

FEDERAL ELECTION COMMISSION**FIRST GENERAL COUNSEL'S REPORT****MUR 7991**

DATE COMPLAINT FILED: Apr. 26, 2022

DATES OF NOTIFICATIONS: May 2, 2022

LAST RESPONSE RECEIVED: June 17, 2022

DATE ACTIVATED: Aug. 10, 2022

EXPIRATION OF SOL: July 1-Nov. 30, 2025

ELECTION CYCLE: 2020

COMPLAINANTS:

Matthew Raymer

Republican National Committee

Ryan Dollar

National Republican Senatorial Committee

Erin Clark

National Republican Congressional Committee

RESPONDENTS:

Google, LLC

Biden for President and Keana Spencer in her
official capacity as treasurer**RELEVANT STATUTE
AND REGULATIONS:**

52 U.S.C. § 30118(a)

11 C.F.R. § 109.21

11 C.F.R. § 114.2

INTERNAL REPORTS CHECKED: Disclosure Reports**FEDERAL AGENCIES CHECKED:** None**I. INTRODUCTION**

This matter arises from a Complaint alleging that the spam filter associated with Google's email platform, Gmail, disproportionately flagged Republican campaign emails as spam during the 2020 election cycle. The Complaint alleges that the spam filter thereby eliminated a major source of political fundraising for Republican candidates and undermined their ability to communicate their messages to the public, resulting in prohibited corporate in-kind contributions to Biden for President and other, unnamed Democratic candidates in violation

1 of the Federal Election Campaign Act of 1971, as amended (the “Act”). In line with the
2 Commission’s recent precedent, because Google credibly asserts that its spam filter is applied on
3 a politically neutral basis and for a commercial purpose, we recommend the Commission find no
4 reason to believe that Google, LLC, made, and Biden for President and Keana Spencer in her
5 official capacity as treasurer knowingly accepted, prohibited in-kind corporate contributions in
6 violation of 52 U.S.C. § 30118(a) and 11 C.F.R. §§ 109.21, 114.2.

7 **II. FACTUAL BACKGROUND**

8 **A. The Parties and the Gmail Email Platform**

9 Google, LLC, is a technology company owned by Alphabet Inc., a publicly traded
10 Delaware corporation headquartered in Mountain View, California.¹ It provides a number of
11 services, including its email platform, Gmail, which Google describes as “the world’s largest
12 email platform” with “[m]ore than 1.5 billion people” using it on a monthly basis.² Google
13 states that it generates revenue by selling paid advertising so that consumers can use the product
14 for free; in addition, Google describes Gmail as a “foundational component of the ‘Google
15 Workspace’ product, which bundles a set of secure collaboration and productivity apps created
16 for businesses of all sizes and which can be purchased for a fee.”³

17 According to its most recent annual report filed with the U.S. Securities and Exchange
18 Commission, Google states that its

19 brands have been, and may in the future be, negatively affected
20 by . . . reputational issues, third-party content shared on our
21 platforms, . . . and product or technical performance
22 failures. . . . Our success will depend largely on our ability to
23 remain a technology leader and continue to provide high-

¹ Google Resp. at 3 (June 17, 2022).

² *Id.* at 4.

³ *Id.* Google notes that “[m]ore than five million paying businesses use Gmail in the workplace.” *Id.*

1 quality, trustworthy, innovative products and services that are
2 truly useful and play a valuable role in a range of settings.⁴

3 To “provide a better experience for [its] users,” and thus “maintain the Gmail brand,
4 business, and financial condition,” Google implements a spam filter policy that it asserts in its
5 Response “appl[ies] to emails from all senders . . . whether they are politically affiliated or not.”⁵
6 Google states that “Gmail’s filtering capabilities and security protections are built to give users
7 the best overall Gmail experience by delivering the emails they want to see” and that providing
8 this service is “integral to Google’s purpose.”⁶

9 Biden for President is the authorized campaign committee of 2020 Democratic
10 presidential candidate Joseph R. Biden, Jr., and Keana Spencer is its treasurer.⁷

11 **B. The NCSU Study**

12 In March 2022, the North Carolina State University Department of Computer Science
13 released an academic study (the “NCSU Study”) intended to identify political biases in spam
14 filtering algorithms (“SFAs”) as applied by three email platforms: Google’s Gmail, Microsoft’s
15 Outlook, and Verizon’s Yahoo! Mail.⁸ To perform this analysis, the NCSU Study’s authors
16 created 102 email accounts which they subscribed to the email listservs of the two primary party
17 presidential candidates, Biden and his opponent, Donald J. Trump, as well as those of 78 Senate

⁴ Alphabet Inc., 2021 U.S. Secs. & Exch. Comm’n Form 10-K Annual Report at 12 (Feb. 1, 2022) [hereinafter Alphabet 2021 10-K], https://abc.xyz/investor/static/pdf/20220202_alphabet_10K.pdf.

⁵ Google Resp. at 4-5, 9.

⁶ *Id.* at 5.

⁷ Biden for President, Amended Statement of Organization at 1-2 (Aug. 30, 2022), <https://docquery.fec.gov/pdf/867/202208309528296867/202208309528296867.pdf>.

⁸ Compl. (Apr. 26, 2022); *see id.*, Ex. A (Hassan Iqbal, *et al.*, Dep’t of Comput. Sci., N.C. State Univ., *Left or Right: A Peek into the Political Biases in Email Spam Filtering Algorithms During US Election 2022*, in WEB CONFERENCE 2022 at 2491 (Assoc. for Comput. Mach. ed. 2022) [hereinafter “NCSU Study”]).

1 and 156 House candidates from across the political spectrum.⁹ The NCSU Study then split the
2 email accounts into different groups in order to test the effect that user actions had on the email
3 platforms' SFAs: (1) a "Baseline Experiment" group in which the accounts never opened or read
4 any emails and did not move them to or from their spam folders or inboxes; (2) an "Interaction
5 Experiment" group in which the accounts read all emails in both the spam folder and the inbox
6 (the "Read Group"); (3) an "Interaction Experiment" group in which the accounts moved all
7 received emails in their inboxes to their spam folders (the "Spam Group"); and (4) an
8 "Interaction Experiment" group in which the accounts moved all emails in their spam folders to
9 their inboxes (the "Inbox Group").¹⁰ The study observed the accounts over a five-month period
10 from July 1, 2020, through November 30, 2020.¹¹

11 The NCSU Study concluded that each of the three email platforms appeared to exhibit
12 "aggregate political bias" in the Baseline Experiment group: While Outlook and Yahoo! Mail
13 leaned "towards the right" by marking a higher percentage of Democratic campaign emails as
14 spam than Republican campaign emails, the NCSU Study concluded that "Gmail leans towards
15 the left as it marks a higher percentage of [Republican] emails as spam."¹² The NCSU Study
16 determined that, across the study period in the Baseline Experiment group, Gmail marked 67.6%
17 of emails from Republican candidates as spam compared to 8.2% of emails from Democratic
18 Candidates.¹³ Outlook, on the other hand, marked 95.8% of Democratic emails as spam, and
19 75.4% of Republican emails, while Yahoo! Mail marked 14.2% more Democratic emails spam

⁹ NCSU Study at 2492-93.

¹⁰ *Id.* at 2493.

¹¹ *Id.*

¹² *Id.* at 2494.

¹³ *Id.*

1 than Republican emails.¹⁴ The NCSU Study also noted that the disparity in Gmail's SFA
2 between Republican and Democratic emails increased over the period of the study, with the
3 percentage of Republican emails marked as spam rising and the Democratic email percentage
4 remaining largely constant.¹⁵

5 With respect to the three Interaction Experiment groups, the NCSU Study observed that
6 the Read Group's interactions "did not have any significant impact on the political bias of any of
7 the three email services."¹⁶ The Spam Group's interactions had a more significant effect, and
8 Gmail's SFA's aggregate bias against Republican campaign emails "improved[] significantly":
9 By moving all emails from the inbox to the spam folder, the Spam Group's interaction increased
10 the percentage of Democratic emails marked as spam from 8.2% to 54.2%, and Republican
11 emails from 67.6% to 83.9% as the NCSU study appears to reflect.¹⁷ Finally, the Inbox Group's
12 interactions caused political bias in Gmail's SFA to "reduce significantly," but did not have the
13 same effect on Yahoo! Mail's nor Outlook's: The percentage of Republican emails marked as
14 spam by Gmail decreased from 67.6% in the Baseline Group to 5.34% in the Inbox Group, while
15 Democratic emails marked as spam decreased from 8.2% to 0%. The NCSU Study concluded
16 that the Inbox Group's interactions caused Gmail to "maintain[] its left[-]leaning [bias], but not
17 very strongly anymore."¹⁸

¹⁴ *Id.* The NCSU Study does not appear to provide the actual percentage of emails from each political party that Yahoo! Mail marked as spam.

¹⁵ *Id.*

¹⁶ *Id.* at 2497.

¹⁷ *Id.* at 2497-98. Yahoo! Mail became "almost unbiased" as a result of the Spam Group's actions, and Outlook "did not show a significant impact on the percentage of emails marked as spam." *Id.* at 2497.

¹⁸ *Id.* at 2498. In contrast, the aggregate political bias for both Outlook and Yahoo! Mail "increased . . . because neither of the two services reacted noticeably" to the interaction of moving emails from the spam folder to the inbox. *Id.*

1 In addressing its limitations, the NCSU Study states that several factors affected the
2 significance of the Study's results: First, the NCSU Study observed a limited time period, and
3 the authors note that they "cannot make inferences about the behaviors of the SFAs in general."¹⁹
4 Second, a number of variables were outside the NCSU Study's control, including how many
5 emails the individual campaigns sent; how long the campaigns had been active; and how many
6 users outside of the study group had marked a specific email as spam. Thus, the study authors
7 conclude, they "cannot determine the extent to which these factors influence spam
8 percentages."²⁰ Finally, the authors note that their study selected for particular variables, and
9 that other variables may have other effects not shown in the NCSU Study.²¹ They state that "we
10 have no reason to believe that there were deliberate attempts from these email services to create
11 these biases to influence the voters."²²

12 **C. The Complaint and Responses**

13 The Complaint relies on the NCSU Study to allege that Google's spam filter is biased
14 against Republican candidates such that its operation constitutes an in-kind contribution to
15 Democratic candidates and their committees, including Biden for President.²³ The Complaint
16 alleges that "Google's biased email filtering mechanism wrongly diverted untold numbers of
17 emails from Republican candidates into recipients' spam folders, thereby eliminating a major
18 source of political fundraising for Republican candidates and severely undermining their ability

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Compl. at 5-6.

1 to communicate their messages to the public.”²⁴ Thus, it urges that the Commission find that
2 “Google has made illegal, corporate in-kind contributions to the Biden campaign and
3 Democrat[ic] candidates across the country by its overwhelmingly — and indefensibly —
4 disproportionate suppression of Republican candidate emails.”²⁵

5 The Responses deny the allegations. Google states that “Gmail is a commercial product,
6 and its spam filters are one of a number of features that Gmail offers to enable more than 1.5
7 billion users to be more secure and efficient in their use of the product.”²⁶ It goes on to say that
8 its SFA “operate[s] solely for commercial purposes: to enhance Gmail users’ experience by
9 fostering a secure, safe, and effective email system, which, in turn, promotes Google’s brand and
10 financial success.”²⁷ Google avers that its spam filter policies “apply to all bulk senders —
11 regardless of political affiliation and regardless of whether the sender is a political campaign or
12 any other enterprise.”²⁸

13 Google describes that it designed its SFA to look at
14 a variety of signals, including characteristics of the IP address,
15 domains/subdomains, whether bulk senders are authenticated, and
16 user input. User feedback, such as when a user marks a certain
17 email as spam or signals they want a sender’s emails in their inbox,
18 is key to this filtering process, and our filters learn from user
19 actions.²⁹

²⁴ *Id.* at 2.

²⁵ *Id.*

²⁶ Google Resp. at 1.

²⁷ *Id.* at 2.

²⁸ *Id.*

²⁹ *Id.* at 5 (quoting Neil Kumaran, Grp. Prod. Manager, Gmail Sec. & Trust, *Understanding Gmail’s Spam Filters*, GOOGLE BLOG (May 27, 2022), <https://cloud.google.com/blog/products/workspace/an-overview-of-gmails-spam-filters>).

1 Google contends that the NCSU Study did not examine key factors that influence the action of its
2 SFA, including sender-controlled settings that reduce the likelihood that emails are blocked by
3 Google's SFA, whether the sender is authenticated, and how other users had flagged the emails
4 received during the study, and thus "cannot be said to measure how the spam filters work in the
5 vast majority of cases."³⁰

6 Google argues that its spam filter does not result in contributions under the Act.³¹ It
7 claims that, because its SFA is undertaken for a *bona fide* commercial purpose and not for the
8 purpose of influencing an election, its operation does not constitute a contribution or
9 contributions under the Act.³² To support this argument, it asserts that the SFA incorporates
10 "objective criteria" that is "neutral to the political affiliation of a sender and reflects user
11 preferences,"³³ and states that "Google also provides guidance to senders on how to minimize
12 having the emails they send filtered out of Gmail users' inboxes in various resources."³⁴

13 Google further argues that the Complaint is vague, speculative, and draws unwarranted
14 legal conclusions,³⁵ both because it relies on a single study without any other evidence and
15 because that study is flawed and does not support the claims made in the Complaint.³⁶ It
16 contends that the NCSU Study was small, analyzing only 34 recipient email addresses when

³⁰ *Id.* at 4-5.

³¹ *Id.* at 6.

³² *Id.* at 7-11.

³³ *Id.* at 10.

³⁴ *Id.* (citing *Prevent Mail to Gmail Users from Being Blocked or Sent to Spam*, GMAIL HELP, <https://support.google.com/mail/answer/81126?hl=en> (last visited Nov. 2, 2022); POSTMASTER TOOLS BY GMAIL, <https://gmail.com/postmaster/> (last visited Nov. 2, 2022); *Best Practices: Send Emails to Gmail Users*, GOOGLE TRAINING CTR, https://civicsresources.withgoogle.com/training-center/amplify/lesson-7/?sm_au=isVknNWPs9V1nRWNB2RNkKOT82pFc (last visited Nov. 2, 2022)).

³⁵ *Id.* at 11-14.

³⁶ *Id.*

1 Gmail has 1.5 billion users, and over “a mere 153 days, 27 of which were post-election.”³⁷
2 Google argues that the number of accounts analyzing user interactions was even smaller and, as
3 such, is even less indicative of broader trends: only four Gmail accounts were included in each
4 of the Read, Spam, and Inbox Groups.³⁸ Google also asserts that the NCSU Study was not
5 comparing “apples[]to[]apples,” as the emails sent by Republican and Democratic campaigns
6 were not identical, and that there are multiple factors that impact the action of Google’s SFA that
7 were outside the authors’ control.³⁹

8 Biden for President submits that the Complaint “states no facts, and indeed makes no
9 allegations, that Biden for President took any action that would constitute a violation of federal
10 campaign finance law.”⁴⁰ It states that the Commission has “resolved the legal theory advanced
11 here in numerous matters since the 2020 election” and that “[t]his pleading brings no new facts
12 or legal arguments to the questions raised and answered in these earlier cases.”⁴¹

13 III. LEGAL ANALYSIS

14 The Act prohibits corporations from making contributions to federal candidates, and
15 likewise bars candidates, political committees (other than independent expenditure-only political
16 committees and committees with hybrid accounts), and other persons from knowingly accepting
17 or receiving corporate contributions.⁴²

³⁷ *Id.* at 13.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Biden for President Resp. at 1 (May 17, 2022).

⁴¹ *Id.* at 2 (citing MURs 7870 (Google LLC, *et al.*); MURs 7812, 7825, 7869 (Facebook, Inc., *et al.*); MURs 7821, 7827, 7868 (Twitter, Inc., *et al.*); MUR 7858 (Facebook, Inc.); MUR 7841 (Twitter, Inc., *et al.*); MUR 7834 (Facebook, *et al.*); MUR 7832 (Twitter, Inc.); MUR 7829 (Twitter, Inc.); MUR 7742 (Twitter, Inc.); MUR 7687 (Twitter, Inc.); MUR 7641 (Facebook, Inc.); MURs 7443, 7447, 7550 (Twitter, Inc.)).

⁴² 52 U.S.C. § 30118(a); *accord* 11 C.F.R. § 114.2(a), (d).

1 Under the Act, a “contribution” includes “any gift, subscription, loan, advance, or deposit
2 of money or anything of value made by any person for the purpose of influencing any election
3 for Federal office.”⁴³ The term “anything of value” includes “all in-kind contributions.”⁴⁴ The
4 Commission has concluded that a commercial vendor providing services to political committees
5 will not make a contribution for the purpose of influencing an election when its business activity
6 “reflects commercial considerations and does not reflect considerations outside of a business
7 relationship.”⁴⁵ A commercial vendor need not make its services available to committees
8 representing all political ideologies, but rather may establish objective business criteria to protect
9 the commercial viability of its business without making contributions to the committees that
10 meet those criteria.⁴⁶

11 The Commission has long considered activity engaged in for *bona fide* commercial
12 reasons not to be “for the purpose of influencing an election,” and thus, not a contribution or

⁴³ 52 U.S.C. § 30101(8)(A); *accord* 11 C.F.R. § 100.52.

⁴⁴ 11 C.F.R. § 100.52(d).

⁴⁵ Advisory Opinion (“AO”) 2012-31 at 4 (AT&T).

⁴⁶ AO 2017-06 at 6 (Stein & Gottlieb) (“[A] commercial vendor, providing services to political committees . . . need not make its services available to committees representing all political ideologies, but rather may establish objective business criteria to protect the commercial viability of its business without making contributions to the committees that meet those criteria.”); AO 2004-06 at 1 (Meetup) (explaining that a corporation may provide goods and services to political committees without being considered to have made an in-kind contribution so long as it does so “on the same terms and conditions available to all similarly situated persons in the general public”); AO 2012-26 at 10 (Cooper for Congress, *et al.*) (concluding that no contribution to committee resulted where its participation in a text message fundraising program was subject to “objective and . . . commercially reasonable” criteria).

1 expenditure under 52 U.S.C. § 30118(a).⁴⁷ This is true even if a candidate benefitted from the
2 commercial activity.⁴⁸

3 The Commission has decided a number of matters involving online communication
4 platforms and the issue of whether particular conduct constituted commercial activity or
5 contributions made for an electoral purpose. For example, in MURs 7821, 7827, 7868 (Twitter,
6 Inc., *et al.*), the Commission found no reason to believe that Twitter had made a prohibited in-
7 kind contribution by engaging in a number of content moderation activities, including placing a
8 label on certain Tweets alleging election fraud and misrepresenting the results of the 2020
9 election, as well as blocking users from sharing information derived from materials believed at
10 the time to have been stolen, because those actions were undertaken by Twitter for a commercial
11 purpose, even though they may have benefitted Biden for President.⁴⁹ Similarly, in MUR 7834,
12 (Facebook, Inc., *et al.*), the Commission found no reason to believe an illegal in-kind
13 contribution had occurred where, *inter alia*, Google, Facebook, and Twitter had removed and

⁴⁷ See, e.g., Factual & Legal Analysis (“F&LA”) at 4, MUR 6586 (World Wrestling Ent., Inc.) (finding that WWE acted with the “sole intent to defend its business reputation” and not for the purpose of influencing an election when WWE’s senior vice president sent a letter to a newspaper seeking a retraction of a negative article about Senate candidate Linda McMahon, who owned and served as CEO of WWE); First Gen. Counsel’s Rpt. (“FGCR”) at 13 & Cert. ¶ 1 (June 7, 2005), MUR 5474 (Dog Eat Dog Films, *et al.*) (approving no reason to believe recommendation) (determining that distributors and marketers of *Fahrenheit 9/11* film did so “in connection with *bona fide* commercial activity and not for the purpose of influencing an election”); AO 2018-11 at 4 (Microsoft Corp.) (concluding that commercially reasonable efforts “to protect [Microsoft’s] brand reputation” by providing election-sensitive customers with free account security services are not in-kind contributions).

⁴⁸ See FGCR at 16 & Cert. ¶ 5 (June 6, 1994), MUR 3622 (The Clinton/Gore ‘92 Committee) (approving no reason to believe recommendation) (“[T]he fact that any of these candidates . . . may have received an indirect benefit (dissemination of their political positions) as a result of the sale of these tapes does not convert commercial activity into a corporate contribution.”); F&LA at 6, MUR 7024 (Van Hollen for Senate, *et al.*) (opining that the “question under the Act is whether the legal services were provided for the purpose of influencing a federal election, not whether they provided a benefit to Van Hollen’s campaign,” and concluding there was no contribution given the “absence of any objective or subjective indication” respondents acted for the purpose of influencing the election).

⁴⁹ F&LA at 13-19, 21 MURs 7821, 7827, 7868 (Twitter, Inc., *et al.*) (“As discussed above, the information before the Commission indicates that Twitter’s actions . . . were undertaken for commercial reasons and not for the purpose of influencing an election. Consequently, because Twitter’s actions reflect a commercial, rather than electoral, purpose, they were not contributions.”).

1 deprioritized communications on their platforms that violated the companies' commercially
2 motivated content policies.⁵⁰ And in MURs 7443, 7447, 7550 (Twitter, Inc.), the Commission
3 found that no contribution or independent expenditure had occurred where Twitter had, among
4 other things, banned a user from its platform for violating its policies about hate speech for a
5 commercial, rather than electoral, reason.⁵¹

6 Here, the available information indicates that Google's spam filter is in place for
7 commercial, rather than electoral, purposes. Even presuming that the NCSU Study is both
8 sufficiently rigorous and well-designed to establish that the spam filter has a disparate impact on
9 Republican and Democratic candidate emails, the fact that a service or action benefits a
10 candidate is not dispositive of whether a contribution results, so long as the purpose for that
11 service or action is a *bona fide* commercial reason rather than for the purpose of influencing a
12 federal election. As Google has stated in its public filings, its brand is "negatively affected" by
13 "reputational issues, third-party content shared on [its] platforms, . . . and product or technical
14 performance failures."⁵² Spam emails, which it contends constituted nearly half of all emails
15 sent in 2021, may contain malware, phishing attacks, and scams designed to exploit and extort
16 users;⁵³ and Google has stated in its public blog that "a big part of Gmail's draw is its built-in

⁵⁰ F&LA at 10-14, 16, MUR 7834 (Facebook, Inc., *et al.*) ("Because the available information indicates that Respondents' conduct was motivated by *bona fide* commercial reasons and was not coordinated with Respondents, the Commission finds no reason to believe that the Respondents made in-kind corporate contributions in violation 52 U.S.C. § 30118(a).").

⁵¹ F&LA at 9-12, MURs 7443, 7447, 7550 (Twitter, Inc.) ("Twitter's action that Complainants allege was a contribution or independent expenditure was part of an effort to 'preemptively detect and reduce the reach of' content that Twitter believes negatively affects its brand and ability to attract advertisers. Thus, the actions taken by Twitter appear to reflect commercial considerations, rather than an effort to influence a federal election.").

⁵² Alphabet 2021 10-K at 12.

⁵³ Tatyana Kulikova & Tatyana Shcherbakova, *Spam and Phishing in 2021*, SECURELIST BY KASPERSKY (Feb. 9, 2021), <https://securelist.com/spam-and-phishing-in-2021/105713/> (cited in Google Resp. at 4 n.24) (stating that Google's spam filter blocked 148.17 million malware attachments and 253.37 million phishing links in 2021, and outlining the most common email scams of that year).

1 security protections” designed to subvert these threats.⁵⁴ Though Google’s Response does not
2 explain with any specificity why the NCSU Study appears to reveal a disparate impact in how
3 Republican and Democratic campaign emails are affected by Gmail’s SFA, the Response
4 supports Google’s contention that the spam filter is applied to enhance the value of the Gmail
5 product, and that it is not implemented to influence any election for federal office.⁵⁵ In sum,
6 Google has credibly supported its claim that its spam filter is in place for commercial reasons
7 and thus did not constitute a contribution within the meaning of the Act.⁵⁶

8 Further, the NCSU Study does not make any findings as to the reasons why Google’s
9 spam filter appears to treat Republican and Democratic campaign emails differently. Though the
10 NCSU Study appears to demonstrate a disparate impact from Google’s spam filter, it explicitly
11 states that its authors have “no reason to believe that there were deliberate attempts from these
12 email services to create these biases to influence the voters.”⁵⁷ As discussed above, a

⁵⁴ Neil Kumaran, Grp. Prod. Manager, Gmail Sec. & Trust, *Spam Does Not Bring Just Joy — Ridding Gmail of 100 Million More Spam Messages with TensorFlow*, GOOGLE BLOG (Feb. 6, 2019), <https://cloud.google.com/blog/products/g-suite/ridding-gmail-of-100-million-more-spam-messages-with-tensorflow> (cited in Google Resp. at 4 n.22).

⁵⁵ Google Resp. at 9 (“Contrary to Complainant’s assertions, Google’s spam filters are not designed to have any electoral purpose; their use is driven by commercial considerations.”).

⁵⁶ On August 11, 2022, subsequent to the filing of the Complaint and Responses in this matter, the Commission approved an advisory opinion to Google. Google had asked whether it could engage in a pilot program under which emails sent by “authorized candidate committees, political party committees, and leadership political action committees” registered with the Commission and that meet certain security criteria would not initially be subject to Google’s usual spam filter. AO Request, AO 2022-14 (Google LLC) (“AO 2022-14”). Whereas this Report concerns Google’s prior activity, the approved proposed program set forth in the Advisory Opinion request will post-date and concern different activity than that which is the subject of the Complaint. In approving the Advisory Opinion Request, the Commission concluded that Google was proposing to modify its service for “commercial, as opposed to political, reasons,” and that “the modifications . . . would serve Google’s commercial interests in protecting its brand reputation and obtaining valuable data on how to enhance its product.” AO 2022-14 at 7-8. The Commission’s determination that Google’s proposed pilot program modification of its spam filter was for commercial purposes supports the conclusion that the spam filtering service is, itself, also provided for commercial purposes.

⁵⁷ NCSU Study at 2498.

1 contribution must be made for the purpose of influencing an election for federal office.⁵⁸ As
 2 Google's Response states, Muhammad Shahzad, "a lead author of the Study[,] has since publicly
 3 stated that those who claim the Study demonstrates political bias are mischaracterizing it."⁵⁹
 4 Without more, the NCSU Study suggests only a correlation between the political affiliation of
 5 particular campaign emails and the likelihood of being flagged by Google's SFA; it does not
 6 establish evidence "at least sufficient to warrant conducting an investigation" indicating that
 7 Google's SFA is implemented with the purpose of influencing a federal election, thereby
 8 effectuating one or more political contributions under the Act.⁶⁰

9 Accordingly, we recommend that the Commission find no reason to believe that Google,
 10 LLC, made, and Biden for President and Keana Spencer in her official capacity as treasurer
 11 knowingly accepted, prohibited in-kind corporate contributions in violation of 52 U.S.C.
 12 § 30118(a) and 11 C.F.R. §§ 109.21, 114.2.

13 **IV. RECOMMENDATIONS**

- 14 1. Find no reason to believe that Google, LLC, made, and Biden for President and
 15 Keana Spencer in her official capacity as treasurer knowingly accepted,
 16 prohibited in-kind corporate contributions in violation of 52 U.S.C. § 30118(a)
 17 and 11 C.F.R. §§ 109.21, 114.2;
- 18 2. Approve the attached Factual and Legal Analysis;
- 19 3. Approve the appropriate letters; and

⁵⁸ 52 U.S.C. § 30101(8)(A); *accord* 11 C.F.R. § 100.52.

⁵⁹ Google Resp. at 12. Shahzad told *The Washington Post*, "Gmail isn't biased like the way it's being portrayed. . . . I'm not advocating for Gmail or anything. I'm just stating that when we take the observation out of a study, you should take all of the observations, not just cherry-pick a few and then try to use them." Cristiano Lima, *Republicans Seized on a Study as Proof of Google's Bias. Its Authors Say It's Being Misrepresented.*, WASH. POST (May 25, 2022), <https://www.washingtonpost.com/politics/2022/05/25/republicans-seized-study-proof-googles-bias-its-authors-say-it-being-misrepresented/> (cited in Google Resp. at 1 n.3, 12 n.56).

⁶⁰ Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,545 (Mar. 16, 2007).

1 4. Close the file.

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November 30, 2022

Date

Lisa J. Stevenson
Acting General Counsel

Charles Kitcher

Charles Kitcher
Associate General Counsel for
Enforcement

Peter G. Blumberg

Peter Blumberg
Assistant General Counsel

Justine A. di Giovanni

Justine A. di Giovanni
Attorney

Attachment:
Factual and Legal Analysis

1 **FEDERAL ELECTION COMMISSION**
2 **FACTUAL AND LEGAL ANALYSIS**

3 **RESPONDENTS:** Google, LLC

MUR 7991

4 Biden for President and Keana Spencer
5 in her official capacity as treasurer

6 **I. INTRODUCTION**

7 This matter arises from a Complaint alleging that the spam filter associated with
8 Google’s email platform, Gmail, disproportionately flagged Republican campaign emails as
9 spam during the 2020 election cycle. The Complaint alleges that the spam filter thereby
10 eliminated a major source of political fundraising for Republican candidates and undermined
11 their ability to communicate their messages to the public, resulting in prohibited corporate in-
12 kind contributions to Biden for President and other, unnamed Democratic candidates in violation
13 of the Federal Election Campaign Act of 1971, as amended (the “Act”). In line with the
14 Commission’s recent precedent, because Google credibly asserts that its spam filter is applied on
15 a politically neutral basis and for a commercial purpose, the Commission finds no reason to
16 believe that Google, LLC, made, and Biden for President and Keana Spencer in her official
17 capacity as treasurer knowingly accepted, prohibited in-kind corporate contributions in violation
18 of 52 U.S.C. § 30118(a) and 11 C.F.R. §§ 109.21, 114.2.

19 **I. FACTUAL BACKGROUND**

20 **A. The Parties and the Gmail Email Platform**

21 Google, LLC, is a technology company owned by Alphabet Inc., a publicly traded
22 Delaware corporation headquartered in Mountain View, California.¹ It provides a number of
23 services, including its email platform, Gmail, which Google describes as “the world’s largest

¹ Google Resp. at 3 (June 17, 2022).

1 email platform” with “[m]ore than 1.5 billion people” using it on a monthly basis.² Google
2 states that it generates revenue by selling paid advertising so that consumers can use the product
3 for free; in addition, Google describes Gmail as a “foundational component of the ‘Google
4 Workspace’ product, which bundles a set of secure collaboration and productivity apps created
5 for businesses of all sizes and which can be purchased for a fee.”³

6 According to its most recent annual report filed with the U.S. Securities and Exchange
7 Commission, Google states that its

8 brands have been, and may in the future be, negatively affected by
9 . . . reputational issues, third-party content shared on our platforms,
10 . . . and product or technical performance failures. . . . Our success
11 will depend largely on our ability to remain a technology leader
12 and continue to provide high-quality, trustworthy, innovative
13 products and services that are truly useful and play a valuable role
14 in a range of settings.⁴

15 To “provide a better experience for [its] users,” and thus “maintain the Gmail brand,
16 business, and financial condition,” Google implements a spam filter policy that it asserts in its
17 Response “appl[ies] to emails from all senders . . . whether they are politically affiliated or not.”⁵
18 Google states that “Gmail’s filtering capabilities and security protections are built to give users
19 the best overall Gmail experience by delivering the emails they want to see” and that providing
20 this service is “integral to Google’s purpose.”⁶

² *Id.* at 4.

³ *Id.* Google notes that “[m]ore than five million paying businesses use Gmail in the workplace.” *Id.*

⁴ Alphabet Inc., 2021 U.S. Secs. & Exch. Comm’n Form 10-K Annual Report at 12 (Feb. 1, 2022) [hereinafter Alphabet 2021 10-K], https://abc.xyz/investor/static/pdf/20220202_alphabet_10K.pdf.

⁵ Google Resp. at 4-5, 9.

⁶ *Id.* at 5.

1 Biden for President is the authorized campaign committee of 2020 Democratic
2 presidential candidate Joseph R. Biden, Jr., and Keana Spencer is its treasurer.⁷

3 **B. The NCSU Study**

4 In March 2022, the North Carolina State University Department of Computer Science
5 released an academic study (the “NCSU Study”) intended to identify political biases in spam
6 filtering algorithms (“SFAs”) as applied by three email platforms: Google’s Gmail, Microsoft’s
7 Outlook, and Verizon’s Yahoo! Mail.⁸ To perform this analysis, the NCSU Study’s authors
8 created 102 email accounts which they subscribed to the email listservs of the two primary party
9 presidential candidates, Biden and his opponent, Donald J. Trump, as well as those of 78 Senate
10 and 156 House candidates from across the political spectrum.⁹ The NCSU Study then split the
11 email accounts into different groups in order to test the effect that user actions had on the email
12 platforms’ SFAs: (1) a “Baseline Experiment” group in which the accounts never opened or read
13 any emails and did not move them to or from their spam folders or inboxes; (2) an “Interaction
14 Experiment” group in which the accounts read all emails in both the spam folder and the inbox
15 (the “Read Group”); (3) an “Interaction Experiment” group in which the accounts moved all
16 received emails in their inboxes to their spam folders (the “Spam Group”); and (4) an
17 “Interaction Experiment” group in which the accounts moved all emails in their spam folders to

⁷ Biden for President, Amended Statement of Organization at 1-2 (Aug. 30, 2022), <https://docquery.fec.gov/pdf/867/202208309528296867/202208309528296867.pdf>.

⁸ Compl. (Apr. 26, 2022); *see id.*, Ex. A (Hassan Iqbal, *et al.*, Dep’t of Comput. Sci., N.C. State Univ., *Left or Right: A Peek into the Political Biases in Email Spam Filtering Algorithms During US Election 2022*, in WEB CONFERENCE 2022 at 2491 (Assoc. for Comput. Mach. ed. 2022) [hereinafter “NCSU Study”]).

⁹ NCSU Study at 2492-93.

1 their inboxes (the “Inbox Group”).¹⁰ The study observed the accounts over a five-month period
2 from July 1, 2020, through November 30, 2020.¹¹

3 The NCSU Study concluded that each of the three email platforms appeared to exhibit
4 “aggregate political bias” in the Baseline Experiment group: While Outlook and Yahoo! Mail
5 leaned “towards the right” by marking a higher percentage of Democratic campaign emails as
6 spam than Republican campaign emails, the NCSU Study concluded that “Gmail leans towards
7 the left as it marks a higher percentage of [Republican] emails as spam.”¹² The NCSU Study
8 determined that, across the study period in the Baseline Experiment group, Gmail marked 67.6%
9 of emails from Republican candidates as spam compared to 8.2% of emails from Democratic
10 Candidates.¹³ Outlook, on the other hand, marked 95.8% of Democratic emails as spam, and
11 75.4% of Republican emails, while Yahoo! Mail marked 14.2% more Democratic emails spam
12 than Republican emails.¹⁴ The NCSU Study also noted that the disparity in Gmail’s SFA
13 between Republican and Democratic emails increased over the period of the study, with the
14 percentage of Republican emails marked as spam rising and the Democratic email percentage
15 remaining largely constant.¹⁵

16 With respect to the three Interaction Experiment groups, the NCSU Study observed that
17 the Read Group’s interactions “did not have any significant impact on the political bias of any of

¹⁰ *Id.* at 2493.

¹¹ *Id.*

¹² *Id.* at 2494.

¹³ *Id.*

¹⁴ *Id.* The NCSU Study does not appear to provide the actual percentage of emails from each political party that Yahoo! Mail marked as spam.

¹⁵ *Id.*

1 the three email services.”¹⁶ The Spam Group’s interactions had a more significant effect, and
2 Gmail’s SFA’s aggregate bias against Republican campaign emails “improved[] significantly”:
3 By moving all emails from the inbox to the spam folder, the Spam Group’s interaction increased
4 the percentage of Democratic emails marked as spam from 8.2% to 54.2%, and Republican
5 emails from 67.6% to 83.9% as the NCSU study appears to reflect.¹⁷ Finally, the Inbox Group’s
6 interactions caused political bias in Gmail’s SFA to “reduce significantly,” but did not have the
7 same effect on Yahoo! Mail’s nor Outlook’s: The percentage of Republican emails marked as
8 spam by Gmail decreased from 67.6% in the Baseline Group to 5.34% in the Inbox Group, while
9 Democratic emails marked as spam decreased from 8.2% to 0%. The NCSU Study concluded
10 that the Inbox Group’s interactions caused Gmail to “maintain[] its left[-]leaning [bias], but not
11 very strongly anymore.”¹⁸

12 In addressing its limitations, the NCSU Study states that several factors affected the
13 significance of the Study’s results: First, the NCSU Study observed a limited time period, and
14 the authors note that they “cannot make inferences about the behaviors of the SFAs in general.”¹⁹
15 Second, a number of variables were outside the NCSU Study’s control, including how many
16 emails the individual campaigns sent; how long the campaigns had been active; and how many
17 users outside of the study group had marked a specific email as spam. Thus, the study authors
18 conclude, they “cannot determine the extent to which these factors influence spam

¹⁶ *Id.* at 2497.

¹⁷ *Id.* at 2497-98. Yahoo! Mail became “almost unbiased” as a result of the Spam Group’s actions, and Outlook “did not show a significant impact on the percentage of emails marked as spam.” *Id.* at 2497.

¹⁸ *Id.* at 2498. In contrast, the aggregate political bias for both Outlook and Yahoo! Mail “increased . . . because neither of the two services reacted noticeably” to the interaction of moving emails from the spam folder to the inbox. *Id.*

¹⁹ *Id.*

1 percentages.”²⁰ Finally, the authors note that their study selected for particular variables, and
2 that other variables may have other effects not shown in the NCSU Study.²¹ They state that “we
3 have no reason to believe that there were deliberate attempts from these email services to create
4 these biases to influence the voters.”²²

5 **C. The Complaint and Responses**

6 The Complaint relies on the NCSU Study to allege that Google’s spam filter is biased
7 against Republican candidates such that its operation constitutes an in-kind contribution to
8 Democratic candidates and their committees, including Biden for President.²³ The Complaint
9 alleges that “Google’s biased email filtering mechanism wrongly diverted untold numbers of
10 emails from Republican candidates into recipients’ spam folders, thereby eliminating a major
11 source of political fundraising for Republican candidates and severely undermining their ability
12 to communicate their messages to the public.”²⁴ Thus, it urges that the Commission find that
13 “Google has made illegal, corporate in-kind contributions to the Biden campaign and
14 Democrat[ic] candidates across the country by its overwhelmingly — and indefensibly —
15 disproportionate suppression of Republican candidate emails.”²⁵

16 The Responses deny the allegations. Google states that “Gmail is a commercial product,
17 and its spam filters are one of a number of features that Gmail offers to enable more than 1.5
18 billion users to be more secure and efficient in their use of the product.”²⁶ It goes on to say that

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Compl. at 5-6.

²⁴ *Id.* at 2.

²⁵ *Id.*

²⁶ Google Resp. at 1.

1 its SFA “operate[s] solely for commercial purposes: to enhance Gmail users’ experience by
2 fostering a secure, safe, and effective email system, which, in turn, promotes Google’s brand and
3 financial success.”²⁷ Google avers that its spam filter policies “apply to all bulk senders —
4 regardless of political affiliation and regardless of whether the sender is a political campaign or
5 any other enterprise.”²⁸

6 Google describes that it designed its SFA to look at
7 a variety of signals, including characteristics of the IP address,
8 domains/subdomains, whether bulk senders are authenticated, and
9 user input. User feedback, such as when a user marks a certain
10 email as spam or signals they want a sender’s emails in their inbox,
11 is key to this filtering process, and our filters learn from user
12 actions.²⁹

13 Google contends that the NCSU Study did not examine key factors that influence the action of its
14 SFA, including sender-controlled settings that reduce the likelihood that emails are blocked by
15 Google’s SFA, whether the sender is authenticated, and how other users had flagged the emails
16 received during the study, and thus “cannot be said to measure how the spam filters work in the
17 vast majority of cases.”³⁰

18 Google argues that its spam filter does not result in contributions under the Act.³¹ It
19 claims that, because its SFA is undertaken for a *bona fide* commercial purpose and not for the
20 purpose of influencing an election, its operation does not constitute a contribution or

²⁷ *Id.* at 2.

²⁸ *Id.*

²⁹ *Id.* at 5 (quoting Neil Kumaran, Grp. Prod. Manager, Gmail Sec. & Trust, *Understanding Gmail’s Spam Filters*, GOOGLE BLOG (May 27, 2022), <https://cloud.google.com/blog/products/workspace/an-overview-of-gmails-spam-filters>).

³⁰ *Id.* at 4-5.

³¹ *Id.* at 6.

1 contributions under the Act.³² To support this argument, it asserts that the SFA incorporates
2 “objective criteria” that is “neutral to the political affiliation of a sender and reflects user
3 preferences,”³³ and states that “Google also provides guidance to senders on how to minimize
4 having the emails they send filtered out of Gmail users’ inboxes in various resources.”³⁴

5 Google further argues that the Complaint is vague, speculative, and draws unwarranted
6 legal conclusions,³⁵ both because it relies on a single study without any other evidence and
7 because that study is flawed and does not support the claims made in the Complaint.³⁶ It
8 contends that the NCSU Study was small, analyzing only 34 recipient email addresses when
9 Gmail has 1.5 billion users, and over “a mere 153 days, 27 of which were post-election.”³⁷
10 Google argues that the number of accounts analyzing user interactions was even smaller and, as
11 such, is even less indicative of broader trends: only four Gmail accounts were included in each
12 of the Read, Spam, and Inbox Groups.³⁸ Google also asserts that the NCSU Study was not
13 comparing “apples[]to[]apples,” as the emails sent by Republican and Democratic campaigns
14 were not identical, and that there are multiple factors that impact the action of Google’s SFA that
15 were outside the authors’ control.³⁹

³² *Id.* at 7-11.

³³ *Id.* at 10.

³⁴ *Id.* (citing *Prevent Mail to Gmail Users from Being Blocked or Sent to Spam*, GMAIL HELP, <https://support.google.com/mail/answer/81126?hl=en> (last visited Nov. 30, 2022); POSTMASTER TOOLS BY GMAIL, <https://gmail.com/postmaster/> (last visited Nov. 30, 2022); *Best Practices: Send Emails to Gmail Users*, GOOGLE TRAINING CTR, https://civicsresources.withgoogle.com/training-center/amplify/lesson-7/?_sm_au=isVknNWPs9V1nRWNB2RNkKQT82pFc (last visited Nov. 30, 2022)).

³⁵ *Id.* at 11-14.

³⁶ *Id.*

³⁷ *Id.* at 13.

³⁸ *Id.*

³⁹ *Id.*

1 Biden for President submits that the Complaint “states no facts, and indeed makes no
2 allegations, that Biden for President took any action that would constitute a violation of federal
3 campaign finance law.”⁴⁰ It states that the Commission has “resolved the legal theory advanced
4 here in numerous matters since the 2020 election” and that “[t]his pleading brings no new facts
5 or legal arguments to the questions raised and answered in these earlier cases.”⁴¹

6 **II. LEGAL ANALYSIS**

7 The Act prohibits corporations from making contributions to federal candidates, and
8 likewise bars candidates, political committees (other than independent expenditure-only political
9 committees and committees with hybrid accounts), and other persons from knowingly accepting
10 or receiving corporate contributions.⁴²

11 Under the Act, a “contribution” includes “any gift, subscription, loan, advance, or deposit
12 of money or anything of value made by any person for the purpose of influencing any election
13 for Federal office.”⁴³ The term “anything of value” includes “all in-kind contributions.”⁴⁴ The
14 Commission has concluded that a commercial vendor providing services to political committees
15 will not make a contribution for the purpose of influencing an election when its business activity
16 “reflects commercial considerations and does not reflect considerations outside of a business
17 relationship.”⁴⁵ A commercial vendor need not make its services available to committees

⁴⁰ Biden for President Resp. at 1 (May 17, 2022).

⁴¹ *Id.* at 2 (citing MURs 7870 (Google LLC, *et al.*); MURs 7812, 7825, 7869 (Facebook, Inc., *et al.*); MURs 7821, 7827, 7868 (Twitter, Inc., *et al.*); MUR 7858 (Facebook, Inc.); MUR 7841 (Twitter, Inc., *et al.*); MUR 7834 (Facebook, *et al.*); MUR 7832 (Twitter, Inc.); MUR 7829 (Twitter, Inc.); MUR 7742 (Twitter, Inc.); MUR 7687 (Twitter, Inc.); MUR 7641 (Facebook, Inc.); MURs 7443, 7447, 7550 (Twitter, Inc.)).

⁴² 52 U.S.C. § 30118(a); *accord* 11 C.F.R. § 114.2(a), (d).

⁴³ 52 U.S.C. § 30101(8)(A); *accord* 11 C.F.R. § 100.52.

⁴⁴ 11 C.F.R. § 100.52(d).

⁴⁵ Advisory Opinion (“AO”) 2012-31 at 4 (AT&T).

1 representing all political ideologies, but rather may establish objective business criteria to protect
2 the commercial viability of its business without making contributions to the committees that
3 meet those criteria.⁴⁶

4 The Commission has long considered activity engaged in for *bona fide* commercial
5 reasons not to be “for the purpose of influencing an election,” and thus, not a contribution or
6 expenditure under 52 U.S.C. § 30118(a).⁴⁷ This is true even if a candidate benefitted from the
7 commercial activity.⁴⁸

8 The Commission has decided a number of matters involving online communication
9 platforms and the issue of whether particular conduct constituted commercial activity or
10 contributions made for an electoral purpose. For example, in MURs 7821, 7827, 7868 (Twitter,
11 Inc., *et al.*), the Commission found no reason to believe that Twitter had made a prohibited in-

⁴⁶ AO 2017-06 at 6 (Stein & Gottlieb) (“[A] commercial vendor, providing services to political committees . . . need not make its services available to committees representing all political ideologies, but rather may establish objective business criteria to protect the commercial viability of its business without making contributions to the committees that meet those criteria.”); AO 2004-06 at 1 (Meetup) (explaining that a corporation may provide goods and services to political committees without being considered to have made an in-kind contribution so long as it does so “on the same terms and conditions available to all similarly situated persons in the general public”); AO 2012-26 at 10 (Cooper for Congress, *et al.*) (concluding that no contribution to committee resulted where its participation in a text message fundraising program was subject to “objective and . . . commercially reasonable” criteria).

⁴⁷ See, e.g., Factual & Legal Analysis (“F&LA”) at 4, MUR 6586 (World Wrestling Ent., Inc.) (finding that WWE acted with the “sole intent to defend its business reputation” and not for the purpose of influencing an election when WWE’s senior vice president sent a letter to a newspaper seeking a retraction of a negative article about Senate candidate Linda McMahon, who owned and served as CEO of WWE); First Gen. Counsel’s Rpt. (“FGCR”) at 13 & Cert. ¶ 1 (June 7, 2005), MUR 5474 (Dog Eat Dog Films, *et al.*) (approving no reason to believe recommendation) (determining that distributors and marketers of *Fahrenheit 9/11* film did so “in connection with *bona fide* commercial activity and not for the purpose of influencing an election”); AO 2018-11 at 4 (Microsoft Corp.) (concluding that commercially reasonable efforts “to protect [Microsoft’s] brand reputation” by providing election-sensitive customers with free account security services are not in-kind contributions).

⁴⁸ See FGCR at 16 & Cert. ¶ 5 (June 6, 1994), MUR 3622 (The Clinton/Gore ‘92 Committee) (approving no reason to believe recommendation) (“[T]he fact that any of these candidates . . . may have received an indirect benefit (dissemination of their political positions) as a result of the sale of these tapes does not convert commercial activity into a corporate contribution.”); F&LA at 6, MUR 7024 (Van Hollen for Senate, *et al.*) (opining that the “question under the Act is whether the legal services were provided for the purpose of influencing a federal election, not whether they provided a benefit to Van Hollen’s campaign,” and concluding there was no contribution given the “absence of any objective or subjective indication” respondents acted for the purpose of influencing the election).

1 kind contribution by engaging in a number of content moderation activities, including placing a
2 label on certain Tweets alleging election fraud and misrepresenting the results of the 2020
3 election, as well as blocking users from sharing information derived from materials believed at
4 the time to have been stolen, because those actions were undertaken by Twitter for a commercial
5 purpose, even though they may have benefited Biden for President.⁴⁹ Similarly, in MUR 7834,
6 (Facebook, Inc., *et al.*), the Commission found no reason to believe an illegal in-kind
7 contribution had occurred where, *inter alia*, Google, Facebook, and Twitter had removed and
8 deprioritized communications on their platforms that violated the companies' commercially
9 motivated content policies.⁵⁰ And in MURs 7443, 7447, 7550 (Twitter, Inc.), the Commission
10 found that no contribution or independent expenditure had occurred where Twitter had, among
11 other things, banned a user from its platform for violating its policies about hate speech for a
12 commercial, rather than electoral, reason.⁵¹

13 Here, the available information indicates that Google's spam filter is in place for
14 commercial, rather than electoral, purposes. Even presuming that the NCSU Study is both
15 sufficiently rigorous and well-designed to establish that the spam filter has a disparate impact on
16 Republican and Democratic candidate emails, the fact that a service or action benefits a

⁴⁹ F&LA at 13-19, 21 MURs 7821, 7827, 7868 (Twitter, Inc., *et al.*) ("As discussed above, the information before the Commission indicates that Twitter's actions . . . were undertaken for commercial reasons and not for the purpose of influencing an election. Consequently, because Twitter's actions reflect a commercial, rather than electoral, purpose, they were not contributions.").

⁵⁰ F&LA at 10-14, 16, MUR 7834 (Facebook, Inc., *et al.*) ("Because the available information indicates that Respondents' conduct was motivated by *bona fide* commercial reasons and was not coordinated with Respondents, the Commission finds no reason to believe that the Respondents made in-kind corporate contributions in violation 52 U.S.C. § 30118(a).").

⁵¹ F&LA at 9-12, MURs 7443, 7447, 7550 (Twitter, Inc.) ("Twitter's action that Complainants allege was a contribution or independent expenditure was part of an effort to 'preemptively detect and reduce the reach of' content that Twitter believes negatively affects its brand and ability to attract advertisers. Thus, the actions taken by Twitter appear to reflect commercial considerations, rather than an effort to influence a federal election.").

1 candidate is not dispositive of whether a contribution results, so long as the purpose for that
2 service or action is a *bona fide* commercial reason rather than for the purpose of influencing a
3 federal election. As Google has stated in its public filings, its brand is “negatively affected” by
4 “reputational issues, third-party content shared on [its] platforms, . . . and product or technical
5 performance failures.”⁵² Spam emails, which it contends constituted nearly half of all emails
6 sent in 2021, may contain malware, phishing attacks, and scams designed to exploit and extort
7 users;⁵³ and Google has stated in its public blog that “a big part of Gmail’s draw is its built-in
8 security protections” designed to subvert these threats.⁵⁴ Though Google’s Response does not
9 explain with any specificity why the NCSU Study appears to reveal a disparate impact in how
10 Republican and Democratic campaign emails are affected by Gmail’s SFA, the Response
11 supports Google’s contention that the spam filter is applied to enhance the value of the Gmail
12 product, and that it is not implemented to influence any election for federal office.⁵⁵ In sum,

⁵² Alphabet 2021 10-K at 12.

⁵³ Tatyana Kulikova & Tatyana Shcherbakova, *Spam and Phishing in 2021*, SECURELIST BY KASPERSKY (Feb. 9, 2021), <https://securelist.com/spam-and-phishing-in-2021/105713/> (cited in Google Resp. at 4 n.24) (stating that Google’s spam filter blocked 148.17 million malware attachments and 253.37 million phishing links in 2021, and outlining the most common email scams of that year).

⁵⁴ Neil Kumaran, Grp. Prod. Manager, Gmail Sec. & Trust, *Spam Does Not Bring Just Joy — Ridding Gmail of 100 Million More Spam Messages with TensorFlow*, GOOGLE BLOG (Feb. 6, 2019), <https://cloud.google.com/blog/products/g-suite/ridding-gmail-of-100-million-more-spam-messages-with-tensorflow> (cited in Google Resp. at 4 n.22).

⁵⁵ Google Resp. at 9 (“Contrary to Complainant’s assertions, Google’s spam filters are not designed to have any electoral purpose; their use is driven by commercial considerations.”).

1 Google has credibly supported its claim that its spam filter is in place for commercial reasons
2 and thus did not constitute a contribution within the meaning of the Act.⁵⁶

3 Further, the NCSU Study does not make any findings as to the reasons why Google’s
4 spam filter appears to treat Republican and Democratic campaign emails differently. Though the
5 NCSU Study appears to demonstrate a disparate impact from Google’s spam filter, it explicitly
6 states that its authors have “no reason to believe that there were deliberate attempts from these
7 email services to create these biases to influence the voters.”⁵⁷ As discussed above, a
8 contribution must be made for the purpose of influencing an election for federal office.⁵⁸ As
9 Google’s Response states, Muhammad Shahzad, “a lead author of the Study[,] has since publicly
10 stated that those who claim the Study demonstrates political bias are mischaracterizing it.”⁵⁹
11 Without more, the NCSU Study suggests only a correlation between the political affiliation of
12 particular campaign emails and the likelihood of being flagged by Google’s SFA; it does not

⁵⁶ On August 11, 2022, subsequent to the filing of the Complaint and Responses in this matter, the Commission approved an advisory opinion to Google. Google had asked whether it could engage in a pilot program under which emails sent by “authorized candidate committees, political party committees, and leadership political action committees” registered with the Commission and that meet certain security criteria would not initially be subject to Google’s usual spam filter. AO Request, AO 2022-14 (Google LLC) (“AO 2022-14”). Whereas this Report concerns Google’s prior activity, the approved proposed program set forth in the Advisory Opinion request will post-date and concern different activity than that which is the subject of the Complaint. In approving the Advisory Opinion Request, the Commission concluded that Google was proposing to modify its service for “commercial, as opposed to political, reasons,” and that “the modifications . . . would serve Google’s commercial interests in protecting its brand reputation and obtaining valuable data on how to enhance its product.” AO 2022-14 at 7-8. The Commission’s determination that Google’s proposed pilot program modification of its spam filter was for commercial purposes supports the conclusion that the spam filtering service is, itself, also provided for commercial purposes.

⁵⁷ NCSU Study at 2498.

⁵⁸ 52 U.S.C. § 30101(8)(A); *accord* 11 C.F.R. § 100.52.

⁵⁹ Google Resp. at 12. Shahzad told *The Washington Post*, “Gmail isn’t biased like the way it’s being portrayed. . . . I’m not advocating for Gmail or anything. I’m just stating that when we take the observation out of a study, you should take all of the observations, not just cherry-pick a few and then try to use them.” Cristiano Lima, *Republicans Seized on a Study as Proof of Google’s Bias. Its Authors Say It’s Being Misrepresented.*, WASH. POST (May 25, 2022), <https://www.washingtonpost.com/politics/2022/05/25/republicans-seized-study-proof-googles-bias-its-authors-say-it-being-misrepresented/> (cited in Google Resp. at 1 n.3, 12 n.56).

1 establish evidence “at least sufficient to warrant conducting an investigation” indicating that
2 Google’s SFA is implemented with the purpose of influencing a federal election, thereby
3 effectuating one or more political contributions under the Act.⁶⁰

4 Accordingly, the Commission finds no reason to believe that Google, LLC, made, and
5 Biden for President and Keana Spencer in her official capacity as treasurer knowingly accepted,
6 prohibited in-kind corporate contributions in violation of 52 U.S.C. § 30118(a) and 11 C.F.R.
7 §§ 109.21, 114.2.

⁶⁰ Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,545 (Mar. 16, 2007).