IN THE COURT OF COMMON PLEAS
DELAWARE COUNTY, OHIO

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

AMICUS BRIEF OF THE PHOENIX CENTER FOR ADVANCED LEGAL & ECONOMIC PUBLIC POLICY STUDIES
IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTEREST OF AMICUS CURIAE

The Phoenix Center for Advanced Legal & Economic Public Policy Studies ("Phoenix Center") is a non-profit 501(c)(3) research organization that studies the law and economics of the digital age. The primary mission of the Phoenix Center is to produce rigorous legal and economic research to inform the policy debate. Among other research areas, the Phoenix Center and its scholars have published significant academic work on communications law and common carriage regulation. The Phoenix Center, therefore, has an established interest in the outcome of this proceeding and believes that its perspective will assist the Court in resolving this case.

ARGUMENT

I. Introduction

According to the State of Ohio, because consumers perceive that Google Search "delivers[s] the best search results," Google Search is the dominant provider in the market. (Ohio Complaint at 2-3.) Curiously, however, Ohio does not allege, nor does it seek redress from this Court for, any specific act of anticompetitive conduct resulting from this dominant market position. Instead, the State of Ohio is asking this Court to declare Google Search to be a "common carrier" under Ohio law. According to Ohio's complaint, if this Court declares Google Search to be a "common carrier," then Google Search (1) will be prohibited from "unfairly discriminat[ing] against third party websites"; (2) will be forced to carry "all responsive search results on an equal basis"; and (3) will be forced to provide "the public with ready access to organic search results that the Google Search algorithms produce." (Ohio Complaint at 5.) In other words, Ohio is asking this Court to impose by judicial fiat prophylactic *ex ante* economic regulation on the terms and conditions of how Google Search provides its service to consumers.

As explained below, this Court should reject Ohio's petition. First, common carrier status is *not status-based*; it is *activity-based*. Thus, the appropriate question is not whether Google Search should be independently treated as a common carrier, but whether *all* Internet search—regardless of provider—is a common carrier *service*. Given the interstate nature of search, answering this question should be left to Congress, not to a single state's judiciary. Second, the economics of search do not support the imposition of *ex ante* regulation. In fact, granting Ohio's petition will likely diminish consumer welfare. Third, even though this Court rejected Ohio's public utility argument, granting Ohio's petition will nonetheless result in *de facto* public utility regulation. However, Ohio has provided no cost/benefit analysis to justify such broad regulation,

and its lack of specificity about the contours of this regulation raises significant procedural due process concerns. Fourth, given that Google Search provides an individualized curated experience to consumers, the imposition of common carriage on Google Search will run afoul of the First Amendment. Finally, granting Ohio's petition will trigger several unintended consequences that will reach far beyond the borders of this State.

II. An Individual Firm's Market Power is Irrelevant to a Common Carrier Designation—Common Carriage is *Service-Specific*

The heart of Ohio's argument is that because Google Search is the "dominant" firm in the market, Google Seach must *a fortiori* be a "common carrier." Ohio is incorrect.

While market power may provide an argument for *public utility regulation* (*i.e.,* regulating a firm's rates, terms and conditions of service), market power is irrelevant to a common carrier determination (*i.e.,* the duty to take on all comers equally). *See, e.g., Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974) (striking down on First Amendment grounds a Florida law that required a newspaper to publish opposing views, even though the newspaper was the only print outlet in the market); *see also* Christopher Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy,* 1 J. FREE SPEECH L. 463, 467 (2021) (a survey of the case law finds that "none of the standard judicial definitions of common carriage depend on the presence of market power."). Thus, with all due respect, this Court's statement that "[w]hile every public utility is a common carrier, not every common carrier is a public utility" is inaccurate. *See May 24, 2022 Opinion and Order Granting in Part and Denying in Part Defendant's Motion to Dismiss* at p. 11. For example, electric utilities—which are the very epitome of "natural monopolies"—have never been regulated as common carriers, yet electric utilities are nonetheless extensively regulated as public utilities. Lawrence J.

Spiwak, *Regulatory Implications of Turning Internet Platforms into Common Carriers, 7*6 FED. COMM. L.J. 1 (2023).[1] For this reason, common carriage is not *status-based* (*i.e.,* who you are), but *activity-based* (*i.e.,* what service you provide). *FTC v. AT&T Mobility,* 833 F.3d 848 (9th Cir. 2018).

To illustrate the point, consider the Federal Communications Commission's efforts to foster competition in the old "long-distance" telephone market in the 1980's via their "*Competitive Carrier*" paradigm. At the time of the breakup of the old Bell System, there were essentially three major "long distance" firms: AT&T (the dominant incumbent), along with MCI and Sprint (the new entrants). The theory behind the FCC's *Competitive Carrier* paradigm was simple: On the one hand, to prevent AT&T from abusing its dominant position, the FCC continued to subject AT&T to legacy public utility regulation such as tariffs with a mandatory forty-five-day notice and comment period before any new (i.e., lower) rate could go into effect, onerous reporting requirements, *etc.* On the other hand, to reduce regulatory barriers to entry, the FCC declared

[1] Indeed, common carriage is simply *one form* of public utility regulation. For example, in the communications sector (which many people point to as an analogy for common carrier regulation of Internet platforms, *see, e.g., Biden v. Knight First Amend. Inst. at Colum. Univ.,* 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring) (although Internet platforms are "digital instead of physical, they are at bottom communications networks, and they 'carry' information from one user to another." Moreover, a "traditional telephone company laid physical wires to create a network connecting people. Digital platforms lay information infrastructure that can be controlled in much the same way.")), voice telephone service (fixed and mobile) is subject to common carrier regulation under Title II and Title III of the Communications Act of 1934, yet Voice over Internet Protocol (VoIP) service exists in the regulatory netherworld of "voice" service, neither an information service under Title I nor a telecommunications service under Title II. Multichannel Video Programming provided by cable and satellite companies is not subject to common carrier regulation, but cable companies are subject to other regulatory requirements under Title VI of the Act. Broadcasting is similarly not subject to common carrier regulation but must comply with the licensing requirements of Title III. And Broadband Internet Access Services (fixed or wireless) are currently considered to be an information service under Title I of the Communications Act and therefore not subject to common carrier regulation under Title II, although now that the Biden Administration finally has a Democratic majority at the FCC it is moving aggressively on its promise to reverse this policy, *see* Executive Order No. 14036, 86 FED. REG. 36987 (July 14, 2021); *Safeguarding and Securing the Open Internet,* NOTICE OF PROPOSED RULEMAKING, FCC 23-83, __ Rcd. __ (2023). Yet regardless of the exact form of public utility regulation, to varying degrees, the FCC oversees the whole lot. The same is true in the energy sector. Under the Federal Power Act and Natural Gas Act, electric utilities and natural gas pipelines are not regulated as common carriers, yet oil pipelines are. Still, the Federal Energy Regulatory Commission has jurisdiction over all these services. Spiwak, *Regulatory Implications of Turning Internet Platforms into Common Carriers, id.*

Sprint and MCI to be "non-dominant" carriers (*i.e.,* they lacked market power) and subjected MCI and Sprint to only the bare minimum amount of public utility regulation necessary to ensure compliance with the precepts of the Communications Act of 1934 (*e.g.,* the FCC presumed Sprint and MCI's tariffs to be "just and reasonable" and allowed their tariffs to go into effect after only one day notice). The paradigm worked, and once competition took hold the FCC eventually placed AT&T on the same "light touch" regulatory footing as the other "non-dominant" carriers. *See In re Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier,* FCC 95-427, 11 FCC Rcd 3271 (rel. Oct. 23, 1995). Yet regardless of the degree of public utility regulation the FCC respectively imposed on dominant or non-dominant long-distance carriers, the underlying activity that AT&T, Sprint and MCI all engaged in was the provision of a common carrier interstate telecommunications service as defined by Title II of the Communications Act. In other words, while public utility regulation may be asymmetrical among firms depending on *status*, the duty to provide a common carrier *service* must be applied uniformly to *all firms* who engage in that exact same *activity*.

Given the above, the correct question is *not* whether Google Search is a "common carrier" but whether Internet search—*regardless of provider*—is a common carrier *service*.[2] Determining whether Internet search should be regulated as a common carrier service is not this Court's job. Due to the interstate nature of the Internet, dictating the regulatory treatment of Internet search—and who should implement and oversee that regulation—is a task best left for Congress.[3]

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[2] For a comprehensive list of alternative free search engines, *see* Michael Muchmore, *Go Beyond Google: The Best Alternative Search Engines,* PC MAGAZINE (December 21, 2023) (available at: https://www.pcmag.com/picks/go-beyond-google-best-alternative-search-engines).

[3] For example, the country just went through a major political fight when a bi-partisan group of legislators tried to pass the American Innovation and Choice Online Act ostensibly to prevent a select number of Internet platforms from favoring their own goods and services (*i.e.,* to impose a non-discrimination obligation). Due to the numerous legal and economic deficiencies of this poorly crafted legislation, the bill ultimately died in Congress. *See* Lawrence J. Spiwak, *The Third Time is Not the Charm: Significant Problems Remain With Senator Klobuchar's Antitrust Reform Bill*, FEDSOC BLOG (June 7, 2022); Lawrence J. Spiwak, *Why Does Congress Want to Break Amazon*

III. The Economics of Search Do Not Warrant Common Carrier Designation

According to this Court, under Ohio law, "a common carrier is defined as one *who undertakes for hire to transport persons or property*, and holds itself out to the public as ready and willing to serve the public indifferently and impartially to the limit of its capacity." *See May 24, 2022 Opinion and Order Granting in Part and Denying in Part Defendant's Motion to Dismiss* at p. 7 (citations omitted and emphasis supplied). Internet search does not fit this definition.

First, unlike a firm which operates a communications network, search engines are not in the business of transmitting Internet traffic for end consumers. As the Eleventh Circuit correctly pointed out, Internet platforms are not in the "transportation of traffic" business and do not act as "dumb pipes":

> They're not just servers and hard drives storing information or hosting blogs that anyone can access, *and they're not Internet service providers reflexively transmitting data from point A to point B.* Rather, when a user visits Facebook or Twitter, for instance, she sees a curated and edited compilation of content from the people and organizations that she follows. *NetChoice, LLC v. Attorney General of Florida,* 34 F.4th 1196, 1204 (11th Cir. 2022) (emphasis supplied).

For a detailed analysis of why Internet platforms do not act like communications networks (and, accordingly, why platforms are not currently regulated as such), *see* Spiwak, *Regulatory Implications of Turning Internet Platforms into Common Carriers, supra.*

Second, and along the same lines, Internet search is not a homogeneous commodity. Internet search results always reflect the unique search terms of the user and must be presented in a sequential manner—first, second, third, and so forth. Since a simple Internet search often returns a bewildering number of potentially relevant links, a search engine differentiates itself—and attracts users—by providing the most relevant search results near the top of the list. In some cases,

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Prime?, NOTICE & COMMENT BLOG – YALE J. ON REGULATION (Feb. 18, 2022); George S. Ford, *The American Innovation and Choice Online Act is an "Economics-Free Zone",* NOTICE & COMMENT BLOG – YALE J. ON REGULATION (June 10, 2022).

the search results are tailored to a specific user, using what information on the user is available to provide better results. Thus, curation is a feature, not a flaw, of a search engine, as users would otherwise be overwhelmed with the quantity of information available with search results were organic or randomized. *See, e.g., Cellco Partnership v. FCC,* 700 F.3rd 534, 546 (D.C. Cir. 2012) ("a carrier will not be a common carrier where its practice is to make individualized decisions in particular cases whether and on what terms to serve.").

Finally, unlike traditional common carrier services, Internet search engines do not charge a fee to consumers—their services are free. *See, e.g.,* 47 U.S.C. § 153(11) ("The term 'common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy…") In its *May 24, 2022 Opinion and Order*, this Court discounted this mandatory fee requirement, noting that "more recent law has shifted from requiring a direct fee paid to the carrier." *Id.* at 10. As examples, this Court pointed to escalators in shopping malls, elevators in office complexes, and terminals in airports. *Id.* But with all due respect to this Court, these examples are inapposite to how Google Search conducts its business.[4]

While Internet search engines provide their service free to consumers, their business is funded through advertising. An independent party may pay a fee for a higher ranking in the

[4] Perhaps some of the confusion over what exactly "common carriage" means stems from the fact that many states view "common carriage" as a euphemism for public accommodation laws. *See, e.g., 303 Creative LLC v. Elenis*, 143 S.Ct. 2298, 2314 (2023) (citations omitted) ("Over time, governments in this country have expanded public accommodations laws in notable ways too. Statutes like Colorado's grow from nondiscrimination rules the common law sometimes imposed on common carriers and places of traditional public accommodation like hotels and restaurants. Often, these enterprises exercised something like monopoly power or hosted or transported others or their belongings much like bailees. Over time, some States, Colorado included, have expanded the reach of these nondiscrimination rules to cover virtually every place of business engaged in any sales to the public.") Viewed in this light, applying common carriage to escalators, elevators and airport terminals has some logic. But as explained in Section IV below, that is not what Ohio seeks in this case. What Ohio seeks from this Court is the imposition of traditional public utility common carrier regulation originally designed to govern the economic behavior of the old Ma Bell monopoly to govern the speech of Google Search. *See* Spiwak, *Regulatory Implications of Turning Internet Platforms into Common Carriers, id.*

sequence, and such fees fund the entire operation—*i.e.,* an advertisement. If Internet search was a common carrier service, then the willingness to pay for advertisements would be substantially diminished (if not eliminated), making it impossible for search engines to fund the large investments required to maintain and improve their service. From a financial perspective, Internet search cannot be a common carrier service, as there is no funding mechanism available under such a regulatory regime. Internet search is, by all practical standards, an advertising service.[5] That is what it is. To define Internet search otherwise by restricting operations to "organic" results is to change the very nature of the business by judicial fiat without providing firms a means by which to fund their search service.

Notwithstanding the above, Ohio nonetheless contends that a common carrier designation is required to prevent Google Search from self-preferencing other Alphabet products over those of independent sellers using the platform. This preference, Ohio claims, is implemented in the way search results are presented to consumers—a bias for the platform's own products. But Ohio misunderstands the incentives of platforms to favor their own products and services over rivals.

All sellers preference their own products to some degree. Whether it is Kroger placing its own store-brand products favorably in store or Google search prioritizing Google Maps results in queries for directions. However, a platform that aims to attract consumers does it less so than a platform that peddles its own wares alone.

Economists Dr. George S. Ford and Professor Michael Stern provide a useful analysis of the incentives of platforms to favor their own products and services over rivals in the context of Internet retail platforms. George S. Ford and Michael Stern, *Retail Platform Bias?* PHOENIX

[5] Norm Vogele, *Google is Not a Search Engine—It's an Advertising Platform*, SEO STRATEGY (May 15, 2019) (available at: https://www.pageonepower.com/linkarati/google-not-search-engine-advertising-platform).

CENTER POLICY PERSPECTIVE NO. 22-02 (February 10, 2022) (available at: https://www.phoenix-center.org/perspectives/Perspective22-02Final.pdf). In this paper, Ford and Stern offer a simple analysis of a digital platform's incentives to bias sales toward its own products and services when the platform also permits third-party sellers. Their analysis reveals that a digital platform is *less* biased—not more biased—in the promotion of its own products and services relative to online sellers that do not permit third-party sales. Every seller has an incentive to promote its own products, but the presence of a platform component to the seller's business reduces that incentive, not enhance it. A platform's users want the best results, and if the information signals sent by the platform are not useful, users will switch to a different platform. Thus, there is a constraint on the platform absent from those that sell only their own goods—the platform with the best results wins, and pushing irrelevant or undesirable products worsens the perceived usefulness of the platform. Like television broadcasting, an advertising-funded platform must balance user interests and revenue creation, a difficult task that common carrier regulation would render impossible.

IV. Ohio's Petition Amounts to *De Facto* Public Utility Regulation Without Adequate Due Process

As noted above, Ohio does not allege, nor does it seek redress from this Court for, any specific act of anticompetitive conduct resulting from Google Search's dominant market position. Instead, Ohio is asking this Court to declare Google Search to be a "common carrier" as a prophylactic measure to ensure that Google Search (1) will be prohibited from "unfairly discriminat[ing] against third party websites"; (2) will be forced to carry "all responsive search results on an equal basis"; and (3) will be forced to provide "the public with ready access to organic search results that the Google Search algorithms produce." (Ohio Complaint at 5.) Although this Court has rejected Ohio's "public utility" claim, *see May 24, 2022 Opinion and Order Granting*

in Part and Denying in Part Defendant's Motion to Dismiss, given that Ohio's desired outcome is to regulate *ex ante* the terms and conditions of service of Google Search, Ohio's stated end-goals nonetheless look a lot like *de facto* public utility regulation. The only difference, of course, is that rather than appropriately pursue this objective through the legislative process, Ohio is attempting to achieve its goals through judicial fiat. This Court should reject Ohio's efforts for several important reasons.

First, it is axiomatic that while regulation may have some benefits, regulation can also impose significant costs. If the costs of the regulation outweigh the benefits, then society is better off with no regulation—allegations of anticompetitive conduct are more efficiently adjudicated on a case-by-case basis via the nation's antitrust laws. But in the case at bar, Ohio has not presented this Court with any cost/benefit analysis; it merely asserts that its proposed remedy will be costless. Needless to say, if an administrative agency attempted to impose such an expansive rule without conducting a basic cost/benefit analysis, then the chance that agency would be reversed on appeal for arbitrary and capricious decision-making is high.

Second, if *de facto* public utility regulation is Ohio's goal, then the procedural Due Process requirements of the Fifth and Fourteenth Amendments to the Constitution also come into play. U.S. Const. amends. V. and XIV. When the government seeks to regulate the rates, terms and conditions of how a private entity provides service, firms must have clear notice of what those rules are. *See, e.g., Comcast Corporation v. FCC,* 600 F.3rd 642 (D.C. Cir. 2010) (rejecting the FCC's efforts to punish a firm for failing to adhere to "net neutrality" non-discrimination policy principles because the agency never promulgated formal rules). Normally, when the government seeks to impose regulation, it must first issue a *Notice of Proposed Rulemaking* and allow for public comment so that everybody clearly understands the rules of the road. *See* Administrative

Procedure Act, 5 U.S.C. §§ 551–559. With its petition, Ohio seeks to bypass this process. Under Ohio's proposed approach, a dedicated regulator that issues clear rules is unnecessary; instead, Ohio would have the *judiciary*, relying on vague common law, determine whether Google Search engaged in "unfair discrimination" or failed to carry "all responsive search results on an equal basis."

Relatedly, industry-wide problems require industry-wide solutions. But as noted above, that is not the remedy Ohio seeks. Ohio is asking this Court to regulate the terms and conditions of a particular firm (Google Search) yet leave untouched the myriad of other firms who provide the identical service offering. Again, the appropriate question is not whether Google Search is a common carrier, but whether Internet search—regardless of provider—is a common carrier *service*. If Google alone is subject to such regulations, then it cannot survive financially as users will migrate to platforms that curate results and can fund their operations. And, given the interstate nature of search, if a dedicated statute—and dedicated regulator—are required, then such matters are best left for Congress, not Ohio's judiciary.

V. Declaring Google Search to be a "Common Carrier" Raises Significant First Amendment Concerns

Courts have long recognized that providing a curated service is a form of speech. *See, e.g., NetChoice, LLC v. Attorney General of Florida,* 34 F.4th at 1214 (11th Cir. 2022) ("All such decisions about what speech to permit, disseminate, prohibit, and deprioritize—decisions based on platforms' own particular values and views—fit comfortably within the Supreme Court's editorial-judgment precedents."); *Comcast Cable Corp. v. FCC,* 717 F.3d 982, 993-97 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("Just as a newspaper exercises editorial discretion over which articles to run, a [cable company] exercises editorial discretion over which video programming networks

to carry and at what level of carriage." Thus, "the FCC cannot tell Comcast how to exercise its editorial discretion about what networks to carry any more than the Government can tell Amazon or Politics and Prose or Barnes & Noble what books to sell; or tell the WALL STREET JOURNAL or POLITICO or the DRUDGE REPORT what columns to carry; or tell the MLB Network or ESPN or CBS what games to show; or tell *SCOTUSblog* or *How Appealing* or *The Volokh Conspiracy* what legal briefs to feature."). As such, granting Ohio's petition raises significant First Amendment concerns.

Under the First Amendment to the U.S. Constitution, "Congress shall make no law … abridging the freedom of speech." U.S. Const. amend. I. Moreover, the Fourteenth Amendment makes the First Amendment's Free Speech Clause applicable to the states. U.S. Const. amend. XIV, § 1. As Justice Kavanaugh wrote for the majority in *Manhattan Community Access Corp. v. Halleck,* the "text and original meaning of those Amendments, as well as this Court's longstanding precedents, establish that the Free Speech Clause prohibits only *governmental* abridgment of speech. The Free Speech Clause does not prohibit *private* abridgment of speech." 139 S. Ct. 1921, 1928 (2019) (emphasis in original).

Some argue that because Internet platforms (including Google Search) serve as the "modern public square," *cf. Packingham v. North Carolina,* 582 U.S. 98, 107 (2017), they take on a quasi-governmental role and are therefore subject to First Amendment obligations rather than enjoying First Amendment protections. Not so. Under the Supreme Court's state-action doctrine, a private entity may be considered a state actor "when it exercise[s] a function 'traditionally exclusively reserved to the State.'" *Halleck,* 139 S. Ct. at 1926. As the Supreme Court observed, it is:

> [N]ot enough that the federal, state or local government exercised the function in the past, or still does. And it is not enough that the function serves the public good

> or the public interest in some way. Rather, to qualify as a traditional, exclusive function within the meaning of our state-action precedents, the government must have traditionally *and* exclusively performed the function. *Id.* at 1928-29 (emphasis in original).

And, noted the Court, "[p]roviding some kind of forum for speech is not an activity that only governmental entities have traditionally provided." *Id.* at 1930.

Internet Search obviously is not service that "only governmental entities have traditionally provided." Following the Supreme Court's reasoning, even though Internet platforms (including Google Search)—which are private entities—provide "a forum for speech," they are "not transformed by that fact alone into a state actor" and may therefore "exercise editorial control over speech and speakers in the forum." *Id.* Other courts have reached similar conclusions. *See generally,* Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191 (2021).

The logic supporting the Supreme Court's holding in *Halleck* is compelling: the Court understood that the government placing restrictions on the ability of private entities to control the content on their platforms would have a chilling effect on their First Amendment rights. As the Supreme Court pointed out, if all private property owners who open their property for speech are placed on the government side of the First Amendment equation, then they "would lose the ability to exercise what they deem to be appropriate editorial discretion within that open forum." *Halleck,* 139 S. Ct. at 1931. In such a case, private property owners "would face the unappetizing choice of allowing all comers or closing the platform altogether." *Id.* Accordingly, the Supreme Court held that:

> [T]o hold that private property owners providing a forum for speech are constrained by the First Amendment would be "to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country." The Constitution does not disable private property owners and private lessees from exercising editorial discretion over speech and speakers on their property. *Id.* (citations omitted).

In light of the Supreme Court's precedent on what constitutes a state actor—and the repeated failure of arguments that Internet platforms are state actors, *see* Goldman and Miers, *supra*—proponents of Internet platform regulation have developed a new legal theory: Internet platforms are communications networks and thus should be regulated as common carriers just like telephone companies, including being subject to a non-discrimination obligation to ensure that all voices are treated equally. *See* Spiwak, *Regulatory Implications of Turning Internet Platforms into Common Carriers, supra*. This theory appears to be the motivation for Ohio's petition now on review before this Court.

However, common carriage was never designed to govern a private entity's *speech*; instead, common carrier regulation was designed to govern the *economic behavior* (*i.e.,* prices) of firms. *See* Spiwak, *id.* The State of Ohio confuses the two regulatory regimes. Thus, as the Eleventh Circuit correctly observed, "[n]either law nor logic recognizes government authority to strip an entity of its First Amendment rights merely by labeling it a common carrier." *NetChoice, LLC v. Attorney General of Florida,* 34 F.4th at 1221.

The Supreme Court recently agreed with this logic in *303 Creative LLC v. Elenis*, noting that:

> No public accommodations law is immune from the demands of the Constitution. In particular, this Court has held that public accommodations statutes can sweep too broadly when deployed to compel speech…. When a state public accommodations law and the Constitution collide, there can be no question which must prevail. 143 S.Ct. 2298, 2315 (2023).

The Constitution also prevails in a collision with an arbitrary common carrier designation. Accordingly, declaring Google Search—again, *a private entity who is engaged in a form of speech*—to be a "common carrier" provides no escape from the First Amendment.

VI. Beware of the "Law of Unintended Consequences"

Given our hyper-political times, politicians often rush to pass sweeping laws with little attention to real-world consequences. *See, e.g.,* George S. Ford, *Is Social Media Legislation Too Broad? An Empirical Analysis,* PHOENIX CENTER POLICY PAPER NUMBER 59 (July 2023) (available at: https://phoenix-center.org/pcpp/PCPP59Final.pdf); *see also NetChoice, LLC v. Attorney General of Florida,* 34 F.4th at 1204 (the fact that platforms are "private enterprises, not governmental (or even quasi-governmental) entities" would be "too obvious to mention if it weren't so often lost or obscured in political rhetoric."). As economist Dr. George Ford explained in the YALE JOURNAL ON REGULATION:

> Firms are not passive recipients of regulation. When new rules or taxes are put in place, firms adjust their activities to accommodate the new setting, maximizing profits across a multitude of margins. Some of these altered behaviors can reflect the intent of the regulation, while others will not. Obamacare wanted employers to pay for employee's healthcare, but many employers avoided the mandate by reducing hours below the threshold thirty hours per week. Affected workers faced lower incomes and had to search for second jobs. A 1990s effort to regulate cable television prices left prices largely untouched while cable companies curtailed quality and reduced industry in-vestment.
>
> This is the "Law of Unintended Consequences."
>
> Unintended consequences are universal. Inevitable. And, often painful. No regulatory intervention can fully escape them. The unforeseen (though often predictable) responses to a regulatory intervention may cause the regulation to do more harm than good. George S. Ford, *Antitrust Reform and the Law of Unintended Consequences*, NOTICE & COMMENT BLOG – YALE J. ON REGULATION (Jan. 7, 2022).

Thus, if this Court grants Ohio's petition and allows an individual state to declare that Google Search is now a "common carrier" by judicial fiat, then no one should be surprised when the inevitable "Law of Unintended Consequences" rears its ugly head.

A. *Triggering the FTC Act's Common Carrier Exemption*

The first and most obvious consequence of granting Ohio's petition will be to trigger the common carrier exemption in the Federal Trade Commission Act. Under Section 5 of the Act, the FTC lacks any jurisdiction over "common carriers." 15 U.S.C. § 45(a)(2). Should this Court agree with Ohio, then the federal government will immediately lose much of its existing authority over Google Search, particularly in the areas of consumer protection and privacy—an unintended consequence which Ohio's petition does not consider.

To remedy this situation, Congress would have two options: On the one hand, it could eliminate the common carrier exemption. In this scenario, while Congress would effectively return FTC oversight of Google Search back to the *status quo*, the practical effect would be to expose existing common carrier services such as railroads and voice telephony (mobile and fixed) to redundant and potentially conflicting regulatory oversight (and with it, increased compliance costs). On the other hand, if Congress chooses not to eliminate the common carrier exemption, then Congress would probably have to opt for a totally new regulatory agency—complete with its own enabling statute—to regulate Google Search (along with other Internet platforms). Spiwak, *Regulatory Implications of Turning Internet Platforms into Common Carriers, supra.* This is an idea that has gained steam over the last several years, but has many unintended consequences of its own. *See, e.g.,* George S. Ford, *Beware of Calls for a New Digital Regulator,* NOTICE & COMMENT BLOG – YALE J. ON REGULATION (Feb. 19, 2021); Lawrence J. Spiwak, *A Poor Case for a "Digital Platform Agency",* PHOENIX CENTER POLICY PERSPECTIVE NO. 21-02 (Mar. 9, 2021) (available at: http://www.phoenix-center.org/perspectives/Perspective21-02Final.pdf); Neil Chilson, *Does Big Tech Need its Own Regulator?,* GEO. MASON UNIV. GLOB. ANTITRUST INST. (2020). But as the path to federal legislation is slow (if not futile), the effect of granting Ohio's

petition will be both immediate and long-lasting on the FTC's oversight capabilities over Google Search.

B. *Death By "Fifty State Cuts"*

There is no such thing as an "intrastate" Internet. The Internet operates on an *interstate*, if not international, basis. *C.f.,* Lawrence J. Spiwak, *The Preemption Predicament Over Broadband Internet Access Services,* 21 FEDERALIST SOCIETY REVIEW 32 (2020). Accordingly, absent a coherent federal framework, granting Ohio's petition would open up the Internet to a Death by Fifty State Cuts of a hodgepodge of conflicting state regulatory regimes. Such a result would, at a minimum, raise compliance costs and possibly render search ineffective, either of which would reduce overall consumer welfare. *See, e.g.*, T. Randolph Beard *et al., Developing a National Wireless Regulatory Framework: A Law and Economics Approach,* 16 COMMLAW CONSPECTUS 391 (2008); *but cf. Nat'l Pork Producers Council v. Ross,* 143 S. Ct. 1142 (2023) (severely limiting the judicial doctrine of the dormant Commerce Clause).

Equally as important, the regulatory mischief would not be limited to this case. Should this Court grant Ohio's petition, then such a decision would set the precedent for a cavalcade of other lawsuits—both in Ohio and across the nation—to impose common carrier status on any Internet platforms with a search function (*e.g.,* Amazon) to grow like a bad fungus. This Court should therefore think carefully before opening up this Pandora's Box.

VII. Conclusion

For the foregoing reasons, the Court should grant Defendant's motion for summary judgment.

Respectfully submitted,

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Dated: January 30, 2024

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing will be served to all parties through the electronic filing system of the Delaware County Court of Common Pleas.

Dated: January 30, 2024

/s/ John C. Camillus
John C. Camillus