

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PERKINS COIE LLP

Abdul Kallon (*pro hac vice*)
AKallon@perkinscoie.com
Ryan Spear (*pro hac vice*)
RSpear@perkinscoie.com
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Sunita Bali, Bar No. 274108
SBali@perkinscoie.com
Danielle Sivalingam, Bar No. 294369
DSivalingam@perkinscoie.com
Angie Kim, Bar No. 270503
AngieKim@perkinscoie.com
605 Howard Street, Suite 1000
San Francisco, CA 94105
Telephone: 415.344.7000
Facsimile: 415.344.7050

Michael R. Huston (*pro hac vice*)
MHuston@perkinscoie.com
700 13th St NW
Washington, DC 20005
Telephone: 202.654.6200
Facsimile: 202.654.621

*Attorneys for Defendant Google LLC
(erroneously sued as Google Inc.)*

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

REPUBLICAN NATIONAL COMMITTEE,

Plaintiff,

v.

GOOGLE INC.,

Defendant.

Case No. 2:22-cv-01904-TLN-JDP

**DEFENDANT GOOGLE LLC’S MOTION
TO DISMISS REPUBLICAN NATIONAL
COMMITTEE’S VERIFIED
COMPLAINT**

Date: April 20, 2023
Time: 2:00 p.m.
Dept: Courtroom 2, 15th Floor
Judge: Hon. Troy L. Nunley

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 20, 2023, at 2:00 p.m. in Courtroom 2, 15th Floor, of the United States District Court for the Eastern District of California, located at 501 I Street, Suite 4-200, Sacramento, California 95814, Defendant Google LLC (erroneously sued as “Google Inc.”) (hereinafter “Google”) will, and hereby does, move, pursuant to Federal Rule of Civil Procedure 12(b)(6), for an Order dismissing all claims against it, with prejudice.

This Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the Declaration of Sunita Bali in Support of Motion to Dismiss Republican National Committee’s Verified Complaint, Defendant Google LLC’s Request for Judicial Notice in Support of Motion to Dismiss, all pleadings and papers on file in this action, and such other and further matters as the Court may consider.

TABLE OF CONTENTS

	Page
1	
2	
3	I. INTRODUCTION 1
4	II. BACKGROUND 3
5	A. Gmail and Gmail’s Spam Filters 3
6	B. The FEC’s Rejection of the RNC’s Discrimination Theory 4
7	C. The FEC Pilot Program 5
8	D. The RNC’s Claims Against Google 5
9	III. LEGAL STANDARD 6
10	IV. ARGUMENT 6
11	A. The RNC’s Telecommunications Act Claim Is Barred by Binding
12	Precedent 6
13	B. The RNC Cannot State a Claim Under California’s Common Carrier Law 7
14	1. The RNC Cannot Allege Discriminatory Treatment 7
15	2. Gmail Is Not a Common Carrier under California Law 9
16	3. The RNC Is Not Entitled to Damages 12
17	4. Treating Gmail as a Common Carrier Would Lead to Absurd
18	Results 13
19	C. The RNC Cannot State a Claim Under the Unruh Act Because It Cannot
20	Allege that Google Intentionally Engaged in Any Covered Discrimination 13
21	D. The RNC Fails to State a Claim Under California’s Unfair Competition
22	Law 15
23	1. The RNC Has Failed to Plead Any Fraudulent, Unfair, or Unlawful
24	Conduct 15
25	a. The RNC Has Not Alleged Any Fraudulent Conduct 15
26	b. The RNC Has Not Alleged Any Unfair Conduct 16
27	c. The RNC Has Not Alleged Any Unlawful Conduct 17
28	2. The RNC Has Not Alleged the Causation Required for UCL
	Standing 17
	E. The RNC Fails to Plead Any Elements of Intentional Interference with
	Prospective Economic Relations 19

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS (continued)

	Page
F. The RNC Likewise Fails to Plead Any Elements of Negligent Interference with Prospective Economic Relations	21
G. The RNC’s Negligence Claim Fails Because Google Does Not Owe a Duty of Care to the RNC	22
H. Google Is Immune to the RNC’s Claims under Section 230 of the Federal Communications Decency Act.....	23
1. The RNC’s Claims are Barred by Section 230(c)(2)	24
a. Section 230(c)(2)(B) Bars the RNC’s Claims.....	25
b. Section 230(c)(2)(A) Bars the RNC’s Claims	26
2. The RNC’s Claims are Barred by Section 230(c)(1)	27
V. CONCLUSION.....	29

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Al-Ahmed v. Twitter, Inc.</i> , No. 21-cv-08017-EMC, 2022 WL 1605673 (N.D. Cal. May 20, 2022).....	29
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	6, 7, 8
<i>Asurvio LP v. Malwarebytes Inc.</i> , No. 5:18-CV-05409-EJD, 2020 WL 1478345 (N.D. Cal. Mar. 26, 2020)	25
<i>Barnes v. Yahoo!, Inc.</i> , 570 F.3d 1096 (9th Cir. 2009).....	28
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	6, 7, 17
<i>Carafano v. Metrosplash.com, Inc.</i> , 339 F.3d 1119 (9th Cir. 2003).....	23
<i>Coit v. W. Union Tel. Co.</i> , 130 Cal. 657, 660 (1900).....	23
<i>Daniels v. Alphabet Inc.</i> , No. 20-cv-04687-VKD, 2021 WL 1222166 (N.D. Cal. Mar. 31, 2021)	27
<i>Della Penna v. Toyota Motor Sales, U.S.A., Inc.</i> , 11 Cal. 4th 376 (1995)	20
<i>Divino Grp. LLC v. Google LLC</i> , No. 19-cv-04749-VKD, 2022 WL 4625076, at *18 (N.D. Cal. Sept. 30, 2022).....	25
<i>Domen v. Vimeo, Inc.</i> , 433 F. Supp. 3d 592 (S.D.N.Y. 2020).....	27
<i>Dyroff v. Ultimate Software Grp., Inc.</i> , 934 F.3d 1093 (9th Cir. 2019)	24, 29
<i>e360Insight, LLC v. Comcast Corp.</i> , 546 F. Supp. 2d 605 (N.D. Ill. 2008)	26, 27
<i>Earll v. eBay, Inc.</i> , No. 5:11-cv-00262-JF (HRL), 2011 WL 3955485 (N.D. Cal. Sept. 7, 2011)	15
<i>Ebeid v. Facebook, Inc.</i> , No. 18-cv-07030-PJH, 2019 WL 2059662 (N.D. Cal. May 9, 2019).....	29

TABLE OF AUTHORITIES (continued)

	Page(s)
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES (continued)

Page(s)

in Munson v. Del Taco, Inc.,
46 Cal. 4th 661 (2009) 14

In re Cox,
3 Cal. 3d 205 (1970) 14

In re iPhone Application Litig.,
6 F. Supp. 3d 1004 (N.D. Cal. 2013) 18

In re Turner,
859 F.3d 1145 (9th Cir. 2017) 18

Jones v. Dirty World Ent. Recordings LLC,
755 F.3d 398 (6th Cir. 2014) 28

Keen v. Am. Home Mortg. Servicing, Inc.,
664 F. Supp. 2d 1086 (E.D. Cal. 2009) 17

Kenney v. City of San Diego,
No. 13cv248-WQH-DHB, 2013 WL 5346813 (S.D. Cal. Sept. 20, 2013) 14

Kinderstart.com LLC v. Google, Inc.,
No. C 06-2057 JF (RS), 2006 WL 3246596 (N.D. Cal. July 13, 2006) 10

Koebke v. Bernardo Heights Country Club,
36 Cal. 4th 824 (2005) 15

Kwikset Corp. v. Superior Ct.,
51 Cal. 4th 310 (2011) 17

Marcus v. Apple, Inc.,
No. C 14-03824 WHA, 2015 WL 151489 (N.D. Cal. Jan. 8, 2015) 17

Marina Point, Ltd. v. Wolfson,
30 Cal. 3d 721 (1982) 14

NetChoice, LLC v. Att’y Gen. (NetChoice I),
34 F.4th 1196 (11th Cir. 2022) 10

NetChoice, LLC v. Paxton (NetChoice II),
49 F.4th 439 (5th Cir. 2022) 10

O’Connor v. Uber Techs., Inc.,
58 F. Supp. 3d 989 (N.D. Cal. 2014) 18

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES (continued)

Page(s)

Prager Univ. v. Google LLC,
85 Cal. App. 5th 1022, 301 Cal. Rptr. 3d 836 (2022)..... 29

Roy Allan Slurry Seal, Inc. v. Am. Asphalt S., Inc.,
2 Cal. 5th 505 (2017) 19

Samuelson v. Pub. Utils. Comm’n of State,
36 Cal. 2d 722 (1951) 10

Sandoval v. Cal-W. Reconveyance Corp.,
No. CV 13-00114 GAF, 2013 WL 12128818 (C.D. Cal. June 4, 2013)..... 18

Sikhs for Just. “SFJ”, Inc. v. Facebook, Inc.,
144 F. Supp. 3d 1088 (N.D. Cal. 2015) 28

Silicon Knights, Inc. v. Crystal Dynamics, Inc.,
983 F. Supp. 1303 (N.D. Cal. 1997) 20, 21

Software Design & Application, Ltd. v. Hoefer & Arnett, Inc.,
49 Cal. App. 4th 472 (1996)..... 22

Soil Retention Prods., Inc. v. Brentwood Indus., Inc.,
521 F. Supp. 3d 929 (S.D. Cal. 2021)..... 19, 20, 21

Squaw Valley Ski Corp. v. Superior Ct.,
2 Cal. App. 4th 1499 (1992)..... 10, 11, 12

Swipe & Bite, Inc. v. Chow,
147 F. Supp. 3d 924 (N.D. Cal. 2015) 20

Sybersound Recs., Inc. v. UAV Corp.,
517 F.3d 1137 (9th Cir. 2008) 21

Tovar v. Sessions,
882 F.3d 895 (9th Cir. 2018)..... 13

Turner v. Ass’n of Am. Med. Colls.,
167 Cal. App. 4th 1401 (2008)..... 15

UMG Recordings, Inc. v. Glob. Eagle Ent., Inc.,
117 F. Supp. 3d 1092 (C.D. Cal. 2015) 19, 21

United States v. Councilman,
418 F.3d 67 (1st Cir. 2005) 11

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES (continued)

Page(s)

Universal Grading Serv. v. Ebay, Inc.,
No. C-09-2755 RMW, 2012 WL 70644 (N.D. Cal. Jan. 9, 2012) 20

Vascular Imaging Pros., Inc. v. Digirad Corp.,
401 F. Supp. 3d 1005 (S.D. Cal. 2019)..... 21

Vess v. Ciba-Geigy Corp. USA,
317 F.3d 1097 (9th Cir. 2003)..... 16

Westside Ctr. Assocs. v. Safeway Stores 23, Inc.,
42 Cal. App. 4th 507 (1996)..... 19

Williams v. City of Bakersfield,
No. 1:14-cv-01955 JLT, 2015 WL 1916327 (E.D. Cal. Apr. 27, 2015)..... 14

ZL Techs., Inc. v. Gartner, Inc.,
No. CV 09-02393 JF (RS), 2009 WL 3706821 (N.D. Cal. Nov. 4, 2009)..... 19

STATUTES

15 U.S.C. § 7701(a) 3, 17

47 U.S.C. § 201 7

47 U.S.C. § 202(a)..... 7

47 U.S.C. § 230(c)(1)..... 23, 27, 28, 29

47 U.S.C. § 230(c)(2)(A) 24, 26, 27

47 U.S.C. § 230(c)(2)(B) 3, 24, 25, 26

47 U.S.C. § 230(f)(2)..... 25

Cal. Bus. & Prof. Code § 17200..... 15

Cal. Bus. & Prof. Code § 17204..... 15, 17

Cal. Bus. & Prof. Code § 17529(a)..... 3

Cal. Civ. Code § 51..... 14

Cal. Civ. Code § 2162..... 2, 23

Cal. Civ. Code § 2168..... 7, 10, 12

Cal. Civ. Code § 2208..... 13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES (continued)

Page(s)

Cal. Civ. Code § 2209..... 12, 13

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Nobody likes spam. That is why Google uses sophisticated spam-filtering technologies to
4 protect users of its free email service, Gmail, from unwanted and potentially dangerous emails.
5 Contrary to the claims of the Republican National Committee (“RNC”), Google designs its spam-
6 filtering technology to make its product better for users—not for any political or partisan
7 purposes. Indeed, effective spam filtering is a key feature of Gmail, and one of the main reasons
8 why Gmail is so popular. *See* Verified Complaint for Injunctive Relief, Declaratory Judgment,
9 and Damages (“Compl.”) ¶ 14 (Dkt. 1) (alleging that Gmail is “the leading email service provider
10 used by 41.9% of Americans”).

11 The RNC is not a Gmail user, but it sends millions of emails to Gmail users each month
12 for “political messaging,” fundraising, and similar purposes. Compl. ¶ 1. According to the RNC,
13 Gmail labels some of the RNC’s emails as spam, and delivers those emails to users’ spam folders,
14 “[a]t approximately the same time at the end of each month.” *Id.* ¶ 2. From that unremarkable
15 fact, the RNC infers an elaborate, politically-motivated plot by Google “to secretly suppress[] the
16 political speech and income of one major political party.” *Id.* ¶ 98.

17 The RNC is wrong. Gmail’s spam filtering policies apply equally to emails from all
18 senders, whether they are politically affiliated or not. Indeed, the Federal Election Commission
19 (“FEC”) has already rejected the RNC’s political-discrimination theory, finding that Gmail filters
20 spam “to enhance the value of the Gmail product,” not “to influence any election for federal
21 office.” Exhibit A to the Declaration of Sunita Bali (“Bali Decl.”) (Jan. 11, 2023 FEC Letter) at
22 13. Nor does anything in the Complaint suggest otherwise. In fact, as explained below, the
23 Complaint’s allegations *undermine* the RNC’s claims of partisan animus.

24 Ironically, the RNC could have participated in a pilot program during the 2022 midterm
25 elections that would have allowed its emails to avoid otherwise-applicable forms of spam
26 detection. Many other politically-affiliated entities chose to participate in that program, which
27 was approved by the FEC. The RNC chose not to do so. Instead, it now seeks to blame Google
28 based on a theory of political bias that is both illogical and contrary to the facts alleged in its own

1 Complaint. And even if the RNC could somehow plausibly allege such a theory—which it has not
2 done and could not do—its claims should be dismissed for a variety of independent reasons.

3 **First**, the RNC’s sole federal claim alleges that Google violated the Telecommunications
4 Act. *See* Compl. ¶¶ 102-07. But that law applies only to “common carriers,” and binding
5 authority makes clear that email services like Gmail are not common carriers under federal law.
6 Thus, as the RNC admits, “this claim is foreclosed” and must be dismissed. *Id.* ¶ 107.

7 **Second**, the RNC claims that Google violated California’s common carrier law. *See id.* ¶¶
8 59-67. That novel theory fails for several reasons, including because the RNC cannot allege that
9 Gmail “carries” its emails.

10 **Third**, the RNC alleges that Google violated California’s Unruh Civil Rights Act (the
11 “Unruh Act”) by discriminating against the RNC based on its “political affiliation[s],” to which
12 Google is supposedly “antagonistic.” *Id.* ¶ 72. But again, nothing in the Complaint suggests that
13 the RNC’s political affiliations or views—which the RNC does not define or describe—played
14 any role in Google’s spam-filtering decisions. In any case, the Unruh Act does not extend to
15 differential treatment based on political viewpoints.

16 **Fourth**, the RNC alleges that Google violated California’s Unfair Competition Law (the
17 “UCL”). *See id.* ¶¶ 75-81. That claim fails for many reasons, including because the RNC does not
18 allege any fraudulent, unfair, or unlawful conduct, and because the RNC does not allege the
19 causation required for UCL standing.

20 **Fifth**, the RNC alleges intentional and negligent interference with prospective economic
21 relations under the common law. *See id.* ¶¶ 82-101. But the RNC has not adequately alleged facts
22 to support any element of either claim.

23 **Sixth**, the RNC alleges negligence under California Civil Code § 2162. *See id.* ¶¶ 108-14.
24 That statute, however, applies only to telegraph companies. Google is not a telegraph company,
25 and Gmail is not a telegraph service.

26 **Seventh**, even if the RNC could overcome the obstacles above, it would not matter. Its
27 claims are categorically barred by Section 230 of the Communications Decency Act, which
28 immunizes Google for precisely the sort of conduct alleged in the Complaint. All the RNC’s

1 claims should be dismissed for that reason, as well.

2 **II. BACKGROUND**

3 **A. Gmail and Gmail’s Spam Filters**

4 This case focuses on Gmail, a free web-based email service offered by Google.

5 Consumers who agree to Google’s Terms of Service can create a Gmail account and use Gmail to
6 compose, view, and store emails. *See id.* ¶ 8.

7 Roughly half of all email traffic consists of unwanted spam. *See* Controlling the Assault of
8 Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act”), 15 U.S.C.
9 § 7701(a)(2) (“Unsolicited commercial electronic mail is currently estimated to account for over
10 half of all electronic mail traffic”); *see also* Cal. Bus. & Prof. Code § 17529(a) (noting that
11 roughly 40% of all email traffic in the United States is spam). Spam is not only irritating and
12 distracting; it is also potentially dangerous. Spam may contain malware, phishing attacks, and
13 other content that could harm users and their devices. *See, e.g., Zango, Inc. v. Kaspersky Lab,*
14 *Inc.*, 568 F.3d 1169, 1174 (9th Cir. 2009) (“Malware may . . . expose users to . . . links to
15 pornographic websites, or to software that can compromise the user’s privacy, computer security,
16 or identity.”). Thus, like virtually every email service, Gmail uses spam filters to make Gmail
17 safer, more useful, and more efficient. *See* Bali Decl., Ex. B at 2 (Google Workspace Blog).¹

18 As Google has publicly explained, and as the RNC does not contest, Gmail’s spam filters
19 “look at a variety of signals, including characteristics of the IP address, domains/subdomains,
20 whether bulk senders are authenticated, and user input.” *Id.* Crucially, “[u]ser feedback, such as
21 when a user marks a certain email as spam or signals they want a sender’s emails in their inbox, is

22
23 ¹ Lawmakers have long recognized the threat spam poses to the utility and safety of
24 email. Nearly 20 years ago, Congress enacted the federal CAN-SPAM Act to combat the
25 proliferation of spam, recognizing that spam “creates a risk that wanted electronic mail . . . will be
26 lost, overlooked, or discarded amidst the larger volume of unwanted messages, thus reducing the
27 reliability and usefulness of electronic mail to the recipient.” 15 U.S.C. § 7701(a)(4). Congress
28 also observed that spam may inflict harms and costs on email users. *See id.* § 7701(a)(3). In
addition, Congress has consistently sought to encourage “[t]he development and adoption of
technological approaches” by private parties to combat the spam problem. *Id.* § 7701(a)(12). For
example, and as discussed below, *see infra* at 23-26, Section 230 of the federal Communications
Decency Act broadly bars all claims against companies based on their voluntary efforts to
develop and provide the “technical means” for restricting spam. 47 U.S.C. § 230(c)(2)(B).

1 key to this filtering process, and [Gmail’s] filters learn from user actions.” *Id.* In other words,
2 users’ actions “teach” Gmail how best to sort incoming email based on user preferences. While
3 some of the details of this process must necessarily remain confidential to avoid exploitation by
4 bad actors, they are all aimed at the same goals: protecting users from unwanted and potentially
5 dangerous emails and providing users with the best overall experience. Indeed, the effectiveness
6 of Gmail’s spam filters is one of the main reasons that Gmail is, as the RNC alleges, one of the
7 world’s most popular email services. *See* Compl. ¶¶ 8, 14, 27.

8 Google also works hard to help entities that send a high volume of emails to Gmail users,
9 like the RNC, understand how to maximize their “inboxing rate.” (The “inboxing rate” is the rate
10 at which emails are placed in users’ inboxes rather than in their spam folders. *See* Compl. ¶¶ 23,
11 36-37.) For example, Google publishes guidelines and help center articles that explain how these
12 “bulk” senders can prevent their emails from being blocked or sent to spam. *See* Bali Decl., Ex. C
13 at 1 (Google Gmail Help). Google also offers free tools that bulk senders can use to access data
14 and diagnostics regarding their email campaigns, so they can better understand how to reach their
15 intended recipients. *See* Compl. ¶¶ 36-37; *see also* Bali Decl., Ex. D (Postmaster Tools by
16 Gmail), Ex. E at 1 (Gmail Help Center). Many senders also retain vendors to assist in designing
17 and evaluating email campaigns, as the RNC allegedly did here. *See* Compl. ¶ 24.

18 **B. The FEC’s Rejection of the RNC’s Discrimination Theory**

19 This is not the first time the RNC has accused Google of discriminatory spam filtering.
20 In April 2022, the RNC filed a complaint before the FEC making very similar allegations. *See*
21 Bali Decl., Ex. F (April 26, 2022 Letter from RNC to FEC). The RNC’s FEC complaint alleged
22 that “Google’s biased email filtering mechanism wrongly diverted untold numbers of emails from
23 Republican candidates into recipients’ spam folders . . . ”. *Id.* at 2 (footnote omitted). Based on
24 that alleged “disproportionate suppression of Republican candidate emails,” the RNC urged the
25 FEC to find that Google had violated the Federal Election Campaign Act by making illegal,
26 corporate in-kind contributions to Democratic campaigns. *See id.* at 2, 5-6.

27 The FEC rejected that request. *See* Bali Decl., Ex. A at 2. Contrary to the RNC’s
28 arguments, the FEC found that Gmail’s “spam filter is in place for commercial, rather than

1 electoral purposes,” and is “applied to enhance the value of the Gmail product.” *See id.* at 12, 13.
2 The FEC thus held there was “no reason to believe” Google violated federal election law and
3 “closed its file” in the matter. *Id.* at 1, 15.

4 **C. The FEC Pilot Program**

5 In August 2022, and at Google’s request, the FEC authorized a pilot program for bulk
6 emails sent to Gmail users by authorized candidate committees, political party committees, and
7 leadership political action committees registered with the FEC (the “Pilot Program”). *See* Bali
8 Decl., Ex. G at 1 (August 11, 2022 FEC Advisory Opinion). The Pilot Program was made
9 available to all eligible participants on a non-partisan basis and was “not intended to favor or
10 disfavor any particular candidate, party or speaker, nor intended to influence the outcome of any
11 election.” Bali Decl., Ex. H at 2 (July 1, 2022 Letter from Google to FEC). Rather, the purpose of
12 the Pilot Program is to help ensure Gmail users receive the emails they want to receive. *See* Bali
13 Decl., Ex. G at 4-5. The Pilot Program is scheduled to run through January 31, 2023. *Id.* at 4.

14 Under the Pilot Program, emails sent by program participants are not subject to forms of
15 spam detection to which they would otherwise be subject. *See* Ex. G at 3. Instead, so long as
16 participants’ emails do not contain material prohibited by Gmail’s terms and policies (such as
17 phishing attacks, malware, or illegal content) and comply with other program requirements, the
18 placement of those emails into users’ inbox folders or spam folders relies on direct feedback from
19 users who receive the emails. *See id.* at 3-4. Users may provide this feedback upon receiving the
20 first or a subsequent email from the sender. *See id.* at 4. Additionally, participants receive
21 information about their inboxing rate, i.e., the rate at which their emails are delivered into users’
22 inboxes as opposed to spam folders. *See id.*

23 As the Complaint makes clear, the RNC has chosen not to participate in Google’s FEC-
24 approved Pilot Program.

25 **D. The RNC’s Claims Against Google**

26 The RNC’s claims in this case arise from the RNC’s practice of sending bulk emails to
27 Gmail users for “election fundraising,” “community building,” and other purposes. Compl. ¶ 2.
28 Crucially, the RNC concedes that Gmail has delivered “nearly all” of the RNC’s bulk emails to

1 users' inboxes for "most of each month." *Id.* Since December 2021, however, the RNC alleges
2 that Gmail has delivered many of its emails to users' spam folders for a brief period "at the end of
3 each month." *Id.* As a result, the RNC contends, it has lost revenue and its ability to communicate
4 with supporters during "critical" times each month. *Id.* ¶ 3.

5 The Complaint identifies several potential explanations for the alleged fluctuations in the
6 RNC's inboxing rate, most of them mundane. For example, Google allegedly informed the RNC
7 that the fluctuations could be addressed by "reduc[ing] the frequency of emails that [the RNC]
8 sends at the end of each month." *Id.* ¶ 31. (The RNC does not say whether it heeded that advice,
9 suggesting that it did not.) Nevertheless, according to the RNC, the "only reasonable inference" is
10 that "Google is intentionally sending critical RNC emails to spam folder[s] because it's the RNC
11 sending them." *Id.* ¶ 3. In other words, the RNC claims Google "suppress[es]" the RNC's emails
12 at the end of each month because Google disagrees with the RNC's political views. *See id.* The
13 Complaint does not explain why, if Google harbored such deep-seated animus toward the RNC
14 and its political beliefs, Google would target the RNC's emails only at the end of each month.
15 Undeterred by that and other gaping holes in its theory, the RNC alleges no fewer than seven
16 claims against Google. Every claim fails for the reasons below.

17 **III. LEGAL STANDARD**

18 To survive dismissal under Federal Rule of Civil Procedure ("Rule") 12(b)(6), a plaintiff
19 must allege "enough facts to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*,
20 556 U.S. 662, 697 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).
21 Plausibility requires "factual content that allows the court to draw the reasonable inference that
22 the defendant is liable for the misconduct alleged." *Id.* at 678. A complaint should be dismissed
23 when the allegations support an "obvious alternative explanation," or when the allegations
24 amount to nothing more than "labels and conclusions." *Twombly*, 550 U.S. at 555, 567.

25 **IV. ARGUMENT**

26 **A. The RNC's Telecommunications Act Claim is Barred by Binding Precedent**

27 The RNC's sole federal-law claim alleges that Gmail's spam filtering violates the
28 Telecommunications Act, 47 U.S.C. § 201, *et seq.* (the "Act"). *See* Compl. ¶¶ 102-07. But the

1 Act’s nondiscrimination obligations apply only to “common carriers.” 47 U.S.C. § 202(a). And,
2 as the RNC admits, “binding precedent” holds that “email providers,” like Gmail, are not
3 “common carriers” under the Act. *Id.* ¶¶ 106, 107. This claim must therefore be dismissed.

4 **B. The RNC Cannot State a Claim Under California’s Common Carrier Law**

5 The RNC also alleges that Gmail’s spam filtering violates California’s common carrier
6 law, Cal. Civ. Code § 2168, *et seq.* See Compl. ¶¶ 66-67. That claim fails for at least four reasons.

7 **1. The RNC Cannot Allege Discriminatory Treatment**

8 The gravamen of the RNC’s claim is that Gmail filtered the RNC’s emails differently, and
9 in a way that disadvantaged the RNC, because Google disagrees with the RNC’s political
10 affiliations and views. But nothing in the Complaint supports that far-fetched theory. To the
11 contrary, the facts alleged in the Complaint strongly support “obvious alternative explanation[s]”
12 for the alleged fluctuations in the RNC’s inboxing rate. *Twombly*, 550 U.S. at 567. In fact, the
13 Complaint offers at least *six* alternative explanations for those alleged fluctuations, all based on
14 mundane aspects of bulk email management and automatic spam filtering technology:

- 15 1. “[T]he frequency of emails that [the RNC] sends at the end of each
16 month”;
- 17 2. A “high number of user complaints” about the RNC’s emails;
- 18 3. “[I]rregularities” with the RNC’s email service provider;
- 19 4. The high volume of the “RNC’s press releases”;
- 20 5. “[T]hat the RNC’s domain authentication (a system ensuring an
21 email comes from the purported sender) was possibly at fault”; and
- 22 6. “[T]hat the issue could be a result of Google’s algorithmic
23 spamming system,” which “collects spam reports over the course of
24 the month and eventually causes a sender’s email to be diverted to
25 Gmail users’ spam folders.”

26 Compl. ¶¶ 31, 36, 42, 44. Google respectfully submits that all those explanations, individually
27 and collectively, are far more plausible than the dark conspiracy to “secretly suppress the political
28 speech and income of one major political party” posited by the RNC. See *Iqbal*, 556 U.S. at 682
 (“As between that obvious alternative explanation for the [defendant’s alleged conduct], and the
 purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible

1 conclusion.”) (cleaned up); *see also id.* at 679 (assessing plausibility is “a context-specific task
2 that requires the reviewing court to draw on its judicial experience and common sense”).

3 Other facts alleged (and not alleged) further undermine the RNC’s discrimination theory.
4 For example, the RNC concedes that Gmail has inboxed the RNC’s emails—in other words, has
5 *not* routed them to spam folders—at “rates consistently above 90%” for most of each relevant
6 month. Compl. ¶ 28. The RNC offers no plausible explanation for why Google would inbox the
7 RNC’s emails at such a high rate for the vast majority of the relevant time period if Google’s true
8 goal was to “suppress[] the [RNC’s] political speech and income.” *Id.* ¶ 98. Similarly, the RNC
9 offers no plausible explanation for why, if Google meant to discriminate against the RNC, Google
10 nevertheless gave the RNC multiple “suggestions” that had a “significantly positive impact” on
11 the “performance” of the RNC’s emails. *Id.* ¶ 48. The RNC also fails to explain why, if Google so
12 fervently wished to target the RNC “secretly,” Google would do so by depressing the RNC’s
13 inboxing rate, like clockwork, to the same degree and at the same time each month. *Id.*

14 Instead, in an effort to support its discrimination theory, the RNC relies heavily on an
15 “A/B test” that it purportedly conducted. *See* Compl. ¶ 33. According to the RNC, that test
16 involved sending two substantively identical emails—Version *A* and Version *B*—to two separate
17 groups of Gmail users. The emails differed only in their “links to different variants of an RNC
18 donation page.” *Id.* The RNC claims that Gmail inboxed Version *A* “at the normal rate,” while
19 “Version *B* went entirely to spam.” *Id.*

20 Even if true, however, nothing about those alleged results supports the RNC’s theory.
21 In fact, the opposite is true. As the RNC admits, the A/B test “suggests that Google is *not*
22 suppressing RNC emails based on their communicative content,” i.e., based on the political
23 positions expressed by the RNC. *Id.* (emphasis added). That is obviously correct, and it is
24 devastating to the plausibility of the RNC’s discrimination theory. After all, if Google is not
25 suppressing the RNC’s emails based on the emails’ “communicative content,” then it is hard to
26 see how the RNC (or this Court) could reasonably infer that Google is discriminating against the
27 RNC based on its “political affiliation” or its political “views.” Compl. ¶ 4. Further, because both
28 Version *A* and Version *B* admittedly pointed to “an RNC donation page,” *id.* ¶ 33, the A/B test

1 also strongly suggests that Gmail does not treat the RNC’s emails any differently based on the
2 fact that they are sent *by the RNC*.

3 In short, the alleged A/B test does nothing to support the RNC’s discrimination theory.
4 To the contrary, the more plausible and obvious inference to be drawn from the test is that the
5 RNC’s inboxing rates have varied over time based on decisions and choices by the RNC,
6 including technical decisions about how its bulk emails are constructed and sent.

7 The RNC also leans heavily on an academic study performed by researchers at North
8 Carolina State University (the “NCSU Study”), which, according to the RNC, concluded that
9 “Gmail labels significantly more campaign emails from Republican political candidates as spam
10 than campaign emails from Democratic political candidates.” *Id.* ¶ 54; *see also* Bali Decl., Ex. I
11 (NCSU Study). Those allegations do not help the RNC, either. The RNC fails to mention that the
12 researchers responsible for the NCSU Study have since expressly refuted claims that the study
13 reveals the sort of political bias alleged by the RNC, stating that “Gmail isn’t biased like the way
14 it’s being portrayed.” Bali Decl., Ex. J, at 3 (May 25, 2022 Washington Post article). In particular,
15 the researchers have noted that they did not take into account how user feedback impacts Gmail’s
16 spam filtering and that “the biases in Gmail almost disappeared” once they accounted for that
17 issue. *Id.* 2.²

18 Equally important, the NCSU Study simply does not address, let alone analyze, the factual
19 scenario described in the RNC’s Complaint—i.e., repeated end-of-month drops in inboxing rates.
20 For that reason, as well, the Study adds no plausibility to the RNC’s theory.

21 The bottom line is that the RNC’s discrimination theory lacks any plausible factual basis,
22 and it should be rejected.

23 2. Gmail is Not a Common Carrier under California Law

24 Even if the RNC could plausibly allege its discrimination theory, its claim under
25 California’s common carrier law would still fail. Like the federal Telecommunications Act,

26 _____
27 ² For that reason, and because of other “factors affect[ing] the significance” of the NCSU
28 Study’s results, the FEC concluded that the study did not support the RNC’s claims that Google
violated the Federal Election Campaign Act by discriminating against emails from Republican
candidates. *See* Bali Decl., Ex. A at 3-8, 11-13.

1 California’s law applies only to “common carriers.” Cal. Civ. Code § 2168. And just as Gmail is
2 not a common carrier under federal law, it is not a common carrier under California law.

3 “[A] common carrier [under California law] is any entity which [1] holds itself out to the
4 public generally and indifferently [2] to transport goods or persons from place to place [3] for
5 profit.” *Squaw Valley Ski Corp. v. Superior Ct.*, 2 Cal. App. 4th 1499, 1508 (1992), *as modified*
6 (Feb. 25, 1992) (citation omitted). Gmail meets none of those criteria.

7 For starters, the RNC cannot allege that Gmail is offered to the public “generally and
8 indifferently.” *Squaw Valley*, 2 Cal. App. 4th at 1508. Only entities that “voluntarily devote[]
9 their . . . facilities to the *indiscriminate use* of the public” meet that requirement. *Samuelson v.*
10 *Pub. Utils. Comm’n of State*, 36 Cal. 2d 722, 729 (1951) (en banc) (emphasis added) (citation
11 omitted). Gmail is not offered to the public indifferently or indiscriminately. Rather, only those
12 who agree to Google’s Terms of Service and Google’s Gmail Program Policies (collectively, the
13 “Terms”) may use Gmail. *See* Compl. ¶ 8. That distinction alone defeats the RNC’s novel theory.
14 The Eleventh Circuit Court of Appeals has recognized, for example, that social media platforms
15 are not common carriers as a matter of law because “they require users, as preconditions of
16 access, to accept their terms of service and abide by their community standards, and thus do not
17 hold [themselves] out to serve the public indiscriminately.” *NetChoice, LLC v. Att’y Gen.*
18 (*NetChoice I*), 34 F.4th 1196, 1220-21 (11th Cir. 2022) (cleaned up).³ The same is true for Gmail.

19 Further, “in the communications context,” common carriers are entities that “make a
20 public offering to provide communications facilities whereby all members of the public who
21 choose to employ such facilities *may communicate or transmit intelligence of their own design*
22

23 ³ The Fifth Circuit has criticized the Eleventh Circuit’s analysis. *See NetChoice, LLC v.*
24 *Paxton (NetChoice II)*, 49 F.4th 439, 469-79 (5th Cir. 2022), *petition for cert. docketed*, No. 22-
25 555 (U.S. Dec. 19, 2022). But the Fifth Circuit did not even address, let alone rebut, the many
26 cases holding that online service providers do not qualify as common carriers under federal and
27 state law. *See, e.g., Howard v. America Online Inc.*, 208 F.3d 741, 752 (9th Cir. 2000) (upholding
28 FCC’s determination that “enhanced” service providers, like email providers, are not common
carriers under federal law); *Kinderstart.com LLC v. Google, Inc.*, No. C 06-2057 JF (RS), 2006
WL 3246596, at *10 (N.D. Cal. July 13, 2006) (dismissing claim that Google Search should be
treated as a common carrier). And the Fifth Circuit’s decision does not establish that *email*
services, like Gmail, qualify as common carriers under federal or state law. The Fifth Circuit’s
decision is therefore both unpersuasive and irrelevant.

1 *and choosing.*” *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979) (emphasis added)
2 (cleaned up). Here again, that is not how Gmail works. Gmail does not give users—much less
3 non-users, like the RNC—complete control over how emails are organized and displayed in
4 Gmail accounts. Rather, Google necessarily makes decisions as to “whether and on what terms”
5 to display emails in Gmail accounts. *Id.* As Google discloses in its Terms of Service, and as the
6 RNC acknowledges throughout the Complaint, Google may choose to place emails in users’ spam
7 folders or even refuse to provide access to emails altogether (e.g., because they contain
8 malware).⁴ In other words, Gmail does not allow users or non-users to “communicate or transmit
9 intelligence of their own design and choosing” (*id.* at 701) if they violate Gmail’s terms by, for
10 example, using Gmail to transmit malware.

11 Even more fundamentally, the RNC does not allege that Gmail “transport[ed]” the RNC’s
12 emails to Gmail users, as Gmail would need to do in order to qualify as a “common carrier.”
13 *Squaw Valley*, 2 Cal. App. 4th at 1508. The RNC alleges that it sends emails to Gmail users from
14 “outside” of Gmail using a non-Gmail address. *See, e.g.*, Compl. ¶ 22. But emails sent to users
15 from outside Gmail cannot be “carried” or “transported” by Gmail. Instead, those emails are
16 necessarily *transported by the Internet* from the RNC to the Gmail user, where they may be
17 accessed using the Gmail service. *See, e.g., United States v. Councilman*, 418 F.3d 67, 69-70 (1st
18 Cir. 2005) (en banc) (explaining how an email “journey[s] from sender to recipient” via “a
19 network of interconnected computers,” after which it may be accessed “in an e-mail client
20 program,” such as Gmail). Thus, contrary to the RNC’s hyperbole, the facts alleged do not
21 suggest Gmail acted as a “carrier” of the RNC’s emails at all.

22
23 ⁴ *See* Bali Decl., Ex. K at 3, 13 (Google Terms of Service) (explaining that Google “use[s]
24 artificial intelligence and machine learning . . . to better detect and block spam and malware,” and
25 “reserves the right to suspend or terminate [users’] access to the services or delete [users’] Google
26 Account if . . . [users] materially or repeatedly breach these terms [or] service-specific additional
27 terms or policies [or if users’] conduct causes harm or liability to a user, third party, or Google”);
28 *see also id.* Ex. L at 2 (Gmail Program Policies) (“Don’t use Gmail to distribute spam or
unsolicited commercial email. . . . When Gmail users mark emails as spam, it increases the
likelihood that future messages you send will also be classified as spam by our anti-abuse
systems.”). The Court may consider Google’s Terms of Service and Program Policies, as well as
other documents cited throughout this brief, for reasons explained in Google’s concurrently filed
Request for Judicial Notice.

1 Finally, even if the RNC could somehow allege that Gmail “carries” the RNC’s email
2 messages, Google certainly does not do so “for profit.” *Squaw Valley*, 2 Cal. App. 4th at 1508.
3 The RNC does not allege that Google charges the RNC or anyone else to send emails to Gmail
4 users, because it does not. The RNC also admits, as it must, that “Google does not charge a user
5 monetary fees to use Gmail.” Compl. ¶ 15. Hoping to plead around those inconvenient facts, the
6 RNC claims that Google collects “personal information” about Gmail users, then “uses” or “sells”
7 that data. *Id.* ¶ 16. But even assuming those allegations are true, and even putting aside their
8 impermissible vagueness, the RNC does not suggest that Gmail makes money *from the*
9 *transporting of emails*—as it would need to do to qualify as a “common carrier.” *Squaw Valley*, 2
10 Cal. App. 4th at 1508 (to be a common carrier, the company must “transport goods or persons
11 from place to place for profit”).

12 Ultimately, Gmail cannot be treated as a common carrier under California law because
13 Gmail has none of the attributes of a common carrier. Nor is that a controversial conclusion.
14 Google is not aware of a single court applying California’s common carrier law to email
15 services.⁵

16 3. The RNC Is Not Entitled to Damages

17 Even if the RNC could show that California’s common carrier law extends to Gmail, it
18 still could not show that it is entitled to damages. The RNC cites California Civil Code § 2209,
19 under which “[e]very person whose message is refused or postponed . . . is entitled to recover . . .
20 actual damages, and fifty dollars in addition thereto.” *See* Compl. ¶ 67. But here, it is undisputed
21 that the RNC’s emails were successfully delivered to recipients without delay. *See, e.g., id.* ¶¶ 27-

22
23 ⁵ The RNC’s claims would still fail as a matter of law even if the RNC could allege some
24 basis for treating Google as a common carrier. Google strongly denies that it treated the RNC’s
25 emails differently based on the RNC’s political affiliations and views. But true or not, it is
26 irrelevant because California’s common carrier law was not enacted to address alleged
27 “viewpoint” discrimination. Rather, it was meant to address physical injuries to stagecoach
28 passengers and physical damage to their belongings—a common phenomenon in the late 1800s.
See Gomez v. Superior Ct., 35 Cal. 4th 1125, 1129 (2005). Google is aware of no evidence that
Section 2168 was enacted to prohibit viewpoint discrimination by telegraph operators, which the
RNC characterizes as forerunners of modern email services. *See* Compl. ¶ 8. To the contrary: In
1874, the legislature amended Section 2168 to *exempt* telegraph companies from common-carrier
obligations. *See Hart v. W. Union Tel. Co.*, 66 Cal. 579, 581-82 (1885) (“By statute, therefore, a
telegraph company in this state is not a common carrier . . .”).

1 29. Whether some of the RNC’s emails were delivered to users’ spam folders rather than users’
2 inboxes is irrelevant under the plain language of Section 2209. Users can access emails in their
3 spam folders at their convenience. In addition, users can move emails from their spam folders to
4 their inboxes, mark emails as “not spam,” and instruct Google to deliver future emails from
5 identified senders to their inboxes. *See* Bali Decl., Ex. M at 1-2 (Gmail Help Center). Stated
6 simply, the RNC cannot allege that its emails were “refused” or “postponed” in any sense, and it
7 therefore cannot seek damages under California law.

8 **4. Treating Gmail as a Common Carrier Would Lead to Absurd Results**

9 Finally, interpreting California’s common carrier law to apply to email services like Gmail
10 would lead to absurd results—an outcome this Court must avoid. *See, e.g., Tovar v. Sessions*,
11 882 F.3d 895, 904 (9th Cir. 2018) (“[I]nterpretations of a statute which would produce absurd
12 results are to be avoided if alternative interpretations consistent with the legislative purpose are
13 available.”) (citation omitted). For example, California’s common carrier law requires covered
14 entities to “always give priority” to “messages from agents of the United States or of this State,
15 on public business[.]” Cal. Civ. Code § 2208. Google could not reasonably comply with such a
16 requirement for a variety of reasons, including because it would be impossible to identify
17 (let alone “priorit[ize]”) all messages composed by the countless federal, state, and local
18 governmental actors who send emails to Gmail recipients.

19 In sum, Gmail is not a common carrier under California law, and this Court should decline
20 the RNC’s request to reach that novel conclusion.

21 **C. The RNC Cannot State a Claim Under the Unruh Act Because It Cannot** 22 **Allege that Google Intentionally Engaged in Any Covered Discrimination**

23 The RNC’s Unruh Act claim fails for two independent reasons.

24 **First**, the Unruh Act does not prohibit the type of alleged discrimination at issue here, i.e.,
25 “political affiliation” discrimination. Compl. ¶ 69. Rather, by its terms, the Unruh Act prohibits a
26 “business establishment” from discriminating against any person based on “their sex, race, color,
27 religion, ancestry, national origin, disability, medical condition, genetic information, marital
28 status, or sexual orientation[.]” Cal. Civ. Code § 51. “Political affiliation” is not among the

1 enumerated classifications. And while some “courts have applied the Act to arbitrary
 2 discrimination beyond the listed categories,” *see Harris v. Cap. Growth Invs. XIV*, 52 Cal. 3d
 3 1142, 1161 (1991) (en banc), *superseded on other grounds by statute*, Unruh Civil Rights Act,
 4 *codified as amended at Cal. Civ. Code § 51, as recognized in Munson v. Del Taco, Inc.*, 46 Cal.
 5 4th 661 (2009), it has not been applied to political discrimination. To the contrary, several courts
 6 have held that “the Unruh Civil Rights Act does not protect against discrimination based upon
 7 political affiliation or the exercise of constitutional rights.” *Williams v. City of Bakersfield*, No.
 8 1:14-cv-01955 JLT, 2015 WL 1916327, at *5 (E.D. Cal. Apr. 27, 2015) (Thurston, J.); *see also*
 9 *Huber v. Biden*, No. 21-cv-06580-EMC, 2022 WL 827248, at *10 (N.D. Cal. Mar. 18, 2022)
 10 (“The Unruh Act has not been held to protect persons based on their viewpoints.”), *aff’d*, No. 22-
 11 15443, 2022 WL 17818543 (9th Cir. Dec. 20, 2022); *Kenney v. City of San Diego*, No. 13cv248-
 12 WQH-DHB, 2013 WL 5346813, at *3 (S.D. Cal. Sept. 20, 2013) (same).⁶

13 **Second**, even if the Unruh Act extended to “political affiliation” discrimination, it only
 14 prohibits *intentional* discrimination. *See, e.g., Greater L.A. Agency on Deafness, Inc. v. Cable*
 15 *News Network, Inc.*, 742 F.3d 414, 425 (9th Cir. 2014) (Unruh Act “contemplates willful,
 16 affirmative misconduct on the part of those who violate the Act” (citation omitted)). An alleged
 17 disparate impact is not sufficient to sustain a claim under the Unruh Act. *See Koebke v. Bernardo*
 18 *Heights Country Club*, 36 Cal. 4th 824, 854 (2005) (“A disparate impact analysis or test does not
 19 apply to Unruh Act claims”) (citation omitted); *see also Turner v. Ass’n of Am. Med. Colls.*, 167
 20 Cal. App. 4th 1401, 1408 (2008), *as modified on denial of reh’g* (Nov. 25, 2008). And as

21 _____
 22 ⁶ The cases cited by the RNC—which all pre-date the authorities cited above—do not
 23 compel a different result. *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721 (1982), addressed family
 24 status, not political affiliation. *Id.* at 724. *Harris* also did not address political views, but rather
 25 refused to extend Unruh Act protections to income-based discrimination. *See* 52 Cal. 3d at 1156.
 26 *In re Cox*, 3 Cal. 3d 205 (1970) (en banc), *as modified* (Oct. 28, 1970), likewise did not involve
 27 political-affiliation bias. To the extent the *Cox* court favored extending the Unruh Act to
 28 unenumerated classifications such as individuals “who wear long hair or unconventional dress,”
id. at 218, the California Supreme Court subsequently rejected such an overbroad interpretation of
 the statute in *Harris*, 52 Cal. 3d at 1156 (“[A]ny presumption in favor of legislative acquiescence
 in the broad concept of ‘arbitrary discrimination’ is weakened by two factors: (1) the specific
 facts of our prior cases which, unlike their broad language, are confined to discrimination based
 on personal characteristics similar to the statutory classifications of race, sex, religion, etc.; and
 (2) evidence of subsequent legislative action emphasizing the continued importance of those
 classifications.”).

1 explained above, nothing in the RNC’s Complaint suggests that Google engaged in intentional
2 discrimination. *See supra* at 7-9. To the contrary, the facts alleged in the Complaint actively
3 undermine any such inference. *See Earll v. eBay, Inc.*, No. 5:11-cv-00262-JF (HRL), 2011 WL
4 3955485, at *3 (N.D. Cal. Sept. 7, 2011) (denying motion to amend complaint to add
5 discrimination-based claim where plaintiff’s allegations regarding discrimination were “offset” by
6 other allegations that supported more plausible alternative explanations).

7 **D. The RNC Fails to State a Claim Under California’s Unfair Competition Law**

8 The RNC’s UCL claim should be dismissed because the RNC fails to allege (1) that
9 Google engaged in any “unlawful, unfair, or fraudulent business . . . practice,” Cal. Bus. & Prof.
10 Code § 17200, or (2) that any purported economic injury was “a result of the unfair competition”
11 as required for UCL standing. Cal. Bus. & Prof. Code § 17204.

12 **1. The RNC Has Failed to Plead Any Fraudulent, Unfair, or Unlawful**
13 **Conduct**

14 The RNC attempts to allege claims under all three prongs of the UCL—fraudulent, unfair,
15 and unlawful—but it has failed to state a claim under any theory.

16 **a. The RNC Has Not Alleged Any Fraudulent Conduct**

17 The RNC’s claim under the UCL’s fraud-prong appears to be premised on the theory that
18 Google misrepresented how Gmail works. *See Compl.* ¶ 79 (“Google’s conduct is fraudulent
19 because its users relied on Google as an email service that would allow them to send and receive
20 emails, not knowing that Google would engage in partisan or arbitrary manipulation to prevent
21 certain emails from reaching their inbox.”). But the RNC does not allege a single fraudulent
22 statement by Google, much less with the particularity required by Rule 9(b). *See Golden v. Sound*
23 *Inpatient Physicians Med. Grp., Inc.*, 93 F. Supp. 3d 1171, 1180 (E.D. Cal. 2015) (Nunley, J.).
24 The RNC fails to specify “who” at Google said “what” to whom “when” and “where” or “how.”
25 *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (citation omitted). And for
26 good reason: Google has never represented that every email sent by the RNC or any other sender
27 will appear in users’ inboxes. To the contrary, Google transparently informs both users and
28 senders that it applies spam filtering to emails. Indeed, all Gmail accounts have a clearly marked

1 “spam” folder, and Google instructs users how to mark or unmark emails as spam and stop
2 messages from particular senders from being sent to spam folders. *See, e.g.*, Bali Decl., Ex. K at 3
3 (“[W]e use artificial intelligence and machine learning . . . to better detect and block spam and
4 malware.”); Ex. L (Gmail Program Policies) (similar). Similarly, Google instructs bulk senders on
5 best practices to avoid emails being sent to spam. *See* Bali Decl., Ex. N at 1 (Gmail Help Center).
6 Thus, there is nothing fraudulent about Google’s description of Gmail or its use of spam filtering
7 to benefit users.

8 **b. The RNC Has Not Alleged Any Unfair Conduct**

9 A plaintiff may bring a UCL claim under the unfair-conduct prong by alleging conduct
10 that is: “(1) tethered to some legislatively declared policy; or (2) is immoral, unethical,
11 oppressive, unscrupulous or substantially injurious to consumers; or (3) cause[s] unforeseeable
12 injuries to consumers that are not outweighed by countervailing benefits.” *Harris v. LSP Prods.*
13 *Grp., Inc.*, No. 2:18-cv-02973-TLN-KJN, 2021 WL 2682045, at *13 (E.D. Cal. June 30, 2021)
14 (Nunley, J.) (citation omitted).

15 The RNC claims that, by presenting Gmail as a service “that delivers emails in a fair and
16 good faith manner,” but nonetheless directing some of the RNC’s emails to users’ spam folders,
17 Google has engaged in conduct that is “immoral, unethical, oppressive, unscrupulous or
18 substantially injurious to consumers,” resulting in harm to the RNC and “its community” that “far
19 outweighs any ‘reasons, justifications [or] motives’ Google could have for its conduct.” Compl. ¶
20 78 (citations omitted). Like the RNC’s claim under the fraud prong, its claim under the unfair
21 prong appears to be premised on some purported misrepresentation by Google about how Gmail
22 works. But again, the RNC does not allege a single misrepresentation. Instead, it merely parrots
23 the definition of unfair conduct under the UCL. The RNC cannot, however, state a claim for relief
24 with “a formulaic recitation of the elements of a cause of action.” *Twombly*, 550 U.S. at 555; *see*
25 *also, e.g., Marcus v. Apple, Inc.*, No. C 14-03824 WHA, 2015 WL 151489, at *4 (N.D. Cal. Jan.
26 8, 2015) (dismissing UCL unfair claim where “[t]he complaint does not state what public policy
27 is offended, or why Apple’s acts were unethical, oppressive, or unscrupulous” and only “baldly
28 state[s] that the ‘gravity of Defendant’s alleged wrongful conduct outweighs any purported

1 benefits attributable to such conduct”). To the extent the RNC is attempting to rely on its theory
2 of political affiliation or viewpoint discrimination to show unfair conduct, for the reasons
3 discussed above, it has not alleged any facts to support an inference of viewpoint discrimination.
4 *See supra* at 7-9. At most, the allegations show that Google applied its standard spam filtering
5 technologies to the RNC’s emails, and there is strong public policy favoring the benefits of spam
6 filtering to consumers. *See, e.g.*, 15 U.S.C. § 7701(a)(12) (recognizing the many problems
7 associated with spam and the need for the “development and adoption of technological
8 approaches” to combat spam).

9 **c. The RNC Has Not Alleged Any Unlawful Conduct**

10 Because the RNC’s claim under the UCL’s unlawful-conduct prong is based on the
11 RNC’s other claims, *see* Compl. ¶ 77, dismissal of those claims also requires dismissal of this
12 claim. *See Holomaxx Techs. v. Microsoft Corp.*, 783 F. Supp. 2d 1097, 1108 (N.D. Cal. 2011)
13 (dismissing UCL claim because plaintiff failed “to state a viable claim for any actionable
14 wrongdoing”); *Keen v. Am. Home Mortg. Servicing, Inc.*, 664 F. Supp. 2d 1086, 1102 (E.D. Cal.
15 2009) (similar); *Harris*, 2021 WL 2682045, at *13 (dismissing UCL unlawful claim because
16 plaintiff failed to state a claim under California statutes).

17 **2. The RNC Has Not Alleged the Causation Required for UCL Standing**

18 Even if the Court finds that the RNC has alleged some fraudulent, unfair, or unlawful
19 conduct, it has not alleged facts sufficient to establish UCL standing. To have standing under the
20 UCL, a plaintiff must have suffered economic injury “as a result of the unfair competition.” Cal.
21 Bus. & Prof. Code § 17204. Courts have interpreted this to require a “causal connection” between
22 the alleged harm and the unfair competition. *See Kwikset Corp. v. Superior Ct.*, 51 Cal. 4th 310,
23 326 (2011) (quoting *Hall v. Time Inc.*, 158 Cal. App. 4th 847, 855 (2008), *as modified* (Jan. 28,
24 2008)). “A plaintiff fails to satisfy [the UCL’s] causation requirement if he or she would have
25 suffered ‘the same harm whether or not a defendant complied with the law.’” *In re Turner*, 859
26 F.3d 1145, 1151 (9th Cir. 2017) (quoting *Daro v. Superior Ct.*, 151 Cal. App. 4th 1079, 1099
27 (2007), *as modified on denial of reh’g* (July 3, 2007)).

28 Here, the RNC cannot show that it would have received additional donations had it not

1 been for Google’s spam filtering. Remarkably, the RNC alleges that Google’s conduct “prevented
2 [Gmail] users from participating in the RNC’s fundraising campaigns,” Compl. ¶ 80, but that
3 allegation is simply not plausible given that the RNC can contact supporters through numerous
4 channels, and supporters can make donations in a variety of ways, including on the RNC’s
5 website, without involving Gmail. *See* Bali Decl., Ex. O at 1 (RNC, 2022 RNC Membership).
6 Further, the Complaint is devoid of any facts showing that the RNC, in fact, lost a single donation
7 because Google directed some of the RNC’s emails to spam folders. *See Sandoval v. Cal-W.*
8 *Reconveyance Corp.*, No. CV 13-00114 GAF (SHx), 2013 WL 12128818, at *9 (C.D. Cal. June
9 4, 2013) (plaintiff failed to plead causation required for UCL standing where he did not allege
10 facts showing that defendant’s conduct “had any impact” on alleged harm).

11 The deficiencies in the RNC’s allegations are even more obvious with respect to its fraud-
12 based claims, which require the RNC to plead “actual reliance.” *In re iPhone Application Litig.*, 6
13 F. Supp. 3d 1004, 1013 (N.D. Cal. 2013) (actual reliance required whenever UCL claim is
14 predicated on misrepresentations). As discussed above, the RNC’s claims under both the
15 fraudulent and unfair prongs appear to be premised on Google’s alleged misrepresentations about
16 how Gmail works. *See* Compl. ¶¶ 78-79. Aside from the fact that the RNC has not alleged any
17 misrepresentations by Google, the RNC fails to plead that *the RNC*, rather than Gmail users,
18 relied on any misrepresentations, which is fatal to its claims. *See, e.g.*, Compl. ¶ 79 (“[Google’s]
19 users relied on Google as an email service that would allow them to send and receive emails” and
20 “Google’s users could have elected to use a different email service if they knew that Google
21 would effectively censor the RNC”).

22 The RNC cannot premise its own standing on the alleged reliance of others. *See O’Connor*
23 *v. Uber Techs., Inc.*, 58 F. Supp. 3d 989, 1002 (N.D. Cal. 2014) (“UCL fraud plaintiffs must
24 allege their *own* reliance—not the reliance of third parties—to have standing under the UCL.”);
25 *ZL Techs., Inc. v. Gartner, Inc.*, No. CV 09-02393 JF (RS), 2009 WL 3706821, at *11 (N.D. Cal.
26 Nov. 4, 2009) (dismissing UCL claim for lack of standing where plaintiff “alleges not its own
27 reliance . . . but that of third parties”).

28

1 **E. The RNC Fails to Plead Any Elements of Intentional Interference with**
2 **Prospective Economic Relations**

3 To plead this claim, a plaintiff must allege: “(1) the existence, between the plaintiff and
4 some third party, of an economic relationship that contains the probability of future economic
5 benefit to the plaintiff; (2) the defendant’s knowledge of the relationship; (3) intentionally
6 wrongful acts designed to disrupt the relationship; (4) actual disruption of the relationship; and
7 (5) economic harm proximately caused by the defendant’s action.” *Roy Allan Slurry Seal, Inc. v.*
8 *Am. Asphalt S., Inc.*, 2 Cal. 5th 505, 512 (2017) (citation omitted). The RNC has failed to plead
9 any of these elements.

10 **First**, the RNC has failed to plead “the existence of a *specific* economic relationship” with
11 the “*probability*” of future economic benefit to the RNC. *Westside Ctr. Assocs. v. Safeway Stores*
12 *23, Inc.*, 42 Cal. App. 4th 507, 522, 525 (1996) (citations omitted). The RNC vaguely alleges a
13 relationship with “supporters who are past, current, and future donors,” Compl. ¶ 88, but “vague
14 allegations regarding a relationship with an ‘as yet unidentified’ customer” do not suffice. *Soil*
15 *Retention Prods., Inc. v. Brentwood Indus., Inc.*, 521 F. Supp. 3d 929, 961 (S.D. Cal. 2021)
16 (quoting *Weintraub Fin. Servs., Inc. v. Boeing Co.*, No. CV 20-3484-MWF (GJSx), 2020 WL
17 6162801, at *8 (C.D. Cal. Aug. 7, 2020)); *see also UMG Recordings, Inc. v. Glob. Eagle Ent.,*
18 *Inc.*, 117 F. Supp. 3d 1092, 1117–18 (C.D. Cal. 2015) (plaintiffs must allege a “relationship with
19 a particular individual”) (citations omitted).

20 Relatedly, the RNC fails to show that it was “reasonably probable that the prospective
21 economic advantage would have been realized but for defendant’s interference.” *Westside Ctr.*
22 *Assocs.*, 42 Cal. App. 4th at 522 (quoting *Youst v. Longo*, 43 Cal. 3d 64, 71 (1987)). There are no
23 allegations about specific donors, their relationship with the RNC including their donation
24 history, or any other facts suggesting that it is “reasonably probable” that they would have made
25 further donations had specific RNC emails been delivered to their inboxes rather than their spam
26 folders. “[A] hope of future transactions is insufficient to support a claim of tortious
27 interference.” *Soil Retention Prods.*, 521 F. Supp. 3d at 961–62 (rejecting claim where
28 manufacturer “never allege[d] which entities, if any, it was negotiating with, what the terms were,

1 when the contracts were being negotiated” and “how much money, if any, Plaintiff lost as a
2 result”); *Silicon Knights, Inc. v. Crystal Dynamics, Inc.*, 983 F. Supp. 1303, 1312 (N.D. Cal.
3 1997) (dismissing claim where complaint did not allege that plaintiff “was in the midst of
4 negotiations with 3DO, Microsoft, or any other publisher, and that the third party pulled out of the
5 negotiations or awarded business to another because of the alleged acts by Defendants”).

6 **Second**, because the RNC fails to plead specific relationships with named individuals, it
7 also necessarily fails to allege that Google had any knowledge of those relationships. *See Soil*
8 *Retention Prods.*, 521 F. Supp. 3d at 962 (plaintiff failed to sufficiently allege knowledge where
9 there was no “specified third party”); *Swipe & Bite, Inc. v. Chow*, 147 F. Supp. 3d 924, 935 (N.D.
10 Cal. 2015).

11 **Third**, the RNC fails to allege that Google “engaged in conduct that was wrongful by
12 some legal measure other than the fact of interference itself.” *Della Penna v. Toyota Motor Sales,*
13 *U.S.A., Inc.*, 11 Cal. 4th 376, 393 (1995). The RNC has not alleged any independently wrongful
14 conduct, such as “violations of federal or state law or unethical business practices, e.g., violence,
15 misrepresentation, unfounded litigation, defamation, trade libel or trade mark infringement.” *Soil*
16 *Retention Prods.*, 521 F. Supp. 3d at 961 (citation omitted). Instead, at most, the RNC alleges that
17 Google improperly diverted some of its emails to Gmail users’ spam folders. *See* Compl. ¶ 87.
18 But spam filtering, even if overinclusive, is not independently wrongful. *See Gordon v.*
19 *Virtumundo, Inc.*, 575 F.3d 1040, 1054 (9th Cir. 2009) (interpreting the CAN-SPAM Act and
20 finding that service providers are expected to “take reasonable precautions, such as implementing
21 spam filters, as part of [their] normal operations”).

22 To the extent the RNC relies on its other claims to establish independently wrongful
23 conduct, dismissal of those claims dooms this claim as well. *See Universal Grading Serv. v.*
24 *Ebay, Inc.*, No. C-09-2755 RMW, 2012 WL 70644, at *11 (N.D. Cal. Jan. 9, 2012) (alleged
25 conduct “cannot serve as the basis for plaintiffs’ tort claims” where “it does not run afoul of
26 federal or state law”), *aff’d*, 563 F. App’x 571 (9th Cir. 2014); *Vascular Imaging Pros., Inc. v.*
27 *Digirad Corp.*, 401 F. Supp. 3d 1005, 1013 (S.D. Cal. 2019) (dismissing intentional interference
28 claim where complaint did not “identify the wrongful conduct engaged in by the Defendants

1 separate from the breach of contract itself”).

2 **Fourth**, the RNC’s assertion of “actual disruption of the RNC’s existing . . .
3 relationship[s] with supporters,” Compl. ¶ 88, offers “nothing more than conclusory allegations,
4 unsupported by facts, that the plaintiff’s economic relationship was disrupted.” *Soil Retention*
5 *Prods.*, 521 F. Supp. 3d at 963; *see also Sybersound Recs., Inc. v. UAV Corp.*, 517 F.3d 1137,
6 1151 (9th Cir. 2008) (dismissing claim where plaintiff did “not allege for example, that it lost a
7 contract nor that a negotiation with a Customer failed”). That is not enough.

8 **Fifth**, the RNC fails to plead economic harm proximately caused by Google’s actions.
9 The RNC simply asserts that, “[o]n information and belief, Google has caused hundreds of
10 thousands of dollars, if not more, in damages to the RNC to date, and the long-term consequential
11 losses likely total in the millions of dollars.” Compl. ¶ 89. But such conclusory allegations cannot
12 withstand a motion to dismiss. *See Soil Retention Prods.*, 521 F. Supp. 3d at 963 (dismissing
13 claim where plaintiff alleged that it “has incurred and will continue to incur harm in the form of
14 losses, costs, damages, and expenses” but failed “to allege what these losses are, such as whether
15 there are losses identifiable to a specific contract loss”).

16 **F. The RNC Likewise Fails to Plead Any Elements of Negligent Interference**
17 **with Prospective Economic Relations**

18 This claim fails for many of the same reasons as the RNC’s intentional interference claim,
19 as it “has many of the same elements.” *UMG Recordings, Inc.*, 117 F. Supp. 3d at 1118. But
20 instead of requiring intentional conduct, negligent interference “arises only when the defendant
21 owes the plaintiff a duty of care.” *Silicon Knights, Inc.*, 983 F. Supp. at 1313 (citation omitted).

22 To establish a duty of care, the RNC urges this Court to apply the following factors from
23 *Biakanja v. Irving*, 49 Cal. 2d 647 (1958): (1) “the extent to which the transaction was intended to
24 affect the plaintiff”; (2) “the foreseeability of harm to plaintiff”; (3) “the degree of certainty that
25 the plaintiff suffered injury”; (4) “the closeness of the connection between the defendant’s
26 conduct and the injury suffered”; (5) “the moral blame attached to the defendant’s conduct”; and
27 (6) “the policy of preventing future harm.” Compl. ¶ 95 (citing *J’Aire Corp. v. Gregory*, 24 Cal.
28 3d 799, 804 (1979) (quoting *Biakanja*, 49 Cal. 2d at 650)). But applying these factors only makes

1 clear that Google owes no duty to the RNC: (1) Google filters spam as a benefit and service to its
2 users; the RNC has not alleged and cannot allege any facts showing that Google’s standard spam
3 filtering was intended to affect the RNC; (2) the RNC has not alleged facts showing that any harm
4 was foreseeable to the RNC because Google has no knowledge of the relationship between the
5 RNC and specific Gmail users, including whether specific users had previously donated to the
6 RNC; (3) the RNC’s alleged injuries are speculative, as the RNC has failed to allege any facts
7 showing that a specific Gmail user did not donate to the RNC because an RNC email was sent to
8 a spam folder rather than an inbox; (4) for the same reason, the RNC has not alleged any
9 connection between spam filtering and speculative lost donations; (5) Google’s spam filtering is
10 not morally blameworthy, but rather a service provided for the benefit of its users; and (6) the
11 policy in favor of spam filtering is well established, and far outweighs the policy of preventing
12 speculative future harm resulting from lost hypothetical donations.

13 Nonetheless, the RNC baldly asserts that “Google owed the RNC a duty to not falsely or
14 arbitrarily label the RNC’s emails to its supporters as spam.” Compl. ¶ 98. The RNC cites no
15 authority for that proposition, nor does it try to explain why Google would owe such a duty to the
16 RNC as a third-party bulk sender of emails to Gmail users. *See Cyber Promotions, Inc. v. Am.*
17 *Online, Inc.*, 948 F. Supp. 456, 462 (E.D. Pa. 1996) (no right for online marketer to “bombard[]
18 AOL’s servers with up to 1.9 million e-mail advertisements per day”); *see also Software Design*
19 *& Application, Ltd. v. Hoefler & Arnett, Inc.*, 49 Cal. App. 4th 472, 479 (1996) (no duty of care
20 owed to noncustomers).

21 **G. The RNC’s Negligence Claim Fails Because Google Does Not Owe a Duty of**
22 **Care to the RNC**

23 The RNC’s negligence claim fails for the same reason as its negligent interference claim:
24 Google does not owe the RNC any duty of care. *See supra* at 21-22. The RNC tries to assert a
25 duty of care under California Civil Code § 2162, reasoning that “Google has a duty to the public
26 to receive” all messages and “to transmit them upon reasonable terms.” Compl. ¶ 109. That
27 theory is incorrect as a matter of law.

28 Section 2162 does not apply to Google. Enacted in 1872, Section 2162 states that “[a]

1 carrier of message for reward, must use great care and diligence in the transmission and delivery
2 of messages.” Cal. Civ. Code § 2162. As discussed above, Google is not a “carrier of message for
3 reward.” *See supra* at 10-12. Indeed, Section 2162 has traditionally been applied to telegraph
4 companies like Western Union that charge for transmitting messages. *See, e.g., Coit v. W. Union*
5 *Tel. Co.*, 130 Cal. 657, 660 (1900) (applying provision to telegraph company); 59 Cal. Jur. 3d
6 Telegraphs and Telephones § 34 (2022) (“This provision is applicable to telegraph companies.”).
7 The RNC fails to cite any authority extending this provision to a non-telegraph company, much
8 less a free email service provider like Google. Further, even if the RNC could allege that Google
9 is “a carrier of message for reward” giving rise to some duty (which it cannot), such duty would
10 not be owed to the RNC as a third-party sender. If any duty exists, it would be owed only to
11 Gmail users.

12 **H. Google Is Immune to the RNC’s Claims under Section 230 of the Federal** 13 **Communications Decency Act**

14 Even if the RNC could overcome the obstacles above, Google is categorically immune to
15 the RNC’s claims under Section 230 of the federal Communications Decency Act (“Section
16 230”). The RNC’s claims must be dismissed for that additional and independent reason.

17 Congress enacted Section 230 “to promote the free exchange of information and ideas
18 over the Internet and to encourage voluntary monitoring for offensive or obscene material.”
19 *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003). The statute
20 accomplishes those goals in two distinct but overlapping ways. Section 230(c)(1) grants online
21 service providers (like Google) “robust” immunity against claims based on how they disseminate,
22 select, and organize content created by others (like the RNC). *Id.* at 1123–24; *see also* 47 U.S.C.
23 § 230(c)(1). In addition, under Section 230(c)(2), providers like Google may not be held liable for
24 “restrict[ing]” content that providers or users deem “objectionable,” or for providing the
25 “technical means” for restricting such content. 47 U.S.C. § 230(c)(2)(A), (B).

26 “[T]he Circuits are in general agreement that [Section 230] should be construed broadly in
27 favor of immunity.” *Force v. Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019). Further, as the
28 Ninth Circuit has made clear, Section 230 must be construed to protect defendants “not merely

1 from ultimate liability, but from having to fight costly and protracted legal battles.” *Fair Hous.*
2 *Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008)
3 (en banc). Thus, “[w]hen a plaintiff cannot allege enough facts to overcome Section 230
4 immunity, a plaintiff’s claims should be dismissed.” *Dyroff v. Ultimate Software Grp., Inc.*, 934
5 F.3d 1093, 1097 (9th Cir. 2019). And “close cases . . . must be resolved in favor of immunity.”
6 *Roommates.com*, 521 F.3d at 1174.

7 Here, the RNC’s claims are barred by multiple provisions of Section 230, and must
8 therefore be dismissed.

9 **1. The RNC’s Claims are Barred by Section 230(c)(2)**

10 Congress enacted Section 230(c)(2) to “encourage[] the development of more
11 sophisticated methods of online filtration.” *Enigma Software Grp. USA, LLC v. Malwarebytes,*
12 *Inc.*, 946 F.3d 1040, 1047 (9th Cir. 2019). Section 230(c)(2) incentivizes that conduct by
13 immunizing providers of “interactive computer services,” like Google, against claims based on
14 “blocking and screening of offensive material.” *Zango*, 568 F.3d at 1173. As the Ninth Circuit has
15 explained, Section 230(c)(2) grants two related types of immunity. Section 230(c)(2)(A)
16 “immuniz[es] internet-service providers from liability for any action taken to block” content that
17 providers or their users deem objectionable, while Section 230(c)(2)(B) immunizes providers
18 from liability for “help[ing] users block offensive and objectionable online content,” including by
19 providing software that filters “[s]pam, malware, and adware.” *Malwarebytes*, 946 F.3d at 1047,
20 1052, *amended* (Dec. 31, 2019). Here, the RNC’s claims against Google are barred by both types
21 of Section 230(c)(2) immunity.⁷

22
23 ⁷ As a threshold matter, Google plainly qualifies as the provider of an “interactive
24 computer service” under Section 230, including when it provides the Gmail service. *See*
25 *Holomaxx*, 783 F. Supp. 2d at 1104 (noting multiple decisions holding that “email services
26 properly are characterized as ‘interactive computer service’ providers” under Section 230(c)(2)).
27 More precisely, in this context, the RNC’s Complaint demonstrates that Google is an “interactive
28 computer service” both because (1) Gmail is an “information service” that “provides or enables
computer access by multiple users to a computer server,” 47 U.S.C. § 230(f)(2), and because (2)
Google is an “access software provider” that provides to users, as part of the Gmail service,
“software” and “enabling tools” that “filter” and “screen” “content,” *id.* § 230(f)(4)). Section
230(c)(2) immunity applies whether Google is treated as an information service, as an access
software provider, or both. *See id.* § 230(c)(2), (f)(2), (4).

1 filtering decisions were motivated by political animus or any other illegitimate motive. *See supra*
2 at 7-9. And, in any case, the Ninth Circuit has not held that spam-filtering decisions motivated by
3 factors that could be construed as “political” fall outside the scope of Section 230(c)(2)(B).

4 **b. Section 230(c)(2)(A) Bars the RNC’s Claims**

5 The RNC’s claims are also barred by Section 230(c)(2)(A), which immunizes Google
6 against claims based on “any action” taken “in good faith” to “restrict access to or availability of”
7 material that Google, or its users, deem “harassing” or “objectionable.” 47 U.S.C.
8 § 230(c)(2)(A).

9 The gist of the RNC’s claims is that Gmail’s spam filters incorrectly labeled some of the
10 RNC’s emails as spam. *See, e.g.,* Compl. ¶¶ 11, 16, 28, 29. But Congress enacted Section
11 230(c)(2)(A) specifically to bar such claims. *See* 47 U.S.C. § 230(c)(2)(A) (immunizing “any
12 action” taken to “restrict access to or availability of” objectionable material) (emphasis added);
13 *see also e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605, 607 (N.D. Ill. 2008) (Congress
14 enacted Section 230(c)(2) to shield defendants from liability “for blocking too much, or even too
15 little”). Accordingly, courts routinely reject claims under Section 230(c)(2)(A) where, as here,
16 plaintiffs allege that spam-filtering systems produce incorrect results. *See, e.g., Holomaxx*, 783 F.
17 Supp. 2d at 1105 (holding that Section 230(c)(2)(A) barred claims based on Microsoft’s allegedly
18 “faulty [email] filtering technology and techniques,” and that Microsoft “reasonably could
19 conclude” that the plaintiff’s bulk marketing emails were “harassing” and “otherwise
20 objectionable” under Section 230(c)(2)(A)); *e360Insight*, 546 F. Supp. 2d at 609 (“Under [Section
21 230(c)(2)], a mistaken choice to block [emails], if made in good faith, cannot be the basis for
22 liability under federal or state law.”). This Court should do the same.

23 Nor does it matter if the RNC does not understand, or simply disagrees with, Gmail’s
24 spam filters. As the Ninth Circuit has made clear, Section 230(c)(2) “establishes a subjective
25 standard whereby” interactive computer service providers, including Google, “decide what online
26 material is objectionable.” *Malwarebytes*, 946 F.3d at 1044; *see also, e.g., Domen v. Vimeo, Inc.*,
27 433 F. Supp. 3d 592, 603 (S.D.N.Y. 2020) (“Section 230(c)(2) is focused upon the provider’s
28 subjective intent of what is . . . [‘]harassing, or otherwise objectionable.” (quoting 47 U.S.C. §

1 230(c)(2))), *aff'd*, 991 F.3d 66 (2d Cir. 2021), *reh'g granted and opinion vacated*, 2 F.4th 1002
2 (2d Cir. 2021), and *amended and aff'd on reh'g*, 6 F.4th 245 (2d Cir. 2021), *opinion withdrawn*,
3 No. 20-616-CV, 2021 WL 4399692 (2d Cir. Sept. 23, 2021), and *amended and aff'd on reh'g*,
4 No. 20-616-CV, 2021 WL 4352312 (2d Cir. Sept. 24, 2021). To hold otherwise—i.e., “[t]o force
5 a provider like [Google] to litigate the question of whether what it blocked was or was not
6 spam”—would “render § 230(c)(2) nearly meaningless.” *e360Insight*, 546 F. Supp. 2d at 609.

7 The RNC likely will argue that Google’s spam-filtering activities were not undertaken in
8 “good faith” because they were motivated by political bias. 47 U.S.C. 230(c)(2)(A). But again,
9 the RNC’s Complaint does not plausibly allege that Google targeted the RNC’s emails at all, let
10 alone for improper reasons. *See supra* at 7-9. The RNC therefore has not met its burden of
11 alleging the “absence of good faith,” and its claims are barred. *e360Insight*, 546 F. Supp. 2d at
12 609; *see also, e.g., Daniels v. Alphabet Inc.*, No. 20-cv-04687-VKD, 2021 WL 1222166, at *12
13 (N.D. Cal. Mar. 31, 2021) (rejecting “conclusory assertions” that YouTube’s filtering decisions
14 were politically motivated and hence not in good faith).⁸

15 2. The RNC’s Claims are Barred by Section 230(c)(1)

16 The RNC’s claims should also be dismissed because they are barred by the separate and
17 independent immunity provided by Section 230(c)(1).

18 Section 230(c)(1) states that “[n]o provider or user of an interactive computer service shall
19 be treated as the publisher or speaker of any information provided by another information content
20 provider.” 47 U.S.C. § 230(c)(1). And, under Section 230(e)(3), “[n]o cause of action may be
21 brought and no liability may be imposed under any State or local law that is inconsistent with”
22 that clear command. *Id.* § 230(e)(3). “At its core,” Section 230(c)(1) “bars ‘lawsuits seeking to
23

24 ⁸ Further, requiring providers to litigate their spam-filtering decisions on a case-by-case
25 basis would force providers to reveal sensitive information about how their spam-filtering
26 systems work, making it easier for bad actors to exploit those systems—precisely the opposite of
27 what Congress intended. *See Holomaxx*, 783 F. Supp. 2d at 1105 (forcing providers to explain “in
28 detail” their filtering decisions “would be inconsistent with the intent of Congress to ‘remove
disincentives for the development and utilization of blocking and filtering technologies’”) (quoting 47 U.S.C. § 230(b)(4)). For that reason, too, the Court should reject the RNC’s thinly
disguised attempt to “look under the hood” of Google’s spam-filtering systems to gain a strategic
advantage over its political opponents.

1 hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such
2 as deciding whether to publish, withdraw, postpone or alter content.” *Jones v. Dirty World Ent.*
3 *Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014) (citation omitted). And as many courts have
4 made clear, curating content with automated tools, like spam filters, is a core editorial function.
5 *See, e.g., Force*, 934 F.3d at 70 (using algorithms to “arrang[e] and display[] others’ content” to
6 make it more “usable” is “an essential part” of publishing).

7 Here, Google is entitled to Section 230(c)(1) immunity if (1) Gmail is an “interactive
8 computer service,” (2) the RNC’s claims seek to treat Google as a “publisher or speaker,” and
9 (3) the content at issue was “provided by another information content provider” (i.e., not Google).
10 47 U.S.C. § 230(c)(1); *accord Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101 (9th Cir. 2009), *as*
11 *amended* (Sept. 28, 2009). All those requirements are met.

12 As explained above, Google is a provider of an “interactive computer service” (namely,
13 Gmail) under Section 230. *See supra* at n.7. And it is undisputed that the bulk emails at issue
14 were created by the RNC, not by Google. Thus, the first and third requirements for Section
15 230(c)(1) immunity are easily met. The only remaining question is whether the second
16 requirement—treatment as a “publisher”—is also met.

17 The answer is “yes” because the RNC plainly seeks to hold Google liable based on its
18 “exercise of a publisher’s traditional editorial functions.” *Jones*, 755 F.3d at 407. All the RNC’s
19 claims boil down to the same idea: that Google improperly routed the RNC’s emails to users’
20 spam folders. But deciding how to organize and display content created by others is one of the
21 most essential “editorial functions” of all. *Id.*; *see also, e.g., Sikhs for Just. “SFJ”, Inc. v.*
22 *Facebook, Inc.*, 144 F. Supp. 3d 1088, 1095 (N.D. Cal. 2015) (Koh, J.) (Section 230(c)(1) barred
23 claims based on Facebook’s allegedly discriminatory decision to restrict access to plaintiff’s
24 Facebook’s page), *aff’d sub nom. Sikhs for Just., Inc. v. Facebook, Inc.*, 697 F. App’x 526 (9th
25 Cir. 2017). Accordingly, the Ninth Circuit has held that Section 230(c)(1) bars claims based on
26 providers’ choices about how to curate content, including when those choices are made via
27 automated systems like spam filters. *See Dyroff*, 934 F.3d at 1098 (Section 230(c)(1) barred
28 claims based on use of automated “features and functions,” including “algorithms,” to organize

1 and display content). So, too, have many other courts.⁹ This Court should do the same.

2 **V. CONCLUSION**

3 For the foregoing reasons, Google respectfully requests that this Court grant its Motion to
4 Dismiss and dismiss the RNC’s Complaint with prejudice.

5
6 Dated: January 23, 2023

PERKINS COIE LLP

7
8 

9
10 By:

Sunita Bali, Bar No. 274108
Danielle Sivalingam, Bar No. 294369
Angie Young Kim, Bar No. 270503
Abdul Kallon, Bar No. (*pro hac vice*)
Ryan M. Spear, Bar No. (*pro hac vice*)
Michael Robert Huston, Bar No. (*pro hac vice*)

11
12
13
14
15 *Attorneys for Defendant Google LLC*
(erroneously sued as Google Inc.)

16
17
18
19
20
21
22 ⁹ *See, e.g., Force*, 934 F.3d at 70 (describing use of “algorithms” to organize and display
23 content as an “essential” aspect of publishing that is immunized by Section 230(c)(1)); *Al-Ahmed*
24 *v. Twitter, Inc.*, No. 21-cv-08017-EMC, 2022 WL 1605673, at *18 (N.D. Cal. May 20, 2022)
25 (Section 230(c)(1) “contemplates the ability of services like Twitter to employ filtering
26 processes” for users’ content), *appeal dismissed*, No. 22-15914, 2022 WL 4352712 (9th Cir. July
27 7, 2022); *Ebeid v. Facebook, Inc.*, No. 18-cv-07030-PJH, 2019 WL 2059662, at *5 (N.D. Cal.
28 May 9, 2019) (Section 230(c)(1) barred claims based on Facebook’s alleged “on-and-off again
restriction of plaintiff’s use of and ability to post on the Facebook platform”); *Fields v. Twitter,*
Inc., 200 F. Supp. 3d 964, 975 (N.D. Cal. 2016) (holding that “the private nature of [Twitter’s]
Direct Messaging [service] does not remove the transmission of such messages from the scope of
publishing activity under section 230(c)(1)”; *Prager Univ. v. Google LLC*, 85 Cal. App. 5th
1022, 301 Cal. Rptr. 3d 836, 848 (2022) (Section 230(c)(1) barred claims based on YouTube’s
use of algorithms to filter user videos because “algorithmic restriction of user content [falls]
squarely within the letter and spirit of section 230’s promotion of content moderation”).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing has been served upon all counsel of record, via the Court’s CM/ECF system on January 23, 2023, as follows:

Harmeet K. Dhillon (harmeet@dhillonlaw.com)
Michael A. Columbo (mcolumbo@dhillonlaw.com)
Jeremiah D. Graham (jgraham@dhillonlaw.com)
Anthony J. Fusaro, Jr. (afusaro@dhillonlaw.com)
DHILLON LAW GROUP INC.
177 Post Street, Suite 700
San Francisco, California 94108
Telephone: (415) 433-1700

Counsel for Plaintiff
Republican National Committee

Thomas R. McCarthy (tom@consovoymccarthy.com)
Thomas S. Vaseliou (tvaseliou@consovoymccarthy.com)
Conor D. Woodfin (conor@consovoymccarthy.com)
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
Telephone: (703) 243-9423

Counsel for Plaintiff
Republican National Committee

/s/ Sunita Bali

Sunita Bali