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22 UNITED STATES DISTRICT COURT
23 NORTHERN DISTRICT OF CALIFORNIA
24 SAN FRANCISCO DIVISION

25 DENNIS RIORDAN; EDWARD)
26 GERARD DE BONIS; ROBERT S.)
27 GERSTEIN; ROD GORNEY; ROBERT)
28 JACOBSON; VINCENT J.)
MANISCALCO; CAROL SOBEL;)
AMERICAN CIVIL LIBERTIES)
UNION OF NORTHERN)
CALIFORNIA, a nonprofit corporation;)
ACLU OF SOUTHERN CALIFORNIA,)
a nonprofit corporation; AMERICAN)
CIVIL LIBERTIES UNION OF SAN)
DIEGO/IMPERIAL COUNTIES, a)
nonprofit corporation,)
Plaintiffs,)
v.)
VERIZON COMMUNICATIONS INC.,)
a corporation; and DOES 1 through 20,)
Defendants.)

CASE NO. C 06-3574 VRW

**DEFENDANT'S OPPOSITION TO
PLAINTIFFS' MOTION TO REMAND**

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

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INTRODUCTION

This is a quintessentially federal case. Plaintiffs seek to enjoin Verizon’s alleged assistance of an alleged federal program of foreign-intelligence gathering implemented, if at all, in the wake of Al-Qaeda’s attacks on the United States on September 11, 2001. Assuming Plaintiffs are right about the facts, the Constitution simply does not permit a state court, under the auspices of state privacy law, to enjoin intelligence gathering in a time of war—an activity of national importance that since the founding of the Republic has been allocated exclusively to the federal arena. Based on the overriding federal nature of Plaintiffs’ claims, Verizon properly removed this lawsuit to federal court.

Plaintiffs’ Motion for Remand should be denied for three independent reasons. *First*, federal law completely preempts Plaintiffs’ claims. The Constitution plainly vests plenary authority over national security and national defense in the national government, and that exclusive power precludes the operation of state law in the same realm. In place of the preempted state-law remedies, Congress has enacted federal causes of action that, along with other federal law, define the scope of remedies potentially available against telecommunications companies for providing assistance to the federal government in national security matters. Because they are completely preempted, Plaintiffs’ claims are deemed to “arise under” federal law and thus were properly removed to this Court.

Second, even if Plaintiffs’ claims were not completely preempted, it is clear that adjudication of those claims will require resolution of substantial, disputed issues of federal law. Plaintiffs’ nominally state-law claims for violation of § 2891 of the California Public Utilities Code and for invasion of privacy under the California Constitution turn, respectively, on whether disclosures of telephone records by Verizon (if any) were made in response to lawful federal process or were authorized by federal law. Resolution of Plaintiffs’ claims will also require consideration of a threshold issue of federal law: whether and to what extent Plaintiffs’ claims are justiciable or must be dismissed in light of both the rule set forth in *Totten v. United States*, 92 U.S. 105 (1876), which precludes adjudication of claims based on alleged espionage agreements with the United States, and the federal state-secrets privilege.

1 millions of California residential telephone calls since September 11, 2001,” without legal process or
2 its customers’ consent. *Id.* ¶ 33. Plaintiffs seek, among other things, declaratory relief and an
3 injunction preventing “defendants from providing any customer calling records to the NSA or to any
4 other person unless the customer to whom those records pertain has provided written consent for
5 their disclosure or unless the records are disclosed pursuant to legal process.” *Id.* at 10.

6 Verizon removed this case to this Court on June 5, 2006. Its Notice of Removal set forth
7 three basic grounds for removal: (1) Plaintiffs’ claims arise under the law of the United States for
8 purposes of 28 U.S.C. § 1331 because federal law completely preempts Plaintiffs’ nominally state
9 law claims; (2) Plaintiffs’ claims arise under a law of the United States for purposes of 28 U.S.C.
10 § 1331 because Plaintiffs’ right to relief depends on the resolution of substantial, disputed questions
11 of federal law; and (3) the action is removable under 28 U.S.C. § 1442(a)(1) because Verizon is
12 alleged to have “act[ed] under” the direction of agencies or officers of the United States under color
13 of office.

14 Plaintiffs’ Complaint is part of a larger wave of litigation that has recently been filed against
15 a number of telecommunications companies. Twenty-one lawsuits are currently pending in federal
16 courts across the nation against Verizon Communications Inc., Verizon Wireless, and/or other
17 subsidiaries or affiliates of those companies. Each suit seeks relief for the defendants’ alleged
18 participation in intelligence-gathering activities allegedly carried out by the federal government, at
19 the direction of the President, as part of the government’s post-September 11 program to prevent
20 terrorist attacks. In addition to the 21 suits against Verizon, there are 14 similar suits pending
21 against other telecommunications companies and 5 suits against the government challenging the
22 legality of its alleged post-September 11 surveillance activities.

23 On May 24, 2006, Verizon filed with the Judicial Panel on Multidistrict Litigation (“Panel”)
24 a motion to transfer and coordinate the numerous actions pending against it and other
25 telecommunications companies raising allegations essentially the same as those made by Plaintiffs in
26 this case. As Verizon explained, the pending complaints present a particularly compelling case for
27 transfer and coordination: They involve common questions of fact; transfer will promote the
28 convenience of parties and witnesses; and transfer will facilitate the just and efficient administration

1 of the actions by avoiding duplicative proceedings and ensuring centralized oversight of any pretrial
2 factual development. Moreover, because all of these cases concern the government’s intelligence
3 sources and methods, a threshold issue for determination in all of these cases will be whether and to
4 what extent the privilege that protects state secrets from disclosure bars the plaintiffs’ claims.
5 Coordination in a single district will minimize the risk of inadvertent disclosure of any sensitive
6 national security information necessary to resolve the state-secrets issue.

7 After removal, Verizon designated this case as a “tag-along” action in a filing with the Panel
8 on June 6, 2006. Plaintiffs did not file an opposition to Verizon’s motion to transfer and coordinate
9 this case with the other pending actions.² On June 15, 2006, Verizon filed a motion to stay this case
10 pending the Panel’s resolution of Verizon’s motion to transfer and coordinate. Under a schedule
11 approved by the Court, the hearing on that motion is set for August 17, 2006, the same day as the
12 hearing on Plaintiffs’ motion to remand.

13 If this Court grants Verizon’s motion to stay, there will be no need at present to adjudicate
14 Plaintiffs’ motion to remand. And it is certainly possible that the Panel will have resolved Verizon’s
15 motion for transfer and coordination by August 17, in which case there may be no need for this
16 Court to adjudicate the motion to remand—or, indeed, to resolve any other pretrial matter—at all.
17 But if the Court does proceed to consider the motion to remand, the materials available for its
18 consideration are limited to the pleadings and law cited therein, which should be sufficient to
19 establish the Court’s removal jurisdiction. To the extent that the Court believes further factual
20 development is in fact necessary to resolve the present motion, however, it should hold the motion to
21 remand in abeyance pending resolution of the state-secrets and *Totten* issues in this case. Verizon is
22 unable to admit or deny the allegations of the Complaint, or otherwise adduce facts that might
23 support this Court’s jurisdiction, until the Court determines the applicability of those doctrines to the
24 alleged call-records program, whose existence the government has never confirmed or denied.
25 Because those doctrines may very well preclude further judicial inquiry altogether, they are

26
27 ² Rule 7.2(c) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation
28 provides that “[f]ailure of a party to respond to a motion [within 20 days] shall be treated as that
party’s acquiescence to the action requested in the motion.”

1 “threshold question[s]” that must be resolved before “allow[ing] discovery or other proceedings in
2 order to resolve the jurisdictional question[s]” presented by the motion to remand. *Tenet v. Doe*, 544
3 U.S. 1, 6 n.4 (2005). But as set forth below, no factual development is necessary to establish this
4 Court’s removal jurisdiction. Plaintiffs’ motion should be denied as a matter of law.

5 **ARGUMENT**

6 **I. PLAINTIFFS’ CLAIMS ARISE UNDER FEDERAL LAW BECAUSE THEY ARE
7 COMPLETELY PREEMPTED BY FEDERAL LAW**

8 Plaintiffs’ nominally state-law claims against Verizon were properly removed to this Court
9 because they are completely preempted by federal law and thus “arise under” the laws of the United
10 States. The federal constitutional scheme leaves no room for state-law claims, like Plaintiffs’, that
11 seek to enjoin alleged cooperation with an alleged federal counter-terrorism program implemented
12 by the NSA after a devastating foreign attack on the United States. In place of state-law claims of
13 this sort, Congress has substituted carefully delineated federal causes of action that balance the
14 government’s intelligence needs, customer privacy, and the necessity that telecommunications
15 companies not face civil liability for complying with governmental requests for information.
16 Plaintiffs may have artfully attempted to frame their Complaint in terms of state law, but in reality
17 their claims necessarily arise under federal law.

18 Notwithstanding the “well-pleaded complaint” rule, when federal law “completely pre-empts
19 [a] state-law cause of action, a claim which comes within the scope of that cause of action, even if
20 pleaded in terms of state law, is in reality based on federal law.” *Beneficial Nat’l Bank v. Anderson*,
21 539 U.S. 1, 8 (2003); *see also Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) (holding that
22 ERISA completely preempted state-law claim for improper processing of retirement plan benefit);
23 *Avco Corp. v. Int’l Ass’n of Machinists*, 390 U.S. 557 (1968) (holding that Labor Management
24 Relations Act completely preempted state-law claim for breach of labor agreement). Such a
25 completely preempted claim “is then removable under 28 U.S.C. § 1441(b).” *Beneficial Nat’l Bank*,
26 539 U.S. at 8.

27 Federal law completely preempts a state-law cause of action where it conflicts with the state
28 law and provides an exclusive federal remedy. *See Abraham v. Norcal Waste Sys., Inc.*, 265 F.3d

1 811, 819 (9th Cir. 2001). In its most recent treatment of the complete-preemption doctrine, the
2 Supreme Court concluded that two provisions of the National Bank Act—those that (1) permitted
3 national banks to charge certain interest rates, and (2) provided a cause of action against banks that
4 charge an interest rate greater than permitted under the Act—completely preempted state-law claims
5 challenging the validity of interest rates charged by the defendant bank. *Beneficial Nat'l Bank*, 539
6 U.S. at 9-11.³ Although the statutory text did not expressly preclude the operation of state law, the
7 Court concluded that the Act provided the “exclusive” cause of action for usury challenges. *See id.*
8 at 11. One court of appeals has explained that *Beneficial National Bank* changed the “analytical
9 framework” under which some courts had assessed complete-preemption questions and that the
10 doctrine now extends to any situation in which federal law “both preempts state law and substitutes a
11 federal remedy for that law, thereby creating an exclusive federal cause of action.” *Briarpatch Ltd.*
12 *v. Phoenix Pictures, Inc.*, 373 F.3d 296, 304-05 (2d Cir. 2004).

13 Based on a range of factors—including the Founders’ intent to vest certain powers in the
14 federal government, *see In re Miles*, 430 F.3d 1083, 1089 (9th Cir. 2005), and the need for
15 uniformity and federal control, *see Beneficial Nat'l Bank*, 593 U.S. at 10-11—the courts have held
16 that a variety of federal statutes completely preempt certain state-law claims.⁴ To have completely
17 preemptive effect, a statute need not preempt all state-law claims that touch on its subject matter or,
18 as Plaintiffs put it, “preempt the entire field.” (Mot. at 10.) Title VII, for instance, completely
19 preempts only those employment discrimination claims that are lodged against the federal
20 government, *see Lawson v. Potter*, 282 F. Supp. 2d 1089, 1092 (W.D. Mo. 2003), and the National
21 Bank Act completely preempts not every claim against a national bank, but only those alleging

22
23 ³ Plaintiffs inexplicably assert that Verizon’s reliance on *Beneficial National Bank* is
24 “misplaced” because that case “involved ordinary (not complete) preemption, and thus is inapposite
25 on the removal issue.” (Mot. at 11.) Plaintiffs are wrong. The Supreme Court made abundantly
26 clear that *Beneficial National Bank* was a complete-preemption case, *see* 539 U.S. at 8-11, and lower
courts—including the Ninth Circuit—have understood it as such, *see Lippitt v. Raymond James Fin.*
Servs., Inc., 340 F.3d 1033, 1042 (9th Cir. 2003) (characterizing *Beneficial National Bank* as
“clarif[y]ing] when removal [is] proper under the complete preemption doctrine”).

27 ⁴ Among the federal statutes having complete preemptive effect are the Copyright Act, *see*
28 *Briarpatch*, 373 F.3d at 305, the Bankruptcy Code, *see Miles*, 430 F.3d at 1093, the Federal
Communications Act of 1934, *see Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 986-87 (7th
Cir. 2000), and Title VII, *see Lawson v. Potter*, 282 F. Supp. 2d 1089, 1094 (W.D. Mo. 2003).

1 usurious interest, *see Beneficial Nat'l Bank*, 539 U.S. at 8. Nor is the complete-preemption doctrine
2 limited to federal *statutes*. The Ninth Circuit has held, for example, that the federal common law
3 concerning “government contract matters having to do with national security” completely preempts
4 state-law contract claims. *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953, 955 (9th Cir. 1996).

5 These complete-preemption precepts make clear that the federal law governing national
6 security matters leaves no room for Plaintiffs’ state-law privacy claims. It goes without saying that
7 “the government of the Union, though limited in its powers, is supreme within its sphere of action.”
8 *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). No power falls more squarely in that
9 supreme sphere of action than the “paramount federal ‘authority in safeguarding national security,’”
10 *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52, 76 n.16 (1964) (citation omitted).
11 “Few interests can be more compelling than a nation’s need to ensure its own security.” *Wayte v.*
12 *United States*, 470 U.S. 598, 611 (1985). The Founders recognized that among the “principal
13 purposes to be answered by [the] union” are “[t]he common defence of the members” and “the
14 preservation of the public peace, as well against internal convulsions as external attacks.” The
15 Federalist No. 23, at 126 (Alexander Hamilton) (E.H. Scott ed. 1898); *see also* The Federalist No. 3,
16 at 20-21 (John Jay) (E.H. Scott ed. 1898) (“[T]he peace of America . . . will be more perfectly and
17 punctually done by one National Government . . .”). Indeed, the United States Constitution was
18 adopted in part “in Order to . . . insure domestic Tranquility” and “provide for the common
19 defence.” U.S. Const., preamble.

20 The Constitution vests “plenary and exclusive” control over national security, national
21 defense, and foreign policy in Congress and the Executive. *Tarble’s Case*, 80 U.S. (13 Wall.) 397,
22 408 (1871); *see also American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 413 (2003) (discussing “the
23 Constitution’s allocation of the foreign relations power to the National Government”); *Perpich v.*
24 *Dep’t of Defense*, 496 U.S. 334, 353 (1990) (“[S]everal constitutional provisions commit matters of
25 foreign policy and military affairs to the exclusive control of the National Government.”); *Banco*
26 *Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426-28 (1964). The Constitution grants Congress the
27 power, *inter alia*, to “provide for the common Defence,” U.S. Const. art. I, § 8, cl. 1; to “declare
28 War,” *id.* cl. 11; to “raise and support Armies,” *id.* cl. 12; to “provide and maintain a Navy,” *id.* cl.

1 13; and to “provide for calling forth the Militia to . . . suppress Insurrections and repel Invasions,”
2 *id.* cl. 14. The President, meanwhile, “shall be Commander in Chief,” *id.* art. II, § 2, cl. 1, with the
3 “unique responsibility” for the conduct of “foreign and military affairs,” *Sale v. Haitian Ctrs.*
4 *Council*, 509 U.S. 155, 188 (1993).

5 It is therefore apparent that “[o]ne of the principal roles of the federal government, under the
6 Constitution, is national defense.” *Abraham v. Hodges*, 255 F. Supp. 2d 539, 550 (D.S.C. 2002).
7 Critical to that role is a “compelling interest” in gathering and protecting “information important to
8 our national security.” *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980). Article II bestows
9 much of that authority on the President. As the Supreme Court has explained, the President, “as
10 head of the Executive Branch and as Commander in Chief,” possesses the “authority to classify and
11 control access to information bearing on national security,” *Dep’t of Navy v. Egan*, 484 U.S. 518,
12 527 (1988), and “as Commander-in-Chief and as the Nation’s organ for foreign affairs,” he “has
13 available intelligence services whose reports neither are nor ought to be published to the world,”
14 *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

15 With the authority over national security matters so securely and exclusively lodged in the
16 federal realm, it is elementary that the states are constitutionally precluded from interfering with or
17 jeopardizing this most critical of national powers. *See McCulloch*, 17 U.S. at 427 (“It is the very
18 essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify
19 every power vested in subordinate governments, as to exempt its own operations from their own
20 influence.”); *Stehney v. Perry*, 907 F. Supp. 806, 824 (D.N.J. 1995) (“State regulation in the area of
21 national security is expressly preempted by Article I, § 8 and Article II, § 2 of the Constitution.”),
22 *aff’d*, 101 F.3d 925 (3d Cir. 1996). At the same time that it vests the “necessary concomitants of
23 nationality” in the national government, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304,
24 318 (1936), the Constitution places corresponding limits on the ability of the states to trench on the
25 federal government’s exclusive authority in this realm. Because “there can be no limitation of that
26 authority[] which is to provide for the defence and protection of the community, in any matter
27 essential to its efficacy,” *The Federalist* No. 23, at 127, the Constitution expressly cabins the role of
28 the states with respect to national defense. *See* U.S. Const., art. I, § 10.

1 In light of these constitutional limitations, state courts lacked the power to issue writs of
2 habeas corpus to inquire into the validity of soldiers' enlistment in the military, because "the sphere
3 of action appropriated to the United States" is "far beyond the reach of the judicial process issued by
4 a State judge or a State court." *Tarble's Case*, 80 U.S. (13 Wall.) at 406; *see also id.* at 408 ("No
5 interference with the execution of this power of the National government in the formation,
6 organization, and government of its armies by any State officials could be permitted without greatly
7 impairing the efficiency, if it did not utterly destroy, this branch of the public service."). Similarly,
8 the Governor of South Carolina had no authority to block the Department of Energy from shipping
9 surplus weapons-grade plutonium into his state for long-term storage. *See Abraham*, 255 F. Supp.
10 2d at 550-51. And in holding that "the federal government's constitutional responsibility and
11 authority to provide for the common defense" preempted the City of Oakland's Nuclear Free Zone
12 Act, this Court held that "states and localities may not enact legislation that impedes or hinders the
13 national defense, regardless of whether the defense activities are carried out directly by agencies of
14 the federal government, or by private contractors." *United States v. Oakland*, No. C-89-3305 JPV,
15 slip. Op. at 7 (N.D. Cal. Aug. 23, 1990) (attached as Ex. 2).

16 The sweeping authority of Congress and the Executive in the arena of national security
17 constitutes "extraordinary pre-emptive power" that renders the claims in this case "necessarily
18 federal in character." *Metro. Life*, 481 U.S. at 64-65. State laws that trench on matters of national
19 security and foreign policy are preempted even when Congress has not expressly said as much. *See*
20 *Garamendi*, 539 U.S. at 424 & n.14; *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968). The Ninth
21 Circuit has held that "state law is totally displaced by federal common law"—and that a claim
22 implicating that body of federal common law is removable—when the case concerns "government
23 contract matters having to do with national security," *New SD, Inc.*, 79 F.3d at 955; *accord*
24 *American Pipe & Steel Corp. v. Firestone Tire & Rubber Co.*, 292 F.2d 640, 644 (9th Cir. 1961).
25 This is all the more true because of the need for uniform rules affecting national security. *See New*
26 *SD, Inc.*, 79 F.3d at 955; *United States v. Pappas*, 94 F.3d 795, 801 (2d Cir. 1996) ("[T]here can be
27 no doubt that a contract for services on matters involving national security is governed by federal
28 law.").

1 There can be no question that Plaintiffs' claims implicate national security issues at the core
2 of federal power. Indeed, they seek to enjoin alleged cooperation with an alleged national security
3 intelligence-gathering program. Under our constitutional system, such a remedy, which would
4 interfere with the federal government's ability to exercise its national security power, is not within
5 the province of state law. Instead, Plaintiffs' claims are completely preempted by federal law, and
6 Plaintiffs must turn to that law in order to pursue their claims. *See Beneficial Nat'l Bank*, 539 U.S.
7 at 9 (complete preemption ordinarily requires available federal cause of action).

8 Congress has created federal causes of action that displace Plaintiffs' claims. Indeed,
9 Plaintiffs themselves concede that they could have cast their claims as federal causes of action (*see*
10 *Mot.* at 9), as the ACLU has done in another case involving the NSA, *ACLU v. NSA*, No. 2:06-CV-
11 10204 (E.D. Mich.). In particular, the Electronic Communications Privacy Act ("ECPA"), 18
12 U.S.C. §§ 2701 *et seq.*, generally provides, subject to various defenses, a cause of action for
13 disclosures of customer calling records that are not otherwise authorized by, *inter alia*, legal process,
14 certifications, or other specified forms of authorizations. *See generally* 18 U.S.C. § 2707.⁵ Under
15 ECPA, a customer may obtain equitable and declaratory relief, damages (including statutory
16 damages), and attorneys' fees. *See id.* § 2707(b) & (c). ECPA specifies that "[t]he remedies and
17 sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional
18 violations of this chapter." 18 U.S.C. § 2708. "The clear import of section 2708 is that Congress
19 intended for ECPA remedies to be exclusive and to preempt state law claims." *Muskovich v.*
20 *Crowell*, No. 3-95-CV-800007, 1995 WL 905403, at *1, 1995 U.S. Dist. LEXIS 5899, at *2 (S.D.
21 Iowa Mar. 21, 1995).⁶

22
23 ⁵ Plaintiffs in other suits against telecommunications carriers concerning the NSA have also
24 invoked 47 U.S.C. § 222, which governs the privacy of customer proprietary network information,
as an additional basis for a federal cause of action for the alleged disclosure of customer calling
records. *See, e.g.*, Am. Compl., ¶¶ 129-134, *Schwarz v. AT&T Corp.*, No. 1:06-cv-02680 (N.D. Ill.).

25 ⁶ ECPA's preemptive effect is reinforced by other federal statutes. The Foreign Intelligence
26 Surveillance Act ("FISA"), 50 U.S.C. §§ 1801 *et seq.*, sets forth a means by which the federal
27 government may engage in foreign intelligence surveillance and provides a comprehensive remedial
28 scheme for violations. And Title III of the Omnibus Crime Control and Safe Streets Act ("Title
III"), 18 U.S.C. §§ 2510 *et seq.*, operates in tandem with FISA in regulating electronic surveillance
and providing a federal remedy for violations. These laws preempt state-law interference with
federal electronic-surveillance activities. *See United States v. Butz*, 982 F.2d 1378, 1382 (9th Cir.
1993) ("[W]e generally interpret Title III as preempting state law . . ."); *United States v.*

1 Plaintiffs insist that these federal causes of action do not entirely displace state-law remedies
2 for *all* violations of wiretap, surveillance, and telecommunication records laws. (Mot. at 11-14.)
3 Even if Plaintiffs are correct that ECPA and the other statutes do not, in and of themselves,
4 completely preempt every run-of-the-mill case involving telecommunication companies' disclosure
5 of customer information, the critical point is that this is no ordinary case. Plaintiffs seek to obstruct
6 an alleged federal foreign-intelligence program to combat international terrorism. If not exclusive in
7 every instance, the federal remedies mentioned above are exclusive here because the plenary federal
8 authority over national security constitutionally precludes any state-law remedies.

9 By ignoring altogether the comprehensive national-defense power vested by the Constitution
10 in the national government—and by focusing instead on a set of statutes that are ancillary to that
11 constitutional authority—Plaintiffs miss the forest for the trees. Not only are “[m]atters intimately
12 related to foreign policy and national security . . . rarely proper subjects for judicial intervention,”
13 *Haig v. Agee*, 453 U.S. 280, 292 (1981), but they are improper subjects for state regulation, *see*
14 *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 381-82 & n.16 (2000). As a result, state-law
15 claims are completely preempted insofar as they interfere with the plenary authority of the national
16 government to gather defense-related intelligence.

17 It is true, as Plaintiffs emphasize, that Congress did not explicitly state its intention to
18 displace entirely state-based remedies in this area. But that is neither surprising nor relevant. Since
19 the founding of the Republic, it has been obvious that the states have no power vis-à-vis the national
20 government with respect to national security, *see supra* at 7-10, and Congress is presumed to know
21 the backdrop of well-settled constitutional law against which it legislates, *see Cannon v. Univ. of*
22 *Chi.*, 441 U.S. 677, 699 (1979). It follows that Congress, aware that the power it shares with the
23 Executive over the national defense is plenary, meant for the remedies it provided in statutes like
24 ECPA to be exclusive in the realm of national security. Just as the Framers surely did not intend to
25 leave “the peace of the *whole* . . . at the disposal of a *part*,” The Federalist No. 80, at 435 (Alexander

26 *Carrazana*, 921 F.2d 1557, 1562 (11th Cir. 1991) (“In 1968, Congress preempted the field of
27 interception of wire and oral communications by enacting Title III”); *Camacho v. Autoridad de*
28 *Telefonos de Puerto Rico*, 868 F.2d 482, 487 (1st Cir. 1989) (“It is beyond cavil that Title III
purports to displace conflicting state and local laws vis-à-vis wiretapping.”).

1 Hamilton) (E.H. Scott ed. 1898), Congress surely did not intend to leave room for state privacy laws
2 to regulate or restrict federal efforts to gather intelligence critical to our national security.

3 **II. PLAINTIFFS' CLAIMS ARISE UNDER FEDERAL LAW BECAUSE THEY**
4 **REQUIRE THE RESOLUTION OF SUBSTANTIAL, DISPUTED ISSUES OF**
5 **FEDERAL LAW**

6 Plaintiffs' claims also "arise under" federal law for purposes of 28 U.S.C. § 1331 because
7 they require the resolution of substantial, disputed issues of federal law. Just last term the Supreme
8 Court reaffirmed that it had "recognized for nearly 100 years that in certain cases federal question
9 jurisdiction will lie over state-law claims that implicate significant federal issues." *Grable & Sons*
10 *Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363, 2366-2367 (2005); *see also Empire*
11 *HealthChoice Assurance, Inc. v. McVeigh*, 126 S. Ct. 2121, 2136 n.5 (2006). Such jurisdiction lies
12 when state-law claims, like those here, "necessarily raise a stated federal issue, actually disputed and
13 substantial, which a federal forum may entertain without disturbing any congressionally approved
14 balance of federal and state judicial responsibilities." *Grable*, 125 S. Ct. at 2368 (citation omitted).
15 As the Court in *Grable* explained, this rule "captures the commonsense notion that a federal court
16 ought to be able to hear claims recognized under state law that nonetheless turn on substantial
17 questions of federal law, and thus justify resort to the experience solicitude, and hope of uniformity
18 that a federal forum offers on federal issues." *Id.* at 2367. Even if only one of several state claims
19 raises a substantial federal question under this rule, all of the claims may be heard in federal court.
20 *See, e.g., City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 165 (1997) (citing 28 U.S.C.
21 § 1367(a)); *County of Santa Clara v. Astra USA, Inc.*, 401 F. Supp. 2d 1022, 1025-26 (N.D. Cal.
22 2005) (citing 28 U.S.C. § 1441(c)).⁷

23 ⁷ For examples of cases finding "arising under" jurisdiction under the rule described in *Grable*,
24 *see, e.g., Nicodemus v. Union Pac. Corp.*, 440 F.3d 1227, 1234-1237 (10th Cir. 2006) (adjudication
25 of state-law claims for, among other things, trespass and unjust enrichment required determination
26 of scope of federal land grants); *Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 194-196 (2d Cir.
27 2005) (state-law claims for breach of contract, deceptive trade practices, fraud, and unjust
28 enrichment turned on whether defendant violated federal statute requiring uniform rates);
Municipality of San Juan v. Corporacion Para El Fomento Economico De La Ciudad Capital, 415
F.3d 145, 148 n.6 (1st Cir. 2005) (breach of contract claim turned on defendant's "adherence to the
intricate and detailed set of federal regulatory requirements"); *Ormet Corp. v. Ohio Power Co.*, 98
F.3d 799, 806-808 (4th Cir. 1996) (claim to establish rights under contract required interpretation
and application of Clean Air Act); *Almond v. Capital Prods., Inc.*, 212 F.3d 20, 22-24 (1st Cir. 2000)
(breach of contract claim assumed to be created by state law required interpretation of contract
governed by federal law); *Price v. Pierce*, 823 F.2d 1114, 1118-20 (7th Cir.1987) (state breach of

1 Plaintiffs, while acknowledging the *Grable* rule, assert that it applies only when the federal
2 issue is an element of a plaintiff’s cause of action. Even under such a restrictive reading, jurisdiction
3 is proper in this court: Plaintiffs’ nominally state-law claims require them to show that any
4 disclosures made by Verizon were not authorized by federal law or in response to lawful federal
5 process. In any case, Plaintiffs’ interpretation of *Grable* is too narrow. Although a federal *defense*
6 is not sufficient to establish jurisdiction, Plaintiffs’ claims here will require adjudication of a
7 substantial, disputed threshold question of justiciability—whether and to what extent the rule in
8 *Totten* and the state-secrets privilege bar Plaintiffs’ claims because their very subject matter is an
9 alleged relationship between Verizon and the federal government concerning sensitive national
10 security matters. The rationale of *Grable* mandates that this issue as well should be resolved in
11 federal rather than state court.

12 **A. Whether Any Disclosures by Verizon Were Authorized as a Matter of Federal**
13 **Law or in Response to Lawful Process**

14 Plaintiffs’ claims arise under federal law because they turn on substantial, disputed questions
15 of federal law regarding the lawfulness of the disclosure of telephone records, if any, made by
16 Verizon to the government. To prevail on their claim under § 2891 of the Public Utilities Code,
17 Plaintiffs will need to demonstrate that any process to which Verizon allegedly responded was not
18 lawful as a matter of federal law. To prevail on their claim under Article I, Section 1 of the
19 California Constitution, Plaintiffs will need to demonstrate that federal law did not authorize any
20 disclosures of records to the government that Verizon may have made.

21 1. Plaintiffs’ Cause of Action Under Public Utilities Code § 2891

22 Plaintiffs allege a violation of § 2891(a) of the California Public Utilities Code, which
23 provides: “No telephone or telegraph corporation shall make available to any other person or
24 corporation, without first obtaining the residential subscriber’s consent, in writing, . . . [t]he
25 subscriber’s personal calling patterns, including any listing of the telephone or other access numbers
26

27 contract claim required resolution of third-party beneficiary status, which was governed by federal
28 law); and *County of Santa Clara*, 401 F. Supp. 2d at 1025-1027 (state law claims turned on whether
defendants sold drugs at prices in excess of those required by federal statute).

1 called by the subscriber.” Cal. Pub. Util. Code § 2891(a)(1).⁸ The Code makes clear, however, that
 2 § 2891 “*does not apply to . . . [i]nformation provided to a law enforcement agency in response to*
 3 *lawful process.*” Cal. Pub. Util. Code § 2891(d)(6) (emphasis added). Thus, disclosures “in
 4 response to lawful process” are not covered by the section and simply fall outside its reach.

5 Plaintiffs briefly acknowledge and partially quote from § 2891(d)(6) in a footnote, but argue
 6 that its only effect is to create a *defense* to an otherwise valid claim for a violation of § 2891(a). (*See*
 7 *Mot. at 18 n.10.*) In support of their position, they point to *another* section of the California Public
 8 Utilities Code—§ 2894(a)—which provides “a complete defense against any civil action brought
 9 under this chapter or any other law” when a telephone company discloses information “in good faith
 10 compliance with the terms of a state or federal court warrant or order or administrative subpoena
 11 issued at the request of a law enforcement official or other federal, state or local governmental
 12 agency for law enforcement purposes.” But the fact that the California legislature enacted a separate
 13 provision that explicitly creates a defense for actions under § 2891—indeed, it is titled “Disclosure
 14 of information pursuant to court order or subpoena issued by government agency; defense”—
 15 undermines Plaintiffs’ position. As it demonstrates, when the legislature wanted to create a *defense*,
 16 it knew how to do so. As Plaintiffs acknowledge, under their interpretation, § 2891(d)(6) and
 17 § 2894(a) are merely duplicative (*see Mot. at 18 n.10*), a reading that runs contrary to basic
 18 principles of statutory interpretation.

19 In fact, it is clear that these two sections operate quite differently. Section 2894(a) is a
 20 defense to “any civil action brought under this chapter *or any other law*” (emphasis added), while
 21 § 2891(d)(6) determines the scope of § 2891 itself. Additionally, § 2891(d)(6) carves out
 22 disclosures made in response only to “*lawful*” process (emphasis added), while § 2894(a) provides a
 23 defense when compliance was in “good faith” regardless of whether the process was lawful. Indeed,
 24 it was for precisely this reason that § 2894 was amended in 1993 to extend its good-faith defense to
 25

26 ⁸ Plaintiffs also assert violations of § 2891(b) and (c), but those provisions are applicable only
 27 where a “residential subscriber” gives a telephone company “his or her written consent for the
 28 release of one or more of the categories of personal information specified in subdivision (a)” of
 § 2891. Here, Plaintiffs affirmatively allege that Verizon provided information to the government
 without “the consent of its customers, including plaintiffs.” Complaint ¶ 2; *see also id.* ¶ 18.

1 telephone companies in addition to “radiotelephone” companies. *See* A.B. No. 1740, 1993 Cal.
2 Legis. Serv. 152. The Bill Analysis of the California Senate Judiciary Committee explained the
3 purpose of the amendment as follows:

4 The sponsor of the bill, the California Association of Long Distance Telephone
5 Associations, believes this bill is necessary because the current law in California does
6 not afford interexchange and local exchange corporations adequate protection against
7 civil lawsuits. Presently, the only immunity given to these corporations is when the
8 utility provides information “in response to lawful process issued under state or
9 federal law”. This, they believe, “leaves these corporations open to liability when the
10 warrant or order is found to be unlawful.” Furthermore, the sponsors claim that these
11 corporations must make their own determinations on what warrants or orders are
12 lawful, thus opening themselves up to possible lawsuits, if these determinations are
13 incorrect.

14 *Disclosure of Personal Information by Interexchange and Local Exchange Telephone Corporations*
15 *Pursuant to Subpoenas*, Senate Judiciary Committee, California Bill Analysis, A.B. 1740 Sen. (June
16 15, 1993).

17 It is therefore clear that the California Legislature *both* limited the scope of the cause of
18 action Plaintiffs have invoked (in § 2891(d)(6)) *and* created a distinct defense applicable to claims
19 under that provision (in § 2894(a)). Accordingly, to prevail on their claim under § 2891(a),
20 Plaintiffs will be required to demonstrate that, if Verizon disclosed any information to the
21 government, it did not do so “in response to lawful process.” *See* Cal. Pub. Util. Code § 2891(d)(6).

22 Plaintiffs argue that determining whether any disclosures by Verizon, if any, were made “in
23 response to lawful process” would not require resolution of substantial issues of federal law, just
24 questions of fact. (*See* Mot. at 18-19.) But that is wrong for the simple reason that whether any
25 federal process was *lawful* is a question of federal *law*. Federal law authorizes telecommunications
26 companies to disclose subscribers’ telephone records in response to a number of different types of
27 federal process that may be issued in different situations.⁹ For example, Section 2709 of title 18 of
28 the U.S. Code requires a service provider to “comply with a request for subscriber information and
toll billing records information, or electronic communication transactional records” in response to a

⁹ Federal law also authorizes carriers to disclose customer records or information in a variety of circumstances even in the absence of “legal process.” *See, e.g.*, 18 U.S.C. § 2702(c)(4). To the extent that § 2891 (or any other state law) would purport to impose liability where federal law authorized disclosure, it would be preempted.

1 national security letter that complies with specific statutory requirements. 18 U.S.C. § 2709.
2 Similarly, § 2511(2)(a)(ii) provides that “[n]otwithstanding any other law, providers of wire or
3 electronic communication service . . . are authorized to provide information, facilities, or technical
4 assistance to persons authorized by law to intercept wire, oral, or electronic communications or to
5 conduct electronic surveillance, as defined in [FISA], if such provider . . . has been provided with
6 . . . a certification in writing by a person specified in section 2518(7) of this title or the Attorney
7 General of the United States that no warrant or court order is required by law, that all statutory
8 requirements have been met, and that the specified assistance is required.” *Id.* § 2511(2)(a)(ii); *see*
9 *also* 18 U.S.C. § 2703(c) (permitting disclosure in response to warrants, court orders, and
10 subpoenas).

11 Thus, to prevail on their claim under § 2891(a), Plaintiffs will need to demonstrate that the
12 process provided by the government, if any, failed to satisfy the requirements of § 2709,
13 § 2511(2)(a)(ii), or any other federal standard—a question that would inevitably turn on an
14 interpretation of federal law. Plaintiffs may be arguing that, as a matter of *fact*, the government did
15 not even attempt to provide process under § 2709, § 2511, or another federal statute. But that
16 argument inevitably requires interpreting those provisions. That is, one cannot contend that the
17 government failed to meet the requirements of statutory provisions specifying the types of legal
18 process that authorize disclosure of customer information without first giving those provisions some
19 meaning. The meaning of those provisions is, of course, a question of federal law.

20 Finally, federal-court adjudication of these issues will only vindicate, not disturb, “any
21 congressionally approved balance of federal and state judicial responsibilities.” *Grable*, 125 S. Ct.
22 at 2368. The federal government has a direct interest in ensuring a federal forum to provide uniform
23 answers to these important questions of federal law. It is inconceivable that Congress would allocate
24 responsibility for hearing cases concerning the legality of cooperation with federal government
25 counter-terrorism and law-enforcement activities to state rather than federal courts.

26 2. Plaintiffs’ Cause of Action Under Article I, Section 1 of the California
27 Constitution

28 Plaintiffs’ other cause of action, which also raises a substantial federal question, is based on

1 the protection of a right to privacy in Article I, Section 1 of the California Constitution. To prevail
2 on their claim for invasion of privacy under this provision, Plaintiffs must establish: “(1) a legally
3 protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3)
4 conduct by defendant constituting a serious invasion of privacy.” *Hill v. Nat’l Collegiate Athletic*
5 *Ass’n*, 7 Cal. 4th 1, 35-37, 39-40 (1994).

6 Here, too, in order to satisfy either the first or second prongs of this test, Plaintiffs must
7 demonstrate that any disclosures made by Verizon were not authorized under federal law. A person
8 clearly does not have a “legally protected” privacy interest in certain information when federal
9 law—which is supreme—affirmatively authorizes its disclosure. And even if there were a legally
10 protected privacy interest, “other factors may affect a person’s reasonable expectation of privacy.”
11 *Id.* at 36. “A ‘reasonable’ expectation of privacy is an objective entitlement founded on broadly
12 based and widely accepted community norms.” *Id.* at 37. For example, as the California Supreme
13 Court has noted, “advance notice of an impending action may serve to limit an intrusion upon
14 personal dignity and security that would otherwise be regarded as serious.” *Hill*, 7 Cal. 4th at 36
15 (internal quotation marks and citation omitted). Federal statutes, which are published and available
16 to the public, provide such notice. *Cf. United States v. Vasarajs*, 908 F.2d 443, 448 (9th Cir. 1990)
17 (“[C]itizens can fairly be charged with constructive notice of the laws that bind them.”). If federal
18 law authorizes or requires disclosure in certain circumstances, it cannot be said that a person is
19 “objectively entitled” to keep information private in those circumstances.

20 Accordingly, in order to demonstrate that they have a legally protected privacy interest and a
21 reasonable expectation of privacy, Plaintiffs will need to demonstrate, for example, that the relevant
22 disclosures, if there were any, were not authorized by 18 U.S.C. § 2702(c), which permits, *inter alia*,
23 an electronic communication service provider to “divulge a record or other information pertaining to
24 a subscriber to or a customer of such service . . . to a government entity, if the provider, in good faith
25 believes that an emergency involving danger of death or serious physical injury to any person
26 requires disclosure without delay of information relating to the emergency.” 18 U.S.C. § 2702(c)(4).
27 Plaintiffs will also need to demonstrate that Verizon did not act (if it acted at all) in response to a
28 request by the government under § 2709 or § 2511(2)(a)(ii) as described above. And here again,

1 whether any disclosures Verizon may have made were authorized—under the provisions set forth
2 above or otherwise—is not, as Plaintiffs suggest (Mot. at 19), merely a “fact-bound and situation-
3 specific” inquiry. Rather, the authorization question may implicate substantial issues concerning the
4 construction of the federal statutes—including, for example, what constitutes an “emergency” within
5 the meaning of 18 U.S.C. § 2702(c)(4), and whether the relevant process, if any, satisfies the
6 requirements of § 2709, § 2511(a), or any other provision of federal law. And as discussed above,
7 the adjudication of these substantial federal issues in a federal forum can hardly be thought to disrupt
8 any congressionally approved allocation of jurisdiction between state and federal courts.

9 **B. Application of the Federal State-Secrets Privilege and the *Totten* Rule**

10 Resolving Plaintiffs’ claims also will require determination of a second disputed, and
11 unquestionably substantial, question of federal law: whether and to what extent the federal
12 constitutionally-based privilege that protects military and state secrets, and the rule in *Totten v.*
13 *United States*, 92 U.S. 105 (1876), that similarly protects information concerning espionage
14 relationships, bars claims based on unconfirmed reports concerning the NSA’s alleged surveillance
15 activities. The state-secrets privilege “allows the government to withhold information from
16 discovery when disclosure would be inimical to national security,” *Zuckerbraun v. Gen. Dynamics*
17 *Corp.*, 935 F.2d 544, 546-47 (2d Cir. 1991); *see also, e.g., United States v. Reynolds*, 345 U.S. 1, 10
18 (1953); *El-Masri v. Tenet*, No. 1:05-cv-1417, 2006 WL 1391390, at *3-*5, U.S. Dist. LEXIS 34577,
19 at **10-13 (E.D. Va. May 12, 2006). It protects, among other things, the government’s intelligence
20 sources and methods. *See, e.g., Sterling v. Tenet*, 416 F.3d 338, 342-46 (4th Cir. 2005) (“disclosure
21 of intelligence-gathering methods or capabilities . . . falls squarely within the definition of state
22 secrets” (internal quotation marks omitted)), *cert. denied*, 126 S. Ct. 1052 (2006); *Ellsberg v.*
23 *Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983) (the state-secrets privilege protects against “disclosure of
24 intelligence-gathering methods or capabilities”); *Halkin v. Helms*, 690 F.2d 977, 993-94 (D.C. Cir.
25 1982); *Halkin v. Helms*, 598 F.2d 1, 8-9 (D.C. Cir. 1978).

26 The state-secrets privilege, when properly invoked, can be dispositive. Where “the very
27 subject matter of the action . . . [is] a matter of state secret,” invocation of the state-secrets privilege
28 renders the case nonjusticiable and requires immediate dismissal. *United States v. Reynolds*, 345

1 U.S. at 11 n.26 (citing *Totten*); accord *Kasza v. Browner*, 133 F.3d 1159, 1166-67 (9th Cir. 1998);
2 see also *Zuckerbraun*, 935 F.2d at 548 (dismissing case where “very subject matter” of the action
3 was a state secret). Even in cases whose “very subject matter” is not a state secret, the state-secrets
4 privilege nevertheless requires dismissal if national security concerns prevent plaintiffs from proving
5 the *prima facie* elements of their claim, and summary judgment in favor of the defendant if those
6 concerns prevent the defendant from invoking a valid defense. *Kasza*, 133 F.3d at 1166-67. For
7 these reasons, the application of the privilege is a threshold issue, not one that will merely lurk in the
8 background of the case.

9 The related rule articulated in *Totten* likewise presents a threshold justiciability issue of
10 federal law. In *Totten*, the estate of an alleged Civil War spy brought a breach of contract claim
11 against the United States seeking to enforce an alleged espionage agreement. See 92 U.S. at 105-06.
12 The Court held that the action was not justiciable because “public policy forbids the maintenance of
13 any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters
14 which the law itself regards as confidential.” *Id.* at 107. Just last term, the Supreme Court
15 reaffirmed the *Totten* rule, holding that “*Totten* precludes judicial review in cases . . . where success
16 depends upon the existence of a secret espionage relationship with the Government.” *Tenet v. Doe*,
17 544 U.S. 1, 8 (2005). The Court made clear that the law requires a threshold inquiry that may be
18 resolved even before addressing jurisdiction, since the law is “designed not merely to defeat the
19 asserted claims, but to preclude judicial inquiry” in the first instance. *Id.* at 6 n.4.

20 Because the government’s intelligence sources and methods are “the very subject matter” of
21 Plaintiffs’ Complaint and their claims would require proof of a secret espionage relationship
22 between the United States and Verizon, the state-secrets privilege and the *Totten* rule will
23 undoubtedly play a significant—and potentially dispositive—role in the adjudication of this case.
24 The heart of the Complaint alleges that the NSA acquired customer calling records from Verizon as
25 part of its intelligence-gathering efforts following the September 11, 2001 attacks. See Compl. ¶ 14.
26 The government has not confirmed or denied the existence of such a call-records program, nor has it
27 confirmed or denied the participation of any particular telecommunications provider in such a
28 program, if it existed. To be sure, as Plaintiffs observe (Mot. at 20-21), the state-secrets privilege

1 “belongs to the Government and must be asserted by it.” *Reynolds*, 345 U.S. at 7. But there is every
2 reason to believe that the Government will assert the state-secrets privilege here. The United States
3 already has asserted the state-secrets privilege, as well as the *Totten* rule, in two cases in which the
4 plaintiffs allege that AT&T cooperated with the government’s alleged post-September 11
5 surveillance activities: *Hepting v. AT&T Inc.*, No. 06-0672, which is pending in this Court, and
6 *Terkel v. AT&T Inc.*, No. 06-C-2837 (N.D. Ill.). It has also asserted the state-secrets privilege in a
7 similar case filed directly against the government, *ACLU v. NSA*, No. 2:06-cv-10204 (E.D. Mich).
8 And it has stated that it intends similarly to assert the state-secrets privilege in, and to seek the
9 dismissal of, the numerous cases pending against Verizon alleging that the company cooperated with
10 the government’s alleged terrorist surveillance programs. *See* Statement of Interest of the United
11 States, *Conner v. AT&T*, No. 06-CV-0632 (E.D. Cal.) at 2 (attached as Ex. 3); Statement of Interest
12 of the United States, *Bissitt v. Verizon Communications Inc.*, No. 06-220 (D.R.I.) at 2 (attached as
13 Ex. 4).

14 There can be no doubt that the application of the state-secrets privilege and the *Totten* rule in
15 this case will be disputed, particularly since their application may well require dismissal of
16 Plaintiffs’ action. Nor can there be any doubt that the application of these doctrines in this case
17 presents a “substantial” question of federal law. These rules are designed to prevent disclosure of
18 information that would jeopardize national security. *See Reynolds*, 345 U.S. at 10; *Ellsberg*, 709
19 F.2d at 56 (“[T]he United States, by invoking its state-secrets privilege, may block discovery in a
20 lawsuit of any information that, if disclosed, would adversely affect national security.”). For this
21 reason, the D.C. Circuit has noted that, if privileges were ranked by importance, the “privilege to
22 protect state secrets must head the list.” *Halkin*, 598 F.2d at 7. Indeed, “[w]hen properly invoked,
23 the state secrets privilege is absolute” and “[n]o competing public or private interest can be
24 advanced to compel disclosure of information found to be protected” by it. *Ellsberg*, 709 F.2d at 57;
25 *Reynolds*, 345 U.S. at 11 (“[E]ven the most compelling necessity cannot overcome the claim of
26 privilege if the court is ultimately satisfied that military secrets are at stake.”).

27 Moreover, allowing cases involving the application of the state-secrets privilege and the
28 *Totten* rule to proceed in federal, rather than state, court obviously will not “disturb[] any

1 congressionally approved balance of federal and state judicial responsibilities.” *Grable*, 126 S. Ct.
2 at 2368. It is difficult to imagine a set of cases that more squarely implicate federal interests than
3 those in which the disclosure of national security information is at issue. Because the state-secrets
4 privilege is “derived from the President’s constitutional authority over the conduct of this country’s
5 diplomatic and military affairs,” *El-Masri*, 2006 WL 1391390, at *3, 2006 U.S. Dist. LEXIS 34577,
6 at *11, federal courts, rather than state courts, are uniquely situated to determine its applicability. In
7 the end, it is unimaginable that Congress would mandate that the crucial *national* security issues at
8 stake here—which have been vested by the Constitution in the federal realm, as explained in Part I
9 above—would be determined by state rather than federal courts.

10 In their motion, Plaintiffs contend that the need to adjudicate the applicability of the state-
11 secrets privilege and the *Totten* rule—an issue Plaintiffs concede is governed by federal law—does
12 not give rise to federal jurisdiction because they are defenses, not elements of Plaintiffs’ causes of
13 action. (*See* Mot. at 21-23.) This argument, however, misconceives the nature of these doctrines
14 and rests on an unduly narrow reading of the substantial federal issue doctrine.

15 As explained above, the state-secrets privilege and *Totten* rule present threshold issues of
16 justiciability that must be addressed before the merits of the case and thus do not fall neatly into
17 either of the two categories of federal issues Plaintiffs acknowledge: elements of a plaintiff’s cause
18 of action and defenses. Plaintiffs argue that the well-pleaded complaint rule mandates that only
19 federal issues that are *elements of a plaintiff’s cause of action* can confer federal jurisdiction under
20 *Grable* and its forerunners. (*See* Mot. at 20-23.) The rule, however, is not so rigid. To be sure, the
21 heart of the “well-pleaded complaint” rule is that a federal *defense* is insufficient to create federal
22 jurisdiction. *See Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152-154 (1908);
23 *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987). And in most cases, the federal issue at stake
24 will either be a federal defense or an element of the plaintiff’s cause of action, making the *Mottley*
25 rule and Plaintiffs’ suggested standard indistinguishable. In no case of which we are aware,
26 however, has the Court considered whether a threshold federal question of justiciability that directly
27
28

1 implicates national security concerns at the heart of federal power is sufficient to give rise to federal
2 jurisdiction.¹⁰

3 The Court’s description of the relevant standard in *Grable*, moreover, is sufficiently broad to
4 encompass the federal issue raised here. As the Court described, the relevant inquiry is whether
5 state-law claims “implicate significant federal issues” or “raise a stated federal issue, actually
6 disputed and substantial.” 125 S. Ct. at 2367, 2368. Contrary to Plaintiffs’ suggestion, the Supreme
7 Court has eschewed a “single, precise, all-embracing test for jurisdiction over federal issues
8 embedded in state-law claims.” *Id.* at 2368 (internal quotation marks omitted); *Merrell Dow*
9 *Pharms. Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (“there is no ‘single, precise definition’”)
10 (quoting *Franchise Tax Bd.*, 463 U.S. at 8). The Court has suggested instead that it is “the nature of
11 the federal interest at stake” that matters, *see Merrell Dow*, 478 U.S. at 814 n.12, and endorsed a
12 “common-sense accommodation of judgment to [the] kaleidoscopic situations that present a federal
13 issue,” *Grable*, 545 U.S. at 2367 (internal quotation marks and alteration omitted). Application of
14 that “common-sense accommodation of judgment” here inevitably leads to the conclusion that issues
15 related to the state-secrets privilege and the *Totten* bar—especially in a case where, as here,
16 Plaintiffs seek to enjoin alleged participation in a national security program—implicates federal
17 interests of the highest order that are sufficient to create federal jurisdiction. *See, e.g., In re Otter*
18 *Tail Power Co.*, 116 F.3d 1207 (8th Cir. 1997) (finding federal jurisdiction over case raising issues

19 _____
20 ¹⁰ Even if Plaintiffs’ view of the well-pleaded complaint rule generally were accepted, it should
21 not be applied here. It is clear that Article III’s grant of federal jurisdiction over “all Cases . . .
22 arising under . . . the Laws of the United States” would extend to this case, as it has been construed
23 to reach “any case of which federal law potentially ‘forms an ingredient.’” *Franchise Tax Bd. v.*
24 *Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 8 n.8 (1983) (quoting *Osborn v. Bank of the*
25 *United States*, 9 Wheat. 738, 823 (1824)); *see also Verlinden B.V. v. Central Bank of Nigeria*, 461
26 U.S. 480, 492 (1983). Moreover, the Court has recognized that the legislative history of the 1875
27 Act that was the precursor to § 1331 and the similarity between the language of § 1331 and Article
28 III “suggest[] that the 44th Congress may have meant to confer the whole power which the
Constitution conferred.” *Franchise Tax Bd.*, 463 U.S. at 8 n.8 (internal quotation marks omitted). It
has only been judicially created limitations—such as the well-pleaded complaint rule—that have
narrowed § 1331’s scope. *See Verlinden*, 461 U.S. at 494-95 (noting that § 1331 “has been
continuously construed and limited in the light of the history that produced it, the demands of reason
and coherence, and the dictates of sound judicial policy which have emerged from the [statute’s]
function as a provision in the mosaic of federal judiciary legislation.” (internal quotation marks
omitted)). In the circumstances of this case, however—where Plaintiffs’ Complaint plainly seeks to
enjoin cooperation with an alleged NSA program—it strains credibility to conclude that Congress
would have intended to preclude federal jurisdiction.

1 of federal Indian law even though federal issues were not strictly elements of plaintiff's cause of
2 action under state law).

3 **III. THIS COURT HAS JURISDICTION UNDER THE FEDERAL OFFICER**
4 **REMOVAL STATUTE**

5 This Court has jurisdiction for yet another independent reason. Jurisdiction exists under the
6 federal officer removal statute, which permits removal by “[t]he United States or any agency thereof
7 or any officer (*or any person acting under that officer*) of the United States or any agency thereof
8 . . . for any act under color of such office.” 28 U.S.C. § 1442(a)(1) (emphasis added). This
9 provision creates removal jurisdiction where (1) “[the defendant] is a ‘person’ within the meaning of
10 the statute”; (2) “there is a causal nexus between its actions, taken pursuant to a federal officer’s
11 directions, and plaintiff’s claims”; and (3) “it can assert a ‘colorable federal defense.’” *Durham v.*
12 *Lockheed Martin Corp.*, 445 F.3d 1247, 1251 (9th Cir. 2006) (quoting *Jefferson County v. Acker*,
13 527 U.S. 423, 431 (1999)). Plaintiffs do not dispute that Verizon has satisfied the first and third
14 requirements: Corporations are “persons” within the meaning of the statute, *see, e.g., Fung v. Abex*
15 *Corp.*, 816 F. Supp. 569, 572 (N.D. Cal. 1992), and Verizon unquestionably has colorable federal
16 defenses, including, among others, federal preemption. Plaintiffs’ argument is, rather, that Verizon
17 did not “act under” a federal officer. (Mot. at 23-24.) Because the Government will likely assert the
18 state-secrets privilege in this case, Verizon is unable to admit or deny the allegations of the
19 Complaint at this time. But even accepting Plaintiffs’ allegations as true, the allegations themselves
20 establish that Verizon acted under agencies or officers of the United States, or persons acting under
21 such agencies or officers, under color of office.

22 As the Supreme Court has often explained, the federal officer removal statute reflects
23 principles of federal supremacy: The federal government ““can act only through its officers and
24 agents, and they must act within the States. If, when thus acting, and within the scope of their
25 authority, those officers can be arrested and brought to trial in a State court . . . the operations of the
26 general government may at any time be arrested at the will of one of its members.”” *Willingham v.*
27 *Morgan*, 395 U.S. 402, 406 (1969) (quoting *Tennessee v. Davis*, 100 U.S. 257, 263 (1879)). The
28 federal officer removal statute is neither “narrow” nor “limited,” but should be read broadly so as

1 not to frustrate the statute’s underlying rationale. *Id.* at 406.

2 In this case, Plaintiffs themselves allege that Verizon has provided the NSA with telephone
3 records to assist the NSA in an intelligence-gathering program designed “to search for patterns of
4 social interaction that might warrant further investigation.” Compl. ¶ 14. Assuming, solely for
5 purposes of the present motion, that Plaintiffs’ allegations were true, they would establish that
6 Verizon participated in a federal program under the direction and control of the NSA. Having made
7 such allegations, Plaintiffs cannot turn around now and assert that Verizon was not acting under the
8 direction of federal officials. If the NSA indeed collected the requisite data to conduct such a
9 program, it could have done so only through “officers and agents” willing and able to provide
10 assistance. To permit the state courts to hear cases against telecommunications companies for their
11 alleged role in assisting this intelligence-gathering program would be to permit “the operations of
12 the general government [to be] . . . arrested at the will of one of its members.” *Tennessee v. Davis*,
13 100 U.S. at 263. Courts have recognized that telecommunications companies sued for cooperating
14 with federal electronic surveillance programs are entitled to litigate in a federal forum under
15 § 1442(a)(1), *see Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 487-88 (1st Cir.
16 1989), and the same result should obtain here.

17 Plaintiffs contend that federal officer removal does not apply here because they “specifically
18 allege” that Verizon provided telephone records to the NSA on a so-called “voluntary basis” (Mot. at
19 24-25)—by which they mean that Verizon allegedly did not provide the records “under the
20 compulsion of any legal process such as a warrant, court order, or subpoena.” Compl. ¶ 18; *see also*
21 *id.* ¶ 33. Even assuming that were true, such “compulsion” to engage in the challenged actions is not
22 a prerequisite to federal officer removal. Nothing in § 1442(a)(1) requires that a defendant offer a
23 warrant, court order, subpoena, or the like as proof that it “acted under” the federal government.
24 Indeed, despite Plaintiffs’ bald statement to the contrary (Mot. at 24), it is clear that “[e]ven a
25 volunteer can be ‘acting under’ a federal officer.” *Watson v. Philip Morris Cos.*, 420 F.3d 852, 860
26 (8th Cir. 2005). In *Oregon v. Cameron*, 290 F. Supp. 36 (D. Or. 1968), for example, the court held
27 that three unpaid VISTA volunteers were “acting under” a federal officer when they entered a farm
28 to help a migrant worker obtain health care because their actions were undertaken “in accord with

