

1 PILLSBURY WINTHROP SHAW PITTMAN LLP
BRUCE A. ERICSON #76342
2 DAVID L. ANDERSON #149604
JACOB R. SORENSEN #209134
3 MARC H. AXELBAUM #209855
DANIEL J. RICHERT #232208
4 50 Fremont Street
Post Office Box 7880
5 San Francisco, CA 94120-7880
Telephone: (415) 983-1000
6 Facsimile: (415) 983-1200
Email: bruce.ericson@pillsburylaw.com

7
8 SIDLEY AUSTIN LLP
DAVID W. CARPENTER (*pro hac vice* application pending)
BRADFORD A. BERENSON (*pro hac vice* application pending)
9 DAVID L. LAWSON (*pro hac vice* application pending)
EDWARD R. MCNICHOLAS (*pro hac vice* application pending)
10 1501 K Street, N.W.
Washington, DC 20005
11 Telephone: (202) 736-8010
Facsimile: (202) 736-8711

12 Attorneys for Defendants
13 AT&T COMMUNICATIONS OF CALIFORNIA,
AT&T CORP. and Specially Appearing Defendant AT&T INC.
14

15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

18
19 TOM CAMPBELL, *et al.*,
20 Plaintiffs,
21 vs.
22 AT&T COMMUNICATIONS OF
CALIFORNIA, *et al.*,
23 Defendants.
24

Case No. C-06-03596-VRW

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR
REMAND**

Date: August 17, 2006
Time: 2:00 p.m.
Courtroom: 6, 17th Floor
Judge: Hon. Vaughn R. Walker

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ISSUES TO BE DECIDED

- 1. Whether this Court has jurisdiction under “the Constitution, treaties or laws of the United States,” 28 U.S.C. § 1441(b); and
- 2. Whether this Court has jurisdiction because Plaintiffs’ suit challenges actions allegedly taken by AT&T under the direction of the NSA, *see* 28 U.S.C. § 1442(a)(1).

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT.

The crux of Plaintiffs’ suit against Defendants AT&T Communications of California, AT&T Corp. and AT&T Inc.¹ (“Defendants” or “AT&T”) is AT&T’s supposed “provi[sion of] data to the NSA.” Compl. ¶ 1; *accord id.* at 1:11-12; *id.* ¶¶ 19, 22, 28.² The Complaint seeks to enjoin what is alleged to be an important part of an ongoing federal intelligence and counterterrorism program conducted by the National Security Agency (“NSA”), an agency of the Department of Defense. While Plaintiffs dress their claims up as state-law causes of action, the claims are directed at a matter of exclusively federal concern: the gathering of foreign and military intelligence. Plaintiffs seek to discover activities related to alleged NSA counterterrorism surveillance programs and would have this Court enjoin AT&T’s participation in any such activities, *see* Compl. 11:14-16, and require “AT&T to disclose to each customer what files or records of that customer have been shared with” the NSA, “including the dates and recipients of any such disclosure,” *id.* at 11:17-19. From the factual allegations to the legal issues to the remedy, the Complaint has “federal” written all over it. Plaintiffs’ lawsuit should accordingly proceed in federal court and their motion to remand should be denied.

¹ Defendant AT&T Inc. is not a proper party to this action and intends to move to dismiss on personal jurisdiction grounds.

² AT&T cannot, and does not, confirm that it was involved in any way in any activities alleged in the Complaint, or in any classified activities, as reported in the popular press or otherwise. Among other reasons, federal statutes directly prohibit any such confirmations. *See, e.g.*, 18 U.S.C. § 798(a)(3); 50 U.S.C. § 402 (note).

1 That said, it is premature to decide the motion. On July 27, the Judicial Panel on
2 Multidistrict Litigation (“JPML”) will hear arguments on whether this and numerous
3 virtually identical actions filed against Defendants and other carriers across the country
4 should be consolidated and transferred to an MDL court. The Court should hold Plaintiffs’
5 motion in abeyance until the JPML rules.

6 Should the Court nonetheless wish to reach Plaintiffs’ motion before the JPML
7 rules, the Court must deny the motion for any of the following three reasons:

8 *First*, the subject matter of the lawsuit is completely preempted by federal law. The
9 subject addressed by the Complaint—the participation by private telephone companies in
10 authorized foreign intelligence-gathering activities of the federal government—is covered
11 by federal statutes, including the Foreign Intelligence Surveillance Act (“FISA”), the
12 Wiretap Act, and the Stored Communications Act (“SCA”). Those federal statutes—not
13 state law—control whether and how carriers may or must provide customer information to
14 the federal government, and when carriers may be held civilly or criminally liable for
15 having done so. In addition, the paramount and exclusive federal interest in military and
16 foreign intelligence matters, reflected in federal common law doctrines such as the state
17 secrets privilege, the *Totten* rule, and carrier immunity, preempts state regulatory authority
18 in this arena entirely, whether exercised by the state legislature or by state courts.

19 *Second*, this Court has jurisdiction because the Complaint necessarily depends on
20 resolution of substantial questions of federal law. Plaintiffs have no claim under the
21 California Customer Privacy Act if their calling information was disclosed “in response to
22 lawful process,” Cal. Pub. Util. Code § 2891(d)(6), which necessarily includes the litigation
23 immunities contained in FISA, Title III and the SCA. Similarly, the Complaint necessarily
24 requires resolution of two national-security-related rules of federal common law: namely,
25 the state secrets doctrine and the *Totten* rule forbidding suits that depend on proof of a
26 secret espionage relationship with the United States.

27
28

1 *Third* and finally, removal is proper because even if, as Plaintiffs allege, AT&T
2 assisted the NSA in its intelligence activities, 28 U.S.C. § 1442 authorizes AT&T to remove
3 this action on the basis that it acted—if at all—at the direction of a federal officer.

4 Today’s decision in *Hepting v. AT&T* reaffirms that the matters at issue in all of the
5 complaints challenging the alleged cooperation of telecommunications carriers with the
6 NSA’s alleged terrorist surveillance program are of exclusively federal concern. *See*
7 *Hepting* Dkt. 308 (“Order”). The Order demonstrates that the state secrets, certification and
8 *Totten* issues that will inevitably arise in this case (and any case challenging the NSA
9 program) are threshold matters that must be resolved before any other issues are litigated.
10 The Order also shows that these issues are likely to recur throughout the litigation. *See*
11 Order at 44 (“After discovery begins, the court will determine step-by-step whether the
12 privileges prevent plaintiffs from discovering particular evidence.”); *id.* at 42-43 (deferring
13 questions of whether Congress “has limited the state secrets privilege”); *id.* at 69-71
14 (describing Court’s intention to appoint a Rule 706 expert). As discussed below, these
15 issues (and the national security concerns they implicate) are all matters of exclusively
16 federal concern. Because the quintessentially federal matters in the Complaint must be
17 resolved in a federal court, Plaintiffs’ motion should be denied.

18 **II. ARGUMENT**

19 **A. This Court should defer ruling pending a decision of the Judicial** 20 **Panel on Multidistrict Litigation.**

21 The Court should refrain from ruling on Plaintiffs’ Motion for Remand pending the
22 likely transfer of this case to an MDL court for consolidated and coordinated proceedings as
23 part of *In re National Security Agency Telecommunications Records Litigation* (MDL
24 Docket No. 1791). Among the numerous reasons justifying the consolidation and
25 coordination of proceedings in this and other NSA-related cases is that the same or similar
26 issues of federal jurisdiction raised by Plaintiffs’ motion for remand are also present in, at a
27 minimum, *Riordan v. Verizon Commc’ns, Inc.*, No. 06-cv-3574 (N.D. Cal. mot. for remand
28 filed July 5, 2006), and *Chulsky v. Cellco*, No. 06-cv-2530 (D.N.J. mot. for remand filed

1 June 30, 2006), and are certain to arise in other complaints that have been or soon will be
2 filed in other state courts, *cf. Cross v. AT&T Commc'ns, Inc.*, No. 06-932 (S.D. Ind.
3 removal filed June 14, 2006); *Mink v. AT&T Commc'ns of the Southwest, Inc.*, No. 0622-
4 CC05061 (Mo. 22d Jud. Cir. Ct. filed June 28, 2006) (not yet served). Moreover, both
5 consolidation and federal jurisdiction are justified by the security risk inherent in litigating
6 cases involving classified documents in numerous state and federal fora scattered
7 throughout the country. Deferring ruling until after the JPML has created an MDL and
8 transferred these cases to the MDL court will serve the interests of judicial and party
9 economy, and uniformity of decision, by allowing a single court to rule on the issues of
10 federal jurisdiction presented by this and other related remand motions. Thus, AT&T
11 respectfully requests that this Court stay or defer proceedings in this case, including ruling
12 on the remand motion, pending likely transfer to the MDL court.

13 **B. This Court has jurisdiction because Plaintiffs' purported state-law**
14 **claims are completely preempted.**

15 A state-court action may be removed to federal court when it "aris[es] under the
16 Constitution, treaties or laws of the United States." 28 U.S.C. § 1441(b). A case "aris[es]
17 under" federal law, in turn, "if 'a well-pleaded complaint establishes either that federal law
18 creates the cause of action or that the plaintiff's right to relief necessarily depends on
19 resolution of a substantial question of federal law.'" *Empire Healthchoice Assurance, Inc.*
20 *v. McVeigh*, 126 S. Ct. 2121, 2131 (2006) (quoting *Franchise Tax Bd. of California v.*
21 *Constr. Laborers Trust for So. California*, 463 U.S. 1, 27-28 (1983)). These conditions are
22 satisfied when federal law completely preempts state law. *Beneficial Nat'l Bank v.*
23 *Anderson*, 539 U.S. 1, 8 (2003). The reason is simple: "When the federal statute
24 completely pre-empts the state-law cause of action, a claim which comes within the scope
25 of that cause of action, even if pleaded in terms of state law, is in reality based on federal
26 law." *Id.*; *see also In re Miles*, 430 F.3d 1083, 1088 (9th Cir. 2005); *ARCO Env'tl.*
27 *Remediation, L.L.C. v. Dep't of Health & Env'tl. Quality*, 213 F.3d 1108, 1114 (9th Cir.
28 2000). This is just such a case. Plaintiffs' claims must be brought, if at all, under the

1 federal statutes governing telephone carrier cooperation in foreign intelligence surveillance
 2 activities. In addition, their claims are otherwise displaced by the federal common law that
 3 protects the exclusive federal interest in foreign intelligence activities.

4 **1. Federal statutory law completely preempts Plaintiffs' claims.**

5 This Court has jurisdiction over this case because federal statutory law completely
 6 preempts Plaintiffs' state-law claims challenging the NSA's foreign intelligence
 7 surveillance activities. The key Ninth Circuit case setting out the applicable analysis,
 8 which Plaintiffs do not cite, is last year's decision in *In re Miles*. There, the Ninth Circuit
 9 noted that "[t]he Supreme Court has concluded that the preemptive force of some federal
 10 statutes is so strong that they 'completely preempt' an area of state law. In such instances,
 11 any claim purportedly based on that preempted state law is considered, from its inception, a
 12 federal claim, and therefore arises under federal law." *Miles*, 430 F.3d at 1088 (internal
 13 quotations and citations omitted). At bottom, complete preemption depends on whether
 14 "Congress intended the federal cause of action to be exclusive." *Id.*; *see also Beneficial*
 15 *Nat'l Bank*, 539 U.S. at 8-9. Where there is no express statutory exclusivity language, the
 16 analysis focuses upon factors such as the "structure and purpose" of the relevant federal
 17 statutes; whether they contain "complex, detailed, and comprehensive provisions" that
 18 "create a whole system under federal control"; whether there is a relevant grant of
 19 authority under the United States Constitution; and whether there exist "extensive federal
 20 remedies." *Miles*, 430 F.3d at 1089.³

21
 22 ³ *Miles* involved bankruptcy law but its statutory analysis is equally applicable to the
 23 statutes at issue here. The court in *Miles* observed:

24 We do not hold that all state actions related to bankruptcy proceedings are
 25 subject to the complete preemption doctrine. We recognize that because
 26 the common law of the various states provides much of the legal
 27 framework for the operation of the bankruptcy system, it cannot be said
 28 that Congress has completely preempted all state regulation which may
 affect the actions of parties in bankruptcy court.

27 430 F.3d at 1092 (internal quotation marks and citation omitted). Here, the "common law
 28 of the various states provides" none of the legal framework governing the "operation" of
 national defense or intelligence gathering, so arguments here for completely preempting

1 Under *Miles*, Plaintiffs’ claims are completely preempted. First and most obviously,
2 the SCA, 18 U.S.C. § 2701 *et seq.*, which was enacted as part of the Electronic
3 Communications Privacy Act of 1986 (“ECPA”), Pub. L. No. 99-508, 100 Stat. 1848
4 (1986), regulates disclosure of the very category of information at issue in this lawsuit:
5 non-content “record[s] or other information pertaining to a subscriber.” 18 U.S.C.
6 § 2702(c). And it contains a provision expressly indicating that its federal remedies are
7 exclusive: “The remedies and sanctions described in this chapter are the only judicial
8 remedies and sanctions for nonconstitutional violations of this chapter.” *Id.* § 2708. This is
9 a plain statement by Congress that all “judicial remedies and sanctions” apart from those in
10 the SCA are excluded. This is precisely what is necessary under *Miles* to confirm that the
11 SCA completely preempts the remedies and sanctions Plaintiffs are seeking under
12 California law for the alleged disclosure of customer telephone records.

13 Another district court has already so held. In *Muskovich v. Crowell*, No. 3-95-CV-
14 80007, 1995 WL 905403, 1995 U.S. Dist. LEXIS 5899 (S.D. Iowa Mar. 21, 1995), the
15 court considered an effort to remove a case brought originally in state court solely under
16 state law complaining of unlawful access to stored communications records. In finding that
17 removal was proper, the court concluded that the plaintiff “allege[d] conduct regulated by
18 ECPA” and concluded that plaintiff’s state-law claims were completely preempted. The
19 court held that, “[i]n section 2708, Congress unequivocally expressed an intent to occupy
20 the field and provide the exclusive remedies for conduct regulated by ECPA.” 1995 WL
21 905403, at *1, 1995 U.S. Dist. LEXIS 5899, at *2-3.

22 That holding applies here. Plaintiffs do not deny that they allege “conduct regulated
23 by ECPA.” *Id.* Instead, they argue that *Muskovich* was wrongly decided, on the theory that
24 § 2708 is limited in scope to violations “of this chapter”—*i.e.*, the SCA—and so does not
25 preempt “violations of state or other federal laws.” Pls.’ Mot. for Remand (hereinafter
26 “Mot.”) at 13 n.6. Contrary to Plaintiffs’ argument, *Muskovich* did not ignore the statutory

27 _____
28 state-law claims that would enjoin federal defense and intelligence functions are even
stronger than those in *Miles*.

1 language; it properly recognized that the preemptive scope of this provision covers all
 2 “conduct regulated by ECPA,” whether pled as a state-law or federal-law claim. 1995 WL
 3 905403, at *1, 1995 U.S. Dist. LEXIS 5899, at *3. After all, the very purpose of complete
 4 preemption is that, “[w]hen the federal statute completely pre-empts the state-law cause of
 5 action, a claim which comes within the scope of that cause of action, *even if pleaded in*
 6 *terms of state law*, is in reality based on federal law.” *Beneficial Nat’l Bank*, 539 U.S. at 8
 7 (emphasis added). Plaintiffs read Congress’s direction that ECPA’s remedies are “the only
 8 judicial remedies and sanctions” for conduct that violates ECPA to mean that they are “the
 9 only judicial remedies and sanctions, except for all the others.” Under Plaintiffs’ reading,
 10 § 2708, which is captioned “Exclusivity of remedies,” would be exclusive of nothing.⁴

11 Even apart from the SCA’s express preemption provision, Plaintiffs’ claims would
 12 be completely preempted by federal statutes under *Miles*. Defending the nation against
 13 foreign threats—of which gathering foreign intelligence is one critical part—is
 14 constitutionally committed to the federal government. *See, e.g.*, U.S. Const. preamble; *id.*
 15 art. I, § 8, cl. 1; *id.* art. II, § 2, cl. 1. Whatever the proper distribution of power between
 16 Congress and the President, national security and the gathering of foreign intelligence are
 17 central to the federal government’s (and only the federal government’s) mission. *See*
 18 *Ullman v. United States*, 350 U.S. 422, 436 (1956) (describing “Congress’ paramount
 19 authority in safeguarding national security”); *see generally Pennsylvania v. Nelson*,

20

21

22 ⁴ Plaintiffs’ further arguments concerning ECPA fall equally flat. They claim that
 23 18 U.S.C. § 2710(f), which limits the preemptive scope of § 2710’s regulation of disclosure
 24 of video tape rental and sales records, indicates that Congress did not intend in the SCA to
 25 preempt state law. *See Mot.* at 13-14. Plaintiffs have it backwards. That Congress
 26 believed it necessary to include an *anti*-preemption provision for the section dealing with
 27 the narrow class of claims involving video tape records, which was added in a later public
 28 law, *see Pub. L. No. 100-618, sec. 2, § 2710(f), 102 Stat. 3195, 3197 (1988)*, shows that
 Congress understood the pre-existing portions of the SCA to preempt more broadly.
 Plaintiffs’ argument under § 2703(d) fails for the same reason. That section specifies that
 certain “court order[s] for disclosure” “shall not issue if prohibited by the law of such
 State,” 18 U.S.C. § 2703(d), but such a provision would be unnecessary if, as Plaintiffs
 posit, ECPA has no preemptive scope. In any event, this does not presuppose that “states
 might very well have their own ... more restrictive privacy laws,” *Mot.* at 14, but only that
 there may be state procedural restrictions on the issuance of the relevant orders.

1 350 U.S. 497, 504-05 (1956) (preempting state cause of action involving national
2 security).⁵

3 As in *Miles*, the subject-matter at issue here—the alleged participation of
4 telecommunications companies in foreign intelligence surveillance—is addressed by
5 ““complex, detailed, and comprehensive provisions”” that ““create a whole system under
6 federal control.”” *Miles*, 430 F.3d at 1089. Several statutes work together to create the
7 overall scheme that completely preempts state-law actions insofar as those actions seek, as
8 Plaintiffs’ does here, to enjoin authorized federal intelligence activities. The first, FISA,
9 regulates, at least in substantial part, many aspects of foreign intelligence surveillance,
10 including electronic surveillance, 50 U.S.C. §§ 1801-1811, physical searches, *id.* §§ 1821-
11 1829, pen registers and trap and trace devices, *id.* §§ 1841-1846, and access to business
12 records, *id.* §§ 1861-1862.⁶ Significantly for assessing complete preemption, the federal
13 Foreign Intelligence Surveillance Court has exclusive jurisdiction to authorize foreign
14 intelligence surveillance, and actions like the Plaintiffs’, even if brought in federal court,
15 have been found to intrude impermissibly upon that jurisdiction. *ACLU Found. v. Barr*,
16 952 F.2d 457, 469 (D.C. Cir. 1991) (“No provision in FISA authorizes private actions in the
17 federal district courts to enjoin surveillance on the basis of statutory violations.”).

18 Likewise, FISA’s “remedial scheme is comprehensive.” *Miles*, 430 F.3d at 1090.
19 FISA establishes both criminal and civil liability, specifying remedies in each case. *See*

20 _____
21 ⁵ *See also MITE Corp. v. Dixon*, 633 F.2d 486, 491 (7th Cir. 1980) (“national security” is
22 “an area of paramount federal importance” and of “unquestionably vital significance to the
23 nation as a whole”), *aff’d on other grounds*, 457 U.S. 624 (1982); *accord Stehney v. Perry*,
24 907 F. Supp. 806, 824 (D.N.J. 1995) (“State regulation in the area of national security is
expressly preempted by Article I, § 8 and Article II, § 2 of the Constitution.”), *aff’d*,
101 F.3d 925 (3d Cir. 1996); *AMCA Int’l Corp. v. Krouse*, 482 F. Supp. 929, 934 (S.D.
Ohio 1979) (“There is an overriding federal interest in the spheres of foreign affairs and
national security.”).

25 ⁶ The federal role is evident in every significant provision. For instance, applications to
26 conduct foreign intelligence surveillance are submitted by a federal officer, approved by the
27 Attorney General of the United States, and certified by an Executive Branch official.
28 50 U.S.C. § 1804(a). Such applications are considered by a special-purpose federal court
created by FISA, *see id.* § 1803, and the federal courts are vested with *exclusive* jurisdiction
to entertain challenges by persons seeking to suppress or discover evidence or materials
relating to FISA surveillance where harm to national security might otherwise occur, even
when the underlying proceedings are in state court, *see id.* § 1806(f).

1 50 U.S.C. §§ 1809(c), 1810, 1828. It also provides for immunity from liability in certain
2 circumstances. *E.g., id.* §§ 1805(i), 1842(f).

3 In response, Plaintiffs argue that “[n]o court has ever found that FISA completely
4 preempts state law privacy claims”—which is true only because no court has decided the
5 question either way—and that FISA permits liability under certain circumstances, as when
6 there is no Attorney General order. Mot. at 11. But this cuts exactly the other way. FISA
7 does indeed create *federal* liability and *federal* remedies, but *Beneficial National Bank* and
8 *Miles* teach that Congress’s creation of federal remedies is one of the primary indicators
9 that there *is* complete preemption. And it is wrong to argue, as Plaintiffs seem to do, that
10 there is no complete preemption because Congress did not explicitly preempt state-law
11 claims. The very purpose of *Miles*’ multi-factor inquiry was to determine when federal
12 remedies are exclusive (and the statute completely preemptive) when Congress has not
13 affirmatively so stated. *See Miles*, 430 F.3d at 1089.

14 FISA is also supplemented by other federal statutes regulating telecommunications
15 carriers’ assistance to the federal government.⁷ In particular, Title III of the Omnibus
16 Crime Control and Safe Streets Act (“Title III”), which created the Wiretap Act, 18 U.S.C.
17 § 2510 *et seq.*, complements the FISA regime in regulating electronic surveillance.
18 Provisions of Title III explicitly cross-reference FISA and indicate that the two statutes
19 operate in tandem. *E.g., id.* § 2511(2)(f). Relevant here, 18 U.S.C. § 2511(2)(a)(ii)
20 provides broad immunity—which extends to *any* cause of action in “any court”—for
21 providers of electronic communication services who provide information to the federal
22 government pursuant to a statutory certification. *See also id.* § 2520(d) (providing
23 immunity for “good faith reliance” on certification); *cf. id.* § 2522 (cross-referencing FISA;
24 establishing procedures for compliance with the Communications Assistance to Law

25 _____
26 ⁷ Plaintiffs concede that the “gathering of intelligence through information about telephone
27 calls” “is an area already addressed by Congress through FISA, portions of Title III and the
28 Stored Communications Act,” and on this basis argue there can be no federal common law.
Mot. at 15-16. Leaving aside that this is mistaken—federal common law complements, not
supplants, federal statutes—it follows *a fortiori* that if *federal* common law cannot
“supplant the detailed work of Congress,” *state* law certainly cannot do so.

1 Enforcement Act).⁸ And Title III, like FISA, provides a federal remedy for violations. *See*
 2 *id.* § 2520. Furthermore, as noted above, the SCA directly regulates the subject matter of
 3 this lawsuit, *see, e.g., id.* § 2702(c), and it, too, contains a federal remedy, *see id.* § 2707,
 4 and is expressly linked to Title III and FISA, *see, e.g., id.* § 2702(b)(2) (cross-referencing
 5 Title III); *id.* § 2511(2)(f) (Title III provision cross-referencing FISA).⁹

6 Taken together, these statutes are precisely the kind of ““complex, detailed, and
 7 comprehensive provisions”” that ““create a whole system under federal control”” that the
 8 Ninth Circuit found completely preemptive in *Miles*. 430 F.3d at 1089. The obvious and
 9 exclusive federal role in foreign intelligence surveillance; the detailed manner in which this
 10 subject has been regulated; and the remedial regime of liabilities and immunities that
 11 Congress has enacted all demonstrate that Congress meant federal law to provide the
 12 exclusive remedies in any challenge to the provision of foreign intelligence surveillance
 13 information to the federal government. If Plaintiffs wish to sue a telecommunications
 14 carrier seeking to enjoin conduct that allegedly violates these statutes, they must do so
 15 under these statutes. Under such circumstances, there is complete preemption, and removal

16

17

 18 ⁸ Plaintiffs mistakenly assert that Title III “does not even ‘ordinarily’ preempt state privacy
 19 laws regulating conduct falling within its scope.” Mot. at 11. The Wiretap Act and FISA
 20 do preempt state laws that attempt to regulate federal surveillance activities. *United States*
 21 *v. Carrazana*, 921 F.2d 1557, 1562 (11th Cir. 1991) (“In 1968, Congress preempted the
 22 field of interception of wire and oral communications by enacting Title III of the Omnibus
 Crime Control and Safe Streets Act ...”); H.R. Rep. No. 103-827, pt. 1, at 11 (1994) (“The
 Senate Report on Title III stated explicitly that the legislation ‘has as its dual purpose (1)
 protecting the privacy of wire and oral communications and (2) delineating on a uniform
 basis the circumstances and conditions under which the interception of wire and oral
 communications may be authorized.’”).

23 Although Congress has permitted States to impose greater restrictions on
 24 surveillance initiated by *state* government officials, such restrictions cannot regulate *federal*
 25 surveillance activities. *United States v. Butz*, 982 F.2d 1378, 1382 (9th Cir. 1993)
 26 (“Although we generally interpret Title III as preempting state law, we have suggested that
 [18 U.S.C. § 2516(2)] requires further authorization by state statute. With the lone
 exception concerning interception by state officers for state prosecutions, the federal statute
 does not defer to the states.” (internal quotation marks omitted)); *United States v. Hall*,
 543 F.2d 1229, 1232 (9th Cir. 1976) (en banc).

27 ⁹ A specialized statute also specifically provides a federal rule of non-disclosure of NSA
 28 activities, stating directly that no law, including state law, may be “construed to require the
 disclosure of the organization or any function of the National Security Agency” or “any
 information with respect to the activities thereof.” 50 U.S.C. § 402 (note).

1 is appropriate. *Beneficial Nat'l Bank*, 539 U.S. at 6-7, 9-10; *Metro. Life Ins. v. Taylor*,
 2 481 U.S. 58, 63-65 (1987).

3 **2. Federal common law completely preempts Plaintiffs' claims.**

4 Plaintiffs' state-law causes of action are also completely preempted by federal
 5 common law, which the Supreme Court has recognized displaces state law where the
 6 unique federal interest in military and defense matters is concerned. *See, e.g., Boyle v.*
 7 *United Techs. Corp.*, 487 U.S. 500, 504-05 (1988) (establishing federal common law
 8 government contractor defense for design of military equipment). "As a general matter,
 9 [courts] rely on state law to fill in the gaps Congress leaves in federal statutes." *Foad*
 10 *Consulting Group, Inc. v. Azzalino*, 270 F.3d 821, 827 (9th Cir. 2001). However, "a few
 11 areas, involving 'uniquely federal interests,' are so committed by the Constitution and laws
 12 of the United States to federal control that state law is pre-empted and replaced, where
 13 necessary, by federal law of a content prescribed (absent explicit statutory directive) by the
 14 courts—so-called 'federal common law.'" *Boyle*, 487 U.S. at 504 (internal citation
 15 omitted). These areas include such intrinsically federal issues as foreign relations; state
 16 boundary and water disputes; the United States' rights and obligations under its contracts;
 17 and, under *Boyle*, "the [Government's] interest in getting ... [its] work done" under defense
 18 or national security-related contracts with private parties. *Id.* at 505-06; *Atherton v. FDIC*,
 19 519 U.S. 213, 225-26 (1997).¹⁰ Where an area is of such unique federal interest that the
 20 federal courts are empowered to create federal common law, complete preemption may
 21 follow. *See, e.g., Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 n.8 (1987) (describing
 22 ruling in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 675 (1974), that state-

23

24

25 ¹⁰ *See also United States v. Pappas*, 94 F.3d 795, 801 (2d Cir. 1996) (state contract law
 26 preempted by federal common law for government contracts involving national security);
 27 *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1490 (C.D. Cal. 1993) (establishing
 28 federal common law immunity from state manufacturing defect suits involving weaponry
 because "[n]o information concerning the design and capabilities of the [weaponry] can be
 discovered without interfering with national security"); *Grinnell Fire Prot. Sys. Co. v.*
Regents of Univ. of California, 554 F. Supp. 495, 498-99 (N.D. Cal. 1982).

1 law complaint was completely preempted by federal common law right of possession to
2 Indian tribal lands).

3 Defense of the nation against foreign attack is the archetypal interest that is so
4 “intrinsically federal” that state authority is excluded. *See supra* at 7 & n.5; *see generally*
5 *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (“If any one proposition could
6 command the universal assent of mankind, we might expect it would be this—that the
7 government of the Union, though limited in its powers, is supreme within its sphere of
8 action.”). “Our system of government is such that the interest of the cities, counties and
9 states, no less than the interest of the people of the whole nation, imperatively requires that
10 federal power in the field affecting foreign relations be left entirely free from local
11 interference.” *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941). States simply have no role,
12 whether through the legislative, executive, or judicial process, in regulating the federal
13 government’s foreign intelligence surveillance activities. *See United States v. Pink*,
14 315 U.S. 203, 233 (1942) (“Power over external affairs is not shared by the States; it is
15 vested in the national government exclusively. It need not be so exercised as to conform to
16 state laws or state policies whether they be expressed in constitutions, statutes, or *judicial*
17 *decrees.*”) (emphasis added); *In re Tarble*, 80 U.S. (13 Wall.) 397, 408-10 (1871).

18 Accordingly, to the extent state law purported to regulate or enjoin federal
19 intelligence activities, it would be wholly displaced by federal common law. In addition to
20 *Boyle*’s recognition that federal procurements of defense equipment implicate uniquely
21 federal interests that must be protected by preemptive federal common law, federal
22 common law rules have been created to protect the specific federal interest in managing the
23 federal government’s espionage relationships and activities. *See infra* §§ II.C.2, II.C.3. For
24 example, in *Totten v. United States*, 92 U.S. 105 (1875), the Supreme Court recognized that
25 the ability of the federal government to conduct espionage activities depends on espionage
26 agreements remaining secret, and thus created a “rule of dismissal” that “absolute[ly]
27 protect[s]” such agreements from being subject to adjudication. *Tenet v. Doe*, 544 U.S. 1,
28 6-11 (2005). Similarly, as a matter of federal common law, lawsuits must be dismissed

1 when “the very subject matter of [the] action is a state secret.” *Kasza v. Browner*, 133 F.3d
2 1159, 1170 (9th Cir. 1998). And telecommunications carriers enjoy federal common law
3 immunity from suit if they provide technical assistance to authorized surveillance or
4 intelligence activities run by the federal government. *See Smith v. Nixon*, 606 F.2d 1183,
5 1191 (D.C. Cir. 1979).

6 All of these doctrines reflect the paramount federal interest, safeguarded by
7 preemptive principles of federal common law, in military and intelligence activities
8 associated with defending against foreign attack. The vindication of this interest requires
9 not only the use of federal law but also the availability of a federal forum to interpret and
10 apply it. That is the clear implication of the Ninth Circuit’s holding in *New SD, Inc. v.*
11 *Rockwell Int’l Corp.*, 79 F.3d 953 (9th Cir. 1996), which Plaintiffs fail to cite. In *New SD*,
12 the plaintiff subcontractor filed a state-law breach-of-contract action against the prime
13 government contractor based on a contract to develop military hardware. *Id.* at 954. The
14 Ninth Circuit affirmed the removal of the action to federal court on a complete preemption
15 theory because “on government contract matters having to do with national security, state
16 law is totally displaced by federal common law.” *Id.* at 955.

17 The subject of this litigation, which concerns an alleged ongoing counterterrorism
18 program of the NSA, implicates national security far more directly and critically than
19 anything in *New SD*. And the state secrets, *Totten*, and *Smith* rules that should be
20 dispositive of Plaintiffs’ claims are all rules of federal common law addressed to
21 circumstances precisely like those here. Under *New SD*, federal jurisdiction exists to
22 consider these claims, and removal is therefore appropriate.

23 **C. This Court has jurisdiction because Plaintiffs’ right to relief necessarily**
24 **depends on resolution of substantial questions of federal law.**

25 “A case arises under federal law ... if ‘a well-pleaded complaint establishes ... that
26 the plaintiff’s right to relief necessarily depends on resolution of a substantial question of
27 federal law.’” *Empire*, 126 S. Ct. at 2131 (quoting *Franchise Tax Bd.*, 463 U.S. at 27-28)
28 (second alteration in original); *accord Grable & Sons Metal Prods., Inc. v. Darue Eng’g &*

1 *Mfg.*, 125 S. Ct. 2363, 2367 (2005) (the Supreme Court has “recognized for nearly 100
 2 years that in certain cases federal question jurisdiction will lie over state-law claims that
 3 implicate significant federal issues”). This “doctrine captures the commonsense notion that
 4 a federal court ought to be able to hear claims recognized under state law that nonetheless
 5 turn on substantial questions of federal law, and thus justify resort to the experience,
 6 solicitude, and hope of uniformity that a federal forum offers on federal issues.” *Grable*,
 7 125 S. Ct. at 2367.

8 Here, there are three significant federal issues that satisfy this test and justify
 9 removal. *First*, Plaintiffs’ claims require adjudication of whether federal law authorizes the
 10 provision of customer calling information to the NSA. *Second*, this case necessarily
 11 implicates the state secrets dismissal doctrine, which the United States has invoked in
 12 substantially identical cases and has explained it will do in cases like this one. *Third*,
 13 litigation of this case necessarily requires consideration of the *Totten* rule, which is a
 14 potentially dispositive threshold inquiry that must be satisfied before the Court can even
 15 take jurisdiction over Plaintiffs’ claims. These federal issues, none of which is an
 16 affirmative defense, are all “substantial question[s] of federal law” upon which Plaintiffs’
 17 right to relief depends. *Empire*, 126 S. Ct. at 2131.

18 **1. Plaintiffs’ right to relief depends on resolution of federal**
 19 **authorization issues.**

20 Plaintiffs’ right to relief under California Public Utilities Code § 2891 expressly
 21 depends on the resolution of important issues of federal statutory law. Section 2891
 22 provides on its face that no cause of action lies where “[i]nformation [is] provided to a law
 23 enforcement agency in response to lawful process.” Cal. Pub. Util. Code § 2891(d)(6).
 24 Plaintiffs have accordingly alleged that AT&T provided customer calling information to the
 25 NSA and did so without “legal process from the government.” Compl. 1:21-22, 25-27.¹¹

26 _____
 27 ¹¹ The Complaint also alleges the absence of lawful process or otherwise addresses the issue
 28 in numerous other places. *See, e.g.*, Compl. 7:14-16 (“these telephone records ... were not
 provided under the compulsion of any legal process such as a warrant, court order or
 subpoena”); *id.* at 10:7-9 (“Plaintiffs are informed and believe that AT&T provided this

1 Even if one were to assume that the allegation that AT&T provided information to the NSA
 2 were correct, resolution of this claim would depend entirely on whether any subpoenas,
 3 orders, certifications, or other legal process issued by the federal government properly
 4 authorized AT&T to provide the information. As discussed above, FISA, Title III and the
 5 SCA all touch on this question and contain numerous authorization and immunity
 6 provisions that may be at issue here. *See, e.g.*, 18 U.S.C. §§ 2511(2)(a), 2520(d),
 7 2702(b)(2), 2707(e); 50 U.S.C. § 1805(i). Removal thus lies under *Grable*: just as the
 8 plaintiff's quiet-title suit in *Grable* depended upon the adequacy of an IRS notice of sale
 9 governed by federal law, so does Plaintiffs' § 2891 claim depend upon whether federal law
 10 authorized and/or immunized AT&T's alleged activities.¹² *Cf. SEC v. Pac. Bell*, 704 F.
 11 Supp. 11, 13-15 (D.D.C. 1989) (interpreting earlier version of § 2891 to include federal
 12 process).¹³

13

14 information voluntarily, rather in response to the compulsion of legal process ..."); *id.* at
 15 3:5-7, 3:14-15, 9:23-25 (under the Public Utilities Code, "[p]ersonal calling information
 may be made available to a law enforcement agency only in response to lawful process,
 pursuant to subsection (d)(6) section 2891").

16 ¹² Because this Court has jurisdiction over the § 2891 claim, removal of the entire action is
 17 proper. *See City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 165 (1997) (citing
 18 28 U.S.C. § 1367(a)). Both claims "'derive from a common nucleus of operative fact,'"
 19 namely, AT&T's purported provision of customer calling information to the NSA. *Id.*;
 20 *compare* Compl. 9:5-7 ("AT&T's actions in providing customer calling records about
 plaintiffs violated their constitutional right to privacy guaranteed by article I, section 1 of
 the California Constitution."), *with id.* at 10:2-3 ("AT&T has violated Public Utilities Code
 section 2891(a) by making available to the NSA ... personal calling pattern information
 ..."). "[T]he principles of economy, convenience, fairness, and comity" also strongly
 weigh in favor of supplemental federal jurisdiction. *City of Chicago*, 522 U.S. at 172-73.

21 ¹³ Contrary to Plaintiffs' conclusory assertion that this threshold matter is really a federal
 22 defense (Mot. at 18), it poses a federal question embedded directly in the state-law cause of
 23 action, as in *Grable*. Section 2891, which contains the language related to "lawful
 24 process," embodies the principal statutory prohibition, defines its scope, and provides a
 25 remedy for violations. Where the information was "provided to a law enforcement agency
 in response to lawful process," *id.* § 2891(d)(6), the statute simply "does not apply." As a
 result, proving that the information was not provided pursuant to lawful process is
 necessary to make out a prima facie case of liability, irrespective of whether a defendant
 puts on a case.

26 This conclusion is confirmed by the structure of the statute, which separately designates
 27 defenses. In contrast to § 2891, § 2894 is titled "Disclosure of information pursuant to
 court order or subpoena issued by government agency; defense," and the text of the
 28 provision, by its terms, creates a defense. *Id.* § 2894(a). That § 2894 is specifically
 designated as a defense whereas § 2891 is not, and that the two provisions appear in
 separate sections of the same statute, is strong evidence that satisfying § 2891(d)(6) is a

1 Section 2891 aside, no cause of action may be maintained if a carrier's conduct was
 2 authorized by a Title III certification. This potentially dispositive issue of federal law, too,
 3 is one on which Plaintiffs' right to relief on all of its claims depends and on which AT&T's
 4 right to a federal forum therefore also rests. Under 18 U.S.C. § 2511(2)(a)(ii), "[n]o cause
 5 of action shall lie in any court against any provider of wire or electronic communication
 6 service, its officers, employees, or agents, landlord, custodian, or other specified person for
 7 providing information, facilities, or assistance in accordance with the terms of a court order,
 8 statutory authorization, or certification under this chapter." *Id.* (emphasis added). In this
 9 provision, Congress unequivocally barred any court from adjudicating claims against
 10 telecommunications carriers who have assisted the federal government in its surveillance
 11 activities pursuant to the specified process. Because Title III forbids Plaintiffs from
 12 proceeding if there was legal authorization, "resolution of" their lawsuit would depend
 13 upon this "substantial"—and indeed critical—"question of federal law."¹⁴

14 Plaintiffs offer little by way of response. As to § 2891(d)(6), their argument is
 15 simply that § 2894 is a defense. Mot. at 18. But this argument favors AT&T, not Plaintiffs,
 16 for the reasons set forth above. *Supra* at 15 n.13. Plaintiffs do not explain the interplay
 17 between § 2891 and § 2894, other than to note in a footnote the existence of § 2891. Mot.
 18 at 18 n.9. Plaintiffs also repeatedly suggest that there was in fact no lawful process and no
 19 "compulsion." *E.g.*, Compl. 18:17-18, 19:18-19. Leaving aside that this assertion is
 20 supported only by vague reference to press accounts—the accuracy of which Plaintiffs
 21 specifically disclaim reliance upon, *see* Pls.' Req. for Judicial Notice at 1 ("Plaintiffs do not
 22 request this Court to take judicial notice that the facts reported in the documents are true
 23")—Plaintiffs' argument is altogether irrelevant to the question whether removal is
 24 proper. Whether AT&T ultimately will establish legal process under federal law is a

25 necessary antecedent to establishing liability. *See Davis v. Michigan Dep't of Treasury*,
 26 489 U.S. 803, 809 (1989); *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 120 (2002);
McMillan v. Pennsylvania, 477 U.S. 79, 84-86 (1986).

27 ¹⁴ The effect of such process is not to provide a carrier with an affirmative defense—good
 28 faith reliance on a certification is a separate defense under 18 U.S.C. § 2520(d)—but rather
 to eliminate the very existence of a cause of action.

1 fundamentally different question from whether this federal-law issue is necessarily present
2 in the case. As described, the issue is indeed present here.

3 Plaintiffs assert that “the issue of federal authorization for AT&T’s conduct does not
4 raise a substantial dispute over the interpretation of federal law,” on the theory that this
5 “dispute is primarily factual in nature.” Mot. at 18:24. *Grable* (as interpreted by *Empire*)
6 does not require that the federal issue be purely legal; rather, the primarily legal nature of
7 the issue was but one factor in *Grable*’s conclusion that federal jurisdiction was proper. *See*
8 125 S. Ct. at 2367 (disclaiming any “‘single, precise, all-embracing’ test for jurisdiction
9 over federal issues”); *Empire*, 126 S. Ct. at 2137 (considering the legal nature of the dispute
10 among numerous other factors).¹⁵

11 In any event, even if *Grable* did impose that requirement, it is satisfied here. The
12 assertion that this dispute is “primarily factual in nature” cannot withstand scrutiny.
13 Resolution of Plaintiffs’ claims necessarily depends upon whether federal law permits
14 carriers to provide the information to the NSA. This potentially requires analysis and
15 application of numerous provisions of FISA, Title III and the SCA. *See, e.g.*, 18 U.S.C.
16 §§ 2511(2)(a) & (3), 2520(d), 2702(b), 2703, 2707(a) & (e); 50 U.S.C. § 1805(i). Unlike
17 the cases cited by Plaintiffs, *see* Mot. at 19, there is no theory under which Plaintiffs could
18 recover that would eliminate the need to determine whether AT&T’s alleged provision of
19 customer calling information to the NSA was federally authorized under one or more of
20 these provisions.

21 **2. Plaintiffs’ right to relief depends on resolution of state secrets.**

22 This Court has jurisdiction because resolution of this case will necessarily require a
23 determination whether the federal common law state secrets privilege requires dismissal of
24 the suit. Even when the federal issue is not itself an element of the state-law claim, “in
25

26 ¹⁵ Indeed, even if Plaintiffs are correct that *Empire* limited *Grable*, the factors specified in
27 *Empire* as supporting federal jurisdiction are all present here. The subject of this litigation
28 relates to a federal agency; the questions involved are substantial; resolution of these issues
is potentially dispositive; and the issues of law that are presented may be controlling in
numerous other similar cases. *Empire*, 126 S. Ct. at 2137.

1 certain cases federal question jurisdiction will lie over state-law claims that implicate
2 significant federal issues.” *Grable*, 125 S. Ct. at 2367; *id.* at 2366 (describing cause of
3 action). The *Grable* Court acknowledged that this is not a mechanical inquiry and framed
4 the question as “[1] does a state-law claim necessarily raise a stated federal issue, actually
5 disputed and substantial, which [2] a federal forum may entertain without disturbing any
6 congressionally approved balance of federal and state judicial responsibilities.” *Id.* at 2368
7 (numbering added).

8 Here, that test is satisfied. There can be little question that state secrets presents a
9 substantial question of federal law—“substantial” both because of its fundamental
10 importance and also because its application to cases like this one is being vigorously
11 disputed. The state secrets doctrine derives from the President’s constitutional authority
12 over the nation’s diplomatic and military affairs, *see United States v. Nixon*, 418 U.S. 683,
13 710 (1974); *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953), and is intended to prevent,
14 among other “harms,” the “impairment of the nation’s defense capabilities” and the
15 “disclosure of intelligence-gathering methods or capabilities.” *In re Under Seal*, 945 F.2d
16 1285, 1287 n.2 (4th Cir. 1991). Because the disclosure of state secrets can injure the
17 country’s security, a lawsuit must be dismissed at the outset when “the very subject matter
18 of the action” relates to state secrets. *Reynolds*, 345 U.S. at 11 n.26; *see Molerio v. FBI*,
19 749 F.2d 815, 821 (D.C. Cir. 1984) (Scalia, J.); *see also Kasza v. Browner*, 133 F.3d 1159,
20 1166 (9th Cir. 1998). Such cases may be removed to federal court because, in those
21 circumstances, the state secrets doctrine completely overrides any state-law cause of action.

22 Although Plaintiffs are correct that the United States must invoke the doctrine, the
23 suggestion that this case should be remanded because the United States has not yet invoked
24 it here is too glib. Mot. at 20-21. Plaintiffs have put the disclosure of state secrets at
25 issue—their very purpose is to require AT&T to “disclose to each customer what files or
26 records of that customer have been shared with any third party,” with specific reference to
27 the NSA surveillance program. *See, e.g.*, Compl. 11 Prayer ¶ 3. And it is clear from the
28 United States’ public filings in *Hepting* that the United States takes the position that any

1 such disclosure is prohibited by the federal common law protecting the nation's military
2 and intelligence secrets.

3 In *Hepting*, the Director of National Intelligence has formally invoked the state
4 secrets privilege. *See generally* Negroponte Decl. (*Hepting* Dkt. 124-1). The United States
5 has asserted that *Hepting* must be dismissed because “the very subject matter of [the
6 *Hepting*] Plaintiffs’ allegations is a state secret and further litigation would inevitably risk
7 their disclosure.” *See* U.S.’ Resp. to Pls.’ Memo. in Resp. to Court’s May 17, 2006 Minute
8 Order (Dkt. 145) at 14:11-12. Lest there be any doubt about the matter, the United States
9 has formally apprised the Judicial Panel on Multidistrict Litigation that it intends to invoke
10 the state secrets privilege over all listed actions that seek to discover information about the
11 alleged NSA program. *See* U.S. Combined Memo. in Support of Verizon Communications
12 Inc.’s Mot. for Transfer and Coordination Pursuant to 28 U.S.C. § 1407 (hereinafter
13 “Combined Memo”) (Mot. to Stay App. F., Dkt. 12-7), at 12 (“[A]ll of these actions against
14 the telecommunications companies put at issue alleged foreign-intelligence surveillance
15 activities undertaken by the United States Government. The United States intends to assert
16 the state secrets privilege in these actions and to seek their dismissal.”).¹⁶ If there were any
17 serious question that the state secrets doctrine will be a central component of this case, that
18 is all the more reason for the Court to stay or defer ruling until the case has been
19 consolidated into the MDL.¹⁷

20 _____
21 ¹⁶ *See also* Letter from Ass’t Att’y Gen. Peter D. Keisler to Bradford A. Berenson, *et al.*
22 (June 14, 2006) (advising that DNI Negroponte’s *Hepting* state secrets assertion covers the
23 “very same topics and types of information” at issue in New Jersey subpoenas seeking
24 information about the same alleged program as that at issue in this case and confirming that
25 the states lack authority to seek such information and that it may not be disclosed consistent
26 with federal law) (attached as Exh. A to the Declaration of Bruce A. Ericson filed in
27 support of this Opposition (the “Declaration”)); Statement of Interest of the United States,
28 *Harrington v. AT&T, Inc.*, No. A-06-CA-374-LY (W.D. Tex. July 14, 2006) (advising that
the United States will invoke the state secrets privilege and seek dismissal of a case raising
claims based solely on the alleged provision of call history data) (attached as Exh. B to the
Declaration).

¹⁷ Plaintiffs implicitly recognize the relevance of the state secrets doctrine, as they
repeatedly insinuate that there are no real state secrets at issue. Mot. at 4-6. In so doing,
however, they rely upon news reports that they claim, in their Request for Judicial Notice,
to be using only for notice purposes, not for the truth of the matters therein asserted. As to
judicial notice, AT&T does not oppose the request only to the extent that Plaintiffs mean

1 Plaintiffs' only other argument against removal on the basis of state secrets is that
2 this doctrine is a mere "evidentiary rule[]," Mot. at 21, and so is not implicated by the well-
3 pleaded complaint rule. This argument takes an insupportably narrow view of the doctrine.
4 To be sure, there are cases in which the state secrets doctrine functions only as a limited
5 evidentiary privilege. But in a case like this one, where it is clear that the United States will
6 assert that the very subject matter of the suit is a state secret, the doctrine functions as a
7 total bar to suit. Under such circumstances, the doctrine cannot fairly be called an
8 "evidentiary privilege," or even a "defense"; it is a threshold, federal-law barrier to suit that
9 creates an independent right to a federal forum precisely because "the 'nature of the federal
10 interest at stake,'" *Grable*, 125 S. Ct. at 2370, "justif[ies] resort to the experience, solicitude
11 and hope of uniformity that a federal forum offers on federal issues," *id.* at 2367.

12 To this end, recognizing federal subject-matter jurisdiction for cases involving state
13 secrets would not "disturb[] any congressionally approved balance of federal and state
14 judicial responsibilities." *Id.* at 2368. Nowhere has Congress suggested that state judicial
15 officers must be entrusted with highly classified information or empowered to consider the
16 national security implications of publicly disclosing such information. Nor would
17 recognizing the availability of a federal court to consider claims of state secrets lead to a
18 raft of cases being filed in federal court that properly belong in state courts, especially
19 considering the rarity of such claims in the first place. In *Grable*, the Court recognized
20 *Merrell Dow*'s concern that permitting federal-court jurisdiction for any state-law claim as

21 _____
22 what they say—namely, "Plaintiffs do not request this Court to take judicial notice that the
23 facts reported in the documents are true, but rather than [sic] they are in the public domain."
24 Pls.' Req. for Judicial Notice at 1. It can be judicially noticed that certain facts have been
25 reported, but whether those news reports are true certainly cannot be judicially noticed.
26 This is with good reason. *See Hepting*, June 23, 2006 Hr'g Tr. (Dkt. 284, "Transcript") at
27 49-50 (Ass't Att'y Gen. Peter Keisler) ("[T]here is a raft of speculation out there, much of it
28 contradictory, much of it seemingly confused, all of it sourced either to anonymous,
unnamed people who claim to be insiders or named people who say that they're outside
experts and acknowledge that they're speculating based upon their expertise. That
combination of anonymous assertions and speculations certainly gives rise[] to suspicions
and may lead lots of people to assume various things. It doesn't establish reliable facts.");
cf. A Note to Our Readers, USA Today, June 30, 2006, at 2A (stating that USA Today
cannot confirm aspects of its previously reported stories on the NSA program) (attached as
Exh. C to the Declaration).

1 to which a federal element established negligence per se would shift innumerable state tort
 2 suits into federal court. *Id.* at 2370-71. There was no such danger for the limited category
 3 of cases at issue in *Grable, id.* at 2371, and the same is true here.¹⁸

4 Plaintiffs do not seriously contest this; they simply argue that state courts are
 5 competent to adjudicate state secrets. Mot. at 23. That does not mean that state courts have
 6 an invariable right to review state secrets claims or that a federal forum should not also be
 7 available. The focus must be, as discussed above, on “the ‘nature of the federal interest at
 8 stake,” *Grable*, 125 S. Ct. at 2370, and that interest here points firmly in the direction of
 9 federal jurisdiction. Indeed, as the United States has made clear, there is a compelling need
 10 for uniform decisions with respect to state-secrets claims because even a single improper
 11 disclosure may endanger national security. *See* Transcript at 49-50 (Ass’t Att’y Gen. Peter
 12 Keisler). By permitting cases involving state secrets to be litigated in federal court, the risk
 13 of a lack of uniformity or ill-considered disclosure of national secrets is reduced.

14 Combined Memo. at 15 (“[g]iven the highly sensitive and classified information at issue,
 15 there is an increased risk of disclosure of such information, which would be harmful to the
 16 national security, if the United States is required to present state secrets in multiple fora”).¹⁹

17 **3. Plaintiffs’ right to relief depends on resolution of the *Totten* bar.**

18 The *Totten* bar, established by the Supreme Court more than a century ago, *see*
 19 *Totten v. United States*, 92 U.S. 105 (1875), provides another strong basis for removal.
 20 *Totten* is similar to state secrets in that it is a federal common law rule that protects federal

21 ¹⁸ Thus, federal jurisdiction over state-secrets cases is wholly different than, for instance,
 22 jurisdiction over all cases raising the federal constitutional privilege against self-
 23 incrimination. *Cf.* Mot. at 23 (making this comparison). Criminal cases are a staple of
 24 state-court jurisdiction, and given the frequency with which constitutional issues arise in
 25 such cases, permitting federal jurisdiction on this basis would work a sea change in the
 26 “balance of federal and state judicial responsibilities,” *Grable*, 125 S. Ct. at 2368. By
 27 contrast, the assertion of state secrets is exceedingly rare, and federal jurisdiction over such
 28 cases would lead to no meaningful shift in the relationship of the federal and state courts.
¹⁹ Nor does it prove the contrary that state courts have on occasion heard state-secrets cases.
 In none of the cases cited by Plaintiffs did the court hold that removal on the basis of state
 secrets was impermissible. Indeed, because only the United States can assert the state-
 secrets doctrine, and because the United States typically can remove when it is party to a
 case, *see* 28 U.S.C. § 1442(a), cases like this one, in which the very subject matter of the
 suit is asserted to be a state secret and the United States intervenes to seek dismissal, remain
 in state courts only with the consent of the United States.

1 intelligence relationships, but it is a separate threshold justiciability principle that acts as a
 2 per se barrier to suit. *Tenet*, 544 U.S. at 7-11. As noted, it is a “rule of dismissal” that
 3 “preclude[s] judicial inquiry” into the existence of an “espionage relationship.” *Id.* at 6 n.4,
 4 8. Simply put, *Totten* provides that “the existence of a contract” “for secret services with
 5 the government” “is itself a fact not to be disclosed.” *Totten*, 92 U.S. at 107.

6 The face of Plaintiffs’ Complaint implicates *Totten*. The allegation at the heart of
 7 Plaintiffs’ Complaint is that AT&T provided data to the NSA. Revealing this fact would
 8 confirm whether or not a relationship involving “secret services for the government”
 9 existed between AT&T and the NSA, which *Totten* forbids. Moreover, Plaintiffs’ claims
 10 would require judicial inquiry into the specific details of any such relationship, including
 11 which customers’ calling information (if any) AT&T provided to the NSA and when such
 12 information (if any) was provided. *See* Compl. at 11 Prayer ¶ 3.

13 Plaintiffs level the same arguments against *Totten* that they aim at state secrets, but
 14 those arguments are even weaker in this context. They argue that *Totten* must be asserted
 15 by the federal government, on the theory that “the interests sought to be protected by *Totten*
 16 and its progeny are the government’s.” Mot. at 20-21. But the Supreme Court has
 17 characterized *Totten* differently. It explained in *Tenet* that *Totten*’s “core concern” is
 18 “preventing the existence of [the supposed espionage agent’s] relationship with the
 19 Government from being revealed,” 544 U.S. at 10, and in no way suggested that this
 20 concern is present only when the United States has raised it. On the contrary, *Totten* itself
 21 stated that espionage agreements cannot be revealed because “disclosure of the service
 22 might compromise or embarrass our government in its public duties, *or endanger the*
 23 *person or injure the character of the agent.*” 92 U.S. at 106. So AT&T, if it had an
 24 espionage relationship with the government, would be well within the zone that *Totten* was
 25 meant to protect.²⁰

26 _____
 27 ²⁰ Plaintiffs also assert that “no court has ever dismissed a case under *Totten* in which the
 28 United States, or one of its agencies or employees was not a party, and in which the
 government had not requested the dismissal.” Mot. at 20. It is equally true that no court
 has *refused* to do so, and no court ever has held that *Totten* only applies when the

1 For the same reasons, Plaintiffs are mistaken to suggest that *Totten* is “a privilege, a
 2 procedural bar, or ... a defense” that does not appear on the face of their Complaint. Mot.
 3 at 23:17. It is, quite to the contrary, a federal rule of justiciability that bars a lawsuit at its
 4 inception. *Totten* itself spoke in categorical terms: “public policy forbids the maintenance
 5 of any suit ..., the trial of which would inevitably lead to the disclosure of matters which
 6 the law itself regards as confidential.” *Id.* at 107. The Supreme Court confirmed this
 7 understanding in *Tenet*. It characterized *Totten* not as a privilege, but as a “rule of
 8 dismissal” that “represents the sort of ‘threshold question’ we have recognized may be
 9 resolved before addressing jurisdiction.” *Tenet*, 544 U.S. at 6 n.4. Thus, a case implicating
 10 *Totten* is “‘beyond judicial scrutiny,’” *id.* at 9 (quoting *Weinberger v. Catholic Action of*
 11 *Hawaii*, 454 U.S. 139, 146-47 (1981)), and “altogether forbidden,” *id.* The “common-
 12 sense” analysis of the “‘nature of the federal interest at stake’” that *Grable* mandates, 125
 13 S. Ct. at 2367, 2370, demonstrates that the *Totten* bar implicates unique and paramount
 14 federal interests that are entitled to be heard in a federal forum.

15 **D. This Court has jurisdiction because, even if AT&T acted as alleged, it**
 16 **was acting at the direction of federal officers.**

17 Plaintiffs’ motion to remand also should be denied because removal is proper under
 18 the federal officer removal statute. Section 1442(a)(1) provides that “[a] civil action ...
 19 commenced in a State court” may be removed when the suit is against “[t]he United States
 20 or any agency thereof or any officer (or any person acting under that officer) of the United
 21 States or of any agency thereof.” As the Ninth Circuit has noted, “the Supreme Court has
 22 mandated a generous interpretation of the federal officer removal statute ... : ‘It scarcely
 23 need be said that such measures are to be liberally construed to give full effect to the
 24 purposes for which they were enacted.’” *Durham v. Lockheed Martin Corp.*, 445 F.3d
 25 1247, 1252 (9th Cir. 2006) (quoting *Colorado v. Symes*, 286 U.S. 510, 517 (1932)). There
 26 government has asserted it. Plaintiffs’ citation to *Reynolds* for the proposition that the
 27 government must assert *Totten* is inapposite. *Id.* at 21. The Supreme Court in *Tenet*
 28 explained that *Reynolds* was a state secrets case that looked to *Totten* for guidance, but that
Reynolds “in no way signaled our retreat from *Totten*’s broader holding that lawsuits
 premised on alleged espionage agreements are altogether forbidden.” *Tenet*, 544 U.S. at 9.

1 is “a clear command from both Congress and the Supreme Court that when federal officers
2 and their agents are seeking a federal forum, [courts] are to interpret section 1442 broadly
3 in favor of removal. And for good reason If the federal government can’t guarantee its
4 agents access to a federal forum if they are sued or prosecuted, it may have difficulty
5 finding anyone willing to act on its behalf.” *Durham*, 445 F.3d at 1252-53; *accord Watson*
6 *v. Philip Morris Cos.*, 420 F.3d 852, 856 (8th Cir. 2005), *petition for cert. filed*,
7 74 U.S.L.W. 3588 (U.S. Apr. 7, 2006) (No. 05-1284).

8 Federal officer removal is proper when a party can demonstrate that “(a) it is ‘a
9 person’ within the meaning of the statute; (b) there is a causal nexus between its actions,
10 taken pursuant to a federal officer’s directions, and plaintiff’s claims; and (c) it can assert a
11 ‘colorable federal defense.’” *Durham*, 445 F.3d at 1251. AT&T is a person for purposes of
12 § 1442(a)(1), and Plaintiffs do not argue to the contrary. *Winters v. Diamond Shamrock*
13 *Chem. Co.*, 149 F.3d 387, 398 (5th Cir. 1998) (a corporation is a “person” for purposes of
14 § 1442(a)(1)); *Fung v. Abex Corp.*, 816 F. Supp. 569, 572 (N.D. Cal. 1992) (same). As to
15 the third prong, there is no dispute that AT&T can assert “colorable federal defense[s],”
16 given the numerous federal issues described above and defenses such as preemption.

17 Plaintiffs’ sole basis for challenging removal under § 1442 is that they have
18 “specifically allege[d] that AT&T voluntarily turned over customer calling records to the
19 NSA.” Mot. at 24. But removal under § 1442 for private actors does not hinge on whether
20 the federal government compelled the alleged conduct; the question is whether they acted
21 under federal direction. 28 U.S.C. § 1442(a)(1) (“any person *acting under* that officer”
22 (emphasis added)); *Watson*, 420 F.3d at 860 (“Even a volunteer can be ‘acting under’ a
23 federal officer.”); *see also Winters*, 149 F.3d at 399; *Fung*, 816 F. Supp. at 572. The central
24 inquiry is whether a federal officer exercised “direct and detailed control over” the actions
25 giving rise to the suit. *Fung*, 816 F. Supp. at 572 (internal quotation marks and citation
26 omitted). “This control requirement can be satisfied by strong government intervention and
27 the threat that a defendant will be sued in state court based upon actions taken pursuant to
28 federal direction.” *Id.* (internal quotation marks and citation omitted); *see also Pack v. AC*

1 & S, Inc., 838 F. Supp. 1099, 1103 (D. Md. 1993).

2 The crux of Plaintiffs' case is that AT&T has responded to NSA requests and
3 assisted the NSA in its surveillance activities. Given the highly classified nature of the
4 NSA's operations generally and the NSA's terrorist surveillance activities in particular, it is
5 inconceivable that if (as Plaintiffs allege) AT&T assisted the NSA, it did so without the
6 "direct and detailed control" of the NSA. Nor is AT&T alleged to have done so. Thus,
7 even if Plaintiffs were correct that AT&T provided customer calling information to the
8 NSA absent compulsion, this does not mean that AT&T was not directed to provide that
9 information by NSA officers "'who were acting under color of their office as federal agents
10 and in the performance of their official duties.'" *Camacho v. Autoridad de Telefonos de*
11 *P.R.*, 868 F.2d 482, 486 (1st Cir. 1989). Plaintiffs have not disputed that if AT&T provided
12 customer calling information to the NSA, AT&T's "involvement in the electronic
13 surveillance was strictly and solely at federal behest. There is no reason to suppose that the
14 [NSA] agents were not engaged in official government business, that is, acting 'under color
15 of' their federal office. In such circumstances, the reach of section 1442(a)(1) extends to
16 private persons, like [AT&T], who act under the direction of federal officers." *Id.*

17 Because Plaintiffs' claims directly challenge the validity of the NSA's alleged
18 request that AT&T furnish customer calling information, this case is the very type of action
19 that Congress intended § 1442(a)(1) to cover. The purpose of requiring parties to establish
20 that they were acting under the direction of a federal officer is to ensure that there is a
21 federal interest in the matter. *See Camacho*, 868 F.2d at 487 ("Statutes like section
22 1442(a)(1) represent a legislatively-spawned value judgment that a federal forum should be
23 available when particular litigation implicates a cognizable federal interest."). Here,
24 Plaintiffs' claims directly implicate federal interests in national defense and foreign
25 intelligence collection, and thus removal of this action pursuant to § 1442(a)(1) is proper.

26 **III. CONCLUSION.**

27 This Court should stay or defer consideration of Plaintiffs' Motion for Remand
28 pending transfer to the MDL. In the alternative, the motion should be denied.

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2 PILLSBURY WINTHROP
3 SHAW PITTMAN LLP
4 BRUCE A. ERICSON
5 DAVID L. ANDERSON
6 JACOB R. SORENSON
7 MARC H. AXELBAUM
8 DANIEL J. RICHERT
9 50 Fremont Street
10 Post Office Box 7880
11 San Francisco, CA 94120-7880

SIDLEY AUSTIN LLP
DAVID W. CARPENTER (*pro hac vice*
application pending)
BRADFORD A. BERENSON (*pro hac vice*
application pending)
DAVID L. LAWSON (*pro hac vice*
application pending)
EDWARD R. MCNICHOLAS (*pro hac vice*
application pending)
1501 K Street, N.W.
Washington, DC 20005

8
9 By /s/ Bruce A. Ericson
Bruce A. Ericson

By /s/ Bradford A. Berenson
Bradford A. Berenson

10 Attorneys for Defendants
11 AT&T COMMUNICATIONS OF CALIFORNIA, AT&T CORP. and AT&T, INC.

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