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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

DENNIS P. RIORDAN, et al., Plaintiffs, v. VERIZON COMMUNICATIONS, INC., a corporation; and DOES 1 through 20, Defendants.	Case No. C-06-3574 VRW **PLAINTIFFS' JOINT RESPONSE TO STATEMENT OF INTEREST OF THE UNITED STATES IN SUPPORT OF DEFENDANTS' MOTIONS TO STAY AND IN OPPOSITION TO PLAINTIFFS' MOTIONS TO REMAND**
TOM CAMPBELL, et al., Plaintiffs, v. AT&T COMMUNICATIONS OF CALIFORNIA, et al., Defendants.	Date: August 24, 2006 Time: 2:00 p.m. Dept: 6, 17th Floor Judge: The Hon. Vaughn R. Walker Case No. C-06-3596 VRW

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INTRODUCTION

The sum and substance of the government's untimely jurisdictional argument is that this is a "quintessentially federal case." But in a case where, as here, there are no federal claims pleaded, no federal defendants sued, and no relief against the federal government requested, jurisdiction must be premised on more than just the federal government's desire to have the case decided by a federal judge. It must be premised on the doctrines that govern the assertion of federal jurisdiction where state law claims against nonfederal defendants have been filed in state court. In this case, the relevant doctrines are found in the "embedded federal question" doctrine of *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363, 2368 (2005) and in the doctrine of complete preemption. *See, e.g.*, *Empire HealthChoice Assurance, Inc. v. McVeigh*, 126 S. Ct. 2121, 2135 (2006).

The government pays lip service to these doctrines setting forth the rules for determining whether this Court has subject matter jurisdiction over Plaintiffs' claims but substitutes rhetoric for the careful analysis these doctrines demand. The government essentially pours these doctrines into a blender, adds a dollop of truism about federal supremacy in matters of national defense, and produces a new recipe for "national security jurisdiction." As demonstrated below—and in Plaintiffs' prior briefs—application of settled law reveals that the government's claims of "arising under" jurisdiction and "complete preemption" are utterly insupportable, even when blended together as the government does in its Statement of Interest.

The principal new argument raised by the government is that its intervention in these actions will confer the missing jurisdictional ingredient. It will not, for two reasons: *First*, this Court lacks jurisdiction to consider the government's motion to intervene until it has ruled on Plaintiffs' motions to remand. *See Vang v. Healy*, 804 F. Supp. 79, 81 (E.D. Cal. 1992). *Second*, because Plaintiffs seek no relief against it, the government cannot satisfy the section 1442(a)(1) requirement that the action be commenced *against* a federal officer or agency.

The government's remaining arguments are equally flawed. Jurisdiction is lacking under *Grable* because the government has not—and cannot—demonstrate that the resolution of a disputed interpretation of federal law is an essential element of either of Plaintiffs' claims; indeed,

even the defense of federal authorization is purely a question of fact. The government's complete preemption arguments focus solely on the federal interests at stake, ignoring the admonition that the involvement of "an area of uniquely federal interest . . . establishes a necessary, not a sufficient, condition for the displacement of state law." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988). Plaintiffs' motions to remand should be granted.

ARGUMENT

I. THE COURT SHOULD DISREGARD THE GOVERNMENT'S UNTIMELY SUBMISSION.

The government's submission of its "Statement of Interest"[1] after the completion of briefing on Plaintiffs' remand motions is inexcusably untimely. Plaintiffs filed these actions in San Francisco Superior Court on May 26, 2006 and Defendants removed both the first week of June. Plaintiffs filed their motion to remand in *Campbell* on June 30 and their motion to remand in *Riordan* on July 5. In the meantime, Verizon had already filed its stay motion in *Riordan* and AT&T filed its stay motion in *Campbell* on June 30.

Desiring to proceed in an orderly fashion, Plaintiffs agreed to a briefing schedule with Defendants and to a hearing date that this Court subsequently approved. Pursuant to that schedule, the parties completed their briefing on August 3. Then, and only then, on August 4, 2006, did the United States file its Statement of Interest.[2] While much of that Statement is simply a rehash of arguments already made by Defendants, it also asserts new, substantive ones.

The government makes no claim that it had only recently learned of the pendency of these actions on August 4. Nor could it. The government knew of these actions by at least June 19,

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[1] Plaintiffs cite the Statement of Interest as "Stmt. of Int." throughout this brief, and utilize the same citation format for Verizon's, AT&T's and Plaintiffs' own briefing on the remand motions as they did in their reply papers.

[2] At the same time it filed its Statement of Interest, the United States filed an administrative motion to have its Motion to Intervene heard on shortened time. The stipulation the government filed in support of its administrative request set out a briefing schedule for the motion and also permitted Plaintiffs, who did not acquiesce in the government's untimely filing, to submit their response to the Statement of Interest on August 16, 2006. The proposed orders, set forth in the alternative, each permitted the filing of Plaintiffs' response on August 16, 2006. To date the Court has not ruled on the government's request. To the extent that it does not approve that stipulation, Plaintiffs respectfully request that the Court disregard both the government's submission and our own.

when AT&T served it with its Response in support of the Verizon MDL transfer motion. *See* Memorandum of Defendant AT&T Corp. in Support of Verizon's Motion for Transfer and Coordination pursuant to 28 U.S.C. § 1407.[3] The government offers no explanation whatsoever for its tardy filing, nor has it sought or obtained leave of court to file its Statement of Interest. *See* Local R. 7-3(d) ("once a reply is filed, no additional memoranda, papers or letters may be filed without prior Court approval."). Accordingly, Plaintiffs respectfully suggest that the Court disregard the government's untimely Statement in its entirety.

II. POTENTIAL INTERVENTION BY THE GOVERNMENT IS IRRELEVANT TO THE MOTIONS TO REMAND.

A. A Court May Not Consider a Motion to Intervene Before Determining Whether It Has Subject Matter Jurisdiction Over a Removed Case.

A district court may not consider a motion to intervene before determining whether it has subject matter jurisdiction over a removed case. *Vang v. Healy*, 804 F. Supp. 79, 83 (E.D. Cal. 1992). The reason is simple: the federal courts are courts of limited jurisdiction, whose removal jurisdiction is derived solely from Congressional authorization. *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979); *Vang*, 804 F. Supp. at 81 (E.D. Cal. 1992). Thus, where, as here, the court lacks subject matter jurisdiction over the action at the time of removal, it does not have jurisdiction to consider a motion to intervene on the theory that granting intervention will then confer jurisdiction. *Vang*, 804 F. Supp. at 83; *see Libhart*, 592 F.2d at 1066 (district court lacked jurisdiction to grant motion to amend complaint to add federal claim because it lacked jurisdiction over case as removed). In such circumstances, a remand is mandatory. *See Bruns v. NCUA*, 122 F.3d 1251, 1257 (9th Cir. 1997)*; Smith v. Wis. Dep't of Agric.*, 23 F.3d 1134, 1139 (7th Cir. 1994).

Vang is directly on point. There, the court had before it both the plaintiffs' motion to remand and the United States' motion to intervene. The defendant argued, much as the government does here, that if the case were remanded, the Secretary of Agriculture would

[3] The government moved to intervene in the *Hepting* case on May 13, 2006. It strains credulity to think that AT&T was not keeping the government apprised of the pendency of other actions being filed, including the filing of these two lawsuits in the very same court as *Hepting*.

intervene in state court and immediately remove the case back to federal court. Thus, argued the defendant, principles of judicial economy counseled against a remand. The court emphatically disagreed, holding that "federal jurisdiction cannot be based upon the presumed eventual intervention of the United States." 804 F. Supp. at 83. As the court explained:

> In order for the Court to have the authority to entertain the Secretary's motion to intervene, the Court must already have jurisdiction to hear the case. Without an independent basis for jurisdiction, the court cannot hear and grant a motion which then would give the court jurisdiction.

Id.; 7C Charles Alan Wright, Arthur R. Miller & May Kay Kane, Federal Practice and Procedure § 1917 (2d ed. 2004) ("Intervention cannot cure any jurisdictional defect that would have barred the federal court from hearing the original action."); *see Canatella v. State of California*, 404 F.3d 1106, 1113 (9th Cir. 2005) (while Rule 24 provides procedural mechanism for intervention, it "does not itself provide the jurisdictional hook").

The government neither discusses nor cites *Vang*. Instead, it argues that its intervention in the state court upon remand would "automatically" entitle it to remove and that therefore this Court should short-circuit the analysis of whether it currently has subject matter jurisdiction because remand would be "futile." *See* Stmt. of Int. 4 (citing *Bell v. City of Kellogg*, 922 F.2d 1418 (9th Cir. 1991) (permitting dismissal rather than remand where remand is futile)).

The government is mistaken. First, the continued vitality of the "futility exception" to section 1447(c) is at best questionable. Four months after the decision in *Bell*, the United States Supreme Court issued its decision in *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72 (1991), *superseded by statute on other grounds*. There the federal defendant argued it would be futile to remand the case because, once remanded, removal was again inevitable on other grounds. The Supreme Court, however, declined the invitation to speculate on whether the second attempt at removal would be successful and held that events should be allowed to play themselves out in the state court first. 500 U.S. at 89. The Court then went on:

> We also take note, as did the First Circuit, of "the literal words of § 1447(c), which, on their face, give . . . no discretion to dismiss rather than remand an action." *Id*. at 1054. The statute declares that, where subject matter jurisdiction is lacking, the removed case "*shall* be remanded." 28 U.S.C. § 1447(c) (emphasis added).

Id. (quoting *Maine Ass'n of Interdependent Neighborhoods v. Comm'r, Maine Dep't of Human Servs.*, 876 F.2d 1051, 1054 (1st Cir. 1989)).

In light of that decision, the Circuit Courts of Appeals that have since considered the question have either held that there is no futility exception to section 1447(c),[4] or questioned whether the doctrine has survived.[5] *Cf. Bruns v. NCUA*, 122 F.3d at 1257 (9th Cir. 1997) (not addressing futility doctrine but holding: "Section 1447(c) is mandatory, not discretionary. *See Roach v. W. Va. Reg'l Jail & Corr. Auth.*, 74 F.3d 46, 49 (4th Cir. 1996) (where subject matter jurisdiction is lacking, district court must remand to state court even if futile").

But even if the futility exception survived, the "absolute certainty" required to invoke it is, as this Court has observed, an exacting standard. *Re-Con Bldg. Prods. v. Guardian Ins. Co.*, No. C-00-0327, 2000 WL 432830, *1, 2000 U.S. Dist. LEXIS 5241, *3-4 (N.D. Cal. Apr. 13, 2000). That standard plainly is not met here. First, as the *Vang* court held: "[i]t is not for this court in the first instance to decide whether the United States can or must be joined. The Superior Court must first determine if the United States is entitled to intervene according to its rules." *Vang*, 804 F. Supp. at 83; *see also Int'l Primate*, 500 U.S. at 89. Second, as next discussed, the government's intervention in these actions in state court would *not* provide a basis to remove.

B. Intervention by the United States Would Not be Grounds for Removal Under Section 1442(a).

The plain language of section 1442(a) permits removal only where an action is "*commenced* in a State court *against* . . . [t]he United States. . . ." 28 U.S.C. § 1442(a)(1) (emphasis added). Plaintiffs have not "commenced" an action "against the United States;" they have sued Verizon and AT&T. The language of the statute is unambiguous; it precludes removal by the United States unless the action is commenced against it. *See Rubin v. United States*, 449

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[4] *Coyne v. American Tobacco Co.*, 183 F.3d 488, 496-97 (6th Cir. 1999); *Bromwell v. Mich. Mut. Ins. Co.*, 115 F.3d 208, 214 (3d Cir. 1997); *Roach v. W. Va. Reg'l Jail & Corr. Auth.*, 74 F.3d 46, 49 (4th Cir. 1996); *Smith*, 23 F.3d at 1139.

[5] *Fent v. Okl. Water Res. Bd.*, 235 F.3d 553, 557 (10th Cir. 2000); *Univ. of S. Ala. v. American Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999); *Barbara v. NYSE*, 99 F.3d 49, 56 n.4 (2d Cir. 1996) (dictum).

U.S. 424, 430 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances.'"). *See also Int'l Primate*, 500 U.S. at 79 (interpreting 28 U.S.C. § 1442(a)(1): "the starting point in every case involving construction of a statute is the language itself") (internal quotation omitted)).

While the government may potentially be entitled to intervene at an appropriate time, in the appropriate court, being an interested party is not the same as being a party against whom an action is being prosecuted. Removal under the circumstances of this case—where no judicial relief has been requested against the government—simply is not authorized by section 1442(a)(1). *See e.g., In Re Estate of Bobby Masters*, 361 F. Supp. 2d 1303, 1307 (E.D. Ok. 2005) (federal government's intervention in state court probate proceeding did not support removal because state court matter not "commenced against" United States); *compare Indiana v. Adams*, 892 F. Supp. 1101, 1105 (S.D. Ind. 1995) (§ 1442(a)(1) does not permit removal where court denied FBI officer's motion to quash deposition subpoena in state criminal proceeding, but no contempt proceedings yet initiated; no state court proceeding had been commenced against the federal officer), *with Florida v. Cohen*, 887 F.2d 1451, 1454 (11th Cir. 1989) (federal officer may remove *after* state court initiates contempt proceedings for failure to respond to subpoena in state court criminal prosecution); *see also Cook v. Peter Kiewit Sons Co.*, 775 F.2d 1030, 1034 (9th Cir. 1985) (although not addressing the intervention issue presented here, nevertheless confirming: "The only prerequisite to removal of a civil action under § 1442 is that it be *brought against* a federal officer or agency." (emphasis in original) (internal quotation omitted)).

The cases the government cites do not support its broad contention that intervention always confers the right to remove. *United States v. Todd*, 245 F.3d 691 (8th Cir. 2001), is both analytically deficient and factually distinct. *Todd* was a state freedom of information act case in which plaintiff sued the state police seeking documents that the police possessed but which belonged to the United States Attorney. The court did not even address *Todd*'s argument that his suit was not against the United States. The closest it came (and the portion of the opinion relied upon by the government) was when it stated: "we reject Mr. Todd's contention that the removal was improper . . . simply because his original complaint had a non-federal cast." *Id.* at 693 (citing

Jefferson County, Alabama v. Acker, 527 U.S. 423, 431 (1999)). The discussion of a "nonfederal cast" in *Acker*, however, is completely unrelated to the question of whether the United States' status as an intervenor allows removal. The cited portion of *Acker* notes that section 1442 removal differs from "arising under" removal because the well-pleaded complaint rule does not apply in a section 1442 case and that "the federal question element [of section 1442] is met if the defense depends on federal law." *Acker*, 527 U.S. at 431.[6] *Todd* thus does not support the government's position here.

Moreover, the relief sought in *Todd* was production of documents belonging to the United States. Although those documents were in the hands of the state police, they belonged to the United States; thus, the named defendant was, in effect, a proxy for the United States. Plaintiffs' lawsuits against AT&T and Verizon do not seek to recover anything belonging to the government. *Id.* at 692. They seek only to compel the telephone companies to stop turning over private information. The fact that an injunction may affect Defendants' future interactions with the government does not make this a lawsuit against the government any more than would a suit to require a company to obey state anti-pollution laws in processing mineral deposits from federal lands. That the suit might limit the extent of the government's future business with that company does not make it a suit against the government.[7]

III. PLAINTIFFS' CLAIMS ARE NOT COMPLETELY PREEMPTED.

A. The U.S. Constitution Does Not Completely Preempt Plaintiffs' Claims.

The government's argument in Parts II.A and II.A.1 of its Statement of Interest present a confused mixture of two distinct issues: (1) whether Plaintiffs' state law claims are completely

[6] *Acker*'s reference to the "federal question element" of section 1442 refers to the requirement that a suit not only be commenced against the federal government, but that the federal defendant also have a colorable federal defense. *See Mesa v. California*, 489 U.S. 121, 129 (1989).

[7] *In re the Marriage of Dyche*, No. 05-1116, slip copy, 2005 WL 1993457 (D. Kan. Aug. 16, 2005), is equally inapposite. The *Dyche* court held removal was proper because the suit was in essence a declaratory judgment action against the United States "challenging the IRS' claimed authority to collect federal estate taxes." *Id*. at * 3. In *Porter v. Rathe*, No. 98-331, 1998 WL 355499, 1998 U.S. Dist. LEXIS 9873 (D. Or. Jun. 18, 1998), plaintiff named no defendant, but served the United States, which claimed an interest in the property that was the subject of the state court proceeding. It was thus a necessary party against whom judicial relief would be rendered; it should have been named as a defendant in the first instance. *Id.* WL at *1, LEXIS at *2.

preempted because they impermissibly intrude in areas reserved for the federal government under the Constitution; and (2) whether Plaintiffs' claims "arise under" federal law because there is a federal issue embedded within the affirmative elements of Plaintiffs' state law claims that must necessarily be determined, as described in *Grable*, 125 S. Ct. at 2368. The government's intermingling of these distinct doctrines does not succeed in manufacturing removal jurisdiction under either.

The government's platitudes—that a state cannot regulate the federal government, and that the federal government has primacy in the area of foreign relations—are unexceptional, but equally unpersuasive. In the first place, the government inaccurately suggests that Plaintiffs are using state law to regulate the federal government. Stmt. of Int. 6. The only conduct sought to be regulated here is the voluntary conduct of AT&T and Verizon. *No relief* has been sought against the government or to limit its rights to exercise its authority to conduct intelligence activities.

The government nevertheless proffers, as ipse dixit, that "foreign intelligence activities necessarily touch upon foreign relations." Stmt. of Int. at 6-7. But it cites no case that has ever concluded that a mere indirect nexus between national security and foreign relations means that state substantive law is preempted. Rather, it simply ducks the actual standard: state law is completely preempted as impermissibly intruding into an area delegated to the federal government by the Constitution if the operation of state law would (1) "significant[ly] conflict" with (2) "uniquely federal interests." *See Boyle*, 487 U.S. at 504. In this case, the government does not even *attempt* to demonstrate an actual conflict.[8]

As Plaintiffs already have explained, these actions do not fall within the narrow scope of preemption over state laws regulating international relations. *See* Pl.'s Br. 14-15. Indeed, the government fails to specify any foreign nation, international policy, or diplomatic issue implicated here. While foreign intelligence activities might implicate foreign relations were the United States conducting a joint operation with a foreign government or tapping the phones of the embassy of a foreign government, the government does not explain how a suit challenging

[8] To the contrary, elsewhere in its Statement the government acknowledges that state law is harmonized with federal law because it excepts from restriction the turnover of information in response to lawful federal (or state) process. Stmt. of Int. 11.

American telephone companies providing telephone records of *California* customers to the *United States* government without consent or court order implicates foreign relations.[9]

Thus this case is just the opposite of *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). In *Garamendi*, a California statute requiring insurance companies doing business in California to disclose information about all policies sold in Europe between 1920 and 1945 was held to be in "clear conflict" with federal policy embodied in an Executive Agreement between the President and Germany concerning the resolution of claims against insurance companies by Holocaust survivors. "The express federal policy and the clear conflict raised by the state statute are alone enough to require state law to yield." *Id.* at 425. The government has identified no comparable conflict between the prosecution of Plaintiffs' claims and a federal policy relating to foreign relations. Absent such a clear conflict, the mere existence of federal authority in international relations does not create federal jurisdiction.

The same is true with respect to national security and national defense. Where, as here, Congress has legislated in the relevant area, congressional statutes are the principal means to identify federal policy. *See Wallis*, 384 U.S. at 69.[10] In this case, FISA and ECPA are the relevant statutes to identify federal policy in the area of intelligence gathering using phone records. As explained before, those statutes afford room for state privacy legislation with respect to telephone records. *See* Pl.'s Br. 9-16; Pl's Reply 4-11.

Finally, the government's attempt to couch the preemptive power of federal supremacy in foreign affairs under the rubric of *Grable* attempts to jam a square peg into a round whole. As

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[9] For example, Congress has plenary power over disposition of federal lands, U.S. Const. art. IV, § 3, cl. 2, but that does not mean that federal common law displaces state law concerning property disputes over leases between private parties concerning federal land. *See Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 69 (1966) (refusing to fashion federal common law concerning dispute over federal lands in the absence of "a significant conflict between some federal policy or interest and the use of state law in the premises").

[10] *Cf. Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 n.23 (2006) ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.") (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)); *see also id.* at 2800 (Kennedy, J. concurring) ("when the President takes measures incompatible with the express or implied will of Congress, his power is at his lowest ebb").

Plaintiffs explained in detail in their Opening Brief (Part I.A) and Reply (Part III.B), the fact that a case may "implicate" an area of law over which the federal government has plenary authority does not satisfy the essential element that must be established to warrant federal jurisdiction under *Grable*. *See Patrickson v. Dole Foods Co.*, 251 F.3d 795, 803 (9th Cir. 2001), *aff'd* 588 U.S. 468 (2003) (federal question jurisdiction does *not* arise in all cases in which foreign relations might arise as an issue). *See also* Part IV, *infra*. It simply is a nonsequitor for the government to rely on *Grable* for the proposition that actions relating to foreign intelligence activities necessarily "warrant [] adjudication in a federal forum" (Stmt. Int. at 5) without pointing to any embedded issue of construction of federal law that constitutes an element of Plaintiffs' claims.

B. Neither the National Security Agency Act Nor the Intelligence Reform Act Completely Preempt Plaintiffs' Claims

Likewise, the government's argument that section 6 of the National Security Agency Act of 1959, 50 U.S.C. § 402, and section 102(A)(i)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, 50 U.S.C. § 403-1(i)(1), completely preempt Plaintiffs' claims is not supported by the language of those statutes or the case law cited.

To begin with, this Court has already recognized that "[n]either of these provisions by their terms requires the court to dismiss this action. . . ." *Hepting v. AT&T Corp.*, No. C-06-672, 2006 WL 2038464, *21, 2006 U.S. Dist. LEXIS 49955, *64 (N.D. Cal. Jul. 20, 2006). Like the state secrets privilege, sections 6 and 102 simply create a *privilege* against disclosure. *See id.* WL at *21, LEXIS at *64-65; *see also Linder v. DOD*, 133 F.3d 17, 25 (D.C. Cir. 1998); *Linder v. NSA*, 94 F.3d 693, 695 (D.C. Cir. 1996); *United States v. Koreh*, 144 F.R.D. 218, 220, 222 (D.N.J. 1992).

The existence of such a federal privilege—like the *Totten* and state secrets doctrines—does not begin to establish a Congressional intent completely to preempt substantive state law causes of action. Indeed, the government's Statement of Interest is bereft of the sort of analysis required to establish removal jurisdiction through complete preemption under *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003), a case the government does not cite. First, nothing in the plain language of the statutes hints at a Congressional intent completely to preempt a state law

claim. *See Empire*, 126 S. Ct. at 2135 ("If Congress intends a preemption instruction completely to displace ordinarily applicable state law, and to confer federal jurisdiction thereby, it may be expected to make that atypical intention clear."). Moreover, the manner in which these statutes typically are applied belies the government's claim that these statutes displace state law causes of action. The cases cited by the government make that plain.

The *Linder* litigation is instructive. *Linder* involved a state law claim for wrongful death brought in federal court in Florida against individual members of the Contras. *Linder*, 94 F.3d at 694; *see also Linder v. Portocarrero*, 963 F.2d 332, 333-334 (11th Cir. 1992). During discovery, plaintiff served a third-party subpoena on the NSA. The NSA objected, asserting its privilege under section 6, and litigated the issue in the federal courts of the District of Columbia. What the NSA did *not* do was intervene in the Florida action, claiming that the wrongful death action was preempted—completely or otherwise—and ask that the case be dismissed. *See also Heine v. Raus*, 399 F.2d 785 (4th Cir. 1968) (slander suit in which U.S. attended deposition to assert privilege under predecessor of section 102); *Heine v. Raus*, 261 F. Supp. 570, 573-574 (D. Md. 1966), *vacated and remanded on other grounds*, 399 F.2d 785 (no preemption claimed).

Sections 6 and 102 no more preempt Plaintiffs' claims here than they did the wrongful death claim in *Linder* or the slander claim in *Heine*. When the time comes, the government will have an opportunity to invoke sections 6 and 102. Whether or not the invocation of those privileges will be successful remains to be seen as this litigation unfolds.[11] Those provisions, however, most certainly do not completely preempt state law claims against private actors and therefore do not confer jurisdiction over Plaintiffs' cases. The government cites no cases saying that they do.

IV. *GRABLE* DOES NOT PROVIDE A BASIS FOR FEDERAL JURISDICTION IN THIS CASE.

The government's assertion that federal jurisdiction is proper under *Grable* fails for the

[11] For example, to the extent that the government establishes that the relief sought by Plaintiffs would require the revelation of information protected by sections 6 or 102, the state court can tailor its injunction accordingly.

same reasons Verizon's and AT&T's do. *See* Pl.'s Br. 16-19; Pl.'s Reply 15-18. The "mere need to apply federal law in a state-law claim" will not "suffice to open the 'arising under' door." *Grable*, 125 S. Ct. at 2367. That door opens *only* if the federal issue is an essential element of the plaintiff's well-pleaded complaint, the resolution of which turns on a substantially disputed interpretation of federal law. *Grable*, 125 S. Ct. at 2368-69.

The government argues, however, that Plaintiffs' claim under the California Constitution "necessarily requires the resolution of questions of federal law." Stmt. of Int. 12. The government is wrong. While correctly reciting the three elements of this claim (*see Hill v. NCAA*, 7 Cal. 4th 1, 39-40 (1994)), the government then wrongfully asserts (without citation of authority) that federal, not state, law governs whether Plaintiffs can establish a legally protected privacy interest and a reasonable expectation of privacy. Stmt. of Int. 12. In doing so it ignores *Hill*, California's leading case on the constitutional privacy right. *Hill* makes clear that a competing interest, such as a search warrant or other lawful process—whether state or federal—is an affirmative defense that does not negate the *existence* of a privacy interest, but instead excuses intrusions upon that interest. *See Hill*, 7 Cal. 4th at 38 ("Invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest."); *see also Baughman v. State of California*, 38 Cal. App. 4th 182, 190 (1995) ("[I]nvestigation of [a] serious crime pursuant to a search warrant *is a defense* which justifies the invasion of [plaintiff's] privacy as a matter of law.") (emphasis added); *Loder v. City of Glendale*, 14 Cal. 4th 846, 891-92 (1997) (collecting cases in which constitutionally protected privacy interests were balanced against interests or justifications supporting the alleged invasion of privacy). Negating an asserted countervailing interest such as a warrant or other lawful process is not a part of Plaintiffs' case.[12]

[12] Indeed, *Hill* plainly states, in a section entitled "Summary of Elements and Defenses," that "[a] defendant may prevail in a state constitutional privacy case by negating any of the three elements . . . or by pleading and proving, *as an affirmative defense*, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests." *Hill*, 7 Cal. 4th at 40 (emphasis added).

V. THE *TOTTEN* DOCTRINE AND THE STATE SECRETS PRIVILEGE PROVIDE NO BASIS FOR FEDERAL JURISDICTION

Finally, the government relies on the *Totten* doctrine and the state secrets privilege to support its jurisdictional claims. They do not.

A. This Court Should Not Decide *Totten's* Applicability Prior to Determining Subject Matter Jurisdiction.

Plaintiffs have acknowledged that, under certain circumstances, a court may—but certainly is not required to—consider the *Totten* rule as a threshold question prior to addressing subject matter jurisdiction. *See* Pl.'s Reply 22. These cases, however, plainly do not present an appropriate circumstance for doing so. Because this Court may not consider the government's motion to intervene before ruling on Plaintiffs' remand motions (*see* Part II.A, *supra*), to consider *Totten*—a rule of dismissal that may only be asserted by the government—before determining remand puts the cart before the horse. *See* Pl.'s Br. 20. This posture is in stark contrast with the circumstances of *Tenet v. Doe*, 544 U.S. 1 (2005), an action filed directly against the United States in which the jurisdictional issue involved *which* federal court should hear the action, rather than a dispute over whether the action should have been brought in federal court in the first instance. *Id*. at n.4.

The interests of comity, reflected in the Supreme Court's discussion in *Int'l Primate*, also argue for addressing the jurisdictional question first. 500 U.S. at 89. The state court certainly can address *Totten*, guided by this Court's decision in *Hepting*. *See Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("Under [our] system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States."); *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976) (rejecting "mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights;" "[s]tate courts, like federal courts, have a constitutional obligation . . . to uphold federal law"). Plaintiffs therefore respectfully submit that the most (if not only)

appropriate course of action is for this Court to determine the jurisdictional question first.[13]

B. Neither *Totten* Nor the State Secrets Privilege Creates Federal Question Jurisdiction Under *Grable* or Under The Complete Preemption Doctrine.

The government concedes that *Grable* requires a showing that federal law provides a "necessary element" of a plaintiff's claim. Stmt. of Int. 5. The argument that the state secrets privilege or *Totten* "rule of dismissal" presents a substantial federal issue under *Grable* simply cannot be squared with this requirement. Neither state secrets nor *Totten* is an affirmative element of either of Plaintiffs' claims. *See* Pl.'s Br. 21-23; Pl.'s Reply 20-23. The government has come forward with no arguments (much less any authority) that would change this analysis.

Likewise, the government's attempt to show that the state secrets privilege and *Totten* doctrine "completely preempt" *substantive state law* misses the mark. *See* Pl.'s Br. 14-16; Pl.'s Reply 10-13. The state secrets *evidentiary* privilege and *Totten* do not supply a substantive rule of decision that could govern the merits of a dispute. That is why the government does not cite a single authority holding that state secrets or *Totten* confers federal question jurisdiction. Instead, it reaches for cases with no conceivable application to the jurisdictional issue at hand.

For example, unlike the federal common law of contracts that ousted state law in supplying the rule of decision in *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953 (9th Cir. 1996), neither the state secrets privilege nor *Totten* can supply a substantive federal rule governing disclosure of customer calling records. Even if Plaintiffs' cases were to proceed in federal court, California state law still would apply to the elements of their claims. The state secrets privilege would simply govern the admissibility of evidence in adjudicating the claims.

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[13] As discussed in Plaintiffs' Reply Brief, if this Court were to proceed with the *Totten* question first, it could simply apply its own precedent from *Hepting*, holding that *Totten* does not apply. *See* Pl.'s Reply 22-23; *see also Terkel v. AT&T Corp.*, No. 06 CV 02837, 2006 WL 2088202, at *7-8, 2006 U.S. Dist. LEXIS 50812, at *22-27 (N.D. Ill. Jul. 25, 2006). That ruling is equally applicable here. Indeed, contrary to the government's contention, not only are Plaintiffs not claiming to be parties to an espionage agreement, Plaintiffs have not even asserted that Defendants are parties to such an agreement (or for that matter, *any* formal agreement) with the NSA. *Compare* Stmt. of Int. 10. Plaintiffs' Complaints allege only that AT&T and Verizon have been providing calling records to the NSA on a voluntary, ongoing basis, under neither judicial nor contractual compulsion. *See* Campbell Complaint at ¶ 19; Riordan Complaint at ¶ 14. That is all.

Similarly, *Totten*, like other justiciability doctrines such as abstention or the political question doctrine, would be argued defensively only as a ground for dismissal.

Similarly, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), does not support the government's position. The Oneidas filed suit in district court alleging a right to possession of lands based on rights conferred and protected by treaties with the United States, later implemented by federal statute. *Id.* at 664. The Supreme Court thus reversed a dismissal for lack of federal question jurisdiction, holding:

> [T]he complaint in this case asserts a present right to possession under federal law. The claim may fail at a later stage for a variety of reasons; but for jurisdictional purposes, *this is not a case where* the underlying right or obligation arises only under state law and *federal law is merely alleged as a barrier to its effectuation*….

Id. at 675 (emphasis added). Thus, federal jurisdiction was proper because "the right to possession itself is claimed to arise under federal law in the first instance." *Id*. at 676.

Implicit in *Oneida*'s formulation is the rejection of the government's position here.[14] The state secrets privilege and *Totten* are, at most, potentially "a barrier to [the] effectuation" of Plaintiffs' state-law claims. *Id*. at 675. Plaintiffs' claims are not preempted.

CONCLUSION

For the foregoing reasons, Plaintiffs' motions for remand should be granted.

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Respectfully,

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[14] *United States v. Pink*, 315 U.S. 203 (1942) is likewise inapposite. The *Pink* Court explicitly concluded that New York State policy impermissibly conflicted with federal policy recognizing the Russian government. *Id.* at 231-234. Plaintiffs' claims here do not implicate, let alone conflict with, the government's exercise of control over relations with foreign nations (Pl.'s Br. 15 & n.7) and the government has made no showing to the contrary.

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