UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re Application for Monitoring of Global Positioning System Information and Cell Site Location Data for Two T-Mobile Cell Phones and Search of Information Associated with the Same Numbers in Violation of [redacted]	**Case No. 22-sc-764 (ZMF)** **Under Seal**[1]

MEMORANDUM OPINION

I. BACKGROUND

Cell phone providers can obtain the prospective precise location information ("PLI") "of a user's wireless device by relying on the device's built-in [global positioning system ("GPS")] capability,"[2] or "by measuring signals the device sends to multiple towers or other antennas." *Geolocation Technology and Privacy: Hearing Before H. Comm. On Oversight & Gov't Reform*, 114th Cong. (2016) (statement of Richard Downing, Acting Deputy Assistant Att'y Gen., U.S. Dep't of Just.).

The government applied for a search warrant (the "Warrant") to compel a cell phone service provider (the "Provider") to produce PLI[3] for two individuals for a period of thirty days,

[1] Because this matter remains under seal, the Court offered the government an opportunity to request redactions to this opinion prior to publishing.

[2] Providers can obtain PLI through an investigative technique called "GPS 'pinging.'" *United States v. Thorne*, 548 F. Supp. 3d 70, 115 (D.D.C. 2021). "A cell phone's GPS location can be identified so long as the phone has GPS functionality installed (as smartphones almost universally do), the phone is turned on, and the GPS functionality is not disabled. . . . The GPS data produced by the three satellites reveal the latitude and longitude coordinates of the cell phone, [] producing an estimate of a device's location." *Id.* at 115 (cleaned up).

[3] The Warrant would compel the Provider to produce "[i]nformation about the location of the target[s'] telephone[s]," which included "all available E-911 Phase II data, GPS data, latitude-longitude data, and other [PLI], as well as all data about which 'cell towers' (i.e., antenna towers

pursuant to 18 U.S.C. § 2703 of the Stored Communications Act ("SCA") and Federal Rule of Criminal Procedure 41 ("Rule 41"). *See* Appl. for Warrant by Telephone or Other Reliable Electronic Means ("Warrant Appl.") 42, ECF No. 1. The government alleged that these two individuals were involved in ongoing criminal offenses. *See* Warrant Appl. at 14.

The government also submitted a combined application for a nondisclosure order pursuant to 18 U.S.C. § 2705(b) of the SCA ("NDO"), delayed notice order pursuant to 18 U.S.C. § 3103a(b) ("Delayed Notice Order"), and a sealing order citing to *Washington Post v. Robinson*, 935 F.2d 282, 287-89 (D.C. Cir. 1991) ("Sealing Order"). *See* Appl. for Nondisclosure Order Under 18 U.S.C. § 2705(b) and to Seal Warrant and Related Documents ("NDO, Sealing, & Delayed Notice Appl."), ECF No. 2. This three-headed hydra sought to preclude notice of the search. *See id.*

The Court granted in part and denied in part the government's requests. *See* Order, ECF No. 4; Min. Order (Mar. 25, 2022).

II. LEGAL AUTHORITY FOR PLI WARRANTS

In the beginning, the government sought PLI by requesting a hybrid 18 U.S.C. § 2703(d) order ("2703(d) Order") and pen register trap and trace order pursuant to 18 U.S.C. § 3123 ("PRTT"). *See In re Application of U.S. for Ord. for Disclosure of Telecomms. Recs. & Authorizing Use of Pen Reg. & Trap & Trace*, 405 F. Supp. 2d 435, 444–49 (S.D.N.Y. 2005). This hybrid order was subject to a lower standard of proof than the probable cause standard required for a search warrant. *See id.* However, even then, prescient prosecutors sought PLI pursuant to a search warrant. *See In re Matter of Application of U.S. for Order Authorizing Monitoring of Geolocation*

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covering specific geographic areas) and 'sectors' (i.e., faces of the towers) received a radio signal from the cellular telephone[s]." Attach. B-1 3, ECF No. 1; *see also* Warrant Appl. 30-32 (explaining the technology behind the request).

& Cell Site Data for Sprint Spectrum Cell Phone Number ESN, No. 6-mc-186, 2006 WL 6217584, at *2–*4 (D.D.C. Aug. 25, 2006) (not ruling on the validity of the "hybrid theory" because the government established probable cause to obtain PLI via a warrant). The Supreme Court subsequently ruled that people have a reasonable expectation of privacy in their historical location information. *See Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018).[4] PLI requests have since evolved to a new hybrid species: a search warrant and PRTT order ("PLI Warrant"). *See* Warrant Appl.; *see also In re Application of U.S.*, 405 F. Supp. 2d at 443–44 (government must combine a search warrant with a PRTT order to obtain PLI).

A. Search Warrants

Rule 41 authorizes search and seizure warrants. *See* Fed. R. Crim. P. 41. The SCA offers additional search warrant authority, allowing the government to obtain "information collected by" a cell phone provider.[5] *In re Matter of Search of Cellular Tel.*, 430 F. Supp. 3d 1264, 1268 (D. Utah 2019). SCA warrants must comport with Rule 41. *See* 18 U.S.C. § 2703(c)(1)(A).

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[4] Pursuant to *Carpenter*, the government must obtain a search warrant before seeking historical cell-site location information, absent exigent circumstances. *Carpenter*, 138 S. Ct. at 2222. The Supreme Court did "not express a view on . . . real-time [cell-site location information]." *Id.* Yet the logic that justified the necessity for a warrant for historical location information seemingly applies to real-time (a/k/a prospective) location information. *See United States v. Baker*, 563 F. Supp. 3d 361, 379–82 (M.D. Pa. 2021). However, some courts disagree. *See United States v. Lewis*, 38 F. 4th 527, 539 (7th Cir. 2022) ("[L]eav[ing] for another day whether the collection of real-time [cell-site location information] after *Carpenter* ever amounts to a search.").

[5] Multiple statutes provide additional authority for search and seizure warrants. *See, e.g.*, 18 U.S.C. §§ 982, 2703, 3117. Which additional authority the government relies upon depends on the information sought and how it is obtained. *See Sprint Spectrum Cell Phone*, 2006 WL 6217584, at *2. For example, requests to track an individual's location through a tracking device require enlisting the Tracking Device Statute, 18 U.S.C. § 3117. *See Cellular Tel.*, 430 F. Supp. 3d at 1268–71. However, requests to track location through a person's cell phone via her provider triggers the SCA. *See id.* This is because "[a] cell phone used to track a person's movements is not a tracking device under § 3117 because the government does not physically install or place the targeted cell phone on the person or property of a suspect." *In re Use of Cell-Site Simulator to Locate Cellular Device Associated with One Cellular Tel. Pursuant to Rule 41*, 531 F. Supp. 3d 1, 7–8 (D.D.C. Mar. 25, 2021) (cleaned up). As such, PLI Warrants are not tracking device warrants.

PLI Warrants draw on the SCA for two reasons. First, "warrants issued pursuant to the SCA are exempted from the [in-district] venue limitation of Rule 41(b)[.]" *United States v. Guzman Loera*, 24 F.4th 144, 158 (2d Cir. 2022). Second, the SCA allows the government to petition a court to forbid a provider from giving its customer notice of the search. *See* 18 U.S.C. § 2705(b).

B. Pen Register Act

A PRTT order forces a provider to "capture [and produce] real-time records of numbers dialed and calls received" for up to sixty days. *United States v. Griffin*, No. 2:17-cr-20639, 2022 WL 2072042, at *6 (E.D. Mich. June 8, 2022); *see* 18 U.S.C. § 3123(c)(1). Prior to the Pen Register Act, the government could only compel a provider to prospectively produce such data via the All Writs Act. *See United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977). At bottom, *New York Telephone* reveals that the government requires some authority to compel prospective actions from a third party.[6] *See id.*

See United States v. Ackies, 918 F.3d 190, 198–200. This distinction is important as to notice requirements. *See infra* Section III.

[6] Another example of this principle arises in the seizure of websites. There, the government may seize a website and compel the host of the site to redirect the website URL to a government-controlled website. *See Appl. for Warrant to Seize Property Subject to Forfeiture*, No. 20-sz-30, (D.D.C. Apr. 22, 2020), ECF No. 1 (available at https://www.justice.gov/usao-dc/pr/covid-19-fraud-domain-seized-seller-who-attempted-sell-it-using-bitcoin). Because the government cannot compel the continued prospective redirect action with a warrant alone, it must rely on the All Writs Act. *See id.* at 10–11 (citing All Writs Act, but not conceding that doing so was necessary).

An anticipatory warrant can also compel a third-party to prospectively assist the government in its search and seizure. *See United States v. All Wire Transactions Involving Dandong Zhicheng Metallic Material Co.*, Nos. 17-mj-217–24, 2017 WL 3233062, at *4 (D.D.C. May 22, 2017) (an anticipatory warrant can compel a third-party to search on behalf of the government if the government shows "(1) that it is *now probable* that (2) contraband, evidence of a crime, or a fugitive, *will be* on the described premises (3) when the warrant is executed") (cleaned up). The Supreme Court created such authority in *United States v. Grubbs*, 547 U.S. 90, 96 (2006).

A PRTT order provides the government with the authority to compel a provider to produce PLI data. *See In re Matter of Application of U.S. for Ord. Authorizing Installation & Use of Pen Reg.*, 415 F. Supp. 2d 211, 214 (W.D.N.Y. 2006) ("[L]ocation data is encompassed by the term 'signaling information' when that term was added to the Pen Statute by Congress in 2001 as part of the Patriot Act[.]"); *In re Application of U.S.*, 405 F. Supp. 2d at 440–41 ("[P]hysical location data *would* have been obtainable under the Pen Register Statute[.]").[7]

That the government must obtain PLI via a search warrant—instead of a § 2703(d) order—does not obviate the need for a PRTT order. *See N. Y. Tel. Co.*, 434 U.S. at 176–77; *Griffin*, 2022 WL 2072042, at *6. The government shares this belief, as the Warrant request cites the Pen Register Act. *See* Warrant Appl. at 12.

Adding the Pen Register Act authority minimally burdens the government. To obtain a PRTT order, an attorney for the government must "certif[y]" that use of the PRTT "is relevant to an ongoing criminal investigation." 18 U.S.C. § 3123(a)(1). That showing is far less than probable cause. *See United States v. Jones*, No. 21-cr-89, 2022 WL 4282098, at *4–5 (W.D. Ky. May 24, 2022) *R. & R. adopted*, 2022 WL 3335773, at *1 (W.D. Ky. Aug. 12, 2022). Thus, a search warrant request will always satisfy the PRTT Order threshold. *See id.* at *5 (collecting cases). The only added labor is administrative: (1) a statement on the application and warrant reflecting the PRTT request/order, *see* 18 U.S.C. § 3122(a)(1)–(2); (2) the prosecutor's signature on the affidavit—which normally is not included in a search warrant application, *see* § 3122(a)(1), (b)(2); (3) the

[7] There is no need—or basis—to employ the All Writs Act for PLI data. "[T]he All Writs Act affords district courts the authority to fill statutory interstices." *In re U.S. for Ord. Pursuant to 28 U.S.C. § 1651(a) for Ord. Precluding Notice of Grand Jury Subpoena*, No. 17-mc-01604, 2017 WL 3278929, at *1 (D.D.C. July 7, 2017) (quoting *Pennsylvania Bureau of Correction v. U.S. Marshals Serv.*, 474 U.S. 34, 42 n.7 (1985)). No gap exists here. The Pen Register Act covers the prospective collection of PLI data. *See supra.*

identity of the subscriber of the phone, *see* § 3123(b)(1)(A); and (4) the identity of the subject(s) of the investigation, *see* § 3123(b)(1)(B).

C. Compliance of the Warrant

The government's application complied with Rule 41 by establishing probable cause of ongoing criminal offenses. *See* Warrant Appl. at 14–39. The government further complied with the SCA by demonstrating that overt acts occurred in this district, which permitted the Court to issue an out-of-district warrant upon the Provider. *See, e.g.*, Warrant Appl. at 18. The government also complied with the requirements of the Pen Register Act. *See* Warrant Appl. at 44. Thus, the Court issued a hybrid warrant authorizing the government to compel the Provider to provide the targets' PLI for a period of thirty days. *See* Search & Seizure Warrant, ECF No. 3.

III. NONDISCLOSURE AND DELAYED NOTICE ORDERS

The government relied on two statutes to preclude direct notice of the search warrant to the targets of its investigation. First, the government requested an NDO, *see* NDO, Sealing, & Delayed Notice Appl., which would require the Provider "not to notify any other person . . . of the existence or content of the Warrant for a period of 180 days." *Id.* at 1. Second, the government requested a Delayed Notice Order. *See* Warrant Appl. at 1. Separately, the government also sought to prevent the public from learning of the Warrant by requesting a Sealing Order. *See* NDO, Sealing, & Delayed Notice Appl. The Court granted the NDO and Sealing Order, *see* Order, ECF No. 4, but denied the request for a Delayed Notice Order, *see* Min. Order (Mar. 25, 2022).

A. NDOs Are Appropriate for PLI Warrants

The SCA does not require the government or a provider "to provide notice to a subscriber or customer" about the issuance of a search warrant. § 2703(c)(3). Historically, many providers opted not to notify subscribers, but that is no longer the prevailing norm. *See* Craig Timberg, *Apple,*

Facebook, others defy authorities, increasingly notify users of secret data demands after Snowden revelations, Wash. Post (May 1, 2014), https://tinyurl.com/262mhk52. However, the SCA empowers the government—through an NDO—to forbid a provider from disclosing notice of the warrant to a subscriber. *See* § 2705(b). To obtain an NDO, the government must demonstrate that "there is reason to believe that notification of the existence of the warrant, subpoena, or court order will result in—(1) endangering the life or physical safety of an individual; (2) flight from prosecution; (3) destruction of or tampering with evidence; (4) intimidation of potential witnesses; or (5) otherwise seriously jeopardizing an investigation or unduly delaying a trial." § 2705(b)(1)–(5). NDOs are only available for SCA warrants. *See In re Application of U.S. for Order Pursuant to 28 U.S.C. § 1651(a) Precluding Notice of Grand Jury Subpoena*, No. 19-wr-10, 2019 WL 4619698, at *5 (D.D.C. Aug. 6, 2019).

The government filed its Warrant application pursuant to the SCA. *See* Warrant Appl. at 11. The government separately demonstrated that nondisclosure was justified by § 2705(b) of the SCA. *See* NDO, Sealing, & Delayed Notice Appl. In turn, the Court issued an NDO. *See* Order, ECF No. 4.

B. Delayed Notice Orders Are Inappropriate for PLI Warrants Issued Under the SCA with NDOs

1. *Background on Delayed Notice Orders*

When the government executes a warrant, it must notify "the person whose property was searched *or* who possessed the information that was seized or copied" about the warrant. Fed. R. Crim. P. 41(f)(1)(C) (emphasis added). "Rule 41 allows [notice] to be given to the person from whose premises the property at issue was seized, even if that person is not the owner of the property. There is no separate requirement that the officer provide the warrant, a receipt, or any other form of notice to the owner of the property." *In re Application of U.S. for Search Warrant*

for Contents of Electronic Mail and for Ord. Directing Provider of Electronic Communic'n Servs. to not Disclose Existence of Search Warrant, 665 F. Supp. 2d 1210, 1221 (D. Or. 2009). For example, "when police seize a package from Federal Express ('FedEx'), they may leave a copy of the warrant and receipt at the FedEx facility and do not need to inform the sender or recipient of the package of the seizure." *Id.* (citing *United States v. Zacher*, 465 F.3d 336, 339 (8th Cir. 2006)). Further, the government can delay the required notice "if the delay is authorized by statute." Fed. R. Crim. P. 41(f)(3).

"[A]ny warrant" may be subject to a Delayed Notice Order, so long as it satisfies the three prongs of 18 U.S.C. § 3103a(b). First, a court must find "reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result (as defined in section 2705)[.]" § 3103a(b)(1). Second, the warrant should "prohibit[]" the seizure of tangible property or wire or electric communication/information, unless a court finds "reasonable necessity for the seizure[.]" § 3103a(b)(2). Third, the warrant must provide for the giving of "notice within a reasonable period not to exceed 30 days after the date of its execution, or on a later date certain if the facts of the case justify a longer period of delay." § 3103a(b)(3). The government may move for subsequent extensions of delayed notice "for good cause shown, subject to the condition that extensions should only be granted upon an updated showing of the need for further delay and that each additional delay should be limited to periods of 90 days or less, unless the facts of the case justify a longer period of delay." § 3103a(c).

Traditionally, Delayed Notice Orders "allow law enforcement agents to enter and search an American's home or business, but not notify the owner until weeks or even months later." Jonathan Witmer-Rich, *The Rapid Rise of Delayed Notice Searches, and the Fourth Amendment "Rule Requiring Notice,"* 41 Pepp. L. Rev. 509, 541 n.175 (2014) (quoting S. Rep. No. 112-13, at

15 (2011)) ("*Rapid Rise of Delayed Notice Searches*"). Such searches are commonly referred to as a "sneak and peek" warrants. *Id.*

2. *Notice is Not Due to the Subscriber*

a. The Search is of the Provider's Property, Not the Subscriber's Property

To determine from whom the government should preclude notice, the Court must first ask to whom notice is required. Applying Rule 41(f)(1)(C), the potential notice recipients are the provider who possesses the information and/or the subscriber of the phone.

PLI Warrants search the *provider's* property. "The [providers] are analogous to FedEx in *Zacher*; the electronic information [i]s stored on the servers at [providers' facilities] the same way the package was stored at FedEx. Requiring notice to the subscriber ignores this third-party context. When the property to be [searched] is in the possession of a third party, Rule 41(f)(1)(C) requires no more than what was already accomplished [by serving the warrant on the provider]." *In re Application of U.S.*, 665 F. Supp. 2d at 1221–22; *see United States v. Scully*, 108 F. Supp. 3d 59, 84 (E.D.N.Y. 2015). Recognizing this principle, the government does not seek Delayed Notice Orders in email search warrants or historical PLI Warrants. *See e.g.*, *Redacted Appl. for a Warrant by Telephone or Other Reliable Electronic Means, Info. Associated with Ten Accts. Stored at Premises Controlled by Google LLC Pursuant to 18 U.S.C. § 2703 for Investigation of Violation of 18 U.S.C. § 1344*, 20-sc-2054, (D.D.C. Aug. 25, 2021), ECF No. 8; *Redacted Search & Seizure Warrant, Info. Associated with One Cell Phone Acct. Stored at Premises Controlled by Verizon Pursuant to 18 U.S.C. § 2703 for Investigation of Violations of 18 U.S.C. § 1512*, 21-sc-3462, (D.D.C. Nov. 4, 2021), ECF No. 4. Treating the notice requirements for prospective PLI Warrants differently is asymmetrical. That runs contrary to the maxim that "[a] court must . . . interpret the

statute as a symmetrical and coherent regulatory scheme[.]" *U.S. Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) (cleaned up).

Indeed, "the [SCA] does not authorize [providers] to do anything more than access information already contained on *their* servers as dictated by their terms of service." *United States v. Rosenow*, 50 F.4th 715, 730 (9th Cir. 2022). And "the data being obtained regarding the location of the cell phone is in fact stored by the carrier" on their servers. *In re Application of U.S.*, 405 F. Supp. 2d at 447 (cleaned up). Providers "contract with their customers to collect and keep [location data] because they are valuable to the providers. Among other things, providers aggregate the records and sell them to third parties along with other information gleaned from cell phone usage. . . . The market for cell phone data is now estimated to be in the billions of dollars." *Carpenter*, 138 S. Ct. at 2225 (Kennedy, J. dissenting).

Thus, it is only the provider who is subject to the *search* and to whom notice under Rule 41 is due. *See In re Application of U.S.*, 665 F. Supp. 2d at 1221–22. "There is no separate requirement that the officer provide the warrant, a receipt, or any other form of notice to the [subscriber of the account]." *United States v. Scully*, 108 F. Supp. 3d 59, 83 (E.D.N.Y. 2015) (following *In re Application of U.S.*, 66 F. Supp. 2d at 1221).[8] Indeed, the SCA states the government "is *not*

[8] That a subscriber has a Fourth Amendment privacy interest in her location data which is possessed by a provider in no way speaks to Rule 41's mandate to notify "the person whose property was searched or [the person] who possessed the information that was seized or copied." Fed. R. Crim. P. 41(f)(1)(C). The Rule 41 notice requirement is distinct from any Constitutional requirement. *See Scully*, 108 F. Supp. 3d at 83–84.

In fact, most courts have concluded that there is no Constitutional requirement for notice. *Compare United States v. Freitas*, 800 F.2d 1451, 1456 (9th Cir.1986) ("[T]he absence of [any] notice requirement in a warrant casts strong doubt on its constitutional adequacy.") (cleaned up), *with United States v. Pangburn*, 983 F.2d 449, 455 (2d Cir. 1993) (holding that the notice requirement derives from Rule 41, not the Constitution), *and In re Matter of Application of U.S. for Warrant Authorizing*, No. 14-mj-8116, 2015 WL 667923, at *8 (D. Kan. Feb. 13, 2015) (supporting *Pangurn* as the "prevailing view among federal courts").

required to provide notice to a *subscriber or customer*" for SCA requests.[9] § 2703(c)(3) (emphasis added).

Relatedly, there is no *seizure* of "tangible property [or] wire or electronic communication" from the provider or subscriber. § 3103a(b)(2). "A seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (cleaned up). The government argues that no seizure occurs with PLI Warrants:

> With respect to the Section 3103a(b)(2), the United States submits that this particular provision is not applicable to the instant Application, which seeks authority to collect, in real time, data from the service provider. That is, the instant application does not seek a warrant for the seizure of any tangible property, wire or electronic communication, or stored wire or electronic information. The United States submits that subsection (b)(2) is geared toward what traditionally is referred to as a "sneak and peek" warrant, which by its terms would prohibit the seizure of evidence during its execution absent a finding of reasonable necessity for the seizure.

Regardless, there is no Constitutional concern here. The government gave immediate notice of the Warrant to the *Provider* when the government served the Warrant. That "satisfied" any "Fourth Amendment notice requirement." *In re U.S.*, 665 F. Supp. 2d at 1224.

Further notice to the *subscriber* was unnecessary pursuant to the Fourth Amendment. "If a suspect leaves private documents at his mother's house and the police obtain a warrant to search his mother's house, they need only provide a copy of the warrant and a receipt to the mother, even though she is not the 'owner' of the documents . . . . In such a case, it is irrelevant that the suspect had a greater privacy interest in the content of the documents than did his mother. When he left the documents in her possession he no longer has a reasonable expectation of privacy in their contents [or a right to be notified about the search]." *In re Application of U.S.*, 665 F. Supp. 2d at 1223 (cleaned up); *see also United States v. McCabe*, No. 20-cr-106, 2021 WL 1321z372, at *5 (D. Minn. Jan. 29, 2021) (following *In re Application of U.S.*, 665 F. Supp. 2d at 1220).

[9] It bears noting that the U.S. Department of Justice generally disfavors indefinite NDOs to subscribers, so the subscriber will likely receive notice at some point. *See* Memorandum for Heads of Dep't L. Enf't Components, et al., Rod J. Rosenstein, Deputy Att'y Gen., *Policy Regarding Applications for Protective Orders Pursuant to 18 U.S.C. § 2705(b)*, U.S. Dep't of Just. (Oct. 19, 2017), https://www.justice.gov/criminal-ccips/page/file/1005791/download; Memorandum for Heads of Dep't L. Enf't Components, et al., Lisa Monaco, Deputy Att'y Gen., *Supplemental Policy Regarding Applications for Protective Orders Pursuant to 18 U.S.C. § 2705(b)*, U.S. Dep't of Just. (May 27, 2022), https://www.justice.gov/dag/page/file/1509476/download.

NDO, Sealing, & Delayed Notice Appl. at 7 n.1. The Court agrees. "Here, there was no such meaningful interference due to the nature of electronic information, which can be accessed from multiple locations, by multiple people, simultaneously. More specifically for the purposes of Rule 41, if no property was taken, there is no person from whom, or from whose premises, the property was taken." *In re Application of U.S.*, 665 F. Supp. 2d at 1222. Thus, there is no need—or basis—to seek a Delayed Notice Order.

b. Statutory Construction Rules Support that Notice is Not Due to the Customer

Delaying notice to the provider creates an "[in]coherent regulatory scheme." *U.S. Food & Drug Admin.*, 529 U.S. at 133 (cleaned up). Courts must avoid such readings and instead "fit, if possible, all parts [of the statutory scheme] into [a] harmonious whole[.]" *Id.* (quoting *U.S. Fed. Trade Comm'n v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959)). The government would never receive real-time PLI data from the provider if the provider was unaware of the warrant. Hence, the government serves the executed warrant on the provider. Simultaneously giving notice to the provider and delaying notice from the provider renders the delayed notice provision "inoperative or superfluous, void or insignificant." *Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1939 (2022) (cleaned up).

The SCA recognizes this discrepancy and adjusts accordingly. Unlike a Delayed Notice Order that only allows the government to forgo notifying the *person* being searched—the provider—an NDO allows the government to delay notice to the *subject* of the search—the subscriber. *Compare* § 3103a(b) ("any notice required [by Rule 41] . . . may be delayed"), *with* § 2705(b) (may "command[] a provider . . . not to notify any other person").

Moreover, an "interpretation [that a Delayed Notice Order and an NDO are necessary] would [] render subsection [3103a(b)(1)] redundant since every time subsection [2705(b)] is satisfied so too would be [subsection 3103a(b)(1)]." *Blum v. Holder*, 744 F.3d 790, 803 (1st Cir. 2014). Indeed, the requirements for a Delayed Notice Order explicitly incorporate the requirements for an NDO. *See* § 3103a(b)(1). And neither fashion nor the law favor a belt and suspenders. "[T]he cardinal rule of statutory interpretation [is] that no provision should be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality opinion). "Under this general rule 'a statutory interpretation that would render an express provision redundant was probably unintended and should be rejected.'" *Garcia v. United States*, 88 F.3d 318, 324 (5th Cir. 1996) (quoting *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 444 (1995) (Souter, J., dissenting)).

c. Delayed Notice Orders for PLI Warrants Contradict Legislative Intent

"When interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature." *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (cleaned up).

Congress requires judges to report the number of applications for Delayed Notice Orders. *See* § 3103a(d). This reporting requirement is unique to Delayed Notice Orders. It stems from Congress's grave concerns about the power of Delayed Notice Orders to allow for "sneak and peak" (i.e., secret) searches of physical property: "The government can go into your house and never tell you they were there. They can look through all of your records. . . . This is in

contradiction to what most people have accepted the Fourth Amendment to be." 161 Cong. Rec. 7553 (2015) (statement of Sen. Paul).

In 2021, federal judges reviewed 19,666 delayed notice applications. Table DNSW 2—Delayed Notice Search Warrant, U.S. Courts (Sept. 30, 2021), https://www.uscourts.gov/statistics/table/dnsw-2/delayed-notice-search-warrant/2021/09/30 ("Delayed Notice Table"). Based on the undersigned's experience, the vast majority of these applications were likely for PLI Warrants. *See In re Matter of Application of U.S. for Warrant Authorizing [Redacted]*, Nos. 14-mj-8116, 8219, 2015 WL 667923, at *8 (D. Kan. Feb. 13, 2015); *Rapid Rise of Delayed Notice Searches* at 539. But Delayed Notice Orders for searches that "do not involve covertly entering any physical space, such as cell phone location [searches]" run afoul of congressional intent for the reporting requirement: to "receive data showing how often investigators were *covertly* entering people's homes and business." *Rapid Rise of Delayed Notice Searches* at 539 (emphasis added). Congress's decision to not create a reporting requirement for NDOs is telling: Congress did not have the same concerns for *overt* searches of providers' data.

Every time a court reports a Delayed Notice Order for a PLI Warrant, data on physical "sneak and peek" warrants is diluted. How many of the 19,666 delayed notice orders were for actual sneak and peek warrants? This dilution presents a real danger. Without such data, "the public and Congress [cannot] evaluate the need for [delayed notice] authority and determine whether it should be retained or modified." *Rapid Rise of Delayed Notice Searches* at 530 (quoting 149 Cong. Rec. S12378 (daily ed. Oct. 2, 2003) (statement of Sen. Russell D. Feingold)). The frustration of congressional intent is another reason to refuse delayed notice orders for PLI Warrants. *See Kokoszka*, 417 U.S. at 650.

d. Redundant Delayed Notice Orders are Inefficient

"Judges have an obligation to manage their dockets to conserve limited resources because 'judicial economy plays a paramount role in trying to maintain an orderly, effective, administration of justice.'" *In re Matter of Search of Encrypted Data Provided by Nat'l Ctr. for Missing & Exploited Child. for Nineteen Related Cyber Tipline Reps.*, No. 20-sw-321, 2021 WL 2100997, at *3 (D.D.C. May 22, 2021) (quoting *In re Vistaprint Ltd.*, 628 F.3d 1342, 1346 (Fed. Cir. 2010)). The public "interest in the dispensation of justice that is not unreasonably delayed has great force." *United States v. Poston*, 902 F.2d 90, 96 (D.C. Cir. 1990) (quoting *United States v. Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978)). "The public [also has] a compelling interest in judicial economy—not only in seeing [the] speedy administration of justice, but also in ensuring that clogged dockets don't render courts inaccessible." *Auto. Techs. Int'l, Inc. v. Delphi Corp.*, No. 08-11048, 2011 WL 13209069, at *2 (E.D. Mich. June 16, 2011).

In addition to the 19,666 delayed notice applications in 2021, courts also reviewed 12,616 delayed notice renewal applications. *See* Delayed Notice Table. Yet for many of these applications, separate NDOs and renewal NDOs have already covered the necessary notice preclusion and provided the needed judicial oversight. *See* supra III.A. For judicial economy reasons, this Court refuses to approve redundant delayed noticed filings.

e. Delayed Notice Order for Warrant

A court is empowered to deny a Delayed Notice Order request when the government fails to establish that immediate notice of the warrant will cause an adverse result. *See* supra III.B.1. Such was the case here. Indeed, no adverse result occurred when the government served the Warrant on the Provider or in the time since. The NDO prevented any of the potential harm from

notice. "In the end, there can be only one [order precluding notice]." Highlander (Thorn EMI Screen Entertainment 1986).

IV. CONCLUSION

The Recipe:

Pen Register Application	✔
Rule 41 and SCA Search Warrant	✔
Nondisclosure Order	✔
Sealing Order	✔
Delayed Notice Order	✘

Date: December 20, 2022

THE HONORABLE ZIA M. FARUQUI
UNITED STATES MAGISTRATE JUDGE