No. 24-5358

In the United States Court of Appeals
for the Ninth Circuit

REPUBLICAN NATIONAL COMMITTEE,
Plaintiff-Appellant,

v.

GOOGLE INC. AND GOOGLE LLC,
Defendants-Appellees.

On Appeal from the United States District Court for the
Eastern District of California, No. 2:22-cv-1904

BRIEF OF AMICUS CURIAE TECHFREEDOM IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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INTEREST OF AMICUS CURIAE*

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible.

TechFreedom has long been a leading voice in opposition to efforts to impose onerous common carrier rules on the Internet. See, e.g., FCC, *Restoring Internet Freedom Order*, 33 FCC Rcd 311 (2018) (citing TechFreedom's comments 29 times). TechFreedom has also long been a leading voice in opposition to government attempts to control online speech. See, e.g., *NetChoice v. Moody*, 34 F.4th 1196, 1219 n.17 (11th Cir. 2022) (quoting TechFreedom's amicus brief). In this lawsuit, the plaintiff seeks both to impose onerous common-carrier rules on the Internet and to use state power—in the form, here, of a heavy judicial gloss on a 150-year-old statute—to control online speech.

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* No party's counsel authored any part of this brief. No one, apart from TechFreedom and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the brief's being filed.

SUMMARY OF ARGUMENT

In 1872 California enacted a law declaring that "every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry." Cal. Civ. Code § 2168. A hundred and fifty years later, the Republican National Committee sued Google, alleging among other things that, by shunting GOP fundraising emails into Gmail spam folders, Google had violated this ancient common-carrier law. The district court dismissed the complaint.

The RNC's claim—that a 19th-century common-carrier statute applies to 21st-century email services—rests on a fundamental misunderstanding of both the statute's historical context and the technical realities of modern digital communication. The statute was drafted for expensive and transportation-based communications. It is ill-suited to address the mechanics of a free and nearly instantaneous medium like email. Further, Gmail does not "carry" messages in the sense envisioned by the law; it sorts them—an essential distinction in both technological and legal terms.

More generally, subjecting spam-filtering to common-carrier rules is simply an insupportable idea. First, common-law common-carrier principles predate—and thus do not account for—either the concept or

the technology of spam. Second, courts are not equipped to second-guess the dynamic, probabilistic filtering systems that email services rely on to protect users. A system of spam filtering-by-lawsuit would be inefficient, inaccurate, and widely abused. And third, the Federal Communications Commission has already rejected similar arguments in the context of text messaging, warning that common-carrier mandates would flood users with unwanted content. The same logic applies with even greater force to email.

The RNC wants to replace spam filters with spam lawsuits. This Court should refuse to play along.

ARGUMENT

I. Email Services Are Not "Carriers" Under California's 1872 Common Carrier Statute.

There is a reason why digital technologies are thought to have brought on an "Information Age." When a pair of researchers at UC Berkeley tried to measure all the information in the world, they estimated that "printed documents of all kinds comprised only .003% of the total." Peter Lyman & Hal R. Varian, *Reprint: How Much Information?*, J. of Elec. Publ'g, tinyurl.com/mukk5fty (Dec. 2000). And that was 25 years ago; since then, the trend has only accelerated. Over

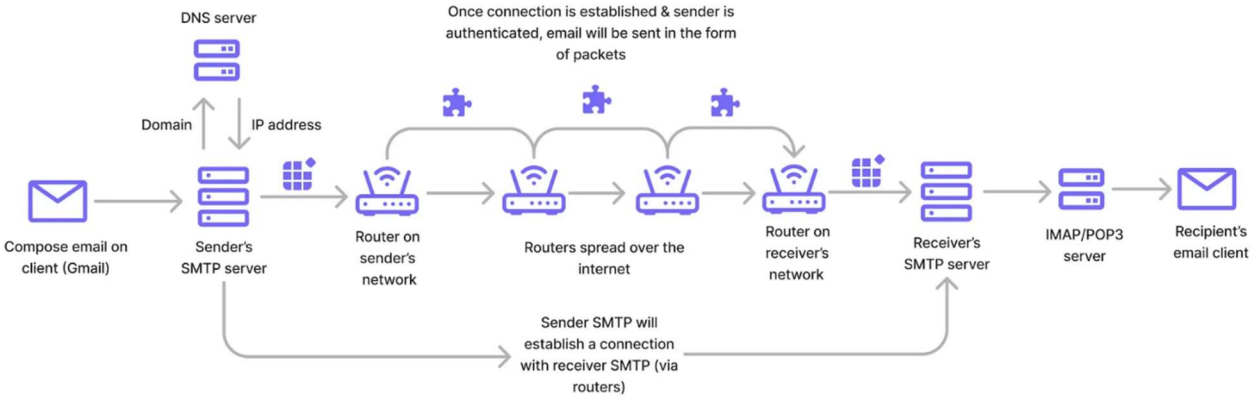
the last couple decades, the volume of data has grown so rapidly that, year after year, something like ninety percent of all data ever created is less than three or four years old. See, e.g., Richard Stengel, *Data Drives the World. You Need to Understand It*, Time, tinyurl.com/bdhv3snc (Oct. 20, 2021).

To send a letter in California in 1872, you had to buy paper and ink, to print words on the paper by hand or with a machine, and to pay for a massive postal apparatus—clerks, conductors, drivers, engines, cars, coaches, horses, mules, and more—to carry the paper from one place to another. See Mary A. Helmich *Stage Company Hierarchy*, Cal. State Parks, tinyurl.com/55pju4x9 (2008). Today, by contrast, the marginal cost of distributing information is nearly zero. Anyone with a computer and an Internet connection can create and send virtually unlimited copies of an email free of charge.

So although "mail" and "email" might sound similar, they aren't. Mail has a cost; email essentially does not; and that makes all the difference. This has been clear from the start. In 1984 a computer scientist named Jacob Palme noticed that "an electronic mail system can, if used by many people, cause severe information overload." Jacob Palme, *You Have 134 Unread Mail! Do You Want to Reed Them Now?*, QZ Computer Center, tinyurl.com/msb6wyee (1984). The "cause of this

problem," he explained, is that "it is so easy to send a message to a large number of people"—the sender has "too much control of the communication process." *Id.* As a result, "people get too many messages" and "the really important messages are difficult to find in a large flow of less important messages." *Id.* Palme proceeded to sketch a system of recipient-side message controls that looks remarkably like contemporary spam-filtering.

Another distinction is that an email service, unlike a mail service, does not "carry" messages for you. Emails travel through an Internet service provider, a domain-name-system (DNS) server, and Internet backbone providers, then into a recipient email service:



A Dummy's Guide, *How Does Email Work?*, Medium, tinyurl.com/2eu7ppme (Apr. 25, 2022). The precise details are unimportant. The key point, for present purposes, is that it's primarily companies like AT&T, Verizon, and Comcast that haul data packets across the Internet's many

nodes. Email services like Gmail and Microsoft Outlook, by contrast, are Internet edge providers. They're not like the stage company in the 1870s, carrying letters from station to station; they're like a secretary in the 1940s, making sure letters go into the right outbox.

The RNC responds that California's 1872 law reaches anyone who "offers" to carry things, and that the RNC believes such an offer to be an inherent part of email service. OB 34. This is wrong on a number of grounds. See AB 20-22. What stands out to us, though, is the disconnect between how the RNC *thinks* the Internet works and how the Internet *actually* works. This brings us back to Jacob Palme's prescient concern. If Google "offers" anything, it is not to *carry* stuff for you, but to *sort* it for you. Google offers to separate the really important messages from the less important ones. Filtering spam is the heart of its service, as shown by its claim that Gmail "blocks 99.9%" of it. Google, *Secure, Smart, and Easy to Use Email*, tinyurl.com/5jd2rsp (visited April 28, 2025).

The 1872 law explicitly excluded telegraphy, the most advanced communication method of the time. Similarly, California did not simply invoke the 1872 law when it recently decided to impose common-carrier mandates on ISPs; it passed a distinct law instead. See Cal. Civ. Code § 3101. That's hardly surprising. The 1872 law focuses on things like the "schedule[d] time[s] for the starting of trains or vessel[s] from their

respective stations or wharves." Cal. Civ. Code § 2170. Plainly, it was not drafted for the ages. It is not some deeply evolving statute, always rushing out in front of great leaps in technology.

That Gmail does not "carry" messages is no trifling detail. That spam-filtering is integral to Google's service is not a mere technicality. These are essential facts that take Gmail outside the scope of California's nineteenth-century common-carrier law.

II. Using Lawsuits to Design Spam Filters Makes No Sense.

There is no legal foundation for applying common-carrier rules to spam-filtering, no practical way for courts to police spam-filtering decisions, and strong regulatory and market evidence that a regime of court-supervised spam-filtering would be disastrous.

A. Ancient Common Carrier Rules Have Nothing to Say About Modern Email Spam.

Not surprisingly, the RNC wants to duck responsibility for trying to break email spam filters. Its solution is to contend that common carriers *are* allowed to filter spam, but that the RNC's emails *are not* spam and that Google has treated them as spam in bad faith. Make no mistake: This is still just an argument that every spam-filtering decision can be made into a federal case.

The RNC assumes that a common carrier is allowed to "filter some . . . spam-related expression." The RNC plucks those words from Judge Oldham's opinion in *NetChoice v. Paxton*, 49 F.4th 439 (5th Cir. 2022). In the part of the opinion the RNC quotes, Judge Oldham wrote for himself alone—and anyway, the whole opinion was vacated by the Supreme Court. *Moody v. NetChoice*, 603 U.S. 707 (2024). Most importantly, though, *Paxton* offers no citation, drawn from the hoary common-carrier cases, for this supposed rule about common carriers and spam—an unavoidable omission, since spam came into its own only with recent technological developments.

The 1872 law has nothing to say about spam: It demands that a common carrier "accept and carry whatever is offered to him . . . of a kind that he is accustomed to carry." Cal. Civ. Code § 2169. Maybe a court could cram a spam exception into the "accustomed to carry" bit, but that new rule would bear no connection to what the common carriers of old did (they'd never heard of "spam"). Rather, it would be cut by judges from whole cloth, and it would place on them the task of drawing from scratch a comprehensive set of lines separating "spam" and "non-spam." Judges would be anointing themselves the arbiters of Jacob Palme's distinction between important and unimportant messages.

It is unsurprising that RNC emails sometimes go to spam folders. See Corbin Barthold, *The Republican Project to Break Your Email Account*, The Bulwark, tinyurl.com/3p7pca9a (Dec. 11, 2022) (examining RNC emails—including "end of the month" fundraising appeals—that could plausibly trigger spam filters). But even if the Court disregards that fact at this stage of the litigation (not that the Court *must* do so, see AB 11-17), the RNC is still asking the Court to construct, from the ground up, an ahistorical scheme of common-carrier spam-filtering law. No such law exists, and the Court should decline to create it on the fly.

B. Spam Filtering Is a Dynamic Process Unsuitable for Judicial Intervention.

Google has no magic spam sorting wand. Cf. Daphne Keller, *Texas, Florida, and the Magic Speech Sorting Hat in the NetChoice Cases*, Lawfare, tinyurl.com/3f4v59r4 (Feb. 21, 2024). For that matter, email does not arrive in neat "spam" and "non-spam" categories. Email comes in a terrific array of gradations between those two poles, and Google uses a variety of signals—e.g., a sender's message cadence, a recipient's reading habits, the number of recipients who've marked the sender's messages as spam, the presence of suspicious links or certain trigger words—to determine which emails cross the line and fall into the spam folder. See AB 3-5. It's a game of cat and mouse, with spammers

constantly deploying new strategies to evade Google's filters, and Google constantly adjusting and filling gaps in its process.

The RNC's new strategy is to file a lawsuit in hopes of evading Google's filters with the help of a court. It's a strategy with immense upside potential: If the RNC succeeds, Google will be unable to adjust; the RNC will possess a ticket to pass through Google's spam defenses indefinitely. This is a great prize the RNC covets, and it is important for the Court to understand that many other entities, too, would go to great lengths to win it. If the RNC succeeds, things will not end there. Other spammers will pile into the litigation strategy of spam-filter evasion.

C. A Case Study: The FCC and Text Messages.

Various groups for years urged the FCC to subject text-messaging services to common-carrier rules under the Communications Act of 1934. In 2018 the agency—at the time under Republican control—issued an order declining to do so. FCC, *In re Pets for Decl'y Ruling on Reg. Status of Wireless Messaging Serv.*, WT Dkt. No. 08-7, tinyurl.com/ycky4n2v (Dec. 13, 2018). Although it had to start by explaining why text-messaging services aren't common carriers under the legal standard set forth in the Communications Act, the FCC devoted most of its energy to

protesting that common-carrier rules for text-messaging is simply a bad idea. Why? Because it'd stop text-messaging services from blocking spam.

The FCC "disagree[d] with commenters that [common-carrier rules] would not limit providers' ability to prevent spam . . . from reaching customers." *Id.* at 22 n.140. Tellingly, some of those commenters were purveyors of "mass-text[s]," who were seeking "to leverage the common carriage [rules] to stop wireless providers from . . . incorporating robotext-blocking, anti-spoofing measures, and other anti-spam features into their offerings." *Id.* at 2. With common-carrier rules in place, those "spammers" would be free, the agency concluded, to "bring endless challenges to filtering practices" and destroy services' ability to "address evolving threats." *Id.* at 22 n.140 (quoting comments of CTIA, the wireless industry trade association). Ultimately, common-carrier rules would "open the floodgates to unwanted messages—drowning consumers in spam at precisely the moment when their tolerance for such messages is at an all-time low." *Id.* at 21.

The FCC's 2018 order knocks down two of the main points raised by the RNC today. First, the RNC claims (as we've seen) that common-carrier requirements and spam-filtering policies are compatible. Looking, however, at telephone services—quintessential common carriers—the FCC concluded otherwise. The agency had "generally found call blocking

by providers to be unlawful, and typically permit[ted] it only in specific, well-defined circumstances." *Id.* at 21. Hence the FCC's belief that common-carriage status for text messages would lead to a flood of spam.

Second, the RNC treats Gmail as a "market-dominant" service capable of "systematically chok[ing] off one major political party's" fundraising emails. OB 43. But as the FCC observed, communications "providers have every incentive to ensure the delivery of messages that customers want to receive in order to . . . retain consumer loyalty." FCC, *Wireless Messaging*, supra, at 23. Services that over-filter messages "risk losing th[eir] customers" to competitors. *Id.* at 24. This market mechanism is, if anything, stronger in the context of email than in the context of text messages, as it is far easier to set up an email service than to enter the wireless industry. "No small group of people controls e-mail"—its "protocol" is "decentralized." *Biden v. Knight First Amendment Inst.*, No. 20-197, slip. op. 7 (Apr. 5, 2021) (Thomas, J., concurring).

* * *

Who is to judge what qualifies as spam? Should we leave it to competing email services to make these calls? Or are we better off if any disgruntled third party can throw such decisions into the courts? This is not a hard question. The Court should make clear that it wants nothing to do with email product design and inbox management.

CONCLUSION

The judgment should be affirmed.

May 2, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify:

This brief complies with the type-volume limits of Fed R. App. P. 29(a)(5) because it contains 2,502 words, excluding the parts exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced serif typeface, in 14-point font, using Microsoft Office 365.

/s/ Corbin K. Barthold

CERTIFICATE OF SERVICE

On May 2, 2025, a copy of this brief was filed and served on all registered counsel through the Court's CM/ECF system.

/s/ Corbin K. Barthold