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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TOM CAMPBELL, *et al*. Plaintiffs, v. AT&T COMMUNICATIONS OF CALIFORNIA, a corporation, *et al*. Defendants.	C-06-3596-VRW **STATEMENT OF INTEREST OF THE UNITED STATES IN SUPPORT OF DEFENDANTS' MOTION TO STAY AND IN OPPOSITION TO PLAINTIFFS' MOTION TO REMAND** Date: August 24, 2006 Time: 2:00 p.m. Courtroom: 6 Judge Vaughn R. Walker

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STATEMENT OF INTEREST OF THE UNITED STATES

INTRODUCTION

The United States of America, through its undersigned counsel, hereby submits this Statement of Interest in opposition to Plaintiffs' motion to remand this case to California Superior Court ("Remand Motion").[1] This is the paradigmatic example of a case that, although artfully pleaded in an attempt to avoid federal courts, is so infused with questions of federal law that it must be litigated in federal court. Plaintiffs' Complaint focuses squarely and exclusively on the alleged foreign intelligence activities of the United States and the alleged participation in those activities by Defendant AT&T Communications of California and AT&T Corp. (hereinafter, "AT&T"), and seeks to enjoin AT&T's alleged participation in these activities. But the United States Constitution vests exclusively to the federal government — to the exclusion of the States — matters related to foreign affairs, the common defense of the nation, and, in particular, foreign intelligence activities. Moreover, Congress has enacted comprehensive and detailed federal statutes governing this conduct that completely preempt any state law that might arguably apply. As a result, the Constitution simply does not permit a state court to entertain the claims presented by Plaintiffs' Complaint.

The Court need not reach these issues, however, because there is an independent and dispositive basis for denying the Remand Motion. The United States is moving contemporaneously to intervene in this action as a defendant, and, as a defendant, has an absolute right to remove this action. *See* 28 U.S.C. § 1442(a).

Counsel for the United States will attend the August 24, 2006 hearing on these motions should the Court wish to address the United States' position.

[1] The "Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517.

BACKGROUND

On May 26, 2006, Plaintiffs, subscribers of various communications services of AT&T, filed this action in California Superior Court alleging that AT&T participates in a government program in which AT&T allegedly provides certain telephone records to the National Security Agency ("NSA") in violation of Article I of the California Constitution and section 2891 of the Public Utilities Code. Compl. ¶¶ 1-47. Plaintiffs seek an order that, *inter alia,* enjoins AT&T from "providing any customer calling records to the NSA" and orders AT&T "to disclose to each customer what files or records of that customer have been shared with any third party, including the dates and recipients of any such disclosure." Compl., Prayer for Relief. Plaintiffs' claims thus seek to put at issue alleged foreign intelligence surveillance activities undertaken by the United States Government.

On May 24, 2006, two days prior to the filing of this action, Verizon Communications Inc. ("Verizon") submitted to the Judicial Panel on Multidistrict Litigation ("JPML") a motion for transfer and coordination pursuant to 28 U.S.C. § 1407. That motion requests that the JPML: (1) transfer 20 virtually identical purported class actions (pending before 14 different federal district courts) to a single district court; and (2) coordinate those actions for pretrial proceedings pursuant to 28 U.S.C. § 1407. Because this case was filed after Verizon's motion for transfer and coordination, it was not subject to the original motion, but was later designated as a potential tag along action. The number of cases raising similar issues continues to increase and now totals well over 30 actions. A hearing on the motion for transfer and coordination before the JPML was held on July 27, 2006; that motion is pending.

On June 6, 2006, AT&T filed a notice of removal in this action, and, on June 30, 2006, moved to stay this action in light of the pending JPML proceedings. Plaintiffs moved to remand the case on June 30, 2006. A hearing on these motions is set for August 24, 2006.

Since this action was filed, two decisions were issued in related cases — *Hepting v. AT&T Corp.*, No. 06-cv-00672-VRW (N.D. Cal.), and *Terkel v. AT&T Corp.,* No. 06-cv-02837 (N.D.Ill.). These cases raise allegations involving foreign intelligence surveillance activities similar to those raised by Plaintiffs here. Both cases were brought against only AT&T; in both

cases, the Courts granted the United States' motions to intervene. In *Hepting*, this Court denied the United States' motion to dismiss but stayed all discovery on the "call records" claims identical to those presented here. *See Hepting v. AT&T Corp.*, ___ F. Supp. 2d ___, No. C-06-672 (VRW), 2006 WL 2038464 (N.D. Cal. July 20, 2006). In *Terkel*, in contrast, the court granted the United States' motion to dismiss on state secrets grounds. *See Terkel v. AT&T Corp.*, No. 06C2837, 2006 WL 2088202 (N.D. Ill. July 25, 2006). Having been "persuaded that requiring AT&T to confirm or deny whether it has disclosed large quantities of telephone records to the federal government could give adversaries of this country valuable insight into the government's intelligence activities," the court held that "such disclosures are barred by the state secrets privilege." *Id.* *17. The court added that, at the very least, it was satisfied, after carefully reviewing the government's public submission, that "requiring AT&T to admit or deny the core allegations necessary for the plaintiffs to prove standing—whether *their* information is being disclosed—implicates matters whose public discussion, be it an admission or a denial, could impair national security." *Id.* *19. Accordingly, because the plaintiffs' claims of injury could not be evaluated on their particular facts, the court found that their contentions were simply a request for an advisory opinion that could not be entertained. *Id.* *21.

DISCUSSION

I. INTERVENTION BY THE UNITED STATES RENDERS THIS ACTION SEPARATELY REMOVABLE PURSUANT TO SECTION 1442, AND REMAND WOULD THEREFORE BE FUTILE

As set forth below, the Remand Motion must be denied because this is a quintessentially federal case that must be litigated in federal court. However, the Court need not reach that issue because the United States has moved to intervene in this matter pursuant to Federal Rule of Civil Procedure 24.

The United States' intervention as a party-defendant provides the government with a separate and independent right to remove this action under 28 U.S.C. § 1442(a). The United States' right to remove "is made absolute whenever a suit in a state court is for any act 'under color' of federal office, regardless of whether the suit could originally have been brought in a federal court." *Willingham v. Morgan*, 395 U.S. 402, 406 (1969). Furthermore, it is irrelevant

whether Plaintiffs' "original case had a non-federal cast." *United States v. Todd*, 245 F.3d 691, 693 (8th Cir. 2001). In *Todd*, for example, the Eighth Circuit held that removal was proper where the only basis for removal was the United States' intervention. 245 F.3d at 693 (rejecting plaintiffs' contention that such removal was improper). *See also In re the Marriage of Dean Dyche and Theresa Beat*, No. 05-1116-WEB, 2005 WL 1993457, *3 (D. Kan. Aug. 16, 2005) (removal is proper, and the requirements of section 1442 are met, when the United States intervenes); *Porter v. Rathe*, No. 98-331-FR, 1998 WL 355499, *2 (D. Or. June 18, 1998) (intervention of the United States in state court "provides grounds for removal to this Court.").

Even if the Court were to conclude that the United States must intervene in state court to trigger Section 1442, it would be futile to remand the case. In *Bell v. City of Kellogg*, 922 F.2d 1418, 1424-25 (9th Cir. 1991), the Ninth Circuit adopted a futility exception to the remand provisions of 28 U.S.C. § 1447. After the district court held that plaintiffs lacked standing to challenge the federal aspects of the case, the district court dismissed the entire case, rather than remand certain pendant state claims. The Ninth Circuit approved this procedure — rather than one that would have required remand even if a remand would been futile — because of the clearly inefficient use of judicial resources the contrary rule would entail. The Court of Appeals thus held that "[w]here the remand to state court would be futile, . . . the desire to have state courts resolve state law issues is lacking" and such remands would be inappropriate because "no comity concerns are involved." *Bell*, 922 F.2d at 1424-25 (citing *M.A.I.N. v. Commissioner, Maine Dep't. of Human Servs.*, 876 F.2d 1051, 1054 (1st Cir. 1989)).

Here, a remand would be futile: the United States' intervention provides a separate and automatic vehicle to remove this action, and a remand would thus serve only as a delay and a waste of resources for the parties and the federal and state courts.

II. BECAUSE THIS IS A QUINTESSENTIALLY FEDERAL CASE, PLAINTIFFS' REMAND MOTION MUST BE DENIED

Because this a quintessentially federal case, the Remand Motion must be denied for at least two additional and district reasons: (1) Plaintiffs' claims necessarily arise under federal law because they require the resolution of substantial issues of federal law; and (2) Plaintiffs' claims are preempted by federal law.

A. Plaintiffs' Claims Necessarily Arise Under Federal Law Because This Action Depends on Substantial Questions of Federal Law

Under long-familiar principles, a case "arises under federal law" within the meaning of 28 U.S.C. § 1331 if "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983). Most recently in *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 125 S. Ct. 2363, 1267 (2005), the Supreme Court held that "federal question jurisdiction will lie over state-law claims that implicate significant federal issues." *See also Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 376 (2004) ("a claim arises under federal law if federal law provides a necessary element of the plaintiff's claim for relief"). In *Grable*, the Court explained that where "a state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities," then federal jurisdiction is warranted. 125 S. Ct. at 2368. *See also City of Chicago v. International Coll. of Surgeons*, 522 U.S. 156 (1997); *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 808-09 (1986); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).

Here, Plaintiffs' Complaint focuses solely on AT&T's alleged participation in a foreign intelligence surveillance program allegedly conducted by the United States. *See, e.g.,* Compl. ¶¶ 1, 19-30 . Plaintiffs ask an organ of state government to enjoin those activities. But it is plain that, under the U.S. Constitution, the federal government has plenary authority over these issues, and the states have no ability to intrude or interfere with these federal functions. Even if the states had some role to play, as provided in *Grable*, the federal issues presented in the Complaint are so substantial as to warrant their adjudication in a federal forum.

1. The United States Constitution Precludes a State Court From Granting Plaintiffs' Requested Relief

Plaintiffs' Complaint, relying exclusively on a purported state law cause of action, asks a state court to apply state law to effectively enjoin a purported foreign intelligence gathering function and order disclosure of highly classified information. *See* Compl., Prayer for Relief. Indeed, that is the first line of Plaintiffs' memorandum of points and authorities supporting their motion to remand. *See* Plaintiffs' Memorandum in Support of the Motion to Remand at 2 ("Plts. Mem."). But the states have no such power under the U.S. Constitution, and for this reason alone this action must be in federal court.

It has been clear since at least *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), that no state law and no organ of state government may regulate the federal government or obstruct federal operations. As the Supreme Court stated in *McColloch*, "[t]he States have no power . . . to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the power vested in the general government." *McCulloch*, 17 U.S. at 326-27. Foreign intelligence gathering is precisely this sort of exclusively federal function in which the states have no role whatsoever. In light of the exclusively federal character of these functions, Plaintiffs' purported state law cause of action must arise under federal law for purposes of removal. Indeed, foreign intelligence gathering concerns three overlapping areas that are peculiarly the province of the National Government.

First, foreign intelligence activities necessarily touch upon foreign relations and the conduct of the Nation's foreign affairs by the federal government, and "[t]here is, of course, no question that at some point an exercise of state power that touches upon foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place." *American Insurance Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) (quotation omitted). *See also Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381 (2000); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

Second, foreign intelligence gathering relates to the conduct of military affairs, and the President has "unique responsibility" for the conduct of "foreign and military affairs," *Sale v. Haitian Centers Council*, 509 U.S. 155, 188 (1993). "The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs." *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948). The "[g]athering intelligence information" is well within the President's constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed forces. *United States v. Marchetti*, 466 F.2d 1309, 1315 (4th Cir. 1972) (citing U.S. Const., art. II, § 2) (affirming an injunction to prevent the release of classified information in a publication). Moreover, these foreign and military affairs functions, vested exclusively through the U.S. Constitution in the federal government, must proceed unfettered from interference by any organ of state government.

In seeking to apply a cause of action under California law, Plaintiffs attempt to use state law as a basis to exert regulatory authority with respect to the nation's foreign intelligence gathering. As a result, this use of state regulatory authority intrudes upon a field that is reserved exclusively to the federal government and in a manner that interferes with federal prerogatives. By virtue of the Supremacy Clause, "the activities of the Federal Government are free from regulation by any state" except where Congress expressly provides to the contrary. *Hancock v. Train*, 426 U.S. 167, 178-79 (1976); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988). Given the powerlessness of state law vis-a-vis conflicting federal law, "[w]here enforcement of . . . state law would handicap efforts to carry out the plans of the United States, the state enactment must . . . give way." *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 103-04 (1940). Here, Plaintiffs seek to not only intrude on federal operations, but to also employ state law and the state courts to impede and burden those operations as well. That is not constitutionally permissible. Irrespective of the meaning of California law, neither California statutes nor its Constitution may intrude on such inherently federal operations. *See McCulloch*, 17 U.S. at 326-27; *see also Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 189-90 (1956).

In sum, under *Grable*, recognizing federal jurisdiction in this case would not "distrub[]

any congressionally approved balance of federal and state judicial responsibilities," *Grable*, 125 S.Ct. at 2368, because there are no state responsibilities, judicial or otherwise, when it comes to matters pertaining to alleged foreign intelligence gathering. Moreover, notwithstanding Plaintiffs' pleading of state law, it is apparent that substantial questions of federal law predominate this case. A federal forum must therefore exist under *Grable* for the adjudication of this case.

2. Adjudication of Plaintiffs' State Law Causes of Action Necessarily Requires the Resolution of Substantial Questions of Federal Law

Plaintiffs' state law causes of action also necessarily raise substantial and actually disputed issues of federal law that go to the heart of this action. This case is therefore nothing like a routine state tort action where federal law plays an ancillary role in the action, so that state courts are entirely competent to consider the matter. *See Empire Healthchoice Assurance, Inc. v. McVeigh*, 126 S. Ct. 2121 (2006). Here, issues of federal common law and federal statutory law predominate this action and must necessarily be resolved for the case to proceed. In addition, and significantly, neither the state courts, nor state law in general, have any ability to provide Plaintiffs with the relief they request. The only forum where this action is cognizable, if at all, would be in a federal forum, and Plaintiffs' pleading of purported state law claims cannot keep this Court from retaining jurisdiction to decide substantial federal issues intrinsically intertwined in this action.

a. State Secrets Privilege and the *Totten* Bar

At the outset, any resolution of Plaintiffs' claims entirely depends on two bodies of federal common law that require dismissal or otherwise render this suit nonjusticiable. Initially, a substantial body of long-standing federal common law recognizes a privilege for the protection of state secrets that likewise is based on the President's Article II powers to conduct foreign affairs and provide for the national defense. *See United States v. Nixon*, 418 U.S. 683, 710 (1974); *United States v. Reynolds*, 345 U.S. 1 (1953); *Kasza v. Browner*, 133 F.3d 1159 (9th Cir.), *cert. denied*, 525 U.S. 967 (1998); *Fitzgerald v. Penthouse Int'l, Ltd.,* 776 F.2d 1236 (4th Cir. 1985). Recognized from the earliest days of the Republic, *see United States v. Burr*, 25 F.

Cas. 30 (C.C.D. Va. 1807), the state secrets privilege encompasses a range of matters, including information that would result in "impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign Governments." *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983), *cert. denied sub nom. Russo v. Mitchell*, 465 U.S. 1038 (1984) (footnotes omitted); *see also Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982) (state secrets privilege protects intelligence sources and methods involved in NSA surveillance). Moreover, the privilege is absolute and may not be pierced by any demonstration of need, no matter how compelling. *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir.1984); *see also Kasza*, 133 F.3d at 1166. Where "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged," the information at issue should not be disclosed. *Reynolds*, 345 U.S. at 10.

Whether federal common law — the state secrets privilege — requires the dismissal of this action is itself a substantial question of *federal* law that will be actually disputed. And where the state secrets at issue go to the heart of the action, a federal forum must be available to protect the federal sovereign's unique interests relating to national security. Finally, in light of the United States' intervention in this action and intention to assert the state secrets privilege, Plaintiffs' contention that the United States is not present to assert these governmental interests, *see* Plts. Mem. at 20-21, is now moot.

A related, but distinct body of federal common law authority, announced more than a century ago in *Totten v. United States*, 92 U.S. 105 (1876), also categorically prohibits suits related to alleged covert espionage agreements. *See Tenet v. Doe*, 544 U.S. 1, 3 (2005); *Weinberger v. Catholic Action of Haw./Peace Ed. Project*, 454 U.S. 139, 146-147 (1981) (citing *Totten* in holding that whether or not the Navy has complied with the National Environmental Policy Act to the fullest extent possible is beyond judicial scrutiny, where, due to national security reasons, the Navy could "neither admit nor deny" the fact that was central to the suit – that it proposed to store nuclear weapons at a facility). When invoked, the suit is rendered nonjusticiable. As the Supreme Court explained, "public policy forbids the maintenance of *any*

suit in a court of justice which would inevitably lead to the disclosure of matters which the law itself regards as confidential." *Tenet v. Doe*, 544 U.S. at 8 (quoting *Totten*, 92 U.S. at 107) (emphasis in original). Indeed, the *Totten*/*Tenet* inquiry should be resolved at the earliest stages of the litigation and even before the Court resolves jurisdictional issues. As the Supreme Court recently noted, the federal common law is "designed not merely to defeat the asserted claims, but to preclude judicial inquiry" at all. *Tenet v. Doe*, 544 U.S. at 6 n.4.

Based on *Totten* and *Tenet*, it is a matter of federal common law that suits seeking to disclose the very existence of a secret relationship between the government and private parties are nonjusticiable. Here, Plaintiffs themselves assert in the Complaint that the relationship between AT&T and the United States is precisely that, *i.e.*, after September 11, 2001, AT&T allegedly entered into an espionage agreement to provide the NSA with certain call records. *See* Compl. ¶ 19. Clearly, under *Grable*, a substantial issue of *federal* common law exists insofar as Plaintiffs' claims would not justiciable under this body of law.

Both the state secrets privilege and *Totten/Tenet* doctrine underscore that substantial questions of federal law exist in this case such that this action must be deemed as arising under federal law. Indeed, because federal common law requires dismissal or otherwise renders this action nonjusticiable, this is not a situation where a mere federal defense exists — such as ordinary preemption of state law — but the action may still be adjudicated in the state court. Rather, where there is an alleged federal espionage agreement, and state secrets go to the heart of the case, then by definition a situation exists where substantial and disputed questions of federal law predominate the action and require a federal court to take jurisdiction over the matter to ensure that the federal interests in this action are vindicated.[2] This is particularly so because state law in the area of federal intelligence gathering is necessarily displaced. Taken together, these federal statutory inquiries and the federal common law justiciability issues clearly meet, as the

[2] Thus, for example, in *Terkel*, discussed above, the federal court granted the United States' motion to dismiss on state secret grounds in a case that raised "call records" claims identical to those presented here. *See Terkel*, 2006 WL 2088202. And this Court stayed all discovery on similar claims in *Hepting*. *See* No. C-06-672 (VRW), 2006 WL 2038464.

Supreme Court described, the relevant inquiry of whether a state law claim "implicate[s] significant federal issues" or "raise[s] a stated federal issue, actually disputed and substantial." *Grable*, 125 S. Ct. at 2368.

b. Statutory Claims

Moreover, Plaintiffs' statutory causes of action also necessarily raise issues of federal law in order for their resolution. First, Plaintiffs' statutory cause of action under California Public Utilities Code § 2891 depends on the resolution of federal law. Notably, section 2891 provides that no cause of action exists where "[i]nformation [is] provided to a law enforcement agency in response to lawful process." Cal. Pub. Util. Code § 2891(d)(6). This is the core of Plaintiffs' allegations because they have asserted that AT&T provided records to the NSA without "legal process from the government." Compl. ¶ 23. Here, resolving Plaintiffs' section 2891 claim would therefore depend entirely on whether any subpoenas, orders, certifications, or other legal process issued by the federal government properly authorized AT&T to provide the information under federal law. Federal statutes such as the Foreign Intelligence Surveillance Act, Title III, and the Stored Communications Act, and other federal law, address this issue and contain numerous authorization and immunity provisions that may be at issue here. *See, e.g.*, U.S.C. §§ 2511(2)(a), 2520(d), 2702(b)(2), 2707(e); 50 U.S.C. § 1805(i).

Thus, the section 2891 claim is properly removed for reasons identical to *Grable*. In *Grable*, the reason that the action arose under federal law and raised substantial issues of federal law was that the quiet-title suit turned on the adequacy of an IRS notice of sale under federal law. 125 S. Ct. at 2368. The same is true here. Because Plaintiffs' section 2891 claim depends upon whether federal law authorized and/or immunized AT&T's alleged activities, then under *Grable* this action necessarily raises issues of federal law. Section 2891 simply does not apply if legal process authorized the actions in question, and these issues of federal law are inherently embedded in Plaintiffs' claims. Indeed, for Plaintiffs to prevail in their state law claim under section 2891, the Court would be required to resolve whether any federal legal process authorized AT&T's actions such that federal law is intrinsically intertwined with Plaintiffs' state law claim.

For substantially similar reasons, Plaintiffs' cause of action under the California Constitution also necessarily requires the resolution of questions of federal law. To establish "a claim under the California right to privacy, a plaintiff must first demonstrate three elements: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy under the circumstances; and (3) conduct by the defendant that amounts to a serious invasion of the protected privacy interest." *Leonel v. American Airlines, Inc.*, 400 F.3d 702, 712 (9th Cir. 2005). While state laws can provide greater protections for its citizens than federal law, the state may only do so with respect to state operations such as for state law enforcement. Here, however, the Complaint asserts that AT&T cooperated with a federal agency in providing records to that agency. For this reason, an individual may only have a legally protect privacy interest and a reasonable expectation of privacy to the extent that the alleged disclosures in question were not authorized by federal law. Thus, as is the case with Plaintiffs' section 2891 claim, whether Plaintiffs have either a legally protected privacy interest or a reasonable expectation of privacy necessarily turns on questions of federal statutes and other federal legal process. Indeed, Plaintiffs' claim under the California Constitution could not proceed without a judicial determination that AT&T did *not* have federal authorization to allegedly provide these records. Moreover, whether the alleged disclosures were authorized under federal law, is not simply a factual question that implicates state secrets, but turns on legal questions regarding the scope and meaning of federal statutes and other law. These are substantial federal questions that will necessarily be litigated if this action proceeds to the merits and therefore are embedded within Plaintiffs' state law right to privacy claim.

Any serious consideration of Plaintiffs' claims establishes that Plaintiffs are incorrect in asserting, *see* Plts. Mem. at 17-19, that federal law is only relevant as a defense to Plaintiffs' claims. Section 2891, on its face, requires a consideration of whether lawful process has been obtained, so Plaintiffs will be wholly unable to establish their claim without a consideration of

federal law and application of state secrets to that law for the reasons above.[3] The same is true for Plaintiffs' right to privacy claim. The federal issues regarding lawful process and authorization must be resolved in order Plaintiffs to bring their claims, and are not mere defenses. Moreover, as discussed below, federal common law matters going to the justiciability of this case and whether it must be dismissed on state secrets grounds are threshold issues to be resolved immediately; they are not mere affirmative defenses of defendants that otherwise would not support removal. Plaintiffs also incorrectly claim that, unlike *Grable*, the issues in this case turn on a "'fact-bound and situation-specific' inquiry" rather than legal issues. Plts. Mem. at 19. As discussed above, a host of federal common law and other federal law issues going to the justiciability of this case, including the state secrets privilege and *Totten*/*Tenet* bar, must necessarily be resolved before any consideration of the factual underpinnings of Plaintiffs' claims proceeds.

B. Plaintiffs' Claims are Completely Preempted By A Comprehensive Body of Federal Statutory and Common Law Regarding Alleged Foreign Intelligence Surveillance

This action was also properly removed to federal court under the complete preemption doctrine. "The Supreme Court has concluded that the preemptive force of some federal statutes is so strong that they 'completely preempt' an area of state law. *In re Miles*, 430 F.3d 1083, 1088 (9th Cir. 2005) (citation omitted); *see also Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987); *ARCO Environmental Remediation, L.L.C. v. Dep't of Health and Envnt'l Quality*, 213 F.3d 1108, 1114 (9th Cir. 2000) ("a state-created cause of action can be deemed to arise under federal law where [] federal law completely preempts state law"). "'In such instances, any claim purportedly based on that preempted state law is considered, from its inception, a federal claim, and therefore arises under federal law.'" *In re Miles*, 430 F.3d at 1083 (quoting *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1107 (9th Cir. 2000)). Here, Plaintiffs' causes of action under state law are completely preempted by the Constitution's vesting of

[3] The California statute's separate section dealing with an affirmative defense based upon receipt of government subpoena or other process, *see* Cal. Pub. Util. § 2894, buttresses this conclusion.

exclusive power over foreign affairs and intelligence gathering functions in the federal government and also by the comprehensive and pervasive federal statutory and common law regarding federal intelligence surveillance.

At the outset, the very structure of the federal constitution completely preempts Plaintiffs' state law claims to the extent they seek state court oversight of alleged federal intelligence operations. There simply are no state responsibilities for foreign intelligence gathering of the kind at issue in this action. Such powers, by constitutional design, are reserved exclusively to the federal government. *See* Part II.A. Moreover, acquisition of foreign intelligence is obviously an essential part of the national security function. Indeed, as the Supreme Court has stressed, there is "paramount federal authority in safeguarding national security," *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 76 n.16 (1964) (quotation omitted), as "[f]ew interests can be more compelling than a nation's need to ensure its own security." *Wayte v. United States*, 470 U.S. 598, 611 (1985); *see also Curtiss-Wright Export Corp.*, 299 U.S. at 320 (the President "has his confidential sources of information. He has his agents"; "especially is this true in time of war"). In particular, "[g]athering intelligence information" is within the President's constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed forces. *Marchetti*, 466 F.2d at 1315. Finally, it is apparent under the *McCulloch* doctrine described above that neither the states, nor others seeking to enforce state laws, may impede or intrude upon such exclusively federal functions. *See McCulloch*, 17 U.S. at 326-27.

Thus, Plaintiffs' state law claims are completely preempted because the federal constitutional structure itself leaves no room for such claims directed at alleged foreign intelligence gathering functions. Given exclusivity of federal law, state law simply has no power to operate in the manner Plaintiffs attempt to assert vis-a-vis the federal government's operations. For this reason alone, Plaintiffs' state law claims are cognizable only in federal court.

Second, several federal statutes completely preempt any state law remedies available to Plaintiffs. First and foremost, Section 6 of the National Security Agency Act of 1959, Pub. L. No. 86-36, § 6, 73 Stat. 63, 64, codified at 50 U.S.C. § 402 note, provides: "[N]othing in this

Act *or any other law* . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of persons employed by such agency." *Id.* (emphasis added). Section 6's breadth is sweeping and covers "any other law," including any state law causes of actions cited by Plaintiffs. Section 6 reflects a "congressional judgment that in order to preserve national security, information elucidating the subjects specified ought to be safe from forced exposure." *The Founding Church of Scientology of Washington, D.C., Inc. v. Nat'l Security Agency*, 610 F.2d 824, 828 (D.C. Cir. 1979); *accord Hayden v. Nat'l Security Agency*, 608 F.2d 1381, 1389 (D.C. Cir. 1979). Thus, in enacting Section 6, Congress was "fully aware of the 'unique and sensitive' activities of the [NSA] which require 'extreme security measures,'" *Hayden*, 608 F.2d at 1390 (citing legislative history), and "[t]he protection afforded by section 6 is, by its very terms, absolute." *Linder v. Nat'l Security Agency*, 94 F.3d 693, 698 (D.C. Cir. 1996). Construing the provisions of state law underlying Plaintiffs' Complaint to require the disclosure of "any" information "with respect to the activities" of the NSA would therefore violate Congress' clear intent regarding the exclusivity of federal law in the field of national security.

Further, in section 102A(i)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (Dec. 17, 2004), codified at 50 U.S.C. § 403-1(i)(1), Congress similarly conferred upon the Director of National Intelligence the authority and responsibility to "protect intelligence sources and methods from unauthorized disclosure." *Id.* This unquestionably includes the protection of NSA sources and methods of gathering intelligence. *See* Negroponte Decl. ¶11. Indeed, it includes in particular information about the alleged involvement of a telecommunication carrier's role in providing assistance to the NSA, information which the DNI explains can neither be confirmed nor denied in order to protect intelligence sources and methods. *See id.* ¶12. The authority to protect intelligence sources and methods from disclosure is rooted in the "practical necessities of modern intelligence gathering," *Fitzgibbon v. CIA*, 911 F.2d 755, 761 (D.C. Cir. 1990), and has been described by the Supreme Court as both "sweeping," and "wideranging." *Snepp v. United States*, 444 U.S. 507, 509 (1980).

See United States v. Koreh, 144 F.R.D. 218, 222 (D.N.J. 1992) (recognizing that the then-Director of Central Intelligence had "sweeping power" to protect intelligence sources and methods under 50 U.S.C. § 403(d)(3)) (quoting *Central Intelligence Agency v. Sims*, 471 U.S. 159, 168-69 (1985)). These "sweeping" and "wideranging" federal prerogatives also demonstrate Congress' judgment that matters pertaining to foreign intelligence gathering are exclusively federal decisions that the states' laws cannot impact in any way. State law has no role in these exclusively federal operations and, in particular, state privacy laws simply cannot provide the basis for ordering the disclosure of national security information controlled by the federal government or the injunction of such federal operations, which are at the heart of Plaintiffs' request for relief. Because there is absolutely no role for the operation of state laws in this regard, Plaintiffs' claims are completely preempted by the operation of the Constitution and federal statutes and are cognizable, if at all, only in a federal forum.

Two bodies of constitutionally based federal common law — the state secrets privilege and the *Totten*/*Tenet* bar — also entirely dominate this action and are federal issues that must be resolved before the Court even assumes jurisdiction over Plaintiffs' claims and therefore also completely preempt state law here. *See generally New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953, 955 (9th Cir. 1996) (holding that the federal common law concerning "government contract matters having to do with national security" completely preempts state-law contract claims). Indeed, the issues of foreign intelligence gathering, alleged federal espionage agreements, and federal state secrets are similar to those that formed the basis of federal question jurisdiction in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 675 (1974).

In *Oneida Indian Nation*, the Supreme Court held that a complaint was cognizable in federal court under federal question jurisdiction because of the federal common law pertaining to possession of Indian tribal lands. These were issues purely of federal law between the federal government and the Indian tribes, even though the possessor claim was stated as one of New York law. *Id.* at 670 ("Indian title is a matter of federal law and can be extinguished only with federal consent") (citation omitted). As is the case with matters relating to Indian law, states have no role in resolving the Indian tribes' right of possession under federal law. Similarly,

whether through the legislative, executive, or judicial process, states have no authority to regulate the federal government's foreign intelligence surveillance activities, alleged espionage contracts, or resolve the issues of state secrets. *See United States v. Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies whether they be expressed in constitutions, statutes, or judicial decrees.").

At bottom, the issues in this case are intrinsically federal ones and go to the heart of alleged federal government operations in areas where the States have no power to interfere or participate under the constitutional structure. In light of the exclusivity of these various bodies of federal law, all state law in this field must be completely preempted and therefore must be resolved exclusively in the federal courts.

CONCLUSION

Accordingly, the United States respectfully requests that the Court grant Defendants' motion to stay pending a decision by the JPML and deny Plaintiffs' motion to remand this civil action.

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Dated: August 4, 2006

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Statement of Interest of the United States in Support of Defendants' Motion to Stay & in Opposition to Plaintiffs' Motion to Remand** was lodged with the Court's CM/ECF system and was served thereby this 4th day of August 2006 on:

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