jan. 8, 1789), https://founders.archives.gov/documents/Jefferson/01-14-02-0196.

18. HALAVAIS, *supra* note 5, at 195.

19. *See Google Hearings*, *supra* note 14.

20. *Id.*

21. *Id.*

22. 17 C.F.R. § 240.14a–8 (2011).

23. *Id.* § 240.14a–8(i).

24. Indeed, at one point, it was the position of the SEC Staff that proposals asking the board of directors to examine and report, as opposed to requiring a specific action, were never excludable. *See* Trinity Wall St. v. Wal-Mart Stores, Inc., 792 F.3d 323, 338–39 (3d Cir. 2015) (citing 1982 Proposing Release, 1982 WL 600869, at *17).

25. *See, e.g.*, *id.* at 329 (asking Wal-Mart to report on the sale of high-capacity assault rifles); Lovenheim v. Iroquois Brands, Ltd., 618 F. Supp. 554, 556 (D.D.C. 1985) (asking the company to "form a committee to study the methods

But first the shareholders need to narrowly tailor the subject of the report they seek. As such, after Part II explains how Google Search operates, Part III suggests two ways that Google Search can be manipulated: malign third parties gaming the search algorithm for political ends (sometimes shortened in this Article to gaming),[26] and malign insiders tweaking the search algorithm for political ends (sometimes shortened in this Article to tweaking). Unfortunately, many authors simply refer to manipulation as a catch-all term for all actions that result in search results being organized other than by relevance.[27]

Part IV, drawing on both theoretical arguments and existing empirical support, explains why gaming and tweaking are a threat to deliberative democracy. Thereafter, Part V contains the gravamen of this Article, explaining how shareholders can use a shareholder proposal to compel Google's board of directors to appoint a special committee of independent directors to investigate and report on manipulation of Google Search. Suggested language for such a shareholder proposal is included (hereinafter the "Model Proposal").

Should Google wish to exclude the Model Proposal from its proxy materials, the matter will likely be decided (at least initially)[28] by the Securities and Exchange Commission ("SEC") Division of Corporate Finance ("SEC Staff").[29] As such, Part V also explains why I believe that the Model Proposal is an appropriate use of Rule 14a-8 (consistent with prior no-action letters declining to exclude proposals and case law).

Part VI discusses counterarguments as well as alternate proposals for battling search engine manipulation. It concludes that the Model Proposal is superior to those alternate proposals.

Before proceeding, it is important to explain that while this Article focuses on Google Search, the concerns regarding

by which its French supplier produces paté de foie gras, and report to the shareholders its findings").

26. In discussing gaming, this Article focuses on Russia's Internet Research Agency ("IRA") using Search Engine Optimization ("SEO") techniques to increase the visibility of fake news webpages it maintained. This propaganda campaign was part of a much larger Russian effort to undermine the 2016 elections. *See* Special Counsel Robert S. Mueller, III, Report on the Investigation into Russian Interference in the 2016 Presidential Election (Washington D.C., Mar. 2019) [hereinafter "Mueller Report"]. Beyond the scope of this Article are other aspects of the Russian effort, such as the hacking of the Democratic National Committee ("DNC"), or release of information obtained through hacking by WikiLeaks. *See id.* at 36–62.

27. *See* Grimmelmann, *supra* note 3, at 456 (stating that "it is a slippery term, and used inconsistently in the search engine debates").

28. The ultimate arbiter of whether a no-action letter was appropriately granted (or declined) is, of course, the courts. *See, e.g.*, *Trinity*, 792 F.3d at 323 (litgating exclusion); *Lovenheim*, 618 F. Supp. at 554 (same).

29. 17 C.F.R. § 240.14a–8 (2018); *see Trinity*, 792 F.3d at 330–31 n.4 (discussing how the no-action letter process applies in the context of Rule 14a-8 shareholder proposals).

manipulation apply to any other search engine (e.g., Bing or Yahoo) or other platforms that use algorithms to find information for users (e.g., Facebook, Twitter, and even Amazon). I chose Google Search because it is, by far, the leading search engine. As of September 2016, it had 73.02% market share.[30] By September 2018, its market share had grown to 78.05%.[31] Google Search's chief competitor is Baidu, with 9.82% market share.[32]

II. HOW GOOGLE SEARCH WORKS

In the days before the internet, information was contained in libraries, in books.[33] To find a relevant book, the patron would use a card catalogue.[34] The card catalogue would allow the patron to search by subject (some even allowed the patron to search by keyword).[35]

When information migrated to the internet, it became necessary to create a mechanism to locate it among the vast sea of digital text (albeit, rather than searching for a book,[36] the user is now searching for a webpage).[37] Thus, the "search engine" was born—"an information retrieval system that allows for keyword searches of distributed digital text."[38]

This Article is concerned with search engines that scour the internet, specifically the most popular by far, Google Search. Most users think of Google Search as a place where they type a keyword, hit enter, and receive a list of webpages that contain information relevant to that keyword. That is generally true. However, this Article is concerned with two "behind the scenes" aspects of Google Search: (1) how Google builds its index of keywords, and (2) how Google orders the results.[39] The second is especially ripe for manipulation by gaming by third parties or by insiders tweaking the algorithm.

30. HALAVAIS, *supra* note 5, at 8.

31. *Browser Market Share*, NET MKT. SHARE, https://netmarketshare.com (last visited Sept. 19, 2019).

32. *Id.* Baidu's market share is largely attributable to the fact that Google does not operate in China; three of four searches in China are conducted instead on Baidu. *Censors and Sensibility*, ECONOMIST, Aug. 25, 2018, at 53.

33. HALAVAIS, *supra* note 5, at 16.

34. *Id.*

35. *Id.*

36. Although Google Books now allows for keyword searches of book contents as well. *See About Google Books*, GOOGLE BOOKS, https://books.google.com/intl/en/googlebooks/about/index.html (last visited Sept. 19, 2019).

37. HALAVAIS, *supra* note 5, at 16.

38. *Id.* at 7.

39. For purposes of this Article, a simple explanation of how search engines function is sufficient. For additional descriptions, see *id.* at 19–25; Eric Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 EMORY L.J. 507, 533–39 (2005); Viva R. Moffat, *Regulating Search*, 22 HARV. J.L. & TECH. 475, 479–86 (2009).

A. Building the Index

Before the user can perform a search, Google Search needs to create an index (Google Search does not search the entire internet each time a user enters a query, instead it searches its index).[40] Creating this index is a massive task. Google Search's index is more than 100,000,000 gigabytes large.[41] It is stored at Google's sixteen data centers, the largest of which is in Mayes County, Oklahoma,[42] and is 980,000 square feet.[43] To build its index, Google Search sends crawlers onto the internet to locate webpages.[44] From each webpage, keywords are extracted and added to the index.[45]

When a user enters a keyword into Google Search, it locates the keyword in the index, which in turn points to each webpage that contained that keyword.[46] Those webpages appear in the results.[47] (Subpart II.B will explain how the webpages are ordered from most relevant to least relevant using Google's search algorithm.)

However, not all webpages are part of Google Search's index.[48] First, Google Search's crawlers cannot index pages that are behind a

40. HALAVAIS, *supra* note 5, at 19. "When a user enters a search query into the Google search box, Google searches the cached content and its own index, rather than the Web itself, and returns ranked results based upon a proprietary algorithm." Moffat, *supra* note 39, at 481.

41. Ryan Nakashima, *AP Explains: How Google Search Results Work*, ASSOCIATED PRESS (Aug. 28, 2018), https://apnews.com/693f55e3781a4c53a390a1e3b917c76e.

42. *Data Center Locations*, GOOGLE, https://www.google.com/about/datacenters/inside/locations/index.html (last visited Sept 19, 2019).

43. ALI GHIASI & RICH BACA, 802.3BS TASK FORCE, INSTITUTE OF ELECTRICAL AND ELECTRONICS ENGINEERS, OVERVIEW OF LARGEST DATA CENTERS 5 (2014), http://www.ieee802.org/3/bs/public/14_05/ghiasi_3bs_01b_0514.pdf.

44. Professor Halavais explains:

> [The crawler] begins . . . with a list of webpages [it] plans to visit. [It visits the page and] saves a copy of the page . . . , noting the time and the date. [It] then looks through the page for any hyper-links to other pages. If [it] finds hyperlinks that are not already on [its] list, [it] adds them to the bottom of the list. Following this pattern, [it] is likely to record a large part of the entire web. Once complete, [it] would begin again from the top of her list, as there are likely new pages that have been created and linked to since [it] began.

HALAVAIS, *supra* note 5, at 14–15.

45. Moffat, *supra* note 39, at 481. The crawlers provide information in the form of cached content that is in turn indexed. *Id.*

46. *Id.*

47. *Id.*

48. Goldman, *supra* note 39, at 533.

password because the crawler cannot see them.[49] That is to say, Google Search can only index public pages.[50]

Second, even public pages may be excluded if they ask to be.[51] That occurs where the webpage has a robot exclusion protocol, "code indicating that the site is not to be searched or indexed by indexing robots."[52] Crawlers usually are "polite," and respect such requests.[53]

Third, even if a page is crawled and indexed, Google may impose the "death penalty," removing it from its index (this is referred to as the death penalty, because if a page is not locatable via Google, that is like not existing at all).[54] Google may impose the death penalty if the page violates law (e.g., child pornography) or pursuant to a Digital Millennium Copyright Act ("DMCA") takedown request.[55] (There is also some evidence that when Google discovers that a webpage is gaming its search algorithm, it may impose the death penalty.)[56]

B. Ordering the Results

Searching involves the user entering a search term into the search box and hitting enter.[57] In less than one second, Google Search matches the search term to relevant entries in its index.[58] A list of pages that contain the search term is then displayed for the user.[59]

A keyword appearing in Google Search's index could point to tens, hundreds, even thousands of webpages.[60] A natural question arises: In what order should those webpages be presented to the user? Google Search could order the results alphabetically (though that would not be very useful).[61] Instead, it uses its proprietary search algorithm (sometimes referred to as the PageRank algorithm), which assigns a PageRank to each webpage to be used in ordering the

49. Dan Hunter & F. Gregory Lastowka, *Amateur-To-Amateur*, 46 WM. & MARY L. REV. 951, 974 n.96 (2004); *URL Inspection Tool*, GOOGLE, https://support.google.com/webmasters/answer/9012289 (last visited Sept.19, 2019).

50. Hunter & Lastowka, *supra* note 49.

51. Moffat, *supra* note 39, at 482.

52. *Id.*

53. HALAVAIS, *supra* note 5, at 16.

54. *See* David Segal, *The Dirty Little Secrets of Search*, N.Y. TIMES (Feb. 13, 2011), https://www.nytimes.com/2011/02/13/business/13search.html.

55. *Remove Information From Google*, GOOGLE, https://support.google.com/webmasters/answer/6332384 (last visited Sept. 19, 2019); *Terms & Policies*, GOOGLE, https://www.google.com/+/policy/content.html (last visited Sept. 19, 2019).

56. *See, e.g.*, E-Ventures Worldwide, LLC v. Google, Inc., Case No. 2:14-cv-646-FtM-PAM-CM, 2017 U.S. Dist. LEXIS 88650, at *7–8 (M.D. Fla. Feb. 8, 2017) (discussing that E-Ventures' content was removed from Google's index).

57. HALAVAIS, *supra* note 5, at 19.

58. *How Google Works*, GOOGLEGUIDE, http://www.googleguide.com/google_works.html (last visited Sept.9, 2019).

59. HALAVAIS, *supra* note 5, at 19.

60. Goldman, *supra* note 39, at 534.

61. *Id.*

results.[62] The PageRank is a function of the webpage's relevance to the query.[63] A webpage with a PageRank of ten is highly relevant and will appear first.[64] A webpage with a PageRank of one, two, or three is much less relevant and will be buried in later pages of search results.[65]

The specifics of how the search algorithm works are a carefully guarded secret.[66] There are hundreds of factors.[67] Below are some of the factors that have been identified (assume Page A, a page about apples, is the page being assigned the PageRank):

1. The number of times the search term appears on Page A;

2. The number of pages linking to Page A, and whether those linking pages (Pages X, Y & Z) also contain the search term; [68]

3. The number of pages linking to Pages X, Y, & Z;

4. The freshness of Page A;[69] and

5. *finally, but very importantly*, tweaks by Google insiders that may favor or disfavor a specific page (here, Page A) or a class of pages (all pages about apples).

Gaming focuses on third parties manipulating factors one through four.[70] Tweaking—by definition—is done by Google insiders and is the domain of factor five.[71]

62. *Id.*

63. Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 U.S. Dist. LEXIS 27193, at *3–4 (W.D. Okla. May 27, 2003).

64. *Id.*

65. *Id.*

66. Michael Mattioli, *Disclosing Big Data*, 99 MINN. L. REV. 535, 550–51 (2014).

67. Goldman, *supra* note 39, at 534 (stating 100 factors); HALAVAIS, *supra* note 5, at 131 (stating 200 factors).

68. Goldman, *supra* note 39, at 534. Professor Halavais explains:

> Google and others recognized that hyperlinks were more than just connections, they could be considered votes. When one page linked to another page, it was indicating that the content there was worth reading, worth discovering. After all, this is most likely how web surfers and the search engine's crawlers encountered the page: by following links on the web that led there. If a single hyperlink constituted an endorsement, a large number of links must suggest that a page was particularly interesting or worthy of attention.

HALAVAIS, *supra* note 5, at 108–09.

69. *Google Hearings*, *supra* note 14 (discussing that Google also considers the "freshness" of pages when assigning a PageRank).

70. *See infra* Subpart III.A.

71. *See infra* Subpart III.B.

III. TWO FORMS OF MALIGN MANIPULATION

The Oxford English Dictionary defines manipulation as a positive, "the action or an act of managing or directing a [thing] . . . in a skillful manner," or a negative, "the exercise of subtle, underhand, or devious influence or control over a [thing] . . . ."[72] It is the second kind of manipulation—that which is underhanded or devious—that this Article is concerned about.

There are two forms of search engine manipulation that are underhanded and devious: (1) third party gaming; and (2) insider tweaking. They are all the more malign when they take place for political purposes.

A. Gaming

1. Gaming for Commercial Purposes

This Article defines gaming as where: (1) a third party,[73] (2) with intent to trick Google's search engine into assigning a webpage a higher PageRank,[74] (3) alters the characteristics of said webpage using search engine optimization ("SEO") techniques. Further, while it is necessary to first discuss (for purposes of background) gaming for commercial purposes, this Article focuses on political gaming. The difference is motive. (Gaming for political purposes will be discussed in the next Subpart.)

The first "gamers" were not acting for political purposes.[75] Instead they were SEO companies working for commercial enterprises, for commercial purposes.[76] For a fee, they would trick

72. *Manipulation*, OXFORD ENGLISH DICTIONARY, http://www.oed.com/view/Entry/113525?redirectedFrom=manipulation (last visited Sept. 19, 2019); *see* Grimmelmann, *supra* note 3, at 456 (discussing that manipulation can be good or bad).

73. I use "third party" to refer to a "person" not affiliated with Google through employment or otherwise. "Person" is used in its broadest possible sense, including natural persons, businesses, or governments.

74. While academic definitions of "manipulation" differ, all seem to agree that "intent" is a necessary element. Grimmelmann, *supra* note 3, at 457; *see also* Oren Bracha & Frank Pasquale, *Federal Search Commission? Access Fairness and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1168 (2008) (focusing on intent); Jennifer A. Chandler, *A Right to Reach an Audience: An Approach to Intermediary Bias on the Internet*, 35 HOFSTRA L. REV. 1095, 1117 (2007) (same); Mark Patterson, *Non-Network Barriers to Network Neutrality*, 78 FORDHAM L. REV. 2843, 2854–55 (2010) (same).

75. *See, e.g.*, E-Ventures Worldwide, LLC v. Google, Inc., No. 2:14-cv-646-FtM-PAM-CM, 2017 U.S. Dist. LEXIS 88650, at *1 (M.D. Fla. Feb. 8, 2017); *see also* Victor T. Nilsson, *You're Not from Around Here, Are You? Fighting Deceptive Marketing in the Twenty-First Century*, 54 ARIZ. L. REV. 801, 812 (2012) (discussing commercial gaming by J.C. Penney); Segal, *supra* note 54 (same).

76. *See E-Ventures*, 2017 U.S. Dist. LEXIS 88650, at *1–2; Segal, *supra* note 54.

Google's search algorithm into assigning their client's webpage a higher PageRank.[77] Examples of common SEO techniques include:

- *Keyword Stuffing*. Because Google's search algorithm takes into account how many times the keyword in question appears on a page (the more times, the higher the rank), it can be gamed by repeating the same keyword many times.[78]

- *Link Schemes*. Because Google's search algorithm takes into account how many incoming links a webpage has (the more links, the higher the rank) as well as the rank of the linking page (the higher, the better), it can be gamed by making sure the page is linked to by other webpages.[79]

The case of *E-Ventures Worldwide, LLC v. Google, Inc.*[80] is illustrative. In that case, E-Ventures, an SEO company, engaged in link schemes,[81] which Google defines as, among other things, "excessive link exchanges ('Link to me and I'll link to you') or partner pages exclusively for the sake of cross-linking, . . . or using . . . services to create links to your site."[82] (In response, Google imposed the "death penalty,"[83] removing from its index E-Ventures' webpage. Google also removed from its index hundreds of webpages belonging to E-Ventures' clients.)[84]

77. *See E-Ventures*, 2017 U.S. Dist. LEXIS 88650, at *1–2; Segal, *supra* note 54.

78. *Irrelevant Keywords*, GOOGLE, https://support.google.com/webmasters/answer/66358?hl=en (last visited Sept. 19, 2019) (using the example of a seller of "custom cigar humidors" using that phrase five times in the same short section of text). More nefariously, the keyword may repeat out of sight of the user, "hidden by matching the text to the background color to avoid detection by users on the page." Metaxa-Kakavouli & Torres-Echeverry, *supra* note 15, at 75. A modification of keyword stuffing involves using keywords that are totally unrelated to the topic of the webpage, but are often searched, like "sex." *Id.*

79. Metaxa-Kakavouli & Torres-Echeverry, *supra* note 15, at 75. Here, one SEO company technique is to create links to their client's webpage from the comments section of a blog with a high PageRank. *Id.*

80. No. 2:14-cv-646-FtM-PAM-CM, 2017 U.S. Dist. LEXIS 88650, at *1 (M.D. Fla. Feb. 8, 2017).

81. *Id.* at *2.

82. *Link Schemes*, GOOGLE, https://support.google.com/webmasters/answer/66356?hl=en (last visited Sept. 19, 2019); *see* Raymundo Reyes, *The Legal Obligations Of Search Engine Optimization Firms*, 57 ARIZ. L. REV. 1115, 1120 (2015).

83. *See supra* Subpart II.A (discussing circumstances where Google will impose the "death penalty").

84. *E-Ventures*, 2017 U.S. Dist. LEXIS 88650, at *3.

Another illustrative case involves J.C. Penney.[85] Someone (J.C. Penney denied it was them),[86] "paid to have thousands of links placed on hundreds of sites scattered around the web, all of which lead directly to JCPenney.com."[87] Many of those linking sites—like nuclearengineeringaddict.com—had nothing to do with products J.C. Penney sells.[88] As a result, J.C. Penney became the top result for searches ranging from "skinny jeans" to "Samsonite Luggage."[89]

Upon discovering the link scheme, Google took "manual action" against J.C. Penney, resulting in the average J.C. Penney position for fifty-nine search terms falling from 1.3 to fifty-two.[90]

2. Gaming for Political Purposes

While SEO techniques originated to increase the visibility of commercial enterprises—as was the case for E-Ventures and J.C. Penney—these same techniques are now being used to conduct political war.[91] That is to say, malign actors are creating fake news webpages and then using SEO techniques to increase their visibility.[92]

The recently released *Report in The Investigation into Russian Interference in The 2016 Presidential Election* ("*Mueller Report*") makes clear that Russia—specifically the Internet Research Agency, LLC ("IRA")[93]—created fake news webpages to interfere with the

85. Segal, *supra* note 54; *see* Nilsson, *supra* note 75, at 807.

86. J.C. Penney did, however, after being punished by Google, fire its search engine consulting firm. Segal, *supra* note 54.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *See* Mueller Report, *supra* note 26, at 14–35; Indictment at 5, U.S. v. Internet Research Agency LLC, No. 1:18-cr-00032-DLF (D.D.C. Feb. 16, 2018) [hereinafter "Indictment"], https://www.justice.gov/file/1035477/download. In recent years, academics have increasingly raised red flags that Google Search can be manipulated for political ends. *See, e.g.*, Metaxa-Kakavouli & Torres-Echeverry, *supra* note 15, at 8–10 (discussing the use of SEO techniques to spread misinformation); Michael C. Dorf & Sidney G. Tarrow, *Stings and Scams: "Fake News," the First Amendment, and the New Activist Journalism*, 20 U. PA. J. CONST. L. 1, 3 (2017) ("in the weeks before the election, search giant Google's algorithms were gamed . . . ."); *see also* Carole Cadwalladr, *Google, Democracy and the Truth About Internet Search*, GUARDIAN (Dec. 4, 2016), https://www.theguardian.com/technology/2016/dec/04/google-democracy-truth-internet-search-facebook ("What these right wing news sites have done . . . is what most commercial webpages try to do. They try to find the tricks that will move them up Google's PageRank system. They try and 'game' the algorithm." (interviewing Jonathan Albright)).

92. *See* Mueller Report, *supra* note 26, at 14–35; Indictment, *supra* note 91, at 5.

93. Formed in 2013, the IRA is a "Russian organization engaged in political and electoral interference operations." Indictment, *supra* note 91, at 5. It employed hundreds of individuals to conduct "information warfare against the United States of America" through fictitious U.S. personas on social media

election.[94] As a result, an indictment was filed against the IRA in the District of Columbia alleging, *inter alia*, fraud against the United States ("Indictment").[95]

Most of the details regarding IRA activities are redacted from the *Mueller Report* to prevent "harm to ongoing matter[s]."[96] However, what can be gleaned from unredacted portions of the *Mueller Report*, in conjunction with the Indictment, is that the IRA created fake news webpages,[97] and, most importantly for our purposes, increased the visibility of those fake news webpages using SEO techniques.[98] The IRA had a dedicated SEO division.[99]

The IRA's activities date back at least to 2014.[100] In an interview granted to NBC News, an ex-IRA employee explained his role in spreading misinformation:

> Following Russia's annexation of the Crimean Peninsula of Ukraine in 2014 — and Russia's subsequent suspension from the G8, plus heavy international sanctions — [the employee] was hired [by the IRA] to rewrite articles about Ukraine for a site that was designed to look like it was based out of that country, not St. Petersburg, Russia.
>
> The facts were to remain the same, but with a few key words swapped out. "Terrorist" became "militia men." "Ukrainian Army" became "national guard." Russia couldn't be criticized.

platforms and other Internet-based media," and "spread[ing] distrust towards the candidates and the political system in general." *Id.* at 6.

94. *See* Mueller Report, *supra* note 26, at 18 n.28 (discussing IRA "trolls" posting inflammatory matter on webpages). Webpages controlled by the IRA included reportsecret.com, a pro Donald Trump news webpage. RENEE DIRESTA ET AL., THE TACTICS & TROPES OF THE INTERNET RESEARCH AGENCY 14 (2018), https://disinformationreport.blob.core.windows.net/disinformation-report/NewKnowledge-Disinformation-Report-Whitepaper-121718.pdf. Curiously, it also included several webpages associated with the Black Lives Matter movement. *See id.*; *see also* Scott Shane & Sheera Frenkel, *Russian 2016 Influence Operation Targeted African-Americans on Social Media*, N.Y. TIMES (Dec. 19, 2018), https://www.nytimes.com/2018/12/17/us/politics/russia-2016-influence-campaign.html. This fact supports the proposition that Russia was more interested in sowing social discord—a mission they accomplished—and less interested in helping one side of the political spectrum.

95. Indictment, *supra* note 91, at 4.

96. *See* Mueller Report, *supra* note 26, at 13–33.

97. *See* Indictment, *supra* note 91, at 14–15 (discussing webpages controlled by IRA).

98. *See id.* at 5–6 (discussing structure of IRA, including SEO department).

99. *See id.*

100. Ben Popken & Kelly Cobiella, *Russian Troll Describes Work in the Infamous Misinformation Factory*, NBC NEWS (Nov. 16, 2017), https://www.nbcnews.com/news/all/russian-troll-describes-work-infamous-misinformation-factory-n821486.

> *The objective was to . . . get them to the top of search engine results*, [the employee] said.[101]

Despite the increasing evidence that Google Search is being gamed for political purposes, Google has been less than forthcoming with details.

Some of the blame goes to lawmakers, who fail to ask the right questions. Many of the questions posed by lawmakers to Google over the past year have focused on the wrong issues (see the discussion in the next Subpart regarding Congressman Nadler asking Mr. Pichai about Russia purchasing ads on Google, an effort that had limited impact),[102] or have been overly broad and unhelpful, such as Senator Grassley asking Google in a letter "[a]re you aware of any foreign entities seeking to influence or interfere with U.S. elections through your platforms?"[103] Because the question was so open-ended, Google was able to simply answer "yes,"[104] but provide no information as to *who* or *how*.

To quote G.K. Chesterton, "[i]t's not that [Congress] can't see the solution. They can't see the problem."[105]

Fortunately, this Article's Model Proposal does not rely on politicians to discover the truth (a task to which they are ill-suited due to a lack of expertise and partisanship).[106] Instead, the Model Proposal recognizes that shareholders—using Rule 14a-8—are in a better position to pry free answers.

3. Buying Political Ads Is Not Gaming

One last point. Google allows companies to buy ads on Google Search. They are not ads per se, but instead paid placement of a webpage in search results (at the top or bottom of the first page).[107] So, for example, a company that builds custom luxury treehouses

101. *Id.*

102. *Google Hearings*, *supra* note 14.

103. Letter from Susan Molinari, Google, to Charles E. Grassley, Comm. on the Judiciary 11 (2018), https://www.judiciary.senate.gov/imo/media/doc/2018-04-25%20Google%20to%20CEG%20-%20Data%20Privacy.pdf.

104. To be precise, Google's answer was an overly lawyered version of "yes." *Id.* ("Protecting our platforms from state-sponsored interference is a challenge we have been tackling as a company for many years. We face motivated and resourceful attackers, and we are continually evolving our tools to stay ahead of ever-changing threats . . . .").

105. G.K. CHESTERTON, THE FATHER BROWN STORIES 81 (1935).

106. Here, partisanship is a real bar to discovering the truth. Republicans may shy away from asking about gaming, because the answers may support a contention that Russia helped Donald Trump during the 2016 election, even if Trump did not invite such assistance. *See* Mueller Report, *supra* note 26, at 181 (finding no collusion or conspiracy). On the other hand, Democrats may shy away from asking about tweaking, because the answers may support the contention that Silicon Valley leveraged technology to help Democrats. *See infra* Subpart III.B.1.

107. *See Google Ads*, GOOGLE, https://ads.google.com (last visited Sept. 19, 2019).

could pay a fee for their webpage to appear whenever someone searches "treehouse."[108]

Those that accuse Russia of gaming Google Search to spread political misinformation tend to default to a discussion about Russia purchasing ads.[109]

Russia did buy some ads on Google, but the impact was fairly limited (it appears that Russia purchasing ads was more of a problem on Facebook).[110] Asked about Russia purchasing ads during the 2016 Presidential Election, Mr. Pichai testified as follows:

> Congressman Nadler: Now, according to media reports, Google found evidence that Russian agents spent thousands of dollars to purchase ads on its advertising platforms that span multiple Google products as part of the agents -- the Russian agent's campaign to interfere in the election two years ago . . . .
>
> Does Google now know the full extent to which its online platforms were exploited by Russian actors in the election two years ago?
>
> Mr. Pichai: We have -- you know we undertook a very thorough investigation, and in 2016, we -- we now know that there were two main ad accounts linked to Russia, which -- which you know, advertised on Google for about $4,700 in advertising. We also found other limited . . . .
>
> Congressman Nadler: Total of $4,700?
>
> Mr. Pichai: That's right, which was, you know -- no amount is OK here, but we found limited activity, improper activity. We learned a lot from that and we have, you know, dramatically increased the protections we have around our election offerings.[111]

I do not include buying ads as a form of gaming, because there is no attempt to trick Google's search algorithm using SEO techniques (instead, Google and the purchaser of the ads are in a mutually beneficial relationship).

108. *See id.*

109. *Google Hearings*, *supra* note 14. The roots of this focus appear to be a *Washington Post* story. *See* Elizabeth Dwoskin et al., *Google Uncovers Russian-Bought Ads on YouTube, Gmail and Other Platforms*, WASH. POST, (Oct. 9, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/10/09/google-uncovers-russian-bought-ads-on-youtube-gmail-and-other-platforms/?utm_term=.442f8f59bba5.

110. *Google Hearings*, *supra* note 14; Mueller Report, *supra* note 26, at 25 (discussing $100,000 in Facebook ads purchased by IRA).

111. *Google Hearings*, *supra* note 14.

B. Tweaking

This Article defines the tweaking of Google Search as where: (1) a Google insider, (2) with intent to promote a webpage with which they agree politically (or demote a webpage with which they disagree politically),[112] (3) alters the search algorithm. Thus, the primary difference between gaming and tweaking are elements one and three, the involvement of a Google insider and the alteration of the search algorithm itself. Consider these two possibilities:

- *Page-Specific Tweaking*. The Google insider could tweak the search algorithm to demote, or promote, a specific webpage. Such a page-specific tweak would likely involve an extra line of code taking an "if," "then" approach: *if* the page is Breitbart.com (a right-wing news source), *then* its PageRank is reduced by X. On the other hand, *if* the page is huffpost.com (a left-wing news source), *then* its Page Rank is increased by X.

- *Class Tweaking*. The Google insider could tweak the search algorithm to demote, or promote, a class of webpage.[113] Such class tweaking would likely involve an extra line of code taking an "if," "then" approach: *if* the page contains the term "illegal alien" (a term more likely to be used by conservative webpages), *then* its PageRank is reduced by X. On the other hand, *if* the page contains the term "undocumented immigrant" (a term more likely to be used by liberal webpages), then its PageRank is increased by X.

We know that Google engages in page-specific tweaking in the nonpolitical context. Google sometimes tweaks the search algorithm to punish SEO companies and their clients. Google fought several high-profile lawsuits over the matter.[114] For example, in *Search King v. Google*,[115] Google took retaliatory action against Search King—tweaking the search algorithm to lower Search King's PageRank from eight to two—after Search King linked its clients' webpages to webpages ranked highly by Google. (Compare *E-Ventures*, discussed

112. Grimmelmann, *supra* note 3, at 456–58.

113. Another example is that in the past, Google tweaked the search algorithm to lower the PageRank of all mugshot webpages. Allyson Haynes Stuart, *Google Search Results: Buried if Not Forgotten*, 15 N.C. J.L. & TECH. 463, 502 (2014).

114. E-Ventures Worldwide, LLC v. Google, Inc., No. 2:14-cv-646-FtM-PAM-CM, 2017 U.S. Dist. LEXIS 88650 (M.D. Fla. Feb. 8, 2017); Langdon v. Google, Inc., 474 F. Supp. 2d 622 (D. Del. 2007); Kinderstart.com LLC v. Google, Inc., No. C 06-2057 JF (RS), 2006 U.S. Dist. LEXIS 82481 (N.D. Cal. July 13, 2006); Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 U.S. Dist. LEXIS 27193 (W.D. Okla. May 27, 2003).

115. *Search King*, 2003 U.S. Dist. LEXIS 27193, at *4.

above, where the SEO company was removed from Google's index entirely.)[116]

While there is no direct evidence of page-specific tweaking or class tweaking at Google,[117] those that believe it takes place often point to: (1) motive on the part of Google insiders, and (2) opportunity, coupled with (3) anecdotal evidence.[118]

1. Motive

Insiders at Google have demonstrated a motive to tweak the search algorithm to promote ideas with which they agree politically and demote ideas with which they disagree politically (although whether they acted on that desire is not clear and part of the reason that the Model Proposal is necessary).[119] According to *The Wall Street Journal*, leaked internal emails show that "days after the Trump administration instituted a controversial travel ban in January 2017," employees at Google discussed how to "tweak" the search algorithm to increase public opposition to the ban (by among other things, moving to the top of search results links to pro-immigration organizations).[120]

The news story was especially potent because it came on the heels of the release of an internal video showing top executives at Google discussing the 2016 election.[121] In the video, Google co-founder Sergey Brin discussed how "deeply offended" he was by the election of Donald Trump (and presumably, many of the conservative policies Trump advocated to win the election).[122]

After the flood of bad publicity for Google, Mr. Pichai quickly drafted a memo warning staff to stay nonpartisan.[123] He wrote, "We do not bias our products to favor any political agenda."[124] This reminds me of telling my toddler "we do not hit" after he has slugged his brother. It is more of an aspirational goal than a statement of fact.

116. *E-Ventures*, 2017 U.S. Dist. LEXIS 88650, at *3.

117. Patterson, *supra* note 74, at 2854 ("[T]here seems to be little hard evidence of intentional manipulation of results by Google.").

118. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (explaining disparate impact).

119. John D. McKinnon & Douglas MacMillan, *Google Workers Discussed Tweaking Search Function to Counter Travel Ban*, WALL STREET J., (Sept. 20, 2018), https://www.wsj.com/articles/google-workers-discussed-tweaking-search-function-to-counter-travel-ban-1537488472.

120. *Id.*

121. Douglas MacMillan, *Google CEO Warns Staff: Stay Nonpartisan*, WALL STREET J., (Sept. 22, 2018), https://www.wsj.com/articles/google-ceo-warns-staff-stay-nonpartisan-1537580004.

122. *Leaked Video: Google Execs Upset Over the Election*, CNN, https://www.cnn.com/videos/cnnmoney/2018/09/13/google-video-trump-election-2016-breitbart-orig-js.cnn (last visited Sept. 19, 2019).

123. MacMillan, *supra* note 121.

124. *Id.*

During questioning by the Judiciary Committee a couple of months later, Mr. Pichai did not deny the authenticity of the emails but simply pointed out that the discussed tweaking never came to fruition:

> Congressman Gaetz: . . . *The Wall Street Journal* reported that your workers were discussion[sic] tweaking search terms to frame the discussion over the travel ban. Did you perform an investigation into that allegation?
>
> Mr. Pichai: We looked into it. There was no attempt at, you know, anything to influence our products.[125]

In short, what is not disputed, is (1) that some Google employees were motivated to tweak the search algorithm to battle conservative ideas; and (2) those employees were part of an ecosystem (Silicon Valley in general, and Google specifically) hostile to conservative thought. This motive, coupled with opportunity and anecdotal evidence that Google employees tweaked the search algorithm, are certainly enough to justify further investigation.[126]

One important subpoint: the above described evidence of motive would also act to render pretextual any claim that the tweaks served a legitimate purpose—e.g., combatting black hat SEO—and any harm to conservatives was coincidental (see analogy to disparate impact claims, discussed below).[127]

2. Opportunity

Logic dictates that Google insiders have ample opportunity to tweak the search algorithm for improper purposes. After all, they have access to the search algorithm. (Although, for his part, Mr. Pichai denies that it is possible for any one insider to tweak the search algorithm for an improper purpose. There are simply too many "checks and balances" he says.[128])

In fact, we know that the search algorithm is regularly tweaked to incorporate the reviews of some 10,000-plus Google employed "search quality raters."[129] There are many ways that this process may be abused. The most obvious is that quality raters have the ability to

125. *Google Hearings*, *supra* note 14.

126. The Mueller Investigation into collusion between Russia and the Trump Campaign was likewise justified by a convergence of motive, opportunity, and anecdotal evidence. *See* Mueller Report, *supra* note 26, at 11–12.

127. Comment, *Section 504 of the Rehabilitation Act: Analyzing Employment Discrimination Claims*, 132 U. PA. L. REV. 867, 879 n.78 (1984) (discussing pretexts for discrimination).

128. *Google Hearings*, *supra* note 14 (Mr. Pichai stated, "Congressman, first of all, I want to assure you. We have checks and balances . . . . In general, we always assume—our systems are designed—we assume there could be bad intent.").

129. Nakashima, *supra* note 41.

flag webpages, presumably for downgrading, or even outright removal from the index, where the webpage contains content that is "offensive."[130] Of course, "offensive" is a highly subjective term. Google's General Guidelines instruct reviewers to "assign the Upsetting-Offensive flag to all results that contain upsetting or offensive content from the perspective of users in your locale, even if the result satisfies the user intent."[131] (Recall that Mr. Brin is on a leaked tape referring to the election of Donald Trump as "offensive." That is a perfectly valid opinion, but is that the type of "offense" that should lead to, for example, a pro-Trump webpage being flagged?)[132]

As such, Google's position that search results are based on an algorithm, and it follows, purely objective, is only half true (and somewhat misleading). While it is true that the search results are based on an algorithm, the algorithm is tweaked by what *offends* 10,000 quality raters.[133] In 2017, Google tweaked its search algorithm 2,400 times based on input from these quality raters.[134]

Asked about this issue by the Judiciary Committee, Mr. Pichai confirmed that quality raters are still used by Google:

> Congressman Rothfus: When -- when Mr. Johnson asked a question about the -- the Trusted Flagger program, you said, "for us to review." Who's the "us"? Who's doing the -- who's doing that review?
>
> Mr. Pichai: We review things both with a combination of our automated systems, as well as manual reviewers. These are people who are part of . . . .
>
> Congressman Rothfus: And -- and how many people is that? How -- how many -- is that a committee? Is it . . . .
>
> Mr. Pichai: You know, in 20 -- we have committed to scale up our manual reviewers to over 10,000 people, and we are well -- well underway to do that. And so this is thousands of people working 24/7 globally across, looking at content based on our policies.[135]

130. *See* GOOGLE, GENERAL GUIDELINES § 14.6 (May 16, 2019) [hereinafter GOOGLE GUIDELINES], https://static.googleusercontent.com/media/guidelines.raterhub.com/en//searchqualityevaluatorguidelines.pdf.

131. *Id.*

132. CNN, *supra* note 122.

133. *Id.*

134. Nakashima, *supra* note 41.

135. *Google Hearings*, *supra* note 14.

3. Evidence of Discrimination

Evidence of discrimination (by Google Search) against conservative webpages often takes the form of anecdote.[136] By way of example:

- *Crooked Hillary*. There are numerous anecdotes in the conservative press about Google Search favoring Hillary Clinton during the 2016 Presidential Election. One allegation is that it tweaked the search algorithm so that searches for "Crooked Hillary"—the less-than-flattering nickname placed on her by Donald Trump—returned webpages favorable to Clinton.[137]

- *Conservative Legislation in a Negative Light*. Conservative members of Congress complained that when users searched for legislation they sponsored—e.g., The American Health Care Act, The Tax Cuts and Jobs Act—the first few pages of results were overwhelmingly negative.[138]

136. A collection of these anecdotes can be found in *The State of Intellectual Freedom in America: Hearing Before the Subcomm. On the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 115th Cong. 31–33 (2018) (Testimony by Harmeet Dhillon, Partner, Dhillon Law Group, Inc.).

137. Patrick Howley, *Google: We're Not Rigging "Crooked Hillary" Searches*, BREITBART (June 5, 2016), https://www.breitbart.com/politics/2016/06/05/google-not-censoring-crooked-hillary-searches/. Although, it was not just the conservative press that noticed the possible bias. A review by *Slate Magazine* showed that "Hillary Clinton had five positive results and only one negative on the first page," while "Donald Trump had four positive and three negative search results on the first page." Daniel Trielli, Sean Mussenden & Nicholas Diakopoulos, *Why Google Search Results Favor Democrats*, SLATE (Dec. 7, 2015), https://slate.com/technology/2015/12/why-google-search-results-favor-democrats.html.

138. When Mr. Pichai testified at the Google Hearings on December 11, 2018, Congressman Steve Chabot argued that conservatives had been discriminated against by Google. He stated:

> A while back, Republicans in the house passed [the American Health Care Act to repeal Obamacare.] I Googled American Health Care Act and virtually every article was an attack on our bill . . . . It wasn't until you got to the third or fourth page of search results that you found anything even remotely positive about our Bill.
>
> [The Tax Cuts and Jobs Act] was passed about a year ago . . . . Same story . . . . To find any article that had anything remotely good to say about our plan you had to go deep into the [Google] search results.

Google Hearings, *supra* note 14. Mr. Pichai responded that, to the extent conservative opinions were buried on the third or fourth page of results, it is not through any tweaking by insiders at Google. *Id.* This mirrors an earlier official Google response to the leaked Google emails regarding tweaking the search algorithm. *See supra* Subpart III.B.1. In response, Google released the following statement:

> Google has never manipulated its search results or modified any of its products to promote a particular political ideology – not in the current

The problem with anecdotes is that they are shaped by the speaker; for every story of discrimination by a conservative, one could find an equally compelling story by a liberal.[139]

For the foregoing reason—i.e., that anecdotal evidence is untrustworthy—during the Congressional Hearings, Congressman Darrell Issa made a suggestion to Mr. Pichai.[140] He suggested Google use a statistical analysis of outcomes—similar to what is used in disparate impact cases—to determine if these anecdotes are symptoms of a wider problem:

> If you measure the outcome such as some of those that were just listed . . .
>
> Will you commit to look . . . at the outcome, measure the outcome, and see if in fact there is evidence of [discrimination] using that, and then work backwards to see [where discrimination enters the system]?[141]

To make sense of the foregoing suggestion by Congressman Issa, an analogy is in order. In other areas of the law (employment discrimination, housing discrimination, etc.), a policy can be shown to be discriminatory if it adversely impacts a protected class.[142] (The

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> campaign season, not during the 2016 election, and not in the aftermath of President Trump's executive order on immigration. Our processes and policies would not have allowed for any manipulation of search results to promote political ideologies.

McKinnon & MacMillan, *supra* note 119. It is worth noting that Google, along with several other technology firms, filed an amicus brief challenging the travel ban, arguing that it "inflicts significant harm on American business, innovation and growth." Brief for Washington et al. as Amici Curiae Supporting Appellees at 8, Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105).

139. Anecdotal evidence is most useful when it complements statistical evidence. *See* Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 385, 422 n.211 (2008) (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977) (noting that such anecdotes bring "the cold numbers convincingly to life")).

140. *Google Hearings*, *supra* note 14.

141. *Id.*

142. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). No discriminatory intent on the part of the policy drafter need be shown. Michael G. Allen, Jamie L. Crook & John P. Relman, *Assessing HUD's Disparate Impact Rule: A Practitioner's Perspective*, 49 HARV. C.R.-C.L. L. REV. 155, 182 (2014) ("Disparate impact by definition does not require evidence of discriminatory intent, and courts and juries can and do find defendants liable under the disparate impact standard even when there is insufficient evidence of discriminatory intent to satisfy the disparate treatment standard."); Steven L. Willborn, *The Disparate Impact Model Of Discrimination: Theory And Limits*, 34 AM. U. L. REV. 799, 805–07 (1985) ("The theory that evidence of disparate impact is relevant only to the extent that it creates an inference of discriminatory motive is, however, badly flawed. . . . [T]he antidiscrimination laws prohibit the use of certain factors, such as race, in making employment decisions, not the reasons or

adverse impact is generally shown through statistical disparity resulting from defendant's policy.)[143]

Here, by analogy, the "policy" is the search algorithm; the "protected class" is conservatives.[144] Congressman Issa is suggesting that whether Google (or its search algorithm) discriminates against conservatives can be shown through a disparate impact analysis. That is certainly something to think about when it comes to implementing the Model Proposal.

IV. A THREAT TO DELIBERATIVE DEMOCRACY

A. Theory

"[W]herever the people are well informed they can be trusted with their own government; that whenever things get so far wrong as to attract their notice, they may be relied on to set them to rights."

—Thomas Jefferson[145]

Professors Bracha and Pasquale, in their 2008 article, *Federal Search Commission*, explore how search engine manipulation can undermine democracy.[146] They point out that when a malign actor manipulates search results—placing favored results higher—it prevents some facts and opinions from entering the marketplace of ideas.[147]

The Introduction to this Article used the 2016 Presidential Election as an example of how Google Search could theoretically (and some believe did) impact an election. The ranking of search results can play a role in public policy debates as well.[148] Consider the issue of health care reform.[149] If a person were trying to reach an informed opinion regarding the American Health Care Act of 2017, she may

motive for the choice of the factors."); *see also* Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 FORDHAM L. REV. 523, 529 (1991) (explaining how disparate impact differs from disparate treatment).

143. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2523 (2015).

144. Generally, political affiliation is not a protected class under federal law. *See* Juncewicz v. Patton, No. 01-CV-0519E(Sr), 2002 U.S. Dist. LEXIS 22651, T *12 (W.D.N.Y. Oct. 8, 2002). Although there are exceptions. *See* D.C. CODE § 2-1402.11 (2019) (outlawing discrimination based on "race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation, *political affiliation*, or credit information." (emphasis added)).

145. Letter from Jefferson to Prince, *supra* note 17.

146. *See* Bracha & Pasquale, *supra* note 74, at 1171.

147. *See id.* at 1172.

148. *See Google Hearings*, *supra* note 14 (containing Congressman Steve Chabot's discussion on apparent discrepancies in search results regarding The American Health Care Act).

149. *See id.*

have entered the search "American Health Care Act" or "AHCA" into Google Search's search box.[150] That query should have led to webpages that argue for and against passage of the Act. If manipulation of the search algorithm caused the results to be one-sided—returning only webpages favorable to one side—that undermines the "public deliberative process" by exposing the public to only those views supported by those that manipulated the search engine.[151]

This is not the first time in our history that scholars have become concerned about some viewpoints being excluded from the marketplace of ideas. Bracha and Pasquale draw parallels to the prior work of Jerome A. Barron.[152] In his 1967 article, *Access to the Press—A New First Amendment Right*, Barron argued that all opinions should be reflected in the marketplace of ideas.[153] However, he stated, the notion that "the marketplace of ideas is freely accessible" is a myth.[154] Barron challenged the romanticized idea that there is a "marketplace of ideas" where "full and free discussion exposes the false and . . . encourages the testing of our own prejudices."[155] Instead, the "mass media"—which Barron defines as radio, television, and broad circulation newspaper[156]—only presents majoritarian commentary, eschewing unorthodox ideas.[157]

And so too, Google. The danger that Google poses—like the mass media before it—is the ability to control information. It is easy to imagine a dystopian future where the public would see only what Google wants it to see.[158] In such a future, the public would not have all the facts (and opinions derived from those facts) necessary to participate in a meaningful debate of any public policy issue.[159]

150. *See id.*

151. Bracha & Pasquale, *supra* note 74, at 1171.

152. *See id.* at 1150 (citing Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641–42 (1967)).

153. Barron, *supra* note 152, *passim*.

154. *Id.* at 1641. The viability of the "marketplace of ideas" theory in the face of active misinformation campaigns was recently revisited. *See* Tim Wu, *Is The First Amendment Obsolete?*, 117 MICH. L. REV. 547, 554 (2018). Professor Wu argues that the marketplace of ideas is now flooded, there is too much information. "If it was once hard to speak, it is now hard to be heard." *Id.*

155. Barron, *supra* note 152, at 1642 (quoting Dennis v. United States, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting)).

156. *Id.* at 1654.

157. *Id.* at 1643, 1645.

158. *See* CASS R. SUNSTEIN, REPUBLIC.COM 3–5 (2001). While Professor Sunstein's also presents a picture of a dystopian picture, his concern is slightly different. *Id.* He is concerned with information bubbles where opinions are never challenged. *Id.*

159. *Id.*

B. Empirical

Search engine manipulation as a threat to deliberative democracy is more than theoretical. Empirical evidence shows that search engine results can alter public opinion and even votes.[160]

First, a large portion of the population is susceptible to manipulation. They are busy. They want an "objective" arbiter like Google Search to help them make decisions. Don't believe it? Consider that the second most popular query on Google Search on Tuesday, November 6, 2018—the day of the midterm elections—was "who to vote for today?"[161]

Second, moving a result up (higher on the search results page) can greatly increase the likelihood that a user will click on the result.[162] Search results located on the first page are much more likely to be clicked on (ninety-two percent of clicks).[163]

A manipulator, by moving favored results up, can increase the number of people that hold that opinion.[164] (That is because increased exposure to an opinion increases the likelihood that one will adopt that opinion as their own.)[165]

One double-blind study conservatively estimated the shift at twenty percent of undecided voters.[166] In writing a summary of their research for *Politico*, Epstein and Robertson explained that moving a favored opinion up in the search results "can easily shift the voting preferences of undecided voters by twenty percent or more—up to eighty percent in some demographic groups—with virtually no one knowing they are being manipulated."[167]

Even taking the conservative twenty percent estimate, that is more than enough to swing an election. In the days before the 2016 Presidential Election, five percent of Florida likely voters were

160. Epstein & Robertson, *supra* note 10, at E4520.

161. *See Google Trends*, GOOGLE (Nov. 16, 2018), https://trends.google.com/trends/story/US_cu_S_kK8WQBAAAliM_en (screen shot dated Nov. 16, 2018 on file with author).

162. HALAVAIS, *supra* note 5, at 42.

163. Shkabatur, *supra* note 9 (stating that ninety-two percent of clicks are on the first page of search results); HALAVAIS, *supra* note 5, at 42 (pointing out that eye-tracking studies have shown that we are drawn to the top of the first page of results (citing Guan & Cutrell, *supra* note 9, at 417–20)).

164. Epstein & Robertson, *supra* note 10, at E4520.

165. Maurice E. Stucke & Ariel Ezrachi, *How Digital Assistants Can Harm Our Economy, Privacy, and Democracy*, 32 BERKELEY TECH. L.J. 1239, 1274–75 (2017).

166. Epstein & Robertson, *supra* note 10, at E4520.

167. Robert Epstein, *How Google Could Rig the 2016 Election*, POLITICO (Aug. 19, 2015), http://www.politico.com/magazine/story/2015/08/how-google-could-rig-the-2016-election-121548.

undecided.[168] That is 475,081 voters.[169] Moving twenty percent of them from Trump to Clinton would take 95,016 votes from Trump (new vote for Trump is 4,522,870) and add 95,016 votes to Clinton (new vote for Clinton is 4,599,991).[170] Clinton would have won Florida. If that result was repeated in another swing state, it would have changed enough electoral votes to change the outcome of the election.[171]

Importantly, when asked a direct question about this issue at the Google Hearings, Mr. Pichai did not deny that Google has the power to alter election outcomes.[172] Consider his exchange with Congressman Rothfus:

> Congressman Rothfus: I want to talk a little bit about these allegations of bias that been out there. You know, I've seen the media reports about a few Google engineers lamenting the 2016 election results. Then they discussed potentially manipulating search results that would favor some political viewpoints in the future. On a hypothetical level, those Google engineers believe that they have the power to influence an election. Do you think Google's products and services are powerful enough that they can sway public opinion to tilt an -- an election if the company wanted to? Are your products that powerful?
>
> Mr. Pichai: Congressman, today we see users get information from a wide variety of sources, and while Google is a big player in search, search is just one of the ways in which people get information. They get it from social networking sites. . . .
>
> Congressman Rothfus: Do you -- do you think that your products are that powerful?
>
> Mr. Pichai: That's not the way I think about it when we are building -- building the products. You know, we constantly worry the areas where we are not doing well, and we are looking to do better. . . . And -- and we do realize we are a large company, and with that comes scrutiny, and we -- we think it's important to engage on that.[173]

168. QUINNIPIAC UNIVERSITY, QUINNIPIAC UNIVERSITY POLL 4 (2016) https://poll.qu.edu/images/polling/ps/ps11072016.pdf/.

169. In 2016, 9,501,617 people voted in the presidential election in Florida. Five percent of the total is 475,081. *See Florida Presidential Race Results: Donald J. Trump Wins*, N.Y. TIMES (Nov. 8, 2016), https://www.nytimes.com /elections/2016/results/florida-president-clinton-trump.

170. *Id.*

171. *See* discussion of 2016 Presidential Election, *supra* note 16.

172. *Google Hearings*, *supra* note 14.

173. *Id.*

V. A SHAREHOLDER PROPOSAL

If we assume *arguendo* that Google Search is manipulated by malign actors for political purposes (either through gaming or tweaking), two questions follow: (1) what is the extent of the manipulation; and (2) what is the best mechanism for preventing it?

This Article argues that those questions are best answered by Google's shareholders compelling the company to investigate whether Google Search has, to date, ever been manipulated for political purposes, by who, and how. The emphasis should be on gaming by third parties and tweaking by insiders, as discussed in Part III. The legal tool available to shareholders is Rule 14a-8 under the Securities Exchange Act of 1934.[174]

Examination and reporting pursuant to Rule 14a-8 is ideal for three reasons. First, it meets Google's self-imposed duty to "not be evil."[175] Why lying is *evil* is perhaps best left to the great philosopher-saints like Augustine of Hippo, not legal scholars like myself, to articulate.[176] I will simply fall back on the simpler proposition that lying is *bad*. Lying is bad because it undermines trust. "Lying undermines trust; and, to the extent trust is undermined, all cooperative undertakings, in which what one person can do . . . is dependent on what others have done . . . must tend to break down."[177] I trust Google with dozens of searches each day, often about the news of the day. That trust—and my faith in my own knowledge—breaks down when Google omits the truth or obfuscates[178] about how its search algorithm works. It makes no difference that the lie is not an affirmative one.

Second, for Google, the potential value of intra-firm introspection is important. The mere act of gathering information and compiling the report may surface heretofore hidden issues.[179] As Dennis Hirsch writes, the mere act of preparing a disclosure may educate a company and its workers "about the . . . impacts of their own actions and so appeals to their moral commitments as social beings."[180] On this point, I believe the majority of Google employees are social beings that

174. 17 C.F.R. § 240.14a–8 (2018).

175. Christopher Mims, *Google Outgrows its Youthful Ideals*, WALL STREET J. (Aug. 18, 2018).

176. Joseph Boyle, *The Absolute Prohibition of Lying and the Origins of the Casuistry of Mental Reservation: Augustinian Arguments and Thomisitic Developments*, 44 AM. J. JURIS. 43, 43 (1999) ("St. Augustine seems to have been the first important moralist to hold and argue for the proposition that lying is always morally impermissible.").

177. CHARLES FRIED, RIGHT AND WRONG 61 (1978) (quoting G.F. WARNOCK, THE OBJECT OF MORALITY 84 (1971)).

178. *Google Hearings*, *supra* note 14.

179. Neil Gunningham & Darren Sinclair, *Instruments for Environmental Protection*, *in* SMART REGULATION: DESIGNING ENVIRONMENTAL POLICY 72 (Neil Gunningham & Peter Grabosky eds., 1998).

180. Dennis Hirsch, *Green Business and the Importance of Reflexive Law: What Michael Porter Didn't Say*, 62 ADMIN. L. REV. 1063, 1112 (2010).

care about the impact that they are having on society, and with a little nudge, will do the right thing (i.e., the employees that seek to—or perhaps do—tweak Google Search for political purposes are not the norm, although they may have outsized influence).

Finally, "sunlight is said to be the best of disinfectants."[181] If it is discovered that Google Search is being gamed by third parties for political purposes, to maintain its position of trust, Google must harden its search algorithm against manipulation (redouble efforts against improper SEO).[182] If it is discovered that Google Search is being tweaked by insiders for political ends, those insiders must be fired, and internal controls put in place to prevent that from happening again.

A. Shareholder Proposals Overview

1. Proxies in General

A shareholder that is unable to attend a company's annual meeting can authorize another person—an agent—to attend the meeting and vote on her behalf.[183] The document that entitles the agent to vote is called a proxy (or sometime the more formal "form of proxy").[184] In practical operation, the person empowered to vote on the shareholder's behalf is usually the CEO or another officer of the corporation.

Through the proxy, the shareholder instructs the agent how to vote with regards to the board of directors, management proposals, and any shareholder proposals that are pending.[185] (Because the

181. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY 92 (1914).

182. Oren Bar-Gill, *The Law, Economics and Psychology of Subprime Mortgage Contracts*, 94 CORNELL L. REV. 1073, 1142 n.245 (2009) (discussing how disclosure can impact consumer behavior). *But see* Marcia Narine, *Disclosing Disclosure's Defects: Addressing Corporate Irresponsibility for Human Rights Impacts*, 47 COLUM. HUM. RTS. L. REV. 84, 92 (2015) (questioning whether disclosure of nonfinancial matters changes consumer behavior).

183. Section 212(b) of the Delaware General Corporation Law provides:

> Each stockholder entitled to vote at a meeting of stockholders or to express consent or dissent to corporate action in writing without a meeting may authorize another person or persons to act for such stockholder by proxy, but no such proxy shall be voted or acted upon after 3 years from its date, unless the proxy provides for a longer period.

DEL. CODE ANN. tit. 8, § 212(b) (2019); *see* Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc., 821 F. Supp. 877, 881 (S.D.N.Y. 1993) ("[T]he realities of modern corporate life have all but gutted the myth that shareholders in large publicly held companies personally attend annual meetings." (quoting Stroud v. Grace, 606 A.2d 75, 86 (Del. 1992))).

184. Trinity Wall St. v. Wal-Mart Stores, Inc., 792 F.3d 323, 334–35 (3d Cir. 2015).

185. Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 VAND. L. REV. 1129, 1135 (1993).

agent is bound by the shareholder's instructions on the proxy, this is like absentee voting in the political context.[186])

2. Proxies as a Forum for Shareholder Activism

A natural corollary to the shareholder's right to vote by proxy, Rule 14a-8 allows a shareholder to submit proposals for inclusion in the proxy (for other shareholders to vote on).[187] The SEC explains:

> Rule 14a-8 provides an opportunity for a shareholder . . . to have his or her proposal placed alongside management's proposals in that company's proxy materials for presentation to a vote at an annual or special meeting of shareholders. It has become increasingly popular because it provides an avenue for communication between shareholders and companies, as well as among shareholders themselves.[188]

Traditionally, shareholder proposals focused on requiring a change in the mechanics of corporate governance (e.g., amend the corporate bylaws to allow for majority, as opposed to plurality, voting).[189] However, in recent years, socio-political proposals have gained popularity.[190] Below, this Article will discuss two famous examples of socio-political proposals: *Lovenheim v. Iroquois Brands, Ltd.*,[191] (attempting to stop animal cruelty), and *Trinity Wall Street v. Wal-Mart Stores, Inc.*[192] (attempting to stop the sale of assault rifles).

186. Thomas Stratmann & J.W. Verret, *Does Shareholder Proxy Access Damage Share Value in Small Publicly Traded Companies*?, 64 STAN. L. REV. 1431, 1433 (2012).

187. Proposed Amendments to Rule 14a-8, Release No. 19,135 (Oct. 14, 1982), 1982 WL 600869, at *2; *see Trinity*, 792 F.3d. at 335 (Rule 14a-8 allows for "a functional corporate democracy") (quoting Alan R. Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation*, 45 ALA. L. REV. 879, 879 (1994)); Fisch, *supra* note 185, at 1144 (stating that Rule 14a-8, providing a mechanism whereby shareholder proposals, not just management proposals, could be included on the proxy).

188. DIV. OF CORP. FIN., SEC, STAFF LEGAL BULLETIN NO. 14: SHAREHOLDER PROPOSALS 2 (July 13, 2001), https://www.sec.gov/pdf/cfslb14.pdf.

189. MARC TREVIÑO & JUNE HU, SULLIVAN & CROMWELL, 2018 PROXY SEASON REVIEW 1–4 (2018), https://www.sullcrom.com/files/upload/SC-Publication-2018-Proxy-Season-Review.pdf (discussing various types of shareholder proposal); *see* Am. Fed'n of State, Cty. & Mun. Emps. v. Am. Int'l Grp., Inc., 462 F.3d 121, 124 (2d Cir. 2006) (involving a proposal seeking to amend bylaws to allow for shareholder nominees to board of directors).

190. Robert Anderson IV, *The Long and Short of Corporate Governance*, 23 GEO. MASON L. REV. 19, 58–59 (2015) ("[I]n recent years, there has been an increasing agitation in favor of "social proposals" through the shareholder proposal process.").

191. 618 F. Supp. 554, 560 (D.D.C. 1985).

192. 792 F.3d 323 (3d Cir. 2015).

B. Model Proposal

Below is the Model Proposal that shareholders at Google could use to pry free answers to the many questions this Article has presented thus far:

> RESOLVED: Shareholders request that the board of directors of Alphabet Inc. appoint a special committee of independent directors to (1) review whether foreign powers are manipulating, or have manipulated, Google Search with the purpose of impacting any United States election, and (2) review whether insiders are manipulating, or have manipulated, Google Search to favor or disfavor any political party or viewpoint. Shareholders request that said committee then issue a report to shareholders containing its findings, at reasonable cost, redacting[193] proprietary or legally privileged information.

This Article compares the above Model Proposal to a shareholder proposal actually submitted to Google last year ("the 2018 Proposal"):

> RESOLVED: Shareholders request Alphabet Inc. issue a report to shareholders at reasonable cost, omitting proprietary or legally privileged information, reviewing the efficacy of its enforcement of Google's terms of service related to content policies and assessing the risks posed by content management controversies, including election interference, to the company's finances, operations, and reputation.[194]

The 2018 Proposal failed, receiving 84,481,308 votes "for" (thirteen percent) and 577,340,067 votes "against" (eighty-seven percent).[195] There were 3,710,724 abstentions and 36,786,414 "broker non-votes."[196]

The Model Proposal is superior to the 2018 Proposal in three important respects: (1) it uses precise language, (2) it covers both of the manipulation issues discussed in Part III of this Article, and (3) it calls on Google's board of directors to appoint a special committee of independent directors.

1. The Model Proposal Uses Precise Language

The 2018 Proposal is not precise as to the problem it is trying to address. It requests that Google "assess the risks posed by content management controversies."[197] What is a "content management

193. I chose "redacting" over the traditional "omitting" so that the shareholder can gauge how much is being withheld.

194. ALPHABET, INC., NOTICE OF 2018 ANNUAL MEETING OF STOCKHOLDERS AND PROXY STATEMENT 70 (2018), https://www.sec.gov/Archives/edgar/data/1652044/000130817918000222/lgoog2018-def14a.htm.

195. ALPHABET, INC., FORM 8-K CURRENT REPORT 3 (2018).

196. *Id.*

197. *Id.*

controversy"? "Content management" is a very broad term of art, defined "as a system of methods and techniques to automate the processes of content collection, management and publishing using information technologies."[198] That arguably encompasses all of Google's operations.

The next clause indicates that it is intended to include "election interference,"[199] but questions remain. What kind of interference? By who? A vague or indefinite proposal may be excluded from the proxy materials as misleading.[200] Specifically, the proposal may be excluded where "neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires."[201] (While Google did not seek to exclude the 2018 Proposal, the Author believes that they could have on vagueness grounds.)

By contrast, the Model Proposal is crystal clear that the report must address gaming (by foreign actors) and tweaking (by Google insiders).

2. The Model Proposal Covers Both Gaming and Tweaking

While the 2018 Proposal itself (the "resolved" clause) was overly broad, the supporting statement (the "whereas" clauses) were overly narrow (that is to say, the drafters managed to be both over- and under-inclusive at the same time).[202] The supporting statement focuses on Russia gaming Google Search to interfere with the 2016 Presidential Election.[203] It alleges that Google had a "role in Russia's reported election interference during the 2016 United States Presidential Election . . . ," and that the American people have a right to know "[i]f Vladimir Putin is using . . . Google . . . to, in effect, destroy our democracy . . . ."[204]

Certainly the foregoing focus is needed to fight foreign actors gaming the search algorithm for political purposes, as discussed in Subpart III.A. However, it ignores the potentially pernicious problem of insiders tweaking the search algorithm for political purposes, as discussed in Subpart III.B.

By contrast, the Model Proposal covers both.

198. Clara Benevolo & Serena Negri, *Evaluation of Content Management Systems (CMS): A Supply Analysis*, 10 ELEC. J. INFO. SYS. EVALUATION 1, 9–22 (2007).

199. NOTICE OF 2018 ANNUAL MEETING OF STOCKHOLDERS AND PROXY STATEMENT, *supra* note 194, at 70.

200. 17 C.F.R. § 240.14a–8(i)(3) (2018).

201. DIV. OF CORP. FIN., SEC, STAFF LEGAL BULLETIN NO. 14: SHAREHOLDER PROPOSALS (Sept. 15, 2004), https://www.sec.gov/interps/legal/cfslb14b.htm.

202. NOTICE OF 2018 ANNUAL MEETING OF STOCKHOLDERS AND PROXY STATEMENT, *supra* note 194, at 70.

203. *Id.*

204. *Id.*

3. The Model Proposal Requires Independence

The investigation and report should be completed by independent directors. An independent director is defined as one that is not part of the current management team (CEO, CFO), or otherwise employed by the corporation.[205] (Conversely, a director that is part of the management team is not independent, because their position or income (or both) can be taken away.)[206]

The question is, independence to do what? The generally accepted answer is: look after the best interests of the shareholders.[207] In the case at hand, investigating search engine manipulation—and stopping it—is in the best interest of shareholders, because Google's most valuable asset is the trust that users place in it. [208]

The 2018 Proposal fails to require that the investigation and report be completed by independent directors, and thus, runs the risk that it may be "captured" by management.

By contrast, the Model Proposal requires a special committee of independent directors to investigate and report.

C. Possible Exclusions

The next important question is whether Google could properly exclude the Model Proposal from its proxy materials.

First, there is a presumption against exclusion of a shareholder proposal from the company's proxy materials.[209] Rule 14a-8 requires a corporation to include a proposal submitted by an eligible

205. *See* Donald C. Clarke, *Three Concepts of the Independent Director*, 32 DEL. J. CORP. L. 73, 85–86 (2007).

206. *See id.*

207. *Id.*; *see* Kabir Ahmed & Dezko Farkas, *A Proposal to Encourage Up-The-Ladder Reporting by Insulating In-House Corporate Attorneys from Managerial Power*, 39 DEL. J. CORP. L. 861, 891 (2015) ("When . . . independent directors [are] tasked with conducting an investigation, there is an added layer of insulation between management and the committee members."); Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1113–14 n.21 (2006) ("Moreover, independent directors may be more willing to disclose wrongdoing publicly because they can do so without losing their employment."); Wesley Bricker, Chief Accountant, Sec. Exch. Comm'n, Remarks before the 2018 Baruch College Financial Reporting Conference: Working Together to Advance Financial Reporting (May 3, 2018), https://www.sec.gov/news/speech/speech-bricker-040318 ("[I]ndependent directors are often in the best position to deliver candid, sometimes tough, but critically important messages to management and other board members without fear of retribution.").

208. A different view is that the independent directors should look after the interests of other stakeholders, such as users. But this difference is of little import. Investigating search engine manipulation—and stopping it—is in the best interest of users as well. *See* Clarke, *supra* note 205, at 85–86.

209. 17 C.F.R. § 240.14a–8(g) (2018) ("Except as otherwise noted, the burden is on the company to demonstrate that it is entitled to exclude a proposal.").

shareholder[210] in its proxy materials, unless the corporation can demonstrate that the proposal may be excluded.[211] The corporation carries "the burden of establishing as a matter of law that it [may] properly exclude[] the proposal under an exception to rule 14a-8."[212]

A shareholder proposal can be excluded if the corporation can demonstrate that the subject matter of the proposal is not proper.[213] To that end, 14a-8 lists thirteen items that are not the proper subject of a shareholder proposal.[214] Most important for present purposes is the (1) relevance exclusion[215] and (2) management functions exclusion.[216]

1. Relevance Exclusion

The relevance exclusion allows the corporation to exclude a proposal that relates to less than five percent of its business.[217] However, that is not the end of the analysis. Where the company can show that proposal relates to less than five percent of its business, the burden shifts to the proponent for the opportunity to show that the proposal is "otherwise significantly related to the company's business."[218] If it is, it still must be included (despite not meeting the five percent threshold).[219]

The key case regarding the relevance exclusion—and what is meant by "otherwise significantly related"—is *Lovenheim v. Iroquois Brands, Ltd.*[220] Lovenheim sought to have a shareholder proposal placed on the agenda for Iroquois Brands, Ltd. annual meeting.[221] His proposal called on Iroquois to:

210. An eligible shareholder is one that has "continuously held at least $2,000 in market value, or 1%, of the company's securities . . . for at least one year by the date you submit the proposal." *Id.* § 240.14a–8(b)(1).

211. *Id.* § 240.14a–8(g).

212. Trinity Wall St. v. Wal-Mart Stores, Inc. 792 F.3d. 323, 334 (3d Cir. 2015).

213. 17 C.F.R. § 240.14a–8(i) (2018).

214. *Id.*

215. *Id.* § 240.14a–8(i)(5).

216. *Id.* § 240.14a–8(i)(7).

217. The entire grounds for exclusion is:

> the proposal relates to operations which account for less than 5 percent of the company's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business.

Id. § 240.14a–8(i)(5).

218. The proponent carries the burden of demonstrating that the proposal is "otherwise significantly related." Amendments to Rules on Shareholder Proposals, 62 Fed. Reg. 50682 (proposed Sept. 26, 1997).

219. Lovenheim v. Iroquois Brands, Ltd., 618 F. Supp. 554, 560 (D.D.C. 1985).

220. *Id.* at 554–55.

221. *Id.* at 556.

> form a committee to study the methods by which its French supplier produces pâté de foie gras, and report to the shareholders its findings and opinions, based on expert consultation, on whether this production method causes undue distress, pain or suffering to the animals involved and, if so, whether further distribution of this product should be discontinued until a more humane production method is developed.[222]

Iroquois was importing pâté de fois gras, which is produced from geese livers.[223] Lovenheim was concerned that the French supplier was force feeding the geese in order to swell their livers and produce more pâté.[224]

Iroquois sought to exclude the proposal based on the fact that the production of pâté de foie gras did not account for five percent of its business.[225] In fact, it sold the pâté at a net loss (and thus accounted for less than five percent of its net earnings and gross sales), and less than one percent of its assets were related to the production and sale of pâté.[226]

Lovenheim conceded that the proposal was not economically significant to Iroquois, but contended that it could not be excluded because it was "otherwise significantly related to the company's business."[227] The use of the words "otherwise significantly related" in the Rule, Lovenheim contended, encompasses questions of "ethical or social significance."[228] The court agreed.[229] It held that,

> [I]n light of the ethical and social significance of plaintiff's proposal and the fact that it implicates significant levels of sales [albeit not 5%], plaintiff has shown a likelihood of prevailing on the merits with regard to the issue of whether his proposal is "otherwise significantly related" to Iroquois/Delaware's business.[230]

The court also noted that the proposal certainly has "ethical or social significance" because "the humane treatment of animals [is] among the foundations of western culture."[231] In so noting, the court cites to the Seven Laws of Noah, an animal protection statute enacted

222. *Id.*
223. *Id.* at 556 n.2.
224. *Id.*
225. *Id.* at 558–59.
226. *Id.*
227. *Id.* at 559.
228. *Id.*
229. *Id.*
230. *Id.* at 561 (quoting Securities Act Release No. 19,135, 47 Fed. Reg. 47,420, 47,428 (1982)).
231. *Id.* at 559 n.8.

by the Massachusetts Bay Colony in 1641, and numerous animal protection statutes passed since, in all fifty states.[232]

2. Management Functions Exclusion

The management functions exclusion allows a shareholder proposal to be excluded "if the proposal deals with a matter relating to the company's ordinary business operations."[233] The management functions exclusion recognizes that shareholders do not manage the corporation.[234] True, they vote for the board of directors, but with limited exceptions, that is the extent of their power.[235]

The board of directors manages the corporation.[236] The board appoints officers, those officers hire mid-level management, and the management makes day-to-day business decisions, such as "hiring, promotion and termination of employees, decisions on production quality and quantity, and the retention of suppliers."[237]

The annual meeting is not a place for shareholders to insert themselves into the day-to-day decisions of the business.[238] Of course, the line between ordinary business decisions (which should be excluded) and extraordinary business decisions (which should not be excluded) is sometimes hard to define.

The key case here is *Trinity Wall Street v. Wal-Mart Stores, Inc.*[239] Trinity,[240] upset by numerous mass shootings, proposed the following resolution for a vote at the upcoming shareholder meeting:

> Stockholders request that the Board amend the Compensation, Nominating and Governance Committee charter . . . as follows:
>
> "27. Providing oversight concerning [and the public reporting of] the formulation and implementation of . . . policies and standards that determine whether or not the Company should sell a product that:

232. *Id.*

233. 17 C.F.R. § 240.14a–8(i)(7) (2018).

234. Stephen M. Bainbridge, *Revitalizing SEC Rule 14a-8's Ordinary Business Exemption: Preventing Shareholder Micromanagement by Proposal*, 85 FORDHAM L. REV. 705, 707 (2016).

235. Delaware General Corporation Law provides: "The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation." DEL. CODE ANN. tit. 8, § 141(a) (2019).

236. *Id.*

237. Amendments to Rules on Shareholder Proposals, 62 Fed. Reg. 50682, 50689 (proposed Sept. 26, 1997).

238. Amendments to Rules on Shareholder Proposals, 63 Fed. Reg. 29106, 29108 (proposed May 28, 1998).

239. *See* Trinity Wall St. v. Wal-Mart Stores, Inc., 792 F.3d. 323 (3d Cir. 2015).

240. Trinity was an "Episcopal parish headquartered in New York City that owns Wal-Mart stock." *Id.* at 327.

> 1) especially endangers public safety and well-being;
>
> 2) has the substantial potential to impair the reputation of the Company; and/or
>
> 3) would reasonably be considered by many offensive to the family and community values integral to the Company's promotion of its brand."[241]

The purpose of the proposal was to force Wal-Mart's management to rethink its decision to sell firearms, as made clear by the narrative portion of the proposal.[242] It stated:

> Oversight and reporting is intended to cover policies and standards that would be applicable to determining whether or not the company should sell guns equipped with magazines holding more than ten rounds of ammunition ("high capacity magazines") and to balancing the benefits of selling such guns against the risks that these sales pose to the public and to the Company's reputation and brand value.[243]

Wal-Mart sought to exclude the proposal on the grounds that it interfered with ordinary business operations.[244]

In *Trinity*, the court discussed in detail when a corporation could properly exclude a proposal for relating to ordinary business operations.[245] It used a two-part test.[246] A corporation can exclude a proposal where: (1) the subject matter relates to ordinary business operations, *and* (2) it does not otherwise raise a significant policy issue related to the company's business.[247] This Article breaks the analysis into four steps.

First, the court set out to determine the subject matter of the proposal.[248] It defined the subject matter as "a potential change in the way Wal-Mart decides what products to sell."[249]

Second, the court found that the subject matter relates to ordinary business operations, that is, day-to-day decisions that would be made by mid-level management.[250] The court stated that deciding

241. *Id.* at 329–30.
242. *Id.* at 330.
243. *Id.*
244. *Id.* at 330–31.
245. *Id.* at 340–46.
246. *Id.* at 341.
247. *Id.*
248. *Id.*
249. *Id.* at 342.
250. In so finding, the court declined an invitation to find that the subject matter of the proposal was improved board oversight (remember, the proposal asked the board to "provid[e] oversight concerning [merchandising decisions that may] endanger[] public safety and well-being . . . ."). *Id.* at 329. Such a finding would have likely allowed the proposal to move forward, because, at least on its face, it did not implicate a specific product. Likewise, the court declined an

"product mix" involves operational judgments that are the "meat of management's responsibility."[251]

Third, having decided that the subject matter does relate to ordinary business operations, the court turned to whether the proposal otherwise "raise[s] a significant policy issue that transcends the nuts and bolts of the retailer's business."[252] The court asked if the proposal "touch[es] the bases of what are significant concerns in our society[?]"[253] (Here, the parallels to *Lovenheim's* discussion of ethical and social significance are hard to miss.)[254] The court found that a significant policy issue was raised.[255] Federal and state legislatures—not to mention the public—regularly debate the free availability of firearms.[256]

Fourth—the most perplexing part of the analysis[257]—the court asked whether the policy issue transcended ordinary business operations.[258] The court reasoned that any proposal involving "product mix" was unlikely to transcend ordinary business operations—and thus this proposal did not.[259] In reaching this conclusion, the court relied on—and indeed the entire case turns on—no-action letters issued by SEC Staff that previously took that position (including a proposal that sought to prevent a retailer from selling carcinogens,[260] and another that sought to prevent a retailer

invitation to find that the subject matter of the proposal was disseminating a report to shareholders (remember, the proposal also asked the board to report to shareholders). *Id.* at 342. Such a finding would have likely led to the proposal being allowed (as the court below had found), because "a company doesn't disseminate reports to shareholders . . . as part of its ordinary business operations." *Id.* at 338–39. That, in turn would have allowed all future proposals to bypass the ordinary business exclusion by asking for a report, as opposed to direct action.

251. *Id.* at 344, 347 (referring to "product mix" as management's "bread and butter" and "the meat of management's responsibility" respectively).

252. *Id.* at 341.

253. *Id.* at 346.

254. Given the significant parallels between 17 C.F.R. § 240.14a–8(i)(5) and 17 C.F.R. § 240.14a–8(i)(7), I believe that a proper understanding of the latter exclusion requires a proper understanding of the former. Most important for our purposes, both exclusions have a carve-out for matters of ethical or social significance. *Id.* at 345; Lovenheim v. Iroquois Brands, Ltd., 618 F. Supp. 554, 560 (D.D.C. 1985).

255. *Trinity Wall St.*, 792 F.3d at 346.

256. *Id.*

257. Bainbridge, *supra* note 234, at 729 (calling this portion of the *Trinity* analysis "complex, convoluted, unhelpful, and unpersuasive").

258. *Trinity*, 792 F.3d. at 346–47.

259. *Id.* at 347.

260. *Id.* at 348–49 (citing Walgreen Co., SEC No-Action Letter, 2006 WL 5381376, at *1–2 (Oct. 13, 2006) (allowing the retailer to omit proposal asking for a report regarding "the extent to which the company's private label cosmetics and personal care product lines contain carcinogens, mutagens, reproductive toxicants, and chemicals that affect the endocrine system")).

from selling glue traps.)[261] This Article will take a similar approach—trying to glean direction from prior no-action letters issued by SEC Staff—in predicting whether the Model Proposal would be properly excludable.

One last point about *Trinity*. Amazingly, despite the obvious parallels, *Trinity* never mentions—or attempts to distinguish—*Lovenheim*.[262] In fact, it provides as an example of a proposal that could be excluded on management function grounds "a proposal that, out of concern for animal welfare, aims to limit which food items a grocer sells."[263] Professor Bainbridge points out that the foregoing statement is inconsistent with *Lovenheim*, which held that a proposal had ethical and social significance where it "ask[ed] a food importer to 'to[sic] study the methods by which its French supplier produces pate de foie gras.' This inconsistency . . . undermines *Trinity's* utility as precedent."[264]

D. Application of the Exclusions to the Model Proposal

This Part discusses how *Lovenheim*[265] and *Trinity*[266] apply to the Model Proposal. That is to say, if Google objects to inclusion of the Model Proposal in their proxy materials, can they lawfully exclude it? Here, the Author assumes that Google will object to inclusion in the proxy. While Google did not seek a no-action letter with regards to the 2018 Proposal, that proposal (1) merely asked them to look outward at gaming (not inward to tweaking); and (2) did not ask for a committee of independent directors. Google is more likely to object to inclusion of a proposal in the proxy if it is like the one at hand, forcing them to look inward and removing the ability of management to control (or manage) the outcome.

First, determinations regarding whether a shareholder proposal may be properly excluded are very fact-intensive. As such, case precedent regarding retailers (*Lovenheim*[267] and *Trinity*[268]) may be of limited utility as applied to a technology company (Google). For that reason, this Part also draws comparisons to no-action letters from the SEC Staff that apply to technology companies, and related, media companies. (In fact, some question whether Google is best categorized

261. *Id.* at 349 (citing The Home Depot, Inc., SEC No-Action Letter, 2008 WL 257300, at *2 (allowing company to exclude a proposal encouraging it "to end its sale of glue traps because they are cruel and inhumane to the target animals and pose a danger to companion animals and wildlife")).

262. *See id.* (failing to mention *Lovenheim* even once in the decision).

263. *Id.* at 347.

264. Bainbridge, *supra* note 234, at 731.

265. Lovenheim v. Iroquois Brands, Ltd., 618 F. Supp. 554 (D.D.C. 1985).

266. *Trinity Wall St.*,792 F.3d. at 323.

267. *Lovenheim*, 618 F. Supp. at 554.

268. *Trinity*, 792 F.3d at 323.

as a technology company, or alternatively, a media company.)[269] This is of special relevance because courts have shown a partial willingness to defer to no-action letters.[270]

1. Relevance Exclusion

The argument that the Model Proposal could be excluded by Google on the basis of the relevance exclusion is weak.[271] First, to get below the five-percent threshold, Google would be required to argue that revenue from search (arguably zero, because search is free) is distinguishable from revenue from advertising (approximately $78,000,000,000 per year).[272] However, the two are inextricably intertwined.[273] Google makes money because companies pay to have their ads appear on the search results page (as well as Google's other properties like YouTube).[274] Without Google Search, Google would have significantly less revenue.[275]

Second, even if Google could show that Google Search accounts for less than five percent of its revenue, it would have a great deal of trouble arguing that the issues raised by the Model Proposal are not "otherwise significant."[276] The issue of search engine manipulation for political ends has both ethical and social significance. Like the issue of animal rights permeating our national discourse, as held in *Lovenheim*,[277] the issue of manipulation of search results has permeated our national discourse. A simple search for "search engine manipulation" on Lexis returns 1,073 news reports, 119 law review articles, and twenty cases.[278] The Author also queried Google Search

269. Bracha & Pasquale, *supra* note 74, at 1192 n.230 (citing Richard Siklos, *A Struggle over Dominance and Definition*, N.Y. TIMES, Nov. 12, 2006, § 3, at 5).

270. *Trinity*, 792 F.3d. at 342–43 n.11 (stating that while it will not defer outright, it will give "careful consideration" to no-action letters issued by SEC Staff); *see* Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 927 (1998) (examining the issue of judicial deference to no-action letters).

271. 17 C.F.R. § 240.14a–8(i)(5) (2018).

272. FORM 10-K, *supra* note 2, at 28.

273. *Id.* at 30.

274. *Id.* at 28 ("Revenues consist primarily of advertising revenues that are generated on: Google search properties which includes revenues from traffic generated by search distribution partners who use Google.com as their default search in browsers, toolbars, etc.; and other Google owned and operated properties like Gmail, Google Maps, Google Play, and YouTube.").

275. The link can also be thought about in terms of Google Search providing a service to users in return for those users consenting to see ads related to their search. Metaxa-Kakavouli & Torres-Echeverry, *supra* note 15, at 7.

276. § 240.14a–8(i)(5).

277. Lovenheim v. Iroquois Brands, Ltd., 618 F. Supp. 554, 560 (D.D.C. 1985) (quoting Securities Act Release No. 19,135, 47 Fed. Reg. 47,420, 47,428 (1982)).

278. The Author entered the following search into Lexis Academic (without the quotes): "search /3 engine /3 manipulation." The Author also filtered the search to require that the result mention Google: "Google & (search /3 engine /3

using "search engine manipulation" (the irony was not lost on the Author) and there were 81,000 results.

2. Management Functions Exclusion

The argument that the Model Proposal could be excluded by Google on the basis of the management functions exclusion is stronger, but still likely to fail.[279] On a basic level, Google could argue that formulating the search algorithm is part of its day-to-day operations. (This in turn requires arguing that while the proposal does not require a change to the search algorithm on its face, its purpose is to effectuate such a change by shaming. That is the same as the proposal in *Trinity*.[280] That proposal did not require that Wal-Mart stop selling high capacity firearms; it simply required the formation of a committee to examine the issue, and thus effectuate change through shaming.)[281]

However, *Trinity* also turned on the idea that "[f]or major retailers of myriad products, a policy issue is rarely transcendent if it treads on the meat of management's responsibility: crafting a product mix that satisfies consumer demand."[282] Here, the fact that Google is a technology company, not a retailer, is certainly relevant.[283] Also important is that even if Google were akin to a retailer, with Google Search being its product, Google Search is not one of "myriad products."[284] Google Search is *the* product.[285] And that implicates another line from *Trinity*, "A policy matter relating to a product is far more likely to transcend a company's ordinary business operations when the product is that of a manufacturer with a narrow line."[286]

Because of the difficulty of applying *Trinity* to the facts at hand, the application of the management functions exclusion will likely turn on whether the SEC Staff believes the Model Proposal is like a (1) "news programming" proposal, a (2) "net-neutrality" proposal, or a (3) "human rights" proposal. If the first, the SEC Staff is likely to concur in exclusion of the proposal from Google's proxy materials, if the second or third, it is likely to find that the proposal should be included. This Article contends that the Model Proposal is more like the second or third, and as such, should be included.

manipulation)." That returned 817 news reports, ninety-eight law review articles, and sixteen cases.

279. *See* 17 C.F.R. § 240.14a–8(i)(7) (2018).

280. *See* Trinity Wall St. v. Wal-Mart Stores, Inc., 792 F.3d 323, 330 (3d Cir. 2015).

281. *Id.*

282. *Id.* at 347.

283. Bracha & Pasquale, *supra* note 74, at 1192 n.230.

284. *Trinity*, 792 F.3d at 347.

285. *See* FORM 10-K, *supra* note 2, at 28–30.

286. *Trinity*, 792 F.3d at 347.

a. The Model Proposal Is Not Like a "News Programming" Proposal

The SEC Staff generally concurs with the exclusion of shareholder proposals that seek to influence the content of news programming.[287] In February 2018, a Time Warner, Inc. shareholder (Time Warner is the parent company of CNN) made the following proposal:

> Resolved: The proponent requests that the Board of Directors adopt a policy requiring that the Company's news operations tell the truth, and issue an annual report to shareholders explaining instances where the Company failed to meet this basic journalistic obligation.[288]

The proponent was upset by various news stories presenting as fact that Donald Trump's campaign had colluded with Russia during the 2016 Presidential Election.[289] According to the proponent, CNN later had to retract the stories.[290]

Time Warner argued that the shareholder proposal could be excluded under the management functions exclusion.[291] The gravamen of Time Warner's argument was that determining the content of news programing is "so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight."[292] Day-to-day decisions include choosing what news stories to report, how to present the news story, who should present the news story, and fact checking the news story.[293]

The SEC Staff agreed, writing in a no-action letter, "there appears to be some basis for your view that the Company may exclude the Proposal under rule 14a-8(i)(7), as relating to the Company's ordinary business operations. In this regard, we note that the Proposal relates to the content of news programming."[294]

287. Reilly S. Steel, *The Underground Rulification of the Ordinary Business Operations Exclusion*, 116 COLUM. L. REV. 1547, 1571 n.169 (2016) (listing instances where the SEC Staff concurred in the exclusion of shareholder proposals that touched on "the nature, presentation and content of programming and film production").

288. No-Action Letter from Evan S. Jacobson, Special Counsel for the SEC, to Time Warner, Inc., 2018 SEC No-Act. LEXIS 175, at *3 (Mar. 13, 2018).

289. *Id.* at *4.

290. *Id.*

291. *Id.* at *5–12.

292. *Id.* at *6.

293. *Id.* at *7.

294. *Id.* at *1.

Similar proposals have met similar fates, including a shareholder proposal[295] submitted to Disney in 2017 (Disney is the parent company of ABC News).[296] In that case, the proponent was upset that an ABC reporter had called President Trump a white supremacist and submitted a proposal requiring ABC News to "tell the truth" when reporting the news.[297] The SEC Staff concurred in its exclusion on the grounds that it sought to influence news programming.[298]

In 2005, a shareholder submitted a proposal to General Electric ("GE").[299] GE owns NBC, NBC News and MSNBC.[300] The shareholder was motivated by what he perceived as inequitable treatment of the Reverend Al Sharpton on the news program *Hardball*.[301] Again, the SEC Staff agreed that the proposal could be excluded because it sought to influence news programming.[302]

What lessons do the no-action letters issued in Time Warner (2018), Disney (2017), and GE (2005) impart? The SEC Staff will likely concur with the Model Proposal being excluded from the proxy materials *if* the Staff views it as trying to impact news programming.

It follows that the next logical question is, "is Google part of the news media?" Here, the law is not settled, but the answer is likely "no." In favor of Google being considered part of the news media is the fact that often search results—especially those involving politicians or policy issues—take the form of news. In fact, Google News is one of Google's products.[303] On the other hand, Google News does not turn raw data into original content—a defining task of news organizations.[304] Google News simply aggregates existing articles.[305] Google does not create a distinct work.[306]

The federal government's definition of the news media (albeit in the context of Freedom Of Information Act ("FOIA")) does not appear to include Google.[307] Specifically, the U.S. Code defines the news

295. No-Action Letter from Evan S. Jacobson, Special Counsel for the SEC, to Lillian Brown, Counsel for Walt Disney Company, 2017 SEC No-Act. LEXIS 370, at *1 (Dec. 12, 2017).

296. *See id.* at *10.

297. *Id.*

298. *See id.* at *1.

299. No-Action Letter from Daniel Greenspan, Attorney-Advisor for the SEC, to General Electric Co., 2005 SEC No-Act. LEXIS 16, at *4–5 (Jan. 6, 2005).

300. *Id.* at *3.

301. *Id.* at *4.

302. *Id.* at *1.

303. *See Google News*, GOOGLE, news.google.com (last visited Sept. 19, 2019).

304. Steven Hetcher, *The Half-Fairness of Google's Plan to Make the World's Collection of Books Searchable*, 13 MICH. TELECOMM. TECH. L. REV. 23, 29 (2006). *But see* Marvin Ammori, *Freedom of The Press: The "New" New York Times: Free Speech Lawyering in the Age of Google And Twitter*, 127 HARV. L. REV. 2259, 2260 (2014) (arguing that Google is the next New York Times).

305. *See* Bracha & Pasquale, *supra* note 74, at 1192 n.230.

306. *Id.*

307. 5 U.S.C. § 552(a)(4)(A)(ii) (2000) (defining news media for purposes of FOIA fee waiver).

media as an entity whose representatives "gather[] information of potential interest to a segment of the public, use [their] editorial skills to turn the raw materials into a distinct work, and distribute[] that work to an audience."[308] Again, Google aggregates; it does not create a distinct work.

Google itself takes the position that it merely aggregates and does not create distinct work.[309] Google phrases itself as "not [being] in the content business."[310] As recently as October 2017, Richard Salgado, Google's Director of Law Enforcement and Information Security, told Congress that Google is "not in the content business."[311]

Tellingly, the traditional media does not accept Google as part of its ranks either.[312] Given the foregoing, the Model Proposal is likely distinguishable from a "news programming" proposal.

b. The Model Proposal Is Like a "Net-Neutrality" Proposal

If the SEC Staff views the Model Proposal as a net-neutrality proposal, they will likely refuse to concur in its exclusion from the proxy materials. That is to say, the proposal would be allowed.[313] There is no agreement on a single definition of net-neutrality.[314] And a full discussion is beyond the scope of this Article. For purposes of this Article, the Author refers back to the definition first proffered by

308. *Id.*

309. *See* Miguel Helft, *Is Google a Media Company?*, N.Y. TIMES (Aug. 10, 2008), https://www.nytimes.com/2008/08/11/technology/11google.html.

310. *Id.*

311. *See Extremist Content and Russian Disinformation Online: Working with Tech to Find Solutions: Hearing Before the Subcomm. on Crime and Terrorism of the S. Comm. the Judiciary*, 115th Cong. (2017) (testimony of Richard Salgado, Director, Law Enforcement and Information Security, Google).

312. Michael Wolff, *Search Engines Could be Running Out of Gas*, USA TODAY (May 19, 2014) ("Google is not a news or editorial organization in any conventional sense.").

313. No-Action Letter from Ted Yu, Senior Special Counsel for the SEC, to David B. Harms, Counsel for AT&T, Inc., 2012 SEC No-Act. LEXIS 118, *8–9 (Feb. 10, 2012) (staff refused no-action letter where net-neutrality issue) [hereinafter AT&T No-Action Letter]; No-Action Letter from Robert Errett, Attorney-Adviser for the SEC, to Verizon Communications, Inc., 2012 SEC No-Act. LEXIS 142, at *2 (Feb. 13, 2012) (same). *But see* No-Action Letter from SEC to Comcast Corporation, 2011 SEC No-Act. LEXIS 164, at *2 (Feb. 15, 2011) (granting no-action letter and stating, "we do not believe that net-neutrality has emerged as a consistent topic of widespread public debate such that it would be a significant policy issue for purposes of rule 14a-8(i)(7)").

314. Catherine J. K. Sandoval, *Disclosure, Deception, and Deep-Packet Inspection: The Role of The Federal Trade Commission Act's Deceptive Conduct Prohibitions in the Net Neutrality Debate*, 78 FORDHAM L. REV. 641, 644, n.5 (2009) ("[T]here is no single accepted definition for net neutrality, but . . . most agree it should include the principle that 'owners of the networks . . . should not be able to discriminate against content provider access to that network.'" (quoting Angele A. Gilroy, CRS Report for Congress, Net Neutrality: Background and Issues 1–2 (2008))).

Professor Tim Wu in 2003.[315] He coined the term "net-neutrality" to refer to a state of affairs where a network does not favor one application over others.[316]

In 2012, a shareholder proposal was submitted to AT&T asking the company to commit to "operate a neutral network . . . such that the company does not . . . prioritize any packet transmitted over its wireless infrastructure based on its source, ownership or destination."[317] AT&T sought to exclude the proposal based on the management functions exclusion.[318] It argued that the proposal would interfere with management's ability to respond to the unique challenges of operating a broadband network.[319] AT&T argued that if the proposal were implemented, management would not be able to respond quickly to reduce the availability of the network for low quality uses (i.e., unsolicited information or SPAM), or reduce the throughput speed of a small number of smartphone users who are using more than their fair share of bandwidth.[320]

The SEC Staff refused to concur with AT&T's argument, stating that even if the shareholder proposal did relate to ordinary business operations, the proposal otherwise raised a significant policy issue.[321] It wrote, "In view of the sustained public debate over the last several years concerning net neutrality and the Internet and the increasing recognition that the issue raises significant policy considerations, we do not believe that AT&T may omit the proposal from its proxy materials in reliance on rule 14a-8(i)(7)."[322]

The next logical question is: Is the Model Proposal like a net-neutrality proposal? Returning to our definition of "net-neutrality" above, it refers to a state of affairs where a network does not favor one application over others.[323] What would violate net-neutrality principles? One example would be "prioritizing data packet delivery based on the ownership or affiliation (the who) of the content, or the source or destination (the what) of the content."[324] Both forms of search engine manipulation discussed above—gaming and tweaking—similarly seek to favor specific types of political content (sometimes who, sometimes what). As such, the parallels between the Model Proposal and net-neutrality proposals appear strong.

315. *See* Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141, 143 (2003).
316. *Id.* at 145.
317. AT&T No-Action Letter, *supra* note 313, at *8.
318. *Id.* at *39–47.
319. *Id.* at *149–50.
320. *Id.* at *150–51.
321. *Id.* at *8–9.
322. *Id.*
323. Wu, *supra* note 315, at 145.
324. Frank Pasquale, *Internet Nondiscrimination Principles: Commercial Ethics for Carriers and Search Engines*, 1 U. CHI. LEGAL F. 263, 279 (2008).

Importantly, scholars often refer to search engine manipulation as the absence of "search neutrality," a none-too-subtle nod to the similarities to "net-neutrality."[325] Net-neutrality applies to carriers (e.g., AT&T), which are "stable conduits, dynamic cartographers, indexers, and gatekeepers of the internet."[326] Search neutrality applies to search engines (e.g., Google Search) which can be described in identical terms.[327] As such, the SEC Staff is more likely to view the Model Proposal as a "net-neutrality" proposal. That weighs in favor of inclusion in the proxy materials.

c. The Model Proposal Is Like a "Human Rights" Proposal

If the SEC Staff views the Model Proposal as a human rights proposal, they will likely refuse to concur in its exclusion from the proxy materials. Like the net-neutrality proposals discussed above, the Model Proposal would be allowed.

For example, a shareholder proposal submitted to Apple is on point.[328] The shareholder proposal requested that Apple establish a "committee to review, assess, disclose and make recommendations to enhance its policy and practice on human rights."[329] The proposal was brought by a shareholder and human rights activist, Jing Zhao, who was concerned that Apple was aiding and abetting censorship in China by among other things, removing anticensorship tools from its China app store.[330] China also forced it to remove its *New York Times* App from its China App Store.[331] Apparently, the content on the *New York Times* App was too politically sensitive for Chinese government censors.[332]

Apple sought to exclude the proposal as relating to ordinary business operations.[333] In an oddly out-of-touch rebuttal to Mr. Zhao, Apple's attorneys spent many pages of its letter to the SEC Staff explaining that human rights is a day-to-day management concern at Apple, but focused on how Apple furthers human rights through environmental protection.[334] Apple never discussed how fighting

325. Bracha & Pasquale, *supra* note 74, at 1167–71.

326. Pasquale, *supra* note 324, at 266.

327. *See id.* at 266–67; *see also* Berin Szoka, *25 Years After .COM: Ten Questions*, *in* THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 10 (Berin Szoka & Adam Marcus eds., 2010), https://nissenbaum.tech.cornell.edu/papers/The-Next-Digital-Decade-Essays-on-the-Future-of-the-Internet.pdf. (asserting that search neutrality is the net-neutrality of the coming decade).

328. No-Action Letter from Matt S. McNair, SEC, to Apple, Inc., 2017 SEC No-Act. LEXIS 382, at *2 (Nov. 11, 2017) [hereinafter Apple No-Action Letter].

329. *Id.* at *5.

330. *Id.* at *19–20.

331. Li Yuan, *Get Used to Apple Bowing Down to Chinese Censors*, WALL STREET J. (Aug. 08, 2017), https://www.wsj.com/articles/as-apples-services-grow-in-china-so-does-its-censorship-risk-1501752605.

332. *Id.*

333. Apple No-Action Letter, *supra* note 328, at *6–17.

334. *Id.* at *9–11.

government censorship is a day-to-day management concern (perhaps because they could not).[335]

The letter from Apple also failed to rebut that human rights is a significant policy issue—arguably it conceded this point.[336] Accordingly, the SEC Staff refused to concur with Apple's position that the proposal should be excluded, reasoning that Apple's "analysis does not explain why this particular proposal would not raise a significant [policy] issue for the Company."[337]

A similar result was reached for Yahoo.[338] There, the proponent was concerned that Yahoo was providing information to the Chinese government regarding its users.[339] The proponent alleged that the Chinese government was using that information to persecute free speech activists.[340] The SEC Staff refused to concur that the proposal could be excluded under 14a-8(i)(7), because it "raised a significant policy issue of human rights."[341]

Thus, if the Model Proposal is viewed as raising a human rights issue, it should be included. The Model Proposal does raise a human rights issue. If tweaking goes beyond reducing PageRank for legitimate reasons (e.g., fighting spammers), to information that is merely objected to by Google insiders (e.g., conservative political content), that is potentially a human rights violation because it interferes with the speaker's ability to impart information.[342]

Article 19 of the Universal Declaration of Human Rights provides:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and *impart information* and ideas through any media and regardless of frontiers.[343]

335. Apple also provided a discussion of the board's analysis of the policy issue. *Id.* at *14–16. However, the board analysis section focused on the board's review of the Company's Supplier Responsibility 2017 Progress Report, which never discusses censorship, or free speech in China (instead, it focused on how its supply chain is as environmentally friendly as possible). *See generally* APPLE, INC., COMPANY'S SUPPLIER RESPONSIBILITY 2017 PROGRESS REPORT, https://www.apple.com/supplier-responsibility/pdf/Apple_SR_2017_Progress_Report.pdf.

336. Apple No-Action Letter, *supra* note 328, at *14–16.

337. *Id.* at *1–2.

338. No-Action Letter from Matt S. McNair, SEC, to Yahoo! Inc., 2011 SEC No-Act. LEXIS 363, at *2 (April 5, 2011).

339. *Id.* at *4–6.

340. *Id.*

341. *Id.* at *2.

342. Gaming has the same result as tweaking, albeit indirectly. When a foreign actor games the search algorithm to increase the PageRank of a fake news webpage, legitimate news is pushed down, and less likely to be clicked on by the user.

343. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, art. 19 (1948).

Google itself has stated that censoring speech runs afoul of international human rights law.[344] Speaking to the issue of censorship in China, it wrote on its official blog:

> Increased government censorship of the web is undoubtedly driven by the fact that record numbers of people now have access to the Internet, and that they are creating more content than ever before. For example, over 24 hours of video are uploaded to YouTube every minute of every day. This creates big challenges for governments used to controlling traditional print and broadcast media. While everyone agrees that there are limits to what information should be available online -- for example child pornography -- many of the new government restrictions we are seeing today not only strike at the heart of an open Internet but also violate Article 19 of the Universal Declaration of Human Rights.[345]

VI. COUNTERARGUMENTS AND OTHER PROPOSALS

Above, I explained why Google shareholders should use the Model Proposal to compel the company to disclose whether Google Search has been manipulated by bad actors, together with the extent of such manipulations. Further, I explained why Google should not be permitted to exclude said proposal. In this Part, I will rebuff two possible counterarguments to the Model Proposal. Finally, I will contrast several alternative proposals.

A. Counterargument One: Manipulation Is Good

Under the heading "Search Engine Bias Is Necessary and Desirable," Eric Goldman writes, "If a search engine does not attempt to organize web content, its system quickly and inevitably will be overtaken by spammers, fraudsters, and malcontents. At that point, the search engine becomes useless to searchers."[346]

Rephrased: "People want Google Search to manipulate their search results to return what is most relevant." This is the "manipulation is good" argument. It is a commonly heard response to any proposal to regulate Google Search.[347] It has much truth to it.

344. David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability Under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. INT'L L. 334, 382 (2011) (quoting Rachel Whetstone, *Controversial Content and Free Expression on the Web: A Refresher*, OFFICIAL GOOGLE BLOG (Apr. 19, 2010), http://googleblog.blogspot.com/2010/04/controversial-content-and-free.html).

345. Rachel Whetstone, *Controversial Content and Free Expression on the Web: A Refresher*, OFFICIAL GOOGLE BLOG (Apr. 19, 2010), http://googleblog.blogspot.com/2010/04/controversial-content-and-free.html.

346. Eric Goldman, *Search Engine Bias and The Demise of Search Engine Utopianism*, 8 YALE J.L. & TECH. 188, 195–96 (2006).

347. *See, e.g.*, DAVID SHENK, DATA SMOG 43 (1998); HALAVAIS, *supra* note 5, at 9; , Goldman, *supra* note 346, at 195.

However, the "manipulation is good" argument must—by definition—be limited to arguing against any regulation (or shareholder proposal) that would reduce relevance of search results. For example, it is an effective argument against the federal government requiring randomization of results.[348]

The "manipulation is good" argument does not weigh against preventing bad manipulation—gaming and tweaking—which has the effect of decreasing relevance.

Indeed, protecting "good" manipulation requires exposing—and combatting—"bad" manipulation.

B. Counterargument Two: The Shareholder Proposal Is Futile

Is the Model Proposal an exercise in futility? As mentioned above, a weaker version was submitted to the Google shareholders last year.[349] It received thirteen percent of the vote in favor.[350]

Google has three classes of stock: Class A, 299,360,029 shares, at one vote per share; Class B, 46,535,019 shares, at ten votes per share; and Class C, 439,291,348 shares, with no voting rights.[351] As Google's 10-K explains, "Larry, Sergey, and Eric E. Schmidt beneficially owned approximately 92.8% of our outstanding Class B common stock, which represented approximately 56.5% of the voting power of our outstanding capital stock."[352]

In short, nothing will pass that Larry, Sergey, and Eric E. Schmidt don't want to pass. Counterintuitively, the Author believes that the foregoing is actually a reason that a shareholder proposal will be effective at Google. If these proposals fail—one after another—the losses rest squarely at the feet of founders, Larry and Sergey, as well as Eric E. Schmidt. If the Model Proposal fails, they will be voting, ultimately, in favor of search result manipulation (or, at a minimum, against disclosing how much search result manipulation occurs).

The ability of a shareholder to place pressure on a company simply by submitting a shareholder proposal should not be underestimated.[353] Where public opinion is on the side of the proponent, the corporation will often reach a compromise with the

348. *See infra* Subpart VI.C.1 (discussing direct federal regulation of search results).

349. NOTICE OF 2018 ANNUAL MEETING OF STOCKHOLDERS AND PROXY STATEMENT, *supra* note 194, at 70.

350. FORM 8-K CURRENT REPORT, *supra* note 195; Meaghan Kilroy, *Technology Companies in Investor Crosshairs*, PENSIONS & INV. (June 11, 2018), https://www.pionline.com/article/20180611/PRINT/180619990/technology-companies-in-investor-crosshairs.

351. FORM 10-K, *supra* note 2, at ii, 19.

352. *Id.* at 18–19.

353. *See generally* Elizabeth Glass Geltman & Andrew E. Skroback, *Environmental Activism and the Ethical Investor*, 22 J. CORP. L. 465, 470–80 (1997).

proponent, rather than allow the matter to go to a vote.[354] They simply wish to avoid the negative publicity of a vote.[355] Here, board diversity policies are a good example.[356] In 2018, thirty shareholder proposals were submitted seeking the adoption of a board diversity policy.[357] Three proposals made it to a vote and failed.[358] However, many were withdrawn after the shareholder and corporation reached an amicable agreement.[359] In the case of board diversity, such agreements often involved the corporation "committing to include women and ethnically diverse candidates in the pool from which nominees are selected."[360]

Trinity, discussed above, is another good example.[361] Wal-Mart won the battle but lost the war. The court agreed it had the right to exclude the shareholder proposal from its proxy materials.[362] But the shareholder proposal ultimately forced—through shaming—the corporation to take the action desired.[363] Just one month after the decision in *Trinity*, where the court held that Wal-Mart could exclude the gun control proposal, Wal-Mart announced that it would stop selling assault rifles.[364]

C. Other Proposals

Commentators have floated several ideas for solving the issue of search engine manipulation.[365] They range from more intrusive (direct regulation of how results are ordered), to less intrusive (requiring disclosure), to out-of-the-box (a Foreign Intelligence

354. Leo E. Strine, Jr., *Making It Easier For Directors To "Do The Right Thing"?*, 4 HARV. BUS. L. REV. 235, 240 n.18 (2014) ("In recent years, companies have been more willing . . . to implement proposals advanced by the activists and to seek to negotiate compromises . . . in order to avoid a shareholder proposal . . . ." (quoting Steven A. Rosenblum, *The Shareholder Communications Proxy Rules and Their Practical Effect on Shareholder Activism and Proxy Contests*, *in* AMY L. GOODMAN, JOHN F. OLSON & LISA A. FONTENOT, A PRACTICAL GUIDE TO SEC PROXY AND COMPENSATION RULES § 10.03 (5th ed. 2010 & Supp. 2013))).

355. *Id.*

356. Robert O. Mueller et al., *Shareholder Proposal Developments During the 2018 Proxy Season*, GIBSON, DUNN, & CRUTCHER, LLP 2 (July 12, 2018), https://www.gibsondunn.com/wp-content/uploads/2018/07/shareholder-proposal-developments-during-the-2018-proxy-season.pdf.

357. *Id.* at 17.

358. *Id.*

359. *Id.* at 2.

360. *Id.* at 17.

361. Trinity Wall St. v. Wal-Mart Stores, Inc., 792 F.3d 323, 327 (3d Cir. 2015).

362. *Id.* at 328.

363. Hiroko Tabuchi, *Walmart to End Sales of Assault-Style Rifles in U.S. Stores*, N.Y. TIMES (Aug. 26, 2015), https://www.nytimes.com/2015/08/27/business/walmart-to-end-sales-of-assault-rifles-in-us-stores.html.

364. *Id.*

365. Goldman, *supra* note 346, at 194–95 (discussing regulatory options).

Surveillance Act ("FISA") court for manipulation claims). A review of these various proposals helps shed light on why the Model Proposal is superior.

1. Regulate How Search Results Are Ordered

Some scholars have suggested federal regulation of the ordering of search results. For example, Pandey et al. suggest a controlled amount of randomness to search results.[366] Under this proposal, "obscure websites randomly should get extra credit in ranking algorithms, appearing higher in the search results on occasion and getting additional exposure to searchers accordingly."[367] Along a similar line, Cass R. Sunstein proposes that a search result that is partisan should (perhaps by way of a note next to said search result) include a link to a webpage containing the counter view.[368]

These proposals are the least likely to be successful because they are considered a threat to the First Amendment guarantee of free speech.[369] Bracha and Pasquale write, "The three courts that have adjudicated cases involving allegations of manipulation rejected all legal claims and refrained from imposing any meaningful restraints on the ability of search engines to manipulate their results."[370] One of those cases is *Search King v. Google*.[371] The basics of that case were that Google lowered Search King's PageRank from eight to two in retaliation for Search King engaging in SEO activities.[372] Search King brought a tortious interference with contractual relations claim, which requires a showing that, "(1) the defendant interfered with a business or contractual relationship of the plaintiff; (2) the interference was malicious and wrongful, and was not justified, privileged, or excusable; and (3) the plaintiff suffered injury as a proximate result of the interference."[373] Google argued that the Plaintiff could not establish the second element—that the action was not justified—because reducing Search King's PageRank was protected First Amendment speech.[374]

366. Sandeep Pandey et al., *Shuffling a Stacked Deck: The Case for Partially Randomized Ranking of Search Engine Results*, *in* 2 PROCEEDINGS OF THE 31ST INTERNATIONAL CONFERENCE ON VERY LARGE DATA BASES 781, 781 (2005), http://www.cs.cmu.edu/~spandey/publications/randomRanking-vldb.pdf.

367. Goldman, *supra* note 346, at 195 (citing Pandey et al., *supra* note 366).

368. SUNSTEIN, *supra* note 158, at 186.

369. U.S. CONST. amend. I.

370. Bracha & Pasquale, *supra* note 74, at 1151 (citing Langdon v. Google, Inc., 474 F. Supp. 2d 622 (D. Del. 2007); Kinderstart.com LLC v. Google, Inc., No. C 06-2057 JF (RS), 2006 U.S. Dist. LEXIS 82481 (N.D. Cal. July 13, 2006); Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 U.S. Dist. LEXIS 27193 (W.D. Okla. May 27, 2003)).

371. *Search King, Inc.*, 2003 U.S. Dist. LEXIS 27193, at *4.

372. *Id.* at *3–4.

373. *Id.* at *5–6.

374. *Id.* at *6–8.

The court agreed, finding that Google's ranking of Search King was protected First Amendment Speech.[375] It was a subjective opinion, even if it was arrived at by an objective algorithm.[376] In so finding, the court likened it to the case of *Jefferson County v. Moody's*[377] where the Tenth Circuit found that Moody's rating of the school district's refunding bonds was a subjective opinion.[378]

It follows that any attempt to regulate search engine rankings would be subject to strict scrutiny.[379] Eugene Volokh and Donald Falk wrote a white paper on behalf of Google, arguing that the company, under the First Amendment, has a right to structure its search results any way it wants.[380] In a multi-faceted analysis, they argue that the First Amendment protects opinions appearing on the internet (just like it would protect opinions appearing in newspapers or on television).[381] They further argue that Google Search provides Google's opinion regarding the relevance of a given webpage in relation to a search term entered by a user.[382] This, Volokh and Falk argue, is like the editor at a newspaper deciding which stories should appear in the newspaper, whether they should appear above the fold, etc.[383]

Volokh and Falk's comparison to newspaper editors allows for ready reference to *Miami Herald Publishing Co. v. Tornillo*.[384] In *Tornillo* the Court struck down Florida's right to reply statute, "which provide[d] that if a candidate for nomination or election is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges."[385] The Court reasoned that the statute infringed on the newspaper's editorial judgment.[386] Applied to

375. *Id.* at *9.
376. *Id.* at *11.
377. 175 F.3d 848 (10th Cir. 1999).
378. *Search King, Inc.*, 2003 U.S. Dist. LEXIS 27193, at *11–12.
379. Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2417–18 (1997) (suggesting that content-based restrictions should be subject to an even higher standard than strict scrutiny).
380. Eugene Volokh & Donald M. Falk, *First Amendment Protection for Search Engine Search Results -- White Paper Commissioned by Google* 8–9 (UCLA Sch. of Law, Research Paper No. 12-22, 2012), https://ssrn.com/abstract=2055364. Not all scholars agree with Volokh and Falk. *See, e.g.*, Oren Bracha, *The Folklore of Informationalism: The Case of Search Engine Speech*, 82 FORDHAM L. REV. 1629, 1634 (2014) (arguing that the First Amendment does not foreclose regulation of the internet); James Grimmelmann, *Speech Engines*, 98 MINN. L. REV. 868, 880–81 (2014) (same).
381. Volokh & Falk, *supra* note 380, at 8–10.
382. *Id.* at 10–14.
383. *Id.* at 4.
384. 418 U.S. 241 (1974).
385. *Id.* at 244.
386. *Id.* at 258.

Google, Professor Volokh writes, "[the First Amendment] also fully protects Internet speakers' editorial judgments about selection and arrangement of content. As the Supreme Court held in *Tornillo*, the freedom to speak necessarily includes the right to choose what to include in one's speech and what to exclude."[387] As such, direct regulation of how search results are ordered is likely to fail a Constitutional challenge.

Finally, in addition to the First Amendment argument, direct regulation of search results has another fatal flaw. It simply replaces one form of manipulation for another. The regulators will simply substitute their normative views for those of Google.[388] "What makes one bias better than another?"[389]

The Model Proposal does not suffer from any such infirmities, because it does not mandate reordering of search results.

2. Mandate Disclosure to the Public

One solution is a federal law mandating search engines disclose how they organize search results directly to the public.[390] Search engines "would be expected to release the source code of their algorithms; explain how webpages, people, and events are rated and ranked; or describe how and why one's 'news feed' or search results are structured and populated."[391]

There is precedent for requiring disclosure of how search results are ordered to the public. In the early 1980s, American Airlines created a search engine that allowed customers to search for flights across all airlines (imagine a Disk Operating System ("DOS") version of Expedia).[392] Predictably, American Airlines flights often appeared at the top of the list.[393] After a nationwide uproar—culminating in Congressional hearings—the Civil Aeronautics Board took action.[394] They promulgated the following regulation: "Each [airline reservation] system shall provide to any person upon request the current criteria used in editing and ordering flights for the integrated displays and the weight given to each criterion and the specifications used by the system's programmers in constructing the algorithm."[395]

387. Volokh & Falk, *supra* note 380, at 8.
388. Goldman, *supra* note 346, at 197.
389. *Id.*
390. Shkabatur, *supra* note 9.
391. *Id.*
392. Christian Sandvig et al., Auditing Algorithms: Research Methods for Detecting Discrimination on Internet Platforms 2 (May 22, 2014) (unpublished paper presented to "Data and Discrimination: Converting Critical Concerns into Productive Inquiry," a preconference at the 64th Annual Meeting of the International Communication Association), https://pdfs.semanticscholar.org/b722/7cbd34766655dea10d0437ab10df3a127396.pdf.
393. *Id.*
394. *Id.*
395. *Id.* at 2–3 (quoting 15 C.F.R. § 255.4 (2019)).

The obvious objection is that mandatory disclosure will harm Google's competitive advantage by revealing Google's search algorithm to the outside world.[396] As such, this proposal is likely to face a great deal of opposition from Google arguing that it will harm the company, and ultimately, *shareholders*.

The foregoing helps highlight where the Model Proposal is superior. Under the Model Proposal, it is the *shareholders* that are asking for the release, not an outside entity. Management will have a difficult time arguing that they are protecting shareholders by keeping the information secret, when it is shareholders that are making the request. Further, the Model Proposal calls for the report, when issued to the shareholders, to redact proprietary or legally privileged information.[397]

3. A Secret Court for Manipulation Claims

One of the more out-of-the-box ideas is the coupling of an antimanipulation regulation (which would likely be subject to the same First Amendment objections discussed in Subpart VI.C.1) with a secret court that would determine if manipulation has taken place.[398] Bracha and Pasquale write: "On the administrative side, an institution modeled on the courts instated by the Foreign Intelligence Surveillance Act (FISA) might be helpful. The reviewing body could, like the FISA court, examine potential cases of manipulation . . . ."[399]

However, given the ability of a secret court to be captured by the entity it is supposed to check (see numerous recent cases regarding FISA abuse by the DOJ)[400], this is not a palatable option.

VII. CONCLUSION

Google's corporate motto is "Don't be evil."[401] While Google itself may not be evil, some suspect that its primary product, Google Search, is the conduit for much malign activity.[402] This Article explains two forms of possible search engine manipulation: (1) malign

396. Allyson Haynes Stuart, *Google Search Results: Buried if Not Forgotten*, 15 N.C.J.L. & TECH. 463, 472 (2014) ("Google fiercely protects its patented algorithms.") (citing JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET 220 (2009)); Kevin Gallagher, *President Trump's Tweet Hints at Search Regulation*, BUS. INSIDER (Aug. 29, 2018, 9:32 AM), https://www.businessinsider.com/trump-tweets-google-negative-stories-2018-8 ("But tech giants won't take a [requirement to disclose their algorithm to auditors] lightly, because algorithms are the secret sauce that gives them competitive advantages over other platforms.").

397. *See supra* Subpart V.B.

398. Bracha & Pasquale, *supra* note 74, at 1204.

399. *Id.*

400. Thomas Anthony Durkin, *Permanent States of Exception: A Two-Tiered System of Criminal Justice Courtesy of the Double Government Wars on Crime, Drugs & Terror*, 50 VAL. U. L. REV. 419, 441–43 (2016).

401. Mims, *supra* note 175, at B5.

402. *See supra* Part III.

third parties gaming the search algorithm for political ends, and (2) malign insiders tweaking the search algorithm for similar reasons.[403]

Our democracy hangs in the balance.[404]

As internet search engines (predominantly Google Search) exercise more and more control over information, there will inevitably be calls for regulation (especially from those politicians that feel they are losing the "information war").[405] Possibilities range from highly- to less-intrusive regulations. Highly-intrusive regulations would mandate the actual order of search results;[406] less-intrusive regulations would require disclosure to the public of how search results are ordered.[407]

This Article argues for a better approach. Google's shareholders should use Rule 14a-8 under the Securities Exchange Act of 1934[408]—the shareholder proposal rule—to submit the Model Proposal set forth in Part V of this Article for a shareholder vote. The Proposal compels Google to investigate whether its search engine has, to date, ever been manipulated for political purposes, by who, and how. A report containing the findings, redacting proprietary or legally privileged information, would be provided to the shareholders.[409]

What if the Model Proposal passes? If it passes, it will effectuate real change at Google. The mere act of conducting the investigation (and preparing the report) will ferret out any instances of past manipulation and better equip Google to deal with attempts to manipulate its search engine in the future.[410] (The Author believes it could pass, because it appeals to Google's self-imposed duty to "not be evil.")[411]

What if the Model Proposal fails? A direct comparison can be drawn to Wal-Mart, where the Trinity proposal failed (indeed never even made it to a vote), but still ultimately forced Wal-Mart—through shaming—to stop selling assault rifles.[412]

So too, here, the mere act of submitting the Model Proposal for a vote would increase pressure on Google, and in the end, the truth will come out. Or in the words of Elvis Presley—"Truth is like the sun. You can shut it out for a time, but it ain't goin' away."[413]

403. *See supra* Part III.
404. *See supra* Part IV.
405. *See supra* Subpart VI.C.
406. *See supra* Subpart VI.C.1.
407. *See supra* Subpart VI.C.2.
408. 17 C.F.R. § 240.14a–8 (2019).
409. *See supra* Part V.
410. Hirsch, *supra* note 180, at 1112 (discussing how preparing a report allows workers to assess their "moral commitments as social beings.").
411. Mims, *supra* note 175, at B5.
412. Tabuchi, *supra* note 363.
413. Richard Johnson, *Endquote*, N.Y. POST, May 21, 2015, at 16.