

1 COOLEY LLP
 MICHAEL G. RHODES (116127)
 2 (rhodesmg@cooley.com)
 WHITTY SOMVICHIAN (194463)
 3 (wsomvichian@cooley.com)
 KYLE C. WONG (224021)
 4 (kwong@cooley.com)
 101 California Street, 5th Floor
 5 San Francisco, CA 94111-5800
 Telephone: (415) 693-2000
 6 Facsimile: (415) 693-2222

7 QUINN EMANUEL URQUHART & SULLIVAN, LLP
 KATHLEEN M. SULLIVAN (242261)
 8 (kathleensullivan@quinnemanuel.com)
 51 Madison Avenue, 22nd Floor
 9 New York, NY 10010
 Telephone: (212) 849-7000
 10 Facsimile: (212) 849-7100

11 Attorneys for Defendant
 GOOGLE INC.

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION

14 IN RE GOOGLE INC. GMAIL
 15 LITIGATION

Case No. 5:13-md-02430-LHK

16 THIS DOCUMENT RELATES TO:
 17 ALL ACTIONS

**DEFENDANT GOOGLE INC.'S MOTION FOR
 § 1292(b) CERTIFICATION FOR
 INTERLOCUTORY REVIEW;
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT THEREOF**

Date: October 29, 2013
 Time: 10:00 a.m.
 Place: Courtroom 8 – 4th floor
 Judge: Hon. Lucy H. Koh
 Trial Date: Not yet set

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**NOTICE OF MOTION AND MOTION
FOR CERTIFICATION FOR INTERLOCUTORY REVIEW**

PLEASE TAKE NOTICE that on October 29, 2013, at 10:00 a.m., before the Honorable Lucy H. Koh, defendant Google Inc. (“Google”) will and hereby does move the Court to certify its September 26, 2013 Order, ECF No. 70 (the “Order”) denying in part Google’s Motion to Dismiss Plaintiffs’ Consolidated Individual and Class Action Complaint (the “Complaint”) for interlocutory appellate review pursuant to 28 U.S.C. § 1292(b). Google’s motion is based upon this notice, the accompanying memorandum of points and authorities, the pleadings on file in these actions, arguments of counsel, and any other matters that the Court deems appropriate.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether the Court should certify the Order for interlocutory appeal under 28 U.S.C. § 1292(b) because it involves the following controlling questions of law as to which there is substantial ground for difference of opinion and because an immediate appeal may materially advance the ultimate termination of the litigation:

- a. Whether automated scanning of emails like that performed by Google in providing Google services falls within the “ordinary course of its business” exception, 18 U.S.C. § 2510(5)(a)(ii), to federal wiretapping liability under 18 U.S.C. § 2511(1).
- b. Whether automated scanning of emails like that performed by Google is protected by the “prior consent” exception, 18 U.S.C. § 2511(2)(d), to federal wiretapping liability under 18 U.S.C. § 2511(1).

MEMORANDUM OF POINTS AND AUTHORITIES

PRELIMINARY STATEMENT

This Court’s ruling that Google might be found liable for illegal wiretapping because of its operation of its Gmail system made national headlines,¹ and has already spurred copycat litigation

¹ See, e.g., Timothy B. Lee, *No, Gmail’s Ad-Targeting Isn’t Wiretapping*, WASHINGTON POST, Sept. 28, 2013, available at <http://www.washingtonpost.com/blogs/the-switch/wp/2013/09/28/heres-whats-wrong-with-this-weeks-ruling-that-google-may-be->

(footnote continued)

1 against other email service providers.² Such widespread attention is not surprising, for the Court’s
2 ruling was a novel interpretation of wiretapping statutes enacted and amended by Congress long
3 before the rise of the Internet and never since updated to reflect the new technological and
4 commercial realities of the Internet age. Few questions could be more appropriate for
5 interlocutory review to the Ninth Circuit in order to obtain guidance on whether the Court’s novel
6 interpretation of now-antiquated statutory provisions in an unanticipated context is correct.

7 **First**, the Order presents two controlling questions of law, neither of which has ever been
8 addressed by the Ninth Circuit: namely, the scope of the “ordinary course of its business”
9 exception under 18 U.S.C. § 2510(5)(a)(ii), as applied to Internet services like Google’s automated
10 scanning of Gmail users’ emails for the alleged purpose of creating targeted email advertisements
11 and user profiles; and the scope of the “prior consent to ... interception” exception under 18
12 U.S.C. § 2511(2)(d), as applied to such email services as Gmail in light of Google’s Terms of
13 Service and Privacy Policies and users’ awareness of automated processing of emails. Each
14 question depends on interpretation of the text, structure, and legislative history of the Electronic
15 Communications Privacy Act (“ECPA”), purely legal questions that are appropriate for the
16 Circuit’s *de novo* review.

17 **Second**, a substantial ground for difference of opinion exists as to resolution of these novel
18 issues of law, and reasonable judges examining the same text, legislative history, and sparse case
19 law could well arrive at different conclusions. For example, while the Court construed the term
20 “business” in the phrase “ordinary course of its business” as narrowly limited to “the transmission
21 of emails,” a reasonable jurist could give “business” a broader interpretation based on the text of
22 the statute. A reasonable jurist could also disagree with the Court’s conclusion that “consent” to
23 “interception” requires consenting to the particular purposes for which interception is used.

24
25 [wiretapping-its-customers/](http://www.nytimes.com/2013/10/02/technology/google-accused-of-wiretapping-in-gmail-scans.html); Claire Cain Miller, *Google Accused of Wiretapping in Gmail Scans*,
26 N.Y. TIMES, Oct. 1, 2013, available at <http://www.nytimes.com/2013/10/02/technology/google-accused-of-wiretapping-in-gmail-scans.html>.

27 ² See, e.g., *Kevranian v. Yahoo!, Inc.*, No. 5:13-cv-04547-HRL, ECF No. 1 (N.D. Cal. Oct. 2,
28 2013).

1 The more targeted the ad, the more relevant and valuable it is to both the consumer and the
 2 advertiser. Thus, as part of delivering pertinent advertisements to Gmail users, Google’s
 3 automated systems analyze words contained in emails transmitted on the Gmail system. The
 4 results of this automated scanning are used to improve Google’s services and to enable Google to
 5 continue to provide Gmail for free.³

6 **B. Google’s Terms of Service and Privacy Policies**

7 While Google’s Terms of Service (“TOS”) and Privacy Policies in effect during the class
 8 period underwent revisions, the core of those policies as relevant to this action has been consistent.
 9 These policies expressly cover all Google services, including Gmail—there is no dispute that the
 10 Gmail service is one of the many “Services” included in Google’s TOS and Privacy Policies.
 11 Before March 1, 2012, the TOS provided in relevant part that: “Some of the Services are
 12 supported by advertising revenue and may display advertisements and promotions. *These*
 13 *advertisements may be targeted to the content of information stored on the Services, queries made*
 14 *through the Services or other information.”* (Rothman Decl., Ex. E ¶ 17 (emphasis added).) The
 15 TOS also provided that “Google reserves the right ... to pre-screen, review, flag, [or] filter ... any
 16 or all Content from any Service.” (*Id.* ¶ 8.3.)⁴ After March 1, 2012, these provisions were revised
 17 to inform users that, when they “upload or otherwise submit content to our Services,” they give
 18 Google “a worldwide license to use ... [and] create derivative works (such as those resulting from
 19 translations, adaptations or other changes we make so that your content works better with our
 20 Services) ... and distribute such content[] ... for the limited purposes of operating, promoting, and
 21 improving our Services, and to develop new ones.” (Rothman Decl., Ex. F.)

22 The Privacy Policy, which is incorporated into the TOS, provides in relevant part:

23 *When you share information with us, for example by creating a Google Account,*
 24 *we can make those services even better – to show you more relevant search results*
and ads, to help you connect with people or to make sharing with others quicker

25 ³ The arguments herein apply to all of the forms of Gmail implicated by the Complaint,
 26 including Google’s operation of email on behalf of Internet Service Providers and Google Apps
 for Education. (See Order at 3-4.)

27 ⁴ “Content” is defined as “all information ... which you may have access to as part of, or through
 28 your use of, the Services.” (Rothman Decl., Ex. E ¶ 8.1.)

1 and easier. As you use our services, we want you to be clear how we're using
 2 information and the ways in which you can protect your privacy. ...

3 *We collect information to provide better services to all of our users – from figuring
 4 out basic stuff like which language you speak, to more complex things like which
 5 ads you'll find most useful or the people who matter most to you online. ...*

6 ***Information we get from your use of our services.*** *We may collect information
 7 about the services that you use and how you use them, like when you visit a website
 8 that uses our advertising services or you view and interact with our ads and content.
 9 This information includes [device information; log information, which “may
 10 include” details of use of service, telephony log information, Internet protocol
 11 address, device event information, and cookies; location information; unique
 12 application numbers; local storage; and cookies and anonymous identifiers]....*

13 *We use the information we collect from all of our services to provide, maintain,
 14 protect and improve them, to develop new ones, and to protect Google and our
 15 users. We also use this information to offer you tailored content – like giving you
 16 more relevant search results and ads....*

17 (Rothman Decl., Ex. J) (emphases added).⁵

18 **C. The Order**

19 Plaintiffs allege, *inter alia*, that Google's automated scanning of emails violates 18 U.S.C.
 20 § 2511(1)(a) of ECPA. In denying Google's motion to dismiss, this Court rejected (Order at 13-
 21 22) Google's argument (ECF No. 44 at 6-13) that automated scanning of users' emails to improve
 22 Google's services is not an “interception” under ECPA because any such scanning is subject to the
 23 “ordinary course of ... business” exception set forth in 18 U.S.C. § 2510(5)(a)(ii). The Court held
 24 that “[t]he exception offers protection from liability *only* where an electronic communication
 25 service provider's interception facilitates the transmission of the communication at issue or is
 26 incidental to the transmission of such communication.” (Order at 13 (emphasis added); *see also*
 27 *id.* at 15.) And the Court further narrowed the “ordinary course of ... business” exception by
 28 stating that “the exception would apply here *only* if the alleged interceptions were an instrumental
 part of the transmission of email.” (*Id.* at 13 (emphases added).) The Court also held that,

25 ⁵ Before March 1, 2012, Google's Privacy Policy had similar language. (*See, e.g.*, Rothman
 26 Decl., Ex. G. (“In order to provide our full range of services, we may collect the following types
 27 of information,” including “[i]nformation you provide,” “[c]ookies,” “[l]og information,” “[u]ser
 28 communications,” “[a]ffiliated sites,” “[l]inks,” and “[o]ther sites” for purposes including “the
 display of customized content and advertising” and “[d]eveloping new services”).) Additional
 terms are also applicable as to certain types of users and in certain time periods.

1 because Google’s Privacy Policies allegedly did not specify that the content of emails that pass
 2 through Gmail systems may be used for targeted advertising or creating alleged user profiles,
 3 Plaintiffs had plausibly alleged “that Google exceeded the scope of its own Privacy Policy, [and
 4 thus] the section 2510(5)(a)(ii) exception cannot apply.” (*Id.* at 22.)

5 The Court also rejected (Order at 22-28) Google’s alternative argument (ECF No. 44 at 13-
 6 14) that “the senders and recipients of the emails at issue have all necessarily consented to the
 7 processing of their emails by Google,” both expressly insofar as Gmail users agree to Google’s
 8 Terms of Service and Privacy Policies (*id.* at 13-16), and impliedly insofar as non-Gmail users
 9 understand and accept that email is automatically processed (*id.* 19-21.) The Court held that
 10 Gmail users’ acceptance of Google’s Terms of Service and Privacy Policies “does not establish
 11 explicit consent” (*id.* at 24) and that “non-Gmail users” not subject to Google’s Terms of Service
 12 or Privacy Policies have not “impliedly consented to Google’s interception of their emails to
 13 Gmail users” (*id.* at 28).

14 As the Court agreed, Plaintiffs’ claims under Maryland’s and Florida’s respective anti-
 15 wiretapping statutes are derivative of, and thus rise and fall with, Plaintiffs’ ECPA claims. (Order
 16 at 42.) The Court dismissed claims brought under CIPA § 632 (*id.* at 40-42) and Pennsylvania’s
 17 anti-wiretapping statute (*id.* at 43), and while the Court granted leave to amend these claims,
 18 Plaintiffs have informed Google (ECF No. 72 at 2) they do not intend to do so.

19 ARGUMENT

20 Google respectfully requests that the Court certify two discrete issues for interlocutory
 21 appellate review:

- 22 1. Whether automated scanning of emails like that performed by Google in providing
 23 Google services falls within the “ordinary course of its business” exception, 18
 U.S.C. § 2510(5)(a)(ii), to federal wiretapping liability under 18 U.S.C. § 2511(1).
- 24 2. Whether automated scanning of emails like that performed by Google is protected
 25 by the “prior consent” exception, 18 U.S.C. § 2511(2)(d), to federal wiretapping
 liability under 18 U.S.C. § 2511(1).

26 A district court may, in its discretion, certify an order for interlocutory appeal if it:
 27 (1) “involves a controlling question of law”; (2) on which there is “substantial ground for
 28 difference of opinion”; and (3) “an immediate appeal ... may materially advance the ultimate

1 termination of the litigation.” 28 U.S.C. § 1292(b). *See, e.g., Regal Stone Ltd. v. Longs Drug*
 2 *Stores Cal., L.L.C.*, 881 F. Supp. 2d 1123, 1130-31 (N.D. Cal. 2012) (certifying order for
 3 interlocutory appeal); *Ritz Camera & Image, LLC v. Sandisk Corp.*, 2011 WL 3957257, at *3
 4 (N.D. Cal. Sept. 7, 2011) (same). And where an order “involves a new legal question or is of
 5 special consequence,” a district court “*should not hesitate* to certify an interlocutory appeal.”
 6 *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009) (emphasis added).

7 Because each of these requirements is easily satisfied here as to both issues presented, the
 8 Court “should not hesitate” to grant the instant motion. *Id.*

9 **I. THE COURT SHOULD CERTIFY THE QUESTION OF THE PROPER SCOPE**
 10 **OF THE “ORDINARY COURSE OF ITS BUSINESS” EXCEPTION UNDER 18**
 11 **U.S.C. § 2510(5)(a)(ii)**

12 ECPA in relevant part permits an action against any person who “intentionally intercepts,
 13 endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire,
 14 oral, or electronic communication.” 18 U.S.C. § 2511(1)(a). “Intercept” is defined as “the aural
 15 or other acquisition of the contents of any wire, electronic, or oral communication through the use
 16 of any electronic, mechanical, or other device.” *Id.* § 2510(4). However, the definition of
 “electronic, mechanical, or other device” excludes:

17 any telephone or telegraph instrument, equipment or facility, or any component
 18 thereof,

19 (i) furnished to the subscriber or user by a provider of wire or electronic
 20 communication service in the ordinary course of its business and being used by
 21 the subscriber or user in the ordinary course of its business or furnished by such
 22 subscriber or user for connection to the facilities of such service and used in the
 23 ordinary course of its business; or

24 (ii) *being used by a provider of wire or electronic communication service in the*
 25 *ordinary course of its business*, or by an investigative or law enforcement
 26 officer in the ordinary course of his duties;

27 *Id.* § 2510(5)(a) (emphasis added). Thus, use of equipment or a facility by an electronic
 28 communication service (“ECS”) “in the ordinary course of its business” is not an interception
 under § 2511(1)(a).

In construing § 2510(5)(a)(ii), the Court held that the phrase “ordinary course of its
 business” requires that the ECS provider “demonstrate the interception facilitated the

1 communication service or was incidental to the functioning of the provided communication
2 service.” (Order at 15.) According to the Court, under such a construction, the Complaint
3 plausibly alleges that “there is no ... nexus between Google’s interceptions and its ability to
4 provide the electronic communication service at issue in this case,” (*id.* at 19), with that service
5 narrowly defined as “transmission of email” (*id.* at 13.) The Court further held, based on a D.C.
6 Circuit decision involving § 2510(5)(a)(i), that Google’s actions fall outside the “ordinary course
7 of its business” exception of § 2510(5)(a)(ii) because Plaintiffs plausibly allege that “Google’s
8 Privacy Policies explicitly limit the information that Google may collect to an enumerated list of
9 items, and that this list does not include the content of emails.” (Order at 21 (citing *Berry v. Funk*,
10 146 F.3d 1003 (D.C. Cir. 1998)).)

11 The Court’s ruling on its construction of § 2510(5)(a)(ii) involves a controlling question of
12 law on which there is substantial ground for difference of opinion, and as to which an immediate
13 appeal may materially advance the ultimate termination of the litigation. The Court should
14 therefore certify the Order on this issue.

15 **A. Interpretation of the “Ordinary Course of Its Business” Exception Involves a**
16 **Controlling Question of Law**

17 The Court resolved a pure question of law that will be subject to *de novo* review on appeal:
18 the proper construction of a provision of ECPA. *See, e.g., Lively v. Wild Oats Markets, Inc.*, 456
19 F.3d 933, 938 (9th Cir. 2006) (“We ... review *de novo* a district court’s interpretation and
20 construction of a federal statute.”); *Metropoulos Telecomms., Inc. v. Global Crossing Telecomms.,*
21 *Inc.*, 423 F.3d 1056, 1063 (9th Cir. 2005) (similar).⁶ As the Court explained, its construction of
22 § 2510(5)(a)(ii) was based on the “statutory text, case law, statutory scheme, and legislative
23 history” of the provision. (Order at 19.) These are purely legal inquiries, not dependent on a
24 factual record.

25
26
27 ⁶ The Ninth Circuit has also accepted § 1292(b) certifications for questions involving
28 application of law to a particular set of facts where the legal conclusion was sufficiently important.
See Steering Comm. v. United States, 6 F.3d 572, 575-76 (9th Cir. 1993).

1 In addition, the issue is “controlling” because “resolution of the issue on appeal could
 2 materially affect the outcome of litigation in the district court.” *In re Cement Antitrust Litig.*, 673
 3 F.2d 1020, 1026 (9th Cir. 1982). “Although resolution of an issue need not necessarily terminate
 4 an action in order to be ‘controlling,’ it is clear that a question of law is ‘controlling’ if reversal of
 5 the district court’s order would terminate the action.” *Klinghoffer v. S.N.C. Achille Lauro Ed*
 6 *Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 921 F.2d 21, 24 (2d
 7 Cir. 1990) (internal citations omitted). Here, reversal of the Order on this issue could terminate
 8 the entire action.⁷ *See, e.g., Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir.
 9 2011) (controlling question where reversal would remove most claims, noting that “neither
 10 § 1292(b)’s literal text nor controlling precedent requires that the interlocutory appeal have a final,
 11 dispositive effect on the litigation”); *In re Google Inc. Street View Elec. Commc’ns Litig.*, No. C
 12 10-md-02184 JW, ECF No. 90 (N.D. Cal. July 18, 2011) (certifying order for review of ECPA
 13 question, notwithstanding grant of leave to amend state-law claim). In addition, permitting
 14 appellate review on this issue at an early stage will avoid the significant costs and burdens of class
 15 certification, discovery, depositions, expert discovery, and motion practice—all of which may be
 16 unnecessary if the Ninth Circuit reverses. *See, e.g., Helman v. Alcoa Global Fasteners Inc.*, 2009
 17 WL 2058541, at *5-6 (C.D. Cal. June 16, 2009) (certifying order that turned on interpretation of
 18 federal statute that was an issue “of first impression in the Ninth Circuit” because “[i]t would be

19
 20
 21 ⁷ The fact that a single state-law claim under CIPA § 631 might remain should not bar
 22 certification. The Court’s ruling on Plaintiffs’ § 631 claim itself presents a controlling question of
 23 law for which there is substantial ground for a difference of opinion. As the Court noted, “there is
 24 no binding authority with respect to whether section 631 applies to email,” and thus the Court
 25 determined that it “must predict what the California Supreme Court would do if confronted with
 26 the issue.” (Order at 36.) If the Court grants the instant motion, the entire Order would be
 27 certified and the Court of Appeals “may review the entire order, either to consider a question
 28 different than the one certified as controlling or to decide the case despite the lack of any
 identified controlling question.” *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004)
 (quoting *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996)). Because the
 Court’s ruling on the applicability of § 631 to email is part of the same Order in which the Court
 decided the “ordinary course of its business” issue, if the Ninth Circuit were to consider and
 reverse both holdings, the action would be terminated in its entirety, without regard to the issue of
 consent.

1 preferable ... to address the issue now, rather than to require the parties ... to expend significant
2 time and resources”).

3 Finally, this question may have widespread effects on a broad swath of internet industries,
4 and thus presents an issue of important precedential value for other cases. *See Klinghoffer*, 921
5 F.2d at 24 (“the impact that an appeal will have on other cases is a factor” in determining whether
6 a question is controlling). As Internet-based businesses continue to grow in unexpected ways
7 beyond what anyone could have ever predicted when ECPA was passed in 1986, these important
8 questions will only arise more frequently. *Cf. Am. Geophysical Union v. Texaco Inc.*, 802 F.
9 Supp. 1, 30 (S.D.N.Y. 1992) (Leval, J.) (“[t]he shared interests of large research corporations and
10 the publishing community would be importantly served by an immediate appeal, clarifying these
11 questions”). The interests of Internet-based businesses, ECS providers, and the general public
12 thus would be served by receiving immediate appellate clarification on this issue. Further, there is
13 every indication that the number of lawsuits on this issue will increase—not only does this class
14 action incorporate six separate complaints gathered from across the Nation, but just *one week* after
15 the Court issued the Order another class action was filed in this District against Yahoo alleging
16 claims materially identical to those here. *See Kevranian v. Yahoo!, Inc.*, No. 5:13-cv-04547-HRL,
17 ECF No. 1 (N.D. Cal. Oct. 2, 2013).⁸ Expeditious resolution of this issue will thus conserve
18 judicial resources for this Court in this case, and for courts in similar cases.

19 **B. Substantial Ground for Difference of Opinion Exists as to the Proper**
20 **Construction of the “Ordinary Course of Its Business” Exception**

21 “Courts traditionally will find that a substantial ground for difference of opinion exists
22 where ‘the circuits are in dispute on the question and the court of appeals of the circuit has not
23 spoken on the point, if complicated questions arise under foreign law, or if novel and difficult
24 questions of first impression are presented.’” *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir.
25 2010) (quoting 3 FEDERAL PROCEDURE, LAWYERS EDITION § 3:212 (2010)) (footnotes omitted);

26 ⁸ In addition, the Order has been submitted to courts in other Wiretap Act cases. *See, e.g., In re*
27 *Google Inc. Privacy Policy Litig.*, No. 12-cv-1382 PSG, ECF No. 65, Ex. A (N.D. Cal. Oct. 3,
28 2013); *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, No. 12-md-2358(SLR), ECF
No. 119, Ex. A (D. Del. Oct. 2, 2013).

1 *see also VIA Techs., Inc. v. SonicBlue Claims LLC*, 2011 WL 2437452, at *1 (N.D. Cal. June 17,
2 2011) (“Substantial grounds for a difference of opinion ... arise when an issue involves one or
3 more difficult and pivotal questions of law not settled by controlling authority.”). As the Ninth
4 Circuit recently explained:

5 Our interlocutory appellate jurisdiction does not turn on a prior court’s having
6 reached a conclusion adverse to that from which appellants seek relief. A
7 substantial ground for difference of opinion exists where reasonable jurists might
8 disagree on an issue’s resolution, not merely where they have already disagreed. Stated another way, when novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusions, a novel issue may be certified for interlocutory appeal without first awaiting development of contradictory precedent.

9 *Reese*, 643 F.3d at 688 (footnote omitted).⁹

10 Applying these principles here, substantial ground exists for disagreement with the Court’s
11 conclusion that the “ordinary course of its business” exception is available *only* where the
12 interception facilitated the “transmission of email” (Order at 13). To the contrary, the plain text of
13 the statute suggests that the exception applies where the interception assists the overall business of
14 which email service is part. This is a novel issue, and fair-minded people may disagree on the
15 interpretation and persuasive value of the statutory text, analogous case law and legislative history.
16 Moreover, there is no controlling authority—*no other court* of which we are aware has construed
17 § 2510(5)(a) as the Court did here. *See VIA Techs.*, 2011 WL 2437425, at *2 (certifying order
18 where “court was unable to locate any definitive authority that answered *the exact question* raised
19 by the ... defense”) (emphasis added).

20 **First**, the statutory text of § 2510(5)(a)(ii) alone would allow a fair-minded jurist to
21 disagree with the Court. The text exempts from the definition of “intercept” any use of a device

22 _____
23 ⁹ The applicable standard is not whether the Court is confident in its ruling, but rather whether
24 others may reasonably disagree. As one court recently explained in certifying an order:

24 On the issue ..., I am convinced that the Decision reflects the better and more
25 considered view of the law. However, if a district court had to believe that her
26 decision was likely to be reversed before certifying a question under 28 U.S.C.
§ 1292(b), there would be no such certifications. Probability of reversal is not the
standard. The standard is whether there is “substantial ground for disagreement.”

27 *Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 2012 WL 2952929, at *8
28 (S.D.N.Y. July 18, 2012).

1 by an ECS provider “in the ordinary course of *its business*”—not “in the ordinary course of
2 *transmitting the electronic communication.*” The word “business” is a broad term that, on its face,
3 encompasses conduct broader than the mere technological instrumentality of transmitting emails.
4 The modification of this phrase with the word “ordinary” demonstrates that Congress intended to
5 protect an ECS provider’s customary, routine business practices.

6 The significance of the plain text cannot be overstated. The “first step in interpreting a
7 statute is to determine whether the language at issue has a plain and unambiguous meaning.”
8 *Wilson v. C.I.R.*, 705 F.3d 980, 987-88 (9th Cir. 2013) (citation omitted). In so doing, the Court
9 “must begin with ... the assumption that the ordinary meaning of that language accurately express
10 the legislative purpose.” *de Osorio v. Mayorkas*, 695 F.3d 1003, 1019 (9th Cir. 2012) (citing
11 *Gross v. FBL Fin. Servs. Inc.*, 557 U.S. 167, 175 (2009)). “If the statutory language is
12 unambiguous and the statutory scheme is coherent and consistent, judicial inquiry must cease.”
13 *Services Emps. Int’l Union v. Nat’l Union of Healthcare Workers*, 718 F.3d 1036, 1045 (9th Cir.
14 2013) (quoting *Miranda v. Anchondo*, 684 F.3d 844, 849 (9th Cir. 2012)). In this case, a fair-
15 minded jurist could disagree with the Court and determine, *based on the statutory text alone*, that
16 Google’s automated scanning of emails to create targeted advertising and alleged user profiles—
17 all of which indisputably are conducted routinely, and which act to improve and underwrite
18 Google’s free services to users—requires reversal. While there may be gray areas in other
19 contexts as to whether the interception is in the course of the ECS provider’s “business” as
20 opposed to *non-business*, no such textual uncertainty exists here.¹⁰

21 **Second**, the statutory scheme and legislative history of ECPA permit a conclusion other
22 than that reached by the Court. For example, in describing the statutory structure of ECPA, the
23 Court cites to and quotes 18 U.S.C. § 2511(2)(a)(i), which states:

24 It shall not be unlawful under this chapter for an operator of a switchboard, or an
25 officer, employee, or agent of a provider of wire or electronic communication
service, whose facilities are used in the transmission of a wire or electronic

26 ¹⁰ The Court’s acknowledgment that “not everything that a company may want to do falls within
27 the ‘ordinary course of business’ exception” (Order at 14) is true—and supports Google. For
28 example, the requirement that use of the device be for valid and routine business purposes acts as a
backstop to any abuse.

1 communication, to intercept, disclose, or use that communication in the normal
 2 course of his employment while engaged in any activity which is a necessary
 3 incident to the rendition of his service or to the protection of the rights or property
 4 of the provider of that service, except that *a provider of wire communication*
service to the public shall not utilize service observing or random monitoring
 5 except for mechanical or service quality control checks.

6 (Emphasis added.) The Court cites this passage for the proposition that the statute “explicitly
 7 limits the use of service observing or random monitoring by electronic communication service
 8 providers to mechanical and service quality control checks.” (Order at 17.) This, however, is
 9 factually incorrect—the statute limits such service observing or random monitoring *only as to wire*
 10 *communication services, not to electronic communication services*. The statute does not impose
 11 any limits on ECS providers regarding service observing or random monitoring. The explicit
 12 exclusion of ECS providers from this limiting language supports a broad, not narrow, reading of
 13 § 2510(5)(a)(ii). Certainly a reasonable jurist could disagree with the Court’s conclusion.

14 The legislative history of ECPA explains why § 2511(2)(a)(i) applies only to wire
 15 communication service providers and not to ECS providers:

16 In applying the second clause only to wire communications, this provision reflects
 17 an important technical distinction between electronic communications and
 18 traditional voice telephone service. The provider of electronic communications
 19 services may have to monitor a stream of transmissions in order to properly route,
 20 terminate, and otherwise manage the individual messages they contain. *These*
 21 *monitoring functions, which may be necessary to the provision of an electronic*
 22 *communication service, do not involve humans listening in on voice conversations.*
 23 *Accordingly, they are not prohibited.* In contrast, the traditional limits on service
 24 “observing” and random “monitoring” do refer to human aural interceptions and
 25 are retained with respect to voice or “wire” communications.

26 (Wong Decl., Ex. BB at 20 (emphasis added).) Based on this legislative history, a reasonable
 27 jurist could adopt a broad reading of § 2510(5)(a)(ii)—Congress simply was not concerned about
 28 the type of scanning presented here that does not “involve humans listening in on voice
 29 conversations.” *Id.*

30 It is important to bear in mind that, in 1986, Congress could not have had an inkling of the
 31 vast presence that online activity would have in everyday lives in 2013. The word “Internet” does
 32 not appear once in ECPA’s legislative history. *See also Hall v. Earthlink Network, Inc.*, 396 F.3d
 33 500, 504 (2d Cir. 2005) (“To understand Congress’ intent it is important to note that Internet
 34 technology has advanced significantly since Congress enacted ECPA in 1986.”). While the

1 legislative history above states that ECS providers “may” have to monitor transmissions to
2 properly “route, terminate, and otherwise manage” emails, there is no indication that Congress
3 intended to *limit* ECS monitoring only to such tasks—otherwise, Congress would have expressly
4 imposed a statutory limit on ECS providers, as it did for wire communications service providers.
5 Thus, reasonable grounds exist for construing Congress’s failure to limit to ECS providers as
6 supporting a broad reading of § 2510(5)(a)(ii).

7 ***Third***, the case law upon which the Court relies reasonably could be viewed as supporting
8 Google’s motion to dismiss. Indeed, the Court cites to *no* controlling authority in support of its
9 interpretation of § 2510(5)(a)(ii), instead relying solely on decisions outside this Circuit, none of
10 which is directly on point and none of which interprets the statute as narrowly as this Court,
11 creating tension between the holdings of this Court and those of the Second and Tenth Circuits. In
12 *Hall*, for example, the Second Circuit relied on the “ordinary course of its business” exception to
13 affirm the dismissal of an ECPA claim brought against an ISP where the plaintiff alleged that the
14 ISP continued processing his emails after he terminated his account. *See* 396 F.3d at 504-05. The
15 processing of emails to a closed account did not facilitate and was not instrumental to the ECS,
16 nor was it incidental to the functioning of the ECS, yet the Second Circuit held that such
17 processing was not an “interception.” *Id.* While this Court distinguished *Hall* on the ground that
18 Earthlink “continued to receive and store emails after an account was cancelled” and that Earthlink
19 “did not have the ability to bounce e-mail back to senders after the termination of the account”
20 (Order at 16), neither of these distinctions explains why it was *instrumental*, as part of Earthlink’s
21 provision of the business of email services, to continue processing emails to closed accounts. A
22 reasonable jurist could conclude that *Hall* supports the conclusion that a business reason (*e.g.*,
23 storing email in case a former customer asks for it) could fall within the scope of § 2510(5)(a)(ii),
24 even if it was not incidental to the provision of the email system itself.

25 Similarly, in *Kirch v. Embarq Management Co.*, 702 F.3d 1245, 1250 (10th Cir. 2012), the
26 Tenth Circuit held that Embarq, in allowing NebuAd to run a technology test related to
27 advertising, was protected by the exception because Embarq had “no more of its users’ electronic
28 communications than it had in the ordinary course of its business as an ISP.” Thus, *Kirch* looked

1 from a historical standpoint at defendant’s ongoing, *entire* business, not just at the particular
2 interceptions at issue. This Court distinguished *Kirch* on the grounds that “Embarq itself did not
3 review any of the raw data that NebuAd collected.” (Order at 15.) *Kirch*, however, made no
4 finding that if Embarq *had* collected and reviewed such data as an ordinary, ongoing part of its
5 business, such a review would be an “interception.” To the contrary, the district court in that case
6 noted that the “ordinary course of its business” defense “appears to have merit, as plaintiffs have
7 admitted that *Embarq conducted the NebuAd test to further legitimate business purposes and that*
8 *behavioral advertising is a widespread business and is commonplace on the Internet.*” *Kirch*,
9 2011 WL 3651359, at *9 n.42 (D. Kan. Aug. 19, 2011) (emphasis added).¹¹ Thus, *Kirch* supports
10 the application of § 2510(5)(a)(ii) where the ESC is furthering its “legitimate business
11 purposes”—including advertising—and is not limited to only those acts that are technically
12 necessary to perform email transmission. Both *Hall* and *Kirch*—the only two cases cited by the
13 Court addressing § 2510(5)(a)(ii)—found that the exception *did* apply, and neither held that only
14 acts “instrumental” to the technological process of sending an email qualify. The Order thus is in
15 tension with the Second and Tenth Circuits, and guidance from the Ninth Circuit is needed to
16 resolve any confusion or inconsistency.

17 The Court also cites to a number of decisions construing the “ordinary course of its
18 business” exception to § 2510(5)(a)(i) in the context of an employer monitoring employees’
19 telephone and pager calls. (See Order at 18-19, citing *Adams v. City of Battle Creek*, 250 F.3d 980
20 (6th Cir. 2001); *Arias v. Mutual Central Alarm Serv., Inc.*, 202 F.3d 553 (2d Cir. 2000); *United*
21 *States v. Murdock*, 63 F.3d 1391 (6th Cir. 1995); *Watkins v. L.M. Berry & Co.*, 704 F.2d 577 (11th
22 Cir. 1983); *James v. Newspaper Agency Corp.*, 591 F.2d 579 (10th Cir. 1979).) While the Court
23 characterizes these cases as holding that “there must be some nexus between the need to engage in
24

25 ¹¹ The Court suggests that “Google is more akin to NebuAd, which intercepted data for the
26 purpose of providing targeted advertising.” (Order at 15.) This ignores, however, that: (1) unlike
27 the one-time NebuAd test on Embarq, Google’s scanning is an ordinary and routine part of its
28 business; and (2) Google’s targeted advertising is a component of its own integrated services—
unlike NebuAd and Embarq, which were two companies with separate business goals, Google’s
business includes *both* the provision of email and targeted advertising, necessarily intertwined.

1 the alleged interception and the subscriber’s ultimate business, that is, the ability to provide the
2 underlying good or service” (Order at 19), none of these cases required such a narrow connection,
3 to the contrary, they suggest the opposite. *Adams*, for example, holds that application of the
4 exception requires that the use be merely “for a *legitimate* business purpose.” 250 F.3d at 984.¹²
5 And *Berry*, 146 F.3d at 1009, noted that “if covert monitoring is to take place it must itself be
6 justified by a valid business purpose, or, perhaps, at least must be shown to be undertaken
7 normally” (quotation marks and internal citation omitted). In any event, Google’s automated
8 scanning serves not merely “legitimate” and “valid” business purposes, but is fundamental to
9 allowing Gmail to continue to operate. Indeed, effective targeted advertising, achieved through
10 the challenged automated scanning, *funds* Gmail and permits it to continue as a free service—a
11 quintessential “nexus.” Substantial ground thus exists for interpreting this line of cases as
12 supporting Google’s argument that its routine practice of automated scanning is for valid,
13 legitimate business purposes and thus falls within the protection afforded by the statute.

14 ***Fourth***, a reasonable jurist may be persuaded that, under the Court’s test, absurd results
15 will necessarily follow. For example, the Court’s construction of § 2510(5)(a)(ii) arguably would
16 manufacture never-ending ECPA cases for the provision of services that are claimed not to be
17 “instrumental” to the facilitation or functioning of an ECS, but nonetheless are expected by all
18 users. Using the Court’s analysis, one could conclude that email spell-checking, spam filtering,
19 and search indexing are not “instrumental” to the technical transmission of emails, but the
20 presence of such features cannot realistically be perceived as giving rise to ECPA violations—
21 they, like targeted advertising, are part of the ordinary business of providing an effective email
22 service, expected by consumers.¹³

23
24 ¹² See also, e.g., *Arias*, 202 F.3d at 559 (“[l]egitimate business reasons”); *Watkins*, 704 F.2d at
25 582 (“if the intercepted call was a business call, then [employer’s] monitoring of it was in the
ordinary course of business”).

26 ¹³ The Court discounts any danger to such generally accepted email services on the ground that
27 they may fall within a narrow definition of “ordinary course of its business” or may be protectable
28 by attaining user consent. (See Order at 20 n.4.) But the Order indisputably creates uncertainty
about whether and when such services are protected under ECPA, underscoring the need for the
Ninth Circuit’s guidance.

1 Further, the Order is in fundamental tension with a recent opinion from this District that
2 dismissed ECPA claims as applied to Gmail services. *See In re Google, Inc. Privacy Policy Litig.*,
3 2012 WL 6738343 (N.D. Cal. Dec. 28, 2012). There, Judge Grewal noted that the “plain language
4 of [ECPA] ... excludes from the definition of a ‘device’ *a provider’s own equipment* used in the
5 ordinary course of business.” *Id.* at *6 (emphasis added); *see also id.* at *5 (use of a “device”
6 under ECPA “cannot include Google’s own systems”). Here, Google’s automated scanning
7 technologies are Google’s own “devices.” Given the disconnect between Judge Grewal’s decision
8 and the Order, both the instant parties and future parties would be best served by receiving
9 guidance from the Ninth Circuit to provide clarity on these issues.

10 ***Finally***, the Court offered an alternative ground for finding that the “ordinary course of its
11 business” exception is inapplicable: namely, that Plaintiffs sufficiently allege that Google has
12 violated its own internal policies and is therefore acting outside the ordinary course of business.
13 (Order at 20-22.) For this argument, the Court cites only *Berry*, where the D.C. Circuit found that
14 the State Department Operations Center’s internal guidelines “clearly indicate the norm of
15 behavior [phone monitors] were to follow.” 146 F.3d at 1010. Substantial ground exists,
16 however, for rejecting the Court’s position because it *notices to third-party customers* in the TOS
17 and Privacy Policy are not “internal policies” akin to the internal guidelines distributed to call
18 monitors at the State Department. To the contrary, Google’s automated scanning is its standard
19 norm of behavior. To state a claim of a violation of an “internal policy,” Plaintiffs must offer
20 allegations as to “internal policies” that Google adopted and how it violated those internal
21 standards. Plaintiffs have not done so. And even if Google’s TOS and Privacy Policy could
22 somehow be construed as internal policies, Google did not violate such policies, as Plaintiffs
23 consented to the activities at issue. *See infra*, Point II.¹⁴

24
25
26 ¹⁴ To the extent that substantial ground for difference of opinion exists as to the examples Google
27 lists of information it may collect from users (Order at 21), Google addresses this argument in the
28 discussion of consent. *See infra*, Point II. Any suggestion that Google violated its own internal
policies because it purportedly did not provide notice of such collection improperly conflates the
two inquiries. *See Amati v. City of Woodstock*, 176 F.3d 952, 955 (7th Cir. 2001) (Posner, J.).

1 **C. Certification of the “Ordinary Course of Its Business” Question May**
 2 **Materially Advance the Termination of the Litigation**

3 Immediate appeal of the Order “may materially advance the ultimate termination of the
 4 litigation.” 28 U.S.C. § 1292(b). This factor does not “require[] that the interlocutory appeal have
 5 a final, dispositive effect on the litigation, only that it ‘may materially advance’ the litigation.”
 6 *See Reese*, 643 F.3d at 688. Whether certification will materially advance the termination of the
 7 litigation “is closely related to the question of whether an issue of law is ‘controlling’ ‘in that the
 8 [district court] should consider the effect of a reversal ... on the management of the case.”
 9 *Lakeland Village Homeowners Ass’n v. Great Am. Ins. Group*, 727 F. Supp. 2d 887, 896 (E.D.
 10 Cal. 2010) (quotation marks and citation omitted).

11 If the Ninth Circuit agrees that the Order too narrowly construes § 2510(5)(a)(ii) and
 12 reverses the Order, this action might well be entirely terminated. Particularly in a class action,
 13 interlocutory appeal saves judicial and party resources that might be wasted on class-certification
 14 motions, expert discovery, and fact discovery, all of which might well be unnecessary should the
 15 Ninth Circuit reverse. *See, e.g., Helman*, 2009 WL 2058541, at *6 (particularly in “complex”
 16 cases, “[i]t would be preferable for the Court of Appeals to address the issue now, rather than to
 17 require the parties and to expend significant time and resources, which might ultimately be
 18 wasted”).¹⁵

19 **II. THE COURT SHOULD CERTIFY THE QUESTION OF THE PROPER SCOPE**
 20 **OF THE “PRIOR CONSENT” EXCEPTION UNDER 18 U.S.C. § 2511(2)(d)**

21 Liability under ECPA is also foreclosed where a party to the communication consents to an
 22 interception:

23 It shall not be unlawful under this chapter for a person not acting under color of law
 24 to intercept a wire, oral, or electronic communication where such person is a party
 25 to the communication or where one of the parties to the communication has given
 26 prior consent to such interception unless such communication is intercepted for the
 27 purpose of committing any criminal or tortious act in violation of the Constitution
 28 or laws of the United States or of any State.

15 For the reasons noted above, *see supra* fn. 7, if the Court determines that the “ordinary course
 of business” exception warrants interlocutory appellate review, the Court need not even proceed to
 the second issue presented, as the entire Order would be certified.

1 18 U.S.C. § 2511(2)(d).

2 On the issue of consent, this Court concluded (Order at 24) that the TOS did not
3 sufficiently inform users that it would “intercept emails for the purposes of creating user profiles
4 or providing targeted advertising” and (*id.* at 26) that the Privacy Policies “do not specifically
5 mention the content of users’ emails to each other or to or from non-users” and thus “are not broad
6 enough to encompass such interceptions.” The Court also found that non-Gmail users did not
7 impliedly consent to Google’s automated scanning of emails sent, because accepting that theory
8 “would eviscerate the rule against interception.” (Order at 27.)

9 The Court’s ruling on the application of the consent exception in § 2511(2)(d) involves a
10 controlling question of law on which there is substantial ground for difference of opinion, and as
11 to which an immediate appeal may materially advance the ultimate termination of the litigation.

12 **A. Whether Plaintiffs Consented to Automated Scanning Pursuant to**
13 **§ 2511(2)(d) Is a Controlling Question of Law**

14 The Court’s interpretation of Google’s TOS and Privacy Policy to determine whether they
15 establish consent under § 2511(2)(d) is a question of law reviewed *de novo* on appeal. *See, e.g.,*
16 *MHC Fin. Ltd. P’ship v. City of San Rafael*, 714 F.3d 1118, 1131 (9th Cir. 2013) (“A district
17 court’s interpretation and meaning of contract provisions is reviewed *de novo*.”); *Doe I v. Wal-*
18 *Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir. 2009) (“Contract interpretation is a question of law
19 that we review *de novo*.”); *Lively*, 456 F.3d at 938 (interpretation and construction of federal
20 statute reviewed *de novo*). As the Court based its ruling both on its interpretation of contractual
21 terms and on its construction of a provision of ECPA, this issue presents a question of law.

22 For reasons similar to those discussed above, *see supra* Point I.A., the issue is
23 “controlling” because “resolution of the issue on appeal could materially affect the outcome of
24 litigation in the district court.” *In re Cement Antitrust*, 673 F.2d at 1026. While it is not necessary
25 for a reversal to completely terminate an action to be controlling, circumstances where reversal
26 will terminate the action are, by definition, “controlling.” *See Klinghoffer*, 921 F.2d at 24. If the
27 Ninth Circuit reverses the Order on *de novo* review and finds that *all* Plaintiffs—Gmail users and
28 non-Gmail users alike—necessarily consented to Google’s automated scanning, the entire case

1 would be terminated. Even if the Ninth Circuit reverses only as to consent of Gmail users but not
2 to consent of non-Gmail users, the scope of the action would be significantly narrowed, removing
3 a large, discrete segment of class-action plaintiffs from the case.

4 Finally, much like the “ordinary course of its business” exception, the “prior consent”
5 question presents an issue of great importance to future litigation and to Internet-based business
6 and Internet users. *Id.* Whether (1) Google’s TOS and Privacy Policy are sufficient to provide
7 notice here; and (2) websites are required to list every conceivable purpose of every conceivable
8 use of a user’s information in its terms of service, are both issues likely to arise in the future that
9 could direct the course of how such provisions are written. Businesses and users alike could only
10 be served by receiving clarity on this important issue. *See, e.g., Am. Geophysical Union*, 802 F.
11 Supp. at 30.

12 **B. Substantial Ground for Difference of Opinion Exists as to Whether Plaintiffs**
13 **Consented to Automated Scanning Pursuant to § 2511(2)(d)**

14 While the Court ruled that Gmail users’ acquiescence to Google’s TOS and Privacy
15 Policies does not establish explicit or implied consent, a fair-minded jurist reviewing Google’s
16 policies could reach a contrary conclusion, satisfying the second § 1292(b) factor.

17 Google’s TOS and Privacy Policy (which is incorporated into the TOS), read together, put
18 Gmail users on express notice that Google may use information gathered from their use of
19 Google’s integrated services—which include Gmail—to improve and develop its services, which
20 include targeted advertising and the alleged user profiles.¹⁶ On an appropriate construction of
21 § 2511(2)(d), a reasonable jurist considering the text of these policies could find that Gmail users
22 expressly consented to automated scanning of emails in connection with Google’s provision of its
23 services. *See, e.g., Kirch*, 2011 WL 3651359, at *7-9 (consent based on terms of service);
24 *Deering v. CenturyTel, Inc.*, 2011 WL 1842859, at *1-3 (D. Mont. May 16, 2011) (granting

25 ¹⁶ In addition, through March 2012, Google had a Gmail-specific Legal Notice, which informed
26 Gmail users that Google “will not use any of *your content* for any purpose except to provide you
27 with the Service.” (Compl. ¶ 121) (emphasis added). Because “your content” logically means “the
28 content of your emails,” this notice, when read in connection with Google’s TOS and Privacy
Policy, further notified Google users their “content” may be used to provide them with Google’s
services.

1 motion to dismiss ECPA claim based on consent to privacy policy); *Mortensen v. Bresnan*
2 *Commc'n, L.L.C.*, 2010 WL 5140454, at *5 (D. Mont. Dec. 13, 2010) (similar). Thus, substantial
3 ground exists for disagreement with the Court.

4 *First*, while the Court acknowledged that Section 8 of the TOS notified users that “content
5 may be intercepted” (Order at 24), the Court nonetheless held that Gmail users did not consent to
6 such automated scanning of their emails *for the specific purposes* for which Plaintiffs now
7 complain. (*See, e.g.*, Order at 23 (“the Court finds that it cannot conclude that any party ... has
8 consented to Google’s reading of email *for the purposes of creating user profiles or providing*
9 *targeted advertising*”) (emphasis added); 24 (TOS suggests that content may be intercepted “for a
10 different purpose” but “[t]his does not suggest to the user that Google would intercept emails *for*
11 *the purposes of creating user profiles or providing targeted advertising.*”) (emphasis added); *id.*
12 (“to the extent that section 8 of the Terms of Service establishes consent, it does so *only for the*
13 *purpose* of interceptions to eliminate objectionable content”) (emphasis added).) Substantial
14 ground exists for disagreement with this construction of “consent.”

15 The text of § 2511(2)(d) provides no indication that “consent” is purpose-specific, nor does
16 the Court cite to any authority that the exception is so narrowly construed.¹⁷ Rather, the statute
17 states that it is *the interception itself* to which a party provides consent. *See* 18 U.S.C.
18 § 2511(2)(d) (it is not unlawful “to intercept a[n] ... electronic communication where ... one of
19 the parties to the communication has given prior consent *to such interception*”) (emphasis added).
20 Indeed, the statute lists specific purposes that are *not* protected by the exception: “the purpose of
21 committing any criminal or tortious act in violation of the Constitution or laws of the United
22 States or of any State.” *Id.* The plain text of the statute thus provides that, once a party consents

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24 ¹⁷ *Watkins v. L.M. Berry & Co.*, 704 F.2d 577 (11th Cir. 1983)—which the Court cites to for this
25 point—is inapposite. (Order at 24.) In *Watkins*, the plaintiff consented to the monitoring of her
26 sales calls, but did not consent to the monitoring of her personal calls. *Id.* at 581. The plaintiff did
27 not argue, nor did the 11th Circuit hold, that a *legitimately monitored sales call* could not be
28 consented to if the company used the monitoring of that business call for a different purpose. *In re*
Pharmatrak, Inc., 329 F.3d 9 (1st Cir. 2003), which the Court also cites, makes this point. There,
plaintiffs “insisted there be no collection of personal data,” *id.* at 20, and thus the initial
interception was not consented to.

1 to an interception, “such interception” may be used by the recipient if it is not “for the purpose of
2 committing any criminal or tortious act”—otherwise, the subsequent language addressing
3 prohibited purposes would be superfluous. Thus, under ECPA, a relevant consent is to the *act* of
4 interception, not to any *purpose* of that interception unless the purpose is to commit a criminal or
5 tortious act. Other decisions are in accord that, once a party to a communication consents to the
6 interception itself, the purpose for such interception is immaterial. *See, e.g., Chance v. Avenue A,*
7 *Inc.*, 165 F. Supp. 2d 1153, 1162-63 (W.D. Wash. 2001), *abrogated on other grounds by Creative*
8 *Computing v. Getloaded.com, LLC*, 386 F.3d 930 (9th Cir. 2004) (act of interception protected by
9 § 2511(d)(2), as long as interception was not for a criminal or tortious purpose).¹⁸

10 Giving this statutory text its plain meaning, a fair-minded jurist could conclude that,
11 because Plaintiffs do not allege that Google’s automated scanning of emails was for the purpose of
12 committing a criminal or tortious act, Plaintiffs consented to the automated scanning of emails
13 regardless of the purpose for interception—and certainly consented to Google using the
14 intercepted material for the purpose of facilitating use of integrated Google services. Where
15 statutory language is clear, “judicial inquiry must cease.” *Services Emps. Int’l Union*, 718 F.3d at
16 1045. And if there were any doubt, it is resolved by clear precedent that “‘consent’ must be
17 construed broadly under the Wiretap Act.” *In re DoubleClick Inc. Privacy Litig.*, 154 F. Supp. 2d
18 497, 514 n.23 (S.D.N.Y. 2001). The fact that remedies may lie under *other* legal provisions for
19 certain misuses of procured information have no bearing on this basic point.

20 The same basis provides reasonable grounds to conclude that *both Gmail and non-Gmail*
21 users impliedly consented to the automated scanning of emails sent to or from Gmail users.
22 Plaintiffs concede that the automated processing of emails—including Google’s scanning of
23 content of emails for spam and virus detection—is widely known. (*See, e.g.,* ECF No. 53 at 2 (not
24 contesting public awareness that email content is scanned “to filter out spam or detect computer

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26 ¹⁸ *See also* Orin Kerr, *Is Gmail Illegal?* at <http://www.volokh.com/2013/10/04/is-gmail-illegal/>
27 (Oct. 4, 2013) (“In the case of Gmail’s policies, Gmail users were put on notice as to the
28 interception. Whether they knew about what would happen after the interception occurred is
immaterial to the consent.”).

1 viruses” (modifications omitted).) Further, every reputable provider of email services offers such
2 features. Thus, when Gmail and non-Gmail users impliedly consented to the content of their
3 emails being scanned by Google for spam or virus detection, the use of such scanning for other
4 non-tortious or non-criminal purposes did not give rise to an ECPA violation.¹⁹ Such a reading
5 avoids the need for the Court to look to the TOS or Privacy Policies to determine express consent,
6 as implied consent is already present. At a minimum, a fair-minded jurist could reasonably
7 understand the text of § 2511(2)(d) to require such an outcome.

8 *Second*, the Court’s apparent requirement that Google list every purpose for which
9 material is collected with specificity is impracticable to satisfy without rendering the policy far
10 less accessible to users, due to increased length, complexity, and excessive detail. Google’s TOS
11 and Privacy Policy are written in such a way to make it *more* likely that users will read and
12 understand the terms—they use general terms and provide a few examples in easy-to-understand
13 language. If Google and other technology companies were suddenly forced to describe and
14 explain in detail every purpose for which every piece of data is used, terms of service and privacy
15 policies would be lengthy and incomprehensible. The level of specificity the Order requires
16 would also require companies to revise their terms of service and privacy policies every time they
17 add or revise features to existing products or alter how they use data to implement existing
18 features—an impracticable task given the speed and frequency at which Google and other
19 technology companies innovate.

20 The same applies to the Court’s suggestion that users did not consent to automated
21 scanning of their email because email is not specifically listed among Google’s list of examples of
22 in its TOS and Privacy Policies of which information it collects. Google (like most companies)
23 provides broad, general language notifying users that it collects information relating to users’
24 interactions with its services. (*See, e.g.*, Rothman Decl, Ex. E at § 17.1 (“advertisements may be
25 targeted to the content of information stored on the Service, queries made through the Service or
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27 ¹⁹ For this reason, substantial ground exists for difference of opinion on the remaining state-law
28 claims, as both parties consent to the acts of interception at issue.

1 other information”); *id.* § 8.3 (“Google reserves the right ... to pre-screen, review, flag, [or] filter
 2 ... any or all Content from *any Service.*”) (emphasis added); Ex. J (“We also use the information
 3 we collect from *all of our services* to provide, maintain, protect and improve them, to develop new
 4 ones.... We use this information to offer you tailored content....” (emphasis added).) It would be
 5 commercially impracticable and unduly burdensome for websites to specifically list every possible
 6 way that information might be collected when general, easily understood terms (such as
 7 “services”) much more clearly inform users of the website’s overall practices. And to avoid any
 8 confusion on that point, in employing language of examples, Google indicates such lists are not
 9 exclusive by using words such as “include” or “in addition to.” (*See* ECF No. 56, App. A.); *see*
 10 *United States v. Gertz*, 249 F.2d 662, 666 (9th Cir. 1957) (“The word ‘includes’ is usually a term
 11 of enlargement, and not of limitation”).

12 **Third**, the Court separately criticized Section 17 of Google’s TOS because it states that
 13 “advertisements *may* be targeted to the content of information,” and not *will* be targeted. (Order at
 14 25.) A fair-minded jurist, however, could find that the Court misconstrued the word “may.” In
 15 the TOS, the word “may” means that Google *has permission to* target advertisements to content.
 16 *See* BLACK’S LAW DICTIONARY 1068 (9th ed. 2009) (first definition of “may” is “[t]o be permitted
 17 to”); *BlueEarth Biofuels, LLC v. Hawaiian Elec. Co.*, 2011 WL 2116989, at *20 (D. Haw. May
 18 25, 2011) (citing BLACK’S). Any other construction of “may” would encourage a tortured reading
 19 of the TOS—why would Google inform users that advertisements “might” be targeted, if not to
 20 notify users of the likelihood that it would occur?²⁰ As such, courts generally accept that using the
 21 word “may” provides sufficient notice of events. *See, e.g., Deering*, 2011 WL 1842859 at *1-2
 22 (notice valid where TOS disclosed that certain information “may” be collected).

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 24 ²⁰ The Court’s only authority for this point is *Berry*. (Order at 25.) In *Berry*, however, the Court
 25 ruled that knowing about the “capacity” to monitor telephone calls was not sufficient evidence of
 26 notice that monitoring would happen. 146 F.3d at 1011. That is, capacity does not automatically
 27 equal possible action. This Court’s interpretation of “may,” however, demonstrates a likelihood,
 28 not merely an ability, to target ads. *See United States v. VandeBrake*, 679 F.3d 1030, 1048 n.17
 (8th Cir. 2012) (where “may” used to express possibility, “‘may’ ... expresses likelihood whereas
 ‘might’ expresses a stronger sense of doubt”). Further, the Court’s construction contradicts almost
 every employee monitoring case, where employees are informed of the *possibility* of monitoring.

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C. Certification of the “Prior Consent” Question May Materially Advance the Termination of the Litigation

For the same reasons discussed above, *see supra* Point I.C., immediate appeal “may materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b). If the Ninth Circuit finds that Plaintiffs consented to Google’s automated scanning and reverses the Order, the action may be terminated in its entirety. And because the case is at such an early stage, resolution of such a threshold issue at the outset will save the parties and the Court significant time and resources by avoiding potentially unnecessary discovery and motion practice.

CONCLUSION

The Court should certify the Order for interlocutory appellate review pursuant to 28 U.S.C. § 1292(b).

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COOLEY LLP
MICHAEL G. RHODES (116126)
WHITTY SOMVICHIAN (194463)
KYLE C. WONG (224021)

QUINN EMANUEL URQUHART &
SULLIVAN, LLP
KATHLEEN M. SULLIVAN (242261)

/s/ Kathleen M. Sullivan
Kathleen M. Sullivan
Attorneys for Defendant GOOGLE INC.