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November 15, 2006

Luly E. Massaro, Clerk
Division of Public Utilities and Carriers
89 Jefferson Boulevard
Warwick, RI 02888

Re: Docket No. D-06-45; ACLU

Dear Ms. Massaro:

Please find enclosed for filing in the above matter the original and two copies of Verizon New England Inc.'s Motion to Dismiss, with Exhibits.

Thank you for your attention to this matter.

Very truly yours,

Alexander W. Moore (graphic)

Alexander W. Moore

cc: Service List (electronic copies)

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DIVISION OF PUBLIC UTILITIES AND CARRIERS

In Re: Rhode Island Affiliate, American Civil Liberties Union - Informal Complaint Against Verizon and AT&T	)))	Docket No. D-06-45

VERIZON NEW ENGLAND INC.'S MOTION TO DISMISS

The Division should dismiss the informal complaint of the Rhode Island American Civil Liberties Union (the "ACLU") alleging that Verizon New England Inc. ("Verizon") disclosed records to, or otherwise cooperated with, the National Security Agency ("NSA") in connection with national security surveillance activities and that Verizon's alleged cooperation violated state or federal law.

As discussed below, dismissal is appropriate for at least two basic reasons: (i) the ACLU's claims are preempted and barred by federal law, and (ii) resolution of the ACLU complaint would require delving deeply into matters covered by the state secrets privilege, which the United States has consistently invoked. Moreover, these issues of federal law are appropriately addressed in the first instance by the federal courts, where they are currently pending, and the ACLU's complaint here should be dismissed and any issues addressed in that forum.

BACKGROUND

The President and the Attorney General have acknowledged the existence of a counter-terrorism program aimed at al Qaeda involving the NSA.[1/] They have also made it

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[1/] *See, e.g.*, Department of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (Jan. 19, 2006); Press Conference of President Bush (Dec. 19, 2005), available at http://www.whitehouse.gov/news/releases/2005/ 12/20051219-

plain, however, that the NSA program is highly classified, including the identities of any cooperating parties, the nature of such cooperation (if any), and the existence and content of any written authorizations or certifications relating to the program. The United States has therefore informed Verizon that disclosing any information relating to the NSA program, including whether any responsive materials relating to the program exist, would constitute a violation of federal laws, potentially including federal criminal law. Thus, as Verizon has already stated and as is explained in more detail below, Verizon can neither confirm nor deny whether it has any relationship to the classified NSA program.

In response to the media coverage concerning carriers' alleged cooperation with the NSA, the ACLU sought an FCC investigation into the alleged involvement of Verizon and other telecommunications carriers in an alleged NSA intelligence-gathering program. The FCC, however, rejected the ACLU's request, concluding that "the classified nature of the NSA's activities make us unable to investigate the alleged violations" at issue. *See* Letter from Kevin Martin, Chairman FCC, to Congressman Edward Markey (May 22, 2006) (attached hereto as Exhibit 1).

Within days of that FCC determination, the ACLU turned its gaze to the states, where it sought essentially the same investigation from many of the country's public utility commissions, including this Division. At least seven states, however, have now joined the FCC in determining not to pursue any investigation at this time in response to ACLU complaints. On August 18, 2006, an ALJ in Pennsylvania dismissed the ACLU's complaint, concluding that "the Commission does not have the authority to compel respondents to

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2.html; Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html.

disclose that information [concerning their alleged cooperation with the NSA] over their claims of national security prohibitions" and that any such issues must be resolved in the first instance in the federal courts. Order, *ACLU v. AT&T*, No. C-20066397, *et al.* (Issued Aug. 16, 2006) (attached hereto as Exhibit 2). In response to a request by the New York Civil Liberties Union, the New York Public Service Commission likewise "decline[d] to initiate any investigation into the alleged cooperation of AT&T and Verizon with the National Security Agency." Letter from William M. Flynn, Chairman, New York Public Service Commission, to Donna Lieberman, Executive Director, New York Civil Liberties Union, at 1 (dated June 14, 2006) (attached hereto as Exhibit 3). The Virginia Commission also declined the ACLU's request because, among other things, it did not appear there were any "actions that the Commission can take — within its jurisdiction — to resolve the matters raised" by the ACLU. Letter from William H. Chambliss, General Counsel, Virginia State Corporation Commission, to Kent Willis, Executive Director, ACLU of Virginia (dated June 1, 2006) (attached hereto as Exhibit 4). The Iowa Commission similarly concluded that it lacked authority to address the ACLU's claims. *See* Letter from David Lynch, General Counsel, Iowa Utils. Board to Mr. Frank Burnette (May 25, 2006) (attached hereto as Exhibit 5). The Delaware Commission also decided not to initiate an investigation at this time because "[t]he courts are better equipped, in both resources and expertise, to assay the competing claims of customers' statutory rights of privacy and the needs of national security." Order No. 6965, PSC Docket No. 06-179, at 3 (Issued July 11, 2006) (attached hereto as Exhibit 6). The Colorado Commission declined to conduct an investigation based on the ACLU's complaint, pointing to a federal court decision that had dismissed similar claims and concluding that it should "await a definitive ruling from the federal courts regarding a state public utility

commission's authority to investigate." Letter from Doug Dean, Director, Colorado Public Utilities Commission to Taylor Pendergrass, Esq., ACLU of Colorado ("*Colorado Letter*") at 1-2 (August 23, 2006) (attached hereto as Exhibit 7). And the Washington Commission likewise deferred further action in its proceeding "pending final resolution of the federal issues by the federal courts," finding that "it is not prudent for the Commission to try to resolve these issues now, because ultimately the federal courts will decide them." Order No. 02, Docket No. UT-060856, at ¶¶ 3, 18 (Issued Sept. 27, 2006) (attached hereto as Exhibit 8).

Moreover, the United States has filed suit against Verizon's affiliates and state officials in federal court in several states to prevent Verizon from disclosing, and to prevent state officials from requiring it to provide, any information relating to the alleged provision of call records to the NSA. In one case, for example, the United States explained that a subpoena issued by the New Jersey Attorney General "may not be enforced by the State Defendants or responded to by the Carrier Defendants because any attempt to obtain or disclose the information that is the subject of these Subpoenas would be invalid under, preempted by, and inconsistent with" federal law. *See* Complaint, *United States v. Zulima v. Farber, et al.*, at 13 (D.N.J. filed on June 14, 2006) ("New Jersey Complaint") (attached hereto as Exhibit 9). The United States also has pointedly noted that intentional disclosure of confidential information may constitute a violation of federal criminal law. In addition, the United States sent a letter to Verizon, as well as several other carriers, in which it stated that "[r]esponding to the subpoenas – including disclosing whether or to what extent any responsive materials exist – would violate federal laws and Executive Orders." *See* Letter from Peter D. Keisler, Asst. Attorney General to John A. Rogovin, Counsel for Verizon, *et al.* (June 14, 2006) (attached hereto as Exhibit 10). The United States therefore advised that

"responding to [] the subpoenas would be inconsistent with and preempted by federal law." *Id.* The United States explained that it filed the suit because requiring carriers to provide information "would place carriers in a position of having to confirm or deny the existence of information that cannot be confirmed or denied without harming national security, and . . . . would be inconsistent with, and preempted by, federal law." *See* Letter from Peter D. Keisler, Asst. U.S. Attorney General, to Zulima V. Farber, Attorney General of New Jersey (June 14, 2006) (attached hereto as Exhibit 11).

The United States subsequently filed similar suits in federal court in Maine against Verizon and the Commissioners of the Maine Public Utilities Commission, in Connecticut against Verizon and the Commissioners of the Connecticut Department of Public Utility Control, in Vermont against Verizon and members of the Vermont Public Service Board, and in Missouri against AT&T, SBC, and the Commissioners of the Missouri Public Service Commission. In each case, the United States is seeking an injunction and a declaratory judgment that requiring carriers to disclose information related to an ACLU complaint substantively the same as the one it has filed here would violate, and is preempted by, federal law. *See* Complaint, *United States v. Adams, et al.* (D. Me. filed on August 21, 2006) ("Maine Complaint") (attached hereto as Exhibit 12); Complaint, *United States v. Palermino, et al.* (D. Ct. filed on September 6, 2006) ("Connecticut Complaint") (attached hereto as Exhibit 13); Complaint, *United States v. Volz, et al.* (D. Vt. Filed on Oct. 2, 2006) (attached hereto as Exhibit 14); Complaint, *United States v. Gaw, et al.* (E.D. Mo. filed on July 25, 2006) (attached hereto as Exhibit 15). In Maine, the United States again sent a letter to Verizon stating that "enforcing compliance with, or responding to, the MPUC's demands for information would be inconsistent with, and preempted by, federal law." *See* Letter from

Carl J. Nichols, Deputy Asst. Attorney General, to John A. Rogovin and Samir C. Jain, Counsel for Verizon (Aug. 21, 2006) (attached hereto as Exhibit 16). And in its Maine Complaint, the United States again explained that responding would "place Verizon in a position of having to confirm or deny the existence of information that cannot be confirmed or denied without causing exceptionally grave harm to national security," and that any "attempts to obtain such information are invalid under the Supremacy Clause of the United States Constitution and are preempted by the United States Constitution and various federal statutes." Maine Complaint at 1-2. All of these lawsuits against state officials have been conditionally transferred to the United States District Court for the Northern District of California, which should allow the difficult federal issues they present to be considered in detail in the first instance by a single federal court. *See Conditional Transfer Order (CTO-3)* (filed in MDL Docket No. 1791 on Sept. 28, 2006) (attached hereto as Exhibit 17).

Likewise, the United States has made the same point to other state commissions that were considering whether to undertake an investigation. As the United States explained to the Michigan Commission, for example, "the MPSC would be unable to engage in any discovery propounded in this MPSC proceeding because such demands for information would place the carriers in a position of having to confirm or deny the existence of information that cannot be confirmed or denied without harming national security. Moreover, any attempt to enforce compliance with such requests for information would be inconsistent with, and preempted by, federal law." Letter from Peter D. Keisler, Asst. U.S. Attorney General, to Michigan Public Service Commission at 2 (Sept. 19, 2006) (attached hereto as Exhibit 18). Further, the United States noted that a carrier's "compliance with such requests would violate federal law." *Id.* Accordingly, as the United States concluded, the

Commission should "grant the pending motions to dismiss or otherwise close these proceedings so that litigation over this matter may be avoided." *Id.* at 7.[2/]

For the reasons given by the United States, the FCC, and the state commissions that have declined to initiate investigations, this Division should similarly dismiss the ACLU's Complaint.

ARGUMENT

The ACLU's complaint should be dismissed for at least two independent reasons: (i) the Division does not have jurisdiction either to hear the ACLU's state-law claims or to grant the relief the ACLU seeks because federal law bars and preempts those claims;[3/] and (ii) the Division would be unable to adduce any facts relating to any of the ACLU's claims because of the state secrets privilege, and thus would be unable to resolve the issues raised in the ACLU Complaint in any case. Moreover, these federal law issues are properly addressed in the first instance by the federal courts, where the issues are currently pending, and ACLU's complaint here should be dismissed and any issues addressed in that forum.

I. THE ACLU'S CLAIMS ARE BARRED AND PREEMPTED BY FEDERAL LAW.

At the most basic level, the ACLU's state-law claims are preempted because they seek to interfere with the national security activities of the federal government. The Constitution plainly vests plenary authority over national security and national defense in the

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[2/] The Michigan Commission subsequently suspended the ACLU's complaint for failure to meet the filing requirements in the Commission's rules. Order, Case No. U-14985 (Issued Oct. 19, 2006) (attached hereto as Exhibit 20).

[3/] By submitting this response, Verizon is not suggesting that the Division has jurisdiction over the issues raised by the ACLU's Complaint. As discussed below at Part I, state commissions lack jurisdiction with respect to matters relating to national security and Verizon's alleged cooperation with federal national security or law enforcement authorities.

national government, and that exclusive power precludes the operation of state law in the same realm. The federal constitutional scheme leaves no room for state-law claims, such as the ACLU's, that seek to investigate and enjoin alleged cooperation with an alleged federal counter-terrorism program implemented by the NSA.

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

The Constitution vests "plenary and exclusive" control over national security, national defense, and foreign policy in Congress and the Executive. *Tarble's Case*, 80 U.S. (13 Wall.) 397, 408 (1871); *see also American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) (discussing "the Constitution's allocation of the foreign relations power to the National Government"); *Perpich v. Dep't of Defense*, 496 U.S. 334, 353 (1990) ("[S]everal

constitutional provisions commit matters of foreign policy and military affairs to the exclusive control of the National Government."); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426-28 (1964). The Constitution grants Congress the power, *inter alia*, to "provide for the common Defence," U.S. Const. art. I, § 8, cl. 1; to "declare War," *id.* cl. 11; to "raise and support Armies," *id.* cl. 12; to "provide and maintain a Navy," *id.* cl. 13; and to "provide for calling forth the Militia to . . . suppress Insurrections and repel Invasions," *id.* cl. 14. The President, meanwhile, "shall be Commander in Chief," *id.* art. II, § 2, cl. 1, with the "unique responsibility" for the conduct of "foreign and military affairs," *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 188 (1993).

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

With the authority over national security matters so securely and exclusively lodged in the federal realm, states are constitutionally precluded from interfering with or jeopardizing this most critical of national powers. *See McCulloch*, 17 U.S. at 427 ("It is the

very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence."); *Stehney v. Perry*, 907 F. Supp. 806, 824 (D.N.J. 1995) ("State regulation in the area of national security is expressly preempted by Article I, § 8 and Article II, § 2 of the Constitution."), *aff'd*, 101 F.3d 925 (3d Cir. 1996). At the same time that it vests the "necessary concomitants of nationality" in the national government, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936), the Constitution places corresponding limits on the ability of the states to trench on the federal government's exclusive authority in this realm. Because "there can be no limitation of that authority[] which is to provide for the defence and protection of the community, in any matter essential to its efficacy," The Federalist No. 23, at 127, the Constitution expressly cabins the role of the states with respect to national defense. *See* U.S. Const., art. I, § 10.

In light of these constitutional limitations, state courts lacked the power to issue writs of habeas corpus to inquire into the validity of soldiers' enlistment in the military, because "the sphere of action appropriated to the United States" is "far beyond the reach of the judicial process issued by a State judge or a State court." *Tarble's Case*, 80 U.S. (13 Wall.) at 406; *see also id.* at 408 ("No interference with the execution of this power of the National government in the formation, organization, and government of its armies by any State officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service."). Similarly, the Governor of South Carolina had no authority to block the Department of Energy from shipping surplus weapons-grade plutonium into his state for long-term storage. *See Abraham*, 255 F. Supp. 2d at 550-51.

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

There can be no question that the ACLU's claims implicate national security issues at the core of federal power. Indeed, it seeks to investigate and potentially stop alleged cooperation with an alleged national security intelligence-gathering program, as well as disclosure of the classified details of that alleged program. Under our constitutional system, such remedies, which would interfere with the federal government's ability to exercise its national security power, are not within the province of state law. Instead, the ACLU's state-law claims are entirely preempted by federal law.

Not only are "[m]atters intimately related to foreign policy and national security . . . rarely proper subjects for judicial intervention," *Haig v. Agee*, 453 U.S. 280, 292 (1981), but they are improper subjects for state regulation, *see Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381-82 & n.16 (2000). As a result, state-law claims are preempted insofar as

they interfere with the plenary authority of the national government to gather defense-related intelligence.[4/] Just as the Framers surely did not intend to leave "the peace of the *whole* . . . at the disposal of a *part*," The Federalist No. 80, at 435 (Alexander Hamilton) (E.H. Scott ed. 1898), Congress surely did not intend to leave room for state laws to regulate or restrict federal efforts to gather intelligence critical to our national security.

That is all the more evident because Congress has created federal causes of action that displace the ACLU's claims. In particular, the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. §§ 2701 *et seq.*, generally provides, subject to various defenses, a cause of action for disclosures of customer calling records that are not otherwise authorized by, *inter alia*, legal process, certifications, or other specified forms of authorizations. *See generally* 18 U.S.C. § 2707. ECPA specifies that "[t]he remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter." 18 U.S.C. § 2708. As courts have explained, "[t]he clear import of section 2708 is that Congress intended for ECPA remedies to be exclusive and to preempt state law claims." *Muskovich v. Crowell*, No. 3-95-CV-800007, 1995 WL 905403, at *1, 1995 U.S. Dist. LEXIS 5899, at *2 (S.D. Iowa Mar. 21, 1995); *see also Voicenet Communications, Inc. v. Corbett*, No. 04-1318, 2006 WL 2506318 (E.D. Pa. Aug. 20, 2006) (holding that section 2708 displaced claims under other statutes).[5/]

[4/] To have preemptive effect, a statute need not preempt all state-law claims that touch on its subject matter. Title VII, for instance, completely preempts only those employment discrimination claims that are lodged against the federal government, *see Lawson v. Potter*, 282 F. Supp. 2d 1089, 1092 (W.D. Mo. 2003), and the National Bank Act completely preempts not every claim against a national bank, but only those alleging usurious interest, *see Beneficial Nat'l Bank*, 539 U.S. at 8.

[5/] ECPA's preemptive effect is reinforced by other federal statutes. The Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. §§ 1801 *et seq.*, sets forth a means by which the federal

None of the federal statutes governing the privacy of telecommunications and customer data forbids telecommunications providers from assisting the government under appropriate circumstances. The Wiretap Act, FISA, the Electronic Communications Privacy Act, and the Telecommunications Act all contain exceptions to the general prohibitions against disclosure and expressly authorize disclosure to or cooperation with the government in a variety of circumstances.[6/] Further, these laws provide that "no cause of action shall lie" against those providing assistance pursuant to these authorizations[7/] and also that "good faith reliance" on statutory authorizations, court orders, and other specified items constitutes "a complete defense against any civil or criminal action brought under this chapter or any other law."[8/] To the extent that state laws do not contain similar exceptions or authorizations, they are preempted. *See, e.g.*, *Camacho v. Autor. de Tel. de Puerto Rico*, 868 F.2d 482, 487-88 (1st Cir. 1989) (Puerto Rico's constitutional prohibition on wiretapping "stands as an obstacle to the due operation of . . . federal law" and is preempted by the Wiretap Act.).

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government may engage in foreign intelligence surveillance and provides a comprehensive remedial 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. Carrazana*, 921 F.2d 1557, 1562 (11th Cir. 1991) ("In 1968, Congress preempted the field of interception of wire and oral communications by enacting Title III . . . ."); *Camacho v. Autoridad de 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.").

6/ *See, e.g.*, 18 U.S.C. §§ 2511(2), 2511(3), 2518(7), 2702(b), 2702(c), 2703, 2709; 50 U.S.C. §§ 1805(f), 1843. For example, 18 U.S.C. § 2709 requires a telephone company to disclose certain information if it receives a "national security letter." Similarly, Section 2511(2)(a) expressly authorizes companies to provide "information, facilities, or technical assistance" upon receipt of a specified certification "notwithstanding any other law."

7/ *See, e.g.*, 18 U.S.C. §§ 2511(2)(a)(ii), 2703(e), § 3124(d)); 50 U.S.C. §§ 1805(i), 1842(f).

8/ *See, e.g.*, 18 U.S.C. §§ 2520(d), 2707(e); § 3124(e).

Finally, federal law preemption is also apparent from another perspective. A variety of federal laws prohibit the disclosure of information concerning Verizon's alleged cooperation with federal intelligence activities, yet such disclosure is precisely what the ACLU's complaint would entail. For example, Section 6 of the National Security Agency Act states that "[n]othing in this Act or *any other law*" can require the disclosure of "information with respect to the activities" of the NSA. 50 U.S.C. § 402 note. As the courts have explained, this provision reflects a "congressional judgment that, in order to preserve national security, information elucidating the subjects specified ought to be safe from forced exposure." *The Founding Church of Scientology of Washington, D.C., Inc. v. Nat'l Security Agency*, 610 F.2d 824, 828 (D.C. Cir. 1979). Thus, if carriers did cooperate with the NSA, then this statute would prohibit them from providing any information concerning such cooperation. In addition, it is a felony under federal criminal law for any person to divulge classified information "concerning the communication intelligence activities of the United States" to any person that has not been authorized by the President, or his lawful designee, to receive such information. *See* 18 U.S.C. § 798. Yet it is precisely that information that is the subject of the ACLU's Complaint. The Division cannot force Verizon to violate federal law by requiring it to disclose information under authority of state law. *See, e.g., English v. Gen. Elec. Co.*, 496 U .S. 72, 79 (1990) (noting that "the Court has found pre-emption [of state law] where it is impossible for a private party to comply with both state and federal requirements"); *see also Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) ("A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce.").

Thus, as the United States has made clear in filing suits against both carriers and state officials in federal courts whenever state officials have sought to require disclosure of carrier involvement in the alleged NSA program, carriers may not disclose, and state officials may not require disclosure of, any information relating to the alleged NSA program. In particular, any attempts by state officials to force Verizon to disclose any information regarding its alleged cooperation with the NSA "are invalid under the Supremacy Clause of the United States Constitution and are preempted by the United States Constitution and various federal statutes." Connecticut Complaint ¶ 1.

II. THE STATE SECRETS PRIVILEGE BARS INQUIRY INTO THE MATTERS RAISED BY THE ACLU'S COMPLAINT.

The ACLU's claims also cannot be adjudicated because the United States has consistently invoked the state secrets privilege with regard to the issue at hand.[9/] As a result of the government's assertion of that privilege, the Division will be unable to obtain any information concerning whether Verizon cooperated with the NSA. Nor will the ACLU be able to provide the Division with anything more than newspaper articles as a foundation for its concerns. In short, the Division will have no basis on which it can determine whether the complaint's characterizations of the NSA's activities are correct.

Under the well-established state secrets privilege, the government is entitled to invoke a privilege under which information that might otherwise be relevant to litigation may not be disclosed where such disclosure would be harmful to national security. *See United States v.*

9/ *See, e.g.*, Memorandum of the United States in Support of the Military and State Secrets Privilege and Motion to Dismiss or, in the Alternative, for Summary Judgment, filed on May 13, 2006, in *Hepting v. AT&T*, No. C-06-0672-VRW (N.D. Cal.) (stating that claims that AT&T violated the law through its alleged cooperation with the NSA program "cannot be litigated because adjudication of Plaintiffs' claims would put at risk the disclosure of privileged national security information.") (attached hereto as Exhibit 19).

Reynolds, 345 U.S. 1, 7-11 (1953). The privilege extends to the protection of any information that would result in "impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign Governments." *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983), *cert. denied sub nom. Russo v. Mitchell*, 465 U.S. 1038 (1984) (footnotes omitted); *see also Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir.), *cert. denied*, 525 U.S. 967 (1998) ("the Government may use the state secrets privilege to withhold a broad range of information"); *Halkin II*, 690 F.2d at 990 (state secrets privilege protects intelligence sources and methods involved in NSA intelligence-gathering). When properly invoked, the state secrets privilege is an absolute bar to disclosure, and "no competing public or private interest can be advanced to compel disclosure. . . ." *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983). Further, if the subject matter of a litigation is a state secret, or the privilege precludes access to evidence necessary for the plaintiff to state a *prima facie* claim or for the defendant to establish a valid defense, then the court must dismiss the case altogether. *See, e.g., Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 547-48 (2d Cir. 1991); *Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978); *Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982).

Moreover, any issues concerning the scope of the state secrets privilege are properly addressed by the federal courts, not this Division. Three federal courts have now addressed this issue with respect to the alleged disclosure of telephone *records* to the NSA, which forms the basis of the ACLU's complaint. One federal court has held that the state secrets privilege barred any inquiry into the alleged disclosure of such records and dismissed the claim. *Terkel v. AT&T*, 441 F. Supp. 2d 899, 916-17, 920 (N.D. Ill. 2006). As it explained,

> requiring AT & T to confirm or deny whether it has disclosed large quantities of telephone records to the federal government could give adversaries of this

> country valuable insight into the government's intelligence activities. Because requiring such disclosures would therefore adversely affect our national security, such disclosures are barred by the state secrets privilege.

(*Id.* at 917.) Thus, the Court concluded that "the state secrets privilege covers any disclosures that affirm or deny the activities alleged in the complaint. As a result, the information at issue is unavailable in its entirety," and the complaint had to be dismissed. (*Id.* at 918.)

In *Hepting v. AT&T*, 439 F. Supp. 2d 974 (N.D. Cal. 2006), the court similarly concluded that claims concerning AT&T's alleged disclosure of communications records could not proceed. In particular, it found that the existence of an alleged NSA program related to communications records had not been disclosed, and therefore, the court refused to permit *any* discovery at this time as to AT&T's alleged disclosure of such records. *Id.* at 997. Finally, in *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mi. 2006), the district court likewise dismissed claims against the United States based on an alleged intelligence program involving the disclosure of telephone records on the grounds that the state secrets privilege barred such claims.[10/]

[10/] The *Hepting* and *NSA* cases also involved a second class of alleged surveillance activities by the NSA—the alleged interception of the *content* of certain international calls. The ACLU's complaint here does not involve claims concerning such alleged surveillance. In any event, even as to such claims, although the *Hepting* court concluded that the fact of the existence of a national security program to obtain the *contents* of particular communications was not—itself—subject to the state secrets, it recognized that the state secrets privilege may well also apply to much of the evidence relevant to the plaintiffs' claims relating to call contents and require the grant of summary judgment for the defendants at a later date. *Hepting*, 439 F. Supp. 2d at 995. The district court also certified its ruling with respect to the call contents issue, and that issue is now pending before the Ninth Circuit. In *NSA*, the court, while not addressing the issue of discovery, determined that publicly available facts allowed it to determine that the program involving call interception was unlawful. The United States has appealed that ruling, and the Sixth Circuit has stayed the district court's ruling pending resolution of that appeal.

As these three federal court cases demonstrate, the state secrets privilege bars any proceeding that would require Verizon to affirm or deny whether it had any relationship to any alleged NSA program concerning the disclosure of records or to provide any information concerning any such alleged relationship. And the United States has made clear, through, for example, its complaints in New Jersey, Maine, Connecticut, Vermont, and Missouri, that it intends to invoke the privilege to prevent disclosure of any such information to state officials. Thus, the state secrets privilege provides an independent basis to dismiss the ACLU's claims as to the alleged disclosure of records. Indeed, the Colorado PUC specifically pointed to the court's decision in *NSA* as the basis for its decision to decline to initiate an investigation. As the Colorado commission explained, "[t]he court [in NSA] . . . dismissed Plaintiffs' data-mining claims. The court found that the ACLU could not sustain its data-mining claims without the use of privileged information and further litigation would force the disclosure of the very information the [state secrets] privilege was designed to protect. . . . The matters which you urge the PUC to investigate are directly related to the data-mining claims dismissed by the federal court in Michigan." *Colorado Letter* at 1-2.

CONCLUSION

In sum, as the United States itself has explained, federal law bars and preempts the ACLU's claims. Verizon cannot confirm or deny cooperation in such a program or the receipt of any government authorizations or certifications, let alone provide the other information that would be necessary to litigate the ACLU's Complaint. As a result, there would be no evidence for the Division to consider in any proceeding. Moreover, the federal wiretapping and surveillance statutes that underlie much of the ACLU's Complaint do not authorize or contemplate investigations or enforcement proceedings by the Division to

determine criminal culpability. Nor does the Division possess the practical tools and ability to construe and enforce federal criminal statutes, consistent with all constitutional rights and protections. Accordingly, even if the Division could inquire into the facts—and, as discussed above, it cannot—the Division lacks the authority or jurisdiction to resolve the ACLU's allegations. Instead, ongoing Congressional oversight, as well as the pending proceedings in federal court that will consider the state secrets and other federal law issues, are the appropriate forums for addressing any issues related to this alleged national security program.

Respectfully submitted,

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